THE DECLINE OF THE AMERICAN JURY

GRAHAM C. LILLY*

INTRODUCTION

The thesis of this essay is straightforward: subtle, long-term trends in the nature of litigation and the selection of juries pose serious questions about the potential of American juries to adequately perform their traditional roles. To many supporters of jury trial, suggestions of jury inadequacies and proposals for reform are idle and useless speculation or, even worse, indications of traitorous infidelity. In their view, the American jury is as immutable as it is essential, an ironclad staple of just adjudication, right up there with mother and apple pie. But a riposte is that dogmatic adherence to the jury system in its present form risks a decline in the quality of justice and growth in disillusionment with our judicial system. The fundamental difficulty is that modern trials and the jury selection process have coalesced to exacerbate traditional problems that have long been recognized.

While there has been much debate in the legal literature about the competence of juries for specific tasks and the relative benefits of judge or jury as decisionmaker, only very modest steps have been taken to address the growing difficulties associated with contemporary jury decisionmaking. Whether the broad adoption of modest "reforms" in the jury system can ameliorate these perceived deficiencies is an open question; perhaps something more drastic is needed. However—assum-

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* Armistead M. Dobie Professor of Law, University of Virginia Law School.

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ing for the moment that growing problems exist—federal and state constitutional provisions requiring the right to jury trial appear to place firm restrictions upon reformers' ability to alter substantially, even experimentally, the deeply ingrained, cardinal role of the American jury. Nonetheless, members of the bench and bar, the academy, and legislative bodies need to, first, consider the possibility of long-term erosions in the jury system, and second, have an open and creative mind about the range and nature of possible changes in traditional jury practices. Although interest in jury reform or improvements may be at an all-time high, it remains to be seen whether modest changes in the jury system will suffice in the long run.

The difficulties encountered by juries are perhaps most pronounced in complex civil litigation, although they are also apparent in criminal trials. This article will use examples from both civil and criminal litigation to illustrate the problems, but will limit suggestions for reform to the civil context, where the problems seem more pronounced and where, in any event, there appears to be more leeway for experimentation. In Part I, there is a sketch of the prevailing, sometimes antagonistic, views about the role and value of jury trials. This brief account leads to Part II, a discussion of current, somewhat unsettling, trends affecting the jury. Finally, Part III first identifies several remedial measures that hold the promise of effective change and then evaluates the legal barriers to implementing such change.

I. THE AMERICAN JURY: A SKETCH

Juries enjoy a special reverence in American legal culture and practice.[1] Although the role of the American jury has varied since its inception in the colonies,[2] the jury's enduring cen-

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1. *See* Warren Burger, *Thinking the Unthinkable, Remarks at the First Robert A. Ainsworth Jr. Memorial Lecture (Nov. 10, 1984)*, 31 LOY. L. REV. 205, 207–08 (1985) ("Jury trial is one of the institutions we borrowed from England, an almost sacred part of our constitutional heritage, and an article of faith.").

2. Among other things, colonial and early American juries were vested with the power to make both factual and legal determinations. *See* Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 421 (1996). In 1895, the Supreme Court revoked the jury's right to make legal determinations in cases decided in federal court. *See* Sparff v. United States, 156 U.S. 51 (1895). For an in-depth discussion of the historical development of

tral mission, of course, is to find facts and, usually, to apply the law to those facts.[3] These functions, which lie at the core of adjudication, give the jury a measure of sovereign authority that is seldom assigned to lay persons. A principal justification for this power is that collective fact-finding is superior to fact-finding by a single person.[4] Beyond this claimed advantage, there are said to be others: the jury brings community standards and morals to a public trial and, by interposing itself between the litigants and the power of the state, the jury can produce a just result even when strict adherence to the applicable, sometimes rigid, legal rules would not.[5] To facilitate the exercise of this lay discretion, the jury deliberates in secret and ordinarily announces in public only its final decision.[6]

So esteemed is the American jury that its place in criminal and civil litigation typically is secured by constitutional provision.[7] While this constitutional protection serves as bulwark against the abolition or diminution of jury trial, it necessarily tends to stifle experimentation with alternative fact-finding procedures in judicial trials.[8] Possibilities for change may be

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the jury, see Stephen Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579 (1993).

3. Through the use of the special verdict, the judge can limit the jury to only a fact-finding role. *See, e.g.*, FED. R. CIV. P. 49(a).

4. *See* Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons From Civil Jury Trials*, 40 AM. U. L. REV. 727, 749 (1991).

5. *See, e.g.*, JAMES J. GOBERT & WALTER E. JORDAN, JURY SELECTION: THE LAW, ART, AND SCIENCE OF SELECTING A JURY 7 (2d ed. 1990).

6. *But see* Shaun P. Martin, *Rationalizing the Irrational: The Treatment of Untenable Federal Civil Jury Verdicts*, 28 CREIGHTON L. REV. 683 (1995) (discussing the use of special verdicts and special interrogators to obtain more specific findings from the jury).

7. *See* U.S. CONST. amend. VI ("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 . . . ."); U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."); *see also, e.g.*, CAL. CONST. art. I, § 16; CONN. CONST. art. I, § 19; N.Y. CONST. art. I, § 2; TEX CONST. art. I, § 15.

8. *See* Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 492 (1989) ("[T]he legal system itself is a major source of the preference for traditional litigation. Under conventional rules of procedure, a single disputant can force a controversy into court even if all the other parties to the dispute prefer to use [alternative dispute resolution].").

even more limited because courts[9] and legislatures[10] in the federal system and in most states have expanded the right to a jury trial by broad constitutional interpretation, legislative enactments, or both.

Despite the hallowed role of juries, most observers agree that the right to jury trial is sometimes—perhaps often—exploited for tactical advantages by one or both of the litigants.[11] When, for example, punitive damages are sought, it is usually much easier to arouse a jury's emotion or anger than it is to persuade a judge to abandon her comparatively detached and balanced view of a pending case.[12] The judge often sees—as a

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9. The Seventh Amendment's right to jury trial in civil cases has been generously construed by the Supreme Court. *See, e.g.*, Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959) (holding that facts common to law and equitable claims must be resolved by a jury). In numerous instances where no explicit right to jury trial was provided for by statute, the Court has nonetheless found a right to exist. *See, e.g.*, Curtis v. Loether, 415 U.S. 189 (1974) (holding there is a right to jury trial under § 812 of the Civil Rights Act of 1968, permitting plaintiffs to bring civil actions for redress for violations of the Act's fair housing provisions); Tull v. United States, 481 U.S. 412 (1987) (holding there is a right to jury trial in civil penalty actions under § 1319(b) of the Clean Water Act). *See also* 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2302.1 (2d ed. 1994).

Recently, a number of state courts have held that a legislatively imposed ceiling on damage awards violates a plaintiff's right to jury trial. *See, e.g.*, Lakin v. Senco Products, Inc., 987 P.2d 463 (Or. 1999) (holding an Oregon statute limiting noneconomic damages violates the right to a jury trial under the Oregon Constitution); Smith v. Schulte, 671 So. 2d 1334 (Ala. 1995) (holding a statute limiting damages in a medical malpractice case violates state constitution's right to jury trial); Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989) (holding a statute limiting noneconomic damages recoverable by personal injury or wrongful death plaintiff violates state constitutional right to jury trial).

10. For an illustration of the legislative expansion of the right to jury trial at the state level, see N.Y. SURR. CT. PROC. ACT § 502.1 (McKinney 1995). This New York legislative enactment allows a jury to determine the validity of a will. *See id.* Normally, proceedings for the probate of a will are equitable proceedings, which do not require a jury trial.

11. *See, e.g.*, Albert W. Alschuler, *A Teetering Palladium?*, 79 JUDICATURE 200, 203–04 ("[W]ell equipped trial lawyers now seek to program and maneuver jurors . . . .").

12. There are several well-known examples from recent years. In one widely-reported case that focused national attention on the issue of punitive damages, a New Mexico jury awarded $2.7 million in punitive damages to a seventy-nine year-old woman who suffered third degree burns to her inner thighs and buttocks as a result of spilling hot coffee served by a McDonald's Restaurant. Following post-trial motions, the judge reduced the amount of punitive damages to $480,000. *See* Liebeck v. McDonald's Restaurants, Inc., No. CV-93-02419, 1995 WL 360309 at *1 (D.N.M. Aug. 18, 1994). In another case, an Alabama jury awarded an automobile purchaser $4 million in punitive damages as a result of

jury usually does not—the long-range implications of the judgment in a case that to nonlegal observers may seem routine or isolated. Further, it is generally easier for counsel to confuse or distract a jury than it is for her to divert an experienced judge from the central issues of trial. These divergent tendencies highlight possible differences in case outcomes, depending upon whether the trial is to a judge or jury. The choice of decisionmaker also has a marked effect on trial strategies and tactics. It is common knowledge, at least among trial lawyers, that jury trials require special rhetorical skills and, sometimes, stratagems involving artifice, affectation, contrivance, and misleading impressions.[13] Too often, to capture the jury's emotion is to win the case.

There is also general recognition that the costs of jury trial—to both the judicial system and to the jurors themselves—substantially exceed those of a bench trial.[14] Jury se-

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the distributor's failure to disclose that the automobile had been repainted after being damaged prior to delivery. On appeal, the Alabama Supreme Court reduced the amount of the award to $2 million. *See* BMW of North America, Inc. v. Gore, 646 So. 2d 619 (Ala. 1994). The Supreme Court granted certiorari and held that the award of $2 million in punitive damages was grossly excessive in light of the low level of the reprehensibility of the distributor's conduct. *See* BMW of North America, Inc. v. Gore, 517 U.S. 559, 574 (1996). On remand, the Alabama Supreme Court held that a new trial was warranted unless the purchaser filed remittitur of damages to the sum of $50,000. *See* BMW of North America, Inc. v. Gore, 701 So. 2d 507, 515 (Ala. 1997). Most recently, a jury in Los Angeles returned a verdict of $4.8 billion in punitive damages in addition to $107 million in compensatories against General Motors in a suit over the explosion of a Chevrolet Malibu gas tank. In a later hearing the judge reduced the verdict to $1.09 billion in punitive damages and let the $107 million compensatory verdict stand. *See News This Week, Ticker, Los Angeles*, NAT'L L.J., Sept. 6, 1999, at A4.

13. *See, e.g.*, Fred Grissom, *Today's Multimedia Technology Means That A Trial Lawyer Can, And Often Should, Put On A Show For the Jury*, LEGAL TIMES, July 21, 1997, at 40; JEFFREY T. FREDERICK, MASTERING VOIR DIRE AND JURY SELECTION: GAINING AN EDGE IN QUESTIONING AND SELECTING A JURY 65 (1995) (advising trial lawyers to use "persuasion" in voir dire process with techniques including "focus[ing] attention on desirable issues," "capitaliz[ing] on psychological reactance," and using "ingratiating compliments"); J. Stratton Shartel, *Litigators Describe Key Factors in Use of Jury Consultants*, INSIDE LITIG., Aug. 1994, at 1, 26 (quoting a jury consultant as stating that it is advisable to use a jury consultant to figure out how to best handle "anything that is volatile—that could result in a tremendous swing potential for damages, that might excite or inflame a jury").

