

1-1-1982

CRIMINAL LAW—THE FAIR CROSS-SECTION REQUIREMENT: DEFENDANT'S FRIEND OR FOE? *Commonwealth v. Bastarache*, 1980 Mass. Adv. Sh. 2465, 414 N.E.2d 984

James D. Horwitz

Follow this and additional works at: <http://digitalcommons.law.wne.edu/lawreview>

Recommended Citation

James D. Horwitz, *CRIMINAL LAW—THE FAIR CROSS-SECTION REQUIREMENT: DEFENDANT'S FRIEND OR FOE? Commonwealth v. Bastarache*, 1980 Mass. Adv. Sh. 2465, 414 N.E.2d 984, 4 W. New Eng. L. Rev. 317 (1982), <http://digitalcommons.law.wne.edu/lawreview/vol4/iss2/6>

This Note is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.

CRIMINAL LAW—THE FAIR CROSS-SECTION REQUIREMENT: DEFENDANT'S FRIEND OR FOE? *COMMONWEALTH V. BASTARACHE*, 1980 Mass. Adv. Sh. 2465, 414 N.E.2d 984.

I. INTRODUCTION

The development of standards used to determine whether a jury is constitutionally composed is of both historic and current interest.¹ The recent Massachusetts case of *Commonwealth v. Bastarache*² illustrates judicial attempts to formulate standards that accommodate different constitutional interests.

On May 26, 1978, twenty-year-old Mark E. Bastarache was involved in a bar brawl as a result of which Pete Wilbur, the individual with whom Bastarache was fighting, died.³ A grand jury, sitting in Franklin County, Massachusetts, indicted Bastarache for manslaughter. Prior to trial, defense counsel moved to dismiss the indictment and the jury pool on the grounds that persons between the ages of eighteen and thirty-four had been underrepresented in the Franklin County jury venire since 1970.⁴ The motion was denied at a pre-trial hearing and Bastarache was later tried before a jury and found guilty of manslaughter.⁵

The appeals court, in reversing the superior court, relied primarily on defendant's constitutional challenge to the composition of the jury pool.⁶ The supreme judicial court upheld the reversal but on different grounds.⁷ The supreme judicial court disagreed with the

1. The text and footnotes that follow demonstrate that the constitutionality of jury composition has been of interest to courts, legislatures, and commentators for decades.

2. 1980 Mass. Adv. Sh. 2465, 414 N.E.2d 984.

3. *Commonwealth v. Bastarache*, 1980 Mass. App. Ct. Adv. Sh. 1729, 1731-32, 409 N.E.2d 796, 799.

4. *Id.* at 1733, 409 N.E.2d at 799-800.

5. *Id.* at 1729, 409 N.E.2d at 798.

6. The conviction was appealed on four grounds, including the challenge to the composition of the jury pool. The other three grounds were based on objections to the evidentiary rulings and instructions of the superior court judge relating to: (1) The admission of autopsy photographs; (2) the instructions on self-defense; and, (3) the Commonwealth's theory of wanton and reckless conduct. *Id.* at 1732, 409 N.E.2d at 799.

7. The supreme judicial court agreed with the appeals court that

[T]he autopsy photographs of the victim's brain and of the interior of his skull after the brain was removed were inflammatory, graphic, and grisley; . . . the defendant's claim of self-defense would not have been foreclosed by a finding that the defendant knew or should have known that the victim was drunk and

appeals court's conclusion "that the age group (eighteen-to-thirty-four) was underrepresented in violation of the Sixth Amendment to the Constitution of the United States."⁸ In rejecting the sixth amendment challenge, the supreme judicial court found that "classifications based on age alone do not involve identifiable or distinctive groups for Federal constitutional purposes and that the jury lists in Franklin County were not deficient under the Constitution of the United States."⁹

II. THE DECISION

Bastarache's arguments before the Massachusetts Supreme Judicial Court encompassed both sixth and fourteenth amendment federal constitutional concerns.¹⁰ Grand jury indictments are not constitutionally required of the states as a necessary prerequisite to state criminal trials; thus, the challenge to the grand jury indictment is subject only to equal protection analysis under the fourteenth amendment.¹¹ A challenge to the composition of the petit jury, however, falls within the purview of the sixth amendment.¹²

In defining the constitutional test to be applied under the fourteenth amendment, the court relied solely on *Castaneda v. Partida*:¹³

The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. Next, there must be a demonstration of disproportionate underrepresentation over a significant period of time. Finally, if the selection procedure is susceptible of abuse or is not racially neutral, the statistical showing supports the presumption of discrimination.¹⁴

The sixth amendment test relied upon by the supreme judicial court

susceptible to injury; [and] . . . no charge should have been given based on the theory of wanton and reckless conduct. . . .

