

Mitchell's Musings 2-27-12: Zenger or Zinger?

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The New York Times has long had the slogan, "All the news that's fit to print." So let's talk about newspapers and what information is fit to print. Here is an excerpt from an item in the San Francisco Chronicle of February 25, 2012:

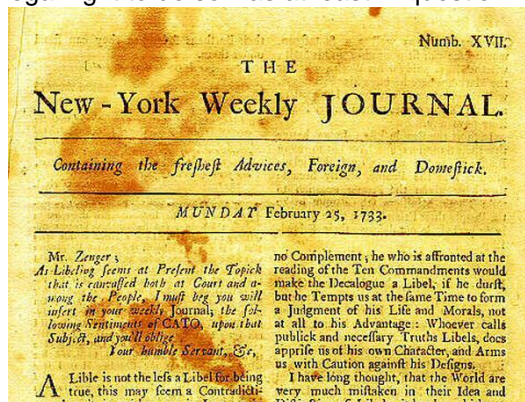
...The Obama administration on Thursday called on lawmakers to create a "privacy bill of rights" that would give people more control over how companies like Facebook collect, store and use their private data. The same day, Google agreed to add a "do-not-track" button to its Chrome Web browser...¹

In short, concerns about individual privacy are in the air as newspaper editors surely are aware. In some cases, there are legal restrictions on what information can be made public. Those of us who work at universities know that there are all kinds of rules regarding the confidentiality of student records. At my university – UCLA – staff employees have been fired and prosecuted for accessing and disclosing health records of celebrity patients at the UCLA hospital.

Your individual responses to the Census of Population are guaranteed to remain confidential. Your tax returns are not public documents. In short, there are many records that are private even if they might be of interest to someone. In some cases, individual privacy is guaranteed because it is nobody's business. In other cases, records are private because, as in the case of the Census, we want cooperation and accuracy in data gathering from respondents.

There are many pieces of information which can be legally obtained about individuals but which newspapers, such as the New York Times, choose not to print. Names of rape victims are generally not published by reputable newspapers, although they appear in public police reports. Exact addresses of other crime victims are often not reported.

For that matter, newspapers have sometimes published stories their editors thought important even though the legal right to do so was at least in question. In the famed Pentagon Papers case, the government sought to



stop publication and for a brief time there was a halt in response to an injunction. When the case reached the U.S. Supreme Court, three of the nine justices voted against the New York Times' decision to publish. In the ongoing Wikileaks affair, the Times has published material that was obtained illegally – although not by the Times itself.

The bottom line is that what is "fit to print" is now, and has always been, a matter of editorial discretion and not just a matter of what a court might say. Newspapers may cloak each editorial decision as a matter of constitutional freedom of the press and give themselves a **John Peter Zenger** award whenever those decisions are made.² However, what the constitution does is

¹ <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2012/02/25/BUH11NC6HA.DTL>.

² From "The Trial of John Peter Zenger" at <http://law2.umkc.edu/faculty/projects/ftrials/zenger/zengeraccount.html>.
"No country values free expression more highly than does the United States, and no case in American history stands as a greater landmark on the road to protection for freedom of the press than the trial of a German immigrant printer named John Peter Zenger. On August 5, 1735, twelve New York jurors, inspired by the eloquence of the best lawyer of the period, Andrew Hamilton, ignored the instructions of the Governor's hand-picked judges and returned a verdict of 'Not Guilty' on

give newspapers a right to publish - or not publish - a wide range of information. I can recall an old Mad Magazine newspaper parody in which the Times' slogan became "All the news that fits, we print." But that hasn't been the operative procedure in the past.

The present, unfortunately, is another matter. With the advent of the Internet and websites, what can fit on a printed page is no longer a constraint, since online publishing allows essentially unlimited databases to be made public. What *is* fit remains a matter of editorial discretion. But the temptation to print what *can* fit, as long as it's legal, as long as anyone might be interested, and as long as the interests of the publisher are not harmed, has produced unfortunate results. The most recent example is the New York Times decision to publish "value added ratings" of individual school teachers by name.³

To be fair, the New York Times was not the originator of the idea of publishing such rating by name. The first newspaper to do so, as far as I know, was my hometown Los Angeles Times. And the precedent before that was the wholesale publication of public worker salaries by name in various newspapers because the information was found to be in the public domain and it was legal to do so.

Value added ratings for teachers indicate the pace of student improvement (not absolute achievement) in his/her classroom. The notion is that all kinds of socio-economic and demographic factors affect the absolute level of student achievement but by looking at the increment of achievement, you have standardized for those background influences. There are other statistical issues that could be raised and there are simple questions of whether the databases that have been developed are free of error. But let's assume that the information is accurate and that it is a good performance appraisal tool. Normally, we still think of personnel records as private. So what is the justification for publication by teacher name?

