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## The Educated Jury: A Proposal for Complex Litigation

Franklin Strier

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# THE EDUCATED JURY: A PROPOSAL FOR COMPLEX LITIGATION

*Franklin Strier\**

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## INTRODUCTION

Jury trials are under siege. Detractors claim that in our increasingly complicated society, the lay jury is an outmoded vehicle for realizing trial justice. Jury incompetence, they say, leads to unjust results, leaving suspect the legitimacy of trial by jury. Typical is the criticism of historian Carl Becker: "Trial by jury, as a method of determining facts, is antiquated and inherently absurd—so much so that no lawyer, judge, scholar, prescription-clerk, cook, or mechanic in a garage would ever think for a moment of employing that method for determining the facts in any situation that concerned him."<sup>1</sup> But juries are most frequently criticized for lacking the wherewithal to comprehend the law and facts of certain complex cases. It is here that jurors most commonly confront lengthy, complicated and highly technical fact situations.<sup>2</sup>

This Article reevaluates and refines a proposed remedy for this shortcoming: requiring a minimum number of college-educated individuals on juries trying complex cases. Part I particularizes the major problems jurors commonly incur in complex cases. Part II reviews earlier proposals for highly educated and other specially qualified jurors, and discusses the germane constitutional issues. Part III examines the related results of a large scale survey of Los Angeles jurors, which provide valuable insight into differences in the perceptions of college-educated versus non-college-educated jurors. Part IV offers suggestions for implementing the educated jury proposal.

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1. JEROME FRANK, COURTS ON TRIAL 124 (1949).

2. Much legal discussion of jury comprehension in complex litigation emanates from the debate over whether there is or should be a complexity exception to the Seventh Amendment right of jury trial. For a discussion of the issue, see generally Patrick Devlin, *Jury Trial in Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43 (1980) (reviewing English jury practices generally in the late eighteenth century); William V. Luneberg & Mark A. Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 VA. L. REV. 887 (1981) (proposing two alternatives to current jury practices); see also Douglas King, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. CHI. L. REV. 581 (1984) (discussing the appropriateness of juries in modern-day complex cases by comparing such cases with "suits at common law" at the time of the Seventh Amendment); Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 Nw. U. L. REV. 486, 504-05 (1975) (discussing the issue of jury competency in complex cases).

## I. COMPLEX TRIALS AND LAY JURIES

A. *Juror Limitations*

Many of the sharpest criticisms of jury performance in complex cases emanate from the judiciary.<sup>3</sup> One of the most prominent critics was former Chief Justice Warren Burger, who voiced profound skepticism of juror ability to comprehend and decide the complex issues of many cases.<sup>4</sup> Others echo the critique.<sup>5</sup> Considerable research supports this charge, indicating, for example, that jurors lack adequate memories for recalling trial testimony and have difficulty making decisions based on statistical or probabilistic information.<sup>6</sup> In their book on jury performance, Selvin and Picus explain some of the reasons why jury performance in complex cases is suspect:

Psychological theory indicates that when presented with complex information on a great number of facts, individuals generally perceive one or a few generalizations that summarize and provide meaning for the information rather than the specific details. As a result, memory is "reconstructive," people recall the general impression of an event or the information presented along with some of the details.<sup>7</sup>

A related charge is of jurors' inability to comprehend a judge's instructions, especially the final instructions on the law to be applied in arriving at a verdict. The task of comprehending and applying the judge's instructions constitutes a critical interface between community standards, as represented by the views of the jurors and the accumulated statutory and common law, with all its nuances, subtleties and idiomatic jargon. Albeit consuming a relatively small part of the jury's time of service, the significance of this process cannot be overemphasized. The very legitimacy of the jury system is inextricably tied to the successful devolution of the law's administration from the

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3. Judge Jerome Frank charged that "while the jury can contribute nothing of value so far as the law is concerned, it has infinite capacity for mischief, for twelve men can easily misunderstand more law in a minute than the judge can explain in an hour." *Skidmore v. Baltimore & O.R. Co.*, 167 F.2d 54, 60 (2d Cir. 1948).

4. See Warren E. Burger, *Agenda for Change*, 54 JUDICATURE 232, 235 (1971) (contrasting British system of trying complex civil suits before experts instead of lay jurors); Warren E. Burger, *The Use of Lay Jurors in Complicated Civil Cases*, Remarks to the Conference of State Chief Justices 3-5 (Aug. 7, 1979) (asserting that lay jurors cannot comprehend technical evidence).

5. See, e.g., Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898 (1979); see also Douglas W. Ell, Comment, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 775, 775-87 (1978).

6. MOLLY SELVIN & LARRY PICUS, *THE DEBATE OVER JURY PERFORMANCE: OBSERVATIONS FROM A RECENT ASBESTOS CASE 45-46* (1987).

7. *Id.* The jury's collective understanding and memory may be better than most individual jurors, especially when enhanced by jury room discussion. It has been demonstrated, however, that in terms of understanding, juries rarely perform up to the ability of their best member. *Id.*

bench to the jury. All the received wisdom of the ages contained in the law is to no avail if the jury cannot understand the judge's instructions. Nonetheless, understanding the law is often the most difficult task for the juror; legal instructions can be extraordinarily complex and/or long.

Critics see this as a problem endemic to the lay jury system.<sup>8</sup> Central to the problem are these corollary paradoxes:

- a) The law seeks the benefit of the common person's judgment but asks that individual to apply legal rules often beyond the comprehension of one not trained in the law; and
- b) the simpler and more intelligible the instructions, the more likely they will miss or inadequately state a relevant point of law, thereby creating grounds for appellate reversal.

How well do jurors comprehend the instructions? To answer this question, we must put current practice into historical perspective. Prior to the 1895 Supreme Court decision, *Sparf and Hansen v. United States*,<sup>9</sup> juries decided issues of law as well as fact. *Sparf* created the obligation of judges to communicate the law, and juries to follow it, via jury instructions.<sup>10</sup> Legal chaos ensued. Each set of instructions bore the vagaries and often unintelligible idiosyncracies of the instructing judge. Federal Judge Jerome Frank, one-time chairman of the Securities Exchange Commission ("SEC") and oft-quoted critic of the jury system, decried the situation:

What a crop of subsidiary semi-myths and mythical practices the jury system yields! Time and money and lives are consumed in debating the precise words the judge may address to the jury, although everyone who stops to see and think knows that these words might as well be spoken in a foreign language—that, indeed, for all the jury's understanding of them, they are spoken in a foreign language. Yet, every day, cases which have taken weeks to try are reversed by upper courts because a phrase or sentence, meaningless to the jury, has been included in, or omitted from the judge's charge [instructions].<sup>11</sup>

As waxing numbers of verdicts were reversed on appeal due to faulty instructions, the solution chosen was the adoption of standardized "pattern" instructions. In 1938, a committee of California judges

8. See MARCUS GLEISSER, JURIES AND JUSTICE 228-31 (1968); WILLIAM O'BARR, LINGUISTIC EVIDENCE 17-18 (1982); Amiram Elwork et. al., *The Trial: A Research Review, in THE TRIAL PROCESS* 34-36 (Bruce D. Sales ed., 1981).

9. 156 U.S. 51 (1895).

10. See *id.*

11. JEROME FRANK, LAW AND THE MODERN MIND 181 (1930).

and lawyers published the *Book of Approved Jury Instructions*.<sup>12</sup> By 1980, thirty-nine states had adopted some such version of pattern instructions.<sup>13</sup> Impelled by the desire to avoid appellate reversal, pattern instructions nevertheless sacrificed clarity, simplicity and, most importantly, comprehensibility. Pattern instructions create four problems for jurors. First, they are usually replete with legal jargon and esoteric words. Second, the language tends to be abstract instead of concrete. Third, sentences are often lengthy, complex and grammatically constructed in the most confounding way, rife with subordinate clauses and double negatives. Finally, they are not presented in an organized way.

A highly regarded series of studies by Elwork, Sales and Alfini tested the comprehensibility of pattern instructions.<sup>14</sup> The subjects were divided into three groups.<sup>15</sup> The first group received the standard Michigan pattern instructions on negligence; the second received a version rewritten to improve comprehensibility; and the third group received no instructions at all.<sup>16</sup> The results confirmed the fears of critics. Pattern jury instructions were about as effective in helping jurors understand the law as no instructions at all. Moreover, the group receiving pattern instructions made far more clear mistakes of law directly impairing the accuracy of their verdicts.<sup>17</sup> That part of the negligence instructions relating to plaintiff's contributory negligence was ignored, rendering their findings incompatible with a verdict for the plaintiff.<sup>18</sup> Pattern-instructed jurors were also more prone to discuss legally inadmissible evidence, such as whether the defendant or the insurance company would pay the award.<sup>19</sup> Conversely, performance significantly improved in the group receiving the rewritten instructions.<sup>20</sup>

Other research confirms the appallingly low levels at which jurors comprehend instructions. Studies in six states place the level of com-

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12. See COMMITTEE ON STANDARD JURY INSTRUCTIONS, *BOOK OF APPROVED JURY INSTRUCTIONS* (8th ed. 1994).

13. Amiram Elwork et al., *Toward Understandable Jury Instructions*, 65 *JUDICATURE* 433 n.3 (1982) (citations omitted).

14. Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 *LAW & HUM. BEHAV.* 163 (1977).

15. *Id.* at 169-71.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

prehension at below fifty percent.<sup>21</sup> Inaccurate verdicts due to incomprehensible instructions translate to gross miscarriages of justice. A disturbing illustration occurred in Washington, D.C., where a jury misunderstood the judge's instructions and found a defendant guilty when it really meant to free him.<sup>22</sup>

One particular problem implicates the growing incidence of expert testimony in complex cases. Studies show that juries attach great weight to such testimony.<sup>23</sup> Yet an especially perplexing task for lay jurors is to assimilate and select, in some rational manner, from the competing testimonies of expert witnesses. This "battle of the experts" tends to confound juries. Moreover, it creates obvious potential for corruption of jury decision-making because of the jury's ignorance and naiveté. An advantage lies with the party whose expert has the most persuasive forensic skills rather than the most authoritative and meritorious testimony.

