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"To Be or Not to Be" Responsible: The Effectiveness of Media's Codes of Ethics as Checks on Biased Reporting

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Dean and Professor of Law, Wake Forest University School of Law; B.A. and J.D., University of Virginia. I express appreciation to the following individuals: Professor Leonard Baynes and others associated with The Ronald H. Brown Center for Civil Rights and Economic Development, which invited me to present this timely topic in the symposium, Rethinking the Discourse on Race: A Symposium on How the Lack of Racial Diversity in the Media Affects Social Justice and Policy; and Mrs. Terry Evans and Catherine Harcus, who provided vital administrative support. I also thank my very supportive spouse, Mrs. Paulette J. Morant, patience, as always, assisted with the completion of this project.
I. Introduction

The quintessential democracy has as endemic components free and robust media.\(^1\) This generally accepted truism presupposes the media’s right to expressive freedom and the deference afforded that right.\(^2\) Such freedom normatively connotes the autonomy to report and disseminate information with minimal restriction.\(^3\)

The media’s robust exercise of expressive freedom, however, has occasionally produced strange fruit. The competition for viewer-or readership, which is directly related to the generation of profit, has led to the periodic dissemination of inaccurate information\(^4\) and arguably contributed to the proliferation of sensationalist reporting.\(^5\)

Some reports by the media have, either tacitly or explicitly, misrepresented or distorted the views, images or perceptions of racial, ethnic or other traditionally disadvantaged groups. One notorious example of this behavior is TIME MAGAZINE’S obscure and darkened...
cover photograph of O.J. Simpson, who had been arrested for the 1994 murder of Nicole Brown Simpson.  

Some believe that TIME’s publication of a more sinister-looking Simpson inflamed racial animus.  

Distorted and seemingly unending coverage of sensational events such as the Simpson trial undoubtedly results from the media’s zeal to capture a sizable audience.  

The misinformation that results from such ambition potentially diminishes public confidence in the industry and places a pallor on its effectiveness as an instrumentality of democracy.

The occasional mistakes, distortions or misrepresentations by the media compel critical examination of the industry’s reporting practices and its overall function within a democratic society. To confine this inquiry to autonomy alone would fail to recognize the media’s essential role as guarantors of democracy. If the media as the “fourth estate” serves as a surety of democratic processes, then its

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6See TIME MAGAZINE, June 27, 1994, at cover; Assoc. Press, Time Magazine Darkens and Blurs O.J. Simpson Mug Shot, Jun. 21, 1994, available at 1994 WL 10150984 (noting that Time and Newsweek both used Simpson's mug shot, but that Time had an artist darken and blur the face, but not, according to a Time spokesperson, in an effort to mislead).


8See Marge Injasoulian & Gregory L. Leisse, Media Crises, 36 CATH. L. REV. 106-07 (1995) (noting that the hysteria surrounding the press’ quest for sensationalism and, thus, increased readership and viewership, often leads to “inaccurate reporting and incomplete source verification”); see also Kevin A. Isern, When Is First Amendment Speech No Longer Protected By the First Amendment: A Plaintiff’s Perspective of Agricultural Disparagement, 10 DEPAUL BUS. L.J. 233, 256 (1998) (noting the controversy surrounding Oprah Winfrey’s dissemination of false information regarding the safety of beef products in the United States, and her show’s purposeful editing and packaging of the false information, including the deletion of scientific rebuttal, in order to increase ratings).

robust nature must include both the sacrosanct right to expressive autonomy and the commensurate duty to report news and information that is accurate and truthful. This responsible exercise of expressive freedom promotes accuracy, reduces distortions and misrepresentations in reported news, and ultimately secures the media’s role as guarantor of democracy.

In my view, the encouragement of a more responsible exercise of expressive autonomy by the media rests on the important postulate that a democratic society will foster both individual autonomy and societal members’ respect for the autonomous rights of others. To this end, there should be societal incentives that encourage the media, as a corporate person that enjoys autonomy, to respect the rights of individuals who seek accurate and reliable information. Such incentives, however, must be carefully crafted. Governmental regulations, which constitute external checks on the industry, potentially offend constitutional norms and chill the robust exercise of expressive autonomy. On the other hand, internal, industry-adopted standards would more effectively proscribe biased or distorted reporting by the media that reports news.

Perhaps the most prevalent industry-adopted standards for the

that the “Fourth Estate” serves as the best watchdog on a national level where it is more attuned to civil rights); Christopher S. Yoo, The Rise and Demise of the Technology-Specific Approach to the First Amendment, 91 GEO. L.J. 245, 333-34 (2003) (arguing that the media’s independence from the government is critical to the performance of a check on governmental abuse in their role as the “Fourth Estate”).

10See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975) (stating that the press has a “great responsibility” to report fully and accurately the proceedings of the government); Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) (“A responsible press has always been regarded as the handmaiden of effective judicial administration”); New York Times Co. v. U.S., 403 U.S. 713, 717 (1971) (Black, J., concurring) (stating that the Founding Fathers protected the press in the First Amendment “so that it could bare the secrets of government and inform the people”); but see Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 256 (1974) (“A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.”).

11For an expanded explanation of the mutual respect notion of democracy, see infra notes 25-30 and accompanying text. See also Blake D. Morant, Democracy, Choice, and the Importance of Voice in Contemporary Media, 53 DEPAUL L. REV. 943, 958-59 (2004) [hereinafter Morant, Democracy, Choice].

12This Article focuses primarily on broadcast news media, i.e., television and radio.
news media are various ethical codes. These regulatory norms guide reporting behavior and symbolize the industry’s good faith in exercise of expressive freedom. Ethical codes, as voluntary mechanisms, have constitutional legitimacy and greater efficiency given the media’s vestment in these norms. Despite their propensity for vague language and lack of authority, these self-imposed restraints potentially instill in the industry a greater sense of respect for the needs of the public.

This Article posits that industry-adopted codes of ethics potentially deter the news media’s dissemination of distorted or misrepresented images, views or perceptions of racial, ethnic or traditionally disadvantaged groups. Advancement of this thesis includes both theoretical and practical considerations. Part II of the Article provides the theoretical predicate for ethical codes, explaining the underpinnings of a respect-based notion of democracy. This theory underscores the intersection of media’s autonomous behavior related to profit maximization with the need to disseminate information that is free from bias, distortion, or misrepresentation. The need for accuracy in reporting forms the incentive for the

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industry’s self-imposed ethical codes. Part III then critiques these codes, noting certain deficiencies associated with indefiniteness, the lack of enforcement and the omnipresent influence of the industry’s motivation for profit. Despite these shortcomings, Part III notes the potential effectiveness of these codes to deter misrepresentation and distortion. Part III ultimately proffers recommendations that bolster ethical codes’ proscription of bias and misrepresentation and strengthen their overall impact on reporting behavior.

Journalistic codes of ethics are, by no means, panaceas for the news media’s occasional tendency to misrepresent or distort information. These established industry-prescribed norms, nonetheless, potentially encourage the news media’s responsible exercise of expressive autonomy and maximize the dissemination of truthful, balanced and unbiased information.

II. Media’s Function in a Democracy and the Predicate for Self-Regulation

A. Toward a Respect Theory of Democracy

Following a trend set by others, my critique of the news media, particularly with regard to its dissemination of distorted or misrepresented information, commences with an understanding of the industry’s function within a democratic society. A democracy is

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15See Drale, supra note 11, at 213 (arguing that communications policy analysts rate the effectiveness of media policy based on normative expectations derived from different theories of democracy); Morant, Electoral Integrity, supra note 4 at 3 (opining that in a true democracy the media should facilitate both the fulfillment of personal liberties and the larger interests of the body politic); C. Edwin Baker, The Media That Citizens Need, 147 U. PA. L. REV. 317, 318 (1998) [hereinafter cited as Baker, Media That Citizens Need] (positing that one can determine if a free press serves its function only when one determines the type of press each form of democracy requires and why it requires that type); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH xix 93 (1993) (stating emphatically “autonomy as guaranteed as it is by law, may in itself be an abridgement of the free speech right…My special concern is that the First Amendment [can be interpreted in such as manner] as to undermine democracy”). See also supra note 3 and accompanying text.
comprised of both the individuals who exercise their express and penumbral rights,\textsuperscript{16} and the collective unit of a “society”\textsuperscript{17} that serves as the venue in which individuals exercise those rights.\textsuperscript{18} Of course, the general, almost abstract notion of democracy has spawned several theories. The first and perhaps dominant theory reflected in today’s jurisprudence is libertarianism.\textsuperscript{19} Strict libertarian theory virtually

\textsuperscript{16} Of course the United States Constitution and Bill of Rights expressly provide for freedom of speech, press, religion, and association. The First Amendment of the U.S. Constitution reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I. See also 16A AM. JUR. 2D Constitutional Law § 399 (1998) (stating that the goal of the Bill of Rights is to protect the citizenry from governmental infringement on both fundamental rights that are necessary to keep the government responsive and rights that are necessary to protect against oppressive legal proceedings). Penumbral rights, e.g., the right to privacy and the right to travel, have been judicially determined as endemic to the Constitution. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (stating that various fundamental constitutional guarantees in the First, Third, Fourth, Fifth, and Ninth Amendments form the penumbral right to privacy). These rights both express and penumbral are essential norms of a functional democracy. See Ronald Dworkin, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 200 (1996) (recognizing the value of autonomy as a fundamental value of the First Amendment, with freedom of expression as a furtherance of the individual will).

\textsuperscript{17} See Morant, Democracy, Choice, supra note 11 at 955 (noting that citizens exercise their autonomous rights within the collective unit of society); Katherine Van Wezel Stone, Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities, 55 U. CHI. L. REV. 73, 167 (1988) (noting a society as “a system of power founded in entrenched divergencies of interest”) (quoting ANTHONY GIDDENS, STUDENTS IN SOCIAL AND POLITICAL THEORY 347, 348 (1977)) (internal quotation marks omitted).

\textsuperscript{18} See Baker, Citizens, supra note 15, at 319, n.2 (1998) (stating that “public liberty can only result from choices of autonomous agents whose autonomy is constituted by private liberties, and the necessary content of private liberties can only be determined collectively by the exercise of public liberty”).

\textsuperscript{19} See Dworkin, supra note 16, at 26 (arguing that individual liberty is a normative construct of any democratic society). This libertarian emphasis on individual liberty or autonomy stems from the notion that citizens should be free to enjoy “life, liberty, and the pursuit of happiness.” Morant, Electoral Integrity, supra note 4, at 15; but see Lee C. Bollinger, THE TOLERANT SOCIETY 57 (1986) (opining that the libertarian theory’s weakness is the protection it affords those who seek to destroy
ignores the inabilities of some groups to enjoy such liberties and the societal impact of that disproportionate exercise of autonomous rights.\textsuperscript{20} The emphasis on individual liberty has contributed to an inelastic interpretation of the first amendment.\textsuperscript{21} Such inelasticity generally thwarts governmental efforts designed to preserve societal interests such as electoral integrity, yet simultaneously infringe on individual freedoms as speech and press.\textsuperscript{22}

Another influential theory of democracy is of civic

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\textsuperscript{20}Id.; see also Larry Catá Backer, \textit{The Extra-National State: American Confederate Federalism and the European Union}, 7 COLUM. J. EUR. L. 173, 183 (2001) (recognizing that the somewhat natural tendency for personal advancement over other fellow societal members “leads to conflict, anarchy, and ultimately reduces the possibilities for personal achievement”); James B. Staab, \textit{The Tenth Amendment and Justice Scalia’s Split Personality}, 16 J.L. & POL. 231, 265 (2000) (noting Hamilton’s view that too little power for government (and its leaders) is as troublesome as too much power, with the former contributing to anarchy and possibly despotism).

