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AVOIDING THOSE WEARING PROPELLER HATS: THE USE OF BLUE RIBBON JURIES IN COMPLEX PATENT LITIGATION.

I cannot stop without calling attention to the extraordinary condition of the law which makes it possible for a man without any knowledge of even the rudiments of chemistry to pass upon such questions as these . . . How long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalized by provincial legal habits of mind ought, I should think, unite to effect some such advance.¹

I. INTRODUCTION

The current state of technology has led to the creation of patents for previously unimaginable inventions.² These inventions are incredible boons to society and mark significant scientific progress. To protect their creations, inventors file for patents that, if granted, gives the patent holder “the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States”³

However, while inventions as complicated as an engine the size of a single molecule have been developed, the juries tasked with analyzing claims to patents for such technology have not changed.⁴ At trial, the parties are likely to call expert witnesses to attempt to clarify complex scientific breakthroughs,⁵ but the matter discussed

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1. *Parke-Davis & Co. v. H.K. Mulford Co.*, 189 F. 95, 115 (C.C.S.D.N.Y. 1911), *aff'd in part, rev'd in part*, 196 F. 496 (2d Cir. 1912).
 2. For example, chemists at Tuft University’s School of Arts and Scientists recently developed an electric motor comprised of a single molecule. Heather L. Tierney et al., *Experimental Demonstration of a Single-Molecule Electric Motor*, 6 NATURE NANOTECHNOLOGY 625, 625–29 (2011). Such a motor could be used to power tiny robots (nanobots) within the human vascular system, tasked with repairing damaged tissues and delivering cancer-fighting drugs directly to a tumor. *How Nanobots Can Repair Damaged Tissue*, INTRODUCTION TO NANOTECHNOLOGY (July 10, 2009), <http://nanogloss.com/nanobots/how-nanobots-can-repair-damaged-tissue>.
 3. 35 U.S.C. § 154(a)(1) (2012).
 4. See *infra* discussion accompanying notes 40–49.
 5. See *Rojas-Ithier v. Sociedad Espanola de Auxilio Mutuo y Beneficiencia de Puerto Rico*, 394 F.3d 40, 43 (1st Cir. 2005) (“[A] factfinder normally cannot find causation

may be so far beyond the comprehension, training, and experience of the lay jury that rational fact-finding is rendered impossible.⁶

To counter the potential for arbitrary decision-making, and to create a fair jury for deciding patent cases, commenters have suggested the use of “blue-ribbon” juries.⁷ Blue ribbon juries “consist[] of jurors who are selected for their special qualities, such as advanced education or special training.”⁸ Nevertheless, in implementing these specialized juries there is a tension between the right to due process and the right to trial by a jury of one’s peers.⁹

Part II of this comment discusses the hurdles faced by the blue-ribbon jury. In Part II.A, the tension between the Fifth Amendment and the Seventh Amendment will be explored. Part II.B discusses the difficulty inherent in empaneling a blue-ribbon jury in the face of the fair cross-section requirement. Presently, jurisdictions differ as to their preferred resolution of these tensions.¹⁰

without the assistance of expert testimony to clarify complex medical and scientific issues . . .”).

6. After resolution of a case dealing with slight differences between patents for similar hydrocracking catalysts, the jurors, two of whom were engineers, were asked about their understanding of the facts. Joseph Sanders, *Jury Deliberation in a Complex Case: Havner v. Merrell Dow Pharmaceuticals*, 16 JUST. SYS. J. 45, 48 (1993). Said one of the engineers: “Nobody else was at that level or even near that level [of education], and [the other engineer and I] were getting lost. Imagine what the poor school teacher, or retired cop or farmer . . . were [sic] feeling.” *Id.*
7. See Kristy L. Bertelsen, *From Specialized Courts to Specialized Juries: Calling For Professional Juries in Complex Civil Litigation*, 3 SUFFOLK J. TRIAL & APP. ADVOC. 1, 1 (1998) (“When two giant corporations engage in multi-million dollar litigation is it fair to ask a millworker, school custodian, receptionist, plumber, nurse’s aid, housewife, and others possessing no expertise in economics or accounting, to render an accurate verdict based on average variable cost determinations and tax consequences of inventory accounting?”); see also LeRoy L. Kondo, *Untangling The Tangled Web: Federal Court Reform Through Specialization for Internet Law and Other High Technology Cases*, 2002 UCLA J.L. & TECH. 1, 99 (stating that, in complex litigation, a jury composed of “scientifically sophisticated members” may lead to more “fair” and “consistent” results).
8. BLACK’S LAW DICTIONARY 423 (4th pocket ed. 2011).
9. See discussion *infra* Part II.A.
10. Compare DEL. CODE ANN. tit. 10, § 4506 (1999) (providing for special juries), and *In re Richardson-Merrell, Inc. “Bendectin” Prods. Liab. Litig.*, 624 F. Supp. 1212, 1217 (S.D. Ohio 1985) (recognizing that the blue-ribbon jury is “separate and apart from the rules of the United States District Court” and would only be empaneled if the parties mutually agreed as to (1) the implementation of such a jury and (2) the area of expertise from which to draw jurors), with *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411, 429–30 (9th Cir. 1979) (“We do not accept [the argument for blue-ribbon juries]. Jurors, if properly instructed and treated with deserved respect, bring collective intelligence, wisdom, and dedication to their tasks, which is rarely equaled in other

Subsequently, Part III provides an analysis of current shortfalls in complex patent litigation that can be overcome by the use of blue-ribbon juries. Part III.A discusses the lay juror's lack of fluency with the specialized languages in scientific fields as a hindrance to decision-making. Part III.B looks at the present shift, in light of *Markman v. Westview Instruments, Inc.*,¹¹ towards allowing trial court judges to interpret patent language as a matter of law, and how the use of blue-ribbon juries provides a better alternative. The blue-ribbon juror's ability (or lack thereof) to wear the shoes of a person having ordinary skill in the art (PHOSITA) related to the patent is discussed in Part III.C. Finally, Part III.D analogizes the blue-ribbon jury to the death-qualified jury as a call for empaneling decision-makers who are able to comply with the instructions of the law and of the court. Throughout these sections, the ability of the blue-ribbon jury to provide a better alternative is discussed.

II. HURDLES OF BLUE-RIBBON JURIES

A. *Tension Between the Right to a Jury Trial and Due Process When Implementing a Blue-Ribbon Jury System*

1. The Fifth Amendment Right to Due Process

The Fifth Amendment guarantees that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”¹² Through the Fourteenth Amendment such due process protection was extended to the states.¹³ “Due process requires a competent and impartial tribunal in administrative hearings . . . and in trials to a judge”¹⁴ In *Sullivan v. Fogg*, a convicted defendant appealed his denial of writ of habeas corpus relief to the Second Circuit Court of

areas of public service.”), and William V. Luneburg & Mark A. Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping With the Complexities of Modern Civil Litigation*, 67 VA. L. REV. 887, 913–15 (1981) (citing congressional hearings regarding the Jury Selection and Service Act of 1968 that indicate the purpose of the Act was to mitigate, if not eradicate, blue-ribbon juries).

11. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996).

12. U.S. CONST. amend. V.

13. U.S. CONST. amend. XIV, § 1.

14. *Peters v. Kiff*, 407 U.S. 493, 501 (1972) (internal citations omitted); see also *In re Murchison*, 349 U.S. 133, 136 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.”).

