INVESTIGATIVE DECEPTION ACROSS SOCIAL CONTEXTS

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(from the Knight Institute's Lies, Free Speech, and the Law symposium[**])

This essay explores investigative deceptions—intentional lies used to gather information that is in the public interest—across different social contexts. In favored contexts, such as civil rights testing, union salting, and undercover law enforcement operations, such falsehoods are viewed as producing great social benefits. This is true even though they each involve persons who intentionally lie in material ways to gain lawful access to private property, where they would not otherwise be welcome if they did not lie, and engage in private conversations and make observations. Their lawfulness, however, is not thought of as a free speech question. But the same type of deceptions by investigative journalists and political activists have been met with hostility or, at best, begrudging acceptance. These undercover investigators are threatened with criminal and civil tort liability because they arguably implicate harms to privacy and property rights. First Amendment doctrine concerning the constitutionality of such restrictions

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is still evolving, and courts seem unsure how to evaluate free speech claims by investigators. This essay argues that over time, investigative deceptions have evolved into an important social practice for gathering and publication of information on matters of profound public concern. As such, they ought to be viewed in most circumstances as producing societal benefits that outweigh any putative harms in the same way that courts have embraced investigations in the favored contexts.

Introduction

People lie to gain access to private property in a surprising variety of contexts. Civil rights "testers" create fake identities and pose as potential buyers or renters to investigate race discrimination by real estate agents and landlords. Union activists secure jobs at nonunion workplaces so they can organize the company's workers. Law enforcement agents pose as drug dealers to gain access to a narcotics

warehouse. An investigative journalist infiltrates a white nationalist group so she can write a story about the group's philosophy and propensity for racially motivated violence. A private investigator working with a seniors' advocacy organization gets a job at a local nursing home to document elder abuse. In prior work, I have described these practices as "investigative deceptions," "intentional, affirmative misrepresentations or omissions about one's political or journalistic affiliations, educational backgrounds, or research, reportorial, or political motives to facilitate gaining access to truthful information on matters of substantial public concern."[1]

Each of these situations bears important similarities. First, they all involve the intentional and material misrepresentation of the speakers' true identities, motives, and actual employers or sponsors. Second, the lies are told with the intent of deceiving the target of the investigation and the goal of gaining entry to private spaces and proximity to people who would not consent to such access if they knew the truth. Third, the access achieved through these lies potentially implicates some common law rights. Fourth, all of these liars seek a benefit not for themselves personally but for a greater social good. The information they discover will be used to enforce laws, facilitate political association, inform public discourse, and advance legal and social reforms. And finally, the persons deceived in each case would strongly prefer that the information that comes to light from these investigations not be publicly disclosed. In a sense, all of these lies could be categorized as a form of fraud.

The similarities among these types of investigate deceptions do not, however, carry over to the way that the law, ethics, and perhaps society view them. Civil rights testers, undercover police officers, and union salts are all widely accepted, legally permissible forms of investigative deception. However, much of the journalism profession disputes the ethics of undercover news investigations, and tort claims have been brought against news outlets and reporters for conducting such investigations. The legality of undercover investigations by advocacy groups has also been questioned. Some states have criminalized the investigative deceptions used by animal rights organizations, while others have enacted statutes creating new tort

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[1] Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1438 (2015).

claims against undercover investigators; although some courts have declared those laws to violate the First Amendment, the doctrine is still evolving.

This essay explores the different contexts in which investigative deceptions are employed and seeks to understand why the lawfulness and acceptability of these lies are so divergent. Why, for example, are some types of investigative lies both legally and ethically acceptable and other comparable lies condemned? Across all of these contexts, there is an implicit, or sometimes explicit, balancing of interests. Are the harms caused by investigative deceptions outweighed by the greater public good that they achieve? Balancing may inform that decision, but the larger question is whether American law, courts, and society understand investigative deceptions to be a desirable practice within our social order. In carrying out that balancing, we might unify our understanding of these investigations as a valuable social practice.[2]

Part I of this essay provides a descriptive account of investigative deceptions in five distinct contexts, while also surveying the legal (and sometimes ethical) infrastructure through which these deceptions are constructed, evaluated, and sometimes contested. Part II then seeks to explain that understanding the similarities in these investigative deceptions as desirable social practices helps inform the First Amendment doctrine as applied to government attempts to restrict or prohibit them.

I. THE CONTEXTS OF INVESTIGATIVE DECEPTIONS[3]

A. Contexts Where Investigative Deceptions Are Highly Valued

1. Civil rights testers

Civil rights testing is a long-standing practice used by fair housing groups and government investigators.[4] It is a common tactic for identifying racial steering,

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[2] *See* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1272 (1995).

[3] Undercover investigators also sometimes use hidden recording devices to document what they discover. I bracket legal issues concerning these recordings here because investigative deceptions can be assessed independently. For a comprehensive treatment of nonconsensual undercover recordings, see Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991 (2016).

[4] *See* FAIR HOUSING JUSTICE CENTER, GUIDE FOR FAIR HOUSING TESTERS 5–8 (2012), http://static1.squarespace.com/static/5277d8d3e4b057c7282d75d8/t/54f604e0e4b0eaa8361e4437/1425409248250/GuideForTesters-portfolio.pdf [https://perma.cc/HC83-QQ8Y]; *Fair Housing Testing Program*, U.S. DEP'T JUST. (Apr. 28, 2022), https://www.justice.gov/crt/fair-housing-testing-program-1 [https://perma.cc/KB5N-VJ4U].

when landlords and real estate agents direct members of protected groups away from rental or purchasing opportunities by denying that any properties are available. Racial steering violates the Fair Housing Act[5] but is extremely difficult to detect.[6] Typically, an investigating group will send paired testers, a white person or couple and a Black person or couple representing that they wish to buy or rent the same property. Paired testers are armed with false names, fictional addresses, fake employment and credit histories, and other misinformation so that, other than their race, they would objectively be viewed as comparable renters or home buyers.[7]

The investigative deception inherent in civil rights testing in the housing context has been so effective that it has now been extended to investigations of racial discrimination in public accommodations, employment, retail sales, and government services.[8] It is also used to identify violations of discrimination based on national origin, family status, disability, gender, sexual orientation, and transgender or gender-nonconforming status.[9]

The legal provenance of civil rights testing is not as straightforward. In the housing context, the Supreme Court recognized the lawfulness of civil rights testing in *Havens Realty Corp. v. Coleman*.[10] *Havens* interpreted the Fair Housing Act's provisions making it a civil rights violation to represent the unavailability of housing "to any person" on the basis of race and other protected categories, meaning that even those who are not sincere renters or homebuyers may sue under the law's

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[5] *See* 42 U.S.C. § 3604(d).

[6] Drew S. Days, III, *Vindicating Civil Rights in Changing Times*, 93 YALE L.J. 990, 992–93 (1984).

[7] *See* Merrick Rossein, 1 EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 12:6 (Thomson Reuters West 2016).

[8] Robert B. Duncan & Karl M.F. Lockhart, *The Washington Lawyers' Committee's Fifty-Year Battle for Racial Equality in Places of Public Accommodation*, 62 HOW. L.J. 73 (2018).

[9] *See Fair Housing Testing Program*, *supra* note 4 ("race, . . . national origin, . . . disability, and familial status"); Molovinsky v. Fair Emp. Council of Greater Wash., Inc., 683 A.2d 142 (D.C. 1996) (gender); EQUAL RIGHTS CENTER, BEHIND CLOSED DOORS: A TESTING INVESTIGATION INTO BIAS AGAINST LGBT JOB APPLICANTS IN VIRGINIA (2019) (sexual orientation); Jamie Langowski et al., *Transcending Prejudice: Gender Identity and Expression-Based Discrimination in the Metro Boston Rental Housing Market*, 29 YALE J.L. & FEMINISM 321 (2018) (transgender and gender-nonconforming people).

[10] 455 U.S. 363 (1982).

private right of action.[11] But no federal statute or regulation at that time affirmatively authorized the use of civil rights testers.[12] Current regulations place conditions on state and local fair housing enforcement agencies receiving federal financial support from the Fair Housing Assistance Program, such as requiring that testers receive training, that they not have prior convictions for honesty-related crimes, and that they have no financial interest in the case.[13] But, as with *Havens*, these regulations themselves assume the validity of using testers. At this point, the use of investigative deceptions to conduct civil rights testing across a number of different areas of law is virtually unquestioned.

2. Union salts

In the context of labor organizing, unions sometimes send employees or volunteer union activists to get jobs at nonunion workplaces with the specific purpose of organizing workers to form a union. These workers are known as "salts," and where they are successful, they undertake their organizing work while also performing the job for which the employer hired them.[14] Although sometimes salts act openly, the law permits salts to act in a covert fashion, which may involve falsifying their employment applications and omitting information from their work histories, including the fact that they also work for a union.[15] Like other undercover investigators, though their purpose is to organize workers, salts are obligated under law to perform their work duties and must obey valid work rules.[16]

Union salting is not directly authorized by either the National Labor Relations Act (NLRA) or any federal regulation. Rather, the practice of salting is believed to have originated with the International Workers of the World, which first used it to organize the lumber industry.[17] Unions have used salts to try to organize workers

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[11] *Id.* at 373–74.

