

April 2005

A Jury of One's Peers: Virginia's Restoration of Rights Process and Its Disproportionate Effect on the African American Community

Amanda L. Kutz

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Repository Citation

Amanda L. Kutz, *A Jury of One's Peers: Virginia's Restoration of Rights Process and Its Disproportionate Effect on the African American Community*, 46 Wm. & Mary L. Rev. 2109 (2005), <https://scholarship.law.wm.edu/wmlr/vol46/iss6/4>

NOTES

A JURY OF ONE'S PEERS: VIRGINIA'S RESTORATION OF RIGHTS PROCESS AND ITS DISPROPORTIONATE EFFECT ON THE AFRICAN AMERICAN COMMUNITY

INTRODUCTION

The plaintiff, an African American male, brought an action against the defendant, a white male, for alleged injuries sustained when the defendant's car collided with the plaintiff's car. During voir dire, the judge asked the prospective jurors if any of them had been convicted of a felony. The only African American member in the jury pool looked inquisitive as he slowly raised his hand, and he explained to the judge that he had been convicted of a felony ten years ago. With a sympathetic look on his face, the judge dismissed the prospective juror and explained that under Virginia law all convicted felons are excluded from serving on any jury unless their civil rights have been restored by the state.¹

Under current Virginia law, convicted felons permanently lose their civil rights unless they apply for, and are granted, a restoration of those rights by the State.² These rights include, among others, the right to vote,³ the right to hold public office,⁴ and the

1. This fictionalized story is based on actual courtroom events that occurred in Virginia's Ninth Circuit Court located in Williamsburg, Virginia, on September 10, 2003.

2. VA. CODE ANN. § 53.1-23.1 (West 2001 & Supp. 2004) (requiring the Director of the Department of Corrections to notify convicted felons of their loss of civil rights as well as the process required to restore those rights).

3. VA. CODE ANN. § 24.2-427 (West 2001 & Supp. 2004) (noting that those convicted of a felony are disqualified to vote).

4. VA. CODE ANN. § 24.2-231 (West 2001 & Supp. 2004) (noting that those convicted of a felony are disqualified from holding public office or serving as a political appointee).

right to serve on a jury.⁵ The Governor has the sole authority to restore a felon's civil rights.⁶ In the summer of 2002, Governor Warner instituted an expedited review process for those convicted of non-violent felonies applying for a restoration of their civil rights.⁷ Although the new process has enabled more convicted felons to regain their civil rights,⁸ the blanket denial of civil rights to convicted felons who have finished serving their sentence has a significant impact on jury trials, particularly those involving African Americans.

One in four African American males in Virginia is a convicted felon,⁹ without the right to serve on a jury. This demonstrates that the exclusion of felons from service on both civil and criminal juries prevents a significant number of African American males in Virginia from representing a fair cross-section of their community in the jury pool.¹⁰ As a result, Virginia's restoration of rights process, although neutral on its face, disparately impacts the

5. VA. CODE ANN. § 8.01-338 (West 2001 & Supp. 2004) (describing the persons who are disqualified from serving as jurors, including persons who have been convicted of a felony).

6. VA. CONST. art. V, § 12 (stating that the power to grant pardons and remove political disabilities resides solely within the authority of the Governor); see also *In re Phillips*, 574 S.E.2d 270, 273 (Va. 2003) (noting that the power to restore a felon's rights resides in the Governor and this power is separate and distinct from the other branches of government).

7. Sec'y of the Commonwealth, *Application for Restoration of Rights for Certain Non-violent Offenders*, available at <http://www.commonwealth.virginia.gov/Clemency/RORShortApp.pdf> (last visited Feb. 2, 2005) [hereinafter *Application for Restoration of Rights*]; see also Laurence Hammack, *Governor Helps Felons Regain Civil Rights*, ROANOKE TIMES & WORLD NEWS (Virginia), May 10, 2004, at B1.

8. See Hammack, *supra* note 7, at B1 (noting that under the new restoration of rights process that distinguishes between non-violent and violent felonies, Governor Warner has restored the rights to more convicted felons than the previous three governors combined).

9. Lawyers' Committee for Civil Rights Under Law, *Restore Your Right to Vote in Virginia*, available at <http://www.lawyerscomm.org/ep04/50states/virginia.pdf> (last visited Feb. 2, 2005) (noting that twenty-five percent of black men in Virginia are disenfranchised) [hereinafter *Restore Your Right to Vote*]; see also *Felons File Lawsuit to Challenge Vote Law*, RICHMOND TIMES-DISPATCH, Oct. 31, 2002 at B2. Five African American males convicted of a felony have challenged the Virginia law that excludes them from voting, arguing that the law is unconstitutional because it disproportionately deprives African Americans of their voting rights. *Id.*

10. See Robert Joe Lee, *Minority Issues in Jury Management*, for the Committee on Minority Access to Justice, Supreme Court Task Force on Minority Concerns 9 (Sept. 1991) (finding that "[t]he combined effects of certain qualifications ... are that up to about one-half of each minority group is excluded from jury service" and that if the jury pool does not contain an "acceptable range of the proportion of minorities in the general population, there may be *de facto* discrimination").

African American community and may deprive an accused African American of his right to be tried by a jury of his peers in a criminal trial.

This Note will explore the restoration of civil rights process and its effect on the jury system in Virginia, particularly on the African American community. Part I discusses the creation of the Anglo-American jury and the development of the jury system in America, and it also discusses the important Supreme Court rulings that shape jury composition and the ways in which the State is permitted to exclude prospective jury members. Following the history of the American jury, Part II explains the Supreme Court's fair cross-section requirement for jury representation. Part III analyzes Virginia's restoration of civil rights process by describing the policy as it currently exists and comparing it with proposed legislation, which would have eased the restoration of voting rights process for those convicted of non-violent felonies. Part IV provides a national overview of felony exclusion laws that prohibit felons from serving as jurors, using Virginia as a benchmark. This Part also offers policy arguments against these laws. Part V outlines the arguments for and against Virginia's current policy in the context of both criminal and civil cases. In addition, this Part analyzes the treatment of drug offenders and evaluates specifically how it burdens the African American community. Part VI highlights the constitutional concerns that underlie Virginia's restoration of civil rights process and its effect on the jury system. Specifically, this Part addresses three constitutional issues: the Sixth Amendment's jury of one's peers requirement, the Fourteenth Amendment's due process requirement that laws be racially neutral, and the right to privacy found in the Ninth Amendment, in the context of the requirement that a felon disclose his felony status before being eligible to serve on a jury. In conclusion, this Note proposes that legislation should be enacted that would make *all* felons eligible to apply for a restoration of their civil rights immediately upon completion of their sentence, using the expedited process for non-violent felons set forth in the current restoration of rights policy.

I. HISTORY OF THE JURY SYSTEM

The Anglo-American jury system has its roots in the Magna Carta, which was signed by the King of England in 1215.¹¹ Prior to the implementation of the Magna Carta, the King served as the head of the legislative, executive, and judicial branches of government.¹² Mounting dissension to the King's tyrannical oppression led the barons of England to draft the Magna Carta, which prohibited the King from punishing anyone unless the individual had been judged by a jury of his peers.¹³ Firmly rooted in this English tradition, the right to a trial by jury was adhered to in America after settlement of the colonies.¹⁴ Indeed, in 1606, the Governor of Virginia declared by royal decree that all criminal defendants in the colony would be tried by jury.¹⁵

A. *The American Colonies and the Jury System*

According to historian J.R. Pole, the early Anglo-American jury served as a practical and economically efficient tool of the government in judicial proceedings.¹⁶ Juries provided a way for members of the community to come together to set community standards, to create a standard of morality, and to instill loyalty to one's community.¹⁷ In colonial America, juries often acted as a form of resistance against the King. Jurors held democratic power over the law imposed upon them, because the King could not decide whether the

11. See LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY 1 (The Lawbook Exchange, Ltd. 2002) (expounding upon the long-standing right of juries to judge the accused).

12. *Id.* at 20 (noting that judges were servants of the King).

13. See *id.* at 21-22 (explaining that the Magna Carta required the "consent of the peers" of the accused before the King could pronounce a punishment).

14. See LEONARD W. LEVY, THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY 66 (1999) (commenting that the charters of Virginia and other colonies afforded colonists the same rights as Englishmen).

15. *Id.*

16. J.R. Pole, "A Quest of Thoughts": Representation and Moral Agency in the Early Anglo-American Jury, in "THE DEAREST BIRTH RIGHT OF THE PEOPLE OF ENGLAND": THE JURY IN THE HISTORY OF THE COMMON LAW 101, 102 (John W. Cairns & Grant McLeod eds., 2002) (noting that juries "nourished loyalty" of community members).

17. See *id.* (explaining the power of juries to mitigate or enhance the law).

jury would originate prosecutions, where the trial would be, or who would serve as the jury.¹⁸ The First Continental Congress declared in 1774 that the colonies and their inhabitants were "entitled ... to the great and inestimable privilege of being tried by their peers."¹⁹ A few years later, the Declaration of Independence condemned the King's control over the colonies' judicial system through his appointment of judges and his denial of "the benefit of trial by jury."²⁰

B. Establishing the American Jury System

In establishing the American judicial system, the newly formed nation grappled with issues of impartiality and locality with respect to juries when formulating the Constitution and deciding rules of criminal procedure.²¹ Specifically, Anti-Federalists argued that a local jury would be more familiar with the location in which a crime occurred and also would know the general character of the accused.²² A local jury with personal knowledge, therefore, would be able to serve as a better judge than a jury foreign to the location and to the criminal defendant.²³ Federalists, however, argued that local representation in making laws would be satisfied in the formation of Congress and state legislatures.²⁴ A local jury would not be needed to interpret the law based on community norms, as was necessary when the colonists were under British control and

18. See JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 25 (1994) (describing juries, "in moments of crisis," as having "the last say on what the law was in their community"); see also RITA J. SIMON, THE JURY: ITS ROLE IN AMERICAN SOCIETY 5-6 (1980) (noting that juries served as a "symbol of rebellion" against the King).

19. SIMON, *supra* note 18, at 5 (describing the colonists' recognition of a trial by jury to be a fundamental right).

20. *Id.* at 6.

21. See ABRAMSON, *supra* note 18, at 22-33 (highlighting the fundamental arguments debated between the Anti-Federalists, who preferred local juries to ensure impartiality, and the Federalists, who argued local juries would be biased due to the likelihood of the jurors knowing the parties at trial or knowing the issues on trial).

22. *Id.* at 27 (focusing on jurors as fact finders).

23. *Id.*

24. *Id.* at 33 (arguing that locally elected legislatures would create laws fair and reflective of the community).

the jury served as the colonists' only form of representative government.²⁵

The Federalists and Anti-Federalists compromised on the issue of locality in creating what is now the Sixth Amendment.²⁶ The Amendment requires criminal defendants to be tried by a jury located in "the State and district wherein the crime shall have been committed."²⁷ Federalists, who initially opposed the idea of a local jury, retained the language in the Sixth Amendment requiring the accused to be tried in districts created by the federal Judiciary Act.²⁸ However, Anti-Federalists achieved a victory for local juries, as jury members had to be chosen from the districts where the crime occurred, and Congress could not expand the districts to a size larger than a state.²⁹ Being tried by a jury composed of local citizens, therefore, eventually became accepted as the defendant's best hope for an impartial trial.

