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## THE HISTORY OF THE SPECIAL (STRUCK) JURY IN THE UNITED STATES AND ITS RELATION TO VOIR DIRE PRACTICES, THE REASONABLE CROSS-SECTION REQUIREMENT, AND PEREMPTORY CHALLENGES

James Oldham\*

*In this Article, Professor Oldham provides a unique historical study of the special, or struck, jury in the United States. First, Professor Oldham discusses the influence of the 1730 English statute on eighteenth-century American law and reviews the procedures of several states in which the struck jury remains valid, in addition to the once-authorized procedures that states have since declared invalid. He also analyzes the relationship between the struck jury and peremptory challenges. Second, Professor Oldham analyzes the special qualifications of the jurors comprising special juries in the context of the "blue ribbon," or "high-class," jury, the jury of experts, and the juries for property condemnation and diking district assessment disputes. Third, he analyzes the relationship between the special jury and the reasonable cross-section requirement in light of constitutional limitations on peremptory challenges.*

*Professor Oldham argues that perhaps there still may be a place for special juries and that history justifies continued experimentation with*

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\* Professor of Law, Georgetown University Law Center, Washington, D.C. The first version of this paper was presented at the Conference on the Role of the Jury in a Democratic Society sponsored by the John M. Olin Program in Law and Economics, Georgetown University Law Center, October 1995. I wish to thank Jeffrey Abramson and Morris Arnold for thoughtful commentary. Also, for reading the paper in draft and for their valuable suggestions, I am grateful to John Langbein, Daniel Klorman, and the participants in the Legal History Colloquium at New York University Law School.

*jury composition, including the special jury. He concludes that formulas for selecting juries, especially those that are aimed at obtaining fair and intelligent verdicts, have achieved historical legitimacy and should be allowed a reasonable coexistence with the reasonable cross-section requirement.*

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## INTRODUCTION

In this Article, I explore the history of the special jury in the United States and relate it to two fundamental features of the institution of trial by jury. The first is what every schoolchild learns: No one who claims to be innocent can be sentenced to jail unless found guilty of wrongdoing by a jury of his or her peers. The second is the requirement that the pooled names of potential jurors used by the courts must comprise, as nearly as possible, a reasonable cross section of the community.<sup>1</sup> A requirement that a defendant's trial jury empanel a representative number of his or her peers (taken from a class that would represent a distinct constituent group in the community), instead of the peers merely being present in the jury pool, could link these two concepts. This additional step, although taken in the past and recently advocated by a few reformers, has no support in contemporary jury practices.

The "jury of peers" notion has an ancient lineage that still reverberates as a supposedly important part of every American's heritage. A recent opinion of United States District Judge Hutton of the Eastern District of Pennsylvania, disposing of a show cause order against a woman who failed to appear for jury service, illustrates the modern, nostalgic perception of this heritage. Judge Hutton wrote that "[t]he right to a trial by a jury of one's peers is one of the cornerstones of the American judicial system. It is a birthright cherished by generations of American citizens . . . ."<sup>2</sup> A 1968 Supreme Court discussion of the objectives of the framers of the federal and state constitutions similarly concluded that

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<sup>1</sup> This requirement is now a widespread feature of state and federal law. For a thoughtful and thorough discussion of this jurisprudential "sea change," see JEFFREY ABRAMSON, *WE, THE JURY* ch. 3 (1994).

<sup>2</sup> *In re Tiffany Green*, No. 96-0222, 1996 WL 660949, at \*1 (E.D. Pa. Nov. 13, 1996). Judge Hutton then quoted language from a 1918 Arizona case about "the blood and treasure it has cost to get and keep this birthright" and the "evils tyranny and the lust of power have visited upon the weak and helpless who were without its protecting aegis," after which he presented a remarkable one-page history of trial by jury across four thousand years. *Id.* at \*2-3 (citing *Preistly v. Arizona*, 171 P. 137, 138 (Ariz. 1918)).

“[p]roviding an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt, or overzealous prosecutor and against the compliant, biased, or eccentric judge.”<sup>3</sup> Consider also the 1995 conviction of former Congressman Walter R. Tucker III for extorting bribes while serving as Mayor of Compton, California.<sup>4</sup> According to news reports, Tucker wrote to California Governor Pete Wilson and to House Speaker Newt Gingrich, stating in his letter that he “was not judged by a jury of [his] peers and . . . did not receive a just verdict.”<sup>5</sup>

What did former Congressman Tucker mean? Who were the “peers” of whom he claimed to be deprived?<sup>6</sup> According to Henry Toulmin, United States Judge for the Mississippi Territory and author of an 1807 book called *The Magistrate’s Assistant*, “[t]he fundamental principle of this institution [trial by jury] is, that a man should be tried by his peers or equals, a commoner by commoners and a nobleman by nobles . . . .”<sup>7</sup> This proposition, however, is, and for the most part always has been, a fairy tale. Historically, we boasted about juries of our peers while excluding half the population—women—from jury service.<sup>8</sup> We also followed practices that kept racial and other minorities off juries or that left them drastically underrepresented. In the not so distant past, the United

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<sup>3</sup> *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

<sup>4</sup> See Kathryn Wexler & William Claiborne, *Rep. Tucker Convicted of Extortion*, WASH. POST, Dec. 9, 1995, at A1.

<sup>5</sup> Greg Pierce, *Inside Politics: Tucker Resigns*, WASH. TIMES, Dec. 14, 1995, at A6. The news story was distributed by United Press International on December 12, 1995. See *California Rep. Tucker Resigns*, United Press International, Dec. 12, 1995, available in LEXIS, News Library, ARCNWS File.

<sup>6</sup> See *Tucker*, City News Service, Dec. 12, 1995, available in LEXIS, News Library, ARCNWS File. Former Congressman Tucker possibly was alluding to the racial composition of the jury (which consisted of “seven whites, four Asian-Americans and one African-American”), suggesting that, as an African-American, his race was unfairly underrepresented. *Id.*

<sup>7</sup> HARRY TOULMIN, *THE MAGISTRATE’S ASSISTANT* 140 (Natchez, Samuel Terrell 1807); see also Lewis H. LaRue, *A Jury of One’s Peers*, 33 WASH. & LEE L. REV. 841 (1976).

<sup>8</sup> In *Strauder v. West Virginia*, 100 U.S. 303 (1880), Justice Strong, writing the majority opinion, stated: “The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.” *Id.* at 308. In *Ex parte Virginia*, 100 U.S. 339 (1879), dissenting Justice Field remarked that “no one will contend that equal protection to women, to children, to the aged, to aliens, can only be secured by allowing persons of the class to which they belong to act as jurors in cases affecting their interests.” *Id.* at 367 (Field, J., dissenting); see also LaRue, *supra* note 7, at 846-47.

States also maintained requirements of property ownership that excluded the poorest segments of the economic spectrum of society.<sup>9</sup>

Both the jury of peers concept and the reasonable cross-section requirement relate to jury composition procedures. They do so, however, with sharply different objectives. As Judge Toulmin suggested, the jury of peers notion is aimed at giving the defendant a fair trial by placing on his jury at least a representative number of people that share the defendant's cultural, linguistic, ethnic, or possibly socio-economic circumstances.<sup>10</sup> Historically, this idea gave rise to the "mixed," or "half-and-half," jury—the jury *de medietate linguae* (literally, "of the half-tongue")—to which foreign defendants would have been entitled. Half of the jury would be citizens of the state where the case was tried, while the other half would be foreigners.<sup>11</sup> The notion was not merely to facilitate communication, but also, as expressed by a defendant in a seventeenth-century English case, to secure jurors "of my own country, that may be able to know something how I have lived hitherto."<sup>12</sup> Occasion-

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<sup>9</sup> In *People v. Ruppert*, 279 N.Y.S.2d 895 (Westchester County Ct. 1967), the court upheld a New York statute that stated that jurors must own at least 250 dollars worth of real or personal property. According to the court:

It does not seem unreasonable in our "free society" to have a minimal ownership in something real or personal to invest a person with the privilege of performing a vital public function, such as being a member of the Grand Jury or Trial Jury, to whom the free rights of individuals, as well as great public interests are committed for resolution in the respective spheres granted to these bodies by custom and statute.

*Id.* at 989-99. The New York Supreme Court reached the same result in *People v. Cohen*, 283 N.Y.S.2d 817 (Sup. Ct. 1967). The *Cohen* court quoted an earlier opinion by United States District Judge Medina that called a challenge to the property qualification under the Fifth and Sixth Amendments "frivolous." *Id.* at 824 (quoting *United States v. Foster*, 83 F. Supp. 197, 207 (1949)).

<sup>10</sup> See TOULMIN, *supra* note 7, at 140.

<sup>11</sup> For a thoughtful analytical treatment of the "half-and-half" jury, see MARIANNE CONSTABLE, *THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE* (1994). For good reviews of eighteenth- and nineteenth-century applications of the procedure in American cases, see LaRue, *supra* note 7, at 850-63; Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and a Proposal for Change*, 74 B.U. L. REV. 777, 783-89 (1994); see also Hiroshi Fukurai & Darryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the Jury De Medietate Linguae*, 4 VA. J. SOC. POL'Y & L. 645 (1997); Daniel W. Van Ness, *Preserving a Community Voice: The Case for Half-and-Half Juries in Racially-Charged Criminal Cases*, 28 J. MARSHALL L. REV. 1 (1994).

<sup>12</sup> *Rex v. Gascoigne*, 7 State Trials 959, 963 (K.B. 1680). According to LaRue, Justice Field understood the jury *de medietate* as a mode of trial made available in

al voices recently have echoed this idea by calling for racial or ethnic quotas for certain types of juries.<sup>13</sup>

The reasonable cross-section requirement, by contrast, is designed to ensure that members of all significant, or "cognizable," segments of the community have the opportunity to be jurors.<sup>14</sup> This egalitarian requirement pulls strongly against any procedure or tradition that would permit the formation of juries from lists of persons with special qualifications. One well-known example of such a jury with special qualifications is the so-called "blue ribbon" jury, that is, the "high-class" jury.<sup>15</sup> Another historical example is the jury of experts, most notably the merchant juries that were instrumental in absorbing commercial practices into common law.<sup>16</sup> Both of these examples fall within the meaning of the "special jury" as used and understood in England and in the United States for several centuries.<sup>17</sup>

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England for an alien "probably as much because of the difference of language and customs between him and Englishmen, and the greater probability of his defense being more fully understood, as because it would be heard in a more friendly spirit by jurors of his own country and language." LaRue, *supra* note 7, at 847 (quoting *Ex parte Virginia*, 100 U.S. 339, 369 (1879) (Field, J., dissenting)). For an elaboration of the several rationales supporting the jury *de medietate*, see CONSTABLE, *supra* note 11, ch. 6; LaRue, *supra* note 7, at 852-63; Van Ness, *supra* note 11, at 37-39.

<sup>13</sup> See Fukurai & Davies, *supra* note 11; Van Ness, *supra* note 11. These articles make the explicit argument for adapting the historical *de medietate* practice to modern trials that promise to be racially charged. Others argue for racial quotas in order to give reality to the "jury of peers" and thereby to secure a fair trial. See Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L. J. 704 (1995); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985); Diane Potash, *Mandatory Inclusion of Racial Minorities on Jury Panels*, 3 BLACK L. J. 80 (1973); Note, *The Case for Black Juries*, 79 YALE L. J. 531 (1970); see also CONSTABLE, *supra* note 11, at 41-48. Ramirez uses the history of the mixed jury to argue for what she terms "affirmative peremptories." Ramirez, *supra* note 11, at 806-17; see also *infra* notes 255-64 and accompanying text.

<sup>14</sup> See *infra* note 269 and accompanying text.

<sup>15</sup> See *infra* Part II.A.

<sup>16</sup> The best-known example of effective use of merchant juries is that of Lord Mansfield, Chief Justice of the Court of King's Bench of England from 1756 to 1788. For explanation and discussion, see I JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY* 93-99 (1992).

<sup>17</sup> In earlier articles, I have explored in detail the history of the special jury in England. In these works, I gave summary descriptions of the special jury experience in the United States and cited representative sources that have given limited attention to the topic. See James Oldham, *Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 137, 138 n.6, 210 n.453 (1983) [hereinafter Oldham, *Origins*]; James Oldham, *Special Juries in England: Nineteenth Century Usage and Reform*, 8 J. LEGAL HIST. 148, 160-61 (1987) [hereinafter Oldham, *Special Juries*]. Because the American special jury built directly upon the English experience, the history of the English special jury is essential

The idea of drawing exclusive special juries from specialized lists seems to be anachronistic today. Elite special juries surely are antithetical to the hard-fought, long-delayed goal of opening up jury service to everyone. Having eliminated the unsavory exclusions of the past, how can there remain a place in modern American society for an exclusive special jury?

I argue that there is still such a place—that our history justifies continued experimentation with jury composition, including the special jury. However desirable the reasonable cross-section requirement is as a means of keeping an increasingly stratified people personally involved in the business of democracy, the requirement contributes little or nothing to other goals, such as coping effectively with jury trial of complex cases, or striving for fairness to litigating parties; yet the latter goal—picking juries that will be fair to the parties—has long been central to the jury selection process, especially as embodied in peremptory challenge and voir dire practices. The Supreme Court has outlawed the use of peremptory challenges to eliminate potential jurors on the basis of race or gender as improperly discriminatory and as inconsistent with the reasonable cross-section requirement;<sup>18</sup> however, voir dire screening, including the use of nondiscriminatory peremptories, continues to be the principal method of ferreting out undesirable jurors.

The voir dire process brings into view another prominent feature of the special jury. Historically, the term “special jury” has had two main connotations—the jury comprised of jurors with special qualifications, as discussed above, and the jury formed by a special procedure involving the presentation of a large panel of potential jurors to the parties who then reduce the panel to a specified smaller number by taking turns striking names off the list. When this procedure is used, the resulting jury usually is referred to as a “struck jury.” Legal literature and case law often have used this expression interchangeably with “special jury.”<sup>19</sup>

In England, the special jury is now extinct. In the United States, it survives in about a dozen states, and in most of these states, it persists solely as a “struck jury” formation procedure.<sup>20</sup> For reasons later explained, this procedure often is viewed as being fairer to criminal defendants than is the peremptory challenge—the more customary device

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to an understanding of the American patterns.

<sup>18</sup> See *infra* notes 270-78 and accompanying text.

<sup>19</sup> The first significant legislative treatment of the special jury in England was in 1730. The legislature described such a procedure for jury formation, saying nothing about who were to be the jurors. See *infra* notes 23-28 and accompanying text.

<sup>20</sup> See *infra* Part I.A.

designed to protect criminal defendants in jury selection.

The other goal mentioned above—coping effectively with jury trial of complex cases—encourages the use of a jury of experts, the modern analogue of the merchant jury. Here, too, recent voices have called for the revival or extension of this type of special jury.<sup>21</sup> In actual practice, Delaware is the only state where this occurs, as I will later show.<sup>22</sup>

Part I of this Article discusses the history and current validity of the struck jury in both civil and criminal cases and deals with the relation between struck jury procedures and peremptory challenges. Part II explores the history and current validity of special juries in which jurors have special qualifications. Part III comments on the relation between the special jury and the reasonable cross-section requirement, especially as reflected in recent Supreme Court cases and other federal cases dealing with peremptory challenges based solely on “protected group” characteristics such as race and sex.

## I. THE STRUCK JURY

It is helpful at the outset to understand the relationship between “struck jury” procedures and the jury composed of jurors with special qualifications. Usually there is no official or formal connection. Eighteenth-century American statutes authorizing the special jury typically approved and set out a struck jury procedure, but said nothing about empaneling jurors of special qualities or characteristics. Most of the American statutes followed the 1730 English statute.<sup>23</sup> The English statute, after noting that some doubt had arisen about the power of the central courts “to appoint Juries to be struck” before the appropriate officers in the several courts, confirmed that such power existed and provided that, on motion by any party in any civil case or in the prosecution of any misdemeanor, juries could be struck “in such manner as special juries have been, and are usually struck in such courts respectively upon trials at bar had in the said courts, which said jury so struck as aforesaid, shall be the jury returned for the trial of the said issue.”<sup>24</sup> The statute excluded trials of capital offenses (felonies) in order to preserve defendants’ peremptory challenges.<sup>25</sup>

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<sup>21</sup> See Rita Sutton, *A More Rational Approach to Complex Civil Litigation in the Federal Courts: The Special Jury*, 1990 U. CHI. LEGAL F. 575 (1990); Note, *The Case for Special Juries in Complex Civil Litigation*, 89 YALE L. J. 1155 (1980).

<sup>22</sup> See *infra* notes 224-49 and accompanying text.

<sup>23</sup> An Act for the Better Regulation of Juries, 3 Geo. 2, ch. 25, § 15 (1730) (Eng.).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* § 20. Each defendant in a capital case was entitled to thirty-five peremptory



The 1730 English statute said nothing about who the special jurors should be, except for one provision that called for the proper officer to bring into court the books or lists of qualified jurors from which to choose the jury panel.<sup>26</sup> The statute did, however, adopt for everyday trials the model of the special jury as it had been used in trials at bar. The trial at bar was a jury trial conducted before the full bench of four justices. In writing his *Commentaries* in the 1760s, Blackstone claimed that special juries were "originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders."<sup>27</sup> Dozens of American cases have quoted this language in explaining the special jury.<sup>28</sup>

It is not at all clear that Blackstone fully understood the seventeenth- and early-eighteenth-century uses of the special jury,<sup>29</sup> but he was essentially correct in associating the special jury with "big cases"—those tried at bar. In the early 1700s, the trial at bar was commonly allowed in cases involving especially difficult questions, parties of high station in government or society, or a substantial amount of money.<sup>30</sup> By the time Parliament passed the special jury statute, the Court of King's Bench was trying to limit the costly and inefficient trial at bar,<sup>31</sup> but whenever trials at bar were granted, they typically were tried by special juries.

