

# Virginia Liberties

Newsletter of the American Civil Liberties Union of Virginia

Spring 2000

## ACLU Study Says Virginia Death Penalty Flawed

### *Publication of "Unequal, Unfair and Irreversible" Reinigorates Moratorium Movement*

The ACLU of Virginia's newly released study of the death penalty exposes a system that works against justice and fairness at nearly every turn. Capricious in some respects, racially discriminatory in others, subject to Draconian procedural rules, and presided over by the most hostile judiciary in the nation, capital punishment in Virginia is in desperate need of reform.

Motivated by a dramatic increase in the number of executions here--only Texas now executes more people than Virginia--the report is the most comprehensive study of the death penalty every undertaken in Virginia. Entitled *Unequal, Unfair and Irreversible*, the fifty-page document will be used to argue for a moratorium on executions. Copies are being distributed to government officials, religious and civic groups, and others positioned to influence public policy in the state.

Within two weeks after the release of the report in April, every major newspaper in Virginia had published an editorial either explicitly seeking a moratorium on executions or questioning the fairness of the death penalty in Virginia.

Among the study's alarming findings is that race still plays a significant role in the administration of the death penalty. Blacks, for example, are four times more likely than whites to receive the death penalty when the victim of a murder is white. Also, trial attorneys for capital murder defendants tend to be far less competent than their peers. Indeed, the lawyers for those who are on death row are ten times more likely than the general population of attorneys to have their law licenses revoked.

The study received endorsements from the NAACP, the Office of Justice Peace of the Catholic Diocese of Richmond, Virginians for Alternatives to the Death Penalty, and the Virginia College of Criminal Defense Attorneys. Pat Robertson provided an unlikely--and entirely coincidental--endorsement by announcing on the same day of the report's release that he, too, supports a moratorium on executions.

*Unequal, Unfair and Irreversible* can be downloaded from the Internet at <http://members.aol.com/acluva>. Copies are also available by contacting the ACLU of Virginia office.

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## **Ban on Same Sex Prom Dates Lifted**

### *Despite Controversy, High School Couple Attends Event without Incident*

After being told by the principal that she could not bring a same-sex date to the prom, Floyd County High School junior Tiffany Lapine asked her father to intervene. Warren Lapine received the same answer from school officials and called the ACLU for help. Our letter to the principal warning that the ban was unconstitutional brought about a quick resolution to the matter, but did not prevent controversy from developing in the conservative southwestern county.

Although public debate seemed to side with Tiffany's right to bring the date of her choice to the prom, one local elected official pledged at a public meeting to take legal action to prevent it. Later, a local minister declared his intent to organize a protest at the dance. In the end, though, Tiffany and her date attended the prom, where other students either paid no particular attention or congratulated them for standing up for their rights.

## **Minute of Silence Law Threatens Religious Freedom**

Beginning this fall, every public school in Virginia will begin each day with a minute of silence so that students may "meditate, pray, or engage in other silent activity" Sponsored by Fairfax County Senator Warren E. Barry at the urging of religious enthusiast Rita Warren, the original purpose of the measure was undoubtedly to promote organized prayer in public schools.

Amid well-organized opposition and heated exchanges by legislators, the minute of silence bill passed the House and Senate with relative ease and was signed into law by the Governor in April. Virginia has had an optional minute of silence law since 1976, but only six school districts out of more than 130 have chosen to utilize it.

The ACLU is opposed to minute of silence laws, as they have been used traditionally to promote organized prayer in school. In its sole decision on the issue, the U.S. Supreme Court struck down Alabama's mandatory minute of silence law in 1986 after determining that its purpose was to promote school prayer.

The ACLU, which joined a large coalition of groups and individuals to challenge passage of the bill, found fleeting success in the House Education Committee when it gutted the measure. Unfortunately, the bill's original language was substantially restored on the floor of the House of Delegates, and that version later passed the Senate as well. The Virginia ACLU is now planning to mount a legal challenge to the new law.

