

THE PUBLIC'S VICINAGE RIGHT: A CONSTITUTIONAL ARGUMENT

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Again and again in notorious criminal trials, courts neglect significant public interests by transferring the trial out of the community in which the crime was committed. The acquittal of the officers who shot Amidou Diallo reflects but the latest of a number of high-profile verdicts in which the change of venue undermined the verdict's legitimacy, particularly within the community victimized by the crime. American law always has presumed that jurors must be drawn from within the victimized community in order to permit the jury to fulfill its representative and adjudicative functions. Local jurors stamp the community's judgment on the verdict, permit the trial to serve as an outlet for community concern, and interpret ambiguous statutory terms in light of the common sense of the community. These essential jury functions were understood by the Founders, yet they wholly are absent from the prevailing law governing change of venue motions. In this Article, Steven Engel argues that the public enjoys a constitutional right to adjudicate criminal trials locally. He first examines a series of cases in the 1980s where the Supreme Court recognized that the public enjoys a right of access to criminal proceedings premised on the tradition of public access, the public interest in publicity, and the link between the right and established constitutional values. He then suggests that the public's "vicinage right" grows from the same soil as does the public's right of access, has long-standing roots in our legal tradition, continues to serve important public policies, and is implicit in other constitutional doctrines protecting the jury right. Engel concludes that recognizing such a public right would encourage courts to explore alternatives to transfers that would preserve the defendant's right to an impartial jury without damaging the community interests implicit in the trial by jury.

INTRODUCTION

Something went wrong when an Albany jury acquitted four officers who fired forty-one bullets at an unarmed man in the Bronx. The problem lay not in the verdict itself—mistaken and panicked police officers, even horribly mistaken ones, may not be criminals. Nor did the Albany jury appear particularly biased in favor of the defendants, as a similar Simi Valley jury might have been several years

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before in the Rodney King trial.¹ The problem was that twelve people from Albany spoke a verdict that was not theirs to give,² and not surprisingly, the people of the Bronx refused to accept the legitimacy of a foreign verdict. The move 100 miles up the Hudson River had taken the trial out of the hands of the only jury that properly could have sat in judgment of the tragic events that claimed the life of Amidou Diallo.

Again and again in notorious crimes throughout the country, criminal defendants move to change the trial venue on the ground that they cannot obtain a fair hearing before the community in which the crime was committed.³ The Constitution guarantees criminal defendants the right to be tried by a jury that is both impartial and drawn from the vicinity of the crime.⁴ Yet, the publicity surrounding a criminal investigation may bring these rights into conflict by filling the minds of potential jurors with prejudicial and inaccurate information in advance of the trial. Under such circumstances, criminal defendants routinely waive their right to a local trial and request a transfer to a location less tainted by pretrial publicity.

The Diallo verdict unavoidably recalls the Rodney King trial, where a California court ordered that the officers who beat King, a

¹ See Joseph Kelner & Robert S. Kelner, *The Rodney King Verdict and Voir Dire*, N.Y. L.J., May 26, 1992, at 3 (quoting one juror in trial of officers who attacked Rodney King as saying King "deserved what he got"); Robert Reinhold, *After Police-Beating Verdict, Another Trial for the Jurors*, N.Y. Times, May 9, 1992, at A1 (describing one King juror as saying "she would not have voted guilty under any circumstances"); see also Steven Lowery, Note, *Changing the California Venue Law After Rodney King*, 23 Sw. U. L. Rev. 361, 364-65 (1994) (describing possible bias of King jury). By contrast, the mixed-race Diallo jury did not appear to be biased. See Somini Sengupta, *2 Jurors Defend Diallo Acquittal*, N.Y. Times, Feb. 27, 2000, § 1, at 1 (conveying jurors' emphasis during deliberation on prosecution's failings); Tracey Tully & Maki Becker, *Jury: Race Not a Factor*, Daily News (N.Y.), Feb. 27, 2000, at 3 (quoting jurors as saying that race was not factor in Diallo shooting).

² See *People v. Boss*, 701 N.Y.S.2d 342 (App. Div. 1999) (ordering transfer of Diallo trial from Bronx to Albany).

³ A preliminary note on terminology is in order. "Venue" refers to the place where the trial is held. "Vicinage" refers to the community from which the jurors are drawn. Although the concepts of venue and vicinage are technically distinct, they have been closely linked for most of the history of the jury system. See Charles Alan Wright et al., *Federal Practice and Procedure: Criminal Procedure* § 301 (2d ed. 1982) (noting that technical distinction "has been of no importance"). Since jurors are typically drawn from the community in which the trial is held, vicinage traditionally has followed venue, and early jurisdictional notions united the two. The history and functional importance of these concepts will be developed at greater length in Part III.

⁴ The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." U.S. Const. amend. VI.

black motorist in Los Angeles, be tried in Simi Valley,⁵ where the residents—and therefore the jury pool—are predominantly white. Likewise, a federal court found that the men accused in the Oklahoma City bombing, Timothy McVeigh and Terry Nichols, could not be tried anywhere in the state, and so transferred the trial to Colorado.⁶ Defendants have tried unsuccessfully to change the venue in other high-profile cases, including the trials of the police officers accused of viciously assaulting Abner Louima⁷ and the terrorists who bombed the World Trade Center.⁸ And a Texas court in the small town of Jasper (population 7000) refused to transfer the trials of the white men accused of savagely killing a black man by tying him to the back of their pickup truck.⁹ In these cases, the trial court found that the defendants were unable to overcome the strong legal presumption that trials will be held in the vicinity where the crime was committed.

The place of a criminal trial is not a matter of accident or administrative convenience.¹⁰ Our law always has presumed that the defendant would be tried by representatives of the vicinage—the community in which the crime was committed—because local jurors are necessary for the jury to fulfill its function in the Anglo-American justice system. There are several justifications for such a presumption. First, local jurors generally will render the most accurate verdicts. The law no longer assumes that jurors will have personal knowledge of the facts of the crime and the character of the witnesses at trial, but their familiarity with the community and its practices allows them to evaluate best the competing narratives of the prosecutor and the defendant. Second, the vicinage presumption provides a neutral venue rule that limits the government's ability to select a forum inconvenient or hostile to the defendant.

Third, the law relies upon the subjective experience of the local community to determine whether ambiguous statutory terms apply to

⁵ See *Powell v. Superior Court*, 283 Cal. Rptr. 777, 788 (Ct. App. 1991).

⁶ See *United States v. McVeigh*, 918 F. Supp. 1467, 1474 (W.D. Okla. 1996).

⁷ See *United States v. Volpe*, 42 F. Supp. 2d 204, 217-19 (E.D.N.Y. 1999).

⁸ See *United States v. Salameh*, No. S5 93 Cr. 0180 (KTD), 1999 WL 364486, at *1 (S.D.N.Y. Sept. 15, 1999) (denying motion to transfer).

⁹ The three killers were tried separately. The trial court denied motions to change venue in all three trials. However, after initially denying a transfer in the second trial, the court granted a transfer supported by the prosecution in order to eliminate one possible ground of appeal. See Michael Graczyk, *Jasper Slaying Suspect Was Impressionable*, DA Says, *Austin-Am. Statesman*, Nov. 11, 1999, at B7, available in 1999 WL 7431479; Terri Langford, *Judge Allows 24-Hour Delay in Jasper Trial: Attorney Seeks Venue Change*, *Dallas Morning News*, Nov. 9, 1999, at 15A.

¹⁰ See *United States v. Johnson*, 323 U.S. 273, 276 (1944) (Frankfurter, J.) ("Questions of venue in criminal cases . . . are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed.").

the circumstances of the crime. By applying the law to the facts of the case, the jury shapes the content of legal norms. In the Diallo trial, for instance, the shooting of the victim was undisputed, but the defendants' criminal liability turned upon whether the officers reasonably had believed that their lives were in danger.¹¹ The jurors had to interpret the meaning of "reasonable belief" in light of their commonsense understanding of the term, an intuition based on the experience and values of their community. In defining the contours of liability, the jury necessarily decides how aggressive or restrained the law enforcement officers will be in the future. The vicinage presumption thus ensures that the community that suffered the crime makes such legal judgments. By transferring the trial to another vicinage, a trial court in effect may change the governing law in the criminal proceeding.

Fourth, and perhaps most significant, the vicinage presumption fulfills the jury's democratic function by allowing the aggrieved community to participate through its representatives on the jury. Community participation injects a democratic component into the application of the laws and the outcome of the criminal trial. By stamping the community's judgment on the verdict, the local jury legitimizes both the convictions *and* the acquittals of criminal defendants. This participation is essential to what the Supreme Court has described as the "community therapeutic value" of the trial, whereby the criminal trial becomes a vehicle for healing the social rupture caused by the crime.¹² As the Diallo and King trials showed, trying the case before a foreign jury may well eviscerate the jury's role in stamping the community's judgment on a criminal case.

Although changing the venue threatens these important public interests, the prevailing legal standards do not pay any attention to the community's interests. Every American jurisdiction permits the defendant to move the court to transfer the trial on the grounds that an impartial jury may not be obtained within the immediate community.¹³ Many jurisdictions grant the prosecutor a reciprocal right to make such a request, recognizing the strong public interest in ensuring

¹¹ See N.Y. Penal Law § 35.30.1(c) (McKinney 1998) (permitting officer to use deadly physical force where "necessary to defend the police officer or peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force").

¹² See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 570-73 (1980); see also *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 503-09 (1984) ("Criminal acts, especially violent crimes, often provoke public concern, even outrage and hostility; this in turn generates a community urge to retaliate and desire to have justice done.").

¹³ Indeed, the Supreme Court has held that the Constitution requires such an option to be available as a last resort. See *Gropi v. Wisconsin*, 400 U.S. 505, 507-12 (1971).

that the jury renders an accurate verdict.¹⁴ However, the legal rules governing these transfers focus entirely upon the danger that prejudice may pose to the accuracy of the verdict. They make no mention of the competing community interests that underlie the initial vicinage presumption. Without exception, these rules provide that when the party seeking transfer demonstrates, to an appropriate degree of likelihood, that there is danger of partiality, then the court should transfer the trial to another venue.¹⁵ Courts that have construed these provisions, with a few notable exceptions, likewise have done so without acknowledging the community's interests.¹⁶ To these courts, the primary costs of changing the venue are largely administrative. Despite the deference appellate courts pay to trial courts when

¹⁴ See generally Erwin S. Barbre, Annotation, Change of Venue by State in Criminal Case, 46 A.L.R.3d 295 (1999) (detailing state provisions authorizing change of venue motions by prosecution).

¹⁵ See, e.g., Fed. R. Crim. P. 21(a) (directing court to transfer trial where "there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district"); Cal. Penal Code § 1033(a) (West 1985) (requiring change of venue "when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be had in the county"); N.Y. Crim. Proc. Law § 230.20(2) (McKinney 2000) (permitting transfers "upon motion of either the defendant or the people demonstrating reasonable cause to believe that a fair and impartial trial cannot be had in such county").

¹⁶ In fact, some courts have justified transfer by suggesting that other districts will lack the same level of interest in the trial. See *United States v. McVeigh*, 918 F. Supp. 1467, 1471 (W.D. Okla. 1996) (stating that in contrast to Oklahomans, "the nation was interested in the human story of suffering and renewal . . . in a more general sense"); *Corona v. Superior Court*, 101 Cal. Rptr. 411, 418 (Ct. App. 1972) (finding local jurors unsuitable because they "will feel a sense of community involvement transcending their strict juridical function"). Although the vast majority of courts ignore the community's interests, a few courts have acknowledged, in dicta, that the community interests weigh in favor of denying motions to change venue. The cases listed in this paragraph comprise an almost exhaustive list of those courts that explicitly have acknowledged the community's right. See *United States v. Palma-Ruedas*, 121 F.3d 841, 862 (3d Cir. 1997) (Alito, J., concurring in part and dissenting in part) (describing one purpose of vicinage presumption to be "to protect a community's right to have trials of local offenses occur in the community"), rev'd in part on other grounds sub nom. *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999); *United States v. Dubon-Otero*, 76 F. Supp. 2d 161, 165 (D.P.R. 1999) ("To this day, the interest of a community in trying those who violate its laws remains a central tenet of our judicial system."); *United States v. Means*, 409 F. Supp. 115, 117 (D.N.D. 1976) ("The interest of a community that those charged with violations of its laws, be tried in that community, is not a matter to be cast aside lightly."); *People v. Guzman*, 755 P.2d 917, 929 (Cal. 1988) ("Our law still recognizes this right of the citizenry to have the trial of crimes committed in their community held in that community."); *State v. Vereen*, 324 S.E.2d 250, 258 (N.C. 1985) ("[E]very county has an *admitted interest* in the criminal justice system as it concerns the violation of a criminal law against one of its own citizens."); *State v. Jerrett*, 307 S.E.2d 339, 347 (N.C. 1983) ("We agree that county residents have a significant interest in seeing criminals who commit local crimes being brought to justice.").

reviewing jury impartiality,¹⁷ lower courts often have transferred the trial as a prophylactic measure,¹⁸ without recognizing the important interests that have been lost. By taking the community's interests out of the picture, courts may order transfers precipitously where a less drastic remedy would suffice.

The problem behind the Diallo verdict thus is structural, and will continue to recur, so long as courts fail to understand that the transfer of criminal trials is problematic on both policy and constitutional grounds. Indeed, the generation that framed the Constitution understood that the vicinage right protected interests beyond those of the defendant.¹⁹ The First Congress framed the Sixth Amendment's Vicinage Clause to protect the defendant's right to a fair trial, yet it did so against the longstanding presumption that the community had its own right to adjudicate crimes committed within the district. This original understanding suggests a constitutional dimension to the public's right that should be recognized by current law.

The text of the Sixth Amendment does not exhaust the constitutional principles that underlie the criminal justice system. In a series of cases beginning with *Richmond Newspapers, Inc. v. Virginia*,²⁰ the Supreme Court held that there was a constitutional right of public access to criminal trials rooted not expressly in the constitutional text, but in the history and the structure of the practice.²¹ Although the Sixth Amendment guarantees the defendant the right to a public trial, the Court found that historical practice and constitutional policy supported the community's reciprocal right to keep the trial open to the public. In describing this right of access, the Court emphasized both

¹⁷ See, e.g., *Mu'Min v. Virginia*, 500 U.S. 415, 427 (1991) ("[O]ur own cases have stressed the wide discretion granted to the trial court in conducting *voir dire* in the area of pretrial publicity and in other areas of inquiry that might tend to show juror bias."); *Patton v. Yount*, 467 U.S. 1025, 1031 (1984) ("[T]he trial court's findings of impartiality might be overturned only for manifest error." (internal quotation marks omitted)).

¹⁸ See, e.g., *McVeigh*, 918 F. Supp. at 1470-73 (ordering transfer in Oklahoma City bombing trial prior to *voir dire*); *Powell v. Superior Court*, 283 Cal. Rptr. 777, 788 (Ct. App. 1991) (same in King trial); *People v. Boss*, 701 N.Y.S.2d 342, 344 (App. Div. 1999) (same in Diallo trial).

¹⁹ See *infra* Part II.A.2 (documenting Founders' experience with Boston Massacre trials and "Murderer's Act").

²⁰ 448 U.S. 555 (1980).

²¹ See *id.* at 563-75 (sketching history of public attendance at trials from pre-conquest Anglo-Saxon era to present). After *Richmond Newspapers*, the Court developed the public's constitutional right of access in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603-06 (1982); *Press-Enterprise Co. v. Superior Court* (Press-Enterprise I), 464 U.S. 501, 505-510 (1984); and *Press-Enterprise Co. v. Superior Court* (Press-Enterprise II), 478 U.S. 1, 7-8, 10-11 (1986).

its strong historical roots and its continuing functional justification.²² Finally, the Court found the right to be necessary to the enjoyment of other constitutional rights, in particular the rights of speech, assembly, and the press found in the First Amendment. The Court thus recognized that the public, through its representatives in the media, had standing to challenge the closure of a criminal proceeding. While weighty reasons might bring a court to close a portion of a criminal proceeding, the judge must demonstrate that there is no reasonable alternative to accommodate both the public's right and the overriding interest involved.

This Article argues that the same considerations that support the public's right of access to a criminal trial justify a constitutional right for the vicinage to participate in the criminal trial. The vicinage right, like the right of public access, serves interests beyond those of the criminal defendant. Like the right of public access, it has longstanding roots in our legal tradition that testify to the favorable judgment of historical experience. The right is necessary to the enjoyment of other constitutional provisions—namely the cross-section requirement of the Sixth Amendment and the individual juror's Fourteenth Amendment right not to be excluded arbitrarily from jury service. Recognizing the right not only would ensure that courts consider the community's interests, but also would allow representatives of the affected community itself to bring claims before the court that might be ignored by the prosecution and the defense.

Just as courts may close trials to the public in extraordinary instances, they also may transfer a criminal trial in the face of weighty threats to the defendant's right to an impartial jury. However, prior to doing so, they must find first that a trial by the vicinage would prejudice the defendant's right to a fair trial in a way that a transfer might cure. The court also must hold that no reasonable alternative to transfer adequately could protect the defendant's fair trial right. In practice, such a right would require courts to try to empanel an impartial jury before concluding that a change of venue is necessary. The constitutional standard could lead in many instances to alternatives that would protect the defendant's right to a fair trial without sacrificing the interests of the community.²³

²² See *Richmond Newspapers*, 448 U.S. at 563-75; see also *Press-Enterprise II*, 478 U.S. at 8 (noting that in right of access cases, Supreme Court considers historical practice of openness and functional role of access).

²³ Recognizing the constitutional vicinage right also would force courts to reinterpret transfers under Federal Rule of Criminal Procedure 21(b), which permits transfers "in the interests of justice." Although transfers for convenience may be justified when the crime itself was committed in multiple districts, a constitutional vicinage right likely would pro-

Although commentators debate transfer rulings in specific trials, there has been relatively little academic scrutiny of the relationship between the vicinage presumption and transfers in criminal trials.²⁴ In the aftermath of the Rodney King trial, a number of scholars argued that courts must consider racial demographics in determining the appropriate venue to transfer the trial to.²⁵ Should courts decide to transfer a case, it is sensible for them to try to recreate the original community, even if race is a constitutionally problematic proxy for doing so. However, virtual representation by racial or socioeconomic identity is no substitute for trying the case before the original community. Just as the American colonists could not be represented by their English cousins in Parliament, the mores and experience of one community never can be replicated elsewhere. Recognizing that Los Angeles jurors are not Simi Valley jurors, nor Albany jurors Bronx jurors, leads to the conclusion that, before transferring a case, courts first must try to solve the problem of prejudice against the defendant in the original venue.

This Article argues for recognizing the constitutional underpinnings of the vicinage's role in the jury trial. Part I examines the Court's decisions in *Richmond Newspapers* and succeeding cases in order to show how the Court arrived at the public's constitutional right of access in criminal trials. Part II then applies that analysis to

hibit courts from transferring a criminal trial to an unrelated forum simply on the ground of convenience alone. See *infra* notes 287-90 and accompanying text.

²⁴ There are, of course, exceptions. Drew Kershen wrote the classic study of vicinage in a lengthy article that was published in two parts. See Drew Kershen, *Vicinage* (pts. 1 & 2), 29 Okla. L. Rev. 803 (1976), 30 Okla. L. Rev. 1 (1977). Akhil Amar likewise has noted the populist interests embedded in the Vicinage Clause in his studies of the original meaning of the Sixth Amendment. See Akhil Reed Amar, *The Bill of Rights 105-07* (1999) [hereinafter Amar, *Bill of Rights*]; Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles 123-24* (1997) [hereinafter Amar, *Constitution and Criminal Procedure*]. Two earlier studies of the Sixth Amendment remain relevant as well. See Francis H. Heller, *The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development* 13-34 (1951) (describing origins of jury right in colonial America); William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 Mich. L. Rev. 59, 63-66 (1944) (same).

