14

The Long Shadow of *Food Lion*

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While attending a conference a few years ago, I had a private conversation about undercover investigations with the deputy general counsel of one of the nation's leading newspapers. When I asked about what I perceived to be a significant decrease in news media conducting such investigations, the person responded something to the effect of, "Well, *Food Lion* pretty much ended all that." The reference was to the U.S. Court of Appeals for the Fourth Circuit's 1999 decision in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*,[1] one of the most important lower federal court cases shaping freedom of the press under the First Amendment in the past twenty-five years. The case involved a lawsuit by a large grocery store chain against ABC News and two of its producers, who had conducted an undercover investigation revealing that some stores' employees engaged in unsanitary, and possibly unlawful, food handling practices.[2] Although the ultimate outcome of the Fourth Circuit's decision was on balance favorable to the press, it flatly rejected the news network's contention that the First Amendment in any way limits tort claims against journalists engaged in this form of newsgathering.[3]

This chapter discusses the continuing shadow of the *Food Lion* case, which looms over the efforts of journalists and, increasingly of other citizens, to engage in undercover investigations to discover and disseminate truthful information on matters of profound public concern. At a time when many impediments to freedom of the press have emerged, legal barriers to undercover investigations suppress a key

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[1] 194 F.3d 505, 510 (4th Cir. 1999).

[2] *Id.*

[3] *Id.* at 520–22. By "newsgathering," I mean the act of "seeking out news of public interest for the purpose of disseminating it to an audience." Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 Duke J. Const. L. & Pub. Pol'y 113, 137 (2008).

newsgathering tool that was once an important part of the news media ecosystem. Section 14.1 provides a brief overview of undercover investigations in American journalism and then explores how the Food Lion investigation was developed internally and carried out by Susan Barnett and Lynne Dale, producers at ABC's "Primetime Live" newsmagazine show.

In Section 14.2, the chapter describes the extensive litigation battle that followed ABC's national broadcast of the Food Lion story and surveys the major legal objections to undercover investigations. It contends that the *Food Lion* decision created a significant degree of uncertainty about whether and when such investigations may be carried out without violating the law. The case never reached the U.S. Supreme Court, making it technically binding only in the five states governed by the Fourth Circuit. But because the Supreme Court has never taken up the specific First Amendment question implicated by the *Food Lion* case, the lower court's decision continues to have widespread, arguably outsized, influence on the law governing undercover investigations.

Section 14.2 goes on to argue that *Food Lion* is responsible for a palpable chilling effect on those who might otherwise engage in undercover investigations, particularly those involving an investigator who secures employment with the target of an investigation. But *Food Lion* is more than just a legal precedent. Its deterrent effect also flows from the fact that it has shaped, and continues to shape, the journalism profession's internal ethical debates about undercover investigations. Sections 14.1 and 14.2 are based in part on interviews conducted with Barnett and Dale, as well as with Nathan Siegel, one of ABC's key legal counsel in the *Food Lion* case.[4]

Section 14.3 proceeds to call for reconsideration of the *Food Lion* framework and articulation of a meaningful constitutional protection for some aspects of newsgathering, which are long overdue. It lays out a tentative framework for a limited First Amendment privilege to protect undercover investigators from both targeted and generally applicable criminal and civil laws, and it addresses the limitations on and concerns with recognition of such a privilege.

14.1 THE NEWS MEDIA, UNDERCOVER INVESTIGATIONS, AND FREE SPEECH

14.1.1 *Undercover Investigations in American Journalism*

As I have written about extensively in other forums,[5] undercover investigations have been a fundamental component of newsgathering by the institutional press at

[4] Zoom interview with Susan Barnett and Lynne Dale, former producers, ABC "Primetime Live" (Jan. 8, 2024) [hereinafter *Barnett/Dale Interview*]; Zoom interview with Nathan Siegel (Jan. 11, 2024) [hereinafter *Siegel Interview*].

[5] Much of my work in this area was done in conjunction with my colleague, Justin Marceau. *See, e.g.*, Alan K. Chen & Justin Marceau, Truth and Transparency: Undercover Investigations in the Twenty-First Century (2023); Alan K. Chen & Justin Marceau,

various times throughout American history. Undercover investigations are actions taken by journalists who seek access to places, persons, and actions, when the investigative targets would otherwise not welcome investigators.[6] They typically involve two features that are sometimes questioned as problematic, unethical, or even illegal. First, the journalists gain access to the investigative target by using some form of deception – lying about their true identity, their news media employer, and their motives for seeking access to the target (or at least omitting relevant information about those things) – in order to gather information on matters of public concern.[7] One common undercover reporting tactic involves the journalist obtaining employment with the investigation's target.

Second, those who engage in undercover investigations also often use hidden cameras or recording devices to memorialize the conduct or information they are seeking to expose. The recordings verify what would otherwise be only the investigator's narrative account, thus lending substantial credibility to the information disclosed to the public. As Susan Barnett, one of the producers who went undercover for the Food Lion investigation told me, recording can be important to address a public increasingly skeptical of the press: If "[the viewers] don't see it, they don't believe it."[8]

American journalists began employing undercover investigative tactics before the Civil War, when northern newspapers sent reporters to the South to report on the abhorrent conditions of slavery.[9] During the war, undercover methods were also important tools for journalists from the North, who would have risked great danger reporting from the battlefields in the South had their true identities been known.[10] Since that time, the popularity of such investigations has ebbed and flowed, depending in part on historical context, changes in relevant legal and ethical principles, and the availability (or lack thereof) of other newsgathering methods.[11]

Developing a Taxonomy of Lies Under the First Amendment, 89 U. Colo. L. Rev. 655 (2018); Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 Colum. L. Rev. 991 (2016); Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 69 Vand. L. Rev. 1435 (2015). *See also* Alan K. Chen, *Investigative Deception Across Social Contexts*, https://knightcolumbia.org/content/investigative-deception-across-social-contexts; Alan K. Chen, *Cheap Speech Creation*, 54 U.C. Davis L. Rev. 2405 (2021).

6 As such, they are distinct from two other important tools of information gathering and disclosure – investigative reporting and whistleblowing. For an explanation of the differences among these methods, *see* Chen & Marceau, Truth and Transparency, *supra* note 5, at 214–15.

7 For a more extensive definition, *see* Chen & Marceau, Truth and Transparency, *supra* note 5, at 18.

8 *Barnett/Dale Interview*, *supra* note 4. *See also* Marceau & Chen, *Video Age*, *supra* note 5, at 1029 ("A recording provides a self-authenticating and easily reproduced memorialization of one's encounters or experiences.").

9 Brooke Kroeger, Undercover Reporting: The Truth about Deception 15–30 (2012).

10 J. Cutler Andrews, The North Reports the Civil War 6–34 (1985).

11 Chen & Marceau, Truth and Transparency, *supra* note 5, at 36–74.

Undercover investigations appear to have thrived during two periods in American history. The first high point was during the Progressive Era. By some accounts, the method was first popularized in the late 1800s and early 1900s by women seeking opportunities to break into what was then the male-dominated journalism profession. To the extent they could get newspaper jobs at all, women were hired primarily to write about issues that their editors believed were of concern only to women, such as fashion.[12] Women seeking to be treated as serious journalists turned to undercover investigations. But they were pejoratively dubbed "girl stunt reporters" for their exploits, suggesting that they were engaged in a kind of sensationalist journalism perhaps unworthy of "real" (i.e., male) reporters. Despite that label, these intrepid journalists exposed shocking misconduct across a wide range of the public and private sectors.[13]

In an attempt to break into the profession with hard news stories, some female reporters went undercover to gather information and then write about many of the day's most important social issues. The journalist most closely associated with this movement is Elizabeth Cochran, who wrote under the pen name Nellie Bly. Bly conducted numerous undercover investigations over the course of her impressive career but is best known for feigning symptoms causing her to be institutionalized at the Blackwell's Island Insane Asylum for Women, where she discovered systematically inhumane treatment of its residents. She took this information and first documented these conditions in the pages of the New York World newspaper, and later in her book, *Ten Days in a Mad-House*.[14]

Upton Sinclair, the writer who is perhaps most associated with undercover investigations, used similar methods to investigate conditions in the Chicago meatpacking industry in 1904. Though he initially undertook this work to expose the greed and excesses of the animal agriculture industry and the poor treatment of meatpacking workers, his investigation quickly turned to the stomach-turning conditions of food sanitation and handling, issues that later became the focus of his bestselling novel, *The Jungle*.[15] As Brooke Kroeger wrote, Sinclair:

> . . . intended to provide a searing examination of Big Beef, its power and corruption, and the grisly working conditions of the immigrant poor. But his story soon began to

[12] Jean Marie Lutes, Front-Page Girls: Women Journalists in American Culture and Fiction, 1880–1930 2 (2006) ("for men, participatory journalism was a choice; for women, it was one of the few ways to break out of the women's pages."). Unfortunately, the high-profile stories produced by women conducting undercover investigations did little to eradicate these types of gender biases in the profession. Amanda Svachula, *When the Times Kept Female Reporters Upstairs*, N.Y. Times (Sept. 20, 2018), https://www.nytimes.com/2018/09/20/insider/times-womens-section-female-reporters.html (noting that between 1955 and 1971, The New York Times ran a separate section on "Food, Fashions, Family, and Furnishings" written by women and directed at a female audience).

[13] Chen & Marceau, Truth and Transparency, *supra* note 5, at 4–6.

[14] Nellie Bly, Ten Days in a Mad-House (1887).

[15] Upton Sinclair, The Jungle (1906).

turn on his stark depictions of how contaminated meat was making its way from the packinghouses of Chicago to the dinner tables of the world.[16]

In order to gather information for their stories, Sinclair and others who conducted undercover investigations during the Progressive Era used either overt or implicit forms of deception to gain access to people, places, and conduct that would otherwise have been inaccessible to them. In each case, that information was conveyed to the public and meaningfully informed public discourse and policy debates. Of course, given the technology of the day, they did not, like contemporary journalists, use hidden recording equipment. Rather, they relied on their memories and surreptitious notetaking to memorialize their findings. Sinclair reportedly would retire to his living quarters each evening to write down his notes while his memory was still fresh.[17] Given that his investigation spanned a period of seven weeks, he had to find some way to ensure that his information was documented without being detected.

Although the earlier work of the women undercover journalists and Sinclair are often linked, Kroeger suggested that by Sinclair's time, the standards for conducting such investigations and reporting the stories had evolved significantly. By the early twentieth century, journalists' undercover investigations were more sophisticated and reporters "went to great lengths to verify and analyze their findings."[18] Thus, at this early stage, the tactics of undercover investigations were maturing in accordance with the best standards of professional journalism.

Following the Progressive Era, "there seems to be a lull in undercover investigations, or at least ones that received national attention, from the mid-twentieth century until the 1970s."[19] Although journalists conducted undercover investigations intermittently from the Progressive Era to contemporary times, their use became much more prevalent after the Watergate scandal in the early 1970s, which placed investigative journalism front and center in the public's eye. Although it is unclear whether Washington Post reporters Bob Woodward and Carl Bernstein ever engaged in the tactics used by most undercover investigators, many other journalists began expanding the use of undercover investigations during the years surrounding Watergate.[20] Professional journalism organizations began focusing on creating or updating ethics codes for the industry during this period as well.[21]

[16] Kroeger, *supra* note 9, at 84.

