People v. Jones--The Jury Must be Drawn from the District of the Crime

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The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to be tried by a jury of the district of the crime. It might appear obvious to a layman that this constitutional right was violated when a defendant was tried by a jury of the Southwest District of Los Angeles County for a crime committed in the Central District. The California Supreme Court, however, arrived at this conclusion in *People v. Jones* by a four to three split decision.

Both the majority and the dissent purported to base their respective positions upon the Sixth Amendment. The dissent interpreted the Sixth Amendment as permitting the federal judicial district to be the district of the crime from which state juries may be selected; on the other hand, the majority interpreted the Sixth Amendment as requiring that the relevant jury selection district created by state legislation must be considered the district of the crime for Sixth Amendment purposes. In support of the differing interpretations of the Sixth Amendment, each side cited cases from other jurisdictions and attempted to discredit the other side's arguments. But by looking no further than to the Sixth Amendment and to decisions from other jurisdictions, each side failed to address the relevant policy considerations which the *Jones* case presented to the California Supreme Court.

This note will explain why no compelling authority for either the majority's or the dissent's position can be located in the legislative history of the Sixth Amendment or in prior case law. This note concludes that because of the lack of authority both the majority's and the dissent's positions must have been based upon policy considerations which were not discussed explicitly. The note will examine the policy considerations which the supreme court should have, but failed to discuss, including the historical concept of a jury district in relation to current jury districts, the interest of the accused in the jury, the inter-

1. U.S. Const. amend. VI.
3. *Id.* at 558-59, 510 P.2d at 714, 108 Cal. Rptr. at 354.
4. *Id.* at 554, 556, 510 P.2d at 711-12, 108 Cal. Rptr. at 351-52.
5. See notes 105-109 and accompanying text infra.
est of society in the jury, and the interest of society in the opportunity for all individuals to serve as jurors. That examination reveals that the majority reached the result most compatible with society's interests.

Further probing into the legislative history of the Sixth Amendment reveals two reasonable bases on which the majority opinion might have rested. In addition to suggesting these two explanations, this note will discuss the scope of both the majority's holding and the two exceptions to that holding which the majority stated in dicta. Finally, there will be a brief discussion of four possible implications of the Jones holding for future California cases.

The Sixth Amendment guarantees that "[i]n 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 . . . ." The terms criminal prosecution, speedy, public, and impartial jury have been the subject of so many United States Supreme Court decisions that the contour of each is reasonably well defined. By contrast, the word district has received very little attention and its contour is largely undefined. The Jones case merits attention because it marks one of the few times since Duncan v. Louisiana held that the Sixth Amendment right to trial by jury is applicable to the states when the requirement that a jury must be drawn from the district of the crime has been given extended consideration.

**People v. Jones**

Leon Dwight Jones was tried in the Southwest Superior Court District (Southwest District) of Los Angeles County by a jury drawn exclusively from that district and found guilty of three counts of selling marijuana. On appeal his convictions were reversed by a divided
California Supreme Court on the ground that residents of the Central Superior Court District (Central District) where the crimes occurred had been excluded from the jury panel of the Southwest District. The issue which divided the Jones court was how best to determine the precise nature of the vicinage requirement of the Sixth Amendment. The majority and the dissent agreed there is a vicinage requirement, that is, that the trial must be held before a jury of the district wherein the crime shall have been committed. They also agreed that this requirement has been an essential feature of state jury trials since Duncan. They further agreed that the Sixth Amendment's vicinage provision never did connote the identical meaning it had acquired in England. Instead, by the clause "shall have been previously ascertained by law," the entire Jones court thought that the Sixth Amendment left to legislatures the opportunity to define the vicinage requirement by creation of districts. They disagreed only as to which legislative bodies were allowed to define jury selection districts for vicinage purposes.

The Jones dissent thought that only federal legislation could define the districts for the purpose of the Sixth Amendment vicinage requirement. It based this belief upon the fact that the federal Judiciary Act of 1789 which created federal judicial districts had been passed only a day before the Sixth Amendment had been recommended to the states by Congress. Under the dissent's view, the geographical distribution of the jury would have satisfied the Sixth Amendment if the jury had been drawn from any part of the federal judicial district in which the crime was committed; that is, the locale of the crime need not have been included in the geographical area from which the jury was selected.

By contrast, the majority held that if smaller jury selection districts had been created within a federal district, a crime committed within one of those districts could not be tried by a jury drawn exclusively from other districts. In Jones, those smaller districts were the judicial districts which had been drawn by the state legislature.

16. Id. at 556, 510 P.2d at 712, 108 Cal. Rptr. at 352.
17. Id. at 551, 558, 510 P.2d at 709, 714, 108 Cal. Rptr. at 349, 354.
18. Id.
20. 9 Cal. 3d at 558-59, 510 P.2d at 714, 108 Cal. Rptr. at 354.
22. 9 Cal. 3d at 558-59, 510 P.2d at 714, 108 Cal. Rptr. at 354; F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION 94 (1951) [hereinafter cited as HELLER].
23. See 9 Cal. 3d at 554, 556, 510 P.2d at 711-12, 108 Cal. Rptr. at 351-52.
24. The Jones principle that "[t]he district, however large or small, from which the jury is drawn must include the area wherein the crime was committed," 9 Cal. 3d
authority for the majority’s position that state legislation could define
districts for vicinage purposes is difficult to ascertain. In reaching that
position, the majority examined neither prior United States Supreme
Court decisions nor its own prior decisions; it also failed to explain
the basis for its position in its discussion of the intent of the First
Congress, which had recommended the Sixth Amendment for ratifica-
tion by the states. It proffered only two decisions from other jurisdic-
tions in support of its position.25 Since neither of these two deci-
sions is binding authority for a California court, the majority’s hold-
ing must have been based on policy considerations.26

The Vicinage Requirement: Community or Cross-section?

In Jones, the Central District, where the crime occurred, was 31
percent black, while the Southwest District, from which the jury was
drawn, was 7 percent black.27 The defendant alleged he was denied
his constitutional right to a trial by a jury representing a cross-section
of the district where the crime had been committed.28 Thus, the ques-
tions of how the district should be defined and of whether Jones had
been denied his right to a jury representing a cross-section of the com-

unity29 were intertwined. However, the Jones majority’s treatment
of Alvarado v. State,30 the principal case on which it relied, showed
that its decision was based upon the vicinage requirement of the Sixth
Amendment rather than upon the requirement of a cross-section.

The crime in Alvarado was committed by a Native Alaskan in a
small Alaskan village located 450 air miles from Anchorage, where
the trial was held. Ninety-five of the one hundred inhabitants of his
village were Alaska Natives. By virtue of a fifteen mile jury selection
radius, residents of the village of the crime and residents of nearly all

at 554, 510 P.2d at 711, 108 Cal. Rptr. at 351, would on its face apply equally well
to federally drawn divisions within federal districts. However, the majority was not
required to decide if the same principle would apply to federal divisions.

