

## ARTICLES

### STINGS AND SCAMS: “FAKE NEWS,” THE FIRST AMENDMENT, AND THE NEW ACTIVIST JOURNALISM

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#### ABSTRACT

*Constitutional law, technological innovations, and the rise of a cultural “Right to Know” have recently combined to yield “fake news,” as illustrated by an anti-abortion citizen-journalist sting operation that scammed Planned Parenthood. We find that the First Amendment, as construed by the Supreme Court, offers scant protection for activist journalists to go undercover to uncover wrongdoing, while providing substantial protection for the spread of falsehoods. By providing activists the means to reach sympathetic slices of the public, the emergence of social media has returned journalism to its roots in political activism, at the expense of purportedly objective and truthful investigative reporting. But the rise of “truthiness”—that is, falsehoods with the ring of truth, diffused through new forms of communication—threatens the integrity of the media. How to respond to these contradictions is a growing problem for advocates of free speech and liberal values more generally.*

#### TABLE OF CONTENTS

PROLOGUE .....	2
INTRODUCTION: THE PLANNED PARENTHOOD STING/SCAM .....	4
I. PROTECTION FOR JOURNALISM, NOT JOURNALISTS .....	11
A. Federal Constitutional Law .....	11
B. State Law .....	15

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II. LAW'S PERVERSE EFFECTS .....	19
III. ACTIVIST JOURNALISM, PAST AND PRESENT .....	24
A. <i>American Journalism and Activism</i> .....	25
B. <i>Journalism in Movement</i> .....	27
C. <i>The Public's "Right to Know" and the Rise of "Truthiness"</i> .....	28
CONCLUSION .....	30

## PROLOGUE

"You look at what's happening last night in Sweden. Sweden! Who would believe this," exclaimed Donald Trump at a political rally in Florida, not long after his election. What had "happened" was that a little-known filmmaker, Ami Horowitz, was interviewed on Fox News about a film he had recently made purporting to show a "surge in gun violence and rape" at the hands of some immigrants admitted to a country that sees itself as a "humanitarian superpower."<sup>1</sup> As is often the case when the current president repeats what he sees on his favorite TV station, the story was invented virtually out of whole cloth by a filmmaker trying to make a name for himself by playing up purported crimes at the hands of Muslim immigrants. Not only that: it was denounced by the Swedish government, but not before a Russian news crew showed up in Rinkeby, a suburb of Stockholm where many immigrants live, and tried to bribe a few local residents to stage a riot. The Russians, in turn, were discovered by a Danish news team who filmed their efforts to fake a riot. Unlike many "fake" news episodes, this one was exposed by an alert "real news" source and a government that was quick to see its dangers.

This story, which we have summarized from the much richer and deeper analysis of W. Lance Bennett and Steven Livingston,<sup>2</sup> is atypical only for its international resonance and for its quick exposure by an alert government and a lucky Danish news crew. But it reveals in archetypical form what we see as a growing trend in mass communications: partisan news sources pick up and amplify manufactured or manipulated news stories that then gain

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<sup>1</sup> See Rich Noack, *Sweden Has No Idea What Trump Meant When He Said, 'You Look at What's Happening . . . in Sweden,'* WASH. POST (Feb. 19, 2017), [https://www.washingtonpost.com/news/worldviews/wp/2017/02/19/sweden-has-no-idea-what-trump-meant-when-he-said-you-look-at-whats-happening-in-sweden/?utm\\_term=.cb88d098a613](https://www.washingtonpost.com/news/worldviews/wp/2017/02/19/sweden-has-no-idea-what-trump-meant-when-he-said-you-look-at-whats-happening-in-sweden/?utm_term=.cb88d098a613). The Fox News segment at issue was *Tucker Carlson Tonight: Filmmaker Documents Refugee Violence in Sweden* (Fox News television broadcast Feb. 17, 2017). For access to the segment online, see *What the US Could Learn from Sweden's Refugee Crisis*, FOX NEWS (Feb. 17, 2017), <http://video.foxnews.com/v/5327830979001/?#sp=show-clips>.

<sup>2</sup> W. Lance Bennett & Steven Livingston, *The Disinformation Order: Disruptive Communication and the Decline of Democratic Institutions*, EUR. J. COMM. (forthcoming 2018).

resonance in the broader public.

The false story of the immigrant-fueled Swedish crime wave was not an isolated example of “fake news.” For example, in the weeks before the election, search giant Google’s algorithms were gamed to direct the far-right supporters of Donald Trump (and others) to anti-Semitic websites.<sup>3</sup> Meanwhile, *BuzzFeed* discovered hundreds of pro-Trump fake news sites, many of which had actually come from for-profit click farms in Macedonia.<sup>4</sup> These sites, *BuzzFeed* speculated in an analysis of stories on Facebook, played “a significant role in propagating the kind of false and misleading content” that energized Trump’s partisans.<sup>5</sup> Given the closeness of the election, some observers alleged that these stories might have been decisive in securing Trump’s victory, although the data do not conclusively show such an impact.<sup>6</sup> Whatever their impact in 2016, their influence persists. In the post-election period, a semi-deranged citizen brandishing a shotgun invaded a pizzeria in Washington, D.C., claiming to have learned from a website that Hillary Clinton was using it as a conduit for running a sex slave operation.<sup>7</sup> Shortly after Trump was sworn in as president, one of his top advisors defended false claims by the president and his press secretary about the size of the inauguration crowd, not by insisting on their veracity, but by calling them “alternative facts.”<sup>8</sup> Since then, the President himself has repeatedly attempted to appropriate the term “fake news” to refer to accurate but negative coverage of his own actions.<sup>9</sup>

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<sup>3</sup> Carole Cadwalladr, *Google, Democracy and the Truth About Internet Search*, GUARDIAN (Dec. 4, 2016, 5:00 AM), <https://www.theguardian.com/technology/2016/dec/04/google-democracy-truth-in-ternet-search-facebook> (relaying how Google’s and Facebook’s search algorithms are “game[d]”).

<sup>4</sup> Craig Silverman & Lawrence Alexander, *How Teens in the Balkans Are Duping Trump Supporters with Fake News*, BUZZFEED (Nov. 3, 2016, 7:02 PM), [https://www.buzzfeed.com/craigsilverman/how-macedonia-became-a-global-hub-for-pro-trump-misinfo?utm\\_term=.uo8Bv61YQP#.puoKoLbpBq](https://www.buzzfeed.com/craigsilverman/how-macedonia-became-a-global-hub-for-pro-trump-misinfo?utm_term=.uo8Bv61YQP#.puoKoLbpBq) (explaining how teens in Macedonia have been creating websites with fake news content that is posted on Facebook in order to increase the traffic that their websites generate).

<sup>5</sup> *Id.*

<sup>6</sup> See Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 232 (2017) (declining to draw firm conclusions but calculating based on survey data that the impact of fake news was “much smaller than Trump’s margin of victory in the pivotal states on which the outcome depended”).

<sup>7</sup> Editorial Board, *The Post’s View: ‘Pizzagate’ Shows How Fake News Hurts Real People*, WASH. POST (Nov. 25, 2016), [https://www.washingtonpost.com/opinions/pizzagate-shows-how-fake-news-hurts-real-people/2016/11/25/d9ee0590-b0f9-11e6-840f-e3ebab6bcdd3\\_story.html?utm\\_term=.34dda6684bd9](https://www.washingtonpost.com/opinions/pizzagate-shows-how-fake-news-hurts-real-people/2016/11/25/d9ee0590-b0f9-11e6-840f-e3ebab6bcdd3_story.html?utm_term=.34dda6684bd9).

<sup>8</sup> Doina Chiacu & Jason Lange, *White House Vows to Fight Media ‘Tooth and Nail’ over Trump Coverage*, REUTERS (Jan. 22, 2017), <http://www.reuters.com/article/us-usa-trump-priebus-idUSKBN1560RM> (quoting White House senior advisor Kellyanne Conway).

<sup>9</sup> See, e.g., Angie Drobnic Holan, *The Media’s Definition of Fake News v. Donald Trump’s*, POLITIFACT (Oct. 18, 2017, 2:11 PM), <http://www.politifact.com/truth-o-meter/article/2017/oct/18/deciding-whats-fake-medias-definition-fake-news-vs/> (“Instead of fabricated content, Trump uses the term [‘fake news’] to describe news coverage that is unsympathetic to his administration and his performance, even when the news reports are accurate.”); *id.* (noting that as of mid-October 2017, Trump had decried what he calls fake news “at least 153 separate times in interviews, on Twitter

The private sector response to (actual) fake news is a work in progress. Facebook’s founder, Mark Zuckerberg, initially dismissed the idea that Facebook should take down hundreds of fake news sites.<sup>10</sup> But as the issue of fake news heated up, the social media giant quietly joined Google in blocking many of these sites from its advertiser network.<sup>11</sup> The issue became more complicated when a Syracuse cyber-activist, Daniel Sieradski, created what he called a “BS Detector” to alert readers to “unreliable news sources.”<sup>12</sup> In reaction to Sieradski’s move, Facebook briefly blocked people from linking to his “Detector,” citing what it called “security reasons.”<sup>13</sup>

The possible electoral influence of pro-Trump fake news and Trump’s own ambivalent relationship with the truth were largely responsible for the high volume of coverage of the “fake news” issue in the wake of the election.<sup>14</sup> But the volume and intensity of fake news, and of substantially-less-than-fully-truthful news, have been increasing on the Internet for years, with both political and legal implications. A chain of events that was set in motion more than two years before the 2016 presidential election illustrates this trend.

#### INTRODUCTION: THE PLANNED PARENTHOOD STING/SCAM

In July 2014, a pair of anti-abortion activists, David Daleiden and Sandra Merritt, representing an organization called the Center for Medical Progress (“CMP”) and a bogus California-based company, BioMax Procurement Services, met with an official of Planned Parenthood in a restaurant and tried to

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and in speeches”).

<sup>10</sup> See Olivia Solon, *Facebook Won’t Block Fake News Posts Because It Has No Incentive, Experts Say*, GUARDIAN (Nov. 15, 2015, 6:52 PM), <https://www.theguardian.com/technology/2016/nov/15/facebook-fake-news-us-election-trump-clinton> (noting Zuckerberg’s initial skepticism of Facebook’s role in spreading fake news that influenced the election and explaining that Facebook’s business model depends on users sharing content without professional filtering).

<sup>11</sup> *Id.*; Samantha Schmidt, *Facebook and Google Take Action Against Fake News Sites*, WASH. POST (Nov. 15, 2016), [https://www.washingtonpost.com/news/morning-mix/wp/2016/11/15/facebook-and-google-take-action-against-fake-news-sites/?utm\\_term=.120d6bd18e14](https://www.washingtonpost.com/news/morning-mix/wp/2016/11/15/facebook-and-google-take-action-against-fake-news-sites/?utm_term=.120d6bd18e14).

