

**Jury Nullification: Inherent, Understood, and Appropriately Utilized
(or It Ain't Broke, So Don't Fix It)**

In his book *For the People: What the Constitution Really Says About Your Rights*, Akhil Reed Amar contends that American juries have “a constitutional right” to nullify the law, understood as the power to acquit defendants despite their factual guilt (Amar 107). Since the 1896 U.S. Supreme Court decision *Sparf and Hansen v. United States*, juries in most states have operated without official knowledge of their “right to nullify” (Levine 102). In fact, judges routinely implore juries that it is their duty to answer questions of fact only—a practice that Amar believes “fosters enormous confusion” in jury deliberations, as some jurors recognize the nullification power and others do not (Amar 107). Therefore, Amar argues, judges should be required to inform juries of this “right,” rather than impress upon jurors that they must only consider the facts of the case and the established judicial interpretation of the law in question. Amar proposes “a sound approach to nullification” with certain built-in boundaries: judges should educate jurors about their “right” to nullify, but that “right” should be limited to apply only to the administration of justice in the particular case at hand—not to express dissatisfaction with a law or to make a broader political statement (108-110).

Although Amar’s proposal at first appears reasonable and appropriately balanced, his argument for a fully informed jury is suspect on several levels. It is not clear that juries have a constitutional right to nullify; rather, the *power* of nullification is inherent in a jury system in which jurors are not required to explain their verdicts. Moreover, nullification does not always serve the purpose of “completing and perfecting” the law, as

juries officially *uninformed* of the nullification power have exercised nullification in both laudable (e.g. the William Penn case) and contemptible (e.g. the Emmett Till case) ways. Because the nullification power of juries is absolute, any attempt to reign it in by informing juries of a narrow right to nullification is both futile and disingenuous. Juries are in no way bound to the judge's interpretation of "proper" nullification, so Amar's compromise solution of restricted nullification does not "educate...and respect" jurors any more than the current system does (Amar 113)—misinformation is no better than, and may be worse than, the absence of information. Jury nullification is an important power retained by the jury; as it exists now, it is not broken, and attempts to fix it are misled.

The jury nullification power is a simple concept, one that is easily defined; however, advocates of the fully informed jury are susceptible to euphemism when defining jury nullification. Jeffrey Abramson, author of *We the Jury: The Jury System and the Ideal of Democracy* and supporter of the jury's right to be informed of the nullification power, offers this definition: "Jury nullification is a controversial doctrine that claims jurors have the right to refuse to enforce the law against defendants whom they believe in good conscience should be acquitted...[J]urors always have discretion to find that justice is better served by ignoring the law and setting a defendant free" (Abramson 57). Such a description implies that the intent behind the exercise of the nullification power is always noble; history proves otherwise (as when post-Reconstruction white juries in the South routinely acquitted white persons charged with violent crimes against blacks). To his credit, Amar gives a more honest definition of jury nullification: "...for a jury to acquit for any reason whatsoever, notwithstanding the

evidence proving the defendant's guilt" (Amar 105)*. Still, this definition is incomplete—a juror may acquit “for any reason whatsoever” or for no reason at all. This is simply because, unlike judges, jurors are not asked to explain the reasoning for their decisions. James P. Levine writes, “[I]n practice, jurors can assess the law in question to their hearts' content as a part of their decision making without any repercussions. Jurors can do as they please, and refusing to apply a law sometimes pleases them” (Levine 103).

Because jurors are not required to cite the basis for their decisions, the nullification power is an inherent part of the system of jury trial. Therefore, to refer to jury nullification as a “right” is somewhat misleading—it insinuates that the nullification power is separable from the general power of jurors to judge guilt or innocence. In reality, nullification is a *de facto* power that is essential to the concept of trial by jury. To pretend that nullification is some kind of “right” conferred upon jurors by the Constitution is to practice redundancy. For this reason, the “power” of jurors to nullify the law in a particular case should not be confused with a constitutional “right” to nullify; the existence of the former is undisputed, but the existence of the latter is questionable, for the Constitution makes no special mention of the “right” of jurors to practice nullification (Finkel 31, Levine 102). Advocates of the notification of jurors of the nullification power often use the terms “power” and “right” interchangeably because they understand the implication: if jurors have the “right” to nullify, should they not be informed of this right by the judge? On the other hand, if the “power” to nullify is inseparable from the power to make the judgment of guilt or innocence in a particular

* Levine includes the jury's power to convict against the evidence in his definition of jury nullification (104-5). However, because convictions can be appealed while acquittals are final, the power of the jury to acquit against the evidence is more far-reaching and is therefore the common battleground of the nullification debate.

case, the special instruction to jurors reminding them of their “right” to nullify seems redundant and, therefore, coercive.

