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The Sixth Amendment to the United States Constitution entitles the accused "to a speedy and public trial, by an *impartial* jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."[1] Impartiality, the essence of the sixth amendment, is recognized by all states. Each state is obligated to empanel jurors devoid of any unalterable preconceived notions, more specifically, prejudice as to the guilt or innocence of the accused.[2] If the state cannot provide the required impartiality, the defendant can waive his right to a local trial and ask for a continuance or request a change of venue.

> The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a *prejudice* against the defendant that he cannot obtain a fair and impartial trial in that district or division.[3]

Prejudice as generally defined is "a feeling, favorable or unfavorable, toward a person or thing prior to, or not based on, actual experience."[4] Since unfavorable feelings toward the accused[5] afford the basis for change of venue, prejudice can be defined for the purposes of this Article as "thinking ill of others without sufficient warrant."[6]

The origin of this prejudice is the commission of the criminal act, manifested through the news media and mob demonstrations. Ultimately, prejudice enters the courtroom through the members of the jury. It is the purpose of this Article to trace prejudice from the commission of the criminal act to its end—the courtroom, and analyze its application by the courts to the sixth amendment and change of venue.

THE CRIMINAL ACT AND COMMUNITY STATUS

As a rule the accused will determine the degree of adverse community feeling that is directed toward him. The creation of such prejudice can be

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1. U.S. CONST., amend. VI. (Emphasis added.)

2. The existence of prejudice against the prosecution will not be discussed in this Article. Although courts have granted the prosecution a change of venue when the accused was favored in some way, most courts hold contra. PUTTKAMMER, ADMINISTRATION OF CRIMINAL LAW 161 (1953).

3. FED. R. CRIM. P. 21(a). (Emphasis added.)

4. ALLPORT, THE NATURE OF PREJUDICE 7 (1954) [hereinafter cited as ALLPORT].

5. See note 2, *supra*.

6. ALLPORT 7. Prejudice must not be confused with prejudgment. Prejudgment is flexible and subject to change upon exposure, while prejdice is resistant to all evidence. "Prejudgments become prejudices only if they are not reversible when exposed to new knowledge." *Id.* at 9.

traced to two factors—an unordinary criminal act, and a perpetrator with qualities unique to the community. Prejudice results from the commission of a serious crime by a member of a group held in community disfavor.

Strong emotional feelings are generated by crimes of a nature that would arouse a "state of feeling which becomes a contagion upon mere recital of the circumstances."[7] Two crimes of such a nature, murder and rape, are the type of crimes most frequently involved when a court grants a change of venue.[8] However, a heinous crime alone does not necessarily create prejudice to a degree where the court is forced to shift the locus of the trial. It is the factors peculiar to the accused, as well as the crime, that may generate the prejudice courts will recognize in changing venue. The stigma attached to being a member of a minority group,[9] one's general reputation[10] or family[11] are the type of personal factors that affect a community's feelings.

Racial animosity has been expressly recognized by courts as having tremendous emotional impact on community thought.[12] The crimes of members of a minority group do not have to be as serious as murder and rape in order to produce prejudice. In *People v. Lucas*[13] change of venue was granted to a Negro accused of practicing medicine without a license. The court in granting the motion referred to the defendant's ethnic background as attracting "unusual public attention to the charges against him."[14] Thus, the community status of a perpetrator is most important in the amount of publicity and prejudice resulting from the crime.

PUBLICITY

Prejudicial publicity[15] is the most frequent ground asserted for change of venue.[16] The more exposed the case, the greater the possibility of the juror crystalizing mental impressions into a fixed belief of either guilt or innocence.

7. People v. Agnew, 77 Cal. App. 2d 748, 759, 176 P.2d 724, 731 (1947).

8. The following involved *murder*: State v. Thompson, 266 Minn. 385, 123 N.W.2d 378 (1963); People v. McKay, 37 Cal. 2d 792, 236 P.2d 145 (1951); People v. Suesser, 132 Cal. 631, 64 Pac. 1095 (1901); People v. Yockum, 53 Cal. 566 (1879); People v. Lee, 5 Cal. 353 (1855). The following involved *rape*: Rawls v. State, 86 Okla. Crim. 119, 190 P.2d 159 (1948); Quinn v. State, 34 Okla. Crim. 179, 16 P.2d 591 (1932); People v. Mabrier, 33 Cal. App. 598, 165 Pac. 1044 (1917).

