SIXTH AMENDMENT JUROR RESIDENCE REQUIREMENT REVITALIZED: *PEOPLE v. JONES*

Leon Jones was convicted by a jury of selling marijuana to a police undercover agent and sentenced to a term of from five years to life in the California state penitentiary.[1] On appeal he contended that the state had violated his sixth amendment rights by excluding from the jury all residents of the heavily black Los Angeles County neighborhood where he lived and where the illicit sale took place. In *People v. Jones*,[2] the California Supreme Court agreed and held that a criminal defendant in a state prosecution has a constitutional right to be tried by a jury drawn from an area that encompasses the scene of the crime.

Prior to Jones' arrest and trial, Los Angeles County had been divided into several judicial districts. Each district has its own courthouse and draws jurors only from within its geographical boundaries. Jones' neighborhood, the 77th Los Angeles Police Precinct, lies on the boundary between the Central and Southwest Districts, and is part of the Central District. Normally, cases arising there are tried downtown in the central courthouse with jurors drawn from the entire Central District, including the 77th Precinct. In 1970, well before Jones' arrest, the presiding judge of the Los Angeles Superior Court ordered that all crimes committed in the 77th Precinct be tried in the Southwest District courthouse to alleviate crowding downtown. As a result, Jones' jury was drawn only from the suburban Southwest District, which did not include the site of the crime in the 77th Precinct.

The 77th Precinct is 73 percent Negro. The Central District, including the 77th Precinct, is 31 percent Negro. The Southwest District is 7 percent Negro. Thus the practical effect of the 1970 order was to try defendants from a heavily black central-city area[3] before

1. Pursuant to CAL. HEALTH & SAF. CODE § 11531 (West 1968). *See* opinion of the Court of Appeals, People v. Jones, 27 Cal. App. 3d 98, 103 Cal. Rptr. 475 (2d Dist. 1972).

2. 9 Cal. 3d 546, 510 P.2d 705, 108 Cal. Rptr. 345 (1973).

3. Actually, under the 1970 order, as under most of the statutes and precedents discussed herein, the critical parameter in determining the area from which jurors are to be selected, is the place where the crime was committed, and not the place where the defendant resides. In most cases these two locales will be sufficiently similar that no problem is raised by treating them interchangeably. However, in the rare in-

suburban juries with significantly fewer black faces than would appear downtown. Nevertheless, the California Supreme Court chose to minimize, at least explicitly, the racial implications of the situation, and based its decision in the *Jones* case solely on the vicinage provision of the sixth amendment, which guarantees to criminal defendants the right to be tried by a jury "of the State and district wherein the crime shall have been committed."[4]

Although not every feature of the common law jury was preserved in the sixth amendment,[5] a modified vicinage requirement clearly did survive, since it is embodied in the language of the amendment itself.[6] The basic sixth amendment right to jury trial was secured against infringement by the states in *Duncan v. Louisiana*,[7] and the *Jones* court therefore reasoned that, after *Duncan*, the vicinage provision is also enforceable against the states through the fourteenth amendment.[8] While conceding that a state may draw its districts as large or small as it wishes,[9] the court found it a near absolute[10] command of the sixth amendment that a defendant be afforded a jury drawn from the whole of the district where the crime he is charged with was committed.[11] For Jones, that would have been the Central District of Los Angeles County. Since he was tried by a jury drawn from the Southwest District, his conviction had to be reversed.[12]

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stance where a defendant is charged with a crime that was committed far away from his home, the *Jones* holding might produce unexpected consequences. See text accompanying note 65 *infra*.

4. U.S. CONST. amend. VI. The California Constitution contains no explicit juror-residence requirement; and its basic jury trial provision, CAL. CONST. art. I, § 7, has been construed to require only that jurors be drawn from within the county fixed by law as the place of trial. *See, e.g.*, People v. Richardson, 138 Cal. App. 404, 32 P.2d 433 (1st Dist. 1934).

5. Features that did not survive include the requirement that there be twelve jurors, Williams v. Florida, 399 U.S. 78, 99-100 (1970), and the requirement that the verdict be unanimous, Apodaca v. Oregon, 406 U.S. 404 (1972). *See also* text accompanying notes 26 and 27 *infra*.

6. *See* U.S. CONST. amend. VI. The relevant language is quoted in text accompanying note 4 *supra*.

