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Truth, Lies, and Spelunking:  
Protecting the Investigative Reporters  
We Send into the Cave

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## INTRODUCTION

*[A] reporter is the person chosen by the tribe to enter the cave and tell them what lies within. . . . But if the reporter does not go deep enough, a dragon might await them, and all could perish.*<sup>1</sup>

In 1887, twenty-three-year-old Nellie Bly (born Elizabeth Cochran) faked insanity<sup>2</sup> to go undercover in a notorious insane asylum on New York's Blackwell's Island. She spent ten horrifying days in the Women's Lunatic Asylum and chronicled cruel treatment of patients (some of whom were not even insane but were simply non-English-speaking immigrants). She described patients living in unsanitary conditions, being forced to eat rancid food, and enduring the threats and often the reality of both physical abuse and sexual violence meted out by staff, many of whom were unqualified to work in a mental hospital.<sup>3</sup> Her six-part series, published in the *New York World*, led to significant legislative reform, the firing of abusive staff, and \$1 million in increased funding to improve conditions on Blackwell's Island.<sup>4</sup> Bly

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<sup>1</sup> Pete Hamill, *Introduction* to BROOKE KROGER, *UNDERCOVER REPORTING: THE TRUTH ABOUT DECEPTION* xi, xi (Nw. Univ. Press 2012). Hamill confessed that this was a hopelessly romantic image (but one that, in my own heart, I secretly embrace).

<sup>2</sup> Bly took a room in a boardinghouse and began wandering the halls and streets acting nervous and agitated. She did not sleep, ranted incoherently, and feigned the face of a crazed woman. The boardinghouse owners called the police; then, a judge sent her to Bellevue Hospital, where she was "diagnosed" insane and sent to Blackwell's Island Women's Lunatic Asylum. Beth Winchester, *What Nellie Bly Exposed at Blackwell's Asylum, and Why It's Still Important*, MEDIUM (Apr. 26, 2016), <https://medium.com/legendary-women/what-nellie-bly-exposed-at-blackwells-asylum-and-why-it-s-still-important-4591203b9dc7> [<https://perma.cc/95PV-E8RC>]; Barbara Maranzani, *Inside Nellie Bly's 10 Days in a Madhouse*, BIOGRAPHY: FAMOUS AUTHORS & WRITERS (Nov. 12, 2020), <https://www.biography.com/authors-writers/inside-nelly-bly-10-days-madhouse> [<https://perma.cc/Z547-9D23>].

<sup>3</sup> Winchester, *supra* note 2; Maranzani, *supra* note 2. Bly may be the most famous investigative reporter, romanticized over the years. Some have suggested she was something of a grandstander, but her accomplishments in this and in other important reports cannot be discounted.

<sup>4</sup> Arlisha R. Norwood & Mariana Brandman, *Nellie Bly*, NAT'L WOMEN'S HIST. MUSEUM (2022), <https://www.womenshistory.org/education-resources/biographies/nellie-bly-0> [<https://perma.cc/UCL5-E6FL>]. In the Introduction to her publication of the article in book form, Bly commented: "[A]s a result of my visit to the asylum and the exposures consequent thereon, that the City of New York has appropriated \$1,000,000 more per annum than ever before for the care of the insane," noting that this gave her satisfaction that her work had done some good. NELLIE BLY, *TEN DAYS IN A MAD-HOUSE 2* (New York, Ian L. Munro 1877), <https://digital.library.upenn.edu/women/bly/madhouse/madhouse.html> [<https://perma.cc/JJ4K-FH4C>]. That \$1 million would be \$31 million in today's dollars. Over the course of her career, Bly also posed as a maid to expose unscrupulous employment agencies, an unwed mother to uncover infant trafficking, and a fallen woman to reveal misconduct in a home for "unfortunate women." David A. Logan, "Stunt Journalism,"

was hailed by a rival newspaper editor at the time of her death as “the best reporter in America.”<sup>5</sup> But she lied—defrauded the police, the court,<sup>6</sup> and the doctors, right?

Most of us have heard of Bly; she is among the most famous, but certainly not the only, investigative reporters whose work has wrought important changes. For example, well before Bly’s dramatic exploits, a number of reporters from Northern newspapers managed to infiltrate the trade in enslaved people in the South prior to the Civil War. They provided firsthand accounts of the atrocities perpetrated on enslaved people. Reporters such as James Redpath, Mortimer Thompson, Henry S. Olcott, and Albert Deane Richardson hid their identities, often posing as slave buyers, and devised “elaborate strategies and tactics . . . to keep themselves safe when reporting from the South.”<sup>7</sup> Their reports informed and helped galvanize the abolition movement. But again, these reporters at best hid their identities and at worst falsified them—lying and using deceit to trespass and gain unauthorized access to what was then a legal (though abominable) business, right?

Gloria Steinem used her grandmother’s name and social security number to get a job as a “bunny”—the name of cocktail waitresses at Hugh Hefner’s glamorous Playboy Club.<sup>8</sup> She published an exposé in SHOW magazine reporting the not-so-glamorous truth about serving drinks at the men’s club in a satin bathing-suit-like costume so tight that it was hard to breathe, wearing high heels that made her feet blister and swell, as she waited on hundreds and maintained a sweet and courteous demeanor in the face of sexist comments and harassment, while graciously rebuffing requests for dates without offending the often drunk customers—all this against the reality of pay that was less than advertised due to a system of demerits for minor offenses (such as *not* being sweet and courteous to drunk, harassing customers who

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*Professional Norms, and Public Mistrust of the Media*, 9 U. FLA. J.L. & PUB. POL’Y 151, 152–53 (1998).

<sup>5</sup> Logan, *supra* note 4, at 153.

<sup>6</sup> Apparently, Bly negotiated immunity from the District Attorney before embarking on this ruse. *Id.* at 152.

<sup>7</sup> BROOKE KROEGER, UNDERCOVER REPORTING: THE TRUTH ABOUT DECEPTION 15 (Nw. Univ. Press 2012).

<sup>8</sup> Jack Shafer, *The Lying Game: Is It Ever Okay to Tell a Whopper in the Name of Journalism?*, COLUM. JOURNALISM REV. (Sept./Oct. 2012), [https://archives.cjr.org/review/the\\_lying\\_game.php?page=all](https://archives.cjr.org/review/the_lying_game.php?page=all) [<https://perma.cc/3D5E-ART6>].

asked for dates).<sup>9</sup> She debunked the idea that Hefner’s twisted version of sexual liberation furthered feminism and exposed not only the harsh reality these women endured but also the misogynist culture of the Playboy Club. She also committed identity theft, fraud, misrepresentation, and trespass.

Even more serious, some undercover journalists have engaged in the very criminal activity they are investigating—not unlike undercover police officers but without the benefit of legal authority. In 1885, British journalist W.T. Stead purchased a child from a mother who believed the girl was headed for a brothel.<sup>10</sup> In 2005, Peter Van Sant purchased a girl under similar circumstances.<sup>11</sup> In both cases the girls were delivered to safe houses, and in both cases the reports—especially Stead’s—generated public outcry as well as major legal and social reforms. But in both cases the reporters committed the crime of purchasing a child.<sup>12</sup>

Society often reveres the courage, cunning, and commitment of these undercover journalists (especially the early ones who benefit from the patina of history), reveling in the reporters’ breathtaking panache and the stunning results they achieve in service of justice and the public interest.<sup>13</sup> As often, however, society—including journalists

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<sup>9</sup> Gloria Steinem Publishes Part One of “A Bunny’s Tale” in *SHOW Magazine*, HISTORY, <https://www.history.com/this-day-in-history/gloria-steinem-publishes-a-bunnys-tale-show-magazine> [<https://perma.cc/AXQ5-Q5VA>] (Apr. 28, 2021). Steinem published a book chronicling her experience: GLORIA STEINEM, *OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS* (1983).

<sup>10</sup> KROEGER, *supra* note 7, at 45.

<sup>11</sup> *Id.* at 47. Sex trafficking has been a recurring theme for undercover reporting. *Id.*

<sup>12</sup> As exemplified by Stead’s investigation of human trafficking, undercover reporting is not limited to U.S. reporters. *Id.* at 45–47 (describing foreign investigative reporting). For example, Anas Aremeyaw Anas disguised himself as a priest in a Thai prison, as a janitor in a brothel, as a mental patient in a hospital, and as a police officer on a crooked force; he used hidden cameras and recorders to expose abuses, to uncover corruption, and to force institutional reform. He has kept his real identity secret by wearing his signature hat with a beaded curtain that covers his face. He undertakes “high-profile, high-impact investigations” and has “become a household name in Ghana, shorthand for standing up to corruption and exploitation.” Susana Ferreira, *The Watchman: The Documentaries of Ghana’s Anas Aremeyaw Anas*, COLUM. JOURNALISM REV. (Summer 2019), [https://www.cjr.org/special\\_report/anas-aremeyaw-anas.php](https://www.cjr.org/special_report/anas-aremeyaw-anas.php) [<https://perma.cc/RE2M-3VKH>]. Because this Article focuses on U.S. law, most examples are of U.S. undercover reporting.

<sup>13</sup> See KROEGER, *supra* note 7, at 27, 34–37; Kathy English, Opinion, *The Public Interest and the Ethics of Undercover Reporting*, TORONTO STAR (Sept. 15, 2017), [https://www.thestar.com/opinion/public\\_editor/2017/09/15/the-public-interest-and-the-ethics-of-undercover-reporting-public-editor.html](https://www.thestar.com/opinion/public_editor/2017/09/15/the-public-interest-and-the-ethics-of-undercover-reporting-public-editor.html) [<https://perma.cc/FUQ9-ZNBS>]; Katy Waldman, *The Lost Legacy of the Girl Stunt Reporter*, NEW YORKER (Apr. 29, 2021), <https://www.newyorker.com/books/under-review/the-lost-legacy-of-the-girl-stunt-reporter> [<https://perma.cc/HB2X-YM4S>] (reviewing KIM TODD, *SENSATIONAL: THE HIDDEN HISTORY OF*

and nonjournalists alike—scorns undercover reporters, decrying their underhanded, dishonorable, deceitful, and sometimes illegal tactics as well as their dramatic grandstanding, dismissing it as unnecessary “stunt journalism.”<sup>14</sup> Indeed, in one of the most high-profile undercover investigative reports of the modern era, the *Chicago Sun-Times* bought a run-down bar that reporters ran for four months, enabling them to document graft and corruption by city officials.<sup>15</sup> The series was a sensation. It was even nominated for a Pulitzer Prize but was rejected by the Pulitzer Board because of the deceit used in setting up the elaborate sting to get the story.<sup>16</sup>

Who has the better case: those who condemn deceit and underhanded tactics as a betrayal of the most essential principles of journalism, or those who defend—even admire—engaging in such tactics as a necessary evil? How can journalism reconcile its universally accepted core value of truth<sup>17</sup> with reporting built on

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AMERICA’S “GIRL STUNT REPORTERS”); Phillip Knightley, *A Cheap Way to Deliver Quick Results as Newspapers Slug It Out in Hard Times*, INDEPENDENT (May 24, 2010), <https://www.independent.co.uk/news/media/press/phillip-knightley-a-cheap-way-to-deliver-quick-results-as-newspapers-slug-it-out-in-hard-times-1981112.html> [https://perma.cc/3636-SVK5] (arguing that going undercover is glamorous); John W. Wade, *The Tort Liability of Investigative Reporters*, 37 VAND. L. REV. 301, 302 (1984) (asserting that investigative reporters have “reached an apex of fame and admiration” and “serve a valuable purpose in our society”).

<sup>14</sup> Logan, *supra* note 4, at 151–54 (arguing that lying to get a story is always controversial and undercover journalists are not universally praised); BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT* 128–32 (4th ed. 2021); Mark Lisher, *Lying to Get the Truth*, AM. JOURNALISM REV. (Oct./Nov. 2007), <https://ajrarchive.org/Article.asp?id=4403> [https://perma.cc/QX9C-UKQF] (referring to “gotcha journalism,” and noting that journalists such as Ben Bradlee criticize deception by journalists); Greg Marx, *The Ethics of Undercover Journalism*, COLUM. JOURNALISM REV. (Feb. 4, 2010), [https://archives.cjr.org/campaign\\_desk/the\\_ethics\\_of\\_undercover\\_journalism.php](https://archives.cjr.org/campaign_desk/the_ethics_of_undercover_journalism.php) [https://perma.cc/H2AG-K5M9] (explaining that journalism ethicists are squeamish about and urge caution when using deceptive tactics).

<sup>15</sup> Jackie Spinner, *A Toast to Undercover Journalism’s Greatest Coup, When Reporters Bought a Bar*, COLUM. JOURNALISM REV. (Jan. 26, 2018), [https://www.cjr.org/united\\_states\\_project/chicago-sun-times-mirage.php](https://www.cjr.org/united_states_project/chicago-sun-times-mirage.php) [https://perma.cc/4LKH-F7K4].

<sup>16</sup> Lisher, *supra* note 14. Influential editors Ben Bradlee of the *Washington Post* and Eugene Patterson of the *St. Petersburg Times* led the effort to deny the *Sun-Times* the Pulitzer.

<sup>17</sup> KOVACH & ROSENSTIEL, *supra* note 14, at 44 (“Journalism’s first obligation is to the truth. On this there is absolute unanimity.”).

deception?<sup>18</sup> Should the law give a pass to journalists who lie, trespass, and commit torts or even crimes in pursuit of the facts?

Brooke Kroeger makes the case that undercover reporting provides an essential tool—to be clear, a tool of last resort<sup>19</sup>—in the “high-value, high-impact journalism of changing systems and righting wrongs.”<sup>20</sup> Journalism endeavors to hold those in power’s feet to the fire and to inform citizens so they may govern themselves and intelligently make both everyday and momentous decisions.<sup>21</sup> Kroeger adds that undercover journalism done right in fact colors within the lines of journalistic integrity, checking off eight of Kovach and Rosenstiel’s ten aspirational principles of journalism.<sup>22</sup>

In this Article, I argue that Kroeger has it right—we need good journalism generally and good investigative journalism specifically—now more than ever. Undercover journalism provides a crucial tool for good investigative journalism, a tool journalists must be able to use, but only when traditional tools of journalism fail, and only under strict guidelines. For this, the law must protect undercover journalists from certain legal consequences. I propose a common law or statutory privilege that would shield journalists from liability for minor wrongdoings such as invasion of privacy, fraud, breach of fiduciary duty or the duty of loyalty, and trespass to land when the journalists’ actions do no other harm. The privilege I propose would be carefully circumscribed, tracking the guidelines many journalists already abide by when engaging in undercover reporting. Finally, I propose that the

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<sup>18</sup> Legendary *Washington Post* editor Ben Bradlee observed: “In a day when we are spending thousands of man-hours uncovering deception, we simply cannot afford to deceive.” Knightley, *supra* note 13. Bradlee refused to allow his reporters to engage in deception to uncover a story: “We instruct our reporters not to misrepresent themselves, period.” Evan Garcia, *The Mirage Tavern: Remembering the Undercover Series 40 Years Later*, WTTW NEWS (Jan. 29, 2018, 6:58 PM), <https://news.wttw.com/2018/01/29/mirage-tavern-remembering-undercover-series-40-years-later> [<https://perma.cc/B93J-WMT2>]. A Washington, D.C., public relations firm that was the subject of an undercover sting that revealed unsavory behavior such as unsettling dealmaking and political compromising commented: “Silverstein’s charade is a comment on his ethics, not ours.” Lisher, *supra* note 14.

<sup>19</sup> KROEGER, *supra* note 7, at 8; *see also* English, *supra* note 13.

<sup>20</sup> *Id.* at 8.