[12] Federal regulatory provisions now confirm the Court's holdings in *Havens* about the scope of the violation, but even those do not affirmatively authorize testing or testers. *See* 24 C.F.R. § 100.80 (2016); 24 C.F.R. § 125.107 (2022).

[13] 24 C.F.R. § 115.311 (2022).

[14] James L. Fox, *"Salting" the Construction Industry*, 24 WM. MITCHELL L. REV. 681, 683–84 (1998).

[15] *Id.* at 684.

[16] *Id.*

[17] Herbert R. Northrup, *"Salting" the Contractors' Labor Force: Construction Unions Organizing with NLRB Assistance*, 14 J. LAB. RES. 469 (1993).

in workplaces that are hard to access and have an itinerant workforce, such as the construction industry and Starbucks franchises.[18]

Today, salting has been recognized as a lawful organizing tactic by the National Labor Relations Board (NLRB) and the Supreme Court. In *N.L.R.B. v. Town & Country Electric, Inc.*,[19] a nonunion employer refused to hire two applicants who were on the union's professional staff. When charged with an unfair labor practice for failing to interview employees because of their union membership, the employer argued that union members who sought jobs in order to organize the employer's workers were not "employees" protected by the act. A unanimous Supreme Court upheld the NLRB's ruling interpreting the NLRA's definition of employees to include salts.[20] While employers have lodged numerous objections and some members of Congress have proposed amendments to the NLRA to ban salting,[21] it remains an important union organizing practice, particularly important in an era when union membership is waning.

3. Undercover law enforcement officers

Like civil rights testers, federal, state, and local law enforcement agents sometimes go undercover to investigate violations of the law. On a large scale, law enforcement officials may employ investigative deceptions to infiltrate organized crime syndicates, drug rings, and private meetings with corrupt public officials. As in the case of civil rights testers and union salts, undercover law enforcement officers use deceptions to gain access to private property and conversations and transactions that they would otherwise be unable to observe. Undercover law enforcement investigations and stings are not only quite common but also have captured the public imagination and have been glamorized in popular culture through books and movies like "Donnie Brasco" and "BlacKkKlansman," which offer fictionalized accounts of real-life investigations.

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[18] Jane Slaughter, *Millennials on the Joys and Trials of Salting*, IN THESE TIMES (Feb. 27, 2014), https://inthesetimes.com/article/stories-from-salts-the-workplace-organizers [https://perma.cc/4LT2-PLFT].

[19] 516 U.S. 85 (1995).

[20] *Id.* at 87.

[21] *See*, *e.g.*, Thomas Voting Reps., *How Your U.S. Lawmaker Voted*, SEATTLE TIMES (Mar. 4, 2007), https://www.seattletimes.com/seattle-news/how-your-us-lawmaker-voted-127/ [https://perma.cc/B994-VCWJ].

To be sure, undercover law enforcement work is more controversial than civil rights testing or union salting. There are strong reasons to be more skeptical about government officials lying to us than private citizens.[22] Having the power of the state behind such lies seems especially problematic. Others assert that when people are found to engage in criminal activity through undercover investigations, they have been entrapped, provoked into committing criminal acts they otherwise would not have undertaken.[23]

Notwithstanding these objections, the Supreme Court has fully embraced the practice and legality of undercover police investigations. First, while police may not legally entrap a suspect, the fact that they have engaged in an undercover investigation does not itself constitute entrapment.[24] Second, the Court has invoked what is known as the "third party doctrine." This doctrine is premised on the notion that when suspects make statements and engage in conduct in the presence of a third person, they assume the risk that the person will report their observations to the police.[25] Courts also have upheld such investigations because they are effective. As one federal appellate court put it, "[i]f total honesty by the police were to be constitutionally required, most undercover work would be effectively thwarted by a simple question, 'Are you in any way affiliated with the police?' In general, what is revealed to another, even if unwittingly, is not entitled to constitutional protection."[26]

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There are striking commonalities across these three categories of investigative deceptions ("favored contexts"). First, they all involve intentional lies, or at the very least omissions, about the tester's, salt's, or undercover agent's true identity, background, genuine motivation, and actual employer or sponsor. In each case, the deception allows the deceiver to gain access to private property and spaces. In the case

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[22] Helen Norton, *The Government's Lies and the Constitution*, 91 IND. L.J. 73 (2015).

[23] *See* Sorrells v. United States, 287 U.S. 435, 453–54 (1932) (stating that police may use "traps, decoys, and deception to obtain evidence of the commission of a crime" but holding that government agents engage in illegal entrapment when they have "instigated the crime").

[24] *Id.*

[25] Hoffa v. United States, 385 U.S. 293, 303 (1966).

[26] Brokers' Choice of Am., Inc. v. NBC Universal, Inc., 757 F.3d 1125, 1146 (10th Cir. 2014). *See also* Lewis v. United States, 385 U.S. 206, 210 (1996).

of housing testers, they may gain physical access to real estate brokers' and landlords' offices and, at least in the case of white testers, they gain access to private rental properties or homes for sale. Union salts are provided with access to nonunionized workplaces. And police officers and informants may gain entry to private offices, hotel rooms, or other places where criminal activity is taking place. Another thing that links these investigative deceptions is that they could be argued to implicate the property rights of the investigations' targets. Furthermore, deceptions in these favored contexts are all undertaken to obtain information that is in the public's interest to be revealed. And while the targets of these people using investigative deceptions are no doubt extremely displeased that they have been deceived, there do not appear to be widespread accusations that the investigators have committed a fraud, trespass, invasion of privacy, or other common law crime or tort or are engaged in ethically inappropriate behavior. It is fair to say that in these contexts, investigative deceptions have become an accepted social practice. But discourse about these investigative deceptions does not take place in the First Amendment space; they are not commonly viewed as *speech* practices.

B. Contexts Where Investigative Deceptions Are Seriously Questioned

1. Investigative journalism

Though it has been contested, professional journalists have undertaken investigations and carried out reporting by disguising their identity and employing other deceptions since before the Civil War, when reporters from Northern newspapers went into Southern states under false identities to report on the conditions of enslaved people, and later to gather news about the war.[27] Undercover journalistic investigations became more prevalent during the Progressive Era. While many publications were accused of being exploitative and sensationalist, this period also witnessed the emergence of journalism as a profession.

It was during the Progressive Era that some of the most prominent historical examples of investigative deception in journalism occurred. Emblematic of such investigations is the work of Nellie Bly[28] and Upton Sinclair,[29] both of whom infiltrated nonpublic spaces to uncover and report on problems ranging from the

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[27] J. CUTLER ANDREWS, THE NORTH REPORTS THE CIVIL WAR 6–34 (1985).

[28] NELLIE BLY, TEN DAYS IN A MAD-HOUSE (1887); BROOKE KROEGER, NELLIE BLY: DAREDEVIL, REPORTER, FEMINIST (1994).

[29] UPTON SINCLAIR, THE JUNGLE (1906).

treatment of patients in mental institutions to food handling and sanitation problems in the meatpacking industry. Both Bly's and Sinclair's work are said to have prompted legal reforms resulting from the public attention on the social problems they exposed. They also may have influenced the ongoing development of the journalism profession, as many reporters followed in their footsteps during the next few decades.

While undercover investigations by journalists seem to have waned during the mid-20th century, investigative deception had a resurgence in the 1970s and 1980s, when several major newspapers produced high-profile stories exposing topics such as local government corruption[30] and deplorable working conditions for undocumented laborers.[31] Perhaps the biggest boon to undercover investigations by journalists was the rise of television news magazines in the late 20th century and early 21st century. Long format national news shows like CBS' "60 Minutes," NBC's "Dateline," ABC's "20/20," and PBS' "Frontline" gave wide public exposure to stories investigated through the use of investigative deceptions and hidden video cameras.[32]

Despite this long history of success in journalistic use of investigative deception, there are ongoing debates about these tactics, both from outside the profession and within. External critiques have come from the law, most commonly from high-dollar tort claims brought against news networks and their reporters. Journalists typically have asserted a First Amendment defense in such cases. The Supreme Court has offered only a couple of relevant general points. First, it has viewed the rights guaranteed by the free press clause as coextensive with rights already guaranteed by the freedom of speech.[33] Relatedly, the Court has made it clear that the

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[30] BROOKE KROEGER, UNDERCOVER REPORTING: THE TRUTH ABOUT DECEPTION 172–76 (2012); Pamela Zekman & Zay N. Smith, *Our "Bar" Uncovers Payoffs, Tax Gyps*, CHI. SUN-TIMES (Jan. 8, 1978), https://undercover.hosting.nyu.edu/s/undercover-reporting/item/13158 [https://perma.cc/MVS5-ES5C].

[31] Merle Linda Wolin, *Sweatshop: Undercover in the Garment Industry*, L.A. HERALD-EXAM'R (1981), https://undercover.hosting.nyu.edu/s/undercover-reporting/item-set/56 [https://perma.cc/VDH2-4VDU].

