



11-2021

The Power of the Modern Media on an “Impartial” Jury: A Deeper Look at the Kobe Bryant Wrongful Death Lawsuit

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Tatum Lowe, *The Power of the Modern Media on an “Impartial” Jury: A Deeper Look at the Kobe Bryant Wrongful Death Lawsuit*, 42 Loy. L.A. Ent. L. Rev. 43 (2021).

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Cover Page Footnote

J.D. Candidate at Pepperdine Caruso School of Law, Class of 2022. The author would like to thank Professor Maureen Weston who has constantly encouraged her to pursue her passion for sports law and Professor Mark Kubisch who has spent countless hours investing his time in this author’s research and writing abilities. The author would al-so like to express her thanks to the editors and staff of the Loyola of Los Angeles En-tertainment Law Review for finding this topic as important as the author does and investing their time and energy in the article. Lastly, the author would like to thank her family and friends for their support and input and feedback through this entire process.

THE POWER OF THE MODERN MEDIA ON AN “IMPARTIAL” JURY: A DEEPER LOOK AT THE KOBE BRYANT WRONGFUL DEATH LAWSUIT

*Tatum Lowe**

The impact of the modern media on jury impartiality has never been more prevalent than today. Whether in criminal or civil trials, courts are faced with adjudicating cases with constant media coverage. This is especially concerning when these issues gain nationwide coverage thus leaving very few people without some sort of preconceived notion or opinion on the case. Courts today are now faced with jury pools that come in with “knowledge” and preconceived opinions before any client has had a chance to make their case. Thus, it is not surprising that the defendant in the Kobe Bryant wrongful death suit was concerned about his ability to have an “impartial jury” in Los Angeles County. This defendant’s concerns spanned beyond the reach of Los Angeles. This situation not only illustrated the concerns of juror impartiality on a local level, but also begged the question of what a defendant is supposed to do when there is no venue that would be able to give them an “impartial jury.” Courts must now make the difficult choice to settle for potentially tainted jurors and comprise one’s right to an impartial jury, or take the proactive steps required to protect those who face widespread media attention.

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TABLE OF CONTENTS

I. INTRODUCTION	45
II. BACKGROUND	48
A. The Constitutional Right to an Impartial Jury.....	48
B. History of the Motion to Transfer Venue.....	51
III. THE MODERN MOTION TO TRANSFER VENUE.....	54
IV. KOBE BRYANT HELICOPTER CRASH AND WRONGFUL DEATH	
LAWSUIT	56
A. Helicopter Crash and Subsequent Lawsuit.....	57
B. Motion to Change Venue and Party Arguments	58
C. The Court’s Decision.....	61
V. LEGALLY, THE COURT WAS RIGHT	62
A. Defendant Failed to Meet the Applicable Standard of “Actual Prejudice”	64
B. The Impossibility of Finding a Venue that Does Not Suffer from the Same Concerns Due to Extensive Media Coverage	70
VI. IMPACT AND SIGNIFICANCE	70
A. The Modern Media’s Impact on an Impartial Jury	71
B. Is the Continuous Search for an Impartial Jury the Right Answer?	77
1. Redefining Impartiality in Light of Pretrial Publicity in High- Profile Cases	78
2. Adjusting the Applicable Standard for Granting Motions to Change Venue.....	80
VII. CONCLUSION.....	81

I. INTRODUCTION

Celebrities have long been the center of litigation in the United States.¹ Whether it be high-profile criminal trials² or highly-publicized civil cases,³ the idea and thought of seeing people who are high-profile in court is nothing new.⁴ What is particularly new to the twenty-first century is the speed at which news spreads, how the public consumes news, and the extent of “knowledge” potential jurors enter the courtroom with, largely due to social media.⁵ Not only have these changes led potential jurors to believe they know the facts before they walk into these high-profile trials, these changes also give potential jurors additional time to form opinions on guilt or liability.⁶

It should, therefore, come as no surprise that with the growth of technology, media, and information sharing today, there has been a rise in concern over whether jurors can fulfill their constitutional duty to be “impartial” in the courtroom.⁷ An impartial juror is, traditionally, one who can consider

1. See Jessica Arnold & Louisa Ballhaus, *20 Most Important Celebrity Lawsuits Over the Years*, SHEKNOWS (Jan. 8, 2021, 2:27 PM), <https://www.sheknows.com/entertainment/slideshow/8731/biggest-celebrity-lawsuits/1/> [<https://perma.cc/GDS5-3EC9>] (examining recent celebrity lawsuits).

2. See Jess Scherman, *6 Intriguingly Famous Court Cases that Captivated the Nation*, RASMUSSEN UNIV. (Aug. 29, 2017), <https://www.rasmussen.edu/degrees/justice-studies/blog/famous-court-cases/> [<https://perma.cc/9SFJ-HG32>] (noting O.J. Simpson, Ted Bundy, Casey Anthony, George Zimmerman, Scott Peterson, and Timothy McVeigh as some of the most famous criminal trials that gained nationwide recognition).

3. See Arnold & Ballhaus, *supra* note 1 (identifying highly publicized civil cases that involved celebrities).

4. See Michael Cieply, *Stars, Cameras and Theatrics Strain Courts*, N.Y. TIMES (July 9, 2010), <https://www.nytimes.com/2010/07/10/us/10celebrity.html> [<https://perma.cc/FQ4S-AFV4>] (providing examples of high-profile celebrity courtroom drama).

5. *Social Media and Its Impact on Trials*, LAWCPD (Oct. 8, 2018), <https://lawcpd.com.au/blog/social-media-and-its-impact-trials/> [<https://archive.is/WEgEo>].

6. *Id.* (“Jurors might be tempted to use social media or the internet to find out further information about the trial other than the evidence presented. This can lead them to forming an opinion about the facts which is not based on the evidence presented in court.”).

7. *Id.* Jurors “must be seen as independent and unbiased, otherwise, the accused’s rights to a fair trial can be undermined.” *Id.* However, when jurors research trial details on social media, or make comments about the trial on social media, or contact members of the case on social media, this is demonstrative of how social media can conflict with a fair trial. *Id.*

the evidence presented at trial without preconceived opinions of liability or fault.⁸ Concerns over impartiality are only heightened when a celebrity or highly-publicized case is tried in court.⁹ Due to social media and the vast amounts of information and news people consume daily, potential jurors walk into the courtroom with more “knowledge”—whether that knowledge be accurate or not—than was available to them pre social media.

Thus, when Kobe Bryant’s wife, Vanessa Bryant, filed a wrongful death suit against a helicopter pilot and company following the death of Bryant, his daughter, and seven other passengers resulting from a sudden helicopter crash in the Los Angeles area, there was immediate concern from the defendant about the ability to secure an impartial jury in Los Angeles County and southern California.¹⁰ This concern grew because not only was Bryant an iconic figure and hero to many in the Los Angeles area, but every news station in the nation was covering the story and sharing their opinions on what happened and who was at fault.¹¹

Despite the defendant’s rational concern about their ability to secure an impartial jury, the Los Angeles Superior Court denied the defendant’s motion to change venue largely because any other venue would also suffer from a similar concern.¹² While the case was later transferred to a federal court in Los Angeles, it did not alleviate the impartiality concerns.¹³

If no other venue can offer an impartial jury, as claimed in this case, is a party supposed to simply roll the dice and hope the jury chooses to ignore

8. See Nicole L. Waters & Paula Hannaford-Agor, *Jury Impartiality in the Modern Era*, in *ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE* 1 (G.J.N. Bruinsma & D.L. Weisburd eds., 2014).

9. See Karen Steinhauser, *Impact on Juries in Sports Celebrity Cases*, NAT’L INST. FOR TRIAL ADVOC. (May 6, 2015), <https://www.nita.org/blogs/impact-on-juries-in-sports-celebrity-cases> [<https://perma.cc/JCW2-8S6A>] (“If we the public are so fascinated by it, the question always comes to my mind of whether a defendant’s celebrity status affects jurors, either consciously or unconsciously.”).

10. Notice of Motion and Motion to Transfer Venue by Defendant Berge Zobayan as Successor-In-Interest to Ara George Zobayan; Memorandum of Points and Authorities; Declaration of Arthur I. Willner at 2, *Bryant v. Island Express Helicopters Inc.*, No. 20STCV07492 (Cal. Super. Ct., L.A. Cnty. filed Feb. 19, 2020) [hereinafter Motion to Transfer Venue].

11. See *infra* notes 86–89 and accompanying text.

12. See *infra* Section IV.C.

13. See *id.* Because the case was transferred to federal court, this Note will examine both the applicability of state and federal law to the case.

everything they heard about the case before the trial begins?¹⁴ Are courts altogether supposed to turn a blind eye to the power and influence the modern media has over potential jurors before they walk into the courtroom?¹⁵ Subjecting parties with legitimate impartiality concerns to this situation hardly seems to be the correct legal solution, especially when access to an impartial jury is a constitutionally protected right.¹⁶

This Note examines these very questions, the modern threats to jury impartiality, and possible solutions in both federal and state court forums.¹⁷ Part II of this Note examines the foundation and history of the right to an impartial jury and the role this constitutional right has played in previous cases.¹⁸ Part III discusses the modern motion to change venue in federal and state courts and how it functions.¹⁹ Part IV then discusses the Kobe Bryant wrongful death lawsuit and why the court denied the defendant’s motion to change venue.²⁰ Part V contains an in-depth analysis and discussion about whether the court in Bryant’s case ruled correctly and examines how the defendant’s claim would have fared under the federal motion to change venue standard.²¹ Part VI considers the modern media’s impact on potential jurors

14. See *Impartial Juries: Do They Really Exist?*, PENN. ST.: PSYCH 424 BLOG (Mar. 7, 2014, 10:57 PM), <https://sites.psu.edu/aspsy/2014/03/07/impartial-juries-do-they-really-exist/> [<https://perma.cc/2TC4-UTGM>] (addressing the question of whether or not it is possible to have a truly impartial jury).

15. See generally Ronn Torossian, *How Media Coverage Affects Judges and Juries*, AGILITY PR SOLUTIONS (Apr. 4, 2018), <https://www.agilitypr.com/pr-news/public-relations/media-coverage-affects-judges-juries/> [<https://perma.cc/XM36-WBSZ>] (examining the media’s impact on judges and juries).

16. See Edie Greene, *Media Effects on Jurors*, 14 L. & HUM. BEHAV. 439, 440 (1990) (“[C]ase specific pretrial publicity of this sort may be dangerous for two reasons. First, it provides jurors with information that if irrelevant, unreliable, or illegally obtained, would not make its way into the trial record. Second, because many news stories precede the actual trial, jurors are informed about certain facts prior to hearing them in the courtroom. This foreknowledge can create a lasting impression on jurors.”); see *infra* Part II (examining the constitutional right to trial by an impartial jury).

17. See *infra* Parts V, VI.

18. See *infra* Part II.

19. See *infra* Part III.

20. See *infra* Part IV.

21. See *infra* Part V.

and whether the courts' search for a truly impartial jury is the best solution to ensure that this constitutional right is not swept under the rug.²² Additionally, Part VI introduces two possible solutions for the problem presented.²³ Lastly, Part VII concludes with a general overview of the Note and highlights the importance of properly balancing the modern media and preserving the constitutional right to an impartial jury.²⁴

II. BACKGROUND

To better understand the importance of an impartial jury and the impact that granting or denying a motion to change venue can have on a moving party, one must understand how these legal concepts and tools developed.²⁵ It was only one hundred years ago that the Supreme Court of the United States decided that the right to an impartial jury in a civil case was implicit in the United States Constitution.²⁶ The sections below will examine the historical development of this constitutional right and how federal and state courts have adopted and interpreted it in the subsequent years.

A. The Constitutional Right to an Impartial Jury

Today, the right to an impartial jury is a constitutionally protected right in both criminal and civil trials.²⁷ The right to an impartial jury has long been recognized in criminal trials under the Sixth Amendment of the United States Constitution,²⁸ which states that “the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State.”²⁹ In contrast, on

22. *See infra* Part VI.

23. *See infra* Part VI.

24. *See infra* Part VII.

