

Jurors should know their rights

A Historical Look at the Power of Jury Independence

The power of jurors to not enforce the letter of the law and to instead seek justice in deciding their verdict is commonly referred to as jury nullification. Juries have been following this simple doctrine for centuries, serving as a final check on the government's ability to enforce unjust, immoral, or oppressive laws. Yet, there are few principles in the study of criminal law that have inspired more controversy than jury independence.

In *Jury Nullification: The Evolution of a Doctrine*, author Clay S. Conrad, an attorney in private practice in Houston, attempts to reintroduce the concept to a general audience. Recently rereleased by the Cato Institute and Carolina Academic Press, the book concludes that there is nothing “wrong” with jury nullification; nullification is part and parcel of what a jury is all about. Conrad argues that the nullification power has sometimes been abused, as has all power. But these abuses have been exaggerated to discredit the nullification idea itself.

Central to the history of trial by jury is the right of jurors to vote “not guilty” if the law is unjust or unjustly applied. When jurors acquit a factually guilty defendant, we say that the jury “nullified” the law. The Founding Fathers believed that juries in criminal trials had a role to play as the “conscience of the community” and relied on jury nullification to hold the government to the principles of the Constitution. “It is not only the juror’s right, but his duty to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the instruction of the court,” John Adams once wrote.

Conrad traces the doctrine of jury nullification from its roots in England to the present day. Although opponents of jury nullification often point to the civil rights era when some all-white juries refused to convict whites accused of brutalizing and killing blacks, Conrad notes that jury nullification was also used to protect people who were prosecuted under



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An advertisement in the Judiciary Square Metro station in Washington, D.C., reminds jurors that they have a right to veto an unjust law. In a book recently rereleased by the Cato Institute, attorney Clay S. Conrad echoes the billboard’s sentiment that “good jurors nullify bad laws.”

the Fugitive Slave Act in the years before the Civil War. Jurors routinely refused to convict people who were helping slaves attain their freedom.

Yet over the last century and a half, the power of jurors has been derided and ignored by American courts, to the point where few jurors are even aware that an important part of their role is, in the words of the Supreme Court, to “prevent oppression by the government.” Several state constitutions explicitly say that juries shall have the power to judge the law as well as the facts in criminal cases, but those provisions have been watered down by judicial rulings.

Jury Nullification has drawn much praise. Randy Barnett of Georgetown Law School says: “This is the most important book on the independence of juries since Lysander Spooner’s *Trial by Jury* in 1852. It is meticulously researched and balanced. The enjoyment of

reading it stems as much from the beauty of Clay Conrad’s writing as from the comprehensiveness of his analysis and the fascinating and important nature of his subject.”

Conrad takes readers through an extensive, eye-opening history of the doctrine of jury independence, the law, and the practical and political implications of nullification. In the end, he writes that the best way for the courts to have their instructions respected is to make them thorough, honest, and even-handed. “Judges should make clear to jurors the gravity and responsibility inherent in a decision to veto the written law,” Conrad concludes. “While it is not a responsibility to be exercised lightly, neither is it a responsibility which can be denied or ignored.” ■

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