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LEGISLATIVE COMMENTS

THE QUESTIONABLE VALIDITY OF THE AUTOMATIC EXEMPTION OF ATTORNEYS FROM JURY SERVICE

I. INTRODUCTION

On January 10, 1980 Senator Emick proposed a bill¹ in the Virginia General Assembly to abolish the automatic² and optional³ exemptions

1. S.B.70, Va. Reg. Sess. (1980).

2. VA. CODE ANN. § 8.01-341 (Repl. Vol. 1977) (current version at § 8.01-341 (Cum. Supp. 1980)) provided certain occupational classes with an automatic exemption from jury service. This section read as follows:

The following shall be exempt from serving on juries in civil and criminal cases:

1. The President and Vice-President of the United States,
2. The Governor and Lieutenant Governor of the Commonwealth,
3. The members of both houses of Congress and their respective officers,
4. The members of the General Assembly,
5. Licensed practicing attorneys,
6. Licensed practicing physicians,
7. Licensed practicing optometrists,
8. Licensed practicing dentists,
9. Officers of any court, provided such officers are in actual service as such and receive compensation therefor,
- 10-13. [Repealed],
14. The clerks of both houses of the General Assembly,
15. The judge of any court and members of the State Corporation Commission,
16. All ministers of the gospel licensed to preach according to the rules of their sect,
17. Sheriffs, deputy sheriffs, State Police, and police and magistrates in counties, cities and towns,
18. [Repealed],
19. Keepers of the jails of counties, cities and towns,
20. Superintendents and employees of public hospitals and mental hospitals,
21. The superintendent of the penitentiary and his assistants and the persons composing the guard,
- 22,23. [Repealed],
24. Undertakers who pay a license tax as such, and their regularly employed assistants,
25. Persons on active duty with the armed forces of the United States or the Commonwealth,
- 26, 27. [Repealed],
28. All persons who hold certificates to practice and are practicing veterinary medicine or surgery,

from jury service of persons engaged in certain occupations. The bill was not passed in its proposed form.⁴ Section 8.01-341.1, providing optional exemptions, still remains in force in its entirety.⁵ Automatic exemptions, however, were eliminated for optometrists, clerks of both houses of the General Assembly, ministers, jail keepers, superintendents of public and mental hospitals, undertakers, veterinarians, members of fire departments, pharmacists, clinical psychologists and citizens of Broad Water

29. Regularly employed members of any fire department of any political subdivision or governmental agency,

30. Registered pharmacists while engaged in the practice of their profession.

The citizens of Tangier Island in Accomack County and of Broad Water and Cobb Islands in the county of Northampton shall be exempt from jury service, except service on grand juries.

Section 8.01-341 as cited above is the amended form of § 8-208.6 (Cum. Supp. 1975). Section 8-208.6 provided automatic exemptions for all the occupational classes which are now specified in § 8.01-341.1 (Repl. Vol. 1977) as *optional* exemptions. See note 3 *infra*. The 1978 VA. ACTS cc. 176 and 340 deleted "and employees" following "Superintendents" in subdivision 20 in § 8.01-341 and added a subdivision which exempted licensed practicing clinical psychologists.

3. VA. CODE ANN. § 8.01-341.1 (Repl. Vol. 1977) provides certain occupational classes with an exemption from jury service if they claim it. This section reads as follows:

The following may claim exemptions from serving on juries in civil and criminal cases:

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

4. Senator Emick's proposed bill read as follows: "§ 8.01-341. Exemptions from jury service.—Except as otherwise provided in this article [disqualifications and excuses of jurors] no qualified prospective juror is exempt from jury service." S.B.70, Va. Reg. Sess. (1980).