Who were the special jurors in trials at bar? If the issues were "of too great nicety for the discussion of ordinary freeholders," presumably there must have been some way to select "extraordinary freeholders" as jurors.<sup>32</sup> Evidence of quarrels about who the special jurors should be exists even in trials at bar. In a case decided in 1710, the Solicitor General argued, on a motion for a special jury in a trial at bar, that the Sheriff would be obliged "to return gentlemen of the better [r]ank," but Justice Eyre of the Court of Queen's Bench observed that "[i]n a trial at bar

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challenges. See 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 347 (Univ. of Chicago Press 1979) (1769).

<sup>26</sup> See 3 Geo. 2, ch. 25, § 17 (1730) (Eng.). Country juries would have been selected from the Freeholders' Book, but in the sixteenth century, Parliament recognized that there were too few freeholders in cities and towns to supply jurors, so the legislators fashioned a property qualification in personality for these venues. See Oldham, *Origins*, *supra* note 17, at 211-13.

<sup>27</sup> 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 357-58 (Univ. of Chicago Press 1979) (1768).

<sup>28</sup> See, e.g., *infra* text accompanying notes 228-32; *cf. infra* text accompanying notes 121-22.

<sup>29</sup> See Oldham, *Origins*, *supra* note 17, at 177-84.

<sup>30</sup> See *id.* at 192-94.

<sup>31</sup> See *id.* at 194 (citing *Goodright v. Wood*, 94 Eng. Rep. 98 (K.B. 1728)).

<sup>32</sup> 3 BLACKSTONE, *supra* note 27, at 357-58.

the jury is returned by the Master. The jury is special only because it is returned in a special manner, it is no objection that a man is a common juror."<sup>33</sup>

Justice Eyre's remarks notwithstanding, it is clear that special jurors in the early-eighteenth-century English trials at bar were "gentlemen of the better [r]ank."<sup>34</sup> Exactly how this was accomplished is somewhat of a mystery. The empaneling officer probably had favored names that he could choose out of the jury book; counsel possibly had their own choices; and separate lists of special jurors may have been maintained.<sup>35</sup>

When Parliament passed the 1730 statute, it specified merely that special juries were to be *formed in such manner* as special juries had been struck in trials at bar. This directive appears to have been procedural, and by 1730 the practice was well-established. The proper court officer would produce the jury book (usually referred to as "the Freeholders' Book" even if some or all of those on the list were personality-holders<sup>36</sup>) from which forty-eight names would be chosen.<sup>37</sup> These forty-eight names would be reduced to a panel of twenty-four names by alternate strikes by counsel for plaintiff and defendant. The Sheriff then would summon the twenty-four persons to attend as trial jurors in the hope that at least twelve of them would show up at trial.<sup>38</sup> This procedure may well have been all that Parliament had in mind by its reference to the manner of striking special jurors in trials at bar. Nevertheless, because special jurors "of the better Rank" had become customary in trials at bar, the special jury came to be thought of as regularly composed of such persons, even when the trial was not at bar.<sup>39</sup> This fact is important in understanding the adoptions of the special jury in America. In 1741, for example, New York enacted a statute that copied Parliament's 1730 statute and declared that "his Maje[s]ty's Supreme Court of this Colony" could, upon motion:

order and appoint a jury, to be struck, before one of the Judges of the said Court, for trial of any issue joined in any

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<sup>33</sup> Regina v. Harcourt (Q.B. 1710), Hollinshed's Reports, Harvard Law School MS 1142, at 190. For a discussion of this case, see Oldham, *Origins*, *supra* note 17, at 200-02. The "Master" referred to the Secondary, an officer of the Court of Queen's (or King's) Bench.

<sup>34</sup> Harcourt, Harvard Law School MS 1142, at 187.

<sup>35</sup> For speculation about these possibilities, see Oldham, *Special Juries*, *supra* note 17, at 153-58; I OLDHAM, *supra* note 16, at 96-97.

<sup>36</sup> See *supra* note 26.

<sup>37</sup> See 3 BLACKSTONE, *supra* note 27, at 358.

<sup>38</sup> See *id.*

<sup>39</sup> See Oldham, *Origins*, *supra* note 17, at 202.

of the said cases, and triable by a jury of twelve men, in such manner as special juries have by law heretofore been struck, for trials at bar; which jury, so struck, as aforesaid, shall be the jury returned for the trial of the said issue.<sup>40</sup>

As we shall see, the New York statutory treatment of the special jury changed after statehood, but the notion that special jurors were jurors "of the better rank" persisted.

The heritage thus was one of a statutorily endorsed struck jury procedure that said nothing about who the special jurors should be, yet was undergirded by a custom of filling the special jury with upper-class gentlemen. By the time of American independence, the custom had expanded so that in commercial cases, special juries of merchants were commonplace.<sup>41</sup>

Against this background, I turn to the struck jury as it took root and prospered in the United States. The formulas in the several states, even in the eighteenth century, were by no means uniform. Clusters of states, however, followed similar patterns, especially as the statutory adoptions spread westward in the nineteenth century. In the discussion that follows, I provide representative examples of special jury enactments, including references to formulations in the states in which the special jury survives.

#### *A. Representative State Patterns: States in Which the Special Jury Remains Valid*

There are about a dozen states in which the special, or "struck," jury remains on the books.<sup>42</sup> In several of these, the struck jury procedure is used in criminal cases because it is viewed as allowing a *voir dire* superior

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<sup>40</sup> Act of Nov. 27, 1741, ch. DCCXX, N.Y. Colonial Laws (encouraging the return of able and sufficient jurors, as well as the better regulation of juries).

<sup>41</sup> See I OLDHAM, *supra* note 16, at 95-96. A special jury of merchants was not a matter of right. See *id.*

<sup>42</sup> I refer to states in which the struck jury originated by statute. As is noted later, there are other states in which trial judges adopted the struck jury method without statutory authorization. See *infra* text accompanying notes 106-07. There are also instances of the adoption of the method by court rules. I have not attempted to canvas federal, state, and local trial courts to discover struck jury usages in states in which there is no statutory history supporting the practice. For a description of the adoption of the struck jury method by court rule, see *State v. Enno*, 807 P.2d 610, 614 (Idaho 1991). After referring to a 1961 case in which a new trial was granted because the struck jury method used by the trial court was at odds with statutory requirements, the Idaho Supreme Court noted that the struck jury procedure followed by the trial court had been made available by court rule. See *id.* For a recent challenge to many Idaho trial judges' practice of placing time limits on attorney *voir dire* during struck jury selection, see *State v. Larsen*, 923 P.2d 1001 (Idaho 1996).

to the "jury box" method.<sup>43</sup> Indeed, as I will explain, this perceived superiority led Hawaii trial judges to use the struck jury method in the face of a contrary statutory mandate.

In three states—Delaware, Virginia, and Alabama—the special or struck jury continues to be regarded as a significant part of the jury trial heritage. The approaches in the three states, however, are very different, and each requires explanation.

Delaware is a special jury laboratory. Constitutional challenges to the special jury have been unsuccessful in Delaware, and the current statute is the only one in the nation that overtly authorizes the use of the special jury for complex civil litigation. This authorization is a recent development; the early history began in 1793 when the Delaware legislature passed "[a]n Act for more certainly obtaining returns of impartial juries, and their better regulation."<sup>44</sup> That statute gave the sheriff directions about what to do with the return of the *venire facias*, "unless in cases where a special jury shall be struck by rule of court."<sup>45</sup> A "rule of court" was a court order, and thus it is clear that informal special jury usage was in place in Delaware during the eighteenth century.

The first detailed statutory recognition of this usage came in an 1810 act, which provided that a struck jury was required on application of either party "in any action, cause or suit whatsoever" in the Supreme Court or the Court of Common Pleas.<sup>46</sup> According to the Delaware Supreme Court in *Nance v. Rees*,<sup>47</sup> the 1810 act could be traced to the English statute of 1730, and "the Act of 1810 did no more than codify into statutory law a practice long followed in Delaware courts as a part of the legal heritage from England."<sup>48</sup> Open to question, however, was whether the procedure applied to criminal as well as civil cases. In *Rush v. State*,<sup>49</sup> a defendant in a murder case claimed that his request at trial for a special jury should have been granted, but the Supreme Court of Delaware concluded that "[t]he legislative history of the Delaware special jury statute, from its inception in 1810, indicates that special juries were to be confined to courts of civil jurisdiction."<sup>50</sup>

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<sup>43</sup> See *infra* notes 165-68 and accompanying text.

<sup>44</sup> Act of Feb. 2, 1793, Del. Laws ch. VIII (1793).

<sup>45</sup> *Id.*

<sup>46</sup> Act of Jan. 30, 1810, Del. Laws ch. CXX (1810).

<sup>47</sup> 161 A.2d 795 (Del. 1960).

<sup>48</sup> *Id.* at 799.

<sup>49</sup> 491 A.2d 439 (Del. 1985).

<sup>50</sup> *Id.* at 443. The Delaware Supreme Court quoted the trial judge in pointing out that special juries originally had been authorized only for courts of civil jurisdiction—the Supreme Court and the Court of Common Pleas—and not for the criminal courts (the court of Oyer and Terminer and General Gaol Delivery and the court of General Quarter Sessions of the Peace and Gaol Delivery). See *id.* at 443 n. 3.

The formula specified in the 1810 statute was one that is now familiar—forty-eight freeholders “most indifferent” and “best qualified,” to be reduced to twenty-four by alternating strikes by the parties.<sup>51</sup> With comparatively minor adjustments, this formula persisted in Delaware for 177 years.

In 1987, however, Delaware repealed the statute and replaced it with a single paragraph, which opens with the following sentence: “The court may order a special jury upon the application of any party in a complex civil case.”<sup>52</sup> The methodology for empaneling special juries under this law is left, apparently, to court rules or to the ad hoc invention of trial judges.<sup>53</sup> Substantively, the two major changes were the conversion from special juries as a matter of right (as they had been under the 1810 statute) to one of court discretion, and the limitation of special juries to complex civil cases.

Both the traditional struck jury statute and the succinct 1987 version survived constitutional challenge during the 1980s. Because both challenges were based largely on claimed conflict between the Delaware practice of maintaining a separate list of jurors for special juries and the reasonable cross-section requirement, discussion is deferred to Parts II and III, below.<sup>54</sup>

In Virginia, the first statutory appearance of the struck jury appears to have been in 1788 for impeachment trials. The statute provided for the sheriff to return a panel of twenty-four jurors from the senatorial district where the accused resided; then “[t]he prosecutor for the commonwealth, and the person accused, shall, in open Court, alternately strike one, until the number shall be reduced to twelve . . . .”<sup>55</sup> The general availability of the struck jury entered the statute books much later. The Code of 1849 provided that a trial jury would be formed by reducing a panel of twenty-four to eighteen by lot, after which the eighteen would be reduced to twelve by alternate strikes by the parties.<sup>56</sup> In 1887, however, the Virginia Code was changed to provide: “Any court, in a case where a jury is required, may allow a special jury.”<sup>57</sup> The procedure was to summon a panel of twenty qualified jurors, to choose sixteen of them by lot, and to reduce the sixteen

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<sup>51</sup> Act of Jan. 30, 1810, Del. Laws ch. CXX (1810). The statute also provided that in civil cases in which the jury was empaneled according to the 1793 statute, each side was to be allowed three peremptory challenges. *See id.*

<sup>52</sup> 66 DEL. LAWS ch. 5, § 4506 (1987).

<sup>53</sup> *See Ramada Inns, Inc. v. Dow Jones & Co.*, No. C.A. 83C-AU-56, 1987 WL 28311 (Del. Super. Ct. Oct. 22, 1987) (granting part of the motion for summary judgment in the libel action); *see also infra* text accompanying note 249.

<sup>54</sup> *See infra* notes 224-32, 288-91 and accompanying text.

<sup>55</sup> Act of Dec. 2, 1788, 1788 Va. Acts ch. 67, § 128 (establishing district courts and regulating the general court).

<sup>56</sup> *See* VA. CODE OF 1849, ch. 162, § 8.

<sup>57</sup> VA. CODE OF 1887, ch. 152, § 3158.

to twelve by alternate strikes by the parties. This formula remained until 1950, when Virginia moved to smaller juries for most cases and adopted the struck jury across the board.<sup>58</sup> The 1950 Code specified that juries in minor civil cases (up to one thousand dollars in controversy) should be five jurors out of a panel of eleven; in other civil cases the jury was to be seven out of a panel of thirteen, "except that when a special jury is allowed, twelve persons from a panel of twenty shall constitute the jury."<sup>59</sup> In all cases, alternate strikes by the parties were to reduce the panel to the number of jurors for the applicable jury.

The jury provisions of the Code of 1950 remain in place today, except for an increase in the jurisdictional limit for the five-person civil jury from one thousand to fifteen thousand dollars.<sup>60</sup> The only difference between ordinary civil juries and special juries in civil cases is the size of the jury panel and the jury itself. Nothing in the statutory language or case law indicates that special jurors are to be persons of special qualifications.<sup>61</sup> Another provision of the Code of 1950 (still in effect), however, permits the parties to create a jury of three members by consent. The plaintiff selects one juror, the defendant selects a second, and the two jurors in turn select a third, and "any two concurring shall render a verdict in like manner and with like effect as a jury of seven."<sup>62</sup> Although not a struck jury, this jury-by-consent is a special jury in the sense that it is formed by a special procedure. What the jury-by-consent most resembles is arbitration.<sup>63</sup>

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<sup>58</sup> The current statutory references are, for civil cases, VA. CODE ANN. § 8.01-362 (Michie 1997) ("Any court in a civil case in which a jury is required may allow a special jury, in which event . . . a jury shall be made in accordance with the provisions of § 8.01-359A."), and for criminal cases, VA. CODE ANN. § 19.2-262(C) (Michie 1997) ("The parties or their counsel . . . shall alternately strike off one name from the panel until the number remaining shall be reduced to the number required for a jury.").

<sup>59</sup> VA. CODE OF 1950, § 8-208.21.

<sup>60</sup> VA. CODE ANN. § 8.01-359A (Michie 1997); see *supra* note 59.

<sup>61</sup> In an early case, *Atlantic & Danville R.R. Co. v. Peake*, 87 Va. 130 (1890), the court disallowed a special jury because there was nothing in the case suggesting prejudice or exceptional difficulty. This case suggests that cases of exceptional difficulty qualify for special juries, and further, that the jurors would be specially qualified. I have had no opportunity to investigate whether such a practice in Virginia courts is called for in court rules or is followed informally.

<sup>62</sup> VA. CODE ANN. § 8.01-359D (Michie 1997).

<sup>63</sup> During the eighteenth century in England, it was common to refer pending court cases to arbitration, and one or some number of jurors would at times be chosen to be the arbitrators. More commonly, arbitrators with expertise in the subject matter in dispute would be selected. If the number of arbitrators chosen were an even number, there would customarily be a provision for the named arbitrators to select an umpire for tie-breaking purposes. See I OLDHAM, *supra* note 16, at 151-55; II *id.* app. E. There are examples of naming two arbitrators with instructions to them to choose a third. See *Hotchkin v. Cotes, Nisi Prius* (Trinity Feb. 15, 1758) (Radford and Sweet, Arb.), *cited*

Alabama uses the struck jury in both criminal and civil cases. The original 1841 statutory authorization in Alabama for struck juries applied to civil cases "sounding in damages merely" or involving more than one hundred dollars.<sup>64</sup> Alternate strikes were to reduce panels of twenty-four persons to twelve.<sup>65</sup> Alabama later expanded this authorization to "all civil actions triable by jury,"<sup>66</sup> an expansion that is still in operation.<sup>67</sup> The Alabama Rules of Civil Procedure, which control all Alabama courts except district courts, codify the same procedure.<sup>68</sup> The struck jury method of Rule 47(b) superseded the older method of peremptory challenges that was available in civil cases for which no special jury was selected.<sup>69</sup>

Meanwhile, early in this century, the struck jury procedure was made applicable to criminal cases.<sup>70</sup> A sliding scale was fashioned so that a panel of at least thirty-six is required for capital offenses, twenty-four for non-capital felonies, and eighteen for misdemeanors. This scheme supplanted peremptory challenges in criminal trials.<sup>71</sup> Constitutional attacks on the statutes applying the struck jury to criminal cases have failed.<sup>72</sup>

Other states in which the struck jury remains valid by statute include South Carolina, Indiana, Arkansas, Maryland, and West Virginia.<sup>73</sup> Use of the method of striking jurors in lieu of peremptories, without calling the result a struck jury, is codified in Arizona and Texas. In addition, there is evidence that the method is used pursuant to court rules in Massachusetts

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in II OLDHAM, *supra* note 16, app. E, at 1544. These practices became common in American colonies and states in the eighteenth and nineteenth centuries. The experience with arbitration in colonial America and in the early republic was extensive, but it is inadequately documented. I have amassed materials that illuminate that experience, but at present they are in unpublished form. For an excellent study of arbitration in colonial Connecticut, see Bruce Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443 (1984).

