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An Overview of Undercover Investigations in Journalism and Political Activism

In the late 1880s, abortion was illegal in Illinois and persons could face several years in prison for performing an abortion. During this time, a new class of women was trying to break into journalism. Known as "girl stunt reporters," these daring writers took dangerous undercover assignments and told stories in the first person as a means of exposing corruption and illegality. They frequently also published under pseudonyms. One such reporter, whose byline was "Girl Reporter," wrote a series of articles detailing the availability, cost, and process for arranging an abortion in Chicago in a series of front-page stories for the conservative publication the *Chicago Times*. The initial installments on the topic seem to have been driven by the anonymous author's interest in exposing what she perceived as the sort of scoundrel who would perform an abortion in contravention of the law.

The project spurred a long-raging debate among the public about the legality and morality of abortion, and the author herself conveyed to her readers a confusing disorientation about the practices she used for her undercover investigations: "I found that I was beginning to be somewhat of an adept at deceit and this rather startled me.... I began to be suspicious of myself. I have talked so much of my pretended [pregnancy] to the doctors that I now and then permitted my thoughts to wander and drift into the channels where it had been wading through the day."[1] And just as with muckrakers like Upton Sinclair who are much more well known, due no doubt in part to the fact that they were not writing under pseudonyms, the motives of this undercover investigator shifted somewhat over time. Late in her deception when a doctor would sternly refuse her request, she wrote of her feelings, "Don't prate of virtue to me. I am as good as the rest of the world only less lucky."

[1] Kim Todd, *These Women Reporters Went Undercover to Get the Most Important Scoops of Their Day*, Smithsonian (Nov. 2016), www.smithsonianmag.com/history/women-reporters-undercover-most-important-scoops-day-180960775/.

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Undercover investigations have always raised morally complicated questions about the propriety of deception, the relevance of one's prying motives, and the use of invasive investigative techniques and technology to document their findings. More recently, these investigations have also faced legal impediments, including statutes prohibiting certain types of undercover investigations or investigations in certain industries. This book comprehensively examines the history, social practices, institutions, and law relating to undercover investigations that obtain and document information that furthers the public interest. The investigators can be government agents, professional journalists, citizen journalists, political activists, or even individual citizens acting on their own. The targets of such investigations are typically powerful institutions, such as government entities and large corporations.

Such investigations have a long and storied history in the United States, stretching back to at least the late nineteenth century, and have often informed the public about critical facts that previously had been obscured from scrutiny. The facts they have uncovered are believed by some to have made a dramatic impact on law and policy, spurred the contemplation of and discussion about important social and moral questions, and generally led to a more transparent society. But they have also been sometimes fraught with controversy because of questions about whether they exceed legal or ethical boundaries or infringe on the valued property and privacy rights of their targets.

This duality – the investigator as simultaneously a hero and a villain – colors the history of undercover investigations. At times or among some groups, undercover investigators are celebrated as positive catalysts for law reform. By others and at other points in history, investigators are viewed as scofflaws, privacy-invaders, and agenda-driven miscreants. The very same tactics might be celebrated in one context, and derided in others. For politicians and ideologically driven groups, the varying reactions to investigations often appear to be motivated by a desire to insulate from scrutiny the causes they support. An investigation of corruption among police officers or abuse within jails might be celebrated by progressives, while the same people might object strenuously to an undercover investigation of Planned Parenthood or of persons involved with the Black Lives Matter movement.

Our original empirical research detailed in Chapter 6 tends to show that the public at large, unlike political entities or those directly impacted by an investigation, tend to support undercover investigations across all party lines and contexts. Still, creating a set of neutral legal principles governing the right to limit and carry out investigations is of critical importance if one hopes to avoid whipsaw-like treatment of investigators that varies depending on partisan political interests and other historical contingencies. Yet, notwithstanding the critical role of such investigations in our democracy and the risk of ideological drift in this field, undercover investigations have not previously received nearly the same level of scholarly examination as other mechanisms of transparency and speech.

This book is about law, but it is also about much more than that. It also examines the social conditions, institutions, and other actors that make up what might be called the "information-gathering ecosystem" or "newsgathering ecosystem." It is about professional journalists and citizen journalists. Examples are drawn from the work of political activists on both the left and the right. It is about the capacity of the individual and the internet to take on powerful institutions of government and the private sector and inform public discourse.

In this chapter, we provide an overview of the topic, which is developed in more detail in the subsequent chapters. We begin with a description of what we mean by "undercover investigations," followed by some historical context to trace the origins of this type of investigative work in the United States over time. Second, we situate the topic of undercover investigations within the set of broader social practices and institutions (government, the news media, political and law reform organizations, and the corporate private sector) that comprise the information-gathering ecosystem and the social conditions under which the need for such investigations is most likely to be important. Third, we examine emerging legal, structural, and political impediments to undercover investigations that have arisen in contemporary times. Finally, we provide an overview of the existing background of American law that governs the practices of undercover investigations.

1.1 HISTORY AND DEFINITION

This is a book examining the sociolegal history of undercover investigations. Yet, defining the scope of this field can be challenging, so we begin with some examples of different types of undercover investigations as background for our discussion.

1.1.1 *Investigative Journalists*

Perhaps the context in which most people would be familiar with undercover investigations is journalism. Though as we shall see later, the relationship between the journalism profession and *deception*-based investigations has been uneasy and inconsistent, there are numerous historical and contemporary examples of such investigations that have revealed to the public important information that has sparked public debate and perhaps led to legislative or other types of reforms. We begin with several early examples.[2]

[2] Professor Brooke Kroeger has provided two valuable, comprehensive sources for researching undercover reporting – first, in her book, Undercover Reporting: The Truth about Deception (2012) (Kroeger, Undercover Reporting); and second, in an online repository collecting and publishing examples of this type of journalism. *Deception for Journalism's Sake: A Database*, NYU, https://undercover.hosting.nyu.edu/s/undercover-reporting/page/about (last visited Nov. 2, 2022).

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Actively obscuring one's identity was a necessity for not only journalists but also political activists, who undertook to investigate and expose the grim realities of slavery prior to the Civil War.[3] Several reporters for the *New York Tribune* pursued this project in the years leading up to the war. In 1852, James Redpath, a journalist and abolitionist, was able to get hired by Southern newspapers so that he could spend time in the South to build trust with local communities and have a pretense for gathering information about the conditions of enslaved persons, which he would then write about in the form of letters to the *Tribune* under a pseudonym. These firsthand accounts were published under a feature called "The Facts of Slavery," to inform Northern readers about the abhorrent conditions of slavery. Similar methods were used by Albert Deane Richardson for the same newspaper in 1858. In another example, from 1859, *New York Tribune* reporter Mortimer Thompson, writing under a pen name, attended what was then one of the largest auctions of enslaved persons in the United States in Savannah, Georgia, so he could report about it to members of the general public.[4] A flavor of his reporting can be gleaned from the subheadline "HUMAN FEELINGS OF NO ACCOUNT."

Thompson's story explicitly states that had he identified himself as a reporter, he would not have been welcome. Instead, he walked around with a pencil and auction catalogue, so that people would believe him to be one of the buyers of enslaved persons. Another *Tribune* reporter, Henry S. Olcott, went undercover to provide news coverage of the execution of abolitionist John Brown on December 2, 1859. The *Tribune* correspondent initially assigned to that area had fled town out of fear of being discovered by Southerners hostile to his stories, which were being published under a pseudonym. To gain access, Olcott joined a regiment assigned to guard Brown's body, but had to hide from people in the area who might be able to identify him as a New York journalist.

One of the most famous undercover investigations in US history was undertaken by the intrepid journalist Nellie Bly, who is often classified as one of the aforementioned "girl stunt reporters."[5] Born Elizabeth Jane "Pink" Cochran in 1864, Bly's career began when, as an emerging young journalist trying to break into a heavily male-dominated field, she found her first writing job with the *Pittsburgh Dispatch*, where she first acquired her pen name. There, she wrote columns mostly focused on women's issues, but eventually became dissatisfied with the limitations of that assignment. She left the *Dispatch* in 1887, and met with several newspaper editors in New York City to find employment, with her primary hope being to secure a position with the *New York World*, which had been recently bought by Joseph

[3] These accounts are described in Kroeger, Undercover Reporting, *supra* note 2, at 16–28.

[4] Q. K. Philander Doesticks, *American Civilization Illustrated: A Great Slave Auction*, N.Y. Tribune (Mar. 5, 1859), https://undercover.hosting.nyu.edu/files/original/7d937ea8eab0c4cbf372e60ca9abb029274d7b3a.pdf.

[5] The Bly narrative is drawn from Nellie Bly, Ten Days in a Mad-House (1887); Brooke Kroeger, Nellie Bly: Daredevil, Reporter, Feminist (1994); and Todd, *supra* note 1.

Pulitzer. She is believed to have snuck her way into the newspaper's offices, and promptly proposed a number of story ideas to Colonel John Cockerill, chief editor at the *World*. Instead, Cockerill commissioned her to undertake an investigative assignment. At the time, there had been reports about questionable treatment of residents at Blackwell's Island Insane Asylum for Women. Either Cockerill or Pulitzer (it is unclear which) suggested that Bly pretend that she was "insane" and get herself committed to the asylum to observe the conditions firsthand.

Bly gladly took on the challenge. Interestingly, she met with a local prosecutor before going undercover to ensure that she had immunity from any prosecution for her conduct during the investigation. She changed her clothing, appearance, and behavior to pose as a person subject to commitment and checked into a boarding house under the name Nellie Brown. While there, she proceeded to act erratically. That act was apparently convincing, for after only one night in the house, the police were called and Bly was brought before a judge, who sent her to Bellevue Hospital for an evaluation. Thereafter, she was quickly transferred to the Blackwell women's asylum, where she spent about ten days, before the newspaper sent in its lawyer to secure Bly's discharge. What followed was Bly's lengthy exposé about her experiences, first published in the pages of the *World* in October 1887, and later in her book, *Ten Days in a Madhouse*. Bly's story reported the deplorable conditions she discovered. Among the things she described were abusive and violent staff, fire hazards, severely cold temperatures, unsanitary practices, terrible food, and the treatment of foreign-born women who were not mentally ill but had been committed because others, including the asylum's staff, could not understand them and assumed them to require treatment. The results of her stories, besides promoting sales of the *World*, are somewhat unclear. A grand jury was convened to investigate the asylum, but there is no evidence that it led to any concrete actions. The government increased the asylum's budget, but that may have been in the works even prior to her reporting.

