

# *Leveling The* **PLAYING FIELD**

JURIES CAN PUT THE LAW ASIDE  
AND DO THE RIGHT THING



By Edward W. Silver

**P**erhaps the greatest secret of American criminal law is that under our Constitution a jury can bring in a just verdict notwithstanding the law. That's right, notwithstanding the law a jury can do the right thing. Let me explain.

The preamble to the Constitution of the United States declares: "We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

Thus, although the people have the power, because there are so many of us, we have a hard time exercising it. As a

result we vote for members of Congress to represent our interests. As time goes on, many of these representatives ignored our interests and voted in their own best interest. Our democratic form of government was seriously damaged. Can we do anything about it?

One thing we can do is vote them out of office, but that takes time. We can recall them, but that not only takes time but is very difficult. Both of these solutions require a great effort by a great many people. Is there a simpler way? Is there anything an individual can do by himself?

Indeed there is. Let me tell you what you can do.

(The scene is a federal courtroom somewhere in the United States. The jury has been impaneled and the trial is about to start.)



**Court Crier:** Oyez, oyez, oyez. This court will come to order. Silence please. The Honorable David O'Neill presiding.

(The judge enters the courtroom)

**Judge O'Neill:** Ladies and gentlemen of the jury, this is a continuation of the trial that began yesterday. As you know, defendant has been charged with the crime of tax evasion. You will recall that yesterday the defendant took the stand and concluded his direct testimony. The government will now have an opportunity to cross-examine him. Will the witness please take the stand? (To the Assistant U.S. Attorney) Please proceed.

**Assistant U.S. Attorney:** Thank you Your Honor. (Addressing the

witness) As you know, you are charged with income tax evasion. During your testimony yesterday you rather surprisingly admitted that the charges were true and that you were guilty as charged. Is that correct?

**Defendant:** No, not exactly.

**Assistant U.S. Attorney:** (Startled) Remember sir, you were and you now are under oath. Yesterday you told us during your direct examination that you were an attorney who practiced law for more than 40 years. Surely you know what perjury is.

**Defendant:** Yes I do. But I have not committed perjury.

**Assistant U.S. Attorney:** You admitted that you did everything for which you were charged. If you now

deny that you were guilty of a crime you are committing perjury.

**Defendant:** That is inaccurate sir. Yesterday I was shown my income tax return and was asked if I had taken a deduction which I called "Leveling the playing field." I said I had. That was the truth.

**Assistant U.S. Attorney:** Yes, and you know that there is no such deduction in the Internal Revenue Code.

**Defendant:** That is correct.

**Assistant U.S. Attorney:** So (smiling) you admit that you are guilty of violating the tax code.

**Defendant:** No indeed. I am not guilty.

**Assistant U.S. Attorney:** (Perplexed) Why not?

**Defendant:** As you said, I practiced

law for more than 40 years before I retired. I became familiar with the Constitution of the United States and let me tell you what I learned.

Since 1819 corporations were considered citizens of the state in which they were incorporated. As such they enjoyed certain rights and privileges just like natural citizens. In 2010 the U.S. Supreme Court gave them an extraordinary right of citizenship, when, in the case of *Citizens United v. Federal Elections Commission*, it gave them the ability to speak by equating their political campaign money with speech.

So it is clear that under the Constitution, corporations must be treated as though they are people because the law considers them to be citizens.

**Assistant U.S. Attorney:** That's all very interesting, but what's that got to do with the fact that you violated the Tax Code?

**Defendant:** Simply this. The Constitution, being the supreme law of the land, applies to all citizens. The Equal Protection Clause requires that all citizens, both corporate and natural, be treated equally. The Tax Code violates this requirement. It treats natural citizens and corporations differently.

**Assistant U.S. Attorney:** Which provisions are you referring to?

**Defendant:** I am referring to the provisions that give corporations so many tax breaks that they pay much less income tax than natural-born citizens. Sometimes they pay nothing at all.

