

2003

ESSAY: A Call For Jury Patriotism: Why the Jury System Must Be Improved for Californians Called to Serve

Mark A. Behrens

M. Kevin Underhill

Follow this and additional works at: <http://scholarlycommons.law.cwsl.edu/cwlr>

Recommended Citation

Behrens, Mark A. and Underhill, M. Kevin (2003) "ESSAY: A Call For Jury Patriotism: Why the Jury System Must Be Improved for Californians Called to Serve," *California Western Law Review*: Vol. 40: No. 1, Article 4.
Available at: <http://scholarlycommons.law.cwsl.edu/cwlr/vol40/iss1/4>

This Article is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized administrator of CWSL Scholarly Commons. For more information, please contact alm@cwsl.edu.

ESSAY

A CALL FOR JURY PATRIOTISM: WHY THE JURY SYSTEM MUST BE IMPROVED FOR CALIFORNIANS

CALLED TO SERVE

MARK A. BEHRENS*

M. KEVIN UNDERHILL**

Ask any adult citizen on the street whether they support the jury system and a substantial majority will probably say, "Yes, of course." According to an American Bar Association (ABA) opinion poll, seventy-eight percent of the public rate our jury system as the fairest method of determining guilt or innocence; sixty percent consider juries to be the most important part of the justice system.¹ Polling by the Association of Trial Lawyers of America (ATLA) found that eighty-five percent of people surveyed agreed with the statement, "I trust juries, who are made up of people like myself, my friends and my neighbors, to make the right decision."² Today, California law recognizes "that trial by jury is a cherished constitutional right, and that jury service is an obligation of citizenship."³

Many citizens, however, seem to want no part of the system they claim to embrace with such support. According to the American Judicature Society, about twenty percent of those summoned to jury duty each year in state courts do not respond.⁴ The problem may be worse in California. According

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

** M. Kevin Underhill is of counsel to Shook, Hardy & Bacon L.L.P. in San Francisco, California. He received a B.A. in Political Science and History from the University of Kansas in 1988, and a J.D. from Georgetown University Law School in 1993, where he served on the *American Criminal Law Review*.

1. See AM. BAR ASS'N, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 6-7 (1998), available at <http://www.abanet.org/media/perception/perceptions.pdf> (last visited Oct. 22, 2003).

2. David S. Casey, Jr., *Free Speech and the Jury Trial*, TRIAL, Aug. 2003, at 9.

3. CAL. CIV. PROC. CODE § 191 (West 1988). See also U.S. CONST. art. III, § 2, cl. 3 and amend. VI; U.S. CONST. amend. VII; CAL. CONST. art. I, § 16.

4. See ROBERT G. BOATRIGHT, IMPROVING CITIZEN RESPONSE TO JURY SUMMONSES: A

to a 2002 study, over forty percent of those summoned for jury service in California either failed to respond or were excused after claiming that service would be too much of a hardship.⁵ It has been estimated that *half* of the four million people sent jury affidavits in Los Angeles County in recent years failed to respond.⁶ A portion of these no-shows can be attributed to out-of-date records and summonses that were mailed to the wrong address, but probably not most of them. Many citizens are simply choosing to ignore their civic obligation and opportunity to serve.

Is poor juror turnout a sign that citizens are apathetic about our democracy or is something more going on?⁷ Consider that 1.4 million Californians recently signed a petition to hold a midterm recall election of Governor Gray Davis.⁸ Approximately 8.6 million people, or about fifty-six percent of registered voters, then turned out for the special election that resulted in the selection of a new state executive, Governor Arnold Schwarzenegger.⁹ Or, consider the devotion to country of the volunteers engaged in the recent military conflicts in Afghanistan and Iraq. Think about how you felt after the September 11, 2001 terrorist attacks. Look around for very long and you are likely to see a flag flying somewhere, a patriotic bumper sticker of some sort, or a person wearing a lapel pin with the Stars and Stripes on it. Clearly, most Americans are not indifferent about our country.

It is, therefore, important to consider why so many citizens have such negative feelings about jury service, and to find ways to relieve their concerns.¹⁰ The Judicial Council of California recognized this need as far back

REPORT WITH RECOMMENDATIONS 13 (Am. Judicature Soc'y 1998). Others have estimated that as many as two-thirds of the approximately 15 million Americans summoned to jury service each year fail to report for jury duty. See David Schneider, *Jury Deliberations and the Need for Jury Reform: An Outsider's View*, 36 JUDGES' J., no. 4, at 25 (Fall 1997).

5. See Daniel Klerman, *ATRA's Report on Jury Service in California*, Sept. 19, 2002, at 5, available at http://www.atra.org/reports/CA_juries/ (last visited Oct. 22, 2003).

6. See Judicial Council of California, Administrative Office of the Courts, *Request for Proposals*, Apr. 17, 2003, at 1, available at <http://www.courtinfo.ca.gov/reference/rfp/documents/juryserv.pdf> (last visited Oct. 22, 2003).