Perhaps the largest impact of Bly's investigation was on journalism itself. Though the techniques of undercover reporting were well established by this time, Bly is sometimes credited with the invention of what was at first labeled "stunt" or "immersion" journalism. Today, those terms appear to have a more negative connotation and are frequently used to describe a journalist who is not engaged in undercover reporting, but instead "becomes a guinea pig, attempting some masochistic or outrageous challenge in an attempt to prove a point or provide a first-hand experiential account."[6] But the impact of Bly's undercover investigation seems to be pretty clear. Following the success of the asylum investigation, Bly doggedly pursued numerous undercover investigations that she would write about for the *World*,

[6] Zach Schonfeld, *Are We Living in a Golden Age of Stunt Journalism?*, Newsweek (July 25, 2016), www.newsweek.com/2016/09/02/are-we-living-golden-age-stunt-journalism-or-just-embarrassment-480508.html.

including posing as a maid to expose questionable practices by local employment agencies, pretending to be an unwed mother to identify a baby trafficking network, and getting hired at a paper box factory to report on the horrible working conditions, to name just a few. Moreover, she inspired other journalists, especially female reporters such as Nell Nelson, Annie Laurie, Eva Gay, and Nora Marks, to use similar deception-based techniques to gather and report important news.

Nearly twenty years after Bly's blockbuster journalism debut, Upton Sinclair also used deception to investigate wrongdoing in the Chicago meatpacking industry as he gathered material for his novel, *The Jungle*.[7] Sinclair's project initially began as an effort to reveal poor treatment of employees in this industry. According to some accounts, Sinclair did not have to affirmatively misrepresent himself, but instead was able to move around at the meatpacking facilities by disguising himself as a worker. As he described it in his autobiography, "I would wander about the yards, and my friends would risk their jobs to show me what I wanted to see. I was not much better dressed than the workers, and found that by the simple device of carrying a dinner pail I could go anywhere." However, one of his biographers reports that the clothes and dinner pail were not quite enough and that Sinclair gained access "armed with a few simple lies appropriate to the area in which he was investigating."[8] To prevent himself from being detected, he also had to be careful about his method of documentation. He had to remember the details of what he learned during working hours and then write his notes down once he returned to his living quarters. He had no other tool to document his findings.

Though published in novel form rather than as journalism, Sinclair's undercover investigation exposed the powerful meatpacking industry to close public scrutiny. At the time, livestock production was the country's largest industry and was becoming important to an increasingly globalized international market. The industry's reputation was important to preserving public and consumer trust, and meatpacking companies tried to do so through public relations efforts. As one Sinclair biographer observed, "The packers were wiser about public relations than most businessmen of that era, arranging Potemkin village tours to carefully manicured parts of their plants and advertising their own virtues lavishly."[9] It was a quintessential example of a

[7] Upton Sinclair, The Jungle (1906). The Sinclair narrative is drawn from Upton Sinclair, The Autobiography of Upton Sinclair (1962); Leon Harris, Upton Sinclair: American Rebel (1975); The Muckrakers (Arthur Weinberg & Lila Weinberg eds., 2001); Anthony Arthur, Radical Innocent: Upton Sinclair (2006). Although this book focuses on undercover investigations in the United States, it should be noted that the American author Jack London engaged in an investigation of living conditions in London's East End using an approach similar to Sinclair's. That investigation resulted in the publication of London's book, The People of the Abyss in 1903, just a few years before publication of The Jungle. Kroeger, Undercover Reporting, *supra* note 2, at 77–83.

[8] Harris, *supra* note 7, at 70 (emphasis added). In her work, Kroeger raises some doubts about exactly how secret Sinclair kept his activities. Kroeger, Undercover Reporting, *supra* note 2, at 87–89.

[9] Harris, *supra* note 7, at 69.

public deception through faux transparency; everything was readied for the tour so as to obscure the reality and ensure public trust. Notably, over 100 years later, the agricultural industry continues to offer these Potemkin village tours.[10] The lack of transparency combined with affirmative efforts to falsely construct a reassuring public narrative are precisely the type of practices by powerful institutions that underscore the need for undercover investigations.

The public reaction to Sinclair's work was profound and concrete. *The Jungle* became a best seller. It inspired President Theodore Roosevelt to send investigators to confirm Sinclair's reports. And Sinclair's work is frequently credited with prompting Congress to enact two major pieces of reform legislation, the Federal Meat Inspection Act and the Pure Food and Drug Act,[11] which remain in effect today.

The type of undercover investigation pioneered and made famous by Bly and Sinclair became a popular and widespread practice in journalism throughout the Progressive Era, and more of these accounts are reported in Chapter 2. But the state of journalism began to shift in the first half of the twentieth century. As one commentator noted, "Investigative work between 1917 and 1950 split into two camps: one continuing the muckraking zeal for reform, pushed by an ideological bent that bordered on socialism; the other evolving into an objective, mainstream version recognizable by today's standards."[12]

By most historical accounts, there seems to be a lull in undercover investigations, or at least in high-profile ones that received national attention, from the mid-twentieth century until the 1970s. During the 1970s, numerous examples of the type of deception-based investigations pioneered by Bly, Sinclair, and others can be identified. Among these are the work covering the Watergate scandal by *Washington Post* reporters Bob Woodward and Carl Bernstein, who may have used deception in communicating with sources to enhance the possibility that those sources would be forthcoming with information, though their deception may have been more through omissions than by affirmative lies.[13]

Later that same decade, *Chicago Sun-Times* reporters Zay Smith and Pam Zekman, working alongside a representative from a local nonprofit government reform group, teamed up to build one of the most elaborate undercover reporting facades ever, when they and their team opened and operated the Mirage Tavern on

[10] Mark Bittman, *Banned from the Barn*, N.Y. Times (July 5, 2011), https://opinionator.blogs.nytimes.com/2011/07/05/banned-from-the-barn/.

[11] Pub. L. No. 59-242, 34 Stat. 1260 (1906) (codified as amended at 21 U.S.C. §§ 601–695); Pub. L. No. 59-384, 34 Stat. 768 (1906) (codified as amended at 21 U.S.C. §§ 301–399f).

[12] James L. Aucoin, The Evolution of American Investigative Journalism 33 (2005).

[13] Carl Bernstein & Bob Woodward, All the President's Men 250 (1974) ("They had dodged, evaded, misrepresented, suggested and intimidated, but they had not lied outright"). It is difficult to find a definitive account or discussion of whether Woodward and Bernstein ever engaged in affirmative deception to investigate the Watergate scandal. This question is discussed a little further in Chapter 2.

the South Side of Chicago.[14] Through this deception, they obtained and reported on corruption among the ranks of the city's health and safety inspectors, who took bribes for not reporting code violations. Their twenty-five-part series in the *Sun-Times* informed the public in detail about this misconduct, and also led to multiple criminal indictments and key statutory reforms.

Another illustration of deception-based undercover journalism, one that we will return to throughout this book, is the 1992 investigation of the Food Lion grocery store chain conducted by two reporters from the ABC News program Primetime Live. The reporters used résumés with false identities, addresses, and references to gain employment with two different Food Lion stores. After they were hired, they used hidden video cameras to document and confirm what their sources had initially reported to ABC News, which was that Food Lion's food handling practices were highly unsanitary and probably violated several laws. The broadcast included, for example, 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 if it were 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.

In the late 1990s, writer and researcher Barbara Ehrenreich set out to examine the plight of the working poor in the United States by traveling around the country applying for low-wage jobs. This resulted in the publication of her acclaimed book, *Nickel and Dimed: On (Not) Getting By in America*.[15] At the book's outset, she described how she was able to maintain her subterfuge so that she could obtain jobs without raising suspicion that she was not who she said she was. As she described it,

> There was also the problem of how to present myself to potential employers and, in particular, how to explain my dismal lack of relevant job experience. The truth, or at least a drastically stripped-down version thereof, seemed easiest: I described myself to interviewers as a divorced homemaker reentering the workforce after many years, which is true as far as it goes. Sometimes, though not always, I would throw in a few housecleaning jobs, citing as references former housemates and a friend in Key West whom I have at least helped with after-dinner cleanups now and then. Job application forms also want to know about education, and here I figured the Ph.D. would be no help at all, might even lead employers to suspect that I was an alcoholic washout or worse. So I confined myself to three years of college, listing my real-life alma mater. No one ever questioned my background, as it turned out, and only one employer out of several dozen bothered to check my references. When, on one occasion, an exceptionally chatty interviewer asked about

[14] Pamela Zekman & Zay N. Smith, *Our Bar Uncovers Payoffs, Tax Gyps*, Chi. Sun-Times (Jan. 8, 1978), https://undercover.hosting.nyu.edu/files/original/efb2fe975245467d38b9bc53605 26ecec06c0702.pdf.

[15] Barbara Ehrenreich, Nickel and Dimed: On (Not) Getting By in America (2001).

> hobbies, I said "writing" and she seemed to find nothing strange about this, although the job she was offering could have been performed perfectly well by an illiterate. There was always, of course, the difference that only I knew – that I wasn't working for the money, I was doing research for an article and later a book.[16]

More recently, in 2007, Ken Silverstein, a *Harper's Magazine* editor, set out to do a story on how much Washington lobbyists promise to their foreign government clients. Silverstein represented himself as the head of the Maldon Group, supposedly a collection of private investors who were exporters of natural gas from Turkmenistan, which had a government regime that he described as "Stalinist."[17] The purported goal of hiring a lobbying firm was to show American policymakers that the reforms being undertaken by the Turkmeni government were real, which would help increase the chance of the Maldon Group's business success. To support his scheme, Silverstein took what he called "minimal preparations."

> I printed up some Maldon Group business cards, giving myself the name "Kenneth Case" and giving the firm an address at a large office building in London, on Cavendish Square. I purchased a cell phone with a London number. I had a website created for The Maldon Group [–] just a home page with contact information [–] and an email account for myself. Then, in mid-February, soon after Berdymukhamedov's ascent, I began contacting various lobbying firms by email, introducing my firm and explaining that we were eager to improve relations between the "newly-elected government of Turkmenistan" and the United States. We required the services of a firm, I said, that could quickly enact a "strategic communications" plan to help us. I hoped that the firms might be willing to meet with me at the end of the month, during a trip I had planned to Washington.[18]

The fiction worked like a charm, and Silverstein set meetings with two powerful DC lobbying firms. As he described it in a later opinion essay, what he found and reported was that

> In exchange for fees of up to $1.5 million a year, they offered to send congressional delegations to Turkmenistan and write and plant opinion pieces in newspapers under the names of academics and think-tank experts they would recruit. They even offered to set up supposedly "independent" media events in Washington that would promote Turkmenistan (the agenda and speakers would actually be determined by the lobbyists). All this, [they] promised, could be done quietly and unobtrusively, because the law that regulates foreign lobbyists is so flimsy that the firms would be required to reveal little information in their public disclosure forms.[19]

[16] *Id.* at 5.
[17] Ken Silverstein, *Their Men in Washington: Undercover with D.C.'s Lobbyists for Hire*, Harper's Bazaar, July 1, 2007, at 53.
[18] *Id.*
[19] Ken Silverstein, *Undercover, under Fire*, L.A. Times (June 30, 2007), https://www.latimes.com/la-oe-silverstein30jun30-story.html.

