

## A Jury of Your Peers: Venue, Vicinage, and Buffer Juries

By Jason C. Miller

Many understand the concept of venue -- the place where a trial is to be held. A change of venue is a popular strategic move, such as in the movie *A Time to Kill* where the defense attorneys seek, and are denied, a change of venue that would move a black defendant from a majority white to a majority black county and correspondingly alter the jury pool. Few people (attorneys included) have even encountered the word "vicinage" (which is the place from which jurors are to be drawn). That may soon change as Michigan State University Law Professor Brian Kalt's recent legal scholarship is increasing public awareness of the concept.<sup>1</sup> Kalt first came to write about vicinage after encountering the case of Clarence Terrell.<sup>2</sup>

Many boundary lines can reflect substantial demographic shifts in potential jury pools. Detroit, Michigan is largely poor and black. Oakland County, Detroit's northern suburb, is mostly rich and white. Terrell was a Detroit native accused of misdemeanor assault of a police officer in the City of Detroit. Though there was no reason to suggest that a Detroit jury would be biased, Terrell was tried and convicted by an Oakland County jury because he committed the crime near the Oakland County border. A crime committed within one mile of a county line in Michigan may be prosecuted in either county, and this choice can radically alter jury pool demographics.



Kalt's research reveals that 18 other states (which cover a majority of America's population) have similar boundary-line criminal venue statutes. These statutes are generally not abused. However, in the case of Clarence Terrell, the abuse prejudiced the rights of the criminal accused and also harmed the community by blocking its right to resolve crimes committed within its own boundaries with its own jurors. The potential for abuse is too great, which is why Kalt has called for the repeal of these statutes. The potential for prosecutors to abuse these statutes to radically alter the demographics of the jury pool is simply too great to allow the statutes to stay in place.

Long forgotten rules about venue and vicinage could also help criminal defendants. The Sixth Amendment to the U.S. Constitution reads, in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." The problem occurs where this intersects with Article III, § 2, cl. 3 which requires federal criminal trials to "be held in the State where the said Crimes shall have been committed." Professor Kalt identifies a loophole he calls the "Yellowstone Zone of Death" -- where portions of Yellowstone National Park in the states of Idaho and Montana are, as a curious product of history, actually in the federal judicial district of Wyoming.<sup>3</sup>

Thus, a crime committed in Yellowstone, Idaho should be tried by a jury that lives in the state of Idaho and the judicial district of Wyoming -- basically, residents of the park. The problem is that the relevant portion of Idaho has a population of zero and the part of Montana covered by the district of

Wyoming has only a tiny population. Crimes committed in Yellowstone, Idaho are tried a convenient nine hour drive away in Cheyenne, Wyoming before Wyoming jurors. This practice seems to violate the letter of the constitution and some day a criminal defendant may use it as a way to get away with a crime. The only case to challenge this circumstance was settled before a decision could be reached.<sup>4</sup> The practice of trying a crime committed within (a portion) of the state of Idaho or Montana in front of a Wyoming jury may not survive future constitutional scrutiny.



Other curious government planning also leads to potential problems. For instance, the Texarkana Federal Courthouse is located in both Texas and Arkansas as it straddles the state line.<sup>5</sup> The problem with that courthouse is more likely to be the right jury sitting in the wrong room, rather than a genuine deprivation of constitutional rights through an altered jury pool.

Boundary-line statutes serve an important purpose in lending some flexibility to the administration of justice. After all, most borders are simply fictitious lines drawn on a map and in many circumstances it may be appropriate to try a case on the other side of the boundary. However, if these statutes are exploited to produce a jury pool more likely to convict the accused, then they take on a seedy character and judges should act to limit overzealous prosecutors. Those interested in the mechanics of developing a jury should watch carefully the application of vicinage rules and buffer statutes to ensure that an appropriately representative jury is selected for their clients.

## References

<sup>1</sup> Miller, Jason, Fix the Yellowstone Loophole, Planet Jackson Hole Pg 7 (April 25, 2007). Available at: [http://www.planetjh.com/opinion/A\\_101001.aspx](http://www.planetjh.com/opinion/A_101001.aspx).

<sup>2</sup> Kalt, Brian C., Crossing Eight Mile: Juries of the Vicinage and County-Line Criminal Buffer Statutes. MSU Legal Studies Research Paper No. 02-17. Available at SSRN: <http://ssrn.com/abstract=700504>.

<sup>3</sup> Kalt, Brian C., The Perfect Crime. MSU Legal Studies Research Paper No. 02-14. Available at SSRN: <http://ssrn.com/abstract=691642>.