7. See Jessica Zisko, Editorial, *The Jury Duty Dilemma: Why Do We Hate It So?*, U-WIRE, Apr. 24, 2002, available at 2002 WL 19553783 ("Where did my 'Ra-Ra America' spirit go? Sadly, a majority of the people called for jury duty have this negative attitude. Somewhere between our founding fathers and our palm pilots, jury duty became a bad ex-boyfriend – disrupting and better if avoided.").

8. See Cal. Secretary of State Kevin Shelley, *Recall Signature Update*, http://www.ss.ca.gov/elections/recall_sigs.htm (last visited Oct. 22, 2003).

9. See Cal. Secretary of State Kevin Shelley, *Statewide Special Election*, Oct. 7, 2003, <http://vote2003.ss.ca.gov>Returns/summary.html> (last visited Oct. 22, 2003); see also Assoc. Press, *Tuesday's California Recall Election by the Numbers*, Oct. 7, 2003 (noting that there were 15,380,536 registered voters in California at the time of the recall election and providing other California voter statistics) available at <http://www.foxnews.com/story/0,2933,99274,00.html> (last visited Oct. 22, 2003).

10. See generally J. Thomas Munsterman & Paula L. Hannaford, *Reshaping the Bedrock of Democracy: American Jury Reform During the Last 30 Years*, 36 JUDGES' J., no. 4, at 5 (Fall 1997) (providing an insightful discussion of administrative, structural, and procedural reforms adopted by state courts and legislatures to increase the representativeness and effec

as 1995 when it created a Blue Ribbon Commission on Jury System Improvement, with the State Bar of California and the California Judges Association as supporting sponsors. The Commission eventually recommended nearly sixty improvements to California's jury system, most of which were approved by the Judicial Council in May 1996.¹¹ In 1998, the Judicial Council formed a Task Force on Jury System Improvements to oversee the implementation of the Commission's recommendations. After years of study, the Task Force issued its final report in April 2003.¹²

Several of the reforms recommended by the Task Force have been implemented in California, including a "one-day/one-trial" term of service,¹³ restrictions on the use of bogus or flimsy hardship excuses,¹⁴ and the first increase of any kind in juror pay since 1957.¹⁵ These reforms improved California's jury system. The California courts can take other steps to make jury service a more pleasant experience for people called to serve, such as improving juror facilities,¹⁶ engaging in public outreach,¹⁷ and continuing efforts to make jury instructions more clear and understandable to ordinary

tiveness of juries).

11. A summary of the Blue Ribbon Commission's recommendations is available online at <http://www.courtinfo.ca.gov/jury/blueribrept.htm> (last visited Oct. 22, 2003).

12. See JUDICIAL COUNCIL OF CALIFORNIA, ADMINISTRATIVE OFFICE OF THE COURTS, FINAL REPORT: TASK FORCE ON JURY SYSTEM IMPROVEMENTS (Apr. 15, 2003), available at http://www.courtinfo.ca.gov/reference/documents/tfsji_final.pdf (last visited Oct. 22, 2003) [hereinafter TASK FORCE REP.].

13. See *id.* at 4, 39-42.

14. *Id.* at 4, 22-23.

15. *Id.* at 4, 45-48.

16. For example, a Baton Rouge, Louisiana trial court recently decided to use the local library as its waiting room. This was well received by jurors. See Ed Cullen, *The Verdict is In: Jury Pool Members Like New Library Setup*, BATON ROUGE ADVOC., July 7, 2002, at 1H, available at 2002 WL 5038617. See also James Needham, *A Citizen's Suggestions for Minimum Standards for Jury Facilities and Juror Treatment*, 36 JUDGES' J., no. 4, at 32 (Fall 1997) (suggesting ways to improve treatment of jurors in the courthouse); Monte Morin, *New Room Caters to Plugged-In O.C. Jurors*, L.A. TIMES, May 14, 2002, at B5, available at 2002 WL 2475506 (describing Orange County jury assembly room with 24 study carrels with modem connections so jurors can send and receive e-mail or access their office, along with a network of 7 large-screen televisions and ergonomically designed chairs).

17. Educational outreach can play an important part in building and reaffirming the importance of jury service. Missouri provides an example. In April 2003, Missouri courts celebrated Juror Appreciation Week. Some courts provided donuts and coffee to each person arriving at the courthouse for jury duty. Another court gave bookmarks to jurors, imprinted with a flag and message of thanks for serving. See *Missouri's Juror Appreciation Week To Be Celebrated Next Week*, DAILY RECORD (Kansas City, Mo.), Apr. 23, 2003, available at 2003 WL 16066432. Another educational initiative in Missouri, a program called "We the Jury," seeks to educate high school students regarding the importance of jury service. The program format is a fifty-minute video that provides a brief history of juries, how a jury is selected, and what to expect during a trial. The video includes clips of Missouri Supreme Court Justices who stress that jury service is an important obligation of citizenship in this country.

citizens.¹⁸ The California legislature can and should play an important role in jury system improvements as well.¹⁹

