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ESTABLISHING CONSTITUTIONAL MALICE FOR DEFAMATION AND PRIVACY/FALSE LIGHT CLAIMS WHEN HIDDEN CAMERAS AND DECEPTION ARE USED BY THE NEWSGATHERER

David A. Elder,* Neville L. Johnson** and Brian A. Rishwain***

*"There is a photographer in every bush, going about like a roaring lion seeking whom he may devour."*¹

*"What is slander? A verdict of 'guilty' pronounced in the absence of the accused, with closed doors, without defence or appeal, by an interested and prejudiced judge."*²

*"Liars are persuaded by their own excuses to a degree that seems incredible to others."*³

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1. SAMUEL BUTLER, *Unprofessional Sermons*, in NOTEBOOKS OF SAMUEL BUTLER 200, 214 (Henry Jones ed., 1913).

2. Joseph Roux, *Meditations of a Parish Priest*, in INTERNATIONAL THESAURUS OF QUOTATIONS § 898(13), at 595 (Rhoda Tripp ed., 1970).

3. SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 86 (1978) [hereinafter BOK, LYING].

*"He [the undercover hidden camera reporter] enters multiple premises under false pretenses, but the only information he will publish is that known to be harmful to the plaintiff. That information, moreover, will be published in a form calculated to score a knockout blow. Any story that vindicates the plaintiff's practices ends up on the cutting room floor. The plaintiff, therefore, wants to exclude this party because her expected utility from his entry is always negative."*⁴

I. INTRODUCTION

In the last two decades network television newsmagazines in an endless search for ratings, which translates into revenues, have declared war on the right of privacy we all enjoy as Americans.⁵ The hidden camera

4. Richard A. Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 STAN. L. REV. 1003, 1020 (2000).

5. Gail Diane Cox, *Privacy's Frontiers at Issue: Unwilling Subjects of Tabloid TV Are Suing*, NAT'L L.J., Dec. 27, 1993, at 1. At the inception of the *Sanders* case, Andrew M. White, counsel for ABC, told the *National Law Journal* that in respect of legal protections afforded the press, "[i]f there is any evolution in the near future, . . . it will be a shrinking of the individual's expectation of privacy." *Id.* One startling occurrence, never reported by anyone, was that the press—The American Society of Newspaper Editors, CBS, NBC, CNN, The National Association of Broadcasters, The Newspaper Association of America, The Reporter's Committee for Freedom of the Press, and other media giants—filed an *amici curiae* brief in the California Supreme Court in *Sanders* supporting ABC's position that there should be no right of privacy in the workplaces of America and that citizens should go to work with the understanding that they might be surreptitiously taped by their "co-workers" who were really spies for later broadcast on a national newsmagazine. Brief of Amici Curiae American Society of Newspaper Editors et al. at 7, *Sanders*, 978 P.2d 67 (No. S059692). The populace should have been informed about this radical position, which was as close to Big Brother as you can come, but there was silence instead, as no one is watching the press when it takes such positions. But this example of the media's arrogance and circling the wagons mentality is not atypical. See, e.g., *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 265 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998). The court there caustically commented:

Paladin, joined by a spate of media *amici*, including many of the major networks, newspapers, and publishers, contends that *any* decision recognizing even a potential cause of action against Paladin will have far-reaching chilling effects on the rights of free speech and press. . . . That the national media organizations would feel obligated to vigorously defend Paladin's assertion of a constitutional right to *intentionally and knowingly* assist murderers with technical information which Paladin *admits* it intended and knew would be used immediately in the commission of murder and other crimes against society is, to say the least, breathtaking.

Id.

There exists an even more recent example of the media's surreptitious attempts to limit the right of privacy. See *Flanagan v. Flanagan*, No. S085594, 2002 Cal. LEXIS 1661 (Mar 14, 2002). The California Supreme Court there held that, under the California Invasion of Privacy Act, a communication is deemed confidential if one party to the conversation reasonably expects that the conversation will not be overheard or recorded. *Id.* at *2-*3. See generally CAL. PENAL CODE § 632 (West 2002). *Flanagan* expressly disapproved an earlier ruling that held a conversation is confidential only if the party asserting confidentiality has an objectively reasonable expectation

is “infotainment”⁶ masquerading as journalism, Christians versus Lions journalism, *The Truman Show*,⁷ *EdTV*⁸ come to life, pandering to the most base emotions, including voyeurism, with eavesdropping used to obtain the salacious footage.⁹ The common ingredients of a newsmagazine show are:

that the content will not later be divulged to third parties. *Flanagan*, 2002 Cal. LEXIS 1661, at *2–*3. See generally *DeTeresa v. ABC, Inc.*, 121 F.3d 460, 464 (9th Cir. 1997). CBS, NBC, ABC, and CNN filed an *amici curiae* brief supporting the disapproved view of *DeTeresa*. See *Flanagan*, 2002 Cal. LEXIS 1661, at *1, *21. Of course, ABC has yet to apologize to Ms. DeTeresa in light of *Flanagan* despite its supposed policy of apologizing when it makes a mistake. See Walter Goodman, *Critic's Notebook; Covering Tobacco: A Cautionary Tale*, N.Y. TIMES, Apr. 2, 1996, at C16, <http://query.nytimes.com/search/full-page?res=9A00E0DA1239F931A35757C0A960958260>. The plaintiff in *DeTeresa*, who was represented by co-author Mr. Johnson, was secretly taped at her doorstep by an ABC newsmagazine. *DeTeresa*, 121 F.3d at 462–63.

6. BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM* 71 (2001).

In the end, the discipline of verification is what separates journalism from entertainment, propaganda, fiction, or art. Entertainment—and its cousin “infotainment”—focuses on what is most diverting. Propaganda will select facts or invent them to serve the real purpose—persuasion and manipulation. Fiction invents scenarios to get at a more personal impression of what it calls truth.

Id.

The trend is not new. For the past decade and a half, journalism has been slowly squeezed into a smaller and smaller corner of the expanding corporations that make up the communications industry. The values and norms of journalism have been steadily eroded as corporate managers order news division to produce more “infotainment” programs.

Bill Kovach, *Big Deals, with Journalism Thrown in*, N.Y. TIMES, Aug. 3, 1995, at A25, LEXIS, News, News Group File, All.

7. *THE TRUMAN SHOW* (1998 Paramount Pictures).

8. *EDTV* (1999 Universal Pictures).

9. See Howard Kurtz, *Hidden Network Cameras: A Troubling Trend?*, WASH. POST, Nov. 30, 1992, at A1 (quoting Richard Kaplan, then Executive Producer of “PrimeTime Live,” as saying he “would like to do a hidden-camera story every week”). *The New York Times*, arguably the most important newspaper in the United States, has written about the increasingly diminished standards in journalism. See, e.g., Bill Carter, *TV News Magazine Shows Are Crowding One Another*, N.Y. TIMES, Oct. 24, 1994, at D1. Carter quotes David F. Poltrack, then executive vice president of research for CBS, as distinguishing “evergreen stories,” which can interest anyone anytime, from topical stories derived from current news. *Id.* Poltrack lamented that, given the proliferation of television newsmagazines, the former “have been told over and over.” *Id.* As a consequence, “[newscasters] are really forced to push for tabloid subjects for all these competitive reasons. You wind up with pop psychology, pop culture, journo-pop, instead of real news.” *Id.* (quoting Howard Stringer, then president of the CBS Broadcast Group and a creator of the television newsmagazine “48 Hours”); see also, e.g., Jeff MacGregor, *Diluting the News into Soft Half-truths*, N.Y. TIMES, June 4, 1995, at H25.

Rather, it is the abandonment of the standards by which we judge these shows and the corruption of the rules by which they are produced that deserve our attention. For example, when did the hidden camera become the *only* camera? A gratuitous application of technology to heighten suspense borrowed from the tabloid stylebook, it is a hollow sideshow scam that cheapens us all. When used to bolster flimsy entrapment scenarios, these stories become nothing more than grainy little morality plays. Simplistic and empty, they serve no higher purpose than to create a villain, because *everyone* looks guilty when viewed through the wide-angle

“features” (i.e., stories with stars), late-breaking news, and “investigative pieces” with hidden cameras because they are cheap and easy to produce, especially when there is no need to get the victim’s point of view.¹⁰ Numerous commentators have written on the iniquities of the hidden camera and generally ridiculed this technique.¹¹

HatCam. . . .

These shows no longer report the complex and nuanced stories we need to see, so much as they fabricate the mini-dramas and sketch the caricatures that we find so satisfying. . . .

And through it all they help us delude ourselves into believing that the world is still binary: cops and robbers, cowboys and Indians, good and evil. They polarize the mortal spectrum until human behavior is no harder to catalogue than a black or white Stetson in a Hopalong Cassidy short.

Id.; see also, e.g., Felicity Barringer, *Telling a Journalistic Coup from a Crime*, N.Y. TIMES, July 26, 1998, at A1. Numerous commentators have echoed these sentiments. See, e.g., Robert Lissit, *Gotcha*, AM. JOURNALISM REV., Mar. 1995, at 17 [hereinafter Lissit, *Gotcha*]; Alan Mirabella, *TV’s Magazine Shakeout*, COLUM. JOURNALISM REV., Mar./Apr. 1995, at 11.

10. Robert Lissit, *Out of Sight*, AM. JOURNALISM REV., Dec. 1994, at 27, 27–28 [hereinafter Lissit, *Out of Sight*].

11. See, e.g., Lyriisa Barnett Lidsky, *Prying, Spying and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173 (1998); Randall P. Bezanson, *Means and Ends and Food Lion: The Tension Between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. 895 (1998); Clay Calvert, *Sifting Through the Wreckage of ABC Reportage: Little Victories, Big Defeats & Unbridled Media Arrogance*, 19 HASTINGS COMM. & ENT. L.J. 795 (1997) [hereinafter Calvert, *Sifting Through the Wreckage*]; Epstein, *supra* note 4; Lori Keeton, *What Is Really Rotten in the Food Lion Case: Chilling the Media’s Unethical Newsgathering Techniques*, 49 FLA. L. REV. 111 (1997); David A. Logan, *Masked Media: Judges, Juries, and the Law of Surreptitious Newsgathering*, 83 IOWA L. REV. 161 (1997) [hereinafter Logan, *Masked Media*]; David A. Logan, “Stunt Journalism,” *Professional Norms, and Public Mistrust of the Media*, 9 U. FLA. J.L. & PUB. POL’Y 151 (1998) [hereinafter Logan, *Stunt Journalism*]; Andrew Jay McClurg, *Bringing Privacy Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989 (1995); Elsa Y. Ransom, *Home: No Place for “Law Enforcement Theatricals”—The Outlawing of Police/Media Home Invasions in Ayeni v. Mottola*, 16 LOY. L.A. ENT. L.J. 325 (1995); Rodney A. Smolla, *Will Tabloid Journalism Ruin the First Amendment for the Rest of Us?*, 9 DEPAUL-LCA J. ART & ENT. L. 1 (1998); John W. Wade, *The Tort Liability of Investigative Reporters*, 37 VAND. L. REV. 301 (1984); John J. Walsh et al., *Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for Publication of Ill-Gotten Information*, 4 WM. & MARY BILL RTS. J. 1111 (1996); Lyriisa C. Barnett, Note, *Intrusion and the Investigative Reporter*, 71 TEX. L. REV. 433 (1992); Eduardo W. Gonzalez, Comment, “Get That Camera Out of My Face!” *An Examination of the Viability of Suing “Tabloid Television” for Invasion of Privacy*, 51 U. MIAMI L. REV. 935 (1997); Nathan D. Leadstrom, Comment, *Sanders v. American Broadcasting Companies, Inc.: Does It Mean the End to the Use of Hidden Cameras in Undercover Media Investigations?*, 40 WASHBURN L.J. 143 (2000); Charles C. Scheim, Comment, *Trash Tort or Trash TV?: Food Lion, Inc. v. ABC, Inc., and Tort Liability of the Media for Newsgathering*, 72 ST. JOHN’S L. REV. 185 (1998); see also JEFFREY ROSEN, *THE UNWANTED GAZE* (2000) (discussing the policy issues involved when dealing with privacy); see also CLAY CALVERT, VOYEUR NATION: MEDIA, PRIVACY AND PEERING IN MODERN CULTURE (2000) [hereinafter CALVERT, VOYEUR NATION] (focusing on the harmful effects of the media and ABC in particular on society by its intentional acts that invade privacy and pander to voyeuristic instincts). Calvert observes that the use of hidden cameras (by ABC’s Diane Sawyer in particular) is extraordinary

The era of television newsmagazines began in the early 1970's with the creation of "60 Minutes," which ultimately became a cash cow for CBS.¹² News at the networks had never been considered or required to be a moneymaker, but now these shows have "become the preeminent profit engine for network television."¹³ In 1989, the newsmagazine "PrimeTime Live" premiered on ABC, and in the show's second year, the hidden camera became almost a weekly feature in its stories.¹⁴ One ABC News executive observed, "[t]here are only so many stories out there and everyone is mining the same territory, so sometimes you end up going to another level of stories that you wouldn't otherwise look to."¹⁵ No other

because they are "hidden" and "[transport] us voyeuristically into a world we do not ordinarily see." CALVERT, *VOYEUR NATION*, *supra*, at 27. He notes further that the media can "cultivate our demand for mediated voyeurism [use of hidden cameras] . . . by constantly pushing the level of sensationalism to a point where only new, more graphic and real images will satisfy audience demands." *Id.* at 88; *see also* BERNARD GOLDBERG, *BIAS: A CBS INSIDER EXPOSES HOW THE MEDIA DISTORT THE NEWS 145-62* (2002) (detailing at length the media's bias and intolerance from the viewpoint of an insider critic). Goldberg cites a Freedom Forum/Roper Center poll that eighty-nine percent of journalists said they voted for Bill Clinton in 1992, as compared to forty-three percent of the non-journalist population! GOLDBERG, *supra*, at 123; *see also* WILLIAM MCGOWAN, *COLORING THE NEWS: HOW CRUSADING FOR DIVERSITY HAS CORRUPTED AMERICAN JOURNALISM* (2001); DAVID MURRAY, JOEL SCHWARTZ & S. ROBERT LICHTER, *IT AIN'T NECESSARILY SO: HOW MEDIA MAKE AND UNMAKE THE SCIENTIFIC PICTURE OF REALITY* (2001).

12. Neil Hickey, *Money Lust: How Pressure for Profit is Perverting Journalism*, COLUM. JOURNALISM REV., July/Aug. 1998, at 28 [hereinafter Hickey, *Money Lust*].

13. Bill Kovach et al., *A First Step to Change: A Commentary on the Findings*, Committee for Concerned Journalists, at <http://www.journalism.org/surveycomment.html> (last visited Jan. 12, 2002) [hereinafter Kovach, *A First Step*] (analyzing a national survey of the news media by the Committee of Concerned Journalists and the Pew Research Center for The People & The Press). Profits are substantial: ABC News earned a pre-tax profit of \$55 million in 1998; NBC News earned a pre-tax profit of \$200 million the same year. Marc Gunther, *The Transformation of Network News: How Profitability Has Moved Networks Out of Hard News*, NIEMAN REPORTS, Summer 1999, at 20, 28-29 [hereinafter Gunther, *Transformation*]. The *Columbia Journalism Review*, arguably the most respected publication for journalists, concluded in 1998 that more than any other time in history, news is "hurt by a heightened, unseemly lust at many companies for ever greater profits." Hickey, *Money Lust*, *supra* note 12. The newsmagazines seem to have been an effective—albeit quick-fix—solution to declining market share and cost-cutting measures. In 1993, newsmagazines accounted for \$670 million in revenue; "60 Minutes" and "48 Hours" generated about \$200 million and \$105 million respectively for CBS; "20/20" and "PrimeTime Live" brought in \$150 million and \$85 million respectively for ABC; "Dateline" brought in \$90 million for NBC. David Zurawik & Christina Stoehr, *Money Changes Everything*, AM. JOURNALISM REV., Apr. 1993, at 26, 29 (citing estimates from *Broadcasting* magazine). These programs became irresistible because roughly half of the revenue is profit. *Id.*

14. Logan, *Stunt Journalism*, *supra* note 11, at 155-56 n.43; *see also* Peter S. Canellos, *ABC Ordered to Pay \$5.5 M to Food Lion: Award Seen as Rebuke to Media*, BOSTON GLOBE, Jan. 23, 1997, at A1 [hereinafter Canellos, *ABC Ordered to Pay*] ("In its relatively low-rated first season, the show broadcast two undercover pieces. Thereafter, it sharply increased the number of hidden-camera segments, until they averaged more than 20 per season. Ratings went up.").

15. Mirabella, *supra* note 9 (quoting ABC Senior Vice President, Alan Wurtzel). Victor

television show has used the hidden camera as much as ABC's "PrimeTime Live," nor has any other show been so seriously sanctioned for unlawful conduct relating to their use.¹⁶ Indeed, the two most important cases in the modern history of the hidden camera, where liability was established, involve stunning defeats of this show: *Food Lion v. Capital Cities/ABC, Inc.*,¹⁷ where a nominal judgment for a corporate plaintiff¹⁸ was upheld on grounds of trespass and breach of fiduciary duty, and *Sanders v. ABC, Inc.*,¹⁹ where a substantial judgment was affirmed in favor of an employee

Neufeld, then of "20/20," another ABC newsmagazine, admitted in 1999, "Our obligation is not to deliver the news. Our obligation is to do good programming." Gunther, *Transformation*, *supra* note 13, at 27.

16. See, e.g., *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (A grocery store chain sued ABC for secret videotaping of its food handling practices.); *Med. Lab. Mgmt. Consultants v. ABC, Inc.*, 30 F. Supp. 2d 1182 (D. Ariz. 1998) (A medical laboratory sued ABC for the network's use of false pretenses to gain entry into the laboratory and secretly videotape meetings of officers therein.); *Sanders v. ABC, Inc.*, 978 P.2d 67 (Cal. 1999) (An employee of a telepsychic marketing company sued ABC for covertly taping workplace conversations.). But ABC is no stranger to these suits, nor to being chastised as a result. See, e.g., *Benford v. ABC, Inc.*, 554 F.Supp. 145 (D. Md. 1982). There, ABC surreptitiously filmed the plaintiff, an insurance salesman making his standard cancer insurance presentation in the home of another to individuals who had falsely represented that they were interested in purchasing insurance from him. *Id.* at 147. The court found as a matter of law that the plaintiff had a reasonable expectation of privacy, reasoning:

The plaintiff did not personally expect, nor did he intend, for his remarks to be intercepted, partly for broadcast to the American public on national television. Certainly, no reasonable person entering a private home to sell insurance under similar circumstances would have anticipated his conversation would be electronically monitored.

Id. at 154.

17. 194 F.3d 505.

18. *Id.* at 510, 524. Under the questionable general rule of the common law, corporations have no protected interest in privacy. DAVID A. ELDER, *THE LAW OF PRIVACY* § 1:4 (1991 & Supp. 2001) [hereinafter ELDER, *PRIVACY*]. Consequently, other tort theories of liability must be used.

19. 978 P.2d 67 (Cal. 1999) (unanimous). *Sanders* (co-author Mr. Johnson represented the plaintiffs on an appeal; he and co-authors Mr. Rishwain and Professor Elder wrote the briefs to the California Supreme Court in this landmark case) involved an attempt by ABC, on its newsmagazine program "PrimeTime Live," to expose the psychic telemarketing industry. *Id.* at 69-70. ABC paid an individual to pose as a psychic to get a job with a psychic telemarketing company. *Id.* After being hired, the spy wore a hidden camera and went around the workplace engaging other psychics in conversations in an attempt to elicit and record inculpatory information about the company and the psychic profession for "PrimeTime Live." *Id.*

After the surreptitiously recorded footage was broadcast to millions of viewers on national television, two of the psychics sued ABC for invasion of privacy by intrusion and for violation of California Penal Code section 632 prohibiting electronic eavesdropping on confidential communications without the consent of all parties so long as the party suing had a reasonable expectation of privacy during the communication. *Id.* at 70. See generally *Kersis v. Capital Cities/ABC, Inc.*, No. BC 077553, 1994 WL 774531 (Cal. Super. Ct. (L.A.) Apr. 25, 1994).

The jury awarded actual and punitive damages, finding that the use of the hidden camera

constituted an intrusion into one psychic's solitude and seclusion. *Sanders*, 978 P.2d at 70–71. A divided court of appeal reversed the judgment for the psychic, ruling that the jury had actually found that the psychic had no reasonable expectation of privacy during conversations with the ABC operative because some coworkers might have been able to hear the conversations. *Id.* See generally *Sanders v. ABC, Inc.*, 60 Cal. Rptr. 2d 595 (Ct. App. 1997).

The California Supreme Court reversed and remanded, finding that the psychic had a limited right of privacy against being covertly videotaped by a journalist in his workplace—even if his or her interaction with that journalist may have been witnessed, and his conversations overheard, by his coworkers. *Sanders*, 978 P.2d at 79–80. The historic decision held that while someone may lack a reasonable expectation of privacy in a conversation because it might be seen or heard by some fellow employees, he or she may nevertheless have a claim for invasion of privacy by intrusion based on a television reporter's surreptitious taping of that conversation. *Id.* at 78; see also Marc Gunther, *Hidden Camera, Hidden Agenda*, DETROIT FREE PRESS, May 14, 1995, at H1 [hereinafter Gunther, *Hidden Camera*] (discussing *Sanders*).