25. *See generally* David E. Steinberg, *The Motion to Transfer and the Interests of Justice*, 66 NOTRE DAME L. REV. 443, 448–62 (1990) (discussing the history and development of the motion to transfer venue).

26. *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946).

27. U.S. CONST. amends. VI, VII.

28. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State”).

29. *Id.*

its face the Seventh Amendment entitles a party only to a trial by jury, not necessarily an impartial jury.³⁰ The Seventh Amendment³¹ states with respect to civil trials “where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”³² While such a difference in language between the Sixth and Seventh Amendments may suggest that there is no constitutional right to an impartial jury in civil matters, this was likely not the intent of the drafters because they envisioned a civil jury trial as it existed at common law.³³

The Supreme Court first mentioned that the Seventh Amendment might include the right to an impartial jury in 1942 when it decided *Glasser v. United States*.³⁴ There, the Court held that to be a “body truly representative of the community,” a jury must reflect a “cross-section of the community.”³⁵ However, *Glasser* left the question open as to whether this requirement was founded in the Equal Protection Clause or “if the concept of the word ‘jury’ as used in the Fifth, Sixth, and Seventh Amendments required this kind of representation.”³⁶ It was not until four years after *Glasser* that the Supreme Court held that the Seventh Amendment specifically contemplated the right

30. U.S. CONST. amend. VII. There has also been lots of debate on what a trial by jury entails. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 649 (1973). One common question from when the amendment was originally adopted is how many jurors the Constitution requires to have a proper trial by jury. *Id.* at 650.

31. Congress originally adopted the Seventh Amendment on September 25, 1789, and the legislature approved it on December 15, 1791. Wolfram, *supra* note 30, at 725–26.

32. U.S. CONST. amend. VII.

33. James J. Gobert, *In Search of the Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 269, 269 n.1 (1988). It is well settled among judicial and academic authors that when looking at the jury trial afforded by the Seventh Amendment, “court[s] must be guided by the practice of English courts in 1791.” Wolfram, *supra* note 30, at 639–40.

34. *Glasser v. United States*, 315 U.S. 60, 85–86 (1942).

35. *Id.*

36. Richard Lorren Jolly, *The New Impartial Jury Mandate*, 117 MICH. L. REV. 713, 733 (2019).

to an impartial jury.³⁷ In 1946, in *Thiel v. Southern Pacific Co.*, the Supreme Court finally extended the constitutional right to an impartial jury beyond criminal cases.³⁸ The Court reaffirmed this requirement thirty-eight years later in *McDonough Power Equipment, Inc. v. Greenwood*, where it held that the “touchstone of a fair trial is an impartial trier of fact—a jury capable and willing to decide the case solely on the evidence before it.”³⁹

While this extension to federal civil trials was a step in the right direction, the constitutional right to a jury trial is still not guaranteed in civil trials in state court.⁴⁰ Still, most states have incorporated the right to a jury trial in civil matters into their state constitutions.⁴¹ For example, the California Constitution states that, in both civil and criminal cases, “trial by jury is an inviolate right and shall be secured to all.”⁴² Similar to the Supreme Court’s

37. *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) (“The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.”).

38. *Id.* This case dealt with a passenger jumping out of the window of a moving train operated by the respondent. *Id.* at 218–19. The passenger claimed that Southern Pacific Company’s “agents knew that he was ‘out of his normal mind’ and [he] should” not have been allowed to board the train, or at least should have been guarded. *Id.* at 219. Petitioner demanded a jury trial and subsequently moved to strike the entire jury panel alleging that “mostly business executives or those having the employer’s viewpoint [were] purposely selected on said panel, thus giving a majority representation to one class or occupation and discriminating against other[s].” *Id.* The court denied the passenger’s challenge and the jury eventually returned a verdict for Southern Pacific Company. *Id.* The passenger then moved for a new trial, but the court denied the motion finding that five of the twelve jurors were more closely related to the type of person the passenger was. *Id.* at 220. The Ninth Circuit affirmed this decision, and the Supreme Court granted certiorari for the limited question as to whether the passenger’s motion to strike the jury panel was properly denied. *Id.* It was here that the Court held that the impartial jury required in the Constitution was expanded to civil trials. *Id.* There, the Court was concerned with potential discrimination when it came to jury selection and eventually held that there was undisputed evidence in the case that there was failure to abide by the proper rules and principles of jury selection because the clerk and jury commissioner both testified that “they deliberately and intentionally excluded from the jury lists all persons who work for a daily wage.” *Id.* at 221.

39. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). The Court emphasized that a litigant is entitled to a fair trial, but not a perfect trial, because those are nonexistent. *Id.* at 553.

40. Renée Lettow Lerner & Suja A. Thomas, *The Seventh Amendment*, NAT’L CONST. CTR.: INTERACTIVE CONST., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-vii/interps/125> [<https://perma.cc/EK27-4ZGK>].

41. *Id.*

42. CAL. CONST. art. I, § 16.

jurisprudence regarding federal trials, California also requires juries to be impartial in civil matters.⁴³ Specifically, California requires jurors to act with “entire impartiality, and without prejudice to the substantial rights of any party”—the exact concern the defendant in the *Bryant* case voiced.⁴⁴

B. History of the Motion to Transfer Venue

One important tool that has developed to help secure the constitutional right to an impartial jury is a motion to transfer venue.⁴⁵ “Courts use venue to balance the plaintiff’s choice of forum with protections of fairness and convenience for defendants.”⁴⁶ Like the right to an impartial jury in civil trials, motions to transfer venue are also relatively new and were not available in civil litigation until 1948 after the Supreme Court adopted a new personal jurisdiction test.⁴⁷ In light of the changes to the requirements of personal jurisdiction, Congress adopted two new venue transfer mechanisms:

43. *People v. Richardson*, 138 Cal. App. 404, 408–09 (1934) (deciding that one of the essential attributes to a jury in civil matters is impartiality); see CAL. CODE CIV. PROC. § 225(b)(1)(C) (2021); see also *Lombardi v. Cal. St. Cable Ry. Co.*, 124 Cal. 311, 317 (1899) (holding that the right to an impartial jury is an “inseparable and inalienable part of the right to a trial by jury guaranteed by the constitution”).

44. CAL. CODE CIV. PROC. § 225(b)(1)(C).

45. Brad W. Keller, *The Importance of Venue in Litigation*, NAT’L L. REV. (July 8, 2015), <https://www.natlawreview.com/article/importance-venue-litigation> [perma.cc/JKA5-6YGF] (“[I]n a jury trial, venue determines the jurors that will ultimately decide a case.”). The motions were previously pointless due to personal jurisdiction because venue was considered only proper in places that were convenient for the defendants. Steinberg, *supra* note 25, at 448. Thus, there would be no need for defendants to utilize such a motion. *Id.*

46. Jeremy Jay Butler, *Venue Transfer When a Court Lacks Personal Jurisdiction: Where are Courts Going with 28 U.S.C. § 1631?*, 40 VAL. U. L. REV. 789, 789 (2006). Venue statutes protect defendants against the risk that plaintiffs will select an unfair or inconvenient place for trial, whereas it also provides plaintiffs the power of choosing the venue and thus determining the location and applicable law of the trial. *Id.* at 793–94.

47. See Steinberg, *supra* note 25, at 448. Before then, motions to transfer venue would have been relatively pointless due to the Supreme Court’s interpretation of personal jurisdiction. *Id.* In 1945, the Court adopted a new personal jurisdiction test (the “minimum contacts” test) that paved the way for civil motions to transfer venue due to a fear that plaintiffs might now bring suits in a forum that defendants had few connections with. *Id.* at 448–49. Prior to the adoption of civil motions to transfer venues, courts developed a doctrine—the doctrine of *forum non conveniens*—which “authorized dismissal of a suit where another court would provide a more convenient forum.” *Id.* at 449. Despite this development, courts tended to disfavor these dismissals and thus often did not grant such motions. *Id.* at 450–51.

28 U.S.C. sections 1404 and 1407.⁴⁸ In 1948, Congress adopted 28 U.S.C. section 1404, which authorizes transfers of cases brought in proper venues that nonetheless are inconvenient for defendants.⁴⁹ Section 1404 states that “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.”⁵⁰ Section 1407, also known as the multidistrict litigation-transfer statute, subjects plaintiffs “to the adjudicatory authority of a new court whose jurisdiction the plaintiff did not invoke.”⁵¹

Since the adoption of sections 1404 and 1407, the Supreme Court has shown great deference to district courts’ decisions on granting or denying these transfer of venue motions.⁵² While the Court has not developed any specific standards for reviewing district court decisions in these situations, the language in section 1404—authorizing transfers “in the interest of justice”—has been interpreted as a grant of broad discretion to district courts.⁵³

After the statutes’ adoption, the Court gave minimal guidance on motions to transfer venue until 1988 when it decided *Stewart Organization, Inc. v. Ricoh Corp.*⁵⁴ There, the extent of the Court’s guidance was that federal

48. See Scott Dodson, *Plaintiff Personal Jurisdiction and Venue Transfer*, 117 MICH. L. REV. 1463, 1466–67 (2019).

49. See Steinberg, *supra* note 25, at 451. Forum non conveniens was the predecessor to 28 U.S.C. section 1404. Butler, *supra* note 46, at 795. Forum non conveniens allowed a court to dismiss a case if there was a more convenient and proper forum even if the original venue and jurisdiction were proper. *Id.*

50. 28 U.S.C. § 1404(a).

51. Dodson, *supra* note 48, at 1466–67. Litigation under this statute has increased drastically in the world of mass tort litigation. *Id.* at 1467 n.21. “Multidistrict litigation is a special procedure in which federal civil (noncriminal) cases from around the country are transferred to one court.” David Goguen, *Multidistrict Litigation (MDL) for Product Liability Cases*, NOLO, <https://www.nolo.com/legal-encyclopedia/multidistrict-litigation-mdl-drug-lawsuits-32952.html> [<https://perma.cc/66LV-ZH98>]. In other words, it consolidates multiple cases so that they are managed by one court. *Id.* The consolidated cases “must have one or more questions of fact . . . in common.” *Id.*

52. See Steinberg, *supra* note 25, at 453.

53. See JAMES W. MOORE, MOORE’S JUDICIAL CODE: COMMENTARY 210 (1949).

54. See Steinberg, *supra* note 25, at 446 (“The Supreme Court rarely has addressed section 1404 transfers, and the few Court opinions that discuss the proper legal standards do so in only the most general terms. Legal scholars have ignored the motion to transfer. As a result, the development of proper standards to govern the transfer of cases has been left to the lower federal courts,

law, rather than state law, should govern forum selection clauses.⁵⁵ Once again, the Court failed to offer any guidance or standards other than a case-specific analysis when deciding and ruling on a motion to transfer venue.⁵⁶ The only specific limitation that the Court placed on section 1404 transfer motions was introduced by the Supreme Court in *Hoffman v. Blaski*.⁵⁷ In that case, the Court forbade transfer to any district where personal jurisdiction or venue was not already authorized.⁵⁸

Like federal courts, state courts also allow motions to transfer venue.⁵⁹ California first enacted a motion for a change of “place of the trial” in 1872, seventy-six years before federal courts recognized such a motion.⁶⁰ The original statute allowed a change in the place of trial “when there [was] reason to believe that an impartial trial cannot be had therein.”⁶¹ This statutory provision was intended to guarantee every litigant a trial before a fair and impartial panel and to provide a mechanism for the protection and enforcement of that right.⁶² The California legislature amended the statute several times over the years, but the right to a change of venue to enjoy an impartial trial always remained intact.⁶³

and almost exclusively to the district courts.”); *see also* *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). Before this case, the Court only briefly addressed motion to transfer venue issues and at most applied the forum non conveniens doctrine of weighing the private interests of the litigant and the public interest factors from *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947). *Cont’l Grain Co. v. Barge FBL-585*, 364 U.S. 19, 25–26 (1960); *Norwood v. Kirkpatrick*, 349 U.S. 29, 31–33 (1955); *see also* *Van Dusen v. Barrack*, 376 U.S. 612, 621–26, 643–46 (1964) (upholding a district court’s motion to transfer venue).

