DOES ETHICS MAKE GOOD LAW? A CASE STUDY

INTRODUCTION

Gannett, one of the nation's largest media companies, was stunned when it discovered that a trusted investigative reporter at its *Cincinnati Enquirer* newspaper had lied to his editors and used illegally obtained voice-mail records of Chiquita Brands International executives to prepare a series about the company's business practices.[1] In June 1998, Gannett disowned the series in an apology published on page one over three separate days, paid Chiquita a $10 million settlement and fired the offending reporter.[2] The reporter cooperated in the prosecution of a former Chiquita lawyer who had supplied him with the secret codes used to loot the voice-mail system, leaving the newspaper vulnerable to a lawsuit for breaching an alleged agreement to maintain the source's confidentiality.[3]

The Chiquita controversy was one of a series of recent high-profile cases of plagiarism, fabrication and other press gaffes.[4] For example, CNN retracted a story about the use of nerve gas in Vietnam after the tale was discredited by a well-known media attorney whom the network had hired to investigate the matter.[5] Also, two *Boston Globe* columnists and a writer for the *New Republic* were forced to resign in response to charges that they had mixed fact and fiction in their articles.[6] These controversies highlight a serious credibility crisis in the news media.[7] Moreover, the loss of public confidence comes at a time when newspapers and broadcasters are beseeching the courts for protection from new legal challenges.[8]

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1 *See* Douglas Frantz, *Mysteries Behind Story's Publication,* N.Y. TIMES, July 17, 1998, at A16.

2 *See id.*

3 *See Ex-Reporter is Sentenced in Chiquita Mail Case,* N.Y. TIMES, July 17, 1999, at A14.

4 *See* Don Campbell, *When Disaster Strikes,* AM. JOURNALISM REV., Dec. 1, 1999; *see also* Eli Lehrer, *Media fakes: What's behind today's troubling epidemic of falsified journalism?* AM. ENT., May 1, 1999, at 40.

5 *See* Neil Hickey, *Ten mistakes that led to the great CNN/Time fiasco,* COLUM. JOURNALISM REV., Sept. 1, 1998, at 26.

6 *See* Mark Jurkowitz, *Caught in the muddle: The big media story of '98 was how the messengers were the message,* THE BOSTON GLOBE, Dec. 31, 1998, at C1; Sinead O'Brien, *For Barnicle, one controversy too many,* AM. JOURNALISM REV., Sept. 1, 1998, at 11; Sinead O'Brien, *Secrets and lies (fiction published as fact in the Boston Globe),* AM. JOURNALISM REV., Sept. 1, 1998, at 40.

7 *See* discussion *infra* note 19.

8 *See, e.g.,* Jon Lafayette, *Floyd Abrams: Libel Expert Feels a Chill: 'Tailwind' Lawyer Sees Media Antagonism on Rise,* ELECTRONIC MEDIA, Mar. 15, 1999, at 27. Abrams, the nation's most prominent media lawyer, says, "I don't think there is any way to detach the current level of public disdain for a good deal of what a part of the media puts out from what juries

Faced with an increasingly chilly legal climate and reader doubts about the media's newsgathering practices, Gannett has decided to go public with its ethics and values—a move that could change the way it and other media companies are viewed in the courts.[9] In June 1999, the company issued detailed guidelines called "Principles of Ethical Conduct for Newsrooms" ("Principles") to seventy-three newspapers with more than five million subscribers.[10] The Principles pledge that Gannett newspapers will seek to report the truth in a candid manner, serve the public interest, exercise fair play, maintain their independence and act with integrity.[11]

Gannett's corporation-wide written standards represent a significant departure for the company and potentially for the media as a whole. Many journalists contend that written ethics codes are both impractical and dangerous.[12] There is a concern that such codes have an undue influence on juries hearing complaints against the press and that these codes could be transformed into legally enforceable standards of conduct.[13] Critics of written codes worry that such documents could undermine a First Amendment jurisprudence that has given the media virtually untrammeled freedom to print what they please about public officials and public figures with little regard to ethics, fairness or sound journalistic practices.[14]

In truth, however, efforts at self-regulation such as Gannett's Principles may be the only way to avoid judicial interference with the media's day-to-day operations. Ethical and legal standards are not identical, but the media must pay more attention to ethics and fairness because that is what the public and courts increasingly de-

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do and what judges do and what legislatures do" and wonders whether "given the current national mood about the press, we can expect the courts to be sympathetic to protecting First Amendment rights." *Id.*

9 *See* David Noack, *Gannett pushes ethics,* EDITOR & PUBLISHER MAG., June 19, 1999, at 9.

10 *Gannett Newspaper Division Issues Guidelines on Ethical Newsgathering Conduct for Newsrooms* (Oct. 2, 1999) *available at* http://www.gannett.com/go/press/pr061499.htm [hereinafter Principles].

11 *See id.*

12 *See, e.g.,* Alex S. Jones, *Facing Ethical Challenges: The Integrity/Judgment Grid,* COLUM. JOURNALISM REV., Nov. 1 1999, at 63. ("There are good reasons to avoid ethics rules and regulations. First, no rule has ever been made that shouldn't also be broken in a particular situation. Second, we fear being hoist on our own ethical petard in a lawsuit. And third, news organizations are very different from each other, and they operate from an idiosyncratic variety of moral platforms.").

13 *See* Lynn Wickham Hartman, *Contemporary Studies Project: Standards Governing the News: Their Use, Character and Their Legal Implications,* 72 IOWA L. REV. 637, 643-44 (1987).

14 *See, e.g.,* William P. Marshall and Susan Gilles, *The Supreme Court, The First Amendment and Bad Journalism,* 1994 SUP. CT. REV. 169 (arguing that Supreme Court decisions setting the legal framework for journalistic practices have encouraged a superficial brand of journalism that focuses on celebrities rather than important public issues).

mand.[15] The price of continued press freedom and independence is a greater responsibility.

This Note will discuss the potential impact of the Gannett Principles, which could foster a convergence of legal and ethical norms in journalism. Part I will summarize the development of voluntary national codes of media responsibility and their use in the courtroom. It will then establish that Gannett's Principles represent a more detailed and specific approach to newsroom conduct—a code of "practices" as well as "ethics." Part II will discuss the possible use of the Principles, both for and against Gannett, in traditional defamation actions. Part III will consider their relevance to increasingly popular legal actions that focus not on the truth of news media reports but on how the information is gathered. The conclusion will summarize the argument that Gannett's Principles are a useful, indeed inevitable, response to legal realities.

I. BACKGROUND: CODES OF MEDIA CONDUCT

The Preamble of the American Bar Association's Model Rules of Professional Conduct argues that the legal professional can avoid government regulation by meeting the ethical obligations of his calling.[16] However, the legal profession's relative autonomy carries with it special responsibilities of self-government.[17] According to the rules, "neglect of these responsibilities can compromise the independence of the profession and the public interest which it serves."[18]

This high-minded commitment to the public interest, coupled with a pragmatic desire to avoid government meddling, has prompted the development in many areas of written codes of "professional responsibility." In addition to the codes for lawyers and judges, professional organizations have devised standards for doctors, chiropractors, counselors and other mental health professionals, realtors, direct marketers, public relations spokesmen, bankers,

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[15] *See* e-mail message from Steve Geimann, former Ethics Committee Chairman, Society of Professional Journalists, to Jeff Storey (Nov. 13, 1999) (on file with author).

> Ethics has become the overriding issue for every newspaper reporter and editor today. What's happened in the profession in the last three years has forced us to pay more attention to the discussion of ethics and ethical decisions. We didn't use to do this, preferring to let our work "speak for itself." I think the attention is overdue and we have to keep focused on what's right, fair and proper.

Id.

[16] *See* RENA A. GORLIN, CODES OF PROFESSIONAL RESPONSIBILITY 626 (4th ed. 1999).