\textsuperscript{21}Morant, \textit{Electoral Integrity}, supra note 4 at 24-32 (arguing that in deciding First Amendment cases, the Supreme Court has deferred to the express right of individual autonomy over competing claims to the larger public interests). In that article, I posit that the Supreme Court’s primary First Amendment cases are based on a negative theory of individual autonomy. \textit{Id.} at 26.

\textsuperscript{22}One case that exemplifies the government’s efforts to temper expressive autonomy for the sake of a societal interest is Ashcroft v. A.C.L.U., 2004 WL 1439998 (2004), which affirmed a preliminary injunction against enforcement of the Child Online Protection Act, 47 U.S.C. § 231, because, inter alia, prosecution under that statute would chill constitutionally protected speech. The Child Online Protection Act criminalized the knowing posting of content “harmful to minors” on the World Wide Web; yet it allowed an affirmative defense for postings that restricted access by “reasonable means.” \textit{See also} R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (invalidating the city’s hate speech ordinance because of fear that its overly broad nature gave officials too much discretion). Morant, \textit{Electoral Integrity}, supra note 4 at 28 (stating that the prior restraint doctrine, which can be seen as an obstacle to the government’s attempts to protect the collective interest at the expense of individual liberties, is the most significant and effective manifestation of the judiciary’s adherence to a negative rights theory of expressive liberty).
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republicanism. Civic republicans take a more egalitarian approach to autonomy and seek the free speech exercised by all societal members, regardless of their political or economic power. This theory also fosters and preserves political processes through a focused effort to include more marginalized segments of society those processes.

The theory of democracy I endorse respects the individual exercise of autonomous rights and also recognizes the need to preserve the society in which those rights are exercised. Pursuant to this theory, a true democracy preserves individualized rights and simultaneously fosters a mutual respect for the exercise of those rights by all members of a society. This respect-based notion of

23J.L. Hill, The Five Faces of Freedom in American Political and Constitutional Thought, 45 B.C. L. Rev. 499 (2004) (opining that civic republicanism embraces three conceptions of positive freedom: the freedom to participate in self-government; the freedom to have, do, or be anything one wishes; and the freedom to act rationally rather than be moved by untoward impulses); William S. Blatt, Interpretive Communities: The Missing Element in Statutory Interpretation, 95 Nw. U. L. Rev. 629, 638-39 (2001) (noting republicanism’s fostering of forum deliberation); David Fontana, Refined Comparativism in Constitutional Law, 49 UCLA L. Rev. 539, 596-97 (2001) (espousing that civic republicanism includes open debate, which should be inclusive of alternative perspectives); W. Bradley Wendel, Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities, 54 Vand. L. Rev. 1955, 2001 (2000) (noting republicanism’s feature of “interlocking relationships” and the state’s neutrality in its conceptualization of the “common good”); Saul Cornell, Moving Beyond the Canon of Traditional Constitutional History: Anti-Federalists, the Bill of Rights, and the Promise of Post-Modern Historiography, 12 L. & Hist. Rev. 1, 7 (1994) (describing “civic republicanism” as a positive liberty that empowers a community through the fostering of public good); Fiss, Why the State?, supra note 2 at 786 (arguing that decision-makers should judge actions by their impact on the richness of social debate rather than by whether they interfere with individual autonomy). Civic republicanism also encompasses deliberative democracy. Cass R. Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539, 1548-49 (1988) (arguing that true expressive liberty requires that all members of the body politic have access to the media and are therefore able to participate meaningfully in public discourse); Cass R. Sunstein, Naked Preference and the Constitution, 84 Colum. L. Rev. 1689 (1984) (noting that deliberative democracy eschews resource distributions based solely on “raw political power”).

24Id.

25Professor C. Edwin Baker’s preferred complex democracy has heavily influenced my conceptualization of democracy. I share Baker’s emphasis on an individual’s
democracy offers several advantages. Because individual exercises of autonomy are valued equally, participation in governmental processes becomes more diverse. Equality of expression and respect for the rights of others, therefore, enrich public discourse and engender in the public a greater sense of vestment in political processes.26 The dual emphasis on the individual right to free expression and the respect for others who exercise that very same right is functionally pluralistic. As a result, this mutuality of respect for expressive rights diversifies commentary, maximizes the participation of more marginalized voices in society, and ultimately sustain political processes that are critical in any society.27

Respect-based democracy does not ensure or even purport to presume that all views on matters of public concern are respected and promoted equally. Rather, the theory serves to enrich public debate through the encouragement of participation by all segments of society.

A democracy that fosters mutual respect for the autonomous rights of others tacitly encourages citizens, including the news media, to exercise their rights responsibly. Responsible conduct inevitably results when individuals consciously respect the exercise of rights by others. In society that encourages all of its members to exercise their autonomous rights, self-restraint, to some extent, becomes a palpable autonomous right to influence and engage others and the respect for the autonomy of others that the right entails. Because of this mutual respect for the autonomy of others, no individual’s autonomous rights take precedent over another’s. For more detailed explanations of my theory, see Morant, Democracy, Choice, supra note 11, at 958-59; Morant, Electoral Integrity, supra note 4, at 20-21. For a more detailed explanation of the theory of complex democracy, see Baker, Media, Markets at 143-47 (2002).

26 Id.
27 See generally Morant, Democracy, Choice, supra note 11, at 962-65; Lawrence M. Friedman, Borders: On the Emerging Sociology of Transnational Law, 32 Stan. J. Int’l L. 65, 66 (1996) (defining legal pluralism as “a situation in which more than one body of laws or set of norms exist inside a single legal jurisdiction, country, or other entity”); Thomas W. Merrill, Chief Justice Rehnquist, Plural Theory, and the Interpretation of Statutes, 25 Rutgers L.J. 621,622 (1994) (stating that pluralism is a political system in which competing groups try to advance their private interests through bargaining and compromise).
consequence. Individuals who abide by the tenets of a respect-driven democracy must monitor their own behavior as they strive to respect the rights of others. Moreover, a member will likely respect the rights of others when she recognizes that the rights of all citizens are interdependent.

A respect theory of democracy has particular application to the news media’s proclivity to self-regulate effectively. Corporate individuals such as media sources share the responsibility to recognize the interdependency of the expressive rights of all citizens. The news media’s exercise of its expressive rights must be tempered by a commensurate recognition of divergent voices within a society, and the need to respect those various voices as a means to foster the societal good. Respect for others and the preservation of societal norms or institutions compel the news media to behave ethically as it exercises its right to free expression and functions as governmental monitor and responsible citizen.

28 Corporate entities, which include media sources, enjoy expressive freedoms guaranteed by the First Amendment. See Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 658-60 (1990) (finding that corporations, like persons, have the right to free expression under the Constitution); Randall P. Bezanson, Institutional Speech, 80 IOWA L. REV. 735, 739 (1995) (noting expressive liberty as an originally conceived right of humankind with institutional speech as an abstraction from that original). See generally Steven R. Ratner, Corporations and Human Rights: A Theory of Legal Responsibility, 111 YALE L.J. 443, 514 (2001). However, the expressive rights enjoyed by the media can be limited by context. For an example of such a limitation, see Estes v. Texas, 381 U.S. 532, 539-40 (1965) (noting that different media forms required different scrutiny as decision-makers balance media access rights with a defendant’s need for due process).

29 See generally Morant, Democracy, Choice, supra note 11, at 963.

30 See ENCYCLOPEDIA BRITANNICA, 15th ed., s.v. “ethics” (stating generally that “ethics” concerns the fundamental issues of practical decision-making, including the nature of ultimate value and the standards by which human actions can be judged right or wrong); PHILIP SEIB & KATHY FITZPATRICK, JOURNALISM ETHICS 3 (1997) (citing PHILIP SEIB & KATHY FITZPATRICK, PUBLIC RELATIONS ETHICS 29 (1995) (stating that “ethics involves defining individual, organizational, and societal values that are morally acceptable and using those values as the basis of human behavior”). See also Bernard Rubin, The Search for Media Ethics, in QUESTIONING MEDIA ETHICS 3 (1978) (stating that all professional codes of ethics are “essentially moral guides to help those who seek solutions to perplexing problems that constantly arise”).
B. Respect Theory of Democracy and the Motivational Triad

Of course, there are significant impediments to the effectiveness of a respect notion of democracy. Unabashed autonomy and the maximization of self interests can overshadow one’s concern for the rights of others. This phenomenon has particular application to the news media. Commercial interests related to the drive for large audiences and resulting profits often dominate the industry’s exercise of its right to disseminate.31 The quest for ratings, which is directly related to profit maximization, often obscures or even supplants the motivation to respect the autonomous rights of others or preserve the collective interests of a society. The dominance of self-interest within the news media can, thus, lead to reporting behavior that distorts information disseminated and, at times, create media frenzy.32

31 See Andrew Kohut, Self-Censorship: Counting the Ways, COLUM JOURNALISM REV., May–June 2000, 42, at 43 (reporting, based on findings of a survey by The Pew Center for the People and the Press, that there is “considerable evidence” that for some journalists there has been an intrusion of commercial interests into newsroom decisions); Elizabeth Thoman, Screen-agers...and the Decline of the “Wasteland,” 55 Fed. Comm. L.J. 601, 606 (2003) (opining that most media messages are construed to gain profit or power); Rick S. Lear & Jefferson D. Reynolds, Your Social Security Number or Your Life: Disclosure of Personal Identification Information by Military Personnel and the Compromise of Privacy and National Security, 21 B.U. INT’L L.J. 1, 23 (2003) (describing the media as a largely profit-motivated industry that is not self-regulated); Richard L. Hasen, Campaign Finance Laws and the Rupert Murdoch Problem, 77 Tex. L. Rev. 1627, 1644 (1999) (noting that media owners will occasionally, in the pursuit of profit maximization, endorse political candidates in exchange for political favors); Clay Calvert, The Reporters Privilege v. The Corporate Interest Muzzle: Philip Morris Cos., Inc. v. ABC, Inc., 22 U. DAYTON L. Rev. 1, 21 (1996) (arguing that corporate ownership of news media causes self-censorship among journalists by “subt[ly] molding...reporters to the conglomerate’s business interests”). Additionally, because of the financial support they provide for the media, advertisers can exert great influence over programming content.

32 Media “frenzy” refers to an obsession with more trivial aspects of a public matter, thus leading to a focus on “gossip rather than governance” and “titillation rather than scrutiny.” LARRY SABATO, FEEDING FRENZY 6 (1991). See also Morant, Democracy, Choice, supra note 11, at 954; Morant, Electoral Integrity, supra note
Despite the controlling nature of self-interest related to audience and profit, individuals, including the news media, can be tacitly prompted to respect the rights of others. If an individual perceives that her own interests are symbiotic with the rights of others, she is more likely to respect those rights. This premise has particular relevance to the news media.

