1993

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SHOULD JUDGES CONSIDER THE DEMOGRAPHICS OF THE JURY POOL IN DECIDING CHANGE OF VENUE APPLICATIONS?

Peter M. Kougasian*

I. Introduction

On April 29, 1992, a jury acquitted four white police officers of charges stemming from the beating of Rodney King, a black man.\(^1\) To many Americans who had repeatedly seen excerpts of a videotape that recorded the brutal beating, the verdict seemed irrational. A poll taken for *Time* magazine by Yankelovich Clancy Shulman shortly after the verdict revealed that 68% of those polled said that, had they been on the jury, they would have voted guilty; only 4% said they would have voted not guilty.\(^2\) In the effort to explain a seemingly inexplicable verdict, attention focused on the court’s decision to move the venue of the trial from Los Angeles to Simi Valley, an overwhelmingly white, middle-class suburb, and the lack of even a single African-American on the jury. Asked by the Yankelovich organization to explain the not guilty verdict, 12% of white respondents and 45% of black respondents cited racism. More significantly, asked whether the verdict would have been different had there been any blacks on the jury, 64% of white respondents and 89% of black respondents said it would have been different. Only 14% of those responding said the verdict would have been the same had any blacks been on the jury.\(^3\)

The common sense conclusion seems clear: the lack of African-Americans on the jury resulted in a biased verdict. And if the jury was biased because it was unrepresentative, the converse principle seems equally clear: an unbiased jury is a representative one. And yet

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2. George J. Church, *The Fire This Time*, *Time*, May 11, 1992, at 18-23. In order to have a statistically significant sample of black respondents, the survey included a disproportionate number of black respondents. But the effect on the aggregated total sample is minimal; corresponding figures for white respondents were 62% guilty, 4% not guilty.

3. Richard Lacayo, *Anatomy of an Acquittal*, *Time*, May 11, 1992, at 30-32. As in note 2, *supra*, I computed the 14% figure without compensating for the fact that a disproportionate number of black respondents was included in the poll; the effect is negligible.
this conclusion is one which constitutional law has avoided in a tor-
tured hundred-year history\(^4\) of addressing the demographics of jury composition. As it stands now, the law guarantees “not a representat-
tive jury (which the Constitution does not demand), but an impartial one (which it does).”\(^5\)

This Essay addresses the narrow question of whether, in changing venue, a court ought in principle to consider the demographic diver-
sity of the venue.\(^6\) Deciding this issue requires consideration of two preliminary questions: what is an impartial jury? And what role, if any, does racial diversity play in empaneling an impartial jury?

II. The Batson Line

A. Batson’s Three Constitutionally Protected Interests

In *Batson v. Kentucky*,\(^7\) the United States Supreme Court held that in the trial of a black defendant, a prosecutor may not exercise a per-
emptory challenge against a black juror on the basis of race.\(^8\) The Court offered three reasons for the holding. First, the Court held that although a defendant is not entitled to persons of her own race on the jury, purposeful racial discrimination against black jurors denies a black defendant “the protection that a trial by jury is intended to se-
cure.” The petit jury safeguards the defendant “against the arbitrary use of power by prosecutor or judge.”\(^9\) The jury, therefore, must be “indifferently chosen” in order to ensure defendant’s Fourteenth Amendment right to “protection of life and liberty against race or color prejudice.”\(^10\)

The second right vindicated by the Court in *Batson* is that of the excluded juror. Striking a juror on the basis of race unconstitution-
ally discriminates against the excluded juror. “Competence to serve

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4. See *Strauder v. West Virginia*, 100 U.S. 303 (1880).
6. Technically, the issue is not a change of venue (the location of the trial) but of the vicinage (the geographical origin of the jury pool).
8. *Id.* A strong argument can be made that the Court had already made that decision in *Swain v. Alabama*, 380 U.S. 202 (1964); all *Batson* did was lower the evidentiary threshold required of the defense to prove a violation of the Swain principle. See *Allen v. Hardy*, 478 U.S. 255, 264 (1985) (Marshall, J. dissenting) (“Swain made quite clear that the use of peremptory challenges to strike black jurors on account of their race violated the Equal Protection Clause.”)
10. *Id.* at 87.
as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial.” Race is unrelated to a person’s fitness to serve as a juror, and using race as a criterion to exercise a challenge thus unconstitutionally discriminates against the juror.11

Finally, the Court noted that discriminatory jury selection harms the entire community. In very general language, the Court stated that “selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice” and are a “stimulant to race prejudice.”12

B. The Relevancy of the Batson Principles to the Change of Venue in the Rodney King Trial

Whatever their merits in determining the rights of Mr. Batson in his trial for burglary, these three principles do little to help us understand what went wrong when the court in People v. Powell (the Rodney King trial) moved the venue from Los Angeles to Simi Valley. The first principle — the right of the defendant to a jury of his peers — was not involved, since the defendants were all white. Nor was there a violation of the second principal: the right of black potential jurors not to be discriminated against. Absent an allegation that the judge decided to move the venue to Simi Valley in order to change the racial composition of the jury pool, it could not be argued that black Los Angelenos were excluded from the vicinage on the basis of their race. A completely “race blind” judge could decide, for reasons completely unrelated to race, to move the venire to a suburb that turned out to be nearly all white.13 Finally, although the King verdict un-

