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I. INTRODUCTION

Texas law governing changes of venue because of local prejudice needs clarification. For decades Texas had two distinct bodies of venue law: statutes guaranteeing litigants a *convenient* forum,[1] and procedural rules guaranteeing litigants an *impartial* forum free of local prejudice.[2] In 1983, the statutes about convenient venues were signifi-

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1. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 15.001-15.037 (Vernon 1986).

2. *See* TEX. R. CIV. P. 257-259. Rule 257 provides that a change of venue is authorized if the county of suit contains great prejudice against a party, a combination instigated by influential persons has formed against it, or the court finds "other sufficient cause." Rule 258 sets out the procedures for evaluating such a motion, and Rule 259 says where the case must go if a showing of prejudice is made.

Throughout this Article, I try to use Professor Patrick Hazel's terminology to keep these two types of motions distinct. I will call a motion based on the statutes about a convenient forum a "motion to transfer," and a motion based on the rules about an impartial forum a "motion to change." *See* J. Patrick Hazel, *Venue Procedure in the Trial Court*, TEX. B.J., June 1984, at 632 ("If either party asserts this ground at any time after the time for filing a motion to transfer venue, it should be entitled a motion to *change* venue to avoid confusion.").

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cantly redrafted.[3] Those new statutes contain broad language that creates tensions with the rules about impartial venues.

Those tensions need swift resolution. They affect major litigation involving giant corporations[4] and important events.[5] And they go to the very heart of the legitimacy of the Texas courts.[6] Allowing them to persist creates extremely costly uncertainty[7] and risks undermining the most basic due process rights guaranteed by the United States and Texas Constitutions.[8]

This paper describes and proposes solutions to three tensions between the Civil Practice and Remedies Code and the Rules of Civil Procedure. Part II sets out the history of the two different bodies of venue law in Texas and explains what happened to them in 1983. Part III recommends that the Code be revised so that a motion to change venue because of prejudice can be filed after the answer. Part IV rec-

3. The extent of the revisions, and the haste in which they were made, are described in *infra* Part II.

4. *See, e.g.,* Marantha Temple, Inc. v. Enterprise Products Co., 833 S.W.2d 736, 741 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (involving a suit against Atlantic Richfield, Conoco, Diamond Shamrock, Dow Chemical, Exxon, Oxy, Tenneco, and Shell, among others); Lewis v. Exxon Co., 786 S.W.2d 724 (Tex. App.—El Paso 1989, writ denied).

5. *See, e.g.,* Union Carbide v. Moye, 798 S.W.2d 792 (Tex. 1990) (involving allegations that a "toxic mushroom cloud" formed around an East Texas steel plant, creating a "greenhouse effect" that produced "Chemical AIDS" in anyone who came too close); Lone Star Steel Co. v. Scott, 759 S.W.2d 144 (Tex. App.—Texarkana 1988, writ denied) (involving a trial court judgment of $8,349,249.26). *Cf.* Robert Margolick, *As Venues Are Changed, Many Ask How Important a Role Race Should Play*, N.Y. TIMES, May 23, 1992, at 7 (quoting the attorney of one of the defendants in the Rodney King trial as saying that "[p]olitically, racially, and culturally, Simi Valley is as different from downtown Los Angeles 'as Manhattan is from the moon' ").

6. *See* Union Carbide v. Moye, 798 S.W.2d 792, 797 (Tex. 1990) (Gonzalez, J., concurring) ("The issue in a motion to transfer pursuant to rule 257 based on alleged *prejudice* in the county where the suit is pending is one of fundamental fairness and integrity of the judicial process. Its resolution has implications far beyond the particular controversy in question." (emphasis in original)); City of Abilene v. Downs, 367 S.W.2d 153, 155 (Tex. 1963) (justifying the local prejudice rules because "a judgment obtained without . . . a [fair and impartial] trial is a travesty upon justice and, if upheld, a disgrace to the law").

One of the thinkers who greatly influenced the American Revolution agreed wholeheartedly:

> To regard the jury simply as a judicial institution would be taking a very narrow view of the matter, for great though its influence on the outcome of lawsuits is, its influence on the fate of society is much greater still. The jury is therefore above all a political institution, and it is from that point of view that it must always be judged.

ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 272 (J. Mayer ed., G. Lawrence trans. 1969).

7. The *plaintiff's* attorneys in *Union Carbide v. Moye* noted that defense costs for *minor* defendants in that very complex litigation could exceed four million dollars. Brief in Support of Petition for Writ of Mandamus at 36, Union Carbide v. Moye, 798 S.W.2d 792 (Tex. 1990) (No. C-90322) [hereinafter *Union Carbide* Mandamus Support Brief].

8. *See infra* notes 29-32 and accompanying text.

ommends that the Code should be revised so that live testimony is permissible in a hearing on a motion to change venue because of prejudice. Part V analyzes the treatment of motions to change venue on appeal. It recommends that the Code be revised so that the harmless error rule does not apply when a trial court holds a trial in a prejudiced forum. Part VI summarizes the proposed modifications and explains how they work together to increase efficiency and fairness.

II. HISTORY

Before 1983, Texas had two independent sets of venue laws: a set of laws guaranteeing convenient forums and a set of laws guaranteeing impartial forums. The statutes about convenient forums were completely overhauled in 1983. This section describes the origins of each body of law and explains the scope of the 1983 revisions.

A. The Two Sets of Venue Laws

1. Convenience

The pre-1983 venue statutes guaranteeing a convenient forum codified the general venue "privilege" of Spanish law, which fixed venue in the county of the defendant's domicile.[9] First enacted into law by the Republic of Texas in 1836,[10] this basic rule remained on the books for over a century, most recently appearing in article 1995 of the Texas Civil Statutes.[11]

Over time, a host of exceptions creating venue privileges for a variety of litigants joined that basic rule.[12] By the 1980s there were over thirty[13] statutory exceptions to the basic privilege, and courts gave

9. *See* Dan R. Price, *New Texas Venue Statute: Legislative History*, 15 ST. MARY'S L.J. 855, 857 (1984); Garey B. Spradley, *Texas Venue: The Pathology of the Law*, 36 SW. L.J. 645, 645 (1982); *See generally* Joseph W. McKnight, *The Spanish Influence on Texas Law of Civil Procedure*, 38 TEX. L. REV. 24 (1959).

10. Act approved Dec. 22, 1836, 1836 Tex. Gen. Laws 198, *reprinted in* 1 H.P.N. GAMMEL, LAWS OF TEXAS 1258, 1260-61 (1898).

11. *See* TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon 1964 & West Supp. 1982) (amended 1983).

12. *See Hearings on Senate Bill 898 Before the Senate Comm. on Jurisprudence*, 68th Leg., R.S. 7 (Apr. 12, 1983) [hereinafter *Senate Hearings*] (testimony of Doyle Curry, representative of the Texas Trial Lawyers Association) ("At the time Texas adopted . . . the Castillian judicial code book . . . it had started off with granting one of the litigants a privilege and that's the problem, that's the pain we've all lived with is picking one of the litigants and proceeding and giving them a privilege about where the case is to be tried.").

