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## Complex Litigation in the New Era of the iJury

Andrew J. Wilhelm

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# Complex Litigation in the New Era of the iJury

I.	A NEW ERA OF LITIGATION .....	818
II.	THE OLD FRAMEWORK .....	821
	A. <i>Technology: Not Yet</i> .....	821
	B. <i>Litigation: Not Complex</i> .....	822
	C. <i>Juries: Not So Diverse</i> .....	824
III.	TIMES ARE CHANGING .....	829
	A. <i>Technology: Proliferating</i> .....	829
	B. <i>Litigation: Increasingly Intricate</i> .....	831
	C. <i>Juries: Evolving</i> .....	836
IV.	A NEW REALITY .....	839
	A. <i>Technology: A Good Thing?</i> .....	839
	B. <i>Litigation: Behind the Times?</i> .....	840
	1. Litigation Must Follow Educational Trends .....	840
	2. Litigation Must Keep Up with Technology .....	843
	C. <i>Juries: Legitimate?</i> .....	846
	1. Competence .....	847
	a. <i>Arguments Against Competence</i> .....	848
	b. <i>The Other Side of the Story</i> .....	849
	2. Advantages of Juries .....	851
V.	IMPROVING LITIGATION BY LEGITIMATING THE JURY .....	852
	A. <i>Juries on the Decline</i> .....	853
	B. <i>Suggestions Moving Forward</i> .....	854
VI.	CONCLUSION .....	857

## I. A NEW ERA OF LITIGATION

After a three-week trial,<sup>1</sup> the jury delivered its much-anticipated decision in only three days, taking the technology and legal worlds by storm.<sup>2</sup> On August 24, 2012, a nine-member jury rendered a verdict of over one billion dollars for Apple in its high-profile patent litigation against Samsung.<sup>3</sup> The jury was diverse but decidedly not a panel of patent experts: among the two women and seven men were a “social worker, an engineer[,] and an unemployed videogame enthusiast.”<sup>4</sup> One juror had experience testing the quality of lunch boxes.<sup>5</sup> Although one juror had experience with patent registration,<sup>6</sup> the court dismissed another potential juror with actual patent experience.<sup>7</sup> Of the nine jurors, only one had prior jury experience, and eight had no experience with the trial’s subject matter.<sup>8</sup> However, the jury was not uneducated—six had college degrees.<sup>9</sup> For such a high-profile technology trial, the jury was not terribly tech-savvy.<sup>10</sup> In fact, only one juror owned an iPhone, and none owned a Samsung phone.<sup>11</sup> In sum, the

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1. Heather Kelly, *Apple and Samsung Make Final Cases to Jury in Patent Trial*, CNN (Aug. 22, 2012, 7:49 PM), <http://www.cnn.com/2012/08/22/tech/mobile/apple-samsung-closing-statements/index.html>.

2. Joanna Stern, *Apple v. Samsung: Jury Rules for Apple, Recommends over \$1 Billion in Damages*, ABC NEWS (Aug. 24, 2012), <http://abcnews.go.com/Technology/apple-samsung-jury-recommends-billion-damages-apple/story?id=17076455>; see Brian X. Chen & Lisa Alcala Klug, *A Verdict that Alters an Industry*, N.Y. TIMES, Aug. 24, 2012, at B1, available at <http://www.nytimes.com/2012/08/25/technology/a-verdict-that-alters-an-industry.html> (describing the impact of the verdict on the smartphone industry as a whole).

3. Joel Rosenblatt, *Samsung Claims Jury Foreman Misconduct Tainted Apple Case*, BLOOMBERG (Oct. 3, 2012, 1:03 PM), <http://www.bloomberg.com/news/2012-10-03/samsung-claims-jury-foreman-misconduct-tainted-apple-case.html>.

4. Jessica E. Vascellaro, *Apple v. Samsung: The Jury’s Hardship*, WALL ST. J. (Aug. 23, 2012, 7:32 PM), <http://online.wsj.com/article/SB10000872396390444082904577607341919205050.html> (access by Google title search; pasting the URL blocks the article by subscription requirement).

5. Greg Sandoval, *How Qualified Is the Apple–Samsung Jury? We Found Out*, CNET (Aug. 24, 2012, 2:52 PM), [http://news.cnet.com/8301-13579\\_3-57499944-37/how-qualified-is-the-apple-samsung-jury-we-found-out/](http://news.cnet.com/8301-13579_3-57499944-37/how-qualified-is-the-apple-samsung-jury-we-found-out/).

6. *Id.*

7. Connie Guglielmo, *At Apple–Samsung Trial, Jurors Selected After Being Asked to List Their Gadgets*, FORBES (July 30, 2012, 2:54 PM), <http://www.forbes.com/sites/connieguglielmo/2012/07/30/apple-samsung-trial-starts-with-jury-selection-still-underway/>.

8. Sandoval, *supra* note 5.

9. *Id.*

10. *Id.*

11. *Id.*

jury was composed of average people who, like the vast majority of Americans, had no prior experience adjudicating litigation.<sup>12</sup>

*Apple, Inc. v. Samsung Electronics Co. (Apple v. Samsung)*<sup>13</sup> was, by any standard definition, complex. The thirty-seven-page complaint alleged a variety of patent and trademark infringements.<sup>14</sup> During trial, when the judge asked an attorney what identification number a newly admitted exhibit should receive, the attorney replied, “How about we give it one million?”<sup>15</sup> At the end of the trial, the judge issued eighty-four esoteric jury instructions spanning 109 pages.<sup>16</sup> Instructions in hand, the jury took only twenty-one hours of deliberation to answer over seven hundred questions necessary for the verdict.<sup>17</sup> According to a popular legal blog, such a feat meant the jury was either brilliant enough to work at Google or too dull to understand the nuanced legal theories.<sup>18</sup> Given the two options, the author said she was “going to vote for the latter.”<sup>19</sup>

12. According to a 2008 poll, less than a quarter of all Americans have served on a jury. See HARRIS INTERACTIVE, *Just Under Three in Five Americans Believe Juries Can Be Fair and Impartial All or Most of the Time*, FLA. JURY SELECTION BLOG (Jan. 22, 2008, 7:08 AM), <http://www.juryblog.com/wp-content/uploads/2008/01/the-harris-poll-on-jury-duty.pdf>.

13. *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-01846 (N.D. Cal. Apr. 15, 2011).

14. Complaint, *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-01846 (N.D. Cal. Apr. 15, 2011), ECF No. 1, available at <http://images.apple.com/pr/pdf/110415samsungcomplaint.pdf>.

15. Vascellaro, *supra* note 4.

16. See Final Jury Instructions, *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-01846 (N.D. Cal. Aug. 21, 2012), ECF No. 1903.

17. Elie Mystal, *The Apple Samsung Verdict Is In*, ABOVE THE LAW (Aug. 24, 2012, 6:09 PM), <http://abovethelaw.com/2012/08/apple-samsung-verdict/>.

18. *Id.*

19. *Id.* Comments like these, which doubt whether average Americans can adjudicate difficult issues, are far from novel: one English lawyer called the jury trial the “high point of amateurism, potentially a recipe for incompetence and bias.” Jennifer Walker Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 TEX. TECH. L. REV. 303, 306 (2012) (quoting Sir Louis Blom-Cooper, *A Judge Can Do the Work of 12 Amateurs, and Better*, TIMES (London), Oct. 21, 2003, at 10).

The late twentieth century was rife with condemnations of juries in light of litigation’s growing complexity. See, e.g., Note, *The Case for Special Juries in Complex Civil Litigation*, 89 YALE L.J. 1155 (1980) [hereinafter *The Case for Special Juries*]. This is not to say that jury competence articles have ceased completely. See, e.g., Jennifer F. Miller, *Should Juries Hear Complex Patent Cases?*, 2004 DUKE L. & TECH. REV. 0004. Rather, existing literature has failed to adequately synthesize technology’s impact on learning and, by extension, its impact on jury competence in complex litigation. This Comment seeks to do so.

There are legions of definitions of “complex litigation,” and the academy has not yet agreed on a definitive meaning. Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 DEPAUL L. REV. 49, 74 (1997). This Comment adopts a general definition of “complex litigation”:

One major change has occurred since the advent of complex litigation: “[l]aw today has entered the technology age.”<sup>20</sup> Certainly, technology was expanding in previous decades when complex litigation concerns were at their height, but this Comment looks at jury critiques from a new perspective: through the lens of the ubiquitous, 24/7 technology of the twenty-first century.<sup>21</sup> The primary concern should not be with the fact that technology itself is changing; rather, it should be on how technology is altering the way young jurors process information. This Comment argues for a comprehensive approach to legitimizing the lay jury—an approach involving education,<sup>22</sup> attorney adaptation,<sup>23</sup> courtroom renovations,<sup>24</sup> and judicial knowledge<sup>25</sup>—and a better understanding of how legal professionals can fairly and most effectively transmit knowledge to the average American.<sup>26</sup> The lay jury can remain a vital, unique part of the American judicial system if the bench and bar take seriously their responsibilities and adapt to today’s new reality.<sup>27</sup>

Part II examines the background of three basic components of a successful contemporary trial: technology,<sup>28</sup> litigation,<sup>29</sup> and the jury.<sup>30</sup> Part

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litigation involving occurrences or requiring evidence “beyond the experience of the typical lay jury.” Ronald S. Longhofer, *Jury Trial Techniques in Complex Civil Litigation*, 32 U. MICH. J.L. REFORM 335, 336 (1999). Though other definitions exist, this Comment employs a broad one due to its wide-ranging applicability to present and future technology-based litigation.

Complexity can apply to several elements of the litigation: the overall nature of the trial, the evidence presented, and the substantive law the jury must apply. Joseph A. Miron, Jr., Note, *The Constitutionality of a Complexity Exception to the Seventh Amendment*, 73 CHI.-KENT L. REV. 865, 883 (1998). “[C]omplex litigation is arguably a macrocosm of individual litigation[, but] it presents an exponential increase in risk and potential complications.” Richard Arsenault, et al., *Settlement Strategies for Complex Global Litigation*, TRIAL, Dec. 2007, at 40, 40 (Dec. 2007).

20. Dwane L. Tinsley, *The Use of Technology in the Courtroom*, W. VA. LAW., Sept.–Oct. 2008, at 4, 4.

21. See *infra* notes 114–30 and accompanying text (describing the rapid growth in technology use).

22. See *infra* notes 376–84 and accompanying text.

23. See *infra* notes 262–69 and accompanying text.

24. See *infra* notes 157–63 and accompanying text.

25. See *infra* notes 256–59 and accompanying text.

26. See *infra* notes 362–75 and accompanying text.

27. See Elrod, *supra* note 19, at 325.

28. See *infra* notes 44–50 and accompanying text.

29. See *infra* notes 51–64 and accompanying text.

30. See *infra* notes 65–105 and accompanying text.

III explores how these three components have evolved in the modern era.<sup>31</sup> Part IV analyzes how the components should be understood to maximize the legitimacy of lay juries.<sup>32</sup> Part V notes probable future trends and offers suggestions for improvement.<sup>33</sup> Part VI concludes.<sup>34</sup>

## II. THE OLD FRAMEWORK

Modern American complex litigation represents the synthesis of at least three factors, each of which has undergone massive changes throughout its history: technology, litigation, and juries.<sup>35</sup> These three factors, while theoretically independent, become inextricably intertwined in the courtroom.<sup>36</sup> With billions of dollars on the line and the world watching, the attorneys litigating *Apple v. Samsung* had to do more than simply know about these factors.<sup>37</sup> Instead, they had to understand and exploit them for maximum juror understanding of complex subject matter.<sup>38</sup> By doing so better than its adversary, Apple received \$1 billion for its efforts.<sup>39</sup> This section explores the background of each of these elements: first, technology;<sup>40</sup> then litigation;<sup>41</sup> and finally, juries.<sup>42</sup> One theme rings throughout: the factors that characterize modern litigation were vastly different for the first two centuries of American litigation than they are now.<sup>43</sup>

### A. Technology: Not Yet

Technology—at least in the way we think of it today—had little impact

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31. See *infra* notes 111–203 and accompanying text.

32. See *infra* notes 204–333 and accompanying text.

33. See *infra* notes 334–84 and accompanying text.

34. See *infra* notes 385–400 and accompanying text.

35. Compare Part II with *infra* Part III.

36. See *infra* notes 204–333 and accompanying text.

37. See *infra* notes 362–73 and accompanying text (describing ways attorneys must adapt to technology).

38. See *infra* notes 204–333 and accompanying text.

39. See Rosenblatt, *supra* note 3.

40. See *infra* notes 45–50 and accompanying text.

41. See *infra* notes 51–64 and accompanying text.

42. See *infra* notes 65–105 and accompanying text.

43. Compare Part II with *infra* Part III.

on the juries of ancient Greece through colonial America for an obvious reason: it did not yet exist. There were no multimedia PowerPoints, video depositions, or digital crime scene recreations.<sup>44</sup> Instead, jurors evaluated oral evidence and arguments.<sup>45</sup> Of course, the printing press brought literacy to the wealthy and educated men who served as jurors, especially by colonial times.<sup>46</sup> However, the tradition of oral advocacy dominated.<sup>47</sup> In colonial America, litigation was a crude dispensation of justice, often argued and decided by non-professionals.<sup>48</sup> By one account, early litigation was simply two adversaries telling their sides of the story to a panel of judges who decided the case by drawing lots.<sup>49</sup> Modern technology was slow to enter the courtroom—it was not until 1998 that a federal pilot program encouraged the use of technology in litigation.<sup>50</sup>

### B. Litigation: Not Complex

Though generalizing the first two millennia of litigation is impossible, several noteworthy themes exist. First, early litigation was usually much shorter than it is today.<sup>51</sup> Early English trials were often extremely short, with up to twenty-five trials occurring in a single day.<sup>52</sup> By contrast, the

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44. Today's use of technology in the courtroom is starkly different. See *infra* notes 157–63 and accompanying text.

45. See J. Bradley Ponder, Comment, *But Look over Here: How the Use of Technology at Trial Mesmerizes Jurors and Secures Verdicts*, 29 LAW & PSYCHOL. REV. 289, 299 (2005). Oral evidence seems more appropriate in a culture in which the main method of education is oral instruction. See *infra* notes 224–31 and accompanying text (describing traditional verbal education's impact on litigation). Today, however, people “remember only 10% of what they hear, . . . but an astonishing 65% of what they both see and hear.” Charles Wright & Jenny Henszey, *Electronic Media in the Modern Trial*, ARK. LAW., Winter 2010, at 28, 28.