1980 Mass. Adv. Sh. at 2482-84, 414 N.E.2d at 996-97.

8. 1980 Mass. Adv. Sh. at 2466, 414 N.E.2d at 987.

9. *Id.* at 2478, 414 N.E.2d at 993.

10. *Id.* at 2467, 414 N.E.2d at 987, 988.

11. *Hurtado v. California*, 110 U.S. 516, 534-35 (1884).

12. The sixth amendment provides in pertinent part: "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. The sixth amendment right to an impartial jury applies to state criminal trials through the due process clause of the fourteenth amendment. *See Duncan v. Louisiana*, 391 U.S. 145, 154-55 (1968).

13. 430 U.S. 482 (1977).

14. *Id.* at 494.

in *Bastarache* was found in *Duren v. Missouri*:¹⁵

[To establish a] prima facie violation of the fair-cross-section requirement, the defendant must 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 systematic exclusion of the group in the jury selection process.¹⁶

The supreme judicial court then concluded that, although the showing of a disparate impact on a group is necessary under both amendments, differences exist between the tests in both the first and third steps.

The first step contemplates the establishment of a distinctive group for sixth amendment purposes and the establishment of an identifiable group for fourteenth amendment purposes. The court noted that "[t]he focus of the equal protection clause has been on classes that have historically been saddled with disabilities or subjected to unequal treatment,"¹⁷ while the sixth amendment's concern is "the broader principle that juries should be drawn from a source fairly representative of the community."¹⁸ The court then determined that, for the purposes of the first step, it may be easier to find a distinctive group for sixth amendment purposes than an identifiable group for fourteenth amendment equal protection purposes.¹⁹

The second step in both tests requires evidence that the group, established in step one, was disproportionately represented in the jury venire. The third step requires a showing that the disproportionate underrepresentation is the result of systematic exclusion.²⁰ The different treatment given this third step is characterized by the supreme judicial court in the following manner: "Equal protection, for the purposes of the case before us (i.e., one not based on race), requires a showing that the selection procedure is susceptible of abuse, while the Sixth Amendment requires a showing that the underrepresentation is due to systematic exclusion of the group in the

15. 439 U.S. 357 (1979).

16. *Id.* at 364. For a discussion of proof of systematic exclusion, see Comment, "Jury-mandering": *Federal Jury Selection and the Generation Gap*, 59 IOWA L. REV. 401, 404-07 (1973).

17. 1980 Mass. Adv. Sh. at 2475, 414 N.E.2d at 992.

18. *Id.*

19. *Id.*

20. See Comment, *supra* note 16, at 403-05.

selection process.”²¹

Once the prima facie case has been established, the burden of proof then shifts to the state; that burden is defined differently for each amendment:

Equal protection principles allow the State to show an absence of intent to discriminate, while the Sixth Amendment test appears to involve less a question of intent than a showing that there were significant interests served by the selection process that resulted in the exclusion or underrepresentation of a distinctive group.²²

The above distinctions, drawn in *Bastarache*, are academic for purposes of the case before the court. The supreme judicial court's holding that “youth” constitutes neither a distinctive, nor an identifiable, group precludes further inquiry into the constitutional challenge. Through dicta the court hypothesized the arguments the state could make that would be sufficient to rebut a prima facie case established under each amendment.²³

The supreme judicial court's holding that youth does not constitute a cognizable group places *Bastarache*²⁴ clearly within the mainstream of both state and federal decisions.²⁵ The court's treatment of youth is disturbing in light of the statement that “a group might constitute a ‘distinctive’ group in the community for Sixth Amendment purposes but not an ‘identifiable’ group for equal protection purposes.”²⁶

If the *Bastarache* distinction is accurate, the question becomes: What factors must be considered to find a group distinctive for sixth amendment purposes, but not identifiable for fourteenth amendment purposes? The *Bastarache* court correctly noted that broader protection should be afforded the individual under the sixth amendment than under the fourteenth amendment's equal protection clause. This note examines the hypothesis that the *Bastarache* distinction of group identity between these amendments is essentially meaningless

21. 1980 Mass. Adv. Sh. at 2475, 414 N.E.2d at 992.

22. *Id.* at 2475-76, 414 N.E.2d at 992.

23. *See* 1980 Mass. Adv. Sh. at 2478-79, 414 N.E.2d at 993.

