

Vicinage, Venue, and Community Cross-Section: Obstacles to a State Defendant's Right to a Trial by a Representative Jury

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Introduction

"The jury's legitimacy has always rested in its capacity to express fairly the community's conscience" ¹ One of the criminal jury's critical functions is to act as a buffer between government and defendant. ² "The purpose of a jury is to guard against the exercise of arbitrary power — to make available the commonsense [sic] judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." ³

A criminal defendant has a constitutional right to a trial by a jury derived from a jury pool composed of a cross-section of the community in which the crime occurred. ⁴ Exclusion of distinctive, also known as cognizable, groups within the community can occur at different stages of jury selection. For example, jury selection statutes can exclude cognizable groups, such as African-Americans, when a list of all possible jurors

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1. JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 9 (1977).

2. *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); *Williams v. Florida*, 399 U.S. 78, 100 (1970).

3. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (citing *Duncan*, 391 U.S. at 155-56).

4. "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, which district shall have been previously ascertained by law" U.S. CONST. amend. VI.

Under modern federal criminal procedure, the trial is held in the district in which the crime was committed. FED. R. CRIM. P. 18. A change of venue is permitted only when there is a danger of an unfair trial. FED. R. CRIM. P. 21.

is compiled to form a "jury pool."⁵ Jury selection systems can also exclude cognizable groups when prospective jurors, known as the "venire," are summoned to a courthouse to be considered to serve on a jury.⁶ In addition, discrimination can occur during voir dire, the selection of a particular jury for a trial.⁷ Discrimination at this stage typically consists of racially motivated peremptory challenges.⁸

The United States Supreme Court, relying on both the Sixth Amendment right to jury trial⁹ and Fourteenth Amendment Equal Protection Clause,¹⁰ has protected a defendant's right to a jury representing a cross-section of the community from discriminatory practices.¹¹ The Court has yet to consider the effect vicinage has on representation of cognizable groups in the jury pool and venire.¹²

The site of a trial can profoundly affect the demographic composition of the jury pool. Venue, the place where the trial is held,¹³ generally determines vicinage, the geographic origin of the jury.¹⁴ Both venue and vicinage influence the demographic composition of the jury pool and, in turn, the jury ultimately selected from it.

5. See *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); *Duren v. Missouri*, 439 U.S. 357, 363-64 (1979) (statutory scheme that diminished representation of women in the jury pool held unconstitutional).

6. See e.g., *Hernandez v. Municipal Court*, 781 P.2d 547 (Cal. 1989), cert. denied, 110 S. Ct. 3222 (1990); *Davis v. Warden*, 867 F.2d 1003 (7th Cir. 1989), cert. denied, 110 S. Ct. 285 (1989).

7. See *Batson v. Kentucky*, 476 U.S. 79 (1986) (racially discriminatory exercise of peremptory challenges held unconstitutional).

8. *Id.*

9. See generally, Robert Wilson Rodriguez, Note, *Batson v. Kentucky: Equal Protection, The Fair Cross-Section Requirement, and the Discriminatory Use of Peremptory Challenges*, 37 EMORY L.J. 755 (1988).

10. "No State shall . . . deny any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. See generally Rodriguez, *supra* note 9.

11. E.g., *Batson v. Kentucky*, 476 U.S. 79 (1986) (racially discriminatory exercise of peremptory challenges held unconstitutional); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (exclusion of women from jury service held unconstitutional).

12. Prior to *Duncan v. Louisiana*, 391 U.S. 145 (1968) (holding that the Sixth Amendment right to a jury trial applies to the states), and long before equal protection or cross-section of the community were considered, the Court interpreted the "vicinage" requirement loosely. E.g., *Ruthenberg v. United States*, 245 U.S. 480 (1918) (a district court may draw jurors from a single division within the district when it is unclear where the crime was committed); *Lewis v. United States*, 279 U.S. 63 (1929) (held constitutional the conduct of a trial in the eastern district of Oklahoma, which failed to include the site of the crime).

The Court's discussion of the historical roots of the Sixth Amendment vicinage provision in *Williams v. Florida*, 399 U.S. 78, 96 (1970) suggests that a fair cross-section analysis may be implicit in interpreting the vicinage requirement.

13. Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801, 805 (1976).

14. *Id.* Venue, however, can be severed from vicinage. For example, the site of the trial, venue, could be moved, while the jury originates in a different geographical area. See *id.* at 804-05.

In the absence of a definitive Supreme Court decision, different jurisdictions have reached varying conclusions about the interaction between the Fourteenth Amendment Equal Protection and the Sixth Amendment vicinage requirements. These range from defining the vicinage to fairly represent the community to treating the vicinage provision as a substantively empty procedural rule.¹⁵

This Note considers (1) the early development of the Sixth Amendment vicinage requirement; (2) the development of the Fourteenth Amendment's equal protection of cognizable groups in jury pools and the Sixth Amendment right to a jury drawn from the cross-section of the community; (3) the different approaches taken by varying jurisdictions; (4) an evaluation of the various approaches; and (5) a proposed approach to vicinage and venue that accommodates Sixth Amendment and Fourteenth Amendment concerns.

I. The Early Development of the Sixth Amendment Right to a Trial by Jury

A. Development of the Anglo-American Jury

The jury evolved into a democratic institution over a number of centuries.¹⁶ The Anglo-American jury began as an instrument of the King of England that investigated civil complaints.¹⁷ Originally, medieval jurors had personal knowledge of the crime.¹⁸ The jury members acted as witnesses and also conducted investigations.¹⁹ Accordingly, to be of any value, the jury needed to reside in the vicinity of the location of the crime.²⁰ As residents of the community, the jury would be familiar with the parties and the dispute.

The jury's role changed by the time of the American Revolution.²¹

15. *Williams v. Superior Court*, 781 P.2d 537 (Cal. 1989); *Hernandez v. Municipal Court*, 781 P.2d 547 (Cal. 1989), *cert. denied*, 110 S.Ct. 3222 (1990).

16. See generally John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201, 203-04 (1988); Van Dyke, *supra* note 1, at 2-9.

17. Mitnick, *supra* note 16, at 203-04. The development of the criminal jury paralleled that of the civil. *Id.* at 232.

For a detailed discussion of medieval and colonial vicinage, see FRANCIS HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES*, 6-12, (1951); Kershen, *supra*, note 13, at 805-18 (1976).

18. Van Dyke, *supra* note 1, at 2. In the twelfth century, jurors were often noble juror-witnesses. *Id.*

19. Mitnick, *supra* note 16, at 203-04; Heller, *supra* note 17, at 8.

20. See Mitnick, *supra* note 16, at 203-04 (discussing juror's personal knowledge of dispute); Kershen, *supra* note 13, at 813-14; *Williams v. Florida*, 399 U.S. 78, 93-94 (1970) and accompanying notes (citing 4 W. BLACKSTONE, *COMMENTARIES*, 350-51 (1768)).

21. Kershen, *supra* note 13, at 816. See Mitnick, *supra* note 16, at 220-26 (tracing the change in the jurors possessing personal knowledge). By the fourteenth century, jurors and witnesses had become separate classes. Mitnick, *supra* note 16, at 204. In the seventeenth

First, jurors had become relatively independent of the crown.²² Second, rather than relying on personal knowledge and investigation, the jury decided factual issues by passively listening to formal evidence at trial.²³ Nonetheless, the vicinity of the crime remained the source of the jurors.²⁴

The American colonists held the jury in high esteem.²⁵ One reason for the importance of the jury was a more widespread use of public prosecutors in the colonies than in England.²⁶ The government's expanded role in criminal prosecution emphasized the role of the jury as a buffer between the accused and the government.²⁷ Because the colonists held the jury in high esteem, one of their major grievances was against the English statutes which provided that colonists accused of certain capital crimes were to be tried in England.²⁸ Consequently, the regulation of jury trials was important to the Framers of the Constitution.

B. Venue and Vicinage in the Constitution

The United States Constitution expressly mandates the provision of local juries: in Article III and the Sixth Amendment.²⁹ While the venue provision in Article III requires all criminal trials to be within the state in which the crime was committed,³⁰ the Sixth Amendment requires criminal trial "by an impartial jury of the State and district wherein the crime shall have been committed."³¹ Although the Sixth Amendment

century, jurors had become dependent on evidence formally presented in trial and could no longer possess personal knowledge. *Id.* at 204-05 (citing E. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 163 (1644)), 220-21 (citing 3 W. BLACKSTONE, COMMENTARIES 359-60 (1768)).

22. Van Dyke, *supra* note 1, at 4-5 (citing Bushnell's Case, 124 Eng. Rep. 1006 (1670)) (upholding a jury verdict that contradicted a magistrate's direction)).

23. Kershen, *supra* note 13, at 813; Mitnick, *supra* note 16, at 220-21.

24. Kershen, *supra* note 13, at 813; Heller, *supra* note 17, at 19-20 (discussing colonial statutes calling jurors from the vicinity of the crime).

25. Mitnick, *supra* note 16, at 230; Kershen, *supra* note 13, at 814-15.

26. Van Dyke, *supra* note 1, at 6; Heller, *supra* note 17, at 21-22.

27. Van Dyke, *supra* note 1, at 6; Heller *supra* note 17, at 21-22.

28. See Van Dyke, *supra* note 1, at 6-7; Kershen, *supra* note 13, at 805-08 (describing the irate colonial reaction to British attempts to curtail the right to jury trial); Heller, *supra* note 17, at 21 (citing the Declaration of Rights of the Continental Congress, art. 5 (1774)). Note the following statement from the Declaration of Independence: "He has combined with others to subject us to a jurisdiction foreign to our constitution . . . depriving us in many cases of the benefits of Trial by Jury: For transporting us beyond Seas to be tried for pretended offences . . ." Declaration of Independence (U.S. 1776). See also, Kershen, *supra* note 13, at 808-11 (discussing colonial attempts to protect the right to a jury trial in venue and vicinage laws during and immediately following the American Revolution).

29. U.S. CONST. art. III, sec. 2, cl. 3., and U.S. CONST. amend. VI.

30. "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 . . ." U.S. CONST. art. III, sec. 2, cl. 3.

31. U.S. CONST. amend. VI.

does not use the word "vicinage," this note will refer to this clause as the Sixth Amendment vicinage provision.

