



**Jury Nullification**  
**Guest: Steve Silverman**  
**January 10**

***Steve Silverman is founder and executive director of Flex Your Rights.***

**WOODS:** First of all can you tell us what Flex Your Rights is all about? What can people expect to find when they go to [FlexYourRights.org](http://FlexYourRights.org)?

**SILVERMAN:** The mission of [FlexYourRights.org](http://FlexYourRights.org) is really very simple. Our mission is to educate people about how to assert their constitutional rights during police encounters and other encounters with law enforcement and the criminal justice system, and when folks go to our website, they'll learn. They'll see videos. They'll see articles about what to do in just about any situation you can imagine. Dealing with a police encounter or anything under the sun. We've got a very detailed Frequently Asked Questions section with just about anything involving canines, how to record the police, what to do if police are knocking at your door. We've pretty much got it covered.

**WOODS:** What to do when there's a BearCat outside my house.

**SILVERMAN:** Exactly. We really try to get as specific as possible with our FAQs. And of course, these are Frequently Asked Questions, so if we get the question just once we'll wait until we get it two or three times before we make it into an FAQ page.

**WOODS:** I notice that you've got a piece up summarizing a panel that you were on, on the subject of jury nullification. Is that your specialization within Flex Your Rights or are you sort of a jack-of-all-trades?

**SILVERMAN:** I'm a lay person, and so really I've been doing this work for about ten years or so. What I find with Flex Your Rights, what I try to identify are places within the law where most citizens do not understand the most basic and fundamental rights. I really got started with Flex Your Rights post-9/11, incidentally. I would have friends of mine who would talk about their bad encounter with the police officer. Some of whom even got busted with tiny amounts of pot, for example. And the thing that I found that bothered me was that just about everybody in this situation at some point wound up giving up their constitutional rights without even knowing it.

I wasn't a law student, but this was just like this one little piece of the law that I knew and that I understood. I found myself giving these "know your rights" talks over and over again to my baffled friends, who were surprised to learn that if police pull you over in your car, you're not required to let them search you. You can say, "No, officer, I don't consent to any searches. Am I free to go?"

I gave this over and over and over again, and it slowly became articles. Everything I did was vetted by lawyers, because everyone thinks that you have to be a lawyer in order to be able to understand your most basic constitutional rights. But that's not so. That's really where the germ of the idea for Flex Your Rights came from. It's finding areas within the law that people didn't understand but then could be explained in very simple lay terms.

With jury nullification it really dovetailed perfectly with what we were doing. At this point we'd pretty much covered almost all of the scenarios, including the BearCat scenario—just joking—about how to handle these various police encounters, if you're pulled over in your car, knocking on your door, if you're stopped on the street. This sort of NYPD stop-and-frisk-style thing. And one of the things that I found a lot of people asked us was have you considered jury nullification? And this was a topic that I had become familiar with when I was an intern at the Cato Institute in Washington D.C., a libertarian think-tank. It was 1999, I believe, and I had seen a panel with Clay Conrad, who is I would call the godfather of jury nullification.

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**WOODS:** He wrote *the* book on the subject. I think he's the guy who wrote *the* book you should read on it.

**SILVERMAN:** Exactly. He wrote *Jury Nullification: Evolution of a Doctrine*, and he was actually on the panel, too. So I saw this panel, I was inspired by it, and I always remembered it. So I knew about jury nullification from this time, so as I developed these "know your rights" resources and our two popular videos. It was one of those ideas that people frequently asked and suggested have you considered doing jury nullification. The idea has been gathering force and gravity in my own mind. And now we're putting it into action as we develop what will be our third film.

**WOODS:** I think most people listening to this program know what jury nullification is, but just for the sake of completeness can you give a quick layman's definition?

**SILVERMAN:** Sure. Jury nullification is every jurist's prerogative to vote not guilty during a criminal trial. Even if you believe that the facts of the case have been proven. This is the prerogative dating back to the signing of the Magna Carta, which guaranteed that citizens get to decide what rules they're going to live under. Even if the judge informs you in the jury that you are only allowed to consider the facts of the case and not the law itself, the truth is jurors have this power to vote "not guilty" if they believe the law is either morally wrong or they simply believe it's being misapplied in this particular case.

**WOODS:** When you say the jurors have this right, I understand that traditionally, under the Sixth Amendment, people at the time of the drafting of the Bill of Rights took for granted that a jury trial included jury nullification. That was just part of what a jury trial was. Jury nullification was embedded in it. And you can find a lot of the Founding Fathers who believed in it. But when you say that today jurors have these rights, is it really a matter of having these rights and people aren't aware of them? Or have these rights actually been taken away from Americans?