<sup>21</sup> *See, e.g.*, KOVACH & ROSENSTIEL, *supra* note 14, at xxvii; Roy Shapira, *Law as Source: How the Legal System Facilitates Investigative Journalism*, 37 YALE L. & POL’Y REV. 153, 160, 163 (2018).

<sup>22</sup> KROEGER, *supra* note 7, at 9 (citing KOVACH & ROSENSTIEL, *supra* note 14). Kovach and Rosenstiel themselves were hardly fans and argued that misrepresentation or deceit should be used rarely and under strict constraints. KOVACH & ROSENSTIEL, *supra* note 14, at 13.

privilege shield journalism as an activity rather than journalists as individuals and offer a method informed by the highest standards of journalism and the journalistic method that identifies when an undercover activity qualifies as journalism.

This Article begins with a brief discussion of journalism and its purposes. It then describes undercover reporting, positioned as a subset of investigative reporting, through a series of examples where reporters use deceit or engage in tortious conduct such as trespassing to gain access to information. The examples run along a continuum from modest to the most extreme techniques. The Article then focuses on the legal actions, usually civil tort claims, brought against journalists—delving in some detail into ag-gag statutes drafted specifically to penalize undercover reporting on the agricultural industry. It explores how courts navigate constitutional questions, nuanced causation issues, and overarching public policy considerations. From this it becomes clear that, while it doesn't happen often, undercover journalists have been sued and have even faced threats of criminal charges for their actions in pursuing critical information of significant public interest. The very threat of legal actions can have a chilling effect on the willingness of the press to risk undercover investigations that rely on deceit or other similar tactics, especially given the increasingly fragile economic circumstances of most media outlets. Against this background, I argue that we need good investigative reporting that in some instances will involve deceit, trespass, and other minor wrongdoing. Finally, I propose a limited common law or statutory privilege that would protect journalists from tort liability and criminal charges for minor unlawful conduct while pursuing important stories of significant public interest.

## I

### JOURNALISM'S PURPOSE

*We proceed best as a society  
if we have a common base of information.*<sup>23</sup>

“People crave news . . . . They need to be aware of events beyond their direct experience. Knowledge of the unknown gives people security; it allows them to plan and negotiate their lives.”<sup>24</sup> Further,

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<sup>23</sup> KOVACH & ROSENSTIEL, *supra* note 14, at 7 (quoting Unpublished Interview by Howard Gardner, Mihaly Csikszentmihalyi & William Damon with Tom Brokaw).

<sup>24</sup> KOVACH & ROSENSTIEL, *supra* note 14, at 13.

democracy relies on an informed citizenry. Perhaps the most often cited “purpose of journalism is to provide citizens with the information they need to be free and self-governing.”<sup>25</sup> One might add people also need information to live their lives safely—informed of danger and potential harm and able to protect themselves. As Roy Shapira explained, society has built-in systems, including legal rules, social norms, and reputational effects designed to control misconduct, abuse of power, and behavior that might create danger or other threats.<sup>26</sup> But these systems, Shapira explains, can work only when information is available: “To hold the powerful to account, information on how the powerful behaved has to be available, accessible, credible, widely diffused, and properly attributed. In today’s world, such diffusion of information happens mainly through mass media.”<sup>27</sup>

In most instances, reporters can and do use traditional methods to gather the information they need to do the job of informing the public. Attending public meetings, conducting straightforward and hard-hitting interviews, making firsthand observations of events and circumstances, undertaking careful investigation, following leads, gathering material through Freedom of Information and Right to Know requests, piecing together disparate information to draw a full, detailed picture—this is how reporters do their jobs.<sup>28</sup> Most of the material needed is available and accessible with hard work and the traditional tools a good reporter has at hand.

In one fine example, *Philadelphia Inquirer* reporters Daniel Biddle, Frederic N. Tulsky, and H.G. (Buzz) Bissinger won the 1987 Pulitzer Prize for Investigative Journalism for a multipart exposé of incompetence, politicking, pay-for-play, backroom deals, and other transgressions and injustices in the Philadelphia court system.<sup>29</sup> The

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<sup>25</sup> *Id.* at 7; see also Luke Morgan, *The Broken Branch: Capitalism, the Constitution, and the Press*, 125 PENN ST. L. REV. 1, 66 (2020).

<sup>26</sup> Shapira, *supra* note 21, at 160.

<sup>27</sup> *Id.*

<sup>28</sup> See generally TIM HOLMES ET AL., *THE 21ST CENTURY JOURNALISM HANDBOOK: ESSENTIAL SKILLS FOR THE MODERN JOURNALIST* (2013) (covering fundamental principles and practices for journalists); JERRY SCHWARTZ, *ASSOCIATED PRESS REPORTING HANDBOOK* (1st ed. 2001) (using examples to describe how reporters obtain information and write stories); Shapira, *supra* note 21, 174–75 (describing the symbiotic relationship in which journalists obtain information from legal proceedings and so perform the necessary oversight duty); JAMES PHILLIP MACCARTHY, *THE NEWSPAPER WORKER: A MANUAL FOR ALL WHO WRITE* (1925) (providing a handbook for reporters in the early twentieth century).

<sup>29</sup> *The 1987 Pulitzer Prize Winner in Investigative Reporting*, THE PULITZER PRIZES, <https://www.pulitzer.org/winners/daniel-r-biddle-h-g-bissinger-and-fredric-n-tulsky> [<https://perma.cc/R4P7-GZ9M>] (last visited July 23, 2023); *Excerpts from Pulitzer-Winning*



series led to federal and state investigations as well as efforts to reform the court.<sup>30</sup> Over the course of two years, the reporters “interviewed more than 200 lawyers and judges . . . pored over thousands of pages of court records, studied verdicts in tens of thousands of criminal and civil cases . . . conducted computerized analyses of close to 5,000 judicial-campaign contributions and examined internal memos from several court agencies.”<sup>31</sup> They pierced the impenetrable curtain that shielded the judiciary and did so without deceit or subterfuge. Rather, they used traditional journalistic tools, including dogged dedication, brains, attention to detail, and the support of what was then (and is again now) one of the best respected metropolitan newspapers in the business.<sup>32</sup>

But this won’t always work. For one thing, a project such as the *Inquirer’s* investigation of the court system costs a lot—both in terms of reporters’ time and the expenses involved during the lag between launching the investigation and having a publishable story to show. All this is compounded by the risk that the story might not end up coming together. While there are still good, long-term investigations of this sort happening,<sup>33</sup> the financial and market pressures on news outlets make undertaking such projects prohibitive.<sup>34</sup>

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*Works of Niemanns, 1951-2016*, NIEMAN REPS., <https://niemanreports.org/speaking-truth-to-power/> [<https://perma.cc/W3VQ-LZWX>] (last visited July 23, 2023).

<sup>30</sup> THE PULITZER PRIZES, *supra* note 29.

<sup>31</sup> H.G. Bissinger & Daniel Biddle, *Disorder in the Court: Politics and Private Dealings Beset the City’s Justice System*, PHILA. INQUIRER: ARCHIVES (Mar. 12, 2009), [https://www.inquirer.com/philly/online\\_extras/Disorder\\_in\\_the\\_court.html#loaded](https://www.inquirer.com/philly/online_extras/Disorder_in_the_court.html#loaded) [<https://perma.cc/AD4Q-3QGT>].

<sup>32</sup> *Id.*; see also *Winners of the Pulitzer Prizes in Journalism, Letters and the Arts*, N.Y. TIMES (Apr. 17, 1987), <https://www.nytimes.com/1987/04/17/nyregion/winners-of-pulitzer-prizes-in-journalism-letters-and-the-arts.html> [<https://perma.cc/F6MK-W5FR>].

<sup>33</sup> Vernal Coleman et al., *Blind Spot*, BOS. GLOBE, <https://apps.bostonglobe.com/2020/08/metro/investigations/blindspot/part-1/> [<https://perma.cc/8N5M-FBW4>] (last visited Aug. 8, 2023) (multipart series reporting result of long-term investigation into government documents and accident reports that uncovered nationwide systemic failures of state government to keep unsafe drivers, including big rig drivers, off the road. The reporters won the 2021 Pulitzer); see also, e.g., *Announcing the 2022 Goldsmith Prize for Investigative Reporting Finalists*, GOLDSMITH AWARDS (Mar. 9, 2022), <https://goldsmithawards.org/2022-goldsmith-prize-finalists/> [<https://perma.cc/D9FS-WATQ>].

<sup>34</sup> Morgan, *supra* note 25, at 13. Morgan makes a strong case that the market model does not work for journalism. He argues that journalism, like national defense, streetlights, and clean air, is a “‘public good’ in the traditional economic sense,” and that “the same thing is true of journalism as is true of all other public goods: one cannot rely on the market to produce the optimal amount of the good.” See also, Shapira, *supra* note 21, at 164 (noting that costs of investigative journalism are borne by the publisher, while benefits inure to society at large); RonNell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. U. L. REV. 567, 576–77 (2017) (“[T]he financial reality of the

Further, often the very people or entities being investigated control the necessary information. Wrongdoers, especially those in power, hide the facts of their misconduct. Of course they do. Nobody expects a corrupt city inspector to answer a reporter's question, "Oh, yeah, I accept bribes to ignore safety violations."<sup>35</sup> Nobody expects a sex trafficker to answer, "Well, you got me; yup, I lied to these young people, got them addicted to drugs and now force them to have sex with all comers and I keep all the money."<sup>36</sup> And nobody expects a supermarket packing meat in unsanitary conditions to do so out in the open where all can see.<sup>37</sup> When that misconduct poses risks to individuals, to the public at large, or to institutions, including our democracy, it must be exposed. And if the information is hidden or falsified, it must be discovered. That lies at the very heart of what we expect from journalism.<sup>38</sup> So, to provide the public with the information it needs to live safely and govern intelligently, reporters will have to resort to undercover reporting that may involve deceit, misrepresentation, trespass, and other actions that cross legal lines—conduct that might expose them to civil and even criminal liability. Should reporters be protected from the impact of laws that would otherwise apply? We begin by examining the range of undercover, investigative reporting and the legal risks involved.

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internet age is that fewer people are willing to pay for news product. . . . [A]dvertising dollars . . . now funnel into digital advertising, where the beneficiaries are technology companies that do not produce news content.”).

<sup>35</sup> See Spinner, *supra* note 15. Reporters for the *Chicago Sun-Times* uncovered corruption among city officials, including inspectors, by going undercover as owners and operators of a bar where they ran a sting operation. The deception was widely criticized, but the sting uncovered widespread and dangerous corruption.

<sup>36</sup> See KROEGER, *supra* note 7, at 53–54.

<sup>37</sup> *The Landmark Food Lion Case*, REPS. COMM. FOR FREEDOM PRESS, <https://www.rcfp.org/journals/news-media-and-law-spring-2012/landmark-food-lion-case/> [https://perma.cc/46DS-E7ZB] (last visited July 23, 2023) (journalists lied on applications to obtain jobs in supermarket meat handling operation and exposed serious health and safety concerns).

<sup>38</sup> KROEGER, *supra* note 7, at xv (“[A]t its best, undercover journalism achieves most of the things great journalism means to achieve.”); Marx, *supra* note 14 (explaining that, used cautiously, undercover reporting is a powerful tool).

## II UNDERCOVER REPORTING

*It is no accident that the word photograph so often characterizes reporting done undercover for its capture of the skillful minuet these reporters performed as clandestine observers locked in step with the unknowingly observed.*<sup>39</sup>

What do we mean by undercover journalism?<sup>40</sup> A broad range of practices fall under the heading, from the sort of careful, diligent, roll-up-your-sleeves investigation undertaken by *Philadelphia Inquirer* reporters that exposed scandals in the court system,<sup>41</sup> to the courageous reporting of those who went undercover to expose the horrors of the trade in enslaved people<sup>42</sup> or sex trafficking,<sup>43</sup> to “gotcha” TV like Chris Hanson’s *To Catch a Predator* series.<sup>44</sup> Investigative journalism runs along a continuum.

Reporting done by *Washington Post* journalists that exposed neglect and deteriorating conditions at Walter Reed Army Medical Center represents one end of the continuum. In a powerful series, the *Post*’s Dana Priest and Anne Hull described conditions at the nation’s premiere veterans’ hospital as follows: “Signs of neglect [were] everywhere: mouse droppings, belly-up cockroaches, stained carpets, cheap mattresses.”<sup>45</sup> Injured veterans were caught up in a “messy bureaucratic battlefield”<sup>46</sup>—this at a hospital famed for treating presidents and honored as the crown jewel of military medicine, and at a time when support for the returning Iraq war veterans who were dumped into these conditions was virtually universal. The reporting “reverberated through the White House” and shook things up at the Pentagon, in the Veterans Administration, across the country, and in

<sup>39</sup> KROEGER, *supra* note 7, at 61.

<sup>40</sup> The term “accountability journalism” covers essentially the same ground as most of what I am calling investigative or undercover journalism. *See, e.g.*, Shapira, *supra* note 21, at 160–165.

<sup>41</sup> *See supra* notes 29–32 and accompanying text.

<sup>42</sup> *See* KROEGER, *supra* note 7 and accompanying text.

<sup>43</sup> *See supra* notes 10–11 and accompanying text.

<sup>44</sup> *See* KROEGER, *supra* note 7, at 54–55.

<sup>45</sup> Dana Priest & Anne Hull, *Soldiers Face Neglect, Frustration at Army’s Top Medical Facility*, WASH. POST (Feb. 18, 2007), <https://www.washingtonpost.com/archive/politics/2007/02/18/soldiers-face-neglect-frustration-at-armys-top-medical-facility/c0c4b3e4-fb22-4df6-9ac9-c602d41c5bda/> [<https://perma.cc/RF8T-7Y98>].

<sup>46</sup> *Id.*

the hospital itself.<sup>47</sup> The response of those in charge “left no doubt that the *Post*’s work had an impact. ‘Those responsible for having allowed this unacceptable situation to develop will indeed be held responsible,’” the Secretary of Defense said shortly after the article was published.<sup>48</sup> The reporters and photographer Michel duCille won the 2008 Pulitzer Prize.<sup>49</sup>

The *Post* reporters spent months with virtually unfettered access to the hospital. They did not go through formal channels, but they never misrepresented who they were. They gave their actual names, although they did not add their affiliation (that is, they did not volunteer that they were *Washington Post* reporters). And, as they explained, they interviewed the soldiers themselves and walked through the facilities, eliminating “the middle filter, because we wanted to hear” their stories and “wanted to witness these problems first-hand.”<sup>50</sup> As noted in the quote that opened this Part: “It is no accident that the word *photograph* so often characterizes reporting done undercover . . . .”<sup>51</sup> Indeed, Priest and Hull drew in words powerful, astonishing pictures—and did so because those whom they were observing did not know they were being observed. After spending four months gathering shocking details, Priest and Hull did disclose their full identities to Walter Reed officials six days before the story was scheduled to run, offering the opportunity to respond.<sup>52</sup> The *Post* and the reporters did not call this “undercover reporting,”<sup>53</sup> sticking to the *Post*’s long-standing rule against using any sort of deception to get a story.<sup>54</sup> While the *Post* refused to call Priest and Hull’s enterprise undercover reporting, a fair characterization of what they did places it on the continuum of undercover reporting,

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<sup>47</sup> Mark Jurkowitz, *The Post’s Scoop Makes Major News*, PEW RSCH. CTR. (Feb. 26, 2007), <https://www.pewresearch.org/journalism/2007/02/26/pej-news-coverage-index-feb-18-23-2007/> [<https://perma.cc/3YV6-292X>].

<sup>48</sup> *Id.*

<sup>49</sup> *The 2008 Pulitzer Prize Winner in Public Service*, THE PULITZER PRIZES, <https://www.pulitzer.org/winners/washington-post-2> [<https://perma.cc/U38Y-35HW>] (last visited July 23, 2023).