[17] *See id.*

[18] *Id.*

financial planners, architects, engineers, human resource managers and software designers.[19]

Some journalists have also felt the need to upgrade their status.[20] As is the case with other professions, the news media's independence has been justified by the press's role in upholding the public good. A "social responsibility" theory was articulated in the influential 1947 report of the Commission on the Freedom of the Press, which argued that freedom of the press "can only continue as an accountable freedom" and that its "legal right will stand unaltered as moral duty is performed."[21]

The first media ethical standards were written in the early twentieth century in response to revulsion against the "stunt journalism" and "muckraking" of reporters who slanted the news and frequently misrepresented themselves to get stories.[22] The call for "ethics" and "fairness" has waxed and waned with the press's credibility within the general public.[23] Recent court decisions and surveys expressing public distaste with press tactics have intensified

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[19] *See id.* At least some of these codes seek to distinguish between legal and ethical duties. For example, the ethical code of the American Medical Association declares, "ethical values and legal principles are usually closely related, but ethical obligations typically exceed legal duties." *Id.* at 344. According to the American Bar Association standards, failure to comply with a Rule may, depending on the circumstances, be a basis for discipline but "should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached." *Id.* at 627. However, most courts allow experts to consider rules of ethics in determining whether a duty of care has been violated. *See* NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 34 (1996); Allen v. Lefkoff, Duncan, Grimes & Dernier, P.C., 453 S.E.2d 719, 722 (Ga. 1995) (holding that a bar rule, while not determinative of the standard of care applicable in a legal malpractice action, may be a circumstance that can be considered along with other facts and circumstances); Ann Peters, *The Model Rules as a Guide for Legal Malpractice*, 6 GEO. J. LEGAL ETHICS 609 (1993) (advocating an expanded use of the rules in malpractice actions).

[20] *See* David A. Logan, *"Stunt Journalism," Professional Norms, and Public Mistrust of the Media*, 9 U. FLA. J.L. & PUB. POL'Y 151, 157 (1998) ("There has been some controversy about whether journalism fits the criteria for definition of a profession, usually defined as (1) substantial formal training; (2) the provision of services, the quality of which a client cannot adequately evaluate; (3) sublimation of self-interest to the public good; and (4) self-regulation, that is, the group is organized to assure the public that its members are competent, do not violate trust, and transcend self-interest.").

[21] Robert E. Dreschel, *Media Malpractice: The Legal Risks of Voluntary Social Responsibility in Mass Communications*, 27 DUQ. L. REV. 237 (1989) *quoting* COMMISSION ON FREEDOM OF THE PRESS: A FREE AND RESPONSIBLE PRESS 18 (1947).

[22] *See* Logan, *supra* note 20, at 152-53.

[23] Several recent polls have explored the press's credibility problems. *See, e.g., Recent journalistic lapses little noted by most Americans, but skepticism about media ethics runs high* (Jan. 16, 1999) *available at* http://www.freedomforum.org/newsstand/1998/10/16ethics.asp (noting that eighty-eight percent of respondents to a Freedom Forum survey believe that reporters "often" or "sometimes" use "unethical or illegal tactics to investigate a story."); *Big Doubts About News Media's Values* (Oct. 9, 1999) *available at* http://www.people-press.org/feb99mor.htm (stating that the number of Americans in a Pew Research Center survey who describe the news media as immoral jumped from thirteen to thirty-eight percent in 1985; also, two-thirds of respondents said the press displays a disregard for the people it covers and two-thirds said it tried to cover up its mistakes).

the discussion of media ethics.[24]

However, while some journalists have called for explicit ethical standards among the news media, many, if not most, working journalists take an "anything goes" approach to newsgathering, preferring to rely on the training, experience, and ethics of individual journalists.[25] They have resisted even self-regulation by the profession, arguing that the limited legal restrictions allowed by the First Amendment represented the only appropriate form of media oversight.[26]

A. *"Glittering generalities," Vague Standards*

Several national organizations representing journalists have developed written ethics codes.[27] One expert in press ethics has said that such voluntary codes are full of "glittering generalities."[28] These codes contain self-evident statements such as those trumpeting the value of a "free press" in a democracy. Their treatment of newsroom conduct is often vague and general. Journalists are expected to be "fair" and to maintain their independence, but there is relatively little to guide them in specific situations such as whether the use of deception in newsgathering is ever appropriate or when unnamed sources should be quoted.[29] Finally, unlike the codes for doctors and lawyers, journalistic codes have no enforcement mechanism. The First Amendment rules out government licensing or other forms of legal enforcement, but none of the codes incorporates even informal mechanisms for censure by fellow professionals.[30] Attempts to add specific enforcement provisions have been rejected.[31]

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24 *See Big Doubts About News Media's Values, supra* note 23.

25 *See* Everette E. Dennis, *Internal Examination: Self-Regulation and the American Media,* 13 CARDOZO ARTS & ENT. L.J. 697, 698 (1995).

26 *See id.* at 703.

27 A selection of ethics codes for national journalism organizations and individual publications can be found on the website of the American Society of Newspaper Editors. *See* American Society of Newspaper Editors, *at* http://www.asne.org (last visited Nov. 13, 1999) [hereinafter ASNE].

28 *See* PHILIP MEYER, ETHICAL JOURNALISM 18 (1987).

29 However, codes do urge the media to keep promises of confidentiality made to sources. As will be seen below, the Supreme Court has held that the press can be punished for breaching such promises in certain circumstances. *See* Cohen v. Cowles Media, 501 U.S. 663 (1991).

30 Many journalists also balked at the activities of the so-called National News Council, a foundation-supported organization that monitored media performance and reviewed complaints of press behavior from 1973 through 1984. *See* Dennis, *supra* note 25. Many journalists feared that the council's advisory decisions would create a "common law" of journalistic practices that could be used against the media in court. They were convinced that journalists should be left to solve their own problems. *See* Hartman, *supra* note 13, at 641.

31 *See* Dreschel, *supra* note 21, at 274-75.

The American Society of Newspaper Editors ("ASNE") adopted its first ethics code in 1922.[32] The revised 1977 version says that "every effort must be made to assure that the news content is accurate, free from bias and in context, and that all sides are presented fairly."[33] ASNE has opposed efforts to write an international code of ethics for journalists.[34] It believes that newspapers should have high standards, but is convinced that agreements on standards, even voluntary ones, are dangerous for press freedom.[35] "Judges and lawyers have used ethical guidelines, council statements and various agreements as evidence and the basis for court decisions against the press. What is intended as voluntary becomes coercive."[36]

The 1987 Code of Ethics of the Radio and Television News Directors Association eschews "sensationalism or misleading emphasis in any form."[37] The code exhorts members to report the news in a "balanced, accurate and fair" manner but to respect the "dignity, privacy and well-being of people with whom they deal."[38] However, the code has nothing to say about the use of hidden cameras and other technical devices that have sparked a rash of legal challenges about the invasion of privacy and the infliction of emotional distress.[39]

According to the code of ethics of the Associated Press Managing Editors ("APME"), "the good newspaper is fair, accurate, honest, responsible, independent and decent."[40] Newspapers "should guard against inaccuracies, carelessness, bias or distortion through emphasis, omission or technological manipulation."[41] However, the code says little about how those goals are to be achieved amid the often chaotic day-to-day realities of journalism.[42]

APME last revised its one-page code of ethics in 1995, after members in a bitter two-year debate rejected a much longer, more

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32 *See* ASNE, *supra* note 27.

33 *Id.*

34 *See* GORLIN, *supra* note 16, at 193.

35 *See id.*

36 *Id.*

37 *RTNDA Code of Ethics* (Jan. 1, 2000) *available at* http://www.rtnda.org/rtnda/ethics.htm.

38 *Id.*

39 *See, e.g.*, Wolfson v. Lewis, 924 F. Supp. 1413, 1417 (E.D. Pa. 1996) ("The issue posed by this case is, therefore, the extent to which the First Amendment protects newsgathering by T. V. journalists using modern techniques."). *See also* discussion of *Food Lion v. ABC, infra* Part IV.

40 *Associated Press Managing Editors Code of Ethics, Revised and Adopted 1995* (Nov. 13, 1999) *available at* http://www.asne.org/ideas/codes/apme.htm.

41 *Id.*

42 *See id.*

detailed version.[43] The proposed standards would have restricted deceptive newsgathering, called for the "systematic verification of facts and quotations and corroboration of critical information," and supported the "earliest opportunity to reply" by subjects of stories whose reputations might be damaged.[44] Associated Press's general counsel objected that the proposed code would give the media's critics "a hook" to use in lawsuits, and many editors said that the detailed practices were unworkable and did not account for the differences among newspapers and the situations each faced.[45]

The Society of Professional Journalists ("SPJ") also updated its code of ethics in 1996 but rejected a more detailed revision that would have provided an informal enforcement mechanism.[46] The current code is both more sweeping than counterparts in its description of journalistic values—stories should be told "boldly, even when it is unpopular to do so"—and more forthcoming in its practical advice.[47] For example, it states that sources should be identified whenever possible, and that journalists should always question a source's motive before granting anonymity.[48] The code recognizes that only an "overriding public need can justify intrusion into anyone's privacy."[49] The "ethical journalist" does not pander to "lurid curiosity."[50] Still, terms like "overriding public need" go undefined, and the code does not address in any detail the concept of deception and other controversial newsgathering techniques.[51]

In addition to the codes crafted by professional organizations, many individual newspapers and broadcast outlets have generated their own codes.[52] These codes are enforceable only within the organizations that develop them.[53] Many editors contend that such standards improve both newspaper quality and credibility

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43 *See id.*

44 Mark Fitzgerald, *Excerpts from proposed code,* EDITOR & PUBLISHER MAG., Oct. 9, 1993, at 10.

45 *See* Mark Fitzgerald, *A Debate About Ethics Code,* EDITOR & PUBLISHER MAG., Oct. 9, 1993, at 9.