Recently, the American Legislative Exchange Council (ALEC), the nation's largest bipartisan membership organization of state legislators, examined the barriers that frustrate jury service in California and elsewhere. ALEC found that many citizens are frustrated by a system that is on the whole not very "user friendly." In addition, many people who would like to serve on a jury are unable to do so as a practical matter because of the financial burden that jury service may impose upon them, their families, and their businesses. ALEC's study of these problems resulted in the development of a model law called the "Jury Patriotism Act."²⁰ The model bill would promote jury service by alleviating the inconvenience and financial burden placed on those called to serve, while making it more difficult for people to escape from jury service without showing true hardship.²¹

The Jury Patriotism Act finds support across the political spectrum. Just a few of its supporters include the Council of State Governments,²² AFL-CIO,²³ National Black Chamber of Commerce,²⁴ National Association of Manufacturers,²⁵ and National Association of Wholesaler-Distributors.²⁶ Elected officials have responded to this broad-based support. Within months after its development in the winter of 2002/2003, laws based on the model Jury Patriotism Act were enacted in Arizona, Louisiana, and Utah.²⁷

18. See TASK FORCE REP., *supra* note 12, at 4, 39-42.

19. See AM. BAR ASS'N, REPORT OF THE ABA COMMISSION ON THE 21ST CENTURY JUDICIARY 86 (Mar. 2003) (stating that "[m]eaningful steps should be taken to ensure that every jury pool represents a fair cross-section of the community from which it is drawn.").

20. JURY PATRIOTISM ACT (Am. Legislative Exch. Council, 2003), available at <http://www.alec.org/viewpage.cfm?pgname=2.1cc43> (last visited Nov. 3, 2003) [hereinafter JURY PATRIOTISM ACT]. See also Victor E. Schwartz et al., *The Jury Patriotism Act: Making Jury Service More Appealing and Rewarding to Citizens*, THE STATE FACTOR (Am. Legislative Exch. Council, Apr. 2003), available at <http://www.alec.org/meSWFiles/pdf/0309.pdf> (last visited Oct. 15, 2003).

21. See Jane Robison, Editorial, *Jury Duty: A Revealing Look Inside the Justice System*, L.A. DAILY NEWS, Jan. 28, 2001, at V1, available at 2001 WL 6050175 (stating that jury service may be viewed as an unwelcome burden, but "[i]t's a chore every American should be forced to do at least one time in his or her life.").

22. The Council of State Governments, Committee on Suggested State Legislation, Recommendations and Meeting Minutes, Docket 24C (Oct. 26, 2003), at <http://ssl.csg.org/dockets/24cycle/2004C/24docmins/24minutes.doc>.

23. Telephone Interview by Lewis Maltby, President, National Work Rights Institute, with Joanna Webb-Gauvin, American Federation of State, County and Municipal Employees Council 31, AFL-CIO (Mar. 11, 2003).

24. Resolution in Support of Jury Service, National Black Chamber of Commerce, Inc. (Aug. 2, 2003) (on file with author).

25. E-mail from Jan Amundson, General Counsel and Senior Vice President, National Association of Manufacturers, to Mark Behrens (Dec. 16, 2003) (on file with author).

26. Press Release, National Association of Wholesaler-Distributors, NAW Endorses Jury Patriotism Act (May 29, 2003) (on file with author).

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

This article highlights some problems with the California jury system and explains why legislation based on the Jury Patriotism Act should be enacted to address those issues.

I. JURY SERVICE SHOULD NOT REQUIRE GREAT FINANCIAL HARDSHIP

From 1957 until 2000, California paid jurors no more than five dollars per day to compensate them for their service.²⁸ Today, things are only slightly better. Jurors receive fifteen dollars per day and thirty-four cents per mile (one way), after the first day of service.²⁹ That does not even cover the cost of transportation, parking, and lunch (especially in expensive urban areas such as San Diego, Los Angeles, and San Francisco), let alone compensate jurors for lost wages.

Most private employers in California have no obligation to pay their employees for time spent in jury service.³⁰ Many choose to do so voluntarily, but a 2001 report prepared for the Los Angeles County Superior Court found that 13.5% of private employers in that area do not pay their employees at all during jury service.³¹ The same survey found that only twenty-two percent of employers pay their employees their full wages during their entire period of jury service, and that forty-three percent of employers provided ten paid days of jury service.³² Across the board, the study showed a significant decrease since 1995 in the percentage of employers paying their employees during jury service.³³ In response, the Los Angeles County Board of Supervisors passed regulations requiring certain state contractors doing over \$50,000 in annual business with the county to compensate their full time employees during the first five days of jury service.³⁴ While some Los Angeles workers benefit from this rule, the vast majority of Californians receive

on Mar. 17, 2003); H.B. 2008, 2003 Reg. Sess. (La. 2003) (signed by Gov. Mike Foster on June 27, 2003). Legislation based on some recommendations contained in the model Jury Patriotism Act was introduced in the California Legislature in 2003. See Cal. A.B. 1180, 2003-04 Reg. Sess., introduced by Assembly Member Harman, Feb. 21, 2003; Cal. A.B. 1397, 2003-04 Reg. Sess., introduced by Assembly Member Longville, Feb. 21, 2003.