<sup>50</sup> KROEGER, *supra* note 7, at 299.

<sup>51</sup> *Id.* at 61.

<sup>52</sup> *Id.* at 5. Disclosing the investigation before publishing is generally considered a critical aspect of responsible investigative reporting. *See* Marx, *supra* note 14.

<sup>53</sup> *See* KROEGER, *supra* note 7, at 5 (*Post* ombudsman framed the investigation as “never undercover”).

<sup>54</sup> *Id.* (*Post* guidelines expressly prohibit deceit or impersonation in investigations); Garcia, *supra* note 18 (quoting legendary *Washington Post* editor Ben Bradlee who argued against giving the Pulitzer to the *Mirage* series: “We instruct our reporters not to misrepresent themselves, period.”).

although at the far end of minimal deception—deception only by omission. They did not lie, but they did not fully disclose their identities or their affiliations and purposes in order to get the information they needed.<sup>55</sup> As the reporters explained, “Working beneath the radar was crucial . . . . We needed to roam around . . . and talk to soldiers and Marines without the interference of Army public affairs. We needed to connect with wounded soldiers that were not pre-selected by the Army.”<sup>56</sup>

“Lying to get a story has always been a subject of controversy,”<sup>57</sup> and most journalism codes of ethics place honesty as a central obligation.<sup>58</sup> Priest and Hull were prepared to answer honestly and identify themselves as *Post* reporters in response to a direct question but were relieved they did not have to.<sup>59</sup> Does this matter? Probably, at least in some respects. But their clandestine investigation clearly was an undercover operation as we generally understand it—and there should be no shame in that characterization, especially given the integrity of their approach.<sup>60</sup>

Other journalists have lied to gain access and get a story. In one ironic example, Stuart Goldman, a reporter for *SPY Magazine*, went undercover at several tabloids to expose the unsavory tactics tabloid reporters used to gain access to celebrities’ most private affairs.<sup>61</sup> Goldman used a fake name to get jobs as a reporter with several tabloids, where he engaged in the very seedy practices (including theft and blackmail) he sought to uncover as he played the part to get the

<sup>55</sup> KROEGER, *supra* note 7, at 5–8; Margret Elaine Regus, Deception in News Gathering by Investigative Reporters 23–24 (May 14, 1982) (M.A. thesis, California State University, Fullerton) (ProQuest), <https://undercover.hosting.nyu.edu/files/original/600e3eacade84c95d58128e14c44ba80c040d9f1.pdf> [<https://perma.cc/5EBH-BMZU>] (“Deception can be broken into two general categories: deception by omission and deception by fabrication.”).

<sup>56</sup> Al Tompkins, *Anatomy of a Pulitzer: Q&A with Hull and Priest*, POYNTER (Apr. 8, 2008), <https://www.poynter.org/reporting-editing/2008/anatomy-of-a-pulitzer-qa-with-hull-and-priest/> [<https://perma.cc/9EPV-ARMY>].

<sup>57</sup> Logan, *supra* note 4, at 151.

<sup>58</sup> *SPJ Code of Ethics*, SOC’Y OF PRO. JOURNALISTS, <https://www.spj.org/ethicscode.asp> [<https://perma.cc/8V5Y-YTSH>] (Sept. 6, 2014, 4:49 PM) (“Journalists should be honest and courageous in gathering, reporting and interpreting information.”).

<sup>59</sup> See KROEGER, *supra* note 7, at 5–6.

<sup>60</sup> Kroeger argues that undercover reporting has gotten an undeserved bad name, citing the *Post*’s reluctance to call what was clearly an undercover operation by that name. *Id.* at 8. She advocates for the “restoration of honor and legitimacy to” undercover reporting. *Id.*

<sup>61</sup> Stuart Goldman, *SPY vs. Spies*, *SPY MAG.*, Dec. 1995, at 8, 32, <https://books.google.com/books?id=NxR5FFDMZZwC&lpg=PA8&dq=Spy%20vs%20Spy&pg=PP1#v=onepage&q&f=true> [<https://perma.cc/H3H2-VN6C>] (last visited July 23, 2023).

story.<sup>62</sup> This wasn't the first time Goldman had lied to get inside and get a story. In the *SPY Magazine* article, he explained that he had often used "bogus identit[ies] . . . to uncover an assortment of scammers, gurus, and con artists."<sup>63</sup>

In 2007, *Forbes* editor Ken Silverstein took the fake name Ken Chase, printed phony business cards, and created a sham website to present himself as a representative of Turkmenistan who was employed to improve public opinion about the dictatorial country.<sup>64</sup> While he uncovered no illegality, his report presented a riveting account of how far some lobbyists would go to polish the image of an unsavory client.<sup>65</sup>

Surreptitious recordings and videography take undercover deceit a step further. And while this might seem like a more modern development evolving from new technology and the evolution of broadcast outlets (which rely more on providing sensory content—visual and auditory), one of the earliest uses of a hidden camera traces to 1928 when a *New York Daily News* reporter snuck a camera taped to his ankle into a prison and used it to record an execution.<sup>66</sup>

The *Chicago Sun-Times* piece referred to above garnered both praise and criticism. Reporters purchased an abandoned bar, named it "The Mirage," and ran it as a sting operation using hidden cameras to record corruption among city officials.<sup>67</sup> The reporters did expose an "underworld of bribery, skimming, and tax evasion" that put the city's residents in danger and "led to indictments for a third of the city's electrical inspectors, and [resulted in] major reforms in city and state codes."<sup>68</sup> Spectacular results, but critics alleged the newspaper had

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<sup>62</sup> *Id.*; see also Josie Fenske, Opinion, *Undercover Journalist Stuart Goldman Lies Down with the Tabloids and Gets Up Exposed*, CLICK (Dec. 6, 2021), <https://theclick.news/opinion-undercover-journalist-stuart-goldman-lies-down-with-the-tabloids-and-gets-up-exposed/> [<https://perma.cc/25LK-U2CN>].

<sup>63</sup> Goldman, *supra* note 61, at 32.

<sup>64</sup> KROEGER, *supra* note 7, at 282–89; Marx, *supra* note 14. One media critic described Silverstein's actions as creating a "web of deceit" to get the story. Howard Kurtz, *Stung by Harper's in a Web of Deceit*, WASH. POST (June 25, 2007), <https://www.washingtonpost.com/wp-dyn/content/article/2007/06/24/AR2007062401677.html?hpid=sec-artsliving> [<https://perma.cc/B69A-GRTU>].

<sup>65</sup> Neal Conan, *Lobbyists Offer Dictators a Door to D.C.*, NPR (June 19, 2007, 10:00 AM), <https://www.npr.org/transcripts/11188218> [<https://perma.cc/7QCW-M8NH>].

<sup>66</sup> Robert Lissit, *Gotcha!*, AM. JOURNALISM REV. (Mar. 1, 1995), <https://www.thefreelibrary.com/Gotcha!-a016764911> [<https://perma.cc/5PNH-6M57>].

<sup>67</sup> Spinner, *supra* note 15; KROEGER, *supra* note 7, at 263–64.

<sup>68</sup> Spinner, *supra* note 15; see also Ken Silverstein, *Undercover, Under Fire*, L.A. TIMES (June 30, 2007, 12:00 AM), <https://www.latimes.com/la-oe-silverstein30jun30-story.html> [<https://perma.cc/XJY6-6AU6>] (noting criticism of sting-undercover reporting).

gone too far with its deception, including using hidden cameras. Indeed, the undercover operation itself generated almost as much coverage as the corruption it exposed.<sup>69</sup>

*Life Magazine* used deception and hidden recording devices to expose medical fraud in one famous case. *Life* reporters collaborated with local law enforcement to uncover what it described as “quackery.”<sup>70</sup> They showed up at the home of A.A. Dietemann, a journeyman plumber who claimed to be a scientist able to diagnose and cure a variety of ailments, including cancer, with bizarre equipment and concoctions of herbs and other potions.<sup>71</sup> Dietemann did not advertise and did not charge for his services.<sup>72</sup> To get the story, the *Life* reporters lied to gain entry to his private home, said they had been sent by a friend of Dietemann’s, and represented that one member of the team desired a diagnosis. Dietemann examined the female reporter while the other *Life* employee took pictures with a hidden camera and recorded the conversation. Dietemann diagnosed the reporter as having a lump in her breast caused by eating rancid butter eleven years, nine months, and seven days earlier and prescribed herbal remedies.<sup>73</sup> Dietemann was arrested and charged with practicing medicine without a license; *Life* ran a multipage exposé, “Crackdown on Quackery,” reporting on several cases of such “quackery,” including a two-page spread on Dietemann, complete with photographs taken with the hidden camera.<sup>74</sup> Dietemann sued the publisher for invasion of privacy and won.<sup>75</sup>

Broadcast outlets use hidden recording devices more often than print, largely because of the nature of the medium.<sup>76</sup> TV especially

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<sup>69</sup> See Spinner, *supra* note 15; Marx, *supra* note 14.

<sup>70</sup> Dietemann v. Time, Inc., 449 F.2d 245, 245–46 (9th Cir. 1971).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 246.

<sup>73</sup> *Id.* Further tainting this episode, the reporters were collaborating with law enforcement who sat in a car as the sting unfolded and heard the recordings in real time. *Id.* Collaboration with law enforcement is often criticized as crossing the line between reporting the story and either creating it or becoming part of it. See *infra* notes 86–89 and accompanying text.

<sup>74</sup> 449 F.2d at 245–47; see *Crackdown on Quackery*, LIFE, Nov. 1, 1963, at 72B, <https://books.google.com/books?id=VIEAAAAMBAAJ&lpg=PA72-IA2&dq=life%20magazine%20crackdown%20on%20quackery&pg=PA72-IA2#v=onepage&q&f=false> [https://perma.cc/6NNN-NQJE].

<sup>75</sup> 449 F.2d at 252.

<sup>76</sup> Seow Ting Lee, *Lying to Tell the Truth: Journalists and the Social Context of Deception*, 7 MASS COMM’N & SOC’Y 97, 104 (2004), <https://undercover.hosting.nyu.edu>

relies on visual and sound support for its reporting. As recording devices became easier to conceal, and as the public's appetite for dramatic news magazine coverage of exposés grew, a new genre of TV news emerged.

In a modern version of the *Life Magazine* piece on quackery, *Prime Time Live* reporter Sam Donaldson sought to uncover alleged Medicare fraud by a doctor specializing in cataract surgery.<sup>77</sup> Dr. Desnick was reported to be a “big cutter”—that is, a doctor who performs a high volume of cataract surgery and allegedly engages in Medicare fraud. Producers told Dr. Desnick that they were doing a piece on “large cataract practices” and assured him that they were filming other practices, that the piece would be fair and balanced, and that there would be no ambush tactics or surreptitious recording.<sup>78</sup> Desnick agreed and allowed the TV crews into his offices. In fact, reporters and producers did film as they described—general soft footage on Desnick's practice. But undercover reporters also posed as patients and used hidden cameras to record diagnoses. The team arranged for independent doctors to examine the undercover “patients,” exposing that many—especially those eligible for Medicare coverage—were diagnosed as needing cataract surgery when they did not.<sup>79</sup> *Prime Time Live* broadcast its findings as an exposé of surgeons who defraud Medicare by doing unnecessary cataract surgery. Desnick was eventually prosecuted,<sup>80</sup> but in the wake of the *Prime Time Live* episode, Desnick, the clinic itself, and several subjects of the broadcast sued the network and Donaldson for defamation, trespass, fraud, violation of state and federal wiretap acts, and invasion of privacy.<sup>81</sup>

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/files/original/4fc322d50137093d9e348c4443ea81aaa0b15dee.pdf [https://perma.cc/A5XQ-M8JH] (noting broadcast journalists generally perceived as more willing to use hidden devices because nature of medium relies more on film and pictures).

<sup>77</sup> *Desnick v. ABC*, 44 F.3d 1345, 1347–48 (7th Cir. 1995).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 1348.

<sup>80</sup> See, e.g., Bruce Japsen & Matt O'Connor, *Desnick Agrees to \$14 Million Settlement*, CHI. TRIB. (Dec. 20, 2000, 12:00 AM), <https://www.chicagotribune.com/news/ct-xpm-2000-12-20-0012200194-story.html> [https://perma.cc/83R4-LJ9S] (reporting settlement of kickback and unnecessary surgery prosecution); *Government Accuses Hospital, Doctors of Kickback Scheme*, S. FLA. BUS. J. (July 2, 2004, 8:39 AM), <https://www.bizjournals.com/southflorida/stories/2004/06/28/daily59.html> [https://perma.cc/R9WK-HMBW] (noting civil kickback and Medicaid fraud actions brought by U.S. Department of Justice against Desnick, other doctors, and hospitals where they worked).

<sup>81</sup> 44 F.3d at 1351.



The trespass, fraud, and privacy claims were dismissed, but the case represented a close call for this sort of undercover reporting.<sup>82</sup>

*Prime Time Live* again went undercover, this time to investigate allegations of unsafe practices in a large supermarket chain's meatpacking department, and generated a landmark civil case against the press. Reporters used false references, false employment backgrounds, and false addresses. They also lied about their real reasons for applying to obtain jobs with Food Lion.<sup>83</sup> Once hired, they surreptitiously recorded interviews with workers and behind-the-counter activities—such as bleaching out-of-date meat to eliminate the smell and discoloration and mixing old ground meat with fresh to disguise that it was past prime.<sup>84</sup> The report aired on ABC, showing that Food Lion employees were engaged in unsafe, unhealthy, and illegal practices.<sup>85</sup> Food Lion sued for fraud, trespass, breach of the duty of loyalty, and unfair trade practices.<sup>86</sup> Food Lion won a staggering verdict at the trial court level, but eventually all but the breach of loyalty claim were dismissed, and Food Lion was awarded only minimal damages.<sup>87</sup> Nonetheless, as discussed in more detail in Section III.A, the *Food Lion* case sent shock waves through journalism because of the size of the initial jury verdict and the punitive damages the jurors awarded.<sup>88</sup>

Further along the continuum of deception we find some of the most notorious sting operations. Among the most famous is Chris Hanson's *To Catch a Predator* series, one of the group of NBC's news magazine programs. Hanson and NBC collaborated with law enforcement and an

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<sup>82</sup> *Id.* at 1355 (defamation claims remanded).

<sup>83</sup> *Food Lion, Inc. v. Cap. Cities/ABC (Food Lion II)*, 984 F. Supp. 923, 927 (M.D.N.C. 1997), *aff'd in part, rev'd in part*, 194 F.3d 505 (4th Cir. 1999).

<sup>84</sup> *Food Lion, Inc. v. Cap. Cities/ABC (Food Lion III)*, 194 F.3d 505, 510 (4th Cir. 1999).

<sup>85</sup> *The Landmark Food Lion Case*, REPS. COMM. FOR FREEDOM PRESS, <https://www.rcfp.org/journals/news-media-and-law-spring-2012/landmark-food-lion-case/> [<https://perma.cc/C9BZ-VLBK>] (last visited July 23, 2023). The case against ABC is discussed in more detail in Section III.A. See *infra* notes 110–142 and accompanying text.

<sup>86</sup> *Food Lion, Inc. v. Cap. Cities/ABC (Food Lion I)*, 964 F. Supp. 956, 959 (M.D.N.C. 1997), *aff'd on other grounds*, 194 F.3d 505 (4th Cir. 1999). The *Food Lion* case is discussed in detail in Section III.A. See *infra* notes 110–42 and accompanying text. The jury awarded \$1,402.00 in compensatory damages and a staggering \$5,545,750.00 in punitive damages. *Food Lion II*, 984 F. Supp. at 927. The judge held that the punitive damages were excessive and instead imposed a \$5 million remittitur; the plaintiff accepted the remittitur and the resulting judgment of just over \$3,000.

