When Change of Venue Means Change in Verdict: A Critical Analysis of Venue, and its Impact upon the *Diallo* Trial[1]

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I. INTRODUCTION

On February 4, 1999, four plain clothed New York City police officers shot and killed an innocent, unarmed man named Amadou Diallo in a hail of gunfire.[2] Kenneth Boss, Sean Carroll, Edward McMellon, and Richard Murphy collectively fired 41 shots at Mr. Diallo, hitting him some 19 times.[3] Dr. Joseph Cohen, the prosecution's medical examiner who performed the autopsy on the victim, presented evidence suggesting that at least three bullets hit Mr. Diallo after he was already on the ground, and possibly even dead.[4] The four police officers maintained that Mr. Diallo had remained standing throughout most of their fatal attack,[5] despite testimony from Dr. Cohen detailing the gunshot wounds to Mr. Diallo's aorta, spine, spinal cord, tibia, fibula, kidneys, spleen, and intestines.[6] The police officers were all white; the victim was black.[7] There were protests.[8]

The four officers had been part of the New York Police Department's Street Crime Unit, a group that made t-shirts for its

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[1] People v. Boss, 261 A.D.2d 1 (N.Y. App. Div. 1999).

[2] Michael Cooper, *Officers in Bronx Fire 41 Shots, And an Unarmed Man Is Killed*, N.Y. TIMES, Feb. 5, 1999, at A1.

[3] Robert D. McFadden & Kit R. Roane, *U.S. Examining Killing of Man In Police Volley*, N.Y. TIMES, Feb. 6, 1999, at A1.

[4] For the tastefully designed autopsy graphics used during trial, see Courttv.com, The Amadou Diallo Shooting trial: Diallo Autopsy Graphics, http://courttv.com/national/diallo/autopsyphoto.html (last visited Feb.8, 2000) [hereinafter Court TV autopsy website].

[5] Howard Chua-Eoan, *Black and Blue*, TIME, Mar. 6, 2000, at 24, 27. *See also* Court TV autopsy website, *supra* note 4. *See generally* Jodi Wilgoren, *Fatal Police Barrage Renews Debate Over Safety of Semiautomatics*, N.Y. TIMES, Feb. 7, 1999, at 43; Kit R. Roane, *Mayor Says Officers' New Ammunition Will Be Safer*, N.Y. TIMES, Feb. 14, 1999, at 39 (reporting on the call for increased police firepower in the wake of the Diallo shooting).

[6] *See* Court TV autopsy website, *supra* note 4.

[7] Kevin Flynn, *Police Killing Draws National Notice: N.A.A.C.P. Leader Urges Justice Department Role in Investigation*, N.Y. TIMES, Feb. 8, 1999, at B5.

[8] Alisa Solomon, *Arresting Developments*, VILLAGE VOICE, Apr. 6, 1999, Special Section (41 Bullets: The City Will Never Be the Same), at 54.

members, boasting, "We Own the Night!"[9] (their motto).[10] Another Street Crime Unit shirt bore a daunting passage attributed to Ernest Hemmingway: "There is no hunting like the hunting of man, and those who have hunted armed men long enough and like it never care for anything else."[11] As can be expected, their aggressive tactics have begotten complaints from the citizens of New York City, and even fellow police officers.[12]

A grand jury indicted officers Boss, Carroll, McMellon, and Murphy for second-degree murder and reckless endangerment based on their role in the killing of Mr. Diallo.[13] Trial was set for early January of 2000 in Bronx County, New York City,[14] as the killing took place in the Soundview section of the Bronx.[15] But on November 9, 1999, the defendant police officers filed a change of venue motion, requesting a removal from Bronx County to "Westchester County, or, in the alternative, to another county outside the City of New York."[16] In *People v. Boss*, the court provided its ruling on the motion—it was granted.[17] As the court explained, "A pretrial change of venue for the purpose of protecting the right to a fair trial is an extraordinary remedy reserved for the rarest of cases. The case of the four police officers accused of murdering Amadou Diallo is that rare case."[18] To ensure this right to a fair trial, the court ordered that the trial be moved to Albany, alluding to the "substantial number[] of New York City law enforcement officers" who live in Westchester (the location that was principally suggested by the defendants).[19] However, the court neither offered any

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[9] Nat Hentoff, *Giuliani's Götterdämmerung: No Hunting Is Like the Hunting of Man*, VILLAGE VOICE, Apr. 6, 1999, Special Section (41 Bullets: The City Will Never Be the Same), at 47.
[10] Chua-Eoan, *supra* note 5, at 26.
[11] Hentoff, *supra* note 9, at 47.
[12] Kit R. Roane, *Elite Force Quells Crime, But at a Cost, Critics Say*, N.Y. TIMES, Feb. 6, 1999, at B5; *see also* David Gonzalez, *In Encounter, Police Altered His Opinions*, N.Y. TIMES, Feb. 13, 1999, at B1 (noting the unwarranted "stop and frisk" of a fifty-one-year-old Italian-looking man, and the refusal by the officers to reveal their badge numbers); David Gonzalez, *Where Police Are Eroding Self-Respect*, N.Y. TIMES, Feb. 10, 1999, at B1 (citing accounts of two Bronx youth center employees who are constantly harassed by plainclothes police officers).
[13] People v. Boss, 261 A.D.2d 1, 3 (N.Y. App. Div. 1999).
[14] *Id*.
[15] Cooper, *supra* note 2, at A1.
[16] *Boss*, 261 A.D.2d at 3.
[17] *Id.* at 2-3.
[18] *Id*.
[19] *Id.* at 8.

evidence in defense of their claim that a substantial number of New York City law enforcement officers reside in Westchester County, nor explained that Albany could be inhabited by a great number of police officers from areas outside of New York City.

At the close of the *Diallo* trial, the four defendant police officers were found not guilty on all counts, including those pertaining to reckless endangerment,[20] despite the numerous bullets they fired into an apartment building that housed a number of families who were just as innocent as the targeted victim.[21]

My argument is simply this: courts should disallow changes of venue in racially charged criminal cases involving allegations of police misconduct that seek to remove jury trials from urban areas (such as all of the boroughs of New York City) to "police-friendly" environments (such as Albany). At the present time, defense counsel are permitted to change venue toward the strategic and systematic exclusion of inner city venirepersons, and this can have an effect upon both the jury verdict, in a narrow sense, and the overall concept of justice.

Until now, much has been written on the importance of *racial* diversity in the selected petit jury, with reference to the 14th Amendment's Equal Protection Clause (especially after the Rodney King case),[22] but racial diversity, alone, is not enough to ensure impartiality in racially charged criminal cases that involve allegations of police misconduct. As illustrated by the *Diallo* trial, in cases such as this, efforts to diversify the jury pool (and even the sitting jury, itself) based on a particular and exclusive attentiveness to juror *race* merely allows for the inclusion of black suburbanites who are just as far removed from the culture, environment, and experiences of the inner city (the location of the alleged police crime) as are their white counterparts. As such, it is

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[20] *See* Courttv.com, Officers acquitted of all charges in Diallo shooting, http://www.courttv.com/national/diallo/022500_verdict_ctv.html (last modified Feb. 25, 2000) (last visited Oct. 1, 2002).

[21] *See generally* APBnews.com, NYC Shooting Highlights Urban Policing Problems, http://www.apbnews.com/newscenter/majorcases/diallo/stories/1999/03/12/diallo_0312.html (featuring a 360º view of the vestibule in which Mr. Diallo was killed) (last visited Jan. 23, 2001).

[22] *See, e.g.,* Peter M. Dougasain, *Should Judges Consider the Demographics of the Jury Pool in Deciding Change of Venue Applications?*, 20 FORDHAM URB. L.J. 531 (1993); K. Winchester Gaines, *Race, Venue, and the Rodney King Case: Can Batson Save the Vicinage Community?*, 73 U. DET. MERCY L. REV. 271 (1996); Note, *Out of the Frying Pan or Into the Fire? Race and Choice of Venue After Rodney King*, 106 HARV. L. REV. 705 (1993).

not enough to have a jury that merely represents a cross-section of the community in which the trial will be heard.

I will begin with a discussion of change of venue law in criminal trials, generally, and then proceed with my argument that the change of venue motion should not have been granted in the *Diallo* case. From there, I will expand the scope of my argument to explain why, as a general practice, motions to change venue should be summarily dismissed when they seek removal from the inner city to the suburbs in criminal cases alleging police misconduct (particularly in cases that are racially charged). Finally, I will conclude with a proposal aimed at addressing this issue.

II. CHANGE OF VENUE LAW IN CRIMINAL TRIALS

A. Change of Venue in Criminal Trials (Generally)

The American system of criminal justice is governed by principles of procedural fairness that date back to the Magna Carta.[23] As such, a number of legal protections have been erected to shield the criminal defendant from potential injustice.[24] In a similar vein, the United States Supreme Court has explained that "the purpose of trial by jury is to prevent oppression by the Government."[25] These concepts of fairness and the protection of the criminal defendant carry over into the rules that determine where the trial should be heard.

