TWELVE IRRELEVANT MEN? HOW JUDGES’ MISTRUST UNDERMINES THE AMERICAN JURY SYSTEM

DAVID E. HARVEY

INTRODUCTION

In recent years, several legal commentators have questioned the wisdom of maintaining the American jury system. Some critics question whether lay juries are the best mechanism for resolving increasingly complex and sophisticated matters while others fear that many jury trial outcomes are more related to savvy attorneys and jury consultants than to the facts of the case. This note will not argue that these critics are right to call for an abolishment of the jury system; instead it argues that the jury system, at least as many Americans know it, does not really exist in the first place.

What exists today is a “quasi-jury” system: lay persons hear the evidence and are asked to reach a decision, but that decision is heavily influenced, and sometimes flat out ignored, by trial and appellate court judges.[1] These judges’ mistrust of juries results in an undermining of the jury system that has the effect of substituting the courts own judgment in place of the jury’s.

After presenting a brief history of the jury system, this note looks at five ways in which trial and appellate court judges demonstrate their lack of faith in the jury at various stages of a case: (1) during the trial itself, the refusal to allow juries to
hear character evidence; (2) during deliberations, the use of ‘Allen charges’; (3) after the verdict is announced, the reduction or overturning of punitive damages awarded by the jury; (4) during sentencing, the use of acquitted conduct; and (5) on appeal, deciding factual issues that were never determined by the jury.

It should be noted at the outset that many of these practices engaged in by judges are not new ones. In fact, as will be seen, some of them have existed, at least to some degree, for decades, if not centuries. Thus, some may argue that these judges are motivated by stare decisis rather than by any mistrust of the jury. However, it is significant that all of these practices are within the discretion of the judge. A judge faced with a deadlocked jury is not required to give an Allen charge, nor are judges compelled to reduce punitive awards made by a jury. In fact, since reliance on precedent does not explain their actions, judges have proffered other rationales in these areas. Included in the discussion will be a critical look at these alleged justifications for impeding on the jury.

I. A BRIEF HISTORY OF THE JURY SYSTEM

Most historians believe the Western jury system originated in classical Athens, about 400 years before the time of Christ. The Athenian philosophy was that those accused of wrongdoing should be allowed to argue their cases before a tribunal of their peers, whose duty was to apply their understanding of justice, that which we would now call the conscience of the community. However, the ancient Greek jury, called a dicastery, was quite different from the juries we now today. There were 501 jurors for each criminal case and 201 for
each civil case.[6] Given the size of the juries, it is not surprising that verdicts were reached by majority rather than unanimous vote.[7] The jurors’ decision was final, although the loser had the right to bring a civil perjury suit against any witness whom he believed testified falsely.[8] Jurors were often chosen for a specific case because they had knowledge or information about it.[9] Preformed opinions were common, and these opinions were openly discussed among the jurors during the presentation of evidence.[10] The jurors were permitted to direct questions to the parties during the trial, and it was not uncommon for the jury to yell or hiss or otherwise express its opinion.[11] No available evidence was kept from the jury, and no aspect of a defendant’s life was off-limits.[12]

When the Athenian world was swept away by the Romans, the jury system’s use diminished. The Romans were indefatigable writers of laws, designed to cover every conceivable situation. Roman courts were designed to apply the statutes, not interpret them, and for that no citizen input was required. However, the Romans did study the Greek system and maintained a system of juries who heard criminal trials once a year.[13] When the Romans conquered Britain, they brought the jury system with them.[14] However, most historians agree that the English jury system did not begin in earnest until after the Normans invaded England in 1066.[15] Up until about 1200 the juries in England dealt primarily with property disputes.[16] Jurors were considered to have knowledge of the matter before the trial began; in fact often they went on tours of the disputed land parcel prior to commencement of the trial.[17]
In 1215, the King signed the Magna Carta. Article 39 of the Magna Carta dictated that “no free man shall be taken or imprisoned . . . unless by the lawful judgment of his peers . . .” While the Magna Carta placed jury trials in prominence, the jurors themselves were hardly treated with reverence. Juries were not allowed food or drink until they reached a verdict. Additionally, if the jury did not reach a verdict by the time a circuit judge had to move on to the next jurisdiction, the jurors were packed into a cart and taken along with the judge until they reached a decision.

As colonization of America began, the jury system was guaranteed in some form in the incorporating charters of each colony. Although unanimity among jurors in criminal case verdicts had become English rule, some colonies had provisions for majority rule decisions. The Declaration of Independence declared among its grievances against the King that he had been depriving colonists of the right to jury trial. The Sixth Amendment to the Constitution guarantees the right to jury trial in criminal trials and the Seventh Amendment provides for the right in civil trials. In 1968, the U.S. Supreme Court held that the Sixth Amendment had been incorporated into the Fourteenth Amendment and therefore applied to the individual states.

