Canadian Journal of Law & Jurisprudence 2024, 1-5

 doi: 10.1017/cjlj.2024.15

Book Review

Joshua Paschal
Indiana University Bloomington, Indiana, USA
Email: jospasch@iu.edu

Jury Nullification: The Jurisprudence of Jurors' Privilege
Travis Hreno*

Jury nullification occurs when a jury, contrary to their belief about the legal culpability of the defendant, renders a 'not guilty' verdict. The jury both believes in the legally-established guilt of the perpetrator—that the act did indeed happen—and nevertheless decides to free them of penalty. In delivering a verdict of not guilty, the jury functionally takes away the power of the law in question, thereby nullifying it. Importantly, the converse cannot be true: An unjust guilty verdict does not nullify a law. A judge can set aside an unjustifiable guilty verdict, but they cannot overrule a not guilty verdict. This makes nullification particularly powerful because, barring a complete mistrial, it gives the jury final and definitive say.

There is an ongoing debate about the permissibility of jury nullification as a feature of the legal system. On one side, jury nullification is often thought of as a means of civil disobedience. In the context of the United States, non-compliance with the Fugitive Slave Act and a Vietnam Draft are the usual examples (127). On the other side, it violates what the jury's role in the system is supposed to be. The jury is a judicial body and is not empowered to make the laws. In a sense, the power of nullification unjustly gives legislative power to a randomly-selected group of citizens contrary to the democratically-elected legislature. This is the main question of the nullification debate.

There is a further debate, one which makes Hreno's book more novel: the debate about the possibility of a "*nullification instruction*" (xv). If nullification is a potential consequence of the legal structure, should juries be explicitly told of this? Proponents of jury nullification as a means of civil disobedience especially should at least be inclined to answer 'yes': It would empower juries to know of the ability they have. Yet we do not presently instruct juries in such a way. This is the question of the right to a 'nullification instruction' as Hreno labels it.

Should juries be allowed to nullify, and if so, should we tell them? Hreno's overall ambition is to answer two distinct principal questions (xiv):

(1) Is nullification a right of juries?
(2) Should we inform or instruct juries on nullification?

*Travis Hreno, *Jury Nullification: The Jurisprudence of Jurors' Privilege* (Ethics International Press, 2024) pp. 236 [ISBN 9781804410905]. All parenthetical page references are to this book.

Hreno's short answers are quite straightforward. The answer to the first question is that "privilege" is a better explanation of what nullification is (xv). The second question, ultimately, is answered in the negative—in short, there is too much practical risk.

The first chapter is a thorough history of the jury system extending back to eleventh-century England. The central theme here is that juries have consistently been motivated by their moral sentiments. A striking example of this is the constant avoidance of guilty verdicts for capital offenses, a tendency extending at least back to the time of Henry II and to juries avoiding capital sentences for "simple homicide" by stretching the law of self-defense (9-11).[1] The chapter works toward an explanation of how we arrive at the modern impartial and independent jury (38), which is central to understanding what is at stake in the nullification debate.

The second chapter will be familiar territory to those most aware of the nullification debate as it often appears in other areas of popular discourse. Simply put, should nullification be allowed? Hreno eventually gives us two related answers to this: first, any possible remedy to nullification would produce worse results by undermining the authority of the jury; second, that nullification is a necessary feature of the jury's operation, even if we do not want them to utilize it. "To the degree that we wish to both have an impartial and independent jury, as well as preserve the principle of double jeopardy, we must accept the reality that jury nullification is an intrinsic and necessary part of the criminal jury system" (80). Any method we could possibly use to take away the power to nullify would simultaneously take away the jury's central power as the final deciders of fact. If a judge could overrule a not guilty verdict, the finality of the jury would no longer be final.

