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## Crossing Eight Mile: Juries of the Vicinage and County-Line Criminal Buffer Statutes

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# CROSSING EIGHT MILE: JURIES OF THE VICINAGE AND COUNTY-LINE CRIMINAL BUFFER STATUTES

Brian C. Kalt\*

*Abstract:* Several state statutes allow the state to choose the county in which to prosecute a person who allegedly committed a crime near a county line. Because these buffer statutes apply even in cases where the location of the crime is not in doubt, they are inappropriate on two levels. First, they are needless as a matter of policy; other statutes solve all of the problems that buffers purport to address, but without the detrimental effects. Second, they conflict with the principle—traditional in some states but constitutionally required in others—of trial by a jury of the vicinage, i.e., from the neighborhood in which the crime was committed. While theorists have recently argued that local juries are important because they allow communities to govern themselves, courts’ treatment of buffer statutes makes it clear that, in practice, vicinage is not considered from this community-centered perspective.

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## INTRODUCTION

Eight Mile Road, which separates Detroit from its northern suburbs, is one of the starkest county lines in the country. The deep divide between the two sides of the road was depicted powerfully in the movie *8 Mile*<sup>1</sup> and was at the heart of—and exacerbated by—the famous busing case of *Milliken v. Bradley*.<sup>2</sup> Put simply, Detroit is poor and black.<sup>3</sup> Oakland County, north of Eight Mile, is rich and white.<sup>4</sup>

Clarence Terrell lived in Detroit.<sup>5</sup> One day he looked out onto his front lawn to see two police officers chasing his sister, Kim, and a third officer striking his sister Kelly hard on the back of her neck.<sup>6</sup> Terrell

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1. 8 MILE (Universal Pictures 2002).

2. 418 U.S. 717 (1974) (rejecting multidistrict busing plan).

3. The 2000 Census indicates that Detroit had a median household income of \$29,526 in 1999, and that eighty-two percent of its residents were black. U.S. Census Bureau, *American FactFinder* (2000), at <http://factfinder.census.gov>.

4. The Census showed that Oakland County had a median household income of \$61,907 in 1999, and that eighty-three percent of its residents were white. *Id.* In the movie *8 Mile*, the key division was between Detroit and Macomb County. *See* 8 MILE, *supra* note 1. Macomb County is east of Oakland County, and it is also much whiter (ninety-three percent white) and much richer (median household income in 1999 of \$52,102) than Detroit. U.S. Census Bureau, *supra* note 3.

5. Defendant-Appellee's Brief at 1, *People v. Terrell* (Mich. Cir. Ct. Aug. 2, 1995) (No. 94-DA6142-AR) [hereinafter Terrell's Brief]. The title on Terrell's brief is inaccurate; Terrell was the appellant in the case.

6. *Id.* at 1–2. The prosecution's brief does not contest the facts recounted here unless otherwise noted. *See* Appellee's Brief at iv, *People v. Terrell* (Mich. Cir. Ct. Aug. 2, 1995) (No. 94-DA6142-AR) [hereinafter Prosecution's Brief].

I encountered this case when it came before Judge Alice Gilbert of Michigan's Sixth Circuit Court in Oakland County on appeal. I worked for Judge Gilbert in the summer of 1995 after my first year in law school. The opinions in this Article are not necessarily shared by Judge Gilbert or anyone else. Indeed, Terrell's attorney did not challenge the statute on any grounds, and, as I recall, essentially conceded the case when it was brought up.

attacked the third officer.<sup>7</sup> Terrell was not arrested, but some time later he was charged with misdemeanor assault, for which he was convicted after a jury trial.<sup>8</sup>

Terrell's crime was committed entirely in Detroit, and no one claimed that a Detroit jury would have been unduly biased. Nevertheless, Terrell was tried and convicted on the other side of Eight Mile—in Ferndale, Oakland County, by six Ferndale jurors.<sup>9</sup> One can imagine that the case might have played differently to a Detroit jury: Ferndale's population is ninety percent white, while Detroit's is eighty percent black; Ferndale's median household earns over fifty percent more than Detroit's.<sup>10</sup> More to the point, police–citizen relations are very different in the city than they are in the suburbs, and a scuffle between a Detroiter of any race<sup>11</sup> and a suburban policeman would look very different in Detroit than it would in the suburbs. Not surprisingly, the prosecutors preferred to take the case to a suburban jury. Terrell appealed his conviction and challenged the jurisdiction of the Ferndale court.

His appeal failed, though, because his house was only about 1500 feet south of Eight Mile, and under Michigan law, any crime committed within a mile of a county line can be prosecuted in either county.<sup>12</sup> Eighteen other states, representing with Michigan a majority of the U.S. population, have such county-line criminal-jurisdiction or venue statutes.<sup>13</sup>

7. Terrell's Brief, *supra* note 5, at 2 (stating that Clarence Terrell "grabbed" officer); Prosecution's Brief, *supra* note 6, at iv (stating that Clarence Terrell "jumped on" officer).

8. Terrell's Brief, *supra* note 5, at 2.

9. *Id.* at 2. The trial was held in Ferndale because it was the police officers' jurisdiction. One of the officers had stopped Kim Terrell's car on Eight Mile; rather than produce her driver's license, Kim fled to her home in Detroit. The officer gave chase, which led to the altercation on the lawn. *Id.*

10. To be precise, the Census put Ferndale's median household income at \$45,629 and race at 91.5% white. See U.S. Census Bureau, *supra* note 3.

11. The record does not reflect the race or income of the Terrells, the police officers, or the jurors. The Terrells' block on Derby Street—one block away from Eight Mile Road—is seventy percent black (85 people out of 122). The two blocks immediately on the other side of Eight Mile, in Hazel Park, have a similar total population and are ninety-five percent white (146 out of 153). (The census classifies the Terrells' block as #3001 in census tract 5076, and the blocks in Hazel Park as #5013 and #5010 in census tract 1753.) U.S. Census Bureau, *supra* note 3.

12. See MICH. COMP. LAWS ANN. § 762.3(1) (West 2000). Going due north from the Terrells' house (on Derby Street), the city on the other side of Eight Mile is Hazel Park, not Ferndale. Ferndale is not far to the west, however, and is less than a mile from the Terrells' house.

13. See *infra* note 23 and Map A accompanying note 29. For the sake of simplicity, this Article refers to buffer "statutes" even though, technically, some states provide for buffers in court rules of criminal procedure rather than in statutes. See, e.g., MINN. R. CRIM. P. 24.02(2).

As Terrell's case makes clear, these "buffer" statutes are problematic. States can define their judicial geographical divisions almost any way they like, of course, but there was no good reason to try Clarence Terrell across the border, and there were many good reasons not to. States need to provide for cases in which the location of a crime vis-à-vis a border is indefinable or unclear, or when a crime's elements are spread over multiple jurisdictions. Buffer statutes are not a necessary mechanism for any of these situations, however, and they reward forum shopping by prosecutors. In short, buffer statutes should be eliminated.

This Article approaches buffer statutes from the perspectives of policy, law, and theory. As a matter of policy, buffer statutes are problematic and unnecessary, because there are better alternatives. As a legal matter, they are inconsistent with traditions of community self-government through local juries. The fact that they persist despite these shortcomings, however, shows, as a theoretical matter, that courts do not view local juries as integral to self-government. However, they should. For all these reasons, buffer statutes should be struck down by courts or repealed by state legislatures.

Part I of this Article describes the use, history, and justifications for buffer statutes, and concludes that their advantages are overrated and minimal at best. This is especially so because there are related statutes, such as those that expand jurisdiction only when the county of the crime is in doubt, that achieve the same positive functions without promoting forum shopping.

Part II discusses another distinct problem with buffer statutes: The foreign-county trials that buffers permit do not use a jury "of the vicinage." The vicinage requirement—which requires criminal juries to be drawn from the place where the crime was committed—is deeply rooted in the common law, expressly guaranteed in many state constitutions, and prudent as a principle of democratic self-government. Because crimes, but not jurors, are drawn from the buffer zones defined in these statutes, juries in cases that are tried across county borders never include anyone from the neighborhood in which the crime occurred. These juries hear cases that do not directly affect their communities. Part II explores and promotes the vicinage concept, and criticizes buffer statutes for clashing with it.

Part III critiques the buffer and vicinage question from another, more theoretical angle. At first glance, buffer statutes might seem to affect mainly the right of criminal defendants to a jury that comprises a "proper cross-section" of the community. The same case law that promotes

defendants' right to jury trial by a "proper cross-section" pays no mind to buffer statutes, however. These cases overlook the rights of the jurors themselves and their community. In recent decades, some scholars have promoted the idea that criminal defendants are not the only ones with a right to jury trials; the community itself has a right, or at least an interest, in ensuring that criminal trials are decided by local juries, as a critical form of self-government. The prevalence with which courts use and approve buffer statutes shows, however, that this community-centered conception of the jury has been largely rejected in practice. Courts have tended to uphold buffer statutes, even in some cases when weighed against seemingly strict state constitutional guarantees of a jury of the vicinage. Courts upholding buffer statutes have concentrated instead on whether a jury is unconstitutionally biased. Even when courts have struck down these statutes—and none have in the last seven decades—they have done so on either legal-positivist grounds or on the basis of the rights of criminal defendants, not on notions of community rights. The notion that jury trials are an essential component of local self-government is nowhere to be found in these cases. The scholarship on local juries, compelling as it is, describes a different world than the case law does, and should be adjusted to account for the case law more accurately.

Part IV concludes that, even if courts are uninterested in standing up for community-centered juries, state legislatures still should do so by repealing these statutes and joining the majority of states, which function just fine without buffers. Eliminating buffer statutes would do justice to the compelling argument that local jury trials facilitate community self-government, and it would also avoid the legal and policy drawbacks of buffer statutes discussed in Parts I and II.

## I. PREVALENT AND POINTLESS: THE HISTORY AND PRACTICE OF CRIMINAL COUNTY-LINE BUFFER STATUTES

Buffer statutes have a widespread use and longstanding history. Nevertheless, they are not necessary. Related statutes that deal with multi-jurisdiction crimes and crimes whose locations are unknown can handle all of the cases that supposedly warrant the use of buffers. More to the point, they do so while avoiding the drawbacks of buffers.

### A. *Definition of Terms: Vicinage, Venue, and Jurisdiction*

This Article deals with three concepts with significant (and confusing) overlap. Vicinage and venue both establish a place for purposes of a trial: Vicinage is the place from which the jurors are drawn, and venue is the place where the trial is held.<sup>14</sup> Usually these are the same place, and so courts do not try very hard to distinguish between the two terms.<sup>15</sup> In some cases, the term vicinage also refers to the location of the crime, so that a “jury of the vicinage” is one drawn from the place where the crime occurred.<sup>16</sup>

Jurisdiction refers not to the location of a trial, but to the power of a court to hear a case. In some systems, every court has jurisdiction to hear a case, but venue is proper in only one geographical subdivision.<sup>17</sup> In other systems, jurisdiction has a geographical basis, and only the court in the proper location has the power to hear a particular case.<sup>18</sup>

In this Article, the primary considerations will be venue and, by extension, vicinage, because buffer statutes and the constitutional provisions that they offend speak in these terms: where trials should be held and from where the jurors should come. Occasionally, however, cases or statutes speak in terms of jurisdiction, and in such cases the Article will use jurisdiction interchangeably with venue, unless the distinction makes a difference.

### B. *Current Laws and Their Use*

In every state, the default rule for venue and vicinage is that cases are tried where the crime occurred<sup>19</sup> and the jury is drawn from the place

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14. See BLACK'S LAW DICTIONARY 1598 (8th ed. 2004) (“vicinage”); *id.* at 1591 (“venue”).

15. For a clear and more detailed treatment of these distinctions, see 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 16.1 (2d ed. 1999).

16. See, e.g., BLACK'S LAW DICTIONARY, *supra* note 14, at 873 (discussing phrase “jury of the vicinage”).

17. See 4 LAFAVE ET AL., *supra* note 15, § 16.1(a). Changes in the nature of jurisdiction and venue have had an impact on the importance attached to vicinage. See Drew L. Kershen, *Vicinage*, 30 OKLA. L. REV. 3, 41–42 (1977) [hereinafter Kershen, *Vicinage II*] (discussing changes in federal system).

18. See 4 LAFAVE ET AL., *supra* note 15, § 16.1(a).

19. See *id.* § 16.1(c) (discussing “crime-committed” formula as “standard formula for setting venue” and surveying states’ standards); Albert Levitt, *Jurisdiction over Crimes*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 316, 324–27 (1925) (discussing history of “Territorial Commission Theory”). Most states make this default rule a constitutional requirement. See *infra* notes 128–33 and accompanying text (listing and discussing state constitutional provisions).

where the case is tried.<sup>20</sup> There are numerous exceptions. Some cases are moved to another location, with another jury, because of pretrial publicity, inconvenience, or local bias.<sup>21</sup> (While venue may be a matter of convenience, however, it is also subject in most states to seemingly strict constitutional requirements that limit trial to the locale of the crime.)<sup>22</sup> Other cases are situated according to more complicated rules that apply when there is more than one place where the crime “occurred,” or when the location of a crime is unclear. These exceptions are discussed in more detail in Part I.D, below. A separate category, and the subject of this Article, are criminal county-line buffer statutes, which allow trials to move intrastate to the next county if a crime occurred close to the border.

Nineteen states, representing a majority of the U.S. population, currently have county-line buffer statutes on the books.<sup>23</sup> (One other

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20. See 4 LAFAVE ET AL., *supra* note 15, § 16.1(b) (“[I]t is assumed also that the jury will be drawn from the judicial district in which the trial takes place.”). There are exceptions. See, e.g., WIS. STAT. ANN. § 971.225 (West 1998) (providing for selection of jury in non-forum county).

21. See 4 LAFAVE ET AL., *supra* note 15, § 16.3 (discussing change of venue).

22. See *infra* notes 128–33 and accompanying text.

23. See ALA. CODE § 15-2-7 (1975) (“When an offense is committed on the boundary of two or more counties or within a quarter of a mile thereof or when it is committed so near the boundary of two counties as to render it doubtful in which the offense was committed, venue is in either county.”); ARIZ. REV. STAT. § 13-109(B)(5) (2001) (“If an offense is committed on the boundary of two or more counties or within one mile of such boundary, trial of the offense may be held in any of the counties concerned.”); CAL. PENAL CODE § 782 (West 1985) (“When a public offense is committed on the boundary of two or more jurisdictional territories, or within 500 yards thereof, the jurisdiction of such offense is in any competent court within either jurisdictional territory.”); *id.* § 790(a) (same, for murder); LA. CODE CRIM. PROC. ANN. art. 614 (West 2003) (“An offense committed on the boundary line of two parishes or within one hundred feet thereof is deemed to have been committed in either parish.”); ME. REV. STAT. ANN. tit. 15, § 3 (West 2003) (“When an offense is committed on the boundary between 2 counties or within 100 rods thereof . . . the offense may be alleged in the complaint or indictment as committed, and may be tried in either.”); MASS. GEN. LAWS ANN. ch. 277, § 57 (West 2002) (“A crime committed on or within one hundred rods of the boundary line of two counties may be alleged to have been committed, and may be prosecuted and punished, in either county; and if committed on or within fifty rods of the boundary line of two judicial districts, it may be alleged to have been committed, and may be prosecuted and punished, in either district.”); MICH. COMP. LAWS ANN. § 762.3(1) (West 2000) (“Any offense committed on the boundary line of 2 counties, or within 1 mile of the dividing line between them, may be alleged in the indictment to have been committed, and may be prosecuted and punished in either county.”); *id.* § 762.4 (“Whenever any court of record having criminal jurisdiction, the boundaries of whose jurisdiction as fixed by statute are not coincident with the boundary lines of a county or counties, shall take jurisdiction or have pending before it any trial or cause arising out of the commission of an offense at, on or near to the boundary line of the jurisdiction of said court, the jurisdiction of said court shall not be questioned, after the swearing of the jury, unless the evidence shall show the offense to have been committed more than 100 rods outside of the boundary of the jurisdiction of said court as fixed by statute.”); MINN. R. CRIM. P. 24.02(2) (“Offenses committed on or within



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state has a law on its books that its courts have declared

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1,500 feet (457.2M) of the boundary line between two counties may be alleged in the complaint or indictment to have been committed in either of them and may be prosecuted and tried in either county.”); NEV. REV. STAT. 171.035 (2003) (“When an offense is committed on the boundary of two or more counties, or within 500 yards thereof, the venue is in either county.”); N.Y. CRIM. PROC. LAW § 20.40(4)(c) (McKinney 2003) (“An offense committed within five hundred yards of the boundary of a particular county, and in an adjoining county of this state, may be prosecuted in either such county.”); *id.* § 20.50(2) (“Where an offense prosecutable in a local criminal court is committed in a city other than New York City, or in a town or village, but within one hundred yards of any other such political subdivision, it may be prosecuted in either such political subdivision.”); N.D. CENT. CODE § 29-03-05 (1991) (“When a public offense is committed on the boundary of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county.”); OR. REV. STAT. § 131.315(6) (2003) (“If an offense is committed on the boundary of two or more counties or within one mile thereof, trial of the offense may be held in any of the counties concerned.”); PA. R. CRIM. P. 130(A)(5) (“When any offense is alleged to have occurred within 100 yards of the boundary between two or more magisterial districts of a judicial district, the proceeding may be brought in either or any of the magisterial districts without regard to the boundary lines of any county.”); R.I. GEN. LAWS § 12-3-5 (2002) (“A criminal offense committed on or within one hundred (100) rods of the boundary line of two (2) counties may be alleged to have been committed and may be prosecuted and proceeded against in either county unless otherwise ordered by the presiding justice, and if a crime is committed on or within fifty (50) rods of the boundary line of two (2) divisions of the district court, it may be alleged to have been committed and may be proceeded against and prosecuted in either division unless otherwise ordered by the chief judge pursuant to § 12-3-4(c).”); S.D. CODIFIED LAWS § 23A-16-9 (Michie 2004) (“When a public offense is committed on the boundary of two or more counties, or within five hundred yards thereof, the venue is in either county.”); TEX. CRIM. PROC. CODE ANN. § 13.04 (Vernon 1977 & Supp. 2004) (“An offense committed on the boundaries of two or more counties, or within four hundred yards thereof, may be prosecuted and punished in any one of such counties and any offense committed on the premises of any airport operated jointly by two municipalities and situated in two counties may be prosecuted and punished in either county.”); VT. STAT. ANN. tit. 13, § 4603 (2002) (“If an offense is committed on the boundary of two or more counties or territorial units of the district court, or within 100 rods of such boundary, such offense may be alleged in the information or indictment to have been committed and may be prosecuted in the superior court in any of such counties or in the district court in any of such territorial units, if the offense is within the jurisdiction of such court.”); VA. CODE ANN. § 19.2-249 (Michie 2004) (“An offense committed on the boundary of two counties, or on the boundary of two cities, or on the boundary of a county and city, or within 300 yards thereof, may be alleged to have been committed, and may be prosecuted and punished, in either county, in either city, or the county or city . . . .”); *id.* § 19.2-250(A) (“Notwithstanding any other provision of this article and except as provided in subsection B hereof, the jurisdiction of the corporate authorities of each town or city, in criminal cases involving offenses against the Commonwealth, shall extend within the Commonwealth one mile beyond the corporate limits of such town or city; except that such jurisdiction of the corporate authorities of towns situated in counties having a density of population in excess of 300 inhabitants per square mile, or in counties adjacent to cities having a population of 170,000 or more, shall extend for 300 yards beyond the corporate limits of such town or, in the case of the criminal jurisdiction of an adjacent county, for 300 yards within such town.”); WIS. STAT. ANN. § 971.19(3) (West 1998 & Supp. 2004) (“Where an offense is committed on or within one-fourth of a mile of the boundary of 2 or more counties, the defendant may be tried in any of such counties.”).

According to the 2000 Census, see U.S. Census Bureau, *supra* note 3, the population of these nineteen states is 50.2% of the total U.S. population.

unconstitutional.)<sup>24</sup> The width of the buffer zones<sup>25</sup> established by these statutes ranges from 100 feet (in Louisiana) to a mile (in Arizona, Michigan, and Oregon); the median and most common distance is 1500 feet.<sup>26</sup> Befitting the anachronistic nature of the statutes, some define the buffer width in rods, an archaic measure equal to 5½ yards.<sup>27</sup> Notwithstanding these buffer statutes, most of these states have constitutional provisions requiring crimes to be tried by a jury of the county, district, “vicinage,” or some other limited area.<sup>28</sup>

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24. See OKLA. STAT. ANN. tit. 22, § 125 (West 2003) (“When a public offense is committed on the boundary of two or more counties, or within five hundred (500) yards thereof, the jurisdiction is in either county.”); *Smith v. State*, 197 P. 712, 713–14 (1921) (striking down statute). There are several other states that used to have buffer statutes but have repealed them or had them struck down by courts. See *infra* note 38 and Map A accompanying note 29.

