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Young Adults: A Distinctive Group under the Sixth Amendment's Fair Cross-Section Requirement

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Young Adults: A Distinctive Group Under The Sixth Amendment's Fair Cross-Section Requirement

By the time the English colonists[1] arrived in America, the right of criminal defendants to have a jury determine their guilt or innocence had become inherent and invaluable.[2] Not surprisingly, the right to trial by jury was recognized in the Constitution,[3] first in article III, section 2,[4] and later in the fifth[5] and sixth[6] amend-

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1. *See* 4 W. BLACKSTONE, COMMENTARIES *349 (Cooley ed. 1899).

> Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. . . . [T]he founders of the English law have, with excellent forecast, contrived that . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors indifferently chosen and superior to all suspicion.

Id. at 349-50.

2. *See* R. Perry, SOURCES OF OUR LIBERTIES 270 (1959). Perhaps because the right to trial by jury was inherent and invaluable to the English colonists, the denial of the right ranks among the grievances enumerated in the Declaration of Independence, where the colonists complained that the King had deprived them of the benefits of trial by jury. *See* The Declaration of Independence para. 2 (U.S. 1776).

3. Duncan v. Louisiana, 391 U.S. 145, 156 (1968). In *Duncan*, the Court explained that the Framers of the Constitution realized that providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt and overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury . . . he was to have it. *Id.*

4. Article III, section 2, clause 3 of the United States Constitution states that "the Trial of all Crimes, except in Cases of Impeachment; shall be by Jury. . . ."

5. The Fifth Amendment to the United States Constitution reads: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ." U.S. CONST. amend. V.

6. The Sixth Amendment to the United States Constitution reads: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." *Id.* amend. VI.

ments in the Bill of Rights. In *Duncan v. Louisiana*,[7] the United States Supreme Court interpreted the due process clause of the fourteenth amendment to require that states[8] provide trial by jury in all serious offenses.[9]

The United States Supreme Court has further protected and enhanced the right to trial by jury by interpreting the Constitution to require that juries in criminal cases, state or federal, be drawn from venires[10] which represent a fair cross-section of the community.[11] In part, the fair cross-section requirement means that distinctive groups may not be systematically excluded[12] from venires without a valid governmental interest.[13] But, since the Supreme Court has yet to define the phrase *distinctive group*,[14] state and federal courts are without a uniform standard by which to determine the cognizability of allegedly distinctive groups under the sixth amendment.[15]

This comment will discuss the sixth amendment right of criminal defendants to have their guilt or innocence determined by a jury drawn from a source which represents a fair cross-section of the community.[16] The sixth amendment requirement that distinctive groups not be excluded from venires will then be discussed,[17] followed by an examination of the factors courts use in determining group distinctiveness.[18] Specific consideration will be given to the current state of both California and federal law concerning judicial recognition of young adults as a distinctive group.[19] Finally, this comment will suggest that the purposes underlying the fair cross-

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7. 391 U.S. 145 (1968).

8. *See Duncan*, 391 U.S. at 156-157. Although the Court in *Duncan* realized that trial by jury has its weaknesses, it extended the right to trial by jury to the states through the fourteenth amendment, stating that juries "do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes they were created and for which they are now employed." *Id.*

9. *See id.* A serious offense has been found to be any offense for which imprisonment for more than six months could be imposed. *See* Baldwin v. New York, 399 U.S. 66 (1970).

10. A venire is the "list of jurors summoned to serve as jurors for a particular term." BLACK'S LAW DICTIONARY 1395 (5th ed. 1979).

11. *See* Glasser v. United States 315 U.S. 60, 86 (1942); Taylor v. Louisiana 419 U.S. 522, 538 (1975).

12. *See* Duren v. Missouri, 439 U.S. 357, 364 (1979).

13. *See infra* note 59 and accompanying text.

14. Lockhart v. McCree, 476 U.S. 162 (1986).

15. *See infra* text and accompanying notes 93-94.

16. *See infra* text and accompanying notes 21-50.

17. *See infra* text and accompanying notes 51-85.

18. *See infra* text and accompanying notes 86-101.

19. *See infra* text and accompanying notes 102-37.

section requirement call for judicial recognition of young adults as a distinctive group for sixth amendment purposes.[20]

I. Sixth Amendment Right to Trial by Jury

A. *The Fair Cross-Section Requirement*

The United States Supreme Court has held that one of the primary rights secured by the sixth amendment is the right of criminal defendants to be tried before juries drawn from a fair cross-section of the community.[21] This does not mean that criminal defendants have a right to a petit[22] or grand jury[23] which represents a fair cross-section of the community.[24] Nor may a criminal defendant argue under the sixth amendment that the use of either for-cause[25] or peremptory[26] challenges violates the fair cross-section requirement.[27] The fair cross-section requirement applies only to the source from which petit or grand juries are selected.[28]

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20. *See infra* text and accompanying notes 138-85.

21. *See* Taylor v. Louisiana, 419 U.S. 522 (1975). *Taylor* is the first case to hold that the fair cross-section requirement is fundamental to the sixth amendment. Before this holding in *Taylor*, the Court had only implied that juries be drawn from sources truly representative of the community. *See e.g.*, Thiel v. Southern Pac. R.R. Co., 328 U.S. 217, 220 (1946) (stating that "the American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a fair cross-section of the community.")

22. A petit jury is defined as "the ordinary jury for the trial of a civil or criminal action; so called to distinguish it from the grand jury." Black's Law Dictionary 768 (5th ed. 1979).

23. A grand jury is defined as a "body of citizens, the number of whom varies from state to state, whose duties consist in determining whether probable cause exists that a crime has been committed and whether an indictment (true bill) should be returned against one for such a crime. If the grand jury determines that probable cause does not exist, it returns a no bill. It is an accusatory body and its function does not include a determination of guilt." Black's Law Dictionary 768 (5th ed. 1979).

24. *See Taylor*, at 538. In holding that petit juries must be drawn from sources which represent a fair cross-section of the community, the Court emphasized that "[d]efendants are not entitled to a jury of any particular composition; but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Id.*

25. A for-cause challenge is defined as "a request from a party to a judge that a certain prospective juror not be allowed to be a member of the jury because of specified causes or reasons." Black's Law Dictionary 209 (5th ed. 1979).

26. "A request from a party that a judge not allow a certain prospective juror to be a member of the jury. No reason or 'cause' need be stated for this type of challenge. The number of peremptory challenges afforded each party is normally set by statute or court rule." Black's Law Dictionary 209 (5th ed. 1979).

27. *See* Lockhart v. McCree, 476 U.S. 162, 173 (1986). The Court in *Lockhart* explained

Nearly all constitutional rules governing jury selection are now codified in state and federal statutes.[29] The federal statutes implement the constitutional policy that the guilt or innocence of a criminal defendant should be determined by juries selected from a fair cross-section of the community.[30] Under the federal statutes, the chief judge of each district must present a plan[31] to implement jury selection.[32] The plan must establish a jury commission or authorize a court clerk to oversee the jury selection process.[33] The plan must require that the jury commissioner or clerk work under the supervision of the chief judge of the district or the designate judge.[34] The plan must specify whether prospective jurors will be selected from voter registration lists or from lists of actual voters from within the district.[35] The plan must also set forth additional sources of names to be used in jury selection in case voter registration lists or actual voter lists fail to provide a fair cross-section.[36] The plan must specify detailed procedures for selecting names of potential jurors.[37] Further, the plan must ensure that the jury wheel[38]

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that "we have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges. *Id.* at 173. *But cf.* Batson v. Kentucky, 476 U.S. 79 (1986). (holding, on equal protection grounds, invalid the use of peremptory challenges to remove improperly members of the defendant's race from jury participation).

