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Challenges to Jury Composition: Purging the Sixth Amendment Analysis of Equal Protection Concepts

LAURIE MAGID*

INTRODUCTION

Courts presented with objections to jury composition can examine such claims either under the sixth amendment’s fair cross-section analysis or under the equal protection analysis of the fifth and fourteenth amendments.1 Defendants usually will find it far easier to

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1. The sixth amendment provides that 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 . . .” U.S. CONST. amend. VI.

State defendants can bring equal protection claims under the express language of the fourteenth amendment, which states that “No State shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. Federal defendants can bring equal protection claims under the equal protection component of the fifth amendment’s guarantee of due process. See Schlesinger v. Ballard, 419 U.S. 498, 500 n.3 (1975); Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Actions found invalid under the fourteenth amendment’s equal protection clause also are invalid under the fifth amendment’s due process clause. See Johnson v. Robinson, 415 U.S. 361, 364-65 n.4 (1974).

Federal defendants can also bring jury composition claims under the statutory equivalent of the sixth amendment’s fair cross-section requirement, embodied in the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 (1962), which states: “It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes . . . .” This policy is implemented by 28 U.S.C. § 1862, which states: “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.”

The sixth amendment guarantee and this statutory requirement “have been construed
meet the requirements of sixth amendment analysis. This Article considers which type of analysis is appropriate when a defendant alleges that particular groups have been excluded from his jury. Courts have confused the two analyses both in cases involving the jury venire and, more frequently, in cases involving the petit jury. Especially when examining claims that a prosecutor has used peremptory challenges to exclude a group from the petit jury, courts have limited unnecessarily the jury composition claims by looking to certain equal protection requirements even when applying a sixth amendment analysis.

The United States Supreme Court recently reaffirmed the continuing validity of applying the sixth amendment’s fair cross-section requirement to prevent the exclusion of certain groups from the jury venire. However, in another recent case, Batson v. Kentucky, the Court declined an opportunity to decide whether the fair cross-section requirement, like the requirements of equal protection, can be applied not only at the jury venire level but also at the petit jury level to prevent the use of peremptory challenges to exclude certain groups from the jury. Since 1978, six states and two circuits have agreed to use the sixth amendment to limit the use of peremptory challenges to exclude groups such as blacks.

In Batson, the Supreme Court greatly eased the onerous burden of proof requirement for equal protection challenges to the petit jury. Nevertheless, the Court failed to grapple with the many cases that still can be brought only under a sixth amendment analysis, not an equal protection analysis, regardless of the equal protection burden of proof requirement. The first step necessary to a full consideration of a challenge to the selection of a petit jury is acknowledging that the sixth amendment’s fair cross-section requirement applies to the


2. The jury selection process begins with the selection from the public of a pool of qualified persons. A number of the people in the jury pool are chosen randomly to constitute the jury venire for a particular trial. After a group of potential jurors is obtained from a jury list and after excuses have been given, a voir dire is held in which either the judge or the attorneys question the potential jurors. Some are excused “for cause,” that is, for specific reasons set out by statute. But an attorney can use peremptory challenges to eliminate some jurors without giving any reason for doing so. Every state, as well as the federal government, permits the use of peremptory challenges. The number of such challenges allowed, however, may vary with the seriousness of the crime, and may be different for the defense and prosecution. On the entire jury selection process, see generally J. Van Dyke, JURY SELECTION PROCEDURES (1977).

5. See infra notes 56-62.
petit jury as well as to the jury venire. Second, and equally important, courts then must apply the sixth amendment analysis without importing burdensome and inappropriate requirements from equal protection analysis. The two chief limitations on equal protection claims that have been applied improperly to fair cross-section claims are those related to standing and to the definition of what constitutes a group whose exclusion cannot be permitted.

This Article argues that only the sixth amendment’s fair cross-section analysis, and not equal protection analysis, can fully protect a defendant’s sixth amendment right to a fair and impartial jury. Part I presents the caselaw and the basic analytic approach undertaken by courts in considering equal protection challenges and fair cross-section challenges to the composition of the grand jury, the jury venire, or the petit jury. Part II discusses the serious standing problems a defendant faces in challenging jury composition under equal protection analysis. An equal protection claim, unlike a fair cross-section claim, requires a defendant to be a member of the excluded group in order to bring suit. Part III explores the different definitions, under equal protection analysis and fair cross-section analysis, of groups that cannot be excluded from jury service. Although no consensus definition of cognizability exists, it is clear that more groups are recognized as cognizable for sixth amendment purposes than are considered suspect classes for equal protection purposes. Finally, Part IV describes the different purposes served by the applications of fair cross-section analysis and equal protection analysis. This review will support the Article’s thesis that the purposes of the fair cross-section requirement are not served if its application is limited by equal protection concepts of standing and group cognizability.

Although the Supreme Court has not yet applied the fair cross-section requirement to limit the use of peremptory challenges, applying the requirement to the petit jury is only logical since it definitely applies at the venire level. A defendant is tried by the petit jury, not the venire. The sixth amendment right to a fair and impartial jury is meaningless if it is upheld at the venire level but not at the petit jury level. But even if the Supreme Court ultimately were to decide not to apply the sixth amendment’s fair cross-section requirement to limit the use of peremptory challenges, it is important to recognize the differences in application and results of fair cross-section analysis and equal protection analysis. This must be done if we at least are to continue to uphold a defendant’s sixth amendment rights at the
grand jury and jury venire levels. Although lower federal courts and state courts have been most likely to limit fair cross-section claims with equal protection requirements on standing and group cognizability in cases involving objections to the petit jury, the same tendency has been evidenced in some cases involving the jury venire. Furthermore, because the states are entitled to give defendants greater protection than is granted under federal law, this Article should prove helpful to those state courts that have decided, regardless of the federal view, to shift from equal protection analysis to fair cross-section analysis in jury composition cases at the level of the petit jury.

I. Background

Supreme Court Caselaw on Jury Composition

The two key jury selection procedures that often are challenged are (1) the way in which the large jury panel or venire is composed, and (2) the way in which particular venirepersons then are excluded by means of peremptory challenges from service on the petit jury. During the voir dire, an attorney can use both “for cause” challenges and peremptory challenges to strike some venirepersons from the petit jury. Peremptory challenges, unlike “for cause” challenges, do not require the attorney to give any reason for eliminating a potential juror. Courts face an increasing number of claims that peremptory challenges are being used to exclude improperly from the petit jury all jurors in a particular group.

The Supreme Court has ruled explicitly that the composition of the jury venire is subject to challenge under both equal protection analysis and sixth amendment fair cross-section analysis. The petit jury, as affected by the peremptory challenge system, has not been subject to the same scrutiny as the jury venire. This is because the Court has not ruled whether the fair cross-section requirement applies to limit the use of peremptory challenges. In 1965, however, in

Swain v. Alabama, the Court found that equal protection principles could limit the discriminatory use of peremptory challenges. The Court required an extremely high burden of proof before the use of peremptory challenges would be found in violation of equal protection.

For more than twenty years, the Supreme Court said that an equal protection claim regarding the petit jury would be successful only if it could be shown that peremptory challenges had been used in trial after trial to exclude blacks, or persons in some other protected group, from service as jurors. This special aspect of the equal protection burden of proof, the systematic exclusion requirement, was subject to widespread criticism. Equal protection objections to peremptory challenges almost never succeeded because defendants faced the nearly insurmountable practical problem of locating supporting data necessary to show a pattern of discrimination. Recently, in Batson, the Supreme Court acknowledged that Swain's systematic exclusion requirement, as interpreted by the lower courts, had "placed on defendants a crippling burden of

11. 380 U.S. 202 (1965). Swain had objected because the prosecutor used peremptory challenges to strike all six eligible blacks on the venire. Swain, who was black, was found guilty of rape by an all-white jury. Because the sixth amendment was not made applicable to the states until 1968, in Duncan v. Louisiana, 391 U.S. 145 (1968), Swain had to make his claim based on the fourteenth amendment's guarantee of equal protection.


13. Most critics of Swain emphasized the argument, made by Justice Goldberg in his dissent, that the majority had placed excessive importance on peremptory challenges by treating them as if they were a fundamental right. See Swain, 380 U.S. at 244 (Goldberg, J., dissenting). Justice Goldberg pointed out that peremptory challenges are not required by the Constitution; they are merely a procedural device originating in statutes or judge made law. In fact, prosecutors functioned without peremptory challenges until 1887 when the Supreme Court recognized the prosecutor's right to exercise them. See Hayes v. Missouri, 120 U.S. 68 (1887).

14. See United States v. Childress, 715 F.2d 1313, 1316 (8th Cir. 1983), cert. denied, 464 U.S. 1063 (1984). ("Although caselaw repeatedly describes the defendant's burden of proof as 'not insurmountable' (cites omitted) . . . a defendant has successfully established systematic exclusion in only two cases since Swain was decided in 1965. State v. Brown, 371 So.2d 751 (La. 1979) and State v. Washington, 375 So.2d 1162 (La. 1979) (same statistical evidence).".