# The ACLU of Virginia in Action ...New Cases

## Ban on Judges' Voting Challenged

Lawyers for the ACLU of Virginia have asked a federal court to order the Virginia Judicial Ethics Advisory Committee (JEAC) to lift its ban on judges' voting in primaries. The lawsuit, filed in U.S. District Court in Richmond on behalf of two Alexandria General District Court substitute judges, claims that judges should have the same right to vote as other citizens.

Late last year, the JEAC, a nine-member panel appointed by the Virginia Supreme Court, concluded that the Canons of Judicial Conduct for the State of Virginia bar judges from participating in primaries. The Canons state that judges "shall refrain from political activity inappropriate to the judicial office" and should not "attend political gatherings." The JEAC indicated that judges who vote in primaries might be viewed as partisan in their politics and therefore not capable of being impartial in their work.

## Bonds for Religious School Opposed

The ACLU of Virginia has asked the Albemarle Circuit Court to order the County Industrial Authority to withdraw bonds for a construction project at The Covenant School. The ACLU has argued that the bonds violate separation of church and state because the bonds would finance a building at which religious activities, such as chapel services and Bible instruction, will take place.

The Covenant School, which defines itself as "an independent Christian day school" sought approval for the construction bonds, subject to validation by a Virginia court. Under state law, taxpayers who believe that the issuance of such bonds may not be constitutional have a right to intervene. The ACLU represents three Albemarle County residents. Although the lower court judge ruled against the ACLU, the decision has been appealed to the Virginia Supreme Court.

## Federal Employee Oath Challenged

The ACLU of Virginia is representing a woman studying to become a Jehovah's Witness who was forced to resign from her government job when she refused to sign a loyalty oath. The oath, which is compulsory, requires all "civil service and uniform employees" in "an office of honor or profit" to "bear true faith and allegiance" to the U.S. Constitution.

Our client, who prefers to remain anonymous, was an employee of the Fort Belvoir Commissary. She was willing to sign a redacted oath saying she would uphold the Constitution, but was not allowed to do so. The Jehovah's Witnesses teach that God is to be worshipped with all of one's heart and mind. Our client may not therefore divide her allegiance between God and another entity, including the government.

Although she had worked for the Fort Belvoir Commissary for 10 years with a sterling work record, the our client was asked to sign the loyalty oath when her temporary job ended, and she was rehired in a permanent position.

## Right to Protest at the Pentagon Supported

The ACLU is providing legal representation to two protestors arrested for demonstrating outside the Pentagon on the anniversary of the bombing of Hiroshima. The protestors were originally charged with assembling at the Pentagon without a permit and refusing to obey a lawful order to disperse. The former charge was dropped when Pentagon officials were made to realize that they could not require a permit for a small demonstration on government property. The latter charge, however, remained.

The ACLU argues that because the protestors had a right to assemble without a permit, they could not be lawfully ordered to leave the premises, so long as they were not creating a disturbance. The order to leave, therefore, was not lawful, and the protestors were not required to obey it. The case was argued in federal court in Alexandria but no ruling has been issued.

## ACLU Defends English Teacher's Right to Post Banned Books List

No one was more surprised than teacher Jeffry Newton when the principal of Spotswood High School summarily ordered him to remove two lists of banned books from his classroom door. After all, Newton teaches English literature to eleventh and twelfth graders, the lists were published by the venerable American Library Association, *and* the school had ordered and paid for the lists.

The lists of banned books, which are published annually in observance of Banned Books Week, includes revered and widely-read American literature such as *Huckleberry Finn*, *The Color Purple*, *Of Mice and Men*, and *Death of a Salesman*. With no objections from the school, Newton had used the door of his classroom for many years to post news clippings, cartoons and other materials of interest to students. Only the banned books list was ordered removed.

Joined by five national organizations representing booksellers, publishers, librarians and writers, lawyers for the Virginia ACLU filed suit in federal court in Harrisonburg to force the school to return the list to the door. The suit claims that the school's removal of the list was an act of censorship that violated both the teacher's and students' free speech rights.

