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FILLING THE BOX: RESPONDING TO JURY DUTY AVOIDANCE

THOMAS L. FOWLER*

*"[J]ury service is the solemn obligation of all qualified citizens, and . . . excuses from the discharge of this responsibility should be granted only for reasons of compelling personal hardship or because requiring service would be contrary to the public welfare, health, or safety."*¹

INTRODUCTION

In the fall of 1997 and the spring of 1998, the Administrative Office of the Courts [hereinafter "AOC"] conducted a statewide survey to gather information about jury service in North Carolina. The *Jury Service Project Final Report*,² published in July of 1998, profiles the characteristics of the average juror,³ details the reported hardships of jury duty,⁴ suggests improvements to the jury system,⁵ and summarizes the summoning and excusal practices of the various counties.⁶ In addition, the *Jury Service Project* concludes that in North Carolina a significant number of persons summoned as jurors fail to appear as directed or simply never respond to the summons.⁷ In some counties, close to half of those summoned fail to appear.⁸ Although not widely

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1. N.C. GEN. STAT. § 9-6(a) (Cum. Supp. 1998).

2. THE CTR. FOR URBAN AFFAIRS & COMMUNITY SERVICES, ADMIN. OFFICE OF THE COURTS (AOC) JURY SURVEY PROJECT FINAL REPORT (1998).

3. The average juror is 43 years old, white, female, and married, with 13.6 years of formal education. *Id.* at 4-7, 36.

4. The most frequently reported hardships as a result of jury service were having to rearrange work schedules, losing wages, and parking problems. *Id.* Summary of Findings at 9-11.

5. Jurors' suggestions for improving the jury system included more efficient use of their time (including informing the jurors about the reasons for delay), better parking and courthouse facilities for jurors, improved financial ease of jury service, and a streamlined voir dire process. *Id.* at 41.

6. Surveys were returned from 99 of the 100 counties. *Id.* Analysis of the 1998 Clerks of Super. Ct. Survey on Jury Practices and Facilities at 1.

7. Analysis of the 1998 Clerks of Super. Ct. Survey on Jury Practices and Facilities at 2.

8. *Id.*

recognized, this problem is neither new nor limited to our state. Filling the jury box has often been a struggle for our nation's courts.⁹

Filling the jury box can be a significant problem for the court system because the judiciary must ensure that enough citizens will be present on a given day to provide the twelve jurors plus alternates who must serve in each trial scheduled for that day. Enough jurors may not be available to proceed with a trial for several reasons.¹⁰ First, as mentioned, the potential juror may ignore the summons. Second, the potential juror may be excused for a legitimate reason before the date of the summons. Third, once in the courtroom, the juror may be excused or peremptorily challenged by one of the parties to the lawsuit. The jury pool must therefore be several times greater than the number of jurors actually needed to hear a trial. High or unpredictable rates of jury duty avoidance could potentially bring the courts to a grinding halt.¹¹

This article argues that the applicable North Carolina statutes do not clearly define how the court system should respond to such jury duty avoidance. As a result, North Carolina's judicial districts have developed no formal procedures for handling jurors who fail to appear when summoned for jury duty. Part I chronicles the history of jury avoidance and the law's responses, including the sheriff summoning citizens in and near the courthouse and punishing jurors with the payment of a fine. Part II reviews the pertinent jury duty statutes in North Carolina.

9. See generally Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796-1996*, 94 MICH. L. REV. 2673 (1996) (examining avoidance of jury duty and misconduct while serving); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 UNIV. OF CHI. L. REV. 867 (1994) (surveying the evolution of the jury system in the United States); Kurt M. Saunders, *Race and Representation in Jury Service Selection*, 36 DUQ. L. REV. 49 (1997) (studying jury selection process and factors that influence representation of racial and socioeconomic groups).

10. For instance, one recent study found that Maricopa County, Arizona had a "juror yield" of only 22.5% of the total number of citizens summoned for jury duty: 25.5% of the summonses were undeliverable; 6.5% of the summoned jurors were not qualified to serve; 27% were excused for hardship reasons; and 18.5% of summoned jurors simply did not appear as directed. ROBERT G. BOATRIGHT, AM. JUDICATURE SOC'Y, IMPROVING CITIZEN RESPONSE TO JURY SUMMONSES: A REPORT WITH RECOMMENDATIONS 85 (1998).

11. The report issued by the American Judicature Society states:

In many jurisdictions, summons nonresponse is a critical problem because the courts find that they do not have enough jurors to conduct trials. Horror stories abound of courts in cities such as Los Angeles and New York where trials must be delayed because of lack of available jurors, or where court personnel must walk around outside of the courthouse looking for citizens willing to volunteer to serve as jurors.

