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# ARTICLES

# High Value Lies, Ugly Truths, and the First Amendment

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# I. INTRODUCTION

Lying has a complicated relationship with the First Amendment. It is beyond question that some lies—such as perjury and fraud—are simply not covered by the Constitution's free speech clause.[1] But it is equally clear that some lies, even intentionally lying about military honors, are entitled to First Amendment protection.[2] Until very recently, however, it has been taken for granted in Supreme Court doctrine and academic writing that any constitutional protection for lies is purely prophylactic—it provides protection to the truth-speaker by also incidentally protecting the liar. What remains unresolved is whether other rationales might also justify First Amendment protection for lies.

This Article argues that some lies—what we call *high value lies*—have instrumental value that advances the goals underlying freedom of speech. It develops a trifurcated doctrinal taxonomy of constitutional protection for lies. Some misrepresentations receive no protection at all;[3] some false statements are protected only because the protection of the liar ensures that the speech of the truthful person is not indirectly chilled,[4] and, in our view, some lies must be protected for their own sake.[5] This framework is descriptively novel and doctrinally important because we provide the first comprehensive look at the wide range of lies that may raise First Amendment issues in the wake of

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1. United States v. Alvarez, 132 S. Ct. 2537, 2546 (2012). *See also* United States v. Chappell, 691 F.3d 388, 400 (4th Cir. 2012). There is an important difference between what speech is covered by the First Amendment and what speech is protected. As Professor Schauer has observed, the question of First Amendment coverage is all too often "simply assumed." Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1767 (2004).

2. *Alvarez*, 132 S. Ct. at 2551; *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (finding that non-intentional, non-reckless false speech that injures reputation of public officials is protected by the First Amendment).

3. *See, e.g.*, 18 U.S.C. § 912 (2012) (upheld in United States v. Tomsha-Miguel, 766 F.3d 1041, 1048–49 (9th Cir. 2014)); *see also* discussion *infra* Sections II.A–B.

4. *See* discussion *infra*, Section II.C.; *see also* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776–77 (1986) ("[In] placing the burden of showing truth on defendants, there would be some cases in which defendants could not bear their burden despite the fact that the speech is in fact true.").

5. *See* discussion *infra* Section II.D.

*United States v. Alvarez*,[6] and analyze the proper level of constitutional scrutiny applicable to regulations of each type of lie.

Beyond doctrine, we advance the thesis that constitutional protection for high value lies is firmly rooted in First Amendment theory because false speech can paradoxically facilitate or produce truth. High value lies, though unacknowledged in the literature and cases to date, have played an important role in American history, and affirmatively further the three most commonly invoked theoretical goals of free speech—enhancing political discourse, revealing truth, and promoting individual autonomy.[7] A prototypical category of high value lies is what we label "investigative deceptions." An investigative deception is the sort of misrepresentation necessary for an undercover journalist, investigator, or political activist to gain access to information or images of great political significance that would not be available if the person disclosed her media affiliations or political objectives. Investigative deceptions are intentional, affirmative misrepresentations or omissions about one's political or journalistic affiliations, educational backgrounds, or research, reportorial, or political motives to facilitate gaining access to truthful information on matters of substantial public concern.[8]

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6. 132 S. Ct. 2537.

7. These are the most widely articulated justifications for the constitutional protection of expression under contemporary free speech theory. *See, e.g.*, KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 744 (16th ed. 2007). We are aware of only two previous scholarly treatments of the First Amendment coverage of the types of lies we discuss here. *See generally* Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107 (2006); Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161. In examining lies more generally, Professor Varat's insightful article includes a subsection on "Lies Designed to Procure the Truth," which sets out some of the challenges that we address comprehensively in this Article. Varat, *supra*, at 1122–26. In trying to predict the implications of the Court's decision in *Alvarez*, Professor Norton acknowledges that "[s]ome lies have instrumental or even moral value," Norton, *supra*, at 164, though she does not emphasize the types of investigative deceptions on which our work focuses. For an argument that lying may sometimes be protected speech on moral grounds, see R. George Wright, *Lying and Freedom of Speech*, 2011 UTAH L. REV. 1131, 1157–58 (2011). *But see generally* SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW (2014) (arguing that government regulation of lies advances social interests in protecting moral agency in human communication and is not incompatible with freedom of speech). For other interesting work addressing more generally the issue of lying and the Constitution, see generally Steven Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1 (2008); Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897 (2010).

8. For examples of the use of investigative deception in undercover investigations, see Animal Legal Def. Fund v. Otter, 44 F. Supp. 3d 1009, 1015 (D. Idaho 2014) (investigating animal abuse in agricultural facilities); Havens Realty Corp. v. Coleman, 455 U.S. 363, 366–68 (1982) (uncovering Fair Housing Act violations with the use of testers "to make equal opportunity in housing a reality in the Richmond Metropolitan area").

We develop our claim by examining the confluence of two contemporary developments in the law of free speech—the Supreme Court's decision in *Alvarez,* and the emergence of new laws aimed at stifling undercover investigations or whistleblowing, particularly the so-called "Ag Gag" laws.[9] Ag Gag laws provide a timely and straightforward case study of the First Amendment's role in protecting high value lies because a key component of these laws is the criminalization of misrepresentations made in order to gain access to agricultural facilities.[10] Under these laws, lies used to facilitate information gathering for a news story,[11] an academic book,[12] or political mobilization[13] are criminalized.[14]

At least since Upton Sinclair lied to gain critical access to the meatpacking industry to gather information for his novel, *The Jungle*, investigators have been misrepresenting their identities and motives to expose unlawful and unethical behavior to the light of day.[15] This

9. The term "Ag Gag" was coined by food writer Mark Bittman. Mark Bittman, Op-Ed., *Who Protects the Animals?*, N.Y. TIMES, Apr. 27, 2011, at A27. As we discuss below, Ag Gag laws seek to stifle whistleblowing and reporting regarding practices at commercial agricultural facilities. Several articles have addressed the First Amendment implications of Ag Gag laws from a doctrinal perspective, but none have situated the discussion against the background of First Amendment theory. *See, e.g.*, Lewis Bollard, *Ag-Gag: The Unconstitutionality of Laws Restricting Undercover Investigations on Farms*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10960 (2012); Larissa U. Liebmann, *Fraud and First Amendment Protections of False Speech: How* United States v. Alvarez *Impacts Constitutional Challenges to Ag-Gag Laws*, 31 PACE ENVTL. L. REV. 566 (2014).

10. Since 2012, more than twenty-five such bills have been introduced. *See Ag-Gag Bills at the State Level*, AM. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, http://www.aspca.org/fight-cruelty/advocacy-center/ag-gag-whistleblower-suppression-legislation/ag-gag-bills-state-level [http://perma.cc/GLB3-S3SX] (last visited Oct. 4, 2015); Eliza Barclay, *2013 Was The Year Bills To Criminalize Animal Cruelty Videos Failed*, NPR (Dec. 27, 2013, 10:39 AM), http://www.npr.org/blogs/thesalt/2013/12/19/255549796/2013-was-the-year-every-new-ag-gag-bill-failed [http://perma.cc/66SS-EGHF]; Ariel Garlow, *Why Factory Farms Are Afraid of Us Looking In*, ONE GREEN PLANET (June 24, 2014), http://www.onegreenplanet.org/animalsandnature/why-the-factory-farms-are-afraid-of-us-looking-in/ [http://perma.cc/ZHT4-SYU3].

11. *See, e.g.*, Harper's Magazine, *Ted Conover Goes Undercover as a USDA Meat Inspector*, THE HARPER'S BLOG (Apr. 15, 2013, 2:37 AM), http://harpers.org/blog/2013/04/ted-conover-goes-undercover-as-a-usda-meat-inspector/ [http://perma.cc/VNV3-CYA6].

12. *See, e.g.*, TIMOTHY PACHIRAT, EVERY TWELVE SECONDS: INDUSTRIALIZED SLAUGHTER AND THE POLITICS OF SIGHT 15–17 (2011).

13. *See, e.g.*, Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965, 969–70 (2012) (undercover video exposing animal abuse in slaughterhouse prompted change in statute governing treatment of animals).

14. *See, e.g.*, IDAHO CODE ANN. §18-7042(1)(a) (2014). Many Ag Gag laws also criminalize the act of recording itself, which raises equally important First Amendment concerns. In a future article, we examine more specifically the concept of image capture as speech. Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. (forthcoming May 2016), http://ssrn.com/abstract=2644551 [http://perma.cc/236N-88SC]. For a general treatment of this topic, see Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 370–74 (2011).

15. *See infra* notes 122–152 and accompanying text.

Article is the first to consider the relationship between these high value lies and the First Amendment. In Part II, we explore the current jurisprudence and scholarship about lying under the First Amendment. Here, we trace the development of the law from earlier understandings that seemed to categorically exclude lying from First Amendment coverage, to a contemporary, post-*Alvarez*, binary understanding of free speech theory—some lies are protected and others are not. In Part III, we explore the interaction of the practical realities of lying—a complex and varied social phenomena—and the theoretical underpinnings of the First Amendment. We demonstrate that investigative deceptions are valuable as a historical and political matter and that they ought not to be relegated to the status of valueless speech. Next, we argue in Part IV that these lies affirmatively serve the purposes of free speech—they promote democratic self-governance, enhance the search for broader truths, and facilitate speakers' autonomy and self-determination.[16] Finally, in Part V, we build on this to show how Ag Gag laws and other government regulations of lying as part of undercover investigations ought to be evaluated within the framework of existing First Amendment doctrine. In short, we introduce, define, and provide a doctrinal framework for understanding high value lies under the First Amendment.

## II. CONSTITUTIONAL DOCTRINE: THE TREATMENT OF LIES AS EXPRESSION

As far back as the early twentieth century, the Court articulated a principle of free speech familiar to most laypeople—you can't falsely shout fire in a crowded theater.[17] This common platitude embodies two underlying premises supporting the claim that false factual statements are not protected by the First Amendment: (1) *they have no value* (false factual statements do not promote democracy, do not, by definition, advance the search for truth, and do not contribute anything, or anything substantial, to the speaker's autonomy); and (2) *they can cause tangible social harm* (unnecessarily alarming people might cause panic, leading to physical injuries).[18]

16. *See infra* notes 217–256 and accompanying text.

17. Schenck v. United States, 249 U.S. 47, 52 (1919).

18. Although two-level speech theory focuses primarily on the *value* of expression, the Court also tends to examine the *social harms* associated with a category of speech when determining whether it is covered by the First Amendment. For categories of expression deemed unprotected, the Court's normal mistrust of government justifications is set aside, not only because these types of speech have no or little value, but also because the states' interests are not speculative, but tangible and easily understood. Thus, fighting words may have no value, but they also arguably may provoke immediate physical violence. Obscenity is said not to facilitate any traditional speech

But in law, as in life, not all lies are alike. Accordingly, in examining whether some lies ought to receive First Amendment protection, it is important to understand precisely why the Court has tolerated laws that regulate false speech and to distinguish among the different types of false statements based on the value they provide or the harm they cause to society.

### *A. Lies as No Value Speech*

Free speech doctrine under the First Amendment has long been understood to follow the so-called two-level speech theory.[19] Under this approach, speech that is considered to have "high value" is entitled to robust, though not unlimited, First Amendment protection.[20] Under much free speech theory, the value of a type of expression is measured in an instrumental sense by determining that expression's contribution to the First Amendment's core functions—promotion of democratic self-governance,[21] facilitating the broader search for truth (beyond the political realm),[22] and enhancing the speaker's self-realization and autonomy.[23] High value speech is subject to the most stringent constitutional protection, and typically cannot be regulated on the basis of the speaker's viewpoint or the content of her expression.[24]

In contrast, on a more or less case-by-case basis, the Supreme Court has determined that some categories of speech fall entirely outside the First Amendment's coverage.[25] This second tier of speech is

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value, but some people argue that it also may undermine societal morals and cause harm to women. And so forth.

19. *See* Geoffrey R. Stone, *Kenneth Karst's Equality as a Central Principle in the First Amendment*, 75 U. CHI. L. REV. 37, 43 (2008) (discussing the application of the "two-level" theory); Virginia v. Black, 538 U.S. 343, 358–59 (2003) (describing the permissibility of government regulation of "certain categories of expression").

20. *See Black*, 538 U.S. at 358–59 (noting the constitutionality of restrictions on speech in limited areas of low value).

21. *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 75 (1948); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971).

22. *See generally* JOHN STUART MILL, ON LIBERTY (Yale University Press, 2003) (1859) (exploring individual rights in relationship to society and government).

23. *See* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 217–18 (1972). Other theorists argue that such constructivist or consequentialist approaches are not helpful to understanding free speech. *See, e.g.*, LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 131 (2005); Andrew Koppelman, *Veil of Ignorance: Tunnel Constructivism in Free Speech Theory*, 107 NW. U. L. REV. 647, 690–91 (2013).

24. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641–42 (1994).

25. *See* United States v. Stevens, 559 U.S. 460, 468 (2010) (describing the categories of unprotected speech).

made up of essentially unprotected expressive activities.[26] Absent another constitutional limitation, the government may regulate or even ban speech that falls outside of the free speech clause.[27] While the two-level theory of speech has been incisively criticized for decades,[28] the Supreme Court at least formally clings to the approach as part of its doctrinal implementation of the First Amendment.[29]

The longest standing expression of the two-level theory comes from the often quoted dictum in the Court's fighting words case, *Chaplinsky v. New Hampshire*.[30] There, in declaring that speech rights under the First Amendment are not absolute, the Court listed several categories of speech that fall beyond its coverage. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. *These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words*."[31] In addition to the implied historical pedigree[32] of these categories of unprotected speech, the Court articulated a functional rationale for their exclusion from the First Amendment. "[S]uch utterances are no essential part of any exposition of ideas, and are of *such slight social value* as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[33] Simply put, under the two-level theory, some types of speech have little or no value, and therefore receive no protection.

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26. *See* discussion *infra* Section II.B.

27. *See* Roth v. United States, 354 U.S. 476, 481–83, 485 (1957) (holding that "obscenity is not within the area of constitutionally protected speech or press" and outlining the history of unprotected speech); Virginia v. Black, 538 U.S. 343, 359–60 (2003) (explaining that "true threats" are not covered by the First Amendment).

28. *E.g.*, Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547, 551 (1989); Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 10–12 (1960).

29. *Stevens*, 559 U.S. at 468 ("From 1791 to the present, however, the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations. These [are] historic and traditional categories long familiar to the bar.") (citations omitted) (internal quotation marks omitted)).

30. 315 U.S. 568 (1942).

31. *Id.* at 571–72 (emphasis added).

32. In a recent article, Genevieve Lakier discredits this historical narrative and demonstrates that neither the Supreme Court nor other federal or state courts in the period prior to the New Deal routinely recognized categories of low value speech. *See* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2177–79 (2015). Indeed, there was both more and less First Amendment protection for categories of speech that the modern Court deems as having no or little value. On one hand, prior restraints were presumptively invalid for all categories of speech. *Id.* at 2179–81. On the other hand, criminal penalties on both high and low value speech were tolerated much more than they are today. *Id.*

33. *Chaplinsky*, 315 U.S. at 572 (emphasis added).

Among the categories of unprotected, or only partially protected, expression are several types of speech that involve false statements of fact, or more bluntly, lies and misrepresentations. The Supreme Court has long suggested that "there is no such thing as a false idea,"[34] premised on the notion that truth is optimally derived from free and open discourse, including the rebuttal and challenge of even the most outrageous or "false" ideas or beliefs.[35] Untruthful statements of fact are another matter, because they are said to neither advance public discourse nor promote individual self-realization.[36]

For decades, then, it was assumed that false factual statements are of no value to public discourse and thus fall entirely outside of the First Amendment's protections. The Court's rhetoric was unequivocal on this point. For example, it repeatedly observed that "there is no constitutional value in false statements of fact."[37] Similarly, it declared that "[n]either lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation."[38] In equally clear language, the Court confirmed that "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."[39] Through these repeated and definitive holdings, it became axiomatic that lying is valueless speech and is therefore not covered by the First Amendment.[40]

But the claim that lies have no value was never closely examined.[41] Lies have been painted with too broad a brush. They are assumed to lack value, but little or no effort has been spent trying to differentiate among types of lies. The remainder of this section takes up this task of creating a taxonomy of lies, and explores whether differences among lies ought to lead to a distinction in the degree of constitutional protection to which they are afforded.

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34. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

35. *Id.* at 339–40 ("However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.").

36. *See* discussion *infra* Section IV.C.

37. *Gertz*, 418 U.S. at 340.

38. St. Amant v. Thompson, 390 U.S. 727, 732 (1968).

39. Garrison v. Louisiana, 379 U.S. 64, 75 (1964); *see also* Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) ("[T]he constitutional [speech] guarantees can tolerate sanctions against *calculated* falsehoods without significant impairment of their essential function.") (emphasis added)).

40. Not all falsehoods are equal. It is possible to unknowingly provide false information, or even to do so negligently. At least in the context of public figures, only statements that are knowingly or recklessly false are actionable as defamatory. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964). Unless otherwise specified, when we refer to lies or misrepresentations, we are referring to *intentional* falsehoods.

41. *See* SHIFFRIN, *supra* note 7, at 122 (describing Court as having "an extended flirtation with the broad proposition" that false factual speech has no First Amendment value).

### *B. Lies That May Be Prohibited Because of a Strong Government Interest*

The two-level theory of speech has substantially evolved in the seventy-three years since *Chaplinsky*. Some of the categories of no value speech the Court listed no longer count among the realm of the unprotected.[42] The fighting words doctrine itself has been withered by criticism and narrowed almost beyond recognition.[43] But the central premise of the two-level theory is still intact—some types of speech have no value under the First Amendment and may therefore be banned by the government. Indeed, since *Chaplinsky*, the Court has expanded the list of categories of unprotected speech to include true threats,[44] child pornography,[45] and expression that violates copyright laws.[46]

Several different categories of lies also have been held to, or are assumed to, fall outside the First Amendment's protection because they lack any social value and also cause tangible harms to third parties or to society at large. Common law and statutory fraud provisions, which regulate speech designed to induce listeners to give money to the speaker under false pretenses, are well-accepted examples of speech regulations the government may enforce without much constitutional limitation.[47] In *Illinois ex rel. Madigan v. Telemarketing Associates,*

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42. *See, e.g.*, Cohen v. California, 403 U.S. 15, 26 (1971) (striking down conviction for lewd and profane language).

43. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1089 (6th ed. 2009):

> The Court has not upheld a conviction on the basis of the fighting words doctrine since *Chaplinsky*. It has been argued that the Court's post-*Chaplinsky* decisions have so narrowed the doctrine as to render it meaningless, and that the doctrine is "nothing more than a quaint remnant of an earlier morality that has no place in a democratic society dedicated to the principle of free expression."

(citing Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 536 (1980)). Moreover, the Court has managed to squeeze a third level into its historically binary model of speech with certain categories of speech deemed to be entitled to some, but not full, constitutional protection. *See* Hess v. Indiana, 414 U.S. 105, 108–09 (1973) (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)) (incitement to unlawful activity); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70 (1976) (non-obscene pornography); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 562–63 (1980) (commercial speech).

44. *See* Watts v. United States, 394 U.S. 705, 707 (1969) ("What is a threat must be distinguished from what is constitutionally protected speech.").

45. *See* New York v. Ferber, 458 U.S. 747, 764 (1982) (discussing limits on child pornography).

46. See Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559–60 (1977) ("Courts and commentators have recognized that copyright, and the right of first publication in particular, serve this countervailing First Amendment value.").

47. Other types of fraudulent inducement unrelated to financial gain may also fall outside of the free speech clause. For example, in *Gilbert v. Minnesota*, 254 U.S. 325, 333 (1920), the Court rejected a First Amendment claim by a person charged with discouraging military enlistment in part because his statements were deliberate misrepresentations.

*Inc.*,[48] the Court rejected a First Amendment challenge by a professional charitable fundraising organization that was sued by the state for making false and misleading misrepresentations to donors.[49] In doing so, it made it clear that "the First Amendment does not shield fraud."[50] Fraudulent speech has no First Amendment value and also causes harm to its targets.[51]

Similarly, the government has unquestioned power to regulate false statements of fact in the context of perjury. It borders on absurd to argue that a person's lies under oath would advance any First Amendment values, since such speech obscures, rather than leads to, truth finding. Indeed, judicial proceedings are designed to smoke out the truth and resolve disputes; lies that distort or impair the judicial process are undoubtedly harmful to these goals.[52] Perjured testimony can lead to harm to third parties (say, a wrongfully convicted criminal defendant), to the justice system itself (by undermining its ability to accurately resolve disputes), and in some cases may materially benefit the speaker (by evading liability or conviction).[53] Not surprisingly, then, the Court has repeatedly classified perjury as speech beyond the First Amendment's protection.[54] The same could be said for laws that prohibit or criminalize making false statements to government officials in the course of their official duties.[55]

48. 538 U.S. 600 (2003).

49. *Id.* at 624.

50. *Id.* at 612. Although fraud is generally not covered by the First Amendment, government regulations directed at fraud are not immune from scrutiny. The Court has, for example, frowned upon broad, prior restraints aimed at preventing fraudulent speech, *see* Schneider v. New Jersey, 308 U.S. 147, 164–65 (1939), and has also invalidated prophylactic measures automatically categorizing certain types of charitable solicitations as fraudulent for fear of overreaching and limiting charitable solicitation as speech, *see* Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 800 (1988); Sec'y of State of Md. v. Joseph H. Munson Co., Inc., 467 U.S. 947, 967–68 (1984); and Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 636 (1980).

51. In other areas in which the government regulates fraud, there is frequently not even a discussion or consideration of First Amendment limitations because the issue is treated as self-evident. *See, e.g.*, Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613, 641–42 (2006) (observing the many ways in which securities regulations affect speech yet are assumed to fall outside of First Amendment scrutiny). *See* Schauer, *supra* note 1, at 1767 ("[W]hether the First Amendment shows up at all is rarely addressed, and the answer is too often simply assumed.").

