This year marks Judicature's 100th anniversary.

To celebrate, each issue of the centennial volume features a reprint of an article from the journal's first 100 years. In reviewing the *Judicature* of those early years, we find writings on many topics that still saturate conversations about the judicial system today. We owe a debt of thanks to the American Judicature Society for creating a forum in which such issues may be explored.

The following excerpt is from an article written by the Hon. Simon H. Rifkind, published in August 1950, in the 34th volume of what was then the *Journal of the American Judicature Society*. Rifkind had recently returned to private practice after serving on the U.S. District Court for the Southern District of New York. A native of Russia, Rifkind was a naturalized American citizen, a graduate of the University of Columbia law school, and a member of the New York bar. His legal career spanned seven decades. Among other accomplishments, he was appointed by the Supreme Court to resolve states' rival claims to water from the Colorado River. President John F. Kennedy selected him to investigate railroad labor issues. Rifkind also helped craft important New Deal legislation, and his clients included business leaders, Jackie Onassis, and the New York Municipal Assistance Corporation.

In this excerpt, Rifkind argues that sensational trials pit two "great constitutional rights" against each other: the right of freedom of the press and the right to due process of law.

Reporters play an important political and social role in informing the public about the courts. But by reporting on trials, they may also influence juries and the judicial process. Rifkind suggests that the bench and bar should work with the media to ensure that the freedom of the press does not impede courts from providing defendants with fair, unbiased trials.

In a time when information about a crime or a trial can be instantly accessed and shared with a finger tap on a smartphone, Rifkind's concerns about the collision of a free press and due process seem as timely and confounding as ever.

–Editors

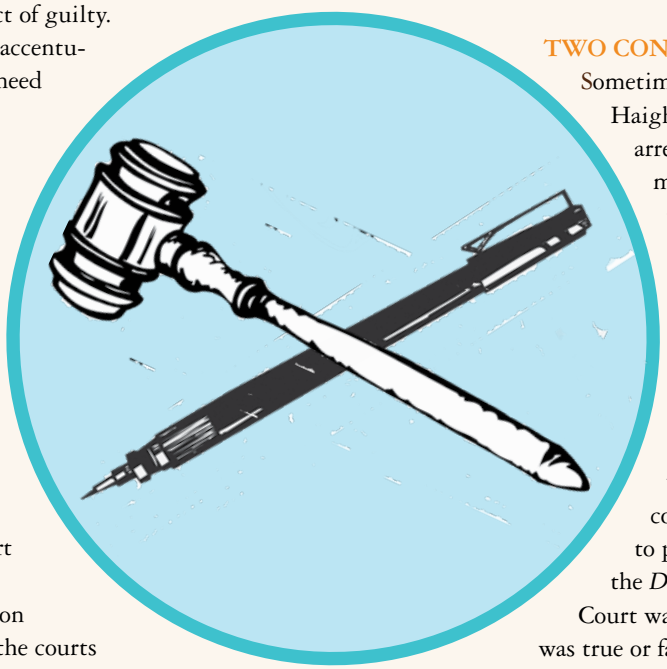
WHEN THE PRESS COLLIDES WITH JUSTICE

(August 1950)

By Simon H. Rifkind

There has been much talk lately of what is called Trial by Newspaper. In recent months there have been a number of cases in the courts which have aroused widespread public interest, and there has been a correspondingly widespread coverage of the details of the cases — from the first rumors of charges to the final verdict of guilty.

Although the problem has been accentuated recently, it is not a new one. I need not emphasize that there have been clashes between court and press at certain times long before the current controversy. There is a vast literature on the subject, but, like the weather, it is something we constantly talk about but never do anything about. Now, however, that the citizens of New York are trying to do something about their weather, perhaps the citizens of our country can be induced to take some steps to resolve this conflict between court and press.