In California, a prosecutor who improperly uses peremptory challenges to exclude members of any distinctive group from jury participation violates the fair cross-section requirement under Article I, Section 16 of the California Constitution. *See* People v. Wheeler, 22 Cal. 3d 258, 280-82, 583 P.2d 748, 764-65, 148 Cal. Rptr. 890, 905-06 (1978) (holding that a defendant has shown improper use of peremptory challenges once he shows either that the prosecutor has struck almost all members of a distinctive group from venire or used a disproportionate number of peremptory challenges against a distinctive group).

28. *See Lockhart*, 476 U.S. at 174. The Court in *Lockhart* specifically stated: "The point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which panels are drawn." *Id.*

29. *See e.g.*, Federal Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1869 (1982). For legislative history, *see* H.R. Rep. No. 1076, 90th Cong., 2d Sess. 53, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 1792. For a general summary of issues relating to jury selection see Foster v. Sparks, 506 F.2d 801, 811 app. (1979) (detailed analysis of jury selection decisions).

30. *See* 28 U.S.C. § 1861 (1982).

31. *Id.* § 1863(a).

32. *Id.* § 1863.

33. *Id.* § 1863(b)(1).

34. *Id.* § 1863(b)(1).

35. *Id.* § 1863(b)(2).

36. *Id.* § 1863(b)(1).

37. *Id.* § 1863(b)(3).

38. A jury wheel is defined as a "physical device or electronic system for the storage and random selection of the names or identifying numbers of prospective jurors. A machine containing the names of persons qualified to serve as grand and petit jurors, from which, in an order determined by the hazard of its revolutions, are drawn a sufficient number of such names to make up the panels for a given term of court." BLACK'S LAW DICTIONARY 769 (5th ed. 1979).

substantially and proportionally represents the judicial district.[39] Once the plan is in effect, names from the jury wheel are selected and assigned to jury panels from which qualified jurors are drawn for duty.[40]

Although procedures for compiling master jury lists vary from state to state, almost all states follow guidelines and procedures similar to those found in the federal statutes.[41] Some states, however, use a "keyman"[42] system to select names for master jury lists.[43] Under the keyman system, "key" local officials[44] recommend people they believe to be qualified as potential jurors.[45] The keyman system also permits various county officials[46] to recommend people of good moral character to be used as prospective jurors.[47] The local officials responsible for jury selection place these recommendations on venires from which jurors are drawn for duty.[48]

Two problems arise with the keyman system: First, individuals recommending names of potential jurors may not know people who belong to potentially large distinctive groups in the community; second, the system is susceptible of intentional discrimination be-

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39. 28 U.S.C. § 1863(b)(1) (1982).
40. *Id.* § 1863(b)(3).
41. *See e.g.,* CAL. CIV. PROC. CODE § 204.5 (West 1982). In California the jury commissioner follows rules of the court in compiling and maintaining master jury lists. *Id.* But under this section, the jury commissioner must detail in writing the plan he uses, and the plan must ensure that the names placed on the master jury lists from source lists are randomly selected from a fair cross-section of the community. *Id.* Under the California Code of Civil Procedure, master jury source lists are compiled from lists of names of registered voters, licensed drivers, and identification card holders. *Id.* § 204.7.
42. *See* Mass. Gen. Laws Ann. ch. 234 § 4 (West 1986) (also called "selectman" or "juror suggest" system).
43. The federal courts used the "keyman" system before enactment of the Federal Jury Selection and Service Act of 1968. *See* H.R. Rep. No. 1076, 90th Cong., 2d Sess. 53, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 1792 n.1.
44. E.g., court clerks and jury commissioners. *See e.g.,* United States v. Duke, 263 F. Supp. 828, 830 (1967) (the court provides a good discussion explaining the keyman system).
45. Massachusetts requires the following:

> The board of election commissioners in cities having such boards, the board of registrars of voters in other cities and the board of selectmen in towns shall annually before July first prepare a list of such inhabitants of the city or town, qualified as provided in section one, of good moral character, of sound judgment and free from all legal exceptions, not exempt from jury service under section one or two, as they think qualified to serve as jurors. The board shall place on said list only the names of persons determined to be qualified as aforesaid upon the knowledge of one of its members, or after personal appearance and examination under oath, or after examination in the form of a questionnaire, approved by the state secretary, to be answered under oath.

Mass. Gen. Laws Ann. ch. 234 § 4 (West 1986).
46. E.g., postmasters, school superintendents, assessors. *Duke,* 263 F. Supp. at 830.
47. *Duke,* 263 F. Supp. at 830.
48. *Id.*

cause it allows individual choice in recommending names.[49] Therefore, the keyman system is more likely than the federal system to produce venires which reflect a selected segment of the community rather than a fair cross-section. Nevertheless, the United States Supreme Court has held that the keyman system is constitutional as long as the master jury source lists represent a fair cross-section of the community.[50]

B. Violating the Fair Cross-Section Requirement by Excluding Distinctive Groups

Venires do not represent a fair cross-section of the community if "distinctive groups" are excluded.[51] Therefore, court officials must not exclude from venires people belonging to any judicially distinctive group merely because of their group affiliation.[52] Generally speaking, this requires court officials to compile names for venires without excluding any economic, sexual, religious, racial, political or geographical groups.[53] One of the primary reasons for not excluding distinctive groups is that a jury whose composition lacks a significant segment of society is inherently less effective in determining the guilt or innocence of a criminal defendant.[54]

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49. *See* H.R. Rep. No. 1076, 90th Cong., 2d Sess. 53, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 1792 n.1.

50. *See* Carter v. Jury Comm., 396 U.S. 320, 335 (1970) (holding that a jury selection statute is not facially invalid because jury commissioners and clerks have wide discretion in compiling source lists as long as the statute was capable of being carried out without discrimination).

51. *See* Thiel v. Southern Pac. R.R. Co., 328 U.S. 217, 220 (1946).

52. *See* Taylor v. Louisiana, 419 U.S. 522, 538 (1975).

53. *See Thiel*, 328 U.S. at 220. This rule has been codified in Federal and State statutes. *See* 28 U.S.C. § 1862 (1982) ("No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the court of International Trade on account of race, color, religion, sex, national origin, or economic status."); *See also* CAL. CIV. CODE § 197.1 (West 1982) ("No person shall be excluded from jury service in the State of California on account of race, color, religion, sex, national origin, or economic status").

54. Peters v. Kiff, 407 U.S. 493 (1972). The Court in *Peters* offered the following reasoning for not excluding distinctive groups:

> The exclusion from jury service of a *substantial* and *identifiable* class of citizens has a potential impact that is too subtle and too persuasive to admit of confinement to particular issues or particular cases. . . . [new paragraph] When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be

1. *A Sixth Amendment Fair Cross-section Distinctive Group Challenge Under* Duren v. Missouri

Two constitutional challenges are available to criminal defendants who believe they were convicted by a jury whose source lists excluded distinctive groups.[55] The first challenge is based on the sixth amendment and is best illustrated by the facts of *Duren v. Missouri*.[56] In *Duren*, the defendant argued that the source from which his jury was selected did not represent a fair cross-section of women in the community.[57] The United States Supreme Court held that the defendant could establish a prima facie sixth amendment claim if he proved the following: (1) that a group was excluded from venire; (2) that this excluded group was a distinctive group in the community; (3) that the representation of this group on venire was not fair and reasonable compared with the number of group members living in the community; and (4) that this unfair and unreasonable representation was due to the systematic exclusion of group members.[58] If the defendant could make this prima facie showing, the burden would then shift to the state to show that

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presented.

