The Efficacy of a Change of Venue in Protecting a Defendant's Right to an Impartial Jury

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NOTES

THE EFFICACY OF A CHANGE OF VENUE IN PROTECTING A DEFENDANT'S
RIGHT TO AN IMPARTIAL JURY

I. Introduction

A person charged by the state with the commission of a crime is protected
by an arsenal of devices designed to insure his constitutional right to a fair trial.
Most conspicuous among these devices are the exclusionary rules of evidence, the
right to counsel, and the right to compulsory process. Yet, all of these are of
little or no value if the right to an impartial jury is not scrupulously preserved.1

Impartiality, as an ideal concept, is the logical derivative of the creation
of the trial as the means by which we reconstruct past events for the purpose
of rendering judgment. In theory, this concept requires judgment to be rendered
solely on the basis of the evidence produced at the trial.2 A slightly less rigorous
statement of this principle is that a juror, to be qualified, must be indifferent to
the guilt or innocence of the defendant "as he [the juror] stands unsworne."3
"The theory of the law is that a juror who has formed an opinion cannot be
impartial."4 Such theoretical purity, however, balks at practical application.
Chief Justice Waite said in Reynolds v. United States: "Every opinion which
he [the juror] may entertain need not necessarily have this effect [disqualification]."5
This process of eroding impartiality, as a pure concept, in order to ac-
commodate it to the Supreme Court's notion of practical necessity, annunciated
in Reynolds, reached its height in Holt v. United States.6 There, it was decided
that a juror need not be disqualified for holding an opinion of such strength that
evidence would be required to remove it. If the opinion would yield to the
evidence produced at trial, that was sufficient.

Beginning with the theory that the trial must be the exclusive source of
information about the alleged offense upon which judgment is passed, the law
traced a path ending, in Holt, with the condonation of a practice which re-
quired only that judgment not be predicated upon an exclusively nontrial source.7

1 The guarantee of an impartial jury is embodied, expressly or impliedly, in the consti-
tutions of all fifty states and the federal government. LEGISLATIVE DRAFTING RESEARCH
FUND, COLUMBIA UNIVERSITY, INDEX DIGEST OF STATE CONSTITUTIONS, 578-79 (2d ed.
1959). Moreover, while the fourteenth amendment imposes no duty upon the states to pro-
vide for trial by jury in criminal cases, if a jury is provided, it must be impartial. Irvin v.

2 "The theory of our system is that the conclusions to be reached in a case will be
induced only by evidence and argument in open court, and not by any outside influence,
whether of private talk or public print." Patterson v. Colorado, 205 U.S. 454, 462 (1907).
(Emphasis added.)

3 1 Coke Lit. 155b (1853).
5 Ibid.
6 218 U.S. 245 (1910).
7 This practice is constitutionally permissible today, Irvin v. Dowd, 366 U.S. 717
1965). It would be erroneous, however, to conclude that the minimal constitutional require-
ments are indicative of present-day practice, at least in all courts. Appellate courts do caution
trial judges to exercise extreme care in examining prospective jurors and to disqualify them
if there is the least doubt as to their ability to render an impartial verdict. See, e.g., State
925
Nevertheless, despite its dilution, the right to trial by an impartial jury, like the right to a fair trial, is carefully guarded by a full complement of protective devices. Among such devices are the continuance, a change of judge, the voir

v. Van Duyne, 43 N.J. 369, 204 A.2d 841 (1964). Compare United States v. Kline, 221 F. Supp. 776 (D. Minn. 1963) (all jurors who expressed an opinion on issue of guilt or innocence of defendant excused), with State v. St. Peter, 63 Wash. 2d 495, 387 P.2d 937 (1963) (all potential jurors who had seen or heard of defendant excused). See also Juelich v. United States, 214 F.2d 950 (9th Cir. 1954). There, the court reversed a conviction on the ground that all twelve jurors believed the defendant guilty before the trial commenced. Juelich is without precedent or progeny. This may be due to the unique circumstances existing there, but it is difficult to distinguish Juelich from a case where less than all twelve jurors believe the defendant guilty before hearing any testimony.

Some misgivings have been expressed regarding the first assumption underpinning Holt v. United States, 218 U.S. 245 (1910), which is that a juror has the ability to lay aside an opinion once formed. "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." Irvin v. Dowd, 366 U.S. 717, 727 (1961). See generally Comment, Fair Trial v. Free Press: The Psychological Effect of Pre-Trial Publicity on the Juror’s Ability to Be Impartial; A Plea for Reform, 38 So. Cal. L. Rev. 672 (1965). The authors there argue that the proposition that a man can set aside an opinion once formed flies in the face of demonstrated psychological factors. It is pointed out that association is an immediate response to perception (opinions formed before all the facts are in), data tends to be interpreted to fulfill psychological needs, the desire for social acceptance tends to exert a strong influence on the process of interpretation, and time intensifies the reaction against revision and change. Courts have not remained unaware of the contribution of the psychic sciences. Commonly, the trial judge is reminded that he is to make an independent evaluation of the prospective juror, not merely accept him at his word because "jurors themselves are incapable of knowing the effect which prejudicial matters might have upon their unconscious minds." People v. Hryciuk, 5 Ill. 2d 176, 184, 125 N.E.2d 61, 65 (1954).

The second underlying assumption in Holt, that "most people are essentially honest...", has been questioned. See generally Broeder, Voir Dire Examinations: An Empirical Study, 38 So. Cal. L. Rev. 503 (1965). The author concludes that voir dire is an ineffective screening device for the following reasons. There is an unwritten law that counsel do not take too long for the voir dire examination; violation of this rule, which is infrequent because trial lawyers seldom have the time or resources to adequately prepare an effective examination, irritates the jurors. Conscious and deliberate lying is practiced by judges. This is a protective device owing to the fact that a juror, if challenged, will feel that he has been impugned, not part of an overall wicked design. Jurors are also resentful over the discharge of another venireman if they do not understand the justification for it. This study included the civil and criminal cases of only one court. The validity of any generalization is, of course, an open question.

9 The leading case is Delaney v. United States, 199 F.2d 107 (1st Cir. 1952). See generally Beck v. United States, 214 F.2d 950 (9th Cir. 1954). There, the court reversed a conviction on the ground that all twelve jurors believed the defendant guilty before the trial commenced. In addition to protecting the defendant from the effects of community prejudice, it is also designed to ameliorate the situation where the defendant is justifiably unprepared for trial. Since the continuance is, by its very nature, dilatory, it is looked upon with skepticism by the courts. There is considerable danger in advancing motions for a continuance and a change of venue alternately because it leaves the impression that counsel is seeking only a delay. See generally Bailey & Golding, Remedies for Prejudicial Publicity—Change of Venue and Continuance in Federal Criminal Procedure, 13 Fed. B.J. 60 (1958). The danger is particularly great when one of the motions has been previously denied. See People v. Brooks, 67 Ill. 2d 479, 214 N.E.2d 498 (1966).

