

# HEINONLINE

Citation: 24 St. John's J. Legal Comment. 479 2009

Content downloaded/printed from  
HeinOnline (<http://heinonline.org>)  
Thu May 27 12:35:14 2010

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?  
&operation=go&searchType=0  
&lastSearch=simple&all=on&titleOrStdNo=1049-0299](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1049-0299)

# THE INESCAPABLE INTERSECTION OF CREDIBILITY, AUDIENCE AND PROFIT IN BROADCAST MEDIA'S COVERAGE OF ELECTIONS

BLAKE D. MORANT\*

## INTRODUCTION

My summer travel in both the United States and Europe produced telling commentary on the 2008 elections in the United States. The comments of those whom I encountered in Europe were particularly revelatory. In Venice, Italy, Vienna, Austria, and London, England,<sup>1</sup> strangers would, without hesitation or encouragement on my part, inquire and proffer opinions about the then forthcoming presidential contest between Senators John McCain and Barack Obama.<sup>2</sup> They also unabashedly volunteered their opinions about the candidates and expressed their preferred outcomes.

The overwhelming majority of strangers who approached me in Europe preferred Senator Obama who, in their view, had the superior capacity to motivate and inspire with his message of hope, could mend international relations that had been strained in recent years, and would likely bring a fresh perspective to vexing problems that crossed international borders. Notwithstanding their admiration for now President-elect Obama, each

\* Dean and Professor of Law, Wake Forest University School of Law, B.A.; University of Virginia, J.D. I graciously acknowledge the contribution of several exemplary individuals: Professor Leonard Baynes, Director of the Ronald H. Brown Center, St. John's University School of Law, who invited me to participate in the symposium, *Making History: Race, Gender, Media and the 2008 Election*; Wyatt Andrews, good friend and correspondent with the CBS Evening News with Katie Couric; Matthew Cullen, for his research assistance; Ms. Kathy Hines, my administrative assistant; Mary and Samuel Kent, members of my Pennsylvania family, who graciously opened their home and hearts while I drafted the Essay; and Mrs. Paulette J. Morant, my incredibly supportive spouse.

<sup>1</sup> See <http://law.wfu.edu/international> (explaining that Wake Forest University School of Law sponsors programs each year in London, England, Venice, Italy, and Vienna Austria).

<sup>2</sup> The ease and spontaneous nature of the approaches made by strangers in Vienna and London were particularly noteworthy. In Vienna, vendors, docents and average passersby would smile at me and immediately inquire about Senator Obama and his chances for winning the election. The frequency of these incidents, which were always preceded by warm smiles as people encountered me, led me to conclude that my status as an African American contributed to their unabashed willingness to engage in this dialogue.

European commentator opined on the unpredictable and possibly undue influence that the candidate's race would have on American voters.

One encounter, in particular, indelibly confirmed the tacit or subtle impact that race and gender can have on individual perceptions and decision-making. During a ride to the airport in Vienna, the cab driver, who was prideful of his admittedly remarkable knowledge of American politics, felt that Senator Obama was clearly an exemplary candidate. He, nonetheless, questioned the strategic wisdom of the Democratic Party to nominate an African American. He also expressed reservations about former presidential candidate and Senator Hillary Clinton, had she become the Democratic nominee. To quote the cab driver verbatim, "I don't think that Americans would vote for a black or woman to be President of the United States."<sup>3</sup>

Encounters during my travel last summer support two fundamental premises: First, the presidential election of 2008 generated unprecedented popular interest both domestically and internationally. Second, the historic campaign, which included a woman and an African-American candidate, confirms the salient intersection of gender and race in the complex dynamic of an election.<sup>4</sup> This latter premise is virtually intuitive given the country's complex history with race and gender, and the obvious imprints these issues have on the "historic" 2008 presidential election.<sup>5</sup> Because of their salience in electoral campaigns, race and gender have become appropriate, if not mandatory, issues that media should address as they disseminate information on elections. The pivotal question that arises, however, is whether media's coverage of these potentially sensational issues is forthright and measured so as not to distract voters from consideration of

<sup>3</sup> While many I encountered in Europe expressed opinions similar to that of my Viennese cab driver, others proffered other views. For example, acquaintances in London took issue with the assumption that President-elect Obama was purely African American, given that he was biracial; consequently, his race should not matter. A white American businessman on vacation in Vienna stated that, "I am a life-long Republican who voted the party line all my life, but will vote for Obama because he is clearly the superior candidate to deal with the terrible problems facing our country." The American businessman's thought captures a viewpoint that would later support the notion that some substantive issues overshadow issues of race and gender. For a discussion of this, see David Von Drehle, *The Limits of Race*, TIME, Oct. 20, 2008, at 40 (discussing how Obama was becoming more popular among voters in Missouri, many of whom were beginning to feel the strain of the falling economy).

<sup>4</sup> See Barbara L. Bernier, *Unholy Troika: Gender, Race and Religiosity in the 2008 Presidential Contest*, 15 DUKE J. GENDER L. & POL'Y 275, 296 (2008) (noting the complexity of race and gender in the 2008 presidential election).

<sup>5</sup> See Walter Kelley, Judicial Profile, *Hon. U.W. Clemon U.S. District Judge, Northern District of Alabama*, 55-SEP. Fed. Law 30, 30 (2008) (referring to the 2008 presidential election as historic); see also Susan Donaldson James, *Historic Election 2008: For the Record Books*, ABC NEWS, Nov. 4, 2008, <http://abcnews.go/Politics/Story?id=616922&page=2> (discussing how the 2008 presidential election was one of many "firsts").

other substantive issues that should be weighed in their decision-making.

The gracious invitation to present in the exceedingly timely symposium entitled, *Making History: Race, Gender, Media and the 2008 Elections*,<sup>6</sup> provides me with the opportunity to examine media's treatment of race and gender as they report on the 2008 presidential campaign. In Part I, this Essay will comment on broadcast media's coverage of elections and, specifically, the manner in which the industry reports issues related to race and gender. It will demonstrate that the industry eventually must remain true to its goals to inform honestly, forthrightly and completely.<sup>7</sup> Broadcast media's coverage of elections ultimately results from a symbiosis of the industry's private interests associated with gain and the interests of other members of society who are entitled to, and often demand, full and truthful information related to elections. This symbiosis contributes to a motivational triad of credibility, audience and profits. The dependency of the triad's elements, with credibility as a dominant force, prompts broadcast media to adhere to its duty to inform fully. Part II of the Essay explores media's self-restraint that the motivational triad encourages. Ostensible by-products of self-restraint are media's various ethical codes that, despite their shortcomings, can function to ensure media's forthright coverage of elections. Ultimately, Part III includes a modest empirical review of two major networks' coverage of news, and those networks' function confirms the operation of the motivational triad.

Broadcast news media, which periodically focuses on the more sensational nature of race and gender, ultimately gravitates toward the motivational triad's emphasis on credibility and the maximization of ratings. Moreover, the industry's self-regulatory rules, such as ethical codes, manifest the triad's focus on credibility and constitute internal metrics that check reporting behavior. The dominance of credibility, together with media's need to fulfill the audience's desire for accurate news, ensures the viability of self-restraint mechanisms and the minimization of distorted coverage of issues related to race and gender.

<sup>6</sup> This symposium, sponsored by the St. John's University School of Law's Ronald H. Brown Center for Civil Rights and Economic Development and Journal of Legal Commentary, explored issues of race and gender within the constructs of law and public policy. For more information, see [www.ssrn.com/update/lsl/lslann](http://www.ssrn.com/update/lsl/lslann) and [www.stjohns.edu/ronbrown/Symposia](http://www.stjohns.edu/ronbrown/Symposia).

<sup>7</sup> While the primary focus in this Essay will be on broadcast media, the principles discussed could have implications on many other forms of media. Therefore, the Essay, when referencing media, will use "broadcast media" or simply "media."

## I. BROADCAST MEDIA'S FUNCTION WITHIN A RESPECT-BASED NOTION OF DEMOCRACY AND THE COVERAGE OF ELECTIONS

Media's status as the fourth estate conjures images of an industry that fosters democracy through the dissemination of information that ensures self-governance.<sup>8</sup> The industry's legitimacy and utility hinges upon the fulfillment of this important societal duty. This duty takes center stage during elections, which are bedrocks of a functional democracy.<sup>9</sup> Media's coverage of elections should focus public attention on the conduct of elected officials and the generalized workings of government. Adherence to this essential task should legitimize the industry's role in a complex democracy.

Expressive autonomy remains a fundamental concept of democracy. Strict, libertarian notions of autonomy, however, has troublesome by-products. The actions of unabashedly free broadcast media can mutate to frenzy, particularly when the industry focuses on sensationalism to advance private interests associated with pecuniary gain.<sup>10</sup> Despite the industry's established forms of self-restraint,<sup>11</sup> broadcast news media continue to suffer from the public perception that maximization of wealth rather than

<sup>8</sup> See Christina S. Drale, *Communication Media in a Democratic Society*, 9 COMM. L. & POL'Y 213, 218, 223 (2004) (noting that the media functions as a fourth estate to check the integrity of democratic procedures); see also Jonathan W. Lubell, *The Constitutional Challenge to Democracy and the First Amendment Posed by the Present Structure and Operation of the Media Industry Under the Telecommunications Acts*, 17 ST. JOHN'S J. LEGAL COMMENT. 11, 44 (2003) (explaining that reference to the media as the "fourth estate" reflects the "role of the First Amendment and its crucial contribution to the people's self-governance"); Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 965 (2003) (arguing that the "'Fourth Estate' serves as a better watchdog" on a national level where it is more attuned to civil rights); Irwin P. Stotzky, *The Indispensable State*, 58 U. MIAMI L. REV. 201, 242 (2003) (arguing that a lively, professional broadcast media striving to perform the "Fourth Estate" function is critical to the success of an emerging democracy); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 333-34 (2003) (stating 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").