<sup>64</sup> ALA. CODE OF 1841, ch. 10, § 52.

<sup>65</sup> *See id.*

<sup>66</sup> ALA. CODE OF 1932, Ex. Sess., at 34.

<sup>67</sup> *See* ALA. CODE § 12-16-140 (1997); *see also* Wallace v. Alabama Power Co., 497 So. 2d 450 (Ala. 1986).

<sup>68</sup> *See* ALA. R. CIV. P. 47(b).

<sup>69</sup> For an explanation of superseding peremptories, see the Committee Comments to the 1973 promulgation of Rule 47; *see also* Holman v. Baker, 169 So. 2d 429 (Ala. 1964).

<sup>70</sup> Act of Sept. 29, 1919, 1919 Ala. Acts No. 715. For current statutory provisions, *see* ALA. CODE § 12-16-100 (1995) and Rule 18.4(f) of the Alabama Rules of Criminal Procedure.

<sup>71</sup> *See* Brown v. State, 231 So. 2d 167 (Ala. App. 1970).

<sup>72</sup> *See* Dixon v. State, 167 So. 340 (Ala. App. 1936).

<sup>73</sup> *See supra* note 42 for the method I followed in identifying states with current special jury practices.

and that it has been employed by trial judges as a matter of personal preference in Alaska and Hawaii.

The South Carolina experience with the special jury has been unique in its explicit use of merchant juries in the eighteenth century.<sup>74</sup> A 1769 statute authorized special juries in the Charleston Court of Common Pleas, if consented to by both parties in a case involving trade or considerable money, or between merchants.<sup>75</sup> Although the statute referred to ordering "a special jury to be struck," the method of juror selection was by balloting—either from lists of potential jurors that the parties supplied (for trials at bar of causes "of weight and importance") or from regular jury lists.<sup>76</sup> The legislature later observed that the 1769 plan sometimes resulted in special juries "drawn entirely out of the number of those whose names were given in or delivered to the court by one of the parties in controversy . . . ."<sup>77</sup> South Carolina thus changed the law in 1791 to a complicated formula, applicable on consent of both parties, on request of either party, or at the court's discretion in big money cases.<sup>78</sup> The gist of the formula was that each party supplied eighteen names of qualified grand jurors; then each party was to strike ten names from the other party's list and identify two names from the twenty rejects to serve as "talesmen" (back-up jurors), if needed. This resulted in a panel of twenty names to be summoned for trial.<sup>79</sup> Five years later, this act was repealed, and the next year, the right to a special jury was abolished "except by consent of both parties" because the device had been found to have been "abused to the purposes of delay and chicanery."<sup>80</sup> When both parties consented, however, the 1791 procedure still could be used.

There were other legislative adjustments over time, and during the present century, the South Carolina legislature adopted a straightforward struck jury approach. The current version calls for the clerk in the Court of Common Pleas to supply a list of twenty jurors from "the whole number of jurors who are in attendance," and then alternate strikes will reduce this list to the trial jury of twelve persons.<sup>81</sup>

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<sup>74</sup> See *infra* notes 207-13 and accompanying text.

<sup>75</sup> See Act of July 29, 1769, 1769 S.C. Acts, No. 1095, sec. XXIII ("establishing courts, building gaols, and appointing sheriffs and other officers, and for the more convenient administration of justice in this province").

<sup>76</sup> See *id.*

<sup>77</sup> See Act of Dec. 20, 1791, 1791 S.C. Acts, No. 1526 ("to alter and amend the Law Respecting Juries and to make some additional regulation to the Acts for establishing and regulating the Circuit Courts").

<sup>78</sup> See *id.*

<sup>79</sup> See *id.*

<sup>80</sup> Act of Dec. 16, 1797, 1797 S.C. Acts No. 1665.

<sup>81</sup> S.C. CODE ANN. § 14-7-1050 (Law. Co-op. 1996).



The nineteenth-century statutory authorization of special juries in Indiana began with the simple declaration that "[t]he Court shall have the power, when the business thereof requires it, to order the impaneling of a special jury for the trial of any cause."<sup>82</sup> This was accompanied by a provision captioned "Jury by agreement," allowing the parties to "agree upon the jurors to compose a special jury, and notify the Court thereof . . . ."<sup>83</sup> Alternatively, the parties were allowed to have a "struck jury, by consent," formed by a return by the sheriff of eighteen competent jurors, reduced to a jury of six via six strikes by each party—or any other number of strikes the parties might choose.<sup>84</sup> When the court ordered a struck jury, the Indiana formula was for a panel of the forty "most indifferent" and "best qualified" men to be returned, with each party's twelve strikes reducing the panel to sixteen.<sup>85</sup> Amendments in 1913 deleted the language calling for the clerk to select forty men "most indifferent" and "best qualified," substituting instructions for the clerk to take forty names from a well-shaken box containing the names of qualified ordinary jurors.<sup>86</sup> In 1988, Indiana repealed the provisions allowing the court to order struck juries, but the sections described above allowing a special jury by agreement or a struck jury by consent remain intact.<sup>87</sup>

The remnant of the struck jury in Arkansas is evident in statutes granting each party three peremptory challenges. In criminal misdemeanor cases, each side has three peremptories that can be exercised orally, after which the names of twenty-four jurors are put in a box, eighteen names are drawn and entered on a list, each side strikes up to three names, and the first twelve names remaining constitute the jury.<sup>88</sup> In civil cases the formula is similar, but the process of striking from a list of eighteen names drawn from twenty-four is optional.<sup>89</sup> Previously the state utilized a more typical struck jury method; on the request of either party, the circuit court had discretion to order a panel of forty-two names to be returned, which after each party's twelve strikes would be reduced to eighteen names.<sup>90</sup>

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<sup>82</sup> 1 Indiana R.S. 1896, Horner, § 522. The 1896 compilation is the earliest set of Indiana statutes to which I have had access. Later historical annotations show that the special jury provisions originated in "An Act concerning proceedings in civil cases." 1881 Ind. Acts 240, ch. 38, §§ 357-362.

<sup>83</sup> 1 Indiana R.S. 1896, Horner, § 523.

<sup>84</sup> 1 Indiana R.S. 1896, Horner, § 524.

<sup>85</sup> *Id.* § 525.

<sup>86</sup> 1913 Ind. Acts ch. 15, § 1.

<sup>87</sup> The repealing authority was 1988 Ind. Acts, P.L.180-1988, § 2. For the retained provisions in the current statutes, see IND. CODE ANN. § 34-1-19-2 (Michie Supp. 1986) ("Special jury by agreement") and *id.* § 34-1-19-3 ("Struck jury—By consent").

<sup>88</sup> See ARK. CODE ANN. § 16-32-203 (Michie 1997).

<sup>89</sup> See *id.* § 16-33-203 (Michie 1994).

<sup>90</sup> See ARK. REV. STAT. ch. 85, §§ 20-21 (1837). The statute had an interesting,

Maryland used the struck jury method for nearly two centuries in the jury formation for all trials. Under a 1797 statute, for each civil case, the clerks drew a panel of twenty jurors by ballot; then the list was delivered to the parties, each of whom then struck out four names.<sup>91</sup> Maryland extended this procedure to criminal cases in 1802, except for capital felonies or treasons, for which peremptory challenges were allowed.<sup>92</sup> Currently, the procedural rules contain the method for striking names that is used to effectuate peremptory challenges. In civil cases in the circuit court, each side has four peremptories (and possibly more, if alternate jurors are empaneled), which are exercised by striking names off of a list "sufficient to provide the number of jurors and alternates to be sworn after allowing for the exercise of peremptory challenges."<sup>93</sup> Larger numbers of peremptories are allowed in criminal cases,<sup>94</sup> and striking names off a jury list occurs only if no party requests alternating challenges.<sup>95</sup>

Until 1985, West Virginia law provided that "any court may allow a special jury in any civil case," and such juries were formed in a typical manner—twenty names to be drawn, reduced to sixteen by lot, and then reduced to twelve by two strikes by each party.<sup>96</sup> By 1985 amendments, the numbers were changed to ten, reduced to eight by lot, and then ultimately reduced to six by one strike each.<sup>97</sup> The original formula was retained, however, for eminent domain cases.<sup>98</sup>

The last group of active struck jury states I mention only briefly here. In Arizona, the rules of civil procedure state that the clerk shall make a list consisting of as many names drawn from the jury box as the court directs.<sup>99</sup> From this list the parties alternate in making peremptory challenges, until such challenges are exhausted. Failure of a party to make a challenge in turn acts as a waiver of that party's remaining challenges.<sup>100</sup> From the list of remaining names the clerk calls the first eight persons to serve as the

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pragmatic twist: If the request came outside of term time, the clerk of the circuit court was authorized to order the struck jury if "satisfied that a struck jury ought to be granted." *Id.* § 18. The statute did not indicate the criteria to be applied in deciding whether to grant the request. *See id.*

<sup>91</sup> *See* 1797 Md. Laws ch. 87, § 9.

<sup>92</sup> *See* 1802 Md. Laws ch. 69.

<sup>93</sup> MD. R. 2-512(g).

<sup>94</sup> *See id.* 4-313(a).

<sup>95</sup> *See id.* 4-313(b)(2).

<sup>96</sup> W. VA. CODE § 56-6-13 (1966).

<sup>97</sup> *See* W. VA. CODE § 56-6-13 (a)-(b) (Michie Supp. 1991)

<sup>98</sup> *See id.* § 56-6-13(b). For eminent domain cases, the twenty names are to be qualified freeholders of the county where the land being condemned is located. *See infra* notes 251-53 and accompanying text.

<sup>99</sup> *See* ARIZ. R. CIV. P. 47(a)(1).

<sup>100</sup> *See* ARIZ. R. CIV. P. 47(a)(3).

jury.<sup>101</sup> In Texas, the law provides that in all non-death-penalty criminal cases, "the party desiring to challenge any juror peremptorily shall strike the name of such juror from the list furnished him by the clerk."<sup>102</sup>

The occasional use of a struck jury method of choosing jurors in Massachusetts is demonstrated by *Commonwealth v. Johnson*.<sup>103</sup> In *Johnson*, the defendant was convicted of rape, and among his challenges on appeal was a claim that the trial judge had deprived him of his peremptory challenges by imposing the "struck jury method" upon him.<sup>104</sup> The claim was rejected after the court explained that the "struck method" was not a system for exercising peremptory challenges, but was, rather, "an alternative method for selecting a jury," in which

a venire pool of about one hundred members [is] drawn. After venire persons from the pool are excused for cause or hardship, the jury are "struck": the defendant strikes two members of the remaining venire, and then the prosecutor strikes one member. This process is repeated until twelve jurors remain, who then serve as jurors for the trial.<sup>105</sup>

Similarly, in the Alaska case of *Van Huff v. Sohio*,<sup>106</sup> the Alaska Supreme Court held that the trial court did not abuse its discretion by using the "struck jury" method of jury selection; neither was this method viewed as inconsistent with an Alaska rule for peremptory challenges. Finally, in Hawaii and California, the use of the struck jury method by trial judges has been held to be improper because it is inconsistent with the method of jury selection prescribed by statute, but if the defendant fails to object to the struck jury method at trial, or if the defendant cannot show prejudice, its use will not justify reversal of a conviction.<sup>107</sup>

#### B. States in Which the Once-Authorized Special Jury Is No Longer Valid

New York and New Jersey have especially rich special jury histories,

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<sup>101</sup> See ARIZ. R. CIV. P. 47(a). In criminal cases, the number of jurors to serve in the case is to be drawn and then augmented by the number of alternates plus the number of peremptories allowed each party. See ARIZ. R. CRIM. P. 18.5(b).

<sup>102</sup> TEX. CRIM. P. CODE ANN. art. 35.25 (West 1989).

<sup>103</sup> 631 N.E.2d 1002 (Mass. 1994).

<sup>104</sup> See *id.* at 1004, 1007-08.

<sup>105</sup> *Id.* at 1007 n.7.

<sup>106</sup> 835 P.2d 1181 (Alaska 1992).

<sup>107</sup> See *People v. Wright*, 802 P.2d 221, 240-41 (Cal. 1990); *State v. Echineque*, 828 P.2d 276 (Haw. 1992); *State v. Corpuz*, 880 P.2d 213 (Haw. Ct. App. 1994); *State v. Shiroma*, 855 P.2d 34 (Haw. Ct. App. 1993).

including, for New York, two United States Supreme Court cases. The special jury survived in New York until 1965,<sup>108</sup> but in a surprising, inverted way. Although the special jury remained theoretically available in both civil and criminal cases until its repeal, it rarely was used in civil trials; instead, its most interesting twentieth-century history was in capital criminal cases. Most states with early struck jury histories followed England's lead and withheld the device from capital cases so as not to impinge on the defendant's right to peremptory challenges. New York, however, fashioned a unique statute in 1896 that provided for special juries only in criminal cases and only in two counties—those having a population of more than 500,000.<sup>109</sup> Special juries were allowable if necessary for a fair and impartial trial, or because of the "importance or intricacy" of the case.<sup>110</sup> Special jurors were to be chosen from a special list to be prepared by jury commissioners after personal interviews.<sup>111</sup> In addition to ordinary trial juror qualifications, candidates had to have a clean record in the courts, be able to disregard newspaper publicity, disavow any conscientious objection to the death penalty, and be able to resist any negative presumption if a defendant were to decline to testify.<sup>112</sup>

In a 1960 decision, *Schuster v. City of New York*,<sup>113</sup> Supreme Court Judge Henry Martuscello wrote a lengthy opinion denying the defendant's

<sup>108</sup> See Laws of 1965, ch. 778, § 3.

<sup>109</sup> Act of Apr. 23, 1896, ch. 378, 1896 N.Y. Laws 354.

<sup>110</sup> *Id.* § 13. Here one can detect an echo of the English trial at bar and of Blackstone's reference to cases that "were of too great nicety for the discussion of ordinary freeholders." 3 BLACKSTONE, *supra* note 27, at 357. Shortly after the 1896 New York special jury statute was passed, Benjamin Tucker gave a speech at the Cooper Union under the auspices of several labor unions, constituting a scathing criticism of the elitist and exclusive effects of the new law. The speech was published in 1889 under the title, *A Blow at Trial by Jury*. In his opening remarks, Tucker stated that instead of the actual title ("An Act providing for a special jury in criminal cases in each county of the State having a certain population, and for the mode of selecting and procuring such special juries; also, creating a special jury commissioner for each of such counties, and regulating and prescribing his duties"), a more accurate title would have been:

An act providing for the enforcement of those laws of the State of New York which, having found their way into the statute-books only through the insidious machinations of a clique or a cabal or a boss or an interest or a handful of fanatics, are so unpopular with the citizens of the State of New York that a conviction of the violation of them can seldom, if ever, be secured from a jury fairly and impartially impaneled from the mass of sober-minded people.

BENJAMIN TUCKER, *A BLOW AT TRIAL BY JURY* 3-4 (New York, Benjamin Tucker 1889).

<sup>111</sup> 1896 N.Y. Laws 354, § 9.

<sup>112</sup> *Id.* § 8.

<sup>113</sup> 205 N.Y.S.2d 190 (Sup. Ct. 1960).

motion for a special jury in an action for damages allegedly caused by police negligence in not preventing an informer's murder. The judge observed that "the historic purpose for which the special jury was introduced to common law [was] to provide more intelligent and competent jurors in exceptional cases," and he concluded that the case before him was not sufficiently important or intricate to justify a special jury.<sup>114</sup> In reaching this conclusion, he expressed his strong distaste for the elitist nature of "blue ribbon" juries, noting that five separate New York judicial councils or conferences from 1937 to 1952 had recommended abolition of the special jury.<sup>115</sup> Judge Martuscello stated, incorrectly, that special juries "were not authorized in this state" until the 1896 statute and "were not established in civil actions until the enactment of Chapter 602 of the Laws of 1901."<sup>116</sup>

In fact, the special jury in civil cases had a much longer history in New York than 1896. That history is laid out by Morton Horwitz in *The Transformation of American Law 1780-1860*.<sup>117</sup> Horwitz describes "the 'struck' or special jury" as "a favorite institution of colonial merchants" that the 1741 statute initially authorized and that a 1786 enactment re-endorsed after independence.<sup>118</sup> In 1801, however, New York codified a detailed struck jury procedure that, according to Horwitz, "for the first time placed struck juries within the judges' control, permitting them only where the court 'may deem it necessary, by reason of the importance or intricacy of the case.'"<sup>119</sup>

By the time George Caines published his New York practice book in 1808, the special jury had assumed sufficient importance to occupy a full chapter.<sup>120</sup> Caines quoted the 1801 statute verbatim. Among other things, the statute sets forth the New York version of the English procedure: In the presence of the parties, the clerk or his deputy was to copy out of the jury book forty-eight names, which would then be reduced to twenty-four by alternate strikes by the parties; the panel of twenty-four would be summoned for jury service, and on the day of trial, "the jurors so struck shall be called as they stand upon the panel, and the first twelve of them who shall appear and are not challenged, or shall be found duly qualified and indifferent,

<sup>114</sup> *Id.* at 197.