26. See text accompanying notes 105-109 infra.
27. 9 Cal. 3d at 555, 510 P.2d at 711-12, 108 Cal. Rptr. at 351-52.
28. Id. at 551, 510 P.2d at 709, Cal. Rptr. at 349.
29. "The principle of the representative jury was first articulated by [the Su-
preme] Court as a requirement of equal protection, in cases vindicating the right of
a Negro defendant to challenge the systematic exclusion of Negroes from his grand
and petit juries. E.g., Smith v. Texas, 311 U.S. 128, 130 . . . (1940). . . . Finally it
emerged as an aspect of the constitutional right to jury trial in Williams v. Florida,
a discussion of the cross-section requirement see Note, The Jury, 20 HASTINGS L.J.
other native villages were excluded from the jury selection pool. The Alaska Supreme Court found the jury selection procedure invalid for this crime, because it was committed outside the fifteen mile radius. The court stated that "the traditional starting point for determining the community from which jurors are to be selected is the scene of the alleged offense." However, it backed away from this language when discussing the possible implications of its position. It conceded that a jury drawn from a selected area within a judicial district might be proper even if the scene of the crime were excluded, provided that the population of the restricted area did not differ significantly from that of the entire district. By this concession, the Alaska court apparently was intent upon satisfying the principle that a jury should ideally represent a cross-section of the community rather than upon defining what the community should mean.

The Jones majority apparently adopted without reservation the position that the community from which the jury is drawn must include the scene of the crime, stating that "even if the two judicial districts had contained an identical proportion of Negroes, defendant would still be entitled to a jury drawn from a panel including residents of the judicial district where the crime was committed." Thus, the Jones holding is grounded upon the Sixth Amendment vicinage requirement and is not tied to the principle that a jury should represent a cross-section of the community. In other words, the Jones majority concentrated upon the meaning of community and not upon the requirement of a cross-section.

Jones Court's Neglect of the Racial Issue

Since the transfer of Jones's trial from a district with 31 percent blacks to one with 7 percent blacks indicates that there was at least

31. Id. at 892-95.
32. See id. at 904.
33. Id. at 902.
34. Id. at n.29.
35. 9 Cal. 3d at 555, 510 P.2d at 712, 108 Cal. Rptr. at 352.
36. The Jones dissent cited United States v. Butera, 420 F.2d 564 (1st Cir. 1970), and People v. McDowell, 27 Cal. App. 3d 864, 104 Cal. Rptr. 181 (1972) to discredit what it termed the majority's "inferential and unwritten conclusion" that Jones was denied a jury which reflected a cross-section of his "community." 9 Cal. 3d at 561, 510 P.2d at 716, 108 Cal. Rptr. at 356. Both cases contain language which could be used to challenge a contention that geographic groups are protected by the cross-section principle. Compare United States v. Butera, 420 F.2d 564, 572 (1st Cir. 1970), with People v. McDowell, 27 Cal. App. 3d 864, 875, 104 Cal. Rptr. 181, 188 (1972). However, since the Jones majority did not rely upon the cross-section principle, the dissent's citing them for that purpose was a meaningless exercise.
37. 9 Cal. 3d at 555, 510 P.2d at 711-12, 108 Cal. Rptr. at 351-52. The Jones majority admitted that this was a "serious difference." Id.
a possible racial issue in Jones, one may ask why the majority chose to base its decision upon geographical considerations rather than upon racial or cross-sectional considerations. Perhaps an explanation for this choice by the majority can be found in the United States Supreme Court decision of Swain v. Alabama.\textsuperscript{38} There, the black petitioner proved that although 26 percent of the male population of jury duty age was black, only 10 to 15 percent of the grand and petit jury panel members since 1953 had been black.\textsuperscript{39} The Supreme Court held that "purposeful discrimination based on race" was not proved by this underrepresentation of 10 percent.\textsuperscript{40} However, as one commentator has observed about Swain: "[c]learly the percentage relied upon by the Court, which was presumably derived by simply subtracting 15\% from 26\%, is plain error. Blacks were actually underrepresented by almost 50\%."\textsuperscript{41} The percentages in Swain are not greatly different from the Jones statistics. Thus, the Jones majority may have decided that it should base its decision upon geographical considerations rather than confront the obstacle created by the Supreme Court's decision in Swain.

Two Exceptions to the Jones Doctrine

Inconvenience and Cost

Although the Jones holding that the jury must be drawn from an area which includes the scene of the crime appears to be clear and easy to apply,\textsuperscript{42} the majority left the decision open to further judicial clarification by its recognition of two exceptions. The majority presented the first exception by conceding that its holding did not "say that there may not be an exceptional case where inconvenience and cost could constitute sufficiently compelling reasons"\textsuperscript{43} for excluding residents in the district where the crime was committed from the jury pool. It is difficult to predict what effect that statement will have on future jury selection and trial transfer procedures. One can predict confidently, however, that prosecutors faced with Jones-based defenses will exert every effort to bring their cases within that exception. Thus the scope of the exception should be examined closely.

Other parts of the opinion of the Jones majority indicate that the exception for inconvenience and cost is a very narrow one. In the

\begin{itemize}
  \item \textsuperscript{38} 380 U.S. 202 (1965).
  \item \textsuperscript{39} Id. at 205.
  \item \textsuperscript{40} Id. at 208-09.
  \item \textsuperscript{41} Kairys, Juror Selection: The Law, A Mathematical Method of Analysis, and a Case Study, 10 AM. CRIM. L. REV. 771, 776-77 (1972) [hereinafter cited as Kairys].
  \item \textsuperscript{42} Under normal circumstances a California court now needs only to examine the jury selection pool, ascertain whether it contained residents from the area of the crime, and then base its decision upon that finding.
  \item \textsuperscript{43} 9 Cal. 3d at 555-56, 510 P.2d at 712, 108 Cal. Rptr. at 352.
\end{itemize}
sentence immediately preceding the above-quoted phrase, the majority recognized that "if convenience and cost were deemed sufficient to justify the exclusion from the jury panel of residents in the district where the crime was committed, the People could defeat this constitutional right by merely changing venue." Thus, the inconvenience and cost which would permit exclusion must be more than that which normally accompanies a change of venue. But how much more inconvenience and cost is needed than that associated with a typical change of venue? A clue to the answer to that question may be found in the majority's reliance upon *Maryland v. Brown.*

*Brown* involved a petition in federal court by H. Rap Brown for removal from the Maryland courts to the federal district court of his state prosecution for rioting, arson and inciting to riot, on the ground that he could not enforce his rights in the state courts. Over Brown's objection, the state court had granted the prosecution's motion for a change of venue on the ground that neither Brown nor the State could receive a fair, orderly and impartial trial in Dorchester County where the alleged crimes had occurred. There was testimony in the state court that the public awareness of the events and tensions created by the civil disorder leading to his indictment would jeopardize a fair trial since it would be difficult to obtain proper courtroom security and atmosphere during the trial. The concern apparently was not that impartial jurors could not be found, but that the conduct of the trial itself would be prejudiced by the extreme security measures which would be required.

One of Brown's contentions was that this change of venue to Harford County would deny him the right to trial by a jury of the district where the crime was committed. The federal court denied the petition for removal and stated that Brown might be entitled to have a jury selected from Dorchester County even though the trial would be transferred to Harford County. This right was dependent upon obtaining a fair and impartial jury composed of residents of Dorchester County.

The *Jones* majority's approval of *Brown* indicates that the inconvenience and cost of transferring jurors to a county approximately one hundred miles away is not enough for the majority to justify excluding residents of the district of the crime. Thus, the supreme court's exception appears to be very narrow; it would justify excluding resi-

44. *Id.* at 555, 510 P.2d at 712, 108 Cal. Rptr. at 352.
45. *Id.* at 69-71.
46. *Id.* at 70.
47. *Id.* at 72.
48. *Id.* at 77, 82.
49. *Id.* at 78.
students of the district of the crime only where the trial could not be held within one hundred miles or more from the scene of the crime. A trial would probably rarely need to be moved further than one hundred miles from the scene of the crime; a move to any city outside the range of public concern would be sufficient to insure the proper security and atmosphere for a fair trial. Therefore, the courts probably would be faced only rarely with a situation where inconvenience and cost might constitute sufficiently compelling reasons for excluding residents of the district of the crime.

