ARTICLES

THE ENDEMIC REALITY OF MEDIA ETHICS AND SELF-RESTRAINT

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Introduction

Media that are active, independent, and free remain iconic symbols of a functional democracy.1 Democracy, despite its

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diverse conceptualizations, generally connotes a governmental structure that is continually monitored by an unabashed media industry.\textsuperscript{2} Such scrutiny of governmental operations contributes to the media's characterization as "the fourth estate."\textsuperscript{3} To optimize its function as governmental overseer, the media must have, as a guaranteed norm, expressive autonomy that is tempered by journalistic prudence and professional integrity. This responsi-

\textsuperscript{2} A.2d 481, 490–91 (R.I. 2004) (weighing the plaintiff's claims against the requirement of a robust and uninhibited press); C. Edwin Baker, \textit{The Media That Citizens Need}, 147 U. PA. L. Rev. 317, 346 (1999) [hereinafter Baker, \textit{Citizens}] (arguing that the media required by the theory of complex democracy is the most robust in that it includes both the liberal positivist and republican media requirements, as well as an emphasis on the media's responsibility to support the value and identity clarification tasks of groups); Vincent R. Johnson, \textit{America's Preoccupation with Ethics in Government}, 90 St. Mary's L.J. 717, 750–52 (1999) (arguing that the robust and independent structure of America's media allows for unrestricted reporting on ethical problems, which generates demand for more vigorous enforcement of and compliance with stricter ethical standards).


ible exercise of the right to free expression ensures that coverage of governmental activities is earnest, balanced, and truly informative.\textsuperscript{4}

As media check the government, however, a critical question emerges: What are the legitimate mechanisms that further the integrity of the media's coverage of events? The presumptive answer to this query appears premised in the belief that a democracy must not only respect the right of individuals to express themselves freely, but also foster in its citizenry a respect for another's right to that very same autonomy.\textsuperscript{5} Questionable external regulatory controls cannot instill such an ethos. It, instead, must be reinforced by internal checks implemented by the industry itself.

Perhaps the most tangible, self-policing mechanisms designed to ensure more responsible journalism are ethical codes.\textsuperscript{6} These regulatory norms serve to guide press behavior and symbolize the industry's good faith in its reporting conduct.\textsuperscript{7}

\textsuperscript{4} See Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491–92 (1975) (stating that the press has a "[g]reat responsibility . . . to report fully and accurately the proceedings of the government"); Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) ("A responsible press has always been regarded as the handmaiden of effective judicial administration . . . ."); New York Times Co. v. U.S., 403 U.S. 713, 717 (1971) (Black, J., concurring) (stating that the Founding Fathers protected the press in the First Amendment "so that it could bare the secrets of government and inform the people"); \textit{see also infra note 6 and accompanying text. But see} Miami Herald Publ’g Co. v. Tornillo, 418 U.S. 241, 256 (1974) ("A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.").

\textsuperscript{5} For a detailed explanation of the mutual respect notion of democracy, \textit{see infra} notes 18–23 and accompanying text. \textit{See also} Blake D. Morant, Democracy, Choice, and the Importance of Voice in Contemporary Media, 55 DePaul L. Rev. 943, 958–59 (2004) [hereinafter Morant, Democracy, Choice].


\textsuperscript{7} Various news organizations and many voluntary associations for journalists have endorsed ethical codes designed, \textit{inter alia}, to promote journalistic honesty, integrity, and truthfulness. \textit{See, e.g.,} Associated Press Managing Editors, APME Statement of Ethical Principles (May 4, 2004), at http://www.asne.org/index.cfm?ID=388 (on file with the Notre Dame Journal of Law, Ethics & Public Policy) (stating that the newspaper has a duty to be a "vigilant watchdog" of legitimate public interests and that the newspaper must be fair, accurate, honest, responsible, independent, and decent); Radio-Television News Directors Association, Code of Ethics and Professional Conduct: Radio-Television News Directors Association, at http://www.rtnfd.org/ ethics/coe.html (last visited Apr. 16, 2004) (on file with the Notre Dame Journal of Law, Ethics & Public Policy) (stating that "professional electronic journalists should operate as trustees of
These ethical codes and other voluntary modes of self-restraint have greater legitimacy under constitutional and democratic norms, and greater efficiency given the industry's vestment in these norms.

The kind invitation to participate in this timely symposium provides the opportunity to continue my role as an ombudsman of the media. As a result, this Article probes more closely the efficacy of the media's self-policing mechanisms, focusing on the ethical codes that many sources have adopted and the various ad hoc instances of voluntary self-restraint that are often employed to maintain journalistic integrity or secure third party interests. Part I commences with a discussion of the theories of democracy, with a particular emphasis on the mutual respect-notion that demonstrates the interdependence of the media's private interests with those of its audience. This theoretical framework forms the basis of the motivational triad in which credibility, audience size, and profit intersect. Part II of the Article then establishes the motivational triad as functional support of the journalistic codes of ethics and other self-restraint mechanisms. Part II examines in greater detail the general effectiveness of journalistic codes of ethics and other voluntary restraints. Discussion in Part II focuses on the indefiniteness and dubious authority of ethical codes due to an apparent lack of enforcement and the pervasive influence of private interests related to ratings and profit. These shortcomings are then countered by the advantages based primarily in the motivational triad, which constitutes a dominant catalyst for the media's adherence to ethical norms. In order to ensure the continued efficacy of self-restraint, particularly journalistic codes of ethics, Part II ultimately urges the industry to sponsor substantive continuing education on the meaning and application of ethical codes, and to publicize to its audience the essentiality of these codes in the dissemination of news and information.

the public, seek the truth, report it fairly and with integrity and independence, and stand accountable for their actions¨); The Washington Post, *The Washington Post Standards and Ethics* (Feb. 17, 1999), at http://www.asne.org/ideas/codes/washingtonpost.htm (on file with the Notre Dame Journal of Law, Ethics & Public Policy) (stating that the *Washington Post* is "pledged to an aggressive, responsible and fair pursuit of the truth without fear of any special interest, and with favor to none"); see also, The Society of Professional Journalists, *Code of Ethics, Preamble*, at http://www.spj.org/ethicscode.asp (last visited June 7, 2004) (stating that society members believe that public enlightenment, which members promote by seeking truth and providing a fair and comprehensive account of events and issues, is the "forerunner of justice and the foundation of democracy").
Despite their ostensible lack of authority and susceptibility to the omnipresent pressure for ratings and profit, mechanisms such as ethical codes and other forms of self-restraint remain effective industry-wide norms and cognitive guide-posts that promote responsible journalism. Exercised conscientiously and explicitly, self-restraint remains the most viable and efficient means to ensure the media's functionality within a modern democratic society.

I. Media's Function in a Democracy and the Philosophical Bases for Self-Restraint

Borrowing from others who have critiqued the media, this discussion of ethical codes and other self-regulatory strategies commences with an examination of its function within a modern, democratic society. Democracy, in and of itself, generally encompasses both the individuals who exercise their express and penumbral rights, and the collective unit of a "society" that

8. See Baker, Citizens, supra note 1, at 318 (positing that one can determine if a free press serves its function only when one determines the type of press each form of democracy requires and why it requires that type); Drake, supra note 2, at 213 (arguing that communications policy analysts rate the effectiveness of media policy based on normative expectations derived from different theories of democracy); Blake D. Morant, Electoral Integrity: Media, Democracy, and the Value of Self-Restraint, 55 ALA. L. REV. 1, 3 (2003) [hereinafter Morant, Electoral Integrity] (opining that in a true democracy the media should facilitate both the fulfillment of personal liberties and the larger interests of the body politic); see also Cass R. Sunstein, Democracy and the Problem of Free Speech xix, 93 (1993) (stating emphatically "autonomy as guaranteed as it is by law, may in itself be an abridgement of the free speech right ... . My special concern is that the First Amendment [can be interpreted in such a manner] as to undermine democracy."). See also Sunstein, supra note 2 and accompanying text.

9. The United States Constitution and Bill of Rights expressly provide for freedom of speech, press, religion, and association. The First Amendment of the U.S. Constitution reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. See also 16A AM. JUR. 2D Constitutional Law § 399 (1998) (stating that the goal of the Bill of Rights is to protect the citizenry from governmental infringement on both fundamental rights that are necessary to keep the government responsive and rights that are necessary to protect against oppressive legal proceedings). Penumbra rights, e.g., the right to privacy and the right to travel, have been judicially determined as endemic to the Constitution. See Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965) (stating that various fundamental constitutional guarantees in the First, Third, Fourth, Fifth, and Ninth Amendments form the penumbral right to privacy); Edwards v. California, 314 U.S. 160, 178 (1941) (Douglas, J., concurring) ("The right to move freely from State to State is an incident of national citizenship."); Pierce v. Soc'y
serves as the venue in which individuals exercise those rights.\textsuperscript{11} Of course, the general, almost abstract, notion of democracy has spawned several theories. The first, and perhaps most dominant, within today's jurisprudence focuses on individual autonomy.\textsuperscript{12} This strict libertarian theory virtually ignores the inabilities of some groups to enjoy such liberties and the societal impact of that disproportionate exercise of autonomous rights.\textsuperscript{13} An emphasis on individual liberty, which dominates the focus of modern jurisprudence, has contributed to an inelastic interpretation of the First Amendment.\textsuperscript{14} Such inelasticity often thwarts

of the Sisters, 268 U.S. 510, 535 (1925) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only."). These rights, of course, are the foundation of personal or individual autonomy that a democracy seeks to protect. See also Dworkin, supra note 2, at 200 (recognizing the value of autonomy as a fundamental value of the First Amendment, with freedom of expression as a furtherance of the individual will).


11. See Baker, Citizens, supra note 1, at 319 n.2 (1998) (stating that "public liberty can only result from choices of autonomous agents whose autonomy is constituted by private liberties, and the necessary content of private liberties can only be determined collectively by the exercise of public liberty").