²⁵ See Darryl K. Brown, *The Role of Race in Jury Impartiality and Venue Transfers*, 53 Md. L. Rev. 107, 152 (1994); K. Winchester Gaines, *Race, Venue and the Rodney King Case: Can Batson Save the Vicinage Community?*, 73 U. Det. Mercy L. Rev. 271, 287-93 (1996); M. Shanara Gilbert, *An Ounce of Prevention: A Constitutional Prescription for Choice of Venue in Racially Sensitive Criminal Cases*, 67 Tul. L. Rev. 1855, 1931-41 (1993); Lowery, *supra* note 1, at 373-78; Note, *Out of the Frying Pan or into the Fire? Race and Choice of Venue After Rodney King*, 106 Harv. L. Rev. 705, 714-22 (1993); see also Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. Cal. L. Rev. 1533, 1566-68 (1993) (arguing for discretionary use of demographics when selecting trial site); Marvin Zalman & Maurisa Gates, *Rethinking Venue in Light of the "Rodney King" Case: An Interest Analysis*, 41 Clev. St. L. Rev. 215, 262-65 (1993) (considering race-determined approach, but ultimately advocating localism).

the public's vicinage right by looking at the right's historical origins, its functional importance, and its relationship to securing other constitutional rights. After establishing the foundations of the vicinage right, Part III considers how courts should apply such a right in practice.

I

THE PUBLIC'S CONSTITUTIONAL RIGHT OF ACCESS IN A CRIMINAL TRIAL

The Supreme Court has recognized that members of the public are not strangers to the criminal trial, but instead enjoy certain constitutional rights.²⁶ Potential jurors, for instance, have the right not to be excluded from the jury arbitrarily.²⁷ Members of the public and the press likewise have the right to observe the proceedings of a criminal trial and to challenge motions that cut off access to the public.²⁸ Although the text of the Constitution does not mention the public's right of access, the Supreme Court has recognized such a right to be implicit in the Bill of Rights. This Part addresses the methodology that the Court developed in establishing this right of access, for that approach supports recognizing another public right—the vicinage right.

A. *The Judicial Development of the Public Access Right*

The Court's rejection of a Sixth Amendment right to a public trial in *Gannett Co. v. DePasquale*²⁹ set the stage for the Court's subsequent recognition of the implicit constitutional guarantee of public access. In *Gannett*, the Court considered whether members of the press had a right to challenge a trial judge's order excluding the public from attending a pretrial suppression hearing. By a five-to-four majority, the Court held that the public's right could not be found in the text of the Sixth Amendment but reserved judgment on whether it might lie in other constitutional guarantees.³⁰ The majority emphasized that,

²⁶ But see Alan M. Dershowitz, *Why Justice Had to Get Out of Town*, N.Y. Times, Dec. 18, 1999, at A23 ("Like it or not, a community has no rights in a criminal trial. The only ones who have constitutional rights are the defendants, who face conviction and imprisonment."). Given the discussion contained in this Part, Professor Dershowitz's observation at best is an overstatement. See also Judith Resnik, *Due Process: A Public Dimension*, 39 U. Fla. L. Rev. 405, 406 (1987) (exploring public's due process interests).

²⁷ See, e.g., *Powers v. Ohio*, 499 U.S. 400, 409 (1991) ("An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race.").

²⁸ See *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993) (per curiam); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

²⁹ 443 U.S. 368 (1979).

³⁰ See *id.* at 391.

despite the "strong societal interest in public trials," the Sixth Amendment's Public Trial Clause was personal to the defendant.³¹ Trial courts might consider the public's interest in ruling on whether to close the trial,³² yet that interest was "a far cry . . . from the creation of a constitutional right on the part of the public."³³ Although acknowledging the common law right of public access, the majority concluded that this right had not been constitutionalized.

Justice Blackmun, writing for the four dissenters, argued that the public trial guarantee of the Sixth Amendment reflected a historical tradition that recognized the public's right of access to the criminal trial.³⁴ The question was not simply whether the public had an independent right, but whether the defendant had a right to close access to the trial. To answer that question, Justice Blackmun first examined "the common law and colonial antecedents of the public-trial provision as well as the original understanding of the Sixth Amendment."³⁵ His dissent looked to the historical common law practice and relied upon the legal writings of Hale, Blackstone, and Coke that had influenced the American Founders.³⁶ Justice Blackmun concluded that the Founders drafted the Sixth Amendment against the backdrop of a legal norm of open trials and that there was no evidence that the Sixth Amendment public trial right meant to depart from that norm.³⁷

Finding no support for closing trials in historical practice, Justice Blackmun examined the purpose of publicity in criminal trials. The Justice found that publicity served the interests of the community as much as it did those of the defendant.³⁸ Publicity enhanced the accuracy of the criminal proceeding by placing testimony before the public eye and exposing partiality on the part of the judge or prosecutors.³⁹ This interest well may protect the defendant against unjust persecution, yet, as Justice Blackmun recognized, it well might be the defendant who stands to gain from partiality and perjury.⁴⁰ In addition to

³¹ *Id.* at 383.

³² The Court earlier had recognized that the defendant's jury right did not grant him the power to insist on the opposite of the right. See *Singer v. United States*, 380 U.S. 24, 34-35 (1965) ("The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right."). Likewise, the defendant had no power to compel the closing of the trial.

³³ *Gannett*, 443 U.S. at 383.

³⁴ See *id.* at 406 (Blackmun, J., dissenting).

³⁵ *Id.* at 418.

³⁶ See *id.* at 419-23.

³⁷ See *id.* at 424-27.

³⁸ See *id.* at 428-32.

³⁹ See *id.* at 428.

⁴⁰ See *id.*

the public interest in accurate adjudication, open trials permitted the public to scrutinize police and prosecutors, granted the victims and their families an opportunity to see justice done, and educated the public in the workings of the criminal justice system.⁴¹ As such, open trials promoted the public confidence in the judicial process necessary for the administration of the laws. Justice Blackmun recognized that these societal interests existed "separately from, and at times in opposition to, the interests of the accused."⁴² His dissent concluded that the Sixth Amendment, as incorporated by the Fourteenth Amendment, prevented the states from excluding the public from a proceeding within the ambit of the Public Trial Clause without full and fair consideration of the public's right.⁴³

In *Gannett*, the majority opinion reserved the question of whether the public's right might be grounded in the First Amendment, rather than the Sixth.⁴⁴ The Court addressed the issue the very next term in *Richmond Newspapers, Inc. v. Virginia*,⁴⁵ and, this time, an overwhelming majority found that the Constitution supported the right. Although there was no majority opinion, Chief Justice Burger's plurality opinion followed the *Gannett* dissent by closely examining the history and purposes of the public trial.⁴⁶ The common law sources demonstrated an unwavering commitment to public trials, and the evidence from the colonial era suggested that the Founders shared the commitment of their English predecessors. Thus, "the historical evidence demonstrate[d] conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open."⁴⁷ The presumption of openness was not some "quirk of history" but instead reflected deep-seated public policies that went beyond the interests of the defendant.⁴⁸ The Chief Justice concluded that "[f]rom this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice."⁴⁹ More than a com-

⁴¹ See id. at 428-29.

⁴² Id. at 427.

⁴³ See id. at 433.

⁴⁴ The majority reasoned that, under the facts of the case, the trial judge's actions were consistent with any First Amendment rights at issue. See id. at 391-93 (declining to address First Amendment issues where petitioner did not object initially to closure order, enjoyed subsequent opportunity to be heard, and received transcript of proceeding with only short delay).

⁴⁵ 448 U.S. 555 (1980).

⁴⁶ See id. at 564-74.

⁴⁷ Id. at 569.

⁴⁸ Id.

⁴⁹ Id. at 573.

mon law norm, *Richmond Newspapers* held that this ancient presumption was of constitutional import.

Chief Justice Burger recognized that the Constitution did not provide explicitly for a public right of access, yet found that the textual omission was not itself conclusive. The Ninth Amendment had been framed so as to ensure that the Bill of Rights was not construed as eliminating other rights retained by the people.⁵⁰ The Chief Justice noted that, in the past, the Court had constitutionalized certain unarticulated rights that rested implicitly within other enumerated guarantees.⁵¹ The Court had recognized these ancient principles to be constitutional rights because they were "indispensable to the enjoyment of rights explicitly defined."⁵² The public's right of access to the criminal trial was likewise necessary to the realization of First Amendment rights.

In grounding the public right of access in the First Amendment, the plurality opinion did not rest on any particular textual provision. Instead, the Court concluded that the right might be seen "as assured by the amalgam of the First Amendment guarantees of speech and press; and their affinity to the right of assembly is not without relevance."⁵³ The freedom of speech implied some notion of a freedom to listen. Likewise, the press's freedom to publish information about a trial implied a right to get that information. This somewhat imprecise formula reflected the fact that the constitutional underpinnings of the public right lay not in a specific textual provision, but in the fact that the Bill of Rights had been enacted against "the backdrop of the long history of trials being presumptively open," and this was an understanding that regarded public access to trials "as an important aspect of the process itself."⁵⁴ Thus, the plurality grounded the public's constitutional right of access in the way in which the right supported, and was supported by, other explicit guarantees in the Constitution.

⁵⁰ See U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); *Richmond Newspapers*, 448 U.S. at 579 & n.15 (noting that Ninth Amendment "served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others").

⁵¹ The Chief Justice cited the right of privacy, the right of travel, and the right to be presumed innocent and found guilty only by proof beyond a reasonable doubt. See *Richmond Newspapers*, 448 U.S. at 579-80.

⁵² *Id.* at 580.

⁵³ *Id.* at 577.

⁵⁴ *Id.* at 575.

B. Defining the Contours of the Public's Right of Access

Although Chief Justice Burger's opinion in *Richmond Newspapers* attracted only two other justices,⁵⁵ majorities of the Court ratified his approach in three subsequent decisions.⁵⁶ In *Globe Newspaper Co. v. Superior Court*,⁵⁷ the Court described the right of access as not "unambiguously enumerated" in the First Amendment but "nonetheless necessary to the enjoyment of other First Amendment rights."⁵⁸ The Court also restated the two-prong analysis through which *Richmond Newspapers* had discovered the right of access.⁵⁹ First, criminal trials historically have been open to the public,⁶⁰ and second, the right of access plays a "particularly significant role in the functioning of the judicial process and the government as a whole."⁶¹ The Court followed this two-prong analysis in determining that the public's right of

⁵⁵ The *Richmond Newspapers* plurality opinion did attract the qualified support of a majority of the Court. Justice Stewart wrote separately to emphasize his belief that "reasonable limitations" might be placed upon the public's right of access. See *id.* at 600 (Stewart, J., concurring). Justice Blackmun, with his dissenting opinion in *Gannett* in mind, approved of the Court's reliance on legal history to support the public right. See *id.* at 601-02 (Blackmun, J., concurring). However, he believed that the Sixth Amendment would be a more welcome home for the public right than the "veritable potpourri" of First Amendment penumbras that the plurality opinion drew upon. *Id.* at 603. Since the Sixth Amendment was set aside, he was "driven to conclude, as a secondary position, that the First Amendment must provide some measure of protection for public access to trial." *Id.* at 604. Justice Brennan, joined by Justice Marshall, saw the public's right of access to trial as part of a First Amendment privilege of access to government information. See *id.* at 585 (Brennan, J., concurring). Justice Powell took no part in the decision, and only Justice Rehnquist dissented.

⁵⁶ *Press-Enterprise Co. v. Superior Court* (Press-Enterprise II), 478 U.S. 1, 13 (1986) (recognizing public right of access to California preliminary hearing); *Press-Enterprise Co. v. Superior Court* (Press-Enterprise I), 464 U.S. 501 (1984) (recognizing public right of access to voir dire); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (finding right of access to trump state's interest in closing trial for testimony of minor sexual assault victim).

⁵⁷ 457 U.S. 596 (1982).

⁵⁸ *Id.* at 604.

⁵⁹ See *Press-Enterprise II*, 478 U.S. at 8 (noting that cases dealing with right of access emphasize "two complementary considerations"); *Globe Newspaper*, 457 U.S. at 605 (describing same two considerations).

⁶⁰ See *Globe Newspaper*, 457 U.S. at 605 (finding history significant not only "'because the Constitution carries the gloss of history,'" but also because "'tradition of accessibility implies the favorable judgment of experience'" (quoting *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring))); see also *Press-Enterprise II*, 478 U.S. at 8 (quoting same).

⁶¹ *Globe Newspaper*, 457 U.S. at 606; see also *Press-Enterprise II*, 478 U.S. at 8 (considering "whether public access plays a significant positive role in the functioning of the particular process").

access adhered to pretrial proceedings, such as voir dire⁶² and the preliminary hearing.⁶³

Richmond Newspapers provides a sensible, if necessarily imperfect, solution to the problem unenumerated rights pose for constitutional interpretation. The Ninth Amendment expressly states that the Constitution protects rights that are not enumerated in its text.⁶⁴ But judicial efforts to discover these rights are fraught with difficulty. There is an unavoidable temptation for individual judges to discover in the constitutional text those values that they themselves view as fundamental. In order to provide some consistency to such "substantive due process," the Court has emphasized that the judicial inquiry into such rights must begin "by examining our Nation's history, legal traditions, and practices."⁶⁵ Some of the best evidence of such fundamental values will rest in existing constitutional guarantees. As such, it seems entirely appropriate to examine how a "new" right would fit within the set of existing constitutional liberties. As Chief Justice Burger acknowledged, the *Richmond Newspapers* methodology permits a somewhat restrained pursuit of unenumerated fundamental rights.⁶⁶

Although the Supreme Court soon accepted the public's right of access, it took several cases for the Court to work out the appropriate balance between that right and the defendant's right to an impartial jury. In *Globe Newspapers*, Justice Brennan held for a majority that

⁶² See *Press-Enterprise I*, 464 U.S. at 505.

⁶³ See *Press-Enterprise II*, 478 U.S. at 10.

⁶⁴ The nature of the rights secured by the Ninth Amendment is open to some debate. Current convention holds that the Ninth Amendment secures unenumerated individual rights. See, e.g., Charles L. Black, Jr., *Decision According to Law* 46-48 (1981); Leonard W. Levy, *Original Intent and the Framers' Constitution* 267-83 (1988); Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 *Cornell L. Rev.* 1, 22-25 (1988); Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 *Chi.-Kent L. Rev.* 131, 143-61 (1988); Laurence H. Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 *Harv. C.R.-C.L. L. Rev.* 95, 100-03 (1987); see also Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 *U. Chi. L. Rev.* 1127, 1161-67 (1987). But see Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 *Colum. L. Rev.* 1215, 1247 (1990) (contending that Ninth Amendment "does not unequivocally point to additional rights"). Others contend that the Ninth Amendment was originally understood as affirming the structural limitations on the federal government. See, e.g., Amar, *Bill of Rights*, *supra* note 24, at 120-24. In light of Professor Amar's description of the transformation of the meaning of the Bill of Rights after adoption of the Fourteenth Amendment, the Ninth Amendment well may support the individual rights reading of current scholarship, even if it would not be justified by the original understanding of the Founders. See *id.* at 280-81; John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 *Emory L.J.* 967 (1993) (arguing that ratification of Fourteenth Amendment, rather than Founding, supports individual rights reading of Ninth Amendment).

⁶⁵ *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997).

⁶⁶ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579-80 (1980).

the public's right of access was as fundamental as other First Amendment freedoms. In order to restrict the right, the state had to show that the restriction served a compelling government interest and was narrowly tailored to serve that interest.⁶⁷ Chief Justice Burger dissented, arguing that such a rigid standard inappropriately suggested an unqualified right to public access.⁶⁸ The Chief Justice instead would have held that the public's right of access might be constrained by reasonable, albeit narrowly tailored, regulations.⁶⁹

Although not expressly disavowing strict scrutiny, the Court adopted this qualified view of the right of access in two subsequent decisions authored by the Chief Justice. In *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*,⁷⁰ the Court held that the trial court only need find that "closure is essential to preserve higher values and is narrowly tailored to serve that interest."⁷¹ In *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*,⁷² the Court suggested that the test was somewhat more flexible than strict scrutiny. In order to close a trial, the defendant must show "that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."⁷³ The Supreme Court required that trial courts privilege the defendant's right to a fair trial over that of the public, yet developed a test that would ensure that the public's right would be considered.

The *Press-Enterprise II* standard is of particular interest for two reasons. First, the Court expressly rejected the California Supreme Court's holding in that case that the trial court may close the proceedings upon a finding of a mere "reasonable likelihood" of substantial prejudice.⁷⁴ Second, *Press-Enterprise II*'s second prong requires that the trial court affirmatively consider all reasonable alternatives to closing the criminal trial. The Court did not describe such alternatives in detail, but it did cite cases where the Court previously had described the tools that trial courts might employ to ensure impartial-

⁶⁷ See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-607 (1982).

⁶⁸ See *id.* at 615 (Burger, C.J., dissenting).

⁶⁹ See *id.* at 616.

⁷⁰ 464 U.S. 501 (1984).

⁷¹ *Id.* at 510.

⁷² 478 U.S. 1 (1986).

⁷³ *Id.* at 14; see also *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 150 (1993) (*per curiam*) (applying *Press-Enterprise II* test). Justice Blackmun suggested a two-pronged test similar to that endorsed in *Press-Enterprise II* in his dissent in *Gannett Co. v. DePasquale*, 443 U.S. 368, 441-42 (1979) (Blackmun, J., dissenting).

⁷⁴ *Press-Enterprise II*, 478 U.S. at 14. For the relevance of this distinction to the vicinage right, see *infra* note 277 and accompanying text.

ity,⁷⁵ such as voir dire, sequestration of jurors, the exclusion of witnesses from the courtroom, and the regulation of behavior in the courtroom and near the courthouse.⁷⁶ Although *Press-Enterprise II* recognizes that the public's right of access must be qualified by the defendant's right to a fair trial, the balancing test ensures that the public's right will not be cast aside lightly. As will be argued in Part III, a similar test would go a long way towards remedying the problems presented by the present law governing change of venue.

II

THE PUBLIC'S CONSTITUTIONAL VICINAGE RIGHT

The public's constitutional vicinage right grows out of the same soil as the public's constitutional right of access to criminal proceedings. The common law presumed that a jury would be drawn from the community that suffered the crime, and the Framers of the Bill of Rights drafted the Sixth Amendment against this historical presumption. The Framers knew about the dangers of local prejudice, yet they recognized that only local juries could fulfill the adjudicative and representational purposes that underlie the jury system. The public vicinage right is implicit in the constitutional jury doctrines: the cross-section requirement and the right of jury service. As such, this Part argues that the Sixth Amendment's Vicinage Clause has an unenumerated echo in the public's right to oppose the motion of either party to transfer the trial out of the district in which the crime was committed.

A. *The Traditional Vicinage Presumption*

The vicinage presumption is deeply rooted in our constitutional tradition. As *Globe Newspaper* acknowledged, the examination of such history is significant "because the Constitution carries the gloss of history" and because such tradition "implies the favorable judgment of experience."⁷⁷ History is important not simply for its own sake but because it reveals the assumptions on which our legal institutions are based. Although our institutions stand at some remove from those that the Founders knew, not to mention those of the early common law, the vicinage right remains vital to the modern jury system.