In short, jury trials involving complex or highly technical facts or legal issues can present a fundamental problem of decision-maker competence. A basic assumption of the law has been that the jury can understand the case presented to it. In a case involving complex application of antitrust law, the Third Circuit Court of Appeals said, "The law presumes that a jury will find facts and reach a verdict by rational means. It does not contemplate scientific precision but does contemplate a resolution of each issue on the basis of a fair and reasonable assessment of the evidence."<sup>24</sup> Complex cases going to a jury may undermine this predicate of a just trial.

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21. Amiram Elwork & Bruce D. Sales, *Jury Instructions*, in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE* 280, 283 (Saul Kassin & Lawrence S. Wrightsman eds., 1985).

22. A *Newsweek* article recounts the story:

The case turned on the fate of Andre Sellars, charged with the murder of an acquaintance, one Epluribus Thomas, during a fight in a grocery-store parking lot. Sellars pleaded self-defense. The jury listened carefully to evidence that Epluribus and his brother Clyde had threatened Sellar's life through a whole weekend of arguments. When testimony ended, the jury heard a whole half-hour's worth of [judicial] instructions couched in classic legalese. . . . After deliberating overnight, the nine women and three men announced that they had found Sellars guilty—not of second degree murder as he was charged, but of manslaughter.

Later, chatting in the jury lounge, several of the jurors discovered that they had really meant to find Sellars innocent, but had misunderstood the judge's instructions. They knew that Sellars had killed Thomas, and thought that if they accepted Sellar's self-defense plea, manslaughter was the appropriate verdict.

*Guilty, I Mean Innocent*, *NEWSWEEK*, Oct. 20, 1975, at 64 (noting that the rule against double jeopardy barred another murder trial for Sellars; the jury's error left open the possibility of a retrial for manslaughter).

23. Allan Raitz et al., *Determining Damages: The Influence of Expert Testimony on Jurors' Decision Making*, 14 *LAW & HUM. BEHAV.* 385, 393 (1990).

24. *Matsushita Electric Indust. Co. v. Zenith Radio Co.*, 631 F.2d 1069, 1073 (3rd Cir. 1980).

### B. *Empirical Evidence of Lay Jury Incompetence in Complex Cases*

Several studies buttress the contention of lay jury incompetence in complex cases.<sup>25</sup> Notably troublesome for lay juries in such cases is the untoward effect of adversarial presentation of evidence. In their study of asbestosis litigation, for example, Selvin and Picus found that the adversarial presentation of complex technical testimony misled jurors regarding the development of the disease.<sup>26</sup> Other studies show jurors will rely on misleading and fallacious arguments of statistical interpretation, depending on the method the attorneys choose to present the statistical information.<sup>27</sup> These findings suggest that the self-interested presentation of complex technical testimony jeopardizes jury comprehension. A common illustration of the problem is that of jurors attempting to evaluate the conflicting testimonies of opposing expert witnesses. Studies document jurors' struggles with such evidence.<sup>28</sup> As a result, jurors may underutilize or even ignore expert testimony.<sup>29</sup> Conversely, some commentators argue that jurors over-emphasize expert testimony.<sup>30</sup>

The artifacts of modernity bring a mixed blessing. Technical and scientific advances expand our knowledge, improve our standard of living and facilitate the realization of our potential. By the same token, the increasing complexity of litigated disputes produces an ever-

25. Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 *LAW & SOC. REV.* 123, 149 (1980-81) (describing errors in judgment resulting from faulty heuristics people tend to use in order to integrate complex information); Selvin & Picus, *supra* note 6, at 45-46 (studying jury competence of medical and other evidence in asbestos litigation); William C. Thompson, *Are Juries Competent to Evaluate Statistical Evidence?*, 52 *LAW & CONTEMP. PROB.*, Autumn 1989, at 9, 24-41 (citing the different types of errors jurors make in interpreting statistical evidence); Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 *HARV. L. REV.* 1329, 1334 (1971) (arguing that laypersons overemphasize mathematical evidence); *Jury Competence in Complex Cases*, A.B.A. SPECIAL COMM. OF JURY COMPREHENSION 25 (1989) [hereinafter, ABA REPORT] (investigating jury functioning in four complex cases).

26. SELVIN & PICUS, *supra* note 6, at 24. The misconception apparently resulted from incomplete medical testimony. *Id.* at 24-25.

27. See William C. Thompson & Edward L. Schumann, *Interpretation of Statistical Evidence in Criminal Trials: The Prosecutor's Fallacy and the Defense Attorney's Fallacy*, 11 *LAW & HUM. BEHAV.* 167, 175-76 (1987).

28. See MICHAEL J. SAKS & R. VAN DUIZEND, *THE USE OF SCIENTIFIC EVIDENCE IN LITIGATION* 9 (1983) (citing problems of "incompetent, incomprehensible, or dishonest" experts); Jane Goodman, Edith Greene & F. Loftus, *What Confuses Jurors in Complex Cases: Judges and Jurors Outline the Problems*, *TRIAL*, Nov. 1988, at 65-66, 69; see also Michael J. Saks, *Expert Witnesses, Nonexpert Witnesses, and Nonwitness Experts*, 14 *LAW & HUM. BEHAV.* 291, 299-302 (1990) (discussing the general problems of reliance on expert testimony, much of which is unreliable).

29. David L. Faigmen & A.J. Baglioni, Jr., *Bayes Theorem in the Trial Process*, 12 *LAW & HUM. BEHAV.* 1, 13 (1988); Saks & Kidd, *supra* note 25, at 148-49.

30. See Tribe, *supra* note 25, at 1334.



growing number of cases whose factual and legal issues are beyond the ken of the average juror. Expert testimony, intended to inform and clarify the evidence in complex cases, instead often further confuses juries. In his review of complex cases, University of Michigan law professor Richard Lempert writes, "One may conclude from looking at these cases that with some frequency trials confront jurors with evidence that only experts have no difficulty understanding. Moreover, even where the evidence should be comprehensible to a jury, jurors chosen in a particular case may not comprehend."<sup>31</sup>

### C. *The Lawyer Factor*

Another important but less chronicled set of cognate problems inheres in the lay jury's reaction to the attorneys. Specifically, how susceptible are jurors to attorney manipulation? Are jury verdicts affected when there is a mismatch of skills between the opposing attorneys? Logic suggests that the more simple and straightforward the factual and legal issues of the case, the less likely that lawyering skills will prevail over the merits of the case. Increasing complexity, on the other hand, allows the crafty tactician greater room to ply his or her skills decisively. The strong inference, then, is that this "lawyer factor" in jury trial outcomes is far more prevalent in complex cases.

Under the adversary system of trial procedure, attorneys are given broad latitude in the courtroom. When the evidentiary facts or apposite law of a case are adverse to a client's interests, the attorney's courtroom skills in swaying the jury come to the fore. The attorney may distort or dissemble the facts. He or she may use highly charged argumentation, even histrionics, to appeal to the jurors' emotions. The attorney may distract the jury during an opponent's questioning of witnesses or may even ferociously attack the credibility of a hostile witness whom the attorney knows to be telling the truth. Commenting on juror receptivity to emotive attorney suasion, one writer observed:

So it is that the experienced lawyer, knowing well this weakness, passes lightly over facts he would have stressed before a judge alone, and instead puts his emphasis on the dramatic aspects of his case. Here is where the orator takes over and leaves the lawyer behind: he knows that each juror is influenced by his own background, training and heredity; that the listener, as in all audiences, can be led about by his emotions and prejudices. So the lawyer hits these hard. He puts aside his professional desire for objectivity in

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31. Richard O. Lempert, *Civil Juries in Complex Cases: Taking Stock after Twelve Years*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 181, 191 (Robert E. Litan ed., 1993).

justice and instead attempts to capitalize upon the whimsical excesses that juries are known for . . . . These very emotions which a lawyer tries to grasp firmly are a major obstacle in the way of a jury sincerely seeking to find the facts about a case before it.<sup>32</sup>

Instances of attorney guile succeeding in contravention of the apparent merits of a case are legion. When this occurs, the fault lies not with the individual attorneys who employ morally or ethically questionable practices, but with the trial system which permits their use. The lawyer's professional duty behooves him or her to make the best possible use of the jurors' emotions. Notwithstanding this, trial and appellate courts routinely overlook all but the most inflammatory practices.<sup>33</sup> Courts have not only held that the shedding of attorney tears is permissible, for instance, but have even suggested it was the attorney's duty to do so under proper circumstances.<sup>34</sup>

The availability of a plethora of trial tactics is one thing; skill in their use is another. Trial attorney skills vary wildly. Some attorneys are incompetent or barely competent; others use their repertoire of trial tactics and stratagems to command six or seven figure fees. As the disparity in opposing attorney skills in a given trial widens, the more likely that the merits of the case will fall into the breach. Indeed, even in theory the adversary system works optimally only when the opposing attorneys are of roughly equal competence.<sup>35</sup>

A potential problem arises in the many trials where the opposing attorneys are significantly mismatched. The disparity in the skills of the opposing attorneys may affect or singularly determine the jury's decision. This disparity may be due to anything from superior preparation, to one attorney simply ingratiating him or herself with the jury more than the opposing attorney does—the so-called “likability factor.”<sup>36</sup> Simply put, juries sometimes try the attorneys, not the case. In that situation, trial justice is denied or, at best, serendipitous. Whenever mismatched attorney skills dictate the outcome, there looms the spectre of style bestriding substance, and the triumph of lawyering over justice.

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32. GLEISSER, *supra* note 8, at 253-54.