5. VA. CODE ANN. § 8.01-341.1 (Repl. Vol. 1977).

and Cobb Islands.⁶ Licensed practicing attorneys, however, along with several other occupational classes, remain automatically exempt from jury service. Consequently, they are not considered as prospective jurors when the master jury list is compiled.⁷

This comment will focus on why attorneys traditionally have been exempt from jury service and whether this exemption violates the fair cross-section principle for jury selection procedures as established by the Supreme Court.

II. DEVELOPMENT OF THE FAIR CROSS-SECTION PRINCIPLE

The sixth amendment of the United States Constitution guarantees an

6. VA. CODE ANN. § 8.01-341 (Cum. Supp. 1980) now reads:

The following shall be exempt from serving on juries in civil and criminal cases:

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

The amendments were approved by Governor Dalton on April 2, 1979 and became effective July 1, 1980.

7. VA. CODE ANN. §§ 8.01-345 to -352 (Repl. Vol. 1977 & Cum. Supp. 1980) prescribe the juror selection process in Virginia. A random selection technique is utilized whereby names are either mechanically or electronically selected, primarily from a current voter registration list. Questionnaires are then mailed to all persons selected, requesting their occupation, among other information. Upon receipt of the questionnaire, the jury commissioners apply the statutory exemptions specified in § 8.01-341 to the names selected.

accused in a criminal trial the right to trial by an "impartial jury."⁸ The breath of this guarantee was not defined by the Supreme Court until passage of the fourteenth amendment in 1868.⁹ Since 1868, the Supreme Court has considered several jury challenges, and in so doing, has grappled with defining what constitutes impartiality in jury selection procedures and the amount of evidence necessary to prove that government officials tampered with jury panels.¹⁰ The present interpretation of "impartial jury" can be traced primarily to four cases decided by the Supreme Court during the 1940's. It is from these decisions that the "fair cross-section" principle, as the standard for jury selection procedures in both federal and state courts, has evolved.

In *Smith v. Texas*,¹¹ a black petitioner charged with rape, challenged the composition of the indicting grand jury on the basis that while blacks constituted twenty percent of the population in his community, only five were summoned to serve over a period of seven years. In this same time period 494 white men were summoned. In reversing the conviction, the Supreme Court held that the use of juries as instruments of public justice contemplates "that the jury be a body truly representative of the community."¹²

Two years later in *Glasser v. United States*¹³ petitioners alleged that they were denied an impartial jury because the only female jurors who were selected to serve were members of the League of Women Voters; the views of the prosecution had been presented at League meetings on sev-

8. U.S. CONST. amend. VI. Article I § 8 of the Constitution of Virginia also guarantees that an accused in criminal prosecutions shall enjoy the right to trial by an "impartial jury of his vicinage." The word "vicinage" corresponds to the territorial jurisdiction of the court in which the venue of the crime is laid. *Newberry v. Commonwealth*, 192 Va. 819, 823, 66 S.E.2d 841, 843 (1951).

9. Until passage of the fourteenth amendment, state governments were bound only by their own constitutions. Consequently, relatively few civil liberties issues were generated for appellate review in the federal courts.

10. Some of the more widely cited cases include: *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Swain v. Alabama*, 380 U.S. 202 (1965); *Hoyt v. Florida*, 368 U.S. 57 (1961); *Fay v. New York*, 332 U.S. 261 (1947); *Ballard v. United States*, 329 U.S. 187 (1946); *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946); *Akins v. Texas*, 325 U.S. 398 (1945); *Glasser v. United States*, 315 U.S. 60 (1942); *Smith v. Texas*, 311 U.S. 128 (1940); *Norris v. Alabama*, 294 U.S. 587 (1935); *Thomas v. Texas*, 212 U.S. 278 (1909); *Strauder v. West Virginia*, 100 U.S. 303 (1880). For an extensive list of Supreme Court decisions involving jury selection see J. VAN DYKE, *JURY SELECTION PROCEDURES—OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 397 (1977).

11. 311 U.S. 128 (1940).

12. *Id.* at 130.