⁷⁵ See *id.* (citing *Press-Enterprise I*, 464 U.S. at 511, and *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980)).

⁷⁶ See *Richmond Newspapers*, 448 U.S. at 581 (noting that "there exist in the context of the trial itself various tested alternatives to satisfy the constitutional demands of fairness").

⁷⁷ *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982) (quoting *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring)); see also *Press-Enterprise II*, 478 U.S. at 8 (quoting same).

At common law, the role of the vicinage was inherent in the concept of the jury. The jury was not simply any twelve laypersons; it was twelve representatives of the community that had suffered the crime. Colonial Americans inherited this understanding of the jury, and in their struggle for independence, they reaffirmed the importance of the vicinage right both for the defendant and for the community. Thus, they framed the constitutional jury protections under the longstanding presumption that the aggrieved community would pronounce judgment upon the accused.

1. The Vicinage Presumption at Common Law

The vicinage presumption is as longstanding as the notion of the jury itself. In fact, local juries predate impartial ones by several centuries. The first juries were administrative bodies summoned by royal officials to provide information about their locality. The jurors represented the community in its dealings with royal officials, and it was their familiarity with local affairs that first led them to take on a judicial role.⁷⁸ Jurors were impartial in the sense that they could not be related to either of the parties or have a financial interest in the trial, yet the law welcomed their extra-judicial knowledge of the facts of the case. If they were not familiar with the events, they were expected to investigate matters themselves prior to the trial.⁷⁹ In the early days of the common law, the court relied more upon the jurors' commitment to their solemn oaths than it did upon the evidence presented at the trial. Indeed, it was only in the seventeenth century that English law recognized defendants' right to present evidence in their defense.⁸⁰ At a time when the law relied upon out-of-court knowledge, local juries were a functional necessity.

The jurors' local character was more than functional, however; it was essential to the jury's claim to represent the community. When the defendant pleaded not guilty, he was said to "put himself upon the

⁷⁸ See 1 William Holdsworth, *A History of English Law* 333 (A.L. Goodhart & H.G. Hanbury eds., 7th ed. 1956) (describing how Florentine merchants were summoned to serve as jurors in case involving act that allegedly took place in Florence); F.W. Maitland, *The Constitutional History of England: A Course of Lectures Delivered 122* (1926) (stating that "the germ of trial by jury" was for English judges to summon neighbors from area of crime).

⁷⁹ See 2 Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I* 622 (Cambridge Univ. Press 1895). The jurors generally were selected two weeks before the trial to give them time to speak with witnesses. See *id.*; see also Edward Jenks, *The Book of English Law* 77 (P.B. Fairsted ed., 6th ed. 1967).

⁸⁰ Until this right became established, indictment by the grand jury was practically conclusive of guilt. See Heller, *supra* note 24, at 9 (describing late adoption of defendant's right to call witnesses).

country,”⁸¹ i.e., to place his fate in the hands of the representatives of the community. As one historian emphasized, “[t]he whole system of trial by jury in its earliest form implies representation—a person is tried by the country, by the neighbourhood, *ponit se super patriam, super vicinetum*. The voice of the jurors is the verdict of the country, *veredictum patriae*.”⁸² Although the jurors themselves might be witnesses to the crime, as representatives of the community, they “carried a weight beyond that of mere witnesses; they stood for the judgment of the people.”⁸³

The jury’s representative role outlasted the law’s emphasis on the jurors’ familiarity with the events behind the crime. Thus, the jurors continued to be drawn exclusively from the locality even after they became triers of facts disputed at trial.⁸⁴

The jury’s representative role was reflected and reinforced by the common law’s understanding of jurisdiction. The grand jurors were sworn to inquire for the body of a county, *pro corpore comitas*, and so could not investigate facts that had occurred outside of the county.⁸⁵ As representatives of a particular community, the jury likewise had no power to “take knowledge” of acts that took place outside of the

⁸¹ 4 William Blackstone, Commentaries *350. It should be noted that “country” refers not to the English nation, but to the “country-side”—the surrounding community. English lawyers used both the Latin *patria* and the French *pays* to refer to “country,” but the Latin word was not quite right, as *pays* descends from the Latin *pagus*, not *patria*. *Pays* captures the local significance of country. See 2 Pollock & Maitland, *supra* note 79, at 621 n.3.

⁸² Maitland, *supra* note 78, at 71; see also 2 Pollock & Maitland, *supra* note 79, at 621 (“The verdict of the jurors is not just the verdict of twelve men; it is the verdict of a *pays*, a ‘country,’ a neighbourhood, a community.”); Theodore F.T. Plucknett, A Concise History of the Common Law 126 (2d ed. 1936) (“From these beginnings as an administrative machine for extorting truth on any matter of royal concern from a reluctant countryside, the jury soon acquired a representative character.”).

⁸³ Frederick Pollock, The Expansion of the Common Law 41 (1904).

⁸⁴ The shift in the jury’s character was gradual, and although there is no precise date for the change, it appears to have been almost complete by the eighteenth century. As late as 1713, Matthew Hale spoke of the advantage of the jury “being *de Vicineto*, who oftentimes know that the Witnesses and the Parties.” Matthew Hale, The History and Analysis of the Common Law of England 263 (The Lawbook Exchange, Ltd. 1713); see also 1 Sir Edward Coke, The First Part of the Institutes of the Laws of England *125a (recognizing that trials take place in vicinity of crime because “the inhabitants whereof may have the better and more certaine knowledge of the fact”). But by 1764, Lord Mansfield wrote that “[a] juror should be as white paper, and know neither plaintiff nor defendant, but judge of the issue merely as an abstract proposition, upon the evidence produced before him.” *Mylock v. Saladine*, 96 Eng. Rep. 278, 278 (K.B. 1764); see also Holdsworth, *supra* note 78, at 334 (suggesting that transformation occurred by sixteenth century); Plucknett, *supra* note 82, at 125 (noting that by sixteenth century jury had come to rely heavily, if not entirely, on evidence presented at trial). See generally John Marshall Mitnick, From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror, 32 Am. J. Legal Hist. 201, 205-29 (1988) (charting transition in common law civil trials).

⁸⁵ See Blume, *supra* note 24, at 61.

county.⁸⁶ Edward Coke wrote that it would cause a mistrial for the jurors to pronounce a verdict on matters outside of their community.⁸⁷ The common law's insistence that all of the elements of the felony take place within the district created problems for the trying of interdistrict offenses, problems that had to be remedied by statute.⁸⁸ These early jurisdictional doctrines reflected a notion that since a felonious act harmed the local community, the defendant must answer to the community's representatives.⁸⁹

Because trial by jury was defined as trial by a body drawn from the community that had suffered the crime, the early legal commentators recognized the vicinage as an essential requirement for jurors. In 1583, Sir Thomas Smith wrote: "And necessarilie the whole xii [twelve] must be of the shire and iiij [four] of them of the hundred where the lande lyeth which is in controversie, or where the partie dwelleth who is the defendant."⁹⁰ Edward Coke wrote that, by law, the juror had to have three qualities, the first of which was that "he ought to be dwelling most neere to the place where the question is

⁸⁶ Act of Parliament, 1548, 2 & 3 Edw. 6, ch. 24 (Eng.) (noting that jurors under common law previously "[could] take no knowledge" of events in other counties); see also Albert Levitt, *Jurisdiction over Crimes: The Territorial Commission Theory*, 16 J. Am. Inst. Crim. L. & Criminology 316, 327-28 (1925) (describing territorial limits on jury's jurisdiction at common law); Glanville Williams, *Venue and the Ambit of Criminal Law*, 81 L.Q. Rev. 276, 276 (1965) (same).

⁸⁷ See 1 Coke, *supra* note 84, at *125a ("[F]or if there be a mistryall, (that is) if the jury commeth out of a wrong place . . . and give a verdict, judgement ought not to be given upon such a verdict.").

⁸⁸ Edward Coke, *The Third Part of the Institutes of the Laws of England* *48-*49. At common law, if a man were struck or poisoned in one county but died in another, no grand jury could indict the murderer since neither could take knowledge of all of the elements of the crime. The Act of Parliament, 1548, 2 & 3 Edw. 6, ch. 24 (Eng.), allowed the grand jury in the county in which the man died to take knowledge of the felonious act committed elsewhere. That act was one of the earliest of several English statutes that modified the common law vicinage presumption in circumstances in which no proper venue could be laid at common law. See Blume, *supra* note 24, at 61-63 (describing English statutes that addressed vicinage and venue). One of the statutes, 33 Hen. 8, ch. 23 (1541) (Eng.), provided that treason committed abroad might be tried in any English court and would be applied at times to American patriots during the revolutionary period. See Henry G. Connor, *The Constitutional Right to a Trial by a Jury of the Vicinage*, 57 U. Pa. L. Rev. 197, 205 (1909) (arguing that statutes eroding vicinage right did not modify American colonists' belief that vicinage right was part of English constitution).

⁸⁹ The definition of the aggrieved community did change with the character of the jury itself. The earliest juries were likely comprised entirely of members of the "hundred," the smallest administrative unit, in which the crime was committed. However, administrative necessities and increasing reliance upon the facts proved at trial led to the disappearance of the requirement that there be hundreds. See Blume, *supra* note 24, at 60.

⁹⁰ Sir Thomas Smith, *De Republica Anglorum* 100 (Mary Dewar ed., Cambridge Univ. Press 1982) (1583).

moved.”⁹¹ In the early eighteenth century, Matthew Hale likewise wrote that the jury must “be of the Neighbourhood of the Fact to be inquired, or at least of the County or Bailywick.”⁹² For these early commentators, the vicinage presumption was part of the structure of the jury.

William Blackstone shared this structural understanding of the vicinage requirement. At common law, Blackstone wrote, the sheriff had to return a panel of jurors “of the *visne* or neighbourhood, which is interpreted to be of the county where the fact is committed.”⁹³ Trial by the country, as trial by jury also was known, implied that the defendant be tried by representatives of the community. The common law’s requirement was a consequence of the “ancient locality of jurisdiction,” and although the relevant community had broadened from the neighborhood itself to permit the drawing of juries from the county, the vicinage requirement still served “many beneficial purposes.”⁹⁴

In identifying those purposes, Blackstone went beyond the earlier writers by recognizing the jury trial as “the grand bulwark” of the defendant’s liberty.⁹⁵ Blackstone described the jury as an intermediary body that protected the defendant’s liberty against executive power.⁹⁶ Royal judges, appointed by the Crown, well might be partial to the King’s interests in criminal prosecutions.⁹⁷ However, the common law’s twofold requirements of presentment and trial by jury ensured that the truth of every accusation would be determined by the judgment of the defendant’s peers.⁹⁸ In terms quite familiar to the American Founders, Blackstone concluded: “[I]t is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals.”⁹⁹

⁹¹ 1 Coke, *supra* note 84, at *155b. The second was that the juror must be legally competent, and the third was that he must be “indifferent” to the parties. *Id.* Coke’s impartiality requirement did not imply ignorance of the parties and their claims, but instead referred to the lack of a strong bias.

⁹² Hale, *supra* note 84, at 252-53.

⁹³ 4 Blackstone, *supra* note 81, at *346.

⁹⁴ 3 *id.* at *384.

⁹⁵ 4 *id.* at *349.

⁹⁶ See *id.* at *349-50.

⁹⁷ See *id.* at *349.

⁹⁸ See *id.*

⁹⁹ *Id.* at *379. Technically, Book III of Blackstone concerned civil actions (“private wrongs”), yet as the above quote demonstrates, Blackstone at times conflated civil and criminal juries. See *id.* (finding that if jury has provided “so great an advantage over others in regulating civil property, how much must that advantage be heightened, when it is applied to criminal cases”). Blackstone consequently noted in Book IV, which concerned criminal actions (“public wrongs”), that “[w]hat was said of juries in general, and the trial

Blackstone thus recognized the vicinage presumption to be an important safeguard to the defendant's liberty.

In recognizing that juries might protect the defendant's liberty, Blackstone also recognized circumstances in which local bias might threaten that liberty. In those cases "where a cry has been raised and the passions of the multitude been inflamed," particularly in small jurisdictions, the defendant may have difficulty receiving a fair trial.¹⁰⁰ The common law had permitted changes of venue where the entire county had a financial interest in the question, such as suits concerning the county's obligation to pay for bridges and other structural improvements.¹⁰¹ But Blackstone recognized that cases could arise where "there may be the strongest bias without any pecuniary interest."¹⁰² In those cases, to expect a jury to be impartial would be "laying a snare for their consciences."¹⁰³ Despite the strong vicinage presumption, Blackstone argued that surely there "can be no impropriety in sometimes departing from the general rule, when the great ends of justice warrant and require an exception."¹⁰⁴

The common law had recognized transfers in the extreme cases in which an impartial jury could not be drawn. Lord Mansfield, writing for the King's Bench during Blackstone's time, stated that "the law is clear and uniform, as far back as it can be traced . . . in parts of England itself where an impartial trial cannot be had in the proper county, it shall be tried in the next."¹⁰⁵ In that case, *Rex v. Cowle*, the court transferred a misdemeanor trial where the local magistrates were the defendant's political rivals.¹⁰⁶ Although the court acknowledged the power to transfer a case in the interest of impartiality, such transfers were exceedingly rare. In *The King v. Holden*,¹⁰⁷ the King's Bench surveyed prior case law and was unable to identify a *single* felony trial in which the court had ordered transfer out of a county on grounds of prejudice.¹⁰⁸ Although courts had removed trials from limited jurisdictions within the county, the Chief Justice concluded: "I should think such a proceeding could not be necessary where the re-

thereby, in *civil* cases, will greatly shorten our present remarks with regard to the trial of *criminal* suits." *Id.* at *350.

¹⁰⁰ 3 *id.* at *383.

¹⁰¹ See, e.g., *The Queen v. Inhabitants of Wiltz*, 87 Eng. Rep. 1046 (Q.B. 1705); *The King v. Inhabitants of Nottingham*, 83 Eng. Rep. 474 (K.B. 1675).

¹⁰² 4 Blackstone, *supra* note 81, at *383.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at *385.

¹⁰⁵ *Rex v. Cowle*, 97 Eng. Rep. 587, 602 (K.B. 1759).

¹⁰⁶ See *id.* at 603.

¹⁰⁷ 110 Eng. Rep. 819 (K.B. 1833).

¹⁰⁸ See *id.* at 821.

moval must be from one great county to another.”¹⁰⁹ The mere infamy of a crime, and the resulting pretrial publicity (such as it existed), were deemed insufficient to prejudice an entire county against the defendant. The court distinguished the removal of earlier misdemeanor cases as involving political disputes where the inhabitants of the counties were in effect parties to the criminal trial.¹¹⁰ Given the large size of the county and the defendant’s right to challenge jurors, few defendants would be able to show that they were unable to obtain an unprejudiced jury.

Although transfers to protect the interests of the defendant were rare, common law judges had exercised their authority to transfer the trial or change the venire to protect the interests of the Crown. As early as 1351, the courts held that when the defendants were “too powerful in their own district,” they might be tried in a neighboring one.¹¹¹ In 1684, rioters who protested elections in Nottingham were tried in Kent.¹¹² Likewise, in 1762, the prosecution sought to change the venire for the trial of Gloucester aldermen, who were charged with denying a group of freeholders their right to vote for Parliament.¹¹³ The justices unanimously agreed that they might do so when justice required, but they emphasized that the party seeking transfer had a heavy burden to carry. As Justice Wilmot wrote, “[t]here was no rule better established . . . than, that all causes shall be tried in the county, and by the neighbourhood of the place, where the fact is committed.”¹¹⁴ That rule would not be infringed “unless it plainly appear[ed] that a fair and impartial trial [could] not be had in that county.”¹¹⁵

Thus, by the latter half of the eighteenth century, the common law remained committed to the ancient presumption that jurors would be drawn from the county. The legal commentators with whom the American Founders were most familiar—writers such as Coke, Hale, and Blackstone—recognized that the vicinage presumption inhered in the very nature of the jury. The trial by jury—or the trial by the country—was defined as a trial before representatives of the aggrieved

¹⁰⁹ See *id.*

¹¹⁰ See *id.*

¹¹¹ 1 Luke Owen Pike, *A History of Crime in England* 479 (London, Smith, Elder & Co. 1873).

¹¹² See *Rex v. Sacheverell*, 10 Howell’s State Trials 30 (1684).

¹¹³ See *Rex v. Harris*, 97 Eng. Rep. 858 (K.B. 1762).

¹¹⁴ *Id.* at 860 (internal quotation marks omitted); see also *id.* (Denison, J., concurring) (“[T]he place of trial ought not to be altered from that which is settled and established by the common law, unless there shall appear a clear and plain reason for it; which can not be said to be the present case.”).

¹¹⁵ *Id.* (Wilmot, J., concurring).

county. The American colonists' experiences during the revolutionary era likewise would show them the dangers that transfers posed both to the defendant and the community as a whole.

2. *The Colonial Experience and the Framing of the Sixth Amendment*

The generation that ratified the Constitution and the Bill of Rights recognized the vicinage presumption as an essential part of the right to trial by jury. In the struggle for independence, the colonists stood ready to defend "the inestimable Privilege of being tried by a Jury from the Vicinage."¹¹⁶ The colonists inveighed against the British for abridging the vicinage right by taking defendants away to England for trial *and* by protecting British soldiers from the justice of colonial juries. A majority of the early state constitutions expressly protected the vicinage right, and the Antifederalists criticized the federal Constitution for failing to do so adequately. The First Congress framed the Sixth Amendment with an understanding that the traditional vicinage presumption protected the structural interests of the jury system, as well as the rights of the defendant.

Although it may surprise modern eyes, the vicinage right was a recurring theme in the struggle for independence. Parliament first threatened the right in 1769, in response to Boston patriots' spirited resistance to the Stamp Act and Townshend Duties. Parliament recommended that the King revive a 1543 statute that granted the Crown the authority to try in England cases of treason committed outside the realm.¹¹⁷ That statute, enacted prior to England's colonial period, permitted the trial of treason planned and committed beyond the jurisdiction of any English courts.¹¹⁸ Parliament suggested that it could be employed to try American patriots before juries more friendly to the Crown.¹¹⁹ To the Americans, however, such an act denied them their rights as Englishmen. The Virginia House of Burgesses immediately responded to Parliament's resolution, enacting its own resolution

¹¹⁶ Virginia Resolves (May 16, 1769), reprinted in *Journals of the House of Burgesses, 1766-1769*, at 214 (John Pendleton Kennedy ed., 1906).

¹¹⁷ See Blume, *supra* note 24, at 62. The resolution generated spirited opposition in Parliament from those members who recognized that English jurors "would infallibly regard themselves as brought together to vindicate the law against a criminal of whose guilt the responsible authorities were fully assured, but who would have been dishonestly acquitted by a Boston jury." Connor, *supra* note 88, at 206 (quoting 1 George Otto Trevelyan, *The American Revolution* 76 (1921)).

¹¹⁸ See Connor, *supra* note 88, at 207-08.