12. See also Dworkin, supra note 2, at 26 (arguing that individual liberty is a normative construct of any democratic society). This libertarian emphasis on individual liberty or autonomy stems from the notion that citizens should be free to enjoy "life, liberty, and the pursuit of happiness." See Morant, Electoral Integrity, supra note 8, at 15. But see Lee C. Bollinger, The Tolerant Society 57 (1986) (opining that the libertarian theory's weakness is the protection it affords those who seek to destroy the values of free speech of others); Richard Epstein, Property Speech and the Politics of Distrust, 59 U Chi. L. Rev. 41, 71–75 (1992). For distinctions between libertarian and other democratic theories of speech, see Owen M. Fiss, The Irony of Free Speech 3 (1996).

13. See Fiss, supra note 12, at 3; see also Larry Catà Backer, The Extra-National State: American Confederate Federalism and the European Union, 7 Colum. J. Eur. L. 173, 183 (2001) (recognizing that the somewhat natural tendency for personal advancement over other fellow societal members "leads to conflict, anarchy, and ultimately reduces the possibilities for personal achievement"); James B. Staab, The Tenth Amendment and Justice Scalia's Split Personality, 16 J.L. & Pol. 231, 265 (2000) (noting Hamilton's view that too little power for government (and its leaders) is as troublesome as too much power, with the former contributing to anarchy and possibly despotism).

14. See Morant, Electoral Integrity, supra note 8, at 24–32 (arguing that in deciding First Amendment cases, the Supreme Court has deferred to the express right of individual autonomy over competing claims to the larger public
governmental efforts that preserve societal interests such as electoral integrity at the expense of individual freedoms such as speech and press.\textsuperscript{15}

Another influential theory of democracy fits within the rubric of civic republicanism. Civic republicans take a more egalitarian approach to autonomy and emphasize the importance of free speech exercised by all societal members, regardless of their political or economic power.\textsuperscript{16} This theory also fosters and pre-

\textsuperscript{15} In that article, I posit that the Supreme Court’s primary First Amendment cases are based on a negative theory of individual autonomy. Id. at 26.

\textsuperscript{16} A noteworthy case that exemplifies the Court’s reluctance to temper expressive autonomy for the sake of a societal interest is Ashcroft v. ACLU, 124 S. Ct. 2783 (2004), which affirmed a preliminary injunction against enforcement of the Child Online Protection Act, 47 U.S.C. § 231, because, inter alia, prosecution under that statute would chill constitutionally protected speech. The Child Online Protection Act criminalized the knowing posting of content “harmful to minors” on the World Wide Web; yet it allowed an affirmative defense for postings that restricted access by “reasonable means.” Id. at 2785. See also R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (invalidating the city’s hate speech ordinance because of fear that its overly broad nature gave officials too much discretion); Morant, Electoral Integrity, supra note 8, at 28 (stating that the prior restraint doctrine, which can be seen as an obstacle to the government’s attempts to protect the collective interest at the expense of individual liberties, is the most significant and effective manifestation of the judiciary’s adherence to a negative rights theory of expressive liberty).

\textsuperscript{16} See, e.g., William S. Blatt, Interpretive Communities: The Missing Element in Statutory Interpretation, 95 Nw. U. L. Rev. 629, 638–39 (2001) (noting republicanism’s fostering of forum deliberation); Saul Cornell, Moving Beyond the Canon of Traditional Constitutional History: Anti-Federalists, the Bill of Rights, and the Promise of Post-Modern Historiography, 12 Law & Hist. Rev. 1, 7 (1994) (describing “civic republicanism” as a positive liberty that empowers a community through the fostering of public good); Fiss, supra note 2, at 786 (arguing that decision-makers should judge actions by their impact on the richness of social debate rather than by whether they interfere with individual autonomy); David Fontana, Refined Comparativism in Constitutional Law, 49 UCLA L. Rev. 539, 596–97 (2001) (espousing that civic republicanism includes open debate, which should be inclusive of alternative perspectives); J.L. Hill, The Five Faces of Freedom in American Political and Constitutional Thought, 45 B.C. L. Rev. 499 (2004) (opining that civic republicanism embraces three conceptions of positive freedom: the freedom to participate in self-government; the freedom to have, do, or be anything one wishes; and the freedom to act rationally rather than be moved by unward impulses); W. Bradley Wendel, Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities, 54 Vand. L. Rev. 1955, 2001 (2001) (noting republicanism’s feature of “interlocking relationships” and the state’s neutrality in its conceptualization of the “common good”). Civic republicanism also encompasses deliberative democracy. Cass R. Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539, 1548–49 (1988) (arguing that true expressive liberty requires that all members of the body politic have access to the media and are therefore able to participate meaningfully in public discourse); Cass R. Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689, 1691

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serves political processes through a focused effort to include more marginalized segments of society in those processes. 17

I advocate a more holistic theory of democracy—one that respects the individual exercise of autonomous rights and recognizes the need to preserve the society in which those rights are exercised. This theory secures individualized rights and simultaneously fosters mutual respect for the exercise of those rights by all members of a society. 18 A respect-notion of democracy presents several advantages. Because individual exercises of autonomy are valued equally, participation in governmental processes becomes more diverse. Equality of expression and respect for the rights of others enrich public discourse and engender in the public a greater sense of vestment in political processes. 19 The dual emphasis on the individual right to free expression and the respect of others who exercise that very same freedom is essentially pluralistic in that it diversifies commentary, maximizes the participation of more marginalized voices in society, and ultimately sustains political processes that are critical in any society. 20

A respect-notion of democracy does not ensure or even purport to presume that all views on matters of public concern are respected and promoted. Rather, the theory philosophically fosters a vibrant and enriching colloquy that includes all segments of society.

(1984) (noting that deliberative democracy eschews resource distributions based solely on "raw political power").

17. See supra note 16.

18. 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 precedence over another's. For more detailed explanations of my theory, see Morant, Democracy, Choice, supra note 5, at 958-59; Morant, Electoral Integrity, supra note 8, at 20-21. For a more detailed explanation of the theory of complex democracy, see Baker, supra note 2, at 143-47.


20. See Lawrence M. Friedman, Borders: On the Emerging Sociology of Transnational Law, 32 Stan. J. Int'l L. 65, 67 (1996) (citing Lawrence M. Friedman, The Legal System: A Social Science Perspective 196-99 (1975)) (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, 622 (1994) (stating that pluralism is a political system in which competing groups try to advance their private interests through bargaining and compromise); Morant, Democracy, Choice, supra note 5, at 962-65.
Democracy that fosters mutual respect for the autonomous rights of others tacitly encourages citizens, including members of the press, to exercise their rights responsibly. Responsible conduct inevitably results when individuals consciously respect the exercise of rights by others. In a society that encourages all of its members to exercise their autonomous rights, self-restraint, to some extent, becomes a palpable consequence. Individuals who abide by the tenets of a pluralistic, respect-driven democracy must monitor their own behavior as they strive to respect the rights of others. Moreover, a member will likely respect the rights of others when she recognizes that the rights of all citizens are interdependent.

Democracy that emphasizes mutual respect for the exercise of free speech has particular application to the media's proclivity to self-regulate effectively. Corporate individuals such as media sources share the responsibility to recognize the interdependency of the expressive rights of all citizens. The media's exercise of its expressive rights must be tempered by a commensurate recognition of divergent voices within a society and the need to respect those various voices as a means to foster the societal good. Respect for others and the preservation of societal norms or institutions require media to behave ethically as it exercises

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

22. See Morant, Democracy, Choice, supra note 5, at 963.

23. 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 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").
its functions as both governmental monitor and responsible citizen.

Of course there remain significant counter arguments to the efficacy of a respect-notion of democracy and the resultant self-restraint. Autonomy, in its most rabid form, can divert attention from the rights of others to the maximization of self interests. This phenomenon has particular application to media. Commercial interests related to the drive for large audiences and the resulting profits can often dominate the industry’s exercise of its right to disseminate.\textsuperscript{24} The quest for ratings and the resultant profit maximization may obscure or even supplant the motivation to either respect the autonomous rights of others or preserve the collective interests of a society. The dominance of individualized interests in audience and profit may distort dissemination and lead to media frenzy.\textsuperscript{25}

Despite the potential dominance of private interests associated with profit, individuals, including the media, can nonetheless be prompted to respect the rights of others and preserve societal interests. If an individual sees her own interests as symbiotic with the rights of others, she will be more prone to respect those rights. With regard to media behavior, several assumptions

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\& the Press, that there is “considerable evidence” that for some journalists there has been an intrusion of commercial interests into newsroom decisions). Additionally, because of the financial support they provide for the media, advertisers can exert great influence over programming content.

\item \textsuperscript{25} Media “frenzy” refers to an obsession with more trivial aspects of a public matter, thus leading to a focus on “gossip rather than governance” and “titillation rather than scrutiny.” LARRY SABATO, \textit{Feeding Frenzy} \textsuperscript{6} (1991). \textit{See also} Morant, \textit{Democracy, Choice, supra} note 5, at 954; Morant, \textit{Electoral Integrity, supra} note 8, at 12–15. For a discussion of the effects of ratings and commercialism on the effectiveness of journalistic codes of ethics, see \textit{infra} notes 63–70 and accompanying text.
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preface this symbiosis. An audience generally prefers information that is both newsworthy and truthful. Moreover, members of an audience often come from diverse constituencies that have various views and perspectives on topics reported by the media. If media perceives that the dissemination of truthful and universally appealing information enlarges its audience (and, therefore, maximizes profits), then it will regulate its behavior to attain these ends. Those media sources that provide news and information that audiences seek will generally garner higher ratings.

The symbiosis of media's private interests with the interests of other members of society contributes to a motivational triad that consists of credibility, audience, and profits. This triad constitutes a baseline criterion that potentially maximizes viewership or readership. In order to maximize the size of its audience, a media source must establish a certain level of credibility, which is a foundational element of the triad. The requirement of credibility rests on the presumption that members of an audience generally gravitate toward those sources that provide truthful information with wide-ranging appeal. Establishment of credibility as a tactic to increase audience size apparently appeals to the industry. A number of media sources tacitly recognize this triad. Some even cite their credibility in advertisements designed to attract an audience.

