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Joel C. Johnson

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# Lay Jurors in Patent Litigation: Reviving the Active, Inquisitorial Model for Juror Participation\*

Joel C. Johnson\*\*

## I. INTRODUCTION

*When the peremptory challenges were all exhausted, a jury of twelve men was impaneled—a jury who swore they had neither heard, read, talked about nor expressed an opinion concerning a murder which the very cattle in the corrals, the Indians in the sage-brush and the stones in the streets were cognizant of! It was a jury composed of two desperados, two low beer-house politicians, three bar-keepers, two ranchmen who could not read, and three dull, stupid, human donkeys! It actually came out afterward, that one of these latter thought that incest and arson were the same thing.*

...  
*The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity and perjury. It is a shame that we must continue to use a worthless system because it was good a thousand years ago.<sup>1</sup>*

In recent decades jurors have increasingly been called to the task of adjudicating patent infringement claims.<sup>2</sup> Indeed, while in 1940 only 2.5% of all patent claims were tried before a jury, by 1999 that number had swollen to 62%, with most of the increase occurring in the past 30 years.<sup>3</sup> The burgeoning jury trial docket coupled with the fact that the technologies at issue in patent disputes are growing increasingly complex has led

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\*\* J.D. Candidate, 2005, University of Minnesota Law School; B.A., 2002, Gustavus Adolphus College. For my mother and father, who pushed me to work my hardest and inspired me to always do my best.

1. MARK TWAIN, *ROUGHING IT*, 342-43 (Oxford Univ. Press 1996) (1872) (original emphasis omitted).

2. See generally Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box*, 11 FED. CIRCUIT B.J. 209 (2002); Deborah M. Altman, *Defining the Role Of The Jury In Patent Litigation: The Court Takes Inventory*, 35 DUQ. L. REV. 699 (1997).

3. Moore, *supra* note 2, at 210 n.7. Moore remarked that most of the increase has occurred in the past thirty years. *Id.* at 210 nn.6-7 (noting that in 1969 only 2.1% of patent cases were tried to juries, compared with 62% in 1999).

academics and legal practitioners to question the efficacy of using lay juries to decide patent matters.<sup>4</sup> Bolstering the arguments of those advocating reform, jury verdicts in patent trials are “often unpredictable and inconsistent.”<sup>5</sup> This state of affairs has led scholars and practitioners alike to call for reforms.<sup>6</sup> Suggestions range from the relatively small step of allowing jurors in patent cases to take notes and use them during deliberations<sup>7</sup> to disallowing the use of the jury entirely.<sup>8</sup> The ensuing debate over the role of the jury has pitted due process concerns against that great palladium—the civil jury. The issue has forced jurists to reconsider the efficacy of the civil jury trial process. Captured in the midst of this debate are the federal courts, which have been called upon to define “the proper role of the jury in [patent] cases.”<sup>9</sup>

Section II.A of this Note traces the historical development of the civil jury trial. Section II.B investigates the historical development of the jury in the patent litigation context specifically. Section II.C addresses some of the problems facing the civil jury in patent litigation and the solutions presented thus far. Part III of this Note provides an analysis of proposed solutions addressing the use of juries in patent cases. Finally, this Note concludes that rather than change the composition of the jury itself, or rid the American system of that hallowed institution, the process by which the jury obtains, digests, and recalls information should be modified. That is the manner in which the patent jury should be reformed. This Note argues that the central focus of all jury reforms should be to make jurors better finders-of-fact in patent disputes. Thus, the

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4. *Id.* at 210. See also Michael A. Fisher, *The Legality of Expert Juries in Patent Litigation*, 2 COLUM. SCI. & TECH. L. REV. 1 (2001); Davin M. Stockwell, *A Jury of One's (Technically Competent) Peers?*, 21 WHITTIER L. REV. 645 (2000).

5. Altman, *supra* note 2, at 699.

6. See e.g., Douglas King, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. CHI. L. REV. 581, 614 (1984) (arguing that in cases of such complexity that they “undoubtedly” fall “well beyond the framers’ understanding of ‘Suits at common law,’ no party should have a right to demand a jury trial”); see generally Fisher, *supra* note 4, at 80-81 (calling for the use of “Blue Ribbon Juries,” which would consist of “jurors educated in the relevant science and technology” at issue).

7. *Development in the Law—The Civil Jury*, 110 HARV. L. REV. 1489, 1509 (1997).

8. See King, *supra* note 6, at 614; see generally Fisher, *supra* note 4 (discussing blue ribbon juries).

9. Stockwell, *supra* note 4, at 645.

transformations should be aimed at tearing down the communicative barriers hindering the information-gathering responsibility of the jury.

## II. BACKGROUND

*“There was initiated in the twelfth century the most radical change that has ever occurred in the legal systems of the Western World.”*<sup>10</sup>

### A. THE PALLADIUM OF A FREE AND CIVIL SOCIETY: THE HISTORICAL DEVELOPMENT OF THE CIVIL JURY TRIAL

The Norman Conquest of 1066<sup>11</sup> is generally credited with making the common law possible.<sup>12</sup> To better understand the debate surrounding the use of the jury in patent litigation it is valuable to know something of its genesis. Such knowledge is exceedingly useful as it provides a framework for understanding the problems afflicting the jury and those solutions leveled at it. Additionally, by understanding the history of the jury and the historical context in which the institution arose, reformers will be better equipped to battle the contemporaneous challenges faced by juries and the jury trial.<sup>13</sup>

The first petit juries<sup>14</sup> exhibited only a few characteristics

10. Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 45 (1980).

11. 1 SIR FREDRICK POLLACK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 79 (2d ed. Cambridge Univ. Press 1898) (Referring to the Norman invasion of the isle in that year and remarking that it was “a catastrophe which determin[ed] the whole future history of English law”).

12. J. H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 6 (Butterworths 1971). BAKER noted that the key to the development of the common law was the centralization of the justice system. Thus, while “[t]he main developments of the common law have been attributed . . . to Henry II (1154-1189) . . . the Normans set in motion the forces which within two centuries gave England a national system of law.” *Id.*

13. The solutions that can be developed by such a methodology would not be *new*, of course, but would result in changes—in some cases drastic—to the *contemporary* jury. This historical-contextual approach is beneficial for several reasons the most important being the reliance of the Supreme Court on history to develop and shape the role of the modern jury through constitutional mandates and limitations. *See infra* note 29 and accompanying text.

14. The petit jury must be contrasted with the grand, or inquest, jury, which had an earlier origin. In fact, the Assize of Clarendon institutionalized the inquest jury as early as 1166. *See Assize of Clarendon (1166), reprinted in HISTORICAL DOCUMENTS OF THE MIDDLE AGES* 16 (Ernest F. Henderson trans., ed., George Bell and Sons, 1910). The petit jury followed soon thereafter and

manifest in contemporary American civil juries.<sup>15</sup> In fact, the first *jurators* existed only to share in the oath of denial with the accused.<sup>16</sup> As the oath and other forms of trial waned in popularity, new characteristics emerged that made the jury a particularly effective adjudicator.<sup>17</sup> Jurors of the 13th and 14th Centuries were selected from pools of individuals who were thought to know—or were in a position to learn about—the facts of the case.<sup>18</sup> Indeed, jurors were *expected* to be active players in the trial process.<sup>19</sup> Not only could individual jurors question witnesses, but they could use information obtained privately from *outside* the courtroom in forming their decision.<sup>20</sup> The early jury was extraordinarily active in the

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found itself enshrined as a right in 1215 by the hand of King John through the Magna Carta. *But see* LORD CROSS OF CHELSEA & G. J. HAND, *THE ENGLISH LEGAL SYSTEM* 50 (5th ed., Butterworths 1971) (asserting that the right to a jury as described in the Magna Carta is significantly different than the right which exists in the modern era).

15. *Compare* HENRY CHARLES LEA, *THE DUEL AND THE OATH* (Edward Peters, ed., 1974) with Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 *HOFSTRA L. REV.* 377, 391-414, 421-39 (1996).

16. LEA, *supra* note 15, at 33-34. *Jurators*, also known as *compurgators*, were not finders of fact. Instead, jurators swore a purgatorial oath. Thus, the process had nothing to do with truth and instead focused on one's reputation. Obtaining jurators was not as simple as it sounds because taking a false oath was a serious offense. The penalty for doing so ranged from heavy fines to "the customary penalty [for] perjury" of losing a hand. *Id.* at 64. *See also* Devlin, *supra* note 10, at 46.

17. *See* LORD CROSS & HAND, *supra* note 14, at 90 (noting that the "mediæval jury . . . was expressly selected from among people who might be supposed to know or to be in a position to ascertain the facts—from neighbours of the parties to the action—and they were expected to answer the questions put to them without the assistance of witnesses").

