

## The Breakfast Club

### Constitutional Minute for 23 May 2023

#### Right #17 (continued): What's Jury Nullification?

"In all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial jury "

Jury trials are such a part of American culture that even if the percentage of cases which ultimately end in a trial continues to decline (now at about 5%), I predict jury trials will never be completely abandoned. We value the option of being judged by an impartial jury.

Biased juries are obviously a danger -- unless of course they are biased in our favor -- but what if a jury is biased towards neither side in a case, but rather to doing justice, especially when doing justice might mean acquitting an accused who is clearly guilty of a violating the law?

Let's begin our discussion of jury nullification by repeating a quote of Thomas Jefferson I used when introducing the 6<sup>th</sup> Amendment. In a 1789 letter to Thomas Paine Jefferson wrote:

*"I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." (Emphasis added)*

In Deuteronomy 16, the Hebrews are commanded to "Appoint judges and officials for each of your tribes in every town the LORD your God is giving you, and they shall judge the people fairly." The next sentence commands those judges: "Do not pervert justice or show partiality. Do not accept a bribe, for a bribe blinds the eyes of the wise and twists the words of the innocent." The same command clearly applies to juries as well; they also must not show partiality or accept bribes, they must not participate in a perversion of justice.

Juries also play a role in the exercise of checks and balances, which are part of the fabric of our Constitution. The Bill of Rights provides a check against our governments intruding upon inalienable rights. But where is there a check against unjust laws?

"Vote the rascals out of office" might be the reply. And yes, the ballot box does provide a check against government injustice, but elections are usually many years apart and much damage can be done in the interval if an unjust law is somehow passed. The court system also provides a check against unjust laws, but the wheels of justice move veeerrrrrryyy slowly at times.

We normally think of juries as judging the guilt or innocence of an individual. What if juries were also empowered to judge the "guilt or innocence" of the law, to thus hold the government accountable to creating just laws and applying them justly?

In 1794, the U.S. Supreme Court ruled that that a jury has a right to judge the law as well as the facts:

*"It may not be amiss, here, Gentlemen [of the jury], to remind you of the good old rule that on questions of fact, it is the province of the jury; on questions of law it is the province of the court to decide. But it must be observed that by the same law which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. ... both objects are lawfully, within your power of decision."<sup>i</sup>*

I've mentioned the Doctrine of the Lesser Magistrate in the past; does that play a role here as well? I think it does. A jury, even though selected, not elected, holds power over the life and property of an accused individual and therefore acts, albeit temporarily, as a magistrate. In this, they are no different from elected magistrates. The doctrine holds that magistrates at all levels of government have a moral responsibility to protect those citizens under their care, including shielding them from unjust laws. Juries have a unique ability to do this: by refusing to convict their fellow citizens, even in the face of convincing evidence of guilt, when the law is unjust.

Sir William Blackstone reminds us that *"no human laws are of any validity, if contrary to [the law of nature]; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original."*<sup>ii</sup> There can be, and have been, unjust laws, laws which, in Blackstone's view, become null and void.

The Fugitive Slave Act was passed by Congress in September 1850 when it became apparent that an earlier, 1794 act of the same name was being ignored. The 1850 Act was part of a compromise to gain Southern state support for a package of bills that Northern Republicans wanted to pass. The act imposed a \$1,000 fine (\$38,696.92 in 2023 dollars) on officials (i.e. magistrates) refusing to capture and return escaped slaves.

Northern juries routinely refused to convict clearly guilty magistrates under the Act. In 1855, the Wisconsin Supreme Court even declared the Fugitive Slave Act unconstitutional, the only state high court to do so (subsequently overruled by the U.S. Supreme Court<sup>iii</sup> The Act has been noted by several writers as *"contributing to the growing polarization of the country over the issue of slavery. It was one of the factors that led to the American Civil War."*

You are unlikely to find a judge today willing to instruct a jury that they have the power to judge the law; judges are jealous of the traditional order of their courtroom and careful to avoid things they see as disruptive of that order.

Even outside attempts to inform juries of this doctrine have been strongly opposed and in the past activists have been jailed for passing out literature on a public sidewalk to prospective jurors arriving for a jury call. The ACLU has taken up this cause as a free speech issue.

There is more to this issue than I can cover here. I highly recommend a short course called "Duty of the Jury" which covers the issue in more detail. It is published by Institute on the Constitution. I've taught the course in the past and can teach it again if there is interest.

For further reading:

[Jury Nullification: The Evolution of a Doctrine](#), by Clay S. Conrad ([Free download](#))

[The People Vs. The State: Using Jury Nullification To Defeat Unjust Laws](#), by Luke von Trapp

[Jury Duty, Jury Nullification and Surviving a Rigged Court Process](#), by Thomas Demarti

Next week: Right #18: Right to a Local Trial

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<sup>i</sup> [Georgia v. Brailsford, 3 U.S. 1 \(1794\)](#).

<sup>ii</sup> Sir William Blackstone, Commentaries on the Laws of England, Book 1, Chapter 2, 1765

<sup>iii</sup> [Ableman v. Booth, 62 US 506 - 1859](#)