

# University of Miami Law Review

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Volume 61  
Number 3 *Volume 61 Number 3 (April 2007)*  
*SYMPOSIUM The Schiavo Case:*  
*Interdisciplinary Perspectives*

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Article 4

4-1-2007

## A New Model for Media Criticism: Lessons from the *Schiavo* Coverage

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### Recommended Citation

Lili Levi, *A New Model for Media Criticism: Lessons from the Schiavo Coverage*, 61 U. Miami L. Rev. 665 (2007)

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# A New Model for Media Criticism: Lessons from the *Schiavo* Coverage

LILI LEVI\*

I. INTRODUCTION .....	665
II. SHARPLY DIVIDED CRITICISM OF SCHIAVO MEDIA COVERAGE .....	666
III. HOW SHOULD WE ASSESS MEDIA COVERAGE?.....	674
A. <i>Journalistic Standards</i> .....	674
B. <i>Internal Limits of Journalistic Standards</i> .....	677
C. <i>Modern Pressures on Journalistic Standards and Editorial Judgment</i> ....	680
1. CHANGES IN INDUSTRY STRUCTURE AND RESULTING ECONOMIC PRESSURES .....	681
2. THE TWENTY-FOUR HOUR NEWS CYCLE .....	686
3. BLURRING THE DISTINCTION BETWEEN NEWS, OPINION, AND ENTERTAINMENT .....	688
4. THE RISE OF BLOGS AND NEWS/COMMENTARY WEB SITES.....	690
5. “NEWS AS CATFIGHT” – CHANGING DEFINITIONS OF BALANCE .....	694
6. CHANGING JOURNALISTIC APPROACHES TO PRIVACY .....	696
7. THE RISE IN ORGANIZED CONSERVATIVE EFFORTS TO SHAPE MEDIA COVERAGE .....	699
8. THE RISE OF RELIGIOUS BROADCASTERS .....	701
IV. SCHIAVO COVERAGE AND JOURNALISTIC STANDARDS.....	705
V. NO EASY ANSWERS .....	720
VI. CONCLUSION .....	730

## I. INTRODUCTION

For two months in Spring 2005, the story of the tug of war between family factions over whether to remove Terri Schiavo’s feeding tube dominated the news and provided fodder for an ideological battle between conservatives and liberals, each of whom found ample grounds to criticize the media for not telling its side of the story.<sup>1</sup> Their faction-based perception of the media coverage threatened to overshadow the

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\* Professor of Law, University of Miami School of Law. Many thanks for their comments to Mary Coombs, Tom Julin, Marilys Nepomechie, Anne Louise Oates, Steve Schnably, Ralph Shalom, Sylvia Shapiro, and Sam Terrilli. I am grateful to Michael Longo and Jason Wolf for excellent research help. Many thanks also are due Barbara Brandon and Mark Plotkin of the University of Miami Law Library. All errors are mine alone.

1. See, e.g., *NewsHour with Jim Lehrer: Schiavo: Talk of the Nation* (PBS television broadcast Mar. 24, 2005), available at [http://www.pbs.org/newshour/bb/media/jan-june05/schiavo\\_3-24.html](http://www.pbs.org/newshour/bb/media/jan-june05/schiavo_3-24.html) (describing wall-to-wall coverage and citing to report quantifying extensive network news coverage of *Schiavo* case). The national media focused sufficiently on the story (169 minutes of coverage on network nightly newscasts) to make it one of the top twenty stories of the year and the most significant news story of the week of March 21, 2005. Andrew Tyndall, *Year in Review 2005*, TYNDALL REPORT, <http://www.tyndallreport.com/yearinreview2005.php3>; Andrew Tyndall, *Tyndall Weekly: Florida Death Watch*, TYNDALL REPORT, Mar. 25, 2005, <http://www.tyndallreport.com/tw0512.html>. A Westlaw search under “Schiavo” for March 2005 in the *New York Times* yielded 148 results. Right after Terri Schiavo’s death, there were apparently

more complex reality of how the press really performed in reporting this multi-dimensional story. Was the coverage fair and accurate or did it pander to special interests? What criteria should be used to make this determination? Is it even possible or appropriate to apply uniform standards to the fragmented and ever-expanding media channels – from network television to cable to blogs? How were the pressures imposed on the media today – both from within and without – implicated in the telling of the story? What lessons does the *Schiavo* case teach about how the press might do it differently or better next time? These are some of the issues addressed in this Article.

Ultimately, this Article concludes that despite the sound and fury from critics, the mainstream print and broadcast press for the most part did a credible job in its coverage of the *Schiavo* case. The very fact that neither side of the ideological divide was satisfied may well stand as ironic confirmation of that assessment. Nevertheless, this Article warns that wholesale ideological critiques of the media – particularly in circumstances in which the reality is far more nuanced – can pose a danger to the credibility of the press and its ability (and desire) to perform its most significant social roles. At the same time, without both self-criticism and reasoned criticism by competitors and media watchdogs, the press would remain insufficiently accountable. This Article suggests that instead of partisan critiques, news media performance be tested by reference to journalistic standards – albeit in full recognition of the developments in the media environment that put pressure on those standards. This, along with shifts in media structure, would help the press perform its most important democratic roles.

## II. SHARPLY DIVIDED CRITICISM OF SCHIAVO MEDIA COVERAGE

Given the length of time the story dominated the news and the breadth of its coverage, it is not surprising that there are those who

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600,000 blog postings about the news. Kenneth Jost & Melissa J. Hipolit, *Blog Explosion*, CQ RESEARCHER, June 9, 2006, at 511.

I characterize the points of view as liberal and conservative for ease of discussion, with “conservative” referring primarily to social conservatives and the evangelical right and “liberal” also including libertarians and progressives. My use of the characterization “conservative” in this Article is not intended to suggest that there was unanimity within the conservative movement with regard to the *Schiavo* case. In fact, reports suggest that the *Schiavo* case generated something of a split within the conservative ranks. See, e.g., John C. Danforth, *Onward, Moderate Christian Soldiers*, N.Y. TIMES, June 17, 2005, at A27; Howard Kurtz, *Splitsville*, WASH. POST, Mar. 30, 2005, available at <http://www.washingtonpost.com/wp-dyn/articles/A12374-2005Mar30.html>; Adam Nagourney, *The Schiavo Case: Conservatives; G.O.P. Right Is Splintered on Schiavo Intervention*, N.Y. TIMES, Mar. 23, 2005, at A14. This Article discusses the reactions of the social conservative and religious-right factions in the conservative movement. While surely not all evangelical Christians agreed that Terri Schiavo’s feeding tube should not be removed, the most vocal portions of that community did consistently articulate that position.

referred critically to the “media frenzy,” “media circus,” and the “overhyping” of the *Schiavo* story.<sup>2</sup> Indeed, as the coverage wore on, polls showed that the majority of Americans disapproved of government intervention<sup>3</sup> and that those polled were sated with media coverage.<sup>4</sup> But what exactly was the problem with press accounts?<sup>5</sup> A close look at media critiques shows that the bulk of criticism came from either side of the political divide between liberals and conservatives, each of whom saw the story through its philosophical lens and found reporting biased.

Many conservatives begin with the proposition that the mainstream media reflect liberal bias in their coverage.<sup>6</sup> In the *Schiavo* case as well,

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2. See, e.g., Rebecca C. Morgan & Michael P. Allen, *Introduction and Commentary: Reflections on and Implications of Schiavo*, 35 STETSON L. REV. 1, 4 (2005); Joan Didion, *The Case of Theresa Schiavo*, N.Y. REV. BOOKS, June 9, 2005, available at <http://www.nybooks.com/articles/18050>; Editorial, *Death By Television*, BROADCASTING & CABLE, Mar. 28, 2005, at 74, available at <http://www.broadcastingcable.com/article/CA513102.html?display=search+Results&text=death&television> (suggesting that cable and radio talk shows made “a freak show out of this sad, sick woman’s predicament” and that the news media used her “as a ratings gimmick”); Ilana Ozernoy, *An Unquiet Death*, U.S. NEWS & WORLD REP., Apr. 11, 2005, at 16; Two Cents, *The Most Overhyped Story in the News Recently?*, S.F. CHRON., Apr. 10, 2005, at C2; Antonia Zerbisias, *All-Out Coverage of Schiavo Wears Thin; No Real Look at Causes of Bulimia*, TORONTO STAR, Mar. 29, 2005, at C06 (discussing criticism of CNN and other cable networks).

3. See, e.g., PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, SURVEY REPORT, STRONG PUBLIC SUPPORT FOR RIGHT TO DIE (2006) [hereinafter PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, STRONG PUBLIC SUPPORT FOR RIGHT TO DIE], available at <http://people-press.org/reports/display.php3?ReportID=266>; Michael Barone, *The Hardest Numbers*, U.S. NEWS & WORLD REP., Apr. 18, 2005, at 46 (stating that public opinion polls showed that congressional action in the *Schiavo* case was unpopular); Dan Gilgoff et al., *Life and Death Politics*, U.S. NEWS & WORLD REP., Apr. 4, 2005, at 14 (citing to CBS and ABC polls indicating large majority of participants opposed to government intervention in *Schiavo* matter); Terry Jones, *Politicians Ignore Public Interest*, ST. LOUIS JOURNALISM REV., Apr. 1, 2005 at 9 (describing *Time* survey as showing seventy-five percent of public found Congress’s involvement “not right”); see also Eric Boehlert, *When Public Opinion Doesn’t Matter*, SALON, Mar. 21, 2005, [http://dir.salon.com/story/news/feature/2005/03/21/polls\\_on\\_schiavo/index.html](http://dir.salon.com/story/news/feature/2005/03/21/polls_on_schiavo/index.html) (describing polls and criticizing mainstream media for downplaying poll data demonstrating lack of support for congressional and religious right’s *Schiavo* agenda).

4. See Sean Mussenden, *Schiavo Survey: Leaders, Media Mishandled Case*, ORLANDO SENTINEL, Apr. 14, 2005, at B1 (in a poll of Florida residents, seventy-one percent disapproved of media’s handling of the case).

5. For convenience, I use the terms “media,” “press,” and “news organizations” interchangeably in this Article, referring to the news functions of both traditional news outlets – such as newspapers and magazines – and newer media – such as television networks and stations, cable, satellite, radio, and the Internet.

6. For an overview of conservatives’ viewpoints on liberal media bias, see, for example, Media Research Center, <http://www.mediaresearch.org/> (last visited Oct. 20, 2005), and see also PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, PUBLIC MORE CRITICAL OF PRESS, BUT GOODWILL PERSISTS (2005), available at <http://people-press.org/reports/pdf/248.pdf> [hereinafter PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, PUBLIC MORE CRITICAL OF PRESS], which reported a study finding that seven in ten Republicans think the media are biased. Evangelical conservatives begin with the proposition that the mainstream media is unduly secular. See L. Brent Bozell III, *The Media’s Secular Orthodox Church*, MEDIA RESEARCH CTR., Mar. 23, 2005, <http://www.mediaresearch.org/BozellColumns/newscolumn/2005/col20050323.asp> (indicating

conservatives thought that although the media was right to focus on the case, its coverage was still overly sympathetic to the Michael Schiavo camp and the secular left.<sup>7</sup> Conservatives took the substantive positions that Terri Schiavo was not in a persistent vegetative state (“PVS”); that the courts that had so found her were biased and mistaken in their application of law; that allowing her feeding tube to be removed would be tantamount to “judicial murder”; that it was a moral imperative for the legislative and executive branches to resist such judicial overreaching; and that the *Schiavo* case raised fundamental questions about the value of human life, however handicapped.<sup>8</sup> They approved the airing of video clips of an apparently responsive Terri Schiavo in order to put a human face on the abstract issue of when society should permit the removal of feeding tubes and to inject doubt into public assumptions that

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that media has “secularizing impulses”). Liberals as well have been criticizing the mainstream press on grounds of bias. See, e.g., Naftali Bendavid, *Media Failures Fan Rival Bias Charges, the CBS News and Armstrong Williams Cases Highlight Rising Claims – from the Left and the Right – That News Isn’t Played Straight*, CHI. TRIB., Jan. 16, 2005, at 9 (liberals claim media is too conservative; conservatives claim media is too liberal); Lori Robertson, *The British Invasion*, AM. JOURNALISM REV., Dec. 1, 2003, at 48 (polls show that forty-five percent of Americans believe media is too liberal); discussion *infra* note 14; see also discussion *infra* note 76.

7. See, e.g., Nat Hentoff, *Terri Schiavo: Judicial Murder*, VILLAGE VOICE, Mar. 30, 2005, at 36; John Leo, *End of the Affair*, U.S. NEWS & WORLD REP., Apr. 11, 2005, at 46 (accusing the news media of “terrible” behavior in clearly reflecting liberal media bias); Art Toalston, *Focus on the Family Lists Errors in Terri Schiavo Media Reports*, <http://www.lifeway.com> (search for “Focus on the Family Errors in Terri Schiavo Media Reports” and select the first source); Wes Vernon, *Despicable Media Coverage of Schiavo Case*, NEWSMAX, Mar. 30, 2005, <http://www.newsmax.com/archives/articles/2005/3/29/205123.shtml> (characterizing mainstream media coverage of *Schiavo* case as “outrageous” because it did not adhere to conservative views); Posting of Pamela F. Hennesy to BlogsforTerri, [http://www.blogsforterri.com/archives/2005/12/top\\_story\\_no\\_st.php](http://www.blogsforterri.com/archives/2005/12/top_story_no_st.php) (Dec. 21, 2005, 21:48); thedefender.org, *The Dishonest Media – Terri Schiavo*, <http://www.thedefender.org/mar2005comment.html> (last visited Oct. 19, 2006) (contending that mainstream media was biased in dozens of differing ways).

8. See, e.g., Daniel Eisenberg, *Lessons of the Schiavo Battle*, TIME, Apr. 4, 2005, at 23; Abby Goodnough, *A Right-to-Die Battle Enters Its Final Days*, N.Y. TIMES, Oct. 15, 2003, at A12 (quoting Randall Terry claim that Terri Schiavo was not in a PVS); Hentoff, *supra* note 7 (“disgracefully ignorant coverage of the case by the great majority of the media, including such pillars of the trade as the New York Times, Washington Post, Miami Herald and Los Angeles Times as they copied each other’s misinformation, like Terri Schiavo being ‘in a persistent vegetative state’”). See generally Postings, Wittenberg Gate: Bloggers’ Best for Terri Schiavo: Anniversary Edition, pt. 1, [http://dory.typepad.com/wittenberg\\_gate/2006/03/bloggers\\_best\\_f.html](http://dory.typepad.com/wittenberg_gate/2006/03/bloggers_best_f.html) (Mar. 18-30, 2006); Postings, Wittenberg Gate: Bloggers’ Best for Terri Schiavo: Anniversary Edition, pt. 2, [http://dory.typepad.com/wittenberg\\_gate/2006/03/bloggers\\_best\\_f\\_1.html](http://dory.typepad.com/wittenberg_gate/2006/03/bloggers_best_f_1.html) (Mar. 25-27, 2006); Walter M. Weber, *Lethal Error: The Schiavo Ruling*, <http://www.aclj.org/News/Read.aspx?ID=528> (last visited Oct. 19, 2006). Conservatives asserted that Terri Schiavo presented a compelling story about whether society should countenance a judicial order sentencing a woman to starve to death because her quality of life was deemed poor. See, e.g., David C. Gibbs III, *Gibbs on Schiavo*, 35 STETSON L. REV. 17 (2005); Leo, *supra* note 7 (characterizing *Schiavo* case as about morality of removing sustenance from persons with grave cognitive disabilities).

medical experts can reliably pronounce someone beyond redemption.<sup>9</sup>

But conservatives found the story extremely newsworthy not only for the specific question of what to do about Terri Schiavo's feeding tube, but also for much broader aspects of the "culture wars." The religious right in particular saw the case as highlighting the "culture of death" purportedly valorized by a too-secular society, rather than the "culture of life" we should affirm instead.<sup>10</sup> This broader focus also led many conservatives who might otherwise have been attracted to the notion of privacy for family decisions to accept the lack of privacy for Terri Schiavo as a casualty in the necessary political war to capture the public's allegiance for the "just" approach to life issues.<sup>11</sup> As she

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9. As will be discussed below, Terri Schiavo's parents, Bob and Mary Schindler, selected, edited, and presented to the press videotapes of Terri Schiavo appearing responsive to her environment. See *infra* note 185; see also MARY SCHINDLER ET AL., A LIFE THAT MATTERS: THE LEGACY OF TERRI SCHIAVO – A LESSON FOR US ALL 127-29, 134 (2006); Abby Goodnough & Carl Hulse, *Despite Congress, Woman's Feeding Tube Is Removed*, N.Y. TIMES, Mar. 19, 2005, at A1.

10. See, e.g., William L. Anderson, *Terri Schiavo, the State, and the Culture of Death*, LEWROCKWELL, Mar. 26, 2005, <http://www.lewrockwell.com/anderson/anderson116.html> (*Schiavo* case "highlights nearly everything that is rotten in American governance" including that the "state mandates death"); Patrick J. Buchanan, *The Culture of Death Advances*, WORLDNETDAILY, Mar. 30, 2005, [http://www.worldnetdaily.com/news/printer-friendly.asp?ARTICLE\\_ID=43541](http://www.worldnetdaily.com/news/printer-friendly.asp?ARTICLE_ID=43541); Dan Gilgoff et al., *supra* note 3; Perry Hicks, *One Year Later . . . Terri's Fight Fights On*, GULFCOASTNEWS, <http://www.gulfcoastnews.com/GCNspecialreportschiavo1yrlater.htm> (last visited Oct. 19, 2006) (*Schiavo* case is similar to Nazi euthanasia of handicapped and mentally ill); Posting by Joe Katzman, to windsofchange.net, <http://www.windsofchange.net/archives/008512.php> (May 2, 2006, 12:31) (culture of death "fits into mainstream medical thinking these days"); see also Steven G. Calabresi, *The Terri Schiavo Case: In Defense of the Special Law Enacted by Congress and President Bush*, 100 NW. L. REV. 151, 153 (2006).

The term "culture of life" has come to symbolize an umbrella notion including opposition to abortion, embryonic stem cell research, and the "right to die" with physician-assisted suicide. See, e.g., George J. Annas, *"I Want to Live": Medicine Betrayed by Ideology in the Political Debate over Terri Schiavo*, 35 STETSON L. REV. 49, 54 (2005); Michael Sokolove, *The Believer*, N.Y. TIMES, May 22, 2005, § 6, at 56. For a rich description of the way in which the phrase has come to encompass more than anti-abortion politics and has been incorporated into broader cultural discourse, see Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753, 800-08 (2006).

The phrase "the culture of life" was originally used by Pope John Paul II in his 1995 address, the Gospel of Life. See Letter from Pope John Paul II, *Evangelium Vitae*: Encyclical Letter on the Value and Inviolability of Human Life ¶21 (Mar. 25, 1995), available at [http://www.newadvent.org/library/docs\\_jp02ev.htm](http://www.newadvent.org/library/docs_jp02ev.htm); see also Sanger, *supra*, at 802 & nn.308-309 (describing President Bush's first use of the phrase, its adoption by the Christian community, and the establishment of culture of life organizations). The rhetoric of the culture of life was associated with Terri Schiavo both by evangelical conservative groups and the president. See, e.g., Press Release, George W. Bush, Statement on Terri Schiavo (Mar. 17, 2005), available at <http://www.whitehouse.gov/news/releases/2005/03/20050317-7.html> ("It should be our goal as a nation to build a culture of life . . . and that culture of life must extend to individuals with disabilities."). The "culture of life" has counterposed itself rhetorically to the "culture of death," which pro-choice advocates have not been able to replace with the rhetoric of the "culture of liberty." See Annas, *supra*, at 54.

11. This was true of the family as well. Terri Schiavo's parents, in their subsequent book

became a symbol for the “culture of life,” the intrusion into her personal autonomy and dignity became a necessary concession in support of the greater goal.<sup>12</sup>

By contrast to conservatives, liberal critics contended that the media’s coverage of the *Schiavo* case reflected the conservative character of the media. Most liberal critics chided the media for allowing their news coverage to be manipulated for right-wing political purposes.<sup>13</sup> Many took the view that the *Schiavo* case was simply a personal tragedy for a split family that was appropriated for partisan political purposes by the religious right.<sup>14</sup> Liberal critics asserted that Schiavo was in a PVS; that claims to the contrary were manifestly false, manufactured, and politically motivated; and that it was entirely consistent even with con-

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about the case, complained often of the media’s intrusion into their and their daughter’s privacy. SCHINDLER ET AL., *supra* note 9, at 203 (leaving hospital after Terri Schiavo’s death would be difficult because media “all wanted a piece of us”); *see also id.* at 154 (Schindler family “knew [they] were being ‘used’ by some politicians and the media for their own agendas.”); *id.* at 158-159 (media swarmed Schindler family’s trailer parked outside hospice). On the other hand, the Schindlers made clear that they saw media publicity as the only way to correct judicial failures in their daughter’s case. *Id.* at 68 (Terri Schiavo’s siblings “faxed a letter to the press about the abomination being perpetrated on Terri – perhaps a public outcry would stop it, they thought”); *see also id.* at 99 (when Ross Perot called to offer help, that was proof that attempt to generate publicity was working); *id.* at 104 (Bobby Schindler suggested to his parents that interview with local television reporter would help the family’s case); *id.* at 189 (frequent radio interviews indicated that family’s message was “finally getting out – and that listeners shared [their] outrage”); *id.* at 160 (family acknowledged that “media was using [them],” but if interviews could “save Terri . . . then so be it”).

12. *See, e.g.*, Frank McClellan, *Medical Malpractice Law, Morality and the Culture Wars*, 27 J. LEGAL MED. 33, 39 (2006) (suggesting that “personal autonomy will be a casualty of the culture wars”).

13. *See, e.g.*, Eric Boehlert, *A Tale Told by an Idiot*, SALON, Mar. 31, 2005, [http://dir.salon.com/story/news/feature/2005/03/31/schiavo\\_media/index.html](http://dir.salon.com/story/news/feature/2005/03/31/schiavo_media/index.html); Sam Perry, *Terri Schiavo & the Right-Wing Machine*, CONSORTIUMNEWS.COM, Apr. 1, 2005, <http://www.consortiumnews.com/2005/040105.html>; Posting of Douglas to Blog Left: Critical Interventions Warblog, [http://www.gseis.ucla.edu/courses/ed253a/2005\\_04\\_01\\_archive.php](http://www.gseis.ucla.edu/courses/ed253a/2005_04_01_archive.php) (Apr. 3, 2005, 16:06:41); Posting of R. Stephen Hanchett to Is Bush the AntiChrist?, <http://isbushantichrist.blogspot.com/2005/03/all-terri-schiavo-all-time.html> (Mar. 21, 2005, 9:20) (arguing that “corporate” media was manipulated in reporting *Schiavo* story); *Hardball* (MSNBC television broadcast Mar. 30, 2005) (suggestion by liberal talk show host Amy Goodman that media coverage of protests outside hospice were dissimilar to the way media covered other protests); *see also* Zerbisias, *supra* note 2. For critiques of the mainstream media as reflecting far more conservative than liberal bias generally, *see, for example*, ERIC ALTERMAN, *WHAT LIBERAL MEDIA? THE TRUTH ABOUT BIAS AND THE NEWS* 24-25 (2003), and JEFFREY SCHEUER, *THE SOUND BITE SOCIETY: TELEVISION AND THE AMERICAN MIND* 10-14 (1999).

14. *See, e.g.*, Americans United for the Separation of Church and State: Americans United Blasts Congressional Leaders’ Promise to Push Religious Right Agenda (Mar. 23, 2005), [http://www.au.org/site/News2?abbr=pr&page=NewsArticle&id=7277&security=1002&news\\_jv\\_ctrl=124](http://www.au.org/site/News2?abbr=pr&page=NewsArticle&id=7277&security=1002&news_jv_ctrl=124); *see also* Carl Hulse & David D. Kirkpatrick, *The Schiavo Case: The Overview; Congress Passes and Bush Signs Schiavo Measure*, N.Y. TIMES, Mar. 21, 2005, at A1 (quoting Democratic congressman); Dan Rodricks, *Exploiting the Tragedy of Terri Schiavo*, BALT. SUN, Mar. 24, 2005, at 1B.

servative teachings that Schiavo's husband be her medical decisionmaker. The courts had fully considered and fairly adjudicated her medical condition and determined her wishes to the best of anyone's ability.<sup>15</sup> Thus, these critics complained that the degree of newsworthiness of the story in objective terms was significantly less than the time devoted to it on the news.<sup>16</sup> On this view, the news media manipulated the public into believing that there was a stronger national consensus on the conservative and evangelical platform than in fact was the case.<sup>17</sup>

For these critics, the extensiveness of the *Schiavo* coverage also effectively helped the Republican governance project at the time – at a minimum by distracting the public's attention from other issues such as

15. *Terri Schiavo: The Misery Goes On*, *ECONOMIST*, Mar. 26, 2005, at 80.

16. Liberals saw the story as more about the need for people to consider autonomy-affirming living wills than about the American culture war between the "culture of life" and the "culture of death." Cf. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *STRONG PUBLIC SUPPORT FOR RIGHT TO DIE*, *supra* note 3 (noting that American public's awareness of living wills is virtually universal). Liberals reminded us that feeding tubes were removed every day in America, and some expressed concern that seeing this occasion as most newsworthy was more an expression of society's racism than the objective importance of the story. See, e.g., Blogwood: Norwood's Nattering, <http://blogwood.com/index.php?s=terri+Schiavo> (May 4, 2005, 8:43); see also Stephanie Shapiro, *Return of the Sob Sisters*, 28 AM. JOURNALISM REV. 50 (2006); Omar Jabara, *The Vast Wasteland of Television News*, *DENVER POST*, Apr. 13, 2005 (both discussing why this case was treated differently than other end-of-life issues); Cynthia Tucker, *Media's Interest Goes Missing for Faces of Color*, *BALT. SUN*, May 9, 2005; About Time, <http://bootprintsandlugsoles.blogspot.com/2005/03/about-time.html> (Mar. 25, 2005, 22:44); BlogWood: Norwood's Nattering, *supra*; Gospel According to Luke, <http://www.gospelaccordingtoluke.com/gl/archives.php?id=A2005031> (Mar. 26, 2005, 10:58).

17. See, e.g., Boehlert, *A Tale Told by an Idiot*, *supra* note 13 (criticizing the media for overplaying *Schiavo* protesters, ignoring facts, and giving President Bush a free ride); Boehlert, *When Public Opinion Doesn't Matter*, *supra* note 3 (criticizing mainstream media for downplaying poll data demonstrating lack of support for congressional and religious right's *Schiavo* agenda and over-covering the case).

Effectively lumping them all together, many liberals accused "the media" of misrepresenting the truth of the *Schiavo* matter by focusing on a few misleading video clips taken out of context. See, e.g., Ginia Bellafante, *The Schiavo Case: Eye Contact; The Power of Images to Create a Cause*, *N.Y. TIMES*, Mar. 27, 2005, § 4, at 3; Goodnough & Hulse, *Despite Congress, Woman's Feeding Tube Is Removed*, *supra* note 9 ("In their efforts to win support for their cause, Ms. Schiavo's parents . . . have circulated pictures and videos of their daughter's appearing to smile at her mother, tracking a balloon with her eyes, and responding to other stimuli from her bed at Woodside Hospice, where she had lived since 2000. But many doctors say that what appear to be emotion and cognition are in fact involuntary reflexes.").

With regard to the political impact of the coverage, liberals wondered whether the extensive coverage by both traditional and "new" media might not have generated political pressure on Congress to take an extraordinary and ill-considered action (intervention through a jurisdictional statute tailored to Schiavo's particular circumstances) that it would not otherwise have taken. See, e.g., Annas, *supra* note 11, at 66 (describing effect on Congress of edited video of Schiavo, representing "blatant misrepresentation of the facts"); see also *The Volokh Conspiracy*, [http://volokh.com/archives/archive\\_2005\\_03\\_20-2005\\_03\\_26.shtml](http://volokh.com/archives/archive_2005_03_20-2005_03_26.shtml) (Mar. 21, 2005, 13:58) ("sheer volume of media coverage made it seem as if there was a groundswell for 'reform'").

the Iraq war.<sup>18</sup> In addition, on this view, the media's excessive focus on the personal troubles of the Schiavos and Schindlers both intruded into Terri Schiavo's autonomy, dignity, and privacy<sup>19</sup> and distracted the public from focusing on more systemic problems, such as the untoward influence of the evangelical right on government, revealed by the *Schiavo* story itself.<sup>20</sup>

Even after Terri Schiavo's death, both sides continued to disagree about the "truth" of the case and the news media's coverage. For liberals, the results of Schiavo's autopsy<sup>21</sup> proved that they had been right all along about her condition and that the news media had been manipulated by the religious right's desire to appropriate a tragedy for political advantage.<sup>22</sup> For Terri Schiavo's parents, many social conservatives, and much of the evangelical right, the autopsy did not in any significant way change their view of the "truth."<sup>23</sup> They challenged the accuracy of

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18. See, e.g., Posting of Eric Boehlert to The Huffington Post, [http://www.huffingtonpost.com/eric-boehlert/on-lapdogs-and-richard-co\\_b\\_20729.html](http://www.huffingtonpost.com/eric-boehlert/on-lapdogs-and-richard-co_b_20729.html) (May 10, 2006) (criticizing columnist for "[a]llow[ing] the radical Christian right to hijack the news agenda for two solid weeks during the spring of 2005 with the Terri Schiavo crusade, as cable news and networks mentioned 'Schiavo' more than 15,000 times – five times as many TV references that were made to 'Iraq,' where eighteen American servicemen died during that same two-week span"); Posting of Kristen Breiweiser to The Huffington Post, [http://www.huffingtonpost.com/kristen-breiweiser/flush-bush\\_b\\_1215.html](http://www.huffingtonpost.com/kristen-breiweiser/flush-bush_b_1215.html) (May 18, 2005); see also Sheryl Gay Stolberg, *The Schiavo Case: The Dangers of Political Theater*, N.Y. TIMES, Mar. 27, 2005, § 4, at 3 (citing to poll that seventy-four percent of Americans felt Congress and the President had intervened to advance a political agenda). A similar argument was made by media watchdog organization FAIR, which claimed that the mainstream media did not cover large protests against the Iraq War in the degree that they covered much smaller protests in front of Terri Schiavo's hospice. Jon Whiten, *Does Size Really Matter? Analyzing the Press's Protest Coverage*, FAIR, July/Aug. 2005, [http://www.fair.org/index.php?page=2628&printer\\_friendly=1](http://www.fair.org/index.php?page=2628&printer_friendly=1). But see McClellan, *supra* note 13, at 35 (noting polls indicating that "substantial number of voters identified 'moral values' as a bigger influence on their vote [in the 2004 presidential election] than the war in Iraq"). Liberals thought that the media were too acquiescent in the administration's desire to focus national attention on what it deems moral issues, as opposed to more significant and controvertible political issues. Jeff Cohen, *Schiavo Case: Media Pander to the Right*, COMMONDREAMS.ORG, Mar. 29, 2005, <http://www.commondreams.org/views05/0329-31.htm>.