46. See Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 399, 432–33, 458–62 (1996). Sixty percent of colonial American men were literate—a figure higher than their European counterparts. Mary Sarah Bilder, *The Lost Lawyers: Early American Legal Literates and Transatlantic Legal Culture*, 11 YALE J.L. & HUMAN. 47, 55–56 (1999).

47. See Ponder, *supra* note 45, at 299.

48. See Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. KAN. L. REV. 347, 369 (2003).

49. *Id.*

50. See Ponder, *supra* note 45, at 290.

51. Smith, *supra* note 46, at 405.

52. *Id.*

average civil trial now takes three to four days.<sup>53</sup> Second, jury trials were relatively simple.<sup>54</sup> The rules of joinder codified in the Federal Rules of Civil Procedure did not exist until 1938.<sup>55</sup> Until then, judges—not juries—heard suits involving several parties or issues.<sup>56</sup> Complex litigation, with vast numbers of plaintiffs and causes of action being argued in front of a jury, simply did not occur.<sup>57</sup> Third, courts were unlikely to compensate injured citizens.<sup>58</sup> In the nineteenth century, “views and practices that held individuals accountable for their own personal injuries . . . dominated the legal and social terrain”; therefore, lawsuits were less prevalent.<sup>59</sup> Finally, lawyers won trials through oral advocacy, with tradition demanding that “two orators stand juxtaposed to one another, and the more persuasive of the two w[on] the day.”<sup>60</sup> Today, however, attorneys have more weapons in their persuasive arsenal.<sup>61</sup> Without characterizing historical jury trials as quaint, it is important to recognize that lay juries simply did not decide complex, multifaceted cases the way they do today.<sup>62</sup> Instead, wealthy, educated men relied on oral advocates to persuade them in cases that

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53. Michael L. Seigel, *Pragmatism Applied: Imagining a Solution to the Problem of Court Congestion*, 22 HOFSTRA L. REV. 567, 595 (1994).

54. See Rita Sutton, *A More Rational Approach to Complex Civil Litigation in the Federal Courts: The Special Jury*, 1990 U. CHI. LEGAL F. 575, 582 (1990).

55. See FED. R. CIV. P. 19–20; see also Douglas King, Comment, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. CHI. L. REV. 581, 581–83 & n.7 (1984); see also *id.* at 606–07 & n.148 (discussing how the introduction of joinder altered the landscape of litigation).

56. Sutton, *supra* note 54, at 582. This is particularly compelling because, historically, juries were composed of the most educated of the populace. See *id.* at 579–80. If the most educated in society were deemed inadequate to adjudicate complex litigation, there has been an enormous shift from elitism to populist thinking in the past two hundred years. Some point to this historical use of equity courts to suggest that there is no right to a jury trial in complex litigation today. See *id.* at 582; *infra* notes 151–56 and accompanying text.

57. See Sutton, *supra* note 54, at 582.

58. See Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1125, 1230–32 (2001); Robert L. Rabin, *The Torts History Scholarship of Gary Schwartz: A Commentary*, 50 UCLA L. REV. 461, 479–80 (2002); Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1730–31 (1981); John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 LAW & SOC. INQUIRY 717, 719–20 (2000).

59. Valerie P. Hans, *The Jury's Response to Business and Corporate Wrongdoing*, 52 LAW & CONTEMP. PROBS. 177, 178–79 (1989).

60. Ponder, *supra* note 45, at 299.

61. See *infra* notes 157–63 and accompanying text.

62. See *supra* notes 52–57 and accompanying text.



involved relatively few issues.<sup>63</sup> But times have changed—drastically.<sup>64</sup>

### C. Juries: Not So Diverse

Though the jury system dates back to at least ancient Greece,<sup>65</sup> most academic discussion begins with sixteenth-century English juries because of their great influence on their colonial American counterparts.<sup>66</sup> English and colonial American jurors had trial experience and specific knowledge of the issues to be litigated.<sup>67</sup> In fact, they were chosen *because of* their special knowledge of the case.<sup>68</sup> Like most groups that wielded any civil power at the time, the jury was composed of white, male property owners.<sup>69</sup> Commonly, these men were required to possess more than property to be eligible—they also needed a minimal level of intelligence.<sup>70</sup> When John Adams described the jury as the “voice of the people,” he took care to define the “people” as not “the vile populace or rabble of the country, nor the cabal of a small number of factious persons,” but instead the “judicious part” of the citizenry.<sup>71</sup> With all of these qualifications, early English and colonial juries were more similar to what today have been coined “special juries”: juries chosen from a select group of “qualified” citizens, rather than from a random selection of lay citizens.<sup>72</sup> Lastly, the jury’s role was greater than it is today: it decided questions of both law *and* fact until 1895.<sup>73</sup>

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63. See *supra* notes 45–60 and *infra* note 69 and accompanying text.

64. See *infra* notes 131–71 and accompanying text.

65. Elrod, *supra* note 19, at 310.

66. See, e.g., Smith, *supra* note 46, at 390 (“Since the modern American jury finds its roots in the early English jury, it is useful to study this institution in order to determine how the jury has evolved in America . . .”).

67. *Id.*

68. Strier, *supra* note 19, at 58; Smith, *supra* note 46, at 399; see also James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 164 (1983) (“Originally, jurors were presumed to know the facts in dispute because they were residents of the vicinity where the dispute arose. The early statutes called for jurors who were ‘next Neighbours,’ those who ‘have best Knowledge of the Truth, and be nearest.’”).

69. See Smith, *supra* note 46, at 399–400.

70. See *id.* at 434. Even when intelligence standards were not explicitly employed, the property qualifications certainly increased the chances of an educated jury. *Id.* at 399.

71. *Id.* at 432 (internal quotations and footnote omitted). This is antithetical to modern concerns of cross-representation. See *infra* note 93 and accompanying text.

72. See generally Sutton, *supra* note 54; see also *infra* note 151 and accompanying text.

73. See, e.g., *Sparf v. United States*, 156 U.S. 51, 63–64, 69–70, 99–103, 106 (1895). The decision to prevent jury determinations of law was an early example of the modern trend to decrease

Like many American institutions, the jury underwent dramatic changes in the twentieth century.<sup>74</sup> Its demographics evolved “dramatically at a pace far exceeding the diversification of legislatures, executive branches, or the judiciary.”<sup>75</sup> Though the Fifteenth Amendment technically opened voting—and jury service—to African Americans in 1870,<sup>76</sup> conservatives<sup>77</sup> widely used Jim Crow laws and other techniques for almost a century to keep them off juries.<sup>78</sup> Changes continued in 1920, when women gained the right to vote and, as a result, to serve on juries.<sup>79</sup> In 1975, the Supreme Court’s

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jury power. *See infra* notes 83–95 and accompanying text. As the opening page of one textbook put it, “mistrust of juries is the single overriding reason” for modern jury-limiting laws. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE UNDER THE RULES 1* (7th ed. 2011).

74. *See infra* notes 75–81 and accompanying text.

75. Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 326 (1995); *see also id.* at 326 n.5 (noting that as of 1988, women comprised only 7.4% of the federal judiciary).

76. U.S. CONST. amend. XV; JOHN R. VILE, *A COMPANION TO THE UNITED STATES CONSTITUTION AND ITS AMENDMENTS* 189, 245 (5th ed. 2010). “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” U.S. CONST. amend. XV.

77. This is not to imply political conservatives. Rather, I use a literal definition of conservative: “tending or disposed to maintain existing views, conditions, or institutions.” MERRIAM-WEBSTER DICTIONARY (11th ed. 2003). In this sense, conservatives are those in power (the bench, bar, and academy) who have no interest in changing power structures because they are already at the top. *See id.* For example, at the time, it was Southern Democrats who were, in this sense, “conservative”—“unified in their desire to uphold segregation and to resist any threats to the Jim Crow South.” Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 102 (2011).

78. *See* C. Vann Woodward, *The Strange Career of Jim Crow*, 6–9 (2001) (“The phase that began in 1877 was inaugurated by the withdrawal of federal troops from the South[] [and] the abandonment of the Negro as a ward of the nation . . . . [But] [i]n the early years of the twentieth century, it was becoming clear that the Negro would be effectively disenfranchised throughout the South, . . . that neither equality nor aspirations for equality in any department of life were for him.”); Pamela W. Carter & Phoebe A. Roaf, *A Historic Overview of Brown v. Board of Education*, 51 LA. B.J. 410, 412–13 (2004) (“[*Plessy v. Ferguson*, 163 U.S. 537 (1896)] contributed to the enactment of Jim Crow laws prohibiting blacks from entering or utilizing public facilities . . . . *Brown*, although momentous, proved to be merely another stepping stone in the lengthy struggle to achieve equality under the law for all citizens instead of a death knell for all segregation.”); Linda Greene, *Jim Crowism in the Twenty-First Century*, 27 CAP. U. L. REV. 43, 46 (1998).

In fact, even today, studies suggest that some jurisdictions suffer from continued underrepresentation of African Americans on juries. *See* Shaila Dewan, *Study Finds Blacks Blocked from Southern Juries*, N.Y. TIMES, June 2, 2010, at A14, available at <http://www.nytimes.com/2010/06/02/us/02jury.html?pagewanted=all>. In one case, prosecutors used all of their peremptory strikes to exclude black jurors, leaving a jury composed of one black and eleven white jurors, even though the county in which the crime was committed was 45% black. *Id.*

79. U.S. CONST. amend. XIX; VILE, *supra* note 76, at 188, 198. “The right of citizens of the

holding in *Taylor v. Louisiana*,<sup>80</sup> that criminal juries must represent a cross-section of society, further cemented jury diversification.<sup>81</sup>

As the twentieth century progressed, conservatives bristled at the idea of—to quote John Adams—the “vile populace”<sup>82</sup> gaining power in the legal realm.<sup>83</sup> In response to expanding jury demographics, they used several strategies to reapportion power to those in the courtroom whose demographics remained stable (judges and lawyers).<sup>84</sup> The first was the peremptory strike, which allows lawyers to dismiss a potential juror for no stated reason.<sup>85</sup> Critics of the peremptory strike allege that “[t]hose persons in the venire who appear perceptive, well-educated, or independent-minded are in the most danger of being peremptorily struck,”<sup>86</sup> but others have found no such result.<sup>87</sup> In 1938, the Federal Rules of Civil Procedure codified a

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United States to vote shall not be denied or abridged by the United States or by any State on account of sex.” U.S. CONST. amend. XIX.

80. 419 U.S. 522, 530 (1975).

81. See *infra* note 93 and accompanying text.

82. Smith, *supra* note 47, at 432 (internal quotations and footnote omitted).

83. See Dooley, *supra* note 75, at 355–56.

84. See *id.* at 355 (“The movement toward limiting jury power corresponds with the struggle of formerly excluded groups to gain access to jury service.”); see also Smith, *supra* note 46, at 385.

85. The peremptory strike has long been a weapon in lawyers’ arsenals. 2 ALAN WRIGHT ET AL., FEDERAL PRACTICE & CRIMINAL PROCEDURE § 384 (4th ed. 2012). Though the Supreme Court has refused to recognize a constitutional guarantee to peremptory strikes, it has long acknowledged their essentiality in litigation. *Id.*; see also *Lewis v. United States*, 146 U.S. 370, 376 (1892) (holding that the “making of [peremptory] challenges was an essential part of the trial, and that it was one of the substantial rights of the prisoner to be brought face to face with the jurors at the time when the challenges were made”). However, the Supreme Court has held litigants may not use peremptory strikes on the grounds of race, see *Batson v. Kentucky*, 476 U.S. 79, 87–88 (1986), or gender, see *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622 (1991).

86. Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 64 (2001). The well-educated are also more likely to be dismissed from the jury due to undue financial hardship, since they typically have the most money to lose by spending the day in the jury box instead of at work. See *id.* at 62 & n.28. Some suggest mitigating or eliminating the peremptory strike as one method of fostering a more educated jury. See, e.g., Strier, *supra* note 19, at 74 (warning that such mitigation would be met with strong resistance from lawyers, who, nonetheless, would retain unlimited challenges for cause).

87. Hillel Y. Levin & John W. Emerson, *Is There a Bias Against Education in the Jury Selection Process?*, 38 CONN. L. REV. 325, 328 (2006) (writing that the results of studying Connecticut juries were “surprising: there is no evidence that juries are undereducated relative to the venires from which they are selected. Indeed, juries seem to be *better* educated than the Connecticut population demographics reported by U.S. census data. Thus, our study suggests that the system is not broken in the way we typically imagine”). It is strange that, at some point, the peremptory strike shifted

second method of sapping jury power: the JNOV.<sup>88</sup> By using the JNOV,<sup>89</sup> judges are able to “fix” unreasonable jury verdicts they find to be against the legally sufficient weight of the evidence.<sup>90</sup> Another academically popular method of jury control is the special jury.<sup>91</sup> For decades, the academy has pushed for special, or “blue ribbon,” juries composed of those it deems qualified to adjudicate complex litigation.<sup>92</sup> For instance, a 1980 Yale Law Journal article advocated that “[a]ny party to a complex suit should be allowed to move for trial by a special jury . . . . [A] complex antitrust action by one large corporation against another would seem perfectly suited to the use of a special jury.”<sup>93</sup> A final strategy is to eliminate the jury altogether in favor of a bench trial,<sup>94</sup> but this would almost assuredly run afoul of the

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from excluding minorities and other perceived *underqualified* jurors, *see generally* WRIGHT, *supra* note 85, to excluding, as critics allege, *overqualified* jurors, *see* Lilly, *supra* note 86 and accompanying text.

88. Rule 50(b) states:

If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court’s later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may: (1) allow judgment on the verdict, if the jury returned a verdict; (2) order a new trial; or (3) direct the entry of judgment as a matter of law.

FED. R. CIV. P. 50(b).

89. JNOV, commonly called “judgment notwithstanding the verdict,” is short for the Latin phrase “judgment *non obstante veredicto*.” *See* Slocum v. N.Y. Life Ins. Co., 228 U.S. 364, 369, 375 (1913).

90. *See* FED. R. CIV. P. 50; Dooley, *supra* note 75, at 333.

91. Cries for special juries were especially loud in the 1980s after the surge of complex tort and technology litigation in the 1970s. *See generally, e.g., The Case for Special Juries, supra* note 19.