The Article III venue provision was meant to protect a defendant from the kind of governmental abuses seen during colonial times, such as holding trials of American colonists in England.³² Keeping the trial within the state would decrease the probability of a defendant facing trial far from family and friends.³³ In addition, a local trial would help the defendant provide witnesses and evidence for his or her defense.³⁴ Finally, the venue provision also implicitly recognized the state's sovereignty and jurisdiction, and the crime's relation to the community.³⁵

The venue provision did not satisfy all of the Framers³⁶ who debated vicinage proposals during the Constitution ratification conventions.³⁷ Debates over vicinage continued through the first Congress in 1789.³⁸ It was during this time that James Madison and a congressional committee began work on a constitutional vicinage amendment.³⁹

Intense debate surrounded the drafting of this clause,⁴⁰ reflecting the Framers' concern with the right to a trial by a jury of one's peers in the community.⁴¹ An early Madison proposal provided that "[t]he trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage"⁴² Other Framers feared that a jury drawn from a single small locality in a rebellious district would protect a local leader of a rebellion.⁴³ Evidence suggests that the strict vicinage requirement was removed because the Framers believed the venue requirement adequately preserved the vicinage feature.⁴⁴ Other debate centered on the meaning

32. Kershen, *supra* note 13, at 808-09.

33. *Id.* at 808-10. *See also* United States v. Cores, 356 U.S. 405, 407 (1958) ("The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place.").

34. Kershen, *supra* note 13, at 810.

35. *Id.* at 811-12.

36. *See Id.* at 816-17 (describing the Constitutional Convention discussion of a vicinage clause).

37. *E.g.*, III ELLIOT'S DEBATES 658 (Virginia); II ELLIOT'S DEBATES 109-14 (Massachusetts). *See also* Kershen, *supra* note 13, at 816-17.

38. Kershen, *supra* note 13, at 817-18 (citing I ANNALS OF CONG. 435 (1789)); Heller, *supra* note 17, at 28-34.

39. Kershen, *supra* note 13, at 818-21 (citing I ANNALS OF CONG. 435 (1789) and V THE WRITINGS OF JAMES MADISON, 1787-1790, at 418 (Hunt 1904)).

40. Kershen, *supra* note 13, at 817-28.

41. Early American colonial vicinage practice varied. Kershen, *supra* note 13, at 813-14; Heller, *supra* note 17, at 16-25 (discussing different colonial approaches to vicinage). By the time of the Constitutional Convention, at least two state constitutions had a vicinage requirement. Kershen, *supra* note 13, at 814-16.

42. I ANNALS OF CONG. 788-89 (1789). *See also* Kershen, *supra* note 13, at 818-24; Williams v. Florida, 399 U.S. 78, 93-94 (1970) and accompanying notes.

43. Kershen, *supra* note 13, at 822-24.

44. *Id.* at 824-25.

of the term; it was unclear if vicinage would be defined by district, community, neighborhood or state.⁴⁵

The Framers finally agreed that jurors should be drawn from the "district and state" in which the crime was committed.⁴⁶ They left to Congress the job of defining those terms.⁴⁷ While Congress determined the exact size of the district, the vicinage clause "preserved the connection between the place of the commission of the crime and the place of residence of the jurors."⁴⁸ Evidence suggests that the Sixth Amendment "district" requirement was strengthened by the vicinage provision in the Judiciary Act of 1789.⁴⁹

When the sixth amendment and the Judiciary Act of 1789 are read together, it appears clear that the right to trial by a jury of the vicinage had emerged from the First Session of the First Congress as a rather robust right. Even though the sixth amendment had no immediate practical impact with respect to limiting the geographical area from which jurors could be selected, the concept of vicinage had achieved constitutional status through reference to "districts." Whether the sixth amendment would have practical impact would then depend upon how future legislatures exercised the power to create judicial districts. Whenever a judicial district was created smaller in area than the area of the state, the sixth amendment would have a practical impact.⁵⁰

The final wording of the Sixth Amendment represented a compromise between advocates of strict juror-residence vicinage and those who wanted less restraint on the power of the national government.⁵¹

II. Development of the Right to a Representative Jury Under the Sixth and Fourteenth Amendments

A defendant's Sixth Amendment right to a trial by jury applies to the states via the Fourteenth Amendment Due Process Clause.⁵² The Supreme Court has held that the defendant also has a right to a "repre-

45. *Id.* at 822-23 (citing *V THE WRITINGS OF JAMES MADISON, 1787-1790*, at 424 (Hunt 1904)).

46. *Id.* at 826-27.

47. *Id.*

48. *Id.* at 843.

49. *See id.* at 860. The Judiciary Act of 1789 states: "the trial shall be had in the county where the offence was committed, . . . twelve petit jurors at least shall be summoned from thence." Act of Sept. 24, 1789, 1 Stat 88, ch. 20, 29 (1789).

The Act gave each district court the discretionary power to select jurors from such parts of the district as necessary to secure a fair and impartial jury and not inconvenience jurors. *See also* Kershen, *supra* note 13, at 825-28.

50. Kershen, *supra* note 13, at 860.

51. *Id.* at 826-28.

52. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

sentative jury.”⁵³ The Court has defined “representative jury” as a jury selected from a jury pool that represents a cross-section of the community.⁵⁴ Although every jury need not mirror the exact demographic composition of the community, the jury selection system must provide a fair possibility of obtaining a representative jury pool.⁵⁵ Consequently, members of cognizable groups within the community may not be excluded.⁵⁶

A. The Sixth Amendment Right to a Representative Jury Pool and the Fourteenth Amendment Right to Equal Protection

The first attempts to obtain representative jury pools relied on the Fourteenth Amendment Equal Protection Clause.⁵⁷ In 1880, the Supreme Court held that a jury selection scheme that excluded members of the defendant’s race violated the defendant’s right to equal protection.⁵⁸ The Fourteenth Amendment Equal Protection Clause has subsequently been held to prevent purposeful discrimination in jury selection.⁵⁹ To make a successful challenge under the Fourteenth Amendment, a defendant must show that the state *intentionally* caused disproportional representation of a cognizable group in the jury or jury pool.⁶⁰

A Sixth Amendment violation focuses on a criminal defendant’s fundamental interest in a jury drawn from a fair cross-section of the community.⁶¹ Rather than demonstrating the state’s discriminatory intent, a defendant making a Sixth Amendment challenge must show that the jury selection scheme systematically deprived her of a jury pool that repre-

53. *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975).

54. *E.g.*, *Duren v. Missouri*, 439 U.S. 357, 363-64 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (statutory scheme that diminished the representation of women in the jury pool held unconstitutional). The United States Supreme Court has yet to rule on whether the vicinage provision is applicable to the states.

55. *Taylor*, 419 U.S. at 538.

56. *Id.*

57. *Strauder v. West Virginia*, 100 U.S. 303 (1880). *See generally*, *Rodriguez*, *supra* note 9, at 768.

58. 100 U.S. at 306-07. *Strauder* was one of the earliest Supreme Court cases discussing an individual’s right to a representative jury. In *Strauder*, the Court found a West Virginia statute that permitted only white males to serve on the jury unconstitutional. *Id.* at 306-07. The court reasoned that because African-Americans were excluded from the jury pool, the defendant, who was African-American, was denied his Fourteenth Amendment right to equal protection. *Id.* at 306. *See also Rodriguez*, *supra* note 9, at 759-63 (discussing other related Supreme Court cases using this type of analysis).

59. *Batson v. Kentucky*, 476 U.S. 79, 85-87 (1986).

60. *Id.* at 96-98. *See also Peters v. Kiff*, 407 U.S. 493 (1972) (A white defendant successfully challenged the systematic exclusion of African-Americans from the jury pool); *Rodriguez*, *supra* note 9, at 764-67.

61. *Duren v. Missouri*, 439 U.S. 357, 367-70 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 533-34 (1975). *See also Rodriguez*, *supra* note 9, at 770-71.

sents a cross-section of the community.⁶²

Many of the Court's rulings on a defendant's right to a representative jury rely on both the Sixth and Fourteenth Amendments.⁶³ Nonetheless, a defendant has no "right to a grand or petit jury composed in whole or in part of persons of his own race or color"⁶⁴ The Court has limited the Sixth Amendment to challenges arising at the jury pool and venire composition, while the Equal Protection challenges have focused on voir dire.⁶⁵

B. Development of the Sixth Amendment Right to a Jury Representing a Cross-Section of the Community

The Court first considered the Sixth Amendment fair cross-section of the community requirement during the 1940s.⁶⁶ In *Smith v. Texas*,⁶⁷ a case challenging the exclusion of African-Americans from the jury pool, the Court ruled that the jury pool must be representative of the community.⁶⁸ Although relying on the Fourteenth Amendment Equal Protection Clause, the Court articulated community cross-section considerations, declaring "[i]t 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."⁶⁹ This idea of a jury composed of a community cross-section dominated the opinion in *Glasser v. United States*.⁷⁰ "our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class."⁷¹

The Court discussed the policies underlying the community cross-section approach in a civil case, *Thiel v. Southern Pacific Co.*⁷² In *Thiel*, the Court held that the exclusion of wage earners from the jury was at odds with the Seventh Amendment⁷³ right to a jury trial composed of

62. *Duren*, 439 U.S. at 370-71.

63. See generally *Rodriguez*, *supra* note 9, at 763-64.

64. *Strauder v. West Virginia*, 100 U.S. 303, 305 (1880).

65. See *Holland v. Illinois*, 110 S. Ct. 803, 806-08 (1990) (holding that a white defendant cannot rely on the Sixth Amendment to challenge the prosecution's use of racially motivated peremptory challenges).

66. See *Rodriguez*, *supra* note 9, at 767-69 (analyzing early Sixth Amendment community cross-section cases).

67. 311 U.S. 128 (1940). See also, *Rodriguez*, *supra* note 9, at 767-68.

68. 311 U.S. at 130-31.

69. *Id.* at 130.

70. 315 U.S. 60 (1942).

71. *Id.* at 85-86. See generally *Rodriguez*, *supra* note 9, at 767-72 (tracing the development of community-cross section analysis).

72. 328 U.S. 217 (1946).

