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The authors have not been convinced that arguments of the proponents for the inclusion of the unborn in the AFDC program are without merit. The weight of authority as indicated by five courts of appeal and fourteen district courts cannot be totally in error. Surely we cannot . . . assume that Congress, at the same time that it intended to provide programs for the economic security and protection of all children, also intended arbitrarily to leave one class of destitute children entirely without meaningful protection . . . Such an interpretation of congressional intent would be most unreasonable. . . .⁸⁰

ACIE LOUELLA WARD
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Change of Venue and Statutory Limitations

The sixth amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and the district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . ." ¹ But the sixth amendment's requirement of local juries can often be inconsistent with its requirement of impartial jurors. Fortunately, states throughout the union have enacted change of venue statutes.²

STATUTORY PROVISIONS

Statutes governing change of venue generally permit a change of venue in the place of trial from the county in which an action is properly brought, to another county where such changes are necessary to promote the ends of justice by eliminating the effect of local prejudice which might operate detrimentally to the rights and interests of a party litigant.³ Most statutes provide that a change of venue may be granted at the request of either party to the action be it civil or criminal,⁴ but

80. *King v. Townsend*, 392 U.S. at 330.

1. The Supreme Court in *Duncan v. Louisiana*, 391 U.S. 145 (1968) held that the Due Process Clause of the fourteenth amendment required that the right to jury trial be applicable to the states.

2. See generally 56 AM. JUR. *Venue* § 42 (1947).

3. *Id.*

4. See 46 A.L.R.3d 295 (1972). Although there has been some discussion as to the prosecutor's right to a change of venue. Under the common law it was generally held that the jury must be drawn from and the defendant tried in the county where the crime was committed. 4 Blackstone, Commentaries 305. It was felt that this jury

there seems to be no dispute that the trial judge and not the party seeking the change, has the right to select the county to which a transfer is made, within the bounds specified by statute.⁵ Venue statutes also provide the manner and means of invoking the power of the trial judge to remove an action, but it has been held the trial judge has the discretionary power to order a change of venue *ex mere motu* when because of existing circumstances, a fair and impartial trial cannot be had in the county in which the action is pending.⁶

Change of venue statutes usually provide no meaningful standard to guide the trial judge in granting or denying a motion for a change. Explicit in the language of most statutes is the discretionary power of the trial judge to grant a change when it is deemed that the ends of justice will be served.⁷ This allows great leeway for abuse of discretion. Particularly since it has been recognized that judicial reluctance to grant a change of venue in some instances is based on the judge's inherent refusal to admit that their court cannot provide an impartial forum.⁸

REASONS FOR CHANGE

Pretrial publicity (newspaper, television and radio) is the most prevalent reason asserted for change of venue.⁹ Coupled with this assertion, the party seeking the change has the burden of showing that because of the pretrial publicity there is such a feeling of prejudice and bias in the locality where he is to be tried that his right to obtain a fair and impartial trial has been put in jeopardy.¹⁰

Jurors are not required to be totally ignorant of the facts and issues involved in the case.¹¹ It is sufficient if the juror can lay aside his impression or opinions and render a verdict based on the evidence presented at trial.¹² For this reason, pretrial publicity whether of a routine

would be already acquainted with them. 1 W. Holdsworth *A History of English Law* 317 (7th ed. 1959). Therefore there developed the accused's absolute and unconditional right to be tried in the county where the crime occurred. For this discussion see Note *Prosecution's Right to Change of Venue*, 14 S. DAK. L. REV. 396 Spring '69 (1973).

5. See 50 A.L.R.3d 773 (1973). *But see* State v. Thompson, 266 Minn. 385, 123 N.W.2d 378 (1963).

6. Everett v. Robersonville, 8 N.C. App. 219, 174 S.E.2d 116 (1970).

7. See N.C. GEN. STAT. § 1-84 (1969). In all civil and criminal actions . . . the judge "may" order a copy of the record of the action removed to some adjacent county for trial, if he is of the "opinion" that a fair trial cannot be had in said county. . . .

8. See Note *Change of Venue in Criminal Cases: The Defendant's Right to Specify the County of Transfer*, 26 STAN. L. REV. 131, 133 (1964).

9. See Austin, *Prejudice and Change of Venue*, 68 DICK. L. REV. 401, 402 (1964).

10. See 21 Am. Jur. 2d, *Criminal Law* § 422 (1965). See also Foster v. Commonwealth, 209 Va. 297, 163 S.E.2d 565 (1963).