The Seventh Amendment reads: “In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.” While this language seems to express a desire that the jury’s word be final, the reference to ‘the common law’ has been interpreted as a restriction on the
After all, the common law “is pretty much what judges say it is,” and thus the prohibition against reexamination of any jury’s verdict has given way to the practice of judges overriding juries in numerous ways.\textsuperscript{[29]}

II. EXCLUSION OF CHARACTER EVIDENCE

Relevant evidence is defined as evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”\textsuperscript{[30]} Since the very purpose of a jury is fact finding, it would seem to follow that any evidence ‘of consequence’ to the determination of a given case should be presented to the jury. Unfortunately, this is not always the case. Federal Rule of Evidence 403 provides that “although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . .”\textsuperscript{[31]} This balancing test traces all the way back to Wigmore whose views dominated the development of evidence law in the early twentieth century.\textsuperscript{[32]}

There are numerous scenarios in which evidence is considered too prejudicial—‘rape shield’ laws which prevent the alleged victim’s prior sexual history from being introduced\textsuperscript{[33]}, polygraph test results, and ‘day-in-the-life’ videotapes which show how a plaintiff’s life has allegedly been changed by the defendant’s conduct\textsuperscript{[34]}. But perhaps the most common type of evidence deemed to be prejudicial is so-called ‘character’ evidence. Federal Rule of Evidence 404, also known as the character evidence rule, prohibits evidence that is aimed at proving
an actor’s conformity with a character trait on a particular occasion.\[^{35}\]

The justification for this rule was succinctly expressed by Justice Jackson in *Michelson v. United States*: “The state may not show defendant’s prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of his crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge. Strictly speaking, propensity evidence is relevant; it shows that the individual is not so inhibited by either the community’s fundamental moral judgments or the law’s physical threat as to invariably refrain from serious crime.”\[^{36}\]

This rule is most often associated with criminal cases during which the prosecution attempts to introduce evidence of the defendant’s negative past conduct even though that specific conduct is not at issue in the present case. In *People v. Golochowicz*\[^{37}\]*, for example, the defendant was on trial for first-degree murder. The victim, Mitchell, had been found in his own condominium in Novi, Michigan, having been strangled by a bathrobe tie.\[^{38}\] Several items were found missing from Mitchell’s condo, including his stereo speakers, his checkbook, and a credit card.\[^{39}\] Mitchell’s automobile was also missing.\[^{40}\] Two days before Mitchell’s body was found, the defendant appeared at the home of his friend Dennis O’Clare.\[^{41}\] The defendant was driving Mitchell’s car and also had Mitchell’s
checkbook. The defendant offered to sell to O’Clare a Quasar television set and a Fisher stereo system. O’Clare declined and both items were found in Mitchell’s condo at the time his body was discovered.

At the defendant’s trial for Mitchell’s murder, the prosecution introduced, over defense objection, testimony from O’Clare relating to a separate crime. O’Clare testified that a few days after Mitchell’s body was found, the defendant asked O’Clare whether he (O’Clare) was interested in buying a Sony television set. After O’Clare stated that he was interested, the defendant drove O’Clare to a house in Detroit where the defendant claimed the TV was located. Once inside the home, the defendant went upstairs after instructing O’Clare to stay in the living room. However, O’Clare went into the kitchen and observed a pool of blood on the stairs leading to the basement. He went downstairs and observed a man’s body lying face down with an electrical cord around his neck. At the defendant’s insistence, the two men removed the television, a stereo, and several other items from the house before leaving. O’Clare further testified that the next day, the defendant confessed to strangling the man in Detroit but then immediately retracted that confession.

After the defendant was convicted for the Novi murder, he appealed, arguing that the testimony related to the events in Detroit was impermissibly allowed. The Supreme Court of Michigan agreed and reversed the defendant’s conviction. The court expressed its opinion that the evidence identifying the defendant as the murderer in the Novi case was fairly weak. Thus, the court stated, there was
good reason to believe that the jury convicted the defendant based
solely on the testimony concerning the defendant’s role in the Detroit
homicide. According to the court, the jury “likely . . . concluded
that whatever the strength of the identification evidence in the case,
the defendant [was] demonstrably a bad person and should be imprisoned
anyway.” Leaving no doubt as to its lack of faith in the jury, the
court further stated that the trial court’s decision created the
danger that the jury would “misconstrue the proper purpose of the
evidence or, upon learning of the other crime, be stirred by such
passion as to be swept beyond a rational consideration of the
defendant’s guilt or innocence of the crime on trial.”

As mentioned, the sort of evidence ruled improper
in Golochowicz is not excluded on the basis that it is not relevant
for determining the immediate case. It would, of course, be ludicrous
to suggest that in a murder case, in which the defendant is accused of
strangling the victim and then stealing his television and stereo,
evidence that the defendant strangled a different individual and stole
his television and stereo, is not relevant in determining the
defendant’s guilt. What the character evidence rule does is prevent
the jury from considering such evidence for fear that the jury will
not consider anything else.

III. ALLEN CHARGES

An Allen charge occurs after a deliberating jury announces to the
court that it is hopelessly deadlocked. While the precise language of
the charge varies among different court systems, its general purpose
is to inform jurors to continue deliberating, often with specific
instructions to those in the minority to reconsider their positions. This type of instruction was first approved in an 1896 United States Supreme Court case, Allen v. United States. There, the Court acknowledged that “the verdict of the jury should represent the opinion of each individual juror.” However, the Court also maintained that “it cannot be that each juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment, or that he should close his ears to the arguments of men who are equally honest and intelligent as himself.”

