Rethinking Venue in Light of the Rodney King Case: An Interest Analysis

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I. Introduction

Shock waves rippled through America in May 1992 when the verdict in People v. Powell, better known as the "Rodney King" case, acquitted four Los Angeles police officers of brutality, and sparked the Los Angeles riots. The
verdict and the attendant riots highlighted continuing problems of police racism and raised the specter of continued urban strife. Soon after the verdict some legal observers suggested that an earlier decision to order a change of venue from urban Los Angeles to the suburban community of Simi Valley was the critical feature in the acquittal.\(^5\)

programs setting off a barrage of news reporting and commentary. On March 14, 1992 four police officers, three observed on the taped beating of Rodney King, and one supervisor, were indicted by a Los Angeles grand jury.

Early in April Los Angeles Mayor Tom Bradley appointed an investigatory commission (the Christopher Commission) and called for Police Chief Darryl Gates to resign. The Police Commission suspended him.

In May 1991, the grand jury refused to indict nineteen police officers who were bystanders to the beating. Three of the indicted officers were suspended without pay by Chief Gates and one officer without tenure was dismissed. The chief’s suspension was voided by a court and four police commissioners resigned.

In the summer of 1991 the Christopher Commission recommended the replacement of Chief Gates as well as other numerous reforms. Chief Gates announced his retirement as of April 1992 but later indicated a willingness to continue his employment. The Los Angeles City Council approved a ballot to implement the Commission’s recommendations. In April 1992, Willie Williams, Philadelphia’s police chief, was appointed to replace Chief Gates.

The Powell case took several turns. Trial Judge Bernard Kamins pushed defense attorneys to try the case without delay, refused a change of venue, and then apparently reversed himself in an unusual letter to the California Court of Appeals. On defense motions, the Court of Appeals removed Judge Kamins in August 1991, Briseno v. Superior Court, 284 Cal. Rptr. 640 (Cal. Ct. App. 1991), and ordered a change of venue. In the fall of 1991, Los Angeles Superior Judge Weisberg selected Ventura County as the new site of the trial. See infra note 83.

Following the verdict, Los Angeles erupted in three days of violent rioting that claimed sixty lives and caused $850 million in damage. The history of the case, including relevant political background, is reported in Powell v. Superior Court, 283 Cal. Rptr. 777, 779-81 (Cal. Ct. App. 1991); Mydans, supra note 3; Cecilia Rasmussen, The Rodney King Case Chronology, L.A. TIMES, July 10, 1991, at A12.; A Case Filled With Twists and Turns, L.A. DAILY JOURNAL, April 30, 1992, at 9.

\(^5\)Simi Valley is in suburban Ventura County, immediately to the west of Los Angeles County and northwest of the City of Los Angeles. Ten jurors were white, one Asian, and one Hispanic. According to the 1990 census, the population of Ventura County was White: 529,166 (79.1%); Black: 15,629 (2.3%); and Asian/Other: 124,221 (18.6%). Similarly, Los Angeles County was White: 5,035,103 (56.8%); Black: 992,974 (11.2%); and Asian/Other: 2,835,087 (32.0%). The black population of the Simi Valley census division was 1.5% of the total. BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION AND HOUSING (Summary Tape File 1A, Pacific Division, California). According to defendant Briseno’s attorney, “[p]olitically, racially, and culturally, ... Simi Valley is as different from downtown Los Angeles ‘as Manhattan is from the moon.’” Margolick, supra note 3, at 7. Jane Gross, In Simi Valley, Defense Of a Shared Way of Life, N.Y. TIMES, May 4, 1992, at B7.

\(^6\)See David Margolick, Switching Case to White Suburb May Have Decided Outcome, N.Y. TIMES, May 1, 1992, at A20; Patricia Montemurri, The Los Angeles Eruption: Race is called wild card in trials - Jurors' values can tip scales in close cases, DETROIT FREE PRESS, May 1, 1992, at 10A; Martin Berg, D.A.'s Action on King Venue Are Questioned, L.A. DAILY JOURNAL, May 7, 1992, at 1; Timothy O'Neill, Wrong Place, Wrong Jury, N.Y. TIMES, May
The vicinage right to be tried by "an impartial jury of the State and district wherein the crime shall have been committed" is one of the Sixth Amendment rights least commented upon. The United States Supreme Court has not explicitly incorporated this right, along with the right to a fair and impartial jury, into the due process clause of the Fourteenth Amendment. Even if it were incorporated, the right to local venue is clearly not absolute and must at times give way to the broader right to a fair trial. Cases and comments refer to the evils committed by the British Crown before the revolution, as the historic basis for placing the venue right in the body of the Constitution. In cases where the government seeks to impose an onerous or "counterintuitive" venue on a defendant, especially in a case with political overtones, Justice Douglas’ dissenting comment, that "[a]ny doubts should be resolved in favor of the citizen" may be appropriate. But

9, 1992, § 1, at 23; Joseph Grano, Change of venue rules protect rights of accused, DETROIT NEWS, May 10, 1992, at 3B.

7U.S. CONST. amend. VI. Rules of venue (place of trial) and vincinage (place from which jury selected) are largely determined by state constitutions, laws, and rules. Federal law is discussed herein to shed light on underlying principles and policies. See generally 2 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 16.1 (1984).

8See Duncan v. Louisiana, 391 U.S. 145 (1968), reh’g denied, 392 U.S. 947 (1968) (recognizing that the Sixth Amendment right to jury trial applies to states); Commonwealth v. Duteau, 424 N.E.2d 1119, 1126 (Mass. 1981) (finding that vicinage right not incorporated). Lisa Alexander, Vicinage, Venue, and Community Cross-Section: Obstacles to a State Defendant’s Right to a Trial by a Representative Jury, 19 HASTINGS CONST. L.Q. 261, 285 (1991) (noting that Supreme Court cases incorporating and applying the Sixth Amendment right to a jury trial have implicitly incorporated vicinage right).

9When the British Parliament proposed taking Americans abroad or to another colony for trial, the Virginia Resolves of May 16, 1769, voiced the unanimous view that ‘thereby the inestimable Privilege of being tried by a Jury from the Vicinage, as well as the Liberty of summoning and producing Witnesses on such Trial, will be taken away from the Party accused.


10"...-~[F]or depriving us in many cases, of the benefits of Trial by Jury:—For transporting us beyond Seas to be tried for pretended offences: ....", THE DECLARATION OF INDEPENDENCE (U.S. 1776).

11The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. CONST., art. III, § 2, cl. 3.

12Johnston, 351 U.S. at 224 (Douglas, J., dissenting) (arguing that the proper venue for a defendant military draft registrant who was classified as a conscientious objector
where the defendant seeks to change venue on fairness grounds, it is not so clear that a simple reflex in favor of changing venue necessarily insures a fair trial or adequately resolves the competing interests at stake. This is reflected in the significant proportion of appeals that almost routinely deny change of venue motions. In any event, venue issues in criminal law typically are treated as intellectual puzzles that require hairsplitting decision-making, rather than the analysis of constitutional interests.

There is not an extensive body of constitutional law concerning change of venue. It is clear that a categorical prohibition of change of venue violates due process. On the other hand, it is the fair trial that is fundamental, not the change of venue, and the cases recognize that courts have various methods of dealing with pretrial publicity and community prejudice, including the voir dire, continuances, controlling the courtroom atmosphere, and controlling what the parties, counsel, and law enforcement personnel say to the press. Thus, while the Supreme Court has ruled that a state conviction violates due process where pretrial publicity poisoned the minds of the jurors, and has reversed a conviction because there should have been a change of venue, these cases at most confirm a right to have a court consider a venue change, not a right to a change of venue. In *Irvin v. Dowd* and *Rideau*, it was not the existence of pretrial publicity and its effect on the trial *per se* that constituted the constitutional violation. Rather, it was the manner in which state officials

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in his district of residence and who refused to report for civilian work in another district was the district in which defendant failed to appear and not his district of residence).

13Peter G. Guthrie, Annotation, *Pretrial Publicity In Criminal Cases As Ground for Change of Venue*, 33 A.L.R.3d 17, 46-51 (1970), reports, in § 8, twenty-one cases where a change of venue was held unwarranted and two where the change was warranted. In the 1992 supplement, § 8 contains nine pages reporting cases denying change of venue and two pages reporting cases allowing a change. Id. (Supp. 1992).


15See *Groppi v. Wisconsin*, 400 U.S. 505 (1971) (stating that due process is violated where change of venue is prohibited by statute in misdemeanor trials).

16Id. at 512 (Blackmun, J., concurring).

17See *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (reasoning that massive, prejudicial pretrial publicity violated defendant's due process right to fair trial where trial judge exercised virtually no control and trial became a "Roman holiday").


20366 U.S. 717.

21373 U.S. 723.
heightened the publicity's impact or failed to take measures to mitigate it.\textsuperscript{22}
This is borne out by limitations, noted in \textit{Irvin}, that are relevant to this study:

It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.\textsuperscript{23}

This article analyzes the California Court of Appeals decision in \textit{Powell v. Superior Court of Los Angeles County},\textsuperscript{24} that issued a writ of mandate on pretrial appeal,\textsuperscript{25} directing the trial judge to order a defense motion for change of venue.\textsuperscript{26} The premise of the article is that the decision was inadequate in significant ways and concludes that the court of appeals improperly exercised its discretion. The venue in the "Rodney King" case properly belonged in Los Angeles County. Two broad lines of reasoning supporting this conclusion are offered. First, as discussed in Part II, the reasoning of \textit{Powell} was wanting. Parts

\textsuperscript{22}In \textit{Irvin v. Dowd}, 366 U.S. 717 (1961), ninety percent of the prospective jurors examined expressed some opinion about the defendant's guilt, and eight panelists who thought the defendant was guilty sat on the jury. Although these jurors said they would be impartial the Court felt that it would have been difficult, in light of the pervasive prejudice, for the jurors to be impartial. \textit{Id.} In \textit{Rideau v. Louisiana}, 373 U.S. 723 (1963), the defendant made oral confessions on television two months before the trial while flanked by law enforcement officers. The majority felt that in light of the excessive publicity the televised confessions amounted to Rideau's real trial. Therefore, due process required "a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.'" \textit{Id.} The fact that the Supreme Court has not invalidated another conviction for failing to change venue suggests that the gravamen of the case was the egregious action of the officials involved.

\textsuperscript{23}\textit{Irvin}, 366 U.S. at 722-23.


\textsuperscript{25}Since \textit{Maine v. Superior Court}, 438 P.2d 372 (Cal. 1968), California appellate courts have had the authority to order pre-trial changes of venue.

\textsuperscript{26}The decision to move the trial to Ventura county was made in November 1991 by Los Angeles Superior Court Judge Stanley M. Weisberg. Andrea Ford & Daryl Kelley, \textit{King Case To Be Tried in Ventura County}, L.A. TIMES, Nov. 27, 1991, at A3. California's Judicial Council provided the judge a choice of three counties: Ventura, Riverside and Alameda (Oakland, Cal.). Judge Weisberg chose Ventura because it was more convenient for the parties and "would also allow Los Angeles residents greatest access to the courtroom" but the decision did not allow the prosecution to argue that Alameda contained a racial mix closer to that of Los Angeles. Martin Berg, \textit{supra} note 6.
III and IV offer an "interest analysis" that gives a positive and principled reason for retaining venue in this case: the value of a local community to have important local decisions made according to its own norms and values.

The interest analysis of the jury's role makes sense only by conceiving the jury in political terms, not as an arm of the government or an adjunct to the courts, but as a representative of "the people"—the sovereign people—of which any jury is a particular and temporary representative. To regard the jury simply as a judicial institution would be taking a very narrow view of the matter, for great though its influence on the outcome of lawsuits is, its influence on the fate of society is much greater still. The jury is therefore above all a political institution, and it is from that point of view that it must always be judged.


S. STIMSON, THE AMERICAN REVOLUTION IN THE LAW 41-56, 142-3 (1991) argues that Locke transmitted to America a framework of ideas and an epistemology of skepticism that formed the basis for a concept of popular sovereignty that raised the common man or "the people" to the position of being the repository of sovereignty, of having the power to reason about law and make legal and political judgments, and as establishing the foundation for the American approach to judicial review. This was embodied institutionally in the powerful role of juries in the colonies and early Republic.

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28 Id. at 5.

29 Id. at 54-62. Phillip Scott, Jury Nullification: An Historical Perspective on a Modern Debate, 91 W. Va. L. Rev. 389 (1989), argues cogently that neither Bushell's Case, 124 Eng.Rep. 1006 (1670) nor Zenger's Case, 16 Amer. State Trials 1-39 (1735) establish clear historical support for jury nullification. The existence of greater jury authority to make decisions of law in the early Republic is acknowledged as is the demise of this jury authority.

30 STIMSON, supra note 27, at 5.
judge’ in matters of law was in dispute."31 After a brief period of post-Revolutionary support for jury hegemony,32 the demands for legal uniformity in the new Republic suppressed the assertion of jury power. At the present time, jury nullification is recognized as a covert and illegitimate power, dangerous to the proper functioning of law and to be hemmed in by voir dire, the judge’s instructions, and by the tempo, tone, and structure of the trial.33 The jury’s current role, closer to that of England than Revolutionary America, is as a factfinder clearly subordinate to the courts’ hegemony over the interpretation of law.

It is not argued that the jury’s historical importance to the jurisprudence and political theory of the nation’s founding, or the notion of juries as political bodies, requires a reversion to an exaggerated idea of localism that would make changes of venue all but impossible. Nor is an argument advanced for jury nullification. The kind of local consensus on which "government by jury" had to be based, after all, was "'disintegrating' by the last decade of the eighteenth century."34 And in recent years the Supreme Court has imposed powerful national requirements on jury selection to overcome the effects of local prejudice.35 The role of the jury has been so subordinated to the professional agenda of the courts that all consideration of interests other than that of providing a mythically impartial factfinder has been virtually lost. The modest goal in this article is to suggest additional interests, inherent in the jury, that give greater weight to keeping the criminal trial in the county of original venue. This interest analysis is put forward not as a jurisprudential base for radically restructuring change of venue decisions, which must continue to be discretionary. The goal is to suggest, in venue change cases, other values that will clarify the interests at stake and help to produce better considered decisions, especially in cases where localism is a pressing value and the value of changing venue is dubious.

31 Id. (emphasis in original).

32 Id. at 61.

33 Sparf v. United States, 156 U.S. 51 (1895) (recognizing that a jury does not possess right to decide questions of law). A few scholars have supported a limited recognition of jury nullification in politically salient cases, but none have gone to the extreme, as allowing a jury to exercise the power of "judicial review." The proposal of any level of jury nullification has met with fierce opposition. Scott, supra note 29, at 419-23.

34 Stimson, supra note 27, at 139.

II. ANALYSIS OF PEOPLE v. POWELL: A FRUITLESS SEARCH FOR IMPARTIALITY

A. Overview of California Change of Venue Law

Under California procedure, a trial court's denial of a motion for change of venue may be appealed before trial by a writ of mandate. The appellate court must make an independent determination of the facts to decide whether a fair trial can be held in the county of original venue. A showing of actual prejudice is not required. In Powell the court of appeals made its judgment appear mandatory by noting that § 1033(a) of the California Penal Code "requires a change of venue 'when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be had in the county.'" The court concluded that in this instance a "motion for change of venue shall be granted upon a determination that dissemination of potentially prejudicial material results in a reasonable likelihood a fair trial cannot be had in the county of original venue." Since the statute is silent about the possibility of an equal level of potential bias outside as well as inside the county of original venue, a brittle argument can be made that once the appellate court finds a reasonable likelihood that a fair trial cannot be held within the county, its task is done and a writ of mandate must be issued ordering the trial moved. Such a conclusion is, of course,

37Id. at 382.
39The change of venue rules of several states are similar to California's in focussing on prejudice in the county of original venue making it impossible to get a fair trial there. See, e.g., ILL. ANN. STAT. ch. 38, para. 114-6(a) (Smith-Hurd 1992); Md. Rule 4-254 (1992); Mo. REV. STAT. § 545.430 (1991); N.Y. [CRIM. PROC.] LAW § 230.20 (Consol. 1992). Others are less directive, thus not creating an exclusive focus on whether a fair trial can be had in the county of original venue. See, e.g., MICH. COMP. LAWS ANN. § 762.7 (West 1992). A good formulation is adopted by New Jersey: "A change of venue in any civil or criminal case in the superior court may be ordered by the court for good cause shown." N.J. REV. STAT. ANN. § 2A:2-13 (West 1991).
40Powell, 283 Cal. Rptr. at 782 (emphasis in original) (citing CAL. PENAL CODE § 1033(a)). The reasonable likelihood standard was articulated by Powell to require something less than "more probable than not," and something more than "merely possible." Id. A showing of actual prejudice is not required to make out the "reasonable likelihood" standard. People v. Hamilton, 259 Cal. Rptr. 701 (Cal. Ct. App. 1989).
41This, indeed, was defense counsel's argument to stay the trial court's decision refusing to change venue. Brief on Petition for Writ of Mandate and Request for Immediate Stay of Proceedings Below, Powell v. Superior Court, Los Angeles Superior Court No. BA 035498 (June 6, 1991) at 9-15. Counsel argued that CAL. PENAL CODE § 1033(a) required a change of venue when the reasonable likelihood standard is met. Counsel, in this pretrial brief, evaluated five factors drawn from the cases (nature and gravity of crime, victim's prominence, defendant's status, community size, and nature and extent of news coverage), but failed to address the political factor later relied on in Powell as the
nonsense. Under established canons of interpretation, the literal application of a statute is not required if it would create an absurdity or injustice. Indeed, the notable California Court of Appeals case of *People v. Manson* held that a change of venue is not required when publicity is so widespread that there is no likelihood of a gain in fairness by going to the inconvenience and expense of moving the trial. The *Powell Court* distinguished *Manson* as a notorious criminal case which was "not entangled in local politics, did not focus on local politicians, and did not involve issues unique to Los Angeles County." Modern California change of venue case law began with *Maine v. Superior Court*, which established pretrial use of mandamus to compel venue changes in light of *Sheppard v. Maxwell*. *Sheppard* obliged state courts, under the United States Constitution, to reduce the effects of pretrial publicity on criminal trials. While not offering a checklist, *Maine* pointed to the seriousness of the crimes (murder, rape and kidnapping), the small size of the community, the defendants' status as strangers, the victim's innocence and the community's outpouring of concern for her, a high level of local publicity, a reported confession, and the intrusion of political factors, in finding that a change of

deciding factor granting the change of venue. *Powell*, 283 Cal. Rptr. at 782-85. The political factor had been an obscure factor prior to Powell, raised in only a few cases, and counsel was not remiss in failing to see its value. *Id.*

However, defense counsel criticized Judge Kamins for applying "an incorrect legal standard," namely, whether "there is a county to which the trial could be transferred where there is not the same probability of adverse publicity affecting the defendants." *Brief for Mandate*, at 15. Judge Kamins, finding no statutory basis for such a factor, labeled it a so-called "Kamins factor." While counsel had a point in complaining that defense counsel are not required to prove this under the statute, the brief did not cite *People v. Manson*, 132 Cal. Rptr. 265 (Cal. Ct. App. 1976), which established a common law basis for considering the factor of widespread out-of-county publicity.


