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The Implications of the American Bar Association Advisory Committee Recommendations for Police Administration

William H. T. Smith

Introduction

Upon looking into the problem of fair trial and free press, I noted several articles that referred to the subject as “Free Press versus Fair Trial.” Rather than stressing one at the expense of the other, I believe it imperative that we have both a free press and a fair trial; and after reading the ABA Report, I am not sure that the problem is as broad in scope as we are led to believe. I do not believe that the number of cases in which press information has prevented a fair trial has been sufficiently documented to warrant the inference that it is a pervasive problem, despite some of the more notorious examples that have been exposed. In order to evaluate realistically the scope of the problem of press influence on a fair trial, it must be noted that most criminal cases are decided prior to trial. For example, in New York State less than ten percent of the criminal defendants ever proceed to trial; and since trial by jury is not a mandatory requirement, we can assume that the number of cases involving a jury is even smaller. The American Bar Association reports that in the federal courts only eight percent of the criminal defendants are tried by a jury.

Police Restriction of Press Information

The ABA Report uses the terms “may affect,” “potential prejudice,” and “possible prejudice.” This seems to me to be a rather indefinite way of looking at the situation. I think the ABA’s study lacks depth in determining the exact extent of the problem: First, by speculation on the number of cases that may exist but are not reported; and second, by the great reliance on opinion in its surveys. However, assuming that there is a problem, our next consideration is how much should press information be restricted. I must confine my remarks to those areas that are the responsibility of the police department, that is, the pretrial period. This includes the period prior to arrest and the period from arrest to trial.

Former Attorney General Katzenbach made the following classification of pretrial information:

* Chief of Police, Syracuse, New York.

1 ABA ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (Tent. Draft 1966) [hereinafter cited as ABA Rep.].

2 A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with approval of a judge or justice of a court having jurisdiction to try the offense. N.Y. Const. art. I, § 2.

The constitutional guaranty of trial by jury does not apply to petty offenses (misdemeanors) triable before a court of special sessions. See People v. Wallens, 297 N.Y. 57, 74 N.E.2d 307 (1947); People v. Bellinger, 269 N.Y. 265, 199 N.E. 213 (1935).

3 ABA Rep. 22.

4 ABA Rep. 22, 23.
1. information that should be made available to the public without question;
2. information so prejudicial that its publication will certainly preclude the possibility of a fair trial;
3. information that may be prejudicial to the defendant but may serve the public interest.\(^5\)

Katzenbach placed the following disclosures in the first category, and I believe the Advisory Committee will find no fault with this.

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.\(^6\)

Information meeting the criteria of the second category is so deeply prejudicial that even the needs of a free press are not enough to overcome the necessity for withholding it. The following types of information would be included:

1. the publication of defendants' confessions or admissions, the single most damaging aspect of pretrial publicity;\(^7\)
2. information that includes editorial expression by law enforcement officials, such as "mad dog killer," "an open-and-shut case," or remarks about the character of witnesses;\(^8\)
3. information concerning investigative procedures or laboratory tests and their results.\(^9\)

The third category, as Mr. Katzenbach has noted,\(^10\) presents a great deal of difficulty in determining the circumstances in which certain types of information should be made public. Some of these situations are: (1) circumstances sur-

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\(^6\) Hearings 400, 403.

\(^7\) Id. at 403.

\(^8\) Ibid.

\(^9\) Ibid.

\(^10\) Ibid.
rounding the arrest, (2) disclosure of a defendant’s criminal record, (3) disclosure of names of witnesses. The ABA recommendations cover the types of information in this third category. They would permit release of information surrounding the circumstances of the arrest, but they would restrict disclosure of the defendant’s criminal record as well as the identity of witnesses. With respect to these recommendations, I tend to agree with the law enforcement people mentioned in the following statement made in the ABA Report:

Most of the law enforcement officers interviewed or responding to the Committee’s questionnaire did not believe that restrictions of the kind proposed would in any significant way impair the benefits obtained from news reporting of criminal matters. This was true of departments currently operating under similar restrictions and those operating under more general limitations. Indeed, it is difficult to see how the proposed restrictions could impair the benefits discussed earlier in this commentary. Announcements relating to the commission of crime, the making of an arrest, the circumstances surrounding the arrest, evidence seized, the identity of the defendant, and the scheduling or result of any judicial hearing could still be made, as could any statements necessary to aid in apprehension, to warn the public of any dangers, or to assist in obtaining evidence. In addition, law enforcement officers would be able to reply to charges of misconduct that are publicly made against them. The media would remain free to criticize or defend official conduct, malfeasance or delay, and to urge prosecution. And even the restrictions that are imposed would be limited in duration, applying only during the period when the threat to the fairness of an impending or ongoing trial is greatest.