28. See *Chief Justice George Applauds New California Court Budget*, in THE CAPITOL CONNECTION Vol. 2, Issue 5, at 1 (Judicial Council of California's Office of Governmental Affairs, July 20, 2000), http://www.courtinfo.ca.gov/courtadmin/aoc/documents/capcon_0700.pdf.

29. See CAL. CIV. PROC. CODE § 215(a)-(b) (West 2002).

30. See *Fewer Employers Give Workers Jury Duty Pay*, PRESS-ENTERPRISE (Riverside, Cal.), July 19, 2001, at A5, available at 2001 WL 20844734; *The Price of Justice*, L.A. TIMES, July 20, 2001, at B14, available at 2001 WL 2504475.

31. Troy Anderson, *Jury Pay Would be Required; Firms Would Have to Provide 5 Days' Wages*, L.A. DAILY NEWS, Jan. 30, 2002, at N4, available at 2002 WL 5529684.

32. See *id.*

33. See *id.*

34. See LOS ANGELES COUNTY, CAL., CODE §§ 2.203.010-.090; see also L.A. County Online, *Jury Service Program*, at http://lacounty.info/doing_business/jury_service.htm (last visited Oct. 22, 2003).

no more than the miniscule fee from the state. Consequently, even a short period of service could result in relatively significant economic hardship for many Californians.

The lack of available compensation may be particularly troublesome for jurors selected to serve on lengthy trials. Such trials are uncommon,³⁵ but jurors who find themselves called to serve on a lengthy trial may be subject to extreme financial hardship.³⁶ As one Napa County housepainter who served on an extended trial and lost over \$3,500 in income told the *San Francisco Chronicle*, "When I started jury duty, I had a nice savings. Now I'm itching and scratching just to get by."³⁷

Lack of adequate compensation for jurors has several unfortunate results. Some potential jurors may opt to simply not show up. Those with jobs who will lose their salary during jury service are likely to plead hardship, particularly when the trial is expected to be lengthy.³⁸ Courts often find they have no other choice, given that they do not have the resources to provide any significant compensation above the jury fee. As the ABA has observed:

The minimal size of the daily fee means that "[f]ew persons making more than the minimum wage can afford [the] . . . sudden and involuntary cut in pay" imposed by jury service. As a result, excuses from jury service because of economic hardship are common in many jurisdictions for laborers, sales people, unemployed parents with child care expenses, and sole proprietors of small businesses. Only those who are not employed or

35. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS 166, tbl. C-8 (2002), available at <http://www.uscourts.gov/judbus2002/contents.html> (last visited Oct. 22, 2003) (finding that seventy-five percent of all civil and criminal trials in the federal courts were completed within three days and four percent extended beyond nine days during the 12-month period ending September 30, 2001); U.S. DEP'T OF JUSTICE, *Civil Trial Cases and Verdicts in Large Counties*, 1996, BUREAU OF JUSTICE STATISTICS BULL., Sept., 1999, at 13, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc96.pdf> (last visited Oct. 22, 2003) (finding that the median number of days in jury trials in the nation's 75 largest counties was three days).

36. Federal law recognizes the need for special compensation for those selected to serve on lengthy trials. Currently, those who serve longer than thirty days as a petit juror in federal court receive an additional ten dollars on top of the forty-dollar juror fee for each day in attendance. See 28 U.S.C. § 1871(b)(1)-(2) (2003). See also H.R. REP. NO. 107-700, at 14 (2002) (House Committee on the Judiciary Report on the Federal Courts Improvement Act of 2002) (recognizing "the hardships encountered when serving on a jury for an extended period of time.").

37. Torri Minton, *Jurors Sometimes Get The Harshest Punishment at Trials / \$15-A-Day Pay Doesn't Come Close to Making Up For Lost Wages*, SAN FRANCISCO CHRON., Dec. 16, 2001, at J1, available at 2001 WL 3422660.

38. See Ryan Oliver, *Officials Institute Jury Duty Reforms; New System Means More Calls to Serve*, L.A. DAILY NEWS, July 21, 2002, at N3, available at 2002 WL 5542011 (quoting a self-employed hair stylist from Reseda as saying, "I want to be a good citizen. But if they picked me, there's no way I could serve a week or more on a jury. It's good if you get compensated by your employer, but there's just some people that can't do it.").

whose employer will continue to pay their salary are then available for jury service.³⁹

As a result, the basic democratic right to be tried by a jury of one's peers may be illusory,⁴⁰ replaced by a non-diverse jury that is basically composed of non-working individuals, and some citizens who continue to be paid by their employers. When managers, doctors, accountants, scientists, executives, and other professionals are not present on juries, the judicial system does not benefit from their life experiences or education. For instance, in a trial involving a corporate defendant, the jury would benefit from the participation of jurors with experience in the business environment. Likewise, a scientist could be helpful in evaluating expert testimony or a financial professional could be of use in arriving at a fair and reasonable damage award.