33. FRANKLIN STRIER, RECONSTRUCTING JUSTICE: AN AGENDA FOR TRIAL REFORM 14-15, 83-84, 166-68 (1996).

34. *Ferguson v. Moore*, 39 S.W. 341, 342 (Tenn. 1897).

35. EDWARD M. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 34 (1956).

36. See FRANK, *supra* note 1, at 121.

## II. SPECIALLY QUALIFIED JURIES AND THE EDUCATED JURY PROPOSAL

### A. *Proposed Solutions: Specially Qualified Juries in General*

The specially qualified jury is not a recent concept. At the inception of the modern jury, all juries were special in that they were purposely chosen for their special knowledge of the facts in dispute.<sup>37</sup> Later on, special juries of merchants, selected for their expertise on trade customs, helped develop the precepts of English commercial law.<sup>38</sup> In the United States, special "blue ribbon" juries were common in the first half of the twentieth century,<sup>39</sup> but fell into desuetude thereafter. Nevertheless, the United States Supreme Court upheld New York's special jury selection process in *Fay v. New York*.<sup>40</sup> Delaware revived the special jury in 1988 for use in complex cases only.<sup>41</sup> Although the United States Supreme Court has not ruled on its constitutionality, a similar statute was upheld under both state and federal constitutions by the highest court in Delaware.<sup>42</sup>

Jury decision-making would likely be improved, where most needed, by using specially qualified jurors. In complex litigation, the jury could be limited to individuals with superior potential for comprehending the evidence and instructions. The judge or the parties could be authorized to select from the venire those with the most relevant experience or education, subject only to challenges for cause. Alternatively, the judge could be authorized to establish minimum standards, e.g., a college degree, for service on the case.<sup>43</sup>

Greater use could also be made of court-appointed special masters or other experts for fact-finding in complex cases. The experts would either report to or supplant the jury.<sup>44</sup> The objection to using special masters or any specially selected external expert body is that it

37. James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 164 (1983).

38. *Id.* at 173-74.

39. See Richard C. Baker, *In Defense of the 'Blue Ribbon' Jury*, 35 IOWA L. REV. 409, 410 (1950).

40. 332 U.S. 261 (1947):

41. DEL. CODE ANN. tit. 10, § 4506 (Supp. 1996).

42. *Nance v. Rees*, 161 A.2d 795, 803 (Del. 1960).

43. Luneberg & Nordenberg, *supra* note 2, at 900, 942-50; see also Dan Drazan, *The Case for Special Juries in Toxic Tort Litigation*, 72 JUDICATURE 292, 296-97 (1989); Peter Huber, *Junk Science and the Jury*, 1990 U. CHI. LEGAL F. 301.

44. Some have even suggested establishment of a "science court." Actually a board of scientists, the science court would be used for certain kinds of scientific factfinding. Expert case managers from each side of a controversy would argue their positions before a three-member board. The board would supplement, not replace, the jury. The board's report is made to the court. Howard T. Markey, *A Forum for Technocracy: A Report on the Science Court Proposal*, 60 JUDICATURE 365, 367 (1977).

removes fact-finding from the jury; whereas even specially qualified jurors would retain the random process by which the original venire is selected. Random selection is intended to provide a representative cross-section of the community in the venire. But no jury-selection statute or court decision prohibits modification of the venire so selected.

One might question whether expertise or other special qualities are necessary or even desirable in complex cases. Consider the opinions of a majority of federal and state trial judges in a nationwide Harris survey.<sup>45</sup> They agreed on these statements regarding complex civil cases:

- A serious study should be made of alternatives to jury trial.<sup>46</sup>
- Jurors need more guidance than they usually get.<sup>47</sup>
- It is difficult for jurors with different educational levels to be effective.<sup>48</sup>
- *Trial before a panel of experts would be preferable to jury trial* (emphasis supplied).<sup>49</sup>

### B. *The Educated Jury Proposal*

A particular kind of specially qualified jury proposed for use in complex civil cases is one requiring some or all of the jurors to hold a college degree.<sup>50</sup> The major premise of the educated jury proposal is utility: All other factors being equal, the knowledge, discipline and cultivated intellect gained from a college education should render one better equipped to execute the juror's fact-finding and application-of-law tasks. This is not elitism; it is merely functionalism.

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45. Lou Harris & Associates, Inc., *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, 747 (1989).

46. *Id.*

47. *Id.* at 748.

48. *Id.*

49. *Id.* Additionally, in this study Harris found that substantial minorities of the federal judges (39%) and state judges (31%) felt that in complex cases there should be a minimum level of juror education to avoid those who cannot understand the case. *Id.*

50. Others have advanced this proposal before, most notably Richard O. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68, 117-21 (1981); Luneberg & Nordenberg, *supra* note 2, at 900, 947-51; William Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 580-81 (1991). Although most technically complex cases are civil, there is no reason to distinguish them from equally difficult criminal cases. For an illustrative discussion of the jury's confusion over medical and legal terminology which led to a mistrial of the last McMartin Preschool criminal molestation case, see Carol McGraw, *In the End, Jury Gave in to Confusion*, L.A. TIMES, July 28, 1990, at 1, 30.

The hypothesized superiority of college-educated jurors flows from the following assumptions. First, during evidence presentation, college-educated jurors should generally fare better than their lesser educated counterparts at grasping the evidence in complex litigation. A presumed corollary is that decisions would be influenced more by the merits of the case than the tactics and skills of the advocates. Second, rule of law comprehension and application would seem facilitated by college education as well. At the least, the college-educated juror should ordinarily have the benefit of greater comprehension of the jury instructions. In sum, a predominantly college-educated jury, having superior capacity for understanding the relevant facts and law in complex cases, would render better informed and, thus, more just verdicts.

Various studies bolster the argument that college-educated jurors would outperform their less educated counterparts in complex cases.<sup>51</sup> The notion of civil juries composed of persons with special education or skills bearing on complex factual or legal issues has been mentioned as a remedy for the perceived incompetence of juries in complex cases.<sup>52</sup> Several commentators have suggested attacking this problem either by making it harder for the better educated to avoid jury duty, or by the seating of full or partial blue ribbon juries.<sup>53</sup> In a

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51. REID HASTIE ET AL., *INSIDE THE JURY* 135-37 (1983) (showing that jurors with higher education had superior recall of the judge's instructions and of the facts of the case); JAMES MARSHALL, *LAW AND PSYCHOLOGY IN CONFLICT* 59-100 (1980) (suggesting the superiority of college-educated jurors in greater and more accurate retention of detail); Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1320 (1979) (finding that college-educated jurors performed better than non-college-educated jurors in ability to comprehend standard jury instructions); Laurence J. Severance et al., *Toward Criminal Jury Instructions that Jurors Can Understand*, 75 J. CRIM. LAW 198, 224 (1984) ("[J]urors with greater experience and learning apparently comprehend and apply jury instructions better than those who are less experienced and/or less well educated."); David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 483 (1976) (stating that jurors with college education scored higher at comprehending the legal principles involved after receiving jury instructions than those without college experience); F. Strodtbeck et al., *Social Status in Jury Deliberations*, 22 AMER. SOC. REV. 713 (1957) (stating that education and occupation are correlates of juror competence); ABA REPORT, *supra* note 25, at 25 (finding less educated jurors experienced greater difficulty with key factual and legal issues in four complex cases). A study currently being conducted by Northwestern University Law Professor John Casper and Shari Diamond of the American Bar Foundation finds that jurors with higher education more accurately recalled complex expert testimony and judicial instructions in an antitrust trial.

52. See, e.g., Drazan, *supra* note 43; Mark A. Nordenberg & William V. Luneberg, *Decision-making in Complex Federal Civil Cases: Two Alternatives to the Traditional Jury*, 65 JUDICATURE 420, 423 (1982) [hereinafter "Nordenberg & Luneberg, *Two Alternatives*"]; Charles W. Fournier, Note, *The Case for Special Juries in Complex Litigation*, 89 YALE L.J. 1155 (1980).

53. Lempert, *supra* note 50, at 119-21; Luneberg & Nordenberg, *supra* note 2, at 942-50; Nordenberg & Luneberg, *Two Alternatives*, *supra* note 52, at 421-31.

widely referenced article, professors Luneberg and Nordenberg advocate that complex civil cases use juries comprised of individuals who have earned a bachelor's degree from an accredited college or university.<sup>54</sup>

### C. Constitutional Issues

A minimum education requirement (or any other specially qualified jury measure) would admittedly invite court challenge. For federal cases, the first impediment would be the 1968 Jury Selection and Service Act: "It is the policy of the United States that all litigants in federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community."<sup>55</sup> In the 1975 case of *Taylor v. Louisiana*, the Supreme Court extended the cross-sectional jury ideal to the states, ruling that the constitutional guarantee of an impartial jury trial required that the jury pool be a microcosm of the eligible community population.<sup>56</sup> The Court justified the new theory as a remedy to the racial discrimination practiced in the South under existing jury eligibility standards which permitted systematic exclusion of African-Americans under the guise of searching for elite jurors.<sup>57</sup>

The plain language of the federal statute and the holding of *Taylor* suggest that special juries excluding the less educated might impermissibly eliminate a significant section of the community. Since *Taylor*, however, a considerable body of case law interpreting the fair cross-section requirement indicates otherwise. Explaining *Taylor*, the Supreme Court in *Duren v. Missouri*<sup>58</sup> held that a prima facie violation of the cross-section requirement cannot occur unless: 1) the defendant shows the group alleged to have been excluded forms a "distinctive" group in the community; 2) the group's under-representation in the pool from which juries are selected is unfair and unreasonable in relation to the numbers of such persons in the community; and 3) the under-representation is due to systematic exclusion of the group.<sup>59</sup> Although the Court did not define "distinctive," it did recog-

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54. Luneberg & Nordenberg, *supra* note 2, at 945-50; see also Nordenberg & Luneberg, *Two Alternatives*, *supra* note 52, at 425-27.