15. To make a claim under Swain, a defendant needed to present statistical evidence. Because the state controls the selection process, defendants had difficulty collecting the data, if it was available at all. See Comment, Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury, 52 Va. L. Rev. 1157, 1161 (1966) ("[t]he problem of evidentiary logistics is rendered virtually insoluble by the pressure of time, the lack of extant records and the general unavailability to the defendant of those which do exist.").

proof" that left peremptory challenges "largely immune from con-
stitutional scrutiny." The Court expressly rejected the evidentiary
burden that Swain had placed on defendants and held that "a de-
fendant may make a prima facie showing of racial discrimination in
selection of the venire by relying solely on the facts concerning its
selection in his case."19

The sixth amendment's fair cross-section basis for challenging jury
composition, which the Supreme Court has not yet applied to the use
of peremptory challenges, first was applied explicitly to the jury ve-
nire in 1975 in Taylor v. Louisiana.20 Although for decades the Su-
preme Court had discussed in general terms the need for a jury to
reflect the community fairly,21 in Taylor the Court specifically ar-
ticulated the sixth amendment's fair cross-section requirement and
applied it to the states.22 Taylor, a male defendant, challenged a
state statute that permitted women to serve jury duty only if they
requested to do so and, thereby, effectively eliminated women from
juries. The Court "squarely held that the exclusion of women from
jury venires deprives a criminal defendant of his Sixth Amendment
right to trial by an impartial jury drawn from a fair cross section of
the community."23 The Court found that since the "two sexes are
not fungible,"24 a distinct quality is lost from the jury if either sex is
excluded.25 Thus, the defendant's right to a fair cross-section of the
community on his jury is violated. Because the cross-section require-
ment is an "essential component"26 of the constitutional right to an
impartial jury, "identifiable segments playing major roles in the
community"27 cannot be excluded from the jury. The Court did not
specify which groups in society it was considering because

17. Id. at 1720.
18. Id.
19. Id. at 1722 (emphasis original).
21. See, e.g., Apodaca v. Oregon, 406 U.S. 404, 410-11 (1972) ("As we said in
Williams, a jury will come to such a judgment as long as it consists of a group of laymen
representative of a cross-section of the community... ."); Williams v. Florida, 399 U.S.
78, 100 (1970) (the Court found that the number of persons on a jury should be large
enough "to provide a fair possibility for obtaining a representative cross-section of the
community."); Glasser v. United States, 315 U.S. 60 (1942) ("But they must not allow
the desire for competent jurors to lead them into selections which do not comport with
the concept of the jury as a cross-section of the community."); Smith v. Texas, 311 U.S.
128, 130 (1940) ("It is part of the established tradition in the use of juries as instru-
ments of public justice that the jury be a body truly representative of the community.").
earlier case, the Supreme Court found that, through the fourteenth amendment, the sixth
amendment applies to the states.
24. Id. at 531.
25. See id. at 532.
26. Id. at 528.
27. Id. at 530.
"[c]ommunities differ at different times and places [and what] is a fair cross-section at one time and place is not necessarily a fair cross-section at another time or a different place."\textsuperscript{28}

The Supreme Court previously had stated that maintaining the "broad representative character of the jury"\textsuperscript{29} assures "diffused impartiality."\textsuperscript{30} The fair cross-section requirement is violated if any substantial group in the community, known as a cognizable or distinctive group, is excluded from the jury, whether or not the exclusion was intentional.

The \textit{Taylor} Court placed careful limits on the scope of its holding, stating that while a jury "must be drawn from a source fairly representative of the community,"\textsuperscript{31} the actual jury chosen — the petit jury — need not "mirror the community."\textsuperscript{32} The process for selecting juries must be one by which representative juries can be chosen but the actual jury chosen need not represent statistically all groups in the community. The fair cross-section requirement maximizes the chance of obtaining a representative jury.

The actual jury selected, the petit jury, need not include with statistical accuracy every cognizable group. The fair cross-section requirement is satisfied if the state follows jury selection methods that give the defendant the opportunity to have a jury drawn from members of all cognizable groups. For example, so long as the selection methods promote this goal, the requirement is met even if the petit jury is composed entirely of blacks, whites, men, women, or senior citizens. It is the steps leading up to the selection of the petit jury, not any particular petit jury selected, that are examined to determine if the fair cross-section requirement has been violated.\textsuperscript{33}

To establish a prima facie violation of the fair cross-section requirement at the venire level, the Court has required a defendant to show:

(1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to

\begin{itemize}
  \item \textsuperscript{28} \textit{Id.} at 537.
  \item \textsuperscript{29} \textit{Id.} at 530 (quoting Thiel v. Southern Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).
  \item \textsuperscript{30} \textit{Id.} at 530.
  \item \textsuperscript{31} \textit{Id.} at 538.
  \item \textsuperscript{32} \textit{Id.} This is a realistic limit given the large number of potential groups, the very limited size of the jury, and the consequences of permitting challenges for cause. \textit{See J. Van Dyke}, supra note 2, at 17-18.
  \item \textsuperscript{33} \textit{See Taylor}, 419 U.S. at 528.
\end{itemize}
In order to show an equal protection violation based on the exclusion of a group from the jury, the Supreme Court has required, in the context of a race-based claim, that 1) the defendant "establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the law, as written or as applied," 2) the degree of underrepresentation be proved "by comparing the proportion of the group in the total population to the proportion called to serve . . . over a significant period of time, and 3) "a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing." 35

The difference between the equal protection analysis and fair cross-section analysis which is discussed most often is the burden of proof requirement. 36 Under an equal protection analysis, the defendant must show purposeful discrimination. 37 If he proves a prima facie case, the government may rebut the case merely by showing that neutral criteria or procedures were used. 38 In contrast, under fair cross-section analysis, the defendant need not show any discriminatory intent. 39 The government can rebut a prima facie case only by showing "that a significant state interest [is] manifestly and primarily advanced by those aspects of the jury selection process . . . that result in the disproportionate exclusion of a distinctive group." 40 If, for example, a state's method of compiling lists of potential jurors results in the selection of few women or blacks as potential jurors, the state cannot overcome a fair cross-section claim by showing that it chose its compilation method to save time or money and not to exclude blacks or women from the jury.

The fair cross-section analysis is somewhat different when used to limit peremptory challenges at the petit jury level. At the petit jury level, a defendant must show that a substantial likelihood exists that the challenges leading to the exclusion of a group were made on the basis of group affiliation rather than because of an individual's possi-

37. See Duren, 439 U.S. at 368 n.26.
38. See Castaneda, 430 U.S. at 495; see also United States v. Leslie, 783 F.2d 541, 552 n.17 (5th Cir. 1986), vacated, 107 S. Ct. 1267, remanded, 813 F.2d 658 (5th Cir. 1987); Gibson v. Zant, 705 F.2d 1543, 1546 n.4 (11th Cir. 1983).
40. Duren, 439 U.S. at 367-68; see also Leslie, 783 F.2d at 552 n.17; Gibson, 705 F.2d at 1546 n.4; United States v. Perez-Hernandez, 672 F.2d 1380, 1384 n.5 (11th Cir. 1982).
ble inability to fairly decide the case. There is no fair cross-section violation if peremptory challenges are used to exclude jurors with specific bias in a particular case with the result that certain groups are not represented on the jury. A defendant is not entitled to a jury that actually represents the community, only to the opportunity to have such a jury selected.

Although the Supreme Court consistently has applied the six amendment's fair cross-section requirement to the jury venire, it has not decided explicitly whether the fair cross-section requirement applies to the petit jury. In 1978 the Court indicated that the fair cross-section requirement applies to the petit jury when it held that a five-person petit jury was unconstitutional because it was too small to represent the community accurately. Nevertheless, the Court recently declined to decide whether the fair cross-section requirement applies to the petit jury in the context of groups excluded through the use of peremptory challenges. But even after the Supreme Court declined the opportunity to decide the issue, the Second and Sixth Circuits reaffirmed their findings that the fair cross-section requirement applies to the petit jury.

There would seem to be no point in establishing elaborate means of ensuring that members of various groups are included on venires if peremptory challenges can be used to exclude all of these same people from the petit jury. As one court has noted:

No defendant has ever been tried before a venire; the venire is not the body that deliberates in the jury room; no defendant has even been found guilty by a venire. If there is a Sixth Amendment requirement that the venire

41. See, e.g., Roman v. Abrams, 822 F.2d 214, 225 (2d Cir. 1987).
42. Id. at 224-25.
45. See Lockhart, 106 S. Ct. at 1764-65 in which the Court stated that "an extension of the fair cross section requirement to petit juries would be unworkable and unsound. . . ." Id. at 1765. But the Court did not actually decide the question because it went on to say that even if it "were willing to extend the fair cross section requirement to petit juries" there would be no violation of the requirement in this case. Id. The Court came to this conclusion by holding that the group excluded — persons who were opposed to the death penalty — did not constitute a cognizable group whose exclusion triggered sixth amendment review. The Court also noted in another case that term, Batson v. Kentucky, 106 S. Ct. 1712 (1986), the Court had declined to consider the sixth amendment claim and had expressed no view on its merits. See id. at 1764-65.
Nevertheless, many courts have refused to use sixth amendment fair cross-section analysis to limit peremptory challenges. These courts have contended that peremptory challenges may be examined only under equal protection analysis. The Supreme Court's reliance on equal protection analysis rather than fair cross-section analysis has dissuaded lower courts from turning to a fair cross-section analysis. But, as will be shown below, equal protection analysis presents insurmountable obstacles for many defendants seeking to object to the composition of their juries.