46 *See* Debra Gersh Hernandez and Bill Schmitt, *SPJ Approves Ethics Code,* EDITOR & PUBLISHER MAG., Oct. 19, 1996, at 22.

47 SPJ *Code of Ethics* (Nov. 14, 1999) *available at* http://spj.org/ethics/code.htm.

48 *See id.*

49 *Id.*

50 *Id.*

51 *See id.*

52 *See* Hartman, *supra* note 13, at 645 (reporting a 1985 survey of 188 daily newspapers in which fifty-eight percent of responding newspapers said they employed some form of written standards).

53 *See id.*

with readers.[54] Here again, however, many journalists have followed the advice of their lawyers and their own inclinations by making their written practices as flexible as possible. Many codes are specific in some areas. They often restrict outside work and forbid accepting gifts from news sources; they sometimes spell out procedures in areas like the publication of wedding and obituary notices.[55] But they are vague about how values like "accuracy" and "fairness" are to be promoted.[56] According to the *Los Angeles Times* Code of Ethics, "in every case, we should strive to achieve balance and fairness in all reporting and news decisions."[57] In contrast, the more detailed *Washington Post* statement does include "a few simple practices" that promote fairness.[58] Some news organizations are rewriting their codes in response to recent ethical dilemmas.[59] Others still prefer the flexibility of standards that are not "written in stone."[60]

B. *Codes of Ethical Conduct in the Courts*

There is little in the codes of conduct written by national journalism organizations that can hurt the press in court. It has been argued that the voluntary codes of national journalism organizations can be used by expert witnesses to discuss standards of care in defamation actions.[61] However, most industry codes are much too vague for that purpose.[62]

For example, journalistic codes of conduct are susceptible to different interpretations by both expert witnesses and reader/jurors. They represent aspirations rather than legal rules.[63] By and

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54 *See id.* at 649.

55 *See* ASNE, *supra* note 27.

56 *See id.*

57 *Id.*

58 *Id.* "While arguments about objectivity are endless, the concept of fairness is something that editors and reporters can easily understand and pursue." *Id.* The *Post* requires that stories should not omit facts of major importance or significance; that irrelevant information should not crowd out important information; that "subtly pejorative" words be avoided; and that the newspaper must be honest with the reader. *Id.*

59 *See* Campbell, *supra* note 4.

60 Tony Case, *Controversy follows Michael Gartner,* EDITOR & PUBLISHER MAG., Mar. 11, 1995, at 12.

61 *See* Jonathan W. Lubell & Mary K. Melveny, *The Expert Witness in Libel Trials,* 227 PLI/PAT 257, 275 (1986).

62 Evidence of journalistic practices at individual publications, whether written or not, has been used in attempts to prove actual malice and/or negligence in defamation actions. *See* discussion *infra* Part II.

63 Bruce W. Sanford, a well-known media attorney, writes that in twenty years of practice, he has "never actually seen (or heard of) a libel case where the plaintiff's lawyer scored points by arguing that a journalist should lose a libel lawsuit because he or she breached a professional code of ethics." Sanford says that journalism codes are not "fact-specific." They are useful in sorting out values but should shun hard-and-fast rules. Bruce

large, they provide few professional standards against which the courts could test independently created legal principles that have their source in the First Amendment.

Journalistic practices frequently are attacked in defamation suits, and while ethics has been a topic of debate among journalists for at least a century, the intra-professional dialogue of which the written codes are one product has not provided much material for appellate court review.

Thus the court in *Kendrick v. Fox Television*[64] rebuffed an attempt by a plaintiff to use journalistic codes as evidence in a landlord's defamation suit stemming from television news reports about a drug raid on a building he owned. The plaintiff cited statements by the American Society of Newspapers and the American Society of Newspaper Editors providing that: content should be accurate and free from bias; all sides of a story should be presented fairly; a newspaper should not publish unofficial charges impugning someone's reputation or moral character without giving the accused an opportunity to be heard; and errors of fact and omission should be corrected promptly and prominently.[65]

The court ruled that the plaintiff had not shown that the cited standards were customarily followed by journalists.[66] In this regard, the court noted that the plaintiff had conceded that none of the media defendants had "developed or applied any written or operational rules or guidelines."[67]

Written journalistic standards played, at most, an indirect role in the case of a psychoanalyst who claimed that quotations attributed to him had been fabricated by an interviewer in a manner that damaged his reputation.[68] The Supreme Court, in *Masson v.*

W. Sanford, *Codes and law: Do ethics codes hurt journalists in court?* THE QUILL, Nov. 4, 1994, at 43. Another media lawyer, Neil Shapiro, makes a similar distinction between ethical codes and "standards" of journalism, which are "a whole lot more dangerous" in court. In Shapiro's view, standards represent a quest for perfection that cannot be achieved. For example, a newspaper practice might require that assertions by anonymous sources be corroborated by at least one other source. But newspapers frequently use information from single sources if they regard the source as especially credible. Interview with Neil Shapiro, Attorney, in New York, NY (Jan. 21, 2000).

64 659 A.2d 814 (D.C. Ct. App. 1995).

65 *See id.* at 823 n. 20-21.

66 *See id.* at 823.

67 *Id.* at 823 n.22; *see also* State v. Krueger, 975 P.2d 489, 498 (Utah Ct. App. 1999) (using SPJ code as evidence against a television station's encouragement of children to chew tobacco so they could be filmed). *But see* Khawar v. Globe, 54 Cal. Rptr. 2d 92, 107 (Cal. Ct. App. 1996), *aff'd* 19 Cal. 4th 254 (Cal. 1998) (citing testimony by experts that tabloid's conduct fell below "acceptable standards of care" for journalists as reflected in the code of the Society of Professional Journalists and the principles of the American Society of Newspaper Editors defining accuracy and fair play).

68 *See* Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991).

New Yorker Magazine,[69] held that the alteration of quotations could be considered evidence of "actual malice" that would support a defamation action against a public plaintiff if these quotes represented a "material change" from his true sentiments.[70] In doing so, the Court adopted the position of Court of Appeals Judge Kosinski who had dissented from a Ninth Circuit decision affirming a grant of summary judgment to the *New Yorker*.[71] Kosinski's dissent included an extensive discussion of journalistic practices, as embodied in ASNE's principles and commentary by journalism ethics experts.[72] He concluded:

> The standards and aspirations of the profession are not, of course, dispositive of the legal question before us. But our ruling rests on constitutional grounds; it limits the operation of state libel law in order to preserve the higher values protected by the [F]irst [A]mendment. Unlike my colleagues, I am unable to construe the [F]irst [A]mendment as granting journalists a privilege to engage in practices they themselves frown upon, practices one of our defendants has flatly disowned as journalistic heresy.[73]

However, the Supreme Court, in applying its actual malice standard, did not cite any evidence of journalistic standards, but instead fell back on more subjective benchmarks in its weighing of malice.[74] At least where public figures are concerned, the ethics or fairness of press conduct has played a relatively minor role in First Amendment jurisprudence.[75] However, the role of ethical codes may become more important in cases to the extent the codes define detailed and enforceable *practices* rather than vague aspirations. Gannett's Principles fit that description.