55. 28 U.S.C. § 1861 (1994).

56. *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975). The case was decided on Sixth Amendment grounds. *Id.* Left unaddressed by the court was whether the Seventh Amendment imposes the same cross-section requirement in civil cases. *But see Colgrove v. Battin*, 413 U.S. 149 (1973) (appearing to link the Seventh Amendment to the cross-sectional ideal).

57. *Taylor*, 419 U.S. at 530.

58. 439 U.S. 357 (1979).

59. *Id.* at 364-67.

nize that the states remain free to confine jury selection "to persons meeting specified qualifications of age and educational attainment."<sup>60</sup>

Further, some of the characteristics of a "distinctive" or "cognizable" group have been identified by the lower courts.<sup>61</sup> They have held that the less educated are not a cognizable group.<sup>62</sup> Even if the less educated were so deemed, no cross-sectional violation would occur (under the Court's syllogism) unless it was shown that the group was under-represented in the jury venires in relation to their numbers in the community.<sup>63</sup>

The college-educated jury proposal arises out of a conflict between two legal constraints. One constraint is the cross-sectional requirement—seeking a jury representative of the community. Significantly, the cases behind this requirement were concerned with the discriminatory practice of excluding minorities and others for reasons unrelated to their competence as jurors.<sup>64</sup> The countervailing constraint is the need for a jury sufficiently competent to reach a fair verdict in complex cases. Courts have stated that there is a due process right to a competent and rational fact-finder,<sup>65</sup> and have recognized that lay jurors may be incapable of deciding complex cases within the spirit of the Due Process Clause.<sup>66</sup>

In complex cases, the college-educated jury would arguably better fulfill what the Supreme Court has acknowledged to be the purpose of

60. *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320, 332 (1970). A lower federal court observed that it may be acceptable "to impose relevant higher qualifications for service" if a jury is to perform work of a "special and demanding nature." *Quadra v. Superior Court of San Francisco*, 403 F. Supp. 486, 496 (N.D. Cal. 1975).

61. *See, e.g., United States v. Guzman*, 337 F. Supp. 140 (S.D.N.Y. 1972), *aff'd*, 468 F.2d 1245 (2d Cir. 1972).

There must be a common thread which runs through the group, a basic similarity in attitudes or ideas . . . which cannot be adequately represented if the group is excluded from the jury selection process. . . . [T]he group must have a community of interests which cannot be adequately protected by the rest of the populace.

*Id.* at 143-44.

62. *See, e.g., United States v. Potter*, 552 F.2d 901 (9th Cir. 1977).

The less educated, like the young, are a diverse group, lacking in distinctive characteristics or attitudes which set them apart from the rest of society. They are of varying economic backgrounds, and races, and of many different ages. We believe the interests of this group can be adequately protected by the remainder of the populace.

*Id.* at 905.

63. *Duren*, 439 U.S. at 364.

64. *See also Taylor v. Louisiana*, 419 U.S. 522, 526 (1975) (African-Americans); *Hernandez v. Texas*, 347 U.S. 474, 480-81 (1954) (persons of Mexican lineage); *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) (persons earning a daily wage).

65. *In re United States Fin. Sec. Lit.*, 609 F.2d 411, 427 (9th Cir. 1979).

66. *Id.*; *In re Japanese Elec. Prod. Antitrust Lit.*, 631 F.2d 1069 (3rd Cir. 1980); *Bernstein v. Universal Pictures Inc.*, 79 F.R.D. 59 (S.D.N.Y. 1978); *In re Boise Cascade Sec. Lit.*, 420 F. Supp. 99 (W.D. Wash. 1976).

the trial: "to assure a fair and equitable resolution of factual issues."<sup>67</sup> At the same time, today's population of college graduates represent virtually every segment of society.<sup>68</sup> Therefore, the college-educated juror should not run afoul of the cross-section requirement, especially if, as discussed below, only *part* of the final jury panel need satisfy the proposed minimum education requirement.

#### D. *Preferability to Other Alternatives for Complex Cases*

Several other proposals purport to ameliorate the perceived inadequacies of the lay jury, particularly in complex civil cases. They can be grouped into three classifications. In ascending degree of the change entailed, they are:

- 1) provide jurors with access to or powers of additional information-gathering, e.g., note-taking, asking questions, availability of a transcript of the testimony and written jury instructions revised for improved clarity,<sup>69</sup>
- 2) use blue ribbon and other expert juries—at least for special findings of fact,<sup>70</sup> and;
- 3) eliminate juries in complex civil cases.<sup>71</sup>

All of the suggestions in the first proposal are compatible with the proposal recommended here, but may be inadequate by themselves. Although permitted occasionally in the state courts, many of the blue ribbon juries contemplated in the second proposal more likely violate the "cross-section of the population" requirement than the educated jury proposal.<sup>72</sup> In any given case, "college graduates" is broader than

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67. *Colgrove v. Battin*, 413 U.S. 149, 157 (1973) (citing *Gasoline Prod. Co. v. Champlin Co.*, 283 U.S. 494 (1931)).

68. An increasingly large number of people have taken advantage of the recent expansion of opportunities to obtain a college education. See, e.g., ANDERSON, *FACT BOOK FOR ACADEMIC ADMINISTRATORS* 148 (1980). By 1994, the number of high school graduates who went to college reached 62%, compared to 45% in 1960. In 1995, 23% of adults over 24 had completed four years of college. *The State of the Union; Spotlight*, L.A. TIMES, Feb. 5, 1997, at A12, available in LEXIS, News Library, Majpap File. The trend continues. The percentage of Americans with college degrees is rising and may reach 40% by 2050. Tom Morgenthau, *The Face of the Future*, NEWSWEEK, Jan. 27, 1997, at 58, 60.

69. See STRIER, *supra* note 33, at 236-53 (discussing a taxonomy of proposed reforms in this area).

70. For a discussion of these and related suggestions, see Peter W. Sperlich, *Better Judicial Management: The Best Remedy for Complex Cases*, 65 JUDICATURE 415 (1982); David U. Strawn & G. Thomas Munsterman, *Helping Juries Handle Complex Cases*, 65 JUDICATURE 444 (1982).

71. See *infra* notes 74-87 and accompanying text; see also Redish, *supra* note 2.

72. Nordenberg & Luneberg, *Two Alternatives*, *supra* note 52, at 427.



“special experts” and, therefore, less likely to constitute a cognizable group requiring legal protection.<sup>73</sup>

Clearly the most draconian option is proposal three—outright elimination of juries in complex cases. When the subject matter of litigation is perceptibly beyond the ken of the jury, some litigants have sought to circumvent a jury trial (in favor of a bench trial) based on the requirement presumed by the law: “a jury capable and willing to decide the case solely on the evidence before it.”<sup>74</sup> But these litigants faced a constitutional impediment in the Seventh Amendment’s right to jury trial in “suits at common law.”<sup>75</sup> Hence, any attempt to avoid a jury trial in such suits would seem to require a constitutional gloss which permits a *complexity exception* to the Seventh Amendment. Some federal courts have so interpreted the Constitution.<sup>76</sup> Each relied on a footnote in the Supreme Court’s decision in *Ross v. Bernhard*.<sup>77</sup> In *Ross*, the Court said: “[T]he ‘legal’ nature of an issue is determined [in part] by . . . *the practical abilities and limitations of juries*.”<sup>78</sup>

The *Ross* footnote suggests an inherent complexity exception when cases are too complicated to be heard by a jury in a suit at common law. Put differently, when a case is too complex to be amenable to jury resolution, there is no remedy “at common law.” Therefore, the only trial remedy is in equity, where there is no right to jury trial.<sup>79</sup>

73. See *United States v. Potter*, 552 F.2d 901 (9th Cir. 1977); see also *Luneberg & Nordenberg*, *supra* note 2, at 949-51.

74. *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

75. U.S. CONST. amend. VII.

76. See, e.g., *In re United States Fin. Sec. Lit.*, 609 F.2d 411 (3rd Cir. 1980); *Bernstein v. Universal Pictures, Inc.*, 77 F.R.D. 59 (S.D.N.Y. 1978); *In re Boise Cascade Sec. Lit.*, 420 F. Supp. 99 (W.D. Wash. 1976).

77. 396 U.S. 531 (1970).

78. *Id.* at 538 n. 10 (emphasis added).

79. Language from Alexander Hamilton in the FEDERALIST PAPERS supports this interpretation:

[T]he circumstances that constitute cases proper for courts of equity are in many instances so . . . intricate that they are incompatible with the genius of trials by jury. They require often such long, deliberate, and critical investigation as would be impracticable to men called from their occupations, and obliged to decide before they were permitted to return to them. The simplicity and expedition which form the distinguishing character of [the jury] mode of trial require that the matter to be decided should be reduced to some single and obvious point; while the litigations usual in chancery [equity] frequently comprehend a long train of minute and independent particulars. . . . [T]he attempt to extend the jurisdiction of the courts of law to matters of equity will . . . tend gradually to change the nature of the courts of law and to undermine the trial by jury, by introducing questions too complicated for a decision in that mode.

THE FEDERALIST No. 83 (Alexander Hamilton) (1937).