If one stops to inspect the collision which occasionally occurs between the courts and the press, one discovers that it is a contest, not between right and wrong, but between two rights. All contests have dramatic possibilities, and if we were to search for the appropriate branch of the dramatic arts to which this particular contest belongs, I think we should find it to be that class which the Greeks called tragedy. It is a contest between hero and hero, not between hero and villain. In such a tragedy the end is always disastrous, and in those unfortunate cases where conflict develops between court and press, the result is frequently disastrous to justice itself.

Two illustrations demonstrate how the problem arises in this country and in England, and how differently it is disposed of in the two places. What follows is reported in the appendix to a decision of the United States Supreme Court written by Mr. Justice Frankfurter.[1]

TWO CONTRASTING CASES

Sometime early last year a man named Haigh, the so-called "Bluebeard," was arrested in England and charged with murder. He was in custody when the London *Daily Mirror*, in a style familiar to those who read New York newspapers, described him as a "vampire" and said that he had committed other murders. The newspapers published a photograph of one of his alleged victims with a description of the manner in which that alleged crime had been committed. Haigh sued out a writ to punish the editor and publisher of the *Daily Mirror*. The issue before the Court was not whether the published story was true or false. The Court said that the truth of the publication was immaterial, but that the story had made it very difficult for Haigh to obtain a fair trial. The Court thereupon sent the editor of the *Daily Mirror* to jail, fined the publisher £10,000 — before devaluation — and warned the directors of the publishing company to beware, that the arm of the court was long enough to reach even them. That was done in England where, as we know, there is a high standard of judicial performance and where exists what we would regard as free press.

How was a similar incident handled in the United States? A child in the City of Washington had been brutally murdered,

> "I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them . . . these ordures are rapidly depraving the public taste. It is however an evil for which there is no remedy, for our liberty depends on the freedom of the press, and that cannot be limited without being lost."
>
> — *Thomas Jefferson*

and ten days after discovery of the crime, another child in nearby Baltimore was tragically slaughtered. There was great excitement and fear throughout Baltimore. At this point a radio broadcaster went on the air and opened his program with the words, "Stand by for a sensation." He then reported the arrest of one James and stated that James had confessed to the killing of the child in Baltimore. He said that James had a prior criminal record, and that at the request of the police he had reenacted the crime and had even disinterred the murder weapon.

The Baltimore Court, holding that the broadcast constituted a "clear and present danger" to the administration of justice and an obstruction to the judicial process, convicted the broadcaster of contempt of court. The highest court of Maryland reversed, feeling that it was compelled to do so under the decisions of the United States Supreme Court. The conviction of the newscaster was regarded as an abridgment of freedom of speech and of the press. The Supreme Court subsequently denied an application for a writ of certiorari.

The difference in the treatment of the conflict here and in England is clearly illustrated by the case of the scientist Fuchs, convicted of having divulged secrets relating to atomic energy. Before Fuchs' conviction, the *New York Herald Tribune* one day headlined the fact that the "British Press Can't Comment on Fuchs' Case." Here, on the other hand, everything pertaining to the Fuchs case that the papers could gather was published. There is practically no restraint upon the character of the information and opinion which a newspaper can publish about a case before trial, while it is pending before a jury, or after it has been decided.

CONSTITUTIONAL PRINCIPLES

What is involved in the problem is a clash between two great constitutional principles. On the one hand our Constitution proclaims that we are all entitled to freedom of expression by word of mouth or by publication, and that Congress shall pass no law abridging that right. On the other hand, the Constitution guarantees due process to one accused of crime.

If you look to the problem from the point of view of the press alone, the answer is rather simple — news is news. It is not only a commodity that can be sold, but the press would cite a much higher warrant for its activities. The press would say that it has a responsibility to impart to its readers such information as it can obtain. What happens in the courtroom is public property and the public is entitled to know how the public business is transacted. The reporter, no less than any other private citizen, is entitled to express his opinion on what he sees and hears in court, and his comments therefore are immune from interference by virtue of that guarantee of freedom of the press. If you point to the fact that it exposes the judicial process to some risks and injuries, the answer would probably be that that is part of the price we have to pay for the privilege of enjoying freedom of the press.