**SILVERMAN:** It's a little bit of both. It's so interesting. This is one of these things where once you see it you can't unsee it. Once you read Clay Conrad's book you'll learn about the history where you have quotes from the Founders, where essentially they're saying, straightforward, this is the power citizens have. The Founders of the Constitution basically said, very straightforward, that of course the power of the jury is the power to determine the law itself. This is the basis of the Bill of Rights, and it was well understood by them. It was something that wasn't even questioned or really debated over the years.

Something happened where it was sort of slowly taken away. The case that really enshrined this challenge for jurors was the *Sparf* case in 1895, which basically ruled that judges weren't required to inform jurors of their rights. It didn't mean that they weren't allowed to or that jurors no longer had the power. It simply said that judges were no longer required to do this. But the practical impact on this was that judges did not allow any discussion whatsoever.

You have this situation where jurors have this power, but the courts essentially ruled the jurors have to come almost preinstalled with jury nullification 1.0 before they come in. Because they can't count on the judges or even the defense counsel to inform them about this right, so it's been this secret dormant power that jurors need to know and understand that they can't be punished for their verdict. They have this

power, but they have to know before they come in. So it's this strange duality that exists, and that's where Flex Your Rights comes in, that the Fully Informed Jury Association comes in. It's like you have to know this stuff before you go in. When you receive your voir dire you have to be ready to know about this power, because you can never count on the government. You can't count on the prosecutor. You can't count on the judge. You can't even really count on the defense counsel, because they may have been barred or essentially threatened by the judge, who may not even allow them to make a jury nullification argument if they even know how to do it. Because they're probably not taught about this even in law school, which is a scandal in and of itself.

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**WOODS:** Isn't there this common joke that if you want to get out of jury duty all you do is just tell the judge that you believe in jury nullification? You'll be out of there. So let's say I show up for jury duty, and I fully intend to employ jury nullification. If I use those words *jury nullification* during deliberation with other jurors does that invalidate what I'm saying? Does it in fact mean that we've had a hung jury? What does it mean? Am I allowed to say that, or if I wanted to engage in jury nullification would I have to do it in a sneaky way? Would I have to say, well, I don't think I trust that witness, and then just belligerently refuse to trust that witness and then they can't convict?

**SILVERMAN:** Really this is something we will portray in our film, which we'll call *Jury Duty*, where we'll show our hero character having to get to this voir dire. The first and foremost part of being a jury hero, in a sense, is just understanding that this is an important power that you have. So there's this prevailing myth that exists among the population that essentially if you get on the jury first and foremost that that is proof that you're stupid, because only stupid people get on juries. They only pick stupid people. Well this has perhaps become a self-fulfilling prophecy. So the first thing you do if you're trying to be a hero is you want to decide this might very well be and probably will be the most important and powerful political position you will ever have in your entire life. Once you see that a jury summons is not just this annoying inconvenience where you're going to have to go to this place that's going to be a lot like going to the DMV. It's not going to be glamorous.

But if you get on that jury you are going to be the most powerful person in that room. Once you get that idea, I think all of these other things can fall into place. For example, yes, during voir dire if you say during the jury questioning selection process "I believe in jury nullification" you will be struck from the jury immediately. The prosecutor will immediately remove you. So if you're going into this to try to figure out a way to avoid jury duty, yeah, sure, go in there and give a speech about jury nullification. You'll be removed from the jury. But then you'll also be removed from something very important, which is the opportunity to potentially set somebody free who is the victim of a malicious prosecution against someone who has broken or not broken a bad and immoral law. And so once you get to that position where you understand the power and as a juror you want to get on the jury, yes, you have to keep the words jury nullification to yourself.

This is something Clay Conrad really gets into, the details of how to do this. And it's interesting, because among people who understand jury nullification, a lot of them have this misconception that there's no way that a person of conscience can get themselves on the jury without outright lying. But it's not so. Certainly there's going to be some facts about you that if they asked you directly—for example, have you ever been convicted of a felony?—and if you have, first of all, you probably wouldn't get the jury summons, because you get that from the voting rolls. But if you've been convicted you might want to reveal that, but it's not your job to volunteer the nature of your conscience during voir dire. So it's not your job to tell them well, I'm part of the 58 percent of citizens according to the latest Gallup poll that think marijuana should be legal, for example. You don't need to say that even though they're trying to weed out those people—no pun intended—if it is a marijuana case or a medical marijuana case.