In establishing the proper location for trial, Rule 18 of the Federal Rules of Criminal Procedure holds, "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice."[26] Relevant New York State law governing criminal procedure establishes the opportunity to remove a criminal trial "to a designated superior court of or located in another county," upon motion of either party that successfully demonstrates "reasonable cause to believe that a fair and

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[23] *See* GEORGE F. COLE, THE AMERICAN SYSTEM OF CRIMINAL JUSTICE 115 (7th ed. 1995). *See generally* FED. R. CRIM. P. 2; FED. R. EVID. 102 (citing "fairness in administration" as a purpose of the federal rules).

[24] *See* COLE, *supra* note 23, at 115-27. *See generally* U.S. CONST. amend. VI (noting rights of the "the accused").

[25] Apodaca v. Oregon, 406 U.S. 404, 410 (1972).

[26] FED. R. CRIM. P. 18.

impartial trial cannot be had in such county."[27] However, should the court find such reasonable cause, the court is not limited to a ruling in favor of removal to another county. Rather, there exists discretion to call for an *expansion of the pool of jurors* "to encompass prospective jurors from the jury lists of counties that are within the judicial district in which, and that are geographically contiguous with the county in which, such superior court is located."[28]

Further, when applying change of venue law to cases that originate in the City of New York, it is important to keep in mind that there are five boroughs within New York City (the Bronx, Brooklyn, Manhattan, Queens, and Staten Island).[29] Consequently, such cases present the opportunity to change venue to one of the four remaining boroughs of New York City without having to relocate elsewhere in New York State.

But who should be able to serve on the jury?

A. The Makeup of the Jury

The United States Supreme Court, in *Smith v. Texas*,[30] held, "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." In *Taylor v. Louisiana*,[31] the Court echoed this sentiment by holding that it has "unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community." This was attributed to the purpose behind the Sixth and Fourteenth Amendments.[32]

However, America's high court has made clear that "every distinct voice in the community" does *not* have an inherent right to actually *be* on a jury in every case before the Court.[33] In other words, the actual jury that is selected does *not* have to *mirror* the community.[34]

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[27] N.Y. CRIM. PROC. LAW § 230.20 (2) (Consol. 2000).
[28] *Id.* at § 230.20 (2)(b).
[29] *See* New York City Department of City Planning, Community District Profiles, http://www.ci.nyc.ny.us/html/dcp/html/cdstart.html (last visited Nov. 5, 2000). *See also* New York City Department of City Planning, New York: A City of Neighborhoods, http://www.ci.nyc.ny.us/html/dcp/html/neigh.html (last visited Nov. 5, 2000).
[30] 311 U.S. 128, 130 (1940).
[31] 419 U.S. 522, 527 (1975).
[32] *Id.* at 538.
[33] Apodaca v. Oregon, 406 U.S. 404, 413 (1972).
[34] *See Taylor*, 419 U.S. at 538.

Instead, the Court ensures protection against the systematic exclusion of any identifiable group of people (from within the community) that would serve to bar them from either the list of potential jurors or the actual juries, themselves.[35] To cite the majority's opinion in *Taylor*, "It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose *no* requirement that petit juries *actually chosen* must mirror the community and reflect the various distinctive groups in the population."[36]

B. The Composition of the Jury After a Change of Venue is Granted

An interesting situation arises when the presiding court grants a change of venue motion , in that the community itself (of which the jury must be representative) changes. In this "new" venue, the resultant jury is now required to represent a fair cross section of the *new* community.[37] The consequence is obvious. "Communities differ at different times and places."[38] Therefore, a strategic advantage arises for parties that are able to successfully change venue from an area comprised of an undesired community to that of a desired community.[39] In this way, the law provides for an end run around the otherwise prohibited systematic exclusion of groups within the original community, by allowing parties to change venue to an entirely new community, whose makeup, *by nature*, excludes or under-represents entire groups of people. For example, a black man who is accused of killing a white man in a predominantly white suburban area may be inclined to change venue to a more urban area that is home to a greater proportion of people in the racial minority, in the hope that he might find a more sympathetic jury.[40] Whereas the black defendant would have been precluded from systematically eliminating suburban white citizens from the list of

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[35] *Id.* (Explaining, "All that the Constitution forbids, however, is systematic exclusion of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels.")

[36] *Id.* at 538 (emphasis added).

[37] *See generally* Groppi v. Wisconsin, 400 U.S. 505 (1971); Norris v. Alabama, 294 U.S. 587 (1935).

[38] *Taylor*, 419 U.S. at 537.

[39] Of course, a party so moving would also need to assert the impossibility of a fair trial in the original venue, *supra* pp. 3-4.

[40] Provided, once again, that the defendant would be able to raise the issue of the original venue's unsuitability.

potential jurors,[41] he would be legally justified in changing venue to produce much the same effect.[42] It is this very type of strategy that was left unchecked by the court in *People v. Boss*.[43]

III. THE COURT SHOULD HAVE DENIED THE CHANGE OF VENUE MOTION IN THE *DIALLO* TRIAL

As previously noted, Section 230.20 of the New York Criminal Procedure Law allows for changes of venue when the moving party can establish "reasonable cause to believe that a fair and impartial trial cannot be had in such a county."[44] In justifying that law, the Court of Appeals of New York has explained that neither party in a criminal trial has any affirmative right to keep the trial in the county where the alleged crime occurred. The opinion to which I refer is that of *People v. Goldswer*,[45] and it specifically held that there is no constitutional right (under either the 6th Amendment of the United States Constitution or Article I, Section 2, of the New York State Constitution) ensuring trial in the county where an offense was committed. As the *Goldswer* Court explained, cases at common law were tried within the county where the alleged crime was committed, presumably due to the expectation that jurors decide such cases based on "their own personal knowledge of the parties and the facts of the case."[46] This changed when "the jury concept evolved and the jury came to be viewed as an impartial body which decided the controversy *on evidence submitted* in open court."[47]

In *People v. Boss*,[48] the trial arising from the *Diallo* killing,[49] the defendant police officers who had been indicted for Mr. Diallo's murder filed a change of venue motion pursuant to Section 230.20, alleging that a fair trial could not be had in the Bronx. They sought to move the trial

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[41] *See, e.g.*, Batson v. Kentucky, 476 U.S. 79 (1986); Whitus v. Georgia, 385 U.S. 545 (1967); Strauder v. West Virginia, 100 U.S. 303 (1880). *See also* Duren v. Missouri, 439 U.S. 357 (1979).

[42] Statistically speaking, an overwhelmingly black community should be more likely than an overwhelmingly white community to produce a jury comprised mostly of black jurors.

[43] 261 A.D.2d 1 (N.Y. App. Div. 1999).

[44] N.Y. CRIM. PROC. LAW § 230.20 (2) (Consol. 2000).

[45] 350 N.E. 2d. 604 (N.Y. 1976).

[46] *Id.* at 606..

[47] *Id.* (emphasis added).

[48] 261 A.D.2d 1 (1999),

[49] *See* discussion of the events surrounding the killing of Amadou Diallo *supra* p.1.

location to either Westchester or another county (so long as it was outside of all five boroughs of New York City).

In granting the motion the court held, "A criminal defendant has the right to a fair trial, and a trial that is not dominated by a 'wave of public passion',[50] that is not overwhelmed by press coverage,[51], and that is not conducted in a 'carnival atmosphere'.[52] Removal of an action pursuant to CPL 230.20 (2), or 'change of venue' is a means of preventing this type of unfairness."[53] However, the court went on to explain that "[t]his does not mean that any defendant who is charged with a highly publicized crime that has inflamed public passions is entitled to a change of venue, particularly where there has not yet been an attempt to select an impartial jury."[54] As for the case at bar, the *Boss* court found that the community had been "deluged by a tidal wave of prejudicial publicity to such an extent that even an *attempt* to select an unbiased jury would be fruitless."[55] I respectfully disagree.

The change of venue motion instead should have been *denied*, because (A) the cases cited by the court in *People v. Boss* (to illustrate the type of atmosphere in which a fair trial was not possible) can be distinguished from the setting that would have surrounded a Bronx *Diallo* trial; (B) the other justifications offered by the *Boss* court should have raised little concern in terms of their effect on the fairness of the impending trial; and (C) the *Boss* decision negatively affected both the *Diallo* trial and the overall relationship between the New York police officers and the citizens of New York City.