[32] KROEGER, *supra* note 30, at 186–87.

[33] Branzburg v. Hayes, 408 U.S. 665, 684 (1972). For criticisms of this approach, see Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029 (2015); Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434 (2014).

First Amendment provides no exemption for journalists from generally applicable laws, though it has also suggested that there is some constitutional protection for newsgathering.[34]

More directly relevant law has come from the lower federal courts. On several occasions, targets of undercover journalistic investigations have sued networks and reporters for engaging in investigative deceptions, even if the resulting published news story revealed only truthful information.[35] Juries have imposed substantial verdicts in some of these cases, though some of these verdicts have been limited or overturned on appeal. Yet these courts have been unwilling to recognize categorical First Amendment protection for journalists who engage in such deceptions, leaving the door open for other journalists and news companies to be sued. Even when these suits have been unsuccessful or have had only limited success, the journalistic entities bear substantial expenses in defense of such litigation. The combination of these factors and the uncertainty of any First Amendment defense to these tort claims loom large and may have a significant chilling effect on journalists, particularly from smaller news entities with less financial stability.

Investigative deception by journalists is also strongly disfavored from an internal perspective. The professional debate about the ethics of undercover investigations involves balancing the news value of the story against the potential negative impact on the profession and on the subjects of a particular story. While journalists are not licensed by the state and therefore not subject to an enforceable code of ethics, several organizations such as the Society of Professional Journalists (SPJ) have adopted aspirational codes of conduct. In 1996, SPJ amended its code to admonish journalists to "Avoid undercover or other surreptitious methods of gathering information except when traditional open methods will not yield information vital to the public."[36] The prohibition is not absolute but strongly discourages investigative deceptions.

In addition, many major news publications and broadcasters have their own ethical standards. The New York Times requires its reporters to disclose their true identities to people they are covering but also states that they "need not always

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[34] *Branzburg*, 408 U.S. at 681–82.

[35] *See*, *e.g.*, Food Lion, Inc. v. Cap. Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999).

[36] SOCIETY OF PROFESSIONAL JOURNALISTS – CODE OF ETHICS (1996), http://ethicscodescollection.org/detail/431146b3-9c90-495d-b530-0f5d31b05cda [https://perma.cc/2AXH-5BL2].

announce their status as journalists when seeking information normally available to the public."[37] Thus, at least some news organizations see a material difference between overt lies and deception by omission.

Some journalists have taken a more absolute approach and have criticized any use of deception in any reporting. As then-Washington Post reporter Howard Kurtz has written, "no matter how good the story, lying to get it raises as many questions about journalists as their subjects."[38] Drawing on the work of moral philosophers and other media ethicists, another commentator contends that undercover journalism undermines the credibility of "serious" investigative journalism because journalists must practice virtue as an aspect of professionalism.[39] Others disagree, asserting that some stories are too important not to investigate, even if journalists have to engage in deception to do so.[40]

2. Investigations by advocacy groups

Following in the footsteps of others who have successfully employed investigative deceptions, political activists and advocacy groups across the ideological spectrum have also used these tactics to carry out their missions of informing the public and engaging in advocacy. Though these investigations seem to be prevalent today, there is evidence that they were employed as early as the 19th century. Some of the pre-Civil War undercover investigations of the deplorable conditions of slavery, for example, were carried out not by journalists but by abolitionists.[41] Today, we have witnessed widely publicized investigations sponsored by animal rights organizations, who have sent undercover investigators to obtain jobs at slaughterhouses and factory farms to gather information about horrific treatment of farmed animals.[42]

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[37] N.Y. Times, *Pursuing the News, in* ETHICAL JOURNALISM: A HANDBOOK OF VALUES AND PRACTICES FOR THE NEWS AND EDITORIAL DEPARTMENTS (2019), https://www.nytimes.com/editorial-standards/ethical-journalism.html# [https://perma.cc/CC2U-3UZ7].

[38] Howard Kurtz, *Undercover Journalism*, WASH. POST (June 25, 2007, 7:24 AM), http://www.washingtonpost.com/wp-dyn/content/blog/2007/06/25/BL2007062500353.html [https://perma.cc/TD8U-PWHU].

[39] JAMES L. AUCOIN, THE EVOLUTION OF AMERICAN INVESTIGATIVE JOURNALISM 98–99 (2005).

[40] Ken Silverstein, *Undercover, Under Fire*, L.A. TIMES, June 30, 2007, at 29.

[41] KROEGER, *supra* note 30, at 16–28.

[42] *Central Valley Meat Shut Down Again by USDA – This Time for Unsanitary Conditions*, ANIMAL OUTLOOK, https://animaloutlook.org/investigations/central-valley-meat/ [https://perma.cc/64RH-ELWQ] (last visited Nov. 7, 2022).

Antiabortion activists have adopted similar tactics to infiltrate Planned Parenthood and other reproductive freedom groups, believing they would uncover violations of federal laws and medical ethics standards.[43] Perhaps the most notorious of politically motivated undercover investigations have been conducted by Project Veritas, founded by James O'Keefe.[44] While there are important factual differences among these types of investigations,[45] they share some common features to each other and to investigative deceptions in the favored contexts. They all involve false or fabricated identities, lies or omissions about the true motive of the investigator, and failure to disclose their political affiliations, all to gain access to people and places that would not have been possible without these deceptions, potentially affecting property rights.

It is safe to say that while there is not universal condemnation of these investigations, they are more highly contested than undercover work in the favored contexts. In recent years, the law in this area has been evolving in two contexts—preemptive lawsuits challenging state laws that impose criminal or civil liability on

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[43] Jackie Calmes, *Video Accuses Planned Parenthood of Crime*, N.Y. TIMES (July 15, 2015), http://www.nytimes.com/2015/07/15/us/video-accuses-planned-parenthood-of-crime.html [https://perma.cc/46YE-LZPS].

[44] Adam Goldman & Mark Mazzetti, *Project Veritas and the Line Between Journalism and Political Spying*, N.Y. TIMES (Nov. 11, 2021), https://www.nytimes.com/2021/11/11/us/politics/project-veritas-journalism-political-spying.html?referringSource=articleShare [https://perma.cc/6N93-2NS8]. Although Project Veritas labels itself as a "non-profit journalism enterprise" (*Overview*, PROJECT VERITAS, https://www.projectveritas.com/about/ [https://perma.cc/7PC6-RJF5] (last visited Nov. 7, 2022)), the fact that its targets are virtually all Democrats and progressive people and groups indicates that it is fair to place its work in this category rather than under journalistic investigations.

[45] Abortion rights groups have claimed that the videos recorded by investigators with the Center for Medical Progress were unfairly edited or shown out of context such that they falsely depicted their officials' statements. Editorial, *The Campaign of Deception Against Planned Parenthood*, N.Y. TIMES (July 22, 2015), http://www.nytimes.com/2015/07/22/opinion/the-campaign-of-deception-against-planned-parenthood.html [https://perma.cc/2PRB-KKQ2]. Project Veritas' founder James O'Keefe has been accused of a range of unlawful and unsavory conduct. *See* Catherine Thompson, *Ex-Staffer Slams James O'Keefe: He Crossed a Line with Vile "Kill Cops" Stunt*, TALKING POINTS MEMO: MUCKRAKER (Mar. 20, 2015, 6:00 AM), http://talkingpointsmemo.com/muckraker/james-okeefe-kill-cops-script [https://perma.cc/9P5M-57BU]; Christina Wilkie, *ACORN Filmmaker James O'Keefe Sentenced in Sen. Mary Landrieu Break-In*, THE HILL (May 26, 2010, 11:15 PM), http://thehill.com/capital-living/in-the-know/100105-filmmaker-okeefe-sentenced-in-sen-mary-landrieu-break-in [https://perma.cc/59YQ-HVX8].

investigators at large animal agricultural facilities, which critics have dubbed "ag gag" laws;[46] and tort claims brought by investigative targets claiming that the investigations have caused them financial harm.

Animal rights investigators, like union salts, typically gain access to animal agricultural facilities by getting jobs. Animal rights groups have conducted several of these investigations around the nation and posted videos documenting, among other things, extremely inhumane treatment of farmed animals. Some of these investigations have resulted in amendments to animal welfare law, criminal prosecutions, and removal of animals from some facilities to protect them from mistreatment.[47] They also spawned efforts by several states in the early 2010s to adopt laws making it a crime to engage in misrepresentation to gain access to an animal agricultural facility.[48]

In the abortion context, investigators working with the Center for Medical Progress (CMP), an antiabortion advocacy group, have used investigative deceptions. In an operation designed to catch representatives of reproductive freedom groups engaging in the unlawful sale of fetal tissue, the group set up a fake company purportedly in the business of legitimately procuring such tissue.[49] Through this deception, CMP gained access to private conferences sponsored by Planned Parenthood and the National Abortion Federation and then used those initial contacts to gain access to meetings at Planned Parenthood affiliates around the country.[50] Throughout all of these meetings, the investigators wore hidden cameras with the goal of showing abortion rights organizations violating federal law.[51] CMP then released videos that it asserts show abortion rights group officials engaged in illegal conduct. The abortion rights groups, which responded that the videos were edited in ways that misrepresent what was actually communicated during the recorded meetings, sued for a wide range of federal and common law claims, including

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[46] The term "ag gag" was first used by food writer Mark Bittman. Mark Bittman, Opinion, *Who Protects the Animals?*, N.Y. TIMES, Apr. 27, 2011, at A27.