[17] Anthony Arthur, Radical Innocent: Upton Sinclair 49 (2006). Even reporters conducting undercover investigations more recently have resorted to similar tactics. Kroeger, *supra* note 9, at 172–76 (describing how Pulitzer Prize-winning Chicago Tribune reporter William Gaines, posing as a janitor to investigate a local private hospital, wrote notes on paper towels that he stashed away until he could safely recover them).

[18] Kroeger, *supra* note 9, at 83.

[19] Chen & Marceau, Truth and Transparency, *supra* note 5, at 7.

[20] *Id*. at 54–55.

[21] *Id*. at 56–58.

The late 1960s and early 1970s also witnessed the introduction of a new form of journalism, the television newsmagazine. The first such program to receive national attention, CBS's still-popular show, "60 Minutes," began airing in 1968.[22] A type of long-form journalism, "television newsmagazine shows . . . allowed television journalists to go beyond reporting on discrete stories of the day to taking on broader, more time-consuming, and more expensive investigations."[23] They were in part the networks' reaction to the high costs and lack of advertising support for full-length documentaries, with executives believing that a single broadcast including multiple segments might be more successful.[24] Although some of the content was (and continues to be) "soft" news stories, television newsmagazines also evolved into a successful vehicle for airing the results of undercover investigations, as the *Food Lion* case illustrates. In addition, television newsmagazines benefited from the evolving technology making it easier to engage in secret recording, though not nearly as easy as it has become today.

Undercover investigations by American journalists have led to the discovery of information critical to public discourse about matters ranging from public corruption to food safety to sweatshop labor conditions, to name just a few. Although these investigative techniques originated in the journalism profession, they have since been adopted, and even celebrated and legally authorized, in other contexts. Fair housing investigators have long engaged in civil rights testing, where investigators using false identities and financial backgrounds are sent in to detect evidence of illegal racial steering and often document their findings with secret recordings.[25] Union activists may lawfully lie about their affiliation with unions to obtain jobs with employers whose workers they want to organize.[26] Law enforcement officers use the same tactics as undercover journalists to expose criminal activity through undercover sting operations.[27] And, more recently, political advocacy groups across the ideological spectrum have adopted undercover investigations to expose what they believe to be wrongful conduct.[28] As such, undercover investigations are an important vehicle for promoting transparency, accountability, and democracy, one of the central functions of the First Amendment.[29]

[22] *Television News Magazines*, in 4 Encyclopedia of Journalism 1385 (Christopher H. Sterling ed., 2009).

[23] Chen & Marceau, Truth and Transparency, *supra* note 5, at 58.

[24] *Television News Magazines*, *supra* note 22.

[25] Havens Realty Corp. v. Coleman, 455 U.S. 363, 373–74 (1982). *See also* Chen & Marceau, Truth and Transparency, *supra* note 5, at 10–12.

[26] James L. Fox, *"Salting" the Construction Industry*, 24 Wm. Mitchell L. Rev. 681, 683–84 (1998). *See also* Chen & Marceau, Truth and Transparency, *supra* note 5, at 15–16.

[27] *See, e.g.*, Hoffa v. United States, 385 U.S. 293, 303 (1966). *See also* Chen & Marceau, Truth and Transparency, *supra* note 5, at 16–18.

[28] Chen & Marceau, Truth and Transparency, *supra* note 5, at 12–14, 30–31. For example, undercover investigations have been used by animal rights activists and anti-abortion advocates, among others.

[29] Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 88–89 (1948).

Undercover investigations may be even more central to promoting those goals in the current political and news environment.[30] The United States is currently living through a time of increasing partisan divide as well as mistrust of government and other institutions. Relatedly, the nation seems to be experiencing a period of epistemic chaos, with some people disputing the very nature of truth while misinformation and disinformation campaigns thrive in part because of the speed with which information can be transmitted over the internet.

In other times, one natural response to this environment might have been a thriving, independent press that could investigate and report on the most critical issues of the day, checking and exposing abuses of truth by government actors, political candidates and organizations, and foreign government interlopers. But the American press is itself experiencing an existential crisis. The institutional news media is struggling through both internal and external threats to its existence. American newspapers have been substantially impaired because their business model has been undermined by the emergence of the internet as a less expensive and more widely viewed platform for news and advertising.[31] A recent study by researchers at Northwestern's Medill School of Journalism projects that by the end of 2024, the nation will have lost a third of its newspapers since 2005.[32]

Shrinking revenues have also caused even the surviving major newspapers to cut budgets, sometimes in areas crucial to newsgathering. As discussed in greater detail below, conducting journalistically sound undercover investigations requires substantial resources.[33] The reduction in resources has also affected another important newsgathering tool, the pursuit of information through open records laws. One report indicated that, with the exception of The New York Times, legacy media companies have substantially reduced the number of requests they submit under the federal Freedom of Information Act.[34]

Nor is the news media immune to the fundamental loss of public trust that plagues other institutions. Multiple sources may be contributing to this loss of trust, from the sustained performative attacks on the news media by high-profile politicians to the emergence of the perception that "fake news" now pervades the media landscape (even though many of these stories come not from mainstream media but from individuals, organizations, and even foreign governments spreading

[30] Chen & Marceau, Truth and Transparency, *supra* note 5, at xiii–xvii.

[31] RonNell Andersen Jones & Sonja R. West, *The Disappearing Freedom of the Press*, 79 Wash. & Lee L. Rev. 1377, 1382–84 (2022)

[32] Penelope Muse Abernathy, *The State of Local News: The 2023 Report*, Executive Summary, https://localnewsinitiative.northwestern.edu/projects/state-of-local-news/2023/report/#executive-summary.

[33] *See infra* note 200 and accompanying text.

[34] Greg Munno, *FOIA Suits Jump in 2014*, The FOIA Project, Dec. 22, 2014, https://foiaproject.org/2014/12/22/foia-suits-jump-in-2014/ (reporting that between 2005 and 2012, traditional media brought between three and nine FOIA suits per year, but than in 2014, no legacy media outlet other than The New York Times filed a FOIA lawsuit).

disinformation across social media platforms).[35] There is also an increasing sense, it appears, that people believe the media is no longer "objective," even though news entities have never been entirely neutral.[36]

Finally, attacks on the media have also been literal, rather than metaphorical, with acts of violence or threats of such violence becoming tragically commonplace around the world.[37] The United States is not immune to the rise in violence against journalists. According to the U.S. Press Freedom Tracker, there were 593 assaults against journalists in the United States in 2020, which was an almost 1,400 percent increase over the prior year.[38] And those are just reported incidents. As Erin Carroll has observed, "Online insults and threats against journalists – particularly against women – exploded. According to one recent study, abuse is so rampant that it is part of the 'daily work lives' of women journalists. Researchers worry that the line between online attacks and offline violence is faint."[39]

One reaction to the challenges facing professional journalism in the United States might be to reinvigorate its newsgathering capacity to shore up its important role in promoting democracy. This might include devoting greater resources to reporting important stories through undercover investigations. Instead, we are witnessing increasing legal and ethical objections to this once important investigative practice.

14.1.2 *ABC's Investigation of Food Lion*

During the heyday of television newsmagazines' undercover investigations, producers at ABC's popular "Primetime Live" learned from a couple of different sources about concerns with practices at some branches of the Food Lion grocery store chain, which operates stores mostly in the southeastern United States.[40] The investigation and story were the project of two producers, Susan Barnett and Lynne Dale, who had never previously worked together.[41] Barnett and Dale initially came at the story from different angles. Barnett had recently completed a well-received

[35] Andersen Jones & West, *supra* note 31, at 1388.

[36] For a thoughtful response to the objectivity issue, *see* A. G. Sulzberger, *Journalism's Essential Value*, Colum. Journalism Review, May 15, 2023, https://www.cjr.org/special_report/ag-sulzberger-new-york-times-journalisms-essential-value-objectivity-independence.php.

[37] Andersen Jones & West, *supra* note 31, at 1386–87. *See also Threats to Freedom of Press: Violence, Disinformation & Censorship*, May 11, 2023, https://www.unesco.org/en/threats-freedom-press-violence-disinformation-censorship (reporting that according to the United Nations Educational, Scientific, and Cultural Organization, a journalist somewhere in the world is killed every four days).

[38] Erin Carroll, *Obstruction of Journalism: A New Way to Combat Violence Against Journalists*, Colum. Journalism Review, Jan. 13, 2022, https://www.cjr.org/analysis/obstruction-journalism-violence.php.

[39] *Id.*

[40] *Barnett/Dale Interview*, *supra* note 4.

[41] The narrative about the initiation of the investigation comes from my Zoom interview of Barnett and Dale. *See Barnett/Dale Interview*, *supra* note 4.

"Primetime Live" story about the meatpacking industry and reached out to her source on that story – the Government Accountability Project (GAP),[42] a nonprofit organization dedicated to protecting and advocating for whistleblowers. GAP shared with her reports from Food Lion workers who had indicated that employees at some stores were adulterating food sold to consumers. Dale had independently been gathering information about labor violations at Food Lion, which prompted her to pitch that element of the story. "It wasn't about rotten meat, it was about [Food Lion stores] working employees off the clock."[43]

Notwithstanding what critics have suggested about undercover investigations, journalists do not typically undertake such investigations as fishing expeditions, sweeping broadly while hoping to uncover some unsavory conduct by their targets. Rather, this undercover work is usually just one component of an extensive, meticulous investigation using a combination of more traditional journalistic techniques, which may have already revealed a reasonable suspicion that an undercover investigation will lead to the discovery of additional newsworthy information. This was the case with the Food Lion investigation.

The Food Lion investigation was conducted consistent with the network and producers' professional journalistic standards. First, investigations were not conducted unless there was first credible information that undercover work would turn up newsworthy information. Importantly, substantial background reporting and sourcing took place as part of the investigation. The Food Lion investigation involved several months of traditional reporting before the undercover investigation began.[44] As Barnett said: "We do all the paper trail work. It's not like that doesn't happen and we just go undercover."[45] Nor is the story done when the undercover investigation has been completed. The producers worked for at least an additional six months between the investigation and the time the story was aired on national television.[46] In the end, the producers had obtained information from over 120 sources, all of whom were current or former Food Lion employees.[47] In addition, Barnett and Dale noted that it was important that an undercover story be one of "national importance" and have "national implication," and that hidden cameras not be used if there were other ways to obtain the relevant information.[48] The consideration of both the importance of the story and the availability of less intrusive means of gathering relevant information parallels

[42] https://whistleblower.org/.

[43] *Barnett/Dale Interview*, *supra* note 4. Coincidentally, as discussed above, Upton Sinclair also first began his undercover investigation of the meatpacking industry focused on labor practices, but also changed direction to instead examine food safety and sanitation.

