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## A PROSECUTOR'S VIEW

By ARLEN SPECTER†

AS DISTRICT ATTORNEY of Philadelphia, it is necessary to balance daily the competing values involved in free press and fair trial in order to insure proper prosecution procedures. The public prosecutor has an absolute duty to do his utmost to see that every accused receives a fair trial. At the same time, the public has a legitimate interest in crime news. Accommodation of these interests, where potentiality of conflict exists, must be solved on a recurrent basis in an office where an average of 150 criminal cases are listed each day — including murders, robberies and rapes, with sensational public overtones.

*Judgment, Rather Than Detailed Rules, Must Govern*

While it is highly desirable for all interested parties to understand the concerns of the others, the ultimate decisions must be made by each in the context of his own duties. The district attorney should know the views of the press and the defense bar, but he must make independent judgments on what is proper, subject to the limitations of the canons of legal ethics. The Warren Commission Report highlights the responsibility that law enforcement officials have not to yield to the demands of the news media beyond the dictates of their duty. The converse is equally true. The news media best understands its own role and its own problems. The ultimate limitations on activity by the news media should come from that group itself.

When the extremes are reached, it becomes necessary for government, usually through the courts, to intervene. However, the daily decisions must be made by responsible men in each field. The news media are supported by the powerful pronouncement of the first amendment. The public prosecutor is a constitutional officer in Pennsylvania and is regulated by decades of judicial decisions. Most important, the prosecutor's acts are subject to periodic review by the electorate. The infinite variety of individual problems precludes detailed specifications of rules to govern the conduct of any of the parties involved and only their own good judgment can be decisive.

*The General Principles*

The paramount principles require that the defendant in a criminal case be given a fair trial and that there be a flow of information through

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a free press to an informed public to the maximum extent consistent with fair trial. In my opinion, there are few, if any, absolute rules. In general, the district attorney and other law enforcement officials should refrain from pre-trial disclosures of confessions, evidence obtained as a result of search and seizure, the defendant's record and conclusions relating to guilt. The prejudicial effect of the disclosure of a confession, which may be excludable at trial, indicates that such releases are in the prohibited area. Tangible evidence seized, which may be strongly indicative of guilt, is in a similar category since such items may be suppressed at trial, although there may be situations where such disclosures are necessary to indicate the nature of the offense.

### *Conclusions of Guilt*

The public prosecutor and police officials should exercise great restraint in expressing opinions or conclusions about the guilt of the defendant. A conflict may arise between the community's interest in knowing that a notorious criminal is no longer at large and the accused's right to a presumption of innocence. There is little disagreement on the propriety of disclosure that the defendant has been arrested for a specific offense on a warrant issued by a judicial officer following an affidavit of probable cause by a police official. Such information is a matter of record, through the warrant of arrest, and is necessary to provide the public with some assurance that the right man is in custody.

It is doubtful if many of the public really comprehend the difference between the statement that the police have arrested the man who committed the crime as opposed to the news that the police have arrested a man on the charge of committing the crime after an investigation showing probable cause. It is possible to provide the community with sufficient assurance without expressing conclusive opinions of guilt. As a practical matter, there may be little difference on the question of prejudice to the defendant.

### *The Defendant's Prior Record*

Great difficulty is presented by publication of the defendant's prior record of criminal offenses. Such information is a matter of public record through documents in the criminal court and is conveniently catalogued in the police department or prosecutor's office. The public has a substantial interest in such information in order to evaluate the effectiveness of the police department, the district attorney, the courts

and the prison system. When a man is arrested, as in the case of a parolee charged with a crime similar to his earlier offense, the public has a legitimate interest in knowing how well the Parole Board and rehabilitation facilities are operating.

However, the publication of the defendant's criminal record may be highly prejudicial, especially near the time of trial. During the selection of the jurors for the second trial of Anthony Scleri, who was charged with a robbery-murder in Philadelphia, the news media referred to 25 prior convictions of Scleri for robbery. Scleri's original conviction had been reversed by the Court of Appeals for the Third Circuit on the ground that due process of law was violated when the jury was informed of his prior criminal record on the issue of penalty at the same time that they were to decide the question of innocence or guilt.<sup>1</sup> The first trial occurred prior to the enactment of the Split Verdict Law of Pennsylvania which provides for separate trials on these issues.<sup>2</sup> Publication of Scleri's record, while the jury was being selected for the second trial, created a situation very similar to that which had caused reversal of the first conviction.

An appropriate balancing of the interests in publication of a prior record may be achieved by the timing of news releases. The concern of the public may be served with the information at the time of arrest, and the interests of the defendant may be protected by not publishing the record at a time when the likelihood is high that prospective jurors will learn of it.

### *Exceptional Circumstances*

It is conceivable that unique circumstances may call for disregarding most of the general rules. The assassination of President John F. Kennedy presented such an extraordinary situation. While my views on this phase are more tentative than others, it may be that the need of the public to know such facts would require full disclosure of such a critical event. If such extreme circumstances do require unusual disclosure, then it may be that some limitation would have to be imposed on the prosecution or on the penalty sought, if the defendant under those circumstances could not receive a fair trial. Realistically viewed, it is highly doubtful if an accused presidential assassin could find a completely unbiased jury in any forum. For obviously good reasons, the Warren Commission criticized the prosecutor and police for inappropriate disclosures and the news media for pushing too hard.

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1. United States *ex rel.* Scleri v. Banmiller, 310 F.2d 720 (3d Cir. 1962).

2. PA. STAT. ANN. tit. 18, § 4701 (1963).

Even without any such improper practices, an unbiased or uninformed jury is virtually inconceivable in light of the magnitude of such a case.