[47] Nat'l Meat Ass'n v. Harris, 565 U.S. 452, 458 (2012).

[48] *What is Ag-Gag Legislation?*, ASPCA, https://www.aspca.org/improving-laws-animals/public-policy/what-ag-gag-legislation.

[49] Planned Parenthood Fed'n of Am., Inc. v. Newman, 51 F.4th 1125, 1131 (9th Cir. Oct. 21, 2022) ("Planned Parenthood I").

[50] *Id.* at 1131–32.

[51] *Id.*

claims that the antiabortion investigators committed trespass and engaged in fraudulent misrepresentation.[52]

In Part II, I survey the details of these courts' conclusions. For now, suffice it to say that the outcomes of these cases have been mixed in terms of the scope of First Amendment protection for investigative deception, but the litigation is ongoing. The Supreme Court has yet to weigh in directly on these questions and recently denied a cert petition in the Kansas ag gag litigation.[53] There is pending litigation regarding multiple legal challenges to Iowa's ag gag laws. The Ninth Circuit recently upheld the substantial jury verdict against CMP for its extensive undercover operation targeting Planned Parenthood, and it certainly would not be surprising if CMP seeks review in the Supreme Court. Litigation challenging state laws in Arkansas and North Carolina that allow private rights of action, as opposed to criminal sanctions, against undercover investigators has led to varied results.[54] While the decisions have been mixed, it is fair to say that investigative deceptions by journalists and political activists are less favored than those carried out by civil rights testers, union salts, and undercover law enforcement officers. At the very least, the lower courts are uncertain how to assess undercover investigations in a First Amendment framework.

Next, I argue that one way to coherently build free speech doctrine in this area is to focus not on the differences but on the similarities among investigative deception across social and legal contexts.

II. Unifying the Concept of Investigative Deception

A. The Speech Value of Investigative Deception

An important commonality among the types of investigative deceptions discussed in this essay is that they all promote speech values that underlie the First Amendment. Although the question of whether these kinds of tactics should be

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[52] *Id.* at 1132–33. I include discussion of only the tort claims here because those are most comparable to the interests that have been asserted to object to other political advocacy groups' undercover investigations.

[53] Animal Legal Def. Fund v. Kelly, 9 F.4th 1219 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 2647 (2022).

[54] People for the Ethical Treatment of Animals, Inc. v. Stein, 60 F.4th 815 (4th Cir. 2023), *cert. denied*, 144 S. Ct. 326 (2023); Animal Legal Def. Fund v. Peco Foods, Inc., No. 4:19cv00442 JM, 2023 WL 2743238 (E.D. Ark. Mar. 31, 2023) (granting motion to dismiss for absence of state action).

permitted is not always conceptualized in free speech terms, one doesn't have to look too hard to find speech value in each context.

The primary purpose of civil rights testers may be to identify violations of antidiscrimination laws, but they also contribute to a broader social movement to promote fair housing.[55] They also publicly expose the prevalence of racial steering practices. Similarly, the job of union salts in the short term may be to help form and certify unions, but they also facilitate a form of political association; communication from salts to nonunionized workers is surely speech on a matter of public concern.[56] Similarly, law enforcement stings may primarily be conceived as part of the criminal justice process, but they also can call public attention to widespread government corruption, organized crime, and other social problems.[57] Law enforcement activity probably fits less comfortably into the free speech framework, but that just underscores the question why investigative deceptions by journalists and political activists are viewed as *less* legally and socially acceptable than the same actions undertaken by government officials. Implicit in the acceptance of investigative deceptions in the favored contexts is that the value they provide outweighs any potential threat to the property interests of the targets of these investigations.

With regard to the disfavored context, surely an easy case can be made for journalists, who are exercising both the right to free speech and the rights protected by the press clause. Their efforts to engage in newsgathering have at least some constitutional protection,[58] and the legal battles challenging their undercover investigations have been fought in the First Amendment space. Finally, most activist and advocacy group investigations are undertaken in a manner that targets the gathering and dissemination of information on matters of public concern, and the

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[55] Leonard S. Rubinowitz & Michelle Shaw, *Delayed Synergy: Challenging Housing Discrimination in Chicago in the Streets and in the Courts*, 17 NW. J. L. & SOC. POL'Y 1, 24 n.159, 30 n.216 (2022) (describing civil rights testing as part of the fair housing movement).

[56] Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2477 (2018).

[57] Jacqueline E. Ross, *Undercover Policing and the Shifting Terms of Scholarly Debate: The United States and Europe in Counterpoint*, 4 ANN. REV. L. & SOC. SCI. 239 (2008). Some critics suggest that undercover law enforcement investigations can sometimes *impede* First Amendment values if they extend to involve the infiltration of political groups. Khaair J. Morrison, *A Call to Expand Protections for Activists*, 3 HOW. HUM. & C.R.L. REV. 25 (2019).

[58] Branzburg v. Hayes, 408 U.S. 665, 681–82, 707 (1972).

litigation to date has discussed their activities within the framework of First Amendment doctrine.

To be sure, there are some noteworthy differences in the underlying legal regimes. As described above, civil rights testers, union salts, and undercover law enforcement stings are at least implicitly acknowledged to be lawful investigative tactics, and in some cases are specifically authorized by the law. Accordingly, were a state or local government to try to prohibit these types of investigations, they might be invalidated under the doctrine of federal preemption.[59] But that says nothing about whether, in the absence of specific federal authorization, states could ban such investigations without violating the First Amendment. Nor does it address whether states could criminalize investigative deceptions to detect other violations of the law where those investigations are not sanctioned by federal law.

B. Concerns About Common Law Rights

The starting point to any First Amendment analysis about whether investigative deceptions are subject to government regulation is the Supreme Court's decision in *United States v. Alvarez*.[60] *Alvarez* struck down the federal Stolen Valor Act, which made it a crime to lie about having received military honors from the United States. The Court rejected the government's argument that false statements of fact categorically fall outside the First Amendment's scope, like obscenity and true threats. Though there was no majority decision, both the plurality and concurring opinions held that the state may prohibit only lies that cause a "legally cognizable harm" or produce a material gain for the liar.[61] Without some constitutional protection for falsehoods, the plurality warned, there would be no limit to the government's authority to "compile a list of subjects about which false statements are punishable."[62] The First Amendment analysis of investigative deceptions in the disfavored contexts of undercover journalism and political advocacy, therefore, must

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[59] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1480 (2018) (state law is preempted where "Congress . . . confers rights on private actors [and] a state law . . . imposes restrictions that conflict with the federal law").

[60] 567 U.S. 709 (2012).

[61] *Id.* at 719, 723. *See* Alan K. Chen & Justin Marceau, *Developing a Taxonomy of Lies Under the First Amendment*, 89 U. COLO. L. REV. 655, 670 (2018) ("It is not entirely clear . . . whether material gain is an independent factor that permits government regulation of lies or if it is simply the flip side of the harm limitation.").

[62] *Alvarez*, 567 U.S. at 723.

include an assessment of the potential legal harms suffered by the targets of undercover investigations. The following discussion draws comparisons across these contexts to illustrate this point.

What can we learn from the disparate legal frameworks touching upon these categories of investigative deceptions? First, we can make some general observations. At one end of the spectrum, it's safe to assume that under *Alvarez*, the government may ban lies used to gain access to people and private property where that access is intended to or likely will lead to *tangible* harms. For example, the state may surely punish an investigator who lies about their identity so they can steal another company's trade secrets or commit an act of vandalism or sabotage. The government may also prohibit lies used to access government facilities for the purpose of espionage or revealing state secrets. And some spaces, such as the Pentagon or a nuclear power plant, may be so sensitive or vulnerable that lies to gain access to them may still be punished without violating the First Amendment.[63]

But the government's claims of power to prohibit investigative deception in the disfavored contexts require a closer examination of what the *Alvarez* Court meant by "legally cognizable harm." We have some ideas about the scope of such arguments from lower court decisions in the journalism and political activist contexts. The claims fall into two general categories—investigative deceptions potentially cause: (1) a *trespass*, and (2) a breach of what some states define as a *duty of loyalty* from employee to employer. What follows is a discussion of whether these interests should be sufficient to overcome the speech value of investigative deceptions. This analysis next asks why, if these interests are important, they would not also be sufficient reasons to prohibit undercover investigations in the favored contexts.