The Third Circuit took another approach in rejecting a request for jury trial.<sup>80</sup> Rather than looking to the Seventh Amendment, it relied instead upon the Due Process Clause of the Fifth Amendment, guaranteeing the right to a fair trial.<sup>81</sup> This right is violated, said the court, when the complexity of the case exceeds the jurors' powers of comprehension: "We conclude that due process precludes trial by jury when a jury is unable to perform this task with a reasonable understanding of the evidence and the legal rules."<sup>82</sup> Where the amendments ostensibly clash, the court found "the most reasonable accommodation between the requirements of the Fifth and Seventh Amendments to be a denial of jury trial."<sup>83</sup> Thus, this argument circumvents the need to find a complexity exception inherent in the Seventh Amendment.<sup>84</sup>

As science and society progress, many more litigated issues will be of greater complexity than those contemplated by the drafters of the Constitution in 1791. In today's complex cases, juries are often demonstrably ill-equipped. Antitrust, high-technology patent, securities, product liability, environmental and medical malpractice litigation are but a sampling of areas where it is increasingly clear that the apotheosized lay jury is a malfunctioning anachronism.<sup>85</sup>

Regardless of fine constitutional issues and the associated vagaries of court interpretation, the educated jury proposal would be preferable to blue ribbon panels of experts or outright elimination of juries in complex cases for a symbolic reason: A panel of educated but non-expert jurors would preserve our heritage of lay participation in the administration of justice. At the same time, it would preserve the compelling state interest in ensuring competent fact-finding tribunals

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80. *In re Japanese Elec. Prod. Antitrust Lit.*, 631 F.2d 1069, 1080 (3rd Cir. 1980).

81. *Id.*

82. *Id.* at 1084.

83. *Id.* at 1086.

84. The issue remains unsettled. The Ninth Circuit refused to interpret the *Ross* footnote as the basis for "such a radical departure from its prior interpretation of a constitutional provision in a footnote." *In re United States Fin. Sec. Lit.*, 609 F.2d 411, 425 (9th Cir. 1979). To date, the Supreme Court has skirted the issue.

85. See, e.g., Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CH. L. REV. 15, 15-16 (1990) ("The jury has become part of the national folklore. . . [although concerns remain] . . . regarding decision-making by amateurs."). Outside of England (where civil juries have all but been abolished) and the United States, there are no lay jury parallels with other major industrial countries. That is not to say lay participation in fact-finding is not valued. In Continental Europe, it is felt that fact-finding is too important to entrust to a fully lay jury; laymen participate as part of a mixed professional and lay bench. Karl H. Kunert, *Some Observations on the Origin and Structure of Evidence Rules under the Common Law System and the Criminal Law System of 'Free Proof' in the German Code of Criminal Procedure*, 16 BUFF. L. REV. 122 (1967).

in complex litigation.<sup>86</sup> Moreover, only a *part* of the proposed panel would need to meet the prescribed minimum education requirements in order to achieve the projected benefits.<sup>87</sup>

### III. THE LOS ANGELES JURY SURVEY

#### A. *Prior Research on Educated Jurors*

If the proposal offered here is ever to be further evaluated and implemented, more information about the perceptions (and not just the performance) of educated jurors would be desirable. Yet there is a dearth of empirical data on educated jurors per se. Two studies agreed that more educated jurors tend to participate more and devote more of their statements to factual and legal issues.<sup>88</sup> Two other studies differed in their findings on the relationship between education level and tendency to convict.<sup>89</sup> Perhaps the greatest commonality with respect to the findings on the effect of juror education level is inconclusiveness.<sup>90</sup> Beyond this, there is little empirical background indicating the trial behavior and post-trial perceptions of educated jurors.

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86. The Supreme Court has acknowledged that this interest may justify the exclusion of a particular group if "a significant state interest be manifestly and primarily advanced by those aspects of the jury selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group." *Duren v. Missouri*, 439 U.S. 357, 367-68 (1979). Similarly, the Court has recognized that the right of parties in complex civil litigation to a jury "suitable in character and intelligence for that civic duty" should prevail over the objections of those eliminated from jury service in such cases due to lack of education or special experience. *Brown v. Allen*, 344 U.S. 443, 474 (1953).

87. See *supra* notes 67-68 and accompanying text.

88. See Rita James, *Status and Competence of Jurors*, 64 AM. J. OF SOC. 563 (1959) (noting that educated jurors received higher ratings from other jurors for their contributions to deliberations, and were more persuasive in changing other jurors' opinions); see also HASTIE ET AL., *supra* note 51, at 136 (finding that educated jurors generated more facts, mentioned more issues and noted a greater number of key fact categories and fact-legal relations).

89. J. P. Reed, *Jury Deliberations, Voting and Verdict Trends*, Sw. Soc. Sci. Q., 45, 361-70 (noting greater tendency for better educated jurors to convict); A. Sealy & O. Cornish, *Jurors and Their Verdicts*, 36 MOD. L. REV. 496, 496-508 (1973) (discussing education level related to verdict preference in only one of four cases, where better educated jurors were less likely to convict).

90. See, e.g., JOHN GUNTHER, *THE JURY IN AMERICA* 91 (1988) (discussing survey of actual jurors tested by education level for various attorney performance factors, results inconclusive); HASTIE ET AL., *supra* note 51, at 136-37 (noting perceptions did not vary as a function of education for the following: rating of judge's fairness, the jury's thoroughness, the pressure to change votes from other jurors, the difficulty of reaching a verdict, confidence that the jury reached a just verdict, and agreement with the final verdict).

One fertile source, however, was revealed upon analysis of a broad-scale survey of Los Angeles jurors (hereinafter "LA Survey").<sup>91</sup> The LA survey was conducted over a six-month period during 1987-88. With over 3800 usable responses, this is the single largest survey of juror perceptions of the trial process yet conducted in the United States.<sup>92</sup>

### B. LA Survey Findings

Among the demographic attributes of the polled jurors (age, gender, race, occupation and highest level of education completed), only the education level produced differences in the reported responses which were statistically significant.<sup>93</sup> Higher education brought more

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91. Franklin Strier, *Through the Jurors' Eyes*, 74 ABA J. 78 (Oct. 1988) (reporting the general findings of the unpublished survey); see *infra* App., Tables 1-7. The data analyzed by demographic variables have not been widely disseminated.

92. Compare this size with the surveys discussed in *supra* notes 14-21, 25-30 and accompanying text. All surveys of juror perceptions have some limitations. They report self-assessments, for example, not actual objective understanding. Regarding evaluation of attorney performance, it is not certain whether juror perceptions of attorney intent correspond with reality. Nevertheless, the data have utility, particularly when considered with converging evidence. Thus, several respectable studies have tested juror self-perceptions. See generally JOE CECIL, ALLEN LIND & GORDON BERMANT, *JURY SERVICE IN LENGTHY CIVIL TRIALS* (1987) (reporting a study by the Federal Judicial Center on how jurors' perceptions were affected by service in lengthy federal civil cases); GUNTHER, *supra* note 90 (discussing survey of actual jurors tested by education level for various attorney performance factors).

The Los Angeles Jury Survey is unique and valuable because of its size, its use of actual trials (instead of mock simulations) and the breadth of its coverage. For results of this unpublished survey see Tables 1-7 of Appendix; see generally Strier, *supra* note 91 (reporting the general findings of the survey). The study covered a wide range of juror perceptions and attitudes. More intensive, narrowly-focused research is encouraged to test the implications of the data and the feasibility of the educated juror proposal. In cooperation with the Los Angeles Juror Services Division, exiting jurors at all 12 Los Angeles Superior Courts answered the survey questionnaire. Each court's jury supervisor gave the questionnaire to the jurors at the conclusion of their tours of duty. The questionnaire contained 16 closed-ended questions within five sections. The first section requested demographic information, and asked whether the juror served on a criminal or civil case. The second section, "Pre-Trial Activity," dealt exclusively with jury selection. All 3830 respondents were free to answer the questions in these two sections. Only the 2533 individuals actually selected to serve on juries were instructed to answer the balance of the questionnaire. (Thus the survey sample drops to 2533 for the balance of the questions.) The last three sections were "Trial Procedures and Practices," "Judge Instructions" and "Jury Deliberation." The final question was open-ended, inviting any comments or suggestions relevant to the inquiry. Closed-ended responses were computer-tabulated using Statistical Package Social Sciences.

93. Chi-square analysis was used to measure the relatedness of education to psychological variables formed during jury duty. Jurors were asked to respond to statements in the survey questionnaire. Responses were measured with a five-point Likert-type scale: strongly agree, agree, no opinion, disagree, and strongly disagree. For the purpose of evaluating results, the Likert-type response categories "strongly agree" and "strongly disagree" were collapsed into "agreed" and "disagreed," respectively; the third response group is "no opinion." Respondent

moderation in the responses and more confidence in the propriety and utility of the evidence presentation procedure.<sup>94</sup> College-educated jurors reported greater comprehension of the jury instructions and less need to reorder the evidence in order to make it clearer.<sup>95</sup> They also perceived more attorney attempts at evidence distortion, yet were more confident that mismatched attorney skills did not have a significant effect on jury decision-making and the jury deliberation process.<sup>96</sup> Further, on every question, jurors' likelihood of taking a stand and expressing an opinion on the statements and questions presented to them increased with their education.<sup>97</sup>

### 1. *Comprehension-related Issues*

#### a. Judge's Instructions

Perceived comprehension of the judge's instructions was tested by two questions, one specific and one general.<sup>98</sup> Differences by education level were especially pronounced in response to a specific inquiry regarding the number of words, terms and concepts the jurors found difficult to understand. (See Table 1.) The general question asked whether the instructions were sufficiently comprehensible to apply to the evidence.<sup>99</sup> Once more, the survey found a correspondence between education and the utility of the instructions. (See Table 2.) The results confirm an earlier study suggesting that higher levels of education result in superior understanding and application of jury instructions.<sup>100</sup>

#### b. Reordering Evidence Presentation

Jurors were asked to respond to suggestions for making the evidence "clearer to and more effectively judged by the jury."<sup>101</sup> (See Table 3.) One of the suggestions was to reorder the proceedings so that all of the evidence on the same subject was presented at the same

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jurors were classified into five educational categories: less than high school, high school, some college, undergraduate degree completed, graduate degree.

94. *Infra* App., Tables 6 & 7.