7. 391 U.S. 145 (1968). Prior to *Duncan*, the states could, consistently with the federal Constitution, try defendants in any manner that insured fundamental fairness. *See* note 42 *infra* and accompanying text.

8. 9 Cal. 3d at ___, 510 P.2d at 709, 108 Cal. Rptr. at 349. This conclusion is, however, open to question. See notes 26-35 *infra* and accompanying text.

9. *Id.* at ___, 510 P.2d at 711, 108 Cal. Rptr. at 351.

10. "We do not say that there may not be an exceptional case where inconvenience and cost could constitute sufficiently compelling reasons" to "justify the exclusion from the jury panel of residents in the district where the crime was committed." *Id.* at ___, 510 P.2d at 712, 108 Cal. Rptr. at 352.

11. *Id.* at ___, 510 P.2d at 711, 108 Cal. Rptr. at 351.

12. As it was necessary for the defendant to be retried, the court went on to con-

Although the Constitution as originally drafted restricted the venue, or place of trial, of criminal cases, it contained no similar limitation on vicinage, the area from which the jury could be drawn. It was in part this omission which produced the impetus for drafting the sixth amendment.[13] As originally introduced in the House, the amendment would merely have codified the common law attributes of the jury, including the traditional vicinage requirement.[14] The Senate, however, was opposed to any vicinage provision, partly because the subject was already covered in the pending judiciary bill,[15] and partly because the Federalists feared that limiting the area of vicinage to the county, as at common law, would hinder the exercise of judicial power by the national government.[16] The compromise which became the sixth amendment retained the concept of common law vicinage but left to Congress the power to fix the size of the districts from which jurors could be drawn in federal court cases. Congress exercised this power in the Judiciary Act of 1789,[17] which was passed contemporaneously with the sixth amendment.[18] Under the Act, state and district boundaries generally coincided.[19]

Significantly, section 29 of the Act provided that

> jurors . . . shall be returned as there shall be occasion for them, from such parts of the district from time to time as the court shall direct, so as shall be most favourable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burthen the citizens of any part of the district with such services.[20]

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sider the propriety of the jury instruction that had been given regarding defendant's alibi, concluding that it was erroneous. *Id.* at ___, 510 P.2d at 713, 108 Cal. Rptr. at 353. This part of the opinion will not be discussed, since it is clear that the court's decision of the case was based instead on the vicinage requirement of the sixth amendment.

13. *See* Williams v. Florida, 399 U.S. 78, 93-94 (1970).

14. "The trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites . . . ." 1 ANNALS OF CONG. 435 (1789).

15. *See* Williams v. Florida, 399 U.S. 78, 95 (1970). This bill ultimately became the Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789).

16. F. HELLER, THE SIXTH AMENDMENT 92-101 (1951). Professor Heller, the leading authority on the history of the sixth amendment, fails to elucidate exactly how a strict vicinage requirement would have hindered the federal judiciary. The point is, of course, that the Federalists believed such a limitation unwise and acted accordingly.

17. Ch. 20, 1 Stat. 73 (1789).

18. *See generally* Maryland v. Brown, 295 F. Supp. 63, 78-81 (D. Md. 1969); F. HELLER, *supra* note 16, at 92-101.

19. Maryland and Virginia were each divided into two districts. Subsequently, other states were divided, and today many states contain more than one federal judicial district. *See* 28 U.S.C. §§ 81-131 (1971).

20. Ch. 20, § 29, 1 Stat. 88 (1789).

Since the same Congress that adopted this language also passed the sixth amendment, it is clear that the amendment's vicinage provision was meant only to prescribe the maximum area from which jurors could be drawn, not to mandate that jurors be drawn from every part of a district; and the courts have so held.[21] When Congress later subdivided some districts into divisions,[22] the courts reiterated that there is no constitutional right to a jury selected from any particular division,[23] and, more specifically, no right to a jury selected from the division in which the crime occurred.[24] The only right a defendant can claim is that each and every member of his jury be a resident of the *district* where the crime was committed; and Congress can define "district" as it wishes, with the proviso that if a district should encompass more than one state, the state boundary would then control for vicinage purposes.[25]