13. 315 U.S. 60 (1942).

eral occasions. Although the conviction was affirmed,¹⁴ the majority opined that a jury cannot be the organ of any one special class. For the first time the Court used the words "a cross-section of the community" as the standard for jury selection.¹⁵ In *Ballard v. United States*,¹⁶ another case involving sex discrimination in jury selection procedures, the Court decided that the intentional and systematic exclusion of women from jury service, like the exclusion of a racial, economic or social group, deprives the jury of the broad base it was designed to have. "Such action is operative to destroy the basic democratic and classlessness of jury personnel."¹⁷

The Court further developed the fair cross-section principle for *federal* jury proceedings in *Thiel v. Southern Pacific Co.*¹⁸ The petitioner in *Thiel* had brought suit against a railroad company for negligence. After demanding a jury trial, the petitioner moved to strike the entire panel, alleging that the clerk and jury commissioner of a federal district court deliberately and intentionally excluded daily wage earners from the jury lists, with business executives or those having the employer's view purposely selected for the panel. In ordering a new trial, Justice Marshall wrote:

The American tradition of trial by jury, considered in connection with either criminal or civil . . . proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. . . . This does not mean, of course, that every jury must contain representatives of all the *economic, social, religious, racial, political* and *geographical* groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups.¹⁹

These four cases applied the fair cross-section principle only to jury proceedings in the federal courts. Although the sixth amendment requirement of trial by "impartial jury" was imposed on the states in 1968,²⁰ it was not until 1975 that the Supreme Court in the leading decision of

14. The petitioners in this case filed an affidavit attesting to the manner in which the jury was selected. The prosecution did not stipulate to accept the affidavit as proof and consequently the Court held that the affidavit alone was insufficient proof of jury tampering.

15. See VAN DYKE, *supra* note 10, at 55 (quoting *Glasser v. United States*, 315 U.S. at 86).

16. 329 U.S. 187 (1946).

17. *Id.* at 195.

18. 328 U.S. 217 (1946). Although *Thiel* is a civil case, it is widely recognized as an integral decision in the Supreme Court's development of the sixth amendment doctrine concerning jury selection procedures in the federal courts.

19. *Id.* at 220 (citations omitted) (emphasis added).

20. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

*Taylor v. Louisiana*²¹ held the fair cross-section principle applicable to jury selection procedures in state *criminal* proceedings.²² In *Taylor*, the petitioner, a male, challenged the constitutionality of a Louisiana statute which provided that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service. Petitioner was convicted by a petit jury drawn from a venire in which no women were listed. However, women constituted fifty-three percent of eligible jurors in his community.²³ The petitioner claimed that he was deprived of his federal constitutional right to "a fair trial by jury of a representative segment of the community."²⁴ In reversing the judgment of the Louisiana Supreme Court and remanding the case for new proceedings, Justice White wrote for the majority: "We accept the fair cross-section requirement as *fundamental* to the jury trial guaranteed by the Sixth Amendment. . . . Restricting jury service to only special groups or excluding *identifiable segments* playing major roles in the community cannot be squared with the constitutional concept of jury trial."²⁵

It is now evident that jury selection procedures for criminal and civil cases in federal court, and at least criminal cases in state court, must comply with the fair cross-section principle. It must be emphasized, however, that the fair cross-section principle does not refer to the composition of each and every jury that is empaneled. The foregoing decisions require only that the master jury list or the panel of prospective jurors (from which actual jurors are chosen to serve) represent a fair cross-section of the community.

III. DO OCCUPATIONAL EXEMPTIONS VIOLATE THE FAIR CROSS-SECTION PRINCIPLE?

In deciding challenges to jury selection procedures, the Supreme Court has focused primarily on whether a "cognizable class" or "identifiable group" has been denied a fair share of seats on jury panels. The Court seemed to recognize a cognizable class as including only those groups which have been the subject of past discrimination or are susceptible to

21. 419 U.S. 522 (1975).