As a general proposition it can be said that counsel will encounter more difficulty in obtaining a continuance than in obtaining a venue change. Note, Colum. L. Rev., supra note 8, at 368-69.


11 See generally Broeder, supra note 7; Orfield, Trial Jurors in Federal Criminal Cases, 29 F.R.D. 43 (1961); Note, Colum. L. Rev., supra note 8, at 354-60.
dire, sequestration of the jury, a change of venue or importation of a foreign jury, cautionary instructions, ministrial, and a change of venue. This note will focus on the use made of venue change by the courts, in order to protect a defendant’s right to a trial by an impartial jury.

II. Statutory Patterns

The power to remove a criminal case to a forum where an impartial jury can be selected existed at common law, and, with the exception of Maine, is codified in the constitutions and either statutes or rules of court of every state and the federal government.


14 See generally United States v. Accardo, 298 F.2d 133 (7th Cir. 1962); Smith v. United States, 236 F.2d 260 (8th Cir.), cert. denied, 352 U.S. 909 (1956). Failure to give instructions, either protective or corrective, may constitute reversible error. United States v. Accardo, supra. The rationale appears to be that cautionary instructions are effective. But see Krulwich v. United States, 356 U.S. 440 (1949). “The naive assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be an unmitigated fiction.” Id. at 453 (Jackson, J., concurring).


17 At the outset it must be noted that the great majority of cases on this subject deal with the question of whether the defendant’s removal motion was erroneously denied. Occasionally a case will be found where the defendant is attempting to resist a change of venue granted on the state’s motion, State ex rel. Sullivan v. Patterson, 64 Ariz. 40, 165 P.2d 309 (1946), or where the issue is jurisdictional in nature, revolving around the power of the trial court to change venue, State ex rel. Fox v. La Porte Cir. Ct., 236 Ind. 69, 138 N.E.2d 875 (1956), but such a case is exceptional.

Accordingly, with the exception of the federal courts, where all indications are that Fed. R. Crim. P. 21(a) is infrequently used by the district courts, Orfield, op. cit. supra note 16, § 21:7, a study of the cases will reflect what the limit of the power of the trial court is to deny a motion for a change of venue. A study of the cases will not show what the practice of the trial courts is in granting such a motion.


This power, as codified, is usually limited to more serious offenses, but a growing number of jurisdictions provide for a change of venue in misdemeanor prosecutions. New Hampshire, uniquely, requires ad hoc legislation, in response to the trial court’s recommendation, before a criminal case can be removed.

Several jurisdictions provide for a venue change, as a matter of right, when certain specified objective standards are met, while a few others require that specified minimum conditions be met before the defendant’s motion will be considered.

Many statutes, by express provision, allow only one change of venue in a case. Courts have, however, usually rejected the argument that the governing provision is the exclusive source of authority for changing venue, holding instead that the controlling statute must yield as circumstances dictate.

(1956), § 2-1432 (Supp. 1966); IOWA CODE ANN. § 778.1 (1946); KAN. STAT. ANN. § 62-1318 (1964); KY. REV. STAT. ANN. § 452.210 (1965); LA. REV. STAT. § 15:220 (1950); MASS. ANN. LAWS ch. 277, § 51 (1956); MONT. STAT. ANN. § 55-2850 (1954); MUNN. STAT. ANN. § 627.01 (1947); MISS. CODE ANN. § 2508 (1956); MO. ANN. STAT. § 545.430 (1949); MO. SUP. CT. R. CRIM. P. 30.01; MONT. REV. CODES ANN. § 94-6901 (1947); NEB. REV. STAT. § 25-410 (1964); NEV. REV. STAT. § 174.410 (Supp. 1965); N.J. REV. STAT. § 2A:2-13 (1952); N.M. STAT. ANN. § 21-5-3 (Supp. 1965); N.Y. CODE CRIM. PROC. § 344; N.C. GEN. STAT. § 1-84 (Supp. 1965); N.D. CENT. CODE § 29-1501 (1960); OHIO REV. CODE ANN. § 2931.29 (Page 1953); ORE. REV. STAT. § 131.400 (Supp. 1963); R.I. GEN. LAWS ANN. § 8-2-29 (1956); S.D. CODE ANN. § 34.0817 (Supp. 1960); TENN. CODE ANN. § 40-2201 (1955); UTAH CODE ANN. § 77-26-1 (1953); VT. STAT. ANN. tit. 13, § 4631 (1958); VA. CODE ANN. § 19.1-224 (1950); WASH. REV. CODE ANN. § 10.25.070 (1961); WIS. STAT. ANN. § 956.05(3) (Supp. 1967); WYO. STAT. ANN. § 1-39 (1957).

22 E.g., IOWA CODE ANN. § 778.1 (1946) (felony); MASS. ANN. LAWS ch. 277, § 51 (1956) (capital offenses).

23 E.g., S.D. CODE § 34.0817 (Supp. 1960); W. VA. CONST. art. III, § 14. Of particular significance is the recent case of Mason v. Pamplin, 232 F. Supp. 539 (W.D. Tex. 1964). There, the refusal of the trial judge to allow the petitioner a hearing on his motion for a change of venue because the governing article did not include prosecutions for misdemeanors, was held violative of due process. In response to Mason, Texas amended the article. TEXAS CODE CRIM. PROC. ANN. art. 31.01 (1966). See generally Annot., 38 A.L.R.2d 738 (1954).


25 E.g., ARIZ. R. CRIM. P. 206(B) (if defendant submits affidavits supporting his motion from 10% of the qualified voters); GA. CODE ANN. § 27-1201 (1935) (evidence of physical violence). This provision is rather strictly construed, Blevins v. State, 108 Ga. App. 738, 134 S.E.2d 496 (1963), rev’d on other grounds, 220 Ga. 720, 141 S.E.2d 426 (1965); IND. ANN. STAT. § 9-1301 (1956) (capital offense), § 2-1432 (Supp. 1965) (after an appellate court reverses, remands for a new trial). See Mitchell v. State, 223 Ind. 16, 115 N.E.2d 595 (1953), cert. denied, 347 U.S. 975 (1954). Mo. ANN. STAT. § 545.490 (1949), if the defendant supports his motion by affidavits from five credible persons residing in different neighborhoods in the county, provided the population of the county is less than 75,000. This means that a change of venue can be had, as a matter of right, in 110 out of 114 counties in Missouri. This unique provision has been explained as the product of an earlier era when the trial was the principal means of entertainment in rural communities. Williamson, Change of Venue, 22 J. MO. B. 74 (1966).

26 E.g., Ark. STAT. ANN. § 43-1502 (1947) (defendant must present the affidavits of two qualified electors, unrelated to defendant); OKLA. STAT. ANN. tit. 22, § 561 (1937) (three credible persons residing in the county).