[44] *Barnett/Dale Interview*, *supra* note 4.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

some of the journalism profession's published ethical standards relating to undercover investigations.[49]

While Barnett had done undercover investigations before, this was Dale's first foray into this newsgathering tactic. Barnett pitched going undercover as Food Lion employees to corroborate the information they had already received. As they designed their investigation, they worked closely with ABC News's legal counsel.[50] ABC approved the producers getting jobs at Food Lion stores, not disclosing their affiliation with ABC, and using hidden cameras. But the network stipulated that Barnett and Dale were to use their real names and Social Security numbers when they applied for their jobs at Food Lion, though it approved of them modifying significant aspects of their backgrounds on their resumes.[51] The trial court noted that Dale lied about having prior experiences as a meat wrapper and that both Barnett and Dale provided false references, employment histories, and addresses, and omitted any reference to their employer, ABC.[52]

To conduct the undercover part of the investigation, Barnett and Dale successfully obtained jobs at different Food Lion stores. Dale worked for two weeks as a meat wrapper in two different stores and Barnett worked as a delicatessen clerk for one week in one store. While working, they both performed their jobs in compliance with their assigned duties, and also engaged in an investigation to confirm the reports about food handling and labor practices.[53] They both wore hidden cameras that they were able to turn on at appropriate times to document problems with the stores' practices and recorded a total of about 45 hours of video between them.[54]

ABC aired the story on national television on its "Primetime Live" newsmagazine program on November 5, 1992. As the Fourth Circuit described the practices revealed by the report:

> The broadcast included . . . videotape that appeared to show Food Lion employees repackaging and redating fish that had passed the expiration date, grinding expired beef with fresh beef, and applying barbeque sauce to chicken past its expiration date in order to mask the smell and sell it as fresh in the gourmet food section. The program included statements by former Food Lion employees alleging even more serious mishandling of meat at Food Lion stores across several states. The truth of the PrimeTime Live broadcast was not an issue in the litigation.[55]

[49] *See, e.g.*, Society of Professional Journalists, *Society of Professional Journalists – 1996 Code of Ethics*, https://spjnetwork.org/quill2/codedcontroversey/ethics-code-2009.pdf [hereinafter *1996 SPJ Code of Ethics*] ("Avoid undercover or other surreptitious methods of gathering information except when traditional open methods will not yield information vital to the public.").

[50] *Id.*

[51] *Id.*

[52] Food Lion, Inc. v. Cap. Cities/ABC, Inc., 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).

[53] *Barnett/Dale Interview*, *supra* note 4.

[54] *Id.*

[55] *Food Lion*, 194 F.3d at 511.

Both before and after the story aired, however, there was a protracted legal battle over the legality of ABC's investigation and the subsequent broadcast. Section 14.2 describes that litigation and the important legal questions surrounding undercover investigations that it framed but did not necessarily answer.

14.2 THE FOOD LION LITIGATION AND POTENTIAL LEGAL BARRIERS TO UNDERCOVER INVESTIGATIONS

As valuable as undercover investigations can be to promoting democracy, transparency, and public discourse, there have long been objections to the secretive tactics necessary to carry them out. Targets of such investigations have been predictably upset when a journalist exposes their illegal or otherwise unsavory conduct to public scrutiny. During the Progressive Era, critics would describe intrepid women reporters with the pejorative label "girl stunt journalists" in order to convey a lack of journalistic legitimacy and to place them below their male peers on some sort of professional hierarchy.[56] This suggested that this type of important journalistic work was sensationalist and unprofessional. Perhaps not surprisingly, current critics of undercover investigations attack investigators with comparable epithets.[57] But at least in the earlier years, criticisms of such investigations were confined to simple rhetorical attempts to undermine journalists' professional credibility. Beginning sometime in the 1990s, however, investigative targets began turning to the courts in an effort to legally punish and chill undercover investigations.[58]

14.2.1 *Legal Theories Regarding Undercover Investigations*

In its case against ABC, Food Lion invoked all three of the potential common law claims typically brought against undercover investigators – fraud, trespass, and violation of the duty of loyalty. Before recounting the course of the *Food Lion* litigation, therefore, a brief overview of each of these theories is warranted. To a significant extent, these claims overlap. They each require us to examine whether one who

[56] Kirkus Reviews, Feb. 15, 2021 ("'By writing these reporters back into history,' Todd writes, 'I aim to highlight the double standard that labels women as 'stunt reporters' while men are 'investigative journalists,' even as they do the same work.'") (reviewing Kim Todd, Sensational: The Hidden History of America's "Girl Stunt Reporters" (2021)), https://www.kirkusreviews.com/book-reviews/kim-todd/sensational-stunt/.

[57] James L. Aucoin, The Evolution of American Investigative Journalism 3–4 (2005). In states that have enacted Ag Gag laws, the legislative histories have revealed some colorful insults directed at undercover investigators, who have been called "jack wagon[s]," Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1198 (D. Utah 2017), "vigilantes," and been compared to "marauding invaders." Animal Legal Def. Fund v. Otter, 44 F. Supp. 3d 1009, 1024 (D. Idaho 2014).

[58] Barry Meier & Bill Carter, *Undercover Tactics by TV Magazines Fall under Attack*, N.Y. Times (Dec. 23, 1996), www.nytimes.com/1996/12/23/business/undercover-tactics-by-tv-magazines-fall-under-attack.html.

engages in investigative deception has violated a common law duty that causes tangible harm to the investigation's target. Importantly, the relevant tort law operates against a background First Amendment doctrine governing the regulation of lies.

14.2.1.1 Fraud

At first glance, common law fraud is arguably the worst fit when it comes to undercover investigations. In *Food Lion*, the court applied the law of North Carolina and South Carolina, the two jurisdictions where the investigation took place.[59] Fraud in those states generally requires the plaintiff to show that the defendant intentionally made a false statement to the plaintiff, with the intent that the plaintiff rely on that statement, and that the plaintiff suffered injury by reasonably relying on the statement.[60] The Restatement (Second) of Torts' definition of fraud is narrower, applying only where the false statement is used to either lead someone to make decisions related to a business transaction or give a gift to the fraudster or a third party.[61]

The paradigm case of fraud is the use of false statements to induce the listener to make a purchase or financial investment. In the *Food Lion* case, however, the argument was that the producers made false statements in order to induce Food Lion to hire them as employees. Notably, even if one could argue that an undercover investigator is inducing someone to make the "business transaction" of hiring the investigator, that hiring decision still must damage the plaintiff. Yet most undercover investigators who conduct employment-based investigations are hired as lower level, at-will employees. Thus, the target is paying them a salary for their labor, and, assuming the investigators actually perform the job for which they were hired, the target is not harmed.

Furthermore, to recover for fraud, the plaintiff must show that the fraud was the cause of the harm. When the target of an investigation sues a journalist, it typically asserts that its damages flow not from the act of hiring the investigator, but from the disclosure of information discovered during the investigation. That is, they seek publication damages. As discussed below, however, under a fraud theory, the investigation's target cannot succeed on the theory that the fraud led to damages from the publication of truthful information acquired through the fraud.

A related theory is that when journalists mislead a target in an employment-based investigation, they are committing "resume fraud." The most obvious implication from the term resume fraud is that it applies to someone who inflates or exaggerates her credentials.[62] Journalists and others who seek employment to carry out an

[59] *Food Lion*, 194 F.3d at 512.
[60] *Id.*
[61] Restatement (Second) of Torts §§552–53 (1995).
[62] Moreover, it is unclear that any state recognizes an independent common law tort action for resume fraud. Rather, resume fraud appears to come up almost exclusively in the context of

undercover investigation are usually qualified to do the jobs, otherwise they would likely be quickly discovered. If they are qualified and perform their duties satisfactorily, there would be no damages other than, again, the harm from any resulting publication damages. Courts are divided on this point. The trial court in *Food Lion* agreed that Barnett and Dale committed resume fraud, but on this point the Fourth Circuit disagreed.[63]

The question of whether lying to get a job to conduct an undercover investigation is protected by the First Amendment turns on the United States Supreme Court's decision in *United States v. Alvarez*.[64] In *Alvarez*, the Court invalidated the Stolen Valor Act, a federal criminal law prohibiting a person from falsely claiming to have been awarded high military honors. In doing so, the Court held that false statements of fact are protected under the First Amendment unless they cause a legally cognizable harm or provide a material gain to the speaker.[65] In dicta, the *Alvarez* plurality identified lies to secure "offers of employment" as not protected, because obtaining a job constituted securing a valuable consideration.[66]

It is unlikely that the Court was contemplating undercover investigators when it included this language. From the context of this paragraph, the Court is describing paradigmatic cases of common law fraud in which people lie with the intent to secure a financial benefit. "It seems clear that the phrase 'material gain' as used in *Alvarez* is meant to be a synonym for fraud or injury-causing lie. Material gain in this context implies that the prevaricator is deriving some tangible benefit from the deceived party – that is to say, it is a species of unjust enrichment."[67]

However, in *Animal Legal Defense Fund v. Wasden*, the U.S. Court of Appeals for the Ninth Circuit held that there is no First Amendment protection for an undercover investigator who lies to gain employment with an investigative target. In *Wasden*, the plaintiffs argued that this language from *Alvarez* meant only to address those who falsely inflate their qualifications for a job, which more closely resembles common law fraud. They claimed that someone who *understates* their education or experience or omits their political affiliation to gain a job for the purpose of exposing wrongdoing does not fall within the *Alvarez*'s "offers of employment" language. The Ninth Circuit rejected that argument on a couple of grounds. First, it noted that someone who seeks employment with the intent to harm the employer is in "breach of the covenant of good faith and fair dealing that is implied

serving as a defense to wrongful termination and employment discrimination claims. *See, e.g.*, Cicchetti v. Morris Cnty. Sheriff's Off., 194 N.J. 563, 579 (2008).

[63] Indeed, in the context of its evaluation of Food Lion's trespass claim, the court observed "if we turned successful resume fraud into trespass, we would not be protecting the interest underlying the tort of trespass – the ownership and peaceable possession of land." 194 F.3d at 518.

[64] United States v. Alvarez, 567 U.S. 709 (2012).

[65] *Id.* at 719, 723 (plurality opinion). *See also id.* at 734–36 (Breyer, J., concurring in the judgment) (stating general agreement with the majority's framework).

[66] 567 U.S. at 723.

[67] Chen & Marceau, *High Value Lies*, *supra* note 5, at 1492 n.313.

in all employment agreements in Idaho."[68] Second, and perhaps more importantly, the court wrote that:

> Although it may be true that "the goal of undercover employment-based investigations is not to 'secure moneys or other valuable considerations' for the investigator, but rather to expose threats to the public," ALDF ignores that the Supreme Court singled out offers of employment and that *these undercover investigators are nonetheless paid by the agricultural production facility as part of their employment*.[69]

Other courts, including the Fourth Circuit in *Food Lion* (albeit before *Alvarez* was decided), have disagreed.[70] The implication of *Wasden* is that states may, without violating the First Amendment, punish even lies that understate one's qualifications or omit one's motivations in order to gain employment. If that is the case, then journalists will rarely if ever be able to engage in an employment-based investigation. But even if the Supreme Court narrows this language in *Alvarez* so that undercover investigators may lie to get jobs for the purpose of undercover journalism, there are other barriers under the common law of tort that would continue to deter them.