19. See, e.g., Rodricks, *supra* note 15; see also ABC News: *Michael Schiavo on 'Nightline'* (ABC television broadcast Mar. 15, 2005), available at <http://abcnews.go.com/Nightline/print?id=584124> (Michael Schiavo interview in which he claims that he had not spoken much to the press because he "always wanted to protect my wife's privacy . . . I didn't want to put her picture all over the news. I just wanted to keep her private").

20. Cohen, *supra* note 18.

21. See David Brown & Shailagh Murray, *Schiavo Autopsy Released; Brain Damage 'Was Irreversible'*, WASH. POST, June 16, 2005, at A1 (brain damage was irreversible; no amount of treatment would have repaired damage); see also Denise Grady, *Word for Word Final Thoughts: The Hard Facts Behind a Heartbreaking Case*, N.Y. TIMES, June 19, 2005, § 4, at 5 (autopsy revealed the following: feeding Schiavo would have resulted in aspiration and would not have been useful, her brain was half of the expected size, and she showed no signs of abuse).

22. See, e.g., Annas, *supra* note 11, at 68-73.

23. *Id.* at 70-71; see also SCHINDLER ET AL., *supra* note 9, at 213-219.

the autopsy<sup>24</sup> as well as its relevance (because PVS is a diagnosis regarding a live person rather than a post-death brain);<sup>25</sup> they contended that even if Schiavo's brain had finally atrophied, it would not have done so if her husband had continued to give her the necessary therapy.<sup>26</sup> Most importantly, they insisted that the "truth" of the story was not principally about Terri Schiavo herself, but about the bigger truth of the "culture of death" in our country today.<sup>27</sup> Nothing changed their view that Schiavo had been the subject of "judicial murder" as part of that "culture of death."<sup>28</sup>

Thus, liberals and conservatives continue to have deeply contested views on the underlying issues in the *Schiavo* case. What is striking about their contrasting judgments of the media's performance is that they share a common approach about what to look at in assessing it: "Did the media get the story 'right?' Did the media coverage support the 'right' policy?" On this analysis, assessment of media coverage requires us first to determine the right policy on the merits and then to analyze whether the media properly reflected it. The opposite camps both agree that the media did not get the story right because each side understood the story differently according to its own policy perspective. For conservatives, if the "liberal media" had properly covered the *Schiavo* issues, there might have been an irresistible groundswell of pressure on government from the public as a whole to "save" both Terri Schiavo's life and to protect the general "right to life." For liberals, if the media had not overlaid the story, a personal tragedy might not have become the weapon for something of a constitutional standoff.<sup>29</sup> Thus, for ideologues, assessment of media coverage was based more on whether the

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24. SCHINDLER ET AL., *supra* note 9, at 213-214 (media's interpretation of autopsy report ignored ambiguities and unanswered questions); *see also id.* at 215 (multiple physicians challenged details of autopsy report).

25. *See, e.g.*, Dianna Lynne, *Was Autopsy the Final Word?*, WORLDNETDAILY, Oct. 11, 2005, [http://worldnetdaily.com/news/article.asp?ARTICLE\\_ID=46735](http://worldnetdaily.com/news/article.asp?ARTICLE_ID=46735); Posting of Tim to BlogsforTerri, [http://www.blogsforterri.com/archives/2005/03/autopsy\\_cannot.php](http://www.blogsforterri.com/archives/2005/03/autopsy_cannot.php) (Mar. 29, 2005, 21:53).

26. SCHINDLER ET AL., *supra* note 9, at 218 (asserting that rehabilitation, which Michael Schiavo ordered stopped, could have helped Terri Schiavo with swallowing, movement, cognizance, and speech).

27. *Id.* at 220-221; *see also* John Leo, *An Autopsy Won't End It (People with Disabilities and Right to Live)*, U.S. NEWS & WORLD REP., June 27, 2005, at 60 (arguing that Schiavo autopsy did not resolve the issue of ending a life without "clear consent" and that "the autopsy had nothing to say about the core moral issue: Do people with profound disabilities no longer have a right to live . . . ? That issue is still on the table"); Terry Krepel, *The Post-Mortem on the Post-Mortem*, CONWEBWATCH, June 20, 2005, <http://conwebwatch.tripod.com/stories/2005/schiavoautopsy.html>.

28. SCHINDLER ET AL., *supra* note 9, at 220, 222; *see also* Hentoff, *supra* note 7.

29. Adam Liptak, *In Florida Right-to-Die Case, Legislation That Puts the Constitution at Issue*, N.Y. TIMES, Oct. 23, 2002, at A20 (stating that the story became a constitutional standoff).

story advanced their agendas than on the accuracy or completeness of the underlying facts.

### III. HOW SHOULD WE ASSESS MEDIA COVERAGE?

Evaluating coverage based on political views and policy impact is problematic because it simply reproduces in media criticism the fundamental policy divides over issues like those in the *Schiavo* case. As one reporter has observed, “[t]he polarization of American politics has grown so severe that partisan critics now blame the media for failing to bring down their political enemies.”<sup>30</sup> But this effectively transforms journalists from independent reporters of events into mere pawns in political battlefields. As a result, the public may increasingly come to view the media merely as propagandist actors. This development could in turn compromise the credibility of the press<sup>31</sup> and hamper its ability to carry out its critical roles as government watchdog, public educator, and instigator of public debate. A potentially more fruitful method to evaluate media coverage is a performance-based standard that steers clear of political rhetoric and has the added virtue of preserving the historically significant role of reporters. This alternative, performance-based perspective is grounded on journalistic standards.<sup>32</sup>

#### A. Journalistic Standards

Of what do such journalistic standards consist? While many have argued that journalism, because it is not licensed or regulated, is not literally a profession,<sup>33</sup> both news organizations and individual journal-

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30. Gabriel Sherman, *MSM Takes Another Beating, with Blows from Left and Right*, N.Y. OBSERVER, June 5, 2006, available at <http://www.observer.com/printpage.asp?iid=12901&ic=Books+4>.

31. For claims that the press has already lost credibility, see Carroll Doherty, *The Public Isn't Buying Press Credibility*, NIEMAN REP., July 1, 2005, at 47, and see also Clay Calvert, *Credibility and the Press: A Response to Professor Loewy*, 4 FIRST AMEND. L. REV. 59 (2005), and PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, PUBLIC MORE CRITICAL OF PRESS, *supra* note 6.

32. I use the terms “journalistic standards” and “news standards” interchangeably in this Article, although an argument may be made that there is a significant difference between the two – at least institutionally. In other words, journalistic standards or ethics may be the rules by which individual journalists do their jobs. By contrast, news standards can also refer to the journalistic and coverage standards of news organizations and not just individual journalists.

33. See, e.g., JAMES FALLOWS, *BREAKING THE NEWS: HOW THE MEDIA UNDERMINE AMERICAN DEMOCRACY* 150 (1997) (noting the “strange, twilight zone of status” of modern journalism in the course of a broad-ranging critique); David A. Logan, “Stunt” Journalism, Professional Norms, and Public Mistrust of the Media, 9 U. FLA. J. L. & PUB. POL’Y 151, 157-59 (1998) (contending that journalism is not a profession); Michael Kelly, Editorial, *Left Everlasting (Cont’d)*, WASH. POST, Dec. 18, 2002, at A35 (same). Nevertheless, there is much talk of the professionalization of the press and many journalists see themselves as professionals. See, e.g., Jeffrey S. Nestler, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist’s Privilege*, 154 U. PA. L. REV. 201, 206-07 (2005), and sources cited therein; see

ists hew to professional-type conventions.<sup>34</sup> Organizations representing journalists – such as the Society of Professional Journalists (“SPJ”), the American Society of Newspaper Editors (“ASNE”), and the Radio-Television News Directors Association (“RTNDA”) – have adopted codes of ethics for journalists, and many accept them as the standards of their craft.<sup>35</sup> In addition, many newspapers and electronic news outlets have their own ethics and practice rules governing their newsrooms.<sup>36</sup>

There are differences among professional news standards<sup>37</sup> and many criticize the rhetoric of neutrality and “objective” reporting that is often used to characterize the goals of mainstream journalism.<sup>38</sup> Never-

also BILL KOVATCH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM* 89-94 (2001) [hereinafter KOVATCH & ROSENSTIEL, *ELEMENTS*] (explaining why some reporters have argued against licensing); ROBERT W. MCCHESENEY, *THE PROBLEM OF THE MEDIA* 64-77 (2004) (arguing that professionalization in journalism was an example of industry self-regulation in response to media criticism in the early twentieth century and cataloguing limits to journalistic professionalism).

34. Press Release, Gannett Newspaper Division, Gannett News Paper Division Issues Guidelines on Ethical News-Gathering Conduct for Newsrooms (June 14, 1999), available at <http://www.gannett.com/go/press/pr061499.htm>; ETHICAL JOURNALISM, A HANDBOOK OF VALUES AND PRACTICES FOR THE NEWS AND EDITORIAL DEPARTMENTS, (N.Y Times 2004), available at [http://www.nytc.com/pdf/NYT\\_Ethical\\_Journalism\\_0904.pdf](http://www.nytc.com/pdf/NYT_Ethical_Journalism_0904.pdf); ETHICS CODE: ASSOCIATED PRESS MANAGING EDITORS (Am. Soc’y of Newspaper Editors 1994), available at <http://www.asne.org/ideas/codes/apme.htm>; THE WASHINGTON POST STANDARDS AND ETHICS (Am. Soc’y of Newspaper Editors 2002), available at <http://www.asne.org/ideas/codes/washingtonpost.htm>.

35. ASNE STATEMENT OF PRINCIPLES (Am. Soc’y of Newspaper Editors 1975); CODE OF ETHICS (Soc’y of Prof’l Journalists 1996) [hereinafter CODE OF ETHICS (SPJ)], available at <http://www.spj.org/pdf/ethicscode.pdf>; CODE OF ETHICS AND PROFESSIONAL CONDUCT (Radio-Television News Directors Ass’n & Found. 2000) [hereinafter CODE OF ETHICS AND PROFESSIONAL CONDUCT (RTNDA)], available at <http://www.rtna.org/ethics/coe.shtml>. For an overview of the journalistic codes of ethics, see, for example, Jeff Storey, *Does Ethics Make Good Law? A Case Study*, 19 CARDOZO ARTS & ENT. L.J. 467, 469-78 (2001), and sources cited therein.

Some journalists reject the notion of written codes of ethics, at least partly because of the fear that such professional codes could be transmuted into legally binding standards of conduct and lead to liability. See KOVATCH & ROSENSTIEL, *ELEMENTS*, *supra* note 33, at 96-97; Storey, *supra*, at 468, and sources cited therein.

36. See Codes of Ethics (July 13, 2006), [http://www.asne.org/print.cfm?printer\\_page=%2Findex%2Ecfm%3Fid%3D387](http://www.asne.org/print.cfm?printer_page=%2Findex%2Ecfm%3Fid%3D387); see also Press Release, Gannett Co., Inc. Newspaper Div., *supra* note 34 (Gannett’s guidelines for its newspapers, consisting of five ethical principles and supporting objectives accompanied by “practices to protect the principles”).

37. While some journalistic standards are widely accepted, others are more controversial. For discussions of controversy even within the news media with respect to guidelines for the use of undercover journalism, see, for example, C. Thomas Dienes, *Protecting Investigative Journalism*, 67 GEO. WASH. L. REV. 1139 (1999); Logan, *supra* note 33, at 151-70.

38. It is beyond the scope of this Article to canvass the manifold critiques of objectivity in journalism. Suffice it to say that some find the concept of objectivity definitionally incoherent. Similarly minded critics find objectivity impossible to put into practice because of the inevitable intrusion of journalists’ own perspectives. Yet others claim it is too vague a notion to provide any real guidance in reporting. Still others challenge the desirability of objectivity in journalism, calling instead for journalists to be engaged with their stories. Critics of traditional objective journalism have argued that the underlying justification for objectivity as a press standard is simply the commercial desire not to offend advertisers. See, e.g., ERIC BURNS, *INFAMOUS*

theless, journalists describing the elements of their craft agree that they are engaged in the search for truth because “the primary purpose of journalism is to provide people with the information they need to be free and self-governing.”<sup>39</sup> The Preamble to the SPJ Code of Ethics states that “public enlightenment is the forerunner of justice and the foundation of democracy. The duty of the journalist is to further those ends by seeking truth and providing a fair and comprehensive account of events and issues.”<sup>40</sup> The SPJ Code identifies the following principles: the pursuit and reporting of truth, minimization of harm, independent action, and accountability.<sup>41</sup> The ASNE Statement of Principles also highlights responsibility, independence, truth and accuracy, impartiality, and fair play as the principal standards for journalism practice.<sup>42</sup> For electronic media, the RTNDA has adopted similar professional guidelines, which prompt journalists to “pursue truth aggressively and present the news accurately, in context and as completely as possible.”<sup>43</sup> The Committee of Concerned Journalists, after having studied the modern state of journalism, concluded that journalists have followed similar guiding princi-

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SCRIBBLERS: THE FOUNDING FATHERS AND THE ROWDY BEGINNINGS OF AMERICAN JOURNALISM (2006) (describing bias of early American press); McCHESNEY, *supra* note 33, at 58-59 (on the history of press as partisan). New forms of journalism, such as narrative journalism, engaged journalism, and even citizen journalism do not seek to test their work against a standard of objectivity. For examples of discussions about objectivity in journalism, see, for example, Brent Cunningham, *Re-Thinking Objectivity*, COLUM. JOURNALISM REV., July-Aug. 2003, at 24; Kathy Roberts Forde, *How Masson v. New Yorker Has Shaped the Legal Landscape of Narrative Journalism*, 10 COMM. L. & POL’Y 101, 133 (2005) (regarding narrative journalism’s departure from neutrality and objectivity); Doug McGill, *The Fading Mystique of an Objective Press*, MCGILL REPORT, available at [http://journalism.nyu.edu/pubzone/weblogs/pressthink/2004/10/29/mcgill\\_essay\\_p.html](http://journalism.nyu.edu/pubzone/weblogs/pressthink/2004/10/29/mcgill_essay_p.html). For a discussion of the effect of narrative journalism conventions on the development of press law, see Forde, *supra*.

39. KOVACH & ROSENSTIEL, *ELEMENTS*, *supra* note 33, at 17 (describing conclusion of Committee of Concerned Journalists after their two-year inquiry into journalism). The mainstream press has maintained the tradition of the same journalistic goals of independence, fairness, and the attempt to report factually and accurately since at least the twentieth century. While references to objectivity, neutrality and impartiality are often made in describing journalistic norms, these terms are both imprecise and heavily baggage-laden. See *supra* note 38 and accompanying text; see also KOVACH & ROSENSTIEL, *ELEMENTS*, *supra* note 33, at 41; Kenneth L. Woodward, *Neither ‘Objective’ Nor ‘Post-Modern,’* 19 NOTRE DAME J.L. ETHICS & PUB. POL’Y 719 (2005) (noting that journalists themselves do not strive for objectivity, but for fairness and factuality). As Kovach and Rosenstiel point out, however, the original meaning of objectivity focused on objectivity of the method or process rather than objectivity of a reportorial viewpoint. KOVACH & ROSENSTIEL, *ELEMENTS*, *supra* note 33, at 72-75; see also PAUL STARR, *THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS* 396-97 (2004) (on Walter Lippmann’s meaning of objectivity in reporting).

40. CODE OF ETHICS (SPJ), *supra* note 35.

41. *Id.* On “journalistic truth” as a process, see, for example, KOVACH & ROSENSTIEL, *ELEMENTS*, *supra* note 33, at 43.

42. American Society of Newspaper Editors, ASNE Statement of Principles (1996), <http://www.asne.org/kiosk/archive/principl.htm>.

43. CODE OF ETHICS AND PROFESSIONAL CONDUCT (RTNDA), *supra* note 35.

ples in different cultures and throughout different time periods and that journalism has been extraordinarily important for society.<sup>44</sup> According to the Committee, modern journalists adhere to nine principles of journalism: an obligation to the truth; first loyalty to citizens; a discipline of verification; an independence from the subjects covered; a commitment to serve as an independent monitor of power; a commitment to serve as a forum for public criticism and compromise; a commitment to make the significant interesting and relevant; a commitment to keep the news comprehensive and proportional; and an ability to exercise personal conscience.<sup>45</sup> There is sufficient commonality among these voluntary standards at least within the mainstream media (“MSM”) that they can serve usefully in the assessment of press performance.

### B. *Internal Limits of Journalistic Standards*

Of course, even in the mainstream news media, different sorts of news-based programming hew to different journalistic and editorial conventions. For example, journalistic standards of factual reporting will apply differently in hard news contexts as opposed to opinion contexts.<sup>46</sup> Moreover, even if print and electronic journalists hew to the same journalistic standards of accuracy and independence in principle, the print and visual media have distinguishable narrative conventions that can influence the way in which information is disseminated.<sup>47</sup> In addition,

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44. THE ELEMENTS OF JOURNALISM is an account of those principles, culled from the work of the Committee and its partners (such as the Pew Charitable Trusts). See generally KOVACH & ROSENSTIEL, ELEMENTS, *supra* note 33.

45. *Id.* at 12-13. Kovach and Rosenstiel resist the urge to include fairness, balance, and objectivity in the list of principles: they characterize fairness and balance as too vague and the concept of objectivity today as mangled and distant from its origins. *Id.* at 13. While the rhetoric of fairness, balance, and objectivity is missing from Kovach and Rosenstiel’s code for journalism, the language is often referred to in the quotes from journalists used by the authors. Far more importantly, however, the notions behind the disfavored rhetoric are actually consistent with the elements of journalism identified by the authors. For example, without calling for fairness, balance, or context, Kovach and Rosenstiel’s book stresses the importance of truth, verification, and journalistic independence from both sources and faction. *Id.* at 36-111.

46. For example, in both the print and electronic contexts, traditions of journalism require that there be differences between “hard,” factual news stories and news commentary pieces or pundit debate shows. See, e.g., Woodward, *supra* note 39, at 722-25 (on newsmagazine formats). Newspapers provide factual news reports, editorial pages, and op-ed pages. Broadcasters and cable outlets air factual news programming in the evening news, news and human interest stories in the morning, investigative news reports in newsmagazine formats, and news and opinions programs with an editorial slant. See also KOVACH & ROSENSTIEL, ELEMENTS, *supra* note 33.

47. On this view, television uses an “episodic frame” that “fragments information into isolated, dramatic particles and resists longer and more complex messages.” Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. 585, 586 (2004) (quoting SCHEUER, *supra* note 13, at 9). Television is said to “emphasize immediacy and discrete occurrences[,] prefer simple, dramatic messages that resonate with what we already know – heroes, villains and other familiar stock figures, right and wrong, easily

not all journalists understand the same thing when interpreting “objective” reporting or distinguishing among “hard” news, “soft” news, and opinion. Likewise, not all journalists agree that their principal role is simply to report events in a neutral frame. There are also wide disparities in the quality of journalists throughout the media. Moreover, editors and producers rather than journalists generally have the last word regarding story selection and coverage in most of today’s media organizations. Thus, it would be naive to believe that a simple appeal to journalistic standards as such will lead to incontrovertible assessments. At a minimum, there will be ambiguity and disparity in the application of journalistic standards. At least some journalistic standards are likely to vary and evolve. Nevertheless, this Article contends that it is better to judge media using an imperfect policy-neutral metric rather than a partisan vantage point.

Some might argue that journalistic standards are more useful in judging the quality of coverage of particular stories than in assessing the choice of stories or the amount of coverage provided.<sup>48</sup> News organizations wield much discretion with respect to the selection of what to cover and what to emphasize. The difficulty with this inquiry is that people will inevitably differ both about what they think stories are “about” and which stories they think are most important. Ultimately, the decisions as to which stories are more important must be based on some

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identifiable problems with simple solutions.” *Id.* at 586. Even if one does not accept a medium-deterministic view of news coverage, however, televised news documentaries have “shifted from expository analyses to brief presentations of personal stories,” becoming “docu-soap[s].” Steven H. Miles, *Medical Ethicists, Human Curiosities, and the New Media Midway*, 4 *AM. J. BIOETHICS* 39, 41 (2004); see also TODD GITLIN, *MEDIA UNLIMITED: HOW THE TORRENT OF IMAGES AND SOUNDS OVERWHELMS OUR LIVES* 12-24 (2001) (describing television as inundating viewers with an endless flow of images); SCHEUER, *supra* note 13, at 8-14, 69-89 (describing television’s structure as audiovisual, kinetic, episodic, linear, orderly, concrete, personal, dramatic, partitioned, symbolic, and fragmentary, thereby promoting shallowness and immediacy and reflecting political conservatism as a result of television grammar’s simplifying character).

Importantly, claims about the nature of television grammar do not necessarily mean that the grammar of television is “inherent in the technology.” Bandes, *supra*, at 586. Rather, “there are complex explanations having to do with corporate imperatives, audience psychology, and the political and social landscape.” *Id.*

For an account of television as a less fully effective information medium than print, see, for example, LEONARD DOWNIE JR. & ROBERT G. KAISER, *THE NEWS ABOUT THE NEWS: AMERICAN JOURNALISM IN PERIL* 172 (2002).

48. Even though there may be differences between near-universal standards and standards for specific media, it is possible to test a particular story by whether it involves fabrications, whether it sought comment from affected individuals, and whether it reflected appropriate balance.

This is not to deny, of course, that even with respect to assessments of particular stories, there are significant data or “proof” issues. Although it is likely possible to gauge any given news story against journalistic standards, it is much harder to do that for “the media” in general on a story over a number of months because of the volume of reporting and the variety of different media actors.

normative notion about comparative news significance. Whether the press spent “too much” time on a particular story depends on the other available options: the operative editorial question is always “compared to what?”<sup>49</sup> It is arguable whether a reference to journalistic standards alone can suffice as to this aspect of the evaluative question.<sup>50</sup> The exercise of discretion in choosing the focus of reportage will inevitably involve subjectivity.<sup>51</sup>

Despite these various difficulties with assessments based on journalistic standards, that approach is still the best available. Disagreement about story selection does not mean that journalists and editors have exercised their discretion in the service of faction or ideology. News organizations often attempt to make their coverage choices less subjective by deferring to assertedly objective market factors (such as responsiveness to audience interests). Close analysis of those factors can reveal whether such purportedly objective metrics contain implicit skews.<sup>52</sup> Journalists can develop less objectionable alternatives as they

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49. Even under this analysis, there is still the question of data or proof. With regard to the selection of what to cover and the degree of emphasis on a particular story as opposed to others, it is not clear what data or information one would gather in order to make the comparison.

50. Bill Kovach and Tom Rosenstiel have argued for the standards of completeness and proportionality as guidelines for choice of coverage. KOVACH & ROSENSTIEL, *ELEMENTS*, *supra* note 33, at 163-78. While this Article fully agrees that those are desirable guidelines, it recognizes, as do Kovach and Rosenstiel, that these guidelines are far from self-defining.

A proponent of journalistic standards might suggest that one way of assessing the legitimacy of the exercise of that discretion is to focus on whether commercial/political or professional/journalistic standards influenced the exercise of that discretion. In other words, did the media focus on the *Schiavo* story with the intensity that it did because it thought the story was that important, an example of editorial judgment, or simply because of the commercial pressures of insufficient funds and the need to keep up with the competition? *Cf.* KOVACH & ROSENSTIEL, *ELEMENTS*, *supra* note 33, at 165-68 (criticizing targeted demographics as justifying story selection).

While attractive as an apparently neutral and relatively apolitical way of distinguishing the acceptable from the unacceptable, the “commercial vs. professional” approach in fact raises many difficulties. At a minimum, given the phenomenon of cognitive dissonance, editors and journalists will think that they are exercising true and independent editorial judgment even if they are subtly influenced by commercial or even political pressures. It is also unrealistic to see the choices as so starkly contrasting. Except for non-commercial outlets, newspapers and electronic media have always been profit-seeking institutions, and therefore the idea that editors would not take circulation and ratings into account in determining the choice of stories and the nature of their coverage would be naïve. In many cases, both commercial and even political factors as well as journalistic standards may exist – even if in different relative weights. Moreover, the very fact that others are covering a story, even if for ideological or commercial reasons, makes it a newsworthy story. After all, the public’s interest in a story must be an aspect of newsworthiness, unless one is completely elitist.

51. *See* KOVACH & ROSENSTIEL, *ELEMENTS*, *supra* note 33, at 168-69 (recognizing that “[p]roportion and comprehensiveness in news are subjective,” but contending that striving for these goals is “essential to journalism’s popularity – and financial health”).

52. *See, e.g.*, KOVACH & ROSENSTIEL, *ELEMENTS*, *supra* note 33, at 165-78 (revealing the skews regarding story choices when coverage is guided by targeted demographics and suggesting

become conscious of the effects of their guideposts for the exercise of discretion. Naturally, sometimes true news judgment will not be exercised at all – as when news media converge on a particular sensational story because their competitors have done so. But that is less a problem with journalistic standards than a failure in their application. In any event, public attention to news outlets' journalistic choices can also promote transparency, public discussion, and, perhaps, more responsive and accountable news organizations.<sup>53</sup> Thus, this Article contends that even though the metric of journalistic standards will undoubtedly be easier to apply to reporting of particular stories than to the issue of story selection in the first instance, it should not be dismissed as an evaluative criterion on that basis.

### C. *Modern Pressures on Journalistic Standards and Editorial Judgment*

Although journalistic standards are a useful yardstick by which to assess press performance, it is also true that they cannot be examined *in vacuo*. Journalism today is part of what press analysts Bill Kovach and Tom Rosenstiel have called the “Mixed Media Culture,” which functions under a variety of pressures that may influence at least some journalists and news organizations to relax their adherence to traditional journalistic standards.<sup>54</sup> Today's media environment presents at least eight developments that may pressure the exercise of news standards regarding newsgathering, news reporting, or both: changes in industry structure; the rise of the twenty-four hour news cycle; the blurring of distinctions among news, opinion, and entertainment; the explosion and complex social role of blogs; a shift in the definition of balance in reporting; a shift in the press' approach to privacy; the strengthening of conservative groups dedicated to shaping public debate through media coverage; and the development of the religious broadcast community.<sup>55</sup>

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instead that reporters cover stories relevant to the diversity of their entire readership – “a news package that is comprehensive and proportional to their community and their needs”).

53. For example, critics could present the underlying facts for audience assessment: here are some stories occurring in some time frame, and they were given *X* minutes on the networks, *Y* minutes on cable, and *Z* column inches in the major newspapers. This would enable a critical public conversation about the particular media outlet's journalistic judgments. KOVACH & ROSENSTIEL, *ELEMENTS*, *supra* note 33, at 169 (even if journalists and citizens would disagree over judgments of story importance, “citizens can accept those differences if they are confident that the journalist is trying to make news judgments to serve what readers need and want. The key is citizens must believe the journalists' choices are not exploitative – they are not simply offering what will sell – and that journalists aren't pandering”).

54. BILL KOVACH & TOM ROSENSTIEL, *WARP SPEED: AMERICA IN THE AGE OF MIXED MEDIA* 1 (1999) [hereinafter KOVACH & ROSENSTIEL, *WARP SPEED*].

55. There are other pressures on modern media that can have significant impacts on journalistic standards and press performance. Examples include government propaganda in video

Many of these developments have led to journalistic self-criticism and generated significant discussion in the journalism literature.<sup>56</sup> All of these developments are reflected, to one degree or another, in the coverage of the *Schiavo* case.