22. Although the right to trial by jury is to be "preserved" in state civil proceedings, the Supreme Court has not explicitly imposed the fair cross-section principle on jury selection procedures for such civil trials. See VAN DYKE, *supra* note 10, at 45-83.

23. Louisiana attempted to assert that the male petitioner had no standing to object to the exclusion of women because he was not a member of the excluded class. The Court held that there was no rule which prohibited such a challenge. 419 U.S. at 524.

24. *Id.*

25. *Id.* at 530 (emphasis added).

general discrimination.²⁶ For example, in *Smith* the Court recognized racial groups as a cognizable class. In *Ballard, Glasser and Taylor*, women were recognized as a cognizable class, and in *Thiel*, at least some members of the daily wage earning class were considered to be an identifiable group. The Court has concluded that exclusion of any of these groups "would pose a substantial threat that the *remaining pool* of jurors would not be representative of the community";²⁷ that is, jury venires would be composed of only one special or partisan class. Underlying this concern is the fear that removal of prospective jurors on the basis of race or gender would deprive the jury of varying qualities of *human nature* inherent in these different classes.²⁸

Yet, the Court has explicitly stated that the varying qualities of human nature, essential to a representative jury, would not be undermined by occupational exemptions,²⁹ perhaps implying that members of an excluded occupational class do *not* constitute a cognizable group.

In *Rawlins v. Georgia*,³⁰ a petitioner challenged his indictment by a grand jury which was chosen from a jury list that excluded doctors, ministers, lawyers, engineers, dentists and many other occupational classes, most of which are exempt in the majority of states today.³¹ In rejecting petitioner's challenge, the Court expressly held that since the exclusion was not the result of race or class prejudice "[t]he nature of the classes excluded was not such as was likely to affect the conduct of the members as jurymen, or to make them act otherwise than those who were drawn would act."³² The Court went on to say that "[a] state [could] . . . exclude certain classes on the *bona fide* ground that it was for the good of the community that their regular work . . . not be interrupted"³³

26. See VAN DYKE, *supra* note 10, at 51. It is Mr. Van Dyke's contention that the Court has thus far only interfered with selection procedures that perpetuate the inequities of our society and that underrepresent the poor, nonwhites, women, the young and the elderly. *Id.*

27. 419 U.S. at 534.

28. See *id.* at 537; *Peters v. Kiff*, 407 U.S. 493, 502-04 (1972); *Ballard v. United States*, 329 U.S. 187, 193-94 (1946).

29. But see 419 U.S. at 542 (Rehnquist, J., dissenting). Justice Rehnquist criticizes the majority's position that occupational exemptions do not rob the jury of "distinct qualities of human nature," while holding that the exclusion of women from jury service does. "[P]resumably doctors, lawyers, and other groups, whose frequent exemption from jury service is endorsed by the majority, also offer qualities as distinct and important as those at issue here."

30. 201 U.S. 638 (1906).

31. See note 37 *infra*.

32. 201 U.S. at 640 (emphasis added).

33. *Id.*

This same view was echoed by the Supreme Court as late as 1975 in *Taylor*.

The States are free to grant exemptions from jury service to individuals . . . engaged in particular occupations the uninterrupted performance of which is critical to the community's welfare. It would not appear that such exemptions would pose *substantial* threats that the remaining pool of jurors would not be representative of the community.³⁴

Furthermore, the Court has never required that jury venires or master lists totally represent all segments of the population within a community, but only that they be "reasonably" or "fairly" representative.³⁵

Thus, it seems that state statutes providing occupational exemptions do not violate the fair cross-section principle established by the Supreme Court. The standard is apparently more concerned with ensuring representation of individuals possessing various physical traits and characteristics, than with ensuring a representative jury in terms of occupation.