Appeals alleging violation of his due process protection because one of the jurors “had a schizoid personality with paranoid features . . . [and was] vulnerable to a paranoid psychotic decompensation.”¹⁵ The Second Circuit recognized that the “due process safeguards which are designed to promote thorough and accurate factfinding” should allow further inquiry as to the juror’s competency and reversed the denial of writ of habeas corpus.¹⁶

The inability of the jurors to understand the pleadings and arguments during trial is the fundamental reason courts will sustain a properly alleged due process violation when a juror is unable to competently understand the English language,¹⁷ or otherwise dismiss the juror upon proper motion,¹⁸ pursuant to 28 U.S.C. § 1865.¹⁹ By keeping those unable to understand the proceedings out of the jury box, the courts are able to prevent juries from reaching arbitrary decisions which can result in overturning a jury’s findings on appeal or by collateral attack.²⁰

15. *Sullivan v. Fogg*, 613 F.2d 465, 465–66 (2d Cir. 1980).

16. *Id.* at 468.

17. *Lyles v. State*, 41 Tex. 172, 177 (1874) (“If the trial by jury is to remain a substantial fact and an important right, and is not to be substituted by a legal fiction bearing the name, but wanting in the most important qualification of a jury, namely, the capacity to understand what the pleadings contain, what is said by the counsel in their addresses to the jury, and utterly unable to comprehend the charge of the court, then it is necessary that jurors unable to speak or understand the English language should be excluded from the panel.”).

18. *See United States v. Paulk*, 372 F. App’x 971, 973 (11th Cir. 2010) (“The district court’s conclusion that juror Pierre Cadet’s English was sufficiently limited to warrant dismissal is supported by the record.”); *United States v. Gray*, 47 F.3d 1359, 1367 (4th Cir. 1995) (citing *United States v. Nickens*, 955 F.2d 112, 117 (1st Cir. 1992)); *Guam v. Palomo*, 511 F.2d 255, 258–59 (9th Cir. 1975); *United States v. Silverman*, 449 F.2d 1341, 1344 (2d Cir. 1971), *cert. denied*, 405 U.S. 918 (1972).

19. This statute, titled *Qualifications for Jury Service*, reads in part:

(b) In making such determination the chief judge of the district court . . . shall deem any person qualified to serve on grand and petit juries in the district court unless he . . . (2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form; [or] (3) is unable to speak the English language.

28 U.S.C. § 1865 (2012).

20. *See Lester v. Dunn*, 475 F.2d 983, 986–87 (D.C. Cir. 1973).

2. Seventh Amendment Right to a Jury Trial Versus the Complexity Exception

The Seventh Amendment guarantees the right to trial by jury for suits at common law.²¹ However, a complexity exception has been carved out whereby “[t]he complexity of a case may justify the refusal to grant a discretionary jury trial motion.”²² This is because the “primary value promoted by due process in factfinding procedures is ‘to minimize the risk of erroneous decisions.’”²³

3. *Japanese Electronic Products* and the Third Circuit’s Embrace of the Complexity Exception

Prior to *Japanese Electronics Products*, there was no specific precedent to uphold a complexity exception.²⁴ The U.S. Court of Appeals for the Third Circuit noted that “[a] jury that cannot understand the evidence and the legal rules to be applied provides no reliable safeguard against erroneous decisions.”²⁵ The Third Circuit found it possible that giving an extraordinarily complex case to the jury to decide would “violate due process and therefore would go beyond the guarantee of the seventh amendment.”²⁶ With that in mind, the Third Circuit Court of Appeals suggests three factors that may prevent a jury from properly understanding the content of the trial:

[F]irst, the overall size of the suit, . . . ; second, the conceptual difficulties in the legal issues and the factual predicates to these issues, which are likely to be reflected in the amount of expert testimony to be submitted and the probable length and detail of jury instructions; and third, the difficulty of segregating distinct aspects of the case²⁷

After enunciating this standard, the Third Circuit surmised that the Seventh Amendment should only give way to the weight of due

21. U.S. CONST. amend. VII.

22. *Davis-Watkins Co. v. Serv. Merch. Co.*, 500 F. Supp. 1244, 1251 (M.D. Tenn. 1980), *aff’d*, 686 F.2d 1190 (6th Cir. 1982).

23. *In re Japanese Elecs. Prods. Antitrust Litig.*, 631 F.2d 1069, 1084 (3d Cir. 1980) (quoting *Greenholtz v. Inmates of the Neb. Penal and Corr. Complex*, 442 U.S. 1, 13 (1979)).

24. *Id.*

25. *Id.*

26. *Id.* at 1089.

27. *Id.* at 1088–89.

process in exceptional circumstances after a detailed examination of the stated indicia of complexity.²⁸

4. *In Re U.S. Financial Securities Litigation* and the Ninth Circuit's Rejection of the Complexity Exception

The mere proposition that one constitutional safeguard can be disregarded in furtherance of another constitutional safeguard through a judge-made law strikes some as abhorrent.²⁹ The U.S. Court of Appeals for the Ninth Circuit addressed the purported complexity exception head-on in *In re U.S. Financial Securities Litigation*.³⁰ The complexity arose, in part, from the consolidation of eighteen cases representing five certified classes.³¹ In dismissing the call for a complexity exception to the Seventh Amendment, the Ninth Circuit was especially concerned with creating a slippery slope that may erode the jury system.³² Moreover, the *U.S. Financial Securities* opinion suggests that other safeguards are in place to sufficiently handle complex cases in which a jury verdict may be irrational³³ or hard to come by.³⁴ In the end, the Ninth Circuit concluded that "in

28. *Id.* at 1089.

29. See *Ullmann v. United States*, 350 U.S. 422, 427–28 (1956) ("If it be thought that the privilege is outmoded in the conditions of this modern age, then the thing to do is to take it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion.") (quoting *Maffie v. United States*, 209 F.2d 225, 227 (1st Cir. 1954)); *SRI Int'l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1128–29 (Fed. Cir. 1985) ("The arguments supporting denial of a jury demand in complex civil cases . . . are not appropriatelymissible to judges sworn to uphold th[e] Constitution. To permit a judicial interpretation of a constitutional provision that destroys another constitutional provision is to place at risk the entire Constitution.").

30. *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411 (9th Cir. 1979).

31. *Id.* at 411.

32. *Id.* at 431–432.

33. To overcome irrationality in jury findings, the Ninth Circuit explains that:

[a] new trial may be granted under Fed.R.Civ.P. 59 when the verdict is against the weight of the evidence, the damages are excessive, or the trial was unfair for some reason. And, a judgment notwithstanding the verdict under Fed.R.Civ.P. 50 may be granted if there was not enough evidence to make an issue for the jury. These procedures protect litigants from the risk of a jury reaching an "irrational" verdict.

Id. at 432 (internal citations omitted).