As a general premise, audiences prefer news that is truthful. Distorted misrepresented information is clearly antithetical to truth. If the news media believes that dissemination of truthful information appeals to its audience (and, therefore, maximizes profits), then it will regulate its reporting behavior to attain these ends. The ultimate aims, of course, are the attraction of a sizeable audience, which translates into higher ratings and substantial profit.

Self-interests related to profit maximization forms the basis of a motivational triad consisting of credibility, audience, and profit. This triad becomes the baseline criterion for the news media that seeks large audiences. The requirement of credibility rests on the assumption that audiences gravitate toward sources that provide truthful information. To achieve its ends, a news source must establish a certain level of credibility. The establishment of

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4 at 12-15. For a discussion of the effects of ratings and commercialism on the effectiveness of journalistic codes of ethics, see infra notes 77-109 and accompanying text.

33See Esther Thorson, What 35 Years of Academic Research Tells Us, Apr. 9, 2003, available at http://www.poynter.org/content/content_print.asp?id=29033&custom=#series (last visited Dec. 12, 2005) (finding based on a review of 35 years of academic literature that the quality of the news content, as defined by both journalists and readers, positively affects a newspaper’s circulation); see also Newspaper Guild of Greater Philadelphia v. N.L.R.B., 636 F.2d 550, 560-61 (U.S. App. D.C. 1980) (arguing that because credibility and integrity are central to the enterprise of journalism, a news publication must be free to establish reasonable rules designed to prevent employees from engaging in activities that may compromise their integrity or the integrity of the news organization for which they work); Lili Levi, Reporting the Official Truth: The Revival of the FCC’s News Distortion Policy, 78 WASH. U. L.Q. 1005, 1010, 1098-1101 (2000).

34For further discussion of this motivational triad, see Morant, Electoral Integrity, supra note 4, at 54.

35See Thorson, supra note 33; see also infra note 135 and accompanying text.
credibility seems to appeal to the industry. Several news media specifically reference in advertisements their penchant for credibility.\textsuperscript{36}

Credibility, as a dominant element of the motivational triad, is not the sole determinant of audience size. In fact, other factors such as regionalism, viewer curiosity, entertainment value or appeal to ideological viewpoints may influence viewer- or readership and, thus, affect the polarity of the triad’s influence.\textsuperscript{37} Despite these contextual factors, I argue that the motivational triad remains an essential, if not controlling, criterion in the news media’s quest for audience size. Credibility, then, constitutes a fundamental element of the triad and becomes a focal point in a strategy to build an audience.

C. Motivational Triad, Self-Regulation and the Genesis of Journalistic Codes of Ethics

I maintain that the motivational triad, with its emphasis on credibility and its genesis within a respect-notion of democracy, operates tacitly to encourage self-restraint and regulation by the news media. For example, the news sources, which appear in constant pursuit of large audiences, have voluntarily refrained from disclosing the names of victims of certain violent crimes\textsuperscript{38} or juveniles involved

\textsuperscript{36}Anecdotal review of advertising on television reveals that advertisements for CNN specifically state that the network’s distinguishing feature is its trustworthiness and penchant for public trust. CNN cites The Pew Center for People & the Press’s recent survey as support for this assertion. \textit{See infra} notes 37 and 76 and accompanying text. Other networks, such as Fox News and NBC, also make reference to their credibility.

\textsuperscript{37}The results of a Pew Research Center study confirms that credibility does not necessarily dictate audience size. \textit{See} Blake D. Morant, \textit{The Endemic Reality of Media Ethics and Self-Restraint}, 19 NOTRE DAME J.L. ETHICS & PUB. POL’Y 606-09 (2005) (detailing the results of a Pew Research poll demonstrating that while CNN was considered the most credible broadcast source for news, Local television and Fox News garnered higher ratings).

\textsuperscript{38}Copley Press, Inc. v. Superior Court of San Diego County, 74 Cal. Rptr. 2d 69, 71 (Cal. Ct. App. 1998) (noting that despite the fact that both the juvenile victim and juvenile assailant’s names had been disclosed in a wardship proceeding below, the press had not published those names because of its policy against identify victims of
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in judicial proceedings. Self-restraint has also been evident in the news media’s more recent reporting of election results. Subsequent to erroneous projections in the 2000 presidential contest, most broadcast media adjusted their reporting procedures and reported the returns during the 2002 mid-term elections with deliberate care. The news media has also exercised restraint in the reporting of matters that implicate security interests related to military operations

sexual assault or minors charged with crimes); Society of Professional Journalists, Code of Ethics, available at http://www.spj.org/ethics_code.asp (last visited July 6, 2004) (stating that journalists should “be cautious about identifying juvenile suspects or victims of sex crimes”); Shirley A. Wiegand, Sports Heroes, Sexual Assault and Unnamed Victims, 12 MARQ. SPORTS L. REV. 501, 501 n.6 (2001) (citing Alex S. Jones, Naming Rape Victim is Still a Murky Issue for the Press, N.Y. TIMES, June 25, 1989, § 1, at 18) (stating that it is estimated that only 5-10% of American newspapers publish the names of sexual assault victims).


See generally Bush v. Gore, 531 U.S. 98 (2000); Morant, Electoral Integrity, supra note 4, at 49 (describing media’s erroneous projections of the 2000 elections); Susan E. Seager & Laura R. Handman, Congress, the Networks, and Exit Polls, 18 COMM. LAW 1 (2001); Pamela S. Karlan, Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore, 79 N.C. L. REV. 1345, 1360-61 (2001) (providing the narratives of two voters who, on their way to the polls, decided not to vote because they heard media reports that Gore carried Florida and were “convinced that [their] vote[s] would be meaningless”).


See David Bianculli, People Have Spoken but Pundits Whisper, N.Y. DAILY NEWS, Nov. 6, 2002, at 99; Frazier Moore, TV News Played It Safe, Not Sorry, in Election Night Coverage, DESERET NEWS, Nov. 6, 2002, at WEB 1. See generally Morant, Electoral Integrity; supra note 4, at 53 (discussing my direct observations of CNN’s voluntary restraint in reporting results of the 2002 mid-term elections).
in World War II, Afghanistan and Iraq.

Perhaps the most tangible manifestation of the media’s self-restraint is the development and implementation of journalistic codes of ethics. Virtually every media source, whether broadcast or print,

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\[\text{43} \text{See, e.g., Howard B. Homonoff, Note, The First Amendment and National Security: The Constitutionality of Press Censorship and Access and Denial of Media Operations, 17 N.Y.U. J. INT’L L. & POL. 369, 400-01 (1985) (citing Censor Journalists Covering Wars? U.S. NEWS & WORLD REP., Nov. 14, 1983 at 33) (stating that journalists were with the military on D-Day, during the invasion of Cambodia, and on numerous other missions requiring surprise and in none of those was the secrecy requirement violated or the enemy forewarned); Floyd Abrams, speaking before the American Bar Association, Standing Committee on Law and National Security, The Media and Government Leaks, 6 (1984) (stating that during the Iran Hostage Crisis the media knew that Americans were being hidden in the Canadian Embassy in Tehran but did not publish the story “because of the sense of responsibility of members of the press”); ROBERT W. DESMOND, TIMES OF WAR: WORLD NEWS REPORTING 1931-45 225 (1984) (noting that during World War II journalists knew of but did not reveal the extent of damage to the United State’s Pacific fleet at Pearl Harbor, the development of the atomic bomb, the landings in western states of Japanese bombs carried by windborne balloons, and the preparations for the Normandy Invasion).}

\[\text{44} \text{See David J. Bodney, War, Wisdom, and Freedom of the Press, 19 COMMS. LAW. 3, 4 (Win. 2002) (stating that after National Security Adviser Condoleezza Rice met with representatives of ABC, CBS, NBC, Fox News, and CNN and asked that they use restraint in airing taped messages from Osama Bin Laden out of fear that they were encoded or would enable the terrorist to disseminate propaganda, all five networks chose not to air unedited Bin Laden messages).}

\[\text{45} \text{See Abuse of Iraqi POWs by GIs Probed, CBSNews.com, Apr. 29, 2004, available at http://www.cbsnews.com/stories/2004/04/27/60II/printable614063.shtml (last visited July 7, 2004) (stating that the network agreed to honor an appeal from Chairman of the Joint Chiefs of Staff, General Richard Myers, to delay broadcast of the Abu Ghraib prison abuse photographs out of concern for the danger and tension on the ground in Iraq). CBS aired the story on 60 Minutes II only after the photographs began to circulate elsewhere in the media and after receiving the Defense Department’s cooperation with its decision to disseminate. James Risen & David Johnston, Chalabi Reportedly Told Iran That U.S. Had Code, N.Y. TIMES, June 2, 2004, at A1 (stating that the New York Times and other news organizations had cooperated with a Bush Administration request that they not disseminate information about the government’s evidence against Ahmad Chalabi out of concern for national security until the information began to appear in news accounts and the Administration withdrew its request).} \]
subscribes to an established ethical code.\textsuperscript{46} The sheer number, language, and breadth of these codes symbolize the media’s intent to exercise expressive freedom responsibly and tacitly connote its sensitivity to the public’s need for credible information.\textsuperscript{47}

Ethical codes adopted by the news media stipulate truth, credibility or fairness as ubiquitous goals.\textsuperscript{48} Moreover, the centrality of truth in these codes demonstrates their nexus with the motivational triad, which has credibility as a dominant factor.\textsuperscript{49} For example, THE WASHINGTON POST STANDARDS AND ETHICS, which emphasizes the newspaper’s mission to “tell the truth,” require reporters “to approach every assignment with the fairness of open minds and without prior judgment and states that “[n]o story is fair if it consciously or unconsciously misleads or even deceives the reader.”\textsuperscript{50} Similarly, THE NEW YORK TIMES: GUIDELINES ON OUR INTEGRITY state the goal to preserve integrity, requiring its personnel to “do nothing that might erode readers’ faith and confidence in [their] news columns.”\textsuperscript{51} The NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION’S CODE OF ETHICS stipulates that journalists “strive for pictures that report truthfully, honestly and objectively.\textsuperscript{52} Given the broad definitions of such terms as integrity, honesty and truth,\textsuperscript{53} one could generally surmise that these codes proscribe the dissemination of information that is racially biased, distorted, or contains misrepresentations with racial