A. The Cases Cited in People v. Boss can be Distinguished from the Case at Bar

The *Boss* court hand-picked three cases decided by the United States Supreme Court to exemplify the unfair trial atmosphere that might have occurred, were the *Diallo* trial to have taken place in the Bronx. The differences between the atmosphere in the cited cases and the *Diallo* atmosphere in 1999 are so numerous and significant that they bear noting. Consequently, I will briefly discuss each of the three cases in the

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[50] Irvin v. Dowd, 366 US 717, 728 (1961).
[51] Murphy v. Florida, 421 US 794, 798 (1975).
[52] Sheppard v. Maxwell, 384 US 333, 358 (1966)
[53] *Boss*, 261 A.D.2d at 3-4.
[54] *Id.* at 5.
[55] *Id.* at 4 (emphasis added).

order of the court's citation:[56] (1) *Irvin v. Dowd*;[57] (2) *Murphy v. Florida*;[58] and (3) *Sheppard v. Maxwell*.[59]

1. The Irvin v. Dowd *"Wave of Public Passion"*

In upholding a criminal defendant's right to a trial that remains free from a "wave of public passion," the *Boss* court cites the 1961 U.S. Supreme Court case of *Irvin v. Dowd*.[60] In that case, six murders had been committed, and the accused murderer was being tried in the same small county where the killings took place.[61] The murders were "extensively covered by news media in the locality, [which] aroused great excitement and indignation throughout [the county]."[62] Shortly after the petitioner's arrest, the county prosecutor and local police officials released to the press that "the petitioner had confessed to the six murders."[63] Newspapers that covered stories of the local murders were regularly delivered to some 95% of the community.[64]

While it is true that the Court then decided the accused had not been given a fair trial before impartial jurors,[65] it also noted:

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

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[56] *Id.* at 3.
[57] 366 U.S. 717 (1961).
[58] 421 U.S. 794 (1975).
[59] 384 U.S. 333 (1966).
[60] *See* People v. Boss, 261 A.D.2d 1, 3-4 (N.Y. App. Div. 1999).
[61] *Irvin*, 366 U.S. at 718-20, 25.
[62] *Id.* at 719.
[63] *Id.* at 719-20.
[64] *Id.* at 725.
[65] *Id.* at 722-29.

> juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.[66]

Thus, it would not be sufficient for the defendant police officers in *Boss* to raise a claim that prospective jurors in the Bronx had *heard* about the case. But how, one might ask, might we examine juror impartiality? Actually, the Constitution does not clearly establish any such test,[67] but the *Irvin* Court seems to have been thrown a proverbial softball: the aforementioned TV reports in *Irvin* "revealed…details of [Petitioner's] background, including a reference to crimes committed when a juvenile, his convictions for arson almost 20 years previously, for burglary and by a court-martial on AWOL charges during the war. He was [also] accused of being a parole violator."[68] Additionally, the stories included his being identified at a police line-up as well as at the scene of the crime, and his confession to the six murders (along with statements that he had previously refused to confess).[69] In stark contrast, the police officers who were accused of murdering Mr. Diallo did not face similar exposure of a prior criminal history or of dishonorable military service, and they certainly did not have to address reports of their confession as to the crimes for which they were being charged. But *Irvin* was fraught with even more evidence of prejudice. According to the first-hand accounts of spectators to the jury selection process, the prospective *Irvin* jurors made statements to the following effect: "My mind is made up;" and even "he should be hanged."[70] These statements similarly hit the newsstands.[71]

On the whole, the *Irvin* case seems to be factually inapplicable to *Boss*, because *Irvin*'s examples of clearly created prejudice simply did not exist in the latter. However, the *Boss* court cited other cases in explaining its result. One such case was *Murphy v. Florida*, 421 U.S. 794 (1975), which the court cited in explaining one's right to a criminal trial that is not "overwhelmed by press coverage."[72]

2. "Overwhelming Press Coverage," According to Murphy v. Florida

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[66] *Id.* at 722-23 (emphasis added) (citations omitted).
[67] *Id.* at 724.
[68] *Id.* at 725.
[69] *Id.* at 725-26.
[70] *Id.* at 726-27.
[71] *Id.* at 726-27.
[72] People v. Boss, 261 A.D.2d 1, 3-4 (N.Y. App. Div. 1999).

Interestingly enough, the *Murphy* Court actually held that the petitioner "*failed* to show that the setting of the trial was inherently prejudicial *or* that the jury-selection process of which he complains permits an inference of actual prejudice,"[73] despite: concessions of extensive press coverage;[74] dismissal by the court of some twenty prospective jurors (due to juror prejudice);[75] and alleged juror knowledge of Petitioner's prior convictions of theft and murder.[76] Furthermore, the United States Supreme Court went on to distinguish *Murphy* from *Marshall v. United States*,[77] a case in which the Court reversed Marshall's conviction due to a finding that it had been based on the jury's exposure to highly prejudicial information *at trial*. *During* the *Marshall* trial (as explained by the *Murphy* Court), "seven of the jurors were exposed to various news accounts relating that Marshall had previously been convicted of forgery, that he and his wife had been arrested for other narcotics offenses, and that he had for some time practiced medicine without a license."[78]

To quickly review, the *Murphy* Court *denied* the petitioner's claim that he did not receive a fair trial.[79] It bears repeating that, unlike the situation in *Irvin*, and now *Murphy*, the potential *Boss* jurors from the Bronx were *not* informed of prior felony convictions of the defendant police officers. In fact, there were never any Bronx County jurors of whom we can speak. The *Boss* case is even further removed from *Murphy* in that the *Murphy* Court expressly distinguished cases that allege jury exposure to prejudicial material *before* trial from those that allege such injurious exposure *during* the trial, itself.[80] Whereas in *Marshall* a conviction was reversed due to a finding of prejudicial exposure *at trial*, in *Murphy*, the Supreme Court *affirmed* the lower court's denial of the petitioner's change of venue motion (based on the same type of prejudicial exposure *before* commencement of trial). Nevertheless, the *Boss* defendants sought a declaration by the court that the Bronx was a prejudicial and therefore inappropriate place for trial *before* any such trial had begun.

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[73] Murphy v. Florida, 421 U.S. 794, 803 (1975)(emphasis added).
[74] *Id.* at 795-96.
[75] *Id.* at 796.
[76] *Id*.
[77] 360 U.S. 310 (1959).
[78] *Murphy*, 421 U.S. at 797.
[79] *Id.* at 803.
[80] *Id.* at 797.

For all of the aforementioned reasons, *Murphy* deserves little attention beyond its general holding as to the unfair nature of criminal trials inundated with press coverage.

3. Sheppard v. Maxwell*'s "Carnival Atmosphere"*

With *Irvin*, *Murphy*, and (as an aside) *Marshall* distinguished from *Boss*, we are invited to examine the applicability of *Sheppard v. Maxwell*,[81] a United States Supreme Court case from 1966 that the Boss court cited for its protection of criminal defendants from trials that are conducted in a "carnival atmosphere."[82]

Though illustrative, the "carnival atmosphere"[83] described in *Sheppard* is so entirely different from the environment in which the Diallo case took place that it, too, can be easily distinguished.

Petitioner Sheppard had been convicted of the 1954 murder of his wife.[84] Dr. Gerber, the coroner, subpoenaed Sheppard for purposes of investigation.[85] The questioning took place in a school gymnasium, before (quite literally) "several hundred spectators,"[86] including the coroner, the county prosecutor, detectives, reporters, photographers, and television and radio personnel (who were conducting live broadcasts of the hearing).[87] The inquest directed at Sheppard spanned a total of *five and one-half hours* over the course of three days,[88] and "ended in a public brawl."[89] Although Sheppard's attorneys were among those in attendance (and it was never, to my knowledge, alleged that a single inhabitant of the planet Earth was not), they were precluded from participation.[90] "When Sheppard's chief counsel attempted to place some documents in the record, he was forcibly ejected from the room by

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[81] 384 U.S. 333 (1966).
[82] People v.Boss, 261 A.D.2d1, 3-4 (citing Shepard v. Maxwell, 384 U.S. 333, 358 (1966)).
[83] Sheppard v. Maxwell, 384 U.S. 333, 358 (1966).
[84] *Id.* at 335. Incidentally, this case arose out of the happenings upon which "The Fugitive" was based. *See* Harriet Ryan, *Will justice remain a fugitive in third Sheppard trial?,* COURT TV http://courttv.com/trials/sheppard/013100_ctv.html (last modified Jan. 31, 2000) (last visited Oct. 1, 2002). *NB:* This is not to be confused with *Shepard v. United States*, 290 U.S. 96 (1933), in which another doctor had been convicted of his wife's murder.
[85] *Sheppard*, 384 U.S. at 339.
[86] *Id*.
[87] *Id*.
[88] *Id.* at 339-40.
[89] *Id.* at 354.
[90] *Id.* at 339.

the coroner, who received cheers, hugs, and kisses from ladies in the audience."[91]