Impartial Jury

By adopting the language of Brown, the Jones majority apparently adopted a second exception to the requirement that the jury be drawn from the district of the crime. The majority quoted from Brown that "a defendant would seem to have no right to be tried by a jury which is selected from a population base which includes such residents if a fair and impartial jury cannot thereby be provided . . . ." 51 This exception recognizes that in a particular case there may be a conflict between the dual Sixth Amendment requirements that the jury must be impartial as well as selected from the district of the crime. 52 Although the Jones majority did not express its position in its own language, its adoption of this language from Brown indicates that if these two guarantees came into conflict, the impartial jury requirement should prevail.

These two exceptions preclude a mechanical application of Jones by California courts. In every case the court must be prepared to determine if the jury has been drawn from a pool which includes residents of the area of the crime. If the trial is transferred on the motion of the prosecution the trial court must decide if the inconvenience and cost of transporting a jury justify overriding the vicinage requirement. Further, regardless of whether the trial is transferred the court must be prepared to decide if it is possible to empanel an impartial jury from the district of the crime.

The Vicinage Requirement in Historical Perspective

Framers' Intent

Both the majority and the dissent looked to the intentions of the framers of the Sixth Amendment to determine what was meant by the phrase "which district shall have been previously ascertained by law." 53

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52. See text accompanying note 7 supra.
53. 9 Cal. 3d at 550-51, 558-59, 510 P.2d at 708-09, 714, 108 Cal. Rptr. at 348-49, 354.
Since the legislative history was incomplete, however, the two sides were forced to rely upon contradictory inferences which they drew from circumstantial evidence of the framers' intent.

James Madison prepared the amendments which were to become the Bill of Rights and introduced them in the House of Representatives of the First Congress.54 In its original form, the amendment relating to jury trial in criminal cases contained a requirement that "the trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage . . . ."55 The amendment passed the House in substantially that form, but after more than a week of debate in the Senate it returned to the House in considerably altered form.56 Following a conference between representatives of the Senate and House, the amendment reappeared containing the requirement of an "impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."57 It was in this form that it was submitted to, and ratified by, the states. Because there is no information available about the proceedings in the Senate and because information about the proceedings of the House and the joint conference is sketchy, there is no definitive explanation of how the vicinage provision reached its final form.58 Professor Francis Heller has suggested that it is equally likely that it was suggested as a compromise in the conference committee or proposed on the floor of the House or agreed upon in informal discussion.59

Since the majority and the dissent in Jones were unable to discover the express intent of the framers, they both relied upon inferences drawn from the circumstances surrounding the adoption of the Sixth Amendment by Congress. Both sides agreed that it was significant that the Judiciary Act of 1789 had been passed the day before Congress recommended the amendment to the states.60 Both inferred from this that the districts to be "ascertained by law" were the federal judicial districts described either by the Judiciary Act or by future federal legislation.61 But in contrast to the dissent, the majority did not accept this as a complete understanding of the district from which the jury must be drawn. It held that federal legislation merely defined the outer limits of the district and that when state legislatures created judicial districts, those were the districts to which the vicinage require-

54. Heller, supra note 22, at 28.
57. Heller, supra note 22, at 33.
58. See id. at 31-34.
59. Id. at 34.
60. 9 Cal. 3d at 554, 558-59, 510 P.2d at 711, 714, 108 Cal. Rptr. at 351, 354.
61. Id.
ment of the Sixth Amendment referred. However, since the majority did not explain where it derived the “immutable mandate” that the “district, however large or small, from which the jury is drawn must include the area wherein the crime was committed,” its legislative interpretation cannot be evaluated. One can only assume that it read between the lines of the Sixth Amendment to reach a result which it judged consistent with the purposes of the amendment.

Even if a complete record of the debates and conferences had been available to the Jones court, the intent of the First Congress would still have been an “elusive quarry.” But without such information, neither the majority’s nor the dissent’s interpretation can be judged as clearly superior. The history which is available can be examined and inferences can be drawn, but a definitive understanding of the intent of the framers cannot be achieved.

**Application of the Sixth Amendment to the States—Two Possible Explanations for the Majority Position**

Even though the majority did not explain what circumstances surrounding the process of enacting the Sixth Amendment would indicate that the First Congress intended the vicinage provision to apply to state districts, an analysis of the treatment of the vicinage requirement by the First Congress provides one possible explanation. The concept of a jury from the neighborhood was an element of the English jury system and stemmed from the early practice of using jurors who would be familiar with the contested facts. At least some of the Colonies incorporated this concept of vicinage into their laws; it was also a provision in the Declaration of Rights of the Continental Congress in 1774. Nonetheless, the Constitution failed to include a narrowly drawn vicinage requirement for that reason among others, it

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62. *Id.* at 554, 510 P.2d at 711, 108 Cal. Rptr. at 351.
63. *Id.*
64. Williams v. Florida, 399 U.S. 78, 92 (1970). Professor Gény has pointed out than an attempt to find legislative intent proceeds from at least two assumptions which are patently false: (1) That the codifier intended to furnish an answer to all problems which would arise within the ambit of the code, and (2) That the codifier was successful in carrying out such an ambitious scheme. GÉNY, MÉTHODE, discussed in J. STONE, LEGAL SYSTEM AND LAWYERS’ REASONINGS 217 (1964).
65. HELLER, supra note 22, at 8.
66. The Charter of Fundamental Laws of 1676 of West Jersey contained a requirement that the jury be “men of the neighborhood.” *Id.* at 17. The Virginia Bill of Rights required a jury of the vicinage. *Id.* at 23. The Georgia Constitution of 1777 guaranteed trial within the county of the crime. *Id.* at 21 & n.54.
67. *Id.* at 21 & n.54.
68. A “narrowly drawn requirement” would specifically guarantee a jury of the vicinage which would have the common law interpretation of a jury of the neighborhood. It would thus have been an inflexible concept, subject to change only as the
was vigorously attacked in state constitutional conventions. These attacks were successfully rebutted by arguments that knowledge of the neighborhood was no longer essential to the performance of the jury’s function and that the diversity in state jury vicinage practices precluded any enactment of a more detailed constitutional provision. James Madison described this diversity in a letter to Edmund Pendleton: “In many of the States juries, even in criminal cases, are taken from the State at large; in others, from districts of considerable extent; in very few from the county alone.” There were subsequent attempts to include a narrowly drawn vicinage requirement in the Bill of Rights, but these attempts also were unsuccessful because of the diversity in state practices.

Although the Jones majority did not make this argument, the fact that diverse state practices apparently helped defeat a narrow vicinage requirement can be interpreted to support the majority’s position that state legislation may affect the Sixth Amendment’s vicinage requirement. If state legislation were not included in the phrase “which district shall have been previously ascertained by law,” then the choice of that phrase rather than a more narrowly drawn vicinage requirement would not have protected the diversity in state practices. If the Sixth Amendment permits only federal legislation to define effectively the vicinage requirement, then the diversity in state practices had already been undermined by the 1789 federal Judiciary Act. In 1789, all but two of the federally drawn districts were state-wide; thus, the neighborhood concept of some of the states would have been destroyed by that act. Under the Jones majority view, whenever a state defines neighborhood should change. The narrow requirement contrasts with the broad, flexible Sixth Amendment provision whereby the framers permitted legislation to alter the nature of the district. See id. at 22-26.