24. For articles addressing the issue of whether youth should constitute a cognizable group under present judicial analysis, see Zeigler, *Young Adults As A Cognizable Group in Jury Selection*, 76 MICH. L. REV. 1045 (1978); Comment, *supra* note 16; Comment, *The Exclusion Of Young Adults From Juries: A Threat to Jury Impartiality*, 66 J. CRIM. L. & C. 150 (1975).

25. 1980 Mass. Adv. Sh. at 2476 n.10, 414 N.E.2d at 992-93 n.10. *See generally* Zeigler, *supra* note 24.

26. 1980 Mass. Adv. Sh. at 2475, 414 N.E.2d at 992.

and will suggest a more meaningful way to distinguish the different interests of the sixth and fourteenth amendments.

III. DEVELOPMENT OF THE FAIR CROSS-SECTION REQUIREMENT

A. *Historical Basis*

The belief that the sixth and fourteenth amendments contemplate protection of different interests and, therefore, demand different tests can be substantiated through an examination of their geneses.

The sixth amendment, from its inception, extended greater protection to the individual. The individual, previously afforded the right to due process of law by the fifth amendment,²⁷ was given the right to an impartial jury trial. This is more than the "right" to a trial, but the right to a "judgment of [one's] peers."²⁸

The sixth amendment finds its roots in language found within Article III of the United States Constitution.²⁹ The language of Article III was derived from the Magna Charta, in which it was declared, "that no man shall be arrested, nor imprisoned, nor banished, nor deprived of life, &c., but by the judgement of his peers, or by the law of the land."³⁰ It then can be inferred that the sixth amendment's "impartial jury" was a transposition of the language of the Magna Charta that required "judgement of [one's] peers."

The fourteenth amendment historically has been focused on dif-

27. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offense to be twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

U.S. CONST. amend. V.

28. See notes 30, 34 & 40 *infra*.

29. The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State, where the said Crimes shall have been committed; but when not committed within any State, the trial shall be at such Place or Places as the Congress may by law have directed.

U.S. CONST. art. III, § 2, cl. 3.

30. J. STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 228 (1854) (quoting the Magna Charta). In Justice Story's study of the Constitution, he stated that

[t]he judgement of his peers here alluded to, and commonly called, in the quaint language of former times, a trial *per pais*, or trial by the country, is the trial by a jury, who are called the peers of the party accused, being of the like condition and equality in the state. *Id.*

The sixth amendment was added, therefore, according to Justice Story "[i]n order to secure this great paladium of liberty, the trial by jury, in criminal cases, from all possibility of abuse . . . which add greatly to the original constitutional barriers against persecution and oppression." *Id.* at 230.

ferent concerns. Historical analysis indicates that the fourteenth amendment had a dual purpose. It was intended to protect the rights of groups from unjustifiable and invidious discriminations. The fourteenth amendment also made due process protections found within the fifth amendment applicable to the states. The fourteenth amendment, in general, entitled individuals in criminal matters, "the right of trial, according to the process and proceedings of the common law."³¹

The "concerns of equality and even-handedness in governmental action" is the underlying thrust of the fourteenth amendment's equal protection clause.³² The clause fundamentally addresses the struggle between individuals seeking equality and the government's right to legislate laws that classify.³³

The fourteenth amendment's equal protection clause is directed at collective protection whereas the sixth amendment's focus is on the protection of individuals.³⁴ The courts, generally, have not

31. *Id.* at 233. U.S. CONST. amend. XIV § 1 states in part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state 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.

Id.

32. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 991 (1978).

33. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 343, 343-44 (1949).

34. The due process clause of the fourteenth amendment has also been relied on in evaluating jury composition cases. *See generally* United States v. Hamling, 481 F.2d 307 (9th Cir. 1973); United States v. Guzman, 337 F. Supp. 140 (S.D.N.Y. 1972); United States v. Deardorff, 343 F. Supp. 1033 (S.D.N.Y. 1971); United States v. Gargan, 314 F. Supp. 414 (W.D. Wis. 1970), *aff'd sub. nom.* United States v. Gast, 457 F.2d 141 (7th Cir.), *cert. denied*, 406 U.S. 969 (1972).

The fourteenth amendment's due process clause is not necessarily different from the fourteenth amendment's equal protection clause. "[T]he due process clauses of the fifth and fourteenth amendments have [also] been held to yield norms of equal treatment indistinguishable from those of the equal protection clause." L. TRIBE, *supra* note 32, at 992. The due process clause, however, is historically distinguishable from the "impartial jury" language of the sixth amendment.