27 E.g., Ind. ANN. STAT. § 9-1305 (1956); MUNN. STAT. ANN. § 627.01 (1947); Wis. STAT. ANN. § 956.03(3) (Supp. 1967).

28 In State ex rel. Fox v. La Porte Cir. Ct., 236 Ind. 69, 138 N.E.2d 875 (1956), it was held that the trial judge lacked the power to grant a second change of venue, regardless of the circumstances. Fox, however, was substantially limited if not overruled in State ex rel. Gannon v. Porter Cir. Ct., 239 Ind. 639, 159 N.E.2d 713 (1959). There it was said "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 statute] . . . ." Id. at 642, 159 N.E.2d at 715. The Minnesota Supreme Court in State v. Thompson, 273 Minn. 1, 139 N.W.2d 490, cert. denied, 385 U.S. 817 (1966), said that a defendant’s right to a fair trial could not be circumscribed by the statute limiting the courts power to grant only one change of venue. Similarly, it was said in State v. Nutley, 24 Wis. 2d 527, 129
A number of states allow removal on the prosecutor’s motion. There has been a rather sharp split of authority on the issue of whether this is constitutionally permissible, with a majority of courts sustaining the statutory power of the trial judge to change venue in such cases.

Although the typical provision for a change of venue vests the trial judge with power to remove a case on the defendant’s application, several states permit the court to change venue on its own motion. New Mexico is unique in providing for removal upon the stipulation of the prosecution and the defense.

III. Judicial Implementation

A. Judicial Disposition

The usual provision regulating removal is cast in broad, general terms. Typically, the defendant must show that there is such excitement or prejudice in the minds of the inhabitants of the forum county or district that he cannot receive a fair and impartial trial therein. The courts have formulated verbal standards of varying intensity in the attempt to implement these provisions in specific cases, but, as has been pointed out, despite these various formulations, there is considerable uniformity in removal practice.

Likewise, there is considerable uniformity in the judicial attitude toward motions for a change of venue—the motion is disfavored. This judicial reticence is evidenced by numerous cases that hold that the issue is one for the discretion of the trial judge; and absent a showing that there was an abuse of

N.W.2d 155 (1964), cert. denied, 380 U.S. 918 (1965) that statutes allowing only one change of venue may require modification in order to meet due process requirements.

29 E.g., Ariz. R. CRIM. P. 201; Fla. STAT. ANN. § 911.02(1) (1944).


31 The defendant usually premises his objection to a charge on the accused’s traditional right to be tried in the “vicinage.” This rule is explained in detail in State v. Brown, 108 Vt. 312, 154 Atl. 579 (1931) and best explained in United States v. Cores, 356 U.S. 405 (1958). “The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place.” Id. at 407.

The majority response is to say that the defendant has a right to an impartial trial in the county in which the crime is alleged to have been committed, not a right to an impartial trial and a right to a trial in the county where the crime is alleged to have been committed. State ex rel. Sullivan v. Patterson, 64 Ariz. 40, 165 P.2d 309 (1946). Trial courts, however, are admonished to grant such removal motions with caution. Ibid.

32 E.g., CAL. PEN. CODE § 1033.5.


34 Haynes v. State, 40 Ala. App. 106, 109 So. 2d 738 (1958), cert. denied, 268 Ala. 546, 109 So. 2d 746 (1959) (must clearly be shown that a fair and impartial trial cannot be had); State v. Turner, 193 Kan. 189, 392 P.2d 863 (1964) (must be shown with reasonable certainty that a fair trial cannot be had); People v. Anderson, 350 Ill. 603, 183 N.E. 588 (1932) (must show reasonable grounds for fear that a fair and impartial trial cannot be had).

35 Note, COLUM. L. REV., supra note 8, at 362.

36 State v. Hunt, 2 Ariz. App. 6, 406 P.2d 208 (1965) (wholly within the trial judge’s discretion); McGruder v. State, 96 Ga. App. 874, 102 S.E. 2d 54 (1958) (where there is conflicting evidence the decision denying a change of venue will not be reversed).

The extensive discretionary authority with which the trial judge is vested can best be seen in State v. BeBee, 110 Utah 484, 175 P.2d 478 (1946). After commenting on the ease with which the jury was selected, and the orderly conduct of the trial, the court continued: [We] will not say that the trial court abused its discretion . . . . However, it certainly would not have been error for the court to have granted a change of venue
discretion,\textsuperscript{37} no appellate relief will be granted. It is also shown by cases that strictly construe provisions that authorize the removal of criminal cases.\textsuperscript{38}

\section*{B. The Law}

Courts presume that a criminal accused will be able to secure an impartial jury in the county or district in which the indictment is returned. He has the burden of rebutting this presumption.\textsuperscript{39} Prejudicial newspaper publicity is the ground most frequently asserted in support of a motion for a change of venue. With few exceptions,\textsuperscript{40} this type of motion has been rather consistently denied.\textsuperscript{41} This is understandably the case when the newspaper publicity did not refer to the defendant in a significant way;\textsuperscript{42} when it was factual and restrained;\textsuperscript{43} and, possibly, when it was not calculated to influence the jury.\textsuperscript{44} The same result, however, is reached when the newspaper publicity contains an extremely detailed account of the case,\textsuperscript{45} is inflammatory in nature,\textsuperscript{46} has a tendency to excite prejudice,\textsuperscript{47} or is denunciatory in tone.\textsuperscript{48}

