

Justice Often Served By Jury Nullification

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By Radley Balko

In February of 2003, a California jury **convicted marijuana activist** Ed Rosenthal of growing marijuana, in violation of federal law.

What the jury didn't know — and wasn't allowed to hear — was that Rosenthal was not only growing the marijuana for medical patients, he was growing the stuff for the city of Oakland. After the trial, the jury was outraged. "'I'm sorry' doesn't begin to cover it," one told the New York Times. Said the foreman, "It's the most horrible mistake I've ever made in my entire life."

As you read this, a 46-year old paraplegic named **Richard Paey** is serving a 25-year prison sentence in Florida. Paey suffered a bad car accident followed by a botched back surgery, and both left him in incredible pain. Paey, a father, discovered that he could relieve his pain by taking large doses of tightly regulated opiate painkillers, but the quantity of the drugs he needed exceeded that which his doctors could legally prescribe. Paey felt he had no choice but to break the law to get the medication he needed to live a normal life, and he was convicted of obtaining the drugs by using a photocopy of the last prescription his doctor wrote for him.

Prosecutors admitted Paey never sold his medication. But they charged him with distribution anyway, under Drug War laws stating that anyone possessing a given amount of a controlled substance is automatically guilty of distribution. Here again, jurors expressed disappointment in how the law gave them no choice but to return an unjust verdict.

But is that necessarily true? Must jurors uphold even unjust laws? Maybe not.

In his 1998 book "Jury Nullification: The Evolution of a Doctrine," Clay S. Conrad defines "jury nullification" this way: "Jurors in criminal trials have the right to refuse to convict if they believe that a conviction would be in some way unjust."

The doctrine of **jury nullification** ([search](#)) rests on two truths about the American criminal justice system: (1) Jurors can never be punished for the verdict they return, and (2) Defendants cannot be retried once a jury has found them not guilty, regardless of the jury's reasoning. So the juries in both the Rosenthal and Paey cases could have returned a "not guilty" verdict, even though Paey and Rosenthal were undoubtedly guilty of the charges against them.

This may sound radical, perhaps even subversive, but jury nullification serves as an important safeguard against unjust laws, as well as against the unfair application of well-intended laws. It's also steeped in American and British legal tradition.

The first case of jury nullification in British law came in the trial of **William Mead** ([search](#)) and **William Penn** ([search](#)), the latter of whom would go on to found the province of Pennsylvania. In 1670, the two men were charged in England with unlawful assembly, a law aimed at preventing religions not recognized by the Crown from worshipping. Both almost certainly broke the law, and the judge demanded a guilty verdict. But the jury refused, on the grounds that the law itself was unjust. After repeated refusals, the judge ordered the jury imprisoned. England's highest court eventually ordered the jurors released, establishing into common law the independence and integrity of juries in criminal cases.

Here in America, the Founding Fathers understood the importance of allowing juries to determine not just the guilt or innocence of the man on trial, but the justice and fairness of the law he's charged with breaking. John

Adams said of jury nullification, "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 direction of the court." John Jay, the first chief justice of the Supreme Court, said "The jury has the right to judge both the law as well as the fact in controversy."

In recent times, the doctrine has become almost obsolete. Judges routinely instruct jurors that they are not to determine the justness of the law in question, only whether the defendant is guilty of breaking it. This is simply not true. In the Rosenthal case, the judge actually cut off the defense lawyer when he hinted in his closing remarks that the jury had the power to acquit Rosenthal regardless of the evidence against him.

So why do judges continue to get jury nullification wrong? Many point to an 1895 case in which the Supreme Court ruled that judges aren't obligated to tell jurors of their power to nullify bad law. Some have wrongly interpreted that decision to invalidate the doctrine of jury nullification altogether. They're mistaken.

In fact, the Supreme Court has since repeatedly upheld the doctrine of nullification. In 1952, for example, the Court found that "juries are not bound by what seems inescapable logic to judges." And in 1972, that "The pages of history shine on instances of the jury's exercise of its prerogative to disregard instructions of the judge."

Indeed, Americans can be proud of our history of boldly and valiantly standing up to unjust laws (if not so proud of the laws themselves). There are multiple cases of jurors refusing to convict violators of the **Alien and Sedition Act** ([search](#)), the **Fugitive Slave Act** ([search](#)), and alcohol prohibition laws, among others.

Now that the Supreme Court ruled that **federal prosecutors** can continue to arrest medical marijuana patients, and given the Drug Enforcement Administration's **continued prosecution** of pain patients and the doctors who treat them, we're likely to see more outrages like those perpetrated against Ed Rosenthal and Richard Paey.

A common question I get from people disturbed by these kinds of cases is, "What can we do?" Well, here's one thing the average citizen can do: Serve when you're called to jury duty, and while there, refuse to enforce unjust laws. If a defendant is guilty of harming someone else, certainly, throw the book at him. But if he's guilty of violating a bad law, or if you feel the law has been unjustly applied to him, by all means, come back with "not guilty," no matter what the judge, the prosecutor, or the evidence says.

Not only is this your right as a juror, some would say it's your obligation.

Radley Balko maintains a Weblog at: www.TheAgitator.com