Id. at 4.

I. HISTORICAL RESPONSES

A. *Sheriff Summons of Citizens In and Near the Courthouse*

Since colonial days, citizens have sought to avoid jury duty,¹² and legislatures and court officials have searched for effective methods to secure their service. One historical response was to rely upon the sheriff's ability to round up bystanders found in or near the courthouse to serve on the jury. In North Carolina, as in other states, "numerous bystanders" attended a court in session.¹³ When the regularly summoned jurors were insufficient to fill the jury box, the court was empowered to order the sheriff to summon these bystanders or talesmen as potential jurors.¹⁴

Commentators often criticized this heavy reliance on bystanders because this process was not representative of the citizenry and resulted in a lower caliber of juror.¹⁵ In 1803, the American edition of *Blackstone's Commentaries* reported that, after the first day or two, juries hearing civil lawsuits in the rural areas of Virginia were "made up, generally, of idle loiterers about the court, . . . the most unfit persons to decide upon the controversies of suitors."¹⁶ In *State v. McDowell*,¹⁷

12. An early North Carolina case provides an example. In *State v. Hogg*, 6 N.C. (2 Mur.) 319 (1818), a commissioner of navigation for the Port of Wilmington was summoned for jury duty as a bystander or talesman. The would-be juror claimed that because of the office he held he was exempt from serving on juries by statute; he prayed for a discharge. The court held that although the statute would have exempted him from service as a regularly summoned juror because such service could interfere with the performance of his important profession, he was not exempt from serving as a tales juror (*i.e.*, someone found in or about the courtroom). The court reasoned that his very presence at the courthouse as a bystander "proves that he has not then any official or professional engagements that require his attention." *Id.* at 319-20. See also *State v. Willard*, 79 N.C. 660, 662 (1878) ("And it is because a talesman must be taken from the bystanders at the Court that he may be summoned, as his being a bystander proves that he was not there on official or professional duties which required his attention.").

13. *State v. Scott*, 8 N.C. (1 Hawks) 24, 26 (1820).

14. *State v. Benton*, 19 N.C. (2 Dev. & Bat.) 196, 201 (1836) (holding that if the court neglects to nominate freeholders to serve as jurors or the persons so nominated shall fail to attend, "it shall be lawful for such Superior Court to order the sheriff to summon other freeholders of the bystanders, to serve as jurors; and the persons so summoned shall be held and deemed lawful jurors."). See also *State v. Lamon*, 10 N.C. (9 Hawks) 175, 180 (1824) (noting defendant argued that to be properly qualified to serve as talesmen, bystanders must be found "about the courthouse"); *State v. Emery*, 224 N.C. 581, 582, 31 S.E.2d 858, 860 (1944) (holding that two women should have been excused as jurors since they were not qualified due to their sex).

15. In 1885, one commentator noted: "[B]etter qualified classes of citizens do not serve as jurymen. By some peculiar way they fail to be drawn . . . , or if perchance drawn, manage to get excused. All lawyers know this to be a fact As a result there is generally left for this important public service but a residuum of stupid and incompetent species of the *genus homo* It were as reasonable and proper in time of war to excuse our able-bodied men and draft none but cripples and puny-bodied unfortunates" Alschuler & Deiss, *supra* note 9, at 882 n.83 (citing S. Stewart Whitehouse, *Trial By Jury, As It Is, and As It Should Be*, 31 ALB L. REV. 504, 505-06 (1885)).

16. WILLIAM BLACKSTONE, 3 *Commentaries* App. 64 (St. George Tucker ed. 1803).

17. 123 N.C. 764, 31 S.E. 89 (1898).

the North Carolina Supreme Court echoed this opinion. In this case, the trial court, after failing to get a jury from the persons present in the courtroom, adjourned until the next morning and directed the sheriff to summon fifty freeholders from the county to attend the next day.¹⁸ The next day the court directed the sheriff to call those summoned, who were then bystanders, into the jury box.¹⁹ The defendant objected on the grounds that those jurors "were not bystanders on the day before, and were then present only by reason of said summons by the sheriff under said order of the court."²⁰ The trial court overruled the objection, and the supreme court upheld the trial court stating:

The order was an *expedient* act in reference to the business of the court. It was calculated to secure an impartial jury, by getting men from the county, honest, uncommitted, unbought and unmerchable men, rather than the professional, loafing jurymen, who hang about the courthouses, ready to be used if it should happen that prosecutors or prosecuting officers, or defendants or defendants' counsel or sheriffs, or their deputies should so far forget their occupation and honorable obligation as to bring them into the jury box.²¹

Today, North Carolina continues to authorize the trial court to order the sheriff to summon additional jurors not on the jury list when the original venire is exhausted,²² although North Carolina law no longer restricts the sheriff to select bystanders in and about the courthouse. The sheriff appears to be free to locate appropriate jurors "from the body of the county,"²³ whether in or near the courthouse, at the mall, or elsewhere.²⁴

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 767. See also *Hale v. Whitehead*, 115 N.C. 28, 29, 20 S.E. 166, 166 (1894) (characterizing the courthouse bystanders as "professional jurors" who might "monopoliz[e] the jury box.").