\begin{itemize}
  \item and we are of the opinion that it would have been better if the trial court had granted the change under the circumstances of this case where there were inflammatory newspaper comments; suggestive remarks of a church official quoted in the paper; the gathering of an armed mob; a comparatively small community, no doubt closely knit by church affiliations; a deceased well known to the community . . . and an obviously eccentric old man . . . whose penchant for rhetorical showmanship repulses what little tolerance might otherwise have been accorded him. 175 P.2d at 481-82.
  \item Not infrequently a case upholding the denial of a removal motion and simultaneously expatiating on the evils of pretrial publicity is to be found. \textit{E.g.}, State v. Hunt, \textit{supra}; Singer v. State, 109 So. 2d 7 (Fla. 1959).
  \item Examples of an abuse of discretion include a decision made by a trial judge without the benefit of a hearing, \textit{e.g.}, State v. Moore, 258 N.C. 309, 128 S.E.2d 563 (1962), and in some jurisdictions a denial of a defendant's motion for a change of venue after an undistected hearing, \textit{e.g.}, Brunner v. Commonwealth, 395 S.W.2d 382 (Ky. 1965); Rush v. State, 238 Ark. 149, 379 S.W.2d 29 (1964).
  \item \textit{See}, \textit{e.g.}, United States v. Kline, 205 F. Supp. 637 (D. Minn. 1962):
    I am satisfied from a reading of these decisions that pre-trial motions for transfers \textit{[under Fed. R. Crim. P. 21(a) . . .] should be granted sparingly, in exceptional cases requiring such unusual action, and then only when it appears with a fair certainty that it is unlikely that a fair trial can be had . . . Id. at 639-40.}
  \item The Wyoming Supreme Court has provided an excellent example of the use to which strict construction can be put. The Wyoming statute provides that a defendant's motion for a change of venue is to be granted only when it appears with a fair certainty that it is unlikely that a fair trial can be had . . . \textit{Id. at} 639-40.
  \item Farrow v. Commonwealth, 197 Va. 353, 89 S.E.2d 312 (1955).
  \item Juelich v. United States, 214 F.2d 950 (5th Cir. 1954); United States v. Parr, 17 F.R.D. 512 (S.D. Tex. 1955).
  \item "\textit{Newspaper publicity alone is not grounds for a 'Change of Venue.'}" State v. Odom, 369 S.W.2d 173, 180 (Mo. 1963), \textit{cert. denied}, 375 U.S. 993 (1944).
  \item People v. Dery, 219 N.E.2d 536 (Ill. 1966); State v. Brown, 31 Wash. 2d 475, 197 P.2d 590 (1948).
  \item See Singer v. State, 109 So. 2d 7 (Fla. 1959); State v. Williams, 245 Iowa 494, 62 N.W.2d 742 (1954).
  \item State v. Truman, 124 Vt. 285, 204 A.2d 93 (1964).
\end{itemize}
The reasoning of the courts in these cases appears to be that although publicity is a necessary prerequisite to a general prejudicial sentiment towards the defendant in the community, it is not itself that sentiment, nor generally is it a reliable indication of a prejudicial atmosphere. Several arguments are preferred in support of this position. It is said, if the rule were otherwise a sensational case could never come to trial.\(^49\) It is also urged that intelligent people do not consider newspaper publicity reliable,\(^50\) and its effect, if any, is ephemeral.\(^51\)

The following have, at various times and in various combinations, supported decisions granting a venue change, or reversing a trial judge's denial of such a motion: prejudicial statements coming from some official source,\(^52\) provided that they were publicized at a date close to the trial;\(^53\) the publication of in-

\(^49\) In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all intelligent people in the vicinity, and scarcely anyone can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. Reynolds v. United States, 98 U.S. 145, 155-56 (1878).


\(^51\) People v. Sollazzo, 106 N.Y.S.2d 600 (Sup. Ct. 1951).

\(^52\) United States v. Florio, 13 F.R.D. 296 (S.D.N.Y. 1952). Statements originating from the New York Crime Commission, referring to the defendant as a "mobster," and containing accounts of the defendant's prior criminal activity were carried in the newspapers on the morning the jury was to be summoned. The decision was not grounded primarily on the reason that readers would consider the publicity reliable, but on a combination of factors—the publicized matter was of a peculiarly local interest, unusually intense, and released on the very day the jury was to be empanelled. A later case, United States v. Bonanno, 177 F. Supp. 103 (S.D.N.Y.), rev'd on other grounds sub nom. United States v. Bufalino, 277 F.2d 408 (2d Cir. 1959), indicated that the significance to be attached to publicity originating from an official—governmental—source is that the government cannot urge the inconvenience and expense which attends a change of venue as a reason for denying the defendant's motion. But see, State v. Thompson, 265 Minn. 385, 123 N.W.2d 378 (1963) where the court found statements made by the police particularly objectionable because they purported to be authoritative and factual. People v. McKay, 37 Cal. 2d 792, 236 P.2d 145 (1951) (publication of a letter of the trial judge impugning the good faith of defense counsel); People v. Pfanschmidt, 262 Ill. 411, 104 N.E. 804 (1914) (sheriff publicized his belief in defendant's guilt).

The basis of all these decisions is either a variant of estoppel or the probability that the publicized matter will be accepted as reliable. There is no notion of granting a change of venue as punishment for reprehensible and unethical conduct. Indeed, removal motions may be denied even though the court strongly disapproves of the prosecuting attorney's conduct. See, e.g., United States v. Dioguardi, 20 F.R.D. 33 (S.D.N.Y. 1956) (statements made by the prosecutor tending to foreclose the issue of guilt); State v. Hunt, 2 Ariz. App. 6, 406 P.2d 208 (1965) where, in a prosecution for child beating, the county attorney appeared on television several times to discuss the case, child beating in general, and the need for legislation.

In the converse situation, where the publicity originated from the defendant's own act, it has been held that he cannot complain. Reynolds v. United States, 225 F.2d 123 (5th Cir.), cert. denied, 350 U.S. 914 (1955).


While the existence of prejudicial publicity close to the time of trial may dispose a court to view a removal application favorably, the fact that publicity ceased, or even diminished, some time before the trial is frequently cited as a reason for denying a change of venue. United States v. Kline, 205 F. Supp. 637 (D. Minn. 1962); United States v. Bonanno, supra note 52; Elias v. Territory, 9 Ariz. 1, 76 Pac. 605 (1904); Parson v. State, 222 A.2d 326
admissible evidence;\textsuperscript{54} the relative density of the publicity;\textsuperscript{55} publicity of an unusual variety or intensity;\textsuperscript{56} organized campaigns designed to prejudice the defendant;\textsuperscript{57} heinous crimes;\textsuperscript{58} crimes affecting the whole community;\textsuperscript{59} and mob

\(\text{Del. 1966}\); State v. Williams, 245 Iowa 494, 62 N.W. 2d 742 (1954); State v. Ellis, 271 Minn. 345, 136 N.W.2d 384 (1965).

The rationale behind these decisions is that a mere lapse of time is sufficient to abate the prejudice. In Morgan, \textit{supra} note 16, at 334-36, the author points to the case of Blevins v. State, 108 Ga. App. 738, 134 S.E.2d 496 (1963), \textit{rev'd on other grounds}, 220 Ga. 720, 141 S.E.2d 426 (1965), where the defendant's first trial was conducted in an atmosphere of prejudicial publicity. This atmosphere had evaporated by the time of the second trial in which the defendant was acquitted. The author contends this lends support to the proposition that the tendency of prejudicial publicity to infect a trial is inversely related to its immediacy.

\textsuperscript{54} United States \textit{ex rel. Bloeth} v. Denno, 313 F.2d 364 (2d Cir.), \textit{cert. denied}, 372 U.S. 978 (1965) (prior criminal record). It must be noted, however, this was only one factor among many which led to the decision in \textit{Bloeth}. Generally the publicity of inadmissible evidence is not a sufficient ground for a change of venue. See, \textit{e.g.}, Odom v. Nash, 226 F. Supp. 855 (W.D. Mo. 1964); Pacheco v. State, 414 P.2d 100 (Nev. 1966).