Rather than being praised for exposing the unsavory underbelly of foreign nationals' lobbying of the United States government, Silverstein was taken to task by, of course, the targets of his investigation, but also by other journalists, for engaging in what they called unethical behavior. As one of his most vocal critics, *Washington Post* reporter Howard Kurtz wrote: "no matter how good the story, lying to get it raises as many questions about journalists as their subjects."[20]

In just the past decade, Shane Bauer, a journalist for *Mother Jones* magazine, has published two exposés based on his experiences working undercover with a paramilitary militia group at the nation's southern border and as a private prison guard.[21] Chris Ketcham posed as a hunter and went undercover to report on a wolf and coyote killing contest in Idaho, where he quickly learned that armor-piercing ammunition is preferred because "[u]nlike soft lead-tipped bullets, which mushroom inside the body cavity and kill quickly," an armor-piercing bullet quickly exits the body and forces the animal to suffer: "It will bleed out slowly, run a mile or so in terrified panic, and collapse," a seasoned hunter explained to him.[22]

This list of successful undercover journalistic investigations goes on and on. As we discuss in Chapter 2, journalism using investigative deceptions has gone in and out of favor both within the journalism community and among the general public, and remains controversial. Yet its real-world impact is generally assumed.[23]

1.1.2 *Civil Rights Testers*

In March 1978, Sylvia Coleman and R. Kent Willis asked representatives of Havens Realty Corporation whether they had any available rental properties in suburban Richmond, Virginia.[24] On three different occasions within a ten-day period, Coleman was told that no apartments were available, while Willis was informed

[20] Howard Kurtz, *Undercover Journalism*, Wash. Post (June 25, 2007), www.washingtonpost.com/wp-dyn/content/blog/2007/06/25/BL2007062500353.html.

[21] Shane Bauer, *My Four Months as a Private Prison Guard*, Mother Jones (July/Aug. 2016), www.motherjones.com/politics/2016/06/cca-private-prisons-corrections-corporation-inmates-investigation-bauer/; Shane Bauer, *I Went Undercover with a Border Militia. Here's What I Saw*, Mother Jones (Nov./Dec. 2016), www.motherjones.com/politics/2016/10/undercover-border-militia-immigration-bauer/.

[22] Christopher Ketcham, *How to Kill a Wolf : An Undercover Report from the Idaho Coyote and Wolf Derby*, VICE (Mar. 13, 2014), www.vice.com/en_us/article/qbee5d/how-to-kill-a-wolf-0000259-v21n3.

[23] For some international examples of deception-based investigations, see SHA, *10 Most Courageous Undercover Journalists*, Career News Insider (Nov. 9, 2012), www.careernewsinsider.com/10-most-courageous-undercover-journalists/.

[24] Facts from this investigation are drawn from Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), in which the Supreme Court held that testers have legal standing to sue discriminatory property managers under the federal Fair Housing Act even if they did not intend to rent the properties in question.

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the opposite. Coleman is Black; Willis is white. Neither Coleman nor Willis had any intention of renting an apartment. Rather, they were acting as testers, posing as real renters to investigate racial steering, a form of housing discrimination in which persons discourage potential buyers or renters from pursuing housing opportunities because of the latter's race. Along with a fair housing organization, Coleman and Willis sued Havens for violating the Fair Housing Act of 1968 (FHA), which prohibits various forms of race, sex, religion, and national origin discrimination in the sale or rental of housing.

As with other violations of law, housing discrimination can be difficult to detect. This is particularly true of racial steering, which is conduct through which persons discourage potential buyers or renters from pursuing housing opportunities on a discriminatory basis. A person who represents to another person "because of race" or other protected category that "any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available" violates the FHA.[25]

To detect these violations, civil rights testers, like undercover journalists, must hide their true identities and motives by pretending to be actual consumers seeking services. In the case of fair housing testers, a false identity is even prepared, so that testers of different races have similar fabricated incomes, credit histories, and other backgrounds. If the testers are otherwise identical, their differential treatment is highly likely to be based on race alone. This is a technique called "paired testing," which uses regression analysis to rule out other variables as having influenced the targets' discriminatory acts. As one organization describes it, "testers simulate ordinary housing transactions for the purpose of obtaining credible and objective information about housing practices."[26] This same organization also authorizes testers, where lawful, to use hidden audio and video recorders to document their conversations with the investigation targets, but they also are encouraged to take careful notes.[27]

It is not just civil rights organizations that engage in testing. The Department of Justice runs its own fair housing testing program,[28] while the Department of Housing and Urban Development, authorized by Congress, created a Fair Housing Initiatives Program that allocates funds to nonprofit organizations for testing.[29] While federal regulations define who can become a tester, they do not (and realistically could not) prohibit testers from engaging in deception about their identities, which is central to the testing protocol.

[25] 42 U.S.C. § 3604(d).
[26] Fair Housing Justice Center, Guide for Fair Housing Testers 6 (2012).
[27] *Id.* at 19, 31–34.
[28] *Fair Housing Testing Program*, U.S. Dep't of Just., www.justice.gov/crt/fair-housing-testing-program-1 (last visited Oct. 31, 2022).
[29] 42 U.S.C. § 3616a.

Moreover, civil rights testing is not limited to housing discrimination. Over the past half century, civil rights testing has been used extensively to identify race discrimination across a wide range of contexts, including hotels and restaurants, taxis and ride-sharing services, employment, retail stores, and government services, to name a few.[30] Nonprofits support litigation and activism by actively recruiting testers.[31] Testing has moved beyond race and is used to smoke out discrimination based on national origin, familial status, disability, gender, sexual orientation, and transgender or gender-nonconforming status.[32] Indeed, civil rights testing has become a central part of advocacy aimed at detecting and remedying discriminatory practices.

Long before anyone dreamed up civil rights testing, others also used deception to investigate racial injustices. As we have already described, journalists around the time of the Civil War assumed false identities to report about the conditions of slavery and the events of the war. Another fascinating example arose during the early twentieth century, when Walter F. White, a representative of the National Association for the Advancement of Colored People (NAACP) posed as a white man to investigate lynchings and other incidents of racial violence against Black people in the southern United States.[33] White, who was Black[34] but had blonde hair, blue eyes, and white skin, was easily able to "pass" as a white person during these investigations, which uncovered and documented these acts of violence in reports for the NAACP. His investigations led to national exposure of incidents of racial violence, including the Tulsa Race massacre.[35] In the early 1920s, White even made inroads into infiltrating the Ku Klux Klan, efforts that eventually led to press accounts on White's investigation indicating that the Klan was still active long after the Civil War, which many public officials had denied.[36] White eventually went on to become the chief executive of the NAACP.

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

[31] *Become a Tester*, Equal Rts. Ctr., https://equalrightscenter.org/become-a-tester/ (last visited Oct. 31, 2022).

[32] *Fair Housing Testing Program*, *supra* note 28 (race, national origin, disability, and familial status); Molovinsky v. Fair Emp. Council of Greater Wash., Inc., 683 A.2d 142 (D.C. 1996) (gender); Jamie Langowski et al., *Transcending Prejudice: Gender Identity and Expression-Based Discrimination in the Metro Boston Rental Housing Market*, 29 Yale J.L. & Feminism 321 (2018) (transgender and gender-nonconforming people); Equal Rights Center, Behind Closed Doors: A Testing Investigation into Bias against LGBT Job Applicants in Virginia (2019) (sexual orientation).

[33] A. J. Baime, White Lies: The Double Life of Walter F. White and America's Darkest Secret (2022).

[34] Toward the end of his life, some people claimed that White was actually a white man after all, and that his greatest deception had been fooling the NAACP and others to believe he was Black, though there has never been a definitive resolution of this dispute. *Id.* at 303, 320.

[35] *Id.* at 84–89.

[36] *Id.* at 80–83.

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1.1.3 *Animal Rights Investigators*

It has been said that the best thing animal agriculture has going for it is that most families are two or three generations removed from the mess and gore that is involved when animals are killed and processed for human use. Timothy Pachirat's compelling 2012 book, *Every Twelve Seconds*, documents the human and nonhuman animal suffering that he discovered while working undercover in a Nebraska slaughterhouse. Pachirat explores in detail what he calls the "politics of sight" in a slaughterhouse, noting that the facilities are constructed so that no single worker sees the entire killing and handling process; the facilities are separated with dividers and walls so that the process is divided into discrete, rote acts. Transparency is anathema to the modern factory farm, even from within the farm itself.[37]

For groups interested in promoting better legal protections for animals, the lack of transparency creates a stifling advocacy barrier. How can someone understand what preceded the cellophane-wrapped pork chop for sale at their local market when industrial slaughter is hidden from the public eye? Not surprisingly, then, though certainly not without controversy, groups and individuals have used a variety of tactics to expose the conditions present on factory farms. In 2020 during the COVID-19 pandemic, many farms were engaging in "depopulating" projects, or the mass killing of animals that had become unprofitable to keep due to decreasing consumer demand for meat. Glenn Greenwald, a Pulitzer prize–winning journalist, was provided video footage from cameras that were left at Iowa's largest pig farm, which revealed that the farm was using a "cruel and excruciating method to kill thousands of pigs."[38] Describing the video footage, Greenwald notes that Iowa Select Farm adopted the mass-extermination method known as "ventilation shut-down," which means that the pigs are killed "by sealing off all airways to their barns and inserting steam into them, intensifying the heat and humidity inside and leaving them to die overnight" of hyperthermia. The video reveals that "Most pigs – though not all – die after hours of suffering from a combination of being suffocated and roasted to death."

The work of animal rights investigators has unquestionably had a measurable impact on government policy, criminal prosecutions, and public opinion. One of the most significant animal investigations was done by Humane Society of the United States (HSUS) at the Westland/Hallmark slaughterhouse in Chino,

[37] There are exceptions. Pachirat himself is working on research examining a factory farm that doubles as an amusement park where guests pay money and buy souvenirs at a large facility that mass produces animal products for consumption. *See* Fair Oaks Farms, https://fofarms.com/ (last visited Nov. 4, 2022). In general, however, industry has been at the forefront of advocating for greater secrecy and less transparency.