14. *See, e.g.*, *In re* Environmental Ins. Declaratory Judgment Actions, 693 A.2d 844, 855 (N.J. 1996). As the New Jersey Supreme Court noted in declining to extend the right to jury trial to declaratory judgment actions for insurance coverage for the recovery of future environmental remediation costs:

lection alone is often time consuming and costly. Once chosen, the jury must be protected from improper influences and shielded from information that might reach it from extra-judicial sources. The trial itself becomes cumbersome and prolonged by the presence of a jury. For example, there are often judge-counsel conferences and evidentiary hearings outside the jury's presence. Lawyers typically make trial or pre-trial motions designed to take the case—or selected issues within it—from the jury's authority. Instructing the jury can be tedious and time-consuming, since opposing counsel and the presiding judge often debate the precise wording of each part of the charge. Sometimes juries deliberate for hours or days, but fail to reach a verdict. Finally, post-verdict motions, such as those for a new trial or judgment as a matter of law, routinely prolong litigation in jury trials. One 1993 study demonstrated that the average federal jury trial lasted more than twice as long as the average bench trial.[15] Another study, comparing jury and non-jury trials in nine state court jurisdictions, found that the median length of both civil and criminal jury trials was roughly three times that of non-jury trials.[16] In addition, administrative costs for the average federal tort jury trial were ten times those for a bench trial.[17]

Despite the costs and burdens of trial by jury, the American legal system strongly affirms the core value of lay participation in the adjudicative process and continues to hold tena-

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> All parties agree that a trial before a judge is more efficient than one before a jury. Efficient judicial administration confirms the conclusion that these actions should proceed before a court sitting without a jury. Although budgetary constraints and concerns about efficiency cannot impinge on the right to a jury trial, in an era of fiscal constraint, we cannot permit the unnecessary expansion of the right to jury trial solely to enable litigants to obtain a tactical advantage.

Id.; *see generally* Patrick E. Longan, *The Case for Jury Fees in Federal Civil Litigation*, 74 OR. L. REV. 909 (1995) (noting the high costs of jury trials).

15. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 193–94 n.1 (2d ed. 1996) (citing ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 19, A1-284, A1-287 (1993)); *see also* Longan, *supra* note 14, at 929 (comparing the relative length of jury and non-jury trials).

16. *See* NATIONAL CENTER FOR STATE COURTS, ON TRIAL: THE LENGTH OF CIVIL AND CRIMINAL TRIALS 8–9 (1988).

17. *See* POSNER, *supra* note 15, at 203 (citing JAMES S. KAKALIK & ABBY EISENSHTAT ROBYN, RAND INSTITUTE FOR CIVIL JUSTICE: COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR PROCESSING TORT CASES xviii, xix (1982)).

ciously to the institution of jury trial. In this unyielding allegiance, the United States stands virtually alone. America is now the only country in the world where the jury continues to play both a broad and a central role in the adjudicatory process. On the continent of Europe, the jury is used sparingly and, generally speaking, is employed only in serious criminal cases.[18] Even in England, where the jury originated, there is no longer a broad right to a jury trial; the use of juries is restricted to a very limited category of civil cases and certain types of criminal trials.[19]

II. UNSETTLING TRENDS

Is public confidence in the American jury waning? No solid evidence is yet available to answer this question. An ever-increasing number of would-be civil litigants who choose to pay for private ("alternative") resolution of disputes by professional, and often expert, arbitrators and mediators[20] suggests a growing distaste for the American judicial system as a whole, not just the role of juries in that system. Whether the presence of a jury is a motivating force in the expanding role of Alternative Dispute Resolution is unclear. One can easily infer that the use of costly juries, unfamiliar with the subject of the litigation

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18. *See* Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 461 (1997) (noting that most civil law countries abandoned trial before a wholly lay jury at the beginning of the twentieth century). Most European countries have instituted a mixed court system for criminal trials in which the panel is composed of both professional and lay judges. For example, in Germany, "a court composed of two lay judges and three professional judges is utilized in serious criminal cases." *Id.* at 461. Likewise, "in France, a mixed panel of three professional judges and nine lay judges is utilized in the Cour d'assise, [a tribunal] which hears the most serious criminal cases." *Id.* at 461–62.

19. English juries rarely try civil cases except those relating to libel, slander, malicious prosecution, fraud, and false imprisonment. Frequently, criminal offenses are tried before a magistrate, rather than before a jury. *See* GOBERT & JORDAN, *supra* note 5, at 6 n.1. Perhaps Canada comes the closest to the American model, but some Canadian provinces have eliminated the civil jury while others allow the jury a more limited role than it enjoys in the United States. *See generally* W. A. Bogart, *"Guardian of Civil Rights . . . Medieval Relic": The Civil Jury in Canada*, LAW & CONTEMP. PROBS., Spring 1999, at 305.

20. Recent statistics from the American Arbitration Association reveal that total arbitration filings with the organization grew from 55,520 in 1989 to 95,143 in 1998. *See ADRnews: AAA's 1998 Case Filings Exceed 95,000*, DISP. RESOL. J., May 1999, at 5. Mr. Steve Gallagher, Senior Vice-President of AAA, recently reported to the author that in 1999, filings exceeded 144,000.

before them and often ill-equipped to understand and evaluate expert testimony, contributes to doubts about the fairness and efficiency of traditional judicial adjudication. Yet there are no empirical data to substantiate this inference, and thus it remains speculative.

It can, of course, be argued straightforwardly—as Judge Jerome Frank has[21]—that the American jury is simply not worth its associated costs and, further, that juries frustrate the stability and even-handed justice that legal rules are designed to secure.[22] The point of this article is related, but distinct: it is, simply, that on-going changes in the composition of juries and the increasing complexities of modern trials are combining to erode the traditional strengths associated with lay decisionmaking. Although evidence of these trends is incomplete and sketchy, reasonable—and sometimes compelling—inferences often can be drawn. In light of these trends, continuing assumptions about the advantages of trial by jury are rendered increasingly suspect by questions regarding the capacity of the lay jury and, inevitably, the legitimacy of outcomes in jury trials, particularly those in complicated civil cases. Although many observers recently have suggested appropriate remedial steps, such as adjustments in the juror selection process and modest changes in the conduct of jury trials,[23] more drastic reform may be necessary. In any event, it is imperative that all members of the legal profession, as well as government officials and citizens generally, take full account of the possibility of *long-term* erosions in the jury system. It is

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21. *See* JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 108–25 (1949).

22. *See* JEROME FRANK, LAW AND THE MODERN MIND 186 (Anchor Books 6th ed. 1963) (1930) (stating that juries are uncertain, capricious, and unpredictable); *id.* at 191 (stating that juries are ignorant and prejudiced); *id.* at 192–94 (stating that juries are poor fact finders); *id.* at 197 (stating that juries are incapable of following complex legal rules); *see generally* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY (1986).

23. *See, e.g.*, Gregory P. Joseph, *Civil Trial Practice Standards: 21st Century Litigation*, LITIG., Fall 1997, at 1–2 (advocating the use of juror questionnaires to expedite the voir dire process, juror notebooks outlining the contents of the trial, juror notetaking during the trial, juror questions for witnesses, clearer instructions to the jury, court-appointed experts, computer-readable submissions, courtroom technology, and videotaped testimony); *see generally* Robert G. Boatright, *The 21st Century American Jury: Reflections from the Cantigny Conference*, 83 JUDICATURE 288 (2000) (describing the various debates at a legal conference dedicated to the problem of jury performance).

important, also, that we maintain an open mind about the range and nature of possible changes in traditional jury practices. What follows is an account of the subtle forces and protracted trends that may be undermining the effectiveness and even the legitimacy of jury decisionmaking, at least in certain circumstances.

A. *The Composition of Juries*

Many factors bear on the composition of a particular jury and the composition of juries generally. For example, urban juries may simply be inherently different from rural juries. A jury's make-up may also be affected when incentives to evade jury duty are strong and there are permissible reasons for jury avoidance that are disproportionately available to certain classes of prospective jurors. Although empirical evidence of jury-duty avoidance is slim, there are indications that incentives to avoid jury duty have increased in recent years.[24] Certainly it is fair to infer from what we can observe that the burdens associated with jury duty are heavier today than at any time in the past. Generally, the compensation of federal and state jurors is quite low, with pay ranging from five dollars to forty dollars per day, usually coupled with an additional allowance for mileage.[25] For those in the work force, this modest compensation often means that jury service entails a significant financial loss. Beyond this, the average length of jury trials has shown a marked increase.[26] Thus, economic incentives

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24. *See, e.g.*, Maura Dolan, *The Times Poll: Jury System is Held in Low Regard by Most*, L.A. TIMES, Sept. 27, 1994, at A1 (reporting a survey of 1703 Los Angeles County adults that showed that nearly fifty-seven percent of those polled thought of jury duty as a personal choice rather than a civic responsibility and that forty-three percent would avoid jury service on a criminal jury for financial, health, time, or family reasons); Andrew Fegelman, *Courts Planning to Ensure Jurors Do Their Duty*, CHI. TRIB., July 16, 1997, at 1 (noting Cook County court officials' "alarm" at the increase in no-show jurors and attributing efforts to avoid service to the rising number of self-employed people and two-worker families). In one recent survey, only one-third of the respondents were "glad" to be called upon for jury duty; almost half of those surveyed thought jury duty should be optional, not mandatory. *See* Susan Carol Losh et al., *"Reluctant Jurors": What Summons Responses Reveal About Jury Duty Attitudes*, 83 JUDICATURE 304, 306 (2000).

25. *See* NATIONAL CENTER FOR STATE COURTS, JURY TRIAL INNOVATIONS 32 (G. Thomas Munsterman et al. eds., 1997).

26. *See* Elizabeth C. Wiggins & Steven J. Breckler, *Management of Complex Civil Litigation*, *in* HANDBOOK ON PSYCHOLOGY AND LAW 77 (D.K. Kagehiro & W.S. Laufer eds., 1991). The percentage of trials lasting more than ten days has

to avoid jury duty are increasingly strong.[27] It is noteworthy that these various disincentives to perform jury service are likely to be most pronounced with respect to those members of the jury panel (venire) with comparatively lucrative jobs or other significant responsibilities. These are often people who are well-educated or have special skills or training that make them especially valuable jury members.[28]

Another factor affecting the modern jury's composition is the probable decline in the number of women serving on juries.[29] During most of the 1900s, large numbers of women did not work outside the home. In recent decades, however, women have entered the work force in unprecedented numbers. In 1960, approximately 37.7% of American women were employed outside the home.[30] By 1997, that number had risen to 59.8%.[31]

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quadrupled since 1945. *See id.* For a recent example of how the length of a trial affects jurors' morale, see Mike Clary, *Sentenced to Service*, L.A. TIMES, July 15, 2000, at A1.