1. Trespass

Trespass interests have been asserted to justify imposing both civil and criminal liability on those engaged in investigative deceptions. Targets of undercover journalistic investigations have brought substantial tort claims against news companies

[63] In describing the types of lies that the law might punish without violating the First Amendment, Justice Breyer included "lies . . . made in contexts in which a tangible harm to others is especially likely to occur; and . . . lies . . . that are particularly likely to produce harm." *Alvarez*, 567 U.S. at 734. Even here, however, the Court has hinted that the government might be limited to restricting such lies where it can establish some level of mens rea and the lie is material. *Id.* at 733–34.

and journalists. In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*,[64] the Fourth Circuit reviewed a substantial jury award against a major television network for its undercover investigation of a grocery store chain. Two reporters obtained jobs with different stores where they observed and secretly recorded other employees engaging in unsanitary practices and mislabeling spoiled food products.[65] After the resulting story was broadcast on national television, Food Lion sued the network, the story's producers, and the reporters on several different theories, including trespass.[66] The jury awarded relatively modest compensatory damages but awarded Food Lion over $5 million in punitive damages (later reduced to $315,000 via remittitur).[67]

The Fourth Circuit upheld a $1 jury award against the reporters for trespass. Although it conceded that consent secured by deception is "sometimes sufficient" to serve as a defense to a trespass action,[68] it held that even a consensual entry to property may become a trespass "if a wrongful act is done in excess of and in abuse of authorized entry."[69] That wrongful act, as discussed below, was the reporters' violation of their duty of loyalty to Food Lion as their employer.

Other federal courts have conditionally rejected claims brought against the news media for exposés resulting from investigative deception. In *Desnick v. American Broadcasting Companies, Inc.*,[70] the Seventh Circuit affirmed the dismissal of trespass claims brought by an ophthalmologist after an undercover news investigation exposed his eye center's practice of routinely prescribing and charging for unnecessary cataract surgeries. The network sent investigators posing as patients and wearing hidden cameras to the practice's different offices to secure evidence of these practices. The court held that where consent is secured by deception in these circumstances, it is not a trespass under Illinois law because such entry to property does not violate "any of the specific interests that the tort of trespass seeks to

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[64] 194 F.3d 505 (4th Cir. 1999).

[65] *Id.* at 510–11.

[66] *Id.* at 511.

[67] *Id.*

[68] *Id.* at 517–18.

[69] *Id.* at 517. The Fourth Circuit also overturned the jury's fraud verdict on Food Lion's common law and statutory fraud claims. *Id.* at 512–13, 519–20.

[70] 44 F.3d 1345 (7th Cir. 1995). The court also affirmed dismissal of the plaintiffs' privacy claims, although it held that the plaintiff's defamation claims were dismissed prematurely and remanded the case for further consideration.

protect."[71] The court also observed that the reporters' actions had not interfered with or disrupted the plaintiffs' use of its offices or invaded a place on the property that was not otherwise open to anyone stating that they had a desire to engage its services.[72]

One might think that because the courts in both *Food Lion* and *Desnick* ultimately resulted in either little or no damages to the news networks and their reporters, journalism is not actually a disfavored context. In other words, it could be argued that liability with virtually no damages is not a substantial burden on journalists. However, neither court embraced the notion that the First Amendment might categorically protect journalists who use investigative deceptions from common law tort liability. In fact, *Food Lion* rejected the reporters' claim that they should be exempt from liability on First Amendment grounds because torts are generally applicable laws.[73] In dicta, the Seventh Circuit in *Desnick* made a bolder claim about possible First Amendment protection, suggesting that in the contemporary news environment, if a broadcast is not defamatory, "*and no established rights are invaded in the process of creating it* . . ., then the target has no legal remedy even if the investigatory tactics used by the network are surreptitious, confrontational, unscrupulous, and ungentlemanly."[74] However, the condition that "no established rights are invaded" suggests that tort remedies may still be imposed against journalists depending on the facts of a particular investigation and the scope of a state's tort law. Thus, even after these decisions, news media and journalists are vulnerable to liability and potentially large jury verdicts, creating a substantial chilling effect.

Similarly, one might contend that First Amendment protection for investigative deceptions is not important as long as journalists may still publish the information obtained, where the target is likely to suffer the most tangible damages. Again, the potential for large money damages for the purported trespass when coupled with punitive damages (these are intentional acts, after all) is such a significant chilling effect that protection is necessary for both the acquisition of the

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[71] *Id.* at 1352. *See also* Baugh v. CBS, Inc., 828 F. Supp. 745, 757 (N.D. Cal. 1993).

[72] *Desnick*, 44 F.3d at 1352.

[73] *Food Lion*, 194 F.3d at 521. However, the court did find that the First Amendment shielded the news network from *publication* damages because it found Food Lion's claim to be an attempt "to recover defamation-type damages under non-reputational tort claims, without satisfying the stricter (First Amendment) standards of a defamation claim." *Id.* at 522.

[74] *Desnick*, 44 F.3d at 1355 (emphasis added).

information and its publication. Furthermore, the Supreme Court has repeatedly recognized that legal restrictions that impede the production of speech may restrict the flow of information in ways that implicate First Amendment interests.[75]

States also have asserted trespassory interests to defend criminal laws that prohibit investigative deception by political activists, arguing that such lies cause the legally cognizable harm of trespass under *Alvarez*. Although consent is a defense to trespass, states have argued in defending ag gag laws that access to animal agricultural facilities through deception vitiates any consent given to the undercover investigators. But each court that has addressed this argument has taken a slightly different analytical path. In *Animal Legal Defense Fund v. Wasden*, the Ninth Circuit struck down part of an Idaho law that banned gaining access to agricultural facilities by deception. In doing so, the court observed that a lie to gain access to another's property, with nothing more, does not necessarily cause a harm to the owner or produce a material gain for the liar.[76]

In contrast, the Eighth Circuit in *Animal Legal Defense Fund v. Reynolds* upheld an Iowa law barring access to agricultural facilities by deception, holding that the statute punished only lies that cause a legally cognizable harm of trespass.[77] There, the court held that "[e]ven without physical damage to property arising from a trespass, these damages may compensate a property owner for a diminution of privacy and a violation of the right to exclude—legally cognizable harms."[78] The Tenth Circuit's decision in *Animal Legal Defense Fund v. Kelly* declined to address the general question of whether access to private property by deception was in and of itself a trespass.[79]

Consistent with the Eighth Circuit's decision in *Reynolds*, the dissenting judges in *Wasden* and *Kelly* took the position that access to land by deception constitutes a trespass, irrespective of whether any actual damages are incurred. Rather, the

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[75] Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 591 (1983).

[76] Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1194–96 (9th Cir. 2018). *See also* Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1203 (D. Utah 2017).

[77] Animal Legal Def. Fund v. Reynolds, 8 F.4th 781, 785–86 (8th Cir. 2021).

[78] *Id.* at 786.

[79] Animal Legal Def. Fund v. Kelly, 9 F.4th 1219, 1234 (10th Cir. 2021). The court held that the Kansas law discriminated based on viewpoint because access was punishable only if done with the "intent to damage" the agricultural enterprise, which the court found reflected the legislature's intent to protect animal facilities from criticism. *Id.* at 1233.

harm caused by a trespass is the interference with the owner's right to "exclusive possession of the land"[80] and "to control access to its property,"[81] irrespective of whether any tangible harm occurs.

Trespass was also at issue in Planned Parenthood's civil suit against CMP. In rejecting CMP's motion to dismiss the trespass claims, the district court distinguished other cases involving people who accessed property by misrepresenting their identities, concluding that they only rejected trespass as a remedy where the investigator's access was limited to publicly accessible places.[82] This is an unfair reading of at least some of the cases it cited, including *Desnick*. While it's true that *Desnick* noted that the reporters only entered areas open to any person seeking ophthalmic care, taken in context it is clear that it was generally referring to access to *any* business spaces that a person was invited into via deception.[83] The court in the Planned Parenthood case also cited the district court decision in *Food Lion* for the same proposition, but the Fourth Circuit later disagreed with the district court on that point, holding that reporters' use of deception to gain access to "*non-public areas* of Food Lion property" did not implicate the interests in "ownership and peaceable possession of land."[84]

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[80] *Wasden*, 878 F.3d at 1206 (Bea, J., dissenting in part and concurring in part).

[81] *Kelly*, 9 F.4th at 1250 (Hartz, J., dissenting).

[82] Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress, 214 F. Supp. 3d 808, 834 (2016).

[83] Desnick v. Am. Broad. Cos., Inc., 44 F.3d 1345, 1353 (7th Cir. 1995).

[84] Food Lion, Inc. v. Cap. Cities/ABC, Inc., 194 F.3d 505, 518 (4th Cir. 1999) (emphasis added) (citing *Desnick* with approval). The Fourth Circuit upheld the trespass claim not because the reporters used deception to gain access to nonpublic workspaces but because their breach of the duty of loyalty resulted in actions exceeding the scope of Food Lion's consent. *Id*. While the states defending ag gag laws have typically not emphasized privacy concerns to justify those statutes, a state might also argue that access to private property by deception also invades the privacy of those being investigated. As Judge Hartz suggested in his dissent in *Kelly*, privacy concerns are one of the interests protected by trespass laws. *Kelly*, 9 F.4th at 1256 (Hartz, J., dissenting). *But see* Lyrissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 194 (1998) ("trespass is designed to protect property; it only incidentally protects privacy"). In a comparable setting, however, *Desnick* held that there are no privacy interests implicated solely by gaining consent to access private property through deception, unless the reporters subsequently revealed intimate personal facts or intruded on "legitimately private activities, such as phone conversations." *Desnick*, 44 F.3d at 1353.