C. *Gannett's Standards Compared to Previous Ethical Codes*

In their commitment to "common decency" and "fairness," the Gannett Principles are similar to voluntary guidelines for journalistic conduct.[76] However, the company has also incorporated more specific and detailed recommendations for "protecting" the Principles.[77] These cover issues such as the preparation and edit-

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69 *Id.*
70 *Id. at* 517-18.
71 *See* 895 F.2d 1535, 1558-62 (9th Cir. 1989) (Kosinski, J., dissenting).
72 *See id.*
73 *Id.* at 1562 (citations omitted).
74 *See Masson*, 501 U.S. at 510-11.
75 *See* discussion *infra* Part II.
76 *See* Principles, *supra* note 10.
77 *See id.*

ing of investigative reports, deception by reporters, use of unnamed sources and the correction of errors.[78] The guidelines also suggest that editors, when faced with complicated issues and conflicting values, seek the advice of "dispassionate outside parties" such as experts, lawyers and ethicists.[79] Finally, Gannett pledges to share information about the Principles and newsroom decision-making with the public, inviting greater scrutiny from readers, an increasing number of whom regard the press as immoral.[80]

Granted, the newsroom practices are not "set in stone." The document insists that "careful judgment and common sense should be applied to make the decisions that best serve the public interest and result in the greatest good."[81] But the Principles do channel the freedom of action of editors and reporters in ways that represent a real departure from other codes and are more demanding than the legal standards that frame press conduct.[82] Gannett pledges that its newspapers will be "vigilant watchdogs of government and institutions that affect the public."[83] But it adds that its journalists will not violate the law and promises that they will not lie to get a story or fabricate or slant the news.[84] The Principles provide detailed guidelines for the use of unnamed sources, which, in any case, will be "rare."[85] They sketch minimal standards for gathering and presenting the news as well as promise "skeptical" editing and a "good faith" effort to ensure that news subjects can tell their side of the story.[86]

Contrary to the policy in many newsrooms, these detailed guidelines were written down so that Gannett journalists "know what the Division stands for and what is expected of them."[87] Staff members will be trained in the standards, which will be a condition of their employment, and will be required at the time of hiring and each year thereafter to sign a statement saying they have read the Principles and will consult their editors about ethical issues.[88]

Gannett is gambling that adherence to the written guidelines will make its stories more believable and less susceptible to legal challenge. It concedes that such standards are controversial

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78 *See id.*
79 *Id.*
80 *See id.*
81 *Id.*
82 *See id.*
83 *Id.*
84 *See id.*
85 *Id.*
86 *Id.*
87 *Id.*
88 *See id.*

among journalists but insists that they cannot be avoided in the current legal climate.[89] Written standards may not deter a reporter who is willing to break the law and lie to his editors, but, at least, they can "make sure the scrutiny of stories is there."[90]

But the skeptics insist that such standards confuse legal doctrine and moral precepts. Far from fending off judicial interference and government regulation, protestations of the press's "social responsibility" only encourage outside oversight that could erode First Amendment protections.[91] If these critics of written newsroom standards are correct, words like "good faith" and pledges that "we will keep our word" are invitations to legal challenges.

II. JOURNALISTIC STANDARDS IN DEFAMATION ACTIONS

The First Amendment to the Constitution gives the press wide leeway to purvey news or entertainment. That leeway is granted to entertainers, sensationalistic tabloids and serious journals of thought alike.[92] However, the media can be penalized for certain kinds of misconduct. This section examines press liability for the defamation of public and private figures. Part III will examine the use against the press by ever-more-creative plaintiff lawyers of non-reputation torts related to newsgathering.

A. *Public Officials and Public Figures*

1. Breathing Space for the Press

To date, the Supreme Court has been willing to make allowances for the press. The Court's defamation jurisprudence regards errors as inevitable; to require a publication to guarantee truth would be to encourage self-censorship. Therefore, the Court has granted newspapers, radio and television stations considerable "breathing space" to perform a function that is regarded as essential to a free society.[93]

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89 *See* discussion *infra* note 173.

90 Noack, *supra* note 9 (quoting Gannett Senior Vice President/News Phil Currie).

91 *See* Dreschel, *supra* note 21.

92 *See, e.g.*, Desnick v. ABC, 44 F.3d 1345, 1355 (7th Cir. 1995).

> Today's "tabloid" style investigative television reportage, conducted by networks desperate for viewers in an increasingly competitive television market constitutes – although it is often shrill, one-sided, and offensive, and sometimes defamatory – an important part of that market [in ideas and opinions]. It is entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation.

Id. (citations omitted).

93 N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963).

In *New York Times v. Sullivan*,[94] a case that involved a newspaper that had failed to follow its own standards, the Court established the principle that the press could not be found liable for false and defamatory stories in the absence of fault.[95] It set a very high threshold for applying that standard to public officials (later extended to all public figures): "actual malice," which has to be proved by the "convincing clarity" of the evidence rather than the "preponderance" required in most civil actions.[96] To find a newspaper or television station liable for the defamation of public figures, a plaintiff must demonstrate that false reputation-damaging material was published with knowledge that it is false or with "reckless disregard of whether it is false or not."[97]

In his plurality opinion in *Curtis Publishing Co. v. Butts*,[98] which extended the principles of *Sullivan* from public officials to all public figures, Justice Harlan suggested that to show malice a public figure need only make "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[99] This objective standard, if maintained, would have made journalistic practices, whether written or informal, strong evidence in public figure defamation cases. However, the Court has consistently held that actual malice is determined by a subjective standard: what did the publisher know and when did he know it?[100] In most circumstances, it is not dispositive of actual malice that a newspaper or broadcaster has acted carelessly, unfairly or even irresponsibly as long as he had no reason to believe that a news story is false.[101] "Even an extreme departure from accepted professional standards of journalism [would] not suffice to establish actual malice; nor will any other departure from reasonably prudent conduct, including the failure to investigate before publishing."[102]

A public figure plaintiff who cannot show awareness of falsity must base his case on "reckless disregard." That requires him to prove by circumstantial evidence that the defendant "entertained serious doubts as to the news of his publication."[103] The Court

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94 376 U.S. 254 (1964).
95 *See id.* at 279-80.
96 *Id.* at 285-86.
97 *Id.* at 279-80.
98 388 U.S. 130 (1967).
99 *Id.* at 155.
100 *See* Lackland H. Bloom, Jr. *Proof of Fault in Media Defamation Litigation,* 38 VAND. L. R. 247, 249-50 (1985).
101 *See id.* at 304.
102 Newton v. NBC, 930 F.2d 662, 669 (9th Cir. 1990).
103 St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

conceded "[i]t may be said that such a test puts a premium on ignorance, encourages the responsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity."[104] However, the Court concluded that the importance of First Amendment values justified a rule that would permit recovery of damages in fewer circumstances than would a "reasonable man" or "prudent publisher" standard.[105]

Where public officials and other public figures are concerned, there is no legal requirement that the press follow professional journalistic norms—or act "ethically"—by carefully checking potentially damaging material before it is published or making sure that a controversial report is balanced and fair. Thus, the court ruled in *Westmoreland v. CBS*[106] that evidence about a violation of internal network procedures was not relevant to the general's libel action against the network.[107] Furthermore:

> [t]he fairness of the broadcast is not at issue in the libel suit. Publishers and reporters do not commit a libel against a public figure by publishing unfair one-sided attacks. A publisher who honestly believes in the truth of his accusations (and can point to a non-reckless basis for his beliefs) is under no obligation under the libel law to treat the subject of his accusations fairly or evenhandedly.[108]

Even the most general media codes hold that a publisher is under an *ethical* obligation to act fairly.[109]

2. Gannett Standards and the Proof of "Actual Malice"

While evidence of unprofessional conduct, taken alone, usually is not enough to support legal liability in public figure cases, it can be relevant to the actual malice inquiry. Information about how a media defendant approaches its job, journalistic practices, whether extracted at discovery or found in written ethics policies, can be used to show a defendant's state of mind, which is necessary to show recklessness.[110] A plaintiff who fails to follow an in-house code, like Gannett's, that requires "skeptical" editing practices might be faulted for publishing inherently implausible allegations.

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104 *Id.*
105 *Id.*
106 601 F. Supp. 66 (S.D.N.Y. 1984).
107 *See id.* at 69.
108 *Id.* at 68.
109 *See* ASNE *supra* note 27.
110 *See* Herbert v. Lando, 441 U.S. 153 (1979).

Many findings of actual malice involve several such evidentiary factors.[111] This suggests that a violation of the Gannett Principles, by itself, probably would not significantly increase a company's vulnerability to a finding of liability in a case brought by a public figure. In fact, following the Principles would reduce the evidentiary factors that can give rise to an inference of malice.