18. *Id.*, but *cf.* Bernard William McLane, *Juror Attitudes Toward Local Disorder: The Evidence of the 1328 Lincolnshire Trailbaston Proceedings*, in *TWELVE GOOD MEN AND TRUE* 56-58 (J. S. Cockburn & Thomas A. Greene eds., 1988) (commenting on accepted scholarship that "[i]n theory, trial jurors were selected from local inhabitants who would be familiar with 'the facts' of the offenses . . . [and] the involvement of the accused", but observing that "practice did not necessarily follow theory").

19. *See* Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 *CORNELL L. REV.* 497, 499 (1990).

20. *Id.* *See also* JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* § 11.2 (3d ed. 1999). FRIEDENTHAL notes that:

[J]urors were expected to inform each other on the issues, relying on their personal knowledge of the events, and to consult any other reliable sources, including direct communication with the parties. They were entitled to decide a case on the basis of their knowledge, even when this contradicted the testimony.

*Id.* (citing M. HALE, *THE HISTORY AND ANALYSIS OF THE COMMON LAW OF*

fact-finding process, at least by contemporary standards of juror participation.<sup>21</sup> But the jury was forced to take a back seat in the proceedings as the trial became more adversarial in nature and attorneys asserted and expanded their role.<sup>22</sup> Thus the passive jury model began its ascent to prominence and is the predominant model today.

While the American colonists did not bring the entirety of English law across the Atlantic, one legal institution that colonists did transplant was the jury.<sup>23</sup> The colonists kept the tradition alive before the revolution, and after the War for Independence, the right to a jury trial in civil matters heard in federal courts was “preserved” by the Seventh Amendment to the United States Constitution.<sup>24</sup> The States also valued the civil jury; however, each state had different procedures

ENGLAND 260-61 (1713)).

21. See Smith, *supra* note 15, at 387.

22. Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 732 (1993). Landsman notes that the decline in the use of the active jury began around 1670. *Id.* at 730. He also points out that other changes were also occurring at this time, such as the abolition of the requirement that “jurors be drawn from the exact neighborhood in which the case arose.” *Id.* Thus, not only was the jury becoming more passive, but it was also turning out to be an *impartial* arbiter of facts.

While the emerging adversarial process undoubtedly had an impact on the passivity of the jury, the bench also played a role. Indeed, “the first known overt restriction” on the jury was the writ of attain. Hon. Michael B. Dann, “*Learning Lessons*” and “*Speaking Rights*”: *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1233 (1993). With this writ, “[i]f the judge disagreed strongly enough with the jury’s returned verdict”, the judge could imprison the jury and vacate the verdict “on the theory that the jurors perjured themselves in their capacities as witnesses.” *Id.*

23. Each of the colonies was, of course, unique and utilized those aspects of the Common Law that suited its particular needs. See Joseph H. Smith, *The English Criminal Law in Early America*, in JOSEPH H. SMITH & THOMAS G. BARNES, *THE ENGLISH LEGAL SYSTEM: CARRYOVER TO THE COLONIES* 22-41 (1975).

24. U.S. CONST. amend. VII.

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

*Id.* According to some commentators, the Seventh Amendment was borne of an attempt to curtail the “centralizing tendencies of Article III.” Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587, 594 (2001). Indeed, not only did the Seventh Amendment interject a democratic element, but it also curtailed the Supreme Court’s ability to “review ‘both as to law and fact’” under its Article III power. *Id.* at 594-95, 597.

governing its use.<sup>25</sup> The variations seen among the states should not lead one to question the importance of the jury to the citizens of early America: the right to a trial by jury was *the only* right protected by every state constitution established between 1776 and 1787 and is guaranteed by the constitutions of all fifty states today.<sup>26</sup> As the nation of colonies rose up to become an industrial power-house, the authority and role of the jury in the civil trial waned. During the industrial revolution, judges came to believe that the jury was simply incapable of “comprehending the new industrial reality” and was “irremediably biased against corporate defendants” and so curtailed the power of the jury accordingly.<sup>27</sup> As happened in England, the once active jury withered. Passivity became the norm.

## B. THE HISTORICAL DEVELOPMENT OF THE JURY IN PATENT TRIALS

The Seventh Amendment preserves the individual’s right to have a jury in those cases in which the common law would

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25. Alexander Hamilton, *The Federalist 83*, THE FEDERALIST PAPERS 503 (Penguin Books, 1961) (1788). Hamilton argued:

There is a material diversity, as well in the modification as in the extent of the institution of trial by jury in civil cases, in the several States; and from this fact these obvious reflections flow: first, that no general rule could have been fixed upon by the convention which would have corresponded with the circumstances of all the States; and secondly, that more or at least as much might have been hazarded by taking the system of any one State for a standard, as by omitting a provision altogether and leaving the matter, as it has been left, to legislative regulation.

*Id.*

26. See Smith, *supra* note 15, at 424-25 (1996) (citing Stephan Landsman, *The Civil Jury Trial in America: Scenes From An Unappreciated History*, 44 HASTINGS L.J. 579, 607 (1993)); see e.g., NEW YORK STATE COURT SYSTEM, THE JURY PROJECT, CONTINUING JURY REFORM IN NEW YORK STATE 1 (January 2001).

27. Smith, *supra* note 15, at 450-51. Also noteworthy is the fact that the ability of the judge to comment on the evidence to the jury was legislatively curtailed in the states. See generally Renée Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM & MARY L. REV. 195 (2000). While the move to legislatively curtail the practice of judicial commentary was borne of a desire to mitigate the judge’s ability to influence the jury, it may have also had the negative effect of depriving the jury of a valuable resource. See also WILLIAM F. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE OLD LEGALITY 1889-1932 4 (Bobbs Merrill Co. 1969) (describing the impact of industrialization on the judiciary and the reaction of ordinary Americans to judicial decisions).

have allowed it.<sup>28</sup> As a result, the courts devised a historical test to determine whether in current times a particular litigant has the right to a jury trial.<sup>29</sup> The test for determining the scope of the Seventh Amendment was first enunciated by Justice Story in *United States v. Wonson*.<sup>30</sup> Since that decision, eighteenth-century English practice vis-à-vis the use of the jury in patent litigation has been guiding judicial decisions regarding the role of the jury in American patent trials.<sup>31</sup> The historical test is relatively simple, but it has profound implications. Under the test, a court must first ask “whether [it is] dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was.”<sup>32</sup> If the cause of action would have been recognized at our founding, the second query is reached. This inquiry considers “whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.”<sup>33</sup>

### 1. At Common Law in England

Throughout England in the eighteenth-century, the jury played an important role in adjudicating patent disputes. Since patent infringement actions could be brought both “at law and . . . in equity”, patentees could opt for a jury trial by seeking damages and then requesting a jury.<sup>34</sup> Alternatively, a patentee could forgo a jury trial entirely by bringing an

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28. See *supra* note 24 and accompanying text.

29. See *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C. Mass. 1812) (No. 16,750).

30. In essence, Justice Story argued that the right to a jury trial exists depends on whether the right existed at English common law. *Cf. id.* (noting that “the common law [preserved by the Seventh Amendment] . . . is not the common law of any individual state . . . but is the common law of England”).

31. See *Altman*, *supra* note 2, at 704.

32. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996).

33. *Id.* Determining whether a matter would have been tried at law or equity is not as simple as it sounds. Indeed, “the most erudite and lucid of English legal historians” could only say of equity that it “is that body of rules which is administered only by those Courts which are known as Courts of Equity.” Devlin, *supra* note 10, at 45 (quoting F. MAITLAND, *EQUITY* 1 (2d ed. 1936)).

34. *In re Lockwood*, 50 F.3d 966, 976 (Fed. Cir. 1995); see Brian D. Coggio & Timothy E. Demasi, *The Right to A Jury Trial in Actions for Patent Infringement and Suits for Declaratory Judgment*, 13 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 205, 206 (2002).

equitable action.<sup>35</sup> Thus, historically, it was the patentee's choice of remedy that determined whether the action was at law or equity.<sup>36</sup> Whether the action was legal or equitable had a direct impact on whether the case could or could not be tried by jury.<sup>37</sup> In the English equivalent to an action seeking declaration of patent invalidity,<sup>38</sup> a patentee was guaranteed that a jury would decide his fate.<sup>39</sup>

## 2. The American Treatment of the Jury in Patent Trials

In America, the use of the jury in patent cases followed a path very similar to that in England.<sup>40</sup> To wit, "courts broadly construed each of its functions to assure that the *right* to a trial by jury would be preserved."<sup>41</sup> Indeed, juries have participated in patent disputes since 1790 when the first patent statute was enacted.<sup>42</sup> While it was almost always the province of the

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35. *In re Lockwood*, 50 F.3d at 976; see Coggio & Demasi, *supra* note 34, at 205.

36. Coggio & Demasi, *supra* note 34, at 207.

37. *Id.* at 206-07.

38. The writ of *scire facias* was an action brought by the King to show why a patent "should *not* be repealed or revoked." *In re Lockwood*, 50 F.3d at 974 n.9 (emphasis added) (quoting *United States v. Am. Bell Tel. Co.*, 128 U.S. 315, 360 (1888)).