92. *Id.*

93. *Id.* at 1172–73. While there is not broad consensus on exactly how to compose special juries, one reasonable suggestion is for a majority of the jury to hold a college degree. *See* Strier, *supra* note 19, at 58–60. The Supreme Court has held that in criminal cases, the Constitution requires juries to be a “fair cross section of the community.” Taylor v. Louisiana, 419 U.S. 522, 527 (1975). While the Court has not squarely held whether civil cases require the same cross-section, *see* Sutton, *supra* note 54, at 581, some argue that a college-educated jury would pass constitutional muster because “today’s population of college graduates represent virtually every segment of society.” Strier, *supra* note 19, at 63. Furthermore, as long as the venire meets cross-section requirements, there is no law requiring that petit juries do so as well. Lockhart v. McCree, 476 U.S. 162, 174 (1986). Therefore, if a college-educated jury pool represents the community as a whole, it might pass constitutional muster.

94. *See infra* notes 151–56 and accompanying text.

Seventh Amendment's guarantee to a civil jury.<sup>95</sup>

The rationale underlying all of these power-shifting techniques is the same: the academy<sup>96</sup> has insisted that the jury is incompetent to effectively, fairly, and objectively adjudicate complex litigation. There are myriad denunciations of the ordinary American's capacity to adjudicate today's complex matters: that the assumption that juries understand instructions "seems highly artificial";<sup>97</sup> that there is "no constitutional or statutory right that 'ignorance' be represented in the jury box";<sup>98</sup> that there is no reason to "wait until the appellate level to have triers of fact that are prepared to render accurate and consistent verdicts";<sup>99</sup> that "[t]he only question is whether we can tolerate comprehension problems as the price for maintaining jury participation in resolving conflicts";<sup>100</sup> and that despite good intentions, "the cross-section requirement . . . serve[s] to decrease the competency of the jurors entrusted with deciding a case."<sup>101</sup> It seems that those at the top of legal structures have always distrusted juries—English kings threatened severe penalties for juries who handed down undesirable verdicts,<sup>102</sup> and modern intellectuals continue to deride common citizens who give what they consider undesirable verdicts.<sup>103</sup> Though the history of the jury has seen plenty of changes,<sup>104</sup> the suspicion with which those in power

95. See Strier, *supra* note 19, at 64. Further, bench trials have not been found to produce better results than jury trials, at least in patent litigation. See Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box*, 99 MICH. L. REV. 365, 387–88, 408 n.155 (2000).

96. The academy's critiques are in the same vein of conservatism referenced in *supra* note 77.

97. Lilly, *supra* note 86, at 68.

98. *The Case for Special Juries*, *supra* note 19, at 1171 (quoting *United States v. Henderson*, 298 F.2d 522, 526 (7th Cir. 1962) (internal quotation marks omitted)).

99. Miller, *supra* note 19, ¶ 42.

100. Arthur Austin, *The Jury System at Risk from Complexity, the New Media, and Deviancy*, 73 DENV. U. L. REV. 51, 60 (1995).

101. Steven L. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 194 (1990).

102. See Smith, *supra* note 46, at 408 ("[I]n the sixteenth century the courts in England possessed the power to set aside verdicts and punish jurors at will . . ."); see also Elrod, *supra* note 19, at 312–13 ("[J]uries even in early modern England could be punished for failing to reach the verdict desired by the government . . . . In extreme cases, even death was an available penalty.").

103. See *supra* notes 97–101 and accompanying text. In all fairness, the fact that those at the top of the legal power structure only critique juries instead of threatening them with jail time for being "wrong" shows a marked improvement in societal norms.

104. See *supra* notes 75–81 and accompanying text.

view it has remained consistently high.<sup>105</sup>

The ever-connected, technology-laden jury<sup>106</sup> is a new phenomenon unknown to the traditional legal system.<sup>107</sup> Historically, technology played a minimal role in predominantly oral trials.<sup>108</sup> These trials were, by modern standards, short and simple.<sup>109</sup> Privileged white males composed juries that wielded more power than they do today.<sup>110</sup> Against this background, however, modern technology burst onto the scene.

### III. TIMES ARE CHANGING

#### A. Technology: Proliferating

One of the greatest changes since early jury competence literature lies in the realm of technology.<sup>111</sup> Decades ago, when the academy was already plenty displeased with the average jury's ability,<sup>112</sup> few would be able to predict the proliferation of new technology and how soon much of it would be ubiquitously enmeshed in society. Today's world is far more interconnected and saturated with battery-powered gadgets than ever.<sup>113</sup>

Americans have always loved their televisions, and "total TV viewing has been on the rise in the U.S. for years . . . ."<sup>114</sup> Currently, 114.7 million households own televisions, and the average American watches an astonishing five hours of video every day, 98% of which is viewed from a traditional TV.<sup>115</sup> That means that in a single year, the average American spends over seventy-six days sitting in front of a television.<sup>116</sup> But the

105. See *supra* notes 83–103 and accompanying text.

106. See *infra* notes 182–203 and accompanying text.

107. See *supra* notes 44–50 and accompanying text.

108. See *supra* notes 44–50 and accompanying text.

109. See *supra* notes 51–64 and accompanying text.

110. See *supra* notes 65–73 and accompanying text.

111. See *infra* notes 117–30 and accompanying text.

112. See, e.g., *supra* notes 91–93, 97–101 and accompanying text.

113. See *infra* notes 114–30 and accompanying text.

114. Brian Stelter, *Nielsen Reports a Decline in Television Viewing*, N.Y. TIMES (May 3, 2012, 10:45 AM), <http://mediadecoder.blogs.nytimes.com/2012/05/03/nielsen-reports-a-decline-in-television-viewing/?src=tp>.

115. *Id.*

116. See *id.* (five hours multiplied by 365 days per year equals 1,825 hours per year, or 76.04 days).

television is no longer the only screen captivating Americans' attention.

Welcome to the era of the cell phone, and, increasingly, the smartphone,<sup>117</sup> which is capable of accessing the Internet and running applications (apps).<sup>118</sup> As of 2011, 83% of all American adults owned cell phones,<sup>119</sup> and approximately one-third of Americans ages fourteen to seventeen owned smartphones.<sup>120</sup> Proliferation of smartphones has contributed to an explosion of texting.<sup>121</sup> While teenagers as a whole send an average of sixty text messages per day, fourteen- to seventeen-year-olds send one hundred per day.<sup>122</sup> An even more poignant illustration of the way technology is replacing traditional modes of communication is the fact that about two-thirds of teenagers text every day, while only about one-third engage in daily face-to-face socializing outside of school.<sup>123</sup>

Americans increasingly turn to omnipresent technology to thwart boredom. Forty-two percent of cell phone owners use them for

117. A smartphone is "a cell phone that includes additional software functions (as e-mail or an Internet browser)." *Smartphone Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/smartphone> (last visited Feb. 20, 2014). CNN has devoted an entire series to the smartphone era. See *Mobile World Congress*, CNN, <http://www.cnn.com/SPECIALS/tech/our-mobile-society/index.html> (last visited Feb. 20, 2014).

118. An app is "a program ([sic]as a word processor or a spreadsheet) that performs one of the major tasks for which a computer is used." MERRIAM-WEBSTER COLLEGIATE DICTIONARY 60 (11th ed. 2003). Along with Internet access and larger screens comes the ability for businesses to advertise. "[T]he mobile ad market is embryonic, although growing rapidly." Steve Lohr, *The Mobile Wave Rolls On*, N.Y. TIMES BITS (Oct. 19, 2012, 12:15 PM), [http://bits.blogs.nytimes.com/2012/10/19/the-mobile-wave-rolls-on/?\\_r=0](http://bits.blogs.nytimes.com/2012/10/19/the-mobile-wave-rolls-on/?_r=0). Might mobile growth lead to additional privacy-centered litigation? See Kevin J. O'Brien, *Data-Gathering via Apps Presents a Gray Legal Area*, N.Y. TIMES, Oct. 29, 2012, at B7, available at <http://www.nytimes.com/2012/10/29/technology/mobile-apps-have-a-ravenous-ability-to-collect-personal-data.html> (highlighting privacy issues for apps that transfer personal data).

119. AARON SMITH, PEW RESEARCH CTR.'S INTERNET & AM. LIFE PROJECT, AMERICANS AND THEIR CELL PHONES 5 (2011), available at <http://pewinternet.org/~media/Files/Reports/2011/Cell%20Phones%202011.pdf>. In *Apple*, eight of the nine jurors owned cell phones. Sandoval, *supra* note 5.

120. AMANDA LENHART, PEW RESEARCH CTR.'S INTERNET & AM. LIFE PROJECT, TEENS, SMARTPHONES & TEXTING 3 (2012), available at [http://www.pewinternet.org/~media/Files/Reports/2012/PIP\\_Teens\\_Smartphones\\_and\\_Texting.pdf](http://www.pewinternet.org/~media/Files/Reports/2012/PIP_Teens_Smartphones_and_Texting.pdf). More than two-thirds of twenty-five to thirty-four year-old cell-phone owners have smartphones. *America's New Mobile Majority: A Look at Smartphone Owners in the U.S.*, NIELSEN NEWSWIRE (May 7, 2012), [blog.nielsen.com/nielsenwire/online\\_mobile/who-owns-smartphones-in-the-us/](http://blog.nielsen.com/nielsenwire/online_mobile/who-owns-smartphones-in-the-us/).

121. See *infra* notes 122–23 and accompanying text.

122. LENHART, *supra* note 120, at 2.

123. *Id.*



entertainment when they are bored.<sup>124</sup> For Millennials,<sup>125</sup> that figure escalates to 70%, with nearly half of them admitting they “have had trouble doing something because they did not have their phone nearby.”<sup>126</sup> As of March 2012, 212 million Americans used the Internet.<sup>127</sup> Ninety-two percent of all young adults, and virtually all college students, are online.<sup>128</sup> Over half of young adults go online everyday “for no particular reason except to have fun or to pass the time.”<sup>129</sup> In short, mobile technology has transitioned from being a luxury of the few to a common fact of everyday American existence.<sup>130</sup> It should also transition legal professionals to a new way of looking at litigating in front of juries.

### B. Litigation: Increasingly Intricate

Since the mid-twentieth century, litigation has become significantly more complex<sup>131</sup> due to several factors. First, the introduction of the federal rules of joinder in 1938 allowed for multiple claims by multiple parties to be decided in a single lawsuit by a single jury.<sup>132</sup> Second, the subject matter of litigation became much more intricate than in the past. Many lawsuits began

124. SMITH, *supra* note 119, at 2.

125. *See infra* note 181.

126. SMITH, *supra* note 119, at 2.

127. *May 2012—Top U.S. Web Brands and News Websites*, NIELSEN NEWSWIRE (June 22, 2012), [blog.nielsen.com/nielsenwire/online\\_mobile/may-2012-top-u-s-web-brands-and-news-websites/](http://blog.nielsen.com/nielsenwire/online_mobile/may-2012-top-u-s-web-brands-and-news-websites/). Google was the most viewed website, while Facebook came in second. *Id.*

128. Aaron Smith et al., *College Students and Technology*, PEW RESEARCH INTERNET PROJECT (July 19, 2011), <http://www.pewinternet.org/2011/07/19/college-students-and-technology/>.

129. Lee Rainie, *The Internet as a Diversion and Destination*, PEW RESEARCH INTERNET PROJECT (Dec. 2, 2011), <http://www.pewinternet.org/2011/12/02/the-internet-as-a-diversion-and-destination/>.

130. As an example of the increasing accessibility of technology, the 1984 Apple iMac cost \$662.35 per MHz of computing power; by 2009, consumers paid just \$0.34 per MHz. Mark J. Perry, *Computers Just Keep Getting Cheaper and Better*, ENCYCLOPEDIA BRITANNICA BLOG (Apr. 7, 2010), <http://www.britannica.com/blogs/2010/04/computers-just-keep-getting-cheaper-and-better-and-we-should-eagerly-await-the-days-ahead/>.

131. *See supra* note 19.

132. *See* FED. R. CIV. P. 19–20. The exponentially increased complexity these Rules allow prompted one commentator to write that the rules of liberalized joinder pit Fifth Amendment due-process concerns against the Seventh Amendment, though the merits of that debate are beyond the scope of this Comment. Roger W. Kirst, *The Jury's Historic Domain in Complex Cases*, 58 WASH. L. REV. 1, 8–9 (1982).



to center around novel and esoteric concepts: DNA,<sup>133</sup> computers,<sup>134</sup> derivative securities,<sup>135</sup> antitrust,<sup>136</sup> and, as in *Apple v. Samsung*, software patents.<sup>137</sup> Third, recent decades have seen juries hear an “explosion of patent litigation,”<sup>138</sup> which is “inherently complex.”<sup>139</sup> One federal district court judge commented: “Honest to God, I don’t see how you could try a patent matter to a jury. Goodness, I’ve gotten involved in a few of these things. It’s like somebody hit you between your eyes with a four-by-

133. DNA was first introduced to the criminal justice system in the mid-1980s. Kathryn A. Harrington, Note, *Ghosts of Innocent Men: Necessary Implications of Skinner v. Switzer*, 38 WASH. U. J.L. & POL’Y 325, 331 (2012). By the late 1980s, courts wrestled with DNA’s reliability as courtroom evidence. See, e.g., *People v. Castro*, 540 N.Y.S.2d 143 (N.Y. Sup. Ct. 1989).

134. One of the earliest computer litigation cases is *Synercom Technology, Inc. v. University Computing Co.*, 462 F. Supp. 1003 (N.D. Tex. 1978). For more on computer copyright history, see Brian Johnson, *An Analysis of the Copyrightability of the “Look and Feel” of a Computer Program*: *Lotus v. Paperback Software*, 52 OHIO ST. L.J. 947, 961 (1991).

135. The most famous derivative securities suit is likely *Ross v. Bernhard*, 396 U.S. 531 (1970) because of its famous “footnote 10,” which some have construed as allowing for a complexity exception to the right to trial by jury. See *infra* note 151. The suit focused on whether Lehman Brothers was unlawfully controlling another corporation. *Ross*, 396 U.S. at 531–32. In footnote 10, the Court listed three factors when discussing whether a jury should try particular issues. *Id.* at 538 n.10. The third factor is “the practical abilities and limitations of juries.” *Id.* The ambiguous phrase, listed last in a series placed in a footnote, has led scholars to conjecture whether the Supreme Court tacitly approved of a complexity exception. See *infra* note 151.

136. See *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983).

137. *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-01846 (N.D. Cal. Apr. 15, 2011).

138. Edmund J. Sease, *Ten Commandments of a Defendant’s Patent Case*, in PATENT LITIGATION 1993, at 603, 603 (PLI Patents, Copyrights, Trademarks & Literary Prop., Course Handbook Ser. No. 375, 1993). While in 1940, only 2.5% of patent cases in federal court went to juries, that figure catapulted to 59% by 1999. Moore, *supra* note 95, at 366.