**Assistant U.S. Attorney:** As an attorney you know that the government can discriminate between taxpayers?

**Defendant:** That's true, but only if there is a reasonable basis for that discrimination. For example, the law can discriminate by giving additional help to minorities such as the elderly or poor because they clearly need help. But Congress cannot legally pass a law discriminating against red-headed people because of the color of their hair. There is no reasonable basis for that. It would violate the 14th Amendment that guarantees equal protection under the law.

**Assistant U.S. Attorney:** That is a decision for the courts to make, not you. When you serve on a jury you take an oath to follow the law in accordance with the judge's instructions, isn't that so?

**Defendant:** No it is not. It is true that you take an oath but it is not true that you violate the law if you do not follow the judge's instructions.

**Assistant U.S. Attorney:** What do you mean? You took an oath to follow the judge's instructions when you retired to decide the case. If you don't follow those instructions you are violating your oath. So if the judge gives you an instruction that the law is constitutional that ends the matter. You must apply the law. Isn't that so?

**Defendant:** No it is not.

**Assistant U.S. Attorney:** (Startled) How can you say that? The jury's job is to render a judgment on the facts only. It has no right to decide what the law should be. It must accept the law as it is given by the judge. If it doesn't, it violates the oath it took as a juror.

**Defendant:** No they do not.

**Assistant U.S. Attorney:** Why not?

(Defendant addressing the judge): Your Honor, in order to substantiate my legal position I did some research. May I refer to my notes?

**Judge O'Neill:** You may.

**Defendant:** (turning to address the jury): The decision of the jury is final. That's the way our system works with criminal trials. When jurors enter the jury room to deliberate they take with them their intelligence, their reasoning ability and, most importantly, their sense of fairness and justice. If they are asked to render an unjust verdict they can follow their heart and render a just verdict. As I said, their decision is final.

That is perhaps the top secret of our Constitution.

The U.S. Constitution does not obligate a citizen to enforce a law that offends both his intelligence and sense of fairness. The fact that so many large American corporations pay little or no income tax offends me because that is not fair. There is no legitimate reason to give them an unnecessary advantage over natural citizens. I have only leveled the playing field.

**Assistant U.S. Attorney:** Objection Your Honor. I will ask that you instruct the jury to ignore the witness's last statement and that it be stricken from the record. He says that the jury has the right to judge not only the facts but the law as well; that they may disregard any law they don't like.

As Your Honor knows, under the *Manning* case you may not so instruct the jury. You can tell them that their job is to determine the facts, but that they must follow your instructions as to the law.

**Defendant:** That is correct. I will concede that neither the court nor my attorney may enlighten the jury on their right to modify any law they don't like. That restriction does not apply to me. My motive for acting as I did is both relevant and material. Indeed my motive is indispensable to my defense. It cannot be excluded. Is that not correct Your Honor?

**Judge O'Neill:** I'm afraid it is. You may continue.

**Defendant:** Thank you sir. This jury can find me not guilty of the crime of which I have been charged. They have that right, under two provisions of the Constitution. Pursuant to these provisions the jury can interpret the law as they see fit.

**Assistant U.S. Attorney:** What provisions are you referring to?

**Defendant:** I rely on the Sixth Amendment that states, "In all criminal prosecutions, the accused shall enjoy the right to

The U.S. Constitution does not obligate a citizen to enforce a law that offends both his intelligence and sense of fairness.

Jury nullification is a highly effective and powerful way to get the attention of elected representatives. If the people refuse to enforce laws they consider unjust, their voice will be heard.

a speedy and public trial, by an impartial jury.” In *Sullivan v. Louisiana* that was interpreted to mean that a judge cannot direct a verdict of guilty nor set aside a jury’s verdict of not guilty “no matter how overwhelming the evidence.”

Even if a defendant admits under oath that he committed every element of the charged offense, the judge may not direct a verdict of guilty over the defendant’s objection.

I also rely on the Fifth Amendment to the Constitution that provides in part “...nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.” As a result *Jackson v. Virginia* held that juries have the power to “err upon the side of mercy,” by entering “an unassailable but unreasonable verdict of not guilty.”