There were a number of newspaper articles citing allegations never to be offered at trial that would have tended to rebut Sheppard's assertions of his innocence, such as claims that the murderer sought to destroy evidence, and suggestions that Sheppard had been engaging in numerous extramarital affairs (which would have the propensity to establish a motive for killing his wife).[92] The Supreme Court also noted that, throughout the trial, the judge never instructed the jury to shield itself from outside influence, offering them only non-compulsory requests.[93]

Once 75 venirepersons were selected (from which the sitting jury would be chosen), "[a]ll three Cleveland newspapers published the names and addresses of the [venirepersons]. As a consequence, anonymous letters and telephone calls, as well as calls from friends, regarding the impending prosecution were received by all of the prospective jurors."[94] The bedlam only continued during the trial, when the unsequestered jurors[95] were "photographed and televised whenever they entered or left the courtroom."[96] "During the trial, pictures of the jury appeared over 40 times in the Cleveland papers alone."[97] The media was so unruly and overbearing that they impeded normal communication of the trial's participants, although there was a loudspeaker system in use by witnesses and counsel.[98] So ubiquitous were the members of the media (in one area, they were seated a mere three feet away from the jury)[99] that Sheppard and his counsel actually had to make frequent trips outside of the courtroom in order to converse in confidence.[100] Side-bar issues actually had to be discussed in the judge's chambers, for the same reason.[101] Even then, such issues could be heard by reporters, who published them in newspaper articles that could be read by the jurors.[102]

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[91] *Id.* at 340.
[92] *Id.* at 340.
[93] *Id.* at 353.
[94] *Id.* at 342.
[95] *Id.* at 353. *NB*: The jury was only sequestered for deliberations as to their findings. *Id.* at 349. During said "sequestered" deliberation, they were still permitted to use the telephone. *Id.* at 355.
[96] *Id.* at 344.
[97] *Id.* at 345.
[98] *Id.* at 344.
[99] *Id.* at 343.
[100] *Id.* at 344.
[101] *Id*.
[102] *Id*.

And, as the Supreme Court later noted, these were "*only the more flagrant episodes* [of the *Sheppard* trial's publicity]."[103]

Granted, *Irvin*, *Murphy*, and *Sheppard* could be cited in the *Boss* opinion because they are all United States Supreme Court cases attributed with establishing different manifestations of the "unfair trial," but the *Boss* court spends little or no time explaining how the cases are related to the one before it; an omission that is perhaps fatal to the persuasiveness of its reasoning, due to the true factual disparity, and therefore seeming inapplicability, that carves a canyon between the Kame terraces of the cited cases and the case at bar.

B. The Boss *Court's Other Justifications Would have had Little Effect on Trial Fairness*

In justifying its decision to grant the change of venue motion, the court also gave mention to other concerns that had influenced its ruling. Namely, the results of public opinion surveys submitted by the defendants, the case's pre-trial publicity, and the public protests that had been taking place in Bronx County.[104] Despite the importance of reviewing these factors when making a determination as to the possible fairness of an impending trial, these issues would have done little to affect the fairness of the *Diallo* trial had it remained in Bronx County.

Because the court's assessment of these criteria led it to a presumption of the potential jurors' prejudice (such that the potential jurors were *never* given the formal opportunity to state whether they could serve with impartiality), this section will examine each of these studied elements of the pre-trial Bronx atmosphere: (1) the public opinion surveys, (2) the case's pre-trial publicity, and (3) the public protest arising from the police shooting of Amadou Diallo.

1. Public Opinion Survey Results are not Indicative of Juror Competence

The defendant police officers submitted the results of three separate surveys that sampled New York City residents.[105] From these surveys, it was estimated that most potential jurors could find no excuse

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[103] *Id.* at 345 (emphasis added).
[104] People v. Boss, 261 A.D.2d 1, 4-6 (N.Y. App. Div. 1999).
[105] *Id.* at 6.

for the killing of Mr. Diallo.[106] Of similar significance to the court was the fact that the prosecution offered no conflicting survey evidence.[107]

However, there are some aspects of public opinion surveys that would tend to cut against their persuasiveness in terms of juror competence. For example, the opinions expressed by the participants were probably based upon the declarants' *limited knowledge* of the facts in the case *at the time the surveys were conducted*. Now, if the defendant police officers in a situation such as this choose to refrain from public comment regarding the shooting for the entire period of time before trial, this is sure to leave a one-sided presentation of the story to the news media (at least in a first-hand sense). With no viable explanation offered for over half a year, it is entirely possible, if not plausible, that someone may be unable to come up with such an explanation on her own. Moreover, this response would be quite different from a statement that she would be unable to listen impartially to the presentation of evidence *at trial* and make a fair decision thereupon.

It is equally disturbing to consider that the people who completed the questionnaires were not, themselves, given the opportunity to justify their answers in open court. Had this been arranged, they might have explained that they merely wished to show the public's discontent with the practices of the New York Police Department, as well as the long overdue need to hold the New York police officers accountable for their inappropriate actions.[108]

Additionally, the *Boss* court failed to mention whether any of the surveys reminded the potential jurors of the defendants' presumption of innocence (as they would be reminded, had they been placed on the sitting jury), or whether they were simply asked for their "opinion," as the term "public *opinion* survey" connotes. This is important to the extent that people who are just stopped in the street and asked for their "off the cuff" opinion would be greatly influenced by a number of factors (such as their immediate emotional response, or even the possible desire to "send a message" to the mayor and the NYPD that the citizens of New York are tired of the City's tendency to fervently rush to the defense of its police officers in cases of alleged misconduct). But keep in mind that one's gut instinct may oft be different than the verdict one

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[106] *Id*.
[107] *Id*.
[108] By "inappropriate," of course, I include shooting at an innocent, unarmed man some forty-one times before his very own doorstep, with little expressed regard for the inhabitants of the fired-upon building.

might return after deliberation. After all, it is entirely possible to have certain opinions but to put them aside and agree to do one's duty; the job one has been assigned to do.[109]

Another distinction between public opinion surveys and questions asked of potential jurors in the courtroom environment is just as obvious as it is important: surveys usually do not require that their participants take an *oath* to support the truthfulness of their responses. Thus, people may answer the same questions differently, based on the forum in which the question is presented. For instance, a New York City resident could easily make a purposely inflammatory statement, regardless of its dissimilarity to her actual opinion, simply to release a particular perspective to the media. Her comment could just as easily result from unexplained or, better yet, unexplainable behavior.[110] A member of the survey's sample could even try to sabotage or otherwise affect the impending trial by making an outrageously incendiary remark of prejudice. Whereas some people have little trouble trading such comments for a "get out of jury duty free" card (during jury selection), participants in a survey usually have even less reason to think there would be any degree of accountability for these utterances, especially if their names or other forms of identifying information are in no way preserved or tied to their answers.

The aggregate of these general characteristics serves to illustrate the true inadequacy of public opinion surveys in the assessment of juror competence, and, therefore, the insignificance of the survey results submitted by the defendants in the *Diallo* trial. But these survey results did not stand alone. The defendant police officers also raised the case's pre-trial publicity in their assertion that New York City, as a whole, was an unfit place for trial. I disagree.

2. Pre-Trial Publicity of the Diallo Shooting did not Prejudice Potential Bronx Jurors

As noted by the *Boss* court, being charged with a "highly publicized crime that has inflamed public passions," is independently insufficient to secure a change of venue, "particularly where there has

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[109] *Cf. The Battle Over Mr. Ashcroft*, N.Y. TIMES, Jan. 28, 2001,at http://www.nytimes.com/2001/01/28/opinion/28SUN1.html (last modified Jan. 28, 2001)(last visited Aug. 30, 2002). *See also* Alison Mitchell, *Senate Confirms Ashcroft as Attorney General*, N.Y. TIMES, Feb. 2, 2001, at A1 (late edition).

[110] S*ee also* Susan Saulny, *Second Boy Burned in Stunt Imitating MTV Show*, N.Y. TIMES, Apr. 19, 2001, at B7.

not yet been an attempt to select an impartial jury."[111] Nonetheless, by *only* examining pre-trial publicity in the general location of an act in question, a tribunal is necessarily permitted to grant changes of venue in cases that reach the public on a nationwide plane (thus diminishing the need to move the trial out of its original location, in the first place). This is exactly what happened in the *Boss* case. By focusing on coverage of the killing of Amadou Diallo that was published *only in New York City*, the court never took the next logical step: an analysis as to whether the case had been widely publicized in *Albany* (the venue chosen to house the actual trial). Had this been the case, any pre-trial publicity in the Bronx would have been a significantly less determinative factor in gauging the suitability of a Bronx trial.

