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# The Constitutionality of Excluding Young People from Jury Service

dictated by statute and public policy, will be compounded by the reluctance of states to be sued in tort actions unless current inroads into the doctrine of sovereign immunity are successful. Moreover, the hesitancy of courts to place restrictions on the discretionary powers of prison officials hampers the likelihood of favorable judicial action. To surmount these problems a prisoner may sue under a claim of constitutional right. Even this, however, would be ineffective unless he was specifically singled out for maltreatment and not merely injured as an innocent bystander or unless factual circumstances conclusively demonstrate that far greater force than was reasonably necessary was employed to quell the insurrection.

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## THE CONSTITUTIONALITY OF EXCLUDING YOUNG PEOPLE FROM JURY SERVICE

With the ratification of the twenty-sixth amendment[1] approximately eleven million young persons have been granted the right to vote.[2] This group of young citizens, however, is still precluded from serving on federal juries and many state juries because of statutory age criteria for jury eligibility.[3] A practical effect of these statutes is to create a class of young people who as defendants are too old to be tried in a juvenile court[4] and

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[1]The twenty-sixth amendment states in part:

> Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any state on account of age.

U.S. CONST. AMEND. XXVI. While there is no direct legal relationship between suffrage and jury service, the ratification of the twenty-sixth amendment may promote a re-examination of statutory ages for jury eligibility. For example, the Senate has recently passed a bill to lower the age for federal jury service from 21 to 18. S. Res. 1975, 92d Cong., 1st Sess., 117 CONG. REC. S. 19925-29 (Dec. 1, 1971).

[2]Senate Judiciary Committee, S. Rep. No. 92-26, U.S. CODE CONG. & AD. NEWS, 92d Cong., 1st Sess. 362, 366 (1971).

[3]*See* text accompanying notes 6 and 7 *infra*.

[4]The maximum age for juvenile jurisdiction in the federal system is 18. 18 U.S.C. § 5031 (1948). The maximum age in the states is as follows: ALA. CODE tit. 13, § 350(1)-(3) (1959) (under 16); ALASKA STAT. § 47.10.010(a) (1971) (minor under 18); ARIZ. REV. STAT. ANN. § 8-201(5) (Supp. 1971) (under age of 18); ARK. STAT. ANN. § 45-201 (Supp. 1969) (under age of 18); CAL. WELF. & INST'NS CODE § 600 (1966) (under 21); COLO. REV. STAT. ANN. § 37-9-2(1) (1963) (under 21); CONN. GEN. STAT. ANN. § 17-53 (Supp. 1971) (under 16, 16-17 at discretion cir. ct. judge); DEL. CODE ANN. tit. 10, § 1101 (1953) (under 18); FLA. STAT. ANN. § 39.01(b) (Supp. 1971) (under 17); GA. CODE ANN. § 24-2401(2)(c) (1971) (less than 17); HAWAII REV. LAWS § 571-11(1) (Supp. 1970) (under 18); IDAHO CODE

yet will not be able to have persons of their own age on the jury at a criminal trial.[5] Thus the question may be raised whether these statutes are constitutional where they exclude this segment of society from jury service.

The statute which excludes persons under the age of 21 from jury service in the federal court system is the Jury Service and Selection Act of 1968,[6] which specifies that a person is not deemed qualified to serve on a federal jury unless he is at least 21 years of age.[7] State statutes also establish standards which restrict eligibility for jury service on the basis of age.[8] While with the passage of the twenty-sixth amendment it appears

