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FROM SPECIALIZED COURTS TO SPECIALIZED JURIES: CALLING FOR PROFESSIONAL JURIES IN COMPLEX CIVIL LITIGATION

[T]he jury trial, at best, is the apotheosis of the amateur. Why should anyone think that twelve persons brought in from the street, selected in various ways, for their lack of general ability, should have any special capacity for deciding controversies between persons.¹

I. INTRODUCTION

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? America's complex commercial litigation system, places lay fact-finders in these situations.² Everyday in this country citizens resolve sophisticated issues

¹ William Schwartz, *Foreword to Lloyd E. Moore, The Jury: Tools of Kings, Palladium of Liberty v, v-vi* (1973).

² See Stephen J. Alder, *Can Juries Do Justice to Complex Suits?*, Wall St. J., Dec. 21, 1989, at B1 (questioning lay jury participation in complex litigation). One antitrust attorney stated that:

It is a leap of faith that goes considerably beyond what a religion requires to say that the best way to determine questions of technology, market-competition and computer science is to find people who have led a life that has not put them in contact with the issues involved.

Id. Perhaps the most widely condemned civil jury verdict in American history occurred in a 1986 suit by the Pennzoil Corporation against Texaco for interference with contract resulting in \$7.53 billion in compensatory damages and \$3 billion in punitive damages. See Stephen Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 Hastings L.J. 579, 616-17 (1993) (indicating jury's Penzoil verdict as one of most discussed and criticized); see generally *Texaco, Inc. v. Penzoil Co.*, 729 S.W.2d 768 (Tex. Ct. App. 1987) (discussing rancorous business dispute placed in hands of jury), *cert. dismissed*, 485 U.S. 994 (1988), *appeal dismissed on agreement of the parties*, 748 S.W.2d 631 (Tex. Ct. App. 1988). The McDonald's coffee-spill case, resulting in a \$2.9 million award is another verdict heavily criticized as erratic and unjust. See Andrew Blum, *Jury System Undergoes Patchwork Remodeling*, Nat'l L.J., Jan. 22, 1996, at A1. As a result, this award was later reduced. *Id.* Tort reformers have also criticized the \$5 million punitive damages award in

in complex disputes involving tremendous potential liability.³ By contrast, England and most countries depend exclusively on judges for the resolution of disputes, completely abandoning the jury system.⁴

The United States Constitution gives Americans the right to a jury trial in all criminal and most civil cases.⁵ Next to voting, jury duty constitutes the chief function where citizens can play an active role in government and ensure the administration of justice.⁶ Yet it seems inconsistent

the 1995 Exxon Valdez oil spill case. Gregory N. Hoole, *In the Wake of Seemingly Exorbitant Punitive Damage Awards, America Demands Caps On Punitive Damages -- Are We Barking Up the Wrong Tree?*, 22 J. Contemp. L. 459, 472 (1996) (discussing capricious punitive damage awards).

³ See generally *Batson v. Kentucky*, 476 U.S. 79 (1986) (indicating fitness to serve as juror depends on assessment of individual qualifications and ability to be an impartial fact-finder); *Fay v. New York*, 332 U.S. 261 (1947) (noting although economic groups may have different outlooks on a case, no evidence proves one economic group will determine a case in a particular manner). As Justices O'Connor and White of the Supreme Court of the United States explained:

Our system of justice entrusts jurors--ordinary citizens who need not have any training in the law--with profoundly important determinations. Jurors decide not only civil matters, where the financial consequences may be great, but also criminal cases, where the liberty or perhaps life of the defendant hangs in the balance. . . . The jury system long has been a guarantor of fairness, a bulwark against tyranny, and a source of civic values. . . . But jurors are not infallible guardians of the public good. They are ordinary citizens whose decisions can be shaped by influences impermissible in our system of justice. In fact, they are more susceptible to such influences than judges. . . . The perennial amateur, layman jury cannot be so quickly domesticated to official role and tradition; it remains accessible to stimuli which the judge will exclude. Arbitrariness, caprice, passion, bias, and even malice can replace reasoned judgment and law as the basis for decisionmaking.

TXO Production Corp. v. Alliance Resource Corp., 509 U.S. 443, 473-74 (1993) (O'Connor and White, JJ., dissenting).

⁴ See Arthur T. Vanderbilt, *Judges & Jurors: Their Functions, Qualifications, and Selection* 74-75 (1958) (noting decline of jury trial in England resulted from disappearance of overbearing judges, savings of time by trial without jury, and heavy costs imposed on losing party in jury case); Stephen C. Thaman, *The Resurrection of Trial By Jury in Russia*, 31 Stan. J. Int'l L. 61, 64 & n.19 (1995) (noting decline of jury trial in European countries).

⁵ See *infra* notes 182-203 and accompanying text (discussing how the Fifth, Sixth, Seventh, and Fourteenth Amendments collectively provide fundamental rights to a jury trial in civil and criminal cases).

⁶ See *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (recognizing the importance of jury

that a sophisticated society allows unsophisticated citizens to make some of the most important and influential decisions without regard to the intelligence, experience, or education of its citizens.⁷ Jurors, a fact-finding body, must assess and evaluate litigant's claims and render a well-reasoned decision based on accuracy and impartiality.⁸ The products of complex litigation, including lengthy trials, complicated scientific evidence, and

duty in the United States); Charles W. Joiner, *Civil Justice and the Jury* 77 (1962) (emphasizing importance of jury duty to American justice system). According to the *Powers* Court:

The jury system postulates a conscious duty of participation in the machinery of justice. . . . The jury . . . invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the law by all of the people. It affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law. Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.

Powers, 499 U.S. at 407.

⁷ See Moore, *supra* note 1, at vii (contrasting scholars' views of jury selection).

⁸ See *Bush v. Vera*, 116 S. Ct. 1941, 2001 n.5 (1996) (recognizing that jury decisionmaking is a neutral process requiring the impartial application of the law); *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 51 (1991) (noting juries should attempt to make fair and rational decisions); Vanderbilt, *supra* note 4, at 54-61 (distinguishing judge and jury functions); Keith Broyles, *Taking the Courtroom into the Classroom: A Proposal for Educating the Lay Juror in Complex Litigation Cases*, 64 *Geo. Wash. L. Rev.* 714, 724 (1996) (noting jury representative of community and one worthy of accurate decisionmaking are not always coinciding goals because a representative jury does not necessarily decide matters more accurately than a non-representative panel); Steven L. Friedland, *The Competency & Responsibility of Jurors in Deciding Cases*, 85 *N.W. U. L. Rev.* 190, 198 (1990) (discussing Constitution's conflicting requirements of accuracy and impartiality); Note, *Jury Selection and Composition*, 110 *Harv. L. Rev.* 1443, 1444 (1997) (noting two functions of jury are to act as impartial factfinders and provide forum for democratic participation in administration of justice); Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 *Harv. L. Rev.* 898, 906-07 (1979) [hereinafter *Jury Trial in Complex Litig.*] (evaluating jury purposes and qualifications). The United States Supreme Court interpreted the Constitution to guarantee the right to a capable and informed jury. See *Carter v. Jury Comm'n*, 396 U.S. 320, 333 (1970). Further, the Sixth Amendment right to a trial by an "impartial jury" requires that a criminal jury must be drawn from a representative cross-section of the community. See *Fay v. New York*, 332 U.S. 261, 296-97 (1947) (Murphy, J., dissenting).

multi-party class actions with volumes of documents, hinder jurors from properly evaluating litigant's claims.⁹ Many trial advocates recommend restructuring the current system to include professional jurors or to heighten juror educational qualifications in complex civil litigation.¹⁰ These specially qualified jurors,¹¹ could help eliminate confusion of issues, make better decisions, and render prompt verdicts.¹²

The purpose of this note is to examine juror qualifications and stress the need to implement professional juries in complex civil litigation. This note advocates that state and federal courts renew the practice of professional juries. Part II of this note traces the historical development of special juries from England's common and statutory law to the adoption of these juries in American courts.¹³ Part III discusses juror competency re-

⁹ See, e.g., Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons From Civil Jury Trials*, 40 Am. U. L. Rev. 727, 729 (1991) (questioning role of civil jury because of increasing complexity of issues); Dan Drazen, *The Case For Special Juries in Toxic Tort Litigation*, 72 *Judicature* 292, 293 (1989) (proposing special juries comprised of scientific and medical experts for toxic tort litigation); Rita Sutton, *A More Rational Approach to Complex Civil Litigation in the Federal Courts: The Special Jury*, 1990 U. Chi. Legal F. 575, 575 (1990) (advocating the need for specialized juries due to jury confusion of complex issues); see also Judicial Conference of the United States, Report of the Federal Courts Study Committee 97 (Apr. 2, 1990) (recommending study to evaluate courts' assessment of complex scientific evidence).

¹⁰ See Jeanette E. Thatcher, *Why Not Use that Special Jury?*, 31 Minn. L. Rev. 232, 232 (1947). Proponents of the jury system perceive it as "a participatory democracy" serving its respective function, while opponents evaluate it as "an awkward relic" in desperate need of reform. *Id.* One jury scholar argues that a "blue ribbon" panel represents the best means to avoid jury bias, prejudice, and passion. See Raymond Moley, *Our Criminal Courts* 112 (1974). Another commentator has suggested that courts organize cases by subject matter rather than by geographical lines. See Roberta Katz, *Old-Fashioned Justice in the Information Age*, Wash. Times, Sept. 5, 1996, at A17 (noting that specialized tax, bankruptcy, family, juvenile, and military courts are in place). For example, Katz suggests courts for environmental law, telecommunications law or intellectual property law. *Id.* These specialty courts would be staffed with judges chosen for their technical and legal qualifications and experts would move from the witness stand into the jury box. *Id.*; see Frank R. Davis, *Esq.*, Mass. L. Wkly, July 22, 1996, at B2 (reporting state jury commissioner's preference for professional juries in certain complex cases).

¹¹ These highly qualified jurors are synonymously referred to as professional, select, special, or "blue ribbon" jurors. Sutton, *supra* note 9, at 577.

¹² See *id.* (encouraging the selection of jurors who have minimal level of knowledge relating to area of litigation).