26. See Esther Thorson, What 35 Years of Academic Research Tells Us (Apr. 9, 2003), at http://www.poynter.org/content/content_view.asp?id=29033 (on file with the Notre Dame Journal of Law, Ethics & Public Policy) (finding, based on a review of thirty-five years of academic literature, that the quality of the news content, as defined by both journalists and readers, positively affects a newspaper's circulation); see also Newspaper Guild of Greater Philadelphia v. 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).

27. For further discussion of this motivational triad, see Morant, Electoral Integrity, supra note 8, at 54.

28. See Thorson, supra note 26; see also infra note 34 and accompanying text.

Note, however, that the motivational triad, which emphasizes credibility, may not be the only contextual factor that influences audience size. For example, results of a Pew Research Center study, which asked respondents to name the most credible broadcast sources for news, yield the following rankings of news sources:

CNN ....................... 32%
Fox News................. 25%
Local Television .......... 25%  

In this study, CNN consistently ranks high in credibility among all political groups, such as Republicans, Democrats, and Independents. A strict interpretation of the motivational triad might lead to the presumption that a source that is deemed most credible should garner a larger audience than its less credible competitors. Yet, despite the fact that it was a leader in credibility, CNN narrowly missed garnering the top ranking as the most watched news source. Responses to the question asking where individuals get their news reveal the following:

Local Television .......... 59%
Fox News................. 25%
CNN .......................... 22%  

Several factors might explain the disconnect between credibility and audience size. Regionalism, which relates to an individual’s gravitation toward information tailored to their respective localities, plays a significant role in viewer preferences. This factor tends to explain local television’s dominance in audience size, regardless of viewers’ assessments of the quality of local programming. In my view, however, local television constitutes

with the Notre Dame Journal of Law, Ethics & Public Policy). Other networks, such as Fox News and NBC, also make reference to their credibility.

30. See supra notes 27–29 and accompanying text (describing the function of the motivational triad in the media industry).


32. The CBS program 60 Minutes, which 33% of the respondents found most credible, is in a statistical deadheat with CNN. Id. 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 considered the most credible network.

33. Id. at 5. Again, I omitted programs from this listing because of the analysis’s focus on network sources.

34. Id. Additionally, studies have demonstrated that among local news organizations, stations with higher quality news programming have higher ratings. Carl Gottlieb & Atiba Perilla, Quality Sells: It Builds Share, Demographics, and More, COLUM. JOURNALISM REV., Nov.–Dec. 2001 (Supp. 2001), at 4 (finding, based on a study of forty three local news stations in fourteen markets, that quality is the best way to increase market share and demographics and ensure
a somewhat unique source given its dominant focus on regional news.

Other, more telling factors impact national networks, which generally have a broader focus, greater financial investment in their operations and, consequently, seek a more global audience. For national networks such as CNN and Fox, entertainment value and innate curiosity generated by their programming can increase the size of the audience. This premise seems particularly relevant to Fox, which has a significant amount of programming that centers on heated exchanges on hot-button political issues. Moreover, viewer curiosity about programming offered by networks other than those the viewer regularly watches can enhance a network's viewing numbers. In the Pew Research Study, twenty-nine percent of acknowledged political liberals who prefer news that reflects their viewpoint regularly watch Fox News, which is generally favored by more conservative viewers. A third factor that can influence audience size is viewer loyalty. A network, regardless of its perception of credibility, may gain a regular core of viewers due to the consistency of its entertainment/curiosity value or its tendency to report news...

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35. A recent study by the Project for Excellence in Journalism examined, inter alia, Fox News' influence on other cable channels. The study refers to the "Fox Effect," as "an orientation toward using fewer people to produce news by focusing on fewer topics, doing fewer edited stories and airing more live reports." Project for Excellence in Journalism, The State of the News Media 2004, at 166 (2004), at http://www.stateofthenewsmedia.org/2004/index.asp (last visited March 15, 2004) (on file with the Notre Dame Journal of Law, Ethics & Public Policy). 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 the 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 Ratings, the Public Falls Behind, Colum. Journalism Rev., Jan.–Feb. 2005, at 12, 13.


37. Id. at 36 (noting that 41% of conservatives seeking news that reflects their viewpoint watch Fox News); id. at 1 (noting that 35% of Republicans regularly watch Fox News).

38. See supra note 35 and accompanying text (discussing the impact of entertainment and curiosity on audience size).
from a desired ideological perspective. The influence of entertainment/curiosity value and loyalty notwithstanding, the motivational triad remains an important, if not dominant, criterion in the quest for audience size. As a fundamental construct of the triad, credibility constitutes a foundational factor in a strategy to build an audience seeking news and information.

Furthermore, entertainment/curiosity and loyalty, while influential, are not necessarily primary criteria in the ultimate strategy to attract viewers to a network. Note from the Pew Study that CNN, ranked the most credible news network, trails its national competitor, Fox, by three percentage points. While

39. The Pew Study provides probative data on viewer preferences based on viewpoint. On one hand, 55% of respondents prefer debates that include varied perspectives. Pew Ctr. for the People & the Press, supra note 29, at 32. Forty percent prefer more in-depth analysis of the major news stories. Id. at 31. However, while 58% of respondents appear indifferent to news that reflects their ideologies, a significant minority of 36% clearly want news that is reflective of their personal viewpoints. Id. at 35. Forty-three percent of identified conservatives and 33% of liberals preferred news that comport 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 in to a particular network. The impact on Fox News' 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.

40. See supra note 27 and accompanying text (describing the motivational triad).

41. See supra note 29 and accompanying text (noting the networks' touting of credibility in their advertisements).

42. See supra note 33 and accompanying text (providing the survey results of the most watched sources for news). Despite Fox's lead in audience numbers, CNN's operating profits are about five times greater than Fox's profits. Project for Excellence in Journalism, supra note 35, at 181. This substantial lead can be attributed to numerous factors, including CNN's economies of scale and the fact that CNN has been profitable for ten 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, Amer. Journalism Rev., Apr. 2008, at 32, 35. 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 ten times the ratings of a good piece by [CNN reporter] Christiane
Fox News slightly leads CNN in terms of most watched source, CNN viewership remains substantial. In effect, contextual criteria such as entertainment/curiosity and loyalty can impact the polarity of the motivational triad but do not diminish its dominance in a strategy to attract an audience.

In my view, the motivational triad, with its emphasis on credibility and audience appeal, and the respect-notion of democracy in general encourage media self-regulation and restraint. The present state of the industry confirms this finding. Throughout the United States, media sources, which are in constant pursuit of a large audience, have voluntarily refrained from the disclosure of the names of victims of certain violent crimes and the names of juveniles involved in judicial proceedings. Other evidence of media self-restraint relates to the recent circumspecct reporting of election results. Subsequent to broadcast media’s problems related to projections in the 2000 presidential contest, most major broadcast media sources reexamined their

Amanpour . . . . But thank goodness Madison Avenue still sees value in being in this kind of classy environment.” Id.

43. Copley Press, Inc. v. Superior Court, 74 Cal. Rptr. 2d 69, 71 (Cal. Ct. App. 1998) (noting that despite the fact that both the juvenile victim and juvenile assailant’s names had been disclosed in a wardship proceeding below, the press had not published those names because of its policy against identifying victims of sexual assault or minors charged with crimes); The Society of Professional Journalists, supra note 7 (stating that journalists should “be cautious about identifying juvenile suspects or victims of sex crimes”); Shirley A. Wie- gand, 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, § 1, at 18) (stating that it is estimated that only 5–10% of American newspapers publish the names of sexual assault victims).


45. See generally Bush v. Gore, 531 U.S. 98 (2000); Morant, Electoral Integrity, supra note 8, at 6 (describing media’s erroneous projections of the 2000 election); Susan Seager & Laura Handman, Congress, the Networks, and Exit Polls, COMM. LAW., Winter 2001, at 1; Pamela S. Karlan, Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore, 79 N.C. L. REV. 1345, 1360–61 (2001) (providing the narratives of two voters who, on their way to the polls, decided not to vote because they heard media reports that Gore carried Florida and were “convinced that [their] vote[s] would be meaningless”).
reporting procedures and exercised considerable care in the reporting of returns during the 2002 mid-term elections.

Perhaps the most noteworthy and contemporary example of media self-restraint consists of the industry’s efforts to preserve national security. Media sources have historically cooperated, to some extent, with governmental attempts to limit dissemination of information related to such national interests as war and protection from terrorism. Of course, the September 11, 2001, terrorist attacks on the New York World Trade Center and Pentagon have amplified society’s consciousness of the extent to which disseminated information could impact national security. Media have been demonstratively sensitive to this now dominant societal concern and has, on several recent occasions, exercised restraint in the reporting of information that might influence operations in Afghanistan or affect various aspects of the war.


47. See David Bianculli, People Have Spoken but Pundits Whisper, N.Y. DAILY NEWS, Nov. 6, 2002, at 99; Frazier Moore, TV News Played It Safe, Not Sorry, in Election Night Coverage, DESERET NEWS, Nov. 6, 2002, at WEB 1; see also Morant, Electoral Integrity, supra note 8, at 53 (discussing my direct observations of CNN’s voluntary restraint in reporting results of the 2002 midterm elections).

48. 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) (stating that journalists were with the military on D-Day, during the invasion of Cambodia, and on numerous other missions requiring surprise and in none of those was the secrecy requirement violated or the enemy forewarned); Floyd Abrams, Speaking Before the American Bar Association, Standing Committee on Law and National Security (March 23, 1984), in THE MEDIA AND GOVERNMENT LEAKS 6 (1984) (stating that during the Iran Hostage Crisis the media knew that Americans were being hidden in the Canadian Embassy in Tehran but did not publish the story “because of the sense of responsibility of members of the press”); ROBERT W. DESMOND, TIMES OF WAR: WORLD NEWS REPORTING 1931–1945, at 225 (1984) (noting 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).