It is the police department that is responsible for the release of information relating to the commission of a crime. The press receives information of this type from the police radio, offense reports, and personal contacts with police officers. Our department in Syracuse makes offense reports available to the press, and as a matter of fact, offense reports and arrest reports are reproduced in sufficient quantity to provide a press copy in our information center. I find it very hard to conceive of a way in which the disclosure of the circumstances of an offense can be restricted, especially by the adoption of departmental rules, as the Committee recommends.

Police - Press Cooperation

The goal of law enforcement has been described as the maintenance of individual and community security. The methods used are crime prevention, crime repression, regulation of noncriminal conduct, provision of services, and protection of personal liberty. In each of these areas, law enforcement in a democratic society must depend on public support, or it would never have a chance of achieving its goal. And public support depends on an informed citizenry; thus, to achieve its goal law enforcement must have the cooperation

11 Ibid.
12 Id. at 404.
13 ABA Rep. 99.
14 GERMANN, DAY, GALLATTI, INTRODUCTION TO LAW ENFORCEMENT 28, 29 (1966).
of the press. Some of the areas in which a cooperative press can be extremely helpful are:

1. assisting in recruitment programs;
2. assisting in improving the quality of police service by editorial support for an increased budget, for additional manpower, equipment, and training;
3. reporting departmental activities to the public;
4. explaining department programs and procedures;
5. enlisting the help of the public in accident prevention and crime prevention programs;
6. instructing the public concerning new regulations and their purposes;
7. providing editorial support for department objectives.

Most of the media are willing to devote time and space to police subjects when requested. I cannot remember when one of our press releases was not used by the Syracuse news media.

It must be noted, however, that press-police cooperation is reciprocal. Just as the police must rely upon the press to support or explain their policies, programs, activities, and procedures, so must the press rely to a great extent on police sources for their news. In fact, I believe that if the news from City Hall, the courts, and the law enforcement agencies were dispensed with, little local news would be left.

Because of the police administrator’s responsibility for balancing the rights of the individual and the rights of society, he must be concerned with this problem of the release of information as it affects both. He must consider whether the information, if released, would injure or affect the rights of the individual. However, he must also weigh the right of society as a whole to be informed, which includes the right to be advised of the types of crime taking place, the gravity of the crimes, the problems involved in solving them, and the general safety climate in the community. In order to get the information across correctly and fairly, it is necessary for the administrator to have the trust and confidence of the media, often the only channels available for the explanation of police purposes. If he is spending valuable time at loggerheads with them over withholding information, or if he is not making any comments on certain crimes or areas of major concern, he is going to find it very difficult to carry out the other worthwhile activities for the maintenance of individual and community security.

Police officials, like everyone else, are human — they like to get favorable coverage from the press. It is also a fact of life that the tenure of a police administrator is much longer when the press is on his side than when it is crusading against him. Very few police administrators have left office when the press was wholeheartedly behind them, while vast legions have left when the crusading press was barking at their heels. The great capacity of the press for exerting pressure and influencing public officials makes it difficult and sometimes impossible for a police official to withhold facts newsmen are trying to obtain. This would be true even where there is a department regulation governing the
release of information. The press seems to feel that the information should be made available and that they should make the decision on what should or should not be published.

The ABA Committee Recommendations and Police-Press Relations

The Committee's recommendation on law enforcement officers provides:

It is recommended that the following rule be promulgated in each jurisdiction by the appropriate court:

Release of information by law enforcement officers.

From the time of arrest, issuance of an arrest warrant, or the filing of any complaint, information, or indictment in any criminal matter within the jurisdiction of this court, until the completion of trial or disposition without trial, no law enforcement officer subject to the jurisdiction of this court shall release or authorize the release of any extrajudicial statement, for dissemination by any means of public communication, relating to that matter and concerning:

1. The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the defendant, except that the officer may make a factual statement of the defendant's name, age, residence, occupation, and family status, and if the defendant has not been apprehended, may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;
2. The existence of contents of any confession, admission, or statement given by the defendant, or the refusal or failure of the defendant to make any statement;
3. The performance of any examinations or tests or the defendant's refusal or failure to submit to an examination or test;
4. The identity, testimony, or credibility of prospective witnesses, except that the officer may announce the identity of the victim if the announcement is not otherwise prohibited by law;
5. The possibility of a guilty plea to the offense charged or a lesser offense;
6. The defendant's guilt or innocence, or other matters relating to the merits of the case or the evidence in the case, except that the officer may announce the circumstances of the arrest, including the time and place of arrest, resistance, pursuit, and use of weapons; may announce the identity of the investigating and arresting officer or agency and the length of the investigation; may make an announcement, at the time of the seizure, describing any evidence seized; may disclose the nature, substance, or text of the charge, including a brief description of the offense charged; may quote from or refer without comment to public records of the court in the case; may announce the scheduling or result of any stage in the judicial process; and may request assistance in obtaining evidence.

