

The Dilution Effect: Federalization, Fair Cross-Sections, and the Concept of Community

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The quintessential distinguishing feature of the American criminal justice system is the jury. Juries representative of their communities perform the interrelated functions in criminal trials of rendering verdicts that reflect a sense of community justice and giving normative content to law. When those functions are successfully performed, the jury lends legitimacy to the criminal justice system, bolstering public confidence in the extant rule of law.

Yet the criminal jury's legitimating functions are critically dependent on its own legitimacy, which in turn requires an examination of two key questions. First, what constitutes a "representative" jury, and second, what is the relevant community the jury is supposed to represent? The first of these questions, grounded as it is in the Sixth Amendment guarantee that a criminal defendant enjoys the right to an impartial jury drawn from a fair cross-section of the community, has received a fair amount of attention from both courts and scholars.¹ The second, arguably more profound and certainly prior

* Professor of Law, Valparaiso University School of Law. I thank Amitai Etzioni, Stanley Fish and Ian Ayres for their kind and helpful comments on a previous draft, and my colleagues at Valpo Law (particularly JoEllen Lind and Alex Geisinger) for their insights. Thanks also to Michelle Dougherty, Kelly Hartzler and Marissa Bracke for excellent research assistance, and to the Law Library staff. The idea for this article sprang from discussions with my colleague David Vandercoy, an incredibly able lawyer whose work in criminal defense cases has given these issues both depth and immediacy. It was his concern that his clients receive fair trials by juries comprised of a fair cross-section of *their* communities that prompted this article, and I thank him both for his unwavering support of this project and his devotion to the representation of those in our society who most need it.

¹ See, e.g., Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J.93 (1996); Kim Forde -Mazrui,

question, has remained largely unexamined.² The purpose of this Article is to fill that gap, and to do so using communitarian and postmodern theories to explore the idea of community as it pertains to the composition of juries.

The issues examined here are not, however, purely theoretical. They have grave practical importance for criminal defendants facing trial. Lawyers on both sides of criminal prosecutions have long tried to manipulate the composition of juries in an effort to obtain favorable results at trial. Devices like peremptory challenges and change of venue motions are routinely used in these efforts, and the strategic effects and

Jural Districting: Selecting Impartial Juries Through Community Representation, 52 VAND. L. REV. 353 (1999) [hereinafter Forde-Mazrui, *Jural Districting*]; Stanton D. Krauss, *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing*, 64 IND. L.J. 617 (1989); Mitchell S. Zuklie, Comment, *Rethinking the Fair Cross-Section Requirement*, 84 CAL. L. REV. 101 (1996).

² There is some interesting literature on the so-called “vicinage” requirement—the rule embodied in the Sixth Amendment that the accused enjoys the right to be tried “by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.” U.S. CONST. amend. VI. See generally Steven A. Engel, *The Public’s Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658 (2000) (arguing that the public has a constitutional right to have criminal trials adjudicated locally). Engel uses history and constitutional theory to make the case that the community which is “aggrieved” by the commission of a particular crime has a paramount, constitutionally protected interest in being the venue for its prosecution. He premises his argument on the notion that legislatures (state and federal) are properly equipped to “define the vicinage community” by drawing judicial districts. See *id.* at 1708-09. He does not, however, consider the question whether state or federal legislatively-drawn boundaries adequately capture the community that criminal juries should represent, particularly in larger federal districts. See also K. Winchester Gaines, *Race, Venue and the Rodney King Case: Can Batson Save the Vicinage Community?*, 73 U. DET. MERCY L. REV. 271 (1996); Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801 (1976). Courts generally have operated on the assumption that the “community” for fair cross-section purposes is adequately captured by political boundaries, state or federal. See, e.g., *Davis v. Warden*, 867 F.2d 1003, 1009-10 (7th Cir. 1989) (“County lines or federal district lines do not magically determine the parameters of a community. We believe, however, that because the decision is somewhat arbitrary, it is a decision that should be left when possible to a body authorized to legislate on such matters.”); *United States v. Grisham*, 63 F.3d 1074, 1079 (11th Cir. 1995) (though vicinage is a constitutional “constraint on the source of the jury, . . . the size of the vicinage was left to Congressional determination.”).

constitutional implications of these are well-documented. But a new, subtler manipulation of the jury composition scheme is emerging, one that makes the theoretical issues around the concept of community immediate and compelling. That is, federal prosecutors are taking control of increasing numbers of prosecutions of crimes previously within the purview of state prosecutors. This “federalization” of so-called street crime, notably murders and robberies, has the effect in most states of widening the “community” from which jurors will be drawn from a county within a state to a federal district or division encompassing several counties. A troubling second-order effect of this practice, then, is to de-localize juries, often diluting any significant minority representation.

A concrete example illustrates the problem, and will provide a case study for the analysis to follow. A robbery takes place in a gun store located in an urban area with a high minority population. During the course of the robbery, the gun shop owner is killed. A young African-American man is arrested for the crime. The United States Attorney decides to pursue a federal prosecution, basing federal jurisdiction on criminal code provisions enacted by Congress under its Commerce Clause powers, and seeks the death penalty under federal law. Because the federal district encompasses not just the urban county, but also “collar” suburban counties, the jury pool from which the federal jury will be drawn has a very different demographic makeup from one that would be drawn, under state law, in a state prosecution within the county where the crime took place. The wider reach of the federal court means that the jury venire panel consists of many fewer

minority members, and the prospect that the defendants will face an all-white, or nearly all-white, jury becomes much more likely.³

In the past thirty years, the Supreme Court has been forced to wrestle with difficult issues of race and the jury,⁴ and its two strands of jurisprudence (one based on the fair cross-section requirement and the other on the equal protection clause) have proven difficult to reconcile.⁵ The difficulty lies in the seeming inconsistency between the fair cross-section requirement's privileging of juror diversity for the sake of the differing perspectives brought to the decisionmaking table and the equal protection doctrine's rejection of stereotyping as predictive of juror perspectives. Rather than mount another attempt to integrate these competing constitutional principles into a coherent doctrine, this article seeks to refocus the debate toward a more communitarian-based view of the jury, using the federal versus state venire problem as a lens.

The article thus proceeds in three major parts. The first explains the process by which juries are assembled in federal and state courts under constitutional and statutory guidelines. The relative geographic spheres encompassed by state and federal jury pools

³ A relatively old federal venue statute requires that capital cases be tried "in the county where the offense was committed, where that can be done without great inconvenience." 18 U.S.C. § 3235 (2000). The section has been interpreted not to give defendants absolute rights to trial in a certain county and to vest discretion in trial courts on the convenience question. *See Davis v. United States*, 32 F.2d 860 (9th Cir. 1929); *Brown v. United States*, 257 F. 46 (5th Cir. 1919), *rev'd on other grounds*, 256 U.S. 335 (1921). In any event, this venue statute does not affect the jury pool, which would still be determined according to the district's jury selection plan on a district or division-wide basis, according to the vicinage requirement of the Sixth Amendment. *See infra* notes _____ and accompanying text.

⁴ Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 946-57 (1998) (describing Supreme Court's relatively recent interventions into jury selection procedures using the Sixth Amendment fair cross-section requirement and the Fourteenth Amendment equal protection clause).

⁵ *See generally* Muller, *supra* note 1.

will be explored, using five metropolitan areas of varying populations around the country⁶ as examples, with particular attention to the demographic consequences of using either federal districts or state counties to define jury venire pools by reference to the latest census data. Part II examines communitarian⁷ and postmodern theory in an effort to define the relevant “communities” from which “fair” cross-sections can be drawn to form politically legitimate juries. In particular, the key postmodern precept of constructed meaning has profound implications for the work of juries: when juries as collective democratic bodies give content to legal norms, they form interpretive communities.⁸ What gives a community coherence such that it can legitimately agree on, and express through a jury, what constitutes, for example, “aggravating” or “mitigating” circumstances that would warrant the imposition of a death sentence? Is that sort of coherence inherently local⁹ and therefore dissipated when one moves beyond fairly small geographic boundaries?

Finally, Part III will synthesize the practice with the theory and consider the implications of the federalization trend in criminal prosecutions. If relatively more of our

⁶ The five areas, randomly chosen, are Los Angeles, California, Philadelphia, Pennsylvania, Gary, Indiana, Detroit, Michigan, and Dallas, Texas.

⁷ "Communitarianism" has been described as "a social philosophy that maintains that societal formulations of the good are both needed and legitimate. Communitarianism is often contrasted with classical liberalism, a philosophical position that holds each individual should formulate the good. Communitarians examine the way shared conceptions of the good (values) are formed, transmitted, enforced and justified." THE OXFORD COMPANION TO POLITICS OF THE WORLD 158 (Joel Krieger ed., 2001).