Note: Shortly before going to press, the federal court in Harrisonburg issued a preliminary ruling that Newton does not have a First Amendment right to post the banned books list. Trial for a permanent ruling is scheduled for this fall, but efforts are being made to resolve the matter prior to that time.

## ...Legal Updates

### ***Supreme Court Upholds Right to Face Accuser***

The U.S. Supreme Court reversed a Virginia Supreme Court ruling allowing hearsay evidence to be used when the bearer of the evidence invokes his Fifth Amendment right not to testify. The ACLU argued that both the Sixth Amendment right to face one's accuser and the Fifth Amendment right against self-incrimination are protected if such evidence is considered hearsay, and the U.S. Supreme Court agreed.

### ***Finn Case Decided, Governor Not Sanctioned***

The Virginia Supreme Court has ruled that doubts about the good faith of lawsuits brought by the Governor should be resolved in the Governor's favor. The ACLU argued that the separation of powers doctrine does not immunize the Governor from sanctions for filing a frivolous lawsuit. A lower court had fined the Governor for intervening when a decision was made to remove life support for a comatose patient.

### ***Public Forum Restrictions Struck Down***

The Fourth Circuit Court of Appeals has struck down the residency requirements for use of a public forum in Fairfax County. The ACLU assisted a Fairfax City resident who had been denied the use of a Fairfax County public forum because she was not a resident.

### ***Miranda Rights Argued in U.S. Supreme Court***

The U.S. Supreme Court recently heard arguments in *Dickerson v. U.S.*, the case challenging the requirement that suspects be told of their constitutional rights. Last year, the Fourth Circuit Court of Appeals ruled that a 1968 federal statute effectively overruled the Supreme Court's decision requiring the Miranda warnings. ACLU filed an amicus brief.

### ***Cross Burning Case Argued in Appeals Court***

The Virginia Court of Appeals heard arguments in the case of a KKK member arrested for burning a cross on a private farm in Carroll County. The ACLU argued that cross burning on one's own property or with the permission of the property's owner is protected by the First Amendment.

### ***Appeals Court Hears Adoption Law Case***

The Virginia Court of Appeals heard arguments in our challenge to the six-month time limit placed on challenging fraudulent adoptions. The ACLU argues that a law giving absolutely no recourse for individuals who have lost their parental rights due to fraud violates the right to due process.

## ...Advocacy

### ***Voter Registration Practices Challenged***

After receiving complaints that the Fredericksburg registrar refused to allow college students to register to vote because they live in dorms (and therefore do not have traditional street addresses) the ACLU staff surveyed the registrars in Virginia's college towns. The research showed that some registrars welcome student registration while others refuse to allow them to register locally. Our letter to the Fredericksburg registrar and the subsequent publicity forced an admission from the State Board of Elections that they do not--but should--have a uniform policy on student registration. The Fredericksburg City Attorney has agreed that students will no longer be prevented from registering merely because they live in dorms.

### ***Norfolk Repeals Leafleting Ordinance***

Shortly before a scheduled trial date, the City of Norfolk agreed to repeal its ordinance requiring permits for distributing political literature in a public park. The ACLU argued that the city's leafleting code is an unconstitutional restriction on free speech.

### ***School Program Now Gender Neutral***

Our letter to Halifax County Schools complaining that only girls are required to participate in the "Baby, Think It Over" program had the desired effect. Designed to simulate the rigors of parenting, the program requires participating students to wear an electronic bracelet that alerts them to when it is time to feed, change, bathe or otherwise care for their "infant." Forced either to make the program mandatory for both boys and girls, or for neither, the school chose the latter.

### ***ACLU Supports Right to Criticize Judge***

The ACLU is assisting Norfolk attorney Jack Ferree, who wrote a letter to the editor of the *Virginian Pilot* that was highly critical of a U.S. District Court Judge. Another attorney wrote the state bar asking that Ferree be disciplined for his uncomplimentary remarks. The ACLU maintains in a letter of support for Ferree that his letter to the editor was protected by the First Amendment.