<sup>115</sup> *Id.* at 200-03 (quoting *Moore v. New York*, 333 U.S. 565, 570 (1948) (Murphy, J., dissenting)).

<sup>116</sup> *Id.* at 196-97. The 1901 statute amended the 1896 act to make it applicable to both criminal and civil cases in counties with a population of over one million (New York and Kings).

<sup>117</sup> MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, at 155-58 (1977).

<sup>118</sup> *Id.* at 155. For the 1741 statute, see *supra* note 40 and accompanying text.

<sup>119</sup> *Id.* (citing 1801 N.Y. Laws ch. 98).

<sup>120</sup> See GEORGE CAINES, *A SUMMARY OF THE PRACTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK* ch. 43 (New York, Isaac Riley 1808).

shall be the jury, and be sworn to try the said cause."<sup>121</sup> Nothing in the act called for a special list of, as Judge Martuscello put it, "more intelligent and competent jurors,"<sup>122</sup> but the act made the special jury a matter of judicial discretion in "intricate or important" cases.<sup>123</sup>

Horwitz points out that the 1801 statute led to a number of special juries between 1801 and 1807, chiefly in marine insurance cases.<sup>124</sup> Thereafter, however, "we hear no more of merchant juries in New York commercial cases of any sort," even though the statute remained on the books "and indeed special juries continued to be used in libel cases."<sup>125</sup> In *Schuster v. New York*, Judge Martuscello gave the twentieth-century history of the civil special jury in New York, based on a total of six cases—four in the first decade, one in 1922, and one in 1935.<sup>126</sup> In declining to make *Schuster* the seventh case, the judge wrote:

Juries were intended to serve as instruments of justice. They cannot fulfill that purpose unless they are truly representative of the community. There can be no true equal representation of a community if jurors are selected because of an alleged economic, social or superior educational status. Responsibility in our democracy should be shared by all and not a few . . . .

Juries of character, courage, and independence can only exist in an atmosphere where there is no discrimination in their choice because of social, economic or philosophic reasons.<sup>127</sup>

These sentiments anticipated, or were in the vanguard of, the "reasonable cross-section" movement that has since swept the country.<sup>128</sup> They are, of course, open to challenge. It is not self-evident why juries cannot accomplish "justice" unless they are truly representative of the community. Presumably New York would continue to achieve justice in capital criminal cases while special juries persisted.<sup>129</sup>

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<sup>121</sup> *Id.* at 456.

<sup>122</sup> *Schuster v. New York*, 205 N.Y.S.2d 190, 197 (1960).

<sup>123</sup> *Id.* at 203.

<sup>124</sup> See HORWITZ, *supra* note 117, at 155-56.

<sup>125</sup> *Id.* at 157-58.

<sup>126</sup> 205 N.Y.S.2d 190, 193-96 (Sup. Ct. 1960). One case involved the valuation of railroad bonds, which called for "a jury equipped with practical business experience"; two were libel cases; one was a *quo warranto* to test the validity of the mayor's election; and two were probate contests. *Id.*

<sup>127</sup> *Id.* at 205.

<sup>128</sup> See, e.g., ABRAMSON, *supra* note 1.

<sup>129</sup> See *People v. Willis*, 257 N.E.2d 650 (N.Y. 1970) (upholding a murder conviction

New Jersey adopted its version of the English special jury practice in 1797 and retained it until 1991. The original act validated the granting of a special jury in any civil case or in any criminal case that did not involve a right to peremptory challenges.<sup>130</sup> When granted, the sheriff was to select forty-eight men from the jury book—men deemed by the sheriff “most impartial and indifferent” and “best qualified as to talents, knowledge, integrity, firmness and independence of sentiment.”<sup>131</sup> The parties then were to strike out twelve each, leaving a jury panel of twenty-four to be summoned for trial.<sup>132</sup> New Jersey made significant changes to this scheme in 1851. The new law made struck juries available in any civil or criminal case, but in civil cases the court had to be satisfied (by an affidavit by the party requesting the struck jury) that the nature and importance of the matter in controversy merited the step.<sup>133</sup> Perhaps New Jersey had encountered the same thing that had happened in the English courts—tactical special jury requests by lawyers seeking only to delay proceedings.<sup>134</sup>

Another significant change made in New Jersey in 1851 was to give the court, in civil cases, the option of ordering a panel of forty-eight to be reduced to twenty-four, or a panel of thirty-six to be reduced to eighteen (by nine strikes per side).<sup>135</sup> The law then remained stable until the end of the century, when New Jersey revised the formula to require a jury panel of

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and finding that the defendant was not deprived of due process because he was tried before a special jury); *People v. Jackson*, 231 N.E.2d 722 (N.Y. 1967) (rejecting a challenge to a special jury under the Sixth and Fourteenth Amendments to the United States Constitution); *People v. Horton*, 241 N.Y.S.2d 224, 227 (App. Div. 1963) (upholding a special jury conviction, despite the claim that the special jury list excluded Puerto Ricans: “In a county such as New York, composed of a vast number of minority groups, it will be almost inevitable that the small number of prospective jurors called for Special Jury service will not conform in proportion to the percentage of each minority group in the population.”), *aff’d*, 221 N.E.2d 909 (N.Y. 1966), *cert. denied*, 387 U.S. 934 (1967); *People v. Follette*, 306 N.Y.S.2d 789 (Sup. Ct. 1970) (upholding the use of a special jury drawn from the 1964 New York County Special Jury panels).

<sup>130</sup> Laws of New Jersey, An Act relative to juries and verdicts, 10 Nov. 1797, §§ 14-15.

<sup>131</sup> *Id.*

<sup>132</sup> *See id.*

<sup>133</sup> New Jersey P.L. 1851, at 92.

<sup>134</sup> *See Oldham, Special Juries*, *supra* note 17, at 158-59. One of the findings of a commission of inquiry in London in 1851, the same year as the New Jersey act, was that “[i]t is well known to be a frequent practice of defendants who wish for delay, to obtain a rule for a special jury, which practically, in London and Middlesex, has the effect of postponing the trial.” *Id.* at 158 (quoting First Report of Her Majesty’s Commissioners for Inquiring into the Process, Practice and System of Pleading the Superior Courts of Common Law, at 44, Parliamentary Papers, House of Commons (1851) xxii, 567); *see also supra* text accompanying note 68.

<sup>135</sup> New Jersey P.L. 1851, at 92.

ninety-six names, to be reduced to forty-eight by twenty-four strikes on each side, after which the forty-eight names remaining were to be "placed in the box," and "the jury for trial of the case is drawn in the usual way."<sup>136</sup> These numbers, however, must have become cumbersome because New Jersey changed the law again to assume the form that it retained until 1991; the enabling language returned to what it was in 1851—discretion in the trial court to grant a struck jury in any civil or criminal case after the nature and importance of the case were established by affidavit.<sup>137</sup> When granted, the order was to "direct the jury commissioners of the county in which the cause is to be tried to prepare a list of 36 or 48 persons or, in special causes or in a criminal cause, a larger number of persons"; the parties or their attorneys were then to strike names until half of the names on the list remained, and the trial jury was to be selected from the remaining names "in as nearly as possible the same manner as a jury from the general panel is required to be selected."<sup>138</sup>

Over the years, the New Jersey struck jury statutes were tested often in the courts. In *Fowler v. State*,<sup>139</sup> for example, the New Jersey Supreme Court held that the struck jury statute was valid under the New Jersey Constitution of 1844 and its guarantee of trial by jury. The court observed that the struck jury was derived from English law and had been confirmed by New Jersey legislation in existence when the constitution was passed.<sup>140</sup> Another attack, this time after the 1898 amendments, failed in *Brown v. State*.<sup>141</sup> There, the struck jury system was claimed to be inconsistent with the defendant's right to challenge potential jurors;<sup>142</sup> however, the New Jersey Court of Appeals disagreed, noting that the struck list of forty-eight names had to be given to the defendant at least twelve days before empaneling, providing ample time to ascertain grounds of objection to individual jurors.<sup>143</sup> Moreover, the defendant was entitled to five peremptory challenges as the names of the trial jurors were drawn from the box of forty-eight names.<sup>144</sup>

After a period of relative calm, several cases decided in the late 1980s contested anew the New Jersey struck jury system. Because these cases dealt with voir dire issues, I will mention them shortly in connection with

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<sup>136</sup> Act of June 14, 1898, ch. 237, § 76, 1898 N.J. Laws 866, 895, *quoted and discussed in* United States v. Ricks, 802 F.2d 731, 735 n.2 (4th Cir. 1986) (quoting *Brown v. State*, 42 A. 811, 812 (N.J. 1899)).

<sup>137</sup> See N.J. STAT. ANN. § 2A:75-1 (West 1971).

<sup>138</sup> *Id.* §§ 2A:75-2, 2A:75-5 (West 1971).

<sup>139</sup> 39 A. 1113 (N.J.), *aff'g* 34 A. 682 (N.J. Sup. Ct. 1896).

<sup>140</sup> *Id.* at 682.

<sup>141</sup> 42 A. 811 (N.J. 1899), *aff'd*, 175 U.S. 172 (1899).

<sup>142</sup> See *id.* at 813.

<sup>143</sup> See *id.* at 818.

<sup>144</sup> See *id.*



peremptory challenges.<sup>145</sup> Still other cases, scattered across most of the twentieth century, questioned the struck jury system in terms of its "excluding" effect—its leaving protected groups underrepresented or unrepresented in the jury pool.<sup>146</sup> Finally, in 1991, New Jersey repealed the struck jury procedure.<sup>147</sup> Two special applications of the struck jury remain on the books, but their retention after the 1991 repeal may have been oversight.<sup>148</sup>

Because a wide variety of historical patterns has been traced, I will provide only a brief description of comparable "struck jury" experience in other states in which the procedure has been repealed. Although this may not be an exhaustive list, the following states, by region, once had struck juries: in the Northeast and mid-Atlantic: Pennsylvania and Vermont; in the South: Georgia; in the Midwest: Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin; and in the West and Southwest: Nevada and Oklahoma. Some of these states followed the standard English model or a close variant.<sup>149</sup> Often the size of the pre-strike panel was smaller than forty-

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<sup>145</sup> See *infra* Part I.C.

<sup>146</sup> See *State v. Gilmore*, 489 A.2d 1175 (N.J. Super. Ct. App. Div. 1984) (holding that the assistant prosecutor's use of peremptory challenges to exclude all black jurors violated the defendant's constitutional right to an impartial jury), *aff'd*, 511 A.2d 1150 (N.J. 1986).

<sup>147</sup> Act of Apr. 9, 1991, ch. 91, § 533, 1991 N.J. Laws 329, 610.

<sup>148</sup> The two statutes are akin to the procedures later discussed for state condemnation of land or other property rights. See *infra* text accompanying notes 251-54. The first of the two New Jersey statutes in question provides for payments to riparian owners for uses of or improvements to land under water, and it provides that if the riparian owner "is dissatisfied with said award he may apply to the Superior Court for a struck jury to try the question in such place as may be designated by the said court . . ." N.J. STAT. ANN. § 12:3-9 (West 1994). The second statute relates to payments for encroachments upon cemeteries and provides that, if an objection is raised, "[t]he court may hear any such objection or proceed in the action in a summary manner or otherwise and with a struck jury if any party demands a jury." *Id.* § 40:60-25.45.

<sup>149</sup> See MICH. REV. STAT. tit. XXII, ch. 103, §§ 36, 38 (1846) (requiring that a special jury be ordered by a circuit court when it appears "that a fair and impartial trial will be more likely to be obtained in any cause pending therein, by having a struck jury," and that a panel of forty-eight deemed "most indifferent" and "best qualified" be returned and reduced to twenty-four by twelve strikes by each party). In 1929, the numbers were changed to a panel of thirty-six, with six strikes per party. See MICH. COMP. LAWS § 13856 (1929). This method was authorized until 1963. See *People v. Miller*, 276 N.W.2d 558, 561 n.1 (Mich. Ct. App. 1979), *rev'd*, 307 N.W.2d 335 (Mich. 1981). As has been true elsewhere, however, the struck jury method continued to have appeal because of perceived voir dire advantages. See *infra* notes 165-68 and accompanying text. In *Miller*, a trial judge's use of the procedure in a murder trial, although violative of the Michigan jury selection rules, was held to be a nonprejudicial error, insufficient to overturn the convictions. See *Miller*, 276 N.W.2d at 561. The Supreme Court of Michigan, however, held that failure to follow the Michigan jury selection rules, coupled with an appropriate challenge before the jury selection process had begun, required

eight.<sup>150</sup> Surprisingly, however, in Nevada, the pre-strike panel was to number one hundred, to be reduced to fifty by alternate strikes.<sup>151</sup> At the other end of the spectrum, Iowa in 1851 legislated a six-man struck jury, reduced from a panel of eighteen,<sup>152</sup> and in 1873, the parties in a struck

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reversal. *See Miller*, 307 N.W.2d at 337. The court further stated that "the 'struck jury method' or any system patterned thereafter is disapproved and may not be used in the future." *Id.*

In Georgia, a colonial statute provided "that all special juries that shall hereafter be moved for and allowed by the court shall be struck in the manner now used in the Courts of Westminster." Act of Dec. 13, 1756. After independence, however, special juries were tied to grand juries. Special jurors were to be taken from the grand jury list, and when a special jury was needed, the clerk was to supply the names of grand jurors then empaneled, which would be reduced to twelve by alternate strikes by the parties. Judiciary Act, § 27 (1796). This method remained in place until the special jury disappeared in Georgia around 1930. Special juries appear in the 1926 Code but are absent in the 1933 Code.

In Vermont the standard formula (forty-eight names, reduced to twenty-four by alternate strikes) was followed from 1884 to 1968 whenever it appeared to the judges of a county court that a struck jury was needed to obtain a fair and impartial trial of an issue of fact or because of the intricacy, importance, or special circumstances of a case. *See An Act Providing for Summoning Special Juries in Extraordinary Cases in the County Courts*, Public Act No. 117 (1884); VT. STAT. ANN. §§ 1471, 1474 (1958); Act of Mar. 14, 1968, § 3, 1967 Adj. Vt. Acts & Resolves, 132, 134.

<sup>150</sup> In 1816, Ohio adopted a struck jury statute calling for a panel of forty to be reduced by striking to sixteen; of the sixteen, the first twelve to appear in court and not be challenged became the jury. *See OHIO STAT. § 17* (1816). In 1824, this statute was made inapplicable to criminal cases in which more than two peremptory challenges were made on either side. *See An Act Relating to Juries*, c. 580, § 19 (1823-24). This scheme remained in place until its repeal in 1894. *See 91 OHIO STAT. 290* (1894). In 1880, an amendment for counties with a population greater than 200,000 was passed calling for the presiding judge in the court where a jury was to be struck to select the names of the special jurors "personally, and without suggestion from anyone." Act of Feb. 26, 1880, House Bill No. 11, 1880 Ohio Laws 12, 13.

Apart from the large county feature, Minnesota followed the "40 to 16 to 12" formula (reportedly copied from Ohio) from 1864 until its repeal in 1891, *see MINN. STAT. ch. XXXI, §§ 1, 5* (1864), as did Wisconsin (reportedly copied, in turn, from Minnesota) from 1898 to 1913. *See WIS. STAT. ANN. § 2544a* (1898); *WIS. STAT. § 2544a* (1913). Wisconsin, however, had a simpler struck jury (panel of thirty-six, reduced to twelve by alternate strikes) from 1858 to 1898. *See REV. STAT. WIS. ch. 115, § 9* (1858).

Missouri utilized a formula calling for a much smaller jury panel—eighteen, reduced to twelve by alternate strikes of three on each side. *See Act of Mar. 17, 1835, § 14, repealed by MO. REV. STAT. § 3791* (1899).

<sup>151</sup> *See NEV. GEN. STAT. § 3183* (1861-1885) (1875 amended statute). This statute disappears from the books in the early 1900s, but I have not located the specific point of repeal.

<sup>152</sup> *See IOWA CODE ch. 96, § 1776* (1851). The struck jury was granted at the request of both parties, and when chosen, it supplanted the parties' right to five peremptories

jury case were given statutory authority to elect a verdict by majority vote.<sup>153</sup> Iowa repealed these procedures in 1927.<sup>154</sup>

In 1890, the legislature of the Oklahoma Territory passed a statute authorizing a special jury whenever the court's business required it.<sup>155</sup> If ordered, the statute provided that "[t]he parties may agree upon the jurors to compose a special jury."<sup>156</sup> Alternatively, the parties could have the sheriff return a panel of eighteen, to be reduced to six by alternate strikes; otherwise, the "40 to 16 to 12" formula used in other states<sup>157</sup> was to be followed.<sup>158</sup>

In Pennsylvania, the struck jury had a long history, starting in the eighteenth century. Initially authorized by statute in 1785, the special jury survived until 1937.<sup>159</sup> By the end of the nineteenth century, however, the status of the statutory authorization was uncertain, as is shown by the following annotation to the special jury provision in the 1894 Code:

This subject is in a very confused state; but as the right is a common law one, and the act of 1785 has never been expressly repealed, it seems safer to insert it. There is certainly nothing corresponding to the clear irreconcilability that is necessary to constitute a repeal by implication.<sup>160</sup>

### C. *The Relationship Between the Struck Jury and Peremptory Challenges*

The right to strike a specified number of jurors without giving any reason closely resembles the right to a specified number of peremptory challenges. In practice, however, the two concepts differ in important ways.