<sup>12</sup> Olivia Solon, *Fake News Detector for Facebook Leads to Fake News Story About Who Made It*, GUARDIAN (Dec. 2, 2016, 3:36 PM), <https://www.theguardian.com/technology/2016/dec/02/facebook-fake-news-flag-techcrunch-bs-detector> (explaining how Daniel Sieradski created a plug-in that was designed to spot fake news but *TechCrunch*, a technology website, misreported that Facebook itself had implemented the tool); Jane Wakefield, *Fake News Detector Plug-In Developed*, BBC (Dec. 2, 2016), <http://www.bbc.com/news/technology-38181158> (discussing *TechCrunch*’s erroneous report about Daniel Sieradski’s “Detector” and how fake news poses a threat to people in part because of the high volume of traffic it receives).

<sup>13</sup> Solon, *supra* note 12; Wakefield, *supra* note 12.

<sup>14</sup> See, e.g., Wakefield, *supra* note 12; Meg Kelly et al., *President Trump’s List of False and Misleading Claims Tops 1,000*, WASH. POST (Aug. 22, 2017), <https://www.washingtonpost.com/news/fact-checker/wp/2017/08/22/president-trumps-list-of-false-and-misleading-claims-tops-1000>.

trick her into negotiating the sale of fetal body parts.<sup>15</sup> This was the “sting” in the title of this Article. The two activists secretly video-recorded the meeting before editing it to make it seem that the official was offering to sell the body parts (rather than merely seeking to recoup costs, as permitted by law).<sup>16</sup> That was the attempted “scam” to which the title of this Article refers.

Researchers studying the growth of mostly right-wing disinformation campaigns abroad and in the U.S. have noted the use of loosely coordinated online networks to create and disseminate false and misleading stories into the mainstream.<sup>17</sup> The Planned Parenthood scam fit this pattern. Daleiden and Merritt initially distributed the video via the Internet<sup>18</sup> before it was picked up by the legacy media and by a string of conservative politicians—including then-aspiring presidential candidate Bobby Jindal, then-Speaker of

<sup>15</sup> Manny Fernandez, *2 Abortion Foes Behind Planned Parenthood Videos Are Indicted*, N.Y. TIMES (Jan. 25, 2016), <http://www.nytimes.com/2016/01/26/us/2-abortion-foes-behind-planned-parenthood-videos-are-indicted.html> (discussing how a grand jury in Harris County, Texas, indicted two anti-abortion activists who made undercover recordings of their discussion with a Planned Parenthood official); Alan Zarembo, *U.S. Judge Halts Release of Secretly Recorded Videos of Abortion Providers*, L.A. TIMES (Aug. 1, 2015, 7:37 PM), <http://www.latimes.com/local/california/la-me-0802-court-order-20150802-story.html> (explaining how a federal judge in San Francisco issued an order that restrains the release of a video showing Planned Parenthood officials discussing aborted fetuses and that prohibits anti-abortion individuals from releasing to the public the names or addresses of National Abortion Federation employees). Both the *New York Times* and the *Los Angeles Times* followed the story in a series of articles beginning in July 2015. See Robin Abcarian, *Undercover Video Sting of Planned Parenthood Is Off-Base, As Usual*, L.A. TIMES (July 16, 2015, 6:11 PM), <http://www.latimes.com/local/abcarian/la-me-ra-attacks-on-planned-parenthood-20150716-column.html#page=1> (discussing the history of staged attacks against Planned Parenthood and the developments of the aforementioned conversation that took place with an unnamed person and Ms. Deborah Nucatola from Planned Parenthood’s medical services division); Jackie Calmes, *With Planned Parenthood Videos, Activist Ignites Abortion Issue*, N.Y. TIMES (Jul. 21, 2015), <http://www.nytimes.com/2015/07/22/us/with-planned-parenthood-videos-activist-ignites-abortion-issue.html> (discussing Daleiden’s releasing of his private conversation with a Planned Parenthood employee and the political ramifications, both present and future, of his actions).

<sup>16</sup> Jackie Calmes, *Planned Parenthood Is Defended as Senate Democrats Block Bill to End Funding*, N.Y. TIMES (Aug. 3, 2015), <http://www.nytimes.com/2015/08/04/us/politics/planned-parenthood-leader-defends-group-as-senate-blocks-bill-to-end-its-funding.html> (reporting that Planned Parenthood officials explained that the videoed conversations, in which the organization purportedly negotiated the sale of fetal tissue for profit, really involved its seeking “reimbursement for the expense of providing fetal tissue”); Jennifer Gerson Uffalussy, *Who Is the 26-Year-Old Man Behind the Planned Parenthood “Sting” Videos?*, YAHOO BEAUTY (July 21, 2015), <https://www.yahoo.com/lifestyle/with-2nd-planned-parenthood-sting-video-a-124676854202.html> (reporting that the videos released by Daleiden were, according to Planned Parenthood, “meant to ‘mislead the public’ through their ‘extremely heavy editing’”); Zarembo, *supra* note 15.

<sup>17</sup> See Bennett & Livingston, *supra* note 2. There is no reason why fake news should be a predominantly right-wing phenomenon. Appetite for and susceptibility to fake news appear to be driven partly by “whether one’s political party is or is not in power . . . suggesting that reception to fake news may be rising among liberals.” Marcus Mann, *The Differentiation of Cognitive Authority, Constraint of Beliefs, and the Spread of Fake News 17* (unpublished Ph.D. dissertation proposal, Duke University) (on file with authors) (citations omitted).

<sup>18</sup> See Jackie Calmes, *Video Accuses Planned Parenthood of Crimes*, N.Y. TIMES (July 15, 2015), <http://www.nytimes.com/2015/07/15/us/video-accuses-planned-parenthood-of-crime.html>.

the House of Representatives John Boehner, and Texas Governor Greg Abbott.<sup>19</sup> In response to the release of a similar CMP video targeting Planned Parenthood in Texas, the Houston district attorney convened a grand jury to investigate whether any laws had been broken.<sup>20</sup>

Despite winning support from conservative website curators and politicians already inclined to believe the worst about Planned Parenthood, CMP's operation did not go entirely as planned. CMP itself released both the highly edited and somewhat fuller versions of the video, although even the latter contained gaps and other evidence of having been edited.<sup>21</sup>

Meanwhile, CMP encountered problems stemming from the recordings themselves, quite apart from the subsequent editing. After the Houston grand jury convened, it indicted Daleiden and Merritt for using counterfeit government documents in order to trick the Houston Planned Parenthood official.<sup>22</sup> According to the grand jurors, there was probable cause to believe that the two activists had falsified government documents and had attempted to purchase human body parts—both crimes under Texas law.<sup>23</sup> A few weeks later, agents of California Attorney General Kamala Harris searched Daleiden's apartment and seized video files and personal information.<sup>24</sup> According to Daleiden, the agents had seized what he called his "First Amendment work product."<sup>25</sup> A parallel federal civil lawsuit in San Francisco brought by the National Abortion Federation resulted in a temporary injunction against dissemination of the California video recordings.<sup>26</sup> In March 2017, Daleiden and Merritt were charged in the San Francisco Superior

<sup>19</sup> Jackie Calmes & Nicholas St. Fleur, *House Republicans to Investigate Planned Parenthood Over Fetal Tissue*, N.Y. TIMES (July 15, 2015), <http://www.nytimes.com/2015/07/16/us/house-republicans-to-investigate-planned-parenthood-over-fetal-tissue.html>.

<sup>20</sup> Danielle Paquette, *The Charges Against Anti-Planned Parenthood Filmmaker, Explained*, WASH. POST: POST NATION (Jan. 26, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/01/26/the-charges-against-anti-planned-parenthood-filmmaker-explained/?utm\\_term=.d923d715c79b](https://www.washingtonpost.com/news/post-nation/wp/2016/01/26/the-charges-against-anti-planned-parenthood-filmmaker-explained/?utm_term=.d923d715c79b) ("Initially, the grand jury set out to investigate Planned Parenthood. But on Monday, it instead returned charges against Daleiden.").

<sup>21</sup> Jackie Calmes, *Planned Parenthood Videos Were Altered, Analysis Finds*, N.Y. TIMES (Aug. 3, 2015), <http://www.nytimes.com/2015/08/28/us/abortion-planned-parenthood-videos.html> (reporting that an independent study commissioned by Planned Parenthood concluded that the so-called full version of the video was neither complete nor accurate. FUSION GPS, CMP ANALYSIS 3 (Aug. 25, 2015) (unpublished report), [https://www.plannedparenthood.org/files/4214/4709/6038/Forensic\\_report.pdf](https://www.plannedparenthood.org/files/4214/4709/6038/Forensic_report.pdf)).

<sup>22</sup> Fernandez, *supra* note 15.

<sup>23</sup> Paquette, *supra* note 20.

<sup>24</sup> Paige St. John, *State Attorney General Seizes Videos Behind Planned Parenthood Sting*, L.A. TIMES (Apr. 5, 2016, 5:57 PM), <http://www.latimes.com/local/lanow/la-me-attorney-general-seizes-planned-parenthood-videos-20160405-story.html>.

<sup>25</sup> *Id.*

<sup>26</sup> Nat'l Abortion Fed'n v. Ctr. for Med. Progress, No. 15-CV-03522-WHO, 2015 WL 5071977, at \*2 (N.D. Cal. Aug. 27, 2015), *aff'd*, 685 F. App'x 623 (9th Cir. 2017), *cert. petition pending*.

Court with one count of conspiracy and fourteen counts of electronically recording private communications without consent.<sup>27</sup>

When the Houston grand jurors indicted Daleiden and Merritt rather than the Planned Parenthood official they had stung, many people in the pro-choice community understandably cheered the stunning reversal.<sup>28</sup> The indictment was not, however, an unmixed blessing for supporters of liberal causes. Even as they condemned CMP for its deceptive editing of the Planned Parenthood videos, some observers noted that the indictment of Daleiden and Merritt could have a chilling effect on legitimate journalism.<sup>29</sup> Others were less concerned, however. Legitimate journalists, they contended, do not break the law.<sup>30</sup> The immediate issue in Texas was mooted when, in July 2016, the charges against Daleiden and Merritt were dropped on procedural grounds at the behest of the prosecution.<sup>31</sup>

Like other jurisdictions that have curtailed the historical independence of grand juries at common law,<sup>32</sup> Texas limits the scope of a grand jury's authority to issue indictments for activities beyond those that the government seeks to investigate.<sup>33</sup> Although Daleiden characterized the dismissal of the indictment as a vindication of "the First Amendment rights of all citizen journalists," neither the prosecutor's decision to seek dismissal of the charges nor the judge's acquiescence in that decision appears to have been based on the First Amendment.<sup>34</sup> The rights of self-proclaimed citizen journalists like

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<sup>27</sup> Complaint at 8, *State v. Daleiden*, SF2016300608 (Cal. App. Dep't Super. Ct. Mar. 28, 2017).

<sup>28</sup> See Danielle Paquette, *Creator of Anti-Planned Parenthood Videos Faces Felony Charge*, WASH. POST: POST NATION (Jan. 25, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/01/25/creator-of-anti-planned-parenthood-videos-faces-felony-charge/?utm\\_term=.877c494c080c](https://www.washingtonpost.com/news/post-nation/wp/2016/01/25/creator-of-anti-planned-parenthood-videos-faces-felony-charge/?utm_term=.877c494c080c) ("Advocates [of Planned Parenthood] applauded Monday's grand jury decision.").