Proponents of Allen charges argue that these instructions do not stem from a mistrust of the jury, but rather are based on legitimate judicial interests, mainly reducing mistrials and the subsequent costs of new trials. But while it is generally difficult to prove a negative (i.e. that judges don’t trust juries), the use of Allen charges in death-penalty cases at least refutes the notion that the preservation of time and money are always the prime motivation behind these instructions. This is because in capital cases, the Allen charge is often given during the penalty phase after the defendant has already been found guilty of the crime(s) charged, and thus a retrial is not an option.

An illustrative case is Sears v. State, a 1999 Georgia case. After the jury determined that the defendant was guilty of the underlying crime, it began deliberating to decide whether to impose the death penalty or life imprisonment. The trial judge informed the jury prior to these penalty phase deliberations that anything less than a unanimous death verdict would have meant an automatic life
In other words, even if the jurors could not reach a unanimous decision, no new court action would be needed. The jury twice announced it was hopelessly deadlocked, with 11 in favor of death and 1 in favor of life imprisonment. The one minority juror also told court that she was being threatened. The court gave an Allen charge and insisted that the jury continue to deliberate. Two hours later, the jury announced returned with a death sentence. The holdout juror later testified that since the judge knew the jury was in favor of death by an 11-1 margin, the juror believed the judge’s insistence on reaching a verdict meant the judge wanted the juror to vote for death. Nonetheless, on appeal, the death sentence was affirmed.

In Lowenfield v. Phelps, the defendant was convicted of first-degree murder. The jury then began sentencing deliberations, deciding whether or not to impose the death penalty. Again, before these deliberations began, the trial judge informed the jury that if the jury could not reach a unanimous recommendation, the court would impose the sentence of life imprisonment. On the second day of deliberations, the jury informed the court that it was unable to reach a unanimous decision. The trial judge then asked each juror whether he/she felt further deliberations would be helpful. Eleven jurors answered ‘yes’ one answered ‘no.’ The court then gave an Allen charge. Thirty minutes later, the jury returned with a death sentence. The Supreme Court upheld the use of the Allen charge despite acknowledging that the principal argument in favor of the charge—saving the costs of a retrial—was not existent in the case. Nonetheless, the Court ruled, “the state has in a capital
sentencing proceeding a strong interest in having the jury express the conscience of the community on the ultimate question of life or death.”[81]

Henderson v. Collins[82] also involved a jury deliberating the penalty phase of a defendant. The defendant, having been convicted of murder, burglary, and attempted rape, was facing the death penalty or life imprisonment.[83] On the second day of the penalty-phase deliberations, the jury sent a note to the judge that read, “We are deadlocked, period.”[84] The court then gave an Allen charge.[85] Remarkably, the judge’s charge concluded, “I don’t think you are deadlocked. You go back there and talk it over.”[86] The jury resumed deliberations and, four hours later, returned with a sentence of death.[97] The circuit court upheld the charge and the death sentence, holding that the trial court’s charge was not “materially distinguish[able]” from the one used and approved in Lowenfield.[88]

Although the use of Allen charges in non-capital cases allows the court to hide behind the pretext of saving court resources, such cases are equally illustrative of the usurping aspect of the charges. Consider the case of United States v. Dawkins.[89] There, the defendant was on trial for heroin distribution.[90] After roughly six hours of deliberations, the jury was unable to reach a unanimous verdict.[91] The court then recalled the jury and gave an Allen charge, during which the judge stated: “I urge you to go ahead and try again, and those of you who are in the majority, if there is a majority, to try and convince those who are in the minority.”[92] Following the judge’s charge, the jury needed only 45 minutes of further deliberation before returning a guilty verdict.[93]
On appeal, the circuit court upheld the conviction, holding that there was “no basis for concluding that the instructions had a coercive effect on the jury.”[94] This was true, the court reasoned, because there was no way of knowing “whether the ultimate verdict of guilty represented the views of those in the majority or those in the minority at the time the instructions were given.”[95]

Despite the court’s feigned ignorance, it is rather difficult to fathom that the initially minority position prevailed less than an hour after the judge explicitly directed the majority jurors to convince the minority jurors. Imagine instead, however, that the initial majority was in favor of a guilty verdict. For the sake of argument, let’s suppose 9 jurors were in favor of a guilty verdict while 3 were in favor of a not guilty one. Each juror remains convinced of his or her position after nearly 6 hours of deliberations. The jurors are then called back into the courtroom, where the judge informs the entire jury that it is the responsibility of those in the majority to convince the others of the correctness of their position. The minority jurors return to the jury room with the impression that the judge believes the correct position is the one held by those in the majority.[96] After all, if the judge did not feel that way, why would he want the majority jurors to convince the others that the majority jurors are in the right? The jurors have seen the judge in a position of power throughout the trial and know he has extensive experience in the area of criminal law. They also likely know that the judge has been privy to evidence and facts related to the case that they as jurors never saw. Not surprisingly, the three
jurors in the minority switch positions in less than an hour and a
guilty verdict is returned.