52. United States v. Alvarez, 132 S. Ct. 2537, 2546 (2012) ("Perjured testimony 'is at war with justice' because it can cause a court to render a 'judgment not resting on truth.'") (citation omitted).

53. *See id.*

54. *See, e.g.*, Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 n.10 (1961).

55. The Federal False Statements Act is one example of such a law. *See* 18 U.S.C. § 1001 (2012); *see also Alvarez*, 132 S. Ct. at 2546.

Other forms of misrepresentation that compromise the integrity of government processes also fall outside of the First Amendment, even when the misrepresentation is not made under oath. For instance, when a private citizen falsely represents that he or she is a police officer or other government official, that statement is not protected speech.[56] Like the preceding examples, this type of speech has the effect not of advancing democracy or facilitating the search for truth, but of interfering with these goals. Speakers who engage in this conduct risk undermining the integrity of government processes and potentially misrepresenting or misappropriating the position and power of the state.[57] As the Court has explained, statutes criminalizing the impersonation of public officials serve to avoid tangible harm to "the general good repute and dignity of the (government) service itself."[58] These lies almost always present a risk of injury to the public reputation of the office or institution in question.[59] In addition, because government actors have the imprimatur of official authority, misrepresenting oneself as having such authority presents special dangers to third parties, who believe they are dealing with, and may yield to, one who has the backing and authority of the State.[60] It is for this very reason that in civil rights litigation, actions under the color of state authority are considered to pose a particular threat to individual liberty.[61] Consistent with the current law, we believe that

56. *See* United States v. Swisher, 771 F.3d 514, 522–23 (9th Cir. 2014) (discussing the deceptive dangers created by the impersonation of government officials); United States v. Tomsha-Miguel, 766 F.3d 1041, 1048 (9th Cir. 2014) ("[G]overnment has the constitutional power to prohibit the impersonation of federal officials and employees."); United States v. Chappell, 691 F.3d 388, 392 (4th Cir. 2012) (citing public safety as justification for the statute prohibiting such impersonation).

57. *Alvarez*, 132 S. Ct. at 2546. *See also* Norton, *supra* note 7, at 198 (observing that lying about being a law enforcement officer harms "the public's trust in, and thus the effectiveness of, law enforcement"). Of course, it is possible that in some instances impersonating a government employee could serve the interests of truth and, on balance, benefit the goals of free speech.

58. United States v. Lepowitch, 318 U.S. 702, 704 (1943).

59. *Id.* We say *almost* always because perhaps it is conceivable that someone's drunken braggadocio over a few beers does not cause harm. *See* Helen Norton, *Lies to Manipulate, Misappropriate, and Acquire Governmental Power*, *in* LAW AND LIES 167–68 (Austin D. Sarat ed., 2015) ("Lies about being the government that constitute mere bragging or puffery, for example, may be relatively harmless and thus undeserving of punishment."). For our part, we think that even this sort of deception about being employed by the government may create risks of harm, but we don't take up that question here.

60. Norton, *supra* note 7, at 198.

61. Monroe v. Pape, 365 U.S. 167, 180 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978). *See generally* Alan K. Chen, *Rosy Pictures and Renegade Officials: The Slow Death of* Monroe v. Pape, 78 UMKC L. REV. 889, 918 (2010) (arguing that *Monroe* "allowed suits against officials who violate constitutional rights while clothed, sometimes quite literally, in judicial robes or police uniforms, giving them the imprimatur of the state's power").

impersonating a public official is a unique category of lying that, even when done in an investigative context, falls outside the First Amendment's scope.

Still another category of deception that is generally exempted from First Amendment protection is commercial speech.[62] At one time, the Court categorically excluded commercial speech from First Amendment coverage.[63] More recently, the Court has recognized that commercial speech may have substantial value because it advances the economic interests of the speaker and provides important information to consumers and society at large.[64] But the Court has made it clear that the government has wide latitude to regulate false or misleading commercial speech. As it wrote in *Central Hudson*, "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it."[65] As with the preceding categories of lies that are beyond the scope of constitutional protection, false or misleading commercial speech is not valuable to the ends served by the First Amendment and also has the potential to cause harm to those who are misled by it.[66]

### *C. Lies That Are Protected in Order to Avoid Chilling (as Opposed to Generating) Truthful Speech*

The Court strongly suggested in its *Chaplinsky* dicta that libel has no First Amendment value because defamatory statements serve no truth finding function and also cause harm to those whose reputations are damaged by them.[67] Since *Chaplinsky*, however, the Court has developed a complicated, idiosyncratic set of First Amendment rules for evaluating state defamation laws that provides

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62. Commercial speech is "expression [that is] related solely to the economic interests of the speaker and its audience." Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980); *see also* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (distinguishing between truthful and deceptive commercial speech).

63. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942), *overruling recognized by* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 504 n.22 (1984).

64. *Cent. Hudson*, 447 U.S. at 562–64 (recognizing intermediate scrutiny as the proper standard of review for content-based restrictions on commercial speech); *Bose Corp.*, 466 U.S. at 504 n.22 (discussing the history of the Court's treatment of commercial speech).

65. *Cent. Hudson*, 447 U.S. at 563.

66. For further elaboration of categories of false factual statements that are not covered by the First Amendment, see Brief of Professors Eugene Volokh and James Weinstein as Amici Curiae in Support of Petitioner at 3–11, *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (No. 11-210), 2011 WL 6179424, at *3–11.

67. 315 U.S. 568, 572 (1942).

robust protection for false statements directed at public officials and public figures.[68] In the seminal case of *New York Times v. Sullivan*, the Court reviewed a $500,000 judgment on a defamation claim brought by a Montgomery, Alabama county commissioner against several civil rights activists and a major newspaper.[69] The newspaper had published the activists' advertisement criticizing the local police, who were ostensibly under the commissioner's direction, for engaging in antagonistic conduct toward civil rights demonstrators.[70] It was undisputed that some of the factual statements contained in the ad were inaccurate.[71] The trial judge had instructed the jury that these types of statements constituted libel per se, meaning that the plaintiff need not prove actual harm or malicious intent on the speakers' part in order to recover damages.[72]

On appeal, the Supreme Court overturned the Alabama courts' rulings upholding the defamation verdict against the defendants.[73] Rejecting the claim that defamatory statements are categorically unprotected by the First Amendment, the Court distinguished prior cases addressing free speech and defamation because they did not involve statements critical of public officials, observing that this dispute must be evaluated "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[74] In direct conflict with the language in *Chaplinsky*, the Court stated that "libel can claim no talismanic immunity from constitutional limitations."[75]

The Court recognized that in the context of criticism of government officials or heated debate on important public issues, speech would sometimes be exaggerated or even contain false statements.[76] It went on to observe that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to

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68. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270–71 (1964) (imposing strict limitations on libel claims brought by public officials); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967) (extending the *New York Times* standard to public figures).

69. *N.Y. Times*, 376 U.S. at 256.

70. *Id.* at 257–58.

71. *Id.* at 258.

72. *Id.* at 262.

73. *Id.* at 264.

74. *Id.* at 270.

75. *Id.* at 269.

76. *Id.* at 271 (citing Cantwell v. Connecticut, 310 U.S. 296, 310 (1940)).

survive.'"[77] The need to allow broad latitude for public discourse directly shaped the scope of the applicable First Amendment protections.

The Court held that where defamation claims are brought by public officials against speakers who criticize their conduct, those claims may not be upheld unless the plaintiff can show that the speaker's statement was made with "actual malice," meaning that the speaker made the defamatory statement with knowledge that it was false or with reckless disregard for its falsity.[78] In addition, the Court held that in order to ensure that speech is not chilled, states must require plaintiffs to prove the defendants' state of mind by clear and convincing evidence.[79] The point of imposing this high burden on public official defamation plaintiffs was not that the false statements themselves had intrinsic value, but that if critics of the government were exposed to substantial tort liability, they might rein in their rhetoric in ways that would result in self-censorship of even truthful criticisms.[80] Later, in *Curtis Publishing Co. v. Butts,* the Court applied these same heightened protections to defendants accused of defamation against *any* "public figures," "nonpublic persons who 'are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.'"[81]

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77. *Id.* at 271–72 (citations omitted).

78. *Id.* at 279–80.

79. *Id.* at 285–86.

80. *Id.* at 279. The Court did allow that false speech might actually play a role in public discourse to the extent that it might increase the chance that truthful counter-speech would emerge in response. *Id.* at 279 n.19. The Court extended the *New York Times* standard to criminal libel claims in *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

81. 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in result). The majority had characterized public figures as those who "commanded a substantial amount of independent public interest at the time of the publications." *Butts*, 388 U.S. at 154 (majority opinion). The opinion for the Court articulated a slightly different standard, requiring that plaintiffs must show that the speaker engaged in "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155. A majority of the Justices, however, endorsed extending the *New York Times* standard to these cases, meaning that the plaintiff must show that the speaker knew that the allegedly defamatory statements were false or showed reckless disregard for their truth. *Id.* at 162 (Warren, C.J., concurring in result). This standard was contained in Chief Justice Warren's concurring opinion, but later commanded the majority of the Court. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 336 (1974) (discussing the overlap in the Justices' multiple opinions in *Butts*). In *Gertz,* however, the Court rejected extending the heightened proof standard to defamation claims brought by private persons, even when the statements related to a highly publicized incident in which the public had a great interest. *Id.* at 347. Even where private citizens are involved, however, the Court said that the state may not impose liability for defamatory statements without imposing some fault standard. *Id.*; *cf.* Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 760 (1985) (plurality opinion) (holding that defamation of private persons about matters of private concern was not limited by the First Amendment).

The Supreme Court has also extended the *New York Times* standard to so-called "false light" invasion of privacy claims under state tort law. In *Time, Inc. v. Hill*, the Court reviewed a tort judgment against a news magazine that had published an article and photo spread connected to the opening of a fictional play loosely based on an actual crime involving individuals who held a Pennsylvania family hostage in their home.[82] The family complained that the magazine story represented the play as accurately depicting the actual crime, when in fact the play had embellished and altered the story in significant ways.[83] The Supreme Court invalidated the jury's verdict for the family on the ground that the First Amendment protects the freedom of speech and press in the publication of material about matters of public concern.[84]

As in the context of defamation, the Court's limitation of state privacy torts was based not on the value of the false or inaccurate statements in the article, but on the fear that zealous enforcement of state law to police untrue statements would likely suppress a wide range of speech, including truthful speech about matters of public concern.[85] Such tort liability could create a chilling effect and "saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to nondefamatory matter."[86]

Another context in which the Court has deemed false speech to be constitutionally protected is in its assessment of the First Amendment implications of the tort of intentional infliction of emotional distress. In *Hustler Magazine, Inc. v. Falwell*, the Court reviewed a tort judgment against a magazine that published a parody in the form of a fake liquor advertisement implying that a nationally known, politically active minister had lost his virginity to his mother in an outhouse.[87] The Court overturned a state court judgment that imposed substantial civil liability on the magazine, holding that this type of penalty for even an "outrageous" parody of a public figure cannot withstand First Amendment scrutiny unless the plaintiff demonstrates that there was a false statement of fact made with knowledge of its

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82. 385 U.S. 374, 377 (1967).

83. *Id.* at 378.

84. *Id.* at 387–88 (limiting liability for state invasion of privacy torts to cases where the plaintiff shows that the speech was undertaken with knowledge of its falsity or reckless disregard for its truth).

85. *Id.* at 388–89.

86. *Id.* at 389.

87. 485 U.S. 46, 47–48 (1988).

falsity or reckless disregard for the truth of the matter.[88] Recognizing a long history of parodies of public figures in political and other public discourse, the Court concluded that the threat of tort liability could create a chilling effect in the absence of a more restrictive standard.[89]

As these cases illustrate, the Court's broad unequivocal language that "there is no constitutional value in false statements of fact" does not tell the entire story.[90] In reality, the Court has parsed out false speech into different categories and distinguished them by their nature and context, as well as by considering whether their protection might be necessary to enhance the universe of speech available to the public at large. But in each of these contexts, the Court's rationale for protecting the statements as speech was to prevent the chilling of *truthful* speech, not because it considered the false speech to have any value.

### *D. The Beginning of a New Era: Protecting Lies That Serve No Public Value*

Prior to 2012, the Court's approach to First Amendment protection for false statements of fact focused not on the value of the speech, but on the concern that regulating false speech would also chill truthful speech. In *Alvarez*, however, the Court struck down the Stolen Valor Act, a federal statute that makes it a crime for anyone to "falsely represent himself or herself, verbally or in writing to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States."[91] Alvarez, a local water board official, was convicted of violating the Act when he boasted during a public meeting that he had been awarded a Congressional Medal of Honor for his military service.[92] The Court invalidated Alvarez's conviction, holding that the Act violated the First Amendment right of free speech.[93]

The lie at issue in *Alvarez* is little more than a valueless act of self-promotion and impersonation, and the government had argued that a variety of harms are suffered by the military community when its honors are diluted in this way.[94] Nonetheless, the Court held that

88. *Id.* at 56.

89. *Id.* at 52–55. The Court also may well have been concerned that without a higher threshold of liability, public figure plaintiffs might circumvent the *New York Times* rule by recasting their defamation claims as emotional distress actions.

90. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

91. United States v. Alvarez, 132 S. Ct. 2537, 2543 (2012) (plurality opinion).

92. *Id.* at 2542.

93. *Id.* at 2551.

94. *Id.* at 2549.

Alvarez's lie was constitutionally protected.[95] *Alvarez*, then, reflects a turning point: an intentional lie of little or no value, which arguably caused some harm, was nonetheless deemed protected speech.

The decision was a fractured one, however, resulting in a legal framework that remains uncertain. Justice Kennedy wrote for a four Justice plurality, which declared that false speech is not categorically unprotected by the First Amendment, and stated that strict scrutiny should be applied to the Act, which it deemed to be a content-based regulation of pure speech.[96] Justice Breyer, joined by Justice Kagan, wrote an opinion concurring in the judgment, but argued that the Court ought to apply intermediate scrutiny, balancing the law's threat to free expression against the government's interest in regulating the speech.[97]

Underlying the reasoning of all six Justices who supported the judgment in *Alvarez* is the clear rejection of the proposition that lies are entitled to "no protection at all" under the First Amendment.[98] In this regard, there is a holding of the Court—a common denominator of reasoning—that some lies are protected.[99] Equally notable, *Alvarez* departs from the two-level theory; the Court recognized that *intentional* false statements were protected even though they lacked both intrinsic and instrumental social value.[100] Both the plurality and concurring opinions regarded Alvarez's lies as nothing more than a valueless, "pathetic attempt to gain respect that eluded him,"[101] yet they viewed the lie as fully protected by the First Amendment.

That is not to say that *Alvarez* opens the floodgates to First Amendment protection for all lies.[102] The traditional categories of

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95. *Id.* at 2551.

96. *Id.* at 2543–44.

97. *Id.* at 2551–52 (Breyer, J., concurring in judgment).

98. *Id.* at 2553.

99. Justin F. Marceau, *Lifting the Haze of* Baze: *Lethal Injection, the Eighth Amendment, and Plurality Opinions*, 41 ARIZ. ST. L.J. 159, 171 (2009) (explaining that "the D.C. Circuit [has] held that a plurality decision rationale is only entitled to precedential weight if it is 'implicitly approved by at least five Justices'" such that the holding reflects a common denominator of reasoning) (quoting King v. Palmer, 950 F.2d 771, 781 (D.C. Cir 1991) (en banc)).

100. *Alvarez*, 132 S. Ct. at 2564 (Alito, J., dissenting).

101. *Id.* at 2542 (plurality opinion). Justice Breyer's concurring opinion, however, did identify circumstances in which lies might have some value. *Id.* at 2553 (Breyer, J., concurring in judgment).

102. Professors Volokh and Weinstein argued in their amicus brief to the Court in *Alvarez* that the Court ought to recognize a categorical exemption from constitutional protection for knowing falsehoods, while allowing narrow exceptions for "statements about the government, science, and history . . . in order to avoid an undue chilling effect on true factual statements, statements of opinion, or other constitutionally valuable expression." Brief of Professors Eugene Volokh and James Weinstein as Amici Curiae in Support of Petitioner at 2, United States v. Alvarez, 132 S. Ct. 2537 (2012) (No. 11-210), 2011 WL 6179424, at *2. Their rationale for this argument, however, is based primarily on a concern that allowing some protection for intentional

unprotected lies that we discuss above—defamation of private persons, fraud, false commercial speech, perjury, and impersonating government officials—were all acknowledged as beyond the scope of the First Amendment.[103] But, for the first time, the Court also recognized a distinct set of lies that warranted protection, and the six Justices who voted to invalidate the law fundamentally agreed on the limiting principles that apply in this context. Both the plurality and concurring decisions share the view that punishing "falsity alone" is not permissible; instead, the government may only regulate false speech when there is some "intent to injure,"[104] or more precisely, some intent to cause a "legally cognizable harm."[105] Moreover, as the plurality clearly explains, "[t]here must be a direct causal link between the restriction imposed and the injury to be prevented."[106] Because it found an insufficient link between lies about military awards and the dilution of the public's perception of such honors, the Court rejected the government's claim of harm.[107]

While there are not yet a substantial number of cases applying *Alvarez*, early indications are that lower courts are taking the Court's cue and applying broad protections to lies. For example, two lower federal courts recently invalidated state laws regulating false speech in the context of political campaigns. In *281 Care Committee v. Arneson*, the Eighth Circuit struck down a Minnesota law making it a misdemeanor for any person to intentionally participate in "the preparation, dissemination, or broadcast of paid political advertising or campaign material . . . with respect to the effect of a ballot question, that is designed or tends to . . . promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false."[108] While recognizing that *Alvarez* did not render a majority opinion defining the appropriate standard of review, the court held that the Minnesota law must be subject to strict scrutiny because it regulated *political* speech based on its content, and held that the law was unconstitutional because it was

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lies might undermine the coherence of First Amendment doctrine and also lead to precedents that would dilute the strict scrutiny standard because courts would be inclined to uphold many government regulations of false statements of fact. *Id.*

103. *Alvarez*, 132 S. Ct. at 2544–45.

104. Holloway v. Am. Media, Inc., 947 F. Supp. 2d 1252, 1263 n.15 (N.D. Ala. 2013) ("[F]alsity must be coupled with some other element of culpability, such as an intent to injure or defraud another person.").

105. *Alvarez*, 132 S. Ct. at 2545.

106. *Id.* at 2549.

107. *Id.*

108. 766 F.3d 774, 778 (8th Cir. 2014).

not narrowly tailored.[109] Ultimately, as in the Supreme Court's defamation cases, the appellate court invalidated the law because of its potential to chill political speech, which often involves highly charged statements that might be deemed by opponents to be "false."[110] Similarly, in *Susan B. Anthony List v. Ohio Elections Commission*, a federal district court issued a permanent injunction preventing the state from enforcing its false campaign speech law.[111] To a substantial degree, the court in this case used the same reasoning as the Eighth Circuit in *281 Care Committee* to hold that the Ohio law violated the First Amendment.[112]

Cases such as these illustrate the emergence of a distinct jurisprudence of lying under the First Amendment. Prior to *Alvarez*, it is less likely that such statutes would have been invalidated.[113] Of note, however, neither the false campaign speech cases nor *Alvarez* provided protection for the lies at issue because the lies had some intrinsic or inherent political value. Quite the contrary. As the district court in *Susan B. Anthony List* noted, the plaintiff, an anti-abortion advocacy group, was not asserting a "right" to lie, but a right "not to have the truth of our political statements judged by the Government."[114]

## III. A HISTORY OF HIGH VALUE LIES—INVESTIGATIVE DECEPTIONS

Lying is a complex behavioral phenomenon. In the abstract, lying is typically viewed with almost universal moral opprobrium. But this assumes that all lies are identical; in fact, context is critical to evaluating whether lies are harmful.[115] Recent studies suggest that

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109. *Id.* at 784. The court did not actually determine whether the state's interest was compelling. *Id.* at 787.

110. *Id.* at 793.

111. 45 F. Supp. 3d 765, 770 (S.D. Ohio 2014).

112. *Id.* at 774–78 (utilizing strict scrutiny to invalidate Ohio's political false-statement laws because of the chilling effect on protected political speech).

113. *See, e.g.*, Pestrak v. Ohio Elections Comm'n, 926 F.2d 573, 575 (6th Cir. 1991) (upholding a law prohibiting false statements during a political campaign). On the other hand, although it was less likely, it was not altogether implausible that, even prior to *Alvarez*, lies made in an overtly political context might have triggered strict First Amendment scrutiny. Our point is that in light of *Alvarez*, the courts are more likely to find that lies in the political context or otherwise having high value are constitutionally protected. *See, e.g.*, Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2347 (2014) (recognizing that criminalizing lies about political candidates could "impose a substantial hardship on" those who engage in political speech).

114. *Susan B. Anthony List*, 45 F. Supp. 3d at 769.

115. In his opinion concurring with the Ninth Circuit's denial of rehearing en banc in *Alvarez*, then-Chief Judge Kozinski recognized the importance of context. As he wrote,

> According to our dissenting colleagues, "non-satirical and non-theatrical[ ] knowingly false statements of fact are *always* unprotected" by the First Amendment. . . . Not "often," not "sometimes," but always. Not "if the government has an important interest"

lying is common behavior, and in many contexts lying is not only not forbidden, but also can serve socially useful functions.[116] As one commentator recently reported, "We all tell lies, and tell them shockingly often: Research shows that on average in an ordinary conversation, people lie two to three times every 10 minutes."[117] To be sure, many lies that society seems to tolerate are relatively trivial and socially acceptable, such as making a false statement to avoid hurting someone's feelings.[118] Lies are tolerated, and even encouraged, for the purpose of gaining employment, so long as they are unrelated to one's qualifications for the position.[119] In public contexts, as Justice Breyer observed in his *Alvarez* concurring opinion, lies "may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts, where (as Socrates' methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth."[120]

There is also a long tradition of using deception as a means of gaining access to knowledge that would otherwise be obscured from public view. Since at least the Industrial Revolution, lies have played a central role in allowing the American public and the political branches of government access to the closed-door goings on of certain industries. From prisons, to mental hospitals, to schools, to the meatpacking industry, lies have facilitated award-winning journalism, prompted

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> nor "if someone's harmed" nor "if it's made in public," but *always*. "Always" is a deliciously dangerous word, often eaten with a side of crow.