49. See David J. Bodney, War, Wisdom, and Freedom of the Press, COMM. LAW., Winter 2002, at 3, 4 (stating that after National Security Adviser Condoleezza Rice met with representatives of ABC, CBS, NBC, Fox News, and CNN and asked that they use restraint in airing taped messages from Osama Bin Laden out of fear that they were encoded or would enable the terrorist to disseminate propaganda, all five networks chose not to air unedited Bin Laden messages).
in Iraq.\textsuperscript{50}

A significant and substantive manifestation of the motivational triad’s influence is the media’s development and implementation of ethical codes. Virtually every media source, whether it is broadcast or print, has an established code of conduct.\textsuperscript{51} The plethora of these codes demonstrates the industry’s desire to exercise expressive freedom responsibly and affirms its sensitivity to the collective interests of society. Moreover, the common language of the various codes applicable to different media sources connotes the industry’s acknowledgment of credibility as a primary objective in the journalistic profession.\textsuperscript{52}

In my view, codified rules of ethics function internally and externally as self-regulatory mechanisms. Ethical codes operate internally as standards of conduct for those who work for media sources. These standards of ethics function as rules that provide professional order and certainty, regulate the performance of those who disseminate information, and embody the professional aspirations of a media source.\textsuperscript{53}

\textsuperscript{50} See Abuse of Iraqi POWs by GI’s Probed, CBS News, April 28, 2004, at http://www.cbsnews.com/stories/2004/04/27/6001/printable614063.shtml (on file with the Notre Dame Journal of Law, Ethics & Public Policy) (stating that the network agreed to honor an appeal from Chairman of the Joint Chiefs of Staff, General Richard Myers, to delay broadcast of the Abu Ghraib prison abuse photographs out of concern for the danger and tension on the ground in Iraq and that CBS aired the story on 60 Minutes II only after the photographs began to circulate elsewhere in the media and after receiving the Defense Department’s cooperation with its decision to disseminate); James Risen & David Johnston, Chalabi Reportedly Told Iran That U.S. Had Code, N.Y. TIMES, June 2, 2004, at A1 (stating that the New York Times and other news organizations had cooperated with a Bush administration request that they not disseminate information about the government’s evidence against Ahmad Chalabi out of concern for national security until the information began to appear in news accounts and the administration withdrew its request).

\textsuperscript{51} Risen & Johnston, supra note 50.

\textsuperscript{52} See supra note 7 and accompanying text.

\textsuperscript{53} 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) (noting that notwithstanding their crudeness, rules still have the power to significantly influence individual perceptions and attitudes); Alan Schwartz, The Default Rule Paradigm and the Limits of Contract Law, 3 S. Cal. Interdisc. L.J. 389, 413 (1998) (suggesting that legal rules have two functions: substantive, which affect transactional outcomes, and transformative, which change parties’ preferences). But see Blake D. Morant, Contractual Rules and Terms and the Maintenance of Bargains: The Case of the Fledgling Writer, 18 Hastings Comm. & Ent L.J. 453, 456 (1996) [hereinafter Morant, Contractual Rules] (stating that rules that would be applicable for a range of circumstances are difficult to design because of the lack of
Ethical codes also operate externally to demonstrate a media sources' intent to behave responsibly and respect the collective interests of society. Another and perhaps greater value of the external function of ethical rules is that they enhance the credibility of the source that has adopted these codes. Media that have codified rules of behavior have an express, almost moral obligation to act ethically and responsibly. Voluntary adoption of ethical standards ensures, to some extent, that the subscribing source will strive to avoid such negative reporting behavior as distortion, bias, and falsity. Media sources that openly adopt ethical rules, thus, garner a presumptive degree of credibility that is further established, or even increased, by its actual behavior.

Thus far, the Article has focused on the theoretical notion that journalistic codes of ethics and media self-restraint are natural manifestations of a pluralistic democracy and the motivational triad. Yet, as the next section hopefully demonstrates, a forthright examination of the shortcomings and advantages of ethical codes reveals the realistic functionality of self-restraint within the industry.

II. REVIEW OF THE UTILITY OF ETHICAL CODES AND VOLUNTARY SELF-RESTRAINT

A. The Inherent Problems with Self-Regulatory Mechanisms

Despite their noble objectives, ethical codes have certain operational fallacies. If one accepts my previously expressed view that these codes function similar to legal rules, then they also potentially suffer the drawbacks of legal rules. Ethical codes, which constitute codified norms of behavior, can apply awkwardly or inflexibly to problems that occur in different contexts. The resultant guidance provided by these codes, therefore, may be incomplete or inapplicable to discrete situations.

Journalistic codes of ethics and other mechanisms of media self-restraint, which often constitute preconceived or set standards, also tend to suffer from a lack of sufficient definiteness

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54. See supra note 53 and accompanying text.
55. Rules of law can have dubious effects given their ubiquitous application in cases with varying facts. See Morant, Contractual Rules, supra note 53 at 456; Sunstein, Problems with Rules, supra note 53, at 957; McAdams, supra note 53, at 1081.
and authority. This deficit distinguishes journalistic ethical codes from similar standards adopted by other professions such as law or medicine. Ethical standards applicable to these latter professions are more precisely drafted and enforced by an independent regulatory authority.\textsuperscript{56} Without some external mechanism that compels compliance, journalistic codes of ethics and, to a certain extent, agreements that limit dissemination of certain sensitive information appear hollow and largely symbolic.\textsuperscript{57}

One of the most resonant criticisms of journalistic codes of ethics relates to their somewhat vague prescriptions. The language of most codes promotes socially-acceptable and professionally-required norms based on truthfulness.\textsuperscript{58} Generalized and somewhat ambiguous guidelines of these codes have contributed to their description as "[a] patchwork of unwritten customs, formal codes, and gut instincts . . . [that] are imprecise, contradictory, and far less elaborate than the ethical regulations governing lawyers, doctors, and other professions."\textsuperscript{59} Journalistic codes of ethics seldom offer precise, bright-line rules that define problematic situations. Moreover, they often fail to provide the specific guidance needed to resolve these situations.\textsuperscript{60} The blatantly

\begin{thebibliography}{99}
\bibitem{56} See Bruce W. Sanford, \textit{Ethics, Codes and the Law}, \textit{Quill}, Nov.-Dec. 1994, 43 (stating that codes governing other professions are more specific and derive their power from the government's power to license).
\bibitem{57} Jeff Storey, \textit{Does Ethics Make Good Law? A Case Study}, 19 \textit{Cardozo Arts \& Ent. L.J.} 467, 471 (2001) (reiterating the problem that codes have dubious effect because of their lack of authority).
\bibitem{58} See, e.g., American Society of Newspaper Editors (ASNE), \textit{Hearst Newspapers: Statement of Professional Principles} (May 20, 2002), at http://www.asne.org/index.cfm?ID=3556 (on file with the Notre Dame Journal of Law, Ethics \& Public Policy) (stating that it is the mission of the papers to be "the most trusted, most respected and most accurate source of news and information"); American Society of Newspaper Editors (ASNE), \textit{The Washington Post Standards and Ethics} (Feb. 16, 1999), at http://www.asne.org/ideas/codes/washingtonpost.htm (on file with the Notre Dame Journal of Law, Ethics, and Public Policy) ("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 7 (stating that journalists should "test the accuracy of information from all sources").
\bibitem{60} Sanford, supra note 56, at 43 (opining that "[c]odes of ethics for journalists should strive to describe ideals, goals, responsibilities, and evils," but hard and fast rules do not belong). \textit{But see} Storey, supra note 57, at 477 (noting that the Gannett Newspaper Division Principles—issued in the wake of an internal scandal that diminished public confidence—provide more guiding standards and represent a "more demanding" departure from other codes).
\end{thebibliography}
amorphous language in most codes suggests that they were intentionally drafted to maintain a certain ambiguity.\textsuperscript{61}

Vagueness, together with the competitive nature of the industry, arguably diminishes the functionality of journalistic codes of ethics. The impact of these codes relates directly to an individual's comprehension and interpretation of the codes' mandates and her decision as to whether those mandates apply to the problem at hand.\textsuperscript{62} The flexible language of these codes leads to varied interpretations and a resultant lack of consensus on their meaning and application.\textsuperscript{63} Such indefiniteness potentially diminishes the influence of these codes on journalistic behavior.

Even if the problems associated with ambiguity were resolved, the natural and somewhat pervasive competition for audience and ratings can overshadow the objectives of ethical codes.\textsuperscript{64} In fact, one commentator underscores the influence of the pressure for ratings with evidence that a major broadcast network offered to kill an investigative report on Michael Jackson in exchange for the singer's exclusive interview.\textsuperscript{65} Although the network denied this charge, the commentator opines that evidence of the alleged deal to suppress the investigative report was not sufficiently countered.\textsuperscript{66}

The confluence of vague and indefinite standards, independent judgment, and the forces of the competitive market have contributed to a pervasive belief that ethical codes have a dubious impact on journalistic decision-making. One researcher has tested this belief. A study of the newsrooms of several print

\textsuperscript{61} Storey, supra note 57, at 474 (noting that the media has followed the advice of lawyers who advise that ethical codes should be "as flexible as possible").

\textsuperscript{62} Linda N. Deitch, Comment, Breaking News: Proposing a Pooling Requirement for Media Coverage of Live Hostage Situations, 47 UCLA L. Rev. 243, 266 (1999) (opining that the success of codes depends upon a reporter's knowledge and judgment).

\textsuperscript{63} Id. at 266, 268 (criticizing internal press codes because reporters and media sources lack consensus on the meaning and direction of those codes).

\textsuperscript{64} Id. at 266–68; see also Kathe Aschenbrenner Pate, Restricting Electronic Media Coverage of Child Witnesses: A Proposed Rule, 1993 U. Chi. Legal F. 347, 358 (1993) (observing that adherence to ethical codes tends to suffer due to the pressure to increase ratings).