55. *Stewart Org., Inc.*, 487 U.S. at 32.

56. *Id.* at 29–30.

57. *Hoffman v. Blaski*, 363 U.S. 335, 335 (1960).

58. *Id.* at 343–44.

59. TEX. R. CIV. P. § 86 (1983); N.Y. C.P.L.R. § 511 (McKinney 1964); *see, e.g.*, CAL. CODE CIV. PROC. § 397 (1994).

60. *See* CAL. CODE CIV. PROC. § 397 (West 1872) (amended 1992).

61. *See id.* § 397(2).

62. *See* *Paesano v. Superior Court*, 204 Cal. App. 3d 17, 20 (1988).

63. *See* CAL. CODE CIV. PROC. § 397(b).

III. THE MODERN MOTION TO TRANSFER VENUE

Today, motions to transfer venue look different in every state, and the state standards for motions to transfer or change venue also differ from the standards used in federal court.⁶⁴ As mentioned above and what will be discussed in greater detail *infra* Section II.B, there is little guidance given on the applicable standard for federal motions to transfer venue.⁶⁵ Still, the current test, used by most circuits, examines two main factors: (1) whether the record contains findings suggesting potential impartiality issues,⁶⁶ and (2) whether there is unfavorable publicity given to the defendant in the geographic area where the suit was brought.⁶⁷ Due to the little guidance given by federal courts, the rest of this Part will focus on the modern venue statute in California (which is slightly more developed than the federal court's jurisprudence on the matter) that is discussed below in connection with the *Bryant* wrongful death suit.⁶⁸

In California, four different types of venue motions have been established: (1) transfer to proper court,⁶⁹ (2) change venue,⁷⁰ (3) transfer to

64. See generally Butler, *supra* note 46 (discussing the modern federal venue transfer process).

65. See *infra* Section II.B.

66. In *Broussard v. State Farm Fire & Cas. Co.*, when examining this factor, the appellate court looked to see if the district court properly analyzed and considered the potential impartiality issues. 523 F.3d 618, 631 (5th Cir. 2008). The court there noted that “[t]he transcript reveal[ed] that the district court was very aware of its responsibility to protect the interests of justice by selecting a jury free from prejudice.” *Id.*

67. Daniels v. Woodford, 428 F.3d 1181, 1211 (9th Cir. 2005); cf. *Broussard*, 523 F.3d at 631. On the other hand, the standard for exclusion of jurors based on a failure to be impartial in a criminal trial is “whether the juror’s views would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath.’” *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). All that is required is that “the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.” *Id.* at 426.

68. See *infra* Part IV.

69. CAL. CODE CIV. PROC. § 397(a) (West 2008); see CAL. CODE CIV. PROC. § 396(a)–(b) (West 2009).

70. See CAL. CODE CIV. PROC. § 397(b)–(e) (West 2008).

neutral county,⁷¹ and (4) remove action from Sacramento County.⁷² Choosing the right venue motion typically depends on the movant’s ground for the transfer or change.⁷³ There are four different grounds on which a party can file a motion to change venue: (1) “an impartial trial cannot be had” in the current county, (2) “the convenience of witnesses and the ends of justice would be promoted by the change,” (3) there is no qualified judge in the current county, or (4) in a proceeding to end a marriage in which one or both of the parties reside outside the county of suit, “the ends of justice would be promoted by the change.”⁷⁴ Additionally, California distinguishes between a motion to “transfer” venue and a motion to “change” venue.⁷⁵ “Transfer” is used to challenge an improper venue, whereas “change” is used to challenge the venue when it is proper, but the case should be moved to another venue for other reasons.⁷⁶ This Note focuses on “changing” venue for purposes of an impartial jury because the original venue is technically proper.⁷⁷

When trying to prevail on a claim of a biased jury in the current venue, the movant bears the burden of showing that they are subject to actual, widespread prejudice in the county.⁷⁸ Although there is no set of particular factors that the movant can address to establish impartiality, some commonly

71. See CAL. CODE CIV. PROC. § 394(a) (West 2003).

72. See CAL. CODE CIV. PROC. § 401(2) (1947).

73. DAVID I. LEVINE, O’CONNOR’S CALIFORNIA PRACTICE CIVIL PRETRIAL Ch. 4-A § 2 (2021 ed.).

74. See CAL. CODE CIV. PROC. § 397(b)–(e).

75. LEVINE, *supra* note 73, at Table 4-2.

76. CAL. CODE CIV. PROC. § 397(b)–(e).

77. See *infra* Parts IV, V, VI.

78. *People v. Ocean Shore R.R.*, 24 Cal. App. 2d 420, 426–27 (1938); see *Ohio Cas. Ins. Grp. v. Superior Court*, 30 Cal. App. 4th 444, 452 (1994). Additionally, a motion to change venue based on inability to obtain an impartial jury is usually only available in a jury trial, not a bench trial. See *Nguyen v. Superior Court*, 49 Cal. App. 4th 1781, 1791 (1996). If a movant were to want to change venue during a bench trial, they would have to prove that the judge lacks impartiality, rather than the county or community. *Id.* at 1791; *Stuart v. Everly*, 50 Cal. App. 551, 552 (1920) (holding that the movant’s motion to change venue based on impartiality of the judge is controlled by section 397).

considered factors are pervasiveness,⁷⁹ longevity,⁸⁰ intensity,⁸¹ publicity,⁸² and inability to impanel a jury.⁸³ Additionally, the timing of the motion is also important because courts require that a motion to change venue be made only after an answer is on file or sometimes even after there has been an attempt to select a jury.⁸⁴ It is clear from case law, however, that the burden on the moving party is heavy, and there must be a sufficient showing of prejudice in order for a court to even consider granting the motion to change venue due to impartiality.⁸⁵

IV. KOBE BRYANT HELICOPTER CRASH AND WRONGFUL DEATH LAWSUIT

California's motion to change venue statute has recently gained national attention for its involvement and function in Kobe Bryant's wrongful

79. This factor looks at the pervasiveness of the prejudice throughout the county. *Compare Ocean Shore R.R.*, 24 Cal. App. 2d at 427–28 (holding that nearly 200 affidavits were enough to show widespread prejudice), *with Riverside Cty. Flood Control & Water Conservation Dist. v. Joseph W. Wolfskill Co.*, 147 Cal. App. 2d 714, 716, 717 (1957) (holding there was no widespread prejudice when one-tenth of the county was subject to a tax that could cause prejudice against the movant). For example, in *Ross v. Kalin*, the court held that there was no widespread prejudice even though movant had been tarred and feathered by an angry mob because only 300 people participated in the mob and the county had between 8,000 and 12,000 potential jurors. 53 Cal. App. 616, 617–19 (1921).

80. This factor looks at the length of time the prejudice has been present. *See Ocean Shore R.R.*, 24 Cal. App. 2d at 427–28 (holding there was prejudice when it extended over many years).

81. This factor looks at the intensity of the prejudice. *See, e.g., J.I. Case Threshing Co. v. Copren Bros.*, 35 Cal. App. 70, 79 (1917) (holding that the fact that the nonmovants were “well and favorably” known in the county of the original venue was not sufficient to establish prejudice).

82. This factor examines the publicity concerning the subject matter of the action. *Ocean Shore R.R.*, 24 Cal. App. 2d at 427–28 (holding that civic meetings and multiple newspaper articles as sufficient to prove prejudice); *Ross*, 53 Cal. App. at 617 (holding that newspaper editorials approving of the mob attack against the movant as insufficient to prove prejudice); *see, e.g., Nguyen*, 49 Cal. App. 4th at 1791 (holding that two newspaper articles on the issue at hand was not sufficient to prove prejudice).

83. This factor focuses on the difficulty of impaneling a jury. *See People ex rel Burdall v. Prob. Ct.*, 46 Cal. 245, 246 (1873). Additionally, a court may postpone ruling on a motion to change venue because the moving party oftentimes cannot make an adequate showing of prejudice until it unsuccessfully attempts to select a jury. *Cook v. Pendergast*, 61 Cal. 72, 79–80 (1882).

84. *Cook*, 61 Cal. at 79–80; *see also Easton v. Superior Court*, 12 Cal. App. 3d 243, 245 (1970).

85. *See* 3 WITKIN, CALIFORNIA PROCEDURE § 956 (5th ed. 2020).

death lawsuit.⁸⁶ This Part discusses the factual background of the case and how the motion to change venue played a crucial role in the outcome.

A. Helicopter Crash and Subsequent Lawsuit

On January 26, 2020, Kobe Bryant, an NBA All-Star, 5-time NBA Champion, and Los Angeles Laker legend, along with his thirteen-year-old daughter, Gianna, and seven other people, tragically died in a helicopter crash in Calabasas, California.⁸⁷ While the exact reason for the crash was undergoing investigation, many speculated that it was due to the helicopter pilot becoming disoriented in the heavy fog present on that day and thinking he was actually climbing instead of descending.⁸⁸ The National Transportation Safety Board (NTSB) recently confirmed this theory in its official report.⁸⁹ The report ultimately faulted the pilot of the helicopter for the crash, stating that the pilot made a “poor decision” to fly in the weather that day.⁹⁰

86. See, e.g., Bill Hetherman, *Judge Denies Motion by Pilot in Kobe Bryant Suit to Move Case to Orange County*, NBC L.A. (Aug. 21, 2020, 2:50 PM), <https://www.nbclorange.com/news/local/kobe-bryant-helicopter-crash-lawsuit-venue/2416840/> [https://perma.cc/5LVG-B6DU].

87. Erik Ortiz, *Kobe Bryant, Former NBA Star and Los Angeles Lakers Legend, Dies at 41*, NBC NEWS (Jan. 26, 2020, 3:12 PM), <https://www.nbcnews.com/news/sports/kobe-bryant-former-nba-star-los-angeles-lakers-legend-dies-n1123436> [https://perma.cc/QU2Z-TKVV]. Kobe Bryant was survived by his wife and three daughters. *Id.*

88. Ian Duncan, Lori Aratani & Michael Laris, *Pilot in Kobe Bryant Helicopter Crash May Have Become Disoriented in Fog, Federal Investigators Say*, WASH. POST (June 17, 2020), https://www.washingtonpost.com/local/trafficandcommuting/pilot-in-kobe-bryant-helicopter-crash-may-have-become-disoriented-in-fog-federal-investigators-say/2020/06/17/0c226af2-b0dc-11ea-856d-5054296735e5_story.html [https://perma.cc/32YA-356N].

89. Nicholas Bogel-Burroughs, *Investigators Fault Pilot in Kobe Bryant Crash for Flying into Clouds*, N.Y. TIMES (Feb. 9, 2021), <https://www.nytimes.com/2021/02/09/us/kobe-helicopter-crash-investigation.html> [https://perma.cc/E5D2-KHN5].

90. *Id.* The report specifically concluded that the pilot lost his bearings in the weather. *Id.* The report also speculates that the pilot’s choices were “probably influenced by his ‘self-induced pressure’ to complete the trip.” *Id.* It is of notable importance to this Note that, over a year after the crash, almost every major news network in America was again reporting this story to the public. NTSB Says *Pilot in Deadly Crash that Killed all 9 Aboard, Including Kobe Bryant and Daughter Gianna, Was Disoriented in Clouds*, ESPN (Feb. 9, 2021), https://www.espn.com/nba/story/_/id/30867166/ntsb-says-pilot-deadly-crash-killed-kobe-bryant-daughter-gianna-disoriented-clouds [https://perma.cc/7BVF-WFRU]; Richard Winton, *Kobe Bryant Helicopter Crash Caused by Pilot’s Poor Decision Making and Disorientation, NTSB Says*, L.A. TIMES (Feb. 9, 2021, 2:36 PM), <https://www.latimes.com/california/story/2021-02-09/pilot-in-kobe-bryant-helicopter-crash-disoriented-ntsb-says> [https://archive.ph/UuqTM]; Tom Schad, *Kobe Bryant Crash Caused by Pilot’s Poor Decision-Making, Disorientation, NTSB Says*, USA TODAY (Feb. 9, 2021, 4:28 PM), <https://>

This unexpected, devastating crash not only sent “shockwaves” through residents of Los Angeles County, but through sports fans across the globe who had come to know and love Bryant.⁹¹

On February 24, 2020, Bryant’s widow, Vanessa Bryant, and the other family members of those who also lost someone in the crash, filed wrongful death lawsuits (which were later consolidated) on behalf of Bryant, Gianna, and all seven others aboard the helicopter that day.⁹² The complaint alleges twenty-eight counts of negligence and breaches of duty and seeks unspecified general and punitive damages.⁹³

B. Motion to Change Venue and Party Arguments

In June of 2020, one of the defendant’s responded by filing a motion to change venue to “County of Orange or another county the Court finds fair and just under the circumstances . . . due to the fact that an impartial trial cannot be had in the County of Los Angeles.”⁹⁴ The defendant raised three main points in support of the motion to change venue: (1) the court has the power to change the place of trial when there is reason to believe that an impartial trial cannot be had in the original county, (2) an impartial trial cannot be had in Los Angeles County because of Bryant’s status, and therefore,

www.usatoday.com/story/sports/nba/2021/02/09/kobe-bryant-crash-pilot-violated-standards-disoriented-ntsb-says/4443520001/ [<https://perma.cc/TGJ9-RREZ>].