69. Patrick Henry and William Grayson of Virginia and John Holmes of Massachusetts were among those who predicted that the jury could be used as a weapon against the people. They reasoned that if a jury could be chosen from any part of the state, it could be chosen to suit the purpose of those in power. Id. at 25-26. Professor Heller suggests that the emotion of these attacks may be partially attributed to a reaction against the English practice of removing prisoners for trial to England or to another colony; he also points out a possible confusion between venue and vicinage on the part of these men. Id. at 93.

70. Id. at 27.

71. This argument was stated in reports of the state conventions on adoption of the federal constitution. In the Massachusetts convention it was stated that only by reason of the diversity in the practices of the various states that a more detailed provision was not used. In the North Carolina convention one speaker stated that the rule could not have been drawn more narrowly without changing the rule of some of the states. Id.

72. Id. at 32.

73. See id.

74. Act of Sept. 24, 1789, ch. 20, § 2, 1 Stat. 73.
a jury selection district, regardless of whether it is a state-wide district or only a neighborhood district, that is the district from which the jury must be drawn to try a crime committed in that district.\textsuperscript{75} This view clearly protects diversity in state jury selection practices.

The foregoing analysis faces difficulties resulting from the long standing position of the Supreme Court that the trial provisions of the Bill of Rights applied only to federal courts.\textsuperscript{76} By the same token, the analysis casts some doubt upon the Supreme Court's traditional interpretation of the framers' intent. Since the First Congress evidently believed that whatever it did with the vicinage requirement would affect state practices, it may well be that the Sixth Amendment was originally intended to apply directly to the states.\textsuperscript{77}

Even assuming the Sixth Amendment's right to trial by jury was never intended to apply directly to the states but applies only because of the Fourteenth Amendment and Duncan v. Louisiana,\textsuperscript{78} a second possible explanation not employed by the Jones majority can be made for the majority position that the federal definition of a district should not control the vicinage requirement in state courts. In Johnson v. Louisiana,\textsuperscript{79} Mr. Justice Powell expressed the view that the Fourteenth Amendment should not be seen as incorporating every element of the Sixth Amendment.\textsuperscript{80} This position had been espoused earlier by Chief Justice Burger\textsuperscript{81} and by Justices Stewart,\textsuperscript{82} Harlan\textsuperscript{83} and Fortas.\textsuperscript{84} Advocates of this view believe that only those elements of federal jury practice which are essential to due process should be applied to state

\textsuperscript{75} See text accompanying note 23-24 supra.
\textsuperscript{77} As early as 1825 William Rawle argued that the provisions of the Sixth Amendment which require notice of the charges, confrontation of witnesses, compulsory process for obtaining witnesses and right to counsel applied to the states. W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 125 (1825). Rawle himself did not think the vicinage provision applied to the states, id. at 124-25, but his willingness to accept the application to the states of some parts of the Bill of Rights, id. at 120-30, suggests that the intent of the framers is not quite so obvious as Supreme Court cases have suggested.
\textsuperscript{78} 391 U.S. 145 (1968).
\textsuperscript{79} 406 U.S. 356 (1972).
\textsuperscript{80} 406 U.S. at 366-80 (Powell, J., concurring).
The Jones majority acknowledged that the vicinage requirement was an "essential feature," and thus even under Justice Powell's view the vicinage requirement would apply to the states. However, it is not obvious that a federal definition of the jury-selection district is essential to due process. The better interpretation, this explanation would continue, is that in state courts the district which "has been previously ascertained by law" is a district defined by state legislation. The main criminal function of federal courts is to try cases in which the entire country has an interest, while the states have been left with state-wide and local concerns. Thus it seems appropriate that the nature of the vicinage requirements which are applicable to each level of the judiciary should differ. Although Justice Powell's view of the Fourteenth Amendment has not yet been embraced by a majority of the present Supreme Court, explicitly permitting the states to control jury vicinage districts would be a particularly appropriate expression of the potentially beneficial fruits of this view.

The Jones majority may have had in mind Justice Powell's view that not all elements of federal jury practice apply to the states when it located in the Sixth Amendment the purportedly immutable mandate that the "district, however large or small, from which the jury is drawn must include the area wherein the crime was committed." If this view of Justice Powell played a part in the majority's locating this mandate, it is unfortunate that it failed to clearly delineate its reasoning. Other state courts will now have to utilize other parts of the Jones decision and examine the history of the Sixth Amendment themselves in order to decide jury vicinage issues.

Prior California and Federal Vicinage Decisions

Probably because no authority exists, neither the majority nor the dissent of the Jones court cited any compelling state or federal authority for its interpretation of the vicinage requirement. Of the few Cali-

86. 9 Cal. 3d at 551, 510 P.2d at 709, 108 Cal. Rptr. at 349.
87. The Constitution defined treason and authorized Congress to punish counterfeiting, piracies and felonies on the high seas, and offenses against the law of nations. U.S. CONST. art. I, § 8; id. art. III, § 3. Early federal criminal legislation dealt with revenue fraud, interference with federal justice, arson of a federal vessel, extortion by a federal officer and theft by an employee from the Bank of the United States. See, e.g., Act of July 31, 1789, ch. 5, § 35, 1 Stat. 46. In modern times, except where it is used to punish conduct of local concern with which local authorities are unable or unwilling to cope, federal jurisdiction is used primarily to punish antisocial conduct of distinctly federal concern or to secure compliance with federal administrative regulation. See Schwartz, Federal Criminal Jurisdiction and Prosecutors' Discretion, 13 L. & CONTEMP. PROB. 64, 64-66 (1948).
88. 9 Cal. 3d at 554, 510 P.2d at 711, 108 Cal. Rptr. at 351.
fornia appellate decisions on geographic discrimination, all but *People v. McDowell*, relied upon by the dissent, were decided before *Duncan v. Louisiana* held that the Sixth Amendment right to jury trial was applicable to the states. *McDowell*, a court of appeals decision, involved an unsuccessful challenge to the exclusion from jury-selection pools of residents who lived over twenty-five miles from the courthouse. Although in *McDowell* the challenge to geographical exclusion was denied, *Jones* does not contradict that decision because the crime in *McDowell* was committed within the area from which the jurors were drawn.

While the federal courts, and particularly the United States Supreme Court, have decided many jury selection cases in the ninety-three years since the first successful Fourteenth Amendment jury selection challenge in *Strauder v. West Virginia*, the few Supreme Court decisions relevant to geographical discrimination have been inconclusive as authority for the vicinage requirement in state courts. Three old Supreme Court cases address the vicinage issue, but because they all involve federal district court juries, they are precedent only for interpretation of the federal court vicinage requirement. If these cases had addressed the policy considerations behind the vicinage requirement or the historical basis for the requirement, perhaps such discussion would have given the *Jones* court direction in determining the applicability of federal vicinage to state courts. However, because none of the decisions explored these considerations, the *Jones* court had no Supreme Court direction for its determination of the proper district for state court vicinage purposes.

