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A Devil Disguised as a Corporate Angel?: Questioning Corporate Charitable Contributions to "Independent" Directors' Organizations

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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

A DEVIL DISGUISED AS A CORPORATE ANGEL?: QUESTIONING CORPORATE CHARITABLE CONTRIBUTIONS TO "INDEPENDENT" DIRECTORS' ORGANIZATIONS

A director's greatest virtue is the independence which allows him or her to challenge management decisions and evaluate corporate performance from a completely free and objective perspective. A director should not be beholden to management in any way.¹

INTRODUCTION

Enron.² WorldCom.³ Tyco.⁴ The accounting scandals surrounding these former market giants⁵ have precipitated a revolution in corporate governance⁶ the likes of which the nation has never seen.⁷ Congress passed the Sarbanes-Oxley Act of 2002⁸ ("Sarbanes-

1. Robert H. Rock, *Caesar's Wife*, 20 DIRECTORS & BOARDS 5, 5 (1996) (former chairman of National Association of Corporate Directors (NACD)).

2. Enron, "at its peak[,] reported annual revenue of \$100 billion, employed 26,000 people and started to build a gleaming new Houston headquarters." Robert Frank et al., *Executives on Trial: Scandal Scorecard*, WALL ST. J., Oct. 3, 2003, at B1. The company, now delisted from the New York Stock Exchange, engaged in "aggressive accounting [techniques] to hide massive debt and inflate the bottom line—enriching top executives in the process." *Id.*

3. Within WorldCom, "several top executives helped deep-fry the books to the tune of \$11 billion to hide costs and inflate profit and revenue over several years." *Id.* WorldCom Inc., now known as MCI and under new leadership, filed for bankruptcy in July of 2002. *Id.*

4. Tyco's executives used corporate funds as their personal piggy bank, as demonstrated by a \$2 million birthday party thrown for the chief executive officer's wife. *See id.* With an admitted \$2 billion worth of accounting falsifications, the corporation has hired new directors and executives in an attempt to regain its credibility. *Id.*

5. These are only some of the recent corporate scandals. For an excellent summary of other highly publicized recent corporate scandals, see *id.*

6. For a discussion of corporate governance, see *infra* Part I.A.

7. Charles M. Elson & Christopher J. Gyves, *The Enron Failure and Corporate Governance Reform*, 38 WAKE FOREST L. REV. 855, 855-56 (2003).

8. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 U.S.C., 18 U.S.C.). The Act is named after its authors, who, interestingly, split between party lines: Senator Paul Sarbanes, a Democrat from Maryland, and Representative Michael Oxley, a Republican from Ohio. David S. Hilzenrath et al., *How Congress Rode a "Storm" to Corporate Reform*, WASH. POST, July 28, 2002, at A1.

Oxley") less than two months after the WorldCom debacle.⁹ Sarbanes-Oxley required the Securities and Exchange Commission (SEC) to demand that self regulated organizations (SROs), like the New York Stock Exchange (NYSE) and National Association of Securities Dealers (NASD), promulgate new listing requirements focusing on corporate governance measures.¹⁰

At the heart of this new wave of reform is a call for more independence within boards of directors.¹¹ Sarbanes-Oxley requires there to be independent directors on all auditing committees.¹² The SROs have gone further and demand more of listed companies in terms of director independence.¹³ Yet this is only the beginning. Institutional investors with significant market clout view Sarbanes-Oxley and the new SRO regulations as only a starting point. For example, one of the largest institutional investors in the country, CalPERS,¹⁴ has an extensive manual specifically defining what kinds of directors they consider to be truly independent and outlining how such directors should function.¹⁵

Lurking beneath this global whirlwind¹⁶ is an issue that has not gained much attention in recent scholarship: corporate charitable

9. In June of 2002, "WorldCom admitted to what could turn out to be the biggest accounting fraud ever." Shawn Young et al., *WorldCom Files for Bankruptcy: Debt, Scandal Overwhelm; Operations Set to Continue During a Reorganization*, WALL ST. J., July 22, 2002, at A3. The Sarbanes-Oxley Act was enacted on July 30, 2002, only nine days after WorldCom filed for bankruptcy. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 1, 116 Stat. 745, 745 (codified as amended at 15 U.S.C. § 7201).

10. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745, 775 (codified as amended at 15 U.S.C. § 78j-1) (requiring the SEC to act within 270 days of the enactment of the Act).

11. See Lynne L. Dallas, *The Multiple Roles of Corporate Boards of Directors*, 40 SAN DIEGO L. REV. 781, 788 & n.21 (2003).

12. Sarbanes-Oxley Act of 2002 § 301.

13. See *infra* text accompanying notes 83-96.

14. "CalPERS" stands for the California Public Employees' Retirement System. As of August 31, 2004, CalPERS' investment portfolio was worth \$165.3 billion. CalPERS, *Facts at a Glance: Investments*, at <http://www.calpers.com/eip-docs/about/facts/investme.pdf> (last modified Aug. 31, 2004).

15. CalPERS, *Corporate Governance Core Principles & Guidelines: United States* (Apr. 13, 1998), at <http://www.calpers-governance.org/principles/domestic/us/downloads/us-corpgov-principles.pdf>.

16. As one reporter has noted, "[i]n the wake of spectacular collapses like Enron Corp.'s and WorldCom Inc.'s, governments around the world are getting tougher on corporate governance." Silvia Ascarelli, *One Size Doesn't Fit All: In Europe, Corporate-Governance Rules Are Not in the Details*, WALL ST. J., Feb. 24, 2003, at R6.

contributions.¹⁷ As noted above, many governmental, regulatory, and institutional organizations have gone to great lengths to issue proposals to arrest the apparent decline of corporate governance standards. Few of them, however, have considered the likes of Ellen Futter. Ellen Futter is the president of the American Museum of Natural History in New York City and she "serves on four [corporate boards of directors]: insurer American International Group Inc., pharmaceutical maker Bristol-Myers Squibb Co., the energy company Consolidated Edison Inc. and J.P. Morgan Chase & Co., the nation's second-biggest bank."¹⁸ During Futter's tenure as President, the Museum of Natural History has received several large donations from the corporations on whose boards Ms. Futter sits.¹⁹ Corporations such as these seek independence and credibility in the boardroom by employing accomplished and well-respected individuals, such as Ms. Futter, as directors.²⁰ The individuals, of course, have many reasons for serving as a director, but one cannot

17. One team of authors recognizes the issue in passing amidst its summary of the recent changes in corporate governance. See Elson & Gyves, *supra* note 7, at 872-73 (recognizing several large charitable donations from Enron Corp. to organizations with which some of the company's directors were affiliated and stating that "[t]hese relationships likely diminished objectivity and consequently the ability of the directors to have appreciated the severity of the red flags before them"). Slightly more attention has been given to this issue by authors writing about general corporate charitable contributions, but these examinations tend to be cursory and lack in-depth proposals for reform. The following excerpt is illustrative:

Donations to independent directors' charities could implicitly depend on their exercising general oversight functions in a way that pleases management. Indeed, a corporate board could be stacked with seemingly "independent" directors (such as university, museum, and hospital administrators) whose charitable organizations depend on inside directors' approval of corporate donations. As the recent Enron scandal demonstrates, such compromise of oversight functions can be disastrous.

Richard W. Painter, *Commentary on Brudney and Ferrell*, 69 U. CHI. L. REV. 1219, 1227-28 (2002); see also Nell Minow, *Corporate Charity: An Oxymoron?*, 54 BUS. LAW. 997 (1999) (suggesting that the business judgment rule is too forgiving of corporate charitable contributions). Nell Minow cites a \$90 million donation from the Occidental Petroleum Corporation to the Armand Hammer Museum of Art and Cultural Center as "one of the most outrageous cases of corporate charity." *Id.* at 1001. Though the Occidental case did not involve a donation to a director's organization but rather one to the CEO's pet charity, it serves as an excellent example of how supposedly "disinterested" or "independent" directors often fail to do their jobs.

18. David Bank & Joann S. Lublin, *Giving at the Office: On Corporate Boards, Officials from Nonprofits Spark Concern*, WALL ST. J., June 20, 2003, at A1.

19. See *id.*

20. See *id.*

overlook the opportunity for those individuals to fundraise for their respective organizations through their special relationship with the corporation and its leaders.

In the past, there were relatively few instances where the courts²¹ squarely confronted this ostensible conflict of interests.²² Recently, however, the Delaware Chancery Court has dealt with the issue in two cases that gained significant attention from the media. Though corporate charitable contributions were not the primary issue in *In re Walt Disney Co. Derivative Litigation*, the court did make a determination in that case that director Father Leo J. O'Donovan, the President of Georgetown University, was not influenced by Chief Executive Officer (CEO) Michael Eisner's charitable contributions to the university.²³ The court acknowledged that Eisner had made donations of over \$1 million to the school since 1989, but it quickly dismissed the plaintiffs' allegation that the donations affected O'Donovan's independence as a director.²⁴ More recently, the court took a completely different stance in *In re Oracle Corp. Derivative Litigation*.²⁵ In this lengthy opinion, the court thoroughly analyzed the independence of two members of a special litigation committee ("SLC") charged with considering allegations against Oracle.²⁶ The court noted a myriad of potential biases that could have influenced the two committee members—both of whom were distinguished professors at Stanford University—not the least of which were large donations to Stanford from Oracle and its CEO, Larry Ellison.²⁷ Ultimately, Vice Chancellor Strine concluded that

21. Although the term "courts" is used, this Note focuses on the Delaware Chancery Court. The Chancery Court is a key player in developing corporate governance standards, as more than half of the Fortune 500 companies are incorporated in Delaware. See Marc Gunther, *Ovitz v. Eisner: Boards Beware!*, FORTUNE, Nov. 10, 2003, at 171, 172.

22. Though there are surely other cases that touch on the subject, there is one case in this area that is cited often. See *Lewis v. Fuqua*, 502 A.2d 962 (Del. Ch. 1985) (questioning the independence of the former Governor of North Carolina and then President of Duke University).

23. *In re Walt Disney Co. Derivative Litig.*, 731 A.2d 342, 359 (Del. Ch. 1998).

24. *Id.*

25. *In re Oracle Corp. Derivative Litig.*, 824 A.2d 917 (Del. Ch. 2003).

26. *Id.* at 937-48.

27. See *id.* at 920-21.

"these and other facts cause me to harbor a reasonable doubt about the impartiality of the SLC."²⁸

It is the purpose of this Note to draw attention to the inevitable conflicts that arise when a leader of a nonprofit organization sits on a for-profit board, and to suggest a way in which to deal with the problem. The primary focus of this Note is on how the courts handle this issue and the ways in which they can improve the test they use to question the independence of such directors. The Chancery Court in *Disney* seemed to lack any concern that a Jesuit priest whose primary task is raising funds for Georgetown University could be influenced by corporate donations.²⁹ This Note argues that the Chancery Court should have been more inquisitive with respect to O'Donovan's conflicts in *Disney*, and it contends that the Chancery Court made the correct determination in *Oracle* only through a long-winded opinion that over-emphasized the minutiae in the case. This Note suggests that the court should apply a more streamlined test to similar cases in the future.