As noted above, ethical codes of national journalism organizations are rarely cited in appellate court decisions because their vagueness makes them poor evidence of journalistic standards.[112] Nevertheless, evidence about journalistic practices and procedures is frequently used by plaintiffs' attorneys in defamation suits.[113] One commentator finds this tactic "puzzling:"

> It is usually employed by the plaintiff in an attempt to establish that the behavior of the defendant is without accepted journalistic practice, evidence that points toward "actual malice." Defendant's witness seeks to counter that testimony. Yet whether the defendant departed from accepted journalistic practices is a standard of liability that has been explicitly rejected by the Supreme Court, and such a departure is relevant only indirectly as evidentiary support for the ultimate conclusion as to whether the defendant believed what he or she said.[114]

Puzzling or not, plaintiffs will not hesitate to use the Gannett Principles in future public figure defamation cases.[115] The fact that the standards are in writing and are so detailed enhances their value as legal ammunition.[116]

Gannett's attempts to enforce the Principles as proof of a good-faith commitment to fair dealing, however, is evidence that should help defend against allegations of actual malice. The value placed on "editing skeptically" could be a useful antidote to claims of actual malice.[117] Editors are advised to "guard against assumptions and preconceived notions—including their own."[118] In addi-

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111 *See generally* Bloom, *supra* note 100 (discussing lead time, seriousness of the charge, inherent improbability, awareness of inconsistent information, no source, obvious reason to doubt source, failure to consult an expert, no further verification following denial, reliance on inherently ambiguous source, and other factors in determining questions of actual malice).

112 *See* discussion *supra* Part I.B.

113 *See* ROBERT SACK, SACK ON DEFAMATION, LIBEL AND RELATED PROBLEMS § 5.5.2.4 (3d ed. 1999).

114 *Id.*

115 *See* Geimann, *supra* note 15 (noting that lawyers are using codes as a "battering ram" in court cases and some "lawyer friends" feel that the Principles will be used against Gannett in court).

116 *See id.*

117 Principles, *supra* note 10.

118 *Id.*

tion, they are urged to "challenge conventional wisdom" and to "consider what may be missing from a story."[119] Moreover, they are instructed to "heed their 'gut instinct.' Don't publish a story if it doesn't feel right. Check it further."[120] It is hard to believe that editors who took this approach could be found liable for recklessly printing stories of doubtful truth.

The company still could be held liable for the actions of rogue reporters, but the existence of the Principles, at least, may help insulate the corporation from huge punitive damage awards.[121] Gannett's position would be strengthened by the fact that its Principles exceed minimum legal standards and the practices of other newspapers.[122] Finally, in the long run, the Principles may help weed out journalistic "bad apples" and produce more believable, more defensible journalism.

The further consideration of the *Masson* case, however, points out one potential pitfall to use of the Principles. In *Masson*, the Ninth Circuit Court of Appeals, on remand, rejected a request for summary judgment from the *New Yorker* magazine.[123] The court pointed out that one of the magazine's fact checkers had been told by the plaintiff that he had been misquoted.[124] This created a material issue of fact about whether the magazine had reason to doubt the quotations.[125] Legally, a publisher is not required to initiate an investigation of the facts in articles or books submitted to it, even when a reasonably prudent man would do so.[126] Once doubt is raised about the facts, however, the publisher must "act reasonably in dispelling [it]."[127] A "purposeful avoidance of the truth" may be evidence of malice.[128]

The Ninth Circuit in *Masson* conceded that this principle placed the *New Yorker*, with its rigorous article-vetting procedures, at a disadvantage *vis a vis* newspapers and supermarket tabloids which cannot or will not engage in thorough fact checking.[129] The Court said that the discrepancy was appropriate because readers do

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119 *Id.*

120 *Id.*

121 *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 70 , at 501-03 (5th ed. 1984) (finding employers liable for actions of "servants").

122 *See* Principles, *supra* note 10.

123 *See* Masson v. New Yorker Magazine, Inc., 960 F.2d 896 (9th Cir. 1992).

124 *See id.* at 900.

125 *See id.*

126 *See id.* at 901.

127 *Id.* at 900.

128 Harte-Hanks Communication v. Connaughton, 491 U.S. 657, 692 (1989).

129 *See Masson*, 960 F.2d at 901-02 n.5.

not expect the same level of care from tabloids and newspapers.[130]

Gannett should remember the experience of the *New Yorker*, which was penalized for failure to follow its careful journalistic practices. Now, Gannett also has detailed fact-checking procedures, introduced with considerable fanfare. Failure to follow these Principles could likewise be used as evidence of a "purposeful avoidance of the truth," i.e., of actual malice.

B. *Private Figures*

1. Setting the Standard of Care

A decade after its seminal ruling in *Sullivan*, the Supreme Court finally made clear that private figures confronted by journalistic scrutiny were entitled to more protection than people who thrust themselves into the public eye.[131] The Court did not retreat from the bedrock principle of earlier rulings. Liability for defamation of private figures cannot be imposed without fault.[132] But a lower level of fault can be required by the states than the actual malice standard for public figures;[133] most jurisdictions have opted for a negligence standard that requires journalists to exercise reasonable or "due" care in the circumstances of reporting and writing about private figures.[134] The existence and content of journalistic standards—written or informal—is quite relevant to the determination of whether reporters and/or editors have acted negligently.[135] Under this objective standard, the courts focus not on the state of mind of the individual journalist but on the actions he or she *should* have taken to avoid an unreasonable risk of harm.[136]

How then is a reasonable level of care to be established for the professional journalist? In evaluating negligence claims in the area of defamation, many states require journalists to exercise the reasonable care required of an ordinary citizen rather than that of the professional journalist.[137] In these jurisdictions, the jury "may rely on its own experience and instincts to determine whether an ordinarily prudent person would have behaved as the defendant [jour-

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130 *See id.*
131 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).
132 *See id.* at 347.
133 *See id.* at 348.
134 *See* Bloom, *supra* note 100, at 335.
135 *See id.* at 345.
136 *See id.*
137 *See* SACK, *supra* note 113, at § 6.2.2 (listing Tennessee, Washington, Illinois, Kentucky, Ohio, and Oregon as maintaining a reasonable person standard, while Arizona, Delaware, Georgia, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Kansas, Oklahoma and Utah apply a professional standard).

nalist] did."[138]

This is contrary to the approach used not only for learned professions such as medicine, law, engineering and accounting, but also for members of callings who possess less esoteric but still specialized knowledge such as travel agents, milk haulers, hockey coaches and expert skiers.[139] Courts have held that the ordinary citizen is in no position, without expert help, to judge what behavior is reasonable in such skilled trades. Thus, professionals are permitted to set the standard of care applicable to their profession.[140]

Many courts, perhaps distrustful of journalists, have been reluctant to grant them the same privilege. There is concern that a journalistic malpractice standard would allow a single newspaper in a community to determine how its conduct is to be judged.[141] This "might tend, in 'Gresham's law' fashion, toward a progressive depreciation of the standard of care."[142] At any rate, judging the conduct of journalists is well within the competence of ordinary citizens. "Due care in gathering information is not [a] technical matter for which a jury unaided by experts would have no basis for decision."[143]

In contrast, other states have adopted the professional standard of the Restatement of Torts: "The defendant, if a professional disseminator of news, such as a newspaper, a magazine or a broadcasting station, or an employee, such as a reporter, is held to the skill and experience normally possessed by members of that profession."[144] As is true with law or medicine, customs within the profession are relevant, but not controlling, in applying the negligence standard to defamation actions brought by private plaintiffs.[145] This means that the standard of care, "to a substantial degree, [is] set by the profession itself."[146]

This is a reasonable and appropriate position.[147] A lay juror may be equipped to detect obvious instances of carelessness by a reporter, just as a lay juror can determine, without expert help, that malpractice is committed where a surgeon's tools are left in-

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138 Memphis Publ'g Co. v. Nichols, 569 S.W.2d 412, 418 (Tenn. 1978).

139 *See* KEETON, *supra* note 121, § 32, at 185-86.

140 *See id.*

141 *See, e.g.*, Troman v. Wood, 340 N.E.2d 292 (Ill. 1975).

142 *Id.* at 299.

143 Schrottman v. Barnicle, 437 N.E.2d 205, 215 (Mass. 1982).

144 RESTATEMENT (SECOND) OF TORTS § 580B cmt. g (1977).

145 *See id.*

146 *Id.*

147 *See* Todd F. Simon, *Libel as Malpractice: News Media Ethics and the Standard of Care*, 53 FORDHAM L. REV. 449 (1984) (discussing the journalistic malpractice standard).

side a patient after an operation.[148] However, journalism is an exacting profession with a sophisticated methodology of its own, as any reader of the Watergate saga *All the President's Men*[149] can testify. Reporters use interviewing skills, knowledge of government records, and—increasingly—computer databases to gather information.[150] It is as hard to imagine an unaided lay juror determining whether the steps taken by an investigative reporter were reasonable as it is to imagine an ordinary citizen evaluating a surgeon's approach to a heart transplant. Also, a lay juror would be ill-equipped to judge whether media actions were reasonable in the circumstances of a high-pressure "deadline-every-minute" environment.[151] There is a risk that the juror, lacking the criteria to evaluate journalistic practices, will fall back on the conclusion that a false report *must* be negligent, thus substituting strict liability for a constitutional determination of fault.[152] The use of such a standard, at a time when public opinion has turned against the press, threatens to chill worthwhile investigations as well as sensationalistic gossip.