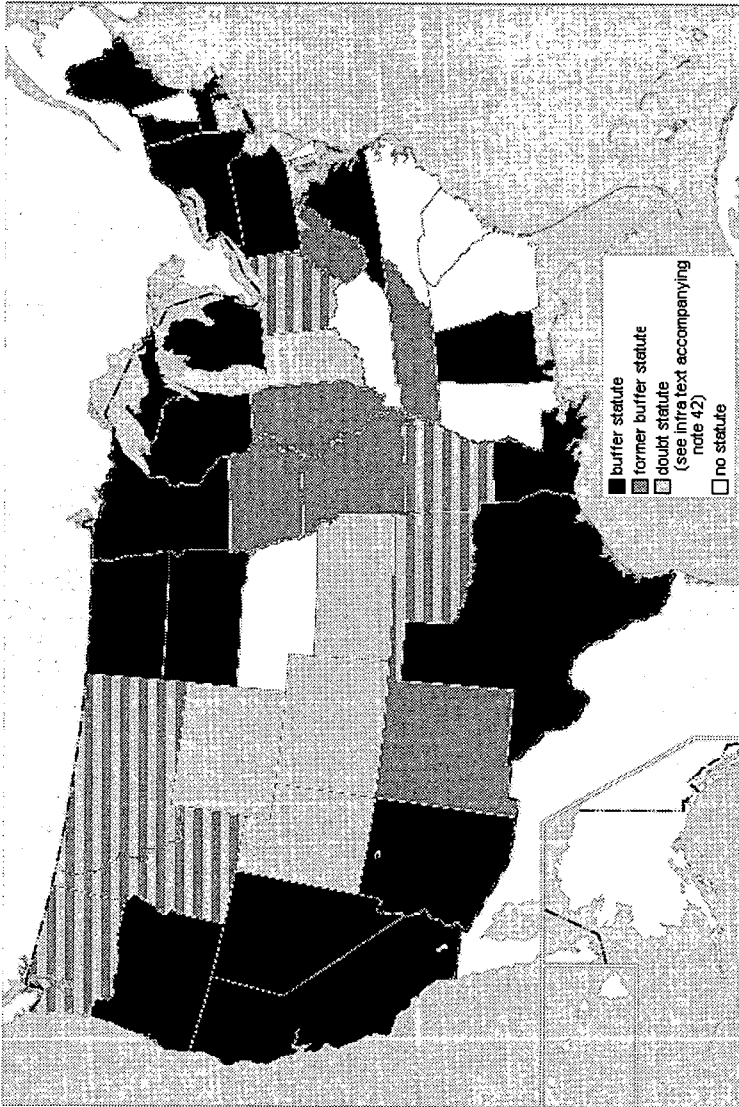
25. The width can be expressed as either the distance into a county that it reaches or twice that amount, because there will be a contiguous buffer of equal width on the other side of the border. This Article uses width in the former sense.

26. For specific provisions, see *supra* note 23. The following is a rough listing of the states with distances converted into feet: Alabama, 1320; Arizona, 5280; California, 1500; Louisiana, 100; Maine, 1650; Massachusetts, 1650; Michigan, 5280; Minnesota, 1500; Nevada, 1500; New York, 1500; North Dakota, 1500; Oregon, 5280; Pennsylvania, 300; Rhode Island, 1650; South Dakota, 1500; Texas, 1200; Vermont, 1650; Virginia, 900; Wisconsin, 1320. See also AM. LAW INST., CODE OF CRIMINAL PROCEDURE § 243 (Official Draft 1930) (recommending 500-yard buffer); *infra* note 35 (discussing British 500-yard buffer).

27. These states include Maine, Massachusetts, Rhode Island, and Vermont. Michigan uses rods in a secondary statute. See *supra* note 23.

28. This apparent contradiction is best seen by comparing Map A below of state buffer provisions with Map B accompanying note 133, which shows state constitutional provisions.

## Map A



29

It is difficult to assess how often and when these statutes are actually used. Judging solely from the appellate case law, it appears that some

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29. This Map is not necessarily exhaustive, and is based on the information in note 23, *supra* and notes 38–42, *infra*.

states use them on occasion, while others, lacking case law, perhaps do not use them at all.<sup>30</sup> An informal survey conducted for this article was inconclusive. Most jurisdictions claimed not to use the statutes very often; other states indicated that they did; and some even admitted that they did so for reasons other than mere administrative convenience, such as to obtain a more favorable jury.<sup>31</sup> Prosecutors in some counties—

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30. For examples of states with buffer statutes that lack related appellate cases, see *Barnes v. State*, 429 So. 2d 1114, 1119 (Ala. Crim. App. 1982); *People v. McClure*, No. A100807, 2003 WL 22463952, at \*2–4 (Cal. Ct. App. Oct. 31, 2003); *State v. True*, 330 A.2d 787, 789–91 (Me. 1975); *People v. Wood*, No. 235558, 2003 WL 1558222, at \*1 (Mich. Ct. App. Mar. 25, 2003); *McLaughlin v. Eidens*, 740 N.Y.S.2d 147, 149 (App. Div. 2002); *State v. McCown*, 833 P.2d 1321, 1322 (Or. Ct. App. 1992); *Commonwealth v. Buechele*, 444 A.2d 1246, 1250 (Pa. Super. Ct. 1982); *Hurst v. State*, No. 11-01-00400-CR, 2002 WL 32345371, at \*1 n.1 (Tex. Ct. App. Oct. 10, 2002); *Hamm v. City of Norton*, No. 1607-98-3, 1999 WL 1134656, at \*1 (Va. Ct. App. Sept. 28, 1999); see also *infra* note 40 (collecting cases deciding constitutionality of buffer statutes).

31. For this Article, Lance Werner made a series of inquiries to county prosecutors' offices around the country, concentrating on states with buffer statutes and counties with very demographically-different neighbors. Some officials said that they used the buffer statutes occasionally. See Telephone Interview by Lance Werner with Dennis McGrane, Chief Deputy District Attorney, Yavapai County, Ariz. (Oct. 6, 2003) (indicating occasional use of statute for transit and vehicular offenses); Telephone Interview by Lance Werner with Brett Stassi, Investigator, Plaquemines Parish District Attorney, La. (Sept. 19, 2003) (indicating frequent use of statute); Telephone Interview by Lance Werner with Paul Lynn, Deputy Chief, Appellate Division, Seventh Quadrant District Attorney, Suffolk County, Mass. (Oct. 2, 2003) (indicating use of statute for vehicular offenses and due to confusing boundaries in Boston area); Telephone Interview by Lance Werner with Mary Yunker, Chief Deputy County Attorney, Sherburne County, Minn. (Oct. 10, 2003) (indicating frequent use of statute because city of St. Cloud spans three counties); Telephone Interview by Lance Werner with Patrick McCormick, Chief Assistant District Attorney, Nassau County, N.Y. (Nov. 19, 2003) (indicating awareness and use of statute).

One official admitted that his county had used the statute to obtain a more favorable jury. See Telephone Interview by Lance Werner with Paul McMurdie, Division Chief of Appeals and Research, Maricopa County, Ariz. (Sept. 18, 2003) (recounting use of statute to avoid rural jury in multi-jurisdiction molestation case). Another said more generally that when counties worked out who would take the case, they considered which county's case was "stronger." Telephone Interview by Lance Werner with Jim Mosely, First Assistant District Attorney, Cleveland County, Okla. (Oct. 24, 2003). Others said that they only used the statutes when the location of the crime was in doubt. See, e.g., Telephone Interview by Lance Werner with Jon Poyner, District Attorney, Colusa County, Cal. (Nov. 4, 2003); Telephone Interview by Lance Werner with Dennis Mahoney, First Assistant District Attorney, Norfolk County, Mass. (Sept. 30, 2003) (recounting confusing multi-jurisdiction case); Telephone Interview by Lance Werner with Judy Roberts, Intern, Grand Forks State Attorney's Office, N.D. (Oct. 21, 2003); see also *infra* Part I.E. (arguing that "doubt" statutes achieve most benefits of buffer statutes with few of their costs).

Most officials said that they rarely use the statute. See, e.g., Telephone Interview by Lance Werner with Patrick Lamb, Deputy District Attorney, Jefferson County, Ala. (Sept. 18, 2003); Telephone Interview by Lance Werner with James Peart, Magistrate Judge, Adams County, Idaho (Sept. 19, 2003); Telephone Interview by Lance Werner with David Allison, District Attorney, Humboldt County, Nev. (Oct. 21, 2003); Telephone Interview by Lance Werner with Mary Killinger, Deputy District Attorney, Montgomery County, Pa. (Nov. 20, 2003); Telephone Interview

including, perhaps not coincidentally, the one in which Clarence Terrell was prosecuted—were evasive.<sup>32</sup> Overall, it seems that while district attorneys are not troubled by these statutes, they would not miss the statutes terribly if they were repealed or reformed.

Buffer statutes serve both benign and malign purposes. The benign purposes center on issues of convenience and evidentiary simplicity. As discussed in detail in Part I.E, buffer statutes avoid the problems of proof and administrative inconvenience that result from crimes that occur near borders, but buffer statutes are a needlessly blunt instrument for avoiding such complications. Thus there are no countervailing benefits to justify the malign purposes these statutes can serve, such as forum shopping and power grabs by prosecutors, or the damage they do to the principle of vicinage. Finally, the fact that these statutes are not used very often—and that the states that lack such laws manage quite well—underscores that buffer laws, and their costs, are unnecessary.

### C. *A Brief History of Buffer Statutes*

Regardless of how buffer statutes are used today, they have been used in the past, and they have been passed and repassed by dozens of legislatures dozens of times. The impetus for the creation of buffer statutes is unclear. The theoretical rationale for the statutes is fairly well documented: to protect prosecutions from derailing over the technicality of the precise location of a near-border crime.<sup>33</sup> There is no obvious explanation, however, for why no states had such statutes until the mid-1830s, after which nearly half of the states adopted a buffer statute within a generation.<sup>34</sup> The inspiration might have come from an 1819

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by Lance Werner with Robert Donohoo, Chief Deputy District Attorney, Milwaukee County, Wis. (Nov. 20, 2003).

32. See Telephone Interview by Lance Werner with unnamed official, Oakland County Prosecutor's Office, Mich. (Oct. 17, 2003) (indicating use of buffer statute but stating that different police agencies generally resolve jurisdictional disputes). Werner's notes indicate that other counties refused to discuss the issue at all.

33. See *infra* Part I.E. The laws also might have reflected a general sentiment against slavishly trying crimes in the stricken community. See, e.g., 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 278 (London, MacMillan 1883) (noting English buffer statute and arguing for basing venue solely on convenience).

34. There were fifteen states with buffer statutes by 1860, out of the thirty-three states extant. See ALA. CODE § 3365 (1852) (quarter-mile buffer); A DIGEST OF THE STATUTES OF ARKANSAS ch. 52, § 107, at 403–04 (E.H. English ed., Little Rock, Reardon & Garritt 1848) (half-mile buffer); DIGEST OF THE LAWS OF CALIFORNIA art. 1433, at 277 (William H.R. Wood ed., San Francisco, S.D. Valentine & Son 1857) (500-yard buffer); IOWA REV. STAT. ch. IV, § 40 (1843) (500-yard buffer); ACTS PASSED BY THE SECOND LEGISLATURE OF THE STATE OF LOUISIANA, No. 121, § 12, at 152

British statute that established a 500-yard buffer.<sup>35</sup> If, however, there were numerous cases in the United States of prosecutions falling apart because of the lack of these statutes, those cases occasioned little comment. Indeed, there is no evidence to support any theory of the origin of these statutes in most states other than simple imitation.

If buffer statutes reflected the problems of sketchy borders in an age of rapid westward expansion, one would expect that as time passed the adoption of these statutes would have become less common as the marking of borders improved, but this is inconsistent with the actual chronological pattern of statutory adoption. Similarly, one might expect that “old” states with confusing “metes and bounds” county-line definitions would have needed buffer statutes more than “new” states using the Public Land Survey System (PLSS), but there is no such correlation in the statutory history here either.<sup>36</sup>

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(New Orleans, La Sere 1855) (100-yard buffer); ME. REV. STAT. ch. 166, § 4 (1847) (100-rod buffer); MASS. REV. STAT. ch. 133, § 7 (1836) (100-rod buffer); MICH. REV. STAT. pt. 4, tit. 1, ch. 11, § 7 (1838) (100-rod buffer); MO. REV. STAT. ch. 138, art. IV, § 7 (1845) (500-yard buffer); N.Y. REV. STAT. pt. IV, ch. II, tit. IV, § 45 (1836) (500-yard buffer); Act of Mar. 31, 1860, § 48, *reprinted in* 1860 Pa. Laws 375 (500-yard buffer); TENN. CODE § 4976 (1858) (quarter-mile buffer); TEX. CRIM. PROC. CODE art. 191 (1857) (400-yard buffer); ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, ch. XI, § 7, at 122 (Richmond, Samuel Shepherd 1848) (100-yard buffer); WIS. REV. STAT. ch. 141, § 7 (1849) (100-rod buffer). Some territories had buffers at that time as well. *See, e.g.,* S.W. KEARNY, LAWS OF THE TERRITORY OF NEW MEXICO 90–91 (Santa Fe 1846) (establishing 500-yard buffer in Territory of New Mexico); WASH. TERR. STAT. § 130 (1855) (establishing 100-rod buffer in Territory of Washington).

Because of the difficulty of researching nineteenth-century statutes, this accounting is less definitive than it might otherwise be. In Arkansas, for instance, the 1848 statute cited above was tested in an 1861 case in which the statute was quoted and applied as if it had no buffer. *See State v. Rhoda*, 23 Ark. 156, 157 (1861).

35. An Act to Facilitate the Trials of Felonies Committed on Stage Coaches and Stage Wagons, or Other Such Carriages; and of Felonies Committed on the Boundaries of Counties, 59 Geo. 3, c. 96, § 2 (1819) (Eng.). Then again, while many of the first group of states to adopt buffer statutes used 500 yards as the width of their buffers, most did not. Another potential inspiration appears to have been a 1795 Massachusetts statute that gave jurisdiction to both Suffolk and Middlesex Counties over offenses that occurred on either bank of the Charles River that divided them, though that statute’s effect on other states, if any, was long delayed and minor. *See* Act of Feb. 10, 1795, § 1, *reprinted in* 2 THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS FROM NOVEMBER 28, 1780 TO FEBRUARY 28, 1807, at 654 (Boston, Thomas & Andrews 1807) [hereinafter MASSACHUSETTS LAWS]; *Commonwealth v. Gillon*, 84 Mass. 502, 503 (1861) (describing 1835 recommendation of buffer statute as “extension” of Suffolk–Middlesex statute).

36. By 1860, the United States comprised thirty-five states. The original thirteen states plus Hawaii, Kentucky, Maine, Tennessee, Texas, Vermont, and West Virginia are the “metes and bounds” states, in which property and county lines are generally defined descriptively. *See, e.g.,* Act of June 21, 1799, § 1, *reprinted in* 2 MASSACHUSETTS LAWS, *supra* note 35, at 838–39 (describing county line as proceeding “northwesterly by the westerly line of said *Pittston* to the mouth of *Purgatory-Stream* (so called) which empties itself into *Cobbesecontee-Stream* (so called)”).

After the initial burst of statutory adoptions between 1836 and 1860, the pattern shifted. Since 1860, some states have added buffer statutes,<sup>37</sup> but others have lost theirs<sup>38</sup> or changed the size of their buffers.<sup>39</sup> There

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(emphasis in original); Act of Dec. 24, 1777, ch. XLII, *reprinted in* 1 THE FIRST LAWS OF THE STATE OF NORTH CAROLINA 350 (John D. Cushing ed., 1984) (directing establishment of one portion of a county border at “a Line from *Drowning Creek Bank*, beginning where *Overstreet’s Bridge* formerly was”) (italics in original); Act of Mar. 12, 1785, *reprinted in* 2 THE FIRST LAWS OF THE STATE OF SOUTH CAROLINA 358 (John D. Cushing ed., 1981) (defining Clarendon County border as “beginning on the Wateree at Person’s Island, thence in a straight line to Black River at Potter’s Plantation, thence by the Widow Grimes’ plantation in a straight line to Lynch’s Creek, [etc.]”). Of the eighteen of these states that were in existence by 1860, only seven (Massachusetts, New York, Maine, Pennsylvania, Tennessee, Texas, and Virginia) had buffer statutes by then. *See supra* note 34 (listing statutes).

The other fifteen states extant in 1860 had more precisely defined property and county lines under the Public Land Survey System (PLSS). Of these states, eight had buffer statutes: Alabama, Arkansas, California, Iowa, Louisiana, Michigan, Missouri, and Wisconsin. *See supra* note 34 (listing statutes). It appears that, despite the more systematic definition of boundaries, even these states faced some uncertainty as to their locations. *See, e.g.,* *People v. Richards*, 226 N.W. 651, 653 (Mich. 1929) (explaining buffer statute as “quite necessary and important in early days, when section lines had not been definitely established”). For a good explanation of the PLSS, *see* U.S. Dep’t of the Interior, Bureau of Land Mgmt. & Fed. Geographic Data Comm., Cadastral Subcomm., Cadastral Information for GIS Specialists, Part One, at <http://www.fairview-industries.com/gismodule/PartOneHistory.html> (last modified May 2002).

37. Because of the difficulty in researching antebellum statutes, it is possible that some of these states had buffer laws before 1860. Fourteen states appear to have passed buffer statutes after 1860 (all but two before 1900): Arizona, Idaho, Illinois, Minnesota, Montana, Nevada, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, and Vermont. *See* ARIZ. TERR. COMP. LAWS ch. 11, § 69 (1877) (500-yard buffer); LAWS OF THE TERRITORY OF IDAHO ch. 2, § 85, at 245 (Lewiston, Idaho, Glascock 1864) (500-yard buffer); ILL. REV. STAT. ch. 38, § 5 (1874) (100-rod buffer); MINN. GEN. STAT. ch. 108, § 20 (1866) (100-rod buffer); MONT. PENAL CODE § 1565 (1895) (500-yard buffer); Act of Nov. 26, 1861, § 86, *reprinted in* LAWS OF THE TERRITORY OF NEVADA 444 (William Martin Gillespie ed., San Francisco, Valentine & Co. 1862) (500-yard buffer); DAK. TERR. REV. CODE, CRIM. PROC. § 76 (1877) (North Dakota) (500-yard buffer); OHIO CODE ANN. § 13426-2 (Throckmorton 1930) (100-rod buffer); OKLA. STAT. § 5375 (1890) (500-yard buffer); OR. CODE CRIM. PROC. ch. III, § 17, at 444 (1865) (one-mile buffer); Act of Apr. 23, 1915, § 34, *reprinted in* ACTS AND RESOLVES PASSED BY THE GENERAL ASSEMBLY OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS ch. 1261, at 229 (1915) (50- and 100-rod buffers); DAK. TERR. REV. CODE, CRIM. PROC. § 76 (1877) (South Dakota) (500-yard buffer); ACTS AND RESOLVES PASSED BY THE GENERAL ASSEMBLY OF THE STATE OF VERMONT, No. 5, § 8 (Montpelier, J. & J.M. Poland’s Steam Printing Works 1870) (100-rod buffer).

Two other states—New Mexico and Washington—had buffer statutes as territories before 1860, but they did not attain statehood until after 1860. *See* KEARNY, *supra* note 34, at 90–91 (establishing 500-yard buffer in Territory of New Mexico); WASH. TERR. STAT. § 130 (1855) (establishing 100-rod buffer in Territory of Washington). West Virginia inherited Virginia’s buffer upon achieving statehood in 1863, and kept the statute. *See* W. VA. CODE ch. 152, § 12 (1870) (100-yard buffer).

38. Courts in eight states have struck down buffer statutes as unconstitutional. *See* *Dougan v. State*, 30 Ark. 41, 43 (1875) (striking down half-mile buffer statute); *Buckrice v. People*, 110 Ill. 29, 34–35 (1884) (striking down 100-rod buffer statute); *State v. Montgomery*, 38 So. 949, 949 (La. 1905) (striking down 100-yard buffer statute); *In re McDonald*, 19 Mo. App. 370, 379 (1885)

was a burst of litigation challenging buffer statutes on the basis of state constitutional requirements for local trials or local juries (some successful and some not) in the 1860s, 70s, and 80s; litigation slowed to a trickle after that.<sup>40</sup> Some states—typically those whose constitutions

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(striking down 500-yard buffer statute); *State v. Chalikes*, 170 N.E. 653, 654 (Ohio 1930) (striking down 100-rod buffer statute); *Smith v. State*, 197 P. 712, 713–14 (Okla. 1921) (striking down 500-yard buffer statute); *Armstrong v. State*, 41 Tenn. 338, 343–44 (1860) (striking down quarter-mile-buffer statute); *State v. Lowe*, 21 W. Va. 782, 795 (1883) (striking down 100-yard buffer statute).

Five states have repealed their buffer statutes. *See State v. Koseris*, 162 P.2d 172, 173 & n.1 (Idaho 1945) (discussing amendment of 500-yard buffer statute in 1945); *State v. Donnelly*, 242 N.W.2d 295, 298 (Iowa 1976) (mentioning 1973 repeal of 500-yard buffer statute); MONT. REV. CODE § 95-403 (1969) (half-mile buffer); MONT. CODE ANN. § 46-3-103 history (describing 1991 repeal of buffer provision from former § 95-403); 1963 N.M. Laws ch. 303, § 30-1 (repealing 500-yard buffer provision described in note 34, *supra*); WASH. REV. CODE ANN. § 10.25.030 (West 1980) (100-rod buffer), *superseded by* WASH. SUPER. CT. CRIM. R. 5.1 (no buffer).

39. Some buffers have gotten bigger. *Compare* ARIZ. TERR. COMP. LAWS ch. 11, § 69 (1877) (500 yards), *and* MICH. REV. STAT. pt. 4, tit. 1, ch. 11, § 7 (1838) (100 rods), *and* VA. CODE ch. 199, § 13 (1849) (100 yards), *with* ARIZ. REV. STAT. § 13-109(B)(5) (2001) (one mile), *and* MICH. COMP. LAWS ANN. § 762.3(1) (West 2000) (one mile), *and* VA. CODE ANN. § 19.2-249 (Michie 2004) (300 yards).