In a discussion of the fifth amendment's due process language, Justice Story indicated that it also derives from the Magna Charta. J. STORY, *supra* note 30, at 233. The roots of the due process clause may be found in the language "[n]either will we pass upon him, or condemn him, but by the lawful judgement of his peers, or by the law of the land." *Id.* In particular,

these latter words, 'by the law of the land' mean, by due process of law; that is, without due presentment or indictment, and being brought in to answer thereto by due process of the common law. So that this clause, in effect, affirms the right of trial, according to the process and proceedings of the common law.

Id.

The "due process" clause also exists within the fourteenth amendment. Utilizing

adopted this historical analysis. "Indeed, the reasoning that prohibits the arbitrary exclusion of cognizable classes from jury service has been fundamentally the same whatever the constitutional context."³⁵ It is the contention of this note that the sixth amendment's impartial jury requirement has been consumed by the filtering effect of the fourteenth amendment thereby reducing it to the interests of equal protection and due process. The result will be future cases similar to *Bastarache*, in which the court fails to constitutionally condemn practices that preclude an individual's right to a judgment by a jury of his peers.

B. *Judicial Development*

Courts have looked primarily to the jury's composition to determine whether the defendant has been given his right to an impartial jury trial. This right presently is characterized as the right to jury representation by a fair cross-section of the community.³⁶ The tests that have developed to determine whether this right has been protected are derived from several sources.

In addition to the sixth and fourteenth amendments, challenges to jury composition have been brought under the fifth amendment to the United States Constitution,³⁷ under the United States Supreme Court's supervisory power over federal courts,³⁸ and, since 1968, under the federal Jury Selection and Service Act.³⁹

The right of a criminal defendant to an impartial jury was noted in the context of a sixth amendment decision made in 1888 by the United States Supreme Court.⁴⁰ In 1968, the United States Supreme

normal rules of statutory construction, it is obvious that "judgement of his peers" and "law of the land" have separate meanings. Likewise, the right to an "impartial jury" and the right to "due process of law" contemplate different interests.

35. *State v. Jenison*, 405 A.2d 3, 7 (R.I. 1979). A challenge was brought in *Jenison* under the sixth and fourteenth amendments to a statute that resulted in the total exclusion of members of the academic community from the jury pool. The court held that the academic community constituted a cognizable group, and that its exclusion, without a rational justification, was a violation of the fair cross-section requirement.

36. *Taylor v. Louisiana*, 419 U.S. 522, 526 (1975).

37. *See* cases cited note 34 *supra*.

38. *See* *Ballard v. United States*, 329 U.S. 187, 192 (1946); *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 225 (1946); *Glasser v. United States*, 315 U.S. 60, 86 (1942).

39. 28 U.S.C. §§ 1861-69 (1968), *as amended by* Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 54. *See also* Comment, *supra* note 16.

40. *Callan v. Wilson*, 127 U.S. 540 (1888).

Except in that class or grade of offences [sic] called petty offences [sic], which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or

Court applied the right to an impartial jury trial in criminal cases to the states through the fourteenth amendment.⁴¹ This right was defined further by the Supreme Court in *Taylor v. Louisiana*,⁴² where the Court held that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."⁴³

Taylor's cross-section requirement finds its roots in a case tried more than one hundred years ago. In *Strauder v. West Virginia*,⁴⁴ a black defendant challenged a state law that prohibited blacks from participating on juries. The United States Supreme Court concluded that the prohibition infringed upon defendant's right to a fair trial⁴⁵ and upon members of the excluded class.⁴⁶ The Court held this to be a violation of the fourteenth amendment's equal protection clause.⁴⁷

This equal protection concern with a defendant's right to fair trial became more focused in a 1940 Supreme Court decision. In *Smith v. Texas*,⁴⁸ a black defendant challenged a practice that resulted in the exclusion of blacks from jury service.⁴⁹ The Court held the practice to be a violation of the fourteenth amendment's equal protection clause.⁵⁰ In language frequently cited, the Court stated:

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For . . . discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war

under the authority of, the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offence [sic] charged.

Id. at 557.

41. *Duncan v. Louisiana*, 391 U.S. 145 (1968). In *Duncan*, petitioner challenged the validity of a Louisiana constitutional provision that denied his request for a jury trial. Petitioner was tried and convicted of simple battery, a misdemeanor. Louisiana permitted jury trials only in cases where capital punishment, or a hard labor sentence could be imposed.

42. 419 U.S. 522 (1975).

43. *Id.* at 528.