The Problem: When Defendants Cannot Rely On Equal Protection Analysis

A defendant faces far greater problems if he wishes to object to the composition of the petit jury than if he wishes to object to the composition of the jury venire. If a defendant objects to the jury venire, he may do so under either equal protection analysis or the sixth amendment's fair cross-section analysis. However, if he wishes to object to the composition of the petit jury — the jury that actually tries him — many courts presently permit him to do so only under equal protection analysis.

Equal protection analysis and sixth amendment fair cross-section analysis in jury composition cases differ in three important ways. First, the defendant's burden of proof is substantially less in a fair cross-section challenge. In an equal protection claim, a defendant must show intentional discrimination and, until recently, had to do so by looking not only to the jury in his own case, but to many other trials to show a pattern of systematic exclusion. Conversely, a de-

48. McCray v. Abrams, 750 F.2d 1113, 1128-29 (2d Cir. 1984), vacated and remanded for further consideration in light of Allen v. Hardy, 106 S. Ct. 2878 (1986) and Batson v. Kentucky, 106 S. Ct. 1712 (1986). On remand, the parties stipulated that the state would withdraw its appeal. The Second Circuit's original opinion, however, was not withdrawn. See Roman, 822 F.2d at 227; see also McCray v. New York, 461 U.S. at 969 (Marshall, J., dissenting from the denial of certiorari, stated that "[t]here is no point in taking elaborate steps to ensure that Negroes are included on venires simply so they can then be struck because of their race by a prosecutor's use of peremptory challenges.")

defendant may prevail on a fair cross-section claim without proving discriminatory intent.

Second, different standards exist for determining whether a group’s exclusion indicates a possible constitutional violation. Actions directed at suspect classes such as blacks, groups limited in number and generally defined by reference to past ill treatment, trigger heightened scrutiny under equal protection analysis. Groups cognizable for sixth amendment purposes are the many groups in the community whose members are sufficiently distinct and numerous that they must be considered for jury service if juries are to represent a fair cross-section of the community. There are groups such as the poor, which probably are cognizable for fair cross-section purposes, but which are not suspect classes.50

Third, different standing requirements accompany each constitutional challenge. A defendant need not be a member of the excluded group in order to bring a fair cross-section claim. A “same class” rule requiring that a defendant be a member of the excluded class is applied for equal protection claims, although a few courts have taken the contrary view.51

For many defendants, equal protection analysis will be of little use because of its strict standing requirements and limited definition of which groups cannot be excluded from the jury. These defendants are unable to bring jury composition challenges based on equal protection principles because of the standing requirement that the defendant be a member of the excluded group and because there are only a few groups whose exclusion triggers heightened scrutiny.52

50. See infra note 163.


52. The court has spoken of classifications based on race or ethnic background as suspect. Such classifications trigger heightened scrutiny. Yet, classifications which seem to work to the benefit of minorities and to the disadvantage of whites have been given special scrutiny. See infra note 135. Nevertheless, the Court continues to refer to minorities but not whites as suspect classes. This is only logical since the Court has defined suspect classes as those groups historically subject to ill-treatment and prejudice. See infra note 134 and accompanying text. Minority groups but not whites meet such criteria. But, because the Court sometimes applies heightened scrutiny even when it is whites who are disadvantaged, the relevance of the designation “suspect class” in equal protection cases is not entirely clear.

In gender cases, women, not men, clearly compose the group that historically has been
a black defendant finds that the government intentionally has excluded all blacks from the jury venire or petit jury, that defendant clearly can bring suit alleging a denial of the equal protection of law guaranteed by the fourteenth and the fifth amendments. The basis of such a claim seems to be that a defendant’s right to trial by jury includes the right to be tried by a jury composed of his peers and equals, and that this right is violated when all members of his race are excluded from his jury. The assumption is that defendants of other races, particularly whites, have not been treated similarly and therefore have not been disadvantaged by having members of their race excluded from jury service.

If the defendant is not black or if the group excluded from jury service is not blacks, it is far less clear whether the defendant can bring an equal protection suit to challenge the composition of his jury. A white defendant apparently has no standing, either in his own right or on behalf of the excluded jurors, to bring an equal protection claim objecting to the exclusion of blacks from his jury. Yet a prosecutor might wish to exclude blacks from a white defendant’s jury if, for example, the defendant were a civil rights activist or if his chief alibi witness were black or if his attorney were black. A black defendant probably lacks standing to bring an equal protection claim objecting to the exclusion of whites from his jury, as does a male defendant to object to the exclusion of women.

No defendant, whether black or white, male or female, is likely to prevail, even if standing requirements are met, in an equal protection suit that objects to the exclusion of groups such as whites, poor people, or blue-collar workers. Although these groups may constitute substantial groups in the community, they have not been designated suspect or semi-suspect classes for equal protection purposes. Disadvantaged. Classifications which disadvantage men and benefit women, nevertheless, are subject to heightened scrutiny. See infra note 137. The Court has indicated that this is done because any classifications based on gender, even ones which seem to benefit women, disadvantage women by perpetuating stereotypes about the abilities and needs of men and women. Id. Classifications based on race which benefit minorities and are designed explicitly to right past wrongs cannot be rationalized on this basis.

This Article does not attempt to reconcile the Court’s statements on which groups constitute “suspect classes” and which classifications trigger heightened scrutiny. When the lower courts, in considering jury composition cases, speak of suspect classes, it is blacks, Hispanics, women, and aliens, not whites and men, which they have in mind. These courts use the term suspect classes to mean groups in need of protection. This Article contends that the question of whether a group is one which needs protection is different than the question of whether it is a group which should be represented on the jury if the defendant is to have a fair and impartial jury.

55. See supra note 52.
nning defendants the opportunity to pursue their claims under fair cross-section analysis leaves many of them unprotected since the equal protection analysis provides relief in only limited situations.

**Shifts from Equal Protection Analysis to Fair Cross-Section Analysis**

Even though the Supreme Court has not decided the issue, several state courts and lower federal courts nevertheless have held that the fair cross-section requirement places limits on the use of peremptory challenges to exclude certain groups from the petit jury. California led the way in its 1978 decision, *People v. Wheeler.*

**56** State courts in Massachusetts, **57** New Mexico, **58** Florida, **59** New Jersey, **60** and Delaware, **61** as well as the Second and Sixth Circuits, **62** have joined California in turning to fair cross-section analysis rather than equal protection analysis to consider challenges to the composition of the petit jury. **63** Several Supreme Court Justices have indicated their willing-

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56. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978). Wheeler, who was black, was convicted by an all-white jury of the murder of a white man. The court kept no records on the race of the jurors but the defendant claimed that the prosecutor used peremptory challenges to exclude all seven blacks in the venire. See id. at 263, 583 P.2d at 752, 148 Cal. Rptr. 893. The court noted the seeming inconsistency between *Swain* and *Taylor.* See id. at 284-85, 583 P.2d at 767, 148 Cal. Rptr. at 908. In finding for the defendants, the court looked to *Cal. Const.* art. I, § 16, which states """"Trial by jury is an inviolate right and shall be secured to all . . . ."


58. *See State v. Crespin, 94 N.M. 486, 612 P.2d 716 (1980) (court looked to the state constitution to apply the fair cross-section requirement in the context of peremptory challenges).*

59. *See State v. Neil, 457 So. 2d 481 (Fla. 1984).*


63. *These courts have not encountered practical difficulties in scrutinizing instances of allegedly improper use of peremptory challenges. The procedure suggested by California in *Wheeler* has been followed explicitly or referred to by all of the other states. The California court fashioned a procedure which places a manageable burden of proof on the defendant while preserving the broad discretionary use of peremptory challenges for valid reasons. *See People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal.*
ness to consider limiting the use of peremptory challenges under sixth amendment principles.64

Most of the courts that have applied the fair cross-section section analysis to the petit jury indicated that they were doing so for two reasons: (1) because a defendant’s sixth amendment rights were being violated, and (2) because equal protection analysis, especially when the systematic exclusion requirement of Swain was applied, would not protect the defendant.65 These courts generally have characterized the prima facie test for equal protection analysis and the prima facie test for fair cross-section analysis as virtually identical.66

In discussing the two analyses, many courts have noted only the differing burdens of proof as the reason for shifting from equal pro-

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65. See, e.g., Soares, 377 Mass. at 479 n.17, 387 N.E.2d at 511 n.17. In Soares, three black defendants were convicted of murder by a jury of eleven whites and one black. The prosecutor used peremptory challenges to exclude 12 of 13 black potential jurors. The court concluded that Swain offered only “illusory” protection and turned to the state constitution to curb the abuse of peremptory challenges. Similarly, the Wheeler court stated that “Swain obviously furnishes no protection whatever to the first defendant who suffers such discrimination in any given court . . . .” Wheeler, 22 Cal. 3d at 258, 583 P.2d at 767, 148 Cal. Rptr. at 908.