Before detailing how a more streamlined test would operate, Part I of this Note discusses the concept of corporate governance, the evolution of the desire for "independent" directors, and presents an explanation of why the courts care about whether a director is independent. Part II discusses more thoroughly the *Oracle* and *Disney* cases and their respective deficiencies. Finally, Part III presents evidence as to how the problem of corporate quid pro quos between seemingly untainted directors and the corporate boards on which they sit is a growing one that will only become more important as the call for adding independent board members continues. This Note then concludes by suggesting a functional approach by which the courts can effectively and efficiently deal with these suspect corporate charitable contributions and their effect on a director's independence.

28. *Id.* at 921. The two professors were the only members of the committee. *Id.* at 923-24. For an explanation of what a special litigation committee is and how it fits into the concept of corporate governance, see *infra* text accompanying notes 116-25.

29. See *In re Walt Disney Co. Derivative Litig.*, 731 A.2d 342, 359 (Del. Ch. 1998). The Chancery Court seemed to give great weight to the fact that O'Donovan was forbidden to collect a director's fee. To say that O'Donovan could not be influenced because he did not accept personal fees completely disregards the fact that he was the president of, and thus the chief fundraiser for, Georgetown.

I. BACKGROUND

A. Corporate Governance

Corporate governance³⁰ is a concept that does not have a straightforward definition. In a *Wall Street Journal* special report, one expert put it simply: "Corporate governance is a hefty-sounding phrase that really means oversight of a company's management—making sure the business is run well and investors are treated fairly."³¹ Others use a more elaborate definition, like the following: "It [corporate governance] is the relationship among various participants in determining the direction and performance of corporations. The primary participants are (1) the shareholders, (2) the management (led by the chief executive officer), and (3) the board of directors."³² There is no doubt as to the significant role management plays in this triangular relationship, but it is worthwhile to elaborate on the roles of the shareholders and the board of directors in corporate governance.

1. Shareholders

It is important to realize that a shareholder may not be the average American dabbling in the stock market. In the past, "individual shareholders ... did not control enough stock to be owners ... [and] had little direct leverage over the company's strategic plans. Their only recourse was to observe the classic 'Wall

30. The need to develop a concept of governance did not exist until the concept of the modern corporation was realized. As one scholar has noted, "[a]t the turn of the century, ownership and management were related. Powerful men both owned and exercised control over major corporations." Charles W. Murdock, *Corporate Governance—The Role of Special Litigation Committees*, 68 WASH. L. REV. 79, 80 (1993). It was not until Adolf Berle and Gardiner Means first recognized a separation between ownership and control that the idea of the modern corporation was born. See *id.* at 80-81 & n.2 (citing ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 69-111 (1932)). As the modern corporation evolved, so did the need for a system to hold the corporation accountable to the individual shareholder. See *id.*

31. Judith Burns, *Everything You Wanted to Know About Corporate Governance ... But Didn't Know to Ask*, WALL ST. J., Oct. 27, 2003, at R6.

32. ROBERT A.G. MONKS & NELL MINOW, *CORPORATE GOVERNANCE* 1 (2d ed. 2001).

Street Walk' and sell their shares."³³ At the opposite end of the spectrum from the average shareholder is the institutional investor.³⁴ Surprisingly, until recently, "voting with their feet" was how institutional investors voiced their opinions as well.³⁵ However, "[t]hese institutional investors have become increasingly active in corporate governance because exit has become a less viable option and norms have changed concerning the appropriateness of their participation in corporate governance."³⁶ It is not surprising that having become so involved with corporate governance, these investors put a high value on the concept.³⁷ A recent survey found that investors are willing to pay up to a fourteen percent premium

33. CAROLYN KAY BRANCATO, *INSTITUTIONAL INVESTORS AND CORPORATE GOVERNANCE: BEST PRACTICES FOR INCREASING CORPORATE VALUE*, at xix (1997).

34. Cf. MONKS & MINOW, *supra* note 32, at 110 ("[I]nstitutions represent a powerful stockholding force."). By the end of the third quarter in 1999, institutions held 57.6% of the stock of the top 1,000 United States companies. *Id.* Private pension funds were the largest investors, with total holdings of \$5064.6 billion in 1998. Following private pension funds were investment companies (\$3396.3 billion), insurance companies (\$2537.4 billion), state and local pension funds (\$2334 billion), bank trusts (\$1799.5 billion) and foundations and endowments (\$290.4 billion). *Id.*

35. See Klaus J. Hopt, *Preface to INSTITUTIONAL INVESTORS AND CORPORATE GOVERNANCE* (Theodor Baums et al. eds., 1994) (claiming that the phenomenon of the institutional investor was not relevant to corporate law until the late 1980s, as institutional investors would "simply sell out" if not happy with a company's performance).

36. Dallas, *supra* note 11, at 787 & n.12; see also *supra* notes 14-15 and accompanying text. For instance, not only does CalPERS maintain a set of core principles and recommendations for corporations generally, but they also maintain an annual "Focus List" detailing company-specific recommendations for some of the low-performing companies in their portfolio. For example, in 2003, CalPERS requested that Gemstar-TV Guide International, Inc. do the following:

Conduct a formal governance review using an independent external consultant.
Make a formal commitment to maintain a majority of independent directors.
Adopt CalPERS definition of an independent director. Commit to 100% independent directors on the Audit, Compensation, and Nominating Committees. Adopt a formal board/self-evaluation process. Add at least one new independent director. Develop and seek shareholder approval for a formal executive compensation policy.

CalPERS, 2003 Focus List At-A-Glance, available at <http://www.calpers-governance.org/alert/focus/2003/default.asp> (last visited Oct. 25, 2004). Some scholars even have called for institutional investors to play the key role in a proposal to install professional directors as the solution to some of the current problems in corporate governance. See Ronald J. Gilson & Reinier Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors*, 43 STAN. L. REV. 863, 885-87 (1991).

37. "For investors, 'poor governance is a substantial risk factor.'" Burns, *supra* note 31, at R6 (quoting Patrick McGurn, Senior Vice President and Special Counsel of Institutional Shareholder Services, a proxy-advisory firm).

for companies that have "good" corporate governance.³⁸ The shareholder is becoming a bigger player every day in corporate governance,³⁹ as evidenced by the cry for more independent board members by many institutional investors. Before addressing this latter issue, however, an explanation of the functions and duties of the board of directors is necessary.

2. *The Board of Directors*

Most simply, "[b]oards ... are expected to oversee management, corporate strategy and the company's financial reports to shareholders."⁴⁰ They "are a crucial part of the corporate structure"⁴¹ in that "[t]hey are the link between the people who provide capital (the shareholders) and the people who use that capital to create value (the managers)."⁴² But just as the role of the investor has evolved over time with respect to corporate governance, so has that of the director. Though directors have always had the same basic, key functions,⁴³ the extent to which they actually perform the duties asked of them has changed over time.⁴⁴ To ensure that directors'

38. *Id.* (citing a 2002 survey completed by the consulting firm McKinsey & Co.).

39. *See supra* Part I.A.1.

40. Burns, *supra* note 31, at R6.

41. MONKS & MINOW, *supra* note 32, at 164.

42. *Id.*

43. *See id.* at 165, 168 (arguing that the directors of America's first corporation, led by Alexander Hamilton, had similar responsibilities to those of modern directors).

44. This is especially true as of late. In these post-Sarbanes-Oxley times, the norms of directorships are changing. *See* Russ Wiles, *Boardrooms Under the Spotlight; Recent Scandals Have Made Corporate Directorships the Hottest Seats in Town. With So Much Scrutiny, Who Wants to Sit on a Board?*, ARIZ. REP., Oct. 18, 2003, at D1. One reporter has noted that, in the past:

[I]t often seemed corporate directors had it made. There were generous stipends, free stock options, golf meetings, cocktail parties, a travel budget and, sometimes, not a whole heck of a lot of work to do. But times have changed, and directors today are breaking into a sweat, both from increased work and worry.

Id. Today's directors are having to spend more time preparing for and attending board meetings, thus reducing the number of boards upon which they can sit. *See id.* In fact, many directors are turning down offers for new directorships, for they cannot handle the others they already have. *See* Andrew Countryman, *Dramatic Turnover Yet to Hit Boards*, CHI. TRIB., May 25, 2003, at 1 (quoting Julie Daum of the executive search firm Spencer Stuart). This was not always the case, however. In the past, directorships were treated "something like the bestowal of an honorary degree." Joseph W. Bishop, Jr., *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J.

interests are aligned with those of the corporation—to wit, the shareholders—the law eventually imposed duties on directors that give them more incentive to effectively monitor management. As a result, today, “a director owes shareholders the fiduciary duties of due care, loyalty, candor, and obedience.”⁴⁵ When discussing director accountability, however, the courts and scholarship usually speak in terms of the duties of care and loyalty;⁴⁶ therefore, these are the duties upon which this Note focuses.

With its origins in the English common law of trusts and agency,⁴⁷ the modern duty of care for directors is said to be “that degree of care and diligence which an ordinarily prudent director could reasonably be expected to exercise in like position under similar circumstances.”⁴⁸ Seemingly an extension of the ordinary reasonable person standard first discussed in the case *Vaughan v. Menlove*,⁴⁹ the duty of care standard applied to corporate directors is more specific, as most “reasonable persons” do not know how to judge whether, for example, a merger is in the best interests of the corporation’s shareholders.⁵⁰ This standard, however, did not develop overnight in this country. The courts first held directors of banks and other financial institutions to a duty of good faith, which was not as stringent as the standard applied today.⁵¹ It was not until the early twentieth century that American courts universally accepted that directors of all corporations owed a fiduciary duty of

1078, 1093 (1968) (quoting Frederick Dwight, *Liability of Corporate Directors*, 17 YALE L.J. 33, 33 (1907)). In 1966, one seventy-six year-old Boston banker actually sat on the boards of forty-three corporations. *Id.*

45. Edward S. Adams, *Corporate Governance After Enron and Global Crossing: Comparative Lessons for Cross-National Improvement*, 78 IND. L.J. 723, 731 (2003).

46. See Garry W. Jenkins, *The Powerful Possibilities of Nonprofit Mergers: Supporting Strategic Consolidation Through Law and Public Policy*, 74 S. CAL. L. REV. 1089, 1117 n.139.

47. Henry Ridgely Horsey, *The Duty of Care Component of the Delaware Business Judgment Rule*, 19 DEL. J. CORP. L. 971, 973 (1994) (“By accepting of a trust of this sort [being a corporate director], a person is obliged to execute it with fidelity and reasonable diligence” (citing *Charitable Corp. v. Sutton*, 26 Eng. Rep. 642, 645 (Ch. 1742))).

48. DOUGLAS M. BRANSON, *CORPORATE GOVERNANCE* § 6.02, at 251 (1993) (internal citation omitted).

49. 132 Eng. Rep. 490 (Ct. Com. Pl. 1837). Thus, the modern definition of the duty of care sprung from the negligence standard in tort law. See Alan R. Palmiter, *Reshaping the Corporate Fiduciary Model: A Director’s Duty of Independence*, 67 TEX. L. REV. 1351, 1359-60 & n.19 (1989).

