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ABSTRACT

Police routinely use deception to get into people's homes without warrant or probable cause. They may pose as UPS delivery persons or homebuyers, or they may say they are looking for a kidnapping victim or a pedophile, when really they are looking for drugs or guns. Recent years have brought hundreds of reported decisions concerning such police ruses.

When the police lie about their identity or their purpose to enter a home, as when they pose as a homebuyer, the courts surprisingly, but routinely, approve these deceptions under the Fourth Amendment. Such intrusions, the courts reason, do not violate a person's reasonable expectation of privacy and therefore do not even trigger Fourth Amendment protection.

But the Supreme Court has announced a new Fourth Amendment test based on the civil law of trespass, and this new test promises to provide more Fourth Amendment protection against police deception. Now, under United States v. Jones *and* Florida v. Jardines, *any time the police trespass to gain information, they trigger Fourth Amendment protections.*

Although Jones *and* Jardines *did not involve police deception, this Article applies, for the first time, the police trespass rule stated in these cases to police deception cases. It makes the claim that the new trespass test should change the outcomes in the leading police deception cases. After all, these deceptive intrusions would otherwise count as trespasses absent consent, and under ordinary trespass principles deception vitiates consent. Without consent, the intrusion counts as a civil trespass and triggers Fourth Amendment protection.*

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INTRODUCTION

Police routinely use deception to get into people's homes without a warrant or probable cause. They have posed as UPS delivery persons[2] or homebuyers,[3] or they say they are looking for a kidnapping victim[4] or a pedophile,[5] when really they are looking for drugs, guns, or stolen property. Recent years have brought hundreds of reported decisions concerning such police ruses.[6] On the federal level, law enforcement, both civil and criminal, has sharply increased its use of undercover officers.[7]

Police deceptions can become somewhat involved, engendering both alarm and perhaps grudging admiration. In *United States v. Baldwin*,[8] for example, a police officer chose to investigate a Memphis nightclub owner by imbedding himself in the suspect's life for nearly six months. The officer took a job as a bartender at Baldwin's Playgirl club, soon becoming manager of the club, driver of Baldwin's car, and even a roommate in Baldwin's home. The officer used his special access to search Baldwin's car and bedroom, finding cocaine residue in both places—all without a warrant or

2. United States v. Miglietta, 507 F. Supp. 353, 355 (M.D. Fla. 1980).

3. United States v. Garcia, 997 F.2d 1273, 1276 (9th Cir. 1993) (police posed as potential renters and saw cocaine in plain view); People v. Lucatero, 83 Cal. Rptr. 3d 364, 366 (Ct. App. 2008).

4. United States v. Vazquez-Velazquez, No. 1:11-CR-212-TCB-GGB, 2012 WL 917845 (N.D. Ga. Feb. 23, 2012) (agents asked to search house for a nonexistent kidnapping victim when really looking for drugs).

5. Krause v. Commonwealth, 206 S.W.3d 922, 924 (Ky. 2006) (police falsely told a resident they wanted to search the house to see if it was the place where a young girl had recently been raped when really looking for drugs); Redmond v. State, 73 A.3d 385, 389–90 (Md. Ct. Spec. App. 2013) (police claimed to be seeking a pedophile when really seeking entrance to the home to look for a stolen cellphone).

6. *E.g.*, United States v. Wei Seng Phua, F. Supp. 3d., 2015 WL 1757489 (D. Nev. Apr. 17, 2015) (officers cut off Internet connection so they could pose as technicians); United States v. Hattaway, No. CR. 13-50047-JLV, 2014 WL 172295 (D.S.D. Jan. 10, 2014) (officer claimed an interest in mountain lions when really investigating illegal fire arms possession); People v. Johnson, No. D056775, 2011 WL 724691 (Cal. Ct. App. Mar. 3, 2011) (officer claimed a neighbor reported that the resident had been the victim of domestic abuse when really looking for pre-recorded buy money); People v. Nelson, 296 P.3d 177, 181 (Colo. App. 2012) (plainclothes officer pretended to be a maintenance man when really looking for drugs); *Redmond*, 73 A.3d at 385; State v. Hoffman, 318 P.3d 225, 227 (Utah Ct. App. 2013) (officer covering peephole to conceal his identity).

7. Eric Lichtblau & William M. Arkin, *More Federal Agencies Are Using Undercover Operations*, N.Y. TIMES, Nov. 16, 2014 at A1 ("The federal government has significantly expanded undercover operations in recent years.").

8. United States v. Baldwin, 621 F.2d 251, 252 (6th Cir. 1980).

probable cause. Nevertheless, the Sixth Circuit held this investigation did not violate the Fourth Amendment; in fact, it held the Fourth Amendment did not even apply.[9]

Courts have generally held that police deceptions, at least when the officer lies about both identity and purpose, do not violate the Fourth Amendment.[10] The deceptive entry, according to these courts, does not violate a person's reasonable expectation of privacy and therefore does not count as a Fourth Amendment search.[11] The fact that the officers have a good motive—to ferret out crime—also has played a role in courts' assessments.[12]

But this ample leeway for police deception may be about to change. In the last two years, the Supreme Court has supplemented the privacy test for the Fourth Amendment search by creating a new test based upon civil trespass to property.[13] In *United States v. Jones* and *Florida v. Jardines*, the Court held that when the police commit a civil trespass to obtain information, they have conducted a Fourth Amendment search, generally requiring a warrant and probable cause.[14] As Justice Scalia wrote for the Court in *Jones*, "for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas . . . it enumerates."[15] The trespass test, as a supplement to the privacy test, would create a bright-line rule and a constitutional "minimum"[16] that the easily manipulated privacy test did not supply. Any civil trespass to the home, even a technical one,[17] used to obtain information, counts as a Fourth Amendment search.

The question thus arises: will this new trespass test change the police deception cases under the Fourth Amendment? Neither *Jones*

9. *Id*.

10. Hoffa v. United States, 385 U.S. 293 (1966); United States v. Garcia, 997 F.2d 1273 (9th Cir. 1993); United States v. Miglietta, 507 F. Supp. 353 (M.D. Fla. 1980).

11. *See Miglietta*, 507 F. Supp. at 355–56; Bond v. United States, 529 U.S. 334, 337–38, 340 (2000).

12. Lewis v. United States, 385 U.S. 206 (1966).

13. Florida v. Jardines, 133 S. Ct. 1409 (2013); United States v. Jones, 132 S. Ct. 945 (2012).

14. *Jardines*, 133 S. Ct. at 1417; *Jones*, 132 S. Ct. at 949–51.

15. *Jones*, 132 S. Ct. at 950.

16. *Id*. at 953.

17. In *Jones*, the police placed a GPS device on the undercarriage of a Jeep Grand Cherokee, causing no physical harm to the property but counting, technically, as a trespass to chattel. 132 S. Ct. at 945.

nor *Jardines* involved deception, but their trespass rule for Fourth Amendment search would still apply to police intrusions by deception. That is, if the police officers were ordinary citizens, would their conduct amount to a trespass exposing them to civil liability? If so, then the same police conduct should likewise be considered a trespass and, therefore, a Fourth Amendment search. If, for example, the officer's intrusion into Baldwin's home described above amounts to a trespass because he had obtained consent by deception, then the Fourth Amendment would apply, requiring him to first obtain a warrant based upon probable cause before engaging in the deceptive tactics described above. Thus, to answer a Fourth Amendment question, we must answer a civil trespass law question.

This Article is the first to look to the law of civil trespass to determine whether the police trespass when they intrude by deception, thereby triggering Fourth Amendment protections. In other words, we must survey the civil trespass cases that involve deception to support the conclusion that police trespass when they employ similar deception.

The bad news is that these civil trespass by deception cases themselves are largely a mess.[18] One court found these cases so bewildering that it refused to rule, stating, "there is no clear majority rule on the subject of fraud vitiating consent to entry upon land."[19] These cases mostly involve journalists lying to gain entry to conduct undercover exposés. Some courts find civil trespass once the journalist uses deception to enter the property; others find no trespass until the journalist begins secretly filming; and still others find no trespass even if the journalist secretly films. This Article, in seeking to clarify the Fourth Amendment rule for deceptive entries, must therefore focus much of its discussion sorting through the civil trespass cases, as well as general tort and trespass principles, to ascertain what the trespass rule ought to be. Only then can we apply that rule to police deception trespasses for purposes of Fourth Amendment analysis.

18. *Compare* Desnick v. Am. Broad. Cos., Inc., 44 F.3d 1345 (7th Cir. 1994) (investigators posing as patients to enter an eye clinic did not trespass), *with* Food Lion v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999) (news reporters posing as employees and secretly filming did trespass).

19. LL NJ, Inc. v. NBC-Subsidiary (WCAU-TV), L.P., No. 06-14312, 2008 WL 1923261 (E.D. Mich. Apr. 28, 2008) (undercover reporters secretly filmed a face-lift clinic). The court used the abstention doctrine literally to avoid deciding the case.

As for civil trespass, this Article makes the following claim: when a person lies about her identity and purpose to obtain consent to enter private property, that deception vitiates consent, thereby transforming the entry into a trespass. Even this rule must be modified somewhat below, but it represents a starting point that enjoys support from the Restatement (Second) of Torts' general view on consent,[20] as well as from numerous trespass cases involving a wide range of trespassers—from journalists[21] to burglars[22]—who used deception to gain entry. General legal principles support the rule as well. As Jed Rubenfeld recently observed in a similar context, "in virtually every area of the law outside of rape, a consent procured through deception is no consent at all."[23]

Finally, the rule that deception vitiates consent flows naturally from the central interest trespass protects: the right to choose whom to exclude. A person typically decides whether to admit or exclude another based upon that other person's identity and purpose. For example, a resident will invite a neighbor in for coffee but not for the neighbor to snoop around. She will invite a UPS delivery person in to deliver a package but not a DEA agent to investigate crimes. Since purpose and identity play such central roles in a resident's decision to consent to another's entry, lies about both are substantial and vitiate consent.

But as noted above, some courts disagree,[24] at least with respect to those cases where the intruder seeks not personal gain but the higher purpose of uncovering wrongdoing. At least one scholar

20. RESTATEMENT (SECOND) OF TORTS § 892B(2) (1979). ("If the person consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm.")

21. Shiffman v. Empire Blue Cross and Blue Shield, 681 N.Y.S. 2d 511 (App. Div. 1998); *see also* Med. Lab. Mgmt. Cons. v. Am. Broad. Cos., Inc., 30 F. Supp. 2d 1182 (D. Ariz. 1998) (finding trespass by undercover reporters, apparently even apart from videotaping), *aff'd by* Med. Lab. Mgmt. Consultants v. Am. Broad. Companies, Inc., 306 F.3d 806 (9th Cir. 2002).

22. *See* Johnson v. State, 921 So. 2d 490 (Fla. 2005) ("Consent obtained by trick or fraud is actually no consent at all and will not serve as a defense to burglary."); State v. Fuller, 296 S.E. 2d 871 (S.C. 1982) (claiming his car broke down and he needed to use a phone—trespass).

23. *E.g.* Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1372 (2013).

24. Desnick v. Am. Broad. Cos., Inc., 44 F.3d 1345 (7th Cir. 1994); Am. Transmission, Inc. v. Channel 7 of Detroit, Inc., 609 N.W.2d 607 (Mich. Ct. App. 2000) (TV reporters posing as customers of car transmission repair shop).

would expressly recognize an exception to trespass for journalists because of this higher purpose.[25] In the civil trespass arena involving journalists, the Free Speech Clause of the First Amendment also lies in the background. Though that clause does not permit the media to violate a law of general applicability, it does seem to exert some force on courts when they provide what appears to be a special trespass rule for journalists using deception.

While it is tempting to loosen or completely vitiate ordinary trespass rules for journalists, police, and others who intrude through deception for a higher purpose, we should resist that temptation. It leads to an irreconcilable conflict with the greater body of trespass law and principles.

There is also a subtler solution to the deception problem within trespass law itself. First, a rule allowing journalists, for example, to trespass for their higher purposes runs quickly into a fatal contradiction. These journalists would not be permitted by the landowner to *openly* intrude to uncover wrongdoing. The law does not afford individuals entry simply by their announcing admirable or humanitarian intentions for entry. For example, an animal rights activist could not arrive at a factory farm and demand entry to film merely by shouting "public interest." Sam Donaldson[26] or James O'Keefe,[27] masters of the undercover camera, could not pull up to a business and demand entry to film wrongdoing.[28] If they persisted in

25. Ben Depoorter, *Fair Trespass*, 111 COLUM. L. REV. 1090, 1117–18 (2011) (right to exclude under trespass should sometimes yield to society's need to know); Paul A. LeBel, *The Constitutional Interest in Getting the News: Toward a First Amendment Protection from Tort Liability for Surreptitious Newsgathering*, 4 WM. & MARY BILL RTS. J. 1145 (1996); Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 GEO. WASH. L. REV. 1097 (1999). *But see* Lyrissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should do About It*, 73 TUL. L. REV. 173 (1998) (urging courts to enhance the tort of intrusion upon seclusion while also creating a newsgathering privilege for appropriate scenarios); David A. Logan, *"Stunt Journalism," Professional Norms, and Public Mistrust of the Media*, 9 U. FLA. J. L. & PUB. POLY 151 (arguing undercover deceptive practices lead the public to mistrust journalists).

26. Sam Donaldson co-anchored ABC's *Primetime Live*, which used deception regularly and became the defendant in many leading lawsuits over those techniques, including *Desnick*, 44 F.3d at 1345, and Food Lion v. Capital Cities/ABC, Inc., 194 F.3d 505, 505 (4th Cir. 1999).

27. *See* Chafets, *infra* 57.

28. Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991) ("[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.").

entering over objections, their entry would constitute trespass.[29] In fact, the landowner would be privileged to use force to eject Sam Donaldson if he refused to leave precisely because the law deems him a trespasser. Why then should deception give these interlopers more rights? In other words, important social needs do not justify open trespass, and so should not justify trespass by deception.

Second, and more importantly, we do not need to abandon ordinary trespass rules to craft a workable solution in the civil arena to the journalism cases because trespass law itself makes clear that their trespasses will ordinarily lead to nominal damages only. That is, trespass law denominates a journalist's intrusion as a trespass, whether openly against the landowner's wishes or by deception, but the landowner can recover only for physical harm to the property.[30] A landowner cannot recover for downstream harms that arise indirectly as a result, for example, of a news report. For those downstream harms, libel law, with its higher standard of proof, remains the appropriate cause of action. In a typical journalism trespass case, therefore, even though the reporters *have* trespassed, the aggrieved business could recover only $1 in damages for the trespass—assuming the reporters did not disrupt the business.

We have thus found a solution within ordinary trespass law for the problem of deceptive journalists. A journalist's deceptive entry is a trespass. If the owner discovers the deception, he may use force to eject the journalist if she refuses to leave. If the owner discovers the deception later, that owner may sue in trespass, but recover nominal damages only, assuming there is no physical harm to the property. If the subject of the journalist's exposé wants recovery for the harm resulting from the news report, rather than for the intrusion itself, she must sue in libel and meet its higher requirements. Trespass thus addresses any harm leading from the physical intrusion itself; libel law addresses harm from the content.[31]

After a necessary detour into the civil world of trespass, we have a rule that we can apply to the police: their deception as to both identity and purpose vitiates consent and transforms their entry into

29. *See* Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154 (Wis. 1997).

30. *See, e.g.*, *Food Lion*, 194 F.3d at 515 n.3; RESTATEMENT (SECOND) OF TORTS § 162 (1979). *But see* Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668 (Ct. App. 1986).

31. As discussed below, the Fourth Circuit largely reflected this allocation between trespass and libel law. *See Food Lion*, 194 F.3d at 510.

a trespass. That trespass triggers Fourth Amendment protections requiring a warrant and probable cause.

In the *Baldwin* case described above, the police officer lied about his identity and purpose when taking work with Baldwin and moving into his home. Accordingly, these lies vitiated Baldwin's consent, transforming the officer's intrusion of Baldwin's car and home into trespasses and therefore Fourth Amendment searches. Since these intrusions occurred without a warrant or probable cause, they violated the Fourth Amendment and would have required that the cocaine be excluded from evidence at trial. Similarly, when officers pose as homebuyers or UPS delivery persons, their lies vitiate the resident's consent, rendering the deceptive entry an unlawful Fourth Amendment search.

But this solution raises a new problem. In the law enforcement context, a trespass by police officers during an investigation triggers the Fourth Amendment, even absent physical damage to the property. Thus, a "nominal" trespass by police officers, if you will, still triggers robust Fourth Amendment protections requiring the exclusion of evidence[32]—hard medicine that will deter such deceptive intrusions.[33] Trespass law thus creates an asymmetry between the consequences of a police trespass versus those of a journalist trespass.

This asymmetry should not deter us from applying the trespass rule proposed here—that deception vitiates consent—to law enforcement. In the final analysis, this asymmetry is justified by our constitutional order, as erected by the First and Fourth Amendments. As elaborated below, the Fourth Amendment *does* give the police the right to trespass, but they must first obtain a warrant based upon probable cause. By contrast, journalists never have a right to trespass, but if they do, the First Amendment limits damages in ways congruent with the law of trespass, precluding recovery for damage arising from the broadcast of true information.

This Article will progress in increasing complexity. Part I surveys the numerous uses to which people put deception to gain entry and uncover wrongdoing—a broad view of the landscape of fraudulently obtained consent. Parts II through IV show how the new Fourth

32. *See* Herring v. United States, 555 U.S. 135, 143 (2009) (explaining that a deliberate violation of the Fourth Amendment, especially by intruding into the home without a warrant, requires exclusion of evidence).

33. *E.g.*, *id.* at 144. (noting the exclusionary rule applies only if it will "meaningfully deter" Fourth Amendment violations).

Amendment trespass test handed down in *Jones* will change the outcome of police deception cases. Specifically, Part II shows how the old Fourth Amendment "reasonable expectation of privacy test" largely endorsed police deception, at least when the police disguised both their identity and their purpose. Part III then ascertains the civil trespass rule for eventual application to law enforcement: deceptive entry to find evidence of wrongdoing constitutes a trespass. But this broad claim makes some compromises with reality and precedent by excluding a distinct class of deception, what we might call tester cases.[34] Part IV applies this new trespass rule for deception to the law enforcement cases, noting in particular changed outcomes. Finally, Part V shows how the *consequences* of a trespass will usually vary between law enforcement and journalists—exclusion of evidence versus nominal damages. It defends this apparent asymmetry by arguing that the First and Fourth Amendments have largely set these varying outcomes.

I. TYPES OF DECEPTION

This section first sketches the types of deception I will consider in this Article, specifically those by the police as well as those on the civil side, such as journalists, animal rights activists, and civil rights testers. It then briefly surveys how professional organizations and scholars have assessed the ethics and legality of such deceptions.

A. Law Enforcement

Law enforcement uses deception regularly. Law enforcement personnel may disguise their identity to gain entrance to a home in search of drugs or other evidence of crime. These entries are potential trespasses and form the backbone of this Article. They include police posing as a delivery person to find drugs in plain view;[35] Department of Fish and Wildlife agents posing as homebuyers to find, for example, moose bones supporting a charge

34. *See* Northside Realty Ass'n., Inc. v. United States, 605 F.2d 1348,1354–55 (5th Cir. 1979); Anthony L. Fargo & Laurence B. Alexander, *Testing the Boundaries of the First Amendment Press Clause: A Proposal for Protecting the Media from Newsgathering Torts*, 32 HARV. J. L. & PUB. POLY 1093, 1147 (2009) (proposing journalists enjoy a privilege to trespass and commit other torts when acting as a "tester"). Fargo and Alexander define "tester" far more broadly than I would, however. *See* discussion *infra* Part III.D.

35. *See* United States v. Miglietta, 507 F. Supp. 353, 355 (M.D. Fla. 1980).

of taking a moose out of season;[36] police posing as college students to find booze at a fraternity party;[37] BATF agents posing as construction workers to search for guns;[38] officers posing as strip club patrons in search of prostitution;[39] and agents posing as potential renters.[40]

Alternatively, police may disguise their purpose but not their identity, such as by claiming to investigate a child kidnapping[41] or pretending to investigate a gas leak[42] when they are actually investigating the resident for drug possession. Or they may simply lie and claim to have a search warrant when they do not.[43]

Finally, police have used a ruse even when they have a search or arrest warrant, in order to gain entry or execute the warrant more safely.[44] Of course, police may also obtain a warrant in order to conduct an undercover investigation. These cases lie outside the scope of this Article, since they involve warrants.

B. Journalists

Journalists regularly use deception to report on stories.[45] For example, reporters from *ABC Primetime Live* lied on their resumes to get jobs at Food Lion grocery store so they could enter the private area where meat was prepared.[46] Washington Post reporters entered Walter Reed Veteran's Hospital for months to uncover squalid conditions and poor medical care,[47] leading to a Pulitzer Prize as well as promises of reform.

36. *See* Guidry v. States, 671 P.2d 1277 (Alaska 1983); *see also* People v. Lucatero, 166 Cal. App. 4th 1110, 1112 (2008) (posing as homebuyer).

37. *See* State v. Carey, 417 A.2d 979, 980 (Me. 1980).

38. *See* United States v. Scherer, 673 F.2d 176, 181 (7th Cir. 1982).

39. *See* Wooten v. Super. Ct., 93 Cal. App. 4th 422, 425 (2001).

40. *See* United States v. Garcia, 997 F.2d 1273, 1276 (9th Cir. 1993).

41. United States v. Vazquez-Velazquez, No. 1:11–CR–212–TCB–GGB, 2012 WL 917845, at *3 (N.D. Ga. Feb. 23, 2012).

42. *See* People v. Jefferson, 350 N.Y.S.2d 3, 4 (App. Div. 1973).

43. Bumper v. North Carolina, 391 U.S. 543, 546–47 (1968).

44. State v. Eleneki, 993 P.2d 1191, 1192 (Haw. 2000).

45. BROOKE KROEGER, UNDERCOVER REPORTING: THE TRUTH ABOUT DECEPTION (2012).

46. The ABC reporters lied about their names, their work histories, and even concocted phony references. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 524 (4th Cir. 1999); KROEGER, *supra* note 45 at, 151–155.

47. Dana Priest & Anne Hull, *Soldiers Face Neglect, Frustration at Army's Top Medical Facility*, WASH. POST, Feb. 18, 2007, at A1. The reporters did not actively deceive or lie but

But reporters have been using disguises since the 1820s or earlier,[48] such as posing as slave buyers at massive, one hundred slave auctions in the South to report the gruesome details to Northern readers.[49] In 1887, a reporter for the *New York World*, Nellie Bly, went undercover to detail the brutality and neglect toward patients at the Blackwell's Island Insane Asylum in her book *Ten Days in a Mad-House*,[50] which led to some reforms. Shortly after the turn of the nineteenth century, Upton Sinclair worked in the meatpacking industry to reveal conditions difficult for man, woman, and animal alike in *The Jungle*.[51] Jack London lived like a tramp in London for his book, *People of the Abyss*.[52]

Other journalists have gone undercover to report on prison conditions in the infamous Sing Sing prison,[53] and on religious groups, including the Moonies or evangelical Christians.[54] Many journalists have gone undercover to immerse themselves in groups such as the KKK, Nazis in America, and even the Freemasons.[55] More recently, Craig Unger went undercover to imbed himself with evangelical supporters of George W. Bush and Mike Huckabee.[56] James O'Keefe has also used undercover techniques—such as hidden cameras—to embarrass political opponents such as ACORN.[57]

C. Animal Rights Activists

Recently, animal rights activists have increasingly turned to undercover work to expose animal abuse at farms. Mercy for Animals, the Humane Society of the United States, and PETA

rather played on expectations that they belonged in the hospital. KROEGER, *supra* note 45, at 1–5.

48. KROEGER, *supra* note 45, at 15–19.

49. *Id.*

50. NELLIE BLY, TEN DAYS IN A MAD-HOUSE (Norman L. Munro ed., 1887).

51. UPTON SINCLAIR, THE JUNGLE (1906).

52. JACK LONDON, PEOPLE OF THE ABYSS (1903).

53. TED CONOVER, NEWJACK: GUARDING SING SING (2000).

54. DECEPTION FOR JOURNALISM'S SAKE: A DATABASE, http://dlib.nyu.edu/undercover/ (last visited Sept. 26, 2014).

55. KROEGER, *supra* note 45, at 209.

56. CRAIG UNGER, THE FALL OF THE HOUSE OF BUSH: THE UNTOLD STORY OF HOW A BAND OF TRUE BELIEVERS SEIZED THE EXECUTIVE BRANCH, STARTED THE IRAQ WAR, AND STILL IMPERILS AMERICA'S FUTURE (2007).

57. Zev Chafets, *Stinger: James O'Keefe's Greatest Hits*, N.Y. TIMES, July 27, 2011, at MM16.

have posted on their websites scores of video showing the abuse of animals. These videos have led in some cases to prosecution of individuals abusing the animals and to decisions by large food corporations to stop sourcing their food from certain factories or slaughterhouses.[58]

These undercover operations have been so successful that eight states have passed some type of "Ag-gag" laws that impose special criminal penalties against activists for lying on resumes to get jobs at farms or slaughterhouses, for secretly videotaping such facilities, and even for publishing or broadcasting those videos.[59] These states have therefore superseded ordinary trespass laws for far more targeted laws.

Similarly, anthropologists have gone undercover, much as Upton Sinclair did one hundred years ago, to work at chicken or beef processing plants, later relating their experiences in books or articles.[60] These hybrid reporter/anthropologists did not secretly film but rather simply reported in writing what they saw (and smelled).

D. Civil Rights Testers

Lawyers have used civil rights "testers" to determine whether realtors, for example, discriminate against minorities in housing. They have set up identities for a black couple and a white couple that are very similar in background, jobs, earning power, etc., and different only in race.[61] These controlled experiments have often shown realtors steering blacks to black neighborhoods or whites to white neighborhoods. Alternatively, they have shown realtors telling

58. Paul Solotaroff, *In the Belly of the Beast*, ROLLING STONE MAG., Dec. 10, 2013, *available at* http://feature. rollingstone.com/feature/belly-beast-meat-factory-farms-animal-activists.

59. *E.g.*, IOWA CODE § 717A.3A (2012); Lewis Bollard, *Ag-Gag: The Unconstitutionality of Laws Restricting Undercover Investigations on Farms*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10960 (2012).

60. *See* TIMOTHY PACHIRAT, EVERY TWELVE SECONDS: INDUSTRIALIZED SLAUGHTER AND THE POLITICS OF SIGHT (2011); STEVE STRIFFLER, CHICKEN: THE DANGEROUS TRANSFORMATION OF AMERICA'S FAVORITE FOOD (2005); Ted Conover, *The Way of All Flesh*, HARPER'S MAG., May 2013, *available at* http://harpers.org/archive/2013/05/the-way-of-all-flesh/.

61. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 366 (1982); Robert Thomas Roos, *No Harm, No Fraud: The Invalidity of State Fraud Claims Brought Against Employment Testers*, 53 VAND. L. REV. 1687 (2000).

black people nothing is available while telling white couples something is.

E. Professional Organizations

Professional organizations that oversee many of the professions described above—journalists, anthropologists, lawyers, and police—have explored and debated the ethics of using undercover techniques in their fields. I sketch here, very briefly, those ethical guidelines merely as further background to the use of undercover work.