Swain has been subject to extensive criticism. For lengthy lists of commentators criticizing the decision, see Commonwealth v. Soares, 377 Mass. 461, 387 N.E. 2d 499 (1979); Note, Prosecutorial Misuse of the Peremptory Challenge to Exclude Discrete Groups From the Petit Jury: Commonwealth v. Soares, 21 B.C.L. REV. 1197, 1201 n.40 (1980); Comment, A New Standard For Peremptory Challenges: People v. Wheeler, 32 STAN. L. REV. 189, 193 n.25 (1979). Many critics of Swain have emphasized the point made by Justice Goldberg in his dissent that the majority placed excessive importance on peremptory challenges by treating them as if they were a fundamental right. Justice Goldberg claimed that the majority's holding meant that “[t]here is nothing in the Constitution of the United States which requires the State to grant trial by an impartial jury so long as the inviolability of the peremptory challenge is secured.” Swain, 380 U.S. at 244 (Goldberg, J., dissenting).

tection analysis to fair cross-section analysis when considering claims that peremptory challenges were used impermissibly to exclude groups from the petit jury. Most of these courts have made the shift somewhat reluctantly. As a result, these courts have applied the fair cross-section analysis with its lower burden of proof, but then have limited the usefulness of the fair cross-section analysis in the context of petit jury composition by retaining the equal protection definitions of groups whose exclusion triggers scrutiny, and sometimes even its standing requirements.

In Batson, the Court greatly lowered the burden of proof required under an equal protection analysis. Nevertheless, the type of proof required to rebut a prima facie case is not the only significant difference between equal protection analysis and fair cross-section analysis. Even after Batson it remains important to look to a sixth amendment analysis, rather than an equal protection analysis, in many jury composition cases. This is true because it is not only the burdens of proof that differ but also the definitions of who has standing to assert a claim and which groups, when excluded, will trigger review.

In Batson, because the group excluded was blacks and the defendant was black, the Supreme Court was able to ignore these differences, use equal protection analysis, and avoid deciding whether fair cross-section analysis applied. Blacks are a group entitled to special consideration under equal protection analysis. Since the defendant was black, and therefore a member of the excluded group, the case did not involve a standing problem. The Court did not discuss those cases in which equal protection analysis, even with the new, lower burden of proof, would be inappropriate because the defendant lacked standing to assert a claim. Nor did the Court discuss those cases in which the excluded group, although part of the community, was one, such as blue collar workers, which does not trigger heightened scrutiny under equal protection analysis. Under fair cross-section analysis, a defendant need not be a member of the excluded class in order to have standing to bring a claim. Furthermore, groups exist that are not entitled to special consideration under equal protection analysis but are considered distinctive or cognizable for the

67. See supra notes 56-61.
68. 106 S. Ct. 1712 (1986).
69. In State v. Gilmore, 103 N.J. 508, 511 A.2d 1150 (1986), the court noted that Batson had rejected the heavy burden of proof in Swain but nevertheless decided to use a fair cross-section analysis to consider the defendant’s jury composition claim.
It remains important, therefore, that some state courts and some lower federal courts are considering jury composition challenges under a fair cross-section, rather than under an equal protection, analysis. In discussing the two analyses, however, these courts have focused on the difference in burdens of proof and have paid scant attention to the differences in standing requirements and definitions of group cognizability or distinctiveness. This has resulted partly because most of the cases, like Batson, met the standing and cognizability requirements under either analysis because they involved a black defendant objecting to the exclusion of blacks from the jury. When examining the petit jury, many of these courts have ignored the differences in standing and cognizability requirements or, even worse, have indicated that the equal protection limits on standing and cognizability should apply even in a sixth amendment context.  

II. STANDING TO CHALLENGE THE EXCLUSION OF GROUPS FROM THE JURY

Traditional standing analysis explains why a defendant clearly has standing to object, under the sixth amendment, to the exclusion of a group even if the defendant is not a member of the excluded group. Two separate considerations must be addressed in determining whether a party has standing to bring a claim. First, the party must meet the constitutional case or controversy requirement by showing that he has suffered an injury in fact. A defendant is presumed to suffer injury when certain groups are excluded from his jury because the fair cross-section requirement is considered an essential component of the sixth amendment right to a fair and impartial jury. It is not relevant whether the defendant was a member of the excluded group. Apart from any injury suffered by potential jurors, the de-

70. Most of these courts have referred approvingly to the procedures outlined in Wheeler. The California court in Wheeler found that a defendant first should:

- make as complete a record of the circumstances as is feasible.
- establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule.
- from all the circumstances of the case he must show a strong likelihood that such persons are being challenged because of their group association rather than any specific bias.

Wheeler, 22 Cal. at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905. If the party is able to raise an inference of abuse, the burden shifts to the other party to show that there were reasons based on specific bias for challenging the potential jurors. If this burden is not sustained, a new venire must be drawn and the jury selection process begun again. See id. at 281-82, 583 P.2d at 764-65, 148 Cal. Rptr. at 906.

71. See supra notes 56-61 and accompanying text.


73. See Taylor, 419 U.S. at 527.
fendant is injured when any group is excluded and that exclusion precludes the opportunity to select a jury that fairly represents the community. If the jury does not fairly represent the community, the defendant is denied a decision based on “diffused impartiality” and reflecting the community’s “commonsense judgment.” Second, as a prudential matter, the party must show that he is the “proper proponent of the particular legal rights” on which the suit is based. In addition, the interest sought to be protected must be within the zone of interest meant to be protected by the particular statute or constitutional guarantee in question. The individual defendant’s interest in being tried by a jury representing a fair cross-section of the community is a personal right and, thus, is within the zone of interest protected by the constitutional guarantee to an impartial jury.

In Taylor, the Supreme Court explicitly held that a defendant need not be a member of the excluded group in order to object, on sixth amendment grounds, to the exclusion of a group from the jury venire. Under this rule, white defendants have been able to challenge the exclusion of blacks, and male defendants have been able to challenge the exclusion of women. If the fair cross-section principle applies to the petit jury to limit the use of peremptory challenges, as well as to the jury venire, a defendant should have standing to object, under the sixth amendment, to the exclusion of any

74. Id. at 530.
75. Id.
77. 419 U.S. 522 (1975).
78. See id. at 526. Taylor, a male, claimed that the exclusion of women from his jury deprived him of a jury drawn from a fair cross section of the community. The Court explicitly reaffirmed this point in Duren, 439 U.S. at 359 n.1 (“A criminal defendant has standing to challenge exclusion resulting in a violation of the fair cross section requirement, whether or not he is a member of the excluded class.”). See also Thiel, 328 U.S. at 225 (when a jury panel excluded blue-collar workers, the Court used its supervisory power to reverse the judgment, stating that it was unnecessary to determine whether the petitioner was a member of the excluded class). Cases applying Taylor to grant standing include Clark, 737 F.2d at 682; United States v. Gomez, 730 F.2d 475, 478 (7th Cir. 1984) (en banc), cert. denied, 469 U.S. 845 (1984); Gibson v. Zant, 705 F.2d 1543 (11th Cir. 1983) (the court assumed standing existed without discussing the issue); Folston v. Alsbrook, 691 F.2d 184, 186 n.3 (4th Cir. 1982), cert. denied, 461 U.S. 939 (1983); United States v. Test, 550 F.2d 577, 581 (10th Cir. 1976); Musto, 540 F. Supp. at 351, aff’d sub nom., United States v. Amimone, 715 F.2d 822 (3d Cir. 1983), cert. denied, 468 U.S. 1217 (1984); United States v. Cabrera-Sarmiento, 533 F. Supp. 799, 806 (S.D. Fla. 1982); United States v. Marciano, 508 F. Supp. 462, 469 (D. P.R. 1980).
79. See, e.g., Clark, 737 F.2d at 681; Gomez, 730 F.2d at 478; Musto, 540 F. Supp. at 351.
80. See, e.g., Musto, 540 F. Supp. at 351.
cognizable group from the petit jury, regardless of whether the defendant is a member of the group. Discomfort, however, with application of the fair cross-section to limit peremptory challenges has led at least one court to suggest that perhaps a defendant who is not a member of the excluded group should not have standing to object to the use of peremptory challenges.\textsuperscript{81}

Standing requirements present a much greater problem for defendants who seek to challenge the composition of the jury under equal protection analysis rather than under sixth amendment fair cross-section analysis. While persons excluded from jury service have the right to bring an equal protection claim,\textsuperscript{82} the Supreme Court has often stated that a defendant may bring an equal protection claim only if he is a member of the group excluded from jury service.\textsuperscript{83} The Court, however, has not been entirely consistent on the question of whether a defendant has standing to bring an equal protection claim to challenge the exclusion of a group from the jury when the defendant is not a member of the group.