Instead, the *Boss* court used a newspaper article, a magazine cover, and a newspaper ad to illustrate the "tidal wave of prejudicial publicity" that prejudiced the "prospective jurors of Bronx County, and the rest of New York City," (but not the people of Albany) "to such an extent that even an attempt to select an unbiased jury would be fruitless."[112] In working through the court's analysis, please keep in mind that it raised two distinct charges: that there was a lot of publicity in the Bronx (and the City), and, separately, that the publicity was so prejudicial that it would be impossible to empanel a fair jury.

The newspaper article cited by the court was printed in the *New York Post*, and "featured the word 'Bang' repeated 41 times to represent the shots fired by [D]efendants."[113] Now, were we to concede that this was one of a number of similar articles published in New York City, and were we also concede that the *Post* is enjoyed by a primarily Bronx County- or New York City-based audience, it might then make sense to consider moving the *Diallo* trial to Albany. But slow your roll. Remember, even the combination of these two concessions gets us only to the second point raised by the *Boss* court: that the article in the *Post* was highly prejudicial. So, was it? I would reply in the negative. Repetition of the word "Bang" is certainly no more prejudicial than the publication of repeated physical blows delivered by law enforcement officers. But perhaps this is a bad example. Maybe both reports create the need to change venue due to their potentially prejudicial effect. Be that as it may, how are we to solve the problem? Should we have the media apply a "wait and see" strategy whereby it withholds potentially inflammatory (read: newsworthy) footage until either the trial is over or

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[111] People v. Boss, 261 A.D.2d 1, 4 (N.Y. App. Div. 1999)..
[112] *Id*.
[113] *Id*.

a change of venue is granted? After all, the effect of the coverage this late in the day would be moot. Nevertheless, this "solution" seems both backwards and violative of the First Amendment's protections of free speech.[114]

Putting aside this *New York Post* article for the moment, the *Boss* court also mentions a magazine cover and a newspaper advertisement in explaining the "tidal wave of prejudicial publicity" that unfairly influenced the people of Bronx County and New York City.[115] I will again reiterate that examples of *national* publication do *not* support an argument in favor of a change of venue. If everyone in the country (or at least everyone in the current venue and the venue sought by the moving party) is exposed to the same pre-trial publicity, then there is no reason to move the trial out of its set location (unless, of course, the moving party can prove that the potential jurors who reside in another district have been less *affected* by the allegedly prejudicial coverage than were the people in the original district that was chosen for trial). Now, the *Boss* court cited a cover from *The New Yorker* magazine and an advertisement printed in the *New York Times*. The reference to these two works should never have warranted advancement beyond the *Boss* court's initial analysis of pre-trial publication in the Bronx. *The New Yorker* enjoys national readership. So, too, does *The Times*. These are well-established truths. The front covers, in particular, of *The New Yorker* are notorious in and of themselves.[116] Furthermore, the ad in the *New York Times* appeared in a Sunday edition, and it was even published in the "Week in Review" section (as opposed to the Metro Section, which focuses on issues relating to the New York City Metropolitan Area). Such direct reference to a story's publication in the *New York Times* in the context of an argument for change of venue (due to overwhelming pre-trial publicity *in the district where the trial is slated to be heard*) is patently unpersuasive. It would be no more remarkable to see the *New York Times* being read in Chicago (much less Albany) than it would be to see the *Wall Street Journal* being read on Park Avenue.

To review, there is no indication that the pre-trial publicity was limited to a Bronx (or a New York City) audience, and there is likewise no proof that the people of Albany were shielded from such allegedly

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[114] *See id.* at 5 (recognizing "the dichotomy between free press and fair trial").
[115] *Id.* at 4.
[116] *See generally* Steinberg v. Columbia Pictures Indus., 663 F. Supp. 706 (S.D.N.Y. 1987) (resolving litigation in which the plaintiff brought a claim of copyright infringement to protect his well-known artwork that had appeared on the cover of *The New Yorker*).

prejudicial publicity about the trial. But the court rested its decision to grant the change of venue motion on more than the pre-trial publicity and the previously mentioned public opinion surveys. In fact, the *Boss* court found instances of public protest to be "more compelling than publicity and polls."[117] Still, the protests did not render the venue unfit for trial.

3. The Demonstrations After the Diallo Shooting did not Warrant Removal to Albany

As Amadou Diallo stood at his doorstep, he was killed in a hail of police gunfire. The four white, plainclothed police officers fired a total of 41 rounds at an innocent, unarmed, black man. It should come as no surprise that inner city minorities may have felt as though their lives were assigned little value by the police. It should come as no surprise that the residents of the Bronx building might have been angered over the bullets that perforated their apartments' walls (especially after finding out that the shots had been aimed at an innocent target). And it should come as no surprise that there were a number of protests after the shooting.

But the protests that took place were *nonviolent*. Similarly, any anger that was expressed (pursuant, I might add, to the First Amendment) was *not* directed at the citizens of Bronx County or New York City. Therefore, all of the marches, sit-ins, and the like did *not* intimidate the potential Bronx jurors so as to affect their ability to reach a fair verdict.

The *Boss* court explained that "over one thousand persons, including high-ranking present and former public officials and other prominent persons, were arrested for acts of civil [yes, *civil*] disobedience."[118] Imagine that. But it is not enough to talk about the sheer number of people who took part in the demonstrations; we also need to examine the *effect* on the jurors. While the local protests were well-attended, some scoffed at the inclusion of high-profile participants such as Susan Sarandon and former New York mayor David Dinkins, calling the civil disobedience "so choreographed and star-studded that [Mayor Rudolph Giuliani] thought he could get away with calling it 'silly' and Liberal Party leader Ray Harding could sneer on NY1 that it was a 'Brie and Chablis' affair."[119] Would someone like Susan Sarandon be more persuasive to Bronx residents than she would be to

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[117] *Boss*, 261 A.D.2d at 6.
[118] *Id*. (emphasis added).
[119] Solomon, *supra* note 8, at 54.

those from Albany? If the court thought so, they never explained how or why this is true. It seems to me that this would be an appropriate question for a public opinion survey. The potential jurors could have been asked outright, "Have the protests or demonstrations affected you in any way? If so, how?" And there's always the obvious, "Have the protests or demonstrations affected your ability to decide the case fairly?" But there is no indication that any of this was asked of the people in New York City. The court instead seemed to regard the prejudicial effect of the protests as an irrebuttable presumption (along with the immunity of the Albany residents from such prejudice). Absent any justification for this finding, I see no reason to conclude that the protests in New York rendered the Bronx, and, in fact, all of New York City, an unfair location for trial.

C. The Change of Venue Negatively Affected the Diallo *Trial and Police Relations in NYC*

Moving the *Diallo* trial from the Bronx to Albany was enough to alter the jury's verdict. There are innumerable differences between Bronx County (where Amadou Diallo was killed) and Albany County (the location to which the trial was moved by the change of venue). These differences were to be taken into account while ruling on the change of venue motion, as the *Boss* court explained that, "within reasonable limits, the community to which the trial is transferred should reflect the character of the county where the crime was committed."[120]

So how closely did Albany "reflect the character" of the Bronx? For starters, while Westchester lies just across the northern Bronx border,[121] Albany is some 150 miles away.[122] In terms of population, data from the U.S. Census Bureau shows Bronx County with a population of 1,332,650;[123] Albany County with 294,565;[124] and

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[120] *Id*. (quoting People v. Goldswer, 350 N.E. 2d. 604, 608 (1976)).

[121] *See* New York City Department of City Planning, Community District Profiles, http://www.ci.nyc.ny.us/html/dcp/html/lucds/cdstart.html (last visited May 1, 2000).

[122] *See* map available http://www.maps.com.

[123] *See* U.S. Census Bureau, State and County QuickFacts: Bronx County, New York, http://quickfacts.census.gov/qfd/states/36/36005.html (last modified May 9, 2001) (based on data from 2000) (last visited Oct. 2, 2002) [hereinafter *Bronx County QuickFacts*].

[124] *See* U.S. Census Bureau, State and County QuickFacts: Albany County, New York, http://quickfacts.census.gov/qfd/states/36/36001.html (last modified May 9, 2001) (based on data from 2000) (last visited Oct. 2, 2002) [hereinafter *Albany County QuickFacts*].

Westchester County with 923,459.[125] Further, Albany County has just 563 persons per square mile, while Bronx County houses 31,730 persons per square mile.[126] Although Albany County has *less than one fourth* of the Bronx population and roughly 2% of its density, the *Boss* court avoided these figures altogether by reasoning that it "contain[ed] urban areas."[127] Moreover, about 36% of Bronx residents are high school graduates over the age of 25,[128] as compared to about 53% of Albany residents.[129] About 8% of Bronx residents are college graduates over the age of 25,[130] as compared to about 19% of Albany residents.[131] According to 1997 model-based estimates, about 30% of the Bronx population lives below the poverty level, along with about 42% of the children in the Bronx, while only 11% of Albany residents live in poverty, along with about 17% of Albany's children.[132] In 1990, the average Bronx household consisted of 2.75 people while the 1997 model-based estimate for median household money income was $24,031.[133] Conversely, the corresponding Albany data for the same time period revealed an average household of 2.4 people, but a median household money income of $40,490.[134] The 1990 Albany County

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[125] *See* U.S. Census Bureau, State and County QuickFacts: Westchester County, New York, http://quickfacts.census.gov/qfd/states/36/36119.html (last modified May 9, 2001) (based on data from 2000) (last visited Oct. 2, 2002) [hereinafter *Westchester County QuickFacts*].