¹¹⁹ See *id.*

decrying the action.¹²⁰ Given the availability of colonial courts and juries, seizing Americans was a “new, unusual, . . . unconstitutional and illegal Mode” that would deprive the defendant of his right to be tried by his neighbors, as well as, in practice, his right to call witnesses in his defense.¹²¹ These Virginia Resolves, as they became known in the colonies, were promptly approved by the legislatures of the other American colonies.¹²²

The American colonists knew that the vicinage presumption protected the community's interest in law enforcement as well as the defendant's right to a fair trial. The Boston Massacre, the notorious clash between English troops and colonists that left five Bostonians dead, led to the most widely publicized trial of the revolutionary period. A distant ancestor of the King and Diallo trials, the Massacre trials involved the prosecution of unpopular law enforcement officers for the allegedly unprovoked assaults on the townspeople.¹²³ The shootings occurred amidst increasing friction between the British garrison and Bostonians, and the case, to put it mildly, was as much a political affair as a judicial one. As one historian observed, “radicals and Tories alike immediately realized the incident's tremendous propaganda value.”¹²⁴ Sam Adams and the Sons of Liberty staged numerous protests in the streets and before the town council.¹²⁵ Paul Revere cast a best-selling print of the massacre, grossly exaggerating the incident by depicting soldiers firing wantonly into a peaceful crowd.¹²⁶ The press was filled with highly prejudicial accounts of the incident, including a widely read pamphlet that included an appendix with ninety-six affidavits from townspeople filled with prejudicial and inadmissible evidence.¹²⁷ The pamphlet alleged that the Massacre had resulted, not from a spontaneous disturbance, but from a planned conspiracy between the British garrison and the Customs House. These deliberate efforts to raise public passion in an already politically

¹²⁰ See Letter to the King from the Virginia House of Burgesses (May 17, 1769), in *Journals of the House of Burgesses*, supra note 116, at 215-16.

¹²¹ *Id.*

¹²² See Blume, supra note 24, at 65.

¹²³ See generally Akhil Reed Amar, *A Tale of Two Cities*, Findlaw (Mar. 10, 2000) <http://writ.news.findlaw.com/commentary/20000501_amar.html> (linking Boston Massacre trial to Diallo trial).

¹²⁴ Hiller B. Zobel, *The Boston Massacre* 210 (1970).

¹²⁵ See *id.* at 214.

¹²⁶ See *id.* at 211.

¹²⁷ See *A Short Narrative of the Horrid Massacre in Boston (Boston 1770)* [hereinafter the Narrative]. The town council voted to impound the Narrative shortly after its initial distribution in March of 1770. However, the printers managed to evade the impound by selling copies of an English reprint of the same document in early July. See Zobel, supra note 124, at 236, 247.

charged trial dwarfed the community protests that preceded the King and Diallo trials.

In contrast to those modern-day trials, however, the British officers were tried in the city in which the riots took place. The colonial justice system was not insensitive to the dangers that community prejudice posed to the defendants. The court employed its power to ensure that the Boston jury would be impartial, yet no motion was made to take the trial out of the hands of the vicinage. Indeed, such a measure well might have resulted in mob violence against the indicted soldiers.¹²⁸ The defendants did not have even the right to evade the justice of the community by seeking a bench trial, as murder charges only could be tried "by the country," i.e., by the local jury.¹²⁹ Instead of considering transfer, the courts first continued the trial for several months until the public excitement had died down.¹³⁰ The Massacre had taken place on March 5, 1770, but the judges managed to delay until October the first trial, that of the captain who allegedly ordered the soldiers to fire.¹³¹ The court also allowed John Adams and the other defense lawyers to make ample use of their rights on voir dire. In the first trial, the lawyers challenged twenty-two members of the panel.¹³² Additionally, during that six-day trial, the jury was sequestered to safeguard them from public pressure.¹³³ These efforts at mitigating the pretrial publicity appear to have succeeded, since the jury ultimately acquitted the captain.¹³⁴ Similar efforts were made to secure an impartial jury in the subsequent trial of the soldiers, and the jury acquitted six of these men while finding two guilty of manslaughter.¹³⁵

¹²⁸ One of the judges in the trial, Judge Oliver, later said: "Had a trial been refused, it was rather more than an equal chance that the Prisoners would have been murdered by the Rabble; and the Judges exposed to Assassinations." Zobel, *supra* note 124, at 222 (quoting Judge Oliver).

¹²⁹ See *id.* at 239. As was the English custom, the clerk asked the defendants at their arraignment, "How wilt thou be tried?" They each responded in turn, "By God and my country." *Id.* (quoting clerk and defendants).

¹³⁰ Not surprisingly, this measure was resisted vigorously through public protest by Sam Adams and other radicals. See *id.* at 221-22.

¹³¹ See 3 *Legal Papers of John Adams* 17 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). The Tory governor, Thomas Hutchinson, aided the delay by refusing to empanel a special judge to fill a temporary vacancy for the trial. See Zobel, *supra* note 124, at 231.

¹³² See 3 *Legal Papers of John Adams*, *supra* note 131, at 18. The local nature of the trial aided the defense counsel in obtaining information on the character and backgrounds of the members of the voir dire. See Zobel, *supra* note 124, at 245.

¹³³ See *id.* at 250.

¹³⁴ See *id.* at 265.

¹³⁵ See *id.* at 294. In the final trial, the jury acquitted four civilians accused of aiding the officers. See *id.* at 297. The defendants' challenges left only nine jurors seated when the venire ran out. At common law, when the sheriff had run out of veniremen (who were

The Boston Massacre trials revealed the colonists' deep-seated commitment to the vicinage presumption. Perhaps by modern standards, even by the constitutional standard argued for in Part III, the defendants' right to an impartial jury would mandate transferring the trial outside of Boston. This historical case, however, reveals the respect the American colonists held for the vicinage presumption. Although Sam Adams and some of the fiercest radicals decried the acquittals, most Bostonians saw them as settling the controversy, at least for the time being.¹³⁶ The Reverend Samuel Cooper saw the verdicts as "wip[ing] off the imputation of our being so violent and bloodthirsty a people, as not to permit law and justice to take place on the side of unpopular men."¹³⁷ Had the vicinage been denied the opportunity to try the defendants themselves, it is doubtful that the colonists would have accepted the verdicts so magnanimously. However, the question of trying the soldiers elsewhere was not an issue for the early Americans. As they shortly would demonstrate in fighting for their independence, the colonists understood the vicinage presumption to be inherent in the trial by jury and as much the community's right as the defendant's.

Although the Americans accepted the verdicts in the Boston Massacre trials, Parliament decided not to take any more chances with the people of Boston. After the Boston Tea Party, it enacted the Act for the Impartial Administration of Justice,¹³⁸ one of the so-called Intolerable Acts, which provided that English soldiers charged with murdering colonists while repressing civil unrest or enforcing the revenue laws would be tried outside of Boston in a nearby province or in England.¹³⁹ Colonists denounced the Act as the "Murderer's Act," charging it with violating the English constitution and threatening the safety of the people of Massachusetts.¹⁴⁰ According to one patriot, its provisions exposed "every inhabitant in Massachusetts Bay . . . to the

chosen randomly from the vicinage in advance of the trial), he had the duty to bind into service talesmen—appropriate citizens who happened to be in the immediate vicinity of the courthouse. Using such a procedure, the sheriff corralled eight bystanders as talesmen. The first five were challenged, but neither the prosecution nor the defendant objected to the last three, who happened to be from outside the county. Although such jurors were ineligible as veniremen, they were acceptable as talesmen. See *id.* at 270-71.

¹³⁶ See *id.* at 299-301.

¹³⁷ Letter from Samuel Cooper to Benjamin Franklin (Jan. 17, 1771), in 7 *The Works of Benjamin Franklin* 499-500 (Jared Sparks ed., Boston, Hilliard, Gray, and Co. 1838).

¹³⁸ 14 Geo. 3, ch. 39 (1774) (Eng.).

¹³⁹ See *id.*

¹⁴⁰ See Amar, *Constitution and Criminal Procedure*, *supra* note 24, at 124 & n.163 (describing colonists' response to Act); Merrill Jensen, *The Founding of a Nation: A History of the American Revolution 1763-1776*, at 456-57 (1968) (same); John C. Miller, *Origins of the American Revolution* 371 (1943) (same).

lawless violence of a Soldiery to be destroyed as wild & savage beasts of the forests.”¹⁴¹ The Continental Congress described the Act as “indemnifying the murderers of the inhabitants of Massachusetts-Bay.”¹⁴² The Murderer’s Act, by denying the Boston community the right to try the defendants, allowed British soldiers to murder with impunity.

Amidst this revolutionary climate, the vicinage right was on the agenda of the first meeting of the Continental Congress. The Congress expressed its concern with trying both American patriots and English soldiers across the seas in England. The Congress’s first series of resolutions echoed the Virginia Resolves in stating that the colonies were entitled to “the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.”¹⁴³ The Congress also charged that the Administration of Justice Act deprived the colonists of their “rights” as Englishmen, including the right to sit in judgment on the jury.¹⁴⁴ In an address to the Province of Quebec enumerating the rights of Englishmen, the Congress conveyed its belief that the vicinage presumption was inseparable from the trial by jury:

[The] great right . . . of trial by jury . . . provides, that neither life, liberty nor property, can be taken from the possessor, until twelve of his unexceptionable countrymen and peers of his vicinage, who from that neighbourhood may reasonably be supposed to be acquainted with his character, and the characters of the witnesses, upon a fair trial, and full enquiry, face to face, in open Court, before as many of the people as chuse to attend, shall pass their sentence upon oath against him.¹⁴⁵

¹⁴¹ Miller, *supra* note 140; see also Robert Middlekauff, *The Glorious Cause: The American Revolution 1763-1789*, at 239 (1982) (quoting one colonist who described Act as extending protection to “harpies and bloodsuckers” of Customs Service).

¹⁴² Address to the Inhabitants of the British Colonies (Oct. 21, 1774), reprinted in 1 *Journals of the Continental Congress, 1774-1789*, at 98 (1904) [hereinafter *Journals of Continental Congress*]; see also Address to the People of Great Britain (Oct. 21, 1774), reprinted in 1 *Journals of Continental Congress, supra*, at 87 (describing Murderer’s Act as having been “passed to protect, indemnify, and screen from punishment such as might be guilty even of murder, in endeavouring to carry their oppressive edicts into execution”).

¹⁴³ Resolutions of Oct. 14, 1774, reprinted in 1 *Journals of Continental Congress, supra* note 142, at 69.

¹⁴⁴ See Suffolk Resolves (Sept. 17, 1774), reprinted in 1 *Journals of Continental Congress, supra* note 142, at 33 (declaring that Murderer’s Act, by “screening the most flagitious violators of the laws of the province from a legal trial,” is a “gross infraction[] of those rights to which we are justly entitled by the laws of nature, the British constitution, and the charter of the province”).

¹⁴⁵ Address to the Inhabitants of Quebec (Oct. 26, 1774), reprinted in 1 *Journals of Continental Congress, supra* note 142, at 107. Chief Justice Burger cited to this address in *Richmond Newspapers*. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 568-69 (1980) (plurality opinion). The Chief Justice described the address as “an ‘exposition of

Like the English commentators, the Continental Congress understood the vicinage presumption to be a structural property of the "great right," one that served not only the interests of the defendant, but those of the community as well.

The Declaration of Independence reflected these sentiments and so listed among its grievances violations of both the community and the defendant's vicinage right.¹⁴⁶ The Declaration attacked the King for his approval of the Administration of Justice Act. It described such an act "of pretended Legislation" as a measure "foreign to our Constitutions" that protected the King's armed troops "by a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States."¹⁴⁷ The document also criticized the King's support for parliamentary acts that violated the defendant's vicinage right, "transporting us beyond Seas to be tried for pretended Offences."¹⁴⁸ The Americans were deeply concerned about the Crown's failure to respect the common law's longstanding vicinage presumption and they expressed those concerns in the founding document of the Revolution.

In the wake of the Declaration of Independence, many of the state constitutions expressly incorporated the vicinage right.¹⁴⁹ The various formulas by which the constitutions guaranteed that right reflected the multiple purposes that it served. Two states required that criminal trials be held in the county in which the offense was committed.¹⁵⁰ Two others declared that trial near the location of the crime

the fundamental rights of the colonists, as they were understood by a representative assembly chosen from all the colonies.'" Id. at 568 (quoting 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 221 (1971)).

¹⁴⁶ The Declaration of Independence paras. 15, 17, 21 (U.S. 1776).

¹⁴⁷ Id. paras. 15, 17; see also Amar, *Constitution and Criminal Procedure*, *supra* note 24, at 124 n.163 (noting that "Mock Trial" system was attacked as "circumvention of the judgment of the victimized community"); Pauline Maier, *American Scripture: Making the Declaration of Independence* 118 (1997) (linking provision to Administration of Justice Act of 1774, 14 Geo. 3, ch. 39 (Eng.)).

¹⁴⁸ The Declaration of Independence para. 21 (U.S. 1776).

¹⁴⁹ See Blume, *supra* note 24, at 67-78 (discussing provisions in early state constitutions). Technically, some of the constitutions spoke in terms of limiting the venue as opposed to the vicinage of the trial, although the primary value of the venue came in the jurors arising from the surrounding vicinage.

¹⁵⁰ See Ga. Const. of 1777, art. XXXIX, reprinted in 2 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 783 (Francis Newton Thorpe ed., 1909) [hereinafter *Federal and State Constitutions*] (providing that all "matters of breach of the peace, felony, murder, and treason against the State" must be tried "in the county where the same was committed"); N.H. Const. of 1784, pt. I, art. XVII, reprinted in 4 *Federal and State Constitutions*, *supra*, at 2455 (providing that "no crime or offence ought to be tried in any other county than that in which it is committed").

was essential in order to have a proper determination of the facts.¹⁵¹ Two expressly guaranteed the defendant the right to trial by the vicinage or the "country."¹⁵² Although the others did not contain an express vicinage guarantee, they secured the trial by jury, which well may have been seen as implicitly protecting the vicinage.¹⁵³ Two of these states, New York and Rhode Island, demonstrated this understanding by ratifying the federal Constitution under the assumption that the guarantee of trial by jury implied a vicinage limitation.¹⁵⁴

The text of the U.S. Constitution contained only a limited recognition of the vicinage presumption. Article III, Section 2, provided that "[t]he 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"¹⁵⁵ There was little debate on this provision, yet it clearly addressed Great Britain's primary abuse of the vicinage presumption: the transporting of American patriots to England for trial.¹⁵⁶ The Venue Clause did not guarantee the right to a local jury, but it did ensure that defendants would not be transported to a distant federal capital or to another state for trial. The Clause thus required that the defendant be tried by the broader politi-

¹⁵¹ See Md. Const. art. XVIII, reprinted in 3 Federal and State Constitutions, supra note 150, at 1688 (declaring that "the trial of facts where they arise, is one of the greatest securities of the lives, liberties and estates of the people"); Mass. Const. of 1780, pt. I, art. XIII, reprinted in 3 Federal and State Constitutions, supra note 150, at 1891 (finding same in criminal cases).

¹⁵² See Pa. Const. of 1776, § 9, reprinted in 5 Federal and State Constitutions, supra note 150, at 3083 (declaring that "in all prosecutions for criminal offences, a man hath a right to . . . trial, by an impartial jury of the country"); Va. Const. of 1776, § 8, reprinted in 7 Federal and State Constitutions, supra note 150, at 3813 (providing that "in all capital or criminal prosecutions a man hath a right to . . . a speedy trial by an impartial jury of twelve men of his vicinage").

¹⁵³ See N.Y. Const. of 1777, art. XLI, reprinted in 5 Federal and State Constitutions, supra note 150, at 2637 (providing that "trial by jury, in all cases in which it hath been used in the colony of New York, shall be established and remain inviolate forever"); N.C. Const. of 1776, art. IX, reprinted in 5 Federal and State Constitutions, supra note 150, at 2787 (preserving the jury right "as heretofore used").

¹⁵⁴ See Kershen, supra note 24, (29 Okla. L. Rev.) 817.

¹⁵⁵ U.S. Const. art. III, § 2.

¹⁵⁶ There appear to be two reasons why the drafters of the Constitution omitted a more detailed vicinage provision. First, the diversity of state definitions of the size of the vicinage made it difficult for the drafters to agree on a specific formula. See 4 Debates on the Adoption of the Federal Constitution 150 (Philadelphia, Jonathan Elliot ed., 1836) (1787) [hereinafter Elliot's Debates] (remarks of Gov. Johnston of North Carolina) (noting differences between juror selection in states of North Carolina and Virginia). Second, some of the Federalists, including James Madison, were concerned that the vicinage could not be guaranteed with "safety," for a rebellion might make trial "impracticable" in the county. See 3 id. at 537 (remarks of Mr. Madison of Virginia). Both of these concerns reappeared in the congressional debates over the Sixth Amendment. See *infra* notes 170-73 and accompanying text.

cal community, if not the neighborhood, in which the crime was committed. Any more specific guarantee would have been difficult, both because of the diversity among state practices and because the structure of the federal court system itself largely had been left to the discretion of future legislatures.¹⁵⁷

The Venue Clause protects the rights of defendants, but the text departs from a defendant-only reading in two respects. First, the Venue Clause does not grant the defendant a personal right but establishes a structural provision, which provides that *all* crimes will be tried in the state in which the crime was committed.¹⁵⁸ In contrast to the Sixth Amendment, the right is not phrased as a guarantee to the accused. Instead, it reflects the common law tradition that equated the jury trial itself with a trial by the locality ("country"). Second, the Venue Clause does not guarantee the defendant the right to be tried in his home state, but only the state in which the crime was committed. Thus, the Clause privileges the goal of trying crimes by jurors familiar with the locality of the crime, rather than those familiar with the character of the accused himself.

The limited protection that the Constitution granted to the vicinage presumption was one of the Antifederalists' primary concerns with Article III. Although Article III guaranteed a trial in the state, it did not ensure that the members of the local community would sit on the jury.¹⁵⁹ Patrick Henry, in the Virginia Convention, argued that to leave the vicinage right unguarded was to sacrifice the jury right itself: "Juries from the vicinage being not secured, this right is in reality sacrificed."¹⁶⁰ Other Antifederalists, such as Stephen Holmes of Massachusetts, criticized the Constitution for failing to provide the defendant with the "right to insist on a trial in the vicinity where the fact was committed."¹⁶¹ As a result of these objections, a number of

¹⁵⁷ See Kershen, *supra* note 24, (29 Okla. L. Rev.) 816.

¹⁵⁸ Despite this structural history, the Supreme Court has interpreted Article III, Section 2 to be a personal right. See *Patton v. United States*, 281 U.S. 276, 298 (1930), overruled on other grounds *sub nom. Williams v. Florida*, 399 U.S. 73 (1970). For a persuasive critique of the reasoning in *Patton*, see Amar, *Bill of Rights*, *supra* note 24, at 104-08.

¹⁵⁹ Technically, Article III guaranteed only that the venue would be within the state and not that the jurors would be drawn from the state. However, none of the Founders contemplated a scenario where jurors would be brought in from out of the state. See Kershen, *supra* note 24, (29 Okla. L. Rev.) 808-11.

¹⁶⁰ 3 Elliot's Debates, *supra* note 156, at 545 (remarks of Mr. Henry of Virginia).