13. Opinions varied as to the precise number. Chief Justice Jack Pope believed there were 31 as of 1983. *Senate Hearings*, *supra* note 12, at 3. Doyle Curry, testifying for the Texas Trial Lawyers Association at the same hearing, believed there were 34. *Senate Hearings*, *supra* note 12, at 7.

those exceptions a number of varying interpretations.[14] And inefficient procedures implemented that array of exceptions. The proof requirements for a successful plea of privilege often resulted in two trials of the same case: one to establish venue and one to prove the case on the merits.[15] And since article 2008 provided for interlocutory appeals from pretrial venue decisions,[16] the first "trial" could run all the way through the appellate system before the second was ready to start.

By 1983, discontent was widespread with the complexity and inefficiency of this body of law. Senator Kent Caperton called it "a legal patchwork, unique in its complexity, that has been criticized for victimizing litigants, increasing litigation, clogging dockets, and inhibiting the administration of justice."[17] Dan Price, a lobbyist for the Texas Association of Defense Counsel, summarized the state of the law by noting that "there was no common principle, rationale, or organization to the venue rules."[18] Doyle Curry, a lobbyist for the Texas Trial Lawyers Association, was more succinct: "That's unfair. It's unjust. A has-been."[19]

One theme runs through the history of this body of law: it creates a statutory privilege rather than implements a constitutional right. The Supreme Court has never viewed a defendant's privilege to be sued in a convenient forum as a requirement of the Federal Constitution.[20] And the Texas constitution does not guarantee litigants a convenient forum either.[21] From their origin in 1836 to their recodification in

14. *See Senate Hearings*, *supra* note 12, at 2 (testimony of Chief Justice Jack Pope) ("1 out of every 12 cases on appeal concerns venue in some fashion. . . . [I]t's the equivalent of 1 1/2 Court [sic] of Appeals devoting full time to doing nothing but writing appellate decisions on where a case will be tried.").

15. *See* Price, *supra* note 9, at 859. When asked why Texas had interlocutory appeals for plea of privilege matters, Chief Justice Jack Pope could only answer "Senator, I don't know how we drifted into that practice. That is unique to Texas." *Senate Hearings*, *supra* note 12, at 4.

16. *See* TEX. REV. CIV. STAT. ANN. art. 2008 (Vernon 1964 & Supp. 1982) (amended 1983).

17. HOUSE JUDICIARY COMM., BILL ANALYSIS, Tex. S.B. 898, 68th Leg., R.S. (1983) (written by Senator Caperton). Specifically, six main problems with the system had become apparent by 1983: (1) it required that most of the issues related to the merits be tried at the venue hearing, (2) it defined essential venue facts in broad terms incapable of precise determination, (3) it fragmented single actions into several lawsuits for trials in several counties, (4) it encouraged joinder for venue purposes of parties that would not otherwise be sued, (5) it discriminated between litigants based upon classifications irrelevant to fairness in the choice of a venue site, and (6) it allowed interlocutory appeals of rulings on venue. *Id.*

18. Price, *supra* note 9, at 859.

19. *Senate Hearings*, *supra* note 12, at 7.

20. *See* Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 168 (1939); CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 42 (1983) (both describing the Supreme Court's conception of the federal venue statutes for civil cases).

21. *See, e.g.*, Marantha Temple, Inc. v. Enterprise Products Co., 833 S.W.2d 736, 741 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (calling the rights created by

1983, the privileges created by the venue statutes are purely creatures of the legislature.[22]

2. Impartiality

While the statutes governed with convenience are rooted in the Castillian code and the legislature's conception of convenience, the laws governing changes of venue because of local prejudice are based in the United States and Texas Constitutions. The leading Supreme Court case applying the United States Constitution to this issue is *In re Murchison*, holding that "[a] fair trial in a fair tribunal is a basic requirement of due process."[23] The Court has further recognized that due process requires that litigants be able to make some kind of motion to escape a biased forum.[24] While *In re Murchison* is almost exclusively cited in criminal cases, the Supreme Court has held that its guarantee of fairness applies to all adjudicatory proceedings.[25]

The Texas Constitution parallels the United States Constitution in this area. It also guarantees the right to a fair and impartial tribunal, and some right to make a motion to transfer because of local prejudice follows from that basic right.[26] And again, while the leading Texas cases on this issue involve criminal law, the basic constitutional principles apply with equal force in civil cases.[27]

Although no court has expressly addressed the issue, the Texas Constitution may in the future extend more protection to a litigant's right to be free of prejudice than the Federal Constitution.[28] The idea of "New Federalism," in which state constitutions expand individual liberties beyond the level set by a conservative federal judiciary, is very popular at both Texas high courts today.[29] That idea, coupled

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the venue statutes "fundamental" but citing no constitutional authority for that proposition).

22. Nowhere in the history of S.B. 898 does any witness or senator argue that a change of the statute will affect a constitutional right. *See Senate Hearings*, *supra* note 12; *Senate Hearings on S.B. 898 Before the Senate Comm. on Jurisprudence*, 68th Leg., R.S. (Apr. 28, 1983); Price, *supra* note 9.

23. 349 U.S. 13, 136 (1955).

24. *See* Holt v. Virginia, 381 U.S. 131, 136 (1965) ("[M]otions for change of venue to escape a biased tribunal raise constitutional issues both relevant and essential.").

25. *See, e.g.*, Withrow v. Larkin, 421 U.S. 35, 46 (1975) (applying *In re Murchison* to an administrative adjudicatory proceeding).

26. *See, e.g.*, Henley v. State, 576 S.W.2d 66, 69 (Tex. Crim. App. 1979); Lewis v. State, 654 S.W.2d 483, 484 (Tex. App.—Tyler 1983, pet. ref'd).

27. *See* Manges v. Garcia, 616 S.W.2d 380, 382 (Tex. App.—San Antonio 1981, no writ) (stating that "[t]here is no reason to conclude that our elementary notions of fairness are inapplicable to civil cases" and citing Withrow v. Larkin, 421 U.S. 35 (1975)).

28. States are free to extend their own constitutions beyond the Federal Constitution as long as they retain the minimum of protection required by the Federal Constitution. *See, e.g.*, Cooper v. California, 386 U.S. 58 (1967).

29. *See, e.g.*, Davenport v. Garcia, 834 S.W.2d 4,8 (Tex. 1992) ("[I]n some respects our free speech provision is broader than the First Amendment."); Heitman v. State, 815 S.W.2d 681, 682 (Tex. Crim. App. 1991) (declaring that "[t]oday we reserve for

with the very strong constitutional protection that the right to trial by jury has traditionally received in Texas,[30] could justify a broader conception of "prejudice" than the Federal Constitution.[31] The long-standing hostility in Texas to the federal standards for summary judgment may preview future developments in this area.[32]

Unlike the statute about convenient venues, the rules implementing these constitutional principles have changed very little over time. Rules 257, 258, and 259 of the Texas Rules of Civil Procedure did not change from their promulgation in 1943 until 1983.[33] Those rules were taken unchanged from articles 2170, 2171, and 2172 of the revised civil statutes, which themselves had not been changed for decades before 1943.[34] This lack of change demonstrates a general content with the operation of these rules. Most procedural points about them were settled,[35] and they received no negative commentary during the 1983 hearings on revising venue practice in Texas.[36]

B. The 1983 Revisions

The Texas statutes about convenient forums had few friends in either the plaintiffs' or the defense bars by 1983.[37] But reform efforts

ourselves the power to interpret our own constitution" and holding that Article I § 9 of the Texas Constitution can provide more protection against unlawful searches than the Federal Constitution). *See generally* Symposium on the Texas Constitution, 68 TEX. L. REV. 1337 (1990).