11. Irwin v. Dowd, 366 U.S. 717, 722 (1961).

12. Spies v. People of Illinois, 123 U.S. 131, 168 (1887).

nature, or even of a mere inflammatory nature, disseminated through the community has generally been recognized as not constituting a sufficient basis in and of itself for granting the defendant's motion for a change. Some proof or evidence of community ill will toward the defendant generally must be exhibited.¹³ However, The Supreme Court in *Sheppard v. Maxwell*¹⁴ stated that a change of venue or continuance must be granted whenever pretrial publicity has created a "reasonable likelihood" that the accused will not otherwise receive a fair trial.¹⁵ The Court didn't define reasonable likelihood; but the importance of this standard is that it is not required in all cases that the accused show actual prejudice or ill will before the right to a change of venue attaches.

In some cases the courts have considered the particular pretrial publicity to have been such that substantial prejudices toward the defendant could be "anticipated" in the community, thus entitling the defendant to a change of venue and so eliminating the necessity of having to give proof or evidence of prejudice in the community.¹⁶ This precept was exhibited in *Forsythe v. State*¹⁷ where the defendant was granted a new trial after being convicted of manslaughter on the ground that a change of venue should have been granted. Throughout the trial two local newspapers with a total circulation of 40,000 in a county of 100,000 made reference to defendant's police record and repeatedly referred to the defendant as an "ex-con" and as the county's "vice king." Local television and radio also gave extensive coverage of the case in as many as seventeen broadcasts daily. The court concluded that when prejudicial news prior to trial is likely to prevent a fair trial, and postponing the trial will not remove the threat, the judge should transfer the case to another county not so permeated with publicity. "That a showing of actual prejudice is not necessary . . . logic and experience can substitute for proof."¹⁸

As a matter of practicalities, the effect of pretrial publicity upon prospective jurors cannot be determined with precision in any given case. However, indicative of whether pretrial publicity is such that a defendant's right to a fair and impartial trial would be jeopardized, the courts have considered several factors in determining this potential effect: (1) the degree to which the publicity has circulated throughout the community; (2) the degree to which the publicity or that of a like nature has circulated in other areas to which venue could be changed; and (3)

13. 33 A.L.R.3d 17 (1970).

14. 384 U.S. 335 (1966).

15. *Id.* at 363.

16. *Supra* note 13 at 33.

17. 41 Ohio Op. 2d 104, 230 N.E.2d 681 (1967).

18. *Id.* at 109, 230 N.E.2d at 686.

the length of time which has elapsed from the dissemination of the publicity to the date of trial.¹⁹

*People v. Jacobson*²⁰ exemplifies the first factor listed above. There the defendant was found guilty of murder in the first degree and was sentenced to death. On appeal the defendant alleged that he was denied a fair trial because of inflammatory news coverage of the crime. One newspaper had featured defendant's incriminating statements and a picture of defendant in a comical pose. The court in rejecting defendant's contention, stated that "it was possible to select an impartial jury, not because the coverage lacked inflammatory qualities, but because the circulation of the newspaper was limited."²¹

*Sorber v. State*²² is indicative of the weight given by courts to the degree to which the publicity has been circulated in areas to which the venue can be changed. The defendant was convicted of murder and on appeal asserted that the trial court had committed reversible error in not granting a change of venue in that the local newspaper had served to cause a prejudgment on the part of the prospective jurors as to the defendant's guilt or innocence, thereby jeopardizing his right to a fair and impartial trial. The court found that no proper showing of change of venue was made in view of the fact that the defendant virtually conceded that the newspapers in which most of the news items about the case had appeared, had a general circulation throughout the adjoining counties where venue could be changed.

*People v. Berry*²³ is typical of the third factor. Berry after being convicted of burglary maintained that the trial court had committed error in not granting a motion for change of venue based on alleged pre-trial publicity. The court, after noting that the motion was not filed nor the trial held until approximately four months after the alleged publicity had been published thought that this delay could be considered as a sufficient time lapse to dissipate any feeling of prejudice whether real or imagined; and it could not be said that the trial court lacked any reasonable grounds whatsoever to believe that the defendant could not get a fair and impartial trial in the county.

19. 33 A.L.R.3d 17 (1970). Other factors enumerated:

- (1) The care and ease encountered in the selection of a jury;
- (2) The familiarity with the publicity complained of and its resultant effect if any upon the prospective jurors or the trial jurors;
- (3) The challenges exercised by the defendant in the selection of the jury, both those preemptory and those for cause;
- (4) The connection of government officials with the release of the publicity;
- (5) The severity of the offense charged; and
- (6) The particular size of the area from which the venire is drawn.

20. 63 Cal. 2d 319, 405 P.2d 555, 46 Cal. Rptr. 515 (1965).