IV. TRADITIONAL JUSTIFICATIONS FOR EXEMPTING ATTORNEYS

Although *Taylor* did not specifically require that states rescind their occupational exemptions, several states have voluntarily eliminated some or all of the exemptions,³⁶ including the one for attorneys.³⁷ Yet, in the

34. 419 U.S. at 534 (citation omitted) (emphasis added).

35. *Id.* at 538.

36. This voluntary action on the part of many states demonstrates an awareness that jury lists should perhaps be broadened. Even before the Court handed down its most recent interpretation of an impartial jury in *Taylor*, Congress passed the Federal Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-69 (1976). The Act provides that automatic exemptions will be granted only for "(i) members in active service in the Armed Forces of the United States; (ii) members of the fire or police departments of any State, district, territory, possession, or subdivision thereof; and (iii) public officers in the executive, legislative, or judicial branches of the Government of the United States, or any State, district, territory or possession or subdivision thereof, who are actively engaged in the performance of official duties." 28 U.S.C. § 1863(b)(6). The Act also provides that groups of persons or occupational classes whose members shall on an individual basis request excuse, will be excused only if the district court finds that jury service by such class or group would entail undue hardship or extreme inconvenience to its members. 28 U.S.C. § 1863(b)(5).

37. The states which have eliminated the automatic exemption for attorneys as of this writing are: ALA. CODE § 12-16-62 (1975); ARIZ. REV. STAT. ANN. § 21-202 (1975); CAL. CIV. PRO. CODE § 200 (West Supp. 1979); COLO. REV. STAT. § 13-71-112 (1973); FLA. STAT. ANN. § 40.013 (West Supp. 1980); Idaho (no specific section); Indiana (no specific section); KAN. STAT. ANN. §§ 43-159 (1973); KY. REV. STAT. ANN. § 29A-090 (Baldwin Cum. Issue 1979); MD. CTS. & JUD. PROC. CODE ANN. § 8-209 (Repl. Vol. 1980); MINN. STAT. ANN. § 593.44 (West Cum. Supp. 1979); NEB. REV. STAT. § 25-1601(2) (1975); N.J. STAT. ANN. § 2A:69-2 (West 1976); N.M. STAT. ANN. § 38-5-2 (1978); N.Y. JUD. LAW § 512 (McKinney Cum. Supp.

majority of states, attorneys still enjoy an automatic exemption. The purpose of this exemption is unclear.

It seems that the traditional justification for occupational exemptions in general was that some persons perform such vital services for the community that it would be wasteful to use their time as jurors.³⁸ This reason seems more tenable for doctors or police officers than for attorneys.³⁹ The availability of more than one source for legal services, seems to obviate this justification.⁴⁰

Another explanation frequently proffered to justify exempting attorneys from jury service is that attorneys are *impliedly* biased because of their professional relationship with the judicial system. In *Harrison v. State*,⁴¹ the Indiana Supreme Court expressed a concern in having attorneys serve as jurors. "An attorney at law is an officer of the Court . . . and as such he is interested in, and an integral part of the judicial ma-

1979); N.C. GEN. STAT. § 9-6 (Repl. Vol. 1969); N.D. CENT. CODE § 27-09.1-10 (Repl. Vol. 1974); OHIO REV. CODE ANN. § 2313.12, .16 (Baldwin 1975); 1979 Or. Laws § 1, ch. 728 (effective July 1, 1980, repealing OR. REV. STAT. § 10.040 (1979)); 1977 Pa. Laws 202, No. 53, § 2(a) (repealing PA. STAT. ANN. tit.17, § 1333 (Purdon Cum. Supp. 1980)); TEX. REV. CIV. STAT. ANN. art. 2135 (Vernon 1979); UTAH CODE ANN. § 78-46-14 (Supp. 1979); WASH. REV. CODE ANN. § 2.36.080 (Cum. Supp. 1980); W.VA. CODE § 52-1-2 (1966); Wyo. STAT. § 1-11-103 (1977).