Of course, since deliberations are conducted in complete secrecy,
there is no way to know if this is what actually happened. The
problem, however, is that it might have happened. And if it did
happen that way, then the defendant’s guilt was in fact determined,
for all practical purposes, by the trial judge and not by a jury of
his peers.

Proponents of the Allen charge assert that eliminating the use of
the charge will increase the number of hung juries and thus result in
increased costs and further burden already overburdened dockets. As
discussed, this concern is inapplicable in the context of death
penalty cases. Of course, most cases are not capital ones. So what
of the others? Although there has been little data compiled on hung
jury rates, most experts place the current hung jury rate at about
five percent.\[97\] Whatever the number, it is obvious that eliminating
the use of Allen charges would increase hung juries. The most
pertinent response to this concern is that worry about the increased
costs of retrials simply does not justify the practice of coercing
juries to reach verdicts that do not accurately reflect each
individual jurors true and honest belief. A second response would be
that the use of Allen charges is not the only way to reduce the
occurrence of mistrials. For example, some legal commentators have
advocated the elimination of the unanimity requirement in criminal
cases.\[98\]

IV. TORT REFORM/ PUNITIVE DAMAGES
Within the last two decades, perhaps no aspect of the American legal system has received more attention than tort reform. According to those in favor of such reform, the civil trial system in this country has gotten out of control, especially with regard to damage awards. They point to statistical data that purportedly show that so-called “mega verdicts” have increased greatly beginning in the late 1970s. Reformers claim that this alleged rise is the result of overly sympathetic juries who make monetary awards based on pity for plaintiffs rather than on the evidence presented to them. Many also believe that juries give larger awards against defendants with ‘deep pockets’ and smaller awards against other equally culpable defendants.

In response to this supposed crisis, both legislatures and judges have significantly reduced the jury’s role in deciding how to best compensate an injured party and/or punish the wrongdoer. This has been accomplished primarily by limiting the jury’s role in assessing punitive damages.

Although punitive damage awards in this country have existed since 1784, they were not widely used until the 1820s.\(^\text{[99]}\) There is not universal agreement as to whether the Constitutional right to a jury includes the right to have punitive damages determined by a jury. In a recent Supreme Court case\(^\text{[100]}\), the Court held that although the Seventh Amendment barred federal appellate courts from reexamining the factual findings of juries, an award of punitive damages does not itself constitute a finding of fact. Justice Ginsburg dissented, arguing that case law dating back to the 1850s supported the view
that, under the Seventh Amendment, the appropriate amount of punitive damages was a question of fact that must be resolved by the jury.\textsuperscript{101}

Many states, concerned with the economic effect of very large punitive awards, have taken measures to limit punitive damages.\textsuperscript{102} One common mechanism is to put statutory ‘caps’ on punitive damages, which may be absolute (i.e. punitive damages can never exceed x million dollars) or relative to compensatory damages (i.e. punitive damages may not exceed compensatory damages multiplied by x). For example, as part of tort reform legislation recently passed in Colorado, non-economic damages are limited to $250,000 in most situations.\textsuperscript{103} The limitations may not be disclosed to the jury.\textsuperscript{104} Thus, no matter what damages are deemed to be fair by the jury, if they exceed the pre-established limits, they are reduced by the court.\textsuperscript{105} Additionally, in wrongful death cases, punitive damages are never allowed, even if the act causing death was outrageous or reprehensible.\textsuperscript{106}

Even in the absence of legislative action, however, courts often reduce punitive awards determined by a jury. This can be done directly through post trial motions or appeals, or indirectly through the remittitur process that enables the court to force the prevailing party to accept a reduced amount or endure a new trial. According to a recent study, one out of two punitive awards were reversed or reduced in the post-verdict period, with the largest awards having the highest rates of downward adjustment.

In a well-known case, a jury in New Mexico awarded $2.7 million in punitive damages to an elderly woman who suffered third degree burns to her inner thighs and buttocks as a result of spilling hot coffee she bought at McDonald’s.\textsuperscript{107} The judge later reduced the
punitive damages to just $480,000. In an Alabama case, a jury awarded $4 million in punitive damages to the purchaser of a car after finding that the distributor had failed to disclose prior damage to the car.\footnote{108} On appeal, the Alabama Supreme Court cut the award in half to $2 million. The United States Supreme Court heard the case and found even the $2 million to be excessive.\footnote{109} On remand, the state supreme court ordered that a new trial be held unless the purchaser agreed to damages of just $50,000\footnote{110}—less than two percent of the jury’s original award. In a recent California case, a jury returned a verdict of $4.8 billion in punitive against General Motors in a suit based on the explosion of a Chevrolet Malibu gas tank.\footnote{111} A judge later reduced the punitive damages to $1.09 billion.

Thus there is no disputing the fact that the jury’s role in assessing punitive damages has been significantly undermined. What is not so obvious, however, is the existence of the tort ‘crisis’ that reformers claim necessitates this intrusion upon the jury.