Another important, precedent-setting, related case is *Shulman v. Group W. Prods., Inc.*, 955 P.2d 469 (Cal. 1998). The *Shulman* case involved two plaintiffs, a mother and a son, who were injured in a severe car accident. *Id.* at 475. A rescue helicopter dispatched to the scene of the accident carried not only medical personnel but also a video camera operator shooting footage for the defendant's television rescue series "On Scene: Emergency Response." *Id.* The nurse wore a wireless microphone as she tended to the victims; the microphone picked up the conversation the nurse had with the mother as she pled for her death, saying repeatedly, "I just want to die" while pinned under the vehicle. *Id.* at 475–76.

At the scene of the accident, the video operator shot gruesome footage of the mother and son as they were rescued using "the jaws of life" including lingering visuals of the victims' bloody wounds and jutting limbs, as well as recording the medical personnel's confidential questions about the victims' medical condition. *Id.* at 475–76. The operator *continued* to record the mother back inside the helicopter on the way to the hospital. *Id.* at 476. The mother and son never consented to the taping. *Id.* Subsequently, the footage and sound were edited into a nine-minute piece with a narrative voice-over—without the victims' knowledge or permission—and broadcast as a segment of "On Scene: Emergency Response." *Id.* at 475. The trial court granted the defendant's motion for summary judgment on the plaintiff's causes of action for invasion of privacy—one for public disclosure of private facts and the other for tortious intrusion. *Id.* at 477. The court of appeals, however, bifurcated its analysis of the taping into two distinct time frames—the scene of the accident itself and the scene inside the helicopter. *Id.*

Filmed events at the scene of the accident were not actionable, according to the court, because the plaintiffs could not have a reasonable expectation of privacy in a public setting. *Id.* at 477. However, the court found the footage captured inside the helicopter to be fully actionable and analogized the setting to that of a private hospital room. *Id.* Thus, the appeals court found triable issues of fact existed as to the mother's claim regarding publication of private facts by broadcasting events recorded inside the helicopter and legal error on the trial court's part as to both plaintiffs' intrusion claims related to the inside of the helicopter. *Id.*

On appeal, the California Supreme Court added yet another twist to the case. The court affirmed the court of appeal's decision regarding the plaintiffs' intrusion claims inside the helicopter but reversed its finding as to the mother's claim of publication of private facts regarding helicopter footage and audio. *Id.* Stating that the challenged material was substantially relevant to the newsworthy subject matter of the broadcast, the court found that the use of the tape of the mother at the accident scene *and* inside the helicopter was not actionable under a private facts theory, as it did not constitute a "morbid and sensational prying into private lives *for its own sake*." *Id.* at 488 (citations and quotations omitted).

However, the California Supreme Court went two critical steps further than the court of appeals regarding the plaintiffs' intrusion claims. In addition to a viable intrusion claim regarding the helicopter footage, the court held that the mother had a triable issue of fact

taped surreptitiously in the work place. As a result of these cases, the landscape in America has been permanently altered and journalists must be extremely wary of engaging in anti-social conduct.²⁰

Based on the authors' experience, hidden camera cases come in differing varieties, but some features are constant. The methodology is usually never explained to the viewer. The "gold" television stations want is the hidden camera footage. There is usually no investigative show without it; rather the need for hidden camera footage drives the creation of the story—not the other way around. Usually the company doing the spying neither shows the footage to the subjects of the hidden camera nor

regarding the intrusion of the camera operator recording and amplifying her conversations *at the accident scene*. *Id.* at 490. More specifically, the court found that the mother was entitled to a degree of privacy in her conversations with the medical personnel *at the accident scene*. *Id.* at 491. And as to the offensiveness of the conduct, the court reasoned that given the victims' confusion and vulnerability a jury could find that the defendants' recording of intimate conversations with rescue workers at the scene and in the helicopter to be highly offensive to the reasonable person. *Id.* at 493–94 (citing *Miller v. NBC*, 232 Cal. Rptr. 668, 678 (1986)). Ultimately, the court held that the press is not exempt from generally applicable civil and criminal laws—including California's Penal Code section 632 prohibiting the recording of confidential communications. *Id.*

20. *See, e.g.*, Timothy Noah, *Sorting Out What the Hidden Camera Saw*, U.S. NEWS & WORLD REP., Dec. 22, 1997, at 64. After ABC was sued in *Food Lion* and *Sanders* in 1993, and until the decisions became final, it continued to engage in the same kind of conduct it was sued for in those cases, especially "stings" and stories involving impersonation. *Id.* However, those who espouse the use of the hidden camera are now somewhat chastened and aware they do so at their own peril. *See, e.g.*, Neil Hickey, *Climate of Change*, COLUM. JOURNALISM REV., Sept./Oct. 2000, at 52 [hereinafter Hickey, *Climate of Change*]. Still, the hidden camera has a strangle hold on "PrimeTime Live" that it just can't shake. On May 17, 2001, its hidden camera struck again, targeting police officers in New York and Los Angeles, attempting to "sting" them to see if they would return wallets that ABC said were lost. *See Testing Police Honesty*, at http://more.abcnews.go.com/sections/primetime/2020/primetime_010517_wallets1.html (May 17, 2001). The cops returned the wallets, ruining ABC's hidden camera "experiment," but taxi cab drivers were not so fortunate on the same broadcast. *Id.*; *see also* MARC GUNTHER, *THE HOUSE THAT ROONE BUILT 231* (1994) [hereinafter GUNTHER, *HOUSE ROONE BUILT*] (detailing a history of ABC News and revealing the corporate culture that produced this sad need for invasions of privacy to be offered up to the public as entertainment). In respect of prime time magazine shows, "[e]ntertainment value, not news judgment, shape[s] story selection, much to the chagrin, once again, of ABC traditionalists." GUNTHER, *HOUSE ROONE BUILT*, *supra*, at 94.

An hour long news program costs half of what ABC otherwise pays for entertainment shows, about \$400,000 for an hour, and generates more profits than all but the most popular entertainment shows. *Id.* at 231 (referencing "60 Minutes" and "20/20"). During the 1988–1989 season, "20/20" generated \$50 million a year in revenues. *Id.* at 274. It is important that ABC never airs its dirty linen in public, which according to Arledge has helped it enormously. *Id.* at 248. By 1988, the three networks became obsessed with visuals, and "the networks could not resist compelling footage, even if it was manufactured news." *Id.* at 269. Sam Donaldson's contract in 1992 was tied to his ratings on "PrimeTime Live." *Id.* at 346. "PrimeTime Live" specializes in hidden camera stories, and its ethics are in great question because it manufactures stories. *Id.* at 352. ABC News is premised upon and required to make money, and Arledge was eased out because although he made plenty for ABC, it was not enough. *Id.* at 362.

gives any opportunity to comment.²¹ It is as unfair an investigation as can

21. See Brian Carnell, *Dateline Covers the Howard Baker Controversy*, at <http://www.animalrights.net/articles/2001/000079.html> (May 30, 2001). One astonishing recent episode of "Dateline," broadcast May 29, 2001, was a segment that established that the hidden camera can be a lie. *Id.* The broadcast detailed how a veterinarian who had been set up with a hidden camera by PETA (People for the Ethical Treatment of Animals) prevailed at trial in a contest over its verisimilitude, establishing that the primary justification for the hidden camera, i.e., that the camera does not lie, is now recognized as a national issue for being a canard. *Id.*

However, consider "The Sting," which aired on "PrimeTime" (the "Live" has now been dropped), on June 14, 2001 and was rebroadcast on December 27, 2001. *The Sting*, at http://more.abcnews.go.com/sections/primetime/2020/primetime_010614_homerepairs_feature.html (June 14, 2001). This episode showed numerous instances of dishonest repairmen at a home on Long Island. *Id.* The house, called the "sting house," had eight hidden cameras, all wired by ABC. *Id.* The story, conducted with the assistance of the district attorney, raises numerous ethical concerns. *Id.* The reporter in this "sting" was Diane Sawyer, who was the correspondent in the *Food Lion* case, the anchor in the *Sanders* case, and was named as a defendant in *Hornberger v. ABC, Inc.*, No. L1078697 (N.J. Super. Ct. 2000), and *Med. Labs. Mgmt. Consultants v. ABC, Inc.*, 30 F. Supp. 2d 1182 (D. Ariz. 1998). *Id.* In the interest of full disclosure, co-authors Mr. Johnson and Mr. Rishwain are trial and appellate counsel, and Professor Elder is of counsel in the appeals of these latter two cases. Ms. Sawyer has been lambasted by Frank Rich of *The New York Times* and cultural scholar Neal Gabler for not being a serious journalist but rather a celebrity. See NEAL GABLER, *LIFE THE MOVIE, HOW ENTERTAINMENT CONQUERED REALITY* 154–55 (1999). She has arguably been the most public advocate of hidden cameras of all on-air news persons. First, this "sting" by ABC is similar to a media ride-along scenario, which encourages police to show off for the camera, to tout their exploits, as this show does. Second, it appears as though ABC is in league with the police in setting up the sting. This is not the role of the press. If the police want to film, let them film. Why is ABC involved—so good hidden camera footage could be obtained? Third, why do the faces of the wrongdoers have to be shown? They may have made a mistake, but is it fair to punish them in front of tens of millions of people? Fourth, why are stories so old and routine as this being done? Fifth, why was it necessary for Diane Sawyer to invade a shop demanding to speak to the owner? This is a "gotcha" tactic that serves no purpose other than to embarrass and convey a false and negative impression. Who in their right mind would give an interview in such circumstances? The sole purpose of the tactic is to embarrass and heighten the emotion of the piece. Lissit, *Out of Sight*, *supra* note 10, at 32 ("It's Sawyer's job to come in after the undercover work has been done and confront people with the results.").

See also *Hanlon v. Berger*, 526 U.S. 808 (1999); *Wilson v. Layne*, 526 U.S. 603 (1999). In *Hanlon*, CNN teamed up with federal investigators to jointly plan the execution of the search warrant of a private ranch. *Hanlon*, 526 U.S. at 809; see also *Supreme Court Puts Educators, Police on Notice* (May 24, 1999), at <http://www.cnn.com/US/9905/24/scotus.01/>. The partnership was memorialized by a written contract so that the officials could assist the media in obtaining material for their commercial programming. See *Media Participation in Search Risks Liability for Media and Government Agents*, APPELLATE DECISIONS NOTED (Dec. 1997), at <http://www.appellate-counsellor.com/newsletter/9712.htm> [hereinafter *Media Participation*]. The plaintiffs claimed that their Fourth Amendment rights were violated by the officers and CNN and claimed that CNN trespassed and violated the Federal Wiretap Act. *Id.* The Montana District Court granted the defendant's motion for summary judgment. See *Timeline—Hanlon v. Berger*, First Amendment Center, at http://www.freedomforum.org/fac/98-99/Hanlon_time.htm (last visited Jan. 19, 2002) [hereinafter *Hanlon Timeline*]. The court of appeals, however, reversed. *Id.* The court found that the agents were not entitled to qualified immunity and CNN, by acting in concert with federal agents and willfully participating in the search warrant execution, did not operate under color of state law. *Media Participation*, *supra*. The court cited CNN's contract

be concocted. Not only is it unfair to the victims of the hidden camera, but also to the public overall, who receive a distorted view because they are not informed that crimes and torts were committed to gather the smear. By virtue of the use of hidden cameras, the media necessarily denies the public an unbiased report.

A hidden camera story is essentially a “grainy little morality play,”²² edited to heighten the entertainment value, where journalists go undercover to mythologize their work by becoming protagonists, modern “folk heroes” who ferret out wrongdoing as the superheroes of pop culture.²³ The

with the agents, the fact that the government shared confidential information with CNN that was under seal, and that the record suggested the government officers planned and executed the search in a manner designed to enhance its entertainment rather than law enforcement value by, for example, engaging in conversation with the plaintiff for the sound bite benefit of the cameras. *Id.* Furthermore, the court held that CNN was on the hook for trespassing. *See Hanlon Timeline, supra.*

On appeal, the Supreme Court held that while the plaintiffs had stated a Fourth Amendment claim, the government agents were entitled to the defense of qualified immunity, but not as to future conduct. *Id.* The remaining claims against CNN, however, stood. *See id.*

22. MacGregor, *supra* note 9.

23. *See* Meredith O’Brien, *A Watchful Eye*, *QUILL*, June, 2001, at 10 (“Hidden camera footage is sexy. It smacks of hard-nosed investigative reporters hiding in the shadows waiting to catch the bad guys . . .”); *see also* J. DYGERT, *THE INVESTIGATIVE JOURNALIST: FOLK HEROES OF A NEW ERA* (1976). Defense lawyers love to trot out Nellie Bly and Upton Sinclair as stellar examples of the benefits of undercover journalism, but they should think twice about doing so. Upton Sinclair wrote *The Jungle* in 1905 as a novel. UPTON SINCLAIR, *THE AUTOBIOGRAPHY OF UPTON SINCLAIR* 109–10 (1962). He never impersonated anyone; rather he walked around the stockyards and interviewed workers to obtain his information. *See id.* Further, he was a radical socialist, known as a “propagandist novelist,” who first published his novel as a serial in *The Appeal To Reason*, a Socialist weekly. Robert B. Downs, *Afterword* to UPTON SINCLAIR, *THE JUNGLE* 343, 343–44 (1960). Further, Sinclair did not publish photographs obtained by trespass or fraud, nor did he invade the privacy of or embarrass by name any individuals. *See id.* at 344–49.

Nellie Bly was a “self-promoting sensationalizer and an embarrassment to the craft,” most interested in her own fame and held in disrepute by many of her peers. Paul Starobin, *Food Lion Expose Was Stunt Journalism: ABC Could’ve Done a Devastating Story Without the Tricks*, *STAR-TRIBUNE* (Minneapolis-St. Paul), Jan. 30, 1997, at A21. Bly’s newspaper, *The World*, engaged in “sensation-mongering [that] was the object of much industry ridicule, with its exploitative use of women reporters especially singled out.” BROOKE KROEGER, *NELLIE BLY: DAREDEVIL, REPORTER, FEMINIST* 225 (Times Books 1994). In Bly’s day, there was no ban on impersonation to get information, and she claimed that it was against her principles to lie to get information, though she did not adhere to the same. *Id.* at 101. Moreover, in her famous story on mental asylums, Bly got prosecutorial immunity before proceeding. Dorothy Rabinowitz, *ABC’s Food Lion Mission*, *WALL ST. J.*, Feb. 11, 1997, at A20 (“Hers was, of course, a time—long before journalists had come to view themselves as an elite society—in which reporters were more likely to concern themselves with deceit and its consequences.”). By contrast, the greatest muckrakers shunned such ruses. An example is Ida Tarbell who toppled the Standard Oil Monopoly of John D. Rockefeller “by the tireless bird-dogging” of public records and other documents. Starobin, *supra*; *see also* Susan Paterno, *The Lying Game*, *AM. JOURNALISM REV.*, May 1997, at 40, 42 (quoting Robert Miraldi to the effect that the best of the early twentieth

investigative journalist is always the hero of any story, and there is always a bad guy/villain.²⁴ Accordingly, it is high drama when the bad guy is actually captured on camera and exposed. We usually see “gotcha” interviews, surprise “attacks” by the journalist upon the unsuspecting alleged miscreant in which they are asked to confess or explain their supposed wrongful conduct.²⁵

As the plaintiffs’ success in *Shulman v. Group W Productions, Inc.*²⁶ and *Sanders*,²⁷ aptly evidence, courts are willing to protect—and vigorously—individual plaintiffs from intrusions upon protected spheres of privacy, whether locational²⁸ or non-locational.²⁹ Undoubtedly, the most insidious and frightening intrusion cases involve an expectation of privacy, with spies working in conjunction with an enemy or competitor of the victim to set up the fraud. A good example is *Food Lion*, where a union antagonist (with indirect support from union-organized food market competitors) cooperated closely with “PrimeTime Live” in a fraudulent-

century journalist reformer types “were all above board, [who] all identified themselves as reporters”).

24. MacGregor, *supra* note 9 (“Simplistic and empty, they serve no higher purpose than to create a villain, because *everyone* looks guilty when viewed through the wide-angle HatCam.”). Former “60 Minutes” producer Barry Lando revealed the failings of these stories and the modus operandi of “60 Minutes”:

What it means is that investigative reports on CNN or *60 Minutes* or anywhere else usually painted starkly: black and white, the bad guys and good guys. In fact, most of life is played out in shades of gray. When you start digging into any supposed scandal you usually find that the bad guy is not all that bad; the good guy is not all that good, and often the supposed villain in not really a villain at all. Such subtleties, though fascinating to uncover, don’t make for the kind of clear-cut morality plays that are the staple of programs like *60 Minutes*.

The producer frequently finds he no longer has “a story.” Usually producers and correspondents recognize when they arrive at that point and drop the project. But not always. It’s when the revelation occurs after you have already committed several weeks and tens of thousands of dollars to a report that the process is most painful, and the temptation to continue, in spite of what you have uncovered, is greatest.

. . . The fact is there is no first-class editorial person at *60 Minutes* who supervises the producers in any serious way, asking for sources, constantly probing for weaknesses. Temptations to distort abound.

Most taped interviews, for example, run at least half an hour in length. But it’s rare that the producer uses more than a couple of minutes of any particular character; usually its [sic] only twenty or thirty seconds. The choice of those sound bites is critical. They’re simple to manipulate; it’s easy to delete bothersome denials of qualifying phrases.

60 Minutes *Laid Bare*, BRILL’S CONTENT, Oct. 1998, at 85, 87.

25. See *infra* text accompanying notes 120–21, 130–38.

26. 955 P.2d 469, 497 (Cal. 1998); see sources cited *supra* note 19 (discussing *Shulman*).

27. See sources cited *supra* note 19 (discussing *Sanders*).

28. See ELDER, PRIVACY, *supra* note 18, § 2:5.

29. See *id.* § 2:6.

“employee” hidden camera “sting” operation with incredibly damaging results.³⁰

In addition to intrusion and/or statutory privacy claims (or in the case of business entities, non-privacy claims³¹), this Article contends that hidden cameras portray individuals in both a defamatory manner and in a false light—by definition and by design. As the discussion hereafter demonstrates, courts should treat these hidden camera stories as presumptively false *and* made with constitutional malice—a standard required for all public persons³² (and in false light claims by private persons in many jurisdictions³³) as a threshold precondition for receiving actual, presumed and punitive damages.³⁴ Precedent, common sense, fairness and an awareness of the Supreme Court jurisprudence balancing competing interests in reputation and free expression support such a result.

As a preface to the constitutional malice discussion, Part II provides a brief overview and offers some cautionary comments about media defendants’ legal and tactical strategies. Part III then presents an overview of hidden camera methodology and motivation, illustrating the corrosive and corrupting influences hidden cameras have had on American television and journalistic integrity. Part IV provides a specific, detailed analysis of the issues not litigated in *Food Lion*. Part V examines in detail the precedent supporting this Article’s thesis: constitutional malice should be easy to prove in hidden camera cases—indeed, it should be presumed. Lastly, Part VI draws some conclusions and suggests how this thesis fits well within, and in fact *enhances* the “marketplace of ideas” function of the First Amendment.

II. THE CONSTITUTIONAL FRAMEWORK

A. An Overview

The exacting scienter requirement of *New York Times Co. v. Sullivan*³⁵—knowing or reckless disregard of falsity—in hand with its heightened evidentiary standard—“convincing clarity”³⁶ / “clear and

30. See discussion *infra* Part IV.

31. See ELDER, PRIVACY, *supra* note 18, § 1:4.

32. See discussion *infra* Part II.

33. See discussion *infra* Part II.

34. See discussion *infra* Part II.

35. 376 U.S. 254 (1964).

36. *Id.* at 285–86. Note that the Court has recognized the close analogue of this standard to the scienter requirement in the law of deceit, i.e., no liability for the “honest liar.” *Bose Corp. v.*

convincing³⁷ evidence—the “*New York Times* standard”) are “widely perceived as essentially protective of press freedoms³⁸ imposing on the public plaintiffs subject thereto an “undoubtedly . . . very difficult and demanding³⁹ or “formidable barrier⁴⁰ as a constitutional condition to liability and damages—actual,⁴¹ presumed,⁴² and punitive.⁴³ However, plaintiffs trying to meet these standards in a libel or false light privacy case need to be cautious and not allow defendants to map out the terrain of battle and muddy the waters in a fashion that needlessly enhances the already exalted standards confronting the plaintiff.

B. Special Considerations for Litigation

A series of cautionary considerations should be noted. First, plaintiffs must be wary, both at trial and on appeal, of defendants’ divide and conqueror strategy to constitutional malice, i.e., trying to focus both the court’s and jury’s⁴⁴ attention on purportedly discrete, severable and

Consumers Union, 466 U.S. 485, 502 n.19 (1984).

37. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 (1971). The terms are used interchangeably. See DAVID A. ELDER, DEFAMATION: A LAWYER’S GUIDE § 7:5, at 64–65 & n.25 (1993) [hereinafter ELDER, DEFAMATION]. Note that this elevated evidentiary standard is only as to constitutional malice (i.e., knowing or reckless disregard), not as to falsity, although the Supreme Court has noted, but not resolved, that issue. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 661 & n.2 (1989). Two cases have limited the clear and convincing evidence standard to constitutional malice and concluded that all other aspects of defamation are subject to the preponderance standard. *Goldwater v. Ginzburg*, 414 F.2d 324, 341 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970), *reh’g denied*, 397 U.S. 978 (1970); *Ratray v. City of Nat’l City*, 51 F.3d 793, 801–02 (9th Cir. 1994), *cert. denied*, 516 U.S. 820 (1995). The District of Columbia and Third Circuits have noted but not resolved the issue. *Tucker v. Fischbein*, 237 F.3d 275, 285, 288 n.5 (3d Cir. 2001); *Tavoulares v. Piro*, 817 F.2d 762, 786–87 n.33 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 870 (1987). *But see Firestone v. Time, Inc.*, 460 F.2d 712, 722–23 (5th Cir. 1972) (Bell, J., concurring) (finding the clear and convincing requirement as to falsity “implicit” in the *New York Times* standard), *cert. denied*, 409 U.S. 875 (1972).

