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Guerrilla Jurors: Sticking it to Leviathan

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Guerrilla Jurors: *Sticking it to Leviathan*

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Citizens in our (once) free republic founded under the English common law system, have both the power and the right to vote according to conscience when they sit on a jury and can vote not guilty even in the face of the law and in the face of the evidence. The defendant also has a right to expect that his jury will be fully informed of their rightful power to vote "not guilty" if they believe justice requires it, regardless of the evidence. Anything less is not a real jury trial.

The jury issues no opinion, gives no explanation of its decision. It simply renders its verdict, and if the verdict is "not guilty," that acquittal cannot be questioned or overturned by any court. It is telling that a conviction can be overturned, but an acquittal cannot — the deck is stacked on the side of the liberty of the individual on trial. While a judge can overturn a jury conviction that in his judgment is unsupported by the evidence, or where the jury harbors prejudicial animus toward the defendant, the judge cannot overturn an acquittal even if the evidence is overwhelming — even if the defendant admits on the stand that he did the actions of which he is accused.

A landmark case in jury history is ***that of William Penn***, the Quaker preacher who would later found Pennsylvania. He was put on trial in England for the "crime" of preaching a non-government approved religion on a public street corner. He did not deny that he had preached as a Quaker. He proudly proclaimed it. There was no doubt that English law at the time considered his actions criminal. That too was plain. And yet, the jury acquitted him in spite of the obvious, undisputed facts, and in the face of the clear law. That jury was initially held in contempt and jailed by the trial judge, but on appeal, the English appellate courts ruled that the jury has an absolute power to acquit despite the facts and in the face of the law, and that it cannot be punished for exercising its power. That acquittal helped to establish the free practice of religion.

The same was true in the celebrated ***Zenger trial*** in the American colonies, where Zenger, a newspaper editor, did not deny he had published an editorial severely criticizing the royal governor. The facts were undisputed. Under English law at the time, mere criticism of government officials, even if true, was still considered libel, and could be punished. And yet, despite both the law and the facts being abundantly clear, the jury acquitted Zenger. That acquittal helped establish legal protection for freedom of the press, and freedom of speech, such that only knowingly false statements can be considered libel.

The ***Fugitive Slave laws*** criminalized the underground railroad. Abolitionists accused of helping runaway slaves were often set free by sympathetic jurors voting according to conscience, nullifying the law.

One way to think of the jury is that it is effectively a fourth branch of government, sovereign in its own realm. Separation of powers requires that its powers and immunities remain inviolate. In this sense, the jury has as much a power to set even a "guilty" man free as a governor using the power of clemency, or as a President using his "Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment" under Article II, Section 2 of the Constitution. That power is also absolute, except in cases of impeachment.

It's telling that modern power elites don't scream and yell about governors and Presidents having such an absolute power to set even a clearly "guilty" man free. When fellow elites within government do it, it is accepted. But when the people, as a jury, do precisely the same thing, elites gnash their teeth and shrilly warn of impending chaos and anarchy (as if that were a bad thing!), crying crocodile tears about all the supposed injustice that will result if the jury does something similar to what governors and presidents do at will.

The plain fact is our entire legal system was originally designed to favor liberty, with discretion built in at every level, from the beat cop, to the prosecutor (who has a responsibility to see that justice is done, and that sometimes means not prosecuting even in a clear case), to the jury, to the judges who can overturn an unjust conviction (such as by ruling the law to be unconstitutional as applied), to the governor and/or President who can overturn even a "just" conviction and set a certifiably guilty man free. As Hamilton stated in Federalist 74, in reference to the power of Pardon:

> "The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel."

Just so. And as it is with the power of pardon, so it is with the power of the jury.

The scales of justice are meant to be tipped on the side of liberty, with "easy access to exceptions in favor of unfortunate guilt" built in at each step.

Another way of looking at the jury is that it is much like the militia, since it too is a vital public institution where the people directly participate by being their own guardians. A people who are their own guardians in the militia cannot be tyrannized, however bloodthirsty a usurping tyrant may be. Likewise, a people who are their own judges of guilt, their own judges of the law as applied to that case, and their own guardians of the liberty of their fellows by serving on a jury, cannot be tyrannized, however bloodthirsty the minions of the usurping state may be. When a jury is aware of its power, they can stop the state cold, however much it lusts for convictions.