Id. at 503-504 (emphasis added). *See* People v. Mora, 190 Cal. App. 3d 208, 221-222, 235 Cal. Rptr. 340, 349 (1987) (citing the foregoing passage from *Peters* in support of its argument that young adults form a distinctive group).

55. Although the primary focus of this comment is on exclusion of distinctive groups from venire under the sixth amendment, a brief look at exclusion under the equal protection clause of the fourteenth amendment is necessary to distinguish the two types of venire challenges.

56. 439 U.S. 357 (1979).

57. *Duren*, 439 U.S. at 363. Under then existing Missouri law all women could receive an automatic exemption from jury service upon request. *See* Mo. CONST. art. 1, § 22(b); Mo. REV. STAT. § 494.031 (Supp. 1988).

58. *Duren*, 439 U.S. at 364. By comparison, California apparently adds an additional "group substitution" requirement: "[T]he party seeking to prove a violation of the representative cross-section rule must *also* show that no other members of the community are capable of adequately representing the perspective of the group assertedly excluded." (emphasis added) Rubio v. Superior Court, 24 Cal. 3d 93, 98, 593 P.2d 595, 598, 154 Cal. Rptr. 734, 737 (1979). (Bird C. J., Newman J., and Tobriner J. dissenting). The dissent in *Rubio* argued that the majority cites no authority for its group substitution rule and that once the court determines a group is distinctive, it need not determine any further distinctiveness of the group. *Id.* at 107, 593 P.2d at 604-05, 154 Cal. Rptr. at 743. But this group substitution rule is of questionable continuing validity. In *People v. Motton*, 39 Cal. 3d. 596, 704 P.2d 176, 217 Cal. Rptr. 416 (1985), the California Supreme Court determined group distinctiveness without applying the group substitution theory of *Rubio*. *Id.* at 606, 704 P.2d at 182, 217 Cal. Rptr. at 422 (citing Tobriner's dissent in *Rubio* as "insightful").

excluding the distinctive group promoted at least one significant and legitimate state interest.[59]

The Supreme Court applied these prima facie elements to the facts in *Duren* and held that the defendant had established a violation of the fair cross-section requirement.[60] Presenting evidence that women comprised only 15% of the venire in a community where women comprised 54% of the population, the defendant argued that a distinctive group in the community had been excluded from venire—women.[61] He further argued that the underrepresentation of women on venire was due to their systematic exclusion.[62] The Supreme Court agreed, holding that women formed a distinctive group for sixth amendment purposes since they are distinct[63] from men.[64] Furthermore, the *Duren* Court held that a venire comprised of 15% women was not fair and reasonable when compared with a community whose population was comprised of 54% women.[65] Since this large discrepancy occurred every week for over one year, not just occasionally, the defendant had proved systematic exclusion.[66] Finally, the state failed to carry its burden to show that excluding women from jury service promoted a legitimate governmental interest.[67]

2. *A Fourteenth Amendment Equal Protection Distinctive Group Challenge Under* Castaneda v. Partida

In addition to a sixth amendment distinctive group challenge, a criminal defendant can challenge the constitutional validity of venire on equal protection grounds.[68] In *Castaneda v. Partida*,[69] the de-

59. *Duren*, 439 U.S. at 367-68. In *Taylor v. Louisiana*, 419 U.S. 522 (1975), the Court explained that these interests included a reasonable exemption based on special hardship, incapacity or certain occupations whose uninterrupted performance is critical to the welfare of the community. *Id.* at 534.

60. *Duren*, 439 U.S. at 366.

61. *Id.* at 364-66.

62. *Id.*

63. Calling women "distinct from men," the Supreme Court essentially took judicial notice of women as a distinctive group. *Duren*, 439 U.S. at 364.

64. *Duren*, 439 U.S. at 364.

65. *Id.* at 364-66.

66. *Id.* at 366.

67. *Id.* at 369. The state argued that it had a legitimate interest in safeguarding the role women play as homemakers. *Id. See* Taylor v. Louisiana, 419 U.S. 522, 534-535 (1975) (the court in *Taylor* had already rejected the state interest in safeguarding the role women play in home and family life).

68. *See e.g.*, Hernandez v. Texas 347 U.S. 475 (1954).

69. 430 U.S. 482 (1977).

fendant argued that the grand jury which indicted him was selected from a venire which excluded persons with Mexican-American surnames.[70] The United States Supreme Court held that a valid constitutional challenge existed under the equal protection clause of the fourteenth amendment, provided the defendant could show that (1) the venire reflected a substantial underrepresentation of an identifiable group or race; (2) that the defendant was a member of that group or race; (3) that the underrepresentation[71] of the alleged group had taken place over a significant period of time; (4) that the venire selection procedure was susceptible of abuse or was not racially neutral; and (5) that the statistical data supported the presumption of discrimination.[72] If the defendant could make this showing, the prosecution would then have the burden of rebutting the inference of intentional discrimination.[73]

In *Castaneda*, the Supreme Court had no trouble concluding that the defendant had established a prima facie case of discrimination against Mexican-Americans.[74] The defendant, a Mexican-American,[75] showed that over an eleven-year period only 39% of the persons solicited for jury service were Mexican-Americans, an ethnic group comprising 79% of the population.[76] This eleven-year time span established the necessary discriminatory intent since the substantial underrepresentation of Mexican-Americans on venire oc-

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70. 430 U.S. at 486.

71. This "rule of exclusion" allows a criminal defendant to prove underrepresentation by comparing the number of group members in the total community to the number of group members called to serve as grand jurors. *Id.* at 494.

72. *Id.*

73. *Id.* at 495.

74. *Id.* at 496.

75. In *Hernandez v. Texas*, 347 U.S. 475 (1954), the Supreme Court held that Mexican-Americans were a distinctive group. *Id.* at 480.

76. The Court relied on the following data to determine discriminatory intent:

Year	No. Persons on grand jury list	Av. No. Spanish surnamed per list	Percentage Spanish surnamed
1962	16	6	37.5%
1963	16	5.75	35.9%
1964	16	4.75	29.7%
1965	16.2	5	30.9%
1966	20	7.5	37.5%
1967	20.25	7.25	35.8%
1968	20	6.6	33%
1969	20	10	50%
1970	20	8	40%
1971	20	9.4	47%
1972	20	10.5	52.5%

Castaneda, 430 U.S. at 487 n.7.

curred over a significant period of time.[77] The Court also held that the keyman system used to select the defendant's grand jury was susceptible of abuse since it was a highly subjective system.[78] Finally, the prosecution was unable to rebut the strong inference of intentional discrimination by establishing any legitimate reason for excluding Mexican-Americans.[79]

Although challenges to venire under both the fair cross-section requirement and equal protection clause appear similar, important and subtle distinctions exist between the two. Primarily, an equal protection challenge requires the criminal defendant to be a member of the allegedly excluded group.[80] But a criminal defendant challenging venire on sixth amendment grounds need not be a member of the allegedly excluded group; the defendant need demonstrate only that venire from which the jury was selected did not represent a fair cross-section of the community.[81] An equal protection challenge requires purposeful discrimination.[82] In contrast, a sixth amendment challenge requires the defendant to present evidence tending to show that exclusion was systematic rather than purposeful.[83] Finally, the burden that shifts to the prosecution for each challenge is different: whereas the prosecution in an equal protection challenge must prove no intent to discriminate,[84] the prosecutor in a sixth amendment challenge must prove that excluding the distinctive group serves at least one significant and legitimate state interest.[85]

II. Defining Group Distinctiveness

77. *Id.* at 494. The Court explained that if the disparity between the number of group members in the community and on venire is sufficiently large, the Court presumes the disparity to be due to discriminatory intent. *Id.*

78. *Id.* at 498.