91. See Ortiz, *supra* note 87.

92. Complaint at 2, Bryant v. Island Express Helicopters, Inc., No. 20STCV07492 (Cal. Super. Ct., L.A. Cnty, filed Feb. 24, 2020) [hereinafter Bryant Wrongful Death Complaint]. To have a successful claim for wrongful death in California, the plaintiff must prove (1) the tort (negligence or other wrongful act), (2) the resulting death, and (3) damages. Lattimore v. Dickey, 239 Cal. App. 4th 766, 773 (2015). Thus, the big issue in this case will be if negligence (the tort) was present or not. See also Max Jaeger, *Insurer Wants in on Kobe Bryant Death Suit After Settlement*, LEXISNEXIS: LAW360 (July 12, 2021, 2:47 PM), <https://www.law360.com/articles/1401975/insurer-wants-in-on-kobe-bryant-death-suit-after-settlement> [<https://perma.cc/LA92-AXEG>].

93. Bryant Wrongful Death Complaint, *supra* note 92, at 7–10.

94. Motion to Transfer Venue, *supra* note 10, at 2. Defendant cited California Civil Procedure Code section 397 as the legal basis for its motion. *Id.* at 6. Section 397 allows a court, on motion, to change the place of trial in cases in which “there is reason to believe that an impartial trial cannot be had therein.” CAL. CODE CIV. PROC. § 397(b). A motion pursuant to this section requires a showing of “actual prejudice to the moving party.” Ohio Cas. Ins. Grp. v. Superior Court, 30 Cal. App. 4th 444, 452 (1994).

(3) the matter should be transferred to Orange County or another county the court finds fair and just under the circumstances.⁹⁵

Much of the motion was devoted to the argument that there was “a widespread feeling of prejudice” in favor of Bryant because of his status in the community.⁹⁶ For example, it is estimated that some 20,000 people attended the public memorial that was held at Staples Center in honor of Bryant and his daughter (this is an especially significant number as this took place at the beginning of a national pandemic).⁹⁷ There were also more than eight street artists who painted murals all through Los Angeles of Bryant and the other victims of the crash to honor their legacy.⁹⁸ Specifically, the defendant believed that Orange County would provide a fairer venue and a more impartial jury because the Bryant family, along with all of the other passengers’ families, reside there.⁹⁹ The defendant further argued that Orange County would be a more favorable venue because “the level of Laker fan following does not even approach what exists in Los Angeles County,” despite the fact that the Bryant’s reside there.¹⁰⁰ Overall, the defendant believed that “Kobe Bryant’s legacy is too far ingrained in the culture of [Los Angeles]” to afford the defense a fair trial and impartial jury in this context.¹⁰¹ In the motion, the defendant argued that “[n]o reasonable person [in

95. See Motion to Transfer Venue, *supra* note 10, at 6–7.

96. See *id.* at 6. The defendant supported this argument by citing numerous articles written about Bryant’s popularity and influence in the Los Angeles community. *Id.* at 9–10; J.M. Poulard, *Who’s More Popular, Kobe Bryant or the LA Lakers?*, BLEACHER REP. (Sept. 19, 2013), <https://bleacherreport.com/articles/1780707-whos-more-popular-kobe-bryant-or-the-la-lakers> [https://perma.cc/YVF8-TJA9]; Jared Groff, *A Quantitative Analysis of Kobe Bryant’s Popularity Using Google*, FOURFRONT (Aug. 20, 2021), <https://www.fourfront.us/blog/quantitative-analysis-of-kobe-bryants-popularity-using-google/> [https://perma.cc/9922-AE6T]; see, e.g., Jason Gay, *What Kobe Bryant Meant*, WALL ST. J. (Jan. 27, 2020, 3:59 AM), <https://www.wsj.com/articles/what-kobe-bryant-meant-11580081927> [https://archive.is/fAGPQ].

97. Brakkton Booker, *Thousands Attend Kobe Bryant Memorial in Los Angeles*, NPR (Feb. 24, 2020, 1:15 PM), <https://www.npr.org/2020/02/24/808822928/watch-thousands-expected-to-attend-kobe-bryant-memorial-in-los-angeles-today> [https://perma.cc/DQ8M-RALM].

98. Natalya Jaime, *Street Artists Continue to Pay Tribute to Kobe Bryant with Murals Throughout the City*, L.A. MAG. (Jan. 30, 2020), <https://www.lamag.com/culturefiles/kobe-bryant-murals/> [https://perma.cc/GRD9-Q239].

99. Motion to Transfer Venue, *supra* note 10, at 3.

100. *Id.* at 8.

101. *Id.*

Los Angeles] can argue that an average juror will view with dispassion the claims of the Bryant family in comparison to the defenses [being] presented.”¹⁰²

In response to the defendant’s motion, the plaintiffs stated three main reasons why the motion should be denied.¹⁰³ First, the plaintiffs argued that the defendant cannot carry his burden to show that he could not receive an impartial trial because the defendant based his argument on the incorrect legal standard for deciding a motion to change venue, and he would not meet the burden of proving “actual prejudice,” which is the proper legal standard.¹⁰⁴ Second, the plaintiffs argued that the defendant did not and could not show any court where the objection to the inability to secure an impartial jury was not an issue.¹⁰⁵ Third, the plaintiffs asserted that the defendant’s concern about the inability to enjoy an impartial jury in Los Angeles County can be addressed through voir dire and the court’s instructions.¹⁰⁶

102. *Id.* at 3. The defendant also noted that “[t]he notoriety and popularity of the late Kobe Bryant in Los Angeles County is detailed herein and reached a level that left no person in the county unaware of his role in branding Los Angeles as his city. No other single individual in recent memory, sports figure or otherwise, has been considered by the people to be such a personification of their city of Los Angeles.” *Id.* The motion goes on further to describe in detail Kobe’s story, position, influence, and popularity in Los Angeles County. *See id.* at 4–6.

103. *See* Plaintiffs’ Memorandum of Law in Opposition to Defendant Berge Zobayan’s Motion to Transfer Venue; Declaration of Gary C. Robb at 1–2, *Bryant v. Island Express Helicopters Inc.*, No. 20STCV07492 (Cal. Super. Ct., L.A. Cnty. filed Aug. 4, 2020) [hereinafter Plaintiff’s Memorandum in Opposition to Motion].

104. *Id.* at 2–6. The defendant based his legal argument on the lower standard that is applicable in criminal cases of substantial prejudice, whereas the higher standard of “actual prejudice” should be applied in this instance. *See infra* note 109.

105. Plaintiff’s Memorandum in Opposition to Motion, *supra* note 103, at 7.

106. *Id.* at 9–10. The defendant filed a reply brief arguing three main points in response to the plaintiffs’ opposition: (1) the defendant can establish “actual prejudice” on the overwhelmingly positive reputation and regard for Bryant, (2) the plaintiffs’ opposition does not show that Orange County is an improper transferee venue, and (3) the defendant is not required to wait to bring such a motion until jury selection. *See generally* Reply of Defendant Berge Zobayan to Plaintiffs’ Opposition to Motion to Transfer Venue, *Bryant v. Island Express Helicopters Inc.*, No. 20STCV07492 (Cal. Super. Ct., L.A. Cnty. filed Aug. 12, 2020).

C. The Court’s Decision

On August 19, 2020, the trial court denied the defendant’s motion to change venue.¹⁰⁷ The court gave five main reasons for refusing to transfer the case.¹⁰⁸ First, the court reasoned that the defendant relied on an incorrect standard—a proving of substantial prejudice—for showing that an impartial jury cannot be had.¹⁰⁹ Second, the court reasoned that the defendant had not demonstrated he would face “actual prejudice” at a trial in Los Angeles County.¹¹⁰ Furthermore, the court’s third point built on its “actual prejudice” analysis to conclude that the defendant had not even shown a “widespread feeling of prejudice.”¹¹¹ Fourth, the defendant failed to show how the same alleged prejudice would not exist in other counties to which the case may be transferred, specifically Orange County.¹¹² The court went on to state that it “cannot throw darts at a map to try to identify a county that is both nearby and accessible to the parties and witnesses, but that does not suffer from the same exposure to Kobe Bryant because of his fame.”¹¹³ Lastly, the court

107. Minute Order Denying Defendant Berge Zobayan’s Motion to Change Venue at 5, *Bryant v. Island Express Helicopters Inc.*, No. 20STCV07492 (Cal. Super. Ct., L.A. Cnty. Aug. 19, 2020) [hereinafter Order Denying Motion].

108. *Id.* at 3–5.

109. *Id.* at 3. The defendant relied on the standard set out in *Williams v. Superior Court*, 34 Cal. 3d 584 (1983), which was a criminal case. *Id.* However, the standard for a motion to transfer venue is lower in criminal cases than it is in civil cases. *Id.* Thus, the defendant was incorrect to rely on the standard and analysis laid out by the California Supreme Court in *Williams*. See *id.* See Part III for a discussion of the standard required in civil cases.

110. Order Denying Motion, *supra* note 107, at 3 (“Defendant Zobayan has not shown Kobe Bryant’s popularity in the County would cause actual prejudice in the jurors’ minds.”).

111. *Id.* at 3–4. The Court further noted that many of the cases that the defendant cited in their motion showed prejudice extending over a long period of years, which is not the case here since the incident just took place in January. *Id.*

112. *Id.* at 4. Ironically, several of the articles cited by the defendants emphasized the impact this tragedy had on Newport, which is in Orange County and where seven of the victims lived. See, e.g., Luke Money, Gustavo Arellano & Hillary Davis, *In Orange County, Kobe Bryant Grew from Basketball’s Enfant Terrible into a ‘Typical Dad’*, L.A. TIMES (Jan. 28, 2020, 3:00 AM), <https://www.latimes.com/california/story/2020-01-28/kobe-bryant-orange-county> [https://perma.cc/B28H-Q733].

113. Order Denying Motion, *supra* note 107, at 4.

denied the motion because the defendant failed to state a reason why any potential juror bias could not be eliminated through voir dire.¹¹⁴

The court ended its decision by reassuring the parties that it “is confident that there will be many jurors in the venire who are not the avid sports fans that defense counsel fears or who do not identify Bryant as the ‘face of Los Angeles.’”¹¹⁵ Additionally, the court asserted that as time passes, Bryant’s notoriety will begin to fade, thus reducing the possibility of actual prejudice in favor of either party.¹¹⁶

The case was later transferred to federal court due to a cross-complaint that was filed against two federal air traffic controllers.¹¹⁷ It is worth noting, though, that the federal court was also in Los Angeles, so concerns of impartiality were still relevant.¹¹⁸ Likely to the defendant’s relief, the case ultimately settled on June 22, 2021, with the material terms of the settlement kept confidential.¹¹⁹

V. LEGALLY, THE COURT WAS RIGHT

While trials involving celebrities are nothing new, most trials that involve the same extensive media coverage and concern for jury impartiality appear in the criminal context.¹²⁰ There are few published opinions

114. *Id.* at 4.