139. Deborah M. Altman, Comment, *Defining the Role of the Jury in Patent Litigation: The Court Takes Inventory*, 35 DUQ. L. REV. 699, 699 (1997). Complexity influenced the Supreme Court’s ruling that the construction of patents “is exclusively within the province of the court.” *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996). The Court wrote:

Where history and precedent provide no clear answers, functional considerations also play their part in the choice between judge and jury to define terms of art. . . . [T]he fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question. . . . The construction of written instruments is one of those things that judges often do and are likely to do better than jurors unburdened by training in exegesis. Patent construction in particular is a special occupation, requiring, like all others, special training and practice. The judge, from his training and discipline, is more likely to give a proper interpretation to such instruments than a jury; and he is, therefore, more likely to be right, in performing such a duty, than a jury can be expected to be. . . . [T]he claims of patents have become highly technical in many respects . . . .

*Id.* at 388–89 (internal quotation marks and citations omitted).

four.”<sup>140</sup> Patents or otherwise, juries are required to understand increasingly complex subject matter.<sup>141</sup>

Such complexity increases the cost of litigation and the scope of evidence. Patent litigation very often costs each party more than \$1 million.<sup>142</sup> Though not necessarily typical, document discovery involved 3,000,000 pages in *In re NASDAQ Market-Markers Antitrust Litigation*.<sup>143</sup> Likewise, 577,000 pages were admitted into evidence in *Cimino v. Raymark Industries, Inc.*<sup>144</sup> Even if the *Cimino* jury were comprised of solely Mensa members,<sup>145</sup> it is hardly conceivable that they would be able to grasp over 500,000 pages of documents.

Since previous academic critiques of jury competence, litigation has continued to evolve.<sup>146</sup> The critiques from the 1980s are still present and, some would argue, more pronounced: “[M]odern trials and the jury selection process have coalesced to exacerbate traditional problems that have long been recognized.”<sup>147</sup> In response to this perceived exacerbation, courts are taking measures to preserve the legitimacy of trials.<sup>148</sup> One involves avoiding the jury;<sup>149</sup> the other involves accommodating it.<sup>150</sup>

The first response, avoidance, assumes that a “complexity exception” exists<sup>151</sup> to the Seventh Amendment’s guarantee of the right to trial by jury in civil cases.<sup>152</sup> Some have used equitable and due process considerations

140. Symposium, *Judicial Panel Discussion on Science and the Law*, 25 CONN. L. REV. 1127, 1145 (1993) (quoting Judge Alfred V. Covello, U.S. District Court Judge for the District of Connecticut).

141. See *supra* notes 133–40 and accompanying text.

142. Moore, *supra* note 95, at 367.

143. 187 F.R.D. 465, 471 (S.D.N.Y. 1998).

144. 751 F. Supp. 649, 653 (E.D. Tex. 1990).

145. Mensa is a group dedicated to those whose IQ scores rank in the top 2% of the population. *About Mensa International*, MENSA, <http://www.mensa.org/about-us> (last visited Feb. 20, 2014).

146. See *infra* notes 147–71 and accompanying text.

147. Lilly, *supra* note 86, at 53.

148. See *infra* notes 151–63 and accompanying text.

149. See *infra* notes 151–56 and accompanying text.

150. See *infra* notes 157–63 and accompanying text.

151. The academy has long debated whether such an exception actually exists. See *supra* note 135. Exception proponents claim that special juries are rooted in history and that incompetent lay juries raise due process concerns. *The Case for Special Juries*, *supra* note 19, at 1163, 1170–72. Others offer what they believe to be sufficient suggestions for improving lay juries without replacing them with special jurors. See, e.g., Friedland, *supra* note 101, at 209–18.

152. “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .” U.S. CONST. amend. VII.

to argue that the most complex civil litigation should be taken away from the purview of a jury.<sup>153</sup> Concerns of complexity, typified by Judge Covello's statement above,<sup>154</sup> led Pennsylvania to contemplate the idea of implementing a specialized jury-free commercial court,<sup>155</sup> which is not unheard of—Delaware has a special chancery court dedicated to commercial matters.<sup>156</sup>

The alternative response, accommodation, requires courts to finally embrace technology. Though judges are notoriously averse to change,<sup>157</sup> the 1999 Federal Judicial Conference endorsed the use of courtroom technology,<sup>158</sup> and as the price of mobile technology has dropped, more attorneys are using it.<sup>159</sup> Affordability is not the only force propelling technology into the courtroom. Indeed, technology has many advantages: expediting proceedings, keeping the jurors' attention, increasing their comprehension, and preventing their boredom.<sup>160</sup> By 2011, nearly half of attorneys used laptops in the courtroom,<sup>161</sup> and jurors are virtually all in favor of courtroom technology.<sup>162</sup> If both attorneys and jurors benefit from technology and it aids in juror comprehension, it is surely an effective means of maintaining the modern jury's legitimacy and buttressing it against

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153. See generally *The Case for Special Juries*, *supra* note 19.

154. See *Judicial Panel Discussions on Science and the Law*, *supra* note 140 and accompanying text.

155. Paul Lansing & Nina Miley, *The Right to a Jury Trial in Complex Commercial Litigation: A Comparative Law Perspective*, 14 *LOY. L.A. INT'L & COMP. L.J.* 121, 122, 135–37 (1991).

156. *Id.* at 135. The Delaware Chancery Court is strictly equitable, meaning that commercial matters in which the plaintiff seeks monetary damages may still be tried before a jury. See *id.* at 135–36.

157. Judges' tolerance of courtroom technology is "evolving"; they "tend to be[come] receptive" to it after seeing its advantages. Ponder, *supra* note 45, at 289–90.

158. ELIZABETH C. WIGGINS ET AL., *FEDERAL JUDICIAL CENTER SURVEY ON COURTROOM TECHNOLOGY 1* (2003), available at [http://www.fjc.gov/public/pdf.nsf/lookup/CTtech03.pdf/\\$file/CTtech03.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CTtech03.pdf/$file/CTtech03.pdf).

159. Ponder, *supra* note 45, at 292.

160. Longhofer, *supra* note 19, at 341.

161. 5 DAVID BOIES & STEPHEN ZACK, *BUSINESS & COMMERCIAL LITIGATION IN FEDERAL COURTS* § 61.3 (3d ed. 2011). A survey revealed that attorneys use their laptops for presentation purposes, litigation support, connecting with the court's audio/visual system, online research, and email access. *Id.*

162. Frank Herrera, Jr. & Sonia M. Rodriguez, *Courtroom Technology: Tools for Persuasion*, *TRIAL*, May 1999, at 66, 68 (quoting John Selbak, *Digital Litigation: The Prejudicial Effects of Computer-Generated Animation in the Courtroom*, 9 *HIGH TECH. L.J.* 337, 359–60 (1994)).

academic criticism.<sup>163</sup>

Technology not only helps lawyers inside the courtroom, it also aids reporters outside.<sup>164</sup> The ease of technology and rise of instantaneous news allows reporters to cover sensational and important cases like never before.<sup>165</sup> Even Supreme Court Justices are not impervious to media reports of their decisions.<sup>166</sup> Finally, many litigants would rather stay out of the public microscope, lest a jury deem their actions illegal for the world to see.<sup>167</sup> In sum, court proceedings are no longer impervious to technology's ever-expanding impact.<sup>168</sup>

As technology infiltrates the courtroom—at however slow a pace—we can expect the character of litigation to continue to evolve.<sup>169</sup> Darwinian though it may be, those who evolve most quickly will likely not only survive, but walk away with tremendous verdicts.<sup>170</sup> Just ask Apple.<sup>171</sup>

163. See *supra* notes 160–62 and accompanying text; see also *infra* notes 182–88 and accompanying text.

164. See *infra* notes 165–71 and accompanying text.

165. Consider, for example, the nonstop news coverage of the Casey Anthony murder trial, for which more than six-hundred press passes were distributed. See T.L. Stanley, *Casey Anthony Murder Trial Garner Extensive Media Coverage*, L.A. TIMES (July 6, 2011), <http://articles.latimes.com/2011/jul/06/entertainment/la-et-casey-anthony-trial-sidebar-20110706>. Technology and instantaneous news also led to some botched media reports of the Supreme Court's ruling in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012). See Katherine Fung & Jack Mirkinson, *Supreme Court Health Care Ruling: CNN, Fox News Wrong on Individual Mandate*, HUFFINGTON POST (June 28, 2012, 3:52 PM), [http://www.huffingtonpost.com/2012/06/28/cnn-supreme-court-health-care-individual-mandate\\_n\\_1633950.html](http://www.huffingtonpost.com/2012/06/28/cnn-supreme-court-health-care-individual-mandate_n_1633950.html).

166. See JAN CRAWFORD GREENBURG, SUPREME CONFLICT 144–45 (2007); *id.* at 145 (“Even [Justice Kennedy’s] memos to other justices . . . sometimes mention concerns about the public’s reaction to their decisions.”). Justice Thomas is particularly disdainful of the press after a horrendous confirmation hearing. JEFFREY TOOBIN, THE NINE 39–41 (2008). When seniority rules dictated that his seat be near the press section of the courtroom, he leaned back so far in his chair that Justice Breyer blocked his view of NPR’s Nina Totenberg—and her view of him. *Id.* at 387. Justice Breyer readily admitted that judges “cannot help but be aware of the public mood. . . . Judges read the newspaper . . . . They realize they can be wrong. That is why they sometimes reconsider earlier decisions and, in rare cases, overrule them.” STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 10 (2010).

167. See Arsenault, *supra* note 19, at 40.

168. See *supra* notes 157–67 and accompanying text.

169. See *infra* notes 220–80 and accompanying text (describing the likely direction of education and, therefore, of jury trials).

170. See *supra* note 2 and accompanying text.

171. *Id.*

C. *Juries: Evolving*

The United States “is now the only country in the world where the jury continues to play both a broad and a central role in the adjudicatory process.”<sup>172</sup> One explanation is that the American jury is defined, in part, by its adaptability.<sup>173</sup> Academics have long discussed how the jury’s demographics and role have adapted to various cultural and political eras<sup>174</sup>—and how those in power have countered with legal adaptations of their own<sup>175</sup>—but they have spilled little ink regarding how juries have changed in the twenty-first century. Perhaps this is because the changes are less immediately noticeable.<sup>176</sup> Recently, we have not seen the introduction of new races or genders into the jury as we did in the twentieth century.<sup>177</sup> However, equally radical changes are presently afoot, particularly among today’s youth.<sup>178</sup> Today’s younger generations are vastly different from baby boomers,<sup>179</sup> and they will likely respond to litigation differently than their parents and grandparents.

While older jurors are certainly important right now,<sup>180</sup> the future of juries—and the legal system—lies with Millennials.<sup>181</sup> Ergo, any adaptations the legal system makes necessarily must take them into consideration. Millennials are marked by several distinct characteristics.<sup>182</sup>

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172. Lilly, *supra* note 86, at 59. In Europe, juries have been relegated mostly to the realm of serious criminal trials. *Id.*

173. Smith, *supra* note 46, at 424. For further explication on the jury’s “protean [ability to] . . . adapt[] to the needs of changing times,” see Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 619 (1993).

174. *See supra* notes 75–81 and accompanying text.

175. *See supra* notes 83–95 and accompanying text.

176. *See supra* notes 76–81 and accompanying text.

177. *See supra* notes 76–81 and accompanying text.

178. *See infra* notes 183–200 and accompanying text.

179. *See infra* notes 183–200 and accompanying text.

180. One study of two Florida venires found the average juror to be forty-nine years old. Shamena Anwar et al., *The Role of Age in Jury Selection and Trial Outcomes* 10 (Econ. Research Initiative at Duke (ERID), Working Paper No. 146, 2013), available at [http://heinz.cmu.edu/ShamenaAnwar/index\\_files/Anwar\\_age.pdf](http://heinz.cmu.edu/ShamenaAnwar/index_files/Anwar_age.pdf).

181. In addressing the contemporary characteristics and changing nature of juries, this Comment focuses predominantly on “Millennials”: the generation born between 1980 and 1994. *See* Scott Carlson, *The Net Generation Goes to College*, CHRON. OF HIGHER EDUC., Oct. 7, 2005, at A34, available at [http://www.msmc.la.edu/include/learning\\_resources/todays\\_learner/The\\_Net\\_Generation.pdf](http://www.msmc.la.edu/include/learning_resources/todays_learner/The_Net_Generation.pdf). Therefore, as of 2012, all Millennials are eligible for jury service.

182. *See infra* notes 183–88 and accompanying text.

They “expect results immediately” and “carry an arsenal of electronic devices.”<sup>183</sup> They are more educated than their parents,<sup>184</sup> expect to make more money, multitask, want to learn only what they have to learn, and do so in a style that is best for them.<sup>185</sup> Teachers often bemoan their inability to hold students’ attention for even the shortest periods of time.<sup>186</sup> Millennials are known for their short attention spans, in part, opined one teacher, “because of the media that . . . teachers and parents have encouraged them to spend their time with, and in part because we haven’t taught them to have longer attention spans.”<sup>187</sup> Students rarely afford professors their undivided attention; “[i]nstead, they must learn to selectively focus when critical material is being discussed . . . . The juror’s role is analogous.”<sup>188</sup>

Today’s (and tomorrow’s) jurors also consume incredible amounts of media—both television<sup>189</sup> and Internet<sup>190</sup>—which has changed the way they process information.<sup>191</sup> For instance, the twenty-four-hour news cycle has turned news into fast-paced bullet points.<sup>192</sup> When it comes to learning the

183. Carlson, *supra* note 181, at A34.

184. *Id.* The education level of juries has been a hot topic among the highly educated academy. See Levin & Emerson, *supra* note 86, at 327. Compare generally Lilly, *supra* note 86, with Levin & Emerson, *supra* note 87. While many suspect that the most educated are barred from participation via peremptory challenges, see Lilly, *supra* note 86, at 64, at least one study has disproven this fear, see Levin & Emerson, *supra* note 87, at 328.

185. Carlson, *supra* note 181, at A36.

186. *See id.*

187. *Id.*

188. Strier, *supra* note 19, at 71. Naturally, this leads to the question: What is “critical material” in a trial? Do jurors, like modern students, mentally calculate what will be “on the exam,” that is, what is necessary for them to arrive at a proper conclusion?

