The police in the Simpson case did just that. In the criminal trial, they implausibly denied that Simpson was a suspect just after the crime. As long as he was not, any evidence they seized at his home that otherwise might have been suppressed, such as blood, could be admitted in court.

Simpson's lawyer, Johnnie Cochran, exploited the fuzziness of the police story, suggesting grander conspiracies, and jurors voted to acquit.

Whether or not justice was done in either O. J. Simpson trial, criminal courts, like civil courts, should try harder to seek the truth.

A TALE OF TWO CITIES

FindLaw, Monday, May 1, 2000

Shots ring out in a fast-moving altercation, and a black man lies dead on a city street. The white officers claim self-defense, saying they sincerely (if erroneously) thought they were in danger. A jury acquits. As the country is now aware, these are the basic facts of the Amadou Diallo case. But they also describe the Boston Massacre of 1770.

Of course history never repeats itself exactly. Five men died in Boston, and only one, Crispus Attucks, was black. The Boston victims were looking for trouble—pelting the officers with sticks and snowballs—whereas Diallo was simply reaching for his wallet. Not all Boston defendants won complete acquittals, but most did. Nevertheless, the comparison between the two trials is instructive.

Despite their similar factual scenarios and results, there was a sharp difference between the Diallo and Massacre trials. The Diallo trial was shifted from the Bronx to Albany, in a move that was designed to avoid unfair prejudice to the defendants, and that may have been responsible for the officers' controversial acquittals. The Massacre trial, in contrast, took place in the city where the tragedy occurred. And rightly so.

Remembering the Massacre trial, and its similarities to the Diallo case, can remind us of what the Founders well knew: a criminal trial is about not only the rights of defendants, but also the rights of communities. And a verdict rendered by jurors from the very community that has suffered the loss enjoys a legitimacy, and public acceptance, that no foreign verdict can muster. If we forget the Founding history that taught these lessons, including the Massacre trial itself, we do so at our peril.

The Massacre trial's Boston venue was no coincidence. Any attempt to move the trial to some "cooler" (and presumably more defendant-friendly) locale would have been viewed by our liberty-loving forefathers as an outrage. As in the Diallo case, passions ran high and virulent anti-defendant pre-trial publicity existed. Sam Adams and the Sons of Liberty could probably teach Al Sharpton and company a thing or two about how to whip up resentment against quick-triggered officers. Yet for the colonists, unlike the court that transferred venue in Diallo, such passions and publicity provided reasons for—not arguments against—impaneling a local jury.

The common law—the body of law, taken from England, that colonists demanded as their sacred birthright—promised a jury of the "vicinage": one composed of citizens of the locality where the blood had spilled. The vicinage rule derived from the local community's right to self-government, a right to judge for itself, via the jury, what had happened and how to respond. That a community might feel passionate about the fates of its own members would have seemed, to the colonists, patriotic, not inappropriate.

This concern for the community was hardly unusual in early America. Then, community rights frequently trumped defendants' desires. Thus, defendants were often barred from waiving jury trials even if they might have preferred to entrust their fate to fact-finding judges. And regardless of the wishes of the defendant, the public itself had a right to attend all criminal proceedings, in part to make sure that the judge—a permanent and paid government official—did not cut the defendant any special breaks. (This risk of favoritism was especially acute when the defendant, too, was a fellow government officer who might expect special treatment from his judicial brethren.)

A modern commentator might protest that the respect for community rights underlying the vicinage rule comes only at a cost to the rights of criminal defendants. But the Massacre trial itself provides a powerful counterargument: like the Diallo defendants, most of the Massacre defendants won complete acquittals, suggesting that they received a fair trial even in a community where passions against them ran high.

The colonial commitment to local trials ran deep. Indeed, it played a part in inspiring the American Revolution. After the Massacre trial, in 1774, Parliament declared that future British officers accused of murdering Americans would be tried in England, far from the madding crowd. Incensed Americans quickly dubbed the statute an "Intolerable Act," one of several outrageous laws that triggered the American Revolution. Indeed, the Declaration of

Independence—authored with the assistance of the Boston Massacre defense attorney, John Adams—thundered against the act as a "Mock Trial" regime. In the wake of the Revolution, the federal Constitution preserved community rights by promising that every federal crime would be tried in the state where the crime occurred; and the Bill of Rights further pledged that federal trials would always be "public."

How did we come to forget these Founding lessons? Part of the answer may be found some fourscore years after the American Revolution, when our Constitution was reconstructed in the shadow of the Civil War. The Revolution had pitted liberty-loving localists against an oppressive imperial center; and the local jury embodied all that patriots held dear. But after the Civil War, the central government emerged as the friend of liberty, and local juries, especially in the South, were not always to be trusted to protect liberty, especially the liberty of African Americans.

Nevertheless, it would be passing strange to invoke the spirit of Reconstruction to support the venue transfer in Diallo, a venue transfer that made it far less likely that blacks would compose a majority or near-majority of jurors. The Fourteenth Amendment adopted after the Civil War surely reflected heightened concern with the rights of individuals, but the individuals at the center of this concern looked more like Amadou Diallo than the armed state officials who shot him.

Nowadays, we have become too accustomed to venue transfers in high-profile cases, state and federal. Thus Los Angeles cops accused of brutalizing Rodney King were prosecuted in officer-friendly Simi Valley rather than the community where the beating occurred; and Timothy McVeigh was tried outside of Oklahoma, contrary to the Constitution's letter and spirit. The result is verdicts that may lack community legitimacy, failing to provide the scarred community the satisfaction of a local trial, and ultimately failing to provide defendants the repose of a legitimate verdict.

When the Simi Valley acquittals predictably raised public suspicion that the venue-shifting judiciary had improperly favored fellow government officers, the federal government was obliged to restore public confidence with a second prosecution. Though technically not double jeopardy (the first trial occurred in state court, the second in federal court), double prosecution nevertheless raised serious fairness concerns in the case of the Rodney King defendants. Federal officials are reportedly considering possible civil rights charges in Diallo, too—running the risk of triggering the same fairness

concerns if they ultimately go forward. How much better for all concerned if the first trial is done right—done, that is, where the blood was spilled.

High-profile cases require special safeguards in order to ensure fairness to all concerned. But as the Boston Massacre trial teaches, venue transfers are generally not the answer. The basic idea of jury trial in cases like the Boston Massacre, the Rodney King beating, and the Diallo killing is that the people directly affected by government officers should be the ones who judge them. Community members are best positioned to decide how passive or aggressive they want their cops to be because they are the ones who must live with—and who may die from—the consequences of their choice. Our Founders understood this basic idea; why don't we?

THE FIRST PRINCIPLES OF THE FOURTH AMENDMENT[4]

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As security experts propose new forms of searches, seizures, and surveillance to combat terrorism, civil libertarians will rhetorically rally round the Constitution. But that document does not quite say what most libertarians—or most judges, for that matter—think it does. Indeed, the document is far wiser than the standard libertarian line and the conventional judicial interpretation.

The key constitutional text is the Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Note what the amendment does not say. It does not say that every search or seizure must have a warrant. Nor does it require that each intrusion must be backed by probable cause, or even individualized suspicion. Nor does it command that whenever an unconstitutional intrusion occurs, judges must exclude the evidence obtained, and its fruits, from any criminal prosecution.

Founding history confirms this straightforward reading of the text. Arrests—highly intrusive seizures—did not require warrants at the Founding. (Nor do they today. Most arrests in fact occur without warrants.) The very Congress that proposed the Fourth Amendment authorized searches of