2. Gannett's "Professional" Standard

Some advocates of the journalistic malpractice standard argue that provisions of the profession's voluntary ethics codes can be used as objective indicators of a national standard of care in journalism.[153] "Adherence to freely adopted standards should present an unusually strong libel defense."[154] In fact, however, the ethics codes of APME, SPJ, ASNE and the radio and television news directors are too vague to serve that purpose and may, indeed, contribute to judicial and public fears that journalists are not serious about ethics.[155] General appeals to the need for "accuracy" and

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148 *See* KEETON, *supra* note 121, § 32, at 189.

149 CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN (1974).

150 The Investigative Reporters and Editors ("IRE"), a professional organization that promotes investigative reporting, sponsors "boot camps" that train journalists in the techniques of computer-assisted reporting. Among the topics covered are the use of spreadsheet and database programs and how to find and negotiate for information. IRE and other organizations also provide training in the arcana of federal and state federal of information laws. *See* ASNE, *supra* note 27.

151 *See* Principles, *supra* note 10 (advising that Gannett editors should not be "stampeded by deadlines, unrealistic competitive concerns or peer pressure").

152 *See* Simon, *supra* note 147, at 459 ("The reasonable person approach thus allows juries to define duty as they please and to set journalistic standards that are quite likely to vary from those of journalists. It leaves the door open for the imposition of strict liability by jurors who think the press should never make mistakes.").

153 *See id.* at 472.

154 *Id.*

155 The public might well adopt a skeptical view of these journalism "ethics" codes similar to that of H.L. Mencken:

"fairness" cannot help a juror determine reasonableness in particular circumstances any more than they are very helpful to the journalist confronting real-world issues. Gannett's Principles are detailed and specific enough to provide a standard of ethical and legal care that both the public and the courts can take seriously. They provide a strong foundation for a standard of care incorporating reasonable procedures that should not chill legitimate reporting.

In fact, the Gannett Principles may well be used to establish standards of care for other news organizations as well as its own. It is significant that the standard of care for doctors, lawyers and other professionals in the Restatement is that "normally possessed by members of that profession or trade in good standing in similar communities."[156] For newspapers, at least, many of those "similar communities" are served by Gannett publications. The Principles are also consistent with the philosophy that private figures deserve more protection than their public counterpart, declaring, for example, that "we will give particular attention to fairness in relations with people unaccustomed to dealing with the press."[157]

Of course, the possibility that Gannett's Principles will be used as a legally enforceable standard of care is exactly what troubles critics of written ethics codes who insist that such standards compromise editorial independence. To these critics, regulation of the press, from inside or outside the profession, is contrary to the First Amendment.[158] It can be argued that many citizens regard this attitude as arrogant. In any case, professional standards are now being set by courts and jurors with little knowledge of journalism and increasing anger toward its practitioners.[159] If the press is to be held to ethical standards and practices, it is better that the media itself play a larger role in making the rules that control their

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> Journalism codes of ethics are all moonshine. Essentially, they are as absurd as would be codes of street-car conductors, barbers or public jobholders. If American journalism is to be purged of its present swinishness and brought up to a decent level of repute—and God knows that such an improvement is needed—it must be accomplished by the devices of morals, not by those of honor. That is to say, it must be accomplished by external forces, and through the medium of penalities exteriorly inflicted.

Pennekamp v. Florida, 328 U.S. 331, 365-66 (1944) (Frankfurter, J., concurring).

156 RESTATEMENT (SECOND) OF TORTS § 299A (1977).

157 Principles, *supra* note 10.

158 *See* Brian C. Murchison, et al., *Sullivan's Paradox: The Emergence of Judicial Standards of Journalism,* 73 N.C. L. REV. 7, 8 (1994) ("The paradox, then, is that while journalists oppose self regulation through detailed professional rules of behavior, they have been silent about regulation by the judiciary through libel decisions.").

159 *See id.* at 101.

conduct.[160]

It should also be recognized that simply because many media organizations have not written down their practices does not mean they do not have such practices.[161] These unwritten policies can be sought by plaintiffs through discovery, raising the question of how much more vulnerable writing down the standards would make the press.[162] Clearly, however, writing down the standards facilitates communication and attention to standards among the journalists themselves. Some journalists have responded to recent controversies by calling for a "culture of ethics" that is implemented through newsroom discussion rather than by written codes.[163] But putting ethical goals and practices in writing is an effective way of encouraging and focusing such a dialogue. Finally, it can be argued that juries may view the absence of written codes as evidence of slipshod journalism, from which they could infer negligence.[164] In fact, a 1985 survey found that the number of editors who believed written standards would make them more vulnerable to legal challenges was actually less than those who believed that such codes reduced their vulnerability.[165]

Gannett's Principles recommend an elaborate series of procedures for the conduct of investigative reporting like the *Cincinnati Enquirer's* botched probe of Chiqutia.[166] These procedures, which are not intended to be exclusive, include the involvement of more than one editor in the early stages of a project; a "fresh read" by an editor who has not seen the material as publication approaches; evaluation by "dispassionate outside parties"; guidelines for the use of unnamed sources, and continual questioning of a story's premise.[167] Such procedures increase the likelihood a story will be accurate, relevant and fair, but they also can provide a strong defense in a defamation action. "Just as superficial investigation or verification can give rise to an inference of negligence, thorough verification procedures can defeat such a conclusion."[168]

A jury may, indeed, look askance at any violations of such high-profile ethical standards, but a publication or broadcaster

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160 *See id.*
161 *See* Hartman, *supra* note 13, at 670.
162 *See id.*
163 *See* Campbell, *supra* note 4.
164 *See* Hartman, *supra* note 13, at 690.
165 *See id.* Thirty-five percent of the 182 respondents believed written codes reduced vulnerability, while twenty-six percent believed having such codes increased vulnerability. *See id.*
166 *See* Principles, *supra* note 10.
167 *Id.*
168 Bloom, *supra* note 100, at 370.

who has established a good faith commitment to ethics would be in a stronger position to argue that carefully thought-out departures from industry or company practices are reasonable and thus not negligent. Overall, "well-marshalled evidence that the defendant behaved like a reasonably prudent professional journalist . . .often would prove persuasive, especially at the appellate review stage."[169] Members of the news media may be forced to explain their actions more often and in greater detail, but such increased accountability can have a healthy impact on news quality by promoting caution in the use of questionable newsgathering techniques.[170] Finally, if the worst happens, a publisher can avoid hefty damages by showing that its employees are schooled in well-defined standards. Even if negligence is found in private figure cases, the Supreme Court has held that punitive damages cannot be imposed absent the much more difficult showing of actual malice.[171] The existence of standards would be powerful evidence against recklessness. It would be hard to demonstrate that a publisher who believed appropriate practices were being followed could have a subjective belief in the falsehood of newspaper articles or television broadcasts such as would trigger liability.

III. NEWSGATHERING PRACTICES UNDER ATTACK

A. *"Generally Applicable" Laws*

Plaintiffs' lawyers often have been frustrated in their attempts to win libel judgments from newspapers and broadcasters, no matter how careless.[172] However, the press now faces new threats from plaintiffs who attack, not the content of newspaper and broadcast reports, but the conduct of reporters in gathering the information.[173] Press critics and judges alike have assailed what many re-

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169 *Id.* at 344.

170 *See id.*

171 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).