⁸ The concept of “interpretive communities” was first articulated by the literary-legal theorist Stanley Fish to describe why language sometimes seems to have embedded meaning. See generally STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980) and *infra* notes ___ and accompanying text. Compare the notion of “communities of interest” developed in Supreme Court cases on legislative districting. See Forde-Mazrui, *Jural Districting*, *supra* note 2, at 382-88.

⁹ Fish argues repeatedly that it is, though not in this (jury) context.

criminal law is to be, in essence, defined by federal as opposed to state juries, then it is essential that we recognize this not just as a dilution of local power (a traditional concern of federalism) but as an affront to the ideal of communitarian justice embodied in the criminal jury.

I. Assembling Federal and State Jury Venires

Jury panels are assembled in both state and federal courts against a backdrop mosaic of constitutional,¹⁰ statutory, and administrative law. I thus begin my description with a short explanation of federal constitutional requirements for the assembling of jury venire panels, requirements that apply to all criminal jury panels in both state and federal courts. I then move to an examination of the statutory and administrative process used in federal court to assemble jury venires. Finally, the demographic consequences of drawing juries from federal districts rather than state counties will be described, using five sample metropolitan areas to demonstrate the dilution effect of federal districting.

A. Constitutional Requirements in the Assembly of Jury Venire Panels

The Sixth Amendment to the United States Constitution guarantees defendants charged with crimes the right to a trial by an "impartial" jury.¹¹ This guarantee has long been interpreted by the Supreme Court to mean that juries must be drawn from a "fair cross-section" of the community.¹² Enforcing this fair cross-section requirement has engaged the courts in an evolving process, from early cases striking down overt exclusions of distinct demographic groups (primarily those based on gender and race) to

¹⁰ For state jury venires, both federal and state constitutional law will control the process.

¹¹ U.S. CONST. amend VI.

¹² *Ballard v. United States*, 329 U.S. 187 (1946).

later cases involving more subtle forms of discrimination. All the cases make clear, however, that the Sixth Amendment right to a fair cross-section applies only to the jury venire,¹³ not to the actual "petit" jury panel that ends up serving in any particular case.¹⁴

The equal protection clause of the Fourteenth Amendment has also served as a check on racial discrimination in jury selection. Not long after the post-Civil War amendments to the U.S. Constitution were ratified, a case came to the Supreme Court on the issue of whether an outright exclusion of African-American men from jury service violated the new concept of "equal protection" under the law. In *Strauder v. West Virginia*,¹⁵ the Supreme Court held that it did, a holding that affects both the jury venire and the petit jury.¹⁶ Later, the Court invoked the fair cross-section requirement of the

¹³ Jury venire panels are typically assembled by clerks of court, who first develop a "source list" for potential jurors—often by using voter rolls or driving records—and then use some random method to choose which persons will actually be called for jury duty.

¹⁴ See, e.g., *Ballard*, 329 U.S. at 192-193 ("This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political, and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups.") (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946))). See also *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) ("[I]n holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population."). As to the petit jury, the tool for inclusion of previously underrepresented groups has been the Equal Protection clause. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (*Batson* rule extended to peremptory challenges based on gender); *Batson v. Kentucky*, 476 U.S. 79 (1986) (equal protection violated by use of peremptory challenges to exclude prospective jurors solely on account of their race).

¹⁵ 100 U.S. 303 (1879).

¹⁶ See *Holland v. Illinois*, 493 U.S. 474, 479 (1990) ("[T]he Fourteenth Amendment's prohibition of unequal treatment in general and racial discrimination in particular . . . therefore has equal application at the petit jury and the venire stages . . .").

Sixth Amendment to strike down both laws and practices that had the effect of excluding African-Americans,¹⁷ daily wage-earners,¹⁸ Latinos,¹⁹ and women²⁰ from jury service.

However, the systematic exclusion of women and racial minorities from jury service persisted in some states well into the twentieth century.²¹ The Supreme Court finally, and definitively, announced in the 1970s that schemes requiring women to affirmatively register their desire to serve as jurors²² or that granted automatic exemptions to women summoned to serve²³ violate the fair cross-section requirement.

In *Taylor v. Louisiana*,²⁴ the Supreme Court identified three purposes served by the fair cross-section requirement: "[1] guard[ing] against the exercise of arbitrary power [and invoking] the commonsense judgment of *the community* as a hedge against the overzealous or mistaken prosecutor . . .; [2] [preserving] public confidence in the fairness of the criminal justice system; and [3] sharing . . . the administration of justice [as] a phase of civic responsibility."²⁵ The Court has extolled these functions as clear justifications for striking down rules that overtly exclude racial minorities and women.²⁶

¹⁷ *Norris v. Alabama*, 294 U.S. 587 (1935).

¹⁸ *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946).

¹⁹ *Hernandez v. Texas*, 347 U.S. 475 (1954).

²⁰ *Ballard v. United States*, 329 U.S. 187 (1946).

²¹ For an argument that a correlation exists between the increasing inclusiveness of women and minorities on juries and increasing limits on jury power on the civil side of the docket, see Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325 (1995).

²² *Taylor v. Louisiana*, 419 U.S. 522 (1975) (striking Louisiana's constitutional provision requiring women to file written declarations to serve on juries).

²³ *Duren v. Missouri*, 439 U.S. 357 (1979) (striking Missouri practice of granting women automatic exemptions from jury service).

²⁴ 419 U.S. 522 (1975).

²⁵ *Id.* at 530-31 (emphasis added).

²⁶ See *Lockhart v. McCree*, 476 U.S. 162, 175 (1986) (while refusing to recognize class of prospective jurors opposed to the death penalty as a "distinctive group" for purposes of the fair cross-section requirement, the court notes that excluding "such groups as

Nevertheless, the Court has refused to find either fair cross-section or equal protection violations in some cases in which statistical data demonstrated gross under-representation of racial minorities in the jury pool. *Brown v. Allen*²⁷ involved the Alabama trial of an African-American man for rape, which resulted in a conviction and death sentence. The Supreme Court held that despite the gross underrepresentation of African-Americans in the jury pool,²⁸ no Sixth Amendment violation existed, noting the efforts the county had made to increase the number of African-Americans in the jury pool.²⁹ Some twelve years later, the Supreme Court revisited the problem of race and juries in Alabama. In *Swain v. Alabama*,³⁰ the Court declared that "a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn."³¹ Absent a showing of purposeful discrimination against an identifiable group, the Court held, a disparity of as

blacks, . . . women, . . . and Mexican-Americans . . . from jury service clearly contravene[s] all three of the aforementioned purposes for the fair-cross-section requirement. Because these groups [are] excluded for reasons completely unrelated to the ability of members of the group to serve as jurors in a particular case, the exclusion raise[s] at least the possibility that the composition of juries would be arbitrarily skewed in such a way as to deny criminal defendants the benefit of the common-sense judgment of the community.").

²⁷ 344 U.S. 443 (1953).

²⁸The source list, comprised of all county property and poll taxpayers, included 16% African-Americans, as compared to 33.5% African-Americans over twenty-one years of age in the general population. Of the sixty potential jurors called for the defendant's case, five were African-American. *Id.* at 469.

²⁹ The county had eliminated poll taxes, minimum property ownership requirements, and the requirement that all taxes be paid for eligibility for jury service. *Id.* at 470.

³⁰ 380 U.S. 202 (1965), *overruled in part by* *Batson v. Kentucky*, 476 U.S. 79 (1986).

³¹ *Id.* at 208.

much as 10% between a group's representation in the jury pool and its representation in the general population does not amount to an equal protection problem.³²

The Supreme Court has subsequently settled on a three-part analysis to ascertain whether a violation of the fair cross-section requirement has occurred: "the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process."³³

Lower courts have read the 10% criterion of *Swain* into the second prong of the *Duren* analysis.³⁴ In *United States v. Phillips*,³⁵ for example, the seventh circuit held that a jury venire panel wholly devoid of African-Americans was not a Sixth Amendment problem when African-Americans comprised only 6.1% of the population.³⁶ Thus, in any district or division that lacks a 10% minority population, a Sixth Amendment fair cross-

³² *Id.* at 208-09. For an explanation of the statistical deficiencies in the Supreme Court's analysis of the data presented in *Swain*, see Mark McGillis, *Jury Venires: Eliminating the Discrimination Factor by Using a Statistical Approach*, 3 HOW. SCROLL 17, 31-33 (1995). *Swain* also held that the prosecutor's use of peremptory challenges to remove prospective African-American jurors did not violate the Equal Protection clause. 380 U.S. at 226. This aspect of *Swain* was overruled by the Court's decision in *Batson*, which now requires race-neutral use of peremptory challenges. *Batson v. Kentucky*, 476 U.S. 79 (1986).

³³ *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

³⁴ *Swain* was an equal protection case, but the test to state an equal protection claim for minority underrepresentation in the jury pool generally mirrors the fair cross-section test. The difference is that equal protection claims require a showing of intentional discrimination.

³⁵ 239 F.3d 829 (7th Cir. 2001).