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ANN. § 16-1802(c) (Supp. 1969) (less than 18); ILL. REV. STAT. § ch. 37, § 702-2 (Supp. 1971) (boy under 17, girl under 18); IND. ANN. STAT. § 9-3204 (Supp. 1971) (under 18); IOWA CODE ANN. § 232.2(3) (1946) (less than 18); KAN. STAT. ANN. § 38-802(b) (Supp. 1970) (less than 18); KY. REV. STAT. ANN. § 208.020(1) (1969) (under 18); LA. REV. STAT. § 13:1569(3) (1968) (less than 17); ME. REV. STAT. ANN. tit. 15, § 2502(4) (1964) (under 17); MD. CODE ANN. art. 26, § 70-1(c) (Supp. 1971) (under 18); MASS. GEN. LAWS ANN. ch. 119, § 52 (1965) (under 17); MICH. STAT. ANN. § 27.3178(598.2)(a) (Supp. 1971) (under 17, crim. ct. option to 19); MINN. STAT. ANN. § 260.015(2) (1971) (under 18); MISS. CODE ANN. § 7185-02(c) (Supp. 1968) (less than 18); MO. ANN. STAT. § 211.021(2) (1962) (under 17); MONT. REV. CODES ANN. § 10-602(1) (1967) (less than 18); NEB. REV. STAT. § 43-201(4) (1968) (under 18); NEV. REV. STAT. § 62.020(1)(b) (1967) (less than 18); N.H. REV. STAT. ANN. § 169:2(III) (Supp. 1970) (under 18); N.J. STAT. ANN. § 2A:4-14 (Supp. 1971) (under 18); N.M. STAT. ANN. § 13-8-20(d) (1953) (less than 18); N.Y. JUDICIARY CT. ACT § 712(a) (McKinney 1963) (less than 16); N.C. GEN. STAT. § 7A-278(1) (Repl. Vol. 1969) (not reached 16); N.D. CENT. CODE § 27-20-02(1) (Supp. 1971) (under 18); OHIO REV. CODE ANN. § 2151.01(B)(1) (1964) (under 18); OKLA. STAT. ANN. tit. 10, § 1101 (Supp. 1971-72) (male under 16, female under 18); ORE. REV. STAT. § 3.250(1) (1969) (under 18); PA. STAT. tit. 11, § 269-1(1) (1965) (under 18); R.I. GEN. LAWS ANN. § 14-1-3(C) (1969) (under 18); S.C. CODE ANN. § 15-1171(2) (Supp. 1970) (under 17); S.D. CODE § 26-8-1(3) (Supp. 1971) (less than 18); TENN. CODE ANN. § 37-202(1) (Supp. 1970) (less than 18); TEX. REV. CIV. STAT. art. 2338-1, § 3 (1971) (male under 17, female under 18); UTAH CODE ANN. § 55-10-64(3) (Supp. 1971) (less than 18); VT. STAT. ANN. tit. 33, § 632(a)(1) (Supp. 1971) (under 16); VA. CODE ANN. § 16.1-141(3) (Repl. Vol. 1960) (under 18); WASH. REV. CODE ANN. § 13.04.010 (1956) (under 18); W. VA. CODE ANN. § 49-5-2 (1966) (under 18); WIS. STAT. ANN. § 48.02(3) (1957) (under 18); WYO. STAT. ANN. § 14-115.2(e) (Supp. 1971) (under 18). *See also* Appendix *infra*.

[5]See Appendix *infra*.

[6]28 U.S.C. §§ 1861 *et seq.* (Supp. 1971).

[7]28 U.S.C. § 1865(b)(1) (Supp. 1971).

[8]ALA. CODE tit. 30, § 21 (Supp. 1969) (not under 21); ALASKA STAT. § 09.20.010 (Supp. 1971) (at least 19); ARIZ. REV. STAT. ANN. § 21-301(a) (Supp. 1970) (registered voter); ARK. STAT. ANN. § 39-101 (Supp. 1969) (registered voter); CAL. CIV. PRO. CODE § 198 (West 1954) (of age of 21); COLO. REV. STAT. ANN. § 78-1-1 (1963) (of age of 21); CONN. GEN. STAT. ANN. § 51-217 (Supp. 1971) (an elector); DEL. CODE ANN. tit. 10, § 4504(a) (Supp. 1970) (qualified voter); FLA. STAT. ANN. § 40.01(1) (Supp. 1967) (over 21); GA. CODE ANN. § 59-106 (Supp. 1970) (registered voter); HAWAII REV. LAWS § 609-1(1) (Supp. 1970) (qualification of voter); IDAHO CODE ANN. § 2-201(1) (1947) (county

that the age for jury eligibility has been lowered to 18 in those states where the minimum age for jury service is defined by the voting age,[9] some thirty states still preclude a young defendant from having persons of his own age on the jury.[10]