## Remembering Phil Brenner, Volunteer and Friend

It is with heavy hearts that we report the loss of ACLU of Virginia volunteer Dr. Phillip Brenner. A retired optometrist, Phil had volunteered at the affiliate office three days a week since 1989. He was 78 when he passed away on April 22.

Phil was not a paid employee, but he was very much a part of the staff. For eleven years, he read and responded to letters requesting assistance from the ACLU. Phil's keen eyes--sharpened after thousands of letters--found many cases that would later develop into lawsuits. He also challenged us to think creatively and progressively about the organization's purpose, constantly urging us to do more to right the wrongs he read about each week.

Phil may have come to the ACLU as a volunteer late in his life, but he had been a member of the ACLU and an advocate for civil rights, civil liberties, and disadvantaged persons for many years. While practicing optometry in the 1960s, he fought for the right to give special discounts to union members and low-income patients. Phil, whose older brother was mentally disabled, also served as the president and board member of the Retarded Children's Association of Richmond.

Phil had also become a great friend to the staff over the past decade, inviting us to his home on many occasions to join him and his wife, Edith, in vigorous discussions about defending constitutional rights.

# ...at the State Capitol

With its usual samplings of good and bad legislation, the 2000 session of the Virginia General Assembly was not so dreadful as pundits, including those at the ACLU, predicted. This may have been the most actively conservative and ideologically driven legislative session in many years, but in the end the damage was limited--and there were actually a few bright spots for civil libertarians to celebrate along the way.

## Success on Two Key Issues

*Anti-choice bills and tax credits for parochial school tuition blocked.*

Early in the session, the concerns of the ACLU and our coalition allies focused on stopping bills authorizing tuition tax-credits for families with children in private schools (including religious schools) and five bills restricting reproductive rights. After contentious public hearings, the tax-credit bill failed in committee in both the House and Senate. Although all the anti-abortion bills received some support, only a bill requiring a 24-hour waiting period gained enough momentum to threaten passage. After approval by the House, it was narrowly defeated, on an 8-7 vote, in the Senate Education Committee when one Republican broke ranks with the party.

## Real Progress

*Restoration of voting rights for felons, death penalty restrictions, freedom of information reform all pass.*

Perhaps the most surprising development of the 2000 legislative session was the success of several bills long championed by moderates, but with a history of abject failure. Lawmakers finally passed legislation creating an administrative process for restoring voting rights to former felons. Previously, felons were forced to rely solely on action by the Governor to regain their voting rights, much like being pardoned. When added to the racial consequences of the War on Drugs (see op-ed on next page) the old restrictions effectively disenfranchised a significant portion of African-American voters. The new law does not make it easy to regain voting rights, but it is a start. Lawmakers also passed measures preventing the execution of anyone under 16 years of age at the time the crime was committed and established a panel for resolving disputes that arise when the government refuses to respond to requests under the Freedom of Information Act.

## Progress of the Ephemeral Kind

*Reform of anti-sodomy statute, hate crimes law, and the notorious 21-day rule do better than ever, but still fail.*

The mere thought of dealing with Virginia's sodomy statute has typically caused politicians to run in terror. No bill repealing or reforming the sodomy statute has ever made it out of committee. But this year a measure to reduce the penalty from a felony to a misdemeanor passed the House before being killed in the Senate. Lawmakers have also refrained from dealing seriously with the fact that Virginia's hate crimes law does not extend protections to gays and lesbians. Although neither the House nor Senate bill made it out of committee, both received serious consideration and garnered more votes than in the past. A bill allowing death row inmates to introduce new evidence of their innocence more than 21 days after trial passed the House. Although it was later watered down so as to be meaningless and withdrawn by the patron, this was the most support ever received for this perennial bill.

## Internet Slow Down

*Attempts to require filtering software on school computers fail.*

Legislators either lost their fascination with the Internet for the first time in several years, or figured they had already done sufficient damage. The most threatening bill, which would have required all public schools to use filtering software on computers used by students, was first diluted by amendments and finally killed off altogether in a last minute committee referral. Lawmakers did expand the state's obscenity statute to make it clear that electronic communications, including email and audio and visual images, were covered.