89. 27 Cal. App. 3d 864, 104 Cal. Rptr. 181 (1972).
92. See 27 Cal. App. 3d at 871-75, 104 Cal. Rptr. at 185-88.
93. See id. at 868, 104 Cal. Rptr. at 183. Fontana, where the crime took place, is less than fifteen miles from San Bernardino. The jurors were drawn from within a twenty-five mile radius from San Bernardino.
95. 100 U.S. 303 (1880). See Kairys, *supra* note 41, at 772.
96. In *Lewis v. United States*, 279 U.S. 63 (1929), the trial in the Eastern District of Oklahoma was upheld even though residents of Tulsa, where the crime was committed, were removed by the clerk and jury commissioner from consideration for jury duty in that court. In *Ruthenberg v. United States*, 245 U.S. 480 (1918), it was held proper to draw jurors from only one division of the federal district, but there was no indication whether the crime was committed in that division. *Agnew v. United States*, 165 U.S. 36 (1897) held that it was proper to draw jurors from only one county of the federal district even though the crime was committed in another county.
Despite language indicating the impermissibility of geographical discrimination,97 such discrimination has never been held to be unconstitutional by the Supreme Court. In fact, lower federal courts have upheld various manifestations of geographical discrimination, even as recently as 1972.98 However, the different lower federal courts have taken various positions regarding vicinage issues: around the turn of the century some held that jurors need not be drawn from the whole federal district;99 others held that even if divisions within the district had been created, the jury might still be drawn from the whole district.100 United States v. Wan Lee,101 cited approvingly by the Jones majority,102 is the only case which has indicated that if juries were drawn from each division they must have been used only to try crimes committed within that particular division.103 However, since the statement was dictum in Wan Lee, a case decided in the nineteenth century, that language is certainly not compelling authority today. In addition, because all of these lower federal court decisions are from other jurisdictions none is authority for the Jones court;104 since they all involve federal court juries, none would be helpful to the Jones court in defining state court vicinage.

The Policy Considerations Implicit in Jones

Faced with an inconclusive indication of the framers’ intent and a lack of precedent, the Jones court was given the opportunity to make a judicial choice. The nature of such choice has been explained by Professor Julius Stone:

[T]o assert the availability of judicial choices is not the same as to assert judicial arbitrariness in decision, or even judicial “legislative power” in the sense in which we attribute this to the legis-

98. See, e.g., United States v. Florence, 456 F.2d 46 (4th Cir. 1972) (upheld conviction by jury exclusively from Elkins division of Northern District of West Virginia for crime committed in Parkersburg division); United States v. Gottfried, 165 F.2d 360 (2d Cir.), cert. denied, 333 U.S. 860 (1948) (upheld conviction by jury drawn exclusively from the counties of Manhattan, Bronx and Westchester when crime was committed in Ulster County); Spencer v. United States, 169 F. 562 (8th Cir. 1909) (upheld conviction even though residents of Polk County, Iowa were automatically excluded and the crime was committed in Polk County).
100. See, e.g., Spencer v. United States, 169 F. 562 (8th Cir. 1909); Clement v. United States, 149 F. 305 (8th Cir. 1906), cert. denied, 206 U.S. 562 (1907).
101. 44 F. 707 (N.D. Wash. 1890).
102. 9 Cal. 3d at 554 n.5, 510 P.2d at 711 n.5, 108 Cal. Rptr. at 351 n.5.
The effect of the exercise of the judicial duty to choose within the leeways left by *stare decisis* is, of course, to produce new law, and control and guide its growth; in this sense it may be called "creative" or even "legislative". But unlike that of the parliamentary legislator, the judicial choice is usually between alternative decisions and modes of reaching them presented to the judge by the authoritative materials of the law. These materials do, of course, include areas of settled rules which it would require parliamentary action to overcome. But they also present (especially at the appellate level) guide posts to alternative solutions which remain legally open, beyond the settled areas.  

The majority in *Jones* cloaked its judicial choice by stating that it was distilling a constitutional principle from *Alvarado v. State* and *Maryland v. Brown*. However, since neither lower federal court nor state court decisions from other jurisdictions are binding on California courts, the majority's decision must have been based upon policy considerations. Like the majority, the dissent relied only upon an inconclusive indication of the framers' intent and upon cases which were not binding upon the court. Thus its decision must also have been based largely upon policy considerations.

Since both the majority and dissenting positions appear to be based primarily on policy, the obvious question is what policy considerations motivated each side. The dissent expressly indicated that it was concerned that the majority's holding could "significantly impede the administration of criminal justice in Los Angeles." Unfortunately, the only clue to relevant policy considerations provided by the majority was its extensive reliance upon *Alvarado*. The majority's obvious sympathy with the *Alvarado* holding can best be understood as a recognition of the diversity of experience and attitudes of various racial groups and as a belief that this fact should take precedence over mere administrative convenience. But the implications of the majority's language go even further and indicate that attributes of particular

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109. United States v. Florence, 456 F.2d 46 (4th Cir. 1972) and United States v. Butera, 420 F.2d 564 (1st Cir. 1970), are both lower federal court decisions from other jurisdictions. State v. Kappos, 189 N.W.2d 563 (Iowa 1971), cert. denied, 405 U.S. 982 (1972), is a state court decision from another jurisdiction whereas People v. McDowell, 27 Cal. App. 3d 864, 104 Cal. Rptr. 181 (1972), is a California Court of Appeals case and is therefore not binding on the California Supreme Court.
110. 9 Cal. 3d at 564, 510 P.2d at 718, 108 Cal. Rptr. at 358.
111. See text accompanying notes 31-36 supra & notes 128-32 infra.
geographic groups exist which prohibit those groups from being inter-changed for mere convenience in administration.\textsuperscript{112}

Neither the majority nor the dissent critically examined the policy questions which were important to the position each side took. Thus, there was no explicit confrontation between the policies which each side considered important. Instead, the open confrontation was between each side’s interpretation of the framers’ intent and choice of cases upon which to rely. Any discussion of the underlying policies was left to commentators and future decisions in the area.

**How Should the “District” be Defined?**

A suitable answer to the question of how the Sixth Amendment vicinage requirement should be interpreted is more important than what is revealed by Jones’s inconclusive analysis of the incomplete legislative history of the Sixth Amendment\textsuperscript{113} and its review of contradictory decisions from other jurisdictions.\textsuperscript{114} Unfortunately, Jones did not answer that question. The following discussion of population growth and the legislative response, trends toward decentralization, and the interests of both the accused and society in the jury and the opportunity for all members of society to serve on juries therefore attempts to set forth some of the policy considerations the court should have discussed.

**Population Growth, Legislative Responses and Trends Toward Decentralization**

A cursory examination of population comparisons, California legislative action and federal congressional action suggests that the Jones majority made the better decision in choosing the narrower definition of a jury district. Federal judicial districts of between 55,000 and 400,000 were deemed appropriate in 1789.\textsuperscript{115} Under the minority’s view in Jones, 10.35 million people would be included in the “district wherein the crime was committed.”\textsuperscript{116} This vast disparity alone should

\textsuperscript{112} See text accompanying note 35 supra.

\textsuperscript{113} See text accompanying notes 53-64 supra.

\textsuperscript{114} See notes 106-109 and accompanying text supra.

\textsuperscript{115} In 1790 the population of West Virginia was just over 55,500; Virginia, the most populous state, had a population of nearly 700,000. U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, 13 (1960). The Judiciary Act of 1789 created thirteen districts: one district for each state except Massachusetts and Virginia, which were each given two. Act of Sept. 24, 1789, ch. 20, § 2, 1 Stat. 73.

\textsuperscript{116} The seven counties embraced by the Central District of California, Los Angeles, Orange, Riverside, San Bernardino, San Luis Obispo, Santa Barbara, and Ventura, had a total population of approximately 10.35 million in 1970. See CALIFORNIA DEP’T OF FINANCE, STATE OF CALIFORNIA, CALIFORNIA STATISTICAL ABSTRACT 9 (1972).
raise doubts about the wisdom of the minority's understanding of the appropriate vicinage requirement.