¹⁶¹ 2 *id.* at 109 (remarks of Mr. Holmes); see also 3 *id.* at 569 (remarks of Mr. Grayson of Virginia) (criticizing Constitution for departing from "true vicinage"); Richard Henry Lee, Letter from a Federal Farmer No. 2, 1787, reprinted in *The Antifederalists* 203-11 (Cecelia M. Kenyon ed., 1966) (describing "jury trial of the vicinage in the administration of justice" as "essential part[] of a free and good government," and questioning its absence in federal Constitution).

the state ratification conventions called for the vicinage right to be added as part of the Bill of Rights.¹⁶²

Given the public interest in a Bill of Rights, James Madison proposed amendments to the Constitution in June 1789. Madison's original plan was to provide a list of amendments to the text of the Constitution, rather than to add to the document a supplemental set of limitations. The original proposal contained two articles relating to the judiciary. The first provided for the rights of the accused in a criminal prosecution.¹⁶³ Madison sought to place those rights in Article I, Section 9, as a limitation upon the power of Congress. The second provision would amend the structural provisions of Article III, Section 2, clause 3, to expand upon the original meaning of the guarantee that all trials would be by jury. Madison placed in the second structural provision the guarantee that all trials would be "by an impartial jury of freeholders of the vicinage."¹⁶⁴ The text contained an exception to the vicinage presumption for cases in which the county was under enemy occupation or in general insurrection.¹⁶⁵ Thus, Madison's original proposal recognized that the vicinage presumption was part of the structure of the judicial branch, not simply a right of the individual defendant.

The House referred Madison's proposals to a Committee of Eleven, which made only minor alterations to Madison's amendment to the judiciary article.¹⁶⁶ In the debate before the full House, Representative Burke proposed that the word "vicinage" be substituted with "district or county in which the offense has been committed."¹⁶⁷ He suggested that these words would conform more closely to the existing practice in South Carolina and other states, and better would address citizens' fears of being carried away for trial to a distant location in the

¹⁶² See Edward Dumbauld, *The Bill of Rights and What It Means Today* 10-33 (1957) (outlining history of adoption and current judicial interpretation of Bill of Rights); Kershen, *supra* note 24, (29 Okla. L. Rev.) 816-17 (describing efforts of New York, North Carolina, Rhode Island, and Virginia to add vicinage right to Bill of Rights). In addition to those four states, Maryland proposed that the trial by jury should match those procedures adopted by the state in which the federal court was sitting. See Dumbauld, *supra*, at 18.

¹⁶³ The text read: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the cause and nature of the accusation, to be confronted with his accusers, and the witnesses against him; to have the assistance of counsel for his defence." 1 *Annals of Cong.* 452 (Joseph Gales ed., 1789) [hereinafter *Annals*].

¹⁶⁴ *Id.* The provision also included other accustomed requisites, such as the requirement of unanimity, grand jury indictment, and the right to challenge members of the petit jury.

¹⁶⁵ Madison had demonstrated the concern behind this exception while defending Article III in the Virginia Ratification Convention. There, he argued that the vicinage presumption should be left to the discretion of the legislature. See 3 *Elliot's Debates*, *supra* note 156, at 537 (remarks of Mr. Madison of Virginia).

¹⁶⁶ See Kershen, *supra* note 24, (29 Okla. L. Rev.) 820-21 (comparing alterations).

¹⁶⁷ 1 *Annals*, *supra* note 163, at 789.

state. Representative Lee, however, replied that "vicinage" was better, "being a term well understood by every gentleman of legal knowledge," and Burke's motion was rejected.¹⁶⁸ The House then approved the clause without amendment. Prior to sending it to the Senate, the House voted to position amendments as a supplement to the original text of the Constitution, rather than to amend the document itself. This cosmetic change did not alter the vicinage right's place as a structural provision.¹⁶⁹

The Senate, however, objected in toto to the House's vicinage provision. The Senate draft deleted Madison's structural guarantees for the jury trial, including the rights of challenge and jury unanimity, except for the guarantee that felonies must be presented to the grand jury. Although there is no record of the Senate debates, Madison explained in contemporaneous letters that some senators believed the vicinage language to be "either too vague or too strict a term, too vague if depending on limits to be fixed by the pleasure of the law, too strict if limited to the County."¹⁷⁰ The diversity of practice within the states made agreement on fine principle difficult, and consequently, the Senate sought to leave the matter to congressional legislation.¹⁷¹ The Judiciary Act of 1789,¹⁷² which was pending during the discussion of the Bill of Rights, protected elements of the vicinage right, and the senators hoped that would be sufficient to calm the popular call to explicitly acknowledge the right in the Constitution.¹⁷³

The House, however, refused to concede the point and demanded that the vicinage right be preserved in the Constitution. After a con-

¹⁶⁸ *Id.*

¹⁶⁹ The change led to a slight textual alteration as duplicative language was removed. See Dumbauld, *supra* note 162, at 214-15; Kershen, *supra* note 24, (29 Okla. L. Rev.) 822.

¹⁷⁰ Letter from James Madison to Edmund Pendleton (Sept. 23, 1789), in 12 *The Papers of James Madison* 419 (Charles F. Hobson et al. eds., 1979).

¹⁷¹ The states differed significantly in the size of the districts and counties from which jurors were drawn. See Kershen, *supra* note 24, (29 Okla. L. Rev.) 822-23. In some colonies, such as Virginia, the relatively sparse population in some parts of the region required that trials be held in central areas. However, even where the venue of the trial was outside of the county, Virginia had provided since 1734 that the jurors would be drawn from the county in which the crime was committed. See *id.* at 814.

¹⁷² Ch. 20, § 29, 1 Stat. 73, 88.

¹⁷³ See Letter from James Madison to Edmund Pendleton (Sept. 23, 1789), in 12 *The Papers of James Madison*, *supra* note 170, at 419 ("The Senate suppose also that the provision for vicinage in the Judiciary bill, will sufficiently quiet the fears which called for an amendment on this point."). The Judiciary Act of 1789 provided that in capital cases, the trial would be held in the county in which the crime was committed. The only exception was for instances where such a trial would cause "great inconvenience," in which case twelve petit jurors from the county would be summoned to the place of the trial to participate in the venire. See Judiciary Act of 1789, ch. 20, § 29, 1 Stat. at 88. In all other cases, jurors needed only to be drawn from the district at large. See *id.*

ference committee failed to reach agreement on the vicinage issue and other differences, the House voted to accept all of the Senate demands in return for three concessions from the Senate, one of which was the vicinage right.¹⁷⁴ As an apparent compromise, however, the House replaced the language providing for "impartial jury of the vicinage" with "impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."¹⁷⁵ This language threaded the needle that Madison described by constitutionalizing the vicinage right yet leaving the districts' size to the ordinary political process.

The final text altered the vicinage right so as to phrase it as a personal right of the accused, rather than as a structural provision. There does not appear to be any firm evidence of why this happened, and nothing in Madison's letters suggests that the changes responded to concern over the public's vicinage right. The structural language reflected the dominant common law tradition that viewed the vicinage presumption as a part of the trial by jury that protected both the defendant and the community. Given the Founders' widespread recognition that in all criminal trials jurors would be drawn from the vicinage, there is no evidence that the Founders believed that the change in language would weaken the structural presumption.¹⁷⁶

Instead, the alterations in the text were made probably for stylistic reasons. Madison and the House expected that the original language, "[t]he trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage," would substitute for the existing structural provision of Article III, Section 2. When the House placed the amendment as part of the Bill of Rights, it preserved the structural language. Yet such language was slightly out of place next to the other personal rights enumerated in the Bill of Rights. More significantly, when the House agreed to the Senate's deletion of the other structural protections for the petit jury (such as the rights to unanimous juries and to voir dire), the vicinage presumption was left as the only remaining provision in that article. Rather than leave the vicinage right as an orphan, the drafters attached it to the other protec-

¹⁷⁴ See 1 *Annals*, supra note 163, at 948; see also Dumbauld, supra note 162, at 48-49 (detailing in greater length procedural steps taken in Congress).

¹⁷⁵ 1 *Annals*, supra note 163, at 913.

¹⁷⁶ Indeed, the Judiciary Act of 1789 made no provisions for permitting the defendant to change the venue of the criminal trial. See ch. 20, § 29, 1 Stat. at 88. It was not until 1944 that the federal rules permitted the defendant to transfer the trial out of the venue in which the crime was committed. See Fed. R. Crim. P. 21 advisory committee's note; see also Kershen, supra note 24, (30 Okla. L. Rev.) 146 n.571 (noting that although transfers to different divisions within judicial district were permitted, it was not until 1946 that courts sanctioned interdistrict transfers).

tions for the accused, including the right to a speedy and public trial. Thus, the House amendments consolidated the protections for the accused, albeit at the expense of an explicit structural protection for the vicinage presumption.¹⁷⁷

The ratification of the Sixth Amendment constitutionalized the vicinage presumption as a right of the defendant. The text modified the vicinage presumption in an important way by leaving the size of the districts to congressional discretion. That compromise must be recognized whether the vicinage presumption is regarded as a personal right or a structural provision. The Federalists who advocated leaving the boundaries of the vicinage to legislative discretion were concerned about a pro-defendant, rather than a pro-government, bias in the local community. However, since the Founders viewed the public and individual elements of the vicinage presumption as intertwined, the public right should be interpreted as coextensive with that of the defendant.

In sum, the Founders understood the vicinage presumption as part of a longstanding common law tradition. That tradition recognized that the vicinage right went beyond the rights of the accused and inhered in the very notion of trial by jury. The Founders demonstrated this understanding during the revolutionary period, and the ratification history of the Sixth Amendment supports it as well. Chief Justice Burger concluded his historical analysis in *Richmond Newspapers* by stating that "the historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open."¹⁷⁸ The very same can be said for the presumption that trial by jury implied trial by members of the locality that had suffered the crime.

B. *The Functional Importance of the Vicinage Right*

The Founders' belief that the vicinage presumption inhered in the very nature of the jury trial reflected more than the historical legacy of the common law. It grew out of their conviction that trial by the vicinage was essential to preserving the virtues of the jury trial. Patrick Henry spoke for many Americans when he warned that, "juries from the vicinage being not secured, this right is in reality sacrificed."¹⁷⁹ Likewise, one delegate at the North Carolina ratification convention

¹⁷⁷ But cf. *Gannett Co. v. DePasquale*, 443 U.S. 368, 426 (1979) (Blackmun, J., dissenting) (arguing that there was no indication that Framers of Sixth Amendment meant to depart from common law practice of open trials by phrasing public trial right as guarantee of defendant).

¹⁷⁸ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (plurality opinion).

¹⁷⁹ 3 Elliot's Debates, *supra* note 156, at 545.

noted that when the accused loses his right to trial by the vicinage, "the principal privilege attending the trial by jury is taken away."¹⁸⁰ The Framers understood that the vicinage jury would be more likely to reach accurate verdicts and to provide the chief safeguard for the innocent defendant against a wrongful prosecution. Moreover, they recognized that trial by the vicinage was essential to fulfilling the jury's role in representing the community.

1. *The Adjudicative Role of the Vicinage*

Local jurors will tend to render more accurate verdicts than foreign ones, for they are most familiar with the context in which the crime took place. The common law long relied upon local jurors' familiarity with the people and the places at issue in the trial.¹⁸¹ Eighteenth-century Americans inherited that faith in local juries.¹⁸² Jurors drawn from the vicinage would be familiar with the character of both the accused and the witnesses, and so would be able best to make determinations of the credibility of eyewitness testimony.¹⁸³ Local jurors also might have personal knowledge of the crime itself that would help them to make such judgments. Even if they lacked personal knowledge, local jurors' familiarity with personal mannerisms, local

¹⁸⁰ 4 *id.* at 150 (remarks of Mr. M'Dowall of North Carolina).

¹⁸¹ See, e.g., 1 Coke, *supra* note 84, at *125a (suggesting that jurors were to be drawn from vicinity of crime since "the inhabitants whereof may have the better and more certaine knowledge of the fact"); Hale, *supra* note 84, at 263 (noting advantage that arises from local juries, "who often-times know the Witnesses and the Parties").

¹⁸² Indeed, three of the early state constitutions explicitly recognized this assumption. See Md. Const. of 1776, art. XVIII, reprinted in 3 Federal and State Constitutions, *supra* note 150, at 1688 ("That the trial of facts where they arise, is one of the greatest securities of the lives, liberties and estates of the people."); Mass. Const. of 1780, pt. I, art. XIII, reprinted in 3 Federal and State Constitutions, *supra* note 150, at 1891 ("In criminal prosecutions, the verification of facts, in the vicinity where they happen, is one of the greatest securities of the life, liberty, and property of the citizens."); N.H. Const. of 1784, pt. I, art. XVII, reprinted in 4 Federal and State Constitutions, *supra* note 150, at 2455 ("In criminal prosecutions, the trial of facts in the vicinity where they happen, is so essential to the security of the life, liberty and estate of the citizen, that no crime or offence ought to be tried in any other county than that in which it is committed."); see also Kershen, *supra* note 24, (29 Okla. L. Rev.) 836 (discussing these provisions).

¹⁸³ In the ratification debates, a number of the proponents of the vicinage amendment focused on the familiarity that local jurors would have with the characters at issue at trial. See, e.g., 2 Elliot's Debates, *supra* note 156, at 110 (remarks of Mr. Holmes of Massachusetts) (describing vicinage jury as one that "would, from their local situation, have an opportunity to form a judgment of the *character* of the person charged with the crime, and also to judge the *credibility* of the witnesses"); 3 *id.* at 447 (remarks of Mr. Henry of Virginia) (describing vicinage jury as one acquainted with character of accused and circumstances of act); 3 *id.* at 547 (remarks of Mr. Pendleton of Virginia) (stating that jury "should have some personal knowledge of the fact, and acquaintance with the witnesses, who will come from the neighborhood").

customs, and the setting in which the crime occurred would leave them well-equipped to interpret the evidence.

The rise of the modern law of evidence challenged the argument that local jurors would prove the best judges of the facts. As noted above, Blackstone expressed concern that local partiality might undermine the accuracy of judicial verdicts.¹⁸⁴ To Coke and Hale, impartial jurors were merely disinterested ones, but Blackstone recognized that disinterested jurors nonetheless might be prejudiced against the defendant.¹⁸⁵ Although eighteenth-century Americans relied in part on jurors' out-of-court knowledge, they had begun to recognize that jurors were supposed to render their verdicts based primarily upon the relevant evidence presented in court. In the Massachusetts ratification debates, Christopher Gore argued against the presumption that jurors from the vicinage would produce more accurate verdicts, since "[i]f the jury judge from any other circumstances but what are part of the cause in question, they are not impartial. . . . [If] the jury could be perfectly ignorant of the person in trial, a just decision would be more probable."¹⁸⁶ The Founders were well aware of the dangers posed by local partiality to the accuracy of verdicts, yet they believed that they might ensure impartial jurors through other measures, such as voir dire, continuances, and sequestration of juries.¹⁸⁷ They thus ratified a Sixth Amendment that encoded both those understandings.

Although modern courts disfavor jurors with specific knowledge of the parties or the crime, the jurors' familiarity with the context in which the events took place remains an important benefit of local juries. One empirical study of juror deliberations concluded that the jurors' knowledge of local conditions played a role in thirteen out of the twenty-one cases observed.¹⁸⁸ Consider as another example the Diallo case, where the character of the neighborhood was essential to

¹⁸⁴ See *supra* notes 100-04 and accompanying text. Governor Johnston expressed similar arguments in the North Carolina ratification debates, stating that he rather would be tried by strangers from outside the community, "disinterested men, who were not biased, than by men who were perhaps intimate friends of my opponent." 4 Elliot's Debates, *supra* note 156, at 150.

¹⁸⁵ See *supra* notes 99-110 and accompanying text.

¹⁸⁶ 2 Elliot's Debates, *supra* note 156, at 112-13 (remarks of Mr. Gore of Massachusetts).

¹⁸⁷ These measures were all used in the Boston Massacre trials. See 3 Legal Papers of John Adams, *supra* note 131, at 17-19, 24-25 (describing extensive voir dire of jurors in Boston Massacre trials).

¹⁸⁸ See Dale W. Broeder, *The Impact of the Vicinage Requirement: An Empirical Look*, 45 Neb. L. Rev. 99, 101 (1966) (reporting results of study); see also Note, *The Jury: A Reflection of the Prejudices of the Community*, 20 Hastings L.J. 1417, 1418-19 (1969) (describing one jury's difficulty in understanding events at trial because of its unfamiliarity with mannerisms of participants in trial).

deciding whether the officers reasonably believed that Mr. Diallo threatened their lives.¹⁸⁹ If Mr. Diallo lived in a dangerous, high-crime neighborhood where police were frequently exposed to attack, the police well might respond aggressively to potential threats. If, on the contrary, Mr. Diallo lived in a more peaceful area, then the police were unreasonably zealous in responding to Mr. Diallo's ambiguous conduct. Bronx jurors likely would have personal experience with the neighborhood in question,¹⁹⁰ yet Albany jurors more likely would know the Bronx from television police dramas. Albany jurors well might have been predisposed to find that the patrolling policemen took their lives into their hands each night. Thus, the jury system still relies upon local jurors' understanding of the context in which the crime took place.

By promoting accurate verdicts, the vicinage presumption safeguards not merely the personal liberty of defendants as such, but importantly, the interest of the community in ensuring that the *innocent* defendant is not wrongly convicted. While the vicinage right remains an important security to defendants, its objective is not to guarantee defendants the most favorable jury available.¹⁹¹ The Sixth Amendment's crime-committed formula emphasizes trying the accused before jurors drawn from the community in which the crime was committed, and not from the defendant's residence, which presumably would be more favorable to the defendant. Likewise, the common law permitted transfers on the ground that the jury was biased against either the prosecution or the defense.¹⁹² Indeed, many states continue

¹⁸⁹ See Amy Waldman, *Diallo's Bronx Neighborhood Defies Stereotypes*, N.Y. Times, Mar. 13, 2000, at B1.

¹⁹⁰ On this note, it is worth mentioning that journalists, after the verdict, contested the defendants' description of Mr. Diallo's neighborhood as a high-crime area. While the Soundview neighborhood where Mr. Diallo resided did contain a pocket of drug dealers, the particular street on which Mr. Diallo lived was several blocks from this area. See Jose Martinez & Bob Kappstatter, *Two Worlds—Blocks Apart: Soundview's Rep Unfairly Tied to 1 Street, Residents Say*, Daily News (N.Y.), Mar. 12, 2000, at S1; Waldman, *supra* note 189, at B1.

¹⁹¹ The American Founders followed Blackstone in recognizing the vicinage right as an important safeguard to the defendant against unjust persecution. Blackstone recognized that the vicinage requirement was a great protection to the innocent defendant, as he could not "be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals." 3 Blackstone, *supra* note 81, at *379. Compare Blackstone's account with that of the Continental Congress's description of the jury right: "This provides, that neither life, liberty nor property, can be taken from the possessor, until twelve of his unexceptionable countrymen and peers of his vicinage . . . shall pass their sentence upon oath against him. Address to the Inhabitants of Quebec (Oct. 26, 1774), reprinted in 1 Journals of Continental Congress, *supra* note 142, at 107.

¹⁹² See *supra* notes 105-15 and accompanying text.

to permit transfers at the prosecution's behest.¹⁹³ Such laws recognize that a purpose of the vicinage presumption is to secure the jury best able to reach an accurate verdict, not the jury that the defendant would most prefer.¹⁹⁴

The Sixth Amendment therefore responds to the fear that in the absence of the vicinage right, the government might select the community that would be most prone to convict the defendant. The defendant has no right to be tried before his home community, nor does he have the right to be tried elsewhere if he has a bad reputation in the community. The Sixth Amendment instead prohibits the government from selecting a distant jury that would be less familiar with the context of the crime than a jury of the vicinage, and so more likely to convict the innocent. It likewise ensures that the accused will not be forced to defend himself in a distant forum that will make it more difficult to summon witnesses to speak on his behalf.¹⁹⁵ The Sixth Amendment creates a neutral-venue rule that prevents the government from forum shopping for a community that will be more predisposed to convict than the natural vicinage.