There is an interesting, albeit untapped, connection to the work being done on pragmatic encroachment in jury deliberations.[2] In brief: Do juries actually form different beliefs when the stakes are made clear? In modern practices, juries are intentionally isolated from sentencing outcomes, such as three strike rules. Hreno gestures to those kinds of questions but makes it clear that, technically, they would not count as nullification-proper: To nullify, the jury must believe the offender factually and legally guilty and nonetheless choose to render an opposite, not guilty verdict. The deep questions about belief-states and the moral psychology of jurors extend well beyond the nullification debate and thus go beyond Hreno's main goals, but they do linger in the background as open questions. The possibility is that informing juries of the power to nullify ends up *changing* the very beliefs of those juries about the relevant facts. For the sake of brevity, though, I will cut this off here.

---

1. See also *ibid* at 140, discussing Norman Finkel, *Common Sense Justice: Jurors' Notion of the Law* (Harvard University Press, 1995) at 51.
2. See e.g. Sarah Moss, "Pragmatic encroachment and legal proof" (2021) 31:1 Philosophical Issues 258.

https://doi.org/10.1017/cjlj.2024.15 Published online by Cambridge University Press

The third chapter turns to the second focus of the book: Should juries be *instructed* about nullification? This is the particularly novel endeavor which goes beyond the more common discussions of jury nullification.

This section starts off with an explanation of why understanding nullification as a 'right' (or, alternatively, a mere power) is confused. The third chapter specifically argues that jury nullification is, more precisely, a *privilege* held by the jury (104). This Hohfeldian conceptual analysis should be familiar to those trained in legal theory and merely serves as a precisification of what the ordinary talk of 'right' is tracking in this particular case. The relevant response is relatively simple: It is not that the jury has a deep legal claim against some other duty bearer, as with claim-rights (usually, the strongest sense of 'right'); rather, it is *legally permitted* that the jury nullifies. Thus, it is a *privilege*, albeit an important and defining one (109-10).

The significance of the Hohfeldian analysis is what follows from the definition of 'right' being offered by Hreno. If by 'right' we do just mean 'privilege', as Hreno argues is the better way to understand jury nullification, then there is little ground for insisting upon a nullification instruction. If, however, we do think it is a claim-right, then we would be inclined to say that the jury is correct in demanding an instruction. Not providing an instruction would be a violation of the duties of the court.

The fourth chapter offers focused arguments in support of a nullification instruction. Although Hreno eventually disagrees with these arguments, he does think they highlight an important concern. Juries are a vital safeguard against government overreach, such as in the Fugitive Slave cases, and it is reasonable to want to empower them to act as such (115). More precisely, the question is whether the jury has a "laudable function" that requires that they receive a nullification instruction (123). There he offers some examples, and I will focus on one.

One contender for the jury's 'laudable function' that could be used to justify a nullification instruction is the democratic value of the jury (116). The thought here is that juries are empowered to express the will of the people through nullification. What Hreno does not explain in his discussion of democratic value is the question of the *separation of powers*. This is perhaps simply because it is a larger question, and one meant for democratic theory. Should juries be allowed to override, specifically, a democratically-elected legislature? If anything, the 'democratic values argument' is weaker than Hreno gives it credit for: It is unobvious why the jury is a democratic institution in the first place, let alone one that should be thought as being vested with something like legislative authority.[3]

The fifth and final chapter offers arguments against a nullification instruction, seeking to justify Hreno's final stance on the subject. He starts carefully, working through familiar objections of the likes of "It will lead to anarchy!" and "What if

3. *Contra* Clay S Conrad, *Jury Nullification: The Evolution of a Doctrine* (Carolina Academic Press, 1998).

https://doi.org/10.1017/cjlj.2024.15 Published online by Cambridge University Press

jurors are motivated to nullify based on racism?" Hreno then works toward what he takes to be the strongest, albeit connected, concern with a possible nullification instruction. Drawing on a study by Irwin Horowitz, Hreno argues that a nullification instruction could lead to jurors, problematically, deliberating in bad faith.[4] The Horowitz study provides evidence of this: A "*Radical Nullification Instruction*" (RNI)[5] leads to jurors actually judging *more* harshly in mock cases of offenses like drunk driving (190).