It's very important not to reveal the full extent of your conscience. Say as little as possible. Don't volunteer anything you don't need to volunteer, and let them do their job. At the end of the day you're on that jury. You're now in a very different place. You now have this esteemed role. You have more power in that courtroom than the judge, than the lawyers, than anybody else. It's not just a democratic system. It's part of the democratic process. But a single juror can veto the jury decision if they want to, and that's a really powerful and important part of the responsibility of being a juror. This idea that you simply are judging the facts of the case. It's nonsensical. There's a great quote by Andrew Hamilton, an important eighteenth-century lawyer, where he says, "Jurors should acquit, even against the judge's instruction...if exercising their judgment with discretion and honesty they have a clear conviction that the charge of the court is wrong." I mean, this is very plain spoken.

You have this power, and once you're on the jury you probably don't even want to say jury nullification inside the jury room unless you sense that other jurors are feeling the same way. But if you're the only one, and someone's life is on the line, the best practice in doing this I would argue is to say not guilty. You can try to argue. If you want to argue a reasonable doubt and play on some of the themes that hopefully the defense council may have brought up, and just say I don't think they proved the case. I don't trust the government's witness who is basically paid off with their life, so they could get a better deal with the prosecutor. It varies from case to case, but you don't want to say jury nullification in that case. It's possible that you could be struck from the jury in that situation. It's unlikely, but it's possible. You certainly don't want to bring up your jury nullification at any point during the voir dire if you have an interest in getting on that jury and ultimately deciding whether you think the facts have been proven and if you think the law itself is moral.

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**WOODS:** Let me raise an objection that you might get. There are people out there dead set against jury nullification. Over their dead bodies are they going to allow it to triumph. And some of those people are going to play dirty pool with you. They're going to raise scenarios like, for example, a case involving a black man getting lynched and a white jury that thinks that the law against lynching is an immoral law. So they're not going to vote to convict. They're going to engage in jury nullification. This just goes to show that this type of power cannot be entrusted to the common man.

**SILVERMAN:** First of all, I'll say make sure you check out the transcript or the full video of the panel, because the ending was the best part when the Q and A came up. A former judge brought up this same concern, so make sure you check out the article called "How Jury Duty Accelerates the Drug War's Demise." You'll see it, and you'll see it on our website.

**WOODS:** We'll link to it in the show notes.

**SILVERMAN:** Great. The response I have for that is, first of all, it's important to see jury nullification or jury independence as part of the process. It's part of the process where you have a situation where the police officers in the criminal justice system have discretion over whether they make arrests or not. The DA and the prosecutor themselves have discretion over what charges they make or don't even make. Then the judge has, of course, his or her own discretion. Ultimately the jury is the last level of discretion. It's part of the process. Yes, some juries will abuse this. There's no doubt about it. But prosecutors can abuse their power, and we don't talk about taking away the government's power. They can misuse their discretion. So why are we scapegoating juries who have this power? But ultimately the jury has this role, and so whether you like it or not, jurors do have this power.

This is something Clay Conrad talks about. He goes right after what was going on in the South. If you have a racist society, you have racist police who aren't even making these arrests. You have a racist judge, a racist prosecutor, and if you're talking about the Emmett Till trial, for example, which is one of the most egregious

murders of a young black man by racist whites, you had the police acting on behalf of the defense rather than the prosecution. Then, of course, you have an all-white jury. The one single obvious reform you can make sure you have that would prevent a race-based verdict like this is simply to make sure you have a jury that is reflected as of the race of the people in the population. So if you have an all-white jury in a racist society you will never, ever be able to have justice. But to blame it on the jury is really disingenuous at best.

The thing with juries is they're easy to scapegoat, because it's not like there are jury guilds or anything like that. There's groups like FIJA [Fully Informed Jury Association], but for the most part the jury scatters after the verdict. And then usually the prosecutor, if they didn't win the case, what do they do? They blame the jury. In many cases, you look at the facts of the case, and there maybe was reasonable doubt. It's always very easy to scapegoat the jury. But when you have a jury in an apartheid state, in a racist state, you're coming from this community where the police are basically in on it, the prosecutors aren't prosecuting people who lynch people, and you have a racist judge, you can't possibly expect to have anything other than a racist outcome. So I would argue that it is a lot of jury scapegoating.

I think when you're looking at it it's a process where our juries are allowing for a certain amount of clemency. After all, presidents have the power to pardon people. Why shouldn't we allow or respect the jury's role as part of this pardon process? As part of this process of mercy of allowing the jury to decide that you know what? In this case it just doesn't—this looks like self-defense. But the judge will say no, no, no. You must vote according to what the law is. And we have cases where jurors, after they've sentenced someone to serve what ultimately became a 10-year, 15-year mandatory minimum sentence for a minor place that's anything in the drug conspiracy, when they're asked about this later, members of the family, the press, they are shocked to learn the length of the sentence. They say, well, I thought it was just going to be community service or something like that. I didn't think he would actually go to jail for this. It haunts them for the rest of their lives.

