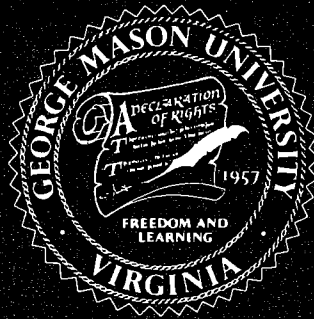

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IMPROVING THE JURY SYSTEM IN VIRGINIA: JURY PATRIOTISM LEGISLATION IS NEEDED

*Mark A. Behrens**

*Cary Silverman***

INTRODUCTION

On June 12, 1776, Delegates to the Virginia Convention met in Williamsburg and adopted the Virginia Declaration of Rights, a document that was to become the model for the Declaration of Independence and the Bill of Rights. George Mason, the drafter of the Declaration of Rights, wrote, "[t]hat in controversies respecting property and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred."¹ Mason also protected a criminal defendant's right "to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty."² For over two centuries, both the United States and Virginia Constitutions have guaranteed the right to a jury trial.³

National polls indicate that Americans hold the jury system in high regard. According to a 1998 American Bar Association (ABA) opinion poll, seventy-eight percent of the public rate our jury system as the fairest method of determining guilt or innocence; sixty-nine percent consider juries to be the most important part of the justice system.⁴

* Mark A. Behrens is a partner in the Public Policy Group of Shook, Hardy & Bacon L.L.P. in Washington, D.C. He is an advisor to the American Legislative Exchange Council's Civil Justice Task Force. He received his B.A. in Economics from the University of Wisconsin-Madison in 1987 and his J.D. from Vanderbilt University in 1990, where he served on the VANDERBILT LAW REVIEW.

** Cary Silverman is an associate in the law firm of Shook, Hardy & Bacon L.L.P. in Washington, D.C. He received a B.S. in Management Science from the State University of New York College at Geneseo in 1997, an M.P.A. from The George Washington University in 2000, and a J.D. with honors from The George Washington University Law School in 2000, where he served as Managing Editor of THE ENVIRONMENTAL LAWYER.

¹ VA. DECLARATION OF RIGHTS § 11 (1776).

² *Id.* § 8.

³ See U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI; U.S. CONST. amend. VII; VA. CONST. art. I, §§ 8, 11.

⁴ See AM. BAR ASS'N, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 6-7 (1998), available at <http://www.abanet.org/media/perception/perceptions.pdf> (last visited Feb. 27, 2004). Each year, state courts hold approximately 88,000 civil and criminal trials impacting people's lives, liberty, and property. See NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2001, at 102

Despite the strong support Americans have for the jury system, however, many in the public appear to avoid jury service at virtually every opportunity. According to one study by the American Judicature Society, on average, about twenty percent of those summoned to jury duty each year in state courts do not respond.⁵ In some urban jurisdictions, fewer than ten percent of all summoned citizens show up in court.⁶ Likewise, in some rural areas, sheriffs' deputies recently have been forced to round up people shopping in the local Wal-Mart to fill the jury box.⁷

Why do so many citizens seem to embrace the jury system, so long as they are not actually part of it? This issue was recently examined by the American Legislative Exchange Council (ALEC), the nation's largest bipartisan membership organization of state legislators. ALEC has developed model legislation—the Jury Patriotism Act—that reflects on these issues and seeks to remove the barriers that frustrate jury service in Virginia and elsewhere.⁸

The Jury Patriotism Act finds support across the political spectrum. Just a few of its supporters include the Council of State Governments, the AFL-CIO, National Black Chamber of Commerce, United States Hispanic Chamber of Commerce, National Association of Manufacturers, National Restaurant Association, and National Association of Wholesaler-Distributors. Elected officials have responded to this broad-based support. Within months after its development in the winter of 2002/2003, laws based on the model Jury Patriotism Act were enacted in Arizona, Louisiana, and Utah.⁹ Most recently, Colorado joined this trend.¹⁰

(Brian J. Ostrom et al. eds., 2002) (providing 1999 statistics) [hereinafter EXAMINING THE WORK OF STATE COURTS], available at http://www.ncsconline.org/D_Research/csp/2001_Files/2001_Part_II_Section.pdf (last visited Apr. 1, 2004).