<sup>9</sup> See Blake D. Morant, *Electoral Integrity: Media, Democracy, and the Value of Self-Restraint*, 55 ALA. L. REV. 1, 12-15 (2003) [hereinafter Morant, *Electoral Integrity*] (underscoring the importance of the electoral process to the body politic).

<sup>10</sup> 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 J. SABATO, *FEEDING FRENZY* 5 (2000). For more commentary on media frenzy, see Blake D. Morant, *Democracy, Choice, and the Importance of Voice in Contemporary Media*, 53 DEPAUL L. REV. 943, 954 (2004) [hereinafter Morant, *Democracy, Choice*] which noted that when the media's motivation is solely for profit, the "media contravenes its ethical responsibility to inform fully and honestly." In addition, for a discussion on the sensational nature of covering presidential elections and the effects that the frenzied rush for information can have on the accuracy of the content being reported, see Morant, *Electoral Integrity*, *supra* note 9, at 12-15.

<sup>11</sup> See *infra* notes 70-109 and accompanying text (explaining ethical codes and other forms of self-restraint by media).

preservation of electoral integrity.<sup>12</sup> Distorted, skewed, or even untrustworthy reporting practices exacerbate this perception.<sup>13</sup> Informal discussions with various colleagues and laypersons often include commentary suggesting that ethical reporting is oxymoronic.

In my view, several factors contribute to cynical opinions about media's dissemination of news. The proliferation of tabloid publications and so-called "reality" programming that emphasize the more sensational aspects of news<sup>14</sup> have become staples in the industry.<sup>15</sup> Moreover, corporate influence on reporting decisions and editorial commentary has clouded media's image as disseminators of unbiased and truthful news.

The pervasive nature of corporate governance has a palpable effect on

<sup>12</sup> See Clay Calvert, *The Reporter's 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 "subtl[y] molding . . . reporters to the conglomerate owners' business interests."); see also 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); Andrew Kohut, *Self-censorship: Counting the Ways*, 39 COLUM. JOURNALISM REV., May-June 2000, at 42, 43 (reporting, based on findings of a survey by The Pew Research 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."); 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); Elizabeth Thoman, *Screen-Agers . . . and the Decline of the "Wasteland"*, 55 FED. COMM. L.J. 601, 606 (2003) (opining that most media messages are constructed to gain profit or power). Additionally, because of the financial support they provide for the media, advertisers can exert great influence over programming content. *Id.*

<sup>13</sup> Press Release, THE PEW RESEARCH CENTER. FOR THE PEOPLE & THE PRESS, NEWS AUDIENCES INCREASINGLY POLITICIZED (June 8, 2004), <http://people-press.org/reports/pdf/215.pdf> (reporting that 53% of Americans agree with the statement, "I often don't trust what news organizations are saying."); see Christine Urban, *Building Reader Trust, Tracking Public Attitudes: Public Attitudes About Journalism Credibility*, in AMERICAN SOCIETY OF NEWSPAPER EDITORS, Aug. 12, 2002, <http://www.asne.org/credibilityhandbook/brt/publicattitudes.htm> (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.").

<sup>14</sup> See Eric Schmuckler, *Facing reality*, BRANDWEEK, May 31, 2004, at SR32, SR32, available at [http://www.brandweek.com/bw/esearch/article\\_display.jsp?vnu\\_content\\_id=1000522067](http://www.brandweek.com/bw/esearch/article_display.jsp?vnu_content_id=1000522067) (noting that six of the top ten programs for adults aged 18-49 are reality shows); see also 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); James McCartney, *News Lite*, AM. 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."); Karen Slattery, Mark Doremus & Linda Marcus, *Shifts in Public Affairs Reporting on the Network Evening News: A Move Toward the Sensational*, 45 J. BROAD. & ELEC. MEDIA 290, 290 (2001) (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., *Facts, Fallacies, and Fears of Tabloidization*, USA TODAY, Nov. 1999, (Magazine), 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).

<sup>15</sup> See *infra* notes 35-37 and accompanying text (noting the advent of sensationalist programming on television).

journalism. Perhaps the most controversial trend has been the continued monopolization of media. During the last quarter century, many media sources have become subject to buyouts, mergers, and attrition.<sup>16</sup> Broadcast deregulation in the 80s and the subsequently enacted Telecommunications Act of 1996<sup>17</sup> have accelerated the industry's trend toward conglomeration.<sup>18</sup> The FCC's relaxation of rules that restrict ownership of media sources within localities added more velocity to monopolization.<sup>19</sup>

Conventional wisdom suggests that a reduction in media ownership leads to the dissemination of less diverse and possibly more biased information.<sup>20</sup> A more prevalent result of monopolization, however, has been the homogeneity of news,<sup>21</sup> thereby leaving fewer sources that provide more

<sup>16</sup> BEN H. BAGDIKIAN, *THE NEW MEDIA MONOPOLY* 27–28 (7th ed. 2004) (stating that five large firms dominate all American mass media).

<sup>17</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>18</sup> See ROBERT W. MCCHESENEY, *THE PROBLEM OF THE MEDIA: U.S. COMMUNICATION POLITICS IN THE TWENTY-FIRST 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); see also BEN H. 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 EXPRESS, July 7, 2004, available at <http://www.eastbayexpress.com/ebx/PrintFriendly?oid=287458> (arguing that despite increased conglomeration of the mainstream media, alternative media sources are increasingly available, contributing to a media saturated world).

<sup>19</sup> FED. COMM. COMM'N, IN RE 2002 BIENNIAL REGULATORY REVIEW-REVIEW OF THE COMMISSION'S BROADCAST OWNERSHIP RULES AND OTHER RULES ADOPTED PURSUANT TO SECTION 202 OF THE TELECOMMUNICATIONS ACT OF 1996, REPORT AND ORDER AND NOTICE OF PROPOSED RULEMAKING, 18 F.C.C. Rcd. 13620 (2003); see Morant, *Democracy, Choice*, *supra* note 10, at 975–79 (summarizing the rule change). *But see* Prometheus Radio Project v. F.C.C., 373 F.3d 372 (3d Cir. 2004) (affirming in part and remanding in part the F.C.C. rule). See generally MCCHESENEY, *supra* note 18, at 252–97 (describing in detail the Commissioner's individual positions on the modification of the F.C.C. rule).

<sup>20</sup> See Morant, *Democracy, Choice*, *supra* note 10, at 977; see also Charles Layton, *News Blackout*, AM. JOURNALISM REV., Dec.-Jan. 2004, available at <http://www.ajr.org/article.asp?id=3500> (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 and finding 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, but noting that PBS and NPR were exceptions, giving in-depth coverage to the story).

<sup>21</sup> See C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097, 2123–26 (1992) (arguing that advertising or the drive for advertising revenue and the rise in the doctrine of objectivity contribute to the homogeneity of news content); see also BAGDIKIAN, *supra* note 18, at 213–15 (arguing that the doctrine of objectivity causes journalists to report stories out 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, *Rethinking Objectivity*, 42 COLUM. JOURNALISM REV., Jul.-Aug. 2003, at 24, 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); Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879, 1885 (2000) (advancing the view

diverse commentary on critical issues in society. Monopolization of media, particularly by large corporate entities, contributes to the perception that disseminated information is tainted by corporate influence.<sup>22</sup> In fact, corporate control of mass media foments the view that money and power contribute to corporate-friendly news and minimized reporting of opposing views.<sup>23</sup> As a result, news reported by media becomes subject to advertisers' preferences and corporate profitability.<sup>24</sup>

Empirical data confirm the reality of corporate influence. 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.<sup>25</sup> The respondents also opine that both corporate owners and advertisers often usurp the editorial judgment of media personnel.<sup>26</sup> It comes as no surprise, therefore, that 80% of journalists surveyed feel that market pressures often kill relevant or socially pertinent stories that are judged as dull or less attention-grabbing.<sup>27</sup>

Corporate influence, regardless of the extent of its impact, is unavoidable under strict notions of autonomy and libertarianism.<sup>28</sup> A free-market economy, which is a manifestation of stark personal autonomy, facilitates personal wealth or utility maximization.<sup>29</sup> This more austere form of

that liberal democracy should include both independent and subsidized press sources to ensure that all citizens receive information that addresses their respective interests).

<sup>22</sup> BAGDIKIAN, *supra* note 16, at 36 (providing examples of various impacts that corporate interests have on the information disseminated by media sources).

<sup>23</sup> EDWARD S. HERMAN & NOAM CHOMSKY, A PROPAGANDA MODEL, MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA 1-2 (1988), *quoted in* MARK ACHBAR, MANUFACTURING CONSENT: NOAM CHOMSKY AND THE MEDIA: THE COMPANION BOOK TO THE AWARD-WINNING FILM BY PETER WINTONICK AND MARK ACHBAR 53 (Mark Achbar ed., Black Rose Books 1994).