It is not clear that technology’s role in American education is as efficacious as it could be. See *Pisa Envy*, ECONOMIST, Jan. 19–25, 2013, at 61–62, available at <http://www.economist.com/news/international/21569689-research-comparing-educational-achievement-between-countries-growing-drawing>. A recent report ranked the United States seventeenth in overall education. *Id.* The top-ranked countries “differ widely in their approach” toward funding and implementing education. *Id.* at 62. Though education’s exact effect on jury competence is difficult to compare since so few countries use juries, continued poor education seemingly would not bode well for the lay jury’s future.

189. The average American watches over thirty hours of television per week. See Stelter, *supra* note 114.

190. Internet users scroll through pages at a rate of about one per minute. *May 2012—Top U.S. Web Brands and New Websites*, *supra* note 127.

191. *See supra* notes 183–88 and accompanying text.

192. *See* Ponder, *supra* note 45, at 292; Liane Hansen, *The Power of the 24-Hour News Cycle*, NPR (May 29, 2005, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=4671485>

news of the day, the thirty-minute nightly news programs now seem impossibly long.<sup>193</sup> Although thirty minutes might be too long for news, it is not too long for the popular phenomenon of legal dramas.<sup>194</sup> One of the most popular, *Law & Order*, premiered in 1990<sup>195</sup> and led to myriad spinoffs.<sup>196</sup> In fact, by 2005, seven of the top twenty TV shows “were premised on forensic investigations and courtroom dramas,” meaning that more than 120 million Americans (many of them potential jurors) watched shows based heavily on litigation.<sup>197</sup> Although these shows are entertaining, they present a false picture of what happens in both the laboratory and courtroom.<sup>198</sup> Because they invariably resolve with successful DNA matches and forensic breakthroughs, jurors tend to believe forensic evidence is infallible.<sup>199</sup> The increase in courtroom dramas may contribute to the decline in jury knowledge of real-life litigation and lead to more evidentiary problems by promulgating false information.<sup>200</sup>

As jurors continue to evolve, and as Millennials occupy more and more seats in the jury box, the influence of technology will only increase.<sup>201</sup> It will change the way children grow up, students learn, and lay citizens

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(“[Cable news] give[s] you brief bursts of updates.”).

193. Since 1980, the three major network newscasts have lost over half of their viewership. Emily Guskin & Tom Rosenstiel, *Network News: The Pace of Change Accelerates*, PEW RESEARCH CTR.’S PROJECT FOR EXCELLENCE IN JOURNALISM (2012), <http://stateofthedia.org/2012/network-news-the-pace-of-change-accelerates/>.

194. See Rocky Salmon & Pat O’Brien, *Jurors Tuning in to TV’s Influence; Popular Crime and Forensics Programs Are Changing Courtroom Perceptions, Lawyers Say*, PRESS ENTER. (Riverside, Cal.), May 1, 2005, at A1.

195. *Law & Order*, IMDB, <http://www.imdb.com/title/tt0098844/> (last visited Feb. 21, 2014).

196. Salmon & O’Brien, *supra* note 194. The most popular spinoff, *Law & Order: SVU*, continues to be broadcast. See Sam Schechner, *NBC Cancels ‘Law & Order’ After 20 Seasons*, WALL ST. J. (May 15, 2010, 12:01 AM), <http://online.wsj.com/article/SB10001424052748703460404575244433956617448.html>

197. Salmon & O’Brien, *supra* note 194.

198. *Id.*

199. See Craig M. Cooley, *The CSI Effect: Its Impact and Potential Concerns*, 41 NEW ENG. L. REV. 471, 475–77 (2007).

200. See *id.* at 486–87 (“Forensic science crime dramas may exacerbate the incompetency issue. These shows have ignited an unprecedented interest in forensic science at all levels of education.” However, “the present percentage of questionably trained forensic examiners may pale in comparison to the next generation . . . . This in turn will presumably result in more errors, more missed opportunities of justice, and more convictions and death sentences being overturned.”).

201. See *infra* notes 241–49 and accompanying text.



perceive litigation.<sup>202</sup> Only those attorneys savvy enough to understand the jury's changing dynamics will find themselves consistently successful in tomorrow's complex litigation.<sup>203</sup>

#### IV. A NEW REALITY

##### A. Technology: A Good Thing?

It is undisputed that technology is proliferating.<sup>204</sup> Put one way, “[w]e will think with, think into, and think through our smart tools.”<sup>205</sup> More prone to debate, however, is the extent to which this proliferation is beneficial.<sup>206</sup> Technology experts are split on the issue.<sup>207</sup> Proponents emphasize that the next generation will be “nimble, quick-acting multitaskers”<sup>208</sup> who will develop the future's most valued skills: “rapidly searching, browsing, assessing quality, and synthesizing . . . vast quantities of information.”<sup>209</sup> In complex litigation involving voluminous discovery, rapid search and synthesis skills could prove to be a distinct advantage for both lawyers who present the information and juries who evaluate it.<sup>210</sup>

Others view technology with greater caution.<sup>211</sup> This new way of constantly networked living “will drive [young people] to thirst for instant gratification, settle for quick choices, and lack patience.”<sup>212</sup> If true, this

202. See *supra* notes 183–98.

203. See, e.g., *supra* note 2 and accompanying text.

204. See *supra* notes 111–30 and accompanying text.

205. JANNA QUITNEY ANDERSON & LEE RAINIE, PEW RESEARCH CTR.'S INTERNET & AM. LIFE PROJECT, MILLENNIALS WILL BENEFIT AND SUFFER DUE TO THEIR HYPERCONNECTED LIVES 5 (2012), available at [http://www.pewinternet.org/~media/Files/Reports/2012/PIP\\_Future\\_of\\_Internet\\_2012\\_Young\\_brains\\_PDF.pdf](http://www.pewinternet.org/~media/Files/Reports/2012/PIP_Future_of_Internet_2012_Young_brains_PDF.pdf). “[B]ut their presence and reach into our lives will be less visible.” *Id.*

206. See *infra* notes 207–18 and accompanying text.

207. ANDERSON & RAINIE, *supra* note 205, at 2. It is likely, however, that time will lead to greater consensus on the need for adaptation.

208. *Id.* There is now even evidence of “supertaskers”—those who “can handle several complicated tasks well.” *Id.* at 3 (citing communications expert Stowe Boyd).

209. *Id.* at 4 (quoting principal Microsoft researcher Jonathan Grudin).

210. See *supra* notes 143–45 and accompanying text.

211. See *infra* notes 212–18 and accompanying text.

212. ANDERSON & RAINIE, *supra* note 215, at 2. The new “cognitive challenge” for today's youth is “integrity, the state of being whole and undivided.” *Id.* at 5 (quoting Barry Chudakov). Maintaining presence, mindfulness, and awareness in the face of persistent and pervasive



could prove to be disastrous for jurors in complex litigation, where decisions must be made methodically,<sup>213</sup> and patience is at a premium.<sup>214</sup> Soon, the skill of critically reading one thing and concentrating on it extensively will not necessarily be completely useless, “but it will be of far less consequence for most people.”<sup>215</sup> If the next generation is trained in skills devoid of sustained critical thinking, difficulty in adjudicating complex cases seems unavoidable.<sup>216</sup> Nicholas Carr provides one final premonition about the scatterbrained jurors of tomorrow: “When we go online, we enter an environment that promotes cursory reading, hurried and distracted thinking, and superficial learning.”<sup>217</sup> The Internet might provide easy access to mountains of information, but “it is turning us into shallower thinkers, [and] literally changing the structure of our brain[s].”<sup>218</sup> Technology’s complete impact remains to be seen, but the trend away from prolonged concentration and toward cursory analysis necessitates that the academy, judges, and attorneys begin thinking now about what that impact might be—and what they should do about it.<sup>219</sup>

### B. Litigation: Behind the Times?

#### 1. Litigation Must Follow Educational Trends

The advent of ubiquitous technology<sup>220</sup> and speculation about its impact

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connectivity will be highly sought after skills. *Id.* These are precisely the skills jurors will need to effectively adjudicate long, complex trials. *See supra* notes 131–71 and accompanying text (describing modern changes in litigation).

213. This is particularly true when the jury needs to fill out a step-by-step special verdict form. *See generally* Shaun P. Martin, *Rationalizing the Irrational: The Treatment of Untenable Federal Civil Jury Verdicts*, 28 CREIGHTON L. REV. 683 (1995) (thoroughly describing the use of special verdicts).

214. Patience is much more important with the length of today’s trials compared to their historical counterparts. *See supra* notes 52–53 and accompanying text.

215. ANDERSON & RAINIE, *supra* note 205, at 4 (quoting Jonathan Grudin).

216. *See infra* notes 290–92 and accompanying text (describing how even higher education did not yield greater juror understanding).

217. Nicholas Carr, *The Web Shatters Focus, Rewires Brains*, WIRED MAG. (May 24, 2010, 12:00 PM), [http://www.wired.com/magazine/2010/05/ff\\_nicholas\\_carr/](http://www.wired.com/magazine/2010/05/ff_nicholas_carr/).

218. *Id.*

219. *See infra* notes 220–80 and accompanying text (analyzing probable changes in litigation).

220. *See supra* notes 111–30 and accompanying text.

on our futures<sup>221</sup> lead to another debate with direct bearing on future litigation: how technology will affect education.<sup>222</sup> The answer affects not only how professors should teach their students, but also how lawyers should communicate with juries.<sup>223</sup> The courtroom and classroom share numerous similarities, and what happens in the classroom necessarily impacts courtroom strategies.<sup>224</sup> The basic structure, purpose, and methods of the university have remained strikingly static over the course of its twelve-century existence: “Other than adding books, electricity, and women, it is still primarily an older person lecturing to a set of younger ones.”<sup>225</sup> Similarly, for all the change the courtroom has undergone, its fundamental *modus operandi* has remained static.<sup>226</sup> A lawyer still stands before jurors and relies heavily on oratory to persuade them.<sup>227</sup> The emphasis on oral communication has been one of the strongest common analogies between the classroom and courtroom.<sup>228</sup> Until recently, the American education system has trained students to learn by in-person verbal instruction.<sup>229</sup>

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221. See *supra* notes 205–18 and accompanying text.

222. “[E]ducation is one of the areas most heavily impacted by technology.” *How Technology Changes Everything (and Nothing) in Psychology: 2008 Annual Report of the APA Policy and Planning Board*, 64 AM. PSYCH. 454, 455–56 (2009) [hereinafter *How Technology Changes Everything*].

223. See *infra* notes 225–31 and accompanying text.

224. See *infra* notes 225–31 and accompanying text.

225. JANNA QUITNEY ANDERSON ET AL., PEW RESEARCH CTR.’S INTERNET & AM. LIFE PROJECT, THE FUTURE IMPACT OF THE INTERNET ON HIGHER EDUCATION: EXPERTS EXPECT MORE-EFFICIENT COLLABORATIVE ENVIRONMENTS AND NEW GRADING SCHEMES; THEY WORRY ABOUT MASSIVE ONLINE COURSES, THE SHIFT AWAY FROM ON-CAMPUS LIFE 7 (2012) [hereinafter FUTURE IMPACT OF THE INTERNET ON HIGHER EDUCATION] (internal quotation marks omitted), available at [http://pewinternet.org/~media/Files/Reports/2012/PIP\\_Future\\_of\\_Higher\\_Ed.pdf](http://pewinternet.org/~media/Files/Reports/2012/PIP_Future_of_Higher_Ed.pdf).

226. See Gail A. Jaquish & James Ware, *Adopting an Educator Habit of Mind: Modifying What It Means to “Think Like a Lawyer,”* 45 STAN. L. REV. 1713, 1721–22 (1993) (suggesting that attorneys need to adapt to new methods of learning and expand beyond traditional verbal communication).

227. See *supra* note 60 and accompanying text.

228. Compare *supra* note 60 and accompanying text, with *supra* note 225 and accompanying text.

229. See FUTURE IMPACT OF THE INTERNET ON HIGHER EDUCATION, *supra* note 225, at 3 (“[T]he standardized knowledge-transmission model is primarily the same today as it was when students started gathering at the University of Bologna in 1088”). Jeff Jarvis summed it up this way:

[O]ur current educational system, start to end, is built for an industrial era, churning out students like widgets who are taught to churn out widgets themselves. That is a world where there is one right answer: We spew it from a lecturer; we expect it to be spewed back in a test.

*Id.* at 5.

However, “[e]xperimentation and innovation are proliferating” in the classroom.<sup>230</sup> Courtrooms should similarly adapt to new learning styles or risk impeding juror competence.<sup>231</sup>

If education experts can accurately predict how future students will learn, legal professionals can more effectively adapt future litigation to maximize juror understanding.<sup>232</sup> The Pew Research Center recently asked experts to speculate on the state of higher education in the year 2020.<sup>233</sup> Those who predict dramatic changes outnumbered those who predict relative stasis nearly two-to-one.<sup>234</sup> The experts holding the less popular view contend higher education is “one of the most resistant social institutions ever created,”<sup>235</sup> in part because “[a]ll learning is not reducible to sound bytes, video clips, and PowerPoint graphics.”<sup>236</sup> They claim the educational system is too large and cumbersome to quickly adapt to changing technology and learning preferences.<sup>237</sup> Finally, they insist the purpose of higher education is not simply to impart knowledge, but rather to “develop [people] as social beings, in some quite specifically institutional ways” the Internet cannot do.<sup>238</sup> If these experts are correct, students will continue to be trained to learn through the traditional oral lecture—which closely resembles how attorneys teach jurors<sup>239</sup>—and courts will have fewer fundamental shifts to which they need to adapt.<sup>240</sup>

230. *Id.* at 3.

231. *See generally* Jaquish & Ware, *supra* note 226.

232. *See infra* notes 233–49 and accompanying text (summarizing current predictions on technology’s impact on future education).

233. FUTURE IMPACT OF THE INTERNET ON HIGHER EDUCATION, *supra* note 225.

234. *Id.* at 3–4.

235. *Id.* at 7 (quoting Hugh F. Cline).

236. *How Technology Changes Everything*, *supra* note 222, at 456.

237. *See* FUTURE IMPACT OF THE INTERNET ON HIGHER EDUCATION, *supra* note 225, at 7. Similarly, courts have been long criticized for their cumbersome inability to keep up with modern trends and needs. *See, e.g.*, Laura Whitney Lee, Comment, *Silencing the “Twittering Juror”: The Need to Modernize Pattern Cautionary Jury Instructions to Reflect the Realities of the Electronic Age*, 60 DEPAUL L. REV. 181, 204–15 (2010); Eric P. Robinson, *The Wired Jury: An Early Examination of Courts’ Reactions to Jurors’ Use of Electronic Extrinsic Evidence*, 14 FLA. COASTAL L. REV. 131, 145–47, 187–90 (2012).