[126] *See Albany County QuickFacts*, *supra* note 116; *Bronx County QuickFacts*, *supra* note 115.

[127] *Boss*, 261 A.D.2d at 8.

[128] *See Bronx County QuickFacts*, *supra* note 115; U.S. Census Bureau, *Counties in Alphabetic Sort Within State, at* http://blue.census.gov/population/cen2000/phc-t4/tab01.xls (last modified Apr. 2, 2001) (based on 1990 data) (last visited Oct. 2, 2002).

[129] *See Albany County QuickFacts*, *supra* note 116; U.S. Census Bureau, Counties in Alphabetic Sort Within State, http://blue.census.gov/population/cen2000/phc-t4/tab01.xls (last modified Apr. 2, 2001) (based on 1990 data) (last visited Oct. 2, 2002).

[130] *See Bronx County QuickFacts*, *supra* note 115; U.S. Census Bureau, Counties in Alphabetic Sort Within State, http://blue.census.gov/population/cen2000/phc-t4/tab01.xls (last modified Apr. 2, 2001) (based on 1990 data).

[131] *See Albany County QuickFacts*, *supra* note 116; U.S. Census Bureau, Counties in Alphabetic Sort Within State, http://blue.census.gov/population/cen2000/phc-t4/tab01.xls (last modified Apr. 2, 2001) (based on 1990 data) (last visited Oct. 2, 2002).

[132] *See Albany County QuickFacts*, *supra* note 116; *Bronx County QuickFacts*, *supra* note 115.

[133] *See Bronx County QuickFacts*, *supra* note 115.

[134] *See Albany County QuickFacts*, *supra* note 116.

homeownership rate was 57%,[135] but the Bronx homeownership rate was about 18%.[136] Finally, 1999 estimates show the Bronx County population to be about 42% black, 49% Hispanic, and 18% white non-Hispanic.[137] Albany County, on the other hand (also based on 1999 estimates), is less than 10% black, about 2% Hispanic, and about 86% white non-Hispanic.[138] Despite this disparity in racial and ethnic makeup, the *Boss* court was able to find that Albany County had a "reasonable degree of ethnic diversity," based on a general reference to the court's examination of U.S. Census Bureau statistics.[139]

Using only the demographics to which he was bound, Albany Supreme Court Justice Joseph Teresi took it upon himself to make sure the Albany jury was as ethnically and racially diverse as possible (in consideration of the diverse racial makeup of the Bronx).[140] In a "MacGyver-esque"[141] showing, Justice Teresi was largely responsible for the resultant jury of seven white men, four black women, and one white woman.[142] However, some of the selected jurors in Albany had ties to law enforcement officers: Juror Number 2's husband had been an FBI agent, and the jury foreperson had a son who was a private investigator with a military police background.[143] More importantly, the aggregate of the differences between Bronx County and Albany County presents the possibility that an Albany juror would have a different view of law enforcement officers, generally, and may have had different personal experiences (if any, at all) with members of the law

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[135] *Id*.
[136] *See Bronx County QuickFacts*, *supra* note 115.
[137] *Id.* (offering further findings on the Bronx population: 4% Asian or Pacific Islander and .6% American Indian, Eskimo, or Aleut).
[138] *See Albany County QuickFacts*, *supra* note 116 (publishing further Albany population data: 3% Asian or Pacific Islander and .2% American Indian, Eskimo, or Aleut).
[139] People v. Boss, 261 A.D.2d 1, 8 (N.Y. App. Div. 1999).
[140] *See*Courttv.com, Profiles of Diallo Jurors, http://www.courttv.com/national/diallo/jury_profile.html (last modified Feb. 22, 2000) [hereinafter *Profiles of Diallo Jurors*]. For a profile of Justice Teresi, seeCourttv.com, *Diallo judge expects no-nonsense in his courtroom*, *at* http://www.courttv.com/national/diallo/teresi_profile_ctv.html (last modified Jan. 28, 2000) (last visited Aug. 30, 2002) [hereinafter *Teresi profile*].
[141] *See generally* MacGyver Ultimate Information Complex, http://www.geocities.com/Hollywood/Club/6285/ (last visited Oct. 2, 2002).
[142] *See Profiles of Diallo Jurors*, *supra* note 132.
[143] *Id*.

enforcement community than the residents of Bronx County, and even the citizens of the rest of New York City.[144]

The geography, demographics, and exposure to the New York City Police Department (and, specifically, the Street Crime Unit) – together, "life experience" – of the jurors was certainly different. This overall amalgam of "life experience" helps us shape the outer limits of what we define as "possible," without necessarily tainting with prejudice our determination as to the probability that a given event actually occurred. Now, Bronx jurors are not, of necessity, prejudiced by their "life experience," as I have defined it. Instead, their experiences, including any knowledge they might have of the common practices of the Street Crime Unit would simply allow them to better assess the *credibility* of the defendant police officers. The Albany jurors, on the other hand, had they *no* knowledge of life in the Bronx, would be more likely to take the word of the officers as gospel, foreclosing entirely even the *remote* possibility that the members of the Street Crime Unit might not, for example, tend to approach rape suspects with a display of their credentials and a rehearsed, "Excuse me, sir, Police Department, City of New York. May I have a word with you?" Further still, any juror who had come in direct contact with the Street Crime Unit would likely be excluded by the defense counsel's challenges during voir dire.[145] And even if they were not so excluded, would not this knowledge of the often violent Street Crime Unit that is prone to extreme overreaction actually be more likely to pressure jurors into finding for the *officers* rather than for the prosecution? It would seem to me that fear of a potentially rogue police unit would be more intimidating than a few star-studded protests. The members of the Street Crime Unit would be applying at least as much pressure toward a (not guilty) verdict, even while refraining from formal public protest, by the mere expression of their everyday actions.

The life experience of your average Bronx juror might differ greatly from the life experience of her average Albany counterpart, and these differences in life experience may signify a difference in culture. As a consequence, embedded in these cultural differences (though they take place within the boundaries of a single state) may be some variation in the way different cultures define the concept of "justice."[146] Therefore, it did not matter that some of the Albany jurors were black.

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[144] Compare the aforementioned experiences of New York City residents, *supra* note 12.

[145] This being the case, maybe there would be the de facto need to change venue to Albany, anyhow!

[146] COLE, *supra* note 24, at 41-46.

At the very least, it did not matter *enough*. The jurors in Albany were *so* different from the Bronx jurors that their sense of identity (or, in this case, lack thereof) transcended the race of the victim, Mr. Diallo, and, perhaps as a collateral issue, the residents of Bronx County, generally.[147] As such, a distinct voice was excluded from the *Diallo* jury.

By now, it should already go without saying; a change of venue in the *Diallo* trial that allowed a move from the Bronx to Albany permitted such a devastating overall difference in "setting" (in a most comprehensive sense) that it is likely to have affected the jury's verdict.

As noted by District Attorney Robert T. Johnson, "What makes this decision particularly disturbing is that absolutely no effort was invested to even attempt to empanel a fair and impartial Bronx jury."[148] Furthermore, unjust decisions by the court are permitted to stand unchecked, in that a court's ruling on a change of venue motion cannot be appealed, regardless of the trial's outcome.[149]

Granted, the Albany jury applied the same law that would have been applied in the Bronx, but it is important to consider the true impact of cultural considerations. Here in Connecticut, it would be preposterous to think that drug offenses are treated alike in each state court, whether urban, suburban, or rural by geography, even though each prosecutor is bound by the same state law. That said, it is incredibly important to have cases arising out of actions that take place in a region be decided by jurors who share in the local ideology, so as to maintain the legitimacy of the judicial system. Please take note that I am not advocating the type of "small town injustice" whereby an out-of-towner who is caught breaking the law is a goner, but we need to acknowledge the existence of differing norms. And if we allow them to exist, then we need to avoid stepping in every time we think one of the "good old boys" might fall victim to the system he helps to maintain. For these reasons, a verdict handed down by a jury of Bronx residents would have been easier to accept, regardless of what it might have been.

A not guilty verdict from a Bronx jury would have been more palatable, *not* because it would mean the defendants were able to overcome some loosely supported claims of anti-police bias, but because

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[147] *See* CORNEL WEST, RACE MATTERS 40-41, 44-45, 71-90 (1993).

