Department of Justice

ADVANCE
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"FREE PRESS AND FAIR TRIAL"

AN ADDRESS BY ATTORNEY GENERAL NICHOLAS deB. KATZENBACH

AMERICAN SOCIETY OF NEWSPAPER EDITORS

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I thank you for your welcome today, even though I come to talk about a topic on which lawyers and editors have done more talking, for a longer time, with less result, than perhaps any other: free press vs. fair trial. I hope, however, that recently, we have begun to approach the problem reasonably.

The American Bar Association already has established a distinguished special advisory committee on this subject, chaired by Justice Paul C. Reardon of the Supreme Judicial Court of Massachusetts. The American Newspaper Publishers Association, the Associated Press Managing Editors, and your organization, have also devoted considerable attention to it.

All these undertakings are motivated by the same recognition once stated by Benjamin McKelway, the distinguished editorial chairman of the Washington Evening Star, that, "without a free press fair trials would be impossible and without fair trials a free press would be impossible."

It is in that spirit that I come here today -- in the spirit that as rational, civilized men, our interests may sometimes be competing, but they do not need to be incompatible.

This is a need for which we have particular understanding in the Department of Justice. The same differences which separate you and the bar are the same arguments which we must reconcile within a single agency. As prosecutors, we have a duty to help insure a fair trial for every defendant. As public officials, we are, in my opinion, at all times publicly accountable as to the wisdom and effectiveness of our law enforcement efforts.

As a practical matter, I believe the Department of Justice has reconciled these responsibilities in the past. The increasing attention given to this topic, however, following the Warren Commission Report and other developments, has prompted requests from a number of Department officials for more explicit guidance as to how to strike the balance.

After six months of the most painstaking study and discussion, we have now drawn up a statement of policy to provide such guidance to be issued this morning.

The policies in this statement represent the same policies, generally, now observed by the Department. We articulate them now because I believe it is our responsibility to see that the balance is struck according to standards that are fair, consistent, and uniform in every office of the Department throughout the country.

We do not believe these policies are conclusive; they do not attempt to deal with local problems. Further, the policies are directed to personnel of the Department of Justice, not to the press. Inescapably, however, they have a bearing on the press and you are, thus, entitled to know both what we believe our responsibilities to be and to what extent we have taken into account the needs of the press. Let me thus describe our statement of policy and the considerations which underlie it.

I.

I believe our first responsibility, as officials of government, is to recognize that we represent the people as a Department of Justice, and not merely as a department of investigation and prosecution. Vigorous investigation and prosecution are not enough. The affected individual, the judiciary, and the public all must be assured that each case is handled with a due sense of justice.

Second, we must insure that none of our actions as individuals will unduly affect a defendant's opportunity to secure a fair and impartial jury. A federal charge demonstrates our conclusion of probable cause that the accused has committed the crime charged. This belief receives the confirmation of a commissioner or at least a majority of a grand jury. But under our system, the defendant is still presumed innocent until a jury determines his guilt beyond a reasonable doubt.

Our third responsibility in this field is to place the possible dangers of prejudice in proper perspective. A very high percentage of federal defendants plead guilty. In fiscal 1964, only 12 1/2 percent of defendants in federal courts were eventually tried, and only 8 percent were tried by a jury.

We have legal safeguards to reject potential jurors who may be influenced. There are other safeguards against influences on the jury once it is selected. Even so, there is no empirical basis for knowing if these safeguards are sufficient. We do not know how many jurors will remember, even subconsciously, what they may have read or heard about the defendant. But it is our duty, in any event, to avoid compounding such influences.

These are rarely federal problems. But Supreme Court decisions illustrate what pretrial publicity can do to defeat the jury system in state cases. One conviction, for example, was over-turned because pretrial publicity was so inflammatory that 370 of 430 jury panel members believed the defendant to be guilty. Even of the twelve jurors eventually chosen, eight thought the man to be guilty before the trial began.

In another case in which the conviction was reversed, a television film of a defendant confessing to the sheriff was broadcast to fully two-thirds of the county's population.

These are obviously extreme examples. But it is the extreme examples which provide such fertile soil for appellate court eloquence. The cases in which prejudice is less blatant can turn out every bit as unjustly -- without the prejudice ever being discovered.

Because courts rectify extreme cases does not mean justice should not be sought in cases involving less dramatic prejudice. Because the number of cases which reach trial is small does not mean justice should be measured by statistics. We can hardly condone injustices on the grounds that they are infrequent.

Finally, we believe it is our responsibility as a public agency to be publicly accountable. Public interest requires public information, and I believe, within the limits of our other obligations as servants of justice, we have a duty to make it available.

These are considerations to which the Department owes a duty. We believe, likewise, that it is necessary for us to take into account the needs and considerations of the press.

II.