Proponents of tort reform often point to polls that seem to support their position of a legal system run amok. And in fact, several recent polls do indicate that the American public believes awards made by juries to plaintiffs in personal injury suits are excessive, and that an increasing number of suits are frivolous.\footnote{112} Yet, while such statistics indicate that the American public agrees with the tort reformers, they may actually run counter to the implementation of reform itself. After all, a poll is very similar to a jury—both are comprised of a relatively small number of individuals, selected (for the most part) randomly, who supposedly represent the feelings and opinions of a larger community.\footnote{113} If the
polls cited by the tort reformers are accurate, then a majority of Americans feel that plaintiffs have been receiving too much money. Yet since these same Americans are the ones summoned for jury duty, presumably they will be unlikely to repeat what they perceive to be the errors of the past.

A second problem with the tort reformers’ use of statistics and polls is the chicken versus egg issue. Specifically, are tort reformers addressing a concern of the public or causing it? Many believe it is the latter, including Professors Stephen Daniels and Joanne Martin, who recently examined the relationship between tort reform and mass culture.\[114\] Daniels and Martin’s insightful article reveals how tort reform has been successfully ‘marketed’ to future jurors, i.e. the adult public at large. For example, in 1986, the Insurance Information Institute announced a $6.5 million public relations campaign entitled “We All Pay the Price: An Industry Effort to Reform Civil Justice.”\[115\] A main aspect of the campaign was national magazine and newspaper print ads with titles such as “The Lawsuit Crisis is Bad for Babies” and “The Lawsuit Crisis is Penalizing High School Sports.”\[116\] A campaign later paid for by Aetna Insurance included an advertisement that lamented, “When a woman riding in an automobile spills hot coffee on her lap, then sues the restaurant where she bought the coffee, something is wrong.”\[117\]

Have these campaigns had any effect in the courtroom? Daniels and Martin interviewed hundreds of plaintiff attorneys throughout Texas, who overwhelmingly agreed that the reformers marketing campaigns had impacted juries.\[118\] Nearly ninety percent said that in their experience, jurors were making lower awards than five years
earlier in cases with comparable injuries. While plaintiff attorneys may be biased, both defense attorneys and trial judges echoed similar sentiments. Daniels and Martin also did a statistical analysis of car accident case verdicts in two Texas counties and found the median award in such cases fell from around $15,000 in the early 1980s to around $6,000 in the late 1990s.

While the Daniels and Martin study dealt primarily with Texas, surveys involving other states have yielded similar results. Professors Neil Vidmar and Mary Rose examined Florida cases involving punitive damages between 1988 and 2000. Their analysis concluded that, contrary to the reformers’ claims, punitive damages were rarely awarded, punitive damages were almost never given in product liability cases, punitive damages are not on the rise, and cases involving large punitive awards involved serious misconduct.

The study also cast doubt on the 'deep pockets’ theory—i.e. that jurors are more likely to assess punitive damages against businesses than against individuals. The study revealed that punitive damage awards against businesses comprised only 48% of all cases involving punitive damages. Furthermore, of the cases in which both an individual and a business were named as being responsible for an injury, 36% resulted in individuals being solely responsible for the punitive portion of the award.

Although the Leatherman case held that an award of punitive damages does not constitute a finding of fact, it also provides the best argument as to why punitive damage awards should be left exclusively to the jury. The majority explicitly differentiated between a jury assessing a plaintiff’s concrete economic loss, which
the Court held was “essentially a factual determination” and its imposition of punitive damages, which are “an expression of its moral condemnation.”[126] Since a jury of twelve individuals, representing a cross-section of the community, will only award punitive damages if there is unanimous agreement that the conduct in question was egregious, there is in effect a ‘safeguard’ against arbitrary or excessive awards. Judge-made determinations, on the other hand, do not reflect the moral voice of the community, but rather the opinion of one person.

V. HARMLESS ERROR/ USE OF ACQUITTED CONDUCT

While the courts practice of altering a jury’s determinations of damages against a party that the jury has determined to be liable/guilty is quite troubling, an even more alarming occurrence is the courts practice of substituting its own judgment in place of the jury’s in determining the outcome of the primary case. Of course, the most obvious example of this occurs when a court sets aside a jury verdict in favor of one party and finds for the other. Yet there exists two lesser known practices that essentially have the same effect. The first is the courts’ use of ‘acquitted conduct’ when sentencing a defendant. The second is the courts determination of the existence of elements, which although necessary for a criminal conviction, are never presented to a jury.