#### 1. CHANGES IN INDUSTRY STRUCTURE AND RESULTING ECONOMIC PRESSURES

The modern media environment is complex and evolving and the future is uncertain. For some time, there has been discussion within the journalistic community as to whether “legacy” media – like the print newspaper – will survive competition and technological change.<sup>57</sup> The decline in the economics of the traditional mass media has led to signifi-

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news release (“VNR”) form, increasingly aggressive government applications of law against journalists, and practices of embedding journalists with the military in wartime. These issues did not figure in the *Schiavo* case and are therefore not discussed in this Article.

56. See generally DOWNIE & KAISER, *supra* note 47; KOVACH & ROSENSTIEL, *ELEMENTS*, *supra* note 33; KOVACH & ROSENSTIEL, *WARP SPEED*, *supra* note 54.

57. By “legacy media,” I refer to newspapers, magazines, radio, and over-the-air television. While newspapers are still making money, their profit margins and stock prices have decreased recently, and their executives are concerned about the future. See, e.g., Eric Black, *Newspapers Turn Page in This New Media Age; Reacting to Declining Circulation Figures, Newspapers Are Reshaping How They Can Best Serve Their Readers*, STAR TRIB., Oct. 11, 2005, at 1A (newspaper profits and the stock prices of the companies that own them were also down during the first half of 2005); James P. Miller, *Tribune to Focus on Costs, Growth; CEO Reiterates Goal of Online Expansion*, CHI. TRIB., May 3, 2006, at C3; *Month in Review*, EDITOR & PUBLISHER, Jan. 1, 2006 (discussing the survival of newspapers in face of competition and cost-cutting resulting from competition); John Morton, *Keeping the Faith*, AM. JOURNALISM REV., Feb./Mar. 2006, at 68 (concern for the future of newspapers at an all-time high); Lucia Moses, *Grabbing the Rebound*, EDITOR & PUBLISHER, Jan. 1, 2004 (newspaper executives profess worry about future of industry). But see Tim Rutten, *Regarding Media*, L.A. TIMES, May 7, 2005, at E1 (concluding that despite talk about death of newspapers, survival is more than likely); PROJECT FOR EXCELLENCE IN JOURNALISM, *THE STATE OF THE NEWS MEDIA 2006* (2006) [hereinafter *THE STATE OF THE NEWS MEDIA 2006*], available at <http://www.stateofthenewsmedia.org/2006/index.asp> (concluding that we are not seeing the end of journalism, but rather we are seeing a “seismic transformation” in journalism).

Analogously, while the traditional advertising model for network television is still viable, see, for example, Ben Grossman, *Poltrack: Network Ad Model Still Strong*, BROADCASTING & CABLE, July 17, 2006, available at <http://www.broadcastingcable.com/article/CA6354112.html?display=search+Results&text=network+advertising>, there is much talk about the decline of broadcast television. Newspaper readership and traditional broadcast viewership have decreased significantly. KOVACH & ROSENSTIEL, *ELEMENTS*, *supra* note 33, at 174; John Eggerton, *Big Three Net Revs Down 21.5%*, BROADCASTING & CABLE, Nov. 16, 2005, available at <http://www.broadcastingcable.com/article/CA6284398.html?display=breaking%20News> (revenues for ABC, CBS and NBC down); James Surowiecki, *Printing Money*, NEW YORKER, Apr. 3, 2006, at 33 (“newspapers are doomed”). The impact of new media, such as the Internet, on the legacy media audience is unclear. See Andrew Ratner, *Spreading the News; Extra*, BALT. SUN, Nov. 6, 2005, at 1F (newspaper industry faces bleak future unless it can adopt and compete with certain new media technologies); Jack Shafer, *Liposuction for Newspapers*, WASH. POST, June 25, 2006, at B02 (newspaper industry is changing as a result of new media, but precise changes remain to be seen).

cant changes in ownership patterns and industry structure.<sup>58</sup> In turn, the economic consequences of those changes are having effects both on newsgathering and news reporting.<sup>59</sup>

These economic consequences are often linked to the much-criticized phenomenon of media consolidation.<sup>60</sup> This consolidation has manifested itself in the conglomerate incorporation of previously independent news outlets<sup>61</sup> and in the increasing transformation of major daily newspapers from family-owned private businesses to publicly-owned entities.<sup>62</sup> Public ownership requires accountability to boards of directors and public shareholders,<sup>63</sup> which, in turn, undermines the traditional assumption that news divisions should not be expected to be profit centers and creates pressure to devote more coverage to what “sells.”<sup>64</sup> The shift from family owned newspaper oligopolies to publicly owned

58. KOVACH & ROSENSTIEL, *WARP SPEED*, *supra* note 54, at 2 (concluding in a 1999 analysis of media coverage of the Clinton-Lewinsky scandal that “[j]ournalism is in a state of disorientation brought on by rapid technological change, declining market share, and growing pressure to operate with economic efficiency”).

59. Recent polls suggest that significant majorities of journalists believe that economic pressures are affecting news coverage. *See, e.g.*, Bill Kovach, Tom Rosenstiel & Amy Mitchell, *Commentary on the Survey Findings*, in *THE STATE OF THE NEWS MEDIA 2006*, *supra* note 57, available at [http://www.stateofthenewsmedia.org/2006/journalist\\_survey\\_commentary.asp](http://www.stateofthenewsmedia.org/2006/journalist_survey_commentary.asp); Pew Research Ctr. for the People & the Press, *Press Going Too Easy on Bush: Bottom-Line Pressures Now Hurting Coverage, Say Journalists*, in *THE STATE OF THE NEWS MEDIA 2006*, *supra* note 57, available at [http://www.stateofthenewsmedia.org/2006/journalist\\_survey\\_prc.asp](http://www.stateofthenewsmedia.org/2006/journalist_survey_prc.asp).

60. *See* KOVACH & ROSENSTIEL, *ELEMENTS*, *supra* note 33, at 30-33. *See generally* BEN H. BAGDIKIAN, *THE NEW MEDIA MONOPOLY* (2004); C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* (2006) [hereinafter BAKER, *MEDIA CONCENTRATION AND DEMOCRACY*]; MCCHESENEY, *supra* note 33; ROBERT W. MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES* (1999); C. Edwin Baker, *Media Structure, Ownership Policy, and the First Amendment*, 78 S. CAL. L. REV. 733 (2005); C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 733-37 (2002).

61. Riane Eisler, *How Politics Impact Your Personal Life*, 62 *HUMANIST* 24 (2002) (more independent newspapers are shut down or swallowed by huge media conglomerates that control many publications); *see also* Laura Mansnerus & Katherine Roberts, *Baltimore Papers Make Some News*, N.Y. TIMES, June 1, 1986, § 4, at 7 (major daily newspapers in Baltimore and Louisville, Kentucky, were sold by independent ownership to conglomerates).

62. Kenneth Jost, *Future of Newspapers: Growing the Press*, 16 *CQ RESEARCHER* 58, 58-62 (2006); *see also* FALLOWS, *supra* note 33, at 70-73; Project for Excellence in Journalism & Rick Edmunds, *Newspapers Ownership*, in *THE STATE OF THE NEWS MEDIA 2006*, *supra* note 57, available at [http://www.stateofthenewsmedia.org/2006/narrative\\_newspapers\\_ownership.asp?cat=5&media=3](http://www.stateofthenewsmedia.org/2006/narrative_newspapers_ownership.asp?cat=5&media=3).

63. Indeed, it was pressure from major institutional shareholders that apparently caused Knight Ridder to put itself on the auction block. *See, e.g.*, Paul Janesch, *Commentary, Why Newspapers Are Having Big Money Problems*, HARTFORD COURANT, Nov. 17, 2005, at D2; Katharine Q. Seelye & Andrew Ross Sorkin, *Newspaper Chain Agrees to a Sale for \$4.5 Billion*, N.Y. TIMES, Mar. 13, 2006, at A1 (same).

64. Logan, *supra* note 33, at 204; *THE STATE OF THE NEWS MEDIA 2006*, *supra* note 57; *see also* HERBERT J. GANS, *DEMOCRACY AND THE NEWS* 22-28 (2003) (describing problems for journalists of conglomerate-owned media firms); John McManus, *Now Is the Time for All Good Journalism Teachers and Students to Come to the Aid of Their Field*, *GRADE THE NEWS*, Aug. 27,

media firms can lead to a diminution of the traditional *noblesse oblige* pursuant to which newspaper families emphasized their role in community service and public interest.<sup>65</sup> Furthermore, news divisions that are part of profit-making organizations with many different interests face new pressures to avoid negative reporting about their parent corporations' other interests, to be gentle on corporate advertisers, or even to engage in cross-promotion of the entities' other interests on news shows.<sup>66</sup>

The changes in ownership, the imperative to satisfy Wall Street profitability expectations, and the concern about the future of traditional media have led to significant increases in economic pressures on news organizations. News organizations have reacted to the economic pressures by reducing resources available for news investigations and verification, trimming journalistic staff, reducing or eliminating foreign news bureaus, and gutting research and fact-checking departments.<sup>67</sup> This decline in resources likely leads to changes both in newsgathering and news coverage.

With regard to newsgathering, the effects are numerous. The decline in resources and staff as well as the competition from full-time news channels<sup>68</sup> are likely to reduce time spent on newsgathering and source selection. With fewer reporters, lower budgets, and less commitment to self-generated investigations, the media increasingly "out-source" – relying on unvetted sources whose assertions they do not independently verify and whose agendas they may not understand or reveal.<sup>69</sup> When the press has fewer resources to evaluate and monitor its

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2004, <http://www.gradethenews.org/commentaries/jschool.htm> (reporting that majority of journalists agree that profit pressure hurts quality of news coverage).

65. See, e.g., DOWNIE & KAISER, *supra* note 47, at 25-26, 68; David A. Logan, *All Monica, All of the Time: The 24-Hour News Cycle and the Proof of Culpability in Libel Actions*, 23 U. ARK. LITTLE ROCK L. REV. 201, 201-02 (2000) (describing tradition of newspapers "operated by powerful families, who mixed a desire to turn a profit with a commitment to improving the life of their communities"); Philip Meyer, *Saving Journalism: How to Nurse the Good Stuff Until It Pays*, COLUM. JOURNALISM REV., Nov./Dec. 2004, at 55, available at <http://www.cjr.org/issues/2004/6/ideas-essay-meyer.asp?printerfriendly=yes>.

66. See, e.g., NEWS INCORPORATED: CORPORATE MEDIA OWNERSHIP AND ITS THREAT TO DEMOCRACY 227-29 (Elliott Cohen ed., 2005).

67. See, e.g., Loren Ghiglione, *Foreword to Symposium on Media Ethic*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 415, 424 (citing TOM FENTON, *BAD NEWS: THE DECLINE OF REPORTING, THE BUSINESS OF NEWS, AND THE DANGER TO US ALL* 3, 17 (2005)) (on the closure of foreign news bureaus); Woodward, *supra* note 39, at 719 (describing lack of fact checkers today because of expense); see also KOVACH & ROSENSTIEL, *ELEMENTS*, *supra* note 33, at 75-93.

68. See discussion *infra* note 69 and accompanying text.

69. Thus, the resource-starved mainstream press may increase its reliance on sources that are not necessarily committed to journalistic standards. This includes, but is hardly limited to, sources of information on the Internet. Journalists may rely on public relations press releases of organized groups without independent verification. Decrease in time and resources may also increase

sources, it is subject to more unchecked manipulation. One might argue that the expansion of news sources is desirable because it expands sources beyond political and media insiders.<sup>70</sup> But this expansion comes with dangers as well. Rather than merely worrying about the judgment exercised by the news media, one may now worry about whether the news media is exercising any independent judgment at all or simply parroting the information provided by distant sources.

In addition, pressures exerted by the changed media environment may also affect news coverage. The decline in resources is said to have led to a limited scope in news coverage.<sup>71</sup> In addition, as will be described below, the search for profit seems to lead to an increase in “infotainment,” a blurring of news and entertainment of which media critics have been complaining for some time.<sup>72</sup> Without attributing Machiavellian motives of specific political bias, it is still possible to conclude that the factors of consolidation and commercialization make certain kinds of coverage more attractive than others. At a minimum, economic pressures lead to an increased desire for the most dramatic, sensational, and compelling story and an excessive reliance on ratings and programming for the lowest common denominator.<sup>73</sup>

In addition to the impact of the “bottom line” on news coverage, some have argued that the current media environment has amplified an ideological slant in the news and exerted a chilling effect on journalists with dissenting views.<sup>74</sup> Claims of widespread media bias – and partic-

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uncritical and exclusive reliance on government sources. There is also, as in the *Schiavo* case, an acceptance of sources provided by the interested parties to the story with little effort by the press to find its own alternate sources of information.

70. HERBERT J. GANS, *DECIDING WHAT'S NEWS: A STUDY OF CBS EVENING NEWS, NBC NIGHTLY NEWS, NEWSWEEK, AND TIME* 144-45 (1980); Jonathan Mermin, *Free But Not Independent: The Real First Amendment Issue for the Press*, 39 U.S.F. L. REV. 929 (2005) (arguing that spectrum of viewpoints on government policy reported in the news is limited to perspectives advanced within government because of reliance on official sources); see also GANS, *supra* 64, at 50-52.

71. *THE STATE OF THE NEWS MEDIA 2006*, *supra* note 57. This has been particularly evident in the news coverage of local television stations. *Id.* Kovach and Rosenstiel have lamented the economics that lead media to converge on the same small group of blockbuster stories at any given time, despite the increase in news sources and total news time. See KOVACH & ROSENSTIEL, *WARP SPEED*, *supra* note 54.

72. See discussion *infra* note 96 and accompanying text. See generally MCCHESENEY, *supra* note 33.

73. Media theorists have noted the impact of advertising on programming content. C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* 45-70 (1994). A survey of journalists released in 2004 by the Pew Research Center for the People and the Press indicates that 66% of more than 500 journalists responding to the survey believed that profit pressures were hurting news coverage. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *HOW JOURNALISTS SEE JOURNALISTS IN 2004* (2004), available at <http://people-press.org/reports/pdf/214.pdf>.

74. For example, many claim that media consolidation has content effects. One common claim ties consolidation to a reduction in diversity of viewpoints (although the increase in outlets

ularly liberal media bias – have persuaded a significant percentage of the public.<sup>75</sup> This becomes increasingly significant as the competitive media environment creates incentives for more opinionated news-type programming at the very moment when people increasingly doubt the mainstream media.

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today beyond the mainstream news media does make this proposition open to empirical challenge). See Michael J. Gerhardt, *The First Amendment's Biggest Threat Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, 89 MINN. L. REV. 1798, 1819 (2005). Another content-related claim, of less significance in the Schiavo coverage, suggests that as a result of consolidated corporate ownership, mainstream media journalists have lost independence and do not have the freedom to report on issues of significance to their corporate owners. See *supra* text accompanying note 59; see also Kovach, Rosenstiel & Mitchell, *supra* note 60.

75. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *supra* note 73; see also BERNARD GOLDBERG, *BIAS: A CBS INSIDER EXPOSES HOW THE MEDIA DISTORT THE NEWS* (2002) (on network liberal bias); GEOFFREY NUNBERG, *TALKING RIGHT* 170-75 (2006); PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *SURVEY REPORT, STRONG OPPOSITION TO MEDIA CROSS-OWNERSHIP EMERGES* (2003) [hereinafter PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *STRONG OPPOSITION*], available at <http://people-press.org/reports/display.php3?ReportID=188> (“liberal media image persists”); Tien-Tsung Lee, *The Liberal Media Myth Revisited: An Examination of Factors Influencing Perceptions of Media Bias*, J. OF BROAD. & ELEC. MEDIA, Mar. 1, 2005, at 43 (noting that, despite research to the contrary, most people believe media have liberal bias). But see ALTERMAN, *supra* note 13, at 1 (describing accounts of the “liberal media” as a self-conscious part of conservative myth-making); Carl Sessions Stepp, *Anger Weakens the Argument*, AM. JOURNALISM REV., Mar. 2002, at 68 (reviewing GOLDBERG, *supra*) (age-old belief that media is liberally biased ignores reality of distinction between reporters and their bosses).

Some influential cable and radio sources generally identified with a conservative viewpoint, such as Fox News, bill themselves as providing only the counterpoint to the otherwise overwhelmingly liberal media landscape. Despite its self-characterization as “fair and balanced,” Fox News is virtually universally seen as largely partisan to the Republican viewpoint. See KOVACH & ROSENSTIEL, *ELEMENTS*, *supra* note 33, at 102; Neil Hickey, *Cable Wars: In a Desperate Race for Ratings, the Public Falls Behind*, COLUM. JOURNALISM REV., Jan./Feb. 2003, at 12 (noting Fox’s slogan and its rejection of the claim that it is in fact conservative, claiming that it is simply immune to the liberal bias of other media). Some have claimed that Fox is a return to the eighteenth-century notion of the newspaper as party organ. See, e.g., Jerome Weeks, *Rowdy from the Start Journalism: Engaging New Book Explores the Raucous Roots of our Free Press*, DALLAS MORNING NEWS, May 21, 2006, at 7G (reviewing BURNS, *supra* note 38) (Fox News resembles eighteenth-century partisan publications); see also Jeffrey Lord, *From God to Godless: The Real Liberal Terror*, AMERICAN SPECTATOR ONLINE, June 12, 2006, [http://www.spectator.org/dsp\\_article.asp?art\\_id=9943](http://www.spectator.org/dsp_article.asp?art_id=9943) (Fox News is a conservative network); *World This Week*, ECONOMIST, Apr. 29, 2006 (refers to Fox News as “stridently conservative” in noting hiring of new White House spokesman Tony Snow).

While one study found that more journalists identified themselves as liberals rather than conservatives, see PEW RESEARCH CTR. FOR THE PEOPLE AND THE PRESS, *SURVEY REPORT, BOTTOM-LINE PRESSURES NOW HURTING COVERAGE, SAY JOURNALISTS*, in *HOW JOURNALISTS SEE JOURNALISTS IN 2004*, *supra* note 73, available at <http://people-press.org/reports/display.php3?PageID=829>, the meaning of the findings is unclear. Commentary on these findings, for example, suggests that most self-identified liberal journalists are actually closer in their politics to libertarians. Kovach, Rosenstiel & Mitchell, *supra* note 59. No reputable studies have characterized the entire media landscape as either unqualifiedly liberal or irremediably conservative.

## 2. THE TWENTY-FOUR HOUR NEWS CYCLE

Today's electronic media includes not only broadcast networks with their morning, midday and evening news, but twenty-four hour cable news services, all-news radio, news Web sites, political blogs, and satellite radio.<sup>76</sup> In addition to reduced resources, the twenty-four hour news cycle is one of the most significant factors affecting news today.<sup>77</sup> Because once-a-day reporting is no longer timely, the increased competition from the twenty-four hour cable channels has fundamentally affected over-the-air nightly newscasts and newsmagazines as well.<sup>78</sup>

The twenty-four hour news hole leads to consequences both in the quality of hard news and in the format and nature of news programming across all media.<sup>79</sup> Because of the need for news content, the twenty-four hour news day is likely to contain a significant amount of repetition.<sup>80</sup> While it offers viewers desirable immediacy, this shortened news cycle can also compromise accuracy and context – particularly in a media world with decreasing resources devoted to news.<sup>81</sup> The pressure of immediacy and the requirement for speed of delivery<sup>82</sup> force reporters and editors to air elements of stories as they develop, without adequate time to assess the evidence and reach conclusions as to its meaning and significance.<sup>83</sup> Technology and time conspire to make it more difficult

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76. Cf. Alessandra Stanley, *From One Voice to Many, A New Golden Age of News*, N.Y. TIMES, July 26, 2006, at E1.

77. This was inaugurated by CNN during its coverage of the Gulf War in 1991. Logan, *supra* note 65, at 202; see also KOVACH & ROSENSTIEL, *WARP SPEED*, *supra* note 54, at 6.

78. Caitlin Anderson, *Dancing to a Different Tune: Can Traditional Media Compete with the New Kids on the Block?*, 52 NIEMAN REPORTS 64 (1998), available at <http://www.nieman.harvard.edu/reports/98-4NRwint98/Anderson.html>; Brian Montopoli, *Surviving the Shrinking News Cycle*, CBS NEWS, Oct. 4, 2005, <http://www.cbsnews.com/blogs/2005/10/04/publiceye/entry910437.shtml>.

79. See, e.g., KOVACH & ROSENSTIEL, *WARP SPEED*, *supra* note 54, at 6-9; Logan, *supra* note 65, at 203-08.

80. DOWNIE & KAISER, *supra* note 47, at 10. Twenty-four hour cable networks presumably explain away the repetitive character of their news coverage by noting that their purpose is to provide news to viewers who tune in throughout the day. But repetition is also an artifact of the need for twenty-four hours of news. Even if there is insufficient hard news to fill up a twenty-four hour news day, something must be aired. See, e.g., KOVACH & ROSENSTIEL, *WARP SPEED*, *supra* note 54, at 7; Anderson, *supra* note 78. Because real, hard news is difficult and expensive to cover, fewer stories will be covered intensively in a climate of corporate cost-cutting that affects newsrooms.

81. Logan, *supra* note 65, at 201; see also KOVACH & ROSENSTIEL, *WARP SPEED*, *supra* note 54, at 6 (“In the continuous news cycle, the press is increasingly oriented toward ferrying allegations rather than first ferreting out the truth.”); Woodward, *supra* note 39, at 720 (describing journalistic complaints about space or time to develop complex stories). Editors, too, find it difficult to make “balanced judgments on what constitutes news” because “the technology simply overwhelms the people working on the desks.” KOVACH & ROSENSTIEL, *WARP SPEED*, *supra* note 54, at x.

82. See, e.g., Anderson, *supra* note 78.

83. See, e.g., KOVACH & ROSENSTIEL, *WARP SPEED*, *supra* note 54, at 6.

for reporters to gather and verify their own facts.<sup>84</sup> Speculations are more easily aired because there is little time to verify facts prior to airing, and the process of newsmaking takes place in the public eye rather than the newsroom.<sup>85</sup> Press watchers also worry that these characteristics of the twenty-four hour news cycle create opportunities for partisan political manipulation of the media.<sup>86</sup>

As for the nature of news programming, the twenty-four hour news cycle will push cost-conscious news organizations to provide inexpensive-to-produce news-related punditry in addition to, and perhaps in place of, more expensive hard news.<sup>87</sup> Such pundit shows may in turn attempt to achieve popularity by courting controversy and shrillness. In turn, that gladiatorial interpretation of news analysis may both attract and repel the public. Even with respect to the hard news shows, the commercial pressure of so many news hours to fill leads to an increased

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84. KOVACH & ROSENSTIEL, *ELEMENTS*, *supra* note 33, at 75 (“In the age of the 24 hour news cycle, journalists now spend more time looking for something to add to existing news, usually interpretation, rather than trying to independently discover and verify new facts.”).

85. KOVACH & ROSENSTIEL, *WARP SPEED*, *supra* note 54, at 6. The text proposes, beyond the observations of Kovach and Rosenstiel, that the twenty-four hour news cycle makes the public an unwitting participant in the formation of a story. In the classic news context, the participants in the newsroom find the facts, verify them, and only tell the story when they are reasonably certain that they understand it at least up to the point of being able to report it. This means that incorrect versions of facts, unsubstantiated rumors, and unexplained developments have been vetted out of the stories by the time the public is informed. In today’s twenty-four hour news cycle, however, there is a strong incentive to air the “initiating charge” and then wait for later events to establish what “really” happened. This means that false information is frequently made available. This is particularly problematic because there is little reason to believe that the public hearing and believing the initial charge will become aware that it has been later discredited. So viewers often will not discover the erroneous nature of rumors, false statements, and journalistic speculation that are initially reported. This both perpetuates inaccuracy and reinforces the public’s concern that the news is not delivered completely and that reporting has “a more chaotic, unsettled, and even numbing quality.” KOVACH & ROSENSTIEL, *WARP SPEED*, *supra* note 54, at 6.

86. Editorial, *News in the Spin Cycle*, *BROADCASTING & CABLE*, Nov. 1, 2004, at 31, available at <http://www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA476537> (“Combine the 24-hour news cycle with corporate bosses demanding returns on news investments, with competition from Internet bloggers, and you have an environment ripe for manipulation by political operatives ready to feed their opponents to the insatiable beast.”); see also Paul McMasters, *Low Marks*, *AM. JOURNALISM REV.*, Aug./Sept. 2004 (describing 2004 edition of poll on state of the media and noting journalists’ complaints about distortions in reporting caused by the twenty-four hour news cycle); KOVACH & ROSENSTIEL, *WARP SPEED*, *supra* note 54, at 6.

87. See, e.g., Hickey, *supra* note 75, at 12 (cable news networks include punditry and hard news). At least in part, this is due to the fact that shorter news cycles require some new takes on stories once they have been reported. See, e.g., Montopoli, *supra* note 78. At least in part, however, it is due to cost concerns. KOVACH & ROSENSTIEL, *WARP SPEED*, *supra* note 54, at 7 (“The economics of these new media . . . demand that [news and information] be produced as cheaply as possible. Commentary, chat, speculation, opinion, argument, controversy and punditry cost far less than assembling a team of reporters, producers, fact checkers, and editors to cover the far-flung corners of the world.”). KOVACH & ROSENSTIEL, *ELEMENTS*, *supra* note 33, at 140 (“talk is cheap”).

desire for the most dramatic story. Competing cable channels<sup>88</sup> jump on the bandwagon and ramp up coverage of anything that begins to look “hot.” Across media, as the availability of multiple outlets for news naturally fragments the audience, the media that profit from mass audiences look for “blockbuster” stories that may serve to “temporarily reassemble the mass media audience.”<sup>89</sup> If a story has been highlighted on cable and higher ratings reflect public interest in the story, it will also migrate into broadcast and print in our current media atmosphere.<sup>90</sup> Thus, rather than different stories, all these outlets look for new angles on the “hot” stories. But because of the built-in time limitations of the twenty-four hour news cycle, those new angles are likely to consist of speculation and inference rather than pursuit of additional facts and verification of already-disseminated information. More subtly, the twenty-four hour news cycle may influence broadcast network news to focus on long-term news – “news that stays news” in order to avoid being scooped.<sup>91</sup> This in turn may lead to more emphasis on lifestyle trends and soft news rather than highly time-sensitive hard news.

### 3. BLURRING THE DISTINCTION BETWEEN NEWS, OPINION, AND ENTERTAINMENT

The economic and structural factors already discussed are at least in part responsible for what has been criticized as the blurring of the distinctions between news and opinion and between news and entertainment.<sup>92</sup> Many credit these developments to a “sometimes desperate

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88. See, e.g., Hickey, *supra* note 75, at 12-13 (noting the negative effect on cable news of “fierce rivalry” between CNN, Fox, and MSNBC).

89. See, e.g., KOVACH & ROSENSTIEL, *WARP SPEED*, *supra* note 54, at 7-8, 74-75. In interpreting a study by the Pew Research Center, Kovach and Rosenstiel describe the change in the media environment that has led to six different audiences for news. *Id.* at 74. Because

[e]ach [category of news audience] has different but overlapping interests, . . . it is difficult to find stories that seem relevant to all. . . . To overcome the difficulty of cobbling together a diversified newscast with a full menu of interesting material, especially for TV, the trend instead is toward finding the rare story that transcends these audience blocks and attracts people of all sorts: the socko blockbuster story.

*Id.* at 74-75.

90. It is particularly difficult for competitors to ignore or downplay a story once some important media outlets have decided to treat it symbolically, as emblematic of something socially fundamental.

91. Montopoli, *supra* note 78 (quoting Robert Lichter); see also KOVACH & ROSENSTIEL, *WARP SPEED*, *supra* note 54, at 7, 51 (explaining that since no single outlet can serve a gatekeeper role for the news, “the proliferation of news outlets and the development of shorter news cycles have left news organizations increasingly unable to maintain or even define their own ethical standards”).

92. The blurring of these distinctions is doubtless tied, among other things, to the twenty-four hour news cycle described above. See Anderson, *supra* note 78.

search to reclaim audience.”<sup>93</sup>

With respect to the distinction between news and opinion, tradition in the mainstream media requires a reasonably sharp separation between the news and the editorial pages of newspapers or the hard news programming and opinion shows on television.<sup>94</sup> This distinction is grounded in the notion that the public should be able to rely on the truth of factual news accounts without fearing that the account is distorted by an author’s biased opinions. Yet a significant percentage of journalists today think that the distinction between reporting and commentary has been blurred in today’s media, leading to public cynicism and disaffection.<sup>95</sup>

Commentators have also remarked on the pressure facing modern electronic news media to blur the distinction between entertainment and news.<sup>96</sup> This boundary crossing is evidenced by an increase in dramatic visuals and storylines. Even the news documentary has become “a human-interest story” or a form of entertainment.<sup>97</sup> Yet just as eco-

93. KOVACH & ROSENSTIEL, *WARP SPEED*, *supra* note 54, at 2.

94. *See, e.g.*, Leonard Downie Jr., Editorial, *A Strict Separation*, WASH. POST, Oct. 27, 2004, at A25 (*Washington Post’s* separation of news side from editorial page is “solemn and complete”); *Journalism Ethics and Standards*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Journalism\\_ethics\\_and\\_standards](http://en.wikipedia.org/wiki/Journalism_ethics_and_standards) (last visited Oct. 23, 2006) (describing the “unequivocal separation between news and opinion” as basic to the norm of objective reporting).