Others have gotten smaller. *Compare* Act of Mar. 31, 1860, § 48, *reprinted in* 1860 Pa. Laws 375 (500 yards), *and* MINN. STAT. § 627.07 (1947) (100 rods), *and* WIS. REV. STAT. ch. 141, § 7 (1849) (100 rods), *with* PA. R. CRIM. P. 130(A)(5) (100 yards), *and* MINN. R. CRIM. P. 24.02(2) (West 1995) (1500 feet), *and* WIS. STAT. ANN. § 971.19(3) (West 1998 & Supp. 2003) (quarter mile).

Louisiana's buffer has changed the most. The state began with a 100-yard buffer, *see* ACTS PASSED BY THE SECOND LEGISLATURE OF THE STATE OF LOUISIANA, No. 121, § 12, at 152 (New Orleans, La Sere 1855), which was struck down in *Montgomery*, 38 So. at 949. Then, the 1921 constitution specifically superseded *Montgomery*, *see* LA. CONST. of 1921, art. I, § 9 (authorizing legislature to enact 100-foot buffer). Louisiana currently has a 100-foot buffer. *See* LA. CODE CRIM. PROC. ANN. art. 614 (West 2003).

40. Cases striking down buffer statutes on state constitutional grounds include, in chronological order: *Armstrong*, 41 Tenn. at 343–44 (1860); *Dougan*, 30 Ark. at 43 (1875); *Lowe*, 21 W. Va. at 795 (1883); *Buckrice*, 110 Ill. at 34–35 (1884); *McDonald*, 19 Mo. App. at 379 (1885); *Montgomery*, 38 So. at 949 (1905) (La.); *Smith*, 197 P. at 713–14 (1921) (Okla.); *Chalikes*, 170 N.E. at 654 (1930) (Ohio). In some states, the court allowed the buffer statute to be applied only when there was doubt as to where the crime occurred or where the county line was. *See, e.g., Cox v. State*, 60 S.W. 27, 27 (Ark. 1900) (limiting statute to cases where location of county line is in doubt); *Smith*, 197 P. at 713 (striking down statute where location of crime is not in doubt); *see also infra* note 42 (discussing “doubt” standards).

Cases affirming buffer statutes in the face of direct state constitutional challenges include, in chronological order: *Hill v. State*, 43 Ala. 335, 338 (1869) (basing decision on fact that prosecution was not by indictment, but bolstered later by *Jackson v. State*, 8 So. 862, 862 (Ala. 1891), in which defendant was indicted); *State v. Robinson*, 14 Minn. 447, *available at* 1869 WL 2333, at \*3–5 (1869), *approved by* *State v. Sanderson*, 469 N.W.2d 476, 478 (Minn. Ct. App. 1991); *State ex rel. Brown v. Stewart*, 19 N.W. 429, 433–34 (Wis. 1884); *State v. Pugsley*, 38 N.W. 498, 501 (Iowa 1888); *Commonwealth v. Collins*, 110 A. 738, 739–40 (Pa. 1920); *State v. Lehman*, 279 P. 283, 284–85 (Or. 1929); *Kaseris v. Justice Court*, 144 P.2d 469, 470–71 (Idaho 1943); *State v. Swainston*, 676 P.2d 1153, 1154–55 (Ariz. Ct. App. 1984); *see also* *Fisher v. County of Roanoke*,



required that crimes be tried by juries in the specific county where the crime was committed—struck down their buffer statutes in these cases.<sup>41</sup> Other states replaced their buffer statutes with narrower “doubt” statutes that expand venue only in those cases in which the location of the crime or of the county line is unclear.<sup>42</sup> When states have dropped their buffer statutes, there does not appear to have been any related public outcry about criminals going free or the wheels of justice getting stuck.

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522 S.E.2d 392, 393 (Va. Ct. App. 1999) (upholding statute against constitutional challenge), *vacated by* 542 S.E.2d 22 (Va. Ct. App. 2001).

Note, then, that there were nine cases between 1860 and 1888 (five negative, four positive); five more between 1905 and 1930 (three negative, two positive); and only two since then (both positive). Given how closely balanced the outcomes of these cases have been, it is difficult to deduce any consensus. *See* 16 C.J. *Criminal Law* § 295, at 196–97 (1918) (characterizing case law at time as, on balance, allowing buffer statutes); HASCAL R. BRILL, 1 *CYCLOPEDIA OF CRIMINAL LAW* § 290, at 516 (1922) (characterizing balance as narrowly favoring constitutionality of buffers); 8 *RULING CASE LAW* § 59, at 99 (William M. McKinney & Burdett A. Rich eds., 1915) (characterizing buffer statutes as “generally, although not always, be[ing] held unconstitutional”).

41. The state constitutions provided specific “county” language in *Dougan*, 30 Ark. at 42; *Montgomery*, 38 So. at 949 (“parish”); *McDonald*, 19 Mo. App. at 379; *Chalikes*, 170 N.E. at 653; *Smith*, 197 P. at 713; and *Lowe*, 21 W. Va. at 786. There was “county or district” language in *Buckrice*, 110 Ill. at 33, and *Armstrong*, 41 Tenn. at 342. Significantly, Arizona and Oregon have such restrictive language, but nevertheless upheld their buffer statutes. *See Swainston*, 676 P.2d at 1154–55; *Lehman*, 279 P. at 284–85.

42. *See infra* text accompanying notes 60–61 (further discussing doubt statutes). Six states that used to have buffer statutes, *see supra* note 38, now have only doubt statutes. *See* ARK. CODE ANN. § 16-88-108(a) (Michie 1987) (“If it is uncertain where the boundary is, the indictment may be found, and a trial had, in either county.”); IDAHO CODE § 19-305 (Michie 2004) (“When a public offense is committed on the boundary of two (2) or more counties, or within five hundred (500) yards thereof, if the place where the crime is committed cannot be ascertained with reasonable certainty by the law enforcing officers of either county . . . then in any such event the venue is in either county.”); MONT. CODE ANN. § 46-3-114 (2003) (“[I]f the county in which the offense was committed cannot be readily determined, the offender may be charged in any county in which it appears that an element of the offense occurred.”); OHIO REV. CODE ANN. § 2901.12(G) (Anderson 2003) (“When it appears beyond a reasonable doubt that an offense or any element of an offense was committed in any of two or more jurisdictions, but it cannot reasonably be determined in which jurisdiction the offense or element was committed, the offender may be tried in any such jurisdiction.”); OKLA. CONST. art. II, § 20 (“[W]here uncertainty exists as to the county in which the crime was committed, the accused may be tried in any county in which the evidence indicates the crime might have been committed.”); WASH. SUPER. CT. CRIM. R. 5.1(b) (“When there is reasonable doubt whether an offense has been committed in one of two or more counties, the action may be commenced in any such county.”).

Nine other states that never had buffer statutes currently have doubt statutes. *See* COLO. REV. STAT. ANN. § 18-1-202 (West 2004); CONN. GEN. STAT. ANN. § 51-352c (West 1985); FLA. CONST. art. I, § 16; FLA. STAT. ANN. § 910.03 (West 2001); IND. CODE ANN. § 35-32-2-1 (West 1998 & Supp. 2002); KAN. STAT. ANN. § 22-2604 (1995); MD. CODE ANN., CRIM. PROC. § 4-201 (Michie 2001); N.J. R. 3:14-1; UTAH CODE ANN. § 76-1-202 (2004); WYO. STAT. ANN. § 1-7-102 (Michie 2003).

Most states (thirty-one) have had buffer statutes at some point in their history, and most of those states (nineteen) still have their statutes today.<sup>43</sup> There is still no geographic rhyme or reason to the state laws. “Metes and bounds” states are still no more likely to have buffer statutes than PLSS states.<sup>44</sup> Wide-open western states, with their sparse populations and expansive spaces, also have not developed a consensus.<sup>45</sup>

Today, most of the states that retain their buffer statutes either have no constitutional vicinage requirements,<sup>46</sup> have only vague ones,<sup>47</sup> or else have never had the constitutional issue litigated.<sup>48</sup> Plenty, however, have had their buffer statutes specifically approved by their courts,<sup>49</sup> and a few have done so despite their seemingly restrictive constitutional vicinage provisions.<sup>50</sup>

#### D. *Other Jurisdiction and Venue Statutes “at the Margins”*

Buffer statutes are not the only laws that cross county lines to deal with criminal venue and vicinage. Indeed, where there are no constitutional vicinage restrictions, states have generally been free to set whichever venue rules they choose.<sup>51</sup>

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43. In addition to the nineteen states that have buffer statutes now, *see supra* note 23, there are twelve other states that used to have them, *see supra* note 38; *supra* Map A accompanying note 29.

44. Currently, eight of the twenty metes and bounds states have buffer statutes, versus eleven of the thirty PLSS states. *See supra* Map A accompanying note 29 (depicting state provisions); *supra* note 36 (discussing metes and bounds and PLSS states).

45. *See supra* Map A accompanying note 29.

46. These states are Michigan, Nevada, New York, North Dakota, Rhode Island, and Texas. *Compare supra* Map A, accompanying note 29 (depicting statutory buffer provisions), *with infra* Map B accompanying note 133 (depicting state constitutional provisions).

47. These states are Maine, Massachusetts, Pennsylvania, Vermont, and Virginia. *Compare supra* Map A accompanying note 28 (depicting statutory buffer provisions), *with infra* Map B accompanying note 133 (depicting state constitutional provisions).

48. These states are California and South Dakota.

49. These states are Alabama, Arizona, Massachusetts, Minnesota, Oregon, Pennsylvania, Virginia, and Wisconsin. *See supra* note 40 (collecting case law).

50. Arizona and Oregon have constitutional provisions that limit the venue or vicinage to the “county.” Alabama, Minnesota, and Wisconsin refer to the “county or district.” *See infra* note 131 (collecting constitutional provisions).

51. *See* *People v. Goldswor*, 350 N.E.2d 604, 607 (N.Y. 1976); Annotation, *Constitutionality of Statute for Prosecution of Offense in County Other than That in Which It Was Committed*, 76 A.L.R. 1034, 1035 (1932) [hereinafter *Constitutionality of Statute*]; *cf.* 4 LAFAVE ET AL., *supra* note 15, § 16.1(e) (“Where a state has either a constitutional venue guarantee of a right to trial in the county in which the offense was committed or a constitutional guarantee of a jury of the vicinage, special venue legislation can pose constitutional difficulties . . .”) (footnotes omitted).

The general principle that crimes should be tried where they were committed<sup>52</sup> is vulnerable to several factual complications, of which buffer statutes are but one example. One complication is that in some crimes, different elements occur in different jurisdictions, such as when a shooter's victim staggers over to the other side of the border to die, or a telemarketing scammer calls across state lines. In English common law, such crimes originally went unpunished because it was necessary to establish that all elements of the charge had been committed in one jurisdiction.<sup>53</sup> This formality began to soften in England in 1548,<sup>54</sup> and it never took root in the in the United States. From early on, American law allowed prosecution for multi-jurisdictional crimes and provided default rules to determine which jurisdiction would host the prosecution.<sup>55</sup> A particular state might need to get those rules just right to fully vindicate the vicinage principle. However, as long as the forum jurisdiction has at least part of the crime committed in it,<sup>56</sup> and as long as the act is a crime in both places,<sup>57</sup> the vicinage principle has a foothold.

A second tricky situation, and one that is more closely related to buffers, is presented when a crime is committed precisely on a border. The defendant may argue that the border is in neither county and, therefore, that neither county has jurisdiction. To deal with this situation, states commonly allow for crimes committed on a borderline to be

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52. See *supra* note 19 and accompanying text. The origins and rationale for this requirement are touched upon further in Part II.A, *infra*.

53. See *infra* text accompanying notes 77–78.

54. See *infra* note 79 and accompanying text.

55. See Norman Abrams, *Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula*, 9 UCLA L. REV. 751, 789–90 (1962) (describing early American case law); see also 4 LAFAYETTE ET AL., *supra* note 15, § 16.1(d) (describing history and practice of “multi-venue offenses”).

56. States may go even further and allow venue to be set where the victim is found, even if that is not an element of the offense. The Minnesota case of *State v. Krejci*, 458 N.W.2d 407 (Minn. 1990), is such an example—the court upheld a statute that allowed venue where a child abuse victim is found, analogizing to murder cases where venue could be where the victim died. See *id.* at 410 & n.3. As the dissent noted, however, the victim being found was not an element of the crime of child abuse. *Id.* at 414 (Kelley, J., dissenting).

57. Of course, if the act in question was a crime in only one of the counties—say, selling alcohol near the border of a dry county and a wet county—then a conviction requires a showing that the act occurred in the county where the act was illegal. This is true even when buffer statutes and their ilk are used. See, e.g., *McKay v. State*, 20 So. 455, 455–56 (Ala. 1896) (refusing to apply buffer statute to activities in wet county near dry county); *Chadwick v. State*, 296 S.W.2d 857, 860–61 (Tenn. 1956) (refusing to try violation of alcohol laws in wet county under travel jurisdiction statute); *Lancaster v. State*, 147 S.W.2d 476, 476 (Tex. Crim. App. 1941) (refusing to apply buffer statute to activities that occurred in wet county, but near dry county where they would have been illegal).

prosecuted in either county.<sup>58</sup> As with buffers, and unlike the multi-jurisdictional cases discussed above, this rule takes a crime committed in only one place and allows for a trial in two places. These on-the-border crimes differ from buffer-zone crimes, though, because in the former it is truly no fairer to say that the crime was committed in one place as opposed to another. Unless the state defines the borderline as part of only one of the two counties, a trial in either county cannot be said to be in the “wrong” place.

Somewhat less defensible are broader “river-border” statutes. If a crime is committed on a river that forms a border between two counties, and thus is part of neither, a borderline statute allows trial on either shore, in either county. Some river-border statutes go further, however, and allow trial to be held in *any* county for which the river is a border, regardless of how far down- or upstream the forum county is, even when there is no possibility that the crime occurred off the shores of the forum county.<sup>59</sup>

Perhaps the closest cousin to buffer statutes—and the one that best exposes their pointlessness—is the border-confusion or “doubt” statute. Most states provide that if it is unclear on which side of a county line a crime was committed, the crime can be prosecuted in either county.<sup>60</sup>

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58. *See, e.g.*, GA. CODE ANN. § 17-2-2(b) (2003) (“If a crime is committed on, or immediately adjacent to, the boundary line between two counties, the crime shall be considered as having been committed in either county.”); NEB. REV. STAT. § 29-1305 (1995) (“When an offense shall be committed on a county line, the trial may be in either county divided by such line . . . .”); TENN. R. CRIM. P. 18(c) (“Offenses committed on the boundary of two (2) or more counties may be prosecuted in either county.”).

59. *See, e.g.*, 720 ILL. COMP. STAT. 5/1-6(e) (2002) (“If an offense is committed on any of the navigable waters bordering on this State, the offender may be tried in any county adjacent to such navigable water.”); N.Y. CRIM. PROC. LAW § 20.40(4)(h) (McKinney 2003) (“An offense committed on board a vessel navigating or lying in any river, canal or lake flowing through or situated within this state, may be prosecuted in any county bordering upon such body of water, or in which it is located, or through which it passes . . . .”); UTAH CODE ANN. § 76-1-202(g)(ii) (2004) (“When an offense is committed on any body of water bordering on or within this state, the offender may be tried in any county adjacent to such body of water.”). Such statutes may be justifiable if the criminal boarded a boat in one county, journeyed downstream several counties, and then committed a crime on the river. If the river is not part of any one county, the point of embarkation is as legitimate a place to try the crime as any other. Broad river-border statutes may also be justifiable when an offense occurred on a moving vessel; while it may be certain that the crime occurred on the boat, it may be far from certain which counties were closest by when the crime occurred. *Cf.* N.Y. CRIM. PROC. LAW § 20.40(4)(f) (McKinney 2003) (providing similar rule for crimes on mass transit); 4 LAFAVE ET AL., *supra* note 15, § 16.1(e) & nn.171–72 (same). However, if there is no such possibility—if the forum county was not an embarkation point or a conceivable “nearest shore” point—then these statutes go further than is necessary.

60. *See supra* note 42 and accompanying text (discussing and listing “doubt” statutes). Of course,

The need for such statutes is obvious, not just where the location of the border is unclear, but also in cases where the location of the *crime* is hard to show. If actions are clearly criminal on either side of a line, there is no reason to allow them to be committed with impunity just because the borders are poorly marked or the prosecution cannot prove beyond a reasonable doubt where the crime was committed.<sup>61</sup> As with borderline statutes, doubt statutes allow a trial to occur when, in the absence of such a statute, there might not be one.

Borderline and doubt statutes substitute the requirement that prosecutors prove the crime occurred in the forum county with the requirement that they prove it occurred on or near the border with no way to tell exactly where. If a defendant believes that the crime was not committed on the line, and that it is possible to determine precisely where it occurred, then he may still stipulate or prove that—and commit himself to being tried in at least one place. What he cannot do is avoid prosecution altogether.

Perhaps buffer statutes evolved from a combination of borderline and doubt statutes, and were similarly aimed at aiding prosecutions. When the exact location of criminal activity is unknown (was the defendant's punch thrown ten feet from that tree or fifteen?), or when an area is poorly surveyed and marked, it greatly simplifies matters to create a fictional presumption that a crime committed very near a border was actually committed right on it. Rather than require prosecutors to prove a negative and establish that the true location of a crime cannot be determined, buffer statutes allow them to substitute a simpler showing that eliminates doubt and increases efficiency. The problem, of course, is that buffer statutes go further and allow prosecution in the next county even when there is no doubt at all that the crime did not occur there. Buffer statutes do avoid the situation in which a defendant argues that there is no uncertainty and the prosecutor, who must prove that there was uncertainty, is forced to prove a negative. However, courts are capable of sorting out such situations. If one side can prove that the

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this result also obtains in any state with a buffer statute, *see supra* note 23 (listing statutory provisions), or an "on-the-line" statute, *see supra* note 58 (listing statutory provisions).

61. *See generally* Annotation, *Necessity of Proving Venue or Territorial Jurisdiction of Criminal Offense Beyond Reasonable Doubt*, 67 A.L.R.3d 988 (1975) (discussing methods and burdens of proof for venue). Not every jurisdiction requires that venue be proven beyond a reasonable doubt, but many do, and "it is recognized generally, at least by implication, that the venue of a criminal offense must be proved by the prosecution to some degree of satisfaction, and that this requirement is a constitutional right of the accused." *Id.* § 2[a], at 991.

crime occurred in one jurisdiction and the other one cannot disprove that, then there should be no problem trying the case in that jurisdiction.

The most important difference between buffer statutes and these other statutes is that multi-jurisdiction statutes, borderline statutes, and uncertainty statutes simplify rather than complicate—they take crimes that occurred *nowhere* and make them triable *somewhere*, or crimes that occurred in *multiple* places and make them triable in *one* place. In this way, they provide certainty and administrative efficiency while preventing defendants from reaping any advantage from the technicalities of the geography of their crime. Buffer statutes, by contrast, can take a crime that undoubtedly occurred in one jurisdiction and make it triable in multiple places, “solving” a problem that never existed.

*E. Justifications for, and Problems with, Buffer Statutes*

Even if most states do well enough without them, buffer statutes have some benefits. Roughly speaking, these advantages can be classified either as improving administrative efficiency or as making it easier for prosecutors to win and preserve convictions. The main justification that courts have advanced in approving buffer statutes is the latter:

The evil intended to be remedied . . . was that where crimes were committed on or near a county line, it might turn out in the proof, after a fair and expensive trial had fully established the guilt of a defendant, that the indictment was in the wrong county, and the prosecution would be defeated on the ground alone that the prosecution was in the wrong county. A few yards or feet would save the greatest offenders from punishment . . .<sup>62</sup>

In other words, buffer statutes free prosecutors from the risk of getting a technical detail wrong that would result in an otherwise guilty person going free.

Defeating a prosecution on grounds that the indictment misstated the location of the crime by a few feet seems less justifiable than, say, allowing a defendant to go free because of mistaken identity (who is thus actually innocent), or because of an illegal search (who is thus convicted

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62. *Armstrong v. State*, 41 Tenn. 338, 341 (1860); *accord* Act of Mar. 31, 1860, § 48, *reprinted* in 1860 Pa. Laws 375; *State v. Harris*, 31 So. 782, 784 (La. 1902); *State v. True*, 330 A.2d 787, 790 (Me. 1975); *Commonwealth v. Gillon*, 84 Mass. 502, 503 (1861); *People v. Richards*, 226 N.W. 651, 653 (Mich. 1929); *State v. Robinson*, 14 Minn. 447 (1869), *available at* 1869 WL 2333, at \*2; *State v. Lehman*, 279 P. 283, 284 (Or. 1929); *State v. Lowe*, 21 W. Va. 782, 787 (1883).

only due to official misconduct). In the case of the geographically flawed indictment, it might appear that the flaw presents no such issue of actual innocence or official misconduct, merely a small error of measurement. Then again, this begs the question. One reason why crimes are tried where they are committed is that local juries are supposed to be better at getting at the truth, due to their greater interest in and knowledge of their environs.<sup>63</sup> Clarence Terrell might have been able to argue more effectively to a *local* jury that his conduct was reasonable—to argue, in effect, that he was actually innocent.<sup>64</sup> As for the parallel of remedying misconduct, buffer statutes are analogous here too, because they encourage prosecutorial misconduct that, while not punished as vigorously as Fourth, Fifth, and Sixth Amendment violations, is still nothing worth protecting. Specifically, buffer statutes allow a prosecutor to pursue a case that everyone knows occurred in another county, perhaps because conviction is easier than it would be in the home county—in other words, they allow forum shopping, a practice that offends basic notions of fairness.<sup>65</sup>

In most cases, the legitimate goals of the buffer statute—administrative efficiency and avoiding technical difficulties in prosecuting crimes near borders—would be served just as well by a statute that allows prosecution in either county only when there is real doubt as to where the crime occurred vis-à-vis the county line. Even if the prosecution proceeds under a near-certain assumption that the crime was in County A, if it later turns out that it really happened in County B, this could meet a sensible standard for confusion: a good faith, reasonable belief that the crime was committed in the forum county.<sup>66</sup>

More importantly, “doubt” statutes avoid some of the drawbacks of buffer statutes. It is one thing for prosecutors to forum shop, overstep their authority, and trample on vicinage and community self-government on purpose; it is less of a problem if these are merely incident to a

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63. See *infra* text accompanying notes 150–61.