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elector; ILL. REV. STAT. ch. 78, § 2 (1968) (21); IND. ANN. STAT. § 4-7115 (Repl. Vol. 1968) (resident voter); IOWA CODE ANN. § 607.1 (1946) (qualified elector); KAN. STAT. ANN. § 43-102 (1963) (qualifications of elector); KY. REV. STAT. ANN. § 29.025 (Supp. 1971) (at least 18); LA. CRIM. PRO. CODE ANN. art. 401(2) (West 1967) (at least 21); ME. REV. STAT. ANN. tit. 14, § 1254 (Supp. 1970) (registered voter); MD. CODE ANN. art. 51, § 6(viii) (Supp. 1970) (21 or over); MASS. GEN. LAWS ANN. ch. 234, § 1 (Supp. 1970) (not under 22); MICH. STAT. ANN. § 27A.1306(a) (Supp. 1971) (an elector); MINN. STAT. ANN. § 593.04, 628.54 (1945) (cannot be a minor); MISS. CODE ANN. § 1762 (Supp. 1968) (not under 21); MO. ANN. STAT. § 494.010 (Supp. 1971) (over 21); MONT. REV. CODES ANN. § 93-1301 (Supp. 1971) (19); NEB. REV. STAT. § 25-1601 (1964) (over 25); NEV. REV. STAT. § 6.010 (1968) (qualifications of elector); N.J. STAT. ANN. § 2A:69-1 (Supp. 1971) (over 21); N.M. STAT. ANN. § 19-1-1 (1953) (qualified elector); N.Y. JUDICIARY LAW § 662(2) (McKinney 1968) (not less than 21); N.C. GEN. STAT. § 9-3 (Repl. Vol. 1969) (21 or over); N.D. CENT. CODE § 27-09.1-05(1) (Supp. 1971) (actual voter); OHIO REV. CODE ANN. § 2313.06 (Baldwin 1964) (elector); OKLA. STAT. ANN. tit. 38, § 28 (Supp. 1971) (21 years of age); ORE. REV. STAT. § 10.030(c) (Repl. Vol. 1969) (over 21); PA. STAT. tit. 17, § 942 (1962) (qualified electors); R.I. GEN. LAWS ANN. § 9-9-9 (1969) (male over 25); S.C. CODE ANN. § 38-52 (Supp. 1970) (over 21); S.D. CODE § 16-13.10 (1967) (qualifications of elector); TENN. CODE ANN. § 22-101 (1956) (over 21); TEX. REV. CIV. STAT. ANN. art. 2133 (Supp. 1971) (over 21); UTAH CODE ANN. § 78-46-8(1) (1953) (over 21); VA. CODE ANN. § 8-174,-175 (Repl. Vol. 1957) (over 21); WASH. REV. CODE ANN. § 2.36.070(3) (1956) (over 21); W. VA. CODE ANN. § 52-1-1 (1966) (21); WIS. STAT. ANN. § 255.01(2) (1971) (qualified elector); WYO. STAT. ANN. § 1-77(1) (Supp. 1971) (21). No minimum age is specified for jury service in New Hampshire and Vermont where the selection of the jury pool is left to the discretion of a local official. *See* N.H. REV. STAT. ANN. § 500:1 (Repl. Vol. 1968) (selectman's list); VT. STAT. ANN. tit. 4, § 903 (Supp. 1971) (selected by jury comm.) See also Appendix *infra*.

[9]ARIZ. REV. STAT. ANN. § 21-301(a) (Supp. 1971); ARK. STAT. ANN. § 39-101 (Supp. 1969); CONN. GEN. STAT. ANN. § 51-217 (Supp. 1971); DEL. CODE ANN. tit. 10, § 4504(a) (Supp. 1970); GA. CODE ANN. § 59-106 (Supp. 1970); HAWAII REV. LAWS § 609-1(1) (Supp. 1970); IDAHO CODE ANN. § 2-201(1) (1947); IND. ANN. STAT. § 4-7115 (Repl. Vol. 1968); IOWA CODE ANN. § 607.1 (1946); KAN. STAT. ANN. § 43-102 (1963); ME. REV. STAT. ANN. tit. 14, § 1254 (Supp .1971); MICH. STAT. ANN. § 27A.1306(a) (Supp. 1971); NEV. REV. STAT. § 6.010 (1968); N.M. STAT. ANN. § 19-1-1 (1953); N.D. CENT. CODE § 27-09.1-05(1) (Supp. 1971); OHIO REV. CODE ANN. § 2313.06 (Baldwin 1964); PA. STAT. tit. 17, § 942 (1962); S.D. CODE § 16-13-10 (1967); WIS. STAT. ANN. § 255.01(2) (1971). Kentucky's age for jury service was 18 prior to the ratification of the twenty-sixth amendment. KY. REV. STAT. ANN. § 29.025 (Supp. 1971).