79. *Id.* at 497.

80. *See id.* at 494. ("[I]n order to show that an equal protection violation has occurred in the context of grand jury selection the defendant must show that the procedure employed resulted in a substantial underrepresentation of his race or of the identifiable group to which he belongs.").

81. *See* Duren v. Missouri, 439 U.S. 357 (1979). In *Duren*, a white male successfully argued that the venire from which his jury was selected violated the sixth amendment cross-section requirement since it did not reflect a fair cross-section of women in the community. *Id.* at 364. This same defendant could not have challenged the venire on equal protection grounds since he was not female.

82. *See Castaneda*, 430 U.S. at 494.

83. *Duren*, 439 U.S. at 364.

84. *See Castaneda*, 430 U.S. 482 at 495.

85. *Duren*, 439 U.S. at 368.

A. *Searching for a Definition of Sixth Amendment Group Distinctiveness*

The distinctive group requirement which began in *Hernandez v. Texas*[86] as an equal protection requirement is also a requisite requirement for sixth amendment venire challenges today.[87] Although the United States Supreme Court in *Hernandez* determined that Mexican-Americans formed a distinctive group for equal protection purposes, the Court carefully expressed its belief that race was not the only basis on which the Court would decide group distinctiveness issues.[88] Accordingly, the Supreme Court has held that women,[89] daily wage earners,[90] persons of similar religious or conscientious beliefs,[91] and blacks[92] form distinctive groups whose members cannot be excluded from venire simply because of their group affiliation. However, in no case where the United States Supreme Court has faced the distinctive group issue has it defined the phrase *distinctive group*.[93] Rather, the Court has taken judicial notice of distinctive

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86. 347 U.S. 475 (1954).

87. *See Duren*, 439 U.S. at 364 (1979); Lockhart v. McCree, 476 U.S. 162, 174 (1986); Taylor v. Louisiana, 419 U.S. 522, 539 (1975).

88. *Hernandez*, 347 U.S. at 478 (1954). In *Hernandez* the Court suggested the possibility of future distinctive groups:

> Throughout our history differences in race and color have defined easily definable groups which have at times required the aid of courts in securing equal treatment under the law. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection.

Id.

89. *See Duren*, 439 U.S. at 370; *Taylor*, 439 U.S. at 531 (both cases holding that women form a distinctive group for sixth amendment purposes).

90. *See* Thiel v. Southern Pac. R.R. Co., 328 U.S. 217, 222 (1946).

91. *See* Witherspoon v. Illinois, 391 U.S. 510, 522 (1968). Some courts refer to these kinds of group members as "Witherspoon-excludables." Witherspoon-excludables appear to form a distinctive group for sixth amendment impartiality purposes in the special context of the punishment phase of a capital case in a bifurcated trial. *Id.* In this context, members of this group may not be excluded from jury service simply because their religious or personal morals will not allow them to impose the death penalty. *Id. But cf.* Lockhart v. McCree 476 U.S. 162, 183 (1986) (holding that Witherspoon-excludables do not form a distinctive group for the guilt phase of a bifurcated trial).

92. *See* Peters v. Kiff, 407 U.S. 493 (1972). The Court held that Blacks form a distinctive group on due process grounds. *Id.* 505. The Court also believed that blacks formed a distinctive group for sixth amendment purposes, but could not hold squarely on the issue because of the procedural posture of the case. *Id.* at 500 n.10; *See also* Swain v. Alabama 380 U.S. 202 (1965) (holding that Blacks form a distinctive group under the equal protection clause of the fourteenth amendment).

93. *See Lockhart*, 476 U.S. at 174.

groups without much analysis or explanation.[94] Therefore, lower courts have created their own approach to determine group distinctiveness, using a "similar attitudes and ideas" standard.[95]

The similar attitudes and ideas standard requires the court to search the excluded group for an attribute or characteristic common to all its members.[96] Courts typically look for any common behavior, attitude, belief or prejudice[97] which clearly distinguishes the challenged group from other segments of society.[98] For example, the California Supreme Court has held that a "common thread" must run through the challenged group before the group can be distinctive for sixth amendment purposes.[99] The common thread approach requires a court to find some kind of attitude, idea, or experience common to all members of the group.[100] The substance of this

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94. Taylor v. Louisiana, 419 U.S. 522 (1975); *See also* Duren v. Missouri 439 U.S. 357 (1979) (holding that women are a distinctive group since they are sufficiently distinct from men).

95. *E.g.*, United States v. Guzman 337 F. Supp 140 (S.D.N.Y.), *affirmed*, 468 F.2d 1245 (1972).

96. *See, e.g., Rubio* 24 Cal. 3d 93, at 97, 593 P.2d at 598, 154 Cal. Rptr. at 737, *Adams*, 12 Cal. 3d at 60, 524 P.2d at 378, 115 Cal. Rptr. at 250; *Guzman*, 337 F. Supp. at 143.

97. *See* People v. Hoiland, 22 Cal. App. 3d 530, 539, 99 Cal. Rptr. 523, 529 (1972). In *Hoiland*, the court expressed its task as looking for an "identifiable consistency in behavior, attitudes, beliefs or even prejudices." *Id.*

98. *See Guzman*, 337 F. Supp. at 143.

99. The California Supreme Court first articulated the "common thread" standard in *Adams v. Superior Court*, 12 Cal. 3d 59, 59-60, 524 P.2d 375, 377-78, 115 Cal. Rptr. 247, 249-250 (1974) (holding that a one-year residency requirement as a prerequisite to being placed on venire was not violative of due process or the equal protection guarantees of the fourteenth amendment). The court in *Adams* relied exclusively on the fair cross-section principle under the sixth amendment to determine the defendant's due process right to proper venire compilation. *Id.* at 59, 524 P.2d 375, 378, 115 Cal. Rptr. 247, 250 (1974).

In *Rubio v. Superior Court*, the California Supreme Court applied the "common thread" test to determine group distinctiveness. *See* Rubio v. Superior Court, 24 Cal. 3d 99, 101-103, 593 P.2d 595, 597-98, 154 Cal. Rptr. 734, 736-37. The *Rubio* Court held that the defendant had a constitutional right under the Sixth Amendment to the United States Constitution and under Article I, Section 16 of the California Constitution to be tried by a jury drawn from a representative cross-section of the community, but failed to specify whether it had applied the *Adams* "common thread" standard to the fair cross-section right under the Sixth Amendment to the United States Constitution or Article I, Section 16 of the California Constitution. *Id.* 24 Cal. 3d at 97, 593 P.2d at 597-98, 154 Cal. Rptr. at 736-37. Therefore, under the principle set forth in *Michigan v. Long*, the *Rubio* court applied the "common thread" standard for determining group distinctiveness under the Sixth Amendment to the United States Constitution. *See* Michigan v. Long, 463 U.S. 1032 (holding that when a "state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.").