The first consideration, I believe, is that it is not for us to regulate the conduct or the content of the press. We, whether in the Department or in the bar, are hardly the exclusive keepers of the keys to the kingdom of justice.

The proper administration of justice is a responsibility in which we all share -- public officials, editors, and citizens. For us to try to impose our judgment on yours denies your share in that responsibility. While we may, out of valid concern, seek to inform your judgment, it is not for us to override it.

Second, I believe there is too little emphasis on the constructive role played by the press in the administration of justice. Too often, the press argument is stated in platitudes -- "the right to know" or "freedom of the press." These phrases are hardly meaningless. Yet in the gloss of generality, they fail to match the urgency of tangible instances of injustice through publicity.

There is no way to produce statistics reflecting the public interest -- to show for example, how many citizens woke up to the crime problem or the need for vigilant law enforcement because they read a story in column 2, page 6, on April 16. But just because it is impossible to calibrate the impact of information, that impact must be neither minimized nor ignored.

Third, I know of no editor who opposes fair trials; I know of no lawyer who opposes public disclosure. Many of our differences of opinion exist not because of principle, but because of timing.

If the orientation of the press were to the time of conviction rather than the time of arrest, our difficulties would disappear. But that orientation is not within our control. It is a fact of life that news is when news happens; it is not something held in suspension.

What we must accept, therefore, is that if there are valid law enforcement aims to be served by making disclosures in a case, it is at arrest that they are news, it is then that they receive maximum attention, and it is then that the necessary questions can most effectively be raised in the public mind.

It is with these considerations in mind, both with respect to our responsibilities and yours, that we reviewed and evaluated the specific types of pretrial information about criminal defendants. It is my belief that it is in a discussion of specifics and not a weary rehearsal of general arguments that we can now begin to approach our problems rationally.

III.

Pretrial information can be broken down into three categories -- information which we should unquestionably make available, information so deeply prejudicial that it should not be provided by the Government, and third -- information which some think to be prejudicial, but which may also significantly serve the public interest.

It is relatively uncomplicated to isolate the first two categories -- the yes and the no. In the first category, we believe the following types of information ought, without question, to be made available:

1. We should identify a defendant not only as to name, but wherever possible give his age, address, occupation, marital status, and other general background information.

2. The substance or text of a charge -- such as a complaint or indictment, should be freely available. It is, after all, a public record, and it is, normally, a source of at least a skeletal description of the offense charged.

3. We should identify the arresting agency and, if relevant, disclose the length of the investigation preceding the arrest.

4. Limitations should not apply to the release of information necessary to enlist public assistance in apprehending fugitives from justice.

5. We may make available photographs of a defendant -- but only if a valid law enforcement function is thereby served. And we should not prevent the photographing of defendants when they are in public places -- but neither should we encourage such pictures, or pose prisoners.

The second category includes information so plainly prejudicial that not even the needs of a free press should override it:

1. The single most damaging aspect of pretrial publicity is the publication of defendants' confessions or admissions. This prejudice is so great and so well understood among editors that I know many flatly refuse to publish confessions, even if volunteered by law enforcement authorities. We believe that no such confessions -- or even the fact that a confession has been made -- should be provided by the Department of Justice.

2. It is undesirable to have a prosecutor editorialize in any release of information. There is substantial risk of prejudice, with no counterbalancing reason of public interest, when a law enforcement official characterizes a defendant as, for example, a "mad dog sex killer"; or characterizes evidence as "an open and shut case"; or publicly appraises the credibility of a witness. Such conduct has no proper place in the fair administration of justice.

3. Finally, we do not believe Department personnel should refer to investigative procedures such as fingerprint, polygraph, ballistics, or laboratory tests. Such demonstrative facts constitute evidence which should be presented publicly for the first time to the trial jury in a court of law. Disclosure of such matters to the public before trial can be deeply prejudicial without any significant addition to the public's need to be informed.

IV.

I have talked so far about two categories of pretrial publicity -- the yes and the no. To achieve a balance in the third category is a task of extreme difficulty.

For example, one type of such information concerns the circumstances of arrest -- what was seized, for example; or was the suspect armed; or did he try to flee?

This information might be decidedly relevant to the offense charged -- such as a packet of number slips found in the office of an interstate gambling suspect. But if the search and seizure were declared improper by the court, this evidence would not be admissible at trial and a potential juror could learn of it only through publication.

There are those who therefore believe, with sincerity and logic, that such information should under no circumstances be disclosed to the press. Since the seized material may not be admissible, the argument goes, no chance should be taken that a potential juror will become aware of the information before trial.

Further, it is said, even if the information is admissible, a juror's only exposure to these facts should be through court procedures established to insure fairness. Publication should come only after trial, this argument concludes, when any possibility of prejudice has passed.

This argument clearly has some force. However, it does not recognize many considerations with which we in the Department of Justice must deal. The public must be informed as to the extent of the crime problem as quickly as possible. The public must be informed whether or not law enforcement is proceeding justly and efficiently. And the public must be protected from further criminal acts.