Journalists have developed non-binding factors for when they can or should use deception. The Society for Professional Journalists Code of Ethics, for example, simply urges reporters to avoid undercover work unless traditional methods will fail to disclose "information vital to the public."[62]

Other journalists have taken a stricter stance, arguing that reporters should use hidden cameras only in exceptional circumstances, such as for stories "of great public interest" that involve either "great harm to individuals or a system failure at the highest level." They should also be a tactic of "last resort."[63]

On the other hand, in her recent and comprehensive book, *Undercover Reporting: The Truth about Deception*, Brooke Kroeger urges reporters to return to more robust use of this technique, surveying the long history of great progressive changes wrought by such deceptive work.[64]

Sociologists and anthropologists have also debated undercover fieldwork for decades.[65] While the code of ethics of their institutional bodies would largely ban[66] undercover work that investigates the

62. *SPJ Code of Ethics*, SOC'Y OF PROF. JOURNALISTS, http://www.spj.org/ethicscode.asp (last visited Sept. 26, 2015).

63. Bob Steele, *ABC and Food Lion: The Ethics Question*, THE POYNTER INSTITUTE, Aug. 25, 2002, *available at* http://www.poynter.org/uncategorized/2125/abc-and-food-lion-the-ethics-questions/.

64. KROEGER, *supra* note 45, at 294–95.

65. *E.g.*, Charlotte Allen, *Spies Like Us: When Sociologists Deceive Their Subjects*, LINGUA FRANCA, Nov. 1997, *available at* http://linguafranca.mirror.theinfo.org/9711/9711.allen.html (summarizing the debate and describing in particular the negative effects of Carolyn Ellis' undercover field research for her book *Guineamen, Fisher Folk*, which made the locals look backward and criminal).

66. Am. Anthropological Ass'n, *Statement on Ethics: Principles of Professional Responsibility,* 2012, http://ethics.aaanet.org/category/statement/ (deception, particularly that which affects decisions to participate in research, is "ethically problematic"); AM. SOCIOLOGICAL ASS'N, CODE OF ETHICS AND POLICIES AND PROCEDURES OF THE ASA

wrongdoing of the person deceived, some anthropologists often do continue to investigate undercover, such as Steve Striffler[67] working at a chicken processing plant; Timothy Pachirat[68] working at a beef processing plant; and Ted Conover working at Sing Sing Prison[69] and, more recently, at a meat processing plant.[70] When working in these hybrid anthropologist/reporter capacities, the authors consider ethical obligations but largely conclude the tactic is justified by some combination of the following factors: they do not name the individuals they encounter or, in some cases, the business itself; they observe what any employee would observe; and undercover work is the only way to disclose vital information about pervasively bad conditions (for animals and human beings) on a matter of important public interest.[71]

Lawyers who oversee the civil rights testers discussed above are subject to ethics rules and guidelines prohibiting dishonest conduct in general.[72] Thus, the question arises: can lawyers ethically supervise such techniques? Bar associations and courts have often approved lawyers using deception in sending civil rights testers to realtors or others to establish violations of civil rights laws, as weighed against lawyers' ethical obligations to be honest; however, other state courts have seemingly rejected such deception.[73]

Finally, law enforcement agencies such as the FBI have developed guidelines governing the appropriate use of undercover work, which require a balancing of risks, such as harm to individuals or

COMMITTEE ON PROFESSIONAL ETHICS § 12.05 (1999) (banning significant deception or concealing of identity if it would cause more than minimal risk to the research participant).

67. STRIFFLER, *supra* note 60.

68. PACHIRAT, *supra* note 60.

69. CONOVER, *supra* note 53.

70. Conover, *supra* note 60.

71. PACHIRAT, *supra* note 60; STRIFFLER, *supra* note 60.

72. *See, eg.*, MODEL RULES OF PROF'L CONDUCT r. 8.4 (2015) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.").

73. ASS'N OF THE BAR OF N.Y.C., PROPOSED AMENDMENT TO RULE OF PROFESSIONAL CONDUCT 8.4 REGULATING LAWYERS' SUPERVISION OF UNDERCOVER INVESTIGATIONS, *available at* http://www2.nycbar.org/pdf/report/uploads/20072162-ProposedAmendmenttoProfessionalConductRule8.4lawyerssupervisionofundercoverinvestigations.pdf. (collecting sources and noting conflicting rules and advice).

businesses—including financial harm and invasion of privacy—and benefits of the operation.[74]

These ethical guidelines do not focus on trespass in particular but rather assess the propriety of deception in general. Nevertheless, they provide a good sense of the general view of the institutional leaders, even if that view is often ignored by the actual practitioners in the field.

F. Media Scholars

Numerous media scholars have grappled with the more general problem of reporters' use of deception, whether in the context of trespass or not.[75] For example, NBC's *To Catch a Predator* used undercover investigators posing as underage girls to lure potential pedophiles to their home, where they met NBC's Chris Hansen instead. This use of undercover reporting did not involve trespass or any apparent violation of the law. One target did later kill himself, however, leading to a lawsuit and further discussion by scholars and media ethicists as to the proper use of deception by journalists.[76]

These media scholars have generally tried to establish legal frameworks that would address intrusive reporting techniques involving not only deception but spying as well, both in private and public places.[77] They therefore focus more upon weighing the reporters' interests in uncovering important information against the targets' interest in privacy, usually meaning the tort of intrusion upon seclusion. Some scholars urge greater legal restraints on deceptive techniques,[78] while others propose greater freedoms

74. UNDERCOVER AND SENSITIVE OPERATIONS UNIT, ATTORNEY GENERAL'S GUIDELINES ON FBI UNDERCOVER OPERATIONS, Revised Nov. 13, 1992, *available at* http://www.justice.gov/ag/undercover-and-sensitive-operations-unit-attorney-generals-guidelines-fbi-undercover-operations.

75. KROEGER, *supra* note 45; LeBel, *supra* note 25, at 1158; Lidsky, *supra* note 25.

76. Fargo, *supra* note 34, at 1094 (citing *e.g.*, Douglas McCollam, *The Shame Game: 'To Catch a Predator' Gets the Ratings, But at What Cost?*, COLUM. JOURNALISM REV., Jan.-Feb. 2007, at 28).

77. *E.g.*, Lidsky, *supra* note 25.

78. *E.g.*, Ethan E. Litwin, *The Investigative Reporter's Freedom and Responsibility: Reconciling Freedom of the Press with Privacy Rights*, 86 GEO. L. J. 1093, 1099–1100 (1998) (urging courts to review journalists' undercover techniques that invade privacy with a least-restrictive alternative test, under which the Food Lion producers would be liable).

through a constitutional privilege for newsgathering.[79] These different views represent the difficult values on both sides, balancing a robust press with important privacy rights.

Not surprisingly, these scholars focus on the tort of privacy and usually do not discuss trespass per se in any great detail. Their mission differs significantly from mine. They seek to create an overall framework for journalists' various newsgathering techniques. I seek to determine the best trespass rule from the civil tort arena to then apply to law enforcement cases. To the extent that scholars such as Ben Depoorter[80] urge an erosion of trespass to afford greater media access, this Article tackles those proposals below.

But with a focus on privacy torts, journalists' work plays an important role for this Article in establishing a threshold principle: any tort remedy for intrusive or deceptive media techniques, even sounding in privacy, should compensate for damages arising from the *newsgathering* techniques rather than for the content of the publication.[81] Libel, with its built-in First Amendment protections, should represent the sole remedy for damages arising from the content of the publication, at least for the kind of cases discussed in this Article.[82]

This threshold principle—limiting damages for reporters' use of deception to newsgathering techniques rather than the content of the publication—dovetails perfectly with a trespass rule that limits remedies to nominal and actual damages from the trespass itself. Trespass law coincidentally proscribes compensation for the downstream harm arising from (truthful) publication of what the reporters learned.

II. LAW ENFORCEMENT AND REASONABLE EXPECTATION OF PRIVACY

This Part examines police deception under the old Fourth Amendment "reasonable expectation of privacy" test to show how generously that test views police deception, especially regarding lies

79. Fargo, *supra* note 34, at 1095 (summarizing both camps); LeBel, *supra* note 25, at 1154 (proposing a constitutional privilege for newsgathering using deception based upon a balance between property rights and society's interest).

80. Depoorter, *supra* note 25, at 1119.

81. Lidsky, *supra* note 25, at 197.

82. The tort of publication of private facts affords a remedy for the publication, of course, but those cases generally involve private and personal facts of little newsworthiness.

about both identity and purpose. Parts III and IV show how a *Jones-Jardines* trespass test will likely change these outcomes.

Three key Supreme Court cases have formed the bedrock for deception cases: *Katz v. United States*,[83] *Lewis v. United States*,[84] and *Hoffa v. United States*.[85] *Katz* of course explicitly established the "reasonable expectation of privacy" test for determining what counts as a search, via the formula announced in Justice Harlan's concurrence, which also noted that a person can enjoy no such privacy over matters she has voluntarily exposed to the public.[86] *Lewis* and *Hoffa*, though they predate *Katz*, have subsequently been treated by the Court as having been decided under an expectation of privacy rationale.[87] I now explain *Lewis* and *Hoffa* in further detail before exploring their progeny and implications for deceptive trespass by police.

A. Lewis v. United States

In *Lewis*, the defendant invited a federal agent, who was posing as a drug buyer named "Jimmy the Pollack," to his home to buy marijuana on two occasions. The defendant sought to suppress the marijuana, arguing the agent had violated his Fourth Amendment right.[88]

The *Lewis* Court refused to find the officer's ruse violated the Fourth Amendment. First, it said that the officer did not observe or take anything other than the exact drugs he had bought. The Court contrasted this with an earlier case in which officers using a ruse ended up ransacking the defendant's home, conduct which was absent in *Lewis*.[89] In some sense the officer in *Lewis* did not conduct a search at all since he did not look for anything; he merely bought what was given him.[90] The Court similarly noted that it was the defendant, not the police, who suggested his home for the

83. 389 U.S. 347 (1967).

84. 385 U.S. 206 (1966).

85. 385 U.S. 293 (1966).

86. *Katz*, 389 U.S. at 361–62 (Harlan, J., concurring).

87. Smith v. Maryland, 442 U.S. 735, 743–44 (1979).

88. *Lewis*, 385 U.S. at 207–08.

89. *Id.* at 209–10 (citing Gouled v. United States, 255 U.S. 298 (1921)).

90. *Lewis*, 385 U.S. at 210. Justice Marshall later characterizes *Lewis* in this fashion to limit its holding. *See* Baldwin v. United States, 450 U.S. 1045, 1047, 1049 (1981) (Marshall, J., dissenting) (denying cert. to United States v. Baldwin, 621 F.2d 251 (6th Cir. 1980)).

transaction, and from the police point of view, the transaction could have taken place anywhere. Second, the Court reasoned that were it to hold this type of undercover buy unlawful, it would invalidate nearly all undercover work.[91]

Third, the Court held that the defendant had essentially converted his home into a place of business—indeed, into a "commercial center"—where outsiders were invited to buy drugs. The defendant had thereby lost any special Fourth Amendment protection for the home, enjoying no greater "sanctity" than a store. Justice Brennan in concurrence emphasized that the defendant had lost any right to "privacy" by opening his home as a business.[92]

The Court in *Lewis*, however, expressed limits. It said that each case of deception must be assessed on its own facts.[93] Although it noted that deception becomes necessary to uncover certain types of crime, it listed those crimes in which ordinarily both participants are willing to conduct the transaction.[94] With no victim to report certain types of crime, deception becomes one of the few ways to uncover them, or so the Court hints.

Also, though not stressed in the opinion, the Court nevertheless mentioned that the defendant conceded that the narcotics agent had probable cause to obtain an arrest warrant before he arrived at the home.[95] Indeed, in general, when a defendant invites an officer to his home to buy drugs, those facts establish probable cause. This is significant because it shows that when police enter to conduct the very transaction proposed by the defendant, they will usually have probable cause. This reduces our fear of a fishing expedition or arbitrary harassment that arises when the police use the ruse of a *lawful* transaction, such as delivering a legitimate package, simply to gain entry to the home to look for contraband.

Lewis is thus as significant for its implied limits as for its holding. It authorized entry based upon a ruse when the transaction itself was unlawful, the defendant himself proposed the home as the location, and the defendant essentially converted his home to a "commercial center." It seems *Lewis* should therefore not apply to situations in which the transaction was lawful, when the officer proposed the

91. *Lewis*, 385 U.S. at 210.

92. *Id*. at 213 (Brennan, J., concurring).

93. *Id*. at 211–12.

94. *Id*. at 209 n.5, 212.

95. *Id*. at 208 n.4.

home as the place to conduct the transaction (thus giving rise to the presumption the officer seeks to enter the home *qua* home), or the defendant does not regularly use his home to conduct drug sales.

But many of these salutary limits in *Lewis* were eliminated by another case decided the same day—*Hoffa*.[96]

B. Hoffa v. United States

In *Hoffa*, the government was in the process of trying union leader James "Jimmy" Hoffa for violating federal labor laws. During the trial, Hoffa set up quarters in a hotel room, which the Court treated as enjoying the same protections as the home. Hoffa caucused with his advisors and lawyers in the hotel over the several weeks of the trial.[97]

During the trial, Hoffa permitted a local official of his union, Edward Partin, to join him in the hotel room during discussions about Hoffa's trial planning, including Hoffa's plans to bribe a juror. Partin was, of course, a government plant, or so the Court assumed in its decision.[98]

The jury hung on the trial over the labor violations, but the government then brought a bribery case against Hoffa based on Partin's testimony. Hoffa sought to suppress Partin's testimony. The question thus arose: did the government violate the Fourth Amendment by placing an informant, posing as a friend, in Hoffa's hotel room?[99]

The Court answered no, the government did not violate the Fourth Amendment by placing an informant in a person's hotel room, or home, if the person invites the informant, mistakenly believing him to be a friend.[100] Such cases are now known as false-friend cases.[101] As in *Lewis*, the *Hoffa* Court did not mention trespass but rather analyzed the conduct essentially under a privacy test. The Court held that the police conduct did not violate Hoffa's

96. Hoffa v. United States, 385 U.S. 293 (1966).

97. *Id*. at 294–304.