64. See *supra* Introduction.

65. See, e.g., *Grogan v. State*, 44 Ala. 9, 13–14 (1870) (refusing to allow transfer of case being tried under buffer statute after it had been submitted to jury); *In re McDonald*, 19 Mo. App. 370, 377–78 (1885) (striking down buffer statute in part due to fear of prosecutorial abuse). But see generally Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79 (1999) (defending forum shopping from its widespread and mainstream critics). Notably, Professor Algero’s defense of forum shopping—which is well taken—nowhere mentions forum shopping by prosecutors in criminal cases.

66. Cf. *People v. Cullen*, 405 N.E.2d 1021, 1024 (N.Y. 1980) (requiring prosecutor to make “good faith” effort to pinpoint location of crime before receiving benefit of doubt statute).

reasonable misunderstanding. Indeed, in cases where the location of a crime is unclear, the community interest in self-government is correspondingly diminished. If there remains some possibility of forum shopping, at least doubt statutes limit it to cases where there is at least enough confusion to pass a reasonableness test.

Rationales of administrative convenience nevertheless merit discussion. One such argument is that without a buffer statute, authorities would need to use resources to determine on which side of the county line a crime occurred. With a buffer statute, these resources can be saved or directed elsewhere. It is a rare crime, however, in which it takes much effort to pinpoint the county in which it occurred. This administrative justification really only applies to cases in which the location of the crime vis-à-vis the county line is in serious doubt. Such a situation is adequately covered by doubt statutes.

Another efficiency rationale is that border crimes often involve authorities from the other side of the line. The *Terrell* case, in which police pursuing a suspect across a county line got into a scuffle on the other side, is one example.<sup>67</sup> Another example is a case involving criminal activity that, while occurring on one side of the line, has effects that spill over to the other side and draw the concern of law enforcement officials there. *Buckrice v. People*,<sup>68</sup> discussed below, is a classic example of this phenomenon. In both of these cases, one county's authorities became involved in a case even though the crime technically occurred in another county. It is more efficient to allow such officers to continue their involvement rather than transfer the case to another authority.

All of that said, buffer statutes do not advance these efficiency goals very much. Most of the cases in which authorities in one county are involved in a crime just across the border would seem to fall under the exception to the usual rules for multi-jurisdictional crimes with some counts or some elements committed in different places.<sup>69</sup>

Cases involving cross-border effects are a more complicated matter

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67. See *supra* Introduction.

68. 110 Ill. 29 (1884).

69. See *supra* Part I.D. Some cases do not fall under this exception—*Terrell*, for instance, did not. However, by the same token, there was no reason in *Terrell*'s case why the matter could not have been referred to Detroit or Wayne County authorities. See *supra* Introduction. If authorities can cooperate with their neighbors well enough to avoid conflicts in buffer cases, then they can cooperate well enough to divvy up the cases under no-buffer regimes as well. See *infra* text accompanying notes 176–77.



because they are less likely to be covered as multi-jurisdictional crimes. *Buckrice* is a paradigmatic example. In that Illinois case, a rollicking roadhouse sat seventy rods on the Cook County side of the Cook–Kane county line, and it featured “a number of pleasures forbidden by state law, city ordinance, and biblical injunction.”<sup>70</sup> Cook County authorities were more concerned with goings on in Chicago than in the boondocks, but Kane County authorities, lacking a similarly distant center of gravity, were affected much more directly.<sup>71</sup> Having a hundred-rod buffer statute allowed the Kane County authorities to take matters into their own hands, rather than having to get the attention of their Cook County cohorts. If not for the Illinois constitutional provision requiring trial by a jury of the county of the crime, which rendered the buffer statute unconstitutional,<sup>72</sup> Kane County might have succeeded in maintaining jurisdiction over the troublesome roadhouse and shutting it down. If the statute had been constitutional, it would have provided a way for Kane County to vindicate its interests much more directly and efficiently, and it likely would have been more efficient for Cook County officials (who would have been left alone) as well.

If the Illinois Supreme Court had allowed the statute in *Buckrice* to stand, however, *Buckrice* could simply have rebuilt his roadhouse 496 feet further east into Cook County to evade Kane County’s reach. If buffer statutes offer a more efficient path to pursue crimes with cross-border effects, the gains are necessarily limited. County authority has to end at some line, and there will always be rollicking roadhouses just on the other side.

There are, moreover, corresponding efficiency losses in such buffer cases. The county in which a crime occurs will not always be as lackadaisical about prosecuting as Cook County was in *Buckrice*. All other things being equal, erecting zones in which there are two different sets of state prosecutors with the power to proceed would seem to decrease, rather than increase, efficiency. By introducing the possibility

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70. E.C. ALFT, ELGIN: DAYS GONE BY ch. 21, available at <http://www.elginhistory.com/dgb/ch21.htm> (last visited Apr. 26, 2005); see *Buckrice*, 110 Ill. at 34 (describing roadhouse as within seventy rods of county line).

71. See ALFT, *supra* note 70 (“The rural area of Hanover Township in Cook County east of Elgin was once the location of a number of disorderly houses. Because they were outside the city limits, they were immune from interference by the city police department and too far away to interest the sheriffs office in Chicago. Even when evidence was gathered, authorities failed to prosecute.”); cf. *Murray v. Roanoke*, 64 S.E.2d 804, 808 (Va. 1951) (describing purpose of Virginia buffer statute as being “to prevent the territory contiguous to a city from becoming a refuge for criminals”).

72. See generally *Buckrice*, 110 Ill. 29 (enforcing Illinois constitutional provision strictly).

of redundancy, turf battles, or even well-meaning but cumbersome consultation, buffer statutes can be said to disserve the goals of efficiency as much as they serve them. If Cook and Kane counties had had a more functional relationship that avoided such conflicts, then Kane County officials presumably could have gotten Cook County to prosecute Buckrice without using the buffer statute. Typically, an alleged criminal must “run the gauntlet” once, but where most people must convince only one prosecutor and grand jury not to indict, defendants in buffer zones must convince two.<sup>73</sup> This increases convictions, but not efficiency.

There is no reason to add a buffer statute in a jurisdiction that is already flexible in cases of multi-jurisdictional crimes and has “doubt” statutes on the books to cover cases of border confusion. To be sure, one could argue that sorting cases out into these precise categories is not so simple. Rather than allow a defendant to argue that there is no border confusion, it might be more efficient to foreclose that argument altogether for cases that are, quite literally, on the margin. On the other hand, it might make even more sense to foreclose the *effects* of the argument, simply by ensuring that the whole issue of county lines is one of venue, not jurisdiction, and that a defendant must challenge venue early in the process or waive his argument.<sup>74</sup> *That* would improve efficiency, and it would also avoid the problem of long trials mooted by technicalities.

In all, buffer statutes offer no legitimate, unique, or practical advantages over other methods of dealing with crimes committed near borders. The statutes cannot be justified as a matter of policy, even apart from the damage they do as a matter of law (discussed in the next Part) to the deeply rooted constitutional principles of trial by “juries of the vicinage.”

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73. *In re McDonald*, 19 Mo. App. 370, 377–78 (1885) (discussing unprecedented requirement from buffer statute that defendant “run the gauntlet” twice). This situation also occurs—but is at least unavoidable—when a crime involves elements that occur in multiple jurisdictions. *See supra* notes 52–57 and accompanying text (discussing implications of multi-jurisdictional crimes). It also arises for crimes that can be charged as both state and federal offenses.

74. *See* 2 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 306 (3d ed. 2000) (“[V]enue is a privilege provided for the benefit of the accused, rather than a limitation on the jurisdiction of the court, and . . . this privilege may be waived by the defendant.”) (footnote omitted).

## II. CRIMES OF THE PERIPHERY, JURIES OF THE VICINAGE

The idea that crimes should be tried before a jury of the vicinage—people from the place where the crime was committed—is a deeply rooted and important value, which buffer statutes subvert. This Part discusses the history and importance of the vicinage right, and it concludes that vicinage provides the main strike against buffer statutes, particularly in those states where county-level vicinage is constitutionally guaranteed.

Trials by a jury of the vicinage are important not just to defendants, but to the victimized communities as well. The relation between buffer statutes and the community-centered aspect of vicinage is explored in more detail in Part III.

### A. *Juries of the Vicinage*

Juries of the vicinage are deeply rooted in the Anglo-American system. This Part revisits that history.

#### 1. *English Experience*

In England, crimes originally had to be tried in the neighborhood in which they were committed, by a jury from that neighborhood. It could not have been otherwise, because under the early English jury system jurors were more akin to witnesses; they decided cases based on their own knowledge, and they were therefore selected on that basis.<sup>75</sup> As the function of jurors was separated from that of witnesses, the vicinage expanded from the immediate neighborhood to the entire county.<sup>76</sup> Jurors were still “local,” to be sure, but the bounds of the locality had expanded.

The local jury requirement was enforced strictly. Initially, the power

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75. See *Zicarelli v. Gray*, 543 F.2d 466, 475 (3d Cir. 1976) (providing historical account of English jury); see also 3 WILLIAM BLACKSTONE, COMMENTARIES \*359–60 (describing early jury requirements); William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59, 60 (1944) (same).

76. See The Juries Act, 1825, 6 Geo. 4, c. 50, § 13 (Eng.) (broadening venire to county); see also *Zicarelli*, 543 F.2d at 475 (providing historical account of English shift from witness-jurors from neighborhood to impartial jurors of county); *State v. Albee*, 61 N.H. 423, 424–25 (1881) (same); 3 BLACKSTONE, *supra* note 75, at \*359–60 (same); Blume, *supra* note 75, at 60 (same); Mike Macnair, *Vicinage and the Antecedents of the Jury*, 17 LAW & HIST. REV. 537, 548 & n.39 (1999) (same). To some authorities, this shift away from knowledgeable jurors eliminated the need for strict vicinage requirements. See, e.g., *Smith v. Times Publ'g Co.*, 36 A. 296, 297 (Pa. 1897).

of a jury ended at the county line, including most significantly the power to inquire into facts.<sup>77</sup> As a result, a defendant who committed at least one of the elements of his crime in another county could not be prosecuted.<sup>78</sup> In 1548, a statute established an exception to that rule in murder cases,<sup>79</sup> and was the first of many such exceptions that allowed cross-border prosecutions.<sup>80</sup> In addition, when a crime was committed on a county line, or when it was unclear in which county the actions occurred, the common law allowed the case to be tried before a jury in either county.<sup>81</sup>

It was not until 1819 that the British enacted a buffer statute. This statute allowed prosecution for a crime committed within 500 yards of a county line to be heard by a jury in either county.<sup>82</sup> This statute was inspired by the problem of criminals in such cases “escap[ing] unpunished from the Defect of Proof.”<sup>83</sup> Apparently, there was an unacceptable number of cases in which either the location of the crime or the location of the border could not be proven, making it impossible for juries—whose power to inquire into facts that occurred in the next county was still limited—to convict criminals who had clearly satisfied every other requirement for conviction.

Some commentators have surmised that the sheer number of exceptions to the vicinage principle indicates that it was not much of a rule.<sup>84</sup> This hypothesis may indeed be true for England, but it ignores the strength of the vicinage principle in the United States, where there was a

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77. See 4 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 530 (3d ed. 1945) (describing English common-law history of venue).

78. See *id.*

79. 2 & 3 Edw. 6, c. 24 (1548) (Eng.); see 4 HOLDSWORTH, *supra* note 77, at 530–31 (discussing statutory change).

80. See, e.g., 8 Geo. 2, c. 20 (1735) (Eng.) (allowing prosecutions for destruction of turnpikes, highways, and locks to occur in adjacent counties); see also 4 HOLDSWORTH, *supra* note 77, at 550 (discussing extent of exceptions).

81. See *State ex rel. Brown v. Stewart*, 19 N.W. 429, 433 (Wis. 1884) (describing common-law standards).

82. See 59 Geo. 3, c. 96, § 2 (1819) (Eng.).

83. See *id.* Nine years later, a similar 500-yard buffer statute was passed for “more effectual Prosecution” of such crimes. See The Criminal Law Act, 1826, 7 Geo. 4, c. 64, § 12 (Eng.) (mandating 500-yard buffer “for the more effectual Prosecution of Offences committed near the Boundaries of Counties”). This problem existed only because proving the location of the crime was an element of the crime, as opposed to merely an incidental fact used to determine venue.

84. See, e.g., 11 HOLDSWORTH, *supra* note 77, at 550 (1938) (“The rules as to venue . . . were being whittled away by a growing number of exceptions and modifications, which showed that these rules had altogether outlived their usefulness.”).

substantial affinity for strictly local juries.

## 2. *Colonial Underpinnings*

At the time of its founding, America took the notion of local jury trials more seriously than did England.<sup>85</sup> Indeed, the greater importance to Americans of trial by a jury of the vicinage loomed large in the debates surrounding the American Revolution.

Some early colonial charters specified that trials were to be by juries of the vicinage.<sup>86</sup> Though the English exceptions discussed above were fairly well entrenched in the colonies by the time the colonists revolted and wrote their own constitutions in the 1770s and 1780s,<sup>87</sup> the American process of independence added new power to the vicinage right.

The revolutionary importance of local jury trials was driven by two outrages. The first was the Boston Massacre in 1770. The British soldiers who fired into a crowd of agitated Bostonians were tried by a local jury.<sup>88</sup> The trial was delayed until passions in the venire had subsided, and the soldiers had the benefit of peremptory strikes on prospective jurors; in the event, six of the eight soldier-defendants were acquitted.<sup>89</sup> One can easily imagine a modern version of the massacre trial being transferred to a less inflamed venue. To the colonists, though, any such trial would have been a sham. Indeed, when despite the acquittals the Crown provided that in the future such trials would be held in England with English jurors, many rebellious colonists vehemently disagreed.<sup>90</sup> The most prominent complaint found its way into the

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85. See Henry G. Connor, *The Constitutional Right to a Trial by a Jury of the Vicinage*, 57 U. PA. L. REV. 197, 205 (1909) (discussing American and Whig opposition to English practice of watering down vicinage rights); Marvin Zalman & Maurisa Gates, *Rethinking Venue in Light of the "Rodney King" Case*, 41 CLEV. ST. L. REV. 215, 220 (1993) (contrasting English jury, bulwark against tyranny, with American juries, institutions of democratic self-government).

86. See FRANCIS H. HELLER, *THE SIXTH AMENDMENT* 17 (1951) (discussing New Jersey charters); Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801, 814 (1976) [hereinafter Kershen, *Vicinage I*] (citing charters of West Jersey and Virginia). Virginia initially did not have a strong vicinage requirement, but evolved toward one. *Id.*

87. See *State v. Albee*, 61 N.H. 423, 426–27 (1881) (noting entrenchment of English "transitory" statutes and corresponding reduction in power of vicinage right in America); *Commonwealth v. Collins*, 74 Pa. C. 608, 614–15 (Ct. Oyer & Terminer 1919) (describing early Pennsylvania constitutional language and statutory provisions consistent with flexible view of vicinage).

88. See Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1681–82 (2000) (recounting Boston Massacre trial).

89. See *id.*

90. See Connor, *supra* note 85, at 198–99 (discussing support for strong vicinage rights, which

Declaration of Independence, which charged the Crown with “protecting [troops], by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States.”<sup>91</sup>

The other outrage that put the right to local jury trials at the forefront of the Revolution involved prosecuting colonists. Not only did the Crown require soldiers accused of killing colonists to be tried in England, but it also whisked away colonists accused of violating the hated Stamp Act, among other statutes.<sup>92</sup> These colonists were not tried before any jury, let alone a local one. Instead, they were tried by the admiralty court in Halifax or across the sea in England.<sup>93</sup> This was a slap in the face to those colonists who believed that, as Englishmen, they were entitled to a trial before a local jury. This outrage too found its way into the Declaration of Independence, in which the rebels protested against the Crown “[f]or depriving [them] in many cases, of the benefits of Trial by Jury” and “[f]or transporting [them] beyond Seas to be tried for pretended offences.”<sup>94</sup>

These examples make clear that the jury of the vicinage was not understood as only a defendant’s right. Bostonians were not interested in holding the Boston Massacre trial locally in order to give the colonists a chance to acquit the British soldiers. Had the matter gone to a vote instead of a trial, the soldiers surely would have lost. Nor were the colonists attempting to preserve their chance to convict: They acquitted most of the defendants, after all. Rather, the Bostonians wanted the trial held locally because doing so would signal their power to govern themselves, regardless of what they chose to do with that power.<sup>95</sup>

The colonists’ strong sense of the vicinage right might not have

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“found expression in all of the colonies”); Engel, *supra* note 88, at 1683–84 (recounting colonial reaction to British Intolerable Acts).

91. THE DECLARATION OF INDEPENDENCE para. 17 (U.S. 1776).

92. See LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 226–27 (1999) (discussing importance of vicinage to rebel colonists); Connor, *supra* note 85, at 197 (mentioning treatment of Stamp Act violators).

93. See Connor, *supra* note 85, at 205–08 (discussing transportation of colonists for trial and opposition to this practice); see also Zicarelli v. Gray, 543 F.2d 466, 468 (3d Cir. 1976) (discussing revolutionary history of vicinage); LEVY, *supra* note 92, at 226–27 (discussing importance of vicinage to rebel colonists).

94. THE DECLARATION OF INDEPENDENCE paras. 20–21 (U.S. 1776); see also LEVY, *supra* note 92, at 226–27 (discussing importance of vicinage to rebel colonists); Blume, *supra* note 75, at 63–65 (discussing additional colonial expressions of outrage); Connor, *supra* note 85, at 205–08 (same).

95. Arguments regarding the importance of vicinage for self-government are discussed in the text accompanying notes 162–65 and in Part III, *infra*.

precluded the passage of county-buffer statutes (which in any case did not arise for two more generations). There is quite a difference between putting Bostonians on trial in Halifax or London and putting them on trial in Cambridge, Massachusetts. The revolutionaries appeared to be more concerned with the former, more extreme situation than the latter,<sup>96</sup> and that focus was evident centuries later in decisions affirming the use of buffers.<sup>97</sup>

This distinction—ensuring jury trial in the right county versus ensuring jury trial in the right country—makes clear that even if a state has a strong sense that crimes should be tried by local juries, it still must define the bounds of the “locality.” In England, the county was the key unit for the vicinage right.<sup>98</sup> However, the English county was a larger geographical unit than the American county. In terms of population and sometimes area, the English county was closer in scope to the American state.<sup>99</sup> For American states to impose a county-level vicinage requirement, therefore, would have represented change, not continuity, because it would have made the geographical bounds of the vicinage much smaller.<sup>100</sup> A state law that allowed a crime to be prosecuted in a neighboring county thus might easily have been accepted as consistent with English common-law notions of trial by a jury of the vicinage, even

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96. See Blume, *supra* note 75, at 65–66.

97. See, e.g., *Hernandez v. Municipal Court*, 781 P.2d 547, 552 (Cal. 1989) (in bank) (accepting non-county vicinage as consistent with historical roots of vicinage requirement because “our citizens are no longer threatened with transportation across the seas for criminal trials”); *State v. Robinson*, 14 Minn. 447 (1869), available at 1869 WL 2333, at \*4 (affirming buffer statute and perceiving purpose of vicinage requirement as preventing party from “being dragged to a trial at a distant part of the state”) (emphasis added).

98. See *supra* note 76 and accompanying text.

99. In 1790, England’s forty traditional counties averaged about 180,000 people, while an American state averaged 278,134 people (counting Vermont, which was not yet a state), and an American county averaged 13,656 people. See E.A. WRIGLEY & R.S. SCHOFIELD, *THE POPULATION HISTORY OF ENGLAND 1541–1871*, at 534 (1989) (estimating English population); U.S. Census Bureau, *Census Data for the Year 1790* (providing data for 283 counties and fourteen states, counting Maine and Kentucky as part of Massachusetts and Virginia, respectively), at <http://fisher.lib.virginia.edu/cgi-local/censusbin/census/cen.pl?year=1790> (last visited Apr. 26, 2005); see also *State v. Lewis*, 55 S.E. 600, 603–04 (N.C. 1906) (arguing that any North Carolina vicinage right would not be at county level because of larger area and population of English counties); *id.* at 609 (Brown, J., concurring in part) (arguing that American vicinage right might still apply, but to multi-county areas).