39. Indeed, even though the writ of *scire facias* was brought in the juryless Court of Chancery (a court of equity), in such cases "the proceeding in chancery was suspended pending a determination by a jury summoned in the Court of King's Bench", where juries were available. *In re Lockwood*, 50 F.3d at 975 n.9.

40. *Id.* at 976, *citing* *Marsh v. Seymore*, 97 U.S. 348, 349 (1877) and *Wise v. Grand Ave. Ry. Co.*, 33 F. 277, 278 (W.D. Mo. 1888). Both *Marsh* and *Wise* held that a patentee could seek redress in either a court of law or equity; Coggio & Demasi, *supra* note 34, at 207.

41. Stockwell, *supra* note 4, at 665 (emphasis added), *citing* *Root v. Ry. Co.*, 105 U.S. 189, 206-07 (1881) (noting that where previous acts had conferred "jurisdiction in patent cases in equity as well as at law", the Court held that such a "distinction of jurisdiction" "is constitutional, to the extent to which the seventh amendment forbids any infringement of the right of trial by jury, as fixed by the common law"). See also *Winans v. Denmead*, 56 U.S. 330, 344 (1853) (a patent infringement case holding that the question of whether "the defendant's [train] cars did copy the plaintiff's invention . . . is a question for the jury"); *Silby v. Foote*, 55 U.S. 218, 226 (1852) (describing circumstances constituting "question[s] of fact which . . . should be left to the jury").

42. Moore, *supra* note 2, at 210. See also An Act to promote the progress of useful Arts, ch. 7, 1 Stat. 109, 111 (1790) (the act entitles a patentee to "such damages as shall be assessed by a jury" upon a finding of infringement). An interesting note regarding this law is that it was enacted *before* the ratification of the Bill of Rights and, thus, the Seventh Amendment. While

judiciary to resolve matters of law “the Supreme Court, in some instances, permitted . . . decisions [where legal and factual issues were intertwined] to be addressed and decided by the jury.”<sup>43</sup> Through custom and by decision, the jury came to play an essential role in the patent trial. From the beginning, juries were given complex tasks such as deciding whether the “specifications, including the claim, were so precise as to enable any person skilled in the structure of machines, to make the one described.”<sup>44</sup> Jurors also decided on the “novelty of the invention, and [in the case of renewed patents,] whether the renewed patent is for the same invention as the original patent.”<sup>45</sup>

In the specific context of an infringement claim then, the jury must first determine whether a given patent is valid.<sup>46</sup> Only then may it resolve the infringement question.<sup>47</sup> While the jury played a vital role in individual cases historically, on the whole, juror participation in patent trials was infrequent.<sup>48</sup> In fact, bench trials “became the norm” as early as 1870 when the equity courts were granted the “power to award common law damages.”<sup>49</sup> From that point until the late twentieth century, juries were an unusual object in patent litigations. While from 1968 until 1970, “juries decided only thirteen of nearly four hundred patent trials”,<sup>50</sup> by 1999 juries tried an

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that fact by itself may be of little use, note that the Congress that enacted the 1790 patent act was the same that drafted the Seventh Amendment. This strongly supports arguments contending that juries should be guaranteed for patent actions at law. At the very least, it is evidence that Congress anticipated juries would play some role in patent litigation.

43. Stockwell, *supra* note 4, at 665.

44. *Battin v. Taggart*, 58 U.S. 74, 85 (1854).

45. *Id.* The Court went on to say that “[t]here are other questions of fact which come within the province of a jury; such as the identity of the machine used by the defendant with that of the plaintiffs, or whether they have been constructed and act on the same principle.” *Id.*

46. *See* Stockwell, *supra* note 4, at 667.

47. *Id.* at 667-68. The jury must first consider whether the patent application “demonstrated the necessary novelty and utility in light of any previous similar inventions. If the patent holder established utility, then the jury had to find that the patent was also not obvious in light of the prior art.” *Id.* at 667. Damages would then be assessed for a finding of infringement upon a valid patent. *Id.* at 668.

48. Stockwell, *supra* note 4, at 660.

49. *In re Lockwood*, 50 F.3d 966, 980 (Fed. Cir. 1995) (Nies, C. J., dissenting).

50. Stockwell, *supra* note 4, at 660.

astounding 62% of all patent trials.<sup>51</sup>

### 3. The Jury in Contemporary American Patent Litigation

In 1979 the Ninth Circuit held that there is no “complexity” exception to the Seventh Amendment right to a jury trial in civil cases.<sup>52</sup> The import of such a holding is self-evident. The right to a jury trial in cases where one would have been allowed at common law cannot be abrogated simply because a judge determines that the case at hand is too complex for a jury to decide. Without passing judgment on the use of the jury in complex modern patent litigations, one thing is certain—the role the jury plays in individual cases is significant. The number of patent trials for which jurors are summoned when coupled with the serious consequences inherent in any legal decision only serves to underscore the importance of the issue. This reality also demands that the legal community look closely at the process by which patent disputes are resolved.

Reacting to this new reality in three recent cases, *In re Lockwood*,<sup>53</sup> *Hilton Davis Chemical v. Warner-Jenkinson Co.*,<sup>54</sup> and *Markman v. Westview Instruments, Inc.*,<sup>55</sup> the Federal Circuit and Supreme Court have undertaken a transformation of the role that juries play in patent trials.<sup>56</sup>

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51. See *supra* note 3 and accompanying text.

52. *In re* U.S. Fin. Sec. Litig., 609 F.2d 411, 431 (9th Cir. 1979). The court not only “refuse[d] to read a complexity exception into the Seventh Amendment”, but it also “express[ed] grave reservations about whether a meaningful test could be developed were we to find such an exception.” *Id.* The court rejected the attempt to “demean[] the intelligence of the citizens of this Nation.” *Id.* at 430. It noted that “[j]urors, if properly instructed and treated with deserved respect, bring collective intelligence, wisdom, and dedication to their tasks, which is rarely equalled [sic] in other areas of public service.” *Id.* But see *In re* Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069, 1086 (3d Cir. 1980), (holding that the Seventh Amendment does not guarantee the right to jury trial when “a jury will not be able to perform its task of rational decision[-]making with a reasonable understanding of the evidence and the relevant legal standards” and concluding that “[i]n lawsuits of this complexity, the interests protected by this procedural rule of due process carry greater weight than the interests served by the constitutional guarantee of jury trial”).

53. 50 F.3d 966 (Fed. Cir. 1995).

54. 62 F.3d 1512 (Fed. Cir. 1995).

55. 517 U.S. 370 (1996).

56. Mark B. Watson, *Expansion, Compression and Relief: An Analysis of the Jury's Role in Patent Infringement Cases Employing the Doctrine of Equivalents*, 2 ROGER WILLIAMS U. L. REV. 91, 99-100 (1996). Watson points

a. *In re Lockwood*

In the first of the trilogy, *In re Lockwood*, patentee Lockwood (“Patentee”) brought an infringement action against an airline.<sup>57</sup> While both equitable and non-equitable relief was sought, only equitable claims remained after American’s motion for summary judgment was granted on the infringement issue.<sup>58</sup> An important question was thus raised—could the patentee still receive a jury trial even though the only remaining claim was equitable in nature? On rehearing, the Federal Circuit held that since the core controversy in the case was a patent infringement action “in which the affirmative defense of invalidity has been pled”, the patentee’s “right to a jury trial must be determined accordingly.”<sup>59</sup> Thus, even though the remaining action was equitable in nature, the court

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out that in *Markman*, the court *restricted* the role of the jury by holding that “claim interpretation is a question of law for the court to decide,” while the *Hilton Davis* court *expanded* the jury’s role by ruling that the “determination of equivalence” is a fact-question and is thus within the province of the jury. *Watson, supra*, at 99 nn.62-63. In equivalence patent infringement cases, the Federal Circuit has shown a willingness to disregard jury verdicts. *Id.* at 102. *Watson* reports that in at least three cases, the Federal Circuit has affirmed district court decisions overruling jury verdicts. *Id.* at 100-02. In *Newell Co. v. Kenney Mfg. Co.*, 864 F.2d 757 (Fed. Cir. 1988), the jury came back with its verdict that the plaintiff’s patent “was not obvious, but that the defendant did in fact, infringe on it.” *Watson, supra*, at 101. The district court overturned the jury verdict and “the Federal Circuit affirmed the rulings of the district court stating that there was ‘no legal error’ in holding that the patent was obvious.” *Id.*

In the case of *Malta v. Schulmerich Carillons, Inc.*, the jury found that the plaintiff’s patent had been infringed and awarded him \$950,000 in damages. 952 F.2d 1320, 1323 (Fed. Cir. 1991). Claiming that there was “insufficient to support a finding of infringement under the doctrine of equivalents”, the district court overturned the verdict. *Id.* at 1327. The Federal Circuit affirmed. *Id.* at 1328.