45 438 P.2d 372 (Cal. 1968).

venue must be ordered. The California Supreme Court made a critical assumption that was unthinkingly incorporated in many later cases. Maine assumed that news of the crime did not travel far and did not influence public opinion in more urban areas of the state: "[i]n a case of this nature it would probably be prudent to transfer the case to a metropolitan area where comparatively little difficulty will be encountered in empaneling a jury free from any kind of prejudice."47 This change of venue stereotype is so strong that it helps carry the day even when the facts do not fit the issue presented. In this regard Justice Stanley Mosk added in a footnote, perhaps for the sake of completeness, that "[w]e do not intend to suggest, however, that a large city may not also become so hostile to a defendant as to make a fair trial unlikely."48 The implications of this dictum were not worked out any further. Finally, Maine also laid out a flexible methodology for exercising change of venue discretion: "We do not assert categorically that each individual circumstance here, isolated and alone, would compel a change of venue."49 Rather it was for a court to weigh all the facts and circumstances in deciding whether they so influenced the public mind as to negate a reasonable possibility of a fair trial.

Cases following Maine turned its loose review of items into a numbered list of factors. People v. Balderas,50 for example, refers to "five controlling factors: the gravity and nature of the crime, the extent and nature of the publicity, the size and nature of the community, the status of the victim, and the status the accused."51 Additionally, on "postconviction review, we must also examine the voir dire of prospective and actual jurors to determine whether pretrial publicity did in fact have a prejudicial effect."52 Courts applied these factors with varying weights as fit the circumstances.53 As these factors were repeated

47438 P.2d at 380. (emphasis added).

48 Id. at 380.

49 Id.

50711 P.2d 480 (Cal. 1985) (failing to grant a change of venue. This case involved capital murder and kidnapping. The court concluded that publicity was not unusual for the nature of the crime. The crime occurred in a large county and the victims were average citizens. Defendant was Hispanic, but was not a stranger in the county).

51 Balderas, 711 P.2d at 496.

52 Id. at 496-97.

53 Martinez v. Superior Court, 629 P.2d 502 (Cal. 1981) (finding that publicity, the size of the county and the nature of the crime are controlling in ordering a venue change. The court also found that the status of the victim and the accused were less important and were not controlling).
in other cases, some did not include "politics" as a factor, while other cases did.\footnote{See People v. Fauber, 831 P.2d 249 (Cal. 1992), cert. denied, Fauber v. California, No. 92-7148, 1993 WL 14266 (U.S. Mar. 29, 1993) (failing to change venue in a murder case. Publicity was not considered prejudicial. The county was large. The victim’s death did not engender unusual emotion and defendant was not an outsider); People v. Howard, 824 P.2d 1315 (Cal. 1992), cert. denied sub nom. Howard v. California, 113 S. Ct. 383 (1992) (failing to change venue in a murder case. Publicity was low compared to other cases. The county was small. The victim not prominent. That the defendant was black in a predominantly white county was not a factor in this case); People v. Price, 821 P.2d 610 (Cal. 1991), cert. denied sub nom. Price v. California, 113 S. Ct. 152 (1992) (failing to change venue in a murder case. There was intermittent publicity. The county was small. The victim’s death did not cause unusual emotion. The defendant was a not minority or friendless outsider); People v. Edwards, 819 P.2d 436 (Cal. 1991), cert. denied sub nom. Edwards v. California, 113 S. Ct. 125 (1992) (failing to change venue in a murder case. Publicity was extensive but fair and not inflammatory. The county was large. The victim was a child. The defendant was not an outsider. There was a political factor, namely that the sheriff criticized the public defender. The passage of time was a special factor weighing heavily against a change in venue); People v. Sully, 812 P.2d 163 (Cal. 1991), cert. denied sub nom. Sully v. California, 112 S. Ct. 1494 (1992) (failing to change venue where the crime involved six counts of murder. Substantial publicity dissipated by the time of the trial. The county was large. The victims were outsiders and criminals. The defendant was a resident and successful person); People v. Cooper, 809 P.2d 865 (Cal. 1991), cert. denied sub nom. Cooper v. California, 112 S. Ct. 664 (1992) (granting venue change once from San Bernardino to San Diego, but was not ordered a second time. The crime involved four murders. There was extensive publicity. The county was large. The victims were family members. The defendant was an escaped prisoner); People v. Jennings, 807 P.2d 1009 (Cal. 1991), cert. denied sub nom. Jennings v. California, 112 S. Ct. 443 (1991) (failing to change venue where the crime involved three murders and other heinous crimes. Publicity was not extensive. The county was large. The victims were prostitutes); People v. Daniels, 802 P.2d 906 (Cal. 1991), cert. denied sub nom. Daniel v. California 112 S. Ct. 145 (1991) (failing to change venue where the crime involved two murders. Publicity was extensive at first, then it declined. The county was large. The victims were 2 police officers killed in the line of duty. The defendant was a black man who was formerly convicted of robbery).}

\footnote{People v. Hamilton, 774 P.2d 730 (Cal. 1989), cert. denied sub nom. Hamilton v. California, 494 U.S. 1039 (1990) (failing to change venue in a case of murder for hire. The publicity was extensive but not inflammatory. No conclusions of guilt were offered in the editorials. The county was small. The victim was the pregnant wife of the defendant and was not prominent. The defendant was not a stranger or a minority group member. There was a political factor inasmuch as the defendant filed a State Bar grievance against the prosecutor and requested a recusal. This factor was not significant.); Williams v. Superior Court, 668 P.2d 799 (Cal. 1983) (ordering a change of venue where the crime involved capital murder, rape, robbery, burglary, and kidnapping. There was extensive publicity over two years, including a period when the brother of the defendant was tried on the same charges in a separate trial. The county was small. The victim was a young white woman described as a virgin in news reports. The defendant was a young black man who was a stranger to the county. The purported political factor was that the prosecuting attorney had run unsuccessfully for District Attorney during the case and a defense attorney was a staunch supporter of the opponent, although the court rejected that these facts alone constituted a political factor); Frazier v. Superior Court, 486 P.2d 694 (Cal. 1971) (ordering a venue change in a case involving multiple murders, committed execution style, and accompanied by "hippie" symbols. The publicity was...}
Among the California criminal venue cases, *Powell* is unique in that it is the only one where a change of venue was based exclusively on the political factor:

We emphasize, however, that were this simply a matter of extraordinary publicity we might have reached a different conclusion. What compels our decision in this case is the high level of political turmoil and controversy which this incident has generated, which continues to this day and appears likely to continue at least until the time when a trial of this matter can be had.\(^{56}\)

The political controversy factor was given comparatively as much attention as the other relevant factors combined.\(^{57}\) We contend that although this factor was a plausible basis for the change of venue, given the unusual level of political controversy surrounding the Rodney King beating, it was erroneously relied on as the controlling factor because it did not contribute to an impartial jury. This conclusion is easy to make from hindsight. But we believe that given the widespread and intense level of publicity and the particular circumstances of the case, this should have been apparent prior to the trial.

**B. Analysis of Change of Venue Factors**

The following analysis critically reviews, on two levels, the factors relied on by *Powell*. First, this discussion will explore the potential weight of each factor for or against a venue change as an independent variable; then the factors will be investigated interdependently, asking whether considered *in toto* they support a change of venue decision. It is emphasized that in this part of the article these factors are analyzed from the traditional perspective of providing a fair trial by empaneling an impartial jury. Nevertheless, the overall, "political," assessment of change of venue, in Parts III and IV, transcends the traditional approach; the concept of an impartial jury must be qualified and values other than impartiality must be considered. The alternative position will evolve out of the discussion in Part II. This section will begin with an examination of the five factors given cursory treatment by the court and conclude with an analysis of the political factor.

**Nature and Gravity of the Offense.** The nature of the charges in *Powell* were not spectacular:\(^{58}\) charges of "assault and battery" simply do not stir the soul of the extensive due to an outpouring of community concern. The murders occurred after the infamous "Manson family" killings. The county was small. The victims included a prominent physician, his family and his secretary. The defendant was identified as a "hippie" at time of public hostility to "hippie" subculture. The political factor consisted of newspaper editorials commenting on the high cost of the prosecution to the county).


\(^{57}\) *Powell* devoted four pages to the analysis of the political factor and four pages to all other factors combined. *Id.* at 781-88.

\(^{58}\) The peculiar facts or aspects of a crime which make it sensational, or otherwise bring it to the consciousness of the community, define its "nature"; the term "gravity" of a crime refers to its seriousness in the

https://engagedscholarship.csuohio.edu/clevstlrev/vol41/iss2/4
average city dweller. Thus, the nature of the charges alone, independent of all other factors, did not weigh in favor of changing venue from Los Angeles. Ordinarily, even a savage beating does not generate a case for a venue change, as acknowledged by the court: "the crime of assault and battery does not compare to the gruesome murders involved in other notorious cases tried in Los Angeles County, e.g., Charles Manson, the 'Night Stalker,' the 'Hillside Strangler.'" While changing venue is typically reserved for murder cases, moves have been ordered in lesser crimes such as robbery and bribery where the circumstances indicated outraged public opinion. The cases indicate that it is not the inherent horror of the crime, as much as the public reaction to it, that adds heft to the crime seriousness factor as a basis for changing venue.

Why then was this crime deemed so serious? It is not too much to say that the nature of the crime, while not stirring the community's emotions in the same way as notorious murders, had in another way produced a stronger public reaction. It was not simply the police brutality (which involves the status of defendant and victim), since such cases occur with revolting regularity in the United States. Nor was the seriousness based solely on the videotaping of a law and to the possible consequences to an accused in the event of a guilty verdict. Martinez v. Superior Court, 629 P.2d 502, 506 (Cal. 1981).

Although the jury in the Powell trial acquitted defendants of assault charges, we refer to the case as an instance of police brutality. Powell v. Superior Court, 283 Cal. Rptr. 777 (Cal. Ct. App. 1991). This reflects our belief, apparently shared by a large portion of the public, that the verdict was not fitting. A federal indictment of the four officers for violating Rodney King's Fourth Amendment protection against an unreasonable arrest and the pending police department suspension hearings also reflect the belief that the King beating was a case of brutality. Robert Reinhold, U.S. Jury Indicts 4 Police Officers in King Beating, N.Y. TIMES, August 6, 1992, at A1.

Indirect evidence of police brutality is found in the extensive news and legal coverage of this topic. Newsbank, a "current awareness reference service" which contains references to newspapers in over 450 cities, has subheading for "Police Brutality and Ethics," listing newspaper articles that appear regularly under that heading. Articles under the heading "Police Brutality" are found in the CRIMINAL JUSTICE PERIODICAL INDEX: in 1988 two columns under that heading appeared, each column listing approximately 25 entries; 1989 - 5 columns, 1990 - 2 columns, 1991 - 4 columns, 1992 - 8 columns.

A majority of whites and blacks say they have a great deal of respect for the police. Nevertheless, a large share of whites (33 percent) and blacks (45 percent) believe police brutality occurs in their local area. The videotape
particular assault, although a filmed private beating would have become a local cause-célèbre. Rather, the fascination of the case lay in the televised videotape of an egregious and race related instance of police brutality. The evidence of the eyes turned Rodney King's beating into a national symbol of police brutality. Understanding the public reaction requires an appreciation of Jerome Hall's dictum that penal harm is "incorporeal" and has a normative-empirical reference based on "a complex of fact, valuation and interpersonal relations - not an observable thing or effect, as is sometimes assumed."64 If crime seriousness is, then, in the eye of the beholder, it is legitimate to ask whether the crime was as well known outside Los Angeles as within, and if it was, how its nature was perceived and its seriousness weighed there. This topic will be discussed below.

Extent and Nature of Publicity. Powell dutifully recapitulated the news coverage of Rodney King's beating, the progress of the prosecution, and the intense political repercussions of the affair, but limited its focus to Los Angeles.65 As is typical in such cases, the court relied on media surveys offered by defense counsel. In separate brief sections the court reviewed news coverage in Los Angeles newspapers, radio, and television, captioning the latter as "graphic and devastating."66 The court noted that the televised images of the videotaped beating "eventually was seen by viewers all over the world, and the world's reaction filtered back to a shocked community."67 The court of appeals' comments about massive media coverage in Manson certainly applied to Powell:

The journalistic energy spawned by this case goes beyond the material we have mentioned. It is patently clear that the crimes charged, as well as the identity and the involvement of appellants, permeated every corner of this state with varying degrees of intensity. The ubiquity of media coverage made any such differential one of insignificant degree. A change of venue offered no solution to the publicity problem. Even if venue had been changed, nothing could

of L.A. police officers beating Rodney King clearly heightened awareness of police brutality. The proportion of all Americans who think some of their local police use excessive force rose from just 9 percent in 1965 to a full 35 percent in the spring of 1991.


64J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 217 (2d ed. 1960).


67Powell, 283 Cal. Rptr. at 784.
have prevented the public media from swinging its attention to that place. The magnetic pull of such notorious cases is compelling.68

Yet, Powell crisply and quickly laid to rest Manson's reasoning in a conclusory manner: "the publicity surrounding the incident itself has been unequaled in Los Angeles County. Of even greater importance is the impact upon the citizenry of the political uproar resulting from the incident."69 It is true that Powell's political factors set it apart from other California cases which spawned nationwide publicity, such as the Juan Corona mass murders and the infamous "Manson family" murders of Sharon Tate and others.70 Yet, as will be shown below, the invasive nature of contemporary television and the existence of the videotapes made the publicity in this case materially different in how it affected all viewers, both in Los Angeles and anywhere else in the United States. The court, while obliquely acknowledging the publicity's national reach, narrowly focused on Los Angeles and failed to confront its impact on potential jurors in other counties.

Because Powell followed the convention of reviewing the influence of publicity on potential jurors within the county of original venue, it is difficult to fathom the extent of external impact from the court's opinion. The opinion poll presented by defense counsel71 was nevertheless biased. Once judicial.


69Powell, 283 Cal. Rptr. at 783.


71In support of the motion for change of venue, defendants rely, in part, on polls of residents of Los Angeles County as reported in the Los Angeles Times. On March 10, 1991, within a week of the incident, the Los Angeles Times reported 86 percent of those surveyed had seen the videotape of the offense and 92 percent believed excessive force had been used. On March 22, 1991, the Los Angeles Times reported 94 percent of all persons surveyed in another poll described themselves as "upset" by the incident and almost two-thirds believed the force used was racially motivated.

Defendants retained experts to conduct a public opinion survey in the community. In a random sample of 1,000 people, 97 percent were aware of the incident. That 97 percent was then broken down into a number of categories: 3 percent believed defendants were not guilty; 70 percent of the persons from the group who felt defendants were guilty had a "strong" view about the incident.

These figures, reflecting preconceived attitudes, are significantly higher than those in similar surveys made in Williams v. Superior Court, supra, 34
notice can fairly be taken of a firestorm of publicity throughout the state, a poll only of Los Angeles residents would not be representative of the appropriate population to be sampled for the purpose of determining whether a more impartial jury could be obtained elsewhere. The reasoning of Balderas, where a community attitude survey was not allowed into evidence, is preferable:

As the trial court noted, the statistics offered were meaningless on the venue issue, since they offered no comparisons with statewide attitudes, or with those in adjoining counties. Thus, they provided no basis for concluding that the situation in Kern County [Bakersfield] was abnormal or that a more representative panel could be convened in another location. The proffered evidence was properly excluded.73

Available evidence of pretrial national opinion on the Rodney King case is indirect. Immediately following the outbreak of the post-verdict riot, it was reported that a "USA Today poll showed almost all blacks and 86 percent of white Americans thought the verdict was wrong. An ABC News/Washington Post poll showed only 4 percent of Americans believe the police officers were innocent; just 5 percent of whites thought so."74 Although taken after the riots, this poll is indirect evidence of the very large magnitude of knowledge and opinion about the case before the acquittals.

Size and Nature of Jury Pool. The court of appeals concluded that the "immense size of [the] potential jury pool [was] not controlling here."75 This is disputable. The size of the potential jury pool, six and a half million people, should have weighed, perhaps presumptively, against a change of venue. The reasoning of Balderas, that the "larger the local population the more likely it is that preconceptions about the case have not become imbedded in the public consciousness,"76 cannot be the basis for our conclusion since the case emphatically was impressed on the public consciousness in Los Angeles. But if the case became embedded in the public consciousness throughout the state, then there was a greater likelihood of empaneling an impartial jury from such

Cal.3d at page 590, in which a writ of mandate was granted directing the trial court to grant a change of venue. . . .

Powell, 283 Cal. Rptr. at 783.