Apparently in response to population growth, the California legislature created the first branch court in 1925. This action demonstrated its doubt that one judicial district was adequate for Los Angeles County. The legislature reaffirmed its doubt during the succeeding three decades by endorsing the continued haphazard growth of the branch court system. In addition, the Congress of the United States recently indicated its support for a narrowed concept of jury vicinage. In the Declaration of Policy section of the Federal Jury Selection and Service Act of 1968, Congress stated:

> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to . . . juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy . . . that all citizens shall have the opportunity to be considered for service on . . . juries in the district courts . . . and shall have an obligation to serve . . .

117. The first branch superior court was established in Long Beach in 1925. The first bills designed to create branch courts provided that there must be a branch court in any city of at least 50,000 population whose city hall was fifteen or more miles from the county courthouse. For over thirty years the distance and population requirements were juggled by branch court bills phrased generally, but designed to create specific branch courts. Second Partial Report of the Joint Judiciary Committee on Administration of Justice 26-28 (1959). By 1957 there were ten branches in addition to the Civic Center Court in downtown Los Angeles. Town Hall—The Trial Courts of the Los Angeles Metropolitan Area 13-15 (1957). As of 1972 there were a total of nine geographical areas constituting specifically named districts, of which the Central District was one. Adams v. Superior Court, 27 Cal. App. 3d 719, 722, 104 Cal. Rptr. 144, 146-47 (1972). The legislature may have been motivated by a concern for administrative convenience rather than by a concern that the judicial process not become too far removed from the communities as they expanded. However, the legislature should be given the benefit of an assumption that the latter concern was given at least some attention.

118. 28 U.S.C. § 1861 (1970) (emphasis added). It is unfortunate that this act, which was apparently intended in part to insure local juries in the divisions, probably caused the Northern District of California to take steps in the other direction. Before the act there was an Oakland division and a Eureka division in addition to those in San Jose and in San Francisco; most of the trials, however, were transferred to the San Jose and San Francisco divisions. Rather than altering this practice of transferring trials and providing Oakland and Eureka division residents an opportunity to serve on juries in their respective divisions, the Northern District has consolidated these two divisions with the San Francisco division. The result has been that now residents of the old Eureka division are denied a realistic opportunity to serve on juries in the Northern District. See Second Amended Plan of the U.S. Dist. Court for the N. Dist. of Cal. for the Random Selection of Grand and Petit Jurors (filed Feb. 22, 1973, Clerk, U.S.D.C., S.F.) [hereinafter cited as Second Amended Plan]. See generally notes 145-54 infra.
In determining that juries should be selected from a cross-section of the community in the division, the Congress was recommending a smaller jury selection district than the federal district which the Jones dissent found appropriate. The focus in the provision on litigants and citizens negates any possible argument that administrative convenience is the only reason for the division of twenty-four states into more than one federal district\(^1\) and the further segmenting of some of those districts into divisions.\(^2\)

Thus population growth, state legislative action and federal policy all point to the desirability of choosing the narrower definition of a jury district for vicinage purposes. Such a narrowing would also comport with the trend in many other areas of society towards local control and decentralization.\(^3\) However, the existence of this social trend by itself should add nothing to the reasons for narrowing the district. A good argument can be made that the trend in these areas is not a result of any inherent advantages of local control so much as it is a reaction to failures in centralized control.\(^4\) The important question is not what trends are present in society today, but rather what society needs from the jury system and whether the system is meeting those needs.

In determining societal needs with respect to the size of the community from which a jury should be drawn, two significant interests must be weighed. The first interest is that of the accused; for a long time it was the only interest which the Supreme Court recognized.\(^5\) The other is the interest of the general community, or more specifically the community where the crime was committed. An examination of the interest of the accused leads to the conclusion that the community’s interest is the more important interest to consider.


\(^{122}\). See Lipset, The Ideology of Local Control, in Education and Social Policy 21-32 (C. Bowers, I. Housego & D. Dyke eds. 1970). The movements from local to central control and then back to local control in education were described by Professor Seymour Lipset as reactions to the failures of the incumbent system.

The Interest of the Accused

If a consensus existed among accused persons that either a small jury district or a large jury district was preferred, the interest of the accused would be an important factor in determining how the Sixth Amendment district should be defined. However, it is unlikely that any such consensus exists. Instead, probably the only accurate generalization about preferences among defendants is that they prefer the jury which is most likely to acquit or to give a light sentence. Whether an accused's preferred community will be the most local or the least local probably depends upon the characteristics of the individual defendant and the individual crime.

For example, a defendant with a good local reputation who has been accused of committing a crime in his own neighborhood that is not considered dangerous or morally wrong by the community would prefer a locally selected jury. On the other hand, if his reputation were bad or if the crime were dangerous or considered morally wrong by the community, he might prefer as few local residents as possible. In addition, even if the jury were neutral toward the individual and the crime, knowledge of local conditions could work against the defendant. The University of Chicago Jury Project's study of the operation of the jury examined a case where having a local jury was detrimental to the defendant. The researchers found that one defendant was convicted because several jurors "knew" that he was lying when he said he was not familiar with a tavern that the jurors knew was only two blocks from his home. Thus, the multiplicity of factual circumstances coupled with the general self-interest of the accused makes it impossible to generalize about the preferred jury vicinage requirement from the viewpoint of the accused.

The Interest of the Community

The more important question is which jury vicinage requirement most nearly satisfies the interests of the community. In other words, is it better for society to require only that jurors be drawn from anywhere within the federal judicial district, or to require them to be drawn from the smaller districts designated by state legislation as jury selection districts? Stated in general terms, should the jury be made up predominately of people who can think of themselves as members of an amorphous group of citizens and who thus can view the facts with the detachment of persons not directly threatened by the crime, or should it be composed of people at the other extreme who live so close to the crime that they identify with the victim and thereby possibly

add an element of personal involvement to their decisions? Or is there some better solution between these extremes?

One commentator has suggested that the answer to these questions should depend upon the nature of the crime. The basic theme of this suggestion is that the jury should reflect the community which is affected by the crime. This theme was explained by contrasting two examples: the first was that of a defendant accused of the murder of an anonymous person who had been walking the streets of a city. The only reason for this murder was to take the victim’s money. It was suggested that this crime should be tried by a jury drawn from the whole metropolitan area because that assailant might kill anyone else walking anywhere in the city. The commentator contrasted this murder with the murder of a husband by a wife. That act threatens a much smaller group, probably only those who would have occasion to deal with the woman in the future on a personal level. Thus, that crime should be tried by a jury drawn from that smaller threatened group. The adoption of this suggestion would create staggering administrative problems which might require a hearing simply to determine what jury vicinage is relevant to the particular crime. This proposal does, however, point out one important consideration for determining the proper size of the jury selection district. That is, jurors should live close enough to the location of the crime so that they believe that they have a stake in their decision. Jurors could then identify with both the victim and a possible innocent defendant.