172 *See* Lucia Moses, *Punitive damage awards on the rise in media libel cases,* EDITOR & PUBLISHER MAG., Feb. 14, 2000. The Libel Defense Resource Center recently reported that the number of libel trials fell from 261 in the 1980s to 177 in the 1990s. Media defendants won 39.1 % of their trials, up from the previous decade's 35.4 %. However, the number of $10-million-plus awards rose to eleven from only four in the 1980s. *See id.*

173 Phil Currie, Gannett Newspaper Division, Senior Vice President/News, and Larry Beaupre, News Executive, writing for an in-house magazine, told newsroom employees that the new principles were a response to a changing legal climate in which "plaintiffs have developed new tactics to get at us on grounds other than the First Amendment, where traditionally we have had the upper hand." Phil Currie & Larry Beaupre, *The How, Why and What of the New Principles* (Oct. 23, 1999) *available at* http://www.gannett.com/go/newswatch/99/june/nw0618-2.htm (on file with author). The wisdom of writing codes of ethics has been controversial, "but we believe that the new, hostile climate we now face has tipped the balance in favor of a public statement of our ideals." *Id.; see also* Jim Moscou,

gard as a convergence of news and entertainment and the mainstream media's adoption of "tabloid" tactics such as misrepresentation, "stalking" celebrities, and the use of hidden cameras to win ratings or readership.[174]

Unfortunately, this is an arena in which the press has less legal protection than it enjoys for defamation claims brought by either public or private plaintiffs.[175] The First Amendment, a strong shield in defamation cases, is not a barrier to actions against the press for tort and breach of contract damages[176] and violation of criminal laws.[177] The courts' interpretation of the First Amendment has had the effect of mitigating the impact of sloppy journalistic practices in traditional defamation cases, at least where public figures are involved. In those cases, the courts have paid little attention to how journalists actually do their jobs and have shown little willingness to craft codes of newsroom practices. In the newsgathering cases, however, the failure of the media to implement their own ethical and professional standards can be much more damaging than in the defamation area. Here ethical and professional norms tend to merge with legal standards of proof; a newspaper or magazine called to account for an "offensive" intrusion into a plaintiff's privacy[178] may also be said to have violated what the Gannett Principles describe as "common decency."[179]

The Supreme Court has recognized that newsgathering serves a First Amendment interest.[180] It has conceded that "without some protection for seeking out the news, freedom of the press could be eviscerated."[181] Also, as a general rule, the publication of lawfully obtained truthful material is protected "absent a need to further a

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News-gathering Tactics on Trial, EDITOR & PUBLISHER MAGAZINE, Dec. 18, 1999, at 18; Jane E. Kirtley, *Vanity and Vexation: Shifting the Focus to Media Conduct,* 4 WM. & MARY BILL RTS. J. 1069 (1996); Matthew D. Bunker, et al., *Triggering the First Amendment: Newsgathering Torts and Press Freedom,* 4 COMM. L. & POL'Y 273 (1999).

174 *See* Rodney A. Smolla, *Will Tabloid Journalism Ruin the First Amendment for the Rest of Us?,* 9 J. ART & ENT. LAW 1, 7 (1998) ("The pressure to maintain or boost circulation and broadcast ratings in a marketplace with ever increasing competitive pressures may tend to make serious journalists more tabloid-like.").

175 *See id.* at 14-15.

176 *See, e.g.,* Desnick v. ABC, 44 F.3d 1345, 1355 (7th 1995) (*citing* Cohen v. Cowles Media Co., 501 U.S. 663, 669-70 (1991)) ("The media have no general immunity from tort or contract liability.").

177 *See* United States v. Barnett, 667 F.2d 835 (9th Cir. 1982) (permitting criminal prosecution for aiding and abetting illegal drug distribution against publisher of manual instructing persons on how to manufacture illegal drugs).

178 *See* Shulman v. Group W Productions, Inc., 955 P.2d 469 (Cal. 1998) (holding that liability under the intrusion tort requires an invasion of privacy that is highly offensive to a reasonable person).

179 Principles, *supra* note 10.

180 *See, e.g.,* Branzburg v. Hayes, 408 U.S. 665 (1972).

181 *Id.* at 681.

state interest of the highest order."[182]

However, the courts have not granted the same protection for gathering the news as for publishing it. In the same decision where it said "some protection" should be granted for newsgathering, the Supreme Court ruled that newspapers must reveal to grand juries the identity of the source who had provided confidential information.[183] Further, the Court encouraged the filing of newsgathering claims with a 1991 decision stating that Minnesota newspapers could be held liable on grounds of promissory estoppel for disclosing the identity of a political operative who gave unfavorable information about an opposing candidate to the newspapers.[184] The plaintiff, who lost his job after the stories appeared, claimed he had relied on the promises of reporters not to name him.[185] The Court concluded that the First Amendment did not bar holding the news media liable for the violation of "generally applicable" laws that have only an "incidental" effect on newsgathering.[186]

The upsurge in newsgathering cases has coincided with the precipitous decline in the credibility of the press.[187] It is reasonable to conclude that the general disdain with which the press is held has seeped its way into jury verdicts and appellate decisions despite the fact that the evidence is largely anecdotal.[188] Nevertheless, it is not unusual to find judicial decisions allowing newsgathering cases to go to the jury accompanied by critical, not to say vituperative, language by the decision writers.

"Defendants are no more free to cause harm to others while gathering the news than any other individual," noted a Texas federal court judge in refusing to dismiss claims in a wrongful death action brought by a local newspaper and television station.[189] Plaintiffs argued that the media outlets had negligently tipped off

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182 Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979) (holding that a newspaper could not be held liable for publishing the name of a 14-year-old charged with murder without prior judicial approval); *see also* Florida Star v. B.J.F., 491 U.S. 524 (1989) (reversing an award of civil damages against a newspaper that published the name of a rape victim mistakenly released by the sheriff's office).

183 *Branzburg*, 408 U.S. at 685.

184 *See* Cohen v. Cowles Media Co., 501 U.S. 663 (1991).

185 *See id.* at 665.

186 *Id.* at 669.

187 *See supra* note 23 and accompanying text.

188 *See* Smolla, *supra* note 174, at 34.

> I believe, as an exercise in legal realism, that the increasing prevalence of practices we associate with tabloids finding their way into the mainstream press will result in diminished First Amendment rights across the board. I suspect this will come less in the alteration of formal doctrine than in the actual outcome of verdicts and damage awards.

Id.

189 Risenhoover v. England, 936 F. Supp. 392, 404 (W.D. Tex. 1996).

the Branch Davidian cult to an upcoming raid on its compound by following federal agents to the scene.[190] The decision is striking because the news media defendants worked from anonymous tips and traditional reporting relationships with authorities, widely accepted techniques in the news business.[191] Nevertheless, the judge analogized their actions to lawbreaking, declaring that "as Plaintiffs note, it would be ludicrous to assume that the First Amendment would protect a reporter who negligently ran over a pedestrian while speeding merely because the reporter was on the way to cover a news story."[192]

In a similar fashion, a New York State judge refused to dismiss an emotional distress action against a radio station that had featured the plaintiff in its "ugliest bride" contest.[193] "The First Amendment was not enacted to enable wolves to parade around in sheep's clothing, feasting upon the character, reputation and sensibilities of innocent private persons."[194]

And a federal appeals court, in a decision invalidating media "ride-alongs," charged that a CNN television crew had played more than a passive role as observers in accompanying federal officials in a raid on a Montana ranch.[195] The court said the television journalists were "active participants in a planned activity that transformed the execution of a search warrant into television entertainment."[196]

Such language is disturbing to the press, but it is the large financial penalties that really attract their attention. The media were particularly alarmed when a North Carolina jury slapped ABC News with $5.5 million in damages, a figure later reduced to $315,000, for a *Primetime Live* broadcast prepared by two reporters who used false resumes to get jobs at the Food Lion Supermarkets

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190 *See id.* at 396-403.

191 *See id.*

192 *Id.* at 404.

193 Esposito-Hilder v. SFX Broadcasting, Inc., 654 N.Y.S.2d 259 (N.Y. Sup. Ct. 1996), *aff'd* 236 A.D.2d 186, 665 N.Y.S.2d 697 (N.Y. App. Div. 3d Dept. 1997).

194 *Id.* at 263.

195 Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997). The case reached the Supreme Court on the same day it declared that media ride-alongs violated the Fourth Amendment's prohibition against unreasonable searches and seizures. However, the Court granted qualified immunity to the police who mounted the raid because the principle behind its ruling had not been generally recognized prior to the decision. *See* Wilson v. Layne, 526 U.S. 603 (1999). The court of appeals had refused to grant immunity to the federal agents involved in the raid. In a brief *per curiam* opinion, the Supreme Court reversed that aspect of the court of appeals decision. *See* Berger v. Hanlon, 526 U.S. 808 (1999). On remand, the court of appeals granted summary judgment in favor of the federal agents but refused to dismiss the claim against CNN. *See* Berger v. Hanlon, 188 F.3d 1155 (9th Cir. 1999).