22. N.C. GEN. STAT. § 9-11(a)(Cum. Supp. 1998); see also *State v. Wilson* 313 N.C. 516, 524, 330 S.E.2d 450, 457 (1985) ("We have held that N.C.G.S. 9-11(a) clearly authorizes the trial court to order the summoning of supplemental jurors as a means to ensure orderly, uninterrupted and speedy trials."); *State v. Brown*, 13 N.C. App. 261, 271, 185 S.E.2d 471, 477-78 (1971) (noting that the trial judge ordered sheriff to summon twenty-five additional jurors without resorting to the regular jury list pursuant to section 9-11(a) of the North Carolina General Statutes).

23. *State v. Hollingsworth*, 11 N.C. App. 674, 677, 182 S.E.2d 26, 28 (1971).

24. In *State v. White*, 6 N.C. App. 425, 427, 169 S.E.2d 895, 896 (1969), the sheriff used the telephone book as his method of locating and selecting tales jurors. He testified that he called some sixty prospective jurors in the course of securing nine tales jurors. The court of appeals approved of this approach stating:

Nowhere in the statute is there a provision delineating discretionary restrictions to be placed on an officer in fulfilling the court's order. The statutory recognition that tales jurors may be needed and the statutory language used contemplates a system easily and expeditiously administered. To place procedural restrictions unnecessarily on their selection would defeat the purpose of the system, which is to facilitate the dispatch of the business of the court. Tales jurors are selected infrequently and only to provide a source from which to fill the unexpected needs of the court. They must still possess the statutory qualifications

B. *Payment of Fines*

Courts also responded to the failure of summoned citizens to appear by punishing the recalcitrant jurors with the payment of a fine.²⁵

Fining those who failed to obey summonses appeared to be a universal response to jury dodging throughout the colonial period, and in the early 1800s statutes in most states authorized fines ranging from one dollar to \$250. Enforcement efforts were quite vigorous in some jurisdictions. For example, court records from the Michigan Territory reveal that contempt proceedings against delinquent jurors occupied much of the circuit court's caseload Many less wealthy veniremen complied in order to avoid the fine. For those with means, however, contempt citations appeared to have operated not as a burden, but as a privilege. Exemption from jury duty was a prerequisite that money could buy. A careful investigation of fines for nonattendance of jurors in South Carolina during the 1790s revealed that fines were sufficient only to assure the attendance of the less wealthy. Most of those fined for failing to report for jury duty were the community's most prominent citizens.²⁶

In these situations, enforcement of fines has not always been pursued consistently or vigorously. One commentator in Pennsylvania has estimated that:

[B]etween 25% and 50% of citizens who receive [juror] questionnaires ignore them; only 55% of citizens summoned for jury service actually bother to appear for service. This situation results from the widespread failure of courts to investigate or sanction those who disregard the warnings on their jury summonses. These individuals simply 'opt out' of service by ignoring the questionnaire or summons when there is a history of no follow-up or sanctions for such conduct.²⁷

and are still subject to the same challenges as regular jurors and may be examined by both parties on *voir dire*. In order to retain the flexibility needed in the administration of such a system, the summoning official must be permitted some discretion, whether he be located in a relatively small community or a more heavily populated area

Id. at 427-28, 169 S.E.2d at 896-97. In *State v. Yancey*, 58 N.C. App. 52, 293 S.E.2d 298 (1982), acting pursuant to a section 9-11(a) order of the North Carolina General Statutes, the sheriff testified:

that he did not attempt to get a list from the clerk of superior court or the register of deeds, but attempted to get people that were readily available and could come on short notice. He testified that so far as he knew he summoned persons who were of good character and respected members of the community.

Id. at 54, 293 S.E.2d at 299.

25. See *State v. Williams*, 18 N.C. (1 Dev. & Bat.) 371, 372 (1835) (noting that the juror who refused to serve was fined twenty dollars); *State v. Willard*, 79 N.C. 660, 661 (1878) (noting that a juror who refused to serve was also fined).