<sup>87</sup> *Food Lion, III*, 194 F.3d at 517–20.

<sup>88</sup> See *infra* notes 110–143 and accompanying text.

antipredator advocacy group called Perverted Justice to lure potential child predators into an undercover trap by posing as teenagers online.<sup>89</sup> When the men (it was always men in the series) showed up at a house expecting a liaison with a teenager, Hanson and the TV crew would spring into action and conduct an ambush interview of the men on live camera. Often, police were waiting, handcuffs ready.<sup>90</sup> The show was a ratings hit—audiences were mesmerized by the sensational “reveal” when Hanson pounced on the mark with lights and cameras.<sup>91</sup> But the show did jump many of undercover reporting’s guardrails,<sup>92</sup> including by paying Perverted Justice—a partisan advocacy group deeply involved in the story being covered—a reported \$100,000 an episode; by collaborating too closely with the authorities, indeed operating as an arm of law enforcement; and by becoming so involved as to become part of the story instead of neutrally reporting it.<sup>93</sup> Some even suggest that Hanson created the story—that absent the provocative postings, many of the men caught might not have ventured into the seamy world beyond exploring content online.<sup>94</sup> As one critic explained, undercover journalism usually goes after existing problems—problems that would have been there regardless of whether reporters were involved, while the *Predator* series relied on the ability of Perverted Justice to lure the marks into doing something and then catching them in the act.<sup>95</sup> Indeed, in a case brought by the family of a target who took his life during the filming of the sting, the judge observed that if the plaintiffs’

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<sup>89</sup> Douglas McCollam, *The Shame Game: “To Catch a Predator” Is Propping Up NBC’s Dateline, but at What Cost?*, COLUM. JOURNALISM REV. (Jan./Feb. 2007), [https://archives.cjr.org/feature/the\\_shame\\_game.php](https://archives.cjr.org/feature/the_shame_game.php) [<https://perma.cc/XC79-8QZ8>].

<sup>90</sup> *Id.*; Vanessa Grigoriadis, *“To Catch a Predator”: The New American Witch Hunt*, ROLLING STONE (Aug. 9, 2007), <https://www.rollingstone.com/tv-movies/tv-movie-news/to-catch-a-predator-the-new-american-witch-hunt-75418/> [<https://perma.cc/3P8Y-CSZN>].

<sup>91</sup> McCollam, *supra* note 89 (“‘To Catch a Predator’ has been the rarest of rare birds in the television news world: a clear ratings winner.”); Grigoriadis, *supra* note 90.

<sup>92</sup> See, e.g., *Conrad v. NBC Universal, Inc.*, 536 F. Supp. 2d 380, 397 (S.D.N.Y. 2008) (citing SOC’Y OF PRO. JOURNALISTS, *supra* note 58) (holding that a reasonable jury could find that Hanson violated a number of ethical rules); see also ROSENSTIEL & KOVACH, *supra* note 14, at 129–30.

<sup>93</sup> Grigoriadis, *supra* note 90; Robbie Rogers & Sara Stone, *Who’s the “Predator”?*, SOC’Y PRO. JOURNALISTS, <https://www.spj.org/ecs8.asp> [<https://perma.cc/L3BA-SGEJ>] (last visited July 23, 2023) (criticizing *To Catch a Predator* as going too far, especially by collaborating with and paying an advocacy group in undertaking the investigation).

<sup>94</sup> McCollam, *supra* note 89 (“[B]y Hansen’s own calculation fewer than one in ten of the men who show up at a sting house have a previous criminal record.”).

<sup>95</sup> Marcus Baram, *Turning the Tables on ‘To Catch a Predator,’* ABC NEWS (June 5, 2007), <https://abcnews.go.com/US/story?id=3235975&page=1> [<https://perma.cc/26XN-99RK>]; see also *Conrad*, 536 F. Supp. 2d at 380 (explaining that the sister of a *Predator* target who took his own life during filming of the episode sued police and NBC as a result).

allegations describing NBC's actions during the filming of this episode were true, *To Catch a Predator* sought "'to sensationalize and enhance the entertainment value' of the confrontations,"<sup>96</sup> adding, they

crossed the line from responsible journalism to irresponsible and reckless intrusion into law enforcement. Rather than merely report on law enforcement's efforts to combat crime, NBC purportedly instigated and then placed itself squarely in the middle of a police operation, pushing the police to engage in tactics that were unnecessary and unwise, solely to generate more dramatic footage for a television show.<sup>97</sup>

Similarly, Project Veritas operatives set up elaborate stings and created false identities to infiltrate organizations, including political entities and government agencies, from Planned Parenthood, to NPR, to the now defunct Association of Community Organizations for Reform Now (ACORN)—an entity that collapsed as a result of Project Veritas's expose.<sup>98</sup> For example, in the NPR case, Project Veritas operatives (including its most famous, James O'Keefe) posed as representatives of a group with ties to the Muslim Brotherhood that, purportedly, were interested in making a significant contribution to NPR.<sup>99</sup> Project Veritas was able to secretly record NPR's chief fundraiser making disparaging remarks about the Tea Party, evangelical Christians, and the Republican Party—remarks made in response to comments made by Project Veritas operatives.<sup>100</sup> Although

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<sup>96</sup> 536 F. Supp. 2d at 385. Conradt was a particularly tragic episode. The target of the *To Catch a Predator* sting was an assistant district attorney. He did make online contact with the decoy, posing as a 13-year-old boy. However, the target never came to the sting house. Hanson asked the local police, who had been involved throughout, to go to the target's home. The police obtained a search warrant (although the judge said that, had he known the details of the TV show's involvement, he would not have issued the search warrant). Police and the film crew gathered outside the target's home, eventually entering with a SWAT team. The target stated he was not going to hurt anyone and then shot himself. *Id.* at 385–87. The target's sister sued NBC and the involved law enforcement agencies. While many of the sister's claims were dismissed under Texas law, the court did allow several claims on behalf of the target's estate to go forward and, as noted in the text, sharply criticized Hanson's actions. *Id.* at 383.

<sup>97</sup> *Id.* at 385.

<sup>98</sup> Zev Chafets, *Stinger: James O'Keefe's Greatest Hits*, N.Y. TIMES (July 27, 2011), <https://www.nytimes.com/2011/07/31/magazine/stinger-james-okeefes-greatest-hits.html?pagewanted=all> [https://perma.cc/SUMV-S3G9]; Jane Mayer, *Sting of Myself*, NEW YORKER (May 20, 2016), <https://www.newyorker.com/magazine/2016/05/30/james-okeefe-accidentally-stings-himself> [https://perma.cc/BVT4-2LS4].

<sup>99</sup> KROEGER, *supra* note 7, at 250–52.

<sup>100</sup> Larry Abramson, *NPR Exec Recorded Disparaging Conservative Groups*, NPR (Mar. 9, 2023, 4:54 AM), <https://www.npr.org/2011/03/09/134384689/npr-exec-recorded>

NPR eventually declined the purported \$5 million gift and distanced itself from the donors (*before* the reveal), Project Veritas published the recorded remarks resulting in embarrassment for NPR (at a delicate time when it was negotiating for renewal of federal funding) and also the firing of the NPR fundraiser involved, as well as another NPR employee.<sup>101</sup> Critics note that Project Veritas is itself an advocacy group—an ideologically driven organization that uses undercover operations to advance an agenda. As noted above, commentators blasted the *Predator* series for collaborating with an advocacy group.<sup>102</sup> Here the critique applies with even more force—Project Veritas was itself an advocacy group.

Many suggest that salacious pieces such as these tarnished undercover reporting and have caused journalists like the *Post*'s reporters and editors to reject the label.<sup>103</sup> Others simply define these extreme operations as not journalism at all.<sup>104</sup>

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-disparaging-conservative-groups [<https://perma.cc/WM4E-RHAG>]; KROEGER, *supra* note 7, at 249–50.

<sup>101</sup> KROEGER, *supra* note 7, at 250–51.

<sup>102</sup> See *supra* notes 93–94 and accompanying text.

<sup>103</sup> See generally Rogers & Stone, *supra* note 93 (criticizing the lengths to which the *To Catch a Predator* series went); Silverstein, *supra* note 68; Spinner, *supra* note 15 (exploring how undercover reporting is still happening but on a much smaller scale); Marx, *supra* note 14 (“[U]se of deception ‘demeans journalism and damages badly the journalist and the public.’”).

<sup>104</sup> McCollam, *supra* note 89 (quoting one broadcast journalist’s assessment of the *Predator* series: “[I]t looks more like a police prostitution sting than a news investigation.”); Rogers & Stone, *supra* note 93 (criticizing the reporters working in concert with “watchdog” groups and law enforcement, and raising concerns about journalists allying with an advocacy group rather than maintaining neutrality); Adam Goldman & Mark Mazzetti, *Project Veritas and the Line Between Journalism and Political Spying*, N.Y. TIMES (Nov. 12, 2021), <https://www.nytimes.com/2021/11/11/us/politics/project-veritas-journalism-political-spying.html> [<https://perma.cc/W7MT-53TN>] (describing Project Veritas as using “tactics that test the boundaries of legality and are outside of mainstream reporting techniques”); Jane Kirtley, *Project Veritas and the Mainstream Media Are Strange Allies in the Fight to Protect Press Freedom*, NEIMAN LAB (Nov. 30, 2021, 10:29 AM), <https://www.niemanlab.org/2021/11/project-veritas-and-the-mainstream-media-are-strange-allies-in-the-fight-to-protect-press-freedom/> [<https://perma.cc/J5W2-P5TG>] (noting that the organization is ideologically driven and routinely violates established norms of media ethics).

### III LEGAL LIABILITY

*The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.*<sup>105</sup>

As illustrated by the narratives above and by articles and books about investigative reporting, undercover journalists at times trespass, lie, invade privacy, breach loyalty, and commit fraud to get a story.<sup>106</sup> If the average citizen would face criminal charges or civil liability, shouldn't journalists?

Undercover journalists have in fact been sued<sup>107</sup> and have even faced threats of criminal charges (although such criminal charges are rarely upheld by US courts)<sup>108</sup> for their actions undertaken to get to the facts.

The following Section describes how the law has responded, first exploring traditional civil causes of action brought against undercover journalists.<sup>109</sup> Then, Section III.B turns to a spate of targeted laws—Agricultural Gag laws, or *ag-gag* laws—drafted to prevent surreptitious activities by reporters and others who seek to expose controversial aspects of the agricultural industry.

<sup>105</sup> Associated Press v. NLRB, 301 U.S. 103, 132–33 (1937).

<sup>106</sup> See *supra* notes 3–13, 56–79 and accompanying text.

<sup>107</sup> See, e.g., *Food Lion III*, 194 F.3d 505, 505 (4th Cir. 1999); *Desnick v. ABC*, 44 F.3d 1345, 1351 (7th Cir. 1995); *Dietemann v. Time, Inc.*, 449 F.2d 245, 245 (9th Cir. 1971).

<sup>108</sup> See, e.g., Vanessa Romo, *The LA Sheriff Now Says No Charges for the Reporter Who Wrote About a Cover-Up*, NPR (Apr. 27, 2022, 12:22 PM), <https://www.npr.org/2022/04/26/1094952916/los-angeles-sheriff-la-times-cover-up-reporter> [<https://perma.cc/LB69-X2JJ>] (noting that, in response to a piece published by *Los Angeles Times* reporting allegations of officers abusing handcuffed prisoners, a Los Angeles Sheriff stated the reporter could face criminal investigation); Zane Sparling, *Oregon Journalist's Criminal Charges Dismissed as Unconstitutional; She Was Reporting on Police Activity*, OREGONIAN (Feb. 22, 2023, 9:01 AM), <https://www.oregonlive.com/crime/2022/09/medford-drops-criminal-case-against-oregon-radio-reporter-after-judge-deems-trespass-charge-unconstitutional.html> [<https://perma.cc/55L4-8VVS>] (explaining that a reporter was arrested for trespass and resisting arrest, but the judge dropped the charges).

<sup>109</sup> Since courts rarely apply criminal sanctions against the press, I focus on civil actions. See *supra* note 108 and accompanying text. It should be noted, however, that many of the *ag-gag* statutes do include criminal penalties. See *infra* notes 172–74. It remains to be seen whether these will be enforced.

*A. Traditional Civil Causes of Action*

The *Food Lion*<sup>110</sup> case provides a clinic in what undercover reporters do to get behind the scenes, the legal actions that might ensue, and the complexities of pursuing these legal actions for both the plaintiffs and the defendant-journalists. As such, it provides an excellent framework to consider whether, and if so, how, to protect reporters engaged in undercover journalism.

As noted above, ABC reporters used false résumés to apply for jobs at Food Lion Supermarkets, seeking to investigate allegations of unwholesome food-handling processes in the backrooms of the stores.<sup>111</sup> Specifically, one reporter claimed she had prior experience as a meat wrapper, provided fake references, a false employment history, and a false address; she was hired as a meat wrapper in a North Carolina Food Lion store.<sup>112</sup> A second reporter also provided fake references, as well as a false employment history, and was hired as a delicatessen clerk in a South Carolina Food Lion store.<sup>113</sup> Both hid the fact that they were employees of ABC and lied about the true reason they sought employment.<sup>114</sup> Both used hidden cameras to record footage in nonpublic work areas. ABC's news magazine *Prime Time Live* aired a segment exposing unsafe, unhealthy, and unsavory practices, reporting what the undercover journalists had discovered and using footage from their surreptitious filming.<sup>115</sup>

Almost immediately after the episode aired, Food Lion's Class A and Class B stock plummeted.<sup>116</sup> The company soon reported significant sales decreases and logged a drop in profits for the year following the broadcast. In the end, Food Lion closed eighty stores.<sup>117</sup> Whether all these losses were directly attributable to the broadcast

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<sup>110</sup> *Food Lion III*, 194 F.3d at 505.

<sup>111</sup> *Id.* at 510.

<sup>112</sup> *Food Lion II*, 984 F. Supp. 923, 927 (M.D.N.C. 1997), *aff'd in part, rev'd in part*, 194 F.3d 505 (4th Cir. 1999).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Food Lion III*, 194 F.3d at 510.

<sup>116</sup> Associated Press, *Food Lion Stock Falls After Report*, N.Y. TIMES (Nov. 7, 1992), <https://www.nytimes.com/1992/11/07/business/company-news-food-lion-stock-falls-after-report.html> [https://perma.cc/ZLY2-Z36Y].

<sup>117</sup> KROEGER, *supra* note 7, at 152.

remains unclear.<sup>118</sup> But public health authorities did announce investigations and inspections after the broadcast.<sup>119</sup>

Food Lion sued but did not claim the reports were false—that is, Food Lion did not claim damages for publication of untruthful information but rather challenged the means the reporters used to gather the information as tortious.<sup>120</sup>

The procedural history of the case was tangled; the trial court dismissed some of Food Lion's claims and carefully parsed what damages went with what legal claims.<sup>121</sup> Most significant, the trial court ruled that Food Lion could not seek compensation for lost sales or for the dip in the stock value because Food Lion did not claim that these damages flowed from either the broadcast of false information or the remaining causes of action (namely fraud, trespass, breach of loyalty, and unfair trade practices).<sup>122</sup> Thus, what Food Lion could put on the board as compensatory damages was significantly trimmed. The jury found ABC, the producers, and the two undercover reporters liable for fraud and found the two undercover reporters liable for breach of the duty of loyalty and for trespass.<sup>123</sup>

The jury awarded Food Lion \$1,400 on the fraud claim and \$1.00 each on the duty of loyalty and trespass claims. But then, in a separate punitive damages phase, the jury walloped ABC (though not the individual undercover reporters) with a punitive damages award of \$5,545,750. While the trial judge reduced the punitive damages award

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<sup>118</sup> *Id.* (noting unrelated bad press stemming from a child labor investigation). Food Lion did not sue for publication of the information obtained by the reporters, and the court did not allow Food Lion to offer these losses as damages, so there is no evidence whether the story directly caused the losses. *Food Lion III*, 194 F.3d at 510–11.