98. *Id*. at 295–98.

99. *Id*. at 294–300.

100. *Id*. at 302–03.

101. Donald L. Doernberg, *"Can You Hear Me Now?": Expectations of Privacy, False Friends, and the Perils of Speaking Under the Supreme Court's Fourth Amendment Jurisprudence*, 39 IND. L. REV. 253, 255 & n.12 (2006).

"security,"[102] or what later cases describe as a reasonable or legitimate expectation of privacy.[103]

To understand how placing an informant, who appears to be a friend, into a hotel room or a home does not violate the Fourth Amendment, we must follow the *Hoffa* Court through several convoluted steps.

Step one: it would not have violated the Fourth Amendment had Partin really been a friend of Hoffa's who entered innocently enough and only went to the authorities after he learned of Hoffa's plot to bribe jurors. In fact, Hoffa knew of this possibility; Partin, like any friend, could betray him by reporting him to the authorities afterwards.[104]

Step two: Hoffa therefore forfeited his privacy, or "security" as the Court put it, with respect to Partin.[105]

Step three: Hoffa likewise enjoyed no privacy when he assumed the risk that Partin may have been a government agent *in the first place*. This last implicit but necessary step, of course, widens Hoffa's forfeiture of privacy not only as to a real friend who later betrays him, but also as to anyone who *appears* to be a friend but is really a government informant. Many scholars argue this final step gets privacy wrong.[106] Regardless, after *Hoffa*, that is how privacy would work under the Fourth Amendment.

Hoffa thus broadens the ways in which *Lewis* endorsed deception. Chief Justice Warren, who wrote the majority opinion in *Lewis*, dissented in *Hoffa*.[107] *Hoffa* no longer requires, as *Lewis* apparently had, that the purpose for which the government informant entered be unlawful. Rather, an informant may use the ruse to enter simply as a friend to collect whatever evidence of crime appears—or at least whatever the informant hears. There need not be probable cause to believe the person might be committing a crime,

102. *Id*. at 301–03.

103. Smith v. Maryland, 442 U.S. 735, 743–44 (1979) (citing *Hoffa* for the proposition that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.").

104. *Hoffa*, 385 U.S. at 302–03.

105. *Id*. at 302.

106. Sherry Colb, *What is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 139 (2002) (criticizing the false friend cases such as *Hoffa* as treating "risk-taking as tantamount to an invitation").

107. Chief Justice Warren deemed the Fourth Amendment challenge serious but instead would have reversed the conviction on the grounds that Partin was a completely unreliable witness. *Hoffa*, 385 U.S. at 316.

as there was at least factually in *Lewis*.[108] And the defendant need not have converted his home—or hotel room here—into a "commercial center" to lose that particular protection the Fourth Amendment affords the home.

Hoffa stands out for its formalism. It moves from one technical logical step to the next, from a person assuming the risk that a friend might report him to the police to assuming that friend might be a government informant in the first place. The Court does not discuss the role of privacy in our lives or vis-a-vis the government; it does not discuss or attempt to define the appropriate role the Fourth Amendment should play in patrolling the divide between government and criminal defendants; and it does not even discuss basic practical or policy questions as to why its rule will result in good outcomes.[109]

Nevertheless, we may discern one possible limit in *Hoffa* based on its facts: the government may rely upon an informant only if he is a pre-existing friend of the defendant, but the government may not place an actual government agent into a home posing as someone else with a different purpose. The Court in *Hoffa* expressly reserved this question,[110] but of course, later cases would attempt to construe precisely whether *Hoffa* contains such limit, as discussed below.

C. Subsequent Law Enforcement Cases

I divide the case law below into four main categories: (i) the *Lewis*-type case, in which the transaction used to enter the home is the very transaction under investigation and is potentially illegal; (ii) coercion cases, such as *Bumper v. North Carolina*,[111] in which the police do not lie about their identity, but lie about having a warrant or an emergency; (iii) the *Hoffa*–type cases, in which the police or an informant lie about both their identity and purpose; and finally, (iv)

108. The Court noted the authorities had some suspicion Hoffa might bribe jurors but does not suggest they had probable cause or really any specific grounds for their suspicion. *Id.* at 296.

109. Justice Douglas, in his dissent in *United States v. White*, attacks the Court for employing a "legalistic" reasoning rather than assessing the role wiretapping might play in an open democracy and how it might smother the freedom privacy protects to engage in spontaneous conversation. 401 U.S. 745, 756 (1971).

110. *See Hoffa*, 385 U.S. at 302 n.6 ("The applicability of the Fourth Amendment if Partin had been a stranger to the petitioner is a question we do not decide.").

111. Bumper v. North Carolina, 391 U.S. 543 (1968).

cases in which law enforcement enter a business posing as an ordinary customer.

1. Lewis*-type cases*

Numerous recent cases have applied *Lewis* to endorse controlled deliveries[112] of contraband such as drugs, allowing the police to enter the home to make the delivery without violating the Fourth Amendment[113] and use evidence against the defendant that he willingly received the package. These cases parallel *Lewis* because the transaction itself is likely illegal. I say *likely* because the defendant may not have asked for the package as expressly as did the defendant in *Lewis.* In other words, the transaction itself does not automatically amount to a crime if the defendant did not order the package and merely accepts it without knowing its contents. Nevertheless, courts extend *Lewis* to allow these deliveries. Courts also go beyond *Lewis* in these cases to permit officers, once invited into the home, to observe contraband in plain view and use that information to obtain a search warrant.[114]

2. Bumper*-type cases*

In the *Bumper v. North Carolina*[115] line of cases, police lie in such a way that the resident feels no choice but to allow the search. In *Bumper* itself, the Court held that the police cannot lie and say they have a search warrant when they do not. If a homeowner consents to their entry to his home, the ruse vitiates that consent and the entry violates the Fourth Amendment. The assertion of a warrant amounts to coercion.

Courts have extended the *Bumper* coercion principle to hold that when the police lie about an emergency, such as a kidnapping,[116] a

112. Illinois v. Andreas, 463 U.S. 765, 769–70 (1983) (describing widespread use of controlled deliveries).

113. *See* United States v. Santiago, 828 F.2d 866 (1st Cir. 1987); Hrubec. v. United States, 734 F. Supp. 60 (E.D.N.Y. 1990).

114. *See* United States v. Wagner, 884 F.2d 1090, 1093–94 (8th Cir. 1989) (officer posing as UPS agent made controlled delivery of drug-making equipment and smelled the cooking of meth); United States v. Turner, 491 F. Supp. 2d 556 (E.D. Va. 2007) (anticipatory search warrant).

115. 391 U.S. 543 (1968).

116. *See* United States v. Vazquez-Velazquez, No. 1:11–CR–212–TCB–GGB, 2012 WL 917845, at *1–2 (N.D. Ga. 2012).

gas leak,[117] or a plumbing leak,[118] in order to get into a home to look for evidence of other crimes, such tactics also amount to a type of coercion vitiating consent. These cases, of course, involve lies only about the police's purpose and not about their identity.

The Ninth Circuit has identified a second reason to hold these deceptions unconstitutional beyond coercion: it would be unfair for the homeowner to trust the government official *qua* government official only to have that trust betrayed.[119] Indeed, the Ninth Circuit noted that a ruse by an official identifying himself as such will trigger the Fourth Amendment, even though the same ruse by an official disguising his identity as well will not.[120]

3. Hoffa*-type cases*

When the police disguise their identity *and* purpose, the homeowner may feel less, if any, coercion, and so courts cannot simply say the consent is vitiated as not voluntary. When the police pose as a UPS agent delivering a real package, or as potential homebuyers, the consent is entirely voluntary. The problem in these case, rather, is whether the consent is vitiated by the deception.

Courts generally approve police deception in this category, even though the police lie about their identity and purpose, and even though they use a perfectly legal transaction—such as delivering a real package to gain entry. As noted above, the courts say such deceptive entries do not violate a reasonable expectation of privacy.[121] Though the defendant in *Hoffa* opened his hotel room to a known friend, later cases extend the rationale to any *stranger*; it does not matter, the courts hold, that the stranger turns out to be a police officer rather than a real UPS driver.[122]

In *United States v. Miglietta*, for example, the court reasoned that because the police entered for the exact transaction for which

117. *See* People v. Jefferson, 350 N.Y.S. 2d 3 (App. Div. 1973).

118. *See* United States v. Hardin, 539 F.3d 404, 418–19 (6th Cir. 2008) (landlord entering apartment to search at behest of police claiming plumbing leak).

119. United States v. Bosse, 898 F.2d 113, 115 (9th Cir. 1990).

120. *Id.* at 115–16.

121. Again, though *Hoffa* did not rest explicitly on an expectation-of-privacy rationale, later cases, including those in the Supreme Court, reinterpreted it based upon a reasonable or legitimate expectation of privacy. *E.g.*, Smith v. Maryland, 442 U.S. 735 (1979).

122. *See e.g.,* United States v. Garcia, 997 F.2d 1273 (9th Cir. 1993); United States v. Miglietta, 507 F. Supp. 353 (M.D. Fla. 1980); People v. Lucatero, 166 Cal. App. 4th 1110 (2008).

they were admitted, they did not exceed the scope of their permission.[123] The police officer who entered disguised as a UPS employee saw no more than the UPS employee would have in the scope of his delivery. And left unsaid, but perhaps implied, the UPS employee could report the drugs to the police anyway.

Similarly, in *People v. Lucatero*, a police officer posed as a homebuyer and entered the defendant's home, where he observed evidence that allowed him to get a search warrant for drugs.[124] *Guidry v. State* had similar facts, but provided a more substantial analysis.[125] There, wildlife protection officers gained entry by implying they were interested in buying the home. Once inside, the officers found moose bones leading to a conviction for taking a moose out of season. The defendant sought relief under the Alaska Constitution, arguing that courts should adopt a bright-line rule that ruses using innocent transactions to gain entry to look for evidence, unlike the illegal transaction in *Lewis*, are unconstitutional. The Alaska Supreme Court rejected the proposed distinction, relying rather upon a general conception of fairness by balancing the needs of law enforcement to use undercover tactics against potential abuse and government oppression. The court found the undercover deception fair, in part because the officers did not affirmatively misrepresent themselves (though they knew the homeowner mistakenly thought they were potential homebuyers) and did not originally approach the home with the intent to enter by deception.

a. United States v. Baldwin.

One of the more disturbing cases in the *Hoffa* line, *United States v. Baldwin*,[126] deserves special treatment because of the level of intrusion and the somewhat bizarre facts. *Baldwin* involved a deep-cover operation without a warrant, in which an officer not only gained employment by ruse but began living with the suspect as well.

Arthur Baldwin owned several local nightclubs in Memphis, including several Playgirl clubs. The Memphis police assigned Officer Joseph Hoing to conduct surveillance of the defendant and his clubs. Officer Hoing befriended the defendant, becoming both his

123. *Miglietta*, 507 F. Supp. at 355–56.

124. *Lucatero*, 166 Cal. App. 4th at 1113.

125. 671 P.2d 1277 (Alaska 1983).

126. United States v. Baldwin, 621 F.2d 251 (6th Cir. 1980).

chauffeur and general handyman for roughly six months. He also worked at one of the Playgirl clubs, as bartender and then manager. Finally, he moved in with the defendant, living in a downstairs bedroom. While living there for several months, he had free access to the entire place, including the defendant's bedroom.

Officer Hoing took full advantage of this access, collecting cocaine residue from a tabletop in Baldwin's bedroom and the floorboard of the defendant's car, as well as some cocaine the defendant asked him to retrieve from his dresser drawer. Each of the collections resulted in separate drug convictions. At his trial, Baldwin asked the court to suppress the cocaine, arguing Hoing had violated his Fourth Amendment rights.

The trial court rejected Baldwin's argument and the Sixth Circuit affirmed, finding that Hoing had not conducted a Fourth Amendment search under *Lewis* and *Hoffa*. As in *Lewis*, the Sixth Circuit said the defendant had invited Hoing into his home, thereby assuming the risk Hoing was an undercover police officer. The court extended *Lewis*, of course, beyond entry based on an illegal transaction to entry based upon an innocent transaction—here simply becoming housemates. The Sixth Circuit also extended *Hoffa* from the entry of a pre-existing friend who was also a government informant to an actual undercover police officer who had no pre-existing relationship with the defendant. Moreover, as the dissent to the denial of a motion to reconsider noted, *Hoffa* involved merely repeating conversations, whereas this case involved a practical fishing expedition for tangible evidence and contraband.[127]

But perhaps most problematic was the extremely formalistic reasoning in *Baldwin*. The Sixth Circuit simply took one questionable logical step after another: first, a person should expect that someone seeking work or housing might report observations of wrongdoing to the police; and second, that person might be an informant or a police officer. Each step itself might seem sensible, but taken together, they led to a bizarre result. The court blinked reality: commonsense tells us the government surely oversteps its bounds when it inserts a police officer into a person's work, car, home, and bedroom for months on end with no pre-existing

127. United States v. Baldwin, 632 F.2d 1, 1–2 (6th Cir. 1980), *denying reconsideration*, (Jones, J., dissenting).

suspicion[128] or warrant, no judicial oversight whatsoever, and all in aid of finding cocaine residue on the person's bedroom table. But the "reasonable expectation of privacy" test, at least in the hands of the Sixth Circuit, found the conduct constitutional.