[38] Glenn Greenwald, *Hidden Video and Whistleblower Reveal Gruesome Mass-Extermination Method for Iowa Pigs Amid Pandemic*, The Intercept (May 29, 2020), https://theintercept.com/2020/05/29/pigs-factory-farms-ventilation-shutdown-coronavirus/.

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California, in 2008. The video footage from that investigation showed workers "kicking cows, ramming them with the blades of a forklift, jabbing them in the eyes, applying painful electrical shocks, and even torturing them with a hose and water in attempts to force sick or injured animals to walk to slaughter."[39] The disclosures resulted in significant government actions, including criminal prosecutions of some slaughterhouse employees, the adoption of new California laws to prevent animal cruelty, a beef recall that is reported to be the largest ever in the United States, and a $500 million judgment under the False Claims Act.[40]

1.1.4 *False Claims Act*

Another context in which undercover investigations can have substantial value is in accessing information that is the basis of claims under the False Claims Act (FCA), a federal statute that establishes a private cause of action that can be brought by individuals who reveal fraud against the federal government and can yield sizable financial awards.[41] Claims may be brought by the United States but also by "relators" pursuing qui tam actions on behalf of the government and who may recover a portion of the proceeds of the litigation if it is successful. Though the FCA was enacted primarily to encourage whistleblowers to come forward with evidence of fraud against the federal government, critics have argued that it is increasingly invoked not by insiders but by people and organizations that have financial or political goals unrelated to the primary purposes of the law. But these are not mutually exclusive functions.

Turning again to the animal agriculture industry, the HSUS's undercover investigation of the Westland/Hallmark meat company's facilities not only provided a basis for reforming the law and securing criminal convictions, but also led to an FCA claim against the company. HSUS filed a qui tam claim against Westland/Hallmark and the United States government intervened. The underlying claim was that the agricultural company, which was party to 140 contracts with the federal government to supply meat for the child nutrition programs, defrauded the government by selling meat that it claimed was processed in establishments that complied with specific federal health and safety standards, including humane handling of cattle that prevented needless suffering. Westland/Hallmark's certification that its facilities met this standard was fraudulent, but the only way that this was discovered in the

[39] *Modern Animal Farming*, Vegan outreach, https://veganoutreach.org/modernfarms-archive/ (last visited Nov. 4, 2022).

[40] *Jailed Chino Slaughterhouse Ex-Employee Says Abusive Tactics Ordered by a Superior*, The Press-Enterprise (Mar. 1, 2008), www.pressenterprise.com/2008/03/01/jailed-chino-slaughterhouse-ex-employee-says-abusive-tactics-ordered-by-a-superior/; United States' Second Amended Complaint in Intervention & Demand for Jury Trial, United States ex rel. Humane Society of the United States v. Westland/Hallmark Meat Company, et al., No. EDCV 08-0221 VAP (OPx) (C.D. Cal.) (Dec. 15, 2010) (False Claims Act suit); Nat'l Meat Ass'n v. Harris, 565 U.S. 452, 458 (2012) (describing beef recall and California law).

[41] 31 U.S.C. § 3730.

first place was through HSUS's undercover investigation. Thus, investigative deceptions can, in the right circumstances, lead to evidence supporting FCA claims.[42]

1.1.5 *Union "Salting"*

In 2009, as the recession was beginning to wane, James Walsh began working with Unite Here, one of the largest service unions in the United States.[43] After interviewing with a union representative, James became a union "salt." At the time, Unite Here was actively recruiting young progressive activists to volunteer with them and had an estimated 200 salts working in the local casino industry. James moved to Florida and applied for jobs with several nonunion racetrack casinos, ultimately securing a job as a buffet server, and later as a bartender. The casinos hired him, not knowing that his intent was to get to know some employees and identify candidates who could lead an organizing movement within the workplace. He performed his job duties well, which he viewed as the best way to avoid detection. To document his findings, James carried small notebooks, wrote down notes on paper receipts, and emailed himself information he had learned. Although Florida is a two-party consent state,[44] on one occasion he tried to use a hidden tape recorder to memorialize what management had said to him. Eventually, the casinos identified several of the salts, including James, and fired them, though ostensibly not because of their organizing work.

Salting represents another context in which investigative deception not only is effectively used but is also recognized as lawful. As James's story tells us, salting is when union organizers apply for and accept jobs with nonunion employers for the purpose of organizing its workers to form a union.[45] While some "salts" work openly, covert salts apply for jobs with nonunion employers while intentionally falsifying their employment applications, including omitting their work histories and connections with unions. And they engage in that deception for the specific purpose of enhancing the possibility that they will be hired. Sometimes the unions actually hire salts, who are then working for the union and for the employer; in other cases, such as James's, they are volunteers.

[42] *See supra* note 40.

[43] These accounts are drawn from Walsh's book, Playing against the House: The Dramatic World of an Undercover Union Organizer (2016), and from a story and interview about his work. James D. Walsh, *The Double Life of an Undercover Union Organizer*, Intelligencer (Feb. 19, 2016), https://nymag.com/intelligencer/2016/02/what-its-like-tobea-salt-for-the-unions.html; Bourree Lam, *Life as an Undercover Union Organizer*, The Atlantic (Mar. 21, 2016), www.theatlantic.com/business/archive/2016/03/undercover-union-organizer/474387/.

[44] Two-party consent laws, which are present in 12 states as of 2022 according to the Digital Media Project, require that all parties to a conversation consent before an audio recording of the conversation is permitted. Although our focus in Chapter 4 is on video recording, the speech protections we elucidate apply with equal force to restrictions on audio recording. In fact, recording a video that includes audio would run afoul of most if not all of the existing two-party consent laws. There is no principled reason to believe that the First Amendment applies with less force to an audio recording or an audiovisual recording than to a video or visual recording.

[45] For an overview of the practice of salting, see James L. Fox, *"Salting" the Construction Industry*, 24 Wm. Mitchell L. Rev. 681 (1998).

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Although it is not the intention of salts to continue working for the targeted employer after they have completed their organizing work, they are recognized by the National Labor Relations Board as employees, and therefore benefit from prohibitions against unfair labor practices.[46] While on the job, covert salts communicate with other workers to help mobilize them and encourage them to form a union. Like other undercover investigators, though their purpose is to organize workers, salts are obligated under law to perform their work duties and must obey valid work rules.

Earlier generations of union activists also used deception to access workplaces. Around the same time that Walter White was conducting undercover investigations for the NAACP, Roger Baldwin, who would later help found the American Civil Liberties Union (ACLU), served as a "labor spy" to report on the working conditions in the steel industry.[47] He would engage in work during the day and document his observations later. "In the evenings he recorded the presence of morale problems, inefficient scab labor, and general problems in the production line."[48] As with other undercover investigations, Baldwin publicly exposed things that would otherwise have been hidden behind steel mill walls.

1.1.6 *Government Investigators and "Stings"*

On January 8, 1980, Congressman Richard Kelly arrived at a Washington, DC, townhouse he believed to be owned by Abdul Enterprises, which was actually a fake company set up by the Federal Bureau of Investigation as part of an elaborate undercover sting to root out political corruption and organized crime known as "Abscam."[49] FBI agents posing as officials of Abdul Enterprises had led Kelly to believe they needed his help as a member of Congress to introduce private immigration legislation to assist them in the event of political upheaval in Iran, where they were supposedly citizens. In exchange, they would pay Kelly $25,000. Kelly agreed, but tried to avoid any direct implication in the bribery by dealing through representatives. But after one of the undercover agents suggested to Kelly that he should receive the bribe directly to avoid having witnesses to the transaction, Kelly agreed to deal with them directly. The FBI had set up secret video recording equipment in the townhouse from which they were able to tape Kelly stuffing the cash into his suit pockets. Kelly, along with several other members of Congress and some local officials, was later convicted of corruption charges based on the operation.

[46] N.L.R.B. v. Town & Country Elec., Inc., 516 U.S. 85 (1995).

[47] Robert C. Cottrell, Roger Nash Baldwin and the American Civil Liberties Union 108–10 (2000).

[48] *Id.* at 110.

[49] The facts described in this narrative are from United States v. Kelly, 707 F.2d 1460 (D.C. Cir. 1983).

Abscam is perhaps the highest profile example of a significant law enforcement investigative tool: the undercover "sting." In these operations, government agents create scenarios for their targets based on lies and misrepresentations, particularly about the agents' identities. Officers pretend to be drug dealers, prostitutes, terrorists, or other players in a criminal enterprise to gain access to evidence of wrongdoing, often leading to criminal charges and convictions. As in journalism, there are debates about the ethics of such techniques (the trial judge in Congressman Kelly's case initially threw out his conviction because he concluded that the FBI's conduct was so outrageous that it violated Kelly's due process rights). But there is a long history of law enforcement lying to further criminal investigations and it has played a role in some of the most important prosecutions in US history.

Indeed, the federal courts not only have frequently upheld but also have praised the value of law enforcement stings. As one federal appeals court wrote in the context of an undercover investigation relating to insurance fraud, "[i]f total honesty by the police were to be constitutionally required, most undercover work would be effectively thwarted."[50] Furthermore, though there are specific limitations on law enforcement stings, including the rule against entrapment, the Supreme Court has sanctioned the use of deception in a wide range of contexts, including securing confessions without an attorney present, securing a confession without providing Miranda warnings, and obtaining access to conversations or private property based on false claims of friendship or business.[51] A secret told to a "false friend" does not enjoy any protection in the eyes of the Supreme Court.

But undercover law enforcement investigations bring risks of abuse as well. Between 1956 and 1971 the FBI operated a Counter Intelligence Program (infamously known as COINTELPRO), which was designed to infiltrate, disrupt, and discredit leftist organizations, particularly the Communist Party.[52] The operation targeted the work of Dr. Martin Luther King, Jr., the Black Panthers, and many others deemed subversive.

After retiring from the FBI, special agent Cril Payne wrote a memoir documenting his similar work infiltrating a leftist student group known as the Weather Underground.[53] Payne, a conservative Texas lawyer, describes how he grew a beard, pretended to be interested in the leftist ideologies of the group, and even started a relationship with one of the female activists in the group. If the FBI had wanted to search an activist's home or even just listen in on their private phone calls, a warrant would have been required. But Payne's deceptive entry and feigned romantic interest in the woman did not implicate the Constitution no matter how many

[50] Brokers' Choice of Am., Inc. v. NBC Universal, Inc., 757 F.3d 1125, 1146 (10th Cir. 2014).
[51] Hoffa v. United States, 385 U.S. 293, 303 (1966); Katz v. United States, 389 U.S. 347, 351 (1967); United States v. White, 401 U.S. 745, 749 (1971).
[52] COINTELPRO, Fed. Bureau of Investigation, https://vault.fbi.gov/cointel-pro (last visited Oct. 31, 2022).
[53] Cril Payne, Deep Cover: An FBI Agent Infiltrates the Radical Underground (1979).

private secrets he obtained through his lies. This was true even though the woman being investigated eventually became pregnant and was persuaded by Payne to get an abortion.[54] It would be a serious oversight to ignore the reality that the sociolegal history of deception-based investigations has frequently included rather unsavory tactics against persons on the political left.