C. Issues with Jury Representation for African Americans and Women

In addition to the issues of locality and impartiality, the nation wrestled with the question of jury representation and who constituted "one's peers." Historically, women and African Americans were excluded from jury service.³⁰ Following the Civil War, African American men became eligible for jury service based on the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, but southern states continued to deny them their right to serve on a

25. *Id.* (noting the difference between an elected legislature and a King).

26. *Id.* at 35-36 (compromising on local juries by allowing Congress to select the geographic boundary from which a juror would be selected, but limiting the boundary to each individual state in existence at that time).

27. U.S. CONST. amend. VI.

28. See ABRAMSON, *supra* note 18, at 35 (noting the true victory of the Anti-Federalists, as the Constitution limited Congress's authority to create districts larger than a state).

29. *Id.* at 36. The Judiciary Act highlighted the importance of local juries as it required juries to be selected from the county where the crime was committed, if the crime carried a possible punishment of death. *Id.*

30. For a discussion on all-white juries prior to the Supreme Court's requirement that a fair cross-section of the community be pooled for jury service, see ABRAMSON, *supra* note 18, at 105-07. For a discussion on the exclusion of women from juries, see *id.* at 112-15.

jury until the middle of the twentieth century.³¹ Most women did not receive the right to serve on a jury until the early twentieth century.³²

D. The Supreme Court and Jury Representation

By the end of Reconstruction, with the drafting of the Fourteenth Amendment requiring "equal protection of the laws,"³³ courts had to decide how the Amendment would affect notions of fairness and representation for newly freed African Americans on trial, who had to be tried by a jury of their "peers."³⁴ One possibility was for courts to require that, in criminal trials, at least some jurors must be the same race as the defendant. For instance, prior to the United States receiving its independence, a colonial Massachusetts court decided that a jury of one's peers for a Native American accused of a crime should include Native Americans,³⁵ consequently, the court allowed a jury composed of six Native Americans and six Englishmen to try the Native American defendant.³⁶ Another possibility was for the courts to construe the "jury of one's peers" requirement to mean only that criminal defendants are entitled to request a trial by jury rather than having a bench trial. Not until its decision in *Strauder v. West Virginia*³⁷ did the Supreme Court finally address the issue

31. SIMON, *supra* note 18, at 7 (noting that juries in the South consistently decided against African Americans, whether they were the accused or the victim of crime).

32. ABRAMSON, *supra* note 18, at 113. The first state to allow women to serve on juries was Utah, in 1898. *Id.* After the Nineteenth Amendment was passed in 1920, many states allowed women to serve as jurors; however, a majority of states did not qualify women to serve until 1940. *Id.*

33. U.S. CONST. amend. XIV, § 1 (requiring states to apply the laws equally to all citizens).

34. See Pole, *supra* note 16, at 110 (commenting on the racial element of defining "peers" during Reconstruction).

35. See *id.* (noting that aliens and other societal groups that lacked political representation had a need for representation in the jury).

36. *Id.* In a perhaps odd sense of justice, Native Americans were treated as aliens without representation in government. Although the Native Americans could be held to laws that they were not permitted to participate in creating, juries could include Native Americans to "represent" Native Americans on trial. *Id.*

37. 100 U.S. 303 (1879) (holding that a state statute that facially discriminated against African Americans to be a violation of the Equal Protection Clause).

of what constitutes a representative jury with respect to African Americans.

In *Strauder*, the Court held that a jury of one's peers is a jury where the members hold the same legal status within the community as that of the accused.³⁸ The defendant in *Strauder*, an African American male, appealed his murder conviction, objecting to the circuit court's denial of removal to federal court where African Americans would be eligible for jury service.³⁹ West Virginia law denied African Americans the ability to serve on a jury, which the defendant claimed would deny him equal protection of the law as guaranteed by the Fourteenth Amendment.⁴⁰ The Court stated that the West Virginia law singled out African Americans, branding them as inferior.⁴¹ Expounding upon the basic premise of a jury, the Court concluded that a jury is composed of individuals with the same rights as the accused; thus, by denying African Americans the ability to serve on a jury in the defendant's trial, the defendant did not receive a trial by a jury comprised of his peers.⁴² Consequently, the state had denied the defendant equal protection under the law.⁴³

In *Strauder*, the Supreme Court determined that the state could not systematically deny African Americans the right to serve on a jury,⁴⁴ but it limited the application of *Strauder* in its decision in

38. *Id.* at 308 ("The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine.").

39. *Id.* at 304. A former slave, the defendant believed he would not receive the "full and equal" protection of the law if tried in a state court. *Id.*

40. U.S. CONST. amend XIV, § 1; see also *Strauder*, 100 U.S. at 304. After the state court denied the defendant's petition for removal to a federal court, the defendant made several motions to quash the venire, all of which the state court denied. *Id.*

41. *Strauder*, 100 U.S. at 308. Specifically, the Court stated:

The very fact that colored people are singled out and expressly denied by a statute all right to participate ... as jurors ... is practically a brand upon them[,] ... an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

Id.

42. See *id.*

43. *Id.* at 308-10 (noting that the Fourteenth Amendment does not prohibit states from qualifying jurors on non-racial grounds).

44. See *id.* at 309 (determining that states cannot qualify jurors on the basis of race).

Virginia v. Rives.⁴⁵ In *Rives*, the Court analyzed Virginia's jury system and its exclusion of African Americans from serving as jurors under the Fourteenth Amendment.⁴⁶ In *Rives*, the defendants, African American males, petitioned to have their all-white jury modified so that one-third of the jury would be composed of African Americans.⁴⁷ The state court denied the defendants' request and later denied the defendants' petition for a change of venue to federal court.⁴⁸ At the time of the trial, the Commonwealth of Virginia allowed "all male citizens twenty-one years of age and not over sixty, who are entitled to vote and hold office under the Constitution" to serve as jurors.⁴⁹ Because Virginia did not *specifically prohibit* African Americans from serving as jurors, the Court found that Virginia did not *explicitly exclude* them from serving as jury members, despite the fact that no African Americans had served on the defendants' jury.⁵⁰ Therefore, the Court held that the defendants did not prove that the Commonwealth had denied them equal protection of the laws.⁵¹ Even though the defendants' jury had no African American members and the county in which the trial took place had never allowed an African American to serve as a jury member when an African American stood as the accused, the Court found that the defendants "[f]ell short of showing that any civil right was denied, or that there had been any discrimination against the defendants because of their color or race."⁵²

45. 100 U.S. 313 (1879) (holding that if a state law requires racial impartiality for jury selection, the fact that no member of an accused's race serves on the jury does not create a violation of the Equal Protection Clause).

46. *Id.*

47. *Id.* at 314-15.

48. *Id.* at 315-16 (describing the state court's refusal to empanel a new jury or remove the case to a federal court).

49. *Id.* at 320. Although the statute did not explicitly deny African Americans the right to serve on a jury, the statute's juror qualifications likely would have the effect of eliminating African American jurors. Many southern states required literacy tests or poll taxes as a condition to vote in an attempt to prohibit African Americans from voting, and consequently, from serving on juries.

50. *Id.* at 320-21. The Court notes that if the defendants could show that a state official limited juror selection to whites, this would be a violation of the Virginia statute and the Fourteenth Amendment. *Id.*

51. *Id.* at 322 (noting that the defendants had a right to an impartially selected jury, not the right to a jury composed of members of their own race).

52. *Id.* (finding that the jury "may have been impartially selected").

The defendant in *Strauder* experienced de jure discrimination, as West Virginia specifically denied African Americans the ability to serve on a jury.⁵³ The defendants in *Rives*, however, experienced de facto discrimination with respect to jury composition, because the Commonwealth had not specifically denied members of the defendants' race from serving on juries, even though no jury member from the defendants' race served on the defendants' jury.⁵⁴ At the turn of the twentieth century, therefore, the Supreme Court decided that when states specifically bar African Americans from serving as jury members, the states denied African Americans equal protection under the laws. However, the Court allowed states to discriminate in selecting juries by de facto means, such that states could discriminate as to who could serve on a jury in a manner that would adversely affect African Americans, without violating the Equal Protection Clause of the Fourteenth Amendment.

II. THE FAIR CROSS-SECTION REQUIREMENT

Almost one hundred years following the decisions in *Strauder*⁵⁵ and *Rives*,⁵⁶ the Supreme Court reconsidered the issue of jury representation. In *Taylor v. Louisiana*,⁵⁷ the Court held that jury pools must be "reasonably representative" of the accused's community in order to protect the accused's Sixth and Fourteenth Amendment rights.⁵⁸ Elaborating on those rights, the Court declared that a jury must be "drawn from a fair cross section of the community."⁵⁹

53. See *Strauder v. West Virginia*, 100 U.S. 303, 304 (1879).

54. See *Rives*, 100 U.S. at 320-21.

55. *Strauder*, 100 U.S. at 303.

56. *Rives*, 100 U.S. at 313.

57. 419 U.S. 522 (1975) (holding the defendant's Sixth Amendment right to be tried by a jury of his peers was violated due to a state statute that excluded women from the jury pool unless women volunteered to serve as jurors).

58. *Id.* at 538 (noting that juries do not have to be representative of a fair cross-section of the community, but must be selected from such).

59. *Id.* at 527 (holding the fair cross-section requirement necessary to the concept of trial by jury).

The Court created further substance to its finding in *Taylor* a few years later in *Duren v. Missouri*.⁶⁰

A. Underrepresented Juries and Statistics

In *Duren*, the defendant appealed his conviction, claiming that he did not have a jury composed of a fair cross-section of the community.⁶¹ In 1979, Missouri was one of two states that excluded women from jury service if they requested not to serve.⁶² At the time of the trial, women made up fifty-four percent of the adult population in the defendant's county, but less than fifteen percent of the female population had been summoned to appear for voir dire.⁶³

In its opinion, the Court laid out a three-prong test that a defendant must satisfy to establish a prima facie violation of the fair cross-section requirement:

- (1) [T]hat 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 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.⁶⁴

60. 439 U.S. 357 (1979) (holding the state's automatic exemption of women who did not want to serve on a jury a violation of the defendant's right to a jury selected from a fair cross-section of the community).

61. *Id.* at 360. Interestingly, the defendant did not claim that someone of his own race or gender was excluded from the jury pool. Rather, the defendant claimed that by excluding women from the jury pool, the state denied him of his Sixth and Fourteenth Amendment rights.

62. *Id.* at 359-60 (noting that Tennessee also excluded from jury service women who requested not to serve).

63. *Id.* at 362. The defendant submitted statistical reports on the percentage of females serving as jury members during the ten months prior to his trial. The defendant calculated the percentage by using population census data collected six years prior to his trial. *See id.* at 362-63. The Missouri Supreme Court contended that due to the age of the census data, the statistical reports may not have accurately reflected the percentage of women eligible to serve as jury members at the time of the defendant's trial. *Id.* at 363. However, the court concluded that even if the statistics were accurate, the Missouri system still met constitutional requirements. *Id.*

64. *Id.* at 364.