<sup>119</sup> Daniel A. Levin & Alan C. Roline, *Undercover Reporters, Tort Law, and the First Amendment: Food Lion v. ABC and the Future of Surreptitious Newsgathering*, 11 KAN. J.L. & PUB. POL'Y 575, 582–83 (2001).

<sup>120</sup> *Food Lion III*, 194 F.3d at 510. At one point, Food Lion did attempt to add libel claims to the case, but the judge refused to allow amendment of the complaint that late in the game. Levin & Roline, *supra* note 119 at 582–83.

<sup>121</sup> *Food Lion III*, 194 F.3d at 511.

<sup>122</sup> *Id.* (holding that lost sales and stock price loss were not proximately caused by trespass or breach of loyalty).

<sup>123</sup> *Id.* Based on the jury's findings of fact, the trial court judge found that ABC had violated the unfair trade practices law. However, determining that the causes of action were duplicative, the judge required Food Lion to elect between the fraud and the unfair trade practices claims. Food Lion elected to pursue the fraud claim. *Id.* The Fourth Circuit later held that the reporters' actions could not violate the unfair trade practices law, as that Act was designed to protect the consuming public or to prevent unfair competitor-to-competitor practices; the actions of the reporters fit neither of these paradigms. *Id.* at 520.

to \$315,000,<sup>124</sup> the jury's imposition of such a draconian award indeed got the attention of the press.<sup>125</sup>

ABC and Food Lion both appealed the final judgment: ABC challenged the judge's refusal to dismiss all claims as a matter of law, and Food Lion contested the judge's causation ruling that eliminated all claims and damages arising from the broadcast's alleged impact on stock prices and sales.<sup>126</sup>

Before digging into the substantive claims, the Court of Appeals dismissed the argument that the press might enjoy constitutional protection that would shield ABC and the reporters from actions that would subject nonpress individuals to liability. Relying on the Supreme Court's *Branzburg* case, the court found that no such privilege exists.<sup>127</sup>

Turning to the specific claims, the Court of Appeals first considered whether the fraud claim could stand and decided it could not. Applying the elements of the claim to the facts, the court concluded that the parties did not dispute that the reporters knowingly made false statements for the purpose of causing Food Lion to rely on them and so hire the reporters. However, the court concluded that Food Lion could not prove that the damages alleged (administrative costs of hiring and training) arose from reliance on the misrepresentations. Noting that the positions in question were at will and that either Food Lion or the employees could terminate the relationship at any time, the court reasoned that Food Lion could not reasonably rely on any expectation of duration of employment.<sup>128</sup> Food Lion couldn't know whether the reporters planned to stay, since they could leave or be terminated at any

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<sup>124</sup> The judge ruled that the punitive damage award was excessive, and Food Lion accepted a remittitur reducing the award to \$315,000. *Food Lion II*, 984 F. Supp. 923, 940 (M.D.N.C. 1997), *aff'd in part, rev'd in part*, 194 F.3d 505 (4th Cir. 1999).

<sup>125</sup> See, e.g., Walter Goodman, *Repercussions of Getting a Story by Sneaky Means*, N.Y. TIMES (Jan. 16, 1997), <https://www.nytimes.com/1997/01/16/arts/repercussions-of-getting-a-story-by-sneaky-means.html> [<https://perma.cc/KJ7P-UQNU>] (explaining that the *Food Lion* verdict puts reporters on notice to stay away from undercover reporting and demonstrates the need for "some protection for reporters who have reasonable grounds for pursuing a significant story by extraordinary means"); Lyrrisa Barnett Lidsky, *Prying, Spying and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 183 (1998).

<sup>126</sup> *Food Lion III*, 194 F.3d at 511.

<sup>127</sup> *Id.* at 520 (press enjoys no immunity from tort or contract liability); *Branzburg v. Hayes*, 408 U.S. 665, 691–92 (1972) (no special protection for press).

<sup>128</sup> *Food Lion III*, 194 F.3d at 513 ("Food Lion could not reasonably rely on the sort of misrepresentations (about background, experience, etc.) made by the reporters to conclude that they would work for any extended period.").



time, and thus could not argue it incurred unnecessary administrative costs. Related, the court held that Food Lion could not prove that the reporters' misrepresentations caused it to pay them their salaries wrongfully. The court reasoned that even in light of the jury's finding that the reporters breached their duty of loyalty, Food Lion did not prove they didn't do their jobs adequately. To the contrary, the court concluded that they "were paid because they showed up for work and performed their assigned tasks."<sup>129</sup> Thus, the Court of Appeals struck the fraud claim and the \$1,400 compensatory damage award as well as the \$315,000 in punitive damages.<sup>130</sup>

Moving on to ABC's claim that the breach of loyalty claim should be stricken, the court disagreed. While the reporters' conduct did not match precisely the actions that the state courts had recognized as establishing employee breach of loyalty in that they "did not compete with Food Lion, misappropriate any of its profits or opportunities, or breach its confidences," grounds that had previously been recognized by the involved state courts,<sup>131</sup> the court concluded that their actions were adverse in a fundamental way: they sought to expose Food Lion as engaging in practices that were not only unsanitary, unhealthy, and deceptive but also put their customers in danger. Their purpose was diametrically opposed—indeed, completely adverse—to Food Lion's interests. This conduct, the court concluded, fit the states' approach to breach of loyalty.<sup>132</sup> Thus, the court affirmed the award of damages for breach of loyalty, minimal as they were.<sup>133</sup>

The court then turned to the trespass claims, which in some ways lie at the vortex of the undercover investigation controversy because they involve access to property, arguably against the will of the property owner, to obtain important information that the property owner would otherwise not divulge or would affirmatively hide.

ABC argued that the reporters did not trespass because they had consent—the reporters were employees.<sup>134</sup> But they obtained that

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<sup>129</sup> *Id.* at 514. Indeed, when one of the reporters quit, her supervisor recommended that if she ever reapplied to Food Lion, she should be rehired. *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 516. One reporter was hired by a North Carolina Food Lion, the other by a South Carolina Food Lion. *Id.* The Circuit Court of Appeals focused primarily on North Carolina law.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* The jury awarded \$1.00 in damages for breach of loyalty. *See supra* text accompanying note 107.

<sup>134</sup> *Food Lion III*, 194 F.3d at 516–17.

consent by lying. Did that vitiate consent? The court wrestled with this, describing a range of circumstances and surveying a range of cases that had come to inconsistent holdings.<sup>135</sup> The court also acknowledged the impact of a finding that consent to enter would always be vitiated if obtained by deceit, pointing to restaurant critics who enter under arguably false pretenses and testers who engage in deception to uncover evidence of housing or other discrimination.<sup>136</sup> The court also cited the *Desnick* case, in which reporters posed as patients and surreptitiously filmed their appointments with eye doctors in an effort to uncover Medicare fraud, calling that court's discussion and ultimate conclusion that consent there was valid as "thoughtful."<sup>137</sup>

Applying this to the case at hand, the court first considered Food Lion's argument that the reporters had committed a trespass because they initially gained entry by virtue of fraudulent applications and résumés. Reasoning that the state law trespass cause of action protects the owner's peaceable possession of property, the court held that gaining entry by way of a false résumé did not in and of itself violate that interest. Therefore, the entry did not give rise to a trespass cause of action—consent to enter was valid. However, the court then considered what happened after they gained entry. It drew on cases that acknowledged that engaging in wrongful activity "in excess of the consent given to enter" could in fact give rise to an action for trespass by virtue of exceeding the scope of the consent.<sup>138</sup> Here, the reporters' actions in entering areas not open to the public and secretly recording for the purpose of exposing Food Lion's practices were actions totally adverse to their duty of loyalty. Thus, the court reasoned, they could be found to have "committ[ed] a wrongful act in abuse of their authority

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<sup>135</sup> *Id.* at 517. The court compared the inconsistent results reached in the following: RESTATEMENT (SECOND) OF TORTS § 892B(2) (1965) (explaining that consent induced by fraud is not effective for "the unexpected invasion or harm"); *Shiffman v. Empire Blue Cross & Blue Shield*, 681 N.Y.S.2d 511, 512 (App. Div. 1998) (holding that consent didn't bar trespass claim where reporter entered medical office using false identification as "consent obtained by misrepresentation or fraud is invalid") to *Desnick v. ABC*, 44 F.3d 1345, 1351–53 (7th Cir. 1995) (holding that reporters who misrepresented themselves as patients to gain entrance to medical office and secretly film were not trespassers because, among other things, they were in public area of office); *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 757 (N.D. Cal. 1993) (holding that consent to enter even if obtained by fraud was still consent, so no claim for trespass existed); *Martin v. Fid. & Cas. Co. of N.Y.*, 421 So.2d 109, 111 (Ala. 1982) (explaining that consent given by mistake of facts or procured by fraud is valid).

<sup>136</sup> *Food Lion III*, 194 F.3d at 517–18.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 518–19.

to be on Food Lion's property."<sup>139</sup> The court therefore upheld the jury's trespass verdict on this ground—that consent was essentially exceeded by abuse of the purpose of consent. But again, the damages awarded were nominal, only \$1.<sup>140</sup>

Finally, the Court of Appeals dismissed Food Lion's unfair trade practices claim, finding that while the law applied quite broadly, it addressed only circumstances in which businesses were competitors or potential competitors, which was not the case here.<sup>141</sup> So in the end, ABC was on the hook for only nominal damages. Nonetheless, the court's finding that consent deceptively obtained and then abused by obtaining and publishing negative inside information, coupled with the jury's staggering punitive damages award (though ultimately reversed, as it was attached to a cause of action the Court of Appeals found could not stand) sent a chilling message to undercover reporters who would use these tactics.<sup>142</sup>

Two other cases relied on in *Food Lion* and referred to earlier add a bit of nuance to how courts will approach these types of cases. In *Dietemann*, where reporters lied to gain access to Dietemann's home to catch him engaging in quack medical treatment, the court allowed a cause of action by Dietemann for violation of his privacy—the fraudulently obtained consent did not bar the action.<sup>143</sup> The court focused hard on the fact that the activities happened in the privacy of Dietemann's own home.<sup>144</sup> Privacy law—criminal and civil—has always granted special protection to the home.<sup>145</sup>

But the court added a troubling note to its analysis by allowing Dietemann to recover for the emotional distress caused by publication of the surreptitiously obtained pictures and information, reasoning that to deny him the opportunity to use “publication as an ingredient of

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<sup>139</sup> *Id.* at 519.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 520.

<sup>142</sup> Silverstein, *supra* note 68 (suggesting that press was hesitant to undertake undercover investigations in part because of the *Food Lion* case).

<sup>143</sup> *Dietemann v. Time, Inc.*, 449 F.2d 245, 248–250 (1971).

<sup>144</sup> *Id.* at 249.

<sup>145</sup> See, e.g., Stephanie M. Stern, *The Inviolable Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 906–07 (2010) (noting that in Fourth Amendment analysis the home is considered inviolable and of paramount importance in constraining government intrusions); Neil M. Richards, *The Information Privacy Law Project*, 94 GEO. L.J. 1087, 1101 (2006) (describing privacy as giving additional sanctity to the home).

damages would deny to the injured plaintiff recovery for real harm done to him without any countervailing interest to the public in being informed.”<sup>146</sup> This finding may be at odds with the Supreme Court’s consistent holdings, beginning with *Cox Broadcasting v. Cohen*,<sup>147</sup> that prohibit imposition of any penalty—civil or criminal—for publication of legally obtained, truthful information.<sup>148</sup> *Dietemann* was decided before the first in this line of Supreme Court cases, so this finding may not hold.<sup>149</sup> It might also be reconciled with the limitation the Court explicitly stated in each of the cases: that the protection exists as long as the publisher did not obtain the information illegally.<sup>150</sup> If a *Dietemann*-like privacy violation rises to a level that would cause the Court to deem the information illegally acquired, recovery of damages might be permissible under the *Cox* line of cases.

Compare *Desnick*. In that case, as noted above, producers and reporters lied and surreptitiously recorded in Dr. Desnick’s medical offices, catching the doctor in alleged Medicare fraud.<sup>151</sup> Desnick sued for trespass, defamation, and invasion of privacy, among other claims. The *Desnick* court wrestled with the question of whether consent obtained by fraud will protect against a trespass claim by discussing the range of cases where courts have considered a similar question—some finding *no* (intercourse under the pretense of medical treatment, consent not effective; neighbor gaining entry to a home by masquerading as a meter reader but actually snooping around, consent not effective); others finding *yes* (paying for sex with a counterfeit bill, consent valid; restaurant critic entering under pretense of being a customer, consent valid). The court found that the case before it fit better with those finding that consent, even if fraudulently obtained, can still be an effective defense to the trespass claim.<sup>152</sup> In this analysis, it was important that the actions of the reporters and producers did little

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<sup>146</sup> *Dietemann*, 449 F.2d at 250.

<sup>147</sup> *Cox Broad. Corp. v. Cohen*, 420 U.S. 469, 491 (1975).

<sup>148</sup> See Doris DelTosto Brogan, *Expungement, Defamation, and False Light: Is What Happened Before What Really Happened or Is There a Chance for a Second Act in America?*, 49 LOY. U. CHI. L.J. 1, 26–30 (2017) (detailing the line of Supreme Court cases protecting the publication of truthful information legally obtained).

<sup>149</sup> 420 U.S. at 469.

<sup>150</sup> Brogan, *supra* note 148, at 29 (citing *The Florida Starr v. B.J.F.*, 491 U.S. 524, 540–41 (1989)). In the most recent of these cases, *Bartnicki v. Vopper*, the information was clearly obtained in violation of federal wiretap laws, but the Court clarified that there was no indication that the broadcaster was involved in the illegality. *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001).

<sup>151</sup> *Desnick v. ABC*, 44 F.3d 1345, 1348–49 (7th Cir. 1995).

<sup>152</sup> *Id.* at 1351.

harm to the interest trespass protects—peaceful enjoyment of property.<sup>153</sup> This is a critical distinction for our purposes. In most instances, undercover reporters do little to disrupt the peaceful enjoyment of property. Rather, the complaint argues harm from the acquisition and publication of truthful, accurate information that the property owner would prefer be kept secret.

Of course, this distinction implicates the privacy claim. Privacy is often defined as control of information—typically information about oneself.<sup>154</sup> The tort of intrusion upon seclusion focuses on unauthorized entry of a very particular type of space—one that a person of ordinary sensibilities would find offensive.<sup>155</sup> It is easy but dangerous to collapse this distinction. Informational privacy protects information about a person. And while there may be a privacy interest in places, typically the law gives relief only for serious encroachments, such as unauthorized entry into a home,<sup>156</sup> or intrusion on a place of seclusion.<sup>157</sup>

The court in *Desnick* recognized these two prongs of privacy and found that while the area the producers and reporters entered was not public, it was not private in the same way Dietemann's home was private. Further, the information gathered was also not the sort of intimate information that privacy torts protect.<sup>158</sup> Therefore, in *Desnick*, the court dismissed the trespass and invasion of privacy claims against the journalists.<sup>159</sup>

What emerges from these three landmark cases is, at best, uncertainty for undercover reporters. In *Food Lion*, the court followed in part the approach in *Desnick* and found consent obtained by fraud initially protected against a trespass claim (agreeing that the actual entry onto private property did not cause discernable harm of the type

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<sup>153</sup> *Id.* at 1352.

<sup>154</sup> Jeffrey Bellin, *Pure Privacy*, 116 NW. U. L. REV. 463, 487–91 (2021) (“Not all disclosures implicate privacy. Only information about yourself counts.”).