[148] Amy Waldman, *4 Officers' Trial in Diallo's Killing Moved to Albany*, N.Y. TIMES, Dec. 17, 1999, at A1.

[149] People v. Brindell, 194 A.D. 776 (N.Y. App. Div. 1921). *See also* N.Y. CRIM. PROC. LAW § 450.10 (Consol. 2000) (listing the situations in which a defendant has the right to an appeal).

it would be a departure from the Alex Kelly-like escape from justice, [150] altogether. The police are currently granted this state-sponsored, paternal immunity from the law, and the people know it. Remember, after killing Amadou Diallo, the defendant police officers were afforded some thirteen months of conversation and planning with co-defendants, attorneys, union officials, and the police department's top brass before any of their statements went on record at the trial.[151] This is far different from the way most civilians are treated as murder suspects (although I would concede that not all civilian suspects are fully aware of their rights). Further, civilians are exposed to the stories of police officers who are fired for speaking out against the practices of the New York Police Department.[152] Finally, when there is a glaring case of grave potential misconduct, a change of venue often permits removal of the case to a police-friendly environment. I'll say it again; *the people see this happening*. They also despise it. What follows is a decline in the police-civilian relationship. The only reasonable solution is *accountability*.

There needs to be accountability at *some* point. If the NYPD is not itself doing a fair and unbiased job of internal regulation, then we need to transfer the power to the *people* through their jury service. Of course, this is only after it has been determined that the jury can be fair.

In this section, I focused only on the issues that specifically affected the *Diallo* trial by examining a number of reasons that suggest the change of venue motion was wrongly decided in this particular instance. However, many of the *Diallo* consequences would be universal to all trials of similar composition. These dangers will be outlined in the following section.

IV. COURTS SHOULD DENY CHANGE OF VENUE MOTIONS IN ALL TRIALS LIKE *DIALLO*

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[150] Alex Kelly was convicted of raping a 16-year-old girl in Darien, Connecticut (he was eighteen at the time). His parents gave him the financial support that allowed him to spend eight years in Europe before returning for trial. *See, e.g.,* Paul Zielbauer, *Connecticut Rejects Bid to Void 1997 Rape Conviction*, N.Y. TIMES, May 1, 2001, at B5.

[151] *See generally* Cooper, *supra* note 2 (explaining that the Bronx District Attorney's Office asked police officials not to speak with the four defendant police officers after they shot and killed Mr. Diallo).

[152] *See, e.g.,* Walton v. Safir, 122 F. Supp. 466 (S.D.N.Y. 2000) (finding for a former police officer who brought suit against New York City and the police commissioner for her retaliatory discharge, which came after her public criticism of the NYPD's racially discriminatory policies).

Courts should *deny* change of venue motions in criminal trials that purport to move the cases from the inner city to the suburbs simply to guarantee the defendant police officers a more sympathetic forum in which to defend against allegations of misconduct. Abiding by the current philosophy by summarily granting these motions is both (A) dangerous and (B) unconstitutional.

A. It is Dangerous to Continue Granting These Change of Venue Motions

The change of venue motions to which I have been referring throughout this piece can cause great danger when they are granted by a court of law.

An out-of-town verdict (such as the Albany verdict in the *Diallo* trial) creates a potentially dangerous situation in the city where the precipitating event takes place. In keeping with the *Diallo* paradigm, when the police shoot an innocent, unarmed, black man in the Bronx and an Albany jury acquits the defendant officers, the Bronx citizens will likely feel unsafe. But we need to immediately differentiate the frustrated reaction of those who felt the *O.J. Simpson* trial came out incorrectly. In the aftermath of *O.J.*, people who took issue with the verdict were primarily frustrated that Mr. Simpson, a man who, to them, seemed guilty, had been set free. Sentiment in the post-*Diallo* phase is thus far similar. But there is one unmistakable difference. The everyday citizen did not reasonably fear for his or her life with Mr. Simpson's acquittal.[153] O.J. was not on trial for a random killing; he was being accused of a crime of *passion*. Quite contrarily, the four officers on trial for killing Mr. Diallo were on trial for shooting an innocent, unarmed, black man who was entering the vestibule of his own apartment. Mr. Diallo could have been any Bronx resident. Therefore, Bronx (and New York City) residents would be reasonable in fearing for their lives as these officers were allowed to return to "service." And not only have the four individual officers avoided discipline from the police department,[154] but their procedures basically passed muster in court, too. Although the practices of the Street Crime Unit were not specifically on trial, they could be regarded as having been upheld by the jury's "dicta," of sorts.

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[153] Granted, this may have changed, following allegations of a road rage incident in February, 2001. *See Charges for O.J. Simpson*, N.Y. TIMES, Feb. 10, 2001,, at A12.

[154] *See* Kevin Flynn, *Panel Urges Retraining, Not Discipline, for Diallo Officers*, N.Y. TIMES, Apr. 26, 2001, at B1.

Thus, civilians in the Bronx (and elsewhere in New York City) would not only fear these four acquitted cops, but also the other members of the Street Crime Unit.

But the fear is not limited to the civilians in the aftermath of a *Diallo*-type change of venue and verdict. The police officers in the original location (where the act took place) are also likely to feel unsafe. These police officers are not impervious to the anger and frustration expressed by the civilians in light of the privileged legal treatment given to the police officers. Because the aforementioned fear that is generated is not limited to a fear of the four acquitted officers, the resultant anger and frustration will be directed toward the Police Department, generally. And since all those "on the job" seem to be treated similarly by the law, so, too, will they will they be (collectively) regarded by the public. The consequences are therefore cyclical; as civilians feel threatened, the police feel threatened.

Tied to these issues of fear and potential danger is the fact that the image of the good New York police officers can be tarnished by the actions of a few bad cops. Current application of change of venue law tends to favor the police officers by removing their cases to the suburbs. When the police department then chooses silent acquiescence over self-regulation and discipline, the public sees systematic bias, and begins to resent all police officers. This can lead to riot.[155]

But our current tendency to grant change of venue motions in these situations does more than create the potential for danger; it violates the United States Constitution.

B. Granting These Changes of Venue is Unconstitutional

When we allow defendant police officers in criminal trials pertaining to misconduct the opportunity to change venue from the inner city to the suburbs *solely* to provide them with a more favorable jury, we give them an end run around a specific constitutional protection.

The Sixth Amendment guarantees the right to an impartial trial, and this includes the requirement that the jury be representative of a cross-section of the community.[156] Now, if the entire Bronx community is not actually incapable of fair and impartial jury service, then it is

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[155] *See* Robert Garcia, *Riots & Rebellion: Civil Rights, Police Reform and the Rodney King Beating, Introduction*, http://www.ldfla.org/introduction.html (last visited May 1, 2001).

[156] Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

unconstitutional to exclude them from the jury pool, for it is violative of this Sixth Amendment interest in ensuring a fair trial.

As the Supreme Court explained in *Taylor v. Louisiana*, a jury cannot be presumed impartial " if the jury pool is made up of only special segments of the populace."[157] The same is true "if large, distinctive groups are excluded from the pool."[158] The Court went on:

> Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.[159]

Similarly, the High Court held that it is unconstitutional to engage in the "systematic exclusion of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels."[160]

In applying this "constitutional terminology" to the *Diallo* case, the Bronx jury appears to be entitled to play a role in the determination of guilt or innocence, as they fall within the terms used by the Court in its interpretation of the Sixth Amendment. The Bronx jurors certainly constitute a "large group" of people; they are one million, one hundred ninety-four thousand, and ninety-nine strong.[161] The Bronx jurors would also be "distinctive" in comparison with the jurors from Albany.[162] And, finally, they would be deemed "identifiable" from our ability to refer to them by their place of residence. We therefore should have allowed the voices of the Bronx to be heard on the *Diallo* jury.

Even if the Bronx residents were not to constitute a *majority* of those ultimately selected to serve on the *Diallo* jury, they should have been granted access to "participate in the overall legal processes by

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[157] *Id*.
[158] *Id*.
[159] *Id*.
[160] Apodaca v. Oregon, 406 U.S. 404, 413 (1972).
[161] Population Division, U.S. Census Bureau, County Population Estimates for July 1, 1999 and Population Change for July 1, 1998 to July 1, 1999, http://www.census.gov/population/estimates/county/co-99-1/99C1_36.txt (Mar. 9, 2000).
[162] *See* discussion regarding the comparison between Albany and The Bronx *supra* pp. 24-26.

which criminal guilt and innocence are determined."[163] Once again, their voices need to be heard, and their points of view taken into consideration, in order to preserve the operation of justice. In the words of Justice William J. Brennan, "[T]he right of all groups in this Nation to participate in the criminal process means the right to have their voices heard."[164]

But to think that the Sixth Amendment is the only constitutional concern affected by these changes of venue is to be short sighted in one's analysis. If we continue to honor such baseless requests for venue changes, this may serve to chill the First Amendment protection of free speech, in that newspapers and the rest of the audio and visual media may decide to seriously delay the publication of critical pieces (or even decide not run them, at all) so as to avoid being cited by the court (or others) as having somehow affected a change of venue ruling.