26. King, *supra* note 9, at 2683-84.

27. Saunders, *supra* note 9, at 64. See also BOATRIGHT, *supra* note 10, at vii, 13 (noting that in state courts 20% of citizens summoned for jury failed to appear, and that in urban jurisdictions such as New York or Los Angeles, summons response rates can fall below 10% of all citizens receiving a summons).

North Carolina's current experience may be similar. Section 9-13 of the North Carolina General Statutes clearly states that a "person summoned to appear as a juror" who has not been excused and fails to appear "shall be subject to a fine of not more than fifty dollars."²⁸ However, according to the AOC's *Jury Survey Project*, when a citizen fails to appear as directed by a jury summons, court officials take no responsive action in forty-six of our counties.²⁹ As the report notes, "Where any follow-up does occur for these non-reporting citizens, the most frequent action taken is that the sheriff tries to locate the missing juror, by phone or in person."³⁰

II. PERTINENT JURY DUTY STATUTES

Allowing a high percentage of summoned citizens to "excuse themselves" from jury duty appears to violate both the spirit and the details of the applicable statutes. In addition, such excusals are unfair to those who are summoned and do properly respond.³¹ Yet, the applicable statutes do not clearly define how the court system should respond to such jury duty avoidance.

A. *North Carolina General Statute § 9-6*

Section 9-6 of the General Statutes states North Carolina's public policy that jury service is "the solemn obligation of all qualified citizens, and that excuses from the discharge of this responsibility should be granted only for reasons of compelling personal hardship or because requiring service would be contrary to the public welfare, health, or safety."³² Other subsections of section 9-6 detail the procedures for presenting, considering and passing on applications for excuses from jury duty.³³ Yet, the excusal provisions of section 9-6

28. N.C. GEN. STAT. § 9-13(a) (1986).

29. THE CTR. FOR URBAN AFFAIRS & COMMUNITY SERVICES, *supra* note 2, Executive Summary at 2. See also *State v. Barnard*, 346 N.C. 95, 101, 484 S.E.2d 382, 385 (1997) (noting that the sheriff used the jury list to contact would-be jurors to determine if they had received their summons and, if so, whether they intended to appear pursuant to the summons).

30. THE CTR. FOR URBAN AFFAIRS & COMMUNITY SERVICES, *supra* note 2, Executive Summary at 2. See also BOATRIGHT, *supra* note 10, at 5 ("[I]t is hardly a secret that [the laws establishing penalties for failure to respond to jury summonses are] seldom enforced. Citizens may feel a twinge of guilt when they toss their summons in the garbage, but they are likely to face few other consequences.").

31. It should be noted that some of the citizens who fail to respond to a jury summons may never have received the summons. This is particularly true in the more metropolitan counties with more mobile populations, where the person summoned may have changed addresses since the preparation of the jury list. BOATRIGHT, *supra* note 10, at 85, 119.

32. N.C. GEN. STAT. § 9-6(a) (Cum. Supp. 1998).

33. *Id.* at § 9-6(b)-(f).

appear to be directory rather than mandatory.³⁴ Despite these appearance and fairness problems, any violation of the spirit or details of section 9-6 appears not to invalidate trials that utilized jury venires in which a high percentage of summoned citizens failed to show up. In *State v. Murdock*,³⁵ evidence indicated that the district court judge excused all prospective jurors presented to him regardless of the reason.³⁶ Defendant argued that this violated section 9-6.³⁷ The supreme court indicated that violation of section 9-6 was insufficient to justify a new trial; instead, the defendant had to show "corrupt intent, discrimination or irregularities which affected the actions of the jurors actually drawn and summoned."³⁸

In *State v. White*,³⁹ upon order of the trial court to summon tales jurors, the sheriff used the telephone book as the method of selection and called sixty different prospective jurors. This effort secured only nine tales jurors, in part, because the sheriff "excused" some of the prospective jurors he reached by telephone who were actually qualified to serve. Nevertheless, the trial court found the sheriff's selection was made without prejudice and intent to discriminate. The court of appeals affirmed, noting that the burden of proving intent to discriminate was on defendant and that the "mere possibility [of discrimination] does not make the panel actually summoned . . . objectionable."⁴⁰

In *State v. Leary*,⁴¹ the defendant argued that in certain cases it was unfair to shift the burden of proving corrupt intent and systematic discrimination to the defendant when no records are kept of the excusal process, the process occurs before defendant's trial begins, and de-

34. *State v. McLain*, 64 N.C. App. 571, 572, 307 S.E.2d 769, 770 (1983) (in determining whether a statutory provision is to be considered mandatory or directory, legislative intent will control, and "this is usually to be ascertained not only from the phraseology of the provision, but also from the nature and purpose, and the consequences which would follow its construction one way or the other.").