Horowitz explains that in the RNI drunk driving cases, the jury deliberation focused more on the defendant's character, rather than the facts of what happened, to establish legal guilt. When instructed that they could nullify, the jury became interested in *moral* judgment. After having their power to nullify highlighted, the jury decided more zealously based on moral attitudes instead of on the basic questions of fact; they did *not* act more mercifully. They ended up caring less about the evidence of the case and more about judgments about the person in relation to their own individual experiences. A stark and grim conclusion, yet one that captures the breadth of concern of the former objections to nullification instruction. It should be noted that this phenomenon only applied to drunk driving cases and not to the mock murder cases (where it made no clear difference) or the euthanasia cases (where the opposite was true, and a not guilty verdict became more common).

If it is true that a jury provided with nullification instruction may render guilty verdicts where a jury with no such instruction would *not* render such a verdict, then it is certainly a compelling reason not to provide *any* nullification instruction. Hreno speculates that this is generally true.

However, I am not entirely convinced of this final note on which Hreno leaves us, as exhaustive and moving as his overall endeavor is. Both the 'bad faith juror objection' (183) and the evidence presented about RNI juries being more apt to convict in some cases (191) are deeply concerning, certainly. That said, I do not think that is enough to reject *all* instruction regarding the privilege of nullification, as Hreno claims. More needs to be said to get us to that general conclusion.

No one wants *any* instruction to a jury to result in unjust injury. But the RNI has multiple features that may lead to the jury *over*-moralizing: those radical instructions speak of final authority, representative power, conscience, and the finality of jury feelings about the law and its equity and justice (190). If *I* were given such instructions about deciding anything, I would feel more like a president than a juror. RNI is over-empowering. One may look at the RNI as an extreme case and one that no one would endorse as a good instruction, without saying *any and all possible* nullification instruction is unwise.

Hreno does conclude on a more holistic point about the balancing of good policy and possible risks, such as the risk of jurors deliberating in bad faith (alternatively, deliberating *viciously*) (193). "The costs are too great; the risks are too

4. See Irwin A Horowitz, "The Effect of Jury Nullification Instruction on Verdicts and Jury Functioning in Criminal Trials" (1985) 9:1 Law & Human Behavior 25.
5. *Ibid* at 30.

https://doi.org/10.1017/cjlj.2024.15 Published online by Cambridge University Press

high" (194). More needs to be said to fully show this, though. The Horowitz study is evidence, yes, that juries can be vicious and misguided in this particularly problematic way. However, it is unclear how far the Horowitz study actually takes us, given the extremity of its studied instructions. Concerns about juries being moral zealots is not novel to the nullification debate particularly: This is a fundamental concern with jury systems as a whole. Yet we have juries, and we do instruct them.

It is up to advocates of a potential jury instruction to specify what kind of instruction would successfully avoid Hreno's concern. While there are some underexplored options in my view, Hreno's overall argument is moving and, putting aside some reservations, it is convincing.

Critical remarks aside (which, ultimately, are relatively minor disagreements), Hreno does successfully navigate a massive area of controversy and faithfully engages with a wide variety of views about nullification itself, as well as the more specific question of nullification instructions. The central Hohfeldian analysis is careful, precise, and elucidates the otherwise sloppy language that is commonly used in these discussions. And while I am not wholly convinced of Hreno's ambitious final conclusion, the range of views discussed in the book—even views he eventually disagrees with—is impressive. Anyone interested in deep questions about criminal procedure and the structures of the judiciary would benefit from a read.

Joshua Paschal is a doctoral candidate in philosophy at Indiana University. His dissertation research is on the philosophy of substantial criminal law and how various types of considerations enter into the setting of legal standards. He uses his theoretical approach to inform on questions in criminal negligence and hate crime penalty enhancement. Email: jospasch@iu.edu

https://doi.org/10.1017/cjlj.2024.15 Published online by Cambridge University Press