38. *Herbert v. Lando*, 441 U.S. 153, 169 (1979).

39. *Grzelak v. Calumet Publ’g Co.*, 543 F.2d 579, 582 (7th Cir. 1975).

40. *McCoy v. Hearst Corp.*, 727 P.2d 711, 727 (Cal. 1986), *cert. denied*, 481 U.S. 1041 (1987).

41. See ELDER, DEFAMATION, *supra* note 37, § 9:1[B], at 67. Note that private persons suing as to matters of public concern in libel cases may collect actual damages under a minimal fault/negligence standard but may collect presumed or punitive damages only if the *New York Times* standard is met. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346, 350 (1974). The status/fault issue as to private persons in false light cases is unclear. See ELDER, PRIVACY, *supra* note 18; see also sources cited *infra* note 369.

42. ELDER, DEFAMATION, *supra* note 37, § 9:1[D], at 14–15.

43. *Id.* § 9:1[E], at 16.

44. See *Ball v. E.W. Scripps Co.*, 801 S.W.2d 684, 691 (Ky. 1990), *cert. denied*, 499 U.S. 976 (1991) (rejecting very lengthy and confusing “jury charges”—forty-one in number, forty-seven pages in length followed by lengthy interrogatories—in favor of the “bare bones” variety,

unrelated items of evidence. Occasionally, courts have followed the media's proffered approach—unaware of the Supreme Court-sanctioned perspective⁴⁵—with very skewed, head-scratching results.⁴⁶ However, the law is clear. The First Amendment imposes *no restrictions* on the types of evidence admissible to prove constitutional malice, with the Court repeatedly affirming the utilization of circumstantial evidence in proving this “critical element.”⁴⁷ Indeed, the Court and lower state or federal courts⁴⁸ have undoubtedly recognized that such evidence is essential considering that “it would . . . be rare for a defendant . . . to admit to having had serious, unresolved doubts”⁴⁹ Requiring proof of recklessness

deeming the former “unsuitable and unreasonable”).

45. See, e.g., *Warford v. Lexington Herald-Leader Co.*, 789 S.W.2d 758 (Ky. 1990), *cert. denied*, 498 U.S. 1047 (1991). The *Warford* approach has been described as an example of “the well-constructed collage” that plaintiffs must construct to prove constitutional actual malice. ELDER, DEFAMATION, *supra* note 37, § 7:1, at 2–3. In *Warford*, the court delineated numerous items of objective evidence that collectively supported a finding of constitutional malice in the case of a college basketball recruiter defamed by charges of recruiting improprieties. *Warford*, 789 S.W.2d at 772. The defendant reporters made minimal efforts to verify the credibility of their source, a student athlete, despite the plaintiff's denials just prior to publication and the plaintiff's request that the reporter contact several individuals, including the source's parents, friends, and high school coaches. *Id.* The defendants also failed to contact anyone at the plaintiff's university, including his boss, prior to the original publication. *Id.* Moreover, the defendants failed to conduct any further investigation prior to publication of the reprint, despite denials by the plaintiff and others. *Id.* In addition, the defendants conceded they were aware of the seriousness of the charge and the potential harm to the plaintiff from the pervasive dissemination to all future college and university employers. *Id.* Furthermore, the defendants delayed in contacting the plaintiff until just prior to the original publication despite the absence of a time deadline, permitting a jury to conclude the defendants “were committed to running the story without regard to its truth or falsity.” *Id.* Finally, the defendants transformed the source's ambiguous statement into “the most potentially damaging alternative” creating a “jury question on whether the publication was indeed made without serious doubt as to its truthfulness.” *Id.* at 772–73 (quoting *Rebozo v. Wash. Post Co.*, 637 F.2d 375, 382 (5th Cir.)).

46. See, e.g., *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1304–05, 1308 (D.C. Cir. 1996) (denying the plaintiff's libel claim despite the defendants' awareness that the independent-contractor author relied on a source viewed as a liar by several of the author's other sources and that the article itself quoted or cited to several factors discrediting the source's truthfulness), *cert. denied*, 519 U.S. 809 (1996); *Perez v. Scripps-Howard Broad. Co.*, 520 N.E.2d 198, 204 (Ohio 1988) (upholding summary judgment where the defendant relied on a source with a history of drug trafficking who implicated the plaintiff, a police captain), *cert. denied*, 488 U.S. 870 (1988). See generally ELDER, DEFAMATION, *supra* note 37, § 7:2, at 33 n.54 (describing *Perez* as a “dubious decision”); *id.* § 7:2, at 217 (Supp. 2001) (declaring the *McFarlane v. Esquire Magazine* court reached a “dubious . . . conclusion”).

47. See, e.g., *Herbert v. Lando*, 441 U.S. 153, 170 (1979).

48. See ELDER, DEFAMATION, *supra* note 37, § 7:1, at 2–3, § 7:2, at 19–20 & n.96; see also cases cited *infra* note 57.

49. *Stone v. Essex County Newspapers, Inc.*, 330 N.E.2d 161, 173 (Mass. 1975); see also *Lyons v. New Mass Media, Inc.*, 453 N.E.2d 451, 456 (Mass. 1983) (quoting *Stone*, 330 N.E.2d at 173).

“without being able to adduce proof of the underlying facts from which a jury could infer recklessness . . . would limit successful suits to those cases in which there is direct proof by a party’s admission of the ultimate fact.”⁵⁰

Furthermore, the cases expressly recognize that the *New York Times* standard by definition “encompasses innumerable subtleties of the defendant’s mind set and conduct, [and] is exceedingly difficult to apply to the varying circumstances of each case.”⁵¹ Accordingly, the basic theme is that followed by the great volume of case law,⁵² i.e., that the “varying circumstances, *taken as a whole*, must provide reasons to question the truth of [the defendant’s] publication.”⁵³ In fact, in most cases no single factor is determinative⁵⁴ and the plaintiff logically endeavors to construct “a collage of pieces of evidence,”⁵⁵ what one decision has termed a “grab-bag of circumstantial evidence,”⁵⁶ collectively pointing toward constitutional malice. One oft-cited opinion has made this point powerfully in its discussion and approval of an instruction that the jury consider *all* the evidence appertaining to the defendants’ actions and conduct: “There is no doubt that evidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant’s recklessness or of his knowledge of falsity.”⁵⁷

50. *Eastwood v. Nat’l Enquirer, Inc.*, 123 F.3d 1249, 1253 (9th Cir. 1997) (“As we have yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article it published, we must be guided by circumstantial evidence. By examining the editors’ actions we try to understand their motives.”); *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1569 (D.C. Cir. 1984) (“The plaintiff need not obtain any admission of fault from the defendant.”), *vacated on other grounds*, 477 U.S. 242 (1986); *Goldwater*, 414 F.2d at 343. If this were not the law, “mere swearing could, as a matter of law, defeat any action to which the *New York Times* principles are applicable.” *Guam Fed’n of Teachers v. Ysrael*, 492 F.2d 438, 439 (9th Cir. 1974), *cert. denied*, 419 U.S. 872 (1974).

51. *DiLorenzo v. N.Y. News, Inc.*, 432 N.Y.S.2d 483, 485 (App. Div. 1981).

52. See ELDER, DEFAMATION, *supra* note 37, § 7:1, at 2.

53. *DiLorenzo*, 432 N.Y.S.2d at 485 (emphasis added).

54. See ELDER, DEFAMATION, *supra* note 37, § 7:1, at 2.

55. *Id.*

56. *Robertson v. McCloskey*, 666 F. Supp. 241, 250 (D.D.C. 1987).

57. *Goldwater*, 414 F.2d at 342; see also *Harte-Hanks*, 491 U.S. at 668 (“[A] plaintiff is entitled to prove defendant’s state of mind through circumstantial evidence.”); *Khawar v. Globe Int’l, Inc.*, 965 P.2d 696, 709 (Cal. 1998) (“To prove this culpable mental state, the plaintiff may rely on circumstantial evidence, including evidence of motive and failure to adhere to professional standards.”), *cert. denied*, 526 U.S. 1114 (1999); *Sprague v. Walter*, 656 A.2d 890, 907 (Pa. Super. Ct. 1995) (“Any competent evidence can be used to establish actual malice.”), *appeal denied*, 670 A.2d 142 (Pa. 1996).

Other decisions parallel this approach, emphasizing that constitutional malice is determined from assessing the “totality” of the defendant’s “choices”⁵⁸ and that the plaintiff is “entitled to an aggregate consideration of all these claims.”⁵⁹ The Supreme Court itself has recently reflected this attitude in making its required independent review, concluding “the evidence in this record in this case, *when reviewed in its entirety*, is ‘unmistakably’ sufficient to support a finding of actual malice.”⁶⁰ This broad all-factors/all-evidence approach is peculiarly appropriate in hidden-camera cases, where a news agency plays *agent provocateur* and does not just report a story after it has transpired, but literally generates it and carries it out to completion as if it is a spying mission—manufactured “news.” Unlike the typical defamation case, the *participants* in these “news” events are usually employees, independent contractors, or interns of the news organization. The media is thus covering itself and is going to make itself look good to the viewer.

Second, as a result of this broad approach to constitutional malice, the pivotal issue would be “the credibility of the reporter or publisher in the context of the surrounding facts and circumstances.”⁶¹ The logical corollary of this, particularly as to hidden cameras with their inherently suspect,⁶² creative, self-interested, self-reporting and self-justifying attributes, is to treat reporters, producers, and editors as interested parties that the jury may deem “not credible and disbelieve,”⁶³ a function entrusted to them by the Supreme Court.⁶⁴ As one court has said, “We accept the jury’s finding as to disputed facts when there is supporting evidence because we claim no superior ability to divine the truth by reason of judicial office, and we question the good judgment of any judge who thinks he has such special powers.”⁶⁵

Undoubtedly, hidden-camera cases with the inherent hazards therein, including the defendant’s propensity for self-justifying selective editing, mandate that a jury assess both actions and inactions and motivation. Indeed, courts have frankly recognized that constitutional malice may be

58. *Kaelin v. Globe Communications Corp.*, 162 F.3d 1036, 1042 (9th Cir. 1998) (citing *Eastwood*, 123 F.3d at 1256).

59. *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1510 (D.C. Cir. 1996); *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1304 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 809 (1996).

60. *Harte-Hanks*, 491 U.S. at 693 (emphasis added).

61. *Burns v. McGraw-Hill Broad. Co.*, 659 P.2d 1351, 1361 (Colo. 1983).

62. See discussion *infra* Part III.

63. *Dombey v. Phoenix Newspapers, Inc.*, 724 P.2d 562, 573–74 (Ariz. 1986).

64. *Ball*, 801 S.W.2d at 688.

65. *Id.*

predicated on “the fact-finder’s negative assessment of the speaker’s credibility at trial.”⁶⁶ Consider, for example, the recent Third Circuit case, where the court remanded for trial the issue of whether the defendant-attorney published a defamation in the face of a complaint served on and received by him.⁶⁷ In responding to the defendant’s contention that there could be no constitutional malice as he did not read the complaint before speaking, the court replied:

[A] reasonable jury could believe that a person who is added as a defendant in a multi-million dollar lawsuit is very likely to read the complaint shortly after receiving it in order to see why he or she has been sued. A reasonable jury could disbelieve [defendant’s] story and find by clear and convincing evidence that [defendant] did read the First Amended Complaint before the interview.⁶⁸

In other words, the Third Circuit has decided that a jury’s conclusion that the defendant lied as to receipt of contradictory information could alone sustain a constitutional malice finding. The Ninth Circuit has similarly found that “[t]he editors’ statements of their subjective intention are matters of credibility for a jury.”⁶⁹

Third, plaintiff-lawyers should respond unambiguously and unequivocally to any suggestion that special rules for summary judgment are mandated by the First Amendment, i.e., that summary judgment is “favored,” a common bit of posturing by media lawyers. The Supreme Court’s jurisprudence rejects any such special protection. Indeed, the Court has recognized society’s “pervasive and strong interest”⁷⁰ in protecting reputation and cautioned against “substantial depreciation” thereof “without any convincing assurance that such a sacrifice is required under the First Amendment.”⁷¹ The Court has implemented this strongly

66. *Newton v. NBC, Inc.*, 930 F.2d 662, 671 (9th Cir. 1990), *cert. denied*, 502 U.S. 866 (1991).

67. *Tucker v. Fischbein*, 237 F.3d 275, 285, 289 (3d Cir. 2001).

68. *Id.*

69. *Kaelin*, 162 F.3d at 1042; *see Gray v. Press Communications, LLC*, 775 A.2d 678, 685 (N.J. 2001).

To say the least, [the defendant’s] sources were of dubious veracity. Indeed, they are so vague that a jury could find that they were contrived after the fact. In addition, a jury would reasonably conclude, in light of the vague nature of his recollection, that [the defendant’s] statement that it was common knowledge that plaintiff is a lesbian, was not credible.

Gray, 775 A.2d at 685.

70. *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966).

71. *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976). The Court’s “substantial depreciation” and “convincing assurance” requirement appeared in the context of a rejection of

held view by repeatedly rejecting Due Process and/or First Amendment-based special protections.⁷² As the Court has repeatedly indicated,⁷³ it has “already declined in other contexts to grant special *procedural* protections to defendants . . . in addition to the *constitutional* protections . . . in the *substantive* laws.”⁷⁴

The Supreme Court has also rejected in dicta the suggestion that summary judgment “might well be the rule rather than the exception,” expressing “some doubt about the so-called ‘rule.’ The proof of ‘actual malice’ calls a defendant’s state of mind into question . . . and does not readily lend itself to summary disposition.”⁷⁵ Later, in *Anderson v. Liberty Lobby, Inc.*,⁷⁶ the Court characterized this latter acknowledgment as reflective of “our general reluctance” to grant such special procedural protections.⁷⁷ In adopting the “heightened evidentiary requirements”⁷⁸ (clear and convincing evidence standard) at the summary judgment stage, the Court took considerable pains to emphasize several things—general requirements of the federal rule must be followed, the jury’s fundamental

per se public figure status for all participants in judicial proceedings. *Id.* at 456–57. See *Herbert*, 441 U.S. at 169–70 (rejecting in comparable terms an attempt to restrict a public person’s access to evidence to meet the *New York Times* standard: “The case for making this modification is by no means clear and convincing, and we decline to accept it.” (emphasis added)). The Court’s use of language in both *Firestone* and *Herbert* is calculated and very important, and also imposes a very strong burden on defendants to justify extending the panoply of protections of the demanding *New York Times* standard and any evidentiary or procedural impediments to meeting these exacting requirements. See ELDER, DEFAMATION, *supra* note 37, § 4:1, at 2 & nn.6–14.

72. The Supreme Court has issued the following rejections: *Calder v. Jones*, 465 U.S. 783, 789–90 (1984) (rejecting a special jurisdictional immunity of individual reporters or editors writing in their official capacities); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780–81 (1984) (rejecting use of the plaintiff’s residency as a precondition to state libel jurisdiction, a limitation on nationwide damages under the “single publication rule”); *Herbert*, 441 U.S. at 170–71 (rejecting special evidentiary rules barring from discovery direct inquiry into the editorial process); *Time, Inc. v. Firestone*, 424 U.S. 448, 461–63 (1976) (rejecting the plaintiff’s request to affirm a finding of fault based not on a jury verdict but solely on the finding of a lower appellate court); *Gertz*, 418 U.S. at 350 (declining to bar punitive damages where the *New York Times* standard is met); *Cantrell v. Forest City Publ’g Co.*, 419 U.S. 245, 253 (1974) (rejecting the defendant’s assertion that vicarious liability does not apply to First Amendment violations); *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 160–61 (1967) (rejecting the defendant’s argument that punitive damages require a higher level of fault than compensatory damages), *reh’g denied*, 389 U.S. 889 (1967).

73. See ELDER, DEFAMATION, *supra* note 37, § 4:1, at 1–2.

74. *Calder*, 465 U.S. at 790–91 (emphasis added); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 n.7 (1986) (citing *Calder*, 465 U.S. at 790–91), *motion denied*, 480 U.S. 903 (1988).

75. *Hutchinson v. Proxmire*, 443 U.S. 111, 120 & n.9 (1979).

76. 477 U.S. 242.

77. *Id.* at 256 n.7 (citing *Calder*, 465 U.S. at 790–91).

78. *Id.* at 247.

role must remain intact, and summary trial by affidavit may not be authorized.⁷⁹ In powerful language the Court reaffirmed:

Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.⁸⁰

In other words, “[t]he Court expressly repudiated the special and media protective minority view . . . [that suggested] that the trial court should evaluate the credibility of witnesses and make its own inferences from the evidence adduced.”⁸¹

In sum, summary judgment is “favored” *only* to the extent that there inures in the *New York Times* standard a difficult *substantive* burden for the plaintiffs to overcome. The California Supreme Court made this point elegantly in *Reader’s Digest Ass’n v. Superior Court*.⁸²

It is pointless to declare in the abstract that summary judgment is a favored or disfavored remedy. A more subtle analysis is required—one that explains how a motion for summary judgment should be decided in a defamation case under the *New York Times* test. The Fifth Circuit in *Rebozo v. Washington Post Co.* undertook such an analysis and reached the following conclusion: “[T]he standard of review of First Amendment defamation actions, as in all summary judgment cases, is whether the record, construed in a light most favorable to the party against whom the judgment has been entered, demonstrates there are genuine issues of fact which, if proven, would support a jury verdict for that party. Given, however, a jury verdict in a defamation case can only be supported when the actual malice is shown by clear and convincing evidence, rather than by a preponderance of evidence as in most other cases, the evidence and all the inferences which can reasonably be drawn from it must meet the higher standard.”

We recognize a potential chilling effect from protracted litigation as well as a public interest in resolving defamation cases promptly. That does not mean, however, that a court

79. *Id.* at 255–57.

80. *Id.* at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–59 (1970)).

81. ELDER, DEFAMATION, *supra* note 37, § 7:6, at 71.

82. 690 P.2d 610, 614 (Cal. 1984), *cert. denied*, 478 U.S. 1009 (1986).

should grant summary judgment when there is a triable issue of fact as to actual malice. Instead, courts may give effect to these concerns regarding a potential chilling effect by finding no triable issues unless it appears that actual malice may be proved at trial by clear and convincing evidence—i.e., evidence sufficient to permit a trier of fact to find for the plaintiff and for an appellate court to determine that the resulting judgment “does not constitute a forbidden intrusion on the field of free expression.” *To this extent*, therefore, summary judgment remains a “favored” remedy in defamation cases involving the issue of “actual malice” under the *New York Times* standard.⁸³

The California Supreme Court in *Reader's Digest* approved and adopted the analysis of the Fifth Circuit in *Rebozo v. Washington Post Co.*,⁸⁴ an analysis which squarely *repudiates* the view that media defendants receive a second procedural “bonus” in summary judgment practice implicating the constitutional malice standard, and instead forcefully advances the view that the *only* benefits defendants receive are those embedded in the protective *New York Times* standard itself.⁸⁵ Thus, media defendants are not entitled to any special breaks. They are only entitled to the substantive benefits of the *New York Times* standard. Plaintiffs, in turn, are entitled to have the issue called “straight up.” If there are triable issues of fact regarding the defendants’ (often just the producer of the piece—whose constitutional malice is imputed to the employer, co-defendant⁸⁶) state of mind, issues that would place in context one way or another the question of whether a jury could reasonably find knowing or reckless falsity by clear and convincing evidence, the plaintiff is *entitled* to have the case placed before a jury. Common fairness, the procedural rules, and the Supreme Court have so decreed.

83. *Id.* at 614 (citations omitted) (emphasis added).

84. 637 F.2d 375, 380–81 (5th Cir. 1981).

85. *See id.*

86. *See, e.g., Cantrell*, 419 U.S. at 253; ELDER, DEFAMATION, *supra* note 37, § 7:8, at 78–

III. THE ROLE OF HIDDEN CAMERAS

A. Hidden Cameras: A Product of the "Bottom Line" Mentality

Television journalists, at least at the newsroom level,⁸⁷ decry the dominance of commercial over journalistic consideration in the newsroom,⁸⁸ feeling they are "caught in a self-defeating spiral"⁸⁹ from "a heightened, unseemly lust" for great profits⁹⁰ with a concomitant diminution in quality.⁹¹ Why is this? It is all about television

87. See *infra* text accompanying notes 89–91.

88. Barry Meier, *Jury Orders ABC to Pay \$5.5 Million in Damages*, DAILY NEWS (L.A.), Jan. 23, 1997, at 15 ("[M]any media experts say television producers have overused them in recent years in a push to create splashy shows and bolster ratings."); Starobin, *supra* note 23 (Noting that a "devastating story" could have been done on Food Lion with the recorded interviews of seventy current and former employees, the critic stated: "But that wasn't sexy enough, so ABC went undercover to dramatize the tale. A commercial imperative, not a journalistic one, drove this piece."); Matt Towery, *That's Entertainment*, GA. TREND, Nov. 1, 2000, at 1 ("Maybe it's time to let everyone who hasn't caught on know the big secret: Journalism is dead. It's all about entertainment these days.").