<sup>24</sup> MARK ACHBAR, MANUFACTURING CONSENT: NOAM CHOMSKY AND THE MEDIA: THE COMPANION BOOK TO THE AWARD-WINNING FILM BY PETER WINTONICK AND MARK ACHBAR 63 (Mark Achbar ed., Black Rose Books 1994).

<sup>25</sup> Bill Kovach et al., *A Crisis of Confidence: Bottom-Line Pressures Now Hurting Coverage, in* HOW JOURNALISTS SEE JOURNALISTS IN 2004, May 23, 2004, *available at* <http://people-press.org/reports/pdf/214.pdf>.

<sup>26</sup> *Id.*

<sup>27</sup> Kohut, *supra* note 12, at 42.

<sup>28</sup> *See infra* note 10 and accompanying text (discussing other by-products of libertarianism, including media frenzy).

<sup>29</sup> Posner defines economic efficiency as a state in which goods are allocated to those who will pay the highest price. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 12-15 (4th ed. 1992). Market economics defines economic efficiency as meeting consumer preferences. B. Badwill, Note, *Thinking Must Be Sufficiently Rational to Warrant Protection*, 116 HARV. L. REV. 1845, 1855 (2003). "The positive economic theory of tort law defines economic efficiency as wealth maximization." Elizabeth J. Goldstein, *Asking the Impossible: The Negligence Liability of the Mentally Ill*, 12 J. CONTEMP. HEALTH L. & POL'Y 67, 84 (1995). Some commentators believe that government regulation of the flow of commerce or bargaining behavior interferes with the efficiency of the market. The securities market, in

autonomy can overshadow media's efforts to foster the public good. In this environment, ethical behavior can become an ancillary aspiration. In fact, some have argued that corporate influence and the focus on profit have led to slipshod journalism.<sup>30</sup> The dominance of corporate interests threatens adherence to ethical tenets of truth and accuracy.<sup>31</sup>

Media's insatiable quest for ratings intensifies competition and leads to the adoption of strategies that guarantee a sizable audience. The competition for audience and ratings, which are maximized by "scooping" other news sources by becoming the first to disseminate a story, can prompt abridgement of procedures used to verify information. This behavior contributes to inaccuracies or distortions. Several examples of this behavior include reports of the winner of the Dewey-Truman presidential contest in 1948<sup>32</sup> and broadcast media's call of the winner of Florida in the 2000 presidential contest.<sup>33</sup>

general, is suspect to allegations of inefficiency due to regulation. Some argue that the restrictive regulation of insider information decreases the efficiency of the securities market. *See generally* HENRY G. MANNE, *INSIDER TRADING AND THE STOCK MARKET* 100-04 (1966). Others posit that regulations limiting the information available to bargaining parties for the benefit of the behaviorally challenged, could result in diminished efficiency in the securities market, thereby increasing the risk to investors, raising the cost of capital and thereby constricting the range of available investment opportunities for investors. *See* Stephen J. Choi & A.C. Pritchard, *Behavioral Economics and the SEC*, 56 *STAN. L. REV.* 1, 61-62 (2003). However, compare that with the argument that Regulation FD (Fair Disclosure) passed by the SEC to cut down on insider trading and even the informational playing field reduces agency costs and improves market efficiency. Jill E. Fisch & Hillary A. Sale, *The Securities Analyst as Agent: Rethinking the Regulation of Analysts*, 88 *IOWA L. REV.* 1035, 1091 (2003).

<sup>30</sup> *What We Do Now*, 36 *COLUM. JOURNALISM REV.*, Mar.-Apr. 1998, at 25, 27 (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); Logan, *supra* note 14, at 161-62 (arguing that undercover reporting by news magazine shows, which raise serious issues of journalistic ethics, have proliferated due to increasing ratings and profits); Lyriisa 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 "dramatic exposes lead to higher ratings and, consequently, higher profits."); Marge Injasoulian & Gregory L. Leisse, *Media Crises*, 36 *CATH. LAW.* 97, 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* Morant, *Electoral Integrity*, *supra* note 9, at 6-7 (documenting the media's missteps in declaring the 2000 presidential race in Florida).

<sup>31</sup> *See infra* notes 72-75 and accompanying text (discussing ethical codes).

<sup>32</sup> MARTIN PLISSNER, *THE CONTROL ROOM: HOW TELEVISION CALLS THE SHOTS IN PRESIDENTIAL ELECTIONS* 69, 69 (1999) (discussing the incorrect reports of the early results of the Dewey-Truman election of 1948).

<sup>33</sup> *Election 2000: The Role of the Courts, The Role of the Media, The Roll of the Dice*, NW. U. CONF. REP., 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* Sherry Ricchiardi, *Standards Are the First Casualty*, *AM. JOURNALISM REV.*, Mar. 1998, at 30, 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, describing the situation as a "classic example" of the frenzy surrounding the Clinton-Lewinsky scandal); *Media Transforms O.J. Into Version of 'The Fugitive'* (National Public Radio, Weekend Edition - Sunday broadcast June 19, 1994) (reporting that a caller to ABC during the network's live

Another and, perhaps, more stark manifestation of the distortions caused by media's overwhelming quest for profit has been the dramatic increase in sensationalist programming.<sup>34</sup> The last twenty years have ushered in a panoply of shows and stories that seem to 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 more mainstream media.<sup>35</sup> Certain talk shows that focus on the most intimate aspects of personal relationships and reality programs that manufacture situations for the sake of entertainment have become staples within the broadcast industry.<sup>36</sup> Such programming, while factually based, seemingly diverts media from its theoretical and historically significant role as educator on issues of public or societal concern.<sup>37</sup> As a consequence, media that seek only to entertain or titillate may see credibility as somewhat less compelling. Sensational programming creates the perception that credibility is not a salient objective in broadcast journalism.<sup>38</sup>

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 later apologized for airing the uncorroborated information, admitting that the call was a hoax).

<sup>34</sup> See Jill Rosen, *Et Tu, "Nightline"?*, AM. JOURNALISM REV., Feb.-Mar. 2004, at 18, 20-21 (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).

<sup>35</sup> See Andrew Calabrese, *Political Space and the Trade in Television News*, reprinted in TABLOID TALES: GLOBAL DEBATES OVER MEDIA STANDARDS 43, 43 (Colin Sparks & John Tulloch eds., 2000) (suggesting 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); R.P., *Monica!*, 40 COLUM. JOURNALISM REV., Nov.-Dec. 2001, at 124, 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, "Stunt Journalism," *Professional Norms, and Public Mistrust of the Media*, 9 U. FLA. J.L. & PUB. POL'Y 151, 166 (1998) ("The tabloid shows and the mainstream media often cover the same stories . . ."); see also Clay Calvert, *The Psychological Conditions for a Socially Significant Free Press: Reconsidering the Hutchins Commission Report Fifty Years Later*, 22 VT. L. REV. 493, 511 (1998) (claiming that the tabloidization of mainstream news, the blurring of the lines between news and entertainment, obscures the press' watchdog function).

<sup>36</sup> See *Talk Shows*, MEDIAWEEK, Mar. 8, 2004, at 23, 23 (reporting that the two most popular talk shows, *Oprah* and *Dr. Phil*, enjoyed double digit increases in ratings during the 2004 season); Schmuckler, *supra* note 14, at SR32 (noting that six of the top ten programs for adults ages 18-49 are reality shows); see also Ted Turner, *My Beef with Big Media*, WASH. MONTHLY, Jul.-Aug. 2004, available at <http://www.washingtonmonthly.com/features/2004/0407.turner.html> (arguing that the rise of reality television, which costs little to produce and garners high ratings, is a byproduct of media conglomerates' overemphasis on short-term profit).

<sup>37</sup> See C. EDWIN BAKER, MEDIA, MARKETS AND DEMOCRACY 73 (2004) (explaining that media functions to "educate, inform political participation, foment and energize civic and political participation, [and] provide a forum for public debate and dialogue."); see also Drale, *supra* note 8, at 224 and accompanying text (describing the media's role as governmental overseer and, thus, the "fourth estate").

<sup>38</sup> See *Chasing Sensational Stories*, EXAMINING OUR CREDIBILITY: PERSPECTIVES OF THE PUBLIC AND THE PRESS, Aug. 4, 1999, available at [http://www.asne.org/kiosk/reports/99reports/1999\\_examiningourcredibility/p51-53\\_chasing.html](http://www.asne.org/kiosk/reports/99reports/1999_examiningourcredibility/p51-53_chasing.html) ("Eighty percent of the American public believes that

Strategies designed to maximize ratings can include a focus on the more sensationalist aspects of race, gender or sexuality. Despite the legitimacy of race and gender as issues in some electoral contests, media's intentional focus on the more inflammatory aspects of these issues can subjugate the industry's primary duties to monitor governmental operations and fully inform the body politic.<sup>39</sup>

Presidential elections represent complex phenomena for media. As a democratic exercise, the election of a president constitutes a fundamental event on which media must report.<sup>40</sup> This election, by its very nature, becomes a high profile event that is prone to frenzy and sensationalism if race or gender are issues in the campaign.<sup>41</sup> Thus, the 2008 campaign, which included Senator Clinton, then-Senator Obama, and Governor Palin, was susceptible to sensationalist reporting. The challenge for media is to resist sensationalism and report in a manner that educates the public on substantive issues of the campaign.

Preservation of journalistic integrity would seem illusive given media's autonomous right to expression and autonomy's manifestation in the form of profit maximization.<sup>42</sup> Yet, achievement of a sizeable audience that ensures profit requires media to become sensitive to the interests of the very audience they seek to attract.