¹³ See *infra* notes 19-90 and accompanying text.

quirements under differing state and federal jury qualification laws.¹⁴ Part IV articulates several problems with lay jurors in complex civil litigation.¹⁵ Part V evaluates the constitutional and statutory challenges to special juries.¹⁶ Part VI discusses current jury reform measures.¹⁷ Finally, part VII examines other viable solutions to improve jury decisionmaking, concluding that current laws should embrace measures implementing professional juries to eliminate erratic and unjust verdicts.¹⁸

II. HISTORICAL DEVELOPMENT OF PROFESSIONAL JURIES

The modern jury originated in ninth century medieval England and on the European continent.¹⁹ Before the development of the jury system in England, three forms of dispute resolution existed: trial by battle, trial by ordeal, and trial by compurgation.²⁰ The English developed the jury sys-

¹⁴ See *infra* notes 91-134 and accompanying text.

¹⁵ See *infra* notes 135-81 and accompanying text.

¹⁶ See *infra* notes 182-203 and accompanying text.

¹⁷ See *infra* notes 204-10 and accompanying text.

¹⁸ See *infra* notes 211-25 and accompanying text.

¹⁹ See James R. Gobert & Walter E. Jordan, *Jury Selection: The Law, Art, and Science of Selecting a Jury* 8 (2d. ed. 1990) (tracing jury development to medieval England and on the European continent). The jury, as an institution, was formally recognized in 1215 in the Magna Carta. *Id.* at 9; see also Vanderbilt, *supra* note 4, at 51 (tracing the jury system back to ninth century Carolingian monarchs and later embraced by England); Moore, *supra* note 1, at vii (examining long history of jury process). From the time of Henry II of England, individuals were tortured to submit to a trial by jury and, like judges of the time, jurors were under the crown's influence to render certain verdicts. *Id.*; see also Jack H. Friedenthal et al., *Civil Procedure* § 11.10, at 520 (1985) (reviewing history of juror qualifications and state jury selection based primarily on voter registration lists and "key man" systems). A key man or key number system drew jurors based on how they were separated on a voting list; for example, by choosing every fifth name. Joiner, *supra* note 6, at 78.

²⁰ Gobert & Jordan, *supra* note 19, at 8-9. Trial by battle was premised on the theory that God would enable the most righteous to prevail. *Id.* Similarly, trial by ordeal was premised on divine intervention. *Id.* There were three types of trial by ordeal: ordeal by hot iron; ordeal by water; and ordeal of the accused morsel. *Id.* In ordeal by hot iron the accused had to carry a hot iron, after which the accused's hands were wrapped and allowed three days to heal; if the wounds healed, the accused was found innocent. *Id.* In ordeal by water, the accused was immersed in water. *Id.* If he floated, the court deemed him guilty. *Id.* In an ordeal by morsel, the defendant was given a morsel of bread by clergy and told to pray; choking on the bread was a sign of guilt. *Id.* If the accused could not swallow the

tem as a mode of trial for certain types of actions.²¹ The objective of the jury trial was to determine a single question of fact, generally between a single plaintiff and defendant.²² The earliest records indicate only simple matters were submitted to a jury.²³ Complex issues and questions of law remained for the court.²⁴

Common law courts selected jurors from two classes of people.²⁵ The first class encompassed those with knowledge of the events, values, parties involved in each case, and the trustworthiness of testifying witnesses.²⁶ The second class included individuals familiar with the various methods, practices, and customs involved in the case.²⁷

The first class of jurors acted as witnesses.²⁸ These people, known as "next neighbor" jurors, originally lived in the community where the dis-

bread or did so incompletely, it was a sign of having borne false witness. *Id.* A trial by compurgation required twelve citizens to swear to a party's credibility. *Id.* If a sufficient number of compurgators swore that a party was credible, the party prevailed. *Id.*

²¹ See Vanderbilt, *supra* note 4, at 51 (indicating England adopted the jury system from Normans and Carolingian monarchs). The English allowed jury trials for suits at common law. *Id.* Courts sitting in equity, probate, and admiralty matters did not employ a jury. *Id.*

²² *Id.* at 55.

²³ *Id.*

²⁴ *Id.*

²⁵ See Joiner, *supra* note 6, at 189 (reviewing the selection of jurors at common law).

²⁶ *Id.*

²⁷ *Id.*

²⁸ See Jon M. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 2* (1977) (dating jury origins to William the Conqueror who developed inquisition system, summoning important men from neighborhood, and questioning them). State officials selected approximately twelve individuals as jurors because of their knowledge of the controversy. Gobert & Jordan, *supra* note 19, at 9-10. Jurors had the obligation to render a verdict, and similar to the modern day witness, jurors testified under oath regarding the facts of the case. *Id.* Unlike compurgators, however, jurors did not testify to a party's trustworthiness. *Id.* In some cases, state officials could not find sufficient witnesses to comprise the jury. *Id.* at 9. As a result, the jury consisted of those unfamiliar with the controversy. *Id.* "In other cases, a twelve person jury was inadequate to encompass all who possessed relevant information bearing on the case." *Id.* If officials refused to expand the size of the jury pool, they separately questioned additional witnesses. *Id.* at 10. The additional witnesses, unlike the jury panel, were subject to cross-examination. *Id.*

pute occurred and testified as to their personal knowledge of the facts.²⁹ These jurors testified under oath, swore to an individual's credibility, and offered knowledge of the events giving rise to the dispute.³⁰ Presumably, their firsthand knowledge placed "them in the best position to adjudicate the dispute on the merits."³¹

Over time, the practice of impaneling jurors with first-hand knowledge stopped.³² The jury as an institution transformed from a body of persons knowledgeable of the facts to a body of persons ignorant of the facts.³³ Eventually, those persons knowledgeable about the facts testified as witnesses while those unacquainted with the facts served as jurors.³⁴

Throughout the seventeenth and eighteenth centuries, American colonists implemented England's developing jury system.³⁵ Colonists also

²⁹ See Vanderbilt, *supra* note 4, at 51 (indicating jurors lived in dispute locality). If jurors were unfamiliar with the dispute, the court sought individuals with such knowledge. *Id.* at 51 n.4.

³⁰ See Gobert & Jordan, *supra* note 19, at 9 (stating the jury metamorphosized from a body aware of facts to an unacquainted body). Under old Anglo-Saxon law, jurors, or compurgators, served dual roles. Valerie P. Hans & Neil Vidmar, *Judging the Jury* 23 (1986). They decided the merits of cases and acted as character witnesses. *Id.* A friend of one party, a compurgator, supported a party's credibility by taking an oath that the party was honest. *Id.*

³¹ Gobert & Jordan, *supra* note 19, at 9.

³² *Id.* at 8-12.

³³ *Id.* at 10. English officials under the King decided that lawyers should cross-examine some witnesses and not those witnesses who served as jurors. *Id.* Further, the officials determined that it made little sense to have some jurors who knew the facts and others who did not. *Id.*

³⁴ *Id.*

³⁵ See Van Dyke, *supra* note 28, at 6 (indicating colonists guaranteed right to trial by jury in their founding charters). The right to jury trial was also granted in the Constitution of the original thirteen states. *Id.* at 6-7. In 1791, the Fifth, Sixth, and Seventh Amendments expressly guaranteed every citizen the right to a jury trial. U.S. Const. amends. V, VI, VII. The Fifth Amendment provides that the government cannot criminally charge anyone "unless on a presentment or indictment of a grand jury." U.S. Const. amend. V. The Sixth Amendment states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." U.S. Const. amend. VI. The Seventh Amendment states in relevant part:

In Suits at common law, where the value in controversy shall exceed twenty

adopted a second type of jury system where the court impaneled individuals in a special manner because of their expertise in certain areas.³⁶ This unique method of impanelment, known as the special jury system, has endured in various forms since the fourteenth century.³⁷

Four types of special juries existed in common law England.³⁸ The first type, the gentlemen jury, consisted of men of high social or economic status.³⁹ The second type, the struck jury, was selected upon the demand of either party and consisted of principal landowners selected from a list of forty-eight names.⁴⁰ The third type, the professional jury, had members who possessed special knowledge or expertise.⁴¹ The fourth and most unique type, the party jury, attempted to ensure a foreign defendant of fair-

dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

U.S. Const. amend. VII.

The Supreme Court of the United States noted the functional significance of the jury in the American political system:

A right to jury trial is granted to criminal defendants in order to prevent oppression of the Government. . . . The framers of the constitution strove to create an independent judiciary but insisted upon further protection against such arbitrary action. Providing an accused with the right to be tried by a jury of his peers gives him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge. . . . Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power C a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.

Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968).

³⁶ See Richard C. Baker, *In Defense of the "Blue Ribbon" Jury*, 35 Iowa L. Rev. 409, 409 (1950) (discussing case law requiring jurors to have expert knowledge of subject matter); James C. Oldham, *The Origins of the Special Jury*, 50 U. Chi. L. Rev. 137, 174 (1983) (tracing commencement of special juries).

³⁷ See Baker, *supra* note 36, at 409 (examining the origin of special jury tribunals).

³⁸ See *infra* notes 39-90.

³⁹ Oldham, *supra* note 36, at 145 n. 32.

⁴⁰ See Oldham, *supra* note 36, at 164-66. Not all residents of the vicinity qualified as jurors because officials required jurors to own a certain amount of property in order to prevent corruption. See Vanderbilt, *supra* note 4, at 51, 62-63. For example, a law still existed in 1953 requiring jurors to own property worth,10, or occupy a house with not less than fifteen windows. *Id.* at 62.

⁴¹ Oldham, *supra* note 36, at 164.

ness by encompassing only individuals who were the same race, sex, or origin as the defendant.⁴²

A. *The Gentlemen Jury*

English Parliamentary legislation reflected efforts to ensure a highly capable jury by requiring jurors to own property or be men of high social standing.⁴³ This legislation sought to secure wealthy jurors who were presumptively immune from bribery.⁴⁴ In addition, this practice attempted to impanel "men of quality," as these persons often avoided jury service by paying off impaneling officers -- sheriffs and coroners.⁴⁵ These jurors often served in grand jury proceedings entailing national importance and in petit jury proceedings involving issues such as high treason or seditious libel.⁴⁶

English law initially required gentlemen jurors to own property valuing at least forty-shillings.⁴⁷ Later, in 1664, the property requirement doubled to twenty pounds, or roughly thirty dollars.⁴⁸ In some cases, the government further required that a potential juror be a person legally entitled to be called esquire, or a person of high decree, such as a banker, a merchant, or the head of a dwelling rated at not less than one-hundred pounds in a town of 20,000 or fifty pounds elsewhere.⁴⁹

B. *The Struck Jury*

The struck jury has its roots in mid-1600 English common and statutory law.⁵⁰ In America, struck jury provisions date back to the mid-1800s where they existed by way of statute and civil procedure codes.⁵¹ Provisions authorizing the use of struck juries attempted to provide more intelligent and capable jurors in exceptional cases.⁵² In practice, however, these

⁴² See *infra* notes 70-74 and accompanying text.