34. Methods for simplification of a complex trial noted by the Ninth Circuit under the Federal Rules of Civil Procedure include the following: motions under Rule 12, judgments as a matter of law under Rule 56, separation of issues or claims under Rule 42(b), and, appointment of a special master under Rule 53. *Id.* at 428. Other methods

view of the mandate of the Seventh Amendment, time might be better spent in searching for ways to improve rather than erode the jury system.”³⁵

B. Improving Rather Than Eroding the Jury System: Reconciling Japanese Electronics Products and U.S. Financial Securities Through the Use of the Blue-Ribbon Jury

The tension between the Seventh Amendment and Fifth Amendment is most clearly seen where the trial court finds that honoring the Seventh Amendment and protecting the right to a jury trial would come at the cost of due process and lead to an irrational decision.³⁶ *Japanese Electronics Products* and *U.S. Financial Securities* represent diametrically opposed ideologies in the approach to handling complex litigation.³⁷ As a result, while the *U.S. Financial*

also include stipulations to admissibility of evidence, settlements prior to trial, and summaries for voluminous evidence under Federal Rule of Evidence 1006. *Id.* at 428–29.

35. *Id.* at 432.

36. Compare discussion *supra* Part II.A.2.a (discussing circumstances that might necessitate use of the complexity exception), with discussion *supra* Part II.A.2.b (discussing the rejection of complexity exception in favor of other due process safeguards).

37. It is worth a note to explain that the complexity in *Japanese Electronics Products* and *U.S. Financial Securities* came from both procedural and substantive complexity. In *Japanese Electronics Products*, complexity arose from claims regarding the Antidumping Act and antitrust violation laws. *In re Japanese Elecs. Prods. Antitrust Litig.*, 631 F.2d 1069, 1073–75 (3d Cir. 1980). Review of the issues would require the jury to effectively become accounting and marketing experts. See *id.* The size and scope of the trial was also considered as adding to the complexity of the trial. *Id.* at 1073. In *U.S. Financial Securities*, the complexity lamented in the trial court arose from both the magnitude of the litigation and the complexity of the issues; said the court:

The time and effort necessary to read and understand 100,000 pages comes a little into focus when one realizes that such a quantity of paper forms a stack over forty feet high (as high as a three-story building). In the alternative, one could say that such a quantity of paper would completely fill five large filing cabinets. Or, from a lawyer's perspective, reading those 100,000 pieces of paper would be like sitting down to read the first 90 volumes of the Federal Reporter, 2nd Series-including all the headnotes.

The fact finder will not only have to read, but will have to comprehend, the contents of these thousands of documents. It will have to analyze the USF accounts and the accounts of many subsidiaries, not only as they exist, but as the plaintiffs contend

Securities court fancies itself as the vanguard of the Constitution, refusing to see the lapse of the Seventh Amendment,³⁸ it is inevitable that the Fifth Amendment suffers with such a position. Similarly, the *Japanese Electronics Products* court believes it has found the best solution to this problem by outlining a test with a high standard to allow for a complexity exception to the Seventh Amendment, thereby protecting the Fifth Amendment.³⁹ Both of these approaches inevitably sacrifice one constitutional safeguard in favor of the other.

The use of blue-ribbon juries represents an improvement rather than an erosion of the jury system. While the public has often been critical of the jury system,⁴⁰ the abandonment of a civil trial by jury in the majority of cases, as has been done in the United Kingdom,⁴¹ is

they should have existed. It will have to listen to, understand, and remember-throughout the trial-months upon months of highly technical and often boring testimony about various aspects of the USF accounts, including the testimony of the various expert witnesses who inevitably will be called by many of the parties to give their theories of whether the accounting standards actually used were correct, and, if not, what the correct standards should have been. After receiving and evaluating all of the evidence, the fact finder will then have to apply this mass of information to all of the asserted causes of action, each of which is based on different laws and different standards. The finder of fact must consider, separately, the evidence pertaining to each of the 100 or so defendants so as to reach a correct decision as to each. Finally, the fact finder will have to figure out which of the 100 or so defendants are liable to which of the plaintiffs, and which of those defendants are consequently liable to which of the other defendants who cross-complained, and for how much money.

In re U.S. Fin. Sec. Litig., 75 F.R.D. 702, 707 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979).

38. See discussion *supra* Part II.A.2.b.

39. See discussion *supra* Part II.A.2.a.

40. "In recent years, juries increasingly have been criticized as being ill-equipped to adequately decide the issues in the cases before them." Steven I. Friedland, *Legal Institutions: The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 190 (1991) (citing Jacoby & Padgett, *Waking Up the Jury Box*, NEWSWEEK, Aug. 7, 1989, at 51 ("[A] growing number of legal scholars think the [jury] reforms would make for more reliable, accurate verdicts.")). See generally STEPHEN J. ADLER, *THE JURY: DISORDER IN THE COURTS* xvi (1995) (demonstrating through multiple examples how jurors can be illogical).

41. Senior Courts Act, 1981, c. 54, § 69(1) (Eng. & Wales) (limiting the use of a civil trial by jury before the Queens's Bench to cases involving "a charge of fraud . . . , malicious prosecution or false imprisonment, . . . unless the court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury"); Piper

not likely to find a foothold in America. Mark Twain, expressing concerns similar to Judge Learned Hand,⁴² lamented upon what he saw as a fault in the jury system over one hundred and forty years ago in his semi-autobiographical book, *Roughing It*:

The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity and perjury . . . Why could not the jury law be so altered as to give men of brains and honesty an *equal chance* with fools and miscreants? . . . I wish so to alter it as to put a premium on intelligence and character, and close the jury box against idiots, blacklegs, and people who do not read newspapers. But no doubt I shall be defeated—every effort I make to save the country “misses fire.”⁴³

While Twain’s concerns lack the politically correct prose of today, his attempt to “save the country” reads as an early call for the blue-ribbon jury.⁴⁴ Prior to the American Revolution, English courts authorized the empanelment of professional juries.⁴⁵ On these panels sat citizens with experience or expertise pertinent to the facts at issue in the trial.⁴⁶ Now, though, few courts will allow for the empanelment of a professional jury,⁴⁷ favoring, if anything, the previously discussed complexity exception.⁴⁸

The use of a jury comprised of those steeped in the knowledge of the field at issue may lead to the most favorable and fair outcome. Taking an ideological extreme is hardly the best approach to a problem as complex as the modern jury system. The blue-ribbon jury, unlike the complexity exception, is a means of keeping the issues of fact in the hands of the jurors. At the same time, like the

Aircraft v. Reyno, 454 U.S. 235, 252 n.18 (1981) (“Even in the United Kingdom, most civil actions are not tried before a jury.”) (citing 1 GEORGE W. KEETON ET AL., *THE UNITED KINGDOM: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTIONS* 309 (George W. Keeton & Dennis Lloyd eds., 1955)).

42. See *Park-Davis & Co. v. H.K. Mulford Co.*, 189 F. 95, 115 (C.C.S.D.N.Y. 1911), *aff’d in part, rev’d in part*, 196 F. 496 (2d Cir. 1912).

43. MARK TWAIN, *ROUGHING IT* 343 (Oxford Univ. Press 1996) (1872).

44. *Id.*

45. Bertelsen, *supra* note 7, at 10.

46. *Id.* at 10–11 (giving as example, matrons sitting on a jury charged with determining the validity of a pregnancy claim).

47. *Id.* at 13–14.