⁵ See ROBERT G. BOATRIGHT, IMPROVING CITIZEN RESPONSE TO JURY SUMMONSES: A REPORT WITH RECOMMENDATIONS 13 (Am. Judicature Soc'y 1998). Others have estimated that as many as two-thirds of the approximately 15 million Americans summoned to jury service each year fail to report for jury duty. See David Schneider, *Jury Deliberations and the Need for Jury Reform: An Outsider's View*, 36 JUDGES' J. 23, 25 (1997).

⁶ See BOATRIGHT, *supra* note 5, at vii.

⁷ See Amy Merrick, *When the Jury Box Runs Low, Deputies Hit Wal-Mart: Personal Summonses Get Job Done When Mail Doesn't; Out for Milk, Off to Court*, WALL ST. J., Aug. 20, 2002, at A1 (reporting on jury summonses for traffic court being served on 55 shoppers in a Shelby, North Carolina, Wal-Mart Supercenter), available at 2002 WL 3403962.

⁸ See Victor E. Schwartz et al., *The Jury Patriotism Act: Making Jury Service More Appealing and Rewarding to Citizens*, THE STATE FACTOR, Apr. 2003, at 1, available at <http://www.alec.org/meSWFiles/pdf/0309.pdf> (last visited Apr. 1, 2004).

⁹ See H.B. 2520, 46th Leg., 1st Reg. Sess. (Ariz. 2003) (signed by Gov. Janet Napolitano on May 12, 2003); H.B. 324, 2003 Leg., Gen. Sess. (Utah 2003) (signed by Gov. Michael Leavitt on Mar. 17,

This article highlights several key problems with the current jury system in Virginia. It then explains how the ALEC model act would address these issues. It concludes that jury service improvements legislation based on ALEC's model act should be enacted in the Commonwealth.

I. WHY VIRGINIANS AVOID JURY SERVICE

A. *Easy Ways Out*

Some people get out of jury service because Virginia law exempts them from jury duty.¹¹ For example, lawyers, judges, various government officials, and law enforcement officers are automatically exempt from service.¹² An obsolete Virginia law also exempts mariners from jury duty.¹³ Many other people may escape jury service by claiming an exemption available to sole proprietors.¹⁴ Those who do not qualify for a complete exemption from service can request a deferral of service for a "particular occupational inconvenience."¹⁵ Those called for jury duty, particularly professionals, may abuse this lax standard to avoid their obligation to serve.

These laws "not only reduce the inclusiveness and representativeness of a jury panel, but also place a disproportionate burden on those who are not exempt," most notably blue-collar workers and retired and unemployed citizens.¹⁶ The privileged should not be allowed to escape jury duty, as some escaped military service in Vietnam, and leave those with less political or financial clout with the burden of service. As a report of the ABA Commission on the 21st Century Judiciary recently concluded: "Meaning-

2003); H.B. 2008, 2003 Leg., Reg. Sess. (La. 2003) (signed by Gov. Mike Foster on June 27, 2003). Legislation modeled after the ALEC act was introduced in the Virginia General Assembly by Delegate David Albo in 2003, see H.B. 1892, 2003 Gen. Assem., Reg. Sess. (Va. 2003), and by Delegate Clark N. Hoganin 2004. See H.B. 1397, 2004 Gen. Assem., Reg. Sess. (Va. 2004).

¹⁰ See H.B. 11598, 64th Gen. Assem., 2d Reg. Sess. (Colo. 2004).

¹¹ See Alan Cooper, *Thinking Out of the Box*, RICHMOND TIMES-DISPATCH, Dec. 12, 2001, at H8, available at 2001 WL 5341681.

¹² See VA. CODE ANN. § 8.01-341 (Michie 2003).

¹³ See § 8.01-341.1(4).

¹⁴ See § 8.01-341.1(12).

¹⁵ See § 8.01-341.2.