35. 325 N.C. 522, 385 S.E.2d 325 (1989).

36. *Id.* at 525, 385 S.E.2d at 326.

37. *Id.*

38. *Id.* at 526, 385 S.E.2d at 327. It is possible that at some point the deviation from the mandatory statutory procedures will be so egregious as to prejudice the integrity of the judicial process itself, and that this alone could suffice to require a new trial without any showing of corrupt intent or systematic discrimination. This was the holding of the Tennessee Supreme Court in *State v. Lynn*, 924 S.W.2d 892 (Tenn. 1996):

Often, the public sees in our justice system something substantially different from what actually exists. It is the appearance that often undermines or resurrects faith in the system. To promote public confidence in the fairness of the system and to preserve the system's integrity in the eyes of the litigants and the public, "justice must satisfy the appearance of justice."

Id. at 898.

39. *State v. White*, 6 N.C. App. 425, 169 S.E.2d 895 (1969).

40. *Id.* at 427, 169 S.E. 2d at 896-87.

41. 344 N.C. 109, 472 S.E.2d 753 (1996).

fense counsel is not present to oversee the procedure.⁴² The supreme court rejected this argument:

Defendant presents us no persuasive authority to depart from our previous holdings, which place the burden on the defendant to come forward with evidence that the district court judge abused his discretion in the excusal process. A review of the record reveals that defendant presented no evidence that the district court judge in this case acted with corrupt intent or systematic discrimination.⁴³

It seems unlikely that a high percentage of “no-shows” by itself or the general failure to follow-up with the “no-shows” will suffice to demonstrate corrupt intent or systematic discrimination.

However, the situation might be different if evidence showed that a certain subset of citizens were more likely to be aware of and take advantage of this de facto self-excusals option, and if court officials played any active role in alerting selected citizens to this option. This issue was raised in a 1997 Alabama case *State v. Wright*.⁴⁴ In *Wright*, the defendant argued that he was denied due process when the trial court refused to compel the attendance of certain black veniremembers who, having been summoned for jury duty, failed to appear.⁴⁵ The appellate court rejected this argument on the basis that the clerk’s undisputed testimony was that “nothing was done to secure the attendance of *anyone* who failed to answer a jury summons”⁴⁶ and that nothing in the record suggested that “black jurors who failed to appear were treated any differently than white jurors who failed to appear.”⁴⁷

B. North Carolina General Statute § 5A-11

Section 5A-11(a) of the North Carolina General Statutes lists the specific grounds for which a person may be found guilty of criminal contempt.⁴⁸ The statute also states that these listed grounds are exclusive and that no other grounds, even if allowed at common law, will suffice.⁴⁹ In addition, criminal statutes must be strictly construed⁵⁰ in

42. *Id.* at 117, 472 S.E.2d at 758.

43. *Id.*

44. 709 So. 2d 1318 (Ala. Ct. App. 1997).

45. *Id.* at 1319.

46. *Id.*

47. *Id.* (noting that fifty of the 530 summonses for jury duty issued for the term during which defendant went to trial were issued to black citizens. Of those fifty, thirty-nine failed to appear).

48. N.C. GEN. STAT. § 5A-11(a) (Cum. Supp. 1998).

49. *Id.* (“The grounds for criminal contempt specified here are exclusive, regardless of any other grounds for criminal contempt which existed at common law.”). *But see id.* § 5A-11(a)(10) (providing that other statutes may specify other grounds for criminal contempt).

50. *Vogel v. Supply Co.*, 277 N.C. 119, 131, 177 S.E.2d 273, 280 (1970).

favor of the defendant.⁵¹ In this light, it would appear that of the grounds listed in section 5A-11(a), only subsection (a)(3) might apply to a citizen who fails to appear in response to a jury summons because the potential juror disobeys lawful “process, order, directive, or instruction.”⁵²

To fit this strict construction, however, a sheriff’s summons authorized by section 9-10(a) must fall under the definition of the “court’s” lawful process, order, directive, or instruction.⁵³ Arguably, the jury summons authorized by section 9-10(a) emanates not from the superior court but from the sheriff.⁵⁴ That is, the sheriff, in summoning the prospective juror, is acting pursuant to the sheriff’s statutory authority, not pursuant to the order of the superior court. If this distinction is legitimate, the practice on some jury summons to state that the summons is “by order of the superior court” or that lists the clerk’s address as the return address should make no difference.⁵⁵