95. *Infra* App., Tables 1 & 3.

96. *Infra* App., Tables 4 & 5.

97. See *infra* App., Tables 1-7; see generally Strier, *supra* note 91 (reporting the general findings of the survey).

98. *Infra* App., Tables 1 & 2.

99. *Infra* App., Table 2.

100. Charrow & Charrow, *supra* note 51, at 1320.

101. *Infra* App., Table 3.

time. Only those without a college education showed a marked preference for this proposal.<sup>102</sup>

Processing fragmented information is a skill one ordinarily must bring to or acquire in college in order to succeed. In elementary and high school pedagogy, information is fed to students in neatly packaged bundles; typically, a palpable thread runs through the information given the students. Conversely, information in college instruction is often desultorily presented, so that the instructor can ask the students to find the common thread as a heuristic exercise.

In similar fashion, the trial attorney is free to present evidence in any order, however scattered, that he or she feels most effectively re-ounds to the client's benefit. The college-educated juror may feel less need than lesser educated counterparts to simplify this presentation process because a college education probably fostered and honed the skills employed in synthesizing diffuse evidentiary information. By the same token, the less educated juror may be overwhelmed by the task.

## 2. *Attorney Performance Issues*

The LA Survey also polled jurors on issues related to the adversarial presentation of issues.<sup>103</sup> The findings suggest that jurors with different education levels perceive and respond to adversarial presentation differently.<sup>104</sup>

### a. *Attorney Trial Tactics*

As their education increased, jurors were more likely to feel that one or both attorneys had tried to distort or hide facts from the jury. (See Table 4.) College-educated jurors were thus more likely to see an overstepping of "lines of propriety" with respect to attorney trial practices. College or post-graduate courses in ethics, philosophy or law may have sensitized them to this distinction. As neither juror orientation programs nor jury instructions address the boundaries of attorney tactical discretion, additional formal education could be the source of this perceptual disparity.

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102. *Id.*

103. See *infra* notes 106-07 and accompanying text.

104. See *infra* notes 106-09 and accompanying text.

## b. Mismatched Attorney Skills

Two survey questions probed the impact of perceived mismatched attorney skills on juror decision-making.<sup>105</sup> At first blush, the responses to the two question statements on this topic may seem inconsistent: Further analysis yields a reconciliation.

College-educated jurors were less likely to think that mismatched attorney skills affected the verdict of the case on which they served.<sup>106</sup> (See Table 5.) Yet when asked in the next question whether an attorney skill mismatch was either partially, primarily or completely responsible for a wrong decision, a higher percentage of the more educated actually found some responsibility, i.e., a causal relationship between the perceived skills mismatch and a wrong decision. (See Table 6.) A possible reason for this apparent inconsistency lies in the fact that the *degree* of responsibility varied markedly by education. College-educated jurors were far more likely to find only partial responsibility, i.e., a moderate response. Less educated jurors tended to have polar, extreme reactions; they were more likely to perceive mismatched attorney skills having *either* no effect or significant (primary or complete responsibility) effect.

These results suggest the following characterizations of the more educated juror with regards to attorney performance. This juror is more likely to perceive attorney mischief. Yet the juror is also more confident and less likely to believe that observed mismatched attorney skills *significantly* affected the jury's decision-making, adversely or otherwise. To the extent that perceptions reflect reality, educated jurors may also be better at: a) sensing and discounting attorney trial tactics designed to corrupt rather than inform the judgment of the jurors, and b) resisting the potential biasing effect (discussed above) when the opposing attorneys are substantially mismatched.<sup>107</sup>

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105. *Infra* App., Tables 5 & 6.

106. Thirty-five percent of all respondents agreed with the statement that mismatched attorney skills probably affected the verdict. *Infra* App., Table 5. No attempt was made to determine the extent of perceived disparity of attorney skills without regard to effect on outcome. (Indeed, this may be a fruitful source of further study.) The percentage believing mismatched attorney skills affected the verdict may be deceptively low because it represents a subset of a subset, i.e., those who believed both that the attorneys were mismatched *and* that the mismatch affected the verdict. If we assume that those disagreeing with the statement were evenly divided among those who a) perceived no mismatch, b) perceived no effect on verdict, or c) perceived neither, then most of those who did perceive a mismatch also thought it affected the verdict. In fact, over half (56%) of the respondents felt that mismatched attorneys "can" affect the outcome. Strier, *supra* note 91, at 80.

107. This is admittedly speculative. Note the other possible interpretations of the findings: a) the perceptions of the educated jurors were wrong, and thus of no value in enhancing fact-finding or discounting the effect of mismatched attorneys, and b) the perceptions were correct,

Several possible and compatible explanations can be offered as to why college education would better prepare one to perform the juror's role less influenced by attorney tactics and mismatched attorney skills. One explanation looks to the content of college courses. Traditional curricula expose students to numerous illustrations of superlative polemicists who swayed others by emotional appeals rather than the substance of their arguments. This is the lesson from history, sociology, philosophy, political science, psychology and other courses in the baccalaureate program. Further, college graduates have typically taken courses in math, economics and physical and natural science, the very subjects which frequently give jurors difficulty in complex cases, particularly when attorneys try to mislead them regarding the evidence.<sup>108</sup>

Not to be overlooked, however, is the *discipline* gained by learning from any lecture. Students can rarely devote full attention for an entire class. Instead, they must learn to selectively focus when critical material is being discussed, and relax their concentration at other times. The juror's role is analogous. During evidence presentation in lengthy, complex cases, when juror lapses of attention are notoriously commonplace, the college graduates' conditioning should better prepare them to focus on critical testimony, rather than on oratorical flourish and attorney diversions.

The college experience arguably makes the student more educable as well.<sup>109</sup> Juxtaposing the college student's learning process with the juror's courtroom experience reveals clear parallels. In both capacities, the individual must seek to understand and apply new concepts of varying difficulties. Both present most of the material verbally, supplemented occasionally with visual aids.

### 3. *Jury Deliberations*

In addition to reactions to the attorneys' performance and judge's instructions, the study also sought the jurors' reactions to their own performance. Specifically, they were asked if they thought their decision-making process, as a jury, was in any way faulty or improper.<sup>110</sup> The college educated expressed more confidence in the soundness and propriety of their jury's decision-making process. (See Table 7.)

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but i) this does not necessarily translate to improved fact-finding, and/or ii) educated jurors *overcompensated* for perceived mismatching. Nevertheless, this set of data still provides a valuable profile of the educated juror given the size and breadth of the survey sample.

108. See *supra* notes 50-54 and accompanying text.

109. See ROBERT MILLS GAGNE, *THE CONDITIONS OF LEARNING* 333-34 (2d ed. 1970).

110. *Infra* App., Table 7.



Inasmuch as juror orientation is the same for all jurors, disparity of formal education may bear upon the perception of proper jury decision-making. Other studies found that better educated jurors participated more actively during jury deliberation, and also gave more attention to procedural matters than did the lesser educated.<sup>111</sup> Intellectual investment in a decisional activity can certainly imbue the participant with a greater sense of its correctness. If the college-educated jurors indeed played more active roles in jury deliberation, it is easy to see how they would have a higher regard for the validity of that decision-making process.

#### IV. SUGGESTIONS FOR IMPLEMENTING THE PROPOSAL

As with any other proposal, theory must be supported by guidelines for implementation. Before it can be operationalized, four distinct aspects of the educated jury proposal invite attention: increasing the availability of college-educated jurors; better defining the "complex" cases targeted by the proposal; establishing the ideal higher educated component of the proposed educated jury; and developing a rough blueprint for selecting the educated jury. These issues are addressed below.

##### A. *Increasing the Availability of Educated Jurors*

Prospective jurors with college educations often do not serve on juries hearing complex cases because they are struck from jury panels. Evidence suggests that trial attorneys use their peremptory challenges to exclude such jurors.<sup>112</sup> Attorneys may fear that educated jurors will see through a weak case or use their education to sway other jurors.

In addition to peremptory challenges, educated professionals are frequently excused from service on complex cases by making claims of financial sacrifice. Complex cases tend to be long. Professionals often cannot afford (or their employers will not abide) jury service on protracted cases. Consequently, courts frequently excuse them upon a showing of undue hardship or extreme inconvenience.<sup>113</sup> The hard-

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111. See, e.g., James, *supra* note 88, at 563-70.

112. Ell, *supra* note 5, at 780-81; see also Frederick P. Furth & Robert Emmett Burns, *The Anatomy of a Seventy Million Dollar Sherman Act Settlement—A Law Professor's Tape-Talk with Plaintiff's Trial Counsel*, 23 DEPAUL L. REV. 865, 880-81 (1974) (discussing claim by trial attorney that, in an antitrust case, defense counsel is more likely than plaintiff counsel to challenge the inclusion of educated persons on the jury).

113. *United States v. Armsbury*, 408 F. Supp. 1130, 1135 (D. Or. 1976) (noting that excusals based on extreme inconvenience or undue hardship are allowable, even if they result in underrepresentations of certain cognizable groups); see also Rita Sutton, *A More Rational Approach*

ship results from the projected loss of pay over a lengthier trial.<sup>114</sup> Collectively, these two practices combine to seriously suppress the percentage of persons with higher education who serve on juries in complex cases.<sup>115</sup>

Several steps might reverse this phenomenon and increase the availability of educated jurors. Compensation for jury service in most state courts is pathetically low—California's five dollars per day, for example. The most obvious remedy is to substantially increase juror compensation: It would take \$60 per day just to compensate a worker making only \$15,000 per year. Necessary additional funds can come from any of three sources: the state, the juror's employer or the litigants. Some states are responding with state funds and mandated employer payments. Massachusetts, Colorado and Connecticut require employers to cover the first three days of jury service, and then the court pays \$50 per day.<sup>116</sup> The California Blue Ribbon Commission on Jury System Improvements (hereinafter "California Commission") has called on the state legislature to increase juror fees to \$40 each day of jury service after the first day and \$50 per day for each day of jury service after the thirtieth day.<sup>117</sup> In addition, the California Commission recommended that employers continue paying usual compensation and benefits for the first three days of jury service if the employee has given reasonable notice to the employer of the service requirement.<sup>118</sup> As an incentive to employers, the California Commission also recommended that the legislature adopt reasonable tax credits for employers who continue paying usual compensation and benefits to employees absent for more than three days because of jury service.<sup>119</sup> Federal and state governments can make the increased juror fees even more attractive by granting them non-taxable status.