44. 100 U.S. 303 (1879).

45. *Id.* at 308-09.

46. *Id.* at 308.

47. *Id.* at 310.

48. 311 U.S. 128 (1940).

49. In Harris County, Texas, blacks constituted over 20% of the population, yet in the years 1931 through 1938, there never had been more than two black persons on the grand jury in any given year. Only five of the 384 grand jurors who served during that period were black. *Id.* at 128-29.

50. *Id.* at 132.

with our basic concepts of a democratic society and a representative government.⁵¹

Smith more clearly defined, in equal protection terms, the interest to be guarded. The jury must be "a body truly representative of the community."⁵² This concept was further refined through a trilogy of cases decided by the United States Supreme Court in the exercise of its supervisory powers over juries in federal courts.

The first case in the trilogy, *Glasser v. United States*,⁵³ held that the practice of adding women to jury rolls solely from lists furnished by the Illinois League of Women Voters violated defendant's right to an impartial jury.⁵⁴ In determining the requirements for state provision of this right, the Court concluded that the jury must represent a "cross-section of the community."⁵⁵

The two cases that followed, *Thiel v. Southern Pacific Co.*⁵⁶ and *Ballard v. United States*,⁵⁷ echoed *Glasser's* mandate in requiring that jury lists be representative of a cross-section of the community. In *Thiel*, a jury venire was stricken due to its exclusion of all who worked for a daily wage;⁵⁸ in *Ballard*, the Court condemned the exclusion of women from grand and petit juries.⁵⁹

By 1946, the requirement that a jury be drawn from a fair cross-section of the population had become entrenched. Although controversy surrounds the source of the fair cross-section requirement,⁶⁰ the better analysis attributes it to the province of the fourteenth amendment.⁶¹ *Strauder* and *Smith* clearly were decided under this amendment.⁶² *Glasser*, *Thiel*, and *Ballard* were decided by exercise of the Supreme Court's supervisory power.⁶³ These decisions, taken

51. *Id.* at 130 (footnote omitted).

52. *Id.*

53. 315 U.S. 60 (1942).

54. 315 U.S. at 86.

55. *Id.*

56. 328 U.S. 217 (1946).

57. 329 U.S. 187 (1946).

58. 328 U.S. at 221-22.

59. 329 U.S. at 193-94.

60. See notes 73-77 *infra* and accompanying text.

61. At least one court observed that the reasoning in jury composition cases is essentially the same regardless of the context in which the constitutional challenge is brought. *State v. Jenison*, 405 A.2d 3, 7 (R.I. 1979); see text accompanying note 35 *supra*. The cases primarily have been decided under either the fourteenth amendment or the Supreme Court's supervisory power. See note 49-57 *supra* and accompanying text. Since the sixth amendment was not made applicable to the states until 1968, the law in this area is, as yet, inconclusive. See notes 41 *supra* & 64 *infra*.

62. See notes 44-52 *supra*.

63. See note 38 *supra*.

in aggregate, concluded that whether an individual's right to an impartial jury was violated depended upon the permissibility of underrepresentation of a particular group on the jury venire. The resolution of the legality of excluding a particular group was therefore a condition precedent to determining the validity of an individual's claim that his right to an impartial jury had been violated. Fourteenth amendment influence is evidenced by this approach and the fair cross-section requirement is an obvious offspring of the fourteenth amendment.⁶⁴

C. Taylor

The Supreme Court, in *Taylor*, adopted the fair cross-section requirement as fundamental to the sixth amendment's mandate of an impartial jury trial in criminal cases.⁶⁵ In *Taylor*, a male, convicted of aggravated kidnapping, challenged the constitutionality of a Louisiana law which provided that women were to be excluded from jury service unless they filed a written statement expressly declaring the intent to serve.⁶⁶ The specific issue before the Court was "whether the presence of a fair-cross-section of the community on venires, panels, or lists from which petit juries [were] drawn [was] essential to the fulfillment of the sixth amendment's guarantee of an impartial jury trial in criminal prosecutions."⁶⁷ The Court concluded that "the fair-cross-section requirement [was] fundamental to the jury trial guaranteed by the Sixth Amendment."⁶⁸ The Court specifically found that this right had been violated where the result of the Louisiana provision was the exclusion from jury venires of fifty-three percent of the citizens eligible for jury service.⁶⁹

Taylor is disturbing in the manner by which the Court arrived at the adoption of the fair cross-section requirement. The Court correctly relied on *Duncan v. Louisiana*,⁷⁰ in which it held that the sixth

64. It is the position of the dissent in both *Taylor v. Louisiana*, 419 U.S. at 539 (Rehnquist, J., dissenting) and *Duren v. Missouri*, 439 U.S. at 370-71 (Rehnquist, J., dissenting), that the fair cross-section requirement is a fourteenth amendment doctrine. See text accompanying notes 74-82 *infra*.