The court may, in its discretion, initiate proceedings for contempt for violation of this rule, either on its own motion or on the petition of any person.

Nothing in this rule is intended to preclude any law enforcement officer from replying to charges of misconduct that are publicly made against him, to preclude any law enforcement authority from issuing rules not in conflict herewith on this or related subjects, to preclude any law
enforcement officer from participating in any legislative, administrative, or investigative hearing, or to supersede any more restrictive rule governing the release of information concerning juvenile or other offenders.

For purposes of this rule, the term "law enforcement officer" includes any person employed or retained by any governmental agency to assist in the investigation of crime or in the apprehension or prosecution of persons suspected of or charged with crime.  

This recommendation should be easy for a law enforcement agency to adhere to. The language appears to be understandable and specific and would solve some of the current police dilemmas concerning the release of information. However, under New York law it is doubtful whether the court has the right or the power to order the executive branch to withhold or disclose information. Therefore, I feel that the ABA Committee's recommendations should not be made a rule of court. Nor should the recommendations be adopted by an executive order, because of the rupture this would cause in police-press relations. If they are to be adopted at all, I feel the adoption should be accomplished by legislative action.

The Committee further recommends the promulgation of departmental rules to augment the judicial rules. The departmental rules are as follows:

It is recommended that law enforcement authorities in each jurisdiction promulgate an internal regulation (1) embodying the prohibitions of the preceding section and (2) directing that releases not prohibited by that section be withheld during the relevant period if the information would be highly prejudicial and if public disclosure would serve no significant law enforcement function. It is further recommended that such agencies adopt the following internal regulations:

(a) A regulation governing the release of information, relating to the commission of crimes and to their investigation, prior to the making of an arrest or the filing of formal charges. This regulation should establish appropriate procedures for the release of information. It should further provide that, when a crime is believed to have been committed, pertinent facts relating to the crime itself may be made available but the identity of a suspect prior to arrest and the details of investigative procedures shall not be disclosed except to the extent necessary to assist in the apprehension of the suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

(b) A regulation prohibiting (i) the deliberate posing of a person in custody for photographing or televising by representatives of the news media.

[Symposium, 1967]
media and (ii) the interviewing by representatives of the news media of person in custody unless he requests an interview in writing after being adequately informed of his right to consult with counsel.

(c) A regulation providing for the enforcement of the foregoing by the imposition of appropriate disciplinary sanctions.\textsuperscript{17}

I find these recommendations, except for the first, too vague and too susceptible to a variety of interpretation to serve as a useful guideline. Furthermore, the committee's recommendations of departmental adoption of the provisions on its own would create tremendous opposition to the police department by the news media. I think the press generally views the recommendations with alarm and considers them as designed to muzzle the news media and to dry up its sources of information. A police official who adopted them would be automatically considered antagonistic to the principle of free press. Thus, I foresee the adoption of this proposal by a police administrator as having the effect of scuttling his entire press relations program. Unless the provisions were imposed by law, I could not, as a police administrator, adopt them.

Conclusion

On the ABA Committee recommendations in general I am inclined to agree with Dr. Stanton of the Columbia Broadcasting System, who stated:

Strictures leading to wide contempt threats would drive information underground, but there will be information — from anonymous sources, from leaks, from backdoor handouts, from payoff agreements. All that sweeping and inclusive use of the contempt charge can achieve, no matter how much caution is urged, is to promote unaccountability — the assurance by the press that police, prosecutor, or defense attorney will never be revealed as the source of information. The net result would be less, rather than more, control of the climate of a trial. This would plunge the judicial system of this country, the bar, and the police into an abyss of public suspicion and distrust.\textsuperscript{18}

If unwarranted disclosures of information are being made in enough cases to jeopardize the principle of fair trial, then obviously something must be done. But the answer may not lie in the adoption of the ABA recommendations. I think that one possibility is the adoption of a voluntary code of ethics that would include guidelines on the release and use of information. This could be done by lawyers, courts, police, and the press. The guidelines for each group could be developed by frank discussion among its members and representatives of the other groups. An indication that this approach is susceptible to some measure of success, is a statement by the ABA Committee itself:

\textsuperscript{17} ABA REP. 107-08.

discernible also in the growing willingness to adhere to voluntary guidelines established by news media groups alone or in conjunction with the bar . . . . \textsuperscript{19}

I think the climate in law enforcement is also conducive to voluntary treatment of the problem. Law enforcement, which is struggling to attain professional status, has developed a set of canons of police ethics. I am sure that the canons could be expanded to include guidelines for the disclosure of criminal information. As Dr. Stanton has said:

Voluntary individual codes such as ours need to be evolved, discussed and disseminated. Above all, we need more, rather than less, reporting of police and court activities, and we need better and more thorough coverage rather than less and more restrictive.\textsuperscript{20}

I concur with Dr. Stanton.

\textsuperscript{19} ABA Rep. 71.