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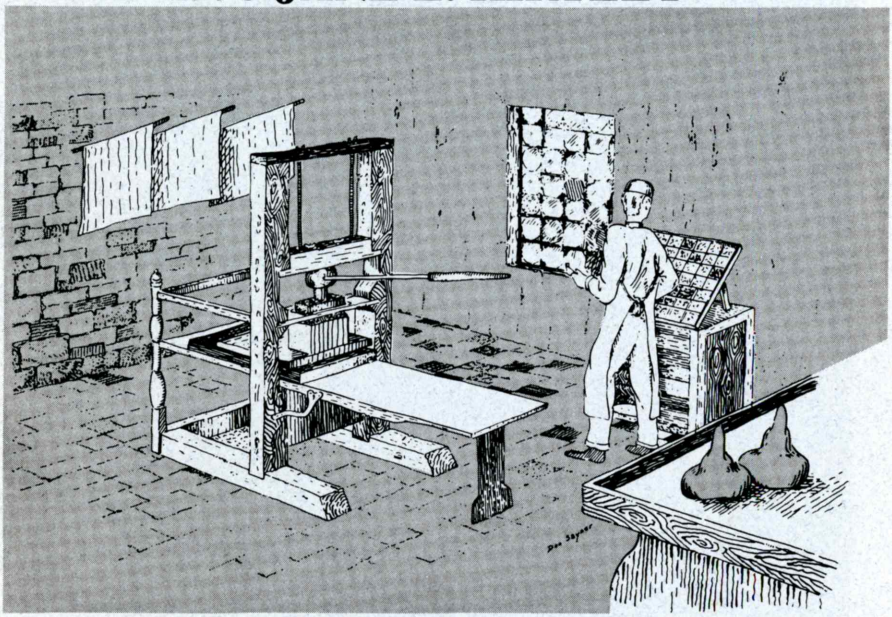

Law & Ethics: A Blurring Of The Lines

By Jane E. Kirtley

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THE JOHN PETER ZENGER AWARD
FOR FREEDOM OF THE PRESS
AND THE PEOPLE'S RIGHT TO KNOW

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Tucson, Arizona
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THE JOHN PETER ZENGER AWARD - 1993

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1974	Thomas E. Gish, Editor and Publisher, The Mountain Eagle
1973	Katharine Graham, Publisher, The Washington Post
1972	Dan Hicks Jr., Editor, Monroe County Democrat
1971	The New York Times
1970	Erwin D. Canham, Editor-in-Chief, The Christian Science Monitor
1969	J. Edward Murray, Managing Editor, The Arizona Republic
1968	Wes Gallagher, General Manager, The Associated Press
1967	John S. Knight, Knight Newspapers, Inc.
1966	Arthur Krock, The New York Times
1965	Eugene C. Pulliam, Publisher, The Arizona Republic and Phoenix Gazette
1964	John Netherland Heiskell, Publisher, Arkansas Gazette
1963	James B. Reston, Chief Washington Bureau, The New York Times
1962	John H. Colburn, Managing Editor, Richmond (Va.) Times-Dispatch
1961	Clark R. Mollenhoff, Washington, Cowles Publications
1960	Virgil M. Newton Jr., Managing Editor,Tampa (Fla.) Tribune
1959	Herbert Brucker, Editor, Hartfort Courant
1958	James R. Wiggins, Vice president, Executive Editor of the Washington (D.C.) Post and Times Herald
1956	James S. Pope, Executive Editor, Louisville Courier Journal
1955	Basil L. Walters, Executive Editor, Chicago Daily News and Knight Newspapers
1954	E. Palmer Hoyt, Editor and Publisher, The Denver Post

LAW AND ETHICS: A BLURRING OF THE LINES

BY JANE E. KIRTLEY

Some of you may know that on Sunday I'm going to Minsk in Belarus to work with journalists and government people there on a press law for them. I've had the privilege to work with a number of developing democracies and it's a fascinating exercise and very useful for people who work in journalism in the United States. One of the things that has always struck me is that journalists in many of these countries, almost without exception, tend to blend together legal and ethical concepts into single lists of rights and responsibilities and then what happens is their parliament enacts this into law. And often times these include very specific duties that you have to promote the government of the day, or that you have to provide a right to reply to anybody who has been criticized.