The Court found that the defendant had met this burden, relying largely upon statistical data.⁶⁵ First, the Court noted that they previously had acknowledged, in *Taylor*, that women were a distinct group in the community.⁶⁶ Second, the defendant demonstrated through census reports the percentage of women within the community.⁶⁷ As the defendant showed that women composed over half of the county's population, the Court concluded that women were not represented in a reasonable manner, because only approximately fifteen percent of women had been summoned and appeared for voir dire.⁶⁸ Finally, the Court found that the large discrepancy between the female population of the county and the composition of juries, which had been consistent for at least ten months prior to the defendant's trial, showed that "the cause of the underrepresentation was systematic—that is, inherent in the particular jury-selection process utilized."⁶⁹

As the defendant had met his burden of showing a prima facie case of a violation of the fair cross-section requirement, the burden shifted to the State of Missouri to show that meeting the fair cross-section requirement would impinge upon a "significant state interest."⁷⁰ Because the state could not prove that any permissible jury exemptions caused the underrepresentation, the automatic exemption for women appeared to be the only viable cause.⁷¹ The state claimed that most women served as caretakers for their children and that the state had an interest in protecting the role

65. *Id.* at 364-70. The defendant satisfied the last two prongs of the three-prong test to prove a prima facie violation of the cross-section requirement using statistical data.

66. *Id.* (citing *Taylor v. Louisiana*, 419 U.S. 522, 531 (1975)).

67. *Id.* (finding the "percentage of the community" the alleged underrepresented group comprises to be the "conceptual benchmark for the Sixth Amendment fair cross-section requirement").

68. *Id.* at 365-66 (commenting that if the percentage of women in the community was accurately mirrored in the composition of jury pools, more than one out of every two jurors should be women, but that in actuality only one out of every six jurors were women).

69. *Id.* at 366 (finding that "85% of the average jury was male").

70. *Id.* at 368. The state argued that more women than men possibly could qualify for permissible exemptions from jury service. *Id.* Possible exemptions included being over the age of sixty-five or working as a teacher or government worker. *Id.* The state, however, could not prove that these permissible exemptions from jury service caused the discrepancy between the number of women in the population and those actually serving on juries. *Id.* at 368-69.

71. *Id.* at 368-69 (noting that the state must offer proof that the permissive exemptions caused the underrepresentation of women on juries).

of women in the home.⁷² The Court, however, found that the automatic exemption of women was overinclusive, as not all women had "domestic responsibilities."⁷³ The overinclusive nature of the automatic exemption of women, therefore, did not meet constitutional muster, as it violated the fair cross-section requirement.⁷⁴

B. Constitutional Standards and Jury Representation

The Supreme Court has articulated important constitutional standards with respect to juries and representation since the end of the Civil War. First, the Court has held that de jure discrimination in jury composition is unconstitutional.⁷⁵ In *Strauder*, the Court stated that a criminal defendant has the right to a jury composed of his peers, defining peers as those members of the community that hold the same legal status as the accused.⁷⁶ When the State deliberately denies the right to serve as a jury member to a particular segment of the community with the same legal status as the accused, the State violates the defendant's Fourteenth Amendment right to equal protection of the laws.⁷⁷ Second, the Court is willing to allow de facto discrimination with respect to jury composition.⁷⁸ In *Rives*, even though no member of the defendant's race served as a member of his jury, the Court held that the defendant's Fourteenth Amendment rights were not violated.⁷⁹ Because the Commonwealth had not purposefully denied African Americans the ability to serve on a jury, the lack of African

72. *Id.* at 369 ("[T]he only state interest advanced by the exemption is safeguarding the important role played by women in home and family life.").

73. *Id.* (excluding all women because of the domestic responsibilities of a few did not justify the gross underrepresentation of women within the jury pool).

74. *Id.* at 370. *But see id.* at 374-75 (Rehnquist, C.J., dissenting) (arguing that the Court "is simply playing a constitutional numbers game" and that there is no essential difference between a jury in which fifteen percent of the members are women and a jury in which twenty or thirty percent of the members are women).

75. *See Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (holding that states may not explicitly exclude African Americans from serving as jurors).

76. *Id.* at 308 (finding that a jury must be composed of the accused's peers).

77. *See id.* at 309-10 (concluding that the Fourteenth Amendment protects against discrimination based on race).

78. *See Virginia v. Rives*, 100 U.S. 313, 322-23 (1879).

79. *Id.* (finding that the jury was composed pursuant to a neutral law).

American jurors did not indicate a violation of the defendant's rights.⁸⁰

Finally, the Court has held that juries must be selected from a fair cross-section of the community,⁸¹ and that if a specific portion of the community is underrepresented in jury composition, the defendant's Sixth and Fourteenth Amendment rights may be violated.⁸² In *Duren*, the defendant showed that the state automatically exempted women from jury service upon request, resulting in a dramatic underrepresentation of women serving on juries.⁸³ The defendant proved the case of underrepresentation through the use of statistics, which the Court accepted as a legitimate way to prove the lack of a fair cross-section of the community.⁸⁴ As the state offered no legitimate interest in systematically excluding women from jury service, the Court held the automatic exemption unconstitutional.⁸⁵ These principles enunciated by the Supreme Court regarding de facto and de jure discrimination in jury selection and regarding the fair cross-section requirement may indicate that Virginia's current restoration of civil rights process may not meet constitutional muster, because it disparately impacts African American males and systematically denies those convicted of felonies from being eligible for jury selection.

III. VIRGINIA'S CURRENT RESTORATION OF CIVIL RIGHTS PROCESS AND ITS EFFECT ON JURY SELECTION

Virginia's restoration of civil rights process is part of the Commonwealth's felony disenfranchisement laws, which deny civil rights to citizens convicted of felonies.⁸⁶ Felony disenfranchisement laws

80. *Id.*; see also *Martin v. Texas*, 200 U.S. 316, 320-21 (1906) (holding that a defendant has a right to be tried by a jury that is selected according to nondiscriminatory standards, but that a defendant does not have a right to be tried by a jury partially or wholly composed of jurors from his same race).

81. *Taylor v. Louisiana*, 419 U.S. 522, 526-27 (1975).

82. *Duren v. Missouri*, 439 U.S. 357, 358-59 (1979) (citing *Taylor*, 419 U.S. at 526-31, 538).

83. *Id.* at 366.

84. *Id.*

85. *Id.* at 368-70.

86. See VA. CODE ANN. §§ 53.1-231.1 to 231.2 (West 2001 & Supp. 2004) (describing the process by which felons are notified of their loss of civil rights and the process by which felons may apply for the right to vote).

made their way into colonial America through the British practice of adding civil punishments to the criminal sanctions imposed on those convicted of felonies.⁸⁷ The additional civil punishment of being denied the right to participate in the political process extended from the belief that those convicted of felonies were less trustworthy and more capable of fraud.⁸⁸ Disenfranchisement laws "increased in importance and effect" in America following the Civil War.⁸⁹ At the start of the twenty-first century, all but two states disenfranchised felons in some form or another, with twelve states permanently disenfranchising "at least some ex-felons."⁹⁰

In 1998, the Human Rights Watch's Sentencing Project released its report on felon disenfranchisement laws in the United States.⁹¹ The report highlighted the disproportionate racial impact created by state disenfranchisement laws, listing Virginia as one of five states with laws that permanently disenfranchise one out of every four African American men.⁹² After Virginia's disenfranchisement laws and their racial impact received national attention, the Virginia Black Caucus, led by chairman Delegate Jerrauld Jones, pushed for new legislation "to ease the process felons must go through to regain their voting rights."⁹³ Although killed in committee when first introduced,⁹⁴ the General Assembly enacted new legislation in 2000 to amend the restoration of civil rights process

87. Martine J. Price, Note and Comment, *Addressing Ex-Felon Disenfranchisement: Legislation vs. Litigation*, 11 J.L. & POL'Y 369, 370 (2002) (noting that the English practice of "imposing collateral civil consequences to felony convictions" was continued in America).

88. *Id.* at 370-71 (justifying the disenfranchisement laws as a way to decrease fraud by keeping felons away from the political process).

89. *Id.* at 369 (highlighting that this practice continues today with the same level of enthusiasm).

90. *See id.* at 371-74 (commenting that twelve states allow for the permanent disenfranchisement of "at least some ex-felons, even after sentence and parole completion").

91. Human Rights Watch & The Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (1998), available at <http://www.hrw.org/reports98/vote/index.html> (providing a state-by-state breakdown of felony disenfranchisement laws) [hereinafter *Losing the Vote*].

92. *Id.* at pt. III. In addition to Virginia, one out of every four African American men is permanently disenfranchised due to a felony conviction in Iowa, Mississippi, New Mexico and Wyoming. *See Losing the Vote*, *supra* note 91.

93. Ruth S. Intress, *Snubs Alleged by Black Caucus; Gilmore: Minority Issues Not Ignored*, RICHMOND TIMES-DISPATCH, Mar. 3, 2000, at A1 (discussing the Legislative Black Caucus's failed effort to pass legislation that would ease the process felons must endure to regain voting rights).

94. *Id.*

felons must go through to regain their voting rights. However, the new legislation does not apply to the restoration of other rights, including the right to serve on a jury.⁹⁵ Two years after the legislation to restore voting rights passed, Governor Warner issued a new policy that expedited the restoration of rights process for all non-violent felons.⁹⁶

A. *The Current Restoration of Rights Process*

Under Virginia's new restoration of rights process promulgated by Governor Warner in 2002, those citizens convicted of non-violent felonies are subject to an expedited review after applying for a restoration of their rights.⁹⁷ Those "convicted of violent felonies, a drug manufacturing or distribution offense or an election law offense" are required to apply under the traditional restoration of rights process.⁹⁸ Under the expedited review process for non-violent felons, an applicant will be notified of the Governor's decision to grant or deny the restoration of rights request within six months.⁹⁹ There is no time frame for when the Governor will act on an application to restore civil rights for those convicted of violent felonies, a drug-related offense, or election fraud.

Although non-violent felons are assured the Governor will take action on their restoration of rights application within six months of filing a completed application, the applicants are still required to wait three years upon finishing their sentence (including parole)

95. VA. CODE ANN. § 53.1-231.2 (West 2001 & Supp. 2004); see Bob Gibson, *Group Helping Ex-Felons Regain Their Voting Rights*, RICHMOND TIMES-DISPATCH, Nov. 28, 2000, at B2 (noting that due to the difficulty of the voting rights process, even after the passage of the new law, some officials and convicted felons who have had their voting rights restored started the Voting Rights Committee to offer free assistance to those convicted felons trying to regain their voting rights).

96. *Application for Restoration of Rights*, *supra* note 7 (providing non-violent felons a "shortened process" to apply to have their civil rights restored by the Governor).

97. *Id.*

98. *Id.* (noting that felons not eligible for the shortened process should contact the Secretary of the Commonwealth to receive information on the correct process).

99. Sec'y of the Commonwealth, *Restoration of Rights Letter* (2002), available at <http://www.commonwealth.virginia.gov/Clemency/rorLetter2002.doc> (describing the basic requirements for non-violent felons wishing to have their civil rights restored).

before they can become eligible.¹⁰⁰ During the three year period, the applicant must be free from both subsequent felony and misdemeanor convictions.¹⁰¹ The decision of the Governor to deny a petition is final and may not be appealed.¹⁰² However, a non-violent felon may re-apply two years after a denial.¹⁰³

The application for non-violent felons is a one-page form, designed to be easier for applicants to complete than the lengthy application required for those convicted of violent felonies.¹⁰⁴ The form is issued by the Secretary of the Commonwealth¹⁰⁵ and the Director of the Department of Corrections is required to notify a convicted felon of the restoration of rights application process.¹⁰⁶ The form asks for basic identification information as well as for information about the felonies and any misdemeanors of which the applicant has been convicted.¹⁰⁷ Specifically, the applicant must identify each felony and misdemeanor conviction along with the name of the court where the conviction occurred and the date of the conviction.¹⁰⁸

100. *Application for Restoration of Rights*, *supra* note 7 (including, in addition to parole, any suspended sentence or probation).