⁴³ Oldham, *supra* note 36, at 164.

⁴⁴ *Id.* at 141.

⁴⁵ *Id.*

⁴⁶ *Id.* at 139-141.

⁴⁷ *Id.* at 164.

⁴⁸ Oldham, *supra* note 36, at 164.

⁴⁹ Moore, *supra* note 1, at 125.

⁵⁰ Oldham, *supra* note 36, at 176-79.

⁵¹ See 1937 Judicial Council St. N.Y. Ann. Rep. 124-27 [hereinafter Judicial Council Report] (tracing history of struck jury in New York). By 1937, several states had enacted struck jury statutes: Delaware, Indiana, Michigan, New York, Virginia, and West Virginia. *Id.*

⁵² *Id.*

juries were not special in the sense that jurors were superior to others in some way.⁵³ Rather, the jury commissioner selected potential jurors from jury lists comprised of ordinary individuals who the clerk deemed the most impartial.⁵⁴

Under the typical struck jury statute, a court could order a trial by struck jury, in civil and criminal cases, on motion of either party but only upon a showing that the importance or intricacy of the case required, or that the administration of justice would be advanced by such a trial.⁵⁵ After granting the motion, the court directed an official to select names of forty-eight persons whom the official deemed most indifferent and best qualified to try the case.⁵⁶ The attorneys for the parties would then take turns striking off twelve individuals from this list.⁵⁷ The remaining twenty-four individuals comprised the jury.⁵⁸ In effect, the struck jury served to give each side ten more peremptory challenges.⁵⁹

C. *The Professional Jury*

Like the struck jury system, courts authorized professional jury tribunals to provide more intelligent and capable juries in complicated litigation.⁶⁰ From the fourteenth through the seventeenth centuries, English courts allowed parties to employ professional jurors.⁶¹ Impaneled with the consent of both parties, these jurors were generally men of particular trades chosen for their special knowledge of, or experience in, mercantile issues.⁶²

Early examples of professional juries abound.⁶³ For example, in disputes of church patronage, jury tribunals consisted of six clergymen and

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See *Fay v. New York*, 332 U.S. 261, 267 (1947) (noting mechanics of struck jury impanelment in New York); Judicial Council Report, *supra* note 42, at 5.

⁵⁶ *Fay*, 332 U.S. at 279 n.17.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See Judicial Council Report, *supra* note 51, at 6 (noting struck juries suited to conditions a century ago, but defunct today because of increased use of peremptory challenges).

⁶⁰ See Oldham, *supra* note 36, at 164.

⁶¹ See Baker, *supra* note 36, at 409 (tracing special jury to fourteenth century); Thatcher, *supra* note 10, at 234 (noting origin of special jury "lost in antiquity").

⁶² Oldham, *supra* note 36, at 164.

⁶³ *Id.* at 173.

six laypeople.⁶⁴ To ascertain whether a woman's pregnancy claim was valid, a party could request the court to impanel a jury of matrons.⁶⁵ In 1394, a jury of "cooks and fishmongers" presided over the prosecution of a defendant accused of selling bad food.⁶⁶ Parties impaneled a jury of book-sellers and printers in a 1663 libel trial,⁶⁷ and early King's Bench cases report juries of clerks and attorneys when the issue was falsification of writs by attorneys and extortion by court officials.⁶⁸ Even in the eighteenth century, jurors well-versed in commercial law assisted Lord Mansfield in articulating commercial law principles.⁶⁹

D. The Party Jury

The party jury, or jury *de medietate linguae*, commenced in England during the reign of King Richard I.⁷⁰ In English and American government, the party jury emerged to ensure that a jury could understand a foreigner's point of view.⁷¹ From 1190 until 1807, English law permitted a defendant, usually a foreigner or minority, to impanel a jury resembling a defendant's nationality or race.⁷² This practice sought to grant a foreign defendant a fair trial, rather than to provide a well-informed jury of professionals.⁷³ For example, courts impaneled jurors who could better un-

⁶⁴ *Id.* at 168 (citing examples of special juries).

⁶⁵ *See id.* at 171 (indicating female defendant in criminal case could delay execution if found pregnant).

⁶⁶ *See id.* at 171-74 (noting certain mercantile trades qualified individuals as experts); *cf. Drazan, supra* note 9, at 297 (indicating special jury used in such cases as will contest involving over 135 witnesses, railroad company's reorganization, and securities litigation).

⁶⁷ *See Oldham, supra* note 36, at 174 (citing *Rex v. Twyn*, 6 State Trials 513 (Old Bailey 1663)).

⁶⁸ *See* 5 Select Cases In The Court of King's Bench under Edward III 47 (G.O. Sayles ed. 1958) (employing special jury upon consent of parties); *Oldham, supra* note 36, at 173.

⁶⁹ *See Oldham, supra* note 36, at 161 (declaring that English impaneled special juries of merchants to adjudicate commercial disputes until 1971); *see also Van Dyke, supra* note 28, at 10.

⁷⁰ *See* Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and Proposal for Change*, 74 B.U. L. Rev. 777, 781 (1994) (discussing origins of jury referred to as "party" or "mixed" jury).

⁷¹ *Oldham, supra* note 36, at 170.

⁷² *Id.* at 169.

⁷³ *See Oldham, supra* note 36, 167-69 (indicating party juries ensured understanding point of view of foreigner). Examples of this practice include: juries consisting wholly of foreigners when both parties in the suit were aliens; juries consisting of aliens and citizens when one party was a citizen and other was alien; and jury where half of the members were

derstand characteristics possessed by the defendant, such as a different nationality, religion, or disability.⁷⁴

E. *The Erosion of Special Juries in America*

After settling in North America, English colonists continued the party jury system.⁷⁵ This practice, along with the struck jury and professional jury system, eventually became part of the individual states' common-law traditions.⁷⁶ Over time, however, the use of special juries became virtually defunct.⁷⁷ By the early twentieth century, state legislatures incorporated the struck jury method, but the use of professional juries and party juries significantly declined.⁷⁸ Sixteen states enacted struck jury statutes in the twentieth century, and at least two states provided for a struck jury without legislative authorization.⁷⁹ For example, from 1741 until the 1960s, New York employed struck juries upon the motion of either party if the importance or intricacy of the case seemed to justify a select fact-finding tribunal.⁸⁰

local politicians when issue regarded local customs. *Id.* at 167-68, 173-74. This "trial de medietate" was unavailable to rogues and vagabonds, those involved in treason trial, and actions involving imports and exports. *Id.* at 170. *See also* Judicial Council Report, *supra* note 51, at 5 (recommending abolishing foreign jury because local prejudice no longer feared).

⁷⁴ *See* Van Dyke, *supra* note 28, at 11 (demonstrating use of mixed jury in thirteenth-century England). For instance, both victim and accused impaneled a mixed jury of Jews and Christians to resolve a dispute between a Jew and Christian. *Id.* Today, in some Canadian provinces, the sheriff must compose a panel of jurors, half of which are French-speaking persons and half English-speaking persons. *Id.*; *see also* Oldham, *supra* note 36, at 170 (discussing origins of party jury).

⁷⁵ *See* Ramirez, *supra* note 70, at 782 (noting English colonists continued ancient custom of mixed jury when settling in America); Judicial Council Report, *supra* note 51, at 6-7 (advocating abolishing foreign, struck, and professional juries in New York).

⁷⁶ Ramirez, *supra* note 60, at 779.

⁷⁷ *See* Judicial Council Report, *supra* note 51, at 6-7 (noting use of special juries declined in America); *see also* Vanderbilt *supra* note 4, at 63 (indicating special juries used in England in civil and criminal cases until 1949).

⁷⁸ Judicial Council Report, *supra* note 51, at 125.

⁷⁹ *See* Thatcher, *supra* note 10, at 251 (citing states which have at one time or another permitted struck juries). Alabama, Arkansas, Delaware, Georgia, Indiana, Louisiana, Maryland, Michigan, Minnesota, Missouri, New Jersey, New York, Ohio, Pennsylvania, Virginia, West Virginia have all employed struck juries by statute. *Id.* Oregon and New Jersey maintained struck juries without legislative authorization. *Id.*

⁸⁰ *See* Fay v. New York, 332 U.S. 261, 267-68 (1947) (demonstrating use of struck

By 1937, the liberal use of peremptory challenges allowed by law made the struck jury system virtually inoperative.⁸¹ Many of the states formerly employing struck juries repealed these statutes.⁸² Today, states are reimplementing laws permitting struck juries upon the motion of either party.⁸³ Pilot projects conducted in 1995 have noted this re-emergence.

Congress has yet to codify the professional jury system on a federal level.⁸⁴ As a result, a federal court may impanel a professional jury only upon the consent of both parties.⁸⁵ For example, a federal district court judge in *In re Richardson-Merrell "Benedectin" Products Liability Litigation*,⁸⁶ suggested a special jury tribunal to litigants, yet held that because the possibility of a special jury was not included in the rules of the United States District Court, it would only be allowed if *both* parties consented.⁸⁷

Although some states still permit struck juries, few courts will impanel professional or party juries, even where a defendant, victim, and wit-

jury in New York); Baker, *supra* note 36, at 414 (indicating New York employed struck juries).

⁸¹ Judicial Council Report, *supra* note 51, at 6.

⁸² See *id.* (noting struck jury system is almost never used). At least one state, however, has maintained the use of special juries in complex civil cases. See Del. Code Ann. tit. 10, § 4506 (1994). The use of special juries in Delaware is likely due to the vast number of incorporated businesses which are involved in complex civil litigation. See *Jury Selection & Composition*, *supra* note 8, at 1456-57 n.127.

⁸³ See William W. Schwarzer & Alan Hirsch, *The Modern American Jury, in Verdict: Assessing the Civil Jury System* 399, 409 n.24 (Robert E. Litan ed., 1993) (assessing judges' authorization to select from the panel several jurors with relevant education, business, scientific, or technical experience); Note, *Confronting the New Challenges of Scientific Evidence*, 108 Harv. L. Rev. 1583, 1596-97 (1995) [hereinafter *Challenges of Scientific Evidence*].

⁸⁴ See *Challenges of Scientific Evidence*, *supra* note 83, at 1596-97 (explaining current application of "blue ribbon" juries in the federal system).

⁸⁵ *Id.*

⁸⁶ 624 F. Supp. 1212 (S.D. Ohio 1985), *aff'd in part and vacated and remanded in part*, 857 F.2d 290 (6th Cir.), *cert. denied*, 488 U.S. 1006 (1988).