One time when I was doing a seminar for some journalists over there, after we talked about prior restraint and how in this country our government is very limited in its ability to impose obligations or compel actions on the part of the press one of the journalists asked me how I draw a bright line between legal and ethical issues. I was really stumped, because I think today the line is growing more blurred than perhaps it ever was. If you think, for example, about a couple of cases that the U.S. Supreme Court decided in the 1990 term, you can see where this blurring is taking place. The cases I'm talking about are Masson v. The New Yorker Magazine and the Cohen v. Cowles media case. I know you know these cases, but just as a quick resume: In Cohen, we had two Minneapolis area newspapers that over the objections of their reporters decided to publish the name of a source who had been promised confidentiality. The source was a guy named Dan Cohen, a Republican campaign worker, who had offered the reporters damaging information about another candidate shortly before the election. He was fired after the stories naming him as the source appeared, and he sued, under breach of contract theory that's known as promissory estoppel, which allows courts to award damages to individuals who are injured by their reasonable reliance on a promise that was broken intentionally.

When the case finally went to the U.S. Supreme Court, the majority held the First Amendment does not protect news organizations that violate promises made to news sources. And the ramification of this, practically, is that now ev-

ery state is going to have to decide whether, as a matter of public policy, it will recognize a cause of action based on this promissory estoppel theory. Now I know you remember that this case has sparked a lot of debate in journalistic and academic circles. A lot of people were appalled that the papers in Minneapolis broke a promise that was made to a source. Lots of journalists have gone to jail, of course, rather than reveal a confidential source. John Peter Zenger was one of them. But it's happening even today, practically as we speak. Most recently a reporter in the state of Ohio spent 22 days in jail for refusing to testify before a grand jury.

Now another element that came into play in this particular case was the issue of who had the right to promise confidentiality. Was it the reporter, was it an editor, was it a reporter whose promises were approved by an editor? And because of the resentment that was generated by management overriding the reporter's promise, which is certainly something I can sympathize with, a lot of journalists I talked to thought the Supreme Court's verdict was great. They said it would teach editors a lesson.

Well, it probably did, but I'm not sure it was a lesson that boded well for the First Amendment. In a nutshell, I think the lesson was this: If you promise a source confidentiality, you must keep that promise, even if the source lied to you. Even if you concluded, as these papers did, that the public's interest demands that the source be revealed. And presumably if you are subpoenaed, and found in contempt, and jailed or fined.

Now a lot of journalists would agree that that is the right thing to do, but my question is, should it be a legal duty enforceable in court? What is the public policy these courts set? Now, one of the arguments I've heard is that if sources don't have a right to sue for breach of promise, they will stop talking to journalists. This is a variation on the pitch we often make ourselves when we are trying to create a shield law, but it's a little bit different, because sources haven't traditionally had the right to sue journalists, and there's no evidence that it has deflected any source who had a story to tell from talking to a reporter. The pattern has been for reporters to fight to preserve confidentiality, and I remember when Cohen first came up, we all were trying to think of other examples of journalists burning sources, and we couldn't really come up with any, because even if you don't have a lot of respect for honor among journalists, you know that for purely practical and pragmatic reasons reporters don't burn sources. If they do, they have just written their professional death warrant. Sources will clam up, and what good is a reporter without her sources?

So what we have here, in my opinion, is a remedy for a harm that is an illusion. It simply isn't the kind of thing the Court should be dealing with, and I'm sorry that the Supreme Court decided to get involved in the case.

Now the Janet Malcolm case is a little bit different and poses another ethical situation. Malcolm was accused by her interview subject, psychoanalyst Jeffrey Masson, of fabricating quotations that she attributed to him. Now, this has to rank at the top of the list of mortal sins. Among other things, Malcolm reported that Masson referred to himself as an intellectual gigolo. And also that he hoped to turn the Freud Archives in London into a place of sex, women and fun. And he sued claiming libel.

