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ARTICLE

VIRGINIA'S JURY EXEMPTIONS: RIPE FOR REFORM

T. S. Ellis, III*

J. Thomas O'Brien, Jr.**

I. INTRODUCTION

Jury exemptions¹ are frequent targets of derisory comment. Who among us has not heard of the proverbial litigant who, upon hearing his lawyer describe juries and jury exemptions, remarked that only a fool would place his fate in the hands of seven or twelve people who were not smart enough to get excused through an exemption.² Indeed, the number and scope of jury exemptions have grown so substantially over the years³ that it is not unreasonable to suppose that jury non-service is now the norm and jury service the exception.

This is not an inconsequential matter; the jury system is central to the administration of justice in Virginia. It is and has been the institution through which the public participates and contributes to the legal system.⁴ Indeed, public participation in juries is an im-

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1. The term "jury exemptions" is used generically here to mean all those Virginia statutes excluding or excusing defined classes of people from jury service either automatically or upon request. See VA. CODE ANN. §§ 8.01-341, -341.1 (Repl. Vol. 1984). But "jury exemption" as used here does not include disqualification. Thus, a felon is *disqualified* from jury service, not *exempt* from it.

2. See E. MCKENZIE, 14,000 QUIPS & QUOTES 277 (1980).

3. See *infra* text accompanying notes 5-43.

4. Virtually nothing, including this point, escaped the attention of Alexis de Toqueville. He wrote:

The institution of the jury may be aristocratic or democratic, according to the class of society from which the jurors are selected; but it always preserves its republican character, inasmuch as it places the real direction of society in the hands of the governed, or a portion of the governed, instead of leaving it under the authority of the government.

A. DE TOQUEVILLE, DEMOCRACY IN AMERICA 272 (12th ed. 1969).

portant reason for the political acceptability of the legal system.⁵ It is, therefore, important to consider, as we do here, whether Virginia's jury exemptions have so grown in number and scope as to undermine the jury's authority, its efficacy, or its important role in ensuring the political acceptability of the legal system. Put simply, this article considers whether principle and policy argue for the abolition of Virginia's jury exemptions.⁶

In exploring this issue, this article focuses first on the history of exemptions in Virginia. Knowledge of the origin of exemptions and the reasons for their enactment helps shed light on whether they should be retained or abolished. Next, exemptions are placed in a constitutional context, not because Virginia's exemptions, singly or together, violate the state or federal Constitution, but because the constitutional analysis helps shed light on the issue of abolition. This is followed by an examination of the policy considerations, leading thereafter to our conclusion that Virginia should repeal her jury exemptions and implement instead (at least in urban areas) the one-day/one-trial system so successful in other jurisdictions.

II. HISTORY

The commonwealth's first sixty years passed without a statutory exemption from jury duty. Not until 1838 was one enacted.⁷ In that year, the General Assembly began the march of statutory jury exemptions by granting this privilege to firemen in Richmond and Portsmouth.⁸ This was just the beginning. In the next decade, this exemption was joined by several others relating to other fire companies,⁹ superintendents of lunatic asylums,¹⁰ and school commis-

5. Justice Black put it well when he wrote that "[t]he jury injects a democratic element into the law. This element is vital to the effective administration of criminal justice, not only in safeguarding the rights of the accused, but in encouraging popular acceptance of the laws and the necessary general acquiescence in their application." *Green v. United States*, 356 U.S. 165, 215-16 (1958) (Black, J., dissenting) (majority affirming criminal contempt convictions without jury trial).

6. Abolition of jury exemptions has been mentioned in the context of tort reform. *See* Virginians for Tort Reform, Proposal for Tort Reform Legislation in Virginia, presented to the Joint Subcommittee Studying the Insurance Crisis and the Need for Tort Reform (Sept. 8, 1986). While abolition would, arguably, have a beneficial effect on the tort system by broadening participation on juries, abolition of exemptions must be considered on its own merits—and is so here—irrespective of its relation to availability and cost of insurance.

7. *See* 1838 Va. Acts 68.

8. *Id.*

9. *See* 1839 Va. Acts 141, 142 (Jan. Sess.); 1839-40 Va. Acts 44 (Dec. Sess.); 1847-48 Va. Acts 325; 1848-49 Va. Acts 196.

10. *See* 1839 Va. Acts 15 (Jan. Sess.); 1840-41 Va. Acts 38-39; 1846-47 Va. Acts 16-17.

sioners.¹¹ These, along with exemptions for the governor, practicing attorneys, officers of courts, and military personnel were all codified in the Code of 1849.¹²

What little legislative history exists concerning the Code of 1849 is silent on the reasons for this initial batch of exemptions.¹³ Nonetheless, the reasons seem evident; Virginia's communities were thought to be better served by having the classes of exempted persons plying their trades or professions rather than serving jury duty. This is all the more understandable given that jury duty could involve weeks of service and given that there were relatively few persons qualified to perform the functions of those exempted.

After 1849, the number and range of exemptions continued to grow. In the latter half of the nineteenth and early part of the twentieth centuries, the following groups, among others, were added to the list: physicians,¹⁴ telegraph operators,¹⁵ farmers,¹⁶ undertakers,¹⁷ pharmacists,¹⁸ dentists,¹⁹ optometrists,²⁰ and the six lock-keepers of the Dismal Swamp.²¹ These were not, for the most part, particularly surprising additions. These groups, like the original groups, were apparently considered too vital to their communities to expend on jury duty. This period also saw the list of statutory exemptions grow in another way: geographic groups. Transportation difficulties apparently led to exemptions for citizens of Tangier, Saxis²² and Chincoteague Islands in Accomack County; Hog (now Broadwater), and Cobb's Islands in Northamp-

11. See 1845-46 Va. Acts 40; 1846-47 Va. Acts 32; 1847-48 Va. Acts 67; 1848-49 Va. Acts 58.

12. VA. CODE ch. 162, § 2 (1849); *id.* ch. 22, §§ 2-3 (military exemptions); *id.* ch. 57, § 1 (promulgating authority of Code).

13. See 3 REPORT OF REVISORS OF THE CODE OF 1849 (1948).

14. See 1852-53 Va. Acts 43.

15. See *id.*

16. 1883-84 Va. Acts 27.

17. 1887-88 Va. Acts 124.

18. 1891-92 Va. Acts 1084.

19. 1908 Va. Acts 677.

20. 1930 Va. Acts 628.

21. 1928 Va. Acts 1029-30.

22. It seems that the General Assembly never could decide how to spell "Saxis". See, e.g., 1878-79 Va. Acts 337 ("Syxes"); 1891-92 Va. Acts 1085 ("Sexes"); 1893-94 Va. Acts 380 ("Syxas"); 1922 Va. Acts 756 ("Saxes"); 1928 Va. Acts 1030 ("Saces"); 1930 Va. Acts 628 ("Saxis").

ton County; and Gwynns Island in Mathews County.²³ Interestingly, these persons were exempted only for petit jury duty; grand jury service remained a requirement. As with other exemptions, the absence of legislative history leaves us to speculate that public participation in grand juries was sufficiently important to require a different result in striking the balance between citizen inconvenience and civic duty.

The growth of exemptions continued into the mid-1970's when it reached its zenith. By this time, the exempted ranks had swelled to include fruit growers,²⁴ septuagenarians,²⁵ railroad employees,²⁶ veterinarians,²⁷ airline pilots,²⁸ deputy sheriffs,²⁹ state police,³⁰ justices of the peace,³¹ clinical psychologists,³² and women who did not wish to serve.³³ Again, no legislative history exists to illuminate the reasons for these exemptions. Even if community need was once a valid justification for some exemptions, it is doubtful that this rationale can support the breadth and number of exemptions that existed by the mid-1970's. A far more likely explanation for the growth of exemptions is simply the exercise of power by special interest groups.

By the 1970's, the pendulum began to swing back; the range of exemptions began to shrink. In 1973, the General Assembly eliminated exemptions for telephone and telegraph operators, postmasters and some government positions.³⁴ In 1977, the automatic fea-

23. 1878-79 Va. Acts 337. The exemption for Gwynns Island was dropped in 1892. 1891-92 Va. Acts 1084-85.

24. 1930 Va. Acts 628.

25. 1952 Va. Acts 121.

26. 1946 Va. Acts 56.

27. 1970 Va. Acts 1091-92.