On appeal, with very little discussion, the Ninth Circuit upheld the district court's rulings on the trespass claims.[85] Interestingly, it did not elaborate on the district court's analysis of the trespass claims and failed to even mention the *Desnick* case. Rather, it relied on a 50-year-old precedent in *Dietemann v. Time, Inc.*,[86] in which it had held that the First Amendment does not exempt journalists from a trespass claim when they use deception to enter a private home and secretly record the occupants. In doing so, the court ignored the fact that *Dietemann* involved entry into a private home (albeit one where business was being conducted), not entry into commercial facilities, business meetings, or public places like restaurants. In a separate decision upholding the district court's grant of summary judgment to the plaintiffs on some of their trespass claims, the Ninth Circuit found not that deception vitiated the plaintiffs' consent as a general rule but that CMP and its investigators exceeded the scope of the consent granted by failing to comply with its contractual commitments to obey confidentiality, privacy, and fraud laws.[87]

Those decisions also upheld the jury's award of $2.425 million in damages against CMP.[88] It is difficult to ascertain the amount of damages attributable specifically to the trespass claims because the verdict did draw a distinction, awarding the plaintiffs "infiltration damages" (the costs to prevent future infiltration by defendants) of $366,873 and "security damages" (the actual costs of providing security to abortion providers and staff) of $101,048.[89] However, the district court stated in its opinion that the plaintiffs sought only nominal damages on their trespass claims.[90]

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[85] Planned Parenthood Fed'n of Am., Inc. v. Newman, 51 F.4th 1125, 1131 (9th Cir. Oct. 21, 2022) ("Planned Parenthood I"); Planned Parenthood Fed'n of Am., Inc. v. Newman, No. 20-16068, 2022 WL 13613963 (9th Cir. Oct. 21, 2022) ("Planned Parenthood II").

[86] *Planned Parenthood I*, at 1134 (citing Dietemann v. Time, Inc., 449 F.2d 245, 247 (9th Cir. 1971)).

[87] *Planned Parenthood II*, at *2.

[88] Appellant's Opening Brief at 12, Planned Parenthood Fed'n of Am., Inc. v. Merritt, No. 20-16820, 2021 WL 955133 (9th Cir. Feb. 26, 2021).

[89] Appellees' Brief at 27, Planned Parenthood Fed'n of Am., Inc. v. Newman, No. 20-16068, 2021 WL 3237902 (9th Cir. July 22, 2021).

[90] Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress, 214 F. Supp. 3d 808, 835 (2016).

The differing views about whether access to property gained via investigative deceptions is a trespass exposes the limitations of what we can learn from *Alvarez*. The Court held that the government may prohibit lies that cause a legally cognizable harm and that trespass is technically a legally cognizable harm. But neither criminal nor civil trespass typically require a showing of any tangible harm to the landowner to establish a trespass; a person who takes one step onto another's property without consent commits a trespass even if not one blade of grass is disturbed. The types of harms *Alvarez* discusses are more concrete.

In addition, arguments based on trespass are problematic because of the lack of uniformity among states. In some jurisdictions, courts have held that deception vitiates the consent that would ordinarily be a defense to a trespass claim.[91] That is, the landowner knows she is consenting to someone's entry on to her property but would not have granted access had the entrant not lied. Moreover, the Restatement (Second) of Torts, states that "[i]f the person consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm."[92]

In other states, however, judicial decisions hold that consent induced by deception is not a trespass, so long as the entrant does not exceed the scope of that consent.[93] And in many states, the courts have simply not addressed or answered the question about whether consent by deception constitutes a defense to trespass. It seems problematic from a uniformity standpoint for the First Amendment's protection to turn on different state law definitions of trespass. More importantly, uncertainty across jurisdictions about the scope of the First Amendment right to engage in investigative deceptions creates a significant chilling effect.

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[91] *See*, *e.g.*, Belluomo v. KAKE TV & Radio, Inc., 3 Kan. App. 2d 461, 474, 596 P.2d 832, 844 (1979).

[92] RESTATEMENT (SECOND) OF TORTS § 892B (1979).

[93] Alexander v. Letson, 242 Ala. 488, 7 So. 2d 33 (1942); North v. Williams, 120 Pa. 109, 13 A. 723 (1888); Kimball v. Custer, 73 Ill. 389, 390 (1874). A recent note in the Harvard Law Review describes this division among state courts. Note, *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).

Returning to our examination of investigative deception across context, it is worth considering why, if trespass by deception is a cognizable harm, the states could not simply ban civil rights testing, union salting, and undercover police operations (setting aside, again, preemption issues).[94] Civil rights testers may access private properties that are for sale or rent, when they would not be granted such access were their identities known to the realtor or rental agent. It is quite likely that union salts would not be able to enter private employers' properties both to work and to conduct union organizing activities (though the availability of noncovert union salting complicates this calculation in some respects). And persons engaged in criminal activity would never allow police to access places where they conduct such activity if they knew they were law enforcement officers.

Indeed, claims of trespass rarely arise in these contexts. My research has revealed no instances in which targets of civil rights investigations claimed that testers had committed a trespass. Nor do there appear to be any trespass-based objections to union salts. It is possible that objections based on trespass law are not raised simply because of the aforementioned preemption issue, but I also could not find trespass-based objections to testers and salts in the legislative or administrative histories discussing these types of investigations.

In the law enforcement context, the Supreme Court has explicitly rejected trespass-based Fourth Amendment claims where law enforcement officers use deception to gain access to a private property or spaces. In *On Lee v. United States*,[95] a former employee who was acting as a government informant entered the defendant's place of business and obtained evidence of federal drug crimes. The defendant claimed this was an unlawful search and seizure under the Fourth Amendment in part because the informant had committed a trespass.[96] But the Court held that no trespass was committed because the defendant had consented to the informant's presence on his property.[97] In doing so, the Court said that the doctrine of trespass ab initio applied only in civil actions and refused to extend it to the context of an undercover investigation.[98] Moreover, the Court rejected the defendant's argument

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[94] States could not ban federal undercover investigations because of the Supremacy Clause.

[95] 343 U.S. 747 (1952).

[96] *Id.* at 751–52.

[97] *Id.* at 752. *See also* Lopez v. United States, 373 U.S. 427, 437 (1963).

[98] *Lee*, 343 U.S. at 752.

that his consent was vitiated by the informant's fraud. "Whether an entry such as this, without any affirmative misrepresentation, would be a trespass under orthodox tort law is not at all clear," it said, refusing to extend any such doctrine to the Fourth Amendment context.[99]

Occasionally, the courts discussing investigative deception will allude to other contexts in analyzing restrictions in such activity. For example, in *Herbert*, the district court compared undercover animal rights investigators to other liars who access property without causing cognizable harm, including "the restaurant critic who conceals his identity."[100] The clearest example is the Ninth Circuit's decision in *Wasden*, which draws heavily on the implications of Idaho's ag gag law for undercover journalists.[101] CMP similarly tried to argue that its activities were comparable to journalists'. But here, we see courts and lawyers borrowing from one less favored context to another, not looking to the favored contexts. The law concerning the favored contexts, of course, is not First Amendment doctrine, but the types of deceptions involved are otherwise identical.

2. Duty of loyalty

When an investigative deception is part of an employment-based investigation, some have contended the deception may be subject to criminal or civil liability to protect the state's interest in promoting the duty of loyalty from employee to employer. This would apply to union salts, and in many cases to law enforcement operations, journalistic newsgathering, and political advocacy group investigations (civil rights testing is not typically employment based).

Many states recognize a common law tort of "duty of loyalty," derived historically from the now anachronistic "master-servant" doctrine and the law of agency. The argument against investigative deceptions in employment settings is that by carrying out an investigation, the employee is being disloyal to the employer. But disloyalty per se is not the controlling factor in duty of loyalty cases. The duty, at

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[99] *Id.* For a thoughtful argument that trespass remedies ought to be available against law enforcement officers who use investigative deceptions, see Laurent Sacharoff, *Trespass and Deception*, 2015 B.Y.U. L. REV. 359, 404–06 (2015).

[100] Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1203 (D. Utah 2017). *See also* N.Y. Times, *supra* note 37 (exempting restaurant critics from rule prohibiting reporters from hiding their identity).

[101] Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1190 (9th Cir. 2018).

least in some jurisdictions, turns on whether the employee has a fiduciary duty to the employer.[102] As such, in some states the duty is limited to employees who are in a special position of trust. Most employment-based undercover investigations involve the acquisition of at-will employment positions, rather than managerial or other positions of power or control over the employer's business. However, even a nonfiduciary employee might violate the duty of loyalty by causing tangible harm to the employer, such as stealing trade secrets or selling information to one of the employer's competitors.