<sup>155</sup> Eli A. Meltz, *No Harm, No Foul? “Attempted” Invasion of Privacy and the Tort of Intrusion upon Seclusion*, 83 FORDHAM L. REV. 3431, 3452 (2015) (describing the intrusion upon seclusion tort and analyzing whether acquisition of information is required).

<sup>156</sup> See *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971).

<sup>157</sup> RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977) (liability for intrusion upon seclusion permitted only if intrusion would be highly offensive to a reasonable person).

<sup>158</sup> *Desnick*, 44 F.3d at 1352–53 (“[P]rivacy embraces several distinct interests, but the only ones conceivably involved here are the closely related interests in concealing intimate personal facts and in preventing intrusion into legitimately private activities.”).

<sup>159</sup> *Id.* at 1353–54.

trespass protects against). But the court departed from *Desnick* by finding that the reporters exceeded that consent by acting against the interests of Food Lion (by reporting the behind-the-scenes misconduct).<sup>160</sup> And comparing *Dietemann*, *Desnick*, and *Food Lion*, it appears that the success of privacy claims will depend on the court's characterization of just how private the area encroached upon is, or how private the information involved is. In *Dietemann*, the den of a home (very private);<sup>161</sup> in *Desnick*, the lobby and exam rooms (less private for the property owner (presumably more private if the one complaining were the patient, but that was not the case)); *Food Lion*, nonpublic work areas (less private). Finally, while both *Desnick* and *Food Lion* held that there could be no liability for truthful publication of the information obtained by subterfuge, *Dietemann* permitted the plaintiff to prove the emotional harm caused from the invasion of privacy—not as a separate cause of action related to publication, but rather only as proof of damages.<sup>162</sup> That holding, as discussed above, might be at odds with the Supreme Court's *Cox* line of cases.<sup>163</sup>

To summarize, the cases create, at best, uncertainty about the risks undercover reporters might face. That uncertainty—those risks—loom large and threaten to chill important undercover reporting, especially in light of the press's fragile economic circumstances.<sup>164</sup>

Before moving on, one additional development must be considered to complete the picture: the evolution of laws designed to protect agricultural facilities from undercover investigations—dubbed ag-gag laws.<sup>165</sup> A full discussion of these ag-gag laws is beyond the scope of

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<sup>160</sup> *Food Lion III*, 194 F.3d 505, 518 (4th Cir. 1999).

<sup>161</sup> *Dietemann*, 449 F.2d at 248–50. While it seems intuitive to protect a home over a place of business in the context of undercover reporting, consider the situations in which the story is hidden in a home. Consider, for example, allegations of underage sex parties in a celebrity's mansion. See, e.g., Mark Savage, *R. Kelly: The History of His Crimes and Allegations Against Him*, BBC (Feb. 24, 2023), <https://www.bbc.com/news/entertainment-arts-40635526> [<https://perma.cc/2M46-AW5D>]. Additionally, imagine an undercover reporter posing as a young actress looking for a major celebrity's career mentoring to attend events at a celebrity's home to uncover sexual misconduct.

<sup>162</sup> *Dietemann*, 449 F.2d at 250.

<sup>163</sup> See *supra* notes 149–52 and accompanying text.

<sup>164</sup> Ben Depoorter, *Fair Trespass*, 111 COLUM. L. REV. 1090, 1092 (2011); Goodman, *supra* note 125; see also David J. Acheson & Ansgar Wohlschlegel, *The Economics of Weaponized Defamation Lawsuits*, 47 SW. L. REV. 335, 355–68 (analyzing the costs of defamation litigation); David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 516 (1991) (concluding that litigation costs cause greater chilling effect than potential judgments).

<sup>165</sup> *New York Times* food columnist Mark Bittman is generally credited with coining the term “ag-gag laws” in a 2011 column. Mark Bittman, Opinion, *Who Protects the Animals?*,

this Article, and a good number of authors have taken on the issues, especially the constitutional concerns, in detail.<sup>166</sup> However, the resilience of such laws—which are often passed, struck down, and passed again in modified fashion,<sup>167</sup> then remaining in force in many jurisdictions<sup>168</sup> and possibly becoming a model for similar statutes in other areas—warrants some attention.

### B. Ag-Gag Laws

In response to allegations of mistreatment of animals in the agricultural business, journalists and animal rights activists have engaged in surreptitious undertakings to gain access to facilities and have recorded and exposed wrongdoing. Their tactics mirror those we have been discussing.<sup>169</sup> In response, those involved in the agricultural industry lobbied legislators to enact laws aimed at activists and undercover journalists.<sup>170</sup> These laws impose criminal and civil

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N.Y. TIMES (Apr. 26, 2011, 9:29 PM), <https://archive.nytimes.com/opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/> [<https://perma.cc/4257-QAFN>]; Alicia Prygoski, *Detailed Discussion of Ag-Gag Laws*, ANIMAL LEGAL & HIST. CTR. (2015), <https://www.animallaw.info/article/detailed-discussion-ag-gag-laws> [<https://perma.cc/F89M-DTLE>]. Others suggest that the term had been in play before Bittman's column. His reference in the column (“‘ag-gag’ law, isn’t that a great name?”) supports this. Bittman, *supra*.

<sup>166</sup> See, e.g., Jamie K. VandenOever, *Shutting the Barn Doors After the Media Has Run Away: Studying the Relationship Between Ag-Gag Laws and the Reporting of Zoonotic Diseases*, 18 ANIMAL & NAT. RES. L. REV. 175, 177 (2022); Rebecca Aviel, *Second-Bite Lawmaking*, 100 N.C. L. REV. 947 (2022); *First Amendment—“Ag-Gag” Laws—Eighth Circuit Upholds Law Criminalizing Access to Agricultural Production Facilities Under False Pretenses.—Animal Legal Defense Fund v. Reynolds*, 8 F.4th 781 (8th Cir. 2021), 135 HARV. L. REV. 1166 (2022).

<sup>167</sup> Aviel, *supra* note 166, at 964–72 (chronicling legislature repeatedly redrafting and repassing ag-gag laws after court struck down prior versions).

<sup>168</sup> See VandenOever, *supra* note 166, at 185–86 (noting that, as of 2020, ag-gag laws are in force in at least 6 states).

<sup>169</sup> See, e.g., Aviel, *supra* note 166, at 966 (investigators gained access by obtaining employment and then documenting abuses); Lewis Bollard, *Ag-Gag: The Unconstitutionality of Laws Restricting Undercover Investigations on Farms*, 42 ENV'T L. REP. NEWS & ANALYSIS 10960, 10962–63 (2012) (reporters lied to gain access to facilities and then recorded and reported on abuses); Kevin C. Adam, *Shooting the Messenger: A Common-Sense Analysis of State “Ag-Gag” Legislation Under the First Amendment*, 45 SUFFOLK U. L. REV. 1129, 1130 (2012) (posing as employee to gather information most common means of exposing problems in agricultural industry).

<sup>170</sup> VandenOever, *supra* note 166, at 184 (describing agricultural interests lobbied and legislatures passed laws to limit undercover investigations); Bollard, *supra* note 169, at 10962 (illustrating ag-gag laws first emerged in the late 1980s and saw a resurgence in the early 2000s); Margot J. Pollans, *Eaters, Powerless by Design*, 120 MICH. L. REV. 643, 673–

penalties not only on those who would blatantly break into facilities but also on individuals who gained entry onto private property using fraudulent means—that is, those who misrepresent their purpose for entry, including specifically those who sought employment under false pretenses—and prohibit surreptitious recordings, gathering of information, and “taking any other trespassory actions against the property and its owner.”<sup>171</sup> Some provide for criminal penalties. Some provide for steep statutory damages<sup>172</sup> and others permit multipliers to be applied to demonstrated damages.<sup>173</sup>

When challenged, many of these laws have been struck down in whole or in part as unconstitutional, either because they prohibit particular content (information about agricultural activities) or penalize only negative reports and so constitute impermissible content-based government restrictions on expression.<sup>174</sup> Most relevant for our purposes is how courts have handled the questions of what can best be labeled causation issues. Recall that in the *Food Lion* case, the court held that because the information published was not challenged as

74 (2022) (ag-gag laws target activists by imposing penalties on those who lie to gain entry to farms or to record there).

<sup>171</sup> VandenOever, *supra* note 166, at 184 (describing prohibited activities); *see also* Claire Regenstreif, *Animal Agricultural Exceptionalism in the 21st Century*, 37 J. ENV'T L. & LITIG. 249, 255–56 (2022) (describing purposes of ag-gag laws and typical provisions of these laws); Sonia Weil, *Big-Ag Exceptionalism: Ending the Special Protection of the Agricultural Industry*, 10 DREXEL L. REV. 183, 185 (2017) (noting laws that criminalize undercover investigations of agricultural practices and curb what can be divulged).

<sup>172</sup> *See, e.g.*, ARK. CODE ANN. § 16-118-113 (“[W]here compensatory damages cannot be quantified, a court may award additional damages as otherwise allowed by state or federal law in an amount not to exceed five thousand dollars (\$5,000) for each day, or a portion of a day, that a defendant has acted in violation of subsection (b) . . .”).

<sup>173</sup> *See, e.g.*, MONT. CODE ANN. § 81-30-104 (permitting recovery of triple the consequential damages).

<sup>174</sup> *See* VandenOever, *supra* note 166, at 185–86 (noting states where courts have struck down ag-gag laws as unconstitutional); Regenstreif, *supra* note 171, at 259–66 (detailing laws passed and those overturned as unconstitutional as of the date of the article). Note that the Utah law reported as overturned by the District Court was reinstated in part by the Eighth Circuit. *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781, 783 (8th Cir. 2021). For examples of courts coming to different conclusions regarding constitutionality, *compare* *People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed’n, Inc.*, 60 F.4th 815, 838 (4th Cir. 2023) (striking down North Carolina’s ag-gag law as unconstitutionally targeting speech on the basis of viewpoint), *with* *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781, 788–89 (8th Cir. 2021) (upholding the provision that imposes criminal penalty for lying to enter agricultural facility). In *Reynolds*, the court applied language from the Supreme Court’s opinion in *United States v. Alvarez*, 567 U.S. 709 (2012), that reasoned penalizing intentionally false speech designed to accomplish a cognizable wrong (in this case trespass) does not violate the constitution, but penalizing lying to obtain employment in an agricultural facility would violate the U.S. Constitution because the lie is not the direct cause of a cognizable harm. 8 F.4th at 787.



false, the plaintiffs could not seek damages that were caused by publication.<sup>175</sup> Publication of truthful information will virtually always be protected by the Constitution, even in the face of state laws that purport to make such publication unlawful.<sup>176</sup>

For example, in *Cox Broadcasting*, when the press disclosed the name of an underage rape victim—information the radio station obtained legally—the victim’s father sued, invoking the common law privacy tort and a well-intentioned statute that prohibited publication of the name of an underage rape victim. The Supreme Court held that the statute and the common law privacy action relied upon by the father were unconstitutional if used to penalize the publication of truthful information contained in an official record and lawfully obtained.<sup>177</sup> In subsequent cases involving information obtained in a variety of ways, the Court has consistently held that accurate publication of truthful information regarding a matter of public interest that was legally obtained by the publisher could not give rise to either civil damages or criminal penalty.<sup>178</sup> This would seem to undercut ag-gag laws that purport to prohibit the publication of accurate information—at least as long as the publisher engaged in no wrongdoing to obtain the information.<sup>179</sup>

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<sup>175</sup> *Food Lion III*, 194 F.3d 505, 511 (4th Cir. 1999).

<sup>176</sup> *See, e.g.*, *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 470 (1975) (explaining that the First Amendment bars state from sanctioning truthful publication of rape victim’s name when information is legally obtained); *see also* *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 97 (1979) (holding that statute prohibiting publication of truthful, lawfully obtained information identifying alleged juvenile offender violated First Amendment); *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 829 (1978) (concluding that criminal punishment of news media for publishing truthful, lawfully obtained information regarding confidential proceedings of judicial inquiry violated First Amendment); *Okla. Publ’g Co. v. Dist. Ct.*, 430 U.S. 308, 311–12 (1977) (holding that truthful publication of name of minor involved in criminal proceeding, legally obtained, was protected by First Amendment); *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (concluding that truthful publication of information legally obtained by the press, even if originally obtained illegally, is constitutionally protected against sanction or penalty).

<sup>177</sup> *Cox Broad. Corp.*, 420 U.S. at 470.

<sup>178</sup> *See supra* notes 149–52 and accompanying text. In each case, the Court noted that it was not saying publication of truthful information, legally obtained, could never be penalized, but in each case the Court held the prohibition or penalty unconstitutional.

<sup>179</sup> In *Bartnicki v. Vopper*, the information in question was obtained in violation of the Federal Wiretap Act by individuals who then passed it along to the broadcaster. 532 U.S. at 535. The Court found no evidence that the broadcaster was involved in any wrongdoing, and so found the publication of the purloined tapes fell into the *Cox* line of cases and was protected by the First Amendment. *Id.*

But of course, that raises the question of whether reporters who engaged in fraud by misrepresenting their credentials or their intentions to gain entry fall outside the protection of the *Cox* rule. This brings us back to the *Food Lion* court's fraud and trespass analysis.

In *Food Lion*, the court found that while the reporters did engage in fraud to induce Food Lion to employ them, that misrepresentation did not cause damage to Food Lion. That is, while the reporters did misrepresent their intentions and their qualifications, they did their jobs for as long as they worked there, and Food Lion could not reasonably rely on their intention to stay for any length of time. In short, any reliance that might cause damages (administrative or training) was not reasonable, so it did not satisfy that element of the misrepresentation tort itself.<sup>180</sup> And the court found that the misrepresentation engaged in to gain entry to the back rooms where the alleged misconduct was occurring did not vitiate Food Lion's consent to let them enter. However, the court then found that while the initial consent was valid, when the reporters engaged in behavior that breached the duty of loyalty (exposing negative information), the reporters exceeded or abused the consent they had obtained to enter and so could be found to have trespassed. Although the jury (which had no problem imposing significant damages, including that staggering punitive damages award) found the actual monetary loss from these two claims were nominal, the two causes of action—breach of loyalty and trespass—survived.<sup>181</sup>

Here, the court's analysis is instructive. The court in *Food Lion* endorsed the reasoning in *Desnick* regarding the contours of fraudulently obtained consent to enter and trespass.<sup>182</sup> By itself, gaining consent to entry by lying or misrepresenting one's purpose or qualifications does not necessarily vitiate consent, especially if the area accessed is not totally private. In this, the court contrasted the *Dietemann* case, where entry was into a home—the plaintiff's living room.<sup>183</sup> But the court reasoned that the individual's actions *after* entering could exceed or abuse the consent granted.<sup>184</sup> Thus, in *Food Lion*, the court allowed the trespass cause of action, reasoning that

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<sup>180</sup> *Food Lion III*, 194 F.3d 505, 511–13 (1999).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 517–19. See *supra* notes 127, 139 and accompanying text.

<sup>183</sup> *Food Lion III*, 194 F.3d at 517–19. In *Dietemann*, reporters misrepresented their intentions to gain entry to the plaintiff's home and secretly filmed him there. *Dietemann v. Time, Inc.*, 449 F.2d 245, 246 (9th Cir. 1971).

<sup>184</sup> *Food Lion III*, 194 F.3d at 518–19. See *supra* notes 118–23 and accompanying text.

while consent covered the initial entry into the nonpublic areas, the reporters' actions in secretly taping for the purpose of exposing wrongdoing exceeded or abused that consent and so supported a trespass claim.<sup>185</sup> Would the jury's award of only nominal damages have been different if they had considered the trespass by virtue of abuse of consent because of the reporters' actions in breach of loyalty?