In 1972 the Supreme Court heard a case in which a male defendant challenged, on equal protection grounds, the exclusion of women from his grand jury.\textsuperscript{84} Although the Court decided the case on other grounds, it stated that nothing in the caselaw gives a man standing to bring such a claim.\textsuperscript{85} Soon thereafter, the Court heard Peters v. Kiff,\textsuperscript{86} the case which initiated much of the confusion in the lower federal courts and state courts over standing in equal protection cases. In Peters, the Court found that a white defendant had standing to challenge the exclusion of blacks from a state grand jury.\textsuperscript{87} The precise rationale for this finding, however, is unclear. The Court began by stating that Peters’ claim could not be brought under the sixth amendment because the sixth amendment had not yet been applied to the states when his trial took place.\textsuperscript{88} The Court specifically noted that if Peters had been able to proceed under the sixth amendment he clearly would have had standing to challenge the exclusion of any group.\textsuperscript{89} After turning to “the commands of equal protection and of due process,”\textsuperscript{90} the Court pointed out that it had “never

\textsuperscript{81. See Schreiber v. Salamack, 619 F. Supp. 1433, 1440 (S.D.N.Y. 1985) (“can a white defendant object to the challenging of black jurors?”).}
\textsuperscript{83. See, e.g., Rose v. Mitchell, 443 U.S. 545 (1979); Whitus v. Georgia, 385 U.S. 545 (1967); Strauder v. West Virginia, 100 U.S. 303 (1880); see also Batson, 106 S. Ct. at 1716 n.3 (collecting cases).}
\textsuperscript{84. Alexander v. Louisiana, 405 U.S. 625 (1972).}
\textsuperscript{85. See Id. at 633.}
\textsuperscript{86. 407 U.S. 493 (1972).}
\textsuperscript{87. See Id. at 504.}
\textsuperscript{88. See Id. at 496.}
\textsuperscript{89. See Id. at 500.}
\textsuperscript{90. Id. at 496.}
before considered a white defendant's challenge to the exclusion of
Negroes from jury service, and had not passed on the "same class" rule imposed by most courts. The Court found it unnecessary to consider Peters' claim that his equal protection rights had been violated, concluding that Peters was denied due process of law because he was subject to indictment by an illegally composed jury. Some lower courts have recognized Peters as a due process case and, therefore, not authority for finding that a defendant has standing to challenge, under equal protection, the exclusion of a group of which he is not a member. Other courts have improperly characterized Peters as an equal protection case and used it as support for finding standing in an equal protection context even when the defendant is not a member of the excluded group.

Statements in cases after Peters indicate that the Supreme Court assumes a defendant may not bring an equal protection claim unless he is a member of the excluded group. In Castaneda v. Partida, a Mexican defendant challenged the exclusion of Mexicans from the jury. The Court, quoting from an earlier case, said that a defendant was denied equal protection of the laws when "all persons of his race or color" were excluded from the grand jury. The Court went on to say that the first step in establishing an equal protection violation is to show a "substantial underrepresentation of his race or of the identifiable group to which he belongs." Two years later, in another equal protection case, Rose v. Mitchell, the Court specifically quoted this statement from Castaneda, which refers to the group to which the defendant belongs. However, at two other places in the Rose opinion, the Court referred simply to the exclusion of "a racial group."

91. Id.
92. Id. at 496-97 n.4.
93. See id. at 497 n.5.
94. See id. at 501, 504.
95. See Cronn, 717 F.2d at 167; Musto, 540 F. Supp. at 353.
96. See Perez-Hernandez, 572 F.2d at 1385-86 (the court claimed that the Peters Court discussed the question of standing "in an equal protection context"); United States v. Donohue, 574 F. Supp. 1269, 1278 (D. Md. 1983).
98. Id. at 492 (quoting Hernandez v. Texas, 347 U.S. 475, 477 (1954)).
99. Id. at 494.
100. 443 U.S. 545 (1979).
102. Rose, 443 U.S. at 556.
The Supreme Court somewhat clarified its position on standing in its 1984 opinion in *Hobby v. United States.* The Court considered the due process claim of a white male defendant objecting to the exclusion of women and blacks from the position of grand jury foreperson. Except for a footnote stating that in *Peters* a white male was allowed to assert a due process claim objecting to racial discrimination in the jury composition, the Court included no substantial discussion of standing. The Court's view, however, is evident in its discussion of why *Hobby* could not look to the earlier *Rose* case to support his claim. The Court noted that *Rose* involved an equal protection claim in which the defendants, as blacks, were "members of the class allegedly excluded from service as grand jury foremen." In *Batson,* the Court once again spoke only of protecting a defendant from the exclusion of members of his race from the jury. The Court went on to say that peremptory challenges could not be used to exclude black jurors in a case against a black defendant and that to make a prima facie case the defendant had to show that he was a member of the cognizable racial group being treated differently.

Even before *Hobby,* few lower courts had found that a defendant had standing to challenge, under equal protection, the exclusion of a group to which he did not belong. Most courts found that *Peters* was an aberrational case which permitted standing in due process cases but not in equal protection cases. Although the language in recent decisions indicates that the Court assumes a defendant must be a member of the excluded class, such language arguably is dictum because it appears in cases in which the defendant was a member of the excluded group. Nevertheless, while the Supreme Court has not stated specifically that a defendant can bring an equal pro-

104. Id. at 343-44 n.2.
105. Id. at 347.
106. See *Batson,* 106 S. Ct. at 1716.
107. See id. at 1719.
108. See id. at 1723.
109. See, e.g., *Birt v. Montgomery,* 725 F.2d 587, 606 (11th Cir.) (white male defendant had standing to challenge, under equal protection, the exclusion of blacks and women), cert. denied, 469 U.S. 874 (1984); *Perez-Hernandez,* 672 F.2d at 1386 (The court noted the troubling language in *Partida* and *Rose* but found *Peters* applicable even in an equal protection case.); *Donohue,* 574 F. Supp. at 1278; *Abell,* 552 F. Supp. at 320; United States v. Holman, 510 F. Supp. 1175, 1178 (N.D. Fla. 1981).
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Protection claim only if he is a member of the excluded group, this seems to be the premise on which the Court proceeds.

Although the Supreme Court assumes that a defendant must belong to the excluded group in order to bring an equal protection claim, the basis for the assumption is unclear. It is difficult to determine the standing requirements for an equal protection objection to the composition of the jury because the interest protected by such an objection is not clearly defined.

Over one hundred years ago, the Court enunciated, and continues to affirm, the proposition that a black defendant is denied equal protection if he is tried by a jury from which blacks purposefully have been excluded.112 The Supreme Court has articulated two chief evils resulting from such discrimination. The first is that excluded jurors are branded with a stamp of inferiority.113 When blacks are excluded from jury service and whites are not, the blacks excluded are denied equal protection of the law. These potential jurors are entitled to bring their own equal protection claim to object to their exclusion from participation as jurors.114 If the defendant is given standing so that this evil can be prevented, he is given third party standing; that is, standing to assert the legal rights of the excluded jurors. Although it will be shown shortly that third party standing is not appropriate in jury composition cases, it is worth noting that a white defendant would seem to be equally capable of acting as a third party to protect the fifth or fourteenth amendment rights of black potential jurors as would a black defendant.

The second evil resulting from the discriminatory selection of juries is the personal injury done to a defendant who is denied the right to a jury composed “of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.”115 It is to vindicate this right that a criminal defendant has direct standing to bring an equal protection claim. Since Batson, a black defendant need show only the exclusion of blacks from his own jury.116 But the basis of such an equal protection claim is that a black defendant has been denied a jury including members of his race, while whites presumably are being tried by juries made up of members of their race. Although the notion that a defendant is in-

112. See Strauder v. West Virginia, 100 U.S. 303 (1880).
113. See id. at 308.
115. Strauder, 100 U.S. at 308.
jured when members of his race are excluded from the jury is not always accurate, it is well-accepted by the Court and explains why the same class rule applies in the equal protection context.

If the defendant's standing to assert his claim is based on third party standing, then a same class rule is not necessary in equal protection cases. Therefore, before concluding that the same class rule for standing presents an insurmountable obstacle to the equal protection claims of some defendants, we must consider why *jus tertii* or third party standing is not appropriate in jury composition cases.117 In general, a defendant has standing to raise only his own rights.118 Some courts, however, have found third party standing to challenge jury composition because equal protection upholds not only the rights of the individual defendants, but also the interests of the potential jurors and the more general interest in maintaining the integrity of the judicial system.119

Granting standing so that a defendant can vindicate society's interest in maintaining the integrity of the judicial system puts the defendant in the position of a private attorney general. If third party standing were granted on this basis, the defendant would not need to be a member of the excluded group. Any defendant tried by a jury from which some groups had been purposefully excluded could serve in the role of private attorney general. Characterizing the interest in maintaining the integrity of the judicial system as one protected by equal protection would remove any real requirements for standing. This interest is diminished when any constitutional guarantee is violated in a judicial setting. It can be protected adequately if the defendant brings his claim under the constitutional provision specifically designed to protect his rights by requiring trial by an impartial jury.

Third party standing should not be granted to allow a defendant to uphold the rights of potential jurors not to be excluded from jury service. Third party standing generally is permitted to uphold the rights of other individuals for three reasons:120 1) the existence of a substantial relationship between the claimant and the third parties;121 2) the impossibility of the third parties vindicating their own

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117. See Singleton, 428 U.S. at 114; Musto, 540 F. Supp. at 353. For an excellent general discussion on third party standing, which has been relied on in this section of the article, see Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984).

118. See Barrows v. Jackson, 346 U.S. 249 (1953); Beal, 532 F. Supp. at 309 ("Traditionally, standing has been accorded only members of the allegedly ill-treated group when an attack is mounted upon equal protection grounds."); Monaghan, *supra* note 117, at 286.