\textsuperscript{65} France, supra note 59, at 61.

\textsuperscript{66} Id. For more in-depth analysis of the tension between ethics and such commercial factors as profit, ratings, and corporate influence, and the accompanying effect of this tension on the motivational triad, see infra notes 117–50 and accompanying text.
media sources reveals that decision-makers rarely invoke ethical
codes to resolve problematic situations.67

Doubts concerning the effectiveness of journalistic codes of
ethics also extend to ad hoc policies of self-restraint. As previ-
ously noted in this Article, various media sources have agreed to
refrain from dissemination of information pertaining to certain
victims of crimes, juveniles, or national security.68 An agree-
ment not to disseminate, however, can be tenuous if the pressure to
attain high ratings dominates the decision-making. A commen-
tator once noted one media source’s rejection of a request to
refrain from disseminating information that the government
deemed potentially injurious to national security.69 The quest
for ratings undoubtedly contributed to that decision. Moreover,
despite the generally accepted custom of preserving the anonymity
of minors who are criminal defendants or witnesses in judicial
proceedings,70 media had, on occasion, abandoned this policy in

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67. David E. Boeyink, How Effective Are Codes of Ethics? A Look at Three News-

68. See supra notes 43–50 and accompanying text (discussing media’s
agreement, express or implied, to refrain from the dissemination of the names
of victims of certain crimes, children involved in judicial proceedings, and
information that is potentially deleterious to societal/national interests).

Leaks: An Analytical Framework for Evaluating Proposals to Curb Unauthorized
Publication of Classified Information, 5 J.L. & POL. 759, 782 n.84 (1989) (citing Evan
Thomas, Shrouding Space in Secrecy: A Hush-Hush Shuttle Mission Pits the Pentagon
Against the Press, Time, Dec. 31, 1984, at 12) (noting that the Washington Post
contravened a Pentagon request not to publish information about a shuttle
launch of a military satellite).

70. See supra note 43–44 and accompanying text. But see Bob Steele & Jay
Black, Codes of Ethics and Beyond (April 4, 1999), at http://www.poynter.org/
content/content_view.asp?id=5522 (on file with the Notre Dame Journal of
Law, Ethics & Public Policy) (noting that in Poynter’s survey of 33 newspaper
codes of ethics only four offered guidance on the identification of juvenile sus-
pects). For examples of codes of ethics that encourage journalists not to use
the name of a minor involved in a criminal trial, see American Society of New-
paper Editors (ASNE), Ethics Code: The Journal News, White Plains, NY (Jan. 28,
1999), at http://www.asne.org/ ideas/codes/gannettsuburban.htm (on file
with the Notre Dame Journal of Law, Ethics & Public Policy) ("Youths 18 years
of age or younger who are adjudicated as juvenile offenders should not be
identified by name or address."); American Society of Newspaper Editors (ASNE),
ideas/ codes/lincolnjournalstar.htm (on file with the Notre Dame Journal of
Law, Ethics & Public Policy) ("We generally do not name juveniles who remain
in juvenile court . . . If the crime is serious and it seems likely the juvenile will
be charged as an adult, we generally will name a juvenile at the time some
formal, legal action is taken, such as an arrest."); American Society of Newspa-
per Editors (ASNE), San Francisco Chronicle: Ethical News Gathering (Jan. 29,
1999), at http://www.asne.org/ideas/codes/sanfranciscochronicle.htm (on file
particularly newsworthy cases.\textsuperscript{71}

Indefiniteness notwithstanding, the lack of enforcement arguably constitutes the greatest impediment to the efficacy of journalistic codes of ethics or agreements. Ethical codes have little authority unless their violation results in some sanction.\textsuperscript{72} In the alternative, perhaps their adoption as legal standards might imbue them with palpable authority.

The law of negligence presents an optimal cause of action in which to employ journalistic codes of ethics. Negligence, as a generalized construct, has as its basis the defendant’s breach of a duty of care and proximate injury to the plaintiff.\textsuperscript{73} Defamation, which is negligence that includes libel and slander, provides a remedy for a plaintiff who suffers an injury due to the dissemination of false information.\textsuperscript{74} In an admittedly simplistic summary, a plaintiff who pleads defamation must prove that the defendant

with the Notre Dame Journal of Law, Ethics & Public Policy) (“In general, we do not name juvenile suspects (under the age of 18) in crime stories. We also are cautious about naming juvenile victims of a crime”). Note that some media sources may modify their non-disclosure rules if the juvenile offender is charged as an adult.

71. LynNell Hancock, Naming Kid Criminals: When Should We Protect Them?, COLUM. JOURNALISM REV., Jul.–Aug. 1998, at 18 (noting that when an eleven-year-old boy and a thirteen-year-old boy were arrested and charged as juveniles for ambushing a playground in Jonesboro, Arkansas, the major national newspapers quickly abandoned their policies of not printing the names of juvenile offenders) (on file with the Notre Dame Journal of Law, Ethics & Public Policy); see also Pate, supra note 44, at 358 (stating that Court TV violated its own policy in broadcasting the name of a child involved in a sensational case).

72. See Storey, supra note 57, at 471 & nn.30–31 (stating the criticism that media codes, unlike the codes of other professions, lack effectiveness because there are no formal or informal enforcement mechanisms).

73. RESTATEMENT (SECOND) OF TORTS § 282 (1965) (defining negligence as “conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm”); 57A Am. Jur. 2d Negligence § 71 (2004) (stating that the elements of negligence are “a duty the defendant owes to the plaintiff, a breach of that duty by the defendant, a causal connection between the breach and the plaintiff’s injury, and actual injury”).

74. RESTATEMENT (SECOND) OF TORTS § 559 (1977) (defining defamatory communication as that which “tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him”); id. § 558 (listing the elements of defamation as “(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication”). 50 Am. Jur. 2d Libel § 22 (1995) (noting that tortious libel conduct comprises three elements: the composition of the statement, its writing, and its publication); see also id. §§ 26 (noting that some courts hold that malice is a necessary element of defamation while others require it only for cases with particular factual circumstances).
breached some duty of care in the dissemination of false information. The duty of care required in such cases presents an excellent vehicle for the judicial adoption of journalistic codes of ethics. Crafted by those who work in the industry, ethical codes define standards of journalistic behavior. They constitute a specifically designed standard of care in the industry and could credibly define the duty of care in cases in which the defendant is a media source.

Despite their compatibility with defamation, there has been historical reluctance to adopt these codes as standards of care. Ethical codes have little relevance in cases that require proof of actual malice, because the central focus is the defendant's state of mind, rather than her conformity with objective standards.

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

76. Sanford, supra note 56, at 43 (stating that "[i]n twenty years of practice and more than one thousand 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 libel lawsuit because he or she breached a professional code of ethics").

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

78. Sanford, supra note 56, at 43.
Moreover, the vague and imprecise language of these codes discourages their use as clear standards of care.\textsuperscript{79}

The lack of definiteness and authority underscores a certain theoretical disutility of journalistic codes of ethics and agreements to self-restraint. As discussed more cogently below, however, these problems may be ameliorated by the more pragmatic benefits of these codes and other forms of self-restraint.

B. The Contextual Utility of Ethical Codes and Other Self-Restraint Mechanisms

1. The Holistic Function of Ethical Codes Within the Journalistic Setting

Certain contextual factors endemic to the media industry prove the continued viability of ethical codes and other forms of media self-restraint. As discussed in the previous section of the Article, democracy and its manifestation in the motivational triad provide a theoretical basis for self-regulation.\textsuperscript{80} There are, however, practical and pragmatic factors that establish the legitimacy and viability of ethical codes and self-restraint.

As a generalized rule, self-regulation diminishes the need for external regulation of the industry. As Jeff Storey astutely observes, self-regulation reduces the need for judicial interference with media's day-to-day operations.\textsuperscript{81} Judicial definition of the industry’s professional standards would most likely be highly inefficient. Judicial officers and jurors have scant knowledge of the industry and may be influenced by personal perceptions and stereotypes.\textsuperscript{82} The rules resulting from their deliberations would likely be awkward and overly intrusive.

Self-regulation, on the other hand, produces behavioral standards that are specially designed and minimally obstructive.

\textsuperscript{79} Id.; see Storey, supra note 57, at 481 (stating that JEGs are rarely cited in appellate court decisions because “their vagueness makes them poor evidence of journalistic standards”); see also Kendrick v. Fox Television, 659 A.2d 814 (D.C. 1995); see also infra note 97 and accompanying text. But see infra notes 77-79 and accompanying text (presenting counter arguments to the use of ethical codes as legal standards in defamation cases).

\textsuperscript{80} Supra note 27 and accompanying text.

\textsuperscript{81} Storey, supra note 57, at 468. But see Press Release, American Society of Newspaper Editors, ASNE Opposes International Code of Ethics for Journalists (June 25, 1998), available at http://www.asne.org/index.cfm?ID-1394 (on file with the Notre Dame Journal of Law, Ethics & Public Policy) (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").

\textsuperscript{82} Storey, supra note 57, at 468.
These regulations instill a certain professional responsibility that overshadows the exercise of the autonomous right of free expression. The resulting codes become a requirement in the responsible exercise of expressive rights.

Although imprecise language can stymie their use as specific guidelines for behavior, journalistic codes of ethics, nonetheless, contribute to what can be described as a culture of responsible journalism. In the previously identified study that revealed the sparse use of ethical codes in specific situations in several print newsrooms, the researcher also notes that these codes are part of, and perhaps even create, a larger ethical culture in the newsroom setting. 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.

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. Media personnel are thus compelled to think probabilistically about 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. The breach of

83. See supra notes 21–23 and accompanying text (discussing the democratic principles associated with autonomy and particularly responsibility as it relates to a mutual respect theory of democracy).
84. Storey, supra note 57, at 468.
85. See supra note 79 and accompanying text (noting indefiniteness thwarts the use of journalistic codes of ethics as standards of care in lawsuits).
86. See supra note 67 and accompanying text (noting Boeyink's study of newsrooms).
87. Boeyink, supra note 67, at 894.
88. Id.
89. Id. at 901. Boeyink found this type of consciousness raising in newsrooms that regularly discussed and debated ethical issues. In those newsrooms, the communication among journalists bridged the gap between the general prescriptions of the codes and the specific demands the journalists faced.
an ethical code, thus, requires 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.