Unrepresentative juries may lead to arbitrary results for plaintiffs, defendants, and prosecutors. Some jurors may even believe that their role is to transfer wealth and not render justice on the merits of the case. Plaintiffs and defendants all would benefit from the diverse perspectives of a truly representative petit jury.⁴¹ As a report of the ABA Commission on the 21st Century Judiciary recently concluded: "Meaningful steps should be taken to ensure that every jury pool represents a fair cross-section of the community from which it is drawn."⁴²

Offering meager compensation to jurors also shows a lack of appreciation for jury service, likely contributing to citizens feeling disgruntled and unwilling to serve. Recently, Judge Dallas Holmes, Chair of the California Judicial Council's Task Force, wrote that "[o]f all the signs of respect we can show our jurors, this is the key . . . \$40 a day [the recommended amount] is not much, but at least it shows the 100,000 or so law-abiding citizens we compel into our courthouses every week that we value their time and effort and realize we need both to make our judicial system work."⁴³ He described

39. AM. BAR ASS'N, STANDARDS RELATED TO JUROR USE AND MANAGEMENT 133-34 (1993) (quoting JON VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE JURY PANELS 112 (1977) and JANICE T. MUNSTERMAN ET AL., THE RELATIONSHIP OF JUROR FEES AND TERMS OF SERVICE TO JURY SYSTEM PERFORMANCE (1991)) [hereinafter ABA STANDARDS].

40. See Editorial, *Civic Duty: Paying for Jury Service*, PRESS-ENTERPRISE (Riverside, Cal.), May 16, 2003, at A14, available at 2003 WL 19924749 (stating that unrepresentative juries weaken the constitutional principle of a trial by a jury of one's peers).

41. See Jean Guccione, *Even Judges Heed the Call to Jury Duty When Summoned to Serve, Officers of the Court are Required to Show Up, Set an Example*, L.A. TIMES, May 16, 2003, at B2, available at 2003 WL 2405606 (quoting Riverside Superior Court Judge Dallas Holmes, who chairs the California state jury task force as saying, "We want the cross-section of doctors, lawyers, blue-collar workers and white-collar workers" to make juries more representative of society).

42. AM. BAR ASS'N, REPORT OF THE ABA COMMISSION ON THE 21ST CENTURY JUDICIARY 86 (Mar. 2003) (draft report).

43. Hon. Dallas Holmes, *Judicial Opinion: R.E.S.P.E.C.T.*, 16 CAL. LITIG. 46 (2003).

increasing juror pay as “the most important thing” that could be done to improve California’s jury system.⁴⁴

Ideally, California would be able to provide greater compensation to jurors to relieve them of the financial hardship that can result from jury service. After all, jury service is a civic obligation. Unfortunately, a significant increase in the juror fee through payments out of the state treasury does not seem to be a realistic option. As long ago as 1993, the ABA recognized that “raising juror fees to compensate citizens for their time at current wage levels would place a nearly impossible burden on many financially hard-pressed jurisdictions.”⁴⁵ This observation is particularly true today in California, given the state’s multi-billion-dollar budget deficit.⁴⁶

The Jury Patriotism Act addresses the problem of poor juror compensation. It includes an innovative “Lengthy Trial Fund” to help relieve the burden on jurors serving on lengthy civil cases.⁴⁷ The model act would provide jurors who serve on civil trials lasting longer than three days with supplemental compensation (up to \$100 per day) if they would otherwise be excused from service due to financial hardship.⁴⁸ In the rare case that a civil trial lasts ten days or more, jurors who are not fully compensated by their employers would be eligible to receive additional supplemental compensation from the fund (up to \$300 per day).⁴⁹ A court administrator, hired by the judicial system and compensated by the fund, would manage the fund under rules and guidelines established by the California Supreme Court.⁵⁰

In order to qualify for payment, the juror would complete a form identifying the amount requested and provide the court with verification of his or her usual wage and how much the employer paid the employee during jury service.⁵¹ An individual who is self-employed or receives compensation other than wages would submit a sworn affidavit to the court attesting to his

44. *Id.*; see also TASK FORCE REP., *supra* note 12, at 47-48 (similarly describing juror pay revision as the most important remaining task).

45. ABA STANDARDS, *supra* note 39, at 134.

46. See Governor’s Budget Summary, 2003-04, reporting a budget shortfall of \$34.6 billion in the current year, available at http://www.dof.ca.gov/HTML/Budgt03-04/BudgetSum03/02_An_Opportunity.pdf (last visited Oct. 22, 2003).