100. See generally Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (exploring how changes in constitutional meaning can occur through faithful application of unchanged wording). Nevertheless, this is exactly what many states did. See *infra* notes 123–35 and accompanying text (relating history of state constitutional vicinage provisions).

if it would have faced more searching review in the new states than in England.

### 3. *American Experience*

Despite the colonists' strong sense of a vicinage right, the Massachusetts Constitution did not specify that crimes had to be tried by a jury of the county in which they were committed. Rather, it declared (and declares): "In criminal prosecutions, the verification of facts, in the *vicinity* where they happen, is one of the greatest securities of the life, liberty, and property of the citizen."<sup>101</sup> It is unclear what the Framers meant by "vicinity," and also whether they meant this to be positive law or merely declaratory.<sup>102</sup> It seems quite clear, though, that a buffer statute would not necessarily conflict with this provision, not least because, to the Framers, the paradigmatic violation of the principle of trial by jury of the vicinage was trial across the sea, not in the next county.<sup>103</sup>

By 1787, eight other states had constitutional provisions similar to Massachusetts's, and three of them drew similarly vague lines, requiring a "jury of the country,"<sup>104</sup> or trial "where [the facts] arise."<sup>105</sup> Three other states were even more vague, providing only that the right to trial by jury would remain inviolate, which may or may not have included an implied vicinage right.<sup>106</sup> Only two states, Georgia and New Hampshire,

101. MASS. CONST. pt. 1, art. XIII (emphasis added).

102. *See Commonwealth v. Parker*, 19 Mass. 550, 552 (1824) (holding provision to be declaratory and not exclusive of legislative power to place trials in counties other than where crime occurred); Blume, *supra* note 75, at 68 (discussing declaratory provisions and case law construing them as weak).

103. *See* Blume, *supra* note 75, at 78 (discussing original states' thinking on vicinage).

104. PA. CONST. of 1776, Declaration of Rights § 9 ("[I]n all prosecutions for criminal offences, a man hath a right to . . . a speedy public trial, by an impartial jury of the country . . ."); VT. CONST. of 1786, Declaration of Rights § XI ("[I]n all prosecutions for criminal offences, a man hath a right to . . . a speedy public trial by an impartial jury of the country . . ."). Vermont had not yet been admitted to the Union at this point.

105. MD. CONST. of 1776, Declaration of Rights, art. XVIII ("That the trial of facts where they arise, is one of the greatest securities of the lives, liberties and estates of the people.").

106. N.J. CONST. of 1776, § XXII ("[T]he inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever."); N.Y. CONST. of 1777, § XLI ("[T]rial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever."); N.C. CONST. of 1776, Declaration of Rights § IX (stating jury is to be "as heretofore used"); *id.* § XIV (using inviolability language for civil juries); *see* Engel, *supra* note 88, at 1686 (surmising that vague state constitutions might have meant to include vicinage right as intrinsic to jury trial).



required trials to be conducted in the “county” in which the crime was committed, and they both provided for venue in another county in certain instances.<sup>107</sup> While most of these provisions mentioned venue, not vicinage, the two went hand in hand.<sup>108</sup>

Between 1787 and 1791, the Federal Constitution and Bill of Rights changed the landscape regarding venue and vicinage. In Article III, Section 2, the Constitution required very specifically that federal criminal trials be by jury, and that the venue be the state in which the crime was committed.<sup>109</sup> Like most of the state provisions discussed in the previous paragraph, however, the federal provision said nothing explicit about the location from which to draw the jury.<sup>110</sup> Presumably, a federal statute that allowed a crime, if it was committed close to the border, to be prosecuted in a neighboring state would have been constitutionally suspect.<sup>111</sup>

Four years later, the Sixth Amendment—which Madison originally intended to amend Article III<sup>112</sup>—further localized this venue and vicinage formula by requiring that the jury be “of the State and district”

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Some courts have, temporarily at least, found similar language to require county-level vicinage, but most have not. *See* *Commonwealth v. Collins*, 74 Pa. C. 608, 611 (Ct. Oyer & Terminer 1919) (rejecting claim that local vicinage is intrinsic to jury trial); *infra* note 127 (discussing California and Michigan cases finding county-level vicinage requirements).

107. GA. CONST. of 1777, art. XXXIX (“All matters of breach of the peace, felony, murder, and treason against the State to be tried in the county where the same was committed. All matters of dispute, both civil and criminal, in any county where there is not a sufficient number of inhabitants to form a court, shall be tried in the next adjacent county where a court is held.”); N.H. CONST. of 1784, pt. I, art. XVII (“In criminal prosecutions, the trial of facts in the vicinity where they happen, is so essential to the security of the life, liberty and estate of the citizen, that no crime or offence ought to be tried in any other county than that in which it is committed; except in cases of general insurrection in any particular county, when it shall appear to the Judges of the Superior Court, that an impartial trial cannot be had in the county where the offence may be committed, and upon their report, the assembly shall think proper to direct the trial in the nearest county in which an impartial trial can be obtained.”).

108. *See* 4 LAFAYETTE ET AL., *supra* note 15, § 16.1.

109. U.S. CONST. art. III, § 2, cl. 3.

110. *See id.*; *see also* HELLER, *supra* note 86, at 25–26 (discussing ratification debates and concern over lack of vicinage protection in Article III); Kershen, *Vicinage I*, *supra* note 86, at 816–17 (discussing venue and vicinage in legislative history of Article III). Though the yearning for a vicinage provision may have reflected a feeling of disconnection between vicinage (which was not mentioned) and venue (which was), jurors were generally selected from the venue unless otherwise specified. *See supra* note 15 and accompanying text (distinguishing venue and vicinage); *infra* notes 119–21 and accompanying text (discussing history of federal vicinage statutes).

111. *See generally* Brian C. Kalt, *The Perfect Crime*, 93 GEO. L.J. 675 (2005) (arguing unconstitutionality of federal statute placing parts of Idaho and Montana in Wyoming District).

112. *See* Kershen, *Vicinage I*, *supra* note 86, at 819.

where the crime was committed.<sup>113</sup> This language resulted from a compromise. Madison had wanted to require a jury of “the vicinage,” but opponents felt that the term was too vague—and also potentially too strict, if it were interpreted to require county-level vicinages.<sup>114</sup> By using the term “district,” the Sixth Amendment left it to Congress (which defined the bounds of federal judicial districts) to decide how local to make federal juries.<sup>115</sup> The Judiciary Act of 1789, which Congress approved the day before the Sixth Amendment, established thirteen state-sized districts.<sup>116</sup> Thus, it was not until Congress started making smaller districts in earnest<sup>117</sup> that the Sixth Amendment significantly localized the federal vicinage requirement, or that anyone reasonably could have seen it as doing so.<sup>118</sup>

The Judiciary Act of 1789 provided a notable exception to the federal requirement that vicinage operate at the state, rather than the county, level. The Judiciary Act provided that federal *capital* crimes had to be tried in the county where they were committed or, if this was not convenient, that at least a portion of the jury pool had to be drawn from that county.<sup>119</sup> This provision shows that local juries were important to

113. U.S. CONST. amend. VI.

114. See *Zicarelli v. Gray*, 543 F.2d 466, 476 (3d Cir. 1976) (describing legislative history of Sixth Amendment); *HELLER*, *supra* note 86, at 29–34 (same); Kershen, *Vicinage I*, *supra* note 86, at 818–25 (same).

115. U.S. CONST. amend. VI.

116. Judiciary Act of 1789, ch. 20, § 2, 1 Stat. 73, 73 (1789). Each of the eleven states—North Carolina and Rhode Island had not yet joined the Union—had one district, except for Massachusetts (whose second district was what is now Maine) and Virginia (whose second district was what is now Kentucky). *Id.* For a good account of the timelines of the vicinage proposals in the Bill of Rights and the Judiciary Act, see 4 LAFAVE ET AL., *supra* note 15, § 16.1(b); Kershen, *Vicinage I*, *supra* note 86, at 817–57.

117. Significantly, most states—and most of the original thirteen states—still only comprise one district each. See 28 U.S.C. §§ 81–131 (2000) (defining bounds of district courts). For a description of the process of the division of states into multiple districts, see Erwin C. Surrency, *Federal District Court Judges and the History of Their Courts*, 40 F.R.D. 139, 147–49 (1966).

118. As Joseph Story put it:

It is observable, that the trial of all crimes is not only to be by jury, but to be held in the state, where they are committed. The object of this clause is to secure the party accused from being dragged to a trial in some *distant* state, away from his friends, and witnesses, and neighbourhood . . . Besides this; a trial in a *distant* state or territory might subject the party to the most oppressive expenses, or perhaps even to the inability of procuring the proper witnesses to establish his innocence.

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1775 (Boston, Hilliard, Gray, & Co. 1833) (emphasis added).

119. Judiciary Act of 1789, ch. 20, § 29, 1 Stat. 73, 88 (1789) (“[I]n cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence.”); see

the Founding generation.<sup>120</sup> However, the fact that federal capital crimes were routinely tried in some other county, and that the requirement of transporting jurors in from the location of the crime eventually disappeared, both show that this concern for local vicinage faded in following years.<sup>121</sup>

Given the relative scarcity of federal prosecutions, the most significant effect of Article III and the Sixth Amendment was that states began parroting their language. While the vicinage provision of the Sixth Amendment is one of the few provisions in the Bill of Rights that the Supreme Court has never incorporated against the states,<sup>122</sup> many states imposed some stricter version of it on themselves in their own constitutions. Before 1792, virtually every state constitution with a venue or vicinage provision used vague terms to describe its bounds,<sup>123</sup>

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*Zicarelli*, 543 F.2d at 477–78 (discussing Judiciary Act). At the time, federal capital crimes included counterfeiting, treason, murder, piracy, and robbery on the high seas. See Kershen, *Vicinage I*, *supra* note 86, at 858 n.195.

120. There is some debate as to how seriously the Framers took vicinage. See, e.g., Blume, *supra* note 75, at 65–66 (positing that Framers were not concerned about very local vicinage); Kershen, *Vicinage I*, *supra* note 86, at 828–33 (disagreeing with Blume and others). Kershen, whose mission is to separate consideration of vicinage from venue, seems to have the most complete argument; his entire article can, in a sense, be seen as standing for the proposition that the Founding generation thought seriously about vicinage.

121. See Kershen, *Vicinage II*, *supra* note 17, at 56–60 (describing use, repeal, and significance of capital vicinage provision).

122. See AKHIL REED AMAR, *THE BILL OF RIGHTS 275* (1998) (arguing against incorporation); 1 LAFAVE ET AL., *supra* note 15, § 2.6(b) (discussing non-incorporation of Sixth Amendment's vicinage provision); Engel, *supra* note 88, at 1707–09 (arguing in favor of incorporation); Lisa E. Alexander, Note, *Vicinage, Venue, and Community Cross-Section: Obstacles to a State Defendant's Right to Trial by a Representative Jury*, 19 HASTINGS CONST. L.Q. 261, 272–74 (1991) (describing pro- and anti-incorporation authority).

123. See KY. CONST. of 1792, art. XII, ¶ 10 (“jury of the vicinage”); MASS. CONST. pt. 1, art. XIII (1780) (“verification of facts, in the vicinity where they happen”); PA. CONST. of 1790, art. IX, § 9 (“[I]n all criminal prosecutions the accused hath a right to . . . , in prosecutions by indictment or information, a speedy public trial, by an impartial jury of the vicinage”); PA. CONST. of 1776, Declaration of Rights § 9 (“[I]n all prosecutions for criminal offences, a man hath a right to . . . a speedy public trial, by an impartial jury of the country”); VT. CONST. of 1777, Declaration of Rights § X (“[I]n all prosecutions for criminal offences, a man hath a right to . . . a speedy public trial, by an impartial jury of the country . . . .”); VA. CONST. of 1776, Bill of Rights § 8 (“[I]n all capital or criminal prosecutions a man hath a right to . . . a speedy trial by an impartial jury of twelve men of his vicinage”). *But see* GA. CONST. of 1789, art. III, § 4 (“[C]riminal cases . . . shall be tried in the county where the crime shall be committed.”); N.H. CONST. of 1784, pt. I, art. XVII (“In criminal prosecutions, the trial of facts in the vicinity where they happen, is so essential to the security of the life, liberty and estate of the citizen, that no crime or offence ought to be tried in any other county than that in which it is committed; except in cases of general insurrection in any particular county, when it shall appear to the Judges of the Superior Court, that an impartial trial cannot be had in the county where the offence may be committed, and upon their report, the assembly shall think proper

but after 1792 most state provisions required juries to be from the “county”<sup>124</sup> or “county or district”<sup>125</sup> in which the crime was committed.<sup>126</sup> Two states even appear to have created, albeit temporarily, county-level vicinage requirements from vague constitutional requirements preserving the right to a jury trial. These states apparently found it inherent in the definition of a “jury” that jurors be from the county where the crime was committed.<sup>127</sup>

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to direct the trial in the nearest county in which an impartial trial can be obtained.”).

124. These states and the years of their first such provision are: ARIZ. CONST. art. II, § 24 (1912); ARK. CONST. art. II, § 10 (1874); FLA. CONST. of 1885, Declaration of Rights § 11; ILL. CONST. art. I, § 8 (1970); IND. CONST. art. I, § 13(a) (1851); LA. CONST. of 1864, art. 105 (“parish”); MISS. CONST. of 1817, art. I, § 10; MISS. CONST. of 1832, art. I, § 10; MO. CONST. of 1875, art. II, § 22; OHIO CONST. art. I, § 10 (1912); OKLA. CONST. art. II, § 20 (1907); OR. CONST. art. I, § 11 (1859); S.C. CONST. of 1895 art. I, § 17; TENN. CONST. art. I, § 9 (1870); UTAH CONST. art. VIII, § 5 (1896, repealed 1984); WASH. CONST. art. I, § 22 (1889, amended 1921); W. VA. CONST. of 1862, art. II, § 8.

125. These states and the years of their first such provision are: ALA. CONST. of 1819, art. I, § 10; ARK. CONST. of 1836, art. II, § 11; COLO. CONST. art. II, § 16 (1876); FLA. CONST. of 1839, art. I, § 10; ILL. CONST. of 1848, art. XIII, § 9; IND. CONST. of 1816, art. I, § 13; KAN. CONST. of 1855, art. I, § 10; MINN. CONST. art. I, § 6 (1857); MONT. CONST. of 1889, art. III, § 16; NEB. CONST. art. I, § 11 (1875); N.M. CONST. art. II, § 14 (1912); OHIO CONST. of 1802, art. VIII, § 11; S.D. CONST. art. VI, § 7 (1889); TENN. CONST. of 1796, art. XI, § 9; UTAH CONST. art. I, § 12 (1896); WIS. CONST. art. I, § 7 (1848); WYO. CONST. art. I, § 10 (1890). One state, Hawaii, refers to only the district. *See* HAW. CONST. art. I, § 14 (1959).

126. Most of the states that enacted vague vicinage provisions later made them more specific. *Compare* ILL. CONST. of 1818, art. VIII, § 9 (“jury of the vicinage”), *and* LA. CONST. of 1812, art. VI, § 18 (“jury of the vicinage”), *and* MO. CONST. of 1819, art. XIII, § 9 (“jury of the vicinage”), *with* ILL. CONST. art. I, § 8 (“jury of the county in which the offense is alleged to have been committed”), *and* LA. CONST. of 1864, art. 105 (“jury of the parish in which the offence shall have been committed”), *and* MO. CONST. of 1875, art. II, § 22 (“jury of the county”). Michigan removed its vague provision altogether. *Compare* MICH. CONST. of 1835, art. I, § 10 (“jury of the vicinage”), *with* MICH. CONST. of 1850 (containing no vicinage provision). Maine is the only post-1792 state that has kept its vague provision. *See* ME. CONST. art. I, § 6 (1819) (“jury of the vicinity”).

127. The first state was Michigan, whose constitution said that the right of trial by jury “shall remain,” which Justice Cooley interpreted to include juries remaining of the vicinage. *Swart v. Kimball*, 5 N.W. 635, 637–38 (Mich. 1880) (overturning law allowing trial for logging violations outside the vicinage). Cooley overlooked the fact that the previous version of the Michigan Constitution had specified a vicinage requirement, which was excised in the then-current version. *See supra* note 126; *see also* Blume, *supra* note 75, at 81 (criticizing Cooley). In any case, *Swart* did not prevent the Michigan buffer statute from being applied by the Michigan Supreme Court the next year. *See Bayliss v. People*, 9 N.W. 257, 257 (Mich. 1881).

The other state was California. *See People v. Powell*, 25 P. 481, 483–85 (Cal. 1891) (following *Swart*). The *Powell* Court’s approach has been rejected, at least to the extent that it defines the vicinage strictly as the county of the crime. *See, e.g., Price v. Superior Court*, 25 P.3d 618, 636 (Cal. 2001) (requiring only “nexus” between county of crime and venue county).

In a third state, Missouri, a court struck down a buffer statute because the state constitution required an indictment, which the court held to require a grand jury from the county where the

Today, of the first fifteen states plus Maine (carved from Massachusetts), eight have vague provisions (“vicinage,” “vicinity,” etc.) in their constitutions,<sup>128</sup> one has a specific venue provision (roughly parroting the Federal Constitution: “county,” “district,” etc.),<sup>129</sup> and seven have no venue or vicinage provision at all.<sup>130</sup> Of the remaining thirty-four states, *none* have vague provisions, twenty-seven have specific provisions,<sup>131</sup> and only seven have no provisions at all.<sup>132</sup> These

crime was committed. *See In re McDonald*, 19 Mo. App. 370, 376–79 (1885). This is somewhat odd, however, given that the state’s constitution provided a specific right to trial “by an impartial jury of the county.” MO. CONST. of 1875, art. I, § 22. Perhaps the court took this language to require that the jury be from the venue, but not that either vicinage or venue be constitutionally tied to the location of the crime. *See also Engel, supra* note 88, at 1674–81 (arguing that jury being of the vicinage is inherent to notion of jury). It is certainly arguable that when one thinks of a jury, one thinks of a group of people from the area of the crime, even if courts have refused to raise this general sense to the level of a constitutional requirement.

128. Most are vicinage provisions. *See* KY. CONST. § 11 (“In all criminal prosecutions . . . by indictment or information, [the accused] shall have a speedy public trial by an impartial jury of the vicinage; but the General Assembly may provide by a general law for a change of venue in such prosecutions for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained.”); ME. CONST. art. I, § 6 (“In all criminal prosecutions, the accused shall have a right to . . . have a speedy, public and impartial trial, and, except in trials by martial law or impeachment, by a jury of the vicinity.”); PA. CONST. art. I, § 9 (“In all criminal prosecutions the accused hath a right to . . . , in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage . . . .”); VT. CONST. ch. I, art. 10 (“[I]n all prosecutions for criminal offenses, a person hath a right to . . . a speedy public trial by an impartial jury of the country . . . .”); VA. CONST. art. I, § 8 (“That in criminal prosecutions a man . . . shall enjoy the right to a speedy and public trial, by an impartial jury of his vicinage . . . .”).

Others are venue provisions. *See* MD. CONST., Declaration of Rights, art. 20 (“[T]he trial of facts, where they arise, is one of the greatest securities of the lives, liberties and estate of the People.”); MASS. CONST. pt. 1, art. XIII (“In criminal prosecutions, the verification of facts in the vicinity where they happen, is one of the greatest securities of the life, liberty, and property of the citizen.”); N.H. CONST. pt. I, art. 17 (“In criminal prosecutions, the trial of facts, in the vicinity where they happened, is so essential to the security of the life, liberty and estate of the citizen, that no crime or offense ought to be tried in any other county or judicial district than that in which it is committed . . . .”).

129. *See* GA. CONST. art. VI, § 2, ¶ 6 (“[A]ll criminal cases shall be tried in the county where the crime was committed . . . .”). The federal language of “state and district” appears in U.S. CONST. amend. VI.

130. The seven states are Connecticut, Delaware, New Jersey, New York, North Carolina, Rhode Island, and South Carolina.

131. Twelve states require trial in a particular “district” or “county or district.” *See* ALA. CONST. art. I, § 6 (“[I]n all criminal prosecutions, the accused has a right . . . in all prosecutions by indictment, [to] a speedy, public trial, by an impartial jury of the county or district in which the offense was committed . . . .”); COLO. CONST. art. II, § 16 (“In criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.”); HAW. CONST. art. I, § 14 (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the district wherein the crime shall have been committed, which district shall have been previously

ascertained by law . . .”); KAN. CONST., Bill of Rights § 10 (“In all prosecutions, the accused shall be allowed . . . to have . . . a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.”); MINN. CONST. art. I, § 6 (“In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law.”); MONT. CONST. art. 2, § 24 (“In all criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, subject to the right of the state to have a change of venue for any of the causes for which the defendant may obtain the same.”); NEB. CONST. art. I, § 11 (“In all criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.”); N.M. CONST. art. II, § 14 (“In all criminal prosecutions, the accused shall have the right to . . . a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.”); S.D. CONST. art. VI, § 7 (“In all criminal prosecutions the accused shall have the right . . . to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.”); UTAH CONST. art. I, § 12 (“In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed . . . .”); WIS. CONST. art. I, § 7 (“In all criminal prosecutions the accused shall enjoy the right . . . in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.”); WYO. CONST. art. I, § 10 (“In all criminal prosecutions the accused shall have the right . . . to a speedy trial by an impartial jury of the county or district in which the offense is alleged to have been committed. When the location of the offense cannot be established with certainty, venue may be placed in the county or district where the corpus delicti [sic] is found, or in any county or district in which the victim was transported.”).