50. See BRANSON, *supra* note 48, § 6.02, at 251-52.

51. See Horsey, *supra* note 47, at 973-74.

care to shareholders that rose to the level of the prudent, reasonable person standard.⁵² Today, the duty of care is codified in one form or another in many states.⁵³

The duty of care standard is necessary to give shareholders a cause of action when they feel a director's misconduct, of whatever sort, has risen to a level that necessitates litigation. Notably, though the standard was developed long ago, for many years courts almost never held directors liable for breach of the duty of care.⁵⁴ Courts were reluctant to find such a breach because they realized they were not business experts and felt they should defer to the business judgment of the directors. A "creature of common law,"⁵⁵ the business judgment rule was first articulated in the United States in 1829 by a Louisiana court,⁵⁶ but most of the literature quotes a Rhode Island state court decision when referring to the birth of the rule.⁵⁷ Amidst questioning whether directors of a screw manufacturing company would be held liable for making an ill-fated decision to purchase stock in an iron company, the court said, "[w]e think a Board of Directors acting in good faith and with reasonable care and diligence, who nevertheless fall into a mistake, either as to law or fact, are not liable for the consequences of such mistake."⁵⁸ Modern courts have not substantially altered this understanding of the business judgment rule, and it is now a bedrock of corporate law.

Most courts articulate the business judgment rule as a rebuttable presumption that the directors acted properly, and therefore

52. *Id.* at 974.

53. See, e.g., CAL. CORP. CODE § 309(a) (West 2004); GA. CODE ANN. § 14-2-830(a) (2003); N.J. STAT. ANN. § 14A:6-14(1) (West 2003); N.Y. BUS. CORP. LAW § 717(a) (Consol. 2003).

54. In the 1960s, Professor Bishop commented, "[t]he search for cases in which directors of industrial corporations have been held liable in derivative suits for negligence ... is a search for a very small number of needles in a very large haystack." Bishop, *supra* note 44, at 1099. Even as late as 1984, one scholar "described the duty of care as having lead [sic] a 'twilight existence.'" BRANSON, *supra* note 48, § 6.01, at 247 (quoting John C. Coffee, Jr., *Litigation and Corporate Governance: An Essay on Steering Between Scylla and Charybdis*, 52 GEO. WASH. L. REV. 789, 796 (1984)).

55. BRANSON, *supra* note 48, § 7.01, at 327. Branson argues that the rule has always been and continues to be a judge-made rule, notwithstanding the arguments of some scholars. See *id.* § 7.01, 327-28 nn.9,10.

56. See *id.* § 7.01, 326 n.3 (discussing *Percy v. Millaudon*, 8 Mart. (n.s.) 68, 78).

57. See *id.* (citing *Hodges v. New England Screw Co.*, 3 R.I. 9, 18 (1853)).

58. *Hodges*, 3 R.I. at 18.

directors will not be held liable for errors in judgment, absent extreme circumstances. Such an "[e]xpansion of the scope of the business judgment rule has the effect of reducing the cases in which plaintiffs may press duty of care claims with success."⁵⁹ As a result, plaintiffs often assert claims alleging that directors not only breached their duty of care, by not acting with reasonable prudence, but that they also breached their fundamental duty of loyalty.⁶⁰

Under the duty of loyalty, directors must act in good faith, keeping the shareholders' interests above their own.⁶¹ In an excellent recitation of the relationship between both the duty of loyalty and the business judgment rule, one author said:

Although the duty of loyalty originally prohibited transactions between a corporation and its directors, this prohibition softened, and the duty evolved into an emphasis on the substantive fairness of the transaction. Hence, under the duty of loyalty, courts carefully scrutinize the transaction and are willing to invalidate it if the transaction is perceived unfair to the corporation. Judicial deference to directors' decisions falls by the wayside when those decisions involve a conflict of interest. If the plaintiffs make a prima facie showing that directors have a self-interest in a corporate transaction, the business judgment rule becomes inapplicable. The burden shifts to the directors to demonstrate the fairness of the transaction to the corporation.⁶²

Not surprisingly, many plaintiffs ask where this development leaves them or, more specifically, how they can recover against directors who allegedly have breached their respective duties. There was a glimmer of hope for plaintiffs pursuing breach of the duty of care claims after the Delaware Supreme Court's 1985 landmark decision in *Smith v. Van Gorkom*, where the court held that the directors had breached their duty of care during merger negotia-

59. BRANSON, *supra* note 48, § 8.01, at 392.

60. *See id.*

61. *See* BRANSON, *supra* note 48, § 8.02, at 395; MONKS & MINOW, *supra* note 32, at 168 ("Duty of loyalty means that a director must demonstrate unyielding loyalty to the company's shareholders.").

62. David A. Rosenzweig, Note, *Poison Pill Rights: Toward a Two-Step Analysis of Directors' Fidelity to Their Fiduciary Duties*, 56 GEO. WASH. L. REV. 373, 376 (1988) (citations omitted).

tions with another company.⁶³ Unfortunately for aggrieved shareholders, the Delaware legislature reacted almost instantaneously to the decision by passing a law that gives corporations the right to fully indemnify directors for similar breaches of their duty of care.⁶⁴ This provision, however, does not give protection to directors for breaches of the duties of good faith and loyalty.⁶⁵ Consequently, shareholders now must attempt to couch any alleged misconduct as a breach of good faith or loyalty in order for their claims for monetary damages to survive the exoneration articulated in the statute.⁶⁶

B. The Independent Director as a Corporate Governance Panacea

As one scholar recently noted, “[p]robably the most significant trend in board governance in the United States in the last twenty years has been the increase in the number and proportion of outside directors on corporate boards of directors.”⁶⁷ Led by scholars,⁶⁸ the SEC,⁶⁹ and the American Law Institute,⁷⁰ many argued that the next step in corporate governance was to have disinterested eyes overseeing management.⁷¹ The theory is that a board of directors predominantly consisting of insiders, usually high-level execu-

63. 488 A.2d 858, 893 (Del. 1985).

64. See DEL. CODE ANN. tit. 8, § 102(b)(7) (2003).

65. *Id.*

66. For a more detailed discussion of this development, see Lyman Johnson, *After Enron: Remembering Loyalty Discourse in Corporate Law*, 28 DEL. J. CORP. L. 27, 32 (2003) (“[S]tockholders ... understandably seek to broadly characterize director conduct as violating the duty of loyalty or good faith, arguing for an expansive reading of these notions.”).

67. Dallas, *supra* note 11, at 787 (citation omitted).

68. See MELVIN A. EISENBERG, *THE STRUCTURE OF THE CORPORATION* 170-77 (1976).

69. See Murdock, *supra* note 30, at 81 & nn.4-5.

70. See *id.*

71. The following excerpt reveals some of the history behind this new trend:

A number of high-profile corporate crimes in the 1970s prompted a fresh look at the role of directors. The Watergate affair caused several illegal campaign contributions to come to light. On the international front, sleazy tales emerged of corporations bribing foreign officials to keep out competition. Observers wondered why boards of directors, whose job it was to prevent such transgressions, had failed in their duty.

MONKS & MINOW, *supra* note 32, at 191.

tives within the firm, cannot effectively oversee themselves. Psychological studies support this notion.⁷²

An illustration proves helpful. Imagine a not-so-hypothetical board⁷³ consisting of the chief executive officer (CEO), his chief financial officer (CFO), and several senior vice presidents of various divisions within the company. Now, picture the CEO pushing the limits on what might be considered acting "loyal" or "with care." Few would argue that one of the lower-level executives would be likely to speak up to question the CEO's intentions; besides putting his directorship at stake, the executive also has his full-time position at risk. Another scenario, however—where the board consists of the CEO, his CFO, only one or two company executives, and several outside directors—is more realistic in modern times.⁷⁴ Assume that this is a relatively small board, with a total of seven members. Without having a majority to "back his play," so to speak, one of the independent directors may be hesitant to question the powerful insiders. Therefore, it follows that as more independent members are added to the board, without the total number of board positions increasing, the more likely it is that the independent director will actively manage the management.

This conclusion—that the more independent directors there are on a board, the more likely it is that those directors will oversee management—assumes that the independent directors are independent in nature rather than in name only. Once the norms of governance began to demand an independent presence on boards, CEOs simply began to stack the board with their business colleagues or, better yet, their personal friends.⁷⁵ As Professor

72. Dallas, *supra* note 11, at 788 (citing James D. Cox & Harry L. Munsinger, *Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion*, 48 LAW & CONTEMP. PROBS. 83, 84-85 (1985)).

73. According to one article "[i]n the 1960s, most [boards] had a majority of inside directors." Sanjai Bhagat & Bernard Black, *The Non-Correlation Between Board Independence and Long-Term Firm Performance*, 27 J. CORP. L. 231, 232 (2002).

74. By 1980, only twenty boards had an outside to inside ratio of three to one or greater. This number grew to fifty-one by 1990. MONKS & MINOW, *supra* note 32, at 191.

75. By definition, the shareholders elect the members of the board, but realistically, this is not how board selection occurs. With thousands or possibly millions of different shareholders, most exercise their vote by proxy. "A proxy is nothing more than a specialized agency for the voting of shares. Intending to be absent, the shareholder, or proxy giver, appoints an individual, the proxy, who will be present to act in her behalf." BRANSON, *supra* note 48, § 1.05, at 14 (citations omitted). In reality, "approximately '99.65% of corporate

Brudney said twenty years ago, “[n]o definition of independence yet offered precludes an independent director from being a social friend of, or a member of the same clubs, associations, or *charitable efforts* as, the persons whose compensation or self-dealing transaction he is asked to assess.”⁷⁶ While this may be true to some extent even today, this bias can be minimized by regulating more closely charitable donations from the corporation to the ostensible friend of the CEO.

Notwithstanding past experience, scholars and institutional investors still argue that independent directors are the cure-all in corporate governance.⁷⁷ There are some scholars, though, who profess that there is no correlation between independence and firm performance.⁷⁸ For the purposes of this Note, however, the concern is not necessarily whether an independent director will increase

boards are elected in uncontested proxy solicitations.” Adams, *supra* note 45, at 733 (quoting Joseph A. Grundfest, *Just Vote No: A Minimalist Strategy for Dealing with Barbarians Inside the Gates*, 45 STAN. L. REV. 857, 862 (1993)).

76. Victor Brudney, *The Independent Director—Heavenly City or Potemkin Village?*, 95 HARV. L. REV. 597, 613 (1982) (emphasis added).

77. See, e.g., Adams, *supra* note 45, at 730 (“The quest for truly independent and qualified boards of directors will continue to achieve the ultimate goal of safeguarding the interests of stockholders.”); Elson & Gyves, *supra* note 7, at 869 (“Independence is a critical element in meaningful monitoring.”). One institutional investor, on its website, states that “independence is critical to a properly functioning board.” Council of Institutional Investors, Independent Director Definition, http://www.cii.org/Policies/ind_dir_defn.htm (last visited Apr. 14, 2005).

78. See Bhagat & Black, *supra* note 73, at 236 (“Prior research does not support a clear correlation between board independence and firm performance.”). See generally Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797 (2001). This conclusion has also been articulated by the media. See, e.g., James Westphal, *Manager's Journal: The Impression Management Trap*, WALL ST. J., Aug. 27, 2002, at B2. While the correlation between director independence and firm performance is beyond the scope of this Note, it is noteworthy that even two scholars who wrote one of the most comprehensive analyses to date on the alleged non-correlation between independence and corporate performance admit:

[S]ome directors who are classified as independent are not truly independent of management, because they are beholden to the company or its current CEO in ways too subtle to be captured in customary definitions of ‘independence.’ For example, some nominally independent directors may ... be employed by a university or foundation that receives financial support from the company. Unfortunately, the data needed to capture these relationships are not currently available.

Bhagat & Black, *supra* note 73, at 266; see also Langevoort, *supra* at 799 (“If we could identify truly independent directors more precisely, perhaps we would find the expected correlation.”).

firm performance. Rather, the objective is to frame the context by which the courts look into the independence of a particular director.