196 *Berger*, 129 F.3d 505 at 512.

and secretly videotaped what appeared to be unsanitary food handling practices.[197] (Their tactics, if not their technology, were reminiscent of *The Jungle*, an early twentieth century exposé of slaughterhouses by muckraker Upton Sinclair.)[198]

Instead of filing a defamation action, Food Lion sued the network for fraud, breach of an employee's duty of loyalty, trespass and unfair trade practices.[199] An appeals court recently reversed the fraud claim, holding that the supermarket chain could not demonstrate that it had relied on the representations of the two reporters, as required by state law.[200] It upheld the trespass and breach of employee loyalty claims, rejecting First Amendment defenses by ABC.[201] "The torts Dale and Barnett [the ABC reporters] committed, breach of the duty of loyalty and trespass fit neatly into the Cowles framework. Neither tort targets or singles out the press."[202] However, it allowed only nominal damages of two dollars.[203] At the same time, it refused Food Lion's plea for damages related to its reputation such as loss of good will and lost sales. "Food Lion attempted to avoid the First Amendment limitations on defamation claims by seeking publication damages under non-reputational tort claims, while holding to the normal state law proof standards for those torts. This is precluded by Hustler Magazine v. Falwell."[204] The Supreme Court's *Hustler* decision requires a plaintiff to show actual malice in proving such reputation damages.[205]

Some media partisans expressed hope that the decision would blunt the use of newsgathering torts. However, the law in this area is still evolving. Faced with allegations that reporters have hidden their identities to gain access to a private business, one court, like the one in *Food Lion*, may conclude that trespass has been proven[206] while another may rule that entry and surreptious taping did not violate an interest the law protects.[207] Moreover, at least one state court, in a case contrary to the results in *Food Lion*, has

197 *See* Marc Gunther, *The Lion's Share*, AM. JOURNALISM REV., Mar. 18, 1997, at 18.
198 *See* Logan, *supra* note 20, at 153.
199 *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 511 (4th Cir. 1999).
200 *See id.* at 514.
201 *See id.* at 521.
202 *Id.*
203 *See id.* at 522.
204 *Id.*
205 *See* Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988).
206 *See Food Lion*, 194 F.3d at 521.
207 *See* Desnick v. ABC, 44 F.3d 1345 (7th Cir. 1995) (noting that misrepresentation did not invalidate the consent for "testers" to enter and videotape with hidden cameras operations of an eye clinic).

allowed reputation damages for wrongfully acquired information.[208] The press's ultimate vulnerability to newsgathering claims may depend on the specific fact patterns of any cases that ultimately reach the Supreme Court.

To avoid legal disputes like *Food Lion* and *Chiquita*, Gannett pledges to seek and report the news in a "truthful way," a recognition that accuracy is not enough to immunize the press from legal challenges.[209] Its newspapers "will not lie" or "misstate our identities or intentions."[210] However, it is unrealistic to believe that the press can totally eliminate journalistic missteps that trigger claims for violations of generally applicable laws. The press, accustomed to fight its legal battles on the lofty heights of constitutional law, may have to accommodate itself to grubbier courtroom realities. Many of its future legal battles will involve the case-by-case application of facts to state law doctrines under less forgiving standards of proof than the "convincing clarity" of public figure defamation issues.

This is illustrated by a Maine federal court decision upholding a jury verdict of more than $500,000 in favor of a trucking company owner who sued NBC for producing a negative documentary about the trucking industry after the network allegedly promised him that the story would be positive in exchange for his cooperation.[211] He claimed, in the language of the Gannett Principles, that the network had misstated its intentions.[212] Whether such a promise was made and broken is a question of fact. Media companies like Gannett that vow to keep their promises could be faced with fighting an increasing number of such claims by disgruntled sources. Still, it is hard to believe that Gannett will not be better off with a set of standards that requires reporters and editors to tell the truth and to carefully explain the terms of any promise made to a news source.[213] Failing to implement such standards will not halt lawsuits, and a failure to keep promises cannot be legally justified given the Supreme Court's doctrine of "generally applicable" law.

Even if the press turn back most newsgathering claims, there is concern that the prospect of expensive legal bills will prevent

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208 *See* Sanders v. ABC, 978 P.2d 67 (Cal. 1999).

209 Principles, *supra* note 10.

210 *Id.*

211 *See* Veilleux v. NBC, 8 F. Supp.2d 23 (D. Me. 1998).

212 *See id.* at 29.

213 *See* Principles, *supra* note 10.

needed stories from being reported.[214] Some press observers feel that ethical standards intended to blunt the assault on the press could have an equally chilling effect.[215] "Journalism is about uncovering and telling the truth, however painful or controversial, and sometimes requires unconventional methods to do so. . .the trappings of regulated professions don't fit the freewheeling trade of journalism very well."[216]

The problem is that a large segment of the general public, and perhaps of the judicial system, believe that journalists are entirely *too* free-wheeling. The best way to deal with that perception is to confront ethical issues in a way that eases public and judicial concerns: set clear written standards, disseminate the guidelines widely, and work to implement them through training and, where needed, disciplinary action. The ASNE's statement of principles "are intended to preserve, protect and strengthen the bond of trust and respect between American journalists and the American people, a bond that is essential to sustain the grant of freedom entrusted to both by the nation's founders."[217] But that trust has been weakening. Unless it shores up its credibility, the press, which now is being criticized for the way it obtains stories, ultimately may face attempts to prevent publication of the stories themselves.[218]

CONCLUSION

One media attorney has pointed out that good journalistic practices may be stricter than their legal counterparts. "In a free market system, the quality of the journalism ought to be more of an incentive towards responsible journalism than legal journalism."[219] Increasingly, however, courts, perhaps responding to public opinion, have taken it upon themselves to define norms like

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214 *See Legal Proof Fails as Ethics Standard,* THE NEWS MEDIA AND THE LAW, Summer 1998, at 2.

215 *See id.*

216 *Id.*

217 ASNE, *supra* note 27.

218 *See* David Rudenstine, *The Book in Retrospect,* 19 CARDOZO L. REV. 1283, 1292 (1998). Courts have not explicitly tied the press's right to publish with how the press obtained the information it has published. But that may be true because traditionally the press has not made it a practice to secure information by conduct giving rise to meritorious civil or criminal claims. If, in the future, the press makes it a practice to engage in such conduct, it is possible that courts will fashion civil or criminal remedies that have the effect of suppressing the right of publication.

Id.

219 George Freeman, Assistant General Counsel, New York Times Co., Address at the New York State Bar Association, Media Section (Jan. 28, 2000).

"responsibility" and "fairness." Media companies like Gannett have no choice but to write and implement standards that conform to the standards of decency of the courts and society at large.

Gannett's written standards are unlikely to hurt and could help in the defense against public figure defamation claims. Where private figures are concerned, the company's new Principles may well establish a new standard of care. The courts already are determining such questions, however, and it would be better for Gannett to apply professional standards that the company has played a big part in writing.

The impact of the Principles is more problematic in the area of newsgathering torts. In the short run, at least, the company's code may generate more lawsuits. There may be confusion among employees about what is permitted and what is not. But evidence of good faith in the implementation of the Principles would be a powerful weapon for the defense. If nothing else, it could avert large punitive damages awards. And in the long run, the number of lawsuits will probably decline as the Principles take root in the company's culture.

Written codes of journalistic practices may cause problems for lawyers defending the media, but it would be shortsighted to reject them for that reason:

> Some news people have trouble keeping the legal-moral distinction clear. Newspaper lawyers have sometimes advised their clients against maintaining any kind of written ethical standards. A libel defendant seeking to prove malice might use a departure from the written code as evidence of malicious intent. A capricious newspaper, one with no identifiable standards, is evidently less likely to be malicious under the law. Those who follow that advice are sacrificing a major moral advantage for a minor tactical benefit.[220]

With many courts passing judgment on the media's newsgathering prospects, it is no longer tenable either to hold that there is a distinction between moral and legal duty or to reject written ethical standards because of concern that they might become legal duties. The press cannot operate in isolation, and the First Amendment is no longer sufficient protection if the media is to

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220 MEYER, *supra* note 28, at 173.

maintain the independence and the aggressive watchdog role they claim to cherish. In this environment, ethics is good law.

*Jeff Storey**

* J.D., 2001, Benjamin N. Cardozo School of Law; Assistant District Attorney, New York County District Attorney's Office, New York, NY. Before deciding to become an attorney, the author worked as a newspaper editor and reporter for twenty-five years. The author would like to dedicate this Note to his wife, Barbara Strauss, the best lawyer he knows, whose example helped inspire him to change careers. In addition, the author would also like to thank Professor David Rudenstine for his advice and support.