The effect of lowering of the age to 18 is premised upon the effect which the nineteenth amendment had in qualifying women for jury service where the status of qualified elector was the basic test of eligibility. *See* United States v. Roemig, 52 F. Supp. 857 (N.D. Iowa 1943).

[10]ALA. CODE tit. 30, § 21 (Supp. 1966); ALASKA STAT. § 09.20.010 (Supp. 1971); CONN. GEN. STAT. ANN. § 51-217 (Supp. 1971); FLA. STAT. ANN. § 40.01(1) (Supp. 1967); GA. CODE ANN. § 59-106 (Supp. 1970); ILL. REV. STAT. ch. 78, § 2 (1969); LA. CRIM. PRO.

In those jurisdictions where the problem exists,[11] there are basically two challenges which a young defendant can make to the constitutionality of these statutes.[12] In federal courts, he can challenge the federal statute which establishes the minimum age for jury eligibility at 21[13] on the basis that it has the effect of denying him his sixth amendment right to trial by an impartial jury. Similarly, since the sixth amendment right to an impartial jury has been made applicable to the states through the due process clause of the fourteenth amendment,[14] state statutes can be challenged in either state or Federal courts on the ground that they also abridge this sixth amendment right.[15] Because this sixth amendment right is equally applicable to the state and federal governments, subsequent discussion of the sixth amendment impartial jury standard bears equal relevance to state and federal statutes.

In the sixth amendment challenge to the federal or to a state statute the court would have to decide whether or not a young defendant has an impartial jury where all persons his own age have been excluded from jury service. The current standard of an impartial jury has evolved from the Supreme Court's 1880 decision in *Strauder v. West Virginia*,[16] where the Court declared:

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CODE ANN. art. 401(2) (West 1967); ME. REV. STAT. ANN. tit. 14, § 1254 (Supp. 1970); MD. CODE ANN. art. 51, § 6(viii) (Supp. 1970); MASS. GEN. LAWS ANN. ch. 234, § 1 (Supp. 1970); MICH. STAT. ANN. § 27A.1306 (Supp. 1971); MINN. STAT. ANN. §§ 593.04, 628.54 (1945); MISS. CODE ANN. § 1762 (Supp. 1968); MO. ANN. STAT. § 494.010 (Supp. 1971); MONT. REV. CODES ANN. § 93-1301 (Supp. 1971); NEB. REV. STAT. § 25-1601 (1964); N.J. STAT. ANN. § 2A:69-1 (Supp. 1971); N.Y. JUDICIARY LAW § 662(2) (McKinney 1968); N.C. GEN. STAT. § 9-3 (Repl. Vol. 1969); OKLA. STAT. ANN. tit. 38, § 28 (Supp. 1971); ORE. REV. STAT. § 10.030 (Repl. Vol. 1969); R.I. GEN. LAWS ANN. § 9-9-9 (1969); S.C. CODE ANN. § 38-52 (Supp. 1970); TENN. CODE ANN. § 22-101 (1956); TEX. REV. CIV. STAT. ANN. art. 2133 (Supp. 1971); UTAH CODE ANN. § 78-46-8(1) Code Ann. § 78-46-8(1) (1953); VA. CODE ANN. § 8-174,175 (Repl. Vol. 1957); WASH. REV. CODE ANN. § 2.36.070(3) (1956); W. VA. CODE ANN. § 52-1-1 (1966); WYO. STAT. ANN. § 1-77(1) (Supp. 1971). See Appendix *infra*.

