

seems entirely outweighed by reverence, compassion, and tenderness.

Elegy for Iris is, more than anything else, what the title says: a tribute.

Norah Vincent, who lives in New York City, is coauthor of *The Instant Intellectual*.

I, THE JURY

By David Koppel

Jury Nullification: The Evolution of a Doctrine

By Clay S. Conrad

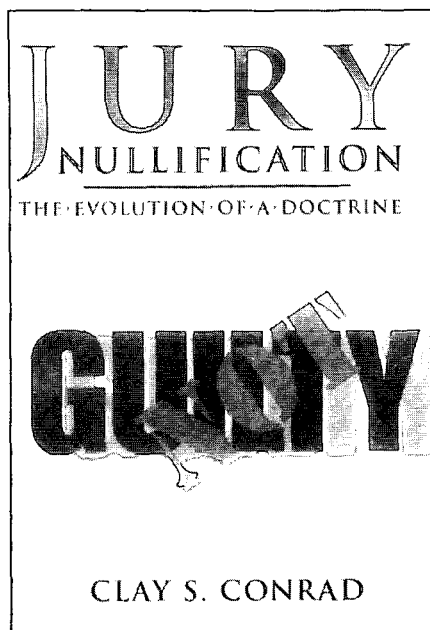
Cato Institute/Carolina Academic Press, 335 pages, \$22.50

In a criminal trial, may the jury consider whether it is fair that the particular defendant be punished? Or are juries required only to decide whether the defendant broke the law, and to avoid questions of whether the law is just or the defendant's actions were justified by circumstances?

According to a poll by the *National Law Journal*, 76 percent of Americans believe juries have the right to bring their conscience into the jury room—and to acquit a defendant who is technically guilty but morally innocent. Writers like the *Washington Post's* Joan Biskupic are striking back at this idea by claiming that a juror's right to vote his conscience is tantamount to "vigilantism" or "anarchy."

Given all the confusion about juror rights, Clay S. Conrad's superb new book *Jury Nullification: The Evolution of a Doctrine* is especially timely. Tracing the jury-rights controversy from medieval England to modern America, Conrad shows that independence of the jury has always been one of the most important safeguards of civil liberty.

Many famous early cases of jury independence involved freedom of the press, and arose when the British government, either in England or in the colonies, prosecuted newspaper publishers such as John Peter Zenger or religious dissidents such as William Penn. Although Zenger and Penn were in fact guilty of the crimes they were accused of

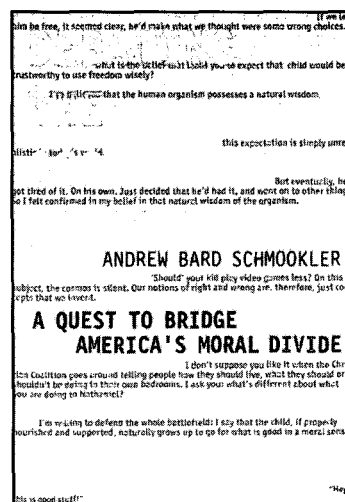


(Zenger had criticized the New York governor in print, and Penn had published illegal religious tracts), juries voted to acquit them.

In the early American Republic, the jury's right to acquit a technically guilty defendant was widely acknowledged by the Founders, including Supreme Court Chief Justice John Jay. Thomas Jefferson and John Adams, though at opposite poles on many issues, were of one mind on the need for jury independence.

The most important exercises of jury independence in the eighteenth century focused on free speech. The middle of the nineteenth century witnessed frequent acquittals of individuals who had helped runaway slaves, in violation of the Fugitive Slave Act. In the 1920s, juries helped speed the repeal of Prohibition by refusing to convict those whose crime was selling beer or fermenting wine.

But while early American courts were receptive to the idea, later courts grew hostile to jury independence. In the 1895 case *Sparf v. Hanson*, a divided Supreme Court held that although jurors possess absolute power to acquit whenever they want, federal judges are not required to inform them of that right. In Maryland, Indiana, and Texas, where state constitutions explicitly guarantee the jurors' right to judge the law, judicial constructions have, in effect, nullified this right—or at



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least nullified the right of juries to be informed about such rights.

Conrad refutes various criticisms of jury independence. He argues that jurors who vote their conscience are not "nullifying" the law. Rather, they are exercising their discretion, ruling that it would not be fair to apply a particular law in a particular case. District attorneys constantly exercise similar discretion—not bringing charges in the first place—and no one accuses them of "nullification" or "anarchy."