Of course the sixth amendment was not initially intended to apply to the states. Although the right to a jury with all the "essential features" was incorporated into the fourteenth amendment's due process clause and thus made applicable to the states in the *Duncan* case,[26] the requirement that there be twelve jurors and the requirement that there be a unanimous verdict have been deemed non-essential by the Supreme Court.[27] While a vicinage restriction, unlike the common law requirements of twelve jurors and a unanimous verdict, was clearly preserved in the sixth amendment[28] and is therefore fully applicable to the *federal* government, the Supreme Court has yet to

21. *See, e.g.*, United States v. Peuschel, 116 F. 642 (S.D. Cal. 1902); United States v. Ayres, 46 F. 651 (D.S.D. 1891); United States v. Wan Lee, 44 F. 707 (D. Wash. 1890); *cf.* Barrett v. United States, 169 U.S. 218 (1898). *See generally* Blume, *The Place of Trial in Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59 (1944); Connor, *The Constitutional Right to a Trial by a Jury of the Vicinage*, 57 U. PA. L. REV. 197 (1909).

22. *See, e.g.*, Acts of Mar. 3, 1911, ch. 231, § 100, 36 Stat. 1121 (subdividing Ohio districts).

23. Ruthenberg v. United States, 245 U.S. 480 (1917); United States v. Titus, 210 F.2d 210 (2d Cir. 1954); United States v. Gottfried, 165 F.2d 360 (2d Cir.), *cert. denied*, 333 U.S. 860 (1948); *see* United States v. Brown, 281 F. Supp. 31 (E.D. La. 1968).

24. United States v. Florence, 456 F.2d 46 (4th Cir. 1972); Larramore v. United States, 8 F.2d 736 (5th Cir. 1925), *cert. denied*, 269 U.S. 586 (1926); *cf.* State v. Kappos, 189 N.W.2d 563 (Iowa 1971).

25. This is the necessary implication of the sixth amendment's text, since jurors must be drawn from the district *and* state in which the crime was committed.

26. 391 U.S. 145 (1968).

27. Williams v. Florida, 399 U.S. 78 (1970) (twelve jurors); Apodaca v. Oregon, 406 U.S. 404 (1972) (unanimity).

28. See notes 4-6 *supra* and accompanying text.

rule on whether it is an "essential feature" of a jury trial and thus one to be applied to the *states* under the incorporation theory.[29] Several other guaranties preserved in the Bill of Rights have so far escaped incorporation.[30] Vicinage is an especially poor candidate for incorporation because, as preserved in the sixth amendment, it is incapable of meaningful application in the state context. Incorporated provisions are usually applied to the states with the full regalia of their federal interpretations,[31] and since under the Judiciary Act of 1789 Congress was given the power to fix the size of districts,[32] a "district" could presumably be as large as the state legislature wanted to make it, and could even coincide with the borders of the state, so long as it was "previously ascertained by law."[33] Moreover, since under section 29 of the Judiciary Act jurors could be summoned from any part of the district[34] (as opposed to being evenly drawn from the entire district), a straightforward application of the sixth amendment's vicinage provision as defined by federal standards would afford no protection that the state legislature could not easily circumvent by drawing one statewide "district" and calling the real functional units of the state judiciary by some other name.[35]

Apparently the California Supreme Court viewed with incredulity such an interpretation of the vicinage provision, under which a major constitutional question could turn on the California legislature's characterization of the administrative units of Los Angeles County courts as "districts" instead of, for example, "divisions." Rather than face the harsh conclusion that any newly established right to a jury

29. Under the incorporation theory, the Supreme Court looks to specific provisions of the Bill of Rights to give meaning to the fourteenth amendment's due process clause. Provisions which are considered fundamental are made applicable to the states as essentials of due process. *See* concurring and dissenting opinions in Williams v. Florida, 399 U.S. 78 (1970) and cases cited therein.

30. Examples are the fifth amendment right to indictment by a grand jury, the right to jury trial in civil cases where the amount in controversy exceeds twenty dollars, and the entire second and third amendments.

31. "Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme . . . of justice' the same constitutional standards apply against both the State and Federal governments." Benton v. Maryland, 395 U.S. 784, 795 (1969) (citations omitted).

32. See notes 14-18 *supra* and accompanying text.

33. The sixth amendment text explicitly requires that the district from which jurors are to be selected have been previously ascertained by law.