28. 1973 Va. Acts 645, 647.

29. *Id.*

30. *Id.*

31. *Id.*

32. 1978 Va. Acts 285-86.

33. 1950 Va. Acts 372-73. The provision relating to the exemption of women was changed on numerous occasions due to constitutional challenges in Virginia and elsewhere. *See, e.g.*, 1973 Va. Acts 645, 647 (*persons* who have legal custody of minors); 1971 Va. Acts 535-36 (*women* who have legal custody of minor children); 1970 Va. Acts 1091-92 (*housewives* who did not want to serve); *see also* *Near v. Commonwealth*, 202 Va. 20, 116 S.E.2d 85 (1960), *cert. denied*, 365 U.S. 873 (1961), *cert. denied*, 369 U.S. 862 (1962); *accord* *Hoyt v. Florida*, 368 U.S. 57 (1961); *Archer v. Mayes*, 213 Va. 633, 194 S.E.2d 707 (1973). The Supreme Court eventually granted standing for defendants to challenge statutes excluding women from jury service. *Taylor v. Louisiana*, 419 U.S. 522 (1975).

34. 1973 Va. Acts 645.

ture of many exemptions was eliminated;³⁵ they were converted to permissive excuses. Persons falling in these categories could claim exemption but were not automatically exempted. They could serve or not as they pleased.

By 1980, the General Assembly had acted to shrink further the range of exemptions. Eliminated were exemptions for optometrists,³⁶ ministers,³⁷ undertakers,³⁸ veterinarians,³⁹ pharmacists,⁴⁰ psychologists,⁴¹ and employees of mental hospitals.⁴² The result of this latest legislative action is the current scheme: twenty-four exemptions⁴³ or automatic excuses.⁴⁴

35. 1977 Va. Acts 690-91.

36. 1980 Va. Acts 632-43.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. 1978 Va. Acts 500.

43. VA. CODE ANN. § 8.01-341 (Repl. Vol. 1984) provides:

Who are exempt from jury service.—The following shall be exempt from serving on juries in civil and criminal cases:

1. The President and Vice President of the United States,
 2. The Governor and Lieutenant Governor of the Commonwealth,
 3. The members of both houses of Congress,
 4. The members of the General Assembly, while in session,
 5. Licensed practicing attorneys,
 6. Licensed practicing physicians,
 7. [Repealed.]
 8. Licensed practicing dentists,
 9. Officer of any court, provided such officers are in actual service as such and receive compensation therefor,
 - 10-14. [Repealed.]
 15. The judge of any court and members of State Corporation Commission,
 16. [Repealed.]
 17. Sheriffs, deputy sheriffs, state police, and police and magistrates in counties, cities and towns,
 - 18-20. [Repealed.]
 21. The superintendent of the penitentiary and his assistants and the persons composing the guard,
 - 22-24. [Repealed.]
 25. Persons on active duty with the armed forces of the United States or the Commonwealth,
 - 26-31. [Repealed.]
 32. Fire fighters who are full-time, paid members of any fire company or department in the Commonwealth.
- The citizens of Tangier Island in Accomack County shall be exempt from jury service, except service on grand juries.

See also 1982 Va. Acts 521.

44. VA. CODE ANN. § 8.01-341.1 (Repl. Vol. 1984) provides:

As was true with other legislative action on exemptions, no substantial legislative history exists to explain the elimination of individual exemptions or the apparent movement to shrink the range of exemptions. In the final analysis, the history is not especially informative. We know that the commonwealth began without exemptions, though it is fair to add that the list of those eligible for jury service was quite restricted at that time.⁴⁵ We are left to speculate that as both the demands for jury service and the list of those eligible grew, perceptions of community need led to the first exemptions. Later, growth in exemptions was likely driven primarily by the political power of special interest groups. The recent trend in the reduction of exemptions is attributable to a growing awareness that the burdens of jury service and community needs are outweighed by the values of representative juries and public participation in the legal system. It is uncertain whether the trend fueled by these values has the momentum to eliminate the remaining exemptions and return the commonwealth to her original position.

Who may claim exemption from jury service.—The following may claim exemptions from serving on juries in civil and criminal cases:

1. Train dispatchers and trainmen employed in train service,
2. Maritime and commercial airline pilots licensed under the laws of the United States or this State,
3. Customhouse officers,
4. Mariners actually employed in maritime service,
5. All persons while actually engaged in harvesting or securing grain, fruit, potatoes or hay or in harvesting or securing tobacco, and, during the tobacco marketing season at any tobacco warehouse, warehousemen and persons employed at such warehouse or engaged in purchasing or handling of tobacco there at,
6. All professors, tutors and pupils of public or private institutions of learning, while such institutions are actually in session,
7. Ferryman actually employed in that capacity,
8. A person who has legal custody of and is necessarily and personally responsible for a child or children sixteen years of age or younger requiring continuous care by him during normal court hours,
9. A person who is necessarily and personally responsible for a person having a physical or mental impairment requiring continuous care by him during normal court hours,
10. Any person over seventy years of age,
11. Any person whose spouse is summoned to serve on the same jury panel.

See also 1977 Va. Acts 690 (section 8.01-341.1 was assigned by the Virginia Code Commission, the number in the 1977 act having been § 8-208.6:1).

45. See, e.g., VA. CODE ch. 73, pt. XII (1792) (jurors must be age 21, freeholders, possessed of a visible estate of at least \$300 value for serious cases—felonies, land titles, etc.—\$150 value for trials in inferior courts); VA. CODE ch. 162 § 1 (1849) (must be age 21 and own real or personal property of \$100 value).

III. EXEMPTIONS, REPRESENTATIVENESS AND THE CONSTITUTION

The Supreme Court, citing the due process and equal protection clauses, has developed a standard of jury representativeness. This constitutional standard mandates that juries be drawn from a fair cross section of the community.⁴⁶ While Virginia's current exemptions do not violate this standard, the development and application of this constitutional doctrine help shed light on the role and effect of exemptions.

A. *The Development of the Fair Cross-Section Principle*

Since 1791, the sixth amendment has guaranteed criminal defendants the right to a trial by an "impartial jury."⁴⁷ Not until the 1940's did the Supreme Court construe this right to include the principle that a jury should be drawn from a fair "cross-section" of the community.⁴⁸ Four cases decided in that decade established general standards by which jury representativeness continues to be judged.⁴⁹

In *Smith v. Texas*,⁵⁰ racially discriminatory jury selection procedures⁵¹ prompted the Court to declare that "in the use of juries as instruments of public justice . . . the jury [must] be a body truly

46. See *infra* notes 50-60 and accompanying text.

47. U.S. CONST. amend. VI.

48. See, e.g., text accompanying note 60.

49. Though not refined until the 1940's, the principle that juries should be representative of the community was recognized by the Supreme Court at least as early as 1879. In *Strauder v. West Virginia*, 100 U.S. 303 (1879), the Court held systematic exclusion of blacks from criminal juries to be a violation of a black defendant's right to equal protection of the laws. It was unfair, the Court said, to subject the defendant to the judgment of a panel of jurors systematically purged of all those who held the same legal status in society as the defendant held. *Id.* at 308-09.

For additional information on the development of representativeness and the fair cross section principle, see generally J. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* (1977); Ashby, *Juror Selection and the Sixth Amendment Right to an Impartial Jury*, 11 CREIGHTON L. REV. 1137 (1977); Daughtrey, *Cross Sectionalism in Jury Selection Procedures After Taylor v. Louisiana*, 43 TENN. L. REV. 1 (1975); Comment, *Representative Cross Section Standard: Another Sixth Amendment Fundamental Right*, 21 LOY. L. REV. 995 (1975); Comment, *Sixth Amendment Right to a Fair Cross Section of the Community—A Change in Emphasis*, 41 MO. L. REV. 446 (1976).

50. 311 U.S. 128 (1940).