119. See Abell, 552 F. Supp. at 320.

120. See Singleton, 428 U.S. at 114.

rights; and 3) the likelihood that the rights of third parties would be diluted or adversely affected if the suit were not permitted. These three reasons do not apply to a defendant objecting to the exclusion of potential jurors.

First, no special relationship exists, such as that of a physician and patient, between a defendant and the potential jurors who were in the excluded group. Second, those persons in the excluded group can protect themselves because they have the right to bring their own equal protection action. Potential jurors do not face nonlegal obstacles, such as a desire or need to preserve their anonymity, in bringing such a suit. Finally, third party standing to assert an equal protection claim simply is not applicable in the context of a defendant objecting to the exclusion of a group from the jury. The right of potential jurors to participate in jury service will not be diluted if the defendant is not entitled to object to the exclusion. The Court has found such a situation to exist when a buyer of an item, such as a house, or alcohol, or contraceptives, is being discriminated against, but it is the seller of the item who has brought suit. No similar nexus or relationship exists between a defendant and potential jurors. Third party standing has been limited to situations in which the litigant's interaction with the rightholder is necessary to the third party's exercise of his right.

To deny a defendant standing under equal protection to challenge the exclusion of a group to which he does not belong is in accord with unquestioned Supreme Court caselaw over the last hundred years. On the other hand, a defendant has standing under the sixth amendment to challenge the exclusion of a group, whether or not he belongs to that group. This contrast highlights the need to permit sixth amendment fair cross-section challenges to object to jury com-

123. See Craig v. Boren, 429 U.S. 190, 195 (1976); Eisenstadt, 405 U.S. at 445-46; Griswold, 381 U.S. at 481; Barrows, 346 U.S. at 257.
125. See Carter, 396 U.S. at 329.
126. See NAACP v. Alabama, 357 U.S. 449 (1958) (members of the organization wished to remain anonymous).
127. See Cronn, 717 F.2d at 170; Coletta, 682 F.2d at 823; Musto, 540 F. Supp. at 353.
128. Cf. Buchanan v. Warley, 245 U.S. 60 (1917) (the purchaser sought to use the discriminatory ordinance as a defense).
position. Lowering the burden of proof in jury composition cases brought under equal protection, as the Supreme Court recently did in *Batson*, does not help those defendants who are not members of the excluded group and who, therefore, do not have standing under equal protection regardless of the level of proof required to prevail.

III. DEFINING COGNIZABLE GROUPS

In *Lockhart v. McCree*, the Supreme Court stated that cognizable groups should be defined by reference to the purposes of the fair cross-section requirement. The lower federal courts and state courts have not always realized this and little agreement exists on which groups are cognizable. This section's survey of the caselaw defining groups for sixth amendment and for equal protection purposes, should make it clear that suspect classes are only a subset of cognizable groups and do not set the boundaries for cognizability.

There are more groups whose exclusion may constitute a violation of the fair cross-section requirement than there are groups whose exclusion triggers heightened scrutiny under equal protection. Even if a defendant meets the standing requirements for an equal protection claim, he has little hope of prevailing if the group excluded was other than one of the few suspect classes, such as blacks, that generally are viewed as triggering heightened scrutiny under equal protection analysis. That is, while a white defendant might be granted third party standing to object to the exclusion of blacks, no reason exists to grant a black defendant standing to object to the exclusion of whites, or a woman standing to object to the exclusion of men.

Under equal protection analysis, a classification presumptively is invidious and therefore subject to heightened scrutiny if it disadvantages a suspect class. In designating groups as suspect, the Supreme Court has looked to whether the classification reflects deep-seated prejudice rather than the pursuit of a legitimate objective. The Court has inquired whether the group historically has been “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” Classifications based on race or

135. See McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Korematsu v. United States, 323 U.S. 214, 216 (1944). Blacks and other racial minorities historically subject to prejudice have been considered the suspect groups triggering strict scrutiny. However, some members of the Court, although not characterizing whites as a suspect class, have maintained that any racial classification triggers strict scrutiny even if it is whites who
national origin are inherently suspect while classifications based on sex, alienage, and illegitimacy are subject to an intermediate standard of scrutiny, and can be considered semi-suspect.

While equal protection groups are defined by reference to past mistreatment and discrimination, groups cognizable for sixth amendment purposes are those whose presence is required to reflect a fair cross-section of the community. The Supreme Court has never specified how to define cognizable groups for sixth amendment purposes. The Court explicitly has recognized as cognizable only groups defined by race, ethnic background, or sex. The Court’s decisions, however, do suggest that although the exact boundaries of cognizability are not yet settled, they encompass more groups than the few suspect classes. An early Supreme Court case indicated that the exclusion of “economic, social, religious, racial, political and geographical groups

are disadvantaged. See Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842, 1846 (1986) (judgment of the Court by Powell, J., joined by Burger, C.J., and Rehnquist, J., and by O'Connor, J. in part). No consensus yet exists among the Justices concerning the level of equal protection scrutiny to be applied in affirmative action cases. See id. at 1862 (opinion of Marshall, J., joined by Brennan, J. and Blackmun, J.). Justices Brennan, White, Marshall, and Blackmun have stated that since whites have none of the immutable characteristics of a suspect class, actions involving them should not trigger strict scrutiny. See University of Cal. Regents v. Bakke, 438 U.S. 265, 357 (1978) (opinion of Brennan, J., White, J., Marshall, J., and Blackmun, J.). See also Wygant, 106 S. Ct. at 1869 n.10 (opinion of Stevens, J.) (The court has applied strict scrutiny when a disadvantaged class has been subjected to a tradition of prejudice).


136. See Craig v. Boren, 429 U.S. 190 (1976). Women, not men, historically have been disadvantaged. Nevertheless, classifications by gender trigger strict scrutiny even if they seem to disadvantage men and benefit women. See Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982). This is so not because men are a suspect class, see Michael v. Sonoma County Superior Court, 450 U.S. 464, 475-76 (1981) (men do not need any special consideration because of past discrimination or disadvantages), but because any statute with gender classifications may reflect “archaic and stereotypic notions” about men and women. Hogan, 458 U.S. at 725. See also Orr v. Orr, 440 U.S. 268, 279, 283 (1979). Such statutes may be based on “the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.” Hogan, 458 U.S. at 726; see also City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 441 (1985) (“Rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women.”).


of the community" is impermissible. The federal statutory equivalent of the fair cross-section requirement refers to groups defined by race, color, religion, sex, national origin, or economic status. Recently, the Court admitted that it had never defined the term "distinctive" or "cognizable" group. While it once again declined to do so, the Court did decide that "groups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors . . . are not 'distinctive groups' for fair cross-section purposes."

Nor does a consensus definition on cognizability exist among the state courts and lower federal courts. Whether a group is cognizable depends on the time and location of the trial. Most courts, however, have identified common criteria which are completely different than those used to determine whether a classification should trigger a high level of scrutiny under equal protection analysis. The factor most often mentioned is whether there is some internal cohesion, cohesive attitude, or common perspective resulting from life experience. Most courts also have required that the group have some quality that defines and limits it. The group also should be a substantial one numerically in the community.

Some courts have added the requirement that the group’s interest or perspective cannot be represented adequately by other persons in the community. This requirement was discussed at great length by a lower state court in California, which found that while resident

141. Thiel, 328 U.S. at 220 (daily wage earners could not be excluded from the jury).
143. Lockhart, 106 S. Ct. at 1766 ("Witherspoon-excludables," those prospective jurors who state that they would not, under any circumstances, vote to impose the death penalty, are not a cognizable group).
144. See Zant, 720 F.2d at 1216 (cognizability depends on the time and location of the trial); see also United States v. Daly, 573 F. Supp. 788, 790 (N.D. Tex. 1983).
146. See, e.g., Zant, 720 F.2d at 1216; Potter, 552 F.2d at 903; Test, 550 F.2d at 591; Marrapese, 610 F. Supp. at 1003; Abell, 552 F. Supp. at 322; see also United States v. Guzman, 337 F. Supp. 140 (S.D.N.Y.) (a group must have a definite composition and its membership cannot shift from day to day), aff’d, 468 F.2d 1245 (2d Cir. 1972), cert. denied, 410 U.S. 937 (1973).
147. See, e.g., Zant, 720 F.2d at 1216; Potter, 552 F.2d at 903; Test, 550 F.2d at 591; Abell, 552 F. Supp. at 322; Guzman, 337 F. Supp. at 143-44; Rubio, 24 Cal. 3d at 103, 593 P.2d at 601, 154 Cal. Rptr. at 740.
aliens and ex-felons had special perspectives, their views could be represented adequately by other members of society who had had experiences similar to those of the persons in the excluded groups. For example, naturalized citizens once were aliens, and some soldiers, like ex-felons, once were imprisoned.\textsuperscript{149} Under this reasoning almost no group would be cognizable. Businessmen once may have been daily wage earners but the former would be a poor representative for the latter. If those once confined to a mental institution, as the California court suggested, adequately can represent the perspectives of ex-felons, then why could not blacks, a minority group, represent Hispanics, another minority group? 

A few courts also have looked to whether the group has been subjected to prejudice or discrimination,\textsuperscript{150} and to whether exclusion would create bias against the defendant or stigmatization of the group.\textsuperscript{151} These considerations for defining cognizable groups, of course, are the ones most like those used to define suspect or semi-suspect classes for equal protection.