34. See notes 21-24 *supra* and accompanying text.

35. The constitutionality of the Judiciary Act of 1789 has been consistently sustained by the courts, inasmuch as the Act and the sixth amendment were both adopted by the same Congress without apparent conflict. *See* cases cited in note 21 *supra*. See note 47 *infra* and accompanying text.

of the vicinage for state defendants could be so easily circumvented, the court chose to wrench the language of the sixth amendment away from its history, and from federal precedent, to read an additional requirement into the vicinage provision: juries must be drawn from the *whole* of a district, and not just from a convenient part thereof.[36] Admittedly this interpretation helps to save what may be a valuable right from the linguistic caprice of legislators: no matter how large the district is drawn, jurors must be selected uniformly from its entire populace, necessarily including the community where the crime was committed. A criminal defendant thus has some assurance that significant elements of this community will be represented on his jury panel, even though this representation can be diluted by legislative enlargement of district boundaries. To understand why a respected court should base such an intuitively defensible result on such an historically dubious theory, it is necessary to consider, and ultimately to discard, an alternative basis for the holding in *Jones*, rooted in the line of cases characterizing a properly impartial jury.

In 1879 the Supreme Court of the United States held that a Negro defendant was denied the equal protection of the laws when he was tried by a jury from which all Negroes had been systematically excluded pursuant to a state statute.[37] Later the Court broadened its holding to cover cases of administrative discrimination.[38] Although there is no right to have Negroes on any particular jury,[39] a long-standing and substantial discrepancy between the proportion of Negroes on a county's jury panels and proportion of Negroes in the community will give rise to an inference of discrimination, which the state may rebut with a reasonable explanation for the discrepancy.[40] The

36. 9 Cal. 3d at ___, 510 P.2d at 711, 108 Cal. Rptr. at 351.

37. Strauder v. West Virginia, 100 U.S. 303 (1879).

38. Patton v. Mississippi, 332 U.S. 463 (1947) (for thirty years clerks had failed to select any Negroes for jury service although some had necessary qualifications); Smith v. Texas, 311 U.S. 128 (1940) (jury commissioners did not know any qualified Negroes to call); Norris v. Alabama, 294 U.S. 587 (1935) (jury commissioners found all Negroes to be unqualified).

39. Thomas v. Texas, 212 U.S. 278 (1909); Martin v. Texas, 200 U.S. 316 (1906); Virginia v. Rives, 100 U.S. 313 (1879).

40. [P]urposeful discrimination exists whenever significant unexplained disparities exist. In other words, it is not the significant disparities themselves which are unconstitutional, . . . they only raise the inference of discrimination. . . . Once that inference has been raised, it is the government's failure or inability to demonstrate that the disparities are not the product of discrimination which confirms the inference and invalidates the jury pool. United States v. Butera, 420 F.2d 564, 569 (1st Cir. 1970) (citations omitted).

See Patton v. Mississippi, 332 U.S. 463 (1947); Norris v. Alabama, 294 U.S. 587 (1935). However, in recent cases, the government's burden has been made very heavy indeed, so that it will almost always lose when there is a strong prima facie case of ra-

racial composition of the jury panel is not expected to mirror exactly that of the community; it is enough that no one is excluded on account of race.[41]

Although the sixth amendment right to an impartial jury could be invoked in jury discrimination cases from federal courts, cases from state courts were treated under the equal protection clause until 1968.[42] Because most of these cases involved allegations of racial discrimination and because the fourteenth amendment was most clearly applicable in such cases, the Court was slow to respond to attacks on discrimination against other groups in jury selection.[43] Nevertheless, a concept of the jury as a cross-section of the community has been gradually emerging. In *Thiel v. Southern Pacific Co.*, Justice Murphy, speaking for the Supreme Court, explained:

> The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected without systematic and intentional exclusion of any of these groups.[44]

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cial discrimination based on statistical comparisons. *See* Whitus v. Georgia, 385 U.S. 545 (1967); *cf.* Avery v. Georgia, 345 U.S. 559 (1953). The Supreme Court has further encouraged challenges to the racial composition of the jury pool by holding that white defendants have standing to challenge the exclusion of blacks, since "the exclusion of a discernible class from jury service injures not only those defendants who belong to the excluded class, but other defendants as well, in that it destroys the possibility that the jury will reflect a representative cross section of the community." Peters v. Kiff, 407 U.S. 493, 500 (1971).