65. 419 U.S. at 530.

66. The Louisiana statute provided that "[a] woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service." LA. CODE CRIM. PRO. ANN. art. 402 (West 1966) (repealed 1975).

67. 419 U.S. at 526.

68. *Id.* at 530.

69. *Id.* at 531.

70. 391 U.S. 145 (1968).

amendment right to an impartial jury was among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"⁷¹ and is therefore applicable to the states through the fourteenth amendment.⁷² In *Taylor*, however, the Court mistakenly held that the fair cross-section requirement had developed as an essential component of the sixth amendment.⁷³

The dissent emphatically noted that the cases relied upon by the majority are more accurately characterized as fourteenth amendment due process and equal protection cases.⁷⁴ The *Taylor* dissent continued by citing the interest to be protected under *Duncan*: "[The jury trial for a serious offense is] essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants."⁷⁵

The *Taylor* debate was continued in 1979 when the Court, in *Duren v. Missouri*,⁷⁶ reversed a Missouri Supreme Court ruling that *Taylor's* mandate that a jury venire be chosen from a fair cross-section of the community was not violated by a Missouri law.⁷⁷ The statute required that women, who so requested, be granted an automatic exemption from jury duty.⁷⁸ Following Missouri's failure to rebut *Duren's* prima facie case, the Court declared the law

71. *Id.* at 148 (citing *Powell v. Alabama*, 287 U.S. 45, 67 (1932)).

72. *Duncan* was one in a line of cases providing to the states sixth amendment protections through the fourteenth amendment due process clause. *E.g.*, *Washington v. Texas*, 388 U.S. 14, 18-19 (1967) (Texas statutes prohibiting testimony by coparticipant charged in the same crime held unconstitutional as violative of defendant's right to have compulsory process for obtaining witnesses for his defense); *Klopper v. North Carolina*, 386 U.S. 213, 222-23 (1967) (right to speedy trial declared fundamental and therefore applicable to states); *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (right of criminal defendant in state court to cross-examine witness held to be fundamental right); *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963) (indigent criminal defendant in state court held to have fundamental right to counsel).

73. "The unmistakable import of this Court's opinions, at least since 1940, . . . and not repudiated by intervening decisions, is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." 419 U.S. at 528 (citation omitted).

74. *Id.* at 539.

75. *Id.* at 541 (Rehnquist, J., dissenting) (citing *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968)).

76. 439 U.S. 357 (1979).

77. *Id.* at 370.

78. "No citizen shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror." MO. CONST. art. 1, § 226. This constitutional mandate is implemented by MO. REV. STAT. § 494.031(2) (Supp. 1978) which states that "[t]he following persons, shall, upon their timely application to the court, be excused from service as a juror, either grand or petit; . . . (2) Any woman who requests exemption before being sworn as a juror. . . ." *Id.*

unconstitutional.⁷⁹

In dissent, Justice Rehnquist argued that the majority was not primarily interested in whether Duren had been given a fair trial as mandated by *Duncan*,⁸⁰ but instead with whether women had "participate[d] in the judicial process. . . ."⁸¹ He argued that this was neither a sixth amendment impartial jury concern nor a concern of the due process clause of the fourteenth amendment, but rather was a fourteenth amendment equal protection issue.⁸²

Although Justice Rehnquist advocated the purging of the fair cross-section requirement from sixth amendment analysis, it is, instead, the Court's unqualified adoption of the fourteenth amendment fair cross-section requirement in *Taylor* that leads to the difficulties manifested in decisions such as *Bastarache*.⁸³

IV. *BASTARACHE*

In *Bastarache*, the supreme judicial court held that defendant's right to an impartial jury was not violated. This decision was made with the knowledge that only eighteen-and-one-half percent of the jury venire was composed of eighteen to thirty-four-year-olds eligible for jury duty in an area where thirty-six percent of the eligible individuals were in that age group.⁸⁴ *Bastarache* was decided against defendant despite his being a member of the excluded age group.

At the most fundamental level, these facts indicate that *Bastarache* was deprived of his traditional right to a judgment by his peers. It is precisely the fair cross-section requirement, as adopted by *Taylor*, that imposes a fourteenth amendment concern upon the sixth amendment. The fair cross-section requirement does not address the sixth amendment's concern for the right to an impartial jury.