¹⁶ AM. BAR ASS'N, STANDARDS RELATED TO JUROR USE & MGMT. 51 (1993) [hereinafter ABA STANDARDS].

ful steps should be taken to ensure that every jury pool represents a fair cross-section of the community from which it is drawn."¹⁷

Furthermore, the absence of certain individuals from jury pools eliminates many important perspectives. When managers, doctors, accountants, scientists, executives, and other professionals do not serve on a jury, the judicial system does not benefit from their life experiences, values or education. For instance, in a trial involving a corporate defendant, the jury would benefit from the participation of jurors with experience in the business environment. Likewise, a scientist could be helpful in evaluating expert testimony or a financial professional could be of use in arriving at a fair and reasonable damage award.

On the other hand, a jury that lacks professionals, or is disproportionately composed of citizens not in the workforce, may lack the collective knowledge of a more representative jury. It is also possible that this small slice of our society may not evaluate or properly weigh complex technical, scientific or other evidence. Such jurors may even believe that their role is to transfer wealth and not render justice on the merits of the case. Plaintiffs and defendants would all benefit from the diverse experience, values, and education of a truly representative jury.

B. *The Length and Inflexibility of Jury Service*

Ask almost anyone why they want to avoid jury service and they will tell you it is a headache—jury service is inconvenient and the system is not very “user friendly.” In Virginia, citizens summoned for jury duty must be prepared to serve one term of court. Depending on where the prospective juror lives, this term may be as long as four months. It is no wonder that some citizens cringe upon opening the jury summons, fearful of the possible disruption to their lives. Citizens have jobs that require their presence, children or other family members for whom they are responsible, travel plans that cannot be altered without penalty, and other commitments. Although some courts provide for a substantially shorter term, as in Fairfax County where jurors are “on call” for two to three weeks, such terms still represent a serious interruption of personal, business, and family commitments.

The inconvenience of jury duty is exacerbated by the lack of flexibility provided to potential jurors. Summoned jurors are instructed to appear on a certain date and are not provided with an easy means of rescheduling their service should they have a conflict. Therefore, those summoned are left with three options: drop all other commitments during the allotted time,

¹⁷ AM. BAR ASS'N COMM'N ON THE 21ST CENTURY JUDICIARY, JUSTICE IN JEOPARDY 86 (2003).

request that the court excuse them from service for hardship, or, if the other two alternatives are not available, ignore the jury summons.

C. *Loss of Income*

Another major reason that people seek to avoid jury duty is the financial burden service may impose. In Virginia, jurors receive a \$30 daily fee for their service from the Commonwealth,¹⁸ which may barely cover the cost of transportation, parking, and lunch.¹⁹ The ABA has recognized that “[f]ew persons making more than the minimum wage can afford [the] . . . sudden and involuntary cut in pay” imposed by jury service.²⁰

As a result, courts must excuse from service many laborers, salespersons, parents with childcare expenses, and professionals because of the economic hardship that they may suffer. Those who remain in the jury pool are primarily those who are not employed or whose employers will continue to pay their salary. Consequently, the basic democratic right to be tried by a jury of one’s peers may be largely illusory in a system whose juries are disproportionately composed of retired and unemployed individuals, especially in lengthy trials. Such juries may be non-diverse and unrepresentative of the community as a whole. They also may produce arbitrary results for plaintiffs, defendants, and prosecutors. Equally important, many people who would like to serve on a jury, and have both a right and obligation to do so, are not, in practice, able to participate.

The lack of available compensation may be particularly troublesome for jurors selected to serve on lengthy trials. Somewhere between one-half and three-quarters of all trials conclude within three days, and very few cases extend beyond ten days, but jurors who find themselves called to serve on the rare, lengthy trial may be subject to extreme financial hardship.²¹

¹⁸ See VA. CODE ANN. § 17.1-618 (Michie 2003).

¹⁹ Virginia law provides that employers may not discharge, take adverse personnel action, or require the use of sick leave or vacation time because of absence from work due to jury duty, but businesses are not required to pay their employees during any period of jury service. See VA. CODE ANN. § 18.2-465.1 (Michie 2003).