41. Swain v. Alabama, 380 U.S. 202 (1965).

42. This was the year that Duncan v. Louisiana, 391 U.S. 145 (1968) was decided. See note 7 *supra* and accompanying text.

43. Ultimately, the courts did strike down exclusion of many different groups. For the historical development of the jury discrimination cases, see Kentucky v. Powers, 139 F. 452 (C.C.E.D. Ky. 1905) (members of certain political parties); Glasser v. United States, 315 U.S. 60 (1942) (women not members of League of Women Voters); Thiel v. Southern Pac. Co., 328 U.S. 217 (1946) (daily wage earners); Ballard v. United States, 329 U.S. 187 (1946) (women); Hernandez v. Texas, 347 U.S. 475 (1954) (Mexican-Americans); State v. Madison, 240 Md. 265, 213 A.2d 880 (1965) (atheists); Witherspoon v. Illinois, 391 U.S. 510 (1968) (persons opposed to capital punishment). *But cf.* Rawlins v. Georgia, 201 U.S. 638 (1906) (exclusion of doctors, lawyers and other professionals permissible to prevent interruption of their services); Fay v. New York, 332 U.S. 261 (1947) (approving so-called "blue ribbon" juries for special cases, despite the fact that certain occupational groups apparently were excludcd); Hoyt v. Florida, 368 U.S. 57 (1961) (approving a scheme whereby women were not called for jury duty unless they volunteered); Bradley v. Texas, 470 F.2d 785 (5th Cir. 1972) (exclusion of women with school-age children permissible).

44. 328 U.S. 217, 220 (1945) (citations omitted). *Thiel* was a tort case filed in

Because state criminal defendants have enjoyed, since 1968, a federal constitutional right to trial by jury,[45] and because "jury" presumably means "impartial jury,"[46] it might be concluded that the cross-section requirement is now fully applicable to state criminal proceedings.

Three questions arise regarding the nature of such a constitutional requirement of cross-sectional balance in jury selection. First, is the exclusion of *geographic* groups indeed unconstitutional, as suggested by Justice Murphy? Second, how much deviation from a true racial cross-section can be tolerated without raising an inference of constitutionally infirm discrimination? And third, what community is it that the jury must represent?

The answer to the first question has already been suggested:

> It has indeed been stated that jurors must be drafted "without systematic and intentional exclusion" of any "geographical," as well as of any "social, religious, racial" or "political" group; and that may well forbid the officials who draw up the lists from excluding any part of the district at their own choice. We assume that they may not do so; but if they do not, "geographical" uniformity is satisfied, for the district and circuit courts have had power since the first Judiciary Act of 1789 to divide a district territorially in the interests of an impartial trial, of economy, and of lessening the burden of attendance. There cannot be the faintest question of the constitutionality of the statute; the courts have again and again recognized its validity.[47]

California state court and removed to federal court. Plaintiff challenged the jury selection procedure on the ground that all wage earners paid on a daily basis were intentionally excluded. In sustaining plaintiff's challenge, the Supreme Court based its holding on its supervisory powers over the federal courts. The quoted passage is dicta in relation to state trials, but is nevertheless cited in many of the cases collected in note 43 *supra* as the definitive exposition of the cross-section concept for both federal and state contexts. The Supreme Court has never *explicitly* embraced cross-sectional representation as an absolute fourteenth amendment standard applicable against the *states*. But see note 46 *infra* and accompanying text.

45. Duncan v. Louisiana, 391 U.S. 145 (1968). Prior to *Duncan*, when federal courts voided state jury selection procedures, they did so on the ground that impartiality in judicial proceedings was fundamental to the concept of ordered liberty underlying the fourteenth amendment due process clause. *See, e.g.*, Witherspoon v. Illinois, 391 U.S. 510, 518 (1967); Irvin v. Doud, 366 U.S. 717, 721-22 (1961).

46. Duncan v. Louisiana, 391 U.S. 145, 181-82 (1968) (Harlan, I., dissenting). Justice Harlan suggested that any other conclusion would be absurd. *See* Irvin v. Doud, 366 U.S. 717, 721-22 (1961). If this analysis is correct, it implies that the Supreme Court will judge state jury selection procedures against the federal constitutional standard of an "impartial jury," rather than on a case-by-case "fundamental fairness" basis; and an "impartial jury" has, in federal cases, meant a jury representative of the community. Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946).