14.2.1.2 Trespass

Investigative targets sometimes sue undercover investigators for common law trespass. The Restatement defines trespass as the intentional entry onto the land of another "irrespective of whether [the trespasser] thereby causes harm to any legally protected interest of the other."[71] Two features of trespass law make it especially complicated to apply to undercover investigators. First, consent is an affirmative defense to trespass.[72] In the case of an undercover investigation, the target has given the investigator consent to enter the property, even if they have done so unaware of the investigator's true identity and motive. In other words, the property owner knows they have consented to *someone* entering their land. In some jurisdictions, consent is vitiated if the alleged trespasser has secured it through fraud;[73] in others, however, consent induced by fraud is valid, and no trespass has occurred.[74] As I have written elsewhere, it is problematic for the *Alvarez* First Amendment standard to turn on a

[68] *Wasden*, 878 F.3d at 1201.
[69] *Id.* at 1201–02 (emphasis added).
[70] Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1206 (D. Utah 2017).
[71] Restatement (Second) of Torts §652B (1995).
[72] *See, e.g.*, Grygiel v. Monches Fish & Game Club, Inc., 328 Wis. 2d 436, 461 (2010).
[73] Belluomo v. KAKE TV & Radio, Inc., 3 Kan. App. 2d 461 (1979); People v. Segal, 358 N.Y.S.2d 866 (Crim. Ct. 1974).
[74] Keyzer v. Amerlink, Ltd., 173 N.C. App. 284 (2005), aff'd, 360 N.C. 397 (2006); Am. Transmission, Inc. v. Channel 7 of Detroit, Inc., 239 Mich. App. 695 (2000). *See also 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, 1169 (2022).

particular jurisdiction's state law, both because there would not be a uniform free speech standard across states and because uncertainty about the nature of state law in a particular jurisdiction may create a chilling effect on investigators.[75]

In some states, however, legislators have begun invoking trespassory interests as a justification for the enactment of criminal laws directed at undercover investigations. In recent years, for example, some states have crafted legislation targeting animal rights groups, who have adopted the undercover tactics of journalists to expose extreme abuses of farmed animals at industrial agriculture production facilities. These statutes, often referred to as "Ag Gag" laws, appear to be a direct response to several highly publicized undercover investigations by groups such as People for the Ethical Treatment of Animals (PETA). These laws impose criminal penalties on any person who either seeks access to animal facilities using deception or engages in secret recording at those facilities, or both. Such laws could also be used to prosecute journalists who conduct undercover investigations at such facilities.

Ag Gag laws target activists who, like journalists conducting undercover investigations, gain employment or otherwise gain access to agricultural facilities by lying or omitting information about their identities, motives, and affiliation with animal rights organizations. There has been extensive litigation about the constitutionality of such laws, with the plaintiffs asserting that the laws interfere with their First Amendment free speech rights. Those cases have led to mixed results, with some laws having been struck down in whole[76] or in part[77] and others upheld.[78]

The state law trespass question is also relevant to whether there is any First Amendment protection for undercover investigators. As we have seen, the Supreme Court's decision in *Alvarez* holds that lies are protected by the First Amendment unless they cause a legally cognizable harm to the listener or produce a material gain for the liar.[79] Trespass is a strict liability tort, however, so even a nonconsensual entry onto the land of another may lead to a tort judgment even if no actual harm has occurred. Thus, a lie that leads to a trespass (in a jurisdiction where fraud vitiates consent), may only be protected under the First Amendment if it causes no legally cognizable harm, but the Restatement says a trespass occurs "irrespective of whether [the trespasser] thereby causes harm to any legally protected

[75] Chen, *Investigative Deception*, *supra* note 5.

[76] People for the Ethical Treatment of Animals, Inc. v. N. Carolina Farm Bureau Fed'n, Inc., 60 F.4th 815 (4th Cir. 2023) (cleaned up); Animal Legal Def. Fund v. Kelly, 9 F.4th 1219 (10th Cir. 2021); Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017). The author discloses that he serves or served as counsel to the plaintiffs in most of the Ag Gag cases cited in this chapter.

[77] Animal Legal Def. Fund v. Reynolds, 8 F.4th 781 (8th Cir. 2021) ("Reynolds I"); Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018).

[78] Animal Legal Def. Fund v. Reynolds, 89 F.4th 1065, 1067 (8th Cir. 2024) ("Reynolds II").

[79] United States v. Alvarez, 567 U.S. 709, 719, 723 (2012) (plurality opinion).

interest of the other."[80] Whether undercover investigations constitute a trespass or involve constitutionally protected speech turns on how to read these two seemingly contradictory legal rules together.

14.2.1.3 Duty of Loyalty

Finally, because successful undercover investigators often obtain employment with their targets to gain access to the information they seek, targets have sometimes also turned to a less common legal claim under the duty of loyalty. The duty of loyalty, which is recognized in some form in all jurisdictions, finds its roots in the law of agency, under which agents have a fiduciary duty to act loyally for the principal's benefit.[81] In the context of an undercover investigation, an employer can sue an undercover journalist under the theory that because the journalist is also working for their media employer, the employee is being disloyal to the target employer. The duty of loyalty is often described as being rooted in the long-standing, and somewhat anachronistic, biblical admonition against serving "two masters."[82] Because it is central to the Fourth Circuit's analysis in *Food Lion*, we will return to the duty of loyalty in greater detail below.

14.2.1.4 Defamation, Privacy, and Other Less-Viable Theories

Other causes of action not raised in Food Lion might conceivably be raised in response to undercover investigations, but are even more clearly not viable paths to liability. First, an employer might claim that an investigation violates its right of privacy. The only common law privacy torts that could conceivably apply in the context of undercover investigations would be intrusion upon seclusion and public disclosure of private facts. Intrusion upon seclusion relates to the types of personal privacy we all value, as it requires the tortfeasor to have interfered with the plaintiff's private space in a way that intrudes on a person or their private affairs or concerns, of a kind that would be highly offensive to a reasonable person.[83] Because undercover investigations seek information of public concern that can inform public discourse, they do not seem susceptible to this type of claim unless the investigator exceeds the

[80] Restatement (Second) of Torts §652B (1995).

[81] Marian K. Riedy & Kim Sperduto, *At-Will Fiduciaries? The Anomalies of a "Duty of Loyalty" in the Twenty-First Century*, 93 Neb. L. Rev. 267, 272 (2014). A related, but distinct concern, might be that an undercover investigator might intentionally or inadvertently reveal an employer's trade secrets. There are, of course, already many legal restrictions against stealing trade secrets, and this chapter is not suggesting the privilege would extend to exemption from such laws. Even beyond legal restrictions, the best practices for undercover investigations could explicitly prohibit even the unintentional public disclosure of trade secrets.

[82] Food Lion, Inc. v. Cap. Cities/ABC, Inc., 951 F. Supp. 1224, 1230 (M.D.N.C. 1996). For the biblical citation, *see* Matthew 6:24 (New American Standard Bible).

[83] Restatement (Second) of Torts §652B (1995).

reasonable bounds of the investigative plan. Public disclosure of private facts does not likely fit with undercover investigations because it only applies where the alleged tortfeasor reveals private information about the plaintiff that would be highly offensive to a reasonable person and the information is not of legitimate public concern.[84] Indeed, the public concern limitation seems uniquely suited to protect newsgathering generally.

A related concern is that an investigation could intrude on the legitimate privacy interests of fellow employees, who may be captured on video or whose conduct or remarks may be collected by the journalists.[85] While there may be cases in which this is true, as long as an employee is acting in the presence of the journalist and other employees, there is at least a more limited expectation of privacy in that they are at the very least aware that someone else is watching or listening to them. But there is, of course, a material difference between whispering a private thought or secret to a coworker and announcing that same information on national television. And in such an environment, confiding in a coworker is certainly not unlikely; Barnett and Dale fully acknowledged that they liked their fellow employees and found most of them to be nice people during their short tenures.[86]

But there are reasonably easy ways to protect the privacy of fellow employees during an undercover investigation. First, any video that is used in a broadcast can blur out the faces and other identifying information of the other employees. Second, there can be clear boundaries on what is newsworthy and what is not, with the latter including private personal information disclosed or revealed by other employees during an undercover investigation that are not germane to the topic being investigated. Third, there could be protections against undercover investigators "doxxing," revealing employees' private identifying information that may subject them to violence, threats, harassment, or embarrassing exposure to the public's eye. For example, suppose an undercover investigation reveals an employee to have engaged in morally abominable or illegal behavior, and the investigator then published that person's home address or other ways to locate them. Even if those employees have engaged in misconduct, there are legal avenues for addressing that without revealing their personal information and subjecting them to abuse. Doxxing can be prohibited under ethical regulations or best practices designed to limit the scope of undercover investigations.

One reason that investigative targets have invoked these particular common law claims is that they are unable to sue for defamation. Undercover investigations typically lead to the publication of truthful information, and truth is an affirmative

[84] Restatement (Second) of Torts §652D (1995).

[85] Typically, employee privacy concerns relate to intrusion by the employer, not by fellow employees. But in this context, there are conceivable privacy interests that may be implicated by an undercover investigation, so I address them here.

[86] *Barnett/Dale Interview*, *supra* note 4.

defense to defamation claims under American law.[87] The Fourth Circuit even recognized this in the *Food Lion* case, when it described part of Food Lion's claim as "an end-run around First Amendment strictures."[88]

The only other way that investigative targets could sue their investigators for the publication of truthful information is if the targets can establish a theory of publication damages. But again, publication of truthful information cannot lead to liability under defamation law. Still, those who have been embarrassed by undercover investigations have tried to assert damages claims even for the publication of truthful information if the information was obtained through means that violated tort law. Those claims have typically faltered on causation grounds, with courts concluding that the cause of any reputational harm from the publication of truthful information is the underlying wrongdoing rather than the disclosure of information about that wrongdoing.[89]

14.2.2 *The Food Lion Litigation and Decision*

Following good journalistic practice, before ABC aired the Food Lion story, it contacted the grocery store company to notify it about the forthcoming broadcast and asked for a response. When Food Lion learned of ABC's plan, it immediately filed a lawsuit in Forsyth County Superior Court in North Carolina. Though Food Lion did not seek a prior restraint on the entire broadcast, its complaint argued that Barnett and Dale had obtained the hidden camera footage illegally and its prayer for relief requested a preliminary and permanent injunction barring the network from using any of that material in its broadcast.[90] The news media defendants removed the case to federal court on diversity grounds and successfully blocked the injunction.[91] After the story was broadcast, Food Lion continued its suit, seeking money damages for the harm allegedly caused by the investigation and broadcast. Its three central claims represent the most common legal theories used to sue undercover investigators – common law fraud, trespass, and breach of the duty of loyalty.

The ensuing litigation at the federal trial court level was an intense battle lasting four years and four months from the time the case was removed to federal court until the end of the trial.[92] The parties fought over discovery questions, sought protective orders, asserted privileges, produced expert witnesses, and filed countless pretrial

[87] *See, e.g.*, Grygiel v. Monches Fish & Game Club, Inc., 328 Wis. 2d 436, 461 (2010).
[88] *Food Lion*, 194 F.3d at 522.
[89] Chen & Marceau, *High Value Lies*, *supra* note 5, at 1502–05; Nathan Siegel, *Publication Damages in Newsgathering Cases*, 19 COMM. LAW, Summer 2001, at 11, 15 (2001).
[90] Complaint, Food Lion, Inc. v. Capital Cities/ABC, Inc., No. 92 CVS 5513 (Forsyth Co. Super. Ct. Sept. 17, 1992) (copy on file with author).
[91] This information was obtained from the Bloomberg docket database for Food Lion, Inc. v. Capital Cities/ABC, et al., U.S. District Court for the Middle District of North Carolina, No. 6:92-cv-00592 [hereinafter *Bloomberg Docket*].
[92] *Id.*

motions. Food Lion also sought sanctions against the defendants and their attorneys relating to some of the discovery fights.[93] There were serious disputes about how to conduct the trial as well. It is unclear whether this was a result of a court order or the parties' agreement, but the actual "Primetime Live" story was never presented to the jury.[94] This may have been the case because, as the trial court recognized, "Food Lion made no defamation claim and, therefore, did not challenge the truthfulness of the broadcast."[95]

Finally, more than four years after the "Primetime Live" broadcasts, the case went to trial.[96] After a multiweek trial on liability, the jury found all defendants liable for fraud and found Dale and Barnett liable for trespass and violating the duty of loyalty. The district court also found, based on the jury's findings, that the defendants had violated the state unfair and deceptive trade practices statute. It ruled, however, that Food Lion could not recover damages for lost profits, lost sales, or other economic harms associated with the broadcast on the ground that those damages were not proximately caused by the defendants' conduct.[97]

With that limit, the compensatory damages phase of the trial proceeded, with the jury awarding $1,400 in compensatory damages for fraud, two $1 nominal damage awards against both Barnett and Dale for trespass and breach of the duty of loyalty, and $1,500 in damages for violation of the state statute.[98] Finally, after the third phase of the trial, the jury awarded a stunning $5,545,750 in punitive damages against ABC and two of its executive producers.[99] Though the trial court reduced the punitive damages award to $315,000 on remittitur,[100] the verdicts were a substantial blow to the network, its producers, and the future of undercover investigations.