9. People v. Lucas, 131 Misc. 664, 228 N.Y. Supp. 31 (1928).

10. People v. McKay, 37 Cal. 2d 792, 236 P.2d 145 (1951).

11. Smith v. Commonwealth, 108 Ky. 53, 55 S.W. 718 (1900).

12. People v. Lucas, 131 Misc. 664, 228 N.Y. Supp. 31 (1928).

13. *Ibid.*

14. *Id.* at 665, 228 N.Y. Supp. at 32.

15. Publicity, for purposes of this Article, encompasses every form of communication.

16. Publicity may be considered on a motion for change of venue, and may in itself be sufficient, if the court is satisfied that it has created enough prejudice in the area rendering it improbable that the defendant can have a fair and impartial trial. See, State v. Thompson, 266 Minn. 385, 123 N.W.2d 378 (1963); Commonwealth v. Mainer, 26 D. & C.2d 540 (1961); People v. Lucas, 131 Misc. 664, 228 N.Y. Supp. 31 (1928); People v. Williams, 106 Misc. 65, 173 N.Y. Supp. 883 (1919).

However conscientious members of the jury may be, it cannot reasonably be concluded that they could so divorce themselves from the present surroundings and publicity to be fair and impartial.[17] Yet such contentions standing alone are rejected by the courts.[18] The rationale of the courts in concluding that no prejudicial publicity exists is either based on the Universal Publicity Rule[19] or the Ephemeral Impression Rule.[20]

The Universal Publicity Rule

Where the accused and the circumstances surrounding the case are universally known through nationwide publicity, a change of venue is denied, for there is no community unexposed to the publicity. This theory the writer designates as the Universal Publicity Rule.

In *Commonwealth v. Sacco*[21] the rationale of the Universal Publicity Rule is clearly illustrated. On September 11, 1920 two Italian immigrants were indicted for robbery and murder of two plant guards in South Braintree, near Boston, Massachusetts.[22] At the time of the indictment, a great deal of publicity was being given to members of minority groups due to the Palmer raids[23] and the "Bolshevik Scare."[24] Thus, Sacco and Vanzetti were not only characterized as perpetrators of a heinous crime, but also as members of a minority group. This nationwide exposure was prior to their trial, making it impossible for the two accused immigrants to obtain a jury devoid of prejudice anywhere in the United States.[25] Consequently, there was no change of venue.

The case of *State v. Hauptmann*[26] is another example of nationwide publicity negating the possibility of a change of venue. Bruno Hauptmann was

17. See, People v. McKay, 37 Cal. 2d 792, 800, 236 P.2d 145, 151 (1951).

18. The courts' general refusal to consider the effects of publicity is reflected by Justice Campbell's remark: "If the courts have to be concerned about newspaper coverage of trials, the authorities might just as well not indict any more known criminals." Saturday Evening Post, Nov. 24, 1962, p. 36. *Contra*, Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961).

19. This terminology is of the writer's designation. It reflects one major approach taken by the courts in discussing prejudicial publicity.

20. *Ibid.*

21. 259 Mass. 128, 156 N.E. 57 (1927).

22. See WECKS, COMMONWEALTH v. SACCO AND VANZETTI (1958) for a summary of the circumstances surrounding the arrest, trial and conviction of Sacco and Vanzetti.

23. "Nation-wide Plot to Kill High Officials On Red May Day Revealed By Palmer." N.Y. Times, April 30, 1920, p. 1, col. 8.

24. There is public disquietude already, and even alarm, at the large latitude and freedom allowed to Bolshevist and I.W.W. agitators and their aiders and abettors. They have been allowed to preach their doctrines openly. In various parts of the country they have instigated strikes and labor disorders.

N.Y. Times, June 4, 1919, p. 14, col. 2. See generally POST, THE DEPORTATIONS DELIRIUM OF NINETEEN-TWENTY (1923).