Both lawmakers and the SROs continue to stress director independence. Recognizing the deficiencies associated with the corporate accounting scandals of Enron, Tyco, and WorldCom,⁷⁹ Sarbanes-Oxley requires that "[e]ach member of the audit committee of the issuer shall be a member of the board of directors of the issuer, and shall otherwise be independent."⁸⁰ The Act's definition of independence leaves something to be desired, however. It requires only that (1) the director not receive any additional fee for serving on the audit committee, and (2) that the director not be "affiliated"⁸¹ with the corporation or one of its subsidiaries.⁸² Thus Sarbanes-Oxley does not consider whether outside directors whose nonprofit organizations receive charitable contributions from the corporation are "independent."

Where Sarbanes-Oxley drops off, the SRO regulations begin. As former NYSE chairman Richard Grasso stated in 2002, "[w]e need to root out bad practices and bad people but not presume the system is broken."⁸³ With these words, the NYSE and the NASDAQ Stock Market (NASDAQ) chose to act upon the suggestion of former SEC chairman Harvey Pitt⁸⁴ and issue new amendments to their

79. See *supra* notes 2-4.

80. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745, 775 (codified as amended at 15 U.S.C. § 78j-1). Note that "[t]he primary role of the audit committee is oversight of the company's accounting and financial reporting process, including oversight of the preparation of financial statements and the performance of internal and external auditors." R. William Ide, *Post-Enron Corporate Governance Opportunities: Creating a Culture of Greater Board Collaboration and Oversight*, 54 MERCER L. REV. 829, 865 (2003).

81. The authors of this legislation must have been purposefully vague as to this point. In this single term lies the sixty-four million dollar question, what does it mean to be "affiliated" with the company? The SEC has not yet clarified this point.

82. Sarbanes-Oxley Act of 2002, § 301.

83. Adam Shell, *NYSE Calls for More Independence on Boards*, USA TODAY, June 7, 2002, at B1 (quoting NYSE chairman Richard Grasso). Interestingly, the "bad people" to whom Grasso was referring must have included himself. On September 17, 2003, Grasso resigned after news of his \$139.5 million deferred-compensation package became public information. Susanne Craig et al., *Taking Stock: As End Nears, Grasso Held On In Hopes Pay Furor Would Ebb*, WALL ST. J., Sept. 26, 2003, at A1. The NYSE board of directors voted for the acceptance of his resignation after receiving pressure from investors and politicians alike. *Id.* As one article notes, "[c]ritics were enraged because the NYSE appeared to be ignoring standards it had been setting for U.S. corporations on good governance" *Id.*

84. Speaking to the NYSE and NASDAQ, in February of 2002, Pitt said, "[w]e believe that there are a number of ways that current corporate governance standards can be

respective listing requirements. The process was not a simple one.⁸⁵ Both the NYSE and NASDAQ took months to deliberate and did not finalize their proposals until August 2002 and October 2002, respectively.⁸⁶ It took more than one year for the SEC to approve the collective amendments, but it finally did so on November 4, 2003, with limited changes to the last round of revisions.⁸⁷

The amendments touch on multiple aspects of governance, but the focus is on increased director independence. For the purposes of this Note, the overall changes in both listing requirements are nearly identical.⁸⁸ For example, both sets of amendments require that listed companies have a majority of independent directors.⁸⁹ Due to the SEC's review, both also have three-year "look back" requirements, indicating that when the board makes its determination on a particular director's independence, the evaluation only "looks back" three years.⁹⁰ However, the rules diverge with respect to compensation and nomination. The NYSE demands that their listed companies have separate, completely independent committees in charge of setting executive compensation and nominating directors.⁹¹ NASDAQ bestows slightly more flexibility upon its relatively smaller companies, allowing for such matters to be

improved to strengthen the resolve of honest managers and the directors who oversee management's actions." Press Release No. 2002-23, SEC, Pitt Seeks Review of Corporate Governance, Conduct Codes (Feb. 13, 2002), at <http://www.sec.gov/news/press/2002-23.txt>.

85. For a detailed narrative on how the NYSE and NASDAQ dealt with Chairman Pitt's challenge, see Ide, *supra* note 80, at 845-54.

86. See Deborah Solomon, *SEC Rules Limit Who Qualifies as 'Independent,'* WALL ST. J., Nov. 5, 2003, at A2.

87. See Goodwin Procter LLP, *Public Company Advisory: SEC Approves Final NYSE and NASDAQ Corporate Governance Standards* (Nov. 11, 2003), http://www.goodwinprocter.com/publications/PC_SECApproves_11_11_03.pdf. The NYSE published its first proposal in August of 2002, but made revisions in April and then October of 2003. See New York Stock Exchange, *Amendment No. 2 to the NYSE's Corporate Governance Rule Proposals*, <http://www.nyse.com/pdfs/amend2-10-08-03.pdf> (last visited Oct. 22, 2004). Likewise, on October 9, 2003, NASDAQ filed an amendment with the SEC. See NASDAQ Stock Market, Inc., *Proposed Rule Changes*, <http://www.NASDAQ.com/about/ProposedRuleChanges.stm> (last visited Oct. 22, 2004).

88. In determining independence, both the NYSE and NASDAQ amendments evaluate past employment and compensation from the company and consider family relationships.

89. See Solomon, *supra* note 86, at A2.

90. *Id.*

91. *Id.*

conducted by a majority of independent members rather than requiring separate committees.⁹²

The most interesting facets of the new definitions of independence involve the "business relationships" (NYSE) and "business or charitable relationships" (NASDAQ) tests that address the issue of corporate charitable contributions presented in this Note. The NASDAQ test is surprisingly more stringent. If a director or one of his family members is an executive in *any* organization that receives the greater of \$200,000 or five percent of the organization's annual gross revenue from the corporation, the director may not be deemed independent.⁹³ Further, the NASDAQ "business or charitable relationships" test is not dispositive, because it maintains that other suspect relationships should be considered despite a director's compliance with the stated test.⁹⁴ The NYSE sets a similar benchmark but carves out an exception for charitable organizations. Referring only to business relationships, the NYSE precludes a director of a corporation from being considered independent if his business receives the greater of \$1 million or two percent of its consolidated gross revenues from the corporation.⁹⁵ The same test is used for directors who are members of charitable organizations, but it only requires disclosure in the annual proxy statement, not disqualification.⁹⁶ The specific dollar amounts and percentages of gross income of the receiving organization are not paramount; more important is the treatment of directors who are executives of charitable organizations.

On the surface, NASDAQ's rule is shockingly aggressive, and both tests certainly would limit the problem addressed in this Note. Yet there are two reasons why neither the NASDAQ nor the NYSE test will solve the problem surrounding charitable donations to ostensibly independent directors' charitable organizations. First, corporations can simply choose not to follow the rules set by their respective SRO. Critics have questioned the effectiveness of enforcement policies and point out a considerable inherent conflict of

92. *Id.*

93. See Goodwin Procter LLP, *supra* note 87.

94. See *id.* at 3-4.

95. See *id.* at 4.

96. See *id.*

interests.⁹⁷ If an NYSE corporation, for example, makes a large charitable contribution to one of its director's organization, it could simply decide not to disclose the donation. The way in which the NYSE would penalize the company would be to delist it from the exchange.⁹⁸ The problem is obvious: not only would such a drastic measure prove embarrassing for the SRO, but it also would decrease its own revenue.⁹⁹ To be sure, we will not likely begin seeing the SROs delisting companies for such infractions.¹⁰⁰

Second, besides the lack of an effective enforcement scheme, a savvy CEO can easily side-step the new regulations, thus perpetuating the problem at hand. The NYSE's and NASDAQ's relationship rules look only to a given year in isolation, even with the three-year "look back" provision. Therefore, a director of an NYSE-listed company could be under the influence of an executive of the corporation who gives his charitable organization, for example, \$750,000 per year every single year. Assuming that this donation does not violate the percentage facet of the rule, such a significant stream of contributions also would not breach the threshold set in the rules. Without considering such contributions in the aggregate, the NYSE and NASDAQ rules have little chance of identifying and impeding "independent" directors' conflicts of interest.

97. See, e.g., Karessa Cain, Note, *New Efforts to Strengthen Corporate Governance: Why Use SRO Listing Standards?*, 2003 COLUM. BUS. L. REV. 619, 649-53; see also Roberta S. Karmel, *The Future of Corporate Governance Listing Requirements*, 54 SMUL. REV. 325, 356 (2001) (questioning whether SROs will be able to enforce effectively their listing standards as competitors enter the market).

98. The NYSE and Amex (American Stock Exchange) have, however, proposed another method of enforcement: the issuance of public reprimand letters. See Cain, *supra* note 97, at 650. Such a humiliation tactic seems to lack any substance, and likely will not prove very effective. All of this is assuming, of course, that the NYSE would spot the transgression. With about 2,800 companies listed on the exchange, it certainly is possible that this is a faulty assumption.

99. *Id.*

100. One student author has noted that "only fifteen of the 2,300 delistings recorded by NASDAQ from 1999 to 2001 were for corporate governance violations, and the NYSE has not initiated any delistings on such grounds in recent years." *Id.*

C. Why the Courts Care About Whether a Director Is Independent: Shareholder Derivative Suits

The laws, regulations, and policy recommendations discussed above are proactive measures designed to influence corporate governance. The hope is that these changing definitions of independence, along with new methods of implementation, will force directors to be more diligent in carrying out their duties and to act with the utmost loyalty with respect to shareholders. There will always be transgressors, however, and the law permits any shareholder to bring a lawsuit to enforce their rights.

There are two forms of shareholder lawsuits. The direct lawsuit involves injury to the shareholder individually and most often involves a denial of voting rights or dilution of ownership.¹⁰¹ Most shareholder suits, however, and the ones with which this Note is concerned, are derivative in nature. Derivative suits evolved, because "[t]he common law provided no means whereby corporate managers could be called to account. The derivative action was thus born in the nineteenth century as an equitable remedy to fill the gap in the common law."¹⁰² The difference between the two types of suits is not always obvious, but the key aspect of the derivative suit is that the shareholder is suing on behalf of the corporation, or stepping into the corporation's shoes, so to speak. For instance, a lawsuit brought by a shareholder alleging breach of the directors' duties will always be a derivative suit. A shareholder has a right to bring a derivative suit, and the law has developed procedures so that the system can accommodate the scores of derivative suits brought each year.

It is important to note that the focus of this discussion of shareholder suits will be on Delaware corporate law. The reasons for this are twofold. First, Delaware law drives corporate law, as most large corporations are incorporated there.¹⁰³ Plaintiffs often

101. See BRANSON, *supra* note 48, § 11.07; see, e.g., *Eisenberg v. Flying Tiger Line, Inc.*, 451 F.2d 267 (2d Cir. 1971) (holding that a shareholder's claim of deprivation of a voting right was rightly a direct suit); *Lochheed v. Alacano*, 697 F. Supp. 406, 412 (D. Utah 1988) (holding that a shareholder's claim of dilution of the value of shares was rightly a direct suit); *Reifsnnyder v. Pittsburgh Outdoor Adver. Co.*, 173 A.2d 319, 322 (Pa. 1961) (holding that dilution of shareholders' voting power could be challenged in a direct suit).