89. Kovach, *A First Step*, *supra* note 13 ("[T]he impact from the business side . . . involves cutbacks, buyouts, focusing journalists around the bottom line, tying journalists' incomes to business incentives, creating a commercial rather than a journalistic mindset in the newsroom."); PEW RESEARCH CENTER, STRIKING THE BALANCE: BUSINESS AND PUBLIC PRESSURES, at <http://www.people-press.org/press99sec3.htm> (last visited Oct. 12, 2001) [hereinafter STRIKING THE BALANCE: BUSINESS AND PUBLIC PRESSURES] ("Members of the news media—particularly those in the newsroom—feel caught in a pressure cycle . . . [B]usiness pressures undermine quality, which hurts credibility, which in turn causes lost audiences. And that cycles back to added business pressure.").

90. Hickey, *Money Lust*, *supra* note 12; see also Epstein, *supra* note 4, at 1021 ("'PrimeTime Live' will resort to a big league fraud to secure entry because of what it hopes to gain, not by taking money out of the plaintiff's pocket, but by pocketing the advertisement revenues generated off the backs of its victims."). And note that newsmagazines do make profits. A media authority has noted that newsmagazines perform nearly as well as entertainment on a yearly basis. In 1998 alone NBC News earned more than \$200 million. Gunther, *Transformation*, *supra* note 13, at 28. Tom Bettag, the Executive Producer of ABC's *Nightline* was recently quoted as saying: "The [news]magazines have clearly become the tail that wags the dog . . . They generate far more profit than anything else we do." *Id.* at 22. The problem is internationally recognized. See *Current Affairs—Blurring the Boundaries*, BROADCAST (Jan. 19, 2001), 2001 WL 8210120 [hereinafter *Blurring the Boundaries*] (quoting a UK television executive as arguing that "intense commercial pressures have affected the way programme-makers work"); see also GOLDBERG, *supra* note 11, at 145, 147, 161 (quoting and agreeing with eccentric journalist Hunter S. Thompson that "[t]he TV business is a cruel and shallow money trench, a long plastic hallway where thieves and pimps run free and good men die like dogs.").

91. Kovach, *A First Step*, *supra* note 13, at 2–4 ("In short, journalists in the newsroom believe the business side is creating the quality problems that are alienating the audience"—not that media executives disagree—causing an "evident schism" within the organizations.); PEW RESEARCH CENTER, STRIKING THE BALANCE: OVERVIEW, at

newsmagazines, with hidden cameras as the drive-trains, becoming “the preeminent profit engine[s]”⁹² for network television while needing to compete with each other, cable and a host of non-news programs⁹³ that attract voyeuristic viewers⁹⁴ with a great affection for “clear, simple stories,

press.org/press99rpt.htm (last visited Oct. 12, 2001) [hereinafter STRIKING THE BALANCE: OVERVIEW] (“At both the local and national levels, majorities of working journalists say that increased bottom-line pressure is hurting the quality of coverage. . . . Two-thirds of those in national and local news say that news organizations’ attempts to attract readers or viewers have pushed them toward infotainment instead of news.”).

The almost desperate attempt to cater to and engage the young with things that young people are not yet ready to be engaged with doesn’t really work. The audience continues to shrink. The only thing that really happens is that you alienate the people who once believed in you. All in all, it’s a sad chapter—in a vain attempt to stem a certain type of hemorrhaging, legitimacy has systematically been traded off. And once you give it up it’s very hard to get it back.

David Halberstam, *The Powers That Were*, BRILL’S CONTENT, Sept. 2000, at 26.

92. Kovach, *A First Step*, *supra* note 13 (noting the dislike of journalists of all types—except for local television—for prime time magazines and their influence in and on the network news divisions; see Logan, *Stunt Journalism*, *supra* note 11, at 158, 167. Co-author Mr. Johnson’s independent survey of the ABC network alone and their use of hidden cameras between May of 1990 and November of 1994 and used at the trial court level in *Sanders* revealed that its “news” magazines aired over eighty shows featuring clandestinely obtained footage during this time period. Plaintiff’s Exhibit 3 at 1–8, *Sanders v. ABC, Inc.*, No. BC077553 (Cal. Super. Ct. (L.A.) Dec. 6, 1994). “PrimeTime” accounted for fifty-eight of these secret camera shows and subsequent repeats; “20/20,” on the other hand, aired approximately twenty hidden camera-based stories, while “Day 1,” another ABC news program, aired but two such shows. *Id.* These secret camera shows were so sexy, successful, and cheap for ABC that over twenty of the aired programs were actually re-broadcasts—some even triple broadcasts—appearing within a month of the original show. *Id.*

93. Peter Kaplan, *Sneaky Journalism’s Foes See Hope in Food Lion Case: Hidden TV Cameras May Be Shelved*, WASH. TIMES, Dec. 27, 1996, at 2; see also Hickey, *Money Lust*, *supra* note 12 (“[A]n irreversible rot in the hulls of all three of the old-line networks (in entertainment as well as news) has TV executives scurrying for new ways to build viewership and counter the threat of cable, the Internet, pay-per-view, and home satellite services.”); Logan, *Stunt Journalism*, *supra* note 11, at 166 (noting that newsmagazine shows must compete in prime time with forms of entertainment such as comedies and dramas); Paterno, *supra* note 23, at 43 (“The newsmagazines often must compete with entertainment shows, which encourages sensationalism as opposed to balance and nuance.”); Gunther, *Transformation*, *supra* note 13, at 20 (noting the highly competitive environment where the three major networks compete for viewers’ attention with dozens of other channel options); Daniel Schorr, *Deception: DeRigueur*, WASH. POST, Mar. 27, 1997, at A27 (noting that “PrimeTime Live” at the time of the Food Lion story was in competition with “the exciting reenactments and inventions of docudramas and syndicated tabloid shows”); see also GOLDBERG, *supra* note 11, at 154 (“[W]hen money is on the line, when their jobs and their salaries are at stake, the liberal news media do what money demands. . . . The problem is that, over the years, news has morphed into entertainment. To the network brass, ‘Dateline’ is the same as ‘ER’ or ‘Friends.’ They all have to compete for prime-time audiences.”).

94. MacGregor, *supra* note 9, at 32 (“[T]hey fabricate the mini-dramas and sketch the caricatures that we find so satisfying.”). MacGregor cites the coverage of the Oklahoma City bombing and the media’s “reducing tragedy by their embellishments to bathos; the latest movie of the week.” *Id.*; see also McClurg, *supra* note 11, at 1017 (concluding the American public has

with victims and villains, preferably illustrated with eye-catching video”⁹⁵ using state-of-the-art hidden camera technology.⁹⁶

As one distinguished commentator has concluded, “[D]espite wrapping themselves in the cloak of public interest, the contemporary media are profit-driven and altruistic only when the bottom line has been secured.”⁹⁷ Unfortunately, this “profit center”/“bottom line”/“new era of profit worship”⁹⁸ mentality, particularly as to the electronic media,⁹⁹ has

proven to be “an all too willing consumer of shocking, titillating, and voyeuristic entertainment”); Scott Huler, *Food Lion Jury Hears Final Arguments*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 14, 1997, at 3A (quoting Andrew Copenhaver, counsel for Food Lion, in closing argument on the punitive damages phase: “The lure of higher ratings creates an economic incentive to the illegal use of hidden cameras . . . Let’s face it—Americans have some voyeurism about them.”); Lawrie Mifflin, *Big Television Shocker: Tabloid Shows Go Soft—The Mainstream Networks Are Co-opting What Was Once Too Lurid for Prime Time*, N.Y. TIMES, Jan. 18, 1999, at C1 [hereinafter Mifflin, *Big Television Shocker*] (citing the seemingly endless coverage of the O.J. Simpson trial, Frank Kelly, co-president of Paramount Domestic Television, referred to the “seismic change” wrought by the story and “this insatiable appetite, and the networks said, ‘This is amazing, but people want this!’”); Starobin, *supra* note 23 (“Teaser promos for the programs hype concealed-camera feats to snag viewers who like to watch people who don’t know they’re being watched. But good journalism is not about sensationalizing how the story was obtained.”).

95. Marc Gunther, *The Lion’s Share*, AM. JOURNALISM REV., Mar. 1997, at 18, 20 [hereinafter Gunther, *Lion’s Share*].

96. Tom Jicha, *Hidden Camera Users: Journalists or Spies?*, SUN SENTINEL (Ft. Lauderdale), Feb. 15, 1997, at 1D (stating that the typical hidden camera is as “small as a decent-sized stogie”); see also Lidsky, *supra* note 11, at 181 (stating that the video camera is a little larger than a lipstick case); Kaplan, *supra* note 93 (quoting prominent media lawyer, Bruce Sanford, that the technology is “only going to get better”); see also *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 510 (4th Cir. 1999) (describing the cameras as “lipstick” cameras).

97. Logan, *Stunt Journalism*, *supra* note 11, at 158; see also Russ Baker, *Damning Undercover Tactics as “Fraud”: Can Reporters Lie About Who They Are? The Food Lion Jury Says No*, 35 COLUM. JOURNALISM REV. 28 (1997), <http://www.cjr.org/year/97/2/greensboro.asp>.

People don’t think a priest ought to be getting rich. They experience some dissonance when they hear a media organization talking about lofty objectives while someone else is pointing to that organization’s vast wealth. . . . The pressures to do so [make money] are unrelenting. So it becomes easier to argue, as Food Lion’s lawyers did, that no well-paid producer dares return home empty-handed, after promising a big score with a story and spending his or her employer’s bundle. “Serious journalists don’t always bat 1.000,” a Food Lion lawyer asserted. “Miss Barnett [co-producer] has.”

Baker, *supra*.

98. Logan, *Stunt Journalism*, *supra* note 11, at 158–65; see also KOVACH & ROSENSTIEL, *supra* note 6, at 50 (stating that most news room executives’ compensation is tied to business performance).

99. Hickey, *Money Lust*, *supra* note 12; see also Halberstam, *supra* note 91, at 26.

Naturally the pressure within the companies to drive the stocks up manifested itself in the newsrooms as a brutal new kind of quest for higher and higher ratings, which presumably could be achieved by frothier programming. . . .

When the Berlin Wall came down, the one thing I never thought of was the effect it would have on journalism, television journalism in particular, releasing those who

resulted in “a ratings-driven descent by the major networks into the swamp of tabloid journalism.”¹⁰⁰ In the latter, sensationalism reigns¹⁰¹ and television news is infected by the “climate of make-believe”¹⁰² and the desperate demand for hidden camera footage¹⁰³ with its capacity to jolt ratings.¹⁰⁴ Without such, as a critic says, “you ain’t got squat.”¹⁰⁵

ran the network news shows from their obligations to cover the world, and allowing them instead to hold up a mirror to an increasingly self-obsessed society.

Halberstam, *supra* note 91, at 26. Discussing the new introduction to his 1979 classic, *The Powers That Be*, Halberstam criticizes the new “managerial” generation controlling the networks, with their “tabloid formula” and profit focus, changes that paralleled the collapse of Marxism. *Id.*

100. Starobin, *supra* note 23; see also Hickey, *Money Lust*, *supra* note 12 (“The ‘tabloidization’ of TV newsmagazines is strictly geared to ratings and profits.”); Mifflin, *Big Television Shocker*, *supra* note 94 (“[T]abloid news magazines have also withered because certain kinds of tabloid-style stories have migrated to the traditional news organizations, which have so much more time to fill.”); Mifflin, *Big Television Shocker*, *supra* note 94 (quoting Maury Povich, original host of “A Current Affair,” as opining “[T]he network prime-time news magazines have co-opted the tabloid genre”).

[W]hen you turn your news into entertainment, you are playing to the strengths of other media rather than your own. . . . The value and allure of news is different. It is based on relevance. The strategy of infotainment, though it may attract an audience in the short run and may be cheap to produce, will build a shallow audience because it is built on form, not substance. Such an audience will switch to the next “most exciting” thing because it was built on the spongy ground of excitement in the first place.

KOVACH & ROSENSTIEL, *supra* note 6, at 154–55 (discussing the perils of the “infotainment” strategy).

101. See sources cited *infra* note 122.

102. Schorr, *supra* note 93.

103. See Peter S. Canellos, *Will the Public Suffer from the ABC-Food Lion Judgment?*, JOURNAL RECORD, Jan. 24, 1997, at 6 [hereinafter Canellos, *Will the Public Suffer?*] (concluding the jury’s judgment “implicitly endorsed” the Food Lion position that “PrimeTime Live” was entertainment, “not news, ‘juicing the ratings with illegally obtained video,’” quoting Food Lion attorney Tim Barber). The incestuous relationship between the hidden camera story and “sweeps weeks” with its emphasis on generating ratings poses a conflict of interest for media defendants. Absent some disclosure of this conflict, journalists appear to violate a major tenet of journalistic integrity. See KOVACH & ROSENSTIEL, *supra* note 6, at 192 (“[Journalists] should take pains to make themselves and their work as transparent as they insist on making the people and institutions of power they cover.”).

104. Eric Alterman, *Lionizing Journalism; Journalism Overreacts to the Food Lion Verdict vs. ABC-TV*, NATION, Mar. 24, 1997, at 5, LEXIS, News, News Group File, Beyond Two Years (“The profit pressure now drives every decision, including the use of unnecessary hidden cameras and phony resumes [sic]. The network newscasts, like the daily print media, feel themselves to be dying a slow, public death, but they have no idea how to revive the body.”); Marc Gunther, *Yikes! Diane Sawyer’s Downstairs!*, FORTUNE, Dec. 23, 1996, at 231, 232 [hereinafter Gunther, *Yikes*] (“Undercover footage can make great TV because audiences can literally see wrongdoing.”); MacGregor, *supra* note 9, at 25 (“[M]ost network executives are uncharacteristically forthright in explaining that the recent proliferation of these shows is a function of their low production cost. . . . No mention is made of the common good. . . . Not exactly the Edward R. Murrow Mandate of Heaven, is it?”).

105. O’Brien, *supra* note 23, at 10.

The damning¹⁰⁶ evidence of the impact of hidden cameras is irrefutable.¹⁰⁷ Hidden cameras are most prominent during “sweeps” periods¹⁰⁸ so that they can enhance advertising charges and ultimately revenue.¹⁰⁹ They are most likely to lead the program.¹¹⁰ The “teasers” hyping the program usually feature the hidden cameras” technology as

106. See discussion *infra* Part IV (discussing the unlitigated case). A recent study conducted by the *Columbia Journalism Review* quotes David E. Michaels, assistant editor at *The Arizona Republic*, saying, “I wish our ownership were more honest about the need to make money. A lot of changes are clothed in the ‘journalism’ garb, but are designed to save money. It’s dishonest, discouraging, and distracting.” Neil Hickey, *CJR Survey: What Do Journalists Want?*, COLUM. JOURNALISM REV., Sept./Oct. 2001, at 37 [hereinafter Hickey, *CJR Survey*]. Other anonymous remarks include the following: “Insulate further the news gatherers from corporate budget pressures”; “Greater focus on good journalism with less emphasis on greater profit and the stock price”; “Reduce focus on profit and Wall Street”; and “Clearly, sales is first, and news a distant second.” *Id.*

107. See Jicha, *supra* note 96 (citing the seventy on-record sources and the “compelling” stories of some in the extended ninety-minute “Nightline/Viewpoint” follow-up, which the author commented was “[a]rguably, more compelling” than the hidden camera video in the original show—“But TV demands pictures.”).

Between August, 1989 when the program began, and early Sept. ’96, PrimeTime Live aired 80 original hidden camera reports. There were also reruns of, and updates on, the original stories.

The number of hidden camera stories began to climb in ’92 & ’93. And, they clustered into September, the start of the fall television season, and the sweeps months of November, February and May.

During the quarter the Food Lion story ran, Sept., Oct. Nov. ’92, PTL ran 8 hidden camera segments. During the week the Food Lion story ran, PTL had its second highest rating to that time; it was the number four show for the week. 17 rating, 28 share.

During the ’89 to ’96 period, PTL’s highest ratings tended to come during quarters when they ran more hidden camera reports.

Email from Bob Lissit to Neville Johnson, Partner, Johnson & Rishwain, LLP (summarizing Lissit’s testimony in *Food Lion*) (on file with author).

108. Logan, *Stunt Journalism*, *supra* note 11, at 165; see also Lidsky, *supra* note 11, at 180 (suggesting that it is “no accident” hidden camera stories are at their zenith during sweeps week).

The determination of how much to charge for a spot is made during what television calls “sweeps weeks,” which is complete and utter lunacy. The networks load up their schedules with what they hope will be ratings blockbusters, then try to convince themselves and their advertisers—not to mention TV columnists—that the phony baloney is a legitimate gauge of how many people are watching when it’s *not* sweeps weeks. The truth is, it’s not a legitimate gauge of anything. . . .

One thing is certain: “Sweeps week” generally doesn’t make for elevated television.

DON HEWITT, TELL ME A STORY 224 (Public Affairs 2001) (commenting on the significance of “sweep weeks” as a long time producer of the celebrated “60 Minutes” program).

109. Logan, *Stunt Journalism*, *supra* note 11, at 165; see also Lidsky, *supra* note 11, at 180, 225 (“Undercover investigations of the sort condemned in *Food Lion* commonly run during sweeps week, because the media know that such investigations garner large audiences.”).

110. Logan, *Stunt Journalism*, *supra* note 11, at 165. Of eighty original stories on “PrimeTime Live” between August 1989 and September 1996, sixty-one opened the broadcast. *Id.* at 165 n.111.

prominently as the substance¹¹¹ in order to snare viewers with voyeuristic instincts. The net effect is that many newsroom journalists feel that this commercial mentality has caused journalism to “lose its professional soul”¹¹² and, concomitantly, its editorial independence,¹¹³ resulting in an increasing demand for professional standards to immunize newsrooms from such corrosive and corrupting influences.¹¹⁴

111. *Id.*

112. Hickey, *Money Lust*, *supra* note 12. Hickey, Editor at Large of the *Columbia Journalism Review*, in a lengthy and compelling analysis of the fixation on profit and its effects on the quality and independence of the media, concludes rhetorically, “What doth it profit a media company to demand unremittingly, steadily higher profit margins year after year and, in that very pursuit, lose its professional soul?” *Id.*

113. *Id.* (discussing the impacts of money: “editors collude ever more willingly with marketers, promotion ‘experts,’ and advertisers, thus ceding a portion of their sacred editorial trust. . . .”; the stock options of high level managers result in their “direct personal interest” in the company’s profit-mongering; bonuses linked to profits create the potential for a conflict of interests); *see also* Canellos, *Will the Public Suffer?*, *supra* note 103 (noting that Diane Sawyer testified her salary totaled “more than \$7 million,” and quoting Food Lion’s lawyer, Tim Barber, as listing ABC salaries and concluding “ABC set up a system where everyone involved in the wrongdoing gets rewarded”); *see also* HEWITT, *supra* note 108, at 162.

Why aren’t broadcast journalists hollering about it? Because we want it both ways. We want the companies we work for to put back the wall the pioneers erected to separate news from entertainment, but we are not above climbing over the rubble each week to take an entertainment-size paycheck for broadcasting news.

HEWITT, *supra* note 108, at 162. A pair of eminent authorities on journalistic ethics recently recounted a lamentable conversation with newsroom executives:

“In the newsroom we no longer talk about journalism,” said Max King, then editor of the *Philadelphia Inquirer*. “We are consumed with business pressure and the bottom line,” agreed another editor. News was becoming entertainment and entertainment news. Journalists’ bonuses were increasingly tied to the company’s profit margins, not the quality of their work.

KOVACH & ROSENSTIEL, *supra* note 6, at 10–11. That newsroom executives’ bonuses are “generally based in large part” on company profits represents a “major shift in thinking at newsrooms” that has undermined journalism and is a key consideration in why the public has “lost confidence in the press, and . . . made it more complicated for newsroom leaders to be advocates for the public interest in their own companies.” *Id.* at 50–51. A “vast majority” of print and television news executives have incentivization programs called “management by objective,” from which most print executives receive twenty to fifty percent of their income. *Id.* at 59. Moreover, for a majority of print executives, more than half of their bonuses were based on the newspaper’s financial success. *Id.*

114. Dan Trigoboff, *News Rules*, BROADCASTING & CABLE, Sept. 11, 2000, at 52 (quoting Al Tompkins, Poynter Institute ethics expert, as receiving repeated calls from television newsrooms “about the business side encroaching on journalism” and his conclusion: “News directors need a strong statement of principles about what’s appropriate and inappropriate.”). Unlike newspaper journalists, many television employees have corporate employers without “roots” in journalism. *Id.* “We often report to supervisors, who are salesmen or accountants, not journalists, and who, quite frankly, have little or no understanding of journalistic ethics. We need language which speaks directly to these owners and managers.” *Id.* (quoting Forrest Carr, news director at KGUN(TV) Tucson). An ethics code would “provide news people with ammunition” against the business side. *Id.* (quoting Brian Trauring). Radio-Television News Directors

B. The Corrosive and Corrupting Influence of Hidden Cameras

Echoing McLuhanesque sentiments,¹¹⁵ media critics have warned that hidden cameras, instruments journalists would be appalled¹¹⁶ to have turned

Association & Foundation ("RTNDA") President Barbara Cochran was quoted as saying: "The revised [Code of Ethics and Professional Conduct of the Radio-Television News Directors Association ("RTNDA Code of Ethics")] talks about the need to preserve the independence of news from all kinds of corporate and advertiser pressure. . . . This is the first time that's been spelled out." *Id.* at 54. The RTNDA Code of Ethics as adopted provides the following:

Professional . . . journalists should [g]ather and report news without fear or favor, and vigorously resist undue influence from any *outside* forces, including advertisers, sources, story subjects, powerful individuals, and special interest groups[, d]etermine news content solely through editorial judgment and not as the result of *outside* influence [and, r]efuse to allow the interests of *ownership or management to influence news judgment and content inappropriately*.