11. Id. This argument to some extent misstates the situation. Judges frequently emphasize in their instructions to potential jurors that peremptory challenges are in no way related to qualifications; and numerous commentators have noted that attorneys typically use challenges not to strike biased or unqualified jurors, but to try to obtain a jury leaning in their clients’ favor. See, e.g., James J. Gobert, In Search of the Impartial Jury, 79 J. L. & CRIM. 269, 317 (1988) (“lawyers look not for impartial jurors but for jurors partial to their side”). Thus, it cannot be said that exercise of a peremptory challenge is likely to involve an assessment of a juror’s qualifications of impartiality.


13. It is disturbing that, even if a judge purposefully moved the trial to an overwhelmingly white venue, it is unclear to what extent the decision would be subject to constitutional scrutiny. In Mallet v. Missouri, 769 S.W.2d 77 (Mo. 1989), cert. denied, 494 U.S. 1009 (1990), a motion court found “an inference of discriminatory purpose” in the trial judge’s decision to transfer a black defendant’s capital murder trial to a virtually all white county; the motion court vacated the defendant’s sentence. But the Supreme Court of Missouri, sitting en banc, reversed, and the U.S. Supreme Court denied certiorari, 494 U.S. 1009 (1990), over the dissent of Justices Marshall and Brennan.

For a compelling argument that the U.S. Constitution forbids transfer of criminal trials
doubtedly "undermine[d] public confidence in the fairness of our system of justice," it still cannot be said that the change of vicinage "purposefully exclude[d] black persons from the jury." Thus, the change of venue did not offend the third principle articulated by the Court in *Batson*.

In short, the Court in *Batson* identified several constitutionally protected interests which prohibit race-based peremptory challenges. The Court's holding in *Batson*, however, was clearly not based on the idea that exclusion of blacks from juries results in biased juries. Indeed, Chief Justice Burger, discussing the issue of retroactivity, noted in his dissent that the opinion of the Court was "not designed to avert 'the clear danger of convicting the innocent.'" And, ultimately, when the Court denied retroactivity to *Batson*, in *Allen v. Hardy* the Court concluded that although the discriminatory use of peremptory challenges "may have some bearing on the truthfinding function of a criminal trial," the *Batson* holding was not "designed to enhance the accuracy of criminal trials." Since jurors are screened in voir dire examination, winnowed by challenges for cause, and instructed to be free of prejudice, the Court concluded there was a "high probability," even before *Batson*, "that the individual jurors seated in a particular case were free from bias."

C. The Dynamics of the Jury Panel

The Rodney King verdict raises questions about the dynamics of the jury panel, rather than the qualification of individual jurors. After the Rodney King verdict, the Court's reasoning in the *Batson* line seems naive, for two reasons. First, the Court's faith in the ability of voir dire to remove racial bias from the jury seems overstated. If the


14. The quoted language is from *Batson*, 476 U.S. 79 at 87.
15. *Id.* (emphasis added).
16. See Barbara Underwood, *Ending Race Discrimination in Jury Selection, Whose Right is It, Anyway*, 92 COLUM. L. REV. 725 (1992). Professor Underwood argues that the primary right at issue in the *Batson* line is the right of potential jurors to be selected for jury service. The article was cited with approval by the Court in *Georgia v. McCollum*, 112 S. Ct. 2348, 2354 (1992).
19. *Id.* at 259.
protections listed in *Allen v. Hardy*\(^{20}\) really were adequate to remove the possibility of racial bias from the jury, how then to account for the seeming irrationality of the jury’s verdict in the Rodney King case? That Simi Valley jurors were subject to voir dire and challenges for cause, and were charged to disregard passion and prejudice, hardly gives one confidence to a “high [degree of] probability” that the “individual jurors were free from bias” in the face of a verdict that seemed to so many observers a product of racial partiality.

But secondly, and most importantly, the Court’s attention seems to be focused erroneously on the freedom from bias of *individual* jurors. Is there no difference between a panel of twelve unbiased middle class suburban white jurors, and a panel of twelve unbiased racially and economically diverse jurors? This exclusive focus on the qualifications of *individual* jurors seems inconsistent with, for instance, the constitutional injunction prohibiting juries of fewer than six members in criminal cases, even in state courts. The qualities of the panel as a whole — apart from the qualifications of individual jurors — are so important to accurate fact-finding that the size of the jury has been held to be essential to due process of law.

In *Ballew v. Georgia*,\(^{21}\) the defendant was convicted by a five-person jury of showing an obscene film. The Supreme Court reversed. Justice Blackmun, expressing the view of a majority of the Court,\(^{22}\) relied extensively on published empirical studies in arguing that juries with only five members fail to provide defendants the Sixth Amendment guarantees incorporated in due process of law. Most significantly, Justice Blackmun noted that in group decision-making, “prejudices of individuals were frequently counterbalanced, and objectivity resulted.”\(^{23}\) Larger juries were necessary to “insure accurate fact-finding.”\(^{24}\)

And thus, Justice Blackmun’s opinion suggests that “objectivity” and “accuracy” of a jury’s fact-finding are not adequately protected by the kind of scrutiny of *individual* jurors described in *Allen v. Hardy*. The opinion suggests that only in a group are prejudices sufficiently counterbalanced that we may be confident that justice results.