73. U.S. CONST. amend. VII states: "In Suits at common law . . . the right of trial by jury shall be preserved." Nothing in the *Thiel* opinion indicates that the Court approach was unique to civil juries. The case has been cited by subsequent criminal cases such as *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) and *Taylor v. Louisiana*, 419 U.S. 522, 531 (1975).

members from the cross-section of the community. "Were we to sanction an exclusion of this nature . . . [w]e would breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged."⁷⁴

A few years later, race and jury representation again surfaced in *Hernandez v. Texas*.⁷⁵ The *Hernandez* court held that the systematic exclusion of Mexican-Americans from the jury pool violated the defendant's right to equal protection.⁷⁶ The Court discussed the harm posed by excluding a segment of the community, and the effect of such exclusion on the jury's ability to deliver a fair verdict.⁷⁷

The Court addressed both Fourteenth and Sixth Amendment concerns in *Peters v. Kiff*.⁷⁸ In *Peters*, the Court held that a white defendant had standing to challenge a racially discriminatory jury pool selection system on both Equal Protection and cross-section of the community grounds.⁷⁹ According to the Court, the defendant could make an Equal Protection challenge on behalf of the excluded class of potential jurors, who had a right to participate in the justice system.⁸⁰ In addition, the Court stated that the defendant had the right to make a Sixth Amendment challenge to the jury pool:⁸¹ "[A] State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner Unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process."⁸² The Court feared that excluding a particular group from the jury pool could affect the range of viewpoints represented in the deliberation room and thus deny the defendant a trial by a fair and impartial jury.⁸³

In a subsequent Sixth Amendment opinion, *Taylor v. Louisiana*,⁸⁴ the Supreme Court invalidated a Louisiana jury selection scheme that excluded women.⁸⁵ Justice White, writing for the majority, emphatically stated that "[This] Court has unambiguously declared that the American

74. *Thiel*, 328 U.S. at 223-24.

75. 347 U.S. 475, 478 (1954).

76. *Id.* at 477-78.

77. *Id.*

78. 407 U.S. 493 (1972).

79. *Id.* at 498-503.

80. *Id.* at 499.

81. *Id.* at 500-01 (citing *Duncan v. Louisiana*, 391 U.S. 145 (1968), which held that the Sixth Amendment right to a jury trial applies to the states). *But see* *Holland v. Illinois*, 110 S.Ct. 803 (1990) (holding that a white defendant does not have a Sixth Amendment right to challenge racially motivated peremptory challenges exercised during jury selection and limiting *Peters* Sixth Amendment challenges to jury pools and venire).
82. *Peters*, 407 U.S. at 502-03.

83. *Id.* at 503-04.

84. 419 U.S. 522 (1975).

85. *Id.* at 525.

concept of the jury trial contemplates a jury drawn from a fair cross-section of the community."⁸⁶ The *Taylor* opinion established that the right to a jury drawn from the cross-section of the community was a fundamental one.⁸⁷ The Court held that a jury pool selection system that disproportionately diminished the number of women from jury service was unconstitutional.⁸⁸ Although a state could make reasonable exemptions from jury service, it could do so only to the extent that the jury pool reasonably represented the community.⁸⁹ In addition, exclusion of women from jury service, even for administrative efficiency was insufficient to overcome the defendant's interest in a jury representing a cross section of the community.⁹⁰

The Supreme Court expanded this analysis and formulated a test for a Sixth Amendment cross-section violation in *Duren v. Missouri*.⁹¹ Under the *Duren* test, a defendant must demonstrate that: 1) the people excluded are members of a distinct, also known as cognizable, group within the community; 2) the representation of this group in the venire was not fair and reasonable in relation to its population in the community; and 3) the underrepresentation of the group was due to a process that systematically excluded the group.⁹² Once a defendant makes this showing, the burden then shifts to the state to explain the jury pool composition.⁹³ The state must then demonstrate that disproportionate representation was designed for the primary purpose of advancing a significant state interest.⁹⁴

The Supreme Court returned to Fourteenth Amendment considerations in *Batson v. Kentucky*.⁹⁵ The *Batson* Court set forth a test for the unconstitutional use of the prosecution's peremptory challenges during jury selection.⁹⁶ To make a prima facie case, the defendant must show: 1) the excluded potential juror(s) was a member of the defendant's race; 2) the prosecution removed members of the defendant's race; and 3) relevant circumstances existed to raise an inference of discrimination.⁹⁷

Although the *Batson* Court expressly limited its holding to chal-

86. *Id.* at 527.

87. *Id.* at 525.

88. *Id.* at 527. For a detailed analysis of the *Taylor* decision, see Elizabeth Bileete, Note, *Taylor v. Louisiana: The Jury Cross-Section Crosses the State Line*, 7 CONN. L. REV. 508 (1975).

89. *Taylor*, 419 U.S. at 538.

90. *Id.* at 538.

91. 439 U.S. 357 (1979).

92. *Id.* at 364.

93. *Id.* at 368.

94. *Id.* at 366-68.

95. 476 U.S. 79 (1986).

96. *Id.* at 86.

97. *Id.* at 96. Suspicious circumstances would include a pattern of peremptory challenges against members of a particular race. *Id.* at 97.

lenges brought under the Fourteenth Amendment,⁹⁸ the Sixth Amendment cross-section of the community requirement is implicit in the opinion.⁹⁹ The *Batson* opinion noted that excluding members of racial groups during the jury selection process violates the Equal Protection clause "because it denies [the defendant] the very protection that a trial by jury is intended to secure,"¹⁰⁰ a check on official power. The Court further acknowledged the role of the community in the justice system as lending legitimacy to the justice process.¹⁰¹

In *Powers v. Ohio*,¹⁰² the Court held that a white defendant may raise a Fourteenth Amendment *Batson* challenge on behalf of potential African-American jurors. Although the decision turned on third party standing, the Court emphasized the right of African-Americans not to be excluded from jury service.¹⁰³ The opinion also emphasized that a criminal justice system that permitted racial discrimination in its jury selection could not maintain its integrity.¹⁰⁴ Thus, the Court has used both the Sixth and Fourteenth Amendments to protect defendants from discrimination during jury selection.

C. Application of the Vicinage Clause to the States

The United States Supreme Court has yet to decide if the Sixth Amendment vicinage provision applies to the states under the Fourteenth Amendment Due Process Clause. The Court, however, was faced with the issue in a petition for certiorari. In *Mallett v. State*,¹⁰⁵ an African-American defendant was accused of killing a white police officer in a

98. *Id.* at 84 n.4. See also Jonathan B. Mintz, Note, *Batson v. Kentucky: A Half Step in the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection)*, 72 CORNELL L. REV. 1026 (1987).

Other decisions have extended *Batson*. *E.g.*, *People v. Kern*, 554 N.E.2d 1235 (N.Y. 1990), *cert. denied*, 111 S. Ct. 77 (1990) (extending *Batson* to defendant's use of peremptories); *Edmonson v. Leesville Concrete*, 111 S.Ct. 2077 (1991) (extending *Batson* to civil actions). For a discussion of extending *Batson* to the defendant's use of peremptory challenges, see J. Alexander Tanford, *Racism in the Adversary System: The Defendant's Use of Peremptory Challenges*, 63 SO. CAL. L. REV. 1015 (1990). For a critique of lower court implementation of *Batson* see Theodore McMillian and Christopher J. Petrini, *Batson v. Kentucky: A Promise Unfulfilled*, U.M.K.C. L. REV. 361 (1990).

99. *But cf.* *Hernandez v. New York*, 111 S. Ct. 1859, 1868-72 (1991) (no *Batson* violation for exclusion of Spanish-speaking veniremen and no discussion of the effect on community representation); *Holland v. Illinois*, 110 S. Ct. 803 (1990). In *Holland*, the Court held that *Batson* did not directly apply to a white defendant challenging exclusion of African-American jurors. *Id.* at 806. Yet even the *Holland* majority conceded that the Sixth Amendment required a possibility of representative jury, at least at the jury pool level. *Id.*

100. 476 U.S. at 86 & n.8.

101. *Id.* at 87.

102. 111 S. Ct. 1364 (1991).

103. *Id.* at 1368-69.

104. *Id.* at 1371.

105. 769 S.W.2d 77 (Mo. 1989) (en banc), *cert. denied*, 110 S. Ct. 1308 (1990).

district with a significant African-American population.¹⁰⁶ The defendant moved for a change of venue because of publicity regarding the case, which the court granted.¹⁰⁷ He also requested a district with a comparable African-American population.¹⁰⁸ Despite this request, the defendant was tried and convicted in a virtually all white district.¹⁰⁹ On appeal, the Missouri Supreme Court applied the *Batson*¹¹⁰ test to the jury pool and found no discriminatory intent behind the change in venue¹¹¹ nor prejudice in the jury pool composition.¹¹² The Missouri court affirmed the conviction, and held that the change of venue was not prejudicial.¹¹³

The United States Supreme Court denied certiorari.¹¹⁴ Justice Marshall, joined by Justices Blackmun and Brennan, dissented.¹¹⁵ Marshall concluded that the defendant had met the *Batson* test.¹¹⁶ Marshall noted that alternative venues existed with comparable African-American population as the district in which the crime was committed.¹¹⁷ Therefore, Justice Marshall reasoned, the absence of African-Americans in the new venue's jury pool supported a prima facie case of discrimination and a Fourteenth Amendment violation.¹¹⁸

Marshall also contended that Missouri had deprived the defendant to the right to a trial by a jury representing a cross-section of the community under the *Taylor v. Louisiana* interpretation of the Sixth Amendment.¹¹⁹ He also maintained that the change in the vicinage and jury pool violated both the Fourteenth Amendment Equal Protection Clause and Sixth Amendment right to a trial by the cross-section of the community.¹²⁰

The federal courts are currently divided on this issue. The Second,¹²¹ Seventh,¹²² and Ninth¹²³ circuits have implicitly accepted the application of the vicinage provision as part of the Sixth Amendment right

106. 769 S.W.2d at 78-79.

107. *Id.* at 81.

108. *Id.*

109. *Id.* at 79.

110. *See supra* notes 95-101 and accompanying text.

111. *Id.* at 80-81.

112. *Id.*

113. *Id.* at 79-81.

114. *Mallett v. Missouri*, 110 S. Ct. 1308 (1990) (Justices Marshall, Brennan, and Blackmun dissenting).

115. *Id.*

116. *Id.* at 1309.

117. *Id.* at 1310.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Martin v. Merola*, 532 F.2d 191, 196 (2d Cir. 1976).

122. *Davis v. Warden*, 867 F.2d 1003 (7th Cir. 1989).

123. *Bradley v. Superior Court*, 531 F.2d 413, 417 (9th Cir. 1976).

to jury trial. The Third,¹²⁴ Fifth,¹²⁵ and Sixth¹²⁶ Circuits have ruled that the vicinage provision does not apply. The remaining circuits have not conclusively considered the issue since *Duncan*.