All courts have agreed that women\textsuperscript{152} and blacks\textsuperscript{153} are cognizable groups. Other groups which have been found cognizable include Mexicans,\textsuperscript{154} Spanish surnamed persons,\textsuperscript{155} and Latins in Miami.\textsuperscript{156} Courts differ on whether Native Americans,\textsuperscript{157} blue collar work-

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\textsuperscript{149} See id. at 100, 593 P.2d at 599-600, 154 Cal. Rptr. at 738-39.
\textsuperscript{150} See, e.g., Potter, 552 F.2d at 904-05.
\textsuperscript{151} See, e.g., Marrapese, 610 F. Supp. at 991.
\textsuperscript{153} See Peters v. Kiff, 407 U.S. 493 (1972); Strauder v. West Virginia, 100 U.S. 303 (1879); see also United States v. Hafen, 726 F.2d 21, 23 (1st Cir.), cert. denied, 466 U.S. 962 (1984); Butkovich, 593 F. Supp. at 949; Cabrera-Sarmiento, 533 F. Supp. at 807.
\textsuperscript{154} See Test, 550 F.2d at 586; Duran De Amesquita, 582 F. Supp. at 1328.
\textsuperscript{156} See Cabrera-Sarmiento, 533 F. Supp. at 804 (S.D. Fla. 1982).
\textsuperscript{157} Compare Hirst v. Gertzen, 676 F.2d 1252, 1256 (9th Cir. 1982) (Native Americans constitute a cognizable group.); United States v. Yazzie, 660 F.2d 422, 426 (10th Cir. 1981), cert. denied, 455 U.S. 923 (1982) and State v. Plenty Horse, 85 S.D. 401, 184 N.W.2d 654, 656 (1971) (Indians are cognizable) with United States v. Hanson, 472 F. Supp. 1049, 1053 (D. Minn. 1979) (Indians are not cognizable for sixth amendment purposes).
ers, whites, the less educated, those not proficient in English, and Hispanics constitute cognizable groups. Groups generally not found to be cognizable include those in low socioeconomic groups, those in classifications based on age, the unemployed, resident aliens, ex-felons, union members, and nonvoters.

The greatest reluctance to define cognizability for the purposes of the fair cross-section requirement has been demonstrated by those courts applying the requirement to the petit jury to limit the use of peremptory challenges. In shifting from equal protection analysis to fair cross-section analysis in order to address jury composition claims, some courts have limited application of the fair cross-section

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158. Compare Thiel v. Southern Pac. Co., 328 U.S. 217 (1946) (daily wage earners are a cognizable group) and Abell, 552 F. Supp. at 324 (blue collar workers in some communities may constitute a cognizable group) with Cabrera-Sarmiento, 533 F. Supp. at 804 (blue collar workers do not constitute a cognizable group) and United States v. Marcano, 508 F. Supp. 462, 469 (D. P.R. 1980) (working class is not a cognizable group).


160. Compare United States v. Butera, 420 F.2d 564, 571 (1st Cir. 1970) ("less educated" may constitute a cognizable group) and Abell, 552 F. Supp. at 324 (the less educated may constitute a cognizable group in some communities) with Cabrera-Sarmiento, 533 F. Supp. at 804 (persons with less than a high school education do not constitute a cognizable group) and Marcano, 508 F. Supp. at 469 (the less educated do not constitute a cognizable group).


164. See, e.g., Barber v. Ponte, 772 F.2d 982 (1st Cir. 1985) (en banc), cert. denied, 106 S. Ct. 1271 (1986); Cox v. Montgomery, 718 F.2d 1036, 1038 (11th Cir. 1983); Davis v. Greer, 675 F.2d 141, 146 (7th Cir. 1982), cert. denied, 459 U.S. 975 (1982); Potter, 552 F.2d at 905; Test, 550 F.2d at 591; Guzman, 468 F.2d at 1247.

165. See United States v. Kleifgen, 557 F.2d 1293, 1296 n.6 (9th Cir. 1977); Marcano, 508 F. Supp. at 469.

166. See United States v. Toner, 728 F.2d 115 (2d Cir. 1984); Rubio v. People, 24 Cal. 3d 93, 593 P.2d 594, 154 Cal. Rptr. 734 (1979).


requirement to the petit jury and to claims involving equal protection
groups rather than the more broadly defined cognizable groups. They have done so despite the fact that in the context of applying
the fair cross-section requirement to the jury venire, more groups
have been found cognizable than the few groups specially protected
under equal protection.

The California Supreme Court, the first court to use fair cross-
section analysis to limit peremptory challenges, did not define cogni-
zable groups in Wheeler because blacks, the group being considered,
clearly were a cognizable group. At one point the court referred to
representation by groups "defined by race, religion, ethnic or na-
tional origin, sex, age, education, occupation, economic condition,
place of residence, and political affiliation," but at another point
the court referred simply to "racial, religious, ethnic or similar
groups." A lower court in California later claimed that Wheeler
meant to define cognizable groups only as those delineated by race,
sex, ethnicity, or religion.

Many of the courts which have accepted the Wheeler fair cross-
section approach have taken a narrow view of cognizability correlat-
ing roughly to the suspect classes of equal protection analysis. When
Massachusetts adopted the reasoning of Wheeler, it limited the re-
view procedure to groups defined by race, sex, color, creed, or na-
tional origin. The court obtained this definition of cognizable
groups from the equal rights amendment of the state constitution.
Delaware adopted the Wheeler procedures in a case involving the
exclusion of blacks and did not discuss what constitutes a cognizable
group. New Mexico applied the Wheeler approach in a case in-
volving the exclusion of blacks but specifically left open the question
of whether the procedure would be applied to other groups.

New Jersey also has adopted the Wheeler procedures. The New
Jersey Supreme Court stated that groups based on religious princi-
pies, race, color, ancestry, national origin, and sex — the suspect and
semi-suspect classifications — are the "core cognizable groups."

170. See 22 Cal. 3d at 280 n.26, 583 P.2d at 764 n.26, 148 Cal. Rptr. at 905 n.26.
171. Id. at 266, 583 P.2d at 755, 148 Cal. Rptr. at 896.
172. Id. at 276, 583 P.2d at 761, 148 Cal. Rptr. at 903.
173. See People v. Estrada, 93 Cal. App. 3d 76, 95, 155 Cal. Rptr. 731, 743
(1979).
175. See MASS. CONST., Declaration of Rights, art. 1.
177. See Crespin, 94 N.M. at 489, 612 P.2d at 718.
178. Gilmore, 103 N.J. at 526 n.3, 511 A.2d at 1159 n.3.
The court refused to determine which other groups are cognizable but noted that courts are divided over whether groups defined by age, economic status, or occupation could be cognizable. The court found it unnecessary to determine whether groups such as the handicapped or veterans, which are given special protection under New Jersey law, might be cognizable groups in some contexts.  

The federal courts have taken divergent views on cognizability. In applying the fair cross-section requirement to limit peremptory challenges, the Second Circuit found that blacks and Hispanics constituted cognizable groups but offered no further definition. Two district courts in the Second Circuit then came to opposite conclusions on whether whites constitute a cognizable group. The Sixth Circuit spoke more broadly, finding that both blacks and whites are cognizable groups and referring to distinctive groups as those defined by skin color, gender, nationality or similar characteristics.

The courts have been most likely to view cognizability for fair cross-section purposes too narrowly in cases involving peremptory challenges. But even when applying the fair cross-section requirement to the jury venire, some courts have come close to finding that exactly the same groups are cognizable for both sixth amendment and equal protection purposes. For example, in finding that blue collar workers are not cognizable for fair cross-section purposes, the First Circuit looked only to equal protection cases for a definition of cognizable groups. Instead of discussing the defendant’s need to have such a group represented in the jury venire, the court spoke at length about defining distinct groups as those that require the aid of the courts to avoid discrimination and prejudice. The court complained that thousands of groups could be found cognizable. While it is difficult to find a bright-line test for defining cognizable groups, tests from equal protection analysis have only ease of application to commend them and unnecessarly limit the fair cross-section analysis.

Nearly all of the courts that have applied the fair cross-section requirement to the petit jury to limit the use of peremptory challenges have done so in cases involving the exclusion of blacks. Because blacks indisputably constitute both a cognizable group and a suspect class, the courts were not required to define cognizability or to differentiate between cognizable groups and suspect classes. But the courts, mostly in dictum, have used language suggesting that

179. See id.
180. See McCray v. Abrams, 750 F.2d at 1135.
181. See supra note 158.
182. See Booker, 775 F.2d at 773.
183. See id. at 771.
184. See Anaya v. Hansen, 781 F.2d 1, 6 (1st Cir. 1986).
cognizable groups may be nearly equivalent to the few groups that trigger heightened scrutiny under equal protection. Cognizable groups can be defined properly only by referring to the constitutional guarantee in question, the sixth amendment right to a fair and impartial jury. An examination of the rationale of this constitutional right demonstrates the impropriety of limiting the applicability of the fair cross-section requirement by resorting to definitions borrowed from equal protection analysis when defining cognizable groups.