25. See, FRANKFURTER, THE CASE OF SACCO AND VANZETTI (1927).

26. 115 N.J.L. 412, 180 Atl. 809 (1935).

indicted for the kidnapping and murder of the Lindbergh boy. Again the publicity was so extensive that the facts of the crime were known in every jurisdiction. "Long before the trial there was a perfect riot of lurid publicity."[27]

The trials of prominent labor leaders[28] and accused communists[29] are also within the rationale of the Universal Publicity Rule, for courts recognize that labor conflicts and communist activity, as well as the participants are known to all citizens.[30] Judge Staley specifically recognized the rationale of the Universal Publicity Rule when he said: "there is no reason to believe that the general community feeling about communism in the Pittsburgh area was significantly different from that which may have permeated the entire country."[31] Application of the Universal Publicity Rule, however, admits that the existence of widespread news media has suppressed the utility of change of venue.[32]

The Ephemeral Impression Rule

The Ephemeral Impression Rule is based on the principle that the life of a news story is short, and is crowded out of the recipient's mind by a succeeding story.[33] This principle assumes the theory that any impression a story may initially have made on a juror's mind is obliviated by a subsequent news story of equal impact.[34] This line of reasoning is the most frequently applied by the courts in denying change of venue.[35]

The rationale of this rule in effect admits that prospective jurors are exposed to inflammatory material, and does not deny that an opinion has been formed. Yet, the jurors are not considered to be tainted with prejudice as long as they are receptive to all evidence, and can listen with an open mind. Application of this rule depends, however, on whether the jurors have formed a prejudgment or a prejudice.[36] Where the latter exists the Ephemeral Impression Rule is not applicable.

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27. Note, 24 MINN. L. REV. 453, 462 (1939).
28. United States v. Hoffa, 156 F. Supp. 495 (S.D.N.Y. 1957).
29. United States v. Mesarosh, 223 F.2d 449 (3d Cir. 1949).
30. Publicity in this area is similar to the news exposure accorded other news-making people. *Id.* at 458.
31. *Ibid.*
32. See, Note, 63 HARV. L. REV. 840 (1950).
33. See, People v. Sollazzo, 205 Misc. 691, 106 N.Y.S.2d 600 (1951). Most perpetrators of an emotion-evoking criminal act are unknown to the public, resulting in an absence of background publicity. The publicity accorded to these criminal cases is of a short, though perhaps intense, duration.
34. "Everyone knows the ephemeral nature of impressions derived from reading the public prints. The community is fed on horrors daily, almost hourly, and one sensation crowds out the previous one." People v. Brindell, 194 App. Div. 776, 780-81, 185 N. Y.Supp. 533, 536 (1921).
35. People v. Sollazzo, 205 Misc. 691, 106 N.Y.S.2d 600 (1951); People v. Brindell, *supra* note 34.
36. See note 6, *supra.*

COMMUNITY DEMONSTRATIONS

Although publicity is an indicia of prejudice, the clearest and most violent manifestation of local prejudice is mob action.[37] A mob is not a rational body, for once unleashed its effects are not directed towards a specific goal. Mr. Justice Holmes accurately described the impact of a mob on the court:

> The court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result. The counsel did not venture to demand delay or a change of venue, to challenge a juryman, or to ask for separate trials. He had no preliminary consultation with the accused, called no witnesses or the defence [*sic*], although they could have been produced, and did not put the defendants on the stand . . . . According to the allegation and affidavits there never was a chance for the petitioners to be acquitted; no juryman could have voted for an acquittal and continued to live in Phillips County and if any prisoner by any chance had been acquitted by a jury he could not have escaped the mob.[38]

Mob demonstrations provide the courts with an obvious indicia of prejudice. When the personal safety of the accused is jeopardized or his home is exposed and threatened by mob action, the courts will grant a change of venue.[39] Although an actual attempt on the defendant's life is not necessary, the threat must exist at the time of the trial before a change of venue will be granted.[40] Thus, any indications of the "probability of danger of lynching, or other violence"[41] will effectuate a change of venue.[42] The physical safety of the accused is paramount. Courts emphasize the right to safety by holding that the presence of reasonable doubt as to the defendant's well-being should be resolved in his favor.[43]

The main thrust of community demonstrations are directed toward the perpetrator. In most demonstrations, however, there is an excess of feeling that causes an overflow of local prejudice. This overflow falls upon the defendant's relatives and associates. In *Moore v. Dempsey*,[44] the Court took cognizance of, and condemned, the existence of the "overflow," for the trial court is no longer able to provide an atmosphere devoid of prejudice when the com-

37. See, DAHLKE, *Race and Minority Riots—A Study in the Typology of Violence*, SOCIAL FORCES 419 (1952).
38. Moore v. Dempsey, 261 U.S. 86, 89-90 (1923).
39. Pinkston v. State, 80 Ga. App. 268, 55 S.E.2d 877 (1949).
40. See, *ibid.*
41. Ga. Code Ann. § 27-1201 (Supp. 1963); Crane v. State, 94 Ga. App. 63, 64, 93 S.E.2d 667, 668 (1956).
42. Pinkston v. State, 80 Ga. App. 268, 55 S.E.2d 877 (1949); see, Spires v. State, 85 Ga. App. 241, 68 S.E.2d 622 (1952).
43. Pinkston v. State, *supra* note 42, at 271; 55 S.E.2d at 879.
44. 261 U.S. 86 (1923).