Is the quest for “objective” juries and “accurate fact-finding,” then, properly focused on the quest for “unbiased” individuals alone, as

\(^{20}\) See, *supra* notes 18 and 19.


\(^{22}\) *Id.* Justice Stevens joined his opinion; Justices Brennan, Stewart, and Marshall concurred with Justice Blackmun’s reasoning, except for his failure to address the First Amendment issue presented by the defendant’s conviction for obscenity.

\(^{23}\) *Id.* at 233.

\(^{24}\) *Id.* at 238-39.
suggested by the Batson line? Or are "objectivity" and "accurate fact-finding" crucially dependent as well upon considerations of the dynamics of the group comprising the jury, as suggested by Ballew v. Georgia? The answer to this question is crucial in determining whether justice is served by weighing the demographic diversity of a jurisdiction in considering a change of venue.

III. Is the Jury More than the Sum of Its Parts?

If, as suggested by the Court's opinion in Allen v. Hardy, the normal safeguards of trial procedure make us confident to a "high [degree of] probability" that individual jurors are "free from bias," then why does the Constitution require so many of them? Would not a single unbiased fact-finder suffice? Or are we like the man of whom Wittgenstein wrote who bought two copies of the same newspaper each morning just to make doubly sure everything he read was true?

There are three perspectives on this question: historical, empirical, and philosophical. That is, first, we might ask what the historical justification was for the traditional twelve-person jury. Was it intended to balance prejudices and bring diversity to the panel of fact-finders, or did it have some other, unrelated purpose?

A. The Historical Approach

The historical approach ultimately resolves nothing. First, as the Court noted in Williams v. Florida, "history . . . affords little insight into the considerations that gradually led the size of [the jury] to be generally fixed at twelve." But, more importantly, while one might trace, entertainingly, the evolution of trial by jury from its roots in trial by ordeal and trial by combat, this history is unlikely to leave us convinced of the optimal size of the jury, or to provide an unambiguous sense of the relationship between the diversity of the jury and its fairness. The historical record suggests that the twelve-person jury (and the unanimity rule) pre-date even the institution of the trial; the traditions of the jury have been far more enduring than have been the justifications that have, from time to time, been offered for them.

B. The Empirical Approach

The second approach, the empirical, might seem more promising; and indeed it was the approach endorsed by Justice Blackmun in Bal-

27. See, e.g., SIR PATRICK DEVLIN, TRIAL BY JURY (1956).
lew v. Georgia. But as Grant Gilmore noted in *The Ages of American Law*:

> It is a fact of life that thinking or talking about doing empirical research is much more fun than actually doing it. And even if you have the resources to employ armies of research assistants to gather all the facts there are, the gathered facts have a disappointing way of turning out not to mean anything beyond themselves.

Indeed, Justice Blackmun's attempt at empirical analysis in *Ballew* yielded less than compelling results. Although Justice Blackmun summarized a substantial body of empirical research on the optimal size of juries, it is extremely difficult to draw from such research alone clear inferences about which kinds of juries produce more just results. Statistics can identify correlations between the size of juries and the kinds of verdicts they produce; but statistics cannot by themselves resolve the normative question of which of the resulting verdicts are more or less just.

For instance, Justice Blackmun asserted that larger juries are more likely to yield consistent verdicts across juries. But it is unclear that consistency is a virtue meriting special consideration. A key component of the criminal justice system is its reliance upon largely unreviewable verdicts by lay juries; this suggests that concerns other than consistency of result are of primary significance. It is hard to know how to quantify these other concerns for purposes of empirical analysis, and after decades of research into juries "the gathered facts have a disappointing way of turning out not to mean anything beyond themselves." Indeed, Justice Powell belittled Justice Blackmun's foray into empirical jury research as "reliance on numerology."

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31. An unsympathetic defendant, for example, might prefer his odds of trying to persuade only five jurors rather than twelve, even if five person juries tend to be less consistent.
32. Gilmore, *supra* note 29, at 89. Professor Gilmore's quotation perhaps somewhat overstates the point; empirical research is indeed helpful in considering, for example, the objection that larger juries are inefficient because they result in too many mistrials, or because selection of larger juries consumes too much trial time. *See Ballew*, 435 U.S. at 244 (citing a study finding little reduction in trial time with smaller juries). Nevertheless, empirical research is not especially helpful in making the value-laden judgment of what juries ought to do.
C. The Philosophical Approach

If neither history nor empirical science is able to provide a coherent rationale for multi-person juries of relevance to our examination of jury diversity, a philosophical examination may be in order. That is, we shift the focus from what juries traditionally have done (the historical approach), or what they are doing now (the empirical approach), to the value-laden question: what do we want juries to do? This is the philosophical approach.