⁸⁷ See *id.* at 1217. The court denied a jury composed of persons knowledgeable in the field, or a jury of those persons having the most formal education available in the jury panel, because plaintiff's counsel failed to consent. *Id.*; see also Schwarzer & Hirsch, *supra* note 83, at 409. *But see* Fay v. New York, 332 U.S. 261, 268 (1947) (permitting special jury by motion of either party in civil action and by either prosecution or defense in criminal cases). Likewise, Delaware permits a judge to order a professional jury upon the application of any party in a complex civil case. Del. Code Ann. tit. 10, § 4506 (1994).

ness have special conditions.⁸⁸ Instead, when cases are deemed too complex for jury comprehension, the court may deny the right to a jury tribunal.⁸⁹ Furthermore, jurors capable of understanding a party's point of view are no longer necessary to alleviate unfair prejudice because of change of venue opportunities.⁹⁰

III. JUROR COMPETENCY & QUALIFICATIONS

*If laymen are to continue to be involved in government as jurors, we must be certain those who serve on juries have capacity to think and understand problems.*⁹¹

The modern jury selection process remains based on random selection from a cross section of the population, usually derived from voter registration and driver's license lists.⁹² Rarely do parties request a professional,

⁸⁸ See Mike Kataoka, *Defense Seeks Deaf Jurors in Teen Rape Case*, Press Enterprise, Oct. 12, 1996, at B1 (commenting on denial of defense attorney's motion for an all-deaf jury). One California district judge denied a deaf rape case defendant's motion for an all-deaf jury despite arguments that non-deaf parties may misinterpret facial expressions and body language of people using sign language. *Id.* The court analogized deaf parties to those who need language interpreters. *Id.*

⁸⁹ *E.g.*, ILC Peripherals Leasing Corp. v. IBM, 458 F. Supp. 423, 447 (N.D. Cal. 1978) (barring jury trial when issue required knowledge of computer technology and financial background), *aff'd sub. nom.* Memorex Corp. v. IBM, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981).

⁹⁰ See *Fay*, 332 U.S. at 279 n.18 (noting foreign jury lost usefulness because change of venue obtained easily); Judicial Council Report, *supra* note 51, at 124.

⁹¹ See Joiner, *supra* note 6, at 78 (concluding that courts should not compose juries of single homogeneous group such as all women, all men, or all unemployed persons). *But see* Alder, *supra* note 2, at B1. According to Harvard Law Professor Arthur Miller, "[t]he jury system is a tremendous exercise in participatory democracy. . . . For us to start saying we are going to exclude complex commercial cases because we are smarter than ordinary people is a mistake." *Id.*

⁹² See Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 53 (1968) (codified as amended at 28 U.S.C. §§ 1861-74 (1994)) (providing plan for selecting grand and petit jurors). The Jury Selection and Service Act provides in pertinent part:

Each United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors Among other things, such plan shall--

- (1) either establish a jury commission, or authorize the clerk of the court, to manage the jury selection process. . . .
- (2) specify whether the names of the prospective jurors shall be selected from

struck, or party jury.⁹³ Yet the random selection process cannot ensure that a jury will be competent in terms of education, experience, and capacity to exercise judgement and intelligent leadership.⁹⁴ With exhaustive demands on lay jurors resulting from longer, more complex trials, and difficult decisions with crucial impacts, scholars often question juror competency.⁹⁵

Reviving the use of professional jury tribunals is one way of improving jury decisions in complex litigation. Impaneling professional juries would alleviate poor decision making and erratic verdicts by ensuring that competent individuals, who are familiar with the subject matter of the litigation, render decisions.⁹⁶ Educated jurors familiar with the general concepts underlying a lawsuit are more likely to produce accurate and well-reasoned decisions.⁹⁷

Although striving for competent decisions, many lawyers fear that educated jurors will see through a weak case and use their education to

the voter registration lists of actual voters of the political subdivisions within the district or division. . . . The plans for the districts of Puerto Rico and the Canal Zone may prescribe some other source or sources of names of prospective jurors in lieu of voter lists. . . .

28 U.S.C. § 1863(a)-(b) (1994). The plan provides for a master jury wheel into which the names of those randomly selected would be placed. See 28 U.S.C. § 1863(b)(4) (1994). The master wheel provides a list of prequalified jurors for its current session. Vanderbilt, *supra* note 4 at 71. Other selection sources include assessor's roll or tax list, poll list, telephone or city directories, and census reports. *Id.* at 70; see generally Romualdo P. Eclavea, Annotation, *Construction & Application of Provisions of Jury Selection & Service Act of 1968 (28 U.S.C.A. §§ 1861-1867) Governing Plans For & Manner of, Selecting Federal Grand & Petit Jurors*, 17 A.L.R. Fed. 590 (1973) (reviewing application of Jury Selection and Service Act of 1968).

⁹³ See Judicial Council Report, *supra* note 51, at 126 (noting decline in use of special juries).

⁹⁴ See Schwartzter & Hirsh, *supra* note 83, at 408; Richard Lempert, *Civil Juries and Complex Cases*, in *Verdict: Assessing the Civil Jury System* 181, 192-93 (Robert E. Litan ed., 1993) (noting jury problems in understanding case compounded when jurors lack college education). Lempert indicates that education and occupation are correlatives of juror competence. *Id.* at 192.

⁹⁵ See *infra* notes 96-134 and accompanying text.

⁹⁶ Joiner, *supra* note 6, at 77.

⁹⁷ Drazan, *supra* note 9, at 293; see generally Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 DePaul L. Rev. 49 (1997) (reviewing proposals for highly educated jurors).

sway other jurors.⁹⁸ Confusion can increase an attorney's odds of winning.⁹⁹ Despite the potential value of educated jurors well-versed in the technical or economic concepts surrounding a case, evidence suggests that trial lawyers use peremptory challenges to exclude jurors with specialized knowledge, or intentionally promote ambiguity and confusion of issues.¹⁰⁰ Indeed, cunning lawyers often attempt to obtain a more sympathetic jury by packing the box with less-educated citizens.¹⁰¹

Proponents of the professional jury system favor using jurors with greater experience in difficult cases.¹⁰² Radical proponents propose special juries in all cases.¹⁰³ "Blue ribbon" advocates favor a system of jurors who are more familiar with the technical language and context of a suit than other jurors.¹⁰⁴ Ideally, educated jurors trained in the area forming the heart of the case or controversy will better handle jury tasks and render better decisions.¹⁰⁵

Opponents of the blue ribbon system warn that the desire to select competent jurors by the "systematic and intentional exclusion of all but the

⁹⁸ See Schwartzter & Hirsh, *supra* note 83, at 408 (indicating educated and experienced jurors often eliminated because they may be too influential); Sutton, *supra* note 9, at 577 (discussing exclusion of educated jurors); Douglas Ell, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 Conn. L. Rev. 775, 781 (1978); Shane Ham, *Twelve Stupid Men* (April 10, 1997) <<http://www.journalx.com/columns/shane/sh041097.html>> (indicating lawyers with bad cases select dull-witted individuals to serve as jurors and spend hours baffling them with "expert testimony").

⁹⁹ Schwartzter & Hirsh, *supra* note 83, at 408.

¹⁰⁰ *Id.* (recognizing that confusion and ambiguity may promote the odds of one party's prevailing); Ell, *supra* note 98, at 780-81 (stating lawyers often exercise peremptory challenges to eliminate hostile jurors who may use personality, education or experience to sway others).

¹⁰¹ See Stephen A. Saltzburg, *Improving the Quality of Jury Decisionmaking, in Verdict: Assessing the Civil Jury System* 341, 365 (Robert Litan ed., 1993) (indicating adversarial attorneys do not always have incentive to promote understanding).

¹⁰² See Drazan, *supra* note 9, at 293 (encouraging special juries in toxic tort litigation).

¹⁰³ See William L. Ransom, *Why Business Men Should Serve on Juries*, 14 Tenn. L. Rev. 181, 183 (1936). Ransom, a former American Bar Association President and prior justice of the City Court of New York, advocated blue ribbon panels in all cases. See Baker, *supra* note 36, at 409.

¹⁰⁴ *Jury Trial in Complex Litigation, supra* note 8, at 916.

¹⁰⁵ *Id.*

best or the most learned or intelligent” undermines the judicial process.¹⁰⁶ These cynics reason that professional, affluent, and well-educated people, generally from the upper strata of society, undermine the representative and democratic basis of the jury.¹⁰⁷

Even if a representative jury is desirable, professional jury advocates emphasize that randomness cannot be equated with representativeness.¹⁰⁸ These researchers indicate six to twelve individuals chosen at random are more likely to reflect the lower end of the spectrum of education and experience, because of pre-trial excuses and peremptory challenges and the fact that not every citizen qualifies for jury service.¹⁰⁹ For example, those holding certain public office in every state cannot serve on a jury.¹¹⁰

Undoubtedly, conflicting goals of representativeness and accurate decision-making create judicial complications.¹¹¹ These important societal

¹⁰⁶ See Van Dyke, *supra* note 28, at 11 (indicating jurors drawn from a narrow group may fail to recognize community concepts). Van Dyke notes that a jury composed entirely of a defendant’s racial, social, or economic group, would fail to see a victim’s perspective. *Id.*

¹⁰⁷ See *Fay v. New York*, 332 U.S. 261, 299 (1947) (Murphy, J., dissenting); *Thiel v. Southern Pac. Ry. Co.*, 328 U.S. 217, 220 (1946). As Justice Frank Murphy adamantly stated in *Thiel*:

The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, contemplates an impartial jury drawn from a cross-section of the community. This does not mean, of course that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such representation would be impossible. But it does mean that the prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of the groups. Recognition 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 discriminations which are abhorrent to the democratic ideals of trial by jury.

Thiel, 328 U.S. at 220 (citations omitted).

¹⁰⁸ See Schwartzner & Hirsh, *supra* note 83, at 408 (reviewing educational requirements for jury selection process).

¹⁰⁹ See *id.* at 408 (discussing competency problem in jury trials).

¹¹⁰ *Id.* at 415.