United States v. Alvarez, 638 F.3d 666, 673 (9th Cir. 2011) (Kozinski, C.J., concurring in the denial of rehearing en banc) (citations omitted).

116. Ulrich Boser, *We're All Lying Liars: Why People Tell Lies, and Why White Lies Can Be OK*, U.S. NEWS & WORLD REPORT (May 18, 2009, 12:20 PM), http://health.usnews.com/health-news/family-health/brain-and-behavior/articles/2009/05/18/were-all-lying-liars-why-people-tell-lies-and-why-white-lies-can-be-ok [http:// http://perma.cc/3JGR-2JVA] (citing Greg Willard & Richard H. Gramzow, *Beyond Oversights, Lies, and Pies in the Sky: Exaggeration as Goal Projection*, 35 PERSONALITY & SOC. PSYCHOL. BULL. 477, 477–92 (2009) (finding that embellishments can create positive effects on future achievements)); *see also Radiolab: Deception: Lying to Ourselves*, WNYC (Mar. 10, 2008), http://www.radiolab.org/story/91618-lying-to-ourselves/ [http://perma.cc/7VR4-CC66] (discussing a study finding liars were happier and tended to be better athletes).

117. Clancy Martin, Editorial, *Good Lovers Lie*, N.Y. TIMES, Feb. 8, 2015, at SR4.

118. *Alvarez*, 638 F.3d at 674 (Kozinski, C.J., concurring in the denial of rehearing en banc).

119. One recent job advice website ran a story boldly titled "Why You Must Lie on Job Interviews." Mark Stevens, *Why You Must Lie On Job Interviews And What You Must Lie About*, LINKEDIN (Oct. 6, 2014), https://www.linkedin.com/pulse/20141006125226-10136502-why-you-must-lie-on-job-interviews-and-what-you-must-lie-about [http://perma.cc/6FUS-CH8X] (advising job candidates to avoid completely being themselves, and instead "be what HR wants you to be").

120. United States v. Alvarez, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring in the judgment).

changes in public behavior, and led to major legislative reforms. Moreover, law enforcement has long engaged in investigative deception to gain access to private information without obtaining a warrant, and the Constitution has never stood as a barrier.[121] But for investigative deceptions, much information critical to public discourse would have remained secret. This section explores the potential First Amendment values of investigative deceptions by surveying several contexts in which both law and society embrace the use of lies to investigate wrongdoing.

### *A. Upton Sinclair and Lies*

Perhaps the most iconic example of using deception to uncover wrongdoing is Upton Sinclair's investigation of the Chicago meatpacking industry, which became the source and inspiration for his

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121. "[G]overnment agents may use deception to gain access to homes, offices, or other places wherein illegal acts are being perpetrated. The Supreme Court has long acknowledged the use of trickery or deception to be permissible . . . ." Brokers' Choice of Am., Inc. v. NBC Universal, Inc., 757 F.3d 1125, 1146 (10th Cir. 2014). Indeed, it has been acknowledged that "[i]f total honesty by the police were to be constitutionally required, most undercover work would be effectively thwarted . . . ." *Id.*; *see also* WAYNE LAFAVE ET. AL., 2 CRIMINAL PROCEDURE § 3.10(c) (3d ed. 2000) (suggesting that the Supreme Court's position is that

> when an individual gives consent to another to intrude into an area or activity otherwise protected by the Fourth Amendment, aware that he will thereby reveal to this other person either criminal conduct or evidence of such conduct, the consent is not vitiated merely because it would not have been given but for the nondisclosure or affirmative misrepresentation which made the consenting party unaware of the other person's identity . . . .).

*But see* People v. Jefferson, 350 N.Y.S.2d 3, 4 (N.Y. App. Div. 1973) (per curiam) (finding a constitutional violation when police lied about an emergency gas leak in a house that threatened health if not immediately inspected). Of course, lies that are so egregious as to be deemed coercive are prohibited by the relevant criminal procedure doctrines. *See* Helen Norton, *The Government's Lies and the Constitution*, 91 IND. L.J. (forthcoming 2015) (manuscript at 26–27), http://ssrn.com/abstract=2574449 [http://perma.cc/XG42-NMFG] (compiling authority regarding the scope of constitutionally permissible lies in the service of investigation); *see also* William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903, 1907 (1993) (contending that the guilty would benefit from a prohibition on lying by police but the innocent would actually suffer under such a rule).

In any event, holding that the Constitution does not forbid lying by government agents is a far cry from holding that lying is constitutionally protected. But to the extent the Constitution is primarily a protection of citizens against the government, it is important to note how much deception has been permitted by the government in the name of information gathering. *See* Chris Hamby, *Government Set Up A Fake Facebook Page In This Woman's Name*, BUZZFEED NEWS (Oct. 6, 2014, 6:16 PM), http://www.buzzfeed.com/chrishamby/government-says-federal-agents-can-impersonate-woman-online#.favGY5LgX [http://perma.cc/GG33-GQBL] (detailing a government sting based on a false Facebook page using actual photos of an arrested person in an effort to gain communication with her affiliates). It would be strange to suggest that the government has largely unchecked abilities to lie to persons to obtain deeply private information, while private persons are prohibited from engaging in limited deceptions in order to uncover non-intimate, business details of political significance.

path-breaking novel, *The Jungle*.[122] To gather information for his work, which he hoped would expose the many unfortunate ways in which meatpacking companies treated their employees,[123] Sinclair gained access to the facilities by disguising himself as a worker. "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."[124] 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."[125] Whether by commission or omission, it is clear that Sinclair gained access to the private workplaces of meatpacking plants through deception. Moreover, to protect his cover, Sinclair could not afford to be seen taking notes of his observations. Rather, he walked through the meatpacking plant, "memorizing details of what he saw, then rushing back to his room to write everything down."[126]

Like modern day animal rights and labor activists, Sinclair's work was critical to revealing the unsavory practices of a wealthy and powerful industry to public scrutiny. At the time he conducted his investigation, livestock production was already the nation's largest industry and was beginning to control a bigger part of the global market.[127] With all its resources, the industry was quite careful to cultivate its public image. 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 . . . ."[128] Thus, Sinclair's investigative deceptions were necessary to expose the truth about the meatpacking industry's treatment of its employees to the light of day. For more than a century, undercover investigations have relied on lies to uncover politically important information otherwise unavailable to forthright journalists.[129]

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122. UPTON SINCLAIR, THE JUNGLE (1906); *see also* ARTHUR WEINBERG & LILA WEINBERG, THE MUCKRAKERS 205–06 (2001) (describing the process behind the novel's publication).

123. Although *The Jungle* would become more famous for exposing the unsanitary practices of the meatpacking industry, it is undisputed that Sinclair's primary objective, driven by his Socialist leanings, was to investigate and write about the plight of mistreated workers. LEON HARRIS, UPTON SINCLAIR: AMERICAN REBEL 70–71 (1975).

124. UPTON SINCLAIR, THE AUTOBIOGRAPHY OF UPTON SINCLAIR 109 (1962).

125. HARRIS, *supra* note 123, at 70 (emphasis added).

126. ANTHONY ARTHUR, RADICAL INNOCENT: UPTON SINCLAIR 49 (2006).

127. *Id.* at 45.

128. HARRIS, *supra* note 123, at 69.

129. Indeed, Sinclair was not alone in his investigative techniques. Numerous other investigative journalists of this era, including Nellie Bly, Lincoln Steffens, and Ida Tarbell, used

### *B. Undercover Journalism and Lies*

Sinclair is characterized as one of the pioneers of "muckraking" journalism.[130] Indeed, the history of modern journalism is filled with examples of journalists employing a wide range of ethically questionable tactics to secure information for their stories, and passing that information on to the public.[131] These efforts have ranged from simple omissions to outright lies.

For example, Ken Silverstein, an editor of Harper's Magazine, 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."[132] 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.[133] To support his scheme, Silverstein took what he called "minimal preparations."[134]

> 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.[135]

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

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the same methods to acquire information for their writings. *See* WEINBERG & WEINBERG, *supra* note 122, at 431–32 (surveying the era of the "muckrakers"); *see also, e.g.*, NELLIE BLY, TEN DAYS IN A MAD-HOUSE 5–7 (CreateSpace Indep. Publ'g Platform 2011) (1887) (describing Bly's feigning insanity to be admitted to an asylum to report on the treatment of patients).

130. For a definition and description of the origins of muckraking, see WEINBERG & WEINBERG, *supra* note 122, at xv–xvi.

131. *See generally* BROOKE KROEGER, UNDERCOVER REPORTING: THE TRUTH ABOUT DECEPTION (2012) (surveying the history of undercover reporting and arguing for its fundamental journalistic value).

132. Ken Silverstein, *Their Men in Washington: Undercover with D.C.'s Lobbyists for Hire*, HARPER'S BAZAAR, July 1, 2007, at 53, 2007 WLNR 26681127.

133. *Id.*

134. *Id.*

135. *Id.*

> 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.[136]

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, and by other journalists, for engaging in 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."[137]

Another illustration of the value, but also the costs, of undercover journalism is the investigation of the grocery store chain, Food Lion, 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.[138] After they were hired, they used hidden video cameras to document and confirm what sources had initially reported to ABC News, which was that Food Lion's food handling practices were highly unsanitary and probably violated several laws.[139]

> 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 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.[140]

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136. Ken Silverstein, *Undercover, Under Fire*, L.A. TIMES, June 30, 2007, at 29, 2007 WLNR 12370843.

137. Howard Kurtz, *Undercover Journalism*, WASH. POST (June 25, 2007, 7:24 AM), http://www.washingtonpost.com/wp-dyn/content/blog/2007/06/25/BL2007062500353.html [http://perma.cc/VX3Z-GV3T].

138. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 510 (4th Cir. 1999).

139. *Id.* at 510–11. *See* Opening Brief for Appellants/Cross-Appellees Capital Cities/ABC, Inc., et al. at 27, Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999) (Nos. 97-2492, 97-2564), 1998 WL 34097797 at *27 (disputing district court's "ironic conclusion that a statute designed to prevent consumer deception can be used to punish ABC for uncovering the consumer deception practiced by Food Lion").

140. 194 F.3d at 511. Food Lion won a jury verdict against the reporters and the news network for fraud, breach of the duty of loyalty, and trespass, but the Fourth Circuit ultimately upheld only the duty of loyalty verdict, for which only nominal damages were awarded, and rejected Food Lion's claims for damages related to the publication of the story and exposure of their food handling practices. *Id.* at 524.

Another more subtle example is reporter Tony Horwitz's investigation of poultry processing plants. Horwitz gained access to a chicken-processing plant by getting hired as an employee so that he could gather information for a story about the conditions of low-wage workers.[141] What Horwitz found was astonishing. Vastly underpaid workers were given little to no training, placed in hazardous work environments subject to minimal oversight by the plant, exposed to unsanitary conditions, and subject to suspension for unexcused trips to the bathroom.[142] These conditions imposed great health risks on employees.[143] Indeed, the type of work that poultry plant workers engage in subjects them to four of the five highest risk factors for cumulative trauma: "rapid and repetitive motion, awkward postures, forceful motions, and no control over the pace of work."[144]

To gain access to the plant and personally observe the working conditions, Horwitz applied for a position with a plant in Mississippi.[145] Unlike the reporters in the prior examples, Horwitz's investigative deception fell somewhere between an omission and an affirmative lie. When he applied for employment, he used his real name and indicated that he had a university education, but stated that his current employer was "Dow Jones & Co.," the parent company of his actual employer.[146] Horwitz, then, without telling an affirmative mistruth, concealed his identity as a newspaper reporter. Notably, however, in the early 1990s when this investigation took place, deception may not have even been necessary in order for Horowitz to gain access to the poultry plant. The industry had unusually high turnover rates, and "poultry companies [would] hire constantly, with few questions asked and no skills required."[147] As Horwitz reported, the plant manager barely glanced at his application before hiring him.[148] For his work on this story as the centerpiece of a series about low wage workers, Horwitz was awarded the Pulitzer Prize.[149]

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141. Tony Horwitz, *9 to Nowhere: These Six Growth Jobs Are Dull, Dead-End, Sometimes Dangerous—They Show How '90s Trends Can Make Work Grimmer For Unskilled Workers—Blues on the Chicken Line*, WALL ST. J., Dec. 1, 1994, at A1, http://www.pulitzer.org/archives/ 5744 [http://perma.cc/D64Q-H2K3].

142. *Id.*

143. *Id.*

144. *Id.* (quoting ergonomics expert Barbara Silverstein from the Occupational Safety and Health Administration).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Wall Street Journal Reporters Horwitz and Suskind Each Win a Pulitzer Prize*, WALL ST. J., Apr. 19, 1995, at A2.

One thing is not disputed about these or the multitude of other successful undercover journalistic investigations conducted by journalists: the truth of what they reported. As the court in the *Food Lion* case clearly stated, "The truth of the *PrimeTime Live* broadcast was not an issue in the litigation."[150] Many other examples of similar investigations have been documented.[151] To be sure, journalists and journalism scholars have long debated the ethics of using lies and deception in their reporting, but it is unquestionable that some of these lies have led to exposure of a wide range of corruption, illegality, and other information that is of great public concern. While some defend the use of deception, and even affirmative lies, as rooted in the history of investigative journalism and as an essential tool for uncovering the hidden truth, others argue that journalists lose credibility when they engage in deception, even if that leads them to uncover valuable information.[152]

### *C. Law Enforcement and Lies*

Another context in which lying is a predominant investigative tool is law enforcement. As with journalism, there is vigorous debate about the morality of such practices.[153] But, there is also a very long history of lying to suspects as part of criminal investigations. The practice of deception has played a prominent role in some of the most important criminal prosecutions in U.S. history, including that of Jimmy Hoffa.[154] And while the practice may attract scholarly and public criticism, courts are virtually unanimous in singing the praises of investigative deception.[155] As the Tenth Circuit recently explained in

150. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 511 (4th Cir. 1999).

151. UNDERCOVER REPORTING: DECEPTION FOR JOURNALISM'S SAKE: A DATABASE, http://dlib.nyu.edu/undercover/undercover-journalism-debated (last visited Sept. 1, 2015) [http://perma.cc/43NS-DE8R].

152. *See* KROEGER, *supra* note 131, at 3–13 (discussing the variety, historical pedigree, and contemporary relevance of undercover journalism); *see also* SHIFFRIN, *supra* note 7, at 221–23 (arguing that certain truth-enhancing institutions such as law enforcement bodies have a greater duty to avoid lying even when such lies arguably achieve social benefits because they symbolically serve special roles as beacons of truth).

153. *See, e.g.*, Irina Khasin, Note, *Honesty is the Best Policy: A Case for the Limitation of Deceptive Police Interrogation Practices in the United States*, 42 VAND. J. TRANSNAT'L L. 1029, 1033 (2009).

154. Hoffa v. United States, 385 U.S. 293, 303 (1966); *see also* United States v. White, 401 U.S. 745, 746–47 (1971); Sorrells v. United States, 287 U.S. 435, 441–42 (1932) (noting the importance of deception to investigations).

155. For scholarly critiques, see, e.g., Elizabeth N. Jones, *The Good and (Breaking) Bad of Deceptive Police Practices*, 45 N.M. L. REV. 523, 529–30 (2015) (criticizing the use of investigative deception through the lens of *Breaking Bad*); Khasin, *supra* note 153.

defending the use of police deception, "[i]f total honesty by the police were to be constitutionally required, most undercover work would be effectively thwarted."[156] Echoing similar sentiments, one commentator has observed, "As a society, we find living with the use of such deception disconcerting, yet we dare not abandon such techniques."[157]

Most notably, government officials routinely lie or misrepresent their identities, as well as other factual information, in undercover criminal investigations, or "stings."[158] Typically, these operations involve government agents posing as criminals or other actors affiliated with criminal activity in order to investigate violations of law. Law enforcement agents go undercover posing as drug dealers, prostitutes, terrorist sympathizers, and various other participants in criminal enterprises, to gather information that they would otherwise be unable to access.[159]

Perhaps one of the best known examples of a government sting is the Federal Bureau of Investigation's "Abscam" investigation.[160] The name Abscam was derived from Abdul Enterprises, a fake company set up by the FBI to recover stolen art and securities.[161] As the investigation developed, it extended beyond its initial goals to pursue charges of bribery of public officials.[162] Of course, there are limits to the government's use of deception. As with other investigative tactics, government stings can cross the line from investigation to entrapment,[163] but the effectiveness of legitimate undercover investigations is widely acknowledged.[164]

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156. Brokers' Choice of Am., Inc. v. NBC Universal, Inc., 757 F.3d 1125, 1146 (10th Cir. 2014).

157. Bernard W. Bell, *Secrets and Lies: News Media and Law Enforcement Use of Deception as an Investigative Tool*, 60 U. PITT. L. REV. 745, 746 (1999).

158. *See, e.g.*, United States v. Hugs, 109 F.3d 1375, 1377 (9th Cir. 1997) (involving an agent "[p]osing as a semiretired contractor interested in hunting, fishing, and purchasing trophy big game heads" who brought beer and participated in an illegal hunt in order to gain the evidence necessary for an arrest based on violations of hunting related laws); *see also* GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 186–87 (1988) (discussing the control mechanisms involved in undercover operations).

159. Bell, *supra* note 157, at 746.

160. Katie Lannigan, *FBI Undercover 'Stings': Catching Politicians Red-Handed*, ALJAZEERA AMERICA (October 30, 2013, 9:00 PM), http://america.aljazeera.com/articles/2013/10/ 30/fbi-undercover-stingscatchingpoliticiansredhanded.html [http://perma.cc/2WKP-2UZU].

161. United States v. Kelly, 707 F.2d 1460, 1461–62 (D.C. Cir. 1983).

162. *Id.* at 1462.

163. *See* Jacobson v. United States, 503 U.S. 540, 553–54 (1992) (determining that law enforcement officials implanted the disposition to commit a crime in the mind of an otherwise law-abiding citizen).

164. *See, e.g.*, Katherine Goldwasser, *After Abscam: An Examination of Congressional Proposals to Limit Targeting Discretion in Federal Undercover Investigations*, 36 EMORY L.J. 75, 78 (1987).

The Supreme Court has approved such deceptions under an "assumption of risk" theory.[165] The idea is seductively simple—in talking to other persons or inviting them into parts of your life, one always assumes the risk that the person might turn out to be a reporter, a cop, or some other form of false friend.[166] One is free to choose one's friends and companions, and free to choose what to share with them, but if the trusted friend or colleague turns out not to have your best interests in mind, you cannot complain that the deception caused you harm. The deceiver's morality can be debated, but under longstanding Fourth Amendment doctrine, the propriety of using the evidence to prevent public harm or crimes is settled.[167]

### *D. Civil Rights Testing and Lies*

A third area in which lying has been routinely and effectively used to expose the truth about matters of public concern is federal housing discrimination law. The Fair Housing Act of 1968 ("FHA") prohibits various forms of race, sex, religion, and national origin discrimination in the sale or rental of housing.[168] 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

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165. *See, e.g.*, United States v. White, 401 U.S. 745, 749 (1971); Katz v. United States, 389 U.S. 347, 351 (1967); Hoffa v. United States, 385 U.S. 293, 303 (1966).

166. In this way, the media, law enforcement, and any other deceptive person are assumed to have an equal claim to the right to deceive an individual. Bell, *supra* note, 157, at 836.

167. *See Hoffa*, 385 U.S. at 302 (describing a wrongdoer's belief or confidence in a deceiver as "misplaced" and undeserving of Fourth Amendment protection). To be sure, the Court's recent decision in *United States v. Jones*, 132 S. Ct. 945 (2012), has generated confusion and excitement about the future of the Fourth Amendment. Justice Sotomayor's concurrence, which seems to be garnering favor among lower courts and commentators, bluntly says that it may be necessary to abandon the third-party doctrine. *Id.* at 957 (Sotomayor, J., concurring) ("[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties."); *see also* Miriam H. Baer, *Secrecy, Intimacy, and Workable Rules: Justice Sotomayor Stakes Out the Middle Ground in* United States v. Jones, 123 YALE L.J. F. 393 (2014), http://yalelawjournal.org/forum/secrecy-intimacy-and-workable-rules [http://perma.cc/473P-QDRU] ("[O]ne should not be surprised if Justice Sotomayor's *Jones* concurrence eventually attains the same recognition as Justice Harlan's concurrence in *Katz* commanded almost five decades ago.").

It is important to note that the concerns identified by the Justices and commentators with the third-party doctrine have nothing to do with the longstanding rule regarding false friends, *Hoffa*, 385 U.S. at 302, and everything to do with the fact that we now live in a "digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." *Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring). We acknowledge, however, that the strength of our analogy to the third-party doctrine would need to be reassessed should that doctrine be abandoned.

168. 42 U.S.C. § 3604 (2012).

opportunities on a discriminatory basis.[169] 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,"[170] violates the FHA. A critical method of identifying racial steering and enforcing the FHA has been the use of "testers" by both government officials and private civil rights organizations.[171] In the context of housing discrimination investigations, "'testers' are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices."[172] For example, investigators will send a white tester and an African American tester to the same person to inquire about buying or renting a home. If that person informs the white tester that housing is available, but tells the African American tester that it is not, an FHA violation has occurred.[173]

Simply put, testing necessarily involves lying. Testers frequently provide false names, addresses, and other identifying data.[174] They also submit manufactured information such as credit ratings and employment information to housing sellers or landlords that conveys that, other than their race, they are essentially indistinguishable.[175] Moreover, of course, the testers are all intentionally lying about their desire to buy or rent the property in question. Civil rights testing is based on social science methods that require control over every variable except race as a method of proving discrimination.[176] This is especially useful under the FHA, which is violated by disparate treatment.[177]

Fair housing testing has been approved by the Supreme Court, which has not only recognized such testing as an established practice, but held that groups who hire persons to conduct these undercover investigations enjoy Article III standing to bring FHA claims in federal

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169. Havens Realty Corp. v. Coleman, 455 U.S. 363, 367 n.1 (1982).