There is considerable to be said for the proposition that the minute you deny the verity of this claim to immunity, you must endow someone with the right to say what shall or shall not go to the press, and that means censorship. That means censorship even though the censors may be judges. Judges are men, not angels. While some would exercise the power of censorship with

high regard for the true interests of the judicial process, others might exercise it to prevent perfectly proper criticism of their own administration of office.

That is what the press could say; and they could call upon high authority to sustain the positions that we cannot have a free society without a free press, and that at whatever point we interfere with freedom of the press we exercise a corrosive influence upon the freedom of our society. The authority to whom they could refer would be Thomas Jefferson himself who said — in language indicating that the habit of one segment of the fourth estate has not changed materially in a century and a half—:

> I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them . . . these ordures are rapidly depraving the public taste.
>
> It is however an evil for which there is no remedy, for our liberty depends on the freedom of the press, and that cannot be limited without being lost.[2]

THE JUDGE'S POINT OF VIEW

If we look at the contest from the point of view of the other contestant — those who try to keep the judicial system running with its high tradition of adherence to due process and fair trial — we get an entirely different picture. They start with a proposition which is basic: that the judicial process is the central pivot about which a free society revolves. I sometimes marvel at the fact that in over five thousand years of history we have invented no other institution for the disposition of human conflict without violence. It has been a slow growth. In international affairs we have not yet made the institution workable. I therefore need make no apologies for feeling that it is mighty important to preserve the institution against deterioration.

There are many parts of the world today where judicial forms are used to accomplish results foreign to the judicial process. They have a courtroom, a bench, judges, and people called lawyers. They often have persons identified as witnesses. But if you read the record of their proceedings, you feel that a great institution has been subverted and perverted to an utterly foreign purpose. Naturally we feel a sense of revulsion when we read of that kind of activity. It is important for us, therefore, to be alert to any intrusion into the judicial process which may impair the high idealism which animates it. The process functions successfully only as long as the public feels that it grinds out what they can accept without — to use the title of a recent book — a "sense of injustice." Law loses its normative function the minute the public loses faith in the judicial process and feels that it is a mill that grinds out sometimes justice and sometimes injustice. Then order can be maintained only by the force of tyranny.

Lawyers and judges make heroic efforts and resort to much ritual to preserve public confidence in the judicial system. We go to great lengths to make certain that our juries are free from prejudice. After they are impaneled, the judge keeps reminding the jurors, and thereby himself, that they must decide the case solely on the facts openly adduced in court and on argument openly heard in court. We proceed in an orderly manner, so that first one side and then the other is given the fullest opportunity to speak. By means of the rules of evidence, an impartial judge screens the information which is passed to the jury to make certain that nothing enters which can pollute the stream of information upon which the jury is to decide the rights of the litigants. An atmosphere of dispassionateness, of objectivity, of serenity prevails in the courtroom.

That time-honored procedure, forged through the generations to the single end that issues shall be impartially determined on relevant evidence alone, works fairly well in all cases but one — the celebrated cause. As soon as the *cause celebre* comes in, the judges and lawyers no longer enjoy a monopoly. They have a partner in the enterprise and that partner is the press.

INFLUENCING THE JURORS

The process of erosion begins long before the trial. The area from which the jury panel is to be called is drenched with all kinds of information — some true, some false — all unchecked by the selective processes of the law, all uncleansed of the dross which it is the object of the laws of evidence to exclude. By the time the panel is called to the courthouse, its members have been living in a climate surcharged with emotion either favorable or unfavorable to one of the litigants. To exclude from the jury panel all who have read about the case or heard about it over the radio is to reduce the jury to the blind, the deaf, and the illiterate. So the jury must be selected from these precharged human vessels.