An opinion by Justice Kennedy of the Supreme Court said that while journalists aren't held to a standard of verbatim accuracy, they must not materially alter the speaker's meaning. Now, whether the alteration was material or not is still going to be difficult to determine. Justice Kennedy said that even exact literal quotation, if it's taken out of context, might be a distortion that would be actionable. And so under that standard, you can't be sure that even a quotation is safe. Its placement in a story might be deemed to have tampered with the meaning that the speaker intended to convey, and a meaning that the speaker may in fact think twice about once it appears in print.

Now, Justice Kennedy went on to say that unless the Supreme Court condemns alteration of quotes, journalists would be free to fabricate them. And he said not only public figures but the press would suffer under such a rule. And he said that newsworthy people would be afraid to talk to reporters if they thought they wouldn't be quoted accurately. It sounds like another version of the Cohen argument, and I think it's equally fallacious.

But, even if it were true, it's irrelevant. I don't think it's the responsibility of the Supreme Court to make sure that the press is respected or that it's respectable.

The First Amendment guarantees the press the right and the freedom to make its own mistakes, standing or falling in public opinion polls based on its own decisions. Now, there's another element here, and this is something that I've been preaching about a lot lately. You may recall that when the case was sent back to the trial-level court, the jury ruled that Janet Malcolm had indeed defamed Masson with five quotations that they decided were fabricated. But they deadlocked on the issue of damages. They could not decide what kind of monetary compensation Masson deserved to get. And there's now a question of whether they'll have a new trial or whether they'll settle the case.

But to me, the difficulty that the jury had with assessing damages points to what I think is one of the biggest problems in libel law today, which is that instead of doing what it was originally or at least in recent years intended to do —which is give to a subject a way to seek recompense when their reputation's damaged—rather, it's used as a method to force journalists to be accurate. I think the jury was not really convinced that Jeffrey Masson was damaged by

Janet Malcolm's article. I'm not convinced he was. His notoriety certainly increased and he became engaged to Catharine MacKinnon, a prominent feminist professor, who presumably was not repulsed by the words Janet Malcolm put in his mouth. and I don't really think that there was that much a proof of harm. And so again, is the purpose of libel law to compensate individuals who have suffered harm as a result of false defamatory statements, or is it to guarantee that the press be accurate?

That reminds me of a conversation I had about a year ago in Bucharest during the course of a seminar on the free press. One of the attendees said, "How do we make the press tell the truth?"

And in my view, that question encompasses two false propositions. The first one is that there is a single truth, and secondly, that it's appropriate and possible for the government to make the press tell it. Now, I think you can say that the notion of a single truth is sort of a mirror image of the old communist days, when the government and the media controlled by the government did preach a single truth, which was false. So it's not surprising that people in those countries would think that there must be a real truth out there and it's obviously the duty of journalists to tell it now.

I hope that those of us in more mature democracies recognize that that is not the case, that there isn't a single truth. And if you have any doubt about that, just think about the Westmoreland and CBS libel case and the Sharon and Time case. I don't know that we're ever going to know the truth in either of those cases in a generation or perhaps ever. And the courts were not the vehicle to decide those questions.

And so this being the case, it's virtually impossible to compel truth-telling, and any attempt to do so runs the risk of the government protecting publications that disseminate its version of the truth and punishing those who differ from it.

Now this prospect is developing into a reality. You know it, and I know it. Specifically, I think of it in the context of the so-called PC movement, which is engaged in promulgating everything from speech codes to suppression of conservative viewpoints of the student press and academia. I've had a lot of arguments with the defenders of the PC movement, and I don't think either of us has ever managed to convince the other that there's any validity to our positions. I once asked someone rhetorically whether it might be the case of expressing negative ideas whether they are racist or sexist or whatever—would be in a verbal form, would actually defuse violence, and that without that outlet, feelings of anger or resentment escalate to violence whether it's on a college campus or in Bosnia. So therefore, might not allowing an expression of negative ideas lead to reasoned refutation by others, and also, ultimately, understanding? And my opponent replied, "I don't care if they understand anything or not. I just

want them to stop talking."

Well, I find that appalling, but unfortunately, it is a position that is increasingly being adopted on campuses around the country, and even in the news media.