Duty of loyalty arguments raise similar problems as trespass claims. First, would the breach of the duty be a legally cognizable harm under *Alvarez*? Under broad readings of the duty, there may be no tangible damages, particularly if the investigator competently performs their job duties while conducting their investigation. Like trespass, there might be a technical violation of the law that causes no actual harm. It also suffers from the same uncertainty as the law of trespass because the requirements vary significantly from state to state. Crafting a uniform First Amendment doctrine to address restrictions on investigative deception based on the duty of loyalty would therefore undermine uniformity and impose a substantial chill on would-be investigators.

The duty of loyalty interest also reflects another difference in how investigative deceptions are viewed across contexts. In *Food Lion*, the Fourth Circuit upheld a jury verdict of nominal damages because the reporters' conduct "verge[d] on" the type of conduct that had been recognized as breaching the duty of loyalty under North and South Carolina law and the reporters' interests were "diametrically opposed" to their employer's.[103] Notably, the North Carolina Supreme Court later rejected the Fourth Circuit's interpretation of the North Carolina duty of loyalty.[104]

While the Fourth Circuit relied on its interpretation of state law to uphold a duty of loyalty claim, the Supreme Court has at least implicitly rejected the loyalty interest in the union salts context. In *N.L.R.B. v. Town & Country Electric, Inc.*,[105]

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[102] Marian K. Riedy & Kim Hoyt Sperduto, *At-Will Fiduciaries? The Anomalies of a "Duty of Loyalty" in the Twenty-First Century*, 93 NEB. L. REV. 267, 272 (2014).

[103] Food Lion, Inc. v. Cap. Cities/ABC, Inc., 194 F.3d 505, 516 (4th Cir. 1999) .

[104] Dalton v. Camp, 548 S.E.2d 704, 709 (N.C. 2001) (noting that employers may introduce an employee's breach of the duty of loyalty only as a defense to a wrongful termination claim).

[105] 516 U.S. 85 (1995).

the Court denied an employer's claim that because salts were being paid by the union, they could not fall within the NLRA's definition of "employee." The employer's relied on the common law of agency, which it contended prohibited a "servant" from serving "two masters" at the same time.[106] Because the salts would be simultaneously serving the union's interests while employed, the employer argued that they would "acting adversely to the company."[107]

The Supreme Court rejected the employer's reading of the relevant common law, the same common law from which the duty of loyalty is derived. Citing the Restatement (Second) of Agency, the Court said that the "hornbook rule" is that a "person *may* be the servant of two masters . . . *at one time as to one act*, if the service to one does not involve *abandonment* of service to the other."[108] The Court also cited an older treatise on the law of agency, which suggested that a detective working undercover as a waiter in a restaurant, while also engaged in crime detecting activities, does not violate the law of agency.[109] "How does it differ from [the treatise's] example for the company to pay the worker for electrical work, and the union to pay him for organizing?"[110] Thus, at once the Court rejected the duty of loyalty as a bar to both union salting and undercover law enforcement work.[111]

C. Conceptualizing Investigative Deception as a Social Practice

How to properly address the First Amendment issues surrounding investigative deception is neither simple nor obvious. First, there is a lack of doctrinal clarity. It is only since the Court's 2012 decision in *Alvarez* that courts and commentators have really grappled with nuances of the constitutional protection for intentional lies. Prior to that point, it was unclear to what extent state regulation of lies fell

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[106] *Id.* at 93.

[107] *Id.*

[108] *Id.* at 94–95 (quoting Restatement (Second) of Agency § 226, at 498) (emphasis by the Court).

[109] *Id.* at 95

[110] *Id.* The Court here also noted that salts "may" limit their organizing to nonwork hours, which further diminishes the loyalty problems but did not suggest that federal labor law requires them to do so. *Id.*

[111] While it is beyond the scope of this essay, there are also independent moral objections to investigative deceptions. *See* SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW 19 (2014); SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 20–21 (1999).

within the scope of the First Amendment. Most constitutional protection afforded to false statements of fact was, before *Alvarez*, primarily prophylactic, designed not to protect the speech because of its First Amendment value but because protecting it was necessary to protect truthful speech.[112]

But without regard to how the doctrine might apply to other types of lies, as Justin Marceau and I have argued, investigative deceptions serve a high speech value by promoting public discourse.[113] In our work, we have primarily rested this argument on traditional free speech theories—investigative deceptions lead to the revelation of truthful information that is of profound public concern and therefore facilitates both the search for truth and democratic self-governance.[114] Furthermore, because they may help promote an investigator's self-definition in terms of their role in uncovering the truth, they might also contribute to self-realization.[115]

But if anything is clear from this paper's survey of investigative deceptions in across social contexts, it is that such lies are valued in some contexts and less valued, unevenly valued, or not valued at all, in others. In the currently favored contexts of investigative deceptions, discussions of legal or ethical concerns about lying either explicitly or implicitly support the conclusion that the social value of uncovering evidence of civil rights violations or criminal conduct or of promoting union organizing are sufficiently weighty to overcome concerns that they may adversely affect legally cognizable interests, such as trespass or loyalty. Because those contexts have not, thus far, been evaluated in the context of free speech doctrine, they are not generally understood in constitutional terms. If they were, as I have argued, they could each be construed as promoting not only enforcement of the law but also exposure of otherwise private information to public scrutiny in a manner that promotes public discourse. If viewed through a First Amendment lens, they could surely be seen to facilitate free speech and freedom of association.

The message is more mixed in the context of journalism and political advocacy group investigations, both of which have been viewed favorably and unfavorably by the courts. In cases such as *Food Lion*, the courts have upheld common law tort claims (albeit for only nominal damages) against professional journalists

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[112] Chen & Marceau, *supra* note 1, at 1471–72.

[113] *Id.* at 1473.

[114] *Id.* at 1473–76.

[115] *Id.* at 1477.

notwithstanding the speech value of their newsgathering and reporting. Much more significantly, the Planned Parenthood case resulted in a damages award exceeding $2 million,[116] not to mention a multimillion-dollar attorneys' fee award[117] against the investigators.

But in other cases, like *Desnick*, the courts have recognized the value of such investigations and have implied that if they are not defamatory, they are part of an important segment of the speech marketplace.[118] In dicta, Judge Posner noted that while investigative targets may sue for defamation if the story resulting from an investigation is false, the First Amendment is necessary to protect journalists "regardless of the name of the tort" and whether the suit is aimed at the story's content or "the production of the broadcast."[119]

The picture is still developing in the context of undercover investigations by political advocacy groups as well. Several courts have now invalidated all or part of state ag gag laws in Idaho, Iowa, Kansas, and Utah. But at least in the case of Idaho and Iowa, the courts have also allowed the states to impose criminal liability on some types of investigations, and dissenting judges in the Idaho and Kansas cases would have upheld all restrictions on the grounds that these investigations involve common law harms of trespass.

Desnick provides a rare example in which a court situated the reporters' investigative deception into the context of other types of undercover investigations. First, in discussing the journalists' undercover investigation, the court compared the reporters' entry to the plaintiff's ophthalmic clinics to a restaurant critic hiding her identity while dining out, a dinner guest falsely befriending a host to gain access to their house, and a customer entering a car dealership to check out the quality of cars even though he intends to buy it from another dealer with lower prices.[120] In each of these examples, the court noted, "consent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the

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[116] Appellant's Opening Brief, Planned Parenthood Fed'n of Am., Inc. v. Merritt, No. 20-16820, 2021 WL 955133 (9th Cir. Feb. 26, 2021).

[117] Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress, No. 16-CV-00236-WHO, 2020 WL 7626410, at *6 (N.D. Cal. Dec. 22, 2020).

[118] Desnick v. Am. Broad. Cos., Inc., 44 F.3d 1345, 1355 (7th Cir. 1995).

[119] *Id.*

[120] *Id.* at 1351.

property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent."[121] Particularly interesting for purposes of this discussion was the court's reasoning, which compared investigative journalists to civil rights testers. "Like testers seeking evidence of violation of anti-discrimination laws . . . the entry was not invasive in the sense of infringing the kind of interest of the plaintiffs that the law of trespass protects; *it was not an interference with the ownership or possession of land*."[122] Finally, the Seventh Circuit observed that if the same investigative conduct had been undertaken by law enforcement officers or private housing testers, it would violate neither the Fourth Amendment nor the law of trespass.[123]

One could look at this array of cases and describe them as involving differences in the balancing of the value of the lies against the potential social harms caused by investigative deceptions. But it is curious why, for the most part, the courts have not made the connection between these practices in other contexts, where the balance seems to come out quite differently. To be sure, the cases rejecting First Amendment protection of investigative deceptions from generally applicable criminal and tort liability have not always led to devastating consequences for the investigators. But the absence of such protection may both raise the prospect of significant civil and criminal liability and chill the speech of potential investigators. These concerns are heightened now that the Ninth Circuit has upheld the verdict in the CMP case and could be further enhanced if investigators are prosecuted and sent to prison for violating the aspects of the Iowa and Idaho ag gag laws upheld by the Eighth and Ninth Circuits, respectively.