100. *Rubio* 24 Cal. 3d at 97, 593 P.2d at 598, 154 Cal. Rptr. at 737, *Adams*, 12 Cal. 3d at 60, 524 P.2d at 378, 115 Cal. Rptr. at 250.

common thread approach is the test almost all courts use to determine group distinctiveness, although the form courts use varies widely.[101]

B. *Youth as a Distinctive Group*

Federal and state courts differ regarding whether young adults form a distinctive group for sixth amendment purposes, and the United States Supreme Court has yet to squarely address the issue.[102] The majority view of lower courts regarding young adults as a distinctive group appears to have been expressed first in California in *People v. Hoiland*.[103] In *Hoiland*, the defendant presented statistical evidence tending to show that the overwhelming majority of residents in the community were students at the University of California at Santa Barbara.[104] The defendant used this evidence to argue that the county judges responsible for venire compilation had systematically excluded young people ages 21-30 from the grand jury pool.[105] Rejecting this argument, the *Hoiland* Court reasoned that no evidence clearly showed young adults (21-30 age group)

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101. *See, e.g.*, Rubio v. Superior Court, 24 Cal. 3d 93, 99, 593 P.2d 595, 599, 145 Cal. Rptr. 734, 738 (1979) (ex-felons do not form a distinctive group); United States v. Brady, 579 F.2d 1121, 1131 (9th Cir. 1978) (the court in *Brady* took judicial notice of Indians as forming a distinctive group); Adams v. Superior Court, 12 Cal. 3d 55, 60, 524 P.2d 375, 378, 115 Cal. Rptr. 247, 250 (1974) (residents of one year or less do not form a distinctive group).

102. Although the United States Supreme Court has not yet decided this issue, the Court has made reference to young adults as a distinctive group. *See* Hamling v. United States, 418 U.S. 87, 137-38 (1974) (the Court assumed that young adults formed a distinctive group to determine that young people were not systematically and purposefully excluded from venire); in *Batson v. Kentucky*, the Court disallowed the use of peremptory challenges to remove potential jurors on the basis of race. *See* Batson v. Kentucky, 476 U.S. 79 (1986) (Rehnquist, J., and Burger, C.J., dissenting). The dissent wrote that group affiliation based on *age* has traditionally been accepted as a legitimate basis for the states to exercise peremptory challenges. *Id.* at 138. In *White v. Georgia*, the Supreme Court was presented with whether to hear the issue of young adult cognizability (whether young adults within an 18-30 age bracket formed a distinctive group), but a majority of the court denied certiorari. *See* White v. Georgia, 414 U.S. 886, 886 (1973) (Brennan, J., Douglas, J., and Marshall, J., dissenting). The dissent contended that a substantial federal question was presented where a large and identifiable segment of the community was arbitrarily eliminated from the jury venire. *Id.* at 889-90.

103. *See* People v. Hoiland. 22 Cal. App. 3d 530, 99 Cal. Rptr. 523 (1st Dist. 1971). The result in *Hoiland* has been consistently followed in other first district cases. *See* People v. Marbley, 181 Cal. App. 3d 45, 225 Cal. Rptr. 918 (1986); People v. Parras, 159 Cal. App. 3d 875, 205 Cal. Rptr. 766 (1984); People v. Estrada, 93 Cal. App. 3d 76, 155 Cal. Rptr. 731 (1979).

104. *Hoiland*, 22 Cal. App. 3d at 537, 99 Cal. Rptr. at 528.

105. *Id.* at 537, 99 Cal. Rptr. at 528.

were a distinctive group for sixth amendment purposes.[106] Specifically, the court believed the very idea that young adults shared any identifiably consistent behavior, attitudes, ideas, beliefs, or prejudices strained credulity.[107] If anything, the court stated, young adults share a common condition—the burden of getting an education, fulfilling military service, or establishing a family.[108] But the court did not believe that the condition of youth made young adults a distinctive group.[109]

Federal courts have also followed the result in *Hoiland* so that all circuits that have decided the issue now hold that young adults do not form a distinctive group.[110] The most recent federal case to address this issue, and one illustrative of the reasoning behind not recognizing young adults as a distinctive group, is *Barber v. Ponte*.[111] Directly overruling First Circuit precedent,[112] the majority in *Barber* held that young adults did not form a distinctive group for fair cross-section purposes.[113] The defendant in *Barber* submitted a report which proved that the percentage of young adults actually appearing on venire was significantly lower than a random selection from the community would have yielded.[114] But the court refused

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106. *Id.* at 540, 99 Cal. Rptr. at 529. The court held that there was no clear evidence that the defendant's mathematical segment of the population (21-30 age group) was a legally distinctive class which required constitutional recognition. *Id.*

107. *Id.* at 539, 99 Cal. Rptr. at 529. The court stated: "To single out one group solely on the basis of a nine-year age bracket as having identifiable consistency in behavior, attitudes, beliefs or even prejudices . . . is either to indulge in sheer presumption or to claim unique omniscience." *Id. But see* People v. Mora 190 Cal. App. 3d 208, 219, 235 Cal. Rptr. 340, 346 (1987) (admitting the risk of "indulging in presumption" or "claiming omniscience," the *Mora* Court nevertheless argued that a distinctive group could be delineated on the basis of age alone).

108. *Hoiland*, 22 Cal. App. 3d at 540, 99 Cal. Rptr. at 529.

109. *Id.* at 539-40, 99 Cal. Rptr. at 529.

110. Barber v. Ponte, 772 F.2d 982 (1st Cir. 1985); Cox v. Montgomery, 718 F.2d 1036 (11th Cir. 1983); Davis v. Greer, 675 F.2d 141 (7th Cir. 1982), *cert. denied*, 459 U.S. 975 (1982); Brown v. Harris, 666 F.2d 782 (2d Cir. 1981), *cert. denied*, 456 U.S. 948 (1982); United States v. Potter, 552 F.2d 901 (9th Cir. 1977); United States v. Test, 550 F.2d 577 (10th Cir. 1976); United States v. Olson, 473 F.2d 686 (8th Cir. 1973), *cert. denied*, 412 U.S. 905 (1973); United States v. Allen, 445 F.2d 849 (5th Cir. 1971); United States v. Di Tommaso, 405 F.2d 385 (4th Cir. 1968), *cert. denied* 394 U.S. 934 (1969).

111. 772 F.2d 982 (1st Cir. 1985) (Bownes, J., dissenting).

112. *See* La Roche v. Perrin, 718 F.2d 500 (1st Cir. 1983); United States v. Butera, 420 F.2d 564 (1st Cir. 1970).

113. *Barber*, 772 F.2d at 996. This case has an interesting procedural history. Upon first appeal from the trial court, three appellate judges (Torruella, J., dissenting) held that young adults did in fact form a distinctive group, but remanded for other reasons. *Id.* On petition for rehearing *en banc* from remand, five judges reversed (Bownes, J., dissenting), holding that young adults (age 18-34) did not form a distinctive group. *Id.*

114. *Id.* at 989. In a period between January 1, 1978 and October 31, 1980, the general community population from which venire was made consisted of 37.82% young adults (ages

to place significant importance on the statistical data of the defendant, conjecturing that young adults could be absent for reasons other than systematic exclusion.[115] Instead of focusing on statistical data, the court insisted that the main emphasis in any group distinctiveness issue should be on class cognizability.[116] Since the defendant in *Barber* offered no specific evidence that identified any common characteristic shared by all people between the ages of 18-35, the defendant had not shown young adults to be a distinctive group.[117] Furthermore, the court did not see anything distinctive about the age bracket 18-35, since this age bracket could constitute one, two, or more groups of young adults.[118]

The dissent in *Barber* reasoned that young adults between the ages of 18-35 did comprise a distinctive group which could not be systematically excluded from jury pools.[119] Unlike the majority which applied a slippery standard of similar attitudes and ideas, the dissent focused on whether the alleged group was easily identifiable and significant,[120] realizing that group distinctiveness resists specific definition and that groups tend to overlap.[121] The dissent argued that because venire selectors had specific information regarding the age of each potential venire member, venire selectors had the opportunity to exclude persons on the basis of age alone.[122] In addition, the actual number of young adults selected for the jury pool was less than half the young adults a random selection would have yielded.[123] Therefore, the opportunity to exclude on the basis

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18-34), but only 18.16% of the jury venire consisted of persons between the ages of 18-34. *Id.* at 1000 n.1. The plaintiff further argued that if adults over the age of 70 were excluded because they could exempt themselves under state law, young adults actually comprised 41.46% of the eligible jurors, but were placed on for the venire only 16.68% of the time. *Id.*

115. *Id.* at 1000. The majority contended that "younger people may be away at school, serving in the armed forces, surfing in Hawaii, etc." *Id.*

116. *Id.* at 999. The court called this emphasis "attitudinal representativeness." *Id.*

117. *Id.* at 998-99.