RADIO-TELEVISION NEWS DIRECTORS ASS'N & FOUND., CODE OF ETHICS AND PROFESSIONAL CONDUCT, <http://www.rtnda.org/ethics/coe.shtml> (rules adopted Sept. 14, 2000) (emphases added). The latter "inappropriateness" criterion qualification unfortunately is subject to manipulative and self-interested interpretation. See discussion *infra* Part V. One noted commentator has eloquently summarized what precisely is wrong with "stunt journalism":

1. Deception demeans journalism. Because journalism is "centered on the question of truth," dishonest tactics undermine the public's confidence in the integrity of all journalists and therefore all news. As one newspaper editor put it, "Philosophically, deception is a bad fit for a journalist. Our role is to find the truth, not obscure it."
2. Deceit undercuts the credibility of the facts actually revealed. Like sloppy reporting, it diverts attention from the revelations and instead focuses debate upon the newsgathering process.
3. A journalist should use deceit only to expose very serious wrongdoing and as a last resort, when traditional reportorial techniques have failed. Too many reporters turn to such tactics too early and too often. Stunts titillate rather than inform, often targeting two-bit criminals rather than the perpetrators of widespread serious harm. And even when the target is a worthy one, efforts should first be made to get the story "through the front door."
4. Deceptive techniques often present a substitute for the traditional tools of investigative reporting, a process that is often tedious, time-consuming, and expensive.
5. Undercover techniques, especially the use of hidden cameras, invade privacy. Few people want to reveal information expressed in the confines of their home or office to the whole world; what one might be willing to say in the presence of an employee or client is quite different from what one would be willing to reveal to millions of viewers.
6. Deception may rise to the level of entrapment, as reporters incite conduct by the target that supports the pre-conceived story line. Plus, hidden cameras create an atmosphere of corruption that insinuates wrongdoing when none has occurred.
7. Lying is wrong. Utilitarian arguments for using deception to reveal serious wrongdoing are flawed because the party responsible for balances the equities (that is, the reporter) is self-interested.

Logan, *Stunt Journalism*, *supra* note 11, at 162-64 (citations omitted).

115. Bezanson, *supra* note 11, at 902 ("What appears real may only be the message of the medium.")

116. A. M. Rosenthal, *Masked Media*, NEW ORLEANS TIMES-PICAYUNE, Dec. 28, 1996, at B7, 1996 WL 11206585 (noting the "treasuries of information" in a newsroom that might intrigue

on themselves, have a tendency to “perpetrate the initial deception”¹¹⁷ by a

the public and concluding: “If another newspaper, magazine or TV team sent its employees into our homes or offices undercover or planted cameras or mikes in them, we would leap into ecstasies of rage.”); see also James Boylan, *Punishing the Press: Tough Judgments on Libel, Fairness, and “Fraud,”* COLUM. JOURNALISM REV., Mar.–Apr. 1997, at 24, 25 (quoting columnist A.M. Rosenthal: “ABC investigators were doing what they would ‘never willingly allow done to themselves.’”).

Of course, media defendants are quite capable of double standards when they are victimized. See, e.g., *Anderson v. WROC-TV*, 441 N.Y.S.2d 220, 224 (Sup. Ct. 1981) (citing media defendants’ ironic reversal of position when the media was the victim of a trespass in *People v. Segal*, 358 N.Y.S.2d 866 (Crim. Ct. 1974), a case involving conviction of trespassers testing the media victim’s discriminatory policies). The double standard is likewise found at ABC, which is incapable of investigating itself (Disney) and recently killed a story by one of its investigative journalists. See Lawrie Mifflin, *An ABC News Reporter Tests the Boundaries of Investigating Disney and Finds Them*, N.Y. TIMES, Oct. 19, 1998, at C8 [hereinafter Mifflin, *ABC News Reporter*]. Shortly after acquiring ABC, Disney CEO Michael Eisner stated it was inappropriate that “Disney cover Disney.” Rico Gagliano, *Lockout Blackout*, L.A. WEEKLY, Dec. 18, 1998, at 26 (quoted in KOVACH & ROSENSTIEL, *supra* note 6, at 30).

117. Ann Sjoerdsma, *Do Deceptive Means Justify the ‘Greater-Good’ in Journalism*, VIRGINIAN-PILOT, Dec. 16, 1996, at A13 (“A lie by another name is still a lie . . . Like the meat, this investigation was tainted from the get-go.”).

Dr. Sissela Bok, a medical doctor teaching ethics at the Harvard Medical School, is one of the finest, most interesting scholars on privacy and the ethics of lying. In her works, she provides a compelling analysis of what is wrong with deception in newsgathering. See BOK, LYING, *supra* note 3; SISSELA BOK, SECRETS (1982) [hereinafter SECRETS]. The media’s traditional rationale or excuse for any breach of society’s rules is the “public’s right to know,” which Dr. Bok points out is “rhetorical nonsense.” SECRETS, *supra*, at 255–98.

Ronald Dworkin has argued . . . that the right to speak does not entail or mirror the right to know; at most, he holds, it may support a right to listen, and thus not to have the government interpose obstacles to that right between willing speakers and willing listeners. But such a right to listen is “very different from the right to know, because the latter, unlike the former, supposes that those who have the information have a duty and not simply a right to publish it. The Supreme Court has not recognized a right to know as a constitutional right. No one could sue the *New York Times* for not publishing the Pentagon Papers.”

Id. at 255. Bok details the exploits of Gunter Wallraff, who obtained employment at a German newspaper under false pretense, and rips him apart. *Id.* at 259–62. Wallraff had three rationalizations. The first is that his victims were so steeped in deceit and coercion, they cannot be said to complain. *Id.* at 261. Bok points out that this does not justify his methods. *Id.* His second excuse is that his deceptions are small in comparison to the vast conspiracies he uncovered. *Id.* at 262.

By itself, this argument is also insufficient. No matter how deceitful or lawless the powers that Wallraff hoped to unmask, he might well agree that ordinary reportorial means should be preferred whenever possible. A third argument comes to the support of the preceding two: it claims necessity

This argument resembles those made for deceit in war. Ordinary channels of correction and control have broken down; law and morality cannot be counted upon; more primitive principles come into operation, justifying actions with claims such as “All is fair in love and war.” . . .

Arguments of this kind are sometimes to the point, but they are peculiarly likely to function as rationalization. They obscure reasoning and invite bias of every kind. They often exaggerate the crisis at hand and the conspiratorial nature of opponents, and they underestimate the adequacy of other methods of investigation. Wallraff

number of overlapping, dangerous practices. Among them are: “entrapping” persons via “scams or stings” using “staged” scenes¹¹⁸ to

could not, in effect, demonstrate either conspiracy or crisis in the newspaper he was investigating, nor show why the many shabby practices that he uncovered could be exposed only by means of infiltration. For journalists as for social scientists and other probes, the infiltrator is often seeking a shortcut for which the more experienced have no need.

Id. at 262. Dr. Bok explains that liars want a “‘free-rider’ status”

[G]iving them the benefits of lying without the risks of being lied to. Some think of this free rider status as for them alone. Others extend it to their friends, social group, or profession. This category of persons can be narrow or broad; but it does require as a necessary backdrop the ordinary assumptions about the honesty of most persons. The free rider trades upon being an exception, and could not exist in a world where everybody chose to exercise the same prerogatives. . . .

How is the liar affected by his own lies? The very fact the he *knows* he has lied, first of all, affects him. He may regard the lie as an inroad on his integrity; he certainly looks at those he has lied to with a new caution. And if they find out that he has lied, he knows that his credibility and the respect for his word have been damaged. . . .

The liar’s self-bestowed free-rider status, then, can be as corrupting as all other unchecked exercises of power. There are, in fact, very few “free rides” to be had through lying.

LYING, *supra* note 3, at 23–26. Hidden camera journalists arguably seek this free-rider status.

Veracity is not only in conflict with the other principles when lies are told. Some claim they lie so as to *protect* the truth. To lie for the sake of the truth—this is surely the most paradoxical of excuses. . . .

Once revealed, the gap is especially shocking in someone whose profession ideally requires a concern for truth. When judges and scientists are caught in fraud, the sense of betrayal is great. A fraudulent scientist goes against the most fundamental standards of science.

Id. at 84–85.

In as much as journalists are supposed to be the paragons of truth, allowing them to lie is the ultimate conundrum from which there is no moral escape. Thus, a trier of fact’s analysis should start from the premise that the determination by a news entity that it will lie to get its story has no moral, legal, or First Amendment justification. This leads to the ineluctable deduction and conclusion that if a journalist is willing to lie to get a story, there should be a presumption of constitutional malice, as doing so violates all intelligent rationales and encourages dishonest reporting. See Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 BUFF. L. REV. 1, 8–9 (1995).

118. Editorial, ‘Dateline’ Scoops Again, WASH. TIMES, Aug. 13, 1993, at F2 [hereinafter ‘Dateline’ Scoops Again]. The *Washington Times* editorial references a “Dateline” story on unnecessary cataract surgery of the elderly where an NBC plant convinced a clinic to schedule surgery after she was told it was unnecessary. *Id.* “Even if she got [the surgery], it might have proved little more than NBC, by lying and misrepresentation, can trick people into doing things that can be construed as unethical. When cops do this, it is called entrapment.” *Id.*; see also Logan, *Stunt Journalism*, *supra* note 11, at 154–55 (referencing the *Sun-Times*’ sting at The Mirage bar); Smolla, *supra* note 11, at 2–3 (listing such techniques as one facet of “tabloid journalism”); Matt Zoller Seitz, ‘PrimeTime Live’ Segment on Jamesburg Backfires, STAR LEDGER (Newark, N.J.), Dec. 10, 1997, at 31 (The “mere existence [of hidden camera technology] often tempts journalists to create rather than report news—to provoke confrontations or unethical acts that can then be captured on tape, making a lazily reported story seem ‘sexier.’”); Starobin, *supra* note 23 (“Many news organizations ban undercover operations. Eager reporters can be tempted to entrap subjects or stage scenes to justify these ventures.”). Consider

confirm a preconceived “bad guy/villain” theme¹¹⁹ on “gotcha” videotapes;¹²⁰ executing “ambush interviews;”¹²¹ sensationalism;¹²²

the “PrimeTime Live” story about alleged racial profiling in which the producers hired three young African Americans and directed them to engage in suspicious conduct while driving an \$85,000 Mercedes through a high crime and high drug arrest area to precipitate a confrontation that could be recorded via hidden camera. See Seitz, *supra*. Note that the media has particular difficulty in reporting in a non-distorted manner about the police and the criminal justice system’s alleged “institutional racism.” MCGOWAN, *supra* note 11, at 74–83.

A sound public discourse requires the press to be an enemy of political demagoguery, not a vehicle for it.

In the end, the realization of a workable multiethnic and multiracial civic future requires ample reserves of public trust. But an ideological press whose reporting and analysis is distorted by double standards, intellectual dishonesty and fashionable cant favoring certain groups over others only poisons the national well. . . .

. . . As the primary shaper of our civic culture, [the news media] sets the terms through which we relate to each other both as individuals and as groups, and provides the mirror by which we understand ourselves as a collective entity. It is important that it tell the full story, and not just the part that fits a preconceived script or affirms a narrow orthodoxy. The mirror the press holds up to our nature, in other words, must show the whole picture.

MCGOWAN, *supra* note 11, at 248–49.

119. Ross MacKenzie, Editorial, *Pursuit of Truth: Does the End Justify the Means?*, RICHMOND TIMES DISPATCH, Jan. 12, 1997, at F7 (“Is tabloid TV principally interested in the truth or in confirming preconceived prejudices?”); see also Lissit, *Out of Sight*, *supra* note 10, at 28 (“In most cases, the first question is whether there are clear-cut good guys and bad guys, since newsmagazines cast their stories like movies[—they must be] ‘character-driven.’ If the characters pass the test, a producer is assigned.”).

120. Logan, *Stunt Journalism*, *supra* note 11, at 168 (“Because the talking head of a media superstar alone cannot provide the necessary heat, television uses an array of visual tricks and lies to get ‘gotcha’ footage.”); Timothy Noah, *Sorting Out What the Hidden Camera Saw*, U.S. NEWS & WORLD REP., Dec. 22, 1997, at 64, 66 (“A tough challenge for all hidden-camera journalism is to make sure the reality it captures isn’t artificially provoked.”); Seitz, *supra* note 118, at 31 (referencing the allegation in *Food Lion* that undercover reporters were “actively encouraging store employees to ignore food preparation rules to create ‘gotcha’ footage”); Sjoerdsma, *supra* note 117 (“Much of what passes now as TV ‘news’ programming is heavy on the ‘gotcha’ visuals, light on the journalism.”).

121. MacGregor, *supra* note 9, at 32. “Ambush” interviews where reporters stakeout a victim’s home or business are prohibited at NBC except in “rare” situations where the person is engaged in illegal activity. Barry Meier & Bill Carter, *Undercover Tactics by TV Magazines Fall Under Attack*, N.Y. TIMES, Dec. 25, 1996, at A1. Andrew Lack, president of the news division, commented: “It’s not fair to stand out front of his house all day with a camera waiting for him to come out If a person says he doesn’t want to talk—leave him alone.” *Id.*

122. Smolla, *supra* note 11, at 1–3 (citing “sensationalism” as an attribute of “tabloid journalism” whose proponents often use surreptitious means); Rabinowitz, *supra* note 23, at 2 (offering a hypothetical about a hygienic worker and an unsanitary weekend worker and posing the question of which worker would attract newsmagazine producers looking for film of unsanitary food practices: “Not, it’s a good bet, the deli manager with her gleaming counters and carefully covered salads.”); *Changing Definitions of News*, Committee of Concerned Journalists, at <http://www.journalism.org/ccj/resources/chdefonews.html> (Mar. 6, 1998) (“Prime time network news magazines, which have replaced documentaries on network television, have all but abandoned covering traditional topics such as government, social welfare, education and

“muckraking;”¹²³ deceptive or distorted editing;¹²⁴ innuendo or insinuation;¹²⁵ and creating a false impression.¹²⁶ All of these techniques

economics in favor of lifestyle and news-you-can-use.”).

123. Boylan, *supra* note 116, at 25 (citing *U.S. News & World Report* columnist Lewis Lord as “warn[ing] that TV muckraking was becoming thin and sensational, just like the original turn-of-the-century muckraking when it went into decline.”); MacKenzie, *supra* note 119 (“Where is the line between investigative reporting and muckraking?”).

124. Sjoerdsma, *supra* note 117 (“Maybe ABC distorted, exaggerated, manipulated its coverage, visual and otherwise.”); *see also* Epstein, *supra* note 4, at 1031 (noting that the investigative reporter will, among other tactics, “select and cull information in a way that places its target in the most unfavorable light,” and noting that such “selective use of evidence” is “rightly frowned on” among those in the social science research community); Gunther, *Yikes*, *supra* note 104, at 234 (noting that an analysis of the “outtakes” showed “that some of the broadcast material was taken out of context . . .”); Gunther, *Yikes*, *supra* note 104, at 232 (explaining Food Lion’s contention that ABC “ignored evidence that would have undermined its story.”); MacKenzie, *supra* note 119.

In pursuit of the truth, does the end justify the means? Are lying, posing, misrepresentation, deception, innuendo, melodramatic or loaded wording, ambush interviews, scams and stings, staging and faking, invasion of privacy, and unfair editing of film footage ever right? In news, is it not always wrong to skew reality?

MacKenzie, *supra* note 119; Phillip Meyer, *Food Lion Case Shows That Cameras, Indeed, Can Lie*, U.S.A. TODAY, Feb. 17, 1999, at 15A (citing Sandra Davidson’s article on Food Lion as “point[ing] to a different ethical issue: lying through selective editing” and finding that the outtakes “provide some support” for the plaintiff’s charges of malfeasance against ABC: “And they do so, she says, ‘with a power that is difficult for the printed word to match.’”); Meyer, *supra* (noting that both Food Lion in its synthesis of the outtakes and ABC in the original production “clearly demonstrated” the ability to engage in “picture selection to support a preconception.”); Noah, *supra* note 120, at 66 (quoting Deborah Potter, a journalist teaching at the Poynter Institute, that “[a]ll editing is selective” but that “a higher standard” applies to hidden camera footage “precisely because of the way it was collected.”). One eminent critic has analogized any reporter’s “tampering with a story, or slanting a story out of personal interest” to “a lawyer forging a document or a judge throwing a case. It’s crooked.” Steven Brill, *A New Code For Journalists*, AM. LAW., Dec. 1994, at 5.

125. ‘Dateline’ Scoops Again, *supra* note 118 (“Insinuating guilt is easy when you have a hidden camera.”).

126. MacKenzie, *supra* note 119 (“Does the television camera . . . sometimes make false impressions easier to leave—given that the truth of a picture so easily can be not what it seems?”); *see also* Gunther, *Yikes*, *supra* note 104, at 234 (concluding that an analysis of “outtakes” revealed that “other pictures weren’t what they seemed to be.”). Even when a hidden camera or microphone accurately catches a person making a particular statement, this may create a false impression. People sometimes blow off steam, saying things they don’t mean, wouldn’t say on future reflection, or would regret or retract hours later or the next day. This seems particularly true as to discussions among friends, co-employees, or intimates. First Amendment theory gives a name to this—the “safety valve” function. Richard W. Aldrich, *Article 88 of the Uniform Code of Military Justice: A Military Muzzle or Just a Restraint on Military Muscle?*, 33 U.C.L.A. L. REV. 1189, 1197 (1986). Indeed, one would suggest that any television news room taped or bugged for a day would seriously embarrass reporters vis-à-vis the editorial hierarchy or management. Why? Because in addition to blowing off steam, often we say hyperbolically or less than completely truthfully what the recipient expects or wants to hear. This variance, based on the special attention given the individual by the data gatherer, is what social scientists call the “Hawthorne Effect.” JULIAN SIMON, BASIC RESEARCH METHODS IN SOCIAL SCIENCE 97–98

allow the defendant to “declare reality, not to report it,”¹²⁷ “not . . . a message of truth” but a broadcast media news “message of power and force and image”¹²⁸ that facilitates a societal self-delusion that “the world is still binary: cops and robbers, cowboys and Indians, good and evil.”¹²⁹

Undoubtedly, the most damning and damaging¹³⁰ is the hidden camera’s creation of “an atmosphere of corruption that insinuates wrongdoing when none has occurred.”¹³¹ Both journalistic defenders of hidden cameras (under at least some circumstances¹³²) and media

(Hanan C. Selvin, ed., 1969); RESEARCH METHODS IN THE BEHAVIORAL SCIENCES 100–01 (Leon Festinger & Daniel Katz, eds., 1953); see also CLAIRE SELLITZ, ET AL., RESEARCH METHODS IN SOCIAL RELATIONS 219–20 (1959). So, the recording can be false, betray the confidence and intrude on the privacy of the victim. One member of the *Food Lion* jury, Marie Bozman, who wanted to assess ABC \$1 billion in punitives, made some astute observations on point. She related one of her concerns about the intrusiveness of the hidden camera and its inherent capacity to misrepresent: “She painted a scenario in which an employee unburdens himself about his employer to a fellow ‘employee’ who is secretly videotaping. ‘The next day they may feel different about their company, but it’s on TV! Nobody should be made to share their innermost thoughts unless they want to.’” Baker, *supra* note 97. The author suggests she was referring to the Food Lion employees who “expressed a feeling of betrayal by the producers,” whom they dealt with as friends. *Id.* Ms. Bozman also cited the personal example of the fellow juror, a black male, she hugged after the trial knowing she’d likely never meet him again. *Id.* Later, she asked herself what if someone (ABC?!) had been taping her, what the other juror’s family would think. *Id.* What a wonderful example of the ability of the hidden camera to lie, transposing a very human example of people of different races (Ms. Bozman is white) sharing a moment of true friendship into something sinister.

Think about the wisdom of Ms. Bozman’s analysis—and the sophisticated awareness it shows the jury had of the broader issues underlying *Food Lion*—the deprivation of a filmed or taped employee’s right of personal autonomy (the intrusion) and the false impression created (defamation/false light). The *Food Lion* jurors taught us (but apparently not ABC) a lesson of common sense, fairness, and righteous anger. But note ABC’s incredible hypocrisy. It tried to have its cake and eat it too! ABC first claimed its hidden camera footage was always accurate. However, exculpatory outtakes inexplicably not used were *defended* on “false impression” grounds: “That same argument about hidden-camera video’s potential for creating false impressions was cited by ABC itself, in claiming that the outtakes did not represent what the Food Lion attorneys said they did.” *Id.*

127. Bezanson, *supra* note 11, at 902.

128. *Id.* at 903–04 (discussing the decision to go undercover and use hidden camera footage, something not needed to “establish the news bonafides of the story” or its believability); see also Sjoerdsma, *supra* note 117 (“Maybe seeing is not believing.”).

129. MacGregor, *supra* note 9, at 32.

They polarize the moral spectrum until human behavior is no harder to catalogue than a black or white Stetson in a Hopalong Cassidy short. It is confirmation rather than information that they provide, beaming back to us over and over again, by any means necessary, what we think we already know.