V. CONCLUSION

Change of venue was designed to protect the constitutional right to a fair trial, yet it simultaneously exists as a catalyst for flight therefrom, allowing inner city police officers to escape convictions based on their alleged misconduct. At the peak of this curious legal paradox, the suspect police officers are allowed to circumvent the precise right that the change of venue was originally intended to uphold. We reach full flower by noting that the change of venue was also designed to protect the criminal defendant, who is often presumed to be a non-state actor.[165]

Now, there are a great many first-rate police officers.[166] But each time we pull cases like *Diallo* outside their place of origin to affect their verdict and help cops avoid punishment, we tarnish the image of the police department and undermine the efforts of those who do their job, day in and day out. We make the job even more dangerous and difficult for *all* officers.

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[163] *Apodaca*, 406 U.S. at 413.
[164] Johnson v. Louisiana, 406 U.S. 356, 396 (1972) (Brennan, J., dissenting).
[165] *See, e.g.,* Taylor v. Louisiana, 419 U.S. 522, 530 (1975).
[166] *See, e.g., The Bulletin Notes*, FBI L. ENF'T BULLETIN, Sept. 2000, at inside of back cover (Vol. 69, No. 9); *The Bulletin Notes*, FBI L. ENF'T BULLETIN, Oct. 2000, at inside of back cover; *The Bulletin Notes*, FBI L. ENF'T BULLETIN, Nov. 2000, at inside of back cover; *The Bulletin Notes*, FBI L. ENF'T BULLETIN, Dec. 2000, at inside of back cover. For the online version of *The Bulletin Notes* (within the cited work), see FBI, U.S. DEP'T OF JUSTICE, *Law Enforcement Bulletin* (last visited Apr. 20, 2002) http://www.fbi.gov/publications/leb/leb.htm.

We need to have accountability, and the only way we can get it is to allow cases to be tried in the places that they belong. The *Diallo* trial belonged in the Bronx, or at least somewhere else in New York City. There was no reason to move it elsewhere, because the defense did not adequately prove that a fair trial could not have occurred in Bronx County. The change of venue motion should have been denied in this case, and like motions should be denied in all similar cases. Stated as simply as is practical: we must systematically deny change of venue motions that purport to move racially charged cases alleging police misconduct from the inner city to the suburbs, wherever these venue changes are requested simply to exclude certain classes of potential jurors. To do otherwise is to endorse injustice.

VI. PROPOSED SOLUTIONS

For quite some time, I toiled with this unconstitutional end run, trying to come up with a viable solution. Technically, I thought, our current change of venue law should be effective, so long as we commit ourselves to its sensible and realistic application. In other words, when we see that the moving party is offering little evidence that the original location (or its potential jury) is unfit for trial, and when their proposed location is dramatically different (in terms of geography, citizenry, and the like), we need to call them out, and disallow the change of venue. But there are other possible solutions, as well.

In cases where it does not appear that a fair trial can be had in the originally selected location, we could remove jurors from the original trial location out to the new location for the duration of the trial, but this would not only be costly in both the traditional and transactional sense, it would be unwise. After all, an "unfit location" would likely be one in which some external forces of intimidation were found to be potentially influential and/or threatening to the region's jurors. As such, it would be unrealistic to presume that the temporary relocation of the jurors (during trial) could ameliorate this influence or threat, when the jurors would know they would be returned to their home region (that which also houses the threat) following the trial.

Even if we were to include *some* jurors from the trial's original location in the resultant post-venue change jury pool, we would not only run into similar concerns, we would be wasting the current (though probably seldom used) opportunity to expand the original jury pool.[167]

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[167] *See* discussion of jury pool expansion *supra* p. 5.

What's more, that would require a variance from the cross-section in *both* venues.

So what are we to do?

Perhaps we need to expand beyond our current "double negative" approach (*preventing* the *exclusion* of potential jurors, based on their race) and instead allow our jury system to evolve toward the *promotion* of *diversity* in the jury pool.

The United States Supreme Court has held, in *Regents of the University of California v. Bakke*, 438 U.S. 265, 313 (1978), that "the contribution of diversity is substantial."[168] Among other advantages, diversity stimulates people "to reexamine even their most deeply held assumptions about themselves and their world."[169] The current system of prohibiting the exclusion of certain jurors, simply because of their race, would help serve this end. "Ethnic diversity, however, is only one element in a range of factors" to consider when attempting to ensure heterogeneity.[170] Diversity, in its truest form, "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[171] For instance, Harvard College expanded their definition of diversity (for admissions purposes) to include geographic origin.[172] And Harvard is not alone in their belief that an institution can conduct a simultaneous examination of race and other diversity factors.[173] The University of Georgia, for example, a school where black students were not admitted until 1961,[174] recently examined race along with employment, sex, residency, and other factors.[175] As noted by the deciding Eleventh Circuit Court of Appeals, other factors could have included "volunteer work in a less developed 'third world' country," having been raised in an economically disadvantaged home, and having lived abroad, just to name a few.[176]

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[168] The *Bakke* Court held that the affirmative action-style special admissions program at the Medical School of the University of California at Davis was unconstitutional, but found student diversity to be a valid admissions goal.

[169] *Bakke*, 438 U.S. at 313 n.48 (citing Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WEEKLY, Sept. 26, 1977, at 7, 9).

[170] *Bakke*, 438 U.S. at 314.

[171] *Id.* at 315.

[172] *Id.* at 316.

[173] *Id.* at 317-18 (citing support from Columbia, Stanford, and the University of Pennsylvania).

[174] Johnson v. Board of Regents, 263 F.3d 1234, 1239 (11th Cir. 2001); *see also* WILLIAM DOYLE, AN AMERICAN INSURRECTION 62 (2001).

[175] *Johnson*, 263 F.3d at 1239-42.

[176] *Id.* at 1255. The court, by the way, found UGA's admissions policy to be unconstitutional.

Granted, in deciding the aforementioned affirmative action cases, the Supreme Court and the United States Court of Appeals were addressing the issue of diversity as it pertained to institutions of higher learning (and a determination of the ideal educational atmosphere), whereas juries are expected to carry out justice, through the finding of fact. And a jury's fact-finding is supposed to be a product of the evidence with which they are presented at trial. But the diversified life experience of a juror can beneficially shape the way in which she communicates with her fellow jurors, as well as the way in which she receives and evaluates information during trial, similar to its usefulness to herself (and others) in an educational forum.

Further still, the United States Supreme Court has not been limited in scope to issues of race when determining constitutional jury selection practices.[177] In *Thiel v. Southern Pacific*, the high court explained that it would be unconstitutional to select jurors through the systematic and intentional exclusion of people from "geographical groups of the community." We must not continue to be so myopic in view as to apply this concern to the geographical groups within the "new" community to where a case is removed.

Race should never have been the most important factor in the selection of the *Diallo* jurors; at least not to the extent that we could allow ourselves to be hoodwinked by the defense in their change of venue far outside of the free thinking confines of New York City. In the words of Spike Lee's fictional character, Pierre Delacroix (played by Damon Wayans), "We are not one monolithic group of people. We do not all think, look, and act alike."[178]

I am therefore advocating advancement toward the promotion of *diversity* in the jury pool. In so doing, we should adopt the more expansive and up-to-date definition of "diversity," as it has been explained in the modern trend of affirmative action cases.[179]

VII. UPDATE: KEEPING OUR "EYES ON THE PRIZE"[180]

The *Johnson* court indicated that "diversity" should be assessed by way of an individual analysis.[181] This could easily be achieved

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[177] *See* Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946).

[178] BAMBOOZLED (40 Acres and a Mule Filmworks 2001) (making reference to African-Americans).

[179] *See, e.g.,* Johnson v. Board of Regents, 263 F.3d 1234 (11th Cir. 2001).

[180] Borrowed from a traditional song of the civil rights movement. *See* JUAN WILLIAMS, EYES ON THE PRIZE (1987).

through voir dire when a change of venue motion is filed in a criminal court. We might not have to wait long before this proposition is put to test, as evidenced by New York's Assembly Bill 5206, which was introduced on February 20th, 2001. This bill proposes a change to New York's criminal procedure law, such that a "complete voir dire of a jury pool of not less than two hundred jurors" would be required prior to the granting of any change of venue motion (pursuant to CPL 230.20) "involving criminal charges against a police officer."[182] It appears as though we will have to stay tuned for future developments.

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[181] *Johnson*, 263 F.3d at 1255-57.

[182] A.B. 5206, 224th Leg. (N.Y. 2001)(as of publication, this bill has not to be enacted).