\begin{footnotesize}
\textsuperscript{46}See supra notes 13, 14 and accompanying text (providing text of various codes of ethics).
\textsuperscript{47}Id.
\textsuperscript{48}See supra notes 34-37 and accompanying text (explaining the motivational triad).
\textsuperscript{49}Id.
\textsuperscript{53}Webster’s II New Riverside University Dictionary (1984) defines “integrity” as “firm adherence to a code or standard of values.” Id. At 634. “Honesty” includes “integrity,” “sincerity” and “truthfulness.” Id. at 590. “Truth” is generally defined as “actuality,” “sincerity” and “integrity.” Id. at 1240.
\end{footnotesize}
overtones.\footnote{For examples of other adopted codes with general language that proscribes distortion and misrepresentation, see \textit{The Code of Ethics: Society of American Business Editors and Writers}, available at \url{http://www.asne.org/ideas/codes/washingtonpost.htm} (last visited Apr. 5, 2006) (stating that writers must “[a]void any practice which might compromise or appear to compromise his (sic) objectivity or fairness”); \textit{The Hearst Newspapers Statement of Professional Principles}, available at \url{http://www.asne.org/ideas/codes/washingtonpost.htm} (last visited Apr. 5, 2006) (espousing dedication “to principles of truthfulness, fairness and independence...” and “trust ... is [their] most valuable asset”).} Certain codes specifically prohibit bias or distortion and, in some cases, mention the importance of diversity. The Association of News Editors’ Statement of Principles provides, \textit{inter alia}, that news must be “free from bias and in context.”\footnote{See \textit{The Association of New Editors Statement of Principles}, available at \url{http://www.asne.org/ideas/codes/washingtonpost.htm} (last visited Apr. 5, 2006).} The Associated Press Statement of News Values states that, in “striving for truthful and unbiased reporting, the organization and its personnel “abhorr inaccuracies, carelessness, bias or distortions.”\footnote{See \textit{The Associated Press Statement of News Values}, available at \url{http://www.asne.org/ideas/codes/washingtonpost.htm} (last visited April 5, 2006).} The Associated Press also prohibits photographic images that “substantially alter the original scene...” specifically rejects racist speech.\footnote{Id.} In addition to the requirement to “present news in a fair, accurate and unbiased manner,” the code of ethics for the Associated Press Managing Editors state that “[newspapers] guard against inaccuracies, carelessness, bias or distortion...”\footnote{See \textit{Ethics Code: Associated Press Managing Editors}, available at \url{http://www.asne.org/ideas/codes/washingtonpost.htm} (last visited Apr. 5, 2006).} The Gannett Company more generally states that they “believe respect for others and our commitment to diversity represent vital strengths of [their] Company.”\footnote{See \textit{Gannett Company, Inc. Ethics Policy}, available at \url{http://www.asne.org/ideas/codes/washingtonpost.htm} (last visited Apr. 5, 2006).}

Two codes of ethics include more specific language that proscribes reporting that is racially biased or distorted. In imploring journalists to “seek the truth” and “be honest, the Society of
Professional Journalists (SPJ) prohibits “deliberate distortion” and requires that reported information does not “misrepresent.”60 The SPJ code of ethics also implores journalists to “avoid stereotyping by race, gender, age, religion, ethnicity, geography, sexual orientation, disability, physical appearance or social status.”61 A striking distinction that strengthens the impact of the SPJ’s code is its requirement that journalists “[e]xamine their own cultural values and void imposing those values on others.”62 The Code of Ethics and Professional Conduct for the Radio-Television News Directors Association (RTNDA) states that journalists, “as trustees of the public, seek truth [reported] fairly and with integrity,” “[r]esist distortions that obscure the importance of events,” must not mislead, and “treat all subjects of news coverage with respect and dignity.” Of particular note in the RTNDA code is its charge that journalists within its organization “[s]eek to understand the diversity of their community and inform the public without bias or stereotype.”63

In my view, codified rules of ethics have both internal and external functionality. They operate internally as guideposts for responsible, journalistic behavior and regulate the performance of those who disseminate information. Ethical codes essentially embody the media’s aspirations for professional order.64 Codes of

61Id.
62Id.
64Ethical codes function similarly to legal rules. Legal rules provide order as well as guidance regarding the conduct both present and future of those who operate within the unit to which the rules apply. See Richard H. McAdams, Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination, 108 Harv. L. Rev. 1003, 1007 (1995) (noting that notwithstanding their crudeness, rules still have the power to significantly influence individual perceptions and attitudes); Alan Schwartz, The Default Rule Paradigm and the Limits of Contract Law, 3 S. Cal. Interdisciplinary L.J. 389, 412 (1993) (suggesting that legal rules have two functions: substantive, which affect transactional outcomes, and transformative, which change parties’ preferences); but see Blake D. Morant, Contractual Rules and Terms and the Maintenance of
ethics also demonstrate externally the news media’s intent to report responsibly and respect the public’s right to credible information. These codes impose moral obligation on the media to report credible information that is devoid of bias, distortion, and misrepresentation. As discussed below, the efficacy of ethical codes rests with the minimization of their deficiencies, shortcomings and the commensurate enhancement of their inherent advantages.

III. The Utility of Ethical Codes as Self-Regulatory Mechanisms

A. Challenges to the Effectiveness of Journalistic Codes of Ethics

Despite their potential to regulate reporting behavior, ethical codes have certain deficiencies. One inherent deficiency relates to their operation as behavioral rules. Ethical codes, as codified norms of journalistic behavior, may relate awkwardly or inflexibly to problems that occur in different contexts. The guidance provided by these codes in some instances, therefore, may be incomplete or inapplicable - the precise problem these codes were designed to avoid.

Journalistic codes of ethics, which are predetermined standards, also tend to lack definiteness and authority. These deficiencies distinguish journalistic codes of ethics from similar standards adopted by other professions such as law or medicine. Ethical standards applicable to these professions contain more precise

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*Bargains: The Case of the Fledgling Writer*, 18 HASTINGS COMM'NT L.J. 453, 456 (1996) (stating that rules that would be applicable for a range of circumstances are difficult to design because of the lack of perfect information regarding the situations to which the rules will apply); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 957 (1995) (stating that “[o]ften rules will be too crude, since they run up against intransigent beliefs about how particular cases should be resolved”).

66Rules of law can have dubious effects given their ubiquitous application in cases with varying facts. See Morant, *Contractual Rules*, supra note 64 at 456; Sunstein, *Problems with Rules*, supra note 64 at 957; McAdams, *supra* note 64 at 1081.
language and are enforced by independent regulatory authorities.\textsuperscript{66}
Without some external mechanism that compels compliance, journalistic codes of ethics can become specious and largely symbolic.\textsuperscript{67}

Perhaps the most resonant criticism of journalistic codes of ethics relates to their somewhat vague prescriptions. As previously noted, the language of most codes promotes socially acceptable and professionally required norms based on truthfulness.\textsuperscript{68} Generalized and somewhat ambiguous guidelines, however, have contributed to a description of these codes as “a patchwork of unwritten customs, formal codes, and gut instincts that are imprecise, contradictory, and far less elaborate than the ethical regulations governing lawyers, doctors, and other professions.”\textsuperscript{69} Journalistic codes of ethics seldom offer bright-line criteria that define problematic behavior. In most instances, they also fail to provide the specific guidance needed to resolve the issues associated with that behavior.\textsuperscript{70} So blatantly amorphous is the language in most codes, that one might surmise that the resultant ambiguity is by design, rather than accident.\textsuperscript{71}

Vagueness or indefiniteness arguably diminishes the functionality of journalistic codes of ethics. The efficacy of these codes relates directly to an individual’s comprehension and interpretation of their prescriptions.\textsuperscript{72} Their broad language leads

\textsuperscript{66}See Bruce W. Sanford, Special Report: Ethics, Codes and Law, THE QUILL, Nov.- Dec. 1994, 43 (stating that codes governing other professions are more specific and derive their power from the government’s power to license).

\textsuperscript{67}Jeff Storey, Does Ethics Make Good Law? A Case Study, 19 CARDOZO ARTS & ENT. L.J. 467, 471 (2001) (reiterating the problem that codes have dubious effect because of their lack of authority).

\textsuperscript{68}See supra notes 47-54 and accompanying text (noting the centrality of truth in journalistic codes of ethics).

\textsuperscript{69}Mike France, Commentary, The Press Should Try Taking a Little of Its Own Medicine: The Media’s Zeal for Higher Standards Doesn’t Always Extend to the Fourth Estate, BUS. WK., Apr. 19, 2004, 60.

\textsuperscript{70}Sanford, supra note 66, at 43; see also Storey, supra note 67 at n. 82 at 477.

\textsuperscript{71}Storey, supra note 67 at 474 (noting that the media has followed the advice of lawyers who advise that ethical codes should be “as flexible as possible”).

\textsuperscript{72}Id. at 266, 268 (opining that the success of codes depends upon a reporter’s knowledge and judgment).
several problems: confusion as to the exact conduct that is
proscribed; varied interpretations of the codes’ directives and a lack
of consensus on meaning and application of the codes’ tenets. 73

In addition to problems associated with vagueness74 and
dubious authority75 a significant impediment to the effectiveness of
ethical codes is the public’s jaundiced perception of the news media.
In fact, informal discussions with colleagues and laypersons suggest
that “media ethics” is an oxymoron. I believe that several factors
generate such a cynical opinion about the media. Despite the
prevalence of ethical codes, the news media contribute to a pervasive
view that private rather than public interests dominate its operations.
Some believe this dominance of private interests leads to reporting
that is distorted, skewed, or even untrustworthy.76

The news media’s pervasive quest for large audiences and
ratings seemingly overshadows the more noble goals objectives of
ethical codes.77 The competitive environment in which the news
media operates undoubtedly affects the influence of journalistic codes

73Linda N. Deitch, Breaking News: Proposing a Pooling Requirement for Media
Coverage of Live Hostage Situations, 47 UCLA L. REV. 243, 266 (1999)
(criticizing internal press codes because reporters and media sources lack consensus
on the meaning and direction of those codes).
74See supra notes 68-73 and accompanying text (explaining the possible
ineffectiveness of ethical codes, resulting from the indefiniteness of code language).
75See generally infra notes 110-41 and accompanying text (noting that ethical codes
and other voluntary means of media self-restraint often suffer from a lack of
authority or enforcement).
76Pew Research Center for the People and the Press, survey report, News Audiences
Increasingly Politicized, released June 8, 2004, available at http://people-
press.org/reports/pdf/215.pdf (last visited July 21, 2004) (reporting that 53% of
Americans agree with the statement “I often don’t trust what news organizations are
saying”); American Society of Newspaper Editors, survey report, Building Reader
http://www.asne.org/credibilityhandbook/brt/contents.htm (last visited July 26,
2004) (reporting that in the seven test markets surveyed, more than two-thirds of the
respondents agreed with the statement, “Lately I have become more skeptical about
the accuracy of anything I hear or read in the news.”).
77Id. at 266-67; see also Pate, Restricting Electronic Media Coverage of Child
Witnesses, supra note 39 at 358 (observing that adherence to ethical codes tends to
suffer due to the pressure to increase ratings).
of ethics. The drive for ratings and profit, which often translates into scooping or becoming the first to disseminate a story, may lead to hurried decision-making and the reporting of distorted or inaccurate information.\textsuperscript{78} Several examples of this negative by-product of ratings pressure exists, including the print media’s report of the winner of the Dewey-Truman presidential contest in 1948,\textsuperscript{79} and the broadcast media’s call of the winner of Florida in the 2000 presidential contest.\textsuperscript{80}

The news media’s tendency to abandon some of its practices of restraint for the sake of higher ratings understandably threatens adherence to ethical standards. As previously noted in this Article, various media sources have agreed to refrain from dissemination of information pertaining to certain victims of crimes, juveniles, or national security.\textsuperscript{81} An agreement not to disseminate, however, can be tenuous if the pressure to attain high ratings dominates decision-making. One commentator notes the media’s rejection of a request to refrain from disseminating information that the government deemed

\textsuperscript{78}For a description of media frenzy, see \textit{supra} note 32 and accompanying text.

\textsuperscript{79}\textsc{Martin Plissner}, \textsc{The Control Room: How Television Calls The Shots In Presidential Elections} 69 (1999).