This question — what do we want juries to do? — is at least as old as classical antiquity. In fifth century Athens, cases were often tried before popular courts, called dicasteries, consisting of 500 to 2,500 members, selected by lot. These popular courts were a remarkable instance of participatory democracy, although it must be recalled that since slaves could not sit on the juries, the dicasteries could scarcely be regarded as paradigms of diversity in the modern sense.

But the dicasteries produced a verdict that today seems just as irrational as the verdict in the Rodney King case: the condemnation of Socrates. The outrage felt by Socrates’s disciples at that notorious verdict formed the context for the first philosophical discussions of the jury process. Plato’s bitter dramatization of the unruly proceeding that condemned his mentor, Socrates, vividly demonstrated his contempt for the dicasteries. To remedy the excesses of the disorderly popular courts, Plato favored abolishing their nisi prius jurisdiction. In the first instance, at least, justice should be in the hands of those persons most qualified to render justice, not a mob of amaters.

But Plato’s pupil Aristotle defended the Athenian popular courts. In his famous words,

as a feast to which all the guests contribute is better than a banquet furnished by a single man, so a multitude is a better judge of many things than any individual.

Aristotle reasoned that “the many are more incorruptible than the few; they are like the greater quantity of water which is less easily

36. Plato proposed courts of first instance called bodies of “neighbors” or “arbitrators”; appeals from these courts would go to popular courts tantamount to dicasteries. See Morrow, supra note 34, at 111.
37. Id.
corrupted than a little." While a single fact-finder may, in a particular case, be overcome by anger or some other passion, it is unlikely that all members of a large jury would be simultaneously overcome.

Aristotle's defense of the dicasteries provides the first philosophical analysis of the jury's function. He seems to make two arguments: one, that the effect of prejudiced jurors is diluted in a large group. But secondly, he seems to argue that the members of a larger jury bring diversity to the deliberations, just as participants in a potluck dinner bring greater variety to the table than does a single chef. This diversity makes a large jury a "better judge" than a single person.

Even so, this passage from The Politics leaves unarticulated how it is that jury diversity leads to better decision-making. What exactly is it that diverse jurors bring to decision-making that is lacking from an equally earnest, but homogeneous jury? Some insight on this question may be found by reflecting on modern political theory.

In A Theory of Justice, John Rawls articulated a highly influential formulation of the conditions ideally necessary for a deliberative body to reach valid decisions about justice. It must be emphasized at the outset that in Rawls's theory, the decision-makers are called upon to make decisions about the structure of societal institutions; they are not called upon to render factual verdicts as is a trial jury. Nevertheless, Rawls's theory provides a starting point for discussions of the circumstances necessary for a diverse group of citizens to reach decisions that we would feel comfortable to endorse, in advance, as just.

Rawls poses a hypothetical "original position" in which all members of society meet behind a "veil of ignorance" to conduct deliberations.

[N]o one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities.

Rawls states that, with these individual differences among parties neutralized by the veil of ignorance,

each is convinced by the same arguments. Therefore, we can view the choice in the original position from the standpoint of one person selected at random. If anyone after due reflection [reaches a particular conclusion] then they all do, and a unanimous agree-

39. Id.
40. Id.
41. JOHN RAWLS, A THEORY OF JUSTICE 12 (1971).
Rawls's original position corresponds to a common intuition that it is
differences among people that interfere with efforts to reach fair con-
clusions about the institutions of justice. According to this view, the
key to empaneling a fair jury is not to maximize diversity; on the
contrary, fairness results when jurors are persuaded to set aside their
differences for purposes of deliberation. And thus, at first glance, it
might appear that Rawls's theory provides philosophical support for
the Supreme Court's dictum that a defendant is entitled to an "unbi-
asied" jury but not a "representative" one. The jury selection process,
in its search for "unbiased" jurors, seems to mimic the drawing of
Rawls's veil of ignorance. Jurors are told to set aside their personal
views of the law; those who cannot are excluded. Jurors are charged
to be unbiased. They are disinterested; indeed, one reason sometimes
advanced for change of venue is that local jurors have too much of a
stake in the outcome of a case. The jurors who ultimately sit, then,
might be imagined to act much like the parties in Rawls's original
position, and consequently the diversity of the jury is irrelevant.
Stripped of their personal biases, prejudices, and interests, one juror is
as good as another. Twelve good citizens of Simi Valley are as capa-
bles of rendering justice to Rodney King as are twelve Los Angelenos,
or 500 Athenians.

This argument, however, overlooks another assumption of Rawls's
original position. While parties behind the veil of ignorance know
nothing about themselves; and while it is true that they do not know
their own race, gender, social status, or political or religious beliefs,

[i]t is taken for granted, however, that they know the general facts
about human society. They understand political affairs and the
principles of economic theory; they know the basis of social organ-
ization and the laws of human psychology. Indeed, the parties are
presumed to know whatever general facts affect the [decision they
are called upon to make].

Access to this real-world information about human society is essential
if Rawls's hypothetical contracting parties are to be able to reach
valid results for real-world, diverse communities on the other side of
the veil of ignorance.