<sup>29</sup> Valerie Richardson, *Even Planned Parenthood Supporters Troubled by Prosecution of Pro-Life Investigators*, WASH. TIMES (Feb. 16, 2016), <http://www.washingtontimes.com/news/2016/feb/16/david-daleiden-sandra-merritt-criminal-charges-dis> (noting that several pro-choice professors of law and of journalism thought the criminal charges against Daleiden and Merritt would have a restrictive effect on journalism).

<sup>30</sup> *Id.* ("Planned Parenthood officials argue that Mr. Daleiden and Ms. Merritt are criminals, not journalists [because] '[t]hey didn't document wrongdoing—they fabricated it.'").

<sup>31</sup> Michael Graczyk, *Duo Behind Fetal-Tissue Planned Parenthood Videos Cleared*, USA TODAY (July 26, 2016, 4:01 PM), <http://www.usatoday.com/story/news/nation/2016/07/26/anti-abortion-duo-fetal-tissue-videos/87578678/> (reporting that the Harris County prosecutor's office requested the charges be dismissed after it concluded "that the grand jury had exceeded its authority by investigating the activists after clearing Planned Parenthood of wrongdoing").

<sup>32</sup> Roger Roots, *If It's Not a Runaway, It's Not a Real Grand Jury*, 33 CREIGHTON L. REV. 821, 821–42 (2000) (providing an overview of the common law authority of grand juries).

<sup>33</sup> GEORGE E. DIX & JOHN M. SCHMOLESKY, TEXAS PRACTICE SERIES: CRIMINAL PRACTICE AND PROCEDURE § 23:7 (3d ed. 2016) ("[T]here is general agreement that [Texas] prosecutors have considerable discretion regarding charging matters and that their exercise of this discretion is to be afforded considerable deference [by grand juries].").

<sup>34</sup> See Graczyk, *supra* note 31 (reporting that the district judge "dismissed the tampering-with-government-records charges . . . at the request of the Harris County prosecutor's office," which explained that "Texas law limits what can be investigated after a grand jury extension order is issued" and

Daleiden and Merritt remain very much an open question, one that may be answered in the federal or state court litigation in California.

The ideological stakes of that question are mixed. True, the Planned Parenthood sting/scam codes as anti-abortion and thus conservative. Before founding CMP, Daleiden had worked with another anti-abortion group, Live Action, known for its video stings of abortion-rights groups.<sup>35</sup> Yet liberal and progressive activists also use new forms of communication, combined with methods that either approach or cross the line of legality, to publicize targets whose practices they consider objectionable. For example, a group calling itself “The Yes Men” made a series of films impersonating people or entities they disliked to expose them to public ridicule.<sup>36</sup> And in the United States and elsewhere, organizations like Mercy for Animals and People for the Ethical Treatment of Animals (“PETA”) secretly video-record and publicize the treatment of pigs, cows, and egg-laying hens on farms and in slaughterhouses as a means of influencing public opinion and the law regarding animals raised for food.<sup>37</sup>

Like anti-abortion activists, animal-rights activists have also sometimes found themselves on the wrong side of the law. Consider a recent federal case: Idaho is one of seven U.S. states with what critics call “ag-gag” laws.<sup>38</sup>

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“the grand jury had exceeded its authority by investigating the activists”).

<sup>35</sup> Samantha Allen, *Maker of Planned Parenthood Video Called Abortion “Genocide”*, DAILY BEAST (July 15, 2015, 7:50 PM), <http://www.thedailybeast.com/articles/2015/07/15/who-made-the-planned-parenthood-video.html> (detailing several “undercover video series” Live Action produced during and after Daleiden’s membership in the organization); Uffalussy, *supra* note 16 (stating that, while in college, Daleiden was “involved in the campus chapter of Live Action, a pro-life new-media movement that uses undercover investigations for its work to end abortion”).

<sup>36</sup> Douglas Britt, *The Yes Men Infiltrate DiverseWorks*, CHRON. (Apr. 30, 2010, 5:30 AM), <http://www.chron.com/entertainment/article/The-Yes-Men-infiltrate-DiverseWorks-1712890.php> (explaining the process by which “the Yes Men” operate).

<sup>37</sup> Mercy for Animals promotes its investigations, via its own website, MERCY FOR ANIMALS, <http://www.mercyforanimals.org/investigations> (last visited Aug. 13, 2017), and, as illustrated by its videos, through the mainstream media. See mercyforanimals, *Hidden Heroes: Meet Mercy for Animals Undercover Investigators*, YOUTUBE (July 15, 2013), <https://youtu.be/RYZveARts7M>. Other animal protection organizations conduct similar operations for similar purposes. See, e.g., PETA, <http://investigations.peta.org/> (last visited Aug. 13, 2017) (listing numerous exposés by PETA investigators of farming, meat industry, and animal-based research practices); see also Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1466–71 (2015) (describing the effective use of undercover investigations by animal welfare organizations, their impact on public policy, and the state laws passed in response in order to shield the affected industries).

<sup>38</sup> *What Is Ag-Gag Legislation?*, ASPCA, <http://www.aspc.org/animal-cruelty/factory-farms/what-ag-gag-legislation> (last visited Dec. 12, 2016) (describing “ag-gag” laws as legislation that restricts protections for whistleblowers on industrial farms); see also Michael C. Dorf, *Federal District Court Invalidates Idaho “Ag-Gag” Law*, VERDICT (Aug. 12, 2015), <https://verdict.justia.com/2015/08/12/federal-district-court-invalidates-idaho-ag-gag-law> (discussing the importance and implications of the invalidation of Idaho’s “ag-gag” law).



The Idaho law criminalizes entering an “agricultural production facility” under false pretenses and separately criminalizes creating an audio or video recording of what takes place there without authorization from the government or the owners of the facility.<sup>39</sup> Animal protection organizations successfully sued to enjoin enforcement of the law.<sup>40</sup> A federal district judge concluded that the law was unconstitutional because it was hostile to the message the activists intended to convey by recording and publicizing activities at farms and slaughterhouses.<sup>41</sup>

Yet, as we explain below, activists seeking to expose animal abuse, environmental damage, exploitation of workers, and the supposed horrors of abortion are vulnerable under general principles of law. As construed by the courts, the First Amendment forbids the government from singling out particular messages for special disadvantage but affords no special protection to journalists, much less to activists.<sup>42</sup> As we discuss below, the case law generally permits the application of laws governing property, contract, and other matters to be used to keep journalists and activists away from their targets.<sup>43</sup> For example, if Daleiden and Merritt had been charged with violating a law forbidding lying to gain access to abortion facilities, they could well have had a successful First Amendment defense. But because they were charged under broader general-purpose laws, they probably would not have had such a defense to a charge like the one that they faced, had it issued from a grand jury with proper jurisdiction.

Meanwhile, as we explore below, free speech law generally does protect the dissemination of opinions and purported statements of fact, even when those statements prove false.<sup>44</sup> Most dramatically, in *United States v. Alvarez*,<sup>45</sup> the Supreme Court rejected the notion that lies necessarily fall outside the protection of the First Amendment.

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<sup>39</sup> IDAHO CODE § 18-7042(a), (d) (2017), *invalidated by* Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195 (D. Idaho 2015).

<sup>40</sup> *Otter*, 118 F. Supp. 3d at 1199, 1209, 1211–12.

<sup>41</sup> *Id.* at 1205–07, 1209, 1211–12 (holding the statute violates the rights to free speech and equal protection because it targets animal activists and their message).

<sup>42</sup> *See infra* Part I.A–B. *See generally* Rodney A. Smolla, *The First Amendment, Journalists, and Sources: A Curious Study in “Reverse Federalism,”* 29 CARDOZO L. REV. 1423 (2008) (arguing that federal law, which “[a] number of lower courts” have interpreted as providing no privilege for journalists, should follow the example of state laws in creating protections for journalists).

<sup>43</sup> *See infra* Part I.A–B; *see also, e.g.*, Anthony L. Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of the Federal Journalist’s Privilege*, 14 WM. & MARY BILL RTS. J. 1063, 1076–77, 1079–80 (2006) (discussing recent changes in First Amendment protections for journalists, including their liability under common-law doctrines for trespass and disclosure of sources’ identity, and courts’ reluctance to recognize a journalist’s privilege).

<sup>44</sup> *See infra* Part II.

<sup>45</sup> 132 S. Ct. 2537 (2012).

Taken as a whole, First Amendment doctrine produces a startling juxtaposition. Stings—defined here to mean efforts to uncover hidden information that the public has an interest in knowing—are legally vulnerable, while scams—the propagation of opinions and purported statements of fact that rest on false information—are generally protected.<sup>46</sup>

The various legal doctrines that lead to favoring scams over stings may well be justified, all things considered. But that does not make the result any less strange or less important: it could have serious implications for the changing relationship between journalism and activism.

The balance of this Article shows how the law and the changing technological and social landscape together foster a “new” kind of activist journalism. We use quotation marks to indicate that the merger of journalism and activism typified by the Planned Parenthood sting/scam might be better characterized as a return to the roots of journalism in activism. As we explain in Part III, the notion of journalism as the objective presentation of “just the facts” was largely a twentieth-century phenomenon. In prior periods, journalism was a branch of activism. We think journalism may well be returning to its activist roots.

Yet in saying that the merger of journalism and activism has deep historical roots, we do not mean to deny the distinctiveness of the twenty-first-century forms that activist journalism takes. As the pre-election wave of fake news showed, in an era when someone as far away as Macedonia can shoot, edit, and widely share video on the Internet, and when traditional media companies tumble while blogs rise, the difference between activists on the one hand and the media on the other is less and less clear.

Three elements—the peculiarities of contemporary American case law governing freedom of speech, the ideologically fragmented media landscape, and the public’s Right to Know<sup>47</sup>—collectively encourage the dissemination of what comedian Stephen Colbert aptly called “truthiness,”<sup>48</sup> the quality of seeming to be true, without actually being true. Citizen journalism holds great promise for democracy, but it also tends to produce fake news with the ring of truth rather than simply promoting a better-informed citizenry. If we are right, then recent developments at the intersection between the law and citizen journalism have profound implications for American democracy.

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<sup>46</sup> See *infra* Part II.

<sup>47</sup> MICHAEL SCHUDSON, *THE RISE OF THE RIGHT TO KNOW: POLITICS AND THE CULTURE OF TRANSPARENCY, 1945–1975*, at 3–16 (2015) (describing the public’s “Right to Know,” which values openness and transparency to the public writ large, as a phenomenon that developed dramatically during the 1950s through 1970s).

<sup>48</sup> *Colbert Report: The Word—Truthiness*, COMEDY CENTRAL (Oct. 17, 2005), <http://www.cc.com/video-clips/63ite2/the-colbert-report-the-word---truthiness> (satirizing the idea of “absolute truth,” especially in the political arena).

## I. PROTECTION FOR JOURNALISM, NOT JOURNALISTS

Readers who are not experts in the Supreme Court's First Amendment case law could be expected to wonder whether the merger of activism and journalism will extend protection for activists or constrict protection for journalists. Given the difficulty of distinguishing between activism and journalism, what counts as journalistic activity? With the decline of old media and the emergence of citizen journalism, does everyone now have the sort of constitutional protection that once shielded only *The New York Times* and *CBS News*? The short answer is "yes,"<sup>49</sup> but the longer answer is more troubling. Even in the heyday of the institutional press, the Supreme Court construed the First Amendment as providing no special shield for the press as such. Yes, every blogger may be a journalist, but the status of journalist is, so far as the Supreme Court is concerned, nearly worthless.