The federal courts that have rejected the application of the Sixth Amendment vicinage requirement to the states have done so for two reasons. First, these circuits argue that the Sixth Amendment vicinage provision is not required for a fundamentally fair trial, and is therefore not binding on the states under the Fourteenth Amendment Due Process Clause.¹²⁷ Second, they maintain that the Framers drafted the Sixth Amendment vicinage provision to complement the judicial districts of the federal court system created by the Judiciary Act of 1789.¹²⁸ Because the states have independent courts and jury pool selection systems, the Sixth Amendment vicinage provision is irrelevant and inapplicable to the states.¹²⁹

III. Vicinage in the State Courts

The right to a jury representing a cross-section of the community is central to the right to a fair trial. The issue is how to define the "community" to be represented. It is this prong of the *Duren* test,¹³⁰ the relationship of the representation of a class within the jury pool to that of the population at large, that hinges on the geographic limits of the community. Venue and vicinage define the community against which courts will assess the minority representation in the jury pool for constitutional purposes.

State courts have grappled with the effect of venue and vicinage on minority representation in jury pools. Not all states have accepted the Sixth Amendment vicinage requirement.¹³¹ This section of the Note considers how the states of Alaska, Florida, New York, Illinois, and California have interpreted the Sixth Amendment vicinage provision in the context of their jury selection systems.

124. *Zicarelli v. Dietz*, 633 F.2d 312 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1083 (1981) (upholding a New Jersey change of venue despite changes in the jury pool).

125. *Cook v. Morrill*, 783 F.2d 593 (5th Cir. 1986) (upholding a Texas change of venue).

126. *Caudill v. Scott*, 857 F.2d 344 (6th Cir. 1988) (upholding a change of venue in a criminal trial in Kentucky).

127. *Cook v. Morrill*, 783 F.2d 593, 595 (5th Cir. 1986).

128. *Caudill v. Scott*, 857 F.2d 344 (6th Cir. 1988). *See supra* note 50 and accompanying text.

129. 857 F.2d at 346.

130. *See supra* notes 91-93 and accompanying text.

131. *See supra* notes 100-09 and accompanying text.

A. Alaska: Relating Vicinage to the Community Cross-Section Requirement

At one end of the spectrum stands Alaska. In *Alvarado v. State*,¹³² the Alaska Supreme Court held that the defendant's Sixth Amendment rights had been violated.¹³³ The defendant, a Native Alaskan, was convicted of a crime that occurred in his village, four-hundred-fifty miles away from Anchorage, which was the site of the trial.¹³⁴ Nearly all of the defendant's village population was also Native Alaskan.¹³⁵ Pursuant to Alaska's jury selection scheme, the vicinage encompassed a fifteen mile radius surrounding Anchorage.¹³⁶

The Alaska Supreme Court declared that the vicinage violated the defendant's Sixth Amendment right to a jury from a cross-section of the community.¹³⁷ "[T]he traditional starting point for determining the community from which jurors are to be selected is the scene of the alleged offense."¹³⁸ The *Alvarado* court looked to the United States Supreme Court Sixth Amendment cases¹³⁹ and to the values underlying the Sixth Amendment.¹⁴⁰ The court acknowledged the role of the jury as a safeguard against an arbitrary government.¹⁴¹ It is also recognized that the jury allows citizens to participate in the government and to increase the public's confidence in the fairness of the judicial system.¹⁴² If sections of the community were systematically excluded, the jury could not fill this role.¹⁴³

The court conceded that the concept of "community" was flexible, and gave a significant deference to the legislature in defining the vicinage.¹⁴⁴ The court, however, required the vicinage to encompass at least

132. 486 P.2d 891 (Alaska 1971).

133. *Id.* at 904.

134. *Id.* at 893-94.

135. *Id.*

136. *Id.* (citing ALASKA STAT. § 09.20.050 (1969))

137. *Id.* at 902.

138. *Id.* Race was only one factor considered by the court; it also considered the juror's sensitivity to the community's values. *Id.* at 901. The court was also sensitive to "the enormous gulf which separates the modes of life of the typical Alaskan villager from the type of existence led by most residents of Anchorage . . ." *Id.* at 899. The court still granted wide deference to the legislature on defining community, as long as the vicinage encompassed the area of the alleged offense. *Id.* at 902.

Indiana recently adopted the *Alvarado* court's approach. *Mareska v. State*, 534 N.E.2d 246 (Ind. 1989) (change of venue to a different city within a county, with a concurrent change in jury pool, violated the defendant's Sixth Amendment right to a jury drawn from the place where the crime was committed).

139. See *supra* notes 52-104 and accompanying text.

140. *Alvarado*, 486 P.2d at 901.

141. *Id.* at 903.

142. *Id.*

143. *Id.* at 904.

144. *Id.* at 905.

the area of the alleged crime.¹⁴⁵

B. Florida: The State Constitution's Strict Vicinage Requirement

The Florida Supreme Court, relying on the state constitution, recently reached the same conclusion as the Alaska Supreme Court, although on less striking facts.¹⁴⁶ The Florida Constitution states: "In all criminal prosecutions the accused shall . . . have the right . . . to have a speedy and public trial by impartial jury in the county where the crime was committed."¹⁴⁷ In *Spencer v. State*,¹⁴⁸ the court ruled the unequal minority representation in the two judicial districts of Palm Beach County violated Florida's constitution.¹⁴⁹

To reduce travel inconvenience for jurors, Palm Beach County was divided into two jury districts: one in West Palm Beach and one in Belle Glade.¹⁵⁰ Each district was served by a branch courthouse.¹⁵¹ All the jurors in a criminal case were drawn from one district exclusively.¹⁵² An administrative order provided that every criminal case was automatically set for trial in the West Palm Beach district, even if the crime occurred in the Belle Glade district.¹⁵³ A defendant, however, was permitted to request a transfer to the Belle Glade district if the offense was committed in that district.¹⁵⁴

The defendant, Spencer, was charged with first degree murder committed in the West Palm Beach District, and his trial was set for the West Palm Beach courthouse. African-Americans comprised 7.5 % of the registered voters in Palm Beach County, but comprised over 50% of the registered voters in the Belle Glade district and 6.4% of the registered voters in the West Palm Beach district.¹⁵⁵ The defendant moved to have his trial in the Belle Glade district. The prosecution argued that 6.4% of the West Palm Beach district population was African-American, and this figure reasonably represented the 7.5% county wide African-American population.¹⁵⁶ The Florida Supreme Court, relying on a state equal protection analysis, found this disparity to be "an unconstitutional systematic exclusion of a significant portion of the black population" from the defendant's jury pool.¹⁵⁷ The court held that the division of Palm Beach

145. *Id.* at 902.

146. *Spencer v. State*, 545 So. 2d 1352 (Fla. 1989).

147. FLA. CONST. art. I, § 16.

148. 545 So. 2d 1352.

149. *Id.* at 1355.

150. *Id.* at 1353 (citing FLA. STAT. § 40.015 (1985)).

151. *Id.* at 1353-54.

152. *Id.* at 1353.

153. *Id.* (citing FLA. ADMIN. ORDER NO. 1.006-1/80).

154. *Id.* at 1353-54.

155. *Id.* at 1354.

156. *Id.*

157. *Id.* at 1355 (citing FLA. CONST. art. I, § 2 and U.S. CONST. amend. VI and XIV).

County concentrated a disproportionate amount of the county's African-American population in the Belle Glade district.¹⁵⁸

The defendant also challenged the venue provisions of the Palm Beach system. A defendant charged with a crime in the predominantly white West Palm Beach district must stand trial in that district, while a defendant charged with a crime in the predominantly African-American district could choose the district in which to stand trial.¹⁵⁹ The Florida Supreme Court found that this situation also violated the Florida Constitution and the federal Constitution's Sixth and Fourteenth Amendments.¹⁶⁰

C. New York: A Functional Approach to Vicinage

New York courts take a more flexible view of vicinage and venue than the Alaska or Florida courts. For example, in *People v. Goldswor*,¹⁶¹ the court considered the vicinage and venue in the context of a high publicity trial.¹⁶² The defendant, a local sheriff, was indicted on corruption charges in Schoharie County. The defendant continued to work as sheriff during the criminal prosecution. The prosecution maintaining that it would be impossible to obtain a fair and impartial jury in the county where the defendant was sheriff, moved for a change of venue. Consequently, the defendant was tried and convicted in Warren County.¹⁶³ The defendant challenged his conviction under the federal and New York constitutions.¹⁶⁴

Justice Wachtler of the New York Court of Appeals found the change of venue did not violate the Sixth Amendment of the Federal Constitution.¹⁶⁵ He reasoned that a case may be transferred on motion of either party to insure a fair and impartial trial.¹⁶⁶ In addition, the defendant presented no evidence that the change of venue was an unreasonable burden.¹⁶⁷ The court, however, added protective dicta to its opinion: "Thus within reasonable limits, the community to which the trial is transferred should reflect the character of the county where the

158. *Id.*

159. *Id.*

160. *Id.*

161. *People v. Goldswor*, 350 N.E.2d 604 (N.Y. 1976).

162. *Id.* at 605.

163. *Id.* at 606.

164. *Id.* at 605-06 (citing N.Y. CONST. art. I, § 2 and U.S. CONST. amend. VI).

165. *Id.* at 607-08.

166. *Id.* at 608 (acknowledging the difficulty of obtaining a fair trial in a biased community).

167. *Id.* at 606. The purpose of transfer was to insure a neutral forum and to allow the defendant to continue to work as sheriff in the face of local publicity. *Id.* The concern with a fair trial, which is the underlying reason for the vicinage clause, may have influenced the outcome.

crime was committed.”¹⁶⁸

In *People v. Shedrick*,¹⁶⁹ the defense challenged minority representation in the vicinage.¹⁷⁰ The defendant contended that the selection of Steuben County jurors from one of the three jury districts, rather than the entire county, violated the Sixth Amendment.¹⁷¹ The court found that the defendant failed to show that any segment of the community was excluded.¹⁷²

Goldswor and *Shedrick*, taken together, appear to prohibit the prosecution from changing venue to obtain a jury pool with a more favorable demographic composition. Rather than tying vicinage to a physical location, New York courts take a functional approach: a change of vicinage or venue is permitted if it provides a jury pool similar to that of the place where the crime was committed.