[11]*Id.*

[12]The first of these challenges, based upon the sixth amendment right to an impartial jury, is discussed in the text accompanying notes 16-36 *infra*.The second challenge, based upon the equal protection clause of the fourteenth amendment, is discussed in the text accompanying notes 37-42 *infra*.

[13]*See* note 7 *supra*.

[14]Witherspoon v. Illinois, 391 U.S. 510, 518 (1968) (stating that petitioner was entitled to an impartial jury under the sixth amendment); Duncan v. Louisiana, 391 U.S. 145 (1968) (applying the sixth amendment right to trial by jury to the states).

[15]While it may appear that a young defendant could also challenge the state statute on the basis that he has been denied equal protection of the law because his sixth amendment right to an impartial jury has been abridged when this same right has not been abridged for all those who are over the statutory age, this challenge in reality is based solely upon the sixth amendment right. Thus, once the court has decided whether or not the sixth amendment right has been abridged, it would seem unnecessary to consider the equal protection question in this context.

[16]100 U.S. 303 (1880).

> The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.[17]

The concept of the jury as a body of peers or equals has its historic origins in the Magna Charta,[18] but the Court went beyond peers and equals as it developed the standard of impartiality, indicating in subsequent years that the jury should be a body truly representative of the community.[19] In *Glasser v. United States*[20] the Court first enunciated what has come to be known as the "cross-section" rule,[21] stating in a subsequent decision that "[t]he American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community."[22] When there existed "the admitted exclusion of an eligible class or group in the community . . . ,"[23] the standard of drawing from a cross section was not met.

With regard to the young defendant the question becomes whether minimum age statutes exclude a class or group from jury service so as to prevent the jury from being a truly representative body. According to sociologist Kenneth Keniston, young people comprise a class with distinctive values, outlooks, manners, roles, and behavior patterns.[24] These distinguishing characteristics are reflected in part in young peoples' attitudes towards drugs[25] and towards compulsory military service,[26] two areas that have become increasingly prominent in criminal law. The problem is that

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[17]*Id.* at 308.

[18]*See* W. McKECHNIE, MAGNA CHARTA 134-38 (1914); 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 119-22 (1895).

[19]*See, e.g.*, Glasser v. United States, 315 U.S. 60, 86 (1942).

[20]315 U.S. 60 (1942).

[21]*Id.* at 86. *See* Note, *The Congress, the Court and Jury Selection: A Critique of Title I and II of the Civil Rights Bill of 1966*, 52 VA. L. REV. 1069, 1109 (1966).

[22]Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946).

[23]Ballard v. United States, 329 U.S. 187, 195 (1946).

[24]K. KENISTON, THE UNCOMMITTED 394 (1st ed. 1965).

[25]In 1969 it is estimated that 77.2% of those arrested for narcotics law violations were under 24 years of age, thereby clearly indicating that this is a youth oriented crime. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1971 at 146 (92d ed. 1971).

Waiver of jury trials occurs most frequently in cases involving narcotics law violations because of low jury leniency ratings. H. KALVEN, JR. & H. ZEISEL, THE AMERICAN JURY 29 (1st ed. 1966). Conversely, liquor and drunk driving laws are unpopular among juries as being too severe. *Id.* at 287. This dichotomy is perhaps indicative of an age-culture bias, as younger juries might tend to treat narcotics laws as unpopular sumptuary laws just as older juries have seemingly done with laws regulating the use of their drug, alcohol.

[26]Selective service law violations, which are most likely to be committed by those

Keniston's definition of this class, generically designated as "youth,"[27] encompasses roughly the ages from 18 to 26,[28] while a young defendant, in order to meet the cross section test of the court, must show, for example, that young people 18 to 20 comprise an identifiable group which should not be excluded from jury service. Even though young adults have been recognized as a group which cannot be constitutionally excluded from jury service,[29] some courts have stated that there is nothing identifiable or distinctive about young adults in a specific age range, such as from 21 to 23, to set them apart from young adults aged 23 and over.[30] Thus, a court might feel that there is nothing identifiable or distinctive about young people aged 18 through 20 to set them apart from those over the age of 20.