Fourteen states limit trial to a particular county. *See* ARIZ. CONST. art. II, § 24 (“In criminal prosecutions, the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed . . . .”); ARK. CONST. art. II, § 10 (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by impartial jury of the county in which the crime shall have been committed . . . .”); FLA. CONST. art. I, § 16(a) (providing right to “a speedy and public trial by impartial jury in the county where the crime was committed”); ILL. CONST. art. I, § 8 (“In criminal prosecutions, the accused shall have the right to . . . a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed.”); IND. CONST. art. I, § 13(a) (“In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, in the county in which the offense shall have been committed . . . .”); LA. CONST. art. I, § 16 (“Every person charged with a crime . . . is entitled to a speedy, public, and impartial trial in the parish where the offense or an element of the offense occurred, unless venue is changed in accordance with law.”); MISS. CONST. art. III, § 26 (“In all criminal prosecutions the accused shall have a right to . . . , in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed . . . .”); MO. CONST. art. I, § 18(a) (“[I]n criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury of the county.”); OHIO CONST. art. I, § 10 (“In any trial, in any court, the party accused shall be allowed . . . to have . . . a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed . . . .”); OKLA. CONST. art. II, § 20 (“In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed or, *where uncertainty exists as to the county in which the crime was committed, the accused may be tried in any county in which the evidence indicates the crime might have been committed.*”) (emphasis added); OR. CONST. art. I, § 11 (“In all criminal prosecutions, the accused shall have the

provisions are depicted on the map below.

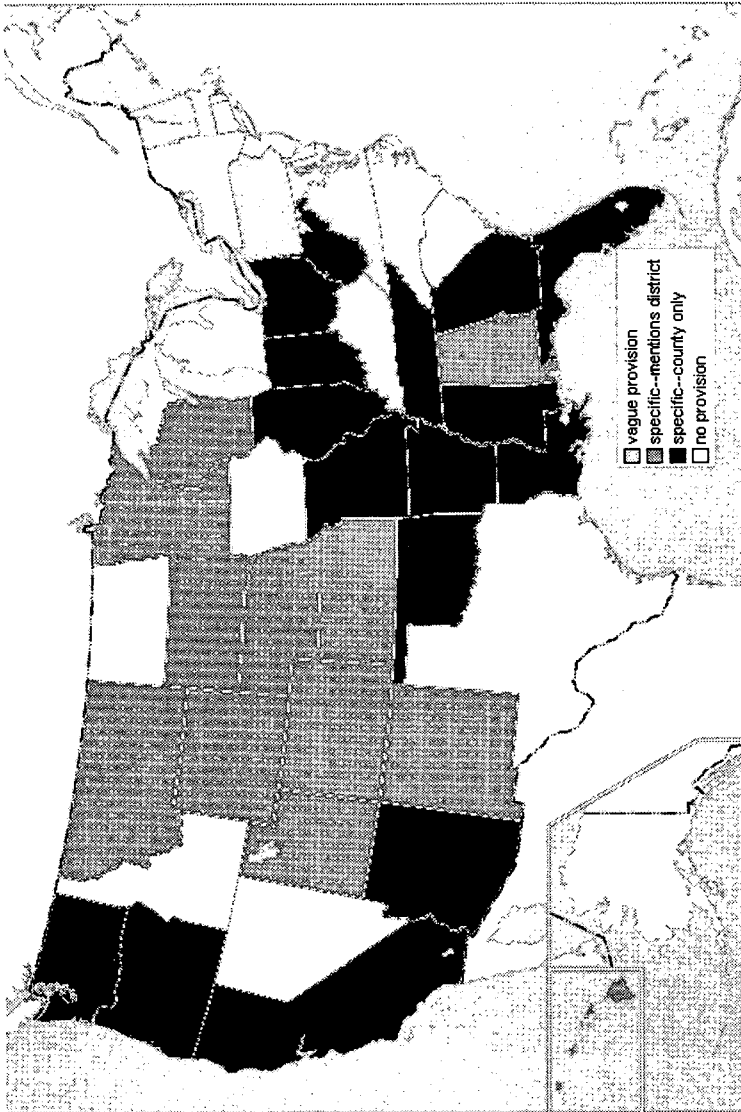
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right to public trial by an impartial jury in the county in which the offense shall have been committed . . . ."); TENN. CONST. art. I, § 9 ("[I]n all criminal prosecutions, the accused hath the right to . . . in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the County in which the crime shall have been committed . . . ."); WASH. CONST. art. I, § 22 ("In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed . . . ."); W. VA. CONST. art. III, § 14 ("Trials of crimes, and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, public, without unreasonable delay, and in the county where the alleged offence was committed, unless upon petition of the accused, and for good cause shown, it is removed to some other county."). Note that Florida, Indiana, Louisiana, Oregon, and West Virginia technically require venue, not vicinage. *See supra* note 15 and accompanying text.

The final state ties trial loosely to particular counties. California's vicinage requirement is a matter of case law. *See Price*, 25 P.3d at 636 (requiring "nexus" between location of crime and venue).

132. The seven states are Alaska, Iowa, Idaho, Michigan, Nevada, North Dakota, and Texas.

**Map B**



133

Commentators have disagreed over whether the specific provisions reflect a genuine concern about ensuring a jury of the vicinage or instead

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133. This Map illustrates the constitutional provisions cited in notes 128–32, *supra*.



show that states just carelessly copied the Federal Constitution<sup>134</sup> and Blackstone's account of common-law county-level vicinage.<sup>135</sup> Careless or not, the translation of the federal-district-wide vicinage right into a stricter county-wide vicinage right is significant and justifiable. Because there are more state crimes and criminal defendants than there are federal crimes and criminal defendants, more state courts are needed. More courts mean smaller geographical divisions. Conversely, federal courts have wider geographical purviews. Thus it makes much more sense to require only state courts to consider vicinage at the county level, because only they have that sort of presence on the ground.<sup>136</sup>

Moreover, federal crimes deal with broader interests, while state crimes deal with more local ones—at least ideally. When someone commits a crime, it is an offense against the “community,” but federal crimes can be seen as an offense against a broader, national community (“United States v. Defendant,” as opposed to “State v. Defendant” or “City v. Defendant”). Ensuring that the jury is drawn from the “community,” then, means something different in the federal context—a broader geography—than it does in the state context.

If states want to guarantee the use of local juries, and if some of them want to define “local” along county lines, then they should feel free to do so. Venue and vicinage are not, however, such simple matters. There are many cases in which local trial is seen as offending other state or federal constitutional guarantees, most prominently the right to an impartial jury, which can necessitate a change of venue.<sup>137</sup> In this age of plea bargains, jury trial is now the overwhelming exception rather than the rule, and this moots the question of where jurors are from in a large majority of cases. All of that said, however, a solid majority of states still guarantee a jury of a specific vicinage in their constitutions, and that must mean something, even if legislators and judges do not always heed

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134. See Blume, *supra* note 75, at 89 (surmising that “county or district” language in state constitutions merely aped Federal Constitution).

135. See *supra* notes 75–76 and accompanying text (citing Blackstone and discussing common-law approach to vicinage); cf. Levitt, *supra* note 19, at 335 (labeling continued requirement of county-level vicinage as “nothing less than stupidity”); B.J. George, Jr., *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609, 635–36 (1966) (expressing similar sentiments).

136. In one instance where the federal government did require county-level vicinage, it often moved venue elsewhere and brought in jurors from the county of the crime, until even this nod to the county was repealed. See *supra* notes 119–21 and accompanying text (discussing county-level vicinage requirement for capital trials in Judiciary Act of 1789).

137. See *infra* text accompanying notes 160–61, 208 (discussing interaction of impartiality and vicinage).

it.

### B. *Evaluating the Vicinage Right*

Vicinage requirements made sense centuries ago when jurors were also witnesses.<sup>138</sup> The persistence of these requirements after jurors became “blank slates” for the reception of evidence, however, is something of a puzzle.<sup>139</sup> Given their continued vitality, there must be some reason why local juries are thought to be better than foreign or random ones. On the other hand, vicinage rules are riddled with so many exceptions that one can argue that they are meaningless, persisting only to the extent that they have not gotten in the way of other interests and values.<sup>140</sup>

The simplest argument in favor of local juries is efficiency. Given that evidence and witnesses will generally be found in and around the scene of the crime, it makes sense to hold the trial there.<sup>141</sup> Defendants are often found near the crime too, as most people do not stray far from home when they commit crimes.<sup>142</sup> Exceptions in individual cases abound, but as a default presumption, trial by a local jury is a pretty good one from the standpoint of having an inexpensive trial.

If this were the only reason to use local juries, however, there would be little reason to constitutionalize venue and vicinage.<sup>143</sup> Given that most states provide for a jury of the vicinage explicitly as a right of criminal defendants,<sup>144</sup> it must have advantages for them. Indeed, at the time of the Founding, this was the crux of the debate over vicinage.<sup>145</sup> The Founders saw it as unfair and inhumane to transport criminal defendants far away from home, where they would be isolated and

138. *See supra* text accompanying note 75.

139. *See* Blume, *supra* note 75, at 60–61 (describing emergence of blank-slate paradigm alongside vicinage changes); Levitt, *supra* note 19, at 327 (speculating as to reasons for persistence of local juries).

140. *See* Kershen, *Vicinage I*, *supra* note 86, at 804 (noting decline in independent consideration of vicinage since time of Founding). *See generally* Kershen, *Vicinage II*, *supra* note 17 (recounting in detail decline in regard for vicinage).

141. *See* RANDOLPH N. JONAKAIT, *THE AMERICAN JURY SYSTEM* 108 (2003) (describing administrative advantages of local juries).

142. *See infra* note 146 (discussing local criminals).

143. To be sure, several states do not, but all of those states have statutory provisions that achieve the same end. *See supra* note 19 and accompanying text.

144. *See supra* notes 128, 131.

145. *See* Kershen, *Vicinage I*, *supra* note 86, at 810–11 & n.26.

rootless and probably represented by a local lawyer not of their choosing, before a jury of strangers.<sup>146</sup>

Requiring local juries also prevents prosecutors from jury-shopping.<sup>147</sup> While most defendants might not want a jury drawn from the community they allegedly just victimized, others might prefer a jury that has to live with the results of its decisions and may as a result be more careful or skeptical. A defendant also might feel that a local jury, with whom he or she may share cultural values, economic status, racial identity, or just a general sense of community identity, would sympathize with him more than with the police or the victim. Either way, a consistent rule requiring local juries puts the defendant on equal footing with the prosecutor, who cannot manipulate the likely results of the trial by selecting the jurisdiction with the toughest jurors. Both sides know in advance where the jury will be from.

Local juries have other advantages apart from the benefits they confer on defendants. They also represent unique institutional competence. If the purpose of a jury is to act as a check on the overzealous prosecutor or the corrupt judge, then it is imperative that the jury be local.<sup>148</sup> The same people who (in some states) elect prosecutors and judges work alongside those officials when serving on juries, and thus have a direct role in keeping them honest.<sup>149</sup> Given that local jurors have to live with the decisions that these prosecutors and judges make, these jurors have heightened incentives to fulfill their role vigorously.

Local juries also possess another type of institutional competence.

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146. See *State v. Lowe*, 21 W. Va. 782, 787 (1883); *infra* note 188 and accompanying text (discussing defendant's-rights view of vicinage). This presumes, of course, that the criminal was from the neighborhood in which he committed the crime, an assumption that the Framers were comfortable making. See Kershen, *Vicinage I*, *supra* note 86, at 810–11 & n.26; see also *In re McDonald*, 19 Mo. App. 370, 377 (1885) (“While the *situs* of the offence draws to it the venue, the law, which in dealing with a principle always generalizes, proceeds upon the assumption that the citizen ordinarily moves and acts about his residence—his home.”) (italics in original). *But see* *State v. Brown*, 154 A. 579, 580 (Vt. 1931) (expressing unwillingness to assume offenders live near crime scenes).

147. See *Engel*, *supra* note 88, at 1660; see also 4 LAFAYETTE ET AL., *supra* note 15, § 16.1(b) (“Imposing a vicinage requirement also prohibited the prosecutor from ‘jury-shopping’ by selecting that community most likely to produce jurors receptive to the prosecution’s point of view.”).

148. See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (stating one purpose of juries is to act as “hedge against the overzealous or mistaken prosecutor”) (citing *Duncan v. Louisiana*, 391 U.S. 145, 155–56 (1968)); *cf.* *State v. Vejvoda*, 438 N.W.2d 461, 465 (Neb. 1989) (holding that right to local trial is waived if defendant opts for bench trial).

149. See *Kaseris v. Justice Court*, 144 P.2d 469, 473–74 (Idaho 1943) (Dunlap, J., dissenting) (criticizing buffer statute on grounds that justice of the peace is elected from county and not buffer).

Their appreciation of local customs and norms allows them to properly evaluate the facts in cases that implicate such things.<sup>150</sup> In such instances, there is no substitute for a local jury. Those who subscribe to an absolute notion of truth, of course, may reject this argument. Jurors, however, must be more than just a quaint anachronism, kept in place to pantomime in service to the requirement that courts cannot direct a guilty verdict. Even in an age where jurors no longer construe the law,<sup>151</sup> it is easy to see that jurors have discretion in all sorts of cases. They determine, for instance, whether the force used against a policeman was “reasonable” (as in the *Terrell* case with which this Article opened) or whether an allegedly obscene act violated community standards.

For those who believe that truth is socially constructed at least to some degree—and if it were not, we would likely not need twelve jurors rather than one judge—the question of who is doing the constructing is key.<sup>152</sup> Put another way, one could say that the assessment of guilt in a criminal trial requires the finder of fact to interpret facts, not just “find” them. There are two advantages to making sure that local citizens are constructing and interpreting the law: a sort of accuracy and a sort of democracy.

As already mentioned, a local jury may be more accurate when proper adjudication requires knowledge of local customs or contexts. Local juries may also be better at evaluating the credibility of witnesses. In cases that turn on credibility—and many do, given that the defendant only needs a reasonable doubt—jurors who make judgments about

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150. One court put it as follows:

When [jurors] were required to find their verdict upon the evidence of witnesses, it was still deemed important that they should come from the place where the witnesses lived and where the dispute originated, since jurors from the visne or neighborhood were regarded as more likely to be qualified to investigate and determine the truth than persons living at a distance from the scene of the transaction.

*Brown*, 154 A. at 579–80; *see also* *Williams v. Florida*, 399 U.S. 78, 100 (1970) (“[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . .”); JONAKAIT, *supra* note 141, at 108–12 (“Those from the local community more readily understand the evidence and see its possible interpretations.”).

151. Kershen, *Vicinage II*, *supra* note 17, at 80, 86–87 (noting that juries reflected sense of community more effectively when they had more power to ignore instructions); Zalman & Gates, *supra* note 85, at 220 (noting democratic nature of American juries, particularly when they decided issues of law).

152. *See* JONAKAIT, *supra* note 141, at 64–74; Darryl K. Brown, *The Role of Race in Jury Impartiality and Venue Transfers*, 53 MD. L. REV. 107, 141–43 (1994) (discussing importance of demographics in arriving at proper social construction of facts); *see also* JONAKAIT, *supra* note 141, at 42–45 (describing general advantages of groups in recall and interpretation of evidence).

witnesses need to do so with the best understanding of local mores. Indeed, there is evidence that this is an accurate description of how jurors make their decisions. One study of jury decision making that examined actual cases showed that jurors almost always took local knowledge into account in criminal cases with less-than-overwhelming evidence.<sup>153</sup> A fine example of this is a case, reported in that study, in which jurors disbelieved a witness who said he had never heard of a particular tavern.<sup>154</sup> Someone who lived where this witness lived, the jurors concluded, could not credibly make that claim.<sup>155</sup>

This use of local knowledge brings us back to the pre-modern purpose of local juries—to bring local knowledge to bear<sup>156</sup>—and thus raises a problem in the jury’s proper performance of its duties. If jurors base their decision on personal knowledge instead of the evidence presented to them, they violate their charge. In this way, foreign juries are *good* because, lacking such specialized knowledge, jurors will not so transgress.

Significantly, this very exchange over the proper role of juries occurred when the framers of the Sixth Amendment debated vicinage requirements in the 1780s and 90s.<sup>157</sup> The way the Framers resolved the issue is instructive. First, the Sixth Amendment does not require a very localized jury, just one from roughly the same state.<sup>158</sup> As with their English forebears, the Framers wanted the jury to be local enough to be generally knowledgeable, but not so local as to be personally involved.<sup>159</sup> Second, and relatedly, the Sixth Amendment requires local

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153. See Dale W. Broeder, *The Impact of the Vicinage Requirement: An Empirical Look*, 45 NEB. L. REV. 99, 101–08 (1966) (describing University of Chicago Jury Project).

154. *Id.* at 106.

155. *Id.*

156. See *supra* note 75 and accompanying text.

157. See Engel, *supra* note 88, at 1686 (describing Founding-era resolution of tension between local juries and partiality); Kershen, *Vicinage I*, *supra* note 86, at 834–35 (discussing Founding-era debates over vicinage).

158. See *supra* note 116 and accompanying text.

159. Blackstone put it as follows:

[B]y the policy of the antient law, the jury was to come *de vicineto*, from the neighbourhood of the vill or place where the cause of action was laid in the declaration : and therefore some of the jury were obliged to be returned from the hundred in which such vill lay . . . For, living in the neighbourhood, they were . . . supposed to know beforehand the characters of the parties and witnesses, and therefore they better knew what credit to give to the facts alleged in evidence. But this convenience was overbalanced by another very natural and almost unavoidable inconvenience ; that jurors, coming out of the immediate neighbourhood, would be apt to intermix their prejudices and partialities in the trial of right. And this our law was so sensible of, that it for a long time has been gradually relinquishing this practice . . . the jury being now only to come *de corpore comitatus*, from the body of the county at large, and not *de*

juries in the same breath with which it requires impartial ones.<sup>160</sup> Therefore, if a party believes that a juror is unable to follow instructions, or has personal knowledge or belief that will prejudice him or her, that party can exclude that juror. In reality, jurors might still bring improper considerations into their deliberations, but the rest of the system ensures that the parties at least have a chance to root out the worst jurors. More to our point, it ensures, at the very least, that the jurors' personal suppositions will be based on local knowledge and experience rather than ignorance or prejudice. Impartiality and local vicinage are a package deal.<sup>161</sup> That is the ideal, anyway.

The second sort of institutional competence relates to a separate notion about local juries: that they are an essential component of democratic self-government.<sup>162</sup> When a jury decides a case in which the law must be applied to particular facts, the jury is, in essence, deciding what the standards for conduct in the community will be.<sup>163</sup> Police

*vicineto*, or from the particular neighbourhood.

3 BLACKSTONE, *supra* note 75, at \*359–60.

160. See U.S. CONST. amend. VI; see also Judiciary Act of 1789, ch. 20, § 29, 1 Stat. 73, 88 (1789) (requiring jurors be from county of crime in capital cases, but also that they be selected “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”); Kershen, *Vicinage II*, *supra* note 17, at 83, 140–46 (arguing for enforcement of both rights, not impartiality at expense of vicinage). *But see* HELLER, *supra* note 86, at 95 (arguing that vicinage and impartiality are at “cross purposes”).

161. See *infra* note 208 and accompanying text (discussing interaction of impartiality and vicinage). *But see* N.H. CONST. of 1784, pt. I, art. XVII (“[N]o crime or offence ought to be tried in any other county than that in which it is committed; except in cases of general insurrection in any particular county, when . . . an impartial trial cannot be had in the county where the offence may be committed . . .”).

162. See *Williams v. Florida*, 399 U.S. 78, 100 (1970) (listing as “essential feature of a jury” notion of “community participation and shared responsibility that results from that group’s determination of guilt or innocence”); AMAR, *supra* note 122, at 94–95; JONAKAIT, *supra* note 141, at 109 (“[T]he consequences of a trial often fall most heavily on the trial’s community.”); Engel, *supra* note 88, at 1661, 1695–98 (discussing self-governing nature of local juries); Kershen, *Vicinage I*, *supra* note 86, at 839–40 (discussing community-centered vision of vicinage); Kershen, *Vicinage II*, *supra* note 17, at 83, 86–87 (arguing that juries of the vicinage “articulate the sense of justice of the community”); Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. CAL. L. REV. 1533, 1546–56 (1993) (discussing community-centered view of vicinage and providing examples for specific crimes of application of community norms); Zalman & Gates, *supra* note 85, at 267–68; cf. John J. Murphy, *Revising Domestic Extradition Law*, 131 U. PA. L. REV. 1063, 1087 (1983) (describing healing power of local trial on stricken community).

163. See Engel, *supra* note 88, at 1660–61; see also JONAKAIT, *supra* note 141, at 64–74 (describing facility of juries for bringing community values to bear in verdicts); cf. Brown, *supra* note 152, at 123–24 (contrasting capital cases, where jury reflects individual sensibilities, with obscenity cases, where jury speaks for community sensibilities).

brutality provides an instructive example. If a jury decides that a police officer did not use excessive force in a particular case, it is in essence saying, "what this policeman did was not a crime."<sup>164</sup> By deciding a series of cases, a series of juries communicates to prosecutors what will and will not result in a conviction in that locale. Juries need not perform this communication through nullification, but if they do, local juries at least provide relative accountability, and through it, legitimacy. If a jury is going to let a criminal go free in its own streets, as opposed to someone else's, it will presumably be more thoughtful and careful about the case.<sup>165</sup>

There is no substitute for a jury of the vicinage.<sup>166</sup> For a jury to determine the standards of *another* community would toss away the institutional competence that local juries represent. As the next Part will make clear, however, buffer statutes contravene the benefits of local juries, and present other vicinage-related problems as well.