170. § 3604(d).

171. *Havens Realty Corp.*, 455 U.S. at 368 (describing the private use of discrimination testers); United States v. Garden Home Mgmt. Corp., 156 F. Supp. 2d 413, 416 (D.N.J. 2001) (describing the Department of Justice's use of testers).

172. *Havens Realty Corp.*, 455 U.S. at 373.

173. *Id.* at 374.

174. *See* MERRICK ROSSEIN, 1 EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 12:6 (Thomson Reuters West 2015).

175. *Id.*

176. *Id.*

177. *See* 42 U.S.C. § 3604 (2012) (making housing-related discrimination unlawful if performed on the basis of race).

court.[178] Congress, too, has expressly embraced testing.[179] It established the Fair Housing Initiatives Program ("FHIP") as a temporary measure in 1987, and permanently in 1991.[180] The FHIP authorizes the Secretary of Housing and Urban Development to allocate funds to private nonprofit housing enforcement organizations to investigate violations of the FHA through testing.[181] The Secretary is required to establish guidelines for such testing to ensure that such activity produces "credible and objective evidence of discriminatory housing practices."[182] These guidelines place several limitations on who can be testers,[183] but do not, and by definition could not, prohibit testers from engaging in deception and misrepresentation as part of their investigations.[184]

There is evidence that testing has been effective in identifying and rooting out housing discrimination. In 1996, the Iowa Civil Rights Commission issued a report that testing as a result of FHIP grants resulted in the identification of 136 possible FHA violations and the filing of 41 complaints.[185] A 1988 Urban Institute conference produced several papers that identified the effectiveness of civil rights testing. As stated in the executive summary, "[e]vidence of discrimination has come from several sources, including analysis of aggregate employment, housing, and other data sets. While the regression techniques employed in these analyses have much to offer, they fail to provide the clear, direct measures and narrative power offered by paired testing."[186] While testing through intentional lies originated in the context of fair housing,

178. *Havens Realty Corp.*, 455 U.S. at 379.

179. In addition to the FHA, the False Claims Act (FCA) reflects the congressional endorsement of undercover investigations, often predicated on deception. 31 U.S.C. § 3730 (2012). The FCA provides for individuals who reveal fraud against the federal government to receive sizeable awards. *Id.* § 3730(d). Notably, empirical data reveals that an increasing share of the FCA actions are brought by private investigators—that is, persons who gain employment or access through deception. David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1278–80 (2012).

180. 42 U.S.C. § 3616a (2012).

181. § 3616a(b)(2)(A).

182. § 3616a(f)(2).

183. For example, testers under FHIP may not have prior felony convictions or convictions of any crimes involving fraud or perjury. 24 C.F.R. § 125.107 (2015).

184. § 3616a(b)(2)(A) (2012).

185. *See* 1996 IOWA CIVIL RIGHTS COMMISSION ANNUAL REPORT: TESTING, http://publications.iowa.gov/1555/1/annualtesting.html (last visited Oct. 5, 2015) [http://perma.cc/SVN2-8EBH]; *see also* Kathryn Lodato, et al., *Investigatory Testing as a Tool for Enforcing Civil Rights Statutes: Current Status and Issues for the Future*, PUBLIC LAW RESEARCH INSTITUTE 5 (2004), http://gov.uchastings.edu/public-law/docs/plri/testing.pdf [http://perma.cc/SF78-YNG4].

186. THE URBAN INST., A NATIONAL REPORT CARD ON DISCRIMINATION IN AMERICA: THE ROLE OF TESTING 1 (Michael Fix & Margery Austin Turner eds., 1998).

it is now used to investigate discrimination in other contexts, including, among other things, disability discrimination.[187]

### *E. Animal Rights Investigators, Lying, and Ag Gag Laws*

Following the path of muckrakers, investigative journalists, law enforcement officials, and civil rights testers, animal rights activists, scholars, and journalists in recent years have been conducting their own undercover investigations of the agricultural industry to expose unlawful and unethical mistreatment of animals. And they have been extraordinarily effective. In a gripping account of the modern industrial production of meat, political scientist Timothy Pachirat published a book vividly describing his undercover investigation of a Nebraska slaughterhouse.[188] The book, *Every Twelve Seconds*, provides an insider's view of what it is like to work in a facility that kills one cow every twelve seconds, or 2,400 animals per day.[189] Likewise, award-winning journalist Ted Conover did an undercover investigation in 2013 and wrote a graphic article in Harper's Magazine titled *The Way of the Flesh*.[190] These are but two examples of a body of investigative work that has considerable political import.

Perhaps no undercover investigations in the agricultural field this century, however, have been more powerful than those produced by animal welfare organizations. In 2008, for example, the Humane Society of the United States released video footage from the Hallmark

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187. Kelly Johnson, Note, *Testers Standing Up for Title III of the ADA*, 59 CASE W. RES. L. REV. 683, 685 (2009)*; see also* Steven G. Anderson, Comment, *Tester Standing Under Title VII: A Rose by Any Other Name*, 41 DEPAUL L. REV. 1217, 1218 (1992) (employment discrimination testers). Yet another context in which lying might serve important instrumental value is in advancing academic research. *See* Philip Hamburger, *The New Censorship: Institutional Review Boards*, 2004 SUP. CT. REV. 271, 323 (2004) (arguing that researchers conducting verbal research (e.g., interviews) sometimes engage in deceit to facilitate access to their research subjects). Government regulation of lying in such situations might raise First Amendment concerns. *Id.* at 322–24. *But see generally* James Weinstein, *The Dimensions of Constitutional Analysis: A Reply to Professor Hamburger*, 101 NW. U. L. REV. 569 (2007) (critiquing Hamburger's analysis). The potential value of lying in academic research is reflected by a recent academic study in which researchers used fake cover letters submitted to the accounting industry and "found that employers expressed interest in candidates who disclosed a disability about 26 percent less frequently than in candidates who did not." Noam Scheiber, *Fake Cover Letters Expose Discrimination Against Disabled*, N.Y. TIMES: THE UPSHOT (Nov. 2, 2015), http://www.nytimes.com/2015/11/02/upshot/fake-cover-letters-expose-discrimination-against-disabled.html [http://perma.cc/QWD7-6ADP].

188. *See generally* PACHIRAT, *supra* note 12.

189. *Id.* at 9.

190. *See generally* Ted Conover, *The Way of All Flesh: Undercover in an Industrial Slaughterhouse*, HARPER'S MAG., May 2013, at 31, http://harpers.org/archive/2013/05/the-way-of-all-flesh/ [http://perma.cc/ZPJ8-CURD].

slaughterhouse in Chino, California that 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."[191] The footage was so compelling that it resulted in criminal charges against a slaughterhouse manager,[192] the largest beef recall in United States history,[193] a $500 million False Claims Act judgment,[194] and state legislation mandating better treatment of injured animals.[195]

It is hard to imagine a lie—the deceptions by the Humane Society investigator in obtaining and performing his job—that could have resulted in more positive or dramatic social and political consequences.[196] To be sure, not every journalistic or activist investigation of an agricultural facility has such striking or clearly traceable results. But the numerous investigations over the past couple of decades are all important in informing the contemporary political debate about agricultural production. These exposés have played a material role in shaping the debate about animals as food in the United States.[197] These investigations are one of the most effective tools in convincing persons to reduce or eliminate animal products from their

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191. *Rampant Animal Cruelty at California Slaughter Plant*, HUMANE SOCIETY OF THE U.S. (Jan. 30, 2008), http://www.humanesociety.org/news/news/2008/01/undercover_investigation_013008.html [http://perma.cc/BTG4-7W3L].

192. Victoria Kim, *Charges of Meat Plant Cruelty Filed*, L.A. TIMES (Feb. 16, 2008), http://articles.latimes.com/2008/feb/16/local/me-beef16 [http://perma.cc/3PBZ-QDJ3].

193. David Brown, *USDA Orders Largest Meat Recall in U.S. History*, WASH. POST (Feb. 18, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/02/17/AR2008021701530.html [http://perma.cc/GE8H-FRCF].

194. Linda Chiem, *Slaughterhouse Owners Hit With $500M Judgment in FCA Case*, LAW360 (Nov. 16, 2012, 9:35 PM), http://www.law360.com/articles/394827/slaughterhouse-owners-hit-with-500m-judgment-in-fca-case [http://perma.cc/UUD5-YNEJ].

195. Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965, 969 (2012) ("[T]he video also prompted the California legislature to strengthen a pre-existing statute governing the treatment of nonambulatory animals."). *But see id.* at 969–70 (nullifying the California law as preempted by federal law).

196. One commentator has observed that the greatest protection for news gathering must apply when the matters investigated are "of the most serious public concern," and explained that "[s]uch matters would include felonies, corruption of public officials, dangers to our democratic institutions, and activities that imperil the public health and safety." Andrew B. Sims, *Food for the Lions: Excessive Damages for Newsgathering Torts and the Limitations of Current First Amendment Doctrines*, 78 B.U. L. REV. 507, 537 (1998). Agricultural investigations implicate all of these concerns.

197. Andrew Cohen, *The Law That Makes It Illegal to Report on Animal Cruelty*, THE ATLANTIC (Mar. 19, 2014), http://www.theatlantic.com/business/archive/2014/03/the-law-that-makes-it-illegal-to-report-on-animal-cruelty/284485/ [http://perma.cc/VBQ6-GP6Y]; Peter Moskowitz, *Idaho Gov. Signs 'Ag Gag' Bill Into Law*, AL JAZEERA AM. (Feb. 28, 2014 5:06 PM), http://america.aljazeera.com/articles/2014/2/28/idaho-gov-signs-aggagbillintolaw.html [http://perma.cc/L9MV-Z9SP].

diet.[198] Likewise, industry researchers have recently concluded that the work of these investigative groups is emerging as the "primary information source" about animal welfare for consumers.[199] To the extent that the First Amendment is animated by the goals of facilitating democratic self-governance and the broader search for truth, these activities clearly advance those objectives.

Notably, as in other fields, there is no viable alternative to an undercover investigation of the commercial agricultural industry. Activists and journalists who are transparent about their investigative objectives are likely to be subject to the same Potemkin village effect as Sinclair confronted in his time.[200] Public relations campaigns by the industry tell only one side of the story. Organized farm tours and carefully chaperoned visits will not produce the same accurate images or truthful information that has become the centerpiece of the American debate on farmed animal welfare. The same barriers to investigation are likely to emerge in other areas of social concern. For example, an officially sanctioned, scheduled tour of an abusive child care facility or nursing home will not likely reveal to the reporter any abuse or neglect.

Just as Upton Sinclair's work led to federal law reforms, recent agricultural industry investigations have resulted in food recalls, enactment of state laws, and criminal prosecutions.[201] In response to the prominence and efficacy of these investigations and their public exposure of the unsavory and sometimes unlawful practices of commercial agricultural operations, the agricultural industry has sought to enact laws that would make these investigations impossible. These Ag Gag laws criminalize undercover investigations by journalists, researchers, or investigators.

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198. *See* Nadine Watters, *16 Million People in the US are Now Vegan or Vegetarian!*, THERAWFOODWORLD.COM, http://news.therawfoodworld.com/16-million-people-us-now-vegan-vegetarian [http://perma.cc/T9FW-PJ8S] ("Sixty-nine percent said they chose to eat a vegan diet to support the ethical treatment of animals.").

199. M.G.S. McKendree et al., *Effects of Demographic Factors and Information Sources on United States Consumer Perceptions of Animal Welfare*, 92 J. ANIMAL SCI., Nov. 2014, at 3161, 3161.

200. *See* HARRIS, *supra* note 123, at 69 ("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.").

201. *See, e.g.*, *supra* notes 188–199.

Since 2012, more than twenty-five states have introduced Ag Gag bills,[202] and eight such bills have been enacted into law.[203] A critical feature of most of these laws is the criminalization of all access to agricultural sites based on deception, misrepresentations, or false pretenses.[204] The laws tend to target gaining employment for investigative purposes specifically, and all misrepresentations to gain access more generally.[205] For example, Utah's Ag Gag law criminalizes "obtain[ing] access to an agricultural operation under false pretenses" or obtaining employment for purposes of obtaining recordings of sounds or images.[206] The Idaho version makes it a crime to "enter[ ] an agricultural production facility by force, threat, misrepresentation or trespass; . . . [or] obtain[ ] employment with an agricultural production

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202. The first Ag Gag laws were passed back in 1990 and 1991, in Kansas, Montana and North Dakota. However, these laws primarily targeted those who were trespassing to acquire footage at agricultural facilities and did not criminalize much, if any, conduct that was not already forbidden by general trespass laws. Similarly, in 2002 the Animal Enterprise Terrorism Act ("AETA"), drafted by the conservative advocacy group, the American Legislative Exchange Council ("ALEC"), was rushed through Congress without debate. WILL POTTER, GREEN IS THE NEW RED: AN INSIDER'S ACCOUNT OF A SOCIAL MOVEMENT UNDER SIEGE 170–73 (2011). The AETA made it a felony to "[e]nter 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." *Id.* at 128. It has been reported that ALEC is also heavily involved in the drafting of model Ag Gag legislation. Will Potter, *"Ag Gag" Bills and Supporters Have Close Ties to ALEC*, GREEN IS THE NEW RED (Apr. 26, 2012), http://www.greenisthenewred.com/blog/ag-gag-american-legislative-exchange-council/5947/ [http://perma.cc/D73U-SZBK].

203. The States with Ag Gag laws as of September 2015 are Idaho, Iowa, Missouri, Utah, Montana, Kansas, North Dakota, and North Carolina. IDAHO CODE ANN. § 18-7042 (West 2015); IOWA CODE ANN. § 717A.3A (West 2015); KAN. STAT. ANN. §§ 47-1825 to -1830 (West 2015); MO. ANN. STAT. § 578.013 (West 2015); MONT. CODE ANN. §§ 81-30-101 to -105 (2015); N.D. CENT. CODE ANN. §§ 12.1-21.1-01 to -05 (West 2015); UTAH CODE ANN. § 76-6-112 (West 2015); An Act to Protect Property Owners From Damages Resulting From Individuals Acting in Excess of the Scope of Permissible Access and Conduct Granted to Them, H.R. 405, 2015 Sess. (N.C. 2015), http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2015&BillID=h405 [http://perma.cc/BD3B-26DW]; *see also* Sarah R. Haag, Note, *FDA Industry Guidance Targeting Antibiotics Used in Livestock Will Not Result in Judicious Use or Reduction in Antibiotic-Resistant Bacteria*, 26 FORDHAM ENVTL. L. REV. 313, 318 (2015) (listing eight states with Ag Gag provisions); Sarah Evelynn, *Does Ag-Gag Make You Gag?*, BILL TRACK 50 (Feb. 26, 2015), http://www.billtrack50.com/blog/civil-rights/does-ag-gag-make-you-gag/ [http://perma.cc/SQ4F-KENB] (listing five states that passed Ag Gag bills).

204. *See, e.g.*, IDAHO CODE ANN. § 18-7042(1)(a), (c); UTAH CODE ANN. § 76-6-112(2)(b). One state, Missouri, criminalizes the failure to immediately report observed abuse. MO. ANN. STAT. § 578.013 ("Whenever any farm animal professional videotapes or otherwise makes a digital recording of what he or she believes to depict a farm animal subjected to abuse or neglect . . . such farm professional shall have a duty to submit such videotape or digital recording to a law enforcement agency within twenty-four hours of the recording."). By requiring immediate disclosure, this law effectively criminalizes long-term investigations that would show a pattern or practice of abuse, and also implicates constitutional concerns. For present purposes, however, we set the Missouri statute to one side because it does not directly regulate lies.

205. IDAHO CODE ANN. § 18-7042(1)(a), (c); UTAH CODE ANN. § 76-6-112(2)(b)–(c).

206. UTAH CODE ANN. § 76-6-112(2).

facility by force, threat, or misrepresentation with the intent to cause economic or other injury."[207]

These laws go beyond generally applicable trespass laws, and instead specifically target those who wish to gain access to agricultural facilities. They also extend well beyond laws prohibiting fraud, invasions of privacy, or physical damage, insofar as the criminalized conduct need not produce any injury other than the exposure of illegal or otherwise abhorrent practices through an undercover recording or a written account of what was observed.[208] In other words, Ag Gag laws criminalize lies even when they do not directly cause any injury at all, but rather expose the practices or illegal acts of a massive, federally subsidized, politically powerful industry. All Ag Gag laws except North Carolina's authorize some form of criminal punishment for violators, including prison time, fines, and restitution.[209]

Moreover, the legislative purpose behind these laws is much clearer than the typical criminal statute. The legislative history, the effect of the laws, and the context,[210] all evince a legislative desire to target animal rights activists and sympathetic journalists and subject their political speech to disfavored treatment.[211] Illustrative are the comments from the executive director of the trade group that drafted the Idaho Ag Gag bill: "This impacts our industry. So, you have to look and say, you know, you don't stand up on a *soapbox* and broadcast."[212] Similarly, an Idaho state representative spoke in favor of that law by

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207. IDAHO CODE ANN. § 18-7042(1)(a), (c). Some laws establish a separate criminal offense for the actual conduct of making a nonconsensual audio or video recording on the premises of an agricultural operation. § 18-7042(1)(d). The constitutional protections applicable to image and sound capture in a nonpublic forum raise distinct questions that we address in a subsequent article. *See* Marceau & Chen, *supra* note 14 (discussing video recording regulations in relation to First Amendment rights). There are pending lawsuits challenging the constitutionality of the Utah and Idaho Ag Gag laws. The authors disclose that they serve as plaintiffs' counsel in both of these cases.

208. *See, e.g.*, IDAHO CODE ANN. § 18-7042(1) (establishing that mere presence on an agricultural facility is enough for criminal punishment); IOWA CODE ANN. § 717A.3A (same).

209. IDAHO CODE ANN. § 18-7042(3); IOWA CODE ANN. §§ 717A.3A, 903.1; MO. ANN. STAT. §§ 558.011(1)(5), 578.013(3); S.C. CODE ANN. §§ 47-21-50, -80 (2015); UTAH CODE ANN. §§ 76-6-112(3)–(4), -3-204(1)–(2).

210. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 nn.16–17, 268 n.18 (1977) (explaining that the historical background and surrounding circumstances of state action play a role in determining whether the state action has a discriminatory purpose).

211. *See, e.g.*, Bollard, *supra* note 9, at 10965–66 (revealing the legislative intent of Iowa and Utah to stop the "extremist vegans" and "national propaganda groups" from destroying the agricultural industry). Importantly, the Supreme Court has recently reaffirmed that under the First Amendment, "strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based." Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015).

212. Idaho Senate Agric. Affairs Comm. Transcripts (Feb. 20, 2014), at 75:10 (statement of Bob Naerebout, Exec. Dir., Idaho Dairyman's Ass'n) (emphasis added) (on file with authors).

explaining that "[b]y releasing the footage to the Internet, with petitions calling for a boycott of products of any company that bought meat or milk from Bettencourt Dairy, the organizations involved then crossed the ethical line for me."[213] As a federal district court recently held, the Idaho legislature's desire to shield an industry from public scrutiny of the most damaging kind—exposure by whistleblowers—is explicit in the legislative record.[214]

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In short, deception has a long and storied, if controversial, role in American history. "[O]ur most cherished image of the press is the fearless reporter who uncovers matters we would prefer not to see or think about."[215] And while there may be instances where deception used to facilitate access to private information goes too far towards violating privacy, many undercover investigations seek information that cannot be fairly "consider[ed] private," such as

> [t]he restaurant critic who pretends to be a regular customer, the journalist who pretends to be a taxicab fare and records his interaction with the cab driver, the housing tester who pretends to need a dwelling and records his interaction with a realtor, or even the television producer who obtains a job at a food processing plant and records food-handling practices she observes.[216]

As we explain in the remainder of this Article, when the information revealed through the use of deception relates to a matter of great political significance or public debate, and the information revealed is not of an intimate personal nature, the deceptions used to gain such information should enjoy protected status under the First Amendment.

## IV. SPEECH THEORY AND THE FIRST AMENDMENT VALUE OF INVESTIGATIVE DECEPTIONS

As we have already shown, the Court has recognized the necessity of protecting lies under the First Amendment, but historically it has done so only when necessary as a prophylactic protection to avoid

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213. Donna Pence, *Pence Legislative 2014 Update Week 7*, DONNA PENCE: LEGISLATIVE UPDATES & NEWS (Feb. 21, 2014), https://representativepence.wordpress.com/2014/02/21/pence-legislative-2014-update-week-7/ [http://perma.cc/K4BB-F9GS].

214. Animal Legal Def. Fund v. Otter, No. 1:14-CV-00104-BLW, 2015 WL 4623943, at *8 (D. Idaho Aug. 3, 2015) ("[A] review of § 18–7042's legislative history leads to the inevitable conclusion that the law's primary purpose is to protect agricultural facility owners by, in effect, suppressing speech critical of animal-agriculture practices.").