Id.

130. Logan, *Stunt Journalism*, *supra* note 11, at 164.

131. *Id.*

132. Bob Steele, *Hidden Cameras: High-Powered and High-Risk*, The Poynter Institute, at http://www.poynter.org/research/me/me_hidecam.htm (Oct. 19, 1998) (advocating the retention

executives have conceded this undoubted potential. For example, as (now retired) ABC Senior Vice President Dick Wald (who ruled on hidden camera proposals) has said, hidden camera footage per se “tends to make anything seem suspicious.”¹³³ One critic has made the point thusly and powerfully:

Insinuating guilt is easy when you have a hidden camera. Put one of those tiny bug-eye cameras in a suitcase and lug it around at kneecap level in Mother Teresa’s Calcutta mission and the footage will have the inescapable air of corruption and wrongdoing. Hidden cameras produce the video equivalent of the trick question, “So are you still beating your wife?”¹³⁴ Everyone looks guilty on hidden camera.¹³⁵

Likewise, the “[a]mbush [i]nterview’ convict[s] by implication alone.”¹³⁶ Once the tactic of “last resort,” it has become the preferred tactic because it “immediately identifies the bad guy . . . the one saying ‘[n]o comment’ in a parking lot somewhere while he fumbles for his car keys.”¹³⁷

of hidden cameras within stringent guidelines: “This covert method of newsgathering clearly amplifies any accusations we make.”; *see also* Lissit, *Gotcha*, *supra* note 9, at 19 (citing Bob Steele, Poynter Institute ethics director as concluding: “Taping someone with a hidden camera implies something is wrong . . . [T]he very act of obtaining information this way is an ethical question.”). Speaking more generally of “investigative reporting as prosecution,” Kovach and Rosenstiel note that use of the “investigative model” connotes that “the news outlet is taking an implied stance on the issue that some wrongdoing has occurred.” KOVACH & ROSENSTIEL, *supra* note 6, at 123–24. Such “advocacy reporting,” what reporter Les Whitten calls “reporting with a sense of outrage,” is why the professional group for Investigative Reporters and Editors has “ire” as its acronym. *Id.* at 24. Kovach and Rosenstiel caution that such journalism “may lead to loss of reputation or change the flow of public events, [and] it carries a greater weight of responsibility, not only in verification of fact but in sharing information about the nature of the sources of that information.” *Id.*

133. Lissit, *Gotcha*, *supra* note 9, at 19 (quoting ABC News Senior Vice President: “Technology is without ethics Our process tries to assure we operate ethically in its use.”). The aura of suspicion is enhanced by the calculated use of techniques as suggestive of reality. As one commentator has concluded: “The footage is grainy. The camera shakes a little. The voices are a bit muffled. And while film school professors may give the video a poor grade for quality, television viewers oftentimes give it the big R: Ratings.” O’Brien, *supra* note 23, at 10.

134. Logan, *Stunt Journalism*, *supra* note 11, at 164 n.103.

135. ‘Dateline’ *Scoops Again*, *supra* note 118; *see also* MacGregor, *supra* note 9, at 32 (“Simplistic and empty, they serve no higher purpose than to create a villain, because *everyone* looks guilty when viewed through a wide-angle HatCam.”). Note that the RTNDA Code of Ethics provides that “[p]rofessional electronic journalists should . . . [u]se technological tools with skill and thoughtfulness, *avoiding techniques that skew facts, distort reality or sensationalize events.*” RADIO-TELEVISION NEWS DIRECTORS ASS’N & FOUNDATION, CODE OF ETHICS AND PROFESSIONAL CONDUCT, <http://www.rtna.org/ethics/coe.shtml> (rules adopted Sept. 14, 2000) (emphasis added).

136. MacGregor, *supra* note 9, at 32.

137. *Id.*

Why is guilt insinuated? “In a media-mad society where the very presence of a microphone demands that someone Say Something, remaining silent when jumped by a reporter is tantamount to crowing, ‘Not only am I physically unattractive under these lighting conditions, but I’m guilty as hell and I’ll do it again! Hahahaha!’”¹³⁸

In sum, hidden cameras convey a defamatory impression and put the target in a false light by definition¹³⁹ with an appalling impact¹⁴⁰ on the stunned deer-in-the-headlight victim. Media defendants know this and are indifferent to it,¹⁴¹ an indicator of the arrogance¹⁴² that is an unconscionable corollary of the blurring of the line between entertainment and news, reality and pretense.¹⁴³ This hidden camera practice has been condemned as dangerous¹⁴⁴ and as tantamount to “vigilante justice” with the media as

138. *Id.* But see *Machleder v. Diaz*, 801 F.2d 46, 57–58 (2d Cir. 1986) (ignoring the per se damning, inculpatory nature of such “ambush” encounters, finding the resulting depiction was *not* false, and holding that “[a]ny portrayal of plaintiff as intemperate and evasive could not be false since it was based on his own conduct which was accurately captured by the cameras.” (emphases added)). Think about the court’s weird logic! A defendant can instigate a surprise encounter, catch the plaintiff looking disoriented, deliberately portray him negatively, and then bootstrap itself out of liability by claiming *accurate* depiction, even where the defendant foists off a calculated falsehood on the viewing public. Could anything be more Orwellian? Who wouldn’t appear evasive under such circumstances? Correspondent Diaz is undeterred about his ambush camera tactic, and was sued for a variety of torts, including stalking under California Penal Code section 1708.5, trespass, and intentional infliction of emotional distress, for such conduct. *Glamour Models v. ABC, Inc.*, No. BC188549 (Cal. Super. Ct. (L.A.) March 31, 1998). Co-authors Mr. Johnson and Mr. Rishwain were counsel for the plaintiffs in that case.

139. MacKenzie, *supra* note 119 (“When is a hidden camera ever not an invasion of privacy? If never, then can a hidden camera exposé ever not result in at least a degree of defamation?”); see also MacGregor, *supra* note 9 (citing the hidden camera and ambush interview scenarios, and concluding such connote “an institutionalized editorial policy of creeping theatricality that promotes a presumption of guilt and violates our right to privacy. Who among us could withstand this sort of prejudicial scrutiny and not look bad?”).

140. Lissit, *Gotcha*, *supra* note 9, at 21 (quoting co-author Mr. Johnson as to the hidden camera case involving the psychics (one died from a relapse into alcoholism): “Imagine being scourged and whipped in front of 24 million people. You’re tried, convicted, sentenced and buried at sea, with no right of appeal, and you don’t know that it is happening to you and have no way to fight back.”).

141. See Rabinowitz, *supra* note 23 (“The facts remain—among them the truth that many journalists continue to believe that they are involved in a calling so high as to entitle them to rights not given ordinary citizens, among them the right to deceive without consequence.”).

142. *Id.*

143. See *supra* text accompanying notes 115–29.

144. Seitz, *supra* note 118, at 2 (“But [hidden-camera technology’s] mere existence often tempts journalists to create rather than report news—to provoke confrontations or unethical acts that can then be captured on tape, making a lazily reported story seem ‘sexier.’”); Sjoerdsma, *supra* note 117 (“Aggressive, fair investigatory reporting in service of the public interest, not for TV ratings or reportorial ego, is journalism at its finest. If a bad guy gets a comeuppance, so much the better. But far too often, reporters play cop or private eye and forget that their job is to preserve balance, not to make arrests.”).

unilateral determiner of guilt¹⁴⁵ with the authorities being contacted only after the bottom line—ratings—have been secured.¹⁴⁶ The public is horrified by such arrogance¹⁴⁷ and the credibility of serious journalism impaired.¹⁴⁸ Almost seventy-five percent of the public has condemned hidden camera use.¹⁴⁹ But, after a brief hiatus after the *Food Lion* initial award,¹⁵⁰ hidden camera usage seems to be on the rise again after *Food Lion*'s damages were reduced to a meager two dollars.¹⁵¹ This should not surprise anyone. As media journalist-critic Daniel Schorr, a critic of the television newsmagazines, has asked rhetorically, “[I]n a medium so laden

145. Logan, *Stunt Journalism*, *supra* note 11, at 170; Gunther, *Lion's Share*, *supra* note 95, at 23 (citing *Food Lion* as illustrative of “the pressures of prime time investigative reporting, which drive some producers and correspondents to act more like prosecutors and judges than dispassionate reporters”). The concern is international in nature. See *Blurring the Boundaries*, *supra* note 90 (noting the potential for impeding criminal prosecutions in Great Britain, the concern police have for the “eroding” “dividing line” between law enforcement and the media and the glamorization of criminality).

146. MacKenzie, *supra* note 119 (“If those working for (for instance) a television newsmagazine think something illegal is going on, why not ask law-enforcement authorities to investigate? Or before establishing their own sting, why not require them to get the approval of a judge—as even law-enforcement agencies must do in the pursuit of their quarry?”); see also Logan, *Stunt Journalism*, *supra* note 11, at 170 & n.150.

147. See MacKenzie, *supra* note 119 (quoting co-author Mr. Johnson: “The government cannot do what the media are allowed to do, and private business cannot do what the media are allowed to do Once a jury is apprised and understands what has happened in a hidden-camera case, they are appalled.”).

148. Gunther, *Lion's Share*, *supra* note 95, at 20 (“Each loss [by a newsmagazine] puts at risk the credibility of a network and damages the cause of serious journalism everywhere.”); see also Logan, *Stunt Journalism*, *supra* note 11, at 168–71; Starobin, *supra* note 23 (referencing the “well-deserved warning shot” by the *Food Lion* jury, the author concluded: “Stunt journalism saps the credibility of the press and makes life tougher for honest snoops.”); STRIKING THE BALANCE: OVERVIEW, *supra* note 91, at 1–2 (stating that a lack of credibility and public distrust are the “most important problem[s]” for journalists and are attributable to “growing financial and business pressures”); see also KOVACH & ROSENSTIEL, *supra* note 6, at 97 (speaking more broadly about the basic principle that “[j]ournalists must maintain an independence from those they cover”).

One might imagine that one could both report on events and be a participant in them, but the reality is that being a participant clouds all the other tasks a journalist must perform. It becomes difficult to see things from other perspectives. It becomes more difficult to win the trust of the sources and combatants on different sides. It becomes difficult if not impossible to then persuade your audience that you put their interests ahead of those of the team that you are also working for.

KOVACH & ROSENSTIEL, *supra* note 6, at 97.

149. Tony Mauro, *Damages Cut to \$2 from \$5.5M in Food Lion Case*, U.S.A. TODAY, Oct. 25, 1999, at 6A (citing a recent Freedom Forum poll, *Food Lion* and other “aggressive media tactics,” including the coverage of Princess Diana before and after her death); O’Brien, *supra* note 23, at 14 (quoting 1999 Freedom Forum/University of Connecticut poll that between sixty-five and seventy-two percent would bar hidden cameras).

150. Hickey, *Climate of Change*, *supra* note 20, at 53.

151. See *id.*

with mendacity, do you think they are really aware of what a lie is?"¹⁵²

IV. *FOOD LION, INC. v. CAPITAL CITIES/ABC, INC.*:¹⁵³ THE LIBEL CASE NOT LITIGATED

Food Lion felt that the November 5, 1992 "PrimeTime Live" program on its allegedly shoddy sanitation and food-handling practices made it "the victim of a televised mugging, in which innocuous practices got blown up into a sizzling scandal."¹⁵⁴ Why then, did it not sue for libel and challenge the truth of the allegations? This point was repeatedly emphasized by ABC¹⁵⁵ and "parroted" by many other media defenders¹⁵⁶—i.e., that truth

152. Schorr, *supra* note 93.

153. 194 F.3d 505 (4th Cir. 1999).

154. Canellos, *ABC Ordered to Pay*, *supra* note 14. Some have suggested Food Lion would have done better to confront the issue squarely and take damage control public relations measures. See Paul McMasters, *It Didn't Have to Come to This: Both Food Lion and ABC Could Have Taken Different Approaches*, QUILL, Mar. 1997, at 18. The broadcast at issue in *Sanders v. ABC, Inc.*, 978 P.2d 67 (Cal. 1999), occurred in February of 1993. John Carmody, *The TV Column*, WASH. POST, Feb. 4, 1997, at E6, LEXIS, News Group File, All.

155. Gunther, *Lion's Share*, *supra* note 95, at 20 (quoting Roone Arledge, president of ABC news, that the Food Lion story was "important," "true," and "about as close to 100 percent perfect as any story we have ever done," and noting to the fact that Food Lion did not sue for libel); Meier, *supra* note 88 (quoting Arledge as stating: "They could never contest the truth [of the story]. These people were doing awful things in these stores.").

156. Logan, *Masked Media*, *supra* note 11, at 182 n.141 (synthesizing the response of many journalists); see also Baker, *supra* note 97 ("Devising a comparatively new strategy, Food Lion managed to transform a business catastrophe into a public relations triumph . . ."); Alterman, *supra* note 104 (quoting First Amendment expert Floyd Abrams as characterizing the deceptions in *Food Lion* as a crime "equivalent to jaywalking"); McMasters, *supra* note 154 (noting that if the judgment were upheld, it would put "the public's watchdog on a much shorter leash" by doing "an end-around of the First Amendment" by suing under "trash torts" instead of challenging underlying falsity); John Siegenthaler & David L. Hudson Jr., *Going Undercover: The Public's Need to Know Should Be More Important*, QUILL, Mar. 1, 1997, at 17 ("The public needs to know about unsanitary food-handling even if the information was obtained from hidden cameras."); Howard Rosenberg, *Food Lion, ABC and Tricks of the Trade*, L.A. TIMES, Jan. 24, 1997, at F1, LEXIS, News, News Group File, All (generally defending ABC by discussing Food Lion's barrage of material disseminated via facsimile under the name "Media Hotline" without disclosing any affiliation with Food Lion, quipping: "Is it possible, just possible, that ABC was not alone in using stealth and deception in [*Food Lion*]?"). Though Food Lion challenged the broadcast as "fabricated, biased, and poorly researched," one author castigated Food Lion because [T]he company has faithfully maintained [this position] at every opportunity—except in court. . . . Food Lion bypassed the pesky hurdles of litigating a libel case and thrust itself into position to attack the credibility of the reporters responsible for the story—all the while having no legal obligation to refute the substance of their charges.

Amy Singer, *Food, Lies & Videotape*, AM. LAW., Apr. 1997, at 56, 58.

Note that some journalists are very critical of hidden cameras. See Rosenthal, *supra* note 116 (noting the practice "demeans journalism" and indicating that he had seen no story "so valuable that a self-respecting newspaper or TV operation had to dirty itself or the news business

was irrelevant to the challenges to legality of the newsgathering practice used.¹⁵⁷ The answer is multifaceted and complex. As any libel plaintiff or lawyer knows, media lawyers engage in Shermanesque attrition tactics that make the march across Georgia look like kindergarten play banter. Cases are rarely settled and are invariably appealed to the court of last resort and tactical maneuvers are used to financially, emotionally, and psychologically exhaust the plaintiff and plaintiff's counsel—all under the purported panoply of the First Amendment.¹⁵⁸ Indeed, media lawyers tout to the public through their mutual support networks how successful they are on appeal in defending libel cases—largely accurately. In sum, libel cases are tough to win,¹⁵⁹ although a good trial lawyer with the assistance

to get it"). Rosenthal further hypothesizes about examples that might override his "distaste for journalism undercover"—"stories of corruption in the presidency, the massacre of minorities, the official but secret story of the conduct and loss of a war, photographs of the victims of war crimes, or corpses piled outside a death camp"—and then answered his query: Every one had been reported by reporters and photographers without deception! *Id.*

157. Trial judge N. Carlton Tilley limited the network to arguing the fake résumés were not technically fraudulent and that the producer/false employees met their responsibilities to Food Lion while seeking evidence of unsanitary conditions. Canellos, *Will the Public Suffer?*, *supra* note 103. As one commentator has noted, "[a]lmost comically, the ABC producers were reduced to swearing that they tried to do their best as deli clerk and meat handler. The jury didn't buy." Baker, *supra* note 97. One recent comment by a libel attorney aptly demonstrates the utilitarian focus of traditional libel practice: "Libel law never asked journalists to explain how they got the truth as long as they got it." Paterno, *supra* note 23. But it is not at all clear the First Amendment imposes such a mandate. See ELDER, DEFAMATION, *supra* note 37, § 2:2[B][1], at 12–14 (discussing *Cohen v. Cowles Media*, 501 U.S. 663 (1991), and then posing a hypothetical involving a public official libeled using information tainted in acquisition (by bribing the public official's aide to rifle his desk) and a response thereto).

Assuming that the public person is unable to show more than mere negligence-falsity, is the cause of action in toto a loser? Or could plaintiff legitimately claim in the libel and false light claims the traditional damages available as to subsequent publication allowed in intrusion-trespass cases (including loss of reputation and mental harm), where issues of truth and fault-regarding-falsity are irrelevant? The result is not totally clear. However, defense counsel could not, it would seem, claim, in utter confidence—post-*Cohen*—that the case is a sure winner for the media client.

Id. at 13–14; see also sources cited *infra* note 207 (dealing with the controversial publication damages issue).

158. See Hickey, *Climate of Change*, *supra* note 20, at 54 (quoting Lucy Dalglish, Executive Director of the Reporters Committee for Freedom of the Press: "If word gets out that you're willing to settle these media cases, or cave in, you're just inviting a flood of law suits. You have to fight them aggressively.").

159. Mauro, *supra* note 149 (noting the proliferating number of newsgathering challenges); see also David A. Logan, *Libel Law in the Trenches: Reflections on Current Data in Libel Litigation*, 87 VA. L. REV. 503, 523 (2001) (citing the statistics of the Libel Defense Resource Center ("LDRC"), and concluding that the *New York Times* standard (as modified by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)) has "dramatically minimized the risk that a media defendant will, at the end of the day, have to pay an aggrieved plaintiff any money, let alone a crippling damage award"). See generally sources cited *infra* note 486 (discussing the LDRC).

of a good consultant or the willingness to learn the law will be amazed at how much helpful precedent¹⁶⁰ there is and how vulnerable media defendants are, particularly if the plaintiff is able to access the totality of information available to the defendant but ignored or not used by the defendant—a matter that will invariably be vigorously contested by the media defendant.

The libel hurdles, particularly under the exacting¹⁶¹ standards applicable to public persons are, however, only part of the problem. The other is damage control. Typically, by the time of trial, much of the notoriety enveloping a plaintiff has dimmed, life has gone on, albeit impaired, and business or professional life is improving again. Going to trial endangers this, potentially dramatically. Why? The doctrine of “fair report” and the absence of a “disinterestedness” limitation allow both the media defendant sued and the media generally¹⁶² to give as much (or as little) coverage as they desire to the libel litigation—in most jurisdictions from the filing of the civil pleadings,¹⁶³ in others from the time of the first judicial action¹⁶⁴ thereon. This is what one co-author has elsewhere denominated the “libel-plaintiff lawyer’s counseling dilemma”¹⁶⁵—the defendant’s or others’ right to revive the defamatory matter and further impair the plaintiff’s reputation,¹⁶⁶ sometimes devastatingly.

The spectre of “fair report” was an awesome responsibility for an enraged Food Lion and its highly experienced counsel. One way of limiting to some extent what could be republished in absolutely privileged fashion¹⁶⁷ was to attack not the truth of the program, which would make the

160. See, e.g., ELDER, DEFAMATION, *supra* note 37, § 7:6, at 68–73 (discussing the constitutional malice issue).

161. See *supra* text accompanying notes 35–40.

162. See ELDER, DEFAMATION, *supra* note 37, § 3:4[K], at 38–40; DAVID A. ELDER, THE FAIR REPORT PRIVILEGE, § 1:19[B], at 171–72 (1988) [hereinafter ELDER, FAIR REPORT].

163. See ELDER, DEFAMATION, *supra* note 37, § 3:4[A], at 14–16; see also ELDER, FAIR REPORT, *supra* note 162, § 1:04[B], at 31.

164. See ELDER, DEFAMATION, *supra* note 37, § 3:4[A], at 13–14; see also ELDER, FAIR REPORT, *supra* note 162, § 1:04[B], at 30–31.

165. ELDER, DEFAMATION, *supra* note 37, § 3:4[K], at 39; ELDER, FAIR REPORT, *supra* note 162, § 1:19[B], at 171.

166. Gunther, *Yikes*, *supra* note 104, at 231 (On the eve of the trial, “Food Lion . . . blamed the messenger and went to court. Now, after its customers have come back and profits have recovered, the retailer will revisit its nightmare.”). Media lawyers are aware of this dilemma—indeed, it is part of their counseling strategy. As Rex Heinke, the well-known media lawyer, has said, “The practical reality is that most people don’t want to pursue litigation because it results in a raft of adverse publicity that will repeat and repeat the adverse story.” Paterno, *supra* note 23, at 45.

167. See generally ELDER, DEFAMATION, *supra* note 37, § 3:5[B], at 42–46 (discussing whether the privilege exists); ELDER, FAIR REPORT, *supra* note 162, § 3:02, at 297–300.

program the trial focus and likely ensure the synthesized replication of the juiciest parts in the media, but to attack ABC's newsgathering methodology, which was also an easier case to prove.¹⁶⁸ The latter would allow some controls over trial use and jury and press access to the damning, defamatory footage, and any other discovered or otherwise available information ABC might use in defense. Food Lion's strategy was in large part ultimately successful.¹⁶⁹ The jury never saw the program¹⁷⁰ but Food Lion's counsel were able to use some of the damning and arguably misrepresented, slanted, staged, or ignored exculpatory matter and other misconduct at trial in attacking the disloyalty¹⁷¹ of the false

168. Gunther, *Yikes*, *supra* note 104, at 234.

169. As one commentator has said, Food Lion's lawyers "spotted a hole in the way 'PrimeTime' got the story and drove a truck full of dynamite through it." Baker, *supra* note 97, at 1.