How does this impact ag-gag laws? It would seem that by statutorily defining access by fraud as wrongful the laws overcome the reasoning that consent to enter fraudulently obtained is not in and of itself wrongful. Does it follow, then, that if it is the reporters—the publishers—who gained entry by fraud, publication by them of even truthful information, now arguably defined as wrongfully obtained, can be penalized under the *Cox* line of cases? Or does the information's truthfulness protect its publication? Does the *Food Lion* court's finding that exposing information the property owner wishes to keep secret (even if truthful) exceeds consent and so transforms the initial non-trespass into a trespass support the approach taken in the ag-gag laws? The resolution of these questions will affect the viability of ag-gag laws as a way to prevent undercover investigations.

Several courts have considered the constitutionality of ag-gag statutes and come to differing answers regarding their constitutionality. And while this Article does not propose a constitutional privilege for undercover reporting, the force of ag-gag laws must be taken into account. If they are by their very design unconstitutional, that blunts their force as a legal impediment to undercover reporting. If they are not, then, while a privilege might protect undercover reporting, it is highly unlikely that a jurisdiction with an ag-gag law would also adopt a privilege for undercover reporting.

In *Animal Legal Defense Fund v. Kelly*, the court considered the Kansas ag-gag law, which was one of the earliest adopted.<sup>186</sup> That statute criminalized engaging in certain undercover investigative activities on agricultural facilities “with the intent to damage the enterprise” and “without effective consent of the owner.”<sup>187</sup> It included language aimed at the trespass/consent issue, defining ineffective consent as “[i]nduced by force, fraud, deception, duress or threat.”<sup>188</sup>

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<sup>185</sup> *Food Lion III*, 194 F.3d at 518–19.

<sup>186</sup> *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1219 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 2647 (2022).

<sup>187</sup> KAN. STAT. ANN. § 47-1827.

<sup>188</sup> *Id.* § 47-1826(e)(1).

The Tenth Circuit Court of Appeals found that recording and photographing animals and conditions was protected by the First Amendment as “creation of speech” and not mere conduct.<sup>189</sup> The court then determined that by virtue of the “with intent to damage the enterprise” language, the Kansas statute was content-based and discriminated on the basis of viewpoint.<sup>190</sup> The court then moved on to consider the constitutional protection offered false speech—here, the statute’s reference to misrepresentation used to gain consent to enter the agricultural facility, and how the Supreme Court’s decision in *United States v. Alvarez* affected its analysis of this provision.<sup>191</sup> In *Alvarez*, a hopelessly fractured decision, the plurality of the Supreme Court held that false speech does not necessarily fall completely outside constitutional protection.<sup>192</sup> However, the plurality and concurring opinion agreed that when false speech also causes some otherwise cognizable harm, it could lose its constitutional protection.<sup>193</sup>

Having determined that falsity alone did not cause the speech (the misrepresentation made to gain access to an agricultural facility) to lose its constitutional protection, the Court of Appeals then determined that the statute penalized protected speech based on its content and, specifically, its viewpoint.<sup>194</sup> That is, only false speech that is designed to gain access to agricultural facilities and only speech that negatively affects the enterprise were punished.<sup>195</sup> The Tenth Circuit Court of Appeals thus struck down the statute.

Not all courts faced with challenges to these statutes agree. The split typically involves how the courts come out on the two questions addressed by *Kelly*: is trespass accomplished by misrepresentation a legally cognizable harm that takes the false speech out of constitutional protection under *Alvarez*? And does the statute’s focus on agricultural enterprises and, specifically, its focus on harm to agricultural enterprises, constitute unconstitutional content-based governmental viewpoint discrimination?<sup>196</sup> As noted, the Tenth Circuit in *Kelly*

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<sup>189</sup> *Kelly*, 9 F.4th at 1228.

<sup>190</sup> *Id.* at 1224.

<sup>191</sup> *Id.* at 1231.

<sup>192</sup> *United States v. Alvarez*, 567 U.S. 709, 709 (2012).

<sup>193</sup> *Id.* at 719, 734–36.

<sup>194</sup> *Kelly*, 9 F.4th at 1235.

<sup>195</sup> *Id.*

<sup>196</sup> Kelly Shanahan, *Taking Down the Eighth Circuit Monolith: Big-Ag & Ag-Gag*, 101 NEB. L. REV. 317, 322–24 (2022) (identifying the primary points of departure of the circuit courts of appeals considering ag-gag statutes).

answered no to the first question and yes to the second in striking Kansas's ag-gag law. The Ninth Circuit, on the other hand, upheld significant portions of Idaho's ag-gag law—provisions that mirror those the Tenth Circuit struck down.

In *Animal Legal Def. Fund v. Wasden*, the Ninth Circuit upheld much of Idaho's ag-gag law.<sup>197</sup> The court did strike down two provisions of the Idaho statute. The first criminalized misrepresentations designed to gain access to a facility.<sup>198</sup> Applying the *Alvarez* analysis, the court found that the First Amendment protected false speech that does not cause a cognizable legal harm—that is, the mere entry onto the property by misrepresentation was not enough.<sup>199</sup> Having found that misrepresentation to gain entry is protected speech, the court concluded that the state's justifications did not clear constitutional strict scrutiny.<sup>200</sup> The second provision prohibited entering an agricultural facility and making a recording of activities without the owner's consent. The court found, as others have, that the First Amendment protects creating speech as well as expressing it and that the state's reasoning for restricting this speech was insufficient to clear the strict scrutiny constitutional standard.<sup>201</sup> But the court went on to uphold the remaining provisions that significantly restrict undercover investigations. With respect to the provision penalizing using false statements to obtain records without the owner's consent, the court found that this constituted the type of cognizable legal harm *Alvarez* contemplated, and so was constitutional.<sup>202</sup> Similarly, with respect to the provision criminalizing misrepresentation to obtain employment with intent to harm the enterprise, the court found it, too, threaded the *Alvarez* needle in that the "intent to harm" constituted the requisite additional cognizable legal harm to remove this false speech from First Amendment protection.<sup>203</sup> Note that other courts have found the "intent to harm" language signaled that the prohibition amounted to viewpoint discrimination—which this

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<sup>197</sup> *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1184 (9th Cir. 2018).

<sup>198</sup> *Id.* at 1193.

<sup>199</sup> *Id.* at 1194–95.

<sup>200</sup> *Id.* at 1199. The court carved out only that portion criminalizing actions accomplished by misrepresentation, leaving the remainder of the section intact. *Id.* (offending term "misrepresentation" should be stricken, leaving intact remainder of subsection criminalizing access by force or threat).

<sup>201</sup> *Id.* at 1203–05.

<sup>202</sup> *Id.* at 1199–2000. The court also found no equal protection violation. *Id.*

<sup>203</sup> *Id.* at 1201.

court did not find.<sup>204</sup> Related, the court found that a provision allowing for restitution of “economic harm” suffered as a result of the misrepresentation did not unconstitutionally punish speech. To get there, the court read the language as excluding reputational harm itself but apparently not the consequential economic injuries.<sup>205</sup> Recall in *Food Lion* the most significant damages suffered—specifically the lost sales and plummet in stock prices that the court found were caused by reputational harm—were legally excluded because they resulted from truthful publication. Under the court’s analysis in *Wasden*, these apparently would be recoverable, although it is hard to imagine how this would pass constitutional muster.

In short, then, ag-gag laws have been challenged, and when they are, they often are struck down in whole or in part on First Amendment grounds. But some do survive, in whole or in part, others have not been challenged, and new ag-gag laws continue to be passed.<sup>206</sup> Thus the threat posed by these laws is real. But more important to this discussion, the analysis used by courts both upholding and striking down the statutes illuminates how courts might handle legal claims brought against the actions of undercover reporters under common law tort causes of action. Further, the survival of ag-gag statutes invites efforts to pass similar statutory protection for favored entities.

### C. *The Risks*

In the end, then, in addition to potential targeted laws like ag-gag laws, several theories emerge for penalizing undercover reporters who gain access to places and people by deceit to uncover important information: trespass to land, breach of loyalty and confidentiality, invasion of privacy (intrusion upon seclusion or public disclosure of private facts), and possibly fraud if the injured party can prove damages were proximately caused by reliance on the deceit.<sup>207</sup> Breach of loyalty presumably would apply only in the context of investigators obtaining employment by deceit, since the duty of loyalty arises from the

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<sup>204</sup> See, e.g., *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1224 (2021) (holding that Kansas ag-gag law’s specification of “intent to damage” constituted content-based, viewpoint discrimination and so was unconstitutional).

<sup>205</sup> *Wasden*, 878 F.3d at 1202. Again, the court found no equal protection violation in this provision. *Id.*

<sup>206</sup> For a summary of how courts have handled constitutional challenges to ag-gag laws, see Shanahan, *supra* note 196, at 322–25.

<sup>207</sup> This cause of action would also presumably require an otherwise legally cognizable harm flowing from the deceit under the *Alvarez* analysis. See *supra* text accompanying notes 151–55, 157–58.

employment relationship.<sup>208</sup> Invasion of privacy may apply only to situations involving the home or particularly sensitive information,<sup>209</sup> and the disclosure tort may not survive at all if the information obtained is truthful and a matter of public importance.<sup>210</sup> But again, the threats are real.

As noted, while some accounts of undercover reporting glorify the pluck and courage of the reporters, especially the early undercover reporters like Nellie Bly, modern undercover reporters don't seem to enjoy that same reverence. Perhaps this is because the world has become more cynical; perhaps it is because of the evolution of abusive practices designed more for ratings and shock value, such as the *To Catch a Predator* series, that dominate what the public sees as undercover reporting; and perhaps it is because the public's respect for journalism generally has fallen.<sup>211</sup> Part of what seems so shocking about the *Food Lion* verdict is how angry the jury seemed to be—awarding \$5 million in punitive damages in a case where the reporters did uncover serious misconduct that threatened the health and safety of the very communities the jurors were pulled from.<sup>212</sup> And they did so in a case that did not involve what might be viewed as outrageous intrusion (such as lying one's way into the private home of a pitiful man who did not seek out attention).<sup>213</sup> Instead, the reporters merely gained access to areas open to virtually all company employees, just not the general public, where they uncovered dangerous and distasteful practices that otherwise might not ever be exposed.<sup>214</sup> Does this

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<sup>208</sup> See, e.g., *Food Lion III*, 194 F.3d 505, 505 (1999); *supra* text accompanying notes 115–17.

<sup>209</sup> Compare *Dietemann v. Time, Inc.*, 449 F.2d 245, 246 (9th Cir. 1971) (reporters fraudulently obtained entry to a private party's home), with *Desnick v. ABC*, 44 F.3d 1345, 1347 (7th Cir. 1995) (reporters fraudulently obtained access to commercial business office).

<sup>210</sup> See, e.g., *Med. Lab'y Mgmt. Consultants v. ABC*, 306 F.3d 806, 819 (9th Cir. 2002) (explaining that intrusion on privacy to obtain information in the public interest may mitigate the offensiveness of the intrusion); *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 478 (Cal. 1998), *as modified on denial of reh'g* (July 29, 1998) (noting that the court must consider accommodating conflicting interests in privacy and first amendment protections where invasion of privacy involves a matter of public interest).

<sup>211</sup> See, e.g., Michael Schudson, *The Fall, Rise, and Fall of Media Trust*, COLUM. JOURNALISM REV. (Winter 2019), [https://www.cjr.org/special\\_report/the-fall-rise-and-fall-of-media-trust.php](https://www.cjr.org/special_report/the-fall-rise-and-fall-of-media-trust.php) [<https://perma.cc/N9Y4-PNMA>]; Megan Brennan, *Americans Remain Distrustful of Mass Media*, GALLUP NEWS (Sept. 30, 2020), <https://news.gallup.com/poll/321116/americans-remain-distrustful-mass-media.aspx> [<https://perma.cc/SWF5-NHB9>].

<sup>212</sup> *Food Lion III*, 194 F.3d at 524; see *supra* note 125 and accompanying text.

<sup>213</sup> *Dietemann v. Time, Inc.*, 449 F.2d 245, 245 (9th Cir. 1971).

<sup>214</sup> *Food Lion III*, 194 F.3d at 505; see *supra* note 160 and accompanying text.

matter? Should reporters, as some argue, never engage in deceit to get a story? Famed *Washington Post* Executive Editor Ben Bradlee said, “I don’t think reporters should misrepresent themselves. Period.”<sup>215</sup> Or are there some stories that are so important, and so unlikely to be uncovered without deception, that a narrow privilege should be provided? Roy Shapira argues powerfully for supporting the press and investigative reporting, noting that media scrutiny can have a crucial impact: “[W]hen done effectively . . . it reduces the costs to citizens of collecting information, processing information, and acting upon information,” and in doing so, limits the ability of powerful entities to act undercover and engage in wrongdoing without backlash or accountability.<sup>216</sup> Shapira notes, as well, that the public gets the better end of the deal: “While the costs of accountability journalism are borne by the journalist and her media outlet, the benefits spill over to society, including to individuals who do not read the paper.”<sup>217</sup> Do these benefits warrant some privilege? I take the position that they do.

#### IV

#### CRAFTING A PRIVILEGE

*Tort law seeks to deter bad journalism by forcing it to pay compensation, whereas privilege seeks to promote good journalism by according it special protection.*<sup>218</sup>

While there may be an argument for crafting a constitutional privilege to protect undercover investigations, specifically for the institutional press, I do not take that approach. Even though the Constitution (a document not known for unnecessary redundancy) protects speech in two separate clauses—one singling out freedom of the press expressly: “Congress shall make no law . . . abridging the freedom of speech, *or of the press*”<sup>219</sup>—the Supreme Court has

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<sup>215</sup> Susan Paterno, *The Lying Game*, AM. JOURNALISM REV. (May 1997), <https://ajrarchive.org/Article.asp?id=598> [<https://perma.cc/5LER-2MUX>]. Paterno notes, “Because nearly all journalists agree lying weakens credibility, most executives at mainstream news organizations say they allow reporters to use deceit only rarely.” *Id.*; see also Logan, *supra* note 4, at 151 (“Lying to get a story has always been a subject of controversy among both among journalists and the public.”).

<sup>216</sup> Shapira, *supra* note 21, at 163.

<sup>217</sup> *Id.* at 164.

<sup>218</sup> Susan M. Gilles, *The Image of “Good Journalism” in Privilege, Tort Law, and Constitutional Law*, 32 OHIO N.U. L. REV. 485, 492 (2006) (citations omitted).

<sup>219</sup> U.S. CONST. amend. I (emphasis added).



consistently resisted creating separate protection for the press.<sup>220</sup> Advocating for special constitutional protections for the press, especially in this climate, seems a fool's errand.<sup>221</sup> James Albert has it right when he argues that we must analyze "newsgathering tort cases through the lens of tort law rather than constitutional law."<sup>222</sup> Therefore, I propose a common law or statutorily created privilege.

A good number of legal scholars have proposed a variety of ways to protect undercover journalists from legal consequences for what would otherwise be tortious or even criminal conduct.<sup>223</sup> Here I draw on two well-conceived and quite similar proposals for privileges and add a scaffolding drawn from a journalistic perspective. Specifically, I add a framework that further defines the contours of the privilege by applying the highest aspirations of journalism as expressed by Bill Kovach and Tom Rosenstiel in their book *The Elements of Journalism*,<sup>224</sup> and as articulated in the Society of Professional Journalist's Code of Ethics.<sup>225</sup>

Ben Depoorter proposes a privilege analogous to fair use in copyright law.<sup>226</sup> Noting that courts enforce the trespass cause of action

<sup>220</sup> See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (reporter liable in tort for breaching promise of confidentiality); *Branzburg v. Hayes*, 408 U.S. 665, 690–91 (1972) (reporter not immune from grand jury subpoena); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576–79 (1977) (publisher subject to copyright laws); *Associated Press v. NLRB*, 301 U.S. 103, 132–33 (1937) (publisher subject to labor laws).