30. *See* Roy McDonald, *The Effective Use of Summary Judgment*, 15 Sw. L.J. 365, 367 (1961) ("Since 1845 the state constitution has protected this right [to trial by jury] in substantially all civil actions, whether of a legal or equitable nature."). As to the level of enthusiasm this protection generates, see, *e.g.*, Sheila A. Leute, Comment, *The Effective Use of Summary Judgment: A Comparison of Federal and State Standards*, 40 BAYLOR L. REV. 617, 618 & n.12 (1988) (noting that the state's faith in trial by jury is "an enthusiasm almost unrivaled elsewhere in the country"); McDonald, *supra*, at 368 (declaring that in Texas "[w]e are enamored with jury trial, and this passion colors our decisions").

31. For example, one old case discussed how local prejudice undermines the "jealous concern that every cause be determined upon its own merits." Freeman v. Ortiz, 106 Tex. 1, 153 S.W. 304 (1913). Restated today, that argument would naturally incorporate concepts of "New Federalism."

32. *See generally* Leute, *supra* note 30.

33. For a summary of what the rules do, see *supra* note 2. For a discussion of the amendments in 1983, see *infra* Part II.B.

34. *See* TEX. REV. CIV. STAT. arts. 2170-2172, *repealed by* Act of May 15, 1939, 46th Leg., R.S., ch. 25, § 1, 1939 TEX. GEN. LAWS 201. *See Freeman*, 153 S.W. at 304 (describing the operation of the statute governing impartial venues in 1913).

35. *See* WILLIAM V. DORSANEO III & DAVID CRUMP, TEXAS CIVIL PROCEDURE: PRE-TRIAL LITIGATION 427 n.2 (3d ed. 1989).

36. *See* Letter from Dan R. Price, Austin lawyer, to David Crump, Professor at the University of Houston Law Center 3 (May 31, 1989) [hereinafter Price Letter] ("I have no memory of any discussions regarding a perceived evil under the old law relating to transfers based on impartiality.").

37. *See Senate Hearings*, *supra* note 12, at 1 (testimony of Senator Caperton) ("[A]ll of us here being practicing attorneys know that one of the areas that has been most roundly criticized by legal scholars and practitioners on both sides of the Bar are the venue provisions that we have in Texas."); Price, *supra* note 9, at 360 n.21.

continually failed because the Texas Association of Defense Counsel ("TADC") and the Texas Trial Lawyers Association ("TTLA") could not agree on an alternative. By 1983, the TADC and TTLA had had enough, and under the leadership of Chief Justice Jack Pope, they reached a compromise.[38] The legislature worked rapidly after this compromise,[39] and in May of 1983, the two groups finally agreed to a compromise bill replacing article 1995.[40]

The compromise bill drastically rewrote the statutes. The old "privilege" became a "general rule" placing suits in the county where the cause of action accrued or the county of defendant's residence.[41] Interlocutory appeals ended.[42] And the new "motion to transfer" hearing significantly streamlined the old "plea of privilege" hearing.[43]

After the May 1983 compromise in the legislature, the Texas Supreme Court began to revise the Texas Rules of Civil Procedure about impartial forums to take the new statute into account. The court made two changes in those rules. First, it stated in Rule 257(c) that a venue change was justified if "an impartial trial cannot be had in the county where the action is pending."[44] Since three other, very similar, grounds for a venue change already appeared in the rule, this change appeared to incorporate similar language used in part of the new statute.[45] The court also added a second sentence to Rule 258 authorizing discovery before hearings on motions to change venue.[46]

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38. *See* Price, *supra* note 9, at 856, 861-62.

39. *See generally* Price, *supra* note 9, at 856 ("[L]egal niceties had little bearing upon the drafting of S.B. 898. As with most legislation, S.B. 898 was born from negotiations and compromise between competing interest groups who finally agreed to a bill with which neither was wholly satisfied.").

40. *See* Price, *supra* note 9, at 856.

41. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.001 (Vernon 1986); Price, *supra* note 9, at 868-73.

42. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(a) (Vernon 1986); Price, *supra* note 9, at 875-80.

43. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064 (Vernon 1986); TEX. R. CIV. P. 86-89; Price, *supra* note 9, at 873-75.

44. TEX. R. CIV. P. 257(c).

45. The language "impartial trial cannot be had" appears in TEX. CIV. PRAC. & REM. CODE ANN. § 15.063(d) (Vernon 1986). Professor Hazel believes that "the only answer" to explain the change in the rule "is that the new statute states the ground in this way and that this language has been incorporated in the rule by the Supreme Court." Hazel, *supra* note 2, at 632.

46. The new sentence reads:

> Reasonable discovery in support of, or in opposition to, the application shall be permitted, and such discovery as is relevant, including deposition testimony on file, may be attached to, or incorporated by reference in, the affidavit of a party, a witness, or an attorney who has knowledge of such discovery.

TEX. R. CIV. P. 258. At least one litigant has argued that this change was intended to conform Rule 258 to the language in § 15.064 that says "the court shall determine venue questions from the pleadings and affidavits." Reply to Motion for Leave to File Petition for Writ of Mandamus at 12, Union Carbide v. Moye, 798 S.W.2d 792 (Tex. 1990) (No. C-90322) [hereinafter *Union Carbide* Mandamus Opposition Brief]. That argument fails if § 15.064 was not intended to apply to motions to change venue

Notably, that rule did not impose any clear limits on the types of discovery that could take place, or the ways that discovery could be presented to the court.

The key question about the 1983 revisions is about their breadth: did the legislature intend them to affect motions to change venue because of prejudice as well as motions to transfer because of inconvenience? The historical evidence is sketchy but suggests that the legislature did not intend to change all of venue law. The only witness who mentioned prejudice during the Senate Jurisprudence Committee hearings about Senate Bill 898 did not seem to think that the bill covered it.[47] Two out of three drafters of the bill that have publicly spoken on the issue think that the new statutory regime was not intended to apply to the situation of local prejudice.[48] And a widely-cited law review article authored by a lobbyist present at all the negotiations refers to Rules 257-259 only to note their existence.[49]

The historical evidence also suggests that the supreme court did not think the legislature had constrained it when it repromulgated the venue rules. The new subpart of Rule 257 is so redundant that it is hard to imagine it as anything but a housekeeping measure. And the new sentence in Rule 258 only speaks to a limited discovery issue. Furthermore, another Rule promulgated in 1983 states that "[a] motion to transfer on the basis that an impartial trial cannot be had . . .

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because of local prejudice, because live testimony would then be permissible. *See infra* Part IV and accompanying text.

47. The witness was Doyle Curry, appearing for the Texas Trial Lawyers Association. He seemed to think that S.B. 898 did not address issues about a "fair trial" and that a different bill did:

> I think that already is (sic) an amendment circulating around to do it where the ends or justice would be reached or to prevent injustice, something of of (sic) that nature where you can't get a fair trial. I don't know whether it has actually been amended or not.

Senate Hearings, *supra* note 12, at 2. The "amendment" appears to have gone unenacted, as nothing resembling this description ended up in the new statute or in the revised Rules.