118. *Id.* at 998. The court explained that there could have been one group of young adults encompassing ages 18-28, another 28-35 or different age groups within the 18-35 age bracket encompassing other age groups. *Id.*

119. 772 F.2d 982, 1001 (1st Cir. 1985) (Bownes, J., dissenting).

120. *Id.* at 1001-1007. (citing Peters v. Kiff, 407 U.S. 493, 503-504 (1972)) (by focussing on the identity and significance of the challenged group, the dissent appeared to rely on the standard set forth in *Peters*). *See supra* note 54 and accompanying text (for the standard set forth in *Peters*).

121. *Id.* at 1001.

122. *Id.* at 1001.

123. *Id.* at 1000. Based on statistical evidence provided by defendant, the dissent noted that "the probability of this discrepancy occurring by chance is less than one in one hundred quadrillion." *Id.*

of age, together with the probability of discrimination, resulted in the systematic exclusion of a distinctive group—young adults.[124] The dissent expressly rejected the majority's argument that measuring group distinctiveness based on age alone would be too amorphous an approach.[125] In support of the argument that age could serve as an appropriate basis for distinctive group cognizability, the dissent pointed to the insurance industry, military service, and eligibility for political office as areas where distinctive groups are not peculiar to society, and where distinctive groups are delineated on the basis of age only.[126]

Some courts share the view of the dissent in *Barber* and reject the reasoning and result of *Hoiland*.[127] The most enlightening of these cases is *People v. Mora*.[128] In concluding that young adults do form a distinctive group for sixth amendment purposes, the *Mora* court expressly rejected the similar attitudes and ideas approach.[129] The court stressed that this approach is of little utility, especially when applied to women[130] and blacks—people belonging

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124. *Id.* at 1001. The dissent found that 37.82% of the population was large and that the group was easily identifiable since all that was needed were birth dates. *Id.*

125. *Id.* at 1002. The dissent challenged the majority's "too amorphous standard" as an illogical premise from which to proceed, asking when "does a Mexican-American or Puerto Rican become simply a Texas [sic] or New Yorker and cease to be part of a distinctive group?" *Id.*

126. *Id.* at 1001.

127. *See. e.g.*, People v. Bartlett, 89 Misc. 2d 874, 393 N.Y.S.2d 866, 871 (1977) (holding the jury array to be defective due to a gross underrepresentation of young adults between the ages of 18 and 30); Julian v. State, 134 Ga. App. 592, 215 S.E.2d 496, 499 (1975) (citing age as a factor to consider when ruling on the distinctive group requirement, although the Court refused to hold that a three-year age group would define the group); People v. Fujita, 43 Cal. App. 3d 454, 475, 117 Cal. Rptr. 757, 770 (1974) (citing age as a proper criterion to identify a community group); People v. Superior Court, 38 Cal. App. 3d 966, 970-77, 113 Cal. Rptr. 732, 735-40 (1974) (concluding that discrimination on the basis of age in the context of grand jury selection is improper); Paciona v. Marshall, 45 A.D.2d 462, 359 N.Y.S.2d 360, 361 (1974) (holding that intentional and systematic exclusion of distinctive classes like women and students from grand jury service is improper); People v. Marr, 67 Misc. 2d 113, 324 N.Y.S.2d 608, 615 (1971) (holding that young adults between the ages of 21 and 32 constitute a distinctive group); State v. Holmstrom, 43 Wis. 2d 465, 168 N.W.2d 574, 578 (1969) (noting that systematic exclusion based on age renders the jury array just as defective as any other type of systematic exclusion).

128. 190 Cal. App. 3d 209, 235 Cal. Rptr. 340 (1987). Although the *Mora* decision regarding young adults as a distinctive group is technically dictum, the court devoted several pages of its opinion to the subject, explaining, "[T]he issue is both controversial and unresolved in our highest tribunals, and we are in disagreement with a number of state and federal intermediate appellate courts." *Id.* at 218, 235 Cal. Rptr. at 346. The *Mora* decision arises out of a peremptory challenge to jury compilation in the context of People v. Wheeler 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978). *See supra* note 28 and accompanying text (for the procedural posture of *Wheeler*).

129. *Mora*, 190 Cal. App. 3d at 219, 235 Cal. Rptr. at 346.

130. *See* Ballard v. United States, 329 U.S. 187 (1946). The United States Supreme Court

to judicially recognized distinctive groups, but people who cannot all possibly share common attitudes and ideas.[131] In reaching the conclusion that young adults do form a distinctive group, the court did not focus on specific age brackets, but on young adults as a whole generation.[132] It proposed that society can be broken down into three separate and distinct categories: The young, the middle-aged and the aged.[133] It also concluded that young adults share common and distinct attitudes which differ greatly from the rest of society.[134] Therefore, excluding young adults from jury participation would weaken the strength of jury deliberation.[135] Finally, the court in *Mora* argued that since almost all criminal defendants are young, and since a jury ought to reflect one's peers,[136] excluding young adults from jury service is fundamentally unfair.[137]

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has rejected the similar attitudes and ideas test as applied to women:

> It is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men [young adults?] were intentionally and systematically excluded from the panel?

Id. at 193-194.

131. *Mora*, 190 Cal. App. 3d at 219, 235 Cal. Rptr. at 346-347.

132. *See id.* at 220, 235 Cal. Rptr. at 347 ("there is no discounting the existence of a certain commonality in the youth of this country despite its enormous numbers and diverse composition").

133. *Id.* at 221, 235 Cal. Rptr. at 348 (the *Mora* Court cites Zeigler, *Young Adults as a Cognizable Group in Jury Selection,* 76 MICH. L. REV. 1045 (1978)). This law review article uses extensive empirical data to support the argument that young adults form a distinctive group.

134. *Id.* at 221, 235 Cal. Rptr. at 348. In asserting its argument that young adults share common attitudes, the *Mora* Court discusses the following:

> It has become a social scientists' [*sic*] truism that the young share common and distinct attitudes. The social scientists' evidence speaks to all the traditional criteria of cognizability. That evidence supplements the . . . argument that the young are easily defined, and the presence of common attitudes suggests that the young are cohesive . . . Age crucially influences people's thoughts and acts: Age, in Mannheim's [*sic*] insightful formulation, locates individuals in the social structure. There is much evidence that, for example, a person's activities, his attitudes toward life, his relationships to his family or to his work—as well as his biological capacities and his physical fitness—are all conditioned by his position in the age structure of the particular society in which he lives.

Id. (citing 3 M. RILEY, M. JOHNSON & A. FONER, AGING AND SOCIETY 398 (1972)).