An extreme example of a jury which could not identify with either the defendant or victim and thus had no stake in the decision occurred in Alvarado v. State, relied upon by the Jones majority. Cloyd Alvarado, a Native Alaskan, was one-quarter Aleut by blood and had lived over half his life in the small village of his alleged crime. His trial was held in Anchorage, 450 air miles away from the village. By virtue of a fifteen mile jury selection radius, nearly all the residents of the native villages were excluded from the relevant jury selection pool. There were many drastic cultural differences between the

126. Id. at 17-18.
127. Not only would it be necessary to determine what group of people would be affected by such a crime, but if an issue of motive or identity were involved, that issue would also have to be resolved before the jury could be selected. For instance, if the actual motive in the first example in the text accompanying note 126 supra were a family feud, or if the actual assailant in the second example were a stranger, then the affected group in each would be drastically changed.
129. Id. at 893.
130. Id. at 895, 900, 903.
City of Anchorage and Alvarado's native village, Chignik. The Alvarado court highlighted some of these differences: In Chignik "there is no television or running water; there are no roads or cars. Principal means of access to the village is by a weekly plane. Chignik's only industry is a single cannery, which operates during the summer." These cultural differences were, in the words of the Jones majority, "dramatically illustrative of one of the purposes of the constitutional rule [that] a criminal defendant is entitled to a jury drawn from a jury panel which includes jurors residing in the geographical area where the alleged crime occurred." In contrast to Alvarado, the Community Youth Responsibility Program (CYRP) in East Palo Alto, California, presents an example of the use of a "jury" which has a stake in its decision and which therefore can identify with both the victim and the defendant. About fifteen percent of the juvenile arrests in the unincorporated, predominantly black area of East Palo Alto are referred to CYRP. Except for victimless crimes, which proceed directly to counseling, the referred arrests are presented to a community panel consisting of four adults and three youths. The panel informally hears evidence, decides guilt or innocence, and then recommends counseling, tutoring and/or work tasks for periods of time which are determined by the panel. Members of the community created this program to meet a need which they felt was not adequately met by county institutions such as the police, courts and probation departments. In addition to combatting crime, the program has given an opportunity to many local people for involvement with the community's youth and the community itself. A natural result of the program has been an elevation of the community's respect for at least the juvenile component of the criminal justice system.

131. Id. at 894.
132. 9 Cal. 3d at 554, 510 P.2d at 711, 108 Cal. Rptr. at 351.
133. Information regarding this program is contained in untitled reports of the Community Youth Responsibility Program, 2220 University Ave., East Palo Alto, Cal. 94303, covering the period 1970-72 [hereinafter cited as CYRP untitled reports]. Much valuable information was obtained in an interview with Robert B. Evans, Program Director of the Community Youth Responsibility Program, in East Palo Alto, July 25, 1973 [hereinafter cited as CYRP interview].
134. See CYRP untitled reports, supra note 133.
135. Id.
136. Of 200 cases, only three juveniles were acquitted in the first two years of the program. According to the program director, most of the others admitted their guilt in the hearing. Id.
137. Often the penalty, or work task, is performing labor which is related to the offense. Examples of the tasks are repairing broken windows and replanting a flower bed tramped in a burglary. Id.
138. Id.
139. CYRP interview, supra note 133. The success of CYRP in reducing crime
The CYRP arrangement is susceptible to the criticism that it presents a jury which is far from impartial. One possible rebuttal to that criticism would contend that CYRP's only partiality is its concern for the community's welfare. However, the objection that a narrow jury vicinage requirement may lead to an inability to empanel an impartial jury is serious and should be dealt with more fully. One response is that the state legislatures can alleviate the problem by drawing districts large enough to minimize the likelihood that jurors will be partial. But a more cogent response is that even if the jury districts are drawn narrowly, the defendant is protected by his right to a change of venue.

The dramatic contrast between the Alvarado jury and the CYRP "jury" suggests that even if neither extreme meets all society's needs, at least a good compromise may exist. It is not the function of this note to suggest at what precise point between the extremes that compromise should fall. However, it should be clear that the Jones majority's decision allows for that compromise to be made by state legislatures. The state legislature is free to draw jury selection districts smaller than East Palo Alto or as large as the federal districts. But once the jury selection district is defined, the Jones holding requires that the jury for crimes committed in that district must be drawn from it. If the Jones dissent had been adopted, even though the legislature had defined certain jury selection districts, trials could have been conducted before a jury drawn from anywhere within the federal judicial district. Thus, the Jones majority's position furnishes a much greater opportunity for the legislature to satisfy societal needs regarding jury

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140. The Sixth Amendment contains a guarantee that trial be by an impartial jury. U.S. Const. amend. VI.

141. Cal. Pen. Code § 1033 (West Supp. 1973), provides that "[i]n a criminal action pending in the superior court, the court shall order a change of venue: (a) On motion of the defendant, to another county when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be had in the county."
selection districts than the dissent's position does. It allows a balance between the dual social interests of selecting juries which have a stake in the outcome of the trial and of empanelling impartial juries.

Opportunity for Individuals to Serve on a Jury

Besides furnishing a jury with a greater stake in the outcome, establishing small jury selection districts for Sixth Amendment vicinage purposes can also provide a greater distribution of the opportunity for individual members of society to serve as jurors. The opportunity to serve on a jury could, in turn, have a beneficial effect upon each individual who served. In writing about American democracy, Alexis de Tocqueville observed: "The jury contributes powerfully to form the judgment and to increase the natural intelligence of a people; and this, in my opinion, is its greatest advantage."142 A similar understanding has been expressed by the Administrative Director of the Circuit Court of Cook County: "A citizen's experience as a juror will contribute substantially to his overall impression of justice prevailing in his community."143 One of the black jurors who was questioned during the University of Chicago Jury Project's study graphically expressed his reaction to jury service:

I was extremely proud... It was... one of the proudest moments of my life... I think it's really a wonderful way in which citizens... can participate in the day to day administration of justice... I got a sense of really belonging to the American community.144

The opportunity for citizens to benefit from and enjoy this important experience can be affected by the interpretation of the Sixth Amendment vicinage requirement. The larger the district for vicinage purposes, the less likely it is that each resident of the district will have a realistic opportunity to serve. Both federal145 and California courts146 espouse the general principle that citizens from all geographic areas must have the opportunity to serve on juries. However, the

145. Compare text accompanying note 118 supra, with Jury Selection and Service Act of 1968, 28 U.S.C. § 1869(e) (1970). Section 1869(e) makes clear that each county or similar political subdivision must be included in some division of the federal district.
146. Thirteen of the fourteen superior courts responding to a questionnaire sent to fourteen of the largest counties in California, on the basis of land area, stated that they constructed their jury pools of residents from all parts of the county. Questionnaire For Superior Courts—Largest Counties, mailed July 23, 1973 by the Hastings Law Journal [hereinafter cited as Questionnaire—Largest Counties].
professed principle of equal opportunity to serve on a jury can be undercuts drastically by the combination of three factors. The first factor is the maintenance of large districts with only one or two court locations in each district.\textsuperscript{147} The second is the provision for automatic excuses from jury duty for people who live beyond a certain distance.\textsuperscript{148} The third factor is the failure to provide per diem pay which is sufficient to support a juror for an overnight stay.\textsuperscript{149} Since travel time may be too great to make the trip daily and expenses too great to stay overnight, by the combination of those three factors some members of society are denied a realistic opportunity to serve on juries because of the location of their homes. Each juror is forced to choose whether to exercise his right to an automatic excuse or to take the personal financial loss accompanying jury duty far from home.

This situation can be remedied in at least two ways: first, by paying realistic expenses and wages for out-of-town jurors\textsuperscript{150} and, second, by tailoring jury districts so that crimes in remote areas would be tried in those areas by juries of "local" residents.\textsuperscript{151} These remedies could be employed either separately or in combination. California's Inyo County offers evidence that the first proposal is feasible. Rather than excluding persons who live a considerable distance from the courthouse, that county pays lodging expenses for jurors who reside over seventy-five miles from the county seat.\textsuperscript{152} While both proposals

\textsuperscript{147} See note 118 \textit{supra}.