\textsuperscript{80}\textit{Election 2000: The Role of the Courts, The Role of the Media, The Role of the Dice}, Conference Report, Northwestern University, Jan. 2001, at 21 (commenting that the networks’ rush to declare a winner in the Bush-Gore contest, and resultant errors in reporting, were due in large measure to the quest for high ratings). See also Sherry Ricchiardi, \textit{Standards Are the First Casualty}, \textsc{Amer. Journalism Rev.}, Mar. 1998, at 30 (detailing a news gaffe in which Larry King reported that a phone message left by Clinton to Lewinsky would be the next sexy scoop and came back immediately after the commercial break to retract the story, explaining the retraction as a “classic example” of the frenzy surrounding the Clinton-Lewinsky scandal); Weekend Edition, National Public Radio, \textit{Media Transforms O.J. Into Version of ‘The Fugitive’}, show 1076, segment 2, aired June 19, 1994 (reporting that a caller to ABC during the network’s live coverage of the O.J. Simpson chase stated that he had seen O.J. in the back of the Bronco in his driveway and that ABC had later apologized for airing the uncorroborated information, stating that the call was a hoax).

\textsuperscript{81}See \textit{supra} notes 38-39; 43-45 and accompanying text (discussing media’s agreement, express or implied, to refrain from the dissemination of the names of victims of certain crimes, children involved in judicial proceedings, and information that is potentially deleterious to societal/national interests).
potentially injurious to national security. The quest for ratings undoubtedly contributed to that decision. Additionally, and despite the tacit agreement to preserve the anonymity of minors who are criminal defendants or witnesses in judicial proceedings, the news media has occasionally abandoned this policy in particularly newsworthy cases.

Another manifestation of distortions caused by the quest for


83 See also supra note 38-39 and accompanying text; but see Bob Steele & Jay Black, Code of Ethics and Beyond, Apr. 1, 1999, available at http://www.poynter.org/content/content_view.asp?id=5522 (last visited July 13, 2004) (noting that in Poynter’s survey of 33 newspaper codes of ethics that only four offered guidance on the identification of juvenile suspects). For examples of codes of ethics that encourage journalists not to use the name of a minor involved in a criminal trial, see San Francisco Chronicle: Ethical Newsgathering, available at http://www.asne.org/ideas/codes/sanfranciscochronicle.htm (last visited July 21, 2004) (“In general, we do not name juvenile suspects (under the age of 18) in crime stories. We also are cautious about naming juvenile victims of a crime”); Ethics Code: Lincoln (Neb.) Journal Star, available at http://www.asne.org/ideas/codes/lincolnjournalstar.htm (last visited July 21, 2004) (“We generally do not name juveniles who remain in juvenile court....If the crime is serious and it seems likely the juvenile will be charged as an adult, we generally will name a juvenile at the time some formal, legal action is taken, such as an arrest.”); Ethics Code: The Journal News, White Plains, NY, available at http://www.asne.org/ideas/codes/gannettsuburban.htm (last visited July 21, 2004) (“Youths 18 years of age or younger who are adjudicated as juvenile offenders should not be identified by name or address.”). Note that some media sources may modify their non-disclosure rules if the juvenile offender is charged as an adult.

84 Pate, Restricting Electronic Media Coverage of Child Witnesses, supra note 39 358 (stating that Court TV violated its own policy in broadcasting the name of a child involved in a sensational case); LynNell Hancock, Naming Kid Criminals: When Should We Protect Them?, COLUM. JOURNALISM REV., Jul.-Aug. 1998, at 18 (noting that when an eleven-year-old boy and a thirteen-year-old boy were arrested and charged as juveniles for ambushing a playground in Jonesboro, Arkansas the major national newspapers quickly abandoned their policies of not printing the names of juvenile offenders).
profit and the commensurate diminution of ethical standards has been
the proliferation of sensationalist programming.\textsuperscript{85} During the last
twenty years, the media have embraced a panoply of shows and
stories that titillate rather than inform and educate. Sex scandals and
bizarre lifestyle stories, which in the past were handled by the once
profitable but not necessarily respectable supermarket tabloids, are
increasingly covered by the more mainstream media.\textsuperscript{86} Certain talk
shows that focus on the most intimate aspects of personal
relationships and other programs that manufacture situations to
heighten public interest have become staples within the broadcast
industry.\textsuperscript{87} Such programming seemingly diverts the media from its

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\textsuperscript{85}Jill Rosen, \textit{Et Tu, "Nightline"? The Kobe Bryant and Michael Jackson Sagas Are the Latest Manifestations of the Media's Infatuation with Celebrity -- Even Ted Koppel Ditched President Bush for the Erstwhile King of Pop. But Is That So Wrong? In an Era with So Many Sources of News, Is Celebrity Overkill a Major Threat to the Republic?}, \textsc{Amer. Journalism Rev.}, Feb.-Mar. 2004, at 18 (opining that because of today’s celebrity-obsessed media market, it is not surprising that Nightline bumped coverage of President Bush’s trip to London for coverage of Michael Jackson’s arrest for child molestation, which became the program’s highest rated show of the year).

\textsuperscript{86}Andrew Calabrese, \textit{Political Space and the Trade in Television News, in Tabloid Tales: Global Debates Over Media Standards} 43 (Colin Sparks & John Tulloch ed., 2000) (arguing that the media in the United States increasingly relies on tabloid formats, which blur the distinction between news and entertainment, because of budget constraints and competition); \textit{Monica! Bill Clinton Had an Affair and the Tabloid Tail Began Wagging the Mainstream Dog}, \textsc{Colum. Journalism Rev.}, Nov.-Dec. 2001, 124, at 125 (arguing that the mainstream media’s coverage of the Clinton-Lewinsky scandal demonstrated the extent to which mainstream media had adopted the tabloid style); David A. Logan, \textit{“Stunt Journalism, Professional Norms, and Public Distrust of the Media}, 9 \textsc{U. Fla. J.L. & Pub. Pol’y} 151, 166 (1998) (noting that tabloid news sources and the mainstream media often cover the same stories); see also Clay Calvert, \textit{The Psychological Conditions for a Socially Significant Free Press: Reconsidering the Hutchins Commission Report Fifty Years Later}, 22 \textsc{Ut. L. Rev.} 493, 511 (1998) (arguing that the tabloidization of mainstream news, that is the blurring of the lines between news and entertainment, obscures the press’s watchdog function).

\textsuperscript{87}Talk Shows, \textsc{MediaWeek}, Mar. 8, 2004, at 23 (reporting that the two most popular talk shows, Oprah and Dr. Phil, enjoyed double digit increases in ratings during the 2004 season). See also Ted Turner, \textit{My Beef with Big Media: How Government Protects Big Media--And Shuts Out Upstarts Like Me}, \textsc{Wash. Monthly}, Jul.-Aug. 2004, \textit{available at}
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significant role as educator on issues of public or societal concern.\textsuperscript{88} The news media are certainly not immune from this trend. Moreover, the proliferation of tabloid publications and so-called “reality” shows that emphasize the sensational aspects of news\textsuperscript{89} contribute to the perception that profit maximization rather than education on matters of public concern is the primary objective. As a consequence, the media that resorts to sensationalist programming and is rewarded by the governing of large audiences may see credibility as somewhat less compelling goal.

Even if sensational programming does not violate the letter of ethical codes, it creates a \textit{perception} that the media fail to adhere to

\begin{itemize}
\item \texttt{http://www.washingtonmonthly.com/features/2004/0407.turner.html} (last visited July 26, 2004) (arguing that the rise of reality television, which costs little to produce and garners high ratings, is a byproduct of the media conglomerates’ overemphasis on short-term profit).
\item \textsuperscript{88}See supra note 9 and accompanying text (describing the media’s role as governmental overseer and, thus, the “fourth estate”); \textsc{Baker, Media, Markets}, supra note 25 at 73 (noting that media functions to “educate, inform political participation, foment and energize civic and political participation, [and] provide a forum for public debate and dialogue”).
\item \textsuperscript{89}Eric Schmuckler, \textit{Facing Reality: Network and Advertising Execs Deal With the New Programming Paradigm}, \textsc{Brandweek}, May 31, 2004, at SR32 (noting that six of the top ten programs for adults age 18-49 are reality shows); Karen Slattery et al., \textit{Shifts in Public Affairs Reporting on the Network Evening News: A Move Toward the Sensational}, \textsc{Spring 2001}, at 290 (reporting results of a longitudinal study of national network evening newscasts during presidential election years that show increasing coverage of sensational and human interest stories, as well as a significant increase in the use of embedded sensational/human interest stories to contextualize hard news); Linn Washington, Jr., \textit{Facts, Fallacies, and Fears of Tabloidization}, \textsc{USA Today (Magazine)}, Nov. 1999, at 67 (noting that despite the decline in both tabloid television programs and tabloid newspaper circulation, tabloid styles are being adopted by traditional news media); James McCartney, \textit{News Lite: The Tendency of Network Newscasts to Favor Entertainment and Tabloid Stories}, \textsc{Amer. Journalism Rev.}, June 1997 at 18 (noting that “[n]etwork newscasts are turning away from traditional hard news in favor of entertainment, tabloid topics and news you can use”); see also David A. Logan, \textit{Masked Media: Judges, Juries, and the Law of Surreptitious Newsgathering}, 83 \textsc{Iowa L. Rev.} 161, 161-62 (1997) (arguing that undercovering reporting by “newsmagazine” shows, which raise serious issues of journalistic ethics, have proliferated due to increasing ratings and profits).
\end{itemize}
Effectiveness of the Media’s Codes of Ethics

the spirit of established, ethical norms. In fact, one commentator highlighted this clash between ethical behavior and competitive zeal with evidence that a major broadcast network offered to kill an investigative report on Michael Jackson in exchange for the singer’s exclusive interview. Although the network denied this charge, evidence suggests that the investigative report was not sufficiently countered. Moreover, within the realm of print media, a study reveals that decision-makers rarely invoke ethical codes to resolve problematic situations.

Perhaps the most controversial trend that is related to profit maximization is the continual monopolization of media. During the last quarter century, many media sources have succumbed to buyouts, mergers, and attrition. Broadcast deregulation in the ‘80s and the subsequently enacted Telecommunications Act of 1996 accelerated the trend toward conglomeration. The FCC’s proposed relaxation

90 See American Society of Newspaper Editors, Examining Our Credibility: Perspectives of the Public and the Press, study published Aug. 4, 1999, available at http://www.asne.org/index.cfm?id=2632 (last visited July 23, 2004) (reporting the finding that “eighty percent of the American public believes that ‘journalists chase sensational stories because they think it’ll sell papers, not because they think it’s important news’”).
91 France, supra note 69 at 61.
92 Id. For more in-depth analysis of the tension between ethics and such commercial factors as profit, ratings, and corporate influence, and the accompanying effect of this tension on the motivational triad, see infra notes 117-50 and accompanying text.
96 Robert W. McChesney, The Problem of the Media: U.S. Communication Politics in the 21st Century 53 (2004) (stating that since the passage of the telecommunications act, cable and telecommunications industries have become increasingly concentrated, customer complaints have increased, and cable industry rates have increased dramatically); Ben Bagdikian, The Media Monopoly xviii (6th ed. 2000) (stating that the Telecommunications Act of 1996 “opened the floodgates to the largest and greatest number of industrial mergers in American history”); but see Will Harper, Rethinking the Media Monopoly, EAST BAY
of rules that restrict ownership of media sources within localities would undoubtedly add more velocity to this trend. Conventional wisdom suggests that concentrated ownership of media sources reduces the diversity, and possibly increases the bias of information disseminated to the public. A more prevalent result of monopolization, however, has been the homogeneity of news—a phenomenon fueled by the motivation to be austerely objective.