170. Rabinowitz, *supra* note 23.

171. See, e.g., Singer, *supra* note 156, at 61 (discussing the exchange by Food Lion counsel and one producer as to why she was sifting through another employee's time records and whether it was consistent with company policy, to which the answer was: "I didn't think it was inconsistent."). One author contended that the hidden camera tapes in *Food Lion* were selectively and dishonestly edited. Sandra Davidson, *Food Lyin' and Other Buttafuocos*, IRE JOURNAL, Nov.-Dec. 1998, at 6, 7. In an interesting example of the power and influence of a corporate giant, the Davidson article resulted in a later detailed set of "apologies" to ABC and the producers. Steve Weinberg, *Apologies to ABC, Producers*, IRE JOURNAL, Aug. 1, 1999, 1999 WL 14273792. The "apology" is all the more interesting because the editor, Steve Weinberg, took on a member of the faculty at the University of Missouri where he and the *IRE Journal* are ensconced, indicating the depth of rancor amongst alleged experts on investigative journalism about the tactics of ABC in *Food Lion*. See *id.* Further, Weinberg's credentials as a scholar of investigative journalism are questionable given the broad-brush, virtually useless advice on ethics contained in his ostensible textbook on investigative journalism. See *infra* note 583 and accompanying text (citing and discussing Weinberg's *The Reporters' Handbook*).

In issuing the detailed set of apologies, Weinberg noted that he had reviewed the following sources: 1) materials Food Lion had distributed to journalism schools; 2) interviews with the producers; 3) materials and outtakes supplied by ABC; 4) an audiotape of an IRE panel; and 5) a letter disseminated by the producers at the IRE conference. Weinberg, *supra*, at 2. Weinberg also made full disclosure that IRE filed an *amicus curiae* brief supporting ABC on the First Amendment issues involved in the undercover newsgathering methods used. *Id.* He also noted that lawyers for ABC had "retained" him to do an affidavit on the history of journalists' use of undercover reporting. *Id.* While apologizing, he listed and discussed "the disputed points and factual errors" he found in the Davidson article. *Id.* Many of the points in the "apologies" are detailed hereafter. See *infra* notes 223-37 and accompanying text; see also Meyer, *supra* note 124 (taking another scathing look at ABC's conduct in *Food Lion*). Meyer, who holds the Knight Chair in Journalism at the University of North Carolina, Chapel Hill, noted:

The main problem with undercover investigation is not the invasion of privacy or faking of credentials. The real problem is that undercover observers find it very difficult, if not impossible, to go to work with open minds. Their projects involve so much of their company's money, not to mention their own sweat, that almost anything would be better than returning empty-handed.

Such a strong bias could find incriminating evidence anywhere, even in newsrooms. Conversations there tend to be energetic and irreverent. I know that

“employee”-producers. As one commentator stated, Food Lion shone “a light on the unsanitary practices at “PrimeTime Live” and the producers went from being good-guy crusaders to bad-guy liars”¹⁷², with the jury asked to be “the policemen on the media highway.”¹⁷³

After assessing the available information further, Food Lion’s lawyers tried to amend their complaint to allege libel counts, an action defendants successfully resisted on statute of limitation grounds¹⁷⁴—a factor ABC¹⁷⁵ and its media defenders¹⁷⁶ rarely acknowledge, i.e., their aggressive legal maneuvers helped limit the issue to one of the legality of its newsgathering practices. What would have been the result of a libel action (false light-privacy being generally unavailable to business entities¹⁷⁷)? One will never know. The facts are in substantial dispute with the interpretation thereof debatable and hotly debated by the two litigants. Maybe a jury would find that the story was substantially true¹⁷⁸ or that the plaintiff had not proved

any 45 hours of secret videotaping could provide enough images and sound bites for splicing to ruin the reputations of the most respected among us. Think about your own workplace, and you will get the idea.

Carl Sagan, in his plea for scientific thinking, *The Demon-Haunted World*, argued that all undercover observation has a built-in bias for perceiving evil, especially if the observers are paid. The witch hysteria in medieval Europe was one of his examples.

Meyer, *supra* note 124. The more the undercover operation costs, the more desperate the producer seems to obtain footage to justify the cost. Desperate producers do desperate things. See discussion *supra* Part II.B (discussing the financial underlay of hidden camera stories).

172. Singer, *supra* note 156, at 61.

173. *Id.* at 63.

174. *Id.* at 61 (detailing the history of the attempt to amend and the federal court’s refusal to allow it, condemning some redactions in the outtakes as a violation of discovery rules, but finding such acts neither in bad faith nor significant); see *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 165 F.R.D. 454, 457 (M.D.N.C. 1996).

175. Gunther, *Yikes*, *supra* note 104, at 234 (quoting ABC’s lawyers: Food Lion “conspicuously fails to dispute the truth of the broadcast. The reason is simple: The broadcast was true, and Food Lion knows it has no basis to say otherwise.”). But after trial, counsel for Food Lion sent a pointed letter to trial counsel for ABC, William Jeffress (and to several news entities), challenging ABC’s post-trial statements that Food Lion had not contested the truth of the charges and insisting that these false statements stop, emphasizing Food Lion’s frustrated attempt to amend to add a libel count. Singer, *supra* note 156, at 65. Jeffress, in response, suggested Food Lion lift the “confidential” designation on Food Lion internal documents and let the public decide the issue of accuracy. *Id.* Singer comments: “It’s a proposal Food Lion is not likely to accept.” *Id.*

176. See sources cited *supra* note 156.

177. ELDER, PRIVACY, *supra* note 18.

178. See Gunther, *Yikes*, *supra* note 104, at 234 (stating that hidden camera tapes “appeared to buttress” ABC’s claims at least in part); see also Baker, *supra* note 97, at 4 (“[F]urther bolstering” ABC’s story were the dozens of sworn statements about management pressure to “cut costs by any means.”). Another author has suggested Food Lion “reformed” its practices in handling food after the broadcast. Boylan, *supra* note 116. Further it has been noted that a Labor Department investigation resulting from the show culminated in citations for compelling some

the story materially false under the requisite First Amendment¹⁷⁹ standard. But, as the analysis below suggests, *if* the latter standard were surmounted, substantial, perhaps even compelling, evidence existed of constitutional malice under the “aggregate consideration”¹⁸⁰ of the all-relevant-factors approach reflected in the case law.

Consider the examples disclosed by media critics separate and apart from, but a natural corollary of, an investigation tainted by its own illegality *ab initio*.¹⁸¹ First, notice how the defendants were led to the story. The United Food and Commercial Workers Union, a bitter antagonist that had tried to organize Food Lion without success,¹⁸² put ABC onto the story and maintained a very close relationship with “PrimeTime Live” throughout its production,¹⁸³ supplying it with disgruntled employees (six of whom were featured without an explicit disclosure they were *all* in litigation with Food Lion over union-related issues¹⁸⁴), references

employees to work overtime off-the-clock. Canellos, *ABC Ordered to Pay*, *supra* note 14. The investigation also resulted in a negotiated \$16.2 million settlement. Singer, *supra* note 156, at 60. See generally discussion *infra* Part V (supporting a presumption of constitutional malice in hidden camera cases).

179. ELDER, DEFAMATION, *supra* note 37, §§ 4:3[A], [B]; 2:2[B][2].

180. See *supra* text accompanying notes 51–65.

181. Gunther, *Lion’s Share*, *supra* note 95, at 19 (ABC “acted recklessly in gathering the news and irresponsibly in presenting it.”); Sjoerdsma, *supra* note 117 (“Hidden cameras only perpetuate the initial deception. Like the meat, this investigation was tainted from the get-go.”). False applications were made at twenty Food Lion stores by the two producers and two hidden camera experts. Singer, *supra* note 156, at 59. None listed ABC affiliation. *Id.* One distinguished commentator characterized the deceit/illegality issue in this way before issuing a resounding “no” except in “extreme life-or-death” cases:

[I]f the word “lying” is too harsh, should journalists masquerade as meat packers in a supermarket to get a story, engage in a bit of clever misrepresentation and bluffing to trick a source, use “lipstick” cameras hidden in wigs and tiny microphones pinned to brassieres to succeed in undercover reporting, produce . . . “cockamamie cover stories” to protect an exclusive?

Marvin Kalb, *Practicing Deception in the Pursuit of Truth*, WASH. POST, Mar. 24, 1997, at A19. Many others have suggested ABC could have done this story without violating any laws, citing the significant number of on and off-the-record statements as to purported practices at 200 stores. Baker, *supra* note 97, at 4–5 (referencing statements by seventy present and former employees). The defendant’s own expert witness, Dr. Louis Hodges, conceded on cross that there were other ways to capture stories besides hidden cameras and that most of the nation’s premier newspapers bar deception under all circumstances. *Id.* One commentator has noted that “PrimeTime Live” televised more hidden camera footage than the other six newsmagazines in combination. *Id.* at 6.

182. Gunther, *Lion’s Share*, *supra* note 95, at 21.

183. *Id.* at 21; Gunther, *Yikes*, *supra* note 104, at 232; Rabinowitz, *supra* note 23; *ABC’s News with a Union Label*, INVESTOR’S BUS. DAILY, Jan. 29, 1997, at A34 [hereinafter *Union Label*] (noting ABC’s denial that the union helped construct the case against Food Lion and concluding: “Court documents suggest otherwise . . .”).

184. Rabinowitz, *supra* note 23. The story did mention toward the end that many of the story’s seventy sources were involved in litigation with Food Lion or union activities with it. *Id.*

(including from competitor supermarkets¹⁸⁵), and training.¹⁸⁶ Now why would a union do this?¹⁸⁷ Because Food Lion was the fastest growing supermarket in the country and its status jeopardized union jobs in labor-organized supermarkets,¹⁸⁸ which had resulted in the union's asserted threat to organize Food Lion or destroy it¹⁸⁹—something ABC nearly did¹⁹⁰ with pride.¹⁹¹

“PrimeTime Live” producers, both with pro-union biases,¹⁹² apparently lapped up this anti-Food Lion stance¹⁹³ and did a number on Food Lion in a portrayal with a “powerful and . . . devastating”¹⁹⁴ impact.

185. Gunther, *Lion's Share*, *supra* note 95, at 21.

186. *Id.* at 21; Gunther, *Yikes*, *supra* note 104, at 232; Rabinowitz, *supra* note 23.

187. ABC contended it went undercover primarily to verify the charges of its union sources. Rabinowitz, *supra* note 23. ABC's true motivation seems clear. See *infra* text accompanying notes 192–98. Note that a defendant's misstatement of its own motivation is itself admissible evidence of constitutional malice. See ELDER, DEFAMATION, *supra* note 37, § 7:11.

188. Gunther, *Yikes*, *supra* note 104, at 232; *Union Label*, *supra* note 183.

189. *Union Label*, *supra* note 183.

190. During the next week stock values dropped \$1.3 billion and profit for the year went from \$178 million in 1992 to \$3.9 million in 1993. Gunther, *Yikes*, *supra* note 104, at 231. The chain stopped its expansion plans and closed eighty-eight stores. *Id.* This result was not “unwelcome” to the union, which had years earlier announced an objective of closing Food Lion. Rabinowitz, *supra* note 23.

191. *Union Label*, *supra* note 183 (citing a January 1993 follow-up story in which “PrimeTime Live” anchors “bragged” about “crippling” Food Lion).

192. See *id.* See generally Bernard Goldberg, *Networks Need a Reality Check*, WALL ST. J., Feb. 13, 1996, at A14.

There are lots of reasons fewer people are watching network news, and one of them, I'm more convinced than ever, is that our viewers simply don't trust us. And for good reason. The old argument that the networks and other “media elites” have a liberal bias is so blatantly true that it's hardly worth discussing anymore. No, we don't sit around in dark corners and plan strategies on how we're going to slant the news. We don't have to. It comes naturally to most reporters.

Id.

193. Sjoerdsma, *supra* note 117. A critic noted a technique that could have been added to make the investigation “more scientific” had ABC so desired—sending different crews to grocery stores of different chains without forewarning which of them was suspected of unhygienic behavior (such an approach would have demonstrated whether Food Lion was typical or atypical in the industry), and training investigative reporters as “passive and neutral observers, as eager to record the good as the bad.” Meyer, *supra* note 124. Professor Meyer noted that a “small but growing” group of reporters were adopting scientific methodology, concluding: “Equating journalism with science might sound pretentious, but journalism should not be shy about adopting the well-tested rules of scientific methods that are designed to counter our human tendencies to fool ourselves with prejudice and wishful thinking.” *Id.*; see also *infra* text accompanying notes 283–87 (discussing an example of calculated misuse of statistical data).

194. Bezanson, *supra* note 11, at 902. “The piece was graphic . . . hard-hitting . . . right there before us on film, which meant, to virtually every viewer, that it was *real*. It spoke for itself. It was complete in and of itself.” *Id.* See generally Baker, *supra* note 97 (noting the enormously persuasive nature of the show and its impact).

From the beginning, and apparently in violation of ABC's clearly stated policy of only doing hidden camera stories where "less intrusive methods"¹⁹⁵ were unavailable (a policy based in part on the concession such footage "reeks a little of the KGB"¹⁹⁶), the producers cast Food Lion as "villain in this morality play,"¹⁹⁷ a story "written by Big Labor."¹⁹⁸

But wasn't ABC's motive pristine, i.e., to expose widespread and dangerous unsanitary practices? If so, its exquisitely timed release during the key sweeps week of November 5, six months *after* completion of the story, is difficult to explain,¹⁹⁹ not that it has posed a difficulty for ABC apologists.²⁰⁰ Imagine. A dramatic exposé with public health ramifications, if true, shelved for six months!²⁰¹ Why? The answer appears clear and incredibly damning. "PrimeTime Live" was not doing well vis-à-vis its competitors in a ratings war and a "universally appealing, titillating piece"²⁰² might "jump-start" it into competitive status vis-à-vis its newsmagazine competitors.²⁰³ So the delay was for purely economic

195. Gunther, *Yikes*, *supra* note 104, at 232 (citing ABC news policy); *see also* Gunther, *Lion's Share*, *supra* note 95, at 20 (The guidelines allowed for hidden camera use only where "other means of getting the story have been tried."); *see also infra* text accompanying notes 516–22 (discussing the admissibility of a violation of internal media guidelines on the constitutional malice issue).

196. Gunther, *Yikes*, *supra* note 104, at 232 (quoting Rick Kaplan, then executive producer of "PrimeTime Live"); Kurtz, *supra* note 9 (quoting Rick Kaplan: "We don't like the idea of spying on each other . . . You have to make sure, when you use a hidden camera, the story is important, or you end up looking like some KGB chief.").

197. Gunther, *Yikes*, *supra* note 104, at 232.

198. *Union Label*, *supra* note 183.

199. *Id.* ("So how worried was [ABC President Roone] Arledge about Food Lion shoppers dropping from food poisoning? Suddenly, Food Lion's workers didn't matter much anymore, either.").

200. Kaplan, *supra* note 93 (quoting ABC News spokesperson Eileen M. Murphy that the network was "proud of the story" and that it was "a good story that affected public health"); Mauro, *supra* note 149 (quoting ABC President David Westin that "the *Food Lion* decision is a victory for the American tradition of investigative journalism"). "PrimeTime Live" "earnestly explained" it had done the story to "get its own verification" of the union's charges. Rabinowitz, *supra* note 23. As a critic has suggested, "It would have come closer to the truth if the narrator . . . had instead explained that 'PrimeTime Live' is a television magazine show, an enterprise requiring pictures and action and on-the-spot live encounters with the quarry of the day, and that's why it went undercover." *Id.*

201. Jicha, *supra* note 96 (noting that, *if* true, ABC should have warned the public immediately on its nightly newscast, and failing to do so endangered peoples' lives during the delay). Later, ABC provided a tepid series of reasons: "ABC says the show aired when it did because of the need for additional research, dealing with legal threats, and delays in obtaining information from Food Lion executives. The producers say that six months is not a long time to complete a major project." Weinberg, *supra* note 171.

202. Bezanson, *supra* note 11, at 904.

203. *Id.* at 906 (concluding that nothing in ABC's decision to use illegal hidden cameras negated such a possibility).

reasons,²⁰⁴ the public health be damned²⁰⁵ (if there was any threat at all), surely raising questions as to whether the story was *really* about widespread practices or the disagreeable but petty behavior of a few rogue employees. And who were the losers? Clearly, Food Lion with massive losses (in stock value, forced closure of stores, derailed expansion²⁰⁶) not recoverable under the Fourth Circuit's indefensible limitation on publication damages.²⁰⁷ Clearly, its employees, at least 5,000 of whom lost

204. One commentator noted that Food Lion's lawyers effectively "portrayed a network hell-bent on ratings and profits, and willing to lie, stage evidence, and invade people's privacy to get them." Baker, *supra* note 97. In a detailed depiction, ABC's news division was shown to be very profitable and its staff well-compensated. *Id.* Counsel "connected hidden-camera television to that profit motive. 'PrimeTime Live' was breaking laws in order to rake in the bucks, an end that hardly justified the deceptive means." *Id.*; see also sources cited *supra* note 113 (discussing the connection between the compensation of newsroom executives and ratings/profits of their corporate employers).

205. One commentator has suggested (in discussing and rejecting a "necessity" defense) that any such imminent health hazard was enhanced by the delay. Bezanson, *supra* note 11, at 925; see also Jicha, *supra* note 96 (suggesting ABC's failure to warn "had more to do with good TV than socially conscious reporting"); Schorr, *supra* note 93 (ABC acted "not to learn the story of tainted food but to enable it to tell the story in a vividly pictorial fashion.").

206. See Rabinowitz, *supra* note 23.

207. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 523-24 (4th Cir. 1999) (interpreting the discussion in *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991), of *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), as barring publication damages unless the *New York Times* standard for a public figure is met). But see Epstein, *supra* note 4, at 1029 (criticizing this view); Walsh et al., *supra* note 11, at 1143; see also ELDER, PRIVACY, *supra* note 18, § 2:17A, at 89, (noting the cases had "uniformly allow[ed]" enhanced damages, following *Dietemann v. Time, Inc.*, 449 F.2d 245, 270 (9th Cir. 1971)); ELDER, PRIVACY, *supra* note 18, § 2:17A, at 98-99 (Supp. 2001) (criticizing the *Cohen* and *Food Lion* decisions).

Unfortunately, the court ignored a *crucial* distinction between *Hustler's* superimposition of falsity requirements on the intentional infliction tort and the case before it. In *Hustler* the allegedly actionable "extreme and outrageous" statements were based solely and exclusively on the communicative publication itself. In *Food Lion* the tortious or illegal noncommunicative acts of informational acquisition lead to later publication of truthful information, a constitutional difference of apples-and-oranges. Under the artificial *Food Lion* distinction an authorized media agent who acquired from plaintiff truthful information of public interest via burglary and a coercive knife-to-the-throat could limit media liability to non-reputational and non-mental damages. This would be an assuredly arbitrary and surreal result at odds with the Supreme Court's emphasis on actionability pursuant to "general laws" and would effectively deny most, if not all, victims of media trespass and intrusion an appropriate remedy, nullifying thereby both the remedial and deterrence function of compensatory damage liability. The Fourth Circuit affirmed the trial court's First Amendment based rejection of publication damages, interpreting *Hustler* as an "unlawful act" claim in which reputational injury based damages (and mental distress) were barred. Surprisingly, the court failed to distinguish between tortious *acquisitions* (*Cohen*) resulting in reputational damages and tortious *publications* (*Hustler*) resulting in reputational damage despite its affirmation of nominal damages for trespass and breach of loyalty and its rejection of special First Amendment protection for news gatherers breaking the law. In the latter decision (*Hustler*) the published content caused the injury. In the former the defendant's violation of a rule of general applicability applying alike to

jobs.²⁰⁸ And probably, the food-buying public in the communities where the eighty-eight closed stores were located, many of them minority communities, who were deprived of Food Lion's competitively priced food.²⁰⁹

Dubious origins, an "elaborate chain of lies"²¹⁰ by the producers to gain insider-employee status (held to be both a breach of loyalty and a trespass),²¹¹ economically motivated timing—a dramatic showing? But there is more, much more. Critics have sifted through the records, the documents, the footage, both in the show and unused, and have collectively disparaged the story as giving Food Lion just cause for being "hopping mad."²¹² One suggests maybe the conclusion is justified given that ABC "distorted, exaggerated, manipulated its coverage, visual and otherwise."²¹³ Another has stated that ABC "vigorously disputes the notion that its news is as tainted as Food Lion's meat."²¹⁴

Consider what the critics have suggested, asking whether what was allegedly done by "PrimeTime Live" to Food Lion is prototypical, indeed, endemic in a medium interested in slick sensationalism, inculpatory footage and the bottom line—crass entertainment thinly veiled as news.²¹⁵

media and nonmedia defendants (with only "incidental" impact on newsgathering) resulted in a publication causing enhanced damages. In such a situation a plaintiff is not trying to circumvent First Amendment libel jurisprudence but is merely trying to get the same redress that would be available against a nonmedia defendant.