47. JURY PATRIOTISM ACT, *supra* note 20, § 6. In most states, including California, citizens summoned for jury service may find themselves serving on either a civil or criminal matter. See CAL. CIV. PROC. CODE § 192 (West 1988). The model Jury Patriotism Act does not provide wage replacement or supplementation for jurors selected for criminal trials. Nevertheless, California might consider providing special compensation to jurors in lengthy criminal trials. See H.B. 2520, 46th Leg., 1st Reg. Sess. (Ariz. 2003) (signed by Gov. Janet Napolitano on May 12, 2003) (applies to civil and criminal petit juries); H.B. 2008, 2003 Reg. Sess. (La. 2003) (signed by Gov. Mike Foster on June 27, 2003) (lengthy trial fund applies to civil cases and criminal cases in which conviction carries a sentence of 20 years or more at hard labor).

48. JURY PATRIOTISM ACT, *supra* note 20, § 6(c)(1).

49. *Id.* § 6(c)(2).

50. *Id.* § 6(a).

51. *Id.* § 6(d)(1).

or her approximate gross weekly income and attaching supporting documentation.⁵²

The lengthy trial fund would be self-sustaining and not require any allocation of resources by the legislature. Rather, the fund would be financed through a minimal court filing fee—in essence, a small “user fee.”⁵³ The fund is based on the premise that those who use and benefit from the jury system should help pay to finance it. The filing fee is not intended to be a barrier to the filing of lawsuits and would be the minimum amount necessary to fairly support jurors who serve on lengthy civil trials (e.g., \$7). At roughly the cost of a movie ticket or meal at McDonald’s, the fee will not place any credible burden on lawyers or their clients. Furthermore, since the fee applies to anyone who files a civil suit, it is just as likely to be paid by a lawyer representing a business suing another business as it is to be paid by a personal injury lawyer. The lengthy trial fund would lend considerable support to jurors serving on extended civil trials.

II. THE FREQUENCY OF SERVICE SHOULD BE LIMITED

Jurors who have fulfilled their responsibilities should not have to serve again for a significant period of time. This would improve citizen attitudes about jury service and provide an opportunity for more persons to serve on juries, thereby distributing jury service more fairly throughout the population that is eligible to serve.

The Jury Patriotism Act provides that a juror who has served on a petit jury shall not be summoned again for at least one year.⁵⁴ The model legislation is consistent with a recommendation by the California Task Force on Jury System Improvements that called for the legislature to amend the Code of Civil Procedure to provide that an eligible person shall be excused from service for a minimum of twelve months if he or she has completed jury service.⁵⁵

III. PROTECTING JOB BENEFITS FOR JURORS

Secondary economic penalties are sometimes suffered by employees who are forced by their employers to compensate in some way for the time missed during jury service. The California Labor Code provides that an employer may not “discharge or in any manner discriminate against” an employee who takes time off for jury service, so long as they give reasonable

52. *Id.* § 6(d)(3).

53. Recently, the Michigan Legislature adopted its own “Juror Compensation Reimbursement Fund.” Like the Jury Patriotism Act, the Michigan Fund relies, in part, on a small increase in court filing fees to increase compensation for jurors serving on lengthy trials. *See* H.B. 4551, 4552, 4553 and S.B. 1448, 1452, 2001-2002 Leg. Sess. (Mich. 2002).

54. JURY PATRIOTISM ACT, *supra* note 20, § 5(d).

55. *See* TASK FORCE REP. *supra* note 12, at 45.

notice.⁵⁶ The Jury Patriotism Act provides even more protection for employees. It states that a business may not require its employees to use their annual vacation or sick leave time for jury service.⁵⁷ Employees should not fear that by responding to a juror summons, they might be required to sacrifice their annual vacation. This provision is one reason why the AFL-CIO supports the Jury Patriotism Act.⁵⁸

IV. JURY SERVICE SHOULD NOT CAUSE UNDUE INCONVENIENCE

Requiring all citizens to serve on juries, regardless of their importance or position, does not mean being disrespectful of their business or personal lives. Currently, California law provides that if a citizen receives a jury summons for an inconvenient time, he or she must apply to a Jury Commissioner for a deferral, which the Commissioner may grant at his or her discretion.⁵⁹ Many, but not all, California courts allow jurors to postpone their service once for any reason.⁶⁰ The Jury Patriotism Act would extend this convenience to all Californians.

The process for obtaining a postponement under the Jury Patriotism Act would be quick and easy. The summoned juror would simply contact the appropriate court official by telephone, email, or in writing.⁶¹ He or she would not have to provide any reason for the postponement. The only prerequisites would be that the requestor had not previously received a postponement, and that the requestor provide a date on which he or she will appear for jury service within the next six months.⁶² Subsequent postponements would be granted only in the case of an extreme emergency that the juror could not have anticipated at the time of requesting the first postponement.⁶³

An automatic postponement would reduce the incentive for professionals who have commitments to clients or patients, or others who have family responsibilities or vacation plans, to avoid jury service. The ABA has observed that such procedures would "enabl[e] a broader spectrum of the community to serve as jurors."⁶⁴

56. CAL. LAB. CODE § 230(a) (West 2002).

57. JURY PATRIOTISM ACT, *supra* note 20, § 5(b).

58. Telephone Interview by Lewis Maltby, President, National Work Rights Institute, with Joanna Webb-Gauvin, American Federation of State, County and Municipal Employees Council 31, AFL-CIO (Mar. 11, 2003).