238. FUTURE IMPACT OF THE INTERNET ON HIGHER EDUCATION, *supra* note 225, at 7 (quoting Matthew Allen).

239. *See supra* notes 225–31 and accompanying text.

240. Logically, if jurors are raised in schools that train them to learn verbally, traditional verbal-based litigation should pose fewer problems going forward. *But see infra* notes 241–49 and accompanying text (suggesting this optimism is unwarranted).

However, the three-fifths of survey respondents who predict extraordinary changes in education are likely correct.<sup>241</sup> Simply put, bricks will be replaced by clicks.<sup>242</sup> Demand for traditional lecture-based education will decrease,<sup>243</sup> and, because of its cost,<sup>244</sup> “[t]raditional face-to-face higher education will become a privilege of a few . . . .”<sup>245</sup> Higher education, these experts say, simply *must* change.<sup>246</sup> Technology is pervading students’ lives so much that concentration is giving way to stimulation, and cognitive effort is yielding to instant gratification.<sup>247</sup> Technology is pervading children’s homes<sup>248</sup> and their classrooms.<sup>249</sup> If litigators ignore the reality that tomorrow’s jurors increasingly crave instant gratification without being trained to exert sustained focus for long periods of time, academic critics of lay juries might very well be correct.

## 2. Litigation Must Keep Up with Technology

If education must change in the wake of ubiquitous technology (as most

241. See FUTURE IMPACT OF THE INTERNET ON HIGHER EDUCATION, *supra* note 225, at 4; *infra* notes 242–49 and accompanying text.

242. See FUTURE IMPACT OF THE INTERNET ON HIGHER EDUCATION, *supra* note 225, at 6–7. *The Economist* claims this is already happening, with 30% of American college students taking at least one online course in 2011. *Higher Education: Not What It Used to Be*, ECONOMIST, Dec. 1–7, 2012, at 30, [hereinafter *Not What It Used to Be*], available at <http://www.economist.com/news/usa/21567373-american-universities-represent-declining-value-money-their-students-not-what-it>. Massive open online courses (MOOCs) are gaining in popularity, in large part due to the flexibility they offer students and their relatively miniscule tuition fees compared to traditional universities. *Id.*

243. FUTURE IMPACT OF THE INTERNET ON HIGHER EDUCATION, *supra* note 225, at 4 (citing Alex Halavais).

244. See *id.* at 5 (citing Donald G. Barnes). The cost of higher education has ballooned at nearly five times the rate of inflation over the past thirty years, and student debt has doubled since 1997. *Not What It Used to Be*, *supra* note 242, at 29.

245. FUTURE IMPACT OF THE INTERNET ON HIGHER EDUCATION, *supra* note 247, at 5 (quoting Tapio Varis) (internal quotation marks omitted).

246. *Id.* at 4 (citing Charlie Firestone).

247. Matt Richtel, *Technology Changing How Students Learn, Teachers Say*, N.Y. TIMES (Nov. 1, 2012), <http://www.nytimes.com/2012/11/01/education/technology-is-changing-how-students-learn-teachers-say.html?pagewanted=all>

248. Steve Kastenbaum, *Helping Kids Cross the Digital Divide*, CNN RADIO (Oct. 5, 2012, 10:27 AM), available at [cnradio.cnn.com/2012/10/05/helping-kids-cross-the-digital-divide/](http://cnradio.cnn.com/2012/10/05/helping-kids-cross-the-digital-divide/). Though it would seem that children from lower-income households might suffer from “digital inequality,” ubiquitous technology seems to transcend economic status. *Id.* However, there is a “huge gap in knowledge of how to use that technology.” *Id.*

249. See, e.g., *Higher Education: Not What It Used to Be*, *supra* note 242.

believe),<sup>250</sup> so too must litigation.<sup>251</sup> The responsibility for jury preservation should fall on the bench and bar.<sup>252</sup> First, as law student Laura Lee recently wrote, judges must solve the problem of the “twittering juror.”<sup>253</sup> Jurors’ “digital misadventures,” such as tweeting during deliberations and Googling outside information, threaten to undermine the legitimacy of trials.<sup>254</sup> To that end, jury instructions need to be more explicit: “[O]ld cautionary prohibitions—such as barring jurors from ‘outside research’ or ‘external discussion’—are no longer specific enough”<sup>255</sup> for Millennials who may not even realize that the current instructions apply to social media.<sup>256</sup> Because judges and their courtroom rules are not keeping up with technology,<sup>257</sup> jury critics gain increasingly more fodder as misconduct is unveiled.<sup>258</sup> While a complete technology ban “is not the wisest approach”<sup>259</sup>—it will likely cause unnecessary frustration<sup>260</sup>—uniform, specific instructions tailored to

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250. See *supra* note 234 and accompanying text.

251. See *infra* notes 252–69 and accompanying text.

252. See *infra* note 264 and accompanying text.

253. See generally Lee, *supra* note 237.

“Twittering” is a reference to the social media application “Twitter,” which is a “real-time information network that connects you to the latest stories, ideas, opinions and news . . . . At the heart of Twitter are small bursts of information called Tweets. Each Tweet is 140 characters long . . . .” *Twitter*, UNIV. OF WIS. RIVER FALLS, <http://www.uwrf.edu/StudentAffairs/SocialMedia/Twitter.cfm> (last visited Feb. 21, 2014).

254. See Lee, *supra* note 237, at 182–83; see also Grant Amey, Comment, *Social Media and the Legal System: Analyzing Various Responses to Using Technology from the Jury Box*, 35 J. LEGAL PROF. 111, 124 (2010) (“[T]he problem of jurors’ misuse of technology looms large and shows no sign of decreasing.”). In *Apple*, the trial judge specifically asked the jurors about their social media habits. Sandoval, *supra* note 5. The results: six used Facebook, one Tweeted, and no one blogged. *Id.*

255. Lee, *supra* note 237, at 183.

256. *Id.* at 195 (“Jurors’ insatiable appetite for immediacy clouds their sense of propriety.” (internal quotation marks and alterations omitted)).

257. Only about 6% of the bench and bar tweet, *id.* at 184, so it is no wonder that judges have not incorporated social media-specific jury instructions.

258. See *id.* at 184–86.

259. *Id.* at 206.

260. Consider New Yorkers’ reaction to the loss of power after Hurricane Sandy in October 2012. The *New York Times* ran several articles about citizens’ “separation anxiety” when they could no longer remain digitally connected at all times. See, e.g., Jenna Wortham, *How New Yorkers Adjusted to Sudden Smartphone Withdrawal*, N.Y. TIMES BITS (Nov. 3, 2012, 9:33 PM), <http://bits.blogs.nytimes.com/2012/11/03/how-new-yorkers-adjusted-to-sudden-smartphone-withdrawal/?hp> (“Not having hot water is one thing . . . . But not having a phone? Forget about it.” (internal quotation marks omitted)); see also Aimee Lee Ball, *Hurricane Sandy Reveals a Life Unplugged*, N.Y. TIMES, Nov. 11, 2012, at ST1, available at

technology-savvy jurors are vital.<sup>261</sup>

Second, litigation's increasing complexity demands that lawyers competently use the Federal Rules, jury instructions, and technology to create the most comprehension-friendly environment.<sup>262</sup> A lawyer's job is "to make . . . [jurors] understand, and if he has not achieved that objective, he has failed, not the jury."<sup>263</sup> Perhaps the academic critique is misplaced—maybe we should be focusing on *attorney*, rather than juror, competence.<sup>264</sup> At least one writer thinks so, asserting that the Model Rules for Professional Responsibility should reflect attorneys' obligation to be at least minimally competent in using courtroom technology.<sup>265</sup> The use of courtroom technology is becoming standard practice in today's courtroom, so the Model Rules (or at least their comments) should address lawyers' ethical obligations pursuant to this new reality.<sup>266</sup> This makes complete sense. If lawyers must be minimally competent in filing motions and presenting cogent arguments to the jury,<sup>267</sup> there is no reason to resist extending minimal competence to something that will eventually be just as common as paperwork or oral arguments.<sup>268</sup> After all, lawyers are the professionals, not jurors. Academic critics should expect more of those who have dedicated

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[http://www.nytimes.com/2012/11/11/fashion/hurricane-sandy-reveals-a-life-unplugged.html?src=dayp&\\_r=0](http://www.nytimes.com/2012/11/11/fashion/hurricane-sandy-reveals-a-life-unplugged.html?src=dayp&_r=0) ("For a swath of teenagers and preteens on the East Coast, the power failures that followed Hurricane Sandy . . . represented the first time in their young lives that they were totally off the grid, without the ability to text, play Minecraft, video-chat, check Facebook, or send updates to Twitter.")

261. See Lee, *supra* note 237, at 205–06. Repetition of cautionary instructions against prohibited technology use "is warranted." *Id.* at 218. Attorneys can also access potential jurors' social media pages during voir dire to determine the likelihood that they will wrongfully use technology during the trial and deliberations. *Id.* Simply identifying "the serious bloggers and tweeters [and] the veteran Internet surfers" is likely insufficient; rather, attorneys must ask more expansive questions to ensure a fair trial. Amey, *supra* note 254, at 128.

262. See *infra* notes 263–69 and accompanying text.

263. Friedland, *supra* note 101, at 212.

264. See Michelle L. Quigley, *Courtroom Technology and Legal Ethics: Considerations for the ABA Commission on Ethics 20/20*, 20 PROF. LAW. 18, 20 (2010) ("[T]he Commission should consider, first, whether lawyers have an ethical obligation to be minimally competent in the use of courtroom technology . . .").

265. See *id.*

266. See *id.*

267. See MODEL RULES OF PROF'L CONDUCT R. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.")

268. See Quigley, *supra* note 264, at 20.

their lives to litigation than of jurors temporarily called away from their daily lives to serve on a single trial.<sup>269</sup>

The introduction of technology into the courtroom is beneficial,<sup>270</sup> especially in light of technology's increasing role in education,<sup>271</sup> but it is not without its dangers. First, while attorneys are adapting to technology,<sup>272</sup> judges lag well behind the general populace in their technology use.<sup>273</sup> Until they get up to speed, they are unlikely to appreciate new courtroom uses for technology or to effectively combat jurors' "digital misadventures."<sup>274</sup> Second, it is possible that litigants might use increasingly advanced technology to mislead jurors.<sup>275</sup> For instance, defense teams are using neurotechnology to explain away any and every criminal action.<sup>276</sup> But perhaps jurors' technological understanding will outpace that of lawyers, or maybe the jury will reject "junk science"<sup>277</sup> based on its collective common sense.<sup>278</sup> Based on current statistics,<sup>279</sup> it is likely that tomorrow's jurors—who have grown up with technology—will be competent to judge technological evidence for themselves.<sup>280</sup>

### C. Juries: Legitimate?

Attorney competence aside, academics have long focused their concerns on juries.<sup>281</sup> This section explores questions surrounding the merits of two

269. *See id.*

270. *See supra* notes 157–63 and accompanying text.

271. *See supra* notes 242–49 and accompanying text.

272. *See supra* notes 157–61 and accompanying text.

273. *See Lee, supra* note 237 and accompanying text. Similarly, Justice Souter famously did all of his work only in fountain pen, eschewing technology altogether. TOOBIN, *supra* note 166, at 51.

274. *See Lee, supra* note 237 and accompanying text.

275. *See Sease, supra* note 138, at 621.

276. Steve Fleming, *Was It Really Me?* AEON MAG. (Sept. 26, 2012), <http://www.aeonmagazine.com/being-human/steve-fleming-neuroscience-crime/>.

277. *See Sease, supra* note 138, at 621.

278. The Supreme Court seemingly views jurors as having more common sense and sympathy than judges. *See Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.").

279. *Compare supra* note 257 and accompanying text *with supra* notes 117–23 and accompanying text.

280. *See infra* notes 314–23 and accompanying text.

281. *See supra* notes 97–101 and accompanying text. This finger pointing at jurors might be

specific critiques in light of the recent technology revolution: first, whether juries are competent to adjudicate complex litigation;<sup>282</sup> and second, whether the traditional advantages to jury trials still apply in the modern era.<sup>283</sup>

### 1. Competence

Whether the jury is competent to evaluate mountains of evidence over the course of weeks or months and arrive at a fair and correct verdict is a matter that divides legal observers.<sup>284</sup> Many authors decry juries as inept<sup>285</sup> and biased,<sup>286</sup> while others defend them as perfectly adequate.<sup>287</sup> This section wades through the arguments with an eye toward how modern technology strengthens or weakens certain assertions.<sup>288</sup>

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because many writers in the legal academy are lawyers who do not want to blame themselves for contributing to the perceived problem of jury incompetence.

282. See *infra* notes 284–341 and accompanying text.

283. See *infra* notes 324–31 and accompanying text.

284. See *infra* notes 285–341 and accompanying text.

285. See *supra* notes 97–101 and accompanying text. “Trial lawyers warn . . . that the broader story often matters as much as evidence in complex patent cases. ‘The winning party is usually the side that convinces the jury that they have been wronged . . . .’” Vascellaro, *supra* note 4.

286. Authors like Edmund Sease emphasize overwhelming juror bias against corporations, saying that 89% of jurors think large corporations “will use unfair tactics to squeeze out a small competitor.” Sease, *supra* note 138, at 608. Nearly just as many think corporations “take advantage of independent investors.” *Id.* They also tend to hold the Patent Office “in very high regard” and “have a natural and very dangerous instinct to make device-to-device comparisons . . . .” *Id.*

Because jurors are prewired to dislike corporate patent holders, Sease encourages corporations to use expert witnesses wisely: “Your expert will look, act, dress and talk like the jurors.” *Id.* at 612. Without characteristics that “fit in” with the jury, he opines that juries will be suspicious of experts who possess even the best credentials and most apt analysis. *Id.* The most telling piece of advice Sease gives deals with scientific evidence and exposes his belief that not only are jurors biased, but also rather incompetent: “Junk science is now in the courtroom, for good . . . . While people can argue whether this is good, it nevertheless is the law. As the defendant’s trial counsel, use it. Develop ‘scientific reasons’ why you should win.” *Id.* at 621.