101. *Id.* (requiring all court costs or fines to be paid as well).

102. *Id.* (noting a restoration of rights is at the Governor's discretion).

103. *Id.* (permitting an applicant to re-apply although initial denial is a result of the applicant providing false information).

104. *Id.* Only half of the one page form requires the applicant to supply information; the remaining half of the form is an affidavit which the applicant must sign in the presence of a public notary.

105. See Sec'y of the Commonwealth, *Clemency* (2005), available at <http://www.commonwealth.virginia.gov/Clemency/clemency.cfm> [hereinafter *Clemency*].

106. VA. CODE ANN. § 53.1-231.1 (West 2001 & Supp. 2004) (requiring the Director of the Department of Corrections to notify a convicted felon regarding the loss of his civil rights as well as the process required of the felon in order to regain those rights upon completion of the felon's sentence).

107. See *Clemency*, *supra* note 105 (requesting identification information such as name when convicted, both home and mailing addresses, both work and home phone numbers, date of birth, and social security number).

108. See *id.* (requiring the applicant to attach additional pages if necessary as the form only provides space for listing one felony).

The restoration of rights process for those convicted of violent felonies, drug-related offenses,¹⁰⁹ or election fraud,¹¹⁰ is more complicated. Unlike those convicted of non-violent felonies, there is no expedited review process and the application is more lengthy and cumbersome. Additionally, while the application's instructions state that the applicant does not need the services of an attorney to petition the Governor, the application is over three times the length of the non-violent application.¹¹¹

Specifically, the application requires the submission of several documents along with the completion of a two-page form.¹¹² The requested documents include: certified copies of the applicant's felony court orders and sentencing orders, certified copies noting fines and court cost payment, a letter of petition, a letter from the applicant's probation officer or parole officer defining the applicant's supervision period, a copy of the applicant's pre- and post-sentencing report, three reference letters from reputable community members who can attest to the applicant's good character, and a personal letter in which the applicant can demonstrate how his life has changed and why he believes his civil rights should be restored.¹¹³ The application also asks for identification information, including the applicant's former prison number and the name under which the state convicted the applicant.¹¹⁴ The applicant must have completed any probation period, or finished with a suspended sentence, five years before applying to have his civil

109. Those convicted of drug-related offenses as defined in VA. CODE ANN. §§ 18.2-248, -248.01, -248.1, -255, -255.2, -258.02 (West 2001 & Supp. 2004) are not eligible for an expedited review.

110. Those convicted of election fraud as defined in VA. CODE ANN. § 24.2-1016 (West 2001 & Supp. 2004) are not eligible for an expedited review.

111. Sec'y of the Commonwealth, *Application and Instructions for Restoration of Civil Rights*, available at <http://www.commonwealth.virginia.gov/Clemency/restore.pdf> (last visited Feb. 2, 2005) [hereinafter *Application and Instructions*]. The application includes seven pages of instructions and supplemental information. *Id.* In contrast, the shortened application process for non-violent felons includes a half page of instructions and supplemental information. *See Application for Restoration*, *supra* note 7.

112. *Application and Instructions*, *supra* note 111 (requiring the applicant to address nineteen requests and to have the form notarized).

113. *Id.* The personal letter should also list community activities in which the applicant is involved.

114. *Id.* (including convictions in other states).

rights restored.¹¹⁵ Once the application is complete, the applicant is to return it to the Secretary of the Commonwealth.¹¹⁶

As with non-violent felons, those convicted of a violent felony, a drug-related offense, or election fraud are to be notified by the state of the loss of their civil rights and the process through which they may regain those rights.¹¹⁷ However, unlike with non-violent offenders, there is no guarantee that the Governor will review other applicants' petitions in a timely manner.¹¹⁸ Since the Governor has the sole authority to grant a restoration of rights, and there is no law mandating the Governor to act upon an application within a specified period of time, those felons not eligible for the shortened restoration of rights process may never regain their civil rights, including the right to serve on a jury, even though they have met the application requirements.¹¹⁹

B. Regaining the Right to Vote

Like Governor Warner's distinction between non-violent felons and those felons convicted of violent crimes, drug-related crimes, or election fraud crimes, the General Assembly promulgated new legislation in 2000 expediting the process to regain the right to vote, distinguishing between the same categories of felons.¹²⁰ Non-violent felons, only wishing to regain their right to vote, can petition the

115. *Id.* In comparison, non-violent felons must be free from probation, parole, or a suspended sentence, for three years. See *Application for Restoration of Rights*, *supra* note 7.

116. *Application and Instructions*, *supra* note 111.

117. VA. CODE ANN. § 53.1-231.1 (West 2001 & Supp. 2004). The Secretary of the Commonwealth is required to inform all applicants of both the dates upon which the Secretary received a complete application and the date the application was forwarded to the Governor. *Id.* The Secretary is required to forward completed applications "within ninety days after receipt." *Id.*

118. The short application for non-violent offenders specifically states that "[p]ersons who have been convicted of a violent offense, a drug manufacturing offense or distribution offense or an election law offense are **not** eligible for this process." *Application for Restoration of Rights*, *supra* note 7.

119. See VA. CONST. art. V, § 12 (stating that the Governor has the authority "to remove political disabilities"). The Supreme Court of Virginia has held that under the Virginia Constitution, the Governor is the only political actor with the authority ultimately to grant or to deny a removal of a felon's "political disabilities." *In Re Iris Lynn Phillips*, 574 S.E.2d 270, 273 (Va. 2003).

120. VA. CODE ANN. § 53.1-231.2 (West 2001 & Supp. 2004) (describing the expedited review process for the restoration of the right to vote).

circuit court, who then make a recommendation to the Governor on whether to grant or deny the right to vote.¹²¹ In addition, the law requires the Governor to act on the circuit court's recommendation within ninety days of the court's decision.¹²²

The law establishes guidelines for non-violent felons petitioning the circuit courts to have their right to vote restored. Specifically, the law requires that the applicant demonstrate "civil responsibility through community or comparable service; and that the petitioner has been free from criminal convictions, excluding traffic infractions" during the five-year period following sentence completion.¹²³ The circuit court serves as a screening mechanism, which can accelerate the application process.¹²⁴ If the circuit court approves the non-violent felon's application, the order is sent to the Secretary of the Commonwealth, who in turn submits the order to the Governor, who has ninety-days to grant or deny the petitioner's right to vote.¹²⁵ If the circuit court denies the application, the felon still may apply directly to the Governor to have his eligibility to vote restored, but the Governor is not required to act upon it within ninety days of its receipt.¹²⁶ By giving non-violent felons the option of first applying to the circuit courts, the current law ensures that those felons who are eligible to have their voting rights restored will have an expedited review of their application.

The current law was passed in 2000 largely in response to harsh criticism of the previous restoration of rights process. Before the voting restoration legislation and the restoration of rights process implemented by Governor Warner in 2002, all felons had only the

121. *Id.*; see also *Phillips*, 574 S.E.2d at 273 (holding that the screening of petitions by circuit courts does not constitute a separation of powers violation as the Governor has the ultimate authority to grant or to deny a petition).

122. *Id.* (requiring the court to submit an order to the Secretary of the Commonwealth, who must forward the order to the Governor).

123. *Id.* For non-violent felons wishing to have all of their rights restored, the wait to apply is three years after sentence completion. See *Application for Restoration of Rights*, *supra* note 7.

124. *Phillips*, 574 S.E.2d at 273 (finding the circuit courts' limited role is to determine "whether a petitioner has presented competent evidence supporting the specified statutory criteria"); see Gibson, *supra* note 95, at B2 (describing the law as establishing a "screening process").

125. VA. CODE ANN. § 53.1-231.2 (West 2001 & Supp. 2004).

126. See VA. CONST. art. V, § 12; see also *Phillips*, 574 S.E.2d at 273 (noting that a felon is not obliged to petition the circuit court, but may directly petition the Governor).

option of applying directly to the Governor to have their civil rights restored, and the Governor did not have to act on the application within any time frame.¹²⁷ Critics of this direct application process argued that the difficulty of the process discouraged felons from applying to have their voting rights restored.¹²⁸ Furthermore, less than eight percent of restoration of rights applications were granted in the twenty-five years prior to the enactment of the current law, which expedites the restoration of non-violent felons' voting right.¹²⁹

The current law applies only to non-violent felons wishing to restore their voting rights.¹³⁰ To restore other rights, including the right to serve on a jury, all felons must apply to the Governor.¹³¹ Although the Governor has instituted a quicker, easier process for non-violent felons wishing to have all their rights restored, the circuit courts do not serve as a screening mechanism for applicants unless they only wish to restore their right to vote.¹³² Thus, even if a non-violent felon petitions the circuit court, the court recommends the felon's voting rights be restored, and the Governor grants the right to vote, the non-violent felon would still be required to fill out a restoration of rights application through the Secretary of the Commonwealth's office in order to be eligible to regain other civil rights, including the right to serve on a jury.¹³³ Additionally, if a non-violent felon wishes to petition the circuit court to regain the right to vote, the felon must wait at least five years after completing his sentence.¹³⁴ However, if the felon wishes to regain all of his civil rights, including the right to vote, he may apply directly to the Governor after three years.¹³⁵

127. *Id.* (instilling the Governor with authority "to remove political disabilities").

128. See Gibson, *supra* note 95, at B2 (noting the lack of criteria to petition the Governor).

129. *Id.* (finding less than five thousand applicants had their rights restored before 2000).

130. VA. CODE ANN. § 53.1-231.2 (West 2001 & Supp. 2004). Those convicted of violent felonies, drug offenses, or election fraud are excluded.

131. See VA. CONST. art. V, § 12; VA. CODE ANN. § 53.1-231.2 (West 2001 & Supp. 2004) (limiting the statute's applicability to those wishing to have their voting rights restored).

132. See VA. CODE ANN. § 53.1-231.2 (West 2001 & Supp. 2004) (limiting the circuit courts in their ability to screen applicants who wish to have only their right to vote restored).

133. See *id.* To restore "political disabilities" other than the right to vote, the applicant must petition the Governor. VA. CONST. art. V, § 12.

134. VA. CODE ANN. § 53.1-231.2 (West 2001 & Supp. 2004) (requiring the applicant to have completed any service, finish probation or parole five years prior to applying).

135. *Application for Restoration of Rights*, *supra* note 7. As Governor Warner has made the restoration of rights process simpler for all convicted of non-violent felonies, it would

C. Newly Proposed Legislation to Amend the Process to Regain the Right to Vote in Virginia

Although the current law is an improvement upon regaining the right to vote, it should also encompass the other rights a felon loses upon conviction, such as the right to serve on a jury. In addition, the wait to apply should either mirror the Governor's policy of three years after completion of sentence, or make the wait shorter than three years. Delegate Jerrauld Jones, who proposed the 2000 legislation expediting the process for non-violent felons wishing to regain the right to vote, argues that additional changes to the current law could make the law more effective.¹³⁶ Jones proposed new legislation in 2002, applicable only to those felons petitioning for their right to vote, that would permit non-violent felons to petition the circuit court immediately upon the completion of their sentence.¹³⁷ However, the bill was not passed before the end of the General Assembly session. In 2003, the House Privileges and Elections Committee passed a proposal for a constitutional amendment that would give the General Assembly power to establish a process whereby felons' rights could be restored, but the Committee voted down the proposed constitutional amendment in 2004.¹³⁸ In the opening of the 2005 session of the Virginia General

seem unlikely that non-violent felons would utilize the process established in VA. CODE ANN. § 53.1-231.2 (West 2001 & Supp. 2004) to have their voting rights restored, when they could have all their rights restored two years sooner. Indeed Virginia's Department of Planning and Budget has noted that only two of 1,403 restoration of rights applicants since 2000 have utilized the statutory process to regain voting rights in VA. CODE ANN. § 53.1-231.2 (West 2001 & Supp. 2004). Virginia Legislative Information System, Department of Planning and Budget, *2005 Fiscal Impact Statement*, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?051+oth+HB2755F122+PDF> (describing the fiscal impact H.B. 2755 would create by amending VA. CODE ANN. § 53.1-231.2 (West 2001 & Supp. 2004)).