The defendants appealed, arguing on several grounds that the verdict should be overturned.[101] In a significant victory for the defendants, the Fourth Circuit reversed several aspects of the trial court's rulings. First, the court reversed the trial court's judgment that all defendants had committed fraud. In a creative variation on resume fraud, Food Lion claimed that it relied to its detriment on the belief that Barnett and Dale would continue in their jobs past the short period in which they worked. It argued that it suffered administrative costs relating to the need to find, hire, and

[93] As one indication of the battle's intensity, the Bloomberg trial docket trial has 671 entries. *Id.*

[94] Food Lion, Inc. v. Cap. Cities/ABC, Inc., 964 F. Supp. 956, 964 n.5 (M.D.N.C. 1997), *aff'd on other grounds*, 194 F.3d 505 (4th Cir. 1999).

[95] *Id.* at 962.

[96] *Bloomberg Docket*, *supra* note 91.

[97] 194 F.3d at 511.

[98] *Id.* at 517. The trial court required Food Lion to elect whether to receive damages under the state statutory claim or the fraud claim. Food Lion elected to receive $1,400 under the latter. *Id.* at 511.

[99] *Id.*

[100] *Id.* at 511.

[101] Food Lion cross-appealed on the denial of publication damages, but the court affirmed the district court's decision to reject that remedy. *Id.* at 522–24.

administratively process new employees to replace Barnett and Dale. Noting that neither of the producers represented that they would work at Food Lion indefinitely and that they were at-will employees, the court held that Food Lion could not have reasonably relied to its detriment on the misrepresentations made by Barnett and Dale to secure their jobs.[102] Most importantly, because the punitive damages award was tied to the fraud claim, the invalidation of that claim meant that the $315,000 verdict on that part of the case was vacated.[103]

Next, the Fourth Circuit reversed one of the two theories on which Food Lion's trespass claim rested. As discussed earlier, the states are divided on the question of whether a person who induces a landowner's consent to enter property by misrepresentation has committed a trespass. Food Lion asserted that such misrepresentation did vitiate its consent, but the Fourth Circuit disagreed. While noting that the Restatement states that consent induced by misrepresentation is not valid, the court nonetheless observed that "the various jurisdictions and authorities in this country are not of one mind in dealing with the issue."[104]

On this point, the Fourth Circuit followed the U.S. Court of Appeals for the Seventh Circuit's decision in *Desnick v. American Broadcasting Companies, Inc.*[105] In *Desnick*, a news station and its reporters conducted an undercover investigation by pretending to be patients in need of cataract surgeries to investigate an eye doctor who was reported to recommend such surgeries when they were not medically necessary. Though the reporters engaged in deception, the Seventh Circuit rejected the doctor's claim that they had trespassed. In an opinion by Judge Posner, the court held that the reporters' entry into a business that is open to customers is not a trespass because "consent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent."[106] The court noted that in such a case, "[t]here was no invasion . . . of any of the specific interests that the tort of trespass seeks to protect."[107] But other federal courts have disagreed on this critical point.[108]

But the appellate court's decision was not a complete win for journalism. The Fourth Circuit upheld liability against Barnett and Dale on the duty of loyalty claim

[102] *Id.* at 512–13. In a partial dissent, Judge Niemeyer disagreed with the majority on this point. *Id.* at 524 (Niemeyer, J., concurring in part and dissenting in part).
[103] 194 F.3d at 522.
[104] *Id.* at 517.
[105] Desnick v. Am. Broad. Companies, Inc., 44 F.3d 1345 (7th Cir. 1995).
[106] *Id.* at 1351.
[107] *Id.* at 1352.
[108] *Compare Wasden*, 878 F.3d at 1196 (holding that a trespass does not occur when an investigator secures consent to enter a business property by deception); *Food Lion*, 194 F.3d at 518 (same); *Desnick*, 44 F.3d at 1352 (same) *with* Animal Legal Def. Fund v. Reynolds, 8 F.4th 781, 786 (8th Cir. 2021). Two federal judges have dissented in Ag Gag cases, taking the position that misrepresentation vitiates consent to enter land. *See Kelly*, 9 F.4th at 1250 (Hartz, J., dissenting); *Wasden*, 878 F.3d at 1211 (Bea, J., dissenting in part and concurring in part).

and on a distinct trespass theory. First, it concluded that under state law, the producers had violated the duty of loyalty. The Fourth Circuit conceded that under existing case law in North Carolina and South Carolina, the duty of loyalty had only been recognized where "an employee competes directly with her employer," "the employee misappropriates her employer's profits, property, or business opportunities," or "an employee breaches her employer's confidences," none of which were true here.[109] Nevertheless, the court predicted that, if faced with the issue, the courts of those states would have found a violation of the duty of loyalty on these facts. As it explained:

> The interests of the employer (ABC) to whom Dale and Barnett gave complete loyalty were adverse to the interests of Food Lion, the employer to whom they were unfaithful. ABC and Food Lion were not business competitors but they were adverse in a fundamental way. ABC's interest was to expose Food Lion to the public as a food chain that engaged in unsanitary and deceptive practices. Dale and Barnett served ABC's interest, at the expense of Food Lion, by engaging in the taping for ABC while they were on Food Lion's payroll. In doing this, Dale and Barnett did not serve Food Lion faithfully, and their interest (which was the same as ABC's) was diametrically opposed to Food Lion's. In these circumstances, we believe that the highest courts of North and South Carolina would hold that the reporters – in promoting the interests of one master, ABC, to the detriment of a second, Food Lion – committed the tort of disloyalty against Food Lion.[110]

The court also upheld the nominal damages verdicts against Dale and Barnett for trespass. Although it found that their initial entry on to Food Lion's property through "resume fraud" was not a trespass in itself,[111] it concluded that a trespass occurs when "*a wrongful act is done in excess of and in abuse of authorized entry*."[112] That wrongful act was the producers' violation of the duty of loyalty. The Fourth Circuit thus bootstrapped the producers' violation of the duty of loyalty as the requisite wrongful act that converted their initially consensual entry into a trespass. The overall outcome of the appeal was that only the two $1 nominal damages awards against both Dale and Barnett were ultimately upheld.

Furthermore, while the court reduced the defendants' financial liability to almost nothing, it rejected their contention that the First Amendment protected the producers from even that liability because the suit was targeting them for engaging in behavior that was indisputably newsgathering. The Fourth Circuit disagreed with the defendants' First Amendment arguments, noting that the Supreme Court has held on more than one occasion that journalists are not constitutionally entitled to exemption from generally applicable laws, even when they are engaged in

[109] 194 F.3d at 516.
[110] *Id.*
[111] *Id.* at 518.
[112] *Id.* at 517 (emphasis added). 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.

newsgathering.[113] Neither the tort of trespass nor the duty of loyalty, it concluded, "targets or singles out the press."[114]

Moreover, it's noteworthy that the litigation lasted nearly seven years and likely cost ABC several million dollars to defend. ABC is a national television news network with substantial assets, but the chilling effect of this level of litigation costs would likely be more than enough to give pause to a local newspaper or television station that might have otherwise hoped to conduct an undercover investigation. In this way, litigation by the targets of undercover investigations has deterrent effects similar to those created by the prospect of costly defamation claims. Notwithstanding that in defamation cases, journalists have the extra First Amendment protection from *New York Times Co. v. Sullivan*[115] and may ultimately prevail in most cases, the litigation costs alone may shape journalists' decisions about what to investigate and what to publish.

Without some constitutional protection for undercover newsgathering, an important vehicle for facilitating the discovery and disclosure of information vital to democracy may be forever lost. Although some recent lower court decisions have offered hope for the development of some type of First Amendment privilege, other cases seem to foreclose that possibility. In the next part, I argue that *Food Lion* and its shadow have deterred journalists from engaging in employment-based undercover investigations. And I make a preliminary case for reconsidering *Food Lion* under certain conditions.

14.2.3 *Food Lion's Legal Deterrent Effect*

Despite a seemingly good outcome and the relatively benign impact of nominal damages awards, *Food Lion* continues to have a chilling effect on undercover investigations. Its ruling on the duty of loyalty has more significant effects than it might at first seem. This is particularly so because many consider employment-based undercover investigations to be the most effective type of undercover investigations because they permit investigators to access people and places beyond the eyes of the general public.[116]

First, although the *Food Lion* court did not directly accept the argument that consent to enter property induced by deception is a trespass, that area of the law continues to evolve. Courts upholding Ag Gag laws have been generally sympathetic to states' claims that gaining access or employment to private property by deception

[113] 194 F.3d at 520–22 (*citing* Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991); Branzburg v. Hayes, 408 U.S. 665, 684 (1972)).
[114] 194 F.3d at 521.
[115] New York Times Co. v. Sullivan, 376 U.S. 254, 278 (1964).
[116] *See generally* Cody Carlson, *The Ag Gag Laws: Hiding Factory Farm Abuses from Public Scrutiny*, The Atlantic, Mar. 20, 2012, https://www.theatlantic.com/health/archive/2012/03/the-ag-gag-laws-hiding-factory-farm-abuses-from-public-scrutiny/254674/.

interferes with the government interest in preventing trespass.[117] The plaintiffs in these cases have argued that although gaining access to private property by consent induced by false statements is a trespass under some states' laws, the trespass harm in cases of investigators is de minimis and therefore does not constitute the type of legally cognizable harm that *Alvarez* contemplates. While some courts that have struck down Ag Gag laws have agreed,[118] others have decided the cases without addressing that specific argument.[119] This leaves that important legal question in limbo.

Even if the trespass theory asserted by investigative targets were to be ultimately rejected, *Food Lion*'s interpretation of the duty of loyalty may make that irrelevant. Recall that the Fourth Circuit ruled that even a person who has received the landowner's consent to enter property as an employee may subsequently be engaged in a trespass if they breach the duty of loyalty by committing a wrongful act in excess of their authority to enter the premises.[120] The wrongful act, according to the court, was the act of "filming in non-public areas … adverse to Food Lion."[121] But that describes virtually every single person who conducts an employment-based undercover investigation, thus exposing them to trespass liability via their inevitable violation (in the Fourth Circuit's view) of the duty of loyalty. Thus, the $1 verdicts notwithstanding, the impact of this part of the holding cannot be overstated. Undercover investigators always engage in deception when they conduct an employment-based investigation. They must lie or obscure their true identity, the sponsor of their investigation, and their motives whenever they try to get a job in this situation. The Fourth Circuit's conclusion that this constitutes a trespass when their *subsequent* conduct breaches the duty of loyalty effectively reverses its holding that "resume fraud" does not constitute a trespass. It also effectively undermines its earlier conclusion that consent to enter property induced by misrepresentation does not constitute a trespass. This seems to slice the onion a little too thin.