2. *The Jury as Democratic Representatives of the Vicinage*

The concern for forum shopping points towards the jury's role not only as a finder of fact, but also as a representative of a particular community. The government might forum shop not simply to decrease the accuracy of the verdict, but more particularly, to select a forum more likely to convict the defendant. The signers of the Declaration of Independence were well aware that an English jury was not the same thing as a Boston jury. Even if both were impartial, the English jury would be more likely to acquit an accused redcoat or convict an accused patriot.¹⁹⁶ Likewise, the jurors from Simi Valley were considerably more ready to acquit the officers who beat Rodney King than similarly situated jurors in Los Angeles.¹⁹⁷ The vicinage presumption acknowledges that juries represent the values and the exper-

¹⁹³ See Barbre, *supra* note 14 (detailing state provisions).

¹⁹⁴ See 4 Elliot's Debates, *supra* note 156, at 150 (remarks of Gov. Johnston of North Carolina) (noting that vicinage right gave defendant no protection from being tried before "men who were perhaps intimate friends of [defendant's] opponent").

¹⁹⁵ See, e.g., Letter from the Virginia House of Burgesses to the King, in *Journals of the House of Burgesses*, *supra* note 120, at 215-16 (describing plight of American transported to England for trial, to be tried by "Strangers" to his country in place "where no Witness can be found to testify his Innocence"); 3 Elliot's Debates, *supra* note 156, at 447 (remarks of Mr. Henry of Virginia) (expressing concern that government might carry accused "from one extremity of the state to another").

¹⁹⁶ See Connor, *supra* note 88, at 205-06 (describing English perceptions of lawless colonists).

¹⁹⁷ See *supra* note 1 (describing biases of jurors).

iences of a particular community and thus serve as democratic representatives of the vicinage.¹⁹⁸

The Founders were well aware that the jury served as the "democratic branch" of the judiciary, injecting the voice of the community into the administration of the laws.¹⁹⁹ Thomas Jefferson famously said that it would be better to leave the people out of the legislative branch than the judicial one for the "execution of the laws is more important than the making [of] them" in securing liberty.²⁰⁰ Alexis de Tocqueville likewise recognized that the "jury is pre-eminently a political institution."²⁰¹ Through its power of judgment, the jury ensures that the laws are not applied merely at the whim of the state. Although juries are finders of fact, the law grants them the province to interpret the meaning of ambiguous statutory terms. Jurors make legal judgments in determining objective standards of conduct in the light of the "common sense" of the community.²⁰²

The jury's political role requires it to be representative of a particular community, for the "common sense" of one people may be quite different from that of another.²⁰³ Only by representing the diverse perspectives within the community can the jury voice the "common sense" of the community as a whole. A particular petit jury need not be representative of all of the interests of the community, yet the Constitution requires that the venire itself reflect a cross-section of the vicinage.²⁰⁴ This seeming paradox is justified on the grounds that

¹⁹⁸ See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case." (internal quotation marks omitted)).

¹⁹⁹ See Amar, *Bill of Rights*, *supra* note 24, at 94-96 (documenting Founders' understanding of jurors as political participants).

²⁰⁰ Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), in 15 *The Papers of Thomas Jefferson* 283 (Julian P. Boyd ed., 1958).

²⁰¹ 1 Alexis de Tocqueville, *Democracy in America* 283 (Phillips Bradley ed., Alfred A. Knopf, Inc. 1946) (1835). De Tocqueville continued:

The jury is that portion of the nation to which the execution of the laws is entrusted, as the legislature is that part of the nation which makes the laws; and in order that society may be governed in a fixed and uniform manner, the list of citizens qualified to serve on juries must increase and diminish with the list of electors.

Id. at 283-84.

²⁰² See *Taylor*, 419 U.S. at 530 (stating that jury makes "available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge"); *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 101 (1934) (holding that jury must set objective standards of conduct in light of experience of community).

²⁰³ Cf. *Hamling v. United States*, 418 U.S. 87, 106-07 (1974) (providing that definition of obscenity is to be determined according to standards of particular venue).

²⁰⁴ See *Holland v. Illinois*, 493 U.S. 474, 480 (1990) ("The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a representative jury

making each petit jury truly representative is practically impossible,²⁰⁵ and moreover, is theoretically unclear, for it founders on the question of which relevant characteristics must be represented.²⁰⁶ A jury chosen by lot from a balanced venire, in fact, may be presumed to represent the character of the community closely. The jury also would be legally representative in the sense that the selection process entitles it to democratic legitimacy.²⁰⁷ The commonsense judgments of jurors therefore reflect the sensibilities of the particular community that the jurors represent.

The representative function of the vicinage is intimately related to the community's right to self-governance over local matters. In cases of police violence, like the Boston Massacre and the Diallo shooting, the juries must determine whether the police reasonably acted in self-defense. These questions are essentially legislative judgments as to how aggressive or how restrained police should be in enforcing the laws.²⁰⁸ Are the police justified in protecting the public by patrolling with hands on the trigger, or do the accidents that such policies cause outweigh the safety benefits to police and citizens? These standards of criminal and tort liability will influence future decisions by the police. Just as our federal system permits each state to make different policy judgments in local matters, juries from the vicinage allow each local community to make policy judgments about the crimes that concern their community. Removing a trial from the aggrieved community deprives that community of its right to self-governance in the administration of the laws.

(which the Constitution does not demand), but an impartial one (which it does)." (emphasis omitted)); see also *Taylor*, 419 U.S. at 530-31 (noting that cross-section requirement helps assure jury impartiality).

²⁰⁵ See *Lockhart v. McCree*, 476 U.S. 162, 173-74 (1986) ("The limited scope of the fair-cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly 'representative' petit jury.").

²⁰⁶ But see Albert W. Alschuler, *Racial Quotas and the Jury*, 44 *Duke L.J.* 704 (1995) (arguing that racial quotas would be constitutional and desirable way of increasing representativeness of juries).

²⁰⁷ Political representation by lottery, after all, is as old as democracy itself. See Akhil R. Amar, Note, *Choosing Representatives by Lottery Voting*, 93 *Yale L.J.* 1283, 1290 (1984) (describing selection of leaders by lottery in Athenian and Venetian republics). Such a selection process arguably has a greater claim to democratic legitimacy than a process that relies upon quotas of designated groups. After all, the heart of liberal democracy is individual membership in the political community, not legally recognized groups. Cf. *J.E.B. v. Alabama*, 511 U.S. 127, 154 (1994) (Kennedy, J., concurring) (noting that "[j]ury competence is an individual rather than a group or class matter" (quoting *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946))).

²⁰⁸ See Amar, *supra* note 123 (suggesting that community members should be those members of society who judge such government actions).

3. *The Jury as the Voice of the Community*

Trial by the vicinage likewise is essential to bringing the community to accept the jury's verdict as its own. As the Supreme Court has noted, "[c]ommunity participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system."²⁰⁹ The local jury, by representing the community's voice, legitimates the outcome of both acquittals and convictions. Moreover, the community's participation on the jury enables the trial to serve as a vehicle for healing the social rupture caused by a violent crime. The Court has described this latter purpose as "'community therapeutic value,'"²¹⁰ and in examining the right of public access to the proceedings, the Court has recognized that the trial serves a deeper purpose than simply the adjudication of the defendant's guilt:

Criminal acts, especially violent crimes, often provoke public concern, even outrage and hostility; this in turn generates a community urge to retaliate and desire to have justice done. Whether this is viewed as retribution or otherwise is irrelevant. When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions.²¹¹

The community's participation on the jury is even more significant than its opportunity to watch in the courtroom. The public's ability to observe legislative deliberations indeed is important to winning public acceptance of the laws, yet it surely would be no substitute for the people's right to select their representatives.²¹² Jurors may not be elected directly, yet they too, selected by lot from the community, stamp upon their verdicts the mark of democratic legitimacy.

In the public access cases, the Supreme Court noted that this appearance of legitimacy often is just as important as the wisdom of the results of the trial. As Chief Justice Burger observed in *Richmond Newspapers*:

It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where the trial has been con-

²⁰⁹ *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

²¹⁰ *Press-Enterprise v. Superior Court* (Press-Enterprise I), 464 U.S. 501, 508 (1984) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 570 (1980) (plurality opinion)).

²¹¹ *Press-Enterprise I*, 464 U.S. at 508-09 (citation omitted).

²¹² After all, as a historical matter, the Continental Congress and the United States Senate in their first years deliberated behind closed doors. See David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. Chi. L. Sch. Roundtable 161, 166 (1995).

cealed from public view an unexpected outcome can cause a reaction that the system at best failed and at worst has been corrupted. To work effectively, it is important that society's criminal process "satisfy the appearance of justice."²¹³

Recent experience in transferring high-profile trials has given these words even greater currency. The King and Diallo trials were not "concealed from public view," yet the transfer of those trials had the same effect in undermining the legitimacy of the proceedings. The jury lost its claim to speak for the relevant community, and so the "unexpected outcome" led to the belief by many—and particularly by the members of the aggrieved community—that the system had failed. In the King trial, that failure had tragic results, provoking the most destructive urban riots in American history.²¹⁴ And the defendants themselves did not even benefit from the acquittals, as the perceived illegitimacy of the verdicts led federal prosecutors to take over and try the defendants again.²¹⁵ As Akhil Amar has stated aptly: "How much better for all concerned if the first trial is done right—done where the blood was spilled."²¹⁶ Community participation on the jury is essential to the jury's claim to speak for the relevant community.

The district court in the Oklahoma City bombing trials evocatively described the profound impact of the crime, yet regarded such a communal wound as a reason in favor of removing the trial from the entire state.²¹⁷ The court recognized that the citizens of the state had endured the hardship as a "family," and that they regarded "participation in the trial of these accused men" as "the necessary last step on the road to recovery."²¹⁸ The court acknowledged that the community's desire for justice included with it a desire "to demonstrate [its] ability to be fair in spite of this extraordinary provocation of their emotions of anger and vengeance."²¹⁹ But while the district court demonstrated a keen awareness of the therapeutic value of the com-

²¹³ *Richmond Newspapers*, 448 U.S. at 571-72.

²¹⁴ See *Koon v. United States*, 518 U.S. 81, 88 (1996) (describing rioting as leading to more than 40 deaths, over 2000 injuries, and nearly \$1 billion in property damage); Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 *UCLA L. Rev.* 509, 511 n.4 (1994) (expressing similar damage assessment).

²¹⁵ Federal authorities reportedly undertook the same investigation after the Diallo trials, although the passage of time suggests that the prosecution of the officers will be unlikely. See DOJ to Review Diallo Case, *United Press Int'l*, Feb. 26, 2000, available in Lexis, News Library, UPI File; Marilyn Rauber & Devlin Barrett, *Feds Examining Case with Eye Toward Civil Rights Charges*, *N.Y. Post*, Feb. 26, 2000, at 5.

²¹⁶ Amar, *supra* note 123.

²¹⁷ See *United States v. McVeigh*, 918 F. Supp. 1467, 1474 (W.D. Okla. 1996).

²¹⁸ *Id.* at 1472.

²¹⁹ *Id.*

munity, it read that community interest as an argument for moving the trial elsewhere. The court, however, got it backwards. Community concern may not justify trying a defendant before a partial jury, yet surely that concern should not be mistaken for partiality. It is precisely in such traumatic cases that the jury's role, as the voice of the community, becomes paramount to the healing process. The court's action prevented the community from receiving the full value of trying the defendant within the state.

Compare the opportunity lost in Oklahoma with the experience in Jasper, Texas. On June 7, 1998, the dismembered body of James Byrd, a black man, was found along a road in the small town of 7000 residents.²²⁰ Within hours, police arrested three white supremacists and accused them of tying Mr. Byrd to their pickup truck with an iron chain and dragging him to his death.²²¹ The horrible crime stunned the nation and shamed the multiracial town, which saw the attack as a throwback to racial violence it thought it had left behind. The defendants moved to transfer the case, arguing that the community's intense interest in the trial would prevent them from receiving a fair trial.²²² However, the trial court sympathized with the community's interest in pronouncing judgment upon the defendants.²²³ By participating in the trial, Jasper had the chance to restore the balance in the community by sitting in judgment of the defendants.

The trial in Jasper provides one more example of the continuing importance of the vicinage right. A trial by laypersons from a community outside of the one in which the crime was committed cannot fulfill the adjudicative, political, and communal tasks of the jury. Trial by jury, in its essence, remains a "trial by the country"—a trial by the aggrieved community itself.

C. The Constitutional Underpinnings of the Vicinage Right

The public's vicinage right has as deep historical and functional roots as the public's right of access. However, the plurality's caveat in

²²⁰ See 3 Charged in Brutal Homicide, Fort Worth Star-Telegram, June 10, 1998, at 1, available in Lexis, News Library, FWSTEL File.

²²¹ See *id.*

²²² See Graczyk, *supra* note 9, at B7; Langford, *supra* note 9, at 15A.

²²³ Numerous members of the Jasper community recognized the importance of participating in the trials of Mr. Byrd's killers. See Patty Reinert & Richard Stewart, Jasper Welcomes Lull, but Knows It Can't Last Forever, Hous. Chron., Feb. 28, 1999, at 1 (quoting District Attorney as saying: "'A horrible thing happened here, and we didn't want to run from it. It's our responsibility to deal with it. We'll take care of our own mess.'"); Pete Slover, Jasper Residents Debate Transfer of Remaining Two Trials, Dallas Morning News, Feb. 27, 1999, at 16A (quoting City Manager as saying that "'[t]he first trial had to be here,'" so that town could "'show [defendants] could get a fair trial in Jasper County'").

Richmond Newspapers "against reading into the Constitution rights not explicitly defined," requires investigating the extent to which such rights are "implicit in enumerated guarantees."²²⁴ Like the public's right of access, the vicinage right does not rest squarely within a single constitutional requirement. Instead, it draws support from both the cross-section requirement and the right of individual jurors to serve. These constitutional doctrines suggest that a true jury must be representative of the particular community in which the crime is committed, and that the defendant cannot deny arbitrarily the member of that community his right to sit in judgment.

The Sixth Amendment requires that the jury be drawn from a representative cross-section of the community. As the Supreme Court has noted, "[t]he American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community."²²⁵ Twelve individuals cannot make up a jury if they are not drawn from "a pool broadly representative of the community as well as impartial in a specific case."²²⁶ Thus, in *Thiel v. Southern Pacific Co.*,²²⁷ the Court reversed the verdict in a civil trial where the clerk of the court had excluded all day laborers from the jury. Likewise, in *Taylor v. Louisiana*,²²⁸ the Court recognized that a state procedure that drastically reduced the number of women on the jury violated the cross-section requirement. Although a particular jury need not contain individual members of all economic, social, religious, and racial groups within the community, the jury cannot represent the community truly if a distinct subclass is systematically excluded from the venire. Day laborers may enjoy world views distinct from those of professional classes, and women's views may differ subtly from men's. The cross-section requirement ensures that the jury venire, if not the petit jury itself, reflects the breadth of views within the community.

The Court's prescription that the jury be drawn from a cross-section of the community begs the question of which community the Court has in mind. The cross-section requirement emphasizes the subtle difference that exists among subgroups within a particular community, and so it draws attention to the even more substantial differences that may exist among communities. The common sense of one

²²⁴ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 (1980).

²²⁵ *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946). *Thiel* actually was decided under the Court's supervisory power over the federal courts. It was not until *Taylor v. Louisiana*, 419 U.S. 522 (1975), that the Court acknowledged the constitutional basis of the cross-section requirement. See *id.* at 530.

²²⁶ *Taylor*, 419 U.S. at 530.

²²⁷ 328 U.S. 217 (1946).

²²⁸ 419 U.S. 522 (1975).

community will differ with the demographics of that community, as well as with its particular experiences. Such concerns have led some commentators to direct trial judges to consider the racial composition of communities in selecting the transfer districts.²²⁹ However, racial composition is only one among a number of relevant factors. The jury venire in Albany will differ from that in the Bronx across numerous demographic lines, such as race, religion, and social class. To transfer a trial from the Bronx to Albany distorts the character of the jury as surely as if the county had excluded women or black jurors from sitting on the venire.²³⁰ Such changes run afoul of the spirit, if not the letter, of the cross-section requirement.

The defendant's right to challenge the venire for failing to reflect a cross-section of the community implies that he has a similar right to challenge the venire for arising out of an inappropriate vicinage. And so he does, through the explicit guarantee of the Vicinage Clause. Does this constitutional concern for the vicinage extend to the public's right? In civil trials, either litigant may challenge the venire for failing to represent a cross-section of the community.²³¹ Traditionally in criminal trials, the defendant has been the party to make those challenges.²³² But the Supreme Court never has held that only the defendant has the standing to make such claims.

Indeed, the interests in preventing an improper venire go beyond simply the defendant's interests. As was discussed at length in the previous section, there are considerable public interests.²³³ These interests are the same ones that the Court has acknowledged grant prosecutors the standing to raise claims that the defendant or the prosecution has made discriminatory use of peremptory challenges.

²²⁹ See *supra* note 25.

²³⁰ See Brown, *supra* note 25, at 152-53 (noting that "transfers of venue substantively affect the standard and perspective by which defendants are judged"). Marvin Zalman and Maurisa Gates argue for an emphasis on localism in order to avoid the constitutional problems associated with racial consciousness in making transfer decisions. See Zalman & Gates, *supra* note 25, at 264-66.

²³¹ See, e.g., *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946) (addressing cross-section challenge in civil trials).

²³² This should not be surprising. From the standpoint of the cross-section analysis, the state is unlikely to employ a mode of jury selection that systematically empanels a prodefendant petit jury.

²³³ Indeed, the Court has acknowledged those same interests in articulating the cross-section requirement. See *Taylor*, 419 U.S. at 530 (noting that broad community participation on jury "is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system"); *id.* at 531 (noting that representativeness of jury is necessary because "'sharing in the administration of justice is a phase of civic responsibility'" (quoting *Thiel*, 328 U.S. at 227 (Frankfurter, J., dissenting))). *Taylor* thus linked the representativeness of the jury to the democratic function of and public confidence in the criminal justice system as a whole.

Relying on the public's interest and the interests of the excluded jurors, the Court has held that any party to a civil or criminal litigation may raise a constitutional claim that the opposing litigant denied a potential juror her right to service.²³⁴ As the Court recognized in *Powers v. Ohio*,²³⁵ the "discriminatory use of peremptory challenges harms the excluded jurors and the community at large."²³⁶ Gross generalizations about a person's race or sex are constitutionally impermissible grounds for excluding him from the right of jury service. The Court also has recognized that arbitrary exclusions damage public confidence in the judicial system. The jury's structural role in preserving "the democratic element of the law" is critical to maintaining public confidence in the criminal justice system.²³⁷ These interests go beyond those of the individual defendant and extend to the members of the community as a whole.

What is true in the case of an individual juror likewise is true when considering whether to strike all of the jurors from the vicinage by moving the trial to another community. Unless the trial court has failed in efforts to empanel an impartial jury, transfer on the basis of community generalizations deprives the individual jurors within that community of their right to be considered for jury service. As the Court has recognized: "All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination."²³⁸ The transfers of notorious criminal trials often are infected with the stereotypical presumption that potential jurors from the community around the crime cannot be impartial. Moreover, they betray the notion lying "at the very heart of the jury system" that "[j]ury competence is an individual rather than a group or class matter."²³⁹ The law governing peremptory challenges acknowledges that jury service is a personal right, and exclusions from that right harm the individual jurors as well as the community as a whole. This equal protection jurisprudence supports the notion that the public has a constitutional right that only

²³⁴ See *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (prohibiting defendant from using peremptory challenge to discriminate on basis of race).