³⁶ *Id.* at 842. The trial had taken place in the federal court in South Bend, Indiana.

section claim could never be mounted, even in the complete absence of minority representation in the jury pool.³⁷

Defining the relevant scope of the community from which a fair cross-section will be drawn, therefore, matters critically to the possibility of genuine diversity on the jury. If minority communities tend to be concentrated in particular geographic areas,³⁸ smaller vicinage districts are much more likely to capture a critical mass of minority presence. And this critical mass is essential to even trigger a fair cross-section analysis under the Sixth Amendment.

B. Assembling the Jury Venire in Federal Court

With the constitutional backdrop explained above, we now turn to a description of the process by which jury venire panels are actually assembled in federal courts. Because a fairly elaborate statutory scheme governs the process, there is some degree of uniformity amongst federal districts around the country with regard to jury selection. The

³⁷ This is known as the "absolute disparity" method for measuring underrepresentation, by which "the percentage of representation of a distinct group on the venire is subtracted from the percentage of representation of the group in the population as a whole." Ted M. Eades, *Revisiting the Jury System in Texas: A Study of the Jury Pool in Dallas County*, 54 SMU L. REV. 1813, 1822 (2001). Though other statistical methods are used by some courts, most use the 10% floor in both equal protection cases (which require a showing of intentional discrimination) and fair cross-section cases. *Id.* at 1824. *See also* United States v. Grisham, 63 F.3d 1074, 1079 (11th Cir. 1995)(using absolute disparity analysis with the 10% rule); United States v. Weaver, 267 F.3d 231, 240-43 (3d Cir. 2001) (using absolute disparity analysis, but without explicit use of the 10% rule); United States v. Rioux, 97 F.3d 648, 656 (2d Cir. 1996)(using absolute disparity analysis, though noting its previous refusal to use absolute numbers in a case where evidence existed that exclusion of minorities from jury pool was not benign).

³⁸ *See generally* Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795 (1999).

uniformity is imperfect, though, because the statute itself allows some flexibility for local federal district courts in developing their jury selection plans to fit local conditions.

Before 1968, federal courts often used a "key man" method of assembling a pool of prospective jurors.³⁹ This method utilized well-connected individuals or organizations to suggest citizens who, because of their esteem within the community, would make good jurors. The obviously exclusionary character of this method finally led both to a court decision striking it down⁴⁰ and to a new statute designed to produce a fairer cross-section of the community. The federal Jury Selection Act,⁴¹ enacted by Congress in 1968, was designed to prevent discrimination in jury service on the basis of race, color, religion, sex, national origin, or economic status.⁴²

The statute requires federal district courts to use lists of registered or actual voters as their "source lists" or, if necessary to "foster the policy and protect the rights" identified by the statute, some other source or sources of names.⁴³ Some federal districts use district-wide plans to draw jurors; others adopt separate plans for divisions or combination of divisions within the judicial district.⁴⁴ The statute specifically requires that the procedures contained in the jury plans of each division or district "shall be designed to ensure the random selection of a fair cross section of the persons residing in

³⁹ JACK FRIEDENTHAL, MARY KAY KANE & ARTHUR MILLER, CIVIL PROCEDURE 539 (3d ed. 1999).

⁴⁰ *See Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966).

⁴¹ *See* 28 U.S.C. §§ 1861-1871 (2000).

⁴² *See* 28 U.S.C. § 1862 (2000).

⁴³ 28 U.S.C. § 1863(b)(2) (2000).

⁴⁴ *See* 28 U.S.C. § 1863(a) (2000) ("Separate plans may be adopted for each division or combination of divisions within a judicial district.").

the community *in the district or division* wherein the court convenes."⁴⁵ Thus, the statute explicitly defines the community from which a fair cross-section of jurors is to be drawn as the entire federal district or division. In most federal districts, this will be a multi-county area.

C. The Demographic Consequences of Assembling Juries in Federal v. State Courts

This section examines five sample metropolitan areas in an effort to determine the demographic consequences of assembling juries in the state courts, organized by county, as opposed to the federal courts, organized by federal districts. In each of the five samples, metropolitan areas are essentially comprised of a city which constitutes the major population center of a county surrounded by suburban collar counties. Census data demonstrate that the minority population is higher in the urban county than it is in the suburban collar counties.⁴⁶ Thus, the federal districts that are drawn to include the collar counties will dilute the minority representation in the jury pool for federal cases.⁴⁷

⁴⁵ 28 U.S.C. § 1863(b)(3) (2000). Further, the plan "shall ensure that names of persons residing in each of the counties, parishes, or similar political subdivisions within the judicial district or division are placed in a master jury wheel; and shall ensure that each county, parish, or similar political subdivision within the district or division is substantially proportionally represented in the master jury wheel for that judicial district, division, or combination of divisions." *Id.*

⁴⁶ When using census data to determine representativeness on jury venire panels, the analysis is necessarily imprecise, because the census does not measure the jury-eligible population. Thus, courts are forced to do a crude comparison, between the percentage of a minority group in the population base and the percentage of that group in the jury pool. *See Eades, supra* note 37, at 1823 (though some courts have objected, the Supreme Court uses general census data in jury representativeness cases, and census information "is the most accurate, readily available source of data.").

⁴⁷ See Appendix A for a graphic representation of the census data.

For example, Indiana is divided into two federal judicial districts, northern and southern.⁴⁸ The northern district is then subdivided into three divisions, one of which is the Hammond Division.⁴⁹ Lake County, in the Hammond division, is where the city of Gary is located, and has a large minority population. The surrounding counties are overwhelmingly white. Thus, moving beyond Lake County to draw a jury pool for federal court cases inevitably dilutes minority representation. While the African-American population of Lake County is 25.3%, blacks are 19.7% of the Hammond division because of the addition of virtually all-white Porter County. Moreover, the dilution effect is often exacerbated by intra-district transfers, which are routinely granted and are not considered a fair cross-section problem because the community is defined by statute as district- or division-wide.⁵⁰ When a case is transferred from the Hammond division, for example, to the South Bend division, juries will be drawn from a division in which only 6.3% of the population is African-American.

The demographics in the Philadelphia, Pennsylvania area are even starker. The Eastern District of Pennsylvania, which is the federal district encompassing the city of Philadelphia and its namesake county, is comprised of eight additional collar counties. The federal court uses voter registration lists to assemble its jury pool; the state courts in

⁴⁸ 28 U.S.C. § 94 (2000).

⁴⁹ *Id.* The Hammond Division is comprised of the counties of Benton, Carroll, Jasper, Lake, Newton, Porter, Tippecanoe, Warren and White. The Hammond Division holds court in Hammond, with jurors drawn from Lake and Porter counties, and Lafayette, with jurors drawn from the other counties.

⁵⁰ *See Davis v. Warden*, 867 F.2d 1003,1008 (7th Cir. 1989)("According to the Supreme Court, the sixth amendment entitles a defendant to a jury drawn from the federal district in which the crime was committed, although the jury may be drawn from a division of the district rather than the entire district . . . [l]ower courts have held therefore that a jury selection system satisfies the sixth amendment if the jury is selected from either the entire district or a division of that district.").

Philadelphia County use both voter and drivers' registration lists. The percentage of African-Americans in Philadelphia County is 43.2%; in the Eastern District of Pennsylvania, that number drops to 16.8%.

A similar phenomenon exists in the Detroit metropolitan area. The city is located in Wayne County, which has a 42.2% black population. The Eastern District of Michigan, Southern Division, encompasses Wayne County along with eight other counties, yielding a 21.5% overall African-American population percentage. Significantly, the state of Michigan does not have a death penalty. Thus, the federalization of murder trials in Michigan makes the death penalty available at the same time that it dilutes minority representation in the jury pool.

In the Los Angeles and Dallas areas, the story is an interesting reflection of the changing demographics in America generally. In both metro areas, the Hispanic population is larger than other minority groups. And in both areas, the proportion of both Hispanic and African-American populations gets diluted by federal divisions that include suburban counties along with the county in which each city is located, though the disparity is not as great as in Philadelphia or Detroit.⁵¹

II. Defining the Relevant Community: Theoretical Perspectives

⁵¹ In California, the proportion of African-Americans in Los Angeles County is 9.8% versus 8.8% in the Central federal district, western division, which encompasses Los Angeles, San Luis Obispo, Santa Barbara, and Ventura Counties. The proportion of Hispanics in Los Angeles County is 44.6%, as opposed to 42.8% in the federal division. In Texas, Dallas County has 20.3% African-Americans and 29.9% Hispanics as opposed to the Northern District of Texas, Dallas Division, which has 18.1% African-Americans and 26.9% Hispanics because it incorporates six additional counties.