48. *See* Letter from Alan Schoenbaum, Co-author of the new Texas venue statute, to Geoffrey C. Graham, Attorney at Cowles & Thompson 2 (June 14, 1989) (on file with the author) ("The legislative focus did not encompass cases in which defendants have reason to believe they may not receive a fair trial in a particular county due to the inability to select an impartial jury.") [hereinafter Schoenbaum letter]; Price Letter, *supra* note 36, at 3 ("I recall absolutely no evidence of whether the legislature considered an 'impartiality question' . . . to be within the ambit of a 'venue question' under Section 15.064(a)."). *But see* Letter from State Senator Kent A. Caperton to Judge Robert N. Campbell (Mar. 1, 1989) (on file with the author):

> Specifically, you ask: "Did this legislation [S.B. 898] intend to do away with evidentiary hearings in all venue matters, including those provided for in Rules 257-258, Tex. R. Civ. P.?" The short answer is yes. As you know, I have repeatedly stated that our intent in changing the law of venue was to require the court to determine venue questions from the pleadings and affidavits. No live testimony would be permitted.

49. *See* Price, *supra* note 9, at 880-81.

shall be determined in accordance with Rules 258 and 259."[50] This statement suggests that the supreme court intended for motions to change venue based on local prejudice to be evaluated based on the rules rather than the statute.[51]

II. A Late Motion to Change Venue Because of Local Prejudice

A. *Sources of Tension*

The venue statutes set forth a due order of pleading rule for motions to transfer venue. A court can transfer an action to another county on grounds of improper venue, local prejudice or consent only on a "motion filed and served concurrently with or before the filing of the answer."[52] Read literally, this language means that any motion to change or transfer venue that does not meet that requirement is not effective.[53]

The tension between this command of the Code and the Rules of Civil Procedure comes from three places. First, the Rules provide that a trial court can consider only one motion to transfer venue unless the motion is based on the grounds that an impartial trial cannot be had under Rules 257-259.[54] This rule implies that a party can file a motion to change venue because of prejudice after the answer is filed, unless the drafters of the rules believed that they needed to expressly authorize multiple preanswer motions to change venue while not allowing any after the answer.

Second, under practice before the enactment of the new venue statute, courts did not follow a due order rule for motions based on Rule 256. A party could apply on any of the grounds in Rule 257 at any time before or after filing the answer.[55] Since the supreme court reconsidered all of the venue rules after the adoption of the venue statute but chose to keep their language virtually unchanged,[56] this fact suggests that the supreme court did not intend to create a rule of due order where none had existed before.[57]

Third, as a matter of policy (and common sense), it is easy to imagine that local prejudice would not become apparent until after the fil-

50. Tex. R. Civ. P. 87(2)(c).

51. *See* William V. Dorsaneo III, The New Venue Rules and Multiple Parties E-9 (1983) [hereinafter Dorsaneo Manuscript] (unpublished manuscript, on file with the author).

52. Tex. Civ. Prac. & Rem. Code Ann. § 15.063 (Vernon 1986).

53. *See, e.g.,* Sutton v. State Bar of Texas, 750 S.W.2d 853, 855 (Tex. App.—El Paso 1988, writ denied).

54. Tex. R. Civ. P. 87(5).

55. *See, e.g.,* City of Abilene v. Downs, 367 S.W.2d 153, 155-56 (Tex. 1963); Atchison, Topeka & Santa Fe Ry. Co. v. Holloway, 479 S.W.2d 700, 706 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.).

56. *See supra* notes 44-46 and accompanying text.

57. *See* Dorsaneo Manuscript, *supra* note 51, at E-9.

ing of an answer. While every community in the state has access to the same basic set of news,[58] some communities will have their own ways of viewing that news. Local biases and prejudices can affect the way communities view the news,[59] as well as localized media sources that are not controlled by large media chains.[60] There is every reason to believe that those local news sources and local sources of prejudice may not "kick in" until fairly late in a lawsuit.[61]

Courts cannot clearly resolve this tension under the current statutory wording. Two canons of statutory interpretation favor following the literal language of the statute and only allowing motions to change venue if they are filed before the answer. The first is the principle that rules promulgated by the supreme court cannot trump statements by the legislature about an issue.[62] The second is that when the language of a statute is unambiguous, the plain and ordinary meaning of that language controls.[63] Taken together, these principles mean that the unambiguous language of the statute preempts any contrary court decisions or rules of procedure promulgated by the supreme court. But

58. *See generally* Newton H. Minow & Fred H. Carr, *Who Is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 635-37 (1991); *cf. Goodbye Dallas!*, DALLAS TIMES HERALD, Nov. 14, 1991, at A1.

59. The defendants in *Union Carbide v. Moye* noted the following "insurmountable obstacles": (1) of the fewer than 6,000 citizens of Morris County qualified for jury service, the overwhelming majority were plaintiffs or were relatives of plaintiffs, (2) of the remainder, most worked at a plant run by a defendant, (3) one of the defendants had laid off hundreds of Morris County residents a few years earlier, and (4) an earlier battle over the location of an incinerator created a state of "near hysteria" about environmental issues in the county. *Union Carbide* Mandamus Support Brief, *supra* note 7, at 2-5.

60. *Cf.* Minow & Carr, *supra* note 58.

61. *See* Union Carbide v. Moye, 798 S.W.2d 792, 797 n.5 (Tex. 1990) (Gonzalez, J., concurring) (arguing that it is illogical for Texas law to ignore "prejudice which only manifests itself after an answer has been filed"); WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 61.06[1] (1992) ("[T]he conditions giving rise to inability to obtain an impartial trial . . . may not arise until after the answer is filed."); *Union Carbide* Mandamus Support Brief, *supra* note 7, at 28 ("[I]t would often be impossible for a defendant to know by [the time it files an answer] whether or not it could receive an impartial trial in the county of suit. There would likewise be no safeguards if the forum became hostile after the defendant filed its answer.").

62. *See* TEX. CONST. art. 3, § 45 ("The power to change the venue in civil and criminal cases shall be vested in the courts, to be exercised in such manner as shall be provided by law; and the Legislature shall pass laws for that purpose."); TEX. GOV. CODE § 22.004 (Vernon 1986) ("The supreme court has the full rulemaking power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge, or modify the substantive rights of the litigant."); *see also* Price, *supra* note 9, at 880 ("Rules promulgated by the Supreme Court of Texas cannot supersede or alter the provisions of S.B. 898.").

63. *See, e.g.*, Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 352 (Tex. 1990) ("[When] language in a statute is unambiguous, this court must seek the intent of the legislature as found in the plain and ordinary meaning of the words and terms used."); Seay v. Hall, 677 S.W.2d 19 (Tex. 1984) ("[Courts] must find its intent in its language and not elsewhere. They are not the lawmaking body. They are not responsible for omissions in legislation."). *See also* TEX. GOV'T CODE § 312.002(a) (Vernon 1986) ("[W]ords shall be given their ordinary meaning.").

cutting in the other direction is the principle that courts must examine legislative history to decide if there is any ambiguity in a statute's terms.[64] Judicial interpretation of these laws will always be uncertain as long as these three principles point in different directions.[65]

B. A Proposed Solution

The best policy is to allow motions to change venue because of local prejudice to be filed after the answer. The United States and Texas Constitutions guarantee a right to a fair trial.[66] Severe local prejudice that arises during a trial hurts that right just as much as prejudice arising before the trial.[67] If anything, it is more destructive, because counsel does not have a chance to dissipate it with the passage of time.