That is not to say that existing law provides no tools to shelter citizen journalists. The *Pentagon Papers* case<sup>50</sup> and subsequent decisions offer some protection to expressive activities like journalism.<sup>51</sup> Moreover, state law may be fertile ground for reconsidering the nature of journalism, because most states have long recognized at least a qualified privilege entitling reporters to shield their sources.<sup>52</sup> As states begin to grapple with how those and other laws granting journalists distinctive privileges apply to citizen journalists, they can provide object lessons in how to adapt the law to the new media environment.

### A. Federal Constitutional Law

For most of American history, the First Amendment lay dormant. Indeed, it is not much of an exaggeration to say that the First Amendment was *created* in the twentieth century. Despite protestations from Jeffersonians, it did not prevent the enactment and enforcement of the Sedition Act.<sup>53</sup> Even landmark civil liberties decisions of the nineteenth century tended to ignore principles of free speech and free press.<sup>54</sup> Thus, the Supreme Court disallowed the use of military tribunals to try civilians,<sup>55</sup> but did not block President Lincoln's suppression of dissident speech.<sup>56</sup> Prior to the modern era,

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<sup>49</sup> See Fargo, *supra* note 43, at 1112–19.

<sup>50</sup> *New York Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 714 (1971) (per curiam) (holding that the Government did not meet its burden of proof in showing that the law restraining expression was constitutional).

<sup>51</sup> See, e.g., *id.*

<sup>52</sup> Smolla, *supra* note 42, at 1423, 1429–30.

<sup>53</sup> HAROLD HOLZER, *LINCOLN AND THE POWER OF THE PRESS: THE WAR FOR PUBLIC OPINION* 335–75 (2014).

<sup>54</sup> *Id.*

<sup>55</sup> See, e.g., *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

<sup>56</sup> HOLZER, *supra* note 53, at 335–75.

the First Amendment was thought to do little more than forbid prior restraints,<sup>57</sup> implementing an important but narrow principle most famously championed by John Milton in *Areopagitica* in 1644.<sup>58</sup>

This narrow view of free speech began to change after World War I and the ensuing first Red Scare.<sup>59</sup> Even then, however, modern free speech principles were articulated only in dissents by Justices Louis Brandeis and, after a time, Oliver Wendell Holmes, Jr.<sup>60</sup> Their views would not triumph until the Court began to stand up to McCarthyism in the late 1950s.<sup>61</sup> Despite numerous censorial federal enactments, the Supreme Court did not invalidate any act of Congress on First Amendment grounds until 1965.<sup>62</sup>

Modern constitutional case law involving free speech and free press was shaped around two main images. First, civil liberties were intertwined with civil rights.<sup>63</sup> Second, the case law protected unlikely anti-heroes like racists<sup>64</sup> and peddlers of smut.<sup>65</sup> The institutional press appeared as protagonists in some important cases, such as *New York Times v. Sullivan*,<sup>66</sup> which limited liability for defamation of public officials absent reckless disregard for the truth,<sup>67</sup> and the aforementioned *Pentagon Papers* case,<sup>68</sup> which featured both the *Times* and the *Washington Post* as parties. But the status of the press qua

<sup>57</sup> LEONARD W. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION 2–4 (Torchbook ed., Harper & Row 1963) (noting that those who believe the Framers intended a broad First Amendment protection of the press are relating back current views onto that era); see also *id.* at 8–9 (describing Blackstone’s definition of a free press under English common law as “the absence of censorship in advance of publication”); *id.* at 248 (stating that the Framers likely understood the First Amendment to protect a free press as defined by Blackstone).

<sup>58</sup> JOHN MILTON, AREOPAGITICA (John W. Hales ed., Oxford at the Clarendon Press 1894) (1644).

<sup>59</sup> THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA 57–60 (2015) (describing early academic opposition to the constraints on free speech enacted during World War I targeting “pacifists and Socialists”).

<sup>60</sup> See generally *id.* (discussing how Justices Brandeis and Holmes came to redefine and reemphasize the First Amendment in their opinions).

<sup>61</sup> See Geoffrey R. Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 92 CALIF. L. REV. 1387, 1406 (crediting Justice Brennan with the shift in the Court’s jurisprudence).

<sup>62</sup> See *Lamont v. Postmaster Gen.*, 381 U.S. 301, 310 (1965) (invalidating regulation of mail containing communist propaganda).

<sup>63</sup> See generally HARRY KALVEN, THE NEGRO AND THE FIRST AMENDMENT (1965) (demonstrating how the African-American Civil Rights Movement changed the First Amendment).

<sup>64</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969). *Brandenburg* states the canonical limits on government power to censor speech to protect public safety. *Id.* The winning party was a Klansman. *Id.* at 444.

<sup>65</sup> See *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46 (1988) (holding that a public figure could not recover for intentional infliction of emotional distress resulting from a lewd parody published in a pornographic magazine). *Hustler* is one of a great many free speech cases protecting pornographic publications.

<sup>66</sup> 376 U.S. 254 (1964).

<sup>67</sup> *Id.* at 279–80.

<sup>68</sup> *New York Times, Co. v. United States (Pentagon Papers)*, 403 U.S. 713 (1971).

press has played no formal role in these or other cases. The logic of these cases would have given a person distributing leaflets in the public square the same rights as the *Times* and the *Post*.

More broadly, Supreme Court case law largely rejects the notion that the right to freedom of the press grants the institutional press or people who work for it any protection beyond what is afforded to every individual as a matter of free speech. Admittedly, normative arguments can be and have been made for giving the First Amendment's press clause independent weight beyond the speech clause,<sup>69</sup> and there may be some remaining room in the doctrine for treating journalists per se as special.<sup>70</sup> Yet taken as a whole, the case law tends to treat journalists no better than anyone else.

For example, in *Zurcher v. Stanford Daily*,<sup>71</sup> the Court held that police seeking the identities of student protesters who had earlier clashed with authorities could execute a search warrant against a newspaper, without making any special showing beyond what would be required to search a bakery or a bowling alley.<sup>72</sup> Despite acknowledging that the First and Fourth Amendments emerged from a common history of executive abuse, the majority rejected the notion that special procedures should be adopted to protect newspapers or other media outlets.<sup>73</sup>

The *Zurcher* ruling cited as precedent a 1972 case, *Branzburg v. Hayes*,<sup>74</sup> which held that the First Amendment provides reporters with no privilege to shield confidential sources against a subpoena.<sup>75</sup> There, the Court invoked the hoary principle that "the public . . . has a right to every man's evidence," thus treating a professional journalist as no different from a random witness to a crime.<sup>76</sup>

To be sure, modern free speech law does provide some protection for journalism, just not for journalists. In other words, the status of working for a news organization confers no special First Amendment rights, but the law nonetheless may not single out for disadvantageous treatment those activities associated with speech and the press.

The *Pentagon Papers* case is the most famous example of the Supreme Court holding that, absent a compelling particularized showing of imminent danger, the government may not block the dissemination of information,

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<sup>69</sup> See generally, e.g., Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434 (2014).

<sup>70</sup> See C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 959–60 (2007).

<sup>71</sup> 436 U.S. 547 (1978).

<sup>72</sup> *Id.* at 565–66.

<sup>73</sup> *Id.* at 564–67.

<sup>74</sup> 408 U.S. 665 (1972).

<sup>75</sup> *Id.* at 708; see also *Zurcher*, 436 U.S. at 566.

<sup>76</sup> *Branzburg*, 408 U.S. at 688 (alteration in original) (citations omitted).

even if the information came into the possession of the would-be disseminators as a consequence of law breaking.<sup>77</sup> *Pentagon Papers* itself only vindicated the narrow principle championed by Milton in the seventeenth century: the First Amendment establishes a “heavy presumption against” prior restraints.<sup>78</sup> But a subsequent ruling extended the protection to persons charged with after-the-fact liability.<sup>79</sup>

How much protection do the principles established in these cases provide for journalism, and thus, indirectly, for journalists? Some, but case law provides nothing like a get-out-of-jail-free card for contemporary citizen journalists (or even conventional journalists) who take their cellphone-video cameras to slaughterhouses, to abortion clinics, or to the streets.

The Idaho ag-gag case we described above illustrates both the speech-protective and speech-unprotective features of contemporary case law.<sup>80</sup> On the civil libertarian side of the ledger, it is notable that nothing in the federal district court opinion striking down Idaho’s law turned on the nature of the organizations suing. They were activists who engaged in journalistic activities, which was sufficient to protect them. Indeed, the district court opinion expressly compares the activists to early twentieth-century muckraking activist journalist Upton Sinclair.<sup>81</sup> The Idaho ag-gag case thus shows that First Amendment doctrine now shelters activist journalism.

Yet even assuming that the Idaho ag-gag ruling is upheld on appeal, journalism—by activists as well as by conventional journalists—remains highly vulnerable. The fact that the Idaho law effectively *singled out* a particular message for special burdens was crucial to the district court’s ruling.<sup>82</sup> Nothing in the decision casts doubt on the ability of government officials and private property owners to enforce *general* laws that do not target speech or particular messages. Activists for animal rights and other causes, as well as conventional journalists, remain vulnerable to the application of general laws restricting trespass, enforcing contracts, forbidding fraud, and more.

Consider the case that might have been brought against Daleiden and Merritt by a prosecutor working with a grand jury properly tasked with investigating them. In Houston, Daleiden and Merritt initially stood accused of violating laws that apply to everyone. For example, the charge of tamper-

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<sup>77</sup> *New York Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 714 (1971).

<sup>78</sup> *Id.* (quoting *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 70 (1963)).

<sup>79</sup> *See Bartnicki v. Vopper*, 532 U.S. 514, 514 (2001) (holding that the First Amendment shields radio commentators from civil liability for playing a recording on air, notwithstanding the fact that it was illegally recorded by a third party).

<sup>80</sup> *See Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195 (D. Idaho 2015).

<sup>81</sup> *Id.* at 1201–02.

<sup>82</sup> *Id.* at 1204–07.

ing with a government document would not raise any First Amendment issues at all if brought against a twenty-year-old who altered his driver's license in an effort to purchase alcohol in violation of state law. The Supreme Court cases denying special protection to journalists to resist searches or to shield their sources indicate that even bona fide journalists would be entitled to no First Amendment defense if they broke a general law to gain access to Planned Parenthood officials or other alleged evildoers<sup>83</sup>; the leading federal appeals court case, involving two reporters for *ABC News*, denied any special right of undercover access for investigators.<sup>84</sup>

Daleiden and Merritt escaped prosecution under a technical limitation of the scope of grand jury jurisdiction in Texas.<sup>85</sup> The dismissal of charges against them did not vindicate their First Amendment rights. Indeed, as we have seen, if the case had gone forward, Supreme Court First Amendment case law would have left them vulnerable to prosecution and conviction. Thus, they face the real prospect of conviction and imprisonment in California.