Sensitivity to the rights of others conjures a more holistic, democratic theory that fosters the exercise of individual rights and simultaneously preserves the society in which those rights are exercised. A respect-based theory of democracy secures individualized rights and simultaneously fosters mutual respect for the exercise of those rights by all members of a society.<sup>43</sup> Respect for the expressive rights of others enriches public

'journalists chase sensational stories because they think it'll sell papers, not because they think it's important news.'").

<sup>39</sup> See Podcast: 10th Annual American Democracy Conference (Univ. of Virginia Ctr. for Politics Nov. 21, 2008), available at <http://www.centerforpolitics.org/programs/adc/index.htm> (noting that the Honorable Arthur Davis, U.S. Congressman (D-AL), echoed some who have opined that the media's focus on questions regarding Senator Obama's status as a Muslim inflated the issue of race and ethnicity to a level of distraction).

<sup>40</sup> Morant, *Electoral Integrity*, *supra* note 9, at 17, 21–22 (emphasizing the importance of elections to a collective democratic society).

<sup>41</sup> *Id.* at 12 (highlighting the media's sensationalism when faced with the excitement and pressure of reporting a significant time-sensitive story).

<sup>42</sup> *Id.* at 14 (discussing media's quest for profit in the coverage of elections).

<sup>43</sup> Professor C. Edwin Baker's preferred complex democracy has heavily influenced my conceptualization of democracy. I share Baker's emphasis on an individual's 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. See Morant, *Electoral Integrity*, *supra* note 9, at 19–21, and Morant, *Democracy, Choice*, *supra* note 10, at 958–59, for more detailed explanations of my theory. See also BAKER, *supra* note 37, at 143–47, for a more detailed explanation of the theory of complex democracy.

discourse and engenders in every segment of society a greater sense of vestment in political processes.<sup>44</sup> A dual emphasis on the individual right to free expression and the respect of others who exercise that right diversifies commentary, maximizes the participation of more marginalized voices in society, and ultimately sustains political processes such as elections.<sup>45</sup> While a respect-based theory of democracy does not ensure the promotion of all views, it implores society to foster the expression of its members, particularly those who have traditionally not enjoyed that right. As a result, coverage of democratic institutions such as elections becomes a vibrant, enriching and inclusive colloquy.

Respect-based democracy naturally moves citizens, including media, to exercise their rights responsibly by encouraging citizens to respect the expressive rights of others. This theory also recognizes that the individual exercise of expressive freedom depends upon the opportunity of all citizens to enjoy this fundamental right. This interdependence of expressive rights compels individuals to check their behavior in order to achieve full expressive autonomy.

Democracy that emphasizes respect for the autonomous rights of others has a direct bearing on media's proclivity to self-regulate. Media are corporate individuals that enjoy expressive freedoms.<sup>46</sup> To fully enjoy these freedoms, however, media sources must respect the autonomous rights of other citizens whom they seek to attract as viewers. As a result, media must behave ethically if they hope to maximize audience size and fulfill its responsibility as monitors of the government.<sup>47</sup>

<sup>44</sup> See *infra* note 43 and accompanying text.

<sup>45</sup> See generally Morant, *Democracy, Choice*, *supra* note 10, at 962–65; Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT'L L. 65, 67 (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, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L.J. 621, 621–22 (1994) (stating that pluralism is a political system in which competing groups try to advance their private interests through bargaining and compromise).

<sup>46</sup> Corporate entities, which include media sources, enjoy expressive freedoms guaranteed by the First Amendment. See *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 657–60 (1990), which finds that corporations, like persons, have the right to free expression under the Constitution, and Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735, 739 (1995), which describes 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), which also discusses the media's rights to expression. However, the expressive rights enjoyed by the media can be limited by context. See *Estes v. Texas*, 381 U.S. 532, 539–40 (1965), which notes that different media forms require different scrutiny as decision makers balance media access rights with a defendant's need for due process.

<sup>47</sup> See 4 ENCYCLOPEDIA BRITANNICA 578 (15th ed. 1995) (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*

Respect-based democracy theoretically supports the notion that media can be prompted to respect the rights of others and preserve societal interests. When an individual sees her own interests as symbiotic with the rights of others, she will be more prone to respect those rights. Applying this premise to broadcast media, the industry will regulate its behavior if it perceives that the dissemination of truthful and universally appealing information enlarges its audience. Media sources that provide news and information that audiences seek will *generally* garner higher ratings and, therefore, maximize profits.

The interdependence of expressive rights forms the basis of a motivational triad consisting of credibility, audience and profits.<sup>48</sup> Applied to media, this triad requires news sources to establish credibility in order to maximize the size of its audience. A sizeable audience, of course, maximizes ratings and profits. The requirement of credibility rests on the presumption that members of an audience generally gravitate toward news sources that provide truthful information with wide-ranging appeal.<sup>49</sup> Establishment of credibility has great appeal for broadcast news media.<sup>50</sup>

The motivational triad, which emphasizes credibility, may not constitute the sole determinant of audience size. A Pew Research Center study conducted several years ago notes that respondents found CNN, as opposed to Fox News and local television, to be the most credible broadcast news source.<sup>51</sup> The motivational triad would suggest that the source perceived as

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 (Bernard Rubin ed., 1978) (stating that all professional codes of ethics are “essentially moral guides to help those who seek solutions to perplexing problems that constantly arise”).

<sup>48</sup> For further discussion of the motivational triad, see Morant, *Electoral Integrity*, *supra* note 9, at 55.

<sup>49</sup> See 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](http://www.poynter.org/content/content_print.asp?id=29033&custom=#series) (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 Phil. v. NLRB*, 636 F.2d 550, 560–61 (D.C. Cir. 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) (finding that rules regarding quality imposed on the press by the FCC would be detrimental and the press should make these determinations themselves).

<sup>50</sup> Anecdotal review of advertising on television reveals that advertisements for CNN specifically stated that the network’s distinguishing feature is its trustworthiness and penchant for public trust. CNN cites The Pew Center for People & The Press’ recent survey as support for this assertion. See THE PEW RESEARCH CENTER, *supra* note 13, at 40.

<sup>51</sup> *Id.* Other networks, such as Fox News and NBC, also make reference to their credibility. *Id.* The survey noted the following with regard to believability: CNN – 32%; Fox News – 25%, and local television – 25%. The CBS program, 60 Minutes, which 33 % of respondents found most credible, is in

most credible should garner a larger audience than its less credible competitors. The Pew study, however, yields a contrary result. Despite its perceived credibility, CNN's ratings place it third behind local television and Fox News.<sup>52</sup>

Any disconnect between credibility and audience size may be attributed to several factors. Regionalism, which refers to viewers' gravitation toward information tailored to their respective localities, affects preferences and explains, to some extent, local television's dominance in audience size.<sup>53</sup> Local television, however, is a rather unique source that focuses on a limited local market.

National networks, which generally have a broader focus, have greater operational investments and, consequently, seek a more global audience. For national networks such as CNN and Fox News, regionalism has little impact on ratings. Entertainment value and innate curiosity generated by their programming, however, can affect audience size regardless of the networks' perceived credibility. This premise seems particularly applicable to Fox News, the programming of which seems dominated by heated exchanges on polemic issues.<sup>54</sup> Moreover, viewer curiosity can increase ratings. In the Pew Research Study, 29% of acknowledged political liberals who prefer news that reflects their viewpoint regularly watch Fox

a statistical dead-heat with CNN. I omitted 60 Minutes from the rankings because the focus in the analysis has been on network sources, rather than specific programs broadcast by those networks. Thus, CNN appears to be the most credible network.

<sup>52</sup> *Id.* at 6–7. The Pew Study shows that the ratings for these news sources are as follows: local television – 59%; Fox News – 25%; and CNN – 22%.

<sup>53</sup> *See id.* at 40. Additionally, studies have demonstrated that *among* local news organizations, stations with higher quality news programming have higher ratings. Carl Gottlieb & Atiba Pertilla, *Quality Sells*, 40 COLUM. JOURNALISM REV., Nov.-Dec. 2001, at 4 (finding, based on a study of 43 local news stations in 14 markets, that quality is the best way to increase market share and demographics and ensure audience retention); *On the Road to Irrelevance: Quality can be the compass to bring viewers back*, 41 COLUM. JOURNALISM REV., Nov.-Dec 2002, at 89 (reporting based on Project for Excellence in Journalism's five-year study of local television news in 50 markets that the data show more conclusively than ever that viewers actually prefer quality).

<sup>54</sup> A recent study by the Project for Excellence in Journalism examined, *inter alia*, Fox News's influence on other cable channels. The study refers to the "Fox Effect," which is an approach to newsgathering that relies more on anchors and talk shows and less on correspondents. *See* PEW RESEARCH CENTER'S THE PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2004: AN ANNUAL REPORT ON AMERICAN JOURNALISM: NEWSPAPERS (Mar. 15, 2004), [http://www.stateofthenewsmedia.org/2004/narrative\\_cabletv\\_contentanalysis.asp](http://www.stateofthenewsmedia.org/2004/narrative_cabletv_contentanalysis.asp). Neil Hickey captures the essence of the entertainment/curiosity factor:

It now appears that by 7 p.m., many Americans have ingested all the news they care to hear . . . and are ready to settle back after dinner to enjoy gladiatorial slugfests and verbal duels to death about a narrow range of events . . . rather than detailed, substantive reporting about what's really going on in Europe, Africa, Latin America, Asia, and here at home.