In the alternative, it is arguable that the more specific provision of section 9-13 preempts the more general provision of section 5A-11(a)(3). If a provision of a statute is general and another provision is specific, the two should be “read together and harmonized.”⁵⁶ However, where the two provisions are inconsistent, the specific power will control over the general provision.⁵⁷ Section 9-13 provides that “[e]very person summoned to appear as a juror who has not been excused, and who fails to appear and attend until duly discharged, shall be subject to a fine of not more than fifty dollars, to be imposed by the court, unless he renders an excuse deemed sufficient.”⁵⁸ By expressly providing the consequences and the procedure to be followed when a citizen fails to respond to a jury summons, it appears that the legislature intended that section 9-13 should apply in these situations rather than the more “general and comprehensive terms” of section 5A-11.⁵⁹ Therefore, the criminal contempt provisions of section 5A-11 may not

51. *State v. Richardson*, 307 N.C. 692, 694, 300 S.E.2d 379, 381 (1983).

52. N.C. GEN. STAT. § 5A-11(a)(3) (Cum. Supp. 1998).

53. *Id.*

54. N.C. GEN. STAT. § 9-10(a) (1986) (“The register of deeds shall . . . deliver the list of prospective jurors to the sheriff of the county, who shall summon the persons named therein . . .”).

55. *See State v. Hoffman*, 895 S.W.2d 108, 112 (Mo. Ct. App. 1995) (holding that the Missouri statute that required individuals contacted for jury service to be “summoned” used the term in its commonly understood, rather than legal, sense, *e.g.*, to call together, to send, for with authority or urgency, to call upon to do something, etc.).

56. *McIntyre v. McIntyre*, 341 N.C. 629, 631, 461 S.E.2d 745, 747 (1995) (quoting *Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966)).

57. *Id.*

58. N.C. GEN. STAT. § 9-13 (1986).

59. *But cf. Oxendine v. Dept. of Social Services*, 303 N.C. 699, 707, 281 S.E.2d 370, 375 (1981) (holding section 50-13.1 of the North Carolina General Statutes to be “intended as a broad statute, covering a myriad of situations in which custody disputes are involved” and there-

apply to a citizen, properly summoned for jury duty, who does not appear at the designated time and place.

C. North Carolina General Statute § 9-13

Historically, a “*fine*” is imposed by a court when a person has been convicted of violating a criminal law; a “*forfeiture*” occurs when a person free on bail does not appear in court and the bail is forfeited; and a “*penalty*” is recoverable in a civil action.⁶⁰ Section 9-13 of the North Carolina General Statutes uses all three terms. The title of the statute is “*Penalty for Disobeying Summons*,”⁶¹ the first sentence describes the fifty dollars as a *fine*,⁶² and the second sentence then describes the fine as a *forfeiture*.⁶³ What is the nature of the consequence established by section 9-13? The provisions of section 9-13 may not create a civil forfeiture,⁶⁴ but a misdemeanor.

Although the precursor statutes to section 9-13 did appear to establish an automatic penalty for failure to appear in response to a jury summons,⁶⁵ the current section 9-13 does not. Section 9-13 states only that the juror who is summoned, is not excused, and fails to appear, is “subject to” a fine that can be in any amount so long as it is fifty dollars or less.⁶⁶ Thus, assuming that the person was properly sum-

fore as “a general statute” pre-empted when the legislature enacted a statute expressly addressing custody in a specific situation.”)

60. *Cauble v. City of Asheville*, 314 N.C. 598, 607, 336 S.E. 2d 59, 65 (1985); *Board of Educ. v. Town of Henderson*, 126 N.C. 689, 691, 36 S.E. 158, 159 (1900) (“[T]here is a clear distinction between a ‘fine’ and a ‘penalty.’ A ‘fine’ is the sentence . . . for a violation of the criminal law . . . while a ‘penalty’ is . . . recovered in a civil action of debt.”). See also *Price v. Edwards*, 178 N.C. 493, 500, 101 S.E. 33, 37 (1919) (noting that a statute was “clearly penal” as it made a violation punishable by a “fine or imprisonment”). But see *State v. Rumpfelt*, 241 N.C. 375, 377, 85 S.E.2d 398, 400 (1955) (holding that statute used terms fine and penalty interchangeably); *State v. Addington*, 143 N.C. 683, 685-86, 57 S.E. 398, 399 (1907) (stating that the term “fine” can also mean a forfeiture, or a penalty recoverable by civil action); *Williams v. Gibson*, 232 N.C. 133, 134, 59 S.E.2d 602, 603 (1950) (noting that the term “penalty” involves the idea of punishment for infraction of the law). See generally David M. Lawrence, *Fines, Penalties, and Forfeitures: An Historical and Comparative Analysis*, 65 N.C. L. Rev. 49 (1986) (analyzing Article IX, section 7 of the North Carolina Constitution that directs the State to use fines, penalties, and forfeitures).