D. Illinois: The Test for Systematic Exclusion and Juror Convenience in Cook County

Cook County, Illinois is a large and diverse county divided into regional judicial districts. Consequently, the Illinois courts have also grappled with venue and vicinage issues.¹⁷³

In *People v. Flowers*,¹⁷⁴ the defendant was arrested for armed robbery on the north side of Chicago and convicted in the Cook County courthouse in Skokie, a Chicago suburb.¹⁷⁵ The Cook County jury selection system permits potential jurors to choose their courthouse, depending on how far they wished to travel.¹⁷⁶ The defendant contended that under this system, African-Americans were underrepresented in venires drawn from the predominantly Caucasian suburbs compared to Cook County as a whole.¹⁷⁷

The appellate court upheld the conviction.¹⁷⁸ The court, however, suggested that the defendant may have been able to show a constitutional violation if he had properly argued the *Duren* violation and attacked the jury selection statute itself.¹⁷⁹

168. *Id.* at 608. See also the companion case *People v. Taylor*, 350 N.E.2d 600 (N.Y. 1976).

169. 489 N.E.2d 1290 (N.Y. 1985) (per curiam).

170. *Id.* at 1291-92.

171. *Id.*

172. *Id.* at 1292.

173. See also *Davis v. Warden*, 867 F.2d 1003 (7th Cir. 1989), cert. denied, 110 S. Ct. 285 (1989), discussed *infra* notes 190-207 and accompanying text, for the Seventh Circuit's evaluation of Cook County's vicinage practice.

174. 478 N.E.2d 524 (Ill. 1985).

175. *Id.* at 524-25.

176. *Id.*

177. *Id.*

178. *Id.* at 525-26.

179. *Id.*

In *People v. Johnson*,¹⁸⁰ the defendant was convicted for home invasion, attempted murder, and aggravated battery on the south side of Cook County.¹⁸¹ He was tried in Markham, on the far south end of the county.¹⁸² Illinois jury selection statutes provided for the jury pool to be drawn from (1) the entire city of Markham, (2) the southern half of the city alone, or (3) the northern half of the city alone.¹⁸³ The goal of the system was to maximize the possibility of an impartial jury without unnecessary expense to citizens.¹⁸⁴

The defendant argued that the jury drawn from the southern half of Markham was a violation of the Fourteenth Amendment's Equal Protection Clause because similarly situated defendants received juries drawn from a different segment of the county.¹⁸⁵ The defendant pointed to another criminal court in the south side that pulled potential jurors from the entire city.¹⁸⁶ The Illinois Court of Appeals found no equal protection violation because the defendant failed to demonstrate the exclusion of a cognizable group.¹⁸⁷

The defendant also contended that the jury selection system violated the Fourteenth Amendment Due Process Clause because judges and commissioners could arbitrarily choose the jury pool source.¹⁸⁸ The court, however, found sufficient guidelines for drawing of the jury and rejected the due process violation.¹⁸⁹

The Seventh Circuit evaluated the constitutionality of Cook County, Illinois vicinage practice in *Davis v. Warden*.¹⁹⁰ The defendant, an African-American, was convicted of attempted murder and theft by an all white jury in Des Plaines, a suburb of Chicago, which was the site of the crime.¹⁹¹ Despite the overwhelming odds against obtaining an all white jury drawn from a random cross-section of Cook County, which includes Chicago and surrounding suburbs, the defendant's jury was selected from an all white venire.¹⁹²

180. *People v. Johnson*, 507 N.E.2d 179 (1987).

181. *Id.* at 180-81.

182. *Id.* at 181.

183. *Id.*

184. *Id.*

185. *Id.* at 181-82.

186. *Id.* at 182-83.

187. *Id.* at 183.

188. *Id.*

189. *Id.* See also *People v. Saunders*, 543 N.E.2d 1078 (Ill. 1989) (when vicinage included the county in which the crime was committed, the African-American population for a single city within the county did not set the level of acceptable African-American representation within the community).

190. 867 F.2d 1003 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 285 (1989).

191. *Id.* at 1005.

192. *Id.* at 1005-06.

This unlikely jury pool could be explained by the Cook County jury selection system. The Cook County jury commissioner gave the jurors some choice of which courthouse they preferred to serve.¹⁹³ Most jurors chose their neighborhood courthouse.¹⁹⁴ Des Plaines is in a predominantly white area of Cook County.¹⁹⁵ Consequently, the white jurors were often disproportionately represented in the venires at this courthouse. The defendant made a *Duren* challenge to the venire, and the district court found that such a jury pool violated the Constitution.¹⁹⁶

The Court of Appeals reversed.¹⁹⁷ The majority found that the defendant had not met the *Duren* test.¹⁹⁸ The majority cautioned, however, against arbitrary vicinage determinations: "Court employees or prospective jurors cannot redefine community, once it has been implicitly defined by the legislature or state court without violating the principle behind fair-cross-section criterion. . . . The language of the Sixth Amendment states 'a defendant . . . is entitled to a trial . . . by an impartial jury of the state and district . . . , which district shall be previously ascertained by law.'"¹⁹⁹ The court stated that although a level of arbitrariness existed in defining the limits of a community, the geographic limits of the community must be decided before trial, preferably by the legislature.²⁰⁰ Cook County had no such provision.²⁰¹ The court found the practice of permitting potential jurors to choose a courthouse, based on convenience, resulted in a redefinition of the vicinage.²⁰²

The court acknowledged that the defendant met the first two prongs of *Duren*: that African-Americans were members of a cognizable group²⁰³ that were significantly underrepresented in the venire.²⁰⁴ The majority, however, found that the defendant failed, using general census data, to satisfy the third prong: that the underrepresentation of African-Americans was the result of systematic exclusion.²⁰⁵ The majority found the statistical evidence presented unconvincing and faulted it for focusing on the entire African-American population, rather than on the jury eligible population, in Cook County.²⁰⁶ Further, the majority found that the defendant had failed to provide evidence showing a causal connection

193. *Id.* (jury commissioner's staff asked for volunteers to serve in suburban courthouses).

194. *Id.*

195. *Id.* at 1005.

196. *Id.* at 1004.

197. *Id.*

198. *See supra* notes 91-93 and accompanying text (discussing the *Duren* test).

199. 867 F.2d at 1010 (emphasis in opinion).

200. *Id.* at 1009-10.

201. *Id.* at 1011.

202. *Id.*

203. *Id.* at 1006.

204. *Id.* at 1011.

205. *Id.* at 1014-15.

206. *Id.* at 1015.

between the Cook County selection practice and the absence of African-Americans in the defendant's jury venire.²⁰⁷

Davis illustrates the difficulties in defining vicinage. Admittedly, the defendant has committed the crime in a predominantly white neighborhood. Under these circumstances, an all white jury pool would not be a constitutional violation. If the vicinage is defined as Des Plaines, then the Cook County jury selection system is functioning in a constitutional manner. If, however, the laws governing the Cook County selection contemplate the entire county as the vicinage, then the gross underrepresentation of African-Americans in the *Davis* venire fails to reflect a fair cross-section of the community required by the Sixth Amendment and *Duren v. Missouri*.²⁰⁸

E. California: Altering Vicinage For Administrative Efficiency and Convenience

The California courts have engaged in the most extensive debate on the effect of vicinage and venue on minority representation. California's jury selection statutes reflect both state and federal constitutional concerns.²⁰⁹ These statutes require that the jury pool be drawn from "source or sources inclusive of a representative cross section of the population of the area served by the court."²¹⁰

Until recently, California led the federal courts in defining the scope of a defendant's constitutional right to a jury that represents a cross-section of the community.²¹¹ The recent California Supreme Court decision *Hernandez v. Municipal Court*,²¹² however, overturned previous decisions²¹³ that protected a defendant's right to a vicinage representative

207. *Id.* at 1015-17. The dissent, however, maintained that the defendant had made a prima facie case of systematic exclusion. *Id.* at 1017. The dissent contended that statistics alone could seldom make out a prima facie case of systematic exclusion, and should therefore not be the standard. *Id.* The extremely low probability that a forty person venire drawn from Cook County composed entirely of white jurors, combined with the practice of allowing potential jurors to express a venue preference suggested systematic exclusion to the dissent. *Id.* at 1017-18.

208. *See supra* notes 91-93 and accompanying text.

209. "The Legislature recognizes that trial by jury is a cherished constitutional right, and that jury service is an obligation of citizenship." CAL. CIV. PROC. CODE § 191 (West Supp. 1990).

210. CAL. CIV. PROC. CODE § 197 (West Supp. 1990).

211. *People v. Harris*, 679 P.2d 433 (Cal. 1984) (The California Supreme Court ruled that a party is constitutionally entitled, under both the California Constitution and the Sixth Amendment, to as near an approximation of a cross-section of the community as random draw permits; relying solely on voter registration lists for jury pools systematically excluded minorities.); *People v. Wheeler*, 583 P.2d 748 (Cal. 1978) (The California Supreme Court anticipated *Batson* by prohibiting the prosecution's use of peremptory strikes in a racially discriminating manner.).

212. 781 P.2d 547 (Cal. 1989), *cert. denied*, 110 S. Ct. 3222 (1990).

213. *People v. Powell*, 87 Cal. 349 (1891); *People v. Jones*, 510 P.2d 705 (Cal. 1973).

of the community in which the crime was committed. The companion decision, *Williams v. Superior Court*,²¹⁴ further narrowed defendants' ability to challenge a non-representative jury pool.

The vicinage issues considered in the California cases have focused on the Los Angeles County jury selection system. Los Angeles County, like Cook County in Illinois and Palm Beach County in Florida, is a sprawling county with neighborhoods of differing racial and socio-economic groups. Because of its size, Los Angeles is divided into eleven judicial divisions.²¹⁵ Each division has its own courthouse.²¹⁶ Potential jurors are drawn using a computer program that gives preference to those living within a twenty mile radius of the courthouse.²¹⁷ Therefore, the jury pool reflects the "community" within the twenty mile radius.

In *People v. Jones*,²¹⁸ California adopted the *Alvarado* rule,²¹⁹ which requires that the vicinage include the place of the crime. In *Jones*, the defendant was tried in the Southwest Los Angeles district on three counts of selling marijuana in the Central District of Los Angeles.²²⁰ The Central district had a significantly higher percent of juror-eligible African Americans.²²¹

The California Supreme Court held that the vicinage must be drawn from the area surrounding the crime.²²² Drawing the jury from the Southwest District violated the defendant's Sixth Amendment right to a trial by jury from the district of the crime.²²³ Although the *Jones* majority cited *Alvarado*, it failed to seriously consider race and community cross-section.²²⁴ Instead, the majority based its decision on a literal reading of the Sixth Amendment vicinage provision.²²⁵ It analogized the state judicial "districts" to the congressionally created federal judicial "districts" and the "district" of the Sixth Amendment.²²⁶ The majority decided that the Los Angeles "district" served by each of the Los Ange-

214. 781 P.2d 537 (Cal. 1989).