Sease makes no qualms about using dubious evidence to persuade what he evidently considers to be a gullible jury. See *id.* From this, it appears that the perception of incompetence leads to greater temptation to use “junk” evidence—after all, who will know the difference? *Id.* If lawyers considered jurors competent and perceptive, perhaps they would think twice before using ethically questionable evidence. This shows the importance of perception over fact: even if juries are not, in fact, incompetent, the perception that they are may lead to practices that, like a self-fulfilling prophecy, hinder their ability to properly adjudicate cases. See *id.*

287. See generally Elrod, *supra* note 19.

288. Much existing literature is based on anecdotal evidence, see David J. F. Gross et al., *You’re Still Killing Me: How to Prevent Your Expert Witness from Destroying Your Patent Case at Trial*, in PATENT LITIGATION 2012, at 273, 293 (PLI Patents, Copyrights, Trademarks & Literary Prop.,



*a. Arguments Against Competence*

The more popular position, it seems, is to denounce the jury as incompetent.<sup>289</sup> In one rather doomsaying analysis, Roger W. Kirst wrote, “Because of the learning curve, the civil jury system probably could not be set up successfully in the United States today and could not be reinstated if abandoned for even a short time.”<sup>290</sup> A recent University of Cincinnati study showing that juror comprehension decreases as complexity increases bolstered Kirst’s position.<sup>291</sup> Although scholars should logically expect an inverse correlation between comprehension and complexity, the study surprisingly showed that comprehension does not improve with higher levels of education or prior jury experience.<sup>292</sup>

Critics also bemoan the jury’s inability to properly follow expert witnesses.<sup>293</sup> The expert’s role is to translate complex subject matter into a readily understandable format for lay jurors.<sup>294</sup> In theory, it seems reasonable to think that the most qualified experts would command the most respect from jurors. This is not necessarily true in complex litigation.<sup>295</sup> In one study, expert witnesses’ personal characteristics, like their credentials, became significant only when jurors had difficulty evaluating complex evidence.<sup>296</sup> Other studies show that jurors are least trustful of the highest-

Course Handbook Ser. No. 34279, 2012), and “[t]he number of studies in this area is inadequate,” Keith Broyles, Note, *Taking the Courtroom into the Classroom: A Proposal for Educating the Lay Juror in Complex Litigation Cases*, 64 GEO. WASH. L. REV. 714, 723 (1996).

289. See *infra* notes 294–302 and accompanying text.

290. Kirst, *supra* note 132, at 38. It seems that Kirst argues the jury has outlived its usefulness—after all, if the jury could not be set up in the United States today, why bother keeping it? The answer: the Seventh Amendment.

291. Matthew A. Reiber & Jill D. Weinberg, *The Complexity of Complexity: An Empirical Study of Juror Competence in Civil Cases*, 78 U. CIN. L. REV. 929, 929 (2010).

292. *Id.* More studies need to be conducted in this regard. At the very least, scholars need to ascertain the minimum amount of education that correlates with ability as a juror, because if juror comprehension does not correlate with education level at all, then comparing methods of teaching college students with methods of teaching juries may be moot.

293. See Neil Vidmar, *Expert Evidence, the Adversary System, and the Jury*, 95 AM. J. PUB. HEALTH S137, S137 (2005) (“For a jury [expert testimony] is especially difficult, because its members usually have no competence in the area. They are often left to make judgments largely on the basis of emotional appeals of the lawyers and their expert witnesses.” (internal quotation marks omitted)).

294. Gross et al., *supra* note 288, at 297 (citing BARRY L. GROSSMAN & GARY M. HOFFMAN, PATENT LITIGATION STRATEGIES HANDBOOK 1327 (2010)).

295. See *infra* notes 296–98 and accompanying text.

296. Gross et al., *supra* note 288, at 299 (quoting Sanja Kutnjak Ivković & Valerie P. Hans,

paid expert.<sup>297</sup> The bottom line is that “charisma has an effect on jurors. . . . [D]uring patent cases that stretch on for weeks, witnesses with captivating personalities can wake up everyone in the courtroom and attract the jury’s attention.”<sup>298</sup>

Technology’s impact on attention spans and information processing will likely bolster jury critics’ arguments.<sup>299</sup> As traditional verbal education declines<sup>300</sup> and the demand for constant entertainment increases,<sup>301</sup> jurors likely will have an increasingly difficult time translating long hours of orally communicated complex material into understanding.<sup>302</sup>

*b. The Other Side of the Story*

Others, however, have come to the defense of juries.<sup>303</sup> First, jury supporters claim they rely on empirical studies more than their counterparts,<sup>304</sup> whom they criticize for basing their assumptions on nothing more than their own elite biases.<sup>305</sup> Even when subject matter becomes

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*Jurors’ Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 LAW & SOC. INQUIRY 441, 447 (2003)).

297. Gross et al., *supra* note 288, at 299.

298. *Id.* Attracting the jury’s attention is an even greater concern in the technology age, in which attention spans are increasingly short. See Carlson, *supra* note 181, at A36.

299. See *supra* notes 189–200 and accompanying text.

300. See *supra* Part IV.B.1.

301. See *supra* notes 124–30 and accompanying text.

302. See *supra* notes 186–200 and accompanying text.

303. See *infra* notes 304–13 and accompanying text.

304. For instance, federal judges who oversee juries have supported their capabilities. “I emphatically reject the idea that ‘ordinary folks’ are not up to the task of judging complex cases. . . . [I]n my opinion, juries almost always get it right. . . . [M]ost judges—those most familiar with jury trials—share my confidence in the jury.” Elrod, *supra* note 19, at 320. When polled, 96.5% of judges responded that juries award disproportionately high tort verdicts less than 10% of the time. *Id.* This kind of empirical study is rare. Because the jury deliberates in secret and is not compelled to discuss what happens in the “black box” of the jury room, see generally Moore, *supra* note 95, judge surveys are one of the few pieces of empirical evidence available to the academy.

305. David Gross writes:

The idea that jurors are not capable of comprehending complex issues, such as those presented by expert witnesses in patent cases, is a widespread misconception. . . . Criticisms about juror competence are based largely on anecdotal evidence, and those anecdotes are contradicted by empirical studies. . . . [G]enerally speaking, jurors have taken the same number of science and math classes as federal district court judges. . . . Studies have shown that jurors are motivated to research a correct verdict, and will therefore attempt to evaluate expert testimony on its merits rather than relying on an

complex, lay juries “are usually capable of finding the facts and applying the law *if* judges make full use of the Federal Rules of Civil Procedure and the Federal Rules of Evidence.”<sup>306</sup> Second, some place the blame for any complexity problem on federal judges who expect juries “to play an impossible role” in disregard to the jury’s limited historical responsibilities.<sup>307</sup> Third, proponents of traditional lay juries contend that expert witnesses are valuable assets to whom juries give proper attention<sup>308</sup> despite technology’s adverse effect on attention spans.<sup>309</sup> Fourth, even if, *arguendo*, jurors might struggle with complex material,<sup>310</sup> appellate affirmance rate comparisons between jury trials and bench trials demonstrate that judges are no better at patent adjudication than juries.<sup>311</sup> Finally, proponents also caution that “[t]his sort of end-of-history approach is dubious . . . that we have reached a watershed and we have to throw everything aside and come in with new approaches.”<sup>312</sup> They emphasize that

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expert’s credentials, likeability, or other peripheral factors. . . . [J]urors appear to be up for the challenge. Studies show that, even in complex trials, jurors comprehend and retain a significant amount of information from expert testimony. . . . “[T]hey could usually comprehend enough of the testimony to engage in rational decision making.”

Gross et al., *supra* note 288, at 293–94 (quoting Joe S. Cecil, *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 757 (1991)).

306. Lisa S. Meyer, Note, *Taking the “Complexity” Out of Complex Litigation: Preserving the Constitutional Right to a Civil Jury Trial*, 28 VAL. U. L. REV. 337, 341 (1993) (emphasis added). For instance, Federal Rule of Civil Procedure 42(b) should be used to bifurcate issues and avoid juror confusion. Development in the Law, *The Jury’s Capacity to Decide Complex Civil Cases*, 110 HARV. L. REV. 1489, 1498 (1997). Again, the important point is whether the legal professionals are competently carrying out their duties. *Cf. supra* notes 252–79 and accompanying text.

307. Kirst, *supra* note 132, at 3. This argument fits more squarely with holding courtroom professionals, and not once-in-a-lifetime jurors, responsible for any systematic inadequacies. *See* Quigley, *supra* note 264 and accompanying text.

308. *See* Gross et al., *supra* note 288, at 296 (“[R]esearchers concluded that the jurors were indeed engaging in ‘central processing’ (which involves analysis of the substantive argument) rather than ‘peripheral processing’ (which involves mental shortcuts and reliance on factors tangential to the substantive argument).” (citing Shari Seidman Diamond, *How Jurors Deal with Expert Testimony and How Judges Can Help*, 16 J.L. & POL’Y 47, 54 (2007–2008))).

309. *See* Carlson, *supra* note 187 and accompanying text.

310. *See supra* notes 291–302 and accompanying text.

311. Michael T. Nguyen, Note, *The Myth of “Lucky” Patent Verdicts: Improving the Quality of Appellate Review by Incorporating Fuzzy Logic in Jury Verdicts*, 59 HASTINGS L.J. 1257, 1259 (2008). Juries seem to be getting damages right as well: they “award punitive damages at about the same rate” as judges, “and their punitive awards bear about the same relation to their compensatory awards.” Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 779 (2002).

312. *See* Carlson, *supra* note 181 (quoting Michael Gorman). Perhaps we are not at a watershed,

juries are not “bewildered and unengaged during complex trials. Rather, . . . jurors are hard-working and competent students, albeit somewhat skeptical of their expert teachers.”<sup>313</sup>

Though there is ample room for debate on the topic, what little empirical data does exist supports jury competence.<sup>314</sup> Appellate affirmance rates of both verdicts and punitive damage awards support the jury’s ability to “get it right.”<sup>315</sup> Furthermore, academic critiques lack a firm foundation in fact.<sup>316</sup> Aside from juries being unduly influenced by expert witnesses’ peripheral factors,<sup>317</sup> critics offer little other verifiable data.<sup>318</sup> Many judges who comment on the issue support the continuing vitality of the lay jury.<sup>319</sup> Studies show that juries are not, in fact, less educated from the general population,<sup>320</sup> and that even if they were, it would not impact competence.<sup>321</sup> In sum, the academy should presume juries are competent until proven otherwise, and critics simply have not proven their case.<sup>322</sup> Instead, it seems that jurors take seriously their responsibility to fairly adjudicate cases, even if their outside lives are immersed in Tweets, bullet-point news, and multitasking.<sup>323</sup>

## 2. Advantages of Juries

The jury was instituted because it offers several distinct advantages. First, the jury is a “powerful reminder of the basic democratic principle of American government.”<sup>324</sup> The United States, often heralded as the pinnacle

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but at the very least, we must be willing to adapt to changing circumstances.

313. Gross et al., *supra* note 288, at 296.

314. See *infra* notes 315–23 and accompanying text.

315. See Nguyen, *supra* note 311 and accompanying text.

316. See *supra* notes 304–05 and accompanying text.

317. See Gross et al., *supra* note 288, at 299.

318. See *id.* at 293–94.

319. See generally, e.g., Elrod, *supra* note 304 and accompanying text. But see Phil Hardberger, *Juries Under Siege*, 30 ST. MARY’S L.J. 1, 4–13 (1998) (describing anti-jury sentiments of the modern Texas Supreme Court).

320. See Levin & Emerson, *supra* note 87 and accompanying text.

321. Reiber & Weinberg, *supra* note 291, at 929.

322. See *supra* notes 303–21 and accompanying text.

323. See *supra* notes 314–21 and accompanying text.

324. Kirst, *supra* note 132, at 28. John Adams called the jury trial and popular elections “the heart and lungs of liberty.” Elrod, *supra* note 19, at 308 (internal quotation marks omitted).

Thomas Jefferson identified the jury “as the only anchor ever yet imagined by man, by

of modern democracy,<sup>325</sup> allows its citizens to participate in civil government in more ways than simply voting.<sup>326</sup> That their civic engagement also involves legal decisions of guilt, liability, and fault sets this country apart from nearly every other.<sup>327</sup> Second, judges hear cases day in and day out, possibly fostering a bias and encouraging stereotypes.<sup>328</sup> Jurors, many of whom presumably serve only once in their lives, do not suffer from these propensities.<sup>329</sup> Third, jury trials allow our common law to develop in ways that Alternative Dispute Resolution (ADR) does not.<sup>330</sup> Judge Jennifer Elrod argues that the increase in ADR, and corresponding decrease in jury trials, deprives our common law of precedential development.<sup>331</sup> None of these advantages has diminished to a level that warrants replacing the lay jury. As long as democratic government, long-tenured judges, and a common law-based judicial system exist, the lay jury remains vital.<sup>332</sup> The legal profession must seek to strengthen it.<sup>333</sup>

#### V. IMPROVING LITIGATION BY LEGITIMATING THE JURY

Though Americans are unique in their adherence to the jury system<sup>334</sup>

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which a government can be held to the principles of its constitution.” Chief Justice William Howard Taft saw the jury as not only central to democracy, but kept vital by the virtues of a democratic people . . .

*Id.*

325. The United States is “the world’s leading and most powerful democracy . . .” Andrew Coleman & Jackson Maogoto, *Democracy’s Global Quest: A Noble Crusade Wrapped in Dirty Reality?*, 28 SUFFOLK TRANSNAT’L L. REV. 175, 201 (2005).

326. See Lilly, *supra* note 86, at 54–56.

327. See *supra* note 172 and accompanying text; see also Elrod, *supra* note 19, at 306–07 (“The result of this skepticism [of jury competence] has been a steady trend away from the adoption of the jury abroad, leaving the United States almost alone in its adherence to the jury system. . . . Where the jury trial does exist, it exists in a form that is fundamentally different than the all-lay, binding, jury system that exists in the United States.”).

328. See Kirst, *supra* note 132, at 28.

329. *Id.* But cf. *supra* note 286 (suggesting that jurors bring unique biases of their own).

330. See Elrod, *supra* note 19, at 324–25.

331. *Id.* at 324 (“Arbitrations with no public record do not develop the law in any way. The decisions of the arbitrators do not become precedent. . . . Without cases, our common law will stagnate and the case law method of legal education will end.”).

332. See Elrod, *supra* note 19, at 322–25.

333. See *id.* at 325 (asserting the jury can still be the “palladium of liberty in the United States” if the bench and bar undertake certain reforms).