See Morant, Democracy, Choice supra note 11 at 977; see also Charles Layton, News Blackout: the FCC Was Getting Ready to Loosen the Rules Limiting Media Concentration. A Grassroots Movement Had Sprung up to Deraile the Plan. But You Wouldn’t Have Learned Much about the Controversy from Many News Outlets Owned by the Big Conglomerates That Were Eager to Cash In, AMER. JOURNALISM REV., Dec. 2003, at 18 (opining that the fact that 72% of those polled by the Pew Center had heard “nothing at all” about the FCC’s plans to allow increased media consolidation could be seen as “Exhibit A” for activist’s claims that the more conglomerates control the media the more they suppress viewpoints at odds with their interests). The American Journalism Review studied media coverage of the proposed rule change and found that, despite public protest and activism from groups as diverse as the National Organization for Women and the National Rifle Association, media coverage from ABC, NBC, CBS, Fox News, and CNN was scant until just before the FCC was due to act. Id. PBS and NPR were exceptions, with both giving in-depth coverage to the story. Id.

C. Edwin Baker, Advertising and a Democratic Press, 140 U. PA. L. REV. 2097, 2123-26 (1992) [hereinafter Baker, Advertising] (arguing that advertising or the drive for advertising revenue and the rise in the doctrine of objectivity contribute to the homogeneity of news content); BAGDIKIAN, supra note 121, at 213-15 (arguing that the “just the facts” doctrine of objectivity causes journalists to report stories out
In addition to fostering the homogeneous of news, monopolization of media also leads to the perception that what is disseminated can be heavily influenced by corporate pressures.\textsuperscript{100} Profitability, which includes bias toward advertiser preferences or corporate-friendly viewpoints, becomes a dominant factor in the decision to report news.\textsuperscript{101}

Although the degree of corporate influence is debatable,\textsuperscript{102} its reality is supported by empirical data. A survey of 547 journalists and media executives conducted by the Pew Center reveals that 66% of national journalists and 57% of local journalists feel that the economic interests in terms of profit negatively affects the quality of their work-product.\textsuperscript{103} The respondents also opine that both corporate owners and advertisers often usurp the editorial judgment of media personnel.\textsuperscript{104} Eighty percent of journalists have expressed the view that market pressures often killed relevant or socially pertinent stories of context, which is essential to understanding the social significance of a story, and to rely on corporate and government experts for facts to the exclusion of dissenting voices) Brent Cunningham, \textit{Rethinking Objectivity}, \textsc{Colum. Journalism Rev.}, Jul.-Aug. 2003, 24, at 26 (arguing that the “impossible ideal” of objectivity excuses lazy reporting by encouraging reliance on just “both sides of the story,” exacerbates the tendency to rely only on official sources, makes reporters wary of conflict with established ideas, and makes journalists hesitant to inject issues into news reports); see also Neil Weinstock Netanel, \textit{Market Hierarchy and Copyright in Our System of Free Expression}, 53 \textsc{Vand. L. Rev.} 1879, 1882-85 (2000) (advancing the view that liberal democracy should include both independent and subsidized press sources to ensure that all citizens receive information that addresses their respective interests).

\textsuperscript{100}\textsc{Bagdikian, supra} note 94 at 36 (providing examples of various impacts that corporate interests have on the information disseminated by media sources).


\textsuperscript{102}See Baker, \textit{Advertising}, supra note 99 at 2108-18, 2120-22.


\textsuperscript{104}Id.
that are judged as dull or less attention-grabbing.\textsuperscript{105} One may theorize that corporate influence on the media is an inevitable by-product of a democracy that fosters individual autonomy.\textsuperscript{106} A free market economy fosters bargaining autonomy, thereby facilitating personal wealth or utility maximization.\textsuperscript{107} This more austere form of autonomy generally overshadows concerns for the public good and ignores the interests of more marginalized constituents who possess limited resources. In this environment, ethical standards can become ancillary platitudes. In fact, some have persuasively argued that the overwhelming influence of corporate interest has led to slipshod journalism in which unverified

\begin{footnotesize}
\begin{enumerate}
\item Andrew Kohut, \textit{Self-Censorship: Counting the Ways}, \textsc{Colum. Journalism Rev.}, May–June 2000, at 42.
\item See supra notes 12-15 and accompanying text.
\end{enumerate}
\end{footnotesize}
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information is reported to maximize audience and profit. This manifestation of corporate influence counters the tenets of ethics, of which truth and veracity are linchpins.

The dubious enforcement of ethical codes also constitutes a significant impediment to their efficacy. Ethical codes have little authority unless their violation results in some sanction. In the alternative, perhaps their adoption as legal standards might imbue them with palpable authority.

The law of negligence seems to be an optimal cause of action to which journalistic codes of ethics could apply. Negligence generally consists of the defendant’s breach of a duty of care and proximate injury to the plaintiff. Defamation, which is a form of

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108. The Editors of CJR, What We Do Now, COLUM. JOURNALISM REV., Mar.-Apr. 1998, at 25 (observing that media coverage of the Clinton-Lewinsky scandal often violated the rule of two-source confirmation and confirmed the negative influence of brutal competition in the industry); David A. Logan, Masked Media: Judges, Juries, and the Law of Surreptitious Newsgathering, 83 IOWA L. REV. 161, 161-62 (1997) (arguing that undercover reporting by “newsmagazine” shows, which raise serious issues of journalistic ethics, have proliferated due to increasing ratings and profits); Lyrissa Barnett Lidsky, Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It, 73 TUL. L. REV. 173, 218 (1998) (arguing that news shows can afford to use questionable newsgathering techniques because of the higher profits associated with the higher ratings they seek); Marge Injasoulian & Gregory L. Leisse, Media Crises, 36 CATH. L. REV. 97, 106-07 (1995) (noting that the hysteria surrounding the press’s quest for sensationalism and, thus, increased readership and viewership, often leads to “inaccurate reporting and incomplete source verification”); See also Morant, Electoral Integrity, supra note 4 at 6-7 (documenting the media’s missteps in declaring the 2000 presidential race in Florida).

109. See supra notes 48-49 and accompanying text (noting the centrality of truth in codes of ethics).

110. See, Storey, supra note 67 n. 30, 31 at 471 (stating the criticism that media codes, unlike the codes of other professions, lack effectiveness because there are no formal or informal enforcement mechanisms).

111. RESTATEMENT (SECOND) OF TORTS § 282 (1965) (defining negligence as “conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm”); 57A AM JUR. 2D Negligence § 71 (2004) (stating that the elements of negligence are “a duty the defendant owes to the plaintiff, a breach of that duty by the defendant, a causal connection between the breach and the plaintiff’s injury, and actual injury”).
negligence that includes libel and slander, provides a remedy for a plaintiff who suffers an injury due to the dissemination of false information. In an admittedly simplistic summary, a plaintiff who pleads defamation must prove that the defendant breached some duty of care in the dissemination of false information.

Comment g of § 580 B of the Restatement of Torts states that the standard of care exercised by a defendant in a suit of defamation should be assessed in accordance with the skill normally possessed by members of the profession, which has established customs and practices. The duty of care defamation provides a measured opening to employ professional ethics codes as standards in negligence. Comment g’s language is neither exclusive nor obligatory. Thus, codes of ethics could become probative indicators

112 Restatement (Second) of Torts § 559 (1977) (defining defamatory communication as that which "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him"); Id. at § 558 (listing the elements of defamation as “(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication”). 50 AM Jur. 2d Libel § 22 (1995) (noting that tortious libel conduct comprises three elements: the composition of the statement, its writing, and its publication). Id. at § 26 (noting that some courts hold that malice is a necessary element of defamation while others require it only for cases with particular factual circumstances).

113 Id.; see also Kforce, Inc. v. Alden Personnel, Inc., 288 F. Supp. 2d 513, 516 (S.D.N.Y. 2003) (stating that under New York law, a plaintiff must prove the following to prevail on a defamation claim: (1) a false and defamatory statement of fact, (2) regarding the plaintiff, (3) published to a third party by the defendant, and (4) resulting in injury to the plaintiff); White v. Blue Cross and Blue Shield of Massachusetts, Inc., 809 N.E. 2d 1034, 1036 (2004) (noting that to prevail on a defamation claim, the plaintiff must show that “the defendant was at fault for the publication of a false statement regarding the plaintiff, capable of damaging the plaintiff’s reputation in the community, which either caused economic loss or is actionable without proof of economic loss”).


115 Note, however, that the Restatement also states that expert testimony generally constitutes evidence of custom. Id.
The duty of care required presents an excellent vehicle for the judicial adoption of journalistic codes of ethics. Crafted by those who work in the industry, ethical codes define standards of journalistic behavior. They constitute a specifically designed standard of care in the industry and could credibly define the duty of care in cases in which the defendant is a media source.

Despite a compatibility with defamation, a review of noted cases indicates a guarded and limited employment of these self-regulatory norms. In fact the only case that has marginally adopted ethical codes as standards of care is *Khawar v. Globe Int’l*.117 In *Khawar*, the plaintiff produced expert testimony that the defendant’s conduct failed to meet the standards set forth in the codes of the Society of Professional Journalists and the American Society of Newspaper Editors.118 The California Supreme Court affirmed the lower court’s finding of culpability, but did so without reference to the journalistic codes of ethics. The court, instead, found that other reliable evidence supported the finding that the newspaper failed to use readily available means to confirm or disprove the allegations against the plaintiff. Because there was sufficient evidence to prove actual malice, the claim of negligence also had evidentiary support.119

The court refused to accept ethical codes as standards of care in *Kendrick v. Fox Television*,120 because the plaintiff failed to cite the sources for those codes, and did not proffer experts to testify that the codes were actually followed by journalists. This failure on the plaintiff’s part notwithstanding, the court never indicated that *Kendrick* would have relied on the codes if the plaintiff had provided

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118 *Id.* at 107.


expert witnesses and proper citations.

In *Utah v. Kreuger*, the defendant attempted to rely on the Society of Professional Journalists’ Code of Ethics in its brief. The court observed that the code explicitly instructs reporters to “avoid misleading re-enactments or staged news events,” which was the alleged conduct of the defendants.

Although courts have not used ethical codes as exclusive determinants of liability, they have endorsed the power of these codes to check journalistic behavior. In *Brown v. Kelly Broadcasting Co.*, the court declined to find that a California statute provided a broad public interest privilege for news reports about a private individual. Such a construction would have protected virtually all media communications from defamation suits. The broader construction would have also premised recovery on proof of malice. The court, instead, found that the California statute only required a showing of negligence. The newspaper argued that the negligence standard would chill the free flow of information. The court, however, rejected this argument, and noted that media should seek accuracy in order to preserve professional credibility as required in the American Society of Newspaper Editors’ and Society of Professional Journalists’ codes. The newspaper should not, in the court’s view, strive for accuracy only to avoid legal liability.