There was a story in The London Times last year that talked about how the press has a propensity to suppress the writings of the revisionists who contend that the Holocaust never happened. He talked about how, during the hearings on anti-Semitism in Moscow, the Supreme Soviet ruled that Hitler's Mein Kampf and the anti-Semitic tract Protocols of the Elders of Zion should not be banned because the precedent could later be used to censor the Russian press. He went on to say that the paradox is that in the West today, to describe that argument as sensible or even to suggest that absolute tolerance has a place in the political spectrum is to risk being labeled a hatemonger, a crypto-fascist or worse. He concludes that the press must defend what latitude it still has to tiptoe on forbidden ground. Such a defense is only effective if the press is seen to oppose efforts by any social group to universalize its political correctness on any issue, and not just the issues on which the social compromise weakened.

So does this mean that we have an obligation to defend the right of David Irving to preach that the Holocaust never happened? Yes, simply, it does. Remember what Justice Powell said, that under the First Amendment there is no such thing as a false idea; however pernicious an opinion may seem would depend not on the conscience of judges and juries, but on the competition of other ideas.

I don't want to take up a lot more of your time, but I do briefly want to touch on one other issue that continues to cause a great deal of anguish in media circles. It's the issue of invasion of privacy, most commonly in the context of publishing the names of victims of violent crime, particularly sexual assault.

I don't need to recap for you the ethical debate that has been going on now for years in the wake of The Des Moines Register series and the Kennedy-Smith rape trial. My organization has always taken the position that it is the news organization's decision whether or not to publish the victim's name. Now, I'm all in favor of sensitivity and of deliberate, considerate decision-making, but I'm very worried about the increasing tendency of those in the press to yield too much to the entreaties of the so-called victims'-rights movement.

Don't make a mistake on this point. These people are very powerful, they have a great deal of clout in the legislatures. Some states are seeking to enact statutes or constitutional amendments which grant victims bills of rights. These often include the right to control media access to trial; to choose which reporters will cover their cases; to demand a correction if inaccurate information is reported; to conduct an interview under their own terms, without cameras present;

and to file a formal complaint against a reporter. Usually it's not quite clear where that would be filed.

Other legislation would seal off the names of victims, prohibit publication of government bureaucrats and criminalized reporting of details of crime. Now, part of this agenda is to ensure that you don't report the names and addresses of victims without their permission. If you respond that you routinely publish the names of those accused of violent crimes, they will very coolly counter that you should elect not to report the names of the accused, either.

What happens to our open system of justice then? What happens to the role of public access and oversight to keep the criminal justice system honest, and to ensure they treat the victim and the accused legally and properly?

Never doubt that this dangerous proposition. It is based on the fallacious belief that secrecy equals safety. If utility records are secret, a stalker can't find you. Your friends can't embarrass you if they can't read a police report stating that you were robbed at gunpoint. A burglar alarm salesman can't solicit you if he can't find out that you were burglarized.

These may be desirable goals; maybe they are not. But whatever they are, I suggest that they are not attainable through secrecy, at least not without an immense cost to our democratic system. The government, after all, is the principal violator of our privacy. It collects huge volumes of information on every one of us. The real danger, in my view, is that it will continue to do that, but it will do it unchecked and unaccountable. And paradoxically, isn't that legitimate concern about how the system of justice operates what got the victims'-rights movement started in the first place? How ironic it would be, if aided and abetted by the press, the victims'-rights movement achieves its goal of secrecy. Who will help the victims then?

We can extend this concern into a whole panoply of errors, and there are many in the government that would be happy to do that. Access to war in the Persian Gulf could be restricted because of national security, access to the Waco debacle could be restricted on grounds of safety, access to the Chinese boat people off the California coast last year was restricted on grounds of diplomatic sensitivity. If we give one buzzword like "privacy" a talismanic significance, why not all these other words? Why not close everything down?

For me, it comes down to a simple proposition. The overriding journalistic ethic is to inform the public. Tell the truth as best that you determine it at the time, and to trust the public to have the judgment and the sense to take the actions that are necessary to ensure preservation of our democratic system. And we must fight against all comers, whether from the government or private citizens, who attempt to divest us of our rights to do that. To do anything else, ladies and gentlemen, would be unethical. Thank you.