136. See Gibson, *supra* note 95, at B2 (noting that Jones's statement that he would like to eliminate the five-year waiting period so that those convicted of non-violent felonies could immediately apply to have their rights restored).

137. H.B. 60, 2002 Leg. (Va. 2002) (proposing to amend VA. CODE ANN. § 53.1-231.2 (West 2001 & Supp. 2004) by eliminating the five-year waiting period for non-violent felons petitioning to have their right to vote restored).

138. Tyler Whitley, *Panel Reverses on Voting Rights for Felons*, RICHMOND TIMES-DISPATCH, Feb. 28, 2004, at A6 (noting that the House Privileges and Election Committee, which had previously supported a constitutional amendment that would have given the General Assembly power to establish a process whereby felons could regain their rights, overwhelmingly disapproved of the measure in 2004).

Assembly, Delegate Fenton Bland, Jr. introduced a bill similar to the bill proposed by Delegate Jerrauld Jones.¹³⁹ Delegate Bland's bill would have eliminated the five-year waiting period for non-violent felons wishing to have their right to vote restored.¹⁴⁰ The bill was referred to the House Courts of Justice Committee but did not make it out of committee before the end of the 2005 session.¹⁴¹

The failed legislation would have expedited the restoration of voting rights process for those convicted of committing a non-violent felony. However, the failed legislation would not have eliminated many of the problems associated with the current legislation. For example, the failed legislation would not have allowed those convicted of violent felonies, drug offenses, or election fraud to apply for a restoration of their voting rights under the expedited process.¹⁴² Consequently, the failed legislation would have affected only those convicted of non-violent felonies, a group that already has a simplified application process under the current legislation¹⁴³ and Governor Warner's policy.¹⁴⁴

While the failed legislation would have improved upon current legislation allowing non-violent felons an expedited process to restore their voting rights, the failed legislation would not have applied to other civil rights, such as the right to serve on a jury. The failed legislation would have benefitted those non-violent felons wishing to vote, but would not have allowed the felons to regain the rest of their rights. Thus, both the current and failed legislation place voting rights above other civil rights, as felons are required to go through a separate process to regain the rest of their civil rights.

139. H.B. 2755, 2005 Leg. (Va. 2005) (proposing to amend VA. CODE ANN. § 53.1-231.2 (West 2001 & Supp. 2004) by eliminating the five-year waiting period for non-violent felons petitioning to have their right to vote restored).

140. *Id.* Delegate Bland introduced this bill days before resigning from the General Assembly after pleading guilty to conspiracy to commit bank fraud. Jeffrey Kelley, *Delegate Resigns After Guilty Plea; Fenton L. Bland Jr. Had Committed Fraud to Fund Funeral Home, Officials Say*, RICHMOND TIMES-DISPATCH, Jan. 27, 2005, at A1.

141. The Virginia Legislative Information System lists H.B. 2755 as failing in the House Courts of Justice Committee. Virginia General Assembly, Legislative Information System, *Failed Legislation*, available at <http://www.leg.1.state.va.us/cgi-bin/legp504.exe?051+com+H8N06> (last visited Mar. 3, 2005).

142. See H.B. 2755, 2005 Leg. (Va. 2005). The bill only amends the current legislation with respect to time restraints placed on the applicant.

143. See VA. CODE ANN. § 53.1-231.2 (West 2001 & Supp. 2004).

144. See *Application for Restoration of Rights*, *supra* note 7.

Particularly with respect to the right to serve on a jury, neither the current or failed legislation benefits the African American community, where a quarter of the male population has been convicted of a felony,¹⁴⁵ as it will not enable more African Americans convicted of felonies to serve on juries.

IV. A COMPARATIVE VIEW OF THE RESTORATION OF RIGHTS PROCESS

While this Note focuses on Virginia's felony exclusion law, the majority of states also exclude felons from serving on juries.¹⁴⁶ Virginia, therefore, is a microcosm of national practice toward felons, as most states impose collateral sanctions upon felons reintegrating into society,¹⁴⁷ including stripping felons of the right to serve as jurors. This Part will highlight national trends in felon exclusion from juries using Virginia as a comparative benchmark. In addition, this Part will address the policy concerns of felon exclusion laws focusing on individualized treatment during criminal proceedings and felon reintegration into society.

A. National Trends

Laws restricting juror qualifications have become less restrictive since the 1940s when the Supreme Court began requiring that juries be selected from a fair cross-section of the community.¹⁴⁸

145. See *Restore Your Right to Vote*, *supra* note 9 (noting that twenty-five percent of black males in Virginia are disenfranchised due to felony convictions).

146. For a national view on felony disenfranchisement laws and their effect on jury service, see Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 65 (2003) (noting that "[t]hirty-one states and the federal government subscribe to the practice of lifetime felon exclusion"). See also Joseph H. Kelley, Note, *Restoration of Deprived Rights*, 10 WM. & MARY L. REV. 924, 926-30 (1969) (describing common rights lost by felons under state laws, including the right to serve on a jury); Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 509-10 (1999) (listing jury exclusion as one of eight common civil penalties imposed on felons after serving their sentences).

147. See Sabra Micah Barnett, Commentary, *Collateral Sanctions and Civil Disabilities: The Secret Barrier to True Sentencing Reform for Legislatures and Sentencing Commissions*, 55 ALA. L. REV. 375, 379-80 (2004) (arguing that civil disabilities imposed upon felons released back into society disrupt the integration process and unfairly impose additional penalties upon felons who have already completed their sentences).

148. See *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975) (requiring juries to be drawn from a fair cross-section of the community); Kalt, *supra* note 146 at 186-88 (arguing that jury

Unlike other juror qualification laws, laws restricting felons from serving as jurors have not become less restrictive, but have remained static.¹⁴⁹ Jurisdictions applying felon exclusion laws fall into three general categories.¹⁵⁰ The vast majority of states exclude felons for life—meaning felons are forever prohibited from serving as jurors, or prohibited until they apply for and receive a restoration of their rights from the state.¹⁵¹ Other states bar felons from serving as jurors while they are imprisoned, and during the subsequent supervisory period after release, but permit juror service upon successful completion of probation.¹⁵² Some states exclude felons from serving as jurors only during the time the felon is imprisoned.¹⁵³

Virginia is included in the majority of states that exclude felons from serving as jurors for life.¹⁵⁴ Of the states that exclude felons from serving as jurors, there are different methods states prescribe to restore the rights denied to felons, including the right to serve on a jury.¹⁵⁵ These methods include restoration: 1) by clemency, where the head of the state government grants a pardon or officially restores lost rights;¹⁵⁶ 2) by statute, where the law requires certain lost rights to be restored at certain times;¹⁵⁷ 3) through a decree of

composition has become more diverse since the 1940s as more people are participating as jurors).

149. Kalt, *supra* note 146, at 187 (noting that the practice of excluding felons from serving as jurors “represents an exception to general trends of liberalization concerning civil disabilities”).

150. *See id.* at 149 app. 1 (providing an analysis of felon exclusion laws from all fifty states).

151. *Id.* at 149-50 (noting that thirty-one states and the federal government bar felons from serving as jurors for life).

152. *Id.* (including time served in prison, on probation, or parole); *see also* Petersilia, *supra* note 146, at 510 (finding that ten states exclude felons from jury service while the felon is serving his sentence, and four states exclude felons for a period between one and four years following sentence completion).

153. Kalt, *supra* note 146, at 150 (allowing felons to serve as jurors upon completion of a prison sentence).

154. *See* VA. CODE ANN. § 8.01-338 (West 2001 & Supp. 2004) (naming felons as a class disqualified from serving as jury members).

155. *See* Kelley, *supra* note 146, at 930-32 (describing four different methods states use to restore rights felons lose by law due to their status).

156. *Id.* at 930 (noting that clemency is the most common method states use to restore rights, and that clemency includes many different forms including pardon or amnesty).

157. *Id.* at 930-31 (providing an example of rights being restored through a statute endowing a felon with the rights lost at conviction when the felon completes his sentence).

an adjudicative body, such as a parole board,¹⁵⁸ or 4) through a combination of the above.¹⁵⁹ Virginia falls into the “clemency” category, as only the Governor has the right to restore a felon’s rights.¹⁶⁰ Virginia permits a combination approach, however, with respect to restoring felons’ right to vote, as the law permits circuit courts to review petitions for the right to vote and submit recommendations to the Governor.¹⁶¹

B. National Policy Concerns Regarding Felon Exclusion Laws

Instead of reentering society with their debt paid, felons reenter society with penalties they may continue to pay for the rest of their lives, as they are often denied the right to vote, run for public office, or serve on a jury.¹⁶² After completing their sentence, most felons are unaware of the collateral sanctions associated with their conviction.¹⁶³ For example, a young first-time offender is more likely to accept a guilty plea in order to avoid a prison sentence.¹⁶⁴

158. *Id.* at 931 (describing the power of certain administrative agencies or courts to restore a lost right).

159. *Id.* at 931-32 (noting that some states use a combination of procedures to restore rights, such as having an administrative agency recommend to an executive official that a right be restored).

160. See VA. CONST. art. V, § 12 (providing the Governor with the sole authority “to remove political disabilities”).

161. In Virginia, a combination approach is used to restore the right to vote under VA. CODE ANN. § 53.1-231.2 (West 2001 & Supp. 2004), as the circuit court is given authority to recommend to the Governor that a felon’s right to vote be restored.

162. Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 273 (2004) (describing the experience of many felons who are unaware of the collateral consequences that accompany their conviction, including the right to vote or serve on a jury). Although beyond the scope of this Note, the American Bar Association (ABA) proposes that collateral sanctions should be limited and imposed sparingly, subject to review by a judge. In addition, the ABA encourages judges to take into account collateral sanctions that operate by law when sentencing. See generally Margaret Colgate Love & Gabriel J. Chin, *Old Wine in a New Skin: The ABA Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, 16 FED. SENTENCING REP. 232 (2002).

163. Thompson, *supra* note 162, at 272-23 (listing common consequences of a felony conviction and stressing the lack of awareness of these consequences by both criminal defendants and judges).

164. Andrew Shapiro, *The Disenfranchised*, THE AM. PROSPECT, Nov.-Dec. 1997, at 60-62 (discussing the lack of knowledge about felony exclusion laws and providing a hypothetical describing how defendants unknowingly give up their right to vote by accepting a plea). Critics of ending felony disenfranchisement laws point to the fact that their opponents focus solely on the loss of the right to vote, not the loss of other rights—including the right to serve

Only later when he is denied from serving on a jury or turned away at the voting booth may he become aware of the full extent of his guilty plea.