1.1.7 *A Definition Drawn from Commonalities*

Several features link these otherwise vastly different undercover investigations. Many of the investigations we highlight involve the investigator engaging in some form of deception toward the investigation's target, either affirmatively misrepresenting the investigator's identity, background, and motives or at least omitting information that would cause the target to turn them away. Second, the investigation uses the deception or other tactic to access private property, information, or people. Third, the investigations reveal conduct that is unlawful, unethical, or immoral, or otherwise a matter of considerable public interest. Fourth, all of these investigations involve documenting the information discovered, whether by handwritten notes made while the investigator cannot be observed or by using hidden digital recording equipment, such as cameras, audio recorders, or video recorders. Finally, in each case the investigation's targets seek to keep the information that is sought from public scrutiny, thus making the information difficult if not impossible to obtain without an undercover investigation.

1.2 SOCIAL PRACTICES, SOCIAL CONDITIONS, AND INSTITUTIONS

Throughout this book, we stress that undercover investigations, like other social practices, do not exist in a vacuum. Rather, the emergence of these investigative techniques is in part a response to weaknesses in the infrastructure of speech and information in our society, and are therefore deeply historically contingent. Some of these factors are legal, but others relate more to structural, political, and social conditions. We contend that undercover investigations become central to the information-gathering ecosphere when, and because of failures of public policy, critical information is kept secret from the public. Indeed, the significance of any particular undercover investigation is inversely related to the public transparency of the events exposed. If certain information is readily available to the public through other means, or if the information sought is merely embarrassing or entertaining, an investigation into such matters is less valuable, and should probably enjoy fewer legal protections. On the other hand, the greater the secrecy and the more relevant the information to public debate, the potentially more valuable the undercover investigation.

[54] *Id.* at 262–66, 274.

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We maintain that our contemporary environment, for reasons described below, is one in which undercover investigations are of critical importance to promoting free speech. We break this discussion down into two major categories. First, current social conditions make it increasingly difficult for the public to gain access to information that informs public discourse on a wide range of issues. Second, structural institutional failures have depressed the quality and quantity of efforts to acquire information and keep state and private institutions in check.

1.2.1 *Social Conditions*

Undercover investigations are a natural reaction to secrecy and non-transparency in powerful institutions. Investigators and those who sponsor them are always on the outside looking in. There may be a well-founded reason to suspect that an institution is engaged in unlawful, unethical, or otherwise unsavory practices, but few traditional avenues to gaining access to relevant information. As we elaborate on throughout this book, this type of transparency in government is essential to fulfilling one of the First Amendment's most critical purposes, promoting an effective, functioning democracy. And this is no less true with respect to the accountability of large corporate interests.

With regard to government institutions, lack of transparency substantially undermines accountability and makes it difficult to engage in political transformation through the electoral process. That process, of course, is plagued by dysfunctions almost too large to tally, whether we are talking about inequality in the electoral process through economic disparities and the ability of the very wealthy to donate and spend on political campaigns, the numerous impediments to voting imposed by governments keen to retain their political power, or, at the presidential level, the distortions of the Electoral College, which grants disproportionate power to voters who reside in less populous states.

But our democracy is equally threatened by an ecosystem that discourages the open and unfiltered disclosure of information from powerful institutions. To be sure, there are other, more formal ways than undercover investigations to gather information through structured legal processes. If the target of an investigation is a private corporation, those monitoring its behavior may be able to look to mandatory disclosures required by federal and state law. Disclosure requirements are narrowly circumscribed, however, and corporations have strong incentives to hide critical information. As one scholar has observed, "disclosure documents today are written by corporate lawyers in formalized language to protect the corporation from liability rather than to provide the investor with meaningful information."[55] Other critical information of great public interest may see the light of day from a beneficent

[55] Susanna Kim Ripken, *The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation*, 58 Baylor L. Rev. 139, 186 (2006).

insider. But while there are many examples of brave whistleblowers who have revealed information, the truth is that people who engage in this conduct are at significant risk for employment termination and maybe even criminal charges.

Consider the fate of Lt. Colonel Vindman, who testified about a phone call between President Donald Trump and foreign officials during Trump's first impeachment proceedings. No one, including the White House, has ever pointed to lies or misstatements made by Vindman. To the contrary, the released phone transcripts strongly corroborate Vindman's testimony. And yet a decorated officer was pressured into early retirement when he was removed from his position and threatened with undesirable assignments and non-promotions. This was the unfortunate outcome for a whistleblower who, according to President Trump's former Chief of Staff, did nothing wrong and acted just as he was trained.[56]

A third way to acquire information about corporate behavior is through lawsuits. In the American legal system, litigation provides parties with the opportunity to acquire information from opposing parties through the process of discovery, which entails formal requests for written answers to interrogatories, for production of relevant documents, and for admissions of certain facts. But before formal discovery may be commenced, the party who is suing must progress to a certain point in the litigation past the initial pleading stage, and the Supreme Court has made it increasingly difficult for plaintiffs who have not pled sufficiently specific information to survive a motion to dismiss the case prior to the discovery process.[57] This puts plaintiffs trying to sue powerful corporate entities or government officials in a bit of a Catch-22 position: they cannot succeed in acquiring information from a corporation unless their lawsuit has reached a certain stage of the litigation process, but they are unlikely to reach that stage unless they have already acquired enough information on which to base their legal claims. This means that claims of corporate malfeasance or government discrimination will be dismissed by trial judges prior to discovery unless the plaintiffs already have access to substantial information to verify their allegations of misconduct through other, informal channels.

Like private businesses, government entities are sometimes required by law to disclose certain information to the public, but like corporations, their incentives to be completely transparent may be limited. Beyond mandatory disclosure laws, if the investigative target is a federal, state, or local government entity, a person or organization who suspects unlawful or unethical behavior may try to acquire

[56] Michael S. Schmidt, *Vindman, Key Figure in Trump Impeachment, Alleges Retaliation in Lawsuit*, N.Y. Times (Feb. 2, 2022), www.nytimes.com/2022/02/02/us/politics/alexander-vindman-trump-lawsuit.html.

[57] In two cases decided over a decade ago, the Supreme Court established law making it more difficult for plaintiffs filing claims in federal court to adequately plead their complaint, meaning that they need to provide more than conclusory factual statements and must detail a facially plausible claim, or their suits will be dismissed at a very early stage of litigation. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

information from that entity through the federal Freedom of Information Act (FOIA)[58] or the applicable state law requiring disclosure of public records. These are laudable, but imperfect, statutory mechanisms to promote information gathering through a structured bureaucratic process.

To its supporters, FOIA is an essential structural component for a functioning democracy, even if it alone cannot address all information problems.[59] It allows any person (even a non-US citizen) to make a request to an entity of the federal government to produce documents; the requester does not have to provide a specific justification for the request; agency denials of requests are subject to de novo judicial review; and FOIA requests have sometimes led to revelations of information crucial to public discourse and government accountability.[60]

Yet legal scholars have produced a persistent barrage of critiques of FOIA's implementation and effectiveness.[61] Some flaws are internal to the statute itself – FOIA applies only to federal executive agencies and not to other important government institutions and it does not apply to the private sector at all; there are numerous exemptions that allow agencies to refuse to turn over documents; and requests for information are tightly controlled and often intensely fought. Other critiques focus on institutional or political limitations: the sheer volume of requests makes processing slow, expensive, and unresponsive to priorities; federal courts are highly deferential to agency decisions not to disclose, even when useful information is sought; and non-lawyers reviewing the requests for the agencies may be trained to err on the side of nondisclosure. Moreover, FOIA disclosures do not always directly result in reforms or other consequences (note that the requester does not have to make the acquired documents available to the broader public); document requests frequently result in disclosure of large volumes of information at high cost without corresponding social benefits. This last observation is connected to an early twenty-first-century concern with the increase in secrecy about matters that the government characterizes as related to national security, much of which is unavailable under FOIA. Another related criticism of FOIA has been that the predominant beneficiaries of

[58] 5 U.S.C. § 552.

[59] Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. Pa. J. Const. L. 1011 (2008) (responding to FOIA's critics and suggesting that its operation must be understood within a broader system that he dubs "the ecology of transparency"). The Supreme Court has occasionally embraced FOIA's role in advancing democracy. *See, e.g.*, N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978); Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157 (2004).

[60] Kreimer, *supra* note 58 (describing some successes by the news media in using FOIA to obtain information from the U.S. government about the global war on terror.).

[61] For a useful compendium of many of these critiques, see David E. Pozen, *Freedom of Information beyond the Freedom of Information Act*, 165 U. Pa. L. Rev. 1097 (2017). There are also those who have suggested that FOIA is unnecessary because the constitutional system of checks and balances is sufficient to ensure government accountability. *See* Antonin Scalia, *The Freedom of Information Act Has No Clothes*, Regul., Mar./Apr. 1982.

records requests are not watchdog groups or journalists, but powerful corporate interests[62] and individuals who have specific disputes with the government.[63]

Thus, while FOIA and open records laws are a part of the information-gathering puzzle, they are incomplete, at best, and may in fact lead to a false appearance of transparency that does more harm than good.

1.2.2 *Institutional Failures*

There are also information failures at the institutional level. changes in the way that government, particularly at the federal level, operates and the economic hardships suffered by the institutional press have combined to reduce the accountability of both the government and the private sector.