72711 P.2d 480 (Cal. 1985).

73Id. at 499. "[T]he control study ought to demonstrate the utility of changing venue, if it is determined that there is a reasonable likelihood that an impartial jury cannot be empaneled in the venue county." John W. Kinch, The Jury Survey: Improved Social Science Input in Change of Venue Decisions, 10 GLENDALE L. REV. 69, 85 (1991).

74Thomas C. Palmer, Jr., Amnesia on victim's rights; Did moving the King trial to Ventura Country harm the accuser's interests?, BOSTON GLOBE, May 3, 1992, at 69.


76People v. Balderas, 711 P.2d 480, 497 (Cal. 1985).
a huge pool than from a smaller venue. The court’s desire not to immunize Los Angeles permanently from venue changes is applauded. The court relied on *Smith*, the Los Angeles bribery case, to refuse to make the "logical conclusion" that forever would bar changes of venue from Los Angeles because of the jury pool size and cited *Maine*’s dictum that "[w]e do not intend to suggest, however, that a large city may not also become so hostile to a defendant as to make a fair trial unlikely." *Powell*, however, failed to adhere to an even more basic rule of discretionary analysis: "each case must turn on its own facts..." The facts and circumstances indicate that the case had as much impact outside Los Angeles as within Los Angeles on the issues that were relevant to finding an unbiased jury.

Community characteristics, in addition to size, must be taken into account and favor a denial of a venue change in *Powell*. Los Angeles county is an urban, metropolitan area, a fact not even mentioned by the *Powell* court. Past change of venue cases, it seems, infer that a locally notorious case transferred from a rural county to a metropolitan venue would be "just another trial" there. Indeed, an argument was made for trying the case in another metropolitan area, such as Alameda County (Oakland), because it is cosmopolitan and contains an ethnically diverse population. This point was not explored in *Powell* and clearly was not the basis for the actual choice of venue by Los Angeles Superior Court Judge Weisberg.

*Powell* did not systematically examine the relationship between county size in prior cases and the decision to change venue. A review of cases makes it clear

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77 See infra notes 214-26 and accompanying text for our distinction between "perfect" and "practical" impartiality. Also, we argue in Parts II and III that the value of localism militates in favor of keeping the venue in the county of original venue in such a case. The reasonableness of this inference depends in part upon our critique of the court’s political factor evaluation. See infra notes 98-107 and accompanying text.


82 In the smallest counties, such as some listed in note 85 infra under counties in which venue was changed, a serious crime is a rare event that inevitably becomes a matter of general notoriety. In the largest counties, where even homicides occur with regularity, news of such crimes tends to get buried in a flurry of other events.

83 See Andrea Ford and Daryl Kelley, *King Case To Be Tried In Ventura County*, *Los Angeles Times*, Nov. 27, 1991, at A3; Adrienne Goodman, *NAACP Official Criticizes Venue Change in King Case*, *Los Angeles Times*, Dec. 5, 1992, at B3.

that county size is a critical factor. In the appeals examined herein venue is more likely to be changed in counties with populations under 250,000 (small counties). Venue was changed in nine small counties and in three large counties. Of the twenty cases where venue was not changed, all had populations of 250,000 or over, except for Price and Adcox. In the two cases from the "borderline" sized county of Tulare, venue was not changed. Many of the large county cases, where venue was not changed, stated that publicity, even where inflammatory, becomes diffuse and non-prejudiced jurors could be found. In typical change of venue cases (i.e., from small to large counties) this reasoning is good applied sociology.

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<table>
<thead>
<tr>
<th>Case</th>
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<td>Williams (SC 1983) P-NS</td>
<td>Placer</td>
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<td>Young (CA 1981)</td>
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<td>Lansdown (CA 1970)</td>
<td>Kern</td>
<td>343,300**</td>
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<td>Howard (SC 1992)</td>
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<td>Harris (SC 1981)</td>
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<td>Manson (CA 1976)</td>
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<tr>
<td>Bunnell (SC 1975)</td>
<td>Santa Clara</td>
<td>992,100**</td>
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CA = California Court of Appeals; SC = California Supreme Court
P = political factor issue; NS = political issue not significant
* Estimate of size of jury pool
** Population not mentioned; pop. in 1968, Whittaker v. Superior Court, 438 P.2d 358, 370 (Cal. 1968)

Although the California courts have not usually favored venue changes from large counties, we cannot rely on this reasoning alone since a totality of the circumstances methodology is required. An examination of Powell's circumstances compels an examination of the political factor as it meshed with statewide publicity.

Status and Prominence of Victim. Cases where change of venue turned on victim status or prominence typically involved highly sympathetic figures, like a murdered physician and family, an abandoned four year old child, or well-liked teens senselessly murdered. Rodney King was not a prominent figure before the time of the videotaped assault. As compared to Odle, where an officer killed in the line of duty trying to apprehend James Richard Odle, whom "by virtue of the events and media coverage after the crimes, became a posthumous celebrity," Rodney King's fame and standing descended from the nature of the case. It was his transformed status, not his inherent prominence, that weighed in the change of venue equation. The court of appeals concluded that other factors overshadowed this one, but the critical factor, for purposes of finding an impartial jury, was the public creation Rodney King had become. As a result of immense publicity the name "Rodney King" became an icon and in the popular mind the incident and prosecution became the Rodney King case. As with the gravity of the crime factor, the importance of Rodney King was not who he was before the chase and beating, but what he became to others afterwards: an everyman in racially tainted police brutality cases.

If the Rodney King case hinged on anything, it hinged on race. Several cases ordered venue changes because of the fear that black or Hispanic defendants who were strangers in all-white rural counties would likely be confronted by hostile jurors; where venue was not changed in cases involving minority defendants, the courts took pains to explain that the defendant's minority status was not a factor. A reverse situation existed in Powell, with a black victim of the brutality of white police officers. This factor gave the case its special force for public controversy. The court utilized this circumstance to bolster its decision to change venue by noting that in a Los Angeles Times poll of county residents two-thirds believed that the force used by the officers was racially

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88 Odle v. Superior Court, 654 P.2d 225, 229 (Cal. 1982). Unlike the officer's posthumous fame, Rodney King's renown was not limited to the "western portion of the county where the crimes took place." The fame, of course, was nationwide.


motivated. Perhaps the court analogized this case to those of black defendants in rural white counties. But the analogy is far from perfect. Los Angeles is demographically and culturally heterogenous; the police officers would have been tried in a venue where whites were still a majority. Unlike Martinez and Williams the defendants were not strangers or outsiders. Whatever angry words may have been said by African-Americans before the trial, the kind of uniform racial hostility noted by the courts in those cases was not the situation in Los Angeles. And the Los Angeles Times poll results may have been simply a logical and appropriate inference to be drawn from observing the videotape on television rather than the result of inflamed anti-white racial hostility. In any event, the court never asked itself what the "raw data" of the videotaped beatings, played over and over on television stations throughout the state and nation, might mean to viewers outside Los Angeles in regard to the racial elements of the case.

Status and Prominence of Defendants. Powell collapsed two factors, status of the victim and status of the accused, into one brief section of two paragraphs, noting that "[i]mportant and unusual factors in this case are the status of the defendants as White law enforcement officers and the arrestee as a Black...." Young v. Superior Court concerned a rogue cop who solicited two other officers to fly "to small towns throughout California, holding up motels, taking but not returning hostages, and killing any police officers who may get in the way." In ordering a change of venue the court noted: "There is a danger that San Luis Obispo County jurors may feel subtle psychological pressure to purge corruption from a local department to which they must look for protection against crime." This concern, standing alone, militates in favor of a change of venue and resonated in Powell:

It cannot be disputed that difficulty in obtaining a fair trial in Los Angeles County is exacerbated by the fact the defendants are police officers, sworn to protect citizens, to uphold the law and to maintain peace in the community. Their status is the basis of the intense coverage and repeated showing of the videotape. The fact that the videotape depicts local officers in such conduct threatens the community’s ability to rely on its police and has caused a high level of indignation, outrage, and anxiety.

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91 Powell v. Superior Ct., 283 Cal. Rptr. 777, 783 (Cal. Ct. App. 1991) (almost two-thirds polled believed the force used was racially motivated).
92 See supra note 5.
93 Powell, 283 Cal. Rptr. at 784-85.
95 Id. at 395.
96 Id. at 396.
97 Powell, 283 Cal. Rptr at 785.
This may be so, but the unique concatenation of circumstances occurring in America’s media center transformed this instance of police brutality from a local case into a national scandal. The defendants’ status as white police officers also had significance to people outside Los Angeles. The case may have raised fair trial concerns within Los Angeles, but impartiality was not to be found by waving a change-of-venue magic wand. The extent to which the explosive combination of race and police brutality transformed this case will be taken up in the combined analysis below.

**Political Factors.** Maine, California’s fountainhead change of venue case, laid the foundation for political factors. The prosecutor apparently removed the trial judge because they were rivals in a forthcoming election. Espousing a strong legal ethic, the court declared: "Political factors have no place in a criminal proceeding, and when they are likely to appear, as here, they constitute an independent reason for change." Some subsequent cases cited the absence of political factors as a reason for denying a change of venue. Political factors have weighed in favor of venue changes when much ado was made over trial costs in small counties. The California Supreme Court in *Harris* rejected the argument that a tussle between local and federal prosecutors over who would first try a case was a political factor. But in *Smith*, the fact that a bribery defendant was a Los Angeles mayoral appointee, indicted during the mayor’s reelection campaign, was found to weigh in favor of a venue change.

The court of appeals found controlling similarity between *Powell* and *Smith*. The defendants in both cases were Los Angeles public officials and the charges involved dereliction of official duties that would be of concern to local citizens. The similarities, however, are outweighed by the differences for the purpose of determining whether a change of venue would produce an impartial jury. The political dispute in *Smith* was mainly between the mayor and the Los Angeles Times, which uncovered the story and was responsible for keeping it in the limelight. It appears that most of the publicity in *Smith* was local to Los Angeles, although the newspaper’s award of a Pulitzer Prize for

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99 Maine, 438 P.2d at 386-87.


102 People v. Harris, 623 P.2d 240. (Bird, C.J., dissenting, felt that it was a political factor).


104 Id. at 694.
its reporting of the scandal gave it some national attention. Smith concluded that "the news media coverage . . . has been so pervasive that there is a reasonable likelihood that the petitioner cannot get a fair trial in Los Angeles County." The court rejected the prosecutor’s argument that "crimes against the taxpayer" would not influence a jury as much as a violent crime and noted that the voir dire indicated elements of prejudice among jurors as a result of the publicity. It does not seem that the award of a Pulitzer Prize to the Los Angeles Times made Harvey Smith the same kind of national symbol as Rodney King. In Smith there is no indication that venues outside Los Angeles were poisoned to the same extent as the county of original venue. The change of venue was therefore defendable under the impartiality paradigm.

Powell clearly departs from Smith in significant ways, including the violence, the vivid and gripping taped images, the racial element, and the massive publicity on a worldwide scale. The Powell court acutely detailed the intense and riveting political controversy that erupted after the beatings. A monumental power struggle ensued, involving moves by Mayor Bradley, a longtime rival of Chief Gates, to have him removed, city council elections, public personages taking sides, charges flung at the Los Angeles police and Gates’ leadership, the formation of an investigatory commission which recommended Gates’ removal and sweeping changes, and shakeups within the Police Department. This political activity continued for most of the year so it undoubtedly had a continuing effect on the opinion of potential jurors. Such political aspects of the case clearly transcended that which existed in Maine. The court concluded:

While we recognize that the incident and some of its ramifications have received widespread publicity elsewhere, the impact on residents of Los Angeles is unquestionably much greater because of the unabated and acrimonious total involvement of city officials and local community leaders. There is no doubt that these political biases would invade the jury box if the case were tried in Los Angeles County.

This plausible conclusion nevertheless was not a proper foundation for changing venue. While the political activities that followed the beating were pronounced and must have been known by potential jurors, it is also the case that an intense national political debate paralleled that of Los Angeles. The national debate was no less political than that of Los Angeles, although in a different way.

C. Rethinking the Change of Venue Decision in Powell

The heart of Powell’s six-factor analysis is that the political elements of the case made it different from other notorious cases. On the surface, the reasoning

105 Id. at 696.
106 Id.
is plausible. In a case like *Manson* or *Corona*, where the crime consists of a gruesome murder which has been broadcast extensively throughout the state, one can argue that the emotional reaction of jurors in one county will be close to that of jurors in another. People in the original county may apprehend a special fear from a terrible crime that occurred close to home, but the crime produces a universal sense of revulsion.\(^{108}\) Where a crime is special because it touches on intensely local and political issues, however, locals may feel about the case in ways that outsiders do not, even if the case has been widely publicized.

However plausible this reasoning, there were aspects of the Rodney King case that transformed it from one of local interest to a case that had universal meaning for Americans in the year between the viewing of the beating tapes and the trial. The court's cursory review of the five "non-political" factors was essentially dismissive of them. Its eager rush to embrace the political factor was a misuse of discretion. Where venue lies is a technical issue that can be evaluated as a matter of law.\(^{109}\) A change of venue decision, on the other hand, is inherently a matter of discretion, often fraught with uncertainty, requiring a court to balance several factors to determine which location offers the best site for a fair trial. A discretionary judgment is not beyond evaluation. California's standard of a reasonable likelihood that a fair and impartial trial cannot be had in the county, like the more common abuse of discretion standard,\(^{110}\) does not establish a hard and fast legal rule, despite the court of appeals' attempt to make it appear so.\(^{111}\) *Powell* chose to rely on the highly charged political situation and on the statute to make it appear that its decision was compelled. By failing to penetrate its assumptions, when all the circumstances of the case were so unusual that stereotypical approaches were not appropriate, the opinion failed to rise to the occasion provided by the Rodney King affair.

What made the change of venue decision in *Powell* a futile search for a perfectly impartial jury was (1) the phenomenal amount of national publicity about this case, (2) the changing nature of television coverage even in the last five to ten years, and (3) the extent to which the case touched a sensitive political nerve in every corner of America.


\(^{109}\)See, e.g., *Williams v. State*, 383 So. 2d 547 (Ala. 1979) (holding that there was proper venue in bribery case properly in county where defendant never performed a single act of bribery where a coconspirator performed acts in furtherance of the crime).

\(^{110}\)Guthrie, *supra* note 13, describes cases under the abuse of discretion standard and the California standard in § 6.

\(^{111}\)See *supra* note 40 and accompanying text. The court softened this appearance by obliquely acknowledging the rule of *Manson* by stating: "[w]e emphasize, however, that were this simply a matter of extraordinary publicity we might have reached a different conclusion." *Powell*, 283 Cal. Rptr. at 779.
The Extent of National Publicity. Competing ideas about the way to deal with cases beset by national publicity are found in the California Court of Appeals cases of Corona,\textsuperscript{112} where a venue change was ordered and Manson\textsuperscript{113} where it was not. Both mass murder cases were covered by the national news media, with Manson arguably the more riveting case.\textsuperscript{114} It is possible to distinguish the cases on their circumstances, especially Corona's small county of original venue compared to the Los Angeles venue of Manson.\textsuperscript{115} Corona creates a problem by the absolute nature of its language, which does not fit all cases, and is misleading taken out of context.\textsuperscript{116} Corona referred to the "massive outpouring of incriminatory publicity in the commercial news media and the potential intrusion of community involvement external to the judicial process" as factors making it reasonably likely that a fair trial could not be had in Sutter County.\textsuperscript{117} That case concluded that in "counties geographically removed from the locale of the crime, lack of a sense of community involvement will permit jurors a degree of objectivity unattainable in that locale."\textsuperscript{118} The context for these statements was an interesting insight in communal psychology advanced by the court:

Twenty-five slayings took place [in Sutter County] without a ripple of public awareness. To some extent the community's reputation for peace and serenity will depend on a solution of the mystery. Understandably sensitive to community reputation, local jurors will feel a sense of community involvement transcending their strict juridical function.\textsuperscript{119}

Residents of a small, rural county, with a population of only 42,000, may indeed feel a sense of personal responsibility at the existence of a mass murderer in their midst that a resident of an urban area, with its higher level of anonymity, may not. This could, indeed, translate back into subtle pressure on the jurors to end their locale's shame by finding that this defendant is the guilty party.

\textsuperscript{113}People v. Manson, 132 Cal. Rptr. 265 (Cal. Ct. App. 1976).
\textsuperscript{114}Television of the Corona case showed workers unearthing a mass grave in a wooded area; the Manson case, though involving fewer victims, was more lurid, with stories about the blood stained walls, and the special attractiveness of one victim, a well-liked movie star who was pregnant at the time of her death.
\textsuperscript{115}As we noted above, by basing its holding exclusively on the political factor, Powell implicitly adopted the Manson approach that there comes a point where publicity is so extensive that to move the case becomes an exercise in futility. See supra notes 65-70 and accompanying text.
\textsuperscript{118}Id. at 419.
\textsuperscript{119}Id. at 417-18.
Thus contextualized, *Corona* is not good authority for changing venue primarily on the basis of intense publicity. Its holding must properly include all its salient facts, including the likely impact of a mass murder in such a small county. *Corona*'s language, if taken to its extreme, would support the discredited argument that a highly publicized case must be dismissed, thus immunizing people like Charles Manson and H.R. Haldeman. The judiciary has a primary responsibility to try suspected criminals. As long as it has eliminated its own defects that add to the impact of publicity, as called for in *Sheppard v. Maxwell*, a judicial system must go forward to do the best it can in providing a fair trial in an imperfect world. In short, *Powell*’s reliance on *Corona* is misplaced.