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It's so important that jurors going into these situations realize the power that they have, and ultimately that the verdict is their responsibility. They're going to be told over and over and over again you are not to consider the law itself. You are only to consider the facts. If the jury sends a note to the judge asking what's the likely sentence of this going to be, the judge will send back a letter saying you are not to even consider the penalty. That is my job. I'm the judge. Your job is to simply consider the facts. Yes or no: was the crime committed? Yes or no? Was the crime committed? Yes or no? And that's scandalous, I think. When jurors are expected to have to already know this beforehand. That they have this power, this disregard for the law. When you have judges telling them, essentially implying in a sense that if they don't do it right, that they're doing something wrong, that it's even illegal.

There's the situation with Rich Paul, who was distributing marijuana in New Hampshire. He went in with a jury nullification defense, and it was interesting. Because there was a camera person afterwards who saw the jurors coming out and asked one of them: how do you feel about your verdict? And the juror said, "I didn't have any choice. I wasn't going to break the law," implying that if he, the juror, had voted "not guilty" that he'd be breaking the law? That's really twisted. Sure enough, the judge made it very clear in that case even though the defense counsel was allowed to mount a jury nullification instruction. These jury oaths and these jury instructions that the judges give hold the most sway, because they're the ones that the jury looks to for instruction.

**WOODS:** I want to make sure we get to the New Hampshire law before I have to let you go. I want you to tell us what the New Hampshire law says, and how does it change things? Then before you go I want to know when your movie is going to be ready, because I want to have you back on.

**SILVERMAN:** The New Hampshire law in the transcript, in the video, Tim Lynch from the Cato Institute, a

mentor of mine, really goes into great detail about this. Long story short, the New Hampshire law is very good, and it's important. It says in all criminal proceedings the court shall permit the defense to inform the jury of its rights, to judge the facts, and the application of the law in relation to those facts and controversy. This is a big deal. This New Hampshire law is different, and it's probably stronger than all the others. It's the only state where there's a recognition of this being respected in some way.

So the question is: how has this law been working? Part of it is we don't really know how well it's working. From what we do know it's not always working, because sometimes judges will say this case is not a jury nullification case. So therefore, the defense counsel is not permitted to use this argument, because this is not a jury nullification case. That's one situation. I believe that's actually what happened in the Rich Paul case. That is now pending appeal, so we'll see what happens with that. In other cases, the judge will allow the defense to use a jury nullification defense. Before the jury retires the judge will issue the final instruction and make it very clear that your job is actually to judge only the facts of the case and not just the law.

They're essentially saying, yeah, the defense lawyer said all this stuff about jury nullification and this, that, and the other thing. But here are the real rules. That is what's happening. That's how some judges in New Hampshire are interpreting this law, totally flying in the face of the spirit of it. It remains to be seen what will happen with the New Hampshire Supreme Court. Either way I agree with Tim Lynch in this. I'm optimistic. If the higher court slaps that down, ultimately I guess that would invalidate the ruling for Rich Paul. Even if the higher court judge says that that was okay, then I would hope that the New Hampshire legislature would look at that and say wait a second. That is exactly what we intended not to happen. We need to redo this law and to make it tighter and stronger.

**WOODS:** Right. Maybe that'll be the outcome. I told people in the introduction about the other DVDs you guys have, but this jury duty movie has me interested. When's this going to be ready?

**SILVERMAN:** Tom, right now we are in that place called development.

**WOODS:** Okay.

**SILVERMAN:** We're in development, so I have not set a release date. I've burned myself before in the past saying that our movie is going to be done by this date. Then all these complicated things happen, and then we have to keep pushing it. People are screaming at me. So I'm not doing that game anymore. I could take some time, but if folks want to keep updated on this definitely follow Flex Your Rights on Facebook. Follow Flex Your Rights on Twitter. Go to [FlexYourRights.org](http://FlexYourRights.org) and sign up to our email list. You have to scroll down all the way to the bottom of the website, but you'll get there. Sign up to our email list. You'll be among the first to know what's going on. We're going to launch a Kickstarter campaign sometime in 2014. I want to make sure that I get that right. Of course, I want to make sure anyone who is interested in this is able to know about that. Any of those three ways, or using all of them, will ensure that you will be among the first to know about when the movie will be ready.