### B. State Law

In the United States, civil liberties are sheltered by not only the federal Bill of Rights but also by federal statutes, state constitutions, state statutes, and common law. Despite repeated efforts in Congress to introduce legislation providing reporters with the right to shield sources,<sup>86</sup> federal statutes provide no special protection to journalists or other investigators. While a few federal appeals courts have suggested that there is some First Amendment protection for a reporter-source shield, in light of *Branzburg*, “these courts may be skating on thin ice,” as Judge Richard Posner observed.<sup>87</sup> Does state law provide any additional rights?

In key respects, the answer is no. So far as we have been able to determine, no state permits an undercover activist or journalist to escape criminal or civil liability under an applicable general law (that is, one not directed specifically at speech or a particular message).<sup>88</sup> In that respect, state constitutions have

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<sup>83</sup> See *supra* notes 71–73 and accompanying text.

<sup>84</sup> See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 520–22 (4th Cir. 1999) (affirming damages award against journalists, who had forged documents to gain entry to supermarkets and secretly videotape the supermarkets' practices, based on Supreme Court precedent upholding journalist liability under generally applicable laws).

<sup>85</sup> See Graczyk, *supra* note 31.

<sup>86</sup> See, e.g., Alicia Armbruster, *Protecting Reporters' Privilege?*, FIRST AMEND. CTR. (Apr. 12, 2007), <http://www.firstamendmentcenter.org/protecting-reporters-privilege>; Jason Stverak, *The Senate's Feel-Good Shield Law*, U.S. NEWS (Apr. 9, 2014, 8:00 AM), <http://www.usnews.com/opinion/articles/2014/04/09/the-senates-media-shield-law-is-toothless-and-arbitrary>.

<sup>87</sup> *McKevitt v. Pallasch*, 339 F.2d 530, 533 (7th Cir. 2003).

<sup>88</sup> There may be some wiggle room for journalists and activists in state tort law. For example, Judge Posner expressed the background rule that “there is no journalists' privilege to trespass,” even as he

generally been construed in parallel with the federal First Amendment.

However, in one area, state law departs substantially from the federal model. Nearly all of the states provide some protection to journalists to shield their sources.<sup>89</sup> As of late 2015, thirty-nine states did so through statutory shield laws, with courts in a few states that lack such statutes filling the gap as a matter of common law or by construing state constitutional protections for free speech and free press more generously than the U.S. Supreme Court has construed the parallel provisions of the First Amendment.<sup>90</sup> In providing journalists with a form of protection that the general public lacks, state lawmakers and—in the states that provide protection via common law or state constitutional interpretation—state courts have had to determine both what counts as journalism and who counts as a journalist.

Most states distinguish between journalists—who qualify for the privilege—and the rest of the public, presumably including activists, bloggers, YouTubers, and other self-appointed or part-time journalists.<sup>91</sup> California's shield law is quite typical. It offers protection against contempt of court for journalists who shield their sources.<sup>92</sup> The coverage extends to any “publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service.”<sup>93</sup> A state intermediate appellate court held that this language extends to publication online, at least where the Internet-based publication was in most respects similar to older media.<sup>94</sup>

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found that consent to enter property is often valid even though obtained by fraud, and thus ruled in favor of journalists who posed as patients to expose profit-motivated bad medical decisions by doctors. *Desnick v. ABC, Inc.*, 44 F.3d 1345, 1351–55 (7th Cir. 1995). But even read for all that it is worth, this protection apparently could be overridden by a state legislature without offending state or federal constitutional law. And even without such an override, other courts disagree. *See, e.g.*, *Med. Lab. Mgmt. Consultants v. ABC, Inc.*, 30 F. Supp. 2d 1182, 1201–02 (D. Ariz. 1998) (holding that consent induced by misrepresentation or a mistake known to an alleged trespasser is “not effective”), *aff'd*, 306 F.3d 806 (9th Cir. 2002); *Shiffman v. Empire Blue Cross & Blue Shield*, 681 N.Y.S.2d 511, 512 (N.Y. App. Div. 1998) (finding that “consent obtained by misrepresentation or fraud is invalid”); *see also* RESTATEMENT (SECOND) OF TORTS § 892B(2) (AM. LAW INST. 1979) (cited by the courts in both of the preceding citations).

<sup>89</sup> Smolla, *supra* note 42, at 1429 (stating “that some 49 states and the District of Columbia have extended some form of newsgathering privilege to citizens”).

<sup>90</sup> Paul M. Smith & Jessica Ring Amunson, *State Shield Laws*, in 2 TESTIMONIAL PRIVILEGES § 8:6 (3d ed. 2015).

<sup>91</sup> *Cf.* Paul M. Smith & Jessica Ring Amunson, *Who May Assert the Privilege*, in 2 TESTIMONIAL PRIVILEGES § 8:8 (3d ed. 2015) (noting that only a few states protect the latter category of online activists, bloggers, YouTubers, etc.).

<sup>92</sup> CAL. EVID. CODE § 1070(a) (West 2009).

<sup>93</sup> *Id.* Nearly all other states have similar restrictions. A complete list of state shield laws can be found in Smith & Amunson, *supra* note 90, at n.1.

<sup>94</sup> *See O’Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 99–105 (Cal. Ct. App. 2006) (concluding that the California shield law protected a news website “which differ[ed] from traditional periodicals” only slightly).



A few state laws could be construed to provide even broader coverage. For example, Georgia affords a qualified right to shield confidential sources to “[a]ny person . . . engaged in the gathering and dissemination of news for the public through . . . electronic means.”<sup>95</sup> In principle, that would entitle an activist blogger to protection. Likewise, the Maryland statute specifically includes protection for persons working (even as independent contractors or students) for entities that use “electronic means of disseminating news and information to the public.”<sup>96</sup> A 2006 intermediate appellate decision construed this language as covering an online financial newsletter,<sup>97</sup> and it too could in principle be said to cover activist bloggers. The West Virginia shield law only covers reporters but defines “reporter” in a way that could reach activists.<sup>98</sup> A New Jersey trial court judge found that that state’s shield law, which extends to persons “connected with . . . news media”<sup>99</sup> did not cover all bloggers, but did cover a blogger/activist for a website affiliated with a nonprofit county government watchdog organization.<sup>100</sup>

Four other state shield laws likewise contain language that could be understood to reach activists,<sup>101</sup> although the count is necessarily tentative because there is very little case law testing the bounds of who is or is not a journalist entitled to shield her sources. Laws that on their face appear to apply to activists could be construed narrowly, while laws that are written in narrower terms could be construed more broadly.

However, even if construed broadly to cover activists, state shield laws do not in practice provide much more protection than does federal law. Under state law, the privilege is typically qualified, not absolute; it can be overcome by a special showing of need for the evidence.<sup>102</sup> Moreover, even a strong privilege will not protect a journalist’s source in all proceedings. A reporter cannot count on a state law shielding her sources because she cannot know in advance if she will be called to testify in federal court in relation to issues of federal law, where the no-shield rule of *Branzburg* applies.<sup>103</sup> Accordingly, a reporter who aims to assure a source that she will truly protect the source

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<sup>95</sup> GA. CODE ANN. § 24-5-508 (2017).

<sup>96</sup> MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (West 2017).

<sup>97</sup> *Forensic Advisors, Inc. v. Matrixx Initiatives, Inc.*, 907 A.2d 855, 863 (Md. Ct. Spec. App. 2006).

<sup>98</sup> W. VA. CODE ANN. § 57-3-10 (West 2017) (“‘Reporter’ means a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns matters of public interest for dissemination to the public for a substantial portion of the person’s livelihood, or a supervisor, or employer of that person in that capacity.”).

<sup>99</sup> N.J. STAT. ANN. § 2A:84A-21–21.8 (West 2017).

<sup>100</sup> *In re* Jan. 11, 2013 Subpoena by Grand Jury, 75 A.3d 1260, 1263, 1267–68 (N.J. Super. Ct. Law Div. 2013).

<sup>101</sup> MINN. STAT. § 595.023 (2017); NEB. REV. STAT. §§ 20-144–147 (2012); OR. REV. STAT. § 44.520 (2015); S.C. CODE ANN. § 19-11-100 (2017).

<sup>102</sup> *See* Fargo, *supra* note 43, at 1068, 1119; *see also* Smolla, *supra* note 42, at 1429.

<sup>103</sup> *See* FED. R. EVID. 501 (recognizing state law privileges only “regarding a claim or defense for which state law supplies the rule of decision”).

cannot rely on the law; instead, the reporter must make a credible promise to go to jail for contempt rather than submit to a court order to testify.

Yet if state shield laws provide little in the way of practical assurance to journalists or activists, at least they show that state lawmakers and judges have explored an alternative to the federal approach under which the First Amendment provides no protection to speech and the press against the application of general laws. The existence of even a qualified privilege under state law thus establishes an important principle.

How far that principle should go raises a set of difficult normative questions. The Supreme Court case law declining to give special protection to speech, speakers, or the institutional press might be thought to go too far in limiting speech. Indeed, it seems especially problematic that journalists and activists can be penalized for lying to gain access to private property in order to discover facts of legitimate interest to the public, while police may use informants—aptly called “pretend friends” by one commentator<sup>104</sup>—to gain such access in order to investigate suspected criminal activity without abridging privacy rights under the Fourth Amendment.<sup>105</sup>

Yet it is not clear that the different approaches should be harmonized by permitting journalist/activist access, rather than by denying police access (absent satisfaction of Fourth Amendment requirements). After all, there are legitimate concerns that counsel caution before trying to fashion a constitutional or other rule granting journalists or activists the access they would seek. These include security, privacy, and the difficulty of drawing sensible lines dividing the press, activists, and the general public.

Whether activists should be able to claim statutory, common-law, or constitutional protection for their reportage has implications for a great many questions. Who, if anyone, may shield a whistleblower or other source? Should people have a right to record their interactions with the police? To record the interactions of others with the police? What of activists like Daleiden and Merritt who go undercover to investigate alleged or imagined wrongdoing, whether by doctors, farmers, bankers, or government agencies? Should the mere breaking of the law deprive them of protection as speakers? And if so, what about people and institutions that receive and then publish information obtained by lawbreakers?

As we have seen, case law and statutes appear to provide straightforward answers to questions like these. From Daniel Ellsberg to Edward Snowden, the fact that a source of information is tainted has not been thought to be sufficient grounds for the government to restrain publication. At the same time, however, the First Amendment does not give professional journalists

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<sup>104</sup> Sherry F. 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).

<sup>105</sup> See *id.* at 139–44.

any preferred position. Whether reporters seek to shield sources or to resist search warrants, the Constitution treats journalists no differently from bakers and candlestick makers. And while state law provides some special privileges to reporters to shield their sources, it does not appear to provide journalists any broader exemptions.

That result might, at first blush, seem sensible. After all, if anyone with a mobile phone can plausibly claim to be a journalist, then journalists can claim no exemption from general legal obligations. But seen from the opposite direction, the law's leveling down is profoundly disturbing. If no one is a journalist because everyone is a potential journalist, then there is no freedom of the press. As we also have seen, the Supreme Court's cases do not go quite that far. As the *Pentagon Papers* case illustrates, the Court provides some protection for the *activity* of journalism, even though the *status* of being a journalist provides no special rights. Whether that protection is enough, given the ease with which First Amendment limits can be circumvented through the application of general laws to journalists and activists, depends on how one weighs such incommensurable factors as speech, privacy, security, and the relative institutional advantages of courts and legislators.