The extraordinary facts of *Baldwin* caught the attention of two Supreme Court Justices. Though the Court denied cert, Justices Marshall and Brennan dissented in separate opinions.[129] Despite the extreme facts, the dissenters struggled to identify where the Sixth Circuit had gone wrong, precisely, because it *was* following precedent to its logical conclusion. Justice Marshall, for example, argued that the case fell outside the *Lewis* rule, because in *Lewis*, the claim was merely that the officer entered the premises by ruse, not that he had conducted a search there, whereas Officer Hoing had searched Baldwin's home. But under *Hoffa*, Officer Hoing was largely within his rights; if a false-friend can listen to and report on conversations, surely he can similarly observe and seize drugs in plain view.

4. Business-entry cases

The foregoing cases addressed police deception used to gain entry into a home, perhaps the most troubling type of intrusion. Businesses open to the public[130] present fewer concerns, at least under a privacy test, since our intuitions largely align with the Court's holdings that such businesses enjoy far less, if any, expectation of privacy. Thus, for businesses open to the public, the Court has held that officers posing as customers may enter as may anyone else, without a warrant or probable cause, even if their purpose deviates from that of a customer: that is, to investigate crime rather than to buy something.[131]

For example, in *Maryland v. Macon*, the Court approved of plain-clothes officers entering an adult bookstore to look for

128. The Sixth Circuit appears to assume there was no suspicion. The holding would permit the same conduct even if there was no suspicion.

129. Baldwin v. United States, 450 U.S. 1045 (1981).

130. The types of businesses that count as open to the public come as very little surprise, including bus terminals, car repair shops, used car lots, parking lot, docks, real estate offices, motels, hospitals, pool halls, and restaurants. *See* WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.4(b) (footnotes omitted).

131. *See* Maryland v. Macon, 472 U.S. 463, 469 (1985) ("respondent did not have any reasonable expectation of privacy in areas of the store where the public was invited to enter and to transact business"); Marshall v. Barlow, 436 U.S. 307, 315 (1978) (dicta); United States v. Berrett, 513 F.2d 154, 155–56 (1st Cir. 1975) (commercial garage); LAFAVE, *supra* note 130.

unlawful obscene material in plain view.[132] On the other hand, the Court recognized that government agents may not enter private portions of businesses where only employees may enter.[133]

III. TRESPASS AND CONSENT

Before we can answer whether a trespass test would change the police deception cases, we must first decide what the law of trespass says about deception. By deception, I mean a lie about both identity and purpose specifically in order to gain entry. Though the simplest rule would be to find that such deceptions always vitiate consent, I propose a more nuanced rule that captures the core of trespass but accommodates important precedent.

My claim: a deception used to gain entry to look around, or listen, for evidence of wrongdoing—a potential fishing expedition—vitiates consent and makes the intrusion a trespass. In law enforcement, this would require overruling cases such as *Hoffa*, *Baldwin*, and the *Miglietta* UPS case. In the journalism cases, it would require modifying *Food Lion* as detailed below to make even the initial entry a trespass. Animal rights activists who lie to gain employment would likewise trespass.

But my claim includes an important limit: a trespass of the *Lewis* variety, in which the intruder gains entry merely to consummate the unlawful or potentially unlawful transaction, will not count as a trespass. This exemption would retain the important *Lewis* line of cases, as well as recognize the lawfulness of the techniques used in *Desnick* and by civil rights testers. In tester cases, the tester lies not in order to gain entry somewhere but rather in order to carry out the transaction that itself is under investigation.[134]

This Part therefore proceeds in two steps. First, Part III.A defends a broader rule: that deception always vitiates consent. It points to other areas of law such as fraud, informed consent, and most trespass cases. I also consider the equally confusing rape-by-deception cases to demonstrate its place within the broader rule.

I then tackle *Food Lion* and *Desnick*, showing why *Food Lion* makes no sense but *Desnick* can be harmonized with my overall

132. *Maryland*, 472 U.S. at 469.

133. *See id.*

134. *See infra* Part III.D.

trespass claim. As part of that discussion, I defend my *Lewis/Desnick* exception to a general rule that deception vitiates consent.

A. General Tort Principles and Cases

The Restatement (Second) of Torts provides an easy rule that would find trespass in almost all the entries by deception considered here. The Restatement simply says that consent is not valid if the person is substantially mistaken about the nature of the intrusion, and the intruder is aware of this mistake.[135]

The key questions, of course, are deciding (1) what kind of mistake is "substantial," and (2) what counts as the "nature" of the intrusion. Most courts[136] and scholars[137] agree that we should answer these questions in relation to the interests protected by the underlying right. In many other areas of law—such as fraud, informed consent, and rape-by-deception—deception vitiates consent if it misleads a person about a substantial fact relevant to the underlying right.

1. Fraud

When a person affirmatively lies to induce another to act in reliance, such as to buy a car, the lie will lead to damages if it causes pecuniary harm.[138] That is, the lie must relate to the interest fraud protects: money.

Similarly, when a person *omits* information, that information must be material to lead to fraud.[139] But the same principle still applies to materiality: courts define materiality in relation to the interests fraud protects—again, generally money. In securities fraud, for example, courts assess materiality based on the significance a reasonable investor would place on the withheld or misleading

135. RESTATEMENT (SECOND) OF TORTS § 892B(2) (1979) ("If the person consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm.").

136. *E.g.*, Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999); Desnick v. Am. Broad. Cos., Inc., 44 F.3d 1345 (7th Cir. 1994).

137. *E.g.*, Rubenfeld, *supra* note 23.

138. RESTATEMENT (SECOND) TORTS § 525 (1979).

139. *Id.* § 550 (1979).

information.[140] But this materiality concerns the value of the stock only; that is simply what fraud has traditionally been understood to protect.[141] Even if an individual investor thought a company's lies about its human rights record were important, that alone would not make the information material, assuming a bad human rights record would not affect the value of the stock.[142]

By contrast, in the context of a charity, the very purpose is to help people. So a lie about whether an individual's donated money actually does help anyone *will* count as fraud.[143] For example, a telemarketer's claim that a significant amount of a donation would go to charity when only 15% did (while the rest would go to the telemarketers) would provide a basis for a fraud claim. Again, we assess the materiality of the lie used to gain consent in light of the interests of the underlying transaction.

2. Informed consent

In the context of informed medical consent, a person is entitled to know the facts relevant to the medical procedure before consenting to that procedure. Some courts restrict this rule to facts a *reasonable* patient would wish to know,[144] and others further limit relevant facts to those relating to the nature of the procedure, risks and benefits, and alternatives.[145] Regardless, what counts as material must be viewed in line with the underlying interest of informed consent: recognizing a patient's right to weigh for him or herself at least some minimum set of relevant risks and benefits.

In most informed consent cases, the doctor is a real doctor; that is, she does not deceive the patient about her identity. Rather, she fails to secure informed consent when she fails to supply complete information. But, as relevant to this Article, what about cases in

140. Basic Inc. v. Levinson, 485 U.S. 224 (1988) (concluding that information must be viewed in context of the "total mix."); Litwin v. Blackstone Group, L.P. 634 F.3d 706 (2d Cir. 2011).

141. *See* Karen E. Woody, *Conflict Minerals Legislation: The SEC's New Role as Diplomatic and Humanitarian Watchdog*, 81 FORDHAM L. REV. 1315, 1323 (2012).

142. *Id*. *But see* Rachel Cherington, *Securities Laws and Corporate Responsibility: Toward an Expanded Use of Rule 10B-5*, 25 UNIV. OF PA. J. OF INT'L ECON. L. 1439 (2004).

143. Illinois *ex rel*. Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 616–18 (2003).

144. White v. Leimbach, 959 N.E.2d 1033, 1039 (Ohio 2011); Willis v. Bender, 596 F.3d 1244, 1254–55 (10th Cir. 2010).

145. Duffy v. Flagg, 905 A.2d 15, 18 (Conn. 2006).

which a non-doctor poses as a doctor or the patient consents to surgery by doctor A, but then doctor B performs the surgery? In these cases the courts have held that the deception, or the substantial mistake, vitiates consent entirely, and the resulting surgery constitutes the tort of battery. No matter how well the fake doctor performs the surgery, the patient still has a protectable right to decide who invades his or her body.[146] Similarly, if a patient consents to have one doctor perform the operation but another does, this mistake will also vitiate consent entirely and again constitute a battery.[147] As with trespass to property, the battery affords a similarly absolute right to exclude, and to selectively exclude.[148]

3. Rape-by-deception

The general rule arising in the above examples—that deception vitiates consent when it relates to the interests the underlying right protects—runs into substantial difficulty in the rape-by-deception cases. Indeed, much like the journalism deception cases, courts seem to depart from the general rule that deception vitiates consent for reasons that lie outside ordinary tort principles.[149] Rape, of course, results in severe criminal punishment; it has a peculiar history all of its own, including the protection of a woman's virtue and autonomy;[150] and it may therefore depart from the ordinary rule for these reasons alone.

Take several examples of lies that seem material, induce reliance, and would, in other contexts, vitiate consent. When a man lies and says he is unmarried or is a doctor, and a woman has sex with him because of this lie, courts have almost uniformly held this conduct does not constitute rape.[151] The woman consented to have sex, she knew the nature of what she was consenting to, and the courts generally view the lie to concern a fact not relevant to the decision to

146. Bowman v. Home Life Ins. Co. of Am., 243 F.2d 331, 333 (3d Cir. 1957).

147. Perna v. Pirozzi, 457 A.2d 431, 438 (N.J. 1983); Robin Cheryl Miller, Annotation, *Recovery by patient on whom surgery or other treatment was performed by on other than the physician who patient believed would perform it*, 39 A.L.R.4th 1034 (1985).

148. *Perna*, 457 A.2d at 440.

149. Rubenfeld, *supra* note 23, at 1395–96; Russell L. Christopher & Kathryn H. Christopher, *Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape*, 101 NW. U. L. REV. 75, 77–78 (2007); B.K. Carpenter, Annotation, *Rape by Fraud or Impersonation*, 91 A.L.R.2d 591 (1963) (collecting cases).

150. Rubenfeld, *supra* note 23, at 1379.

151. *Id*. at 1397–98; Christopher, *supra* note 149, at 77–78.

have sex. And yet, many would say that whether a man is married is very relevant to the decision to have sex.

In fact, courts have traditionally found that only two main categories of deception will support a rape charge. First, if a doctor claims that a woman must have sex with him as part of medical treatment,[152] or claims that he is inserting a medical device when in reality he is inserting his penis,[153] *this* conduct does vitiate consent, leading to a finding of rape. Second, if a man impersonates a woman's husband and she has sex with him, thinking he is her husband, the man has raped her because the consent is invalid.[154]

In drawing distinctions between these two categories, courts will say that the former is fraud in the inducement and therefore does not vitiate consent. The latter cases, the medical cases and the impersonation cases, are deemed fraud in the fact and therefore do vitiate consent. But numerous courts and scholars have pointed out the obvious: the principle does not explain why one should count as vitiating consent and the other should not. The principle also does not even apply consistently. Why is lying to a woman that the sex is needed for medical treatment "fraud in the fact?" The woman still knows she is having sex with a man. The same seems to apply to the impersonation cases.[155]

There may be historical reasons supporting the distinctions drawn by the courts; for example, if we see rape as a crime of defilement in which a woman has lost her virtue, we can make some sense of the distinction.[156] But this rule cannot apply today when rape relies largely upon determining consent.

Jed Rubenfeld has prompted a new discussion of rape-by-deception by arguing that if we take consent seriously as the key determiner of rape, then many of the deceptions courts currently

152. Such a scenario may sound farfetched but becomes more understandable when related to children. In *Doe v. St. Francis Hosp. & Med. Ctr.*, a doctor and endocrinologist claimed to be conducting a growth study on children when he was, in fact, sexually abusing them. 72 A.3d 929 (Conn. 2013) (affirming $2.75 million award against hospital for failure to supervise).

153. Christopher, *supra* note 149, at 78 & n.18 (collecting cases).

154. *See* People v. Crippen, 617 N.W.2d 760, 763–64 (Mich Ct. App. 2000) (defendant wore mask and posed as victim's fiancé); Rubenfeld, *supra* note 23, at 1397–98; Christopher, *supra* note 149, at 77–78.

155. Christopher, *supra* note 149, at 85–87; Rubenfeld, *supra* note 23, at 1398–99.

156. Rubenfeld, *supra* note 23, at 1388–92.

allow would vitiate consent.[157] If a woman reasonably relies upon a man's lie that he is not married, or went to Yale, and the man knows that she would not have sex with him if she knew the truth, then Rubenfeld argues the consent is not valid, and the man knows this. If the consent is not valid, why is it not rape?

Rubenfeld has his own, somewhat eccentric answer: we should return to a definition of rape that requires a finding of force.[158] Whether we should adopt this solution and return a force requirement of rape is, happily, beyond the scope of this Article. The point, however, which both Rubenfeld and his critics agree upon, is that if we take consent seriously in the rape context, we must apply the same standard for when deception vitiates that consent as we do in other areas of law.[159] Whether we use a reasonable woman standard, or a standard simply assessing whether the man realized the woman thought the fact important, we will treat deception as material if it is material and not according to some odd set of criteria that bear little connection to reality.

Thus, although the rape-by-deception cases represent an exception to the ordinary rule that deception vitiates consent, they demonstrate the perils of deviating from that rule. First, courts that deviate may well afford women less protection than they deserve from men who claim not to be married, for example. Second, the deviation from the rule leads to complete doctrinal inconsistency, in which some deceptions vitiate consent and others do not, according to no rhyme or reason. As we will see below, the same problem has vexed courts in the trespass-by-deception cases.