215. Bell, *supra* note 157, at 837.

216. *Id.* at 750.

chilling truthful speech.[217] Even after *Alvarez*, the Court has never explicitly distanced itself from the longstanding view that "[u]ntruthful speech, commercial or otherwise, has never been protected *for its own sake*."[218] That is, it has never considered that false factual speech might in some contexts actually have either intrinsic or instrumental social value. This approach has considerable intuitive appeal. Deliberate misrepresentations would seem to be completely at odds with advancing democratic self-governance or the broader "truth-seeking function of the marketplace of ideas" that are often cited as central objectives of the First Amendment.[219] Indeed, it is not at all clear that even investigative lies have intrinsic value. That is, such deceptions do not directly contribute to discourse, but are a tool to gather information that informs that discourse. The lie itself, so the argument would go, is not directly serving any truth or democracy enhancing purposes. It is certainly true that the lies like, "I hate PETA and I am not affiliated with any animal rights organization" or "I love eating bacon and I have no problem with killing animals" do not directly contribute to a debate of public importance in the same manner as, for example, "*Meat Is Murder*,"[220] might.

In this Part, we offer a novel view of the intersection of the First Amendment and lying by arguing that, contrary to conventional wisdom, lies by journalists, law enforcement officers, other investigators, and political activists made for purposes of exposing illegality or other private conduct that involves matters of important public concern fundamentally advance the First Amendment's values, and therefore have particularly strong *instrumental* value.[221] Even if investigative deceptions do not directly influence public discourse, the courts have routinely protected other types of speech and even conduct

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217. As the *Alvarez* plurality explained:

> Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.

United States v. Alvarez, 132 S. Ct. 2537, 2547–48 (2012).

218. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (emphasis added)*; see also Alvarez*, 132 S. Ct. at 2545 (explaining that such a view of false speech in prior cases arose in the context of "defamation, fraud, or some other legally cognizable harm associated with a false statement"). The opinions in *Alvarez*, particularly Justice Breyer's concurrence, acknowledge that some falsehoods might in some contexts have value. *Id.* at 2553 (Breyer, J., concurring in judgment).

219. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988).

220. THE SMITHS, *Meat Is Murder*, *on* MEAT IS MURDER (Rough Trade Records 1985).

221. *See* Norton, *supra* note 7, at 164 ("Some lies have instrumental or even moral value.").

that is not itself expressive in the conventional sense, but is preparatory to speech. As the Court observed in *Citizens United v. FEC*, "[l]aws enacted to control or suppress speech may operate at different points in the speech process."[222] Indeed, the Court's campaign finance cases are all to some degree predicated on the notion that restrictions on fundraising and spending are limited by the First Amendment because they facilitate subsequent political speech.[223] Similarly, investigative lies may be understood as speech that is a necessary precursor to public debate about important political, social, and moral issues.

Most contemporary free speech theory is grounded in instrumental justifications for constitutional protection of expression,[224] and lies of the sort we have discussed in the previous section—investigative deceptions—actually serve these values underlying the First Amendment. High value lies promote the three primary theoretical purposes of the First Amendment: democracy, truth-facilitation, and self-fulfillment. We develop these arguments in detail in the following discussion.

### A. *Investigative Deceptions Promote Democratic Self-Governance*

One of the dominant speech theories argues that expression must be protected to ensure the advancement of democratic self-government. As one of its most prominent proponents has written, "The primary purpose of the First Amendment is . . . that all the citizens shall, so far as possible, understand the issues which bear upon our common life."[225] Meaningful deliberation about such issues can only take place with free and open discourse. More recently, Robert Post has

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222. 558 U.S. 310, 336 (2010).

223. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 19 (1976) ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."). For the same reason, Ag Gag laws that directly restrict nonconsensual investigative video recordings also implicate First Amendment speech concerns. *See* Animal Legal Def. Fund v. Otter, 44 F. Supp. 3d 1009, 1023 (D. Idaho 2014); *see also* ACLU v. Alvarez, 679 F.3d 583, 595 (7th Cir. 2012) (holding that "[t]he act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording"). We will discuss this in greater detail in a forthcoming article. *See* Marceau & Chen, *supra* note 14 (discussing video recording regulations in relation to First Amendment rights).

224. Other scholars reject instrumentalist theories of speech and argue instead that the freedom of expression can best be understood by focusing on the government's reasons for regulation. Larry Alexander argues that "[f]reedom of expression is implicated whenever an activity is suppressed or penalized for the purpose of preventing a message from being received." ALEXANDER, *supra* note 23, at 9; *see also* Koppelman, *supra* note 23, at 722 ("Government regulation of speech is truth advancing in some contexts and not others . . . .").

225. MEIKLEJOHN, *supra* note 21, at 88–89.

observed that the democracy-based theory of speech requires protection of the process of forming public opinion.[226] On this view, the First Amendment ought to protect "those speech acts and media of communication that are socially regarded as necessary and proper means of participating in the formation of public opinion," which he calls "public discourse."[227] "The function of public discourse," he writes, "is to enable persons to experience the value of self-government."[228]

Both its strength and weakness as a First Amendment theory is the fact that self-governance is a justification for protecting only speech that is at least somewhat related to public affairs, either in the context of electoral politics or public policy debates. While some types of expression are more difficult to defend on democracy grounds,[229] investigative deceptions are directly connected to the advancement of self-governance. After all, as we have described, some of the most famous and award winning journalism is predicated on an investigative deception that led to access to a commercial, governmental, or other non-intimate enterprise. Deception and lies can effectively uncover criminal conduct, enhance transparency in government, expose race discrimination, and reveal animal abuse, among many other types of illegal conduct.[230] These are all matters of public concern, and enhancing citizen scrutiny of them advances public discourse and democracy in meaningful ways. Thus, investigative deceptions seem well-anchored in the promotion of self-governance.

Accordingly, limits on such "lies of access" run afoul of the principle that "debate on public issues should be uninhibited [and] robust,"[231] and, more generally, undermine democratic self-governance. As Dean Post has observed, "[t]he difficulty is that government control over factual truth is in tension with the value of democratic legitimation."[232] For example, exposing unsavory behavior by private Washington lobbyists[233] and uncovering racial steering in the housing

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226. Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 483 (2011).

227. *Id.*

228. *Id.*

229. *See, e.g.*, Alan K. Chen, *Instrumental Music and the First Amendment*, 66 HASTINGS L.J. 381, 385 (2015).

230. *See generally* KROEGER, *supra* note 131 (analyzing ethical debates surrounding journalists' use of deception and asserting the public service provided by such reporting should be celebrated).

231. Bartnicki v. Vopper, 532 U.S. 514, 534 (2001) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)) (recognizing a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open").

232. ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 29 (2012).

233. *See supra* notes 132–136 and accompanying text.

market[234] both clearly contribute to citizen self-governance in critical ways. Similarly, investigative deceptions in the agricultural context, like the sort of misrepresentations criminalized by Ag Gag statutes, promote democracy. Animal welfare has become an important national public policy issue. Investigations in this field regularly result in front page stories in major newspapers, televised investigative reports, and animal welfare bills introduced and debated at the federal, state, and local level.[235] The impact of Ag Gag laws in criminalizing investigative deceptions is to shield from public scrutiny matters that are indisputably of public concern because they directly inform discussion and debate on this important issue. Food safety, environmental, labor, and animal welfare issues that arise in a massively subsidized industry must fall near the top of any list of politically significant issues.[236]

### *B. Investigative Deceptions Promote the Broader Search for Truth*

Under another understanding, protection of speech from state interference is necessary to advance the search for "truth," which is defined as broader than political truth and extending to a more general theory of social enlightenment.[237] The notion of truth under this theory emphasizes the truth of ideas, rather than factual truths. A key notion here, and one that is often drawn upon in judicial decisions about speech, is that there is no such thing as a false idea, and that truth can ultimately only emerge through robust, open discourse in the so-called marketplace of ideas.[238]

Even beyond the legal and public policy questions that are placed into issue when exposés of the agricultural industry are conducted, undercover agricultural investigations inform significant moral and philosophical questions relevant to the broader search for

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234. *See supra* notes 168–187 and accompanying text.

235. *See, e.g.*, Michael Moss, *In Quest for More Meat Profits, U.S. Lab Lets Animals Suffer*, N.Y. TIMES, Jan. 20, 2015, at A1; Stephanie Strom & Sabrina Tavernise, *Animal Rights Group's Video of Hens Raises Questions, but Not Just for Farms*, N.Y. TIMES, Jan. 9, 2015, at B3.

236. Sims, *supra* note 196, at 537; *see also* Animal Legal Def. Fund v. Otter, No. 1:14-CV-00104-BLW, 2015 WL 4623943, at *8 (D. Idaho Aug. 3, 2015) ("[T]he lies used to facilitate undercover investigations actually advance core First Amendment values by exposing misconduct to the public eye and facilitating dialogue on issues of considerable public interest.").

237. JOHN STUART MILL, ON LIBERTY 91–92 (Yale University Press, 2003) (1859); JOHN MILTON, AREOPAGITICA 4–5 (1644); *see also* Eugene Volokh, *In Defense of the Marketplace of Ideas/Search for Truth as a Theory of Free Speech Protection*, 97 VA. L. REV. 595, 596–98 (2011) (arguing that government regulation of ideas in the marketplace would lessen the public's belief in the idea because contrary ideas challenging thoughts is how we decide what is truthful or not).

238. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.").

truth protected by the First Amendment. For example, while some might believe that agricultural animals are merely unfeeling, unthinking forms of property, like tractors or barns, others believe that any use or exploitation of animals for human gain is immoral.[239]

While there is certainly an overlap between this moral discourse and the public policy debates on related issues, the search for truth in the sense of social enlightenment is also advanced by the information produced by investigative deceptions. Again, to take agricultural investigations as an example, such lies serve to expose the hidden conduct of commercial agricultural operations. These revelations may affect the public's thinking about the morality of modern agricultural practices. While an investigator cannot control the message that her videos convey, one can be sure that she is prompting the kind of reflection that shapes public opinion.[240] Certainly the same could be said about investigations in other fields. Thus, under the truth serving theories of the First Amendment, investigative deceptions may be powerfully justified.[241]

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239. *See, e.g.*, GARY L. FRANCIONE, ANIMALS AS PERSONS: ESSAYS ON THE ABOLITION OF ANIMAL EXPLOITATION 3–21 (2008) (arguing that how humanity treats nonhumans does not matter in the debate for animal rights because the more salient issue is that humanity treats nonhumans as property in the first place); PETER SINGER, ANIMAL LIBERATION: THE DEFINITIVE CLASSIC OF THE ANIMAL MOVEMENT 94 (First Harper Perennial ed. 2009) (advocating the end of "all exploitation of sentient animals").

240. *ASPCA Research Shows Americans Overwhelmingly Support Investigations to Expose Animal Abuse on Industrial Farms*, ASPCA (Feb. 17, 2012), http://www.aspca.org/about-us/press-releases/aspca-research-shows-americans-overwhelmingly-support-investigations-expose [http://perma.cc/L6BS-UXNL].

241. We distinguish this argument from claims that lies may be morally necessary not because they lead to truth, but because they advance morality at either the individual or societal level. *See, e.g.*, Varat, *supra* note 7, at 1122 (examining "whether the First Amendment might impose limits on the imposition of . . . liability for lies used to secure publishable information that is both true and potentially of great public importance"); Wright, *supra* note 7, at 1143–44 (arguing that people lying with reasonable frequency has yet to sabotage human verbal communication).

Moreover, lies may even enhance society's ability to deliberate about truth over the long run. As Wright observes:

> Unquestionably, to lie to anyone, including an interrogating slave hunter or Nazi officer is, ordinarily, to fail to further the interrogator's true understanding of where his innocent quarry may be found. But on the other hand, such a lie (at least where successful), may over time promote the moral truths of the real consequences of slavery–ethnic and religious extermination, and genocide. Also to be factored in are such truths that the liar, the liar's family, and the sheltered slaves or Jews might later have discovered and perhaps shared. To obstruct the social systems of chattel slavery or Nazism, insofar as either amounts distinctively to a truth-suppressive institution, furthers the promotion of the truth.

Wright, *supra* note 7, at 1157–58.

### *C. Investigative Deceptions Promote Individual Autonomy*

The third widely cited First Amendment theory argues that the function of free speech is to promote individual autonomy or self-realization. The autonomy theory focuses not on the value of speech to the broader society, but on its enhancement of the speaker's and listener's liberty. Thomas Scanlon defined autonomy as necessitating the protection of an individual's freedom to engage in self-determination in forming his or her own opinions and beliefs.[242]

While autonomy arguments are probably the least weighty justification for First Amendment coverage of lies, even here a case can be made. Laws barring investigative deceptions interfere with the autonomous choices of journalists, government agents, and activists to choose how to identify themselves in the context of an undercover investigation. Autonomy arguments have tended to focus on the freedom of the speaker to determine his or her own feelings, beliefs, and thoughts without government interference rather than on the liberty to frame (truthfully or falsely) one's identity. In that sense, lying does not obviously serve the goal of autonomy. Still, there are arguments that might focus more on the way that lies may promote the autonomy of self-identity, whether it be for the purpose of individual self-esteem ("I am the *best* law professor in the world"), to gain respect from others ("I volunteer at the soup kitchen *every* week"), or to gain access to an area where one believes illegal conduct may be occurring ("I am not affiliated with any group antagonistic to your industry").

David Han has suggested that what he calls individual "self-definition" is an important aspect of autonomy that ought to be recognized under First Amendment doctrine.[243] Thus, sometimes, autobiographical lies may be a form of speech protected as a means of promoting individual autonomy. As he observes, "Under any basic conception of autonomy . . . a fundamental component of being an autonomous individual is exercising control over who you are—and who you are is, to a significant extent, a function of who you *define yourself to be* to others."[244] Han's theory could offer an alternative basis for

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242. Scanlon, *supra* note 23, at 215. In later work, Scanlon modified his views about speech and autonomy. T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 531–35 (1979). Other autonomy theorists take a slightly broader view that includes the protection of the individual's ability to develop his or her powers and abilities and to control his or her own destiny through the autonomy of decision making. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

243. David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 92 (2012).

244. *Id.* at 99.

understanding the Court's decision in *Alvarez*.[245] Alvarez provided a biographical summary of his career after being elected to a local political position and he claimed to have served in the military and to have won the Congressional Medal of Honor.[246] None of this was true, but the Court held that such lies were protected speech even though they had seemingly minimal truth or governance value.

Consistent with this view, R. George Wright has suggested that lying might be better examined as part of a broader moral context, in which lies might advance personal autonomy and liberty in ways that supersede their moral costs.[247] Analyzing lies in the historical context of an imagined lie to a fugitive slave hunter or Nazi officer seeking to find Jews during the Holocaust, Wright argues that lies might have moral value in advancing the autonomy of the liar, and those she seeks to protect from harm.[248] "The lie may be instead motivated by a sense of the equal or irreplaceable value and infinite dignity of persons, or even by genuine concern for the questioner's moral or spiritual well-being."[249] At least in the context of Ag Gag laws, the same moral claim could be made for activists seeking to promote the dignity and autonomy of non-human animals, a central tenet of many animal rights groups.[250]

Balanced against these arguments is the countervailing loss of autonomy potentially experienced by the listener. This argument is often used to explain why lies ought not to be protected under the First Amendment.[251] Derived from the writings of Immanuel Kant and other moral philosophers, this claim suggests that lies are morally problematic because they deprive the listener of the very same autonomy that free speech is designed to promote.[252] Kant was

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245. United States v. Alvarez, 132 S. Ct. 2537, 2542 (2012).

246. *Id.* at 2542.

247. Wright, *supra* note 7, at 1142 ("The obvious and quite substantial moral benefits of 'benevolent' lies should also be taken into account.").

248. *See id.* at 1145–46.

249. *Id.* at 1146.

250. *See, e.g.*, SINGER, *supra* note 239, at 239–40 (arguing that attempts to distinguish humans from animals based on the "intrinsic dignity of human beings" disregard a lack of actually relevant distinguishing characteristics).

251. *See* Varat, *supra* note 7, at 1114 ("[T]he First Amendment's protection against government efforts to prevent persuasion rests on respect for people's autonomy. Lies disrespect autonomy so fundamentally that they can lay no claim to that protection."); Wright, *supra* note 7, at 1143 (explaining the Kantian principle that "lying whenever a lie is advantageous . . . would sabotage the credibility of assertions . . . and appeal of the cultural institution of making and paying attention to verbal assertions").

252. Wright, *supra* note 7, at 1145 ("The first inherent disvalue is the immediate restriction of the deceived's freedom.") (quoting Joseph Kupfer, *The Moral Presumption Against Lying*, 36 REV. METAPHYSICS 103, 103 (1982)).

something of a truth "absolutist" in that he rejected an instrumental theory under which lies could ever be understood in context as socially valuable.[253] As David Strauss has written:

> [The] Kantian account gives relatively clear content to the notion that lying is wrong because it violates human autonomy. Lying forces the victim to pursue the speaker's objectives instead of the victim's own objectives. If the capacity to decide upon a plan of life and to determine one's own objectives is integral to human nature, lies that are designed to manipulate people are a uniquely severe offense against human autonomy.[254]

A couple of factors might mitigate the concern over listener autonomy in the context of investigative deceptions used to gain access to private, commercial business operations. First, the employer or fellow employee who is lied to and allows access to a commercial facility is unlikely to be directly harmed by the lie in any material way. That is, to the extent that her autonomy is lost by being persuaded to permit an undercover investigator to enter the facility, it is not a personal loss, as it would be if her individual privacy were somehow compromised by the exchange. Lies that facilitate access to intimate, personal details may very well work too much harm to the listener's autonomy to be tolerated by the autonomy theory.[255] One could argue that the business's autonomy is harmed by the lie insofar as it has lost complete control over its property. But it is not clear that a conception of autonomy grounded in an indiscriminate right to be free from whistleblowers and exposés ought to be taken seriously. As long as there are limits on collecting obviously protected information such as trade secrets or tax records, the harm of that autonomy loss is minimal or non-existent. Moreover, there may even be an "unclean hands" argument that where unsavory or illegal conduct is occurring and the business's employees are arguably complicit (or vicariously responsible), the loss of listener autonomy that occurs when an

253. *Id.* at 1143.

254. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 355 (1991)*; see also* C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 910 (2002) ("With lies, the speech operates by tricking the other, purposefully undermining the other's capacity for successfully autonomous acts."). Other leading scholars have rejected the view that lying harms the autonomy of listeners in all contexts. Wright, for example, suggests that a lie might paradoxically enhance rather than diminish the *listener's* autonomy. Wright, *supra* note 7, at 1145–46. He observes, "[c]ould not a lie to a murderous SS officer also promote the rationality, personhood, or dignity of that SS officer over the longer term?" *Id.* at 1143.

255. In addition, there may be circumstances in which the listener's individual autonomy is compromised by an investigative lie because it is tantamount to coercion over their personal will. *Cf.* Norton, *supra* note 121 (discussing when lies by law enforcement officers, which are generally permissible, cross over to being impermissibly coercive).

investigator lies to gain access to the property is at least less of a concern than it would be in other contexts.[256]

## V. DOCTRINAL IMPLEMENTATION OF FIRST AMENDMENT PROTECTION OF HIGH VALUE LIES

The previous section demonstrates that investigative deceptions are a type of speech that should be covered by the First Amendment. The remaining task is to describe how current doctrine would apply to laws that regulate or prohibit such lies, including Ag Gag statutes. In the following sections, we offer a thorough discussion of the appropriate level of scrutiny and identify the key limiting principles applicable to First Amendment protections for high value lies.

### *A. Considering and Applying the Proper Level of Scrutiny for Laws Criminalizing Investigative Deceptions*

#### 1. Strict Scrutiny

##### *a. Reading the* Alvarez *Plurality Tea Leaves*

*Alvarez* is the lone Supreme Court decision to directly address First Amendment protection of lies. Because it is a fractured opinion, the status of lies under the Constitution remains obscured. Six Justices clearly held that some lies—even intentional, self-promoting lies—constitute protected speech.[257] Likewise, these same six Justices recognize that only lies that are likely to cause legally cognizable or tangible harm to the listener fall outside of the First Amendment as unprotected speech.[258] Indeed, even the three dissenting Justices acknowledged that only those lies that "inflict real harm and serve no legitimate interest" fall outside of the protection of the First Amendment.[259] On this point, then, there is unanimity—lies that cause no real harm are protected.

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256. Critics might argue that the unclean hands response offers a justification for lying that is entirely ex post. That is, an investigator would not know at the time she entered a facility whether she would necessarily find unlawful or unethical behavior on the premises, yet will have already compromised the listener's autonomy. While we acknowledge this concern, we maintain that the notion that the listener is affected entirely in a business or professional context still mitigates the autonomy concerns even if it does not eliminate them altogether.

257. United States v. Alvarez, 132 S. Ct. 2537, 2544–45 (2012).

258. *Id.* at 2545; *id.* at 2554 (Breyer, J., concurring in the judgment). For a thorough discussion of what constitutes a "cognizable harm," see *infra* Section V.B.

259. The dissenters' disagreement, then, was not over the relevant legal principles but over their application to the Stolen Valor Act. In their view, lies about receiving the Medal of Honor were valueless and caused a tangible diminution to the prestige of military awards. *Alvarez*, 132

The question of whether the Constitution requires strict or merely heightened scrutiny of government regulation of lies, however, is less clear. Because *Alvarez* includes no majority consensus on the applicable standard of review, lower courts must toil through the impenetrable rule from *Marks v. United States*, which instructed that non-majority opinions will generally create precedent.[260] Under the *Marks* rule, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds."[261] Of course when it comes to judicial reasoning, the term "narrow" is rarely illuminating. For example, when the fundamental difference between the opinions concurring in the result is a core doctrinal disagreement, such as determining the applicable level of scrutiny, it may very well be that the *Marks* rule does not help us discern a single clear holding on that question.[262] The difference between intermediate and strict scrutiny is arguably one of kind, not of breadth, and so it is simply not the case that one opinion is necessarily narrower than the other.[263] *Marks*'s narrowest grounds rule cannot and does not stand for the view that when the Court is fractured, the holding constitutes the opinion that articulates the most parsimonious view of constitutional rights.[264]

Accordingly, while *Alvarez* reflects a clear majority rejecting the notion that lies are categorically unprotected by the First Amendment, it does not squarely answer the question of the degree of scrutiny that

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S. Ct. at 2558 (Alito, J., dissenting). The dissent explained that there is a "long tradition of efforts to protect our country's system of military honors." *Id.* at 2557–59 (noting a "proliferation of false claims concerning the receipt of military awards" and describing the "substantial harm" by, among other things, "debas[ing] the distinctive honor of military awards").