<sup>4</sup> Kalt, Brian C., Tabloid Constitutionalism: How a Bill Doesn't Become a Law. Georgetown Law Journal, Vol. 96, No. 6, 2008. Available at SSRN: <http://ssrn.com/abstract=1136301>.

<sup>5</sup> Eugene Volokh, The Volokh Conspiracy, Article III, Congress, and the Texarkana Courthouse, June 10, 2008. Available: <http://volokh.com/posts/1213115619.shtml>.

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## Conservative Court Buffers Buffers from Batson

by Edward P. Schwartz

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In his brief note, “A Jury of Your Peers: Venue, Vicinage and Buffer Juries”, Jason Miller discusses a subject – vicinage rights – that might seem esoteric to many lawyers, but can have profound implications for criminal defendants. A venue is a trial location, but a vicinage is the geographic location from which jurors (and judges) are chosen, and whose rules of procedure apply at trial.

Mr. Miller’s primary focus is “buffer statutes,” which permit a trial to be held in a neighboring jurisdiction if the alleged crime took place close enough to the border. Along the way, he touches on two of my favorite final exam questions from my courses on jury trials.

First, if a defendant waives his venue right by requesting a change of venue (usually due to pre-trial publicity concerns), does that defendant also waive all of his vicinage rights, as well? The answer, according to the courts, seems to be “yes.” The jury is to be drawn from a fair cross-section of the population of actual trial venue, even should that population look very different from that of the crime’s location. The judge is free to apply local rules of criminal procedure (most importantly those governing jury selection), even should they differ from those employed in the original venue.

The second question is whether there are any Constitutional restrictions on the choice of a new venue. This relates to Mr. Miller’s (and Professor Kalt’s) concern that prosecutors will use buffer statutes to circumvent the requirements of *Batson v. Kentucky*. They might attempt to secure racially homogeneous juries simply by moving trials over borders into mostly white suburbs (obviating the need to use peremptory strikes against minority jurors).

Consider the case of Jerome Mallett, an African-American man, who was accused in 1986 of killing a white state trooper in Perry County, Missouri. Mallett sought a change of venue due to pre-trial publicity. The judge asked each side to submit the names of counties to which the trial might be moved. The District Attorney submitted the names of counties with very small African-American populations while Mallett’s attorney suggested counties near St. Louis and Kansas City with greater minority populations. The judge rejected both lists and moved the case to Shuyler County, along the Iowa border, where there are *no African-Americans*.

Mallett was convicted and sentenced to death by an all-white jury in Shuyler County. On appeal, Mallett argued, inter alia, that the judge’s decision to move the trial to Shuyler County violated his 6<sup>th</sup> and 14<sup>th</sup> Amendment rights under *Batson v. Kentucky*. After all, the judge’s decision effectively precluded any African-Americans from serving on Mallett’s jury. A special magistrate initially granted his appeal and ordered a new trial. The Supreme Court of Missouri, however, reversed on the grounds that *Batson* only applied to the use of peremptory challenges.

The Supreme Court of the United States denied certiorari, refusing to address the legitimacy of the judge’s venue decision. In a fairly rare move, however, Justice Marshall wrote a dissent of the cert denial (joined by Brennan), arguing that the trial judge was a state actor, operating within a system that permitted “those who are of a mind to discriminate” to do so. As such, Mallett should have been given the opportunity to make out a prima facie case of discrimination based on the totality of the evidence. Supposing he could meet that burden, the judge would then have to provide a plausible race neutral explanation for his choice of venue.

According to Marshall and Brennan, *Batson* applies to any jury selection procedure that could be employed in a discriminatory manner. To my mind, the judge's choice of Shuyler County constituted a clear *Batson* violation.

Alas, this logic did not carry the day. As such, the choice of venue has never been subjected to the Constitutional limitations of *Batson* and its progeny. Returning to the question of buffer statutes, I would argue that *Batson* *should* apply to requests by prosecutors to move trials across county lines (as it should have applied to Mallett's case). Such a logical (and quite small) extension of *Batson* would obviate some of Professor Kalt's concerns that such statutes will be employed to discriminate against minority defendants (and jurors). Given that the current Supreme Court is even more conservative than the one that refused to apply *Batson* in Mallett's case, I fear that such protection for minority defendants isn't coming any time soon. In the absence of such protection, I would support Kalt and Miller's call for a repeal of these buffer statutes.

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The September edition of *The Jury Expert* unveils several firsts: our first reader-requested feature (on preparation of narcissistic witnesses); our first law student author (Jason Miller on buffer statutes); our first author from the Netherlands (Fredrike Bannink on solution focused mediation); our first article on training law students (the DePaul program); and our first Favorite Things (we couldn't choose just one). Help us stay fresh--send in your wishes for upcoming issues--what would you like to see? Tell [me](#)...we'll see if we can make it happen.

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