Several courts have rejected challenges to the exclusion of minors from juries apparently on the basis that there is a legislative perogative to treat minors differently from adults.[31] In *George v. United States*[32] a minor

between the ages of 18 and 26, have increased significantly in the past 10 years.

*Number of Defendants Charged with Selective Service Law Violations*

| | *Year* | | | | | | |
|---|---|---|---|---|---|---|---|
| Number | *1960* | *1965* | *1966* | *1967* | *1968* | *1969* | *1970* |
| | 239 | 341 | 516 | 996 | 1,192 | 1,744 | 2,833 |

BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1971 at 257 (92d ed. 1971).

[27]K. KENISTON, YOUNG RADICALS 264 (1st ed. 1968).

[28]*Id.*

[29]In a challenge to the apparent exclusion of young adults from jury pools the First Circuit has said that

> we are satisfied that young adults constitute a cognizable—though admittedly ill-defined—group for the purposes of defendant's prima facie case. We cannot allow the requirement of a 'distinct' group to be applied so stringently with regard to age grouping that possible discrimination against a large class of persons—in our case, those between 21 and 34—will be insulated from attack. Nor can we close our eyes to the contemporary national preoccupation with a 'generation gap,' which creates the impression that the attitudes of young adults are in some sense distinct from older adults.

United States v. Butera, 420 F.2d 564, 570 (1st Cir. 1970).

[30]United States v. Kuhn, 441 F.2d 179, 181 (5th Cir. 1971); *see* King v. United States, 346 F.2d 123, 124 (1st Cir. 1965).

[31]United States v. Tantash, 409 F.2d 227 (9th Cir.), *cert. denied*, 395 U.S. 967 (1969); King v. United States, 346 F.2d 123 (1st Cir. 1965); George v. United States, 196 F.2d 445 (9th Cir.), *cert. denied*, 344 U.S. 843 (1952); *cf.* United States v. McVean, 436 F.2d 1120, 1122 (5th Cir. 1971).

[32]196 F.2d 445 (9th Cir.), *cert. denied*, 344 U.S. 843 (1952).

defendant who was under indictment for violation of the Selective Service Act of 1948 challenged the exclusion of minors from the grand jury. The Ninth Circuit rejected the challenge, upholding the right of Congress to exclude minors from jury service[33] and expressing the view that minors could not be eligible for jury service because they would have no place on juries which deal with offenses committed by adults,

> [f]or, as to adults, minors would represent not a part of the cross section of the country, but a wholly *foreign* group unrelated to the adult stream which dominates American life.[34]

While the Supreme Court has stated in dicta that a legislature may restrict jury eligibility on the basis of age,[35] it has never considered whether age standards would violate the concept of the impartial jury as stated in *Strauder*.[36] If a court places primary emphasis on the concept of the jury as a body composed of those having the same legal status in society as the defendant, it may find that the young defendant has been denied an impartial jury by the exclusion of persons who, like himself, are too old to be tried in the juvenile system. Therefore, the court might decide that these young persons are members of an identifiable group within the community and that the exclusion of this group will be said to violate the cross-section standard.

It is possible to assert the challenge to a state statute in different terminology, relying upon the fourteenth amendment guarantee of equal protection of the law.[37] A young defendant could assert that the state has denied him equal protection because, as against all other defendants who are over the minimum statutory age for jury service, he, as a person under that age, had no opportunity to have persons his own age on his jury.[38] Here the young defendant would claim that age qualifications discriminate unreasonably against his class.

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[33]*Id.* at 453.

[34]*Id.* at 454.

[35]Carter v. Jury Commission, 396 U.S. 320, 332 (1970); Strauder v. West Virginia, 100 U.S. 303, 310 (1880).