27. *See* Joe Sharkey, *Prime Seats at Democracy Still Only $5*, N.Y. TIMES, Sept. 21, 1997, § 13NJ at 1 (describing how a juror questioned the judge's no-excuses policy, noting that many jurors do not get paid while on jury duty and that the five dollars per day paid by Essex County could not cover the financial losses sustained and quoting another juror as saying "[i]f this goes on for a week . . . I can't pay my rent"); *see also* Harriet Chiang, *Simpson Jury Selection Starts: Judge Excuses 112 Who Said Serving Would Be A Hardship*, S.F. CHRON., Sept. 27, 1994, at A1 (noting that the "judge excus[ed] more than half of the first 212 potential jurors," and that most were excused on the grounds that they could not afford to serve on a case that was expected to last for months).

28. *See* Rita Sutton, *A More Rational Approach to Complex Civil Litigation in the Federal Courts: The Special Jury*, U. CHI. LEGAL F., 1990, at 575, 578. Many groups are routinely excused from service for "undue hardship," such as lawyers, doctors, dentists, managers, and supervisors. *See id.*

29. Just as women overcame historical legal and cultural obstacles to gain the right to serve on juries, changing work patterns began to pull the other direction. Women were completely disqualified from serving on juries in almost all states until the end of the nineteenth century, but most states (with a handful of prominent exceptions) had integrated women into the jury venire by the mid-twentieth century. For an account of the struggles of women to gain the right to serve on juries, see LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 136–51, 165–200 (1998). My point is not that women had a historical tradition of jury service, but that some women who would arguably be the most able jurors may not serve because of the combined demands of work and family responsibility.

30. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COM., STATISTICAL ABSTRACT OF THE UNITED STATES: 1996, at 394 tbl.616 (116th ed. 1996).

31. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COM., STATISTICAL ABSTRACT OF THE UNITED STATES: 1998, at 404 tbl.646 (118th ed. 1998). Note that the data for different years are not strictly comparable because of changes in

Although the dramatic change in women's employment patterns may at first seem remote from an assessment of the American jury, this shift may be highly significant. At least it is beyond dispute that today, as compared to the relatively recent past, a far greater number of women will suffer adverse financial consequences from jury service. Again, common sense suggests that working women generally will be reluctant to perform jury duty, especially for long periods. There is a related—but, again, intuitive—point: if employed women have, on average, more education, training or skills than women outside the work force, then the most qualified (potential) female jurors are less likely to serve than their counterparts. Extending this hypothesis across both genders suggests that the persons apt to be the most capable jurors are also the individuals with the greatest incentives to avoid jury duty. Even though this hypothesis may have been historically true, in recent years, the proportion of the population that has both enhanced ability and a heightened motivation to escape jury service has significantly increased.

Another important factor in determining the composition of juries is the growing sophistication in the process of jury selection. The allowance of peremptory challenges has historically enabled the litigants to strike a specified number[32] of potential jurors without having to offer any justification. During the last several decades, professional jury consulting, which embraces, among other things, professional advice about the advantageous use of peremptory challenges, has become a major enterprise.[33] If a litigant engages a professional jury con-

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the estimation procedures that were introduced in 1982. However, rates on labor force characteristics were essentially unchanged. *See id.* at 400.

32. *See* David B. Rottman et al., U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 1993, at 269 tbl.36 (1995). The number of strikes varies among jurisdictions, but typically three to six peremptory challenges per party are allowed in a civil case. *See id.* Federal courts permit three peremptory challenges per side in a civil case. *See* 28 U.S.C. § 1870 (2000). *See, e.g.*, Donald E. Evins, Annotation, *Jury: Number of Peremptory Challenges Allowable in Civil Cases Where There are More Than Two Parties Involved*, 32 A.L.R.3d 747 (1970 & Supp. 2000).

33. *See Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1463 (1997) (noting that jury consulting is a "booming industry" and "has become a standard ... part of trial work"); CATHY E. BENNETT & ROBERT B. HIRSCHHORN, BENNETT'S GUIDE TO JURY SELECTION AND TRIAL DYNAMICS (Eda Gordon ed., 1993) (a treatise authored by two professional jury consultants noting the extensive use of jury consultants and indicating that some law firms even

sultant,[34] she typically uses that consultant's services to assist both in striking potential jurors and in orchestrating the evidentiary presentation (including argument) so as to maximize its appeal to the jury panel that is seated. The presence of professional jury consultants usually alters the selection of those members of the panel who will be dismissed by peremptory challenge.[35] By taking into account carefully compiled background information on members of the venire and striking jurors with unfavorable "profiles," jury consultants strive to empanel a jury sympathetic to (or which can be coaxed into sympathy with) their client's claim or defense.[36] Those persons in the venire who appear perceptive, well-educated, or independent-minded are in the most danger of being peremptorily struck.

Nonetheless, it appears that trial attorneys and jury consultants share some common ground with respect to what types of potential jurors are desirable (or undesirable) for achieving a particular trial outcome. Too often, after all of the parties have exercised their peremptory challenges, the brightest and most capable members of the panel have been struck.[37] Their elimi-

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have in-house jury consultants); *McVeigh Jury Consultants Play Big Role*, THE LAS VEGAS REV. J., Apr. 12, 1997, at 3D; Phil Linsalata et al., *Prosecution Stung by Jury Consultants in Kevorkian Trial*, THE DETROIT NEWS, Mar. 10, 1996, at 1.

34. Consultants are generally expensive. *See* Wade Lambert, *Jury Consultants Lose Mystique as Firms Tighten Their Belts*, WALL ST. J., Feb. 4, 1994, at B7 (indicating that "very few jury consultants can come in and do any meaningful work for less than 50,000 or 100,000 bucks").

35. *See Developments in the Law—The Civil Jury, supra* note 33, at 1463–66; TED A. DONNER & ROBERT M. KALEC, JURY SELECTION: STRATEGY & SCIENCE § 6:04, at 12 (Bill Colson & Richard Neely eds., 2d ed. 1998) (noting the various ways in which a jury consultant can assist an attorney in his case, including creating juror profiles, conducting surveys, and conducting mock trials); Gary Moran et al., *Attitudes Toward Tort Reform, Scientific Jury Selection, and Juror Bias: Verdict Inclination in Criminal and Civil Trials*, LAW & PSYCHOL. REV., Spring 1994, at 309 (noting the use of "scientific jury selection" to select a jury "predisposed to a certain verdict").

36. *See, e.g.*, Louis Genevie & Sharon Sebolt, *Jury Consulting Assists Defense Counsel in Assisted Suicide Trial*, INSIDE LITIG., Aug. 1994, at 19 (discussing the tactics used by the jury consultants in the Kevorkian trial to construct a panel sympathetic to Dr. Kevorkian's cause).

37. *See, e.g.*, Stuart Taylor, Jr., *Selecting Juries: Dumb and Dumber*, LEGAL TIMES, Apr. 14, 1997, at 33 (noting "the deplorable tendency of the selection process to purge the best-informed people from juries" and quoting one prosecutor as saying, "Smart people will analyze the hell out of your case. They have a higher standard. They take those words 'reasonable doubt' and actually try to think about them. You don't want those people."); Margaret Cronin Fisk, *Winning: Successful Strategies from 10 of the Nation's Top Litigators, Knowing When to Tiptoe*

nation, when coupled with potential jurors who are excused on one of the available "for cause" grounds—such as financial burden, medical excuse, undue hardship, or parenting responsibilities—is apt to weaken significantly the collective educational and intellectual capacity of the empanelled jury.[38] Indeed, it probably is true that jury selection procedures, especially in high profile cases, have a built-in bias favoring jurors who are comparatively less informed, less skilled, or less educated than the pool of potential jurors, and who, it thus seems, may often be unrepresentative of the community.[39] This jury-selection phenomenon has earned the sobriquet, "dumbing down the jury." If this hypothesis is true, it remains so despite the fact that increasing percentages of the population enroll in higher education.[40] That is, even if formal education is increasing on an absolute scale, it could still be that juries are less educated on a relative scale.

These modern trends in jury selection and composition, if documented by empirical evidence, are, to say the least, unsettling. The subtle, but significant, long-term effect of an erosion in the capacity of jurors presumably would parallel a decline in the accuracy and justness of jury verdicts. It is no answer to say that if there is an erosion in jury performance, parties will

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or Stomp, THE NAT'L L.J., Sept. 22, 1997, at C3 (Attorney Ivan Schneider candidly remarked, "[if prospective jurors are] reading the Wall Street Journal editorial page, I know I'll have to supersell the case. If they're reading the Daily News sports page, I'll take that person any day.").

38. *See* JOE S. CECIL ET AL., FEDERAL JUDICIAL CENTER, JURY SERVICE IN LENGTHY CIVIL TRIALS 19 (1987).

39. Supreme Court Justice Sandra Day O'Connor has remarked:

> It is unfortunate that, in high-profile cases in this country, which sometimes are high-profile precisely because they are very important, courts are forced to look high and low for jurors who never read newspapers, never watch the news, and never give much thought to issues of public importance. I'm not saying that those jurors are incapable of deciding cases properly. But I *am* saying that those jurors probably are unrepresentative of their community, because they probably are on average considerably less well-informed citizens than a random cross-section would provide.

Sandra Day O'Connor, *Juries: They May Be Broken, But We Can Fix Them*, FED. LAW., June 1997, at 20, 23.

40. In 1997, nearly 23.9% of the U.S. population had completed four years of college or more; by contrast, in 1970, only 10.7% of the U.S. population had completed four years of college or more. *See* BUREAU OF THE CENSUS, U.S. DEP'T. OF COM., STATISTICAL ABSTRACT OF THE UNITED STATES: 1998, at 167 tbl.260 (118th ed. 1998).

resort to alternative methods of dispute resolution. On some, perhaps many occasions, one party to a dispute will conclude that a jury trial, whatever its fairness, is likely to be advantageous and he thus will refuse to participate in an alternative means of dispute settlement. Likewise, it is also no answer to say that jury trials have a very limited effect on litigation because they constitute less than two percent of all civil trials in America.[41] A large amount of pre-trial activity, including, significantly, settlement negotiations, is conducted with the knowledge that at least one of the parties has demanded (or is expected to demand) a jury trial. This is especially true in class actions, where a defendant's loss in a jury trial can be ruinous.

B. The Changing Nature of Trials

The second essential backdrop for an assessment of jury competence is the nature and demands of the modern trial, in which juries continue to play a central role. Quite obviously, a modest decline in the competence of juries would be of marginal consequence if the judicial tasks assigned to these bodies were becoming simpler and more comprehensible. It seems clear, however, that the tasks assigned to juries are growing ever more complex and formidable, thus threatening to widen the gap between the law's assumption of adequate jury performance and the stark reality of that performance. The increasing complexity of American law and the judicial trials applying that law have had at least three effects on civil adjudication: more intricate and difficult issues, protracted trials, and (in jury trials) complicated instructions.[42]

Can it be shown persuasively that, on average, cases tried to a jury today are more complicated than those presented to juries during the middle decades of the last century? Certainly both intuition and anecdotal evidence suggest an affirmative answer. The data, though not definitive, are at least highly suggestive. We begin with the general observation that American laws themselves have become more complicated with the

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41. *See* Stephen Landsman, *The Civil Jury in America*, LAW & CONTEMP. PROBS., Spring 1999, at 285, 289.