No concern about delay cuts against this policy argument. At the outset, realize that the presumption is against any argument based on delay: the nature of the right involved requires a substantial risk of delay to justify restricting motions to the pre-answer period. Courts have long viewed the ability to select a *convenient* venue as a privilege that the defendant has, which the defendant can waive by not exercising it promptly.[68] But the constitutional right to due process lasts as long as a party is in the judicial system.[69] In other words, a given risk of delay might be enough to justify another condition on a statutory privilege that is often conditioned, but that same risk might not be enough to justify restrictions on constitutional rights.

The risk of delay caused by extending the period for filing these motions almost certainly falls short. No evidence shows that the legislature ever worried about that risk when they drafted this statute.[70] The delay that concerned it was the relitigation of contested fact issues, not an occasional evaluation of an issue removed from the merits of a case.[71]

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64. *See* TEX. GOV. CODE § 312.005 (Vernon 1986) ("In interpreting a statute, a court shall diligently attempt to ascertain legislative intent and shall consider at all times the old law, the evil and the remedy.").

65. *Compare* Boykin v. State, 818 S.W.2d 782, 785 (Tex. Crim. App. 1986) (affirming the court's fidelity to a statute's "plain meaning" if its words are clear and unambiguous) *with Boykin*, 818 S.W.2d at 786 (Miller, J., dissenting) (arguing that the majority "puts the cart before the horse" because ambiguity is often not apparent until a statute's legislative history is researched).

66. *See supra* notes 26-32 and accompanying text.

67. *See supra* note 61.

68. As Justice Frankfurter once stated:

> [T]he locality of a law suit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition. . . . Being a privilege, it may be lost. It may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct.

Neribo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 168 (1939).

69. *See supra* note 61.

70. *See supra* notes 47-49 and accompanying text.

71. *See supra* notes 12-19 and accompanying text.

The rules of procedure should work to reduce the risk of overload further. Rule 13, which allows courts to impose sanctions upon lawyers and parties that file groundless motions, should provide some check on groundless motions.[72] And Rule 257 imposes stringent substantive requirements. The requirement that a litigant "*cannot* obtain a fair and impartial trial"[73] is not easy to satisfy, and courts should be able to quickly dismiss claims that fall significantly short of that mark.

The legislature should amend section 15.063 of the Civil Practice and Remedies Code so that parties can move to transfer because of prejudice after the answer. The new version should read:

> (a) The court, on motion filed and served concurrently with or before the filing of the answer, shall transfer an action to another county of proper venue if:
>
> (1) the county in which the action is pending is not a proper county as provided by this chapter; or
>
> (2) written consent of the parties to transfer to any other county is filed at any time.[74]
>
> *(b) The court shall, on motion filed and served at any time* transfer an action to another county of proper venue if an impartial trial cannot be had in the county in which the action is pending.

This amendment will make clear what the legislative history and policy considerations show is the correct result.

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72. *See* TEX. R. CIV. P. 13 (stating that trial courts "shall impose an appropriate sanction" for groundless motions). Local rules can augment Rule 13 to further check abuses from deliberately filing late. *See* Lone Star Steel Co. v. Scott, 759 S.W.2d 144 (Tex. App.—Texarkana 1988, writ denied) (Grant, J., concurring) (arguing that local rules can check the abuses of late-filing defendants). *But see* TEX. R. CIV. P. 3a (limiting local rulemaking authority).

73. TEX. R. CIV. P. 257 (a) & (b).

74. A detailed analysis of the history of the law of venue by consent is beyond the scope of this paper. But even a cursory reading of the statute shows that this provision (§ 15.063(2) in the current version) suffers from the same drafting problems as the rules about local prejudice. There is a good argument for letting parties put trials where they want them, and there is very little downside. Since the parties are delaying their own lawsuit by mutual consent, there is no real harm to any delay that a late-arriving venue agreement might cause.

While redrafting this subsection would increase the tidiness of this statute, I do not believe that the need for its redrafting is as urgent as the need for redrafting the local prejudice provision. This subsection does not present a clash between a statute and a court-created rule, but rather presents a clash between two parts of the same statute (the requirement that the motion be "filed and served concurrently with or before the filing of the answer" clashes with the statement that the consent can be "filed at any time," and the requirement that the transfer be to "another county of proper venue" clashes with the statement that the written consent can be to transfer "to any other county"). When the plain language of the statute does not make sense, courts are free to look to legislative history. *See supra* note 63 and accompanying text. I suspect that such an inquiry would lead to the conclusion that the transfer can be made at any time and to any place, given what the history of the rules about local prejudice shows about the concerns of the statute's drafters. *See* Dorsaneo Manuscript, *supra* note 51, at E-11 (agreeing with this conclusion).

IV. Live Testimony and Venue Hearings

A. Sources of Tension

The venue statutes limit the types of evidence that parties can offer in a hearing on a motion to transfer venue. Civil Practice and Remedies Code section 15.064(a) states that "no factual proof concerning the merits of the case shall be required to establish venue" and that venue questions are to be determined "from the pleadings and affidavits."[75] Commentators believe that this language means that parties cannot offer live testimony in a hearing conducted under this statute.[76]

Tension arises because Rule 258 says that "the issue thus formed [by a motion to change venue because of prejudice] shall be tried by the judge."[77] Courts uniformly read this language to allow trial judges to conduct a minitrial on the issue of local prejudice before the new statute was adopted.[78] Professors Dorsaneo[79] and Hazel[80] argue that this practice has survived the enactment of the new venue statute and the revised Rule 258.

As with the tension discussed in the previous section, courts will find it difficult to resolve this tension under the current statutory language.[81] A court following the "plain language" of the statute would apply it to all venue hearings despite the contrary language in the rules, as the words of the statute standing alone do not contain ambiguity.[82] On the other hand, a court considering the legislative history

75. Tex. Civ. Prac. & Rem. Code Ann. § 15.064(a) (Vernon 1986).

76. *See* Letter from Alan Schoenbaum, co-author of the venue statute, to Robert Campbell, former Justice of the Texas Supreme Court 1 (Mar. 17, 1989) ("There is no question in my mind that in all venue hearings, no factual proof concerning the merits of the case shall be required to establish venue, and that the court must determine whether venue is proper from the pleadings and affidavits."); Reply to Motion for Leave to File Petition for Writ of Mandamus, at 18-19, Union Carbide v. Moye, 798 S.W.2d 792 (Tex. 1990) (No. C-90322) [hereinafter *Union Carbide* Mandamus Opposition Brief] ("When the legislature amends the law, it is presumed that it intends to change the law. It did change the law; all *venue questions* are to be determined by pleadings and affidavits." (emphasis in original) (citations omitted)); *cf.* Michol O'Connor, O'Connor's Texas Rules 389 (1992) ("A hearing on a motion to transfer [because of local prejudice] is probably meant for the presentation of evidence, although this is uncertain.").

77. Tex. R. Civ. P. 258.

78. *See, e.g.,* Governing Board v. Pannill, 659 S.W.2d 670, 688 (Tex. App.—Beaumont 1983, writ ref'd n.r.e.) ("Rule 258 mandates and requires a hearing before the trial court for the purpose of presenting evidence."); City of Irving v. Luttrell, 351 S.W.2d 941, 942-43 (Tex. Civ. App.—Amarillo 1961, no writ) ("[The language of Rule 258] implies that there shall be a hearing before the court for the purpose of presenting evidence in support of the opposing affidavits.").