Finally, in the famous *Markman* case, the jury returned a verdict in favor of the plaintiff patentee, but the district court promptly “granted the defendant’s motion for a [Judgment as a Matter of Law].” *Watson, supra*, at 103. Again, the Federal Circuit affirmed. *Id.* at 104. On review, the Supreme Court affirmed the Federal Circuit. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996).

57. *In re Lockwood*, 50 F.3d 966, 968 (Fed. Cir. 1995). Specifically, Patentee alleged that American Airlines had infringed his patents relating to “self-service terminals and automatic ticket dispensing systems.” *Id.*

58. *See id.* at 968-69; Altman, *supra* note 2, at 708-09.

59. *In re Lockwood*, 50 F.3d at 974. The court noted, “the primary difference between American’s action and the infringement suit that would formerly have been required for an adjudication of validity is that the parties’ positions here have been inverted.” *Id.* at 974-75.

concluded that it was more important that the patentee control whether a particular action would be eligible for a jury trial.

b. *Hilton Davis*

*Hilton Davis* represents the Federal Circuit's affirmation of the sanctity of the jury verdict in patent cases. In that case the court in an *en banc* rehearing asked the parties to address whether "the issue of infringement under the doctrine of equivalents<sup>60</sup> [was] an equitable remedy to be decided by the court, or . . . like literal infringement, . . . [was] an issue of fact to be submitted to the jury."<sup>61</sup> The court held that the issue of infringement was undoubtedly a question of fact.<sup>62</sup> In so holding the Federal Circuit is in good company. In *Graver Tank* the Supreme Court held that a finding of equivalence was "a determination of fact."<sup>63</sup> Thus, the Federal Circuit concluded "infringement under the doctrine of equivalents is an issue of fact to be submitted to the jury in a jury trial."<sup>64</sup> The decision "shocked" a legal community still reeling from the *Markman* decision.<sup>65</sup> In practice, however, *Hilton Davis* did not reinvigorate the role of the jury in patent trials as much as *Markman* destroyed it—the court retained the power of claim determination.<sup>66</sup> It is the *Markman* case to which this Note now turns.

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60. The doctrine of equivalents refers to an action brought by a patentee in which there is not a literal infringement of the patent, but where the "infringing" device performs "substantially the same function in substantially the same way to obtain the same result." *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 608 (1950); Watson, *supra* note 56, at 91 (explaining the difference between literal infringement and infringement based on the equivalence doctrine).

61. *Hilton Davis Chem. v. Warner-Jenkinson Co.*, 62 F.3d 1512, 1516 (Fed. Cir. 1995).

62. *See id.* at 1520 (noting that this issue had been firmly resolved by the Supreme Court). *See Graver Tank*, 339 U.S. at 609-10.

63. *Graver Tank*, 339 U.S. at 609.

64. *Hilton Davis*, 62 F.3d at 1522.

65. Watson, *supra* note 56, at 109-10, 111-12. Indeed, Watson points out that the court itself was not in total agreement over the outcome, as it drew three dissenting opinions. *Id.* at 110-11. Watson also notes, "[p]rior to the *Hilton* decision, many felt that the doctrine of equivalents was an equitable remedy, and thus not on the same level as statutory literal infringement." *Id.* at 114.

66. Watson, *supra* note 56, at 112.

c. *Markman v. Westview Instruments, Inc.*

In *Markman* the Supreme Court addressed whether claim interpretation lay within the province of the judge or the jury.<sup>67</sup> At trial the jury returned a verdict in favor of Markman on the infringement claim, but the court granted Judgment Notwithstanding the Verdict against Markman because it disagreed with the jury over its interpretation of the claim.<sup>68</sup> Both the Federal Circuit and the Supreme Court affirmed the action by the lower court.<sup>69</sup> The Court reasoned that the “history and precedent” on the topic suffered from a lack of perspicuity on the issue of whether the judge or jury should “define terms of art.”<sup>70</sup> The inquiry is basically this: Which of the two parties “is better positioned . . . to decide the issue in question”?<sup>71</sup> Since the “construction of written documents” has often been found to be within the province of the judge, the court thought it wise to hold that claim construction was exclusively for the judge to perform.<sup>72</sup>

d. The Jury’s Role

In patent trials, as in any jury trial, the role of the jury is to resolve questions of fact.<sup>73</sup> Indeed, the role of the jury has been confined exclusively to fact-finding since the Supreme Court resolved the issue in *Sparf v. United States* in 1895.<sup>74</sup> As

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67. *Markman*, 517 U.S. at 375.

68. *Id.* at 375-76. The disagreement stems from divergent interpretations of the word “inventory.” *Id.* at 375. The jury apparently interpreted that word to mean only cash inventory (which results in an infringement of Markman’s patent). *Id.* The court, on the other hand, interpreted inventory to mean physical inventory only, which means that there can be no infringement of the patent unless the infringing system can track both types. *Id.*; Altman, *supra* note 2, at 713.

69. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 970, 988-89 (Fed. Cir. 1995); *Markman*, 517 U.S. at 391.

70. *Markman*, 517 U.S. at 388.

71. *Id.*

72. *Id.*

73. Philippe Signore, *On the Role of Juries in Patent Litigation (Part 1)*, 83 J. PAT. & TRADEMARK OFF. SOC’Y 791, 797 (2001). Signore noted that while the fact-law distinction usually holds true, there are exceptions to the rule. *Id.* For example, the issue of whether a patentee committed inequitable conduct before the United States Patent and Trademark Office is “sometimes reserved for the judge because of the equitable nature of the overall issue.” *Id.*

74. 156 U.S. 51, 101-03 (1895) (holding in the context of the criminal trial, that when the jury ceases to be bound to apply the law as the judge has stated it, society would become imperiled as “our government . . . cease[s] to be a government of laws, and become[s] a government of men. Liberty regulated by

important as that distinction is, the general notion that the jury is a “fact-finder” is unhelpful given the myriad decisions that have shaped the role of the jury and its interplay with the judge. Therefore, this section will address the various parts of a patent trial. There are at least five main parts in any patent trial.<sup>75</sup> First, the claim must be interpreted.<sup>76</sup> As the prior section demonstrated, that job has been delegated to the judge.<sup>77</sup> The second issue to be addressed is the validity of the patent involved.<sup>78</sup> The issue of validity too, has been determined to be a question of law.<sup>79</sup> However, since the issue of validity is usually wrapped up in fact questions, “courts often let the jury decide the validity issue.”<sup>80</sup> The third matter is whether infringement has occurred.<sup>81</sup> It is well settled that the determination of patent infringement requires a factual inquiry and is therefore most appropriately placed into the jurors’ hands.<sup>82</sup> The fourth question that must be answered is whether the patent is unenforceable due to fraudulent or

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law is the underlying principal of our institutions”).

75. See Signore, *supra* note 73, at 799-810.

76. *Id.* at 799.

77. See *supra* Part II.B.3.c and accompanying notes. Moreover, in addition to being the first part of a patent trial, claim interpretation is also probably “the most important issue in a patent litigation because it affects the findings on the validity, infringement, and enforceability of the patent.” Signore, *supra* note 73, at 799.

78. Signore, *supra* note 73, at 800.

79. See *Great Atl. & Pac. Tea Co. v. Supermarket Equip. Co.*, 340 U.S. 147, 155 (1950); *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17 (1966).

80. Signore, *supra* note 73, at 800. Signore also notes that while the jury usually decides whether a patent is valid or not, since the issue is one of law and not fact, the decision remains “reviewable on appeal de novo.” *Id.* Among the numerous mixed fact-law questions that the jury must decide are the utility of the infringed patent, whether “a person of ordinary skill in the art in the field of the invention” could “make and use the claimed invention” based on the patent (enablement), and whether the patent contains a valid, “written description of the claimed invention.” *Id.* at 801-02. Additionally, the jury must determine whether the patent describes the “best mode of carrying out the claimed invention”, whether the claimed invention is novel, whether the patentee has lost his right to a patent because of prior sale or use, and finally, the issue of obviousness, though a legal conclusion, has been left for the jury since it factual issues envelop the inquiry. *Id.* at 802-05.

81. See Signore, *supra* note 73, at 805.

82. See *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 609 (1950) (“A finding of equivalence is a determination of fact.”); see also, *SRI Int’l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1125 (1985) (“It is settled that the question of infringement (literal or by equivalents) is factual.”).

inequitable conduct by the patentee.<sup>83</sup> Finally, while the court has the power to determine what the character of the damages will be (e.g., actual damages and a reasonable royalty), it is the jury that decides the “*amount* of a prevailing party’s damages.”<sup>84</sup> As can be seen, though it has been limited, the jury continues to have a significant role in patent litigations. But the significant task jurors have been called upon to perform coupled with the hyper-technicality of modern patent trials has led many to question whether the lay jury is up to the challenge.