48. See discussion *supra* Part II.A.2.a.

complexity exception, allowing blue-ribbon juries to decide complex patent cases will result in more rational fact-finding.⁴⁹

C. *The Fair Cross-Section Requirement*

One of the stumbling blocks to the empanelment of blue-ribbon juries is the “fair cross-section” principle.⁵⁰ While leeway may be given to the implementation of juror qualifications, the basic principle is that those potentially empaneled on the jury be a fair representation of the community.⁵¹ That principle has been codified to give

all litigants in Federal courts entitled to trial by jury . . . the right to . . . juries selected at random from a fair cross section of the community . . . It is further the policy . . . that *all citizens* shall have the opportunity to be considered for service on . . . juries in the district courts of the United States.⁵²

The Jury Service and Selection Act of 1968⁵³ provides the statutory basis for the fair cross-section requirement.⁵⁴ Additionally, the Act provides a statutory cause of action to challenge a jury not taken from a fair cross-section of the community.⁵⁵ This fair cross-section does not necessarily require that any particular jury be a fair cross-section,⁵⁶ but that the jury selection process implemented forestalls the selection of a truly diverse jury.⁵⁷ With that in mind, the implementation of the blue-ribbon jury arguably would keep a

49. See discussion *infra* Part III.

50. See *Taylor v. Louisiana*, 419 U.S. 522, 537–38 (1975).

51. See *id.* at 538.

52. 28 U.S.C. § 1861 (2012) (emphasis added). Previously, the federal standard for jury qualifications rested on the laws of the district in which the federal court sat. *Thiel v. S. Pac. Co.*, 328 U.S. 217, 221 (1946).

53. See 28 U.S.C. § 1861.

54. *Morro v. City of Birmingham*, 117 F.3d 508, 518 (11th Cir. 1997).

55. 28 U.S.C. § 1867(e) (2012).

56. See *Swain v. Alabama*, 380 U.S. 202, 208 (1965) (“Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group.”); *United States v. Johnson*, 386 F. Supp. 1034, 1035 (W.D. Pa. 1974) (“[A] challenge to a particular jury because it consisted only of white persons is without merit unless it can be shown that this district’s jury selection system fails to produce juries from a fair cross-section of the community.”).

57. The Supreme Court, in analyzing cases of purported violations of the fair cross-section requirement, focuses on discriminatory selection processes. *United States v. Butera*, 420 F.2d 564, 568 (1970) (citing *Ballard v. United States*, 329 U.S. 187, 195 (1946)); *Thiel v. S. Pac. Co.*, 328 U.S. 220, 225 (1946).

cognizable group—likely those with less than a four-year degree—from sitting on a jury, thus violating the fair cross-section requirement.⁵⁸

Interestingly, the Supreme Court has not ruled against blue-ribbon juries in the civil context,⁵⁹ though they do violate the Constitution in the criminal context.⁶⁰ In *Fay v. New York*,⁶¹ decided before the enunciation of the fair cross-section requirement, the Court summarized the benefit of the federal system in exploring different approaches to jury empanelment:

The states have had different and constantly changing tests of eligibility for service. Evolution of the jury continues even now, and many experiments are under way that were strange to the common law . . . “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁶²

This leeway for the states to experiment with different forms of jury selection requires that “the jury lists or panels are representative of the community.”⁶³ In *Thiel v. Southern Pacific Company*, a California jury venire was deemed unconstitutional because it omitted daily wage earners.⁶⁴ The *Thiel* court emphasized that

[r]ecognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and

58. Luneburg & Nordenberg, *supra* note 10, at 914–15; see *infra* notes 66–67 and accompanying text.

59. *Developments in the Law—Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1482, 1597 (1995).

60. *Taylor v. Louisiana*, 419 U.S. 522, 529 (1975).

61. *Fay v. New York*, 332 U.S. 261 (1947), *abrogated by Taylor*, 419 U.S. at 538 (“Defendants are not entitled to a jury of any particular composition . . . but the jury wheels . . . from which juries are drawn must not systematically exclude distinctive groups in the community . . .”).

62. *Id.* at 296 (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

63. *Taylor*, 419 U.S. at 538.

64. *Thiel v. S. Pac. Co.*, 328 U.S. 217, 224–25 (1946).

discriminations which are abhorrent to the democratic ideals of trial by jury.⁶⁵

It is inevitable that the selection of a blue-ribbon jury necessarily requires drawing from a venire not generally representative of the community. Nationally, out of 234,719,000 adults in the United States over eighteen years of age, only 66,192,000 have attained a bachelor's degree or above—about 28% of the population.⁶⁶ The empanelment of a special jury for complex patent litigation, in which case the greatest benefit comes from selecting a jury of those in a *particular* field, would create an even less representative jury venire.⁶⁷

This system inevitably undermines the democratic ideals behind jury selection.⁶⁸ Nevertheless, as the discussion below will explain, the lay jury is likely unable to come to anything but an arbitrary decision when faced with complex patent litigation.⁶⁹ Where the fair cross-section requirement grew from the desire to protect minority defendants from a discriminatory jury,⁷⁰ applying the same requirement to complex patent litigation *harms*, rather than benefits, the litigants and should give way to the blue-ribbon jury.

III. BENEFITS OF THE BLUE RIBBON JURY

“Honest to God, I don’t see how you could try a patent matter to a jury. Goodness, I’ve gotten involved in a few of

65. *Id.* at 220.

66. U.S. Census Bureau, *Educational Attainment of the Population 18 Years and Over, by Age, Sex, Race, and Hispanic Origin: 2012*, U.S. DEPT. OF COMMERCE, tbl.1, <http://www.census.gov/hhes/socdemo/education/data/cps/2012/tables.html> (last revised Jan. 7, 2013).

67. For example, if only those who have degrees above a baccalaureate are considered, the percentage of eligible Americans drops by nearly two-thirds to just under 10% of the population. *See id.*

68. *See Bertelsen, supra* note 7, at 16–17 (citing *Fay v. New York*, 332 U.S. 261, 296–97 (1947) (Murphy, J., dissenting)); *Thiel*, 328 U.S. at 220.

69. *See* discussion *infra* Part III.

70. *See Batson v. Kentucky*, 476 U.S. 79, 85–87 (1986) (discussing the history of the Equal Protection Clause as a basis for eliminating racially discriminatory jury venires); *see also* Peter A. Detre, *A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel*, 103 YALE L.J. 1913, 1927 (1994) (“Many courts have recognized that what the fair cross-section guarantee protects is the defendant’s right to a fair chance at a representative jury.”) (citing *Williams v. Florida*, 399 U.S. 78, 100 (1970)).

these things. It's like somebody hit you between your eyes with a four-by-four. It's factually so complicated."⁷¹

A. *Technical Fields Develop Their Own Languages Rendering Simplification of Issues to Layman's Terms More Harmful Than Beneficial*

Recently, there has been a growth of linguistic study of highly specialized scientific fields and the specialized languages developed within them.⁷² Such specialized language is called a Language for Special Purpose (LSP).⁷³ Within these LSPs, specialized vocabulary is a keystone feature.⁷⁴ As a result, speakers of the English language will find themselves out of place listening to English speakers of a technical field engaged in a discussion using that field's LSP.⁷⁵ Moreover, not only will an LSP have its own terminology, LSPs "also have special ways of combining terms or of arranging information that differ from the [Language for General Purpose]."⁷⁶

Communication between the LSP speaker and the non-expert is fraught with incomplete understanding. When the LSP user must communicate with a non-expert in the field—such as the expert witness testifying before a lay jury—the expert is forced to use general language rather than relying on the field's LSP to effectuate communication.⁷⁷ As a result, "[t]he expert does not expect the non-expert to achieve the same level of understanding of the terms used as

71. *Judicial Panel Discussion on Science and the Law*, 25 CONN. L. REV. 1127, 1145 (1993) (quoting Covello, J., U.S. District Court Judge for the District of Connecticut, in response to a question regarding the use of juries in patent litigation).