42. *See* Joel Cooper et al., *Complex Scientific Testimony: How Do Jurors Make Decisions?*, 20 LAW & HUM. BEHAV. 379, 380 (1996).

passage of time. It would be difficult to argue that most fields of substantive law are simpler today than they were a half-century ago, or even to argue that they have remained stable. Traditional areas such as torts, contracts, and property have become increasingly complex as the familiar rules and principles are elaborated or refined in order to address modern problems such as mass torts, complex contractual undertakings, and new forms of property ownership. The regulation of business, too, is more intricate than it was even several decades ago. The rise of new fields of law governing such areas as the environment, employment, cyberspace, healthcare, and modern civil rights provides yet another layer of difficulty. Add to this the proliferation of modern class actions and so called public-interest (institutional) lawsuits and the increasingly elaborate profile of contemporary litigation begins to emerge. Class action filings, for example, have shown a dramatic increase: filings of state class actions,[43] mass tort class claims,[44] and class actions generally[45] are all rising significantly.

As noted earlier, longer trials appear to contribute to the reluctance of many potential jurors to serve. Beyond this, however, longer trials entail more testimony and more real and documentary evidence—in short, more information for jurors to digest, sort out, and evaluate.[46] Ordinarily, an increase in the mass of information produced at trial adds to the jury's difficulties of comprehension and recollection. Ultimately, this inability to understand or recall important information makes it more difficult for the jury to reach a decision, and may affect the soundness of judgments.[47]

While the number and intricacy of the issues in a particular case are likely to add to the difficulty and volume of the

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43. *See* Thomas Merton Woods, *Wielding the Sledgehammer: Legislative Solutions for Class Action Jurisdictional Reform*, 75 N.Y.U. L. REV. 507, 531 (2000).

44. *See* DEBORAH R. HENSLER ET AL., RAND INSTITUTE FOR CIVIL JUSTICE: CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 27 (2000).

45. *See* Michael E. Solimine & Christine O. Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1543 n.62 (2000) (citing an Annual Report of the Administrative Office of the United States Courts and a RAND study on class actions).

46. *See* Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 751 (1991).

47. *See* Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1704–05 (1992).

evidence, these multi-issue intricacies, along with the complexities of many laws, probably correlate even more closely with the complexity of the charge to the jury.[48] If this straightforward hypothesis is correct, then there is an inverse relationship between trial length and jury competence.

There have been long-running debates about whether juries generally understand the judge's instructions. Modern empirical studies indicate that in many cases, and especially in complex cases, they do not.[49] The jury's failure to comprehend the judge's charge is a feature in both the civil and criminal contexts.[50] In light of the extensive data indicating that in many instances juries have little comprehension of the instructions they receive, the "presumption" that jurors understand jury instructions seems highly artificial.[51] And while the judiciary may employ a number of mechanisms such as summary judgment, trial bifurcation, judgments as a matter of law, and new trials to prevent or address obviously inconsistent or il-

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48. *See* Robert MacCoun, *Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries, in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 137, 151 (Robert E. Litan ed., 1993) (observing that "[a] growing body of studies indicates that some jurors may fail to comprehend as much as 50 percent of the judge's instructions regarding the law"); Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 191 (1990) (arguing that "[t]he reoccurrence of jury failure in complex and lengthy civil litigation cases [in areas] such as understanding jury instructions, has created doubts about the efficacy of the jury as a competent decisionmaking body").

49. *See* Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37 (1993) (noting the results of numerous studies); Alan Reifman et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539, 539 (1992) (citing study results indicating that "jurors understand fewer than half of the instructions they receive at trial"); Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77 (1988) (discussing numerous studies showing juror confusion over instructions); David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478 (1976) (citing empirical research indicating that jurors often do not understand the judge's instructions).

50. *See* Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y. & L. 589 (1997) (analyzing recent social science on comprehension of jury instructions typical in both civil and criminal contexts).

51. *See* Gacy v. Welborn, 994 F.2d 305, 313 (7th Cir. 1993) (indicating that courts often presume "that jurors understand and follow their instructions despite evidence to the contrary"). *See also* Kimball R. Anderson & Bruce R. Braun, *The Legal Legacy of John Wayne Gacy: The Irrebuttable Presumption That Juries Understand and Follow Jury Instructions*, 78 MARQ. L. REV. 791 (1995) (discussing this presumption and a study that refutes it).

logical jury verdicts, these mechanisms are often insufficiently utilized.[52] More importantly, these procedural devices cannot themselves detect those instances in which instructions have been misunderstood and a jury's performance has been sub par. A faulty performance is often obscured by the rules providing for jury secrecy and allowing only the most limited judicial interrogation of jurors concerning their verdict.[53]

Some supporters of the jury system discount findings that suggest jurors do not comprehend the judge's instructions.[54] They argue that even though juries probably do not understand the technical aspects of the judge's charge, they nonetheless return "correct" verdicts.[55] These jury advocates credit the jury with an intuitive or common-sense capacity that allows it to make accurate judgments about the central aspects of litigation, such as basic fairness, witness credibility, probabilities gleaned from collective experience, and acceptable guidelines for the allocation of losses.[56] These important lay abilities, the jury supporters argue, are largely divorced from educational levels and particular kinds of expertise.[57] The theory is that through the exercise of these innate or experiential capacities, juries produce fair and accurate outcomes. There are data that indicate a fairly high correlation between jury determinations and those made (on the same evidence) by the presiding

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52. *See* Shaun P. Martin, *Rationalizing the Irrational: The Treatment of Untenable Federal Civil Jury Verdicts*, 28 CREIGHTON L. REV. 683 (1995).

53. *See* Bellows Falls Village Corp. v. State Highway Bd., 190 A.2d 695, 698 (Vt. 1963) ("However worthy its motives, when the trial court delved into the mental processes of the jurors in this case, to search out how their verdict was composed, the protection [of jury secrecy] was invaded. In this aspect of its investigation, the court exceeded the limits of its authority."); *see also* Continental Cas. Co. v. Howard, 775 F.2d 876, 886 (7th Cir. 1985) (excluding the jury foreman's affidavit concerning the jury's motives behind the damage award because it was "an attempt to testify about the jury's thought processes [in violation of Federal Rule of Evidence 606(b)]"); FED R. EVID. 606(b); FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 388 (4th ed. 1992) (indicating that there is general agreement that the mental processes of jurors will not be investigated, nor will the effect of those processes on the decision).

54. *See* Marc Galanter, *The Regulatory Function of the Civil Jury*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 61, 70 (Robert E. Litan ed., 1993) ("The literature, on the whole, converges on the judgment that juries are fine decisionmakers. They are conscientious, collectively they understand and recall the evidence as well as judges, and they decide on the basis of the evidence presented.").

55. *See id.*

56. *See id.*

57. *See id.*

judge.[58] But if in fact legislators and judges, who structure and oversee judicial adjudications, expect juries to rely on intuition and experience, it seems oddly inconsistent that even comparatively small errors in instructing a jury usually lead to a reversal and new trial.[59] It is also fair to note that even if one concedes that juries have traditionally produced appropriate outcomes, there is no assurance that less capable, or even equally capable, juries sitting in modern trials of increasing complexity will continue to do so.[60] It is one thing for a jury to adjudge a civil suit for assault and battery, and quite another for it to determine the economic effects of sophisticated pricing arrangements.

If there is at least some correlation between the formal education of jurors and their judicial performance, the picture darkens. In fact, a number of studies have shown that, at the least, a correlation exists between jurors' educational levels and their ability *to understand legal instructions*.[61] In some types of modern trials—such as those involving complex scientific findings or esoteric economic or mathematical evidence—there probably is no adequate substitute for actually comprehending the evidence, the arguments of the parties, and the judge's instructions. In these kinds of cases, intuition and a sense of fairness are unlikely to produce a result that is consistent with the governing law. Furthermore, if jurors' intuitive notions of right and wrong are permitted generally to supplant understanding, reasoning, and logic as the cornerstone of the

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58. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966) (documenting the Chicago Law School's Jury Project, in which the rate of judge-jury agreement was seventy-eight percent). Note, however, that this study was conducted more than three decades ago.

59. *See, e.g.*, United States v. Migliaccio, 34 F.3d 1517 (10th Cir. 1994) (reversing the conviction and ordering a new trial in a case involving the filing of false claims by doctors under the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS)). While the trial court's instructions addressed the situation where the accused makes an honest mistake, the defendant did not plead honest mistake, but rather contended that CHAMPUS regulations contained ambiguous matter and that his interpretation was reasonable. *See id.*

60. One commentator noted the oft cited Kalven and Zeisel study, *supra* note 58, did not assess judge/jury correlation in complex cases involving toxic torts, securities, and antitrust matters. *See* Dan Drazan, *The Case for Special Juries in Toxic Tort Litigation*, 72 JUDICATURE 292, 296 (1989).

61. *See, e.g.*, AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 58–59 (1982); Valerie P. Hans & Andrea J. Appel, *The Jury on Trial*, *in* A HANDBOOK OF JURY RESEARCH (Walter F. Abbott & John Batt eds., 1999).

adjudicatory process, then the highly refined and orderly presentation of evidence and the crafting of instructions become meaningless exercises. Jury trial may thus devolve into a battle of instincts, hunches, and judgments based on non-relevant criteria such as the dress and demeanor of attorneys, witnesses, and especially, expert witnesses.

Another source of jury misunderstanding is the increasingly difficult nature of judicial evidence. Even relatively simple trials, such as paternity suits, often involve highly technical medical or mathematical evidence. For example, in *Kammer v. Young*,[62] where the issue was paternity, the jury was presented with evidence derived by applying the Bayes's theorem[63] to a "paternity index" derived from blood-group and human leukocyte antigen testing. This case illustrates a recent trend: with increasing frequency, contemporary juries are faced with sophisticated, highly technical evidence drawn from such diverse fields as economics, mathematics, statistics, psychiatry, engineering, epidemiology, toxicology, serology, and genetics.[64] These technical forms of evidence, once common only in complex litigation, are now beginning to surface in garden-variety civil and criminal litigation.[65] The abundant and ever-increasing literature on scientific or forensic evidence[66] serves

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62. 535 A.2d 936 (Md. Ct. Spec. App. 1988).

63. For a discussion of Bayes's theorem and its use in the courtroom, see GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 202–05 (3d ed. 1996).

64. Of course, the trial judge retains some limited power to control the evidence presented to the jury. The Supreme Court recently reaffirmed the trial judge's ability to exercise discretion in screening proffered scientific testimony for relevancy and reliability under the Federal Rules of Evidence in *G.E. v. Joiner*, 522 U.S. 136 (1997).