260. Marks v. United States, 430 U.S. 188, 193 (1977).

261. *Id.* at 193.

262. Justin Marceau, *Plurality Decisions: Upward-Flowing Precedent and Acoustic Separation*, 45 CONN. L. REV. 933, 994 (2013) (explaining the *Marks* rule's proper application).

263. *See, e.g.*, Jackson v. Danberg, 594 F.3d 210, 220 (3d Cir. 2010) (recognizing that, in the absence of a true commonality of reasoning, there is no binding holding from the Supreme Court); United States v. Gerke Excavating, Inc., 464 F.3d 723, 724 (7th Cir. 2006) (concluding that a plurality holding is "the narrowest ground to which a majority of the Justices would have assented if forced to choose").

264. There is no serious argument that "narrowest" is synonymous with the stingiest vision of the Constitution. Take, for example, the famous plurality decision addressing the proper constitutional test for assessing a method of execution in *Baze v. Rees*, 553 U.S. 35 (2008). There is considerable debate regarding what is the narrowest opinion, but *no one* has argued that the narrowest construction of the Eighth Amendment—the opinion of Justices Thomas and Scalia—is the controlling precedent simply because it would result in the fewest successful challenges. The narrowest grounds calculation must consider whether there is some core analytic overlap between the opinions, and, if not, identify the opinion that is most case-specific and factually driven.

applies. A prior study of the Court's application of the *Marks* rule suggests that when, as in *Alvarez*, there is no true common denominator of reasoning, no true narrowest grounds, the Court tends to defer to the lower courts in how to define the precedent from a prior Supreme Court plurality.[265] Under this view, the precedential value of a plurality may be upward flowing from lower courts to the Supreme Court.[266] Notably, since *Alvarez*, a number of lower courts have held that strict scrutiny is the proper level of scrutiny for government actions prohibiting lies.[267]

### *b. Restrictions on High Value Lies Warrant Strict Scrutiny*

The first two-thirds of this Article develops the claim that not all lies are equal and that lies told in order to gain access to private, though non-intimate, information of considerable public concern ought to be recognized as distinct from other mistruths. These investigative deceptions—misrepresentations that made the work of Upton Sinclair and his modern day heirs possible—should receive the highest level of constitutional protection. Insofar as investigative deceptions advance the goals of self-governance, truth, and autonomy undergirding the freedom of speech, such lies deserve correspondingly more protection than lies that are protected only because the failure to do so might chill otherwise protected speech. That is to say, the protection of instrumentally valuable lies surely must be stronger than the protection of lies that are of no value.[268] Accordingly, whether *Alvarez* prescribes strict scrutiny for *all* lies is of no moment when assessing whether *high value* lies are deserving of strict scrutiny. Indeed, in a decision addressing the constitutionality of a law that criminalized lies about ballot initiatives, the Eighth Circuit held that because the law in

265. Marceau, *supra* note 262, at 994.

266. *Id.*

267. *See, e.g.*, Am. Freedom Def. Initiative v. Se. Pa. Transp. Auth., No. 14-5335, 2014 WL 6676517, at *4 (E.D. Pa. Nov. 25, 2014) (recognizing that when the lies at issue are "political expression," the speech is "entitled to even greater First Amendment protection than the speech at issue in *Alvarez*"); *In re* Jud. Campaign Compl. Against O'Toole, 141 Ohio St. 3d 355, 363 (2014) (assuming the application of strict scrutiny and observing "*Alvarez* does not consider whether the state can *ever* have a compelling interest in restricting false speech solely on the basis that it is false so that such prohibition could withstand strict scrutiny."); O'Neill v. Crawford, 132 Ohio St. 3d 1472, 1473 (2012) ("The *Alvarez* court . . . recognized that not only must the restriction meet the 'compelling interest test,' but the restriction must be 'actually necessary' to achieve its interest."); State *ex rel.* Loughry v. Tennant, 732 S.E.2d 507, 517 (W. Va. 2012) (quoting the plurality opinion from *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012), for the view that "[W]hen the Government seeks to regulate protected speech, the restriction must be the least restrictive means among available, effective alternatives.").

268. *See* Norton, *supra* note 7, at 163 (arguing that "[t]he very ubiquity and diversity of lies thus supports a presumption that lies are fully protected by the First Amendment and that government therefore generally may not regulate them unless it satisfies strict scrutiny.").

question regulated politically salient speech on the basis of its content, it must be subject to strict scrutiny.[269] This reasoning is consistent with a wide range of First Amendment doctrine and theory.

i. Strict Scrutiny Under Standard First Amendment Doctrine

Even setting aside for a moment *Alvarez* and other lie-specific case law, it would be "puzzling"[270] to conclude that laws banning investigative deceptions would not receive strict scrutiny. Any law that is content discriminatory is subject to the most exacting standard of review,[271] which requires that the government show that the law in question is the least restrictive means of serving a compelling governmental interest.[272]

Taking Ag Gag laws as an example, laws that criminalize investigative deceptions are indisputably content-based. For example, outlawing only parodies or jokes but not more serious types of expression is a content-based limitation.[273] Similarly, for the law to distinguish between truthful and untrue speech is to favor one form of content over another.[274] If we have successfully made the case that investigative deceptions are not categorically exempt from constitutional scrutiny, then Ag Gag laws and their ilk are content based on the distinction between true and false content alone.[275]

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269. 281 Care Comm. v. Arneson, 638 F.3d 621, 636 n.3 (8th Cir. 2011) (summarizing Supreme Court doctrine and recognizing that speech limits—even if indirect, such as limits on tort verdicts—that limit speech "about matters of public concern" are subject to the highest scrutiny) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)); *id.* at 636 ("We do not, of course, hold today that a state may never regulate false speech in this context. Rather, we hold that it may only do so when it satisfies the First Amendment test required for content-based speech restrictions: that any regulation be narrowly tailored to meet a compelling government interest.").

270. Erwin Chemerinsky, *The First Amendment and the Right to Lie*, ABA JOURNAL (Sept. 5, 2012, 1:57 PM), http://www.abajournal.com/news/article/the_first_amendment_and_the_right_to_lie/ [http://perma.cc/YR3Q-4BAK] (summarizing the *Alvarez* concurrence suggesting intermediate scrutiny).

271. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641–42 (1994).

272. *Id.* at 668. *See also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) (noting that to impose strict liability for false statements would have a "chilling" effect on other constitutionally valuable speech).

273. *Turner Broad. Sys., Inc.*, 512 U.S. at 680.

274. Analogous reasoning compels the conclusion that strict scrutiny applies to investigative deceptions, like those criminalized by Ag Gag statutes. In *Animal Legal Defense Fund v. Otter*, the only reported decision in a challenge to an Ag Gag law, Judge Winmill denied a motion to dismiss by explaining, in relevant part, that laws criminalizing lies are content-based and warrant the application of strict scrutiny. 44 F. Supp. 2d 1009, 1023–24 (D. Idaho 2014). *But see* SHIFFRIN, *supra* note 7, at 125–29 (arguing that laws regulating untruthful speech are not content based, but rather distinguish violations of the law based on the speaker's state of mind).

275. *Animal Legal Def. Fund*, 44 F. Supp. 2d at 1023–24.

Moreover, Ag Gag laws are content-based for a second, independent reason. In addition to discriminating between truthful and false speech, these laws discriminate based on the content of speech because they specifically apply only to statements made in the context of gaining access to agricultural facilities. The reason the Court imposes heightened scrutiny on viewpoint and content discriminatory laws is that such laws raise serious concerns that the government is using its power to control and distort public discourse.[276] State action that protects agricultural facilities, but not other private business enterprises, suggests that the government wishes to skew the debate about agricultural practices by steering public scrutiny away from this particular range of topics.[277] A generally applicable law prohibiting all investigative deceptions would present a different constitutional question.[278] But Ag Gag laws criminalize only deceptions used to gain access and report on a single, massive and publicly important industry; indeed, in the rural states where these laws are most common, agriculture may be the largest industry in the state.[279] These same legislatures have not generally prohibited misrepresentations made to gain access to child care facilities, large banks, workplaces where labor law violations may be occurring, or companies that dispose of toxic

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276. *See*, *e.g.*, Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (stating that content discrimination "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace").

277. *See* Animal Legal Def. Fund v. Otter, No. 1:14-CV-00104-BLW, 2015 WL 4623943, at *12 (D. Idaho Aug. 3, 2015) ("[T]he State fails to provide a legitimate explanation for why agricultural production facilities deserve more protection from these crimes than other private businesses."). As stated earlier, the Court has recently made it clear that a law's underlying purpose is relevant to whether it is content-based. Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2228 (2015).

278. Generally applicable laws that have only an incidental effect on speech activities typically are subject to intermediate scrutiny. United States v. O'Brien, 391 U.S. 367, 376–77 (1968). Accordingly, traffic laws and the like are common examples of laws that, though they may impede a journalist's efforts to gather a story, are not unconstitutional. By contrast, laws that criminalize the very means of gathering a story (misrepresentation) and do so in a manner that distinguishes among the type of targets for investigations can hardly be considered generally applicable laws. If a state enacted a law that banned all investigative misrepresentations across all industries, serious First Amendment concerns would still arise, both because the law threatens to be substantially overbroad and because it has much more than a merely incidental effect on expression. This scenario has recently become a reality. The state of North Carolina recently enacted, over the Governor's veto, a statute creating a sweeping civil tort claim for all employers who are the subjects of investigative actions on the part of their employees. 2015 N.C. SESS. LAWS 50.

279. *See* Chris Kirk, *Maps: Agriculture in the U.S. and Around the World*, SLATE.COM (June 19, 2012 3:49 PM), http://www.slate.com/articles/technology/future_tense/2012/06/a_map_of_farmers_in_the_u_s_and_world_.html [http://perma.cc/G8B4-DTP7] (showing the percentage of farmers per thousand people in each U.S. county).

waste, just to name a few examples of other regulated businesses where undercover investigations have been conducted.

Ag Gag laws single out the agricultural industry for protection against misrepresentations. Both the distinction between truth and falsity, and the effort to safeguard a single industry from investigative reporters and activists, thereby driving certain information from the marketplace of public discourse, are independently sufficient to trigger strict scrutiny for Ag Gag laws.

That is not to say that investigative deceptions can never be criminalized. A journalist's efforts to expose national security matters or trade secrets may well constitute the sort of lie for which strict scrutiny is satisfied.[280] A trickier question would be the use of deception to gain access to a facility or process by someone who does not know that trade secrets or other interests would be exposed or injured. Assuming trade secret laws and other privacy protections of this sort in the commercial context can withstand constitutional scrutiny,[281] we think that the proper standard in assessing liability under the laws in such circumstances would be the public figure defamation standard.[282] That is, if the investigator is malicious or reckless in revealing or benefitting from such protectable interests, then the lies told to gain access and the publication of such information can be criminalized. In this way, persons who lie with the intent of exposing a competitor's trade secrets or to cause physical damage to the facility can be punished without risking First Amendment injury. By contrast, most lies that result in the exposure of unsavory or illegal industry practices but do not compromise intellectual property or trade secrets will be protected insofar as they are not made with the intent or reckless disregard of the risk of exposing trade secrets or similarly protectable interests.[283] Upton Sinclair may have gained access to things that the slaughterhouse owner wished he had not seen, but he did not expose

280. Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 63–64 (2014):

> Privacy regulations are rarely incidental burdens to knowledge. . . . Although the First Amendment creates a barrier to the enforcement of new and existing information laws, that barrier is not insurmountable. It simply requires, as it should, a lively inquiry into whether the harms caused by the collection of information are probable enough, and serious enough, to outweigh the right to learn things.

281. *Id.*

282. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964).

283. To the extent that trade secret liability is defined too broadly or generically, these laws would themselves fail First Amendment scrutiny. And if deception is used to access a facility that contains trade secrets or the like, then certainly the investigator or reporter can take precautions to avoid revealing any of these protected secrets, just as any other employee would do. A failure to take such precautions might justify liability under a statute punishing reckless disclosures of such information.

(nor did he intend or care to expose) any properly protected intellectual property.

### ii. Strict Scrutiny under *R.A.V. v. City of St. Paul*

An alternative doctrinal approach to examining the constitutionality of Ag Gag laws and other prohibitions on investigative lies would not even necessitate the prior conclusion that investigative deceptions are speech covered by the First Amendment. In *R.A.V. v. City of St. Paul*, the Supreme Court held that laws regulating even *unprotected* speech must be subjected to strict scrutiny if they discriminate within that category of unprotected speech on the basis of content.[284] In that case, the defendant was charged under a city ordinance that prohibited the display of a symbol that the defendant has reason to know "arouses anger, alarm or resentment in others *on the basis of race, color, creed, religion or gender*" after he allegedly burned a cross on the property of an African-American family.[285] The state courts that had interpreted the ordinance had narrowed its construction to cover only conduct that was itself unprotected speech in the form of fighting words as defined by the Supreme Court in *Chaplinsky v. New Hampshire*.[286]

Notwithstanding the assumption that the ordinance only prohibited fighting words, the Court held that the ordinance was facially unconstitutional because "it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[287] As explained by Justice Scalia,

> What [the cases announcing categories of unprotected speech] mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.[288]

The Court elaborated further by drawing on the example of unprotected defamation. "[T]he government may proscribe libel," it said, "but it may not make the further content discrimination of proscribing *only* libel critical of the government."[289] By similar reasoning, even if the government could criminalize lying in general (or lying to gain access

284. 505 U.S. 377, 383–84 (1992).
285. *Id.* at 380 (emphasis added).
286. *Id.* at 381.
287. *Id.*
288. *Id.* at 383–84.
289. *Id.* at 384.

more specifically), criminalizing lies to gain access and expose the conduct in only a single industry must be subject to strict scrutiny.

The regulation of lies by Ag Gag laws and similar statutes discriminates based on the type of facility sought to be accessed, and in some instances based on whether the individual intends to help or hurt the industry.[290] Thus, even if investigative deceptions might be generally proscribable, these laws act as content-based discrimination "unrelated to their distinctively proscribable content."[291]

To make this point more concrete, consider that the *Alvarez* plurality in dicta suggests that not all lies will constitute protected speech. In particular both the plurality and the concurring opinion single out lies that harm another party, such as fraudulently obtaining employment for which one is not qualified, as an example of the type of lie that may be proscribed.[292] As the plurality explains, "[w]here false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment," the First Amendment generally provides no protection.[293] On its face this passage seems to provide support for the view that laws criminalizing misrepresentations to gain employment are not protected by the First Amendment.[294] But when the prohibition is industry specific (or motivated by speech suppressing impulses[295]), strict scrutiny is required.

The crux of *R.A.V.*'s analysis is that while the government may suppress certain categories of speech because of the harms that are uniquely associated with their expression, it may not discriminate within those categories because of its hostility toward its non-proscribable content or viewpoint. If it is permissible to criminalize all

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290. *See, e.g.*, IDAHO CODE ANN. § 18-7042(1)(c) (West 2015) (criminalizing lies used to gain employment but only if the individual intends to cause (economic) harm to the agricultural industry).

291. *R.A.V.*, 505 U.S. at 383–84.

292. United States v. Alvarez, 132 S. Ct. 2537, 2547 (2012).

293. *Id.*

294. Obviously, criminalizing lies to gain access unrelated to employment are unaffected by this dicta from *Alvarez*. Such lies are criminalized by Ag Gag statutes. *See* IDAHO CODE ANN. §18-7042(1)(a)–(c). More importantly, as we have already argued, we think that this superficial reading of *Alvarez* is misguided. In the context of investigations, one is *not* exaggerating credentials to gain employment and so the harm, if any, suffered by the business is not caused by the lie (understating one's education for example). Read in context, the passage about gaining employment in *Alvarez* is clearly referring to attempts to defraud an employer by securing wages from a job for which one is not qualified.

295. *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 452 (1996) (recognizing that the core inquiry in assessing whether a law is content based is ferreting out improper legislative motive). *See also* Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 85–87 (2003) (arguing for an expanded application of First Amendment overbreadth law to uncover discriminatory government motives).

threats, but impermissible to criminalize only threats based on a particular viewpoint, it is flawed to assume that because (hypothetically) all lies to gain employment may be criminalized, lies to gain employment in one particular industry to expose misconduct can be criminalized.

Even were we to concede that false statements of fact are a particularly worthless and harmful category of expression in the context of gaining employment or access, the state would still be constitutionally forbidden to criminalize lies in a selective manner reflecting its interest not in promoting truthfulness generally, but in inhibiting lies in a particular realm of public discourse.[296] As one leading First Amendment scholar has observed, "Singling out one or a small group of lies for government condemnation, while leaving others unregulated, signifies a 'realistic possibility that official suppression of ideas is afoot.'"[297]

### 2. Intermediate Scrutiny – High Value Lies as a Hybrid Speech Category

Although we think it less plausible, we consider an additional possibility, which is that laws targeting investigative deceptions might be subject to intermediate, rather than strict, scrutiny under First Amendment doctrine.[298] Justice Breyer's concurrence in *Alvarez* suggests a preference for intermediate scrutiny of laws regulating lies.[299] As discussed above, investigative deceptions like those criminalized by Ag Gag statutes are materially distinguishable from the sort of lie at issue in *Alvarez*, which did not touch upon issues of public concern. Thus, even if Justice Breyer's concurrence were viewed as the *Alvarez* holding on this question, his opinion would not necessarily be controlling in the context of high value, investigative deceptions. Nonetheless, even if intermediate scrutiny did apply, we think such laws are still vulnerable to invalidation.

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296. Although this type of discrimination differs slightly from content regulation about particular *ideas*, as in *R.A.V.*, it is the conceptual parallel of that decision. Ag Gag laws are not designed to address the distortion of truth in the same sense as, say, perjury laws, but rather are motivated by the government's desire to prohibit revealing information about a particular topic—the mistreatment of animals by commercial agriculture facilities. This is not just any run of the mill topic, but one that has been the subject of intense public discourse in recent years. Such laws regulate lies not for the sake of regulating falsity, but to protect big agriculture from public scrutiny.

297. Varat, *supra* note 7, at 1118 (citing R.A.V. v. St. Paul, 505 U.S. 377, 390 (1992)).

298. *See* Norton, *supra* note 7, at 183 (arguing that intermediate scrutiny is the appropriate standard for evaluating government regulation of some low value lies).

299. United States v. Alvarez, 132 S. Ct. 2537, 2552 (2012) ("[I]in this case, the Court's term 'intermediate scrutiny' describes what I think we should do.").

When a law is deemed content-neutral,[300] the Supreme Court employs a formulation of intermediate scrutiny drawn from its cases evaluating the constitutionality of content neutral regulations of the time, place, or manner of expression in public forums.[301] In these cases, the Court has said that such laws must be "narrowly tailored to serve a significant governmental interest," and they must "leave open ample alternative channels for communication of the information."[302] While this test is not as rigorous as strict scrutiny, it still imposes a substantial burden on the government in defending a law and is considered a form of heightened review.[303] Indeed, the Court's most recent invocation of intermediate scrutiny in *McCullen v. Coakley* is revealing.[304] Not only did the Court strike down a Massachusetts law that criminalized the mere conduct of standing (even without speaking or picketing) within 35 feet of the entrance to an abortion clinic, it emphasized that laws that impinge speech for content-neutral reasons will face exacting scrutiny.[305] The Court explained that laws designed to avoid the problems associated with speech are strongly disfavored:

> Even though the Act is content neutral, it still must be narrowly tailored to serve a significant governmental interest [and] [t]he tailoring requirement does not simply guard

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300. The analogy to the time, place, or manner cases is not a perfect one, of course, because as we have already argued, Ag Gag laws are inherently content-based. But intermediate scrutiny is applied in some other areas of First Amendment law as well, even where the laws arguably regulate based on content. Thus, it is possible that lies might be treated as a *sui generis* type of speech, like commercial speech. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 562–63 (1980) (distinguishing between the protections afforded commercial speech versus other speech).

301. Another version of intermediate scrutiny had previously emerged in cases examining the constitutionality of government regulations of expressive conduct. In those cases, the Court held that the regulation can only be upheld if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." United States v. O'Brien, 391 U.S. 367, 377 (1968). The Court has essentially acknowledged that time, place, or manner and speech/conduct tests are now the same standard. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991); Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298, 316 n.8 (1984); *see also* Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, the New Mass Media, and the Political Components of Culture*, 74 N.C. L. REV. 141, 167–70 (1995) (describing the Court's merger of the time, place, or manner test with the speech/conduct test as the "*Ward/O'Brien* rule"). Moreover, it is "the *Ward* statement of the test [that] has become the standard formulation." Bhagwat, *supra*, at 168. For a general discussion of the intermediate scrutiny test, see Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 190 (1983) ("The Supreme Court tests the constitutionality of content-neutral restrictions with an essentially open-ended form of balancing.").

302. *Ward*, 491 U.S. at 791 (quoting *Clark*, 468 U.S. at 293).

303. Bhagwat, *supra* note 301, at 169.

304. 134 S. Ct. 2518, 2530 (2014).

305. *Id.* at 2526, 2534–35.

> against an impermissible desire to censor. The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience. Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily "sacrific[ing] speech for efficiency."[306]

Accordingly, the application of intermediate scrutiny to laws targeting investigative deceptions would require the state to articulate and defend its interests in criminalizing such lies by showing that the regulation is narrowly tailored to serve an important government interest.

A general ban on all lies used for undercover access in an industry is surely too blunt a tool to survive such exacting scrutiny. Assuming, for example, the government interest were in preventing people from fraudulently obtaining employment and thereby performing jobs they are not qualified to carry out, there is no material harm arising from such conduct if the undercover investigator is actually *capable* of performing the job tasks at hand. Thus, the law could be more narrowly drawn to address misrepresentations that actually interfere with the employer's ability to hire employees capable of performing their assigned duties. In this way, laws that prohibit lying about having a law license or similar professional training would likely survive First Amendment scrutiny. A general ban on lies to gain employment (much less general bans on all misrepresentations to gain access, which include employment lies) would not likely survive intermediate scrutiny.