### C. TAKING ISSUE: QUESTIONING THE COMPETENCY OF LAY JURORS

Lay jurors play an important role in patent litigation, but their function and utility have come under fire in recent years.<sup>85</sup> Indeed one commentator has stated that “[t]he worst problem with the patent system in my opinion is juries in the patent system.”<sup>86</sup> At the same time, others argue that the problem is not as severe as so many perceive it to be.<sup>87</sup> Nevertheless, as technologies that are the object of patents become more complex, most commentators argue jurors are less likely to comprehend the task before them.<sup>88</sup> The response from academia and the legal field has been heated, and the solutions proposed are diverse. For the most part, however, there are two categories of reform proposals: those dealing with the role and characteristics of the jury and those dealing with

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83. See Signore, *supra* at note 73, at 808.

84. *Smithkline Diagnostics v. Helena Lab. Corp.*, 926 F.2d 1161, 1164 (1991) (emphasis added).

85. See Altman, *supra* note 2, at 699.

86. Stockwell, *supra* note 4, at 660.

87. See Philippe Signore, *On the Role of Juries in Patent Litigation (Part II)*, 83 J. PAT. & TRADEMARK OFF. SOC’Y 896 (2001) (noting that in reality only a “few patent cases are tried by juries”). Since the role of the jury in those cases can be limited, Signore argues that the impact of uncomprehending jurors on the overall system is “relatively small.” *Id.* at 897.

88. See Stockwell, *supra* note 4, at 645 (noting that today’s technology is a world apart from the technologies driving the industrial revolution); Fisher, *supra* note 4, at 1 (noting how as the complexity of patented technologies increases, the ability of jurors to understand the issues may suffer); but see John B. Pegram, *Should There Be a U.S. Trial Court with a Specialization in Patent Litigation?*, 82 J. PAT. & TRADEMARK OFF. SOC’Y 766, 770 (2000) (noting that the presence of a jury has had a positive impact as well. For example, “[t]he presence of the jury forces simplification and acceleration of trials once they begin, and is likely to reduce interruptions”).

the role and characteristics of the judge.<sup>89</sup> This section will look at those proposed solutions.

### 1. Reforming Patent Litigation: The Special Jury

While several different solutions have been put forth, the one that appears to be most popular is the utilization of an old common law practice—the special jury.<sup>90</sup> Stockwell argues that because the right to a trial by jury necessarily implies that the jury be properly equipped for its job, Congress should mandate that those in the jury pool have training similar to that of “patent practitioners” required by the Patent and Trademark Office.<sup>91</sup> Such a jury, it is thought, would be in a position to understand the issues presented at trial because of its members’ specialized education.<sup>92</sup> There are variants of this proposal as well. For example, at least one scheme would create a mixed jury composed of lay jurors as well as “special” jurors.<sup>93</sup> This diversification would be accomplished either by creating a jury pool consisting of at least forty percent special jurors or by having two pools of jurors, from which a certain number would be selected.<sup>94</sup>

### 2. Reforming Patent Litigation: Specialized Courts

The second school of thought proposes that the judiciary itself become more specialized so that it can be more adept at adjudicating cases involving modern technological realities.<sup>95</sup>

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89. See e.g., Fisher, *supra* note 4; Signore, *supra* note 87. See also LeRoy L. Kondo, *Untangling the Tangled Web: Federal Court Reform Through Internet Law and Other High Technology Cases*, 2002 UCLA J. L. & Tech. 1, 11 (2002), at [http://www.lawtechjournal.com/articles/2002/01\\_020309\\_kondo.php](http://www.lawtechjournal.com/articles/2002/01_020309_kondo.php)

90. Fisher, *supra* note 4, at 18 (noting that the practice of having merchant jurors hear trade disputes goes back to the fourteenth century, and the practice of utilizing special juries also has a history in the United States). For a detailed account of the use of the special jury, see James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137 (1983).

91. Stockwell, *supra* note 4, at 685-86.

92. See Fisher, *supra* note 4, at 1 (noting that using such expert jurors in patent infringement cases would be “particularly beneficial” and “is arguably the only realistic way to achieve a just result”); Stockwell, *supra* note 4, at 661 (noting that “[a] panel of technically trained individuals would be in a better position, than a judge trained in law, to understand and resolve the issues associated with the patent infringement. Furthermore, such a panel would certainly be a marked improvement over the current traditional jury system”).

93. Signore, *supra* note 87, at 900.

94. *Id.*

95. Kondo, *supra* note 89, at 11.

As a model for this specialization, Professor Kondo argues that reformers should look to the states, as they have successfully created “business courts, adult drug courts, family courts, juvenile drug courts, teen courts, [and] domestic violence courts.”<sup>96</sup> More important than the number of courts that numerous states have created is the fact that the specialization has had the effect of making decisions more consistent and giving the specialist judges more credibility.<sup>97</sup> If the federal court system would create specialty trial courts to deal with patent litigation, it would allow the courts to have a “greater uniformity of judgment.”<sup>98</sup> In addition, specialization could occur with relatively minor changes.<sup>99</sup> For example, while it would be ideal to have specially trained judges on the bench, specialization could occur simply by utilizing experts, special masters, and technical advisors who would assist the judiciary.<sup>100</sup>

### 3. Reducing Juror Passivity: An Inquisitorial Approach

The method advocated by this Note, and the third approach to reform, is to reduce juror passivity in the courtroom. This Note argues that reducing juror passivity has the most potential to cure a defective jury trial process in patent litigation.<sup>101</sup> Juror passivity would be reduced in three ways. First, jurors would be allowed to take notes during trial.<sup>102</sup> Importantly, those notes could be used during deliberations.<sup>103</sup> Second, jurors would be allowed to question witnesses.<sup>104</sup> As will be discussed *infra* part III.C.2, this is one of the more controversial reform proposals; however, restrictions could be put into place that would alleviate many of the concerns brought about by such a procedure.<sup>105</sup> Finally, jurors should be allowed to discuss the case among themselves

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96. *Id.* at 14.

97. *Id.*

98. *Id.* at 16.

99. *Id.* at 24.

100. *Id.* at 24, 28.

101. See generally *infra* Part III.C.

102. See Tom M. Dees III, *Juries: On the Verge of Extinction? A Discussion of Jury Reform*, 54 SMU L. REV. 1755, 1773 (2001).

103. See *id.*

104. See Valerie P. Hans, *U.S. Jury Reform: The Active Jury and the Adversarial Ideal*, 21 ST. LOUIS U. PUB. L. REV. 85, 90-91 (2002).

105. See Dann, *supra* note 22, at 1254-55.

during the course of the trial.<sup>106</sup> These reforms, while not perfect, would go a long way towards improving jurors' abilities to comprehend complex cases and to decide them correctly.

### III. ANALYSIS

*I am by no means enamored of jury trials, at least in civil cases, but it is certainly inconsistent to trust them so reverently as we do, and still to surround them with restrictions which if they have any rational validity whatever, depend upon distrust.<sup>107</sup>*

The proposals as set forth are not flawless. While each has the potential to increase the predictability and improve the accuracy of the jury trial, the faults that exist must be considered. This section will address the strengths and shortcomings of the two approaches to reform the current patent litigation process rejected by this Note.

#### A. THE BLUE RIBBON PANEL: SETTING THE BAR HIGHER

In response to the perceived problem of juror incompetence, commentators have proposed the use of special, or expert, juries in patent disputes.<sup>108</sup> Special juries would have several advantages over the current lay jury model.<sup>109</sup> Among the advantages noted by Fisher, the most notable is the increased likelihood that jurors will be able to comprehend the issues in the case.<sup>110</sup> In addition, given the standard for determining patent validity, it is likely that jurors familiar with the technological arts at issue in the litigation would be better equipped to make a rational decision.<sup>111</sup> Not only would a special jury be a useful tool in patent litigation, there is also historical support for its use in other contexts.<sup>112</sup> Most commonly the special jury was used in disputes between

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106. *See id.* at 1262.

107. Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, in *LECTURES ON LEGAL TOPICS: 1921-1922*, at 89, 101 (James N. Rosenberg et al. eds., 1926).

108. *See supra* note 90 and accompanying text.

109. *See Fisher, supra* note 4, at 80; Stockwell, *supra* note 4, at 682. Moreover, it is likely that this increased level of juror comprehension would lead to more predictable and more stable decisions, thus eliminating one of the largest perceived problems. *See supra* note 5 and accompanying text.

110. Fisher, *supra* note 4, at 90.

111. *See supra* note 92 and accompanying text.

112. *See Oldham, supra* note 90, at 139 and accompanying text. Among the special juries that have been used, historically, is the trial *de medietate linguae*, which consisted of a jury of half foreigners.

merchants.<sup>113</sup> In those cases the jury was composed of merchants who would decide the case.<sup>114</sup>

It is clear that a special jury composed of engineers or other “experts” would have the tendency to improve the accuracy of the fact-finding ability of the jury. Moreover, it is likely that, given the historical support for special juries, such a practice would probably survive a constitutional attack.<sup>115</sup> Even though there exists historical support for the use of special juries in certain cases, that alone is not reason enough to revive the tradition.<sup>116</sup> Several problems exist that call the feasibility of such a system into question. Moreover, other reforms exist that might mitigate the necessity of such a drastic step.<sup>117</sup>

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113. See Fisher, *supra* note 4, at 18 (noting that the practice of using a jury in mercantile disputes “goes back at least to the fourteenth century”).