72. See SPECIALISED LANGUAGES IN THE GLOBAL VILLAGE: A MULTI-PERSPECTIVE APPROACH (Carmen Pérez-Llantada & Maida Watson eds., 2011). The field is so recent, in fact, that the First International Symposium on Languages for Specific Purposes was held April 13–14, 2012, and a second conference convened in 2014. University of Colorado Boulder, Second International Symposium on Languages for Specific Purposes (Apr. 17–19, 2014) (an overview of the 2012 conference proceedings and a preview of the 2014 conference program may be viewed at <http://altec.colorado.edu/lsp/>). As of 2013, the LSP Journal is only in its fourth volume. 4 LSP JOURNAL 1 (2013).

73. LYNNE BOWKER & JENNIFER PEARSON, WORKING WITH SPECIALIZED LANGUAGE: A PRACTICAL GUIDE TO USING CORPORA 25 (2002).

74. *Id.* at 26.

75. "As an LGB [Language for General Purpose—i.e. the native English language] speaker, you might feel a little out of your element if you overheard two meteorologists discussing the weather using terms like 'advection', 'helicity', and 'radiational cooling!'" *Id.*

76. *Id.*

77. *Id.* at 28.

long as the *general idea* is understood.”⁷⁸ However, when an expert communicates with another expert or a semi-expert a fuller understanding of the content of the communication can be reached.⁷⁹ Ultimately, it is important to know a field’s LSP to properly and fully explain the topic at hand.⁸⁰

As discussed above, the judicial system disqualifies jurors unable to competently read and write the English language, recognizing the fundamental requirement that, to render a fair decision, the juror must be able to competently understand the facts at issue, the law being presented, and the courtroom procedure.⁸¹ With the rise of LSPs, the English language is being broken into sublanguages distinct and nearly incomprehensible to the lay person not familiar with the specialized language.⁸² This makes the case for blue-ribbon juries

78. *Id.* (emphasis added).

79. *Id.*

80. *Id.*

81. *See supra* text accompanying notes 17–20.

82. For example, the following exchange took place in *ILC Peripherals Leasing Corp. v. IBM Corp.*:

The Court: Do you know what *demand substitutability* is, [Juror A]?

Juror A: Well, I would like to kind of look into that.

The Court: Okay. And how about the *barriers to entry*, [Juror B]?

Juror B: I would have to read about it

The Court: All right. And how about *reverse engineering*, [Juror C]?

Juror C: That's when you would take a product and you would alter it in a, or modify it for your own purpose; that is, you would reverse its function and use it in your own method.

The Court: And [Juror D], what is *software*?

Juror D: It's software.

The Court: Well, what is software?

Juror D: That's the paper software.

The Court: What's the *hardware*?

Juror D: That's the wires and hardware.

The Court: And what is—do you know what an *interface* is?

Juror D: Yes.

. . .

The Court: Can you give me an example of that?

Juror D: Well, if you take a blivet, turn it off one thing and drop it down, its [sic] an interface change, right?

Kimberley A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box*, 99 MICH. L. REV. 365, 370–71 (2000) [hereinafter Moore, *Black Box*] (emphasis added) (quoting Rec. at 19,490–91, *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423 (N.D. Cal. 1978), *aff'd sub nom. on other grounds*, *Memorex Corp. v. IBM Corp.*, 636 F.2d

analogous to the due process protection requiring that jurors be able to comprehend the English language.⁸³ Where a patent lawsuit takes place between two experts in a highly specialized field, the case can only be fully and truly decided by a discussion of the specific facts at issue. Requiring the parties and the witnesses to generalize the language and not rely on their LSP simplifies the proceedings to a point that ultimately detracts from the substance of the case.⁸⁴ This is greatly exacerbated by the minimum English-speaking requirement for juror competency.⁸⁵ When the LSP speaker is tasked with simplifying complex terminology and principles to laymen's terms, there is already a loss of deep and full understanding.⁸⁶ When this is compounded by the listener who only has a basic understanding of the general language, it is inevitable that full understanding is lost.⁸⁷

The use of a blue-ribbon jury may be the best way to overcome the understanding limitation created by LSPs. With a blue-ribbon jury deciding a patent infringement issue, the experts and parties can explain the terms and distinctions of the patents at issue without resorting to simplified, general language that fails to specifically and wholly address the problem. In this way, blue-ribbon juries would protect the constitutional right to jury trials and avoid the arbitrary decision-making of a lay jury.

B. Markman Took Interpretation of Patent Language Away From the Jury, Blue-Ribbon Juries Would Encourage Its Return

Frankly, I don't know why I'm so excited about trying to bring this thing [patent suit] to closure. It goes to the Federal Circuit afterwards. You know, it's hard to deal with things that are ultimately resolved by people wearing propeller hats. But we'll just have to see what happens when we give it to them. I could say that with impunity because they've

1188 (9th Cir. 1980)).

83. See *supra* Part II.A.1.

84. See *supra* notes 77–82 and accompanying text.

85. See *supra* note 19.

86. See *supra* notes 76–82 and accompanying text.

87. The theory “that our mother tongue restricts what we are able to think” has been debunked in linguistics. Guy Deutscher, *Does Your Language Shape How You Think?*, N.Y. TIMES MAG., Aug. 29, 2010, available at <http://www.nytimes.com/2010/08/29/magazine/29language-t.html?pagewanted=all&r=0>. However, some research has shown that a language using particular terms *does* imbue the speaker with a tendency perceive and make sense of the world in a specific way consistent with those terms. *Id.*

reversed everything I've ever done, so I expect fully they'll reverse this, too.⁸⁸

1. The *Markman* Decision

In *Markman v. Westview Instruments, Inc.*, Markman owned a patent describing a system designed to track the movement of clothing through the dry-clean process.⁸⁹ The independent issue in the trial turned on the meaning of the term "inventory."⁹⁰ The jury found that Westview infringed on Markman's patent.⁹¹ Nevertheless, the district court granted judgment as a matter of law for Westview, reaching a different interpretation of the term "inventory."⁹²

Markman appealed the district court's ruling as a matter of law, arguing that interpretation of the claim was for the jury under the Seventh Amendment.⁹³ The U.S. Court of Appeals for the Federal Circuit and the Supreme Court affirmed the district court's holding.⁹⁴ In part, the Supreme Court decided that the "decisionmaker vested with the task of construing the patent is in the better position to ascertain whether an expert's proposed definition fully comports with the specification and claim and so will preserve the patent's internal coherence."⁹⁵ The Court stated that this furthers the policy goal of ensuring uniformity in the treatment of a certain patent.⁹⁶ Claim construction, the Court admitted, is rooted in "evidentiary underpinnings,"⁹⁷ but is ultimately a "mongrel practice"⁹⁸ falling between issues of law and fact.⁹⁹ The Court therefore concluded that "submitting issues of document construction to juries" would be a disservice to uniformity.¹⁰⁰ In effect, according to the Supreme Court, placing claim construction solely within the province of the

88. Kimberley A. Moore, *Are District Court Judges Equipped to Resolve Patent Cases?*, 15 HARV. J.L. & TECH. 1, 11 (2001) [hereinafter Moore, *District Court Judges*] (quoting *O.I. Corp. v. Tekmar Co.*, No. 95-CV-113 (S.D. Tex. June 17, 1996) (Kent, J.)).

89. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 374 (1996).

90. *Id.* at 375.

91. *Id.*

92. *Id.*

93. *Id.* at 376.

94. *Id.*

95. *Id.* at 390.

96. *Id.*

97. *Id.*

98. *Id.* at 378.

99. *Id.* at 388.

100. *Id.* at 391.

judge serves a notice function to the populace by creating stability through well-reasoned judge-made decisions.¹⁰¹

2. *Markman*'s Ironic Twist

As a result of *Markman*, “a trial judge must determine as questions of law the meaning of patent claims,” which is a central issue in patent litigation.¹⁰² The cautious judge is then inclined to make a ruling on disputed terms before trial and “may prudently enlist the aid of qualified experts to determine the meaning of the [technical] claim terms.”¹⁰³ A *Markman* hearing then becomes a mini-trial before the main event.¹⁰⁴ *Markman* hearings typically employ experts and require their own discovery issues and expert depositions before the hearing takes place.¹⁰⁵

Ironically, while the Court in *Markman* intended to encourage stability and provide notice of patent claims,¹⁰⁶ the result is a decision on a claim that is reviewed de novo in the Federal Circuit Court of Appeals,¹⁰⁷ and reversed roughly 40% of the time.¹⁰⁸ As a result, the noble goal of providing certainty is undone by the very means implemented to reach that end.

Meanwhile, the Federal Circuit Court of Appeals enters a land of “sophistry and fiction” when it states that trial judges, “in weighing evidence and making credibility determinations,” are only making decisions as a matter of law.¹⁰⁹ Inevitably, *Markman* hearings become as much about weighing credibility and making evidentiary determinations as any other factual inquiry.¹¹⁰ The folly of the *Markman* hearing has been summarized as

[t]he court and a bunch of lawyers get[ting] together. Not one of them is a person of ordinary skill, or even mediocre

101. *Id.* at 390. See *The Interpretation of Patent Claims*, 32 AIPLA Q.J. 1, 9–10 (2004) (discussing the notice function of claims).

102. *Loral Fairchild Corp. v. Victor Co. of Japan*, 911 F. Supp. 76, 79 (E.D.N.Y. 1996).

103. *Id.*

104. Raymond P. Niro & Joseph N. Hosteny III, *Markman: An Infringer's Delight; An Inventor's Nightmare*, 3 SEDONA CONF. J. 69, 71–72 (2002).

105. *Id.*

106. *Markman*, 517 U.S. at 390.

107. *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1473–74 (Fed. Cir. 1998) (*en banc*) (Rader, J., dissenting in part).

108. *Id.* at 1476.

109. *Lucas Aerospace, Ltd. v. Unison Indus., L.P.*, 890 F. Supp. 329, 333 n.7 (D. Del. 1995).

110. Niro & Hosteny, *supra* note 104, at 78.

or bad skill in the art. They then read—at least we hope they do—a document intended by statute to be *written for people of skill in the art*, so that the document need not include what those of skill in the art would already know. This makes as much sense as having an engineering paper interpreted for the class by the “D” student, or someone who hasn’t even finished a year of engineering school. The whole idea is malformed from the outset.¹¹¹

In the end, the attempt to remove claim construction from the province of the lay jury sought to better promote uniformity with the hopes that a judge is better suited to make a determination of the use of technical language.¹¹² Instead, the result is nothing more than a lack of finality to district court decision-making, causing some to lament that “the effect of [*Markman*] is to make of the judicial process a charade, for notwithstanding any trial level activity, [the U.S. Circuit Court of Appeals for the Federal Circuit] will do pretty much what its wants under it de novo retrial.”¹¹³ The Federal Circuit *Markman* court, in following that path, and the Supreme Court in affirming it, “jettisons more than two hundred years of jurisprudence and eviscerates the role of the jury preserved by the Seventh Amendment”¹¹⁴ This is so because, “while not technically a dispositive ruling, claim construction can have outcome-determinative effects,” and “drastically affect the prospect of settlement.”¹¹⁵

3. The Blue-Ribbon Jury as an Alternative to *Markman*

Rather than eviscerate the Seventh Amendment, a blue-ribbon jury is a better middle ground that reaches the desired end-goal of well-reasoned claim construction and stability of patent decisions. While there are constitutional issues with implementing a blue-ribbon jury system,¹¹⁶ straining one constitutional provision rather than eviscerating it altogether is arguably the lesser of two evils.

The primary concern behind *Markman* hearings is the lay jury’s inability to come to a consistent interpretation of patent’s terms.¹¹⁷ In

111. *Id.* (emphasis added).

112. *See supra* notes 95–101 and accompanying text.

113. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 993 (Fed. Cir. 1995) (Mayer, J., concurring).

114. *Id.* at 989.

115. *The Interpretation of Patent Claims, supra* note 101, at 5.

116. *See* discussion *supra* Part III.

117. *Markman*, 517 U.S. at 390.

response, the *Markman* Court made claim construction a matter of law, “notwithstanding its evidentiary underpinnings,” in the hopes of saving uniformity.¹¹⁸ As a result, these hearings become mini-trials, even including expert testimony to better enable a district court judge, not steeped in the language of art,¹¹⁹ to make rulings on the meaning of terms within a patent. On review, despite the goal of uniformity, the judge’s decision at law is subject to de novo review with reversals occurring around 40% of the time.¹²⁰

The blue-ribbon jury solves many of these problems. On appeal, the jury’s determination of claim construction is subject to a highly deferential standard, only being disturbed if a reasonable jury could not reach the conclusion the trial jury did.¹²¹ While this standard may have its flaws when reviewing the interpretation of technical language by a lay jury, the same cannot be said when the jury is comprised of those reasonably skilled in the art of the patent at issue. If the trial court judge is better skilled at syllogizing expert testimony during *Markman* hearings than the lay jury during a trial, *a fortiori*, a jury comprised of experts in the field of the patent at issue would be even better equipped to determine the use of language in a patent. The end result is a trial less at risk of erroneous decision-making because the jury would be well-versed in the language at issue.

Presumably, blue-ribbon juries listening to expert testimony, including the drafters of the patent and the purported infringers, would clearly understand (certainly more so than the lay jury or district court judge) the true intricacies of the issue and come to well-reasoned conclusions in light of the facts presented at trial.¹²² Given the critical appraisals of *Markman* hearings,¹²³ blue-ribbon juries present an alternative to putting judges in the position of fact-finder *vis a vis* evidentiary determinations during a *Markman* hearing. These determinations have the added benefit of being more stable at

118. *Id.*

119. See discussion *supra* Part III.A.

120. *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1473, 1476 (Fed. Cir. 1998) (*en banc*).

121. See Steven Alan Childress, *Standards of Review Primer: Federal Civil Appeals*, 229 F.R.D. 267, 281 (2005) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250–51 (1986)).