If, then, massive statewide publicity is an argument against shifting venue, it should be incumbent on a court to explore such facts where there is a fair likelihood that publicity outside the county of venue has influenced the minds of potential out-of-county jurors. Non-residents of Los Angeles who recall the year between the first televised showing of the Rodney King videotape and the verdict in Simi Valley are likely to recall the image of the beating vividly because it was played incessantly on national television, both for its own newsworthiness and as a backdrop to any story having to do with race relations and the police. While we do not have an accounting of the number of times the tape was shown on national networks and on local news stations across the country, proxy evidence of the story’s notoriety exists. In the immediate aftermath of the televised beating, editorial comment, all of it critical of the Los Angeles police, was to be found in newspapers in Albuquerque, Buffalo, N.Y., Chattanooga, Cleveland, Denver, Des Moines, Hackensack, N.J., Minneapolis, Omaha, Pittsburgh, Portland, Ore., Rockford, Ill., San Francisco, Syracuse, N.Y., Worster, Mass., and in the *Christian Science Monitor*. *A Philadelphia Inquirer*

122 See supra note 74 and accompanying text.
123 The editorials listed are found in *22 EDITORIALS ON FILE* 284-87 Mar. 1-15, 1991: *Albuquerque Journal*, Mar. 8, 1991 ("Ten Los Angeles policemen did more in two minutes to damage respect for law enforcement than have uncrowned allegations of police brutality over many years."); *The Buffalo News*, Mar. 9, 1991 ("It looked like something that came out of South Africa."); *The Chattanooga Times*, Mar. 11, 1991 ("Seen on national news programs, the beating outraged the nation . . ."); *The (Cleveland) Plain Dealer*, Mar. 11, 1991 (". . . officials have shown little outrage and even less inclination to vigorously pursue long-standing allegations that Los Angeles police routinely brutalize minorities."); *The Denver Post*, Mar. 7, 1991 ("Americans were horrified by the image on their TV screens Tuesday night . . ."); *Des Moines Register*, Mar. 9, 1991 ("The tape was turned over to CNN, which broadcast it."); *The Hackensack, N.J.) Record*, Mar. 13, 1991 ("The whole national will be watching to see what happens to the Los Angeles police officers . . ."); *Minneapolis Star and Tribune*, Mar. 15, 1991 (". . . law enforcement personnel be held to the highest standards of discipline and accountability."); *Omaha World-Herald*, Mar. 10, 1991 (". . . exceeded any reasonable, humane limits."); *The Pittsburgh Press*, Mar. 10, 1991 (". . . repulsive . . ."); *The (Portland) Oregonian*, Mar. 9, 1991 (". . . reminiscent of the worst police
cartoon of helmeted L.A.P.D. officers beating a person in a fetal position on the ground had Darryl Gates saying, "These Black people are so self-destructive. Time after time they run into our night sticks." Later in the year, editorial comment was made either directly about the case or on related issues in newspapers in Atlanta, Chicago, Houston, New York, San Francisco, Seattle, Washington, D.C., and in a conservative national opinion magazine. National columnists Anna Quindlen and Tom Wicker were moved to comment. The conservative National Review compared the case to police woes in England. A political cartoon critical of a tough Portland, Ore. jaywalking ordinance caused a minor furor by portraying local cops beating a jaywalker the way Los Angeles police beat Rodney King. Gossip columnist Liz Smith worked an item about Rodney King into a story. Former New York Police Commissioner Lee Brown offered an op-ed column on how the case affected proposals for civilian police review. In national magazines annual wrap-ups of the events of 1991 put the Rodney King case before Operation Desert Storm. Mention of the case seemed a natural lead-in to a trade abuses during the civil rights marches of the 1960s ..."; Rockford (I11.) Register Star, Mar. 11, 1991 ("Punishment for officers should be swift and sure."); The (San Francisco) Sun Reporter, Mar. 13, 1991 ("... savagery ..."); Syracuse (N.Y.) Herald-Journal, Mar. 8, 1991 ("... videotape was shown over and over again on television news programs."); The (Worster, Mass.) Evening Gazette, Mar. 12, 1991 ("... a police 'wilding'..."); and in The Christian Science Monitor, Mar. 15, 1991 ("... a systemwide examination of police methods and ethics is in order.").


magazine article on racism in music.\textsuperscript{132} We have little doubt that were a firm hired to collate evidence of television, radio and newspaper comments on the case throughout California, that evidence of news saturation would have been found, even if not to the degree in the Los Angeles metropolitan area.\textsuperscript{133}

More significantly, in recognition of the unusual and highly charged emotional nature of the videotape, the print media referred incessantly to this factor and to the national impact of the case: "Fortuitously videotaped by a bystander, the beating was memorably broadcast on television all over this country and abroad;"\textsuperscript{134} "Since it first aired a year ago, the brutal scene of Los Angeles policemen beating motorist Rodney King senseless has been replayed hundreds of times;"\textsuperscript{135} "Every American has the right to a fair trial; but what if most of the country thinks it has witnessed the accused committing the crime? . . . The scenes [of the King beating] were shown repeatedly on national television;"\textsuperscript{136} "The impact of the LAPD video is being felt in courts and precinct houses across the country;"\textsuperscript{137} "The videotaped beating of Rodney King shocked the nation;"\textsuperscript{138} "Within a few days, as Holliday's indelible images began to appear again and again on network news shows, the entire country recoiled in horror. The \textit{Los Angeles Times} called the tape 'America's Ugliest Home Video;'")\textsuperscript{139} "The scandal reverberated far beyond Los Angeles, stirring a nationwide debate over excessive police violence and finally prompting


\textsuperscript{133}Polls conducted after the May 1992 riots indicate a virtually universal awareness of the case. Robin Toner, \textit{After the Riots; Los Angeles Riots Are a Warning, Americans Fear}, \textit{N.Y. Times}, May 11, 1992, at A1, col. 3 (New York Times/CBS News Poll indicated that over 90% of black and white respondents had opinion on whether the riots were warning to nation or isolated incident); Richard Morin, \textit{Polls Uncover Much Common Ground on L.A. Verdict}, \textit{The Washington Post}, May 11, 1992, at A15 ("86 percent of the whites and 100 percent of the blacks interviewed by USA Today said the verdict was 'wrong.'"); \textit{Riots In Los Angeles; Scant Support for Verdict or Rioting}, \textit{N.Y. Times}, May 3, 1992, at sec. 1, p. 26, col. 5 (Reporting that a NEWSWEEK poll indicated 93% of black respondents and 74% of whites disagreed with acquittals); \textit{Views On the King Verdict; Washington Post-ABC News Poll}, \textit{The Washington Post}, May 3, 1992, at A26 (Washington Post-ABC News Poll indicated that 92% of blacks and 64% of whites believed that the officers were guilty).

\textsuperscript{134}Paul Chevigny, \textit{Let's Make It a Federal Case; Police Brutality}, \textit{The Nation}, Mar. 23, 1992, at 370.

\textsuperscript{135}American Notes; Trials; Tale of the Tape, \textit{Time}, Mar. 16, 1992, at 33.


\textsuperscript{139}Bill Hewett, et al., \textit{When L.A. Cops Furiously Beat a Black Motorist, They Didn't Know They Were on George Holliday's Candid Camera}, \textit{People}, Mar. 25, 1991, at 83.
Washington to take action.”\textsuperscript{140} All this does not prove that there was more publicity outside of Los Angeles than inside. It does demonstrate that the amount of publicity outside the county, much of it in the most emotional form of televised beatings, was so pervasive that there was a reasonable likelihood that potential jurors outside Los Angeles would have heard about and formed opinions about the case.

A final point is that in this case venue was moved to a county contiguous to Los Angeles. The California practice on interlocutory appeals is to order the trial court to make the decision, and in this case the judge chose the venue from among three counties with available courts named by the California’s Judicial Council.\textsuperscript{141} Even if there were some belief that a trial in a rural northern California county, or a metropolitan county in the San Francisco Bay area, might have removed the case from its immediate political milieu and the same level of media impact, it is clear that the trial’s proximity to Los Angeles raised the effective level of publicity and its impact to that of Los Angeles.\textsuperscript{142} Given the extent to which political news of central cities still tend to dominate the news in suburbs, we suspect that the actual jurors were as immersed in the politics of the case as Los Angelinos.\textsuperscript{143} In contrast, Illinois courts which have moved venue have taken pains to "buffer" the trial county from the county of original venue.\textsuperscript{144}

\textit{The Changing Nature and Impact of the News Media}. The court in Powell avoided a direct confrontation with Manson,\textsuperscript{145} and based its decision to change the venue on the local political fallout of Rodney King’s beating. The Powell court indirectly acknowledged that news media attention in some cases can have so great an impact outside the county of venue as to render a change of venue useless. However, the court failed to acknowledge the enormous growth of news programming intrusion and intensity and changes in style in only the last few years. Over the past five years "American mass media have changed

\textsuperscript{140}Alex Prud'homme, \textit{Police Brutality} Four Los Angeles officers are arrested for a vicious beating, and the country plunges into a debate on the rise of complaints against cops, \textit{Time}, Mar. 25, 1991, at 16.

\textsuperscript{141}See supra note 26.

\textsuperscript{142}Seth Mydans, Officers' Assault Trial Nears Opening, \textit{N.Y. Times}, Mar. 2, 1992, at B8, col. 1. ("Simi Valley residents see the same television programs and read similar newspapers as residents of Los Angeles . . .").

\textsuperscript{143}Polls conducted after the riots in suburban Orange County found that 22% of the population agreed with the verdicts, compared to 13% in Los Angeles County. Tammerlin Drummond, \textit{Times Orange County Poll; L.A.-Style Riots Likely in O.C., Majority Believe}, \textit{Los Angeles Times}, May 22, 1992, at A1, col. 5.

\textsuperscript{144}People v. Johnson, 499 N.E.2d 1355, 1358-59 (Ill. 1986).

significantly. . . ."146 New technologies have created a "new age of personalized mass media."147 In the news business, "noteworthy advances" have been made:

on three fronts: news gathering, news processing, and news dissemination. Access to computer databases and satellites has put an enormous store of usable information within range of average newspeople wherever they may be. . . . When it comes to distribution, the array of available channels for immediate or delayed transmission has multiplied far beyond the range deemed possible a scant twenty-five years ago.148

This trend has been abetted by the explosion of cable TV, found in half of America's households by 1987.149 The competition from the round-the-clock news programming from CNN may have made broadcast television news lean even more to the visual and the shocking than was previously the case.150 In television news "sensational and novel occurrences drown out news of more lasting significance" and stories tend to stress "trivial aspects of serious stories" often by personalizing them.151 More people, as we are reminded by TV advertising, "get their news from television." As a result, what television does best—"transmitting realism and emotional appeal"152—has increased.

This phenomenon can produce divergent trends. On the one hand, the growth of cable TV creates a more fragmented viewing public. Although at certain moments, what has been called "total television" creates a "new form of media reality . . . [T]otal TV was born in certain mesmeric moments in the eighties when the whole nation seemed to have been mobilized at couchside to stare at the same images across many channels."153 For example:

Starting with the Iran hostage crisis of 1979-81 and running through the Gulf War, these glimpses of total TV generally had the theme of America or Americans held hostage—most humiliatedly in Iran; most tragically in various terrorist plane-nappings and murders; most

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146 Doris A. Graber, Mass Media and American Politics xiii (3d ed. 1989)
147 Id. at 373.
148 Id. at 374-5.
149 Id. at 378.
150 The selection of news is not a neutral process that matches the political or social importance of the stories. The five most important factors used in selecting news stories are: (1) strong audience impact; (2) violence (natural or man-made), disasters, and scandals (people remember violent more than non-violent behavior); (3) familiar situations (e.g., attention to "celebrities"); (4) local events; and (5) timely and novel events. "Among these five basic criteria, conflict, proximity, and timeliness are most important." Id. at 84-6 (emphasis in original).
151 Id. at 96.
152 Id. at 148.
pathetically in the Challenger disaster, in which a schoolteacher’s life was hostaged to the failure of American technology; most absurdly in the little girl hostaged to the elements by her fall down a well shaft in Texas; most triumphantly in the images of students kissing American soil after their ostensible rescue from Grenada.  

In the Rodney King case Americans were held hostage not by irrational foreign foes or by accidental forces, but by the accumulated pain and ambiguities of the dilemma of race. This new media trend is driven in part by economics, which has led networks to sharply pare their news staffs. So, when a highly visual story like the King beating arises, national and local broadcast television is more than eager to play the story to the hilt.

It is hard to underestimate the impact of "total television" on the attitudes of Americans. In a special Newsweek feature on television it was noted that "watching TV has become What We Do. On a typical day, the average American spends no less than seven hours and five minutes in front of the screen." The controversy over TV watching includes an indeterminate debate as to what extent our social ills can be laid at television’s door. Much of television’s impact is evanescent although cumulatively the images "added up to the kind of commonality of experience that binds a heterogeneous people." Television, then, does have the ability to produce a unified social sense of community when a high proportion of the public watches a single show, event, or series.

These trends were powerfully abetted by the large number of personal video cameras owned and used by the general public. This easy form of making instant "home videos" has become so widespread that a popular television show emerged replaying them. In a very short time it has become clear that "private citizens with camcorders are now part of the news gathering process" and a useful adjunct to law enforcement. In the post-trial L.A. riots prosecutors have examined 329 tapes made by individuals. "[L]aw-enforcement investigations in general have been transformed by the rapid spread of amateur videotapes like the famous tape of the police beating of Rodney G. King. . . ."

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154 Id.

155 Id.

156 Harry F. Waters, The Future of Television, Newsweek, October 17, 1988, at 84.

157 Id.

158 "Remember those eight nights in 1977 when virtually the entire nation sat transfixed by 'Roots'? Television has, for better or worse, made America look at itself." Id.


None of these trends of professional and private media coverage are unknown to persons, including judges, who are aware of modern social trends. In Powell the court took judicial notice of the news media coverage, even though some news items were not entered into evidence by the parties, for the purpose of evaluating "the likelihood pretrial publicity has prejudiced a defendant’s right to a fair trial in the county of original venue. . . ." The court avoided discussing the fact that the amount of publicity outside Los Angeles was so extensive as to saturate potential jurors throughout the state.

The Political Meaning of the National Publicity - The Politics of Race. The combined effect of the massive publicity of the beating and the ability of television to intrude on people’s consciousness to establish a national focus of attention, does not entirely undermine Powell’s reasoning. This combined effect does raise a threshold question about the impartiality of a jury outside Los Angeles compared to those within Los Angeles. In some cases the venue of a local political case, under the impartiality paradigm, should be changed. On the other hand, there are some cases, such as the Watergate trials and the trial of Sirhan Sirhan, where the case is invariably touched by political considerations and where interest is inherently national. In these cases, the place of the crime is fortuitous and a change of venue is useless (if it is useless, it can’t achieve fairness), at least where the jury pool in the county of venue is large enough to draw jurors who pass the test of practical impartiality on voir dire.

The political meaning of Powell was as weighty and as political outside Los Angeles as within the county. It is true that political actors within Los Angeles, including the mayor, the police chief, the appointed commission to investigate the police, and other elected officials were active and vocal and that this had an impact on potential jurors. However, as the California cases make clear, a "political factor" is not limited to the election of the contending attorneys in a prosecution, as was the case in Maine. The national political impact of the acquittals was evidenced by the alacrity with which presidential candidates responded to them and to the subsequent riots. President Bush’s first public comments sounded “wishy-washy” and left

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163 Sirhan Sirhan assassinated Robert Kennedy at the height of Kennedy’s 1968 presidential primary campaign.
164 United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976); People v. Sirhan, 497 P.2d 1121 (Cal. 1972) cert. denied, 410 U.S. 947 (1973). These issues raise fundamental questions of justice: should, for example, the victorious Allies after World War II have refrained from trying German leaders for war crimes and crimes against humanity because of the notoriety of the case, among other legal impediments? See ANNTUSA & JOHN TUSA, THE NUREMBERG TRIAL (1983); JUDITH SHKLAR, infra note 215.
165 Powell, 283 Cal. Rptr. at 786-87.
some advisors concerned that the President's words "almost made the rioting sound justified."\textsuperscript{166} This led to frantic meetings with speechwriters resulting in a "new statement [that] had a sharper edge, condemning 'the wanton destruction of property and the senseless death of several citizens,'" thus putting the President "on firmer (and familiar Republican) ground."\textsuperscript{167}

Meanwhile, Governor Clinton, the Democratic standardbearer, found in the riots an issue to break out of the "character issue"\textsuperscript{168} impasse and the occasion, after a few days of hesitancy, to "deliver a long, powerful speech in Birmingham, Alabama, attempting to harmonize law and order and social justice, toughness and compassion."\textsuperscript{169}

The political meaning of the riots transcended the amount of violence. From the beginning the Rodney King case was about race. The politics of race continues to be the great subtext of all specific domestic political issues in America, as it has been since the pre-Civil War sectional crisis. The Powell court could not exorcise race as a factor by shifting the venue. In retrospect the venue change made matters worse. The particular racial elements of the case, involving egregious and racially tinged, if not racially motivated, police brutality by white officers on a black man was the most explosive manifestation of race hostility in contemporary America. It touched deep and sensitive nerves not only in black communities but throughout America. Half forgotten in our era was almost a century of rampant police-condoned lynchings of blacks following emancipation,\textsuperscript{170} compounded by a toleration of police brutality to all lower class persons into the 1960s.\textsuperscript{171} Police brutality and routine harassment of blacks sparked the urban riots of the 1960s.\textsuperscript{172} It may be true that in the 1970s and 1980s "[a]rbitrary harassment and intimidation of blacks by legal authorities... [has] greatly diminished, although there are regular reports of such incidents."\textsuperscript{173} The reason for this lies primarily in the growth of urban


\textsuperscript{167}\textit{Id}.


\textsuperscript{169}\textit{Id}.