1.2.2.1 Increasing Government Secrecy

With respect to the federal government, notwithstanding mandatory disclosure requirements and FOIA, the twenty-first century has emerged as a time during which government leaders in both major political parties tend to make sweeping claims about the need for secrecy to promote national security. Historically, the US government has asserted national security concerns most frequently during times of war, when the courts and the public have been the most deferential to these claims. At the same time, exaggerated security concerns have frequently led to substantial infringements on civil liberties, as with prosecutions of antiwar and labor activists during World War I under the Espionage Act of 1917 and the Sedition Act of 1918, and of suspected Communists under the Smith Act in the mid twentieth century, as well as the detention of persons of Japanese descent in internment camps during World War II.[64]

The contemporary era, with its protracted "war" on terrorism and rapidly changing technology, has brought on both security concern and rights claims quite different from the past contexts of formally declared wars. Whether this is a consequence of living in a post-9/11 world or the long-standing military conflict the United States has been involved in since the World Trade Center towers were toppled, the effects are noticeable. And while government secrecy increases, so do counterpunches from whistleblowers or "leakers" of otherwise secret information, who have taken great personal risks to reveal information of compelling public importance. Predictably, government officials displeased with the leaks have responded severely,

[62] Margaret B. Kwoka, *FOIA, Inc.*, 65 Duke L.J. 1361 (2016).
[63] Margaret B. Kwoka, *First-Person FOIA*, 127 Yale L.J. 2204 (2018).
[64] *See generally* Alan K. Chen, *Free Speech and the Confluence of National Security and Internet Exceptionalism*, 86 Fordham L. Rev. 379 (2017).

though evidence is mixed about whether efforts to enforce criminal laws against leakers have changed the situation dramatically.[65]

One of the most visible examples of how leaking works comes from the controversial case of Edward Snowden, an employee of a contractor for the National Security Agency who leaked an extremely large number of classified documents to the press revealing that, despite its public denials, the US government was engaged in massive surveillance of its citizens' private telephone calls, emails, internet browser search histories, and online chats, including both metadata and content.[66] With the cooperation of other governments, this spying reached around the globe. The program had at least two components, one known as PRISM, which allowed the National Security Agency (NSA) to acquire information from existing databases, including data held by tech companies such as Apple, Facebook, Google, and Microsoft, and one known as XKeyScore, which seemed to allow it to monitor data while it was in the process of being transmitted. Both became public knowledge only because of Snowden's leaks. Under federal law, when seeking this data regarding any US "person," the government is supposed to, at a minimum, first seek authorization from a special court under the Foreign Intelligence Surveillance Act.[67] Snowden's revelations documented that the NSA frequently ignored that requirement.

In 2010, prior to Snowden's actions, Chelsea Manning, a private in the US Army, leaked confidential documents to Julian Assange's WikiLeaks organization. The documents Manning released included videos documenting that US air strikes had killed civilians and journalists in Iraq and Afghanistan. Snowden was reportedly concerned about Manning's treatment in the wake of the leaks, and it is believed that this may have factored into his actions, which at first included highly secretive meetings with journalists to whom he leaked the data and plans to evade

[65] *Compare* Heidi Kitrosser, *Leak Prosecutions and the First Amendment: New Developments and a Closer Look at the Feasibility of Protecting Leakers*, 56 Wm. & Mary L. Rev. 1221, 1228 (2015) (describing the Obama administration's "unparalleled numerical record of prosecuting cases" involving leakers) *with* David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 Harv. L. Rev. 512, 536 (2013) ("Against a backdrop of 'routine daily' classified information leaks, a suite of eight [Obama administration] prosecutions looks more like a special operation than a war"). *See also* Gabe Rottman, *A Typology of Federal News Media "Leak" Cases*, 93 Tul. L. Rev. 1147, 1182–85 tbl.1 (2019) (counting only the prosecutions brought under Section 793).

[66] We draw from the following sources for the Snowden story. Glenn Greenwald, *Xkeyscore: NSA Tool Collects "Nearly Everything a User Does on the Internet,"* The Guardian (July 31, 2013), www.theguardian.com/world/2013/jul/31/nsa-top-secret-program-online-data; Bryan Burrough, Sarah Ellison, & Suzanna Andrews, *The Snowden Saga: A Shadowland of Secrets and Light*, Vanity Fair (May 2014), http://fs2.american.edu/dfagel/www/Class%20Readings/Civil%20Disobedienc%20And%20Obligation/Snowden_Vanity%20Fair.pdf; Barton Gellman, *NSA Broke Privacy Rules Thousands of Times per Year, Audit Finds*, Wash. Post (Aug. 15, 2013), www.washingtonpost.com/world/national-security/nsa-broke-privacy-rules-thousands-of-times-per-year-audit-finds/2013/08/15/3310e554-05ca-11e3-a07f-49ddc7417125_story.html.

[67] 50 U.S.C. § 1801 et seq.

detection by US authorities. At this moment, Snowden is living in Russia, where he is free from extradition, while the United States has pending criminal charges against him for alleged violations of the Espionage Act and theft of government property.

The critical role of leakers is underscored by the fact that the federal government's consistent practice has been to deny that it is engaged in surveillance of its citizens, which also means that there are impediments to filing lawsuits to challenge such actions. For example, in *Clapper v. Amnesty International, USA*, the Supreme Court held that the plaintiffs, which included attorneys, human rights organizations, and media organizations that worked with organizations in other nations, did not have legal standing to challenge a program of surveillance of certain foreign persons even though they alleged their work "requires them to engage in sensitive and sometimes privileged telephone and e-mail communications with colleagues, clients, sources, and other individuals located abroad."[68] The Supreme Court held that the plaintiffs' fears of being subject to surveillance were "too speculative" since they could not demonstrate that they were imminently subject to such conduct. Therein lies the problem for citizens seeking to challenge secret surveillance of their activities. They can sue only if they can show that they have or are imminently likely to be spied on, but because the program is secret they will not know about the surveillance until it is too late to stop it from occurring. A leak like Snowden's pertaining to that particular program might have given them such standing. Without whistleblowers, government secrecy and surveillance can be inoculated from legal challenges in court.

The secrecy surrounding federal and state government actions pales in comparison with the privacy demanded by most private businesses. Even publicly traded corporations are required to disclose relatively little information when it comes to specific projects or undertakings that might be unseemly or harmful to the public. When a private company is engaged in its own profit-making endeavors, it may force employees to sign punitive nondisclosure agreements and may also insist on comprehensive non-disparagement agreements. Journalists have detailed the work of lawyers and private investigators who work through harassment and intimidation to enforce nondisclosure agreements and silence would-be whistleblowers.[69] Though there is little empirical evidence available, corporations are reported to engage in the aggressive use of nondisclosure agreements to silence employees who might reveal businesses' deceptive claims about products or research.[70] And nondisclosures in the workplace have recently gained attention in the #MeToo movement, as celebrities and others detail contractual secrecy that kept sex predators safe from prosecution.

[68] Clapper v. Amnesty Int'l USA, 568 U.S. 398, 406 (2013).
[69] *See* John Carreyrou, Bad Blood: Secrets and Lies in a Silicon Valley Startup (2018).
[70] *Id.*

Businesses also ensure that when they litigate and settle lawsuits alleging malfeasance, they do so with court-approved secrecy under seal. Indeed, it is common knowledge that a large number of private lawsuits result in settlements that are not open to the public. In addition, companies vigorously assert intellectual property and trade secret protections through lawyers as a means of silencing those who might report on conditions in a factory or otherwise make allegations of corporate misconduct.

Even when private companies are working for or with the government, they enjoy levels of secrecy that insulate them from public rebuke and scrutiny. In 2007, for example, the ACLU filed a federal lawsuit against Jeppesen, a subsidiary of Boeing, alleging that Jeppesen had knowingly facilitated torture programs by the Central Intelligence Agency (CIA). One victim of torture, Binyam Mohamed, did not have to speculate about the government programs at issue, but instead pled specific facts detailing his multi-year extradition to a torture site in Morocco and then Kabul, before eventually being brought to Guantanamo Bay. Yet a federal appellate court dismissed the case, holding that it could not proceed because the litigation against a private company could reveal state secrets.[71]

1.2.2.2 A Substantially Diminished Press

At the same time that state and private actors are becoming more powerful and secretive, one of society's most critical monitors is diminishing in power and stature. A central component of a system of free speech is a thriving, independent news media free from state control. The press is designed to be an external check on government. We rely on it to both gather information about public affairs and inform us so that we can hold the state accountable for its actions. In addition, free speech protects not only speakers, but also listeners. The audience for speech enjoys First Amendment protection for the freedom to read and listen to speech they wish to consume. In the United States, the press has long facilitated these interests.[72]

Unfortunately, in recent years, there has been a substantial decline in the availability of institutional news media outlets that have historically served these important functions. This phenomenon has already presented significant challenges

[71] Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1083 (9th Cir. 2010)

> (even if the claims and defenses might theoretically be established without relying on privileged evidence, it may be impossible to proceed with the litigation because – privileged evidence being inseparable from nonprivileged information that will be necessary to the claims or defenses – litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets.).

[72] The freedom of the press under the First Amendment has largely been subsumed under the free speech clause because of their close interrelationship, though many scholars have observed the flaws in such an understanding. Sonja R. West, *Press Exceptionalism*, 127 Harv. L. Rev. 2434 (2014); Ashutosh Bhagwat, *Producing Speech*, 56 Wm. & Mary L. Rev. 1029 (2015).

to the continued protection of free speech. First, over the past few decades, and particularly since the expansion of the internet, the news media has declined in large part because of its business model is no longer viable. The media, and in particular newspapers, long relied on a large revenue stream from two sources: classified ads and commercial advertising. The advent of Craigslist and other free online services has nearly caused these revenue streams to vanish. From 2000 to 2012, American newspapers' annual classified ad revenue fell from a high of $19.6 billion to $4.6 billion, a loss of $15 billion per year.[73] An industry once dependent on commercial advertising revenue to subsidize its important journalistic work has lost out to competition for ads on social media platforms and other places on the internet. Indeed, commercial advertising revenue, which peaked around the year 2000, recently fell to levels last seen in the 1950s (although that still leaves $20 billion in revenues nationally, which is not insignificant).[74]

The impact of these losses has been manifest. As a recent *Wall Street Journal* article reported, between 2004 and 2018, nearly 1,800 newspapers have gone out of business.[75] Most of these were local newspapers, which once played an important role in informing Americans. From 1990 to 2016, jobs at American newspapers declined from 465,000 to 183,000. The efforts of some newspapers to move to digital content to reverse this trend have been largely unsuccessful. This is not a problem isolated to the news industry, for as Richard Kluger once noted, "Every time a newspaper dies, even a bad one, the country moves a little closer to authoritarianism."[76]

Major news media that remain have been forced to rely on other revenue streams, so they tend to be controlled by huge corporate interests, which necessarily limits the range of possible different perspectives that their editorial arms can offer. They also emphasize national reporting over local journalism. As the *Wall Street Journal* reported, when large corporations and hedge funds take over newspapers, they follow a familiar "playbook [that] calls for instituting drastic cost reduction and layoffs in hopes of goosing profits in the short term." But the impact is that "Local coverage suffers [and] investigative ambition withers."[77] The disinfecting light that Justice Brandeis promised from transparency has become less common.

[73] John Reinan, *How Craigslist Killed the Newspapers' Golden Goose*, MinnPost (Feb. 3, 2014), www.minnpost.com/business/2014/02/how-craigslist-killed-newspapers-golden-goose/.