The rationale for the exclusion of felons from juries stems from the belief that felons are less trustworthy and would be unable to administer the law fairly.¹⁶⁵ However, this view is inconsistent with the idea of reintegration and rehabilitation, both of which are interests of the state.¹⁶⁶ Jury service is a forum that provides the ultimate in representative government, as it allows community members collectively to decide important issues within the community.¹⁶⁷ By excluding felons that have served their sentences from participating in juries, felons are marginalized within the community.¹⁶⁸ The marginalization of felons from their communities due to collateral consequences, such as jury exclusion, impedes the ability of felons to transition back into society as they are denied a stake in what happens in their communities.¹⁶⁹

on a jury—indicating that the advocacy is disingenuous as the focus on disenfranchisement suggests winning votes for the liberal agenda is more important than securing actual rights. See Glenn Richardson & Jerry Keen, *Push to Let Felons Vote a Simple Power Play*, THE ATLANTA-J. CONST., Oct. 18, 2004, at 11A. Indeed, when Virginia amended its restoration of rights process in 2000, the abbreviated procedure applied only to those seeking to regain the right to vote. See VA. CODE ANN. § 53.1-231.2 (West 2001 & Supp. 2004) (establishing a shortened procedure to have the right to vote restored, but leaving the lengthy procedure to have other rights restored intact).

165. See Nora V. Demleitner, Symposium, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 158-59 (1999) (analogizing the state's treatment of felons to groups historically excluded from political participation, including women and minorities).

166. See Petersilia, *supra* note 146, at 511 (noting that states spend millions of dollars on rehabilitation programs to help felons ease into society upon release, yet also impose collateral sanctions upon offenders that impinge upon the goal of rehabilitative services).

167. Although focusing on civil juries, Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29, 54-55 (1994), equates jury participation to a parliament, where people come together to decide issues for the community.

168. See Thompson, *supra* note 162, at 273 (arguing that collateral sanctions, such as denial of the right to serve on a jury, serve as a barrier to felons' successful reintegration into society as they are separated from non-felons in exercising their rights as citizens).

169. Depriving felons of the right to vote and the right to serve on a jury through a collateral sanction is a denial of the most basic forms of representative government. See Barnett, *supra* note 147, at 383 (noting that collateral sanctions impede integration into society and encourage recidivism).

V. ASSESSING THE CURRENT LAW FROM A CRIMINAL AND CIVIL PERSPECTIVE

A. *Felons as Jurors in Criminal Cases*

Under Governor Warner's policy, Virginians convicted of non-violent felonies can become eligible to serve on a jury three years after their conviction. Violent felons, drug offenders, and those convicted of election fraud also have the opportunity to apply for a restoration of civil rights and thus may become eligible for jury service. According to Virginia prosecutors who were ordered by a circuit court to refrain from criminal record or driver history checks on prospective jurors, however, all felons should be kept out of the jury box.¹⁷⁰ The state's policy argument is based on the premise that a convicted felon may be sympathetic toward a criminal defendant and thus may not be able to serve impartially as a juror.¹⁷¹ Indeed, the Supreme Court has ruled that the Sixth Amendment requires that a jury be impartial for both the accused and the state.¹⁷² Additionally, the Virginia Court Rules require trial courts to determine whether a jury member can serve impartially as to both the defendant and the Commonwealth.¹⁷³ Thus, as the government would argue, the state has as much of a right to an impartial jury as does the criminal defendant.¹⁷⁴

Given the government's right to an impartial jury and the their belief that felons cannot serve impartially, the government argues that felons should be excluded automatically from jury service. Arguing that convicted felons are likely to be biased against the

170. See Memorandum Re: Use of Jury Lists (Va. Cir. Ct. Loudoun County June 2, 1998) (arguing that felons are inherently biased toward the state).

171. *Id.* (noting that the state has a right to an impartial jury).

172. *Holland v. Illinois*, 493 U.S. 474, 483 (1990) (stating the impartiality goal of the Sixth Amendment is applicable to both the accused and the state).

173. VA. CT. R. 3A:14 (requiring the court to examine prospective jurors to determine if any would be unable to provide an impartial adjudication); see also VA. CONST. art. I, § 8 (stating that the accused in criminal prosecutions has a right to an impartial jury).

174. See Lance Salyers, *Invaluable Tool vs. Unfair Use of Private Information: Examining Prosecutors' Use of Jurors' Criminal History Records in Voir Dire*, 56 WASH. & LEE L. REV. 1079, 1081 (1999) (arguing that background checks of prospective jurors should be permitted to ensure both the state and the defendant receive a fair trial).

Commonwealth, the government claims that having felons serve as jury members would unduly burden the Commonwealth in trying to obtain a conviction against a criminal defendant.¹⁷⁵ Excluding felons from juries, however, is unnecessary for the government to achieve its purpose of having an impartial jury, given the state's ability to use peremptory strikes and strikes for cause during the voir dire process. Lastly, the government's argument, without foundation, assumes that all felons hold thoughts of prejudice toward the state.

1. The State's Policy Ignores Existing Court Rules That Remove Biased Jurors

Disallowing convicted felons to serve as jury members may be unnecessary, as any jury member who is biased may be struck for cause by the judge or by use of a peremptory strike. During voir dire, the judge and attorneys have the right to examine prospective jury members, particularly to discover if the prospective jury member has "expressed or formed any opinion, or is sensible of any bias or prejudice therein."¹⁷⁶ Any party who objects to a prospective jury member for fear of the juror's bias can introduce evidence to support the objection and can have the jury member removed by the court for cause.¹⁷⁷ The government, therefore, can object to a prospective jury member who had been convicted previously of a felony if the jury member has indicated any sort of prejudice toward the state. If the judge finds the convicted felon does harbor some bias, the judge must excuse the jury member.

Furthermore, the government in criminal prosecutions, the plaintiff in civil actions, and the defendant in either setting are entitled to strike prospective jury members for no cause during voir dire until the appropriate number of jury members remain.¹⁷⁸ In a Virginia felony case, twenty prospective jury members are sum-

175. See Memorandum Re: Use of Jury Lists (Va. Cir. Ct. Loudoun County June 2, 1998) (contending that a denial to conduct background checks on prospective jurors would create a jury impartial to the state).

176. VA. CODE ANN. § 8.01-358 (West 2003) (providing the court and counsel for both parties the right to examine prospective jurors).

177. *Id.* (requiring the court to conclude the prospective juror is not indifferent).

178. VA. CODE ANN. § 19.2-262 (West 2003) (permitting each party to strike a certain number of prospective jurors for no cause).

moned for service and examined during voir dire.¹⁷⁹ Twelve jurors are then required to serve as the jury.¹⁸⁰ Therefore, each party may peremptorily strike up to four prospective jurors. If a felon serving as a prospective juror does not demonstrate any prejudice toward the government and is not struck for cause, the government still has the option of striking the juror by using a peremptory strike. Due to the highly unlikely chance that more than four prospective jurors in a criminal trial would be convicted felons, the government still can achieve its goal of eliminating convicted felons from the jury box through the usual voir dire process.

Although Virginia prosecutors can use their peremptory strikes to excuse convicted felons from the jury box, the Supreme Court requires that a jury be selected from a fair cross-section of the community.¹⁸¹ Thus, an outright prohibition on felons serving as jury members may violate the three-prong fair cross-section test laid out in *Duren v. Missouri*.¹⁸² Under *Duren*, in any criminal case the state cannot deny the accused his Sixth and Fourteenth Amendment rights if the accused can show that felons are a distinct group, that felons' representation in the jury box is unfair and unreasonable in comparison with the percentage of felons in the community, and that this unfair and unreasonable representation of felons in the jury box is due to the state's systematic exclusion of felons from the jury selection process.¹⁸³ The use of strikes for cause and peremptory strikes, therefore, may be the only constitutionally sound way to ensure that both the state and the defendant each have an impartial jury.

179. *Id.* (requiring twenty prospective jurors to be called for a felony case).

180. *Id.* (requiring twelve jurors to serve as a jury in a felony case).

181. *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975) (requiring juries to be drawn from a fair cross-section of the community).

182. 439 U.S. 357, 364 (1979). To establish a prima facie violation of the fair cross-section requirement, the allegedly excluded group must be distinct in the community; the number of people in this group in the overall community as compared with the number of people serving on juries must be unfair and unreasonable; and the underrepresentation of this distinct group in the jury pool must be due to the state's systematic exclusion. *Id.*

183. *See id.*

2. The State's Policy Assumes All Convicted Felons Are Biased

The government's belief that convicted felons are likely to be biased jury members may be an overstatement. For instance, a jury member who previously had been convicted of selling marijuana would, in all likelihood, be able to consider impartially the conviction of someone accused of rape. The government's fear of bias hinges on the idea that all convicted felons share a sort of camaraderie with those accused of any kind of crime. Research by psychologists Tom R. Tyler and Yuen J. Huo, however, suggests otherwise.¹⁸⁴ Tyler and Huo's research indicates that acceptance of legal decisions is shaped by personal views of procedural fairness and observation of an authority figure's motive.¹⁸⁵ In their study, they asked respondents to consider their personal experience with law enforcement and the courts and whether the outcome of the proceedings was fair. Over seventy percent of the respondents indicated they thought law enforcement and the courts followed fair procedures and that they had been treated fairly.¹⁸⁶ Therefore, those convicted of felonies called to serve as jury members are not likely to associate their conviction with a universal belief that all criminal defendants are being treated unfairly by the state.

B. Felons as Jurors in Civil Cases

Even if the government's argument that non-violent offenders, violent offenders, drug offenders, and election fraud offenders serving on juries would bias the jury against the government in a criminal case were well-founded, the government's argument is significantly less persuasive when it comes to banning convicted felons from serving on jury trials in civil cases. In a civil proceeding, a jury is not required but may be requested by either party or by

184. TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* (2002) (studying societal attitudes toward law enforcement and courts).

185. *Id.* at 49-50, 58-59 (questioning those who had been involved with a police or court proceeding).

186. *Id.* at 53. Sixty-two percent of those surveyed believed they received the outcome they deserved, while sixty-six percent perceived the outcome as fair under the law. *Id.*

the court.¹⁸⁷ If a jury is requested, both parties have the right to examine prospective jury members during voir dire in order to determine if any prospective juror is harboring bias toward either party that would prevent him from serving impartially.¹⁸⁸ As in a criminal proceeding, each side may question prospective jurors regarding prejudice and may ask the judge to strike for cause those harboring prejudice.¹⁸⁹ Specifically, parties may ask prospective jurors if they have "any interest in the cause, or ... expressed or formed any opinion, or [are] sensible of any bias or prejudice."¹⁹⁰ A convicted felon, therefore, would be treated the same as other jury members in a civil case in terms of whether the felon is harboring bias that would make him unable to serve as a jury member.

Moreover, as in a criminal trial, parties in a civil proceeding are entitled to peremptory strikes, whereby they can strike prospective jurors from serving as jury members for virtually any reason. In Virginia civil jury trials, up to thirteen prospective juror members can be summoned, and each side may strike up to three prospective jurors using their peremptory strikes.¹⁹¹ Therefore, both parties have the opportunity to prevent convicted felons from serving on the jury using a peremptory strike in the event the felon did not get struck for cause.

Unlike a criminal trial, there is no government entity for a felon to harbor prejudice against during a civil proceeding. While a convicted felon serving as a prospective juror could harbor prejudice against one of the parties, this bias will most likely manifest itself during the voir dire process. A convicted felon serving as a jury member in a civil proceeding, therefore, is not likely to be harboring any more prejudice against one of the parties than any other prospective jury member. Consequently, eliminating convicted felons from civil jury service seems particularly unnecessary, as each jury member's ability to serve impartially is dependent upon

187. VA. CODE ANN. § 8.01-336 (West 2003) (permitting the court to deny or to grant a party's request for a jury in a civil trial).