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to *Complex Civil Litigation in the Federal Courts: The Special Jury*, 1990 U. CHI. LEGAL F. 575, 578.

114. Most employers will not unqualifiedly pay jurors during their jury service regardless of service length. Some do not pay at all; many will only pay for a prescribed period such as three or five days. A September 1994 *Los Angeles Times* poll of Los Angeles County's working eligible jurors found 37% said their employers do not pay for jury service, 37% said they would pay and 22% did not know. STATE SENATE JUDICIARY COMMITTEE, JURY REFORM 9 (1995) (on file with *DePaul Law Review*).

115. Sutton, *supra* note 113, at 577-78; see also SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 125 (1988).

116. STATE SENATE JUDICIARY COMMITTEE, *supra* note 114, at 10.

117. J. CLARK KELSO, *FINAL REPORT OF BLUE RIBBON COMMISSION ON JURY SYSTEM IMPROVEMENT* 42 (1996) (on file with *DePaul Law Review*).

118. *Id.* at 43.

119. *Id.* at 43-44.

Another alternative requires the litigants, as opposed to the employers, to bear the additional juror fees paid for cases lasting beyond a few days.<sup>120</sup> This has been ordered in at least one case.<sup>121</sup> Obviously, this would discriminate against litigants less able to afford the additional fees. A sliding scale or some other fee schedule based on ability to pay would moderate the impact.

A different but compatible approach to the hardship problem is to reduce trial time. Means to this end include imposing deadlines on the parties for the presentation of evidence, allowing jurors to take exhibits, videotaped depositions and other evidence to view at home over a weekend,<sup>122</sup> and segregating discrete issues for trial by different juries.<sup>123</sup> Scheduling trials after working hours would also enhance the availability of highly-paid individuals.<sup>124</sup>

A direct solution is also available to the problem of deselection, where attorneys intentionally exclude well educated jurors. Mitigating or eliminating peremptory challenges in complex cases would greatly curtail this practice. Trial attorneys, of course, would denounce any such encroachment upon their perceived prerogatives. The call for reducing peremptories has been debated in many quarters.<sup>125</sup> Ultimately, it remains for trial procedure policy-makers to weigh all the perceived advantages of reducing or eliminating peremptories, including curtailing the deselection of educated jurors, against the projected disadvantages claimed by trial attorneys and other supporters of the present practice. Even if peremptories were reduced or eliminated, attorneys would retain the right to unlimited challenges for cause. Additionally, judges might adopt a more expansive view of the challenge for cause.

### B. Defining "Complex" Cases

Although widely discussed in cases and articles, there is no consensus on exactly what constitutes a "complex" case. A case's complexity is a function of its length and/or subject matter.<sup>126</sup> Modern trials can present any or all of three cognitive problems for jurors: too long, too

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120. See Lempert, *supra* note 50, at 118-19.

121. In what may be the first instance of parties contributing to juror pay, a Texas judge ordered jurors be paid \$50 per day—\$44 from the parties. Kate Thomas, *Texas Judge Tells Parties: Pay Jurors*, NAT'L L.J., Dec. 9, 1996, at A7.

122. Stephan A. Saltzburg, *Improving the Quality of Jury Decisionmaking*, in VERDICT, *supra* note 31, at 351.

123. *Id.* at 350-51.

124. *Id.* at 351.

125. For a discussion of the pros and cons, see KELSO, *supra* note 117, at 53-64.

126. Lempert, *supra* note 31, at 183.

complicated or too technical. A jury may be able to recall all of the witnesses in a burglary case, but surely cannot be expected to resolve the conflicts in the testimony of one hundred witnesses in an antitrust case. A California murder trial amply demonstrates the plight of jurors.<sup>127</sup> After twenty-two days of deliberation, the jurors appeared deadlocked.<sup>128</sup> They passed a note to the judge stating their inability to arrive at a unanimous decision.<sup>129</sup> Seeking to avoid a mistrial, the judge offered to have any or all of the testimony read back to the jurors.<sup>130</sup> The jurors agreed to listen to a complete reading of the testimony of two key witnesses, which took about seven days—over 1,000 pages in all.<sup>131</sup>

Complex cases test the compartmentalization and logical ordering skills of most jurors beyond their capacities. Jurors tend to confuse evidence in trials involving multiple parties, causes of action, or offenses.<sup>132</sup> As a result, they may use evidence admitted on one issue to resolve other issues.<sup>133</sup>

But the type of trial most beyond the comprehension of the average juror is one containing scientific or other technically-specific issues. For example, cases in which the issues relate to statutory securities law, patent infringement or medical malpractice often implicate matters that only lawyers, scientists or medical doctors, respectively, could satisfactorily appreciate. And how well can unsophisticated jurors sitting in a complicated shareholder derivative action determine whether a challenged business practice is improper on the basis of conflicting expert testimony?

Courts should acknowledge realistic limitations of average juror competence in cases involving lengthy, complicated or technical facts or legal issues. Tests or guidelines can be developed to help decide when a major trial issue is probably of sufficient complexity as to require a higher level of competence for its resolution.<sup>134</sup> For example, whenever a litigant indicates an expert in a technical field will be called as a witness, and that witness' testimony will be material, it could create a rebuttable presumption of complexity. In establishing

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127. G.M. Bush, *Maniscalco Jurors Seek Second Reading of Key Testimony*, L.A. DAILY J., Oct. 30, 1990, at 2.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. J. Alexander Tanford & Sarah Tanford, *Better Trials Through Science: A Defense of Psychologist-Lawyer Collaboration*, 66 N.C. L. REV. 741, 750 (1988).

133. *Id.*

134. Ell, *supra* note 5, at 798.

these parameters, courts and court commissions would be wise to work with psychologists and other behavioral scientists. These professionals can supply the relevant empirical findings and current theory necessary for informed development of guidelines.

Whatever guidelines are used, once a case is designated "complex" by the court it should become eligible to be heard by a special jury with a minimum number of college-educated jurors. The court can order its impanelment if both parties so stipulate. If not, the judge can rule on the motion of either party.

### C. *Composing the Educated Jury*

Even if judges and procedural policymakers acknowledge the need for more educated jurors in complex cases, legal and political issues would still impede adoption. Courts must rule that this particular special jury does not contravene the cross-section requirement,<sup>135</sup> and the body politic would have to believe that the projected benefits outweigh the potential diminution of jury representativeness. For each impasse, the same dynamic would obtain: the less specialized the jury, the more acceptable to the courts and the public.

Key to the appeal of this proposal is that only *some* of the jury members would have to hold a degree from an accredited college. The research of Hastie et al., demonstrated that while individual educated jurors generate more issues and discuss more fact/law relationships, only a few such jurors on any jury raise the performance of the entire jury.<sup>136</sup> Jurors in the study were distributed so that the average level of education in each jury was kept uniform.<sup>137</sup> Differences in performance across juries were not impressive.<sup>138</sup> Similarly, another jury study found that the ablest jurors of each jury helped the other jurors understand the evidence and legal rules while guiding the deliberations.<sup>139</sup>

Given the uncertain legal and political environment for acceptance of this reform, the ideal college-educated component of the proposed special jury would be the lowest number (or fraction) generally necessary to obtain the desired advantages. As noted above, research indicates it is unnecessary to require all or even nearly all of the jurors to

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135. See *supra* notes 63-66 and accompanying text.

136. See generally HASTIE ET AL., *supra* note 51 (showing that jurors with higher educations were better able to understand the law and facts of the case).

137. *Id.*

138. *Id.*

139. ABA REPORT, *supra* note 25, at 22.

be college educated.<sup>140</sup> Yet one or two, though possibly sufficient in any given case, would probably be unreliable in most cases. Therefore, this Article proposes half of the jury as an initial, and admittedly tentative, baseline fraction. Accompanying this proposal, however, is an exhortation for further research in this area so that, given the "lowest number necessary" criterion, commensurate refinements to the minimum college education component can be made in the future.

#### D. *Selecting the Educated Jurors*

Judge William Schwarzer describes two procedures for selecting specially qualified jurors in complex cases.<sup>141</sup> The first permits each attorney to choose a given number of potential jurors following voir dire.<sup>142</sup> Specifically, each side would exercise challenges for cause and peremptory challenges against jurors chosen by the other side.<sup>143</sup> Each attorney would then select one-half of the required jurors and alternates from those remaining.<sup>144</sup> The jury is thus entirely composed of jurors selected by each side. Any side that desired a more educated or otherwise specially-qualified jury is thus ensured of selecting half of the jury with that qualification.<sup>145</sup>

Schwarzer's alternate procedure shifts responsibility for selection to the judge.<sup>146</sup> Following voir dire, the judge would select the requisite number of prospective jurors based on their education and discuss this list with counsel.<sup>147</sup> After considering counsels' comments and ruling on their challenges, the judge would seat the jury that had been selected.<sup>148</sup>

A proposal outlined by professors Luneberg and Nordenberg relies on a *questionnaire* to identify prospective jurors with a bachelor's degree from an accredited college or university.<sup>149</sup> These names are placed in a jury wheel of qualified prospective jurors from which a jury commissioner or court clerk selects.<sup>150</sup> This would be the simplest and least costly method to administer. As with Schwarzer's al-

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140. See *supra* notes 51-87 and accompanying text.