### C. *Buffer Statutes and Vicinage*

Buffer statutes may conflict with constitutional vicinage requirements, and they definitely interfere with the goals of local juries. If a state's constitutional rules are strict and explicitly limit trials and/or juries to the county where the offense was committed, then buffer statutes are obviously incompatible. In a state with a strict constitutional vicinage requirement, buffer statutes unconstitutionally allow a crime committed in one county to be tried in another county before a jury from that other county.

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164. Cf. Levenson, *supra* note 162, at 1563 (listing survey data on gulf between white and black perceptions of police use of force).

165. See JONAKAIT, *supra* note 141, at 109 ("Because a community-based jury may have a higher stake in making a correct decision, they may pay closer attention to the proceedings."); Kershen, *Vicinage II*, *supra* note 17, at 83, 87-94 (arguing that, through avoiding "bifurcated responsibility," local juries minimize nullification and lend more legitimacy to that which still occurs); Zalman & Gates, *supra* note 85, at 273 (surmising that Rodney King case acquittals would have been accepted had venue and vicinage not been changed).

This advantage of local juries can be turned on its head, of course. Nullification might be a bad thing in, say, a lynching case in which the enfranchised community is sympathetic to the defendants rather than the victim. See JONAKAIT, *supra* note 141, at 110. This problem explains some anti-"juries of the vicinage" statutes. See, e.g., *State v. Lewis*, 55 S.E. 600, 602 (N.C. 1906) (discussing lynching statute that required notification to all adjoining counties of lynching and allowed any of them to prosecute because of "prejudice or sympathy which in cases of lynching usually and naturally pervades the county where that offense is committed").

166. See Engel, *supra* note 88, at 1665 (criticizing notions of virtual representation in transferred-venue cases).

### 1. Working Around Vicinage Provisions

There are a few ways in which a buffer statute might not transgress even a strict constitutional vicinage requirement. First, to avoid constitutional problems, some courts have construed buffer statutes narrowly and applied them only when there is doubt as to the location of a crime.<sup>167</sup> Indeed many states do not use buffers in cases where the location of a crime is clear, essentially transforming their buffer statutes into “doubt” statutes.<sup>168</sup>

Another, less acceptable, way in which courts may permit buffers in a county-vicinage state is by construing the constitutional vicinage requirement as flexible enough to allow for marginal legislative exceptions, and thereby construing the buffer statute as a mere *de minimis* violation.<sup>169</sup> While some rules provide brighter lines than others, a constitutional vicinage provision that relies on a *literal* line, like a well-marked county border, is probably not the best candidate for this type of loose construction.

Third, and least acceptable of all, a court may require no exception to the vicinage rule at all. If the constitution speaks of placing the trial and drawing the jury from the “county or district” in which the crime was committed (instead of just the “county”), then a court may find the buffer statute simply provides a fancy way for the legislature to define a “district” to include a county plus the ribbon of land just outside of it. Many courts have adopted this very interpretation.<sup>170</sup>

This interpretation ignores two things, however. First, a constitutional requirement that limits trials and juries to a “place certain” defined by the legislature hardly seems compatible with a law that defines swathes of the state as being in two “places” at once. Such a constitutional requirement is also incompatible with a buffer system that favors prosecutors by requiring defendants to run two gauntlets instead of one.<sup>171</sup>

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167. Some states achieve this through statutory language, while others have done so when their courts found a constitutional requirement to so limit their buffer statutes. *See supra* note 42. Other states may do this in practice at the prosecutor’s discretion. *See supra* note 31.

168. Doubt statutes are discussed in notes 42 and 60–61, and accompanying text, *supra*.

169. *See infra* text accompanying notes 223–25 (discussing *de minimis* arguments further).

170. *See, e.g.*, *State v. Lehman*, 279 P. 283, 284–85 (Or. 1929); *State ex rel. Brown v. Stewart*, 19 N.W. 429, 433 (Wis. 1884); *see also State v. Robinson*, 14 Minn. 447 (1869), available at 1869 WL 2333, at \*4 (noting multi-county nature of districts).

171. *See supra* note 73 and accompanying text.



Second, it is inappropriate for a legislature to define the vicinage more narrowly than the venue. That is, a state should not define the “district” as comprising the county plus a 500-yard ribbon outside it, but then define the “vicinage” as comprising just the county. Doing so would ensure that people from the buffer zone could “only appear as culprits” in a neighboring county’s court, and never appear as jurors there, a notion that is incompatible with democratic self-government.<sup>172</sup> It also would ensure that when the buffer statute is used, the jurors are deciding a case that, by definition, does not affect their immediate community. Conversely, the community directly affected by the alleged crime is precluded from evaluating it. Such community preclusion does not pose a constitutional problem in most cases. Courts have fairly consistently allowed courts to summon jurors from some subset of a county or district (usually the area around the courthouse) rather than drawing from the entire county, and this reasoning would most likely apply in the case of buffer statutes.<sup>173</sup> As a matter of policy, though, this community preclusion is unfair,<sup>174</sup> especially in states where counties are small enough, or courts spread out enough, that everyone has a chance to serve on a jury somewhere. Simply defining the vicinage as equal to the venue would mean, of course, that people living in the buffer zone would be susceptible to double the rate of jury service because they

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172. *State v. Voris*, 8 Ohio N.P. 16, 17–18 (Police Ct. 1900) (striking down statute extending jurisdiction of municipal court with municipal juries to entire county); *cf. Brown*, 19 N.W. at 433 (raising, but leaving undecided, question of whether jurors living in buffer are susceptible to jury service).

173. *See Zicarelli v. Gray*, 543 F.2d 466, 479–82 & n.69 (3d Cir. 1976) (discussing case law and citing *Ruthenberg v. United States*, 245 U.S. 480, 482 (1918)); *Kershen, Vicinage II, supra* note 17, at 106–09 (discussing and criticizing case law); *cf. Judiciary Act of 1789*, ch. 20, § 29, 1 Stat. 73, 88 (1789) (directing 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”); 2 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 264 (Professional Books 1971) (1736) (indicating that at common law jurors could come from any part of county). *But see Alvarado v. State*, 486 P.2d 891, 898–903 (Alaska 1971) (finding cross-section violation from trying crime from remote native village by jury drawn from fifteen-mile radius around Anchorage). The buffer example is distinguishable in one sense. If a county has all of its juries drawn from one geographical subset of that county, at least that subset is subject to the precedents it sets in those cases. A jury is always only a subset of the community it adjudges anyway. In buffer cases, by contrast, the defendant and the victimized community are “others,” and the jury is not a part of that which it judges.

174. Some have praised the *Alvarado* rule (“[W]e must adhere to a notion of community which at least encompasses the location of the alleged offense.”), *Alvarado*, 486 P.2d at 902, though few courts have. *See, e.g., Alexander, supra* note 122, at 274–85 (describing various state approaches to vicinage, including lonely *Alvarado*); *id.* at 287–88, 293 (praising *Alvarado*); *see also People v. Jones*, 510 P.2d 705, 709–10 (Cal. 1973) (in bank) (relying on *Alvarado*), *overruled by Hernandez v. Municipal Court*, 781 P.2d 547, 548–49 (Cal. 1989) (in bank).

would live in two vicinages. States that are serious about vicinage but deeply attached to their buffer statutes would have to make this sacrifice.

In the face of these arguments about the pitfalls of trying cases before “foreign” juries, one can of course counter-argue that jurors would apply the same standards to any case on which they sat, regardless of whether the facts arose on their street, somewhere else in the county, or in another county altogether. On the other hand, jurors might find it easier in buffer cases to dissociate the facts they are deciding from the standards that they would want applied to themselves, because they are applying their standards to another community.<sup>175</sup> Relatedly, a decision rendered by a buffer jury, because it literally does not apply to the forum county, might be less likely to add to that body of decisional law that defines the standards of the forum community.

## 2. *Buffers and Local Juries*

Buffer statutes may also sacrifice (or, at the very least, fail to promote) the benefits of local juries discussed in Part II.B. The idea that trials are most easily held near where the crime occurred, where the witnesses live, and where the evidence is found, might militate in favor of eschewing buffers. It also might not, to be sure. Not all counties are geometrically perfect or equally sized. Because not all county courthouses are situated in their counties’ geographic centers, there are plenty of places in plenty of counties that are closer to the next county’s court than to their own. Even if it would be a good idea to allow trial in the nearest courthouse instead of the county courthouse, though, buffer statutes are not premised on, or limited to, moving trials to the courthouse nearest to the crime.

Similarly, buffer statutes may threaten the institutional competence of local juries. As discussed in Part II.B, local knowledge and the proper social construction of the facts of a case require local juries. It might be the case here, too, that a jury from the next county may execute its duties as well, or even better, than a jury from the forum county. A case from the rural fringes of a county with an urban core might, for instance, be more appropriately tried by the citizens of the rural county next door. Buffer statutes are not based on, or limited to, such situations, however. While buffers may provide a more suitable jury in some cases, they may just as easily provide a less suitable one in other cases by moving a rural

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175. See Kershen, *Vicinage II*, *supra* note 17, at 84 (arguing that jurors take their task more seriously if they are deciding local matter).

trial to a neighboring county's urban seat. Any such county line, after all, will have buffers on both sides of it.

Buffer statutes conflict more directly with the other goals of local juries, most obviously the prevention of forum shopping by prosecutors.<sup>176</sup> If two counties' prosecutors are coordinated enough to work out which of them should pursue a case, it is possible that their discussion would turn on mundane considerations: Does one county have a greater interest in the case? Has one county taken the prosecutorial lead already? And so on. Indeed, some of the prosecutors informally surveyed for this project indicated that they do discuss these considerations.<sup>177</sup> It is unlikely, however, that prosecutors would completely ignore the question of which jurisdiction would be more likely to produce a conviction.<sup>178</sup> (If, alternatively, the two prosecutors were not so well in tune, then a buffer statute would provide ample opportunity for turf wars, which would serve no one well.)

The ability of juries to serve as a check on overzealous prosecutors and judges is incompatible with buffer statutes. One point of having local juries try cases is that they have to live with the results. If a local jury feels that a prosecution is improper, it can acquit, and this consideration is sharpened by the knowledge that the same prosecutor could prosecute any of the jurors. If a case can be deflected—say, portrayed as the act of a zealous prosecutor projecting the power of the county outward against the “others” in the next county—then the self-regarding mechanism is absent.

### 3. *Crossing Bright Lines*

All of the conflicts discussed in the previous Parts mean, simply, that if a state is serious about county-level vicinage, it cannot use a buffer statute—and states *should* be serious about county-level vicinage. County lines have consequences. Every county is different from its neighbor. Some might argue that the next best thing to a trial in one's own county is a trial in the next one, and this belief has animated some venue statutes and transfer cases.<sup>179</sup> However, even assuming that “next

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176. See *supra* notes 65, 147, and accompanying text.

177. See, e.g., Mahoney, Mosely, Poyner, Roberts, Stassi, and Yunker interviews, *supra* note 31; Telephone Interview by Lance Werner with Val Solino, Chief of Appeals Division, Orleans Parish District Attorney, La. (Oct. 3, 2003) (“There are no turf battles.”).

178. See *supra* note 31 and accompanying text.

179. See, e.g., *Newberry v. Commonwealth*, 66 S.E.2d 841, 844–45 (Va. 1951) (allowing transfer of case to next county for lack of qualified jurors, and collecting common-law authorities).

best” is good enough, “next to” does not always deliver it. When people decide where to live, they are deciding to be on one side of a line and not on the other. Those choices may be based on pure preference, but they may also result from external economic or cultural forces. In either case, by definition, neighboring counties may contrast with each other in a more direct way than randomly disconnected counties do. For instance, county-line racial and socioeconomic segregation abound, including extreme examples like Eight Mile Road in Michigan.<sup>180</sup> In racial terms, many counties that are mostly white sit alongside counties that are mostly black, Hispanic, or Native American.<sup>181</sup> In economic terms, the very wealthy often live in counties next to the very poor.<sup>182</sup> There is significant and compelling evidence that the socioeconomic and demographic composition of juries affects their deliberations and verdicts.<sup>183</sup> The next county might not, therefore, be the best substitute source of jurors.

Some adjacent counties are more different than others, though, and plenty of neighboring counties are demographically and economically similar. Even in these situations, however, county borders can represent important contrasts.<sup>184</sup> Terrain, population density, and property tax rates might vary, for instance. Even lacking these sorts of differences, counties are at least distinct in the sense that they govern themselves. Two counties might be identical in every other way, but each may elect its own prosecutor and judges.<sup>185</sup> If a state crime occurs in a known

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180. See *supra* notes 3–4 (discussing demographic data on both sides of Eight Mile).

181. See U.S. CENSUS BUREAU, MAPPING CENSUS 2000: THE GEOGRAPHY OF U.S. DIVERSITY, available at <http://www.census.gov/population/www/cen2000/atlas.html> (last visited Apr. 26, 2005). This outstanding resource provides national county maps broken down by race, making stark divides plain to the eye. If a state with a buffer statute also contains an Indian reservation over which its jurisdiction is limited, this obviously trumps the buffer.

182. The Census Bureau’s interactive site, found at <http://factfinder.census.gov>, allows users to create “thematic maps” that color each county according to income. Specific data is available by clicking on a particular county. This makes stark divides plain to the eye.

183. See Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL’Y & L. 622, 673–74 (2001) (collecting research and concluding that juries favor socioeconomically and demographically similar defendants).

184. See, e.g., Levenson, *supra* note 162, at 1562 (noting problems with assumption that jury in other county with similar demographics will make same decisions as local jury).

185. See *supra* text accompanying note 149. In an even broader sense, sending a trial to a jury in the next county, even a demographically similar one, smacks of a sort of virtual representation that is, and should be, disfavored. Presumably, few Americans would agree to let, say, their mayor be chosen by the voters in some other town just because the people in the other town had a similar distribution of income and skin color.

location, there is one local prosecutor whose job is to decide whether prosecution is warranted. That prosecutor is accountable to his or her constituency; the prosecutor may base his or her decision on past experience with juries drawn from that constituency, and how the voters affected by the crime feel the case has been handled. In this way, each county develops its own norms for the enforcement of its criminal laws.

When a crime occurs in a buffer zone, this accountability breaks down. If the location is known, the relevant prosecutor is known too. If that prosecutor does not wish to prosecute, however, there is now another prosecutor—not elected with any votes from the buffer—who can step in. When this case is sent to a court presided over by a judge and jury who are all foreign to the buffer, the norms and accountability that were carefully developed for the county where the crime occurred become irrelevant. The defendant is tried by another community, one with power over him but virtually no interest in what he has done. The community that does have an interest is stripped of its power to vindicate it.

For all of these reasons, buffer statutes do damage to the deeply-rooted tradition of local juries. They contravene the policy of local juries, and they should be read as violating constitutional requirements of local juries as well. Admittedly, courts seem not to care about the policy point, and on the constitutional point they are split. More than a dozen states' courts have either upheld or struck down buffer statutes.<sup>186</sup> No state court has ever struck down (or, apparently, considered striking down) a buffer statute on any ground other than a state constitutional guarantee of vicinage. On the other hand, about half of the buffer statutes have been approved or never seriously challenged, including several in states with constitutional vicinage requirements.<sup>187</sup> For the sake of the principle of local juries, this level of acceptance for buffer statutes should not be.

### III. COUNTY-LINE BUFFER STATUTES AND THE WEAK COMMUNITY-CENTERED CONCEPTION OF THE JURY

The previous Parts of this Article explored and criticized county-line buffer statutes, both for their policy deficiencies and for their incompatibility with the law and traditions of local juries. This Part takes

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186. See *supra* note 40.

187. See *supra* notes 46–50.

a slightly different approach and focuses on the community-centered argument in support of juries of the vicinage. Some have argued that the key right to local jury trials belongs to the community, not the criminal defendant. While buffer statutes can be criticized for contravening this community right, the actual treatment of buffer statutes in state courts—even those invalidating the statutes—makes clear that the community-centered view of local juries is rarely if ever raised by defendants, and that courts are not receptive to it when (or if) it is raised.

#### A. *The Community-Centered Conception of the Jury of the Vicinage*

In the federal system and in most states, criminal defendants have a right to be tried by a jury of the vicinage. For the most part, and for most of its history, the conventional understanding of vicinage has been dominated by a defendant-centered approach. As one court's representative articulation of this defendant-centered understanding of vicinage put it:

The object of this provision is to protect the defendant against a spirit of oppression and tyranny on the part of our rulers, and against a spirit of violence and vindictiveness on the part of the people; and also to secure the party accused from being dragged to a trial at a distant part of the state, away from his friends and witnesses and neighborhood, and thus to be subject to the verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities or prejudices against him, as well as the necessity of incurring the most oppressive expenses, or, perhaps, even to the inability of procuring the proper witnesses to establish his innocence.<sup>188</sup>

While arguments over the scope of “vicinage” have long abounded,<sup>189</sup> little attention has been paid to the nature of the right itself. In the last few decades, though, scholars have increasingly turned their attention to an alternative, community-centered conception of the vicinage right. These scholars have argued that juries of the vicinage serve as institutions of local self-government—a function that is as important as

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188. *State v. Robinson*, 14 Minn. 447 (1869), available at 1869 WL 2333, at \*4; accord *State v. Lowe*, 21 W. Va. 782, 787 (1883); 3 STORY, *supra* note 118, § 1775; see also *State ex rel. Scott v. Crinklaw*, 59 N.W. 370, 372 (Neb. 1894) (“The right of trial within the county or district is a mere personal privilege of the accused, and not conferred upon him from any consideration of public policy.”); *State v. Albee*, 61 N.H. 423, 426 (1881) (explaining vicinage right as “a protection to the citizen against the power of the state”).

189. See *supra* text accompanying notes 101–07.

protecting defendants, if not more so.<sup>190</sup>

Although this scholarly emphasis is new, much of the historical evidence that supports it is not. While most vicinage provisions in early American constitutions were expressed in terms of defendants' rights,<sup>191</sup> some were not,<sup>192</sup> and there are scattered quotations from the Founding generation and before that take a more community-centered approach.<sup>193</sup> Article III of the Constitution, for instance, requires jury trials without mentioning criminal defendants, which suggests that jury trials are a structural necessity, rather than a benefit for defendants.<sup>194</sup> Similar tidbits are found scattered in the judicial record over the next two centuries,<sup>195</sup> and the new scholarship amplified this latent community-centered view.

The seminal work in this new wave of vicinage scholarship is Drew Kershen's 1976–77 two-part article, *Vicinage*.<sup>196</sup> The main purpose of Kershen's article was to rescue vicinage from being disregarded in favor of, or subsumed into, venue.<sup>197</sup> In the process of untangling vicinage and venue, Kershen made a strong argument in favor of the community-

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190. See generally Engel, *supra* note 88; Kershen, *Vicinage I*, *supra* note 86; Kershen, *Vicinage II*, *supra* note 17.

191. See *supra* notes 104, 107, and text accompanying note 101 (quoting constitutions of Massachusetts, New Hampshire, Pennsylvania, and Vermont).

192. See *supra* notes 105, 107 (quoting constitutions of Georgia and Maryland); see also Engel, *supra* note 88, at 1688 (noting that early version of Sixth Amendment did not phrase vicinage in terms of defendants' rights).

193. See Engel, *supra* note 88, at 1673–92 (presenting historical evidence supporting community-centered account); Kershen, *Vicinage I*, *supra* note 86, at 838–40 (discussing Founding-era concerns about ensuring local popular participation in adjudication); cf. Daniel W. Van Ness, *Preserving a Community Voice: The Case for Half-and-Half Juries in Racially-Charged Criminal Cases*, 28 J. MARSHALL L. REV. 1, 12–27 (1994) (describing English history of jury from community-centered perspective).

194. U.S. CONST. art. III, § 2, cl. 3. Akhil Reed Amar has argued persuasively that this should have been taken to require jury trials as a matter of the community's right, not the defendants', though he recognized that the Supreme Court disagrees. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1196–99 (1991).

195. See, e.g., Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (“Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.”); State v. Lewis, 55 S.E. 600, 609 (N.C. 1906) (Connor, J., concurring) (noting that in addition to defendants' rights, local grand juries “placed upon the people of each county or neighborhood the responsibility for securing a fair, firm, and just administration of the law, detection and punishment of the guilty, and protection of the innocent”).

196. Kershen, *Vicinage I*, *supra* note 86; Kershen, *Vicinage II*, *supra* note 17; see Murphy, *supra* note 162, at 1087 (describing community-centered benefits of vicinage as “newly recognized”).

197. Kershen, *Vicinage I*, *supra* note 86, at 804.

centered vision of vicinage. He argued that community interest, among other things, distinguished vicinage from the more party-centered concept of venue.<sup>198</sup> Subsequent scholarship, most recently that of Akhil Reed Amar and Steven Engel, has amplified Kershen's community-centered approach to vicinage and located additional support for this approach in the historical record.<sup>199</sup> Some judicial opinions have taken notice of the community-centered theory as well.<sup>200</sup>

The basic idea of the community-centered approach is that local juries enable communities to govern themselves by allowing them to set their own standards for criminal conduct through acquittals and convictions. If local juries are not used to decide cases—if people other than local citizens adjudicate the case—the community loses this ability to govern itself.<sup>201</sup>

The community-centered account of vicinage is persuasive as a matter of theory (i.e., it sounds nice), but there is little doubt that the defendant-centered account remains the predominant rationale for local juries. Scholars who push the community-centered approach are right to point out that it deserves consideration, but any assertion that it is the principal

198. Kershen's article makes these points in several places, but does so in the most focused way in Kershen, *Vicinage II*, *supra* note 17, at 83–94.