\textsuperscript{170}See Ralph Ginzberg, \textit{100 Years of Lynching} (1988); Howard Smead, \textit{Blood Justice} (1986); Walter Francis White, \textit{Rope and Faggot} (1929).


black political power and the ensuing increase in minority representation on police forces. 174 In the 1980s, there have been many well publicized racially related crimes and a growing belief in the existence of police brutality, which kept the sensitivity of inner-city blacks to police harassment alive. 175 The issue was most volatile in Miami where at least three serious riots erupted during the last decade in response to police killings of African-Americans. 176 Still, the growth of a sizeable black middle class and the resulting isolation of poor African-Americans has generated many grievances. A survey done in Los Angeles in the early 1970s, for example, noted that residents:

- demonstrated the existence in the black community of serious grievances about police brutality, merchant exploitation, agency discrimination, poor service agency performance, local white political officials, and biases in white-managed communications media. These varied in intensity but in each case sizeable minorities expressed them. Each of the conventional mechanisms provided by our society to redress such grievances—individual striving, normal administrative procedures, conventional politics, and nonviolent protest—appeared blocked to almost half the community. 177

The salience of such issues for selecting jurors and the venue of trials is that race consciousness pervades not only the black community but all American communities. This is especially problematic in criminal cases. Many, for example, believe the key to George Bush's election in 1988 was the barely veiled


175 See supra note 63; see, e.g., Binder & Fridell, Lethal Force as a Police Response, 16 CRIM. JUST. ABSTRACTS 250 (1984); Calm Prevails as House Panel Looks into NYC Brutality Charges, LAW ENFORCEMENT NEWS, Oct. 10, 1983, at 17.


There is often uncertainty in counting civil disturbances. Newspapers have referred to Miami experiencing three major riots in the last decade, Mike Clary, Police in Miami Brace for Violence, LOS ANGELES TIMES, June 29, 1991, at A16, and to experiencing its fifth riot in a decade, Jeanne DeQuine, 'Volatile' Miami a City Divided; Race Riot Revives Fears, Frustrations, USA TODAY, Dec. 5, 1990, at 3A.

177 See supra note 63; see, e.g., Binder & Fridell, Lethal Force as a Police Response, 16 CRIM. JUST. ABSTRACTS 250 (1984); Calm Prevails as House Panel Looks into NYC Brutality Charges, LAW ENFORCEMENT NEWS, Oct. 10, 1983, at 17.
use of race as a wedge issue in the notorious "Willie Horton" advertisement, which clearly played on white fears of black criminals.\textsuperscript{178} Given the virtual certainty that juries outside and within Los Angeles would not have the same racial composition, race would consequently matter very much in the verdict.

That race is an influential factor is not a matter of speculation. The most comprehensive scientific review of data on the issue of race, by the National Research Council of the National Academy of Sciences, concluded that in the area of racial attitudes "race still matters greatly in the United States."\textsuperscript{179} Although the attitudes of white Americans have changed substantially from 1940 to the 1980s to favor principles of equality, white attitudes are less favorable to implementation of egalitarian principles and exhibit considerable indicia of social distance.\textsuperscript{180} Black attitudes continue to display substantial distrust of white intentions and of predominantly white institutions. The reported findings indicate substantial differences between the races on a wide spectrum

\textsuperscript{178}See, e.g., George Bush and Willie Horton, N.Y. TIMES, Nov. 4, 1988, at A34, col. 1 (editorial); Mark Crispin Miller, Invisible Man; Alan Keyes' Campaign in Maryland, THE NATION, Nov. 21, 1988, at 517.

\textsuperscript{179}JAYNES & WILLIAMS, supra note 173, at 155 (1989). This massive volume summarizes hundreds of studies of substantive issues such as employment, health, political participation, education, crime and criminal justice, as well as attitudes concerning race. The work was conducted by a panel of distinguished academics and research associates.

\textsuperscript{180}This has been labeled the "new racism." Paul M. Sniderman, et al., The New Racism, 35 AM. J. POL. SCI. 423 (1991) [hereinafter New Racism]. In a survey of white respondents in the San Francisco-Oakland Bay area in 1986, using a combination of survey and experimental methods, the study found that conservatives are less likely than whites to favor government support for the disadvantaged, that conservatives are more likely to support assistance for "worthy" distressed blacks than "worthy" distressed whites, that both liberals and conservative favor governmental equal opportunity measures for women over blacks, and that low educational achievement is a salient predictor of anti-black assistance attitudes. This exploration of the "new racism" punctures the assumption that political conservatism is associated with racism, but also confirms both broadly held views that disfavor assistance to blacks by liberals and conservatives and suggests that there are socio-economic correlates among whites with lower classes being more hostile to black preferment.

Kluegel, Trends in Whites' Explanations of the Black-White Gap in Socioeconomic Status, 1977-1989, 55 AM. SOC. REV. 512 (1990) notes the paradox of whites favoring race equality but not supporting programs to promote this. Using national survey data, Kluegel found that between the late 1970s and the late 1980s, "an individualistic perception of the causes of the black-white socioeconomic gap remains prevalent," based on beliefs that blacks are inherently inferior and/or do not have the motivation to succeed (68.2% in 1977; 64.6% in 1988-89). \textit{Id.} at 523. A structural view of the gap included discrimination (19.9% in 1977, 21.0% in 1988-89) and the lack of educational opportunity (6.7% in 1977, 9.0% in 1988-89) and 5% found that none of these factors explained the gap. \textit{Id.} at 517. Respondents favoring individual explanations of the gap more strongly opposed government assistance to blacks than whites holding structural views. \textit{Id.} at 521. Kluegel thus offers support for the thesis that conservative economic views help explain the paradox of a belief in racial equality coexisting with lack of support for policies to ease inequalities that allow whites to maintain a "comfortable acceptance" of the black-white economic gap. \textit{Id.} at 523-24.
of issues.\textsuperscript{181} The recent past has also seen an increase in black militancy and protest demonstrations, often triggered by race motivated crimes that have been widely publicized.\textsuperscript{182} Despite some improvements,\textsuperscript{183} the long history of race discrimination in American criminal justice has left a deep reservoir of distrust, and significant differences in attitudes, between the races.\textsuperscript{184}

Because of the "new racism,"\textsuperscript{185} public opinion polls will not capture racist statements by whites in any significant percentage. But in behavior, white Americans continue to keep a clear social distance from blacks, and these measures may be far more important indicators of juror attitudes. Housing segregation, for example, continues to remain high in metropolitan areas. The Chicago area's index of black-white residential segregation went from 91 percent to 88 percent from 1960 to 1980; for Los Angeles, the index moved from 89 percent to 79 percent over that twenty year period.\textsuperscript{186} Segregation patterns are more severe for blacks than for other minority groups. The average black-white housing segregation index in the United States is 80%; for Hispanic and Asian-Americans "who entered many metropolitan areas in great numbers in the 1970s . . . segregation indices average about 45 points."\textsuperscript{187} When asked in the 1980s if they would allow their children to attend schools with blacks, 95 percent of white respondents would allow it where a few of the students are black, but only 37 percent would where most of the students are black. Eighty-six percent of white respondents in 1978 said they would not move from their residence if a black moved in next door; 46 percent said they would not move if great numbers of blacks moved into their neighborhood.\textsuperscript{188} These patterns reflect several concerns, including crime. Whites "hold three beliefs about the effect of racial change on neighborhoods:" (1) that stable neighborhoods are rare, i.e., that once African-Americans move into the neighborhood, it quickly turns black, (2) residential property values are lowered by the presence of blacks, and (3) "crime rates are higher in black neighborhoods than in white neighborhoods."\textsuperscript{189}

These are not local attitudes or minor issues in America today. These pervasive fears of black crime by white Americans may indeed be overlooked by jurists because of many external indices of real improvements in the conditions of many African-Americans. This perspective overlooks the

\textsuperscript{181}JAYNES & WILLIAMS, supra note 173, at 115-60.
\textsuperscript{182}Id. at 247.
\textsuperscript{183}Id. at 473-89; WILBANKS, supra note 176.
\textsuperscript{184}JAYNES & WILLIAMS, supra note 173, at 215.
\textsuperscript{185}See supra note 180.
\textsuperscript{186}Id. at 78.
\textsuperscript{187}Id. at 27.
\textsuperscript{188}Id. at 121-24.
\textsuperscript{189}Id. at 141.
growing economic rift not only in America at large between classes, but between middle class and disadvantaged blacks. Whatever the precise economic reality, attitudes concerning race and crime are real and if they are likely to emerge anywhere, they are likely to emerge in the trial of a serious crime where race is a central concern. Lawyers, when asked for quick comments on the case by newspaper reporters, were quick to state the truth of the matter: that race is a wild card that can be skillfully played in a trial such as that of Rodney King's assailants. It was only the California Court of Appeals, in Powell, that clung to the legal fiction that race need not be taken into account.

When California courts changed venue on the basis of political factors they had to speculate about the meaning that the political factor would have on the minds of the jurors. In Maine the court feared "that the campaign competition might inadvertently intrude during the course of a proceeding in which they are also trial adversaries." In Smith the court was concerned that local jurors would feel personally victimized by the official corruption on trial. And in Powell the court concluded:

While we recognize that the incident and some of its ramifications have received widespread publicity elsewhere, the impact on residents of Los Angeles is unquestionably much greater because of the unabated and acrimonious total involvement of city officials and local community leaders. There is no doubt that these political biases would invade the jury box if the case were tried in Los Angeles County.

At some level the speculation contained in the last sentence must be true, although it would take a very fine social psychological study to determine whether the political wrangling in Los Angeles had a greater potential impact on the minds of potential jurors than the scenes of the beating. In view of the far-reaching publicity, the tremendous impact of television on the public, and the salience of race in this case, it is necessary to speculate on the impact of the case to jurors outside Los Angeles. It is as plausible to guess that potential non-Los Angeles white jurors might approach the well-known case with a mixture of sadness and revulsion. While jurors who could pass the voir dire challenges would not be overtly biased, they would most probably harbor the "normal prejudices" of the day. Unlike their parents, fewer would believe that African-American are inherently inferior, and they would likely believe that lawful segregation was a blot on America's past. A clear majority would believe that every person could, if only they would, get ahead by their individual effort.

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190 See infra note 226 and accompanying text.
194 See Kluegel, supra note 180, at 517 (in 1988-89 this belief held by 28.3% of whites aged 51-61, but by 14.9% of whites aged 18-28).
They would probably feel comfortable knowing that they do not live in predominantly black neighborhoods, since they are likely to believe that such neighborhoods are more prone to crime. If they moved to a small town or to a suburb from a large city, they may have experienced such concerns directly, although their reasons for moving may have been generated by several factors. These jurors, with a "normal" set of beliefs and fears, typically would view police as their protectors not only from crime in general, but of crime perpetrated by the stereotypical criminal in the American mind - a young Black male. Rodney King was 25 years old at the time.

All this speculation goes to the point that was immediately intuited by many who thought about the case: that the arguments made so skillfully by the defense in the trial would be an easier "sell" to an all-white jury than a mixed jury. If this is correct, then the Powell court faced a dilemma. The jury would subtly lean in one direction in Los Angeles because of the local political furor, but lean in another direction outside Los Angeles, especially if the jury's racial composition was radically different. In such a case what should a court do? The Powell court chose to ignore the risks involved in moving the case to another venue and vicinage and to fasten on the political factor as a rationale.

The decision in Powell, although giving the appearance of being carefully crafted by reviewing several factors as the basis for its decision, was fundamentally flawed by its adherence to a stereotyped approach to the change of venue issue when circumstances called for a non-stereotypical response. The court asked whether the defendants could have received a trial by an impartial jury within Los Angeles when it should have asked whether the defendants could have received a trial by an impartial jury anywhere in the state. By not thinking what "impartial" meant in a situation like the Rodney King case and accepting the well-worn legal rubric, the court of appeals simply replaced the demographics, values, and prejudices of Los Angeles County by those of another place, which turned out to be Ventura, just over the county line.

A counter-argument is that jurors' social beliefs are not "political" factors and that only matters like the struggle between Mayor Bradley, Chief Gates, and the Los Angeles City Council, or election battles between trial participants are political factors. Thus, it may be possible, however facile, to argue that since there were no political issues which concerned potential jurors outside Los Angeles, that the political factors noted in Powell outweighed any other factor outside the county. But, as George Fletcher noted, "[t]he defense of Bernhard Goetz was strongly political in the sense that it rode a crest of popular enthusiasm for the symbolic significance of turning the tables on the youths who menace so many law-abiding citizens." We live in an era when the personal lives of political candidates have become "political" matters. Since candidates were first "sold" on television, matters of clothing style and personal

195 See sources cited supra note 6.

appearance, down to Richard Nixon's "five o'clock shadow" in his televised debates with John Kennedy in 1960, have become political matters. While classical definitions of politics concern power, in the last generation it has become accepted that "sociological" factors like public opinion and the distribution of wealth by class shape power-holding, and thus are central to the definition of politics. A broad but valid definition is that "[s]omething is called political if it is thought to relate in a particularly intensive way to the interests of the community."\(^{197}\) Making allowances for a normal range of thought, we are confident that most observers would agree that to potential jurors outside Los Angeles the Rodney King case, involving a notorious instance of excessive police force, involved the politics of race.

A final matter in this regard was a very real concern that the trial might spark violence within Los Angeles if the police officers were acquitted in the county. Indeed, *Powell* stated "that this court has received a document which can be construed only as a threat of community violence if the case is transferred to another venue,"\(^{198}\) noting that the document had been publicized in Los Angeles newspapers and television. The court cited *Lozano v. State*\(^{199}\) as support for moving venue. Despite *Powell*’s hyperbolic and near-hysterical reaction\(^{200}\) to what may at that time have been political posturing or excited talk, the point made in *Lozano* is serious. A juror in Los Angeles may have been so concerned about a riot following an acquittal that this factor would cause the juror to lean toward conviction.

There are several ways to look at this point. The riots that followed the Simi Valley acquittal can be seen as validating the court’s fear. However, a city on its guard, such as Miami, could have positioned its police forces to quell any incipient insurrection. Chief Gates was roundly criticized for having been at a speaking engagement on the evening of the day of the verdict and being out of touch with headquarters.\(^{201}\) In the immediate aftermath the vaunted Los Angeles police were in disarray.\(^{202}\) A second point is that an acquittal in Los

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\(^{197}\) *Otto Kirchheimer, Political Justice* 25 (1961).


\(^{200}\) If the mere possibility an order directing that trial be conducted outside Los Angeles County gives rise to such threats, we must draw the inevitable inference about the possibility of threats which could surface during the trial itself. Such unacceptable attempts to influence the judicial proceedings at this early stage add another impermissible factor into the boiling cauldron surrounding this case, making it imperative to take every step possible to ensure that an impartial unbiased jury be seated.

*Powell*, 283 Cal. Rptr. at 787.


Angeles by a panel that would likely have included black jurors, would not have furnished to African-Americans in Los Angeles the same justified anger as the acquittal by a suburban jury containing no African-Americans and drawn from a vicinage where it would be most unlikely to draw such a juror.203 Another point is that the court in Powell, like governments that negotiate with hostage taking terrorists, opened the judicial system to further threats of violence. From this perspective the better position would have been for the court to do what it believed was correct and to call on the government to supply the necessary protection.

These points still do not erase the disturbing possibility of the threat of violence affecting the mind of the Los Angeles juror in an action such as the Rodney King case. Indeed, a Simi Valley juror later expressed remorse for not considering the consequences that would follow the acquittal.204 This juror's oblivion to the possible fallout of an acquittal is apparently exactly what the Court of Appeals thought desirable in Powell. If, as the Supreme Court of the United States said in Irwin v. Dowd, "scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case,"205 then there is a troubling assumption at the heart of Powell. The court would seem to have preferred a totally blank jury on the false assumption that such a jury was impartial. If the case fit the change of venue stereotype of moving a case from a small town to a big city where nobody has heard of the crime, then the change of venue would be adequate under the impartiality paradigm. But, to bring together the three points of our analysis, where publicity is rife, the nature of the publicity intrusive into the minds of potential jurors everywhere, and the case inherently political, it is no longer possible to stand by the change of venue stereotype. For a Simi Valley juror, or a juror anywhere else in California, to have been oblivious to the potential violence following the case was as much a political factor as for a Los Angeles juror to have been sensitive to the issue. A critic of this view can argue that the Los Angeles juror was thinking about something other than the evidence while the outside juror was thinking only about the evidence. That was what the Simi Valley juror told the world. But in a "Rodney King case" we do not know what the juror really knows and surmises. It is as likely that a non-Los Angeles juror would think that once an acquittal was announced all hell would break loose in Los Angeles, and that the juror could accept this consequence with equa-

203 See infra notes 276-81 and accompanying text.

204 "I don't live where the rioting was, but I know what it's like in those neighborhoods.... My first reaction was, 'Oh my God, I've been part of something that is completely out of control.' You have to feel some sense of responsibility for it." Jana Mazanec, Juror: 'Sense of responsibility' for riots, USA TODAY, May 5, 1992, at 1A (emphasis added).

nimity, knowing that he would be protected by distance, and by police forces, from "those people." There are times when ignorance is no excuse.206

III. AN INTEREST ANALYSIS OF VENUE207

As shown above, the decision in Powell was inadequate. While the court gave microscopic scrutiny to the publicity and political impact of the case within Los Angeles, it gave no consideration to the impact of the intense media barrage on people outside Los Angeles.208 One reason for this is that defense counsel, for good tactical reasons, focused their attention only on events within Los Angeles, thus channelling and narrowing the attention of the trial and appellate courts.

Other reasons have to do with assumptions that judges bring to change of venue cases. Typical change of venue criminal cases involve local publicity and prejudice without substantial coverage in other parts of a state. But when this stereotype does not apply, a different perspective is required.209 The


207We have not found anything that can be understood as an interest analysis in the few studies of venue and vicinage studies in criminal law, outside of considerations of the search for an impartial jury. An interesting "interest analysis" in administrative law is Cass Sunstein, Participation, Public Law, and Venue Reform, 49 U. CHI. L. REV. 976 (1982), which discusses the relationship between the location of the forum, substantive outcomes, and the changing role of courts: "[A]judication is no longer conceived of as merely dispute-settlement, but has assumed a place alongside voting as a means of influencing government policy." Id. at 987. While this statement, reflecting the use of courts by interest groups, is too strong to apply "neat" to the criminal law, it points to the fact that jury service is an element of enfranchisement and empowerment and the criminal verdicts have political effects. See, e.g., the "Mormon cases:" Reynolds v. United States, 98 U.S. 145 (1879) (upholding juror challenge on grounds of polygamy); Miles v. United States, 103 U.S. 304 (1880) (prospective juror may be asked about beliefs regarding polygamy); Murphy v. Ramsey, 114 U.S. 15 (1884) (upholding disenfranchisement of polygamist). See Orma Linford, THE MORMONS AND THE LAW: POLYGAMY CASES, AND THE TERRITORY OF UTAH, 9 UTAH L. REV. 308, 543 (1964-65).