47. United States v. Gottfried, 165 F.2d 360, 364 (2d Cir. 1948) (opinion of the court by Judge Learned Hand) (footnotes omitted).

The requirement of cross-sectional balance in jury selection is predicated on the sixth amendment's mandate that defendants be afforded an impartial jury; and since the same Congress that adopted the sixth amendment authorized geographical exclusion and therefore presumably did not feel that such a practice contravened impartiality, there is little historical support for reading the sixth amendment to prohibit exclusion of geographical groups. Furthermore, while members of racial, economic, and sexual groups may possess distinct attitudes, so that their inclusion in jury panels is essential to insure the representation of all viewpoints,[48] it can hardly be said that residents of one area necessarily hold different views and attitudes from those of their neighbors in another.[49] Of course, exclusion of a geographic group can be a subterfuge for racial discrimination if the excluded area is heavily populated by minority group members; but if a geographic limitation has an acceptable purpose independent of its racial effect and is fair and reasonable, then notwithstanding the contrary language in the *Thiel* case, it is apparently immune from constitutional attack.[50]

48. For an eloquent discussion of racial and occupational discrimination in jury selection, see Judge Wisdom's opinion in Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966).

49. United States v. Butera, 420 F.2d 564, 572 (1st Cir. 1970). Different areas may, of course, vary in their racial and economic composition, and these differences may produce attitudinal variations. If the influences of such social factors are cancelled out, however, there is no reason to suppose that people will possess different attitudes solely because they live in different parts of the same city or county. Thus if a court can eliminate any independent inference of purposeful racial or economic discrimination (including the possibility mentioned in the text that racial discrimination may have been effected by the careful drawing of boundaries), and if the jury panel has sufficient representation from all *cultural* groups to satisfy the cross-section requirement, there is no reason why logical geographic limits on the area from which jurors are drawn should be inherently suspect.

50. Geographic limitations are analogous to other jury service eligibility requirements in that both are designed to effect reasonable state purposes and are facially neutral with respect to race, yet both may have the effect of excluding disproportionate numbers of minority group members. "[T]he [Supreme] Court has long recognized that fair and reasonable qualifications for jury service eligibility can be imposed even though they detract from a cross section in the actual jury pools." United States v. Butera, 420 F.2d 564, 567 (1st Cir. 1970) (footnotes omitted). *Contra*, Glasser v. United States, 315 U.S. 60, 86 (1942): "[Officials charged with choosing federal jurors] must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community."

At least one court has suggested that where an otherwise valid eligibility requirement disables a disproportionate number of members of a minority group, the state has an affirmative obligation to seek out more of the qualified group members in compensation, if it is to avoid an inference of discrimination. Labat v. Bennett, 365 F.2d 698, 725 (5th Cir. 1966).

If there is in reality no geographical branch of the cross-section test, is it possible that the *racial* imbalance between the district in which the crime was committed (31 percent Negro in the *Jones* case) and the district from which the jurors were drawn (7 percent in *Jones*) could be great enough, standing alone, to invalidate the jury? The Supreme Court has stated that the jury roll need not be "a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group."[51] It is enough that every properly cognizable element of the community has "substantial" representation.[52] Although one court has held that race may properly be considered in choosing jurors in order to alleviate the effects of past discrimination,[53] no court has suggested that ratios or quotas be imposed.[54] If the jury selection process is fair and reasonable, significant deviations from an ideal statistical model of the community are tolerable if each important sociological group has some representation. Indeed, it appears that the emphasis has shifted from the actual composition of the jury to the selection process, and whether that process presents "a *fair possibility* for obtaining a representative cross-section of the community."[55]

The more interesting question concerns the proper community to be used as a standard, assuming that constitutional requirements of geographic or racial representation do exist.[56] It seems reasonable,

51. Swain v. Alabama, 380 U.S. 202, 208 (1965); *see* United States v. Di Tommaso, 405 F.2d 385, 398 (4th Cir. 1968); United States v. Arnett, 342 F. Supp. 1255, 1259 (D. Mass. 1970).