215. *Id.* at 538 n.2 (citing CAL. GOV'T CODE §§ 69640-50).

216. *Id.*

217. *Id.* at 538.

218. 510 P.2d 705 (Cal. 1973).

219. *See supra* notes 132-45 and accompanying text.

220. 510 P.2d at 707.

221. *Id.*

222. *Id.* at 710-11.

223. *Id.* at 712.

224. For a detailed analysis of *Jones*, see John E. Darr, Comment, *People v. Jones — The Jury Must Be Drawn From the District of the Crime*, 25 HASTINGS L.J. 547 (1974).

225. 510 P.2d at 711. *See also* Darr, *supra* note 224, at 556. Darr notes that while the *Alvarado* court focused on the community cross-section analysis of the Sixth Amendment jury trial requirement, both the *Jones* majority and the dissent focused more on the historical intent behind the vicinage requirement. *Id.*

226. The majority concluded that the Judiciary Act of 1789, enacted during the drafting of the Bill of Rights, defined the broadest sweep of vicinage as the federal judicial district. *Jones*, 510 P.2d at 711.

les branch courthouses was equivalent to a federal "district."²²⁷ Because the majority reasoned that a defendant could not be constitutionally transferred to a different federal district under most circumstances, it concluded that transferring a trial from the Los Angeles Central District, the site the crime, to the Southwest District violated the Sixth Amendment.²²⁸

The dissent initially rejected the analogy between the Los Angeles and federal judicial districts.²²⁹ Assuming that the federal and state judicial districts were equivalent, the dissent maintained that the equivalent of a federal "district" was the entire county, not the small sub-county "districts."²³⁰ Under the dissent's analysis, a Los Angeles courthouse could constitutionally draw a jury from anywhere within the county without including the place of the crime.²³¹

The California Supreme Court overturned *Jones* in the companion decisions, *Williams v. Superior Court*²³² and *Hernandez v. Municipal Court*.²³³

In *Williams*,²³⁴ an African-American defendant was convicted of first degree murder in Santa Monica, which is within Los Angeles County.²³⁵ At that time, a computer program assigned jurors to the different courthouses within the county.²³⁶ The program assigned jurors to the nearest courthouse, typically within twenty miles of her residence.²³⁷

The defendant moved to quash the venire because it inadequately represented the African-American population of Los Angeles County.²³⁸ The defendant presented evidence that 11% of the county's jury-eligible population was African-American. Only about 4.5 %, however, of those appearing for jury duty in the Santa Monica courthouse were African-American.²³⁹ Nonetheless, the California Supreme Court ruled that the defendant failed to show that African-Americans were underrepresented in the jury pool.²⁴⁰

227. *Id.*

228. *Id.* at 712.

229. *Id.* at 714.

230. *Id.* at 714-15.

231. *Id.* See also Darr, *supra* note 224, at 548-50; Johnson v. Superior Court, 163 Cal.App.3d 85 (1984) (applying *Jones* to racial discrepancies between jury pools for two San Diego courthouses).

232. 781 P.2d 537 (Cal. 1989).

233. Hernandez v. Municipal Court, 781 P.2d 547 (Cal. 1989), *cert. denied*, 110 S. Ct. 3222 (1990).

234. 781 P.2d 537.

235. *Id.* at 538.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 543.

The court first considered the definition of "community." It concluded that the legislatively created judicial "district" within the Los Angeles County was the "community" for vicinage purposes.²⁴¹ The court found that the twenty mile radius around the courthouse "harmonized" with these districts.²⁴² As long as the minority representation in the defendant's jury pool was representative of the minority population in that judicial "district," the jury selection system did not violate the Sixth Amendment.²⁴³

Justice Broussard, concurring in part and dissenting in part, agreed with the result that the legislature may define the community as that within a twenty mile radius of the courthouse.²⁴⁴ Broussard emphasized, however, that it is essential that the vicinage include the site of the crime.²⁴⁵ He noted that the majority permitted the jury pool to reflect the area surrounding the trial site, without necessarily including the actual crime site.²⁴⁶ Without the vicinage requirement, he stated, the prosecution could forum shop for a more favorable jury pool.²⁴⁷

Broussard's discomfort with the *Williams* reasoning was highlighted when the California Supreme Court formally overturned *Jones* in *Hernandez v. Municipal Court*.²⁴⁸ Hernandez was arrested in downtown Los Angeles for driving while intoxicated and without a license.²⁴⁹ He was arraigned in the downtown traffic court and then transferred to the San Fernando Valley division, which was approximately twenty-five miles away from the downtown courthouse.²⁵⁰ Because the jury selection system generated a jury pool composed of people living within a twenty mile radius of the courthouse,²⁵¹ the probability that anyone from the site of the crime would be in the jury pool was very low.²⁵² The defendant maintained that such a selection system violated his Sixth Amendment right to a trial by a jury of the vicinage.²⁵³

The California Supreme Court overruled *Jones*.²⁵⁴ Echoing the *Jones* dissent, the *Hernandez* majority analogized the Los Angeles Municipal Court system to divisions within federal court districts.²⁵⁵ Using

241. *Id.* at 541-42.

242. *Id.* at 542.

243. *Id.* at 542-43.

244. *Id.* at 544-45 (Broussard, J., concurring in part and dissenting in part).

245. *Id.* at 545 (Broussard, J., concurring in part and dissenting in part).

246. *Id.*

247. *Id.*

248. 781 P.2d. 547.

249. *Id.* at 549.

250. *Id.*

251. *Id.* at 549 n.3.

252. *Id.* at 549.

253. *Id.*

254. *Id.* at 548-49.

255. *Id.* at 552-54.

this analogy, it found no Sixth Amendment violation in transferring the defendant to a different branch within the county/district.²⁵⁶ The court defined "vicinage" as coterminous with the county rather than the smaller municipal or superior court judicial district where the crime occurred.²⁵⁷ According to the court, the defendant could be tried within any of the county's districts.²⁵⁸ The majority also added a policy argument: because personal knowledge was undesirable in potential jurors, a venire drawn from the vicinity of the crime was of little consequence.²⁵⁹

Justice Mosk dissented, stating that while the Sixth Amendment permits the legislature to define the outer limits of the vicinage, it must include the area where the crime occurred.²⁶⁰ He noted that in *Hernandez* the majority defined vicinage as all of Los Angeles County, but in *Williams* the majority defined vicinage as the local area surrounding courthouses.²⁶¹ Mosk criticized the majority's definitions of "community," "district," and "vicinage" in *Hernandez* and *Williams* as confusing and inconsistent.²⁶²

Justice Broussard dissented separately. He found the majority's definition of community as the district, which may include any part of the county, logically inconsistent.²⁶³ He further maintained that the majority's analysis would permit prosecutors to choose a judicial district which they perceived would have a favorable racial composition.²⁶⁴ In this way, prosecutors could circumvent the fundamental constitutional rights of defendants by excluding members of racial groups from jury pools.²⁶⁵ Broussard further contended that combining the *Hernandez* and *Williams* decisions threatened defendants' Sixth Amendment right to be tried by a jury drawn from the district of the crime.²⁶⁶ He also criticized the majority for failing to address the role of juries in protecting the

256. *Id.*

257. *Id.* at 556-57.

258. *See id.* (rejecting that a Los Angeles judicial "district" was equivalent to the "district" of the Sixth Amendment).

259. *Id.*

260. *Id.* at 557 (Mosk, J., dissenting).

261. *Id.*

262. *Id.* Mosk reproached the majority for defining "community" as all of Los Angeles County in *Williams*, and then equating "community" to judicial district in *Hernandez*. He advocated defining "district" and "community" as a Los Angeles judicial district in all cases.

263. *Id.* at 557-58 (Broussard, J., dissenting). A few months before the *Williams* and *Hernandez* decisions, a unanimous California Supreme Court acknowledged the importance of the Sixth Amendment vicinage requirement to the accused and the community in *People v. Guzman*, 755 P.2d 917 (Cal. 1989). The *Williams* opinion failed to consider the ramifications of *Guzman*.

264. 781 P.2d at 557-58.

265. *Id.*

266. *Id.* In addition, in his *Williams* opinion, Broussard noted that combining *Williams* and *Hernandez* with two other recent decisions, *People v. Bell*, 778 P.2d 129 (Cal. 1989), *cert. denied*, 110 S. Ct. 2576 (1990), and *People v. Morales*, 770 P.2d 244 (Cal. 1989), drastically

rights of the accused and acting as the conscience of the community: “[T]he protective interaction of the right to a representative jury and the right to a jury of the vicinage fails if ‘community’ means one thing for jury representation and something quite different for vicinage.”²⁶⁷ Broussard concluded by advocating a definition of community that is co-terminous with the judicial district.²⁶⁸

Thus, the impact of vicinage on jury pool composition has been debated in different forums. Different courts have differed in their interpretation of the meaning of the Sixth Amendment vicinage clause and its relationship to the Sixth Amendment right to a fair and impartial jury and the Fourteenth Amendment Equal Protection Clause.

IV. Critique of Current Approaches to Vicinage and Venue

A. Vicinage and the Cross-Section of the Community Requirement

The right to a trial by a fair and impartial jury is a right fundamental to the American criminal justice system.²⁶⁹ To prevent the government from infringing the right to a fair and impartial jury, “[t]he Supreme Court established the fair cross section of the community criterion, not to exclude minorities, but to increase their participation in the system.”²⁷⁰ A long line of federal and state court decisions on this issue “indicate that [legislators] must create the jury selection system with an eye to the policies of fairness and inclusiveness.”²⁷¹

The Sixth Amendment vicinage clause has not been expressly incorporated into the Fourteenth Amendment Due Process Clause.²⁷² Yet the cases upholding the Sixth Amendment right to a jury trial strongly suggest that the vicinage provision has been implicitly incorporated as part of this right via the Due Process Clause.

A number of assumptions are implicit in the Sixth Amendment cross-section of the community and Fourteenth Amendment Equal Protection policies: first, members of different segments of the community will have some inherent bias; second, a jury that includes all segments of the community will balance these biases; third, this balance will result in a fair jury; fourth, a jury selection system that excludes a segment of the

hindered a defendant's ability to make prima facie case of a nonrepresentative jury pools. 781 P.2d 537, 546.