That absolute power to nullify has always been the jury's power — it is, in fact, the very core of what a jury does. When I (Stewart) was a student at Yale Law School, my procedure professor, Owen Fiss, openly acknowledged that a jury is not merely a fact finder. He pointed out that if that were all a jury were for, we could have professional fact finding juries, made up of forensic experts, handwriting analysis experts, voice analysis experts, etc. who would be far more "efficient" fact finders, working together on one case after another.

Though Professor Fiss, being an elitist liberal, didn't trust juries and instead considered judges "the "embodiment of public reason" (I know, I know, amazing that someone so brilliant can be so blind), he was at least honest enough to admit that the jury is there to serve as a populist, peoples' check on government power. It didn't make sense any other way. What Professor Fiss could not see is that the virtue of the jury is precisely the fact that it does not come from some elite segment of society out of touch with the "unwashed masses." It is made up of average people who will never sit together again on the same jury. They come together only once, to do justice and then to depart. The jury is not a repeat player in the system, like judges, lawyers, and hired-gun expert witnesses. It cannot be influenced by special interests, it has no institutional turf to defend, no reason to go along to get along with backroom deals, and no desire to rack up a conviction record to further political ambitions.

And the real purpose of that unique, independent assembly of average people is to stand in between an accused and the mighty state, as the last shield against tyranny short of recourse to arms. And like David standing in front of Goliath, it does not matter how powerful the state is, however air-tight its case, however artfully it has stacked the laws against the accused, however unconstitutional its manipulations, however blood-thirsty its prosecutors, or however complicit its judges. However much the state wants to strip the life, liberty, or property from the lone defendant, it can still be stopped by that one jury. Just a handful of citizens, if they know their true power, can grind the machine to a halt, and stop it cold, at least in that one case … if they but know of their own power.

And therein lies the problem. Though that absolute power to acquit is part and parcel of traditional trial by jury — is in fact inseparable from it — judges, prosecutors and the power elite have always resented this fact and have tried to suppress it. In effect, there has long been a power struggle between the people, seeking to preserve their rights and powers, and established state power seeking to usurp the power of the people and to enhance its own

power. Despite the clear, well settled power of the jury to acquit, willful judges have cleverly argued that while the jury has the absolute power to acquit, they don't have a right to (so say the crafty judges) and so judges are not required to tell the jury of the power it clearly has. But they don't just omit that information, they actively mislead the jury by telling them the opposite — that they must convict if they find such and such facts to have been proven, that they must follow the law as the judge explains it, and that they may only consider the evidence presented to them. In other words, the judges, and the prosecutors, lie to the juries.

First, during jury selection (voir dire) the jurors are grilled by the prosecutor and the defense attorneys, and are often asked very intrusive personal questions. Seeking the lowest common denominator, prosecutors and judges eliminate intelligent, aware people, who are routinely eliminated via "pre-emptive strikes" which require no explanation, or "for cause."

And, an increasingly common question is something like: Do you believe that the jury can judge the law? Have you heard of jury nullification? Can you agree to set aside your own convictions and follow the law, and convict the defendant if the evidence proves guilt? If you wish to avoid jury duty, an answer to the effect that Yes, you do understand your right to vote your conscience, will get you sent home. But, if instead, you wish to be seated, what should you do? First, say as little as possible. Do not volunteer information.

So, if the judge asks you if you can apply the law as he explains it, say "Yes." You may believe the judge when he says "this is what the law is" (though judges will disagree on points of law) but no one can force you to convict against your conscience and better judgment. Certainly you can follow the judge's instructions, so you are not lying by saying "yes" when asked that question, but you also know the well established truth that you can also acquit even in the face of the law as given by the judge, and in spite of the facts. You can just keep that knowledge to yourself without volunteering it.