65. *See, e.g.*, Martha Neil, *Panel to Discuss Getting Through to Juries*, CHI. DAILY LAW BULL., Apr. 28, 2000, at 3. In addition to paternity suits, criminal cases involving DNA evidence are likely to cause confusion because of the highly technical nature of the evidence. A May 2000 conference at Northwestern University confronted this very issue. Discussing the conference, Law Professor Shari Seidman Diamond acknowledged that:

> even cases that on their face seem cut and dried in ordinary litigation can have a complex element.... For example, a standard old criminal case might now have DNA evidence, or a contest over a document might bring in people who can testify about the paper or the contents of the signatures.

Id.

66. *See, e.g.*, PAUL GIANNELLI & EDWARD IMWINKELRIED, SCIENTIFIC EVIDENCE (2d ed. 1993); 29 CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE § 6266 (1997); FEDERAL JUDICIAL CENTER,

as yet another confirmation of the changing nature of evidence presented in modern trials. This increasing reliance on technical evidence exacerbates the aforementioned problems with jury comprehension and recollection, again affecting the final judgments. This provides further support for the thesis that the jury system needs a careful, far-reaching reexamination.

There is a general recognition that lawyers and judges need instruction and guidance in comprehending difficult, specialized evidentiary subjects.[67] Yet our laws governing jury adjudication continue to embody the remarkable assumption that lay jurors can comprehend and evaluate perplexing evidence that often challenges specialists in the field from which it is drawn. The following two cases, *Brooke Group* and *Havner*, illustrate the point.

In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,[68] the Liggett Group tobacco subsidiary sued one of its competitors, alleging predatory pricing under the Robinson-

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REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (1991); THE EVOLUTION RULE OF STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS: REPORT OF THE PANEL ON STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS (Stephan E. Fienberg ed., 1989); Timothy W. Bouch & D. Jay Davis, Jr., *Organization and Admissibility of Complex Scientific Evidence: Helping Your Jury Understand*, 9 S.C. LAW. 32 (1998); David H. Kaye, *DNA Evidence: Probability, Population Genetics, and the Courts*, 7 HARV. J.L. & TECH. 101 (1993).

67. There is general agreement that training is desirable, if not essential, in both "scientific" evidence and the administration of complex litigation. *See* Paul S. Miller & Bert W. Rein, *Whither* Daubert? *Reliable Resolution of Scientifically Based Causality Issues in Toxic Tort Cases*, 50 RUTGERS L. REV. 563, 565 (1998) (observing that "the Federal Judicial Center has formally recognized the need for judicial involvement by increasing science training for district court judges and by publishing a handbook on scientific evidence, which includes detailed 'reference guides' for scientific and technical specialties frequently encountered in the courtroom"); *see also* WAYNE D. BRAZIL ET AL., MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS (1983); FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION § 20.14 (3d ed. 1995); Margaret G. Farrell, *The Role of Special Masters in Federal Litigation*, SE99 ALI-ABA 837 (2000) (Westlaw); Ronald E. McKinstry, *Use of Special Masters in Major Complex Cases, in* FEDERAL DISCOVERY IN COMPLEX CIVIL CASES: ANTI-TRUST, SECURITIES, AND ENERGY 211 (Marvin G. Pickholz & Douglas M. Schwab eds., 1980). In fact, some statutes explicitly recognize the arcane nature of certain types of disputes and specifically provide for the appointment of special masters. *See* 15 U.S.C. § 16(f)(2) (allowing for the appointment of a special master to help determine the "public interest" in connection with consent judgments); 15 U.S.C. § 6613 (allowing for the appointment of a special master to assist with Y2K litigation).

68. 509 U.S. 209 (1993). Arthur Austin discusses his perception of the jury's understanding of this case in Arthur Austin, *The Jury System at Risk from Complexity, the New Media, and Deviancy*, 73 DENV. U. L. REV. 51 (1995).

Patman Act. Liggett had successfully developed a generic cigarette market and its lower-cost brands cut into the sales of higher-priced name brands. Brown & Williamson then entered the generic cigarette market and began to undercut Liggett's prices. At trial, Liggett argued that Brown & Williamson sold its generic cigarettes through a predatory pricing scheme in order to injure competition in the domestic cigarette market as a whole. The trial, which lasted 115 days, involved "scores of witnesses" and thousands of documents.[69]

Two researchers, Arthur Austin, a professor of law, and Stephen Adler, a journalist, conducted post-trial interviews with the jurors. Both investigators concluded that "the jurors were overwhelmed, frustrated, and confused by testimony well beyond their comprehension."[70] Austin concluded that "at no time did *any* juror grasp—even at the margins—the law, the economics, or any other testimony relating to the allegations or defense."[71] Further, the jurors did not comprehend fundamental terms such as "oligopoly," "market power," or "average variable cost."[72] Instead, when faced with complicated testimony beyond their comprehension, they focused on attorneys' attire, demeanor and personal hygiene.[73] The jury reached a compromise verdict of $49.6 million in favor of the plaintiffs, which, when trebled, produced a $148.8 million judgment.[74] Even though the Supreme Court ultimately held that the case should be reversed because there was insufficient evidence to support an essential element of the plaintiff's case,[75] the jury's performance supports the conclusion that some, perhaps many, modern juries cannot perform at the required level.

In *Havner v. Merrell Dow Pharmaceuticals, Inc.*,[76] the plaintiff sued Merrell Dow on theories of negligence, defective design, and defective marketing, claiming that her limb deformity, present at birth, resulted from her mother's ingestion

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69. *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 218 (1993).

70. Austin, *supra* note 68, at 54.

71. *Id.*

72. *See id.*

73. *See id.*

74. *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. at 218.

75. *See id.* at 243.

76. 907 S.W.2d 535 (Tx. Ct. App. 1995), *rev'd sub nom.* Merell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706 (Tx. 1997).

of the prescription drug, Benedictin. All of the plaintiff's expert witnesses had made numerous appearances for plaintiffs in other Benedictin litigation. Indeed, their "expert" recitations were so common that one court compared the series of Benedictin cases to a traveling orchestra, playing the same tune at every stop as it traveled across the country.[77] At trial, however, the *Havner* jury was persuaded by the plaintiff's experts that Benedictin caused the birth defects in question. It then rendered a verdict against the defendant for compensatory damages of $3.75 million and punitive damages of $30 million (a figure which the trial judge later reduced to $15 million).[78] On appeal, the Court of Appeals of Texas held that the evidence was legally insufficient to support the punitive damages findings.[79] On further appeal, the Texas Supreme Court ruled that the evidence was legally insufficient to support causation, thus reversing the judgment for compensatory damages.[80] The court found that the expert witnesses had based their conclusions on improper assumptions and dubious studies that were unpublished, unreviewed by peers, and that were not replicated by the relevant scientific community.[81] As another judge remarked, "the only review the plaintiffs' experts' work has received has been by judges and juries, and the only place their theories and studies have been published is in the pages of federal and state reporters."[82]

One might argue that the trial judges in *Brooke Group* and *Havner* were as confused as the juries, indicating that bench trials are as subject to error as jury trials. But, that criticism overlooks two critical points: first, the judges did not make the initial determinations of liability and one can only speculate as to whether the plaintiff would have won a judgment in a bench trial; second, in bench trials—as opposed to jury trials—appellate courts exercise more rigorous review and have a broader range of choices for modifying or reversing the decision below, including some authority to reexamine the trial judge's conclusions of fact. In contrast, our system elevates the jury verdict

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77. *See Merell Dow Pharm.*, 953 S.W.2d at 709 (citing Sixth Circuit opinion).
78. *See id.*
79. *See Havner*, 907 S.W.2d at 535.
80. *See Merell Dow Pharm.*, 953 S.W.2d at 730.
81. *See id.* at 726.
82. *Id.* (quoting Judge Kozinski in Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1318 (9th Cir. 1995)).

to such an impregnable point that often the only way to reverse a "bad" jury verdict is to find fault with the legal decisions of the judge that may have had little actual effect on the outcome. If the jury's verdict has at least some evidentiary support, it is not usually disturbed. So, while it is true that the jury verdicts in these cited cases did not withstand appellate review,[83] most jury verdicts remain intact.[84]

It might be asked whether jury verdicts like those in *Brooke Group* and *Havner* are infrequent or aberrational. There is no definitive answer,[85] but common observation permits the inference that lay jurors are frequently unable to interpret data presented by experts and often have no sound basis for accepting or rejecting the testimony of a particular expert. Some inferential support for this hypothesis comes from studies, which show that jurors have particular difficulty understanding statistical evidence,[86] which, of course, is commonly introduced in many modern cases. If statistical evidence is a source of jury misunderstanding and confusion, then one can infer that scientific and medical evidence, often involving statistics and probability theory, is equally likely to confound lay jurors.

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83. *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. at 243; Havner v. Merrell Dow Pharmaceuticals, Inc., 953 S.W.2d at 730.

84. For a discussion of the appellate standard of review regarding jury verdicts, see MOORE'S FEDERAL PRACTICE Ch. 206.02 (3d ed. 2000).

85. Several antitrust cases add further support to the belief that jurors cannot understand highly technical evidence. For instance, one jury could not reach a decision after being confronted with advanced computer technology, complex economic analysis, and the testimony of eighty-seven witnesses during the ninety-six trial days. *See* ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423, 444 (N.D. Cal. 1978). In another case, a demand for jury trial was denied based on the length of the trial and the fact that jurors would have to analyze Japanese market conditions and business practices over a thirty-year period and make price comparisons of thousands of electronic products based upon their marketability, performance, and cost of production. *See In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1073–74 (3d Cir. 1980).

86. *See* Joe S. Cecil et al., *supra* note 4 at 756–60 (discussing various studies showing jurors' inability to understand complex data); William C. Thompson, *Are Juries Competent to Evaluate Statistical Evidence*, LAW & CONTEMP. PROBS., Autumn 1989, at 9; *see also* Christopher G. Shank, *DNA Evidence in Criminal Trials: Modifying the Law's Approach to Protect the Accused from Prejudicial Genetic Evidence*, 34 ARIZ. L. REV. 829, 865 (1992) (noting that "jurors tend to read statistical statements and immediately form conclusions about them, although even a slight change in the wording of a statistical statement of probability could result in astonishingly contradictory conclusions").

If we again consider probable trends, it seems highly likely that the use of scientific, economic, and mathematical evidence will continue to increase, while it seems highly unlikely that the capacity of juries to evaluate this evidence will expand significantly. Indeed, even assuming that most juries accurately reflect the composition of the local community, the fact that these bodies generally consist of lay persons suggests the difficulty of bridging the widening chasm between lay decisionmakers and modern technical evidence. Furthermore, the supposed leveling effect of the adversary system appears inadequate to meet this growing challenge. While it is true that each party to a suit can point out the defects in her adversary's forensic evidence, lay persons are probably unable to determine which of two competing mathematical or scientific proofs is likely to be valid. As Chief Justice Burger once remarked:

> The common sense of the ordinary juror cannot be brought to bear unless there is comprehension of the facts and the law.
>
> The question I leave for [the next] generation . . . is this: can the common sense of the ordinary juror be brought to bear in a complex, economic, or scientific case, or indeed any case which lasts two months, four months, six months, or eight months?[87]

The picture that is emerging is one in which modern obstacles to jury performance are superimposed on conventional jury contaminants, such as bias based on race,[88] ethnicity,[89] gender,[90] corporate identity,[91] or sympathy for the injured. A

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87. Burger, *supra* note 1, at 220.