¹¹¹ See Saltzburg, *supra* note 101, at 345-48 (discussing the improvement of juror decision-making).

objectives raise an issue which cannot be ignored: Will a jury do a better job if less-educated jurors are entirely excluded? Ultimately, the answer depends on how people view the kinds of decisions jurors are called upon to make in trials. Some researchers insist intelligent jurors better judge the credibility of witnesses and assess the amount of money that should be paid as punitive damages.¹¹² Other scholars suggest that a lay juror's judgment may be more accurate than that of judges and experts.¹¹³ Scholars reason that lay jurors may look beyond the legalese with which lawyers, judges, and other professionals become comfortable and instead draw upon their own personal experiences.¹¹⁴ Researchers suggest that everyday experiences may be more relevant to resolving disputes than education.¹¹⁵

Critics of heightened juror qualifications speculate that judges and lawyers can present issues in an understandable way as long as courts do not draw jurors exclusively from the worst-educated portion of the community.¹¹⁶ They insist that experience and education do not always ensure accuracy and fairness.¹¹⁷ For example, knowledge within one's field of expertise does not guarantee quality decisionmaking in other technical areas.¹¹⁸ Although a doctor may understand scientific evidence better in a medical malpractice or toxic tort action, critics question whether a doctor is necessarily better at understanding accounting issues than a less-educated midwife.¹¹⁹

In 1968, Congress reformed the jury selection process to create a more impartial and representative sampling of the public.¹²⁰ The Federal Jury

¹¹² *Id.* at 347.

¹¹³ *Id.* at 348.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Saltzburg, *supra* note 101, at 348.

¹¹⁷ *Fay v. New York*, 332 U.S. 261, 299 (1947) (Murphy, J., dissenting).

¹¹⁸ *Id.*

¹¹⁹ *See* Saltzburg, *supra* note 101, at 348 (stating expertise in one area may be irrelevant in accurately deciding a case outside one's field of expertise).

¹²⁰ Van Dyke, *supra* note 28, at 16 (discussing Congressional debate on 1968 Act). Judge Irving R. Kaufman, former head of the Federal judiciary's Committee on the Operation of the Jury System, defended the proposed bill before Congress:

The principal opposition to the [bill] is centered on the requirement that juror qualifications be determined on the basis of objective criteria only. This provision would abolish the so-called blue ribbon jury, chosen for special "intelligence" and "common sense" qualifications. . . . We have learned that at

Selection and Service Act directs federal courts to choose jurors randomly and focuses on objective jury qualification standards.¹²¹ Although considering “intelligence” and “common sense” as qualifications, Congress ultimately rejected these proposals.¹²² The existing federal system most likely prevents the use of professional juries.¹²³ The combination of liberal federal competence standards and broad discretion of the trial court to excuse jurors for “undue hardship and inconvenience” makes selecting highly-educated citizens as federal jurors extremely difficult.¹²⁴

the present time a prospective juror may be considered unfit for jury service because he is not very articulate, or speaks with an accent, or appears nervous But all these considerations are arbitrary. They having nothing to do with “intelligence,” “common sense,” or, what is more important, ability to understand the issues in a trial. . . . The end result of subjective test is not to secure more intelligent jurors, but more homogeneous jurors. If this is sought in the American jury, then it will become very much like the English jury - predominantly middle-aged, middle-class and middle-minded. . . . If the jury’s verdict is to reflect the community’s judgment - *the whole community’s judgment* - jurors must be fairly selected from a *cross-section of the whole community*, not merely a segment of it.

Id. at 16-17.

¹²¹ See 28 U.S.C. § 1865 (1994) (providing qualifications for federal jury service).

The Act provides in relevant part:

[A federal] district court judge . . . shall deem any person qualified to serve . . . unless he:

- (1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;
- (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;
- (3) is unable to speak the English language;
- (4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or
- (5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.

. . .

28 U.S.C. § 1865(b) (1994).

¹²² See Van Dyke, *supra* note 28, at 17. One federal judge on the committee argued that “[g]ood jury service is judgment, an inherent mental quality which does not perforce coincide with superior intelligence.” *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

Under the Federal Jury Selection and Service Act, the only competency requirements are that jurors “have no mental or physical infirmity conflicting with their ability to render a satisfactory judgment,” and that a juror have proficiency in the English language.¹²⁵ Yet federal courts, such as the Fifth Circuit in *Rabinowitz v. United States*,¹²⁶ indicate that courts can heighten these minimum standards.¹²⁷ As an alternative to the use of professional juries, Congress should heighten federal jury qualifications to provide some minimum level of competency such as high school or college education.¹²⁸

Similarly, states should statutorily heighten jury qualifications. Although many states differ in their juror qualifications, no state currently requires jurors to have a specified level of education.¹²⁹ Several states, however, require that jurors possess certain qualities, such as good character and intelligence.¹³⁰ Yet, provisions mandating certain educational and capacity requirements, however, have been challenged in the Supreme Court of the United States.¹³¹ In *Carter v. Jury Commission*,¹³² the Su-

¹²⁵ 28 U.S.C. § 1865(b) (1994).

¹²⁶ 366 F.2d 34 (5th Cir. 1966).

¹²⁷ *Id.* at 50.

¹²⁸ See John Guinther, *The Jury in America* 207 (1988) (questioning what generalized test would examine an individual's competency). Guinther points to I.Q. tests, memory tests, minimal educational qualifications, or some working knowledge of the subject of the suit. *Id.*; see also Strier, *supra* note 97, at 49; Sutton, *supra* note 10, at 596 (noting professors' plan requiring a special jury wheel be maintained of prospective special jurors who have “earned a bachelor's degree from an accredited college or university”).

¹²⁹ Friedenthal, *supra* note 19, § 11.10, at 520-22. Although states differ in jury qualifications, common qualifications imposed are residency requirements, property ownership, payment of taxes, and good health. *Id.*

¹³⁰ See *Carter v. Jury Comm'n*, 396 U.S. 320, 333 (1970) (providing that many states require jurors be “well informed”); Ga. Code Ann. § 15-12-40 (1995) (requiring intelligent and upright citizens maintained on jury list).

¹³¹ See *Franklin v. South Carolina*, 218 U.S. 161, 167-68 (1910) (rejecting an attack upon jury-selection statute which granted jury commissions power to select jurors based on sound judgment and good moral character). As the *Franklin* Court stated:

We do not think there is anything in this provision of the statute having the effects to any rights secured by the Federal Constitution. . . . There is nothing in this statute which discriminates against individuals on account of race or color or previous condition, or which subjects such persons to any other or different treatment than other electors who may be qualified to serve as jurors. The statute simply provides for an exercise of judgment in attempting to secure competent jurors of proper qualifications.

preme Court held that states are free to confine jurors to persons meeting specific age and educational attainments as well as good intelligence, sound judgement and character.¹³³ The *Carter* decision stands for the proposition that it is constitutionally acceptable for states to heighten jury qualifications in order to obtain more competent juries.¹³⁴

IV. WHY THE CURRENT METHOD OF SELECTION IS INADEQUATE

Masses of complex evidence and technical language, numerous parties and claims, lengthy trials, voluminous evidence, morality issues, juror's unversed background, and difficult legal issues compromise a layperson's ability to render competent judgments.¹³⁵ Former Chief Justice War-

Id. at 167-68. Similarly, in *Fay v. New York*, 332 U.S. 261 (1947), the Court held that a state jury system did not violate due process because of a lack of proportional representation of an economic class comprised of laborers, craftsmen and service employees, which did not result from an intentional and purposeful exclusion of any class but from tests of intelligence, citizenship and proficiency in the English language. *Id.* at 290-94.

¹³² 396 U.S. 320 (1970).

¹³³ *See Carter*, 396 U.S. at 331 (holding constitutional Alabama statute requiring jurors to be honest, intelligent, esteemed for their integrity, and possessing good character and sound judgment).

¹³⁴ *Id.* at 335. The Court noted that "[t]he statute simply provides for an exercise of judgment to secure competent jurors of proper qualifications." *Id.*

¹³⁵ *See In re Japanese Elect. Prod. Antitrust Litig.*, 631 F.2d 1069, 1086-88 (3d Cir. 1980) (holding a suit too complex for jury when circumstances render jury unable to decide in proper manner). In the *Japanese Electronic Products* suit, the Third Circuit examined three factors which contribute to a jury's inability to understand evidence and legal rules: (1) the overall size of the case, including the length of the trial, the amount of evidence, and the number of issues; (2) the conceptual difficulties in the legal issues and factual predicates to issues, reflected in amount of expert testimony and probable length of jury deliberations; and (3) the difficulty of segregating distinct aspects of the case. *See id.* at 1088; *see also Drazan*, *supra* note 9, at 296 (comparing complex toxic tort litigation to antitrust and securities cases). The Second Circuit has voiced similar doubts about jury infirmity when complex issues arise: "[W]hile the jury can contribute nothing of value so far as the law is concerned, it has infinite capacity for mischief, for twelve men can easily misunderstand more law in a minute than a judge can explain in an hour." *See Skidmore v. Baltimore & O.R. Co.*, 167 F.2d 54, 60 (2d Cir. 1948) (quoting Sunderland, *Verdicts, General and Special*, 29 Yale L.J. 253 (1920)). As the *Skidmore* court noted:

One who has never studied a science cannot understand or appreciate its intricacies, and the law is no exception to this rule. . . . [T]he general verdict . . . confers on the jury a vast power to commit error and do mischief by loading

ren Burger, perhaps the leading critic of the modern jury system, expressed several concerns about jury competence while head of the Supreme Court of the United States.¹³⁶ In a speech to the Conference of State Chief Justices in 1979, the then-Chief Justice expressed worries “about the fairness of requiring citizens to serve for extended durations” as jurors.¹³⁷ Burger stated that “the masses of complicated technical information . . . combined with the often difficult legal issues involved, strain the abilities of the juries to find the facts competently.”¹³⁸ He further advocated that lawyers waive jury trials in complex litigation, citing English courts that have abolished juries in all civil cases except libel and fraud since 1937.¹³⁹

A. *Technical Evidence & Jargon*

Scientific developments play a central role in America’s legal system, allowing advanced discourse to resolve complex problems.¹⁴⁰ These developments require jurors, as the fact-finding body, to comprehend crucial technical evidence of increasing complexity and to apply proper legal standards.¹⁴¹ Concerns about laypersons’ abilities to participate effectively in complex tribunals has escalated as a result of excessive jury awards.¹⁴² Juror confusion in complex litigation results from the reality that the typi-

it with technical burdens far beyond its ability to perform, by confusing it in aggregating instead of segregating the issues, and by shrouding in secrecy and mystery the actual results of its deliberations.

Id. at 60-61.

¹³⁶ See Warren Burger, *Is Our Jury System Working?*, 118 *Readers Dig.* 126, 129 (1981) (indicating delay in proceedings when lay jurors used in complex trials); see also Warren Burger, *The Use of Lay Jurors in Complicated Civil Cases*, Remarks to the Conference of State Chief Justices 3-5 (Aug. 7, 1979) (declaring technical evidence too complex for lay jury); *Burger Suggests Waiving Juries in Complex Civil Trials*, *Nat’l L.J.*, Aug. 13, 1979, at 21 [hereinafter *Burger Speech*]; Guinther, *supra* note 128, at 211.