<sup>221</sup> By way of example, at least two current Supreme Court Justices have called for reconsideration of *New York Times v. Sullivan*. See *Berisha v. Lawson*, 141 S. Ct. 2424, 2426–27 (2021) (Gorsuch, J., dissenting) (suggesting that the Court should reconsider *Sullivan*); *McKee v. Cosby*, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring) (stating that *Sullivan* was policy-driven rather than stemming from constitutional law and suggesting reconsideration).

<sup>222</sup> James A. Albert, *The Liability of the Press for Trespass and Invasion of Privacy in Gathering the News—A Call for the Recognition of a Newsgathering Tort Privilege*, 45 N.Y. L. SCH. L. REV. 331, 387 (2001).

<sup>223</sup> Anthony L. Fargo & Laurence B. Alexander, *Testing the Boundaries of the First Amendment Press Clause: A Proposal for Protecting the Media from Newsgathering Torts*, 32 HARV. J.L. & PUB. POL'Y 1093, 1136–45 (2009) (surveying a variety of suggestions for protecting the press and proposing a privilege based on protection given to "testers" who investigate matters, such as housing discrimination).

<sup>224</sup> ROSENSTIEL & KOVACH, *supra* note 14, at xxvii. Kovach and Rosenstiel set out ten "elements" or values that form the scaffolding for their in-depth discussion of what journalism must aspire to. *Id.*

<sup>225</sup> SOC'Y OF PRO. JOURNALISTS, *supra* note 58. The SPJ describes the Code of Ethics as "a statement of abiding principles" and "not a set of rules" designed as a guide that "encourages all who engage in journalism to take responsibility for the information they provide." *Id.* They note that, under the Constitution, the principles cannot be legally enforced. *Id.*

<sup>226</sup> Depoorter, *supra* note 164, at 1093–94.

as a strict liability tort that protects the right to exclude quite absolutely, Depoorter argues that this absolutist approach values the right to exclude too heavily, given the interest it protects, and values most other interests too lightly or not at all.<sup>227</sup> It prevents any opportunity to weigh “the benefits of the trespass against the likely costs to the owner of the land.”<sup>228</sup> He gets this right.

His fair use privilege poses four questions. The first considers the nature and societal value of the trespass and whether some social benefit accrues from the incursion. Only if the answer to this question is “yes” would the analysis proceed to the next three considerations: (2) the nature of the protected property, (3) the amount and substantiality of the trespass, and (4) the impact of the trespass on the owner’s property interest, made by weighing each consideration and its relative importance in the same way a court would in a fair use analysis.<sup>229</sup> This framework sets up well in the context of undercover reporting. While Depoorter focuses primarily on trespass, his analysis applies to the other causes of action undercover reporters might face, specifically invasion of privacy, fraud, and breach of loyalty. While these other torts do not enjoy the absolutist approach that Depoorter identifies in trespass, and already involve some balancing, the four-step approach he advocates works well in considering the applicability of a privilege regarding these other causes of action.

James Albert proposes a privilege based on a public interest foundation for undercover journalism.<sup>230</sup> Important here, his analysis expands the focus from Depoorter’s concentration on trespass to the other torts as well. Albert notes that, historically, privileges have existed to protect tortfeasors who have “acted to further an interest of such societal importance that it is entitled to protection, even at the expense of damage to the plaintiff.”<sup>231</sup> Over the course of the article, he describes a series of public-interest based privileges, including not

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<sup>227</sup> *Id.* at 1100.

<sup>228</sup> *Id.* at 1097. He notes that traditional trespass provides very limited exceptions to the absolutist approach in the form of the private necessity defense. *Id.* at 1100. In what is typically referred to as an imperfect defense, the necessity doctrine will generally require the trespasser to pay for any actual damage done to the property but imposes no damages for the actual entry—the breaking of the close. *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 222 (Minn. 1910) (vessel owner permitted to tie vessel to dock to preserve property, and while no damages for the mere incursion, vessel owner must compensate dock owner for damage to the dock).

<sup>229</sup> Depoorter, *supra* note 164, at 1094.

<sup>230</sup> Albert, *supra* note 222, at 387.

<sup>231</sup> *Id.* at 356 (citing W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 16, at 109 (5th ed. 1984)).

only those that would affect property rights but also those that affect reputational interests.<sup>232</sup> He concludes that the law should apply the existing structure of tort privileges based on public interest and protection of health and safety to protect journalists engaged in undercover reporting, defining the public interest by examining “current ideas on what will most effectively promote the general welfare.”<sup>233</sup> His public interest approach dovetails with Depoorter’s and provides content for Depoorter’s first question. The privilege he proposes works well to balance the interests the tort causes of action purport to protect against the importance to society of obtaining information.

### A. *The Journalistic Scaffolding*

As noted above, journalism itself has a fraught relationship with undercover reporters who engage in deceit or other wrongful conduct to get the story.<sup>234</sup> And as *Washington Post* reporters Dana Priest and Anne Hull demonstrated with their stunning exposé of abuses at Walter Reed Medical Center, it is sometimes possible to uncover information even from as seemingly impenetrable a source as the U.S. military.<sup>235</sup> While the *Post* takes a “never, never, never lie” approach to investigative reporting,<sup>236</sup> others take a less extreme position.

For example, Kovach and Rosenstiel, authors of *The Elements of Journalism*, a book virtually every journalism student has on their bookshelf, limit use of deceit (which they call “masquerade”) to situations where it is truly necessary. This approach applies several of Kovach and Rosenstiel’s key principles of good journalism. Journalism’s purpose, they posit, “is to provide people with the information they need to be free and self-governing.”<sup>237</sup> They then set out ten principles necessary to fulfill that task. Most relevant here are the following: (1) journalism’s first obligation is to the truth and (2) journalism’s essence is a discipline of verification. Related to these are what they call “the spirit of transparency.”<sup>238</sup> The spirit of

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<sup>232</sup> *Id.* at 353–87.

<sup>233</sup> *Id.* at 356 (citing W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 16, at 109 (5th ed. 1984)).

<sup>234</sup> *See supra* notes 16, 18 and accompanying text.

<sup>235</sup> *See supra* notes 45–56 and accompanying text.

<sup>236</sup> *See supra* note 16 and accompanying text.

<sup>237</sup> ROSENSTIEL & KOVACH, *supra* note 14, at xxvii.

<sup>238</sup> *Id.* at 123–29.

transparency requires journalists to come clean with their audience with respect to things like the reliability of their sources, and relevant to this discussion, whether they engaged in deceit in obtaining their information.<sup>239</sup> Related, transparency requires candor toward sources. With this as background, and with respect to the question of when a journalist may engage in deceit or masquerading, Kovach and Rosenstiel give three rules:

1. The information must be sufficiently vital to the public interest to justify deception.
2. There is no other way to get the story.
3. Journalists should reveal to their audiences whenever they mislead sources to get information and should explain their reasons for doing so and why this was the only way to get the facts.<sup>240</sup>

The Society of Professional Journalists (SPJ) Code of Ethics takes a similar position. Among its four guiding principles, the SPJ states that journalists “[m]ust seek truth and report it,” must “minimize harm,” and must be “accountable and transparent.”<sup>241</sup> Applying these principles, the SPJ cautions journalists to “[a]void undercover or other surreptitious methods of gathering information unless traditional, open methods will not yield information vital to the public.”<sup>242</sup> It adds under the accountability and transparency principle that journalists should “explain ethical choices and processes to audiences.”<sup>243</sup>

Applying the imperatives of transparency, accountability, and avoiding harm, one additional rule emerges: once the reporter has obtained the necessary information, the reporter must come clean with the target and provide the opportunity for response. Criticism of some higher-profile undercover investigations that relied on deceit often focused on the fact that the reporters published without giving the targets of the investigation an opportunity to respond. That is, having uncovered alleged wrongdoing or other negative information, these reporters did not give the subjects a chance to explain or counter their findings.<sup>244</sup> Reporting without fully disclosing the deceit and without

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<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 130.

<sup>241</sup> SOC’Y OF PRO. JOURNALISTS, *supra* note 58.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *See* Marx, *supra* note 14.

inviting a responsible response not only seems unfair but also renders the story incomplete—missing essential information.

Against this background, the contours of a privilege emerge. But first, I draw on Kovach and Rosenstiel’s wisdom and do not suggest that the privilege applies to any defined person or institution. Rather than being swept into the vortex of defining who is a reporter, or what entity is the press, I suggest that the privilege apply to those engaged in journalism as an activity, and that activity is defined by its purpose—to provide us with “the information [we] need to be free and self-governing”<sup>245</sup>—and by its adherence to the principles Kovach and Rosenstiel explain.<sup>246</sup> As providing information becomes increasingly frictionless, the identity of those who might provide the information we need—those who “sort through what government officials, important private persons, [and] witnesses, and other news sources say . . . people who are . . . committed to learning the truth of significant events and to reporting them accurately”<sup>247</sup>—has expanded, and the privilege should apply, but only when they adhere to the core principles of journalism.

### *B. The Privilege*

Against this background, the privilege would look like this (and here I only outline its key components and do not purport to draft it as a statute).

The privilege would protect one engaged in undercover investigative reporting designed to uncover important information of significant public interest to shield the actor from tort liability and from minor criminal liability—the key, again, is defining not the person as journalist, but the activity as journalism. It would apply only to investigations designed to uncover information that is important to disclose for reasons of public safety, health, or other public interest, including self-governance or the prevention of significant financial loss (private or public). The privilege would apply only to efforts to uncover this information for the purpose of reporting it to the public and not for personal or private reasons. To invoke the privilege, the investigator must demonstrate not only the importance of the information to the public interest but also that there is no other feasible way to obtain the

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<sup>245</sup> ROSENSTIEL & KOVACH, *supra* note 14, at 7.

<sup>246</sup> *Id.* at xxv. “[T]he question has never been who is or isn’t a journalist. It is whether the work produced lives up to the character of what we would call journalism.” *Id.* at 8.

<sup>247</sup> Michael Davis, *Why Journalism Is a Profession*, in JOURNALISM ETHICS: A PHILOSOPHICAL APPROACH 101 (Christopher Meyers ed., 2010).

information. In addition, the undercover reporter must weigh the potential harm or damage (for example, the seriousness of the trespass, or the potential harm of deception, or the impact of invading privacy) against the importance of the information in light of the assessment that there is no other feasible way to obtain the information. To invoke the privilege, the reporter must show that they disclosed their actions and their discoveries to the target at the appropriate time, that they gave the target the opportunity to respond, and that they have or will include responsible responses in their report. Further, the investigator must fully disclose to the audience the nature of the deception involved in obtaining the information. The investigator must take all reasonable steps to minimize potential harm, especially avoiding causing even minimal unnecessary harm. This would include, for example, harm to property, invasion of privacy interests, and harm to protected trade or commercial interests.

The privilege as outlined here should work well to facilitate important undercover investigations while weeding out those that play on sensationalism and do not expose information truly essential to the public interest. Contrast, by way of example, the Food Lion investigation, which uncovered unhealthy practices, with *To Catch a Predator*, which uncovered a string of individuals arguably lured into engaging in online predatory behavior—repeated instances of the same sort of conduct that by virtue of the repetition did not uncover any new or otherwise unknown information and did little to combat the larger issues.

As a matter of best practices, and as a check on what might be perceived as the possibility of self-serving bias in making some of the determinations involved in invoking the privilege (for example, in determining whether deception or other potentially tortious activity is justified because there is no other feasible option to access the information, or to determine the legitimacy of the public interest), the investigative reporter might employ what is colloquially called a “red team” exercise. The term “red team” applies to a variety of decision-making practices. The Army describes it as “a function executed by trained, educated, and practiced team members that provides commanders an independent capability to fully explore alternatives in plans, operations, [and] concepts.”<sup>248</sup> Applied here, it would involve bringing in a team with qualifications (that is, individuals familiar with

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<sup>248</sup> DAVID F. LONGBINE, U.S. DEP’T OF DEF., ADA485514, RED TEAMING: PAST AND PRESENT 7 (2008), <https://apps.dtic.mil/sti/citations/ADA485514> [<https://perma.cc/AAN2-RWEQ>].

investigative reporting) but with no knowledge of the investigation in question. The investigator seeking to use deception or other tortious techniques to go undercover would make the case to the team. To be clear, I contemplate the red team would be affiliated with the news organization or entity itself. Given the nature of important undercover investigations, keeping it in-house is crucial.

Finally, for the privilege to work, its applicability to shield the undercover investigation from liability must be determined easily and early—for example, at preliminary stages of any litigation. As is true in defamation suits, the litigation costs—even if the defendant prevails—can be ruinous. Thus, the privilege should be available to be litigated in pretrial proceedings.

#### CONCLUSION

Can the press do its job “without resort to the commission of run-of-the-mill torts”?<sup>249</sup> Perhaps, at least in many cases. But when powerful players engage in wrongdoing that has serious implications for the health, safety, and well-being of the public, they are unlikely to come forward voluntarily when asked about their conduct. There will be times when it is necessary to engage in deception or other minimally harmful tortious conduct to get at important truths. One might argue that suits against reporters engaged in undercover reporting for tortious conduct are unusual.<sup>250</sup> Probably true. But the potential threat of tort liability or criminal prosecution can have a chilling effect on the willingness of the press to risk undercover investigations that rely on deceit or other similar tactics, especially given the increasingly fragile economic circumstances of most media outlets.<sup>251</sup> The risks are hard to predict, and the threat might counsel caution where bravery is

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<sup>249</sup> See Fargo & Alexander, *supra* note 223, at 1111 (citing *Food Lion III*, 194 F.3d 505, 521 (1999)).

<sup>250</sup> *Id.* at 1133 (noting authors who suggest only a “trickle” of cases). Fargo and Alexander suggest a privilege similar to the leeway given to testers who uncover housing and other discrimination, usually for government agencies. *Id.*

<sup>251</sup> Depoorter, *supra* note 164, at 1092–2011 (using example of student reporter taking job as server to investigate food poisoning incidents exposing himself and newspaper to trespass claim); Goodman, *supra* note 125 (describing unease among journalists because they “can be sued for engaging in ‘sneakiness’” to get a story, and noting plaintiffs in *Food Lion* case had asked for upwards of \$1.9 billion); see also Acheson & Wohlschlegel, *supra* note 164, at 335 (applying economic analysis to the doctrine of chilling effect of potential tort liability in defamation law applicable by analogy to potential tort liability for deceit and trespass); Anderson, *supra* note 164, at 516 (concluding litigation costs cause greater chilling effect than potential judgments).

needed. As Walter Goodman argued, I do not call for unlimited protection “for promiscuous prying, [but rather] for some protection for reporters who have reasonable grounds for pursuing a significant story by extraordinary means.”<sup>252</sup> A carefully circumscribed privilege, such as the one described above, designed to provide appropriate protection for important undercover investigative reporting, while offering no protection for the deceptive practices engaged in only to sensationalize or chase ratings, represents a fair balancing of interests. We need investigative reporting. As Michael Davis said in describing why he calls journalism a profession,

What seems obvious to me is that I, and everyone I know, needs journalists, that is, professionals . . . to sort through what government officials, important private persons, witnesses, and other news sources say; people who are more committed to learning the truth of significant events and to reporting them accurately.<sup>253</sup>

And we need them to penetrate the walls put up by those who would engage in wrongdoing. These are the people we send into the cave in search of dragons.<sup>254</sup> We should protect that venture.

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<sup>252</sup> Goodman, *supra* note 125.

<sup>253</sup> Davis, *supra* note 247, at 101.

<sup>254</sup> See Hamill, *supra* note 1, at xi.