The Washington Post

History is clear: Juries were supposed to be able to overturn laws

Clay Conrad

April 8, 2016

The law is unclear on exactly what a jury is. Juries can range from four to 12 members, depending on the state and case. In two states, criminal juries need not reach unanimous judgments. In some states, jurors can question witnesses. There have even been arguments for so-called professional jurors.

Still, the right to a "trial by jury" — a right guaranteed by the constitutions of the United States and of all 50 states — must mean something. What powers does a jury have? How does it serve as the "palladium of justice" and "conscience of the community"? History, common law and the founders' writings offer some guidance, but the stories they tell do not comport with current practice.

Some believe that the right of jurors to refuse to convict in cases in which they believe a conviction would be unjust — what we now call jury nullification of the law — is obsolete in the 21st century. Yet this practice is something the founders knew of, and deliberately protected.

Jury nullification was an important part of Anglo-American law. In 1735, John Peter Zenger was charged with seditious libel for publishing newspapers criticizing the governor of New York. The law at the time left the jury to decide only whether Zenger published the papers, and let the court decide whether the papers were libelous. Defense attorney Andrew Hamilton arguedthat "leaving it to the judgment of the Court, whether the words are libelous or not, in effect renders juries useless (to say no worse) in many cases."

"Gentlemen, the danger is great, in proportion to the mischief that may happen through our too great credulity. A proper confidence in a court is commendable; but as the verdict (whatever it is) will be yours, you ought to refer no part of your duty to the direction of other persons. … It is your right to do so, and there is much depending on your resolution, as well as upon your integrity."

The transcript of Zenger's case was widely published, and Benjamin Franklin himself commented on it. The Founding Fathers incorporated this history into the U.S. Constitution and Bill of Rights.

American juries would go on to use nullification to avoid sentencing minor felons, and even some murderers, to death (giving rise to the degrees of felonies that exist today). Juries refused to convict those who helped slaves escape and refused to convict labor organizers. As many as

60 percent of juries refused to enforce the Volstead Act, leading to the end of Prohibition. Jury nullification led to recognition of battered spouse syndrome, and jury refusal to convict Vietnam War protesters helped bend public policy against that war.

One alleged dark chapter in the history of jury nullification is the claim that racist jurors routinely refused to convict lynch mobs and racist murderers. However, there is no reason to believe jurors are more racist than the communities that elect their sheriffs, judges and prosecutors. While a majority may determine an election, even the minority should have a voice on the jury. Even in a malevolently racist community, it is rare to get a consistently racist jury without the complicity of the judge and prosecution.

In the Byron De La Beckwith trial, two deputies testified Beckwith was in another county when Medgar Evers was shot. In the Emmett Till case, the sheriff testified that the body recovered was not Till's, resulting in a racist acquittal. It was not the jurors but legal officials who threw these and other cases. Juries have been scapegoated and blamed for the racism of elected officials.

Jury nullification became increasingly controversial as legal formalism arose in the late 19th century. Consistency and predictability in the law became more highly valued than reaching just results in individual cases. In 1895, theSupreme Court held that defendants had no right to have jurors instructed on their nullification prerogative. Only 25 years later, however, the court notedthat juries may "bring in a verdict in the teeth of both law and facts" and acquit, regardless of the evidence.

That leaves us with the world's silliest legal dichotomy: Juries can nullify, but lawyers and courts can't, or won't, tell them that they can. Advocates for nullification call it a right; opponents call it a power. Regardless, it is a power that jurors cannot be punished for exercising — one with a long history inscribed in our laws. Whether one is in favor of it or not, jury nullification remains the jury's prerogative.

Clay S. Conrad is a partner in the firm of Looney & Conrad, P.C., where he is in charge of appellate litigation. He is the author of "Jury Nullification: The Evolution of a Doctrine" published by the Cato Institute.