79. Dorsaneo Manuscript, *supra* note 51, at E-10; *Union Carbide* Mandamus Support Brief, *supra* note 7, at 11-12 (signed by Professor Dorsaneo, among others).

80. Hazel, *supra* note 2, at 625.

81. *See* Dorsaneo, *supra* note 61, at § 61.06[2] (noting that this requirement "may be applicable to impartial trial motions" and that if it is, "prior practice has changed"); O'Connor, *supra* note 76, at vi (calling the issue "uncertain" at present).

82. *See supra* notes 62-63 and accompanying text.

of the statute would find that the statute was not intended to change the law about impartial forums,[83] and would limit the statute to disputes about inconvenient venues. A legislative solution is necessary to clarify the law adequately.[84]

B. A Proposed Solution

Policy strongly suggests that courts should allow live testimony in hearings on motions to change venue because of local prejudice. The wide variety of ways that information can be conveyed in modern society almost requires looking at the people involved to see how they are reacting to it.[85] More specifically, the evidence in hearings about local prejudice often takes the form of complex surveys done by experts.[86] Refuting such evidence requires thorough cross-examination to fully enlighten the fact finder.[87]

The general concerns about delay that motivated the drafters of section 15.063 do not apply in this setting for two reasons. First, the rules of evidence give every trial court the power to limit the presentation of repetitive and unnecessarily cumulative evidence.[88] Second, the delay that might result from having some witnesses take the stand is not the same kind of delay that led to the new venue laws. The drafters of the new statute were concerned about the exceptional waste caused by trying contested fact issues twice,[89] and were not concerned about the occasional delays that may have been caused by long hearings

83. *See supra* notes 47-49 and accompanying text.

84. The current uncertainty means that loose language in supreme court opinions about motions to transfer venue may be cited for conclusions about motions to change venue because of local prejudice. For example, in a recent case Justice Cornyn commented: "Live testimony may be considered at a special appearance, and on objections to discovery requests, but not at a summary judgment hearing or venue hearing." Jack Anglin Co. v. Tipps, 842 S.W.2d 266, 269 n.4 (Tex. 1992) (citations omitted). It is impossible from this one sentence in a footnote to determine what he had in mind when he said "venue hearing." If the statute were worded with more clarity, lawyers would know exactly what he meant.

85. *See* Union Carbide Corp. v. Moye, 798 S.W.2d 792, 794 (Hecht, J., concurring) ("A witness' credibility, for example, may be an important consideration in deciding a motion under Rule 257 that is difficult to ascertain from affidavits or transcribed depositions."); *Id.* at 798 (Gonzalez, J., concurring) ("[T]he existence of prejudice, favoritism, and partiality so great that a fair trial cannot be had in the county where suit is pending is more subjective, with proof resting ultimately on opinion."); *see also Union Carbide* Mandamus Support Brief, *supra* note 7, at 13 ("[T]he resolution of disputed fact issues regarding 'impartial trial' venue cannot be accomplished on a paper record. A trial court cannot meaningfully decide which affidavit is the more credible, or what inferences should be drawn from opposing sets of sterile written submissions.").

86. Supplemental Brief in Support of Petition for Writ of Mandamus at 9, Union Carbide v. Moye, 798 S.W.2d 792 (Tex. 1990) (No. C-90322).

87. *Id.* at 9-10. *But see Union Carbide*, 798 S.W.2d at 794 (Hecht, J., concurring) (noting that the credibility of surveys or demographic data can often be evaluated by written evidence alone).

88. *See* TEX. R. CIV. EVID. 403 (giving trial judges the power to exclude evidence if it is unfairly prejudicial, confusing or misleading, or unnecessarily cumulative).

89. *See supra* notes 12-19 and accompanying text.

about the impartiality of forums.[90] An oral hearing on the issue of prejudice will not force parties to have two trials, because the facts used to prove prejudice have no relation to the contested fact issues in a case.[91]

I recommend changing 15.064(a) to maintain unequivocally the Rule's pre-1983 meaning:

> (a) In all venue hearings, no factual proof concerning the merits of the case shall be required to establish venue. The court shall determine venue questions from the pleading and affidavits, *except that questions about any issues listed in Texas Rule of Civil Procedure 257 are to be determined in accordance with Texas Rule of Civil Procedure 258.* No interlocutory appeal shall lie from the determination.

This revision strikes the best balance. Practice for determining *proper* venue remains unchanged, and trial judges keep the discretion they had before 1983 to determine the *impartiality* of a particular venue.

Justice Hecht's concurring opinion in *Union Carbide v. Moye* endorses this solution.[92] He argued that "the wise exercise of discretion by the trial court" as to live testimony would balance the rights of litigants with the justice system's need for efficiency. He drew an analogy between his proposal and proceedings under Rule 120a,[93] which allows the trial court to consider oral testimony in determining a special appearance, particularly when it appears from the affidavits that the facts cannot fairly be presented otherwise. That procedure "offers reasonable flexibility . . . while assuring a full and fair presentation of the facts."[94]

Justice Hecht's analogy not only illustrates the workability of this proposal, but also addresses a concern of Justice Gonzalez. In Justice Gonzalez's *Union Carbide* concurrence, he contended that the importance of the right to an impartial trial meant that parties have a right to an oral hearing when the impartiality of a forum is contested.[95] If trial courts exercise their discretion about similar types of evidence in a situation where equally important rights[96] are at issue, Justice Gon-

90. *See supra* notes 47-49 and accompanying text.

91. *See Union Carbide*, 798 S.W.2d at 797 (Gonzalez, J., concurring) ("The vice that the legislature intended to correct—dual trials on the merits of the case—is no way implicated when the only issue to be tried in the venue hearing is the availability of an impartial forum.").

92. 798 S.W.2d 792, 794 (Tex. 1990) (Hecht, J., concurring). The holding of the case was that a trial judge in Morris County had denied due process to litigants when he drastically changed the timetable for a hearing one day before it was scheduled to begin. *Id.* at 792.

93. TEX. R. CIV. P. 120a.

94. *Union Carbide*, 798 S.W.2d at 794 (Hecht, J., concurring).

95. *Union Carbide*, 798 S.W.2d at 795 (Gonzalez, J., concurring).

96. A special appearance involves a challenge to the power of a court to exercise personal jurisdiction. That challenge raises constitutional due process questions. *See, e.g.*, Schlobohm v. Schapiro, 784 S.W.2d 355, 358 (Tex. 1990).

zalez's arguments weaken considerably. The balance struck by my proposal appears more reasonable.

V. APPELLATE REVIEW

A. *Background: The Two Requirements For a Successful Appeal*

A successful appellant in Texas must show that the trial court erred, and then show that the error caused harm.[97] In determining whether a trial court erred, the court of appeals analyzes the trial court's actions through the lens of the appropriate standard of review.[98] The standard of review is a "measuring stick"[99] for the appellate court that sets the limits of the court's power to decide if a case requires reversal.[100] If the trial court's actions constitute error when examined under the appropriate standard of review, then the court of appeals must decide if the error caused harm. The court again applies a measuring stick to the facts of the case, looking either to the rules of appellate procedure[101] or to a more specific statute,[102] depending on the type of error at issue.