Rawls's decision-makers receive this information by fiat. But how
do trial juries gain the knowledge they need to evaluate the credibility

42. Id. at 139.
43. See, e.g., Minnesota Mining and Mfg. Co. v. Platt, 314 F.2d 369, 370 (7th Cir.
44. RAWLS, supra note 41, at 137.
of witnesses, to weigh the plausibility of competing inferences from the evidence, and ultimately to assess the "reasonableness" of, for instance, the force used by a police officer? To make these determinations, a kind of knowledge is needed that is of a different sort from the technical, social scientific information to which Rawls seems to refer. The diversity of a jury panel can play a crucial role in providing the special kind of knowledge a jury needs to reach a just verdict.

IV. Should Judges Consider Racial Demographics in Changing Venue?

A. The Purposes of Venue Rules

Where should a trial be held? When trial by jury originated, in England during the reign of Henry II, the answer was obvious. The institution of the jury began, not as a panel of impartial arbiters, but rather, according to Lord Devlin, as

men drawn from the neighbourhood who were taken to have knowledge of all the relevant facts (anyone who was ignorant was rejected) and were bound to answer upon their oaths.45

Since the jurors had to have knowledge of the relevant facts, the trial naturally took place in the community where the matter in dispute occurred.

Over the centuries, the function of the trial jury evolved, gradually becoming, during the sixteenth, seventeenth, and eighteenth centuries, more like the board of impartial arbiters the law seeks today.46 But even as the jury's function changed dramatically, the rule placing venue in the vicinity of the crime survived, supported by new justifications. By the time of the American Revolution, jurors were no longer expected to have personal knowledge of a dispute; nevertheless the venue rule was still considered important enough ultimately to be included in the United States Constitution.47

The United States Constitution addresses the issue of venue in two contexts. Article III section 2 provides that trials "shall be held in the State where the said Crimes shall have been committed." And the Sixth Amendment grants to the defendant "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 previ-

45. SIR PATRICK DEVLIN, TRIAL BY JURY 8 (1956).
46. For a discussion of this era of the jury's history in America, and in New York in particular, see People v. Goldswy, 350 N.E.2d 604 (N.Y. 1976).
47. Id.
ously ascertained by law."\textsuperscript{48}

The Article III provision appears to have been a response to the detested English practice of transporting American colonists to England, or to other colonies, for trial.\textsuperscript{49} Not only was this enormously inconvenient for the defendant, it made it likely that the jury pool would be hostile, or at least unsympathetic, to the defense.\textsuperscript{50} But even the Article III provision was eventually considered inadequate: restricting venue to the state wherein the crime occurred still failed to fix with precision the location of the trial. Particularly in eighteenth century America, setting venue in a remote part of a state, while certainly not as drastic as removal to England, might still cause great inconvenience to the accused; and allowing the government \textit{carte blanche} in selecting the venue might still enable it to produce a jury likely to be hostile to the defense. As one contemporary argued, "where the governing power possesses an unlimited control over the venue, no man's life is in safety."\textsuperscript{51}

All of these are concerns of fairness to the defense; but James Madison expressed concern, on the other hand, that restricting the place of trial too severely might prejudice the government. In cases of local insurrection, for instance, it might be impossible to try the offenders at the location of the crime.\textsuperscript{52} These competing concerns of fairness to the defense and fairness to the government were balanced ultimately in the language of the Sixth Amendment, which provides for trial by "an impartial jury of the State and district wherein the crime shall have been committed."\textsuperscript{53} Although the Sixth Amendment provision granting the defendant the right to an impartial jury has been incorporated into the Fourteenth Amendment and applied to the states,\textsuperscript{54} it is unclear what, if any, restrictions the vicinage require-

\textsuperscript{48} Technically, the Article III clause concerns the venue — where the trial is to be held — while the Sixth Amendment clause addresses vicinage — the geographical origin of the jury. See Scott Kafker, \textit{The Right to Venue and the Right to an Impartial Jury: Resolving the Conflict in the Federal Constitution}, 52 U. CHI. L. REV. 729 n.2 (1985).

\textsuperscript{49} The Declaration of Independence protests against the British practice of "transporting us beyond Seas to be tried for pretended offences." \textbf{THE DECLARATION OF INDEPENDENCE} para. 21 (U.S. 1776).

\textsuperscript{50} Kafker, supra note 48, at 741-43. Kafker notes that the provision "generated little discussion during the Constitutional Convention."

\textsuperscript{51} \textbf{FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT} 26 (1951) (quoting William Grayson, \textit{The Debates in the Several State Conventions on the Adoption of the Federal Constitution} III at 568 (Jonathon Elliot ed., 1835)).

\textsuperscript{52} Kafker, supra note 48, at 742-43 (footnotes omitted).

\textsuperscript{53} Id. at 742-46. Kafker notes that Congress simultaneously defined judicial districts broadly enough to allow the Government considerable discretion in selecting venue.

B. Moving Venue: The Search for Fairness

The problem of moving venue from the vicinity of the crime arises not only in instances of local insurrection, but in cases in which local media publicity makes it difficult to select a jury without firm opinions as to the defendant's guilt. That pretrial publicity requires a change of venue is in itself a controversial proposition, particularly in a case such as People v. Powell, in which the media coverage far exceeded the local venue. In such cases, jury selection becomes, in Mark Twain's words, a search for "twelve every day [people] who don't know anything and can't read." Some commentators have consequently questioned the whole practice of changing venue in highly publicized cases.