*In re Access to Certain Records of Rhode Island Advisory Committee on the Code of Judicial Conduct* presented an interesting endorsement of journalistic codes of ethics. In that case, the court ordered that all advisory opinions issued by the committee

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121 975 P.2d 489, 497 n. 11 (Utah Ct. App. 1999), cert. granted 984 P.2d 1023 (Utah 1999). (No subsequent opinion is listed.)
122 Id. at 497.
124 Id. at 422.
125 Id. at 432.
126 Id. at 409.
127 Id. at 429.
128 Id. at 430.
129 637 A.2d 1063 (R.I. 1994). (No primary sources cite his case for the proposition discussed here.)
be made part of the public record.\textsuperscript{130} This increased disclosure required an increased responsibility on the part of the press to not “incite a wildfire of insinuation.”\textsuperscript{131} The court opined the press’ behavior in such matters should be measured in accordance with the Society of Professional Journalists’ Code of Ethics. A dissenting judge, however, found the majority’s reference to journalistic codes of ethics somewhat disingenuous during “these times where tabloid journalism is becoming the rule rather than the exception.”\textsuperscript{132}

Curiously, ethical codes can trump other legal rules. Courts have found that the journalistic codes of ethics represent one facet of media’s ability to control its credibility and should be protected when they conflict with a statute. In \textit{Newspaper Guild of Greater Philadelphia v. N.L.R.B.},\textsuperscript{133} the court found that provisions of journalistic codes of ethics were central to the newspaper’s interest in preserving legitimate, managerial prerogatives. These standards affected employees minimally and, thus, should be exempt from the mandatory bargaining statute.\textsuperscript{134} Likewise, the court in \textit{Nelson v. McClatchy Newspapers, Inc.}\textsuperscript{135} found that a statute that prohibited an employer from discriminating against an employee on the basis of the employee’s refusal to abstain from political activity could not constitutionally invalidate the defendant’s ethical requirement that employees of the paper avoid active involvement in politics. The court in \textit{Nelson} cited \textit{Philadelphia Newspaper Guild} for the proposition that the newspaper’s ability to control its credibility is protected by the First Amendment and any law infringing on it should be scrutinized.\textsuperscript{136}

As the case law discussed indicates, journalistic codes of ethics, do not conclusively establish liability. With the help of expert testimony, however, they may \textit{contribute} to the establishment of the

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\footnotetext{130}{\textit{Id.} at 1066-67.}
\footnotetext{131}{\textit{Id.} at 1067.}
\footnotetext{132}{\textit{Id.} at 1070 (Shea, J., dissenting).}
\footnotetext{133}{636 F.2d 550 (U.S. App D.C. 1980).}
\footnotetext{134}{\textit{Id.} at 561.}
\footnotetext{135}{936 P.2d 1123 (Wash. 1997), cert. denied, 522 U.S. 866 (1997).}
\footnotetext{136}{\textit{Id.} at 1131-32.}
\end{footnotesize}
standard of care necessary to establish negligence. This admittedly limited use by the judiciary enhances, if only incrementally, the influence of these codes on journalistic conduct. Ethical codes lack relevance in cases that require proof of actual malice because the central focus is the defendant’s state of mind, rather than her conformity with objective standards. Additionally, the vague and imprecise language of these codes bodes against their use as clear standards of care.

Vagueness of the codes’ language, their seeming lack of authority and the industry’s consuming quest for profit all contribute to a certain disutility of self-restraint mechanisms such as journalistic codes of ethics. As discussed more cogently below, however, these problems may be ameliorated by the news media’s systemic need to embrace credibility as a foundational goal, and the incorporation of

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137 See supra note 117-19 and accompanying text (commenting on the use of ethical codes as standards of care when explained or endorsed by expert testimony).

138 See Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 499 (1991) (stating that the First Amendment protects authors and journalists by requiring public figure plaintiffs to prove that the defamatory publication was made with actual malice); Hustler Magazine v. Falwell, 485 U.S. 46, 56-57 (1988) (holding that, as a public figure, Reverend Falwell was required to show actual malice to prevail on his claim of intentional infliction of emotional distress resulting from a defamatory publication); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) (noting that the actual malice standard applies to plaintiffs who “by reason of the notoriety of their achievements or the vigor and success with which they seek the public’s attention, are properly classed as public figures and those who hold governmental office”); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (noting that constitutional guarantees protect false statements relating to the official conduct of a public official unless that official can show that the statement was made with actual malice); 50 AM JUR 2D Libel § 33 (1995) (noting that to prevail when actual malice is required, the plaintiff must demonstrate that the author knew realized that the statements were false, entertained serious doubts about the truthfulness of the publication, or was highly aware of the probable falsity of the statement).

139 See Sanford, supra note 66 at 43.

140 Id.; see Storey, supra note 67, at 481 (stating that JECs are rarely cited in appellate court decisions because “their vagueness makes them poor evidence of journalistic standards”); see also Kendrick v. Fox Television, 659 A. 2d 814 (D.C. 1995) infra note [97] and accompanying text; but see infra notes 77-79 and accompanying text (presenting counter arguments to the use of ethical codes as legal standards in defamation cases.)
strategies that enhance the overall effectiveness of ethical codes.

**B. The Functionality of Ethical Codes within the Journalistic Setting**

Certain contextual factors that are endemic within the media industry enhance the viability of ethical codes and other forms of media self-restraint. As previously discussed, a respect-driven democracy and its foundation for the motivational triad provide a theoretical basis for self-regulation.  

There are, however, other, more pragmatic factors that establish the legitimacy and viability of ethical codes.

As a generalized rule, journalistic codes of ethics, as forms of self-restraint, diminish the need for external regulation. As Jeff Storey insightfully observes, judicial interference with the media’s day to day operations becomes imprudent if the industry self-regulates. Judicial definition of the industry’s professional standards would most likely be highly inefficient. Judicial officers and jurors do not know and cannot appreciate the intricacies of journalism and are prone to judgments influenced by personal perceptions and stereotypes. As a result, rules resulting through judicial proceedings would likely apply awkwardly to operational problems within the media industry.

Self-regulation also produces behavioral standards that are specially tailored for the industry and will likely be minimally obstructive. These standards in the form of ethical codes tend to instill a sense of responsibility that overshadows the exercise of the right to free expression. The resulting codes, thus, become

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141 Supra note [27] and accompanying text.
143 Id. at 486.
synonymous with the responsible exercise of expressive rights by the news media.\textsuperscript{144}

Despite the imprecise language of journalistic codes of ethics,\textsuperscript{145} these standards of conduct, nonetheless, contribute to what I describe as a culture of responsible journalism. In the previously identified study that revealed the sparse use of ethical codes in specific situations in several print newsrooms,\textsuperscript{146} the researcher also notes that these codes are part of, and perhaps even create, a larger ethical culture within the newsroom.\textsuperscript{147} Decision-makers within those newsrooms that were studied tend to invoke ethical codes as generalized standards of professional conduct. Periodic discussion of the codes’ prescriptions reinforces the importance of ethical behavior and imbeds into the consciousness of personnel the need to behave responsibly.\textsuperscript{148}

Consciousness-raising produced by ethical codes is the precursor to responsible, journalistic behavior. These codes essentially operate as mental defaults in decision-making\textsuperscript{149} and, as a consequence, compel media personnel to think probevatively about the manner in which they execute their reporting functions. The obligations of truth and good faith, which all ethical codes reinforce, become operational tenets that, if violated, prompt a degree of cognitive dissonance.\textsuperscript{150} The breach of an ethical code, thus, compels

\textsuperscript{144}Storey, supra note 67 at 468.
\textsuperscript{145}See supra note 68-73 and accompanying text (noting indefiniteness thwarts the use of journalistic codes of ethics as standards of care in lawsuits).
\textsuperscript{146}See supra notes 93 and accompanying text (noting David E. Boeyink’s study of newsrooms).
\textsuperscript{147}Id. at 894.
\textsuperscript{148}Id.
\textsuperscript{149}Boeyink found this type of consciousness raising in newsrooms that regularly discussed and debated ethical issues. In those newsrooms, the communication among journalists bridged the gap between the general prescriptions of the codes and the specific demands the journalists faced. Boeyink, supra note 93 at 901.
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A journalist to justify her abridgement of industry-adopted norms. While the cognitive operations of ethical codes may not stymie all forms of negative behavior, they, nonetheless, serve as tacit checks on problematic journalism.

Prior commentary in this Article has focused on the pervasive influence of profit maximization on the effectiveness of ethical codes. Advancement of corporate interests associated with profit, however, fits within the complexity of a pluralistic democracy. True fulfillment of individual goals and objectives occurs only if the interests of society as a whole are protected. Private interests are dependent upon the maintenance of societal interests, such as preservation of the rights of other members of society. Corporate gain depends on the fulfillment of the goals and desires of the public that is served. Accordingly, the news media that seeks private gain must be responsive to public needs.

In my view, the news media’s responsiveness to public needs forms the foundation for ethical behavior. This theoretical premise is not only reflective of a respect-based notion of democracy, but also

(explaining that cognitive dissonance occurs when one’s conduct and principles clash); Elizabeth Harmer-Dionne, Note, Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction, 50 STAN. L. REV. 1295, 1312, 1316 (1998) (observing that in seeking to maximize the internal consistency of his or her cognitive system, composed of one’s thoughts, attitudes and beliefs, a person will minimize cognitive dissonance, the divergence between action and belief); Kenneth A. Sprang, After-Acquired Evidence: Tonic for an Employer’s Cognitive Dissonance, 60 MO. L. REV. 89, 141 (1995) (explaining the theory of cognitive dissonance as based on three premises: (1) a person is able to manipulate or modify his beliefs regarding certain circumstances or information so that those beliefs are compatible with the person’s personal preferences; (2) people seek out information that will confirm or augment desired beliefs; and (3) once beliefs are formed in the context of cognitive dissonance reactions, they persist over time). For the cornerstone theorization on the effect of cognitive dissonance in predicting complex behavior, see generally JACK W. BREHM & ARTHUR R. COHEN, EXPLORATIONS IN COGNITIVE DISSONANCE (1962).

See generally supra notes 77-108 and accompanying text (discussing the impact of profit and ratings on the efficacy of journalistic codes of ethics).

For more regarding a respect-based notion of democracy, see supra notes 25-30 and accompanying text.
underscores the primacy of the motivational triad, which recognizes the linkage between credibility and pecuniary gain. If credibility is the cornerstone of a strategy to maximize audience size and profits, then ethical codes, which promote trustworthiness and reliability, become naturally compulsory rules in the operation of contemporary media. The motivational triad provides the impetus that prompts the news media to adhere to ethical codes.

Profit maximization, which is a factor in the motivational triad, tacitly serves a stimulus for responsible, journalistic behavior. If, as the motivational triad demonstrates, there is a palpable nexus between audience size and credibility, then news media must focus on truth and accuracy—values which ethical codes are designed to foster. The motivational triad, therefore, imbues ethical codes with a degree of natural authority that, in turn, fosters responsible journalistic behavior.