122. See discussion *supra* Part III.A.

123. See generally Niro & Hosteny, *supra* note 104 (discussing problems raised by the *Markman* process).

the appellate level—the motivation behind the *Markman* in the first place.¹²⁴

C. *A Blue-Ribbon Juror is Better Able to Step into the Shoes of a PHOSITA Than a District Court Judge*

Nonobviousness is the standard against which a new patent is measured to determine whether or not it sufficiently differs from prior art in order to qualify for a patent.¹²⁵ Section 103 of the Patent Act explains that:

[a] patent may not be obtained . . . if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious before the effective filing date of the claimed invention to a *person having ordinary skill in the art* to which said subject matter pertains.¹²⁶

Section 103 creates an inherent difficulty in resolving patent claims—gaining access to the perspective of the person having ordinary skill in the art (PHOSITA).¹²⁷ “The risk posed by assigning the evaluation to a decisionmaker who does not have ordinary skill in the art is that the [obviousness] bar will be set too low.”¹²⁸

Obviousness, a fact-law inquiry, requires three steps: “(1) articul[at]ing the legal standards; (2) identify[ing] the relevant facts; and (3) apply[ing] the law to the facts.”¹²⁹ When this inquiry is tried before the jury, the jury may make a finding as to obviousness without any articulation of the facts that lead to such a conclusion.¹³⁰ Alternatively, a judicial determination of obviousness requires similar findings of fact and the weighing of evidence.¹³¹

As the procedure currently stands, it is not improper for a district judge to submit the obviousness determination to the jury.¹³²

124. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 989–91 (Fed. Cir. 1995) (Mayer, J. concurring).

125. Rebecca S. Eisenberg, *Obvious to Whom? Evaluating Inventions from the Perspective of Phosita*, 19 BERKELEY TECH. L.J. 885, 885 (2004).

126. 35 U.S.C. § 103 (Supp. V. 2012) (emphasis added).

127. See Eisenberg, *supra* note 125, at 885–87.

128. *Id.* at 888.

129. Wesley A. Demory, Note, *Patent Claim Obviousness in Jury Trials: Where's the Analysis?*, 6 J. BUS. & TECH. L. 449, 458 (2011).

130. *Id.*

131. See *id.*

132. *Id.* at 460.

However, as per *Graham v. John Deere Co.*,¹³³ and *KSR International Co. v. Teleflex, Inc.*,¹³⁴ should the district court submit to the jury the question of obviousness, the district court still has the responsibility of reviewing the jury verdict.¹³⁵ However, the reality is that by requiring the district court judge to make a determination from the point of view of the PHOSITA, “the district court judge must attempt to step in the shoes of a person skilled in the technical field of the patented invention and determine from that vantage point what the terminology in the patent claims means.”¹³⁶

In *Robotic Vision Systems, Inc. v. View Engineering, Inc.*,¹³⁷ the district court judge donned the shoes of an engineer with an integrated circuit background with those skills and degrees to interpret, as an engineer would, the terms “providing . . . fiducials,” “correlated . . . heights,” “disposing . . . in a prearranged pattern,” and “restricting . . . to a predetermined range of heights.”¹³⁸ Few, if any, district court judges actually have a background to make a determination of these terms *sua sponte*, and, like in the *Markman* hearings,¹³⁹ the judge must obtain, weigh, analyze, and appraise extraneous evidence including, but not limited to, treatises, dictionary definitions, and expert testimony.¹⁴⁰

Probably as a result of the inability for an individual unlearned, unskilled, and untrained in a highly technical field to pretend to be otherwise, the role of the PHOSITA has become marginalized in judicial decision-making.¹⁴¹ “This approach has left the courts with considerable room for active judicial review . . . [and] has arguably disregarded the statutory language and permitted the issuance of patents on routine advances within easy reach of technological practitioners of ordinary skill.”¹⁴² The relevance of the PHOSITA, a statutory requirement, has been further lowered by the Federal Circuit Court of Appeal’s determination that “obviousness” is a legal

133. *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966).

134. *KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398, 419 (2007).

135. *Demory*, *supra* note 129, at 460.

136. *Moore, District Court Judges*, *supra* note 88, at 6 (citing *Hockerson-Halberstadt, Inc. v. Avia Grp. Int’l, Inc.*, 222 F.3d 951, 955 (Fed. Cir. 2000)).

137. *Robotic Vision Sys., Inc. v. View Eng’g, Inc.*, 189 F.3d 1370, 1373 (Fed. Cir. 1999).

138. *Moore, District Court Judges*, *supra* note 88, at 6. (quoting *Robotic Vision Sys., Inc.*, 189 F.3d at 1375)).

139. *See* discussion *supra* Part III.B.

140. *Moore, District Court Judges*, *supra* note 88, at 7.

141. *See Eisenberg*, *supra* note 125, at 889 (discussing the diminishing role of the PHOSITA in judicial decisions).

142. *Id.* at 889–90.

conclusion and therefore not granted the same level of deference as is a finding of fact.¹⁴³ Furthermore, PHOSITA's relevance has been mitigated by the Federal Circuit's elevation of the use of nontechnical evidence to being on par with the technical examination relevant to the statutory PHOSITA inquiry.¹⁴⁴ The result is a move away from the statutorily set level of inquiry due to the inability of the factfinder, whether judge or jury, to properly and legitimately put itself in the shoes of someone well-versed in the field at issue.¹⁴⁵

Submitting the question of obviousness to a blue-ribbon jury obviates the difficulties lay persons have putting themselves in the mind of someone with advanced, technical expertise,¹⁴⁶ with the added benefit of finality to the ruling.¹⁴⁷ When a juror is asked to place himself in the shoes of a reasonable person, say, in the determination of negligence, it is generally well accepted that jurors are able to play the fictional role of the reasonable person because they can "draw on their own understanding of reasonable behavior, based on their experience of the world."¹⁴⁸ The same can be said for the judge. This is diametrically opposed to either the judge or juror placing himself in the shoes of a PHOSITA. The requirement that the individual pretend to be a person highly skilled in a technical field forecloses the ability to rely on one's every day experiences unless that person is highly skilled in the same or similar area.¹⁴⁹

The PHOSITA in *Carnegie Mellon University v. Marvell Technology Group, Ltd.*,¹⁵⁰ had a master's degree in electrical engineering.¹⁵¹ The juror, who statistically speaking is unlikely to even have a bachelor's degree,¹⁵² must put himself in the shoes of a reasonable person having a master's degree. Not only that, but the

143. *Aktiebolaget Karlstads Mekaniska Werkstad v. U.S. Int'l Trade Comm'n*, 705 F.2d 1565, 1575 (Fed. Cir. 1983).

144. *See Eisenberg, supra* note 125, at 893.

145. *See id.* at 896-97.

146. *See Deutscher, supra* note 87, (explaining that understanding the world through a certain language, like an LSP, leads the individual to understand the world around them in regard to that particular approach). Inevitably, the result is that experts in a particular field are better attuned to the intricacies of the field and able to place themselves in the shoes of a PHOSITA. *See discussion supra* Part III.A.

147. This is similar to the discussion regarding *Markman* hearings. *See supra* Part III.B.

148. Steven Hetcher, *The Jury's Out: Social Norms' Misunderstood Role in Negligence Law*, 91 GEO. L.J. 633, 654 (2003).

149. *See discussion supra* Part III.A.

150. *Carnegie Mellon Univ. v. Marvell Tech. Grp., Ltd.*, No. 09-290, 2010 WL 3937157, at *1 (W.D. Pa. Oct. 1, 2010).

151. *Id.* at *6.