88. *See* Jeffrey Taylor, *Getting Aboard: Lawyers, Once Chary of Big Tobacco, Rush to Line Up Plaintiffs*, WALL ST. J., Apr. 1, 1998, at A1 (noting that the attorney particularly wants to try cases with African American plaintiff smokers before DC juries composed of mostly African Americans).

89. *See* MOLLY SELVIN & LARRY PICUS, THE INSTITUTE FOR CIVIL JUSTICE, THE DEBATE OVER JURY PERFORMANCE: OBSERVATIONS FROM A RECENT ASBESTOS CASE 49 (1987) (noting that in *Newman v. Johns-Manville Sales Corp.*, No. M-79-124-CA (E.D. Tex. 1984), a Mexican plaintiff received less than other prevailing plaintiffs in the case, suggesting that bias may have played a role in this discrepancy).

90. *See* Tammy B. Grubb, *The Functional Effect of Eliminating Gender Bias in Jury Selection: A Critique and Analysis of* J.E.B. v. Alabama, 48 OKLA. L. REV. 173, 181–82 (1995) (noting that gender impacts criminal cases such as rape and death penalty cases, but that empirical evidence does not demonstrate any gender

traditional concern of long standing is that trial outcomes are affected by the biases or subtle predispositions of jurors that may be consciously (or subconsciously) hidden during voir dire.[92] Although the thesis of this article is that long-term trends in jury selection and in the nature of trials are eroding our customary confidence in jury trials, traditional problems centering on a lack of neutrality continue to raise concerns in jury trials as well.

III. REMEDIAL STEPS

Recently, legal commentators and professionals have shown a renewed interest in the performance of American juries.[93] Most current observers believe that the basic health of the jury system is sound. They argue that what is needed is a series of moderate reforms such as increased compensation for jurors, elimination or reduction of peremptory challenges, limitations on the exemptions from jury duty, revelation of the ap-

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differences with respect to outcomes in civil trials); Deborah L. Forman, *What Difference Does It Make? Gender and Jury Selection*, 2 UCLA WOMEN'S L.J. 35, 53 (1992) (indicating that men and women may recall facts and events differently, and that women participate in jury deliberations much less than men); Terri Kirkpatrick, *Gender-Based Peremptory Strikes:* J.E.B. v. Alabama *Scuttles the Controversy*, 33 U. LOUISVILLE J. FAM. L. 143, 160 (1995) (indicating that "a more favorable jury for a wife seeking child support may be a jury comprised mostly of women").

91. *See* ROBERT MACCOUN, RAND, IS THERE A "DEEP-POCKET" BIAS IN THE TORT SYSTEM? 4 (1993) (noting various studies indicating that juries treat corporations differently from individuals and suggesting that this discrepancy arises from jurors' sense that corporations should be held to a higher standard, jurors' distrust of corporations, and the impersonal nature of corporations).

92. *See* Barbara A. Babcock, *Voir Dire: Preserving Its "Wonderful Power,"* 27 STAN. L. REV. 545, at 547, 554 (1975); Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 839 (1989); Donna J. Meyer, *A New Peremptory Inclusion to Increase Representativeness and Impartiality in Jury Selection*, 45 CASE W. RES. L. REV. 251, 264–65 (1994).

Recent polls indicate that jurors' intuition and biases may play a significant role in their decisionmaking process. A majority of potential jurors surveyed indicated that "they would do what they believed was right," countermanding judicial instructions if necessary. *See* Peter Aronson et al., *1998 Juror Outlook Survey*, NAT'L. L. J., Nov. 2, 1998, at A1.

93. *See* Munsterman et al., *supra* note 25, at 1 (describing the symposium on the civil jury system, cosponsored by the Section of Litigation of the American Bar Association and the Brookings Institution and attended by judges, litigators, researchers, trial consultants, and representatives of insurance and consumer groups); *see also supra* note 23.

plicable legal rules at the outset of trial, limitation on the length of jury service, and simplified instructions.[94] Other, more far-reaching changes, such as eliminating juries in complex cases, are proposed less frequently, and have less prospect for successful implementation in our constitutional framework. Given the trends discussed in the previous section, however, proponents of jury reform must begin to look beyond intermediate remedies if the jury is to remain a central participant in modern litigation. This section will briefly review some reform proposals that hold considerable promise, both in the realistic possibility of implementation and in the capacity for improving the system. What follows is not a concrete plan for reform, but rather a suggestive agenda—a culling from the reform literature—that is meant to encourage more thought, research, and experimentation.

If the thesis of this article is correct, long-term trends will increasingly threaten the competence and traditional role of the American jury. As noted above, these trends are rooted in both the composition of the jury and, more importantly, in the growing duration and complexities of modern trials. Obviously, innovations that operate to improve the quality of traditional juries are an important first step toward reform. A more fundamental and far-reaching change, however, is to match the strengths of jurors with the particular case before the court. There are various innovative means for achieving this end. The following section, Part III.A, discusses this proposition in more detail. This suggestion includes completely removing certain cases from consideration by juries, which is discussed in Part III.A.1, and the specific reform of empanelling specially qualified juries, which is discussed in Part III.A.2. Part III.B. discusses the advantages of utilizing court-appointed expert witnesses to assist juries, an available option rarely taken advantage of by trial courts.

These reform measures hold promise even in jurisdictions where juries consist of twelve members and verdicts must be unanimous. They hold even more promise in jurisdictions that use juries of reduced size and accept verdicts that are not unanimous. Because of their considerable diversity, the states seem especially well-suited to experiment with modifications of

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94. *See* Munsterman et al., *supra* note 25, at v–vi.

the traditional jury system.[95] Not surprisingly, some of the proposals that follow raise constitutional issues. These issues will be addressed in the course of the ensuing discussion.

A. *Matching the Trier to the Nature and Complexity of the Case*

One promising proposal is to enlist a judge or magistrate to identify the characteristics of the cases about to be placed on the trial docket and then to assign an appropriate fact-finder based on this pre-trial assessment. Some cases would no doubt fall clearly within the competence of the traditional, randomly selected lay jury. Conversely, in very complex cases, especially those likely to last for an extended period of time, the court might conclude that a bench trial, with or without the assistance of court-appointed experts, would be the most appropriate means of adjudication. In still other cases, the court would empanel a "blue ribbon" or "special" jury. In some instances, members of this specially qualified panel might meet a certain level of general education or experience. In other instances, the court would appoint a special jury of experts in the appropriate specialties—replicating arbitration proceedings that often use private decisionmakers with specialized knowledge or

95. States might lead the way in the curtailment of the use of the traditional civil jury, since the Seventh Amendment to the United States Constitution, guaranteeing a right to jury trial in civil "suits at common law," is not binding on the states. *See* Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211 (1916). The Supreme Court has upheld less than unanimous verdicts for state criminal trials. *See* Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1970). The Court has also approved state criminal juries with as few as six members. *See* Ballew v. Georgia, 435 U.S. 223 (1978). At the federal level, the Supreme Court has indicated that a jury of less than twelve is consistent with the language of the Seventh Amendment. *See* Colgrove v. Battin, 413 U.S. 149 (1973). The Federal Rules of Civil Procedure allow a jury of "not fewer than six nor more than twelve members." FED. R. CIV. P. 48. The Court has yet to address the question of whether the Seventh Amendment permits less than unanimous verdicts in civil trials. In his opinion in *Colgrove*, however, Justice Brennan indicated that the characteristics of a jury are not as important as the right to a jury trial itself. *See Colgrove*, 413 U.S. at 156. This statement appears to imply that a less than unanimous jury would satisfy the Seventh Amendment jury trial right in federal cases. There is, however, support for the opposing view. In the *Apodoca & Johnson* cases, five Justices agreed that the Sixth Amendment guarantees a jury trial with a unanimous verdict. *See* Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1970).

expertise.[96] In all cases that do not clearly fall within the competence of the traditional, randomly selected jury, a judge or magistrate would have to choose the appropriate fact-finder after hearing arguments of counsel, presumably after discovery was well under way.

1. The Complexity Exception and Judge Trials

The proposal described above entails withdrawing altogether some cases from jury consideration and setting them for a bench trial. Implicit in this proposal is the assumption that courts could invoke the so-called "complexity exception" to constitutionally based rights to a trial by jury, such as the Seventh Amendment's right to a jury trial in civil cases.[97] The complexity exception, recognized by a few federal courts, permits particularly complicated cases to be withdrawn from the jury and tried before a judge (or a panel of judges) on the grounds that a jury trial would probably not result in a fair adjudication. In state cases, to which the Seventh Amendment does not apply, it probably will be necessary to develop a similar exception where state constitutional provisions guarantee the right to a jury in civil trials, as they typically do. It seems especially appropriate to invoke the exception when a forthcoming trial is likely to be protracted and involve difficult technical or scientific issues. In such cases, the evidence that must be assimilated and understood is likely to be both massive and complex.

Despite considerable scholarly and judicial attention, the Supreme Court has yet to address directly the constitutionality of the complexity exception. Approval of this exception for application in federal courts would increase the chances that states, too, would sanction this sensible limitation on the right to jury trial. The Supreme Court has at least lent inferential support to the recognition of a complexity exception to the traditional right to a jury trial. In what may be one of the more significant footnotes in the Court's Seventh Amendment jurisprudence, Justice White, speaking for the court in *Ross v. Bernhard*,[98] stated that the "practical abilities and limitations

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96. *See* Joseph Sanders, *Scientific Validity, Admissibility, and Mass Torts After* Daubert, 78 MINN. L. REV. 1387, 1439–40 (1994) (supporting the use of blue ribbon juries to decide complex cases).

97. *See* Sutton, *supra* note 28, at 582–83.

98. 396 U.S. 531 (1970).

of juries" is one appropriate criterion for determining the scope of the Seventh Amendment's right to a jury.[99] If the Court adhered to this principle, at least some complex cases could, perhaps, be withdrawn from jury consideration.

The complexity issue has arisen in several federal circuit courts with varying results. The Ninth Circuit, for example, has rejected all arguments in favor of the complexity exception.[100] In contrast, the Third Circuit, while rejecting any broad exception to the Seventh Amendment founded simply on the *Ross* footnote, nonetheless concluded that the due process clause may require a bench trial in "exceptional cases."[101] The court's rationale was that, in some cases, the likelihood that a lay jury would fail to comprehend the trial's essential features threatened the basic fairness of the proceeding, thus creating a due process violation.[102] This court at least accepts the basic proposition that some cases are simply "beyond the practical abilities and limitations of a jury."[103]

The Supreme Court, in a 1966 opinion, invoked complexity "considerations" to deny jury consideration of certain aspects of a patent case. In *Markman v. Westview Instruments, Inc.*,[104] the Court held that a judge, rather than a jury, should determine claim terms in a patent dispute. Declaring that neither history nor precedent yielded a clear answer as to who should construe a patent, the Court concluded that "judges, not juries,

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99. *See* Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970).