An announcement that a man has been arrested on a forged securities charge tells little. But considerable public interest is served by disclosing, as well that millions of dollars of the securities were seized

at the time of arrest; that others were sold to unknown victims; and that still others are loose somewhere in the marketplace.

True, the release of such information might raise dangers of prejudice, but we have legal safeguards to protect against this possibility. Meanwhile, the public interest is overriding and must be served.

Under the present press system, we can serve that function only at the time of arrest. If this is one of the ninety-two percent of cases that do not go to jury trial, the possibility of prejudice disappears. If the trial is a year or more after arrest, memories -- and the problems of prejudice -- will have faded. If any jury panel member happens to recall the news item and cannot serve impartially, the system provides for his rejection.

We therefore feel that, generally, our duty justifies the release of information pertaining to the circumstances surrounding an arrest.

There is a second specific type of information for which we found the balance even harder to strike: the disclosure of a defendant's criminal record.

Virtually all existing proposals designed to cope with the problems of pretrial publicity list, as one of their chief requirements, a flat prohibition against any such disclosure. The potential impact of such a disclosure cannot be doubted. Unless a defendant takes the stand, his criminal record generally is not admissible and jurors could not know it, unless they read it in the newspapers.

I do not believe any of us would argue that there is no prejudice in publishing, as a major paper did recently, a three-column sidebar story on a murder arrest, featuring a numered police mug shot of the suspect, together with a list of 20 prior arrests, most of which had resulted in no prosecution. It is such stories which make understandable the view of many lawyers that prior records should not be released.

But I believe we must acknowledge that there is another side to the argument. The Department of Justice administers much of the federal correctional system. If an arrested suspect has been convicted of the same crime four times previously, that fact may be vivid indication that something went wrong in the law enforcement or correctional process after the prior convictions.

Public scrutiny requires information as to what kinds of people are becoming involved in the criminal process. Is the problem one of the first offenders or repeaters? Does the arrest of a repeated offender result in speedy trial -- or in one continuance after another? Was there undue leniency in prior treatment? Is the arrest mere harassment of a prior offender? These are social questions to which the public has a right, and even a duty, to consider.

In any event, the underlying issue of disclosure is hardly one of principle. Convictions are a matter of public record to any reporter with the time to consult the offices of a number of court clerks. For the Department of Justice to provide them, from our records, is a matter of accuracy and convenience, not principle.

It is a matter of principle, however, whether the prosecutor flaunts a criminal record by volunteering it in a press release or other statement. Indeed, it seems to me that the Government's responsibility is to be as circumspect as possible in the disclosure of criminal record.

Consequently, after the most searching debate, we have concluded that--within certain limitations--prior criminal conviction records should continue to be made available.

The limitations are simple and, I believe, reasonable. We will not volunteer such information in a press release or public statement, but will respond to specific, legitimate inquiries. We do not believe it is fair for us to disclose elements of the record unless we can also show disposition, and, therefore, we will disclose only convictions. And finally, we believe we should be called on to supply only the prior records of the federal offenses for which we keep formal records, except in unusual circumstances. Again, let me make it clear, these limitations do not apply to information about fugitives.

Nevertheless, there remains substantial feeling within the Department that even this solution to the question of disclosing prior records is too permissive. We will draw upon the ABA and other pending studies in our continued analysis of this problem and we hope that you, as leading representatives of the press, will cooperate to the fullest extent in requesting and publishing such information only when you believe a significant public purpose is served thereby.

V.

No matter how carefully we may frame policies, and no matter how scrupulously representatives of the Department of Justice may behave, the impact of the balance we have tried to strike depends on how the press conceives its responsibility in this field.

For us to say we will not disclose confessions does not bar you from obtaining them from other sources. The question for your judgment is whether you will publish them, automatically, as a matter of course -- whether you will seek to strike a balance in deciding between possibly prejudicial information and the public interest.

Similarly, for us to say we will disclose prior conviction records at the time of arrest does not bar you from republishing them during the critical period just before and during the trial, or from reporting matters in trial from which the jury is specifically excluded. The obvious question to consider is, will the public interest be served? It is in that interest, after all that each of us serves.

"The First Amendment and Sixth Amendment," one press commentator has observed, "are on collision course all over the country." For my part, I hope we can demonstrate that there is room in our Constitution for both the First Amendment and the Sixth. Certainly there must be room in our thinking for a balance.

Or, to put it another way, in the words of the Florida Supreme Court:

> "There is little justification for a running fight between the courts and the press on this question of a fair trial and a free press. Both are basic and sacred concepts in our system of government. Both are in one constitution and govern one nation of millions of individuals.
>
> "All that is required to preserve both is for the press and the courts to place the emphasis on the Constitution instead of themselves."