2. The Prospective Efficacy of Ethical Codes as Legal Standards

As previously discussed, there is a certain reluctance to accept journalistic codes of ethics as standards of care in judicial proceedings. These codes, thus, have limited authority and reduced impact as behavioral modifiers. This problem, however, may be somewhat overstated. The Restatement of Torts notes that the standard of care exercised by a defendant in a suit of defamation should be assessed in accordance with the skill normally possessed by members of the profession, which has established customs and practices. This direction provides a measured opening to employ professional ethics codes as standards in negligence. The Restatement's language is neither exclusive, nor obligatory. Thus, codes of ethics could be probative indicators of industry customs.

Yet, the most persuasive signal of the functionality of ethical codes as standards of liability would be their adoption by the judiciary. A review of noted cases indicates a guarded and lim-

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91. See supra notes 76–79 and accompanying text.
92. Restatement (Second) of Torts: Defamation of Private Person § 580 cmt. g (1977).
93. Id. (noting that the Restatement also states that expert testimony generally constitutes evidence of custom).
94. See America Society of Newspaper Editors (ASNE), ASNE Opposes International Codes of Ethics for Journalists, in Codes of Professional Responsibility 193 (Rena A. Gorlin ed., 4th ed. 1999) ("Judges and lawyers have used ethical guidelines, council statements and various agreements as evidence for the basis for court decisions against the press.").
ited employment of these self-regulatory norms. In fact, *Khawar v. Globe Int'l*,\(^95\) represents the only case in which a court used ethical codes to define the acceptable standards of care for journalists. In *Khawar*, the plaintiff produced expert testimony that the defendant's conduct failed to meet the standards set forth in the codes of the Society of Professional Journalists and the American Society of Newspaper Editors.\(^96\) The California Supreme Court affirmed the lower court's finding of culpability, but did so without reference to the journalistic codes of ethics. The court, instead, found that other reliable evidence supported the finding that the newspaper failed to use readily available means to confirm or disprove the allegations against the plaintiff. Because there was sufficient evidence to prove actual malice, the claim of negligence also had evidentiary support.\(^97\)

In *Kendrick v. Fox Television*,\(^98\) the court refused to accept journalistic codes of ethics as standards of care because the plaintiff failed to cite the sources for those codes and did not proffer experts to testify that the codes were actually followed by journalists. This failure on the plaintiff's part notwithstanding, the court never indicated that *Kendrick* would have relied on the codes if the plaintiff had provided expert witnesses and proper citations.

In *State v. Kreuger*,\(^99\) the defendant attempted to rely on the Society of Professional Journalists' Code of Ethics in its brief. The court observed that the code explicitly instructs reporters to "avoid misleading re-enactments or staged news events," which was the alleged conduct of the defendants.\(^100\)

Although courts have not used ethical codes as exclusive determinants of liability, they have endorsed the power of these codes to check journalistic behavior. In *Brown v. Kelly Broadcasting Co.*,\(^101\) the court declined to find that a California statute provided a broad public interest privilege for news reports about a private individual.\(^102\) Such a construction would have protected virtually all media communications from defamation suits.\(^103\) The broader construction would have also premised recovery on

96. *Id.* at 107.
100. *Id.* at 497.
102. *Id.* at 422.
103. *Id.* at 432.
proof of malice. The court, instead, found that the California statute only required a showing of negligence. The newspaper argued that the negligence standard would chill the free flow of information. The court, however, rejected this argument and noted that the media should seek accuracy in order to preserve professional credibility as required in the American Society of Newspaper Editors' and Society of Professional Journalists' codes. The newspaper should not, in the court's view, strive for accuracy only to avoid legal liability.

In re Access to Certain Records of Rhode Island Advisory Committee on the Code of Judicial Conduct presented an interesting endorsement of journalistic codes of ethics. In that case, the court ordered that all advisory opinions issued by the committee be made part of the public record. This disclosure increased the responsibility of the press to not "incite a wildfire of insinuation." The court opined the press' behavior in such matters should be measured in accordance with the Society of Professional Journalists' Code of Ethics. A dissenting judge, however, found the majority's reference to journalistic codes of ethics somewhat disingenuous during "these times where tabloid journalism is becoming the rule rather than the exception."

Curiously, journalistic codes of ethics can trump other legal rules. Courts have found that the journalistic codes of ethics represent one facet of media's ability to control its credibility and should be protected when they conflict with a statute. In Newspaper Guild of Greater Philadelphia v. NLRB, the court found that provisions of journalistic codes of ethics were central to the newspaper's interest in preserving legitimate, managerial prerogatives. These standards affected employees minimally and, thus, should be exempt from the mandatory bargaining statute. Likewise, the court in Nelson v. McClatchy Newspapers, Inc. found that a statute that prohibited an employer from discriminating against an employee on the basis of the employee's refusal to abstain from political activity could not constitutionally invali-

104. Id. at 409.
105. Id. at 429.
106. Id. at 430.
108. Id. at 1066–67.
109. Id. at 1067.
110. Id. at 1070 (Shea, J., dissenting).
112. Id. at 561.
date the defendant's ethical requirement that employees of the paper avoid active involvement in politics. The court in Nelson cited Philadelphia Newspaper Guild for the proposition that the newspaper's ability to control its credibility is protected by the First Amendment, and any law infringing on it should be scrutinized.114

As the case law discussed indicates, journalistic codes of ethics do not conclusively establish liability. With the help of expert testimony,115 however, they may contribute to the establishment of the standard of care necessary to establish negligence.116 This admittedly limited use by the judiciary enhances, if only incrementally, the influence of these codes on journalistic conduct.

C. Contextual Influences on Ethical Codes and Other Forms of Media Self-Restraint

The examination of ethical codes and other self-restraint mechanisms has, thus far in the Article, focused on such factors as vagueness117 and dubious authority.118 These problems remain static and ingrained factors in a society that places such a significant premium on private autonomy. In my view, however, the most significant problem that illustrates the dubious effect of self-restraint mechanisms lies in the public's perception of the industry.

Despite the prevalence of ethical codes and the employment of voluntary measures of restraint, the media suffers, to varying degrees, from the public's view that proprietary, rather than public, interests dominate the industry's operations. Such a perception contributes to a troublesome consensus that media's reporting can be distorted, skewed, or even untrustworthy.119 In

114. Id. at 1131–32.
115. See supra note 93 and accompanying text (commenting on the employment of ethical codes explained or endorsed by expert testimony).
116. See supra notes 75, 92–93 and accompanying text.
117. See supra notes 58–61 and accompanying text (explaining the possible ineffectiveness of ethical codes resulting from the indefiniteness of code language).
118. See supra notes 56–57 and accompanying text (noting that ethical codes and other voluntary means of media self-restraint often suffer from a lack of authority or enforcement).
fact, informal discussions of the topic of this Article with various colleagues and laypersons elicited commentary suggesting that ethics in media is oxymoronic.

In my view, several factors generate such cynical opinions about the industry. The proliferation of tabloid publications and so-called “reality” programming that emphasize the more sensational aspects of news\textsuperscript{120} contributes to the perception that the maximization of profits and ratings, rather than education on matters of public concern, dominates the media’s agenda. Moreover, corporate influence on the media’s dissemination has continually loomed large as a cloud on the industry’s function as a disseminator of diverse information.

The pervasive nature of corporate governance theoretically affects the very nature of media operations and journalistic inquiry. Perhaps the most controversial trend has been the continuing monopolization of media. During the last quarter century, many media sources have become subject to buyouts, mergers, and attrition.\textsuperscript{121} Broadcast deregulation in the 1980’s and the subsequently enacted Telecommunications Act of 1996\textsuperscript{122} accelerated the industry’s trend toward conglomera-

\textsuperscript{120} Eric Schmuckler, \textit{Facing Reality: Network and Advertising Execs Deal with the New Programming Paradigm}, \textit{Brandweek}, May 31, 2004, at SR23 (noting that six of the top ten programs for adults age 18–49 are reality shows); Karen Slater et al., \textit{Shifts in Public Affairs Reporting on the Network Evening News: A Move Toward the Sensational}, 2001 \textit{J. Broadc. \\& Electronic Media} 290, 292–93 (reporting results of a longitudinal study of national network evening newscasts during presidential election years that show increasing coverage of sensational and human interest stories, as well as a significant increase in the use of embedded sensational/human interest stories to contextualize hard news); Linn Washington, Jr., \textit{Facts, Fallacies, and Fears of Tabloidization}, \textit{USA Today}, Nov. 1999, at 67 (noting that despite the decline in both tabloid television programs and tabloid newspaper circulation, tabloid styles are being adopted by traditional news media); James McCartney, \textit{News Lite, Am. Journalism Rev.}, June 1997, at 19 (noting that “[n]etwork newscasts are turning away from traditional hard news in favor of entertainment, tabloid topics, and news you can use”); \textit{see also} David A. Logan, \textit{Masked Media: Judges, Juries, and the Law of Surreptitious Newsgathering}, 83 \textit{Iowa L. Rev.} 161, 161–62 (1997) (arguing that undercover reporting by “newsmagazines” shows, which raises serious issues of journalistic ethics, has proliferated due to increasing ratings and profits).