51. In *Smith*, the petitioner, a black man charged with rape, challenged the composition of the grand jury which indicted him on the basis that, although blacks constituted twenty percent of his community, only five were summoned to serve over a seven-year period, while 494 white men were summoned in the same period. *Id.* at 128-29.

representative of the community.”⁵² Two years later, in *Glasser v. United States*,⁵³ the Court again stressed that juries must be truly representative. In *Glasser*, all women who were not members of the League of Women Voters were allegedly excluded from jury service.⁵⁴ The Court stated that jury selection procedures “which do not comport with the concept of the jury as a cross section of the community” are violative of the guarantee of an impartial jury.⁵⁵

*Thiel v. Southern Pacific Co.*⁵⁶ and *Ballard v. United States*,⁵⁷ decided in 1946, further developed the fair cross section principle. These decisions established that intentional and systematic exclusion of identifiable segments of the community, such as daily wage earners in *Thiel*⁵⁸ and women in *Ballard*, was impermissible because the exclusion would deprive the jury of the broad base it was designed to have.⁵⁹ Perhaps Justice Murphy best stated the guiding principles of jury selection when he wrote in *Thiel*:

The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. This does not mean, of course, that every jury must contain representatives of all economic, social, religious, racial, political and geographic groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact

52. *Id.* at 130.

53. 315 U.S. 60 (1942).

54. Although petitioners failed to offer sufficient proof of their allegations, the Court recognized that such a practice would violate the guarantee of an impartial jury because a jury cannot be the organ of any one special class. *Id.* at 86.

55. *Id.* (emphasis added).

56. 328 U.S. 217 (1946).

57. 329 U.S. 187 (1946).

58. In *Thiel*, a negligence action against respondent railroad, the petitioner moved to strike out the entire jury panel alleging that “employees and those in the poorer classes” were underrepresented, thereby giving majority representation to “those having the employer’s viewpoint.” Testimony taken at a hearing on petitioner’s motion revealed that both the clerk of the court and the jury commission excluded from the jury lists all persons who worked for a daily wage, because the judges would usually let those men go on the basis of financial hardship. The Court held that, as “there was no effort, no intention, to determine in advance which individual members of the daily wage earning class would suffer an undue hardship,” the practice operated to systematically and automatically exclude the entire class. 328 U.S. at 224.

59. See *Ballard*, 329 U.S. at 195.

that those eligible for jury service are to be found in every stratum of society.⁶⁰

These four cases applied the fair cross section principle only to federal jury selection procedures in criminal⁶¹ and civil cases.⁶² In 1968, however, *Duncan v. Louisiana*⁶³ extended the sixth amendment requirement of trial by an "impartial jury" to state criminal proceedings.⁶⁴ Building upon this foundation, *Taylor v. Louisiana*⁶⁵ held explicitly that the fair cross section principle was applicable to state criminal proceedings by virtue of the sixth and fourteenth amendments.⁶⁶ No case has extended this principle to state civil proceedings, although the Supreme Court thought it sufficiently important in civil cases to impose it upon federal civil trials through its supervisory powers.⁶⁷

The Virginia Constitution guarantees criminal defendants the right to be tried by an impartial jury,⁶⁸ paralleling the federal Constitution's guarantee. Virginia statutes set forth the same jury selection procedure for criminal and civil trials.⁶⁹ In practice, therefore, Virginia's civil litigants enjoy the same safeguards as do criminal defendants.

B. *Application of the Fair Cross Section Principle*

The initial step in jury selection is to prepare a "source" list or lists. To be fully representative, these lists of prospective jurors should include the entire qualified adult population of a given ju-

60. *Thiel*, 328 U.S. at 220 (citations omitted).

61. See *Ballard*, 329 U.S. 187; *Glasser*, 315 U.S. 60. In both of these cases, the defendant-petitioners were charged with federal crimes and alleged violations of their sixth amendment rights.

62. The Court noted in *Thiel* the importance of the cross section principle to both criminal and civil trials. *Thiel*, 328 U.S. at 220. *Thiel* imposed the requirement on federal civil proceedings through the Court's supervisory power over the federal courts but did not declare it a constitutional requirement of all civil jury proceedings. *Id.* at 225.

63. 391 U.S. 145 (1968).

64. *Id.* at 154.

65. 419 U.S. 522 (1975).

66. *Id.* at 526-30.

67. *Thiel*, 328 U.S. at 225.

68. VA. CONST. art. I, § 8 states that "in criminal prosecutions a man . . . shall enjoy the right to a speedy and public trial, by an impartial jury of his vicinage." (emphasis added). "Vicinage" corresponds to the territorial jurisdiction of the court in which the venue of the crime is laid. *Newberry v. Commonwealth*, 192 Va. 819, 823, 66 S.E. 2d 841, 843 (1951).

69. VA. CODE ANN. § 8.01-345 (Repl. Vol. 1984).

risdiction.⁷⁰ However, no practical method exists by which to choose prospective jurors from the population at large. In consequence, a prepared "source" list must be used.

In Virginia and elsewhere, voter registration rolls are the primary source list⁷¹ from which master jury lists or "wheels"⁷² are compiled. These rolls have the virtue of being readily available. Some groups, however, such as non-whites, women, poor persons, and young adults, are under-represented on the voter rolls because they do not register to vote in as high a proportion as white males.⁷³ Additionally, registered voters comprise little more than half of the eligible community.⁷⁴ As a result, jury lists compiled exclusively from voter registration rolls often fail to be representative or inclusive⁷⁵ of the population they are supposed to reflect.

70. See *infra* text accompanying notes 114-24.

71. Many states provide for the exclusive use of voter registration rolls. See, e.g., ARK. STAT. ANN. § 39-101 (Cum. Supp. 1985); FLA. STAT. ANN. § 40.01 (West Supp. 1986); IOWA CODE ANN. § 609.1 (West Supp. 1986); MICH. COMP. LAWS ANN. § 600.1304 (West 1981); MISS. CODE ANN. § 13-5-8 (Cum. Supp. 1986); MONT. CODE ANN. § 3-15-402 (1985); R.I. GEN. LAWS §§ 9-9-8 to -9 (1985); S.C. CODE ANN. § 14-7-140 (Law Co-op. 1976); TEX. GOV'T CODE ANN. § 62.001 (Vernon 1986); WASH. REV. CODE § 2.36.060 (Cum. Supp. 1986). Virginia and several other states provide for the use of voter registration rolls and "other sources" which may be adopted by the court system. See VA. CODE ANN. § 8.01-345 (Repl. Vol. 1984); see also COLO. REV. STAT. § 13-71-106 (1973); DEL. CODE ANN. tit. 10, § 4505 (Cum. Supp. 1984); HAW. REV. STAT. § 612-11 (1976); N.C. GEN. STAT. § 9-2 (Repl. Vol. 1981). Some other states specify what other sources, such as driver's license lists, may or are required to be used. See, e.g., ALA. CODE § 12-16-57 (Cum. Supp. 1986); ALASKA STAT. § 09.02.050 (1973); CAL. CIV. PROC. CODE § 204.7 (West Supp. 1986); CONN. GEN. STAT. ANN. § 51-217 (West 1985); ILL. ANN. STAT. ch. 78, para. 1 (Smith-Hurd Supp. 1986); KAN. STAT. ANN. § 43-162 (Supp. 1985); NEB. REV. STAT. § 25-1628 (Repl. Vol. 1979); OHIO REV. CODE ANN. § 2313.08 (Baldwin 1984); OKLA. STAT. ANN. tit. 38, § 18 (West Supp. 1985) (drivers license lists will be added beginning in 1987).

Virginia is one of the few states which maintains both driver's license and voter registration lists at the state level. Efforts are underway to provide combined lists to interested courts. See G. MUNSTERMAN & J. MUNSTERMAN, A SURVEY OF THE JURY SYSTEMS IN VIRGINIA 3 (1983) (a study performed by the Center for Jury Studies of the National Center for State Courts for the Office of the Executive Secretary, Supreme Court of Virginia) [hereinafter MUNSTERMAN SURVEY]; JUDICIAL COUNCIL OF VIRGINIA, STANDARDS RELATING TO JUROR USE AND MANAGEMENT IN VIRGINIA 11 (1985) [hereinafter VIRGINIA STANDARDS].

72. A master jury list, sometimes referred to as a master wheel, is a roster of potential jurors for a particular term of court drawn usually by random selection from the master lists. From the wheel, names are selected for qualification and summoning. See AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO JUROR USE AND MANAGEMENT 184 (1983) [hereinafter ABA STANDARDS]. Procedures vary greatly from state to state as to when qualifications are applied to the master jury list. See generally J. VAN DYKE, *supra* note 49, at 77-109.