## II. LAW'S PERVERSE EFFECTS

Different readers will draw different conclusions about whether U.S. law adequately protects journalists and/or activists who go undercover to expose real or imagined evils. For our purposes, however, it will be useful to contrast the scant protection afforded to undercover investigations with the relatively robust protection the law affords to the dissemination of falsehoods. As we shall see, the law plays a role in reinforcing the alternate realities that modern technology and social norms facilitate. The law's impact may be perverse, as the Planned Parenthood story reveals.

We have distinguished between two phases of the anti-Planned Parenthood operation—the sting and the scam:

- *In the sting phase*, Daleiden and Merritt misrepresented their identities in order to gain access to Planned Parenthood officials, whom they surreptitiously recorded.
- *In the scam phase*, they used CMP and a network of social conservative blogs, media outlets, and politicians to spread the false message that Planned Parenthood profits from the sale of fetal body parts obtained via abortions.<sup>106</sup>

A legal regime designed to vindicate a broad-based right of the public to learn the truth would seemingly provide robust (or at least some) protection

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<sup>106</sup> See *supra* Introduction.

for undercover investigators seeking to detect wrongdoing that affects the public interest while discouraging the spread of false information. It would, in other words, protect the sting while discouraging the scam. And yet, our legal system does nearly precisely the opposite.

As we have seen, neither freedom of speech nor freedom of the press would prevent the prosecution of actors such as Daleiden and Merritt for violating speech-neutral laws like those forbidding falsifying government documents.<sup>107</sup> More generally, undercover journalists and activists have no free speech shield under state or federal law for violating speech-neutral laws protecting property, privacy, or contracts. Although clumsy legislative efforts (such as the Idaho ag-gag law) that target speech or particular viewpoints will fail, sophisticated government and private lawyers seeking to restrict access to sensitive facilities or personnel will increasingly turn to general laws and common law doctrines to keep out journalists and activists. In short, stings are vulnerable.

By contrast, scams in the sense of false claims of the sort made by Daleiden and CMP, as well as completely fake news of the sort that drew attention following the 2016 presidential election, can thrive. Indeed, to a considerable extent, such scams are constitutionally protected.

Consider the case of *United States v. Alvarez*.<sup>108</sup> A local government official who falsely claimed to have received the Congressional Medal of Honor was indicted and convicted for violating the Stolen Valor Act, a federal statute that criminalizes false statements about military awards, with special penalties for such statements about the Congressional Medal of Honor.<sup>109</sup> Even while describing the official as a habitual liar, the Supreme Court invalidated the conviction and the Act on free speech grounds.<sup>110</sup> In the lead opinion, Justice Anthony Kennedy rejected the Government's "contention that false statements have no value and hence no First Amendment protection."<sup>111</sup>

To be sure, *Alvarez* involved a criminal prosecution. It left civil liability available for defamatory statements, but this option came with an important caveat. As the Court itself emphasized in *Alvarez*, "Even when considering some instances of defamation and fraud . . . falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood."<sup>112</sup>

Would that caveat avail Daleiden and CMP in a defamation suit targeting the scam? The answer is not entirely clear. The leading Supreme Court

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<sup>107</sup> See *supra* Part I.A–B.

<sup>108</sup> 132 S. Ct. 2537 (2012).

<sup>109</sup> *Id.* at 2542–43 (citing Stolen Valor Act of 2005, 18 U.S.C. § 704 (2012), *invalidated by Alvarez*, 132 S. Ct. 2537 (amended 2013)).

<sup>110</sup> *Alvarez*, 132 S. Ct. at 2542–43.

<sup>111</sup> *Id.* at 2544.

<sup>112</sup> *Id.* at 2545; see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

case allows that deliberate misquotations in print can be the basis for a libel action consistent with the First Amendment.<sup>113</sup> No similar case has decided whether that principle extends to editing out context (but not otherwise altering content) of video so as to mislead viewers about what was meant.

However, even assuming that Daleiden and CMP could be held liable for defamation based on misleading editing, such liability leaves targets like Planned Parenthood highly vulnerable to misleading as well as outright fake reports about its activities. Proving deliberate or reckless misquotation will be difficult, as the defendant can always claim (often justifiably) that some editorial judgment is necessary to turn notes or raw footage into sellable news. Moreover, civil damages will often be inadequate, even when they succeed.

Suppose that the plaintiffs ultimately succeed in obtaining a judgment against CMP and Daleiden in the civil litigation in California. CMP and Daleiden almost certainly lack the resources to satisfy a judgment for all of the damage that will have been done by the scam, including the loss of future public resources. Thus, tort liability for CMP and Daleiden will not necessarily protect Planned Parenthood from harm to its reputation.

Consider the important example of the Association of Community Organizations for Reform Now (“ACORN”), which was the victim of a 2009 sting/scam that foreshadowed the one directed at Planned Parenthood.<sup>114</sup> In response to the spread across the politically conservative mediaverse of the false meme that ACORN systematically promoted voting fraud, Congress defunded it.<sup>115</sup> ACORN sued the government, claiming that the defunding measure was an unconstitutional “bill of attainder”—that is, a punishment impermissibly meted out by the legislature rather than by the courts.<sup>116</sup>

But ACORN’s lawsuit failed.<sup>117</sup> According to the federal appeals court that resolved the case, Congress merely failed to fund, but did not punish, ACORN.<sup>118</sup> From the perspective of ACORN and its enemies, of course, that was a distinction without a difference. Even before the appeals court delivered that *coup de grâce*, the writing was on the wall. Starved of the public

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<sup>113</sup> *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 513–14, 517, 525 (1991).

<sup>114</sup> *ACORN v. United States*, 618 F.3d 125, 130–131 (2d Cir. 2010) (relating that a “scandal arose in the summer of 2009 when ‘hidden camera’ videos revealed ACORN employees and volunteers providing advice and counseling in support of a proposed prostitution business,” although an independent report concluded that “the hidden-camera videos were heavily edited, ‘manipulated,’ and ‘distorted’”) (citations omitted).

<sup>115</sup> *Id.* at 131.

<sup>116</sup> *ACORN*, 618 F.3d at 131–32.

<sup>117</sup> *Id.* at 138, 141–42.

<sup>118</sup> *Id.*

resources on which it had come to rely,<sup>119</sup> ACORN disbanded.<sup>120</sup> The sting/scam had worked.

In noting the inadequacy of liability for defamation as a means of deterring future scams, we do not mean to suggest a clear path of law reform. As a candidate for office, Donald Trump proposed to “open up” libel laws to make it easier for plaintiffs to win defamation judgments,<sup>121</sup> but as president there is little he can do to accomplish this goal. Tort law is state law, not federal law, and even if President Trump can use his bully pulpit to influence state defamation law, there is no reason to think that the Supreme Court would overrule the constitutional limits on defamation liability.

Nor should it. The justices were right to worry that the alternative of too-easy liability for defamation can be used to harass and intimidate activists who are not scammers. It is no accident that the leading case limiting such liability on First Amendment grounds involved a lawsuit by an Alabama official against the New York Times for publishing an advertisement by civil rights activists.<sup>122</sup> And even when legitimate speech is ultimately protected, defending a lawsuit can be costly—as Oprah Winfrey discovered when ranchers sued her under the Texas False Disparagement of Perishable Food Products Act for airing a television show segment about mad-cow disease.<sup>123</sup>

Nor is it clear that free speech doctrine ought to be changed to grant journalists and activists a privilege to conduct stings. In their illuminating discussion of undercover journalism (including by activists), Alan Chen and Justin Marceau persuasively argue that ag-gag laws and other laws that *target* what they helpfully call “investigative deceptions” violate the First Amendment. They contend that such deceptions should be protected *because* they promote the truth, by contrast with those lies that receive First Amendment protection *despite* the damage they do.<sup>124</sup>

We agree entirely, but as we explained above, in general the free speech and free press rights protect only against laws and policies that target speech

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<sup>119</sup> *Id.* at 131 (noting that in 2009, “[s]everal states suspended their funding of ACORN and its affiliates”).

<sup>120</sup> See Michael A. Memoli, *ACORN Filing for Chapter 7 Bankruptcy*, L.A. TIMES (Nov. 2, 2010), <http://articles.latimes.com/2010/nov/02/news/la-pn-acorn-bankruptcy-20101103> (reporting that ACORN would be filing for bankruptcy as it “was not able to recover from” the sting/scam).

<sup>121</sup> Hadas Gold, *Donald Trump: We’re Going to “Open Up” Libel Laws*, POLITICO (Feb. 26, 2016, 2:31 PM), <http://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866>.

<sup>122</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>123</sup> See *Tex. Beef Grp. v. Winfrey*, 201 F.3d 680, 682–84 (5th Cir. 2000); see also Sue Anne Pressley, *Oprah Winfrey Wins Case Filed By Cattlemen*, WASH. POST (Feb. 27, 1998), [https://www.washingtonpost.com/archive/politics/1998/02/27/oprah-winfrey-wins-case-filed-by-cattlemen/dd4612f5-ccb4-4e3d-a1c1-f84d1f4fd23c/?utm\\_term=.a26af1b78a9f](https://www.washingtonpost.com/archive/politics/1998/02/27/oprah-winfrey-wins-case-filed-by-cattlemen/dd4612f5-ccb4-4e3d-a1c1-f84d1f4fd23c/?utm_term=.a26af1b78a9f) (describing six-plus week trial involving “untold legal fees”).

<sup>124</sup> Chen & Marceau, *supra* note 37, *passim*.

based on its content, not against the application of general laws and doctrines—such as property, contract, and the like—that happen to infringe on expression in particular cases.<sup>125</sup> Perhaps constitutional doctrine ought to be changed to provide greater protection against such incidental burdens (as one of us has argued);<sup>126</sup> yet such a change could have real costs, especially in an era when social conservatives increasingly point to religious freedom and freedom of expression as grounds for opting out of legal obligations to avoid discriminating on the basis of sexual orientation or otherwise comply with general laws.<sup>127</sup>

Thus, each piece of the legal regime may be justified in its own terms, but collectively, the regime creates perverse incentives. Journalism receives no special protection against general laws for legitimate fear of what the Court called, in a different First Amendment context, making every citizen “a law unto himself.”<sup>128</sup> By contrast, *dissemination* of information, even if false, is protected for fear of harassment of those expressing unpopular viewpoints. Taken together, these two principles make it relatively difficult for activist journalists to uncover the truth about the targets of their dissatisfaction and relatively easy for them to disseminate falsehoods about those targets.

Although perhaps justified in their separate domains, the legal principles interact with each other and with the new media landscape to create a perfect storm. With bona fide investigation posing substantial risks but promulgation of falsehoods subject to at most modest penalties, it is hardly surprising that activist journalists and the organizations and media outlets that support them perpetrate and promulgate scams. Journalism struggles, while fake news thrives. Thus, the anti-Planned Parenthood scam may prove to be less ideological performance art than the harbinger of an age of “truthiness,” as we will argue below.