But if a judge does decide to change venue, ought racial demographics be considered in relocating the trial? In the aftermath of the first Rodney King verdict, the California legislature passed a bill requiring that, when a court selects a new venue, it consider among other factors the "demographic characteristics" of the counties to which the trial may be moved. The phrase "demographic characteristics" explicitly included "the composition of the county or counties by race, age, ethnic background, income, and other appropriate characteristics, as determined by the court of original venue." In a letter requesting the Governor's signature for the bill, the Chairperson of the California Assembly Subcommittee on the Administration of Justice wrote,

The verdicts in the "Rodney King" case precipitated a riot. Perhaps, as importantly, the verdicts convinced many of California's minority citizens that justice is not blind — that the color of a litigant's skin, in fact, produces a predetermined outcome at trial.

57. MARK TWAIN, SKETCHES, NEW AND OLD 235 (Nat'l ed. 1968).
60. Letter from Lloyd G. Connelly, Member of the California Assembly, to Hon. Pete Wilson, Governor of California 2 (Sept. 11, 1992) (on file with FORDHAM Urb. L.J.) [hereinafter Connelly letter].
Nevertheless, Governor Pete Wilson vetoed the bill. In doing so, he wrote:

A jury of one's peers may deliver a fair verdict regardless of its demographic composition. . . . The predicate of this bill is that gender or membership in an ethnic group, an age group, or some other demographic classification is more important as a determinant of individual juror performance than the character and conscience of the individual juror.

I reject that assumption as flawed in logic, belied by our American experience, and counter to the time-tested assumptions underlying centuries of American jurisprudence.61

If the analysis advanced in this Essay is correct, then both of the above arguments are mistaken. The supporter's letter is wrong in identifying the rationale for considering demographics in locating venue. According to the supporter's letter, moving the first Rodney King trial to Simi Valley was wrong because trying the case in that overwhelmingly white jurisdiction made it likely that “the color of a litigant's skin, in fact, produce[d] a predetermined outcome at trial.” But using that logic, one would never be confident that a black person could get a fair trial in Simi Valley, and the issue of change of venue — a relatively rare event62 — is largely beside the point.63

Yet neither, if our analysis is correct, is Governor Wilson's reasoning persuasive. Governor Wilson's letter says that a juror's “character and conscience” are more important to “individual juror performance” than a juror's “demographic classification.” That is undoubtedly true but largely irrelevant to the wisdom of the proposed legislation. Certainly, demographic considerations are not crucial to “individual juror performance.” A black juror is, by virtue of his or her race, no better qualified than a white juror to decide the Rodney King case. But from that does it follow that we should be unconcerned whether a change of venue virtually guarantees empaneling of an all white or all black jury to decide a racially charged case? Focusing on the individual juror ignores Aristotle's justification for the jury: the legitimacy of a deliberative body which encompasses, and thereby

62. According to Lloyd G. Connelly, member of the California Assembly, since 1989 in California there have been a total of only 34 changes of venue. See Connelly letter, supra note 60 at 2.
63. See, e.g., Underwood, supra note 16, at 730 (“[I]f an all-white jury selected through a discriminatory process is a biased decisionmaker, then the identical all-white jury selected through a nondiscriminatory process must likewise be a biased decisionmaker.”).
TRANSCENDS, A HOST OF DIVERSE EXPERIENCES, BELIEFS, AND VALUES. The whole history of venue rules exists because there is much more to a fair jury than the "character and conscience" of the individual juror. As we have seen, consistently throughout history, venue rules have been regarded not as arbitrary rules of case assignment, but as important guarantors of a fair trial. "Questions of venue in criminal cases . . . are not merely matters of formal legal procedure. They raise deep issues of public policy . . . ." Venue rules were included in the United States Constitution in large part because of concerns that an unscrupulous prosecutor could, given free reign to select the venue, guarantee selection of a jury unsympathetic to the defense. In light of this history, it is clear that a rule which requires a judge to consider demographics in changing venue serves not to corrupt the jury's traditional function, but to preserve it. The location of the jury pool has always been regarded as essential to the ability of the jury to render a fair verdict.

C. Jury Diversity and Public Judgment

But at the same time, it must not be imagined that demographic considerations are important simply in order to even the odds of selecting jurors prejudiced against one party as against the other. It is not equality of prejudice, but quality of knowledge, which marks a fair jury. Originally, this meant literal knowledge of the facts of a dispute. Later, it meant literal knowledge of the facts of a dispute. But in a deeper sense, what the jury provides is what public opinion expert Daniel Yankelovich calls "public judgment." According to Yankelovich, public judgments are value judgments "revealed through dialogue developed from a variety of human perspectives under conditions free from domination and coercion." Yankelovich contrasts considered "public judgments" with mere "public opinion." Whereas public opinion is volatile, public judgment represents the mature value judgment that results from careful consideration of competing points of view. It is this deeper, more stable public judgment which Yankelovich considers a form of knowledge, on a par