¹³⁷ *Burger Speech*, *supra* note 136, at 21.

¹³⁸ Guinther, *supra* note 128, at 211. The quotes are the Federal Judicial Center’s summary of Burger’s statements.

¹³⁹ *Burger Speech*, *supra* note 136, at 21.

¹⁴⁰ See Deborah Young, *Introduction, The Impact of Science and Technology on the Courts*, 43 *Emory L.J.* 853, 853-56 (1994) (discussing fundamental changes in litigation wrought by scientific and technological advances).

¹⁴¹ See *id.* at 854 (noting that use of scientific evidence in courtroom is receiving widespread attention).

¹⁴² See *infra* notes 204-10 and accompanying text.

cal juror often has only a high school education and may not understand technical evidence.¹⁴³

Complex areas of the law create juror confusion, including, asbestos, antitrust, and securities litigation that involve sophisticated principles of economics.¹⁴⁴ Recently, the intricacies of toxic tort litigation and cases involving scientific evidence have challenged the abilities of many juries to comprehend and evaluate evidence.¹⁴⁵ For example, attorneys seeking to prove or disprove causation in mass toxic tort cases, such as the breast implant and Agent Orange class actions, rely on highly technical evidence, perplexing the jury in the process.¹⁴⁶

In one especially complicated antitrust action, the jury proved unable to understand complex evidence.¹⁴⁷ Jurors deliberated to a deadlock after a five month trial on whether the defendant monopolized computer industry markets, resulting in a hung jury.¹⁴⁸ The trial judge questioned jurors and concluded that the jury could not understand the elaborate and perplexing issues at the base of the suit.¹⁴⁹ As a result, the judge directed a verdict for the defendant and ordered that if he retried the case, the suit must sound in equity.¹⁵⁰ In summarizing the qualifications needed to evaluate

¹⁴³ Drazan, *supra* note 9, at 295.

¹⁴⁴ See *Jury Trial in Complex Litig.*, *supra* note 8, at 908-09 (discussing uneducated juror inadequacy in antitrust litigation); Drazan, *supra* note 9, at 294 (noting similar complexity for jury present in securities and antitrust suits); Strier, *supra* note 97, at 55 (discussing jury confusion in asbestos litigation); Richard A. Shaffer, *Those Complex Antitrust Cases*, Wall St. J., Aug. 29, 1978, at 16 (indicating economic terms such as cross-elasticity of demand, market power, exclusionary leasing, and reverse engineering may baffle jurors).

¹⁴⁵ See *Lowe v. Norfolk & Western Ry. Co.*, 124 Ill. App. 3d 80, 100-05, 463 N.E.2d 792, 806-10, 79 Ill. Dec. 238, 253-55 (Ill. App. Ct. 1984) (involving complex multiparty litigation over chemical spill); Cecil, *supra* note 9, at 729 (noting concerns of jury comprehension in toxic tort and product liability cases); Drazan, *supra* note 9, at 296 (advocating use of special juries in toxic tort litigation).

¹⁴⁶ See Drazan, *supra* note 9, at 295-96 & n.46 (indicating long latency periods in toxic tort cases result in hundreds of documents, thousands of pages of transcripts, and trials lasting up to four years).

¹⁴⁷ See *ILC Peripherals Leasing Corp. v. IBM*, 458 F. Supp. 423 (N.D. Cal. 1978), *aff'd sub. nom. Memorex Corp. v. IBM*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981).

¹⁴⁸ *Id.*; Guinther, *supra* note 128, at 210.

¹⁴⁹ *ILC*, 458 F. Supp. at 447.

¹⁵⁰ *Id.*

the case, the judge quoted the foreman of the jury as saying “[i]f you can find a jury that’s both a computer technician, a lawyer, an economist; knows all about that stuff; yes, I think you could have a qualified jury, but we don’t know anything about that.”¹⁵¹

Some courts have carved out an exception to the Seventh Amendment’s right to a jury trial for exceptionally complex civil cases.¹⁵² In the late 1970s, several massive antitrust suits resulted in a conflict among the circuits on the issue of whether judges have discretion to bar a trial by jury in complex civil cases.¹⁵³ In a complex antitrust action, the United States Court of Appeals for the Third Circuit held that litigants’ rights to due process under the Fifth Amendment justified an exception to the Seventh Amendment.¹⁵⁴ By contrast, the United States Court of Appeals for the Ninth Circuit refused demands to forego a jury trial in a convoluted securities litigation, stating that ‘if properly instructed and treated with deserved respect, [jurors] bring collective intelligence, wisdom, and dedication to their tasks, which is rarely equaled.’¹⁵⁵

The increasing number of specialists employed to discuss highly technical evidence can also create juror confusion, often because expert witnesses frequently disagree about complex scientific data.¹⁵⁶ As an antidote, legal scholars suggest jury reform measures that include higher juror qualifications and the use of court appointed experts.¹⁵⁷ Yet some scholars insist that current reforms do not go far enough to solve the problem of jury in-

¹⁵¹ *Id.*

¹⁵² See Cecil, *supra* note 9, at 734.

¹⁵³ See *id.* (discussing circuit split).

¹⁵⁴ *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1088 (3d. Cir. 1980).

The court provided that no right to a jury trial exists “when a jury will not be able to perform its task of rational decisionmaking with a reasonable understanding of the evidence and relevant legal standards.” *Id.*; Friedland, *supra* note 8, at 190 n.3 (indicating issues in suit involved price comparisons, expert testimony on accounting, marketing, and other obscure technical and financial matters).

¹⁵⁵ *In re United States Fin. Sec. Litig.*, 609 F.2d 411, 429-30 (9th Cir. 1979); see also Cecil, *supra* note 9, at 734 (comparing Third and Ninth Circuits’ views of Seventh Amendment complexity exception).

¹⁵⁶ See Strier, *supra* note 97, at 54 (stating “battle of the experts” tends to confuse juries); Blum, *supra* note 2, at A1 (noting complexity enhanced because of increased use of specialists to discuss highly technical evidence).

¹⁵⁷ Blum, *supra* note 2, at A1. As a solution, Professor Blum advocates that better educated people serve on juries, lawyers improve jury instructions, and tribunals use court-appointed experts to help jurors decide between each side’s experts. *Id.*

capacity.¹⁵⁸ One academic has even proposed revamping the current system to provide professional juries trained as arbitrators.¹⁵⁹

B. *Multiparty Claims*

Multiparty claims perplex lay juries, and judges will often characterize a case as complex litigation when parties initiate a class action.¹⁶⁰ These actions complicate matters due to voluminous claims predicated on differing yet interdependent legal grounds.¹⁶¹ Multiparty litigation has existed since the twelfth century; the Federal Rules of Civil Procedure have facilitated its modern practice since the 1930s.¹⁶² A 1994 study by the American Law Institute (ALI) indicates a substantial increase in the number of complex cases.¹⁶³ To alleviate the problem of multiparty, multiforum litigation, the ALI has suggested consolidating cases involving "one or more questions of fact," then transferring them to a judge who separates the consolidated cases into smaller groups involving common questions.¹⁶⁴ Despite these attempted solutions, parties continue to bring class actions, inevitably creating jury confusion.

C. *Lengthy Trials*

Lengthy trials in complex litigation can disable juries from proper adjudication.¹⁶⁵ For example, after months or years of litigation, jurors

¹⁵⁸ *Id.*

¹⁵⁹ *See id.* (observing law professor's suggestion to abolish jury system and replace it with professional juries trained as arbitrators).

¹⁶⁰ *E.g.*, *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59, 62-71 (S.D.N.Y. 1978) (striking jury demand in class action antitrust litigation in music industry involving 400 to 1100 plaintiffs and over 1000 contracts because of multiple parties and complexity); *Lowe v. Norfolk & Western Ry.*, 124 Ill. App. 3d 80, 100-05, 463 N.E.2d 792, 807-10, 79 Ill. Dec. 238, 253-56 (Ill. App. Ct. 1984) (ruling consolidation of numerous claims reversible error because jury confusion resulted from amount of evidence and multiple issues).

¹⁶¹ *See* Christine Gail Clark, Comment, *The Sky is Falling--The ALI's Efficient Response to Courts in Crisis?*, 1995 B.Y.U. L. Rev. 997, 998 (1995) (discussing complexity in class action suits caused by voluminous evidence and resources).

¹⁶² *See id.*; Fed. R. Civ. P. 23 (governing class actions).

¹⁶³ *See* American Law Inst., *Complex Litigation: Statutory Recommendations and Analysis With Reporter's Study 13* (1994) [hereinafter *Complex Litigation*] (providing that causes of complex litigation show no sign of diminishing); Deborah R. Hensler et al., *Trends in Tort Litigation: The Story Behind the Statistics 8-11* (1987) (announcing that mass latent injury cases have potential for explosive growth).

¹⁶⁴ *See* *Complex Litigation*, *supra* note 163, at 13.

¹⁶⁵ *See In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1087 (3d Cir. 1980)

may forget crucial evidence introduced in the first few days of trial.¹⁶⁶ Several judges have indicated that they would abolish the jury system as a violation of people's civil rights because it may ask them to serve on a jury for an unreasonably long period.¹⁶⁷ Other commentators suggest that forcing jurors to serve in long trials causes them to harbor resentment, resulting in an irrational or biased verdict.¹⁶⁸ Few prospective jurors can afford, or are willing to serve, for an extended period of time.¹⁶⁹ Even after finding willing participants, courts often find it difficult to maintain jury composition over time because jurors may die, leave the jurisdiction, or simply be unable to continue.¹⁷⁰

(observing that long trials in complex litigation cases are especially disabling for a jury); *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411, 416 (9th Cir. 1979) (extending trial over two years); *SCM Corp. v. Xerox Corp.*, 463 F. Supp. 983, 986 (D. Conn. 1978) (continuing trial for fourteen months and thirty days of jury deliberations); *ILC Peripherals Leasing Corp. v. IBM*, 458 F. Supp. 423, 444 (N.D. Cal. 1978) (lasting five months with nineteen days of jury deliberations), *aff'd sub. nom. Memorex Corp. v. IBM*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981).

¹⁶⁶ See *Jury Trial in Complex Litig.*, *supra* note 8, at 899.