73. See ABA STANDARDS, *supra* note 72, at 25 & n.8.

74. In Virginia only 62.2% of the over-18 population is registered to vote—65.4% of the white population, 49.7% of the black population. VIRGINIA STANDARDS, *supra* note 71, at 11. See also ABA STANDARDS, *supra* note 72, at 25.

75. Representativeness is a concept used to express the degree to which cognizable or

For this reason, commentators and some courts have condemned this practice.⁷⁶

Once the master jury list or "wheel" has been randomly selected from the source lists,⁷⁷ qualifications and exemptions operate to yield the available juror pool for a given term.⁷⁸ This process has been sanctioned by the Supreme Court which has consistently held that "[t]he States remain free to prescribe *relevant qualifications* for their jurors and to provide *reasonable exemptions* so long as it may be fairly said that the jury lists or panels are representative of

identifiable groups in the population are reflected in the juror source lists. Inclusiveness refers to the percent of entire over-18 population of a jurisdiction which is included in the source list. For example, if a voter registration included 35% of every cognizable group, it would be very representative, but not very inclusive of the entire community. See ABA STANDARDS, *supra* note 72, at 25-26, 173-76, 182, 188.

The ABA and the Judicial Council of Virginia have adopted identical standards which express the policy that "[t]he jury source list should be as representative and should be as inclusive of the adult population as is feasible." VIRGINIA STANDARDS, *supra* note 71, at 11; ABA STANDARDS, *supra* note 72, at 23. See generally Dogin & Tevelin, *Jury Systems of the Eighties: Toward a Fairer Cross-Section and Increased Efficiency*, 11 U. TOL. L. REV. 939 (1980); Annotation, *Validity of Requirement or Practice of Selecting Prospective Jurors Exclusively From Lists of Registered Voters*, 80 A.L.R.3d 869 (1977); Kairys, Kadane & Lehoczky, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CALIF. L. REV. 776 (1977); Munsterman & Munsterman, *The Search for Jury Representativeness*, 11 JUST. SYS. J. 59 (1986).

This, of course, is to reject, as do the authors, the notion that people who lack civic interest are properly left out of civic affairs.

76. See, e.g., *California v. Harris*, 36 Cal. 3d 36, 679 P.2d 433, 201 Cal. Rptr. 782, cert. denied, 469 U.S. 965 (1984) (California Supreme Court overturned a first degree murder conviction because the jury pool, selected solely from voter registration lists, did not represent a fair cross section of the community); *People v. Wheeler*, 22 Cal. 3d 258, 272, 583 P.2d 748, 759, 148 Cal. Rptr. 890, 900 (1978) (noting that "[o]bviously, if . . . [the source] list is not representative of a cross-section of the community, the process is defective *ab initio*"). See generally Comment, *Jury Pools Drawn from Voter Registration Lists May Not Provide a Fair-Cross-Section*; *People v. Harris*, 15 CUMB. L. REV. 555 (1985); Kairys, Kadane & Lehoczky, *supra* note 75. Cf. Comment, *The Constitutionality of Calling Jurors Exclusively From Voter Registration Lists*, 55 N.Y.U. L. REV. 1266 (1980) (suggesting that exclusive use of voter registration lists infringes on the right to vote and is thereby unconstitutional); accord *J. VAN DYKE*, *supra* note 49, at 91 (stating that many people fail to register in order to avoid jury service).

77. In Virginia, jury commissioners are required to employ random selection techniques. VA. CODE ANN. § 8.01-345 (Repl. Vol. 1984); see also Federal Jury Selection and Service Act of 1968, 28 U.S.C. § 1864 (1968). Both the ABA and the Judicial Council of Virginia have adopted standards which require random selection procedures to be used in "(i) selecting persons to be summoned for jury service; (ii) assigning prospective jurors to panels; and (iii) calling prospective jurors for voir dire." ABA STANDARDS, *supra* note 72, at 36; VIRGINIA STANDARDS, *supra* note 71, at 12. But see J. Coulter, *Jury Management* 8 (1985) (unpublished manuscript) (suggesting that there is a conflict between "pure random selection" and the goal of the fair cross-section principle in that random selection from the source list perpetuates any biases which are inherent in the source list).

78. See VA. CODE ANN. § 8.01-345 (Repl. Vol. 1984).

the community."⁷⁹ Yet there is some reason to suspect that the result of this process does not yield juries representative of the community. For example, some Richmond Circuit Court data for the first ten months of 1986 suggest that males generally, and white males especially, may be underrepresented.⁸⁰

To be sure, the disqualification of convicted felons,⁸¹ persons unable to communicate in English,⁸² non-citizens,⁸³ minors,⁸⁴ the blind,⁸⁵ and the deaf⁸⁶ "remove[s] from the jury room qualities of human nature and varieties of human experience."⁸⁷ These disqualifications arguably impair representativeness. On balance, though, they seem justified for they reflect the overriding concerns that jurors be competent to perform their challenging task⁸⁸ and be deserving of the trust.

79. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (emphasis added).

80. Records maintained by Chief Judge Thomas N. Nance, Circuit Court of the City of Richmond, Virginia, regarding 26 juries indicate the following panel and jury compositions: Panels: 25 of 26 were majority black; 22 of 26 were majority female. Juries: 24 of 26 were majority black; 22 of 26 were majority female.

Memorandum from Chief Judge Thomas N. Nance to Judge James M. Lumpkin (November 21, 1986) (study conducted from March, 1986 to November 21, 1986).

Records maintained by Judge James M. Lumpkin, Circuit Court of the City of Richmond, Virginia, regarding 53 juries indicate the following panel and jury compositions:

Panels: 44 of 53 were majority black, 3 were tied 10-10; 29 of 53 were majority female, 11 were tied 10-10. Juries: 46 of 53 were majority black, 3 were tied 6-6; 43 of 53 were majority female, 5 were tied 6-6.

Letter from Judge James M. Lumpkin to T.S. Ellis, III (November 20, 1986) (study conducted from January 1, 1986 through October 31, 1986).

81. See VA. CODE ANN. § 8.01-338 (Repl. Vol. 1984); see also ABA STANDARDS, *supra* note 72, at 47 (Standard No. 3); VIRGINIA STANDARDS, *supra* note 71, at 13 (Standard No. 3).

82. See ABA STANDARDS, *supra* note 72, at 47; VIRGINIA STANDARDS, *supra* note 71, at 13.

83. See VA. CODE ANN. § 8.01-337 (Repl. Vol. 1984); see also ABA STANDARDS, *supra* note 72, at 47; VIRGINIA STANDARDS, *supra* note 71, at 13.

84. See VA. CODE ANN. § 8.01-337 (Repl. Vol. 1984); see also ABA STANDARDS, *supra* note 72, at 47; VIRGINIA STANDARDS, *supra* note 71, at 13.

85. The blind are usually disqualified on the ground that they are unable to see the expressions of the witnesses and are thus unable to judge the witnesses' demeanor. See, e.g., *Rhodes v. State*, 128 Ind. 189, 27 N.E. 866 (1891) (juror with defective eyesight found incompetent to serve since he could not see the face of the defendant, the expressions of the witnesses, nor the exhibits). See generally 47 AM. JUR. 2d *Jury* § 108 (1964).

86. See, e.g., *Lindsey v. State*, 189 Tenn. 355, 225 S.W.2d 533 (1949) (juror with impaired hearing not disqualified because counsel had failed to challenge juror's qualifications prior to trial, he was given seat closest to witness, and he made no complaint during trial that he could not hear); cf. Annotation, *Deafness of Juror as Grounds for Impeaching Verdict, or Securing New Trial or Reversal on Appeal*, 15 A.L.R.2d 534 (1951).

87. *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972). Justice Marshall's full quote is reproduced in the text at note 115.

88. See ABA STANDARDS, *supra* note 72, at 47; VIRGINIA STANDARDS, *supra* note 71, at 13; see also 28 U.S.C. § 1865 (1968); UNIFORM JURY SELECTION AND SERVICE ACT § 8(b) (1971). See generally J. VAN DYKE, *supra* note 49, at 131-33.