The court in *Bastarache* did acknowledge that determination of

79. 439 U.S. at 369-70.

80. 391 U.S. at 157-58.

81. 439 U.S. at 371 note (Rehnquist, J., dissenting).

82. *Id.* at 371.

83. *Taylor* correctly recognized that the jury is a "prophylactic vehicle" whose purpose is to "guard against the exercise of arbitrary power." 419 U.S. at 530. On this basis, *Taylor* mandates that the state meet an increased burden once the initial establishment of a constitutional violation has been made. The fourteenth amendment compels the state to meet a rational relationship test to justify its laws in cases dealing with non-suspect classifications, whereas the sixth amendment commands that "[t]he right to a proper jury cannot be overcome on merely rational grounds." *Id.* at 534.

84. 1980 Mass. Adv. Sh. at 2467, 414 N.E.2d at 988.

the existence of a group may be easier under the sixth amendment than under the fourteenth amendment.⁸⁵ The *Bastarache* court did this by echoing the Supreme Court's characterizations of the types of groups protected under both amendments.⁸⁶ The difference between a distinctive group for sixth amendment purposes and an identifiable group for fourteenth amendment purposes is of dubious value. Although *Bastarache* attempted to expand the protections provided under the sixth amendment, differentiation between distinctive and identifiable is not the proper means to that end. Adjectives describing groups to be protected historically have been used liberally and interchangeably.

In *Smith*, an equal protection case, the Court used the adjective "qualified" to describe the type of group protected under the fourteenth amendment: "For racial discrimination to result in the exclusion from jury service of otherwise *qualified groups* not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government."⁸⁷

*Hernandez v. Texas*⁸⁸ involved an equal protection challenge made to the exclusion from the jury pool of individuals of Mexican origin. The characterization of the group protected under the fourteenth amendment is what the *Duren* and *Bastarache* courts characterized as a sixth amendment standard: "When the existence of a *distinct* class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated."⁸⁹

As recently as *Taylor*, a clear sixth amendment case, the Court held: "Restricting jury service to only *special groups* or excluding *identifiable segments* playing major roles in the community cannot be squared with the constitutional concept of jury trial."⁹⁰ The criteria used to determine whether a group is distinctive or identifiable is as enigmatic as the impact of the distinctions noted in *Bastarache*. This difficulty apparently is inherent in the process of distinguishing groups from nongroups, and only further exemplifies the need to

85. *Id.* at 2475, 414 N.E.2d at 992.

86. *Id.* at 2475-76, 414 N.E.2d at 992.

87. 311 U.S. at 130 (emphasis added).

88. 347 U.S. 475 (1954).

89. *Id.* at 478 (emphasis added).

90. 419 U.S. at 530 (emphasis added).

amend the fair cross-section requirement when applied to situations as that in *Bastarache*.

The frustration experienced in attempting to determine whether a distinct group objectively exists was voiced in the *Duren* dissent:

This Court resorted to similar mystical incantations. . . [n]oting that the effect of excluding any large and identifiable segment of the community from jury service "is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." . . . [I]n *Taylor v. Louisiana*. . . the Court based its reversal of a . . . conviction largely on the transcendental notion that "a flavor, a distinct quality" was absent from his jury panel⁹¹

In sixth amendment challenges to the composition of a particular jury pool, the solution to the problems raised by *Bastarache* lies in amending the fair cross-section requirement.

V. CRITICISM

Fourteenth amendment due process and equal protection concerns permit an individual to bring a suit against the systematic exclusion of a cognizable group even if he is not a member of that group. This is so because there is more at stake under the fourteenth amendment than protection of the individual. "When a grand or petit jury has been selected on an impermissible basis, the existence of a constitutional violation does not depend on the circumstances of the person making the claim. . . . The exclusion of . . . any . . . well-defined class of citizens, offends a number of related constitutional values."⁹²

The fourteenth amendment analysis broadened the rights of an individual in order to afford greater judicial scrutiny of potential discrimination against various groups. A requirement that the individual be a member of the group whose exclusion is being contested would obstruct protection of these fourteenth amendment interests.

This principle has been extended to sixth amendment analysis.⁹³ The extension, however, has been mechanical and little consideration has been given to the protections that the sixth amendment was designed to provide. The sixth amendment should afford the indi-

91. 439 U.S. at 372 note (Rehnquist, J., dissenting).

92. *Peters v. Kiff*, 407 U.S. 493, 498 (1972).