21. *Id.* at 325, 405 P.2d at 559, 46 Cal. Rptr. at 519.

22. 225 Miss. 436, 76 So. 2d 234 (1967).

23. 37 Ill. 2d 329, 226 N.W.2d 591 (1967).

Aside from adverse pretrial publicity as a reason for change, courts have also recognized that ill feeling may be generated in the community against a particular defendant if he is a member of a certain cultural or ethnic group. Thus in *Frazier v. Superior Court of Santa Cruz County*,²⁴ defendant, who had been identified as a "hippie," was indicted on five counts of murder and moved for a change of venue on the ground that an impartial trial could not be had in the county. When the motion was denied, defendant sought a writ of mandamus to compel the respondent court to grant the relief. In granting relief, the court noted that throughout the county there was a deep seated antagonism toward hippies.

There may not be, as the trial court found hostility toward this particular defendant as an individual, so long as there is hostility towards the group or subculture with which he is identified he runs a very real risk of being judged not for what he has done but for what he is, or what he appears to be.²⁵

Though murder and rape are the types of crimes most frequently involved when a court grants a change of venue,²⁶ the crimes of members of a minority group do not have to be as serious as murder and rape in order to produce prejudice,²⁷ therefore invoking the right to a change. This was exemplified in *People v. Lucas*²⁸ where the defendant, a black, was indicted for practicing medicine without a license. A change of venue was granted and the court in reference to the defendant's race, stated that this fact, "with the nature of his occupation, has attracted unusual public attention."²⁹

Finally, as a reason for change, it has been recognized that there may be more hostility toward persons accused of certain crimes in some counties than in others; for example, jurors in rural counties where murders are relatively uncommon may react more emotionally and unfavorably toward a defendant accused of a brutal murder than might urban jurors,³⁰ therefore preventing an impartial trial.

LIMITATIONS IMPOSED BY STATUTES

Some statutes authorizing change of venue impose limitations such as allowing only one change of venue,³¹ a change to an adjacent³² or

24. 5 Cal. 3d 287, 486 P.2d 694, 95 Cal. Rptr. 798 (1971).

25. *Id.* at 294, 486 P.2d at 699, 95 Cal. Rptr. at 803.

26. *Supra* note 9.

27. *Id.*

28. 131 Misc. 664, 228 N.Y.S. 31 (Sup. Ct., 1928).

29. *Id.* at 665, 228 N.Y.S. at 32.

30. *Supra* note 8.

31. *See* WIS. STAT. ch. 956.03 (1967).

32. *See* N.C. GEN. STAT. § 1-84 (1969).

CHANGE OF VENUE

adjoining³³ county or to an adjoining district or parish.³⁴ However, some courts have recognized that even statutory limits on the possible places of transfer may be transcended, if it can be established that a fair trial cannot be obtained in any locality permitted by statute, since the statute then must bow to the constitutional right to a fair trial by an impartial jury.³⁵ It has also been held that the right to change the place of trial is based upon the constitutional right of an accused to a fair and impartial trial and exists wholly apart from the statute, which merely provides the procedure for enforcing the right.³⁶

This reasoning seems to be the most logical approach to such statutory limitations and more consistent with the purpose of allowing a change of venue. Especially in the light of the fact that many communities are served by the same newspaper, television and radio stations; and economic and social ties are so intertwined that they are virtually a single community. In such cases the same grounds (adverse publicity, prejudice, etc.) that existed for transferring the case may exist in the place of transfer.³⁷

In *State of Louisiana v. Rideau*,³⁸ defendant was convicted of murder and sentenced to death. The conviction was upheld by the Supreme Court of Louisiana but the United States Supreme Court reversed the conviction³⁹ because the jury had been drawn from a community exposed to a television broadcast of defendant being questioned by the local sheriff where the defendant confessed to the murder. On remand the prosecutor moved for a change of venue outside the range of the television station. Granting the motion would have required transferring the case out of the parish, therefore the trial judge denied the motion on the ground that under Louisiana Law he was without authority to transfer the case to any parish other than one in his district.

On appeal the Supreme Court of Louisiana held:

. . . that a change of venue is primarily to insure the rights of the accused to a speedy trial by an impartial jury, as guaranteed under the Bill of Rights to the United States constitution and section 9 of Article I of the Louisiana Constitution, and when procedural legislation setting out the rules of governing such change conflict with these

33. See MASS. GEN. LAWS ANN. Ch. 277 § 51 (1956). The words "adjacent" and "adjoining" have been considered equivalent to each other by some courts. See *Grooms v. State*, 40 Tex. Crim. 319, 50 S.W.2d 370 (1899).