Occupational exemptions also impair representativeness. These exemptions are unrelated to the public interest in ensuring juror competency. Nonetheless, the Supreme Court has recognized a justification for these exemptions in the purportedly vital role played by the exempted persons in society. As early as 1906, in *Rawlins v. Georgia*,⁸⁹ the Court upheld occupational exemptions, noting that:

[I]f the state . . . should exclude certain classes on the *bona fide* ground that it was for the good of the community that their regular work should not be interrupted, there is nothing in the Fourteenth Amendment to prevent it. The exemption of lawyers, ministers of the gospel, doctors, and engineers of railroad trains . . . is of old standing and not uncommon in the United States.⁹⁰

The fair cross section principle prohibits jury selection procedures that result in the systematic exclusion of cognizable groups.⁹¹ Claimed violations of the principle are judged by a three-part test fashioned by the Supreme Court in *Duren v. Missouri*:⁹²

[T]o establish a *prima facie* violation of the fair cross section requirement, the defendant must show: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are to be selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.⁹³

Typically, the threshold and often determinative issue in applying the test is whether a group is sufficiently "cognizable,"⁹⁴ "identifiable"⁹⁵ or "distinctive"⁹⁶ for its exclusion to be constitutionally im-

89. 201 U.S. 638 (1906) (exemptions upheld against a due process challenge).

90. *Id.* at 640. Although *Rawlins* was decided before the development of the fair cross section principle, subsequent decisions acknowledge that there is much leeway in the application of the principle. *Taylor*, 419 U.S. at 534. Therefore, reasonable exemptions are allowable so long as the jury lists remain fairly representative of the community. *Id.*

91. *See, e.g., Taylor* 419 U.S. at 530; *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946).

92. 439 U.S. 357 (1979).

93. *Id.* at 364.

94. *Hamling v. United States*, 418 U.S. 87, 137, *reh'g denied*, 419 U.S. 885 (1974) (superceded by statute as stated in *United States v. Petrov*, 747 F.2d 824 (2d Cir. 1984), *cert. denied*, *Petrov v. United States*, 105 S. Ct. 2037 (1985)).

95. *Taylor*, 419 U.S. at 530; *Hamling*, 418 U.S. at 137.

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

permissible. Groups held to satisfy this threshold criterion include daily wage earners,⁹⁷ common laborers,⁹⁸ blacks,⁹⁹ women,¹⁰⁰ Hispanic-Americans,¹⁰¹ native Americans,¹⁰² college students, professors and administrators,¹⁰³ young adults¹⁰⁴ and, until recently, those who oppose the death penalty.¹⁰⁵ The rationale for recognizing these groups as sufficiently distinctive is apparently that individuals within each group have a singular outlook or world view based on shared common experiences, ideas, attitudes or community of interests.¹⁰⁶ If a particular singular outlook, or *weltan-*

97. See, e.g., *Thiel*, 328 U.S. at 224; *People v. White*, 43 Cal. 740, 278 P.2d 9 (1954), *cert. denied*, *White v. California*, 350 U.S. 875 (1955).

98. See, e.g., *Simmons v. State*, 182 So. 2d 442 (Fla. Dist. Ct. App. 1966).

99. See, e.g., *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320 (1970); *Turner v. Fouche*, 396 U.S. 346 (1970); *Smith v. Texas*, 311 U.S. 128 (1940).

100. See, e.g., *Duren*, 439 U.S. 357; *Taylor*, 419 U.S. 522.

101. See, e.g., *Castaneda v. Partida*, 430 U.S. 482 (1977); *Hernandez v. Texas*, 347 U.S. 475 (1954).

102. See, e.g., *United States v. Freeman*, 514 F.2d 171 (8th Cir. 1975).

103. See, e.g., *State v. Jenison*, 122 R.I. 142, 405 A.2d 3 (1979) (grand jury).

104. See, e.g., *Hamling*, 418 U.S. 87 (assumed *arguendo* that young people were an identifiable group but found no systematic exclusion); *United States v. Butera*, 420 F.2d 564 (1st Cir. 1970).

105. *Wainwright v. Witt*, 469 U.S. 412 (1985) stated that the proper inquiry was whether the juror's views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath," and held that it need not be shown, before excluding a juror, that he would automatically vote against the death sentence. *Id.* at 424 (citation omitted). *Adams v. Texas*, 448 U.S. 38 (1980) held that exclusion of prospective jurors from service because of their views on capital punishment "on 'any broader basis' than inability to follow the law or abide by their oaths" violated the defendant's sixth amendment rights. *Id.* at 47-48. *Witherspoon v. Illinois*, 391 U.S. 510 (1963) held that a venireman could not be excluded from a jury merely because he expressed "qualms" about the death sentence.

In the past the argument was advanced that those who have inflexible scruples against capital punishment (and could thus be excluded from the sentencing phase of a trial under *Witherspoon*) constitute a "distinctive" group and could not be systematically excluded from the guilt/innocence phase. Until 1986, the circuit courts were in conflict on this issue. See *Grigsby v. Mabry*, 758 F.2d 226, 231 (9th Cir. 1985). *But see Keeten v. Garrison*, 742 F.2d 129, 133 (4th Cir. 1984) (those irrevocably opposed to death penalty may be excluded from non-bifurcated trial); *Spinkellink v. Wainwright*, 578 F.2d 582, 597 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979) (such persons would not be impartial fact-finders at guilt stage). *Grigsby* was reversed by *Lockhart v. McCree*, 106 S. Ct. 1758 (1986) ("death qualification" not violative of suspect's sixth or fourteenth amendment rights). The Supreme Court, with *Lockhart*, resolved this conflict among the circuits.

106. In *State v. Williams*, 659 S.W.2d 778 (Mo. 1983) (en banc), the Supreme Court of Missouri discussed the attributes of cognizable groups:

Generally, though, the segment of the population in question must have cohesion. There must be a quality or attribute that defines the group. There must be a common thread running through the group that reflects a basic similarity in attitudes, ideas or experiences. Finally, the group must possess a community of interest which may not

shawung, is underrepresented in the jury by virtue of systematic exclusion of a distinctive group in the jury selection process, the other parts of the *Duren* test are satisfied and the fair cross section principle is violated.¹⁰⁷

In Virginia, groups such as attorneys and physicians¹⁰⁸ are statutorily exempted and thus not represented at all.¹⁰⁹ Hence, parts two and three of the *Duren* test are satisfied. The key issue thus becomes whether the occupational exemptions operate to exclude any "cognizable" or "identifiable" group. Courts that have addressed this issue have unanimously agreed that occupational groups, such as attorneys, physicians, dentists, etc., do not represent a cognizable class or classes.¹¹⁰ Though the persons in these exempted categories may be numerous, courts apparently conclude that they are not linked by any common thread or similarity of attitudes or experience. As a constitutional matter, the Supreme Court concluded that "[i]t would not appear that such exemptions would pose substantial threats that the remaining pool of jurors would not be representative of the community."¹¹¹

The automatic excuses provided under Virginia law,¹¹² in which those eligible "may claim exemption" from jury service,¹¹³ would appear to be even less threatening to the fair cross section principle than exemptions. Their exclusion is elective, not compulsory. Thus, underrepresentation of these citizens is not "*due to systematic exclusion of the group in the jury-selection process.*"¹¹⁴

be represented by other segments of the populace.

Id. at 780 (citations omitted). The court concluded that attorneys did not constitute such a group. *Id.* at 781.

107. Systematic exclusion was found in cases discussed *supra* notes 96-100, 102 and accompanying text. No exclusion was found in cases discussed *supra* notes 101 and 103 and accompanying text.

108. VA. CODE ANN. § 8.01-341 (Repl. Vol. 1984); see *supra* note 43.

109. Section 8.01-345 of the Code of Virginia requires the jury commissioner to apply the statutory exemptions to the master list. VA. CODE ANN. § 8.01-345 (Repl. Vol. 1984).

110. See, e.g., *People v. Cohen*, 12 Cal. App. 3d 298, 90 Cal. Rptr. 612 (1970); *State v. Brown*, 169 Conn. 692, 364 A.2d 186 (1975); *Commonwealth v. McFerron*, 680 S.W.2d 924 (Ky. 1984); *State v. Williams*, 659 S.W.2d 778 (Mo. 1983) (en banc); *Commonwealth v. Kloch*, 230 Pa. Super. 563, 327 A.2d 375 (1974). See generally Legislative Comment, *The Questionable Validity of the Automatic Exemption of Attorneys from Jury Service*, 14 U. RICH. L. REV. 837 (1980).

111. *Taylor*, 419 U.S. at 534.