The demonstration that the demographic makeup of the jury venire pool will vary in state and federal court, at least in the five sample districts examined, pushes toward a fundamental question: what is the relevant community from which the "fair cross-section" of jurors should be drawn? Both state counties and federal districts are political subdivisions, drawn by historical accidents or political expediencies. But does either geographically-defined space capture the sort of coherence that could fairly be said to constitute community in a more meaningful sense of the word? I look now to two distinctive theoretical schools in an effort to give content to the concept of "community" as used in the fair cross-section context. The first is the communitarian movement, whose agenda has been most famously articulated by sociologist Amitai Etzioni. The second is the postmodern linguistic theory of "interpretive communities," an idea championed by literary and legal scholar Stanley Fish.

A. Communitarian Theory

In his book *The New Golden Rule: Community and Morality in a Democratic Society*,⁵² Amitai Etzioni⁵³ makes a powerful case for the importance of a core of shared values⁵⁴ in defining moral order. This "core of shared values" enables a community to "formulate specific public policies [by providing] criteria for settling differences in a principled rather than an ad hoc or interest-based manner."⁵⁵ The problem, of course, is the tension inherent in a pluralistic society such as the United States between these "shared core values" and the notion of a liberal state fueled by individual freedoms. Much of Etzioni's book is devoted to the ongoing debates between liberals and communitarians as to the shifting contours of individual freedom and autonomy in contraposition to the concept of the common good. Moreover, communitarian thinkers make clear that "communal values must be judged by external and overriding criteria, based on shared human experience."⁵⁶ But rather than focusing on the imposition of values on some pre-existing group (geographical or otherwise) of people, communitarian

⁵² AMITAI ETZIONI, *THE NEW GOLDEN RULE: COMMUNITY AND MORALITY IN A DEMOCRATIC SOCIETY* (1996).

⁵³ Etzioni, University Professor at George Washington University, is the founding president of the Communitarian Network and the editor of *The Responsive Community*, a widely-distributed newsletter. He is one of the premier voices in the communitarian movement.

⁵⁴ *Id.* at 85 (Chapter 4: Sharing Core Values). "Shared values are values to which most members of the society are committed (albeit not necessarily to the same extent). Shared values differ profoundly from *agreed* positions, which are the results of some procedure, such as negotiated contracts or arbitration, and are reached on practical or tactical grounds—an accommodation by individuals who have different values." *Id.* at 85-86.

⁵⁵ *Id.* at 87.

⁵⁶ See Amitai Etzioni, *The Responsive Communitarian Platform: Rights and Responsibilities*, reprinted in AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* 255 (1993).

theory posits that the values themselves actually help to *define* the community.⁵⁷ Thus there is always a complex symbiotic interplay between any moral decisionmaker, including a juror, and her community: the community shapes her values just as her values shape her community.⁵⁸

At this point one confronts the problem of levels of generality. If values rather than geography are a better determinant of community, then at what level of specificity should the values be articulated? Michael J. Perry, after affirming that "moral deliberation requires community"⁵⁹ (in the context of constitutional interpretation) argues that there exists a national "judging community" at the level of generally shared ideals like freedom of speech and religion, due process of law and equal protection.⁶⁰ Because those ideals are by nature "underdeterminate,"⁶¹ they are directly useful in situations that test the core of the principle of each⁶² and indirectly useful as tools to mediate consensus and dissensus.⁶³ But when decisionmakers are faced with the task of answering a particular question, as jurors in criminal trials always are, this broad notion of community may well break down. As jurors struggle with difficult moral decisionmaking

⁵⁷ "The starting point, typically, is shared values, not individual choices or formulations of the good." ETZIONI, *THE NEW GOLDEN RULE*, *supra* note 50, at 93.

⁵⁸ ETZIONI, *THE SPIRIT OF COMMUNITY*, *supra* note 54, at 31 ("[W]e find reinforcement for our moral inclinations and provide reinforcement to our fellow human beings, through the community.").

⁵⁹ MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY* 157 (1988).

⁶⁰ *Id.* at 154.

⁶¹ *Id.* at 155.

⁶² *Id.* at 155-56. For example, there would likely be "virtual consensus" as to whether the government could compel allegiance to a particular religion. *Id.*

⁶³ *Id.* at 156. For example, the shared ideal would give decisionmakers a point of reference to decide whether a particular policy violates the core principle. *Id.* Perry argues that constitutional discourse, in nonoriginalist constitutional adjudication, is "*at its idealized best*, . . . the moral discourse of the constitutional community." *Id.* at 158.

(constrained only loosely by the judge's instructions on the relevant law), the relevant communities that shape the values brought to the deliberation table cannot be so broadly defined.⁶⁴

Indeed, communitarianism has been criticized for its failure to define what constitutes a community for the purpose of deliberating moral or societal questions.⁶⁵ Modern life is organized such that most people identify with many more than one community.⁶⁶ Daniel Bell describes the communities that matter for moral deliberation as those that constitute identity, and then proposes criteria "for distinguishing constitutive communities from other forms of association, contingent attachments, fleeting 'facts'

⁶⁴ "[W]hich community is appealed to for the intersubjective criteria or grounds of judgment, since the latter will vary as one varies the community appealed to . . . [W]here allegiances conflict, it is not decided in advance which community will supply the basis of judgment. Does my commitment to a particular people outweigh, or is it outweighed by, my commitment to' some other group? '[I]t [is not] immediately apparent to whom the judgment is addressed: a community of the past or one projected into the future; a particular national community or a community of nations; a tiny circle or [of?] associates or universal mankind. . . . Thus, the claim—judgment implies judging community—gives rise to the question: which community?" PERRY, *supra* note 57, at 157-58 (quoting RONALD BEINER, *POLITICAL JUDGMENT* 142-43, 146 (1983)) (passages rearranged).

⁶⁵ See DANIEL BELL, *COMMUNITARIANISM AND ITS CRITICS* 91 (1993) ("[E]veryone knows that communitarians place special emphasis upon communal life, but few have a clear grasp of what sort of community we are to value."). Bell's book is written in the form of a two-character play, in the manner of the movie *My Dinner with Andre*. Both characters are graduate philosophy students; over dinner and wine in a Paris restaurant, the character Anne describes her doctoral thesis which is a defense of communitarianism against the character Philip's various critiques.

⁶⁶ German sociologist Ferdinand Tönnies, in the nineteenth century, described what he called *gemeinschaft* as an ideal of a local community that is static, orderly, and intimate in contrast to *gesellschaft*, the modern large-scale society of individuals who form associations only for instrumental reasons. See generally FERDINAND TÖNNIES, *COMMUNITY AND SOCIETY* (Charles P. Loomis trans., Harper & Row 1963) (1887); see also BELL, *supra* note 63, at 90-91. Modern communitarian thinkers reject such a strict dichotomy, recognizing that it is possible for people to function in our modern large-scale society and still be part of constitutive communities. *Id.* at 91-92.

about oneself, and so on."⁶⁷ Significantly, constitutive communities are revealed by their members' self-definition and are aspects of their identities that "can't be shed like membership of a voluntary association."⁶⁸ And the values of those constitutive communities inform, in a way that is both subtle and sometimes dimly perceived even by the member herself, every act of moral deliberation.⁶⁹ Bell identifies three kinds of constitutive communities: communities of place, of memory (that is, a shared history), and of "face to face personal interaction governed by sentiments of trust, cooperation, and altruism."⁷⁰ Thus, the work of moral decisionmaking, which is the key task performed by juries, is according to communitarian theory informed by the jurors' constitutive communities—defined geographically, by shared histories, and, most significantly, by the sort of face-to-face personal interactions that demand both value expression and accountability. This suggests that relatively smaller community boundaries, where repeated interpersonal interactions are more likely to take place, better capture the idea of community that would most matter for moral decisionmaking, including that done by juries.

The idea that local communities have intrinsic value that is endangered by modern industrial and transient societal trends is not new. Early in the twentieth century, Progressive philosopher John Dewey described the corrupting influence of technology on

⁶⁷ *Id.* at 94.

⁶⁸ *Id.* at 95.

⁶⁹ *See id.* at 103 ("[T]hree criteria [are] employed to distinguish 'constitutive communities' from contingent attachments. . . . one should start with how it is that people in fact define themselves, i.e. how they answer the question 'who are you?' Next. . . . a constitutive community provides a largely background way of meaningful thinking, acting, and judging. The last criterion [is that] one loses a commitment to a constitutive community at the price of being thrown into a state of severe disorientation where one is unable to take a stand on many things of significance.").