100. *See In re* United States Fin. Sec. Litigation, 609 F.2d 411 (9th Cir. 1979).

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

102. *See id.* For a similar analysis, see ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423 (N.D. Cal. 1978); Bernstein v. Universal Pictures, Inc. 79 F.R.D. 59 (S.D.N.Y. 1978). *But see In re* United States Fin. Sec. Litig., 609 F.2d 411 (9th Cir. 1979); *cf.* Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1673 (1998) (noting the Third Circuit's conclusion that the Fifth Amendment narrows the scope of the Seventh Amendment by means of a complexity exception); 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, 716 (1996) (observing in the context of due process that "[s]ome courts address the concern of juror competence by reading a complexity exception into the Seventh Amendment jury trial right").

103. William V. Luneburg & Mark A. Nordenburg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with Complexities of Modern Civil Litigation*, 67 VA. L. REV. 887, 891 (1981) (quoting *In re* Japanese Elec. Prod. Antitrust Litigation, 631 F.2d 1069, 1079 (3d Cir. 1980)).

104. 517 U.S. 370 (1996).

are the better suited to find the acquired meaning of patent terms."[105] Justice Souter explained:

> The construction of written instruments is one of those things that judges often do and are likely to do better than jurors unburdened by training in exegesis. Patent construction in particular "is a special occupation, requiring, like all others, special training and practice. The judge, from his training and discipline, *is more likely to give a proper interpretation to such instruments than a jury; and he is, therefore, more likely to be right, in performing such a duty than a jury can be expected to be.*"[106]

Surely patent cases are not the only kinds of cases in which accurate decisionmaking would be enhanced by the employment of a fact-finder more likely than a lay jury to comprehend the evidence and applicable legal rules. The reasoning applied in *Markman* might equally be applied in numerous other types of civil or even criminal cases. Otherwise stated, if the Seventh Amendment permits complex issues in patent cases to be removed from the jury, that Amendment may also tolerate similar leeway in other areas. Similar reasoning might prevail in states that have a constitutional right to trial by jury in civil cases. *Markman* does not, of course, rely on the complexity exception. Indeed, the *Markman* Court was careful to demonstrate conformance to previous Seventh Amendment jurisprudence. The Court's precedents mandate that the historical nature of the issues—legal or equitable—and the nature of the remedies sought be the paramount considerations in determining whether trial by jury is constitutionally secured.[107] The issue before the Court in *Markman* was not clearly controlled by precedent, thus affording the opportunity to fashion a rule for patent cases. It should not be forgotten, however, that the Court first noted the complexity theme over thirty years ago in *Ross*,[108] and in the intervening years, marked by increasingly complex trials, it has not foreclosed the possibility of such an exception. *Markman* suggests, at least, that there

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105. *Id.* at 388.

106. *Id.* at 388–89 (emphasis added).

107. STEPHAN C. YEAZELL, CIVIL PROCEDURE 649–50 (4th ed. 1996).

108. Ross v. Bernhard, 396 U.S. 538 n.10 (1970). *But see* Sutton, *supra* note 28, at 583–84 (citing later Supreme Court cases that confine the scope of the *Ross* footnote to cases tried before administrative law courts).

still may be a place within the constitutional balance for assessing jury competence as a factor—perhaps a decisive factor—in the constitutional right to trial by jury.[109] Note, also, that *Markman* raises the possibility of invoking the complexity exception *for selected issues* in a case, leaving other, less complex questions, for jury resolution.

Of course, the Supreme Court has also held that the constitutional right to jury trial does not extend to non-judicial adjudicative tribunals, such as administrative agencies. In construing the Constitution to permit administrative fact-finding and determinations without jury participation, the Court has noted that some administrative matters are within the "special competence" of an administrative agency in the "relevant field."[110] This suggests that the Court, at least implicitly, has acknowledged the limitations of juries in some capacities. Quite obviously, observations like this can easily be confined to the context in which they were made, thus diluting their force in judicial trials. The most that can be said is that the Court is sensitive to the limitations of a lay fact-finder faced with conflicting lines of highly technical evidence.

2. Special Juries

While the complexity exception favors bench trials over jury trials in certain circumstances, there are, as noted above, various procedures aimed at improving the performance of juries. Perhaps the most promising of these schemes attempts to match juror competence with the nature and complexity of a pending case. Two such proposals merit particular attention. First, one procedure would require that courts seek a certain level of formal education (or equivalent training or experience) in jurors consistent with the issue to be tried. The assumption here is that in certain kinds of cases, juries with more formal education (or relevant "educational" experience) will produce a

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109. *See generally* Colleen P. Murphy, *Implications for the Applicability of the Seventh Amendment to Federal Statutory Actions*, 95 YALE L.J. 1459 (1986) (discussing the administrative agency exception).

110. *See* Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 455 (1977) (finding that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law'").

more fair and accurate outcome than would randomly selected juries. Presumably, the so-called "special jury" would be better able to decipher and assimilate the complex evidence and to understand the judge's instructions. This hypothesis draws support from a 1987 poll in which a majority of the federal and state court judges reported that jurors with differing levels of education experienced roughly proportional difficulty dealing with cases involving highly technological or scientific evidence.[111] A substantial minority of those polled believed that some minimum level of education or qualification would be desirable in these kinds of cases.[112] At various times in the past, numerous American states have had statutes permitting the use of some form of specially qualified juries.[113] Many of these statutes have been repealed or fallen into disuse.[114] In Delaware, however, there is renewed recognition of the need for specially-trained jurors. In 1987, the state legislature enacted a provision allowing judges, in their discretion, to empanel special juries in complex civil cases upon application by one of the parties.[115]

The second proposal is that for some cases involving complicated economic, medical, or scientific evidence, the court might elect to empanel a jury of experts in the relevant field. For instance, in a case involving complex scientific analysis, the court could empanel a jury composed of scientists or techni-

111. *See Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases*, 69 B.U. L. REV. 731, 748 (1989) (reporting the results of the poll conducted by Louis Harris and Associates).

112. *See id.* Of 200 federal judges polled, thirty-nine percent agreed with this statement; of 800 state judges polled, thirty-one percent agreed. *See id.*

113. *See generally* James Oldham, *The History of the Special (Struck) Jury in the United States and its Relation to Voir Dire Practices, the Reasonable Cross-Section Requirement, and Peremptory Challenges*, 6 WM. & MARY BILL RTS. J. 623 (1998).; *see also* Luneburg & Nordenburg, *supra* note 103, at 906 (noting that "[s]eventeen states have used some form of special jury at one time or another").

114. *See id*; Sutton, *supra* note 28, at 580 (reporting that "[s]pecial or 'blue-ribbon' juries were also used in the United States in various forms through the first half of the twentieth century, after which they fell into disuse").

115. *See* DEL. CODE ANN. tit. 10, § 4506 (1999). The Delaware statute reads: "The Court may order a special jury upon the application of any party in a complex civil case. The party applying for a special jury shall pay the expense incurred by having a special jury, which may be allowed as part of the costs of the case." *Id.* The Delaware Superior Court upheld the constitutionality of the statute in *In re Asbestos Litigation*, finding that the qualifications of jurors may be determined by legislative action. *See* 551 A.2d 1296, 1299 (Del. Super. Ct. 1988).

cians with an appropriate background. As with the jury composed of members with a higher than average level of education or experience, this "expert" jury would represent a balance between the litigants' right to a jury trial and their equally important right to a fair trial.

The most obvious drawback of the expert panel is that jury service for more than a few days would be costly to the jury participants. Presumably, they would suffer significant financial loss by reason of time spent away from their usual occupations. The Delaware statute, noted above, accounts for this difficulty by requiring the party requesting a special jury to pay for the associated expenses.[116] Indeed, the use of any type of special jury would probably entail increased compensation for jurors. These extra costs could be covered either by the parties, as in the Delaware statute, by increased public appropriations for jury service, or, perhaps, by a portion of lawyers' bar dues. The latter two options of public support may be justified by the cost benefits to society of having a more efficient system capable of reaching better-reasoned decisions in less time.

Expert or "special" jury panels have historical support: special juries composed of persons from relevant fields were used in England centuries ago.[117] Such juries seem compellingly appropriate for some types of modern trials. According to a survey conducted in 1987, a majority of state and federal judges agreed that it would be preferable to try some complex civil cases before a panel of experts, rather than before a typical jury.[118] In addition, numerous commentators have also supported the use of special expert juries in certain types of cases.[119] Such juries not only bring specialized knowledge to

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116. *See* DEL. CODE ANN. tit. 10, § 4506 (1999). Special juries, however, have not been widely used in Delaware since the enactment of the statute and confusion has accompanied their occasional use, largely because of the lack of legislative guidance in determining what is a "complex" case and how the jury should be selected. *See* Oldham, *supra* note 113, at 659–62 (discussing the Delaware statute and several cases in which special juries have been used).

117. *See* Luneburg & Nordenburg, *supra* note 103, at 902.

118. *See id.* Of 200 federal judges polled, fifty-three percent agreed with this statement; of 800 state judges polled, fifty-one percent agreed. *See* Harris, *supra* note 111, at 748.

119. *See, e.g.*, E. Donald Elliott, *Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence*, 69 B.U. L. REV. 487 (1989) (recommending use of expert panels and administrative-court hybrids); John W. Wesley, *Scientific Evidence and the Question of Judicial Capacity*, 25 WM. & MARY L. REV. 675, 700 (1984) (suggesting that "[i]f a case involved complex scien-

bear on the technical issue presented at trial, but also capture the advantage of collective, as opposed to singular, fact-finding.

It is highly likely that the use of specially-trained jurors by state courts, at least in civil cases, would be compatible with the United States Constitution. The United States Supreme Court has held that states are not required to select juries randomly and, in a 1947 case, the Court went further and expressly upheld the states' use of special juries.[120] There is no reason to think the Court would rule differently today. As long as no group is unfairly excluded based on factors such as race or financial status,[121] it would appear that educational level, experience, and special expertise are permissible selection criteria.[122]

Whether the use of special juries in federal courts would be constitutional is a separate and more difficult question, since the Seventh Amendment, as broadly construed by the Supreme Court, should impose more rigorous constitutional requirements on courts in the federal system. Yet, even at the federal level, there appears to be no constitutional impediment to the use of special juries composed of persons with higher than average educational levels or possessing relevant expertise. Such juries were in use before the enactment of the Constitution, and the language of the Seventh Amendment purports to preserve the right to jury trial as it existed at the time the amendment was adopted.[123] The linguistic analysis of the Sev-

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tific evidence, an advisory jury could consist of scientists from the appropriate field or from a related field"); Note, *The Case for Special Juries in Complex Civil Litigation*, 89 YALE L.J. 1155, 1172 (1980) (recommending amendment of the federal Jury Selection and Service Act of 1968 to permit special juries); *Developments in the Law—Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1482, 1603 (1995) (suggesting that "[t]he court could use jurors with scientific backgrounds to minimize confusion among decisionmakers over the central issues of a complex case").