[74] Derek Thompson, *The Collapse of Print Advertising in 1 Graph*, The Atlantic (Feb. 28, 2012), www.theatlantic.com/business/archive/2012/02/the-collapse-of-print-advertising-in-1-graph/253736/.

[75] Keach Hagey, Lukas I. Alpert, & Yaryna Serkez, *In News Industry, a Stark Divide between Haves and Have-Nots*, Wall St. J. (May 4, 2019), www.wsj.com/graphics/local-newspapers-stark-divide/?shareToken=st4812f966bc45412d9dedb41622863b2f.

[76] Richard Kluger, The Paper: The Life and Death of the New York Herald Tribune (1986).

[77] Michael Posner, *Hedge Funds and Newspapers: A Bad Mix*, Forbes (Jan. 18, 2019), www.forbes.com/sites/michaelposner/2019/01/18/hedge-funds-and-newspapers-a-bad-mix/#53f97c795c53.

A second institutional trend is the increased blurring of the news media's reporting and editorial functions. Looking at a print newspaper, it's easy to distinguish between the news stories and opinion pieces, which are actually located in a separate physical space. When reading an online news magazine or watching a cable news program, however, the programmers do not always neatly distinguish news from opinion. And while Fox News has earned deserved attention in this regard, left-leaning media outlets are also vulnerable to these biases.[78]

Collectively, these changes and others have also led to a sharp decline in the public's trust of the news media. A recent Gallup poll reported that while 51% of Americans had a great deal or a lot of confidence in newspapers in the late 1970s, that figure had dropped to about 27% by 2017 (up from a historic low of 20% in 2016). At the same time, those with little or no confidence in newspapers rose from 13% in the late 1970s to about 36% in 2016.[79]

The reasons for this decline in trust are complex and not easy to explain, but we can certainly speculate. First, in recent years, there has been a downward trend in Americans' trust in most major institutions.[80] Second, there appears to be an unprecedented assault on the media from public office holders. Politicians have complained about and attacked the news media since this country's founding generation, but perhaps no other public office holder has more directly confronted the news media's legitimacy than former President Trump, who has described some parts of the press as the "enemy of the people."[81] It has become commonplace for public officials to denigrate the press.

Simultaneously, as challenges to the press's legitimacy are publicly raised, the news outlets that still exist are threatened by libel suits that can expose them to huge financial liability, even when their reporting is truthful. Despite the Supreme Court's protective standard from *New York Times v. Sullivan*,[82] which held that libel suits by public officials against news media may succeed only if the media publishes a false story with actual malice or reckless disregard for its truth, libel suits continue to cost American media huge amounts in settlements, even when their stories may well be true. In 2017, ABC news paid a settlement of more than $177 million to a South Dakota company that sued it for defamation based on an investigative report

[78] Jane Mayer, *The Making of the Fox News White House*, The New Yorker (Mar. 4, 2019), www.newyorker.com/magazine/2019/03/11/the-making-of-the-fox-news-white-house.

[79] Lydia Saad, *Americans' Confidence in Newspapers at New Low*, Gallup (June 13, 2016), https://news.gallup.com/poll/192665/americans-confidence-newspapers-new-low.aspx; Art Swift, *In U.S., Confidence in Newspapers Still Low but Rising*, Gallup (June 28, 2017), https://news.gallup.com/poll/212852/confidence-newspapers-low-rising.aspx.

[80] Frank Newport, *Americans' Confidence in Institutions Edges Up*, Gallup (June 26, 2017), https://news.gallup.com/poll/212840/americans-confidence-institutions-edges.aspx.

[81] John Wagner, *Trump Renews Attacks on Media as "the True Enemy of the People"* Wash. Post (Oct. 29, 2018), www.washingtonpost.com/politics/trump-renews-attacks-on-media-as-the-true-enemy-of-the-people/2018/10/29/9ebc62ee-db60-11e8-85df-7a6b4d25cfbb_story.html.

[82] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

in which the network featured a US Department of Agriculture biologist who was whistleblowing about what he considered deceptions in the labeling of certain meat product as "ground beef." The scientist, and subsequently ABC, dubbed the product "pink slime," which would seem to either be an entirely accurate factual description or a protected opinion. Nonetheless they were sued. The strength of the First Amendment arguments against such liability were strong, but no media lawyer would risk liability that could bankrupt the client, particularly when the network's fate was in the hands of a local jury. Accordingly, because the local trial judge steadfastly refused to dismiss the case, ABC settled.[83]

One doesn't need to reach far to imagine the consequences of media lawsuits for a less well-heeled news organization. Gawker Media declared bankruptcy after Terry Bollea (aka "Hulk Hogan") successfully sued it for invasion of privacy and won a jury verdict of $140 million for the publication of a story and excerpts from a "sex tape" showing him having sex with a friend's wife.[84] The video posted with the story was one minute and 40 seconds long, but only 9 seconds of that showed sexual conduct. While that may sound like outrageous conduct without more context, as it turns out, Bollea, a widely known celebrity, had openly discussed his sex life and the fact that there was a video of him engaged in an extramarital affair, and this had been previously discussed in the media. Earlier state court rulings had declared that the topic of the story and video regarding Bollea's sex life had become a matter of "public concern" based partly on his own behavior. Another important development that became known after the case was that Bollea's lawsuit was financed by conservative billionaire Peter Thiel, who had specifically hoped to impart substantial financial damage on Gawker in retaliation for the outlet's earlier outing of his sexual orientation. Gawker spent $13 million just in lawyers' fees, while Thiel bankrolled Bollea's case, allowing Bollea's lawyers to aggressively litigate and disincentivizing a pretrial settlement.

And if verdicts and settlements such as these weren't enough of a threat to the press, public officials have called for the expansion of libel laws or to revisit the *New York Times* standard to make it easier to sue news media, as Trump did in public statements and Justice Clarence Thomas did in one of his opinions.[85]

The confluence of these market factors and increasing media vulnerability to private lawsuits at the very least diminishes the role that the press can play in

[83] Steven D. Zansberg, *Recent High-Profile Cases Highlight the Need for Greater Procedural Protections for Freedom of the Press*, COMM. L., Nov. 2017, at 7–8.

[84] For a thoughtful discussion of the problems the Gawker litigation might pose for media defendants and a proposal for both substantive and procedural changes that might better protect the media, see Mary-Rose Papandrea, *Media Litigation in a Post-Gawker World*, 93 TUL. L. REV. 1105 (2019).

[85] McKee v. Cosby, 139 S. Ct. 675, 682 (2019) (Thomas, J., concurring in the denial of certiorari). Former President Trump also argued for changing libel law to make it easier for plaintiffs to prevail. Hadas Gold, *Donald Trump: We're Going to "Open Up" Libel Laws*, POLITICO (Feb. 26, 2016), www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866.

informing the public and holding government accountable. Even though we are beginning to see the emergence of some new independent, online news services, often hiring the best journalists from now defunct newspapers, the speech and information ecosystem needs additional actors in the system to help carry out these functions.

It is our claim throughout this book that the totality of current circumstances warrants alternative approaches to accessing information of great interest and reporting it to the public and that undercover investigations, properly understood and executed consistent with a general set of best practices that we provide, are a critical tool for fulfilling this function. We maintain, therefore, that such investigations should be lawful in most circumstances and government attempts to restrict them understood as violations of the freedom of speech under the First Amendment. In the following section, we provide an overview of recent attempts to restrict undercover investigations, which we examine in greater detail in the chapters that follow.

1.3 LEGAL AND SOCIAL IMPEDIMENTS TO UNDERCOVER INVESTIGATIONS

While the previously discussed social, political, and institutional conditions underscore the importance of undercover investigations as an alternative source of information that feeds our current system of freedom of expression, there are nonetheless substantial barriers to creating an environment in which such investigations might thrive. These barriers can be broken down into roughly three categories: legal, ethical, and ideological.

1.3.1 *Legal Restrictions on Undercover Investigations*

Legal impediments to undercover investigations come in at least three different forms. First, there have been increasing efforts to criminalize the types of affirmative deceptions or omissions that have been used by investigators to gain access to information vital to democratic governance since at least the era of the girl stunt reporters, Upton Sinclair, and the heyday of "muckraking" journalists. On the surface, laws regulating lying or misrepresentation tend to resemble legal constraints on fraud. In truth, although investigative deceptions unequivocally involve overt lying or omissions of the truth, the resulting harms, if any, are a usually a product of the dissemination of the truthful information discovered, which often reveals illegal, unethical, or immoral conduct on the part of the investigation's target.

Instead, those who support such restrictions assert concerns about the target's property and privacy interests. One example of such restrictions is so-called ag-gag laws. These laws, which are the brainchild of the conservative group the American

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Legislative Exchange Council,[86] are designed to criminalize conduct that has led to the type of high-profile animal rights investigations discussed earlier. Nearly all such laws make it a crime to use deception to gain access to an animal agricultural facility, either generally or to gain employment.[87] Because most animal agricultural investigations are employment based, these are a substantial impediment to undertaking an investigation. Similarly, Planned Parenthood has successfully lobbied for state laws that prohibit undercover recordings of confidential communications with health care providers or the distribution of such recordings.[88] In addition, laws requiring licenses for private investigators can substantially limit the ability of persons to engage in an undercover investigation. It might violate multiple statutes in some states for a person to engage in the very sort of conduct that was celebrated during the muckraking era.

Gaining access to property to conduct a deception-based investigation is one thing, but documenting what the investigator observes is equally important. Not surprisingly, a second form of government regulation seeks to criminalize the act of surreptitious photography and audiovisual recording without the target's consent. Such recording might be done by an undercover investigator with a hidden camera or cell phone. Other recordings might involve the use of other newer technologies, such as drones. While there have been some successful early legal challenges to laws regulating investigative deceptions and secret recording, the law is still evolving.[89]

A third category of legal impediments to undercover investigations has been invoked by the private sector, whose misconduct is often brought to light by such investigations. Turning to private tort and contract remedies, these businesses can bring private law claims against journalists and activists for invasion of privacy, trespass, violation of the duty of loyalty, or other state torts.[90] The US Court of Appeals for the Ninth Circuit recently upheld a $2.425 million jury verdict against

[86] Ag-gag laws appear to be drawn from model legislation drafted by ALEC as "The Animal and Ecological Terrorism Act," which includes a provision that would make the following conduct a crime: "Obstructing or impeding the use of an animal facility or the use of a natural resource without the effective consent of the owner by . . . entering an animal or research facility to take pictures by photograph, video camera, or other means with the intent to commit criminal activities or defame the facility or its owner." *The Animal and Ecological Terrorism Act (AETA)*, Am. Legis. Exch. Council, www.alec.org/model-policy/the-animal-and-ecological-terrorism-act-aeta/ (last visited Oct. 31, 2022).