141. Schwarzer, *supra* note 50, at 580-81.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. Luneberg & Nordenberg, *supra* note 2, at 942-50.

150. *Id.* at 946.

ternate procedure, it would remove the attorneys from the selection procedure.

Another alternative would require that upon the motion of either party to a complex case, the judge would make a determination of the suitability of a specially-qualified jury.<sup>151</sup> If so, the jury would be selected in either of two ways. First, the judge could make the choice from persons randomly selected from a master jury wheel using information from a questionnaire similar to the Luneberg and Nordenberg proposal. The value of this method of selection is that the demographic information the questionnaire supplies can be used to create jury pools which still reflect a representative cross-section of the community.<sup>152</sup> Alternatively, the selection could be made by a three-person committee comprised of one representative from each side, plus a neutral.<sup>153</sup>

It would betray both ignorance and presumptuousness to prescribe one selection method over another when there has been only the barest of experience with any method. To do so might foreclose potentially valuable experience for the sake of appearing authoritative. Two procedures are recommended, however, regardless of the method chosen. First, questionnaire information to offset the potential loss of representativeness can be inestimable and should be utilized. Second, the number of educated jurors to be specially selected should be reduced on a one-for-one basis by the number of qualified educated jurors which would have been *coincidentally chosen* in the normal manner. In this way, any compromise of the random selection and diversity underlying the cross-section rule would be limited to no greater than necessary.

The latter procedure could work as follows. One-half of the jurors in a complex case would first be chosen by conventional means. In the unlikely event that they all meet the minimum education requirement, the balance of the jury would be selected without any special selection necessary. But where one or more of this first half did not meet the minimum education requirement, additional jurors would be chosen in the conventional manner only until the deficiency in the minimum component of educated jurors equaled the remaining number of vacancies. At that point *all* the remaining jurors would have to be specially selected from a list of prospective jurors with the

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151. Fournier, *supra* note 52, at 1172.

152. *See id.* at 1172-76.

153. *Id.* at 1174-76.

necessary education.<sup>154</sup> Assume, for example, two of the first six jurors conventionally chosen (in what was to be a twelve person jury) had college degrees from accredited schools. Two more could be chosen in the same standard way before reverting to any special selection procedure. Assuming neither of the next two selected jurors were college graduates, the jury would be completed by choosing four additional educated jurors through the special procedure.

#### CONCLUSION

The jury's role is central to our justice delivery system. Continued public deference for jury decision-making cannot be understated. Society risks losing that vital support if it does not recognize the clear limitations of juries in modern complex litigation. By applying a functional approach to restructuring the jury in apt situations, the courts can meet the current challenge and preserve the institution of jury trial.

Mandating that half of the members of every jury in complex cases be college graduates could effect a significant improvement of the jury system. A panel so constituted would increase the probability of obtaining a more competent jury without resort to nonrepresentative or less representative expert panels. Further research should inform and refine this proposal so that the desired benefit is achieved with minimum deviation from conventional jury selection procedures.

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154. If none of the first half selected had the minimum education required, then all of the second half would have to be specially selected.



APPENDIX:  
LA SURVEY TABLES<sup>155</sup>

TABLE 1  
JUDGE'S INSTRUCTIONS—SPECIFIC

Chi-square Analysis: Comparison of Responses to the Question "In the judges instructions, how many words, terms or concepts did you have difficulty understanding?" (By level of education)

	None		1 to 5 Words		6 to 10 Words		More than 10 Words		TOTAL	
	N	%	N	%	N	%	N	%	N	%
Jurors with less than high school	35	59	16	27	3	5	5	9	59	100
Jurors with high school diploma	292	63	138	30	23	5	12	2	465	100
Jurors with some college	602	64	298	31	31	3	18	2	949	100
Jurors with undergraduate degrees	343	64	178	33	10	2	5	1	536	100
Jurors with graduate degrees	<u>245</u>	75	<u>71</u>	22	<u>5</u>	2	<u>4</u>	1	<u>325</u>	100
TOTALS	1517		701		72		44		2334	

$X^2=45.60$ ;  $DF=12$ ;  $P<.05$

TABLE 2  
JUDGE'S INSTRUCTIONS—GENERAL

Chi-square Analysis: Comparison of Responses to the Statement "Overall, the judges instructions were sufficiently understandable to apply them to our findings of fact." (By level of education)

	AGREE (Understandable)		DISAGREE (Not Understandable)		NO OPINION		TOTAL	
	N	%	N	%	N	%	N	%
Jurors with less than high school	49	86	2	4	6	10	57	100
Jurors with high school diploma	416	90	18	4	28	6	462	100
Jurors with some college	850	90	42	4	53	6	945	100
Jurors with undergraduate degrees	485	92	29	5	14	3	528	100
Jurors with graduate degrees	<u>305</u>	95	<u>11</u>	3	<u>6</u>	2	<u>322</u>	100
TOTALS	2105		102		107		2314	

$X^2=21.45$ ;  $df=8$ ;  
 $p<.05$

155. All data is derived from the unpublished LA Survey, *supra* notes 91-93.

TABLE 3  
REORDERING EVIDENCE PRESENTATION

Chi-square Analysis: Comparison of Response to the Statement "If you feel the evidence would be clearer to, and more effectively judged by the jury by any of the following changes, rank order them, '1' being the most effective change."

"All the evidence on the same issue were presented at the same time, instead of all the evidence for one side being presented before hearing any of the opposition's evidence." (By level of education)

	1	2	3	4	5	6	TOTAL
	N (%)	N (%)	N (%)	N (%)	N (%)	N (%)	N (%)
Jurors with less than high school	8 89	1 11	0 0	0 0	0 0	0 0	9 100
Jurors with high school diploma	35 86	3 8	1 2	1 2	0 0	1 2	41 100
Jurors with some college	45 48	16 17	19 20	8 9	5 6	0 0	93 100
Jurors with undergraduate degrees	24 37	13 20	9 14	10 16	7 11	1 2	64 100
Jurors with graduate degrees	16 37	7 16	8 19	5 12	6 14	1 2	43 100
TOTALS	128	40	37	24	18	3	250

$\chi^2=42.90$ ;  $df=20$ ;  $p<.05$

TABLE 4  
ATTORNEY TRIAL TACTICS

Chi-square Analysis: Comparison of Response to the Statement "At times, I felt one or both attorneys were trying more to distort or selectively hide facts rather than seeking to reveal the truth so the jury could make an informed judgment." (By level of education)

	AGREE (Perceived Distortion)		DISAGREE (Lack of Distortion)		NO OPINION		TOTAL	
	N	%	N	%	N	%	N	%
Jurors with less than high school	15	25	30	51	14	24	59	100
Jurors with high school diploma	126	27	229	49	111	24	466	100
Jurors with some college	287	30	481	51	182	19	950	100
Jurors with undergraduate degrees	178	34	257	49	92	17	527	100
Jurors with graduate degrees	104	32	176	54	47	14	327	100
TOTALS	710		1173		446		2329	

$X^2=16.23$ ;  $df=8$ ;  $p<.05$

TABLE 5  
MISMATCHED ATTORNEY SKILLS-AFFECTING VERDICT

Chi-square Analysis: Comparison of Response to the Statement "The difference in courtroom skills between the attorneys probably affected the verdict." (By level of education)

	AGREE (Verdict Impact)		DISAGREE (No Impact)		NO OPINION		TOTAL	
	N	%	N	%	N	%	N	%
Jurors with less than high school	14	25	22	39	20	36	56	100
Jurors with high school diploma	126	28	213	47	118	25	457	100
Jurors with some college	260	28	450	49	210	23	920	100
Jurors with undergraduate degrees	130	25	285	55	106	20	521	100
Jurors with graduate degrees	91	28	178	56	504	16	319	100
TOTALS	621		1148		504		2273	

$X^2=22.90$ ;  $df=8$ ;  $p<.05$

TABLE 6  
MISMATCHED ATTORNEY SKILLS-CONTRIBUTING TO  
WRONG DECISION

Chi-square Analysis: Comparison of Response to the Statement "If you think the jury reached any wrong decisions—with respect to either the verdict, size of the award or length or sentence—to what extent was the difference in courtroom skills between the attorneys responsible?" (By level of education)

	Significant Effect		Partial Effect		NO Effect		TOTAL	
	N	%	N	%	N	%	N	%
Jurors with less than high school	4	13	6	19	21	68	31	100
Jurors with high school diploma	25	16	27	18	100	66	152	100
Jurors with some college	31	10	68	23	202	67	301	100
Jurors with undergraduate degrees	16	9	60	32	109	59	185	100
Jurors with graduate degrees	<u>7</u>	<u>7</u>	<u>36</u>	<u>36</u>	<u>56</u>	<u>57</u>	<u>99</u>	<u>100</u>
TOTALS	83		197		488		768	

$X^2=21.94$ ;  $df=8$ ;  $p<.05$

TABLE 7  
JURY DELIBERATIONS

Chi-square Analysis: Comparison of Response to the Statement "I believe some part of the jury's decision-making process was faulty or improper." (By level of education)

	AGREE (Faulty/ Improper)		DISAGREE (Not faulty/ Proper)		NO OPINION		TOTAL	
	N	%	N	%	N	%	N	%
Jurors with less than high school	16	26	29	48	16	26	61	100
Jurors with high school diploma	78	28	254	57	114	25	446	100
Jurors with some college	181	20	518	58	190	22	889	100
Jurors with undergraduate degrees	79	16	313	62	112	22	504	100
Jurors with graduate degrees	<u>53</u>	<u>17</u>	<u>196</u>	<u>65</u>	<u>85</u>	<u>18</u>	<u>334</u>	<u>100</u>
TOTALS	407		1310		517		2234	

$X^2=15.59$ ;  $df=8$ ;  $p<.05$

