

## Law Journal

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**CRIMINAL  
PROSECUTION**  
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### *Jury Nullification: Can we justify ignoring the law?*

*My instructions to you on the law must be accepted by you whether you agree with them or not. If you have any ideas of your own of what the law is or what you think it should be, it is now your duty under your oath to cast aside your own ideas of the law and to accept the law exactly as I give it to you. -- Criminal Jury Charge, Function of Court, CJI 5.11*

Although these pattern jury instructions rarely invite comment, the contemporary role of the jury as arbiter of the facts and no more has in fact developed over time. Prior to the formation of the Republic, the criminal jury was at times an instrument of peaceful resistance to British oppression, and since independence there have been instances in which juries have refused to convict defendants of criminal laws they found repugnant. Indeed, there are those who once again wish to expressly invest criminal juries with the ability to reject certain criminal laws, thereby creating a buffer between legislatures and our liberty.

The notion that criminal juries may ignore proof beyond a reasonable doubt of factual guilt and acquit a defendant as a moral declaration of conscience actually has a pedigree in American jurisprudence. It was no less a personage than Alexander Hamilton who, when representing a New York printer in the British Crown's prosecution for seditious libel related to published comments critical of the colonial Governor, told the jury that *in your justice lies our safety.*

Hamilton exhorted the jury in Rex v. Zenger to reject application of the Crown's seditious laws to a fellow citizen who merely spoke the truth, declaring that rejection of the law in that case *is your right, and there is much depending upon your resolution, as well as upon your integrity.* The jury acquitted after brief deliberations.

The development of the doctrine of jury nullification from the Zenger case to our time is characterized by the judiciary's restriction of the jury's right to decide the law, culminating in CJI 5.11. Despite that, jury nullification never really died. It saw application during the Civil War when juries refused to enforce the fugitive slave laws, and more recently in Michigan during the prosecutions of Dr. Jack Kervorkian.

The doctrine has been advanced during the last election in South Dakota, whose citizens in November voted on Amendment A, a proposed amendment to the state constitution that would permit a criminal defendant to argue the merits, validity, and applicability of the law, including the sentencing laws, effectively institutionalizing the doctrine of jury nullification.

Proponents of jury nullification thus place criminal codes in the same category as acts of colonial repression, allowing juries to reject application of victimless crimes in the name of liberty, just as Mr. Zenger was acquitted for speaking the truth about colonial tyranny. Advocates are usually promoters of a larger, libertarian agenda and cite prosecutorial abuses such as a cancer victim jailed for possession of small amount of medicinal marijuana, or an elderly man charged with animal abuse for caning an attacking dog as justification for jury independence as a matter of policy.

In their zeal to neatly pare the criminal code, jury nullification advocates place in the hands of criminal jurors a mallet-handled butcher knife, ill-equipped for the task and capable of doing much damage. Prosecutors have always been vested with the discretion to avoid injustices in the application of law, and courts routinely strike down laws that encroach upon our fundamental liberties.

Creating jury nullification as a matter of right reduces to absurdity the rule of law and invites another parade of injustices in its turn. For example, one jury may find that while a particular defendant did in fact engage in sexual acts with a child, the victim on the witness stand appeared intelligent and mature. The jury would therefore be invested with the right to suspend the statutory age of consent in that instance, removing the prosecution of a terrible crime from the firm ground of the law and placing it into a quagmire of situational ethics.

In the end, the people of South Dakota saw the jury nullification issue for the dangerous subversion of the rule of law that it was. Amendment A was rejected by South Dakota voters 3-1. I think Alexander Hamilton would be pleased.

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