The cases go further than this, however, indicating that the defendant must demand a district free of prejudice, United States v. Carper, 13 F.R.D. 483 (D.D.C. 1953), and demonstrate that his right to an impartial jury will be secured in another community. See generally United States v. Bando, 244 F.2d 833 (2d Cir.), \textit{cert. denied}, 355 U.S. 844 (1957); United States v. Mesarosh, 223 F.2d 449 (3d Cir. 1955), \textit{rev'd on other grounds}, 352 U.S. 1 (1956); Odom v. Nash, \textit{supra} note 54; Parson v. State, 222 A.2d 326 (Del. 1966).

The reasoning behind these cases is that no useful purpose would be served by changing venue when the publicity is widespread and that courts must get on with their business even though conditions are not at an optimum level. As was stated in United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), \textit{aff'd}, 341 U.S. 494 (1951).

Certainly we must spare no effort to secure an impartial panel; but those who may have in fact committed a crime cannot secure immunity because it is possible that the jurors who try them may not be exempt from the general feelings prevalent in the society in which they live; we must do as best we can with the means we have. \textit{Id.} at 226.

It has been suggested the better approach would be to allow the defendant to make this decision himself, once he has shown the facts necessary to warrant a change of venue. Note, \textit{Colum. L. Rev.}, \textit{supra} note 8, at 364 n.86. The recent case of State v. Thompson, 265 Minn. 385, 123 N.W.2d 378 (1963), takes this approach.


57 \textit{E.g.}, State v. Hillman, 42 Wash. 615, 85 Pac. 65 (1906) (\textit{ad hoc} voluntary association). \textit{But cf.}, Wood v. United States, 357 F.2d 425 (10th Cir. 1966) (allegation that police department attempted to intimidate witnesses not within the compass of \textit{Fed. R. Crim. P. 21(a)}); see, Singer v. State, 109 So. 2d 7 (Fla. 1959) (bar association offered reward for defendant's capture).


59 \textit{E.g.}, Miller v. Commonwealth, 248 Ky. 717, 59 S.W.2d 969 (1933) (bank failure); People v. Jackson, 114 App. Div. 697, 100 N.Y. Supp. 126 (1906), where to increase burial fees, defendants ordered the dismembering of bodies of friends and relatives of the veniremen.
The last factor has, more than any other, consistently resulted in a holding that the defendant is entitled to a change of venue. The reason for this is readily understandable. Mob domination is the result of group cohesion cemented in semispontaneous fashion from within rather than by a formal organizational structure from without, engaging in abnormal behavior, indicative of intense feelings of wrath or revulsion, and not amenable to reason and calm, detached reflection. In short, it is highly reliable if not conclusive proof of a general prejudicial sentiment existent in the forum.

IV. Voir Dire

The preceding section attempted to state the law governing change of venue in criminal cases. This is an extremely hazardous undertaking for basically two reasons. First, many cases are devoid of an adequate factual analysis, the decision being justified by the invocation of a formula, such as, absent an abuse of discretion, the trial court's decision must stand. Second, even where there is an adequate factual analysis, a high level of abstraction is not possible because courts do not conceive of the problem in terms of technical, sharply distinguishable concepts. Rather, each case is approached in terms of the presumption that a defendant can receive a fair and impartial trial in the particular county, the requested relief being granted only when there is a sufficient accumulation of multifarious factors that, in their totality, rebut this presumption. Although this means that the cases are confused, inconsistent, and chaotic when compared factually, it does not mean that they are devoid of any unifying principle of intelligibility.

The concept of voir dire seems to be a tolerably efficient unifying principle of intelligibility with which to examine the problem of removal in criminal cases.

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A third group of cases suggests the defendant is being protected from the prejudicial atmosphere of which the mob domination is indicative. See, e.g., Seals v. State, 208 Miss. 236, 44 So. 2d 61 (1950). Cf., People v. McKay, 37 Cal. 2d 792, 236 P.2d 145 (1951). Contra, State v. BeBee, supra.

61 This approach has not gone without criticism. It has been suggested that courts analyze prejudicial publicity in terms of six categories. They are confessions; prior criminal activity; incriminating tangible evidence; statements of persons who do not, or might not, testify; reports of proceedings from which the jury has been excluded; and miscellaneous inflammatory matter. Jaffe, The Press and the Oppressed — A Study of Prejudicial News Reporting in Criminal Cases, 56 J. Crim. L.C. & P.S. 4-7 (1965).

It has also been suggested that courts create absolute qualitative (proscribing the publication of confessions, prior criminal activity, extended official comment, etc.) and quantitative (proscribing X inches of newspaper print concerning the case, within Y months before trial) standards, the violation of which would entitle the defendant to relief as of right. Note, U. CHr. L. Rsv., supra note 16, at 525-26.
This can best be illustrated by a line of cases which stand for the proposition "that the ultimate question involved in a motion for change of venue on the ground of prejudice is whether it is possible to select a fair and impartial jury . . . ."62 This line of cases can be grouped into three categories.

First, there are those cases that contain a general statement of the proposition. "[T]he prejudice must be so great that traditional voir dire procedures . . . were unavailing to ensure a fair trial."63 "[W]e fail to see any error . . . where there has been no showing . . . that a qualified jury was not selected . . . ."64

[T]he decision of the trial court in denying [a change of venue] . . . will not be considered as cause for reversal, unless it is made to appear from the voir dire examination of the jury that the appellant may have been denied a fair trial because of bias and prejudice of the jury.65

Finally, in State v. Thompson,66 the Minnesota Supreme Court, after reviewing the trial judge’s denial of a motion for a change of venue by writ of mandamus, reversed, declaring that it was satisfied of the improbability of securing a fair and impartial jury.67

The second group of cases are those which are more attentive to the particulars of the jury selection process. Often it is noted that the trial judge was satisfied with the jury,68 or that the jury was selected with ease.69 When the record shows that difficulty was encountered in empanelling the jury, the typical response by an appellate court is to the effect that the trial judge was diligent and exhaustive in his efforts to insure the defendant a trial by an impartial jury.70 Defense counsel’s failure to make any challenges for cause71 or to continue making such challenges until met with denial72 have also been cited as reasons for upholding the trial court’s denial of a removal motion.

It is the failure to exercise all preemptory challenges, however, which presents a constantly recurring theme.73 If the ability to empanel a jury is, in fact, the ultimate question on the issue of removal, one might have expected the courts to fashion an applicable concept of waiver, arguing that by refusing to exercise all of his preemptory challenges, the defendant has declined to use the voir dire to its fullest extent and will not be heard when he seeks to invoke another protective device. Generally, this has not been done. Rather, the courts usually say that the failure to exercise preemptory challenges is a significant, though not

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64 Benefield v. State, 151 So. 2d 650, 664 (Fla. Ct. App. 1963), rev’d on other grounds, 160 So. 2d 706 (Fla. 1963).
66 265 Minn. 385, 123 N.W.2d 378 (1963).
68 United States v. Bando, 244 F.2d 833 (2d Cir.), cert. denied, 355 U.S. 844 (1957).
69 Virgin Islands v. Rivera Solis, 359 F.2d 518 (3d Cir. 1966).
dispositive, factor. There is, however, some ambiguity on this issue.