²³⁵ 499 U.S. 400 (1991).

²³⁶ *Id.* at 406.

²³⁷ *Id.* at 407 ("Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people.").

²³⁸ *J.E.B. v. Alabama*, 511 U.S. 127, 141-42 (1994).

²³⁹ *Id.* at 154 (Kennedy, J., concurring) (quoting *Thiel*, 328 U.S. at 220).

may be overcome by demonstrating an overriding interest, not by relying on overgeneralizations about a community.²⁴⁰

The cross-section requirement and the limitations on peremptory challenges demonstrate that public rights and the rights of individual jurors are at issue here. Neither of these doctrines can operate effectively if the defendant can transfer the trial merely by showing the trial court opinion poll surveys and newspaper articles. Removing the trial from the vicinage indelibly alters the cross-section of the jury pool. It undermines public confidence in the outcome of the trial and denies the members of the relevant community their right to be selected for the jury. Unless the defendant can demonstrate an overriding interest to overcome the rights at stake, transfer of the trial is an arbitrary strike against an entire community. Without the public's vicinage right, both the cross-section requirement and the individual right of jury service would be eviscerated in practice by the transfer of a trial out of the vicinage.

III

THE VICINAGE RIGHT AND CHANGE OF VENUE LAW

This Article thus far has shown how historical, functional, and constitutional interests support recognizing the public's vicinage right. The following Part describes the contours of this right. This Part first examines the doctrinal elements of the vicinage right to show how the right would be weighed against the defendant's Sixth Amendment

²⁴⁰ The Supreme Court never has addressed this issue, but Justice Marshall identified the link between transfer motions and peremptory challenges in dissenting from a denial of certiorari. In *Mallet v. State*, 769 S.W.2d 77 (Mo. 1989), a black man was accused of murdering a white police officer in a predominantly black district. The defendant moved for a change of venue, and the trial court ordered the trial transferred. See *id.* at 79. The court, however, denied the defendant's request to be transferred to a county with a black population similar to that of his district; the defendant was convicted instead by a jury from a completely white district. See *id.* On appeal, the defendant argued that the transfer order violated his equal protection rights and the cross-section requirement. See *id.* The Missouri Supreme Court upheld the conviction, concluding that there was no showing of purposeful discrimination as required under *Batson*. See *id.* at 80 (relying on *Batson v. Kentucky*, 476 U.S. 79 (1986)). The Supreme Court denied certiorari, but Justice Marshall, in a dissent joined by Justice Brennan, argued that the trial court's decision to transfer the trial to an all-white district supported a finding of racial discrimination. See *Mallet v. Missouri*, 494 U.S. 1009, 1011 (1990) (Marshall, J., dissenting from denial of cert.). Justice Marshall also found that the transfer violated the cross-section requirement by denying the defendant a "venire that is 'truly representative of the community.'" *Id.* at 1011 (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)). The point here is not to endorse Justice Marshall's interpretation of the Constitution's jury requirements per se, but to show how closely these provisions are linked to the vicinage right. A precipitous transfer threatens constitutional interests by denying jurors the right to serve and dramatically altering the composition of the jury.

right to an impartial jury. Who is to have standing to assert the right? How might courts reconcile the competing community interests that might arise in trying multivenue offenses? After answering these questions, this Part turns to the existing constitutional and nonconstitutional standards that govern transfers. Although the public's vicinage right comports with constitutional standards of due process, it requires revision of the rule-based standards that govern transfers. The vicinage right, however, would help remedy the persistent problems that have arisen in recent high-profile trials. By raising the bar on transfers, and just as importantly, by directing courts' attention to the underlying interests of the community, the public's vicinage right would lead to more coherent and satisfactory outcomes in the criminal justice system.

A. The Contours of the Vicinage Right

The public's vicinage right is primarily a right to oppose a party's motion to transfer the trial to another venue. Although vicinage and venue are distinct concepts, the transfer of a trial from one venue to another is in modern practice a change in the district from which the jurors are drawn.²⁴¹ The Sixth Amendment and state constitutions provide that the original indictment or information be within the district or county in which the offense was committed.²⁴² As such, the initial venue for most crimes will be within the vicinage of the crime. The concern for the public's right generally arises when the defendant (or in some jurisdictions, the prosecution) moves to transfer the trial to an alternative venue on the ground that no impartial jury can be drawn from the vicinage. Such circumstances pit the Sixth Amend-

²⁴¹ A number of states grant trial courts the discretion to change the venire of the trial, i.e., to maintain the original venue but to empanel jurors from another community. See, e.g., Fla. Stat. ch. 910.03(3) (1994); Idaho Code § 19-1816(a) (1997); 42 Pa. Cons. Stat. § 8702 (1998); S.C. Code Ann. § 17-21-85 (Law Co-op. 1999); Wash. Rev. Code § 10.25.140 (1990); Wis. Stat. § 971.225 (1997-98). These statutes seem designed to preserve the convenience aspects of the venue for the court and witnesses at the expense of the participation of the vicinage. In cases in which the trial court is concerned that the highly charged atmosphere in the venue might pressure the jurors, the trial court well might change the venue yet continue to draw impartial jurors from the vicinage. While this arrangement is not in general use today, the Judiciary Act of 1789 adopted this approach for those capital cases in which it was inconvenient to hold the trial in the county where the crime was committed. See ch. 20, § 29, 1 Stat. 73, 88.

²⁴² Every state, by constitutional provision, statute, or court rule, provides that the trial shall be had within the county or judicial district in which the crime was committed. See Wayne R. LaFave et al., *Criminal Procedure* § 16.1(c) (2d ed. 1999). Twenty-five states require that the trial be held or that the jurors be drawn from the county in which the crime was committed. See id. at 471-75 & nn.88-92, 101.

ment right to an impartial jury against the public's right to try the defendant locally.

1. *The Nature of the Vicinage Community*

Before examining the standard for deciding between these competing rights, it is necessary to define the nature of the locality in question. What does it mean to speak of the vicinage community? The definition of the community has varied throughout the course of Anglo-American legal history.²⁴³ In England, jurors were originally drawn from the immediate vicinity of the crime. Later, that requirement was relaxed and jurors were drawn from the county as a whole, although courts often would import jurors from the neighborhood to supplement the venire.²⁴⁴ The Framers of the Sixth Amendment recognized the uncertainty behind this concept, as well as the problems that might arise from defining community too narrowly.²⁴⁵ They arrived at a compromise whereby the legislature would determine the size of the vicinage community in defining federal judicial districts. Because the Founders did not distinguish clearly between the public's vicinage presumption and the defendant's Sixth Amendment right, the public's vicinage right should be treated as coextensive with how courts have understood the scope of the defendant's right.²⁴⁶ In the federal system, the public's right should be equivalent to that of the accused, and so likewise should correspond with the judicial districts as previously ascertained by law.

Defining the vicinage community in state court is not as simple as it at first would seem. The Supreme Court has not determined the extent to which the Sixth Amendment Vicinage Clause is incorporated by the Fourteenth Amendment. In the absence of an authoritative decision, lower federal courts and state courts have approached the question from two directions. Some courts have found that the

²⁴³ Indeed, skeptics might question whether the common law's vicinage community really exists in modern America. Mass culture has broken down differences among local communities, while at the same time ethnic and cultural diversity has increased the heterogeneity within local communities. But despite patterns of convergence, the examples cited in this Article suggest that there remain real differences among localities in the United States. Albany is not the Bronx, nor is Los Angeles, Simi Valley.

²⁴⁴ See *supra* note 238.

²⁴⁵ See *supra* notes 170-75 and accompanying text.

²⁴⁶ This also would imply that intradivision transfers themselves would not burden the public's vicinage right. Congress and the courts have long presumed that the Vicinage Clause does not require that the accused be tried within the division of the district in which the crime was committed. See, e.g., *Clement v. United States*, 149 F. 305 (8th Cir. 1906). Congress may subdivide judicial districts without impinging upon constitutional concerns. For a closer consideration of this point, see Kershen, *supra* note 24, (30 Okla. L. Rev.) 49-52, 72-75.

Vicinage Clause speaks only to federal districts and so has no relevance at all to state courts.²⁴⁷ Other courts have found that the federal judicial boundaries should set the standard for state courts. So long as the transfer takes place between counties within a federal district, there is no violation of the Sixth Amendment.²⁴⁸ Neither of these approaches, however, appears to be consistent with the history and plain meaning of the Vicinage Clause.

The arguments that the Fourteenth Amendment does not incorporate the Vicinage Clause are particularly unconvincing. Those courts that have rejected incorporation have done so because they have found that the vicinage right is not "fundamental" to a fair trial and that the Founders drafted the clause with distinctively federal interests in mind, namely the preservation of federal judicial districts under the Judiciary Act.²⁴⁹ There is little doubt that the Founders believed that the protection granted to the accused by the Vicinage Clause was fundamental to a fair trial. Indeed, the Founders fought for the vicinage right at every stage in their struggle for independence.²⁵⁰ The Antifederalists objected to its absence from the Constitution, and despite resistance in the Senate, the House of Representatives demanded that some version of the vicinage right be incorporated in the Sixth Amendment. The Founders believed that the right was fundamental to ensuring that the government did not try the defendant at a distant location before jurors who would be more prone to convict than those from the vicinage.

There is nothing uniquely federal to this understanding of the Vicinage Clause. Although the clause speaks to federal districts, the vicinage presumption was a longstanding tradition within the states and at common law. The Bill of Rights placed no limitations on the state governments, yet there is no evidence that the Founders of the

²⁴⁷ See, e.g., *Caudill v. Scott*, 857 F.2d 344, 345 (6th Cir. 1988) (holding that Sixth Amendment's vicinage right applies only to federal courts); *Cook v. Morrill*, 783 F.2d 593, 595 (5th Cir. 1986) (suggesting that "the Supreme Court, if it is ever faced with the issue, would hold that the right of vicinage does not apply to the states"); *Zicarelli v. Dietz*, 633 F.2d 312, 325-26 (3d Cir. 1980) (holding that vicinage right applies only to federal criminal trials, and not to state criminal trials); *State v. Byrnes*, 150 N.W.2d 280, 282 (Iowa 1967) (finding that Sixth Amendment "applies only to prosecutions in federal courts"); *State v. Bowman*, 588 A.2d 728, 730 (Me. 1991) (holding that Sixth Amendment "has no application to a state criminal prosecution").

²⁴⁸ See, e.g., *United States v. Grisham*, 63 F.3d 1074, 1079-80 (11th Cir. 1995) (holding that geographical area from which jury is summoned may be determined by district and need not be area smaller than judicial district); *State v. Morgan*, 559 N.W.2d 603, 609 (Iowa 1997) (holding that vicinage may be defined as federal judicial districts).

²⁴⁹ See Lisa E. Alexander, Note, *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, 273 (1991).

²⁵⁰ See *supra* Part II.A.2.

Fourteenth Amendment rejected the common law vicinage presumption. Moreover, as a structural matter, the Supreme Court has incorporated every other provision of the Sixth Amendment against the states.²⁵¹ Every state has adopted the concept behind the Vicinage Clause—the idea that a defendant should be tried before jurors drawn from the judicial unit in which the crime was committed—as a matter of either statutory or constitutional law.²⁵² There is no reason to think that the Fourteenth Amendment should not respect some understanding of the Vicinage Clause.

Those courts that have accepted incorporation, however, have had to face the problem of translating the concept of federal districts to states that employ their own judicial units. Most courts have answered the question by accepting federal districts as the constitutional boundaries.²⁵³ So long as state court transfers take place within the federal districts, there is no federal constitutional issue.²⁵⁴ This theory is based on the idea that there is no occasion for presuming that the federal Constitution places any greater limits on state courts than it does on the federal court system.²⁵⁵ Such a mechanical theory of incorporation is simple, yet it is shallow.²⁵⁶ The Vicinage Clause requires that the defendant be tried before a jury drawn from the judicial division in which the crime was committed—a judicial division that the legislature must define in advance. Specifically, the mechanical view of incorporation permits state prosecutors to forum shop

²⁵¹ See *Taylor v. Louisiana*, 419 U.S. 522, 526-31 (1975) (incorporating right to jury drawn from representative cross-section of community); *Duncan v. Louisiana*, 391 U.S. 145, 149-50 (1968) (incorporating right to trial by impartial jury); *Klopfer v. North Carolina*, 386 U.S. 213, 222-23 (1967) (incorporating right to speedy trial); *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (incorporating right to confront witnesses); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (extending right to counsel to right to state-appointed counsel); *In re Oliver*, 333 U.S. 257, 272-73 (1948) (incorporating right to public trial).

²⁵² See *supra* note 242.

²⁵³ See *supra* note 248.

²⁵⁴ There well may be state constitutional issues that arise when the court transfers the trial from one venue to another. Although the purpose of this Article is to argue for a federal vicinage right, state constitutional provisions well may provide even greater protection for a vicinage right.

²⁵⁵ See, e.g., *State v. Morgan*, 559 N.W.2d 603, 609 (Iowa 1997) ("After the Sixth Amendment was made applicable to the states by the Fourteenth Amendment, there is no reason to think that any narrower requirement would be applicable to the states.").

²⁵⁶ Akhil Amar's reading of the Bill of Rights reveals the mistake in simply presuming that the incorporated Bill of Rights is identical to the original limitations on the federal government. Professor Amar explains that the Fourteenth Amendment requires a more refined view of incorporation in light of both the structure of the original Bill of Rights and the views of the Framers of the Fourteenth Amendment. See Amar, *Bill of Rights*, *supra* note 24, at xii-xv, 221-23. The Vicinage Clause provides one more example of how the constitutional architecture of the original Bill of Rights must be refined in interpreting the extent to which the vicinage right is incorporated.

among counties so long as the counties happen to be within more expansive federal judicial boundaries.²⁵⁷ Moreover, it grants the federal Congress, and not the state legislatures, the power to determine the size of the constitutional vicinage community in the state court system.

The Vicinage Clause, properly understood, requires that the defendant be tried within the state judicial district in which the crime was committed as defined by the state legislature prior to the commission of the crime. The state legislatures should enjoy the same discretion to define the vicinage community in the state court system as Congress enjoys in the federal court system. There is no principled reason why the federal boundaries should be constitutionally relevant to the state courts. True, it is possible that state legislatures might define the entire state as the relevant judicial district, thereby granting prosecutors the discretion to try the defendant anywhere in the state.²⁵⁸ But the potential to abuse a power is not an argument against its existence. Congress always has enjoyed that discretion in the federal courts, and indeed, a number of federal districts are coterminous with the boundaries of a state. However, the vicinage requirement ensures that the legislature decides the relevant boundaries in advance, rather than allowing the government to do so in a specific case, and it guarantees that the accused will be tried by a jury drawn from within those boundaries.

The definition of the vicinage at the state level will depend upon the way in which the states set up their courts. Where state constitutional or statutory provisions define the vicinage or venue of the trial, courts should read those provisions to determine the geographic scope of the constitutional vicinage community. In the absence of such provisions, courts should look to the organization of the state court system for guidance. The vicinage community should be presumed to be the pool from which juries generally are drawn from under state law, and state courts then could modify that understanding through subsequent statutes.

²⁵⁷ Of course, there may be state constitutional or statutory limitations upon the discretion of the prosecutor. See *LaFave et al.*, *supra* note 242, § 16.1(b), at 472-73 (describing state limitations on original venue in criminal cases).

²⁵⁸ There is no federal constitutional right to have jurors drawn from the entire district in which the crime was committed. See *Lewis v. United States*, 279 U.S. 63, 72 (1929). A slightly more problematic interpretation finds that the subdivision of the district from which jurors are drawn need not include even the area in which the crime was committed. See *United States v. Baker*, 98 F.3d 330, 337 (8th Cir. 1996); *United States v. Florence*, 456 F.2d 46, 50 (4th Cir. 1972); *Hernandez v. Municipal Court*, 781 P.2d 547, 557 (Cal. 1989).

2. *Standing to Assert the Public's Right*

The next question concerns the nature of the parties who have standing to raise the public's claim. The prosecutor, in the first instance, should have the right to assert the public's interest. Since *Georgia v. McCollum*,²⁵⁹ the prosecutor has enjoyed the right to challenge the defendant's discriminatory use of peremptory challenges. In reviewing peremptory challenges, the Supreme Court has recognized that "[a]s the representative of all its citizens, the State is the logical and proper party to assert the invasion of the constitutional rights of the excluded jurors in a criminal trial."²⁶⁰ To evaluate such claims of third-party standing, the Court has looked at whether (1) the state has suffered a concrete injury, (2) the state enjoys a close relation to the party whose right is being asserted, and (3) there is some hindrance to the third party in protecting its own interests.²⁶¹

The prosecutor will satisfy the test for third-party standing when he seeks to keep the trial before the vicinage. First, the transfer of the trial harms the state interests supported by the vicinage presumption. The transfer may reduce the accuracy of the verdict and may undermine the public perception of the fairness of the trial. The participation of the local community is critical to public acceptance of the laws and the legitimacy of outcomes. Second, the state, as the representative of the political community, enjoys a close relationship with the public whose right is at stake. The prosecutor's jurisdiction often is coextensive with the vicinage district itself, and thus he is a logical party to assert the community's right. Third, as the jurors are drawn by lot from the undifferentiated body of the citizenry, a serious collective-action problem hampers the community's assertion of the right. Although community representatives, be they Sam Adams or Al Sharpton, often will claim to speak for the community, the law need not rely exclusively upon such ad hoc representatives. The government, as a party to every criminal case, appropriately may represent the diffuse rights of the members of the community.

There might be cases, however, in which the state's interests are not in line with those of the public. In the trials of law enforcement officers, for instance, the state may have an incentive to seek a more defendant-friendly forum. The Founders placed such great trust in juries, after all, because they doubted whether the government's interests always would be aligned with those of the public. Thus,

²⁵⁹ 505 U.S. 42 (1992).

²⁶⁰ *Id.* at 56.

²⁶¹ See *id.* at 55-56.

representatives of the vicinage also may have standing to intervene in the criminal trial to assert the public's right.

The public may rely upon its elected or unelected spokespersons in asserting its rights. The press, for example, has standing to assert the public's right of access to criminal proceedings, not because of any special legal or representative status, but because it has the financial interest to pursue the diffuse public interest in open court proceedings.²⁶² So, too, may members of the public with strong interest in the change of venue assert the vicinage right.²⁶³ Potential jurors have standing just as individual voters have standing to challenge the dilution of their voting rights,²⁶⁴ and it would be a mistake to limit the right to speak for the vicinage to government officials alone.

3. *Balancing Impartiality Against the Public's Right*

What then is the appropriate constitutional standard by which a court is to decide transfer motions? Again, the public's right of access provides a useful analogue. In *Press-Enterprise II*, the Supreme Court described the public's right of access as a qualified one that might be overcome by the higher constitutional values of fairness to the individual defendant.²⁶⁵ Before a court may order the trial closed, it must hold that "there is a substantial probability that the defendant's right

²⁶² See, e.g., *Gannett Co. v. DePasquale*, 443 U.S. 368, 397-98 (1979) (Powell, J., concurring) (noting that press may raise public right of access not because of any special status as such, but rather because "[i]n seeking out the news the press . . . acts as an agent of the public at large," since each citizen cannot obtain for himself "the information needed for the intelligent discharge of his political responsibilities" (citation omitted)).