135. *See Mora*, 190 Cal. App. 3d at 221, 235 Cal. Rptr. at 348. The *Mora* court noted: "the evidence provides a basis for the inference that the attitudes of the young differ sufficiently from those of the rest of the population that excluding the young from juries would adversely affect the quality of deliberation." *Id.* Focussing on the strength of jury deliberation is the same approach the United States Supreme Court used in *Taylor* when it used sociological data which tended to show that "women bring to juries their own perspectives and values that influence both jury deliberation and result." *See Taylor*, 419 U.S. at 532 n.12 (1975).

136. *Mora*, 190 Cal. App. 3d at 221, 235 Cal. Rptr. at 348.

137. *Id.* (citing *Taylor*, 419 U.S. at 530).

III. A Proposed Solution to Defining Sixth Amendment Young Adult Group Distinctiveness

As discussed so far, nearly all courts that have decided whether young adults comprise a distinctive group have focussed on whether they share similar attitudes and ideas.[138] Lower courts have taken this approach since the United States Supreme Court has neither defined the phrase *distinctive group* nor squarely decided whether young adults form a distinctive group for sixth amendment purposes.[139] Although the Court has not expressly defined the phrase *distinctive group* for sixth amendment purposes, the Court has recently resolved a sixth amendment group distinctiveness issue by asking whether exclusion of the challenged group from venire contravened the primary purposes of the fair cross-section requirement.[140] This approach, enunciated in *Lockhart v. McCree*,[141] requires courts to recognize young adults as a distinctive group for sixth amendment purposes.[142]

Lockhart involved an Arkansas felony murder case in which the judge at voir dire[143] removed for cause all potential jurors who stated that they would not impose the death penalty under any circumstance.[144] After losing at the state level, the defendant sought

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138. *See supra* text at notes 102-26.

139. *See supra* text at notes 93, 94.

140. *See* Lockhart v. McCree, 476 U.S. 162, 174-75 (1986).

141. 476 U.S. 162 (1986).

142. *See supra* text at notes 154-85. The *Lockhart* approach obviously does not require delving into the minds of young adults to determine whether they share similar attitudes and ideas; rather, this approach applies the policy factors underlying the fair cross-section requirement to young adults to determine whether they form a distinctive group which should not be excluded from venires.

143. Because the defendant argued that excluding the challenged group at voir dire violated his right to have a jury comprised of a fair cross-section of the community and because the alleged right applies only to venire—not to jury composition—the Court did not have to reach the issue of determining whether the challenged group was distinctive. *Lockhart*, 476 U.S. at 173. *See supra* text at notes 24, 28. Nevertheless, the Court did so under the assumption that the fair cross-section principle applied to petit juries. *Id.* at 174. The Court stated:

> We have never invoked the fair cross-section principle to . . . require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large. . . . [A]n extension of the fair-cross-section requirement to petit juries would be unworkable and unsound, and we decline McCree's invitation to adopt such an extension."

Id. at 173-174.

144. *Id.* at 166.

and received habeas corpus relief.[145] He contended that removing these "Witherspoon-excludables"[146] violated his sixth and fourteenth amendment rights to have a jury drawn from a source fairly representative of the community to determine his guilt or innocence.[147] The district court agreed,[148] and the appellate court affirmed.[149] But the Supreme Court reversed.[150]

In holding that Witherspoon-excludables did not form a distinctive group for sixth amendment fair cross-section purposes, the United States Supreme Court did not use a similar attitudes and ideas test.[151] Instead, the Court determined group distinctiveness by first outlining the three primary purposes of the fair cross-section requirement expressed in *Taylor v. Louisiana*,[152] and then resolving whether excluding Witherspoon-excludables from venire promoted or contravened these purposes.[153]

The first purpose of requiring venires to reflect a fair cross-section of the community is to protect against the use of arbitrary government power and to ensure that the common sense judgment of the community prevails against a mistaken prosecutor.[154] If a segment of society is excluded from jury participation for reasons wholly unrelated to its ability to serve as jurors, the possibility

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145. *Id.* at 167.

146. "Witherspoon-excludables" refers to potential jurors whose views (usually regarding the imposition of the death penalty) "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *See* Wainwright v. Witt, 469 U.S. 412, 433 (1985). *See supra* note 91 and accompanying text.

147. *Lockhart*, 476 U.S. at 167. Understandably, the defendant argued that excluding Witherspoon-excludables produced a conviction-prone jury. *Id.*

148. The trial court held that excluding Witherspoon-excludables before the guilt phase of a bifurcated trial violated the fair cross-section requirement. *See id.* at 168.

149. *See id.* at 169.

150. *Id.* at 174-76.

151. *See id.* at 174-76. The Court did not employ the similar attitudes and ideas standard, because, had the Court done so, it certainly would have found the challenged group to be "distinctive," since all the excluded members shared a common belief concerning the imposition of the death penalty and in fact were excluded for that reason. The Court's approach in *Lockhart* therefore raises the issue of whether the Court impliedly has rejected a similar attitudes and ideas standard to determine group distinctiveness for sixth amendment purposes.

152. 419 U.S. 522 (1975). Citing *Taylor*, the Court in *Lockhart* identified these objectives:

> (1) [G]uarding against the exercise of arbitrary power and insuring that the common sense judgment of the community will act as a hedge against the overzealous or mistaken prosecutor, (2) preserving public confidence in the fairness of the criminal justice system, and (3) implementing our belief that sharing in the administration of justice is a phase of civic responsibility.

See Lockhart, 476 U.S. at 174-75 (citing *Taylor*, 419 U.S. at 430).

153. *Lockhart*, 476 U.S. at 174-75.

154. *Id.* at 174. This first policy consideration in the context of jury trials and the sixth amendment is not new to the court. *See supra* note 3 and accompanying text.

exists that the jury composition in that district will be arbitrarily skewed.[155] A criminal defendant tried before an arbitrarily skewed jury is denied the benefit of the common sense judgment of the community.[156]

Applying these policy considerations to the facts in *Lockhart*, the Court held that the state of Arkansas had a legitimate interest in excluding Witherspoon-excludables.[157] The state sought to obtain one jury properly and impartially qualified as a trier of fact at both the guilt and sentencing phases of a capital case.[158] Since exclusion of Witherspoon-excludables was based on this legitimate government purpose, the state had not arbitrarily skewed the jury composition.[159] Therefore, the defendant was not denied the benefit of the common sense judgment of the community.[160]

But excluding young adults from venire without a legitimate state purpose can give rise to skewed jury composition thereby denying criminal defendants the benefit of the common sense judgment of the community.[161] No legitimate governmental purpose exists for the *wholesale* exclusion of young adults from venire.[162] Further, under the reasoning of *Lockhart*, exclusion of potential jurors on the basis of age alone is improper since age is wholly unrelated to a person's ability to serve as a juror.[163] Therefore, venires that exclude potential jurors on the basis of age produce juries arbitrarily skewed against criminal defendants. And a criminal defendant tried before an arbitrarily skewed jury is denied the common sense judgment of the community.

The second purpose of the fair cross-section requirement is to preserve public confidence in the criminal justice system.[164] The

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155. *Lockhart*, 476 U.S. at 175.
156. *See id.*
157. *Id.*
158. *Id.* The sixth amendment never has been interpreted to guarantee a criminal defendant the right to have a jury determine the appropriate punishment, but only whether a criminal defendant committed the charged offense. *See* Spaziano v. Florida, 468 U.S. 447 (1984).
159. *Lockhart*, 476 U.S. at 176.
160. *Id.* at 175.
161. *See* People v. Mora, 190 Cal. App. 3d 208, 221, 235 Cal. Rptr. 340, 348. In *Mora*, the court argued that because nearly all criminal offenders are young, juries should fairly represent young adults in the community to give criminal defendants a jury of their peers. *Id.*
162. This conclusion appears to accord with the policy declared in the Federal Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 (1982); *See infra* note 185 and accompanying text.
163. *Lockhart*, 476 U.S. at 175.
164. *See id.* at 174-75.