\textsuperscript{121} Ben Bagdarian, \textit{The New Media Monopoly} 27–28 (2004) (stating that five large firms dominate all American mass media).

tion.\textsuperscript{123} The FCC’s proposed relaxation of rules that restrict ownership of media sources within localities will undoubtedly add more velocity to monopolization.\textsuperscript{124} Conventional wisdom suggests that a reduction in media ownership leads to the dissemination of biased information.\textsuperscript{125} A more prevalent result of monopolization, however, has been the homogeneity of news—a phenomenon fueled by the motivation to be austerely objective.\textsuperscript{126}

\textsuperscript{123} Robert W. McChesney, The Problem of the Media: U.S. Communication Politics in the 21st Century 53 (2004) (stating that since the passage of the Telecommunications Act, cable and telecommunications industries have become increasingly concentrated, customer complaints have increased, and cable industry rates have increased dramatically); Ben Bagdikian, The Media Monopoly, at 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, at http://www.eastbayexpress.com/issues/20040707/feature.html (on file with the Notre Dame Journal of Law, Ethics & Public Policy) (arguing that despite increased conglomeration of the mainstream media, alternative media sources are increasingly available, contributing to a “media saturated world”).


\textsuperscript{125} See Morant, Democracy, Choice, supra note 5, at 977; see also Charles Layton, News Blackout: The FCC Was Getting Ready To Loosen the Rules Limiting Media Concentration. A Grassroots Movement Had Sprung up to Derail the Plan. But You Wouldn’t Have Learned Much about the Controversy from Many News Outlets Owned by the Big Conglomerates That Were Eager to Cash In, AM. JOURNALISM REV., Dec. 2003, at 18, 20 (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 activists’ claims that the more conglomerates control the media, the more they suppress viewpoints at odds with their interests). The American Journalism Review studied media coverage of the proposed rule change and found that, despite public protest and activism from groups as diverse as the National Organization for Women and the National Rifle Association, media coverage from ABC, NBC, CBS, Fox News, and CNN was scant until just before the FCC was due to act. Id. Two exceptions were PBS and NPR, which had been tracking the issue for at least a couple of years. Id.

\textsuperscript{126} C. Edwin Baker, Advertising and a Democratic Press, 140 U. Pa. L. REV. 2009, 2193–28 (1992) [hereinafter Baker, Advertising] (arguing that advertising or the drive for advertising revenue and the rise in the doctrine of objectivity contribute to the homogeneity of news content); Bagdikian, supra note 121, at 213–15 (arguing that the “just the facts” doctrine of objectivity causes journal-
In addition to the tendency for homogeneity, monopolization of the media, particularly by large corporate entities, also leads to the perception that media content can be heavily influenced by corporate pressures, whether those pressures are direct or indirect.\textsuperscript{127} In fact, corporate influence and control of mass media has been theorized in a propaganda model. Such a model focuses on the tendency of money and power to filter disseminated information, advance views that are corporate-friendly or inspired, or minimize opposing views.\textsuperscript{128} The primary factors that fuel corporate filtering include corporate ownership that emphasizes profitability, advertisers who indirectly control content, the media's reliance on information provided by governmental and private sources, and the threat of lawsuits.\textsuperscript{129}

While the degree of corporate influence has been subject to debate,\textsuperscript{130} empirical data demonstrate the reality of its effect. 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 affect the quality of their work-product.\textsuperscript{131} The survey respondents also opine that both corporate owners and advertisers often usurp the editorial judgment of media personnel.\textsuperscript{132} It comes as no surprise, therefore, that 80\% of journalists surveyed

\begin{footnotesize}
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  \item[127.] \textbf{Bagdikian}, \emph{supra} note 121, at 36 (providing examples of various impacts that corporate interests have on the information disseminated by media sources).
  \item[128.] \textbf{Edward S. Herman} \& \textbf{Noam Chomsky}, \emph{Manufacturing Consent} 1–2 (1988).
  \item[129.] \emph{Id.} at 8–27.
  \item[130.] \textit{See} \textbf{Baker}, \emph{Advertising}, \emph{supra} note 126, at 2107–18, 2120–22.
  \item[132.] \emph{Id.} at 28.
\end{itemize}
\end{footnotesize}
feel that market pressures often kill relevant or socially pertinent stories that are judged as dull or less attention-grabbing. 133

On one hand, the corporate influence factor, regardless of the extent of its impact, remains an unavoidable by-product of libertarianism. 134 A free market economy fosters bargaining autonomy, thereby facilitating personal wealth or utility maximization. 135 This more austere form of autonomy can generally overshadow concerns for the public good and ignore the interests of more marginalized constituents who possess limited resources. In this environment, ethical standards can become ancillary platitudes. In fact, some have argued persuasively that the overwhelming influence of corporate interest has led to slipshod journalism in which unverified information is disseminated to maximize audience and profit. 136 This manifestation of corpo-

134. See supra notes 12–15 and accompanying text.
135. For varying definitions of economic efficiency, see Richard A. Posner, Economic Analysis of Law 12–16 (4th ed. 1992) (defining economic efficiency as a state in which goods are allocated to those who will pay the highest price); Elizabeth J. Goldstein, Asking the Impossible: The Negligence Liability of the Mentally Ill, 12 J. CONTEMP. HEALTH L. & POL’Y 67, 84 (1995) (noting that “[i]f positive economic theory is taken literally, it defines economic efficiency as wealth maximization”); Note, Badwill, 116 HARV. L. REV. 1845, 1855 (2003) (noting that market economics defines economic efficiency as “meeting consumer preferences”). 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 general, is subject to allegations of inefficiency due to regulation. See Henry G. Manne, Insider Trading and the Stock Market (1966) (arguing that the restrictive regulation of insider information decreases the efficiency of the securities market); Stephen J. Choi & A.C. Pritchard, Behavioral Economics and the SEC, 56 STAN. L. REV. 1, 61–62 (2003) (posing 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, increasing the risk to investors, “raising the cost of capital and thereby constricting the range of available investment opportunities for investors”). But see Jill E. Fisch & Hillary A. Sale, The Securities Analyst as Agent: Rethinking the Regulation of Analysts, 88 IOWA L. REV. 1035, 1091 (2003) (arguing 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).
136. The Editors, What We Do Now?, COLUM. JOURNALISM REV., Mar.–Apr. 1998, at 25 (observing that media coverage of the Clinton-Lewinsky scandal often violated the rule of two-source confirmation and confirmed the negative influence of brutal competition in the industry); Logan, supra note 120, 161–62 (arguing that undercover reporting by “newsmagazine” shows, which raise serious issues of journalistic ethics, has proliferated as a result of increasing ratings and profits); Lyrisa Barnett Lidsky, Prying, Spying, and Lying: Intrusive Newspapergathering and What the Law Should Do About It, 73 TUL. L. REV. 173, 218 (1998) (arguing that news shows can afford to use questionable newspapersgathering tech-
rate drive and competition directly counters the tenets of ethics, which has truth and veracity as its linchpins.\textsuperscript{137}

Advancement of corporate or private interests, however, constitutes only one segment of the dynamic of a pluralistic democracy. Complete maximization of individual goals and objectives occurs only if the interests of society as a whole are protected.\textsuperscript{138} Private interests, which appear central in the corporate model, become dependent upon the maintenance of societal interests, such as preservation of the rights of other members of society. Thus, corporate influence and gain become dependent upon the goals and desires of the public that is served. If this is an accepted theoretical norm, then we must also accept the corollary that private gain must be responsive to public needs and desires. Responsiveness to public needs forms the foundation for ethical behavior. This theoretical premise underscores the primacy of the motivational triad, which manifests the linkage between credibility and pecuniary gain.\textsuperscript{139} If credibility is the cornerstone of a strategy to maximize audience size and profits, then ethical codes, which promote trustworthiness and reliability, become compulsory rules in the operation of contemporary media.

The motivational triad, thus, becomes the reinforcing impetus that prompts sources to adhere to the mandates of ethical codes. A media source that publicly acknowledges and actually follows ethical requirements for truth and accuracy should enhance its odds of greater viewership or readership. Credibility, and ethical codes’ furtherance of that credibility, creates a kinetic force that compels adherence to the codes’ mandates.

Systemic forces, however, can weaken the natural adherence to the mandates of ethical codes. Media’s drive for ratings and profit, a factor which has been previously introduced as a general drawback to the effectiveness of ethical codes,\textsuperscript{140} has diverse ramifications. Competition for audience and ratings, which
often translates into scooping or becoming the first to disseminate a story, may cause abridgement in procedures used to verify information and, thus, contribute to inaccuracies or distortions.\textsuperscript{141} Several examples of the negative by-product of ratings pressure include reports of the winner of the Dewey-Truman presidential contest in 1948\textsuperscript{142} and broadcast media's call of the winner of Florida in the 2000 presidential contest.\textsuperscript{143}

Another, and perhaps more stark, manifestation of the distortions caused by media's overwhelming quest for profit and the commensurate diminution of ethical standards has been the proliferation of sensationalist programming.\textsuperscript{144} 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.\textsuperscript{145}

\textsuperscript{141} For a description of media frenzy, see supra note 25 and accompanying text.

\textsuperscript{142} Martin Plissner, The Control Room: How Television Calls the Shots in Presidential Elections 69 (1999).

\textsuperscript{143} Northwestern University, Election 2000: The Role of the Courts, the Role of the Media, the Roll of the Dice Conference Report 21 (2001) (commenting that the networks' rush to declare a winner in the Bush-Gore contest, and resultant errors in reporting, were due in large measure to the quest for high ratings); see also Sherry Ricchiardi, Standards Are the First Casualty, Am. Journalism Rev., Mar. 1998, at 30 (detailing a news gaffe in which Larry King reported that a phone message left by Clinton to Lewinsky would be the next sexy scoop and came back immediately after the commercial break to retract the story, explaining the retraction as a "classic example" of the frenzy surrounding the Clinton-Lewinsky scandal); Weekend Edition: Media Transforms O.J. Into Version of 'The Fugitive' (NPR radio broadcast, June 19, 1994) (reporting that a caller to ABC during the network's live coverage of the O.J. Simpson chase stated that he had seen O.J. in the back of the Bronco in his driveway and that ABC had later apologized for airing the uncorroborated information, stating that the call was a hoax).