The reason the struck jury was inapplicable to trials of capital offenses in England in the eighteenth century was pragmatic. The struck jury tradition that had crept into practice the century before had settled on a jury panel of forty-eight with twelve strikes on each side, and this did not ac-

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each. *See id.* § 1774.

<sup>153</sup> *See id.* § 2778 (1873).

<sup>154</sup> *See id.* ch. 496, § 11484 (1927), repealed by Act of Mar. 31, 1927, ch. 221, § 1, 1927 Iowa Acts 193.

<sup>155</sup> OKLA. CODE (Terr.) ch. 70, § 7 (1890).

<sup>156</sup> *Id.* Compare the Oklahoma Territory statute with the like provision in Indiana, *supra* note 83 and accompanying text.

<sup>157</sup> OKLA. CODE (Terr.) ch. 70, § 7 (1890).

<sup>158</sup> *See id.* The Oklahoma statute did not last long; it does not appear in the 1893 Code. I have not been able to mark its exact disappearance.

<sup>159</sup> Act of June 25, 1937, No. 419, § 1, 1937 Pa. Laws 2093.

<sup>160</sup> PA. CODE ch. IX, Juries, § 81 n.3 (1894).

commodate a defendant's right to thirty-five peremptory challenges. There is no apparent evidence that anyone seriously argued for extending the struck jury procedure to capital offenses by increasing the size of the jury panel from which names would be struck. Had there been any such attempt, another problem immediately would have come into view.

The struck jury procedure was a preliminary process implemented in the clerk's office before any jurors whatever had been summoned to the courthouse. The struck jury tradition was that of striking names off a list, whereas the tradition of peremptory challenges was one of eliminating persons who had appeared for jury duty and who stood ready to serve. As Justice Harlan wrote in *Pointer v. United States*:<sup>161</sup>

The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused . . . . Any system for the empaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned. And, therefore, he cannot be compelled to make a peremptory challenge until he has been brought face to face, in the presence of the court, with each proposed juror, and an opportunity given for such inspection and examination of him as is required for the due administration of justice.<sup>162</sup>

Thus it is obvious that the traditional struck jury system fell far short of the protection intended by peremptory challenges. Changes in court practice, however, eliminated the problem. A good review of the issue is given by Judge Winter of the Fourth Circuit in *United States v. Ricks*,<sup>163</sup> in which convicted drug dealers challenged the use of the struck jury system at their trial by the United States District Court for the District of Maryland. Judge Winter explained:

[A]t common law, the veniremen were summoned by the sheriff *after* the parties exercised their strikes against the list. Experience demonstrated that twenty-four veniremen were usually necessary to ensure that at least twelve persons appeared . . . . The rationale for summoning more than the minimum number required to draw a jury does not exist today where the veniremen are summoned and are present in

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<sup>161</sup> 151 U.S. 396 (1894) (approving a struck jury system).

<sup>162</sup> *Id.* at 408-09.

<sup>163</sup> 802 F.2d 731 (4th Cir. 1986).

the courtroom *before* any exercise of peremptory challenges.<sup>164</sup>

Under modern practice, therefore, the struck jury method can satisfy statutory rights to peremptory challenges. Indeed, the method is widely viewed from the criminal defendant's vantage point as superior to the traditional "jury box" method. As the Second Circuit explained in *United States v. Blouin*:<sup>165</sup>

Within the Second Circuit, both the "jury box" and the "struck jury" methods are used. The goal of the "jury box" system is to fill the box with twelve acceptable jurors, and the system is indifferent whether the parties use all their challenges before acquiescing in a panel, or waive all challenges and accept the first twelve called. The goal of the "struck jury" is to whittle down an initially selected group of normally twenty-eight candidates (twelve jurors plus sixteen challenges) to twelve survivors, and it therefore builds in a preference for the parties' exercising all their allotted challenges. This difference in procedure highlights the different outlooks of the two systems. The "jury box" system tends to focus the parties' attention on one member of the venire at a time, as he or she is seated in the box, and prompts the parties to ask, "Is this juror acceptable?" The "struck jury" system, by contrast, emphasizes the overall complexion of the panel and suggests the very different question, "Which twelve of these twenty-eight will be most favorable to my side?"

By permitting full comparative choice among a panel of twenty-eight prospective jurors, the "struck jury" system lets the parties make the most effective use of their challenges, in the sense that through their choices they are able to determine from the initial panel not only who will not serve but also who will serve as the petit jury . . . . The "jury box" system does not afford the opportunity . . . of full comparative choice, for the parties do not know ahead of time who the replacement for a challenged juror will be.<sup>166</sup>

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<sup>164</sup> *Id.* at 734-35.

<sup>165</sup> 666 F.2d 796 (2d Cir. 1981) (footnotes omitted).

<sup>166</sup> *Id.* at 798.

With this explanation in mind, it will not be surprising to learn that convicted criminal defendants have raised on appeal the claim that they have been deprived of the full and effective use of their peremptories when the struck jury method of empaneling the jury was not used at trial.<sup>167</sup> In the *Blouin* case, for example, the court, although admitting that the struck jury method "affords a more 'effective' opportunity for the use of peremptories than the 'jury box' system," held that both systems fell within trial court discretion and that neither was mandatory.<sup>168</sup>

Sometimes the challenge on appeal is the opposite—that the use of the struck jury method somehow deprived a defendant of the full effect of his peremptories. These challenges also fail. In *People v. Miller*,<sup>169</sup> the Michigan Court of Appeals lost its patience, stating, "We cannot accept the contention that defense counsel could not keep track of the responses of the prospective jurors. The struck jury method has been used and continues to be used in other jurisdictions and the attorneys there handle the situation."<sup>170</sup> Similarly, the Supreme Court of Alaska rejected a defendant's protest that "the struck jury method is inconsistent with the Alaska Rule of Civil Procedure 47(d) because that rule provides for the exercise of peremptory challenges as to jurors in the box, and under the struck jury method peremptory challenges are exercised before jurors are seated in the box."<sup>171</sup>

The courts, however, continue to face new issues about the struck jury system. In *United States v. Ricks*,<sup>172</sup> a divided Fourth Circuit observed that "from the historic operation of the struck jury system and from the careful recitation of facts showing that in each case upholding its validity, the number of veniremen supplied to counsel did not exceed the number of jurors actually required plus the authorized number of peremptory challenges" and held that such a limitation on the size of the panel "is an essential requirement of a valid struck jury system."<sup>173</sup> The dissent called this "a new rule that affects every criminal trial in this circuit"—a rule that prior authority refuted and that worked against the "fair cross-section of the community" goal.<sup>174</sup> In operation, at least in the state courts, struck jury panels often have been qualified that were larger than the number that would be produced by the Fourth Circuit's formula.<sup>175</sup>

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<sup>167</sup> For representative cases from New Jersey, see *State v. Bey*, 548 A.2d 887 (N.J. 1988), and *State v. Ramseur*, 524 A.2d 188 (N.J. 1987).

<sup>168</sup> See *Blouin*, 666 F.2d at 799.

<sup>169</sup> 276 N.W.2d 558 (Mich. Ct. App. 1979), *rev'd*, 307 N.W.2d 335 (Mich. 1981).

<sup>170</sup> *Id.* at 561.

<sup>171</sup> *Van Huff v. Sohio Alaska Petroleum Co.*, 835 P.2d 1181, 1184-85 (Alaska 1992).

<sup>172</sup> 802 F.2d 731 (4th Cir. 1986).

<sup>173</sup> *Id.* at 736-37.

<sup>174</sup> *Id.* at 737-39 (Wilkinson, J., dissenting).

<sup>175</sup> New Jersey cases are again illustrative. See *State v. Perry*, 590 A.2d 624, 631 (N.J. 1991) (qualifying "approximately fifty-four" jurors); *State v. Zola*, 548 A.2d 1022,

The history of the struck jury does not support the viewpoint of either the majority or the dissent in *Ricks*. The limitation that the majority articulated cannot be found in "the historic operation of the struck jury."<sup>176</sup> Even though, as the dissent stated, "[a] large venire . . . enhances the likelihood that the jury will include a fair cross-section of the community,"<sup>177</sup> that goal was never a rationale for the struck jury. The struck jury originated in civil cases, and it gave the parties some degree of control over jury composition that they otherwise would not have had.<sup>178</sup> In doing so, the struck jury concept was cousin to the "jury of peers" in that it allowed parties some leeway to pick jurors sympathetic to their lifestyles and circumstances. At least in theory, the same can be said of peremptories.<sup>179</sup> Regardless of whether the number of strikes is limited to the number of peremptories, the struck jury formula is not complementary to the reasonable cross-section requirement. The struck jury formula is a protection for litigants, while the cross-section requirement is a device to protect the citizens' right to serve on juries.<sup>180</sup>

## II. THE SPECIAL JURY COMPRISED OF JURORS WITH SPECIAL QUALIFICATIONS

It is not radical to hope to fill juries with capable people. Early statutes explicitly made the point. Statutory requirements customarily called for jurors to be "well-informed,"<sup>181</sup> or "most indifferent" and "best-qualified."<sup>182</sup> These formulations typically accompanied other general qualifications such as property ownership. As I have noted, however, the special jury

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1028 (N.J. 1988) (qualifying forty-eight potential jurors); *State v. Halsey*, 526 A.2d 1165, 1171 (N.J. Super. Ct. Law Div. 1987) (qualifying fifty-six potential jurors by the court before striking began). For an example of a formula that is limited in the way the Fourth Circuit describes, see the Arizona criminal procedure rule, *supra* notes 99-101.

<sup>176</sup> *Ricks*, 802 F.2d at 736.

<sup>177</sup> *Id.* at 739 (Wilkinson, J., dissenting).

<sup>178</sup> Indeed, the opportunities for control became, in the views of some, opportunities for improper jury packing. See JEREMY BENTHAM, *THE ELEMENTS OF THE ART OF PACKING AS APPLIED TO SPECIAL JURIES* (Garland Publishing, Inc. 1978) (1821).

<sup>179</sup> Some believe that this theoretical justification for peremptories has been mangled in practice beyond recognition. See HAROLD J. ROTHWAX, *GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE* 203-07 (1996). Rothwax is a New York judge and former criminal defense attorney who observes that criminal defense attorneys attempt to exploit the jury selection system by seeking "jurors who will not or cannot intelligently evaluate evidence." *Id.* at 200-01.

<sup>180</sup> See *infra* text accompanying notes 292-311.

<sup>181</sup> See ILL. REV. STAT. ch. 78, § 2 (1874); KAN. COMP. LAWS ch. 54, § 2 (1879).

<sup>182</sup> See the Michigan statute, *supra* note 149, and the Indiana statute, *supra* note 86. One Indiana jury commissioner testified that he tried to make sure that jurors had been "somewhat successful in life." *Shack v. State*, 288 N.E.2d 155, 161 (Ind. 1972).

was often thought to be a "blue ribbon," or "high-class," jury, somewhat in the tradition of the grand jury.<sup>183</sup> This is only one of at least four types of "special qualification" juries represented in American jury traditions and practices, each of which is discussed below.

#### A. The "Blue Ribbon," or "High-Class," Jury

In the United States, the practice of empaneling "gentlemen of the better rank"<sup>184</sup> was ordinarily an unwritten custom,<sup>185</sup> although sometimes a statute explicitly required it. In one instance, the practice was explicitly tied to the grand jury.

In New Jersey, the 1797 statute authorizing the struck jury specified that the sheriff was to select as the struck jury panel the forty-eight persons from the jury book that he thought were "most impartial and indifferent . . . and best qualified as to talents, knowledge, integrity, firmness and independence of sentiment, to try the said cause . . . ."<sup>186</sup> Indeed, the 1929 amendment that dropped these qualifying words was unsuccessfully challenged in court as unconstitutional.<sup>187</sup>

In Georgia, the special jury was expressly linked to the grand jury. From 1796 until 1914, Georgia statutes required special jurors to be taken from the grand jury list.<sup>188</sup> Grand jurors, in turn, were to be "the persons most able, discreet and qualified."<sup>189</sup>

The struck jury procedures in New York are those that have been most notoriously associated with jurors "of the better rank."<sup>190</sup> The procedures twice came before the United States Supreme Court in the 1940s—in *Fay v.*

<sup>183</sup> For a description of the grand jury tradition as it existed in England in the seventeenth century, see Oldham, *Origins*, *supra* note 17, at 162-64.

<sup>184</sup> See *supra* text accompanying notes 33-34.

<sup>185</sup> The Tennessee Code of 1843-44 authorized the circuit courts in any civil case, on motion of either party, to empanel a special jury. In construing this statute, the Tennessee Supreme Court explained that this section "contemplates the selection of men with reference to their superior competency and fitness to try and determine the particular issues involved in the case." *Jackson v. Pool*, 91 Tenn. 447, 453 (1892). Interestingly, the court added that the special jurors were not to be selected with reference to their relationship to the parties in nationality or color and that it was error for the trial court to select one-half of the jury from among colored persons upon the motion of a colored party litigant, solely because they were colored. *Id.*; see also *Virginia v. Rives*, 100 U.S. 313 (1880). For a discussion of this case, see *infra* note 279.

<sup>186</sup> Act of Nov. 10, 1797, § 15 (relating to juries and verdicts).

<sup>187</sup> See *State v. Donato*, 148 A. 776, 780 (N.J. Ct. Err. & App. 1930).

<sup>188</sup> See Judiciary Act § 35 (1796). In 1914, the statute was amended to allow special jurors to be selected from either the grand or traverse jury, at the discretion of the judge. See GA. CODE ANN. art. 8, § 852 (Park 1914).

<sup>189</sup> Judiciary Act § 28 (1796).

<sup>190</sup> See Oldham, *Origins*, *supra* note 17.



*New York*<sup>191</sup> and *Moore v. New York*.<sup>192</sup> Both times the Court barely upheld the special jury statutes by a five-to-four vote, over strongly worded dissents by Mr. Justice Murphy. In *Fay*, Justice Jackson, writing for the majority, explained: "Special jurors are selected from those accepted for the general panel by the county clerk, but only after each has been subpoenaed for personal appearance and has testified under oath as to his qualification and fitness."<sup>193</sup> Justice Jackson reviewed the prior unsuccessful attacks on the New York special jury because of its restrictive composition, after which he turned to the proof presented in the case before the Court. Tabulations and studies of New York jury questionnaires claimed to show that laborers, operatives, craftsmen, foremen, service employees, and women were systematically excluded from the special jury panel. The Court was not convinced that the statistics proved "that the jury percentages are the result of discrimination,"<sup>194</sup> stating that "petitioners adduced no evidence whatever that the occupational composition of the general panel is substantially different from that of the special"<sup>195</sup> and that women had an absolute exemption from jury service should they wish to exercise it, which apparently they often did.<sup>196</sup> Dissenting Justice Murphy, anticipating later developments, thought that the "blue ribbon" jury "denies the defendant his constitutional right to be tried by a jury fairly drawn from a cross-section of the community."<sup>197</sup> Justice Murphy admitted that "[t]here is no constitutional right to a jury drawn from a group of uneducated and unintelligent persons" or "chosen solely from those at the lower end of the economic and social scale,"<sup>198</sup> but he observed that the jury "is a democratic institution, representative of all qualified classes of people," so that the jury lists had to include persons "with varying degrees of training and intelligence and with varying economic and social positions."<sup>199</sup> He continued the argument in the *Moore* case, characterizing the New York special jury panels as "completely at war with the democratic theory of our jury system, a theory formulated out of the experience of generations."<sup>200</sup>

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<sup>191</sup> 332 U.S. 261 (1947).

<sup>192</sup> 333 U.S. 565 (1948).

<sup>193</sup> 332 U.S. at 267 (citing N.Y. Judiciary Law § 749 (McKinney 1946)).

<sup>194</sup> *Id.* at 276.

<sup>195</sup> *Id.* at 276-77.

<sup>196</sup> *See id.*

<sup>197</sup> *Id.* at 298.

<sup>198</sup> *Id.* at 299.

<sup>199</sup> *Id.* at 299-300.

<sup>200</sup> 333 U.S. at 570. Other challenges to the New York special jury statute on grounds similar to those presented in *Fay* and *Moore* cases were rejected by the Second Circuit. *See United States ex rel. Torres v. Mancusi*, 427 F.2d 168 (2d Cir. 1970). The juries in these cases were empaneled before the repeal of the New York blue ribbon jury statute in 1965. The argument in *Mancusi* was interesting; the defendant claimed

The repeal of the New York blue ribbon jury statute in 1965 ended the chapter in United States history that expressly permitted the formation of trial juries from special lists of persons in the upper echelons of society. It is not surprising that this chapter happened or that it is now closed; nevertheless, the idea of special juries of experts persists. Because experts typically are highly educated, most of them fall within the upper end of the socioeconomic spectrum. It is usually less objectionable, however, to think of selecting special jurors from this segment of society when those jurors are chosen for their expertise, rather than solely because of their social standing.