102. BRANSON, *supra* note 48, § 11.03, at 595.

103. See *supra* note 21.

bring suit in Delaware, because the state has unique statutory devices for gaining personal jurisdiction over all of the likely corporate executive defendants.¹⁰⁴ The second reason is that both of the principal cases that this Note analyzes are Delaware cases.¹⁰⁵

To perpetuate Delaware's corporate-friendly status, the legislature has created a high hurdle for shareholders to clear in their efforts to have the Chancery Court hear their case on the merits. Chancery Court Rule 23.1 requires a shareholder first to take their issue to the board by making a pre-litigation demand, before they can file a derivative action with the courts.¹⁰⁶ The court does not regard this demand requirement as a procedural rule but rather as a substantive one, which is strictly enforced in Delaware.¹⁰⁷ As a result of this demand requirement, shareholders only have "the right to bring a derivative action under two circumstances: (1) where demand on the board of directors was made and wrongfully refused, and (2) where the plaintiff can establish that demand would have been futile had such a demand been made."¹⁰⁸ Given that shareholders almost never succeed when proceeding under the first option,¹⁰⁹ most plaintiffs choose to allege that demand would have been futile.

The law of demand futility is governed by the court's decision in *Aronson v. Lewis*.¹¹⁰ As articulated in *Aronson*, the test has two

104. Delaware law states that:

Every nonresident of this State who ... accepts election or appointment as a director, trustee or member of the governing body of a corporation organized under the laws of this State ... shall, by such acceptance or by such service, be deemed thereby to have consented to the appointment of the registered agent of such corporation (or, if there is none, the Secretary of State) as an agent upon whom service of process may be made in all civil actions or proceedings brought in this State, by or on behalf of, or against such corporation

DEL. CODE ANN. tit. 10, § 3114 (1974). Since its passage, the Delaware Supreme Court has held the statute constitutional. See *Armstrong v. Pomerance*, 423 A.2d 174, 176 (1980).

105. See *infra* Part II.

106. See DEL. CH. CT. R. 23.1.

107. Elizabeth A. Wilburn, *Recent Developments in Delaware Corporate Law, Beyond Aronson: Recent Delaware Cases on Demand Futility*, 20 DEL. J. CORP. L. 535, 537 (1995).

108. *Id.* at 537-38.

109. In Delaware, under demand-refused cases, the plaintiff gets only limited discovery, which makes it invariably difficult to meet the pleading requirements. See Harry G. Hutchison, *Presumptive Business Judgment, Substantive Good Faith, Litigation Control: Vindicating the Socioeconomic Meaning of Harhen v. Brown*, 26 J. CORP. L. 285, 313-14 (2001).

110. 473 A.2d 805 (Del. 1984).

prongs. First, the court questions "the independence and disinterestedness of the directors."¹¹¹ The court conducts this inquiry through the lens of the business judgment rule, however, which means that director independence will be presumed.¹¹² Second, the court inquires into whether the board exercised valid business judgment with respect to the challenged transaction.¹¹³ As discussed above, the court rarely will conclude that the directors did not exercise sound business judgment;¹¹⁴ so, to meet the demand futility test, plaintiffs usually allege in one form or another that the directors are not independent. As a result, before reaching the merits of the case, the court usually questions the independence of the board, director-by-director, on a purely subjective basis.¹¹⁵ Clearly, the courts must pay careful attention to the definition of director independence, as it becomes the threshold issue for plaintiffs striving to have the merits of their cases heard by the court.

Long after the rules surrounding the demand requirement became commonplace in corporate law, corporations found yet another method to thwart shareholders' derivative claims. Conceived in the 1970s,¹¹⁶ the special litigation committee ("SLC") spells disaster for derivative plaintiffs. Even if a plaintiff has a good case for demand futility, Delaware corporations are authorized by statute to create a committee to inquire into whether the litigation is in the best interest of the corporation.¹¹⁷ The case that governs the substantive law surrounding SLCs in Delaware, *Zapata Corp. v. Maldonado*,¹¹⁸ is illustrative of plaintiffs' likely success in proving derivatives when the board has created an SLC.

In *Zapata*, a shareholder brought a derivative action against the directors of the corporation for breaches of their fiduciary duties, and alleged that demand was futile, as all of the directors were

111. *Id.* at 814.

112. *See id.*

113. *See id.*

114. *See supra* text accompanying notes 55-66.

115. *See, e.g., Orman v. Cullman*, 794 A.2d 5, 26-32 (Del. Ch. 2002); *In re Walt Disney Co. Derivative Litig.*, 731 A.2d 342, 356-61 (Del. Ch. 1998).

116. *See Murdock, supra* note 30, at 88.

117. *See* DEL. CODE ANN. tit. 8, § 141(a), (c)(2) (1974).

118. 430 A.2d 779 (Del. 1981).

“interested” parties.¹¹⁹ At this point, the directors could have taken their chances under the law of *Aronson*. Zapata’s attorneys surely advised against this route, under the assumption that the corporation’s board would not have passed judicial scrutiny as “independent.” Instead, the corporation expunged several directors—surely the most culpable ones—and added two new directors to create an “independent” SLC to determine whether the derivative suit was in the best interest of the corporation.¹²⁰ Ultimately, the corporation was hoping to purge the board of its alleged wrongdoers and add newfound credence to its decision to terminate the litigation.

After deciding that a corporation does have the power to form an SLC notwithstanding the absence of a demand,¹²¹ the Delaware Supreme Court laid out the test that is now followed by courts dealing with SLC issues. Not unlike the *Aronson* test for demand futility, the *Zapata* test has two parts. First, the corporation must bear the burden of proving the independence and good faith of the committee and must show that their inquiry was a reasonable one.¹²² Here, the court stressed that independence is crucial and will not be presumed.¹²³ Second, the court may use its own business judgment to determine whether the SLC correctly ended the litigation,¹²⁴ an analysis that is typically deferential to the decisions of board directors.¹²⁵ The end result is that the independence of the newly appointed members of the SLC becomes the only “Achilles’ heel” at which plaintiffs can take aim. Consequently, unless courts are willing to discount the importance of derivative suits in corporate law, courts must pay more attention to the implications of defining director independence for derivative suit litigation.

119. *Id.* at 780.

120. *Id.* at 781.

121. *Id.* at 785-88.

122. *Id.* at 788.

123. *Id.* at 788-89.

124. *Id.* at 789.

125. See *supra* text accompanying notes 59-60.

II. A CRITICAL LOOK AT TWO RECENT CASES: *DISNEY* AND *ORACLE*A. *In re Walt Disney Co. Derivative Litigation*¹²⁶

The facts of *Disney* are well-known. The story began in 1995 when Disney CEO Michael Eisner hired his friend of twenty-five years, Michael Ovitz, as Disney's president.¹²⁷ Ovitz had gained experience in the entertainment industry through his talent agency but had never served as an executive for a large, publicly held company.¹²⁸ Ovitz's lack of pertinent experience was of no consequence to Eisner, though, as he unilaterally hired Ovitz.¹²⁹ The rest is history; after only fourteen months on the job, Ovitz admitted knowing "about [one] percent of what I need to know" and began searching for a new position.¹³⁰ Eventually, Eisner and Ovitz agreed that Ovitz should resign but not before collecting on his now infamous employment contract. After all was said and done, Ovitz walked away with a gargantuan severance package valued at \$140 million.¹³¹ Plaintiffs then filed a derivative suit alleging four different claims, the most salient being that the directors had "breached their fiduciary duties of loyalty, good faith, and due care" in connection with both entering into the contract with Ovitz and in failing to handle appropriately his resignation.¹³²

Notwithstanding the court's acknowledgment that the severance package was "perhaps larger than any ever paid,"¹³³ it refused to be swayed by the shocking nature of the facts and quickly turned to the *Aronson* test concerning the demand requirement. In addressing the first prong of *Aronson*, the court stated:

In order to prove domination and control by Eisner, Plaintiffs must demonstrate first that Eisner was personally interested in obtaining the Board's approval of the Employment Agreement ... and, second, that a majority of the Board could not exercise

126. 731 A.2d 342 (Del. Ch. 1998).

127. John Gibeaut, *Stock Responses*, A.B.A. J., Sept. 2003, at 38.

128. *Id.* at 41.

129. *Id.*

130. *Id.* at 42.

131. *Id.* at 38.

132. See *In re Walt Disney Co. Derivative Litig.*, 731 A.2d 342, 353 (Del. Ch. 1998).

133. *Id.* at 350.

business judgment independent of Eisner in deciding whether to approve the Employment Agreement.¹³⁴

After concluding that the plaintiffs had not met their burden with respect to Eisner's alleged personal interest,¹³⁵ the court proceeded to consider whether each director was sufficiently independent of Eisner.¹³⁶

Most important for the purposes of this Note is the way in which the court dealt with director Father Leo J. O'Donovan of Georgetown University. The court immediately acknowledged that "O'Donovan is the president of Georgetown University, the *alma mater* of one of Eisner's sons and the recipient of over \$1 million of donations from Eisner since 1989."¹³⁷ The court seemed to take these facts into consideration, but it then distinguished this purported "independent" relationship from similar relationships in two cases that resulted in decisions favorable to the respective plaintiffs.¹³⁸

First, the court stated that "[t]he closest parallel to O'Donovan's situation faced by this Court occurred in *Lewis v. Fuqua*."¹³⁹ In that case, the alleged disinterested director, Sanford, was the president of Duke University, which had received millions of dollars from the dominant board member, Fuqua.¹⁴⁰ The *Disney* court quickly distinguished that relationship from the one before the court, concluding that "*Lewis* does not apply,"¹⁴¹ because Fuqua and Sanford had sat on other boards together and were involved politically and financially, whereas such an interlocking relation-

134. *Id.* at 355.

135. *Id.* at 356. Notably, the case then went up to the Delaware Supreme Court, which affirmed in part, reversed in part, and remanded back to the Chancery Court. *See Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). Then, most recently, the Chancery Court viewed the plaintiffs' amended complaint and concluded that it sufficiently pleaded a breach of the directors' fiduciary duty so as to withstand a motion to dismiss. *See In re Walt Disney Co. Derivative Litig.*, 825 A.2d 275, 278 (Del. Ch. 2003). Thus, after seven years of litigation, the plaintiffs finally will have the merits of their case heard by the court.

136. *Disney*, 731 A.2d at 356-62.

137. *Id.* at 359.

138. *Id.*

139. *Id.* (discussing *Lewis v. Fuqua*, 502 A.2d 962 (Del. Ch. 1985)).

140. *Lewis*, 502 A.2d at 965, 967. Interestingly, Duke's business school is named "The Fuqua School of Business."

141. *Disney*, 731 A.2d at 359.

ship was not alleged to exist between O'Donovan and Eisner.¹⁴² The court's hasty distinction is assailable on several grounds. First, the *Disney* court's inquiry is more narrow than that of the *Lewis* court. In his opinion in *Lewis*, Vice Chancellor Hartnett listed the facts that called Sanford's independence into question, before stating that "[t]hese potential conflicts of interest or divided loyalties, *when considered as a whole*, raise a question of fact as to whether Terry Sanford could act independently."¹⁴³ Although there were additional facts linking Fuqua and Sanford, the *Lewis* court did not stress any one set of facts over another. Arguably, the core set of facts between the two cases are the same. In each case, a dominant board member gave substantial donations to the alleged disinterested outside director's organization.