Similarly, even if *Alvarez* is ultimately interpreted to allow First Amendment protection for investigative deception, *Food Lion*'s conclusion about the duty of loyalty would render that pro-speech holding a nullity. According to the Fourth Circuit, the duty of loyalty is breached not by "resume fraud" but by the very fact that the employee is simultaneously working for the sponsor of the investigation and its target.[122] Thus, under any interpretation of *Alvarez*'s "offers of employment" dictum, under *Food Lion*, the breach of the duty of loyalty would still represent a legally cognizable harm.

[117] *See, e.g.*, Reynolds I, 8 F.4th at 786. Dissenting judges in some of the other cases asserted this same position. Kelly, 9 F.4th at 1250 (Hartz, J., dissenting); *Wasden*, 878 F.3d at 1211 (Bea, J., dissenting in part and concurring in part).
[118] Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017).
[119] Animal Legal Def. Fund v. Kelly, 9 F.4th 1219 (10th Cir. 2021).
[120] 194 F.3d at 518.
[121] *Id.*
[122] *Id.* at 516.

It is not surprising, therefore, that Food Lion's trial strategy was to focus on Barnett and Dale's supposed acts of disloyalty. Both before and during the trial, Food Lion's lawyers attempted to portray Barnett and Dale as having staged some parts of the report that showed food sanitation or handling problems.[123] One incident described in the report was about a meat grinder that was not cleaned before the store closed one night, and that employees simply began using the uncleaned equipment the next day. Food Lion lawyers suggested that this was misleading, falsely alleging that Dale had sabotaged the store's water heater so that it would be unavailable for cleaning – a charge that was later found by the jury to be untrue.[124] Siegel reported that the focus of Food Lion's trial strategy was based on these "pseudo-staging allegations," attempting to show that Barnett and Dale were not only failing to do their jobs as Food Lion employees but also actively interfering with Food Lion's operations.[125] In a pretrial ruling, the district court found that allegations of "staging" were relevant to Food Lion's duty of loyalty claim, but those staging claims were later ruled inadmissible by the judge, who found they had no merit.[126]

To be sure, it isn't clear that *Food Lion* is even correct that the duty of loyalty applies in this context. First, the Fourth Circuit appears to have been incorrect even as a matter of state law. Just two years after *Food Lion* was decided, the North Carolina Supreme Court held that the district court in *Food Lion* had "incorrectly interpreted our state case law" and that "although our state courts recognize the existence of an employee's duty of loyalty, we do not recognize its breach as an independent claim."[127] Moreover, in many jurisdictions that do recognize a duty of loyalty cause of action, liability turns on whether the employee has a fiduciary duty to the employer.[128] As previously discussed, most undercover investigators take lower level, at-will employment jobs, which are generally not entrusted with the type of duties from which a fiduciary relationship is created.[129]

Furthermore, the Supreme Court has rejected this same type of agency law claim when directed at another type of undercover investigator. In *N.L.R.B. v. Town & Country Electric, Inc.*,[130] the Court considered an employer's claim that an employee who was also a paid union organizer was not an "employee" within the meaning of the National Labor Relations Act. In doing so, the employer invoked the common law of agency, which it maintained prohibited a person from

[123] *Barnett/Dale Interview*, *supra* note 4.
[124] *Id. See also* Food Lion, Inc. v. Cap. Cities/ABC, Inc., 964 F. Supp. 956, 964 (M.D.N.C. 1997), *aff'd on other grounds*, 194 F.3d 505 (4th Cir. 1999).
[125] *Siegel Interview*, *supra* note 4.
[126] Food Lion, Inc. v. Cap. Cities/ABC, Inc., 951 F. Supp. 1224, 1230 (M.D.N.C. 1996).
[127] Dalton v. Camp, 353 N.C. 647, 653 (2001).
[128] Riedy & Sperduto, *supra* note 81, at 272.
[129] *Id.*
[130] 516 U.S. 85 (1995).

simultaneously serving "two masters," the union and the employer.[131] But the Court disagreed with the employer's argument, concluding that the common law did not prohibit this particular type of disloyalty. In an opinion by Justice Breyer, the Court stated that it is a "hornbook rule" 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*."[132] That seems to be the case with the investigation in *Food Lion*. In rejecting Food Lion's claim that it should recover the wages it paid to Barnett and Dale, the Fourth Circuit observed that:

> Dale and Barnett were paid because they showed up for work and performed their assigned tasks as Food Lion employees. Their performance was at a level suitable to their status as new, entry-level employees. Indeed, shortly before Dale quit, her supervisor said she would "make a good meat wrapper." And, when Barnett quit, her supervisor recommended that she be rehired if she sought reemployment with Food Lion in the future.[133]

Thus, it would appear that Barnett and Dale's work for ABC did not "involve abandonment of service to" Food Lion. Notwithstanding this conclusion on damages, however, the court found that "it is possible to perform the assigned tasks of a job adequately and still breach the duty of loyalty."[134]

14.2.4 *Food Lion's Influence on Journalism Ethics*

But *Food Lion*'s deterrent effect on undercover investigations derives not only from its status as a legal precedent but also because it has significantly influenced debates about the ethics of undercover investigations in the journalism profession. In recent years, there has been extensive criticism of undercover journalism from within the profession, with many claiming that the tactics necessary to carry out a successful undercover investigation demean the profession and undermine its credibility. Unlike other professions, journalism does not have a state licensing scheme, which would be severely problematic for freedoms of the press because it would grant the government too much control over journalists and might even be viewed as a form of prior restraint. But in other professions, ethical standards are set by professional licensing institutions. In journalism, each individual news institution, whether it be a newspaper or television network, sets its own internal ethical standards. While there are ethical codes published by professional journalism organizations, they are not binding. Ethical decisions are therefore decentralized, leaving substantial room for disagreement.

With regard to undercover investigations, this disagreement has been manifest. While some journalists defend undercover investigations as a critical tool for

[131] *Id.* at 93.
[132] *Id.* at 94–95 (quoting Restatement (Second) of Agency §226, at 498) (emphasis by the Court).
[133] *Food Lion*, 194 F.3d at 514.
[134] *Id.*

newsgathering, particularly to discover information that would not otherwise see the light of day, others argue that journalistic honesty cannot have exceptions and that truth is a central tenet of what it means to be a journalist. As Justin Marceau and I have written about extensively, this debate largely turns on the different schools of thought about the foundations of journalism ethics.[135] But the debate among journalists continues and is likely to persist.

While I cannot identify any empirical data or systematic examination of *Food Lion*'s impact on undercover investigations, there is a fair amount of anecdotal evidence that it has influenced the journalism ethics debate. First, as the quote from the beginning of this chapter suggests, in contemporary times, print newspapers have shown a great reluctance to undertake such investigations. Many of them have well-publicized ethical codes that forbid their employees from engaging in deception or using hidden cameras in their newsgathering.[136] It is unclear exactly when these codes went into effect, but my prior research suggests that the emergence of general professional objections to undercover investigations began in the late 1990s, roughly coinciding with the *Food Lion* decision.[137] For example, the Society of Professional Journalists (SPJ) first addressed undercover investigations explicitly in its 1996 revision to its Code of Ethics.[138] The prior 1973 version of SPJ's Code of Ethics does not mention undercover investigations,[139] but the 1996 revision states that journalists should "Avoid undercover or other surreptitious methods of gathering information except when traditional open methods will not yield information vital to the public" and further advises that "Use of such methods should be explained as part of the story."[140]

Indeed, the Food Lion company itself tried to expand the reach of its courtroom victory by trying to influence university journalism curriculums.[141] In a highly

[135] Chen & Marceau, Truth and Transparency, *supra* note 5, at 36–74. We argue in favor of a journalistic ethics standard grounded in the liberal theory and interpretation and activism theories, which both match well with a utilitarian model that weighs the value of the information discovered against any social harms that might be caused by an undercover investigation. Having said this, I do not take the counterarguments on the ethics of undercover investigations lightly. After all, utilitarian arguments can be highly subjective and tied to the value judgments of the person making them. One person may value newsgathering more highly than property and privacy interests, even in a business setting, while another may simply disagree. This makes it difficult to center an ethical claim on any form of general consensus. On the other hand, at least utilitarian arguments are transparent about their justifications, enabling society and individuals ultimately to make their own judgments.

[136] *See, e.g.*, *Ethical Journalism: A Handbook of Values and Practices for the News and Editorial Departments – Pursuing the News*, N.Y. Times, www.nytimes.com/editorial-standards/ethical-journalism.html#. The Times does not indicate an initial publication date for the Handbook though it references a Newsroom Integrity Statement, published in 1999.

[137] Chen & Marceau, Truth and Transparency, *supra* note 5, at 60–62.

[138] *1996 SPJ Code of Ethics*, *supra* note 49.

[139] Society of Professional Journalists, *Society of Professional Journalists – 1973 Code of Ethics*, https://spjnetwork.org/quill2/codedcontroversey/ethics-code-1973.pdf.

[140] *1996 SPJ Code of Ethics*, *supra* note 49.

[141] Jacqueline Sharkey, *Taking the Fight to the Classroom*, 20 Am. Journalism Rev. 12 (1998); *Barnett/Dale Interview*, *supra* note 4.

controversial effort, shortly after the Fourth Circuit's decision, Food Lion prepared materials about the case and sent them to around 200 journalism professors around the country.[142] "The grocery chain's educational kit included a self-produced report, 'Fakes, Lies and Videotape,' and a 15-minute video prepared by a public relations firm, which uses unaired ABC footage to support the company's contention that ABC's report was untrue."[143] The company also apparently engaged a journalism professor to assist them in their efforts.[144] It is unclear what, if any, influence Food Lion's propaganda efforts had on journalism curricula, and many journalism faculty were quite skeptical about the effort. One professor noted that the materials prioritized Food Lion's viewpoint but did not provide the counterpoint from ABC's perspective that the investigation was consistent with journalism philosophy and norms.[145]

There is also anecdotal evidence from commentators about *Food Lion*'s impact on undercover investigations. Seth Stern, advocacy director for the Freedom of the Press Foundation, recently observed a drop in undercover investigations. As he noted, the *Food Lion* case has been "often presented to young journalists as a cautionary tale," and "the landmark case significantly slowed the once relatively common practice of 'undercover' journalism."[146] Notwithstanding the fact that *Food Lion* ultimately resulted in only nominal damages, Stern suggested that the case made lawyers recognize a substantial risk of "punitive damages based on news-gathering methods."[147] He suggested that because of the *Food Lion* case, many mainstream news outlets stopped engaging in hidden-camera and other undercover investigations.[148] As Stern observed, "There's no telling how many stories the public missed out on as a result of the changes to journalism – both legal and cultural – brought about by Food Lion."[149]

My interviews with the ABC producers and lawyer in the *Food Lion* case support Stern's observations and provide anecdotal support for my theory that *employment-based* investigations are decreasing. Although Susan Barnett and Lynne Dale went on to conduct multiple undercover investigations with different national television networks after the *Food Lion* case concluded, neither of them has done one requiring them to secure a job with the investigation's target.[150] Dale reported that "we couldn't get a job. That was off the table and had been off the table ever since

[142] Sharkey, *supra* note 141, at 12.
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] Seth Stern, *Is It Time to Revisit Undercover Journalism?*, Freedom of the Press Foundation (Oct. 31, 2023), https://freedom.press/news/is-it-time-to-revisit-undercover-journalism/
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *See Barnett/Dale Interview*, *supra* note 4.