Most people who are even vaguely familiar with the criminal justice system in America are aware that judges take several factors into account when sentencing a defendant who has been convicted of a given crime. For instance, the defendant’s prior criminal record and
the circumstances under which he committed the immediate crime often play a significant role in the length of sentence imposed. However, it may come as quite a surprise to many that courts routinely increase a defendant’s sentence based on conduct for which the defendant was tried and acquitted by a jury of his peers.\footnote{127}

Take for example the case of Vernon Watts.\footnote{128} Following a police search of his home, during which authorities found drugs and guns, Mr. Watts was arrested for possession of cocaine with the intent to distribute and for using a firearm in relation to a drug offense.\footnote{129} Following a jury trial, Mr. Watts was convicted on the possession charge but acquitted on the weapons charge.\footnote{130} During Mr. Watts sentencing for the possession charge, however, the district court enhanced his base offense level by two levels based on a provision in the United States Sentencing Guidelines which applies if “a dangerous weapon (including a firearm) was possessed” during the offense or conviction.\footnote{131}

Watts appealed his sentence, arguing that it was improper for the trial court to increase his sentence based on the weapon possession since a jury had acquitted him of that charge.\footnote{132} The government argued that the trial judge had acted properly because whereas the jury had acquitted Watts of using a firearm \textit{in relation to a drug offense}, the sentencing factor was merely the possession of a firearm.\footnote{133} The circuit court rejected that notion, noting that the commentary to the Guidelines did in fact refer to a link between the underlying crime and the weapon.\footnote{134} Furthermore, the court noted that at the sentencing, the trial judge explicitly expressed his belief that “there [was] a connection between the possession of the guns and
the offense.”[135] Holding that the two level upward adjustment for the firearm possession was improper, the circuit court remanded the case for resentencing.[136]

The Supreme Court, however, granted certiorari and reversed the circuit court, holding that the use of acquitted conduct at sentencing was not improper.[137] The Court held that a jury “cannot be said to have ‘necessarily rejected’ any facts when it returns a general verdict of not guilty.”[138] The Court ruled that the jury’s acquittal of Watts on the firearm count did not “preclude a finding by a preponderance of the evidence that [Watts] did, in fact, use or carry such a weapon.”[139]

While the Court in Watts attempted to justify the trial judge’s usurpation of the jury’s findings on the distinction between the differing standards of proof at trial and at sentencing, the Supreme Court of Michigan has been less opaque. In People v. Ewing[140], the defendant was charged with several counts of sexual assault, stemming from several separate incidents involving different alleged victims. The defendant was convicted on some counts, and acquitted on others. During his sentencing, the judge considered not only the crimes that the defendant had been convicted of, but also those in which the jury had acquitted the defendant. The court stated several reasons why a jury’s decision to acquit did not necessarily mean that the defendant did not engage in criminal conduct. For example, the court noted that a jury may “quite plausibly” return a defense verdict “because of lenity.”[141] The court then lamented that “it is also true, unfortunately, that a jury may acquit a factually guilty
defendant because of confusion with regard to the judge’s instructions.”

This mistrust of juries can, in certain circumstances, create a situation whereby there is literally no difference whatsoever between a jury verdict of guilty and not guilty. Such was the case for Cheryl Putra. Ms. Putra was arrested and charged with one count of aiding and abetting possession with the intent to distribute one ounce of cocaine on May 8, 1992; and a second count of aiding and abetting possession with the intent to distribute five ounces of cocaine on May 9, 1992. A jury convicted Putra on the first count but acquitted her on the second. At her sentencing, however, the trial judge found by a preponderance of the evidence that Putra had in fact been involved in the May 9 transaction, and therefore calculated her base offense level by aggregating the amounts of both sales. Ms. Putra was sentenced to 27 months in prison. Had the guilty verdict on the first count been the only basis for imposing punishment, the Sentencing Guidelines would have required the judge to impose a sentence of between 15 and 21 months. If Putra had been found guilty of both counts with which she was charged, the Guidelines would have mandated a sentencing range between 27 and 33 months. In other words, as the district court applied the guidelines, “precisely the same range resulted from the acquittal as would have been dictated by a conviction. Notwithstanding the absence of sufficient evidence to prove guilt beyond a reasonable doubt, the alleged offense on May 9 led to the imposition of a sentence six months longer than the maximum permitted for the only crime that provided any basis for punishment.”
It is also worth noting that the use of acquitted conduct at sentencing directly contradicts the main justification for disallowing character evidence. As previously mentioned, courts have expressed concern that allowing character evidence will result in a sort of jury nullification—i.e. juries convicting defendants for their prior bad conduct rather than for their conduct in the immediate case. Yet that is precisely what courts do when they consider acquitted conduct—punish defendants for prior bad acts.

That juries in America have become little more than window dressing in many ways is perhaps best illustrated by a 1999 Supreme Court case, Neder v. United States. The appellant, Neder, was convicted in the District Court on federal tax fraud charges. Neder appealed to the 11th Circuit, arguing that materiality, an element of the offense for which he was convicted, was never submitted to the jury. The Circuit court agreed that the district court erred in refusing to let the jury decide the materiality issue, but affirmed the defendant’s conviction on the grounds that since materiality was not in dispute, the error was ‘harmless.’ The Supreme Court agreed that materiality was an element of the crime, but also agreed that the district court’s error was harmless. The Supreme Court reasoned that since it was beyond a reasonable doubt that “the jury verdict would have been the same absent the error,” no new trial was warranted. As Justice Scalia noted in his dissent, “the Court let the defendant’s sentence stand, because we judges can tell that he is unquestionably guilty.”