⁷⁰ *Id.* at 185.

the preexisting local communities of the day, noting that "the machine age in developing the Great Society has invaded and partially disintegrated the small communities of former times without generating a Great Community."⁷¹ Dewey worried that the loss of those smaller communities would portend a diminishment of American democracy, because he considered "genuine community life"—that is, a common identity—to be necessary to effective self-governance.⁷²

At the turn of the twenty-first century, Robert D. Putnam famously described a similar phenomenon—that is, a loss of what he calls "social capital"—as "bowling alone."⁷³ In his book of that name, Putnam describes the waning participation of Americans in both formal and informal social institutions, using the decline of league bowling as a symbolic example.⁷⁴ While the general theme of Putnam's book is that Americans desperately need to recapture a sense of community,⁷⁵ he pointedly avoids nostalgic visions of a past "golden age" by noting both that social capital can have seriously negative externalities for those outside the community⁷⁶ and that debates over

⁷¹ JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* (1926), *reprinted in* 2 *THE LATER WORKS OF JOHN DEWEY, 1925-1953* at 314 (Jo Ann Boydston ed., 1984), *quoted in* MICHAEL SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* at 208 (1996).

⁷² *See* SANDEL, *supra* note 69, at 208.

⁷³ ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000). "[S]ocial capital refers to connections among individuals—social networks and the norms of reciprocity and trustworthiness that arise from them. In that sense social capital is closely related to what some have called 'civic virtue.' The difference is that 'social capital' calls attention to the fact that civic virtue is most powerful when embedded in a dense network of reciprocal social relations." *Id.* at 19.

⁷⁴ *Id.* at 111-13.

⁷⁵ *See, e.g., id.* at 28 ("[W]e Americans need to reconnect with one another. That is the simple argument of this book.").

⁷⁶ Putnam notes that like other forms of capital, social capital "can be directed toward malevolent, antisocial purposes . . . [t]herefore it is important to ask how the positive consequences of social capital—mutual support, cooperation, trust, institutional

the loss of community are nothing new in American intellectual life.⁷⁷ Indeed, Putnam's thesis is not that community bonds have been in steady decline, but that the story of American civic engagement is one of both "collapse and renewal."⁷⁸

Putnam's book is empirically based on the study of a rich collection of survey data, rendering insights that have at least two important implications for our project of defining community in the context of the fair cross-section requirement. First, the data demonstrate that the size of the community makes a difference in terms of civic engagement. Second, there is apparently a generational shift in the way that the concept of community is understood by Americans.

When early Progressive thinkers worried over the loss of community, they in part manifested a privileging of the small town over what was described (often quite accurately) as urban squalor.⁷⁹ Dewey and others believed that the connectedness of relationships in smaller communities led to a better quality of democracy.⁸⁰ Putnam's study of recent data seems to bear out the early reformers' intuition that the size of the community makes a difference in civic engagement: "formal volunteering, working on

effectiveness—can be maximized and the negative manifestations—sectarianism, ethnocentrism, corruption—minimized." *Id.* at 22.

⁷⁷ "Debates about the waxing and waning of 'community' have been endemic for at least two centuries . . . We seem perennially tempted to contrast our tawdry todays with past golden ages." *Id.* at 24.

⁷⁸ *Id.* at 25.

⁷⁹ *Id.* at 378-79.

⁸⁰ *Id.* at 377-80. These communitarian Progressives were not necessarily pessimistic about the possibility of civic engagement in larger settings, however: "As historian Quandt describes the optimistic outlook of these reformers, 'The easy sense of belonging, the similarity of experience, and the ethic of participation might be more easily maintained in the small locality than anywhere else, but this did not preclude their cultivation in different soil.'" *Id.* at 380, quoting JEAN QUANDT, FROM THE SMALL TOWN TO THE GREAT COMMUNITY: THE SOCIAL THOUGHT OF PROGRESSIVE INTELLECTUALS at 10 (1970).

community projects, informal helping behavior (like coming to the aid of a stranger), charitable giving, and perhaps blood donation are all more common in small towns than in big cities."⁸¹ This supports the common-sense intuition that the smaller the community, the more cohesive its ties, and, presumably, its values—or, conversely, that as community boundaries are drawn more broadly, values are less likely to be shared.

A second important insight of Putnam's study shows a generational divide on civic engagement. He found that people born before 1946 were "nearly twice as likely to feel a sense of belonging to their neighborhood, to their church, to their local community, and to the various groups and organizations to which they belong" as Gen X'ers born after 1964.⁸² Interestingly, though both groups were intimately tied to their families and friends, the younger generation was markedly less engaged with their local communities.⁸³ Putnam struggles with possible explanations for the generational difference, noting the near-impossibility of sorting cause from effect in this complicated context.⁸⁴ Without reaching any definite conclusion, Putnam is dismissive of the possibility that the rise of "big government" is somehow a causative factor in the decline in civic engagement.⁸⁵ But in the particular context of the jury, it is worth exploring the possibility that as the jury pool widens, the potential for genuine community input into jury decisionmaking declines. For as the "community" represented by the jury is enlarged, the probability of cohesive values that might bind jurors together is lessened. Thus, the enlargement of the jury pool (by federalizing) has the effect of diluting

⁸¹ *Id.* at 119. For more data on the impact of community size on altruism, see references listed in note 10 to Chapter 7 in Putnam's book. *Id.* at 463.

⁸² *Id.* at 274. Baby boomers fell midway between those two groups. *Id.* at 275.

⁸³ *Id.*

⁸⁴ *Id.* at 277-84.

⁸⁵ *Id.* at 281-82.

community values. This, in turn, may well produce the second-order effect of rendering public sentiment that is at best dismissive of, and at worst disdainful of, jury service.

This is not to say that the only places in which community-wide values can be cultivated must, necessarily, have small populations. Sociologist Herbert Gans has described "urban villages" within large cities like Boston and New York, where people of various ethnic groups live together, know each other and their local merchants, and look out for each others' safety and children.⁸⁶ Nor does this argument lead to a call for return to the smaller, traditional communities of yesteryear (which tended toward complete homogeneity and, often, rigid authoritarianism).⁸⁷ Rather, as Etzioni argues, "[w]hat we need now are communities that balance both diversity and unity . . . we need to strengthen the communitarian elements in the urban and suburban centers, to provide the social bonds that sustain the moral voice, but at the same time avoid tight networks that suppress pluralism and dissent."⁸⁸

In an effort to sketch the communitarian agenda, Etzioni has drafted a document called *The Responsive Communitarian Platform: Rights and Responsibilities*⁸⁹ One

⁸⁶ See HERBERT J. GANS, *THE URBAN VILLAGERS: GROUP AND CLASS IN THE LIFE OF ITALIAN-AMERICANS* 14-15 (1982); see also JIM SLEEPER, *CLOSEST OF STRANGERS: LIBERALISM AND THE POLITICS OF RACE IN NEW YORK* (1990), cited in ETZIONI, *THE SPIRIT OF COMMUNITY*, *supra* note 54, at 120. Daniel Bell makes a similar point: in refuting the argument that people are less "determined by, and attached to, their home if they're from the large cities of contemporary society than if they were born and bred in the small communities of the past," Bell's communitarian character Anne asks: "Have you seen any Woody Allen films? Do you not think that New York is constitutive of Woody Allen's identity?". BELL, *supra* note 63, at 105-06.

⁸⁷ See ETZIONI, *THE SPIRIT OF COMMUNITY*, *supra* note 54, at 122.

⁸⁸ *Id.* at 122.

⁸⁹ ETZIONI, *THE SPIRIT OF COMMUNITY*, *supra* note 54, at 251-267. As the author explains, the platform was first drafted by Etzioni himself, and was later significantly edited and rewritten by a large number of others, including Mary Ann Glendon and

point made in the platform is that communities are weakened when tasks they should rightfully perform are usurped by larger institutions: "Generally, no social task should be assigned to an institution that is larger than necessary to do the job. . . . What can be done at the local level should not be passed on to the state or federal level[.]"⁹⁰ The platform then articulates duties that communities should expect from their members, notably voting and jury service.⁹¹

B. Postmodern Theory: The Interpretive Community

In his famous book *Is There a Text in this Class?*,⁹² literary theorist Stanley Fish took on the conundrum that was the raging debate in literary circles of the time: does meaning reside in the text or is it constructed by the reader of the text? Choosing either of those options was problematic: if the text had determinate meaning, then how to explain disagreement? But if individual readers determined the meaning so that a text's meaning varies with each reader, then how to explain agreement? Fish sought an explanation accounting for both agreement and disagreement, and thus set out to answer how a postmodernist like himself who "preach[ed] the instability of the text and the unavailability of determinate meanings"⁹³ could explain how different people could find

William Galston. It was eventually endorsed by seventy leading Americans, both conservative and liberal. *Id.* at 251.

⁹⁰ *Id.* at 260.

⁹¹ *Id.* at 261. Elsewhere in his book, Etzioni describes communities as "Chinese nesting boxes, in which less encompassing communities (families, neighborhoods) are nestled within more encompassing ones (local villages and towns), which in turn are situated within still more encompassing communities, the national and cross-national ones[.]" *Id.* at 32. He also notes that some communities, like professional or work-based ones, are not geographically based. *Id.*

⁹² FISH, *IS THERE A TEXT*, *supra* note 7.