112. VA. CODE ANN. § 8.01-341.1 (Repl. Vol. 1984); see *supra* note 44.

113. VA. CODE ANN. § 8.01-341.1 (Repl. Vol. 1984).

114. *Duren*, 439 U.S. at 364 (emphasis added).

IV. EXEMPTIONS AND PUBLIC POLICY

Occupational exemptions and excuses may not violate the constitutional standard for representativeness, but they unquestionably impair it. The precise effect of this impairment is unknown and, indeed, very likely unknowable. Justice Marshall has put this point well:

[W]hen any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.¹¹⁵

On this view, representativeness has a functional aspect; it is important for the effect it may have on the jury's fact-finding process. This point is not open to serious dispute. Exclusion of distinctive groups necessarily limits the range of perspectives that are brought to bear on the case. But this functional aspect of representativeness seems not to have been the sole driving force in the constitutional development of the doctrine. Most of the groups held to be "distinctive" are historically disadvantaged groups. And the constitutional status of these groups as "distinctive" owes as much to history as it does to the functional importance of representativeness.¹¹⁶

This illustrates the difficulty of identifying cognizable groups. In the past, the determination has been made largely on the basis of the historical, social, economic, or cultural position of the group.¹¹⁷ But a *weltanschauung* can be influenced by shared interest, whether vocational or avocational. Distinctive groups, especially on particular issues, can be identified by a variety of fac-

115. *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972).

116. Consider, for example, the effect of a physician exemption in a case where health care providers are charged with withholding life sustaining care from a severely afflicted newborn or an aged, incompetent and comatose patient. Another telling example is the effect of the physician exemption in which a health care provider stands accused of Medicare or Medicaid fraud.

117. The impact of quasi-suspect classes of the Court's equal protection jurisprudence are clearly cognizable groups of this type. Daily wage earners, common laborers, and young adults are identifiable on this basis as well. See *supra* notes 96-101 and accompanying text.

tors—hobbies,¹¹⁸ jobs,¹¹⁹ ethnic background, educational experiences, religion, family structure¹²⁰ and the like. From a functional point of view, therefore, the constitutional standard of representativeness is just a starting point. Representativeness is a continuum. Somewhere along this continuum lies the constitutional minimum. But this minimum governs only what must be done; a legislature must consider what ought to be done. The functional value that underlies the constitutional standard influences the rest of the continuum as well.

More important, perhaps, than the functional aspect of representativeness is the aspect of civil participation.¹²¹ The jury is more than a fact-finding tool. It is an important civic engine for involving citizens in the apparatus that governs them. An appreciation of this is hardly fostered by making jury service a nuisance which must be borne only by those in "unimportant" occupations.¹²²

Omission from juries of anyone in the twenty-four categories eligible for exemption or excuse in Virginia cultivates two insidious evils: first, a public attitude that jury service is unimportant, a leisure pursuit for those with the luxury of idle time; and second, a public perception that is misinformed about the administration of justice because the media is its only source of data.¹²³

More comprehensive public involvement in the jury process, and

118. For example, an individual's preference of leisure activity might lead him to join the Sierra Club or the National Rifle Association; his particular view on political issues might find him in the Federalist Society.

119. Job concerns are often channeled through labor unions or professional associations.

120. Whether a person grew up with both parents in the home, for example, can affect his attitudes.

121. Indeed, if fact-finding accuracy were the only goal, an unrepresentative elite jury might be superior to a representative one. See J. VAN DYKE, *supra* note 49, at 13-16 (discussing the existing sentiment in favor of elite juries). "Blue Ribbon" juries are available in Virginia. See VA. CODE ANN. § 8.01-362 (Repl. Vol. 1984) (court in civil case may summon such jurors as it shall designate).

122. This reference to important people brings to mind the remark Lord Campbell is said to have made when Charles Dickens failed to appear for jury service:

The name of the illustrious Charles Dickens has been called on jury, but he has not answered. If his great Chancery suit had still been going on [Jarndyce v. Jarndyce], I certainly would have excused him; but, as that is over, he might have done us the honor of attending here, that he might have seen how we went on at common law.

HEARD CURIOSITIES OF THE LAW REPORTERS 106 (1871).

123. History gives us another example of the ill effect of an exemption. It may be thought singular to suppose that the exemption from serving on juries is the foundation of the vulgar error, that a surgeon or butcher (from the barbarity of their businesses) may be challenged as jurors. D. BARRINGTON, OBSERVATIONS ON THE MORE ANCIENT STATUTES 442 (3d ed. 1769).

public perception of this involvement, would confer more dignity on jury service. There is no reason a governor should not serve.¹²⁴ On the contrary, leaders should set the example in this context as in others. What more potent symbol of the importance of jury service is there than the picture of a governor reporting for jury service.¹²⁵ And if familiarity with the system serves to breed contempt because of perceived faults, the electorate, having served on juries and venires, will at least possess the knowledge and understanding of the system necessary to deal with its infirmities.

Finally, a jury brings citizens together in an undertaking that emphasizes the common beliefs and values upon which the judicial system rests. This, too, is at least as important as the functional aspect of representativeness. Perhaps no other of the few civic duties required of Americans is so centered upon the shared aspects of our culture. In a society that is so diverse, so fragmented in almost every other way—religious, political, economic, social, philosophical—such a unifying exercise should not be set aside for the sake of convenience.

In sum, the functional and participatory aspects of representativeness militate in favor of inclusiveness and for the abolition of exemptions. Exemptions deprive the judicial system of the views of significant segments of the population. It might even be argued that those most active in the affairs of society, those likely to be the best informed, are the very persons absent from the jury room due to exemptions. The remedy is abolition.

V. JURY REFORM: ABOLITION OF EXEMPTIONS

The General Assembly must, of course, ensure that Virginia's jury selection procedures comply with the constitutional minimum. But it should do more; it should strive to achieve the broadest public jury participation possible. Indeed, the commonwealth should impose upon itself a "compelling state interest/least burdensome alternative" standard against which to judge exemptions, even though such exemptions may not fall below the constitution-

124. The Governors of California, Massachusetts, and Colorado have served. STATE OF NEW YORK, UNIFIED COURT SYSTEM, INTERIM REPORT OF THE JURY MANAGEMENT ADVISORY COMMITTEE 39 (Dec. 1984). The Governor of Connecticut is scheduled to serve. *Virginian-Pilot and The Ledger-Star*, Nov. 30, 1986, at A2, col. 1.

125. The analogy comes to mind of government leaders urging people to vote and then doing so themselves to set an example.

ally required minimum. Judged against this standard, Virginia's exemptions and automatic excuses fail. No compelling state interest supports them¹²⁶ and, as we shall see, their abolition can be accomplished while, at the same time, minimizing burdens on the public.

Nor is this a novel conclusion. It is widely recognized that exemptions, such as those in Virginia, operate to exclude a significant portion of the community from the pool of jurors in many areas¹²⁷ and should therefore be eliminated. The American Bar Association (ABA) has led the way in recommending abolition. Its Standard No. 6 states that "all automatic excuses or exemptions from jury service should be eliminated."¹²⁸ The ABA's rationale for this recommendation appears in its Standard No. 1, which notes that: "[t]he opportunity for jury service should not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation or any other factor that discriminates against a cognizable group in the jurisdiction."¹²⁹ It is not surprising, therefore, that a majority of states have eliminated or severely limited the availability of exemptions.¹³⁰

126. Traditionally, occupational exemptions have been justified primarily on the ground that "it was for the good of the community that [the exempted persons'] regular work should not be interrupted." *Rawlins v. Georgia*, 201 U.S. 638, 640 (1906). See 71 *A.B.A.J.* 27 (May 1985) (quoting G. Thomas Munsterman, director of the Center for Jury Studies of the National Center for State Courts: "The original reason for exempting professions was community hardship. Trials could last a week or two and the feeling was the local doctor or lawyer couldn't be spared." No doubt this was true when there were few doctors or lawyers or dentists or others who performed services vital to developing communities, especially considering how prolonged periods of jury service could be). See also Graham & Pope, *One Day/One Trial or a One Week Term of Jury Service: The Misleading Marketing of Modern Jury Management Systems*, 45 *Mo. L. Rev.* 255, 255 (1980) (noting that terms of service ranged from weeks to months). Although the number of doctors and lawyers is sufficient (indeed arguably excessive) to handle today's needs, nonetheless, it remains true that, were these persons prevented from performing their services for an extended period of time, they would suffer, their patients or clients would suffer, and hence, their communities would suffer. Thus, the continuing validity, if any, of the community-need justification depends upon the length of jury service required.