\textsuperscript{144} Jill Rosen, \textit{Et Tu}, "Nightline"?, Am. Journalism Rev., Feb.–Mar. 2004, at 18, 20–23 (opining that because of today's celebrity-obsessed media market, it is not surprising that Nightline bumped coverage of President Bush's trip to London for coverage of Michael Jackson's arrest for child molestation, which became the program's highest-rated show of the year).

\textsuperscript{145} See Andrew Calabrese, \textit{Political Space and the Trade in Television News}, in Tabloid Tales: Global Debates over Media Standards 43 (Colin Sparks & John Tulloch eds., 2000) (arguing that the media in the United States increasingly relies on tabloid formats, which blur the distinction between news and entertainment, because of budget constraints and competition); \textit{Monica! Bill Clinton Had an Affair, and the Tabloid Tail Began Wagging the Mainstream Dog}, 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.
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.\textsuperscript{146} Such programming, while factually based, seemingly diverts media from its theoretical and historically significant role as educator on issues of public or societal concern.\textsuperscript{147} As a consequence, the media that seek only to entertain or titillate may see the credibility factor of the triad as somewhat less compelling. Even if such sensational programming does not violate the letter of ethical codes, it creates a perception that media industry fails to adhere to the spirit of established ethical norms.\textsuperscript{148}

I posit, however, that the compelling force of profit maximization tacitly serves as a fundamental impetus for the positive behavior that ethical codes promote. This factor has particular applicability to media sources that report news and factual information. If, as the motivational triad demonstrates,\textsuperscript{149} there is a palpable nexus between audience size and credibility, then

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\textsuperscript{146} Schmuckler, \textit{supra} note 120, at SR32 (noting that six of the top ten programs for adults age eighteen to forty nine are reality shows); \textit{Talk Shows}, \textit{MediaWeek}, Mar. 8, 2004, at 23 (reporting that the two most popular talk shows, Oprah and Dr. Phil, enjoyed double-digit increases in ratings during the 2004 season); see also Ted Turner, \textit{My Beef with Big Media: How Government Protects Big Media—and Shuts Out Upstarts Like Me}, WASH. MONTHLY, July–Aug., 2004, at 30, available at \texttt{http://www.washingtonmonthly.com/features/2004/0407.turner.html} (on file with the Notre Dame Journal of Law, Ethics & Public Policy) (arguing that the rise of reality television, which costs little to produce and garners high ratings, is a by-product of the media conglomerates’ overemphasis on short-term profit).

\textsuperscript{147} See Baker, \textit{Media, Markets, supra} note 2, at 73 (noting that media functions to educate, inform political participation, foment and energize civic and political participation, and provide a forum for public debate and dialogue’); see also \textit{supra} note 3 and accompanying text (describing the media’s role as governmental overseer and, thus, the “fourth estate”).

\textsuperscript{148} See \textit{supra} note 119 and accompanying text; American Society of Newspaper Editors (ASNE), \textit{Chasing Sensational Stories} (Aug. 4, 1999), at \texttt{http://www.asne.org/kiosk/reports/99reports/1999examiningourcredibility/p31-53_chasing.html} (on file with the Notre Dame Journal of Law, Ethics & Public Policy) (reporting the finding that “eighty percent of the American public believes that ‘journalists chase sensational stories because they think it’ll sell papers, not because they think it’s important news’”).

\textsuperscript{149} See \textit{supra} notes 27–28 and accompanying text.
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media sources must focus on truth and accuracy—values that ethical codes are designed to foster.\textsuperscript{150}

Recent high-profile apologies have demonstrated media's recognition of the importance of credibility. For example, the \textit{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 \textit{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 \textit{Post}'s coverage, "despite flashes of ground-breaking reporting, in hindsight looks strikingly one-sided at times."\textsuperscript{151} The \textit{New York Times} similarly criticized its coverage of the build up to war in Iraq. In an open, published letter, the \textit{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."\textsuperscript{152} The article then listed specific stories that contained questionable information. The \textit{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."

In a similar act of self-criticism, \textit{USA Today} publicized its suspicions concerning possible plagiarism committed by Jack Kelley, a Pulitzer-Prize finalist and foreign correspondent. In the article, Karen Jurgensen, a \textit{USA Today} editor, cites the paper's best practice guidelines that proscribe conduct that is "dishonest or illegal to obtain or alter content."\textsuperscript{153} The paper asked "readers, sources, or employees" for any information on Kelley's reporting.\textsuperscript{154} After an independent investigation, almost four months later, \textit{USA Today} again published a story about the scandal. Al Neuharth, the story's author and founder of \textit{USA Today}, stated that the paper's editor, who resigned over the Kelley scandal, inherited problems that allowed Kelley's thirteen years of ques-

\begin{footnotes}
\item[150.] \textit{See supra} notes 6–7 and accompanying text (discussing the function of media's code of ethics).
\item[154.] \textit{Id.}
\end{footnotes}
tionable reporting to take place. He partially blamed the paper's
decision to abandon the "no anonymous source" guideline, 
which "built reader trust, confidence and circulation." An 
investigating committee opined that abandonment of the "no 
amnonymous source" guideline resulted from an objective to make 
the paper more competitive. 

The admissions by these major publications, and the numer-
umous daily corrections by other industry sources, demonstrate the 
extent to which the media are aware of the need to maintain 
credibility. While we may 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 demonstrates 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.

D. Reinforcement of Ethical Codes' Natural Authority

My thesis that the motivational triad reinforces the mandates 
of ethical codes has an admittedly theoretical basis. While it has 
analytical appeal, theory sometimes flounders in the real world context. This factor underscores the inherent weakness of 
triad-driven authority and the comparative strength of more tangible institutionalized reinforcements such as courts or disciplinary boards. These latter institutions, which other professions employ, 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 
enforce ethical standards on the media. Bodies with punitive

156. *Id.*
157. *See* Morant, *Electoral Integrity*, *supra* note 8, at 50 (opining that theory "is of little analytical value unless it is manifested in practice").
158. *See supra* note 56 and accompanying text (noting other professions, such as law and medicine, that have formalized bodies and procedures to reinforce ethical standards).
powers, while imbuing greater authority to performance standards, potentially offend constitutional guarantees of free expression.\textsuperscript{159} Moreover, these bodies chill the functionality of personal autonomy, which constitutes an integral factor in a pluralistic democracy.\textsuperscript{160}

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, however, 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,\textsuperscript{161} 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 education programs would 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 the reinforcement strategy.

Because public perception of media credibility is an inexorable part of audience size,\textsuperscript{162} 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

\textsuperscript{159} See Morant, \textit{Electoral Integrity}, supra note 8, at 49 (noting that coerced forms of self-restraint would be met with judicial hostility because of the judiciary's adherence to a negative theory of free speech, which protects individual autonomy and expressive liberty); see also supra note 14 and accompanying text.

\textsuperscript{160} See supra notes 18–23 and accompanying text (discussing the bases for a respect-model of democracy).


\textsuperscript{162} See supra notes 26, 33–41 and accompanying text.
media responsibility and veracity. To accomplish this goal, the media must provide “more information” on the function of ethical codes in its operations.\textsuperscript{163}

The Washington 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.\textsuperscript{164}

In order to convince the public of the industry’s genuine regard for responsible journalistic behavior, the 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, embeds in the public’s consciousness the prevalence and importance of ethical standards within the industry.\textsuperscript{165}

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, in

\textsuperscript{163} 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, \textit{Electoral Integrity}, supra note 8, at 59–61 (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, \textit{Customized News Services and Extremist Enclaves on Republic.com}, 54 \textit{Stan. L. Rev.} 831, 884 (2001) (reviewing Cass Sunstein, \textit{Republic.com} (2001)) (explaining that many First Amendment proponents advocate the use of “more speech” in response to extremist hate speech and that the tactic “implicitly relies] on a paraphrase of Newton’s Third Law that every example of hateful speech creates an opportunity for an equally powerful [and] effective response”).

\textsuperscript{164} Leonard Downie, Jr., \textit{The Guidelines We Use To Report the News}, WASH. Post, Mar. 7, 2004, at B01.

\textsuperscript{165} 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.
effect, creates a moral obligation to observe and follow these standards.

**Conclusion**

Ethical codes and other means of self-restraint within the media industry constitute tools that ensure 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. Despite these attributes, the lack of tenable enforcement of self-restraining mechanisms potentially weakens their impact on behavior.

The absence of overt enforcement, however, does not diminish the overall influence of self-regulatory mechanisms. Ethical codes, in particular, have become embedded fixtures in the operation of the media and have contributed to a professional ethos of truth and reliability. Further, the interrelation of profit, audience size, and credibility, which collectively forms a motivational triad that is an operational criterion for most media sources, imbues these codes with a natural authority that reinforces their influence.

To thrive as a legitimate and essential construct of a democratic society, the 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 the media internally emphasize ethical behavior, public perception of the industry's commitment to those standards becomes a significant factor in building public trust and faith.

For decades, critics have evaluated the true ethical nature of media's conduct.\(^{166}\) Perhaps the industry's explicit and demon-

\(^{166}\) For recent examples of such critiques of media's responsible behavior, see generally Eric Alterman, *What Liberal Media? The Truth About Bias and the News* (2003) (arguing that the salient issue is not whether the media exhibit liberal or conservative bias, but the extent to which the dissemination of information is controlled by the financial interest of the media owners); Baker, *Advertising, supra* note 126; Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of "Journalist" in the Law*, 103 *Dick. L. Rev.* 411 (1999); Clay Calvert & Robert D. Richards, *Journalism, Libel Law and a Reputation Tarnished: A Dialogue with Richard Jewell and His Attorney*, *L. Ltn 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"). But see Bill Kovach & Tom Rosenstiel, *The Elements of Journalism* (2001) (arguing that despite the increased commercialization of journalism, the industry can retain ethics
strative acknowledgment of the essentiality of ethical norms in its operations will ensure that future critiques reflect the media's professional goodwill and genuine embrace of responsible journalistic conduct.

and credibility by actively focusing on the principles of independent, democratic journalism in the newsrooms).