Illustrative of the news media’s focus on credibility are certain high-profile apologies for mistakes, gaps or errors in reporting. For example, in an open, published letter, the NEW YORK TIMES acknowledged that coverage of the build up to the war in Iraq was “not as rigorous as it should have been. In some cases, information that was controversial then, and seems questionable now, was insufficiently qualified or allowed to stand unchallenged.” The article then listed specific stories that contained questionable information. The NEW YORK TIMES concluded, “We consider the story of Iraq’s weapons, and of the pattern of misinformation, to be unfinished business. And we fully intend to continue aggressive reporting aimed at setting the record straight.” Similarly, USA TODAY publicized its suspicions concerning possible plagiarism committed by Jack Kelley, a Pulitzer-Prize finalist and foreign correspondent. In the article, Karen Jurgensen, a USA TODAY editor, cites the paper’s best practice guidelines that proscribe conduct that is

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153 See supra notes 31-35 and accompanying text (explaining the nexus between credibility and profit as demonstrated in the motivational triad).
154 Id.
155 See supra notes 48-54 and accompanying text (discussing the fundamental importance of truth as a construct in the media’s codes of ethics).
“dishonest or illegal to obtain or alter content.” The paper asked “readers, sources, or employees” for any information on Kelley’s reporting. After an independent investigation, almost four months later, USA TODAY again published a story about the scandal. Al Neuharth, the story’s author and founder of USA TODAY, stated that the paper’s editor, who resigned over the Kelley scandal, inherited problems that allowed Kelley’s thirteen years of questionable reporting to take place. He partially blamed the paper’s decision to abandon the “no anonymous source” guideline, which “built reader trust, confidence and circulation.” An investigating committee opined that abandonment of the “no anonymous source” guideline resulted from an objective to make the paper more competitive.

C. Strategies to Enhance the Effectiveness of Ethical Codes

The motivational triad’s reinforcement of journalistic codes of ethics is admittedly theoretical, a factor that may shed doubt on the triad’s functionality. Tacit enforcement of ethical codes by the motivational triad contrasts with actual enforcement by courts or disciplinary boards. These bodies provide more palpable authority to ethical codes, and would seemingly have greater influence on journalistic behavior.

The more demonstrative effects of direct enforcement by disciplinary bodies do not, however, justify their employment. Non-judicial bodies that utilize punitive powers to enforce journalistic standards of behavior impinge upon constitutional guarantees of free

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159 Morant, *Electoral Integrity*, supra note 4 at 50 (opining that theory “is of little analytical value unless it is manifested in practice”).
160 See supra note 66 and accompanying text (noting other professions, such as law and medicine, that have formalized bodies and procedures to reinforce ethical standards).
expression.\textsuperscript{161} Moreover, the chilling effect imposed by overt enforcement threatens the functionality of expressive autonomy, which constitutes an integral factor in a pluralistic democracy.\textsuperscript{162}

Instead of dubious enforcement mechanisms, the news media should adopt strategies that bolster the effectiveness of codes of ethics. I offer several recommendations.

A pivotal strategy that addresses the indefiniteness associated with ethical codes would be the incorporation of specific prohibitions against distortions or misrepresentations related to race. Note, for example, that the Code of Ethics for Society of Professional Journalists (SPJ) expands the contours of truth or credibility to include the “avoidance of stereotyping, [distortions or misrepresentations] related to race, gender, age, religion, ethnicity, sexual orientation, disability, physical appearance or social status.” The SPJ’s code specifically encourages journalists to acknowledge the natural tendency to view events through their own perceptual lenses. As a result, the code implores journalists to review potential stories in light of attitudes, bias, or personal values or norms.\textsuperscript{163} In addition to consciousness-raising that mandatory self-examination accomplishes, the SPJ code of ethics also requires their members to remain informed about the diversity within the communities they report. Journalists must, accordingly, recognize and acknowledge the racial, gender or socio-economic dimensions of the stories they disseminate.\textsuperscript{164} The totality of SPJ code’s mandates more effectively identify racially biased or distorted reporting as abridgements of ethical conduct. Other news organizations should emulate the SPJ’s more specific prohibitions against distortions and bias.

\textsuperscript{161}See Morant, Electoral Integrity, supra note 4 at 49 (noting that coerced forms of self-restraint would be met with judicial hostility because of the judiciary’s adherence to a negative theory of free speech, which protects individual autonomy and expressive liberty); see also supra note 14 and accompanying text.

\textsuperscript{162}See supra notes 25-30 and accompanying text (discussing the bases for a respect-model of democracy.)

\textsuperscript{163}See supra notes 60-62 and accompanying text (discussing the Society of Professional Journalist Code of Ethics).

\textsuperscript{164}This latter suggestion borrows from the Radio-Television News Directors Association’s Code of Ethics. See supra note 63.
The news media should also expand the interpretation of “bias” to include prejudicial beliefs, attitudes or expressions related to race. Because the employment of stereotypes has a nexus with bias, \textsuperscript{165} ethical codes must prohibit the use of these generalizations in news reports. Both the SPJ and the Radio-Television News Directors Association (RTNDA) adopt this mandate in their respective codes. \textsuperscript{166}

Regardless of the precision of language, ethical codes may not address all forms of biased or distorted reporting. Codes of ethics operate in a manner similar to legal rules and, consequently, they have inherent drafting flaws that limit their applicability to all forms of bias or distortions. \textsuperscript{167} This deficiency may, nonetheless, be minimized through the news media’s institution of regularized programs that sensitize journalists to the problems associated with racial bias and distortion, and provide them with strategies that reduce reliance on biased attitudes and beliefs. These programs for journalists would function similarly to continuing education required for members of the legal and medical professions. \textsuperscript{168} Various pedagogical techniques should be employed, including the discussion of hypothetical situations that involve racially charged issues, and examples of previously disseminated biased or distorted stories.

\textsuperscript{165}Patricia G. Devine, Stereotypes and Prejudice: Their Automatic and Controlled Components, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 6 (1989); Mary F. Radford, Sex Stereotyping and the Promotion of Women to Positions of Power, 41 HASTINGS L.J. 471, 489 (1990); Duncan Kennedy, A Cultural Pluralist Case for Affirmative Action in Academia, 1990 DUKE L.J. 705, 710 (1990).


\textsuperscript{167}See supra note 64 and accompanying text (describing generally the problem with rules).

\textsuperscript{168}Corrine P. Parver, Holding Decision Makers Liable: Assessing Liability Under a Managed Health Care System, 51 ADMIN. L. REV. 199 (1999) (stating that beginning in the 1960s states began to more widely adopt regulations requiring continuing education for physicians); David Barnhizer, Of Rat Time and Terminators, 45 J. LEGAL EDUC. 49, 51 (1995) (stating that most state bars have continuing education requirements for attorneys).
Because audience size has a nexus with a news source’s credibility, the industry must externalize its focus on truth and accuracy. Accordingly, the news media should acknowledge the importance of ethical codes within the industry, and regularly publicize the functional relevance of these codes in its operations. Increased public awareness of the salience of ethical codes within the industry not only fosters public confidence in the news media’s genuine regard for responsible, journalistic behavior, but also reinforces the industry’s obligation to adhere to standards of ethics.

Several strategies serve to publicize the news media’s adherence to ethical standards. Print media should regularly cite to those standards in its distributed periodicals. Broadcast media can include references to its observance of ethical standards in the credits that accompany its programming. The seeming simplicity of these tactics may suggest their limited effectiveness. Continual publicity, however, embeds in the public’s consciousness the prevalence and importance of ethical standards within the industry.

Perhaps the most striking illustration of the externalization of

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169 See generally supra notes 31-35 and accompanying text (discussing the linkage between credibility, the size of an audience and profit as key elements of the motivational triad).

170 The “more information” tactic that I advocate is virtually synonymous with “more speech,” which has been endorsed as a legally permissible strategy to advance counter viewpoints. See Mark S. Nadel, Customized News Services and Extremist Enclaves in Republic.com, 54 STAN. L. REV. 831, 884 (2001) (book review) (explaining that many First Amendment proponents advocate the use of “more speech” in response to extremist hate speech and that the tactic “implicitly rel[ies] on a paraphrase of Newton’s Third Law that every example of hate speech creates an opportunity for an equally powerful [and] effective response”); Morant, Electoral Integrity, supra note 4 at 59 (discussing the utility of a “more speech” rationale to counter erroneous projections of election contest winners with a swift dissemination of accurate information).

171 Examples of this tactic of continual publicity of institutional norms are the equal opportunity statements inscribed on literature distributed by various employers and public entities. For example, the Washington and Lee University includes in all publicly distributed notices for employment or advertisements the policy of non-discrimination based on “sex, age, race, religion, national origin, handicapped disability, sexual orientation, or any other legally impermissible or irrelevant ground.
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ethical norms was a relatively recent publication by The Washington Post (The Post). In the wake of highly publicized credibility scandals involving Jayson Blair at The New York Times and Jack Kelley at USA Today, the Executive Editor of The Post published an open letter to readers, detailing the newspaper’s reworking of its ethical guidelines on the matters of the use of direct quotations, attribution of information, the use of confidential sources, and the newspaper’s policy on corrections.172 While continuing education and publicity about the industry’s employment of ethical codes may not secure the public’s confidence in the news media, these strategies, nonetheless, symbolize an intent to perform journalistic functions responsibly.

IV. Conclusion

Self-regulation through the conscientious employment of journalistic codes of ethics constitutes an efficient means to address distortions and misrepresentations reported in the news. As industry-adopted standards of conduct, ethical codes inculcate norms of responsible behavior and, thus, can potentially reduce biased reporting. Despite problems associated with indefinite language, codes of ethics have become fixtures in the news media’s operations and contribute to a professional ethos of truth and reliability. Moreover, the interrelation of profit, audience size, and credibility, which collectively form a motivational triad that drives most news media, imbues these codes with a natural authority that reinforces their influence.

To thrive as integral constructs of a democratic society, the news media must not only respect the public’s right to accurate information through forthright adherence to self-generated ethical norms. In my view, this charge constitutes a significant challenge. Regardless of the extent to which the media internalizes ethical standards, it cannot garner true credibility unless the public perceives a genuine commitment to those standards. As a result, the media

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must continually demonstrate the salience of ethical codes in the dissemination of news and information.

Critics continually question the news media’s true embrace of responsible journalism that ethical codes are designed to foster.173 Perhaps the industry’s focused employment of ethical standards that enhance credibility will demonstrate its good faith effort to respect the public’s right to unbiased and truthful information.

173For recent examples of such critiques of media’s responsible behavior, see generally Clay Calvert & Robert D. Richards, Journalism, Libel Law and a Reputation Tarnished: A Dialogue with Richard Jewell and His Attorney, L. Lin Wood, 35 McGeorge L. Rev. 1, 5 (2004) (opining that defamation suits involving involuntary public figures “are increasingly likely to arise in an age in which the media are quick to pounce on and heap saturation coverage upon individuals who initially are cast as suspects in high-profile tragedies”); ERIC ALTERMAN, WHAT LIBERAL MEDIA? THE TRUTH ABOUT BIAS AND THE NEWS (2003) (arguing that the salient issue is not whether the media exhibit liberal or conservative bias, but the extent to which the dissemination of information is controlled by the financial interest of the media owners); Clay Calvert, And You Call Yourself a Journalist?: Wrestling with a Definition of “Journalist” in the Law, 103 Dick. L. Rev. 411 (1999); Baker, Advertising, supra note 124; but see BILL KOVACH & TOM ROSENSTIEL, THE ELEMENTS OF JOURNALISM (2001) (arguing that despite the increased commercialization of journalism, the industry can retain ethics and credibility by actively focusing on the principles of independent, democratic journalism in the newsrooms).