Finally, a jury does not have to give any reason for its determination. Unlike civil cases where special verdicts or interrogatories may be required, in a criminal case the jury is required only to bring in a general verdict of guilty or not guilty. *United States v. McCracken* made that clear.

These rules give the jury “a general veto power, and this power should not be attenuated by requiring the jury to answer in writing a detailed list of questions or explain its reasons.”

These constitutional rules give a criminal jury the right to “decline to convict” and their decision to be lenient is “final and unreviewable.”

Now that this jury had been enlightened on the law, I am happy to leave my fate in their hands.

## *Free Yourself From Stress and Worry*

***Don (Donny) Rothbardt***  
*Master Life Coach*

- Change your thoughts, change your life
- Let me show you how to eliminate limiting thoughts
- Learn how to empower your litigation skills with clearer thinking and superior communication
- Learn techniques that are used by world masters

Free complimentary interview at your office.



**215-887-4286**  
**[donny4luv@verizon.net](mailto:donny4luv@verizon.net)**  
**[www.donnyrothbardt.vpweb.com](http://www.donnyrothbardt.vpweb.com)**

**Epilogue:** Under our system of criminal justice the jury gets the last word. Once they bring in a verdict of “not guilty” that is the end of the matter. If a jury decides that the law is grossly unfair, they can decide not to enforce it. This doctrine is called “jury nullification.” The jurors are not required to explain their decision to anyone; not the judge, not the press, not anyone. Jury nullification is a highly effective and powerful way to get the attention of elected representatives. If the people refuse to enforce laws they consider unjust, their voice will be heard.

**Cautionary note:** It should be used rarely and only to correct clear and substantial governmental abuses. We are a nation of laws, not men. Indiscriminate and widespread use of jury nullification could result in anarchy, but when used judiciously, it is a powerful tool for change.

Our forefathers who wrote the Constitution were fully aware that governments often took advantage of the people. That’s why we had a revolution – to form a government where the wishes of the people were paramount. Would the country suffer were the people to express their feelings by refusing to enforce laws they deem unfair?

It would take just a few courageous souls to peacefully resist an unjust law. It would not take long for the politicians to get the message.

Used rarely and carefully jury nullification could become a potent and effective weapon in the unending struggle to create a just society.

Would it not have been proper for that northern jury to have ignored the law enforcing slavery prior to the Civil War in the *Dred Scott* case? When Hitler was in power should juries in Germany have refused to enforce German laws that upheld the theft of Jewish property?

A review of the cases in this area of the law make it clear that the judiciary does not favor jury nullification and that it has done everything in its power to keep it a secret from the people. Judges cannot charge the jury on its right to nullify nor can defense counsel inform them of their constitutional right to do so. The author of this essay, after

being impanelled to sit on a jury in a criminal case, was once removed after declaring *on voir dire* that he believed in jury nullification in an appropriate case.

By keeping it a closely held secret the judiciary hopes to prevent juries from exercising this constitutional right. Suppose, however, that someone stands at the door of the courthouse and hands out copies of this essay to everyone who goes into the courthouse. Some

would undoubtedly be potential jurors. How would they try to stop it? Would they arrest him for jury tampering?

Hardly. Is it a crime to arrest a person for exercising his First Amendment right of free speech to educate the public on the law?

What do you think? ■

*Edward W. Silver (ewsilver@iname.com) is an attorney with Astor Weiss Kaplan & Mandel, LLP.*

## Your Solution for Peace of Mind

Our highly qualified and trained professionals will help you navigate the medical maze when caring for loved ones.

GERIATRIC CARE MANAGEMENT • SPECIAL NEEDS  
HOME CARE SERVICES • ADVOCACY



### Complete Care Strategies

*Innovative Care Management. Patient Advocacy. Home Care.*

A Division of Elder Connections

1.888.433.0040 • [completecarestrategies.com](http://completecarestrategies.com)

*“The help you have given us can only be described as priceless. If I have any regret, it is in not having made the connection earlier.”* –W.D.R. JR., CLIENT’S SON