²⁰ See ABA STANDARDS, *supra* note 15, at 133-34 (quoting J. THOMAS MUNSTERMAN ET AL., THE RELATIONSHIP OF JUROR FEES AND TERMS OF SERVICE TO JURY SYSTEM PERFORMANCE (1991)).

²¹ See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS 165, tbl. C-8 (2002) (finding that 75% of all civil and criminal trials in the federal courts were completed within three days and 4% extended beyond nine days during the 12-month period ending September 30, 2002), available at <http://www.uscourts.gov/judbus2002/contents.html> (last visited Feb. 26, 2004); U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STAT., CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 1996, at 13 (1999) (finding that the median number of days in jury trials in the nation’s 75 largest counties was three days), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc96.pdf> (last visited Feb. 26,

Lack of adequate compensation for jurors has several unfortunate results. Some jurors may opt to simply not show up in court. Those with jobs who will lose their salary during jury service are likely to plead with the court to be excused, particularly when the trial is expected to last several days, weeks or months. Individuals who are not excused from service may be forced to make an inequitable and unfair personal sacrifice.

D. *Lack of a Significant Penalty*

Research shows that a significant number of those who do not respond to jury summonses fail to do so because they have little fear of receiving a penalty, or believe that the penalty will be a mere "slap on the wrist." In Virginia, those who do not respond to a jury summons face a fine of between \$25 and \$100 from the court.²² When the penalty for not showing up for jury service is comparable to driving above the posted speed limit, it is no wonder that so many people disregard their jury summons with impunity. Furthermore, courts have little resources to follow up and penalize those who do not show. It is no secret that what is already a minimal fine rarely is imposed.

II. PROMOTING JURY SERVICE IN VIRGINIA

There are many ways the jury system could be improved to make jury service a more pleasant experience for Virginians. Some courts have focused on improving jury services and facilities. Other efforts have aimed at making jury service a more interesting and active process. A Task Force convened by then Virginia Supreme Court Chief Justice Harry Carrico examined some of these issues. That Task Force was composed of a statewide cross-section of former jurors, academicians, civil and criminal attorneys, and trial and appellate judges. In 2000, the Task Force submitted a report recommending jury service improvements in the Commonwealth.²³

Some jury improvements can and should be implemented by courts. But there are also certain measures that the General Assembly should take to safeguard the right to a representative jury. A model "Jury Patriotism Act" developed by ALEC would eliminate certain occupational exemptions

2004).

²² See VA. CODE ANN. § 8.01-356 (Michie 2003).

²³ See JUD. COUNCIL OF VA., REP. TO THE GEN. ASSEMBLY AND SUPREME CT. OF VA. ch. 3 (2000).

and flimsy hardship excuses that allow many to avoid jury service while placing a disproportionate burden on blue-collar Virginians, as well as retired and unemployed citizens. The model act also would lessen the burdens placed on citizens that render them unable to serve, or discourages their service on juries.

A. *Unjustified "Loopholes" Should Be Closed*

1. Elimination of Automatic Exemptions

The first step to a more representative jury is the elimination of unnecessary or antiquated occupational exemptions from service. In 2000, the Virginia Jury Task Force recommended eliminating all jury duty exemptions and cracking down on juror excuses.²⁴ Norfolk took such measures in 1995 after a study found that professionals and small businesspersons were routinely avoiding jury duty.²⁵ ALEC's Jury Patriotism Act would eliminate Virginia's current occupational exemptions. By doing so, the act would more fairly distribute the burden of jury duty and provide for a jury pool that better reflects the experience and values of the entire community.

Many states have recognized that occupational exemptions to jury service are elitist and unnecessary, and that such exemptions place an unfair burden on those who do not qualify for special treatment. Approximately two-thirds of the states have now taken the positive step of repealing broad occupational exemptions to jury service.²⁶

Evidence from other states suggests that even those who receive special exemptions from jury service do not believe they are too valuable to take time off to sit on a jury, or too biased or influential to serve. New York's experience is illustrative. New York once held the record for occupational exemptions.²⁷ Remarkably, these exemptions excluded over one million of New York's citizens from the jury pool and contributed to a

²⁴ See *Group Suggests Jury Duty Changes*, RICHMOND TIMES-DISPATCH, Aug. 11, 2000, at B5, available at 2000 WL 5044782.