And then comes the trial itself. Recently my colleague, Judge McGohey, told me of a simple case before him involving an injured seaman. There was something in the papers in the case about the man's origin and early history which was inflammatory, and which would have diverted the jury from its duty to decide the case on the relevant facts. Judge McGohey told me that, as a matter of course, he called counsel to the bench and secured an agreement that the material should not be disclosed to the jury. The jury never heard about it, and decided the case without reference to this prejudicial material.

If that were a celebrated case, what would have happened? Judge McGohey would have had the same agreement with counsel, and the material would have been kept from the eyes and ears of the jury that afternoon. That night the twelve men and women would start for home and, fifty feet from the courthouse, they would receive a copy of their evening paper and there, on the front page, would see the excluded material. If any one of them was near-sighted, he would arrive home, turn on the radio at 7, 8, or 9 o'clock, and hear a commentator express his views on this piece of excluded evidence.

The next morning the jurors, on their way to the courthouse, would open their morning papers and there read the column of a hypothetical columnist whom I shall call Sokolborn. In his column would appear the statement, conveying this thought: "I don't think this witness ought to be believed. After all, he has a bad record and is a convicted liar. But I think every intelligent juror should place credence in the other witness."

Or it may be that in the courtroom a question is asked and objection is taken. The judge listens to argument and during a recess consults *Wigmore on Evidence*. *Wigmore* refers him to some cases which he reads. After some meditation he returns

> “If you or I wrote upon a little memorandum, ‘I think witness X is a liar and you should not believe a word he says,’ and if you or I handed that memorandum on the courthouse steps to a juror, we may be sure that whoever was trying that case would send the bailiff to fetch us forthwith before the court where we would be dealt with summarily. Why should it make a difference that I have a big machine which multiplies that memorandum into a million copies and that I have a newsboy deliver it to the jury for me?

and renders his reflected decision: “Objection sustained.” The answer is not given in the courtroom. But that night, in Mr. Sokolborn’s column, the jurors find the question and they find the answer — but with a difference. The answer they find is not protected by an oath and whoever supplies that answer does not take upon himself what we used to call the risk of the pains and penalties of perjury. Further, whoever supplies the information for that column does not have to confront the defendant as he would if he were a witness in the case. The informant is not subject to cross-examination, a process which has been called the greatest instrument ever invented for the discovery of truth. So we have unsworn testimony, unconfronted-witness-testimony, uncross-examined testimony going to the jurors. Moreover, it is uncontradicted testimony because the story in Sokolborn’s column is not received in evidence, and therefore the poor defendant or plaintiff, as the case may be, is not afforded the opportunity to put anyone on the witness stand to contradict or explain it.

That is indeed a strange situation. If that kind of practice obtained in surgery, the situation would be somewhat as follows. The poor victim is on the operating table. He has been prepared by all the latest methods of science so that he is as pure, as clean, as sterile as science can make him. He is wheeled into the operating room, which has been as thoroughly prepared for his reception. No germ would dare to penetrate the devices employed for its extermination. The doctor wears a sterile gown. He has cleansed his hands, turned off the faucets with his elbows, and donned rubber gloves. The nurses have masks over their mouths to prevent contamination. Elaborate precautions are taken to insure against infection. Precisely when the incision is made, the windows are thrown wide open, and the dust, dirt, and pollution of the Sanitation Department’s trucks are allowed to enter.

If that were the practice of surgery, we would think that surgeons are mad. And of course they would be. There would doubtless be numerous medical miscarriages. And when we use a comparable method in the courts, we have miscarriages of justice.

And here is the strangest part of the dilemma. Sokolborn never took an oath. He was never scrutinized by the FBI. He was never passed upon by the United States Senate, a comparable state body, or the voters. He has his license to write only because a publisher gives him a column in his paper. But Sokolborn is free to comment on the evidence in the case; he is free to disclose testimony which the judge excludes, to tell the jury whom to believe and whom not to believe. The only man not allowed to make any comment is the one man who has devoted his lifetime to the study of the law, the one man who has taken an oath to be impartial, and the one man who by professional habits has achieved freedom from external pressures. Were the judge to say anything to the jury about whom to believe and whom not to believe, he would commit reversible error. Once we take on the celebrated cause we go down the rabbit-hole into Wonderland, a realm of fantastic futility.