## Drug Wars: The Sequel

*SABRE bill meets resistance, but still enhances, expands drug penalties.*

Lawmakers aggressively promoted the war on drugs with an omnibus anti-drug bill, SABRE, that not only steps up enforcement efforts but also increases penalties for drug use and distribution in numerous categories. This bill could have been much worse, but legislators listened to the ACLU and our friends with Virginians Against Drug Violence, ultimately backing away from many of the bill's most outrageous provisions.

## Politics of Race and Corrections

*Profiling, supermax bills ignored.*

Despite overwhelming anecdotal evidence that Virginia motorists who are African-American are far more likely than whites to be stopped by police--and despite statistics from nearly every state on the eastern seaboard supporting this proposition--legislators refused to study the problem. Likewise, a proposal to study Virginia's supermax prisons failed, even though the controversial facilities have been heavily criticized for their inhumane conditions and tendency to engender violence.

## Portentous Legislative Future

*Public school prayer bills reveal lawmakers' mindset.*

The bill that spoke most frighteningly to the tenor of lawmaking in Virginia was House Joint Resolution 71, which asks Congress to amend the U.S. Constitution to permit organized school prayer. Although only a resolution, it was a vehicle for lawmakers to make a statement on school prayer--a survey of sorts. In the end, 85% of Virginia's legislators voted in favor of the bill. A measure requiring public schools to open each day with a minute of silence for meditation or prayer became law despite vigorous opposition (see page one for details).

*For complete information on the 2000 legislative session visit the ACLU of Virginia website at <http://members.aol.com/acluva>.*

## ACLU Members Make Grassroots Lobbying Project a Success

Hundreds of ACLU of Virginia members signed up to participate in this year's legislative project. These "grassroots lobbyists" received timely memos on the many constitutional issues addressed by legislators this year and, often with little turn-around time, contacted their representatives to voice their opinions on various bills. Thanks to everyone who participated. Your efforts really do make a difference!

# ACLU of Virginia Asks for Moratorium on War on Drugs

*The ACLU believes that the War on Drugs has not only failed to curb drug-related crime, but may be the one policy most responsible for the rapid erosion of our due process and privacy rights in recent years. It has also become yet another vehicle for perpetuating race discrimination in the United States.*

*For these reasons the ACLU of Virginia this year urged legislators to oppose all the bills before the Virginia General*

*Assembly that enhanced existing penalties for illegal drug activities or created new ones.*

*The statement below, which was distributed to legislators and other government officials during the 2000 General Assembly session and sent to most Virginia newspapers, describes in more detail the ACLU's concerns about the War on Drugs, both nationally and as it applies to Virginia.*

## *The War on Drugs: A Failed Policy and a Threat to Constitutional Rights*

After decades of criminal prohibition and intensive law enforcement efforts to rid the country of illegal drugs, violent traffickers still endanger life in our cities, a steady stream of drug offenders still pours into our jails and prisons, and tons of cocaine, heroin and marijuana still cross our borders unimpeded. Criminal prohibition, the centerpiece of the nation's drug policy for more than 75 years, has not only failed to deal effectively with the drug problem, but has also sharply diminished the constitutional rights of law-abiding individuals everywhere.

Since the early 1980s, the government's escalating War on Drugs has led to massive and continuing civil liberties violations. These include the warrantless drug testing of workers and students, the civil forfeiture of people's homes, cars and other assets, racially discriminatory drug courier profiles and unconstitutional searches of people's homes. The War on Drugs not only violates the fundamental rights of privacy and personal autonomy that are guaranteed by our Constitution, but it also perpetuates the racism already deeply imbedded in our society.