115. *Id.* at 5.

116. *Id.*

117. See Nancy Dillon, *Kobe Bryant Wrongful Death Lawsuit Against Helicopter Company Moved to Federal Court Against Vanessa Bryant’s Wishes*, N.Y. DAILY NEWS (Oct. 6, 2020, 1:28 PM), <https://www.nydailynews.com/news/national/ny-vanessa-bryant-suit-against-kobe-chopper-co-moved-to-federal-court-20201006-clxg2falkvcopbrqaefuimximu-story.html> [<https://perma.cc/ZB6Z-5NUP>]. The case was transferred to federal court because federal courts have exclusive jurisdiction of civil matters involving federal employees. *Id.* Despite being transferred to federal court, California law would be the applicable law for examining the motion to change venue because it was filed when the case was under the jurisdiction of the California state court. See Motion to Transfer Venue, *supra* note 10, at 1 (recording the motion to transfer venue was filed on June 19, 2020).

118. Dillon, *supra* note 117.

119. Matt Bonesteel, *Vanessa Bryant, Families of Other Victims Settle Lawsuit Over Crash that Killed Kobe Bryant*, WASH. POST (June 23, 2021, 11:53 AM), <https://www.washingtonpost.com/sports/2021/06/23/kobe-bryant-lawsuit-settlement/> [<https://perma.cc/MR4D-THJR>].

120. See Chris Harris, *A Brief History of Some of America’s Most Notorious Televised Trials*, PEOPLE (Feb. 11, 2020, 10:10 AM), <https://people.com/crime/televised-trials-in-america/>

addressing this issue in a civil setting, especially when one takes into account that roughly “95 percent of pending lawsuits end in pre-trial settlement[s].”¹²¹ In light of these few opinions, however, the denial of a motion is unsurprising due to the high bar a defendant must overcome, especially when the law is analyzed and read literally.¹²² This Note argues that due to the media, the vast popularity of Bryant, and the publicity surrounding his horrific death, there is nowhere in the surrounding Los Angeles area, California, or even potentially the United States, that potential jurors would not already have some preconceived notion of liability or fault on the part of the defendant in this circumstance.¹²³

Because of Bryant’s popularity in the Los Angeles area and the sheer amount of publicity the accident and wrongful death lawsuit have received, it is easy to see why the defendant would be concerned about receiving an impartial jury in Los Angeles County.¹²⁴ Indeed, this sort of situation begs the question whether it is even possible to receive an impartial jury in any appropriate venue.¹²⁵ Still, given the current circumstances and the

[<https://perma.cc/525J-WMF3>] (for a description of some of the most famous criminal trials). The trials mentioned include Ted Bundy, O.J. Simpson, Jeffrey Dahmer, and Casey Anthony. *Id.*

121. *What Percentage of Lawsuits Settle Before Trial? What Are Some Statistics on Personal Injury Settlements?*, BLACK’S L. DICTIONARY, <https://thelawdictionary.org/article/what-percentage-of-lawsuits-settle-before-trial-what-are-some-statistics-on-personal-injury-settlements/> [<https://perma.cc/85UM-QLUY>]. This statistic even begs the question whether the idea and possibility of having an impartial jury due to the parties involved and media coverage increases the likelihood of settlement. *Id.*

122. *See infra* Section V.A.

123. *See* Groff, *supra* note 96 (discussing and analyzing Bryant’s national popularity). Despite spending all twenty years of his career in Los Angeles, Bryant’s popularity spanned the entire NBA market—in other words, the majority of the country. *Id.* Groff’s article conducts a quantitative analysis of Bryant’s online popularity compared to five other elite NBA athletes who arguably have the same skill and recognition level. *Id.* Between April 2014 and March 2019, Bryant accounted for approximately 46.9 million search queries, second only to LeBron James. *Id.* While Los Angeles accounted for 34% of the search traffic, another 27 major cities across the United States accounted for the rest of the traffic. *Id.* Some of these cities included New York, Chicago, Houston, Boston, Atlanta, and Philadelphia. *Id.* Thus, Bryant was not just a Los Angeles household name, but a United States one. *Id.*; *see also* Sopan Deb, *How Kobe Bryant Helped The N.B.A. Conquer The World*, N.Y. TIMES (Jan. 29, 2020), <https://www.nytimes.com/2020/01/28/sports/basketball/kobe-NBA-global.html> [<https://perma.cc/4TXY-2XUM>].

124. Motion to Transfer Venue, *supra* note 10, at 8.

125. Charles H. Whitebread, *Jurors Must Be Impartial. They Shouldn’t be Clueless*, WASH. POST (June 22, 2003), <https://www.washingtonpost.com/archive/opinions/2003/06/22/jurors-must-be-impartial-they-shouldnt-be-clueless/efa21572-1c16-43f0-9e9b-4b6436052138/> [<https://>

applicable legal analysis, the court made the correct decision for two reasons.¹²⁶ First, the defendant did not meet the high burden of proving “actual prejudice” or provide a compelling reason for why voir dire would not solve the potential prejudice problem.¹²⁷ Second, it is unlikely that there is a forum that the case could be transferred to that would not face a similar problem due to the publicity of the accident and Bryant’s nationwide fame.¹²⁸

A. Defendant Failed to Meet the Applicable Standard of “Actual Prejudice”

While the right to an impartial jury is guaranteed by the Constitution, a defendant must still meet the requisite burden of proof to show that the jury pool is sufficiently biased.¹²⁹ In the Bryant case, the defendant initially applied the incorrect standard for showing that an impartial jury could not be obtained.¹³⁰ As mentioned above, the defendant applied the criminal standard—looking at the effect a party’s prominence and widespread publicity has on the ability to find impartial jurors in selected venues¹³¹—to conclude that there would not be an impartial jury.¹³² While not controlling in civil court, the Supreme Court has given guidance on the issue and held that an impartial jury in these situations need not be “totally ignorant of the facts and issues involved It is sufficient if the juror can lay aside his impression or

perma.cc/U7RW-H4WQ] (“It has become an article of faith that an ‘untainted’ jury is an essential ingredient of a fair trial and that the ideal juror is unadulterated, as though newly hatched from an opaque, soundproof bubble.”); *see also infra* Section V.B.

126. *See infra* Part V.

127. Order Denying Motion, *supra* note 107, at 3–5.

128. Memorandum in Opposition to Motion, *supra* note 103, at 7–9; Order Denying Motion, *supra* note 107, at 4.

129. *Buran Equip. Co. v. Superior Court*, 190 Cal. App. 3d 1662, 1666 (1987) (“The burden rests on the party seeking change of venue to defeat the plaintiff’s presumptively correct choice of court.”).

130. Motion to Transfer Venue, *supra* note 10, at 6–7 (applying the standard from *Williams v. Superior Court*, 34 Cal. 3d 584 (1983), which is a criminal case); Order Denying Motion, *supra* note 107, at 3.

131. *See Williams*, 34 Cal. 3d at 589–94.

132. Motion to Transfer Venue, *supra* note 10, at 6–7.

opinion and render a verdict based on the evidence presented in court.”¹³³ While the defendant applied the incorrect standard, the argument could still be made that the defendant would not have met this even lower standard applicable in only the criminal context.¹³⁴ In the defendant’s motion, all that was demonstrated in support of a sufficiently biased jury pool was an extensive discussion of Bryant’s popularity in Los Angeles. Defendant then pushed a theory that since he was “unknown to the city at large,” he would not receive “anything close to similar treatment” that Bryant would receive.¹³⁵

While a genuine and realistic concern exists as to Bryant’s popularity, courts have not held concern alone to be the legal standard for motions to change venue, especially in civil cases.¹³⁶ Thus, it should come as no surprise that the defendant could not satisfy the standard of “actual prejudice” that is required in civil cases.¹³⁷ The defendant failed to argue or prove any of the recognized factors that are taken into consideration when evaluating whether this sort of motion should be granted.¹³⁸ This higher standard established for federal civil suits has been continually reinforced by case law in California.¹³⁹

For example, in *People v. Ocean Shore Railroad, Inc.*, the court held there was no abuse of discretion by granting a motion to change venue when a defendant filed almost 200 affidavits in support of widespread feeling of prejudice that extended over a period of years against the defendant.¹⁴⁰

133. *Irvin v. Dowd*, 366 U.S. 717, 722–23 (1961).

134. *See infra* Section V.A.

135. Motion to Transfer Venue, *supra* note 10, at 7.

136. *See id.* at 6–7 for a discussion of the defendant’s concern with having the trial in Los Angeles County. While the defendant does have a legitimate concern about the integrity of the jury, they still must meet the burden of proof of “actual prejudice” that is required by the State of California. *See infra* note 104 and accompanying text.

137. *Nguyen v. Superior Court*, 49 Cal. App. 4th 1781, 1791 (1996) (citing *Union Tr. Life Ins. Co. v. Superior Court*, 259 Cal. App. 2d 23 (1968)).

138. *See* Motion to Transfer Venue, *supra* note 10, at 6–7; *see also supra* notes 75–79 and accompanying text.

139. *See, e.g., Ohio Cas. Ins. Grp. v. Superior Court*, 30 Cal. App. 4th 444, 452 (1994).

140. *People v. Ocean Shore R.R.*, 24 Cal. App. 2d 420, 427–28 (1938).

Based on this precedent, the defendant in the *Bryant* case would need to bring forth substantive evidence that there was widespread prejudice towards them, not just a general fear that there could be.¹⁴¹ Thus, *additional* concrete evidence may have helped the defendant more convincingly and thoroughly argue and set forth *concrete* facts that the intensity and the publicity of the prejudice would impact the impartiality of the jury in order to present a more complete picture to the judge of the potential prejudice that could occur.¹⁴² Here, the defendant would have to wait to truly argue inability to impanel a proper jury until voir dire occurred.¹⁴³ Thus, while the defendant did present some evidence of Bryant's popularity and influence in the Los Angeles community, it would have been more effective to present actual affidavits of people in the Los Angeles community or a survey of the community and their reactions to and feelings about the events that transpired as would be more persuasive per the precedent in this court.¹⁴⁴

Defendant's motion may have fared better in federal court simply because there is a lack of specific guidance on what the standard is in considering motions to change venue and what "interest of justice" really entails.¹⁴⁵ As previously mentioned, there are two relevant factors that the court could consider when looking at the interest of justice standard: (1) whether the

141. *Id.*; see also *supra* notes 110–11. The defendant would likely not have an argument under the longevity factor because this is a recent event and there is no history of prejudice against the helicopter pilot and company.

142. See *supra* notes 81–82 and accompanying text.

143. See *supra* note 83.

144. *Ocean Shore R.R.*, 24 Cal. App. 2d at 427; see Motion to Transfer Venue, *supra* note 10, at 6–7.

145. *Rsch. Automation, Inc. v. Schrader-Bridgeport Int'l, Inc.*, 626 F.3d 973, 978 (7th Cir. 2010) ("The 'interest of justice' is a separate element of the transfer analysis that relates to the efficient administration of the court system. For this element, courts look to factors including docket congestion and likely speed to trial in the transferor or potential transferee forums, each court's relative familiarity with the relevant law, the respective desirability of resolving controversies in each locale, and the relationship of each community to the controversy. The interest of justice may be determinative, warranting transfer or its denial even where the convenience of the parties and witnesses points toward the opposite result.") (citations omitted); *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 499 n.21 (9th Cir. 2000) (noting that the Court recognized that the district court "must weigh 'those public-interest factors of systemic integrity and fairness that . . . come under the head of the interest of justice.'"); see *In Re Morgan Stanley*, 417 Fed. Appx. 947, 949 (Fed. Cir. 2011) ("The interest of justice as a component of a § 1404(a) analysis takes into consideration how administration of the court system would best be served in deciding a transfer motion.").

record contains findings suggesting potential impartiality issues, and (2) whether there was unfavorable publicity given to the defendant in the area where the suit was brought.¹⁴⁶

First, the presumption of prejudice when the record contains a basis for concern, though vague, could potentially offer the defendant an out.¹⁴⁷ Here, there could be an argument that the record lays out a basis of concern due to Bryant’s sheer popularity in Los Angeles, as well as the amount of publicity the accident received.¹⁴⁸ The defendant put forth a plethora of documents in support of changing venue that were meant to show that the people of Los Angeles (and potential jurors) were inherently biased in favor of Bryant because of his popularity and impact on the community.¹⁴⁹ In the end, however, the defendant’s motion would likely nevertheless be denied because the burden of proof applied in these situations is that of “clear and convincing evidence.”¹⁵⁰ The federal courts, similar to the Los Angeles Superior Court, would likely look for more than just widespread popularity of Bryant and would require some sort of concrete evidence (like an expert survey examining the alleged widespread prejudice) in support of prejudice.¹⁵¹ Thus, the defendant would have also likely failed under this standard.¹⁵²

146. See *Broussard v. State Farm Fire & Cas. Co.*, 523 F.3d 618, 631 (5th Cir. 2008); *Daniel v. Woodford*, 428 F.3d 1181, 1121 (9th Cir. 2005).