The third group of cases illustrating the strategic importance of the voir dire on the issue of a change of venue comes from the federal district courts where the normal procedure is to deny a motion for removal made before the voir dire examination, with leave to renew after the completion of the examination.

The conclusion to be drawn from an examination of this line of cases is that many courts do not conceive of removal as an independent protective device, but subordinate its role to procedures regulating the selection of the jury. Change of venue is seen as part of a hierarchical structure of protective devices which is triggered only in the event of a malfunction at an upper echelon.

There remains, however, the question of whether courts are correct in maintaining this view. It could be contended that this conception of removal cannot be justified by the typical statute or rule regulating change of venue. To conceive of removal as less than an independent remedial device is to regard it as no more than a supplement to the statutes or rules governing the selection of the jury, yet each has been treated independently by the lawmakers. If removal were meant to be a dependent, protective device one would expect to find it as the final paragraph in the particular statute or rule regulating jury selection, in language to the effect that should all else fail the defendant shall be entitled to a venue change. But in fact, this has not been done. Further, the typical statute or rule providing for removal is cast in terms of prejudice or excitement, in the minds of the inhabitants of the community, so great that the defendant cannot receive a fair trial. Thus, removal should be regarded as an independent protective device that requires inquiry into the prevailing com-


The significance attached to this factor is, presumably, that trial counsel did not consider the exercise of all preemptory challenges as necessary to insure the defendant's right to an impartial jury; his opinion is entitled to great weight. The validity of assigning such significance to the failure to exercise all preemptory challenges has been questioned. The attorney, faced with an objectionable prospective juror, may exercise a preemptory challenge only to find himself faced with a more objectionable prospect, who cannot be challenged for cause. ABA, ADVISORY COMMITTEE REPORT ON FREE PRESS AND FAIR TRIAL STANDARD RELATING TO FREE PRESS AND FAIR TRIAL 127 (tent. draft 1966). The resolution of this dilemma cannot be characterized as other than acquiescence in the lesser of two evils.


76 See, e.g., Blumenfield v. United States, 284 F.2d 46 (8th Cir. 1960), cert. denied, 365 U.S. 812 (1961).  "The ultimate question is whether it is possible to select a fair and impartial jury, and the proper occasion for such a determination is upon the voir dire." Id. at 51. Colosacco v. United States, 196 F.2d 165 (10th Cir. 1952). This is also the procedure with regard to motions for a continuance. United States v. Medlin, 353 F.2d 789 (6th Cir. 1965), cert. denied, 384 U.S. 973 (1966).

There are only two reported cases from the federal district courts in which a change of venue was granted before the voir dire examination. United States v. Parr, 17 F.R.D. 512 (S.D. Tex. 1955); United States v. Florio, 13 F.R.D. 296 (S.D.N.Y. 1952). In Florio removal was granted because the court was satisfied that an impartial jury could not be empanelled. In Parr the court made no mention of the probable inability of selecting an impartial jury.

77 An exception to this would be those cases holding the trial court abused its discretion. See note 37 infra.

78 The following discussion is hypothetical because the issue appears never to have been raised before any court.
community sentiment rather than a subordinate procedure concerned with the state of mind of individual prospective jurors.

To the contrary, it may be argued that the courts' view of removal is the valid one since the voir dire examination affords an excellent opportunity to sound out community sentiment.79 Moreover, several statutes explicitly recognize the inability to select an impartial jury as grounds for a change of venue.80 As for those provisions that are cast in terms of the prejudice in the minds of the inhabitants of the community that is so great as to deny a defendant his right to a fair and impartial jury, it may be argued that community prejudice can operate to defeat this right in only two situations, viz., when an impartial jury cannot be selected and, if selected, it would be intimidated by a dominant sentiment of prejudice in the community.81 This argument goes too far, however, if it concludes as a general proposition that the successful completion of the voir dire is fatal to a motion for a change of venue. The reason for this was best stated in Seals v. State,82 where the voir dire revealed that approximately sixty percent of the veniremen were excused because they were prejudiced against the defendant. The court said:

The requirement of the law is not satisfied by the mere empanelling of 12 men against whom no legal complaint can be made. The defendant is entitled to be tried in a county where a fair proportion of the people qualified for jury service may be used as a venire from which a jury may be secured to try his case fairly and impartially, and uninfluenced by a preponderant sentiment that he should be flung to the lions.83

Usually the "preponderant sentiment" will be evidenced by some form of mob violence or threat thereof, as was the case in Seals.84 Community prejudice, however, can express itself in more subtle forms, that are no less harmful. Situations where community prejudice is likely to exist and adversely affect an otherwise impartial jury include the small, well-knit community, where the defendant is regarded as an outsider because he has only recently become a resident of the community;85 is of a different race86 or social class;87 possesses annoying personal eccentricities;88 or, for one reason or another, the community tends to identify with the victim of the crime.89 Also dangerous is the situation where the defendant has fallen drastically in the esteem of his fellows,90 caused

80 E.g., MONT. REV. CODES ANN. § 94-6901 (1947); N.D. CENT. CODE § 29-1501 (1960); N.M. STAT. ANN. § 21-5-3 (Supp. 1965).
82 208 Miss. 236, 44 So. 2d 61 (1950).
83 Id. at 248-49, 44 So. 2d at 67.
84 See cases cited note 60 supra.
87 See Seals v. State, 208 Miss. 236, 44 So. 2d 61 (1950).
90 State v. Thompson, 265 Minn. 385, 123 N.W.2d 378 (1963).
economic loss to many of the residents of the community, or engaged in criminal activity that personally affects them.

Excessive difficulty in empanelling a jury, owing to the fact that many prospective jurors are disqualified on account of prejudice, should be sufficient grounds to entitle a defendant to a change of venue. The degree of difficulty which must be encountered will, of course, vary in direct proportion to the stringency of juror qualification tests. In the situation where a "preponderant sentiment" that would adversely affect jury independence and integrity is not of the kind that manifests itself in the disqualification of veniremen, the solution is to create independent standards regulating change of venue.

V. The Supreme Court and Change of Venue

To date, the Supreme Court has taken three different approaches to the problem of determining whether a defendant's constitutional right to a trial by an impartial jury has been violated. The first approach was adumbrated in Reynolds v. United States.

It is clear, therefore, that the court will be called upon to determine whether the nature and strength of the opinion formed [by the juror] are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried like any other issue of that character, upon the evidence. The finding of the trial court ought not to be set aside unless the error is manifest.