For over a century, the courts have made the distinction between the “power” to nullify and the existence of a constitutional “right” about which the jury should be informed. According to Norman Finkel, in an 1851 case dealing with the Fugitive Slave Act, “the judge refused to let the defense counsel make the nullification argument to the jury, noting that ‘power is not the right’” (Finkel 31). More importantly, the Supreme Court effectively ended the routine practice of jury notification of the nullification power in *Sparf and Hansen v. United States* (1896), while recognizing that the jury cannot be forced to follow the judge’s interpretation of the law (Kassin 158). More recent cases, such as *United States v. Dougherty* (D.C. Cir. 1972), have reaffirmed this distinction between an understood power and an explicitly stated constitutional right (Finkel 32). Today, juries in forty-eight states and the District of Columbia are not explicitly informed of their power to nullify; Maryland and Indiana are the two exceptions, as their state constitutions require jury notification of the nullification power* (Levine 102).

Advocates of a “fully informed” jury often cite the 1735 seditious libel case against colonial New Yorker John Peter Zenger, who published unflattering information, however true, about British officials (Abramson 73-4). The technical facts of the case were inarguable: Zenger was clearly guilty of printing stories that were critical of the colony’s royal governor. The jury, however, exerted their power to nullify and acquitted Zenger on the grounds that English common law respected the defense of truth to charges

* Although Amar notes that Indiana and Maryland “do not appear to experience rampant use of” nullification (112), Levine presents a possible reason: “[M] any of the judges in Maryland and Indiana manage to soft-pedal this message [about the power to nullify], and it appears that most jurors are inclined to follow the judge’s interpretation of the law in any event” (Levine 102).

of libel (74). This case, Amar recognizes, is not a satisfactory basis for a natural “right” of jury nullification—the people of New York had no representation in the British Parliament, and therefore did not have the natural right to nullify laws with which they did not agree (Amar 110: footnote). In the United States today, dissatisfaction with a particular law can be expressed through means other than the jury box—through elected representatives and elections. Amar writes, “There are ample forums for expressing disapproval of a law or government policy” (110).

This is the most controversial aspect of jury nullification. There is no doubt that the jury retains the *de facto* power to acquit defendants for any or no reason, and therefore has the power to nullify law in a particular case. The appropriate use of that power—and whether it should be encouraged through a judge’s explicit instructions to the jury—is the fundamental question. George P. Fletcher, author of *A Crime of Self-Defense: Bernhard Goetz and the Law On Trial*, believes that nullification does not undermine the rule of law, but instead allows juries “to perfect the law, to realize the law’s inherent values” (Fletcher 154). He writes: “It would be better if we abandoned the phrase ‘jury nullification’ and spoke instead of the jury’s function in these cases of completing and perfecting the positive law recognized by the courts and the legislature” (155). Jeffrey Abramson recalls the early American jury that was the “premier institution of self-government” and “a hands-on school where citizens learned the virtues of self-government by actively participating in constructing their community’s laws” (Abramson 89). What could be more democratic, they ask, than citizen participation in the lawmaking process?

At the same time, Fletcher realizes that “nothing prevents [jurors] from making these decisions on the basis of their passions rather than a reasoned effort to refine the law” (156). Therein lies the problem: if the practice of jury nullification is regarded as a means of “perfecting the law,” like a fourth branch of government, some juries may indeed exercise exceptional judgment, recognize flawed law, and acquit the right defendants—but others will undoubtedly exhibit poor judgment (or none at all) and nullify perfectly sound law. As Nancy King, professor of law at Vanderbilt University, writes, we should not expect jurors to be capable of recognizing bad or unjust law:

Unlike legislators or electors, jurors have no opportunity to investigate or research the merits of legislation. Carefully stripped of those who know anything about the type of case or conduct at stake [through peremptory challenges and for-cause dismissals], juries are insulated from the information they would need to make reliable judgments about the costs and benefits, the justices or injustices, of a particular criminal prohibition (King 2).

On this point, Amar agrees—democracy is not served when the lawmaking function is delegated, in any way, to a group of twelve anonymous jurors. He adds: “For a body of just twelve people to refuse to convict merely because it dislikes a law is antidemocratic; the law-making function belongs to the public at large, either directly or through its elected representatives” (Amar 110). Clearly, a jury of twelve is no more likely to be a representative sample of the population than a twelve-person telephone survey; in fact, it is *less* representative, as the system of jury selection ensures that juries will usually have an inordinate number of “empty minds,” as Abramson calls them (Abramson 60). “If there is a concentrated population of homophobes, racists, or anti-Semites in my state,” contends King, “I, for one, do not want judges and lawyers encouraging jurors...to apply their own standards” (King 3).