The claim that racist juries in the South used to acquit criminals who attacked blacks has some basis in fact, but acquittals in cases where the district attorney really tried to win a conviction were rare. In some places today there appears to be an inverse pattern of black juries refusing to convict black defendants. The proper remedy for such cases, Conrad suggests, is ensuring that people are not excluded from jury service on the basis of race.

Although most judges today don't tell juries their rights, more and more jurors appear to be following their personal judgment. Nationally, about 20 percent of criminal prosecutions result in a hung jury, compared to only about 5 percent in earlier decades. In response, some opponents are calling for allowing more non-unanimous jury verdicts. Advocates of jury independence rejoin that laws which inspire jury revolts should be repealed.

Jury independence has become more relevant today than in any other period since the 1920's. And not since Lysander Spooner's 1852 classic *Trial by Jury* has such a substantive book about jury independence appeared as Clay Conrad's. It is a definitive guide for citizens who want to bring their consciences to jury service.

David Kopel, co-author of No More Wacos, is research director at Colorado's Independence Institute.



OVER-LOOKED, NEWLY RELEVANT, OR OTHERWISE DESERVING OLDER BOOKS

LIKE A GOOD NEIGHBOR

By Brian Doherty

Dear America

By Karl Hess, 1975

Karl Hess's life was a quintessential modern American journey. He was reared mostly by his mother in Washington, D.C., in the 1930s. She had left his father because of his relentless tomcatting. Family legend had his hot-blooded father, Carl Hess, beheaded by a Japanese soldier during their occupation of the Philippines because he refused an order to interrupt a card game. Though Karl—who changed the spelling of his name from "Carl" to seem less his father's son—credited his mother for how he turned out, a strong streak of Dad's romantic windmill-tilting was in his blood.

Dear America was published in 1975, during one of Hess's many ideological turnings. On its first page this former GOP platform drafter, Goldwater speechwriter, and (later) editor of the Libertarian party's newspaper wrote that "corporate capitalism is...the Grand Larceny of our particular time in history."

Yes, Hess was a peculiar sort of ideologue. He was fired from one newspaper job for refusing to write a laudatory obituary for FDR because "I regarded his regime as social fascism then and I still do." In the '50s he became a journalist at *Newsweek*. A serious anti-Communist, Hess helped run guns to (non-Castro) enemies of Batista who he thought would be better for American interests. He also met with Frank Costello's lawyer in hopes of convincing the Mob to patriotically hijack shipments of Soviet cash headed to American Communists.

By the end of the '60s, the former Goldwaterite was hobnobbing with

Black Panthers, and raging about the revolution that was going to hit middle-class America. According to *Dear America*, which is part memoir and part call for social revolution, Hess grew bored, bought a motorcycle, began hanging out at the leftist Institute for Policy Studies, doing welding for a living, and discovering pot. Hess and his hippie honey lived on houseboats and let it all hang out.

Hess's eclecticism resulted from his mistrust of ideology. Experience, inherently local, was his lodestar. In the mid-1970s he tried to turn his D.C. neighborhood of Adams-Morgan into a functioning experiment in local technological and agricultural self-sufficiency. A few hydroponic gardens sprouted on roof tops; machine shops were opened to neighborhood kids. Trout were fed in tanks in rowhouse basements. (The full story is told in a later Hess book, *Community Technology*.)

Hess appears in *Dear America* in all his dogged contrariness. He was libertarian enough to finger the withholding tax as the beam supporting the weight of the American Leviathan, and to declare that it must be first to go. He was lefty enough to call for takeovers of absentee-owned factories or housing. He was crazy enough to stop paying taxes, and to announce this, with his reasons, to the IRS. This decision caused Hess no end of bedevilment, leaving him unable to earn any legal income because of a 100 percent IRS lien. He regretted his stance, but only because of the troubles it caused for his wife and family.

After *Dear America*, Hess retreated with his second wife, Therese, to a home they built in West Virginia. Asked what it took to be the perfect anarchist, Hess replied being a good friend, a good lover, and a good neighbor, and *Dear America* is dedicated "To My Neighbors."

Upon his death in 1994, Hess's West Virginia friends gathered to remember him fondly, suggesting that though Goldwater lost and libertarian anarchism has not descended upon the land, Karl Hess won.

Brian Doherty is the Warren Brookes Fellow at the Competitive Enterprise Institute.