### B. *The Jury of Experts*

The notion of bringing experts into dispute settlement processes makes good common sense and has an extensive history. Perhaps the best known example is the use of experts as arbitrators. The idea of expert decision makers is also at the heart of the extensive network of quasi-adjudicatory administrative agencies that have flourished since New Deal days. Another example is the formation of specialty courts, such as a commercial court<sup>201</sup> or the United States Court of Patent Appeals.<sup>202</sup> Neither the private arbitrator nor the administrative judge, however, need worry about submitting questions of fact to a jury. Specialty courts must do so, continuing to recognize the preserved right to jury trial embodied in the Seventh Amendment, comparable state constitutional provisions, and statutes.

The courts have responded to some extent to the robust debate in legal literature about the constitutionality of dispensing with the jury in complex civil litigation.<sup>203</sup> By and large, the argument that a "complexity exception" can be carved out of the Seventh Amendment has not succeeded.<sup>204</sup>

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that the jury had a large number of educated and well-to-do people on it and "was less well equipped than a general jury would have been to pass judgment upon his offense, which he represents was a crime of passion committed by a man of underprivileged background, frail in health, of low intelligence, and who had been working at poorly paid menial jobs." *Id.* at 169.

<sup>201</sup> Louisiana, for example, once formed a commercial court. *See infra* note 218.

<sup>202</sup> Patent appeals are now part of the responsibilities of the United States Court of Appeals for the Federal Circuit.

<sup>203</sup> *See* Oldham, *Origins*, *supra* note 17, at 138 n.5; M.S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980).

<sup>204</sup> That the issue remains alive, however, is shown in the patent case of *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995), *aff'd*, 517 U.S. 370 (1996). The Federal Circuit decided that in a patent infringement action, questions of patent claim construction and interpretation were exclusively questions of law for the court and that neither the Seventh Amendment nor precedent required these questions to go before a jury. *See id.* The Supreme Court, in a unanimous opinion by Justice Souter, affirmed.

One alternative, as earlier noted,<sup>205</sup> is to revive and expand the use of the special jury and to utilize jurors equipped by education or training to understand the complex issues in dispute. This idea is currently on the statute books in Delaware. Before discussing Delaware's statutory provisions, however, I will lay out the historical use of special juries of experts.

The most common historical example, following the English experience, is the use of the "merchant jury" for commercial cases. There was such a chapter in New York law, as earlier explained.<sup>206</sup> South Carolina and Louisiana also utilized the "merchant jury."

In addition to discussing New York's use of the "merchant jury," Morton Horwitz summarized the South Carolina history in *The Transformation of American Law 1780-1860*.<sup>207</sup> According to Horwitz, "[e]ven more than in New York, merchant juries seem to have exerted a powerful influence over the course of development of post-revolutionary South Carolina commercial law."<sup>208</sup> He gives several examples of the power of merchant juries during the 1780s and early 1790s (their heyday in South Carolina) authorized by a colonial statute of 1769<sup>209</sup> and allowed on the court's own

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*See Markman*, 517 U.S. 370 (1996). In the Federal Circuit opinion, Judge Mayer, concurring in the judgment for different reasons, protested that the majority opinion marked a bizarre "sea change in the course of patent law" that was "of a piece with a broader bid afoot to essentially banish juries from patent cases altogether." *Markman*, 52 F.3d at 989 (Mayer, J., concurring). He characterized the majority decision as threatening "to do indirectly what we have declined to do directly, that is, create a 'complexity exception' to the Seventh Amendment for patent cases." *Id.* at 989, 993. In the Supreme Court opinion, Justice Souter, after disposing of the constitutional issue, observed that complicated patent issues can be handled better by judges than by juries. *See Markman*, 517 U.S. at 388. Nevertheless, applying the historical test for the scope of the Seventh Amendment jury trial guarantee, the Court concluded that a jury would not have decided the patent claim issue in England in 1791. *See id.* at 379-80. In my view, the Court's conclusion was incorrect, but that is a topic for another day.

<sup>205</sup> *See supra* note 21.

<sup>206</sup> *See supra* notes 118-25 and accompanying text. One twentieth-century example cited by Judge Martuscello in *Schuster v. City of New York*, 205 N.Y.S.2d 190 (Sup. Ct. 1960), was the case of *Industrial & Gen. Trust, Ltd. v. Tod*, 46 Misc. 492 (N.Y. Sup. Ct. 1905). The case involved valuation of railroad bonds, and the trial court granted a motion for a special jury on the ground that the issue should be determined by a jury "of intelligence and of practical business experience . . . the best which any established method of selection may secure." *Id.* at 493. Indeed, the court stated that "each juror should have much of the capacity for financial analysis which a successful reorganizer of railroad properties may be deemed to possess." *Id.* at 494.

<sup>207</sup> MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977).

<sup>208</sup> *Id.* at 158.

<sup>209</sup> *See id.* The statute allowed special juries, on consent of both parties or motion of one willing to pay the cost, in cases involving much money or "concerning trade, and disputes with merchants." *Id.*

motion by an Act of 1791.<sup>210</sup>

The Library of Congress holds a privately printed volume containing South Carolina jury lists from 1778 to 1779.<sup>211</sup> These were copied from original handwritten lists in the South Carolina archives and are broken down by judicial districts, as shown on explanatory maps. Three categories are tracked—grand jurors, petit jurors, and special jurors. Special jurors comprised thirty-eight percent of the total number of jurors in Charleston, whereas in other districts the percentages ranged from two percent to eight percent. Clearly the use of special juries of merchants in the commercial center of South Carolina was well-established by the time of American independence, and probably earlier. As Horwitz has pointed out, however, parties began to use special juries as a delay tactic, and in 1797, South Carolina passed a statute that limited special juries to cases in which both parties consented.<sup>212</sup> Thereafter the special jury trail goes cold. Presumably the use gradually died out.<sup>213</sup>

Louisiana is another jurisdiction with a history of actively using merchant juries. In 1807, Louisiana passed a statute that proved to be unique in United States history by allowing the trial judge to appoint special jurors who had expertise relevant to the litigated dispute. The statute provided:

In all cases when the judges shall be of opinion that the matters to be submitted to the decision of a jury, are of such a nature as to require certain information peculiar to certain occupations or professions, then and in that case the judges are empowered, at the request of either party, to direct to be summoned a sufficient number of jurors; being of the occupation, profession or trade, an acquaintance with which is more particularly necessary for the decision of the cause.<sup>214</sup>

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<sup>210</sup> Act of Dec. 1791, No. 1526 (altering and amending the South Carolina law respecting juries of 1769 and instituting additional regulations to the Acts for establishing and regulating the circuit courts).

<sup>211</sup> GELEE CORLEY HENDRIX & MORN MCCOY LINDSAY, *THE JURY LISTS OF SOUTH CAROLINA 1778-1779* (privately printed n.d.).

<sup>212</sup> See HORWITZ, *supra* note 207, at 159; Act of Dec. 1797, No. 1665 (abolishing the right of trial by special jury, except by consent of both parties).

<sup>213</sup> See HORWITZ, *supra* note 207, at 159. As Horwitz has pointed out, standard printed sources show no special juries in use after 1796, but they likely were used with the consent of both parties in cases with no printed record or in cases that were reported but in which there was no occasion for the reporter to note the fact that the jury was special. See *THE SOUTH CAROLINA JUSTICE OF THE PEACE* 257 (New York, T. & J. Swords 1810) (describing how the special jury lists in Charleston and other districts are to be fashioned, even though the description that had been in the 1788 edition (at page 291) of the empaneling of special juries pursuant to the 1769 statute no longer appears).

<sup>214</sup> Act of 1807, ch.23 (authorizing a special jury in certain cases).

The experience in Louisiana with this statute (which was repealed in 1823 and reinstated in 1831) is described by Richard Kilbourne in *Louisiana Commercial Law*.<sup>215</sup> According to Kilbourne, the statute, after its revival in 1831, "remained viable during the antebellum period and even appears in John Ray's Digest of 1870."<sup>216</sup> He attributes this longevity to facts peculiar to New Orleans—its civil law tradition, the dependence of its economy on international trade, and the concomitant traffic in commercial paper.<sup>217</sup> His own examination of juries summoned during the first three years of the Commercial Court,<sup>218</sup> from 1839 to 1842, showed a large percentage of merchants even when the juries were not special. This abundance of merchants was due primarily to the fact that often merchants were the only men who met the qualifications for regular jury service.<sup>219</sup>

After the Commercial Court was eliminated in 1846, the preeminence of merchants on juries, both special and ordinary, undoubtedly dwindled.<sup>220</sup> For several decades, however, the experience with merchant juries in New Orleans represented the closest approximation in the United States to Lord Mansfield's use of merchant juries to incorporate mercantile practices into the common law.<sup>221</sup> Kilbourne names many of the prominent commission merchants, brokers, bankers, directors of insurance companies, and directors of the chamber of commerce who served as jurors.<sup>222</sup> Moreover, he notes that "[p]ermitt[ing] juries of merchants . . . to generate their own laws with a stamp of approval on trade practices had important economic repercussions."<sup>223</sup>

Delaware also has a rich history of special jury use. As earlier explained, the Delaware statute passed in 1987 allows a special jury to be ordered "upon the application of any party in a complex civil case."<sup>224</sup> The Delaware Superior Court upheld the constitutionality of special juries in *In re Asbestos Litigation*.<sup>225</sup> The court concluded that "qualifications of jurors and the exercise of peremptory challenges, which are the distinguishing

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<sup>215</sup> R. KILBOURNE, *LOUISIANA COMMERCIAL LAW: THE ANTEBELLUM PERIOD* 101-05 (1980).

<sup>216</sup> *Id.* at 101.

<sup>217</sup> *See id.* at 102.

<sup>218</sup> This court lasted in New Orleans from 1839 to 1846. *See id.* at 85.

<sup>219</sup> *See id.* at 102-03.

<sup>220</sup> *See id.* at 102-03, 106-07.

<sup>221</sup> *See id.* at 26-28, 102-05; *see also supra* note 16.

<sup>222</sup> *See id.* at 103-04.

<sup>223</sup> *Id.* at 102-04.

<sup>224</sup> DEL. CODE ANN. tit. 10, § 4506 (1987).

<sup>225</sup> 551 A.2d 1296 (Del. Super. Ct. 1988). In reaching its conclusions, the superior court leaned on the 1982 decision of the Delaware Supreme Court that upheld the constitutionality of the special jury statute then in effect. *See id.* at 1298 (citing *Haas v. United Techs. Corp.*, 450 A.2d 1173 (Del. 1982)).

characteristics of the special jury procedure, are not constitutionally protected."<sup>226</sup> The statutory change in 1987 that converted the Delaware special jury from a matter of right to a matter of court discretion was legitimate.<sup>227</sup>

In reaching this conclusion, the Delaware court briefly reviewed the English special jury background, including Blackstone's reference to "causes of too great nicety for discussion of ordinary freeholders . . . ."<sup>228</sup> The court also noted that "[t]he use of special jurors who had particular knowledge or experience in the subject of the trial had been customary in England from early times."<sup>229</sup> At various stages in Delaware, jurors were required to be "the most discreet and judicious freeholders," "sober and judicious persons of fair characters," and "qualified to vote at the general election."<sup>230</sup> No special statutory requirements differentiated special jurors from common jurors in England.<sup>231</sup> In Delaware, they were to come from the general jury lists and were to be (initially) the "most indifferent" and "best qualified" or (later) "indifferent and judicious citizens."<sup>232</sup>

Presumably the Delaware legislature, in making the 1987 change in the special jury law, intended both to make the special jury more exceptional by making it discretionary, and to respond to the perceived problem of relying on ordinary juries in complex civil cases. No guidance, however, was given about what constitutes a complex civil case, or for that matter, about how special jurors are to be selected whenever a special jury is ordered in such a case.

The several reported cases that have used special juries or that have responded to motions for special juries under the new law show that the new law may lead more to confusion than clarity. A growing distaste for the special jury option among superior court judges may be discernible. In four Delaware cases, the court denied motions for special juries, all on the ground that the cases before the court were insufficiently complex. One of these cases, *Amoroso v. Joy Manufacturing Co.*,<sup>233</sup> was a product liability case involving a heavy air compressor, and the court, reasonably enough, saw no complex issues. Less straightforward was a series of asbestos cases in which special jury motions were denied,<sup>234</sup> despite the fact that in a pre-

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<sup>226</sup> *Id.* at 1297.

<sup>227</sup> *See id.* at 1297, 1300.

<sup>228</sup> *See id.* at 1297; *see also supra* note 27 and accompanying text.

<sup>229</sup> *Id.* at 1298.

<sup>230</sup> *Id.*

<sup>231</sup> *See id.*; *see also supra* notes 26 and 33 and accompanying text.

<sup>232</sup> *In re Asbestos Litigation*, 551 A.2d at 1298. The latter requirement ended when the special jury law in Delaware changed in 1987. *See id.*; DEL. CODE ANN. tit. 10, § 4506 (1987).

<sup>233</sup> No. C.A. 86C-MY-189, 1987 WL 26911 (Del. Super. Ct. Dec. 4, 1987).

<sup>234</sup> *See Bradley v. A. C. & S. Co., Inc.*, Nos. 84C-MY-145, 85C-FE-10, 1989 WL

vious trial the jury had been called upon to render its verdict by answering thirty-six pages of interrogatories and that one scheduled case might require jury answers to interrogatories from fifteen or more defendants. The court pointed out that many of the answers would be the same as to the various defendants, and prior verdicts in other cases "demonstrated that the issues which are presented in these cases are well within the comprehension and capabilities of jurors who come from the ordinary panels of jurors."<sup>235</sup> The court explained its meticulous habits to assist ordinary juries, pointing out as well that "[m]ost areas of science can be described in such a way that they can be understood by people of ordinary intelligence, education and experience," for example, "by avoiding overly technical words and expressions (particularly of Latin origin) and using less erudite verbiage."<sup>236</sup> Responding to defendants' reliance on an article entitled *The Case for Special Juries in Toxic Tort Litigation*,<sup>237</sup> in which the author argues for special juries formed by a system of specific education and experience standards, the court wrote:

The use of jurors who have expertise which relates to the case also presents problems. One is that many cases involve more than one area of expertise. Another is that in many specialties, experts do not subscribe to a single philosophy or approach, and therefore, the decision could be slanted toward one predetermined philosophy or another and not dependant upon the evidence presented at trial. The use of experts as jurors could well produce a more prejudiced system of justice than does the traditional jury system.<sup>238</sup>

The court also observed that the proposed scheme would represent a method of selection that is "contrary to fundamental principles of jury trial" and "inconsistent with established principles of justice," requiring "statutory and perhaps constitutional modification."<sup>239</sup>

Yet another motion for a special jury was denied in *Noramco (Delaware), Inc. v. Carew Associates, Inc.*<sup>240</sup> The court was not impressed by the argument that the construction dispute estimated to occupy a two-week

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70834 (Del. Super. Ct. May 23, 1989).

<sup>235</sup> *Id.* at \*1.

<sup>236</sup> *Id.* at \*3.

<sup>237</sup> Dan Drazan, *The Case for Special Juries in Toxic Tort Litigation*, 72 JUDICATURE 292 (1989).

<sup>238</sup> *Bradley*, 1989 WL 70834, at \*3.

<sup>239</sup> *Id.* One prior statutory authorization in the United States came close to the proposed scheme—the 1807 Louisiana statute. *See supra* note 214 and accompanying text.

<sup>240</sup> No. C.A. 85C-MY-54, 1990 WL 199509 (Del. Super. Ct. Oct. 22, 1990).

trial would involve the proverbial "battle of the experts."<sup>241</sup> The court noted that "[t]he better experts have learned to be able to speak understandably to lay people," adding, "That the expertise may be complex does not necessarily mean that the case is a 'complex civil case.'"<sup>242</sup>

When a special jury is granted, a new question occurs—one that seems obvious in retrospect, but that may not have been anticipated. A question arises regarding whether the standards for the admissibility of expert testimony require upward adjustment because of the supposed greater capabilities of the special jurors. This question came before the Delaware Superior Court in *Ramada Inns, Inc. v. Dow Jones & Co.*,<sup>243</sup> a libel case presenting an "actual malice" issue. The plaintiff proposed that a Pulitzer Prize-winning journalist, professor, and author testify about journalistic standards.<sup>244</sup> Dow Jones filed a motion in opposition, arguing, among other things, that the testimony should be rejected because "the subject of the testimony is within the comprehension of the average special juror in this case."<sup>245</sup> The Delaware Superior Court acknowledged the test set forth by the Delaware Supreme Court:

Knowledge is specialized only when not possessed by the average trier of fact who lacks the expert's skill, training or education. Consequently, expert testimony impermissibly invades the province of the jury if it embraces matters in which the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions.<sup>246</sup>

Despite case authority from other jurisdictions holding that journalism standards were well within the reach of ordinary jurors, the court was "not persuaded that members of a special jury are sufficiently knowledgeable of the standards and practices of investigative journalism so as to render expert testimony on the subject useless."<sup>247</sup>

The future of the 1987 Delaware special jury statute remains uncertain. In addition to the cases discussed above, a recent product liability case

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<sup>241</sup> *Id.* at \*1.

<sup>242</sup> *Id.* The court also wondered why the parties had not followed a common path in the case by seeking expertise through arbitration, adding that "[t]he application for a special jury here may result in having 'expertise' the parties did not freely contract for." *Id.*

<sup>243</sup> No. C.A. 83C-AU-56, 1987 WL 28311 (Del. Super. Ct. Oct. 22, 1987).