Similarly, if the state's interest is preventing the illegal acquisition of confidential information, such as trade secrets, a law could be narrowly drawn to regulate that conduct in particular. Indeed, most trade secret and intellectual property laws are likely constitutional for exactly this reason. By contrast, laws that are written as broadly as the Ag Gag statutes manifest an intention not to address legitimate interests in property or fraud prevention, but to criminalize the conduct of undercover investigators in order to suppress their speech.

Finally, intermediate scrutiny also requires that the law in question leave "open ample alternative channels" for the speech impinged by the law in question.[307] For any industry, but particularly in the agricultural industry, which has strongly advocated for laws protecting it from scrutiny by investigators, it is unlikely that any

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306. *Id.* at 2534 (quoting Riley v. Nat'l Fed'n of Blind of N.C., Inc., 487 U.S. 781, 795 (1988)).
307. *Id.* at 2522.

viable alternatives to undercover whistleblowing exist.[308] The lies are speech that facilitates the production of undercover videos showing the real time production of food. Merely pointing to the ability to protest on the street, distribute leaflets, or hold rallies is no answer to the law's ability to utterly foreclose access to investigations of the agricultural industry. There really is no ample alternative forum through which activists and journalists might carry out this type of expression, and thus, even under intermediate scrutiny, these Ag Gag laws would likely be found to be an unconstitutional infringement of expression.[309]

### *B. Limiting Principles—Cognizable Harm as a Precondition to Criminalizing Lies*

The previous discussion attempts to situate investigative deceptions within the Court's tiers of scrutiny for the First Amendment and concludes that strict scrutiny most likely applies to laws criminalizing such lies. But even if investigative deceptions are recognized as high value speech subject to strict scrutiny, it is important to note that the law would still leave the government ample room to regulate material misrepresentations that endanger identifiable and tangible privacy and property interests.[310] A critical

308. *See generally* Second Brief of *Amicus Curiae* the Idaho Dairymen's Association, Inc. Re: Plaintiffs' Motion for Partial Summary Judgment Filed on November 18, 2014, Animal Legal Def. Fund v. Otter, 2015 WL 4623943 (No. 1:14-CV-00104-BLW) (advocating for the upholding of Idaho's agricultural security legislation as, *inter alia*, a legislative judgment to protect the vulnerable agriculture industry over First Amendment rights used to do harm).

309. Ag Gag laws and similar statutes criminalizing investigative deceptions are also vulnerable to claims that they are unconstitutionally overbroad. The First Amendment overbreadth doctrine requires that laws be invalidated when they restrict significantly more speech than the First Amendment allows. Criminal statutes must be examined particularly carefully. Such laws are particularly dangerous from a First Amendment perspective because of their potential to chill important expression. Overbreadth law protects individuals who "may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." Gooding v. Wilson, 405 U.S. 518, 521 (1972). Ag Gag laws typically criminalize a wide range of conduct, some of which is not protected by the First Amendment (such as using force to enter, obtain records from, or obtain employment with an agricultural production facility), but a substantial amount of which is protected expression under the First Amendment, such as using misrepresentations to further an animal welfare investigation. Because the laws often prohibit any type of misrepresentation used to gain access to an agricultural operation, they reach a wide range of expression, including, but not limited to, stating a false need to use a restroom to gain access to a property and failing to disclose one's political affiliations. As such, they sweep well beyond the scope of conduct that may be constitutionally regulated. Moreover, a law is more likely to be deemed overbroad if it is impinging speech of particular political salience. Richard Fallon, *Making Sense of Overbreadth*, 100 YALE L.J. 853, 908 n.259 (1991).

310. *See* Animal Legal Def. Fund v. Otter, No. 1:14-CV-00104-BLW, 2015 WL 4623943, at *4 (D. Idaho Aug. 3, 2015) ("[L]aws against trespass, fraud, theft, and defamation already exist. These

piece of the doctrinal framework for understanding high value lies is developing a coherent set of limiting principles, which we attempt to do in this final section.

The most significant limiting principle is easily stated: lies that cause cognizable harm fall outside the ambit of the First Amendment's protection.[311] Both the plurality and Justice Breyer's concurrence in *Alvarez* recognized this as a limit on the protections afforded to lies by noting variously that the lie must not produce "legally cognizable harm"[312] or be used to gain "material advantage,"[313] and that the lie must not have caused "actual injury"[314] or "specific harm."[315] Under this view, the government may not criminalize lying "in contexts where harm is unlikely."[316] As we discuss in this section, it is, therefore, necessary to define with some specificity what constitutes a legally cognizable harm in the context of investigative deceptions. Regulations of lies that cannot fairly be regarded as the legal cause of an injury are protected speech and subject to either strict or intermediate scrutiny, depending on the analysis above.

As Professor Varat has observed, there are two main categories of potential interests that might limit First Amendment protection for lies designed to secure truthful information. The first possible interest would be in protecting the listener from "psychological or pecuniary harm" that the investigative deception caused "directly and independently."[317] Second, there is a potential indirect harm caused by "the subsequent publication of the accurate information obtained as the

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types of laws serve the property and privacy interests the State professes to protect through the passage of § 18–7042, but without infringing on free speech rights.").

311. *But see* Norton, *supra* note 7, at 187–99 (dividing harms into "second-party" (i.e., listener) and "third-party" (i.e., broader social) harms).

312. United States v. Alvarez, 132 S. Ct. 2537, 2545 (2012).

313. *Id.* at 2548. Read in context, it seems clear that the phrase "material gain" as used in *Alvarez* is meant to be a synonym for fraud or injury-causing lie. Material gain in this context implies that the prevaricator is deriving some tangible benefit from the deceived party—that is to say, it is a species of unjust enrichment. By way of illustration, it is unpersuasive to suggest that Dateline NBC gains a material advantage when it airs a report that exposes rampant child abuse by a politician or daycare facility. Any gain is from exposing truth, not from taking something from the deceived party. *See also* State v. Melchert-Dinkel, 844 N.W.2d 13, 21 (Minn. 2014) (holding that the state could not premise the prosecution of a defendant who had misrepresented his identity online to others and induced them to commit suicide on the fraud exception to the First Amendment because he had not "gained a material advantage or valuable consideration from his false speech").

314. *Alvarez*, 132 S. Ct. at 2554 (Breyer, J., concurring).

315. *Id.* at 2556; *see also id.* at 2255 (noting that "proof of injury" is a general requirement for outlawing lies).

316. *Id.* at 2555.

317. Varat, *supra* note 7, at 1122–23.

result of the lie."[318] We address each of these categories in the following sections.

### 1. Possible Direct Harms

There are, of course, easy examples at both extremes of the spectrum of direct harms caused by lies. Defamation of private persons causes financial and reputational harm and falls beyond the scope of First Amendment protection.[319] The same is true of common law fraud, which has actual injury as an element.[320] Likewise, crimes such as perjury or lying to government officials impose materiality requirements, which typically require a showing of some likely injury or harm flowing from the lie,[321] and in any event lies that may cause our democratic system of governance to falter are always safely categorized as causing harm. On the other end of the spectrum fall white lies and puffery. Intentionally lying and telling a co-worker that he does good work or that he always dresses professionally, for example, is clearly protected speech.[322]

It is not terribly difficult to fit laws barring investigative deceptions such as Ag Gag laws into this framework. To the extent these laws impose criminal penalties on misrepresentations to gain access to business operations, and do so without reference to any tangible harm caused by the misrepresentations themselves, the First Amendment protects the lie. The laws criminalize lies to gain the access itself. Any other harm that occurs during the course of the entry—whether it be theft, destruction of property, or loss of trade secrets—is independent from and separately punishable under distinct criminal provisions. Moreover, the sort of purely psychic injury that flows from having

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318. *Id.* at 1123.

319. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760–61 (1985).

320. *Alvarez*, 132 S. Ct. at 2545.

321. Materiality in this context is often defined as lies which could have affected the outcome of a governmental proceeding. COLO. REV. STAT. ANN. § 18-8-501(1) (West 2014) (defining a materially false statement as "any false statement . . . which could have affected the course or outcome of an official proceeding, or the action or decision of a public servant, or the performance of a governmental function"). More importantly, it is recognized that perjury undermines the credibility and legitimacy of our justice system, thus causing a grave social harm. *See, e.g.*, Nicole Oelrich Tupman & Jason Tupman, *No Lie About It, the Perjury Sentencing Guidelines Must Change*, 59 S.D. L. REV. 50, 65 (2014); John L. Watts, *To Tell the Truth: A Qui Tam Action for Perjury in A Civil Proceeding Is Necessary to Protect the Integrity of the Civil Judicial System*, 79 TEMP. L. REV. 773, 785 (2006) ("[T]he judicial branch has a genuine interest in addressing the harm that perjured testimony causes to the civil judicial system.").

322. *See, e.g.*, United States v. Alvarez, 638 F.3d 666, 673 (Kozinski, J., concurring in denial of rehearing en banc) (cataloguing a long list of such lies and identifying the lie as an essential feature of modern communication).

employees that may not like you (or your way of business) is not the sort of cognizable harm that the Constitution recognizes as justifying restrictions on speech.[323] Surely an employee's false attempts to suggest that he enjoys his boss's company cannot be criminalized, nor can any other form of non-loyalty that does not manifest itself in concrete financial or other injuries.

### *a. Trespass*

One likely basis for a legitimate assertion of harm to a protected interest would be the property right to possession. One who enters through deception, so the argument goes, would be harming the exclusive possessory interests of an agricultural operations owner in ways analogous to a trespass.[324] Notably, however, it is axiomatic under common law that civil trespass complainants need not show actual damages as a precondition of liability.[325] Liability for trespass will presumptively only result in the imposition of nominal damages, and any recovery of more than that requires a showing of actual damage.[326] That is to say, even if one strains to categorize entry gained through deception as trespass (a view we reject and regard as inconsistent with the weight of common law authority),[327] because the First Amendment protects lies unless there is a showing of actual harm, trespass claims could not be constitutionally enforced against those who access private property through investigative misrepresentations.[328] To the extent

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323. *See Alvarez*, 132 S. Ct. at 2545 (cataloguing the types of cognizable harms that can justify regulation of lies without violating the First Amendment).

324. 17 WASH. PRAC., REAL ESTATE § 10.2 (2d ed. 2014) (consent can be a defense to trespass, "provided it was not obtained by fraud, misrepresentation, or duress"); Food Lion, Inc. v. Capital Cities/ABC, Inc., 951 F. Supp. 1217, 1222–23 (M.D.N.C. 1996)*; see also* Laurent Sacharoff, *Constitutional Trespass*, 81 TENN. L. REV. 877, 882 (2014) (suggesting that trespass advances privacy interests).

325. JOSEPH WILLIAM SINGER, PROPERTY 28 (3d ed. 2010).

326. *See, e.g.*, IDAHO CODE, § 18-7008(A)(9) (establishing a misdemeanor for "[e]ntering without permission of the owner or the owner's agent, upon the real property of another person which" is posted with proper signage indicating that the property is private and may not be trespassed upon). Interestingly, all other provisions of the Idaho criminal trespass statute entail actual tangible harm to the property. *Id.* at § 18-7008(A)(1)–(8), (10). In contrast, it is common for statutory trespass actions to require actual damages. While some state criminal trespass laws may be enforced even without a showing of actual harm, the sort of privacy and property rights protected by trespass laws are simply not served by punishing someone who gains access through deception.

327. As Judge Posner has explained, entry into a business through deception where one wants or invites entry (but does not know the investigator's true purpose) is not a true trespass because in such cases there is no invasion of the "the specific interests that the tort of trespass seeks to protect." Desnick v. Am. Broad. Companies, Inc., 44 F.3d 1345, 1352 (7th Cir. 1995).

328. It bears reemphasizing that we think the sort of *high value* lie at issue when one seeks to engage in an investigative misrepresentation is so materially distinct from the sort of valueless

that prior cases suggested that harmless misrepresentations made in order to gain access were actionable, such cases must be revisited in light of *Alvarez* and the unequivocal mandate that lies that do not cause cognizable harm are protected by the First Amendment.

Simply put, investigative misrepresentations that result in access to non-intimate business settings for the purpose of exposing information of public significance are protected by the First Amendment. There is generally no legally cognizable harm caused by entry gained through investigative deceptions. Needless to say, if an undercover investigator actually caused physical damage to property, personal injury, or some other tangible harm arising from an investigation, she could be held criminally or civilly liable. But the act of accessing a place through deception does not in and of itself cause a legally cognizable harm.[329] The absence of any harm and the "inevitable effect" of the laws on investigative journalism and other speech activities doubtlessly implicate First Amendment protection.[330]

### *b. Interference with Business Operations and Hiring Practices*

Another interest that the state may legitimately protect is the business's ability to lawfully carry out its operations. Thus, any misrepresentation that leads to direct interference with business operations (as distinguished from the self-inflicted economic harm resulting from the exposure of unlawful treatment of animals) could be constitutionally punished. Similarly, as we have already acknowledged, the state has a legitimate interest in helping businesses protect trade secrets and other proprietary information that allows them to fairly compete in the economic marketplace.[331] Again, misrepresentations that are used to secure such information are within the state's authority to regulate because the harm prevented is concrete. But such conduct is also clearly covered by more specific available legal remedies, and

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lie at issue in *Alvarez* so as to call for an entirely different framework. Whatever limits *Alvarez* imposes on the First Amendment protection available for lies of self-aggrandizement, a very different set of First Amendment rules must apply to lies that facilitate the core purposes of free speech, including the discovery of truth.

329. Lies to reveal intimate, private details may present different questions. As Judge Posner has elaborated, "If a homeowner opens his door to a purported meter reader who is in fact nothing of the sort—just a busybody curious about the interior of the home—the homeowner's consent to his entry is not a defense to a suit for trespass." *Desnick*, 44 F.3d at 1352.

330. United States v. O'Brien, 391 U.S. 367, 385 (1968).

331. *Desnick*, 44 F.3d at 1352 (explaining that "if a competitor gained entry to a business firm's premises posing as a customer but in fact hoping to steal the firm's trade secrets," that would be trespass) (citing Rockwell Graphic Sys., Inc. v. DEV Indus., Inc., 925 F.2d 174, 178 (7th Cir. 1991)).

therefore these interests are satisfied by less restrictive alternatives than laws that ban investigative deceptions.

There is another way of viewing the state's interest in protecting business operations, and that is through the idea that investigative deceptions might interfere with a business's *hiring* practices, as opposed to its general operations. As the *Alvarez* plurality emphasizes, the First Amendment does not protect fraudulent speech, which may include lies made in order to "secure moneys or other valuable considerations, say *offers of employment*."[332] As to lies by undercover investigators who seek employment, then, that might seem to be the end of the matter, as a cursory reading of *Alvarez* would suggest that employment securing lies are beyond the First Amendment. But the matter is not so simple. Not all lies to gain employment are on equal footing. The passages in *Alvarez* regarding employment are dicta because the Court was not considering a lie used to get a job.

To put the issue of employment-based investigative deceptions in context, consider the lies told by Xavier Alvarez and their potential impact. Alvarez's lies about his military experience and honors were not the sort of generic puffery that would have struck many judges as protected speech; instead, they were the sort of lies that are designed to gain credibility or at least reputational benefits for the speaker.[333] Such lies, though perhaps not persuasive to many, were made, according to the Supreme Court, in order to "gain respect" from the public and his fellow board members.[334] In other words, the lie was made intentionally, and with the purpose of securing undeserved respect in the community, something that is not trivial to politicians. Yet because the lie did not cause any *legally cognizable injury*, six Justices agreed it was protected speech.[335] If a politician's lies about accomplishments, even military honors, are protected speech, then the range of lies that cause cognizable harm is relatively small and a vast range of mistruths is entitled to First Amendment protection.

On the one hand, telling an employer that he has beautiful kids, that you have always dreamed of working in a slaughterhouse, that you are a born again Christian, or that you are an Iowa State football fan, might very well affect his decision to hire you. So, too, might lies about one's sexual orientation, love of sports, or marital status. In that sense these lies are relevant, and maybe even material, to the employment decision. But such lies are not the sort of harm-causing, material lies

332. United States v. Alvarez, 132 S. Ct. 2537, 2547 (2012) (emphasis added).

333. *Id.* at 2542.

334. *Id.*

335. *Id.* at 2539.

that fall outside the protection of the First Amendment. Similarly, pretending to seek employment to gain access to an industrial facility for investigative purposes is unlikely to cause sufficient injury to place the deception outside of the First Amendment's protection. The harm that befalls an employer following such an employment decision, if any, is the harm of publicly exposing non-defamatory information discovered during the employment.[336] Similarly, loyalty to a cause might make one a more desirable employee, but omissions or misrepresentations about political or ideological disagreement with the industry or employer fall into the class of lies to which the First Amendment applies, because they cause no harm as a matter of law.[337] Simply failing to disclose an investigative purpose does not, without more, cause legally cognizable injury any more than failing to disclose a desire to unionize a workplace.[338]

In contrast, a wide range of employment related lies might easily be characterized as falling outside the reach of the First Amendment. Lying about one's *qualifications* for a job—claiming to have a law degree, to have completed a surgical residency, or to have been trained in the operation of heavy equipment, or other certificates or special skills—is a quintessential example of a lie that typically does not enjoy First Amendment protection. These lies relate to the essential function or task of the job and can cause cognizable injury to employers by exposing them to liability risks and an unsafe or unqualified work force. Work that is done less safely or less productively is a cognizable injury and lies made to shield inexperience or lack of credentials may cause such injury. Such fraudulent representations might lead to actual and direct harm to a business's operations and perhaps to third parties, as in the case of an employee who creates safety risks because she is not

336. *Desnick*, 44 F.3d at 1355 (recognizing that both the "broadcast" and the "production of the broadcast" are protected by the First Amendment and noting that the target of an undercover exposé has no legal remedy when the business secrets are revealed even if the "investigatory tactics used by the network are surreptitious, confrontational, unscrupulous, and ungentlemanly").

337. Of course, answering this threshold question—the very question at issue in *Alvarez*—does the First Amendment apply at all, is not the end of the inquiry. If a factual showing can be made that lies about loyalty, among other things, materially harm the employer, then the lie might still be criminalized because appropriately tailored legislation could satisfy strict scrutiny. But whether the law satisfies the applicable level of scrutiny is generally a factual question. Our goal is to make clear that as a legal matter such scrutiny should be applied, and that such a factual showing must be made to justify upholding the law.

338. For example, "salting" is a common union practice whereby union organizers seeking to organize a particular employer's workforce may apply for a job without disclosing their status as a salt or union organizer. *See, e.g.*, Harman Bros. Heating & Air Conditioning, Inc. v. NLRB, 280 F.3d 1110, 1113 (7th Cir. 2002) ("The only purpose of criminalizing such a lie could be to discourage salting, an activity protected by the [National Labor Relations] Act.").

trained in the way she represented.[339] But when the lie has no bearing on the requisite qualifications of the individual and no relationship to the ability of the individual to safely and effectively perform the work in question, the First Amendment is clearly implicated.

Even the wages paid to undercover investigators who secure employment based on lies will not generally result in harm to the employer that is proximately caused by the lies so long as the employees competently perform all of their duties. That is to say, a lie that enables a journalist to obtain paid employment and thus causes the employer to experience the most concrete and measurable harm—a financial expense—is not a legally cognizable harm. As the leading circuit court decision on this point explains:

> The question is what was the proximate cause of the issuance of paychecks to Dale and Barnett. Was it the resume misrepresentations or was it something else? It was something else. Dale and Barnett were paid because they showed up for work and performed their assigned tasks as Food Lion employees. Their performance was at a level suitable to their status as new, entry-level employees. Indeed, shortly before Dale quit, her supervisor said she would "make a good meat wrapper." And, when Barnett quit, her supervisor recommended that she be rehired if she sought reemployment with Food Lion in the future. In sum, Dale and Barnett were not paid their wages because of misrepresentations on their job applications.[340]

If a lie to gain employment does not cause a legal "injury" to the employer who pays the wages, then a wide range of injuries suffered by the employer (or accessed party) are also not caused by the lie.[341] Certainly, the run-of-the-mill lie about one's interest in the field, an underselling of one's credentials, a lie about political or ideological beliefs, or a lie about investigative motives does not cause such harm, and as such these lies fall within the First Amendment protections recognized in *Alvarez*.[342]

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339. Thus, where tangible harms result, the constitutional implications are different. *See* Cohen v. Cowles Media Co., 501 U.S. 663, 665–66 (1991) (rejecting newspaper's First Amendment defense to suit by confidential source who claimed the newspaper breached its promise to protect his identity from public disclosure, resulting in the loss of his job).

340. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 514 (4th Cir. 1999) (holding that lost sales and profits were not caused by the undercover investigation but by the information disclosed by the publication of the investigation's findings).

341. *Food Lion* stands for the proposition that the harms occasioned by investigative reporting are "caused not by [the Reporter's] conduct but by Food Lion's own labor and food handling practices." Symposium, *Panel I: Accountability of the Media in Investigations*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 401, 424 (1997). Moreover, in the mass media, internet age, the practical distinction between the media and non-media is crumbling, and so too must any doctrinal distinctions between the professional and amateur person engaged in publicizing an event. We are all to some degree, through Facebook, Twitter, YouTube, and the like, journalists now.