Further, stressing that Eisner had no formal relationship with Georgetown, the *Disney* court missed the forest for the trees. The *Lewis* court expressed two related points that the *Disney* court failed to consider: (1) that true independence of board members is crucial to sustaining the validity of derivative suits, and (2) that the burden is on the moving party to show independence.¹⁴⁴ The explanation for the *Disney* court's departure from *Lewis*'s point is clear: it deemed that O'Donovan's status as a Jesuit priest made him "like Caesar's wife ... above reproach."¹⁴⁵ Presumptions as to the character of a director simply have no place in a court's determination of independence. The plaintiffs alleged enough information for the court to accept that large donations had been made to O'Donovan's organization and this should have been the end of the inquiry.

The next step in the analysis, according to the *Disney* court, was to consider "whether Eisner exerted such an influence on O'Donovan that O'Donovan could not exercise independent judgment as a director."¹⁴⁶ In this inquiry, the court again stressed O'Donovan's status as a Jesuit priest, noting that he did

142. *Id.*

143. *Lewis*, 502 A.2d at 967 (emphasis added).

144. *Id.*

145. *Id.*

146. *Disney*, 731 A.2d at 359.

not even collect a director's fee for his services.¹⁴⁷ The plaintiffs analogized O'Donovan's reward, "Eisner's philanthropic largess to Georgetown,"¹⁴⁸ to that of the three SLC members in the Chancery Court's unpublished decision in *Kahn v. Tremont Corp.*¹⁴⁹ Not surprisingly, the court held that "[t]he distinction between *Kahn* and this matter ... is clear,"¹⁵⁰ simply because the directors in *Kahn* received a personal financial benefit whereas O'Donovan did not.¹⁵¹ However, the court's distinction is contradicted by a more recent decision with remarkably similar facts.¹⁵² In the case of *In re Limited, Inc. Shareholders Litigation*, the alleged disinterested director was the former president of The Ohio State University—the dominating director's alma mater—and the university had received millions of dollars in donations from the corporation during the director's presidential tenure.¹⁵³ In its discussion, the court said that "[w]hile the gift was not to [the alleged independent director] personally, it was a positive reflection on him and his fundraising efforts as university president to have successfully solicited such a gift."¹⁵⁴ Granted, the gift in this case was larger than Eisner's gift to Georgetown, but the court's logic in *Limited* cannot be ignored.

As to the *Disney* court's acknowledgment of O'Donovan's purported ambivalence towards the reward, the only valid conclusion to be drawn from the court's reasoning is that O'Donovan served on Disney's board out of the kindness of his heart. Without being overly pessimistic, one can safely say that this is not a logical assertion. Few individuals, if any, take on such a significant responsibility without any expectation of reward. Ironically, this reality actually bolsters the argument that O'Donovan's presence on Disney's board was on a quid pro quo basis: a board seat for continued generous donations.

147. See *id.* (differentiating between O'Donovan's situation and the personal financial benefits involved in *Kahn v. Tremont Corp.*, No. 12339, 1994 WL 162613 (Del. Ch. Apr. 21, 1994)).

148. *Id.* (citing Pls.' Br. Opp'n to Defs.' Mots. to Dismiss at 30).

149. See *id.* (discussing *Kahn*, No. 12339, 1994 WL 162613).

150. *Id.*

151. *Id.*

152. See *In re Limited, Inc. S'holders Litig.*, No. CIV.A. 17148-NC, 2002 WL 537692 (Del. Ch. Mar. 27, 2002).

153. See *id.* at *6.

154. *Id.* at *7.

*B. In re Oracle Corp. Derivative Litigation*¹⁵⁵

In contrast to *Disney*, the court in *Oracle* correctly determined that the directors at issue were not sufficiently independent of the dominating board member. There are problems, however, with the court's mode of analysis. The court should have ended its inquiry after discovering only the tip of the iceberg, to wit, the well established philanthropic relationship between Oracle, its directors, and the academic institution at which the SLC members work. Instead, the opinion spans twenty-eight pages. This Note's criticism of the court's decision aims not only to encourage judicial economy, but also to make sure that courts in future decisions do not stray from the crux of the matter by delving into an unnecessary analysis of directors' personal relationships.

In *Oracle*, the shareholders brought a derivative action against specific directors, including Oracle's famed CEO, Larry Ellison, alleging various insider trading infractions.¹⁵⁶ Following the now-standard procedure,¹⁵⁷ the corporation organized an SLC to investigate the insider trading charges.¹⁵⁸ The corporation chose to enlist the aid of two revered Stanford University professors, Hector Garcia-Molina of the computer science department and Joseph Grundfest of the law school, to serve on the SLC.¹⁵⁹ The average outsider might deem such a choice a fair one that was congruent with the spirit of SLC law, which requires proof of independent judgment. This was not the case, however. Relatively early in his opinion, Vice Chancellor Strine acknowledged, among other things, that the SLC report specifically omitted material ties between the board and the members of the SLC, which he regarded "with some shock."¹⁶⁰ At this point, the court went to great pains to distinguish the Stanford professors from those called into question in the previously discussed cases. There existed an admitted "multitude of ties" between the professors and the board members, but the

155. 824 A.2d 917 (Del. Ch. 2003).

156. *Id.* at 921.

157. See *supra* text accompanying notes 116-25.

158. *Oracle*, 824 A.2d at 923. It almost goes without saying that the two-person SLC voted to terminate the derivative action. *Id.* at 928.

159. *Id.* at 923-24.

160. *Id.* at 929.

court emphasized that the professors' duties at Stanford did not include fundraising.¹⁶¹ Finally, the court went through all of the named defendants and fully examined the ties each had to Stanford and/or the SLC members.¹⁶²

By no means should a director's status as a fundraiser or non-fundraiser be diminished with respect to the independence inquiry, but in this case the overwhelming nature of the facts made this point moot. Two of Oracle's directors, Lucas and Ellison, had given tens of millions of dollars to Stanford in the past.¹⁶³ Another director, Boskin, was also a tenured professor at Stanford and was the former mentor of Grundfest, an SLC member.¹⁶⁴ As if these facts, undisclosed in the SLC report,¹⁶⁵ were not enough to end the inquiry summarily, during this period Ellison was planning to donate \$150 million to either Stanford, Harvard, or the Massachusetts Institute of Technology to create an interdisciplinary economics-technology program.¹⁶⁶ The sheer size of this potential donation should have blinded the court to anything other than the fact that both SLC members were professors at Stanford with much to gain—or lose—from their relationship with Ellison. Renowned in their respective disciplines or not, neither Grundfest nor Garcia-Molina wanted to do anything that might have hindered Stanford's opportunity to capture this significant endowment. Any court that might conclude otherwise is simply ignoring reality.

Ultimately, the court properly dismissed the corporation's motion to terminate the derivative suit. The problem with the decision, however, becomes clear late in the opinion, when the court stated:

Given that general context, Ellison's relationship to Stanford itself contributes to my overall doubt, when heaped on top of the ties involving Boskin and Lucas. During the period when Grundfest and Garcia-Molina were being added to the Oracle board, Ellison was publicly considering making extremely large contributions to Stanford. Although the SLC denies knowledge of these public statements, Grundfest claims to have done a fair

161. *See id.* at 930.

162. *See id.* at 930-36.

163. *See id.*

164. *See id.*

165. *See id.* at 929.

166. *See id.* at 932-34.

amount of research before joining the board, giving me doubt that he was not somewhat aware of the possibility that Ellison might bestow large blessings on Stanford.¹⁶⁷

There was no need for the court to summarize the many ties between the board and SLC members. The court had enough ammunition to safely find that the directors were non-independent without seemingly creating, whether intentionally or not, a test for “independence” based on the convoluted ties between three different directors and the corporation itself. In its defense, the court was moving the law into previously uncharted territory, which may explain the overly exhaustive and detailed nature of the opinion. Indeed, as one expert commented, “[t]he decision by [Chancellor] Strine represents one of the most far-reaching ever on corporate governance by the influential Delaware Chancery Court because it tightens the definition of director independence to cover philanthropic ties.”¹⁶⁸ Regardless, the law of corporate governance remains in need of a more distinct test for defining director independence in order to ensure systematic adherence to the underlying purpose of providing shareholders with a genuine opportunity to have the merits of a claim adjudicated.

III. HOW TO ADDRESS THIS GROWING PROBLEM

A. *The Need for Concern*

Although this Note has shown that there is sufficient cause for concern with respect to the Delaware Chancery Court’s treatment of nonprofit leaders sitting on corporate boards, the magnitude of this issue still remains in limbo if there is not a significant number of such directors in existence. Yet, as it turns out, there are indeed enough members of this distinct class of directors to warrant increased attention.¹⁶⁹

167. *Id.* at 945-46.

168. Kara Scannell & Joann S. Lublin, *Judge Rules Special Oracle Panel Had Conflicts of Interest*, WALL ST. J., June 17, 2003, at C14 (quoting Charles Elson).

169. *See infra* app.

The author of this Note conducted a limited empirical study using a sample consisting of sixty-eight Fortune 500 companies.¹⁷⁰ The survey covers those corporations that Fortune ranked numbers one through twenty, respectively, and then every tenth firm in the list of the remaining four-hundred-eighty companies. For each corporation examined, the following data were recorded: 1) total number of directors; 2) number of inside directors; 3) number of outside directors; and 4) number of target directors.¹⁷¹ Overall, the average number of directors for the firms examined was 11.69. Company insiders represented only about 18% of this total, whereas outsiders and target members collectively comprised 82% of board membership. Target board members composed about 10% of overall board membership. These numbers, of course, do not prove a trend but demonstrate that nonprofit leaders have a significant presence on corporate boards.¹⁷² These figures also lend support to this Note's call for increased attention to the way in which a director's independence is defined. Furthermore, corporations are continually seeking increased board independence,¹⁷³ and therefore, the number of nonprofit leaders sitting on public corporate boards should only increase in the future.¹⁷⁴

170. See *The Fortune 500*, FORTUNE, Apr. 14, 2003, at F-1, F-19.

171. For the purposes of this examination, the definitions are as follows. Any current or former company officer (e.g., chief executive officer, vice president, etc.) is deemed an "insider." The "target members" are those leaders of nonprofit organizations who are the focus of this Note. Finally, all others not affiliated with the corporation in any respect are considered "outsiders." This final group is dominated by executives from other large corporations but also includes many attorneys.

Although the data are reliable and serve as the empirical ground upon which this Note rests, the investigation was limited by the lack of readily available information on a particular director's status. Most of the information gathered to determine each director's status came from 19 CORPORATE YELLOW BOOK (Fall 2003). Given that some corporations were not included in this compilation, some data were recovered from corporate websites, Lexis/Nexis, and corporate public filings.

172. Initially, the goal of this study was to identify specific target members and to investigate whether the corporation makes significant donations to the respective director's nonprofit organization. Such a task, however, is immensely difficult to accomplish, as this sort of information is extremely hard to find. As such, this type of inquiry is beyond the bounds of this Note.

173. See *supra* Part I.B; see also Adams, *supra* note 45, at 730.

174. See Bank & Lublin, *supra* note 18, at A1.

B. Bright-line Rules/Two Possible Solutions

There are two possible solutions that would simplify the problem of identifying which directors are independent. Each has the benefit of ease of administration; the courts would have little trouble applying the rules to achieve the desired result of making sure that independent directors are true to their label.