It was elaborated upon in United States v. Wood.

Impartiality is not a technical conception. It is a state of mind. For the ascertaining of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.

Further, this approach requires the defendant to show actual prejudice.

[I]t is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.

This approach rests upon the presumption that the members of the jury are impartial. This presumption can be overturned, however, by a sufficient accumulation of multifarious and unclassified factors, if such accumulation would lead

91 E.g., Miller v. Commonwealth, 248 Ky. 717, 59 S.W.2d 969 (1933).
93 This is apparently what the Supreme Court did in Rideau v. Louisiana, 373 U.S. 723 (1963).
94 98 U.S. 145 (1878).
95 Id. at 156.
96 299 U.S. 123 (1936).
97 Id. at 145-46.
to the conclusion that the jurors were not to be believed when they swore their ability to render a verdict based on the evidence produced at trial.

_Irvin v. Dowd_, the first Supreme Court case "to set aside a state conviction because newspaper publicity prevented a fair trial," affords an excellent opportunity to observe this technique in operation. In this case, 8 of 12 prospective members of the jury believed the defendant guilty, but after swearing that their belief would yield to the evidence produced at the trial were included on the jury. The issue was whether, in light of the surrounding circumstances, they were to be believed. Among such surrounding circumstances were the following. The entire area was saturated with newspaper, radio, and television publicity. This publicity contained, _inter alia_, accounts of Irvin's prior criminal record, announcements that he had confessed to the crimes in question, and rampant excitement and speculation on the outcome of the trial. Finally, 268 out of 430 prospective jurors were excused because they held fixed opinions as to the defendant's guilt, while an additional 102 prospective jurors entertained some belief in Irvin's guilt. The Court concluded:

[I]t is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt.

In order for Irvin's conviction to be valid under the federal constitution two things were required: an atmosphere undisturbed by a huge wave of public passion and a verdict by a jury other than one where two-thirds of the members had a belief in the defendant's guilt prior to the commencement of the trial. Although a verdict by a jury, all of whose members swear that they do not believe the defendant guilty, would not be binding on a federal court because a juror need not be taken at his word, if all twelve members of the jury in _Irvin_, in fact, did not believe the defendant guilty, Irvin's conviction would, presumably, still have been invalid because of the prejudicial atmosphere surrounding the trial. If this is so, _Irvin_ is authority for the proposition that in some circumstances a change of venue, or alternately, a continuance, is constitutionally required.

The second technique used by the Supreme Court in dealing with the problem of the impartial jury is found in _Marshall v. United States_. In this case the prosecutor sought to introduce evidence concerning the defendant's prior

100 DOWLING & GUNTER, CASES ON CONSTITUTIONAL LAW 814 (1965). In Shepherd v. Florida, 341 U.S. 50 (1951), the Court, over strong objection from Justice Jackson, chose to reverse on a narrow technical ground, rather than on the basis of the prejudicial atmosphere surrounding the trial.
103 The inconclusiveness which exists in _Irvin_ concerning this issue was not clarified in _Beck v. Washington_, 369 U.S. 541 (1962). _Beck_, the last Supreme Court decision employing the _Irvin_ technique, was distinguished from that case in the following particulars: the publicity ceased being of an inflammatory nature some time before trial; the trial judge granted all the defense's challenges for cause; and no juror admitted having a belief in the defendant's guilt prior to the commencement of the trial.
criminal record in order to counter the defense of entrapment. The evidence was ruled inadmissible because it was prejudicial. Nevertheless it was reported in the newspapers and read by seven members of the jury. The trial court, after questioning each of the seven jurors, determined that none of them would be unduly influenced by what they had read. The Supreme Court reversed the conviction, saying:

We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury throughout news accounts, . . . .

The approach taken in Marshall stands in sharp contrast to that taken in Irvin. Rather than overturn the presumption that the jurors were qualified, by an accumulation of multifarious factors, the Court focused on the nature of the publicity and reversed merely on the showing that seven members of the jury read the newspaper accounts. Thus, the standard of impartiality was measured by a sharply defined technical concept based upon the inadmissibility of the evidence and not its actual effect upon the prospective jurors.

Marshall, however, does not have much significance for the law concerning change of venue. This is because the disposition of the case was based on the Court's exercise of its supervisory power over the lower federal courts; thus, it is not binding on state courts. Also, Marshall is not applicable to the situation involving pretrial publicity.

The case of Rideau v. Louisiana marks the birth of the third technique employed by the Supreme Court in dealing with the problem of insuring an impartial jury. There, the defendant's filmed confession was televised throughout Calcasieu parish and the adjoining areas on three different occasions. Notwithstanding the fact that three of the jurors had seen the telecast, the trial judge determined that they could render an impartial verdict. In reversing, the Supreme Court held:

[W]e hold that it was a denial of due process of law to refuse the request for a change of venue. . . . [W]e do not hesitate to hold, without pausing

105 Id. at 312-13.
108 See United States v. Bowe, 360 F.2d 1 (2d Cir.), cert. denied, 385 U.S. 961 (1966). The court in Bowe held that Marshall did not apply to the pretrial publicity in issue because the time lag made it extremely unlikely that the jurors remembered it. If Bowe is authoritative, the implications of Marshall for change of venue are extremely limited. The remedy in Marshall was reversal and remand for a new trial. On remand, if the defendant could have shown that all but eleven prospective jurors had recently read the newspaper account, he might then, but not before, have successfully moved for a change of venue.
to examine a particularized transcript of the *voir dire* examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised "interview."\(^{110}\)

**Rideau** differs from *Marshall* in that the decision rests on constitutional grounds. It deals with pretrial publicity and not the admissibility of evidence. The distinction to be drawn between *Rideau* and *Irvin* is the distinction that exists between a normative judgment and an empirical judgment.\(^{111}\) In certain situations, therefore, the Supreme Court will not inquire into the *voir dire* examination or the atmosphere surrounding the trial, because there is no need to establish a nexus between the publicity and the asserted prejudice.\(^{112}\) The nexus will be presumed.

*Rideau* is the first case in which the Supreme Court said that pretrial publicity so endangered the defendant's right to be tried by an impartial jury that a change of venue was constitutionally required. There is some ambiguity, however, in the holding. The Court first said it was holding that the refusal to remove the case at Rideau's request was a denial of due process. Yet, later in the opinion it said that due process of law required a jury, none of whose members came from the community subjected to the telecast. If this means what it says, then a change of venire, would have been a constitutionally acceptable alternative to a change of venue. Thus, in those states that provide for the importation of a foreign jury,\(^{113}\) due process is broader in scope than a change of venue.