Likewise, in United States v. Colon-Munoz, the jury was not instructed that materiality was a required element of the bank fraud
crime with which the defendant was charged. After his conviction, the defendant appealed, arguing, \textit{inter alia}, that the trial court’s failure to submit all required elements of the bank fraud charge to the jury required a reversal of his conviction on that charge.\textsuperscript{158} The circuit court disagreed, choosing instead to decide for themselves whether the defendant’s alleged scheme to defraud involved material falsehoods.\textsuperscript{159} Reviewing the facts of the case, the appellate court reasoned that “officials at the bank reviewing [the defendant’s] transaction would undoubtedly be influenced . . . by [defendant’s] deception.”\textsuperscript{160}

In \textit{United States v. Mojica-Baez}\textsuperscript{161}, the defendants were convicted of several crimes related to an armed robbery, including a firearms possession charge.\textsuperscript{162} On appeal, the defendants noted that with regards to the firearms possession charge, the question of whether the defendants used a semiautomatic assault weapon was not presented to the jury.\textsuperscript{163} The circuit court acknowledged that the United States Supreme Court had recently held that under the statute at issue, the distinction between types of firearms were elements of separate crimes and not just sentencing factors.\textsuperscript{164} This, the appellate court stated, meant that “the question of whether a firearm is a semiautomatic assault weapon must (1) go to the jury, not the judge, and (2) be proven beyond a reasonable doubt.”\textsuperscript{165}

Instead of submitting that issue to a jury, however, the appellate court decided that it would decide whether the submission of the question to the jury would have resulted in a different outcome.\textsuperscript{166} The court examined the evidence introduced at the trial and found that:
“one of the Loomis Fargo guards testified at trial that one of the robbers was carrying an AK-47. The robbers twice told the guards they had AK-47 rifles, and AK-47 rounds were found at some of the defendants’ homes. One of the robbers claimed that his weapon could shoot through cement, and an FBI firearms instructor testified that an AK-47 round is capable of penetrating cement. The FBI firearms instructor also testified that the weapon in the photograph of [one of the defendants] was an AK-47. He further testified that an AK-47 can operate either as a semiautomatic or as a fully automatic weapon. In light of this evidence . . . [we do not] find any miscarriage of justice.”[167]

This sort of fact finding assessment by the court is not only a gross intrusion upon the role of the jury, it also runs counter to courts’ rationalization for using acquitted conduct at a criminal defendant’s sentencing. As mentioned previously, courts have expressed the belief that jurors often make decisions based not on the evidence, but rather as the result of lenity or a lack of comprehension of the judge’s instructions. Thus it seems strange that an appellate court could determine how a jury would decide a case based solely on evidence never considered by a jury.

CONCLUSION

There is no question that a separation of duties between a judge and a jury is necessary in both civil and criminal cases. Throughout all phases of a case, a judge is called on to make numerous legal determinations. The majority of these rulings are made in order to ensure a fair trial for both sides.[168] For example, a judge might exclude evidence or witnesses that were not disclosed to the other side. The well-known hearsay exception also works to ensure fairness, since out of court statements cannot be cross-examined.[169] Obviously, it makes no sense for a jury of laymen to make these legal determinations.
Equally illogical, though, is the practice of having a jury make (or attempt to make) factual determinations, only to have those determinations overruled or undermined by a judge. After all, if the judges are in better position to make these decisions, why submit them to the jury in the first place?

No doubt, some will argue that this practice is no different than appellate courts overruling trial courts. However, it is openly acknowledged that the court systems in this country, both state and federal, are structured in a hierarchical fashion. We recognize, for example, that the United States Supreme Court is ‘above’ the Eleventh Circuit court, just as the Eleventh Circuit is ‘above’ the district courts in Florida. Once we accept this hierarchy, we accept the fact that the Eleventh Circuit may overrule a district court.

This rationale does not apply to the relationship between judge and jury. In the area of fact-finding, we do not view the judge as being ‘above’ the jury. If we were to accept such a framework, then obviously the right to be tried by a jury—a right that James Madison called one of “the most valuable” in the Bill of Rights[^170]—would be of little value.[^171]

The current mistrust of juries by judges can be rectified in two ways. The first is to eliminate the jury system altogether. As mentioned, many people have already advocated for this, arguing that modern trials are often too complex or too easily manipulated by creative attorneys. Some abolitionists also argue that the prime motivation behind the jury system—preventing government tyranny—is not applicable in modern America as it was in ancient Greece.
A second option is to take steps to address the concerns judges seem to have in the above areas. For example, some courts now give a detailed Allen-like charge--informing jurors of the repercussions of a retrial--before deliberations begin, but accept the jury’s word when deadlocks occur. With regard to punitive damages, courts could do likewise--inform juries upfront as to the consequences of large punitive damage awards--but then accept whatever award is given. Other steps might help judges have more faith in the jury’s ability to understand the law. One idea is the use of ‘special juries’ that require jurors in more complex cases to have a minimal amount of formal education or equivalent experience. This idea was given support in a 1987 poll in which a majority of federal and state court judges reported that jurors with less education had more difficulty dealing with cases involving highly technical or scientific evidence.\footnote{172}