Food Lion sued us."[151] Similarly, media lawyer Nathan Siegel, who represented Barnett, Dale, and ABC during the *Food Lion* litigation, confirmed that there have been very few "undercover investigations since [*Food Lion*] that have turned on actually obtaining employment."[152]

Stern observed that not only have major journalism companies steered away from undercover investigations, but also that such investigations are "now often associated with fringe (and often disreputable) platforms,"[153] such as the far-right activist group Project Veritas. In response, he suggests that more mainstream journalists should (after consulting with lawyers) seize this tactic back from such groups, noting that the Fourth Circuit's recent favorable decision in *People for the Ethical Treatment of Animals v. North Carolina Farm Bureau Federation*[154] could be a catalyst.[155]

Another commentator has also framed the debate against the backdrop of groups with questionable credibility, but, unlike Stern, argues that the influence moves in the other direction. Erik Wemple, The Washington Post's media critic, has argued that the fringe groups' efforts to use undercover investigation have proven that the tactics are dishonorable.[156] Wemple wrote that before James O'Keefe established Project Veritas in 2011, "*American journalists were falling out of love with undercover tactics – a breakup aided by Food Lion's 1995 suit against ABC News* for its clandestine exposé on the grocery behemoth's unsavory meat-handling practices."[157]

Wemple goes on to say that "Mainstream outlets, accordingly, have spent the past couple of decades either swearing off undercover work or narrowing the circumstances when it's warranted."[158] He continued:

> Project Veritas must not have been spending enough time reading Poynter.org for ethics guidance. "Especially since the Food Lion misrepresentation and hidden-camera stuff, news organizations don't do the [full range]" of clandestine tactics, "where they put them all together at the same time," says Lee Levine, a longtime First Amendment attorney. Contemporary examples of undercover stories are harder and harder to come by these days, says Levine – and even in the years when the practice was tapering off, he continues, news organizations that did embrace it were "very careful not to lie."[159]

[151] *Id.*
[152] *Siegel Interview*, *supra* note 4.
[153] Stern, *supra* note 146.
[154] People for the Ethical Treatment of Animals, Inc. v. N. Carolina Farm Bureau Fed'n, Inc., 60 F.4th 815 (4th Cir. 2023) (cleaned up).
[155] Stern, *supra* note 146.
[156] Erik Wemple, *Verdict Upends Project Veritas's Journalism Defense in Infiltration Case*, Wash. Post (Sept. 23, 2022), https://www.washingtonpost.com/opinions/2022/09/23/project-veritas-democracy-partners-verdict/.
[157] *Id.*
[158] *Id.*
[159] *Id.*

14.3 RECONSIDERING FOOD LION

14.3.1 *Legal Hurdles to Reconsidering Food Lion*

The case for reconsidering *Food Lion* must begin with some existing barriers under current First Amendment doctrine. As has long been documented and criticized, the Supreme Court has never recognized a substantive constitutional right for the press distinct from the First Amendment right of free speech.[160] Notwithstanding the First Amendment's text, which specifically establishes a freedom of the press, the Court has ignored this and held that the press's rights are coextensive with the rights recognized under the Speech Clause.[161] Even in cases where the Court has recognized important freedoms for the press, such as in cases holding that the First Amendment embodies a right to access certain types of criminal proceedings in court, those rights have been understood as belonging to the public, not to the press per se.[162]

Furthermore, to date, the Court has consistently held that journalists are not entitled to exemptions from generally applicable criminal and civil laws, even if the enforcement of such laws directly impairs critical press functions.[163] More specifically, the Supreme Court has never recognized in any type of First Amendment right for journalists or others to protect them from laws or government action that inhibits their newsgathering. In *Branzburg v. Hayes*, the Court rejected the First Amendment claims of journalists who sought an exemption from testifying before grand juries and disclosing their confidential sources.[164] The reporters involved in that case argued that revealing their sources in grand jury proceedings would undermine their ability to engage in newsgathering because such sources would no longer trust that their identities would remain secret. While they did not seek an absolute privilege from grand jury subpoenas, the reporters argued that journalists should not be compelled to testify unless the State showed "sufficient grounds . . . for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure."[165]

Rejecting the journalists' privilege claim, the Supreme Court noted that the Constitution does not call for treating journalists differently from the average citizen, who must appear before a grand jury and testify when subpoenaed, even if

[160] Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. Rev. 1025, 1027 (2011).
[161] *Id.*
[162] Press-Enterprise Co. v. Superior Ct, 478 U.S. 1 (1986); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (plurality opinion).
[163] Cohen v. Cowles Media Co., 501 U.S. 663 (1991).
[164] Branzburg v. Hayes, 408 U.S. 665 (1972).
[165] *Id.* at 680.

the relevant information they have was obtained in confidence.[166] Key to the Court's reasoning was its concern that journalists not be permitted to be exempt from every "incidental" burden on their professional work from generally applicable laws.[167] While the Court stated it was not holding that newsgathering does not qualify for First Amendment protection, it did not articulate when such protection would be available and has not done so in the fifty years since it decided *Branzburg*.[168]

The Court also declared that members of the press are not exempt from generally applicable laws in *Cohen v. Cowles Media Co.*[169] In *Cohen*, a confidential source sued a newspaper for breach of contract and misrepresentation after it published a story disclosing the source's identity. The newspaper asserted a First Amendment privilege, arguing that it should not be subject to liability for the publication of truthful information that is lawfully obtained.[170] While the Court accepted that proposition in the abstract, it held that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news . . . The press may not with impunity break and enter an office or dwelling to gather news."[171]

These precedents would seem to present insurmountable barriers to the recognition of even a limited privilege for undercover investigations. But while they may set the baseline for claims to be exempt from otherwise generally applicable laws, there is nonetheless still room to assert some privileges. First, notwithstanding *Branzburg*'s holding, many lower federal courts have subsequently recognized a "qualified privilege" permitting journalists to refuse disclosure of confidential sources if potential negative impact on newsgathering outweighs the public's need for the information.[172] These courts seem to have taken to heart *Branzburg*'s recognition that the First Amendment provides "some protection" for newsgathering.[173] Nor is *Cowles*'s seemingly categorical rejection of a press exemption from generally applicable laws a complete bar to some constitutional protection for newsgathering. In some recent

[166] *Id.* at 682.
[167] *Id.*
[168] *Id.* at 681. It's also worth noting that there is a seamless connection between *Branzburg* and undercover investigations that has heretofore gone unrecognized. To the extent that no constitutional privilege exists to protect confidential informants, the law places greater pressure on journalists to find other ways to gather and disseminate information of broad public concern. Undercover investigations might at least partially fill that information gap, but only if there is some constitutional protection for conducting them.
[169] Cohen v. Cowles Media Co., 501 U.S. 663 (1991).
[170] *Id.* at 668–69.
[171] *Id.* at 669.
[172] *See, e.g.*, Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 595–96 (1st Cir. 1980); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436–37 (10th Cir. 1977).
[173] *Branzburg*, 408 U.S. at 681.

cases, lower courts have held that statutes that apply to a range of conduct are not exempt from First Amendment scrutiny where those statutes are applied to speech.[174]

14.3.2 *The Shape of a Legal Privilege for Undercover Investigations*

A legal privilege to engage in investigative deception and secret recordings to gather information on matters of public concern might be established by the Supreme Court as part of the First Amendment's Speech Clause or Press Clause. If the Court is unwilling to do so, such a privilege could be created at the local level by state supreme courts interpreting and applying their own speech and press clauses. Finally, as has occurred with shield laws that protect journalists from being compelled to disclose confidential sources, it could happen through state legislatures. The following sections discuss my proposal for possible ways to construct such a privilege.

14.3.2.1 Unconditional Privilege with Industry Self-regulation

If courts or legislatures were to recognize a newsgatherer's privilege to engage in deception and secret recording to conduct undercover investigations, one approach they could take is to make it an unconditional privilege, but rely on the news media's practice of self-regulation in other areas of press freedom in which broader public interests counsel against publication.[175] Despite the fact that news outlets are incentivized to pursue high circulation, ratings, and profits, the press counterbalances that demand with other concerns, such as maintaining credibility with its audience.[176]

One might reject an approach relying on industry self-regulation on the grounds that it insufficiently protects against the potential invasion of property, privacy, and loyalty interests that undercover investigations are said to compromise. But in several areas, the journalism profession has engaged in self-regulation and resisted publication of newsworthy information that may technically be published without restriction because such publication is protected by the First Amendment. For example, at least where the media obtain the information from publicly available sources, the Supreme Court has established that the news media may publish the names of

[174] People for the Ethical Treatment of Animals, Inc. v. N. Carolina Farm Bureau Fed'n, Inc., 60 F.4th 815, 825–26 (4th Cir. 2023) (cleaned up); Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1190 (9th Cir. 2018).

[175] Blake D. Morant, *The Endemic Reality of Media Ethics and Self-Restraint*, 19 Notre Dame J.L. Ethics & Pub. Pol'y 595, 618 (2005) ("As a generalized rule, self-regulation diminishes the need for external regulation of the [news media] industry.").

[176] *Id.* at 609.

crime victims.[177] Yet it is recognized that because of internal ethics standards, the vast majority of media outlets generally do not report such information.[178] Similarly, self-regulation in journalism typically means that, despite the newsworthiness of these matters, the press does not report the names of juveniles involved in judicial proceedings, the results of presidential elections prior to the polls closing in western time zones, and information that might compromise national security interests.[179]

Relying on the journalism profession to self-regulate regarding undercover investigations may not, however, accomplish the goal of expanding such investigations because there is substantial and ongoing disagreement about the ethics of such investigations among the American media.[180] Many major newspapers prohibit their reporters from conducting undercover investigations regardless of whether there is any legal protection for such conduct.[181] However, the recognition of a constitutional or other legal privilege to engage in deception and secret recording might influence the internal professional standards that prohibit such conduct.

Another significant disadvantage of the unconditional privilege coupled with industry self-regulation is that it relies on professional standards that may not be generally accepted outside of the institutional news media. That is, it might limit the privilege to only those in the newsgathering profession and thereby exclude undercover investigators working with nonprofit organizations to support their political advocacy. By definition, those groups and their investigators would not be bound by the standards of professional journalism. Some would argue that this is a feature, not a bug, of a profession-based standard – under this view, the trade-off necessary to recognize a privilege that outweighs other legal interests, such as trespass or the duty of loyalty, can only be justified if that privilege is limited to those who agree to be bound by the journalism profession's ethical standards and are therefore professionally accountable. While I acknowledge this concern, the cost of a privilege limited to professional journalists would be the loss of information that might otherwise be uncovered through undercover investigations by non-journalists. And, as I argue below, ethical considerations may be accounted for by conditioning the privilege on adherence to a set of best practices, without regard to the identity of the investigator.

This version of the privilege would also arguably not apply to the increasingly common practices of citizen journalists, who are also not technically governed by professional journalistic standards. It is for this reason that I have previously argued that constitutional protection for undercover investigations be grounded in the

[177] *See, e.g.*, The Fla. Star v. B.J.F., 491 U.S. 524 (1989); Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).
[178] Morant, *supra* note 175, at 609.
[179] *Id.* at 609–11.
[180] For a comprehensive discussion of these ethical debates, *see* Chen & Marceau, Truth and Transparency, *supra* note 5, at 36–74.
[181] *See, e.g.*, *Ethical Journalism*, *supra* note 136.