The connections across context might be more apparent if, rather than looking at each investigation as a discrete First Amendment problem—whether they are *speech or nonspeech*—the practice of investigative deception were viewed in a broader social and political context. Professor Robert Post once criticized First Amendment doctrine as being too focused on traditional considerations of whether speech has value and overlooking how speech can only be understood as promoting

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[121] *Id.*

[122] *Id.* at 1353 (emphasis added). *See also* Med. Lab'y Mgmt. Consultants v. Am. Broad. Cos., Inc., 30 F. Supp. 2d 1182, 1202 (D. Ariz. 1998) ("Generally claims of trespass in these cases appear to be attempts to place a square peg in a round hole. Consequently, trespass cases involving fraudulently induced consent have reached contradictory results . . . ."), *aff'd*, 306 F.3d 806 (9th Cir. 2002).

[123] *Desnick*, 44 F.3d at 1353.

such value in the context of social order. "Speech alone," he wrote, "in the absence of other necessary social practices, will not yield the values we seek in either democracy or truth-seeking."[124] He continued, "we attribute to speech the constitutional values allocated to the discrete forms of social practice that speech makes possible."[125] Given the broad range of circumstances in which society uses and understands investigative deceptions, such deceptions can be understood as a social practice, rather than simply speech.

Investigative deceptions might be located in this way as "discrete forms of social order that are imbued with constitutional value."[126] They involve deception through speech or omissions, but the discrete act of deception is not what makes them valuable under the First Amendment. That is, we ought not to disaggregate the deception from the broader speech-promoting function of these practices. They may be lies, but they are, as I have suggested, "high value" lies because they facilitate many of the values the First Amendment is said to promote.[127]

The majority's decision in *Animal Legal Defense Fund v. Kelly* suggests one way to view these deceptions more broadly in understanding their speech value. Its focus on the entire investigation, and not just the mistruth used to gain access to animal agriculture facilities, supports envisioning the speech as part of a social practice. The court wrote that "[w]hatever legally cognizable harm is, it cannot be harm from protected, true, speech. The damage Kansas fears is that animal facilities may face 'negative publicity, lost business[,] or boycotts.'"[128] "Although the information from which the harm flows would not be obtainable without the false statement used to gain entry to the facility, the false statement itself does not directly cause the

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[124] Post, *supra* note 2, at 1272. *But see* Joseph Blocher, *Public Discourse, Expert Knowledge, and the Press*, 87 WASH. L. REV. 409, 418 (2012) ("If instead the boundaries [of the First Amendment] are based directly on whether particular speech acts further the value of democratic legitimation, the concepts of public discourse and protected social practices seem to be little more than conclusory labels.").

[125] Post, *supra* note 2, at 1273.

[126] *Id.* at 1277.

[127] Chen & Marceau, *supra* note 1, at 1437 (arguing that "constitutional protection of high value lies is firmly rooted in First Amendment theory because false speech can paradoxically facilitate or produce truth").

[128] Animal Legal Def. Fund v. Kelly, 9 F.4th 1219, 1235 (10th Cir. 2021).

harm."[129] This way of looking at the problem treats the deception not as a discrete act that causes a discrete harm (trespass or otherwise) but as part of a practice of gathering and disclosing information that would otherwise be unlikely to come to public light.

Finally, another way of understanding investigative deception as a social practice is that it promotes discourse and democracy by enabling groups with less power to contribute information to the marketplace by obtaining information from more powerful institutions. One of the most important critiques of contemporary free speech doctrine is that it pays insufficient attention to power imbalances that in reality distort the totality and composition of speech.[130] The investigations into commercial animal agricultural practices are illustrative, as they are for the most part directed at larger industrial agriculture corporations.

One might dispute the assertion that investigative deception is a social practice even on its own terms, suggesting that the different contexts are themselves relevant to whether a form of investigative deception is an acceptable social practice. For instance, it could be suggested that such deception in the favored contexts is acceptable not on the grounds that it promotes speech value but because it is integrally related to enforcement of the law. Journalists and political advocacy groups might sometimes detect violations of law, but they are not necessarily focused solely on that objective. But I would argue that this contention actually flips the presumptions in favor of investigative deceptions in the *disfavored* contexts, which are more directly connected to disclosure of information that promotes, and has actually promoted, public discourse.

Because such investigative deceptions appear to be widely, if not universally, supported in the favored contexts, they should be viewed as an accepted and valued social practice across contexts, so long as certain criteria are met. First, the investigative deceptions must be used to gather information about matters of public concern. Individual snooping into others' private conduct for malicious or salacious purposes would not be considered part of the accepted social practice.

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[129] *Id.*

[130] Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241, 1245 (2020). *See also* Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439, 452 (2019) (observing that massive resource inequalities distort the First Amendment marketplace of ideas).

Second, though investigative deceptions involve some minimal intrusion on property interests, to be justified as a social practice, the extent of the intrusion must be limited to gathering truthful information on matters of public concern. Use of deception to gain access in order to commit physical damage, theft, or to steal trade secrets would be excluded. Furthermore, the scope of the intrusion must be limited to areas where the matter that is being investigated occurs. Spying on private areas within a workplace that have nothing to do with the investigation would fall outside of the practice. However, to the extent that those who are being investigated reveal information or engage in conduct before the investigator's own eyes, there is no cognizable privacy interest. In the undercover law enforcement investigation context, the Court has recognized that where the only information gathered is statements made in the presence of an undercover officer, there is no invasion of the suspect's privacy.[131] We all take this same risk with respect to persons we talk to or invite onto our property, at least where the information they acquire or conduct they observe is a matter of public concern.

Third, the information acquired during an undercover investigation must be reported truthfully for any constitutional privilege to attach.[132] The privilege is lost where the information is intentionally altered or reported in a manner that does not accurately reflect the statements made or the events observed. Relatedly, the investigators would still be subject to defamation liability for publishing false factual information about their discoveries.

If all these conditions are met, then the law should treat investigative deceptions equally across social contexts, for the speech value and the potentially countervailing interests are roughly identical. Courts examining investigations by journalists and political advocacy groups should look to the way that these same factors are considered under the law in the favored contexts and extend that analysis to the free speech doctrine in the disfavored contexts.

Professor Stephen Gillers has argued that under the press clause, the news media should have a constitutional privilege to engage in undercover work, a "right that no one outside of law enforcement has. It subordinates some property and

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[131] Hoffa v. United States, 385 U.S. 293, 303 (1966).

[132] If an investigation yields no information that is newsworthy or in the public interest, the privilege should still attach if the investigator *ex ante* had good reason to believe that such information would be discovered.

privacy rights to the press's (and therefore the public's) interest in newsgathering."[133] While acknowledging that these practices might violate a number of generally applicable state laws, Gillers suggests that the scope of this privilege could be resolved on a case-by-case basis balancing the newsgathering value against the potential harm to an investigation's targets, referring to the balancing that courts in some of the ag gag cases have employed.[134]

But even those who agree with Gillers might argue that such a privilege ought to be confined to the institutional press and not extended to political activists. For example, Professor Paul Horwitz has argued that the First Amendment should be more attentive to the special role institutions such as the press and universities play in public discourse, entitling them to greater deference in part because they have established internal professional norms.[135] Political activists in contrast have no ethics codes or norms and could be viewed as less trustworthy than professional journalists. But to deny a First Amendment privilege for investigative deceptions to political activists who are engaged in fundamentally the same investigative tactics would be to ignore the unifying social practice that I have argued is already embedded in the free speech firmament. It would simply draw the line in a different place than it currently lies.

In recent years, the law in this area is becoming less settled, not more. Courts have decided cases that are divided over the appropriate First Amendment analysis applied to investigative deceptions by journalists and political activists. Perhaps the importation of these considerations' balancing should instead come not from other cases about journalists and political advocacy groups but from debates about the lawfulness of testers, undercover cops, and salts. Ultimately, employing this balancing, the courts should interpret the First Amendment to exempt investigative deceptions from even generally applicable criminal and tort law provisions where the deception causes no tangible harm.

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[133] STEPHEN GILLERS, JOURNALISM UNDER FIRE: PROTECTING THE FUTURE OF INVESTIGATIVE REPORTING 116 (2018).

[134] *Id.* at 116, 142. For earlier work discussing such balancing for newsgatherers, see Lidsky, *supra* note 84.

[135] Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461, 589 (2005). *See also* Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005).

Conclusion

Whether undertaken in the context of civil rights enforcement, union organizing, police work, journalism, or political activism, investigative deceptions promote the production of knowledge, an informed public discourse, and perhaps even law and social reform. Yet they have not heretofore been understood as a discrete and unified social practice that facilitates speech and the underlying values the First Amendment is commonly thought to advance. And in all of these contexts, this speech value outweighs the de minimis property and loyalty interests sometimes protected under the law. Conceptualized in this manner, investigative deceptions should be protected by the First Amendment, even from generally applicable criminal and civil laws if they meet the standards set forth above.