64. One might even say that empaneling a diverse jury to render a verdict under conditions of equality and unanimity effectively mimics Rawls's original position, in that the announced verdict must be satisfactory to each juror notwithstanding a wide array of individual demographic characteristics.
66. Id. at 279 (Murphy, J., concurring).
with scientific or historical knowledge. Yankelovich concludes that the formation of such public judgments is the essence of self-government.\textsuperscript{68}

Do we want juries to reach such public judgments? Or is the jury's job simply to reach value-free factual judgments? It might be argued that the very existence of lay juries implies that something more than a sterile, technical determination is sought. But whatever the merits of this argument in general, in two types of cases the answer seems clear. A public judgment is called for where a jury is asked to render a judgment regarding community standards of obscenity or reasonableness of police conduct.\textsuperscript{69} It would seem peculiar to ask a jury of Simi Valley residents to determine community standards of obscenity in Los Angeles.\textsuperscript{70} To say this is not to disparage the "character and conscience" of Simi Valley jurors. It is simply to recognize the unique form of knowledge supplied by jurors of the local venue. Similarly, ought not the "reasonableness" of police conduct be adjudicated by a representative group of citizens from the community policing itself? And if venue must be moved from that community, at the very least should not the court consider whether the demographic diversity of the new venue makes it a suitable surrogate for the jury pool from the original community?\textsuperscript{71}

The proposal to consider demographics in moving venue withstands two serious criticisms. The first criticism is that to conclude that a Simi Valley jury could not do justice in the Rodney King case would imply that no jury drawn from an overwhelmingly white jurisdiction could ever do justice in a racially-charged trial.\textsuperscript{72} Put more
concretely, Rodney King was chased by police for eight miles before he was assaulted. What if he had been chased into an overwhelmingly white suburb before he was assaulted, and the case consequently had been tried there, with no change of venue? The jury would likely have been very similar demographically to the Simi Valley jury. Are we to conclude, the criticism goes, that such a jury could not do justice? And even in integrated communities, the contingencies of even the fairest jury selection procedures often result in all white juries. Justice Blackmun noted in *Ballew v. Georgia* that if a minority group comprises 10% of a community, the laws of probability tell us that 28.2% of twelve-person juries selected from that community can be expected to have not a single minority group member.\(^7^3\) Must we conclude that such an all white jury is incapable of rendering justice?

The analysis presented in this Essay escapes this criticism. It is not that an all white jury is doomed to produce racist verdicts. Rather, a jury not reflective of the diversity of the community that it serves is, by virtue of that fact, less capable of bringing to its verdict that species of knowledge called "public judgment." While it might be argued that jury selection rules make the diversity of the jury too dependent upon the fickle probabilities of twelve names pulled out of a drum\(^7^4\) —

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\(^7^3\) 435 U.S. 223, 236-37 (1978).

\(^7^4\) Two recent efforts to engineer more diverse panels than might result by chance have met with judicial disapproval. In *Ramseur v. Beyer*, 983 F.2d 1215 (3rd Cir. 1992) (en banc), an assignment judge supervising the empaneling of a grand jury explicitly took into consideration the race of individual prospective jurors in an attempt to achieve a "racial balance" or "cross section" of black and white grand jurors. A defendant who was indicted by that grand jury challenged the procedure. The Third Circuit found no violation of the Equal Protection Clause, but criticized the selection process. "While subjectively rigging the jury to represent [the judge's] vision of the appropriate representation of Essex County's population was ill-conceived, it apparently was not motivated by a desire to discriminate purposefully against African-Americans, nor was it apparently an attempt to limit the number of African-Americans who could serve on an Essex County grand jury." *Id.* at 1228.

The pending trial of Rep. Harold E. Ford on federal bank fraud and conspiracy charges has raised a similar issue, and aroused similar judicial disapproval. Mr. Ford's first trial, held in Memphis, resulted in a deadlocked jury, with eight black jurors favoring acquittal and four white jurors favoring conviction. For the retrial of the case, the vicinage was moved to a rural community 100 miles from Memphis; the ensuing jury selection procedure produced a panel of eleven whites and one black. After complaints from the defense and from the Congressional Black Caucus, the Justice Department announced that it would join the defense in moving to dismiss the panel. Federal District Court Judge Jerome Turner responded by saying: "It is a sad day, in my view, when the Acting Attorney General and a representative of the White House give in to a demand that a jury of the United States must be selected by race, that their concept of fairness means percentages, that equality depends on one's race." David Johnston, *Shift on Congressman's Trial Stirs Fury at Justice*, N.Y. TIMES, Feb. 26, 1993, at B16.

These judicial criticisms are not condemnations of jury diversity, but of post hoc efforts to reconfigure the jury after vicinage has been set and the ordinary selection procedure
perhaps, as in Athens, we should insist upon juries of 500 — this concern does not indict venue rules in general, nor does it refute the principle that in moving a trial, the new venue should be as demographically diverse as the original venue. While unquestionably too many American communities are segregated by race, this fact is not a condemnation of rules selecting venue. The proposal requiring judges to consider demographics in moving trials only seeks to ensure that the change of venue will not make the jury any less diverse as a consequence of the change.