95. *See, e.g.*, PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *supra* note 73, at 9-10 (finding that sixty-four percent of journalists think the distinction has been blurred). Media critics point especially to the developments in cable news, and particularly on Fox, that permit reporters to inject their views into hard news accounts. *See, e.g.*, J.C. et al., *Led by Fox, “Hard News” Anchors on Cable Injected Opinion into Schiavo Coverage*, MEDIA MATTERS FOR AM., Mar. 22, 2005, <http://mediamatters.org/items/printable/200503220010> (asserting that news anchors on cable made statements in support of reinsertion of Schiavo’s feeding tube); N.C., *Julie Banderas: Fox’s Newest “Fair and Balanced” Reporter*, MEDIA MATTERS FOR AM., Mar. 29, 2005, <http://mediamatters.org/items/printable/200503290006> (cataloguing instances in which the Fox reporter Julie Banderas “made a number of unsubstantiated comments that appear to reflect her personal views of the situation”); *see also* Paul Farhi, *Moving Rightward*, AM. JOURNALISM REV., Apr. 2003, at 37 (MSNBC says it will not be like Fox and attempt to pass off opinion as hard news).

96. *See, e.g.*, DOWNIE & KAISER, *supra* note 47, at 135-36, 234-43; Joshua Gamson, *Incredible News*, AM. PROSPECT, Fall 1994, at 28 (explaining that journalistic norms have been malleable and that blurring the line between news and entertainment makes economic sense); Logan, *supra* note 65, at 204; Rodney A. Smolla, *Will Tabloid Journalism Ruin the First Amendment for the Rest of Us?*, 9 DEPAUL-LCA J. ART & ENT. L. & POL’Y 1 (1998); *see also* Jonathan Yardley, *Entertainment? That’s News to Me*, WASH. POST, Feb. 3, 1997, at D02 (opining that it is virtually impossible to distinguish between news and entertainment on television). One way in which the distinction is blurred is the increasing cross-promotion of a media entity’s entertainment products on its news programming – a phenomenon most clearly evident in the broadcast networks’ morning news shows. Another way in which the distinction is blurred is the attempt to sensationalize the news. It is the latter effect that is relevant to the *Schiavo* coverage and discussed in this Article.

97. *See* Miles, *supra* note 47, at 41 (“This leveling of hard news, soft news and commercials reflects the confluence of the objectives of television news show[s]: to inform, draw audiences, and sell things.”); *see also* NEIL POSTMAN, *AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN*

conomic pressures induce greater blurring of the news and entertainment distinction, studies suggest that the “infotainment strategy” is a losing business plan over the long term.<sup>98</sup>

#### 4. THE RISE OF BLOGS AND NEWS/COMMENTARY WEB SITES

Another of the most significant aspects of the changed media environment is the development and influence of the online commentator and blogger.<sup>99</sup> Some consult blogs and other online outlets as sources of news and information.<sup>100</sup> Even for those who do not, however, the blogosphere has begun to interact with traditional media and cannot be

THE AGE OF SHOW BUSINESS 87, 100, 103-08, 147-54 (1985) (asserting that “[e]ntertainment is the supra-ideology of all discourse [including news] on television” and suggesting that television must avoid exposition, require no previous knowledge from the viewer, and induce no perplexity).

98. KOVACH & ROSENSTIEL, ELEMENTS, *supra* note 33, at 154 (describing reasons why attracting audiences by being “merely engaging” will fail, including the fact that it will destroy the news organization’s authority to deliver more serious news and drive away audience desirous of such fare and the fact that it “play[s] to the strengths of other media rather than [one’s] own”).

99. For a history of blogs, see Jost & Hipolit, *supra* note 1, at 514-18 (2006); *Blog*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Blog> (last visited Oct. 23, 2006). For discussions of blogging, see, for example, Anne Flanagan, *Blogging: A Journal Need Not a Journalist Make*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 395 (2006); Jost & Hipolit, *supra*, at 507; David D. Barb Palser, *Journalism’s Backseat Drivers*, AM. JOURNALISM REV., Aug./Sept. 2005; Perlmutter & Misti McDaniel, *The Ascent of Blogging*, 59 NIEMAN REP. 60 (2005). Academic institutions like Harvard Law School are sponsoring symposia about blogging. See, e.g., Rebecca MacKinnon, *Blogging, Journalism and Credibility*, NATION, Mar. 17, 2005; Berkman Center for Internet & Society at Harvard Law School, *Bloggership: How Blogs are Transforming Legal Scholarship*, <http://cyber.law.harvard.edu/home/bloggership> (last visited Oct. 23, 2006) (bloggership conference to discuss “impact of blogs on the legal academy”); see also PEW INTERNET & AM. LIFE PROJECT, THE STATE OF BLOGGING (2005), available at [http://www.pewinternet.org/PPF/r/144/report\\_display.asp](http://www.pewinternet.org/PPF/r/144/report_display.asp) (describing blogging by the end of 2004); Posting of Dave Winer to BloggerCon, <http://www.bloggercon.org/III/newbies> (Aug. 17, 2004, 17:23:48) (BloggerCon is a gathering of bloggers).

100. Articles expressing concern about the future of the newspaper indicate that young Americans are increasingly relying on the Internet as their source of news and information. See *Web Watch; Trust and Targeting*, HOTLINE, June 21, 2006 (noting that young males rely on Internet for news); see also PEW RESEARCH CTR. FOR THE PEOPLE AND THE PRESS, SURVEY REPORT, ONLINE PAPERS MODESTLY BOOST NEWSPAPER READERSHIP (2006), available at <http://people-press.org/reports/display.php3?ReportID=282>; *Blogometer; Fair, Balanced and Unafraid?*, HOTLINE, Feb. 16, 2006 (stating that journalists rely on bloggers, often using them as sources); Peter Johnson, *Young People Turn to the Web for News; Ramifications Could Be Huge for Media*, USA TODAY, Mar. 23, 2006, at 9D (citing Pew study to the same effect); Craig McGuire, *All the News That’s Fit to Embargo*, PR WEEK, Mar. 20, 2006, at 18 (“Print and broadcast journalists watch online media and blogs for news.”) (quoting Sandra Sokoloff). Admittedly, this trend does not mean that the Internet is their only source of news or that their Internet sources are necessarily blogs rather than the online versions of traditional mass media. Nevertheless, it is an important new development. Studies suggest that blog users judge blogs as credible and even more credible than traditional information sources. Thomas J. Johnson & Barbara K. Kaye, *Wag the Blog: How Reliance on Traditional Media and the Internet Influence Credibility Perceptions of Weblogs Among Blog Users*, 81 JOURNALISM & MASS COMM. Q. 622 (2004), available at [http://www.blogresearch.com/articles/JOHNSON\\_&\\_KAYE\\_2004.pdf](http://www.blogresearch.com/articles/JOHNSON_&_KAYE_2004.pdf).

ignored.<sup>101</sup> Online sources are credited for breaking very significant news stories at first ignored by the mainstream media.<sup>102</sup>

People within and outside journalism have been passionately discussing whether political bloggers should be treated as journalists.<sup>103</sup> One does not need to be a professional journalist to be a blogger; many well-known bloggers are not and do not operate under traditional journalistic standards and ethics.<sup>104</sup> Blogs are regarded by some as the Petri dish for the development of a vibrant cadre of citizen journalists who can serve as a counterweight to our profit-driven mainstream media.<sup>105</sup> Others see bloggers as often highly ideological and unaccountable pur-

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101. Indeed, many mainstream media outlets have their own blogs. See, e.g., Flanagan, *supra* note 99, at 398; BluePlateSpecial.net, The Best Blogging Newspapers in the U.S. (2006), [http://journalism.nyu.edu/pubzone/blueplate/issue1/best\\_nwsp](http://journalism.nyu.edu/pubzone/blueplate/issue1/best_nwsp); The State of Blogging at America's 100 Largest Newspapers (2006), <http://journalism.nyu.edu/pubzone/blueplate/issue1/top100.html>. The *New York Times* has more than a dozen blogs on topics from business to politics to dining. See NYTimes.com, Blogs (2006), <http://nytimes.com/ref/topnews/blog-index.html?8qa>; see also Glenn Greenwald, *Bloggers Strike Back*, ALTERNET, May 11, 2006, <http://www.alternet.org/story/36100> (noting that although blogosphere was at first self-contained, with bloggers influencing other bloggers' discussions but not the mainstream media, "that is now changing, too").

102. Although not a blog per se, Matt Drudge's *Drudge Report* is credited with having broken the story of the Clinton/Lewinsky liaison. See Jost & Hipolit, *supra* note 1, at 507; John Anthony Maltese, *The Presidency and the News Media*, 29 PERSP. ON POL. SCI. 77 (2000) (Drudge broke the Lewinsky scandal). Blogs are said to have triggered the departure of CBS anchor Dan Rather, whose election-period report on President Bush's military service was attacked by conservative bloggers as inaccurate and insufficiently documented. Jost & Hipolit, *supra* note 1, at 510, 519-20. Blogs, reporting on Trent Lott's praise of Strom Thurmond's 1948 presidential campaign, which had been waged on a segregationist platform, cost Lott his Senate majority leadership. Jost & Hipolit, *supra* note 1, at 509-10; Palser, *supra* note 99; Perlmutter & McDaniel, *supra* note 99; Posting of Jay Rosen to PressThink, [http://journalism.nyu.edu/pubzone/weblogs/pressthink/2004/03/15/lott\\_case.html](http://journalism.nyu.edu/pubzone/weblogs/pressthink/2004/03/15/lott_case.html) (Mar. 15, 2004, 01:16).

103. For law review articles regarding the appropriate legal treatment to be provided bloggers, see Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371 (2003); Flanagan, *supra* note 99; William E. Lee, *The Priestly Class: Reflections on a Journalist's Privilege*, 23 CARDOZO ARTS & ENT. L.J. 635 (2006); see also Jost & Hipolit, *supra* note 1, at 513. The one viable generalization about blogs appears to be that online commentary and blogs vary extensively in every significant regard. Some blogs and Web sites are associated with the mainstream press, others are highly personal and idiosyncratic self-expressions, yet others are engaged in political commentary from many political vantage points, and still others organize activist campaigns as adjuncts to traditional politics. See Jost & Hipolit, *supra* note 1, at 513-14.

104. See, e.g., Garance Franke-Ruta, *Blog Rolled: That Most Bloggers Are Not Journalists Is a Given. That Some Are Trained Partisan Operatives out to Take Scalps Is Not*, AMERICAN PROSPECT, Apr. 2005, at 39. Nevertheless, some bloggers are developing online reporting standards. See, e.g., Blogging Code of Ethics, <http://www.microcontentnews.com/resources/bloggingcodeofethics.htm> (last visited Oct. 14, 2006) (on blogging ethics for non-journalist bloggers); CyberJournalist.net, A Blogger's Code of Ethics, <http://www.cyberjournalist.net/news/000215.php> (last visited Oct. 14, 2006) (code of ethics based on SPJ code).

105. See Flanagan, *supra* note 99, at 398 n.22; Jost & Hipolit, *supra* note 1, at 523; Jacob Weisberg, *Who Is a Journalist?*, SLATE, Mar. 9, 2005, <http://img.slate.com/toolbar.aspx?action=print&id=2114581>; Informed Comment, Mainstream Media and Bloggers, [http://www.juancole.com/2005\\_04\\_01\\_juancole\\_archive.html](http://www.juancole.com/2005_04_01_juancole_archive.html) (Apr. 26, 2005, 06:10); see also DAN GILMOR, WE THE

veyors of rumor and “spin.”<sup>106</sup>

It would be a mistake to characterize blogs as having a single, particular type of effect on journalistic standards. On the one hand, independent blogs can check facts, add material, and serve as trenchant critics of mainstream media’s failure to abide by journalistic standards.<sup>107</sup> They can also prolong stories,<sup>108</sup> serve as “conduits between mainstream media and the online zeitgeist,” and promote bloggers into media pundits featured on mainstream media.<sup>109</sup> Whether focusing on stories underreported in the mainstream media or rapidly checking the accuracy of reported stories, the blogosphere as a whole puts pressure on mainstream media.<sup>110</sup> Blogs associated with mainstream media, such as blogs sponsored by daily newspapers, can serve as fora for interactive discussions between journalists, editors, and the public.<sup>111</sup> In those roles, blogs can enhance the media’s ability to assess its own coverage of events.

On the other hand, blogs can goad mainstream media into sloppy, responsive reporting and create partisan swarms that can distract media coverage and lead to excessive defensiveness on the part of mainstream outlets. Moreover, some argue that the blogosphere has increasingly been appropriated as an organized political tool by partisan political operatives with particular political agendas.<sup>112</sup> Although it is dangerous

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MEDIA: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE 61-64 (2004); GLENN REYNOLDS, AN ARMY OF DAVIDS 89-114 (2006).

106. See Bob Hoover, *To Blog or Not to Blog*, PITTSBURGH POST-GAZETTE, Jan. 15, 2006, at H6, available at <http://www.post-gazette.com/pg/pp/06015/637040.stm> (concluding that compared with mainstream media, blogs appear to have less accountability); see also Franke-Ruta, *supra* note 104, at 39 (arguing that increasingly, bloggers are “partisan operatives whose agendas are as ideological as they come”). Blogs are often explicitly opinionated, although their ideological slant is not necessarily clearly articulated or self-evident from any given set of blog posts. This is true at a minimum because of the interactive nature of the blog.

One common denominator is that most political bloggers, other than journalists blogging for mainstream media, do not engage in fact-finding and newsgathering themselves. See Jost & Hipolit, *supra* note 1, at 509; Matt Welch, *Emerging Alternatives Blogworld, The New Amateur Journalists Weigh In*, COLUM. JOURNALISM REV., Sept./Oct. 2003, available at <http://www.cjr.org/issues/2003/5/blog-welch.asp?printerfriendly=yes>. Some blogs do engage in original reporting. See, e.g., Greenwald, *supra* note 101 (describing AmericaBlog’s revelation of the Jeff Gannon story).

107. See, e.g., Jost & Hipolit, *supra* note 1, at 510; Palser, *supra* note 103.

108. Jost & Hipolit, *supra* note 1, at 510.

109. Palser, *supra* note 99.

110. See, e.g., Rick Edmonds, *As Blogs and Citizen Journalism Grow, Where’s the News?*, POYNTERONLINE, Nov. 14, 2005, [http://www.poynter.org/content/content\\_print.asp?id=91391&custom;Palser, supra note 99; Richard A. Posner, Bad News, N.Y. TIMES, July 31, 2005, § 7, at 1](http://www.poynter.org/content/content_print.asp?id=91391&custom;Palser, supra note 99; Richard A. Posner, Bad News, N.Y. TIMES, July 31, 2005, § 7, at 1).

111. See, e.g., J.D. Lasica, *Blogs and Journalism Need Each Other*, 57 NIEMAN REP. 70, 73 (2003) (noting that journalists who blog are inviting the audience into the newsmaking process). For a list of journalists who maintain blogs, see CyberJournalist.net, J-Blog List, [http://www.cyberjournalist.net/cyberjournalists.php#jblogs\\_ongoing](http://www.cyberjournalist.net/cyberjournalists.php#jblogs_ongoing) (last visited Oct. 17, 2006).

112. See, e.g., Franke-Ruta, *supra* note 104.

to generalize about blogs,<sup>113</sup> the blogosphere does seem to contain some strikingly partisan, extremist, and caustic rhetoric, which some fear will enhance political polarization and undermine reasoned political debate.<sup>114</sup>

Another uncertainty about the character and effect of the blogosphere concerns the question whether conservative or liberal bloggers are more “successful.” Some have argued that conservative blogs have been more effective than liberal blogs.<sup>115</sup> If true, this might well influence one’s assessment of the role of the blogosphere. Such claims are difficult to evaluate, however. How is one to measure “success” in this context? How can one assess the entirety of the extraordinarily protean and evolving blogosphere in order to determine its political bent? Do we look to see whether conservative blogs have been more effective than liberal blogs at motivating grassroots politicking by their own partisan audiences? Do we attempt to determine (query how) the impact of the conservative blogs on the Republican administration’s policies? Do we inspect what blogs are read by mainstream journalists and thereby characterize indirect effects on mainstream news coverage of events? Do we compare liberal and conservative blogs by popularity?<sup>116</sup> Moreover, even if conservative blogs have been unified on some issues, there has been a diversity of opinion on others.<sup>117</sup>

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113. Jost & Hipolit, *supra* note 1, at 512 (quoting blogger and UCLA law professor Eugene Volokh to that effect).

114. Jost & Hipolit, *supra* note 1, at 511. According to some, blog technology “invites intemperate postings.” *Id.* While blogs “cannot be blamed for political divisions in the country[.]” the increasingly polarized political landscape and the development of blogs “feed off each other.” *Id.* (quoting media historian Paul Starr).

115. Michael Crowley, *Conservative Blogs Are More Effective*, N.Y. TIMES, Dec. 11, 2005, § 6, at 64 (“Liberals use the Web to air ideas and vent grievances with one another, often ripping into Democratic leaders. (Hillary Clinton, for instance, is routinely vilified on liberal Web sites for supporting the Iraq war.) Conservatives, by contrast, skillfully use the Web to provide maximum benefit for their issues and candidates. They are generally less interested in examining every side of every issue and more focused on eliciting strong emotional responses from their supporters. But what really makes conservatives effective is their pre-existing media infrastructure.”).

116. For example, liberal blogs such as Daily Kos are extremely popular. Bill McKibben, *The Hope of the Web*, N.Y. REV. OF BOOKS, Apr. 27, 2006, available at <http://www.nybooks.com/articles/18910> (quoting Kos for the proposition that “he gets fifty times the number of visits received by the entire right-wing ‘blogosphere’”).

117. For conservative criticisms of the Crowley piece on this ground, see, for example, Michelle Malkin: Candidate for Dumbest NYTimes Piece Ever, <http://michellemalkin.com/archives/004051.htm> (Dec. 11, 2005, 11:10). *But see* Posting of Michael Stickings to The Moderate Voice, <http://www.themoderatevoice.com/posts/1134403257.shtml> (Dec. 12, 2005) (claiming that despite diversity within conservative ranks, at least on some issues, “what conservatives have discovered is that it is possible to maintain diversity of thought behind a unified front . . . . This is how they have been able to translate intellectual diversity and productive debate into political success, as the Republican Party has effectively become the bottleneck for conservative thought in America. Meanwhile, on the other side, liberals have

Blogs are still a new phenomenon in the greater media landscape and continue to evolve.<sup>118</sup> Whether they will ultimately supplant, supplement, or be co-opted by traditional media is still unknown. Whether political and journalistic discourse on the Internet will develop its own methods of accountability is still an open question. A sense of the ultimate effect of blogs on journalistic standards must await the further development of the blogosphere.

##### 5. "NEWS AS CATFIGHT"<sup>119</sup> – CHANGING DEFINITIONS OF BALANCE

One of the most notable developments reflecting a shift in journalistic standards has been the apparent reinterpretation of "balance" in some types of news programming. The new version of balance consists of polarized debate orchestrated by ringmaster journalistic hosts. At least in certain types of news analysis programming, principally associated with cable, extreme sources<sup>120</sup> are solicited, and all their views are treated with equal respect and dignity by the hosts while producers eschew more nuanced and less confrontational participants. This represents a change from historical understanding. While balance in the past might also have featured proponents of opposing viewpoints, the formal similarity to current claims of "balance" is misleading. In the heyday of the FCC's fairness doctrine in the 1970s, for example, broadcasters only had to demonstrate to the Commission that they had aired balanced viewpoints from "responsible sources" in their overall coverage of controversial issues of public importance.<sup>121</sup> Journalistic judgments were

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grown smug and self-righteous, and they have not learned to put aside their internecine squabbles for the sake of unity. This is why they often look disorganized, discombobulated, and, at times, simply unelectable").

118. Jost & Hipolito, *supra* note 1, at 511-12, 523-24; Edmonds, *supra* note 110; Chris Mooney, Editorial, *Forum: How Blogging Changed Journalism – Almost*, PITTSBURGH POST-GAZETTE, Feb. 2, 2003, at F1; Posting of Paul Horwitz to PrawfsBlawg, [http://prawfsblawg.blogs.com/prawfsblawg/2005/05/posner\\_on\\_blogs.html](http://prawfsblawg.blogs.com/prawfsblawg/2005/05/posner_on_blogs.html) (May 25, 2005, 10:05) (discussing the ethical norms that will likely develop among bloggers).

119. I am indebted to Mary Coombs for this turn of phrase.

120. Of course, what makes a source or a point of view "extreme" is a complex question, which is itself loaded with one's own point of view about the spectrum of plausible viewpoints and spokesmen. I use the term in this context as referring to the frame of polarizing argument that is often evident on cable news talk shows. Participants are often chosen because they will present the most absolute positions in the most absolute terms. Their expertise and knowledge are secondary in importance to this combative frame. And, most importantly, their expertise will not be challenged by the host lest the equipoise of conflict be disturbed. *See* discussion *infra* at notes 123-24.

121. *In re* Handling of Pub. Issues Under the Fairness Doctrine & the Pub. Interest Standards of the Commc'ns Act, 48 F.C.C.2d 1 (1974). The FCC thereafter eliminated the general fairness doctrine obligations. *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989) (affirming FCC's elimination of the general fairness doctrine obligations). It was made clear that editing was what editors were for and that decisions about what points of view and what sources could be

made in the definition of controversial issues of public importance and the identification of “responsible” sources; those perceived as somehow extreme or unconventional were not provided access to the airwaves.<sup>122</sup>

When norms of balance or fairness are reinterpreted through an entertainment lens, however, media organizations can be tempted to frame issues in extreme contrasts simply for entertainment value. This begets what one media theorist has called the “Argument Culture.”<sup>123</sup> After all, nuance and moderation are perceived as less entertaining than the “news as catfight” between extreme views.<sup>124</sup> Moreover, when the sources present themselves as already-prepared spokesmen for their respective sides, the mainstream press does not have to do very much journalistic work to craft the story. This, however, is a dangerous development in journalistic practice. On the one hand, there is something heartening in the democratizing move of the media beginning to expand its notion of sources to include people outside the Beltway and the Eastern Establishment elites. On the other hand, query whether this expansion of sources is desirable if the media are taking their news from individuals or groups with no firsthand knowledge, without a sense of being bound by balance or professionalism, and with particular political and ideological agendas.<sup>125</sup> This is a particularly significant question if the media, in addition to presenting opposing viewpoints, does not seek

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published in newspapers were matters covered by the First Amendment and not subject to governmental suggestion. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

122. For criticisms of the doctrine because, *inter alia*, it did not accomplish its purposes, see, for example, Thomas Krattenmaker & Lucas A. Powe, *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151, 158-62 (noting that the fairness doctrine led to a two-sided approach to multi-sided controversies), and see also THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 237-75 (1994).

123. KOVACH & ROSENSTIEL, ELEMENTS, *supra* note 33, at 140 (quoting Deborah Tannen). Troubling features of the Argument Culture are identified as “the diminished level of reporting, the devaluing of experts, the emphasis on a narrow range of blockbuster stories, and the emphasis on an oversimplified, polarized debate.” *Id.* at 142; *cf.* DOWNIE & KAISER, *supra* note 47, at 231-34.

124. *But see* KOVACH & ROSENSTIEL, ELEMENTS, *supra* note 33, at 141-42 (arguing that polarizing debate between shrill absolutes is also alienating).

125. Kovach and Rosenstiel have worried that in the Mixed Media Culture, sources are gaining power over journalists and news organizations. KOVACH & ROSENSTIEL, WARP SPEED, *supra* note 54, at 6. When sources dictate the terms of their disclosures – both because of “growing sophistication in the art of media manipulation” and because of “rising demand for news product and a limited supply of news makers,” the leverage of news organizations is reduced, and norms of verification may be compromised as a result. *Id.*

More generally, Kovach & Rosenstiel argue that “public debate should not be a shouting match – political pie throwing or argument as entertainment.” KOVACH & ROSENSTIEL, ELEMENTS, *supra* note 33, at 143. Rather, the press should promote discussion that is “inclusive and nuanced, and an accurate reflection of where the debate in society actually exists, as well as where the points of agreement are.” *Id.*

to provide context or information that would help the audience put the contending viewpoints in perspective.<sup>126</sup> When the journalistic hosts orchestrating “balanced” catfights either purport to remain entirely neutral or even take one passionate side over another, they do not play the educative role that is implicit in the notion of mediated balance. Moreover, polarization for entertainment value can lead to the impression that all the problems on the table are intractable and that compromise is impossible.<sup>127</sup> This, in turn, can “alienate the large public that increasingly fails to see itself in the debate.”<sup>128</sup>

Another question raised by modern versions of balance in application goes to what happens when apparent equipoise is misleading. What does balance mean, for example, when a news outlet is covering scientific issues where there is overwhelming consensus within the scientific establishment on one side and a smaller but determined cadre of dissenters on the other side? If balance simply includes showcasing one speaker from each side, it is plausible that the audience may walk away with the idea that each viewpoint has a similar amount of support.<sup>129</sup> But not providing the “balanced” account in that sense – not providing the dissenting point of view – carries dangers. It may turn out that the scientific establishment was wrong. More broadly, one might wonder why the news media should be in the position of first vetting the credence of contending viewpoints. While the relatively easy answer is that the media can address this conundrum by providing adequate context in order to help the audience assess the credibility of the contending points of view, the gladiatorial framework of “news as catfight” does not appear to provide the media much incentive to provide that context.

## 6. CHANGING JOURNALISTIC APPROACHES TO PRIVACY

The modern media’s coverage of news and public affairs also reflects a changed balance between the public and private. In the media’s coverage of illness, for example, the press of the mid-twentieth century colluded with government attempts to hide presidential illness

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126. See, e.g., Orcinus, ‘Balance’ and the Tipping Point, <http://dneiwert.blogspot.com/2005/03/balance-and-tipping-point.html> (Mar. 27, 2005, 11:35) (criticizing mainstream media’s current conception of balance and concluding that “what ‘balance’ has become . . . is a fig leaf for broadcasting falsehoods on behalf of right wing propaganda efforts . . . [and] a major means for transmitting extremist beliefs into the mainstream”).

127. KOVACH & ROSENSTIEL, *ELEMENTS*, *supra* note 33, at 141.

128. *Id.*

129. This kind of argument is relevant to the creationism debate, for example. Cf. KOVACH & ROSENSTIEL, *ELEMENTS*, *supra* note 33, at 46 (on how presenting both sides can be misleading if the two are not equal); see also Ted Vaden, *Schiavo Coverage: Too Much, Not Enough*, *NEWS & OBSERVER*, Apr. 3, 2005, at A31 (discussing “media attempting to insert balance into the story in an unbalanced way”).

and appeared to believe that issues of health were personal.<sup>130</sup> Yet subsequent developments – ranging from televising President Johnson’s Vietnam-shaped gallbladder scar to Katie Couric’s nationally televised colonoscopy – demonstrate that the press’ notion of the boundary between the private and the public in medical matters has changed significantly.<sup>131</sup> The same shift is reflected in coverage of sexual matters, particularly in connection with celebrities and politicians.<sup>132</sup> In both contexts, what might ordinarily have been considered private is rendered newsworthy and appropriate for public consumption by its inherent significance or its association with celebrity or politics.

One can think of a number of plausible meanings of this shift in the media’s approach to publicizing the private.<sup>133</sup> An interpretation that

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130. See, e.g., Stephen G. Bloom, *Health Legacies from Franklin Roosevelt to Robert Dole, or How Medical and Health Care Issues Took over the Nation’s News*, 1 J. OF HEALTH COMM. 83 (1996); House Call with Dr. Sanjay Gupta, *Medical Secrets Behind Presidential Health* (CNN television broadcast Oct. 2, 2004), available at <http://transcripts.cnn.com/TRANSCRIPTS/0410/02/hcsg.01.html> (disclosing that media did not report on President John F. Kennedy’s crippling back pain or President Woodrow Wilson’s massive 1919 stroke).

131. See, e.g., Robert Signor, *Gallbladder Breakthrough*, ST. LOUIS POST-DISPATCH, Feb. 2, 1991, at 1D (Johnson’s scar); Press Release, University of Michigan, U-M Study: Katie Couric’s Colonoscopy Caused Cross-Country Climb in Colon Cancer Checks (July 14, 2003), available at <http://www.med.umich.edu/opm/newspage,2003/couric.htm> (Couric’s colonoscopy). Admittedly, these were instances of medical issues voluntarily disclosed to the press, and we might question whether their airing indicates a shift in news media’s approach to disclosing medical information. For involuntary disclosures, see, for example, Anna Quindlen, *Public & Private; Journalism 2001*, N.Y. TIMES, Apr. 12, 1992, § 4, at 21 (presenting the involuntary disclosure of Arthur Ashe’s medical condition as evidence of the tension between the press and individual privacy); Sydney Schanberg, *The Ashe Scoop, or Peephole Journalism*, NEWSDAY, Apr. 14, 1992, at 79 (same); Jonathan Yardley, *Arthur Ashe and the Cruel Volleys of the Media*, WASH. POST, Apr. 13, 1992, at C2 (same).

132. See, e.g., Anthony Lewis, *Privacy and Civilization, An Essay*, 27 NOVA L. REV. 225, 236 (2002). Particularly when the celebrities are no longer prominent in the news, journalists criticize editorial decisions to air private information. See, e.g., sources cited *supra* note 131.