Neil Hickey, *Cable Wars: In a Desperate Race for Profits, the Public Falls Behind*, 41 COLUM. JOURNALISM REV. Jan.-Feb. 2003, at 12, 13.

News,<sup>55</sup> which is generally favored by conservatives.<sup>56</sup> Another influence on audience size is viewer loyalty. A news source, regardless of credibility, may attract viewers due to the entertainment/curiosity value or sensational nature of its programming,<sup>57</sup> or because the source tends to report news from a certain ideological perspective.<sup>58</sup>

While regionalism, entertainment/curiosity, and viewer loyalty are influential factors in viewership, they are not, in my view, foundational in the ultimate strategy to *maintain* consistent viewership. The Pew study demonstrates that CNN, ranked the most credible news network, trails its major competitor, Fox News, by only three percentage points.<sup>59</sup> CNN's viewership, despite trailing Fox News, remains substantial. While entertainment/curiosity can temporarily impact audience size, credibility, which is the linchpin element in the motivational triad, remains the

<sup>55</sup> See THE PEW RESEARCH CENTER, *supra* note 13, at 36 (revealing further that 30% of liberals who prefer to watch news programs that reflect their viewpoints watch CNN and 33% favor National Public Radio).

<sup>56</sup> See *id.* (noting that 41% of conservatives seeking news that reflects their viewpoint watch Fox News); see also *id.* at 1 (indicating that 35% of Republicans regularly watch Fox News).

<sup>57</sup> See *infra* notes 34–39 and accompanying text (discussing the media's sensationalist programming for ratings).

<sup>58</sup> The Pew study provides probative data on viewer preferences based on viewpoint. On one hand, 55% of respondents prefer debates that include varied perspectives. See THE PEW RESEARCH CENTER, *supra* note 13, at 32. Forty percent prefer more in-depth coverage of the major news stories. *Id.* at 31. However, while 58% of respondents appear indifferent as to whether the news reflects their ideologies, a significant minority of 36% clearly prefers news that is reflective of their personal viewpoints. *Id.* at 35. Forty-three percent of identified conservatives and 33% of liberals prefer news that comports with their ideologies. *Id.* Of the 43% of conservatives who seek news reflective of their views, 41% regularly tune in to Fox News. *Id.* at 36. While not majority figures, the significant minorities who desire news that reflects their ideologies can impact the size of an audience that regularly tunes into a particular network. The impact on Fox News's popularity can be seen by comparing the news preferences of the 43% of conservatives with those of the 33% of liberals who prefer news that reflects their views. *Id.* If one were to remove local news, network news, and daily papers (all of which were high for both liberals and conservatives), the 41% achieved by Fox News is by far the highest among the rest of the news sources for conservatives. *Id.* Morning news is the next highest at 26%. *Id.* For the 33% of liberals seeking news reflecting their views, the news preferences are more evenly distributed, with morning news, CNN, NPR, and Fox all achieving between 28–33%. *Id.*

<sup>59</sup> For a summary of the survey results of the most watched sources for news, see *supra* note 51 and accompanying text. Despite Fox's lead in audience numbers, CNN's operating profits are about five times greater than Fox's profits. See PEW RESEARCH CENTER'S THE PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2004: AN ANNUAL REPORT ON AMERICAN JOURNALISM: CABLE TV (Mar. 15, 2004), [http://www.stateofthenewsmedia.org/2004/narrative\\_cabletv\\_economics.asp?cat=4&media=5](http://www.stateofthenewsmedia.org/2004/narrative_cabletv_economics.asp?cat=4&media=5). This substantial lead can be attributed to numerous factors, including CNN's economies of scale and the fact that CNN has been profitable for 10 years longer than Fox. *Id.* However, CNN's popularity among big advertisers could also be attributed to the strength of the CNN brand. Paul Farhi argues that CNN's advertising revenue is based on the fact that advertisers respect CNN's reputation and "are willing to pay handsomely to be associated with it." Paul Farhi, *Everybody Wins*, AM. JOURNALISM REV., Apr. 2003, available at <http://www.ajr.org/article.asp?id=2875>. Walter Isaacson, former chairman and CEO of CNN, described CNN's market power in this way: "If all we wanted to do was get better ratings, we'd put on car chases or wrestling, and we'd get 10 times the ratings of a good piece by [CNN reporter] Christiane Amanpour. . . . But thank goodness Madison Avenue still sees value in being in this kind of classy environment." *Id.*

mandatory criterion to ensure news viewership.

In my view, the motivational triad, which is a subset of a respect-based theory of democracy, encourages media to be more circumspect in its reporting behavior. Distorted reports or sensationalist coverage of issues of race and gender may garner temporary viewer interest. Such questionable, journalistic behavior, however, fails to secure a significant number of loyal viewers, the majority of whom crave accurate, relevant and substantive news. The enhancement of credibility also confirms media's role as responsible citizens when they temper corporate gain for the benefit of society's common good. For example, news sources have refrained from the disclosure of the names of victims of certain violent crimes<sup>60</sup> and the names of juveniles involved in judicial proceedings.<sup>61</sup> Media have also cooperated with governmental attempts to limit dissemination of information related to such national interests as war and protection from terrorism.<sup>62</sup> Demonstratively sensitive to concerns related to national security, the industry has refrained from reporting information that might influence operations in Afghanistan<sup>63</sup> or the war in Iraq.<sup>64</sup>

<sup>60</sup> See *Copley Press, Inc. v. Super. Ct. of San Diego County*, 74 Cal. Rptr. 2d 69, 70–71 (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 identifying victims of sexual assault or minors charged with crimes); SOCIETY OF PROFESSIONAL JOURNALISTS, CODE OF ETHICS (1996), [http://www.spj.org/ethics\\_code.asp](http://www.spj.org/ethics_code.asp) (stating that journalists should "be cautious about identifying juvenile suspects or victims of sex crimes"); Shirley A. Wiegand, *Sports Heroes, Sexual Assault and the Unnamed Victim*, 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, at 18) (suggesting that it is estimated that only 5-10% of American newspapers publish the names of sexual assault victims).

<sup>61</sup> See *Copley Press*, 74 Cal. Rptr. 2d at 71 (noting that the press had not published the names of the assailants and students involved because of its policy against identifying victims of sexual assault or minors charged with crimes). But see Kathe Aschenbrenner Pate, *Restricting Electronic Media Coverage of Child-Witnesses: A Proposed Rule*, 1993 U. CHI. LEGAL F. 347, 357–58 (1993) (citing Court TV's policy not to broadcast the testimony of any witness under 12 years of age and its failure to follow those guidelines when airing a sensational divorce trial).

<sup>62</sup> See, e.g., Howard B. Homonoff, Note, *The First Amendment and National Security: The Constitutionality of Press Censorship and Access Denial in Military 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) (noting 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 A.B.A. Standing Committee on Law and Nat'l Security and the Media Institute of Wash., D.C., *The Media and Government Leaks*, 6 (Mar. 23, 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, *TIDES OF WAR: WORLD NEWS REPORTING 1931–45*, 225 (1984) (commenting that during World War II, journalists knew of but did not reveal the extent of damage to the United States' 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).

<sup>63</sup> See David J. Bodney, *War, Wisdom, and Freedom of the Press*, 19 COMM. LAW. 3, 4 (2002) (noting the conference call between National Security Adviser Condoleezza Rice and top executives of ABC, CBS, NBC, Fox News, and CNN, where the television news organizations were asked to exercise

With regard to its coverage of elections, media have exercised restraint in order to maintain credibility with viewers. Subsequent to broadcast media's problems related to projections in the 2000 presidential contest,<sup>65</sup> major broadcast media sources modified their reporting procedures<sup>66</sup> and guardedly reported the returns from the 2002 mid-term elections.<sup>67</sup> This history of restraint with regard to elections underscores the industry's tendency to check its reporting of race and gender issues.

While the lure of ratings may tempt sources to engage in more sensationalist coverage of race and gender, the motivational triad, with its foundation based on credibility, encourages media to report such issues in a more responsible manner. As commentators in the 10<sup>th</sup> Annual American Democracy Conference at the University of Virginia observed, media's coverage of the 2008 campaign has as dominant themes salient issues

further restraint in airing taped messages from Osama Bin Laden out of fear that they were encoded or would enable the terrorist to disseminate propaganda; later, all five networks chose not to air unedited Bin Laden messages).

<sup>64</sup> See CBSNews.com, *Abuse Of Iraqi POWs By GIs Probed*, Apr. 28, 2004, available at <http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml>. 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. See also James Risen & David Johnston, *The Reach of War: The Offense; Chalabi Reportedly Told Iran That U.S. Had Code*, N.Y. TIMES, June 2, 2004, at A1. The New York Times and other news organizations cooperated with the Bush Administration's request not to disseminate information about the government's evidence against Ahmad Chalabi out of concern for national security.

<sup>65</sup> See generally *Bush v. Gore*, 531 U.S. 98 (2000) (announcing the Supreme Court's determination to a complaint filed by Al Gore contesting the certification of state results in the 2000 presidential election); Morant, *Electoral Integrity*, *supra* note 9, at 6-7 (describing the media's erroneous projections of the 2000 elections); Susan E. Seager & Laura R. Handman, *Congress, The Networks, and Exit Polls*, 18 COMM. LAW 1, 1 (2001) ("[R]eview[ing] the legal and political developments over the past twenty years related to network projections on election night and the use of exit polls."); 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 votes would be meaningless).