188. VA. CODE ANN. § 8.01-358 (West 2003) (allowing the court and parties to question any prospective juror).

189. *Id.* (allowing the court or either party to question prospective jurors regarding whether the prospective juror is related to any party or is harboring bias).

190. *Id.*

191. VA. CODE ANN. §§ 8.01-359, -360 (West 2001 & Supp. 2004) (describing the selection process for jurors in civil trials).

the specific issues involved in the civil proceeding, and not at all upon their felony status.¹⁹²

C. Drug-Related Offenses and the Rate of Recidivism

Breaking down by race the percentage of prisoners confined for drug offenses nationwide, a 1996 study by the Human Rights Watch reported that African Americans compose nearly sixty-three percent of those confined.¹⁹³ In Virginia, Governor Warner's policy concerning restoration of civil rights excludes felons from applying for expedited restoration of their civil rights if they have been convicted of a drug-related offense, including manufacturing or distributing drugs.¹⁹⁴ In addition, legislation to expedite the restoration of voting rights excludes those convicted of a drug offense.¹⁹⁵ Mirroring national statistics, in Virginia, African Americans compose the vast majority of those convicted of drug-related charges.¹⁹⁶ According to the Human Rights Watch, which analyzed data presented to the Justice Department by Virginia in 1996, African Americans comprise more than eighty percent of those serving jail sentences in the Commonwealth for a drug-related crime.¹⁹⁷ Thus, the automatic ban on applying for an expedited restoration of civil rights for those convicted of drug related offenses disparately affects the African American community with respect to jury composition, as the number of African Americans eligible to vote, and thus eligible to serve as jurors, is greatly diminished.

192. See *Educ. Books, Inc. v. Commonwealth*, 349 S.E.2d 903, 905-06 (Va. Ct. App. 1986) (holding that impartiality in a civil case is dependent upon the particular circumstances and issues in each individual case).

193. Human Rights Watch of the Sentencing Project, *Punishment and Prejudice: Racial Disparities in the War on Drugs* pt. VI (2000), available at http://hrw.org/reports/2000/usa/Rcedrg00-04.htm#P289_60230 (reporting that the "war on drugs" disproportionately affects African Americans).

194. VA. CODE ANN. § 53.1-231.2 (West 2001 & Supp. 2004) (excluding those convicted of drug offenses).

195. See *Application for Restoration of Rights*, *supra* note 7 (excluding those convicted of drug offenses).

196. Steven A. Holmes, *Race Analysis Cites Disparity in Sentencing for Narcotics*, N.Y. TIMES, June 8, 2000, at A14 (reporting the findings of Human Rights Watch).

197. *Id.* (citing the study's prominent findings with respect to individual states).

1. Distinctions Between Non-Violent, Violent, and Drug-Related Felony Convictions

In fiscal year 2001, the Virginia Department of Corrections reported that the Commonwealth was confining 4,549 prisoners for drug-related offenses and expected 2,279 drug-related offense prisoners as new court admissions in that year.¹⁹⁸ In that report, the Department of Corrections lists drug-related offenses below non-violent and violent offenses in order of most serious offenses.¹⁹⁹ Yet both the current law, the failed legislation as to voting right restoration, as well as Governor Warner's policy for restoration of civil rights, treat felons convicted of drug offenses more harshly than those convicted of non-violent felonies. Specifically, those convicted of non-violent felonies have the opportunity to apply to the Governor for a restoration of their civil rights three years after sentence completion, through an expedited and simplified process, whereas those convicted of drug offenses can only apply to the Governor using a complicated process with no guarantee that any action will be taken for such restoration.²⁰⁰ Although the Department of Corrections seems to define non-violent felonies as more serious than drug offenses,²⁰¹ both the current law and the proposed legislation regarding voting rights, as well as Governor Warner's policy, treat those convicted of drug-related felonies the same as those convicted of violent felonies—that is, more harshly than those convicted of non-violent felonies. Accordingly, those who have been convicted of drug-related offenses cannot take advantage of the expedited restoration of voting rights process available to those convicted of non-violent felonies.

198. Va. Dep't of Corr., *Facts & Figures, Annual Statistical Summaries, Population by Most Serious Offense* (2001), available at http://www.vadoc.state.va.us/resources/statistics/research/statsum_01/01offense.htm [hereinafter Va. Dep't of Corr., *Population by Most Serious Offense*]. The Virginia Department of Corrections reports that it is confining 29,196 inmates; of these, 19,262 are African Americans, and 18,082 are African American males. Va. Dep't of Corr., *Facts & Figures, Annual Statistical Summaries, Population by Gender & Race* (2001), available at http://www.vadoc.state.va.us/resources/statistics/research/statsum_01/01gender.htm [hereinafter Va. Dep't of Corr., *Population by Gender and Race*].

199. Va. Dep't of Corr., *Population by Most Serious Offense*, *supra* note 198 (noting that law enforcement considers drug offenses as being less serious than non-violent felonies).

200. *See supra* Part III (discussing the restoration of rights processes applicable to those convicted of different types of felonies).

201. *See supra* note 199 and accompanying text.

2. Rates of Recidivism

The harsh treatment of those convicted of drug-related offenses may be related to recidivism rates associated with drug crimes. The Virginia Department of Corrections tracked prisoners released in 1998 to determine whether the felons would become involved in criminal activity again and thus be subject to re-incarceration.²⁰² The study found that of those who recidivated, less than nine percent of those convicted of non-violent felonies returned to prison, while twenty-five percent of those convicted of drug related offenses returned to prison.²⁰³ The study also found that for those who recidivate, most return to prison within two years of release.²⁰⁴

Despite the fact that those convicted of drug-related offenses have a higher rate of recidivism, the exclusion of drug offenders from Governor Warner's expedited review policy for restoring civil rights is unnecessary. Governor Warner requires non-violent felony applicants to be "free of any sentence, including any suspended sentence, probation or parole for at least three years."²⁰⁵ Thus, a drug offender who engages in criminal activity within two years after finishing his sentence for the drug offense would not be eligible under Governor Warner's short application.²⁰⁶ The distinction between non-violent felons and felons convicted of drug related offenses, therefore, is unwarranted and unduly burdens African Americans as they constitute the vast majority of those felons convicted of drug-related offenses.²⁰⁷

202. Va. Dep't of Corr., *Study, Recidivism in Virginia: Tracking the 1998 Release Cohort*, 14 INSIDE OUT 4 (2003), available at <http://www.vacure.org/docs/vacuren12003-08.pdf> (discussing the primary findings of the study) [hereinafter Va. Dep't of Corr., *Tracking the 1998 Release Cohort*]. The complete study can be found at VA. DEP'T OF CORR., RECIDIVISM IN VIRGINIA: TRACKING THE 1998 RELEASE COHORT (2003), available at <http://www.vadoc.state.va.us/resources/statistics/research/recidivism03.doc>.

203. Va. Dep't of Corr., *Tracking the 1998 Release Cohort*, *supra* note 202.

204. *See id.* (finding that 8.9% recidivated in 1998, 38.5% in 1999, and 35.5% in 2000).

205. Sec'y of the Commonwealth, *Application for Restoration of Rights*, *supra* note 7 (requiring an applicant to have a three-year clean record before applying).

206. *Id.*

207. *See* Holmes, *supra* note 196, at A14 (noting that African Americans constitute an overwhelming portion of the population serving a sentence for a drug-related offense).

VI. VIRGINIA JURY PROCEDURE AND CONSTITUTIONAL CONCERNS

There are several constitutional issues that question the validity of Virginia's current restoration of civil rights process. First, the law may not meet constitutional muster, as the Supreme Court has held that a criminal defendant must be offered a jury composed of his peers in order to preserve the defendant's Sixth Amendment right, through the Fourteenth Amendment's Equal Protection Clause.²⁰⁸ Because Virginia's restoration of civil rights process has such an adverse effect on the exercising of rights of the African American community, it may result in purposeful discrimination and may deny a criminal defendant a jury chosen from a representative community pool. Second, because prospective jurors are screened for eligibility to vote and thus to serve on a jury, the Commonwealth may be invading a felon's right to privacy if the felon could show the prospective jury questionnaire was intrusive and not relevant to the felon's ability to serve impartially.²⁰⁹

A. A Jury of One's Peers and Due Process

The Supreme Court has held that the Sixth Amendment, through the Fourteenth Amendment's Equal Protection Clause, requires that a criminal defendant be offered a jury composed of his peers.²¹⁰ In *Batson v. Kentucky*, the prosecution used its peremptory strikes to eliminate all four African American prospective jurors.²¹¹ In response, the Supreme Court concluded that the state could not so purposefully deny a specific race from serving on a jury.²¹² The Court stressed that purposeful discrimination during venire selection can occur under the guise of a neutral state statute,

208. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (requiring juries to be composed of peers of the accused).

209. *See Brandborg v. Lucas*, 891 F. Supp. 352, 361 (E.D. Tex. 1995) (holding that questions asked of prospective jury members must be non-biased and relevant to the case).

210. *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (finding that eliminating all African Americans from the jury box violated the African American defendant's right to equal protection).

211. *Id.* at 83 (leaving a jury composed of only white members).

212. *Id.* at 86. The Court stated: "Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial." *Id.* at 87.

stating that "where the procedures implementing a neutral statute operated to exclude persons from the venire on racial grounds," the defendant is denied his right to equal protection.²¹³ The Virginia statute forbidding convicted felons from serving as jury members until their civil rights are restored is neutral on its face. The law, however, has discriminatory effects, as it disproportionately impacts African Americans.²¹⁴ In 2001, the Virginia Department of Corrections' annual statistics confirmed that African Americans compose approximately sixty-five percent of all confined prisoners.²¹⁵ Thus, African Americans are more likely to be disproportionately applying to have their voting rights restored. Even though African Americans compose nearly one-fifth of Virginia's population,²¹⁶ they are more than twice as likely as other Virginia residents to be affected by the restoration of civil rights process and thus to be denied the ability to serve on a jury.

The Supreme Court has affirmed the constitutionality of some voter disenfranchisement laws. In *Richardson v. Ramirez*,²¹⁷ the Court upheld a California statute that denied voting rights to felons.²¹⁸ The Supreme Court interpreted Section 2 of the Fourteenth Amendment as not guaranteeing convicted felons the right to vote.²¹⁹ The Court also noted that states may take residence, age, and criminal records into consideration when determining stan-

213. *Id.* at 88 (citation omitted) (disallowing any procedure where a specific race is eliminated from serving as a juror).

214. See Pierre Thomas, *Study Suggests Black Male Prison Rate Impinges on Political Process*, WASH. POST, Jan. 30, 1997, at A3 (citing a report by The Sentencing Project finding that an estimated 1.46 million out of 10.4 million African American males nationwide are ineligible to vote and, consequently, to serve on a jury in Virginia and many other states, due to felony convictions).

215. Va. Dep't of Corr., *Population by Gender and Race*, *supra* note 198 (confirming that African Americans compose the vast majority of confined inmates).

216. U.S. Census Bureau, Population Division, *Virginia Population Estimates by Sex, Race and Hispanic or Latino Origin: April 1, 2000 to July 1, 2002* (release date Sept. 18, 2003), available at http://www.census.gov/popest/archives/2000s/vintage_2002/ST-EST2002-ASRO-05.html (providing population information by race and gender).

217. 418 U.S. 24 (1974) (upholding the practice of denying felons voting rights).