Some may call this taking a "mental reservation" as in, Question: *"Can you follow my instructions on the law?"* Answer: *"Yes"* — but with a mental reservation (to yourself) of: I may believe your description of the statute law, but the higher law is the Constitution, if there is a conflict.

Others see it as simply retaining the knowledge of the fact that a jury can acquit even in the face of the judge's instructions — which is well settled law. No acquittal can be overturned, even if the jury didn't follow the law. The statute law may be as the judge describes it, but the judge has no power to dictate a verdict of "guilty" to the jury. If the judge requires an "oath" of the jurors which requires them to follow the law as given by the judge and to convict if the facts are proven, that oath is a false oath and is not enforceable.

As the Penn trial established hundreds of years ago, jurors may not be punished for their verdict. ***An attempt to punish a Colorado juror*** (Laura Kriho) with contempt of court for not being forthright during jury selection questioning (voir dire) ended when she was released by an appeals court ruling.

However, what has occasionally happened is that seated jurors have been dismissed for refusing to discuss a possibility of finding the defendant guilty, taking a clear jury nullification stance. The United States Court of Appeals for the Second Circuit held, in 1997, that if you insist that you will acquit regardless of the evidence, you can be removed for being "incapable" of being impartial. However, if you express "reasonable doubt" about the evidence, or the credibility of the witnesses and informants, or the credibility of the police, in addition to questioning whether the law itself is unjust, the judge cannot remove you from the jury, because they can't prove that you were determined to acquit regardless of the evidence. You might also suspect that evidence favorable to the defense has been withheld from the jury.

Jurors should be aware that if an acquittal is not possible, a hung jury is an acceptable outcome if a juror believes it necessary to prevent a conviction that would be unjust. A series of hung juries sends a signal to the legislature and to prosecutors that a significant portion of the population does not support that law. A mistake jurors sometimes make is to throw the prosecution a bone by convicting the defendant on a "lesser charge." (Prosecutors often multiply charges on the hope that something will stick, and to encourage a plea bargain.) That can cost the defendant years in prison if the judge so decides at sentencing. If justice requires it, nothing short of an acquittal or hung jury on all counts is appropriate. It can take intestinal fortitude to stand alone but a single juror can hang the jury.

The power of the jury to vote according to conscience and judge the merits, fairness, constitutionality and applicability of the law itself, is the only real, undiluted power the individual citizens have in our system of government. If we are engaged in a struggle for our fundamental rights against governments on all levels, and we are, then we must view our role as partisan guerrillas, and we have a powerful yet peaceful tool at our disposal. It has been hidden from us, and we are intimidated into thinking it is not our right, but if we will summon the courage

to grasp it, we can use jury veto power, or jury nullification, as a weapon in defense of liberty.

Frankly, when awake and aware lovers of liberty choose not to serve on a jury, they are leaving the battlefield with Goliath still standing, jeering at them as they walk away. By not serving, they are denying to themselves one of the critical "boxes of freedom" and a chance to sling one right between Leviathan's eyes. If they don't take that shot, what is left? Not much. The ballot box is a joke, the soap box, while still there, is also under relentless attack, with mainstream media now nothing more than Mordor's mouthpiece. Why give up the jury box to the enemy? You know what comes next.

Serving on a jury should be viewed as a form of liberty guerrilla warfare in the current "soft" or cold war between the forces of liberty and the forces of tyranny. We'd better use it while we can before the war goes hot. Besides, It's good practice. We need to exercise our liberty muscles and our own cunning and resolve in the face of adversity. Step into the ring!

We must close with the enemy and battle him in every arena, including in the courtroom. Give Leviathan no safe place, no place to let down his guard, and instead take the fight straight to him in a place where he thought he was supreme and could not be defeated. One juror, just one, can shut down all the gears, all the levers, and all the apparatus of unjust power, and make it stop. One juror can throw a critical monkey-wrench into the works. And if enough jurors do that, the cursed machine will be prevented from working at all. Just you, a lone liberty guerrilla, in a peaceful, bloodless, mini-revolution of conscience, can drive a dagger into the soft underbelly of the beast and set someone free. Talk about focus of effort! There can be no better time spent in the struggle to directly stop oppression.

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