34. See LOUISIANA STAT. ANN. R.S. § 15.293 (1950).

35. *State v. Rideau*, 246 La. 451, 165 So. 2d 282 (1964).

36. *State ex rel. Ricco v. Briggs*, 198 Ore. 413, 255 P.2d 1055 (1953).

37. *Liber v. Flor*, 160 Colo. 7, 415 P.2d 33 (1966).

38. 242 La. 431, 137 So. 2d 283 (1962).

39. *Rideau v. State of Louisiana*, 373 U.S. 723 (1963).

constitutional rights to the extent the legislative enactment deprive an accused of the process of law then they must yield.⁴⁰

In an action to determine whether a second change of venue should be granted in spite of a statute allowing only one change of venue; the Supreme Court of Indiana in *State v. Porter Circuit Court*⁴¹ held that it is the duty of the judiciary to provide to every accused a public trial by an impartial jury, even though to do so the court must grant a second change of venue and thus contravene the general legislative policy of granting only one change of venue from the county.⁴² The Indiana Supreme Court seemed to have placed great weight on the fact that the state and the defendant had agreed that a second change was necessary and that the Constitution of Indiana itself guaranteed a trial by an impartial jury.

No case was found where the United States Supreme Court decided a case involving a due process attack on a statute involving one of the limitations discussed above. But in one case the Court declared that a statute allowing only one change of venue is not unconstitutional on its face as violative of due process where construed by the highest court of the state to permit a second change of venue after an impartial jury in the county to which venue is first changed cannot be obtained.⁴³ By way of implication, this declaration by the Court can be said to mean that if such statutes are applied and interpreted strictly in disregard of the right to a fair and impartial trial, due process issues may arise.

One recent writer⁴⁴ has advocated that the defendant should have the right to select the transferee county if his change of venue motion is successful; and that unless a strong state interest requires denying the defendant this right, the doctrine of unconstitutional conditions is applicable.

The doctrine of unconstitutional conditions states that the government cannot condition the receipt of a benefit upon the surrender of a constitutional right or penalize a person for exercising such right, unless the condition or penalty is justified by a substantial public interest.⁴⁵ In applying this doctrine to present change of venue statutes, the writer demonstrates that in certain instances the defendant, rather than run the risk of transfer to a county where there is less likelihood of obtaining a fair trial, may surrender his constitutional right to a change of venue and remain in the original forum despite prejudicial conditions.

40. *Supra* 246 La. at 455, 165 So. 2d at 284.

41. 239 Ind. 637, 159 N.E.2d 713 (1957).

42. *Id.*

43. 366 U.S. at 722.

44. *Supra* note 8.

45. *Id.*

Whether the doctrine is applicable or will be applied to change of venue statutes in future cases remains to be seen; but it can be safely said that unless the various legislatures take some action to repeal or amend change of venue statutes that impose limitations which have the effect of circumventing the purpose of allowing change, most courts will feel bound by the language of the statutes.

CONCLUSION

The Supreme Court in its pronouncement of the "reasonable likelihood" test as the measure of evidentiary showing warranting a change of venue, obviously realizes that in many instances such safeguards as voir dire examination of prospective jurors does not detect prejudice or the effect of pretrial publicity on a given community. It appears that the Court constructs a very liberal test for insuring the constitutional right to a fair and impartial trial. However, the writer submits that change of venue laws that impose limitations on the place or number of changes do not enhance this given constitutional right. In spite of the policy pronounced by legislatures, the trial judge in granting a change of venue must operate with a view of carrying out the guarantee enunciated in the sixth amendment of the United States Constitution.

CURTIS O. HARRIS

In the Matter of: Certificate of Need for Aston Park Hospital, Inc.:
Impasse for Regulation of Hospital Construction in North Carolina?

In January, 1973, the North Carolina Supreme Court held that the 1971 certificate of need law was void because its application to Aston Park Hospital, Inc. resulted in a deprivation of liberty without due process of law, established a monopoly in existing hospitals, and granted exclusive privileges to existing hospitals in violation of the Constitution of North Carolina.¹ Prior to *Aston Park*, certificate of need laws had been challenged in courts in California² and New York,³ and in both cases, the laws were upheld.

The certificate of need legislation was a regulatory measure enacted

1. *In re* Certificate of Need for Aston Park Hosp., Inc., 282 N.C. 542, 193 S.E.2d 729 (1973).

2. *Simon v. Cameron*, 337 F. Supp. 1380 (C.D. Cal. 1970).

3. *Attoma v. State Dep't of Social Welfare*, 26 App. Div. 2d 12, 270 N.Y.S.2d 167 (1966).