First, the courts could simply disqualify, as not independent, any director who is an executive of a charitable organization, regardless of any alleged donations being made to that organization. However, such a broad, sweeping rule would greatly decrease the pool of truly independent director candidates. The corporations would then have to rely on other "outside directors" who may not be as disconnected from the corporate world.¹⁷⁵ To be sure, executives from museums, university presidents, academics, and the like bring significant talents and independence to their respective boards. Further, not every corporation with such independent directors makes contributions to the directors' organizations, and such a bright-line rule would ultimately punish many for the questionable actions of a few. Such a judicial test would place a large hurdle in the way of corporations attempting to comply with the recent trend towards more accountable corporate governance. Accordingly, this test is not desirable or feasible.

Less stringent than the first proposed test, the courts instead could disallow charitable contributions to the target directors' organizations.¹⁷⁶ What some might characterize as legislating from the bench,¹⁷⁷ this prohibition would require corporations to characterize directors as not independent when donations are made to their respective organizations. In effect, corporations would have to stop donating to some of their favorite charities; otherwise, the legal benefits of having such well respected, independent directors

175. See *supra* text accompanying notes 74-75.

176. Jayne Barnard has suggested a similar rule to control "opportunistic corporate giving" through legislative means. See Jayne W. Barnard, *Corporate Philanthropy, Executives' Pet Charities and the Agency Problem*, 41 N.Y.L. SCH. L. REV. 1147 (1997).

177. Of course, this type of judicial activism is likely to stir some emotions, but others still argue that state judges can and should continue to shape the law from the bench. See Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 424 (2003). Furthermore, a judicial approach bypasses the insurmountable obstacles that accompany legislative prohibitions. See Barnard, *supra* note 176, at 1169.

could not be realized. There are several benefits to this solution. Like the first proposal, this approach certainly appears to be relatively easy to administer. The courts simply would look to the plaintiffs' limited discovery efforts—thus relying on the plaintiffs to do their own “homework” and point out such conflicts of interest to the court—and identify any donations that the corporation has made to the director's charitable organization during the preceding five years. Once such donations are identified, the court would proceed no further in its investigation and would conclude that the director is not independent.

Unfortunately, a complex web of fundamental and systematic problems hinders the effectiveness of this proposal. First, it surely is easier said than done for plaintiffs to uncover much information on charitable contributions during the pre-litigation stage of a derivative suit,¹⁷⁸ as cases like *Oracle*, in which the plaintiffs uncovered an amazing amount of useable information, are aberrations. The plaintiffs in *Oracle* were more fortunate than most in that many of the ties for which they were looking were available to the public at large; this certainly is not true for most corporate charitable contributions. Unless a corporation donates through its own charitable foundation, no law requires it to disclose any of its charitable contributions.¹⁷⁹ One scholar has noted that “the generally confidential nature of corporate philanthropy, combined with the fact that politicized donations are especially likely to be kept confidential from corporate shareholders (and other members of the public), means that it is very difficult to unearth examples of ... noncommercial charitable contributions.”¹⁸⁰ This scholar, and others,¹⁸¹ argue that amending federal regulations to require disclosure of charitable contributions would greatly benefit corporate governance. It would also help the shareholder overcome his present task of finding the needle in the haystack. Such a change

178. See *supra* note 109.

179. See Faith Stevelman Kahn, *Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579, 581-88 (1997).

180. *Id.* at 613.

181. See, e.g., Barnard, *supra* note 176, at 1169 (agreeing with Professor Kahn's proposal); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Transparency*, 112 HARV. L. REV. 1197, 1201 & n.13 (1999) (citing Kahn and others in support of her argument that the SEC can and should require corporations to disclose their charitable contributions as one way in which to create a “social transparency”).

is not likely,¹⁸² however, and shareholders must continue to use the limited "tools at hand."¹⁸³

Assuming that a plaintiff somehow manages to gather enough facts to establish a lack of independence, a sweeping per se rule that bars charitable contributions to target directors' organizations may still have other problems. For instance, as Professor Barnard notes, many truly philanthropic donations may not be made as a result of such a rule, and society as a whole may suffer.¹⁸⁴ Obviously, this is not a desired result. However, this proposal does not preclude the corporation from donating to other charitable organizations. If philanthropy is truly the reason for the donation, then this test should cause no problem, for there are certainly thousands of other charities that need assistance.¹⁸⁵ If influence is the goal, then this rule would put a stop to it. Nevertheless, the practical difficulty of a plaintiff proving a lack of independence outweighs the potential benefits of such a test, and a less precise test will have to suffice.

C. *The Functional Approach*

To alleviate the problem alluded to in the discussion of *Oracle*,¹⁸⁶ courts must utilize a less-inclusive test of independence. With the simplification of a process, one must be willing to trade some exactness for efficiency though it is noteworthy that the way in which courts examine each director using a subjective standard, rather than an objective standard is not purported to be an exact test anyway.¹⁸⁷ A more proactive court in this area could then devote its time and resources to the more substantive portions of a case.

182. Congress has not considered the issue since 1999. See H.R. 887, 106th Cong. (1999).

183. See, e.g., *In re Walt Disney Co. Derivative Litig.*, 825 A.2d 275, 279 (Del. Ch. 2003) (noting how the plaintiffs made use of DEL. CODE ANN. tit. 8, § 220).

184. See Barnard, *supra* note 176, at 1168.

185. The *Oracle* court made an analogous point in defending its holding on policy grounds. The defendants in that case argued that the court's holding would "chill the ability of corporations to locate qualified independent directors in the academy." *In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 947 (Del. Ch. 2003). The court responded that such a statement was ludicrous given that "[i]f there are 1,700 professors at Stanford alone, as the SLC says, how many must there be on the west coast of the United States, at institutions without ties to Oracle ...?" *Id.*

186. See *supra* text accompanying notes 166-68.

187. See *Orman v. Cullman*, 794 A.2d 5, 24 (Del. Ch. 2002).

First, it is imperative that the courts not be influenced by the ostensible untarnished character of a director. A quintessential example of such a mistake was highlighted in an earlier Part with respect to the *Disney* court's treatment of Father O'Donovan.¹⁸⁸ Regardless of how impeccable one's reputation might seem, the court cannot ever peer into the soul of an individual. Admittedly, this is counterintuitive in that the reason for the presence of this director is to appear untouchable and to bring a sense of morality to the board which is allegedly deficient in this respect. The director serves a practical role in serving on certain committees that require independent directors. On the other hand, the independent director also serves as an attractive asset to investors looking for a company that values strong governance.¹⁸⁹ Thus, the figurehead nature of the director is not eliminated altogether but only in the eyes of courts.

The next step requires a realization that this problem of director independence can be viewed on a spectrum. At one end of the spectrum, there exists a director whose organization receives relatively small charitable donations and who also has no central role in the donor-donee relationship. On the opposite end, there exists the director who heads the fundraising for his organization and who sits on the board as a *quid pro quo* for large donations. There should be some *per se* rules to quickly disqualify the latter director from being treated as independent. Conversely, as to the former, the court should use pre-determined factors to quickly deem him independent.

Further, there must be some sort of moderate bright-line rule as to the raw dollar amounts being donated. A modified version of the NASDAQ test¹⁹⁰ will best serve courts. As previously mentioned, the NASDAQ and NYSE tests look only to one given year and therefore miss the "big picture."¹⁹¹ A more realistic plan would involve a broader view—one that examines donations as a whole or as a stream of cash flows. After all, receiving a relatively modest donation every year for a number of years could represent an

188. See *supra* Part II.A.

189. See *supra* notes 37-39 and accompanying text.

190. See *supra* text accompanying notes 83-96. The NASDAQ test includes charitable relationships in its inquiry, whereas the NYSE test looks only to business relationships. See *supra* text accompanying notes 93-96.

191. See *supra* Part I.B.

integral facet of a particular charity's expected revenues. This contribution could prove more influential than a larger, lump sum payment and, therefore, must be taken into account.

There exists one last consideration before these proffered modes of evaluation can be applied. As noted above, charitable donations are invariably difficult to uncover,¹⁹² and courts need to adapt accordingly. Once the court acknowledges that a director is suspect, it should assume that the corporation is donating to the charitable organization for which he works.¹⁹³ The result is a rebuttable presumption against the independence of the target director. This is not a drastic change from the court's current role in an SLC inquiry. In *Oracle*, Vice Chancellor Strine said that "the SLC bears the burden of proving its independence. It must convince me."¹⁹⁴ This Note's proposed extension of the burden of proof articulated in *Oracle* would make that task only slightly more difficult¹⁹⁵ and should alleviate the problem associated with the non-disclosure of charitable donations.¹⁹⁶ Now, given that the court presumes the worst case scenario, the defendants will be forced to provide documentary evidence of their historical and prospective charitable activity and to explain how such donations do not affect the accused director.

192. See *supra* notes 178-83 and accompanying text.

193. As it turns out, this is a safe assumption to make. See Bank & Lublin, *supra* note 18; Kahn, *supra* note 179, at 613.

194. *In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 937 (Del. Ch. 2003).

195. That is, of course, if the director is truly independent. If he is not, the task should necessarily be an onerous one.

196. See text accompanying notes 178-80. Of course, the shareholders are not "fishing in the dark." Delaware does have a statute that gives shareholders access to some internal corporate documents. See DEL. CODE ANN. tit. 8, § 220 (2001). This statute, however, is not likely to help a plaintiff searching for information concerning the corporation's charitable contributions, because the Chancery Court scrutinizes shareholder requests to ensure that the statute's scope is a narrow one. See, e.g., *Helmsman Mgmt. Servs., Inc. v. A & S Consultants, Inc.*, 525 A.2d 160, 165-66 (Del. Ch. 1987) ("A mere statement of a purpose to investigate possible general mismanagement, without more, will not entitle a shareholder to broad § 220 inspection relief. There must be some evidence of possible mismanagement as would warrant further investigation of the matter."). Even if one were to assume away this reality, the above suggested proposal would alleviate the time and cost issues associated with the utilization of this statute. See Randall S. Thomas, *Improving Shareholder Monitoring of Corporate Management by Expanding Statutory Access to Information*, 38 ARIZ. L. REV. 331, 360 (1996) (discussing the deficiencies of section 220).

Once the corporation has provided the court with the relevant information,¹⁹⁷ the court must turn to the individual director. The directors who are also university presidents, private foundation CEOs, and other leaders who engage in fundraising as one of their primary job functions are most likely to have questionable independence. For this reason, the court should perform only a quantitative analysis with respect to these individuals, and only a bright-line test will suffice. Because the goal of this test is to preclude over-influence of individuals who are supposed to serve as unbiased corporate overseers and not to stop donations altogether, corporate charitable contributions are not problematic so long as the donations do not "amount" to influence. Finding an exact number at which to draw the line, however, can be problematic. The SRO guidelines provide an excellent starting place.¹⁹⁸ To allow for some relatively trivial charity to exist, the courts should consider any donations under \$100,000 in any fiscal year as not raising concerns about compromised integrity.¹⁹⁹ Ultimately, then, the court should disqualify a director if more than \$100,000 was donated to the director's organization. Just as the SROs take into consideration the size of the director's organization, so must the courts. The director should not be deemed independent if the donation is greater than two percent (the NYSE's limit) of his entity's gross revenue. Finally, the court must consider the overall picture. If more than \$250,000 was donated during any five-year interval, including any prospective pledges, then the court should deem the director not independent.²⁰⁰

The more difficult determination involves those directors, usually university professors, who do not participate in fundraising as part of their core job description. Unless the dollar amount of the

197. One can assume that the corporation will be forthright with the court so that its civil suit does not turn into a criminal one.