¹⁶⁷ See Guinther, *supra* note 136, at 211 (noting Maine judge advocates abolishing jury system); *Burger Speech*, *supra* note 136, at 21 (quoting Chief Justice Burger as stating that "it borders on cruelty to draft people to sit for long periods trying to cope with issues largely beyond their grasp"). Burger states that requiring a person to serve on a jury for five to six months and earn only thirty dollars per day may deprive the juror of property without due process and just compensation. See *Burger Speech*, *supra* note 136, at 21.

¹⁶⁸ See *Jury Trial in Complex Litig.*, *supra* note 8, at 899.

¹⁶⁹ See Ell, *supra* note 98, at 776-77 (1978) (addressing problems with protracted litigation).

¹⁷⁰ *Id.* at 778.

D. Numerous Witnesses and Voluminous Evidence

Other quantitative problems with complex jury trials include numerous witnesses, millions of documents, and voluminous evidence, all of which contribute to jury confusion.¹⁷¹ For example, in *SCM Corp. v. Xerox Corp.*,¹⁷² a request to submit facts relating to antitrust and patent violations resulted in production of ninety-six volumes of documents concerning 30,000 facts, one-third of which were in dispute.¹⁷³ During the case, SCM rented a floor of office space near the courthouse where approximately one-hundred persons devoted time to present SCM's case.¹⁷⁴ Not surprisingly, the presentation of SCM's evidence created jury confusion because of the sheer volume of documents.¹⁷⁵

E. Morality and Reliance on Emotion

America's judicial system enforces professional responsibility, requiring lawyers to zealously advocate on behalf of a client.¹⁷⁶ Although ethical parameters limit the actions of an attorney, courts often allow lawyers to play on jurors' emotions, overlooking all but the most inflammatory practices.¹⁷⁷ One court has held that an attorney may not only shed tears, but even suggested that it was the attorney's duty to do so under proper circumstances.¹⁷⁸

¹⁷¹ See *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1073 (3d Cir. 1980) (noting parties after nine years of discovery produced millions of documents and over 100,000 pages of depositions); *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411, 416 (9th Cir. 1979) (indicating that documentary evidence was as high as a three-story building or as long as the first 90 volumes of the *Federal Reporter*); *ILC Peripherals Leasing Corp. v. IBM*, 458 F. Supp. 423, 444-48 (N.D. Cal. 1978) (comprising 4000 exhibits and 50,000 pages of transcripts), *aff'd sub. nom. Memorex Corp. v. IBM*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981).

¹⁷² 463 F. Supp. 983 (D. Conn. 1978), *remanded*, 599 F.2d 32 (2d Cir. 1979).

¹⁷³ *Id.* at 986. Trial transcripts totaled forty-seven thousand pages. *Id.*

¹⁷⁴ See Ell, *supra* note 98, at 784-85.

¹⁷⁵ *Id.*

¹⁷⁶ The ABA Model Rules of Professional Conduct and ABA Model Code of Professional Responsibility regulate the behavior of lawyers. See Model Code of Professional Responsibility DR 7-101 (1996) (requiring lawyer to zealously advocate); Model Rules of Professional Conduct Rules 1.3, 3.2 (same).

¹⁷⁷ Strier, *supra* note 97, at 57.

¹⁷⁸ *Id.* at n.34 (citing *Ferguson v. Moore*, 39 S.W. 341, 342 (Tenn. 1897)).

These psychological ploys frustrate the judicial process as jurors are hindered from accurately assessing liability.¹⁷⁹ Studies suggest that when juries rely on emotions and instinct, they disregard the evidence in a case.¹⁸⁰ For example, in toxic tort litigation, juries may feel sympathy for a stricken plaintiff and disregard crucial medical and scientific evidence on causation.¹⁸¹

V. STATUTORY & CONSTITUTIONAL IMPLICATIONS

The Constitution of the United States and forty-eight state constitutions authorize the right to a trial by jury.¹⁸² The Sixth Amendment provides that defendants in criminal cases have the right to a trial "by an impartial jury of the State and District wherein the crime shall have been committed."¹⁸³ A similar guarantee for civil actions appears in the Seventh Amendment.¹⁸⁴ Additionally, the Fourteenth and Fifth Amendments

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ See Drazen, *supra* note 9, at 296 (noting that juries base decisions on intuition rather than relying on medical and scientific evidence). For instance, jurors feel it is wrong for chemicals to leak from landfills into drinking water and rule for the plaintiff based upon these sympathies. *Id.*

¹⁸² See U.S. Const. amends. VI, VII; Friedenthal, *supra* note 19, at § 11.7 (discussing guarantee of right to trial by jury by states and federal government). The Seventh Amendment to the United States Constitution provides in pertinent part:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Id.; see also *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) (emphasizing importance of jury in American law); *Fay v. New York*, 332 U.S. 261, 288 (1947) (stating commandments of Sixth and Seventh Amendments not applicable to states by Fourteenth Amendment); Friedenthal, *supra* note 19, at § 11.7 (reviewing the Seventh Amendment's right to a trial by jury). Although current construction of the Seventh Amendment is not applicable to the states, almost all states, except Louisiana and Colorado, have comparable constitutional guarantees. See Friedenthal, *supra* note 19, at § 11.7.

¹⁸³ U.S. Const. amend. VI. For a discussion of the Constitutional origins of the right to a trial by jury, see Hans & Vidmar, *supra* note 30, at 49-50, and Richard W. Beckler & Fredrick Robinson, *Challenges to the Venire*, in *The Jury 1987: Techniques for the Trial Lawyer*, at 387, 391 (PLI Litig. & Admin. Practice Course Handbook Series No. 340, 1987).

¹⁸⁴ U.S. Const. amend VII. The Seventh Amendment does not apply to those cases in

ensure a fair trial by the Procedural Due Process and Equal Protection Clauses.¹⁸⁵ The Supreme Court has interpreted this fairness requirement to mean that an individual has a right to an informed and capable jury.¹⁸⁶ The Court has also interpreted these Amendments to require that a trial court must draw a jury from a fair cross-section of the community, meaning that courts may not systematically exclude one particular group from the jury pool.¹⁸⁷

Opponents of special juries argue that they fail to represent a fair cross-section of the community as mandated by the Sixth and Fourteenth Amendments to the United States Constitution, the Federal Jury Selection and Service Act, and state jury selection statutes.¹⁸⁸ The Federal Jury Selection and Service Act provides: "It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the district or division wherein the court convenes."¹⁸⁹

equity. See *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 211 (1916) (noting Seventh Amendment not binding on the states); Beckler & Robinson *supra* note 183, at 391 (indicating that although Seventh Amendment inapplicable to states, many states have comparable constitutional provisions).

¹⁸⁵ U.S. Const. amends. V, XIV; see also Drazen, *supra* note 9, at 297 (discussing constitutionality of special juries).

¹⁸⁶ See generally Broyles, *supra* note 8 (discussing right to an informed jury and Seventh Amendment's complexity exception).

¹⁸⁷ See Hans & Vidmar, *supra* note 30, at 49-50.

¹⁸⁸ See *Jury Selection and Composition*, *supra* note 8, at 1444-47 (reviewing history of cross-section requirement). Although the language of the Sixth Amendment does not expressly guarantee the right to a jury composed of a fair cross-section of the community, the Supreme Court read the requirement into the Sixth Amendment's grant of an "impartial jury." See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). The Court has not conclusively established whether the Seventh Amendment imposes the same mandate in civil cases. See *Colgrove v. Battin*, 413 U.S. 149, 160 n.16 (1973). Even if the Sixth Amendment does not require a fair cross-section in civil juries, the Jury Selection and Service Act of 1968 explicitly requires a fair cross-section of the community in civil and criminal cases. See *Jury Selection and Service Act of 1968*, Pub. L. No. 90-274, 82 Stat. 53 (1968) (codified as amended at 28 U.S.C. §§ 1861-74 (1994)). Litigants have also relied on the Due Process Clause of the Fourteenth Amendment to ensure a representative jury. See *Peters v. Kiff*, 407 U.S. 493, 504 (1972). In *Peters*, a white defendant challenged the systematic exclusion of blacks in the venire. *Id.* at 496. The Court held that due process requires that all criminal defendants possess the right to the possibility of having all perspectives on the panel. *Id.* at 504; see also Sutton, *supra* note 9 at 581, 587 (examining cross-section requirement).

¹⁸⁹ 28 U.S.C. § 1861 (1994).

Similarly, the Supreme Court has interpreted the Sixth Amendment's "impartiality" requirement and the Due Process Clause of the Fourteenth Amendment to require a fair cross-section.¹⁹⁰

In order to demonstrate a violation of the fair cross-section requirement, a defendant must show that the excluded group forms a "distinctive" segment of the community; the segment's under-representation in the jury pool is unfair and unreasonable; and the under-representation results from a systematic exclusion of the segment.¹⁹¹ Although the Court has never directly addressed whether excluding less-educated individuals from jury service constitutes the elimination of a "distinctive" group, the majority of lower courts have held that less-educated individuals are not sufficiently "distinctive" to justify a violation of the cross-section requirement.¹⁹²

The Supreme Court has upheld the use of struck juries against challenges under the Equal Protection Clause of the Fourteenth Amendment on the ground that they systematically exclude specific groups.¹⁹³ The Court

¹⁹⁰ See, e.g., *Mallett v. Missouri*, 494 U.S. 1009, 1011 (1990) (noting fair cross-section applies to states through Due Process Clause); *Holland v. Illinois* 493 U.S. 474, 480 (1990) (stating "fair cross-section requirement is not explicit in [Sixth Amendment's] text, but is derived from the traditional understanding of how an 'impartial jury' is selected"); *Taylor v. Louisiana*, 419 U.S. 522, 526 (1975) (incorporating fair cross-section to apply to Sixth Amendment).

¹⁹¹ See *Duren v. Missouri*, 439 U.S. 357, 364 (1979) (outlining test to evidence violation of fair cross-section requirement). The Court has never defined exactly what constitutes a "distinctive" segment, but one federal district court has defined distinctive as "a common thread which runs through the group, a basic similarity in attitudes or ideas . . . which cannot be adequately represented if the group is excluded from the jury selection process. . . . [T]he group must have a community of interest which cannot be adequately protected by the rest of the populace." See *United States v. Guzman*, 337 F. Supp. 140, 143-44 (S.D.N.Y. 1972), *aff'd*, 468 F.2d 1245 (2nd Cir. 1972).

¹⁹² See, e.g., *Anaya v. Hansen*, 781 F.2d 1, 7 (1st Cir. 1986) (citing *United States v. Kleifgen*, 557 F.2d 1293, 1296 (9th Cir. 1977)) (less educated not cognizable); *United States v. Potter*, 552 F.2d 901, 905-06 (9th Cir. 1977) (providing that the "less educated are a diverse group, lacking in distinctive characteristics or attitudes"); *id.* at 905 (defining "less educated" as citizens possessing high school diploma at most); *United States v. Cabrera-Sarmiento*, 533 F. Supp. 799, 804-07 (S.D. Fla. 1982) (same).