A DISCARDED PRECEDENT

What has to be done about it? Back in 1918, in the *Toledo Newspaper* case, the Supreme Court did something about the

problem.[3] That case involved nothing as violent as what we have just been discussing. The contest there had to do with a streetcar fare. There was a difference of opinion in the community as to whether the streetcar company should or should not get an increase in fare, and the City passed an ordinance providing for the lower fare on a more or less temporary basis. An injunction to prevent enforcement of the ordinance was applied for. One of the newspapers expressed the view in its columns that if the judge granted the injunction there would be some question about his integrity and probility, and surely about his intelligence. It also intimated that the public might refuse to comply with the injunction, in terms which the judge considered an open invitation to resist the court's decision. The court found the editor guilty of contempt, and the decision was sustained by the Supreme Court. But in 1941, in *Nye v. U.S.*,[4] the Supreme Court repudiated the doctrine of the Toledo Newspaper case.

Since then there have been several decisions by the Supreme Court on the subject, but so far no publisher, no radio broadcaster, no writer, no one who sells information or opinions wholesale, has gone to jail or paid a fine. Not that the Supreme Court has said that they may not be published in an appropriate case. The Court left a small area in which it said the contempt power still exists for protection of the judicial process. But the area of judicial freedom of action is becoming narrower and narrower, with the result that the liberties taken with due process are becoming greater and greater. Just when a court may act to defend the administration of justice is unclear. I suppose the Supreme Court would be more prone to sanction defensive action in a jury case than in a non-jury case, and probably would be more sympathetic to a contempt citation in a criminal than a civil case. But that is only a guess on my part.

If you or I wrote upon a little memorandum, "I think witness X is a liar and you should not believe a word he says," and if you or I handed that memorandum on the courthouse steps to a juror, we may be sure that whoever was trying that case would send the bailiff to fetch us forthwith before the court where we would be dealt with summarily. Why should it make a difference that I have a big machine which multiplies that memorandum into a million copies and that I have a newsboy deliver it to the jury for me? I don't know, but apparently it does make a difference. You might say, as the Court said in the *Nye* case, that the federal contempt statute is limited to offenses committed "near" the courthouse, the Supreme Court holding that "near" means "geographically near." But in some of the state cases that reached the Supreme Court no such statute was involved, yet the Court reached the same conclusion on constitutional grounds.

CONTEMPT PROCEEDINGS INEFFECTUAL

We shall not find a remedy for the situation in contempt proceedings. In the clash of the constitutional principles of freedom of the press and due process, the point of the contempt weapon has been blunted. The Supreme Court is loath to permit action that appears as though it is censorious. Mr. Justice Black in *Bridges v. California*[5] stated:

> Since they punish utterance made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at their height . . . .

This unfocused threat is, to be sure, limited in time, terminating as it does upon final disposition of the case. But this does not change its censorial quality. An endless series of moratoria on public discussion, even if each were very short, could hardly be dismissed as an insignificant abridgement of freedom of expression.

Yet it is clear that the Supreme Court has not gone as far in granting immunity to the press as the Constitution has conferred on members of Congress. To preserve freedom of legislative debate, the Constitution has expressly granted to a Congressman the right to speak without the necessity of account to anyone but his constituents at election time. That freedom has top priority. If private injury be sustained in the process, it is the cost of that freedom of legislative discussion so necessary for the enactment of wise legislation and the defeat of measures not promotive of the public welfare. There is no such priority asserted in the Constitution as between freedom of the press and due process. They have equal priority, and having equal priority, they come into collision under the circumstances I have indicated.

Certain correctives suggest themselves, but on examination are found to be unrealistic. Change of venue was all right in the days of the horse and buggy, but today, in a celebrated case, the newspapers and radio blanket the country and most communities are deluged with information and opinion about the case.