59. *See* CAL. CIV. PROC. CODE § 218 (West 1988).

60. San Francisco is one example of an area that provides citizens with an automatic postponement of jury service. *See, e.g.*, <http://www.courtinfo.ca/gov/jury/basics.htm> (last visited Oct. 30, 2003) (informing potential jurors of their right to postpone).

61. JURY PATRIOTISM ACT, *supra* note 20, § 3(b)(2).

62. *Id.* § 3(b)(1) & (3).

63. *Id.* § 3(c).

64. ABA STANDARDS, *supra* note 39, at 51-4.

V. JURY SERVICE SHOULD NOT DISPROPORTIONATELY IMPACT SMALL BUSINESSES

Current California law creates potentially inequitable situations for employers, especially small businesses. Small businesses may be seriously affected if more than one employee is called to serve at one time, particularly if one or more of the trials involved ends up taking a substantial amount of time. Such situations are rare, but create real burdens when they occur, particularly if the employer is a labor-intensive, small business.

The Jury Patriotism Act provides a type of postponement aimed at protecting small businesses from the consequences of this problem. The Act would require courts to postpone and reschedule the jury service of a summoned juror if another employee of his or her business is already serving jury duty.⁶⁵ This postponement would not count toward the one postponement for any reason extended to all jurors.

VI. MANY PEOPLE ARE EXCUSED FOR REASONS NOT REFLECTING TRUE HARDSHIP

California law provides that “[a]n eligible person may be excused from jury service only for undue hardship, upon themselves or upon the public, as defined by the Judicial Council.”⁶⁶ The California Judicial Council currently defines acceptable grounds for a hardship excuse as: (1) no reasonably available means of transportation to the court; (2) need to travel an excessive distance to the court (over one-and-one-half hours); (3) an extreme financial burden; (4) an undue risk of material injury or destruction of the juror’s property; (5) a physical or mental disability or impairment, not affecting that person’s competence, that would expose the potential juror to undue risk of mental or physical harm; (6) the prospective juror’s services are immediately needed for the protection of the public health and safety; and (7) a personal obligation to provide actual and necessary care to another, where no comparable substitute care is available or practical.⁶⁷ Unfortunately, there is evidence that Rule of Court 860 has not been consistently applied.⁶⁸

Unless a citizen has a mental or physical condition which makes him or her incapable of serving, the Jury Patriotism Act would limit hardship excuses to three circumstances: (1) when a potential juror would have to abandon a person under his or her personal care or supervision due to the impossibility of obtaining an appropriate substitute caregiver during the period of

65. JURY PATRIOTISM ACT, *supra* note 20, § 5(e).

66. CAL. CIV. PROC. CODE § 204(b) (West 2000).

67. *See* CAL. R. OF COURT 860(d).

68. *See* TASK FORCE REP., *supra* note 12, at 22-23 (noting lack of data from some courts as to use and effectiveness of hardship standards, and suggesting that judges and administrators be “urged” to follow Rule 860).

participation in the jury pool or in the jury;⁶⁹ (2) when the person would incur costs that would have a substantial adverse impact on the payment of the individual's necessary daily living expenses or on those for whom he or she provides the principal means of support;⁷⁰ and (3) when the prospective juror would suffer physical illness or disease by serving.⁷¹

The Jury Patriotism Act also establishes procedures that make it more likely that the excuses will be strictly applied. First, potential jurors would have to provide the court with documentation supporting the need for an excuse.⁷² This minimal requirement will ensure that jurors are not inventing or exaggerating claimed hardships. For instance, a person claiming a medical condition could provide a statement from a physician. Someone who claims financial hardship might submit a copy of his or her tax return or pay stub. Potential jurors who are caring for a young child or other family member might provide the court with a sworn statement providing the reason that he or she cannot obtain alternative care.

Second, the model act also places the responsibility for making hardship determinations with a judge, rather than with the Jury Commissioner, as permitted under current Rule 860.⁷³ Having judges make hardship determinations would demonstrate the seriousness of the jury service obligation within the judicial system. Such a requirement also would have an important practical effect. People may think twice about articulating a bogus hardship excuse when in a courtroom, before a judge, and faced with the threat of a sanction.

VII. NO-SHOWS SHOULD RECEIVE AN APPROPRIATE PENALTY

Research shows that a significant number of those who do not respond to jury summonses fail to do so because they have little fear of receiving a penalty, or believe that the penalty will be a mere "slap on the wrist."⁷⁴ California law provides that a person who fails to respond to a summons may be "compelled to attend; and, following an order to show cause hearing, the court may find the prospective juror in contempt of court, punishable by

69. The Jury Patriotism Act does not permit any person with a child to claim hardship. Rather, only those who can demonstrate the *impossibility* of obtaining child care, for financial reasons or because of the young age of the child, can obtain an excuse. Those who can afford to find child care or have a relative or babysitter they can rely upon, are required to do so.