133. Some have claimed that society today promotes both exhibitionism and voyeurism and that media interested in satisfying their audience must provide in its “infotainment” the access to the private that voyeurs desire. See, e.g., Clay Calvert, *Revisiting the Voyeurism Value in the First Amendment: From the Sexually Sordid to the Details of Death*, 27 SEATTLE U. L. REV. 721 (2004); Clay Calvert, *The Voyeurism Value in First Amendment Jurisprudence*, 17 CARDOZO ARTS & ENT. L.J. 273 (1999). On this view, the distinction between the public and private may still be what it was, but commercial pressures require the media to invade the private in order to please the transgressive needs of their audience.

Another explanation rests on the media’s democratizing function: allowing the public to develop “pseudo-intimacy” with significant cultural icons such as celebrities and politicians. Rodney A. Smolla, *Qualified Intimacy, Celebrity, and the Case for a Newsgathering Privilege*, 33 U. RICH. L. REV. 1233 (2000) (discussing Prof. Nagel’s coinage of the term “pseudo-intimacy”). On this view, it is not that the private is no longer private nor that people are increasingly voyeurs, but that everyone sees himself or herself as a “pseudo-intimate” allowed access to the private lives of public persons.

Both of these accounts take for granted the traditional views of what is appropriately public and private, but explain the media’s changed approach to coverage of the private as simply

focuses on changes in journalistic standards rests on an apparent shift in the press' interpretation of newsworthiness. Previously, the mainstream press' coverage suggesting the fact that something was private made it, by definition, either not newsworthy or at least less newsworthy.<sup>134</sup> Now, the private aspect of the information is only one of the considerations in the press' calculus of newsworthiness and not necessarily even an extremely important consideration.<sup>135</sup>

This apparent conceptual shift should not be exaggerated. Journalists and editors will often opine that the modern press has overstepped its boundaries and unduly intruded into the private.<sup>136</sup> On the other hand, as media watchers note, "there are no more gatekeepers."<sup>137</sup> The media is now sufficiently diverse that there is no common code of non-disclosure. Even if mainstream, traditional news organizations seek to protect the private unless absolutely newsworthy, their decisions to self-censor will be undermined by the fact that the information will be released by other, less scrupulous competitors.<sup>138</sup> Thus, competition will promote disclosure.

There are certainly significant benefits to a press that does not consider any topic off limits simply because it could be considered private. But there are worrisome consequences, too – and not only to the value of privacy itself. If newsworthiness is not cabined by strong notions of propriety and privacy, news outlets may focus on the private excessively. The often-scintillating character of the private may too easily convince competitive editors and producers that their disclosure is in

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responsive to a shift in the public's appetite to transgress those boundaries. A contrasting account is grounded on the notion that there has been a shift in public consensus on what should be private. Thus, the media, when it publicizes what would previously have been considered private, is simply reflecting the shift in social mores. In all of these accounts, the media is simply reactive to audience needs or public understandings.

134. In exercising their discretion not to publicize President Roosevelt's disability or President Kennedy's womanizing, journalists of the time simply saw those facts as private and therefore not relevant to the public interest. *See, e.g., Lewis, supra* note 132, at 236.

135. The fact that President Clinton engaged in inappropriate sexual behavior in the White House, while a private matter, was interpreted as newsworthy by definition (if not for the sex, then for the President's attitudes toward it).

The significance of the consideration may depend on the type of medium. For example, television networks may assess the calculus differently than tabloid newspapers and other paparazzi outlets. In addition, press organizations seriously consider the possibility that their coverage would be deemed to violate privacy law.

136. *See, e.g., sources cited supra* note 131.

137. KOVACH & ROSENSTIEL, *WARP SPEED, supra* note 54, at 7.

138. No news organizations disclosed the information provided to them by J. Edgar Hoover's FBI regarding Dr. Martin Luther King, Jr.'s infidelities. *Id.* at 2-3. As Kovach and Rosenstiel acknowledge, that result would be unlikely today. *See also* DOWNIE & KAISER, *supra* note 47, at 61-62 (describing competitive pressures that ultimately led the *Washington Post* to publish the Dole love affair story).

fact very newsworthy. Perhaps more problematically, assumptions about the newsworthy character of private revelations may lead the press to reflect ideological skew, even if unintentionally. This is because a press excited by the potential impact of a private revelation may think only of the newsworthiness of the information rather than the motives of its sources in providing the information. This can invite partisan manipulation of press disclosures.

#### 7. THE RISE IN ORGANIZED CONSERVATIVE EFFORTS TO SHAPE MEDIA COVERAGE

The internal economic constraints and the competitive pressures on the press are accompanied by developments external to the media that may, at least indirectly, affect traditional news standards in important social contexts. For example, well-funded conservative interest groups have become increasingly strategic and tactical in their efforts to shape both government action and media coverage. Obviously, politicians, corporate interests, and ideological groups have been using public relations and “spin” in order to influence media coverage virtually since time immemorial. What, if anything, is new? In sum, the religious right has become an increasingly influential part of the national conversation because it has developed a long-range plan,<sup>139</sup> been active on numerous fronts to shift policy rightward,<sup>140</sup> succeeded in crafting rhetorical frames – such as the “culture of life” – that appeal to sound-bite-obsessed media,<sup>141</sup> recast its goals in the “rights” rhetoric of liber-

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139. Different groups within the religious right have joined together on central issues, despite their doctrinal differences. See Jessica Clark & Tracy Van Slyke, *Welcome to the Media Revolution*, IN THESE TIMES, July 2006, at 20, available at <http://www.inthesetimes.com/site/main/print/2687/> (right wing groups have joined together to “articulate larger progressive vision”). Unlike liberal groups whose public communications reflect faction and disagreement, the religious right has become increasingly effective at speaking with one voice. See *id.*

140. This includes state-level political and electioneering activity. CLYDE WILCOX & CARIN LARSON, *ONWARD CHRISTIAN SOLDIERS? THE RELIGIOUS RIGHT IN AMERICAN POLITICS* 86-107 (3d. ed. 2006).

141. Such convenient rhetoric permits the aggregation of all sorts of different policy issues under a single conceptual umbrella that fits easily into broadbrush television narratives. This means that groups whose relevance to the media had been limited to single issues such as abortion have increased their relevance to a variety of social and moral issues. And because television grammar makes complex contextualization difficult, such rhetorical devices as “the culture of life vs. the culture of death” may end up being particularly powerful tropes (especially if the opposing interest groups do not craft similarly compelling counter-rhetoric). For discussion of how capturing language can lead to political effectiveness, see, for example, Stanley Fish, *They Write the Songs*, N.Y. TIMES MAGAZINE, July 16, 2006 (discussing linguists George Lakoff and Geoffrey Nunberg’s alternative accounts of the political right’s effectiveness in deploying rhetoric to frame social debates).

alism,<sup>142</sup> begun to make issue-based (rather than identity-based) alliances,<sup>143</sup> learned how to use the public relations tools effective for modern media (including e-mails, blogs, and mass marketing) to enhance widespread dissemination of its message,<sup>144</sup> and deployed the notion of the media's "liberal bias" when coverage did not suit its purposes.<sup>145</sup> Evangelical Christians have increasingly become part of the new conservative political environment: they are represented in Congress, well-funded by philanthropy, and courted by the administration.<sup>146</sup>

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142. WILCOX & LARSON, *supra* note 140, at 48-49; *see also* NUNBERG, *supra* note 76, at 151-67 (describing the right's appropriation of the language of the civil rights movement).

143. Clergy of different faiths have joined together because of their opposition to abortion. Liberals have joined with conservative Christians to promote child-friendly airwaves. Disability advocates have joined right-to-life groups in their opposition to euthanasia. After decades of isolationism, the Christian Coalition under the leadership of Ralph Reed began to preach a more inclusive message for broader effectiveness. *See* WILCOX & LARSON, *supra* note 140, at 7, 47-48, 52, 61; *see also* Kathy L. Cerminara, *Critical Essay: Musings on the Need to Convince Some People with Disabilities that End-of-Life Decision-Making Advocates Are Not Out to Get Them*, 37 LOY. U. CHI. L.J. 343, 344, 371-84 (2006); Notdeadyet.org, About Not Dead Yet, <http://www.notdeadyet.org/docs/about.html> (last visited Oct. 14, 2006) ("In the 2003-2005 fight to save Terri Schiavo, twenty-five national disability groups joined Not Dead Yet in opposing her guardian's right to starve and dehydrate her to death.").

144. In terms of dissemination, social conservatives, including the religious right, have made good use of new media (such as blogs) both to spread their vision and to pique the interest of the traditional media. *See* Clark & Van Slyke, *supra* note 139 (right has used new media to deliver its message). The press itself has opined on the particular effectiveness of conservative blogs. *See* Crowley, *supra* note 115; *see also* discussion *supra* notes 115-17 and accompanying text.

The religious right has also availed itself of mass marketing techniques in order to mobilize its membership, put pressure on legislatures, and increase media coverage. *See* Clark & Van Slyke, *supra* note 139 (right wing has "infiltrated" mainstream media, rallying conservatives); Erin Saberi, *From Moral Majority to Organized Minority: Tactics of the Religious Right*, 110 CHRISTIAN CENTURY 781 (1993) (describing how the right used media tools such as television advertisements and polls later discussed on right-wing television shows).

145. *See* Michelle Goldberg, *The Rise of Christian Nationalism: Across the United States, Religious Activists Aim to Establish an American Theocracy*, CHI. SUN-TIMES, May 21, 2006, at B1 (discussing right's desire to shift national policy to the right). With regard to the strategic use of claims of media bias, *see*, for example, ALTERMAN, *supra* note 13, at 1-27 (criticizing the right's use of liberal media rhetoric); DAVID BROCK, *THE REPUBLICAN NOISE MACHINE: RIGHT WING MEDIA AND HOW IT CORRUPTS DEMOCRACY* 74-115 (2004); McCHESNEY, *supra* note 33, at 98-118 (criticizing right's use of liberal media trope); Jessica Clark & Tracy Van Slyke, *Making Connections*, IN THESE TIMES, Apr. 14, 2005, at 17, available at <http://www.inthesetimes.com/site/main/article/2069/> (describing claims of liberal media bias as part of a "conservative campaign to dominate the airwaves"); *see also* WILCOX & LARSON, *supra* note 140, at 48-49 (emphasizing the religious right's rise to prominence as resulting from a specific strategy).

Many have commented that the increasing polarization of debate in today's politics has moved the social conservative and religious right segments of the Republican Party to the center. *See, e.g.*, PEOPLE FOR THE AM. WAY, REPORT, DOBSON'S CHOICE: RELIGIOUS RIGHT LEADER BECOMES POLITICAL POWER BROKER (2005), <http://www.pfaw.org/pfaw/general/default.aspx?oid=17931>; Theocracywatch.org, *The Rise of the Religious Right in the Republican Party*, <http://www.theocracywatch.org/> (last visited Oct. 14, 2006).

146. *See, e.g.*, John Russell, *Funding the Culture Wars: Philanthropy, Church and State* 4-5

All of this doubtlessly has an impact on news coverage. The increasing deployment of strategies designed to appeal to news values and news practices makes it easy for beleaguered journalists simply to adopt the spin offered or at least to deploy the proffered organizing rhetoric. In addition, the opinionated commentary formats generated by the twenty-four hour news cycle will enhance the likelihood that “experts” honed by the religious right will be invited to participate in high profile television discourse.<sup>147</sup> Moreover, as the increasing sophistication and organization of the religious right – not to mention its connections with the current administration – influence policy and create more “news,” the media will naturally tend to increase its coverage of their initiatives and views.

#### 8. THE RISE OF RELIGIOUS BROADCASTERS

Tied to the increasing effectiveness of the religious right in becoming part of the mainstream discourse is the rise in prominence of the religious, and predominantly evangelical, broadcasting community.<sup>148</sup> Christian media have greatly expanded in the last decade, growing beyond radio and over-the-air broadcasting and into cable and satellite delivery.<sup>149</sup> Analysts claim that the network of Christian broadcasters

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(Jan. 2005) (unpublished manuscript, on file with the National Committee for Responsive Philanthropy), available at <http://www.ncrp.org/publications/index.asp#Ready>. For a history of the Religious Right in America until the late twentieth century, see generally WILLIAM MARTIN, *WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT IN AMERICA* (1996).

147. See WILCOX & LARSON, *supra* note 140, at 47-51 (on evangelical training for leadership).

148. Religious broadcasters in the United States are predominantly evangelical or fundamentalist. See, e.g., Mariah Blake, *Stations of the Cross: How Evangelical Christians Are Creating an Alternative Universe of Faith-Based News*, COLUM. JOURNALISM REV., May/June 2005, at 32, available at <http://www.cjr.org/issues/2005/3/blake-evangelist.asp> (“Conservative evangelicals control at least six national television networks, each reaching tens of millions of homes, and virtually all of the nation’s more than 2,000 religious radio stations.”); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 342 n.358 (2001); Juan Gonzalo Villasenor, Note, *For Entertainment Purposes or Ad Majorem Dei Gloriam: Televangelism in the Marketplace of Ideas*, 3 VAND. J. ENT. L. & PRAC. 145, 145-48 (2001).

149. Blake, *supra* note 148 (“The number of religious radio stations – the vast majority of which are evangelical – has grown by about 85 percent since 1998 alone. They now outnumber rock, classical, hip-hop, R&B, soul, and jazz stations combined.”); see also Michael Freedman, *Articles of Faith: What Does It Take to Run a Religious Radio Empire?*, FORBES, Dec. 27, 1999, at 281 (on growth of Salem Communications Corp., a religious radio broadcasting chain); Adam Piore, *A Higher Frequency*, MOTHER JONES, Nov./Dec. 2005 (on “how the rise of Salem Communications’ radio empire reveals the evangelical master plan”); Sarah Posner, *Right-wing Radio*, ALTERNET, Apr. 5, 2005, <http://www.alternet.org/story/21639> (on how low power community radio has become “the bastion of Christian programming”); Russell, *supra* note 146, at 11-12 (on philanthropic grants for religious radio and TV programs); George Winslow, *Mega-Church, Mega-TV*, BROADCASTING & CABLE, Feb. 13, 2006, at 16, available at <http://www.broadcastingcable.com/article/CA6306809.html?display=special+Report> (on shifting strategies of religious broadcasters); George Winslow, *More Clout, More Problems*, BROADCASTING & CABLE,

has also become very influential in public discourse.<sup>150</sup> “All the while, they’ve remained hidden in plain sight – a powerful but largely unnoticed force shaping American politics and culture.”<sup>151</sup> Evangelical broadcasters are credited with assisting the rise of the increasingly prominent religious right.<sup>152</sup> With “aggressive political maneuvering,” the National Religious Broadcasters (“NRB”) association has “helped shape federal policy, further easing the evangelical networks’ rapid growth.”<sup>153</sup>

What is the relevance of the rise in the evangelical media’s power

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Feb. 14, 2005, at 28, available at <http://www.broadcastingcable.com/article/CA503568.html?display=special+Report> [hereinafter Winslow, *More Clout, More Problems*] (noting that forty-three percent of all adults in 2002 watched a Christian television show in the poll month). Some argue that “the Christian hard right is buying up the signals of progressive stations to get liberals off the air.” BlatherWatch, Big Eddy Shouts Out: Censoring Liberals for Jesus – Buy ‘Em Up & Shut ‘Em Up, [http://www.blatherwatch.blogs.com/talk\\_radio/2006/05/big\\_eddy\\_shouts.html](http://www.blatherwatch.blogs.com/talk_radio/2006/05/big_eddy_shouts.html) (May 13, 2006, 00:13). Others note that Christian radio broadcasters have taken advantage of the FCC’s relaxed translator ownership rules in order to create national Christian radio networks. Daniel Schulman, *Out of Thin Air*, COLUM. JOURNALISM REV., Mar./Apr. 2006, at 45, available at <http://www.cjr.org/issues/2006/2/Schulman.asp>. For histories of religious broadcasting, see generally Jeffrey K. Hadden, *Policing the Religious Airwaves: A Case of Marketplace Regulation*, 8 BYU J. PUB. L. 393 (1994), and see also SCHEUER, *supra* note 13, at 51-54.

While religious broadcasters still claim smaller audiences than the major secular outlets, their growth has far outpaced increases in audience for the rest of the industry. Blake, *supra* note 148 (“Despite their growing reach, Christian networks still lag behind many secular heavyweights when it comes to audience size. About a million U.S. households tune in daily to each of the most popular Christian television shows; about twenty times that number watch CBS’s top-rated program, CSI. Likewise, Christian radio stations draw about 5 percent market share, on average, while regular news and talk stations attract triple that percentage. But more and more people are tuning into Christian networks. Christian radio’s audience, in particular, has climbed 33 percent over the last five years, thanks in large part to the emergence of contemporary Christian music. No other English-language format can boast that kind of growth.”). Admittedly, however, changes in the media environment, including media consolidation that reduces the number of possible outlets for religious programming, suggest to some that faith-based programming is “at a crossroads.” Winslow, *More Clout, More Problems, supra*. Nevertheless, the growth of Christian media groups is reflected in increased advertising revenue. Piore, *supra*. In addition, religious broadcaster funding (unlike secular media funding) rests not only on advertising, but also on sponsorship.

150. Blake, *supra* note 148. Politicians and business tycoons have recognized the power of the evangelical broadcasting community and have courted the National Religious Broadcasters (“NRB”), an association of “1,600 broadcasters with billions of dollars in media holdings and staggering political clout.” *Id.*; see also Bruce Ledewitz, *Up Against the Wall of Separation: The Question of American Religious Democracy*, 14 WM. & MARY BILL RTS. J. 555, 555-69 (2005) (describing religious presence in public life); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 195-96 (1992) (challenging claims about secularization of America); Anne Becker, *TV’s Religious Revival*, BROADCASTING & CABLE, Apr. 25, 2005, at 26, available at <http://www.broadcastingcable.com/article/CA527238.html?display=special+Report> (noting that “[r]eligion is now a major feature of the national conversation”).

151. Blake, *supra* note 148 (noting also how Rupert Murdoch, George Bush, and Mel Gibson have courted evangelical media).

152. *See id.*

153. Blake, *supra* note 148; see also Winslow, *More Clout, More Problems, supra* note 149 (on Christian conservatives’ role in the Bush-Kerry presidential election).

in terms of journalistic norms? In recent years, religious broadcasters have broadened their programming far beyond pulpit ministries into the production of news and talk shows.<sup>154</sup> Importantly, Christian broadcasters have made clear that, presumably unlike their secular counterparts, they “won’t sacrifice [their] values for profit.”<sup>155</sup> Rather than hewing to traditional norms of journalistic objectivity or neutrality, they are interested in selecting and presenting news from an avowedly Christian perspective.<sup>156</sup> Analysis of their news coverage suggests that their point of view has usually been conservative as well as religious.<sup>157</sup> Given that

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154. Blake, *supra* note 148. Some evangelical broadcasters have been very clear in explaining that their foray into news was a strategic attempt to increase their audiences. According to Pat Robertson, news “provides the crossover between religious and secular, and it bridges the age gap.” *Id.* Yet this does not mean that news is desired simply for its own sake and to increase viewership. Rather, news is explicitly seen as an opportunity to showcase religion. In Pat Robertson’s words, just as the setting is very important when buying a diamond from Tiffany’s, “[t]o us, the jewel is the message of Jesus Christ. We see news as a setting for what’s most important.” *Id.*

Evangelical broadcasters’ entry into news has been very successful. As Blake puts it, [a]fter remaking the 700 Club, Robertson went on to launch the first Christian radio news network, called Standard News, in the early 1990s. It was later purchased by Salem Radio. Over the next several years, American Family Radio, USA Radio, and Information Radio Network unveiled news operations. All of them, except American Family Radio, syndicate their news programming. And they’ve been picking up affiliates at a lightning pace, even as regular news has been dropping off the radio dial. Salem Communications, which started with around 200 stations, now airs on 1,100 – seven times as many as broadcast National Public Radio programs. USA Radio, which in the beginning had just a handful of news affiliates, now has more than 800. Its news also can be heard on two XM Satellite Radio stations and Armed Forces Radio. USA Radio’s rapid growth is due, in part, to the fact that many mainstream stations are picking up its programming.

*Id.*

155. Piore, *supra* note 149.

156. Blake, *supra* note 148. Blake’s article makes clear that evangelical broadcasters like Pat Robertson “see news and current affairs as a means to an end.” *Id.* They

attribute the success of their news operations to the biblical perspective that underpins their reporting in a world made wobbly by terrorist threats and moral relativism. “We don’t just tell them what the news is,” explains Wright of the NRB. “We tell them what it means. And that’s appealing to people, especially in moments of cultural instability.”

*Id.*; see also Colleen McCain Nelson, *Faith-Based News Finding a Steadily Growing Flock*, DALLAS MORNING NEWS, June 17, 2005; Colleen McCain Nelson, *Christians Flocking to Religious Media Turned Off by Bad News, Faithful Find Salvation in Alternative Stations*, DALLAS MORNING NEWS, June 5, 2005, at 1A (noting Christian news’ filtering of political and cultural issues through a religious lens).

157. Blake, *supra* note 148 (“Evangelical news looks and sounds much like its secular counterpart, but it homes in on issues of concern to believers and filters events through a conservative lens. In some cases this simply means giving greater weight to the conservative side of the ledger than most media do. In other instances, it amounts to disguising a partisan agenda as news. Likewise, most guests on Christian political talk shows are drawn from a fixed pool of culture warriors and Republican politicians. Even those shows that focus on non-political topics – such as finance, health, or family issues – often weave in political messages. Many evangelical

Christian broadcasting is increasingly becoming the news choice for many viewers,<sup>158</sup> this reinterpretation of common journalistic standards may be having a significant direct effect on the public's perception of events. It is certainly injecting an alternative group of journalistic standards into the existing norms espoused by the conventional, secular media.

In addition, the increasing significance of the evangelical broadcasting community may also indirectly affect mainstream journalistic standards in a number of plausible ways. The most obvious scenario is that the religious media can help set the mainstream press' agenda by providing stories. The option of getting on a bandwagon already established by the evangelical media can be attractive to overworked and understaffed mainstream newsrooms whose desire for convenience may tempt them to accept the religious press' interpretation, sources, and "angle" for the story uncritically. Incorporation of stories originally explored in the religious press is also indirectly prompted by the mainstream media's responsiveness to the audience. Because they eschew traditional norms of journalistic objectivity, especially on topics that they believe affect fundamental Christian issues, religious broadcasters do not shy away from attempting to generate activism on the part of their viewer and listener constituencies.<sup>159</sup> When aided by the technical and communicative sophistication of increasingly organized issue groups supporting such broadcasters, the religious broadcast community can trigger a significant amount of public pressure on government and secular media to cover and address their issues their way.<sup>160</sup> At a mini-

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programs and networks are, in fact, linked to conservative Christian political or legal organizations, which use broadcasts to help generate funding and mobilize their base supporters, who are tuning in en masse.").

158. Cf. Blake, *supra* note 148 ("Ninety-six percent of evangelicals consume some form of Christian media each month, according to the Barna Research Group.").

159. See, e.g., *Christian Soldiers*, 36 NAT'L J. 49 (2004) (noting that in 2004 election religious broadcasters mobilized listeners to "vote their worldview"); see also Blake, *supra* note 148 (quoting the president of a religious broadcasting organization as stating that his goal is "to re-engage the political culture on issues relating to broadcasting"). Religious-based conservative organizations have been very successful at sending their members voting guidelines for elections and petitions to send to government on various conservative issues. Posner, *supra* note 149; Russell, *supra* note 146, at 5 (on effectiveness of Christian Coalition's voter guides); Pamela Ellis-Simons, *The Rising Voice of a Family Crusader*, U.S. NEWS & WORLD REP., Feb. 6, 1989, at 27; see also Traditional Values Coalition, *Religious News Media Vital to Free Speech and Freedom of Religion*, <http://traditionalvalues.org/print.php?sid=148> (last visited Oct. 15, 2006).

160. Winslow, *More Clout, More Problems*, *supra* note 149 (Bush-Kerry presidential election showed the political power of evangelical broadcasters and programmers); see also *Religious Broadcasters Celebrate Greater Access in Washington*, CHURCH & STATE, Apr. 2005, available at [http://www.findarticles.com/p/articles/mi\\_qa3944/is\\_200504/ai\\_n13633026](http://www.findarticles.com/p/articles/mi_qa3944/is_200504/ai_n13633026) ("National Religious Broadcasters (NRB), an umbrella group for evangelical Christian television and radio preachers, is celebrating a new level of access to lawmakers on Capitol Hill.").

num, even if the secular media would not immediately engage in expansive coverage of an issue simply because it was highlighted by the religious media, such coverage would follow from governmental responsiveness to pressure from religious voting blocs. Thus, both direct and indirect effects on the development of journalistic standards can flow from the expansion of the religious broadcaster community.

#### IV. SCHIAVO COVERAGE AND JOURNALISTIC STANDARDS

When examined from the point of view of traditional journalistic standards, the *Schiavo* media coverage is mixed. It is neither perfect nor completely odious, as many ideological critics have claimed. It raises important questions for journalistic self-reflection, but should not be used as the basis for a wholesale critique of the American press.

Let us begin with the criterion of newsworthiness. The *Schiavo* story was newsworthy, especially after the political responses from Congress, then-Florida Governor Jeb Bush, and President George W. Bush; it would have been irresponsible for the media to have ignored it. Liberal media critics were wrong to try to minimize this: the liberal criticisms were based on an unrealistically narrow view of what makes something a public issue. Similarly, conservative critics erred in asserting that what made the story increasingly newsworthy was the *Schiavo* case on its facts – there are doubtless many such stories that have not reached public attention. And poll data did not support the proposition that the public reaction to the *Schiavo* case demonstrated overwhelming support for the general “culture of life.”<sup>161</sup>

*Schiavo* was not just another case in a line of highly publicized “right-to-die” cases.<sup>162</sup> Unlike some other sensational court cases that may have caught the public’s attention,<sup>163</sup> the sensationalism of the *Schiavo* case reflected at least some political polarization in the country.<sup>164</sup> While polls showed that a majority of the American public disap-

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161. For a discussion of political ideology and consistency in the American public, see Scott Keeter & Gregory A. Smith, *In Search of Ideologues in America, It's Harder Than You May Think*, PEW RESEARCH CTR., Apr. 11, 2006, available at <http://pewresearch.org/obdeck/?ObDeckID=17>.

162. See Jonathan Curiel, *Death with Dignity Debate Started with Karen Quinlan; She Was the Terri Schiavo of 30 Years Ago – And Her Case Changed Our Thinking*, S.F. CHRON., Apr. 3, 2005, at C1. (noting that Quinlan’s case in 1976 “helped galvanize both sides of the debate” about the right to die); see also Abdon M. Pallasch, *Family Fights Are Common, but Court-Jumping Is Not*, CHI. SUN-TIMES, Mar. 22, 2005, at 4 (noting that the *Cruzan* case was the first in which the Supreme Court ruled that family members could disconnect a patient’s feeding tube under certain conditions). Unlike prior right-to-die cases, the *Schiavo* case presented a purported conflict among plausible proxies for the incapacitated Schiavo, rather than a conflict between an incapacitated person’s representative and the state.

163. The trials of Scott Petersen and Michael Jackson come to mind.

164. Cf. Posner, *supra* note 110.

proved of Congress' intervention in the case, there was more substantive disagreement about whether Schiavo's feeding tube should be removed.<sup>165</sup> Many differed on the moral issues raised by the case, and virtually everyone was riveted by the story.

The *Schiavo* story also deserved intense coverage because of its "storytelling efficiency" – it was a useful vehicle for addressing a multiplicity of different themes on the basis of a single fact pattern. Numerous types of news narratives emerged from the facts: personal tragedy, family conflict, and views about who should speak for people who cannot speak for themselves; the role of the state in such cases; the politicization of life and death issues (including expansion of the rhetoric of the culture of life and the conflict between legislatures and courts); the role of the media as instigators of attention to public health, preparedness, and self-help;<sup>166</sup> what individuals can do to plan for this risk in their own lives, including explorations of living wills, advance directives, and official durable powers of attorney; bioethics and disputes regarding expertise and medical knowledge, especially with respect to diagnoses of PVS; the role of disability in justifying quality of life judgments; the apparent shift in the traditional positions of liberals and conservatives regarding, *inter alia*, the privileges of marriage; and the relationships between state and federal governments, legislatures, and courts.<sup>167</sup> These narratives allowed the news media laudably to fos-

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165. See, e.g., Gilgoff, *supra* note 3 (citing to CBS and ABC polls indicating large majority of participants opposed to government intervention in *Schiavo* matter); Jones, *supra* note 3 ("A March 22-24 Time survey showed 75 percent saying Congress's involvement was 'not right . . . .'"); see also Barone, *supra* note 3 (public opinion polls show that congressional action in the *Schiavo* case was unpopular). Numerous sources discuss and include data concerning the disagreement over the substantive issue as compared to the disagreement over government intervention. See Terry Jones, *Politicians Ignore Public Interest*, ST. LOUIS JOURNALISM REV., Apr. 1, 2005, at 9 (summarizing polls); Gary Langer, *Poll: No Role for Government in Schiavo Case*, ABC NEWS, Mar. 21, 2005, <http://abcnews.go.com/Politics/print?id=599622> (reporting that sixty-three percent of public supports tube removal for Schiavo); Mussenden, *supra* note 4 (presenting Florida poll results); *Poll: Keep Feeding Tube Out*, CBS NEWS, Mar. 23, 2005, <http://www.cbsnews.com/stories/2005/03/23/opinion/polls/printable682674.shtml> (reporting that sixty-six percent of those polled thought Schiavo's feeding tube should not be reinserted).