⁹³ *Id.* at 305.

the same meaning in a given text.⁹⁴ He did so by articulating the concept of the "interpretive community," which he later described as:

Not so much a group of individuals who shared a point of view, but a point of view or way of organizing experience that shared individuals in the sense that its assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance were the content of the consciousness of community members who were therefore no longer individuals, but, insofar as they were embedded in the community's enterprise, community property . . . such community-constituted interpreters would, in their turn, constitute, more or less in agreement, the same text, although the sameness would not be attributable to the self-identity of the text, but to the communal nature of the interpretive act.⁹⁵

Fish's idea of the interpretive community thus suggests that people's understanding of texts, and indeed of facts⁹⁶ and presumably norms, is constructed by the communities of which they are a part. He is careful to distinguish this view from subjectivity or relativism: it is not relativistic because "a shared basis of agreement at once guid[es] interpretation and provid[es] a mechanism for deciding between interpretations";⁹⁷ it is not subjective because the interpretive strategies by which

⁹⁴ Or explain, for that matter, how meaningful human communication could ever occur. See *id.* at 303-304.

⁹⁵ STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* at 141 (1989).

⁹⁶ See FISH, *IS THERE A TEXT*, *supra* note 7, at 338 ("[D]isagreements cannot be resolved by reference to the facts, because the facts emerge only in the context of some point of view . . . disagreements must occur between those who hold (or are held by) different points of view, and what is at stake in a disagreement is the right to specify what the facts can hereafter be said to be. Disagreements are not settled by the facts, but are the means by which the facts are settled.").

⁹⁷ *Id.* at 317. Indeed, Fish argues that "no one can *be* a relativist, because no one can achieve the distance from his own beliefs and assumptions which would result in their being no more authoritative *for him* than the beliefs and assumptions held by others, or, for that matter, the beliefs and assumptions he himself used to hold." *Id.* at 319. Interpreters do not, in fact cannot, act on their own; they are "extensions of an institutional community [and thus] solipsism and relativism are removed as fears because they are not possible modes of being." *Id.* at 321.

meanings are constructed are "social and conventional."⁹⁸ Moreover, Fish characterizes interpretive communities as "engines of change because [their] assumptions are not a mechanism for shutting out the world but for organizing it, for seeing phenomena as already related to the interests and goals that make the community what it is."⁹⁹ And though persons within interpretive communities are not free agents, since their interpretive assumptions and strategies are a product of the community of which they are a part, neither are their ideas (nor those of their communities) fixed or immutable. Rather, both the members and their interpretive communities are constantly evolving, in an ongoing project that is "at the same time assimilative and self-transforming."¹⁰⁰

Later in his career, Fish explicitly applied his ideas about literary interpretation to law. In a series of essays framed as debates between Fish and the leading legal theorists of the day,¹⁰¹ Fish exported the central problem of literary theory—that is, what is the source of interpretive authority, the text or the reader?—to the context of legal interpretation. In particular, he focused on the process of judging: as judges make decisions, they must use texts in the forms of both precedents and statutes. In these essays, Fish continued to argue that legal interpreters (that is, judges) are neither constrained by embedded meaning in the text nor wholly free to imbue the text with whatever meaning they might choose. Rather, "[i]nterpreters are constrained by their

⁹⁸ *Id.* at 331 ("[T]he 'you' who does the interpretative work . . . is a communal you and not an isolated individual.").

⁹⁹ FISH, DOING WHAT COMES NATURALLY, *supra* note 93, at 150.

¹⁰⁰ *Id.* at 152.

¹⁰¹ See Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, in DOING WHAT COMES NATURALLY, *supra* note 93, at 87-102 (debate between Fish and Ronald Dworkin); Stanley Fish, *Fish v. Fiss*, in DOING WHAT COMES NATURALLY, *supra* note 93, at 120-140 (debate between Fish and Owen Fiss); Stanley Fish, *Don't Know Much About the Middle Ages: Posner on Law and Literature*, in DOING WHAT COMES NATURALLY, *supra* note 93, at 294-311 (debate between Fish and Richard Posner).

tacit awareness of what is possible and not possible to do, what is and is not a reasonable thing to say, what will and will not be heard as evidence, in a given enterprise; and it is within those same constraints that they see and bring others to see the shape of the documents to whose interpretation they are committed."¹⁰²

Fish's notions that the law, as any other text, cannot and does not operate as a self-executing constraint in the process of judging and that interpretations are the product of community-based understandings and assumptions have important implications for the work of juries. Indeed, juries may be understood to be an artificially-created interpretive community,¹⁰³ formed in a particular case to construct a factual history and then to render its legal meaning. The work of juries throughout a trial is interpretation in the sense Fish describes: the texts to be interpreted are presented in formats both evidentiary (documentary and testimonial) and instructive (jury instructions on the law). Thus, when a jury is required to decide whether conduct is "negligent" or "reckless" or, in a death penalty case, whether there are "mitigating" or "aggravating" circumstances, its decision is the culmination of a series of interpretive acts. And those acts are not just the sum of the individual responses of the twelve jurors involved to the evidence presented and the

¹⁰² FISH, *DOING WHAT COMES NATURALLY*, *supra* note 93, at 98 (in response to Dworkin). *See also id.* at 126 (in response to Fiss: neither the text nor "disciplining rules" can operate as a constraint on interpretation, and the "fear of unbridled interpretation—of interpreters whose determinations of meaning are unconstrained—is baseless.").

¹⁰³ This is not to say that because it is artificially-created, the jury is some sort of new or freestanding interpretive community. Central to Fish's argument is the notion that one cannot extricate oneself from the embedded assumptions and understandings that inform one's interpretations. Thus, jurors could never come to a jury room as blank slates to form a new interpretive community divorced from their previous social contexts. But this, of course, supports my argument: it is precisely because jurors bring their pre-existing "interpretive communities" with them to the jury room that makes their role in establishing and confirming social norms so important.

instructions given, but in a larger sense are the product of the embedded understandings and assumptions of the interpretive communities of which those jurors are a part.

III. Synthesizing Theory and Practice: Why Community Matters

In this section, I consider the implications of the theoretical problem of defining the relevant community from which a fair cross-section of jurors must be drawn in light of the very practical reality that much more of our criminal law is now being prosecuted at the federal level. I turn first to a description of this federalization trend, and then to an analysis of its effect given the demographic data presented earlier, in light of the communitarian and postmodern theory. Finally, I return to our case study of the inner-city murder scenario as an illustration of why the notion of the relevant "community" might indeed make a very real difference.

A. The Federalization of Street Crime

In 1997, the American Bar Association formed a task force to examine the federalization trend in criminal law. The task force, chaired by former Attorney General Edwin Meese,¹⁰⁴ both documented that the trend exists and characterized it negatively, as "inappropriate federalization."¹⁰⁵

The task force began its report by tracing the history of federal criminal law. In the early years of the Republic, the federal government had jurisdiction to prosecute very

¹⁰⁴ Membership in the task force included judges, former members of Congress, former United States attorneys, academics, law enforcement personnel and private practitioners. See *Report of the ABA Task Force on the Federalization of Criminal Law*, Executive Summary at 1 n.1 (1998) [hereinafter *ABA Task Force Report*].

¹⁰⁵ *Id.* at 45.

few crimes,¹⁰⁶ all of which had to do with harm done to the federal government itself.¹⁰⁷ The states exercised virtually exclusive control over criminal enforcement, largely because crime was viewed as "a uniquely local concern."¹⁰⁸ The federal government made its first forays into what had previously been viewed as subjects within the states' police powers in the years following the Civil War.¹⁰⁹ Notably, Congress located its constitutional power to reach crime formerly within the states' exclusive purview in the Commerce Clause.¹¹⁰ Given the rapid technological change of the late nineteenth and early twentieth centuries, the increasing movement of people, goods and services in interstate commerce became a justification for federal intrusion into the criminal law via the Commerce Clause. The movement toward federalization accelerated during the New Deal years and beyond; indeed, today there are more than 3,000 federal crimes.¹¹¹ The Task Force further noted that the trend, far from abating, is growing.¹¹² Some 40% of federal criminal provisions passed by Congress since the Civil War were passed in the

¹⁰⁶ See Kathleen F. Brickey, *The Commerce Clause and Federalized Crime: A Tale of Two Thieves*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 27, 28 (1996) ("[Seventeen] crimes . . . formed the entire body of federal criminal law two centuries ago. . .").

¹⁰⁷ *ABA Task Force Report*, *supra* note 102, at 5. See also Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40 (1996) ("[F]ederal offenses of the time included treason, bribery of federal officials, perjury in federal court, theft of government property, and revenue fraud. Since the federal government was small and it conducted few programs, the list of actions classified as offenses for the protection of federal interests was correspondingly restricted.").

¹⁰⁸ *ABA Task Force Report*, *supra* note 102, at 6.

¹⁰⁹ *Id.*

¹¹⁰ See Brickey, *supra* note 104, at 28.