4. Trespass

The above areas of law show that not simply *any* deception will vitiate consent, but rather only those deceptions that relate to the interests the underlying right protects. Thus, we must determine what interests trespass protects. How do we determine these? First, we can look at the remedy trespass provides, which includes compensation for damages to the land or injury to

157. Rubenfeld, *supra* note 23.

158. Rubenfeld, *supra* note 23, at 1408–10.

159. Tom Dougherty, *No Way Around Consent: A Reply to Rubenfeld on "Rape-by-Deception,"* 123 YALE L. J. ONLINE 321 (2013), http://yalelawjournal.org/2013/12/1/dougherty.html.

persons on it. It does not provide real damages for other injury, such as invasion of privacy or finding out bad information, as in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*[160] From this we *could* conclude that a deception vitiates consent only when the intrusion ends up damaging the property somehow, *physically*. Such a rule, however, would permit almost all deceptive intrusions and deem them not trespasses.

Limiting the interests trespass protects merely to physical damage, simply because that is the only real compensation available in a lawsuit, ignores a key feature of trespass: that it provides nominal damages for trespasses that cause no harm. Why does it do so? Because trespass protects other important interests beyond damage to the land, including privacy[161] and the right to exclude.[162] It protects the right to associate with whomever one wishes. It protects the right to keep secret one's business, including meat handling (putting aside whether it protects the right to keep secret unlawful activity).[163] After all, grocery stores that follow the law still do not want customers to actually see how the meat is handled and prepared. And they have the right to exclude a customer who tries to go to the back area to protect this interest, however much we might not like it. Trespass, of course, has limits, as discussed below, but these limits do not turn on the use of deception.

Jacque v. Steenburg Homes provides the easiest example.[164] There, a builder of mobile homes sought to deliver a home through snowy and treacherous roads. One road presented such a challenge that they asked a couple if they could drive the home across their open field. The couple refused—they had had a bad past experience with adverse possession—but the mobile-homebuilder drove the home across the fields anyway. The trespass caused no damage to the land, but the couple prevailed in their trespass suit nonetheless. The court held that trespass protects the right to exclude, for any reason or for no reason at

160. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 514–15 (4th Cir. 1999) (imposing nominal damages only); RESTATEMENT (SECOND) OF TORTS § 162.

161. De May v. Roberts, 9 N.W. 146, 149 (Mich. 1881); Dolecky v. Borough of Riverton, 538 A.2d 856, 860–61 (N.J. Super. Ct. Law Div. 1987); Brush v. Pa. State Univ., 414 A.2d 48, 52–53 (Pa. 1980).

162. Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 159–60 (Wis. 1997).

163. *Food Lion*, 194 F.3d at 524.

164. *Id.* at 157–58; RESTATEMENT (SECOND) OF TORTS § 158.

all, even if the trespass causes no harm. This rule continued the principle from the English common law that a trespass, no matter how insignificant, will give rise to at least nominal damages.[165]

Trespass thus protects the right to exclude, and the right to *selectively* exclude.[166] Even if we were to consider a reasonable person, rather than an eccentric, we quickly discover that such a person decides whom to exclude based primarily on the identity and purpose of the intruder. A resident will invite a friend over for coffee, but not to look through his dresser drawers. A resident might invite a child and parent into the home for candy on Halloween (that is, invite in *only* those in disguise) but refuse entry to anyone else. In assessing the interests trespass protects, we must therefore look at the two central reasons a person bases his exclusion upon: identity and purpose.

It takes little further analysis to conclude that when a police officer or reporter disguises her identity and purpose, posing as an employee or delivery person when in reality investigating wrongdoing by the resident or business, their lies induce a substantial mistake on the part of the resident or business person. The mistake vitiates consent and makes the intrusion trespass. Whether we consider a person with something to hide, or even one with little to hide, that person is very unlikely to allow police or reporters into private areas to simply root around to find some kind of wrongdoing.

Much, or at least *some*, of the trespass-by-deception case law supports this straightforward view that a lie about identity and purpose vitiate consent for the intrusion. In *Shiffman v. Empire Blue Cross and Blue Shield*, for example, a reporter posed as a potential patient to enter a doctor's private office. The court held the conduct was trespass and the consent invalid because the consent was "obtained by misrepresentation or fraud."[167]

165. *See* Entick v. Carrington, 19 Howell's State Trials 1029 (1763) ("[E]very invasion of private property, be it ever so minute, is a trespass . . . . he is liable to an action, though the damage be nothing.").

166. *See* Cynthia L. Estlund, *Labor, Property, and Sovereignty After* Lechmere, 46 STAN. L. REV. 305, 322 (1994) ("[T]he right . . . to pick and choose among admittees—is ordinarily secured to property owners by trespass law"; arguing for an exception in union organizing cases); Commonwealth v. Dow, 3 Pa. D. & C. 4th 283, 289-90 (Pa. C.P. 1989).

167. Shiffman v. Empire Blue Cross & Blue Shield, 681 N.Y.S.2d 511, 512 (App. Div. 1998); *see also* Med. Lab. Mgmt. Consultants v. ABC, Inc., 30 F. Supp. 2d 1182, 1203 (D.

In the Muslim Mafia case, an intern lied on his resume to gain entry to the offices of CAIR, the leading Washington, D.C. lobbying organization for Muslims, where he taped conversations and stole confidential documents.[168] The federal district court held the complaint stated a claim for trespass premised not only upon the stealing of documents and secret taping, but also upon the initial entry itself, gained by disguising his identity and purpose.[169]

Numerous burglary cases likewise find that the burglar had committed the predicate trespass, or breaking and entering, despite apparent consent because that consent was obtained by disguising one's purpose or identity.[170] In *Johnson v. State*, for example, the defendant was charged with felony murder premised on the burglary of a laundromat. The defendant arrived at a locked laundromat and pretended to the owner that he wanted change; the owner unlocked the door allowing him in. The court held the consent was invalid because it was obtained under false pretenses. The court reasoned, "Consent obtained by trick or fraud is actually no consent at all and will not serve as a defense to burglary."[171]

Other courts have come to similar conclusions, making the entry a trespass that will support a burglary charge,[172] including a defendant who gained entry by making up a story about a surprise party,[173] or pretending to need the bathroom,[174] or pretending to have a toothache.[175]

Of course, a burglar who lies about a surprise party so he can bang a 90-year-old man on the head with a pot, threaten him with a

Ariz. 1998) (finding trespass by undercover reporters, apparently even apart from videotaping), *aff'd*, 306 F.3d 806 (9th Cir. 2002).

168. P. DAVID GAUBATZ & PAUL SPERRY, MUSLIM MAFIA: INSIDE THE SECRET UNDERWORLD THAT'S CONSPIRING TO ISLAMIZE AMERICA (2009).

169. Council on American-Islamic Relations Action Network, Inc. v. Gaubatz, 793 F. Supp. 2d 311, 345 (D.D.C. 2015); *Gaubatz*, 793 F. Supp. 2d 311, 345 (D.D.C. 2011).

170. *E.g.* People v. Sipult, 44 Cal. Rptr. 846, 849 (Ct. App. 1965); Johnson v. State, 921 So. 2d 490, 508 (Fla. 2005); Templeton v. State, 725 So. 2d 764, 767 (Miss. 1998); State v. Ortiz, 584 P.2d 1306, 1308 (N.M. Ct. App. 1978) ("[T]he entry is trespassory because the entry is based on false consent."); State v. Keys, 419 P.2d 943, 947–48 (Or. 1966); State v. Fuller, 296 S.E.2d 871, 871 (S.C. 1982) (claiming car broke down and he needed to use phone).

171. *Johnson*, 921 So. 2d at 508.

172. *See* People v. Scott, 787 N.E.2d 205, 210 (Ill. App. Ct. 2003).

173. *See* Schrack v. State, 793 So. 2d 1102, 1103 (Fla. Dist. Ct. App. 2001).

174. *See* Alvarez v. State, 768 So. 2d 1224, 1225 (Fla. Dist. Ct. App. 2000).

175. *See* Gordon v. State, 745 So. 2d 1016, 1018 (Fla. Dist. Ct. App. 1999).

knife, and take his money[176] commands far less sympathy than police or journalists seeking to uncover wrongdoing. Nevertheless, the universal rule that applies to burglary—a person who conceals his purpose to steal or kill has trespassed—rests on a principle that should apply across the board: if the resident had known of the hidden purpose, she would have denied entry.[177] If the grocery store managers in *Food Lion*, or the person receiving the UPS package in *Miglietta*, had known that the real identity and purpose of the intruder was to investigate wrongdoing, they would have likewise denied entry.

B. A More Nuanced Rule: Exception for Tester Cases

We could end our discussion here with a rule that deception always vitiates consent, as it does in many other areas of law, but that rule would ignore too much precedent, including important cases such as *Desnick* on the civil trespass side and *Lewis* on the law enforcement side. I will argue in this subpart that the general rule, that a lie about identity and purpose vitiates consent, should be modified to recognize an exception for what I will call tester-type cases. In these cases, the person lies not specifically to enter private property, but rather to lure the person into carrying out the transaction itself.

Put even more precisely, however, this exception for tester-type cases might not really be an exception at all. Instead, we can cast tester-type deception as one not related to the interests trespass protects. After all, in the tester-type case, the person lies not exactly to enter private property, but to induce the other to carry out the transaction; it does not matter where the transaction takes place. As a consequence, the deception is not really related to trespass, though it *involves* a trespass.

But before arriving at this more nuanced deception rule, I consider in-depth both the *Food Lion* and *Desnick* cases.

176. *See Schrack*, 793 So. 2d at 1103.

177. *See* Templeton v. State, 725 So. 2d 764, 767 ("Inasmuch as an owner would not knowingly grant someone permission to enter his house with the intent to commit the crime of burglary . . . Templeton's entry was obviously gained by deceit . . . .").

1. Food Lion *and the scope test*

The *Food Lion* case, and others like it,[178] hold that while the mere lie and entry do not constitute trespass, exceeding the scope of the license does. This is true even if the trespasser were who she said she was. Thus, in *Food Lion*, the Fourth Circuit held that the reporters had not trespassed when they lied and entered the back area merely to observe bad meat-handling practices, because any real employee could see the same practices. They did trespass, however, when they secretly videotaped, because that conduct exceeded the scope of the license given even to real employees.[179] Accordingly, we look to the scope of the license given by the landowner.

This scope test would make sense if the test for trespass were invasion of privacy. After all, if the undercover employee observes only what any other employee observes, then the undercover employee has effected no *additional* invasion of privacy merely by observing, or at least arguably so. On the other hand, when the undercover employee films, that filming effects an invasion of privacy beyond that effected by the real employee.

But we seek a test that measures whether conduct counts as a trespass, not an invasion of privacy; conduct may constitute trespass without invading privacy. Whether the reporter films or not, she has entered to gather information for broadcast, and any business owner would likely wish to exclude that person if they knew their true identity and purpose. The filming makes the trespass *worse*, but it does not establish any principled line between a trespass and a non-trespass.

A simple hypothetical shows why filming should not matter under a trespass test. Suppose Sam Donaldson[180] himself had shown up, announced his identity and intentions, and entered Food Lion over the objections of its managers—but without cameras. He observes only what an ordinary employee there would observe. Nevertheless, he has trespassed. Food Lion can forcibly remove him without committing a battery, because trespass justifies reasonable physical force used to end the trespass. Food Lion could also sue in trespass and recover nominal damages. Whether Donaldson entered

178. *See* Pitt Sales, Inc. v. King World Prods., Inc., 383 F. Supp. 2d 1354, 1365 (S.D. Fla. 2005).

179. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 518–19 (4th Cir. 1999).

180. *See supra* note 26.

with cameras or not is irrelevant; either way, he has violated *the interests trespass protects*—the right to exclude, regardless of the level of privacy violated. The Fourth Circuit in *Food Lion* says it applies a test based on the interests trespass protects, but it ignores the fact that trespass protects the right to exclude for its own sake, and selectively, and not simply to protect privacy.

When we add deception, we see similarly that whether the ABC reporters filmed or not should not alter our trespass determination; either way they have gained consent through a substantial deception. Just as the interests trespass protects against, including the right to exclude for any reason or for no reason at all, are violated by Sam Donaldson entering openly and without cameras, they are equally violated by him entering, without cameras, via a substantial deception.

But we might identify other more practical reasons to draw the line between mere intrusions to observe as any other employee would and those involving hidden cameras. For example, perhaps such a line would be more administrable, providing a simple evidentiary function in dividing real deception from an employee whistleblower. But this advantage dissolves upon further examination. After all, in most deception cases a potential plaintiff generally concedes the intruders were reporters. We do not need any secret filming to tell us so.

The same holds true for undercover police; whether they film or merely observe, no one will later dispute in any litigation that they were actually police. Thus, at least in cases of institutional players, such as law enforcement, mainstream media, civil rights testers working for lawyers, and restaurant critics working for newspapers, we have no problem distinguishing them from actual employees, patients, or customers. Even independent journalists such as James O'Keefe are clearly not really who they pretend to be. The only cases on the line are writers such as George Orwell[181] who serve dual purposes of living a life and writing about it.

Thus, as tempting as the *Food Lion* scope test seems, deeming an intrusion by deception a trespass only when the intruder goes beyond even what the disguised person would be permitted to do, such as videotape, we must reject it as inconsistent with basic trespass

181. GEORGE ORWELL, DOWN AND OUT IN PARIS AND LONDON (1933). Orwell worked in a restaurant deep in the private recesses of a fancy Paris hotel; he gained entry to this private area both in order to write about it and to support himself.

principles. Residents and businesses wish to exclude snoops, whether they videotape or not.