114. *Id.*

115. *But see* Fisher, *supra* note 4, at 19-23 (describing the *possibility* that a special jury might violate the Equal Protection Clause since the practice might not comport with the “fair cross section” requirement that jury selection requires).

116. Indeed, while the historical context is very important—as this Note strenuously maintains—it is but one factor in the analysis. While study of the historical antecedents of various institutions allows for a more informed approach to reforming the current versions of those institutions, it also must be remembered that many institutions have passed on into the dustbin of history for a reason. For example, until relatively recently, citizens of some states could not serve on a jury unless they met certain property requirements. While the belief was that such qualifications resulted in a jury composed of individuals less prone to bribery, few would argue that such a system should be revived. See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867 (1994).

117. See discussion *infra* Section III.C. Indeed, it is the position of this Note that such a step is not as urgent as others suggest. Fisher argues that the use of a lay jury in certain patent cases may be *unconstitutional*—a violation of due process. See Fisher, *supra* note 4, at 13-16. This characterization of the jury is unreasonable and most unfortunate. As Fisher points out, the Third Circuit did hold that “[d]ue process requires that jurors be sane and competent during trial.” *Id.* at 5. It has also been held that “due process is violated by a jury incapable of rendering a rational verdict.” *Id.* at 13. Fisher then takes the leap to argue that “if a non-expert jury is utterly incapable of comprehending the technology in a patent case, can its decision-making be any more rational than that of an insane jury? The answer must surely be no.” *Id.* at 47.

With regard to the analogy between a potentially insane juror experiencing delusions and paranoid schizophrenia, see *Sullivan v. Fogg*, 613 F.2d 465, 466 (2d Cir. 1980), and a lay jury deciding a complex case, the error should be readily apparent. In the former case, the fear is that the particular juror had lost all ability to reason; in the latter instance, jurors retain all of their

While using a special jury may have the desired effect of improving the accuracy of the fact-finding process, the practice of convening expert juries in complex patent cases raises significant problems. Even if one believes that, in principle, special juries are a good thing, one still must face the realities of the jury selection process. Implementation of a special jury in real cases and on the scale envisioned would create an administrative mess. For example, Fisher proposes that the courts develop separate jury wheels, "one for ordinary jurors, and one for each type of technology likely to arise in patent litigation."<sup>118</sup> Moreover, in cases involving multiple specialties, Fisher proposes that the court "require each juror to have a background in at least one discipline related to the patents in dispute."<sup>119</sup> The problem with such a solution is that it is simply unworkable. Not only would it be difficult to target all of those with special expertise, label them, place them into categories, and then wait until a lawsuit springs up, but it would also be difficult to keep such individuals on a jury. It must not be forgotten that ultimately, it is the attorneys who play the most significant role in jury selection. Considering the current practice of weeding out more intelligent jurors, it is difficult to see how this kind of scheme would work.

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faculties; however, they lack a technical education. This Note is in agreement with the Ninth Circuit in that the onus for ensuring juror comprehension should fall onto the backs of the attorneys. See *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411, 427 (9th Cir. 1979). The court further noted that "[w]hether a case is tried to a jury or to a judge, the task of the attorney remains the same. The attorney must organize and assemble a complex mass of information into a form which is understandable to the uninitiated." *Id.*

Courts in other circuits have also followed the Ninth Circuit lead. Indeed, a district court in the Sixth Circuit criticized the rationale of the Third Circuit. In *Kian v. Mirro Aluminum Co.*, the court noted:

Those who claim that juries cannot understand complex civil cases improperly demean the intelligence of the citizens of this nation, and do not understand the jury system . . . .

Those who would seek an "elitist" [*sic*] approach to the use of the jury trial would undermine one of the most fundamental of our rights. There is no complexity exception to a jury trial that would authorize the denial of a jury when it is otherwise available under the Seventh Amendment.

*Kian v. Mirro Aluminum Co.*, 88 F.R.D. 351, 355 (E.D. Mich. 1980).

118. Fisher, *supra* note 4, at 67.

119. *Id.* at 71.

## B. SPECIALIZATION OF THE COURTS

The second major type of reform that has been proposed is *potentially* the most drastic depending on how it is implemented. If the judiciary is specialized and the civil jury is eliminated in such courtrooms, unique constitutional challenges will follow. If, on the other hand, the judiciary is specialized without curtailing the Seventh Amendment right to a civil trial by jury, the constitutional questions vanish.

Specialization of the district courts would have several advantages over the current scheme. Indeed, the advantages of specialized courts have led to widespread acceptance of them abroad.<sup>120</sup> For example, in England patent trials take place in the Patents Court, a division of the Chancery Division.<sup>121</sup> In 1990 Parliament created the Patents County Court—"a small claimants' court, suitable for disputes between small and medium-sized entities."<sup>122</sup> Japan has also begun to create specialized courts for patent infringement cases.<sup>123</sup> Even the United States has experimented with specialization by way of the United States Court of Appeals for the Federal Circuit, which was created in 1982.<sup>124</sup> That court was given "exclusive jurisdiction over [Patent and Trademark Office] *appeals* for both patent denials and interference proceedings."<sup>125</sup> Thus far, the Federal Circuit has been effective at not only delineating "patent law doctrine", but it has become the "de facto 'court of last resort' for patent cases."<sup>126</sup> Consonant with its purpose, in the relatively short period of time since its inception, the Federal Circuit has "already provided some degree of uniformity and predictability to the area of intellectual property law."<sup>127</sup>

While specialization of the judiciary poses no constitutional problems in and of itself,<sup>128</sup> problems arise when the

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120. See Pegram, *supra* note 88, at 773-80.

121. *Id.* at 774.

122. *Id.*

123. See *id.* at 776-77.

124. See Federal Courts Improvement Act of 1982, Pub. L. No 97-164, 96 Stat. 25 (1982), codified as 28 U.S.C. § 41 (2000).

125. Kondo, *supra* note 89, at 15 (emphasis added).

126. *Id.* at 20.

127. *Id.* at 20.

128. See U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish") (emphasis added).

specialization includes eliminating the use of the civil jury in violation of the Seventh Amendment.<sup>129</sup> To pass constitutional muster, any reform proposal would have to allow litigants the opportunity to have cases heard by a jury if that would have been allowed at common law.<sup>130</sup> Thus, the challenges created by the use of a lay jury remain.

### C. REFORMING THE JURY: REDUCING JUROR PASSIVITY AS A WAY OF IMPROVING JUROR ACCURACY

As has been stated, those seeking to transform jury trials in the patent litigation context generally fall into one of two potentially overlapping camps. The first camp consists of those who argue that the characteristics of the jury are to blame for the ills observed.<sup>131</sup> They claim that the jurors comprising the jury are uneducated and unable to comprehend the subject matter of the patent disputes before them. The second camp has challenged Congress to create specialty courts where judges would have similar qualifications to those currently practicing patent law.<sup>132</sup> Within this proposal there are two possibilities—the specialty court could either sit with a jury when one is requested or it could sit by itself. As argued earlier, the latter is an unacceptable abridgment of the Seventh Amendment.<sup>133</sup> One commonality that exists between both camps is that they both seek to improve the accuracy and efficacy of the patent litigation process by use of individuals specifically trained in the technical sciences. Of those advocating reform of the patent litigation process specifically (as opposed to complex litigation generally), few have taken the approach advocated by this Note.

So long as the jury remains in use in patent litigations, problems will remain with regard to juror comprehension of complex facts and the law not because of the intelligence or educational stature of jurors, but because of the *procedures*

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129. U.S. CONST. amend. VII; *cf.* United States v. Wonson, 28 F. Cas. 745, 750 (C.C. Mass. 1812) (No. 16,750) (holding that the facts tried by a jury are never re-examined, unless a new trial is granted by the trial court or the judgment of the trial court is reversed by a writ of error).

130. U.S. CONST. amend VII; *see Wonson*, 28 F. Cas. at 750; *see also supra* section II.B.

131. *See infra* section II.C.1.

132. *See infra* section II.C.2.