Amar presents a reasonable standard for legitimate jury nullification: “The jury may legitimately nullify when it believes that a conviction would be unjust to *the particular defendant* because of the circumstances of the case,” with “the point of nullification [being] to perform justice in the particular case before the jury”(Amar 109-10). The very vast majority of the time, “justice” should be defined as the factual guilt or innocence of the defendant; however, in those rare cases in which the law is not sufficient in administering “justice”—when conscience strongly conflicts with reason—jurors should consider their power to nullify.

And they already do. It is estimated that three to four percent of all jury criminal trials end in jury nullification—that is, roughly one of twenty-five *cases* (not merely acquittals) result in a jury’s determination that a factually guilty defendant should nevertheless be acquitted (Conrad 1). This is *without* jury instruction as to the power to nullify, and many judges specifically warn jurors *against* basing their verdicts on factors other than the evidence. “History teaches us that jurors escape from all kinds of legal straitjackets designed to restrain conscientious acquittals in criminal trials,” writes Abramson, a supporter of jury notification of the nullification power (Abramson 92). Certainly, the numbers bear out his assertion, which begs the question: Should jury nullification be any more common than it already is?

This is the trouble with the movement for full jury notification of the power to nullify: the problem advocates bemoan does not exist. Juries do have an intuitive sense of their inherent power to nullify, and they use that power when they feel it is appropriate, regardless of the instructions of judges. There are, of course, rare exceptions when fully informed juries might nullify in cases in which the standard jury

convicts. These are not, however, travesties of justice; the failure of a jury to have mercy on a factually guilty defendant is not tragic, but perhaps unfortunate—and the defendant can appeal the conviction. As Clay Conrad, attorney board member of the Fully Informed Jury Association, admits, “There is no way to prevent jury nullification because juries can never be ordered to convict or be punished for acquitting someone” (Conrad 1). Jury nullification is alive and well, even without jury notification.

Legal scholars like Amar, however, argue for jury notification from a philosophical perspective: if juries do indeed have the power—they would say the “right”—to nullify, it is inconsistent and irresponsible for judges to insist that jurors act merely as arbiters of factual guilt or innocence without notifying juries explicitly of the nullification doctrine. Amar describes notification as “leveling with [jurors] about their rights and powers” (Amar 113). The tension that exists between what jurors are charged to do by the judge and the inherent power juries possess should be ameliorated, he argues. Amar’s solution is to notify jurors of a sort of partial nullification: that judges should encourage jurors to pursue justice in the case at hand, but not to nullify based on disagreement with the law or as an act of political speech (113). This approach, however, is more disingenuous than the current practice of no notification—to instruct jurors that they may only legitimately nullify for certain reasons is to misinform, since jurors can legally nullify for any reason whatsoever. No information at all is preferable to misinformation.

Furthermore, the inconsistency that, according to Amar, leaves jurors “to flail about in ignorance” may be exaggerated. According to a poll by the National Law Journal, three in four Americans admit that they would nullify if they believed the

conviction of a factually guilty defendant would be unjust—a statistic that suggests that more than 3 in 4 are at least aware of the nullification power, even if they would not use it (Conrad 2). Abramson writes, “Legal realist critics have pointed out since the beginning of the century that modern jury procedures mask a charade: we have judges...instructing jurors on the law and tell them they must abide by the instructions, but we suspect that jurors...fall back on their own gut reactions” (Abramson 91). Therefore, most jurors are both aware of the nullification power and inclined to mollify their consciences when deciding criminal cases.

Whatever tension does exist between the official role of the juror as fact-finder and the power to nullify is healthy. Without question, jurors retain the right to acquit (or convict) for any reason or no reason at all; therefore, they clearly possess the power to nullify. However, jurors should not enter the jury room eager to exercise their nullification power; rather, should treat nullification as a last option to which they resort only when a guilty verdict clashes with their sense of justice. When this happens, most jurors quickly realize their inherent power to nullify, and they base their judgments on justice rather than law. To emphasize the nullification power before the trial through notification by the judge, however, is to undermine the integrity of the rule of law and to encourage jurors to base verdicts on emotions rather than facts. For a justice system based on the absolute rule of law and the swift and certain punishment of criminals, frequent and reckless use of the nullification power would be disastrous. Akhil Reed Amar’s standard of appropriate nullification is satisfactory—juries should only nullify to administer justice in a particular case against a particular defendant. Amar’s proposal of juror notification of the nullification doctrine, though, is misguided: notification is both

unnecessary and possibly harmful, and Amar’s partial nullification compromise creates more inconsistency than it eliminates. Jury nullification, in the words of the U.S. Court of Appeals for the District of Columbia, is “an occasional medicine [that] would be disastrous as a daily diet” (Levine 102). As such, the prescription for jury nullification should not be given recklessly—and jury notification of the nullification power is an invitation to addiction.

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