*Public Information For Legislation*

The district attorney must exercise his discretion in public comments on some subjects, which involve more than a single case, depending upon a wide variety of circumstances. The potentiality for prejudice turns on many subtle factors. It is possible that extensive emphasis on the problem of crime in the streets may result in prejudice to the average defendant in a serious felony case, who has never been mentioned in any newspaper release, because of the general public reaction to crime. The prosecutor's public statements, therefore, must be weighed in the light of the necessity to inform the public on the problems of law enforcement.

Recently, the Governor of Pennsylvania called a special session of the State Legislature to consider the question of increasing the penalty for rape. The crime of rape has received extensive coverage in the news media in Philadelphia and elsewhere because of the serious community problem posed by that offense. The people of the Commonwealth must be accurately informed of the situation so that their views may be considered by the General Assembly in reaching a decision as to what public policy requires by way of sentencing. Public debate is necessary to determine whether longer sentences will serve as a deterrent to future sexual assaults. As to the death penalty, which has been proposed for rape, debate is in process. I have publicly expressed the view that the death penalty for rape would be unwise because of the necessity for selective use of the extreme penalty, if it is to be retained for the most serious of the first degree murder cases.

*Information To Support Expenditures and Taxes*

Public awareness of the community problem caused by rape and other sexual assaults is vital if the people are to support extensive expenditures which require increases in taxation. The public must be informed of the problems that the penal institutions face in rehabilitating the sexual offender, so that the community's interests are protected when he gains his freedom, as he ultimately must, unless the death penalty is imposed. In a recent celebrated Philadelphia case involving child molestation, extensive publicity by the news media put the public squarely on notice that substantial additional funds are needed for psychiatric treatment and better institutions if any progress is to be made in curing the sex offender. Hopefully, such treatment and cure will assure the community that he will not repeat his prior offenses when he is ultimately released.

The public also needed information in order to act rationally upon the recent request made to the City Council of Philadelphia for one thousand extra policemen. The volume of serious criminal cases must also be known by the public in order to obtain additional courtroom facilities and judges.

### *Constitutional Reform of the Magisterial System*

The public's need to know is emphatically shown in the area of magisterial corruption which forms the basis for necessary constitutional reform in Pennsylvania. The incompetency and corruption of Philadelphia's magisterial system has long been suspected. While many other complex issues were involved, the Pennsylvania electorate in 1963 rejected a movement for constitutional reform. A lengthy investigation of the magisterial system in 1964 and 1965 documented the rumors of corruption. The *Report of the Attorney General on the Investigation of the Magisterial System*<sup>3</sup> made public disclosures of evidence and conclusions which have subsequently been introduced in criminal proceedings.

As we discuss the problem of free press and fair trial at this moment, a jury in Philadelphia is being sequestered during a recess over the weekend of a trial on criminal charges against a magistrate arising out of the investigation. In the context of the 515 page *Report*, it is most improbable that any of the prospective jurors will have read the few pages relating to the facts and conclusions on the magistrate's prosecution. Balancing all of the interests involved, public information on this subject is of the highest importance so that the electorate may intelligently decide questions of constitutional reform of the magisterial system.

### *Protection Through Voir Dire of the Jury*

As a general proposition, the questioning of prospective jurors is an adequate safeguard to provide the defendant with an impartial jury in situations where there has been pre-trial publicity. In my opinion, the voir dire is over-used in Philadelphia at the present time, with days of court time being consumed by irrelevant questions. Prospective jurors are questioned at length on their understanding of the law relating to reasonable doubt or burden of proof only as a preliminary for later defense arguments on those subjects. Extensive questioning is also submitted on whether the prospective juror has

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3. THE REPORT OF THE ATTORNEY GENERAL ON THE INVESTIGATION OF THE MAGISTERIAL SYSTEM (1965).

some distant relative in the police department, how often he sees that relative, and their subjects of conversation on matters unrelated to law enforcement. When the scope of the voir dire is restricted to relevant matters, it can be a reasonable safeguard on the question of pre-trial publicity.

### *Greater Justification For Responses Than Releases*

There is a large area of discretion for responses to the news media by the district attorney. The public prosecutor should exercise restraint on speaking out on some subjects even where comments would not constitute the denial of the defendant's right to a fair trial. Some questions are so delicately balanced that a key factor in the desirability of public comment is whether the prosecutor is asked pointed questions by the news media on a given issue or whether he volunteers the information. This factor is indicative of whether the information disclosed is reasonably related to public concern, as reflected by the reporter's questions, or whether it is a gratuitous observation which has no public value in relation to the potentiality for prejudice.

In our democratic society, it is generally undesirable for an elected public official to decline to answer a question related to the operation of his office, submitted by the news media, unless there is some real reason to decline other than personal embarrassment to the official. Thus, when a reporter asks a question, which involves the prosecutor's conduct of his office or his attitude on a particular subject, there is better reason for the prosecutor to reply than there would be for the prosecutor to initiate the disclosure.

### *Independent Duty To Be Fair*

Where pre-trial publicity creates a substantial likelihood of prejudice, the district attorney has the independent duty to do his utmost to see that a defendant receives a fair trial. Within the past few weeks, a newspaper release in Philadelphia referred to a defendant's membership in a political organization which had been the subject of comment by the Attorney General of the United States. On that occasion, I joined the defense counsel in an application for a continuance.

*Conclusion*

These are some of the factors which guide a district attorney in his comments to the news media. They are easy, although dull, to read from a prepared text. In the context of a crowded room filled with microphones, reporters pads and the overpowering glare of the television cameras, it is more difficult to observe the refinements of the rules. But the district attorney's duties require candid and forthright responses that will withstand the scrutiny of the appellate courts, the bar association, the defense bar, the city desks, and the ultimate arbiter — the law school forum on free press and fair trial.