166. An example is Katie Couric's famous attempt to direct public attention to colon cancer by televising her colonoscopy. Patricia Guthrie, *A Celebrity Cause: When Stars Speak Out on a Disease, People, Even Congress, Listen*, ATLANTA J. & CONST., Mar. 21, 2000, at 1C (noting that celebrity attention to diseases helps raise public awareness); Patricia Talorico, *Couric Leads Cancer Crusade Husband's Death Spurs Her Call for Screening*, USA TODAY, Mar. 1, 2000, at 10D (explaining Couric's motive as publicizing the message that colorectal cancer can be caught and treated with proper early screening).

167. Roy Peter Clark, *Reading Terri Schiavo*, POYNTERONLINE, Mar. 31, 2005, [http://www.poynter.org/content/content\\_print.asp?id=80285&custom](http://www.poynter.org/content/content_print.asp?id=80285&custom) ("We read into what is left of Terri Schiavo our own hopes and fears. Like the iconic Cuban child, Elian Gonzales, she has become more than a person. She is now a sacred text, the incarnation of our totems and taboos. How we read her . . . reveals more about us than it does about her."); Kelly McBride, *Schiavo Case a*

ter national debates on a variety of important social issues. As one online journalist puts it: “This is a story with many dimensions. The best journalism explores them all.”<sup>168</sup>

It is important to remind the cynics that newsworthiness is not a static notion to be evaluated only at the beginning of a story. Instead, the newsworthiness of developments in a story is an organic matter, to be judged over time, in light of changing circumstances, and in response to other coverage in the media. The *Schiavo* story was part of a complex litigation, with moves and countermoves reminiscent of a tennis match. Something traditionally “newsworthy” happened frequently and Schiavo’s parents and supporters actively sought media attention for the developments in the case.<sup>169</sup> Once Congress, President Bush, and then-Governor Bush entered the arena, the events gave rise to some truly extraordinary governmental theater. The media’s coverage was reactive to very active litigants and extraordinary government actions. It would have been remiss, not to mention suggestive of a conservative political skew, for journalists to minimize the story, particularly at that time.

Newsworthiness alone is not the only professional standard by which we should measure media coverage of a particular story, of course. Quality of coverage is also central. With respect to the quality of the *Schiavo* coverage, we might look at accuracy, completeness, sourcing, the appearance of bias, and the provision of explanatory context.

The first step in this inquiry is an assessment of the breadth of the field to be evaluated. How do we define the universe? What do we mean when we speak of assessing the “media” coverage of the *Schiavo* case? It is an error to talk about the adequacy of media or news coverage as if it were a single, undifferentiated datum to assess. These days, news is reported and discussed in daily and weekly newspapers, online and print magazines, broadcast networks, local broadcast stations, cable outlets, Internet-only sites, Internet sites associated with newspapers and electronic media, and blogs.<sup>170</sup> Even if a review of the major news stories in reputable mainstream newspapers – such as the *New York Times*,

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*Chance for Journalists to Lead*, POYNTERONLINE, Mar. 25, 2005, [http://www.poynter.org/content/content\\_print.asp?id=80096&custom](http://www.poynter.org/content/content_print.asp?id=80096&custom) (“Unlike any story in recent memory, this one highlights the intimate connection between the personal and the political, the private and the universal. It’s a story that is rearranging the liberal/conservative landscape on such issues as states’ rights and the role of a spouse.”).

168. McBride, *supra* note 167.

169. SCHINDLER ET AL., *supra* note 9, at 43, 89, 92-93, 133-36, 154-55, 160, 188-89. For further discussion on the strategy of Terri Schiavo’s father to get the media interested, see *Saving Terri Schiavo*, SOC’Y FOR TRUTH & JUSTICE, Oct. 26, 2003, <http://www.societyfortruthandjustice.com/prod01.htm>.

170. This litany excludes satirists, comic journalists, Saturday Night Live, and the Daily Show,

*Wall Street Journal*, and *Washington Post* – would reveal that traditional journalistic standards were generally respected in factual reporting, that would not cancel out the effects of a multitude of different media with different formats and different rules of ethics having simultaneously weighed in on the story.<sup>171</sup>

With respect to the *Schiavo* coverage, there were certainly differences between local and network news stories, between cable news and cable opinion/pundit shows, between blogs and the mainstream media, among blogs themselves, and between television and radio as media. Yet an overview of the coverage would suggest that the mainstream newspapers' and broadcast networks' coverage was reasonably factual. The major issues were reported: the facts concerning Schiavo's medical condition, the history of the judicial proceedings, the legislative developments such as passage of Terri's Law, and the dispute between her husband and parents over her condition and her wishes. There may well be grounds for criticizing the particular balances struck, but that is always true in any reporting.<sup>172</sup> Moreover, the reporting errors in this case do not appear to have been critical.<sup>173</sup> Mainstream media – and

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among others. See Loren Ghiglione, *Foreword*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 415, 416-17 (2005).

171. Prior discussions of how to define the media in the legal literature have focused on this question in order to define eligibility for certain types of privileges, such as the availability of the reporter's privilege, and in order to define the press' constitutional role under the First Amendment. See, e.g., Berger, *supra* note 104, at 1375-76 (proposing that the journalist's privilege attach to the work process of journalism rather than the "who" involved in the process, thereby avoiding the need to define the term "journalist"). By contrast, this Article seeks to describe the variety of media, their journalistic conventions, and their effects on one another in an effort to get beyond the generalities of the current criticism of the *Schiavo* coverage.

172. Jeffrey A. Dvorkin, *A Week of Tough Stories on NPR*, NPR, Mar. 23, 2005, <http://www.npr.org/templates/story/story.php?storyId=4557547> (concluding that NPR had covered the *Schiavo* story well during week reviewed, noting that "[a]lthough a few listeners have written to complain about what they consider excessive coverage, most listeners have said they find the story painfully compelling and powerfully consequential," and asserting that some listeners wished that "NPR would look deeper into the legal and medical aspects of this story"); Peter Johnson, *An 'Important, Agonizing' Story*, USA TODAY, Mar. 23, 2005, at 4D; William Larue, *CNY Professors, Others Rate the Media*, POST STANDARD, Apr. 1, 2005, at A9; Chase Squires, *In Schiavo TV Coverage, a Struggle to Find Balance*, ST. PETERSBURG TIMES, Apr. 1, 2005, at 2B.

173. A number of the errors in major newspapers were minor and corrected by the papers themselves. See *For the Record*, L.A. TIMES, Mar. 24, 2005, at 2 ("Terri Schiavo – A question-and-answer article in Tuesday's Section A stated that Terri Schiavo was 22 when she went into a vegetative state; she was 26. A correction of that error Wednesday misspelled Schiavo's first name as Terry."). When more significant errors and controversies were reported – including mainstream media reports of speculation that the Republican "talking points" memo about the political usefulness of the *Schiavo* case to the Republicans had perhaps been a forgery circulated by Democrats – the major outlets corrected their reports quickly when the author of the memo was ultimately identified. See generally Howard Kurtz, *Doubts Raised on Schiavo Memo*, WASH. POST, Mar. 30, 2005, at C01; *Senator Says His Aide Wrote Terri Schiavo Memo*, ABC NEWS, Apr. 7, 2005, <http://abcnews.go.com/Politics/print?id=600937>; Posting of John in DC to AMERICAblog, <http://americablog.blogspot.com/2005/04/i-love-when-conservative-bloggers->

particularly the print press – worked hard to address the multiple dimensions of the story and often provided context for its analysis. Indeed, one of the striking aspects of this story is the broad context of the reporting: numerous articles situated the *Schiavo* story in the broad narratives of “social control vs. autonomy” and “secular humanism vs. religious faith.”<sup>174</sup> By contrast to the voyeuristic and narcotizing coverage of other attention-getting stories in the recent past, the *Schiavo* stories often provided some explanatory context regarding the players. And the media’s attempt to start national conversations about the issues raised by the *Schiavo* case was a desirable change.

Yet, by contrast to major newspaper accounts and most network news coverage, some local news and cable programming stretched the boundaries of the news/entertainment distinction, blurred the line between straight factual reporting and editorializing, and overemphasized video clips of Terri Schiavo appearing responsive.<sup>175</sup>

While causation is difficult to establish in such circumstances, these observations are at least consistent with the modern pressures on journalistic standards discussed above in Part III.C.<sup>176</sup> For example, the

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make.html (Apr. 6, 2005, 22:36). *But see Fox News Channel Controversies*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Fox\\_News\\_Channel\\_controversies\\_and\\_allegations\\_of\\_bias](http://en.wikipedia.org/wiki/Fox_News_Channel_controversies_and_allegations_of_bias) (last visited Apr. 3, 2007) (indicating that Fox News did not do a follow up after having characterized the talking points memo as a Democratic hoax).

174. *See generally* Boehlert, *supra* note 13; David Brooks, *Morality and Reality*, N.Y. TIMES, Mar. 26, 2005, at A13; Gail Russell Chaddock, *Why Schiavo Is a Cause Celebre*, CHRISTIAN SCI. MONITOR, Mar. 21, 2005, at 1; Clark, *supra* note 167; Gilgoff, *supra* note 3; Hendrik Hertzberg, *Matters of Life*, NEW YORKER, Apr. 4, 2005, at 33; David D. Kirkpatrick & Sheryl Gay Stolberg, *The Schiavo Case: The Campaign; How Family’s Cause Reached the Halls of Congress*, N.Y. TIMES, Mar. 22, 2005, at A1; John Leland, *The Schiavo Case: Final Moments; Did Descartes Doom Terri Schiavo?*, N.Y. TIMES, Mar. 27, 2005, § 4, at 1; Leo, *supra* note 7; Sharon Lerner, *The Schiavo Circus*, VILLAGE VOICE, Mar. 29, 2009, available at <http://www.villagevoice.com/news/0513,lerner,62490,6.html>; McBride, *supra* note 167; *Schiavo as Prologue*, NATION, Apr. 18, 2005, available at <http://www.thenation.com/docprint.mhtml?i=20050418&s=editors>; *What Schiavo Taught*, NEW REPUBLIC, Apr. 11, 2005, at 7. *But see* Eric Boehlert, *supra* note 3 (suggesting that press characterization of the *Schiavo* story as a “furious debate” was due to the press’ own needs, given that the issue was driven by a “very small minority” who were “out of step with the mainstream.”).

175. *See, e.g.*, Bellafante, *supra* note 17; Brad Smith, *Schiavo Videotapes Offer Powerful but Misleading Evidence*, TAMPA TRIB., Mar. 20, 2005, at 12; Al Tompkins, *Friday Edition: Selecting Schiavo Images*, POYNTERONLINE, Mar. 17, 2005, [http://www.poynter.org/content/content\\_print.asp?id=79832&custom=](http://www.poynter.org/content/content_print.asp?id=79832&custom=). The reliance on the video clips was particularly true on cable. *See, e.g.*, Robert P. Laurence, *Schiavo Case a Godsend for Cable News*, SAN DIEGO UNION-TRIB., Apr. 1, 2005, at E1; *see also* PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *supra* note 6, at 2 (indicating that only 45% of viewers think that cable news outlets “mostly report the facts”); Hickey, *supra* note 75, at 13 (“[B]y 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 news events . . . rather than detailed, substantive reporting about what’s really going on . . .”).

176. *See supra* Part III.C (noting that the internal pressures currently faced by the media, the twenty-four hour news cycle, the blurring of news and entertainment distinctions, the rise of blogs,

*Schiavo* story was a perfect fit for the twenty-four hour news cycle of the cable networks. Because of the impressive amount of litigation and legislative pressure generated by the groups supporting the Schindlers in response to the state court decision permitting disconnection of Schiavo's feeding tube, there were virtually daily developments in the case. This continuous stream of events naturally triggered media coverage. The shortened news cycle of cable in turn put pressure on competitive mainstream media to cover the story extensively as well. Whether due to pack journalism promoted by consolidated media, the increasingly unusual and constitutionally interesting developments, or both, virtually all the news outlets focused on the *Schiavo* story at the same time. In addition to continuous coverage, the twenty-four hour news cycle increased the public dissemination of the videotape clips of Terri Schiavo.<sup>177</sup>

That intensive focus led to the blurring of fact and opinion, as well as the interpenetration of news reporting and entertainment, in at least some of the news outlets. Media monitors have claimed, for example, that Fox News slanted its news reporting and permitted its reporters to inject their opinions into the coverage of the *Schiavo* case.<sup>178</sup> In addi-

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the tendency of modern media to rely on a balance of sources without context or comment, and the media's increasing willingness to intrude into the private are all factors visible in the *Schiavo* coverage).

177. Cerminara, *supra* note 143, at 369.

178. A.S., *Fox News Alert: Hannity & Colmes' Schiavo Case Guest List Not "Fair and Balanced,"* MEDIA MATTERS FOR AM., Mar. 22, 2005, <http://mediamatters.org/items/printable/200503220006>; A.S., *Who Is Randall Terry?*, MEDIA MATTERS FOR AM., Mar. 21, 2005, <http://mediamatters.org/items/printable/200503220001>; J.C., *Cables Covered Operation Rescue Protests Without Noting Group's Controversial Past*, MEDIA MATTERS FOR AM., Mar. 24, 2005, <http://mediamatters.org/items/printable/200503240004>; J.C., *Fox Anchor Repeated False Claim About "Nobel Prize-Nominated" Doctor*, MEDIA MATTERS FOR AM., Mar. 24, 2005, <http://mediamatters.org/items/printable/200503240007>; J.C., *Fox's Psychic Friend: Crossing Over's John Edward Claimed Terri Schiavo Is "Definitely Clear on What's Happening Now Around Her,"* MEDIA MATTERS FOR AM., Mar. 25, 2005, <http://mediamatters.org/items/printable/200503250006>; J.C. et al., *Led by Fox, "Hard News" Anchors on Cable Injected Opinion into Schiavo Coverage*, MEDIA MATTERS FOR AM., Mar. 22, 2005, <http://www.mediatters.org/items/printable/200503220010>; N.C., *Morris Joined Effort to Downplay President Bush's Role in Schiavo Case*, MEDIA MATTERS FOR AM., Mar. 30, 2005, <http://www.mediatters.org/items/printable/200503300006>; Only on Fox: *Business Analyst Michael Norman Compared Schiavo Rulings to "Malicious Prosecution" of Insurance Industry*, MEDIA MATTERS FOR AM., Mar. 30, 2005, <http://www.mediatters.org/items/printable/200503250003>; Only on Fox: *John Gibson Suggested That "Republicans Stand for Parents' Right to Life, and Democrats Have Sided for Questionable Husband and Dying,"* MEDIA MATTERS FOR AM., Mar. 23, 2005, <http://www.mediatters.org/items/printable/200503230005>; P.H. et al., *Dissecting a Right-Wing Smear: How Conservatives Used Trumped-Up Evidence to Blame Democrats for Schiavo Memo*, MEDIA MATTERS FOR AM., Apr. 7, 2005, <http://mediamatters.org/items/printable/200504070005>; R.S.K., *Hume Minimized Bush's Actions in Schiavo Case*, MEDIA MATTERS FOR AM., Mar. 28, 2005, <http://mediamatters.org/items/printable/200503280006>; R.S.K., *O'Reilly Badgered Attorney with False Claim About Schiavo Trial*, MEDIA MATTERS FOR AM., Mar. 23, 2005, <http://mediamatters.org/items/printable/>

tion to opinion-laden news reports, Fox also made the *Schiavo* case the focus of its commentary shows featuring conservative pundits.<sup>179</sup> Some cable and local broadcast outlets also used implicitly opinion-laden on-screen titles, such as “Terri’s Fight” or “Fight for Terri,” even in hard news segments.<sup>180</sup>

As for the blurring of news and entertainment, one might say that some of the cable coverage was akin to a reality show in the guise of a news story with a dollop of self-help advice about living wills. The hyperbolic language of some of the participants<sup>181</sup> – e.g., Bill Frist’s proto-diagnosis of Schiavo as not in a PVS on the basis of video clips<sup>182</sup> and President Bush’s overnight return to Washington from his vacation just in order to sign Terri’s Law<sup>183</sup> – were all events with more-than-the-usual dramatic flair. When joined with the uncritical airing of Schindler-edited pictures of Terri Schiavo appearing responsive to her environment,<sup>184</sup> one could complain of a “ghoulish” sort of entertainment value.<sup>185</sup> One could worry that the *Schiavo* story was part of the modern

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200503240001; R.S.K., *O’Reilly Covered Up Earlier False Claim About Witnesses in Schiavo Case*, MEDIA MATTERS FOR AM., Mar. 24, 2005, <http://www.mediamatters.org/items/printable/200503240006>; R.S.K., *O’Reilly, Morris Falsely Painted Schiavo Case as Battle Between Religious, Secular Americans*, MEDIA MATTERS FOR AM., Apr. 1, 2005, <http://www.mediamatters.org/items/printable/200504010006>; S.S.M., *Barnes Wrongly Attacked “Biased” ABC News Poll on Terri Schiavo Case*, MEDIA MATTERS FOR AM., Mar. 25, 2005, <http://mediamatters.org/items/printable/200503250005>; S.S.M., *John Gibson’s and Fox News’ Description of Schiavo Case: “Terri’s Fight,”* MEDIA MATTERS FOR AM., Mar. 29, 2005, <http://mediamatters.org/items/printable/200503290002> [hereinafter S.S.M., *John Gibson’s*].

179. A LexisNexis search on July 24, 2006, of Fox News Network transcripts from March 1, 2005, through May 1, 2005, for the term “Terri Schiavo” yielded 333 results.

180. See, e.g., S.S.M., *John Gibson’s*, *supra* note 178; Orcinus, *supra* note 126 (criticizing media coverage for its adoption of the pro-Schindler argument with “subtler bias like the omnipresent ‘Fight for Terri’ label that is being used by half the networks to accompany their coverage logos.”); see also J.C. et al., *supra* note 178.

181. See, e.g., Abby Goodnough, *In Schiavo Feeding-Tube Case in Florida, Notoriety Finds an Unlikely Judge Presiding*, N.Y. TIMES, Mar. 17, 2005, at A18 (describing a flier calling Schiavo case judge a “judicial murderer”); Adam Liptak, *With Schiavo Subpoenas, Lawmakers Leap into Contested Territory*, N.Y. TIMES, Mar. 19, 2005, at A12, (quoting Tom DeLay’s remarks that subpoenas for Terri Schiavo were needed to “save [her] from an act of barbarism”).

182. *Frist Responds on Schiavo*, N.Y. TIMES, June 17, 2005, at A22.

183. Elisabeth Bumiller, *The Schiavo Case: The President; Supporters Praise Bush’s Swift Return to Washington*, N.Y. TIMES, Mar. 21, 2005, at A15; Hulse & Kirkpatrick, *supra* note 14.

184. See Miles, *supra* note 47, at 42.

185. Joyce Marcel, *Why I Don’t Care About Terri Schiavo*, AM. REP., June 13, 2006; see also *Death by Television*, *supra* note 2, at 74; Rochelle Gurstein, *On the Shamelessness of Our Public Sphere*, NEW REP. ONLINE, Apr. 15, 2005, <http://www.tnr.com/docprint.mhtml?i=WO50411&s=gurstein041505>; Kay McFadden, *Cable News’ Coverage of Schiavo Case Was Obscene*, SEATTLE TIMES, Apr. 1, 2006, at E1; Frank Rich, Op-Ed, *A Culture of Death, Not Life*, N.Y. TIMES, Apr. 10, 2005, §4, at 13; Tompkins, *supra* note 175; Alex Valk, *Perspective: Is the Dignity of Dying Lost in Media Glare; with Death Dominating the News Agenda*, BIRMINGHAM POST-HERALD, Apr. 6, 2005, at 10. The video clip was apparently provided to the press by the Schindlers and culled from many hours of videotape that did not send a similar message. SCHINDLER ET AL., *supra* note

media's preference for lifestyle stories, self-help advisories, and dramas that blur the line between fantasy and reality.

Worse yet, one might argue that the mainstream media's coverage of the *Schiavo* case indicated its willingness to be used as a cat's paw by both the right-to-life groups that appropriated the *Schiavo* case as part of a broader metaphor and by the Republicans in Congress who wished to enter the arena and challenge the courts. If the media rely on limited visuals because they are the most dramatic, such a practice could intrinsically tilt the scale toward one side of the story. That may be the most powerful criticism of the electronic media's coverage of the *Schiavo* case. Yet the electronic media rely on visuals. If a story has a limited set of visuals but is an important story, media use of potentially misleading visuals may be the better of two evils. Indeed, some have argued that the *Schiavo* story would not have been the focus of electronic media attention if the Schindlers had not provided videotapes.<sup>186</sup> The videotapes and pictures of Schiavo do not speak for themselves; they too, are artifacts to be interpreted. Nevertheless, those media outlets that continuously played the videotapes without context – without explaining that the tapes had been filmed over a period of time by the Schindlers, were not current, had been taped surreptitiously and extensively edited by the Schindlers, and that many physicians had opined that Schiavo's apparent responsiveness on the tapes was consistent with a patient in a PVS – can be faulted for having failed their professional norms.<sup>187</sup>

A similar difficulty with some *Schiavo* coverage was that it did not provide adequate context for credibility assessments of the sources it used to comment on the *Schiavo* story. For example, some media outlets reported not only the mainstream doctors' conclusions that Schiavo was in a PVS, but also the contrary assertions of the Schindlers' doctors, even if they were not particularly credible.<sup>188</sup> People whose views

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9, at 129, 134, 136; Hendrik Hertzberg, *Matters of Life*, *NEW YORKER*, Apr. 4, 2005, at 33; Howard Kurtz, *It's to Laugh (or Cry) About; Tragedy or Farce? Either Works for TV*, *WASH. POST*, May 8, 2005, at B1. Yet the press uncritically used the clip as the introduction to virtually every *Schiavo* story.

186. See Hertzberg, *supra* note 185; Kurtz, *supra* note 185.

187. See Smith, *supra* note 175; Judith Graham, *Seeking Meaning in a Hint of a Smile*, *CHI. TRIB.*, Mar. 23, 2005, at 1, available at 2005 WLNR 23479172; Jeff Johnson, *Schindler Family Releases Video of Daughter*, *CNSNEWS.COM*, Oct. 14, 2003, <http://www.cnsnews.com/Culture/Archive/200310/CUL20031014c.html>; Diane Waldman, *Schiavo Videos – Context and Reception*, *JUMP CUT*, Winter 2006, available at <http://www.ejumpcut.org/currentissue/SchiavoWaldman/text.html>; see also SCHINDLER ET AL., *supra* note 9, at 174-75, 230-31, 236; sources cited *supra* notes 180, 185.

188. A.S., *Former NIH Director Healy Misstated Facts in Schiavo Case*, *MEDIA MATTERS FOR AM.*, Mar. 30, 2005, <http://mediamatters.org/items/printable/200503300004> (criticizing senior *US News & World Report* writer for claiming that several neurologists had evaluated Schiavo, when the only neurologist to examine her and conclude that she was not in a PVS was Hammesfahr);

would previously have identified them as too extreme to be news sources – such as Randall Terry, head of Operation Rescue – were routinely granted television time to express their support for the Schindlers.<sup>189</sup> Much was made by the cable outlets of the views of conservative physician-politician Bill Frist. The media, particularly news commentary shows on cable networks, did not seek out independent sources.<sup>190</sup> However, even factual news reporting often appeared to suggest that sufficient balance had been provided so long as the husband's and the parents' spokesmen were interviewed. This seems consistent with a conception of “news as catfight” and an abdication by the press of a role in editing, mediating or contextualizing the catfight.

On the one hand, we should not fault the media coverage when it simply sought to provide a balanced report based on the very sources identified by the parties to the case. In giving a platform to people like Randall Terry, for example, the press respected the Schindlers' identi-

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N.C., *Dubious Doctor Touted as Nobel Prize Nominee by Hannity, Scarborough*, MEDIA MATTERS FOR AM., Mar. 22, 2005, <http://mediamatters.org/items/printable/200503220009> (describing Fox hosts' failure to challenge Dr. Hammesfahr's claim of being Nobel prize nominee); T.K., *News Outlets Ignored Questions About Doctor Who Claimed Schiavo Can Be Helped*, MEDIA MATTERS FOR AM., Mar. 21, 2005, <http://mediamatters.org/items/printable/200503220002> (describing failure of Fox News' Hannity & Colmes and *Los Angeles Times* article's failures to describe Schindler doctor William Hammesfahr's “controversial past”); cf. Annas, *supra* note 10, at 73-74 (implicitly criticizing media for accepting the self-characterization of one of the Schindler family's doctors as a bioethicist even though “no one in mainstream American bioethics had ever heard [of him]”).

The particular problem with the attempt by some media outlets to create a balance of viewpoints in this case was that the scientific side – most reputable physicians who had seen Schiavo or her records – took the position that she was in a PVS. It was only the outliers – such as the doctors selected by the Schindlers and doctors who either had not seen her or were not neurologists by training (but politicians opining on her status from having seen the snippets of video shown on television) – who took the position that she was not in a PVS.

As suggested in text, however, some news outlets, such as the *St. Petersburg Times*, ran stories noting that Dr. Hammesfahr offered no evidence that Schiavo could be helped and that he had had license problems. William R. Levesque, *Doctors Offer Voices for Terri Schiavo*, ST. PETERSBURG TIMES, Oct. 25, 2003, at 1B; William R. Levesque, *Schiavo Case Doctor Target of Complaint*, ST. PETERSBURG TIMES, Oct. 22, 2002, at 3B; see also A.S. & S.S.M., *CNN, Fox Featured Ex-Schiavo Nurse Whose Affidavit Was Dismissed as “Incredible” by Judge*, MEDIA MATTERS FOR AM., Mar. 22, 2005, <http://mediamatters.org/items/printable/200503230001>.

189. The terms “Randall Terry,” “Operation Rescue” and “Schiavo” appeared 146 times in a November 2, 2006 LexisNexis search of the transcripts database covering March 1, 2005, through May 1, 2005. See also A.S., *Who Is Randall Terry?*, *supra* note 178. It has also been reported that Sean Hannity, a Fox talk-show host, contacted former Los Angeles Police Department detective Mark Fuhrman (who gained notoriety during the O.J. Simpson trial) to investigate the events, and Fuhrman subsequently published a book on the matter. See e.g., MARK FUHRMAN, *SILENT WITNESS: THE UNTOLD STORY OF TERRI SCHIAVO'S DEATH* at xv (2005); *Mark Fuhrman Probing Schiavo Case*, NEWSMAX, May 6, 2005, <http://www.newsmax.com/archives/ic/2005/5/6/230418.shtml>.

190. It appears, for example, that Mark Fuhrman was associated with the Schindler group and argued in his own account of the case that Michael Schiavo had likely caused Terri Schiavo's collapse. See generally FUHRMAN, *supra* note 189.

cation of Terry as their spokesman.<sup>191</sup> In quoting Michael Schiavo's attorney George Felos, characterized by Schindler supporters as a right-to-die advocate,<sup>192</sup> the press did no more than offer Schiavo the opportunity to speak through his chosen representative. Under those circumstances, it would have been an aggressive editorial act not to provide the parties' representatives with platforms in which to argue their case. It is not the media's fault that the parties were represented by people who many might consider extremist in their political views. Moreover, the *Schiavo* case involved many issues, some concrete like the question of Terri Schiavo's physical state and some much more abstract like the question of the value of a disabled life.<sup>193</sup> It was not as simple as either the conservatives or liberals wanted it to be. The more abstract questions raised by the case – questions beyond the specifics of the status of Schiavo's brain – were questions as to which there is true debate in this country. The media could not have avoided that.

Again, however, it is important for the media to provide explanatory and evaluative context when it is reporting on a case in which there may be both an extreme balance of passions on a broad range of issues and a relatively clear consensus about which side is "right" as to the most concrete issue from an objectively verifiable point of view.<sup>194</sup> When some of the media reporting on the *Schiavo* matter did not provide such context, they failed in their adherence to professional goals.

Blogs were also part of the equation in the *Schiavo* case, and they reflected the complex role of that medium today. Much blogging activ-

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191. See, e.g., *The Misery Goes On; Terry Schiavo*, ECONOMIST, Mar. 26, 2005 ("[T]he parents' spokesman, Randall Terry, is the founder of Operation Rescue"); see also Eisenberg, *Lessons of the Schiavo Battle*, *supra* note 8, at 25 (noting that Randall Terry is spokesperson for Schindler family).

192. See, e.g., Wesley J. Smith, *The Interview That Wasn't*, DAILY STANDARD, Oct. 28, 2003 (noting that George Felos is "dutiful 'right-to-die' attorney"); Posting by Tim to BlogsforTerri, [http://www.blogsforterri.com/archives/2006/03/cast\\_of\\_charact\\_1.php](http://www.blogsforterri.com/archives/2006/03/cast_of_charact_1.php) (Mar. 30, 2006, 03:52); see also Maya Bell, *Debate About How We Die Rages On, but Chasm Grows*, ORLANDO SENTINEL, Mar. 26, 2006, at A1 (reporting that *Schiavo* case was Felos' second high profile right-to-die case); Robert J. Johansen, *Hope vs. Despair*, NAT'L REV., Mar. 31, 2006 (stating that George Felos is an attorney who has won several right to die cases).

193. See, e.g., Leland, *supra* note 174, at 1 (describing case as reenacting fundamental clash of ideas between the Aristotelian value of the inviolability of existence and the Cartesian value of autonomy and self-determination about the value of life).