munity transfers its antipathy from the defendant to members of his family or race.[45] Generally speaking, this concept of transferred prejudice is restricted to racially inspired mob action.[46]

Evidence of Prejudice in the Courtroom

The amounts of prejudice that may exist among the jurors is evidenced upon examination on voir dire.[47] There is no rule as to the number of jurors that must be disqualified before enough prejudice is considered to exist to justify a change of venue.[48] It does appear from the cases reviewed, however, that if all the defense preemptories have been exhausted and at least 75% of the potential jurors have been excused enough prejudice will be considered existing to allow a change of venue.[49]

The public opinion surveys are another method by which the existence of prejudice is determined. The purpose of the survey is to determine how a specific group feels about a given condition or object. The most prominent use of these surveys has been in the political[50] and manufacturing[51] areas. The strongest advocates contend that such a survey of public attitude can be gauged with near scientific accuracy. The fact that many large corporations are willing to invest large sums of money in projects whose success is predicted by surveys substantiates this contention.[52]

The courts have utilized opinion surveys as evidence for the past 43 years, predominately in the areas of trademarks and patents.[53] An example is the sidewalk poll taken by Judge Frank to determine the impression made by a product on prospective teenage customers.[54] The courts are reluctant to use a polling device. however, because of the criticism of being unscientific[55] and illogical to the hearsay rule.[56] The most notable example of the attempted use

45. See, *ibid.*

46. 5 U.S. Comm. on Civil Rights Report 29-67 (1961).

47. "Preliminary examination which the court may make of one presented as a witness or juror where his interest is objected to." Black, Law Dictionary (4th ed. 1951).

48. The courts will approach the problem negatively, however, and decide what does not constitute prejudice. United States v. Bando, 244 F.2d 833 (2d Cir. 1957) (disqualification of one-third of the jurors on voir dire was not sufficient); Rakes v. United States, 169 F.2d 739 (4th Cir. 1948) (disqualification of one-half on voir dire was not sufficient).

49. See, *e.g.*, People v. McKay, 37 Cal. 2d 792, 236 P.2d 145 (1947).

50. White, The Making of the President: 1960 (1961).

51. Ferber and Verdoorn, Research Methods In Economics and Business (1962).

52. *Ibid.*

53. Coca-Cola Co. v. Chero-Cola Co., 273 Fed. 755 (D.C. Cir. 1921). *Contra*, Citizens Wholesale Supply Co. v. Downing, 107 Ohio St. 422, 140 N.E. 683 (1923).

54. Triangle Publications, Inc. v. Rohrlick, 167 F.2d 969, 976 (2d Cir. 1948).

55. Sorensen and Sorensen, *The Admissibility and Use of Opinion Research Evidence*, 28 N.Y.U.L. Rev. 1213 (1953).

56. Cases holding that opinion research as evidence is inadmissible on the basis of

of opinion surveys occurred in *Irwin v. State*,[57] where a Negro was accused of raping[58] a white woman.[59] The defense attempted to show through a public opinion poll that prejudice against the accused was so intense, a fair trial could not be obtained in that jurisdiction. In order to get this evidence before the court, a specialist[60] testified as to the method used in conducting the survey.[61] The court, not satisfied with the explanation, refused to admit such testimony.[62] The reaction of the court in *Irwin* represents the essence of the hearsay rule, holding opinion surveys inadmissible. The Florida Supreme Court said:

> As the appellant points out the establishment of adverse sentiment of such degree as to indicate that the victim of it cannot receive a fair trial is informal and largely based upon hearsay. But the result of the poll taken in this case went far beyond the latitude allowed by the statute and established procedure. Neither the witness, the one who had general supervision nor the one who served as field representative, pretended even to have made any interviews on which he could base an opinion as to facts which would support an application for change of venue. Any information he could give on the witness stand, would in our opinion, have amounted to hearsay based upon hearsay. . . . [I]t seems to us that there is a vast difference between that sort of inquiry [polls as to a household product] and a demonstration to the court of some overpowering sentiment that would so penetrate the thought of the community as to indicate that twelve persons of the integrity and character to fit them to serve on juries could not be found who could take a solemn oath to decide a case upon legal evidence, and abide by the obligation.[63]