Speech Clause rather than the Press Clause.[182] But recognizing a Press Clause privilege in this form would at the very least ensure the protection of important undercover investigations by the professional news media.[183]

14.3.2.2 Conditional Privilege

An alternative model that courts or legislatures could consider is establishing a newsgatherers' privilege to be exempt from criminal or civil liability for engaging in undercover investigative tactics conditioned on two distinct grounds. First, it would only apply to the extent the person conducting the investigation is involved in newsgathering activities. Second, the privilege would apply only where investigators have adhered to a set of best practices or ethical norms that would safeguard against intrusion on some of the interests that would otherwise be promoted by enforcement of such laws.

The newsgathering limitation would provide some flexibility to courts examining a First Amendment newsgathering defense in criminal or civil litigation because it would permit them to reject the enforcement of such laws only as applied to newsgathering. There is obviously nothing unconstitutional about a generally applicable law requiring employees to be loyal (however defined) to their employers. But it is equally obvious, I think, that when employers dust off this tort to be used only when they have been the target of an undercover investigation, some First Amendment scrutiny should be applied.

In one of the most recent Ag Gag cases, the Fourth Circuit invalidated North Carolina's Property Protection Act, which created a new private right of action for employers to sue employees who entered "nonpublic areas of an employer's premises," captured the employer's data, paper, records, or other documents or recording images or sound occurring within that premises, and used that information "to breach the person's duty of loyalty to the employer."[184] The law was challenged as

[182] There is an ongoing and important scholarly debate about the meaning of the Press Clause. Some legal scholars have argued for a more functional approach to applying the Press Clause, meaning that the constitutional protections extend to any person engaged in newsgathering, rather than only those who work for the institutional press. *See, e.g.*, Ugland, *supra* note 3, at 137; Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 137, 137 (2003). Under that view, the Press Clause could be read to protect undercover investigations by the institutional media and other actors. Others contend that a functional approach is too broad, erasing the distinction between the Speech and Press Clauses, and paradoxically undermining the rights of the press and the distinct role the press plays in promoting democracy. *See, e.g.*, West, *supra* note 160, at 1032. This view, of course, is more consistent with the First Amendment's text.

[183] *See* West, *supra* note 160, at 1056 (observing that a narrower reading of the Press Clause's scope might actually lead to more expansive, albeit not unlimited, constitutional protection for the press).

[184] N.C. Gen. Stat. Ann. § 99A-2

unconstitutional on its face and as applied to animal rights investigators and others who wished to get jobs and disclose wrongdoing by their employers. The Fourth Circuit, however, invalidated the statute only as applied to the newsgathering activities of the animal rights organizations who challenged the law.[185] This is somewhat similar to a standard that Ashutosh Bhagwat has proposed. He has argued that while content-neutral regulations of the production of speech "are presumptively constitutional on their face," they "may be challenged as applied to speech that contributes in some substantial way to democratic self-governance."[186]

This condition has the further advantage of applying the privilege to any person engaged in legitimate newsgathering activities, rather than just professional journalists. As described in much of my other work, undercover investigations by political groups contribute to public discourse in ways that are comparable to those conducted by members of the press.[187] If we conceptualized the privilege as grounded in the Speech Clause, it would apply to all investigators. And even if the protection was located in the Press Clause, that Clause has sometimes been understood to protect the actions of people who undertook their actions with the intent to disseminate the information they obtained to the public, rather than to a particular class of professional journalists.[188]

The best practices condition would, like the newsgathering condition, allow the privilege to extend to both professional journalists and others, so long as the investigations adhere to best practices. Thus, civil rights investigators, animal rights activists, and labor organizers could assert the privilege even though they are not affiliated with the institutional press.

In our recent book on undercover investigations, Justin Marceau and I articulate a set of such practices.[189] Under our model, undercover investigations should follow several protocols as a safeguard against investigations that are unimportant, unnecessary, or overly intrusive. These standards are set forth in greater detail in our book, but a basic summary should suffice for the purposes of this chapter. First, the investigators must have "specific evidence" that an undercover investigation will "reveal misconduct, illegality, or wrongdoing on the part of [the] investigation's target" and should be limited to seeking information on matters of public concern.[190] Next, the information should not be otherwise available, or not available at a

[185] People for the Ethical Treatment of Animals, Inc. v. N. Carolina Farm Bureau Fed'n, Inc., 60 F.4th 815, 821 (4th Cir. 2023) (cleaned up).
[186] Ashutosh Bhagwat, *Producing Speech*, 56 Wm. & Mary L. Rev. 1029, 1065 (2015).
[187] *See, e.g.*, Chen & Marceau, Truth and Transparency, *supra* note 5; Chen, *Investigative Deception*, *supra* note 5; Marceau & Chen, *Video Age*, *supra* note 5; Chen & Marceau, *High Value Lies*, *supra* note 5.
[188] Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. Pa. L. Rev. 459, 524 (2012).
[189] Chen & Marceau, Truth and Transparency, *supra* note 5, at 264–65.
[190] *Id.*

sufficiently detailed level, through more conventional sources.[191] Deception, including affirmative misrepresentation about "the investigator's identity, political affiliations, and motivations for gaining access to the investigation site" should be permissible, but only for the purpose of conducting the investigation.[192] Where an investigation is employment based, "the investigator should not exaggerate or inflate their credentials" and "must be able to competently perform their assigned job functions."[193] Additionally, any secret recording "must be reproduced truthfully in reports to the public. No alterations or editing to mislead the listener or viewer are permissible," although editing for "brevity, coherence, and to protect the privacy interests of the individuals recorded is permissible."[194] Investigators must not "cause physical harm, theft (including intellectual property), or other harms to the property of the investigation's target or to any person on the premises during the investigation" and should not "induce, solicit, or entrap others to engage in misconduct."[195] Finally, investigators should not "deprive individuals who are associated with the investigation site of their dignity, privacy, or autonomy unless that is the direct result of those individuals' participation in the suspected misconduct being investigated," and investigations involving access to "commercial properties are preferable to investigations that involve access to private homes or spaces."[196]

Conditioning the privilege on compliance with these best practices has a couple of advantages. First, and probably most importantly, it substantially limits the possibility that any such investigation will cause the types of tangible harms that are the basis of criminal and civil regulations of deception and secret recording. Thus, while it does not completely discount those potential harms, it uses them to define the limits of the privilege. Second, imposing this set of conditions on the exercise of the privilege means that the privilege can extend to both professional journalists and non-journalists who are careful to adhere to these standards.

14.3.3 *Addressing Concerns About an Undercover Investigations Privilege*

There are, of course, many potential objections to the recognition of a newsgatherers' privilege for undercover investigations. First, skeptics might argue that recognizing even a limited privilege would open the door to additional claims of privilege to violate other generally applicable laws. If undercover investigations are privileged, why shouldn't journalists be permitted to violate laws against breaking and entering into spaces where information of public concern can be found? And why wouldn't such privilege also extend to journalists who engage in computer

[191] *Id.* at 265.
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] *Id.*

hacking, accessing private databases to troll for information hidden on a company's hard drive?

The interests compromised by break-ins and computer hacking, however, are far more tangible than those at stake in undercover investigations. The paradox of undercover investigations is that they take place secretly, but also in the open. In contrast to physical break-ins or computer hacks, in undercover investigations, the target knows that *someone* is observing questionable behavior on their property; they are just unaware of that person's true identity or motives. While investigative targets may claim that their rights are being violated because the trust they place in the investigator has been violated, the expectation of privacy in such a situation is much lower or, in some cases, may be nonexistent. Professor Marceau and I have argued elsewhere that this reduced expectation of privacy is analogous to the third-party doctrine in criminal procedure. As we observed, "in talking to other persons or inviting them into parts of your life, one always assumes the risk that the person might turn out to be a reporter, a cop, or some other form of false friend."[197] The same violation of trust might also arise with a current employee who engages in whistleblowing.[198] In other words, unlike with burglary or hacking, targets of undercover investigations assume the risk that the behavior they freely engage in while another person is present will later be revealed to others.

Another concern is that granting of legal permission for undercover investigations will lead to a massive expansion of such investigations, many of which may exceed the scope of legitimate newsgathering and result in serious privacy invasions and interference with businesses' ability to maintain a functioning workplace. The fear is that the recognition of a legal privilege would create a kind of atmosphere in which newsgatherers recklessly conduct undercover investigations as fishing expeditions hoping to find something worth reporting. There are a couple of natural impediments, however, to such a massive expansion. First, some news outlets are likely to retain their internal ethical prohibitions against their employees engaging in the type of conduct necessary to carry out an undercover investigation. As the ethical debates reflect, some journalists and media companies are viscerally opposed to undercover journalism.[199] Although I strongly disagree with this approach and hope that the recognition of a privilege would influence those beliefs, individual news entities may still decide to act more conservatively if they so choose.

Second, as reflected by the details of the Food Lion investigation,[200] properly conducting undercover investigations requires enormous resources. Investigations are complex, time consuming, and demand a large number of personnel hours for

[197] Chen & Marceau, *High Value Lies*, *supra* note 5, at 1463.

[198] Of course, employers may require their employees to sign nondisclosure agreements that may address this confidentiality concern. Whether an undercover investigation privilege might render such agreements unenforceable is beyond the scope of this chapter.

[199] *Barnett/Dale Interview*, *supra* note 4.

[200] *See supra* notes 44–47 and accompanying text.

background reporting, planning, conducting the investigation, post-investigation researching, and producing and editing the story that goes out to the public. This type of investigation cannot be undertaken lightly, even by a national news network. It is accordingly unlikely that recognition of a privilege will open the floodgates to an unreasonable number of new investigations.

Moreover, there are serious personal costs to journalists. The work is stressful. Barnett and Dale recounted their fear of being discovered by Food Lion employees during their undercover investigations. For example, Barnett recalled an instance when she was working at a Food Lion delicatessen. While instructing her, Barnett's supervisor "patted me on the stomach to show me how you kind of put the sandwich next to your stomach and you roll it in the Saran wrap. Anyway, when she patted my stomach, she hit [recording] gear. And I remember just catching my breath at that moment."[201]

Undercover journalists can also suffer serious physical burdens. During the Food Lion investigation, the producers had to carry heavy equipment concealed under bulky clothing. This was physically taxing, so much so that Barnett threw out her back from wearing the recording equipment while trying to do her Food Lion job.[202] Today, technology has developed so that cameras can be hidden in something the size of a button, alleviating the bulk problem. But there were also specific hazards from the large battery packs necessary to supply the hidden cameras with power. Dale suffered severe burns from the battery she was carrying, something she could not do anything about until the end of her shift.[203] The extent to which this problem has been alleviated by technology is less clear. These physical challenges can not only create a risk of physical harm but also significantly increase the chances that journalists will be discovered.

14.4 CONCLUSION

For a relatively narrow, mostly pro-press freedom opinion, the Fourth Circuit's decision in *Food Lion* has had a continuing and long-lasting deterrent effect on undercover investigations, both as a legal precedent and as an influence on journalists' ethical debates about such tactics. Its invocation of the relatively obscure common law duty of loyalty in some ways supersedes the importance of the law of undercover investigations that has developed since it was decided. Repudiating *Food Lion* and recognizing a limited form of newsgatherer's privilege for undercover investigations would be a useful reform that could restore an important journalistic tradition that has frequently led to the discovery and publication of information critical to public discourse and, in turn, to our democracy. At a time when many external and internal impediments already threaten the future of press freedom, perhaps taking this narrow but important step toward expanding the ability to engage in newsgathering could move the law in a promising direction.

[201] *Barnett/Dale Interview*, *supra* note 4.
[202] *Id.*
[203] *Id.*