267. *Hernandez*, 781 P.2d at 559-60.

268. *Id.* at 561.

269. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

270. *Davis v. Warden*, 867 F.2d 1003, 1013 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 285 (1989) (citing *Taylor v. Louisiana*, 419 U.S. 419 U.S. 522, 530 (1975)).

271. *Id.* at 1012 (citing *Taylor v. Louisiana*, 419 U.S. 522 (1975) and *Alvarado v. State*, 486 P.2d 891 (Alaska 1971)).

272. *Duncan*, 391 U.S. 145 (1968) (Sixth Amendment right to a jury trial is a fundamental right and applies to the states); *Williams v. Florida*, 399 U.S. 78 (1970) (jury size of twelve is not preserved by the Sixth Amendment).

community, particularly a members of the defendant's race, threatens the impartiality of the jury.²⁷³

The Framers drafted the venue and vicinage provisions in the constitution to prevent abuses of the Anglo-American jury trial that existed under colonial rule.²⁷⁴ One of these abuses was trying colonial defendants in England.²⁷⁵ Today, however, there is little concern that a criminal defendant accused of a crime in Los Angeles will be tried, against his or her will, in London or New York. Few defendants or defense attorneys would argue that a defendant accused of a crime in Chicago suffers undue hardship by attending a trial in Des Plaines.

Nonetheless, the constitutional vicinage and venue provisions are still relevant today. The cross-section requirement prevents the government from manipulating the jury pool to exclude segments of the community from jury service. The jurisprudence of the Sixth Amendment right to a fair and impartial jury, and the Fourteenth Amendment right to equal protection, has inextricably linked the composition of the jury pool to the lines defining the geographic limits of the community. The vicinage, the geographic area where the jury originates, defines the community: "[w]hether the disparity in representation here is significant hinges on defining what constitutes community."²⁷⁶

The greatest danger posed by neglecting the Sixth Amendment vicinage provision is the prosecution's potential ability to forum shop for what it perceives to be the most advantageous jury pool. Today, a prosecutor may no longer use peremptory challenges to remove members of cognizable groups from the jury pool.²⁷⁷ If a prosecutor believed that a jury with little or no minority representation would be advantageous to her case, however, she could conceivably shop for a forum with a community with a small minority population. Because the constitutional level of minority representation in the jury pool is tied to minority population in the community,²⁷⁸ a prosecutor could manipulate venue and vicinage to obtain a minority-poor jury pool. The result would be identical to a pre-*Strauder*²⁷⁹ statute excluding groups from jury service, or a pre-*Batson*²⁸⁰ prosecutor removing all minorities from the venire: to ensure a jury that contains no minority members. The value of preventing the prosecution from exercising peremptory challenges in a racially discriminatory manner is undermined if the courts interpret vicinage to exclude minorities or dilute their presence.

273. See Van Dyke, *supra* note 1, at 23-25.

274. See *supra* note 28, and accompanying text.

275. *Id.*

276. *People v. Johnson*, 209 Cal. Rptr. 425, 427 (1984).

277. *Batson v. Kentucky*, 476 U.S. 79 (1986).

278. *Castenada v. Partida*, 430 U.S. 482 (1977).

279. 100 U.S. 303 (1880). See *supra* notes 64-58 and accompanying text.

280. 476 U.S. 79 (1986). See *supra* notes 95-101 and accompanying text.

The ability of a prosecutor to manipulate the jury pool runs counter to the due process concept of the jury as a hedge against arbitrary abuses of governmental power,²⁸¹ as well as a defendant's right to equal protection.²⁸²

B. Other Fourteenth Amendment Considerations

The right of segments of the community to participate in the criminal justice system provides another rationale for prohibiting exclusive jury selection systems. Failure to consider the effect of vicinage on minority representation also discriminates against members of minority-dense communities by preventing participation in the judicial process.²⁸³ The jury is a democratic manifestation in a nondemocratic judicial institution.²⁸⁴ "Just as popular election helps to legitimize legislatures to members of the society, lay participation on juries provides legitimation for the judicial process."²⁸⁵ Community involvement in the process, acting as the "conscience of the community," adds integrity and reliability to nondemocratic judicial institutions.²⁸⁶ Consequently, "[t]he vicinage right belongs to the community as well as to the accused."²⁸⁷ Manipulating the system to exclude particular groups undermines the role of the public in the criminal justice process.

C. Comparing Approaches

State courts have debated the meaning of the Sixth Amendment vicinage requirement. Some courts have avoided linking vicinage to the community comprising the jury pool. Typically, these courts have deflected such challenges by finding no evidence of systematic exclusion and dismissing statistics presented as unreliable or inconclusive under the *Duren* test.²⁸⁸

Assuming that the Sixth Amendment's vicinage provision applies to the states, the Alaska Supreme Court's opinion in *Alvarado v. State*,²⁸⁹ with its emphasis on community-cross section, is most consistent with

281. See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *Duncan v. Louisiana*, 391 U.S. 145, 155-57 (1968).

282. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880).

283. "Since these community standards are determined by the attitudes and experiences of the jurors, the jury is a legitimating device only to those who are a part of the community whose norms the jury expresses." Note, *The Case for Black Juries*, 79 YALE L.J. 531 (1970).

284. See *Van Dyke*, *supra* note 1, at 1.

285. Note, *supra* note 283, at 531.

286. *Id.* at 531-33.

287. *People v. Guzman*, 755 P.2d 917, 929 (Cal. 1989). See also *Powers v. Ohio*, 111 S. Ct. 1364, 1366 (1991). See generally, Carl H. Imlay, *Federal Jury Reformation: Saving a Democratic Institution*, 6 LOY. L.A. L. REV. 247 (1973).

288. See *supra* notes 91-93 and accompanying text.

289. 486 P.2d 891, 901 (Alaska 1971). See *supra* notes 132-45 and accompanying text.

the policies and the original intent underlying the Sixth Amendment right to a trial by a fair and impartial jury.

The interpretation of *People v. Jones*²⁹⁰ in California, although reaching the same result as *Alvarado*, is a strained interpretation of the vicinage requirement. The majority's failure to consider the policies underlying the Sixth Amendment right to jury trial weakened the opinion. It neglected the important policies behind the requirement, and focused on artificial analogies between federal and Los Angeles County "districts."²⁹¹ The majority's conclusion that the jury must be drawn from the local Los Angeles judicial "district" where the crime was committed rested on how it chose to define district.²⁹² The dissent's parallel reasoning that Los Angeles County districts were really analogous to federal divisions, and not districts, further reveals the weakness of the majority opinion.²⁹³

When *Hernandez* overturned *Jones*,²⁹⁴ the California Supreme Court simply adopted the definition of "district" offered by the dissent in *Jones*. This approach severed the concepts of vicinage community and representativeness. The California court's semantics undermined the values underlying the community cross-section requirement.

*Hernandez*²⁹⁵ and *Mallett*²⁹⁶ are especially troubling. Past federal and state decisions had stressed the importance of the defendant's right to a trial by the cross-section of the community,²⁹⁷ and racial discrimination in the jury selection process is contrary to this right: "Where [sic] decisions of this Court have been concerned largely with discrimination during selection of the venire, the principles announced there also forbid discrimination on account of race in selection of the petit jury."²⁹⁸

Unlike California courts, some courts have at least added dicta protecting the cross-section requirement, even if a defendant's right to a jury drawn from the cross-section of the community in which the crime was committed is not unequivocally protected.²⁹⁹ Although the lack of commitment in these decisions is not always satisfactory, the language appears to provide defendants with more protection than the decisions of the California and Missouri courts. For example, the dicta in the Illinois cases indicate that the courts wanted the defendant to prove that the

290. 510 P.2d 705 (Cal. 1973), *overruled by* *Hernandez v. Municipal Court*, 781 P.2d 547 (1989). *See supra* notes 218-32 and accompanying text.

291. *Id.*

292. *Id.*

293. *See supra* notes 218-32 and accompanying text. *See also* Darr, *supra* note 224, at 547.

294. 781 P.2d 547 (Cal. 1989). *See supra* notes 248-78 and accompanying text.

295. *Id.*

296. 769 S.W.2d 77 (Mo. 1989) (en banc), *cert. denied*, 110 S. Ct. 1308 (1990).

297. *See supra* notes 52-104 and accompanying text.

298. *Batson v. Kentucky*, 476 U.S. 79, 88 (1986).

299. *See supra* notes 161-72 and accompanying text.

vicinage caused the systematic exclusion of a cognizable group.³⁰⁰ Likewise, the New York cases³⁰¹ suggest changing venue is permissible only if it is in the defendant's interest. These decisions are consistent with the values underlying the community cross-section requirement.

Justice Marshall's application of the *Batson* test in his dissent in *Mallet v. Missouri*,³⁰² however, is inconsistent with previous jury pool composition analysis. The *Batson* test is designed to prevent abuses during the jury selection process, not to determine the vicinage or the jury pool. Although many of the same concerns underlie the discrimination during jury selection and jury pool composition, evidentiary concerns differ. A prosecutor's discriminatory intent is easier to ascertain when she exercises peremptory challenges in a racially discriminatory manner than when she moves for a change in venue. Systematic exclusion is difficult to prove, and discriminatory intent would be even harder. Requiring a cross-section of the community provides the effective and workable approach to challenging venue and vicinage-driven changes of jury pool composition.

D. Judicial Administration Concerns and Vicinage

Many vicinage challenges arise from statutes designed to lessen juror inconvenience and docket pressure.³⁰³ Yet *Taylor*³⁰⁴ and *Duren*³⁰⁵ strongly suggest that only a significant state interest can outweigh a defendant's right to a jury that reasonably represents the community.³⁰⁶ In *Taylor*, the Court stated that administrative efficiency failed to justify a jury selection system that significantly underrepresented women in the jury pool.³⁰⁷ Likewise, the state's interest in having juror's traveling an extra twenty miles is not a sufficiently significant state interest to compromise the right to trial by jury by the cross-section of the community. As the *Davis*³⁰⁸ court acknowledged: "To permit . . . jurors to define the community in which they serve based on convenience undermines the objectivity of the jury selection system."³⁰⁹

The *Taylor* majority also noted that a "distinct quality is lost" from

300. See *supra* notes 173-208 and accompanying text. One may argue, however, that the Illinois courts have made meeting the third prong of *Duren* practically impossible by requiring defendants to show systematic exclusion of cognizable groups within the judicial district where they are tried.