147. See *supra* notes 66–67 and accompanying text (examining cases where the court presumed prejudice because the record contained a basis for concern). But see *In re TS Tech USA Corp.*, 551 F.3d 1315, 1320 (Fed. Cir. 2008) (refusing to take into account the possibility of prejudice against the parties); *In re Horseshoe Ent.*, 337 F.3d 429, 434 (5th Cir. 2003) (holding that the possibility of prejudice must be established by clear and convincing evidence, not vague and indefinite circumstances); *Pressley v. Spraymax, Inc.*, 2011 WL 4590791, *3 (N.D. Tex. 2011) (“[D]elay and prejudice associated with transfer is relevant ‘in rare and special circumstances’ and only if ‘such circumstances are established by clear and convincing evidence.’”).

148. See *Motion to Change Venue*, *supra* note 10, at 6–7 (discussing at length Bryant’s popularity and influence in the Los Angeles community).

149. See *id.* at 8–10; see sources cited *supra* note 93.

150. See *In re Horseshoe Ent.*, 337 F.3d at 434 (establishing the clear and convincing evidence standard). Clear and convincing evidence is evidence that is highly and substantially more likely to be true than untrue. See *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984). In other words, the fact finder must be convinced that the contention is “highly probable.” *Id.*

151. See *supra* notes 66–67 and accompanying text.

152. See *supra* note 140 and accompanying text.

In federal court, the defendant could also have made an argument that the case should be transferred because the defendant had received unfavorable publicity in the area where the suit was brought.¹⁵³ Not only were local news stations covering this story, but every major news network in the United States took time the day of the accident to cover and pay tribute to Bryant.¹⁵⁴ The Los Angeles Times, which normally requires a paid subscription to access its articles, even offered free coverage of the story.¹⁵⁵ Furthermore, the President of the United States tweeted about the incident,¹⁵⁶ the House of Representatives observed a moment of silence on the floor for Bryant and the other victims,¹⁵⁷ and numerous fans flooded the helicopter crash area and Staples Center to pay tribute to Bryant.¹⁵⁸

While news publicity alone is not enough to establish prejudice, the possibility that much of the news initially reported on this story was

153. *Compare* United States v. Carona, 571 F. Supp. 2d 1157, 1159 (C.D. Cal. 2008) (allowing a presumption of prejudice when the record contains evidence that the community where the trial is to be held is “saturated with prejudice and inflammatory media about the [situation]”), with Flotsam of Cal., Inc. v. Huntington Beach Conf. & Visitors Bureau, No. C 06-7028, 2007 WL 1152682, at *2 (N.D. Cal. 2007) (holding that alleged “hostile” publicity surrounding a defendant’s actions was not sufficient to prejudice potential jurors).

154. See Tom Jones, *How the Media Covered the Death of Basketball Superstar Kobe Bryant*, POYNTER (Jan. 27, 2020), <https://www.poynter.org/newsletters/2020/how-the-media-covered-the-death-of-basketball-superstar-kobe-bryant/> [https://perma.cc/7D9Y-NLPM].

155. *Id.* In comparison, the *Los Angeles Times* rarely provides this sort of access unless it is necessary. For example, they currently provide free access for COVID-19-related news. *Free Coronavirus Coverage*, L.A. TIMES, <https://www.latimes.com/about/free-coronavirus-coverage> [https://perma.cc/2F2X-PE3L].

156. Margaret Sullivan, *Media Coverage of Kobe Bryant’s Death Was a Chaotic Mess, But There Were Moments of Grace*, WASH. POST (Jan. 27, 2020, 7:36 AM), https://www.washingtonpost.com/lifestyle/style/media-coverage-of-kobe-bryants-death-was-a-chaotic-mess-but-there-were-moments-of-grace/2020/01/27/d825ade4-4106-11ea-aa6a-083d01b3ed18_story.html [https://perma.cc/8JFT-CCHA]. This further suggests there may not be a venue where the defendant could truly have an impartial jury. See *infra* Section V.B.

157. *House of Representatives Observes Moment of Silence for Kobe Bryant, 8 Others Killed in Helicopter Crash*, CBS L.A. (Jan. 29, 2020, 8:10 AM), <https://losangeles.cbslocal.com/2020/01/29/house-moment-of-silence-kobe-bryant/> [https://perma.cc/4SDN-YE7F].

158. Richard Winton, *250,000 Fans Visited L.A. Live in Days After Kobe Bryant’s Death. Monday Will Be Different*, L.A. TIMES (Feb. 22, 2020, 11:46 AM), <https://www.latimes.com/california/story/2020-02-22/la-live-visitors-kobe-bryant-death-memorial> [https://perma.cc/FP6U-6HL5]; Richard Winton, *So Many Kobe Bryant Fans Flooded Helicopter Crash Area that Authorities Have Closed Roads*, L.A. TIMES (Jan. 26, 2020, 9:00 PM), <https://www.latimes.com/california/story/2020-01-26/kobe-bryant-fans-helicopter-crash-site-closed> [https://perma.cc/LS6V-MM4N].

incorrect, inaccurate, or incomplete,¹⁵⁹ could establish prejudice, as this would be seen as unfavorable publicity. Additionally, many of the articles from major news sources in the following months contained theories and speculations about why the helicopter crashed; many of which implicated the defendant as the cause of the crash.¹⁶⁰ While the articles alone do not prove prejudice, they are evidence that the defendant received at least some unfavorable publicity in the Los Angeles area.¹⁶¹ The defendant would likely still need to produce more concrete evidence or a significantly large number of articles, news reports, etc., to show by clear and convincing evidence that they were subject to unfavorable publicity.¹⁶²

Thus, moving forward in federal court, the defendant likely had the strongest argument under the theory that they were subject to unfavorable publicity in the County of Los Angeles.¹⁶³ Still, the defendant's motion to change venue would likely have been denied in both California state court and in a federal district court because he failed to meet the respective applicable standard of proof.¹⁶⁴ Thus, even though there is a large possibility that there could be impartiality issues in this case, the judge technically made the correct decision in denying the motion based on the relevant law.¹⁶⁵

159. See generally Sullivan, *supra* note 156 (examining much of the incorrect news that was initially reported about the helicopter crash).

160. Kelly McCarthy & Alex Stone, *Fog May Have Disoriented Pilot in Helicopter Crash that Killed Kobe Bryant, 8 Others: NTSB*, ABC NEWS (June 17, 2020, 4:22 PM), <https://abcnews.go.com/US/fog-disoriented-pilot-helicopter-crash-killed-kobe-bryant/story?id=71309758> [<https://perma.cc/MX6X-FRYG>]; *What We Know About the Helicopter Crash that Killed Kobe Bryant*, N.Y. TIMES (Feb. 25, 2020), <https://www.nytimes.com/2020/01/31/us/kobe-death.html> [<https://perma.cc/AV4Y-FC84>]; see, e.g., Nathan Fenno, *Text Messages Reconstruct Copter Crash that Killed Kobe Bryant, Eight Others*, L.A. TIMES (July 3, 2020, 6:01 AM), <https://www.latimes.com/sports/story/2020-07-03/reconstruct-of-kobe-bryant-copter-crash> [<https://perma.cc/9ZFL-NVP6>].

161. See *supra* note 144 and accompanying text.

162. See *supra* notes 66–67 and accompanying text (examining the applicable standard and how other courts have handled the issue).

163. See *infra* Section V.A (analyzing the defendant's potential success in a federal district court under the theory they were subject to unfavorable publicity).

164. *Id.*

165. See *infra* Part V.

B. The Impossibility of Finding a Venue that Does Not Suffer from the Same Concerns Due to Extensive Media Coverage

Another reason the court ruled correctly is because it is unlikely there is a forum that the case could be transferred to that would not face a similar problem due to the publicity of the accident and Bryant's nationwide fame.¹⁶⁶ It is unreasonable to believe that Orange County is the proper venue and would offer a fairer jury in this case for several reasons.¹⁶⁷ First, as mentioned before, Bryant, his family, and the other victims all resided in Orange County and were members of the community.¹⁶⁸ Furthermore, after Bryant's death, Orange County announced that August 24th—8/24 to represent Bryant's basketball numbers—would be Kobe Bryant Day.¹⁶⁹ Because of the Los Angeles community and surrounding area's admiration and commitment to Bryant and his legacy, the question of where the defendant can truly have access to an impartial jury is left open.¹⁷⁰

VI. IMPACT AND SIGNIFICANCE

This next Part of this Note (1) examines the general argument and idea that there may not be a venue that is truly "impartial" in traditional terms for a high-profile case, (2) analyzes the modern factors that contribute to juror impartiality issues, and (3) questions whether the search for a truly impartial jury is the correct answer for courts.¹⁷¹ If there truly is no viable, realistic

166. See generally Poulard, *supra* note 96 (discussing the extent of Bryant's popularity and legacy).

167. See *infra* Section V.B.

168. See Chuck Schilken, *Orange County Declares 8/24 Kobe Bryant Day*, L.A. TIMES (Aug. 12, 2020, 9:26 AM), <https://www.latimes.com/sports/story/2020-08-12/kobe-bryant-day-august-24-orange-county> [<https://perma.cc/JVK3-GQC4>].

169. *Id.* In deciding to dedicate this day to Bryant, one member of the board in Newport Beach described Bryant as a "treasured member of our community" who "inspired so many men and women to pursue their dreams and never give up." *Id.* Furthermore, the specified intent of the day was to commemorate Bryant's legacy and encourage others to continue Bryant's legacy. *Id.* The Los Angeles City Council had previously decided to recognize the same day as Kobe Bryant day. *Id.*

170. See *infra* Section V.B.

171. See *infra* Part VI.

venue¹⁷² where an impartial, unprejudiced jury can be had, a defendant may be out of luck and left to face a trial at a distinct disadvantage.¹⁷³ Courts cannot settle for this result, especially since it is a foundational right of our civil trial system that all parties are entitled to an impartial jury.¹⁷⁴ If the current tools and strategies of the trial system are failing parties, then they should be reconsidered in light of changing circumstances, technologies, and information available to prospective jurors.¹⁷⁵ Not only is a reconsideration necessary for the standard required for a motion to change venue when a high-profile individual or heavy media coverage is involved, but it is also necessary to reconsider what “impartiality” means in present times.¹⁷⁶

A. The Modern Media’s Impact on an Impartial Jury

It should come as no surprise that modern technology has drastically impacted not only how we access information, but also how we process and interpret that information.¹⁷⁷ Specifically, “[t]he Internet has become one of the most vital tools for communication, information, and entertainment in

172. Viable and realistic venue means a venue that also does not inconvenience the witnesses and parties as required by the law. *See generally* CAL. CODE CIV. PROC. §§ 392–403 (2021) (listing the different viable venues considered in California).

173. *See A Non-Biased Jury: Do They Really Exist?*, LEXISNEXIS, <https://www.lexisnexis.co.uk/research-and-reports/bar/a-non-biased-jury-do-they-really-exist.html> [https://perma.cc/APS4-7WQZ] (“[I]n cases where there is media involvement or inflammatory social media, judges and legal counsel must focus its attention on identifying areas of potential bias and seeking to remedy then through skilled advocacy. The issue grows more complex however. It is possible that not only is the age of information shaping our perceptions of guilt, innocence and implicit bias but is also having profound sway over how advocates present evidence and utili[z]e a jury.”).