342. Of course, a wide range of injuries suffered by an employer can fairly be said to have been caused by a lie. Criminalizing deceptive entry for the purpose of stealing intellectual property, clients or trade secrets is likely permissible. Likewise, acts of terrorism or sabotage or the like

Finally, while employers might argue that investigations resulting from deceptive employment applications breach a common law duty of loyalty arising from the employment relationship, those duties have typically been limited to direct interference with the employer's business operations, as where an employee directly competes with her employer, misappropriates property, profits, or business opportunities, or breaches confidences, such as revealing trade secrets.[343]

### *c. Privacy and Autonomy*

Finally, a law may legitimately protect reasonable expectations of individual privacy on commercial premises. Speech is always entitled to more protection if it is of public concern, and thus investigative deceptions may serve to facilitate politically important speech on issues relating to how certain industries are operating. But the importance of speech about an industry does not make everything that happens at its facilities politically significant. Thus, a law that forbade someone from lying to gain access to private information, such as individual income tax or health insurance records, or to areas of a commercial enterprise in which expectations of privacy are commonplace, such as workplace restrooms or employee locker/changing rooms, would advance valid *personal* privacy concerns. Protection of personal privacy is a powerful interest that might be sufficient to rebut the claim that a lie to gain access is protected speech. While many lies to gain access will cause no cognizable harm and are thus protected by the First Amendment, lies

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committed by persons gaining access under false pretenses will always be the cause of injury to the victimized employer or citizen, and the lies that make such acts possible could be criminalized. Perhaps even lies about one's desire to remain employed for an extended period of time with the same employer could give rise to actual cognizable harm in certain instances. But even in the face of explicit lies about one's desire to remain employed, it may be difficult to show that such a lie caused the damage in question. *See Food Lion*, 194 F.3d at 513:

> Because Dale and Barnett did not make any express representations about how long they would work, Food Lion is left to contend that misrepresentations in the employment applications led it to believe the two would work for some extended period. There is a fundamental problem with that contention, however. North and South Carolina are at-will employment states, and under the at-will doctrine it is unreasonable for either the employer or the employee to rely on any assumptions about the duration of employment. At-will employment means that (absent an express agreement) employers are free to discharge employees at any time for any reason, and employees are free to quit.

If the state can meet the burden required under heightened scrutiny—a showing, for example, that a particular lie or class of lies in a specific industry will cause financial harm based on empirical data—then a law narrowly tailored to prevent that type of lie will likely survive constitutional scrutiny.

343. *Id.* at 515–16.

to gain access in ways that are harmful to personal dignity or to concrete business interests do not deserve constitutional sanction.

Furthermore, independent of actual privacy concerns is the previously discussed matter of the deprivation of listener autonomy. We have already addressed that potential interest in our discussion about how high value lies advance the speaker's autonomy.[344] In addition, as Helen Norton has cautioned, the privileging of listeners' over speakers' autonomy "would empower the government to punish a wide swath of lies and thus frustrate an anti[-]paternalistic understanding of the First Amendment."[345]

#### *d. Harms to Moral Interests in Truthful Communication*

In her impressive scholarly work examining lying, Seana Shiffrin has developed a broader theory about why the government might regulate lies. She defines a lie as "an assertion that the speaker knows she does not believe, but nevertheless deliberately asserts, in a context that, objectively interpreted, represents that assertion as to be taken by the listener as true and as believed by the speaker."[346] Thus, her definition of lying, and the harm that it causes, is not limited to what she distinctively labels as "deceptions," which are lies that actually are intended to and result in affecting the listener's "mental contents."[347] Even if no manipulation is accomplished, she claims that lies work a unique harm on social relationships. Shiffrin argues that "deliberately false speech does damage to our collective testimonial framework by giving us reasons to doubt that a person's word is reliable as such and that somber testimonial speech provides us with warrants to take what is offered as representing what is believed."[348]

While we take Shiffrin's moral claims seriously, we also recognize that even accepting them as a generally sound proposition for government regulation of lies, she articulates a limiting principle that

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344. *See supra* notes 251–256 and accompanying text.

345. *See* Norton, *supra* note 7, at 190. A final possibility, raised in Seana Shiffrin's thoughtful philosophical work on lying, is that the liar causes a moral harm to the listener by failing to treat the listener as "an equal moral partner and as a rational agent who deserves to receive warrants that she may accept as representing the listener's beliefs." SHIFFRIN, *supra* note 7, at 24. While we concede that such moral harm might be generated in many contexts, we are at least skeptical that in the investigative context it would be sufficiently compelling to outweigh the expressive interests at stake, or more pragmatically, that a court would treat them as such.

346. SHIFFRIN, *supra* note 7, at 116.

347. *Id.* at 19.

348. *Id.* at 136. She elaborates: "That is, deliberately insincere speech does collective harm by ambiguating signals that function well only when fairly clear, signals whose preservation and use are crucial for sustaining a functional moral and political culture." *Id.*

we embrace as applying to investigative deceptions. In explaining why she does not directly advocate for general legal regulation of lies, she notes that "there are important pragmatic concerns about the potential for governmental abuse that might, in some circumstances, be unleashed by such regulation.[349] She counsels that regulations therefore must be assessed on a case-by-case basis. We assert that laws targeting investigative deceptions for criminal punishment fall within an area that could well be argued to fall outside of Shiffrin's general theory because these laws represent a high risk that the government is abusing its regulatory powers to influence expression.

2. Possible Indirect Harms Caused By Public Disclosure

While it may be difficult to identify any direct harms from investigative deceptions, it is easy to recognize indirect harms to an employer exposed to an investigative reporting effort. One such harm from investigative deceptions is the reputational injury that flows from the publication of an exposé. Businesses universally seek to exclude undercover investigations because of the risk of backlash in the form of boycotts or bad publicity. The sources of alleged injury in cases of undercover investigations are the publication and distribution of information or images obtained by deception. For instance, the harm that befalls a child care facility exposed by an undercover investigation by *Dateline NBC* is the damage to its reputation when the public sees the abusive treatment of children. The harm to a grocery store that is revealed by an investigator to have repackaged adulterated meat products is the public disclosure of its unsanitary practices. Likewise, the harm to an agricultural facility from an undercover employment investigation is the public reaction to the food safety, animal welfare, and labor issues that are documented or reported by the investigator.[350]

These can be serious harms. And at an intuitive level, they are "caused" by the deceptive entry into the business. However, these are

349. *Id.* at 118.

350. Food Lion, Inc. v. Capital Cities/ABC, Inc., 964 F. Supp. 956, 963 (M.D.N.C. 1997) ("[I]t was [Food Lion's] food handling practices themselves—not the method by which they were recorded or published—which caused the loss of consumer confidence."). As Justice Brennan wrote in his concurring opinion in *Oklahoma City v. Tuttle*, "[O]rdinary principles of causation used throughout the law of torts recognize that 'but for' causation . . . is never a sufficient condition of liability." 471 U.S. 808, 844 n.9 (1985)*; see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 41 ("[T]he causes of an event go back to the dawn of human events, and beyond . . . . As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability."); Kaimipono David Wenger*, Causation and Attenuation in the Slavery Reparations Debate*, 40 U.S.F. L. REV. 279, 287–88 (2006) (discussing proximate causation in terms of necessary and sufficient conditions).

not harms that can be addressed by criminal prohibitions. The harm that flows from public disclosure and debate about *non-defamatory* material is qualitatively different than direct harm to one's property or privacy interests.[351] When the harm sought to be avoided is the publication of truthful information of public concern, the First Amendment is uniquely implicated for at least two reasons.[352]

First, harms borne of publication on issues of public concern, and the concomitant public discourse that results, are harms that cannot fairly be traced to the lie that created the opportunity for the exposure.[353] Of course, it is true that without publication there would be no reputational harm, but the First Amendment cannot tolerate a limitation on lies simply because they may lead to the publication of information that is otherwise unavailable, at least not when the information is non-intimate, non-defamatory, and of great political importance.[354] Just as the payment of wages by an employer to the

351. *Cf. Food Lion*, 194 F.3d at 522 ("The publication damages Food Lion sought (or alleged) were for items relating to its reputation, such as loss of good will and lost sales.").

352. *See* Susan M. Gilles, Food Lion *as Reform or Revolution: "Publication Damages" and First Amendment Scrutiny*, 23 U. ARK. LITTLE ROCK L. REV. 37, 60 (2000) ("[*Food Lion*] suggests a unifying constitutional principle for all actions against the media precisely because it treats the cause of action filed as irrelevant. First Amendment scrutiny is triggered if a plaintiff seeks damages based on publication.").

353. *But see* Dietemann v. Time, Inc., 449 F.2d 245, 250 (9th Cir. 1971) ("No interest protected by the First Amendment is adversely affected by permitting damages for intrusion to be enhanced by the fact of later publication of the information that the publisher improperly acquired."). A number of cases dating back to an era of very different and more robust expectations of privacy reach similar conclusions, extending the media's liability for newsgathering torts to damages arising from the ensuing publications. Sims, *supra* note 196, at 542 n.187 (1998) (compiling cases). These cases have been rightly and roundly criticized by the few commentators who have paid attention to them. *See, e.g.*, Jacqueline A. Egr, *Closing the Back Door on Damages: Extending the Actual Malice Standard to Publication-Related Damages Resulting from Newsgathering Torts*, 49 U. KAN. L. REV. 693, 712–13 (2001):

> The *Dietemann* court erred in simply relying on the common law without incorporating First Amendment principles into its decision. Although Dietemann allegedly sought damages for invasion of privacy, the real harm, arguably, was his loss of reputation or esteem in the community resulting from the publication of the article and photographs disclosing his medical "quackery." Based on this theory, the court allowed Dietemann to recover damages coextensive with those awarded for a defamation claim without meeting the actual malice standard.

354. A case that is frequently cited in defense of Ag Gag statutes is *Houchins v. KQED, Inc.*, in which a plurality denied the press unlimited access to a county jail. 438 U.S. 1, 15 (1978). Even if *Houchins* was correctly decided, it primarily stands for the proposition that there is no press exceptionalism regarding rights of access to government property. Moreover, the controlling concurrence in *Houchins*, Justice Stewart's opinion, explains that the First Amendment's freedom of press is not a mere redundancy. *Id.* at 17. If ever the Court should recognize a distinct freedom of press right, it should be in the context of lies to gain access to non-intimate details of great political significance. In any event, we note here that our argument relies on the First Amendment's Speech Clause, not the Press Clause, and that we assert that high value lies should be constitutionally protected whether engaged in by members of the press or private citizens.

employees conducting undercover investigations is not caused by the lie, but by the work that was completed, the harm of publication is not caused by the lie, but by the bad acts that the investigator recorded or documented. The lie itself facilitates access, and if one does poor work or appears disloyal, or overly snoopy, he can be fired at will; the lie is instrumental to publication but is not the true cause of the harms of publication.[355] As one commentator has summarized the law:

> Courts have advanced several reasons why publication damages are not the proximate cause of newsgathering torts. Some follow the *Food Lion* district court's conclusion that the *acts of the plaintiff depicted in the publication are the real proximate cause* of publication damages, rather than newsgathering torts that merely facilitated access to learning about those acts. Others give no reason at all.[356]

As explained above, lies that do not implicate the essential qualifications or functions of the job, but rather omit or affirmatively conceal journalistic or investigative motives, do not proximately cause any legally cognizable harm by exposing unsavory or criminal acts thereafter observed as an undercover employee. Such investigative deceptions are surely a "but for" cause of the harm, in the sense that it is logical to believe that an employer would not offer a job to someone looking to document and expose unseemly or illegal industry practices. But any reputational harm is not the product of a "natural and continuous sequence, unbroken by any efficient intervening cause."[357] The First Amendment cannot countenance a system in which the exposure of one's wrongdoing is treated as an actionable cause of the injury that flows from the exposure. The illegal or unsavory acts documented by an undercover investigator are the intervening cause

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355. The defamation related protections are designed to protect against allegations of injury arising from publication. Some have argued that in newsgathering cases, the injury to the plaintiff occurs during the investigation and prior to publication, thus arguing that speech rights are less implicated by limits on investigations through generally applicable laws. Sims, *supra* note 196, at 526. In the Ag Gag context, however, exactly the opposite is true. The lie is the act of speech that facilitates an investigation and eventual publication. Arguably any harm from publication is too attenuated from the lie itself to justify depriving the lie of First Amendment protection.

356. Nathan Siegel, *Publication Damages in Newsgathering Cases*, 19 COMM. LAW., Summer 2001, at 11, 15 (2001) (emphasis added) (footnote omitted). The author also notes that

> [o]ne reason the means by which raw information is obtained is not the proximate cause of publication damages is because that raw information harms no one. Rather, damage is caused by the way that information is subsequently presented in the publication, including the meaning that the publication ascribes to it editorially. Thus, the content and viewpoint of the ultimate publication, and the decisions made to express that content, are the proximate causes of publication damages.

*Id.*; *see also* Animal Legal Def. Fund v. Otter, No. 1:14-CV-00104-BLW, 2015 WL 4623943, at *6 (D. Idaho Aug. 3, 2015) ("[H]arm caused by the publication of true story is not the type of direct material harm that *Alvarez* contemplates.").

357. James Angell McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 199 n.99 (1925) (defining proximate cause).

that breaks the chain. If an investigator gains employment at a child care facility and documents unsafe or criminal interactions with the children, neither the recording nor the recorder are the cause of the harm that will flow to the business; rather the practices exposed are the cause of harm. To imagine otherwise would be to turn the First Amendment on its head insofar as the more newsworthy and politically salient the investigative publication—the more effective the investigation and the more damaging its revelations—the lower the First Amendment protection and the more likely the state could regulate.[358] By that logic an undercover investigation showing that a business is an ongoing criminal enterprise would be less protected than an investigation that revealed no wrongdoing.

Defenders of Ag Gag laws and similar prohibitions might argue that the actual cause of cognizable harm to a business is the editing of the raw footage showing wrongdoing. Indeed, the history of Ag Gag laws is replete with assertions by the agricultural industry and its supporters that investigators of these industries unfairly edit their recordings before publishing the videos.[359] Legislators and industry representatives have repeatedly referred to the investigations as orchestrated or staged, and on this basis justified the Ag Gag laws. Of course, if the harm is from staged or unfairly edited videos, then "the real conduct being challenged . . . . is editorial conduct, not newsgathering [and] . . . publication damages should only be permitted through the tort that challenges those decisions directly, defamation, rather than through fraud or trespass claims that have nothing to do with editorial content."[360]

Aside from that, the reputational harm to the investigated business that results from investigative deceptions is not a legally cognizable injury.[361] The Supreme Court has been steadfast in holding

358. Siegel, *supra* note 356, at 15 (2001) ("[C]ompanies would receive compensation for the public's refusal to tolerate their potentially antisocial conduct.").

359. Susie Cagle, *Two Views on Ag-Gags: The Investigator and the Farm Advocate*, GRIST (Apr. 25, 2013), http://grist.org/food/two-views-on-ag-gags [http://perma.cc/5XW3-UGFV]; *Debate: After Activists Covertly Expose Animal Cruelty, Should They Be Targeted With "Ag-Gag" Laws?*, DEMOCRACY NOW! (Apr. 9, 2013), http://www.democracynow.org/2013/4/9/debate_after_activists_covertly_expose_animal [http://perma.cc/D885-QEV5].

360. Siegel, *supra* note 356, at 15; *see also id.* at 16 ("*Dieteman*[*n*] was decided before much of the First Amendment jurisprudence related to publication damages was developed. Moreover, the question of whether publication damages should be rejected on proximate cause grounds was not raised or addressed. Thus, *Dieteman*[*n*] did not address the principal issues currently relevant to publication damages, and its authority may reasonably be questioned on that ground alone.").

361. One might object that the harm to companies whose conduct is exposed to public scrutiny is real, even if not legally cognizable, and that the state might still have a legitimate interest in protecting businesses from such harm. *Alvarez*, however, makes it clear that the relevant limit on First Amendment protection for lying is predicated on the government demonstrating a legally

that the First Amendment limits on defamation actions apply to all tort or criminal actions that attempt to prevent reputational injuries based on publication.[362] If the ultimate harm flowing from the lie is damage to reputation caused by publication, then falsity of the publication and malice, among other things, are constitutional prerequisites for liability.[363] The lies used to facilitate access to a business (the conduct of producing the undercover investigation), no less than the production of the video itself, are insulated from civil or criminal liability by the First Amendment's stringent limits on defamation.[364] To hold otherwise would be inconsistent with the entire line of the Court's First Amendment defamation cases, which assume the speech is false. Indeed, it is likely that the agricultural industry's push for Ag Gag laws is a direct response to the fact that they are unable to seek relief under defamation law because the information revealed by undercover investigations is truthful.

Moreover, the Court has recognized that the publication of truthful information about a matter of public significance, even if obtained unlawfully, may still be protected by the First Amendment.[365] In *Bartnicki v. Vopper*,[366] the Court held that the media's publication of the contents of a cellphone conversation regarding a highly contentious union negotiation were protected by the First Amendment, even when the media outlet had reason to believe that the conversation was

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cognizable harm that is likely to result from such speech. *See* United States v. Alvarez, 132 S. Ct. 2537, 2545 (2012).

362. *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374, 387–88 (1967) (holding that state privacy tort could not be enforced against a news magazine unless the plaintiff could prove that the story was published with knowledge of its falsity or in reckless disregard of its truth); Hustler Magazine v. Falwell, 485 U.S. 46, 50–51 (1988) (holding that damages for intentional infliction of emotional distress based on publication are unavailable unless the preconditions for defamation liability, including actual malice, are satisfied)*; see also* Sims, *supra* note 196, at 511 ("Food Lion argued that its enormous financial losses were proximately caused by the PrimeTime Live broadcast and should properly have been included in its compensatory damage award.").

363. Sims, *supra* note 196, at 556–57 ("In *Food Lion*, . . . injury to reputation . . . was an issue in the case [and] Judge Tilley therefore recognized that Food Lion's attempt to link its reputational injuries to the damages caused by the newsgathering torts without proving falsity or actual malice was, in fact, an attempt to circumvent *Gertz* and [*New York Times*].").

364. Arlen W. Langvardt, *Stopping the End-Run by Public Plaintiffs:* Falwell *and the Refortification of Defamation Law's Constitutional Aspects*, 26 AM. BUS. L.J. 665, 666 (1989) ("Recent years have witnessed attempts by plaintiffs to make an end-run around the obstacles posed by defamation law's harm to reputation element and its constitutional aspects." (footnote omitted)); Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 522 (4th Cir. 1999) ("What Food Lion sought to do, then, was to recover defamation-type damages under non-reputational tort claims, without satisfying the stricter (First Amendment) standards of a defamation claim. We believe that such an end-run around First Amendment strictures is foreclosed by *Hustler*.").

365. Bartnicki v. Vopper, 532 U.S. 514, 534 (2001). Notably, in *Bartnicki* the publisher was not implicated in the illegal effort to acquire the information at issue.

366. *Id.*

illegally intercepted and recorded. While it did not categorically conclude that all publications of truthful information are constitutionally protected, it adhered to its practice in past cases that "'if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order.'"[367]

If lying is protected insofar as it does not cause cognizable injury, and if publication harms short of defamation are generally not cognizable, then lying for the purpose of facilitating a politically significant investigation will generally be protected speech. The lie told by an undercover investigator—denying a desire to document food safety issues, for example—does not cause a harm other than those caused by the ultimate publication, and such injuries are not legally cognizable if the publication is non-defamatory.[368]

## VI. CONCLUSION

Lies play a surprisingly important historic role in uncovering truth. Investigative deceptions are the hallmark of the journalistic tradition. Since the time of Upton Sinclair's work at a meatpacking plant, gaining access or even employment through deception has led to landmark legislative reforms, shaped public opinion, and ignited political debate. These tactics are now routinely used by government investigators and political activists as well. Notably, however, over the past few years, dozens of states have considered legislation that criminalizes misrepresentations used to gain access to a business for purposes of an undercover investigation. These laws—Ag Gag statutes and their statutory parallels[369]—present a timely opportunity to consider the appropriate degree of constitutional protection for lies.

On this point, we conclude with two thoughts. First, although we have not emphasized the point in this Article, it is extremely important

367. *Id.* at 528 (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 102 (1979)).

368. One could imagine that if the investigator not only lies but stages the reported conduct, then damages would exist. *Cf.* Brokers' Choice of Am., Inc. v. NBC Universal, Inc., 757 F.3d 1125, 1139–40 (10th Cir. 2014) (recognizing that when the "unedited footage" from an undercover investigation would show that the publication created a "false impression," then an action for defamation is colorable).

369. Strictly speaking, some anti-access statutes are not Ag Gag laws, but they raise some of the same concerns. For example, statutes that criminalize all investigations except for those done by a licensed private investigator would likely raise serious constitutional challenges in an as-applied challenge by an activist or media organization. Similarly, laws that would criminalize investigative misrepresentations in all industries would present the same, serious First Amendment concerns as Ag Gag laws.

to note that, despite any dictum to the contrary, there is no well-established precedent categorically banishing all false statements from First Amendment protection, and this is particularly true in the context of investigative deceptions. On this basis alone one would assume that investigative misrepresentations are protected speech and any effort to ban such speech would reflect an effort to carve out a new category of unprotected expression, something the Court has indicated it is loath to do.[370]

Second, and no less important, whatever the ultimate status of lies generally under the First Amendment, investigative deceptions are *high value lies*, and laws regulating them should be subject to the most exacting constitutional scrutiny. For decades, the Court has classified lies on a dichotomy: either they are entirely unprotected, or they are a form of speech that is disfavored, but protected only insofar as is necessary to avoid chilling valuable speech. By comprehensively identifying the doctrinal, theoretical, and historical case for recognizing the distinct value in investigative deceptions, this Article challenges the misconception that all lies are equal. Many lies are entitled to First Amendment protection, but no lie is more valuable than the lie that enables important speech on issues of public concern. High value lies have evaded judicial attention for too long, and with the rise of Ag Gag laws, their time in the First Amendment spotlight has finally arrived. As we demonstrate, in the context of lies, the First Amendment critically intersects with the law of causation, and because the harm flowing from an investigation is linked to publication or exposé and not the lie itself, investigative deceptions are entitled to robust constitutional protection.

370. *See, e.g.*, United States v. Stevens, 559 U.S. 460, 472 (2010).