¹⁹³ See, e.g., *Moore v. New York*, 333 U.S. 565, 565-69 (1948) (5-4 decision) (upholding murder convictions after trial by struck jury against equal protection challenge); *id.* at 569 (Murphy, J., dissenting) (labeling "tragic" that two defendants "must forfeit their lives after having been convicted of murder not by a jury of their peers, [and] not by a jury chosen from a fair cross-section of the community"); *Fay v. New York*, 332 U.S. 261, 296-

has held that central to the Fourteenth Amendment is the principle that courts may not systematically exclude any identifiable group from the jury pool.¹⁹⁴ Defendants convicted by a struck jury have argued that their convictions violated the democratic principle of equality because the court intentionally excluded less educated persons from the venire.¹⁹⁵ Scholars have commented that the rationale behind an equal protection challenge is that a heterogeneous jury collectively brings a wide range of experiences, backgrounds, and knowledge which may aid in a vigorous and thorough debate of the issues in a case, while a special jury may neglect important points of view.¹⁹⁶

As Justice Murphy noted in his dissent in *Fay v. New York*,¹⁹⁷ the Equal Protection Clause “prohibits a state from convicting a person by using a jury which is not drawn impartially from a cross-section of the community.”¹⁹⁸ Justice Murphy indicated that “juries must be chosen without systematic and intentional exclusion of any otherwise qualified group of

97 (1947) (Murphy, J., dissenting) (arguing struck jury violates equal protection). In his dissent in *Fay*, Justice Murphy stated that “[t]he equal protection clause . . . prohibits a state from convicting any person by use of a jury which is not impartially drawn from cross-section of community. That means that juries must be chosen without systematic and intentional exclusion of any otherwise qualified group of individuals.” *Id.*: at 297.

¹⁹⁴ See, e.g., *Fay*, 332 U.S. at 296-97 (Murphy, J., dissenting) (stating Fourteenth Amendment prohibits state from convicting person by use of jury which systematically and intentionally excludes a qualified group of individuals); *Akins v. Texas*, 325 U.S. 398, 403-04 (1945) (holding proof of intent to discriminate evidenced by systematic exclusion of eligible jurors); *Smith v. Texas*, 311 U.S. 128, 129 (1941) (holding that conviction based upon indictment returned by grand jury where blacks were intentionally and systematically excluded violated equal protection).

¹⁹⁵ See *Moore*, 333 U.S. at 565-69 (denying equal protection challenge to convictions by struck jury); *Fay*, 332 U.S. at 297-99 (Murphy, J., dissenting) (criticizing convictions by special juries as violating principle that jury must be drawn from fair cross-section of community). The *Fay* Court held that New York’s judiciary law, providing for the administrative selection of a special jury panel for certain classes of cases, did not violate the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. *Fay*, 332 U.S. at 286-96.

¹⁹⁶ See Friedland, *supra* note 8, at 194; Hans & Vidmar, *supra* note 30, at 50.

¹⁹⁷ 332 U.S. 261 (1947).

¹⁹⁸ *Id.* at 297 (Murphy, J., dissenting) (criticizing majority decision which held that blue ribbon panel did not intentionally and systematically exclude qualified persons). Justice Murphy stated that those tried before a blue ribbon jury received unequal protection of the laws. *Id.* at 299.

individuals.”¹⁹⁹ Accordingly, “there is no constitutional right to a jury drawn from a group of uneducated and unintelligent persons . . . [nor] a right to a jury chosen from those at the lower end of the economic and social scale.”²⁰⁰ A defendant is entitled “to be judged by a fair sampling of all one’s neighbors.”²⁰¹ This fair sampling includes those who are qualified, not merely those with superior intelligence or learning.²⁰² As a result, opponents of the special jury argue that jurors with education may be prejudiced about the case and do not make impartial fact-finders.²⁰³

VI. IMPETUS FOR CURRENT JURY REFORM MEASURES

“If it ain’t broke, don’t fix it.”²⁰⁴ While this may reflect the attitude of some jury analysts, it does not reflect the majority of American society. Those endorsing jury reform have rightfully done so. For example, studies conducted during the late 1970s and early 1980s suggest that jurors fail to comprehend technical jury instructions. As a result, jury reformers advocated for the adoption of standardized “pattern” jury instructions.²⁰⁵ This movement resulted in thirty-nine states adopting some version of the pattern instructions by 1980.²⁰⁶ Indeed, jurors’ unversed legal backgrounds and tendency to be persuaded by cunning lawyers, resulting in erratic verdicts, has prompted jury reform. Current measures include uniform verdicts, jury questions during trial, juror commentary during trial, abolishment of peremptory challenges, jury notetaking, the use of special masters, and the bifurcation of liability and damages.

Leading the forefront towards jury improvement are tort reform advocates. These groups argue that courts should overturn unreasoned and capricious jury verdicts.²⁰⁷ The Supreme Court’s landmark punitive dam-

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Fay v. New York*, 332 U.S. 261, 297 (1947) (Murphy, J., dissenting).

²⁰³ See Friedland, *supra* note 8, at 194.

²⁰⁴ See Eugene R. Sullivan et al., *Jury Reform in America -- A Return to the Old Country*, 33 Am. Crim. L. Rev. 1141, 1154 (1996) (providing transcript of actual debate on jury reform before leading members of the American and English bar before public).

²⁰⁵ Strier, *supra* note 97, at 51-53.

²⁰⁶ *Id.*

²⁰⁷ See Blum, *supra* note 2, at A1 (stressing placement of caps on damages needed to control jury power).

ages decision in *BMW v. Gore*,²⁰⁸ represents a step in the right direction toward jury improvement. In that case BMW's counsel argued that the Court to prevent jurors from setting punitive damages.²⁰⁹ Alternatively, BMW's counsel recommended that jurors obey strict guidelines when awarding punitive damages, because jurors lack experience, a frame of reference, and are incapable of determining which party's expert is a better guide in setting amounts.²¹⁰ In its ruling, the Court held unconstitutionally excessive the imposition of four million dollars in punitive damages for BMW's failure to disclose that it had repainted a sports car sold as new.²¹¹

VII. ALTERNATIVES TO PROFESSIONAL JURY SYSTEM

A 1983 American Bar Association Task Force on jury standards provoked recent measures to improve the jury system.²¹² Fourteen states have adopted the guidelines promulgated by the ABA and seven other states are currently reviewing the guidelines.²¹³ In addition to jury reform through the increased use of professional juries in complex litigation, courts should use special masters in the pretrial stages to resolve evidentiary disputes.²¹⁴ Computer programs, jury notetaking, detailed jury instructions, special verdicts, and jury questions can also help organize and present evidence.²¹⁵ Courts might, for example, eliminate all automatic exemptions from jury service so that everyone will actually be called to appear in court, thus allowing broad representation, and limit jury exemptions based on the excuses of professional responsibilities and undue hardship.²¹⁶ Imposing deadlines on the parties for presentation of evidence in order to shorten trial length could also allow a broader jury pool.²¹⁷ Further, courts could require bifurcation, allowing juries to decide liability first and then dam-

²⁰⁸ 116 S. Ct. 1589 (1996).

²⁰⁹ *Id.* at 1594-97. Attorney Frey, representing BMW, said that there are certain things jurors are not competent to deal with and therefore have no frame of reference for setting proper punitive damages in products liability or antitrust cases. *Id.*; see also Blum, *supra* note 2, at A1.

²¹⁰ *BMW*, 116 S. Ct. at 1592-1604.

²¹¹ *Id.*

²¹² See Blum, *supra* note 2, at A1 (highlighting ABA standards which cover jury selection, exemptions, fees, and juror treatment).

²¹³ *Id.*

²¹⁴ See Clark, *supra* note 161, at 1009-11.

²¹⁵ *Id.* at 1010-11.

²¹⁶ *Id.*

²¹⁷ *Id.*

ages. This procedure would permit separate juries in several short trials, thereby drawing from a more representative jury pool and ultimately more educated jurors.²¹⁸ In some cases, judges could forego peremptory challenges, and instead permit each party to select a number of prospective jurors from the venire, subject only to challenges for cause by the opposing party.²¹⁹ Alternatively, judges could establish minimum jury standards on a case-by-case basis, such as high school graduation or perhaps college attendance.²²⁰ A more radical solution is the use of expert judges such as those currently used in Probate and other specialty courts in other areas of complex civil litigation.²²¹ Still another way to get better qualified jurors for complex cases is to pay them more money, up to \$1,000 a week. By doing so, better educated people will serve on juries and have no basis for exemption based upon financial hardship.²²²

These alternatives, although likely to improve our current system, fail to address one's due process right to a competent and impartial tribunal. Justice Thurgood Marshall, in *Peters v. Kiff*,²²³ acknowledged that the due process right to a competent and impartial tribunal is separate from the right to any particular form of proceeding.²²⁴ He indicated that "[l]ong before the Constitution imposed the requirement of jury trial on the States, it was well established that the Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict, based on the evidence and the law."²²⁵ As a result, the special jury or in the alternative, statutorily heightened jury qualifications are the only viable solutions which ensure a capable jury.²²⁶

VIII. CONCLUSION

A judicial system which affirmatively seeks competent and capable jurors is a worthy goal. The professional jury system takes into account the individual's rights to a well-informed and well-versed tribunal. The

²¹⁸ *Id.*

²¹⁹ Clark, *supra* note 161, at 1010.

²²⁰ *Id.*; Strier, *supra* note 97, at 59-61 (stating the seating of educated juries is not elitism; it is merely functionalism).

²²¹ Clark, *supra* note 161, at 1010.

²²² Guinther, *supra* note 128, at 208.

²²³ 407 U.S. 493 (1972).

²²⁴ Clark, *supra* note 161, at 1009-11.

²²⁵ *Id.*

²²⁶ *Id.* at 998.

proposal to seat expert and better-educated jurors may not be the most democratic solution, yet it is likely the most effective. Impaneling experts and others with heightened qualifications deprives some individuals the opportunity to serve in lengthy and complex trials. Lay jurors' privileges, however, would not be hindered in all cases. Potential jurors ineligible in complex tribunals would remain eligible in less-complicated matters so as to preserve the essential values of the jury system while helping to resolve juror distrust.

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²²⁷ This note is dedicated to my late grandmother, May Seaton Bertelsen, who inspired me to continue my education through the study of law.