¹¹¹ *Id.* Indeed, this number may be low. The ABA Task Force noted the difficulty of counting federal crimes, because "there is no conveniently accessible, complete list of federal crimes." *ABA Task Force Report*, *supra* note 102, at 9. Criminal sanctions are widely dispersed throughout federal statutory and administrative law; nearly 10,000 federal regulations mention sanctions of either a criminal or civil nature. *Id.* at 10 and n.11.

¹¹² *Id.* at 11.

period since 1970.¹¹³ In the 105th Congress, an estimated 1,000 bills with some connection to criminal law were introduced.¹¹⁴ The Task Force further noted the concomitant growth in the size of federal criminal justice services, made necessary in order to cope with the growing number of crimes being processed in the federal system.¹¹⁵

The Task Force attributed the federalization trend to Congress's "patchwork response" to newsworthy events and the political popularity of crime legislation.¹¹⁶ Moreover, there seems to have been a systemic failure of federalism reflected in the trend: federal crime legislation passes without meaningful analysis of whether state and local governments are better equipped to deal with the problem.¹¹⁷ Much of this legislation overlaps, or even duplicates, existing state law.¹¹⁸

Having assembled the statistics that document the federalization trend, the Task Force turned its attention to an analysis of the impact of this trend on both the federal

¹¹³ *Id.* at 7.

¹¹⁴ *Id.* at 11.

¹¹⁵ *Id.* at 13. "[B]etween 1982 and 1993, overall federal justice system expenditures increased at twice the rate of comparable state and local expenditures, increasing 317% as compared to 163%." *Id.* at 14.

¹¹⁶ *Id.* at 14-15.

¹¹⁷ *Id.* at 15. Chief Justice Rehnquist has also weighed in on this problem: he has noted, in reference to recently enacted federal statutes that expand federal jurisdiction, that "the question of whether the states are doing an adequate job . . . was never seriously asked." William H. Rehnquist, *Address to the American Law Institute*, REMARKS AND ADDRESSES AT THE 75TH ANNUAL ALI MEETING, MAY 1998, at 18 (1998).

¹¹⁸ Brickey, *supra* note 104, at 37. See also Philip B. Heymann and Mark H. Moore, *The Federal Role in Dealing with Violent Street Crime: Principles, Questions, and Cautions*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 103, 110 (1996) ("Street crimes are accepted as a local responsibility and state government can readily create the law enforcement advantages enjoyed by the federal government by simply changing the statutes that define crimes, procedures, and sentences").

system¹¹⁹ and state and local governments. The Task Force concluded that there was no persuasive evidence that federalizing crime had a demonstrable, significant impact on public safety.¹²⁰ The reason for this may be that despite the staggeringly increased number of federal crimes, the pursuit of actual federal prosecutions is still somewhat limited by resource issues.¹²¹ Thus, "the selection of which crimes to investigate and prosecute therefore requires a decisionmaking process which reflects highly selective prioritizing by investigative agencies and federal prosecutors."¹²²

This selectivity in federal prosecution, requiring as it does the exercise of federal prosecutorial discretion,¹²³ yields another potential concern given the demographic data of the relevant state and federal jury pools. That is, it raises the possibility that the federal prosecutorial power could be invoked *in order to* avoid an expected outcome in particular state prosecutions based on the expected demographic makeup of the jury pool.¹²⁴

¹¹⁹ *ABA Task Force Report, supra* note 102, at 35-42.

¹²⁰ *Id.* at 18.

¹²¹ *Id.* Federal prosecutions constitute fewer than 5% of all prosecutions in the country. *Id.* at 19.

¹²² *Id.* at 18.

¹²³ The Task Force noted the basically unreviewable discretion of federal prosecutors as to whether to bring particular prosecutions, and that state prosecutors are usually more directly accountable to the electorate. *Id.* at 32-35.

¹²⁴ Indeed, there is some evidence that federal death penalty prosecutions are being undertaken precisely because the states where the crime occurred either don't have the death penalty or are unlikely to impose it. For example, Michigan does not have a death penalty; federal prosecutions for murder there make the defendant subject to capital punishment in contravention of the apparent will of the majority of people in Michigan.

The Task Force concluded its study by characterizing the federalization trend as troubling.¹²⁵ In particular, they expressed deep concern that local values would be lost in the rush to federalize crime and impose national standards:

Local crimes involve local values and should be handled by state law. Each state's criminal justice system embodies a series of state decisions about what conduct should be subjected to governmental control and criminal sanctions (prison or fine) and about what socially unacceptable conduct should be left outside those criminal prohibitions (left perhaps to private social pressures, to moral restraints, or perhaps to non-criminal suits between individuals or between governmental agencies and individuals). Community views also differ from state to state on related issues: the appropriate limits on police investigative practices, acceptable prosecutorial discretion, the locale of trials, suitable court procedures and rules of evidence, the exact penal consequences that should accompany conviction, and the wisest allocation of limited resources to confront the important problem of crime. In the participatory democracy of our large nation, *with varying local values*, citizen views about such matters are more likely to be felt and acted upon through representatives at the local level, rather than at the federal level where most of those in power are more removed from the affected local values and more preoccupied with issues of national and international concern.¹²⁶

Though the Task Force expressed its concern in relation to the community's role in *articulating* criminal standards through its elected representatives (that is, legislatively) and the more direct that role would be in state and local governments, its conclusions apply with equal force to the community's role in *giving content to* criminal standards through jury service. In both contexts, more localized community norms are better expressed through more localized prosecutions.

¹²⁵ *ABA Task Force Report*, *supra* note 102, at 43.

¹²⁶ *Id.* at 44 (emphasis added).

B. The Implications of a More Localized Understanding of Community for Drawing a Fair Cross-section of Jurors

If the community to be represented by the fair cross-section of the jury is better defined at a more local level, then the concern becomes the monolithic character of many communities. One thinks immediately of the all-white jury in Simi Valley, California, that acquitted the police officers who, as all the world knew from the video tape, had beaten Rodney King. As Putnam notes, communities often produce negative externalities for those outside their boundaries. Is it possible to preserve the positive values of local communities without ensconcing negative ones?

This huge question harkens back to a point long debated by communitarians and liberals as to the normative value of a community's views. Without purporting to take on that debate here, we can perhaps escape the conundrum by developing a more nuanced and situational definition of what "community" (or polity) is relevant for a particular purpose.¹²⁷ It is fitting that a much larger community—namely, the state—defines through the criminal code what behavior will be sanctioned by the criminal process.¹²⁸ But where the criminal code leaves issues to be determined by jury (community)

¹²⁷ Daniel Bell, through his character of the communitarian Anne, approaches the problem this way: "While I don't think one can appeal to 'objective' standards of morality, standards not dependent on the actual historical processes of societies, there's another possibility—a universalism rooted in the convergence of people's understanding of certain core moral propositions. Every society, it seems, has come to accept a bare set of prohibitions—on murder, deception, betrayal, and gross cruelty—prohibitions which constitute a kind of minimal and universal moral code." BELL, *supra* note 63, at 76.

¹²⁸ In *The Spirit of Community*, Etzioni makes a similar point in his explication of the communitarian agenda: after noting the importance of the "social webs that communities provide, in neighborhoods, at work, and in ethnic clubs and associations" and that "government needs to refrain from usurping [the communities' institutional] functions," Etzioni further argues that "the national society must ensure that local communities will not lock in values that we, as a more encompassing and overriding community, abhor[.]" ETZIONI, *THE SPIRIT OF COMMUNITY*, *supra* note 54, at 248.

discretion, a more localized vision of community may better serve the end of affirming community values.

Note that this is decidedly not an argument for anything akin to jury nullification (as, arguably, the first Rodney King verdict in Simi Valley is an example). If the criminal code defines aggravated battery as the use of deadly force on another person, and the evidence shows that the defendant did that, the jury is not free to ignore either the law or the evidence. But if the law asks the jury to give content to words as vague as "mitigating circumstances" that would obviate a death sentence, the community's values take center stage in the deliberation process.

Moreover, while concerns about self-interested community action are real, and are vividly illustrated by such outrages as the first Rodney King verdict, they do not obviate the need for, and indeed the inevitability of, the community performing its norm-setting function.¹²⁹ That is, inevitably *some* community, acting through *some* institutional vehicle, will set moral norms. The project thus becomes a question of allocating moral questions to the appropriate polity.¹³⁰

My position is that local communities, charged as they have traditionally and historically been with the execution of the criminal law, continue to be the better arbiters of ambiguities within the law. The federalization trend in criminal law is divesting local communities of that traditional role, and is doing so at the expense of both community

¹²⁹ Indeed, American society is replete with examples of local deviation from national norms – consider the persistence of school prayer in many areas in contravention of the Supreme Court rulings that such practices violate the First Amendment.