208The intense worldwide reaction to the post-verdict riots is understandable in light of the fact that the videotape of Rodney King's beating was repeatedly played on television throughout the United States and the rest of the world. Craig Whitney, World View - Europe is Aghast, Fearing Unrest There; Japan Takes High Moral Ground, N.Y. TIMES, May 3, 1992, at 18. As the NEW YORK TIMES remarked editorially upon the federal indictment of the four officers for violating Rodney King's civil rights, "A Federal courtroom is an appropriate forum to try this case; it scarred the nation as well." N.Y. TIMES, Aug. 7, 1992, at A14.

209See supra note 47 and accompanying text. It may be that the stereotypical response is reinforced by a lingering, even romantic, image of courts as autonomous and central institutions in rural settings. Even judges in multi-judge metropolitan courts may in their mind's eye dwell on imagery of courts operating in self-sufficient and partially isolated communities where news of local events does not travel instantaneously to the larger world. Whether this is or is not the case, a change of venue case like Powell displays a number of assumptions that may not fit the circumstances.
assumption that the community is a self-contained unit, sealed off from other isolated communities typically does not confront difficulties in rigorously defining "community." The question of what constitutes a community in venue cases is exacerbated by different ethnic compositions of areas and by vicinage rules designed for juror convenience, as is the case in California. Los Angeles, for example, is divided into eleven judicial districts with a courthouse in each and juries are drawn by computer to give preference to not having to travel more than 20 miles to a courthouse. Los Angeles jurors, then, typically represent not the county as a whole but the "community" in a 20 mile radius from the courthouse. Does the "Los Angeles community" mean a neighborhood such as South-Central Los Angeles within city limits, the City, the County, or the Los Angeles Standard Metropolitan area, including near suburbs like Simi Valley? The definition can clearly differ for different purposes.

Because attorneys challenging the county of original venue have polls conducted only in that place, the cases tend to assume there has been little or no publicity about the case in the removal venue. Even where this was patently not the case in Powell, the court virtually ignored the external effects of the publicity. But in light of the changing nature of the news media, this easy assumption is no longer possible. In the aftermath of the "Rodney King case" courts will have to become sensitive to the pervasive and intrusive impact of the news media, especially as its formats come more and more to resemble television entertainment programs.

Another assumption, critical to our interest analysis, is that a "perfectly impartial" jury can be found. We argue, to the contrary, that in a significant sense, there is no such a thing as a perfectly impartial jury, but only what we label a jury of "practical impartiality." We do not mean to suggest that most juries are grossly biased. Nor do we think that voir dire and judges' instructions have no effect on focusing the attention of jurors on the evidence and requiring of them a sober approach to their task. In this sense we believe that the law does achieve a level of practical impartiality that is ordinarily adequate for the practical necessity of trying cases. Nevertheless, juries inevitably reflect the

210 Community, in the context of a jury venue and vicinage, can refer to a county, a multi-county judicial district, a judicial district within a county or city. Depending on context, this expansive and elusive term can refer to a national or global "community." See Kershen, supra note 9, at 823.


211 LISA ALEXANDER, supra note 8, at 281.

212 See supra notes 145-61 and accompanying text.

213 But see infra note 282.
beliefs, values, common knowledge, and prejudices of their communities. In this sense, a level of perfect impartiality cannot be achieved. Ordinarily, the imperfections of the practical impartiality obtained by the voir dire can be safely overlooked. But recent events and developments are making it necessary for the legal world to pay closer attention to the risks of overlooking the implications of the impossibility of perfect impartiality. Accepting this understanding requires that when judges balance the costs and benefits of transferring venue, that they take a comparative approach of the county of venue and other places into account.

With this backdrop we consider a variety of interests that are potentially at stake in venue change cases. Not each of the following interests has the same standing in law or, indeed, in our eyes. Nevertheless, they exist in the minds of some litigants and lawyers. The first interest is the ideal of impartiality.

A. Impartiality

A change of venue interest analysis is possible only from a skeptical perspective about the existence of a perfectly impartial jury. This skepticism is borne of the findings of the social sciences, especially of social psychology, that perfect impartiality is not humanly possible. Past influences and life experiences necessarily shape the way in which all persons understand and react to the world around them. Even if a person is free of gross forms of bigotry abhorred and declining in contemporary America, such as stereotypical racial or ethnic prejudice, she will hold some opinions that are in part formed by group associations. The substantial growth of the practice of jury research...
and trial consulting is evidence that litigators and judges accept the basic social psychological understanding that a person's views, to some degree, are associated with her group identity.

The evidence of jury research, paradoxically, supports the position that in close cases juror characteristics must be taken into account because they will have some impact on the verdict (i.e., "perfect impartiality" does not exist) while reaffirming the position that the "practical impartiality" of a properly selected jury is allowable in most (but not all) cases. Jury research has been used since 1972 to assist litigators in selecting juries with predispositions favorable to their sides. Jury research uses a variety of social scientific methods to replace trial attorneys' proverbial hunches as the basis for exercising peremptory challenges on the grounds that systematic information and analysis are more likely to produce the desired result. Techniques include: pre-trial surveys of random jury-eligible samples of citizens in a jurisdiction, surveys of previously-serving jurors in the same court, asking prospective jurors to provide information about relevant attributes such as authoritarianism, trial story surveys, demographic surveys of prospective jurors, pre-trial focus groups, in-court expert rating of prospective jurors' non-verbal communications, shadow juries, and trial simulations. Summaries of research findings about jury research confirm our presuppositions about juries:

Several reviews of this research indicate that individual differences can affect juror decision-making. However, this research has failed to produce consistent relationships between demographics and verdict/punishment measures across studies. In addition, significant relationships between various attitudes held by individuals and verdict/punishment measures have not yielded entirely consistent results. The inability to isolate consistent demographic predictors...
across studies is not surprising in view of the different populations studied and variations in the type of cases considered. The inconsistencies observed in relationships between attitudes and verdict/punishment preferences, however, may reflect the more general problem of attitude-behavior discrepancies.

Of particular relevance here are the results of those few studies examining systematic jury selection. . . . The results indicated that both demographic and case specific attitudes were related to verdict preferences. However, neither demographic characteristics or case specific attitudes accounted for greater than eight or nine percent of the variance in verdict preferences. The best predictor of verdict preference was how the jurors rated the strength of the parties evidence, which in turn was influenced by the individual's case specific attitudes.219

Thus, juries decide cases primarily on the basis of the evidence, but personal attributes and attitudes play a measurable role. These findings support the conclusion that in most cases the jury's demographics can be overlooked for change of venue purposes. The finding that case evidence has the greatest influence on decisions supports the belief in juries' practical impartiality, despite the inevitable link between one's group associations and her opinions, beliefs, and values. In a rough and workable sense, then, a viable notion of the impartial jury required by law exists. The ancient practice of using several fact-deciders rather than a single judge is a powerful device to eliminate the subtle (or not so subtle) biases of a single individual from the decision.220 The deliberation requirement is vital to reducing reliance on overt individual prejudices. Other valued jury practices, including voir dire, the judge's instructions on the law and evidence, and the atmosphere of civic duty and solemnity that attend the trial, all work to reduce overt prejudice. But the need for these devices reminds us that jury selection, composition, and rules, like the antisepsis of the operating room, is a process where much care is expended to create an artificial environment of "hyper-fairness" to counteract the normal venting of attitudes that could infect the trial with unaccepted influences. Attitudes, values, mores, opinions, and prejudices cannot be totally eradicated from the minds of jurors, and may in their submerged form continue to be a factor in a trial.221

219Frederick, supra note 218, at 379-80 (references omitted). The case specific attitudes referred to by Frederick include not only attitudes regarding the specific criminal charges, but also include background personality measures such as authoritarianism. Accord, KAPLAN & MILLER, supra note 214.


221For a particularly illuminating example, see FLETCHER, supra note 196; see infra note 282.
The practical understanding of an impartial jury, then, must accept some introduction of community norms into the decision-making process, as is at times acknowledged by courts. But it is also acknowledged that in some circumstances community norms imply unacceptable prejudice. Hence the peremptory challenge cases. While no scientific test exists to differentiate a jury espousing community norms from one enacting local prejudices, judges must ever be alert to the distinction, at least in cases where gross and unacceptable prejudices make it unlikely that a jury of "practical impartiality" can be empaneled.

The judges in Powell, discounted the effect of widespread publicity on Manson grounds. But we have found their reliance on the political impact of the case in Los Angeles unconvincing, when offset by the political impact on potential jurors elsewhere. What the court failed to consider was that a case with such widespread and intense publicity was likely to have as much of an impact on juries in other California counties.

Thus, in a race-sensitive case the court must give some thought to the weight that race may play with the jury. The overtly expressed race bigotry that was noted as late as the 1950s is not likely to be heard in jury deliberations today. Still, if African- and European-Americans display significant differences in attitudes on racially tinged issues to the point that race consciousness can reasonably be expected to affect all potential jurors, how should courts handle such matters?

The best exploration of the meaning of America's complex and ambiguous stance on race in criminal trials is George Fletcher's study of the Bernhard Goetz trial. Goetz's attorneys skillfully played on fears of crime, intermingled with fears of black urban youths, in many ways. Yet, they never overtly mentioned the racial factor. They understood that the average person was not likely to consider himself a bigot, but was likely to harbor concerns with stereotypes of criminals. From the defense perspective, even a typically law abiding African-American juror, in a large city, was also prone to stereotypes of young black men as criminals. Given this ambiguity, the defense would have ruined its own case by making the latent understandings of race and crime explicit. In this regard, the Rodney King case was a mirror image of the Goetz case. The defense attorneys had to play on racial fears but had to do so subtly, by appealing to jurors' ability to see the white police-officer defendants as a line of protection against black crime and anarchy. Their task

223 See supra note 35.
224 See supra notes 41, 43, 164 and accompanying text.
226 See FLETCHER, supra note 196. Goetz was the notorious "subway vigilante" shooter of four black youths in a New York City subway car in 1984. He was acquitted of the most serious charges.
was immeasurably assisted by presenting their case to a jury with no
African-Americans in a venue where few minorities lived.

In conclusion, any court failing to give serious consideration to the inevitable
impact of race on jury deliberations, in a case of alleged white on black police
brutality, has failed to adequately exercise its discretion in a responsible
manner. It is disturbing that the Powell decision gave virtually no extended
discussion to the issue of race when it was clearly the most salient issue in the
venue change decision. No amount of sugar coating, avoidance, or mantra-like
invocation of the "if-you-move-it, the-jury-will-be-impartial" formula, can
remove the fact that racial composition will be an important factor in jury
selection and deliberations. Also, it will be important whether the jury is
selected from a racially mixed city, such as Los Angeles, or from a more
homogenous area, such as Simi Valley. The court of appeals tried to avoid the
implications of its decision, but the hard fact is that in this case the jury
would be inevitably slanted one way or the other. By acceding to the defendant's
motion, the court, instead of choosing an impartial jury, favored one jury's
biases over another's. Powell's implicit belief in the perfect impartiality of a jury
in a removed venue was therefore an inadequate basis for decision.

Still, raising the impartiality issue does not answer it. The question now
becomes, is there a principled basis for deciding a change of venue issue in a
case like Powell, where race is inevitably implicated in the facts of the case,
where race-consciousness about the case has been raised, and where publicity
is as widespread throughout the state for all practical purposes as in the county
of original venue?

B. Legal Liberalism and Conservatism

The awareness that perfect jury impartiality is impossible227 opens the way
to consider other interests. One set of interests is legal liberalism and
conservatism or, in Herbert Packer's familiar dichotomy, the due process and
crime control models of criminal justice.228 Liberalism, a standard intellectual
mainstay of criminal procedure law, views the Bill of Rights as a constitutional
barrier against the constant threat of government overreaching and misuse of
power by taking certain processes and values out of the reach of majoritarian
politics. While rights such as free speech are the necessary matrix for the
enjoyment of majoritarian politics, the criminal justice provisions of the Fourth,
Fifth, Sixth and Eighth Amendments prevent governments from sliding into

227 This conclusion was pointedly made by critics of the change of venue in Powell. See Adrianne Goodman, NAACP Official Criticizes Venue Change in King Case, Los Angeles Times, Dec. 5, 1991, at B3, col. 5.

destructive tyranny through the power to criminalize political opponents. From this perspective, constitutional process requirements should be interpreted to favor the individual criminal defendant against the government. The implication in venue cases is to prevent the state from imposing burdensome venues by statute and to favor defense requests for changes of venue. Doubts should be resolved in favor of the defendant.

The counter-argument to legal liberalism, legal conservatism or the crime control model, posits that without effective government the resulting anarchy and widespread criminality effectively curbs freedom in a direct way, leading to a social life that is impoverished and miserable along with a constricted political life. Packer carefully set the crime control model within the larger framework of constitutional government, fundamental fairness, and an independent judiciary. This model nevertheless stresses speed and finality. From this perspective the criminal process may be misused by defendants to undermine if not destroy the overriding end of the law to do justice and ascertain guilt and innocence. The hurdles erected by the due process paradigm can, if pushed to their limits, undermine the ability of the government to prosecute those deserving of punishment. At the most extreme, an exaggerated view or excessive application of rights causes the machinery of justice to break down. This in turn undermines the ability of government to protect citizens, spurring vigilantism and lawlessness that leads to tyranny as citizens grow impatient with lawfully constituted government. From this perspective, change of venue petitions can be viewed skeptically as delay tactics by defendants that if granted, except in the most egregious cases of jury bias or community intolerance, adds unnecessary burdens to already overworked courts.

A more balanced view evaluates change of venue motions evenhandedly. The body of criminal venue case law indeed balances the classic and inescapable liberal-conservative tension in a practical and nonideological manner. In cases where the prosecution chooses a venue unrelated to the place of the crime and puts defendants to inconvenience, especially in politically sensitive cases, the liberal aspect of the Sixth Amendment should invalidate such venue. Nevertheless, the liberal approach does not require a change of venue at every defendant’s demand. In most ordinary criminal cases the craft-oriented approach taken by intermediate appellate courts appears to deny

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229 See, e.g., HALL, supra note 64, 29-77; KIRCHHEIMER, supra note 197.


231 PACKER, supra note 228, at 154-59.

232 See supra note 12 and accompanying text.

233 "[W]e have clearly rejected the establishment of a presumption in favor of a venue change in all capital cases." People v. Hamilton, 774 P.2d 730, 739 (Cal. 1989).
most requests for change of venue where actual prejudice is not shown. Courts, of course, do grant venue changes where to do so measurably increase fairness by eliminating or decreasing the prejudicial effects of pre-trial publicity. This paradigm works well in ordinary cases but breaks down in notorious ones. Thus, the due process and crime control approaches cancel each other out as useful guideposts for making difficult decisions in change of venue cases. The vicinage requirement is not absolute and should give way to fairness issues but fairness has to be evaluated on a case by case basis. In a case like Powell the pro-defense bias of the Sixth Amendment does not necessarily carry the day. In this case an awareness of the real media impact and the way in which race and political considerations were as likely to affect California jurors outside Los Angeles as well as residents of the county, should have been seen to cancel out any constitutional favor to defendants.

C. Race Consciousness

Another interest that may arise in venue change cases is race-consciousness. Our premise is that in a race-sensitive case even jurors drawn from a fair cross-section of the community and subjected to voir dire (i.e., a "practically impartial" jury) cannot entirely avoid the subtle influence of the race factor. It is a baleful fact of American history that a large portion of the white population has been held in thrall to "Negrophobia" from the beginning. This has influenced criminal justice in many ways. The link between the Warren Court’s civil rights and criminal procedure agendas was not fortuitous, since many of the Court’s liberal criminal procedure cases counteracted oppressive tactics designed to politically repress African-Americans. Even the currently conservative Court acts with special sensitivity to issues of criminal procedure that directly implicate race, as in the jury selection and voir dire cases. Nevertheless, the politics of race is still a sensitive issue in an era characterized by more subtle forms of discrimination.

The interest of race-consciousness can apply to change of venue decision in different ways. One position is that where the defendant or the victim is a

234 See supra note 13.


239 See supra note 35.

240 See supra notes 170-89 and accompanying text.
member of a discernable and subjugated minority group, and a showing is substantiated that the defendant's or victim's race is reasonably likely to affect the jury, the venue decision should be most favorable to the minority person, whether the victim or defendant. Applying this approach, the minority party would not be able to dictate the venue, but could overtly advance race as an element to be weighed in the discretionary decision. In most cases, this factor would not change the decision. In an ordinary criminal case, where pre-trial publicity is localized, and defendants are minority group members in an all-white county, the court would likely order a change of venue on grounds of impartiality. On the other hand, in Powell such a factor would have required the court to consider the likely impacts of race on juries in Los Angeles and in any other part of the state. The court would have been constrained to leave venue in Los Angeles because the defendants were white police officers and the victim an African-American.

In defense of this position, to avoid the race issue only submerges a matter that is inevitably present, leaving courts open to charges of hypocrisy. This approach is also based on an understanding that in the past judicial power had been misused to support racism; despite the formal eradication of racism in courtrooms, a pervasive mistrust of the justice process lingers among many minority citizens. On a more psychologically subtle level, white judges and lawyers cannot operate with complete racial impartiality, and juries cannot be fully trusted to deal with racial conflict in a truly neutral manner. Sensitivity to these legitimate concerns should at least require courts to indicate an awareness of the issues.