127. See ABA STANDARDS, *supra* note 49, at 60-61; *Coulter*, *supra* note 77, at 12; see generally VAN DYKE, *supra* note 49, at 111-37.

128. ABA STANDARDS, *supra* note 72, at 60.

129. See *id.* at 16.

130. See ALA. CODE § 12-16-62 (Cum. Supp. 1985); ARIZ. REV. STAT. ANN. §§ 21-202, 203 Historical Note (Repl. Vol. 1975); CAL. CIV. PROC. CODE § 202 (West 1982) (Repealed); CONN. GEN. STAT. ANN. § 51-219 (West 1985) (repeal effective 9/1/86); DEL. CODE ANN. tit. 10, § 4504 (Cum. Supp. 1984) (policemen, firemen, members of the Delaware State Guard, public officers actively engaged in the performance of official duties, and others where the Superior Court finds an exemption to be in the public interest); FLA. STAT. ANN. § 40.08 (West Supp. 1986) (Repealed. This section had held practicing attorneys exempt.); GA. CODE ANN. § 15-

Despite all this, Virginia has yet to follow suit. The Judicial Council, while concurring with the ABA on policy, has failed to follow the ABA in recommending the elimination of exemptions and automatic excuses.¹³¹ The General Assembly, at the 1986 regular session, similarly demonstrated its reluctance to follow the ABA by tabling a bill designed to abolish all exemptions and automatic excuses.¹³² Reasons for this reluctance are unclear. Very likely, it grows out of a concern that elimination of all exemptions and excuses may result in burdensome jury service for those no longer exempt. Pessimists doubtless suggest that doctors and other providers of vital services, if not exempted, would have to spend weeks on jury duty.

This concern, whatever its validity, cannot be ignored. There is, undeniably, some nexus between the length of jury service and the need for exemptions.¹³³ Jury exemption abolition is only one side of the coin; the obverse of the same coin is the necessity to imple-

21-1 (1985); IDAHO CODE § 2-211 (Repl. Vol. 1979); IND. CODE ANN. § 33-4-5-7 (Burns 1985) (over 65); IOWA CODE ANN. § 607.2 (West Supp. 1986); KAN. STAT. ANN. § 43-159 (Repl. Vol. 1981); KY. REV. STAT. § 29A-090 (Repl. Vol. 1985); MD. CTS. & JUD. PROC. CODE ANN. § 8-209 (Repl. Vol. 1984) (Military Personnel, over 70); MASS. ANN. LAWS ch. 234 §§ 1-1A (Michie/Law Co-op. 1986); MICH. COMP. LAWS ANN. § 600.1307a (West 1981); MINN. STAT. ANN. § 593.44 (West Supp. 1986); MISS. CODE ANN. § 13-5-23 (Cum. Supp. 1986) (attorneys and physicians); NEB. REV. STAT. § 25-1601 (Repl. Vol. 1985) (judges, clerks of court, sheriffs and jailors); N.M. STAT. ANN. § 38-5-2 (Cum. Supp. 1986); N.C. GEN. STAT. § 9-6 (Cum. Supp. 1985); N.D. CENT. CODE § 27-09.1-10 (Repl. Vol. 1973); OHIO REV. CODE ANN. § 2313.12, .16 (Baldwin 1982); TEX. GOV'T CODE ANN. § 62.106 (Vernon Supp. 1986) (person with custody of child under 10, students); UTAH CODE ANN. § 78-46-14 (Cum. Supp. 1986); WASH. REV. CODE ANN. § 2.36.080 (Cum. Supp. 1987) (repealed 1971 WASH. LAWS ch. 81 § 103); W. VA. CODE ANN. § 52-1-10 (Cum. Supp. 1986); WYO. STAT. ANN. § 1-11-103 (Repl. Vol. 1977) (policemen, firemen, public officials) (source list provided by Center for Jury Studies of the National Center for State Courts).

131. Standard no. 6 of the VIRGINIA STANDARDS, entitled "Exemption, Excuse and Deferral" is conspicuously silent on the topic of abolition of exemptions. Compare VIRGINIA STANDARDS, *supra* note 71, at 16 with ABA STANDARDS, *supra* note 72, at 60. Cf. Coulter, *supra* note 77, at 12 (some confusion must have existed as to the Judicial Council's final recommendation because the Hon. Mr. Coulter, a member of the Advisory Committee on Juror Use and Management, was under the impression that the VIRGINIA STANDARDS eliminated all exemptions).

132. The Parkerson-Emick Bill, S.77, 1986 Sess., Virginia, provided for the repeal of the exemption statutes, §§ 8.01-341 and -341.1; See *supra* notes 43-44. As passed by the Senate, this bill enlarged § 8.01-341.2 to permit deferral not just for "occupational inconvenience," but for any particular inconvenience. Even so, the House Courts of Justice Committee voted 10-6 to table the measure for the 1986 legislative session. Richmond Times-Dispatch, Feb. 21, 1986, at A6, col. 6.

133. This nexus is recognized in Massachusetts, where in 1979 reduction of terms of service was coupled with elimination of exemptions. MASS. GEN. LAWS ANN. ch. 23A, § 3 (West Supp. 1986).

ment a system designed to minimize inconvenience to jurors. Without some means of ensuring that jury service will not be unduly burdensome, it is doubtful that the abolition of exemptions would be viewed as justified. This close functional relationship between jury exemption abolition and reduction or jury service requirements is well recognized. The ABA and the Virginia Judicial Council both note that:

reducing the term of service is essential to achieving a representative and inclusive jury. Long terms of service disrupt domestic schedules, personal plans, and business activities, thereby discouraging many prospective jurors from wanting to serve. The economic hardship and extreme inconvenience created by lengthy terms lead to an increase in the number of requests to be excused from jury duty.¹³⁴

In addressing this problem, the ABA and the Judicial Council again agree on policy: the period of service and availability "should be the *shortest* period consistent with the needs of justice."¹³⁵ ABA and Judicial Council agreement on a policy of shortening jury service is as unsurprising as popular agreement on apple pie and motherhood. But it is similarly not surprising that agreement is more elusive when it comes to concrete implementation of the policy.

In the ABA's view, the policy calls for implementation of the system of one day or one trial, whichever is longer.¹³⁶ The Judicial Council disagrees, recommending instead that "persons not be required to report for more than seven days of roll call *or* to serve on more than three trials per term."¹³⁷ Additionally, the Judicial Council fixed the term of availability at one month, except in those rural areas where infrequent jury trials may dictate a longer period. The ABA, in sharp contrast, provides for jurors to remain

134. ABA STANDARDS, *supra* note 72, at 56; VIRGINIA STANDARDS, *supra* note 71, at 14.

135. ABA STANDARDS, *supra* note 72, at 55; VIRGINIA STANDARDS, *supra* note 71, at 14 (emphasis added).

136. See ABA STANDARDS, *supra* note 72, at 55 (Standard No. 5(a)).

137. VIRGINIA STANDARDS, *supra* note 71, at 14 (Standard No. 5(a)). Apparently, the Judicial Council believed that variances in the number of terms of court and the population differences between rural and urban areas were not suitable for implementing a one-day/one-trial system; see *Coulter*, *supra* note 77, at 14. But see ABA STANDARDS, *supra* note 72, at 55 (Commentary for Standard 5 provides that one-day/one-trial should be used where feasible and makes provision for a term of one week in those rural areas where such a system is not feasible).

available for only two weeks.¹³⁸ Closer examination of these proposals helps point the way to an appropriate solution for Virginia, a solution that should accompany and support abolition of exemptions.