218. *Id.* at 56 (allowing felon disenfranchisement when the laws are applied consistently).

219. *Id.* at 54. The Court relied on the language in Section 2 of the Fourteenth Amendment, which provides that the State may not deny the right to vote to any citizen, except those who have participated "in rebellion, or other crime." *Id.* at 42 (alteration in original) (quoting U.S. CONST. amend. XIV, § 2).

dards for voter qualifications.²²⁰ Thus, the Court concluded that the state did not deny the defendant equal protection of the law in *Ramirez*.²²¹

Although the Court has validated some disenfranchisement laws like that in *Ramirez*, it has also been willing to strike them down on the basis of violating the Equal Protection Clause. In *Hunter v. Underwood*,²²² the Court held that a challenged section of the Alabama State Constitution, which disenfranchised those convicted of crimes of moral turpitude, violated the Equal Protection Clause.²²³ The Court applied a two-prong test, which the opponent of the state action must use to establish, by a preponderance of the evidence, that a racially neutral law violates the Equal Protection Clause. First, the opponent of the law must show that the law has had a racially discriminatory impact;²²⁴ and second, the opponent must prove that the law was enacted for a racially discriminatory purpose or with an intent to discriminate.²²⁵ Applying *Hunter's* two-prong test, a convicted felon in Virginia could challenge the restoration of civil rights process on equal protection grounds if he shows by a preponderance of the evidence that the law is based on a discriminatory purpose and that it disparately impacts the African American community. The discriminatory purpose requirement may be easier to prove, because Virginia is a southern state. As disenfranchisement laws have their roots in the Reconstruction era, and as Virginia was a Jim Crow state,²²⁶ those challenging the law could argue that the Commonwealth enacted the law under purported legitimate reasons but with the actual intent to disen-

220. *Id.* at 53 (quoting *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51 (1959)) (finding that states may exclude some groups from voting).

221. *Id.* at 56 (holding that the state may uniformly deny felons the right to vote).

222. 471 U.S. 222 (1985) (holding that statutes restricting voting rights must not be racially motivated).

223. *Id.* at 233 (finding the statute was enacted to restrict African Americans from voting).

224. *Id.* at 227 (noting that a neutral law that has a disparate impact will be subject to Equal Protection analysis).

225. *Id.* at 227-28 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977)) (finding that where a law is neutral on its face, the law must be shown to be racially motivated to violate the Equal Protection Clause).

226. For a history of race relations in Virginia during the Jim Crow period, see J. DOUGLAS SMITH, *MANAGING WHITE SUPREMACY: RACE, POLITICS, AND CITIZENSHIP IN JIM CROW VIRGINIA* (2002).

franchise African Americans.²²⁷ Disparate impact may be proven by showing that the law denies one in four African Americans the right to serve as a jury member.²²⁸

B. The Right to Privacy

The Supreme Court recognized the right to privacy as a penumbral right of the Ninth Amendment²²⁹ in *Griswold v. Connecticut*.²³⁰ When prospective jurors are called for jury service in a criminal trial, the prosecution is afforded an opportunity to run a criminal background check on all of them before the trial begins.²³¹ Through this process, the prosecution can eliminate prospective jurors convicted of felonies.²³² By prying into a prospective juror's history, however, the Commonwealth may be violating the prospective juror's right to privacy.²³³

227. To prove the Commonwealth's discriminatory intent in determining eligibility for jury service, challengers of Virginia's restoration of voting rights process could point to the history surrounding the law's enactment, under a totality of the circumstances test. Specifically, if the law was originally enacted during the Jim Crow era, the history would serve as evidence of the state's discriminatory intent. See *Arlington Heights*, 429 U.S. at 267 (stating that historical background may be an evidentiary source to show discriminatory purpose).

228. See *Felons File Lawsuit to Challenge Vote Law*, *supra* note 9, at B2; *Losing the Vote*, *supra* note 91, pt. III.

229. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

230. 381 U.S. 479, 484-85 (1965) (holding the right to privacy is an enumerated right of the Ninth Amendment).

231. *Salmon v. Virginia*, 529 S.E.2d 815, 818-19 (Va. Ct. App. 2000) (holding that the Commonwealth may obtain and review criminal background information on potential jurors). In *Salmon*, the court relied on Virginia Code § 19.2-389(A)(1), which states that criminal record information is to be circulated only among officers or employees of criminal justice agencies. *Salmon*, 529 S.E.2d at 818-19. The Commonwealth may not run background checks on prospective jurors in Loudoun County. After the practice was challenged by a criminal defendant, the Chief Justice of the twentieth circuit issued a procedural rule that prohibited the use of jury lists for background checks. See *Salyers*, *supra* note 174, at 1084-87.

232. *Salmon*, 529 S.E.2d at 819. *Salmon* argued that the prosecution had an unfair advantage in being able to remove prospective jurors who could be sympathetic toward him. *Id.*; see also Paula L. Hannaford, *Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures*, 85 JUDICATURE 18, 22-23 (2001); *Salyers*, *supra* note 174, at 1092-93.

233. The prosecution has the ability to screen prospective jurors through many different forums, including the Virginia Crime Information Network and the Virginia Department of Motor Vehicles. See Memorandum Re: Use of Jury Lists (Va. Cir. Ct. Loudoun County June 2, 1998).

Before actually being called to serve as a jury member, those on the master jury list are asked to answer a questionnaire, which asks if they have been convicted of a felony.²³⁴ In *Brandborg v. Lucas*,²³⁵ the petitioner received a questionnaire for jury selection that contained over one hundred questions.²³⁶ The petitioner failed to answer twelve questions, submitting a note to the Judge that she thought the questions to be of a "private nature" that had "no relevance" to her ability to serve impartially.²³⁷ Summoned to service, the court instructed the petitioner to answer the questions in writing and held the petitioner in contempt when she refused to comply with the court's orders.²³⁸ Accepting the petitioner's writ of habeas corpus challenging the contempt conviction, the United States District Court for the Eastern District of Texas held that a juror's right to privacy must be examined by weighing it against the right of each party involved to an impartial jury.²³⁹ The Court held that questionnaires must be screened to ensure each question asked of the prospective juror is relevant to the case and is an unbiased question.²⁴⁰ If relevance is established and the juror still objects to the question on invasion of privacy grounds for fear of public disclosure of private information, the juror should be instructed of the option of having her answer recorded *in camera* in the presence of only the judge and attorneys involved.²⁴¹

Under the District Court's logic, those convicted of felonies could object to the relevance of their prior conviction in a court proceeding. The court would have to weigh the interests of the parties involved in determining whether the prospective juror's right to privacy has been violated. In a criminal case, the court would have to weigh the interest of the public, which may outweigh

234. *Id.* (describing the process where jury lists are created).

235. 891 F. Supp. 352 (E.D. Tex. 1995) (requiring prospective jurors to answer questions determined relevant, but requiring the court to provide the least intrusive way to comply).

236. *Id.* at 353.

237. *Id.*

238. *Id.* at 354-55.

239. *Id.* at 360 (requiring judges to determine the relevance of a question any time a prospective juror evokes a privacy concern).

240. *Id.* (requiring courts to determine the relevance of all questions prior to the questionnaires being submitted to prospective jurors).

241. *Id.* (requiring that the prospective juror be offered the least intrusive method of responding).

the prospective juror's privacy interest in keeping his felony conviction unknown. In a civil case, however, there is no public interest to weigh. Having a juror with a prior felony conviction is irrelevant to a dispute between two community members, as the parties involved are under no threat of state prosecution.

Theoretically, all convicted felons who have not had their civil rights restored should be dismissed from the jury pool, based solely on the questionnaire that would require the prospective juror to indicate whether or not he had been convicted of a felony or had his rights restored. However, many respondents do not correctly mark their questionnaires, due to a lack of education or an inability to understand the questions asked of them. These felons who slip past the preliminary screening can then be called upon to serve as jury members.²⁴² Once erroneously called upon to serve, convicted felons are subject to questioning by the judge and attorneys, as part of the public record.²⁴³ Although felony convictions are public record, felons who are erroneously summoned for jury duty are subject to undue public attention when their past felony convictions become known during the voir dire process.²⁴⁴ Being singled out for their past crime in front of fellow community members, felons summoned as prospective jurors consequently are punished by the Commonwealth again, even though they have already completed their sentence.²⁴⁵

CONCLUSION

Under Governor Warner's policy for restoring felons' civil rights, as well as the system for felons wishing to restore only their right

242. As serving on a jury is a compulsory duty imposed on eligible citizens, those convicted felons who incorrectly fill out their questionnaires prior to being called are not assumed to be subverting the judicial system.

243. See Hannaford, *supra* note 232, at 24. Hannaford cites a 1991 study that found that twenty-five percent of jurors questioned during voir dire did not report their prior criminal convictions or those of their family members when asked to do so in court. *Id.* at 23.

244. See Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123, 125 (1996) (noting that jury service exposes jurors to "exploitation by the press, ... retaliatory threats, and unwanted attention").

245. See George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Use of Infamia*, 46 UCLA L. REV. 1895, 1898-99 (1999) (arguing that convicted felons are treated as the "untouchables" of society and as "unreliable members of the democracy ... banished from the political community").

to vote under current Virginia law, the process is simplified for those convicted of non-violent felonies.²⁴⁶ Even under the simplified process, the earliest a felon may apply to restore his rights is three years after completion of his sentence.²⁴⁷ Virginia's General Assembly should reform the entire restoration of rights process to make it easier for all convicted felons to regain their civil rights. Specifically, the distinction between non-violent felons and those felons convicted of violent felonies, drug-related offenses, and election fraud need to be eliminated so that all felons who have served their sentences can enjoy the rights that the rest of Virginia's citizens enjoy. Currently, while non-violent felons are guaranteed action by the Governor on their petition for a restoration of their civil rights, those convicted of violent felonies are required to fill out a longer and more complicated application with no guarantee that the Governor will act on their application.²⁴⁸ Under this process, those felons ineligible for the shorter, expedited review can be permanently denied civil rights although they have served their sentence and remained crime-free.

The current restoration of rights process is particularly harsh on the African American community. As a disproportionate number of African American men are convicted felons—and therefore have lost their civil rights, including the right to serve on a jury—jury pools have a diminished number of eligible African American jurors. Due to this diminished number of eligible African American jurors, an African American criminal defendant may not be guaranteed a jury of his peers due to the disparate impact the restoration of rights process has on the African American community.²⁴⁹

By making it easier for all felons to apply to have their civil rights restored, more felons would become eligible for jury service. This in turn would benefit Virginia's African American community, in

246. See *Application for Restoration of Rights*, *supra* note 7; VA. CODE ANN. § 53.1-231.2 (West 2001 & Supp. 2004) (stating the restoration of rights policy of the Governor and the restoration of voting rights law, both of which have a simplified process for non-violent felons).

247. See *Application for Restoration of Rights*, *supra* note 7. Only non-violent felons free from any subsequent convictions are qualified to apply for a restoration of rights within three years of the completion of their sentence. *Id.*

248. See *Application for Restoration of Rights*, *supra* note 7 (noting that the short form application is only available for those convicted of non-violent felonies).

249. See *supra* Part IV.A.

which one in four men is a convicted felon. In addition, the jury selection pool would become a more accurate reflection of Virginia's communities, as more African Americans would become eligible for jury service. These proposed changes to the restoration of civil rights process would promote equal application of justice in all trials, benefitting both African Americans specifically and Virginia's population as a whole.

Amanda L. Kutz