In Part B, I will discuss the standard of review in light of the recent supreme court decision of *Ruiz v. Conoco*.[103] With that background, in Part C I will analyze the concept of harmless error as it applies in the context of a motion to change venue because of local prejudice.

B. *Standard of Review after* Ruiz v. Conoco

The venue statute says that: "[o]n appeal from the trial on the merits[,] . . . [i]n determining whether venue was or was not proper, the appellate court shall consider, the entire record, including the trial on the merits."[104] The language of that statute raises two questions for courts of appeals: what standard of review does the statute require, and does that standard also apply to motions to change venue because of prejudice?

97. *See, e.g.*, Cox Engineering v. Funston Mach. & Supply, 749 S.W.2d 508, 511 (Tex. App.—Fort Worth 1988, no writ).

98. For an overview of the various standards of review employed in Texas civil appeals, see W. Wendell Hall, *Standards of Appellate Review in Civil Appeals, reprinted in* TEXAS LITIGATION READER 565 (1992).

99. *Id.* (quoting John C. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, FIFTH CIRCUIT REPORTER, Jan. 1987, at 169).

100. *Id.*

101. The rules of appellate procedure provide that no judgment shall be reversed on appeal for an error of law unless that error was reasonably calculated to cause and probably did cause rendition of an improper judgment in the case, or probably prevented the appellant from making a proper presentation of the case to the appellate court. TEX. R. APP. P. 81.

102. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 1986) ("[I]f venue was improper it shall in no event be harmless error and shall be reversible error.").

103. 36 Tex. Sup. Ct. J. 1304 (Oct. 2, 1993) (on motion for rehearing).

104. TEX. CIV. PRAC. & REM. CODE § 15.064(b) (Vernon 1986).

The recent supreme court opinion in *Ruiz v. Conoco* answered the first question in the context of a dispute about the convenience of venue. An appellate court should conduct an independent review of the entire record to determine whether venue was or was not proper in the ultimate county of suit. But because the statute requires review based on the entire record[105] while the trial judge's decision was based on the prima facie proof presented to it at a hearing, an appellate court is to be extremely deferential. If any probative evidence supports the trial court's decision, even if the preponderance of evidence is to the contrary, the court of appeals is to defer.[106]

The question then becomes whether this holding governs in reviewing disputes about the fairness of venue. There is a good argument that having all complaints about a lawsuit's venue approach the courts of appeals on an even footing enhances efficiency and predictability.[107] Two different standards invite confusion when a case raises both kinds of venue errors. Also, hearings about motions to change venue involve the same sort of subjective evaluations of evidence that are involved in deciding motions to transfer venue.[108] If those determinations deserve deference in one context there is a good argument that they deserve deference in another.

105. The court's statement that an appeals court is to decide a venue appeal by looking to the "entire record" rather than the conduct of the court at the motion to transfer hearing settled a persistent question in this area. The statement is generally consistent with the practice of courts of appeals. *See, e.g.*, Texas City Ref., Inc. v. Conoco, 767 S.W.2d 183, 185 (Tex. App.—Houston [14th Dist.] 1989, writ denied). *See generally* Hall, *supra* note 96, at 568 & n.16 (summarizing the court of appeals decisions on this issue). But it was the first statement by the supreme court on the issue.

106. *Ruiz*, 36 Tex. Sup. Ct. J. at 1309. This holding indirectly settled a split among the courts of appeals as to the treatment of an erroneous transfer of a case from one proper venue to another. Some courts reasoned that venue was "proper" if the case was tried in a place allowed by the venue statute. *See, e.g.*, Lewis v. Exxon, 786 S.W.2d 724 (Tex. App.—El Paso 1989, writ denied); Cox Eng'g v. Funston Mach. & Supply, 749 S.W.2d 508, 511-12 (Tex. App.—Fort Worth 1988, no writ). Others reasoned that the erroneous transfer took away the plaintiff's right to choose venue and thus led to a venue that, while technically proper, was "improper" for purposes of the venue statute. *See* Marantha Temple, Inc. v. Enterprise Products Co., 833 S.W.2d 736, 741 (Tex. App.—Houston [1st Dist.] 1992, writ denied). *Ruiz* suggests that, while a procedural error in the venue hearing can be error, the mere fact that venue is in a place not of the plaintiff's choosing is not error so long as evidence supports the propriety of the *location*. *See generally* Price, *supra* note 9, at 878-79 ("Other points of error directed at alleged errors at the 'motion to transfer' hearing would be subject to the traditional appellate-review standards.").

107. *See generally* RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 934 n.9 (1989); Charles A. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957) (both discussing the impracticality of evaluating similar issues with different standards of review).

108. *See, e.g.*, Lubbock Mfg. Co. v. Sames, 598 S.W.2d 234 (Tex. 1980) (describing the range of issues that can surface in determining where a cause of action accrued). A good example would be a dispute about the terms of an oral contract, where the parties remember very different terms and the court has to make some assessment of their credibility.

On the other hand, the degree of deference called for in *Ruiz v. Conoco* is exceptional, and is based on the supreme court's frustration with the awkwardness of the statute. The legislature created a statute requiring review of a trial court decision based on a different set of facts than what was before the trial court at the time it made that decision.[109] The court is trying to reduce the number of remands based on facts that only become apparent late in the trial by requiring appellate courts to be very deferential.[110] That risk is lower in the context of motions to change venue because Rule 258 gives trial judges more fact-finding flexibility than the rules governing motions to transfer venue give them.

While the answer is uncertain in the absence of an authoritative statement from the supreme court, policy considerations point to deference on the order of a clearly erroneous standard. Efficiency considerations suggest that the two types of venue motions should receive similar scrutiny on appeal, but the different lower court procedures used in the case of motions to transfer venue point to slightly more deferential review.

C. Presumption of Harm

1. The Law Today

Suppose an appellant persuades a court of appeals that a trial took place in a county so filled with local prejudice that a fair trial was impossible. Having gotten over the first hurdle for a successful appeal, how can the appellant get over the second hurdle of showing harm?

The Civil Practice and Remedies Code clearly states that improper venue is *never* harmless error.[111] Chief Justice Pope of the Texas Supreme Court, one of the main architects of the new venue statute, stated that the statute could be no stronger or clearer in its mandate.[112] Dan Price, who was present during the negotiations about this provision, said that "the uniqueness and harshness" of this standard was well known to and fully discussed by all legislators involved, and that "[w]ithout this . . . subsection, there would have been no agreed bill whatsoever."[113]

But the interplay between section 15.064(b) and the rules about local prejudice is fuzzy. The most recent court of appeals decision on this issue reasoned that the statute about "improper venue" did not

109. *Ruiz*, 36 Tex. Sup. Ct. J. at 1308-09.
110. *See id.* at 1309.
111. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 1986) ("[I]f venue was improper it shall in no event be harmless error and shall be reversible error.").
112. Price, *supra* note 9, at 879.
113. *Id.*

apply because the word "improper" did not include "unfair" venue.[114] The court then stated that since all of the rules of civil procedure stand together unless a rule provides otherwise,[115] and the harmless error rule says that it applies to all of the rules, the harmless error rule applies to Rules 257-259.[116]

The same dynamic is at work here that was at work in the problems analyzed before. The statute says one thing, the rules of procedure say something else, and the standard canons of statutory construction give no clear answer.[117] The answer has to lie in the legislature.