Nevertheless, it is felt that hearsay offers no barriers if the results of the polls

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hearsay: Irwin v. State, 66 So. 2d 288 (Fla. 1953); Proctor and Gamble Co. v. Sweets Laboratories, Inc., 53 U.S.P.Q. 67, *aff'd*, 137 F.2d 365 (C.C.P.A. 1943); Elgin Nat. Watch Co. v. Elgin Clock Co., 26 F.2d 376 (D. Del. 1928). *Contra*, People v. Franklin Nat. Bank, 200 Misc. 557, 105 N.Y.S.2d 81 (Sup. Ct. 1951), *rev'd*, 281 App. Div. 757, 118 N.Y.S.2d 210 (1953); United States v. 88 Cases, 187 F.2d 967 (3d Cir.), *cert. denied*, 342 U.S. 861 (1951); S. C. Johnson & Son v. Johnson, 28 F. Supp. 744 (W.D.N.Y. 1939), *modified*, 116 F.2d 427 (2d Cir. 1940).

57. 66 So. 2d 288 (Fla. 1953).

58. The accused and another had been convicted of rape in Shepard v. State, 46 So. 2d 880 (Fla.), *rev'd*, 341 U.S. 50 (1951). This conviction was reversed by the Supreme Court because Negroes had been excluded from the grand jury that returned the indictment.

59. These facts exemplify the classic community prejudicial features.

60. Dr. Julian Woodward, a research executive with the Elmo Roper Research and Public Opinion Organization.

61. Original questions were prepared in New York City and tested in the Jacksonville, Fla. vicinity. After preliminary interviewers had tested the first form, the forms were returned to New York for revision. Eventually they were used in four counties—Marion County, the place designated for the second trial, Lake County, where the crime was alleged to have been committed and in Gadsen and Jackson Counties. 66 So. 2d at 291.

62. *Id.* at 291-92.

63. *Ibid.*

are offered as proof of the existence, as opposed to the truth of the opinion, for the latter is inadmissible.

Another indicia of community feeling is the affidavit. Use is made of affidavits by individuals "whose knowledge of the tenor of feeling"[64] of public sentiment qualifies them to gauge such feeling as it relates to one of the litigants. Courts will usually disregard affidavits if they are uncorroborated and the state rebuts. To the contrary, absolute inability to obtain affidavits due to the intense ill feeling of the community may afford a basis for a change of venue.[65] Thus, the defendant can get a change of venue if he presents numerous affidavits, meets with no rebuttal from the state, and disqualifies at least 100 potential jurors on voir dire.

CONCLUSION

In analyzing the courts' thinking on prejudice and change of venue, three factors have been considered: the commission of a heinous crime, the community status of the accused and the existence of widespread adverse publicity. It is discernible from this analysis that anyone of these factors standing alone will not have sufficient impact on the community prejudice level to effect a change of venue. The addition of violence in the form of mob action to any of the above-mentioned factors will provide the courts with justification to grant a change of venue. However, even with obvious mob action the courts have manifested a strong reluctance to move the trial. The source of this reluctance is contained in the inherent refusal to admit that their particular court cannot provide an impartial forum, *i.e.*, a refusal to admit that justice is absent in their jurisdiction.

The tenacity with which courts hold onto their sovereignty means that prejudice must exist as a *certainty* before change of venue will be granted. This requirement of certainty implies that mob action is essential before there will be a change of venue. Yet, mob action is a step beyond prejudice, for the latter involves a degree of mental conflict while the former is physical force, devoid of any reason.

It is clear that no mathematical equation or judicial barometer can be devised to determine the existence of prejudice in the community. Nevertheless, it is submitted that the emphasis should be placed on the *probability* of prejudice existing, *i.e.*, more attention should be given to the effect of prior publicity and affidavits. And in considering the jurors' responses to questions on voir dire, a subjective approach should be taken. The courts should recognize that "jurors themselves are incapable of knowing the effect which prejudicial matters might have upon their unconscious minds."[66]

64. Note, 54 HARV. L. REV. 679, 681 (1941).
65. See, People v. McKay, 77 Cal. App. 2d 748, 176 P.2d 724 (1947).
66. People v. Hryciuk, 5 Ill. 2d 176, 184, 125 N.E.2d 61, 65 (1954).