93. "Thus if the Sixth Amendment were applicable here . . . he would clearly have standing to challenge the systematic exclusion of any identifiable group from jury service." *Id.* at 500.

vidual greater protections than does the fourteenth amendment.⁹⁴ The prime concern of the sixth amendment's impartial jury requirement is that the individual be given a fair trial. This is a question of fundamental fairness and fundamental rights.⁹⁵ When a violation of this sixth amendment right has been alleged, the facts and circumstances of each case must be examined and the test to determine a constitutional violation should be applied on a case-by-case basis.

In both *Taylor* and *Duren*, where appellant was not a member of the excluded group, the fair cross-section requirement provided protection against arbitrary jury selection procedures.⁹⁶ In a situation such as *Bastarache*, however, where appellant is a member of the excluded group, the fair cross-section requirement acts as a restraint on the individual's right to an impartial jury trial. This is particularly so when the group to which the appellant belongs is not recognized as a group for traditional fourteenth amendment purposes.⁹⁷

In a situation where the plaintiff is a member of the excluded group, the requirement that the group be "a 'distinctive' group in the community"⁹⁸ should be eliminated from the three elements necessary to establish a fair cross-section violation under *Taylor* and under the sixth amendment. The fair cross-section requirement, in such a situation, should demand a showing of a disproportionate representation on the jury venire over a period of time. The burden should then shift to the state to justify this underrepresentation by more than "merely rational grounds."⁹⁹

VI. CONCLUSION

The right of a criminal defendant to be tried by a jury selected from a fair cross-section of the community is a hybrid. It has evolved from judicial attempts to define the extent of the guarantees of the United States Constitution that provide that a criminal defendant be tried by due process of law and by an impartial jury.

In the dawn of this evolution, courts primarily were answering challenges brought under the fourteenth amendment. The roots of the fair cross-section requirement thus were drawn from the concerns addressed by the fourteenth amendment's due process and

94. *Taylor v. Louisiana*, 419 U.S. at 530; *see Duren v. Missouri*, 439 U.S. at 368.

95. *Duncan v. Louisiana*, 391 U.S. at 157-58.

96. *See* notes 41 & 83 *supra*.

97. *See* notes 24 & 25 *supra*.

98. 1980 Mass. Adv. Sh. at 2474, 414 N.E.2d at 992.

99. *See* note 83 *supra*.

equal protection clauses. The Court in *Strauder*, *Smith*, *Glasser*, and *Ballard* considered the constitutional safeguards afforded blacks and women to ensure their equal participation in the jury system. The guarantees of a fair trial and due process of law primarily were defined through the protections given to constitutionally recognized groups.

In 1968 the Supreme Court, in *Duncan*, extended the sixth amendment guarantee that a criminal defendant be given an impartial jury trial to include trials in state courts. In 1975, against the historical backdrop of fourteenth amendment analysis, *Taylor* defined the right to an impartial jury as being a right to be tried by a fair cross-section of the community.

The sixth amendment mandate for an impartial jury, however, contemplates more than a right to a trial by jurors chosen from a fair cross-section of the community. The right to an impartial jury historically was intended to guarantee a trial by a jury of one's peers. The focus of the fair cross-section requirement is upon the right of constitutionally recognized groups to equal representation on jury venires.

The potential inequitable application of the fair cross-section requirement to sixth amendment impartial jury cases is demonstrated by *Bastarache*. In that case, a twenty-year-old defendant challenged the composition of the jury venire in Franklin County, Massachusetts, as underrepresenting individuals between the ages of eighteen and thirty-four.

The Massachusetts Supreme Judicial Court acknowledged this circumstance and indicated that it had existed for a period of time. The dictates of the fair cross-section requirement, however, mandate a determination that the excluded group be constitutionally recognizable before a violation of the requirement is found. The supreme judicial court indicated that although it may be easier to find a cognizable group under sixth amendment analysis than under the fourteenth amendment, the court decided to follow the mainstream of both state and federal decisions. The court held that age classification did not constitute a cognizable group and therefore defendant was not deprived of his right to a trial by an impartial jury.

When an individual challenges practices or laws that result in the exclusion from the jury venire of a group to which he belongs, the sixth amendment's protections demand an easing of the fourteenth amendment requirements. The sixth amendment requires that the individual be given a fair trial by an impartial jury, a judg-

ment by one's peers. The focus is on the treatment of the individual. The fair cross-section requirements should not become a barrier to sixth amendment claims, nor should the individual's relation to the protected group be a barrier to fourteenth amendment claims.

James D. Horwitz