2. Desnick v. American Broadcast Company

Many cases[182] such as *Desnick v. American Broadcasting Cos.*[183] fare somewhat better, at least with a little creative interpretation. In *Desnick*, the Seventh Circuit attempted to evaluate the types of interests trespass protects and assess whether the intrusion trenched upon those interests.[184]

Desnick was another ABC *Primetime Live* hidden camera exposé. ABC enlisted elderly individuals to pose as patients seeking advice on eye procedures and secretly videotaped Desnick doctors. The test patients did not really need cataract surgery, yet doctors at the various Desnick clinics told them they did. An independent expert in cataract surgery told viewers that in at least one of the test cases filmed on hidden camera, continuing with the unneeded procedure would have bordered on malpractice.

The eye clinic sued ABC in trespass, among other claims. The Seventh Circuit held that the disguised entry and secret videotaping did not constitute trespass because they did not invade any of the interests trespass protects: "ownership or possession of the land." This formula does not help very much because "possession" includes the right to exclude. Why would that right not include the right against deceptive entries?

But the court in *Desnick* seemed to believe that trespass protects not the abstract right to exclude, but other more tangible, measurable interests, such as privacy, or physical harm, or disruption of business operations. The court noted, for example, that the patients had not invaded any reasonable expectation of privacy, since they saw only what any patient would see. It noted the interviews largely occurred in areas open to other patients. The investigation did not disrupt the business itself.

True, privacy and smooth business operations are *among* the interests trespass protects. But as discussed above, trespass protects the

182. Am. Transmission, Inc. v. Channel 7 of Detroit, Inc., 609 N.W.2d 607, 609–11 (Mich. Ct. App. 2000) (showing TV producers posing as customers secretly videotaped automobile transmission garage).

183. Desnick v. American Broad. Cos., 44 F.3d 1345 (7th Cir. 1995).

184. *Id.* at 1352–54.

right to exclude for its own sake, for any reason or for no reason at all. Again, surely the eye clinic could exclude the reporters if they knew they were reporters investigating wrongdoing—trespass *does* protect their interest in excluding them simply to avoid the investigation.

So how can we make sense of *Desnick*? The court drew analogies to other permissible disguised trespasses that perhaps provide clues to the rationale underlying its holding. It pointed to restaurant critics and civil rights testers as examples of persons whose intrusions do not count as trespasses.

Though the court did not explain why, these examples exemplify the *transactional*, *Lewis*-type intrusion. As in *Lewis*, restaurant critics and civil rights testers seek entry not to observe other evidence of wrongdoing in plain view unrelated to the reason for entering; rather, the restaurant critic truthfully says she is there to taste the food. The civil rights testing couple likewise enters to investigate the very transaction for which it has sought entry. So, when limited, *Desnick* becomes a *Lewis*-type case. But does even this limited version of *Desnick* accord with ordinary trespass principles? Perhaps. The test patients in *Desnick* commit the deception not exactly to gain entry but in order to be diagnosed. The deception relates directly to a transaction that could occur anywhere. If we change the scenario such that the doctor had come to the test patient's home to make the diagnoses, the effect would have been the same. Similarly, civil rights testers could just as easily meet the realtor outside as inside the realtor's office. Nothing depends upon gaining entrance to the office. Further, the police officer who seeks to consummate a drug transaction can similarly do that anywhere and still accomplish his goal; the deception relates to tricking the dealer into dealing with the officer, not into letting him in.

By contrast, cases such as *Food Lion* and *Hoffa* involve deceptions used to gain entry in order to observe evidence of wrongdoing, or hear conversations planning criminal activities. In these cases it *does* matter where the reporters or police enter because the suspect or other person under investigation *does* rely upon her home or private business to shield her activities from the public at large.

Thus, we could distinguish the *Desnick* case from the *Food Lion* case, and craft a rule that says trespass used to gain entry to observe whatever one can, as in *Food Lion*, constitutes trespass, but deceptions that really are used not to gain entry but to trick the person into undertaking the very transaction under investigation,

such as a drug deal or a potentially faulty diagnoses, will not form the basis of trespass. Indeed, this is the course I take, in part for the foregoing reasons and in part simply as a compromise with precedent, *Desnick* and *Lewis* in particular.

C. Societal Interests

Ultimately *Desnick* and *Food Lion* treat trespass not as an absolute and uncrossable barrier, but as a boundary subject to accommodation to greater societal interests. *Desnick*'s focus on civil rights testers points out the need for trespass to uncover certain kinds of grave harms. The Supreme Court in *Lewis* similarly noted that the intrusion into the home to consummate the drug transaction could be justified by societal interests in uncovering a type of crime that is otherwise hard to detect because the participants consensually violate the law. The court in *Food Lion* likewise seemed intent on treating trespass not as an absolute but as a negotiable barrier depending upon the level of intrusiveness; the ABC producers' entry became trespass only when they secretly filmed.

These courts recognize that trespass must yield at times to weightier societal interests, and of course, laws in other realms categorically abridge *any* right to exclude. Businesses such as hotels and restaurants cannot exclude patrons because of race, color, religion, or national origin,[185] or disability[186] under federal law, or for sexual orientation, transgender status, or other categories under some state and local laws.[187] Similarly, firefighters, police, and even private citizens may enter a person's property under state trespass law for emergencies such as fires, or to protect the safety of persons from physical abuse—exceptions congruent with those under the Fourth Amendment.[188]

Courts too have recognized that trespass law must yield to other important social interests. In *State v. Shack*, for example, a lawyer and a medical provider entered a farmer's land to speak with and provide legal and medical assistance to migrant workers who lived on the property..[189] The farmer ordered them off the land, but the visitors refused to leave. They were prosecuted for criminal trespass. The New Jersey Supreme Court held that the trespass statute did not

185. 42 U.S.C. § 2000a.

186. 42 U.S.C. § 12182.

187. *E.g.*, N.J.S.A. 10:5-4 (applying to "affectional or sexual orientation . . . gender identity or expression").

188. *E.g.*, Brigham City v. Stuart, 547 U.S. 398, 403 (2006).

189. State v. Shack, 277 A.2d 369, 370 (N.J. 1971).

apply to these circumstances. Trespass law, the court wrote, protects important human values, but it has limits, including when outsiders must intrude to speak with and assist a vulnerable population such as migrant workers in their isolated living quarters.[190]

Several scholars have pointed to these exceptions to the trespass right to exclude to argue for more exceptions. Cynthia Estlund has argued that businesses should not have the right to exclude union organizers from coming onto the property to talk to company workers.[191] Ben Depoorter, in *Fair Trespass*, has gone so far as to argue that journalists, for example, should have a right to trespass if it would be in the public interest, apparently whether they use deception or not.[192]

But as noted in the introduction and throughout this Article, the argument for allowing deceptive intrusions based upon society's needs runs into the problem of open trespass. If a reporter openly trespasses upon a business, the business owner enjoys a privilege to use physical force to remove that reporter, and she enjoys this privilege because the reporter has trespassed. Similarly, the business could obtain an injunction barring the reporter from returning, an injunction based upon trespass. Society's interests in news do not vitiate the business owner's trespass rights in these open trespass situations. When the reporter obtains consent to enter by deception, therefore, this intrusion should not enjoy any greater justification because the deception has not *increased* society's needs, nor has the deception *decreased* the business owner's interests in exclusion. As a consequence, the same trespass right should apply with or without deception.

Or consider *State v. Shack*, noted above. There, the court held that the visitors had not trespassed even though their intrusion was open and hostile to the landowner. Since society's interests in protecting an insulated and vulnerable population outweighed the farmer's right to exclude, it did not matter whether the visitors had trespassed openly, in stealth, or by deception; regardless of the manner, the intrusion simply did not constitute trespass.

190. *Id*. at 370–72.

191. Cynthia L. Estlund, *Labor, Property, and Sovereignty after Lechmere*, 46 STAN. L. REV. 305, 310 (1994).

192. Depoorter, *supra* note 25.

D. Tester Exception

On the other hand, we can justify creating an immunity from trespass for tester cases, because we can argue that these do not constitute trespass at all. Testers in cases such as *Lewis* and *Desnick* do not use the deception to enter the premises in particular; each investigator would be just as happy to conduct the transaction anywhere. If the doctors in *Desnick* had come to the homes of the test patients to make their fraudulent diagnoses there, the result would be the same.

Similarly, in *American Transmission, Inc. v. Channel 7 of Detroit, Inc.*, television reporters disconnected a vacuum hose from their cars shortly before bringing them to a shop, which then tried to get the reporters to pay for unnecessary expensive transmission work—on hidden camera, of course.[193] The court held under *Desnick* that the intrusion was not trespass.[194] Though it largely recited the more general incantation that the fake customers had not invaded any of the interests trespass protects, we can see this as another tester case. If the fake car customers in *American Transmission* had pulled up to the curb of the shop and sought the same advice, the outcome would be the same. Entry itself matters less than accomplishing the transaction.

Indeed, the tester cases may not count as trespasses for the simple reason that even but-for causation might be lacking. That is, in many tester situations the target would still admit the person knowing they are testers, only treat them differently once admitted. For example, if a restaurant recognizes a food critic, it will likely not turn her away but greet her warmly. Likewise, if the mechanics at American Transmission knew the truth, they would happily have fixed the TV reporters' cars, on camera by reattaching the disconnected vacuum hose, and likely for free and with a smile. Even the doctors in *Desnick* might have welcomed the test patients into their clinic and provided them with the good news that they do not need cataract surgery. If the targets in these tester cases would still have invited the fake customers onto their premises had they known the truth, we cannot say the deception vitiated consent—or at least not as easily.

193. Am. Transmission, Inc. v. Channel 7 of Detroit, Inc., 609 N.W.2d 607, 609 (Mich. Ct. App. 2000).

194. *Id.* at 614.

Exempting testers from trespass does not fit perfectly within a pure rule for when deception vitiates consent, but it comes close enough for us to adopt it, especially since it enjoys precedential support from leading cases such as *Desnick* and *Lewis.*

Some media scholars have made a similar proposal to exclude tester cases from trespass violation. Fargo and Alexander, for example, propose that journalists should enjoy immunity from trespass and other torts if they are acting as "testers."[195] They appropriately note that much wrongdoing such as civil rights violations by realtors cannot be uncovered without investigators posing as homebuyers or renters to ferret out discriminatory treatment. So far, so good.

But unfortunately Fargo and Alexander go on to define tester too broadly, as any intruder who seeks to uncover wrongdoing, including the journalists in the *Food Lion* case. By defining "tester" so broadly, they uncouple the technique from its central justification: that the illegality, or the potential illegality, of the *transaction itself* justifies the intrusion. In paradigmatic tester cases such as *Desnick*, the fake patients enter to consummate the transaction under investigation—in that case, a medical diagnosis. But in the *Food Lion* case, which Fargo and Alexander rank as a tester case, improperly in my view, the producers entered not to investigate the employment relationship—for example, whether Food Lion failed to pay minimum wage; rather, the producers entered in the guise of employment to investigate something else in plain view: bad meat-handling practices. It is therefore not really a tester case as I define that class.

IV. TRESPASS AND LAW ENFORCEMENT

Our long detour into trespass law may leave us wondering why we strayed down that path in the first place. We are ultimately trying to ascertain the civil trespass rule for deception cases so that we can apply that rule to law enforcement under the post-*Jones-Jardines* Fourth Amendment trespass test. Part II showed how the old Fourth Amendment test, reasonable expectation of privacy, endorsed police deception by finding, improbably, that a resident forfeits practically all privacy interests by admitting a stranger into his home,

195. Fargo, *supra* note 34.

at least under many lower court cases such as *Miglietta*. This Part considers how a trespass test will change those results.

This new Fourth Amendment trespass test emerges from *United States v. Jones*[196] and *Florida v. Jardines*.[197] Neither case involved deception (hence all the hard work we needed to undertake above). But both cases ascertained the appropriate trespass rule drawing on contemporary state law trespass cases and the Restatement (Second) of Torts. And both cases applied trespass law somewhat literally and technically.

In *Jones*, in particular, we can see this literal and technical application of a civil trespass rule to law enforcement. There, the police affixed a GPS device to the undercarriage of Jones's Jeep Grand Cherokee to follow his whereabouts for four weeks. Under traditional principles, the government argued there was no Fourth Amendment search because Jones knowingly exposed his whereabouts on public streets to everyone. The police could simply have followed him, for example. The majority, however, put aside the privacy argument and relied upon the trespass test. The police, in placing a GPS on Jones's vehicle, trespassed upon his personal property—a personal "effect" under the Fourth Amendment. They did so in order to obtain information, and therefore conducted a Fourth Amendment search. The trespass may seem minor, barely a trespass at all, but it sufficed to amount to a search.

Let us now turn to apply our civil trespass rule to the police deception cases.

A. Application of Trespass Rule to Police Deception

As in the journalism cases, the key questions residents ask when deciding whether to admit a person into their home is the person's identity and purpose. When a police officer lies about both, and lies specifically in order to gain entry, that officer has trespassed. In the *Miglietta* case, DEA agents in UPS uniforms accompanied a real UPS agent on three separate occasions. They disguised their identity and purpose, leading the resident to believe they were UPS delivery persons delivering legitimate packages.

Miglietta would have excluded the delivery persons had he known they were really DEA agents. After all, he had covered the windows with Styrofoam in order to hide what appeared to be a

196. United States v. Jones, 132 S. Ct. 945, 953 (2012).

197. Florida v. Jardines, 133 S. Ct. 1409, 1417 (2013).

methaqualon-pill-making operation.[198] But even if we use a reasonable person test rather than a reasonable drug manufacturer test, an ordinary person would certainly consider it crucial information to know that the visitor was not a UPS person but a DEA agent conducting an investigation into that particular home.