²⁶³ One interesting question is whether victims or members of their families should have the right to assert the vicinage right. Like the media in the right of access cases, the victims are in some respects the most likely candidates to assert the public's right. Their personal interest in seeking justice might give them the incentive to bear the expense of litigating the public's claim. Because the victims never could be eligible jurors, they would not have standing on the basis of their right to serve on the jury. Under *McCullum's* three-part test, the question may be whether the victims have a concrete legal interest at stake and whether they bear a close relationship to the vicinage community. In the Oklahoma City bombing trial, the Tenth Circuit ruled that the victims lacked Article III standing to challenge the trial court's ruling that victims who wished to present victim-impact evidence at sentencing should not be permitted to observe the trial. See *United States v. McVeigh*, 106 F.3d 325, 328, 335-36 (10th Cir. 1997) (per curiam). However, the propriety of that ruling has been debated, and Congress currently is considering a Victims' Rights Amendment to the U.S. Constitution. See Paul G. Cassell, *Barbarians at the Gates? A Reply to Critics of the Victims' Rights Amendment*, 1999 Utah L. Rev. 479, 520-22 (stating that *McVeigh* will interfere with enforcement of federal victims' rights laws absent Victims' Rights Amendment).

²⁶⁴ See, e.g., *Miller v. Johnson*, 515 U.S. 900, 908 (1995) (granting standing to residents of district to challenge racial gerrymandering); *Baker v. Carr*, 369 U.S. 186, 204-08 (1962) (granting standing to voters to challenge vote dilution claim).

²⁶⁵ See *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 13-14 (1986).

to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."²⁶⁶

The *Press-Enterprise* decisions provide an appropriate standard for the public's vicinage right. In some instances, the defendant's right to a fair trial must qualify the public's right. The constitutional concern for the innocent defendant will trump the public's more abstract right in such extraordinary circumstances. However, the standard also requires an on-the-record determination that no reasonable alternative would satisfy the concern for impartiality, and that transfer would alleviate those concerns. Courts would be required under this standard to investigate and explore reasonable alternatives. In particular, transfers prior to voir dire would (and should) be disfavored.²⁶⁷ A study of generalized public opinion polls is no substitute for examining the views of the particular jurors who might sit in judgment of the defendant. As the Supreme Court has recognized, judging the qualifications for jurors is a matter of individual, not group, responsibility.²⁶⁸

By requiring the trial court to acknowledge the community's interests in trying the case, the public right would ensure that courts examine the impartiality question through the lens of the community's interest. The existing standards speak of the lack of impartiality and prejudice. Yet they do a poor job of articulating the precise nature of the prejudice at issue. The question is not whether a Simi Valley jury would be more likely to acquit the officers who beat Rodney King than a jury drawn from Los Angeles. Instead, the appropriate question, as the Supreme Court has described it, is whether the opinions of the jurors are so fixed that they cannot lay aside their initial impressions to judge the case on the facts presented at trial.²⁶⁹ The jurors need not be ignorant of the facts of the case in order to be impartial.

²⁶⁶ *Id.* at 14; see also *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 149-50 (1993) (per curiam) (applying *Press-Enterprise II* test). Justice Blackmun suggested a similar test to that endorsed in *Press-Enterprise II* in his dissent in *Gannett*. See *Gannett*, 443 U.S. at 440-42 (Blackmun, J., dissenting).

²⁶⁷ There is a point at which pressure for justice within the community might direct a trial court to transfer the trial out of the vicinage. However, trial courts rarely will be able to determine this point without first attempting to seat an impartial jury. Moreover, a defendant who is convicted before a manifestly impartial jury can secure a new trial on appeal. A trial court's transfer of a trial to a defendant-friendly district cannot be appealed after an acquittal.

²⁶⁸ See *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946) ("Jury competence is an individual rather than a group or class matter.").

²⁶⁹ See *Patton v. Yount*, 467 U.S. 1025, 1035 (1984) ("The relevant question is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant." (citation omitted)).

Instead, they must lack fixed opinions about the defendant's guilt, particularly those based on evidence not admissible at trial. A highly publicized crime, committed before the eyes of the media, well may generate large numbers of people who believe that the defendant is guilty prior to the trial. However, that prejudice may reflect nothing more than advance knowledge of facts that surely would be brought out in trial. If the jurors' minds are not closed, and their pretrial knowledge reflects evidence that the prosecution would bring out in its case, then there is no reason to presume that the jury is not constitutionally impartial.

The two-pronged *Press-Enterprise* test would improve judicial consideration of transfer motions in criminal trials. The existing standards for pretrial publicity fail to account for the strong legal presumption that the trial will be held in the vicinage. Courts often deny transfer motions when defendants fail to establish sufficient community prejudice, yet such rulings understand the primary competing interest as merely one of administrative convenience.²⁷⁰ In such a situation, it is difficult to determine how much prejudice is too much prejudice. And in close calls, such as the Diallo trial, courts are predisposed to tip the balance in favor of the defendant and against the community. By focusing on the public's interest, the vicinage right requires courts to acknowledge that transferring the criminal trial might damage the goals of the criminal justice system in ways that cannot be remedied in another district.

4. *Balancing the Rights in Multivenue Offenses*

The public's vicinage right raises a special problem in the case of multivenue offenses. Although most crimes are local to a particular jurisdiction, many are not. Racketeering and drug trafficking, for instance, are particularly susceptible to being tried in more than one jurisdiction. In such instances, the court may be forced to consider the rights of competing communities in deciding whether venue should be transferred. As an initial matter, the law should presume that the prosecution's initial venue is proper, so long as the crime in some sense was committed in the district. However, if the defendant, or representatives of another community, contend that an alternative venue has a stronger interest in the trial, then the court should consider whether the interests of justice dictate transfer.

Such transfers should be judged by different standards than those in which the defendant claims his right to an impartial trial is at stake. As with change of venue motions in civil trials, there can be no single

²⁷⁰ But see *supra* note 16 (citing several cases that consider community's interest).

formula to determine the best forum in which to hear the trial. Administrative factors, such as the location of the witnesses and defendants, no doubt will play a role.²⁷¹ The vicinage right, however, is also biased towards the location in which the victims reside.²⁷² The role that a trial plays in healing the breach that the crime caused is more significant to the community that suffered the harm. Likewise, that community is better situated to employ its own values in imposing standards of conduct.²⁷³ If the Unabomber built a bomb in his home state of Montana, for instance, and mailed it to a victim in Silicon Valley, the vicinage presumption should create a bias towards holding the trial in California. Even if important evidence is located in the defendant's home state, the people of California have suffered the crime; they should have the right to adjudicate.²⁷⁴

B. The Vicinage Right and Existing Legal Standards

In many respects, the public vicinage right need not affect the existing standards that govern transfers. The Federal Rules of Criminal Procedure provide that a trial should be transferred where there is "so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding

²⁷¹ In *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240 (1964), the Supreme Court endorsed a ten-factor list that courts might use in determining transfers for convenience under Federal Rule of Criminal Procedure 21(b). This list, which frequently has been invoked by the lower courts, includes (1) residence of the defendant, (2) location of possible witnesses, (3) location of events likely to be in issue, (4) location of documents and records likely to be involved, (5) potential disruption of defendant's business unless the case is transferred, (6) expense to the parties, (7) location of counsel, (8) relative accessibility of place of trial, (9) docket condition of each district or division involved, and (10) any other special elements that might affect the transfer. See *id.* at 243-44.

²⁷² Cf. Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 Utah L. Rev. 289, 318 (discussing victim's right to attend trial in "victim participation model" of criminal justice system).

²⁷³ In deciding change of venue motions in obscenity trials, where criminal liability explicitly depends upon community standards, courts have recognized the importance of holding the trial before the aggrieved community. See, e.g., *United States v. Bagnell*, 679 F.2d 826, 832 (11th Cir. 1982) (noting that "in light of the 'contemporary community standards requirement of *Miller v. California*, 413 U.S. 15 (1973)] it is logical to try a defendant [in a federal obscenity case] in the district to which he allegedly mailed obscene materials'" (alterations in original) (quoting *United States v. Slepico*, 524 F.2d 1244, 1249 (5th Cir. 1975))); *United States v. Toushin*, 714 F. Supp. 1452, 1456-57 (M.D. Tenn. 1989) (finding that factors favoring transfer for convenience of out-of-state defendant are outweighed by need for local jury to apply contemporary community standards); see also Comment, *Multi-Venue and the Obscenity Statutes*, 115 U. Pa. L. Rev. 399 (1967) (describing historical roots of vicinage trial and arguing for its necessity in obscenity cases).

²⁷⁴ The common law understood this presumption. The territorial theory of criminal jurisdiction was based in part upon the presumption that the community in which the last act of the crime occurred was the one more likely to be concerned with the act itself. See Levitt, *supra* note 86, at 327-28.

court in that district.”²⁷⁵ Such language may go even beyond the *Press-Enterprise* standard that permits transfers where there is a “substantial probability” that no impartial jury would be available.²⁷⁶ Although state provisions that permit transfers absent a “substantial probability” of prejudice would have to be changed,²⁷⁷ the texts of most existing standards are not inconsistent with the public’s right.

The real change would be in judicial interpretations of these existing standards. By focusing on the public’s interest, courts will have to consider the competing concerns that underlie the venue. Under the current standards, courts have held that the public’s interest in a prosecution militated in favor of a transfer.²⁷⁸ In the Diallo trial, for instance, the court justified the transfer in part by reference to the intense community protest that arose after the shooting.²⁷⁹ There is no surprise here. If the public’s right is not considered, community interest will continue to go hand-in-hand with partiality. There is always a tension between intense public excitement over a trial and the difficulty in obtaining an impartial jury.

However, once the public’s right is brought to the fore, courts should recognize that, despite the obvious dangers, high-profile trials well may be the ones in which trial by the vicinage is most important. Considering the public right reminds the trial court of the policies that support keeping the trial within the vicinage.²⁸⁰ When the public ire is aroused, the jury’s legitimating and healing functions are paramount. In such cases, the trial court should obtain an impartial trial within the vicinage by employing all of the tools at hand: voir dire, sequestra-

²⁷⁵ Fed. R. Crim. P. 21(a).

²⁷⁶ *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 14 (1986).

²⁷⁷ See, e.g., Md. Const. art. IV, § 8(b) (permitting transfers “on suggestion in writing under oath . . . that the party cannot have a fair and impartial trial”); Cal. Penal Code § 1033(a) (West 1985) (permitting transfers where there is “reasonable likelihood”); N.Y. Crim. Proc. Law § 230.20(2) (McKinney 1993) (permitting transfers upon showing of “reasonable cause”); Tenn. R. Crim. P. 21 (allowing transfers where “fair trial probably could not be had”). Recall that in *Press-Enterprise II*, the Supreme Court explicitly rejected California’s “reasonable likelihood” test as setting too low a standard for permitting judges to close court proceedings. See *Press-Enterprise II*, 478 U.S. at 14-15.

²⁷⁸ See, e.g., *United States v. McVeigh*, 918 F. Supp. 1467, 1472, 1474 (W.D. Okla. 1996) (ordering transfer because of intense trauma Oklahoma City bombing inflicted upon people of state); *Powell v. Superior Court*, 283 Cal. Rptr. 777, 785-87 (Ct. App. 1991) (ordering transfer in part because King beating had triggered intense scrutiny of police practices).

²⁷⁹ See *People v. Boss*, 701 N.Y.S.2d 342, 346 (App. Div. 1999) (noting that “[w]hat is unique about this case is the scale and intensity of the public clamor that preceded the indictments”).

²⁸⁰ Indeed, focusing on the public’s right may lead the court to grant transfer motions in some instances. A case in which community standards are not in dispute and where there is not widespread public concern about the crime well may be one worth transferring if there is serious danger that the local community has been prejudiced by the release, for instance, of an inadmissible confession.

tion, continuances, control over the premises of the court, and restrictions on the litigants' statements to the press.²⁸¹ Only if such efforts prove unsuccessful should the court transfer the trial.²⁸²

The public's vicinage right also would reconcile the distinction that has grown in the law between the *ex ante* and *ex post* definitions of partiality. The Supreme Court has demonstrated its respect for the local nature of trials by restricting the definition of the kinds of prejudice that would motivate transfer. In *Rideau v. Louisiana*,²⁸³ the Court suggested that pretrial publicity so may saturate a community with prejudice that a court might presume partiality without any need to *voir dire* potential jurors.²⁸⁴ However, the Court retreated from finding "inherent prejudice,"²⁸⁵ and in its subsequent cases, emphasized that the protection of the defendant's right to an impartial jury is to be generated by an evaluation of the fitness of the jurors themselves.²⁸⁶ The jurors need not be ignorant of pretrial publicity. They must instead be able to lay aside their preliminary impressions and judge the matter on the facts. The Court has emphasized its faith in the individual juror's ability to conscientiously discharge his or her duty. The Supreme Court consequently has been unwilling to upset convictions when *voir dire* suggests that the jurors were sufficiently impartial.

In contrast to these deferential standards, trial and appellate courts have transferred trials before *voir dire* by relying on public

²⁸¹ See *Sheppard v. Maxwell*, 384 U.S. 333, 358-60 (1966) (describing methods at trial court's disposal to limit prejudice from pretrial publicity).

²⁸² A renewed emphasis on the vicinage right also might lead courts to revive the earlier practice of changing the venue but preserving jurors from the vicinage. Such a practice might help ease external pressures on the trial, yet retain the community's right of representation. See *supra* note 173.

²⁸³ 373 U.S. 723 (1963).

²⁸⁴ See *id.* at 726-27.

²⁸⁵ In the 37 years since *Rideau*, the Supreme Court never has reversed another conviction on the ground that pretrial publicity caused the community to be inherently prejudiced. In two cases, the Court found that the trial judge created a presumption of prejudice by permitting extensive media coverage to disrupt the courtroom atmosphere. See *Sheppard*, 384 U.S. at 358 n.11; *Estes v. Texas*, 381 U.S. 532, 544 (1965). However, these cases emphasized that the trial court can take measures to ensure an impartial trial. Lower courts likewise have found that such extreme circumstances are unlikely to be met. See, e.g., *Coleman v. Kemp*, 778 F.2d 1487, 1537 (11th Cir. 1985) (noting that standard is rarely met).

²⁸⁶ Prior to *Rideau*, in *Irvin v. Dowd*, 366 U.S. 717 (1961), the Court reversed a conviction after finding that the *voir dire* record suggested that the pretrial publicity had predisposed jurors to believe in the defendant's guilt. See *id.* at 727. However, in subsequent cases, the Court narrowed *Irvin*, finding no prejudice in cases where there was extensive pretrial publicity and the jurors demonstrated some prior knowledge of the case. See *Mu'Min v. Virginia*, 500 U.S. 415, 428-29 (1991); *Patton v. Yount*, 467 U.S. 1025, 1035 (1984); *Murphy v. Florida*, 421 U.S. 794, 800, 803 (1975).

opinion polls and press reports. Such decisions are difficult to appeal, as higher courts may be loath to review such fact-intensive decisions and to delay the start of the trial. Moreover, there is no practical way to appeal the matter after the judgment. The prosecution cannot appeal an acquittal, and except in the rare instance where transfer was granted at the prosecutor's behest, a convicted defendant has no grounds upon which to appeal the transfer. Under the current standards, the trial judge may order the transfer before trial without finding the actual prejudice a defendant must establish when appealing the denial of the transfer.

The public's vicinage right would reconcile the discrepancy between these *ex ante* and *ex post* definitions of impartiality by requiring the trial court to exhaust all reasonable alternatives prior to transfer. The on-the-record showing will approximate the standard by which appellate courts set aside a verdict rendered by a constitutionally prejudiced jury. Although appellate courts still might be loath to review the orders prior to trial, the public right would facilitate appellate review by providing more comprehensive guidelines against which courts can measure the decision to transfer.

The public's vicinage right will have a significant impact on transfers under Federal Rule of Criminal Procedure 21(b) and analogous state provisions. Rule 21(b) permits a trial court to transfer a trial "[f]or the convenience of parties and witnesses, and in the interest of justice."²⁸⁷ Prior to 1965, the Rule was limited expressly to trials of multivenue offenses that originally might have been tried elsewhere. However, the Rule was amended to grant district courts, in rare instances, the discretion to order transfers to a convenient district that need not have any relation to the place where the crime was committed.²⁸⁸ This federal rule has not been widely followed among the state courts, and recognizing the public vicinage would require that it be amended.

While district courts still could consider transfers in multivenue offenses, mere convenience could not trump the public's constitutional right. The 1965 amendments reflected the almost complete failure of district courts to consider the public's stake in the location of

²⁸⁷ Fed. R. Crim. P. 21(b). Most state venue positions do not permit transfers on grounds of convenience, although a minority do. See LaFave et al., *supra* note 242, § 16.3(c).

²⁸⁸ See *In re Balsimo*, 68 F.3d 185, 187 (7th Cir. 1995) (finding that rule permits change of venue if, "all relevant things considered, the case would be better off transferred to another district"); *United States v. Aronoff*, 463 F. Supp. 454, 460 (S.D.N.Y. 1978) (granting motion for transfer partially on grounds of defendant's expenses).

the criminal trial.²⁸⁹ The concept of venue so had overcome that of vicinage that the place in which the trial took place was seen as an administrative matter rather than one of any political significance.²⁹⁰ As recent trials remind us, however, the place of the criminal trial has great importance to the law and to the community that suffered the crime. By placing the vicinage's interest at the heart of the venue question, the public right demonstrates the clear inadequacy of transfers prompted by mere notions of convenience and requires that the 1965 amendment to Rule 23(b) be repealed.

CONCLUSION

The community's interest in its participation in adjudicating crimes committed within the vicinage is a matter of constitutional significance. Most of the policies at the heart of the jury system cannot be supported by trials that take place outside the community. The jury always has represented the voice of a particular community and that understanding is supported by reasons as valid today as they were at the time of the Founding. The local jury is necessary to represent the common knowledge and values of the community, to legitimate the processes and outcomes of the criminal trial, and to permit the trial to heal the social rupture caused by the crime. The importance of the locality likewise is reflected in the constitutional doctrines that ensure that the jury reflects a cross-section of the community and that the law respects the juror's right not to be arbitrarily excluded from service.

So long as the law ignores these important purposes, we will continue to see high-profile trials that invite widespread distrust in their outcomes. Courts, by myopically seeking the "most impartial" jury, uproot the trial from the only community that might sit appropriately in judgment. The law must be attentive not only to just results, but to results that embody the appearance of justice. The jury's legitimating function is critical to this appearance. These values were understood by the generation that framed our organic law, as the trial by jury—a trial "by the country"—was the only legitimate body to adju-

²⁸⁹ As Drew Kershen has noted, although a defendant "can waive his rights of venue, an accused is not entitled to waive the constitutional rights of the citizens of the vicinage to serve as petit jurors with respect to crimes committed in the vicinage, unless the accused can present a compelling reason why such rights should be abrogated." Kershen, *supra* note 24, (30 Okla. L. Rev.) 151-52. Change of venue motions motivated by "reasons of convenience for the defendant are not compelling reasons entitling the accused to a change in the geographical source of the jurors." *Id.* at 150.

²⁹⁰ See *id.* at 148-49 (noting that rule drafters amended Rule 21(b) with concern only for venue and not for vicinage).

dicating criminal liability. The law should recapture these values in order to ensure that the great bulwark of Anglo-American justice, the trial by jury, is not lost in those important public trials in which its wisdom is most necessary.