133. *See supra* notes 128-130 and accompanying text.

surrounding the jury trial.<sup>134</sup> Even if the reforms described *supra* at section II.C.1 and section II.C.2 were carried out, problems would remain because of the restrictive procedures that envelop the jury trial. This Note contends that the procedural barriers have been put into place because of one assumption, which is that a neutral decision maker must be a passive one.<sup>135</sup> Jurors today are relegated to the role of observer. They “are not permitted to ask questions and in some jurisdictions are not even allowed to take notes. They are instructed to refrain from speaking with one another and with outsiders for the duration of the trial. They are instructed to hold off reaching a conclusion until the final deliberations.”<sup>136</sup> This Note advocates a tempered return to the inquisitorial, active jury model as a way of improving the ability of the jury to perform its fact-finding role and increasing its level of comprehension and understanding of the issues in patent cases.<sup>137</sup> While numerous lawyers and judges will reject such proposals out of a “fear of losing total control over the trial and fact-finding processes”, such measures are essential to the viability of the jury trial process.<sup>138</sup>

### 1. Juror Note-Taking

One of the easiest ways of boosting juror comprehension and understanding of the evidence in patent cases would be to allow jurors to take notes during the trial and to use those notes during deliberations.<sup>139</sup> While the reform is not without detractors,<sup>140</sup> by and large, there is a growing consensus that

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134. See Arizona Supreme Court Committee on More Effective Use of Juries, *Jurors: The Power of 12* 1 at ¶ 2 (November 1994) [hereinafter *Jurors: The Power of 12*]; see generally Dees, *supra* note 102 (discussing the Arizona jury reform proposals).

135. See Hans, *supra* note 104, at 87 (noting that adversarial system is premised on the assumption that a neutral arbitrator must be passive).

136. *Id.* at 89-90.

137. See discussion *supra* at section II.A (describing the active nature of the early petit jury).

138. Dann, *supra* note 22, at 1236-37.

139. See *Jurors: Power of 12*, *supra* note 134, at 83; but cf. Dees, *supra* note 102, at 1773 (discussing criticism of the proposal to allow jurors to take notes during trial).

140. Dees provides a list of ten criticisms of juror note taking:

[(1)] jurors who take notes may participate more effectively in jury deliberations than those who do not; [(2)] jurors may miss important testimony because they are busy writing down every detail; [(3)] jurors may be less attentive to witnesses' behavior and demeanor,

such a reform would have significant benefits.<sup>141</sup> Both the Arizona Supreme Court Committee on More Effective Use of Juries and the Supreme Court of Texas Jury Task Force have found that the benefits outweigh any disadvantages that may exist.<sup>142</sup> While allowing jurors to take notes during trial is a small and, arguably, non-controversial reform, it would go a long way towards rectifying the problem of reduced juror retention of information and material presented.<sup>143</sup> Allowing juror note-taking is an important step, but in isolation, it can do little to improve the ability of jurors to *understand* the material presented at trial.

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which are important characteristics to note when assessing credibility of witnesses; [(4)] jurors may take notes of inadmissible or stricken material and accentuate irrelevant things while ignoring more substantial issues; [(5)] jurors may attach significance to their notes simply because they are in writing; [(6)] researchers have found a correlation between the best note takers and those who dominate deliberation, which is dangerous because several jurors could come to rely upon one juror's notes, which may include irrelevant or stricken material, or be lacking in significant detail; [(7)] a dishonest juror could sway the verdict by falsifying notes; [(8)] jurors who take notes may be listened to more carefully during deliberations simply because they have what purports to be a summary of the testimony and if inaccurate or selective, this can be dangerous; [(9)] notes, because they are in writing, can fall into the wrong hands and make public a juror's most private thoughts; [and (10)] note taking can encourage jurors to write books and such a juror might try to influence the course of deliberations and the outcome of the case to make for a better story to tell.

Dees, *supra* note 102, at 1773 (citing Supreme Court of Texas-Jury Reform Task Force, Final Report (Sep. 8, 1997), available at <http://www.supreme.courts.state.tx.us/jurytaskforce/index.htm>).

141. See Dees, *supra* note 102, at 1773-74; Dann, *supra* note 22, at 1251-52; *Jurors: Power of 12*, *supra* note 134, at 83. The Arizona Supreme Court Committee on More Effective Use of Juries noted that: "Experience has shown that the obvious benefits of the practice . . . outweigh any supposed drawbacks. . . . Jurors should be able to review their own notes during any recess." *Id.* The authors of the study discovered that the practice resulted in increased attentiveness of the jurors at trial. *Id.* The practice also improved juror memory recollection, reduced the frequency of and need for "court reporter readbacks of testimony" during deliberations, and left jurors with higher morale and increased satisfaction. *Id.* Additionally, in Arizona, where juror note taking is commonplace, "[n]o material disadvantages have surfaced." *Id.* at 83-84.

142. *Jurors: Power of 12*, *supra* note 134, at 83-84; Dees, *supra* note 102, at 1774 (noting that the Supreme Court of Texas Jury Task Force concluded that the prohibition on juror note taking was based on faulty assumptions).

143. See *supra* discussion at II.C.3 (explaining three ways juror passivity can be reduced, including by allowing jurors to take notes during trial).

## 2. Allowing Jurors to Question Witnesses

One way to improve the ability of jurors to comprehend the evidence at trial would be to allow them to ask questions during the course of the proceedings.<sup>144</sup> This reform is perhaps the most controversial and indeed, it involves a significant departure from the current adversarial process towards “its inquisitorial cousin.”<sup>145</sup> Despite the drastic nature of this reform, some jurisdictions have already put it into place.<sup>146</sup> Indeed, the United States military has in place a system whereby members:<sup>147</sup>

[M]ay request to call or recall witnesses, interrogate witnesses, take notes during trial and use them in the deliberation room, request during deliberations that the court-martial be reopened and portions of the record be read to them or additional evidence introduced, and take written instructions with them into the deliberation room.<sup>148</sup>

In the non-military federal context, such a reform would be easily implemented, procedurally, since a plausible reading of the Federal Rules of Evidence appears to allow individual judges to permit the practice.<sup>149</sup> In fact, several circuits have “uniformly concluded that juror questioning is a permissible practice, the allowance of which is within a judge’s discretion.”<sup>150</sup> Despite that uniformity, those same courts have

144. See Hans, *supra* note 104, at 90-91; Dann, *supra* note 22, at 1253-55; Dees, *supra* note 102, at 1774-78.

145. See Hans, *supra* note 104, at 90.

146. Of states that have begun the process of jury reform, while Texas Jury Task Force recommended that jurors *not* be allowed to ask questions, Arizona, California, Colorado, and the District of Columbia all either endorse or are considering allowing juror questioning in civil trials. Dees, *supra* note 102, at 1778. Additionally, the United States Military also allows such questioning. See generally David A. Anderson, *Let Jurors Talk: Authorizing Pre-Deliberation Discussion of the Evidence During Trial*, 174 MIL. L. REV. 92 (2002).

147. Members are the military equivalent to jurors. Anderson, *supra* note 146, at 92.

148. *Id.* at 92-93.

149. FED. R. EVID. 611(a) (allowing the judge or magistrate to “exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment”). Additionally, the Fifth Circuit has held that “[t]here is nothing improper about the practice of allowing occasional questions from jurors to be asked of witnesses. If a juror is unclear as to a point in the proof, it makes good common sense to allow a question to be asked about it.” *United States v. Callahan*, 588 F.2d 1078, 1086 (5th Cir. 1979).

150. *United States v. Ajmal*, 67 F.3d 12, 14 (2d Cir.1995).

clearly expressed their disapproval of the procedure.<sup>151</sup>

There are in essence three different approaches for enabling juror questioning of witnesses. This Note advocates adoption of either one of two.<sup>152</sup> The first method, which is not advocated by this Note, allows jurors to question witnesses orally during the course of the trial.<sup>153</sup> The second mode of questioning would have jurors submit anonymous, written questions to the court.<sup>154</sup> After submission the “jury and witness leave the courtroom”, and the judge rules on the admissibility of the questions.<sup>155</sup> The attorneys would also have the opportunity to object.<sup>156</sup> Assuming the questions are admissible, the judge would ask the questions of the witness and the attorneys would then be able to “ask follow-up questions limited to the subject matter of the jurors’ questions.”<sup>157</sup> Finally, the third method would have the jurors submit written questions to the court only to be passed on to the attorneys who could do with the question as they wish.<sup>158</sup>

Of course, the ability of the jurors to ask questions would not be unlimited. Indeed, two limitations have already been discussed. Namely that the questions must be in writing and are then dealt with by the attorneys and judge outside of the jury’s presence. Additional safeguards could also be

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151. *Id.* (noting that the general consensus is that jurors should only be allowed to question witnesses in extraordinary circumstances). One argument against the practice of juror questioning is that “[w]hen acting as inquisitors, jurors can find themselves removed from their appropriate role as neutral fact-finders.” *Id.* While the elimination of juror neutrality is a real concern, one should not conflate participation in the fact-finding process with partiality—a neutral juror need not be a passive one. *See supra* note 135 and accompanying text.

152. *See Dees, supra* note 102, at 1774-75.

153. One serious problem that can arise when jurors are allowed to ask questions orally, without being first filtered through the court is that counsel will be unable to object to any of the questions asked “for fear of antagonizing, alienating or embarrassing a juror.” *United States v. Hernandez*, 176 F.3d 719, 724 (3d Cir.1999). Given that alternative approaches exist, this Note argues that oral questioning by jurors would not be the appropriate solution. The serious consequences that can accompany oral questioning by jurors can be mitigated, perhaps even eliminated, by use of written questions, filtered through the attorneys and judge.