199. See AMAR, *supra* note 122, at 83–110; Engel, *supra* note 88. See generally Zalman & Gates, *supra* note 85 (advocating community-centered vision of juries of the vicinage).

200. See, e.g., *Williams v. Florida*, 399 U.S. 78, 96, 100 (1970) (stating, in case denigrating vicinage as not inherent part of jury trial, that “the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group’s determination of guilt or innocence”); *Witherspoon v. Illinois*, 391 U.S. 510, 519 & n.15 (1968) (stating that jury in capital cases expresses “conscience of the community,” and that “one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system”); *Hernandez v. Municipal Court*, 781 P.2d 547, 548 n.1 (Cal. 1989) (in bank) (“Although the vicinage right is assertable by a defendant in a criminal trial, in the present day criminal justice system the vicinage requirement also protects the right of the offended community to pass judgment in criminal matters.”); *id.* at 559 (Broussard, J., dissenting) (discussing benefits to stricken community of local trials); see also *People v. Tamble*, 7 Cal. Rptr. 2d 446, 449 (Cal. Ct. App. 1992) (“Although the vicinage right is assertable by a defendant in a criminal trial, it also protects the right of the offended community to pass judgment in criminal matters.”); Engel, *supra* note 88, at 1662 n.16 (citing recent community-centered judicial opinions); Murphy, *supra* note 162, at 1087–88 (describing manifestations of community-centered view in recent case law).

201. See *supra* note 162 and accompanying text. Among the other evidence supporting the community-centered version is that requiring local trials does not necessarily benefit the defendant, who may be from somewhere else, or who may not want the affected community to be the ones judging him. See Engel, *supra* note 88, at 1694–95 (discussing contrast between defendants’ rights view and reality of vicinage rules).



reason for juries is an exaggeration.<sup>202</sup> A rigorous proof of the subordinate status of the community-centered approach is beyond the scope of this Article, but the treatment of buffer statutes in American case law gives at least one example of the fact that the community-centered notion of juries is very weak in practice.

It does not appear from the case law that courts have been presented with community-centered arguments about vicinage in buffer cases. In cases where courts have affirmed buffer statutes, the community-centered approach (which is incompatible with buffer statutes) obviously did not persuade them, but none of these cases even engages the community-centered argument.<sup>203</sup> This suggests, if not proves, that they were not raised by any party. In other words, for courts affirming buffer statutes, the community-centered concept of vicinage is irrelevant.

The scarcity of the community-centered approach to vicinage in the case law reflects the changing nature of the jury. The vicinage requirement was a self-evident *sine qua non* of juries back when few people traveled and jurors were local witnesses. Juries remained local, however, even after the juror's role became that of the impartial blank slate.<sup>204</sup> The justification for maintaining local juries was more a matter of administrative convenience than democratic policy,<sup>205</sup> not least because the self-governing nature of juries faded when juries were

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202. Indeed, even Steven Engel admits as much. See Engel, *supra* note 88, at 1661–62. I have been guilty of promoting the community-centered notion of juries without fully wrestling with the limited appeal that this view has had to courts. See Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 124–26 (2003) (discussing self-government theory of juries).

203. See, e.g., *State v. Swainston*, 676 P.2d 1153, 1154–55 (Ariz. Ct. App. 1984) (basing decision solely on longevity of statute and weight of authority in other states); *Kaseris v. Justice Court*, 144 P.2d 469, 470–71 (Idaho 1943) (approving buffer statute after cursory discussion); *State v. Pugsley*, 38 N.W. 498, 501 (Iowa 1888) (same); *State v. Robinson*, 14 Minn. 447 (1869), available at 1869 WL 2333, at \*4–5 (approving buffer statutes as, at most, minor infringement on constitutional vicinage rights of defendants and as necessary for effective law enforcement); *State v. Lehman*, 279 P. 283, 284 (Or. 1929) (approving buffer statute as not inconsistent with pro-defendant goals of vicinage requirement); *Commonwealth v. Collins*, 47 Pa. C. 608, 610 (Ct. Oyer & Terminer 1919) (describing vicinage as “most important of personal rights,” but affirming buffer statute as not inconsistent with vicinage); *State ex rel. Brown v. Stewart*, 19 N.W. 429, 433–34 (Wis. 1884) (treating vicinage as “right” of the “accused,” but in any case flexible enough to accommodate a buffer statute).

204. See *supra* text accompanying notes 75–76.

205. See, e.g., *Taylor v. Gardiner*, 11 R.I. 182, 184–85 (1875) (“The principal reason for trial in the vicinage now is the convenience of parties and witnesses. Trials in this state are not confined to the vicinage, except in actions relating to real estate or in criminal prosecutions.”); Simon Stern, Note, *Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After Bushell’s Case*, 111 YALE L.J. 1815, 1853–54 (2002) (discussing shifting justification for juries of the vicinage).

stripped of the power to judge the law and reduced to judging only facts.<sup>206</sup> At the same time, the substantial expansion of individual rights in the twentieth century meant that the persistence of jury trials (if not strict-vicinage jury trials) became even more a matter of defendants' rights than it had been before.<sup>207</sup> While vicinage persisted out of inertia, convenience, and some lingering sense of self-government, its enforcement as a matter of defendants' rights was bound to fade in favor of defendants' much more robust and obvious interest in having an impartial jury.<sup>208</sup>

Vicinage is one of the few provisions in the Bill of Rights that has not been incorporated against the states. With no constituency both interested in and able to fight for it, vicinage has been detached from other provisions of the Sixth Amendment, which all have been incorporated against the states.<sup>209</sup> Vicinage has never been incorporated, primarily because the United States Supreme Court has been unwilling to declare that vicinage is central to the notion of what a jury is, or that local juries are so central to the idea of a fair trial, that Sixth Amendment vicinage must be expanded to reach state courts.<sup>210</sup> Not only do courts treat vicinage as a defendant's right, rather than the community's right,

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206. See *supra* note 151 and accompanying text.

207. On the state of these matters before this transformation, there are a few early American sources. As Joseph Story put it:

[T]he common law . . . required[] that the jury itself should come from the vicinage of the place, where the crime was alleged to be committed. This was certainly a precaution, which, however justifiable in an early and barbarous state of society, is little commendable in its more advanced stages. It has been justly remarked, that in such cases to summon a jury, labouring under local prejudices, is laying a snare for their consciences; and though they should have virtue and vigour of mind sufficient to keep them upright, the parties will grow suspicious, and indulge other doubts of the impartiality of the trial.

3 STORY, *supra* note 118, § 1775 (footnotes omitted); see also *State v. Holloway*, 146 P. 1066, 1067–68 (N.M. 1914) (prioritizing impartiality over vicinage and taking defendant-centered approach). But see Kershen, *Vicinage II*, *supra* note 17, at 140–46 (arguing for enforcement of both impartiality and vicinage). See generally Scott Kafker, Comment, *The Right to Venue and the Right to an Impartial Jury: Resolving the Conflict in the Federal Constitution*, 52 U. CHI. L. REV. 729 (1985) (arguing for placing impartiality above constitutional venue requirements).

208. See, e.g., *Swainston*, 676 P.2d at 1155 (“[T]he constitutional [vicinage] provision was not designed to establish venue but rather to preserve the right to an unbiased jury.”); see also GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS’ RIGHTS IN CRIMINAL TRIALS 169 (1995) (arguing that moving trials because of publicity violates spirit of Sixth Amendment); *HELLER*, *supra* note 86, at 95 (discussing clash between impartiality and vicinage requirements); *Engel*, *supra* note 88, at 1662 (characterizing recent case law).

209. See *supra* note 122.

210. Cf. *Williams v. Florida*, 399 U.S. 78, 96 (1970) (using vicinage as example of common-law right not implicit in inherent nature of jury trial); *Price v. Superior Court*, 25 P.3d 618, 626 (Cal. 2001) (“[V]icinage . . . is not a fundamental and essential feature of the right to jury trial.”).

but they do not accord much respect even to the former.

One area of jury composition that *has* received attention in recent decades is the cross-section requirement. The cross-section requirement mandates that the jury venire be representative of the community,<sup>211</sup> but this obviously begs the question: What community?<sup>212</sup> While cross-section cases often discuss the minutiae of which groups are “distinctive,” these cases are routinely transferred to different venues without regard for the principles of vicinage. So long as the jury selection practices in the eventual forum do not discriminate against women, black people, or other “distinctive” groups, the courts typically do not intrude.<sup>213</sup> In cross-section cases, courts have focused (at least implicitly) on due process, equal protection, and fairness—to the defendant being tried and, only by extension, to the jury pool—instead of focusing on vicinage.<sup>214</sup> If cross-section cases were at all about getting vicinage right, one would expect to see defendants in cases like Clarence Terrell’s (where the state in question has no specific vicinage guarantee) challenge buffer statutes on cross-section grounds. None have. This is not to say, of course, that defendants could not or should not bring such challenges, even if this would entail rewriting the law of the cross-section right.<sup>215</sup>

In all, courts do not take vicinage very seriously. In the rare cases in which they do, moreover, they treat it as a defendant’s right. For this reason, there is little basis to conclude that the negative impact of buffer statutes on a community’s right to try its own criminal defendants would move the courts much. As the next Part shows, the case law indicates exactly that: Courts have not in fact been swayed by vicinage arguments.

### *B. The Rejection of County-Line Buffer Statutes . . . on Other Grounds*

Many courts have struck down buffer statutes. All such cases

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211. For a more detailed description and critique of the cross-section standard, see Kalt, *supra* note 202, at 75–88.

212. See Alexander, *supra* note 122, at 273 (“The right to a jury representing a cross-section of the community is central to the right to a fair trial. The issue is how to define the ‘community’ to be represented.”)

213. See Kalt, *supra* note 202, at 81 (discussing application of cross-section requirement).

214. See *id.* at 75–88.

215. See Alexander, *supra* note 122, at 294 (concluding that vicinage must be taken seriously if cross-section right is to mean anything); Engel, *supra* note 88, at 1673, 1701 (“The public vicinage right is implicit in . . . the cross-section requirement . . .”).

occurred between 1860 and 1930,<sup>216</sup> and therefore do not provide much direct evidence of the current strength of the community-centered theory of vicinage. These cases do show, however, that even during those decades, the community-centered approach was moribund.<sup>217</sup> The fact that the more recent scholarly revitalization of the community-centered theory has not been accompanied by increased challenges to buffer statutes on community-centered grounds does not bode well for the current strength of the theory either.<sup>218</sup>

The largest set of anti-buffer decisions from these decades were based on state constitutional provisions that required trial by a local jury, with “local” meaning “drawn from the county of the crime.”<sup>219</sup> When state constitutions spoke of juries of the “vicinage,” or the “district” in which the crime was committed, courts usually found the buffer statutes acceptable because vicinage is a vague term, and buffers represent only one way of drawing district lines.<sup>220</sup> When provisions were specific, though, and required juries of the “county” of the crime, many (but not all) courts found that the buffer statutes had to yield.<sup>221</sup> Most of these decisions were purely positivist, as befit the era in which they were made. As one court put it:

It may be that [buffers] would work no inconvenience, and be greatly promotive of a rigid enforcement of the Criminal Code . . . but it is enough for the present to say this is not warranted by the constitution . . . and our opinion of its wisdom or convenience can not in the slightest affect the question of its obligatory force.<sup>222</sup>

Such courts overturned buffer statutes because they conflicted with a

216. *See supra* note 40.

217. While Kershen injected new vigor into the community-centered argument, he did not purport to be making a novel argument; rather, in the finest traditions of the common-law, he emphasized ideas that had always been there but had faded. *See Kershen, Vicinage II, supra* note 17, at 85–94.

218. *See supra* text accompanying note 203.

219. *See supra* note 41 and accompanying text.

220. *See supra* text accompanying notes 170–71.

221. *See supra* note 41 and accompanying text.

222. *Buckrice v. People*, 110 Ill. 29, 34 (1884). For other purely positivist opinions, see *Kaseris v. Justice Court*, 144 P.2d 469, 473–75 (Idaho 1943) (Dunlap, J., dissenting); *State v. Harris*, 31 So. 782, 786 (La. 1902) (Blanchard, J., dissenting), *relied on by State v. Montgomery*, 38 So. 949, 949 (La. 1905) (striking down buffer statute); *State v. Chalikes*, 170 N.E. 653, 653–54 (Ohio 1930) (striking down buffer statute); *State v. Lowe*, 21 W. Va. 782, 793 (1883) (striking down buffer statute, “however convenient this statute may be”). For a legal realist attack on these court decisions, see Comment, 25 ILL. L. REV. 732, 734 (1931).

specific state constitutional provision, and no deeper analysis of vicinage requirements was needed. In the face of the obvious argument that buffers were at worst a *de minimis* violation,<sup>223</sup> these courts typically replied with slippery-slope arguments,<sup>224</sup> or limited the statutes' application to crimes of uncertain location.<sup>225</sup>

On the few occasions when courts went into more depth—when they explored *why* vicinage was important, and what was wrong with allowing buffers—the community-centered view was nowhere to be found in the court's analysis. Instead, these case discussions were cast in terms either of protecting the rights of defendants, or protecting the integrity of the common law for its own sake.<sup>226</sup> In one typical case, *In re McDonald*, the court explained:

It has ever been esteemed as among our most valuable common law heritages to enjoy the right of trial by jury. . . . [The law] has, therefore, ever been zealous to accord to [the citizen] the privilege of a trial at home, among his neighbors. So, in criminal prosecutions, while the privilege is usually accorded to the accused to take a change of venue, in order that he may escape local prejudice and passion, and to secure a fair and impartial trial, it does not recognize the right of the state to change the venue. Whereas, if the statute in question is valid, it is plain to be seen how the ancient privilege of the citizen in this respect may be stricken down by the state, and the state secure by

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223. See, e.g., *State v. Robinson*, 14 Minn. 447 (1869), available at 1869 WL 2333, at \*4 (affirming buffer statute as *de minimis*).

224. See *Buckrice*, 110 Ill. at 34.

If this may be done as to one hundred rods of territory, why may it not be done as to one mile? And if it may be done as to one mile, why may it not be done as to the entire county, and thus drag men for trial to Cook or JoDavie's county for offences committed in Alexander or Pulaski county?

*Id.*; see also *Dougan v. State*, 30 Ark. 41, 43 (1875) (making slippery slope argument); *Harris*, 31 So. at 786 (Blanchard, J., dissenting) (same), relied on by *Montgomery*, 38 So. at 949; *In re McDonald*, 19 Mo. App. 370, 376 (1885) (same); *Armstrong v. State*, 41 Tenn. 338, 342 (1860) (same). But see, e.g., *State v. Lehman*, 279 P. 283, 285 (Or. 1929) (rejecting slippery slope argument).

225. See, e.g., *Dougan*, 30 Ark. at 43.

226. See, e.g., *Smith v. State*, 197 P. 712, 714 (Okla. Crim. App. 1921) (striking down buffer statute due to fear of prosecutorial forum-shopping); *Lowe*, 21 W. Va. at 793 (striking down buffer statute and casting vicinage right in terms of defendants' rights); *Constitutionality of Statute*, *supra* note 51, at 1038 (noting cases striking down buffers as based on offenders' rights); cf. *Swart v. Kimball*, 5 N.W. 635, 637–639 (Mich. 1880) (finding vicinage right inherent in notion of jury and discussing right in terms of defendants' interests).

indirection a change of venue.<sup>227</sup>

As another court apologetically stated in 1860, as it struck down a buffer statute: “The worst criminals have their rights.”<sup>228</sup>

If the community-centered view of local juries really mattered to courts, it would be a counterweight to impartiality, instead of a second-tier value below it.<sup>229</sup> Litigants and courts would try to vindicate both interests. Litigants would challenge buffer statutes on the grounds that they offend an important constitutional value, and courts in some states would agree with them.<sup>230</sup> This is not the world we live in, however. Defendants like Clarence Terrell and their attorneys do not think of challenging buffer statutes when they are applied against them,<sup>231</sup> even if they are in states with arguably strong constitutional vicinage requirements.<sup>232</sup> Defendants and their attorneys think that as long as the jury is impartial, there is nothing to complain about—not successfully, anyway.

Though the community-centered view of vicinage provides a powerful basis for rejecting buffer statutes,<sup>233</sup> it is nevertheless unsurprising that it was not raised in the cases challenging buffer statutes. For one thing, no one represented the interest of the community in these cases. The prosecution, normally the representative of the people, is the one applying the statutes in these cases, and thus is the one defending them. The defendant who opposed the buffer statute had a sufficiently powerful defendant-centered argument without resorting to less potent and less direct community-centered ones.

227. *McDonald*, 19 Mo. App. at 377. The *McDonald* Court also feared prosecutorial abuse. *Id.* at 377–78.

The prosecution . . . sometimes stimulated by private ambition and personal spite, could select for such prosecution that one most inimical to the accused and most inconvenient to his witnesses, and farthest removed, at the place of trial, from and least in sympathy with, his neighborhood and home influence, wrought, perhaps, by a hitherto unblemished, reputation.”

*Id.*

228. *Armstrong*, 41 Tenn. at 342.

229. See *supra* text accompanying notes 160–61.

230. This is exactly what happened in those cases between 1860 and 1930 in which buffer statutes were struck down. See *supra* note 40. It would appear, however, that the states interested in interpreting their constitutional vicinage requirements this strictly have already done so.

231. See *supra* notes 5–9, 12 and accompanying text.

232. See, e.g., *supra* note 48 (mentioning South Dakota, the strongest example of this curious failure to challenge buffers with a strong constitutional vicinage requirement).

233. At least one court used a different sort of community-centered argument to *affirm* a buffer statute, noting the community’s interest in the effective prosecution of crime. *State v. Robinson*, 14 Minn. 447 (1869), available at 1869 WL 2333, at \*5.

This same pattern is reflected in the much more heavily (and more recently) litigated area of discrimination in jury selection. In cases where prospective jurors are excluded because of their race, the person challenging the practice is almost always a criminal defendant who asserts that the exclusion violates his right to a proper jury trial.<sup>234</sup> These defendants argue, at most, indirectly on behalf of the excluded jurors, whose rights are implicated most directly, but who are not before the court.<sup>235</sup> Relatedly, in cross-section cases, the most direct interest—that of the community and all its members to govern themselves on equal terms—is either left unspoken or is vindicated only indirectly by a defendant arguing for his own rights.<sup>236</sup>

While the community-centered approach is not explicitly mentioned in the buffer-statute case law, this does not necessarily mean that it would be irrelevant to a court to whom it was argued. Nevertheless, the arguments that the parties make are a function of the posture of the cases themselves. While jury selection and cross-section cases have managed to bring in community interests, they have done so by identifying individuals whose rights are affected: the particular excluded jurors. In buffer cases, no jurors are harmed as individuals, and so the community-centered argument in favor of vicinage offers no real basis for an argument from a notion of individual rights, only harder-to-represent collective rights.<sup>237</sup>

In the sources reviewed for this Article, there is simply no evidence that the community-centered view of vicinage has been raised in any cases challenging buffer statutes. Criminal defendants and their attorneys are not known for being shy about raising novel arguments in their cases. Here, however, even they are restrained, which suggests either that the community-centered view is not on their radar screens, or that even criminal defendants and their attorneys recognize that a community-centered argument for a local jury has no chance of success.

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234. See Kalt, *supra* note 202, at 72 (discussing phenomenon).

235. See, e.g., *Campbell v. Louisiana*, 523 U.S. 392, 400 (1998) (hearing white defendant's challenge to exclusion of black would-be grand jurors).

236. See Engel, *supra* note 88, at 1710–11 (discussing standing issues in vicinage cases).

237. Cf. *Silveira v. Lockyer*, 312 F.3d 1052, 1066–67 (9th Cir. 2002) (dismissing case for lack of standing after construing Second Amendment as providing only collective rights).

## IV. NOT CROSSING EIGHT MILE: PRESERVING JURIES OF THE VICINAGE

When Clarence Terrell was accused of committing a crime in Detroit, he should have been tried in Detroit before a Detroit jury, which would have done a better job, and which should have had the right to decide a case within its borders. Because a buffer statute was available, however, Terrell was tried across the county line before a suburban jury, contrary to the common-law tradition favoring local juries, and in contravention of sound policy. Even if his state had had a constitutional provision guaranteeing a trial in the county or district where the crime was committed, he might still have faced trial in a foreign county, and it still would have been for no good reason. Clarence Terrell's chances of acquittal might have been better in Detroit, but his were not the only interests at stake. Detroit also had an interest in having its citizens adjudicate Terrell's case and govern themselves through this adjudication. Nobody argued that Terrell's and Detroit's rights were violated, however, and if anybody had, he or she would likely have lost. For a bad statute that violates a good principle, this solicitude is hard to defend.

On the other hand, most states do not have buffer statutes, and they do just fine without them. Defendants are either unaware or uninterested in the possibility of challenging buffer statutes where they do exist. Courts are thus not presented with these challenges, and, somewhat circularly, would likely not affirm such challenges if they were made. That said, there is no reason that state lawmakers cannot simply repeal these laws. Indeed, they should do just that.