Between 1914, when the Harrison Act made drugs illegal, and 1970, 55 federal laws and hundreds of state laws were passed making the possession and the sale of drugs for personal use a crime. Criminalization, however, has not made drugs less accessible. For example, a federal study showed that at in 1975, 87 percent of young people said marijuana was "very easy" or "fairly easy" to obtain. In 1998--after millions of arrests and an exponential increase in prison sentences--the figure was 90 percent.

The War on Drugs has also led to an unprecedented explosion of racially triggered incarceration. Despite the fact that the vast majority of drug users are white, most of those arrested and imprisoned are people of color. The racial disproportion between who is arrested, who is prosecuted, and who gets convicted is alarming. In the end, for the same crime, African-Americans are twice as likely to be prosecuted as whites, and, if convicted, receive substantially longer sentences.

The racial disparity in prosecuting and sentencing drug users has contributed significantly to the over-representation of African-Americans in prison. One out of every three African-American men between the ages of 20 and 29 is now under the jurisdiction of the criminal justice system in this country. This has led to another problem. Fourteen percent of all African-American males in this country are now disenfranchised as a result of felonies, many of which are due to drug possession convictions. In Virginia alone, it is estimated that as much as 25% of African-American men have lost the right to vote.

The War on Drugs has become a system of separating out, subjugating, and imprisoning substantial portions of our population based on skin color.

The War on Drugs affects more than just drug users. It has contributed to the spread of AIDS, a genuine public health disaster, because of prohibitions on the availability and distribution of clean needles. It has swept away the right not to have property taken without due process of law, through the extensive use of civil asset forfeiture. It has established a pretext for racial profiling on our highways, in our airports, at our customs checkpoints and on our streets that is based not on evidence of misconduct but on skin color.

Mandatory minimum sentences, a mainstay of the War on Drugs, eliminate any discretion a judge might have in sentencing. According to the Federal Bureau of Statistics, the average sentence for a first time federal drug offense is 82 months--a third longer than for sexual abuse, twice as long as for assault, and four times longer than for manslaughter. With mandatory minimum sentencing, non-violent drug offenders clog the courtrooms and the prisons originally designed for violent criminals.

A long list of opponents to the War on Drugs has developed in recent years. From William F. Buckley, to former Baltimore Mayor Kurt Smote, to the conservative Cato Institute, the pressure is mounting to rethink from the ground up our decision to criminalize drug use.

Someone once said that the definition of government is an entity that deals with failed programs by allocating more money to them. The billions of taxpayers' dollars spent on the War on Drugs has resulted in no reduction in drug use, the most precipitous decline in Fourth Amendment rights in our history, and a whole new Jim Crow era. Still, we spend more money on it every day.

No less than 25 bills were introduced during the 2000 legislative session to create new crimes related to drugs or enhance old ones. Maybe the place to start is here and now, by opposing all these measures and declaring a moratorium on the War on Drugs in Virginia--at least until a study is conducted to determine if, as many of us suspect, it is doing far more harm than good.

ACLU of Virginia  
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*Spring 2000 Newsletter*

*I want to do more to help guard  
our constitutional rights!*

*Please send me information on:*

- Serving on the ACLU Board.
- Becoming a volunteer attorney.
- Making a tax-deductible donation to the ACLU Foundation of Virginia.
- Joining the DeSilver Society by designating the ACLU in my will.
- Making a gift to the ACLU Endowment.

Name: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

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**WANTED IMMEDIATELY!!**

*Public school students (and their parents) who are willing to serve as plaintiffs in the ACLU's legal challenge to Virginia's new mandatory minute of silence law. No experience necessary. See front page for complete story. Call (804) 644-8080.*

***NOVA CHAPTER CRABFEST  
Sunday, June 25, 1-5 p.m.***

The Northern Virginia Chapter of the ACLU will hold its annual meeting and crabfest Sunday, June 25, from 1-5 p.m. The event will take place, rain or shine, in Area D of Fort Hunt Park in Alexandria and will feature an update from affiliate staff on this year's activities.

The cost is \$12.50 per person for all-you-can-eat crabs, burgers, hot dogs, beer, etc. Please call (703) 370-4944 for more information.