301. See *supra* notes 161-72 and accompanying text.

302. 110 S.Ct. 1308 (1990).

303. See e.g., *Hernandez v. Municipal Court*, 781 P.2d 547 (Cal. 1989); *Spencer v. State*, 545 So.2d 1352 (Fla. 1989); *Davis v. Warden*, 867 F.2d 1003 (7th Cir. 1989).

304. 419 U.S. 522 (1975).

305. 439 U.S. 357 (1979).

306. See *Taylor*, 419 U.S. at 534-38; *Duren*, 439 U.S. at 367-68.

307. *Taylor*, 419 U.S. at 534-38.

308. *Davis v. Warden*, 867 F.2d 1003 (7th Cir. 1989).

309. *Id.* at 1013.

the courthouse when women were excluded from jury service.³¹⁰ Similarly, excluding the members of the community in which the crime occurred, particularly when excluding the community results in a decreased representation of distinct groups, is a loss to the criminal justice system.

One possible approach that accommodates varying docket pressures of different courthouses and the defendant's Sixth Amendment rights would be to allow changes of venue to a quieter judicial districts, while the drawing the jury from the vicinage.

E. The Effect of Vicinage on the Jury

Failure to acknowledge the role of vicinage threatens minority representation in jury pools and juries. Reducing minority representation can affect deliberations and verdicts.³¹¹ Studies evaluating the effectiveness of juries of less than twelve have noted that smaller juries have a lower proportion of minority viewpoints.³¹² Individuals that share a viewpoint not shared by the majority of the jurors can express that viewpoint more effectively than if only one person holds that viewpoint.³¹³ Consequently, increasing the number of jurors holding minority viewpoints increases the quality of the deliberations.³¹⁴ Removing minorities from jury pools by manipulating the vicinage ultimately would adversely affect jury deliberations.

F. The Influence of Vicinage on Juries and Verdicts

Vicinage and juror knowledge of local conditions can affect the outcome of trials.³¹⁵ "Even today the juror still performs the vital role of applying his or her general knowledge of the vicinage to the construction of the fact. . . . [D]espite the modern rule, verdicts are still often influenced by jurors' personal knowledge of local customs, attitudes, and even people and places."³¹⁶ From this view, "[e]nsuring the jury's integrity may necessitate different approaches in today's complex society than in

310. *Id.* at 532.

311. See Richard O. Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 644, 670-73 (1975).

312. Hans Zeisel, *The Verdict of Five out of Six Civil Jurors: Constitutional Problems*, 1982 AM. B. FOUND. RES. J. 141, 146 (1982).

313. *Id.*

314. Lempert, *supra* note 311, at 671-73. Other data suggest that members of minority groups are less likely to convict members of minority groups and tend to give them lighter sentences, thus raising equal protection problems. Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1621-22 (1985). Studies showing that such juries are more likely to be hung also suggest excluding minorities from the jury system will affect verdicts and deliberation. Lempert, *supra* note 311 at 676-77, 693-98.

315. Mitnick, *supra* note 16, at 235; Dale W. Broeder, *The Impact of the Vicinage Requirement: An Empirical Look*, 45 NEB. L. REV. 99, 101 (1966).

316. Mitnick, *supra* note 16, at 235 (citing Broeder, *supra* note 315, at 101).

medieval England or colonial America."³¹⁷ Despite voir dire³¹⁸ and other methods of screening jurors with personal knowledge of the dispute, juror knowledge of local conditions may play a part in deliberations.³¹⁹

V. A Proposed Approach to Analyzing Vicinage Issues

A. The Vicinage Clause Should Apply to the States

Although the United States Supreme Court has yet to decide if the vicinage provision applies to the states, previous Supreme Court decisions and due process concerns suggest it should.³²⁰ The most compelling argument for finding the Sixth Amendment vicinage requirement applicable to the states is a defendant's right to be tried by a jury drawn from the cross-section of the community.³²¹ Vicinage is the starting point for determining the "community" for the purposes of the cross-section of the community test of *Taylor*³²² and *Duren*.³²³ Previous Supreme Court decisions suggest that the Court assumes the vicinage right is part of the Sixth Amendment right to a trial by a fair and impartial jury. For example, the Court's reasoning in *Williams v. Florida*,³²⁴ suggests that the vicinage provision should apply to the states. In *Williams*, the Court held that a state defendant had no constitutional right to a trial by a twelve-member jury.³²⁵ As part of its analysis, the Court juxtaposed the history of the right to a jury chosen from the vicinage with the right to a trial by a twelve-member jury.³²⁶ The Court noted the vicinage requirement was deliberately drafted into the Constitution in concert with the adoption of the 1789 Judiciary Act.³²⁷

In contrast, no explicit twelve-member jury provision was drafted into the Sixth Amendment.³²⁸ The Court reasoned that if the Framers

317. Van Dyke, *supra* note 1, at 9.

318. Criminal voir dire is conducted by judges in a number of jurisdictions, including the federal, FED. R. CRIM. P. 24, and California courts, CAL. CIV. PROC. CODE § 223 (West Supp. 1991).

319. Broeder, *supra* note 315, at 101. Consequently, a jury of the vicinage may be at odds with an "impartial jury."

320. See *supra* notes 52-104 and accompanying text.

321. See *supra* note 130 and accompanying text.

322. 419 U.S. 522 (1975). See also Kershen, *Vicinage* (pt. II), 30 OKLA. L. REV. 1, 131 (1977) (interpreting the Framers' intent to mean that under the Sixth Amendment, one cannot exclude jurors from the area surrounding the site of the crime from the juror selection process).

323. 439 U.S. 357 (1979).

324. 399 U.S. 78 (1970).

325. *Id.* at 86.

326. *Id.* at 87-97 and accompanying notes.

327. *Id.* at 93-97 and accompanying notes (discussing incorporation of vicinage requirement into the Constitution).

328. *Id.*

had intended to preserve the right to a twelve person jury, the language of the Sixth Amendment would have included a specific reference.³²⁹ The Court declined to impose a twelve-member jury trial requirement under the Fourteenth Amendment because it found no such requirement in the Sixth Amendment.³³⁰ The Sixth Amendment, however, explicitly requires a jury drawn from the district where the crime was committed.³³¹ From the Court's analysis in *Williams* one can infer that the right to a jury drawn from the vicinage was integral to the Sixth Amendment and should apply to the states via the Fourteenth Amendment Due Process Clause.

B. Community Cross-Section Test For the Constitutionality of a Vicinage

A solution to the vicinage problem should reflect the policies underlying the Sixth Amendment community cross section requirement: 1) to prevent the prosecution from forum shopping; 2) allow citizen participation in the judicial system; and 3) to prevent exclusion of cognizable groups.

Professor Kershen has proposed a test for the constitutionality of the vicinage.³³² The test would require: 1) a clearly defined vicinage;³³³ and 2) a jury pool drawn from the vicinage.³³⁴ The vicinage may be constitutional even if the jury pool is not drawn exclusively from the entire vicinage, if the jury pool fairly represents the vicinage as a whole.³³⁵

Kershen's approach flows out of a community cross-section analysis of the Sixth Amendment's jury trial provisions. This functional approach employs workable standards to determine equivalent representation among communities. It preserves the defendant's right to a trial by a cross-section of the community. In addition, this approach deters forum shopping by maintaining the jury pool composition despite a change in venue or vicinage.

Permitting a change of venue under these circumstances would also help ease docket pressures in courts with heavy schedules, and facilitate the defendants' Sixth Amendment right to a speedy and public trial.³³⁶ Kershen's approach would also avoid the evidentiary problems of prov-

329. *Id.* at 97-99.

330. *Id.* at 102-03.

331. U.S. CONST. amend. VI.

332. Kershen, *supra* note 322, at 119-21.

333. For example, the vicinage statute should make clear that its limits are the twenty mile radius around the courthouse or the entire county.

334. *See* Kershen *supra* note 322, at 119-21.

335. *Id.* This approach is also suggested in *People v. Goldswor*, 350 N.E.2d 604 (N.Y. 1976). *See supra* notes 161-72 and accompanying text.

336. U.S. CONST. amend. VI.

ing the systematic exclusion requirement of *Duren*.³³⁷

A cross-section of the community approach would have another benefit. Prosecutors would be discouraged from forum shopping, preserving the community's right to participate in the judicial system as jurors.³³⁸

Another approach would be a strict geographical interpretation of venue and vicinage. Under this approach, a trial must be held in the district where the crime was committed. Using the cross-section analysis, a trial will not always take place in the vicinity where the crime was committed. A strict geographical approach also would ensure that the members of the community affected by the crime administer the law to the particular facts. A trial held closer to the site of the crime provides a better chance of getting evidence and witnesses. It is unclear, however, how significant a factor this would be in an intra-county situation such as Los Angeles.

Jury selection practices should conform to the policies set forth in *Alvarado v. State*.³³⁹ Admittedly, a certain level of arbitrariness exists in drawing up jury districts. Vicinage and community, however, should be defined in a consistent manner to keep a defendant's trial in the district of the alleged crime, or use that district's demographic composition to evaluate the constitutionality of the defendant's jury pool.

Conclusion

The role of the jury requires a community cross-section with adequate minority representation. Exclusion of particular groups, such as ethnic minorities, from jury pools will result in fewer minorities in juries, which may affect deliberations and verdicts. Exclusion of minorities from jury pools denies defendants their Sixth Amendment right to a trial by a representative jury. Failure to consistently and fairly define vicinage also prevents members in minority-dense communities from participating in the judicial process.

The decisions of a number of jurisdictions, such as California and Missouri, are at odds with the Sixth Amendment and the policies represented by *Taylor*, *Duren*, and *Batson*.

"At the heart of the problem of determining whether a jury may be considered impartial lies the notion of the proper community from which the jury should be drawn. If we are to decide that the source from which jurors are drawn either does or does not represent a fair cross-section of the community, then we must inquire

337. See *supra* notes 91-93 and accompanying text.

338. Cf. *Powers v. Ohio*, 111 S. Ct. 1364 (1991) (defendant has standing to assert the Fourteenth Amendment Equal Protection rights of those excluded from jury service due to race).

339. 486 P.2d 891, 901 (Alaska 1971). See *supra* notes 132-45 and accompanying text.

into what may properly be deemed a community.”³⁴⁰

If the state may define the vicinage in an arbitrary or inconsistent manner that is independent of “community,” the promise of a representative jury drawn from the cross-section of the community is a hollow one.

340. *Alvarado v. State*, 486 P.2d 891, 901 (Alaska 1971).