174. *See* U.S. CONST. amends. VI, VII.

175. *See generally* Marvin Zalman & Maurisa Gates, *Rethinking Venue in Light of the “Rodney King” Case: An Interest Analysis*, 41 CLEV. ST. L. REV. 215 (1993) (discussing potential options and solutions for trials when there is significant publicity involved and a risk of an impartial jury).

176. *See infra* Sections VI.A, VI.B.

177. *See A Non-Biased Jury: Do They Really Exist?*, *supra* note 173 (examining the impact that technology has on our access to information and how that relates to justice).

today's globalized world."¹⁷⁸ Today, over 90% of Americans have access to the Internet.¹⁷⁹ Thus, when something newsworthy happens, that news is no longer contained to only the local area where the event occurred, nor is there any delay in the mass population hearing some interpretation of the events that occurred.¹⁸⁰ This means that people may not only have knowledge of certain events before they walk into a courtroom, but people also have had considerable time to formulate a preconceived opinion on that matter.¹⁸¹ These opinions may be based on some facts, but many of these personal opinions are now shaped by how the news outlets portrayed the story or how that person's friends talked about the story on social media prior to the trial.¹⁸²

This is especially worrisome if the mass media portrays the events at issue in a light that is dooming or fault-assigning to one of the parties involved.¹⁸³ This results in high-profile cases and parties being stuck with a

178. Joseph Johnson, *Internet Usage in the United States - Statistics & Facts*, STATISTA (Aug. 4, 2021), <https://www.statista.com/topics/2237/internet-usage-in-the-united-states> [<https://perma.cc/LXD7-GNBA>].

179. *Id.*

180. See *A Non-Biased Jury: Do They Really Exist?*, *supra* note 173 (discussing how the control of information impacts a jury trial). "It is often impossible for a judge to control the publication of prejudicial information because, increasingly, the most dramatic revelations occur at the time of the [event in question], long before there is a trial, much less a judge selected to oversee the trial." *Id.*

181. See *id.* ("In our modern world, it is possible for jurors to arrive with an extensive knowledge of the victim, through access to their social media or journalistic coverage and judges are virtually powerless to stem [] the flow of information.").

182. See generally Yariv Tsfati & Jonathan Cohen, *Perceptions of Media and Media Effects*, in 5 THE INTERNATIONAL ENCYCLOPEDIA OF MEDIA STUDIES: MEDIA EFFECTS/MEDIA PSYCHOLOGY (Angharad N. Valdivia & Erica Scharrer eds., 2013) ("Not only is it hard for us to verify the validity of the *information* that appears in the media, it is even harder to verify the *character* and *intentions* of those working in the media. Hence it is often hard to evaluate the fairness of media *interpretations* of reality.").

183. See Romeo Vitelli, *How "Trial by Media" Can Undermine the Courtroom*, PSYCH. TODAY (Aug. 22, 2018), <https://www.psychologytoday.com/us/blog/media-spotlight/201808/how-trial-media-can-undermine-the-courtroom> [<https://perma.cc/RC4L-RUAH>]. This Note examines what the author calls a "trial by media"—in other words, a trial that is subject to high media coverage and publicity in a criminal context. *Id.* Vitelli expresses particular concern over media coverage about these events because they are "typically skewed and one-sided, often assuming that the defendant is already guilty. To make matters worse, these stories frequently include prejudicial information that is rarely allowed during the actual criminal trial." *Id.*

prejudicial jury or a jury with biases that might even be subconscious due to the news and media they have consumed.¹⁸⁴ Recent research studies around highly publicized cases and situations have also consistently shown that "potential jurors often have extremely negative attitudes toward the accused."¹⁸⁵ On the other hand, there are times where publicity also results in jurors having extremely positive attitudes toward high-profile litigants.¹⁸⁶ This seemed to be the case in the O.J. Simpson criminal trial.¹⁸⁷ This just goes to show that juror impartiality can swing both ways depending on the tone and opinion of the modern media. Still, there are few tools outside of a motion to change venue based on a prejudiced jury that could resolve such an issue for a party.¹⁸⁸ No wonder certain parties are concerned about the impartiality of a jury when they walk into a courtroom and have no control over what members of the jury have already read about the case and events.¹⁸⁹

Those concerns about the mainstream media do not even begin to touch on the impact and influence that social media has on potential jurors.¹⁹⁰ Many of the concerns mentioned above are only amplified in the social

184. See Toni Messina, *Criminally Yours: Don't Eliminate Peremptory Challenges*, ABOVE THE L. (Nov. 9, 2015, 4:46 PM), <https://abovethelaw.com/2015/11/criminally-yours-dont-eliminate-peremptory-challenges/> [<https://perma.cc/RPW9-WU6Y>] ("[T]here are a lot of potential jurors out there who won't admit to prejudice, or don't even know they have it. What prejudice is to one person is just day-in-the-life for another. It's a concept open to a lot of interpretation.").

185. See Vitelli, *supra* note 183.

186. Christine L. Ruva, Christina C. Guenther & Angela Yarbrough, *Positive and Negative Pretrial Publicity: The Roles of Impression Formation, Emotion, and Predecisional Distortion*, 38 CRIM. JUST. & BEHAV. 511, 513 (2011).

187. See Vincent Bugliosi, *Outrage: Five Reasons Why O.J. Simpson Got Away with Murder*, WASH. POST (1996), <https://www.washingtonpost.com/wp-srv/style/longterm/books/chap1/outrage.htm> [<https://perma.cc/A4GK-3PXH>].

188. See generally *Publicity in Criminal Cases: Overcoming Prejudicial Publicity*, L. LIBR. AM. L. & LEGAL INFO., <https://law.jrank.org/pages/1890/Publicity-in-Criminal-Cases-Overcoming-prejudicial-publicity.html> [<https://perma.cc/ENT3-58YT>] (listing potential remedies, voir dire, continuances, imported pool of prospective jurors, and sequestration as potential tools to use to combat a prejudicial jury).

189. See Vitelli, *supra* note 183 (examining specific trials where a party was at a distinct disadvantage due to the publicity of the trial before it started).

190. See generally Leslie Y. Garfield Tenzer, *Social Media, Venue, and the Right to a Fair Trial*, 71 BAYLOR L. REV. 421 (2019) (discussing how social media has impacted trial venues and a party's right to a fair trial).

media context.¹⁹¹ At least reporters and journalists are ethically encouraged to “present an accurate, well-balanced explanation” of the things they report on—something that is comparatively absent in the informal, friend-to-friend social media context.¹⁹² But even this formal journalism that has an “ethical duty” to be well-balanced, tends to walk the line in the age of “fake news.”

The law today has not evolved to take into consideration the prejudice or bias that can be created through social media.¹⁹³ Courts must be willing to take into consideration what people in the relevant area, reporters or not, are saying on social media when considering motions to change venue due to lack of an impartial jury.¹⁹⁴ Considering social media as part of the “media” when considering motions to change venue is becoming more crucial than ever as more and more Americans rely on social media as their main source of news.¹⁹⁵ As of 2019, the Pew Research Center conducted a study and found that 55% of American adults get their news from social media either “often” or “sometimes.”¹⁹⁶ Furthermore, the Pew Research Center

191. See Cortney S. Warren, *How Honest Are People on Social Media?*, PSYCH. TODAY (July 30, 2018), <http://www.psychologytoday.com/us/blog/naked-truth/201807/how-honest-are-people-social-media> [<http://perma.cc/25D3-TKC6>].

192. Ellie Williams, *Duties & Responsibilities of Journalists*, CHRON (June 29, 2018), <http://work.chron.com/qualities-good-newspaper-journalist-22454.html> [<http://perma.cc/8ZFR-EJVB>]; see also Warren, *supra* note 191 (“Research suggests that what people post on social media is not an accurate representation of their lives or who they are. In fact, it may be blatant lies.”).

193. *Harris v. Pulley*, 885 F.2d 1354, 1361 (9th Cir. 1988) (“The presumed prejudice principle is rarely applicable and is reserved for an extreme situation.”); see *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966) (limiting what is considered suitable publicity in a criminal trial when considering a defendant’s motion to change venue); see also *Skilling v. United States*, 561 U.S. 358, 381 (2010) (stating that a “presumption of prejudice” because of adverse press coverage attends only the extreme cases).

194. See Tenzer, *supra* note 190, at 423.

195. See Peter Suci, *More Americans Are Getting Their News From Social Media*, FORBES (Oct. 11, 2019, 10:35 AM), <http://www.forbes.com/sites/petersuci/2019/10/11/more-americans-are-getting-their-news-from-social-media/?sh=2fabe7a43e17> [<http://perma.cc/BX5R-9DBY>]. Additionally, the average person spends three hours per day on social media networks and messaging. Katie Gilson, *2019 in Review: Social Media Is Changing, and It’s Not a Bad Thing*, GLOB. WEB INDEX (Sept. 27, 2019), <http://blog.gwi.com/trends/2019-in-review-social-media/> [<http://perma.cc/MNS5-632Z>].

196. See Suci, *supra* note 195. Additionally, 83% of Fortune 500 companies have social media accounts. Keith A. Quesenberry, *Social Media Etiquette & Ethics: A Guide for Personal, Professional & Brand Use*, LINKEDIN (Sept. 27, 2016), <http://www.linkedin.com/pulse/social-media-etiquette-ethics-guide-personal-brand-use-quesenberry/> [<http://perma.cc/8WCC-3RR6>].

found that 88% of Americans “recognized that social media companies now have at least some control over the mix of the news that people see each day.”¹⁹⁷ Specifically, the study found that of those Americans who relied on social media for their news, 52% relied on Facebook, 28% on YouTube, 17% on Twitter, and 14% on Instagram.¹⁹⁸ People are not just getting news from these social media sites, but people are also consuming the opinions and commentary of their peers.¹⁹⁹ These opinions and commentary are held to no ethical standard, nor is there typically any sort of “truth” filter on what is said.²⁰⁰ Thus, there are limited ways to regulate what media—whether true or false—potential jurors are consuming before walking into a trial.²⁰¹ Failure to take this reality into consideration will result in more of what psychologist Rome Vitelli coined as “trial by media,” rather than by facts, analysis, and consideration of a truly impartial jury as guaranteed by the Constitution.²⁰² Thus, not only is failing to consider social media as part of the larger “media” definition out of date, but it also infringes on a party’s constitutional right to an impartial jury.²⁰³

197. Suciu, *supra* note 195.

198. *Id.* Some other noteworthy websites included LinkedIn, Reddit, and Snapchat. *Id.*

199. See Sebastian Stone, *Friendships in the Age of Social Media*, BETTER MKTG. (June 16, 2019), <https://medium.com/better-marketing/friendship-in-the-social-media-age-b72b404fb5fe> [<https://perma.cc/L7KM-LF67>].

200. See Quesenberry, *supra* note 196 for a discussion of useful etiquette tips for posting on social media. Most sites provide some sort of general rules or standards about how users should conduct themselves on the site, but these are difficult to thoroughly enforce due to the large volume of users. See *Community Standards*, FACEBOOK, <https://www.facebook.com/communitystandards/> [<https://perma.cc/9M22-6BE9>]; see also *The Twitter Rules*, TWITTER (Jan. 16, 2020), <https://help.twitter.com/en/rules-and-policies/twitter-rules> [<https://perma.cc/25CM-N62W>]; see also Dipayan Ghosh, *Are We Entering a New Era of Social Media Regulation?*, HARV. BUS. REV. (Jan. 14, 2021), <https://hbr.org/2021/01/are-we-entering-a-new-era-of-social-media-regulation> [perma.cc/NN8J-FM8S].

201. See Jemma Holt & Brendan Gogarty, *Juries Need to Be Told How They’re Allowed to Use the Internet to Ensure Fair Trials*, CONVERSATION (Jan. 21, 2020, 2:03 PM), <https://theconversation.com/juries-need-to-be-told-how-theyre-allowed-to-use-the-internet-to-ensure-fair-trials-130127> [<https://perma.cc/2JVD-DCWL>].