<sup>66</sup> See CNN.com, *Network executives tell panel they plan changes*, Feb. 14, 2001, available at <http://www.cnn.com/2001/ALLPOLITICS/02/14/election.calls.03/index.html> (reporting that network executives told a House committee that they were improving their election coverage to help avoid problems that arose during the 2000 presidential election); see, e.g., CNN.com, *Statement of CNN Regarding Future Election Night Coverage*, Feb. 2, 2001, available at <http://www.cnn.com/2001/ALLPOLITICS/stories/02/02/cnn.statement/> (releasing an overview of CNN's new election night coverage policies).

<sup>67</sup> See David Bianculli, *People Have Spoken But Pundits Hold Off*, N.Y. DAILY NEWS, Nov. 6, 2002, available at [http://www.nydailynews.com/archives/entertainment/2002/11/06/2002-11-06\\_people\\_have\\_spoken\\_but\\_pundi.html](http://www.nydailynews.com/archives/entertainment/2002/11/06/2002-11-06_people_have_spoken_but_pundi.html) (describing the cautious nature of the media's coverage of the 2002 elections); Frazier Moore, *TV News Played It Safe, Not Sorry, in Election Night Coverage*, DESERET NEWS, Nov. 6, 2002, available at <http://archive.deseretnews.com/archive/947002/TV-news-played-it-safe-not-sorry-in-Election-Night-coverage.html> (discussing the restraint used by the media in covering the 2002 elections). See generally Morant, *Electoral Integrity*, *supra* note 9, at 53-54 (discussing my direct observations of CNN's voluntary restraint in reporting results of the 2002 midterm elections).

related to national security, temperament, experience and ultimately, the financial crisis.<sup>68</sup> Focus on Senator Clinton's crying episode, the Jeremiah Wright controversy, or Governor Palin's subsidized wardrobe has been a temporary interruption in coverage dominated by pivotal societal issues. On balance, coverage was far more substantive, particularly during the latter stages of the campaign.<sup>69</sup>

## II. THE MOTIVATIONAL TRIAD AND MEDIA'S PROPENSITY FOR VOLUNTARY SELF-RESTRAINT

The motivational triad prompts media to check its reporting behavior in order to preserve credibility and affirm the industry's concern for the common good. In addition to its positive influence on media, the triad also undergirds media's adoption of ethical codes. All media, whether broadcast or print, have codified rules of professional responsibility.<sup>70</sup> These various codes share language that confirms the importance of truth and accuracy in the reporting of news and information.<sup>71</sup>

Ethical codes function both internally and externally. As rules of reporting behavior, they regulate the internal processing of news that is reported. They establish professional order and certainty, and serve as goals for professional conduct.<sup>72</sup> The external operation of ethical codes

<sup>68</sup> See, e.g., Transcript of *Countdown with Keith Olbermann* (MSNBC television broadcast Sept. 25, 2008), available at <http://www.msnbc.msn.com/id/26904575/>.

<sup>69</sup> The financial crisis, which was arguably the gravest in more than 70 years, dominated the public's conscientiousness and consumed most media coverage in the final weeks of the campaign. One may posit that the sheer newsworthiness of the issue prompted more attention to the issue. While I acknowledge this argument, I also posit that media's coverage of the issue relates directly to the audience's need for credible news on issues that relate directly to electoral decision-making. This behavior has a discernable nexus with the motivational triad.

<sup>70</sup> See Pew Research Center's The Project for Excellence in Journalism, *Ethics Codes*, [www.journalism.org/resources/ethics\\_codes](http://www.journalism.org/resources/ethics_codes) (last visited Mar. 10, 2009) (listing ethics guidelines from various news organizations worldwide).

<sup>71</sup> See *infra* note 75 and accompanying text.

<sup>72</sup> Ethical 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, 1081 (1995). McAdams notes that notwithstanding their crudeness, rules still have the power to significantly influence individual perceptions and attitudes. *Id.*; see also Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 390, 413 (1993). Schwartz says that legal rules have two functions: substantive, which affect transactional outcomes, and transformative, which change parties' preferences. *Id.* But see Blake D. Morant, *Contractual Rules and Terms and the Maintenance of Bargains: The Case of the Fledgling Writer*, 18 HASTINGS COMM. & ENT. L.J. 453, 456 (1996). This article argues 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. *Id.* Cass Sunstein contends that, "[o]ften rules will be too crude, since they run up against intransigent beliefs about how particular cases should be resolved." Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 957 (1995).

relates to their demonstration of media's intent to report responsibly and respect the collective interests of society. When dogmatically followed, ethical codes enhance credibility and impose an almost moral obligation for media to act responsibly, thereby ensuring that subscribing sources will avoid distortion, bias and falsity. Operating under such rules, media garner a presumptive degree of credibility that is further established, or even increased, by its actual behavior.

Codes of ethics, while valuable tools of self-regulation, are not panaceas. When viewed as legal rules,<sup>73</sup> they can apply awkwardly or inflexibly to problems that vary in context and complexity.<sup>74</sup> As a result, the guidance provided by these codes may be incomplete or inapplicable and, therefore, lead to disparate or confusing outcomes. At the center of the fallacy of codes as rules is their inherent indefiniteness. The language of most codes promotes socially acceptable and professionally required norms based on truthfulness.<sup>75</sup> Generalized and somewhat ambiguous guidelines have caused these codes to be described 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."<sup>76</sup> The blatantly amorphous language in most codes suggests that they were intentionally drafted to maintain a certain ambiguity.<sup>77</sup> Vagueness leads to either flexible interpretation of codes or complete disuse. A study of the newsrooms of several print media sources reveals that decision-makers rarely invoke ethical codes to resolve problematic situations.<sup>78</sup> Ethical codes also lack authority unless their

<sup>73</sup> See *supra* note 72 and accompanying text.

<sup>74</sup> Rules of law can have dubious effects given their ubiquitous application in cases with varying facts. See Morant, *Contractual Rules*, *supra* note 72, at 456; see also McAdams, *supra* note 72, at 1081; Sunstein, *Problems with Rules*, *supra* note 72, at 957.

<sup>75</sup> See, e.g., THE WASHINGTON POST, THE WASHINGTON POST STANDARDS AND ETHICS (Feb. 16, 1999), <http://www.asne.org/ideas/codes/washingtonpost.htm> (noting that the first mission of a newspaper is to tell the truth as nearly as the truth may be ascertained); SOCIETY OF PROFESSIONAL JOURNALISTS, *supra* note 60 (stating that journalists should test the accuracy of information from all sources); HEARST NEWSPAPERS, HEARST NEWSPAPERS STATEMENT OF PROFESSIONAL PRINCIPLES (May 20, 2002), <http://www.asne.org/index.cfm?ID=3556> (proclaiming that it is the mission of the papers to be the most trusted, most respected and the most accurate sources of news and information).

<sup>76</sup> Mike France, *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, at 60, 60. available at [http://www.businessweek.com/magazine/content/04\\_16/b3879098\\_mz016.htm](http://www.businessweek.com/magazine/content/04_16/b3879098_mz016.htm).

<sup>77</sup> Jeff Storey, *Does Ethics Make Good Law? A Case Study*, 19 CARDOZO ARTS & ENT. L.J. 467, 474 (2001) (noting that the media has followed the advice of lawyers who advise that ethical codes should be as flexible as possible).

<sup>78</sup> David E. Boeyink, *How Effective Are Codes of Ethics? A Look at Three Newsrooms*, 71 JOURNALISM Q., 893, 893-94 (1994).

violation results in some sanction.<sup>79</sup> Not even the law of negligence offers legal clout for these voluntary standards of conduct. In the alternative, perhaps their adoption as legal standards might imbue them with palpable authority. Despite their compatibility with defamation,<sup>80</sup> there has been historical reluctance to adopt these codes as standards of care.<sup>81</sup>

Contextual factors endemic in the media industry nonetheless prove the continued viability of ethical codes. Self-regulation, which is the essence of ethical codes, diminishes the need for external regulation. As Jeff Storey astutely observes, self-regulation reduces the need for judicial interference with media's day-to-day operations.<sup>82</sup> Judicial definition of professional standards would most likely be awkward and inefficient. On the other hand, self-regulation produces behavioral standards that are specially designed and minimally intrusive. These standards instill a sense of professional responsibility<sup>83</sup> and become requirements in the responsible exercise of expressive rights.<sup>84</sup>

Journalistic codes of ethics also contribute to what can be described as a culture of responsible journalism. In the previously identified study that reveals the sparse use of ethical codes in specific situations in several print newsrooms,<sup>85</sup> the researcher also notes that these codes are part of, and

<sup>79</sup> See Storey, *supra* note 77, 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).

<sup>80</sup> See RESTATEMENT (SECOND) OF TORTS § 559 (1977) (defining defamatory communication as that which "tends 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 AND SLANDER § 22 (1995) (noting that tortious libel conduct comprises three elements: the composition of the statement, its writing, and its publication); *Id.* at § 26 (stating that some courts hold that malice is a necessary element of defamation while others require it only for cases with particular factual circumstances).

<sup>81</sup> See Bruce W. Sanford, *Ethics, Codes and Law*, in QUILL, Nov.-Dec. 1994, 43, at 43 (stating that "[i]n 20 years of practice and more than 1,000 libel cases, I've never actually seen (or heard) of a libel case where the plaintiff's lawyer scored points by arguing a journalist should lose a liable lawsuit because he or she breached a professional code of ethics."); see, e.g., *Khawar v. Globe Int'l, Inc.*, 54 Cal. Rptr. 2d 92, 107 (Ct. App. 1996) (representing the only case in which a court used ethical codes to define the acceptable standards of care for journalists).