198. See *supra* text accompanying notes 83-96.

199. Note that this is half of the amount dictated by the NASDAQ rule. See *supra* text accompanying note 93.

200. Admittedly, this is somewhat of an arbitrary distinction. More extensive empirical research into the size of corporate charitable contributions would prove helpful; however, such an investigation is beyond the bounds of this Note. On the other hand, bright line rules must always bear some level of arbitrariness. The point here is to employ a more exacting test than those of NASDAQ and the NYSE.

corporation's charitable donation is shockingly large,²⁰¹ the court should not write off these directors as beholden to management. Instead, for these individuals, a more extensive analysis is necessary. The court must ask questions such as: Does the director have *any* personal ties to the management and, particularly, to the CEO? Does the director have *any* other suspect connections to the corporation or to other directors? Do this professor's research activities depend upon private donations? If the answer to any of these questions is "yes," then the court must deem the director non-independent. The result of this test is that a corporation can make sizeable donations to a university at which one of its director works as a professor without negatively affecting the alignment of interests; the donations are not large enough for the university's administration to exert pressure upon the professor to act contrary to the shareholders' interests. Alternatively, if there is a single suspect connection between the corporation and the donee, the director will be considered tainted and set aside as non-independent.

Finally, the court must consider the impact of a massive lump-sum donation that is either prospective in nature or is more than five years in the past. For example, the court in *Limited* concluded that a previous \$25 million gift to The Ohio State University created a sense of "owingness" in a director who formerly served as the university's president.²⁰² Similarly, the *Oracle* court made a point to discuss the insurmountable pressure forcing any director affiliated with Stanford University to please CEO Larry Ellison when it was publicly known that he was going to contribute \$150 million to either Stanford or one of a few other schools.²⁰³ As alluded to by the courts in both of these cases, such large donations tend to influence even the purest of hearts. Such amazing displays of philanthropy cannot accompany professed independence and any director associated with such largess should not be deemed independent.

To be sure, this proposal may have dramatic side-effects of its own. One might argue that charitable contributions would decrease,

201. For this facet of the test, the court should triple the figures used for suspect individuals.

202. See *In re Limited, Inc. S'holders Litig.*, No. CIV.A. 17148-NC, 2002 WL 537692, at *7 (Del. Ch. Mar. 27, 2002).

203. See *In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 934 (Del. Ch. 2003).

because personal connections between corporations, directors, and charities foster more generous donations. However, the public would not stand for such a decline in "philanthropic" generosity. Whether it be the media uncovering such results or the former benefactors complaining of reduced contributions without the quid pro quos, corporations could not withstand open scrutiny on this matter. The modern corporation considers its public appearance paramount²⁰⁴ and it would not allow such a furor to amass. Some might also argue that this test almost completely drains the pool of applicants qualified to become directors. This test does not disqualify many individuals from serving on corporate boards, however, for there are thousands of universities and nonprofit organizations around the country with capable individuals willing to serve on boards. The search for board members may become more difficult, given that the corporation's management or inside directors cannot woo their friends or acquaintances to join them in the boardroom, but besides simply searching harder for independent directors, the corporation could simply tap into its resources and hire an executive/director search firm to locate potential candidates. Additionally, simply because a director is non-independent does not mean that he cannot serve on the board.

CONCLUSION

Corporations are beginning to dominate American society. Americans are investing in these publicly held companies run by executives and monitored by directors. Recently, the world has witnessed a frightening number of corporate scandals that have resulted in tremendous losses for the average shareholder. To compensate the injured shareholder, the law provides him with a right to sue the directors on behalf of the corporation to recoup the corporation's loss.

204. See Mark Tungate, *The Quest for Superbrand Status: How Does A Business Brand Build Itself Up To Become a Superbrand?*, *MARKETING*, May 9, 2002, at 17 (noting how Shell Oil Co.'s "enviable public image" is a key component to its "superbrand" status). Some corporate leaders go to great lengths to foster a strong public image. See, e.g., Gary Weiss, *The \$140,000,000 Man: What Dick Grasso's Excessive Payout Reveals About How He Runs the New York Stock Exchange*, *BUS. WK.*, Sept. 15, 2003, at 84 (describing how former NYSE chairman and Chief Executive Officer Dick Grasso "[r]aised the exchange's public image" through various publicity stunts, including an appearance in HBO's hit series *Sex and the City*).

This right to sue is meaningless if the shareholder cannot have his case tried on the merits. With the development of demand futility and special litigation committees, the shareholder plaintiffs must battle to prove that the given directors did not exercise independent judgment, in order for a court to examine the transaction more closely. To counter this attack, the corporations often enlist the services of persons associated with nonprofit organizations who seem above reproach. Almost universally, the nonprofit leader will receive not only a director's fee but also substantial donations from the corporation to his respective organization. More attention must be paid to whether and how much such donations affect a director's ability to remain independent and not become beholden to the corporation or one of its dominating insiders.

As more directors from nonprofit organizations are added to corporate boards, courts cannot afford to be influenced by a director's ostensibly unflawed character and they must use a comprehensive, functional approach when defining a particular director's independence. In sum, the courts must first pay more attention to the problem and then implement a new test for director independence to account for this growing segment of corporate boards.

APPENDIX

| COMPANY | Fortune 500 Rank | Total # Directors | Insiders or Former Insiders | Outsiders: CEOs, Presidents, Attorneys | Target Members |
|---------------------------------------|---------------------|----------------------|-----------------------------------|---|-------------------|
| Wal-Mart Stores | 1 | 14 | 6 | 8 | 0 |
| General Motors | 2 | 10 | 1 | 9 | 0 |
| Exxon Mobil | 3 | 12 | 2 | 9 | 1 |
| Ford Motor | 4 | 14 | 4 | 8 | 2 |
| General Electric | 5 | 17 | 4 | 11 | 2 |
| Citigroup | 6 | 17 | 3 | 13 | 1 |
| ChevronTexaco | 7 | 14 | 2 | 11 | 1 |
| International Business Machines (IBM) | 8 | 11 | 1 | 8 | 2 |
| American International Group (AIG) | 9 | 19 | 9 | 8 | 2 |
| Verizon Communications | 10 | 12 | 2 | 10 | 0 |
| Altria Group | 11 | 12 | 1 | 10 | 1 |
| ConocoPhillips | 12 | 16 | 2 | 13 | 1 |
| Home Depot | 13 | 12 | 1 | 11 | 0 |
| Hewlett-Packard | 14 | 11 | 1 | 8 | 2 |
| Boeing | 15 | 11 | 2 | 8 | 1 |
| Fannie Mae | 16 | 17 | 3 | 9 | 5 |
| Merck | 17 | 11 | 1 | 5 | 5 |
| Kroger | 18 | 17 | 4 | 12 | 1 |
| Cardinal Health | 19 | 14 | 1 | 12 | 1 |
| McKesson | 20 | 8 | 1 | 7 | 0 |
| Sears Roebuck | 30 | 11 | 1 | 9 | 1 |
| Morgan Stanley | 40 | 11 | 2 | 8 | 1 |
| Conagra Foods | 50 | 13 | 1 | 11 | 1 |
| Lowe's | 60 | 10 | 1 | 7 | 2 |
| Wachovia Corp. | 70 | 15 | 1 | 13 | 1 |
| Electronic Data Systems | 80 | 10 | 2 | 7 | 1 |
| HCA | 90 | 13 | 2 | 8 | 3 |
| Abbott Laboratories | 100 | 13 | 3 | 8 | 2 |
| 3M | 110 | 11 | 1 | 9 | 1 |
| American Electric Power | 120 | 13 | 1 | 9 | 3 |
| Gap | 130 | 11 | 4 | 7 | 0 |
| PG&E Corp. | 140 | 9 | 1 | 7 | 1 |
| Eastman Kodak | 150 | 12 | 1 | 9 | 2 |
| Cinergy | 160 | 9 | 1 | 7 | 1 |
| Pacificare Health Systems | 170 | 11 | 1 | 9 | 1 |
| Xcel Energy | 180 | 12 | 1 | 10 | 1 |
| Oracle | 190 | 10 | 3 | 3 | 4 |
| Pepsi Bottling | 200 | 10 | 4 | 5 | 1 |
| Principal Financial | 210 | 14 | 2 | 11 | 1 |
| Continental Airlines | 220 | 14 | 2 | 10 | 2 |
| Smurfit-Stone Container | 230 | 8 | 1 | 7 | 0 |
| Yum Brands | 240 | 12 | 2 | 10 | 0 |
| Pulte Homes | 250 | 11 | 1 | 10 | 0 |
| SafeCo. | 260 | 10 | 1 | 8 | 1 |
| DTE Energy | 270 | 13 | 2 | 10 | 1 |
| Avon Products | 280 | 11 | 2 | 9 | 0 |
| Keyspan | 290 | 10 | 1 | 8 | 1 |
| Apple Computer | 300 | 6 | 1 | 5 | 0 |
| Federal-Mogul | 310 | 8 | 3 | 5 | 0 |

| COMPANY | Fortune 500 Rank | Total # Directors | Insiders or Former Insiders | Outsiders: CEOs, Presidents, Attorneys | Target Members |
|-------------------------------|---------------------|----------------------|--------------------------------|---|-------------------|
| Baker Hughes | 320 | 11 | 1 | 8 | 2 |
| Northeast Utilities | 330 | 11 | 2 | 7 | 2 |
| State Street Corp. | 340 | 16 | 2 | 12 | 2 |
| Mellon Financial Corp. | 350 | 15 | 2 | 9 | 4 |
| Mohawk Industries* | 361 | 9 | 3 | 6 | 0 |
| Black & Decker | 370 | 8 | 1 | 6 | 1 |
| Leggett & Platt | 380 | 10 | 4 | 6 | 0 |
| Hershey Foods | 390 | 9 | 1 | 7 | 1 |
| Cablevision Systems | 400 | 14 | 7 | 6 | 1 |
| Nash Finch | 410 | 9 | 1 | 7 | 1 |
| Regions Financial | 420 | 14 | 2 | 10 | 2 |
| Brunswick | 430 | 12 | 2 | 10 | 0 |
| Jabil Circuit* | 441 | 8 | 3 | 5 | 0 |
| American Axle & Manufacturing | 450 | 9 | 2 | 7 | 0 |
| Wesco International* | 461 | 9 | 1 | 8 | 0 |
| PepsiAmericas | 470 | 9 | 4 | 5 | 0 |
| Smith International | 480 | 6 | 3 | 3 | 0 |
| Lennox International* | 491 | 15 | 3 | 11 | 1 |
| Neiman Marcus | 500 | 11 | 2 | 6 | 3 |

*NOTE: Each marked company was added to complete a full list of the Fortune 500 companies. The company directly preceding the marked one either did not have information readily available, no longer exists, or is not a public company.

RESULTS

| | |
|--|-------|
| median number of directors | 11.00 |
| median percent Insiders (currently holds an executive position or has in the past) | 0.14 |
| median percent outsiders (has no affiliation with the company, usually executives from other companies, attorneys, etc.) | 0.75 |
| median percent target members (university professors and presidents, foundation executives, etc.) | 0.09 |
| median number of target members | 1.00 |
| average number of directors | 11.69 |
| average percent of insiders | 0.18 |
| average percent of outsiders | 0.72 |
| average percent of target members | 0.10 |
| average number of target members | 1.19 |

*** All errors found herein are, of course, my own.

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