202. See Vitelli, *supra* note 183.

203. See Tenzer, *supra* note 190, at 447 (arguing that the Constitution demands that courts consider pretrial social media publicity).

The concerns mentioned above about social media just begin to scratch the surface on the influence social media can have on a jury and trial.²⁰⁴ Another source of potential problems and prejudice comes from the new tactic used on social media called “microtargeting.”²⁰⁵ “Microtargeting is a marketing strategy that uses people’s data—about what they like, who they’re connected to, what their demographics are, what they’ve purchased, and more—to segment them into small groups for content targeting.”²⁰⁶ In the jury context, microtargeting would allow someone to collect the general and specific characteristics of potential jurors and then target specific content to that small group of people containing those traits.²⁰⁷ This is dangerous because, depending on the extent and quality of the information in this content, jury impartiality could be compromised simply by what content the jurors are consuming outside of the courtroom—either potentially false information or information that would not have otherwise been admitted into evidence.²⁰⁸

With all these modern concerns facing a court and a jury, we must find a better way to determine the impartiality of the jury than the current

204. See Holt & Gogarty, *supra* note 201.

205. See Rachel Kraus, *How Well Does ‘Microtargeted Psychographic Advertising’ Work Anyway?*, MASHABLE (Mar. 24, 2018), <https://mashable.com/2018/03/24/how-microtargeted-ads-affect-behavior/> [<https://perma.cc/TEC4-HP8M>] (discussing the concept of microtargeting and the impact it has had on companies like Facebook recently). While this practice would be an obvious violation of most if not all of states’ ethics rules and the ABA’s Model Rules of Professional Conduct, the possibility of this happening is something that should be directly acknowledged and considered. MODEL RULES OF PRO. CONDUCT r. 3.5(a) (AM. BAR ASS’N 1983) (“A lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law.”).

206. Dipayan Ghosh, *What Is Microtargeting and What Is it Doing in Our Politics?*, MOZILLA (Oct. 4, 2018), <https://blog.mozilla.org/internetcitizen/2018/10/04/microtargeting-dipayan-ghosh/> [<https://perma.cc/MVV7-PNK2>].

207. *Cf. id.* Microtargeting and a related concept called data mining (where companies turn raw data into useful information and help predict outcomes based on personal information) also present other impartiality concerns in the juror selection process. See Leslie A. Gordon, *Professor Says Data Mining Can Improve Jury Selection*, ABA J. (Sept. 1, 2016, 3:20 AM), https://www.abajournal.com/magazine/article/big_data_improve_jury_system [<https://perma.cc/XS4C-AA32>]. Specifically, there is concern that by using these techniques when picking a jury, the idea of equality and equal protection are being undermined.

208. See John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. TIMES (Mar. 17, 2009), <https://www.nytimes.com/2009/03/18/us/18juries.html> [<https://perma.cc/MHV2-LSNQ>] (addressing the issue of misinformation).

standard.²⁰⁹ While some courts are already taking steps in the right direction by calling mistrials when jurors try to interact with judges on Facebook or when a juror “Googles” the trial to learn more information, there needs to be a reconsideration of the impact the modern media has on potential jurors before trials even start.²¹⁰ Courts currently take different approaches to how they handle pretrial publicity and high-profile cases, but a more complete and unified standard is needed.²¹¹ For example, some courts attempt to remedy this problem through jury instructions, instructing juries on the importance of jury impartiality, and stressing the importance that this is a protected constitutional right. “Unfortunately, research has failed to show that most of these methods successfully decrease the effects of [pretrial publicity] on juror judgments.”²¹² Thus, instead of settling with the potential of partial juries, a reconsideration of how courts define “impartiality” and approach high-profile civil cases is needed.²¹³

B. Is the Continuous Search for an Impartial Jury the Right Answer?

Due to modern media’s vast influence and the accessibility of information, the continuous search for what courts have considered an impartial jury in the past will not suffice in protecting one’s constitutional rights in the courtroom today.²¹⁴ If the traditional route of impartiality is followed, there will be cases that are so well-known and so high-profile, like the *Bryant* case, where one will not be able to have a traditional “impartial” jury. Thus, courts can no longer settle for the traditional definition of an impartial juror—one who can “consider the evidence presented at trial without preconceived

209. See Tenzer, *supra* note 190, at 461 (arguing to include social media in impartiality decisions).

210. See Schwartz, *supra* note 208.

211. See *Pretrial Publicity Impact on Juries*, CRIM. JUST., <http://criminal-justice.iresearch-net.com/forensic-psychology/pretrial-publicity-impact-on-juries/> [<https://perma.cc/M6K7-CHED>] (listing voir dire, judicial instruction, and continuances as tools used by courts to combat pretrial publicity).

212. *Id.*

213. See *infra* Section VI.B.

214. See *infra* Section VI.B.

opinions” of liability or fault.²¹⁵ Instead, it is time to redefine impartiality to include the idea that “jurors are drawn from the community at large . . . [and] one of the primary roles of the jury is to inject community values into judicial decision-making.”²¹⁶ This community now extends beyond that of a physical community and includes the intangible social community that we are all connected to.²¹⁷ Faced with this reality, courts must make a choice between redefining what an impartial juror looks like or adjusting the standard that is applied when considering whether or not a motion to change venue should be granted for these concerns.²¹⁸

1. Redefining Impartiality in Light of Pretrial Publicity in High-Profile Cases

First, courts could consider redefining what “impartiality” means for a juror.²¹⁹ As previously mentioned, impartiality on a federal level means a jury capable and willing to decide the case solely on the evidence before it.²²⁰ On a state level, California defines impartiality as entire impartiality—partiality without prejudice to the substantial rights of any party.²²¹ The idea of “entire impartiality” as set forth in California is no longer realistic in high-profile cases in light of the evolving media and how people consume information.²²² To enforce such a high bar for impartiality would likely leave few to no jurors left when it comes time for trial.²²³ This principle is exemplified in the *Bryant* case where, due to the publicity of the situation and finding of

215. See *Waters & Hannaford-Agor*, *supra* note 8, at 2.

216. *Id.* at 5.

217. *Id.* at 1.

218. See *infra* Sections VI.B.1, VI.B.2.

219. See generally Scott W. Howe, *Juror Neutrality or an Impartiality Array? A Structural Theory of the Impartial Jury Mandate*, 70 NOTRE DAME L. REV. 1173 (1995).

220. See *supra* note 39 and accompanying text.

221. See CAL. CODE CIV. PROC. § 225(b)(1)(c) (West 2021).

222. See sources cited *supra* notes 43–44 (discussing California’s current standard of “entire impartiality” and how it functions).

223. See *supra* Section IV.C.

wrongdoing, few jurors could likely walk into a courtroom without prejudice or consideration of outside evidence and media coverage.²²⁴

The standard set forth in federal courts is slightly more realistic because it does not require “entire” or “full” partiality but only requires jurors to decide cases based on the evidence before them.²²⁵ While this standard is still not ideal in high-profile cases where much of the evidence has already been publicized, it does provide a more workable standard without calling for absolutes or something that most, if not all, jurors in these cases are capable of.²²⁶

Thus, a slightly altered version of the federal courts’ standard when defining impartiality could be a solution.²²⁷ Ideally, the definition and expectation of impartiality would take into consideration the fact that jurors do have access to information about high-profile cases before walking into the courtroom.²²⁸ Instead of pretending jurors live in a world where there is no media or opinions being shared about cases, the proposed definition here would acknowledge these facts.²²⁹ Impartiality would be defined as a juror’s capability to act fairly in light of this previous knowledge and would look to see if a juror is capable of treating all parties equally and listening to the evidence presented with an open mind.²³⁰ While this obviously is still not a perfect definition or solution, it moves the idea of impartiality in the right direction and acknowledges the current circumstances that potential jurors are experiencing.²³¹

224. *See id.*

225. *See id.*

226. *See supra* notes 34–39 and accompanying text (examining the evolution of the federal definition of an impartial juror and how it has been applied).

227. *See supra* Section VI.B.1.

228. *See Bria 11 1 Is a Fair Trial Possible in the Age of Mass Media?*, CONST. RTS. FOUND., <https://www.crf-usa.org/bill-of-rights-in-action/bria-11-1-a-is-a-fair-trial-possible-in-the-age-of-mass-media> [<https://perma.cc/57AE-74CR>] (discussing the media’s impact on jurors before trial).

229. *See supra* Section VI.B.1.

230. *See id.*

231. *See id.*

2. Adjusting the Applicable Standard for Granting Motions to Change Venue

Courts could also consider changing the standard that is applied when having to prove whether there are concerns about an impartial jury.²³² One option would be to apply the lower standard that is typically applied in criminal cases to a civil context.²³³ This option, in theory, would provide more protection to the party seeking to change venue because it would be a lower burden of proving the existence of prejudice in the jury pool.²³⁴

In California specifically, that would shift the burden from proving actual, widespread prejudice in a county to a lesser showing that there is a “reasonable likelihood that a fair and impartial trial cannot be had” in the particular venue.²³⁵ This would provide parties who are concerned about an absence of a fair and impartial trial a more lenient standard when trying to prove their point.²³⁶ Adoption of the lower standard here is ideal, especially in California where the standard for showing actual prejudice is based on case law that requires a large amount of affidavits to meet the burden of proof.²³⁷

In the *Bryant* lawsuit, the adoption of the lower standard would likely have increased the chances that the defendant’s motion to change venue would have been granted because there is ample evidence to support a “reasonable likelihood” of partiality concerns.²³⁸ While this proposed solution does not solve the issue presented in the *Bryant* case—that potentially no

232. See *supra* Section VI.B.2.

233. See generally Sophia R. Friedman, *Sixth Amendment—The Right to an Impartial Jury: How Extensive Must Voir Dire Questioning Be?*, 82 J. OF CRIM. L. & CRIMINOLOGY 920 (1992) (discussing the Sixth Amendment’s guarantee to an impartial jury and its applicable application).

234. See *supra* notes 226–28 and accompanying text.

235. See CAL. PENAL CODE § 1033(a) (West 1983).

236. *Id.*

237. See *supra* Part III (examining California’s motion to change venue and what it takes to get the court to grant the motion).

238. See *supra* Part V.

venue offering an impartial jury exists—it does move the court in the right direction for deciding similar issues in the future.²³⁹

VII. CONCLUSION

While these proposed solutions may be helpful in some cases, they still do not solve the problem of what to do in a case like *Bryant* where there does not seem to be a viable venue that offers an impartial jury.²⁴⁰ Attempting to find a solution for cases like this one is crucial with the continuing rise of social media and access to both accurate and inaccurate information.²⁴¹ Without a tangible solution for this increasing problem, a party who has to go up against a celebrity in a civil case will continue to put their financial livelihood on the line as they try to combat not only the celebrity in court, but also the modern media.²⁴² When this is brought to light, as it was in the *Bryant* case, citizens begin to question the fairness of the legal system and the purpose it serves.²⁴³ It is the responsibility of legal practitioners and the courts to address this issue head on and begin to consider the standards that are in place and if changes need to be made in order to better serve the needs of those utilizing the legal system in these circumstances.²⁴⁴

239. See *supra* Section V.B.

240. See *supra* Section V.B, VI.B.2.

241. See Steven Shiffrin, *How to Prevent Pre-Trial Publicity from Contaminating Fair Trials*, HUFFPOST (Feb. 4, 2015), https://www.huffpost.com/entry/how-to-prevent-pretrial-p_b_6255000 [<https://perma.cc/W6YP-58T9>].

242. See *supra* Part IV (examining how the defendant is going up against Bryant’s estate in court while also battling the media).

243. See generally *Do Americans Have Confidence in the Courts?*, WILLOW RSCH. (Mar. 27, 2019), <https://willowresearch.com/american-confidence-courts/> [<https://perma.cc/V836-XE55>].

244. See MODEL CODE OF PRO. CONDUCT pmbl. (AM. BAR ASS’N 2020).