120. *See* Fay v. New York, 332 U.S. 261 (1947) (finding that due process of law is not denied to a person tried by a special jury).

121. *See* Carmical v. Craven, 547 F.2d 1380, 1382 (9th Cir. 1977) (noting that "[e]xclusion from jury service on the basis of race or financial status clearly is constitutionally impermissible").

122. *See id.* (holding that "[s]tates remain free to confine the selection to citizens, to persons meeting specified qualifications of age and educational attainment, and to those possessing good intelligence, sound judgment, and fair character").

123. *See* U.S. CONST. amend. VII. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be pre-

enth Amendment does not, of course, resolve the problem. The Supreme Court has expanded quite considerably the right to jury trial so that, in fact, it exists in many cases in which, at common law, there would have been no right to a jury.[124] Thus, the current interpretation of the Seventh Amendment does more than simply preserve old rights to jury trials. However, this expansion of the right to a jury trial does not necessarily foreclose the possibility of using special juries in the federal system; rather the constitutionality of their use remains an open question.

The final constitutional obstacle for the special jury is the "fair-cross-section" requirement. The Constitution provides a litigant with the right to an impartial and rational jury drawn from a cross section of the community.[125] This requirement applies equally to both civil and criminal juries.[126] In *Duren v. Missouri*,[127] the Court reaffirmed its adherence to a three-prong test:

> [I]n order to establish a prima facie violation of the fair-cross-section requirement the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[128]

While the Court did not define "distinctive" in the *Duren* case,[129] it has recognized that states remain free to confine jury

served, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." *Id.*

124. See the discussion of judicial expansion to the right to a jury trial in *supra* note 9; *see also* Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472–73 (1962) (reaffirming that "'only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims'" (quoting Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510–11 (1959))); Ross v. Bernhard, 396 U.S. 531, 534 (1970) (extending the right to a jury trial to a shareholders' derivative suit, though the right did not exist at common law).

125. *See* Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

126. *See* Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946).

127. 439 U.S. 357 (1979).

128. *Id.* at 364.

129. *See* Duren v. Missouri, 439 U.S. 357 (1979). The Court has refused to define "distinctive group" in subsequent cases as well. *See, e.g,* Lockhart v. McCree, 476 U.S. 162 (1986). *Duren* recognized that women were a distinctive

selection "to persons meeting specified qualifications of age and educational attainment."[130] The Court in *Duren* also confirmed that a state can prescribe "relevant qualifications" of jurors in state courts if "a significant state interest [is] manifestly and primarily advanced by those aspects of the jury-selection process . . . that result in the disproportionate exclusion of a distinctive group."[131] If a more fair and efficient resolution of complex civil disputes could be accomplished through the use of a special jury, that significant state interest would seem to satisfy the constitutional requirement.

The Jury Selection and Service Act of 1968, however, may pose a final obstacle to the use of a special jury. This Act requires that federal juries be "selected at *random* from a fair cross section of the community."[132] While the Act does impose some minimum criteria on persons who serve on juries, such as citizenship, age, and English proficiency, it does not appear to permit consideration of educational level or technical skills. Nonetheless, some legal commentators contend that since exclusion based on education is not expressly forbidden by the plain language of the statute, the Act should be interpreted to

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group. Under the local practice in Jackson County, Missouri, women were allowed to opt out of jury service at their request by simply returning a questionnaire to the jury commission. *See Duren*, 439 U.S. at 361–62 (1979). Subsequent case law has recognized that African Americans also constitute a distinctive group. *See* Davis v. Warden, Joliet Correctional Institution, 867 F.2d 1003, 1006 (7th Cir. 1989). "Young adults and college students, however, do not comprise distinctive groups" because of the difficulties of delineating such a group. Ford v. Seabold, 841 F.2d 677, 681 (6th Cir. 1988). Several circuits have adopted a three-part test to determine if a group qualifies as a distinctive group:

> (1) that the group is defined and limited by some factor (i.e., that the group has a definite composition such as by race or sex); (2) that a common thread or basic similarity in attitude, ideas, or experience runs through the group; and (3) that there is a community of interest among members of the group such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process.

Id. at 681–82. *See also* Barber v. Ponte, 772 F.2d 982 (1st Cir. 1985) (en banc); Willis v. Zant, 720 F.2d 1212 (11th Cir. 1983), *cert. denied*, 467 U.S. 1256 (1984).

130. Carter v. Jury Comm'n, 396 U.S. 320, 332 (1970).

131. *Duren*, 439 U.S. at 367–68. In *Duren*, "safeguarding the important role played by women in home and family life" was not considered a significant state interest. *Id.* at 369. Note that the Seventh Amendment has not been incorporated to apply directly to state courts, so states have more room to experiment with various types of juries than federal courts. *See* MOORE'S FEDERAL PRACTICE, Rule 38, § 38.11 (3d ed. 2000).

132. 28 U.S.C. § 1861 (1994) (emphasis added).

permit the exclusion of the less educated from juries in complex litigation.[133] At any rate, should this enactment be construed to preclude the use of education or other special qualifications in jury selection, unlike constitutional requirements, the Act could be amended by Congress.[134]

B. Court-Appointed Experts

A final device, useful in complex trials, is the engagement of court-appointed experts. The current Federal Rules of Evidence explicitly permit, as do similar rules of a number of states,[135] the use of such experts upon the motion of the court or of any party.[136] In practice, however, courts have used these experts rather sparingly.[137] This reluctance apparently stems from a variety of factors, including judicial concern about interfering with the adversarial process and a lack of judicial initiative in locating experts.[138] One 1993 study by the Federal Judicial Center indicated that only twenty percent of active federal district court judges had used court-appointed experts. Yet those who had engaged experts were generally quite pleased with the results.[139] More frequent use of court-appointed experts might assist lay juries in parsing through the complicated

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133. *See* Sutton, *supra* note 28, at 589–90.

134. *See* Note, *The Case for Special Juries in Complex Civil Litigation*, *supra* note 119, at 1172 (proposing that Congress amend the federal Jury Selection and Service Act of 1968); *see also* Susan Scott & Lynne A. Anderson, *Admissibility of Scientific Evidence: Proposed Implementation of the Guidelines of* Daubert *and* Landrigan *Under the Newly Adopted New Jersey Rules of Evidence*, 20 RUTGERS COMPUTER & TECH. L.J. 1, 64 n.246 (1994) (noting that "[i]t may be argued that by mentioning race, color, religion, sex, national origin, and economic status in 28 U.S.C. § 1861, but not education, Congress did not intend to prohibit selection based on education"); Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 DEPAUL L. REV. 49, 63 (1997) (arguing that "the college-educated juror should not run afoul of the cross-section requirement [of the 1968 Jury Selection and Service Act]"); Sutton, *supra* note 28, at 593 (indicating that the federal Jury Selection and Service Act "could be amended to eliminate the [fair cross-section] requirement in complex civil litigation").

135. *See, e.g.*, CAL. EVID. CODE § 730; ARIZ. R. EVID. 706; MD. R. 5-706.

136. *See* FED. R. EVID. 706.

137. *See* Tahirih V. Lee, *Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence*, 6 YALE L. & POL'Y REV. 480 (1980).

138. *See id.* at 480.

139. *See* JOE S. CECIL & THOMAS E. WILLGING, FEDERAL JUDICIAL CTR., COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706, at 7 (1993).

testimony of typically partisan expert witnesses.[140] On balance, such experts are likely to be more impartial than those chosen and compensated by the adverse parties. A court-appointed expert could simply assist the jury in understanding the technical evidence or, in appropriate cases and with consent of the trial judge, the expert could offer his own opinion.

CONCLUSION

The title to this article was chosen with particular care. There is a growing, but as yet inconclusive, body of evidence suggesting that the American jury may be in decline. As with many long-term trends, however, the increasing difficulties with trial by jury are not strikingly obvious. In some parts of the United States, jury problems may be imperceptible or even nonexistent. But with the passage of time, the limitations of a lay jury in a modern trial context are likely to become increasingly apparent throughout the United States. There is, of course, the possibility that as growing problems with the traditional system are brought to the attention of the bench and bar, timely and efficacious reforms will address and resolve the shortcomings of jury trials. I am not, however, optimistic. Many members of the bar not only have a vested interest in trial by jury, but also in trial by jury (or threat of trial by jury) *in its present form*. For some, what we have identified as shortcomings are merely avenues that can be traveled or exploited to increase the likelihood of a trial victory. Reformers will be matched, voice for voice and vote for vote, by members of the bar, particularly, one supposes, those on the plaintiff's side, who are likely to resist any significant modifications of the American jury system.

Even with a united judicial and legislative push for jury reform, carefully considered changes in jury trial are not easily wrought. Experimentation is hampered by the tradition of jury secrecy, by litigants' unwillingness to have their case subjected to untested, experimental procedures, and by the ubiquitous presence of constitutional and statutory provisions that guarantee the right to trial by jury. The vastness and cost of the comprehensive empirical work that should precede and accom-

140. *See Developments in the Law-Confronting the New Challenges of Scientific Evidence*, *supra* note 119, at 1589.

pany jury reform is also daunting. The alternative, however, of doing little—or nothing—is even more bleak. Some states, notably Arizona and New York, have already made significant changes in their jury systems.[141] Whether these reforms are sufficient is yet another question. Since I do not think that the traditional mode of trial by jury will adequately serve either the judiciary or the public in the century that lies ahead, I predict that agitation for change will generally increase. It will be most acute in those urban areas of the country where complex litigation is frequent and where such cases are often tried to juries.

I am mindful of the danger of drawing generalizations from a few high-profile cases in which jury performance is questionable. Although I have avoided resting my tentative conclusion on these cases, they generally provide at least anecdotal evidence supporting my thesis. The question of concern here is whether the forces now at work will slowly erode jury performance in a larger sector of jury trials. What is needed now is a series of comprehensive studies based upon actual (not simulated) cases that will precipitate informed structural and procedural changes and address thoughtfully the ultimate question: the future of civil jury trials in America.

141. These reforms include, among others, eliminating all statutory exemptions of potential jurors from the venire because of their occupations, allowing jurors to take notes at trials and submit questions to witnesses through the judge, and providing better pay for jurors so jury duty will be less of a financial hardship. *See, e.g.*, Judith S. Kaye, *Special Report: The State of the Judiciary*, N.Y. ST. B. J., May-June 1998, at 50, 52; Robert J. Hirsch et al., *Attorney Voir Dire and Arizona's Jury Reform Package*, ARIZ. ATT'Y, Apr. 1996, at 24, 24.