334. See *supra* notes 172, 327 and accompanying text.

(and show no signs of willingly abolishing it), their enthusiasm is waning.<sup>335</sup> One commentator put it this way: “The modern American jury has a bipolar presence in the popular consciousness.”<sup>336</sup> On the one hand, we hear that the jury is a vital component in our democratic system.<sup>337</sup> On the other, there are scores of academic critiques condemning the jury system as nothing more than an unpredictable roulette for litigants.<sup>338</sup>

#### A. *Juries on the Decline*

The critics seem to be getting their way, at least in practical terms, because, even though litigation is on the increase, fewer disputes are reaching the jury.<sup>339</sup> Jury trials are becoming “vanishingly rare”<sup>340</sup> for several reasons. First, the Federal Rules of Civil Procedure have fostered a legal environment “in which litigants have found it not in their interests to exercise th[eir] right” to a jury trial.<sup>341</sup> Second, *Ashcroft v. Iqbal*<sup>342</sup> and *Bell Atlantic Corp. v. Twombly*<sup>343</sup> have made it more difficult to survive motions to dismiss, and cases that do survive are being increasingly resolved via summary judgment.<sup>344</sup> Third, “businesses perceive jury trials as being

335. See Elrod, *supra* note 19, at 303 (“[T]he American jury system is under assault . . . . [I]t is being used to settle disputes less and less, and . . . it has become commonplace to deride the very idea of the jury. After all, why leave justice to the untrained public when almost every other trade has been the subject of increasing professionalism, when almost none of our global competitors have chosen the jury system for their own, and when our nation’s business leaders seem to have chosen alternatives to the jury system?”).

336. Dooley, *supra* note 75, at 325.

337. Justice Scalia called the criminal jury trial the “spinal column” of American democracy. *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part and dissenting in part).

338. Both legal commentators and the general public are growing increasingly negative about the jury. See Elrod, *supra* note 19, at 317–18; see also *supra* notes 97–105 and accompanying text.

339. See *infra* notes 340–46 and accompanying text.

340. John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524 (2012).

341. Langbein, *supra* note 340, at 542. Prior to the introduction of the Federal Rules, one-fifth of all civil cases went to trial. *Id.* at 524. Today, that number is below 2%. *Id.*

342. 556 U.S. 662, 681 (2009) (requiring more than “bare assertions” in order to survive motions to dismiss).

343. 550 U.S. 544, 556 (2007) (increasing plaintiffs’ burden to survive motions to dismiss).

344. Elrod, *supra* note 19, at 319. These pre-trial motions are the meat and potatoes of today’s litigation. As one Texas trial lawyer said, “Litigation is what lawyers do on the east coast to keep out of court.” *Id.* at 323.

unpredictable, slow, and costly,”<sup>345</sup> which has led to “[p]rovisions for binding arbitration of disputes . . . [being] employed in virtually all kinds of contracts, making arbitration a wide-ranging surrogate for civil litigation.”<sup>346</sup> In sum, most cases simply are not reaching juries.

### B. Suggestions Moving Forward

The civil jury need not be abandoned, even though, in practicality, it seems to be. As one recent article explained:

[S]cholars should jettison measures to reduce or eliminate lay decisionmaking in civil cases and turn their attention instead to improvements in the trial process that increase the likelihood that lay jurors will understand the case and, as a result, reach more-informed decisions. This should include empirical studies of decisionmaking, both by individuals and groups, as well as the techniques currently used in the educational context that might be applied to the trial setting.<sup>347</sup>

The Seventh Amendment still exists, and as long as it does, so will juries.<sup>348</sup> Instead of bemoaning the current jury system and insisting it be composed only of the most educated citizens,<sup>349</sup> the bench and bar should take steps to increase the lay jury’s legitimacy in the eyes of both the academy and the public.<sup>350</sup>

A good start would be implementing several of Matthew Reiber and Jill Weinberg’s easy, rather noncontroversial suggestions. First, judges should eliminate unnecessary confusion by allowing jurors to take notes.<sup>351</sup> Students are used to multitasking,<sup>352</sup> and early concerns that note-taking

345. *Id.* at 318.

346. *Id.* at 319. If corporations continue to increase their use of binding arbitration agreements—which courts generally uphold, *see, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011),—there will be less complex litigation and less reason to worry that juries are incapable of adjudicating it.

347. Reiber & Weinberg, *supra* note 291, at 944.

348. “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .” U.S. CONST. amend. VII (emphasis added).

349. *See, e.g.*, *The Case for Special Juries*, *supra* note 19.

350. *See* Reiber & Weinberg, *supra* note 291, at 960–67.

351. *Id.* at 965.

352. *See* Carlson, *supra* note 181, at A36; *see also supra* notes 182–88 and accompanying text.

would distract jurors<sup>353</sup> are increasingly unwarranted. Second, instructing the jury at the beginning, middle, and end of trials would help keep jurors mindful of both what they should and should not be doing.<sup>354</sup> Professors give their students syllabi on the first day of class; jurors should not have to wait until the end of trial for the judge to outline their task. Third, complex trials would also profit from interim juror discussions and counsel summations.<sup>355</sup> Today's students spend much of their time in group-based discussion, yet today's juries have no opportunity to learn from one another until deliberations.<sup>356</sup> For particularly lengthy trials, giving counsel an opportunity to summarize what has and will happen, and then allowing intra jury discussion to clarify confusion, would properly focus the litigation and prevent early questions from translating into incompetent decision-making days or weeks later.<sup>357</sup>

Next, and perhaps more controversially, courts should allow jurors to submit written questions to the judge as the trial progresses.<sup>358</sup> As technology develops, jurors might even electronically submit questions in real time, which the judge could immediately evaluate.<sup>359</sup> This would both streamline proceedings and allow the litigants to ensure that jurors understand witness testimony before they step down.<sup>360</sup> On that note, those courtrooms that are not yet fully equipped with modern technology *must* get with the times. Modern Americans "are used to technology and expect its use to help them understand difficult concepts."<sup>361</sup>

Attorneys must also adapt. To compensate for a perceived shaky educational foundation<sup>362</sup> and the misleading influence of litigation dramas on TV,<sup>363</sup> it is essential for the bar to understand how today's juries process

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353. See Reiber & Weinberg, *supra* note 291, at 965–66.

354. See *id.* at 963; see also *supra* notes 256–61 and accompanying text.

355. Reiber & Weinberg, *supra* note 291, at 966–67.

356. See *id.*

357. See *id.* at 966–67.

358. *Id.* at 967.

359. See Sonja Thompson, *10 Innovative Ways Businesses Are Using the iPad*, TECHREPUBLIC (May 25, 2012, 3:12 AM), <http://www.techrepublic.com/blog/tablets/10-innovative-ways-businesses-are-using-the-ipad/1489> (describing increasingly diverse uses for the iPad). There is no reason to stop such innovation at the courthouse door.

360. See Reiber & Weinberg, *supra* note 291, at 967.

361. Elrod, *supra* note 19, at 329–30.

362. See Lilly, *supra* note 86, at 64; see also *supra* notes 93–105 and accompanying text.

363. See *supra* notes 189–200 and accompanying text.



information and to adapt appropriately.<sup>364</sup> One tool has remained constant over time: the expert witness.<sup>365</sup> Juries continue to “depend on experts to explain complicated technical, scientific, financial, and legal issues.”<sup>366</sup> Since attorneys’ fundamental job is to educate the jury about the facts and law of their particular case,<sup>367</sup> expert witnesses should view their jobs similarly.<sup>368</sup> The best educators understand the characteristics of their students,<sup>369</sup> and they should know of modern students’ affinity for technology.<sup>370</sup> They should also know that though experts remain necessary, they are now insufficient.<sup>371</sup> For instance, one tool that was unthinkable just decades ago, but is now essential,<sup>372</sup> is the computerized display.<sup>373</sup> Jurors are “almost uniformly in favor of computer animation in the courtroom.”<sup>374</sup> So, asks one commentator, “[W]hy do trial lawyers spend the majority of courtroom time teaching factfinders in a manner that burdens the auditory system and draws upon visual sensitivities to a far lesser degree?”<sup>375</sup>

Finally, because there is no practical way to make media depictions of litigation true to life (imagine conforming TV shows to the Federal Rules of

364. See Elrod, *supra* note 19, at 329–30.

365. Attorneys have long used experts to explain complicated concepts, such as patents, to juries. See, e.g., *Winans v. N.Y. & Erie R.R. Co.*, 62 U.S. 88 (1858).

366. Gross et al., *supra* note 288, at 281.

367. See Jaquish & Ware, *supra* note 226, at 1715.

368. See *supra* note 294 and accompanying text.

369. Jaquish & Ware, *supra* note 226, at 1720.

370. See *supra* note 361 and accompanying text.

371. See *infra* notes 373–75 and accompanying text.

372. See *supra* note 361 and accompanying text.

373. At the advent of the computerization of society, “people resisted computer technologies very strongly.” Lori Reed, *Domesticating the Personal Computer: The Mainstreaming of a New Technology and the Cultural Management of a Widespread Technophobia, 1964–*, 17 CRITICAL STUD. MEDIA COMM. 159, 170 (2000), available at <http://www.uky.edu/~addesa01/documents/DomesticatingthePersonalComputer.pdf>; cf. *infra* note 374 and accompanying text. “The last 25 years have seen great advances in the field of demonstrative evidence and its uses. The next 25 years shall be at the very least equally exciting.” MUELLER & KIRKPATRICK, *supra* note 73, at 878.

374. Frank Herrera Jr. & Sonia M. Rodriguez, *Courtroom Technology: Tools for Persuasion*, TRIAL, May 1999, at 66, 68 (quoting John Selbak, *Digital Litigation: The Prejudicial Effects of Computer-Generated Animation in the Courtroom*, 9 HIGH TECH. L.J. 337, 359–60 (1994)).

375. Jaquish & Ware, *supra* note 226, at 1721–22. As Judge Elrod noted, jurors demand visual aids and technology, but lawyers must take care to incorporate them in the most fluid manner by playing short clips that both keep jurors’ attention and avoid preventable evidentiary objections. Elrod, *supra* note 19, at 329–30.

Evidence!), America must do a better job with civic education.<sup>376</sup> Fewer than half of Americans can name the three branches of government, and only one-third of eighth graders can explain the original function of the Declaration of Independence.<sup>377</sup> The United States can, and must, do better if the lay jury is to survive.<sup>378</sup> Future education must build on the principles discussed above by incorporating interesting, informative, and engaging formats<sup>379</sup>—inevitably, this will involve up-to-date technology that students want to use. Justice Sandra Day O’Connor has dedicated a great deal of effort to this end,<sup>380</sup> publicly endorsing “a nonprofit organization called Games for Change, which created video games placing children in positions of decision-makers, like judges.”<sup>381</sup> If American litigation were to abandon lay juries, there would be much less incentive to provide civic education—there would be no point in teaching ordinary Americans about a system into which they would never be invited.<sup>382</sup> Instead, we must encourage ordinary Americans to actively participate in both the classroom and the courtroom—and give them the tools to do so.<sup>383</sup> As Justice Breyer said, “pessimism is not the complete order of the day. . . . Our democratic Constitution assumes a public that participates in the government that it creates. It also assumes a public that understands how government works.”<sup>384</sup>

## VI. CONCLUSION

Both technology and litigation are becoming increasingly complex,<sup>385</sup> and juries are becoming increasingly interconnected.<sup>386</sup> In the courtroom,

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376. See STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 219 (2010).

377. *Id.*

378. See *infra* notes 379–84 and accompanying text.

379. Elrod, *supra* note 19, at 330.

380. *Id.*

381. TOOBIN, *supra* note 166, at 398.

382. Recognizing the importance of the jury and its educational impact, Alexis de Tocqueville wrote, “I do not know whether a jury is useful to the litigants, but I am sure it is very good for those who have to decide the case. I regard it as one of the most effective means of popular education at society’s disposal.” ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 275 (J.P. Mayer ed. & George Lawrence trans., Harper & Row 1969) (1848).

383. See *supra* notes 379–81 and accompanying text.

384. BREYER, *supra* note 376, at 219–20.

385. See *supra* notes 111–71 and accompanying text.

386. See *supra* notes 111–30 and accompanying text.

gone are the days of homogenous, well-educated men listening to short oral arguments.<sup>387</sup> Instead, attorneys are beginning to cater to diverse juries' desire for technological instruction.<sup>388</sup> Juries themselves are changing, both in their demographics and in the way they process information.<sup>389</sup> This transformation is far from complete; indeed, scholars are unsure of what future education—and, by extension, litigation—will look like.<sup>390</sup> The consensus is that traditional, lecture-based university education will likely decline as new modes of education, such as distance learning, sharply increase.<sup>391</sup> All the while, jurors are becoming more and more dependent on ubiquitous technology that shortens their attention spans.<sup>392</sup> Soon, the concept of sitting in a room for weeks listening to complex material could be a wholly foreign concept to the average American.<sup>393</sup> Some might consider the jury doomed.<sup>394</sup>

Fortunately, there is cause for hope.<sup>395</sup> If attorneys can harness technology to present information to jurors in effective ways, and if jurors are willing and able to forego the momentary instant gratification of every new tweet and status update while they listen to the litigants, the American lay jury can survive.<sup>396</sup> Legitimizing the jury, like all great American problems, is a holistic, collaborative endeavor.<sup>397</sup> It requires cooperation from the academy, bench, bar, educators, and society at large.<sup>398</sup> Though empirical studies are few,<sup>399</sup> they do establish that juries are sufficiently educated, take their responsibilities seriously, and seem to arrive at the “correct” decision as frequently as judges do.<sup>400</sup> Academic critiques—

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387. See *supra* notes 51–64 and accompanying text.

388. See *supra* notes 157–63 and accompanying text; see also *supra* notes 262–70 and accompanying text.

389. See *supra* notes 172–203 and accompanying text.

390. See *supra* notes 220–49 and accompanying text.

391. See *supra* notes 242–49 and accompanying text.

392. See *supra* notes 111–30 and accompanying text.

393. See *supra* notes 242–49 and accompanying text.

394. See *supra* notes 97–101 and accompanying text.

395. See BREYER, *supra* note 376, at 219–20; *supra* note 384 and accompanying text.

396. See generally Lee, *supra* note 237.

397. See Elrod, *supra* note 19, at 325 (“All of us—lawyers, courts, legislators, and litigants—can help.”).

398. See *id.*

399. See *supra* note 304 and accompanying text.

400. See *supra* notes 306–11 and accompanying text.

largely outdated in this new era—should not lessen America’s faith in its jury system that, so far, has lived up to its task. Embracing technology and adapting to modern methods of communication will ensure that the jury system does so far into the future.

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