¹³⁰ *Cf. Romer v. Evans*, 517 U.S. 620 (1996) (Supreme Court strikes down, as violative of *national* equal protection norms, a Colorado *state* constitutional amendment adopted by referendum that was designed to undo protections given to gay and lesbian citizens by *local* governmental entities).

values and genuine racial diversity in the jury system. For whatever geographical polity defines the community from which a fair cross-section of jurors will be drawn will then establish its social norms through the juries' decisionmaking. And just as gerrymandered political districts frequently have the effect of diluting minority voting power,¹³¹ federalized jury districts have the effect of diluting minority community values that would otherwise be expressed through criminal juries drawn more locally in state courts.

The key is to understand the local community's function, through the institution of the criminal jury in individual trials, as giving immediate, fact-based content to the larger community's moral proclamations as expressed in the criminal code. This approach avoids the potential dangers of separatist local community action (as in the Simi Valley Rodney King verdict) while preserving the community-strengthening and legitimating effects of local decisionmaking. The local jury thus acts as the interpreter and enforcer, in particularized fact situations, of the supracommunity's more general value judgments. As Etzioni notes, "the more one favors strengthening communities . . . the more one must concern oneself with ensuring that they see themselves as parts of a more encompassing

¹³¹ Kim Forde-Mazrui has argued that jurors should no longer be drawn on an at-large basis from the judicial district that hosts the trial. Rather, courts should subdivide their districts into "jural districts" in an effort to capture "communities of interest" as that concept has developed by the Supreme Court in electoral districting cases. Forde-Mazrui, *Jural Districting*, *supra* note 2, at 388-395. Jurors for particular cases would be selected such that each of those districts would be represented in the petit jury, or at least the venire. In the electoral context, the Supreme Court has approved the use of race as a factor (though not the sole factor) along with other demographic characteristics like political affiliation and socioeconomic status, in drawing legislative districts. *Id.* at 383-84. This plan would thus promote the representation of minority groups on juries, as long as the "jural districts" are drawn to capture neighborhoods with a high minority population. As Professor Forde-Masrui acknowledges, however, the plan would impose significant administrative burdens and costs. *Id.* at 400-403.

whole, rather than as fully independent and antagonistic."¹³² He further argues that this makes it possible for smaller, constituent communities "to follow their own subsets of values without endangering the body society, as long as they accept these shared values."¹³³ The problem posed by the federalization of criminal juries is that these subsets of values held in minority communities, though not incompatible with the larger community's "shared values" as expressed in the criminal code, are in danger of being subsumed by the larger majority.¹³⁴

Indeed, the notion of "constitutive communities" that give content to one's values may have particular resonance in a minority community. Recall that communitarian theory uses community members' self-identification as a means of identifying community.¹³⁵ In answer to the question "who are you?", how many whites in America would answer "I am white"? Whiteness as an identity is obviated by a society that privileges whiteness in countless overt and covert ways.¹³⁶ But identification with a minority racial or ethnic group is more likely to be a key component of one's self-understanding in a society that often oppresses and suppresses that group. Thus, there is

¹³² ETZIONI, *THE SPIRIT OF COMMUNITY*, *supra* note 54, at 155.

¹³³ *Id.* at 157.

¹³⁴ As highlighted earlier, this is akin to the problem of the dilution of minority voting power by gerrymandering electoral districts. *See supra* notes _____ and accompanying text.

¹³⁵ *See supra* notes _____ and accompanying text (Daniel Bell's discussion of constitutive communities).

¹³⁶ *See generally* IAN AYRES, *PERVASIVE PREJUDICE: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* (2001) (documenting race discrimination effects in contexts such as car buying and kidney transplantation).

arguably an obligation on the larger supracommunity to arrange its institutions (such as the jury) in a way that allows expression of values held dear in minority communities.¹³⁷

C. From Theory to Practice: A Case Study in the Effect of Federally Diluted Jury Pools

This section addresses the question whether the confluence of the demographic effect of the federalization of crime with the communitarian and postmodern theory explored above has any real-world implications. The case study described in the introduction will serve as a vehicle to examine that question. Imagine a gun-store robbery/murder allegedly committed by an African-American youth in Philadelphia. If the youth is tried in the state court system, his jury will be drawn from the county of Philadelphia, where the African American population constitutes 43.2% of the total population. If he is charged under federal law and tried in the Eastern District of Pennsylvania, the African-American population percentage is 16.8%.

Of course, neither of these figures portends any particular demographic makeup of the petit jury that will try the case. The question becomes, then, whether the added probability of having *any* black jury members makes a difference. Empirical research indicates that it does. David Baldus and colleagues studied data on capital juries in Philadelphia in the years 1984 through 1994. Their findings indicate that "black defendants are treated less punitively vis-à-vis nonblack defendants as the proportion of

¹³⁷ One might even frame an argument that this obligation is analogous to that justifying remedial measures in cases of *de jure* discrimination under the Equal Protection clause.

blacks on the juries increases."¹³⁸ Moreover, as the number of black jurors increases, death sentences become less likely.¹³⁹ Similar findings emerged from the Capital Jury Project, which is a national study of the decisionmaking of capital jurors, based on interviews with 1,155 capital jurors involved in 340 trials in fourteen different states.¹⁴⁰ The study authors found two strong impacts of jury racial composition in cases involving black defendants and white victims, which they referred to as the "white male dominance" effect and the "black male presence" effect.¹⁴¹ Specifically, "the presence of five or more white males on the jury dramatically increased the likelihood of a death sentence between cases with four and those with five white male jurors (23.1% vs. 63.2%). . . . [and t]he presence of black male jurors in these B/W cases, by contrast, substantially reduced the likelihood of a death sentence."¹⁴² The addition of one black male juror made a stark statistical difference: "[i]n the absence of black male jurors, death sentences were imposed in 71.9% of the cases, as compared to 42.9% when one

¹³⁸David Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1721 n.159 (1998). See also David Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001).

¹³⁹Baldus et al., *The Use of Peremptory Challenges*, *supra* note 136.

¹⁴⁰William J. Bowers, Benjamin D. Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 189 (2001). Black jurors comprised 9.8% of the entire sample. *Id.*

¹⁴¹*Id.* at 192-93.

¹⁴²*Id.* at 193.

black male was on the jury."¹⁴³ Significantly, the authors found that these effects were independent of one another, further intensifying the statistical disparity.¹⁴⁴

It thus becomes apparent that juror decisionmaking in capital cases is highly sensitive to the demographic makeup of the jury. Substantively, this is no doubt related to the areas of discretion built into capital sentencing schemes. For example, Pennsylvania law requires jurors in capital cases to consider aggravating and mitigating factors in determining whether the death penalty should be imposed.¹⁴⁵ Many of the listed statutory factors engage the jurors in a discretionary evaluation of highly contextualized conduct.¹⁴⁶ This discretionary space is exactly the reason why juries drawn from a fair cross-section of the *relevant community* is so important.

CONCLUSION

The criminal justice system, understood in its broadest sense to include the combined law enforcement efforts of both federal and state governments, relies for its legitimacy on a sense of public investment, most importantly manifested in the direct community participation of the criminal jury. The trend toward federalization of crime,

¹⁴³ *Id.* at 193. "The difference rose to thirty-four points when the comparison was between none and one or more black male jurors (71.9% vs. 37.5%)." *Id.*

¹⁴⁴ That is, in the absence of white male dominance, the presence of one black male juror yielded an even lower rate of imposition of the death sentence; conversely, the absence of black male jurors yielded an even higher rate of imposition. *Id.* at 193-94.

¹⁴⁵ See 42 PA. CONS. STAT. § 9711 (2004). Indeed, this is typical of the capital sentencing schemes of the states that impose the death penalty, and of the federal capital sentencing statute. See 18 U.S.C. § 3592.

¹⁴⁶ For example, jurors might be called upon to decide whether "the defendant was under the influence of extreme mental or emotional disturbance." 42 PA. CONS. STAT. § 9711(e)(2). *Cf.* 18 U.S.C. § 3592(a)(2) ("The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.").

particularly street crime, threatens that legitimacy by removing the immediacy of local control and changing the demographics of those called to serve on juries. And this is not merely a theoretical threat: as I have demonstrated, federalization in capital cases can possibly, and quite literally, mean the difference between life and death.

The impact of this apparently gathering trend¹⁴⁷ thus becomes something akin to the dilution effect observed in voting rights cases. Just as the minority vote gets diluted in at-large districting schemes, but can be captured by demographically-sensitive districting, the values of minority communities are more likely to be subsumed in juries drawn from larger federal districts than they would be in smaller, county-based state court juries.

One question worth exploring is whether there is a causal connection between the federalization of crime and the minority dilution effect on criminal juries. Regardless, the effect is real, and ought to be a consideration both for legislators who define crime and officials who select which prosecutions to pursue. The legitimacy of the criminal justice system is at stake.

¹⁴⁷ See *supra* notes _____ and accompanying text (describing growing trend of federalizing crime).

Appendix A