[36]*See* text accompanying note 39 *infra.*

[37]*See, e.g.*, Swain v. Alabama, 380 U.S. 202 (1965); Hernandez v. Texas, 347 U.S. 475 (1954); Brown v. Allen, 344 U.S. 443 (1953); Fay v. New York, 332 U.S. 261 (1947); Smith v. Texas, 311 U.S. 128 (1940); Strauder v. West Virginia, 100 U.S. 303 (1880). It may be possible upon the same facts and analysis to make an "equal protection" argument against the federal statute. While the fourteenth amendment does not apply to the federal government, the Supreme Court has interpreted the due process clause of the fifth amendment as forbidding discriminatory classifications which are so unjustifiable that they are violative of due process. Shapiro v. Thompson, 394 U.S. 618, 642 (1969); Schnieder v. Rusk, 377 U.S. 163, 168 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[38]*See* note 5 *supra.*

In determining whether or not the state had created a classification which unreasonably discriminated against young people the court would decide first, if the classification was a permissible exercise of state power and second, if the classification had a reasonable relation to the intended purpose.[39] The Supreme Court has held that states may validly promulgate standards for qualification for jury service,[40] the general rule being that as long as the classification is not totally irrelevant to the purpose of the statute, that is, as long as some rational nexus can be found, the statute will be upheld.[41]

When the defendant asserts that equal protection has been denied him as against other defendants who have an opportunity to have persons of their own age on the jury, he is claiming that the statute setting a minimum age for jury service results in "under-inclusion." This result has been said to occur

> when a state benefits or burdens persons in a manner that furthers a legitimate public purpose but does not confer this same benefit or place this same burden on others who are similarly situated.[42]

The argument can thus be made that the state has burdened a young defendant by excluding persons of his age from jury service when it has not so burdened other defendants.

The ultimate success of this challenge, then, will depend upon the ability of a young defendant to show that he has been burdened when other defendants have not. It seems that the only burden which he can show is that persons his own age have been excluded from eligibility for jury service, which in reality is merely another way of saying that an identifiable class has been excluded. Therefore, there seems to be no practical difference between the equal protection and the sixth amendment challenge to the state statute.

If either of these challenges should be successful, a court would have to consider several practical problems. In the challenge based upon the

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[39]*See, e.g.*, Kramer v. Union Free School Dist., 395 U.S. 621, 632-33 (1969); McLaughlin v. Florida, 379 U.S. 184, 191 (1964). *See also Developments in the Law-Equal Protection*, 82 HARV. L. REV. 1065, 1077-84 (1969).

[40]The Court stated in Strauder v. West Virginia, 100 U.S. 303, 310 (1880), that a state could prescribe qualifications for jury service and in doing so could make discriminations within the limits of the fourteenth amendment.

[41]*See, e.g.*, McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969); International Harvester Co. of America v. Missouri, 234 U.S. 199, 215 (1914); Metropolis Theatre Co. v. Chicago, 228 U.S. 61, 70 (1913); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

[42]*Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1084 (1969). *See, e.g.*, Rinaldi v. Yeager, 3894 U.S. 305, 309 (1966).

sixth amendment to either a state or the federal statute, a court would have to decide what new minimum age for jury service would not violate the impartial jury standard. With regard to a successful equal protection challenge to a state statute, the court in balancing competing interests must determine the specific age at which the state interest will again predominate. A possible solution to this problem is to make the minimum age for jury service coincide with the age at which criminal courts assume jurisdiction from juvenile courts.

A second problem is that lowering the age for jury service may involve large numbers of people in high school or college, or with pending military obligations. The exigencies of a long trial may conflict with these situations. On the other hand, to exempt these young people from jury service will greatly reduce the pool of available young jurors.

A third possible problem of lowering the age of criminal jury eligibility involves the impact upon civil juries. The question arises as to whether the state and federal government could maintain the minimum age for civil juries at the existing level. It seems, however, that the standard of the impartial jury based upon the cross-section of the community is equally applicable to civil and criminal proceedings whenever a jury is provided.[43] The practical effect, then, of a successful challenge by a young defendant would seem to be to lower the age for jury service for both criminal and civil juries.

Despite these practical problems, it appears that the argument can still be made against the constitutionality of these statutes. Notwithstanding the previous rulings on this issue, the question may continue to be raised and perhaps the problem should be re-evaluated. The sixth amendment standard of an impartial jury may be violated by excluding from eligibility for jury service those young people who no longer fall within the protection of the juvenile court. While there would be some difficulty in establishing that these young people constitute an indentifiable class, this class may well be defined as those subject to the criminal court system who are denied the opportunity to have persons of their own age on the jury.