²⁵ See Mark Davis, *Jury Duty For Many Citizens, It's Two Words They Dread. A State Task Force Has Recommended 20 Ways to Improve The Process. One Local Man Learned—The Hard Way—That the More You Serve, The Better You Get*, VIRGINIA-PILOT & THE LEDGER-STAR (Norfolk, Va.), Aug. 10, 2000, at A1, available at 2000 WL 23680415.

²⁶ See ABA STANDARDS, *supra* note 15, at 51. The ABA has recommended the complete elimination of automatic excuses or statutory group exemptions. See *id.*

²⁷ See JULIA VITULLO-MARTIN ET AL., FIVE YEARS OF JURY REFORM: WHAT JURORS ARE SAYING: FINAL REPORT ON JUROR CONCERNS TO THE UNIFIED COURT SYSTEM 2, 10-11 (2000), available at http://www.vera.org/publication_pdf/juryfinal.pdf (last visited Feb. 26, 2004).

shortage of jurors in the 1990s.²⁸ In 1995, the New York legislature, upon the recommendation of the Citizens Jury Project, under the leadership of Chief Judge Judith Kaye, eliminated all occupational exemptions. When New York doctors were asked whether they should be exempt from jury service following New York's reform, only twelve percent said that physicians should be exempt from service.²⁹

New York lawyers had a similar reaction. One attorney who was furious immediately following the elimination of occupation exemptions exclaimed, "Are they out of their minds in Albany? Lawyers are never going to let other lawyers, much less judges or docs, serve on a jury."³⁰ One year later, the same attorney was selected for a jury and was "quite proud" to have served.³¹ "Both sides thought I could be fair," he said.³² According to the study, only three percent and ten percent of Manhattan and Brooklyn attorneys, respectively, thought they should be exempt from jury service.³³ Even Chief Judge Kaye was called for jury duty. Rudolph Guiliani, despite being a sitting mayor, lawyer, and former prosecutor, also made headlines when he was summoned and selected to serve on a jury hearing a \$7 million civil suit in 1999.³⁴

More recently, it was revealed on an "anonymous" juror qualification form for federal jury duty in New York that Juror No. 142's former occupation was "President of the United States" and that he felt that he could be fair and impartial despite his "unusual experience with the O.I.C.," otherwise known as the Office of Independent Counsel.³⁵ In April 2004, jurors in Cincinnati, Ohio found themselves seated next to Neil Armstrong.³⁶ If judges, mayors, ex-presidents, and the first person on the moon are not be-

²⁸ See *id.* at 2, 10.

²⁹ See *id.* at 12.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ See *id.* at 13.

³⁴ See Robert D. McFadden, *Court Surprise: Guiliani Picked As Juror No. 1*, N.Y. TIMES, Aug. 31, 1999, at A1, available at 1999 WL 30479714; David Rohde, *Mayor Is Praised as Just Another Juror*, N.Y. TIMES, Sept. 8, 1999, at B3, available at 1999 WL 30481757; David Rohde, *The Nation: One Angry Man; What's the Verdict When the Mayor is Also Jury Foreman?*, N.Y. TIMES, Sept. 5, 1999, sec. 4, at 6, available at 1999 WL 30480634.

³⁵ See Benjamin Weiser, *Civic Duty, Sure, But Wasn't the White House Enough?*, N.Y. TIMES, Mar. 1, 2003, at B1, available at 2003 WL 15169815. Ultimately, the judge excused former President Clinton from jury duty out of concern that his presence might sensationalize the trial. See Benjamin Weiser, *Ex-President Passed Over for Jury*, N.Y. TIMES, Mar. 5, 2003, at B6, available at 2003 WL 15171120.

³⁶ See Kimball Perry, *Armstrong Serving on Theft Jury*, CINCINNATI POST, May 7, 2004, at A13, available at 2004 WL 58458064.