The one-day/one-trial system¹³⁹ is at the forefront of modern jury management systems. Under this system, a juror's term of service ends at the completion of one trial or, if a juror is not selected to serve on a trial, at the end of one day. Although some jurors would have to return on subsequent days because their trials or their voir dire process consumed more than one day,¹⁴⁰ the majority of jurors would complete their service at the end of one day.¹⁴¹

Since 1971, when Houston adopted the one-day/one-trial system,¹⁴² over sixty court systems in at least twenty-six states and four federal districts have implemented the system in hopes of enjoying its potential benefits.¹⁴³ One-day/one-trial clearly achieves its primary objective, which is to minimize the time requirement of jury service. This, in turn, renders occupational exemptions unnecessary and greatly reduces the need for excuses based on inconvenience and hardship, thereby resulting in more representative and inclusive jury panels.¹⁴⁴ One-day/one-trial should also provide higher quality decision making¹⁴⁵ and produce greater juror

138. Compare VIRGINIA STANDARDS, *supra* note 71, at 14 (Standard No. 5(b)) with ABA STANDARDS, *supra* note 72, at 55 (Standard No. 5(b)).

139. Although the system is more commonly referred to as one-day/one-trial, some jurisdictions have noted juror reluctance to serve on "one trial" because of the overselling of "one day." See, e.g., *Overselling "One Day"*, Center for Jury Studies Newsletter, Vol. 4, No. 2, p.4 (March 1982). To avoid this problem, cities such as Baltimore have begun publicizing their systems as "one trial or one day." *Id.* This article follows their example.

140. Juror inconvenience might be reduced by holding a single voir dire for the selection of multiple juries.

141. See ABA STANDARDS, *supra* note 72, at 55-57. See generally Canham, *One Day/One Trial*, 16 JUDGES' J. 34 (Summer 1977); K. Carlson, A Holper & D. Whitcomb, *An Exemplary Project: One Day/One Trial Jury System—Wayne County, Michigan* (1977); *One Day/One Trial*, Center for Jury Studies Newsletter, No. 1 (Jan. 1979) [hereinafter cited as *Newsletter*].

142. See *Newsletter*, *supra* note 140, at 2.

143. According to the National Center for Jury Studies, at least 18% of the 18-years-and-older population reside in jurisdictions with one-day/one-trial terms of service. Not all jurisdictions using the one-day/one-trial system are known, so this is a conservative estimate. Four federal districts use this system: the Middle District of Alabama, the District of Nevada, and the Eastern and Middle Districts of North Carolina.

144. See ABA STANDARDS, *supra* note 72, at 56; *Before and After One-Day/One-Trial*, Center for Jury Studies Newsletter, Vol. 3, No. 4 (July 1981). The reduced period of service would probably reduce even the hardship on the residents of Tangier Island. They are already required to serve on grand juries. See *supra* note 43.

145. Many commentators believe that jurors who have been exposed to several trials be-

satisfaction.¹⁴⁶

Judicial Council recommendations for periods of juror service are more burdensome than those recommended by the ABA. This may explain the reluctance of the Council and the General Assembly to eliminate exemptions. Arguably, it is unnecessarily burdensome for persons in vital occupations to serve or remain available for seven days or three trials. The Council's seven-day/three-trial recommendation may derive from a concern that certain rural counties may not be able to support a one-day/one-trial system. However, the Council did not articulate fully its reasons for selecting seven days or three trials, nor does there appear to be any empirical basis for selecting these figures. By contrast, there is a substantial body of experience with the one-day/one-trial system, including experience within Virginia, all of which suggests that the system is appropriate for Virginia.¹⁴⁷

Successful implementation of a one-day/one-trial system is a function of a jurisdiction's caseload and the size of its jury pool. In rural areas, for example, the number of available jurors may fall short of the need; preservation of one-day/one-trial might dictate that jurors serve more often than urban jurors do. Or one-day/one-trial might have to be modified to longer periods of service, e.g., five-days/one-trial, in certain hard-pressed jurisdictions. It is es-

gin to give less weight to the evidence presented to them and more weight to extraneous matters, such as the personal style of the attorneys. See *Canham*, *supra* note 140, at 51; *Newsletter*, *supra* note 140 at 2.

146. See ABA STANDARDS, *supra* note 72, at 56; see also *One-Day/One-Trial Analysis*, Center for Jury Studies Newsletter, No. 6, at 3 (Nov. 1979).

147. Jurisdictions that have tried this system have reaped a variety of benefits. For example, in Allegheny County, Pennsylvania (Pittsburgh), one-day/one-trial brought nearly four times as many individuals participating in jury service as before, reduced average days served from 9 to 2, and provided fresh jurors unbiased by exposure to other cases. *Newsletter*, *supra* n. 138. In Bucks County, Pennsylvania, one-day/one-trial increased substantially the number of white collar workers serving on jury duty. Center for Jury Studies Newsletter, vol. 3, No. 4, at 3 (July 1981). In the Federal District of Nevada, one-day/one-trial improved juror utilization and improved age representation on juries. Jurors' attitudes toward service also improved. Office of the Circuit Executive, Final Evaluation Report of the One Day/One Trial Jury Project, United States District Court, District of Nevada, (1986) (unpublished draft). And in Sonoma County, California (Santa Rosa), a one-day/one-trial system resulted in "Peanuts" cartoonist Charles Schultz returning to his important occupation by noon of the day he was called. Center for Jury Studies Newsletter, No. 6, at 5 (Nov. 1979); see also *supra* note 142.

In Virginia, Henry County has successfully used a one-day/one-trial system. Similar short term systems are used in Buckingham, Highland and Buena Vista counties where persons are summoned per case and few people have been called to report more than once in a term. MUNSTERMAN SURVEY, *supra* note 71, at 21.

sential that each circuit have the discretion to design a workable system adapted to its particular needs and problems, with the guiding star being the broadest jury participation possible. The courts must also retain the discretion to defer service for good cause shown.

One-day/one-trial does not in itself produce any cost savings. Indeed, as noted in the *ABA Standards*, the system "can increase jury costs because of the additional number of individuals who must be summoned."¹⁴⁸ Many court systems, however, have reduced overall costs by efficient management techniques.¹⁴⁹

Abolition of exemptions also raises questions not directly addressed by the one-day/one-trial system. For example, if abolition increases the size and variety of juror pools, some may argue for a need for broader voir dire questioning or for more peremptory strikes, or both, to afford counsel adequate information and choice. This argument, however, is at least unclear, if not unpersuasive. Another issue arguably raised by the abolition of exemptions relates to juror fees. Juror fees should be increased, some may argue, if abolition of exemptions results in longer jury service. Fee increases might mitigate perception of increased inconvenience. This argument, too, is, at least at present, unpersuasive. Experience in other jurisdictions does not support the spectre of longer or more onerous jury service. Moreover, the magnitude of feasible fee increases would likely be so disproportionate to the value of jurors' time as to have no significant effect.

These questions and others must be answered. So important are the policies underlying greater public participation in the jury system that every effort must be made to abolish exemptions and minimize the terms of service. To this end, the General Assembly should pass legislation: (1) abolishing exemptions; (2) instructing each circuit to adopt one-day/one-trial or an adaptation thereof fitted to the needs of the circuit and aimed at minimum terms of

148. ABA STANDARDS, *supra* note 72, at 56.

149. The Virginia Center for Jury Studies has listed six factors which are essential to the efficient operation of a one-day/one-trial system: (1) computerized selection of names from source lists; (2) accurate prediction of daily juror needs; (3) telephone call-in; (4) first-class mail summoning; (5) rapid orientation; and (6) re-use of jurors during the service day. *Newsletter*, *supra* note 140, at 2-3; see also *One Day/One Trial Analysis*, Center for Jury Studies Newsletter, No. 6 (Nov. 1979) (noting that under-use of jurors could be abated by making use of distribution patterns of trial starts). Implementation of these factors in conjunction with one-day/one-trial should serve to minimize costs and inconvenience while maximizing use of jurors.

service; and (3) retaining in the courts the discretion to excuse or defer service.

CONCLUSION

Exemptions are anachronisms. They are no longer justified. The community need rationale on which exemptions were originally based no longer exists. Nor is general personal inconvenience a sufficient justification for exemptions. Such inconvenience does not outweigh the public policy importance of broad-gauged public participation in the justice system. Virginia should seize the opportunity now to eliminate exemptions and thereby make juries more representative, more effective, and more democratic. Justice Murphy, in a statement on this point forty years ago which is especially apt today, stated that “[u]nder our Constitution, the jury is not to be made the representative of the most intelligent, the most wealthy or the most successful, nor of the least intelligent, the least wealthy or the least successful. It is a democratic institution, representative of all qualified classes of people.”¹⁵⁰

150. *Fay v. New York*, 332 U.S. 261, 299-300 (1947) (Murphy, J., dissenting).