<sup>244</sup> *See id.* at \*1.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* (quoting *Wheat v. State*, 527 A.2d 269 (Del. 1987)).

<sup>247</sup> *Id.*



against General Motors also used the special jury.<sup>248</sup> The Delaware Superior Court, in *Ramada Inns*, published by slip opinion the following method agreed upon with counsel for the selection of the special jury:

1. The parties shall submit to the Court a list of witnesses likely to be called at trial . . . for the Prothonotary's use in furnishing notice to jurors.
2. The Prothonotary shall promptly identify potential special jurors and shall send the appropriate special jury questionnaire to those persons identified.
3. After receiving the responses to the juror questionnaires, the Prothonotary shall select one hundred persons who are qualified as special jurors . . . .
4. . . . [T]he Prothonotary shall provide the Court and counsel with (a) a list of the names of the special jurors selected and (b) a copy of the responses by those individuals to the special jury questionnaire.
5. . . . [T]he parties shall file any written challenges for cause on the ground that individual jurors selected by the Prothonotary do not qualify as special jurors. Any party objecting to such a challenge shall not file a written response but shall reserve his objections until the hearing conducted by the Court or until the prearranged teleconference.
6. The Court shall conduct a hearing in the Court or over the telephone . . . . At that time the Court will consider the written challenges and any oral opposition to those challenges. The Court will rule on each challenge at that hearing.
7. The parties will have the right to exercise peremptory challenges at a date to be determined during the pretrial conference . . . . Each side may exercise up to, and including, six peremptory challenges.
8. After the exercise of the peremptory challenges the Prothonotary shall promptly summon the remaining jurors to appear at the first day of trial . . . .
9. The jury and alternates in this case shall be selected from the remaining array in the same manner as juries are selected in non-special jury cases.<sup>249</sup>

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<sup>248</sup> See *McLain v. General Motors Corp.*, 569 A.2d 579 (Del. 1990).

<sup>249</sup> *Ramada Inns, Inc. v. Dow Jones & Co.*, No. C.A. 83C-AU-56, 1987 WL 28311 (Del. Super. Ct. Oct. 22, 1987).

### *C. Juries for Property Condemnation and Diking District Assessment Disputes*

#### 1. *Next Neighbors*

In this discussion of special qualifications for special jurors, I have considered both the "blue ribbon" jury and the jury of experts. I now turn briefly to two features of the larger history of the jury. The first is the original notion that jurors were to be "next neighbors" who ought to be in a position to know something about the dispute and the parties, instead of being disinterested strangers requiring proof of facts. The theory was that by being "next neighbors," the jurors would be able to get to the bottom of the dispute effectively.<sup>250</sup>

There is one species of jury statute that survives to the present that still retains the flavor of this ancient notion—statutes that require juries to decide valuation disputes caused by property condemnations effected through eminent domain for public works (usually highways) or resulting from diking district assessments. The West Virginia statute requires the jurors to be "qualified freeholders" in the county where the property in dispute is located.<sup>251</sup> These are the only civil juries in that state still requiring twelve members, determined by the parties' alternate strikes of four each from a panel of twenty freeholders.<sup>252</sup> The language of the Washington state statute allows the court to "call a special jury . . . and direct that a jury panel be selected and summoned . . . from the citizens of the county in which the lands . . . sought to be appropriated are situated, as many qualified persons as may be necessary in order to form a jury of twelve persons . . . ."<sup>253</sup>

Colorado has codified an interesting variation, circling back to the special jury with expertise, for juries in drainage district assessments. To resolve a disputed assessment, the statute provides that the district court shall "cause to be summoned six landowners living outside of the drainage district, who are not interested in any lands or work in said district, or of kin to any of the parties interested," and "[t]he six landowners shall be men who have some knowledge of the costs and benefits of farm drainage."<sup>254</sup>

<sup>250</sup> See Oldham, *Origins*, *supra* note 17, at 173.

<sup>251</sup> W. VA. CODE § 56-6-13(b) (1997).

<sup>252</sup> See *id.*

<sup>253</sup> WASH. REV. CODE ANN. § 8.04.080 (West 1992). The parties to such a dispute in Washington can consent to a jury of less than twelve, but no smaller than three. See *id.*; see also *id.* § 85.06.120 (West 1995) (setting forth procedures for juries to resolve disputes about diking district assessments).

<sup>254</sup> COLO. REV. STAT. ANN. § 37-23-104 (1997). The continued statutory reference to

## 2. *Juries De Medietate Linguae*

The second feature of the broader history of the jury previously mentioned is the "half-and-half" jury and its kinship to recent arguments calling for racial quotas for juries in racially charged cases.<sup>255</sup> The "half-and-half" jury—the jury *de medietate linguae*—was part of the early jurisprudence of several states.<sup>256</sup> This type of jury required that jurors have the special qualification of being foreigners. Judge Henry Toulmin's rationale bears repeating:

The fundamental principle of this institution [trial by jury] is, that a man should be tried by his peers or equals, a commoner by commoners and a nobleman by nobles; and so liberal was the extension of this principle even in the 14th century, that by the 28th of Edward III, ch. 13, it was provided, that in inquests to be taken between aliens and English subjects, one half of the jury should consist of aliens, and the other half of English subjects. We have a similar provision in our own statutes . . . .<sup>257</sup>

Often, however, a practical difficulty arose—that of finding six foreigners from the defendant's own country. The solution was for the empaneling officer to try his best to find jurors from the defendant's own country, but to resort to *any* foreigners, as necessary. According to an 1803 New York practice book:

Juries and inquests between aliens and citizens of the United States . . . , the one half shall be citizens of this state, . . . and the other half aliens, if so many there be in the city or county where such jury or inquest is to be taken, and who shall be indifferent between the parties; and if there be not so many aliens or strangers, then as many as shall be found . . . .<sup>258</sup>

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"men" is obviously obsolete.

<sup>255</sup> See *supra* notes 11-13 and accompanying text.

<sup>256</sup> See KY. REV. STAT. ch. 55, art. III, § 5 (1852); Statute of Oct. 1788, § 44, *reprinted in* XII W.W. HENING, LAWS OF VIRGINIA 746 (1823); *Respublica v. Mesca*, 1 Dall. 73 (Phila. Oyer & Terminer Sept. Sess. 1783).

<sup>257</sup> H. TOULMIN, THE MAGISTRATE'S ASSISTANT 140 (Natchez, Samuel Terrell 1807); see *supra* text accompanying note 7.

<sup>258</sup> A NEW CONDUCTOR GENERALIS 257 (Albany, D. & S. Whiting 1803).

In contrast, an 1810 South Carolina Justice of the Peace manual stated that the sheriffs in a trial of an alien were to "summon 18 subjects of the nation of such alien, if they may be had, or the subjects of any other nation (except subjects of Great Britain during the war) . . . ." <sup>259</sup>

It is doubtful that today's calls for racial quotas for juries in racially charged cases—the modern counterpart to the jury *de medietate*—will be enacted into law. Interestingly, however, the concept was officially recommended in England. The Royal Commission on Criminal Justice issued its Report in July 1993, paragraph 62 of which reads as follows:

We are reluctant to interfere with the principle of random selection of juries. We are, however, anxious that everything possible should be done to ensure that people from the ethnic minority communities are represented on juries in relation to their numbers in the local community. The pool from which juries are randomly selected would be more representative if all eligible members of ethnic communities were included on the electoral roll. Even if this were to be achieved, however, there would statistically still be instances where there would not be a multi-racial jury in a case where one seemed appropriate. The Court of Appeal in *Ford* held that race should not be taken into account in selecting juries. Although we agree with the court's position in regard to most cases, we believe that there are some exceptional cases where race should be taken into account. <sup>260</sup>

Almost uniformly, case law and secondary literature in England prior to the Royal Commission's Report opposed the idea of racial quotas. <sup>261</sup> In the *Ford* case referred to by the Commission, the Court of Appeal ruled that "in the absence of evidence of specific bias, ethnic origins could not found a

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<sup>259</sup> SOUTH CAROLINA JUSTICE OF THE PEACE 252 (New York, T. & J. Swords 1810). The passage in the 1810 edition is the same as that in the 1788 edition at page 288 (Philadelphia, R. Aitken & Son).

<sup>260</sup> THE ROYAL COMMISSION ON CRIMINAL JUSTICE REPORT 133 (London, HMSO 1993) (footnote omitted).

<sup>261</sup> See *R. v. McCalla*, 1986 CRIM. L. REV. 335 (Stoke-on-Trent Crown Ct. 1985); *R. v. Bansal, Bir, Mahio and Singh*, 1985 CRIM. L. REV. 151 (Maidstone Crown Ct. 1984); *R. v. Danvers*, 1982 CRIM. L. REV. 680 (Nottingham Crown Ct. 1982); A. Dashwood, *Juries in a Multi-Racial Society*, 1972 CRIM. L. REV. 85. In one case in 1981, a judge on the Bristol Crown Court ruled that, notwithstanding the apparently preclusive wording of the Juries Act 1974, he had discretion to manipulate jury selection to achieve racial balance when it appeared that this would not be achieved through the use of peremptory challenges. See *R. v. Binns*, 1982 CRIM. L. REV. 522 (Bristol Crown Ct. 1981).

valid ground for challenge to an individual juror," and that a judge does not have discretion to remove a potential juror solely on that ground, not even in the interest of achieving racial balance on the jury.<sup>262</sup> In a 1995 speech to the Leeds Race Issues Advisory Council, the Lord Chief Justice of England stated his opposition to the Royal Commission on Criminal Justice proposal, calling it "the thin end of a particularly insidious wedge."<sup>263</sup> He viewed the proposal as a dangerous departure from the time-honored practice of random selection of jurors. In the Lord Chief Justice's opinion, members of the jury should not be regarded "as representing the views of the community, or of discrete parts of it, nor indeed of 'representing' either the complainant or the defendant."<sup>264</sup>

### III. THE SPECIAL JURY, THE "REASONABLE CROSS-SECTION" REQUIREMENT, AND CONSTITUTIONAL LIMITATIONS ON PEREMPTORY CHALLENGES

Jeffrey Abramson has observed that "[t]he cross-sectional jury is so familiar to us today that we forget how modern is its triumph."<sup>265</sup> He catalogues the march of the idea, from infancy in the 1960s, to the Jury Selection and Service Act of 1968, to the Supreme Court's 1975 decision in *Taylor v. Louisiana*,<sup>266</sup> which raised the concept to constitutional stature under the Sixth Amendment.<sup>267</sup> Abramson gives this summary appraisal: "To say, as the Supreme Court did in its landmark 1975 decision, that only 'representative' juries are 'impartial' juries is to suggest a new way of thinking about how to make jurors capable of impartial justice—a way that stands the classical view of impartiality on its head."<sup>268</sup>

Abramson's appraisal is correct. The fundamental change in opinion that occurred regarding the selection of juries was a shift away from rules that promote fairness to the parties to a lawsuit, especially defendants in criminal cases, to rules that are perceived as promoting fairness to society at large and its democratic traditions. The classical model was shaped to produce unbiased jurors who could decide cases unencumbered by any personal agendas. Occasionally—as in the "half-and-half" jury—this was leavened by a desire to be as fair as possible to a defendant, by having some jurors equipped to understand and empathize with the defendant's cultural and

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<sup>262</sup> *Regina v. Ford*, 1 Q.B. 868, 873 (C.A. 1989); see also Dashwood, *supra* note 261, at 828.

<sup>263</sup> Frances Gibb, *Lord Chief Justice Rejects Jury Race Quota as Insidious*, TIMES OF LONDON, July 1, 1995 (quoting the Lord Chief Justice Taylor).

<sup>264</sup> *Id.*

<sup>265</sup> ABRAMSON, *supra* note 1, at 99.

<sup>266</sup> 419 U.S. 522 (1975).

<sup>267</sup> See ABRAMSON, *supra* note 1, at 99-125.

<sup>268</sup> *Id.* at 100.

linguistic background. The new model jettisoned this idealism, adopting a brand of realism that frankly acknowledged the existence of sharp ethnic, gender, and racial divisions in society. The best way to account for these divisions in jury composition is to ensure that all clearly identifiable, "cognizable" groups are fairly represented in the jury pools. This way, in the aggregate, the biased votes by jurors of the various interest groups eventually will cancel each other out.<sup>269</sup>

The next logical development dealt with peremptory challenges. If we insist on a fair cross section of the community in the jury lists that generate jury panels, surely it is wrong to allow a party to tamper with the *chance* that various cognizable groups will find representation on particular juries. Thus it is wrong to allow the exercise of peremptory challenges solely to eliminate blacks, other racial or ethnic groups, or women. A series of Supreme Court decisions established this proposition in the 1980s and 1990s: *Batson v. Kentucky*<sup>270</sup> (disallowing peremptories based solely on race); *Powers v. Ohio*<sup>271</sup> (holding that *Batson* applies regardless of whether jurors eliminated are of the same race as the defendant); *Edmonson v. Leesville Concrete Co.*<sup>272</sup> (holding that *Batson* applies to civil cases as well as criminal); *Georgia v. McCollum*<sup>273</sup> (holding that *Batson* applies to defense counsel as well as to the prosecution); and *J.E.B. v. Alabama*<sup>274</sup> (holding that the *Batson* principle precludes using peremptories to eliminate jurors solely because of their sex). Unsurprisingly, *Batson* led to a call for the elimination of peremptories altogether, on the theory that they are inconsistent with the cross-section idea.<sup>275</sup> A closely divided Supreme Court, however, refused to eliminate peremptories completely in *Holland v. Illinois*,<sup>276</sup> reasoning (in the majority opinion by Justice Scalia) that the constitutional principle at work seeks jury impartiality, not cross-section representativeness on specific juries. Abramson is nevertheless correct in concluding that "the present position of American law on peremptory challenges is incoherent."<sup>277</sup> He adds that "[h]aving taken the first step of pro-

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<sup>269</sup> See *id.* at 100-01.

<sup>270</sup> 476 U.S. 79 (1986).

<sup>271</sup> 499 U.S. 400 (1991).

<sup>272</sup> 500 U.S. 614 (1991).

<sup>273</sup> 505 U.S. 42 (1992).

<sup>274</sup> 511 U.S. 127 (1994).

<sup>275</sup> See *Batson*, 476 U.S. at 103-08; Rodger L. Hochman, Note, *Abolishing the Peremptory Challenge: The Verdict of Emerging Caselaw*, 17 NOVA L. REV. 1367 (1993); Jeffery S. Juber, Note, *The Peremptory Challenge at the Federal Level and in Maryland: Its Uncertain Future After Georgia v. McCollum*, 23 U. BALT. L. REV. 225 (1993); Edward P. Schwartz & Warren F. Schwartz, *The Challenge of Peremptory Challenges*, 12 J.L. ECON. & ORG. 325 (1996).

<sup>276</sup> 493 U.S. 474 (1990).

<sup>277</sup> ABRAMSON, *supra* note 1, at 139.

hibiting race and sex as grounds for peremptory challenges, the Supreme Court has little logical choice but to take the second and decisive step of banning all uses of peremptory challenges that target specific groups for exclusion from the jury.<sup>278</sup>

Regardless of whether the current position of American law on peremptory challenges is incoherent, one should ask what the implications of the new law are for whatever life may be left of the special jury. If the Supreme Court were to adopt a quota of a specified number of black jurors in a racially charged case, a new special jury would exist because at least some of the jurors would be required to have special qualifications. This is not likely to happen; the idea is out of fashion with the political temper of the times and is incompatible with the cross-section concept.<sup>279</sup>

Short of the racial quota notion, what are the implications of the new jury rules for the special jury? Clearly the restrictions preventing the discriminatory use of peremptories apply to the "struck jury" method of jury selection and to the "jury box" method.<sup>280</sup> It may be easier, however, to camouflage discrimination with the struck jury model because the demographics of the entire panel will be known from the start, making it easier to pick and choose. A party hoping to eliminate women from a jury may avoid a charge of intentional sex discrimination by merely eliminating *most* of the women, allowing one or two who seem least objectionable to stand.

Alternatively, the opportunity to discriminate, provided by advance knowledge of the entire panel, could supply real meaning to the "jury of peers" idea. By strategic striking, it often may be possible for a criminal

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<sup>278</sup> *Id.* In *Willis v. Zant*, 720 F.2d 1212 (11th Cir. 1983), the court noted:

Although the distinctiveness of a group for sixth amendment purposes is a question of fact, . . . [c]ertainly, a court can determine as a matter of law that a group is not cognizable or distinct. For example, no evidentiary hearing would be needed to determine that redheads or vegetarians are not distinctive classes within the sixth amendment fair cross-section analysis." *Id.* at 1217.

Despite the assurance of the Eleventh Circuit, the lines are ever moving. For example, one can imagine a future argument, in litigation involving animal rights protests, that vegetarians should represent a cognizable class.

<sup>279</sup> The Supreme Court considered and rejected the quota idea in 1879 in *Virginia v. Rives*, 100 U.S. 313 (1879). As Abramson has explained, "the defendants moved prior to their trial to have the panel of available jurors modified so that it would be one-third black," a motion "premised on the existence of an affirmative right to have blacks actually included on the jury (that is, to have blacks represented in rough proportion to their population in the county)." ABRAMSON, *supra* note 1, at 106. Thus, "the Virginia defendants' motion . . . was a claim that society was so cleaved along racial lines that the jury had to be also." *Id.* Although the Supreme Court rejected this notion in 1879, the idea is not far from the customary rationale given for the cross-section requirement. See *supra* note 269 and accompanying text.