Note how trespass changes the analysis. In *Miglietta*, the court drew in part on *Hoffa* to reason that the resident lacked any privacy vis-à-vis the DEA agents because he had ceded his privacy to the actual UPS delivery person. Under a trespass analysis, however, the resident has the right to *selectively* exclude: had the DEA agents arrived in uniform along with the delivery person, Miglietta could have invited the UPS person into his home while refusing entry to the DEA agents.

The *Baldwin* case would lead even more directly to the same result. No one would invite a person to be his bartender, chauffeur, and roommate, knowing that person was really a police officer investigating him.

Indeed, *Hoffa* itself must be reversed under a trespass test. Hoffa would never have invited his friend into his hotel room had he known the friend was acting as a government informant. Indeed, no reasonable person on trial would invite a government informant to listen to conversations about the trial—even if he were merely prepping in a lawful way and not planning something illegal such as bribing jurors.

But the *Lewis* line of cases will fare differently under my proposed test since I have expressly made an exception for them; those cases will not count as trespasses and therefore not trigger the Fourth Amendment. Thus, in *Lewis* itself, the police officer did not enter to look around the home to search or seize other evidence; rather, he stayed at the porch and merely consummated the drug transfer. Also, the act of buying the drugs itself likely takes the officer's actions outside of a seizure since the drugs no longer belonged to the defendant.[199] Of course, under the plain view doctrine,[200] *had* the officer in *Lewis* seen other drugs, he could have seized them or used that information to obtain a search warrant.

198. United States v. Miglietta, 507 F. Supp. 353, 358 (M.D. Fl. 1980).

199. *See* Maryland v. Macon, 472 U.S. 463, 469 (1985).

200. *See* Arizona v. Hicks, 480 U.S. 321, 326 (1987).

Controlled deliveries would likewise remain valid as non-trespassory. True, the officers do not know for certain that the person receiving the package knows of its contents; but nevertheless the police are investigating that transaction rather than using a legitimate delivery to gain entry to look for other evidence of crime. After all, the fake patients in *Desnick* did not know in advance that the doctors there would give faulty diagnoses until they had done so. The point is that controlled delivery cases investigate the very transaction for which they entered.

V. ASYMMETRY IN REMEDY

The above trespass rule harmonizes the police deception and journalism deception cases by deeming both to be trespasses (when the deception is used beyond the transaction itself). At the same time, the rule leads to different outcomes between the two types of deceptions: exclusion of evidence in the case of law enforcement versus mere nominal damages in most journalism cases. These differences may strike some as unsatisfactory or even unprincipled. Perhaps. This section will attempt to justify the difference.

First, the different outcome for police versus journalist deception arises from a neutral application of general principles in each area of law. Trespass law and ordinary notions of consent lead inexorably to the conclusion that such substantial deception to achieve such deep intrusions vitiates consent. If we take seriously a trespass test under the Fourth Amendment, it must apply to the same conduct as in civil cases. So far, in fact, we are treating law enforcement and journalism cases the same.

The difference arises, of course, at the next stage (exclusion of evidence for law enforcement or civil damages for journalists). But in each realm we simply apply the existing law, albeit seemingly technical. In the criminal case we exclude the evidence because that is what the law requires under Fourth Amendment jurisprudence.[201] In the trespass realm, ordinary and longstanding principles afford nominal damages only (putting aside punitive damages, discussed below) for trespasses that cause no physical harm to the property.[202]

201. *E.g.*, Mapp v. Ohio, 367 U.S. 643, 678 (1961).

202. *E.g.*, Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 515 (4th Cir. 1999).

Put another way, we can explain the asymmetry as arising from the exclusionary rule itself, which already provides a windfall for the guilty in order to deter future violations of the Fourth Amendment.[203] The asymmetry thus arises not from my trespass rule but from the separate concerns underlying the exclusionary rule.

But the larger answer to the asymmetry lies, I contend, in the structure of the Bill of Rights, and the different ways in which the First and the Fourth Amendments empower and limit the press versus law enforcement. The Fourth Amendment both empowers and limits law enforcement. It empowers law enforcement by endorsing trespasses into the home—a power no one else, including journalists, enjoys. Armed with a warrant, the police can enter any home, business, or other property, search any closet, safe, computer, and search the person in often very intrusive manners.[204]

The Warrant Clause gives police unique powers compared to journalists and others, but it also imposes unique limits. The Supreme Court has insisted that such searches occur only with a warrant based upon probable cause.[205] Thus, the police power comes with a trade-off. The founders drew the appropriate balance in the text of the Fourth Amendment, at least as consistently interpreted by the Court.[206] This balance requiring a warrant and probable cause to enter the home should remain intact even if we analyze the intrusion under a general "reasonableness" standard, as discussed above.[207]

Journalists and other civilians conducting investigations stand in the opposite posture. Neither the First Amendment nor any other

203. *See* Davis v. United States, 131 S. Ct. 2419, 2434 (2011) (explaining that the exclusionary rule is "a 'windfall' remedy to deter future Fourth Amendment violations.") (citation omitted).

204. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 782 (1994) (arguing that the framers intended the Warrant Clause *solely* as a power and not as a limit because it afforded officers immunity from civil lawsuits).

205. *See* Mincey v. Arizona, 437 U.S. 385, 394 (1978).

206. *See* Payton v. New York, 445 U.S. 573, 596 (1980). Though everyone agrees the Warrant Clause provides the power to search (with a warrant) and immunizes the police from trespass damages, both scholars and Supreme Court Justices have debated whether any search *without* a warrant is automatically "unreasonable." *See* Amar, *supra* note 204; WILLIAM J. CUDDIHY, ORIGINS AND ORIGINAL MEANING 602–1791 (2009); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 686–87 (1999). But even those disagreeing agree that the police need a warrant to search the home.

207. *See* Veronia School Dist. 47J v. Acton, 515 U.S. 646, 669 (1995) (noting that the Fourth Amendment requires a warrant and probable cause at least in those cases that did at the founding, such as home searches).

provision generally affords journalists the right to enter private property, no matter how well-founded their suspicions of wrongdoing. Neutral trespass laws apply to reporters just as they apply to anyone else,[208] and a journalist cannot arrive at a person's home demanding entry based upon the Free Press or Free Speech Clause. If Sam Donaldson from *ABC Primetime Live* approached the manager of Food Lion, cameras in tow, the manager could demand he leave, physically ejecting him if necessary.

But *once* the reporters have already trespassed and gathered evidence of wrongdoing, then what? The trespass itself, as we have seen, accomplishes little if any damages to the property, and so nominal damages cap any tort remedy. The information, however, once broadcast on prime time television, *does* cause harm. Food Lion, for example, claimed millions of dollars in losses. But this harm, arising from true information (if true), *does* enjoy First Amendment protection. As the Court in *Food Lion* made clear, a plaintiff cannot avoid the Free Speech strictures incorporated into libel law by instead suing in trespass or fraud, in order to avoid the burden of proving that the information was false. The Supreme Court drew a similar line for public figures.[209]

Put another way, law enforcement has a readily available alternative to the use of deception—developing probable cause to obtain a warrant. Reporters and animal rights activists lack this vital tool, which may be the only means to expose serious wrongdoing to the public; in important cases, therefore, we can conceptualize trespass law's award of nominal damages only as winking at such journalist's deceptions, affording, perhaps inadvertently, some play in the joints.

This play in the joints recognizes the long tradition that deception has played in the United States in uncovering wrongdoing

208. *See* Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991) ("[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 519 (4th Cir. 1999); Dietemann v Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971) (privacy tort).

209. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) ("We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice.'").

with potential or actual widespread social consequences.[210] Though a cliché, it remains true that Upton Sinclair's *The Jungle* helped bring about widespread reform to the meatpacking industry[211] through the Federal Meat Inspection Act of 1906,[212] and the accompanying outcry helped push passage of the Pure Food and Drug Act.[213] Nellie Bly's undercover reporting in an insane asylum brought about reform there.

Even today, the leading journalism cases involve business wrongdoing with potential public consequences. A grocery store's meat-handling practices touches public health in ways that individual cocaine use does not. An eye clinic's fraudulent use of eye surgery similarly involves wrongdoing affecting scores, or perhaps hundreds, of vulnerable victims. Animal rights investigations have likewise uncovered not only individual instances of abuse but more pervasive practices affecting the entire food supply.

A. Punitive Damages

I have drawn a stark contrast between journalists' trespasses leading to nominal damages only versus a police officer's trespass leading to exclusion of evidence, and have done so both for clarity's sake, and to tackle the hardest version of the counterargument to my proposal. But am I right to assert that a journalist's trespass will lead to nominal damages even when cases such as *Jacque v. Steenberg Homes* make clear that outrageous trespasses that cause no physical harm to property may still support punitive damages?[214] By making punitive damages available, we might bridge the gap between the results of a journalist's trespass and a police officer's; punitive damages would allow jurors to punish at least the more outrageous uses of deception by journalists. Should we authorize jurors to impose punitive damages upon journalists who use deception even though their trespasses cause no physical harm?

I would argue no—courts should never or almost never authorize punitive damages in journalism cases on matters of public

210. *See* KROEGER, *supra* note 45 (detailing 200-year history of undercover reporting leading to important social and legal reform).

211. *See* DORIS KEARNS GOODWIN, THE BULLY PULPIT, THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM (2013).

212. *See* 21 U.S.C. § 601 (2012).

213. *See* Pub. L. No. 59-384, 34 Stat. 768 (1906).

214. Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 159–60 (Wis. 1997).

interest because those damages will too often stand in as a pretext for recovering for the harm flowing from the publication of true information. After all, jurors may well consider the tactics of many journalists sufficiently outrageous as to merit punitive damages even though these tactics fit squarely within the tradition sketched above. Punitive damages would thus circumvent precisely the limits imposed by the First Amendment in libel law.

The Supreme Court's *Hustler Magazine, Inc. v. Falwell* illustrates the problem and provides additional grounds to reject a punitive damages regime for journalism cases. There, the magazine published a parody in which Jerry Falwell, a famous minister, portrayed saying that his "first time" was "during a drunken incestuous rendezvous with his mother in an outhouse."[215] The jury rejected Falwell's libel claim, finding that no reasonable reader would fail to recognize it was a parody, but the jury did find the conduct outrageous and awarded $100,000 in compensation plus $50,000 in punitive damages against each defendant for intentional infliction of emotional distress.

The Supreme Court reversed the jury award on the emotional distress claim, holding, as noted above, that at least for a journalist defendant publishing about a public figure, that public figure cannot recover even for "outrageous" parodies without meeting the elements of libel. The *Hustler* holding applies with equal force here: allowing punitive damages against reporters using deceptive practices, at least when they report on businesses or political organizations, would run afoul of the First Amendment. That would cover the type of cases addressed in this article, from the *Food Lion* case to animal rights activists reporting undercover on industrial farming.

Moreover, it would be almost impossible to disentangle our political views when considering whether a journalist's deceptive methods were outrageous enough to merit punitive damages. A liberal might consider the deceptions in the *Food Lion* case perfectly justified in exposing the evils of big business, whereas a conservative might feel precisely the reverse. Or take James O'Keefe, who used deception to gain entry to the offices of liberal organization ACORN, where he secretly recorded its employees engaging in what he portrayed as wrongdoing.[216] Not surprisingly, liberals excoriated

215. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 48 (1988).

216. *Chafets*, *supra* at 57.

his deceptive tactics while conservatives celebrated them. In both cases, reporters used deception to get the story, but if we empower jurors to award punitive damages for mushy concepts such as outrageous deceptions, we will likely authorize them to decide based upon their personal politics rather than some neutral principle.

(On the other hand, one can imagine a role for punitive damages when the reporters invade a home to report on an issue that does not involve the public interest.)[217]

CONCLUSION

Each year courts hand down hundreds of decisions addressing police use of deception. Law enforcement uses deception as part of investigations for a broad array of reasons, including undercover drug operations and interrogations. This Article focused on police use of deception to gain entry into homes. In particular, the police will often lie about their purpose and identity, such as posing as a homebuyer or delivery person, in order to gain access to a resident's home and look for evidence of crimes.

The courts have traditionally approved many police ruses under the old Fourth Amendment "reasonable expectation of privacy" test. But this Article showed how the Supreme Court's new *trespass* test, adopted in 2012 in *United States v. Jones*, might well render these police deceptions Fourth Amendment violations. *Jones* tells us to weigh a police intrusion against the yardstick of civil trespass law, but when we turn to the civil trespass cases dealing with entries by deception, we discover a deeply incoherent body of law. In other words, to answer how the new *Jones* test will affect police deception cases, we must first develop a defensible rule for deceptive trespass within the civil context.

This Article, conceding the uncertainty in the civil cases, defended a straightforward principle: when a person lies about her identity and purpose to gain entry into a home or the private portion of a business, that person has committed a trespass. The core purposes of trespass, to allow a person to decide whom to admit and whom to exclude, depends in the first instance upon the identity and

217. Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668 (Ct. App. 1986). In that case, a camera crew accompanied a paramedic team into a resident's home where they filmed a man dying from a heart attack, which they later broadcast. The court held the plaintiffs could recover for emotional distress flowing from the trespass.

purpose of the person seeking entry. When we apply this rule to the police, it means they commit a Fourth Amendment search when they similarly lie about their identity and purpose to enter someone's home to search for evidence of crime. Since they generally do so to avoid obtaining a warrant with probable cause, any evidence they uncover must be suppressed at trial.

Nevertheless, the question remains: which trespass rule will courts pick as the best civil trespass rule and therefore the best rule to apply to the police? Above, I have sketched several trespass rules developed by different courts but have urged a particular trespass rule—that deception as to identity and purpose vitiates consent—as the best rule because it best reflects the purposes of trespass law. It is this rule that courts should apply to the Fourth Amendment cases involving deception.