[87] *See, e.g.*, Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018) (invalidating on First Amendment grounds an Idaho statute that prohibited using deception to gain access to animal agricultural facilities, but upholding provision outlawing deception to gain employment at such facilities).

[88] Nick Cahill, *Health Care Sting Videos a Crime in California*, Courthouse News Serv. (Sept. 30, 2016), www.courthousenews.com/health-care-sting-videos-a-crime-in-california/. The law is codified at Cal. Penal Code § 632.01 (West 2017).

[89] *See, e.g.*, Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018); Animal Legal Def. Fund v. Kelly, 9 F.4th 1219 (10th Cir. 2021), *cert. denied*, 142 S.Ct. 2647 (2022).

[90] *See, e.g.*, Food Lion, Inc. v. Cap. Cities/ABC, Inc., 194 F.3d 505, 510 (4th Cir. 1999).

the Center for Medical Progress, the organization that sponsored the undercover investigation of Planned Parenthood and other reproductive choice organizations.[91]

Or, to the extent that engaging in an undercover investigation might violate the terms and conditions of one's employment, employers might bring breach of contract claims, or simply fire those investigators from the jobs they secured with the target. Sometimes these claims might be available under common law, but in some jurisdictions, the legislature has enacted laws that establish new civil claims that can be invoked by private businesses to sue investigators.[92] Because such actions can sometimes result in large financial judgments or at least the potential for such judgments, they further chill participation in undercover investigations in a manner similar to the threat of criminal penalties. Moreover, because of existing procedural doctrines, it may be more difficult for individuals and organizations who conduct investigations to challenge the constitutionality of these claims as applied to investigators.

We discuss these legal issues in greater detail in the forthcoming chapters.

1.3.2 *Moral and Ethical Restrictions on Undercover Investigations*

Independent of the law, there may be objections to undercover investigations from an ethical or moral standpoint. To some degree, our arguments in favor of robust undercover investigations might reflect a basic utilitarian suggestion that even if deception is wrong, the greater good that is served by such investigations outweighs that wrong. But moral philosophers from Immanuel Kant to the present day have argued that lying is inherently wrong and suggest that there should be a strong prohibition of lies in most circumstances.

Moral questions about lies sometimes get translated into professional ethics codes. We have already alluded to the idea that professional journalists have conflicting views about investigative deceptions. Sometimes those views may be historically contingent and sometimes they may simply be a function of individual journalists' subjective values.

We take the challenge of these moral and ethical considerations seriously. In Chapter 2, we more fully explore historical evolution of the journalism profession and the ethical debates about undercover investigations. In Chapter 3, we address some of the moral concerns about lying in particular, and suggest some reasons why lies associated with undercover investigations might fall outside even moral objections. Finally, in the book's Conclusion, we offer a set of "best practices" for

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

[92] *See*, *e.g.*, N.C. Gen. Stat. Ann. § 99A-2 (West 2016); Ark. Code Ann. § 16-118-113 (West 2017). These statutes are currently undergoing legal challenges in federal court.

undercover investigations that promote their use, while delineating safeguards to minimize these objections.[93]

1.3.3 *Cultural, Political, and Ideological Impediments*

Even beyond legal, moral, and ethical barriers to engaging in undercover investigations, there are cultural and political/ideological constraints that push back against the idea that such investigations promote the public good. First, there are likely some intuitive negative connotations about such work, which might be viewed (in both journalistic and political contexts) as sensationalistic and unfair. There is something deeply unsettling about the undercover investigator, inherently troubling to many casual observers. The phrase "stunt" journalism, often associated with Nellie Bly, itself implies something outside social or professional norms. Critics have characterized such undercover investigations as a form of spying or trickery and frequently claim that they may infringe on the emotional well-being, privacy interests, and property rights of an investigation's targets. How far can an undercover investigation pry into one's life? If a journalist wants to document an underground activist movement or penetrate a secretive corporate boardroom, can they feign romantic interest and form a relationship with a person who might get them access to information?

And, of course, anyone who has been the target of a sting or undercover investigation is self-interestedly likely to have substantial objections to these techniques. There is also likely a view of such investigations that is ideologically path-dependent – one might look at undercover investigations as healthy, even heroic, when the target is an institution or bad actor on the other end of political or ideological spectrum, but view comparable methods used to investigate one's allies as suspect, an invasion of privacy, an unfair ambush. And precisely because the targets of such investigations span the political and ideological spectrum, there may well be bipartisan, cross-ideological opposition to undercover work. Journalists have targeted Democrats and Republicans, liberals and conservatives, government entities and businesses. Political activists from both the left and right have engaged in these tactics, and both have borne criticism from targets, who argue that the investigations employ duplicitous, unfair practices and that the information gathered is used in misleading ways to misrepresent the truth of what goes on behind closed doors. Thus, in recent years, we have witnessed such arguments from groups as diverse as the animal agriculture industry and Planned Parenthood.[94]

[93] *Cf. Undercover and Sensitive Operations Unit, Attorney General's Guidelines on FBI Undercover Operations*, U.S. Dep't of Just. (Nov. 13, 1992), www.justice.gov/archives/ag/undercover-and-sensitive-operations-unit-attorney-generals-guidelines-fbi-undercover-operations.

[94] Jackie Calmes, *Planned Parenthood Videos Were Altered, Analysis Finds*, N.Y. Times (Aug. 27, 2015), www.nytimes.com/2015/08/28/us/abortion-planned-parenthood-videos.html.

This may cause ideological divides within political communities, leading some who would ordinarily favor free speech and robust newsgathering to question the value of undercover investigations, or at least to believe the costs outweigh the benefits. Such complex political and ideological opposition, in addition to the previously mentioned cultural objections, can make the claim for promoting and protecting undercover investigations even more challenging than the legal, moral, and ethical complaints.

1.4 THE FIRST AMENDMENT AND UNDERCOVER INVESTIGATIONS

Throughout this book, we examine undercover investigations and the critics of such information-gathering methods against the background of free speech theory and doctrine, ultimately arguing that there are strong reasons to embrace and protect undercover investigations as a critical piece of our speech and information infrastructure. To the extent that there are legal, moral, ethical, or cultural and political constraints on undercover investigations, we maintain there are compelling constitutional arguments for at least a qualified privilege to engage in the conduct necessary to carry them out successfully.

The vast majority of free speech law focuses on *outputs* – it examines what things count as "speech." The protection of expression is the most common explanation for the First Amendment, and thus questions arise as to when, if ever, the state can restrict communications. But an equally important element of our system of freedom of expression is facilitating the protection of *inputs* – the ability to access, acquire, compile, and construct information in ways that will promote the robust outputs that occupy more space in the freedom of expression debate. Without inputs, there can be no outputs; both are necessary to allow us to deliberate about critical political, social, and moral issues of public concern.

Nonetheless, historically, less attention has been paid to the First Amendment's protection of the ability of professional journalists, political activists, and others to gain access to information that both is newsworthy and informs public opinion as well as advances political, moral, and other debates about the course of our republic. Until recently, the structure of free speech doctrine imposed substantial barriers to recognizing a constitutional right to engage in some of the tactics that are key to carrying out undercover investigations. For example, the Supreme Court has never recognized any sort of blanket right of access for journalists or citizens to public proceedings, aside from cases recognizing a First Amendment access right to some types of criminal court proceedings.[95] Furthermore, the Court has never provided

[95] *Compare* Houchins v. KQED, Inc., 438 U.S. 1 (1978) (plurality opinion) (rejecting press's claim that it should have First Amendment right to access county jail to examine conditions) *with* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (upholding press's First Amendment right to gain access to criminal judicial proceedings).

much protection for journalists from legal orders requiring them to disclose their confidential sources.[96] Indeed, despite the existence of an independent freedom of the press located in the First Amendment, journalists do not have special protection from generally applicable laws at all. In addition, there is also typically no right of any person to gain access to another's private property for the purpose of engaging in speech. Taken together, this set of legal rules would suggest that there are important limits to the idea that the First Amendment might protect undercover investigation tactics.

Building on our earlier work, however, this book makes the social and legal case for a qualified constitutional right to engage in undercover investigations. Principles of government neutrality toward speech suggest that investigations, conducted within certain parameters or limits, should be constitutionally protected without regard to the ideological predisposition of the investigator. The neutrality principle is a strong force when it comes to evaluating the constitutionality of restrictions on communication, and should play a comparably strong role in assessing the validity of law governing undercover information-gathering techniques.

Beyond neutrality, there are three doctrinal building blocks on which we rest our assertions. First, we argue for an understanding of free speech that embraces the notion that conduct essential to producing speech is in many instances covered by the First Amendment's guarantees in the same way that the law protects acts of communicating the information that such conduct discovers.[97] Second, we maintain that certain types of lies – what we have called "investigative deceptions" – also constitute "speech" that deserves to fall within the scope and protection of the Free Speech Clause. This contention has found great support in more recent years from the Supreme Court's decision in *United States v. Alvarez*, in which the Court struck down a federal law making it a crime to lie about having been awarded high military honors as a violation of the First Amendment.[98] Third, our analysis also supports the claim that the acts of photography, audio recording, and visual recording are all components of expression that must be protected from government regulation because they are expressive in and of themselves and also are critical precursors to the later publication of such information to the broader public. We therefore argue that there is a First Amendment right to engage in such documentation of events in public (as when a protestor uses their cell phone to record a police officer engaged in the use of excessive force)[99] and, more controversially, even in private, so long as the person doing the recording is lawfully present and the conduct or things that the

[96] Branzburg v. Hayes, 408 U.S. 665 (1972).

[97] *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

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

[99] *See, e.g.*, Glik v. Cunniffe, 655 F.3d 78, 82–83 (1st Cir. 2011); Am. C.L. Union of Ill. v. Alvarez, 679 F.3d 583, 595 (7th Cir. 2012); Fields v. City of Philadelphia, 862 F.3d 353, 356 (3d Cir. 2017).

person is photographing or recording is a matter of public concern that advances other values promoted by the freedom of speech.[100]

Through a comprehensive exploration of free speech theory and doctrine, this book will suggest that there is room for a more capacious understanding of the law that would protect a limited privilege to engage in false statements of fact to gain access to private property as well as a right to engage in nonconsensual video recording on the property of others, so long as both activities are directed toward investigating and disclosing matters of broad public concern. It provides a road map for understanding the place of undercover investigations in free speech doctrine as we progress through the twenty-first century.

[100] *Wasden*, 878 F.3d at 1203–05.