<sup>280</sup> See, e.g., *Lemley v. State*, 599 So.2d 64 (Ala. Crim. App. 1992), *cert. denied*, 1992 LEXIS 817 (Ala. June 12, 1992).

defendant to have some jurors from his own race or socio-economic circumstances. This possibility falls short of the "affirmative peremptories" argued for by one writer,<sup>281</sup> but it moves in the same direction.

The Fourth Circuit in *United States v. Ricks*<sup>282</sup> presents another open question.<sup>283</sup> District courts within that circuit now must tailor their struck jury method so that the panel is no larger than the number of trial jurors required plus the total applicable number of peremptory challenges.<sup>284</sup> It is unclear whether federal courts in other circuits, or state courts, will adopt this limitation.

Because the cross-section idea pertains to both civil and criminal cases, as do the new rules on peremptory challenges, new questions arise regarding the use of special juries comprised of jurors with special qualifications. Despite an extensive history in the United States, this practice occurs only in Delaware and in the few states with statutes prescribing special qualifications for jury service in real estate condemnation or drainage district disputes. The number of juries convened for condemnation or drainage district disputes is undoubtedly quite small, and it is unlikely that a serious challenge to those statutes will arise. Were such a challenge to occur, however, the circumstances should be sufficient to justify an exception to the cross-section concept. Sustaining, for example, the Colorado statute calling for six jurors who "have some knowledge of the costs and benefits of farm drainage"<sup>285</sup> would have the effect of excluding large segments of the community from jury service in drainage district disputes, but this outcome should not be viewed as evil or impermissible. The cross-section requirement and the limitations on peremptories need not blot out the view of the two-plus centuries of American jury tradition. That history was built upon fairness to parties in litigation, a perspective that should not be lost. It would be senseless to return to the elitist days of blue ribbon juries and prescriptive disqualifications from jury service. The reasonable cross-section concept is now rightfully prevalent and strong. It is strong enough not to be shaken by exceptional jury composition procedures when special circumstances justify them.

The Delaware special jury statute, as implemented in the *Ramada Inns* case, is again illustrative.<sup>286</sup> In *Ramada Inns*, the special jury was assembled through the use of questionnaires designed to produce a panel that could handle a complex civil case. Can such a special jury be valid? The answer should be yes. What is prohibited is *intentional* discrimination,

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<sup>281</sup> See Ramirez, *supra* note 11.

<sup>282</sup> 802 F.2d 731 (4th Cir. 1986).

<sup>283</sup> See *supra* notes 172-75 and accompanying text.

<sup>284</sup> See *Ricks*, 802 F.2d at 736-37.

<sup>285</sup> See *supra* text accompanying note 254.

<sup>286</sup> See *supra* notes 243-49 and accompanying text.



which a selection process that used neutral criteria shaped by the needs of the case would not demonstrate. This is true even if the criteria could be shown to have a disparate impact on "cognizable classes" entitled to be proportionately represented on the jury rolls. This practice parallels the realm of employment, where specific business needs justify neutral selection criteria in hiring and promotion despite disparate impact on classes protected by the Civil Rights Act of 1964.<sup>287</sup>

The Delaware practice in *Ramada Inns* calls on the parties to stipulate under court supervision to a procedure to produce the special jury panel and to select the trial jury. The superior court does not seem to have responded to the advice that the Delaware Supreme Court offered in *Haas v. United Technologies Corp.*<sup>288</sup> In upholding the pre-1987 special jury statute, the court called upon its power under the Delaware constitution to supervise the administration of justice, and commended to the superior court "the delicate and difficult task of drafting a rule of court stating the criteria and guidance for the selection of special juries to ensure 'a cross section of the population suitable in character and intelligence for that civil duty.'"<sup>289</sup> The Delaware Supreme Court admonished the superior court to "be mindful of the twin goals of achieving a fair representation of the community on the jury panel while providing for intelligent, educated and competent jurors for the adjudication of complex cases."<sup>290</sup> The Supreme Court concluded:

We offer as a suggestion, and without fettering the Superior Court's discretion in this matter, that jurors be randomly selected from a special jury pool comprised of individuals meeting specified age, intelligence and educational requirements and, to the extent deemed legally permissible by the superior court, possessing special occupational skills. Perhaps a minimum educational requirement of a bachelor's degree from an accredited college or university might be one of those criteria.<sup>291</sup>

The superior court probably has chosen the wiser course by handling each case ad hoc rather than trying to write a rule of court for all cases. Several factors support this course of action, including the discretionary nature of the special jury in Delaware since 1987, the uncertainty among Superior Court judges about when a case is complex enough to merit such a jury, and

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<sup>287</sup> See *Hernandez v. New York*, 500 U.S. 352, 359 (comparing a neutral selection process in the use of peremptory strikes to employment discrimination).

<sup>288</sup> 450 A.2d 1173 (Del. 1982).

<sup>289</sup> *Id.* at 1185 (citation omitted).

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

the palpable tension between a jury pool composed along the lines suggested by the Delaware Supreme Court in *Haas* and a jury pool conforming to a cross section of the community.

### CONCLUSION

The current prevailing philosophy about jury composition, the "reasonable cross-section" requirement, is ahistorical. The history of jury composition rules and practices before American independence and in the following centuries, especially those creating or permitting special qualifications for jurors to decide particular types of cases, demonstrates this fact. Such rules and practices define the special jury. Although the term "struck jury" was often used as if synonymous with "special jury," many struck juries were merely juries formed in a specific way, different from the traditional "jury box" method, with no statutory or customary second feature calling for jurors to have special qualifications. The typical special jury in both English and American history was a struck jury composed of persons of the better rank, merchants, or others with special capabilities that facilitated understanding the dispute in question.

The rationale behind the typical special jury has always been to improve the decision-making process. In some states, courts have the power to order a special jury when the nature of a particular dispute calls for it, but ordinarily one or both parties will request a special jury. A party's request for a special jury was a matter of right (although the requesting party might have had to bear any extra cost), or a matter of court discretion. The fundamental point, however, is that the special jury aids the parties or the court.

Occasionally one encounters a claim that the reasonable cross-section requirement also aids defendants. For example, in *State v. Gilmore*, a New Jersey court wrote: "While defendant in the present case has no right to insist that Blacks serve on his trial jury or that there be proportional representation of Blacks on the jury, . . . he does have the unqualified right to be tried by a fair and impartial jury," and the New Jersey Constitution defines that jury as "a jury drawn from a representative cross section of the community."<sup>292</sup>

This formulation illustrates the air of unreality that so often infects jury discourse. If a black defendant truly were entitled to a jury drawn from a representative cross section of the community, that jury would include some black members. In fairness, however, the New Jersey court recognized the

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<sup>292</sup> 489 A.2d 1175, 1180 (N.J. Super. Ct. App. Div. 1985) (citation omitted), *aff'd*, 511 A.2d 1150 (N.J. 1986); see *supra* text accompanying notes 197-99 (discussing Justice Murphy's dissent in *Fay v. New York*).

following realistic appraisal by the California Supreme Court in *People v. Wheeler*.<sup>293</sup>

[A] party is constitutionally entitled to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits. Obviously he cannot avoid the effect of that process: the master list must be reduced to a manageable venire, and that venire must in turn be reduced to a 12-person jury. The best the law can do to accomplish those steps with the least risk to the representative nature of the jury pool is to take them by random means . . . . We recognize that in a predictable percentage of cases the result will be a wholly unbalanced jury, usually composed exclusively of members of the majority group. This is inevitable, the price we must pay for juries of a workable size.<sup>294</sup>

In cases governed by a statutory or constitutional cross-section requirement, the traditional special jury, one drawn from a distinct group of specially qualified jurors, is not permissible. The cross-section requirement protects the rights of the population at large, not those of the parties to a lawsuit or those of the judicial system.<sup>295</sup> Skirmishes will continue over what constitutes a "cognizable group," such that it should be a part of the cross section, and what constitutes an impermissible basis for the exercise of peremptory challenges,<sup>296</sup> but judicial support for the cross-section requirement is strong. As the Fifth Circuit baldly stated, "the desire for competency must not be pursued to the extent that a fair cross-section is prevented."<sup>297</sup>

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<sup>293</sup> 583 P.2d 748 (Cal. 1978).

<sup>294</sup> *Id.* at 762.

<sup>295</sup> See Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725 (1992).

<sup>296</sup> In addition to race and sex, claims have been made based on age, education, economic status, and religion. See generally *Foster v. Sparks*, 506 F.2d 805 (5th Cir. 1975); *United States ex rel. Chestnut v. Criminal Court*, 442 F.2d 611 (2d Cir. 1971); *United States v. Butera*, 420 F.2d 564 (1st Cir. 1970); *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966); *Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966); *State v. Davis*, 504 N.W.2d 767 (Minn. 1993); *Casarez v. Texas*, 913 S.W.2d 468 (Tex. Crim. App. 1995).

<sup>297</sup> *Rabinowitz*, 366 F.2d at 55. The court quoted from the recommendations of the September 1960 Judicial Conference, as follows: "Any attempt to gain competent jurors that would result in a less representative cross-section than a choice from the statutorily qualified pool destroys the 'right' Congress intended to confer." *Id.* at 55 n.53 (referring to the amendments to 28 U.S.C. § 1861, "Qualifications of Federal jurors," effected by the Civil Rights Act of 1957).

In a 1947 opinion denying a special jury, the Bronx County Court quoted former New York Governor Herbert Lehman's address to the Legislature: "I recommend that Blue Ribbon Juries be abolished. The use of special or so-called 'Blue Ribbon' juries is not consonant with the preservation of the constitutional right to a trial by jury of peers. It is at war with our basic concepts of a democratic society."<sup>298</sup>

What did Governor Lehman mean? Did he suppose that a democratic society cannot, under any circumstances, allow competence to prevail over representativeness, anticipating the recommendation of the 1960 Federal Judicial Conference?<sup>299</sup> Even if so, special juries in civil cases have been commonplace throughout most of the history of this democratic society. Other juror qualifications that dilute the purity of the "trial by peers" ideal also pervade history. That ideal, moreover, points logically toward a destination that the courts and most commentators have resisted—the mandatory presence on a trial jury of some persons empathetic toward the parties, especially criminal defendants. As a legal commentator wrote recently, "no constitution or law guarantees a right to trial by a jury of one's racial peers."<sup>300</sup>

Occasional voices still call for a return to something like the "half-and-half" jury of an earlier era in order to make the jury-of-peers idea realistic in some cases.<sup>301</sup> These voices are likely to remain lonely as two cases

<sup>298</sup> *People v. Brandenburg*, 75 N.Y.S.2d 851, 853 (Bronx County Ct. 1947); see also *supra* note 200 and accompanying text (discussing Justice Murphy's dissent in the *Moore* case); *supra* notes 234-39 and accompanying text (discussing the Delaware Superior Court in the *Bradley* case).

<sup>299</sup> See *supra* note 297.

<sup>300</sup> Stuart Taylor, Jr., *Making Juries Look Like America*, LEGAL TIMES WASH., Aug. 7, 1995, at 19. The author comments on the case of *State v. Harris*, 660 A.2d 539 (N.J. Super. Ct. App. Div. 1995), in which the court held that, just as constitutional policies limit a prosecutor's use of peremptory challenges to exclude members of a particular race from a jury, these policies "also require a trial court to consider racial demographics in exercising its authority . . . to change the venue of a criminal trial or to impanel a foreign jury." 660 A.2d at 543. The court explained:

If a trial court disregards racial demographics in selecting a county for a change of venue or as the source for impanelling a foreign jury, resulting in a jury pool with a significantly smaller percentage of a racial minority than would be generated in the county where the crime was committed, it will reduce the likelihood that the jurors ultimately selected will be members of different groups whose "respective biases . . . will tend to cancel each other out" in the course of jury deliberations.

*Id.* at 543 (quoting *State v. Gilmore*, 511 A.2d 1150, 1158 (N.J. 1986)). According to Taylor, the holding in *Harris* "should not be seen as a first step toward racializing jury selection in general. It can and should be cabined to the context of venue changes and foreign juries . . ." Taylor, *supra*, at 19.

<sup>301</sup> See *supra* note 11; see also *supra* text accompanying note 260 (discussing the

dealing with Spanish-speaking jurors demonstrate. In *Hernandez v. New York*,<sup>302</sup> a jury, from which all Latinos had been eliminated at voir dire, convicted the defendant of attempted murder. The jury composition resulted from the prosecution's use of its peremptories to eliminate all potential jurors who spoke Spanish. The defense challenged this behavior as an improper exclusion of Latinos from the jury pool. Although there was no majority opinion, a majority of the Supreme Court rejected the challenge. According to Justice O'Connor (joined by Justice Scalia), language-based peremptory strikes are not the same as racially based strikes: "That is the distinction between disproportionate effect, which is not sufficient to constitute an equal protection violation, and intentional discrimination, which is."<sup>303</sup> Justice Kennedy, Chief Justice Rehnquist, and Justices White and Souter acknowledged the possibility that, in some circumstances, language ability might properly "be treated as a surrogate for race under an equal protection analysis."<sup>304</sup> They did not find this possibility justified, however, on the specific facts of the case before them.<sup>305</sup>

Following *Hernandez*, the Third Circuit in *Pemberthy v. Beyer*<sup>306</sup> concluded that peremptory challenges based on language ability are not "equivalent for equal protection purposes to the types of challenges prohibited in *Batson* and related cases."<sup>307</sup> The court, however, cautioned that "[b]ecause language-speaking ability is so closely correlated with ethnicity, a trial court must carefully assess the challenger's actual motivation even where the challenger asserts a rational reason to discriminate based on language skills."<sup>308</sup>

From the standpoint of the history of the special jury, the significance of *Hernandez* and *Pemberthy* is their demonstration of how far the law has moved away from our jury heritage. In the "half-and-half" jury, the jurors' ability to communicate in the defendant's language was at least one reason supporting the belief that foreign jurors were needed to ensure a foreign

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1993 recommendation of the Royal Commission on Criminal Justice).

<sup>302</sup> 552 N.E.2d 621 (N.Y. 1990), *aff'd*, 500 U.S. 352 (1991). *Hernandez* has been the subject of extensive legal commentary. For interesting early examples, see Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761 (1993); Note, *Peremptory Exclusion of Spanish-Speaking Jurors: Could Hernandez v. New York Happen Here?*, 23 N.M. L. REV. 467 (1993).

<sup>303</sup> *Hernandez*, 500 U.S. at 375.

<sup>304</sup> *Id.* at 371.

<sup>305</sup> See *id.* The theory of the prosecution in striking Spanish-speaking prospective jurors was to eliminate those jurors who might disregard translations introduced into evidence of testimony or documents given or written in Spanish, favoring instead their own translations.

<sup>306</sup> 19 F.3d 857 (3rd Cir. 1994).

<sup>307</sup> *Id.* at 870.

<sup>308</sup> *Id.* at 872.

defendant a fair trial. Neither *Hernandez* nor *Pemberthy*, however, discussed the relationship between the ability of potential jurors to speak Spanish and the fairness owed the defendants by the jury trial guarantee. The interest at stake was that of the potential jurors.

*Hernandez* and *Pemberthy* nevertheless may provide support for the use of higher education as a juror criterion, such as in the selection of Delaware's special juries in complex cases. If attorneys can strike jurors because they speak Spanish, likely eliminating at least three out of four of the Hispanics or Latinos in a jury pool,<sup>309</sup> then attorneys can select educated jurors even if the education criterion has a disproportionate racial or socio-economic impact. In 1967, Judge Botter of the Superior Court of New Jersey wrote in response to a complaint about the method for selecting grand jurors:

I think that legally in the discretion of the jury commissioners a higher education standard can be used for the selection of persons to serve on the grand jury . . . . [W]e may talk about broad economic or social classes. I'm not certain . . . that the grand jurors, do not represent a fair cross-section of economic classes. In any case, . . . [i]f you accept the proposition that a higher educational standard can properly be used, then you cannot accept the corollary that the use of a higher educational standard must produce intentional discrimination.<sup>310</sup>

This philosophy elevates competence over representativeness and, therefore, may not be permitted whenever the reasonable cross-section requirement applies.<sup>311</sup> If such a requirement is not preclusive, however, history supports the continuation of experiments with other models, just as Delaware has done. The jury is a remarkably rich and resilient tradition. The richness of that tradition should not be disregarded altogether to achieve the abstract satisfaction of jury lists representative of cross sections of communities. More often than not, little correlation will exist between the reasonable cross section and the composition of a particular jury. It is easy to understand the conceptual appeal of the link between the reasonable cross-section idea and democratic traditions. The reasonable cross-section idea, however, need not be all consuming. Other formulas, especially those shaped to achieve fair and intelligent verdicts in specific cases, have achieved historical legitimacy and should be allowed a reasonable coexistence.

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<sup>309</sup> See Ramirez, *supra* note 302, at 789-90.

<sup>310</sup> State v. Rochester, 253 A.2d 558, 571 (N.J. Super. Ct. Law. Div. 1967).

<sup>311</sup> See *supra* note 297 and accompanying text.