52. A cognizable group must have a definite composition, not shifting from day to day; must have members who share common ideas, attitudes or experiences; and there must be a possibility that exclusion of members of the group will result in a partiality or bias in cases in which group members are involved. United States v. Guzman, 337 F. Supp. 140, 143-44 (S.D.N.Y.), *aff'd on other grounds,* 468 F.2d 1245 (2d Cir. 1972). For example, "young people" are not a cognizable group. *Id.* at 145; *cf.* Chase v. United States, 468 F.2d 141 (7th Cir. 1972); United States v. Deardorff, 343 F. Supp. 1033 (S.D.N.Y. 1971). For a discussion of what constitutes "substantial" representation, see Kuhn, *Jury Discrimination: The Next Phase,* 41 So. CAL. L. REV. 235 (1968).

53. Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966) (en banc), *cert. denied,* 386 U.S. 975 (1967), *overruling* Collins v. Walker, 329 F.2d 100 (5th Cir.), *cert. denied,* 379 U.S. 901 (1964). *But see* Cassell v. Texas, 339 U.S. 282, 287 (1949) (dicta): "An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither *inclusion* nor exclusion because of race" (emphasis added).

54. *But cf.* Kuhn, *supra* note 52.

55. Williams v. Florida, 399 U.S. 78, 100 (1970) (emphasis added).

56. The courts have never defined just what is meant by a "community." Presumably, the term is intended to refer to a group of people living in a certain area, and therefore requires extrinsic definition of the area involved, *i.e.,* what community (area)

from the standpoint of both history and logic, to begin with the community in which the crime was committed. If the jurors are drawn from that community, the cross-section requirement should be satisfied. However, if jurors are to be selected from another population that is significantly different—for example, one that is totally devoid of members of a cognizable group in the community in which the crime was committed—care must be taken that there is some possibility for representation of that group on the jury panel. One approach in such a case would be to redefine the area from which the jurors are to be selected to include the community in which the crime was committed. This approach was followed by the Alaska Supreme Court in *Alvarado v. State*,[57] a case relied on heavily by the California Supreme Court in *Jones*. However, the Alaska court based its result on a requirement of cross-sectional representation, and not on a constitutional vicinage limitation, as the *Jones* court suggested in its opinion.[58]

The California Supreme Court was clearly troubled in *Jones* by implications of the cross-sectional approach which it chose not to artic-

is it that the jury must represent? This may very well be a different answer for purposes of assuring cross-sectional balance in the jury pool than for purposes of deciding whether a vicinage requirement has been met. The definitional problem is not considered here, beyond pointing out that, in some cases, the pursuit of cross-sectional representation may require modification of juror selection district boundaries, and that *Jones* is probably not one of those cases.

57. 486 P.2d 891 (Alas. 1971). Alvarado was a native Alaskan from a small, isolated village, who was tried by a jury drawn from within a 15 mile radius of Anchorage, thereby excluding all residents of native villages. The crime was committed in the village, and the Alaska court therefore held that native villagers were among the groups that had to be represented in the jury pool. A lower California court distinguished *Alvarado* in a similar situation because there was no proof that residents of the excluded area were siguificantly different from residents of the area from which the jury was drawn—whereas there was concededly a vast difference between villagers and city-dwellers in the Alaska case. People v. McDowell, 27 Cal. App. 3d 864, 104 Cal. Rptr. 181 (4th Dist. 1972).

It seems safe to say that, had the California Supreme Court chosen to approach the *Jones* case under the "cross-section of the community" theory, the result would have resembled that in *McDowell*, because of two problems that loom large in trying to apply the *Alvarado* reasoning to intra-city variations. First, there are probably *some* blacks and *some* poor people in every region of a city, and the cases have uniformly held that *some* representation of these groups is enough, absent purposeful discrimination. See notes 51-55 *supra* and accompanying text. Second, while one might argue that suburban blacks have different values and lifestyles than ghetto dwellers and therefore under the *Alvarado* rationale cannot fairly represent them in the jury pool, the spectre of a parade of anthropologists, sociologists and psychologists attempting to draw parallels between Alaskan villagers and the inner-city poor is likely to prove too much for most courts. Given the very real problems of judicially administering such an elusive standard, *Alvarado* is probably destined to be limited to its unique facts.