For a detailed chart of the specific occupational exemptions existing, as of 1977, in the various states, see VAN DYKE at 272-79.

For an informative article on the impact of eliminating occupational exemptions in Riverside County, California see Brown, *Eliminating Exemptions from Jury Duty: What Impact Will It Have?*, 62 JUD. 436 (1979). Mr. Brown concluded that the elimination of California's statutory exemptions led to the inclusion of more than 120 citizens who otherwise would have avoided jury duty.

38. *Taylor v. Louisiana*, 419 U.S. at 534; *Rawlins v. Georgia*, 201 U.S. at 640.

39. Although the Supreme Court has not specifically announced the standard by which challenges to jury selection procedures will be reviewed, it is clear that mere "rational" reasons will not be sufficient to justify excluding a distinctive class from jury service. In *Taylor*, the Court recognized that a jury drawn from a fair cross-section of the community is "fundamental to the American system of justice," and that "weightier reasons" must be tendered if a distinctive class is to be excluded from service. 419 U.S. at 530, 534. The question left unanswered is whether attorneys constitute a distinct class. See text accompanying notes 26-29.

40. A fairly new juror management program which further erodes this traditional justification is the one day/one trial jury system. This system requires a citizen to report for only one day of jury duty unless he is selected to serve on a trial jury. For details of the system and sources to contact see LEAA JUROR USAGE AND MANAGEMENT PROGRAM, CENTER FOR JURY STUDIES, NEWSLETTER, (Nos. 1 & 6, 1979). The address of the Center for Jury Studies is 6723 Whittier Ave., McLean, Va. 22101.

41. 231 Ind. 147, 106 N.E.2d 912 (1952).

chinery which administers justice."⁴² The court found that prejudicial error had not been committed when the lower court overruled appellant's challenge to the array of jurors because attorneys were excluded. The court noted that while attorneys are not public officials, they can be excluded on the same grounds; they may have a public interest in the case.⁴³ Another court held attorneys to be impliedly biased because of the likelihood that they will be acquainted with the attorneys involved in the case and familiar with their professional reputations.⁴⁴

Neither of these reasons seems to justify excluding attorneys, as a class, from jury service. The proper concern should be whether an individual prospective juror has any knowledge or biases about the particular trial, including the facts and individuals involved in the case. Bias should not be presumed from one's status. The general conclusion among commentators who have attempted to document the many factors affecting juror behavior is that all jurors are inevitably biased, to some extent, due to their personal and occupational experiences.⁴⁵ The voir dire examination is the procedure by which individuals with extreme biases are eliminated from jury service. Thus, as with other prospective jurors, a voir dire of attorneys would expose any "damaging" biases held by the individual attorney-prospective juror.

A more important concern, however, seems to be the belief that attorneys will exert an unusual amount of influence over the other jurors because of their legal training. Although this may in fact be true, the automatic exclusion of "licensed practicing attorneys" from jury service does not alleviate this danger. The Virginia statutory exemption does not apply to those individuals who have had legal training but are not licensed to practice law, or to those who have had legal training and are licensed to practice law but are engaged in nonlegal occupation. The partial inclusion of persons falling within these latter categories casts doubt on the suggested rationale of the automatic exemption of "licensed practicing attorneys," since they have the ability, like "licensed practicing attorneys" to exert the same type of influence over other jurors not so trained.

This is not to say that an amendment to the statute which would encompass these individuals would be appropriate. The possibility that at-

42. *Id.* at 158, 106 N.E.2d at 919.

43. *Id.* at 160, 106 N.E.2d at 919-20. See also Annot., 72 A.L.R.3d 895 (1976).

44. *Commonwealth v. Kloch*, 230 Pa. Super. Ct. 563, —, 327A.2d 375, 388 (1974).