Some of my colleagues caution the jurors not to read the papers or listen to the radio during the trial. Not only does the warning usually come a little late, but if you are dealing with a celebrated cause in which juror John Doe sees his name in the newspapers for the first time in his life, it is probably futile. To prevent that man from reading the papers will result in his death from frustration. You might just as well ask Katherine Hepburn not to read her press notices following an opening night.

You can lock up the jury during the trial. But I doubt whether my colleagues believe they would have obtained juries in certain protracted trials if they informed the members of the panels that they would be held incommunicado for a period of months.

WHAT CAN BE DONE

Nevertheless, I do not think the members of the bench and bar have done all they might have done. This hypothetical columnist, Sokolborn, is after all not a bad fellow. He has no desire, really, to subvert the judicial process. That is not his intention. He is a good citizen, and if you told him he was undoing due process, he would be alarmed, shocked, and resentful. On the basis of conversations I have had with practitioners of the pen, I believe many of them do not really know to what it is that lawyers and judges take exception. They think we object to their manner, to their choice of language, to sensationalism. Their eyes open wide when they find that, so far as the judicial process is concerned, they can be as sensational as they like.

It is when their writings impinge upon the judicial process in the fashion I have described that judges and lawyers stand up in arms. I don't think we have made that clear to the press. Our small efforts

to do so have not amounted to much. And I think a great deal could be accomplished if we stated, in simple language, the objectives we have in mind and the restraints we expect the press to observe. They would then discover that there was really no undue interference either with artistic expression or the commercial instincts of the paper's treasurer. A formulation of standards would go a long way to clarify the problem and evoke efforts for its solution.

My other suggestions are two-fold. Since the area of judicial action is circumscribed in the extreme, and since we are unlikely to get remedial legislation because of constitutional limitations, I think we must resort to the voluntary remedy. A permanent body composed of members of the bench, bar, and press should be organized to bring together the viewpoints of all concerned. I am confident that common ground would be found upon which all could stand, preserving to each the essentials for decent and orderly functioning. After all, the press and the courts are mutually interdependent. The press must have an uncoerced judiciary to maintain freedom of the press; and the judiciary requires an uncensored press to maintain an uncoerced judiciary. Only ignorance of each other's problems can keep such natural partners in conflict. With enlightenment may come resolution of the clash, or at least mitigation of its evils.

Next, I would, as part of this cooperative endeavor, like to see a watchdog committee of the bar established, composed of district attorneys and general practitioners. Once a celebrated case came to the fore, that committee would be alerted to see that the press did not interfere unduly with the judicial function, you would, I believe, get a great deal of operative response from publishers who were simply told that the committee believed their columns were running afoul of those standards. Most of our newspapers are published by very well behaved persons who, if they trespass on our domain, do so unintentionally and not maliciously. And if an independent committee of the organized bar, having no personal stake in the case, were to call on Mr. Sokolborn and were to tell him that his column of the proceeding evening was close to the line and that it was creating a danger to due process and was violating an established standard, we would, I think, if we did not achieve Utopia, nevertheless accomplish considerable results. If even the time came that a publisher was to be punished for contempt, the fact of a warning by such a committee would weigh considerably in determining whether he was guilty, and if so, whether he should be punished, and if punished whether the decision should be sustained on review. That is my story. It is a subject that has given me personally, and I know my colleagues, a great deal of concern in the recent past. It is a subject in which I believe the bar, if it is to measure up to its communal responsibilities, must take an interest.

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[1] *Maryland v. Baltimore Radio Show*, 338 U.S. 912 (1950).

[2] Quoted by Black, J. in *Bridges v. California*, 314 U.S. 252, 270 (1941).

[3] *Toledo Newspaper Co. v. United States*, 247 U.S. 402 (1918).

[4] *Nye v. United States*, 313 U.S. 33 (1941).

[5] *Bridges v. California*, 314 U.S. 252, 268–69 (1941).