154. *See Dees, supra* note 102, at 1775.

155. *Id.* (quoting Judge Ken Curry & M. Beth Krugler, *The Sound of Silence: Are Silent Juries the Best Juries?*, 62 *Tex. B.J.* 441, 442 (May 1999)).

156. *Id.*

157. *Id.* (quoting Curry & Krugler, *supra* note 155, at 442).

158. *Id.*

implemented, such as a precautionary warning to the jurors that they “not attach any significance to the failure of the judge to ask a requested question since rules of law may prevent some questions from being asked.”<sup>159</sup>

Since the major concern of those seeking to reform the way in which patent cases are tried is the ability of the jury to understand the evidence and subject matter before them, allowing the jurors to ask questions should be a welcome proposal. Although many legal practitioners are hostile to the idea of allowing juror questioning, so long as jurors are *not* allowed to engage in the practice, the effectiveness of all other reforms is placed in jeopardy. The benefits that would accrue by implementation of this reform outweigh the risks.<sup>160</sup> Moreover, such a practice would take far fewer resources than would the traditional reforms proposed for patent cases.<sup>161</sup> The jury developed because of its unique ability to discover the facts of the case; the inability of jurors to actively participate in the presentation of evidence obstructs the one task the jury was designed to perform—discover truth.<sup>162</sup>

### 3. Pre-Deliberation Discussion of the Evidence: Losing the Requirement that Jurors Not Discuss the Case Amongst Themselves

One of the hallmarks of the traditional passive juror model is the admonition to jurors forbidding them from discussing the case or evidence amongst themselves until deliberations have begun—after *all* the evidence has been submitted.<sup>163</sup> The

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159. Dann, *supra* note 22, at 1255. The State of Arizona’s Supreme Court Committee on the More Effective Use of Juries proposed that jurors be:

[A]llowed to ask question during trials of civil and criminal cases, subject to careful judicial supervision. At a minimum the safeguards should include: telling the jurors in advance of trial of the procedures to be followed; having questions put in writing and left unsigned; discussing the question with the attorneys and allowing them to object to the question out of the jury’s presence; the asking of the question of the witness by the judge; and telling the jurors that the law may prevent some of their questions from being asked.

*Jurors: Power of 12, supra* note 134, at 90.

160. Dann, *supra* note 22, at 1253.

161. See discussion and notes at section III.A (indeed, even the creation of new specialty courts would require the expenditure of immense resources).

162. See discussion and notes at section II.A.

163. See *Jurors: The Power of 12, supra* note 134, at 96; Dann, *supra* note 22, at 1262; Dees, *supra* note 102, at 1782-84; Anderson, *supra* note 146, at 94-95.

controversy created by this reform proposal rivals allowing juror questioning of witnesses. But if a goal of reforming the trial process is accuracy in fact-finding, then this reform is essential. The traditional rule is grounded in a view of the average juror that is simply not based in reality.<sup>164</sup> Jurors do not passively absorb information and are not “accurate encoder[s] of information [that] suspend[] judgment until the end of the case.”<sup>165</sup> Recognizing this, the Arizona Supreme Court Committee on the More Effective Use of Juries proposed that jurors “be instructed that they are permitted to discuss the evidence among themselves in the jury room during recesses from trial, when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence.”<sup>166</sup> It is a sensible reform with profound consequences.

The benefits of such a reform in the patent litigation context are manifest. Allowing jurors to discuss evidence during the course of the trial will enhance “juror understanding of the evidence”, and questions that might be forgotten by the time deliberations begin can be asked immediately.<sup>167</sup> The primary criticisms of this proposal are not without merit, however. There is a legitimate concern that allowing jurors to discuss the case during the trial without having heard all of the evidence “(1) would cause jurors to make premature determinations about a case; (2) would jeopardize the jury’s impartiality; [and] (3) would cause extra-legal factors to cloud decision-making.”<sup>168</sup> Fortunately, the fears of the critics have not materialized in those jurisdictions that have begun to allow the practice. Thus far, studies have shown “no overall effects of trial discussions” on the timing of when jurors begin to make

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164. See Dann, *supra* note 22, at 1263.

165. *Id.*

166. *Jurors: The Power of 12, supra* note 134, at 98.

167. Dann, *supra* note 22, at 1264; see also Dees, *supra* note 102, at 1782 (noting that not only can pre-deliberation discussion “lead to enhanced understanding of the case,” but it “can lead to more thoughtful consideration of the case; . . . reduce juror stress; and . . . result in greater efficiency”).

168. Dees, *supra* note 102, at 1782. Anderson notes similar criticism but adds that another fear is that not only will jurors form opinions earlier on, but that subsequent to forming an opinion, jurors will “pay greater attention to evidence that confirms” their initial opinion. Anderson *supra* note 146, at 95 (citing *Commonwealth v. Kerpan*, 498 A.2d 829, 831 (Pa. 1985)). In addition, “[t]he quality of deliberations may decline as jurors become more familiar with each other’s views.” *Id.* at 95 (citing *JURY TRIAL INNOVATIONS* 139 (G. Thomas Munsterman et al. eds., 1997)).

up their minds.<sup>169</sup> Indeed, rather than make jurors more alike in terms of how they believe the case should turn out, allowing pre-deliberation discussions had the tendency to “encourage[] more vigorous debate.”<sup>170</sup> Additionally, the vast majority of judges who have “had actual experience with civil jury trials in which pre-deliberation discussions were permitted”, reported that the practice was a “positive development”<sup>171</sup> and that pre-deliberation discussions should be permitted in civil cases.<sup>172</sup>

While countless other reform proposals exist that would have the potential to improve the ability of jurors to recall, analyze, and understand the information presented to them at trial, the three proposed—permitting juror note taking, allowing juror questioning of witnesses, and enabling jurors to discuss the evidence amongst themselves during the course of the trial—would do the most in the way of improving the ability of the jurors to perform their task.

#### IV. CONCLUSION

*If it had been as easy to remove the jury from the customs as from the laws of England, it would have perished under the Tudors; and the civil jury did in reality at that period save the liberties of England. . . . [T]he civil jury[] serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged and with the notion of right. If these two elements be removed, the love of independence becomes a mere destructive passion. . . .*

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*. . . I do not know whether the jury is useful to those who have lawsuits, but I am certain it is highly beneficial to those who judge them . . . .*<sup>173</sup>

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169. Hans, *supra* note 104, at 95-96. Additionally, Hans reports that “[j]udicial agreement with the jury verdicts was similar in trials where juries had or had not been permitted to participate in trial discussions.” *Id.*

170. *Id.* at 96. Additionally, juries that could engage in discussions about the case during the trial “reported more conflict and more difficulty reaching” a unanimous verdict than those juries that could not engage in such discussions. *Id.*

171. Anderson, *supra* note 146, at 112-13 (quoting Natasha K. Lakamp, *Deliberating Juror Predeliberation Discussions: Should California Follow the Arizona Model?*, 45 UCLA L. REV. 845, 871 (1998)).

172. Lakamp, *supra* note 171, at 871. In the study cited, 92.1% of the judges who responded to the survey (43.3%) favored allowing predeliberation discussions. *Id.*

173. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 284-85 (Alfred A. Knopf, Inc. 1994) (1835).

As an institution, the jury has weathered the storms of time and withstood the salvos which nearly all political institutions face. The petit jury developed in the 12th and 13th Centuries as a method of discovering truth.<sup>174</sup> Since that time the methodologies employed by the jury have undergone dramatic change, as have the purposes for which the jury is used. Yet, in America the jury has been elevated to a status not reached anywhere else on the globe. In the United States, the jury has two fundamental natures that any reforms must take into account—the judicial and the political.<sup>175</sup> From the time of the Navigation and Stamp Acts, the jury has taken on a *political* significance in this nation that it has not achieved elsewhere. That is why, even in the patent litigation context, it is so difficult to reform the system without maintaining the role of the jury. The institution is an omnipresent characteristic of our system, and thus far, the solutions that have garnered the most attention have been designed to improve upon, rather than eliminate the civil jury.

While blue ribbon panels and specialty courts have merits that have not gone unnoticed in this Note, it is this author's belief that those reforms are inadequate. While such reforms alone would no doubt improve the quality of the jury's fact-finding, problems would remain that undermine the ability of *any* jury to perform its job.<sup>176</sup> The passive juror model must be relegated to the dustbin of history. Not only does it ignore human nature, but it threatens to undermine the integrity of the judicial process. The law is, after all, administered by human beings. While those involved in the process may try their hardest, they can, and at times, do arrive at wrong conclusions. The purpose of this Note is to examine how the active juror model can be used to reform the patent litigation system. As Mark Twain noted, jurors are often criticized for their ignorance. The question to ask, then, is whether it is the jurors themselves or the procedures governing them that cause those in academia and in practice to view the jury so negatively.

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174. See *infra* section II.A.

175. DE TOCQUEVILLE, *supra* note 173, at 280.

176. See *infra* section III.A.