Court in *Lockhart* explained that excluding large groups from jury participation creates an appearance of unfairness,[165] especially when exclusion is based on some immutable characteristic lying beyond the control of a potential juror.[166] To illustrate this point, the Court noted the immutability of blacks, women and Mexican-Americans and explained that these traditionally excluded groups have no control over their race, gender or ethnic background.[167] Therefore, excluding members of these types of groups simply because of their group affiliation is inherently unfair.[168]

On the facts of *Lockhart*, the Court held that excluding Witherspoon-excludables from jury participation did not create an appearance of unfairness.[169] Unlike blacks, women, and Mexican-Americans, Witherspoon-excludables are excluded from jury participation because of a characteristic over which they have complete control.[170] In the context of *Lockhart*, people belong to the group *Witherspoon-excludables* because under no circumstance—even if the law requires—will they impose the death penalty.[171] Since Witherspoon-excludables are excluded from jury participation because of a characteristic which they themselves control, the Court held that their exclusion created no appearance of unfairness.[172] Therefore, their exclusion did not destroy public confidence in the criminal justice system.[173]

In contrast, the exclusion of young adults from jury participation unquestionably creates an appearance of unfairness since exclusion is based on a characteristic over which young adults have no control—age.[174] In this sense, young adults are like traditionally excluded classes: Young adults *must* belong to the group *young adults* because membership in that group depends on age, an attribute lying beyond the control of each individual member. Since age is not within the control of any person, exclusion based on this

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165. *Id.* at 175.
166. *Id.*
167. *Id.* at 176.
168. *Id.* at 175-176. Although the fair cross-section requirement exists to ensure fairness to criminal defendants, the *Lockhart* approach to determine group distinctiveness seems to focus, in part, on the fairness to the prospective juror.
169. *Id.* at 176.
170. *Id.*
171. *Id.*
172. *Id.* at 175-176.
173. *Id.* at 174-176.
174. Even though age changes it can never be within the control of any particular individual.

characteristic undermines the public confidence in the fairness of the criminal justice system.

The third and final purpose of the fair cross-section requirement, as explained in *Lockhart*, is to ensure that every individual help shoulder the burden of administrating criminal justice by participating in the jury system.[175] Explaining this purpose further, the Court in *Lockhart* noted that the improper exclusion of traditionally distinctive groups has deprived citizens of their right to serve on juries in criminal cases.[176] In *Lockhart*, however, the Court held that excluding Witherspoon-excludables did not contravene the third purpose of the fair cross-section requirement since removing Witherspoon-excludables with cause from a *capital case* did not deny members of that group the privilege to participate in other kinds of criminal cases.[177] Therefore, removing Witherspoon-excludables led to no *substantial deprivation* of the basic rights of citizenship.[178]

But excluding young adults from jury service substantially deprives them of a basic right of citizenship.[179] Master jury lists are not normally compiled and used for any one case; they are compiled and used for all criminal cases in a particular community.[180] Therefore, when young adults are excluded from these lists, they are denied a basic right of citizenship by being denied the opportunity to participate as jurors in *all* criminal cases.[181] One court has recognized additional advantages of ensuring that young adults share in the civic responsibility of administrating justice.[182] In *People v. Marr*,[183] the New York Court of Appeals explained that since many young adults are alienated from the government, their participation

175. *See Lockhart*, 476 U.S. at 175.
176. *Id.* at 175.
177. *Id.*
178. *Id.* at 175-176. Important to the Court's decision is the manner in which it determined whether a substantial deprivation of the right to participate as jurors had taken place. The Court did not focus on whether the challenged group was denied the opportunity to participate in any one case, but focused on whether the challenged group was denied the opportunity to participate in *all* criminal cases. *Id.*
179. The Supreme Court has underscored before the importance of sharing in the administration of justice in the context of jury duty. *See* Thiel v. Southern Pacific R.R. Co., 328 U.S. 217, 224 (1946) ("sharing in the administration of justice is a phase of civic responsibility.")
180. United States v. Duke, 263 F. Supp. 828 (1967).
181. Being denied the right to participate in *all* criminal cases is precisely the problem the Supreme Court in *Lockhart* thought to be egregious, calling it a "substantial deprivation" of the right of citizenship. *See Lockhart*, 476 U.S. at 175-76. *See supra* note 178 and accompanying text.
182. *See* People v. Marr, 67 Misc. 2d 113, 324 N.Y.S.2d 608 (1971).
183. 67 Misc. 2d 113, 324 N.Y.S.2d 608 (1971).

in jury service develops their sense of civic responsibility and creates interest in and respect for the law.[184] Therefore, in a much larger sense, excluding young adults from participating as jurors not only leads to a substantial deprivation of their right to citizenship, but also denies them a socially important and socially valuable learning experience.[185]

CONCLUSION

This comment has illustrated that criminal defendants have a constitutional right to be tried by juries drawn from a source which represents a fair cross-section of the community. The sixth amendment requires that distinctive groups not be systematically excluded from venire absent a legitimate state interest. The similar attitudes and ideas standard courts use at present to determine group distinctiveness is unworkable and unpredictable. Courts therefore need to determine group distinctiveness by judging allegedly distinctive groups by the purposes underlying the fair cross-section requirement.

The first purpose of requiring venires to reflect a fair cross-section of the community is to prevent the use of arbitrary government power and to ensure that the common sense judgment of the community will prevail against a mistaken prosecutor. Second, requiring venire to reflect a fair cross-section of the community preserves public confidence in the criminal justice system. Third,

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184. *Id.* at 615. The New York Court of Appeals stated the following reasons for holding that young adults between the ages of 21 and 32 could constitute a distinctive group:

> The court is aware of the alienation of many of our youth from the institutions of government and feels strongly that participation in government, whether by jury duty or voting or other means, will tend to decrease this sense of alienation. Jury service is an important educational experience for the citizen. It encourages the development of civic responsibility as well as an interest in, and respect for, the law and its enforcement. For these reasons, as well as the primary one of providing a fair trial, the officials who administer the jury system should take whatever positive steps are necessary to insure that young adults are fairly represented on jury lists.

Id.

185. This conclusion accords with the policy declared in the Federal Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 (1982). The statute reads:

> It is further the policy of the United States that *all* citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

Id. (emphasis added).

requiring venire to reflect a fair cross-section of the community ensures that every individual helps shoulder the burden of administrating criminal justice by participating in the jury system.

These purposes support the assertion that young adults form a distinctive group for sixth amendment purposes.[186] First, excluding young adults from venires denies a great number of young criminal defendants the benefit of judgment by their peers. Second, excluding young adults on the basis of age—a condition over which an individual can exert no control—is inherently unfair and erodes the confidence society places in the criminal justice system. Third, and perhaps most important, systematically excluding young adults from venire substantially denies them a basic right of citizenship—the opportunity to participate as jurors in the criminal justice system.

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186. This comment has purposefully not attempted to specify any age brackets which might encompass young adults. This kind of determination must be made on specific facts as cases arise. Perhaps the words spoken by Justice Powell in *Barker v. Wingo* are worth repeating here:

> We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months . . . our approach must be less precise.

Barker v. Wingo, 407 U.S. 514, 523 (1972). Rather than quantify young adults into specified age brackets, this comment has instead suggested that young adults form a distinctive group for sixth amendment purposes. How or when a constitutional right is protected means nothing if not recognized at all.