<sup>82</sup> See Storey, *supra* note 77, at 468 (specifying "Gannett's Principles," issued by Gannett newspapers, as a self-regulatory means that circumvents the need for judicial interference with the media). *But see* Press Release, American Society of Newspaper Editors, *ASNE Opposes International Code of Ethics for Journalists* (June 25, 1998) (stating that ASNE urged the Word Association of Press Councils not to adopt an international code of ethics because of fear that the codes would become coercive and be "subverted into quasi-extensions of [the] legal system.").

<sup>83</sup> See *infra* notes 42-46 and accompanying text (discussing the democratic principles associated with autonomy and responsibility as it relates to a mutual respect theory of democracy).

<sup>84</sup> *Id.*

<sup>85</sup> See Boeyink, *supra* note 78, at 895 and accompanying text (noting David E. Boeyink's study of newsrooms).

perhaps even create, a larger ethical culture in the newsroom setting.<sup>86</sup> Decision-makers within those studied newsrooms tend to invoke ethical codes as generalized standards of professional conduct. Regularized discussion of the codes' prescriptions reinforces the importance of ethical behavior and, thus, imbeds into the consciousness of personnel the need to behave responsibly.<sup>87</sup>

Moreover, consciousness-raising produced by ethical codes constitutes a critical component in responsible journalistic behavior. These codes become cognitive mechanisms that operate as mental defaults in decision-making.<sup>88</sup> Media personnel are thus compelled to consider deliberately responsible journalistic behavior. The ingrained obligations of truth and good faith, which all ethical codes reinforce, become operational tenets that, if violated, prompt a degree of cognitive dissonance.<sup>89</sup> A breach of an ethical code, thus, compels the individual to justify her conduct. Such a cognitive assessment works prescriptively to encourage responsible behavior. While this operation of ethical codes may not stymie all forms of negative behavior, it systematically serves as a ubiquitous check on problematic journalism.

Another factor that supports the viability of ethical codes relates to media's omnipresent goal of profit maximization. If corporate profit is dependent on the interests of the public,<sup>90</sup> then those seeking that profit

<sup>86</sup> *Id.* at 894 (focusing on the methodology of the study, which focused on key editors and reporters, and their responses to the questionnaires regarding standards of professional conduct).

<sup>87</sup> *Id.* (noting the results of the studies created an awareness of ethical behavior).

<sup>88</sup> Boeyink found this type of consciousness in newsrooms that regularly discussed and debated ethical issues. In such newsrooms, the communication among journalists bridged the gap between the general prescriptions of the codes and the specific demands the journalists faced. *See* Boeyink, *supra* note 78, at 901.

<sup>89</sup> *See generally* JACK W. BREHM & ARTHUR R. COHEN, *EXPLORATIONS IN COGNITIVE DISSONANCE* (1962) (providing the cornerstone theorization on the effect of cognitive dissonance in predicting complex behavior); *see also* Elizabeth Harmer-Dionne, *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); David Luban, *Integrity: Its Causes and Cures*, 72 *FORDHAM L. REV.* 279, 279 (2003) (explaining that cognitive dissonance occurs when one's conduct and principles clash); Paul Bennett Marrow, *Crafting a Remedy for the Naughtiness of Procedural Unconscionability*, 34 *CUMB. L. REV.* 11, 22 n.14 (2003-04) ("Cognitive dissonance involves the tendency of people to repudiate or marginalize information that contradicts more favorable information about oneself."); 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 can 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 information that will confirm or augment desired beliefs; and (3) once beliefs form in the context of cognitive dissonance reactions, they persist).

<sup>90</sup> *See infra* notes 46-47 and accompanying text (noting the interdependence of the expressive rights to individuals with the rights of others in society).

must be responsive to public needs and desires. Responsiveness to public needs forms the foundation for ethical behavior and underscores the primacy of the motivational triad.<sup>91</sup> Credibility, which is a central element of the motivational triad, is the cornerstone of a strategy in the maximization of audience size and profits, and is actualized in media's codes of ethics. Credibility and ethical codes become kinetic forces that prompt responsible journalistic behavior. A news source that diligently adheres to these codes is likely to garner greater viewership or readership.

If there is a palpable nexus between audience size and credibility, then media sources must focus on truth and avoid distortions of race and gender – values that ethical codes are designed to foster.<sup>92</sup> Recent high-profile apologies have demonstrated media's recognition of the importance of credibility and the industry's sensitivity to the public's interest in responsible journalism. For example, *The Washington Post* published a front page article that criticized the paper's coverage of dissenting views on the build up to the war in Iraq. The article stated that *The Post* relegated previous articles that questioned the evidence of weapons of mass destruction (WMDs) in Iraq to the back pages of the A section. On the other hand, articles that contained assertions about the presence of WMDs were published on the front page of the paper. Written by a staff writer, this critical article admitted that *The Post's* coverage, “despite flashes of groundbreaking reporting, in hindsight looks strikingly one-sided at times.”<sup>93</sup> *The New York Times* similarly criticized its coverage of the build up to the war in Iraq. In an open, published letter, *The 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.”<sup>94</sup> The article then listed specific stories that contained questionable information. *The 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.”<sup>95</sup>

In a similar act of self-criticism, *USA Today* publicized its suspicions

<sup>91</sup> See *infra* notes 48–59 and accompanying text (explaining the triad that motivates media sources in greater detail).

<sup>92</sup> See *infra* notes 72–75 and accompanying text (discussing the function of media's code of ethics).

<sup>93</sup> Howard Kurtz, *The Post on WMDs: An Inside Story*, WASH. POST, Aug. 12, 2004, at A1.

<sup>94</sup> Editorial, *The Times and Iraq*, N.Y. TIMES, May 26, 2004, at A10.

<sup>95</sup> *Id.*

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 practices guidelines that proscribe conduct that is "dishonest or illegal to obtain or alter content."<sup>96</sup> The paper asked "readers, sources or employees" for any information on Kelley's reporting.<sup>97</sup> After an independent investigation, almost four months later, *USA Today* again published a story about the scandal. Al Neuharth, the article'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."<sup>98</sup> An investigating committee opined that abandonment of the "no anonymous source" guideline resulted from an objective to make the paper more competitive.<sup>99</sup>

These admissions made by these major publications and the numerous daily corrections by other industry sources demonstrate the extent to which the media is aware of the need to maintain credibility. While one might speculate as to the totality of motives behind these self-critiques, it seems objectively clear that the newspapers published these high-profile mea culpas to maintain their readers' trust and confidence. Media's focus on credibility and profit demonstrate the inherent functionality of the motivational triad. In essence, the triad provides ethical codes and their tenets with a somewhat natural authority. Despite the pervasive influence of ratings and profit, the motivational triad's reliance on credibility continually reinforces ethical standards. This dynamic contributes to an omnipresent conscientiousness of responsible journalistic behavior.

A critical question emerges in this discussion: Is media's respect for the autonomous rights of viewers truly manifested in its reporting behavior? Theoretically, the motivational triad and ethical codes, which are manifestations of the triad, should ensure responsible behavior by the media. Theory, however, can flounder in reality.<sup>100</sup> In the real world, self-

<sup>96</sup> Peter Johnson, *Similar wording is found in 'Post,' USA TODAY stories*, USA TODAY, Jan. 14, 2004, at A3.

<sup>97</sup> *Id.*

<sup>98</sup> Al Neuharth, *She took the fall for the male-made mess*, USA TODAY, Apr. 30, 2004, at A21.

<sup>99</sup> *Id.* ("The independent investigating committee found that in 1995 the publisher and editor 'dramatically' abandoned our original 'no anonymous sources' rule. Their new policy had a stated goal of making USA Today more competitive, but it gave Kelley a vehicle with which to run wild.")

<sup>100</sup> See Morant, *Electoral Integrity*, *supra* note 9, at 50 (opining that theory "is of little analytical value unless it is manifested in practice.").

restraint by the media can be an aspiration, particularly when modes of self-restraint are compared to other professions' behavioral rules that are reinforced by courts or disciplinary boards. These reinforcement institutions, which other professions employ,<sup>101</sup> provide overt authority to ethical codes adopted by those professions. Undoubtedly, this overt enforcement of ethical standards has greater influence on behavior than the more indirect, natural forces fostered by the motivational triad.

The more palpable effects of direct enforcement do not necessarily justify the establishment of similar bodies that would police media's compliance with ethical standards. Bodies with punitive powers, while imbuing greater authority to performance standards, potentially offend constitutional guarantees of free expression.<sup>102</sup> Moreover, these bodies chill the functionality of personal autonomy, which constitutes an integral factor in a pluralistic democracy.<sup>103</sup>

Given the inherent infeasibility of direct enforcement mechanisms, it becomes incumbent upon the industry to ensure the effectiveness of self-regulated codes of ethics. To accomplish this goal, efforts to reinforce the behavioral norms required in ethical codes must enhance media's natural compulsion to follow those norms. The adoption of the following two general suggestions, in my view, would enhance the effectiveness of ethical codes without intruding on expressive liberties. Because of its vestment in credibility, which ethical codes bolster, media should institute regularized programs designed to re-educate and emphasize the manner in which ethics must be included in journalistic decision-making. These voluntary programs, which would function similarly to continuing education programs sponsored for members of the legal and medical professions,<sup>104</sup> should educate members of the profession on the meaning of ethical codes, demonstrate their applicability to hypothetical situations, and emphasize the codes' essentiality to responsible journalism. Such continuing educa-

<sup>101</sup> See *infra* note 76 and accompanying text (indicating that other professions, such as law and medicine, have formalized bodies and procedures to reinforce ethical standards).