\footnote{1 As will be seen in the discussion of tort reform, this mistrust may originate from the legislature as well as the judiciary.}
\footnote{2 It can be argued that the Federal Rules of Evidence mandate the exclusion of character evidence; however, as will be seen, the exclusion only occurs after the judge conducts his own balancing test that is very subjective.}
\footnote{3 Paula DiPerna, JURIES ON TRIAL, at 22 (1984). Given that the jury system has existed in at least some form for approximately 2400 years, a comprehensive account of the history of the jury system is well beyond the scope of this note.}
\footnote{5 DiPerna, supra note 3, at 23.}
\footnote{6 Id.}
\footnote{7 Id.}
\footnote{8 Guinther, supra note 4, at 2.}
\footnote{9 DiPerna, supra note 3, at 24.}
\footnote{10 Id.}
Id.
Id. at 25.
Id.
Id.
Id.
Id. at 26.
Id. at 27.
Id.
Id.
Id.
Id. at 28.
Id.
Id.
Id. at 25.
Id.

Guinther, supra note 4, at 31.
Id. at 32.
Id.

FEDERAL RULE OF EVIDENCE 403.


335 U.S. 469, 475-76 (1948).
Id. at 304.
Id. at 305.
Id.
Id.
Id.
Id.
Id. at 306.
Id.
Id.
Id.
Id.
Id.
Id. at 307.
Id.
Id.
Id. at 327.
Id. at 318.
Id. at 323.
Id. at 325.
Id. at 326.

Studies have shown that the single best predictor of future violence is past violence. See William Monahan, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES 92, 104 (1981).

For example, the Eleventh Circuit has approved the following language for use in its Allen charge in the context of criminal cases: “If a substantial majority of your number are in favor of a conviction, those of you who disagree
should reconsider whether your doubt is a reasonable one since it appears to make no effective impression upon the minds of the others. On the other hand, if a majority . . . of you are in favor of an acquittal, the rest of you should ask yourselves again . . . whether you should accept the weight and sufficiency of evidence which fails to convince your fellow jurors beyond a reasonable doubt.”

164 U.S. 492 (1896).

Id. at 501-02.

Id.


Id.

Id. at 835.

Id. at 838.

Id. at 839.

Id. at 837.

Id.

Id. at 848.

Id. at 846.


Id. at 234.

Id.

Id. at 235.

Id.

Id. at 238.

Id.

2001 WL 967910 (6th Cir. 2001).

Id.

Id. at *1.

Id.

Id.

Id. at *6.


Id. at 568.

Id. at 569.

Id. at 570.

Id.

Id.

Id.

Id.

It is true that at the time he gave the Allen charge, the trial judge did not know what verdict the majority was in favor of. Nonetheless, it is certainly not illogical for a juror, upon hearing the trial judge ‘side’ with the majority, to believe that the correct result is fairly obvious, and thus likely the one more people are in favor of.


Id.


Id.
It is of course true that a jury is meant to represent the feelings of a specific community rather than the nation as a whole.

Daniels & Martin, supra note 84.

Id. at 467.

Id.

Id. at 468.

Id. at 472-73.

It should be noted that these studies looked at total awards, not just punitive ones. They do however reflect juries change in feelings about monetary awards, which presumably would apply to punitive damages as well.

Daniels & Martin, supra note 84, at 473.

Id. at 480.


Id. at 512.

Id. at 499.

Id.


United States v. Watts, 67 F.3d 790 (9th Cir. 1995)

Id. at 793.

Id.

Id. at 796.

Id.

Id. at 797.

Id.

Id.

Id. at 798.


Id. at 155

Id. at 157

435 Mich. 443 (1990)

Id. at 452

Id. at 452

United States v. Putra, 78 F.3d 1386 (9th Cir. 1996)

519 U.S. 148 (1997)

Id. at 150.

Id. at 150-51.

Id. at 163. Because Putra was a first time offender with no criminal history, the punishment range was based entirely on the immediate offense(s).
A judge of course may also make ‘administrative’ rulings, such as limiting the time allowed for opening statements or imposing certain requirements on briefs submitted to the court.

It can be argued that the hearsay exception is no less based on jury mistrust than the character evidence rule. This assertion is inaccurate. Second-hand (and third-hand, etc.) accounts of what occurred in the past tend to be less accurate than first-hand accounts, and, as mentioned, cannot be cross-examined. Thus it is the evidence that is mistrusted, not the jury. Statements about a defendant’s past, even if acknowledged to be true by both sides, are still subject to exclusion; thus the character evidence rule is based solely on a mistrust of the jury to properly consider the evidence.


In fact, even recognition of the judge as being ‘above’ the jury would not support the appellate review analogy. If a judge is deemed to be ‘above’ the jury, then the continued existence of the jury is pointless since both the judge and jury hear and see the evidence at the same time. Appellate courts, of course, cannot simultaneously see and hear all the trials in all the courts that are ‘below’ them, and thus trial courts must make the initial determinations that are subject to later review.