IV. PURPOSES OF THE FAIR CROSS-SECTION REQUIREMENT

The primary goal of the constitutional guarantee to equal protection of law is to protect groups from invidious discrimination.185 For example, blacks excluded from jury service are being treated differently from whites who are permitted to serve. Although excluded jurors clearly have the right to bring equal protection suits,186 defendants are much more likely to want to challenge the composition of a jury. A defendant who finds that all potential jurors in his racial or ethnic group have been excluded may bring an equal protection claim.187 The basis of his claim would be that he, unlike other defendants, is being tried by a jury not composed of his peers and equals. Equal protection is concerned with ensuring that all groups are treated similarly, as either jurors or defendants.

The primary goal of the fair cross-section requirement is to provide the individual defendant with a fair and impartial jury as required by the sixth amendment. The Supreme Court has found that the fair cross-section requirement helps achieve the purpose of the jury, which is to "guard against the exercise of arbitrary power"188 by making "available the commonsense judgment of the community."189 The Court has explained how the fair cross-section requirement accomplishes this purpose. Representation of many groups on the jury assures a "diffused impartiality"190 by not excluding from the jury room the various "qualities of human nature and varieties of

187. See Partida, 430 U.S. at 492.
188. Taylor, 419 U.S. at 530.
189. Id.
190. Id.
human experience.” Likewise, the primary goal of the Jury Selection and Service Act of 1986 (Jury Selection Act), the statutory equivalent of the fair cross-section requirement, is to ensure that federal juries are selected from a fair cross-section of the community.

The second purpose of the fair cross-section requirement is to permit all members of the community to share in the administration of justice as a “phase of civic responsibility.” This gives recognition to the fact that those eligible for jury service are to be found in every stratum of society. Excluding persons from jury service because they belong to a particular group “open[s] the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury,” and makes the jury an “instrument of the economically and socially privileged.” Excluding a group “stigmatizes the whole class, even those who do not wish to participate . . . .”

A third and final rationale for imposing the fair cross-section requirement is that it maintains public confidence in the integrity of the judicial system. If groups can be excluded arbitrarily from juries, the legitimacy of the jury system is undermined. In enacting the statutory equivalent of the fair cross-section requirement, the Jury Selection Act, Congress stated that its aim was to assure that potential jurors are selected from a cross-section of the community and to provide all qualified citizens the opportunity to be considered for jury service.

Clearly, an overlap in the goals achieved by application of the fair cross-section requirement and equal protection analysis exists in the context of jury selection. Both requirements help maintain the general integrity of the judicial system. Both requirements help avoid discrimination against groups whose members are prevented from undertaking jury service. But while stopping discrimination directed at groups is the primary goal of applying equal protection analysis, it is only a secondary goal in applying the fair cross-section requirement. The primary rationale for the fair cross-section requirement is not that it protects members of groups but that it protects any indi-

191. Id.
194. Taylor, 419 U.S. at 531 (quoting Thiel, 328 U.S. at 227 (Frankfurter, J., dissenting)).
195. Thiel, 328 U.S. at 220 (Frankfurter, J., dissenting).
196. Id.
197. Id. at 224.
vindual defendant's right to a fair and impartial jury. The sixth
amendment is concerned primarily with the rights of the defendant,
not with the rights of those in the group excluded from jury
service.200

The differing burdens of proof under equal protection analysis and
fair cross-section analysis reflect the different purposes of the two
analyses. A defendant bringing an equal protection claim must show
intentional discrimination.201 But a defendant bringing a claim under
the sixth amendment need not show bad faith.202 Furthermore, a
prima facie showing that groups have been excluded from the venire
cannot be rebutted simply by showing a lack of discriminatory in-
tent. At the petit jury level, the defendant must show that peremp-
tory challenges were used to exclude jurors not because of their spe-
cific bias in a case but simply because they belonged to a particular
group.203

Recognizing that the rights of the defendant and the rights of po-
tential jurors are separate and distinct is crucial to understanding
why groups cognizable for sixth amendment purposes and groups
which trigger heightened scrutiny under equal protection analysis
need not correlate. Discrimination against potential jurors is pre-
vented by granting heightened scrutiny under equal protection to
those few groups which historically have been subject to unfair treat-
ment. To fully vindicate a defendant’s fair cross-section right, we
must find cognizable all groups that are distinct in the community
and have numerous members.204 Suspect classes are chosen with an
eye to history and past ill-treatment; cognizable groups are chosen
by determining whether their members possess a perspective that
must be represented on the jury if the jury is to be fair and impar-
tial. There is no necessary correlation between cognizable groups de-
defined in this way and groups that in any way are disadvantaged or
even particularly cohesive. A defendant, whether he is black or
white, has as much right to object to the exclusion of all whites from
the jury as to object to the exclusion of all blacks. Whites, while
probably not a suspect or even a semi-suspect class, surely are a cog-
nizable group.

The courts which have used sixth amendment cross-section analy-

200. See Hanson, 472 F. Supp. at 1053.
201. See Batson, 106 S. Ct. at 1721.
203. See id. at 1131.
204. See Duren, 439 U.S. at 364.
sis but limited its application to cases involving the exclusion of equal protection groups generally have done so without explanation or reference to the purposes of the fair cross-section requirement or equal protection analysis. This mixing of sixth amendment analysis and equal protection analysis probably is due to the fact that early claims of unfair jury selection procedures were grounded only in equal protection.\textsuperscript{205} Although the Supreme Court has long recognized that the fair cross-section requirement is an essential component of the right to a representative jury, the Court did not hold that the sixth amendment applies to the states until 1968.\textsuperscript{208} Furthermore, because the burden of proof for objecting to peremptory challenges under equal protection, until recently, was extremely difficult to meet, courts seem reluctant to apply fully the less stringent sixth amendment analysis in the peremptory challenge context.

Courts may be limiting application of the fair cross-section requirement because they are more concerned with those goals of the cross-section requirement that overlap with the goals of equal protection analysis. They are losing sight of the fact that the chief goal of the fair cross-section requirement remains the protection of every defendant, not the protection of only particular groups. In \textit{Lockhart}, the Supreme Court recently made it marginally more difficult to distinguish between the goals of the fair cross-section requirement and equal protection. Although the Court declined the opportunity to define group distinctiveness or cognizability for fair cross-section purposes, the Court stated that the concept had to be linked to the purposes of the cross-section requirement. The Court then went on to refer to \textit{Taylor} and list these purposes as:

\begin{quote}
(1) "guard[ing] against the exercise of arbitrary power" and ensuring that the "commonsense 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."
\end{quote}

Although this list is accurate, the Court hardly discussed the defendant's individual right. The Court refers to protection against "arbitrary power" but not to the "diffused impartiality" ensured by a representative jury.

The standing requirements and the definition of a cognizable group differ for fair cross-section analysis and equal protection analysis because the two analyses vindicate different rights and reflect separate goals and policies. The caselaw on standing requirements and the definition of cognizability under each analysis often does not

\begin{itemize}
\item 205. See, e.g., \textit{Strauder v. West Virginia}, 100 U.S. 303 (1879).
\item 207. \textit{Lockhart}, 106 S. Ct. at 1765 (quoting \textit{Taylor}, 419 U.S. at 530-31).
\end{itemize}
reflect these differences. Examining the differing rationales of equal protection and the fair cross-section requirement shows the need to distinguish clearly the two means of challenging jury composition. The present confusion in the area of jury composition claims is a result of the mixing of equal protection and sixth amendment analysis.

In holding in *Lockhart* that jurors who state that they would never vote for the death penalty do not constitute a cognizable group for sixth amendment purposes, the Court referred several times to equal protection groups to give examples of which groups are recognized as cognizable. The Court further blurred the lines between equal protection groups and cognizable groups by stating that cognizable groups had "some immutable characteristic such as race, gender, or ethnic background" and often were "historically disadvantaged groups." If such statements are interpreted by courts as expressing an exclusive definition of cognizable groups, the important distinction between cognizable groups and groups significant for equal protection purposes will be lost.

**CONCLUSION**

The fair cross-section requirement has been recognized as an essential component of the sixth amendment right to a fair and impartial jury. A defendant's right to a jury that fairly represents the community is wholly distinct from the right of persons to serve as jurors. Limiting fair cross-section analysis with equal protection requirements prevents defendants from vindicating their own sixth amendment rights unless their claims also will further equal protection goals. There is no reason for leaving some defendants unprotected in this way. Defendants are deprived of their sixth amendment rights when a group is excluded from the jury regardless of whether the defendants are members of the excluded group. They should not be subject to the "same class" rule, which is appropriate in equal protection cases, in order to meet standing requirements. A white or Hispanic defendant should have the same right as a black defendant to object to the exclusion of blacks from the jury. Likewise, defendants are deprived of their sixth amendment rights when any cognizable group, not just the few suspect classes, are excluded from service on the jury. The exclusion of senior citizens, whites, men, or blue-

208. *Id.* at 1766.
209. *Id.*
collar workers is as much a violation of a defendant's sixth amendment rights as is the exclusion of a suspect class such as blacks.

Courts have noted that the different burdens of proof for equal protection claims and fair cross-section claims require the use of the latter analysis to vindicate fully sixth amendment rights. But courts must recognize that sixth amendment rights will remain unvindicated if fair cross-section claims are rejected because equal protection standing requirements or definitions of a group are not met.