<sup>102</sup> See Morant, *Electoral Integrity*, *supra* note 9, 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 *infra* notes 10–15 and accompanying text (conveying the paradoxical nature of ethics enforcement in news reporting, as enforcement compromises free speech while unenforcement compromises integrity and reputation).

<sup>103</sup> See *infra* notes 43–47 and accompanying text (discussing the bases for a respect-model of democracy).

<sup>104</sup> Corrine P. Parver & Kimberly Alyson Martinez, *Holding Decision Makers Liable: Assessing Liability Under a Managed Health Care System*, 51 ADMIN. L. REV. 199, 201 (1999) (stating that states began to more widely adopt regulations requiring continuing education for physicians beginning in the 1960s); David Barnhizer, *Of Rat Time and Terminators*, 45 J. LEGAL EDUC. 49, 51 (1995) (noting that most state bars have continuing education requirements for attorneys).

tion programs potentially strengthen the codes' direct impact on journalistic decision-making and foster a pervasive culture of ethics throughout the mainstream media. This tactic, however, constitutes only one segment of a reinforcement strategy.

Because public perception of media credibility is an inexorable part of audience size,<sup>105</sup> the industry must also externalize the influence of ethical codes by informing the public of the importance and influence of these norms on journalistic behavior. Increased public awareness of the operation of ethical codes in the industry fosters greater public confidence in the reality of media responsibility and veracity. To accomplish this goal, media must provide "more information" on the function of ethical codes in its operations.<sup>106</sup>

*The Washington Post (The Post)* recently employed such a strategy 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.<sup>107</sup>

In order to convince the public of the industry's genuine regard for responsible journalistic behavior, media must habitually publicize its adherence to ethical standards. Print media should periodically 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 this tactic may suggest a limited potential for actual effect. Continual publicity of the essentiality of journalistic codes of ethics, at a minimum, embed in the public's consciousness the prevalence and importance of ethical standards

<sup>105</sup> See generally *infra* notes 11–12, 38 and accompanying text (emphasizing that most sensationalized programming that maximizes viewership is seen as less credible, and therefore the growth in audience size is linked to a decrease in credibility).

<sup>106</sup> 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 Morant, *Electoral Integrity*, *supra* note 9, 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); Mark S. Nadel, *Customized News Services and Extremist Enclaves in Republic.com*, 54 STAN. L. REV. 831, 884 (2002) (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 . . .").

<sup>107</sup> Leonard Downie Jr., *The Guidelines We Use to Report the News*, WASH. POST, Mar. 7, 2004, at B01 (referencing the Washington Post's internal policy assessment).

within the industry.<sup>108</sup>

While continuing education and publicity focused on media's employment of ethical standards may not guarantee public confidence, these tactics evidence the pervasive applicability of ethical codes within the industry. Media's acknowledgment of ethical codes also reinforces the codes' mandates on the media itself. Explicit admission of performance standards creates a moral obligation to observe and follow these standards.

Confirmation of media's focus on credibility and the avoidance of distortion also come from my modest empirical study of two major broadcast networks: CNN and also the CBS Evening News. Direct query to those who make decisions regarding the networks' reporting decision offer legitimacy to the respect theory of democracy and confirm the operation of the motivational triad.

Within the last four years, I visited CNN and CBS News during the advent of the 2004 election. More recently, I interviewed a reporter for the CBS Evening News with Katie Couric. The individuals I interviewed confirmed the salience of sensationalist issues and their impact on credibility. All confirmed the goal of credibility, noting that truth is the fundamental construct of news reporting. They also, however, emphasized the importance of audience size and the goal of high ratings. This omnipresent goal of high ratings appears to have a link with attention-grabbing issues such as race and gender. The CBS correspondent noted the producer's requirement that reported stories appeal to every segment of society and to educate the public on interests related to race and to gender.<sup>109</sup>

To reinforce its sensitivity to diverse viewers, correspondents interview people in every venue – on the street, within their studios, on the phone with randomly selected individuals. They specifically seek out persons of color and women in an effort to discover what stories and issues appeal to them. An overarching goal in this exercise is the enhancement of broadcast appeal to a wide audience. The CBS Evening News with Katie Couric has a predominantly white audience, which influences the decisions on which issues are covered and to what extent they are explored. The angle of that

<sup>108</sup> One rather historic example of this tactic of continual publicity of institutional norms is the equal opportunity statements inscribed on the literature distributed by various national employers and public entities. The New York Times Company, <http://www.nytc.com/careers/> (last visited on Mar. 7, 2009) (displaying the Equal Opportunity Employer notice at The New York Times Company).

<sup>109</sup> See CBS Mission Statement, [http://www.cbcorporation.com/diversity/cbs\\_network/mission\\_statement.php](http://www.cbcorporation.com/diversity/cbs_network/mission_statement.php), (identifying the broadcasting network's dedication to diversity and a multi-cultural workforce and viewing audience).

coverage is geared toward viewers who are in the majority.<sup>110</sup> Of course presumptions of viewer interest, particularly in sensationalist issues that may be of natural interest to people of color, can be questionable. This factor the interviewee acknowledged.

What becomes clear from my interviews is that media are sensitive to audience's interests, preferences and perceptions of the industry. This premise, if accepted, confirms the efficacy of a respect-based democracy – that media will be responsive to the desires of the audience. If audiences demand accurate and salient coverage of news, media will provide just that. The industry's key to success is, therefore, tied to respect for the audience's right to credible news. Accurate news reporting becomes a linchpin concept, confirmed by media's respect for the audience's desire for truth. Media are then checked by both audience preferences and self-imposed standards of ethical behavior. These two checks ensure media's respect for the right of the audience to obtain accurate and educative news, particularly news concerning elections.

A final and significant point by my interviews is the power of the audience to ensure media's respect for the rights of viewers. Media are also sensitive to the audience's views and criticisms of broadcast programming. As a result, viewers' opinions communicated directly to news sources become surprising powerful tools to ensure responsiveness to audience's preferences and sensibilities.

## CONCLUSION

The introduction to this Essay describes my encounter with a Viennese cabdriver who questioned the Democratic Party's decision to nominate either an African American or a woman for the U.S. presidency.<sup>111</sup> The candid opinion of this politically aware European underscores the prevalence of race and gender in the public's conscientiousness when electoral contests involve women or people of color. This reality naturally compels media to explore these issues when they are endemic in elections. Yet the manner and extent to which these issues are covered implicate far more than the usual coverage of noteworthy public events.

Race and gender, by their complex history in the United States, can become polemic, inflammatory distractions from other important issues in a campaign. Consequently, the industry must balance focused coverage of

<sup>110</sup> For the CBS Evening News, the correspondent confirms that the majority of viewers are white.

<sup>111</sup> *Infra* notes 2 and 3 and accompanying text (noting the cabdriver's opinion regarding the 2008 presidential election).

these issues with the commensurate responsibility to focus the public's attention on information that contributes to holistically informed decision-making. The extent and manner in which these issues are presented become pivotal factors. If coverage diverts the audience from the totality of the issues that impact decisions of an electorate, then media has shirked its responsibility as a monitor of government. Such conduct, however, need not be checked by governmental intervention.

Natural market forces such as the motivational triad ensure more responsible reporting behavior. The triad's focus on credibility can prompt prudent behavior despite the industry's penchant for sensationalism and entertainment value. Media's recognition of credibility's importance in the maintenance of audience enhances the viability of self-regulatory mechanisms such as ethical codes. These codes prescribe responsible journalistic conduct. These internally produced checks on behavior are optimally efficient given media's vestment in their creation and ultimate influence on journalistic behavior. Any operational weakness of ethical codes is balanced by media's quest for credibility to attract a sizeable audience and the audience's capability to check media's behavior through "more information" tactics.

To thrive as legitimate and essential constructs of a democratic society, media must not only adhere to standards of self-regulatory norms, but also assure its viewers or readers of the integral function of these norms within the industry. In my view, this latter charge constitutes the industry's greatest challenge. Regardless of the extent to which media internally emphasizes ethical behavior, public perception of media's commitment to those standards becomes a significant factor in building public trust and faith. Yet, the onus for responsible reporting does not rest solely with media. The audience should check media's behavior through avoidance of sources that engage in distorted coverage, or direct communication to those sources of flawed news coverage.

Media's reporting behavior has been debated for years.<sup>112</sup> This continual

<sup>112</sup> For recent examples of such critiques of media's responsible behavior, see 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, 12-13 (2003) (arguing that the salient issue is not whether the media exhibits 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, 414 (1999) (identifying the continuous debate over the how courts have struggled with determining the basic parameters of journalism); Baker,

conversation underscores the industry's challenge and duty to cover elections responsibly. Despite the allure of sensationalist aspects of race and gender, media must maintain professional integrity through undistorted coverage that contributes to a fully informed electorate. If the industry achieves this essential mission, it will maintain its hallowed position as guarantor of democracy for all citizens of society.

*supra* note 21, at 2123–24 (positing that advertising and its commercial drive for revenue add to the uniformity of media content). *But see generally* 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).