45. For some of the more noted articles dealing with this issue see Broeder, *Occupational Expertise and Bias as Affecting Juror Behavior: A Preliminary Look*, 40 N.Y.U.L. Rev. 1079 (1965); Broeder, *The University of Chicago Jury Project*, 38 NEB. L. Rev. 744 (1959); Hermann, *Occupations of Jurors as an Influence on Their Verdict*, 5 F. 150 (1970).

torneys may control jury deliberations should not be a unique concern. A study⁴⁶ of 225 jurors serving in 23 jury trials within a single federal district concluded generally that those jurors evincing special knowledge or expertise, by virtue of their occupation in such fields as engineering, medicine, or mechanical technology, for example, educated the other jurors when the issues in the case related to their particular expertise. In fact, in some of the cases documented, these experts were the only individuals on the panel who were able to understand the facts of the case, the issues involved and the testimony given.

It is difficult to see how jurors can be insulated from the inevitable influence of "experts" in the course of jury deliberations. The potential for influence by an attorney-juror who may lecture other jurors on concepts such as negligence or preponderance of the evidence, however, deserves no greater concern than the situation where an "expert" *erroneously* lectures fellow jurors on issues thought to be involved in the case. In the instance where an individual attorney appears to be extremely prosecution or defense oriented, he can be preemptorily challenged as any other biased juror would be.⁴⁷

V. THE RIGHT TO SERVE ON A JURY

Throughout this comment the occupational exemptions have been considered from the legislature's point of view. It is equally important, however, to view the situation from the perspective of the exempt individual.

While an attorney is not disqualified from serving on a jury solely by virtue of his status,⁴⁸ the automatic exemption may infringe on his/her right to be considered equally with all other citizens for jury service. In *Carter v. Jury Commission*,⁴⁹ the Supreme Court, for the first time, permitted citizens to challenge jury selection procedures on the ground that they were systematically excluded from consideration as potential jurors. In recognizing an individual's right to *equal* consideration in the selection

46. Broeder, *Occupational Expertise and Bias as Affecting Juror Behavior: A Preliminary Look*, 40 N.Y.U.L. REV. 1079 (1965).

47. Although the preemptory challenge may be used to eliminate prospective jurors who may demonstrate a particular bias, at least two jurisdictions have held that such challenges cannot be used to exclude prospective jurors solely by virtue of their membership in or affiliation with a particular group in the community. See *People v. Wheeler*, 22 Cal.3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); *Commonwealth v. Soares*, — Mass. —, 387 N.E.2d 499 (1979).

48. VA. CODE ANN. § 8.01-338 (Repl. Vol. 1977) specifies that persons adjudged legally or mentally incompetent, convicted of treason or a felony, addicted to drugs or alcohol, of advanced age or impaired health shall be disqualified from serving as jurors.

49. 396 U.S. 320 (1970).

of jurors, the Supreme Court said "[w]hether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others"⁵⁰

While this decision may indeed be a positive step toward broadening jury lists, it must be recognized that *Carter* involved a discretionary selection system; one in which appointed jury commissioners collected names of prospective jurors through personal recommendations. Since the discretionary method provides an opportunity for discrimination, the Court will review such a system more rigorously than when jurors are selected by a more random process.⁵¹ Where a random selection process exists and the source list for prospective jurors is relatively standard, for example, a voter registration list, it is difficult to establish a deliberate or intentional act on the part of state officials to exclude individuals from the master source list. Thus, the Court is less likely to interfere when challenges are asserted against the random system.⁵² Although the Court in *Carter* did not declare unconstitutional the discretionary system operating in Alabama, it did emphasize that if a state desires to use discretionary criteria, it has an affirmative duty to seek out persons from all sectors of the community.⁵³

Whether *Carter* will be a basis for challenging an exclusion from jury service in a random selection system remains to be seen.⁵⁴ A potential juror may rely on the Supreme Court's decision in *Thiel* to challenge a blanket exemption in favor of establishing an individual determination of availability to serve. In *Thiel*, the Court specifically held that

50. *Id.* at 330 (statement is based on a determination of racial discrimination).

