

From: Ideas On Liberty, monthly magazine of the Foundation For Economic Education

Jury Nullification: Cornerstone of Freedom

February 1994 • Volume: 44 • Issue: 2 •

Mr. Koopman is a free-lance writer and businessman from Bozeman, Montana.

“The Jury has the right to judge both the law and the fact in controversy.” That statement was penned not by some modern-day political theorist, but by John Jay, first Chief Justice of the United States Supreme Court. It did not reflect some quaint or offbeat ideology, but rather, the consensus of opinion at the founding of our nation. Our Founding Fathers understood that the constitutional republic they had crafted was a fragile thing. Without the proper safeguards, it could in time fall prey to tyranny masquerading as law. They recognized that one of the most essential of safeguards was the power vested in the common citizen through the jury box.

If our nation’s founders were able to come back today and witness the instructions that judges lay upon the juries, they would react with horror at the emasculation of our once-proud jury system. Indeed, it bears little resemblance to the system they established, precisely because its most essential ingredient—the individual, independent juror—has largely disappeared. The juror is instructed to accept the letter of the law without question, and apply no moral judgment to his decisions. To the nation’s founders, today’s jury system would appear as nothing more than a ghost of its former self.

They would wonder how we managed to stray so far from the original pattern they instituted and why, as a result, America has chosen to place her freedoms in such obvious peril. Our forefathers, it seems, understood far better than we that for a nation to remain free, sovereign power must rest in the people themselves. They designed the jury system to act as a constant check on the excesses of government and the abuses of unjust law. Individual jurors acknowledged that they had not only the authority, but the moral responsibility to acquit just men who ran afoul of unjust law.

Throughout the history of our republic, there have been many instances of juries that stood firmly for justice in the face of illegitimate law. They commonly refused, for example, to enforce the British Navigation Acts against the colonists and later, the Fugitive Slave Act against the abolitionists. American history would have been written much differently if the juries of the past functioned like the juries of the present. Sadly, a modern-day jury would toss those abolitionists in jail, not because we now believe in slavery, but because juries today are consistently misinformed from the bench about their essential role in securing justice, and are thus rendered impotent in the defense of freedom. They are instructed to determine the facts, apply the law, and go home.

The “Fully Informed Jury”

It is ironic, then, that proposals to require juries to be informed of their vested powers are characterized as “radical.” There is nothing radical about recognizing the wisdom of our Founding Fathers and reestablishing those sound principles of justice which we have allowed, through carelessness and neglect, to slip away. The so-called “fully informed jury” is at the bedrock of our republic.

It is important to recognize that this concept does not create any “new” powers, rights, or privileges. It merely asserts those jury powers and rights that have long existed. Simply stated, the proposal requires that juries once again be apprised of their inherent right to judge not only the facts of a case, but the law itself as it relates to that case.

As a practical matter, fully informed juries would result in little or no change in the great majority of all jury decisions. But in the few cases where juries asserted themselves and to some degree judged the law itself, they would help both secure justice and maintain a free society. Over time, if juries consistently “nullified” certain statutes by refusing to convict defendants, juries would be sending a powerful message to the legislative branch. The “sovereign” (the people) would have spoken, making an unjust law unenforceable and dramatically demonstrating that the law should be amended or repealed.

Jury nullification could also act some day as a vital defense against oppressive federal laws criminalizing behavior that is no crime. Consider if, for example, Congress voted to ban gun ownership. Ninety percent of those living in my home state of Montana would instantly become “law-breakers,” yet none would be viewed by their neighbors as having committed any “crime.” If Montana juries were informed of their true powers, it would be impossible to convict a Montanan who was simply exercising his Second Amendment rights. But this kind of check on abusive governmental power requires that juries be well informed.

Of course, juries could refuse (and occasionally have refused) to enforce just laws. But such cases are likely to be rare since most people agree on the government’s basic duty to protect life, liberty, and property.

Once “informed juries” started cleansing the system of unpopular and repressive laws, two changes would begin to take place among the people themselves. First, people’s respect for law itself (something that has declined in recent years, largely because of the mischief caused by so much bad law) would be regenerated. Second, people’s moral senses would be sharpened by their increased individual responsibility to preserve our freedoms. We would become, once again, a vigilant people, more keenly aware of the abuse of government power, jealous of our liberties, sensitive to the moral and philosophical prerequisites of freedom.

America’s founders did not place their trust in a “professionalized” judiciary, controlled by lawyers, judges, and organized interests that make their living from government. They

had a deep and abiding faith in the people themselves, and placed the ultimate power of the courtroom in the citizens' hands. Isn't it time that we returned to this fundamental principle of our republic?