58. 9 Cal. 3d at ___, 510 P.2d at 709-10, 108 Cal. Rptr. at 349-50.

ulate: in a typical large metropolitan area with segregated housing patterns, a state could easily build its courthouses in the all-white suburbs, draw all-white juries from the surrounding areas, and use them to try black defendants from the inner-city ghetto. Such a result is patently unjust but heretofore would arguably have been constitutional, under the established case law defining the characteristics of an "impartial" jury and a "cross-section of the community." The standards developed under these precedents would not prohibit such action by the state because (1) geographical exclusion, unlike sociological exclusion, is not intrinsically invidious,[59] (2) there are some few blacks in the suburbs, and, beyond that, proportional representation of minorities in the jury pool is not required,[60] and (3) communities within the same city are not so different that one cannot fairly represent another.[61] Thus the court in *Jones* undoubtedly felt compelled to seek an alternative legal tool, and found one in the sixth amendment vicinage provision. Although historical justification for the court's interpretation is meager,[62] this is not the first time that a court has twisted the past in order to cope more effectively with the vicissitudes of the present.

The *Jones* decision leaves several problems unresolved and may create a new one. First, nothing in the opinion prohibits the state legislature from drawing *smaller* judicial districts, and making their boundaries coextensive with existing racial housing patterns, producing all-white juries in one district and all-black juries in another. This situation is disquieting, but not clearly inconsistent with the common law concept that a jury should be composed of the accused's peers (assuming blacks are tried for crimes committed in black areas and therefore get black juries, and whites are tried for crimes committed in white areas and therefore get white juries). It is unlikely, however, that even a racially-motivated legislature would choose such a course, because although black defendants in predominately white areas would get fewer blacks on their juries, black defendants in black areas would

59. See notes 47-50 *supra* and accompanying text.

60. See notes 51-55 *supra* and accompanying text.

61. This is really a corollary of proposition number two, that there are *some* blacks in the suburbs and that, beyond that, proportional representation is not required. While there is no doubt that communities within the same city are different, the point is that the differences are not perceived as being of sufficient magnitude to warrant judicial intervention in the state jury selection scheme. See note 57 *supra*. Defendants challenging their jury panels are unlikely to overcome this obstacle until the United States Supreme Court reverses its stand on the proportional representation question. See note 51 *supra* and accompanying text.

62. See notes 21-36 *supra* and accompanying text.

get more black jurors. Regardless of the legislature's districting decisions, under *Jones* the *average* defendant will be tried by an *average* jury which reflects the racial composition of the entire state.[63] If a state should nevertheless decide to gerrymander its districts, as the *Jones* court suggests it can, there is a potential conflict between the *Jones* court's reading of the vicinage provision and the federal precedents requiring that a jury be representative of a cross-section of the community.[64] This conflict would materialize if "community" was judicially defined as a broader area than the legislatively-drawn juror selection districts. If, for example, the courts determined that jury panels must reflect a cross-section of the population of the state as a whole, and at the same time continued to insist that each and every juror be drawn from the district where the crime was committed, the legislature's only solution would be to draw one statewide district and impanel statewide juries. This would hardly promote convenience or lessen the burden of attendance. Finally, the *Jones* case may actually hurt minority defendants accused of committing crimes in white areas away from their homes.[65] Unless a state chooses to draw very large juror selection districts, such defendants will virtually be assured an all-white jury. Thus, while *Jones* will curb the most flagrant abuses (*i.e.*, trying *all* black defendants in white suburban areas), the vicinage provision must be regarded as a legal tool of limited utility.

California must now retry Leon Jones. But more importantly, no matter how large or small the state may draw its districts in the future, most minority defendants will stand a better chance of getting juries that reflect the racial composition of their community.[66] Justice will more nearly be done, albeit at the expense of logic. Given the growing number of defendants challenging the composition of their jury panels, and the concomitant need of the courts for analytic tools with which to attack jury discrimination questions, it seems likely that *People v. Jones* will be cited frequently in the future with both approval and disapproval. Controversy over how to guarantee an impartial jury to minority defendants will continue until the courts admit that, in matters of jury selection, the Constitution cannot be color blind unless it is color conscious.

63. See note 66 *infra.*

64. See note 44 *supra* and accompanying text.

65. See note 3 *supra.*

66. While *individual* minority defendants may not be in any better position after *Jones,* minority defendants as a class gain significant protection: they cannot *all* be tried by white juries from outlying areas of a city. See note 63 *supra* and accompanying text.