61. N.C. GEN. STAT. § 9-13 (1986) (emphasis added).

62. *Id.* (emphasis added).

63. *Id.* (emphasis added).

64. If section 9-13 of the North Carolina General Statutes was interpreted to create a civil forfeiture or penalty, the non-appearing juror would still be entitled to notice and an opportunity to be heard prior to entry of any judgment.

65. In 1905, the applicable statute stated:

Every person on the original venire summoned to appear as a juror, who shall fail to give his attendance until duly discharged, shall forfeit and pay for the use of the county the sum of twenty dollars, to be imposed by the court: Provided, that each delinquent jurymen shall have until the next succeeding term to make his excuse for his non-attendance, and, if he shall render an excuse deemed sufficient by the court, he shall be discharged without costs.

Former N.C. GEN. STAT. § 1977 (1905).

66. N.C. GEN. STAT. § 9-13 (1986).

moned, was not excused and failed to appear, the judge who presides at a section 9-13 matter must nevertheless determine in each case whether the person's excuse was "sufficient," and, in any event, whether the person should be fined at all and, if so, the amount of the fine. Thus, there can be no automatic penalty — a hearing is required unless waived by the defendant.

Section 9-13 can be reasonably interpreted to create the crime of disobeying a jury summons because: (1) the liability for and the amount of the fine are not predetermined and require a hearing; (2) the clear use of the term "fine"; and (3) the lack of specificity of the procedure to be followed.⁶⁷ If so interpreted, then pursuant to section 14-1, which defines felonies and misdemeanors,⁶⁸ a violation of section 9-13 is a misdemeanor.⁶⁹ Although a violation of section 9-13 might more appropriately be handled as an infraction under section 14-3.1, *i.e.*, a noncriminal violation of law not punishable by imprisonment but subject to a "penalty of not more than one hundred dollars," it is unlikely that the crime specified in section 9-13 became an infraction simply upon the adoption of section 14-3.1.⁷⁰ If this is the case, then prosecution of violators of section 9-13 should proceed under section 15A-1101. This statute sets forth the applicable procedure for service of a citation or criminal summons (charging a violation of section 9-13), scheduling and prosecution by district attorney, and no right to an

67. In *State v. Addington*, 143 N.C. 683, 57 S.E. 398 (1907), the court stated:

In ordinary legal phraseology, . . . the term 'fine' means a sum of money exacted of a person guilty of misdemeanor, or a crime, the amount of which may be fixed by law or left in the discretion of the Court, while a penalty is a sum of money exacted by way of punishment for doing some act which is prohibited, or omitting to do something which is required to be done. While the words "fine" and "penalty" are often used interchangeably to designate the same thing, we think it will accord more with the true intention of the Legislature if we hold that . . . the word "fine" was used in the sense of punishment for a criminal offense. In the first place, the amount is not fixed or certain, which is the general characteristic of a fine, but not of a penalty, the amount of the latter being certain

Id. at 686, 57 S.E.2d at 399. Compare *State v. Briggs*, 203 N.C. 158, 159, 165 S.E. 339, 339 (1932) (holding that a statute which provided "that no other person than said weighers shall weigh cotton or peanuts sold in said town or township . . . under penalty of \$10.00 . . ." did not create a criminal offense, and a penalty alone can be imposed and enforced in a civil action) with *State v. Snuggs*, 85 N.C. 541, 543 (1881) (holding that where a statute not only creates the offense but fixes the penalty that attaches to it and prescribes the method of enforcing it, no other remedy exists than the one expressly given, and no other method of enforcement can be pursued than the one prescribed).

68. N.C. GEN. STAT. § 14-1 (Cum. Supp. 1998).

69. If so, it would appear to be a Class 3 misdemeanor. N.C. GEN. STAT. § 14-3(a)(3)(1993); N.C. GEN. STAT. § 15A-1340.23(a)(1988).