194. Thus, for example, outlets like Fox News can be faulted for having featured – without any discussion or qualification – Dr. William Hammesfahr, one of the Schindlers' doctors (whose credibility had been attacked by many in the medical establishment), who improperly claimed that he was a Nobel Prize nominee and made extreme claims that Schiavo was not only conscious, but communicative. While Fox cannot be faulted for having featured one of the physicians on whose diagnoses the Schindlers relied, Fox commentators can be faulted for appearing to accept all his statements at face value, without challenge. See, e.g., Daniel Ruth, *Jesse Arrives! Message Clear! He Cares!!*, TAMPA TRIB., Apr. 4, 2005, at 2 (reporting that Dr. William Hammesfahr "conned" Fox News' Sean Hannity into "referring to him as a Nobel Prize nominee").

ity and online news site commentary accompanied the mainstream media's *Schiavo* coverage.<sup>195</sup> Bloggers from both liberal and conservative perspectives were engaged in the *Schiavo* debate.<sup>196</sup> In addition, many of the blogs and Web sources addressing the *Schiavo* case reported on and criticized mainstream media coverage.<sup>197</sup> In turn, those criticisms and reports found their way back to mainstream press outlets in a feedback loop in at least one instance.<sup>198</sup> The plethora of blogs might have led to a snowballing effect in the coverage both directly and indirectly. The direct effect is attributable to the fact that mainstream journalists now often read blogs and may well have done so in this case. The blogs may have had an indirect effect on news coverage as well to the extent that they promoted grassroots mobilization and fundraising, as well as telegenic protests at Terri Schiavo's hospice and e-mail avalanches at legislators' offices.

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195. See, e.g., *NewsHour with Jim Lehrer: Schiavo: Talk of the Nation*, *supra* note 1 (noting over 4000 references to "Schiavo" per day in blogs in March 2005).

196. *Id.* BlogsforTerri.com e-mailed media outlets, "urging them to probe more deeply." Johnson, *supra* note 172 (noting that the liberal blog Dailykos.com has criticized government intervention). Some have argued that the blogosphere has been most effectively used by conservative voices. See, e.g., Crowley, *supra* note 115.

197. See, e.g., Jesus-Is-Savior.com, *Media Bias in Terri Schiavo Case at Extreme Levels* in AP, Reuters Reports (Mar. 23, 2005), [http://www.jesus-is-savior.com/Evils%20in%20America/Euthanasia/Terri\\_Schiavo/media\\_bias\\_at\\_extreme\\_levels.htm](http://www.jesus-is-savior.com/Evils%20in%20America/Euthanasia/Terri_Schiavo/media_bias_at_extreme_levels.htm); Michelle Malkin, *ABC Caught: Schiavo Poll Distorted*, HUMANEVENTSONLINE, Mar. 23, 2005, <http://www.humaneventsonline.com/article/php?print=yes&id=6942>; Newsmax, *Despicable Media Coverage in Schiavo Case*, PROPAGANDA MATRIX, MAR. 31, 2005, <http://www.propagandamatrix.com/articles/march2005/310305mediacoverage.htm>; Vernon, *supra* note 7; Orcinus, *Balance and the Tipping Point*, <http://dneiwert.blogspot.com/2005/03/balance-and-tipping-point.html> (Mar. 27, 2005, 11:35); Posting of Luis to The Blog from Another Dimension, <http://www.blogd.com/archives/001194.html> (Mar. 23, 2005 22:59); Posting of Patterico to Oh, That Liberal Media!, <http://www.thatliberalmedia.com/archives/003598.html> (Jan. 24, 2005). For non-blog criticisms of mainstream media coverage, see Cohen, *supra* note 18, Terry Krepel, *Pulling the Plug on Fairness*, CONWEBWATCH, Mar. 7, 2005, <http://conwebwatch.tripod.com/stories/2005/schiavo.html>, and Terry Krepel, *Starving Fairness, Feeding Bias*, CONWEBWATCH, Mar. 23, 2005, <http://conwebwatch.tripod.com/stories/2005/schiavo2.html>.

198. For example, the *Washington Post* and ABC News reported early in March 2005 that a "talking points" memo indicating that the *Schiavo* case was a "great political issue" for Republicans was circulated among Republican senators. See, e.g., Howard Kurtz, *Doubts Raised on Schiavo Memo*, WASH. POST, Mar. 30, 2005, at C01. Conservative bloggers such as Powerline speculated that the memo was in fact a Democratic plant falsely attributed to Republicans. *Id.* That claim was in turn reported in the mainstream media. *Id.* It was thereafter revealed that the memo had been written by a legal staff member of Republican Senator Mel Martinez. David D. Kirkpatrick, *Schiavo Memo Is Attributed to Senate Aide*, N.Y. TIMES, Apr. 7, 2005, at A20. Conservative bloggers did not issue retractions for their speculations, however, noting that the specifics of the original reports in the mainstream press – that the memo had been circulated to the Republican leadership – were not true. The memo had only been passed by mistake to Senator Harkin by Senator Martinez. See also Eric Boehlert, "Citizen Journalists?" *Try Partisan Hacks*, SALON, Apr. 8, 2005, [http://dir.salon.com/story/news/feature/2005/04/08/schiavo\\_memo/index.html](http://dir.salon.com/story/news/feature/2005/04/08/schiavo_memo/index.html); Posting of Dale Franks to Qando Blog, <http://www.qando.net/details.aspx?Entry=1541> (Apr. 7, 2005).

The electronic media's coverage of the *Schiavo* case is also a useful context in which to look at the news media's approach to privacy. Some have claimed, as noted above, that the coverage of the *Schiavo* case was an unsavory invasion of privacy.<sup>199</sup> The SPJ Code of Ethics specifically states that "[o]nly an overriding public need can justify intrusion into anyone's privacy," that journalists should "avoid pandering to lurid curiosity," and that they "be sensitive when seeking or using interviews or photographs of those afflicted by tragedy or grief."<sup>200</sup>

However, a traditional invasion of privacy type of argument does not appear to have much traction in this case. While the media of an earlier era might have balked at airing pictures of Schiavo or at trying to interview her parents immediately after her death, today's news outlets decided that their coverage did not implicate Schiavo's privacy in the traditional sense. In her final state, Schiavo herself did not have any privacy interests; she was incapable of expressing or even feeling concerns about her dignity or privacy. Claims that media coverage breached Schiavo's sense of privacy and dignity are nothing more than a projection of our views of what she would have wanted before she was rendered incapacitated (or what we would want in her place).<sup>201</sup>

In any event, the *Schiavo* case was triggered by an intra-family dispute. It was not a voracious news media that created the conflict – as has been the case in some sting operations or "stunt journalism."<sup>202</sup> The public airing of the case by the Schindler family was the trigger for the news coverage.<sup>203</sup> It was not unreasonable for the press to conclude that even if there is still a consensus that one's personal medical story is indeed private, the policy should change when the family puts the issue in the public eye.<sup>204</sup> In the end, the press could claim, the focus on

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199. See *supra* note 19 and accompanying text.

200. CODE OF ETHICS (SPJ), *supra* note 35.

201. See, e.g., Abby Goodnough, *Behind Life-and-Death Fight, A Rift That Began Years Ago*, N.Y. TIMES, Mar. 26, 2005, at A1 (describing Michael Schiavo's view that his "self-conscious" wife would have "been mortified" by the distribution of the Schindlers' videos).

202. See Logan, *supra* note 33, at 151; see also Eric Alterman, Editorial, *Lionizing Journalism; Journalism Overreacts to the Food Lion Verdict vs. ABC-TV; Full-Court Press*, NATION, Mar. 24, 1997, at 5 (arguing that the relentless "Geraldo-ization" of network news magazines has led them to use hidden cameras as an audience-grabbing stunt rather than as a considered last resort, at the cost of equating all journalism with that practiced by the *New York Post* and the *National Enquirer*).

203. See *supra* note 186 and accompanying text. While complaining about the media's intrusion into their and their daughter's privacy, the Schindlers continued to update the press and try to foment media interest in the continuing story. Although the news media's repeated airing of the video of Terri Schiavo appearing sentient may have appeared invasive, the video was provided to the press precisely to prompt media dissemination so that it could undermine public acceptance of the judicial conclusions about Schiavo's physical status. In any event, what was to be made of that video by the viewing public was also unclear.

204. See Hertzberg, *supra* note 185 (reporting that one factor in making the *Schiavo* case a

Schiavo was justified by the results: the public began to pay more attention to end-of-life issues, and therefore news value properly trumped the desire to protect Schiavo's privacy.<sup>205</sup>

However, there is a more powerful, albeit non-traditional, type of privacy argument: Schiavo had a "right" to be seen as a private individual, a private citizen, and not to be appropriated and made into a public symbol. The underlying privacy argument was thus about autonomy: end-of-life issues should still be personal and familial matters without governmental intervention or public attention. The *Schiavo* case energized a systemic cultural conflict between personal autonomy and social control.

Yet this was not the fault of the media, and too much should not be laid at their door. The media reported the conflict – including the transformation of Terri Schiavo into an icon. Obviously, the story fit important narrative conventions that have become central to news coverage today. The press is much more likely to emphasize a story featuring an individual who can be made representative, symbolic, and iconic.<sup>206</sup> Nevertheless, it was the participants in the saga and not the media that

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television spectacle was a "set of video snippets, provided by the Schindler family and broadcast incessantly by the three cable news networks"); *Saving Terri Schiavo*, *supra* note 169 (describing media strategy organized by Terry on behalf of the Schindlers); *see also* David Kohn, *Terri Schiavo's Autopsy Released; Brain Damage Called 'Irreversible'; Florida Woman's Condition Prompted Years of Wrangling*, BALT. SUN, June 16, 2005, at A1 (noting that medical examiner's conclusions countered a videotape released by the Schindlers that seemed to show Schiavo smiling and able to follow some movements); Wesley J. Smith, *The Case Heard Round the Web*, WEEKLY STANDARD, Apr. 4, 2005, at 10.

Thus, a privacy argument akin to a claim under the intrusion into seclusion tort seems inapplicable on its face. To the extent that the claim rested on the notion that publicizing the picture undermined Schiavo's dignity interests, one could argue that by showing her in an apparently responsive state, the video granted her dignity that would have been absent had she been shown in a video in an entirely comatose, unresponsive state. *Cf.* Smith, *supra*, at 10. *But see* Gurstein *supra* note 185.

205. Abby Goodnough, *Schiavo Dies, Ending Bitter Case over Feeding Tube*, N.Y. TIMES, Apr. 1, 2005, at A1 (quoting then-Florida Governor Jeb Bush stating that the *Schiavo* case "will heighten awareness of the importance of families dealing with end-of-life issues"); *see also* Larry Copeland & Laura Parker, *Schiavo Case Doesn't End with Death*, USA TODAY, Apr. 1, 2005, at A1 (*Schiavo* case "spurred public interest in living wills").

206. Even some hard news today – especially on television – seeks to copy the newsmagazine format of dramatic stories. Karlyn Kohrs Campbell, *Marketing Public Discourse; Media Influence on Political Communication*, HEDGEHOG REV., Sep. 22, 2004, at 39 (arguing that to remain profitable, newscasts "feature conflict and human interest packages as stories with a beginning, middle, and end"); *see also* Daniel Sutter, *News Media Incentives, Coverage of Government and the Growth of Government*, 8 INDEP. REV. 549, 554 (2004), available at [http://www.independent.org/pdf/tir/tir\\_08\\_4\\_sutter.pdf](http://www.independent.org/pdf/tir/tir_08_4_sutter.pdf) (citing memo from "network news producer" requiring all stories to contain "'structure and conflict, problem and denouement, rising action and falling action, a beginning, a middle, and an end'"). This means that many important stories without such narrative hooks go unreported or underreported, even if they are, substantively, of equal political significance or more so.

turned Terri Schiavo into a symbol and an icon.<sup>207</sup>

The *Schiavo* case is not only a useful context in which to think about the internal economic pressures on journalistic standards, but also a fruitful lens through which to assess external pressures. Without being unduly nostalgic for a mythical press of perfect balance and objectivity, there is reason to worry that developments might allow special interest groups, including politicians, to become more successful than in the past at hyping stories to the press.

Both the evangelical media and the religious right's lobbying machine played significant roles in the process by which the *Schiavo* case came to be a national story. The *Schiavo* case was a significant story in the evangelical media for several years before its migration into the mainstream media discourse "[because] . . . it combine[d] two issues that are of critical importance to religious conservatives – the power of the courts and the 'sanctity of life.'"<sup>208</sup> Evangelical media have been credited with "help[ing] drive" the attempt to "sustain Terri Schiavo's life."<sup>209</sup> They did so in at least two ways: by promoting a grassroots

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207. Supporters of the "culture of life" used her to symbolize their socio-political platform. (Ironically, the distinction between private and public has been a significant conservative platform for some time.) Absolute vitalism triumphed in much of the conservative approach to the *Schiavo* situation. On this view, the private can be sacrificed for public purposes because of society's interests in social – rather than individual – control over some sorts of life and death decisions: even if everyone in the Schiavo/Schindler families agreed to the removal of Schiavo's feeding tube, the public and the state should stop them from "killing" her by doing so. *See, e.g.*, Buchanan, *supra* note 10; Steve Burgess, *All-Schiavo TV*, THE TYEE, Mar. 28, 2005, <http://theyee.ca/Mediacheck/2005/03/28/AllSchiavoTV>; Eric Cohen, *How Liberalism Failed Terri Schiavo*, WEEKLY STANDARD, Apr. 4, 2005, at 19; Johansen, *supra* note 192; Sheryl Gay Stolberg, *The Schiavo Case: The Legacy; A Collision of Disparate Forces May Be Reshaping American Law*, N.Y. TIMES, Apr. 1, 2005, at A18; Rusty Lee Thomas, *Terri Schiavo and the Culture of Death*, COVENANT NEWS, Mar. 27, 2005, <http://covenantnews.com/rustythomas050326.htm>.

The Schiavo story was thus analogized to the unborn fetus whose "rights" should not be overborne by a woman's desire to end her pregnancy. By contrast, for those opponents of the "culture of life," Schiavo became a symbol of the "culture of autonomy." They saw Schiavo as the unwilling symbol of the culture wars – a tragic individual appropriated for political and propagandistic purposes by the religious right. Admittedly, it was the religious right that effectively assimilated the Schiavo story into the culture of life, and thus the liberals' arguments for privacy were attempts to challenge her symbolic status and reduce her situation to a classic private, family problem. Yet, by reacting against the culture of life symbolism, the liberal supporters of Michael Schiavo effectively used Schiavo as a symbol as well – in their case, of autonomy and individuality. *See also* Timothy É. Quill, *Terri Schiavo – A Tragedy Compounded*, 352 NEW ENG. J. MED. 1630, 1630 (2005) ("Distortion by interest groups, media hyperbole, and manipulative use of videotape characterized this case and demonstrate what can happen when a patient becomes more a precedent-setting symbol than a unique human being.").

208. Blake, *supra* note 148, at 32.

209. *Id.*; *see also* Piore, *supra* note 149 (asserting that "Salem's stations allow the religious right to share information, mobilize allies, and galvanize public opinion," and describing how Christian talk-show host James Dobson "took to Salem's airwaves and told listeners: 'A woman's life hangs in the balance. We really have to defend this woman, because if she dies, the lives of thousands of people around the country can be killed too. There's a principle here: It's a

campaign aimed at the government and by bringing the story to the mainstream media's attention. Most importantly, by being the pioneers of the *Schiavo* case, religious broadcasters framed the issue as something far beyond a personal family tragedy.<sup>210</sup>

In deploying the culture of life rhetoric in the *Schiavo* case, religious broadcasters reflected the strategic appropriation of the case by the religious right and the right-to-life lobby. In the *Schiavo* case, an increasingly organized right-to-life movement was joined by segments of the disability advocacy community, not to mention conservative blogs, in exerting organized pressure to shape the story.<sup>211</sup> The increasingly organized, socially conservative ideological groups used technology,<sup>212</sup> rhetoric,<sup>213</sup> legal assistance,<sup>214</sup> and issue-based (rather than

paradigm of death versus a paradigm of life.' Dobson's cohost then reeled off the phone numbers of Florida's legislators").

210. Blake, *supra* note 148, at 32 (noting that the *Schiavo* case was "a story that was incubated in evangelical media three years before it hit the mainstream"). Even though the mainstream media did not simply parrot the evangelical stations' *Schiavo* accounts, particularly as those religious stations apparently often misrepresented facts about Schiavo's condition, the religious broadcasters nevertheless helped set the agenda for mainstream reporting of the story. *See id.* ("Much of the coverage on Christian networks has distorted Schiavo's condition by indicating she retained the ability to think, feel, and function. Some newscasts reported as fact her parents' contested claim that she tried to utter the words 'I want to live' before her feeding tube was pulled for the last time. Others, like Janet Folger, host of the radio and TV call-in show Faith2Action, described Schiavo as actually sitting up and talking. Evangelical pundits also demonized Schiavo's husband, Michael, and Florida Judge George Greer, who presided over the case, referring to them as murderers and invoking holocaust rhetoric. Indeed, Christian broadcasters seemed to set the tone for the emotional language that would burst into the mainstream media and the halls of Congress during Schiavo's final days.").

211. *See, e.g.*, John A. Robertson, *Schiavo & Its (In)significance*, 35 STETSON L. REV. 101, 113-114 (2005) (noting the different issue groups brought together by reframing of *Schiavo* case not as about "the inferred wishes or best interests of a permanently comatose person," but as a "story about the unjustified killing of a disabled person whose condition could be improved").

212. These groups used technology very skillfully to bombard legislators and others with e-mails on behalf of "keeping Terri alive." Although the governor's office disputed it, some contend that Jeb Bush was persuaded by the outpouring of such e-mails in support. Mass marketing techniques have been used to identify supporters and aid them in petitioning government. *See, e.g.*, Julia Duin, *Believers Aim to 'Reclaim' America*, WASH. TIMES, Apr. 15, 2005, at A01 (describing 107,000 names on online petition to then-Governor Jeb Bush, organized by the National Grassroots Alliance); Robin Toner & Carl Hulse, *Congress Ready to Approve Bill in Schiavo Case*, N.Y. TIMES, Mar. 20, 2005, at 11 (describing "tens of thousands" of calls and e-mails generated by social conservatives in days before Terri's Law was passed). Conservative groups have also made good use of the "new media" in the form of opinionated blogs. On the use of new technology by the religious right, see generally MEDIA, CULTURE, & THE RELIGIOUS RIGHT (Linda Kintz & Julia Lesage, eds., 1998).

213. One of the explanations aired by pundits for the apparent success of conservatives in the public sphere is that they have deployed compelling rhetorical devices that people can use to organize their views. *See supra* note 212.

214. The Schindlers' legal teams consisted of attorneys associated with the conservative right and the right-to-life community. *See, e.g.*, Bill Berkowitz, *One Year Later, Conservatives Still Cashing In on Terri Schiavo*, MEDIA TRANSPARENCY, Mar. 30, 2006, <http://www.>

identity-based) alliances with otherwise politically distinguishable groups<sup>215</sup> in order to expand their area of influence beyond the specific issue of abortion.<sup>216</sup>

Ultimately, however, even if a given media outlet was not balanced, was unduly sensationalistic in its coverage, or appeared to parrot the views of a particular ideological group, overall the media's coverage apparently reflected the gamut of viewpoints on the questions raised by the *Schiavo* case. Moreover, the media did engage in some amount of self-reflection, which is ultimately the most we can expect of any institution with public impact and wide discretion.<sup>217</sup>

## V. NO EASY ANSWERS

Media criticism should be sensible, balanced, factual, and realistic. It should avoid exaggeration and ideological partisanship. It should seek to promote accountability and professionalism. Yet the criticism of the media's coverage of the *Schiavo* case demonstrates exactly the opposite. The increasingly polarized media criticism – from both conservatives and liberals<sup>218</sup> – threatens to undermine important press functions in a democracy. A robust and independent press can serve both as an impor-

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mediatransparency.org/storyprinterfriendly.php?storyID=118; Arian Campos-Flores, *The Legacy of Terri Schiavo*, NEWSWEEK, Apr. 4, 2005; Joe Conason, *Schiavo's Advocates Contradict Themselves*, N.Y. OBSERVER, Apr. 1, 2005.

215. For example, the religious right created an alliance with the disability rights community that might well otherwise have been on the other side of the political aisle with regard to other civil liberties issues. See, e.g., Laura Hershey, Commentary, *Killed by Prejudice*, NATION, Apr. 14, <http://www.thenation.com/doc/20050502/hershey>. In addition, evangelical groups joined Catholics in their *Schiavo* arguments. Jesse Jackson as well supported the Schindlers, even though his politics are otherwise quite distinct from those of the conservative right.

216. See, e.g., Annas, *supra* note 10, at 66-68 (describing methods used by “variety of right-to-life groups and fundamentalist religious organizations” in support of Schiavo's parents). In addition to more adept use of the media, evidence suggests that funding from foundations to evangelical religious organizations has significantly supported socially conservative causes and policies, including the “culture wars.” See e.g., Russell, *supra* note 146. Groups like the Center for Reclaiming America say that “since the late 1980s, the conservative movement has become more organized, better funded and more sophisticated.” Duin, *supra* note 212, at A01 (quoting the executive editor for the Center for Reclaiming America).

217. See, e.g., Editorial, *Death by Television*, *supra* note 2, at 74 (suggesting that the media's intense coverage of Schiavo's final days stripped her of opportunity to die with dignity).

218. While all-out media-bashing is to be expected from conservatives who have strategically used media criticism as part of their project to influence social policy, liberals, too, have joined the fray. See, e.g., Franklin Foer, *Bad News*, NEW REPUBLIC, Dec. 26, 2005, at 6 (criticizing media-bashing from both right and left); Gabriel Sherman, *MSM Takes Another Beating, with Blows from Left and Right*, N.Y. OBSERVER, June 5, 2006 (“[T]he news business has been sorely troubled by the rise of the media-bashing complex, a full-blown industry of press critics armed with cable news shows, blogs, and talk-radio programs. Their mission is simple: discredit and defang the so-called mainstream media (MSM). Historically, the wolf pack of media bashers has come from the right. Conservatives found they could whip up support from their base by exposing the MSM's ‘liberal media bias’ . . . . Since the attacks of Sept. 11, however, the piñata-

tant catalyst of public debate on issues of social and political importance and as a powerful check on government and the powerful.<sup>219</sup> Yet undifferentiated media bashing creates the risk that journalists will be perceived simply as political players allied with one side or another in ideological wars rather than professionals at least attempting to provide independent and accurate accounts of events for public discussion. This in turn is likely to erode public confidence in press credibility<sup>220</sup> and thereby compromise the media's historically significant roles.

With respect to its role as catalyst for public conversation, the news media's *Schiavo* coverage presented virtually a textbook case of engaging the public in a national debate about profound and difficult social issues.<sup>221</sup> We cannot expect perfection from the news media.<sup>222</sup> Overall, the *Schiavo* coverage enabled a nationwide conversation on matters far more weighty than those raised by other sensational stories that have captured the media. It demonstrated that despite all the pressures, the media as a whole are capable of generating and supporting important national debate about difficult issues. It would be a pity indeed if blun-

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like MSM has had to contend with a new band of angry critics lashing out from the left."); see also Lakshmi Chaudhry, *Rage Against the MSMachine*, NATION, Aug. 7, 2006, at 18.

219. For the seminal argument for such a watchdog role for the press, see Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 526, 528. In addition to its powerful role as the Fourth (and Fifth) Estate, the press is also obviously a disseminator of news and catalyst for public conversation. Journalists and news organizations see themselves as playing such multiple roles. See ASNE STATEMENT OF PRINCIPLES, *supra* note 35 ("The American press was made free not just to inform or just to serve as a forum for debate but also to bring an independent scrutiny to bear on the forces of power in the society, including the conduct of official power at all levels of government."). See generally KOVATCH & ROSENSTIEL, ELEMENTS, *supra* note 33, at 100-05.

220. Wholesale media criticism from both conservatives and liberals "contribute[s] to the erosion of the public's faith in our establishment media." Sherman, *supra* note 218. On the decline in news media's credibility with the public, see, for example, Doherty, *supra* note 31. But see THE STATE OF THE NEWS MEDIA 2006, *supra* note 57 (noting audience's skepticism regarding media, but also reflecting audience desire for press as neutral reporter).

221. It is of course important not to fall into the trap of generalizing too much from one example – journalism and the modern media should not be judged solely on their coverage of a particular story.

222. See Blake D. Morant, *Electoral Integrity: Media, Democracy, and the Value of Self-Restraint*, 55 ALA. L. REV. 1, 5 (2003) (discussing the news media in the context of electoral coverage). The various scandals of journalistic falsifications in news stories – epitomized by Jayson Blair's reporting for the *New York Times* and Stephen Glass' stories for the *New Republic* (later made into a major motion picture) demonstrate challenges to the accuracy of the news. See Marianne M. Jennings, *Where Are Our Minds and What Are We Thinking? Virtue Ethics for a "Perfidious" Media*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 637, 641-72 (2005). Some have suggested systemic reasons for such increases in newspaper error. See, e.g., Clay Calvert, *The First Amendment, Journalism & Credibility: A Trio of Meaningful Reforms for a Meaningful Free Press More Than Three Decades After Tornillo*, 4 FIRST AMENDMENT L. REV. 9 (2005).

Media analysts suggest that the public does not require perfection and will forgive errors if they believe in the media's intention to act in the public interest. See, e.g., KOVATCH & ROSENSTIEL, ELEMENTS, *supra* note 33, at 66-82, 122-23.

derbuss and partisan media criticism were to lead to media self-censorship and avoidance of future controversy.<sup>223</sup>

As for its role as government watchdog, it is particularly important for the press to pursue that difficult role today, in light of an administration actively engaged in quelling dissent and suppressing information in the name of national security.<sup>224</sup> Although the mainstream media has made a number of important revelations since the *Schiavo* case,<sup>225</sup> there

223. It is of course difficult to speculate about the effects of media criticism. For example, a cynic might argue that modern media have the economic incentive to cover stories that lead to high ratings and that they will continue to cover such stories regardless of whether they are criticized or lauded for their coverage. Nevertheless, the traditional media are often characterized as afraid of controversy for fear of offending viewers and advertisers. If media are vociferously criticized for news coverage of controversial issues, is it not plausible that they will focus on equally highly rated entertainment or, at best, infotainment?

224. Ken Auletta, *Fortress Bush; How the White House Keeps the Press Under Control*, NEW YORKER, Jan. 19, 2004, at 53; see, e.g., *How is President Bush Doing?*, on TALK OF THE NATION (Nat'l Pub. Radio Mar. 18, 2002), available at <http://www.npr.org/templates/calendar/index.php?prgId=5> (locate March 18, 2002 broadcast on the broadcast calendar) (agreeing that administration tends to "leap all over" dissent); see also Doherty, *supra* note 31, at 48; Laura Rozen, *He's Done*, AM. PROSPECT, Dec. 2005, at 27 (noting that Bush administration seeks to "crush dissent").

In addition, the Bush administration has been at some pains to criticize and "delegitimize" the press. See Ghiglione, *supra* note 170, at 421; Michael Massing, *The End of News?*, N.Y. REV. OF BOOKS, Dec. 1, 2005, available at <http://www.nybooks.com/articles/18516>; Lori Robertson, *In Control*, AM. JOURNALISM REV., Feb. 2005, at 26 (stating that Bush administration has "perfected the art of tightly controlling information"). Most recently, the administration has done so by characterizing press revelations as "disgrace[ful]" and practically traitorous in the nation's fight against terrorism. See, e.g., Byron Calame, *Secrecy, Security, the President and the Press*, N.Y. TIMES, July 2, 2006, §4, at 10; Nicholas D. Kristof, *Don't Turn Us into Poodles*, N.Y. TIMES, July 4, 2006, at A15; Frank Rich, *All the News That's Fit to Bully*, N.Y. TIMES, July 9, 2006, §4, at 12; Frank Rich, *Can't Win the War? Bomb the Press!*, N.Y. TIMES, July 2, 2006, §4, at 10; Sheryl Gay Stolberg, *Bush Condemns Report on Sifting Bank Records*, N.Y. TIMES, June 27, 2006, at A1.

This is not to say that concerns about threats to national security should be dismissed out of hand. The government always has an incentive to cloak its activities in secrecy. An unexamined reliance on claims of national security may in fact be used improperly to protect government abuses.

225. From Abu Ghraib to domestic surveillance, the press has broken many stories putting pressure on the administration. See, e.g., Bill Kirtz, *Unleash the Watchdog!*, POYNTERONLINE, May 22, 2006, [http://www.poynter.org/content/content\\_view.asp?id=101564&sid=32](http://www.poynter.org/content/content_view.asp?id=101564&sid=32) (providing an online compilation of articles about the reinvigorated watchdog press); see also Arnold H. Loewy, *An Unworkable Solution for a Non-Existent Problem: A Reply to Professor Calvert*, 4 FIRST AMEND. L. REV. 43, 48 (2005) (suggesting that the press is performing its checking function).