70. Under the model act, loss of income from employment or other activities would not permit one to avoid jury service automatically. Professionals who stand to lose a substantial sum would only be exempt if they can show that the loss would actually impair their ability to live. This would fairly distribute the burden of jury service equally among white-collar workers and those who make less money, but for whom lost income may be a greater strain.

71. JURY PATRIOTISM ACT, *supra* note 20, § 4(b)(3)(i)-(iii).

72. *Id.* § 4(b)(4).

73. *Id.* § 4(b)(1).

74. The *Los Angeles Times* reported in 2000 that a number of jurors in Ventura County had responded to jury summons by simply writing "No thank you" on the forms and returning them, apparently believing the summons to be more of an "invitation" to serve. See *Tough Rules for Jury Duty Try Patience of Residents*, L.A. TIMES, May 28, 2000, at Metro, B1.

fine, incarceration, or both, as otherwise provided by law.”⁷⁵ But, overburdened judges often have little time to hold a full contempt hearing for everyone who ignores a jury summons.⁷⁶

In order to address this situation, California enacted legislation in September 2003 to authorize courts to impose fines in addition to or in lieu of contempt penalties.⁷⁷ After notice and an opportunity to be heard, the court may fine an unexcused no-show up to \$250 for a first violation, \$500 for the second violation, and \$1,000 for a third violation.⁷⁸ This change in the law is helpful, so long as courts consistently enforce its provisions against those who fail to respond to a juror summons.

There are additional steps that California could take to increase jury participation. The California Task Force on Jury System Improvements has recommended legislation to place a hold upon driver license renewals of those persons who fail to respond to a juror summons, following the issuance of an order to show cause and the failure of a juror to appear at a hearing.⁷⁹ Another option would be to require no-shows to perform community service. This period should be at least equal to the time that the citizen would have spent in jury service and could be in lieu of, or in addition to, a monetary fine.

The Jury Patriotism Act would punish a summoned juror’s failure to appear in court as a misdemeanor.⁸⁰ California law defines a misdemeanor as punishable by imprisonment of not more than six months, a fine not exceeding \$1,000, or both.⁸¹ The mere availability of this penalty would communicate to jurors the importance of jury service by notifying them that avoiding their civic responsibility is potentially a criminal offense. “The point is not to punish people but to encourage people to answer the summons and make arrangements to do their jury service.”⁸²

75. See CAL. CIV. PROC. CODE § 209 (West 1988).

76. See TASK FORCE REP., *supra* note 12, at 14-16.

77. See A.B. 1180, 2003-04 Reg. Sess. (Cal. 2003) (to be codified at CAL. CIV. PROC. CODE § 209).

78. See *id.*

79. See TASK FORCE REP., *supra* note 12, at 14-15.

80. JURY PATRIOTISM ACT, *supra* note 20, § 3(d).

81. See CAL. PENAL CODE § 19 (West 2003).

82. Troy Anderson, *Show Up or Else; Courts Get Tough: Ignore Another Jury Summons And Get \$1,500 Fine*, L.A. DAILY NEWS, Jan. 19, 2002, at N1, available at 2002 WL 5528920 (quoting acting Pomona Supervising Judge George Genesta, who also oversees courthouses in El Monte and West Covina). See also Jean Guccione, *Jury Duty Scofflaws Get Hit in the Pocketbook; In a New Crackdown, L.A. County Residents Who Don't Show Up For Their Service Are Being Fined \$1,500*, L.A. TIMES, Aug. 16, 2002, at B2, available at 2002 WL 2497039 (quoting San Fernando Superior Court Judge William A. MacLaughlin as saying to prospective jurors, “We would rather have you appear as a juror than impose a monetary sanction.”); TASK FORCE REP., *supra* note 12, at 16 (“The overall goal of the failure-to-appear program is to decrease the number of people who do not respond to a summons for jury service. It is not meant to be punitive for the prospective juror, but consequences are built into the program.”).

VIII. CONCLUSION

Like most Americans, Californians continue to overwhelmingly support the jury system, at least in principle. But many citizens fail to appear for jury duty when summoned, or do their best to get out of jury service once they enter the courthouse. Few of these individuals lack a sense of civil duty. Rather, they are discouraged from serving by the hardship and headache imposed by a system that does not provide adequate financial compensation, leaves little or no flexibility, and may severely inconvenience them. Moreover, the current standards and practices relating to hardship excuses still provide too many people with an easy means of escape from jury service, and shirkers have little fear that they will be punished for evading their duty.

The Jury Patriotism Act developed by the American Legislative Exchange Council would break down the barriers that continue to frustrate jury service in California. Through these reforms, Californians, regardless of income or occupation, will be expected, and better able, to fulfill their patriotic duty to serve on a jury.