***Taxpayers have a right to know, because they are paying for it.** That rationale is a slippery slope, because many things taxpayers pay for are provided by private firms. The government buys everything from paper clips to missiles from private firms. Roads and bridges are typically built by private contractors. School textbooks are published by private companies. Should the personnel records of individual employees of those firms be made public? Are the personnel records of a government-hired floor sweeper everybody's business but those of a floor sweeper hired by a private contractor to clean a public building nobody's business?

***Parents have a right to know, because their children are using the service.** How far would you extend that rationale? A teacher who has developed a health problem might be at risk for absences even if he/she had good ratings in the past. Should we therefore publish health records of teachers? If a particular teacher is undergoing a bitter divorce that might be distracting, should that information be public? Financial problems? Religious beliefs? Note that apart from confidential health records, evidence of divorces, financial problems, and religious beliefs may exist in scattered documents that could be found from various sources. It might be hard for individuals, as a practical matter, to pull information from such sources systematically, but an organization as large as the New York Times could.

***School authorities will make better hiring/firing decisions if the information is published.** If bad decisions are being made – and assuming value added ratings will disclose that fact – the problems can be illustrated by publication of summary statistics, illustrative statistics, etc., without naming names of individual teachers. No effort was made by either the Los Angeles Times or the New York Times to start with anonymous data presentations before a wholesale data dump was published.

the charge of publishing 'seditious libels.' The Zenger trial is a remarkable story of a divided Colony, the beginnings of a free press, and the stubborn independence of American jurors."

³ Normally, at this stage in a Mitchell's Musing, I would provide a link. In this case, since I disapprove of what was done, I will not.

***Teachers will perform better if their ratings appear in public.** Note that this behavioral assumption is quite different from whether value added ratings are valid measures of performance. Undoubtedly, there will be a behavioral response by teachers. It could well be perverse. For example, the quickest way for a teacher to improve his/her rating is to get rid of students that are perceived as likely to drag the rating down. Get them expelled or at least out of your class. By the way, private schools – particularly expensive ones that are known for high-achieving students and parent involvement – could, if they wished, make their teacher performance appraisals public. Such schools are typically nonunion and are not required to negotiate about their terms and conditions of employment for teachers. I am aware of no private schools that publish individual teacher performance appraisals. Yet such schools are very concerned about what their teachers do and are responsive to parental concerns. They certainly evaluate what their teachers do, but as internal matters.

***We considered the pros and cons of publication and decided to go ahead.** In recent years, “balanced” journalism has often been based on the notion that every issue has two sides and as long as you quote someone from both, good practice has occurred. That approach often descends into “some say the world is round/others say it is flat.” In the case of value added ratings, the New York Times first published an op ed by Bill Gates of Microsoft fame explaining why – whatever the legalities – no good would come from publishing individual teacher performance ratings.⁴ Then, having “balanced” itself by printing the Gates op ed, it proceeded to go ahead with its pre-determined plan to publish the teacher ratings by name.

In fact, what Gates had to say puts far more weight on the scale of not publishing the data than any justification: (excerpts)

Shame Is Not the Solution

By Bill Gates

Last week, the New York State Court of Appeals ruled that teachers’ individual performance assessments could be made public. I have no opinion on the ruling as a matter of law, but as a harbinger of education policy in the United States, it is a big mistake. I am a strong proponent of measuring teachers’ effectiveness, and my foundation works with many schools to help make sure that such evaluations improve the overall quality of teaching. But publicly ranking teachers by name will not help them get better at their jobs or improve student learning. On the contrary, it will make it a lot harder to implement teacher evaluation systems that work...

Putting sophisticated personnel systems in place is going to take a serious commitment. Those who believe we can do it on the cheap — by doing things like making individual teachers’ performance reports public — are underestimating the level of resources needed to spur real improvement. At Microsoft, we created a rigorous personnel system, but we would never have thought about using employee evaluations to embarrass people, much less publish them in a newspaper. A good personnel system encourages employees and managers to work together to set clear, achievable goals. Annual reviews are a diagnostic tool to help employees reflect on their performance, get honest feedback and create a plan for improvement. Many other businesses and public sector employers embrace this approach, and that’s where the focus should be in education: school leaders and teachers working together to get better... (underline added)

Developing a systematic way to help teachers get better is the most powerful idea in education today. The surest way to weaken it is to twist it into a capricious exercise in public shaming...

The New York Times, like Microsoft, would never dream of publishing the performance appraisals of its employees on line, nor would its predecessor in this endeavor, the Los Angeles Times. There is indeed “a capricious exercise in public shaming” going on. But it is those two newspapers - and any others following similar paths - that are being shamed by their own editorial decisions, legal though they may be.

⁴ <http://www.nytimes.com/2012/02/23/opinion/for-teachers-shame-is-no-solution.html>.