Some purists may complain that many of the revelations made by the news media recently have been triggered by anonymous sources and whistleblowers, indicating that the media of today is too ready to wait for the stories to come to it (rather than developing the stories themselves). See e.g., Carol Marin, *Media Lax as Feds Go on Free Press Attack*, CHI. SUN-TIMES, July 1, 2005, at 49 (noting that journalists often rely on anonymous sources); NEWS INCORPORATED, *supra* note 66, at 22-23; see also Rachel Smolkin, *USA Tomorrow*, AM. JOURNALISM REV., Aug./Sept. 2005, at 20 (discussing that some experts view *USA Today's* new policies, which include restricting reliance on anonymous sources, as potentially inhibiting aggressive journalism).

Others may complain, too, that if so much attention had not been devoted to Terri Schiavo

are nevertheless good reasons to worry that wholesale partisan media criticism adds to an inhospitable environment for crusading journalism.<sup>226</sup>

This is not to say that the mainstream media should not be criticized and held accountable for their errors and journalistic failures. In

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and other sensational but far less politically significant cases, stories like these might have had more room to fill in the news. See, e.g., Cynthia Tucker, Editorial, *Media's Interest Goes Missing for Faces of Color*, BALTIMORE SUN, May 9, 2005, at 11A (noting that media's coverage of sensational stories is at expense of other noteworthy stories); see also Barbara Jeziuro, Commentary, *Media Focus on the Sensational, Ignore Real Issues*, BUFFALO NEWS, Apr. 5, 2005, at A8 (discussing media's focus on sensational stories causes press to ignore "real news"). But to argue that the press might have challenged the government earlier had it not been distracted by *Schiavo* or similar stories is second-guessing with an unanswerable claim. It may well be true that important whistleblowing stories will be displaced by the next sensational story to lead the news, but that cannot serve as the justification for giving up on the press.

One can only speculate as to the reasons for the press' reinvigorated role as investigator of government activity. Whether because of a lessening of timidity in the media, a political shift that eroded the administration's power to define dissent as disloyalty, or simply the importance of the stories, the mainstream press in 2006 played an active, watchdog role.

226. Is it not inconsistent to worry that criticism in contexts such as the *Schiavo* coverage will lead to media reluctant to undertake their watchdog role when, as is pointed out above, the media have been revealing government secrets despite the widespread criticism? The following four observations – not in order of significance – suggest that there is no inconsistency:

First, if media credibility is further undermined by widespread criticism, the public may be more likely to disbelieve the revelations of a watchdog press and may also be more susceptible to government denials and self-justifications. In addition to undermining the effectiveness of the press' revelations, such public reactions may induce self-censorship on the part of news organizations with respect to future stories.

Second, the fact that important revelations have been made by some powerful news organizations – and particularly the grand dames of the print press – says nothing about whether additional investigations and revelations might not have been made public but for timidity fostered by partisan criticism. If media organizations feel compelled to respond to criticism that they are too liberal, for example, it stands to reason that they will feel pressure either to favor the conservative point of view or to self-censor entirely. See, e.g., Posting of Linkmeister to The Talking Dog, <http://thetalkingdog.com/archives2/000580.html> (June 2, 2006, 10:02 PM) (interview with Eric Boehlert, in which he notes that "the media has a tremendous fear of the liberal bias charge"). While one might suppose that the pressure by conservatives is counterbalanced by pressure from liberals accusing the press of being conservative lapdogs, the reality is that the conservative critique of the media appears to have achieved much greater traction than the liberal critique. In any event, even if there were equipoise of pressure, the most attractive response would be self-censorship and avoidance of the watchdog role.

Third, even if media criticism would not lead to self-censorship, it might well lead to significant caution and even delays in publicizing the results of investigative reporting. Thus, news organizations made timid by the fear that criticism had undermined their support (both with the public and within government) might wait for political winds to shift before too explicitly criticizing government.

Fourth, it is possible that the atmosphere of media criticism might make potential government sources more wary of trusting the press. As demonstrated by the revelation of the identity of Deep Throat, the anonymous source for the Watergate revelations, see Bob Woodward, *THE SECRET MAN: THE STORY OF WATERGATE'S DEEP THROAT* 226-27 (2005), media engaged in investigative reporting of government often have to rely on government employees because they are the very sources likely to know about the matters being investigated. If such potential sources see the media as battered, they may not provide the leaks necessary to the stories.

fact, appropriate, journalistic standards-based media criticism is a good way of promoting press accountability.<sup>227</sup> When the criticisms are exag-

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227. It is possible to argue that media criticism is in fact ineffective and therefore irrelevant. People of this view would suggest that universities have had media studies departments for decades, that their (and others') media criticisms have been extensive and harsh, and that things have not changed much for the better. A less extreme argument is that media criticism is at most tangential to significant economic and structural factors that influence media behavior.

If either of those claims is true, then there are only two things this Article's analysis of *Schiavo* media criticism can suggest. The first is the "no worries" prescription: mainstream media will be increasingly irrelevant in a world of technology that enables anyone to reach global audiences for a few dollars, so let us not worry too much about assessing their performance. The second suggestion is the "educate and mobilize the public" prescription: media reformers need to abandon media criticism and instead educate the public and mobilize grassroots opposition to media consolidation. Media theorists and activists such as Robert McChasney have been intensely engaged in such a program (with organizations such as The Free Press, <http://www.freepress.org> (last visited Nov. 11, 2006)). Strategically generated public outcries about media consolidation have doubtless helped derail deregulatory policies entertained by the FCC. In addition to a judicial decision striking down its deregulatory efforts with respect to media ownership issues, for example, the FCC's appetite for deregulation may have been reduced by an immense outpouring of public protest on the issue. See PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, STRONG OPPOSITION, *supra* note 75; Calvert, *supra* note 222, at 23-25; see also Pamela Jackson & James Stanfield, *The Role of the Press in a Democracy; Heterodox Economics and the Propaganda Evaluation of the Freedom of the Press*, J. ECON. ISSUES, June 1, 2004, at 475, 479-80 (noting that the negative public response to regulatory proposals was overwhelming); Stephen Labaton, *U.S. Backs Off Relaxing Rules for New Media*, N.Y. TIMES, Jan. 28, 2005, at 1 (noting that the Bush administration dealt setback to companies favoring relaxation of ownership rules by dropping challenge to FCC's reconsideration of rules); cf. Michael A. McGregor, *When the "Public Interest" Is Not What Interests the Public*, 11 COMM. L. & POL'Y 207, 210-11 (2006) (suggesting that although many of the comments received by the FCC in the ownership deregulation proceedings may not have influenced the Commission's decision, the public outcry was heard by Congress). On this view, content-based criticism of media coverage of events is akin to the tail wagging the dog. Success in improving press product can only come from directly resolving the structural conditions that lead to the problematic coverage. A reduction in media consolidation can be expected to lead to more independent journalism and better watchdogs, thereby addressing the media critics' substantive complaints indirectly. See, e.g., BAKER, MEDIA CONCENTRATION AND DEMOCRACY, *supra* note 60.

The problem with both prescriptions is that they are not likely to be very effective, at least in the short term. Relying on cheap technology to democratize the mass media is both unrealistic and accompanied by its own problems. Admittedly, the fact that anyone can start a Web page or a blog with a small investment permits an end-run around the daunting barriers to entry into the mainstream mass media. However, the embarrassment of riches on the Web, the fact that blogs and the Web in general have seen increased commercialization, and the limit to human beings' attention spans all suggest that a single blog will be only as significant as a single newsletter in comparison to the power and influence of the established professional media. Worse yet, even if the electronic pamphleteer does escape anonymity and develops status and power, the politically polarized discourse of the blogosphere may well reinforce rather than mitigate the political polarization in the age of mass media. See generally CASS R. SUNSTEIN, REPUBLIC.COM (2002) (warning that the other side of the Internet's democratizing character is the increase of extremist voices as people choose to read or listen to only those points of view they already share); see also KOVATCH & ROSENSTIEL, ELEMENTS, *supra* note 33, at 136-37; Google News, <http://news.google.com> (last visited Apr. 3, 2007) (customizable automated news aggregator).

As for the second suggestion, while there is nothing wrong with attempting to mobilize public opinion, little in fact appears to halt consolidation in the communications industries today. Moreover, some might question whether the few setbacks to media consolidation in the past

gerated and ideological, however, they do not serve that function. The right kind of media criticism – measured, specific, and professional – may improve media processes. At a minimum, it would not have the potentially harmful effects of the kind of partisan media-bashing in the *Schiavo* case.

It is of course true that mainstream media today are subject to commercial and other pressures that can easily compromise their professional reporting. It is also true, however, that there are more globally-available sources today that can serve to criticize media. Media monitoring by professional press organizations, scholarly journals, and journalistic ombudsmen can enhance press responsibility and care and promote a rededication to journalistic standards as a counterweight to the economic pressures under which modern news organizations operate.<sup>228</sup> We can attempt to promote news cultures in which self-criticism is expected.<sup>229</sup> Useful press criticism can even be undertaken by the rich cadre of competitors in the new Mixed Media Culture, so long as independent monitors identify and disclose their affiliations and partisanship.<sup>230</sup> Think-tanks and organizations dedicated to a free and robust

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several years are attributable to the effectiveness of grassroots mobilization or rather to constitutional interpretations via judicial opinions. *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) (affirming in part and remanding in part the FCC's proposed changes to broadcast ownership rules). This is not persuasive criticism, however, because the expression of overwhelming public sentiment is doubtlessly significant to politicians (even if not to the rank and file of administrative agencies) and because policy mobilization can target courts as well, with attempts to litigate constitutional issues prompted and underwritten by interest groups.

228. The desirability of media monitoring naturally raises the question of who does the monitoring of the press' compliance with professional standards. There are a variety of plausible monitors. The most obvious is the media ethicist or ombudsman hired by news organizations themselves. The practice of hiring ombudsmen (or Public Editors, in the case of the *New York Times*) has a lengthy history. KOVACH & ROSENSTIEL, *ELEMENTS*, *supra* note 33, at 88-91. Another is professional standards organizations – such as the Society for Professional Journalists. Yet another is professional press journals such as the *Columbia Journalism Review* and the *American Journalism Review*. Still another category of monitors is competing media. *See, e.g., CBS Latest to Be Hit by Scandal; Chronology of Hoaxes*, *TORONTO SUN*, Sept. 21, 2004, at 13 (listing incidents of media falsifications); *see also* Paul Janensch, *Commentary, What Publisher of the New York Times Should Do Next*, *HARTFORD COURANT*, June 12, 2003, at D2 (recommending specific changes to restore *Times*' credibility); Mark Jurkowitz, *Times Makes Post-Blair Changes; New Policies Follow Report Examining Newsroom Culture*, *BOSTON GLOBE*, July 31, 2003, at D1 (reporting that the *New York Times* hired ombudsman and training editor to avoid repeat of Blair "fiasco"). Then there are ideologically-based sources of media criticism: columnists, politicians, and bloggers with particular points of view. Even though they have an "ax to grind," they can still reveal journalistic failures. *See, e.g.,* K. Daniel Glover, *The Rise of Blogs*, *NAT'L J.*, Jan. 21, 2006; Jost & Hipolit, *supra* note 1; Chuck Raasch, *Transparency and the Blog Fog*, *ALBANY TIMES UNION*, Mar. 13, 2005, at B8 (explaining that, in 2004, bloggers first challenged the veracity of CBS' report on President Bush's National Guard service).

229. *See* Ghiglione, *supra* note 170, at 423 (on the need for journalists and news organizations to "support an environment in which self-criticism is encouraged"); *see also* DOWNIE & KAISER, *supra* note 47, at 253-54.

230. At the risk of sounding too glib, all the public needs to assess the conclusions of those

press can expand independent funding and support for non-partisan media studies. The variety of possibilities for press monitoring available today is the saving grace of a model based on adherence to professional norms.

Of course, one must be careful to distinguish among media and to remember that despite extensive cross-media pressures, failures of one medium should not be automatically attributed to all other media without refined differentiation. That said, the *Schiavo* coverage provides some general suggestions. There is a need to reemphasize that mainstream media must provide context when they choose to offer a bare balance of extreme viewpoints generated by spokesmen for opposing ideological fronts. Journalists must provide adequate information to enable the audience to assess source credibility.<sup>231</sup> Context also means something more than simply the complete contours of a particular story. It is important for the press to keep a bird's eye view on the culture and to explain the interconnections among stories that are likely to affect cultural meaning.<sup>232</sup> Context is also important for audience interpretation of images. Sometimes, news organizations will even have to make the news judgment that bare "balance" is not appropriate.<sup>233</sup>

The public's trust can be gained not only by reinvigorated attention to the fundamental elements of journalism, but also by transparency about news processes.<sup>234</sup> Public appreciation of journalistic processes

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monitors is relative transparency with regard to the political viewpoints/affiliations of the most ideologically committed critics.

231. At a minimum, this all means verification, finding the press' own sources to opine on the reported debate, chasing down additional facts better to understand the story, and challenging statements made by partisan sources.

232. So, for example, the coverage of the *Schiavo* case benefited in this regard from the attempt by at least some news organizations to frame the case as an example of the culture wars, the rhetorical strategy of the anti-abortion movement in transforming itself into the culture of life movement, and the religious versus secular divide in American society today.

233. It is not appropriate, for example, to seek a Holocaust denier as a source in a Holocaust story in order to achieve bare "balance" without editorial judgment and context. See Robert C.L. Moffat, *Mustering the Moxie to Master the Media Mess: Some Introductory Comments in the Quest for Media Responsibility*, 9 U. FLA. J.L. & PUB. POL'Y 137, 144 (1998) (criticizing "the tendency of contemporary journalism to balance all perspectives, no matter how ridiculous the alternatives offered").

234. Some have argued that the public's cynical view of press bias would be reduced if news organizations and journalists were more transparent about identifying and declaring their biases. See, e.g., Fred Brown, *Putting Biases to Work*, QUILL, May 1, 2001, at 37 (identifying biases would be beneficial). This notion of transparency sounds like a fine idea in principle; however, it poses significant difficulties in practice. One possible version of transparency would cause reporters to indicate their political affiliations in relevant stories. But, presumably, that is so that readers can discount the likely political bias in those stories. Why should we assume that we should discount reported stories if they are critical of Republicans, say, and the authors are Democrats? Conservatives complain that most reporters are self-described as liberal, Cathy Young, Op-Ed, *New Ammo in the War over Media Bias*, BOSTON GLOBE, June 9, 2003, at A15

and standards can result in both increased credibility for the press and a more reasoned public debate on the issues covered in the media.<sup>235</sup> Enhanced credibility for the press in turn can help journalists do – and want to do – their jobs.<sup>236</sup> People who are given a bird’s eye view of the professional norms news organizations attempt to follow are less likely to believe in generalized, undifferentiated claims of media bias. Readers and viewers who have the opportunity to ask questions about and comment on stories, or who are solicited for their views and information, are likely to see themselves “not only as news consumers but also as partners in pursuit of the truth.”<sup>237</sup>

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(conservatives consider media to be liberally biased), but it is unclear what that means precisely. While some reports say that a majority of reporters identify themselves as liberal, they also indicate that those reporters are more likely libertarian than liberal in the most classic sense. Bill Kovach, Tom Rosenstiel & Amy Mitchell, *Journalist Survey: Comment on the Survey Findings*, in THE STATE OF THE NEWS MEDIA 2006, *supra* note 57, available at [http://www.stateofthenewsmedia.com/2006/journalist\\_survey\\_commentary.asp](http://www.stateofthenewsmedia.com/2006/journalist_survey_commentary.asp); see also Wilson Carey McWilliams, *We Report. And We Decide*, COMMONWEAL, May 9, 2003, at 34 (reviewing ALTERMAN, *supra* note 13) (arguing that libertarianism is the “dominant persuasion” of the media). In any event, the effect of party affiliation on how a particular story gets covered is unclear. What does a reporter’s personal political affiliation have to do with how well he or she reports the facts of a story? There is little reason to believe that party affiliation or political outlook will necessarily play a more significant role in the coverage than non-political factors – including professional norms, economic pressures, or reputational goals. Transparency is also problematic in operation for another reason. What does a transparency norm require to be disclosed and when? Even if it clearly makes sense to require identification of a reporter’s party affiliation with respect to a story on a political party, event, or election, what about stories that are in the penumbra of the clearly political? What about stories that have a political back story or a political implication?

235. News organizations and journalists that promote transparency about the process of newsgathering and reporting are more likely to be trusted and forgiven their errors. KOVACH & ROSENSTIEL, ELEMENTS, *supra* note 33, at 80-84; Ghiglione, *supra* note 170, at 423-24.

236. On the existence and effectiveness of media self-criticism, see, for example, Blake D. Morant, *Democracy, Choice, and the Importance of Voice in Contemporary Media*, 53 DEPAUL L. REV. 943, 954 (2004), and see also James Boylan, *A Thousand Voices Bloom*, COLUM. JOURNALISM REV., Mar. 2000, at 34, which argues that media criticism has helped “raise the consciousness” of journalists.

237. KOVACH & ROSENSTIEL, ELEMENTS, *supra* note 33, at 24-25 (describing modern reporters as mediating high-tech interactions with audiences in something like the conversations of original journalism 400 years ago); Ghiglione, *supra* note 170, at 423-24.

Transparency can also help journalists in their interactions with editors, as well as journalists and editors in their relationships with publishers. Professional journalists and editors pride themselves on independence and getting the best story. Reputation and recognition in their field are significant motivators for reporters and editors. To the extent that media consolidation has led to journalists being discouraged from reporting on stories unfavorable to their corporate parents, having insufficient funds or time to develop their stories to the degree their professional norms would suggest, or to the degree that editors or publishers have sought to exercise a chilling effect on journalists’ reporting (whether due to timidity in a corporate climate or fear of libel suits or advertiser unhappiness), publicly revealing those consequences of the current media climate can be beneficial in bringing these matters to public attention. If the public complains vociferously enough, journalists and editors may have powerful leverage against the dictates of the business side of the news operations. Admittedly, there are down-sides to this as well, including the

To be more effective, media self-criticism and process transparency should also be joined by a public educated in what it should expect from different types of reporting and different types of media. As different types of news purveyors – with different formats and standards – become more common, the public may become confused as to its expectations of coverage, balance, objectivity, opinion, and completeness. Reinvigorated distinctions between news stories and opinion pieces, as well as attempts to educate the public in the distinctions, may help reverse such confusion.<sup>238</sup> Even if the public is not confused,<sup>239</sup> it may well be made cynical by the news media's failure to maintain clear boundaries between reporting and editorializing.<sup>240</sup> The public must be informed that even in opinion programming – on the editorial page or the cable news talk show – it can expect participants to adhere to basic journalistic standards of truthfulness and not to misrepresent facts.<sup>241</sup> Clear delineations in programming, as well as clarity in communicating to the public about what they should expect, would likely enhance public confidence in the press.

As for the “new media” debate, we cannot put the Internet genie back in the bottle. The blog has become a fixture in the making both of policy and of news reports. Thus, query whether news-like sources – such as Internet information and gossip sites as well as blogs – should be encouraged to adopt more traditional journalistic norms. At a minimum, this would mean care and honesty in developing and reporting

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strategic use of complaints. Few would benefit from the airing of every disagreement among journalists or among journalists, editors, and publishers/owners. On the other hand, to the extent that greater transparency about news processes will sometimes give conscientious reporters or editors or both the opportunity to make the public's views known to publishers, it may serve as a useful counterweight to the excessively profit-centered direction of the modern consolidated media.

238. See also Ghiglione, *supra* note 170, at 423-24 (calling for more transparency on the part of the press regarding how they made decisions); Blake D. Morant, *The Endemic Reality of Media Ethics and Self-Restraint*, 19 NOTRE DAME J. L. ETHICS & PUB. POL'Y 595, 619 (2005) (arguing for the development of a “culture of responsible journalism” through both continuing education of journalists on codes of ethics and media coverage of ethics codes in order to inform the public about news organizations' compliance). It is possible that the increasing use of ombudsmen and public editors by news organizations would assist in achieving Morant and Ghiglione's suggestions. See Ghiglione, *supra* note 170, at 423. The blogs that mainstream newspapers have begun to sponsor may serve as useful venues for such conversations with readers about ethics code issues.

239. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, PUBLIC MORE CRITICAL OF PRESS, *supra* note 6, at 2 (survey suggesting that audience distinguishes between fact and opinion-based news coverage). On the other hand, the fact that some surveys indicate that only 15% of poll respondents believe that freedom of the press is protected by the Constitution suggests that public education about the press might be useful. See Loewy, *supra* note 225, at 43.

240. This may well be a reason why the public apparently attributed political bias to news organizations.

241. KOVATCH & ROSENSTIEL, *ELEMENTS*, *supra* note 33, at 136.

stories. For some, this would also mean seeking meaningful balance and context in their reporting – just as in the mainstream press. As for such new media engaged in “citizen journalism” – media for whom common understandings of the norms of “objectivity” or “balance” are inconsistent with their approach to journalism – it would be useful for such outlets to develop a culture of disclosure and transparency in order to make their conceptions of journalism evident.<sup>242</sup>

This Article does not argue with the observation of media watchers that the culture of news is changing and that the classic functions of journalism are being challenged by the imperatives of the Mixed Media Culture.<sup>243</sup> Indeed, it suggests that the economic forces constructing the current media environment are not the only factors that contribute to undermining the modern press. It proposes that polarized and factional criticism of the media of the kind seen regarding the *Schiavo* coverage may well be another significant contributing factor. At a minimum, partisan criticism does not help.

It is beyond the scope of this Article to resolve the fundamental question of what should be done about the challenges facing journalistic standards today.<sup>244</sup> It is worth wondering, however, whether public disenchantment with the excesses of tabloid-like television news and information shows – particularly when linked with resources through which the public can learn about and comment on the media’s news-delivery processes – might lead to public pressure even on non-traditional media and cable to adhere more distinctly to journalistic standards – or at least to be more transparent about the situations when they feel the need to compromise such standards.<sup>245</sup> While there are certainly reasons to be

242. There are a variety of theories about what kind of press is necessary to achieve the public interest – whether it should be an independent, confrontational press, a press consisting of citizen journalists, a neutral and objective press, or an engaged and activist press. *See, e.g.,* DOWNIE & KAISER, *supra* note 47, at 98-99 (describing and criticizing rise of civic journalism).

243. KOVATCH & ROSENSTIEL, *WARP SPEED*, *supra* note 54, at 5 (arguing that “the classic function of journalism . . . is being displaced by the continuous news cycle, the growing power of sources over reporters, varying standards of journalism, and a fascination with inexpensive, polarizing argument”). *See generally* KOVATCH & ROSENSTIEL, *ELEMENTS*, *supra* note 33.

244. KOVATCH & ROSENSTIEL, *WARP SPEED*, *supra* note 54, at 89.

245. Some press critics are guardedly optimistic about the possibility of reviving “news values” and increased resources devoted to news because they contend that the public wants good and authoritative news coverage and existing types of news sources are not equivalent. *See, e.g.,* DOWNIE & KAISER, *supra* note 47, at 104-05, 254-65. Some press analysts apparently conclude that the fragmentation of the current media environment is such that the clock cannot be turned back to a nostalgic common ideal of professional journalism. *See, e.g.,* KOVATCH & ROSENSTIEL, *WARP SPEED*, *supra* note 54, at 93-98. They suggest that the incentive for re-dedication to professional norms is precisely that many news organizations will not be able to comply and that marketing oneself as a reliable, accurate resource of important information vetted by professionals will be one of the important tools available to some news organizations in order to differentiate themselves from the alternatives. *Id.* It is beyond the scope of this Article to assess that view.

pessimistic about the future of the press as a whole, an utterly bleak prognosis is not necessary.<sup>246</sup> A close look at the reality – albeit not the perception – of the mainstream media’s coverage of the *Schiavo* case bears this out.

## VI. CONCLUSION

Terri Schiavo’s is not the first story whose media coverage has triggered critical scrutiny. Media critics have made a cottage industry of criticizing the modern press.<sup>247</sup> There is undeniably much to criticize. However, much of the debate about the media coverage of the *Schiavo* story has been based on both conservatives and liberals claiming that the media “got the story wrong.” This kind of criticism is substantively partisan on grounds of ideology – it is about whether the media took the right side in a conflict. Wholesale partisan criticism of press coverage is neither deserved nor helpful in promoting an independent press mindful of its roles as government watchdog and forum for public discussion. A serious commitment to these journalistic roles is most necessary during periods of government secrecy and public fear.

Policy-neutral metrics for judging press performance – such as compliance with journalistic standards – are far preferable to partisan

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Suffice it to say, however, that history suggests the public has an appetite for factual reporting. The appearance of the *New York Times*, with its promise to publish only what was “fit” to print, ultimately moved newspapers away from the model of the Hearst papers’ sensationalistic yellow journalism in the late nineteenth century. See KOVATCH & ROSENSTIEL, *WARP SPEED*, *supra* note 54, at 94. A revived focus on policy-neutral journalistic standards as an aspirational ideal for the news media as a whole might cause the public to expect more even of non-traditional “new” media. See KOVATCH & ROSENSTIEL, *ELEMENTS*, *supra* note 33, at 153-54.

246. Some have argued that an optimistic view of the future of the mainstream press is unrealistic today. Philip Meyer, *Saving Journalism*, *COLUM. JOURNALISM REV.*, Nov. 1, 2004, at 55. After all, the optimistic view is based on an assumption that if we are careful enough, we can find reasonable solutions to the undermining effect of today’s economic pressures on the professionalism of the mainstream press. If we push for self-regulation, shine light on media’s professional failures, and educate the public on what to expect from the press, public cynicism can be reduced. On this view, behaving ethically and professionally is good, especially for the bottom line. *Id.* But is that realistic? After all, if traditional newspapers are a dying business, it may not be rational economic behavior for them to expend resources in an attempt to shore up public confidence. Meyer, *supra* note 65; Jay Rosen, *Laying the Newspaper Gently Down to Die*, *PRESSTHINK*, Mar. 29, 2005, [http://journalism.nyu.edu/pubzone/weblogs/pressthink/2005/03/29/nwsp\\_dwn\\_p.html](http://journalism.nyu.edu/pubzone/weblogs/pressthink/2005/03/29/nwsp_dwn_p.html). Such a conclusion, however, does not take into account the changing and evolutionary character of information-disseminating media today. What is a moribund business model today may well morph into something more viable tomorrow, with the aid of technology and the fluidity of the media landscape today. In any event, reports of the death of mainstream media have been greatly exaggerated. Finally, it is possible that at least some media see their contributions not only in pure profit-maximizing terms.

247. See e.g., Mary Jones, *Monitoring the Media Industry*, *PRESSTIME*, Sept. 2005, at 48 (noting that media criticism has grown over past decade); see also POYNTERONLINE.COM, <http://www.poynter.org/column.asp?id=45> (last visited Apr. 3, 2007) (containing links to hundreds of media criticism articles, updated five days per week).

media-bashing. At the same time, the realities of the modern media landscape place significant pressure on traditional journalistic standards. Developments most salient to the *Schiavo* coverage – changes in media structure, the twenty-four hour news cycle, the blurring of the distinctions between news and opinion and news and entertainment, the rise of “news as catfight” and a new definition of balance, the increasing role of blogs in the world of news and opinion, the press’ changing notions of privacy, the increasing organization and unlikely alliances of conservative interest groups, and the rise of religious broadcasters – are all factors that are likely to influence the application and evolution of journalistic standards. At a minimum, thoughtful and policy-neutral criticism of media coverage – and media self-criticism – can serve as counterweights to those pressures. Especially if the public is educated as to what it should expect from different kinds of reporting, media coverage of events like the *Schiavo* case can be seen by the public in perspective.<sup>248</sup> It may be that only some news organizations will accept the challenge of being judged by journalistic standards, but studies of the American public show that we thirst for independent and effective journalism.<sup>249</sup>

In the end, a cautiously optimistic but skeptical view of the press,

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248. In its statement of principle, the Project for Excellence in Journalism reminds us of the following:

Increasingly, the [journalism] profession seems overwhelmed by the sheer size of the media, by hidebound habits, by infotainment, by the quest for sensation and gossip, by the imperatives of the stock market or by a pursuit of ever-fragmenting audiences that lead us ever-farther from home.

It is uncertain whether the essential mission of journalism – to be a public service for democracy – always remains clearly in mind. The crisis in journalism is a crisis of conviction.

Yet, the surest way for journalism to survive is by emphasizing what makes it unique – its basic purpose and core standards. Even in a new era, journalism has one responsibility other forms of communication and entertainment do not: to provide citizens with the information they need to navigate the society. That does not preclude being entertaining or profitable – or publishing something merely because it’s interesting. That does not mean journalism should not abandon failed habits in the way we present news.

But it does imply a commitment to comprehensiveness, to offering certain information about democratic institutions, and to ordering information in some relationship to its significance so that people can use it as a map to travel through the culture.

Project for Excellence in Journalism, *About Us*, <http://www.journalism.org/who/pej/about.asp> (last visited June 27, 2006).

249. See, e.g., PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, PUBLIC MORE CRITICAL OF PRESS, *supra* note 6, at 13 (“As Americans continue to acquire news in new ways, there remains continued, even stubborn, support for the values of an independent press, a watchdog press, the press as agenda-setter, and even in the traditional journalism brands. The public is not rejecting the principles underlying traditional journalism. Rather, it suspects journalists are not living up to those principles.”).

joined with both structural and disclosure-enhancing mechanisms to shore up its independence, in tandem with an invigorated public critique based on policy-neutral standards, constitute a better approach to the challenges facing the press than the wholesale, partisan media critique generated by the *Schiavo* case. Without that, we are left with nothing but partisan name-calling and public distrust.