In addition, this special class of defendants may have been so unreasonably discriminated against that they have been denied equal protection of the law. The possibility of disadvantage accruing from this discrimination is only speculative, but there is some question as to whether middle-aged and middle-class jurors can sit in judgment of a young selective service law violator and fairly evaluate his case, or whether wage earners can objectively hear the case of a long-haired campus radical.

To promote the legitimacy of our legal system and to assure that juries may be truly representative of the community, it would seem that efforts

[43]Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946).

are needed to lower present minimum jury age requirements where they exclude the class of young people who no longer enjoy the protection of the juvenile court system. While it is possible that problems may arise in lowering the jury age requirements and that these problems may best be handled by legislative action, unless such action is forthcoming some impetus should be judicially supplied.

PHILIP BLAIR DUNDAS, JR.

## APPENDIX

| State | Minimum Jury Age | Minimum Mandatory[a] Criminal Court Age | Age Group of Criminal Defendants Precluded From Having Juror Of Same Age |
|---|---|---|---|
| Alabama | 21 | 16 | 16-20 |
| Alaska | 19 | 18 | 18 |
| Arizona | 18 | 18 | — |
| Arkansas | 18 | 18 | — |
| California | 21 | 21 | — |
| Colorado | 21 | 21 | — |
| Connecticut | 18 | 16[b] | 16-17 |
| Delaware | 18 | 18 | — |
| Florida | 22 | 17 | 17-21 |
| Georgia | 18 | 17 | 17 |
| Hawaii | 18 | 18 | — |
| Idaho | 18 | 18 | — |
| Illinois | 21 | 17 (male), 18 (female) | 17-20 (male), 18-20 (female) |
| Indiana | 18 | 18 | — |
| Iowa | 18 | 18 | — |
| Kansas | 18 | 18 | — |
| Kentucky | 18 | 18 | — |
| Louisiana | 21 | 17 | 17-20 |
| Maine | 18 | 17 | 17 |
| Maryland | 21 | 18 | 18-20 |
| Massachusetts | 22 | 17 | 17-21 |
| Michigan | 18 | 17[b] | 17 |
| Minnesota | 21 | 18 | 18-20 |
| Mississippi | 21 | 18 | 18-20 |
| Missouri | 22 | 17 | 17-21 |
| Montana | 19 | 18 | 18 |
| Nebraska | 26 | 18 | 18-25 |
| Nevada | 18 | 18 | — |
| New Hampshire | n/a* | 18 | — |
| New Jersey | 22 | 18 | 18-21 |
| New Mexico | 18 | 18 | — |
| New York | 21 | 16 | 16-20 |
| North Carolina | 21 | 16 | 16-20 |
| North Dakota | 18 | 18 | — |
| Ohio | 18 | 18 | — |
| Oklahoma | 21 | 16 (male), 18 (female) | 16-20 (male), 18-20 (female) |

*not applicable

a. This column does not account for cases where the juvenile court may waive its jurisdiction and the state may try a minor as an adult where a serious crime has been committed; nor does it account for the situation where a minor who has reached the minimum mandatory age of criminal court jurisdiction may nonetheless be tried as a juvenile for a violation of the law committed while he was a juvenile.

b. See note 4 *supra*.

| | | | |
|---|---|---|---|
| Oregon | 22 | 18 | 18-21 |
| Pennsylvania | 18 | 18 | — |
| Rhode Island | 26 | 18 | 18-25 |
| South Carolina | 22 | 17 | 17-21 |
| South Dakota | 18 | 18 | — |
| Tennessee | 22 | 18 | 18-21 |
| Texas | 22 | 17 (male), 18 (female) | 17-21 (male, 18-21 (female) |
| Utah | 22 | 18 | 18-21 |
| Vermont | n/a | 16 | — |
| Virginia | 22 | 18 | 18-21 |
| Washington | 22 | 18 | 18-21 |
| West Virginia | 21 | 18 | 18-20 |
| Wisconsin | 18 | 18 | — |
| Wyoming | 21 | 18 | 18-20 |
| Federal Courts | 21 | 19 | 19-20 |