51. See VAN DYKE, *supra* note 10, at 49-50.

52. While attorneys are given a blanket exemption, they are not excluded because of a racial, economic, religious or gender-based discriminatory motive. Any attorney wishing to serve need only express his desire on the questionnaire he returns to the jury commissioner.

53. 396 U.S. at 331-40.

54. In *Archer v. Mayes*, 213 Va. 633, 194 S.E.2d 707 (1973), the Virginia Supreme Court entertained a somewhat similar question. Complainants challenged a Virginia statute providing an optional exemption for women responsible for the maintenance of children, mental incompetents and those suffering physical impairments. Complainants, a man and woman, qualified to serve as jurors and desirous of doing so, alleged that the exemption discriminated against men in favor of women and therefore violated the United States and Virginia constitutions. The Virginia Supreme Court held that despite the exemption, the jury commissioner was able to insure a fair cross-section of the community and therefore the exemption is constitutional. The court specifically said that "[a]ppellants are in no different position than every eligible person in the county who desires to serve as a juror but has not been called." *Id.* at 641.

This optional exemption still exists today, but it applies to "a person." VA. CODE ANN. § 8.01-341.1 (Repl. Vol. 1977).

"[r]ecognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. *Jury competence is an individual rather than a group or class matter.*"⁵⁵

Whether blanket exemptions should be eliminated in favor of an individual grant of excuse by the court is debatable.⁵⁶ Since the *Carter* decision, courts may be more apt to entertain the argument that each prospective juror is entitled to equal consideration.⁵⁷

VI. CONCLUSION

The courts and the majority of state legislatures have, until recently, perpetuated the automatic exemption of attorneys from jury service. The difficulty in articulating the rationale of the automatic exemption for attorneys, however, points out that indeed there may not be a valid justification for such treatment. If Senator Emick proposes his bill in the 1981 session of the Virginia General Assembly, the Committee for Courts of Justice should seriously consider whether the traditional reasons for exempting attorneys from jury service are valid today.

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55. 328 U.S. at 220 (emphasis added).

56. One of the rationales for granting blanket exemptions is administrative convenience; in many cases those individuals exempt would have been individually excused had they so requested. It would seem that this justification should not work to vitiate the "right" to be considered for jury service, or to dilute the representativeness of the jury. The Supreme Court has so stated as much in *Taylor v. Louisiana*, 419 U.S. at 535, at least where a large cognizable class is involved. Yet, in *Archer v. Mayes*, 213 Va. 633, 194 S.E.2d 707 (1973) the Virginia Supreme Court recognized it was not irrational for the state legislature to consider preferable a broad exemption over an individual excuse system, for purposes of administrative convenience. *Id.* at 636, 194 S.E.2d at 709.

If blanket exemptions are to be eliminated in exchange for an individual excuse system, uniform guidelines must be established to govern the circumstances in which excuses are to be granted so that the already high percentage of excuses granted is not increased. See CENTER FOR JURY STUDIES, *METHODOLOGY MANUAL FOR JURY SYSTEMS* (1980) for an outline of suggestions to improve jury systems by eliminating exemptions and limiting the instances for individual excuses.

57. One interesting initiative was taken by Joe Romanow, Jury Commissioner of Middlesex County, Massachusetts. Mr. Ramanow introduced the Juror's "Bill of Rights," which is not a legal imperative, but serves to notify a juror of what he may expect from a well-managed jury system. One such "right" is to be fairly selected by random procedure, as opposed to purposeful selection, and to have the master list include all qualified jurors from every occupation. Another "right" specifies freedom from exclusion on the basis of categorical criteria. For other enumerated rights see LEAA JUROR USAGE AND MANAGEMENT PROGRAM, CENTER FOR JURY STUDIES, NEWSLETTER (No. 5, 1979).