The significance of *Rideau* lies in its technique, rather than in its substantive holding. This is because the factual situation in *Rideau* is extremely limited. Its substantive holding does not seem capable of being greatly extended. The Court did not engage in any general discussion of the problem of pretrial publicity, but rather limited itself to the specific issue before it. The Court made quite clear that it regarded such use of television inimical to justice and that it was striking at the practice of televising confessions. Finally, the recent case of *Sheppard v. Maxwell*\(^{114}\) casts extreme doubt on any conclusion that a change

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\(^{110}\) *Id.* at 726-27.

\(^{111}\) (T)he Court departed from the approach it charted in ... *Irvin v. Dowd* ... where we made a careful examination of the facts in order to determine whether prejudice resulted. In *Rideau v. Louisiana* ... the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it. *Estes v. Texas*, 381 U.S. 532, 543 (1965).

\(^{112}\) "The burden of showing essential unfairness ... as a demonstrable reality," *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942), need not be undertaken when television has exposed the community "repeatedly and in depth to the spectacle of [the accused] personally confessing in detail to the crimes with which he was later to be charged." *Sheppard v. Maxwell*, 384 U.S. 333, 351-52 (1966).

It has been suggested that *Rideau* muddies the waters of clear thought. McCarthy, *Fair Trial and Prejudicial Publicity: A Need for Reform*, 17 HAST. L.J. 79, 87 (1965). Inimical to rational thought as it may be, the technique was used in *Sheppard v. Maxwell*, *supra*; *Estes v. Texas*, *supra* note 111; *Cox v. Louisiana*, 379 U.S. 559 (1965); and *Turner v. Louisiana*, 379 U.S. 466 (1965).


\(^{113}\) See note 13 *supra*.

\(^{114}\) 384 U.S. 333 (1966).
of venue is constitutionally required in cases which are distinguishable from *Rideau*. Although it is true that in *Sheppard* the Court said that "Where there is a reasonable likelihood that prejudicial news prior to the trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity,"\(^{115}\) (emphasis added) this statement must be read against its background. The federal district court granted the writ of *habeas corpus* because the state court's failure to grant Sheppard's motion for a continuance or change of venue was a denial of due process.\(^{116}\) Thus, unlike *Estes v. Texas*,\(^{117}\) the issue of prejudicial pretrial publicity was present for decision. The Court did not merely decline to base its decision on the issue of prejudicial pretrial publicity\(^ {118}\) but concluded that the pretrial publicity did not, of itself, fatally infect the trial:

> We conclude that these procedures [adoption of strict rules governing the conduct of newsmen in the courtroom; insulation of witnesses; control on the release of information to the press; warning newspapers to check the accuracy of their reporting; and warning the press of the impropriety of publicizing material not introduced at the proceedings] would have been sufficient to guarantee Sheppard a fair trial . . . . \(^ {119}\)

Thus, if *Sheppard* can be read as holding that methods short of a change of venue will, in cases unlike *Rideau*, be sufficient to meet federal constitutional requirements, *Irvin*, to the extent that it requires a change of venue to afford a criminal defendant his constitutional right to a trial by an impartial jury, is no longer good law. The weakness of any such reading of *Sheppard* is, however; the possibility that the Court concluded, *sub silentio*, that under the circumstances a change of venue would have been futile because there was no place free of prejudice to which the case could have been removed.\(^ {120}\)

In conclusion, it can be said that in no case coming from the Supreme Court has it been unambiguously held that a change of venue is coextensive with due process requirements. Further, the tone, if not the holding, of *Sheppard* is to the effect that in most cases procedures can be taken during the trial that will save a conviction from any taint of unconstitutionality.

**VI. Conclusion**

A change of venue is not, in present theory, a panacea to the problems posed by pretrial publicity. Its effectiveness depends not upon its ability to

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115 Id. at 363.
117 The issue in *Estes*, as formulated by the Court, was whether the defendant was "deprived of . . . due process by the televising and broadcasting of his trial." *Estes* v. *Texas*, 381 U.S. 532, 535 (1965).
119 Id. at 358.
120 However, in *Irvin*, the trial which was condemned had been previously removed.
prevent publicity tending to generate or nurture the growth of prejudice, but upon its ability to remove a defendant from a poisoned atmosphere. Thus, where the prejudicial publicity is widespread or of the kind likely to follow a defendant wherever he goes, change of venue is an impotent protective device. On the other hand, when the prejudicial publicity is rooted in circumstances peculiar to a particular community and draws its strength from only those circumstances, removal is indeed a most effective protective device.

An examination of the cases reveals that more often than not, removal is an inherently effective protective device. Thus, writers in the field are correct in concluding that courts have failed to use venue change to its fullest possible extent in promoting the ends of justice.

The reasons that explain this judicial hesitancy are several. Removal is capable of working an extreme dislocation in the administration of criminal justice. It is expensive and generally inconvenient, and it has excellent potential as a dilatory tactic. Further, it amounts to an admission that justice cannot be done in the forum in which the motion is made, which is a severe blow to people who pride themselves in their ability to be fair to their fellows. Finally, removal runs counter to the tradition that the administration of criminal law is primarily the concern of the community in which the crime is committed.

All of these reasons fall, of course, before a case of genuine need; this is the crux of the matter. The defendant will always argue that his situation presents a case of genuine need. The typical judicial response, in syllogistic form is: if other devices designed to protect the right to an impartial jury are effective, there is no need for a change of venue. Other devices, notably the voir dire, are effective; therefore the defendant is not entitled to a change of venue. The flaw, if any, in this syllogism is not in its form, but in the content of the middle term, which is the efficacy of the voir dire. The fact that removal is a relatively drastic remedy is sufficient justification for treating it as operationally dependent upon the efficacy of milder protective devices. However, the standards which are used to determine the efficacy of those milder protective devices are insensitive to the demands of justice; and these standards, absent the most stringent demands of policy and necessity, must be strengthened to perform the task for which they were created — justice.

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121 It seems not to have been noted that change of venue might have vast potential for use as a punitive device to prevent prejudicial publicity at the outset, rather than merely protecting a defendant from its harmful effects. It would not be baseless conjecture to predict that the Supreme Court's decision in Rideau v. Louisiana, 373 U.S. 723 (1963), effectively concluded the practice of televising defendants' confessions. If the normative judgment made in Rideau were made as to other types and forms of publicity, the technique of changing venue might constitute an effective means of curbing prejudicial publicity. It would be, however, the last act of desperate men.


124 ABA, ADVISORY COMM. REPORT ON FREE PRESS AND FAIR TRIAL, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 121 (tent. draft 1966); Austin, Prejudice and Change of Venue, 68 Dick. L. Rev. 401, 408 (1964); Jaffe, supra note 61. Of course, any estimate of the degree to which courts have declined to use removal in order to protect a criminal defendant's right to an impartial jury must be qualified to the extent that the reported cases, generally, give no indication of the number of times in which change of venue was granted.

125 The viability of this tradition in the modern mass-urban community is somewhat questionable.