\textsuperscript{148} The Jury Selection and Service Act of 1968, 28 U.S.C. § 1863(b)(7) (1970) allows district courts to fix the distances beyond which individuals will be excused on request. The distance is thirty-five miles for the Northern District of California. Second Amended Plan, \textit{supra} note 118, at 5. At least four of California's largest counties give automatic excuses to persons who live beyond a specified distance; that distance ranges between forty and sixty miles from the courthouse. \textit{See} Questionnaire—Largest Counties, \textit{supra} note 146.


\textsuperscript{150} The Uniform Jury Selection and Service Act, approved by the House of Delegates of the American Bar Association on Feb. 9, 1971, prohibits automatic exemptions for people living beyond a specified distance and allows excuses only on a showing of undue hardship, extreme inconvenience or public necessity. It also provides that per diem payments should be made at current wages. McKusick & Boxer, \textit{Uniform Jury Selection and Service Act}, 8 \textit{Harv. J. Legis.} 280, 289-92 (1971).

\textsuperscript{151} The idea of tailoring districts to give opportunity to previously underrepresented groups to serve on juries was suggested in a different context in Note, \textit{The Case for Black Juries}, 79 \textit{Yale L.J.} 531, 547-48 (1970). The author suggested that, in order to insure that black communities have significant representation on trial juries, at least in Northern urban areas the districts should be drawn so that each black community would constitute a vicinage.

\textsuperscript{152} Questionnaire—Largest Counties, \textit{supra} note 146.
would reasonably enable all citizens to serve on juries, the second has the advantage that the average juror would have a greater interest in the outcome of the trial.  

The second proposal also has the further advantage of lessening the impact of cultural differences.

Summary of the Advantages of Small Jury Selection Districts

There appear to be at least four advantages of smaller jury selection districts. First, there would be advantages to the operation of the trial itself by having jurors with a real stake in the outcome of the proceedings. Second, there would be advantages to the community which could become more involved in the judicial process. Third, there would be advantages to society in general created by the more broadly shared respect for the judicial system. Fourth, and finally, there would be advantages to the individual citizen, particularly in a remote area, who would have a better chance to serve as a juror. The major disadvantage would seem to be mainly in increased administrative difficulties.

Since there was no binding authority, at least some of these policy considerations surely must have been among those with which the Jones court grappled in coming to its decision. It is unfortunate for other courts that the Jones majority and dissent did not more fully and explicitly explore these considerations.

Four Potential Implications of People v. Jones for the California Criminal Justice System

There are at least four kinds of factual situations in California which Jones may affect. The first, of course, is the situation involving the transfer of a trial to another district for reasons of administrative convenience. Unless the jury is transferred with the trial or a

153. See text accompanying notes 125-39 supra.
154. See text accompanying note 131 supra.
155. See text accompanying notes 126-39 supra.
156. See text accompanying note 139 supra.
157. Id.
158. See text accompanying notes 142-54 supra.
159. See text accompanying note 110 supra.
160. Jones was only one among many defendants from the Central District who were tried by juries from the Southwest district; from May, 1970, until the fall of 1972 all trials from the 77th Street precinct were transferred. People v. Jones, 9 Cal. 3d 546, 548, 510 P.2d 705, 707, 108 Cal. Rptr. 345, 347 (1973). At least seven California counties in addition to Los Angeles have branch courts. Three of these counties do not conduct jury trials at the branch courts, but the other four could be affected by the Jones ruling in similar trial transfers. One county has admitted to transfers for reasons other than the inability to empanel an impartial jury. Questionnaire for Superior Courts—Most Populous Counties, mailed July 23, 1973, by the Hastings Law
county-wide jury is used, *Jones* clearly means that a Sixth Amendment challenge to the competency of the jury would have to be sustained.

A second kind of situation, closely related to *Jones*, would be one in which the trial is transferred to another district upon the insistence of the prosecution for reasons of adverse local reaction. In that type of case, the *Jones* majority's approval of dictum in *Maryland v. Brown* would indicate that, absent enormous administrative burdens, either the jurors should be transferred from the district of the crime to the district of the trial, or, alternatively, a county-wide jury should be used.

The third factual situation upon which *Jones* will undoubtedly have some impact is the type exemplified by *People v. McDowell*.

San Bernardino, the county where McDowell was tried, is one of at least three counties that automatically exclude from jury service residents who live outside a specified radius from the county seat. While such a system is not rendered invalid per se by *Jones*, a defendant whose crime was committed outside that radius appears to have a valid constitutional argument after *Jones*. It would be a difficult task for a lower California court to ignore the supreme court's assertion that it is an immutable mandate of the Sixth Amendment that the district from which the jury is drawn must include the area of the crime.

A slight variation on the *McDowell* situation arises when, rather than a mandatory exclusion, there is an automatic excuse upon request for people who live beyond a certain distance. A defendant whose crime was committed in the area of the automatic excuses could argue that this was, in effect, depriving him of a jury of the district of the crime because residents of the area of the crime had no reasonable opportunity to serve on the jury. The per diem allotment and the percentage of excuses would probably be important factors in resolving such an argument.

*Journal* (nine of ten counties responding). This problem could be remedied by transferring jurors with the trial, or by using county-wide juries.

161. See text accompanying note 46-49 *supra*.


164. The other counties are Tulare and Imperial. *Questionnaire—Largest Counties, supra* note 146.

165. 9 Cal. 3d at 554, 510 P.2d at 711, 108 Cal. Rptr. at 351. A closely related factual situation arose in *State v. Kappos*, 189 N.W.2d 563 (Iowa 1971), *cert. denied*, 405 U.S. 982 (1972). There the judicial district included the whole county, but the jurors were drawn from only one city in the county. This situation would likewise fall within the holding and language of *Jones* if the crime were committed outside the city.

166. See note 148 *supra*.

167. See text accompanying notes 145-154 *supra*.
The *Jones* decision has already been applied once by the Second Appellate District of the California Court of Appeals. In *People v. Casillas*,\(^{168}\) the defendant's conviction was overturned although he had been tried by the court and not a jury. The court of appeals held that the defendant did not waive his right to a jury trial in the Central District of Los Angeles; he had agreed to be tried by the court in the Southeast District only after the trial court had denied his motion to be transferred to the Central District.\(^{169}\) Thus, *Jones* has already had an impact, and probably will continue to have some impact upon defendants and courts, at least until jury selection and trial transfer procedures in California begin to conform to *Jones*'s requirements.

**Conclusion**

The California Supreme Court has now added its name to the short list of courts that have attempted to define the Sixth Amendment vicinage requirement. The *Jones* decision will be important to California; it will ensure that trials are not transferred away from local juries and that residents of all parts of the state will be considered for jury duty in at least some cases. Unfortunately, the majority failed to explain a crucial step in its reasoning, that is, how it determined that there was an immutable mandate of the Sixth Amendment that the district must include the area where the crime was committed, regardless of the size of the district. It also failed to explain the policy considerations behind its decision.

The court did, however, come to the better result. Under this decision the opportunity for all citizens to serve on juries will be improved. In addition, the concept that the jury should be a body concerned with the matter before it will be enhanced. Finally, rather than having been forced to accept the versions of jury vicinage districts established by federal legislation to fulfill the needs of federal courts, the state legislature has been given the opportunity to define jury vicinage districts to meet the needs of the state's communities.

*John E. Darr*

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\(^{169}\) *Id.* at 1080-81, 109 Cal. Rptr. at 580.

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