70. N.C. GEN. STAT. § 14-3.1 (1993). Section 9-13 was adopted in 1967 while § 14.3 became effective on July 1, 1986. No statute expressly states that a violation of § 9-13 is an infraction or changes the term "fine" in § 9-13 (which indicates a criminal statute) to the term "penalty" or "sanction" as used in § 14-3.1. However, § 15A-1361 does blur the significance of the fine/penalty distinction as used in statutes in the post-infraction world.

attorney because no possibility of imprisonment or a fine greater than fifty dollars.⁷¹

CONCLUSION

It appears that most of North Carolina's judicial districts have developed no formal procedures for handling citizens who fail to appear when summoned for jury duty. Thus, the questions raised herein, *e.g.*, does section 5A-11(a)(3) apply or is violation of section 9-13 a civil penalty or a crime, have not been authoritatively addressed or resolved – and there is room to interpret these statutes in several ways. Regardless of how these questions are resolved, several issues of practical significance remain. First, do our courts have the resources to prosecute, for either criminal contempt or a section 9-13 violation, the significant percentage of summoned jurors who fail to appear?⁷² Second, can non-appearing jurors be selectively prosecuted without violating the juror's rights or affecting the viability of the jury venire?⁷³ Third, what effect will such prosecution have on citizens' attitudes towards and willingness to comply with jury duty? Finally, was section 9-13 intended to allow, or in practice will it allow, a citizen to buy his or her way out of jury duty for fifty dollars?⁷⁴

In weighing these questions, some practical observations by those who have studied the issue may be worth considering. As one author

71. See N.C. GEN. STAT. § 7A-451(a)(1) (1995) (“Any case in which imprisonment, or a fine of five hundred dollars (\$500.00), or more, is likely to be adjudged . . .”); see also N.C. GEN. STAT. 15A-1361 *et seq.* (establishing the authority and imposition of fines for criminal offenses).

72. In 1992, in response to a judge's question about how to handle citizens who fail to appear for jury service, AOC Court Management Specialist Miriam Saxon suggested several “better and perhaps less expensive options that might be exercised in lieu of issuing and serving show cause orders” under either § 5A-11 or § 9-13. These options included adding a strong warning on the mailed juror summons on the consequences for failure to appear (*e.g.*, criminal contempt), mounting a public relations campaign on the importance of jury duty and the need to appear if summoned, and adopting a policy that some court official or the sheriff would routinely call each juror who failed to appear and warn them of the consequences for failure to appear and attempt to defer their service until a later time. This latter approach would seem to, at least technically, violate section 9-6(c) of the North Carolina General Statutes which allows the judge to defer service of an excused juror; a juror who fails to appear has not been excused and presumably is subject to being drawn again pursuant to § 9-5. Letter from Miriam Saxon, AOC Court Management Specialist, to E. Burt Aycock, Jr., Chief District Court Judge, Pitt County (May 8, 1992) (on file with the author).

73. Jury expert G. Thomas Munsterman reports that in Washington, D.C., judges would randomly select the unlucky “juror of the month” to prosecute for failure to appear, and that in another city the practice with regard to prosecuting juror no-shows was that “every six months or so we haul 10 people in here and try to get a lot of publicity.” King, *supra* note 9, at 2673 n.106.

74. Although this would seem to be a clear contradiction of the public policy as stated in § 9-6, buying one's way out of jury duty did appear to be allowed under the precursor statutes to § 9-13. Although under these statutes there was no opportunity to seek a court-approved excusal prior to the date of actual service, the court could approve an excuse after the fact which would have the effect of voiding the automatic penalty entered at the time the juror failed to appear.

observed, “[o]ver the years efforts to prevent culpable behavior rather than punish it have proved their value, a useful lesson for those hoping to improve further juror compliance in jurisdictions where jury avoidance . . . affect[s] a significant portion of trials.”⁷⁵ Addressing the reasons citizens prefer to avoid jury duty rather than punishing them for seeking to avoid jury duty may in the long-run prove more effective and efficient.

Reducing the disincentive to jury service may be the preferred solution.⁷⁶ Pending such solutions, however, judges must address the real problem of jurors failing to respond to the summons and the perceived problem of unfairness or selective enforcement. According to a recent survey of judges’ practices in this regard, most judges do little to enforce jury summons but the reasons are varied: (1) proceedings to enforce jury summons are too costly or inefficient; (2) coerced jurors make bad jurors; (3) juror compliance is not so bad that any special action is required; (4) jurors who fail to appear usually have a legitimate reason that would be deemed sufficient if presented to the court; and (5) holding delinquent jurors in contempt is bad publicity for judges facing election.⁷⁷ Unfortunately, after two centuries we have not come very far in resolving the issues surrounding how the court should respond when a summoned citizen fails to appear for jury duty.

75. King, *supra* note 9, at 2675.

76. This conclusion is, of course, debatable. The first recommendation of the recent study *Improving Citizen Response to Jury Summonses: A Report with Recommendations* is that the court should enforce summonses: “The strongest finding in both of our surveys was that sending follow-up mailings to no-show jurors and, when necessary, requiring such citizens to attend show-cause hearings and penalizing them for their nonresponse, substantially increases summons response rates.” BOATRRIGHT, *supra* note 10, at xii.

77. King, *supra* note 9, at 2703.