152. *See supra* note 66 and accompanying text.

inquiry as a PHOSITA is done at the time the patent application is submitted.¹⁵³ It is all but impossible to presume that a layman, without any training in a particularized field, can gain the requisite knowledge of the PHOSITA merely through expert testimony (likely to be far less informative than a lecture)¹⁵⁴ and a reading of material on the subject. If the average person is able to fill the shoes of a “reasonable person,” it is only logical that the PHOSITA is best attained by one already having knowledge in the field at issue. A jury drawn from individuals trained in the area to which the patent applies would be far better suited to assuming the role of PHOSITA than the lay person.

This more rational conclusion has the added benefit of being less likely to be overturned on appeal. For one, as a finding of fact, a higher review standard would apply.¹⁵⁵ More importantly, though, the blue-ribbon jury steeped in the language of the field would, presumably, be able to render decisions based on individual issues at trial, leaving a cleaner record for the appellate court.¹⁵⁶

D. Blue Ribbon Juries are More Likely to Properly Follow the Trial Court’s Jury Instructions

In criminal cases, trial courts are permitted to empanel “death-qualified juries.”¹⁵⁷ Death-qualified juries are juries “fit to decide a case involving the death penalty because the jurors have no absolute ideological bias against capital punishment.”¹⁵⁸ The basis for these juries, according to Justice Stewart, is that the juror must be able to, at minimum, consider the instructions given by the judge under the applicable law.¹⁵⁹ In *Wainwright v. Witt*,¹⁶⁰ the Court clarified that the inquiry is “whether the juror’s views would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’”¹⁶¹ The upshot is that

153. See 35 U.S.C. § 103 (Supp. V 2012) (delineating that the PHOSITA standard applies “before the effective filing date”).

154. See discussion of LSPs, *supra* Part III.A (indicating that the expert cannot even communicate to the lay person the full depth of the expert’s knowledge).

155. See *supra* note 121 and accompanying text.

156. Cf. Moore, *Black Box*, *supra* note 82, at 368 (discussing the lay jury’s tendency to fail to decide discrete issues).

157. See *Witherspoon v. Illinois*, 391 U.S. 510, 516–18 (1968) and its progeny.

158. BLACK’S LAW DICTIONARY, *supra* note 8, at 424.

159. See *Witherspoon*, 391 U.S. at 522 n.21 (1968).

160. *Wainwright v. Witt*, 469 U.S. 412 (1985).

161. *Id.* at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

proper jury decision-making requires the dismissal of a juror who "would be unable to faithfully and impartially apply the law."¹⁶²

The requirement that jurors be able to impartially apply the law in the case of death-qualified juries is analogous to this Comment's call for blue-ribbon juries. When a juror is unable to comprehend the facts and instructions of the case,¹⁶³ it is a foregone conclusion that the juror will be hard pressed to faithfully apply the laws of patents, by putting him or herself in the shoes of a PHOSITA.¹⁶⁴ Inevitably, the result is likely a decision not in-line with the court's instruction.¹⁶⁵

Furthermore, once the patent juror is unable to follow the court's instruction, or the facts at issue, she may base her decision on "emotional or other irrelevant factors."¹⁶⁶ The jury's decision is more likely to be based on sympathy for David as he squares off against Goliath,¹⁶⁷ than it is to be based on a full understanding of the facts at issue.¹⁶⁸ As is the fear that allows death-qualified juries, patent jurors may enter the jury box irretrievably vested on one party's side because the juror is unable to follow trial proceedings and the court's instructions.

The blue-ribbon jury could effectively fill an analogous roll to the death-qualified jury. By using blue-ribbon juries in patent litigation, the juror is far more likely to understand the legal task at hand and reach a decision based on the facts of the case and the court's instructions.¹⁶⁹ This is particularly so when the juror is asked to

162. *Id.* at 425-426.

163. *See supra* note 82.

164. *See* PHOSITA discussion *supra* Part III.C.

165. *See* Moore, *Black Box*, *supra* note 82, at 368 ("[J]uries tend to decide whole suits rather than delineate individual issues, even when separate issues are presented to them via special verdict forms or interrogatories.").

166. *Id.* at 372 (citing *Jury Cases on Patent Infringement on Trial*, CHI. TRIB., June 12, 1995, http://articles.chicagotribune.com/1995-06-12/business/9506120025_1_patent-cases-patent-suit-jury-trial).

167. *See* Jonathon Taylor Reavill, Note, *Tipping the Balance: Hilton Davis and the Shape of Equity in the Doctrine of Equivalents*, 38 WM. & MARY L. REV. 319, 366 (1996) ("[J]uries also tend to idealize inventors. Before the jury is a plaintiff who, in using her talent, skills, and effort to invent something, has received the recognition of the United States of America. Such a person may inspire awe and therefore bias jurors in her favor.") (citation omitted); *see also* *Jury Cases on Patent Infringement on Trial*, *supra* note 166 (reporting on *Fonar Corp. v. Gen. Elec. Co.*, 902 F. Supp. 330 (E.D.N.Y. 1995), *aff'd in part, rev'd in part*, 107 F.3d 1543 (Fed. Cir. 1997) in which inventor Dr. Raymond Damadian sued corporate giant General Electric Co. for infringement of Dr. Damadian's patent covering a means of detecting potentially cancerous tumors through magnetic resonance imaging (MRI) technology).

168. *See* discussion *supra* Part III.A.

169. *See* discussion *supra* Part III.A.

assume the position of a PHOSITA.¹⁷⁰ Just as the death-qualified juror is able to reach a decision for or against the death penalty,¹⁷¹ the blue-ribbon juror is able to place herself in the shoes of a PHOSITA.¹⁷² The lay juror, however, cannot seriously be expected to place herself in the shoes of the reasonable inventor who—depending on the patent—may possess master’s degrees in advanced scientific fields. Excluding the lay juror from such inquiries serves the same ends as excluding the juror who cannot possibly agree to a death sentence—ensuring that the juror can follow instructions from the court.¹⁷³ Blue-ribbon juries allow for better decisions in complex patent litigation and should be used for that purpose.

IV. CONCLUSION

Fifty-six percent of patent claims that went to trial in the year prior to September 2011 were tried by jury.¹⁷⁴ However, jurors likely are unable to fully rationalize the complexity of the patent before them,¹⁷⁵ depriving citizens of the freedom from arbitrary decision-making.¹⁷⁶ Lay jurors put patent litigants at risk of reaching such arbitrary decisions.¹⁷⁷

The implementation of blue-ribbon juries might ensure that those patent claims be decided in a non-arbitrary manner,¹⁷⁸ but it must overcome the fair-cross section requirement.¹⁷⁹ This slight harm, the result of a rule rooted in protecting a criminal defendant,¹⁸⁰ should be acceptable for an alternative juror selection process that solves more problems than it creates.¹⁸¹

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170. See discussion *supra* Part III.C.

171. Cf. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

172. See discussion *supra* Part III.C.

173. See *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968).

174. ADMIN. OFF. OF THE U.S. CTS., U.S. DISTRICT COURTS-CIVIL CASES TERMINATED, BY NATURE OF SUIT AND ACTION TAKEN (2012).

175. See *supra* Part III.A.

176. See *supra* Part II.A.1.

177. See *supra* Part III.A.

178. See *supra* Part III.A.

179. See *supra* Part II.B.

180. See *supra* note 70.

181. See *supra* Part III.

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