A race-determined approach is raised for consideration because there are likely to be some who believe it is a proper consideration and because it is impossible to entirely eradicate considerations of race in cases such as Powell. Indeed, a strain of legal scholarship has recently suggested that in sensitive policy areas of public and private law, race-consciousness rather than race neutrality should be advanced as a positive value and consideration. In suggestive and wide ranging essays Donald Lively, Gary Peller, and Alexander Aleinikoff have argued that the dominant colorblind stance of the law, while partially set aside in affirmative action cases, is undermining hard won gains of previously disadvantaged minorities. Peller sees the current potency of colorblindness as a reaction to the Black nationalist challenge to the universalist assumptions of integration in the 1960s. While not supporting extreme separatism, Peller points out that universalism weakens the cultural

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identity not only of African-Americans but other Americans as well. Aleinikoff, who admits that race-consciousness is a difficult legal and constitutional argument to make, bases his position on the continuing crisis of inequality in all social and economic spheres of life, on the pervasive embeddedness of racial thought and action to the general detriment of blacks in American society, and on the strategic conclusion that for all the gains made in the past against discrimination by colorblindness, "it has now become an impediment in the struggle to end racial inequality." Aleinikoff asserts that a race-conscious policy has application in many areas of law; however, none involved criminal law, except for equality of representation on juries. But even in criminal law scholarship, indirect and overt arguments have been made in favor of affirmative action in sentencing. Finally, in the aftermath of the Simi Valley acquittals, several state legislatures are reported to have proposed laws guaranteeing "that racially tinged cases that must be moved at least go to sites with similar ethnic populations."

Despite the serious arguments for race-conscious policies in the law, this approach is clearly problematic here. To skew the venue decision in favor of one race or ethnic group as a matter of law obviously flies in the face of fundamental equal protection norms. In cases involving members of

245 "My attack on colorblindness is stated more in cognitive and cultural terms; and my defense of color-consciousness is made more in terms of political principle than constitutional argument." Id. at 1062.

246 Id.

247 He suggested: applications for radio and television licenses, local government policies of hiring minorities for social service positions where clients are predominantly minority group members, voting rules, school integration, police force integration, modifying curricula to include the works of minorities, giving a weight to race in hiring for higher education positions. Id. at 1065.

248 Charles J. Ogletree, Commentary: The Death of Discretion? Reflections on the Federal Sentencing Guidelines, 101 HARM. L. REV. 1938, 1958 (1988) (poverty, educational deprivation, family instability, prior unemployment, drug dependence and the like should be mitigating factors in sentencing; since these conditions fall disproportionately on minority group members, "treating such circumstances as mitigating factors, far from increasing racial disparities in sentencing, should tend to diminish them."

249 Bruce P. Archibald, Sentencing and Visible Minorities: Equality and Affirmative Action in the Criminal Justice System, 12 DALHOUISIAN J. 377 (1989). This explicit call for affirmative action in sentencing in favor of "visible minorities" (blacks and aborigines are mentioned) is weakened by a lack of clarity as to whether such a program would apply across-the-board or only to minor crimes for which community sentencing is appropriate. Archibald points out that such a proposal is less problematic under Canada's Constitutional Charter § 15(2) than under the Fourteenth Amendment Equal Protection Clause of the U.S. Constitution.

250 See Gest, supra note 216.

251 "The moral imperative of racial neutrality is the driving force of the Equal Protection Clause." City of Richmond v. J. A. Croson, 488 U.S. 469, 518, 734 (1989) (Kennedy, J. concurring), quoted in Aleinikoff, supra note 244, at 1077. "A normative principle of 'colorblindness' runs deep in the American civil rights narratives . . . . To
different minority groups, this approach gives no guidance and is likely to breed confusion and hostility. A race-conscious policy assumes that racism among individuals runs in only one direction, a view of reality that is questionable. Even if the politically charged assumption that only whites can be considered racist in an unequal society is believed, it is not conducive to selecting impartial jurors in voir dire, since the choice of a jury involves assessing the ways in which an array of ordinary citizens of all races think. It could, in some instances, offer to criminals who are minority group members a form of partial immunity from the normal process of law by suggesting that they select areas of non-minority residence for criminal activity in the hope of receiving a more favorable venue at trial.

A race-determined policy would tend to have negative effects on the courts and on popular concepts of justice. It would generally infect the voir dire and tend to destroy that level of practical impartiality that the law can achieve even if perfect impartiality is never attainable in human affairs. Such a position flies in the face of the Supreme Court's efforts to exclude the practical operation of race-determined decisions in lawyers' exercises of peremptory challenges. Such an approach would be met with hostility from the broad majority of citizens who believe in the formal importance of race neutrality in these kinds of decisions. Whatever position is held on the complex issues of affirmative action, in the realm of crime and retributive justice, it violates deeply held beliefs of strict individual responsibility and tends to upset efforts to exclude race from procedural or substantive decisions of criminal courts.

Thus, on the one hand, Powell's adherence to the legal fiction that removing the case from Los Angeles would produce an impartial jury is unsettling. The opinion hypocritically avoided any serious discussion of the central issue of race. The court attempted to exorcise race from the case by basing its decision on its cursory review of the standard "objective" factors and its conclusory treatment of the political factor. This was tragically wrong-headed. Its fiction of strict neutrality collapsed in obvious falsehood and bitter recriminations the moment the verdicts were pronounced.

On the other hand, to advocate a race-conscious standard as the test for change of venue may not be the answer. Perhaps it is possible for a court to attempt to be open about race in a race-sensitive case by noting the prominence of the factor and attempting to control jury biases by cautionary instructions. The danger is that the court may only heighten awareness of the gap between practical and perfect impartiality without offering a positive rationale for settling the venue question or effectively controlling subtle juror biases. It is not meant to underestimate the ability of courts, or other political actors, to

the extent colorblindness represents the goal of anti-discrimination law, race-consciousness measures must always be defended as temporary and transitional." Aleinikoff, supra note 244, at 1061.

252 See supra note 35.

253 See JAYNES & WILLIAMS, supra note 173.
adhere to fictions or insupportable formulations, when they believe that vital interests are at stake. It surely would be a difficult thing for a court to acknowledge the influence of racial factors, even if, this factor is prominent in the minds of all the trial actors and observers.

Thus, where race is a factor courts are caught in a dilemma of maintaining hypocritical silence on the one hand or opening a pandora's box on the other. Revived interest in localism may be the most appropriate, race-neutral and non-hypocritical way to resolve the change of venue issue in difficult cases, such as Powell. This final interest is discussed in the conclusion.

IV. CONCLUSION: THE INTEREST OF LOCALISM

Impartiality, the due process approach, and race-consciousness have been reviewed as possible guides to determining venue questions in difficult cases where publicity blankets an entire state or region and highly volatile issues rise to the fore. For differing reasons all have been rejected, although we maintained that in typical cases "practical impartiality" is the appropriate standard. In fastening on localism as the proper measure for the determination of the venue issue in Powell, it is necessary to go back to the nation's founding and review the scholarship that informs our understanding of the jury. Courts and legislatures are urged to think hard and well about what the jury means in states where the fates of criminal defendants are in the hands of ordinary citizens chosen by lot.

A. Localism and the Criminal Jury

The political and legal elements of the Sixth Amendment's jury provision—vicinage and impartiality—sit together in potential tension.\textsuperscript{254} To Heller the vicinage requirement was anachronistic long before 1789 because jurors no longer were witnesses.\textsuperscript{255} The political issues accompanying the separation from England led to the view, especially among anti-Federalists, that vicinage and venue were among those rights necessary to protect individual liberty against government tyranny. Ironically, Heller's vision was shaped by a very conservative Supreme Court willing in 1950 "to depart from the former rigid interpretation of the procedural guarantees. . . ."\textsuperscript{256} Since his writing the Court has swung to a liberal and back to a conservative stance in criminal procedure. It is worth considering that to extreme legalists the jury system is an inconvenience and an impediment to an efficient, technically proficient, and professionally dominated legal system. But the Sixth Amendment requires that the tensions inherent in it be resolved, not eradicated. The task facing the courts is to give meaning to vicinage and venue

\textsuperscript{254}"Vicinage, revitalized, as was suggested above, as [sic] a political argument of the Revolution, as a legal concept appears to be at cross purposes with the ideal of impartiality." Heller, supra note 9, at 95.

\textsuperscript{255}Id.

\textsuperscript{256}Id.
requirements that are workable while giving due respect to underlying values. For too long the value of localism was swept away as an anachronism. The courts sought only to find the most "impartial" venue. But where the search for impartiality becomes blind adherence to a legal fiction that produces more mischief than gain, a revived interest in the value of localism provides a satisfactory solution. This is not to propose an exaggerated "anti-Federalist" position of extreme localism, such as eliminating the court's change of venue discretion. Indeed, the Sixth Amendment itself does not take so extreme a step. 257

Powell fastened on the "political factor" as the rationale to change venue, in the belief that to do so would eliminate "politics" from the case. But Powell's exclusive focus on Los Angeles blinded it to the reality that by taking the case away from a Los Angeles jury, it necessarily subjected the case to the politics of whatever jurisdiction inherited it. The preferable approach would have been to acknowledge that the intense publicity and the extent to which it raised issues of race, crime, and police brutality, would likely have some impact on jurors whether the trial was held within or outside Los Angeles. Where widespread publicity makes it unlikely to find a "sanitary" venue, the court should stress the role of voir dire in finding a jury that meets the criterion of practical impartiality. In such a case, the process works as well in any court in the state. Indeed, the huge Los Angeles jury pool would have created a better opportunity to find a jury of practical impartiality. It is preferable in this kind of case to have the trial in the county of original venue. Trusting the people of the vicinage is an important strand of the value of localism.

Another more political aspect of localism recognizes that some cases should remain in the locality because local political issues are raised. The court-hegemonic approach to venue has tended to view jurors more as inconvenient appendages to the judicial process and less as citizens called on to decide cases from the perspective of community norms. But if the value of

257 Madison proposed a narrow vicinage as an amendment to Art. III using the term "vicinage." Madison Resolution of 8 June 1989, in HELEN E. VEIT, ET AL., CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 13 (1991). Senate opposition came from anti-Federalists who apparently wanted a narrower vicinage limited to the county of the crime and a larger group who wanted greater flexibility in ascertaining the vicinage. The wording of the Sixth Amendment ("which district shall have been previously ascertained by law") is evidence of a compromise that did not accord with anti-Federalist ideology. Id. at 296-97; Heller supra note 9, at 93.

We would also suggest that at the time of the Constitution's ratification, juries loomed larger in the calculation of political actors as a protection against tyrannous government than later. This was due in part to the active role of juries in seditionist libel cases in America and England. Stimson, supra note 27, at 51-59; THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800 318-55 (1985). In this light, a related cause for the decline in the jury's political station was the development of the two party system later in the 1790s, which began the process of making vocal opposition to the regime in power safer and legitimate, SEYMOUR LIPSET, THE FIRST NEW NATION 42-51 (1963).

In any event, the elimination of change of venue is not possible under Groppi v. Wisconsin, 400 U.S. 505 (1971).
vicinage means anything, it includes the right of people in the locality to decide hard questions of fact and, through the play of community norms, of law and policy. The court of appeals was too quick to move the case rather than to trust the good sense of the local jury and of the trial process to produce a fair and a correct result. The trial of the four police officers should have been conducted in Los Angeles, in the district where the crime was committed. After all, the nation's framers had the example of a local jury acquitting the British soldiers in the Boston Massacre case, at a time of political tension.

The strongest general argument for localism has been made by Drew Kershen. The Bill of Rights' ratifiers appreciated that a local jury, even if instructed on the law, would apply it with a local flavor, so that the effective rules of law might differ from one locale to another. This democratic and decentralized perspective allowed citizens to establish community standards. After more than a century of courts paring down the legitimate jury role in deciding or even shaping issues of law, does localism continue to have any value? Kershen emphatically believes so:

Because the verdict they will render will affect their own community, not another, the jurors of the vicinage will likely feel an obligation to articulate as accurately and conscientiously as possible the sense of justice of the community. Moreover, because the jury of the vicinage represents its own community, the community as a whole, and in particular cases the members of the jury who make up the jury of the vicinage, will realize they have only themselves to praise or blame for the sense of justice reflected in the verdicts of the juries of the vicinage. By contrast, using jurors from a community unrelated to the crime poses significant dangers that those jurors will not sufficiently feel the desired sense of obligation for the verdict rendered because the verdict will not affect their own community. At the same time, even if the jurors from a community unrelated to a crime do act as conscientiously as possible in reaching a verdict, the community where the crime was committed would be unable to feel responsible for the verdict. If the verdict reached by the jury from the community unrelated to the crime was a praiseworthy verdict, the community where the crime was committed could not claim the praise. If the verdict reached by the jury from the community unrelated to the crime was a condemnable verdict, the community where the crime was committed could avoid

258 Given that established rules in Los Angeles divided the city into eleven judicial districts, see supra note 211, it is entirely possible that a case like that of Rodney King would be tried wherever the auto chase ended, whether a wealthy enclave or a poverty-stricken area.


260 Kershen, supra note 9, at 833-40.

261 See supra notes 27-33 and accompanying text.
the blame. Under the tenets of democratic responsibility, a community ought to be permitted to take the praise, and conversely, ought not to be permitted to avoid the blame, for the standards required of the community as articulated in verdicts concerning crimes committed in that community. Today, as in 1789, a jury of the vicinage best preserves the jury as a democratic institution in the administration of justice.262

These words apply precisely to Powell. Ventura County was allowed, even forced, to make law for the governance of Los Angeles. Ventura County, speaking through its jury, told the police in Los Angeles, or at least told white officers, that it is not criminal for them to beat African-American suspects.263 In Kershen’s terms, the effect of the case was to saddle Ventura county with the opprobrium of a condemnable verdict and to strip Los Angeles county of an element of self-rule. Perhaps the court didn’t see it this way, but only saw county lines as administrative artifacts. People today, however, often are acutely aware of the county-community relationship, especially in metropolitan areas with high degrees of black-white residential segregation.264 The public certainly made a distinction between the jury in Simi Valley and one that could have been empaneled in Los Angeles in the comments following the acquittal.

The criticism of the court of appeals in this article is not meant to suggest that local political controversy can never be a reason for changing venue. Our argument is based on the idea that in cases of nationwide political impact, including the "Rodney King" case, a change of venue makes no sense. There were, as Powell demonstrated, high political concerns raised by the case, especially in Los Angeles. But it is argued that the court was too quick to move the case in advance of an attempt to empanel a jury, failed to take national publicity and political salience into account, and did not credit the value of localism in the venue decision.

The value of localism directs the court to keep the case in the jurisdiction of original venue whenever possible, especially when a case is of high local political concern. In the anti-polygamy cases, for example, Congress tried to gain ascendancy over the Mormons by eliminating polygamists and those favoring

262 Kershen, supra note 9, at 84-8.

263 Ventura County prides itself on what it is not. First and foremost, it is not Los Angeles . . . Collars are overwhelmingly white—as is the population . . . The 1980 census counted 2,000 active law enforcement officers in Simi Valley and neighboring Thousand Oaks. "I would much rather try a brutality case in Ventura than in L.A. with an L.A. jury," said attorney Alan Wisotsky, a former Los Angeles police officer who now defends police officers in so-called "excessive-force" cases. 'Here, police go into the trial with the advantage of being viewed as trustworthy, and it's up to the adversary to prove otherwise.' Betsy Streisand, A Nice, Safe Place to Live, U.S. NEWS & WORLD REPORT, Feb. 10, 1992, at 18.

264 See supra note 186 and accompanying text.
polygamy from the jury. 265 Consider the questionable possibility of the United States government having attempted to move those cases to Washington, D.C. for trial. 266 To have done so would have been overt political manipulation of the jury in order to obtain a verdict desired by the government, in imitation of British action before the Revolution. It seems to us that under the guise of perfect impartiality, the Powell court subliminally achieved a political result while convincing itself that it acted under a domain of pure legality. In the examples of the British pre-Revolutionary trials and in the Mormon cases, political results were achieved directly and with the intended effect in sight. In Powell a political effect, perhaps not the one intended by the court, was nevertheless achieved, as moving the case from Los Angeles was likely to produce a differently conditioned jury. While the Powell court does not deserve opprobrium for this, its opinion should not be beyond evaluation for its possible effects. At the very least, then, the locality should be given the opportunity to seat a jury before the conclusion is drawn that a jury with practical impartiality cannot be found. 267

Significantly, since Irvin, Rideau, and Sheppard, 268 trial courts have taken effective steps to control pre-trial publicity by never again allowing the "circus like" atmosphere of those cases. The courts have thus attempted indirectly to influence the press to behave responsibly. There was a limit to a court's ability to control publicity, and these limits were recognized in these cases. The Supreme Court's publicity cases directed American trial courts to control those elements of publicity that were within a court's ability to control. The cases did not intend the suppression of all publicity nor did they rule that extensive publicity alone required the dismissal of prosecutions. 269

265 See supra note 207.

266 Compare the British practice before the Revolutionary War, supra note 9.

267 This proposal does not conflict with the California practice of allowing pretrial review of the venue issue. See Powell v. Superior Court, 283 Cal. Rptr. 777, 781-82 (Cal. Ct. App. 1991). It would add some burden on attorneys to take pretrial appeals for change of venue at the point where empaneling a jury fails. This is a price worth paying to insure that the locality receives an opportunity to empanel a jury of practical impartiality. Id.


268 See supra notes 15-23 and accompanying text.

269 This is the interpretation put on these cases in the Watergate appeal. United States v. Haldeman, 559 F.2d 31, 60-1 (D.C. Cir. 1976). Thus, it was noted that the televised confession in Rideau was staged by the police, that the decision in Irvin was not based only on the extent of pretrial publicity but on an evaluation of the voir dire testimony that showed that community prejudice had in fact "invaded the jury box," and that the trial court in Sheppard failed to insulate the jury from the effects of publicity during the trial.
By analogy, the Powell court may have reacted to a feared loss of control. The situation in Los Angeles after Rodney King's beating came to light included heated political rhetoric and threats of violence if the case was transferred. The Powell court, operating under the juristic ideal of Maine, that "political factors have no place in a criminal proceeding, and when they are likely to appear, as here, they constitute an independent reason for a venue change," may have felt compelled to change venue or be held responsible for allowing the situation to get out of hand, as it had in the trio of federal cases. A court operating in the context of hegemonic control assumed by the venue cases simply could not tolerate the threat to legal quietus by anything as messy as local political passions. This is implied in the court's conclusion:

While we recognize that the incident and some of its ramifications have received widespread publicity elsewhere, the impact on residents of Los Angeles is unquestionably much greater because of the unabated and acrimonious total involvement of city officials and local community leaders. There is no doubt that these political biases would invade the jury box if the case were tried in Los Angeles County.