2. A Proposed Solution

The legislature should amend the venue statute so the harmless error rule does not apply to either a motion to change venue because of prejudice or a motion to transfer. Such an amendment advances the policy goals of the two sets of Texas venue rules better than the current ambiguous situation.

Consider first the goals behind the harmless error rule. The harmless error rule is a cousin of the constitutional "case or controversy" requirement. The case or controversy requirement is motivated by the federal courts' desire for parties to have the "concrete adverseness which sharpens the presentation of issues."[118] Given the backlog of litigants with real disputes that they have strong desires to litigate, the federal courts feel they should not waste their time on cases that do not present real clashes between the parties.[119] The idea behind the harmless error rule is similar: if a litigant has not been harmed by a court's error, his interest in appealing that error is so weak that courts should not squander their resources evaluating it.[120]

The drafters of the new venue statute had two motives for including the "no harmless error" provision in the venue statute. First, they intended for its strict sanction to encourage parties to avoid fraud, negligence, or oversight in the way they approached venue.[121] Second, the provision eliminates the need for appellants to demonstrate that they

114. Lone Star Steel Co. v. Scott, 759 S.W.2d 144, 146 n.1 (Tex. App.—Texarkana 1988, writ denied).

115. *See generally* Jampole v. Touchy, 673 S.W.2d 569, 576 (Tex. 1984); Standard Fire Insurance Co. v. Reese, 584 S.W.2d 835, 839 n.2 (Tex. 1979).

116. *Id.*

117. *See supra* notes 62-65 and accompanying text.

118. Baker v. Carr, 369 U.S. 186, 204 (1962).

119. *See generally* WRIGHT, *supra* note 20, §§ 12-13.

120. *See* MARCUS ET AL., *supra* note 107, at 942-43.

121. *See* Marantha Temple, Inc. v. Enterprise Products Co., 833 S.W.2d 736, 741 (Tex. App.—Houston [1st Dist.] 1992, writ denied); Price, *supra* note 9, at 879 ("Subsection 4(d)(2) was intended to serve and does serve the beneficial purpose of placing parties at great risk if by fraud, negligence, oversight, or otherwise venue is improper in the ultimate county of suit."); *see also* Caperton et al., *supra* note 48, at 247 ("The automatic 'reversible error' provision was inserted to ensure that plaintiffs file their suits in the county of proper venue.").

have been harmed by going to trial in an incorrect venue. Absent this statute, appellants would have great difficulty in showing that they were harmed by going to trial in an improper venue.[122] In other words, the "no harmless error" rule sets forth a rule of substantive law: a litigant who demonstrates that his case was tried in an improper venue never has so weak a claim that it does not deserve judicial attention.

Two hypotheticals illustrate why applying the no harmless error rule to motions to change venue because of local prejudice advances the goals behind it. Error as to local bias can arise in one of two situations: (1) the trial court incorrectly moving the trial from a proper venue where no local prejudice exists, and (2) the trial court incorrectly keeping the trial in a "proper" venue where local prejudice does exist. The first situation illustrates the "easy case": if the judge erroneously moves the trial, the no harmless error rule clearly applies if venue is moved to an improper forum.[123]

Consider then the second type of error: a trial judge erroneously keeping the trial in a place where local prejudice exists. In that situation, the judge has denied a party its constitutionally protected right[124] to trial in a fair forum. Venue is statutorily proper but constitutionally wrong. Applying the no harmless error rule in this context advances both of the goals behind it. Litigants and courts should be at least as careful about this kind of prejudice as about statutorily-created privileges. And it is no easier to prove harm in this hypothetical than in the first one.

Applying the no harmless error rule under these circumstances appears to be even better policy after considering the consequences of *not* applying it. Not applying the "hammer" to Rule 257 motions

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Senator Brown focused on the judge rather than the litigants. He expressed concern that trial judges would have biases in favor of their own forums:

> [I]f you get the right attorney, local counsel, or you can—you're going to find a judge that . . . isn't going to be transferring it. He's going to say, well, you know, leave it here. That just happens. It's not really surprising to anybody, I don't think, that practices law. And so, you can say that trial judge is going to do that, but if you put the right combination together, you don't have to worry, it's going to stay there.

Senate Hearings, *supra* note 12, at 10.

122. *See* Kent Caperton, Alan Schoenbaum, & Art Anderson, *Anatomy of the Venue Bill*, TEX. B.J., Mar. 1984, at 246-47 ("After all, how can an appellate judge hold that a defendant would have had a fairer trial in another county if all of the due process requirements were met?"); Russell H. McMains, *"Legislative History" of the New Venue Statute From the Plaintiff's Perspective* A-8 (Oct. 1983) (unpublished manuscript on file with the author) (arguing that the new statute is "logical" because "[a] party is not likely to be able to demonstrate the probability of having procured a more favorable verdict in a different county.").

123. And if venue is proper in the new county, *Ruiz v. Conoco* means that the no harmless error rule does not apply because no error exists to trigger § 15.064 in the first place. *See supra* notes 109-111 and accompanying text.

124. *See supra* notes 23-32 and accompanying text.

would mean that, in the second hypothetical, the judge would have an incentive to keep the trial in the original venue *even though* that venue was biased. The judge would be automatically reversed for leaving the proper venue but could take refuge in the harmless error rule by remaining in the original venue. That discrepancy is particularly troublesome given the constitutional foundation of the venue laws that it slights.

This result also makes sense in light of the arguments for a deferential standard of review in these cases. If an appellant overcomes the substantial presumption of correctness embodied in the standard of review, the evidence of error must be compelling. Turning around and then calling that error harmless seems incongrous.

The statute should be amended so that the "no harmless error" rule clearly applies to motions to transfer because of local prejudice. There is no reason to have a "hammer" on the books that defends "proper" venue more than "impartial" venue. Specifically, one sentence should be added to section 15.064(b):

> On appeal from the trial on the merits, if venue was improper, it shall in no event be harmless error and shall be reversible error. *If venue should have been transferred because of a reason listed in Texas Rule of Civil Procedure 257, the failure to transfer shall in no event be harmless error and shall be reversible error.* In determining whether venue was or was not proper, the appellate court shall consider the entire record, including the trial on the merits.

These changes unambiguously remove Rule 257 from the harmless error rule. The constitutional right to an unbiased forum is then protected as much as the statutory privileges about convenient forums.

VI. Conclusion

Texas venue law has two purposes: assuring *convenient* forums and assuring *impartial* forums. The law governing the timing of and evidence at hearings about *convenient* forums should not control the timing of and evidence at hearings about *impartial* forums, because the underlying rights are fundamentally different. Adopting my proposals will mean that a litigant's constitutional right to an impartial forum will be protected throughout the trial, and that a hearing on an alleged violation of that right will use the appropriate types of evidence. Without my proposal, this right will not receive full protection, because procedures devised in haste to protect a statutorily-created privilege are not adequate.

But at the same time, the law should treat the two types of hearings as evenhandedly as possible on appeal. Amending the Civil Practice and Remedies Code so that a trial erroneously conducted in a biased forum is never harmless error will make it possible for the victims of prejudice to appeal their cases. Taken together, these changes should

revitalize an important area of the law that is needlessly unclear, which will help Texas venue law better achieve its twin goals of efficient and fair dispute resolution.

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