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<sup>125</sup> See *supra* Part I.A–B. It is not entirely clear whether Chen and Marceau mean their proposal to cover the application of general laws and doctrines to investigative deceptions. In discussing the grounds that can be offered for limiting such deceptions, they include a subsection titled “Trespass,” which identifies property interests as potentially countervailing. Chen & Marceau, *supra* note 37, at 1494. That might suggest that Chen and Marceau do indeed mean their proposal to cover such general laws and doctrines. However, throughout their article, they appear to limit their discussion to laws (such as ag-gag laws) that specifically *target* investigative deceptions. See, e.g., *id.* at 1488, 1490, 1501 (discussing laws that “target” such deceptions), 1507 (concluding the paragraph that summarizes a proposal addressing “laws regulating” investigative deceptions).

<sup>126</sup> See Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175 (1996) (tentatively proposing that laws that substantially burden fundamental rights, including speech and press, ought to be subject to heightened scrutiny even when the infringing law does not specifically target the right).

<sup>127</sup> See generally NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE (2017) (exploring conflicts between claims of religious liberty and anti-discrimination laws).

<sup>128</sup> Emp. Div., Dep’t of Hum. Res. v. Smith, 494 U.S. 872, 885 (1990) (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).

### III. ACTIVIST JOURNALISM, PAST AND PRESENT

Have we entered a new age? Authors who write about the twenty-first-century rise and implications of citizen journalism often treat the phenomenon as if it were radically new. For example, commenting breathlessly on the impact of the digital revolution on journalism, *New Yorker* staff writer Jill Lepore wrote: “With our phones in our hands and our eyes on our phones, each of us is a reporter, each a photographer, unedited and ill judged, chatting, snapping, tweeting, and posting, yikking and yakking. At some point does each of us become a party of one?”<sup>129</sup>

But the link between activism and the media that Lepore observes is far from new. As sociologist Paul Starr writes, “as remarkable as the recent wave of innovation has been, it is only the latest phase of a centuries-long process that has been punctuated by a series of upheavals in communications and information *at least as revolutionary as our own*.”<sup>130</sup> Although Daleiden and Merritt were using the newest tools of technology, they acted in line with a long tradition of subversive activist journalism, which began with the advent of cheap printing in the eighteenth century and rose to a crescendo with the industrialization of journalism and the rise of investigative journalism in the late nineteenth and early twentieth centuries.<sup>131</sup>

Like the current one, these upheavals came not only from technological breakthroughs but from their interactions with the political contexts in which they were born. As Starr demonstrates in his book, the media were shaped by politics from the beginning.<sup>132</sup> Although Starr shows how American policy made U.S. media a world leader,<sup>133</sup> media everywhere have long been a tool for political activists. This manifested in Europe early with the diffusion of what

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<sup>129</sup> Jill Lepore, *The Party Crashers: Is the New Populism About the Message or the Medium?*, NEW YORKER, Feb. 22, 2016, at 27. Declarations of the revolutionary nature of the new media are not limited to journalists like Lepore. For example, human rights advocate Eileen Donahoe writes that “[w]e live in a world where the distinction between online and offline has effectively collapsed . . . The distinction between ‘online’ and ‘offline’ activity now almost seems quaint.” Eileen Donahoe, *So Software Has Eaten the World: What Does It Mean for Human Rights, Security and Governance?*, JUST SECURITY (Mar. 18, 2016, 1:24 PM), <https://www.justsecurity.org/30046/software-eaten-world-human-rights-security-governance>. Academics are often almost as categorical. For example, Alice Mattoni claims that activists “engage in a form of ‘native journalism,’ according to which the boundaries between the news source and the person writing the news dissolve.” Alice Mattoni, *Journalism and Social Movements*, in WILEY BLACKWELL ENCYCLOPEDIA OF SOCIAL AND POLITICAL MOVEMENTS (David Snow ed., 2013).

<sup>130</sup> PAUL STARR, *THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS* 1 (2004) (emphasis added).

<sup>131</sup> See *infra* Part III.A.

<sup>132</sup> STARR, *supra* note 130, at 1–19 (discussing the “constitutive” role of politics for media).

<sup>133</sup> See generally *id.*



Benedict Anderson called “print-capitalism.”<sup>134</sup> If a man could read in his national press about how insurgents in another country overthrew their ruler, then ruler-overthrow became conceivable everywhere.<sup>135</sup> As Anderson writes of the French Revolution, “[O]nce it had occurred, it entered the accumulating memory of print . . . [T]he experience was shaped by millions of printed words into a ‘concept’ on the printed page, and, in due course, into a model.”<sup>136</sup>

#### A. *American Journalism and Activism*

When we look back to the eighteenth century, the idea of journalists as objective reporters looks like a brief twentieth-century interlude in a much longer story of the inseparability of journalism, activism, and social movements. For example, in 1774 a failed English excise worker named Thomas Paine stepped off a boat in Philadelphia with a letter of introduction from Benjamin Franklin to Robert Aiken, a well-known printer in the town.<sup>137</sup> Paine’s ideas were not particularly new or even radical.<sup>138</sup> What made his impact on history so great was not only his role in two revolutions—the American and the French—but his capacity to merge activism and journalism.<sup>139</sup>

Paine arrived in a country that was practically covered in printed papers. Bernard Bailyn reports that there were thirty-eight newspapers in the American colonies in 1775.<sup>140</sup> As the conflict with Britain heated up, broadsides appeared everywhere, and even almanacs “carried, in odd corners and occasional columns, a considerable freight of political comment.”<sup>141</sup>

It was in the form of political pamphlets that the democratic implications of print flourished. “Highly flexible, easy to manufacture, and cheap, pamphlets were printed in the American colonies wherever there were printing presses, intellectual ambitions and political concerns.”<sup>142</sup> By the time Paine arrived in

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<sup>134</sup> BENEDICT ANDERSON, *IMAGINED COMMUNITIES passim* (rev. ed. 2006).

<sup>135</sup> *Id.* at 81 (describing the impact of the American Revolution on France).

<sup>136</sup> *Id.* at 80.

<sup>137</sup> Joyce Appleby, *Introduction to THOMAS PAINE, COMMON SENSE AND OTHER WRITINGS*, at xv–xvi (George Stade ed., Barnes & Noble Classics 2005).

<sup>138</sup> *See id.* at xxi–xxii (“Paine was not a profound thinker. He was more a vector for the radical theorizing about the origins of government that Thomas Hobbes and John Locke began in the seventeenth century.”)

<sup>139</sup> *See* E. J. HOBBSAWM, *LABOURING MEN: STUDIES IN THE HISTORY OF LABOUR* 2–3 (Weidenfeld Goldbacks 1968). Paine’s language, much more than that of the more learned essayists who penned political pamphlets up until his time, resembled that of the Bible. For example, he used biblical parallels to convince his Bible-reading public that kingship causes wars and that, for the ancient Hebrews, “it was held sinful to acknowledge any being under that title but the Lord of Hosts.” THOMAS PAINE, *COMMON SENSE* 8–9 (Kuklick ed., Cambridge Univ. Press 2012) (1775–76).

<sup>140</sup> BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 1 (1967).

<sup>141</sup> *Id.* at 1–2 (describing the role print media played during the rise of the American Revolution).

<sup>142</sup> *Id.* at 4 (explaining why political pamphlets were the most widespread print form at the time).

America, pamphlet wars were a familiar part of the political landscape.<sup>143</sup>

“In the early days of the American republic,” writes Lance Bennett, “the news was anything but objective.”<sup>144</sup> When the Democratic-Republicans of Thomas Jefferson campaigned to oust the Federalists of John Adams from the presidency, they employed the services of a Scottish republican activist named James Callender, who published a scurrilous diatribe against Adams in the *Examiner* and other pro-Jeffersonian essays in the *National Magazine* to help Jefferson win the 1800 election.<sup>145</sup> For his trouble, Callender was prosecuted for sedition by the outgoing Adams administration.<sup>146</sup>

For much of the nineteenth century, newspapers “were either funded by or were otherwise sympathetic to particular political parties, interests, or ideologies. People bought a newspaper knowing what its political perspective was and knowing that political events would be filtered through that perspective.”<sup>147</sup> Later publishers, like William Randolph Hearst and Joseph Pulitzer, had looser ties with party machines, but their papers were full of “high-profile crusades and stunts” intended to attract readers and put forward their political viewpoints.<sup>148</sup> Pulitzer’s *New York World* “combined sensationalism and storytelling with a crusading liberal reformism and built circulation . . . with investigations of tenement housing, adulterated food, official misconduct (including police brutality), and corporate malfeasance.”<sup>149</sup> The muckraking journalism that had its apogee in the beginning of the twentieth century with Upton Sinclair’s *The Jungle*<sup>150</sup> had its origins in the pages of Hearst’s and Pulitzer’s papers.<sup>151</sup>

Journalism only began to separate from activism in the new century, as the population grew—and grew more diverse—and as the economics of the news business evolved. The norm of objectivity, which was eventually naturalized through journalism schools and the claims of the elite press (e.g., “All the News That’s Fit to Print”), developed out of the expansion of the market for news and from its standardization through the wire services.<sup>152</sup> But not even standardization ended the politicization of the press, which grew out of

<sup>143</sup> See *id.* at 4–5 (highlighting different ways pamphlets were used during the Revolutionary Period).

<sup>144</sup> W. LANCE BENNETT, *NEWS: THE POLITICS OF ILLUSION* 158 (10th ed. 2016).

<sup>145</sup> MICHAEL DUREY, “WITH THE HAMMER OF TRUTH”: JAMES THOMSON CALLENDER AND AMERICA’S EARLY NATIONAL HEROES 117 (1990) (providing an example of subjective news in early America).

<sup>146</sup> *Id.* at 125–35.

<sup>147</sup> BENNETT, *supra* note 144, at 158.

<sup>148</sup> STARR, *supra* note 130, at 254.

<sup>149</sup> *Id.* at 256.

<sup>150</sup> UPTON SINCLAIR, *THE JUNGLE* (Joslyn T. Pine ed., Dover Thrift Editions 2001) (1906).

<sup>151</sup> Sinclair himself likely would not have acknowledged the debt, as his work was highly critical of the Hearst press. See generally UPTON SINCLAIR, *THE BRASS CHECK* (1919).

<sup>152</sup> BENNETT, *supra* note 144, at 161.

the competition for markets. Even the Associated Press, which was a major force for standardization, was intricately bound up with politics.<sup>153</sup> The connection between journalism and politics in America had profound implications for the future of social and political movements.

### B. *Journalism in Movement*

Although a movement press was most highly developed in Europe, with its mass parties and ideologies, the phenomenon was not limited to the old world. Indeed, in America, a genuine movement press grew out of the agrarian, anarchist, socialist, and populist movements that arose during the last decades of the nineteenth century.<sup>154</sup> The agrarian revolt that began in the late 1880s was archetypical: editors supporting the agrarian cause founded hundreds of papers throughout the South and West to denounce the railroads and robber barons and to support William Jennings Bryan's presidential candidacies.<sup>155</sup>

But until recent decades, activist journalism was constrained by the high costs of traditional newspaper printing and by its static capital establishments. It took the development of electronic communication to liberate activists from these constraints. As the audience for digital—and especially for social—media grew, activist journalism was freed from the ponderous organizations and the norms of objectivity that had previously constrained the printed press. This change has led to the rapid formation of online newspapers, personal blogs, and audiovisual media to expose the real or invented defects of political opponents.<sup>156</sup> It has also led to the use of stunts made explicitly for circulation through the media.