One last criticism must be considered. In discussions of the Batson line, the concern has been raised that by granting a black defendant the right to challenge race-based exclusion of black jurors, an unseemly racial stereotype might thereby be reinforced: that black jurors may be expected to reach verdicts based, not upon the evidence, but upon sympathy for the accused. Governor Wilson’s veto message seems to echo that criticism in the context of the change of completed. The proposal endorsed by this Essay — considering the demographics of the vicinage when venue is moved — avoids the objectionable appearance of tampering with the composition of the jury. By selecting an appropriately diverse vicinage before the prospective jurors are summoned, the court can enhance the potential diversity of the panel without excluding or including specific jurors on the basis of their race.

75. One could argue, however, that this fact is an indictment of the way judicial districts are drawn. Just as pairing and grouping school zones can serve the constitutional goal of desegregating schools, so could broadening judicial districts produce more diverse juries. Cf. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 27-29 (1970).

76. It might be asked how a judge is to determine whether a new venue is more or less “diverse” than the original venue, given the large number of variables that might be considered — for instance, race, economic or social class, ethnicity, age, religion, gender, political affiliation, sexual orientation, disability, and native language. If a judge were forced to find a venue which was no less diverse in any of these (or other possible) categories, it would likely become impossible to move the venue anywhere. But that reductio ad absurdum does not defeat the logic of the principle proposed in this Essay. A rule requiring the judge to consider the demographics of the venue in moving a trial need not commit a court to a rigid, mathematical calculation of diversity. Rather, the court should be accorded the flexibility to pay particular attention to those demographic factors that seem of most direct relevance to the case on trial. In moving the Rodney King trial, for instance, a court would be justified in considering the racial and economic diversity of the venue as more significant than its religious diversity. Where the defendant and the victim of a crime are members of different minority groups, finding an appropriate venue for a trial may be especially difficult. For a particularly notorious case, see Miami Officer’s Retrial Moved Yet Again, N.Y. TIMES, Mar. 11, 1993, at A18 (recounting four changes of venue of retrial of Latino police officer charged with killing two black men). However hard cases make bad law, and it would be wrong to cite such an extreme instance for the proposition that judges ought to ignore the demographics of the vicinage, even at the price of empaneling unrepresentative juries.

77. “[E]ven if there were some statistical support for the view that jurors tend to be especially sympathetic to defendants of their own race, it would be profoundly wrong to enshrine any such view in our constitutional jurisprudence.” Underwood, supra note 16, at 732.
venue legislation: considering demographics seems to imply that some jurors vote on the basis of their demographic classification rather than on the basis of the facts and the law. But, as we have seen in this Essay, no such cynical generalization need be relied upon to justify consideration of the demographic diversity of the jury pool in changing venue. It is not because we expect jurors to vote as demographic blocs that diversity is valued. Rather, demographic diversity is valued because it brings to the deliberative process a greater breadth of knowledge. As Justice Thurgood Marshall wrote in Peters v. Kift:

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude . . . that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.78

The poll results cited at the beginning of this Essay79 may be revealing in this regard. Asked to explain the Rodney King verdict, some respondents mentioned racism — but not a majority of respondents, indeed not a majority of black respondents. On the other hand, when asked whether a more diverse jury would have reached a different result, an overwhelming majority of both black and white respondents said it would have. The poll results strongly suggest that we need not assume that jurors are racist to conclude that more diverse juries reach different — and fairer — verdicts.

V. Conclusion

Jurors are real people. They do not behave like the generic citizens behind Rawls’s veil of ignorance. Real jurors bring to their deliberations experiences and values that are in no small part a product of living in a particular place, at a particular time, as a person of a particular race and gender. For centuries, the law has recognized that jurors may come to different conclusions, based upon where they live. To so recognize is not to resort to demeaning stereotypes, or to compromise the objectivity of the jury.80 Rather, it is to be sensitive to the

79. See supra notes 1-3 and accompanying text.
80. As the philosopher Richard Rorty has argued, it is a mistake to suppose that objectivity results only when individuals deny their subjectivity, like parties in Rawls’s original position. Rather, objectivity results from the inclusion of the broadest possible
role of jurors as representatives of their community. And so, venue rules were constructed to try to place the trial where there was the greatest likelihood that justice would result. It is now time to recognize that jurors bring to their deliberations perspectives and knowledge that may, in part, be a product of their race, gender, and economic class. We can recognize this insight without stereotyping jurors, without questioning anyone's impartiality, and without setting one set of values as the yardstick against which all others must be measured. It is therefore appropriate for judges to include the demographic diversity of the prospective venue among the factors they consider in moving trials. To do so is consistent with the jury's historic function, with precedent, and with the philosophical foundations of justice in a democracy.

array of subjective views. "For pragmatists, the desire for objectivity is not the desire to escape the limitations of one's community, but simply the desire for as much intersubjective agreement as possible, the desire to extend the reference of 'us' as far as we can." Richard Rorty, Solidarity or Objectivity? in POST-ANALYTIC PHILOSOPHY 5 (John Rajchman & Cornell West eds., 1985).