Accordingly, Powell heroically and futilely attempted to keep "politics" out of the trial, by controlling that which was beyond the court's ability to control. It was as impossible in Powell to keep politics out as it was in the Watergate or Robert Kennedy assassination cases. The court failed to recognize limits inherent in the Maine rule, which if taken to its logical conclusion, would immunize defendants in cases as politically charged as Powell.

B. The Implications of Localism

A complete analysis of criminal venue requires a recognition and analysis of competing interests. There are times, and the Powell case was one, where the standard formula of practical impartiality does not fit and consideration must be given to other values. By adhering to a constricted standard when circumstances called for more, the court of appeals applied California's venue rules while wearing blinders. It stressed the professional concern for impartiality to the total exclusion of the "political" element of vicinage interests. Indeed, citing Maine it fled in horror from any taint of political considerations in making a ruling.

The irony is apparent. In Powell, a case dripping with politics, the attempt to flee from its political impact on the minds of potential Los Angeles jurors only moved the case to a place where a different set of political considerations are more likely to appear, as here, they constitute an independent reason for a venue change." Maine, 438 P.2d at 380.
influenced jurors. As discussed above, in this case the notion of impartiality ceased to have the meaning conventionally assigned to it by change of venue law. The stereotypical venue change situation did not exist in Powell, and the court’s error was to apply a rule to an inapt situation.

It would be ideal to offer an econometric formula that gave courts in every instance the right answer to vexing problems of venue. This, of course, is a "will-o’-the-wisp," and commentators who view the totality of judging exclusively in terms of craft are of no help in the real world of passion and politics that at times intrude in the courtroom.274 Judges, as Edward Levi noted, are rulers275 and must at times be called on to act with statesmanlike perceptiveness and courage. It would no doubt have taken an act of courage for the court to let venue lie in Los Angeles. The impartiality argument would have been tossed about in the news media and, were the officers convicted, would surely have been a basis for appeal.

Yet it seems, even without the benefit of hindsight of the acquittals’ appalling aftermath, that the decision in Powell was unwise from a "calculating" perspective. Assume, arguendo, that the court of appeals panel took a Machiavellian approach and asked what the consequences of their decision would be.276 There are four possibilities represented in the following table.

<table>
<thead>
<tr>
<th>VENUE</th>
<th>Los Angeles</th>
<th>Not Los Angeles</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acquit</td>
<td>No justification for riot</td>
<td>Riots (Powell case)</td>
</tr>
<tr>
<td></td>
<td>LA: Upset, confused</td>
<td>LA: Outrage</td>
</tr>
<tr>
<td></td>
<td>OUT: Confused, congratulatory</td>
<td>OUT: Confused, angry</td>
</tr>
<tr>
<td>VERDICT</td>
<td>No riot</td>
<td>No riot</td>
</tr>
<tr>
<td></td>
<td>LA: Justice</td>
<td>LA: Justice, congratulatory</td>
</tr>
<tr>
<td>Convict</td>
<td>OUT: Justice, some <em>political</em> doubts</td>
<td>OUT: Justice, congratulatory</td>
</tr>
</tbody>
</table>


276The court addressed the prudential concern of possible violence in the aftermath of an acquittal; see supra notes 198-200 and accompanying text.
Angeles might have been and the third line (OUT) guesses at the possible opinion of whites holding average opinions\(^{277}\) outside of Los Angeles.

In cell #1 (acquittal in Los Angeles), any actual or threatened riot would have been tempered by the knowledge that there was less justification to do so, as the jury would have included blacks and would have been seen to be a jury of peers of the affected community. While riots may have occurred, the political meaning attached to them would be different. It would have been more difficult if not impossible for political leaders to shift the blame for the riots to white America and use the events as a lever for policy advantage. Given the impact of the tapes on virtually every television watcher, an acquittal would have produced some confusion in white America, which, given the universal editorial condemnation of the L.A.P.D.,\(^{278}\) expected a guilty verdict. But a sizeable portion of public opinion would likely have applauded the remarkable fairness of the L.A. jury to set aside any latent prejudices and evaluate the case on its merits. As in the Simi Valley case (cell #2, acquittal outside Los Angeles), opinion may also have noted the excellent reputation of defense counsel and the weak record of Ira Reiner, the elected District Attorney.\(^{279}\) If the same trial prosecutor were used, some of the blame for an "incorrect" verdict may have fallen on his inexperience and errors in handling the case.\(^{280}\)

Cell #2 is our assessment of black and white opinion following the riots. It seems naive of the court of appeals to have believed that removing the case would preclude riots in this era of instantaneous mass media, even were the case not held closer to the site of Rodney King's beating than the central Los Angeles courthouse.\(^{281}\) The court nevertheless based its opinion on the legal fiction of perfect impartiality.

In cells #3 and #4 (conviction in and outside of Los Angeles, respectively) no riots could be anticipated. Blacks in Los Angeles would have concluded that convictions were justified and would have congratulated a jury outside Los Angeles for not succumbing to racism. Likewise, white America would have recognized the justice of a Los Angeles conviction, mixed perhaps with some questions as to whether the Los Angeles jury acted purely on the basis of the facts and law or was influenced in part by "political" considerations.

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\(^{277}\)See supra notes 173-89 and accompanying text.

\(^{278}\)See supra notes 123-25.

\(^{279}\)Loss Likely to Affect Election, LOS ANGELES DAILY JOURNAL, April 30, 1992, at 1, col. 6. (L.A. District Attorney's office had "suffered a string of bitter defeats in high publicity criminal cases."). Matt Lait, 2 'Formidable' Lawyers Take Officer's Case in King Beating, LOS ANGELES TIMES, February 9, 1992, at B1, col. 5.


\(^{281}\)Petitioner's Brief at 4, Petition for Writ of Prohibition or in the Alternative Writ of Mandate; Request for Stay of Trial at 4, Powell v. Superior Court of California, County of Los Angeles, (LASC BÁ 035498) (Powell II).
This is what the jury is supposed to do: balance the judge’s instructions on the law and the facts presented during trial with their own understanding of community values. A Washington, D.C. lawyer serving on a criminal jury some months after the Los Angeles beating case noted the impossibility of keeping community values out of an ordinary prosecution. Three elements enter into the jury equation: facts, law, and community values. If the last element is deemed totally illegitimate by courts which act to exclude community values entirely, as the court of appeals did in Powell, then the argument for the continuation of the criminal jury is weakened. Certainly, a better verdict-spewing computer than the jury can be found.

A fear of the intrusion of community values into the judging process has always been that the "wrong" values would intrude. The argument for considering localism means that a notorious case of a black motorist beaten by white police in a white suburban enclave, like Ventura County, would indeed be tried by a "Simi Valley jury" if a jury of practical impartiality can be empaneled. A white suburban motorist beaten by black police officers in Atlanta would be tried by an Atlanta jury. An Asian motorist from Lowell, Massachusetts beaten by Latino police officers in Miami, Florida would be tried by a Miami jury. The position is that barring the proven impossibility of securing a jury of practical impartiality upon voir dire, this solution, that allows a level of community consciousness into the jury’s decision, is a preferable solution to the venue issue than other formulae.

A concept that arose in Powell, the implementation of which was attempted in Lozano, was to move the trial to a venue that matched the racial makeup of the county of original venue. In the aftermath of Powell state legislatures have proposed instituting this "solution" by statute. Courts have also recently begun to consider moving notorious cases from the county of original venue to another city in the state with a similar ethnic makeup. The bizarre fate of

282 What soon became apparent was that much of the law went out the window . . . One woman expressed concerns about Martin with a gun on the streets and her daughter needing to live in a safe community . . . .

There seemed to be a direct correlation between a juror’s personal experience with the police and the weight he or she gave to the testimony of the law enforcement officials. The jurors who had only pleasant encounters with the police assumed that the testimony of the policemen was the absolute truth and should be given more weight than witnesses for the defense. Those who had been wrongly accused by the police of criminal conduct or who empathized with the plight of Rodney King in Los Angeles questioned the credibility of the police’s testimony.

Our discussions at times veered off into larger societal issues. One juror stated that we need to get “these people” off the streets. Another said she felt that because the police had such a difficult job they could not be expected to follow every technical legal procedure.


Florida's *Lozano* case, which has become an embarrassing legal-political football, is an indication of how the application of stereotypical change of venue rules in unusual cases can lead to absurd results.\(^{284}\) The reported

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\(^{284}\) In January, 1989, William Lozano, a Colombian born Miami police officer shot and killed a black motorcyclist in the Overtown ghetto of Miami on the eve of Martin Luther King, Jr. holiday. Riots erupted. Lozano was convicted of manslaughter in December, 1989. In June, 1991, the conviction was overturned on the ground that the defendant's change of venue motion should have been considered. *Lozano v. State*, 584 So. 2d 19, 23 (Fla. Dist. App. 1991). The Florida Court of Appeals issued a vague order on remand: although we find that the circumstances at the time of trial were such that the trial court erred in not granting a change of venue at that point, we do not mandate a transfer of venue after remand. Instead, that question will be resolved below, after hearing, on the basis of the conditions existing at the time of any such motion.

*Id.*

An unseemly spectacle arose. "It is a trial that no city in Florida wants to hold, a political football that has already bounced from Miami to Orlando to Tallahassee, back to Orlando, and that's not the end of it." Larry Rohter, *Retrial of Miami Policeman Could Test Judiciary on Race*, N.Y. TIMES, Aug. 15, 1992, at 1. After a prosecution appeal failed, Circuit Judge Thomas Spencer ruled that the trial must be moved out of Miami because of pretrial publicity but did not indicate where it would be held. *Judge Moves Lozano Trial Out of Miami*, UPI, Apr. 2, 1992, available in LEXIS, Nexis Library, UPI File. The case was then shifted to Orlando under orders of an appeals judge. The percentage of blacks in Orlando was 10.1 percent. In May, 1992, after the Los Angeles riots, Judge Spencer, apparently on his own motion with no input from counsel, took the unusual step of shifting the venue to Tallahassee, where the African-American proportion of the population approximates Miami's of 20%. This in turn, brought criticism from Lozano's lawyer who argued that less than three percent of the Tallahassee population is Hispanic.

Early in August, Circuit Judge William Gary of Tallahassee moved the case back to Orlando on the ground that due process was violated when proper legal process was not followed by Judge Spencer. Lozano's attorney called for the case to be returned to Miami. Mike Clary, *A Case No One Wants Is Still Shopping For A Courtroom*, LOS ANGELES TIMES, Aug. 1, 1992, at A23. This was followed by a cryptic order by Judge Spencer moving the case back to Tallahassee, at first giving no reason, thereby giving the State the opportunity to appeal. Larry Rohter, *Move Advised in Retrial of Ex-Miami Officer*, N.Y. TIMES, Aug. 18, 1992, A9.

Following these gyrations the Florida Supreme Court, in November 1992, on a mandamus petition by the State, ruled that Judge Spenser was the original trial judge and that Judge Gary, the successor judge "had only limited authority to issue orders inconsistent with his predecessor's rulings." *State v. Gary*, 609 So.2d 1291, 1293 (Fla. 1992). Once venue is transferred, barring extraordinary circumstances, it is subject only to appellate review. But this ruling seems to be geared largely to an attempt to preserve the appearance of justice. "The interests of justice require a rule designed to inhibit trial courts from engaging in a 'ping-pong game' by transferring a case back and forth, thereby jeopardizing the rights of parties and undermining public confidence in the judicial function." *Gary*, 609 So.2d at 1294. Thus, the Florida Supreme Court did not have a principled view of venue law uppermost in its mind in making this ruling. But the venue "ping-pong game" did not end with the Supreme Court's transfer of the case back to Tallahassee.

On the eve of the voir dire in Tallahassee in March, 1993, the prosecution petitioned the court of appeals for a writ of certiorari to review the venue transfer. The appellate court stretched its normal procedures to grant the writ, characterizing the *Lozano* case as unique, and thus transferring the case back to Orlando. *State v. Lozano*, 616 So.2d 73,
accounts of Lozano's search for a venue have clearly damaged the repute of Florida's judicial system as the political nature of the case's odyssey was exposed. In this situation, the courts must establish a principled basis for decisions, and this has been found wanting when stereotypical change of venue rules are applied to unusual circumstances. The legal contortions that go into finding a comparable venue miss the constitutional point about trials in sensitive and notorious cases. The Constitution does not require courts to engage in exercises of applied sociology to match the demographics of the county of original venue with another location. Decisions concerning venue and vicinage are fundamentally political: as long as there are states and counties in the United States the fundamental meaning of the jury system is

75 (Fla Dist. Ct. App. 1993). The court of appeals noted that both the prosecutor and the defense believed that the transfer of venue to Tallahassee violated Lozano's rights. The prosecution was sure that a conviction of Lozano in that city would bring another appeal on change of venue grounds. Judge Spencer's Order of May 6, 1992, moving the case to Tallahassee, which was appended to the court of appeal's opinion, took into consideration only the victim's race and not that of the defendant. The move to Tallahassee "virtually guaranteed the absence of Hispanic jurors," Lozano, 616 So. 2d at 76, constituting, in the court's opinion, a clear violation of Batson v. Kentucky, 476 U.S. 79, 86 (1986): "Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure."

As a result of this ruling the case was transferred back to Orlando, the fifth move in a year, and a mixed jury of two Hispanic members, three whites and one black, four women and two men, was empaneled. Larry Rohter, Mixed Jury Picked to Try Policeman, N.Y. Times, May 15, 1993, § 1, at 6. Lozano was acquitted. The acquittal may have been the result of several different factors. Roy Black, Lozano's celebrated attorney switched trial strategy. Instead of presenting a defense, he based his strategy on showing that the prosecution failed to prove its case. While it is true that the racial composition of the jury was mixed, as was the case in the Miami jury that originally convicted Lozano in 1989, Orlando had a "reputation as a bastion of law-and-order sentiment, a city whose residents regard Miami and surrounding Dade County as a violent and alien place." Larry Rohter, Miami Police Officer Is Acquitted In Racially Charged Slaying Case, N.Y. Times, May 29, 1993, § 1, at 1.

The Lozano "saga" supports our view that a jury that earnestly discharges its responsibility to review the facts of the case will nevertheless inevitably bring community sentiment into the jury room. It demonstrates the futility of trying to find a city that "matches" the racial makeup of the original venue, even if one were to accept the controversial thesis behind Judge Spencer's order that "minority groups need to be represented on the jury in proportion to their presence in the population." Larry Rohter, Lozano Case Tests How Racially Balanced a Jury Must Be, N.Y. Times, May 16, 1993, § 4, at 3.

"D. Marvin Jones, a professor of law at the University of Miami, agrees the Lozano case has been compromised by politics." Clary, supra note 284 at A23, col. 1. Also, while attorneys take the rhetorical high road on this issue, their actions can be expected to protect their clients' interests. Lozano's attorney, for example, argued for the case to be moved to Orlando because of publicity in Miami, but was against moving the case to Tallahassee. Orange County (Orlando) was the venue where Lozano's police partner was acquitted of perjury in relation to the case, and was described by a Florida sociologist as "the most reactionary, most pro-police county in the State of Florida."" Rohter, supra note 284.
political in a constitutional sense. The framers' intents, both in the federal and in state constitutions, was to leave a residue of local political control in the hands of local citizens. Local control can and should be overridden in cases where local prejudice clearly undermines a fair trial and feasible alternatives to a prejudiced jury panel exist. But in a case like Powell a constitutional choice must be made and the only constitutionally correct decision would be to leave venue in the county of original jurisdiction. In the Powell situation we have argued that the court should have relied on Manson to arrive at this decision. If, however, the decision is seen as legally determined by the strictures of the California Penal Code,\textsuperscript{286} then we recommend that California model its statute on open-ended venue provisions in other states.\textsuperscript{287} A law that enjoins courts to seek a "comparable" jurisdiction is likely to raise far more problems than it solves. Such a law would emphasize the value of race-consciousness, with all the problems that are created in criminal law by relying on that value.

To argue that such calculations have no place in a judicial decision is to be blind to the myriad ways in which courts mix considerations of principle and prudence in their decisions. Drew Kershen's statement about a community taking credit or reaping blame for praiseworthy or condemnable verdicts, so seemingly abstract, has come home to roost in the Rodney King case. The verdict in Simi Valley has added real tension to the malignant state of race relations in America by substituting the judgment of an outside community for the one saddled with its consequences. Los Angeles residents should have been allowed to have a hand in deciding a case that would mark its place in national esteem and affect the temper of its race relations. Deciding when a notorious case should remain in the county of original venue will surely require the exercise of finely honed political as well as legal insight on the part of judges. It seems to us that courts are well suited to take into account matters of political structure and atmosphere, as factual issues, in making such venue decisions. The underlying problem with Powell was its view of the jury as a chaste instrument of "blind justice" and as the court's appendage. The legal community must begin to treat the criminal jury with greater respect as a political institution. To do so, the jury as a fact-finding device must be balanced against a valid concept of the jury as a political manifestation of the local community. The lip-service given by courts to the jury as the conscience of the community must be transformed into renewed deference to this vital institution of democracy. And that can best be done by leaving venue where our constitutional scheme assumes it will be in difficult cases, in the county of original venue.

\textsuperscript{286}See supra notes 39-41 and accompanying text.

\textsuperscript{287}See supra note 39. A statute that avoids the traditional verbiage of determining if prejudice in the county of original venue would prevent a fair trial in effect directs judges to engage in a comparative analysis of publicity and other factors in the county of original venue and in other jurisdictions throughout the state.