Some of the new activist journalists, like the “Occupy” movement's Tim Pool, operate from within movements.<sup>157</sup> Others, like *The Intercept*'s Glenn Greenwald, come from a traditional journalism background but embrace the goals of a movement and occasionally skirt the borders of legality—as he did in publicizing the Snowden revelations in 2013.<sup>158</sup> Still others embrace what can be called “the practice of the objective,” in which reaching the goal or

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<sup>153</sup> In the key election of 1876, the AP's support for the Republican candidacy of Rutherford B. Hayes was so overt that Democrats called it “the ‘Hayesociated Press.’” STARR, *supra* note 130, at 187.

<sup>154</sup> *Id.* at 264.

<sup>155</sup> *Id.*

<sup>156</sup> See Martin Johnson et al., *The Decline of Daily Newspapers and the Third-Person Effect*, 95 SOC. SCI. Q. 1245, 1245–46 (“Daily newspapers have been declining for at least the past decade, with reduced circulation, advertising revenue, and staffing. Cheaper to produce and easier to distribute, online news sources now serve much of the surveillance function of traditional newspapers.” (citations omitted)).

<sup>157</sup> ADRIENNE RUSSELL, JOURNALISM AS ACTIVISM: RECODING MEDIA POWER 2 (2016).

<sup>158</sup> See generally GLENN GREENWALD, NO PLACE TO HIDE: EDWARD SNOWDEN, THE NSA, AND THE U.S. SURVEILLANCE STATE (2014).

objective on your own is the message of the movement.<sup>159</sup>

But few of these activist journalists possess the wherewithal to widely diffuse the results of their activities on their own. To do so, they need to develop, or employ, the mechanisms and the professionalism of mass-based social media, which have the capacity to reach key sectors of the public that those who carry out the stings wish to reach. And this takes us back to the legal dilemma that we explored above: *that the law appears to punish journalistic “stings” but offers more protection to the dissemination of falsehoods, that is, to fake news.*

The Daleiden and Merritt operation against Planned Parenthood raises thorny questions of both legality and rights. The First Amendment prohibits laws “abridging the freedom of speech, or of the press,”<sup>160</sup> and thus, one might think, today’s radical democratization of journalism poses a conceptual challenge of identifying “the press.” Yet, as we saw in Part I, American law largely punts on that issue. Under the existing case law, everyone and no one is the press. How does the Supreme Court’s indifference to the distinction between the press and the rest of us interact with the new media landscape?

### C. *The Public’s “Right to Know” and the Rise of “Truthiness”*

The first thing we need to understand about the new technologies is that they facilitate—but have not produced—the problems that we as citizens face in the re-integration of journalism and activism. These problems arise because of the assumption that we have a Right to Know, rather than from technological innovation alone, and this Right to Know provides incentives and avenues for the diffusion of information, quasi-information, and outright lies, all through the same media.

We do not mean to suggest that new technology per se has had no effects. On the contrary, in some domains—such as police-citizen interactions—the effects may turn out to be profound. The ubiquity of video cameras in mobile phones transforms what were once swearing contests into public events. However, the phenomenon that chiefly concerns us here is not the random citizen who accidentally becomes a journalist because she happens to observe police brutality. Instead, we are focusing on activists who *set out* to capture evidence of (real or imagined) wrongdoing, and then disseminate the evidence to the public. No new technology of capture is needed for this task. Miniature recorders have existed for decades and are not, in any event, strictly necessary for undercover activist journalism. After all, Upton Sinclair simply took notes. What is truly new is a profound change in the cultural understanding that forms the backdrop for the new technologies of diffusion.

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<sup>159</sup> RUSSELL, *supra* note 157, at 137–38, 142.

<sup>160</sup> U.S. CONST. amend. I.

At the country's founding, there would certainly have been no understanding that citizens had the right to know everything that their government or their fellow citizens did or thought. It has been more than a century since Louis Brandeis opined that "sunlight is said to be the best of disinfectants,"<sup>161</sup> but it has been a mere half-century since the enactment of the federal Freedom of Information Act (FOIA), which is emblematic of the modern cultural and legal expectation of the Right to Know. "Things widely taken for granted since the 1970s," writes Michael Schudson, "from doctors' willingness to inform dying patients they are dying to unit pricing in the supermarket and nutritional information listed on a package label, are developments of the 1960s and after."<sup>162</sup>

Reversing the diffusion of information by activist journalists would involve curtailing not only the use of technology but what has become a "cultural right to know."<sup>163</sup> It is that "cultural right to know" that animates the citizen journalism of today and that galvanized activists like Daleiden and Merritt to insinuate themselves into Planned Parenthood and utilize a relatively simple technology to "expose" the organization's supposed sins.

But "the public" in the "public's right to know" is an abstraction. Daleiden and Merritt were not speaking to "the public," but to an already-convinced *slice* of the public through "movement halfway-houses" that were willing to broadcast and authenticate their message.<sup>164</sup> In scamming Planned Parenthood, these new media outlets were projecting—through a lie—what they "knew to be true": that Planned Parenthood is an inherently evil organization. They made use of a network of online "news" sources, the Internet-fortified rumor mill, and, eventually, the legacy press which gave them the publicity they craved, even if it was not always favorable. Their scam traveled the same byways as other fake news.

As we have seen, the commingling of activism and journalism is nothing new in American history. What is new is the network of radio talk shows,

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<sup>161</sup> Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WEEKLY, Dec. 20, 1913, at 10.

<sup>162</sup> SCHUDSON, *supra* note 47, at 14.

<sup>163</sup> *Id.* at 7.

<sup>164</sup> Sociologist Aldon Morris coined the term "movement halfway-house" to refer to "an established group or organization that is only partially integrated into the larger society because its participants are actively involved in efforts to bring about a desired change in society." ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT* 139 (1984). Although "their relative isolation from the larger society" initially limits movement halfway houses' ability to "disseminate their views" society-wide, these institutions enable activists to "develop a battery of social change resources." *Id.* at 139–40. In developing the concept of the halfway house in the context of the civil rights movement, Morris illustrates its role in forming a generation of civil rights militants and eventually diffusing the movement's message to a broader public. *See id.* at 139–73. Needless to say, movement halfway houses may operate anywhere on the political spectrum.

blogs, printed publications, and foundations that sit between citizen journalists like Daleiden and Merritt and the audiences for their productions. That is the key innovation in early twenty-first century activist journalism, and not the technology itself or the willingness of activist journalists to play fast and loose with the truth. It is these nodes of information transmission that authoritatively diffuse information which—on its own—might have little resilience and even less persistence.

Remember how widely the “news” that Barack Obama was not a U.S.-born citizen diffused? That soundbite might have seemed preposterous when it issued from the mouths of Donald Trump and his ilk, a “meme” made for the moment. Yet in 2016, majorities of some sectors of the public still believed it.<sup>165</sup> They believed it not because it issued from the mouths of “informants” a near-decade ago, nor because it had become more credible, but because it had been reinforced by repetition by the authoritative movement halfway-houses to which these citizens attend.

#### CONCLUSION

In this Article, we have focused on an unusual incident—the Daleiden-Merritt sting/scam of Planned Parenthood—in order to raise broader questions about American democracy. We broadened the field of inquiry from a single form of collective action to show its general relevance.

In the Introduction, we argued that although the Planned Parenthood sting/scam codes as politically right-wing, the story is relevant to a broad range of activists: those who seek to expose animal abuse, environmental damage, exploitation of workers, and other evils. Due to legal, social, and technological factors, this kind of activist journalism is likely to become ever more common in the coming years.

In Part I, we looked at how the law addresses what seems to be the key puzzle raised by activist journalism: who can claim the protection for freedom of the press? We saw that while First Amendment cases give some shelter to journalistic activities, they provide no special rights to journalists as such. That answer, which dates to pre-Internet-era cases, may seem presci-

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<sup>165</sup> See Josh Clinton & Carrie Roush, *Poll: Persistent Partisan Divide Over ‘Birther’ Question*, NBC NEWS (Aug. 10, 2016, 2:19 PM), <https://www.nbcnews.com/politics/2016-election/poll-persistent-partisan-divide-over-birther-question-n627446> (finding that 41 percent of Republicans disagreed with the statement “Barack Obama was born in the United States, while only 27 percent agreed, with the balance neither agreeing nor disagreeing). For a relatively recent version of this canard, which pretends to have Obama himself admitting to not being a citizen, see David Mikkelson, *Obama Admits Not Being Born in Hawaii*, SNOPE: FACT CHECK, <http://www.snopes.com/politics/obama/birthers/notborn.asp> (last updated June 27, 2016) (demonstrating that “[a] video clip showing Barack Obama supposedly acknowledging that he is not a natural-born U.S. citizen was assembled as a joke”).

ent, but it comes with an extremely important limitation. Although laws specifically targeting journalists or journalism are invalid, well-informed government officials and private actors can use general-purpose laws involving such mundane matters as property and contract to shield potential or perceived wrongdoers from the prying eyes of activists and journalists.

In Part II, we juxtaposed the slim protection given to activists and journalists seeking to uncover wrongdoing with the substantial protection given to those who disseminate misleading and even outright false claims. The law leaves genuine stings vulnerable, while protecting scams. This juxtaposition may have developed organically out of America's legal history, but in the technical and political conditions of the early twenty-first century, it is having perverse effects.

In Part III, we showed that the combination of activism with journalism is nothing new, and, indeed, that the norm of "objective" journalism was probably an exception to a long history of social movement activists using the media to advance their goals. The novelty of these interactions lies not in the intrusion by activists into other people's premises to produce falsified findings, or in their diffusion to a wider public through electronic media, but in the combination of the two. That combination is facilitated by employment of simple forms of technology and the availability of a broad spectrum of "movement halfway-houses" to diffuse the "information" to a broader public. In the name of "the public's right to know," these agents make the scams of activists far more rapidly available to publics who are prepared to accept "truthiness" in place of truth so long as it jibes with their ideological assumptions.

Observers of how Donald Trump and his supporters play fast and loose with the truth have only lately begun to worry about fake news, but the phenomenon is broader and has deeper roots. Daleiden and Merritt's sting/scam was an extreme form of the performance journalism that new technologies have helped, if not to create, then to diffuse. Thus, it may not be far-fetched to wonder whether significant sectors of the public have become so taken with performance journalism that they mistake both the inventions of a pair of anti-abortion activists and the truthiness of a Donald Trump for reality.

Meanwhile, even as fake news may have helped elect Trump, some of the same forces that fueled the rise of scams will make good-faith stings by journalists and activists difficult to accomplish, just at the moment when progressives would benefit from launching stings of their own. Trump's disregard for longstanding norms requiring presidential candidates to disclose their tax returns and presidents to divest assets that pose a substantial risk of conflicts of interest indicate that his administration is opaque even by the standards set in the recent era of over-classification. Fearless investigative reporting will be needed more than ever; yet, as we have shown, law, technology, and culture will likely give us more and more fake news instead.