ELDER, PRIVACY, *supra* note 18, § 2:17A, at 98–99 (Supp. 2001). Note that the California Court of Appeals has reaffirmed the *Dietemann* rule on enhanced damages. *Sanders v. ABC*, 28 Media L. Rptr. 1183, 1187 (Cal. Ct. App. 1999).

208. *Union Label*, *supra* note 183.

209. *Id.*

210. Gunther, *Yikes*, *supra* note 104, at 232; *see also* Gunther, *Lion's Share*, *supra* note 95, at 21 (suggesting that a story based in "a foundation of deception" and bound to be criticized should have been "scrupulously fair").

211. *Food Lion*, 194 F.3d at 518. The court threw out the remitted punitive damage award (remitted from \$5.5 million to \$315,000) because it was based on a fraud claim not allowable under state law. *Id.* at 510, 522. Note that the original punitive damages award was less than a day's earnings for ABC-Capital Cities. Canellos, *ABC Ordered to Pay*, *supra* note 14. In hyperbole typical of media lawyers, ABC Attorney William Jeffress said of the initial jury award, "American journalism 'would not survive' a high punitive-damage award." *Id.*

212. Gunther, *Yikes*, *supra* note 104, at 232.

213. Sjoerdsma, *supra* note 117.

214. Gunther, *Yikes*, *supra* note 104, at 234; *see also* Baker, *supra* note 97 (critiquing both sides of the story, and noting that the plaintiff introduced outtakes that "at least raised doubts about whether ABC was scrupulously dedicated to the truth. . . . Food Lion's attorneys meticulously scoured the cutting room floor for evidence to the contrary. And the outtakes they rolled certainly could give the impression that the *PrimeTime* producers were working overtime to build their case.").

215. *See supra* Part III.A, B.

First, ponder the mildest of the alleged dubious unethical practices. In one scene a producer-“employee” failed to perform her duty as a faithful and dutiful employee to clean a meat grinder, but instead videotaped it for use.²¹⁶ Another film was taken and used of employees rewrapping poultry, fish, and meat.²¹⁷ The footage was implicitly inculpatory of fraudulent behavior, but it may have been much less, as it in no way evidenced that the rewrapped goods were spoiled or old.²¹⁸ Much more sinister was the use of distorted footage indicating a busy manager often ran out of time *sans* the qualification by the same person that the store always provided the necessary time to do all his work.²¹⁹

Even more indicative of the blurring of ethical values were the cited *unused* instances of “staged” incidents involving attempted “entrapment,”²²⁰ with non-inculpatory results. Take, for example, the unused footage of attempted coaxing of Food Lion workers regarding spoiled food.²²¹ In one, the employee said he “could feed the dorm at [college] where I live with all the food I throw away.”²²² In another, a Food Lion employee was shown complaining of a bad chicken marinade, but later said the store manager told her to discard food anytime it was spoiled and that she did so.²²³ In a third, an employee was asked to say a manager made them work “off the clock” but the employee refused, saying that such a practice was contrary to store policy.²²⁴ The frustrated crew then spoke of setting up a “sting” at

216. *Food Lion*, 194 F.3d at 524 (Niemeyer, J., concurring in part and dissenting in part).

217. Gunther, *Yikes*, *supra* note 104, at 234.

218. *Id.*

219. *Union Label*, *supra* note 183; *see also* Meyer, *supra* note 124 (noting that while the original telecast showed an employee slipping and sliding on a meat department floor due to a collection of grease, a scene from the outtake provides another explanation—that the employee was cleaning equipment and the slippery surface was from soapy water). *But see* Weinberg, *supra* note 171 (“The outtakes provided by ABC do not seem to show soapy water being spilled. They do capture a Food Lion employee commenting that a manager almost fell the previous night because of grease and the same employee saying that he never mops the floor properly.”).

220. *See* *Food Lion*, 194 F.3d at 526 (Niemeyer, J., concurring in part and dissenting in part) (stating “in seeking to ‘uncover’ practices, the ABC employees baited fellow employees to say and do things that they knew would undermine Food Lion’s standard food-handling practices.”). *See generally* Logan, *Stunt Journalism*, *supra* note 11, at 171 (“There is also a sense that the media create the news, rather than simply reporting what has occurred.”).

221. Gunther, *Lion’s Share*, *supra* note 95, at 21; Gunther, *Yikes*, *supra* note 104, at 234.

222. Gunther, *Yikes*, *supra* note 104, at 234.

223. *Id.* Citing “restored” “editing cuts,” one author concluded that an employee “learned that no prior approval for getting rid of spoiled food was needed.” Meyer, *supra* note 124. *But see* Weinberg, *supra* note 171 (“On the ABC outtakes, a Food Lion cook criticizes the chicken’s lack of freshness, partly because the marinade in which it cooks is frequently old. She also mentions a recent customer becoming ill.”).

224. *Union Label*, *supra* note 183. *But see* Weinberg, *supra* note 171. The apology points out that in the original broadcast, a Food Lion store manager says he quit the chain “partly

a different store.²²⁵ Lastly, and arguably very telling, was the co-producer's response to a Food Lion employee instructing her to throw out a tray of dated chicken after she suggested it go back in the cooler: "Damn."²²⁶

Fascinating, isn't it? But the beat goes on. Ever eaten kielbasa, the spicy Polish sausage? Well, kielbasa featured strongly in the videotapes. Mold was found on a package. The package was filmed more than once (once at a producer's hotel) with careful identification of the product and to ensure the mold was visible.²²⁷ And, according to Food Lion, the producer worked late to ensure she had the "opportunity to fraudulently create a news story."²²⁸ Oh, by the way, who were the filmed buyer *and* seller? The defendant ABC's co-producers!²²⁹ As one tongue-in-cheek commentator mused, "[T]he little-kielbasa-that-couldn't does tell a story."²³⁰

Even more stunning were several acts of alleged affirmative employee sabotage. For example, there is footage of: (1) the co-producer putting baking sheets away filthy just following a Food Lion employee's stacking them to be washed;²³¹ (2) the insertion of the wrong date on turkey parts after being told the correct dates by a Food Lion employee;²³² (3) the wrapping of flounder and a three-day sell sticker being placed on them rather than the one-day identifier she was instructed to use;²³³ and (4) the depiction of spoiled rice pudding removed from a sales area for disposal as being still for sale.²³⁴ By contrast, *nothing* complimentary was said of

because of the pressure-cooker atmosphere." Weinberg, *supra* note 171. The apology continues by noting that "[Diane] Sawyer [in the original broadcast] also hears from three on-camera sources who say they worked off the clock at least 10 hours a week—week in, week out so they can try to complete their assigned tasks." *Id.*

225. *Union Label*, *supra* note 183.

226. Baker, *supra* note 97; Rabinowitz, *supra* note 23. As to the "damn" comment, ABC contended that any suggestion such was reflective of disappointment at failing to entrap an employee would be inconsistent with the context in which it was issued. Weinberg, *supra* note 167. It was noted that outtakes pointed to by ABC "can be viewed as consistent" with its position. *Id.* It was also noted that Food Lion stood behind its contrary version. *Id.*

227. Keeton, *supra* note 11, at 113 n.14; Rabinowitz, *supra* note 23.

228. Keeton, *supra* note 11, at 113 n.14. (quoting from *Prime Time Live: Hidden Cameras/Hard Choices* (ABC television broadcast, Feb. 12, 1997)).

229. Rabinowitz, *supra* note 23.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*; see also Weinberg, *supra* note 171 (stating "ABC's outtakes show that [the producer's] supervisor set the labeling machine.").

234. Gunther, *Lion's Share*, *supra* note 95, at 21. *But see* Weinberg, *supra* note 171 (citing ABC's position).

Food Lion.²³⁵

In sum, it can be argued once damning and selectively usable hidden camera footage was available, the investigative process was “stillborn. The picture was all the perspective and context needed.”²³⁶ Indeed, the avenues of inquiry not explored seem inexplicable. It has been suggested no attempt was made to search state or federal safety or health reports²³⁷ for complaints or citations for evidence of unsanitary practices. And, of course, no positive mention was made of the state records listing Food Lion as third of eight major supermarket chains in this respect—as above average, in other words.²³⁸ This was not done even with the six-month delay,²³⁹ providing ample opportunity for producers interested in learning the whole truth. One distinguished commentator has termed this a “surprising fact, in retrospect.”²⁴⁰ Nor did defendants take purchased samples for independent testing,²⁴¹ the most compelling evidence of public health endangerment. The tepid later response was that Food Lion might have challenged such.²⁴² But that is the point, is it not, in a search for truth? Evidence of contamination, refutatory challenges thereto? Unless, of course, ABC was afraid that such testing and its refutation might

The producers object to . . . implications of staging. The sniffing of the pudding occurred at least two hours after a customer returned it because of alleged spoilage, according to outtakes provided by ABC. The employee taking the sniff said without provocation that she would never buy some of the items regularly offered for sale to customers.

Id. One commentator cited an outtake episode interpretable as a sabotage of a water heater so it could not be utilized to clean a meat grinder, thus letting the producer “get a good gunked-up shot of it.” Singer, *supra* note 156, at 62. *But see* Weinberg, *supra* note 171. Weinberg notes that although the trial judge said he had “seen people tried on less evidence than that in criminal cases and convicted,” in a post-trial motion the same judge absolved the producer of any involvement with the dirty meat grinder. *Id.* “The jury specifically found that [the producer] did not damage Food Lion’s property. The judge also said that the point of the broadcast ‘was that the grinder was used the following morning, even after the hot water was restored, without ever being cleaned.’” *Id.*

235. Gunther, *Lion’s Share*, *supra* note 95, at 21.

236. Bezanson, *supra* note 11, at 902.

237. Gunther, *Lion’s Share*, *supra* note 95, at 20–21 (“Neither was done or even considered, court documents show.”). *But see* Weinberg, *supra* note 171 (noting that the producers gathered records for Food Lion stores in every state where it operated and the records were shown to IRE). The apology does not disclose the contents of the reports, whether they were positive (as contended by Food Lion), and if so, why they were not discussed. *Id.*

238. Gunther, *Lion’s Share*, *supra* note 95, at 21 (describing it as a “most troubling” aspect of the story). After the “teasers,” but before the story, Food Lion ran its own ads asserting its North Carolina stores had “top-grade sanitation ratings.” Singer, *supra* note 156, at 60.

239. *See* Bezanson, *supra* note 11, at 903.

240. *Id.* at 904.

241. *See* Gunther, *Yikes*, *supra* note 104, at 232.

242. *See* Gunther, *Lion’s Share*, *supra* note 95, at 21.

whammy its inculpatory footage and its story. Lack of investigation because of sufficient evidence or failure to investigate for fear of what an investigation would disclose that would gut a story? A jury could have been the judge.

Two other glitches were also quite damning of ABC. It nowhere asked (or responded) to the logical inquiry that was implicitly posed by the theme of its story—how could the fastest growing store in the nation have grown so quickly if the practices exhibited in the story were so widespread?²⁴³ It also did not explain or justify its failure to provide Food Lion with an opportunity to respond, but rather merely cited that Food Lion gave a written denial.²⁴⁴ It did not disclose the willingness of Food Lion to have its ranking executives provide a detailed background briefing (declined) or Food Lion's willingness to have its CEO respond to questions *if* done live or unedited (declined on the ground ABC needed editorial control).²⁴⁵ This was after working with antagonistic employees and an even more antagonistic union for months!²⁴⁶ Justified? Or a calculated way of ensuring that no effective response would be made?²⁴⁷

243. See Gunther, *Yikes*, *supra* note 104, at 234. And why Food Lion only? As one commentator has asked, "What about the grocery chain's competitors? Did they engage in the same practices? An expose [sic] designed for maximum protection of health should surely tell if other grocery stores engaged in the same practices." Davidson, *supra* note 171, at 8. Indeed, where are all the customers, the supposedly endangered parties? One media defender of hidden cameras in general and defendant-ABC in *Food Lion* suggested the story would have been improved if it had included and emphasized certain additional elements—including interviews of customers and whether they had encountered any problems and their responses. McMasters, *supra* note 154, at 18. A story without such raises the question: Was the defendant afraid of encountering evidence undermining or refuting its thesis? Note the hazard for ABC of such a story, i.e., that an angry plaintiff such as Food Lion might get a local patron on the jury who was familiar with its food practices and reputation and angered by the disconnect from ABC's story line. And this happened! Baker, *supra* note 97 (quoting a jury member who wanted to assess punitive damages of one billion dollars: "I have never seen anything nasty or dirty in Food Lion.").

244. Gunther, *Yikes*, *supra* note 104, at 234.

245. *Id.* Why should anyone be expected to appear on camera if a crime or tort has been committed to obtain the unlawful and/or illegal footage which then has to be explained? If one is willing to comment, then doesn't it stand to reason that such person, within reason, should be allowed to rebut and "say his or her piece" without interruption or editing? Further, the invaders of privacy refuse to allow the victim to see the raw footage, claiming First Amendment protection. See *id.* The authors believe the victims of such conduct should have an absolute right to see any footage taken of them by surreptitious means, irrespective of whether they choose to appear or rebut whatever investigation or charges are being made.

246. See *id.* at 232.

247. Note that where there are reasons to doubt the truth of the subject matter, the defendant's decision not to ask the plaintiff specific questions it had about its charges during an interview with the plaintiff has been held evidence of constitutional malice. See *Alioto v. Cowles Communications, Inc.*, 519 F.2d 777, 780 (9th Cir. 1975). Such might constitute a failure to

In sum, the items presented above individually and collectively may have evidenced constitutional malice, a permissible finding that a television news magazine sought “exclusively . . . evidence to support a story . . . of terrible wrongdoing”²⁴⁸ by Food Lion. Such evidence (if found persuasive by a jury and upheld by the trial and appellate courts, and provided the material falsity requirement was met) would have allowed Food Lion access to the panoply of damages permitted by the Supreme Court once a “calculated falsehood”²⁴⁹ is shown—actual²⁵⁰ (including publication damages),²⁵¹ presumed,²⁵² and punitive.²⁵³ As one commentator has pointed out, this apparently calculated “investment in finding the evidence” was nowhere better exemplified than in the producer’s exclamation when he attempted to capture footage of an uncleaned meat slicer, but a faithful employee was cleaning the machine: “Shit.”²⁵⁴

pursue the most obvious sources of corroboration because the defendant “did not want to find them to be untrue, and so published the statements with a reckless disregard for the truth.” *Id.* Such a failure may also be admissible as a “gross deviation” from accepted journalistic standards. See discussion *infra* Part VI.

248. Rabinowitz, *supra* note 23; see Gunther, *Lion's Share*, *supra* note 95, at 21 (quoting Food Lion’s expert witness, Robert Lissit, former network news producer and present Syracuse University journalism professor: “PrimeTime’ was guilty of flagrant violations of journalistic ethics by deceptively editing its hidden-camera footage.”). Tom Goldstein, the present Dean of the Columbia University Graduate School of Journalism, summarized ABC’s post-mortem on Food Lion as “as much self-serving as it was illuminating” and praised as “[f]ar better” a piece aired on Court TV’s “Cochran & Grace,” which included a fifteen-minute segment produced by Food Lion using “outtakes [from ABC’s unused footage that] graphically demonstrated that ABC producers had selectively edited the 45 hours of tape they had collected, seemingly omitting anything favorable to the food company.” Tom Goldstein, *When Hidden Cameras Make the News*, TV GUIDE, Mar. 8, 1997, at 40, 40–41.

249. See sources cited *infra* note 433.

250. See ELDER, DEFAMATION, *supra* note 37, § 9:1[B], at 6–12.

251. See *id.* at 3–12.

252. See *id.* § 9:1[D], at 14–15.

253. See *id.* § 9:1[E][1], at 16–21.

254. Baker, *supra* note 97; see also Meyer, *supra* note 124 (“In the ABC outtakes, you can hear someone vocalizing disappointment with soft expletives when an anticipated wrongdoing or damaging statement fails to materialize. At another point, someone murmurs, ‘. . . get these guys.’”); Singer, *supra* note 156, at 62. *But see supra* note 226 and accompanying text (discussing ABC’s response). As to the swearing episodes, the producers responded that heavy equipment caused such frustrated comments. Baker, *supra* note 97. The commentator noted that “that story sounded like baloney to just about everybody in the courtroom” and left trial observers to wonder why the producers did not admit to honest frustration in failing to document by video a practice they believed to be true from their own investigation. *Id.* Note that such statements that lack credibility may themselves be substantial evidence of constitutional malice. See *infra* note 345 and accompanying text.

V. A CASE FOR CONSTITUTIONAL MALICE IN HIDDEN CAMERA CASES

A. Common Law Malice and Constitutional Malice

Undoubtedly, common law malice does not *suffice* to prove constitutional malice,²⁵⁵ i.e., the “subjective awareness of probable falsity.”²⁵⁶ However, “reason and the weight of precedent”²⁵⁷ indicate that proof of common law malice *supports* a finding of constitutional malice when “combined with other, more substantial evidence of a defendant’s bad faith”²⁵⁸ or “other indicia of malice.”²⁵⁹ Although cautioning that courts not allow litigants to “place too much reliance” on this factor, the Supreme Court has concluded that it “cannot be said that evidence concerning motive . . . never bears any relation to the actual malice inquiry.”²⁶⁰

A number of decisions have analyzed why common law malice in its many variants provides such supporting evidence.²⁶¹ Common law malice may explain what made a defendant: “disregard the most rudimentary precautions before publishing,”²⁶² reinforce the inference that a reporter recklessly disregarded the truth,²⁶³ provide insight into why every one of a defendant’s employees in a position to influence content “treated the question of truth or falsity as a matter of total indifference;”²⁶⁴ evidence what influenced a defendant’s assessment of likely falsity; help prove that a defendant published in spite of its own determination of probable falsity;²⁶⁵ evince “a state of mind highly-susceptible to the entertainment of serious doubts concerning probable falsity;”²⁶⁶ indicate why a defendant was “not

255. ELDER, DEFAMATION, *supra* note 37, § 7:3, at 48–55.

256. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334–35 n.6 (1974).

257. *Tavoulareas v. Piro*, 817 F.2d 762, 795 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 870 (1987).

258. *Id.*

259. *Robertson v. McCloskey*, 666 F. Supp. 241, 251 (D.D.C. 1987).

260. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 668 (1989).

261. ELDER, DEFAMATION, *supra* note 37, § 7:3, at 56–62.

262. *Fopay v. Noveroske*, 334 N.E.2d 79, 91 (Ill. App. Ct. 1975).

263. *Herron v. King Broad. Co.*, 776 P.2d 98, 107 (Wash. 1989); *see Reader’s Digest Ass’n v. Superior Court*, 690 P.2d 610, 618–19 (Cal. 1984), *cert. denied*, 478 U.S. 1009 (1986).

264. *Widener v. Pac. Gas & Elec. Co.*, 142 Cal. Rptr. 304, 315 (Ct. App. 1977), *cert. denied*, 436 U.S. 918 (1978).

265. *Indianapolis Newspapers, Inc. v. Fields*, 259 N.E.2d 651, 664 (Ind. 1970), *cert. denied*, 400 U.S. 930 (1970).

266. *Cochran v. Indianapolis Newspapers, Inc.*, 372 N.E.2d 1211, 1221 (Ind. Ct. App. 1978).

in the least concerned... with the true facts;²⁶⁷ demonstrate “an atmosphere infected with a disposition to ignore” knowing or reckless falsity;²⁶⁸ “provide a motive for defaming someone or explain apparently illogical leaps to unsupported conclusions;”²⁶⁹ explain a defendant’s failure to peruse or listen to sources of information in its possession;²⁷⁰ indicate what may have precipitated a defendant to participate in “a stretching of standards;”²⁷¹ or support a finding of bad faith and disinclination to the truth.²⁷²

Ill will or one of its multiple variants is a typical, relevant factor in support of a constitutional malice finding, particularly when accompanied by criminal and/or tortious misconduct by the defaming person or entity.²⁷³ It relates to an intent to act anti-socially and is antithetical to the fact-finding, truth-seeking function of a journalist and evidences a predisposition to both gather and report information in an intellectually dishonest manner. This is peculiarly well-illustrated where a journalist’s motivation makes him co-participant-co-creator of the story, the norm in hidden camera stories.²⁷⁴ Hidden camera investigative reporting is not some dispassionate journalistic endeavor objectively covering third persons, but is often times a calculated “sting” where the “stingors” are employees and agents of the “journalists.”²⁷⁵ The persons “covered” in the story are one and the same as the “journalists,” i.e., *agents provocateurs*

267. *Arber v. Stahlin*, 170 N.W.2d 45, 48 (Mich. 1969), *cert. denied*, 397 U.S. 924 (1970).

268. *Miller v. Argus Publ’g Co.*, 490 P.2d 101, 111 (Wash. 1971), *overruled on other grounds* by *Taskett v. King Broad. Co.*, 546 P.2d 81, 88 (Wash. 1976).

269. *Sharon v. Time, Inc.*, 599 F. Supp. 538, 584 (S.D.N.Y. 1984).

270. *Harte-Hanks*, 491 U.S. at 683–84.

271. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 158 (1967).

272. *Robertson*, 666 F. Supp. at 251; *Cochran*, 372 N.E.2d at 1222.

273. ELDER, DEFAMATION, *supra* note 37, § 7:3, at 58–61.

[T]he decisions have generally held that almost any evidence of common law malice may be relevant and admissible evidence on the constitutional actual malice issue—anger; hostility; retaliation or threats to “get” plaintiff; political partisanship; participation in a scheme to injure plaintiff; personal ill will; coercive purposes or blackmailing attempts; motive to suppress information or intimidate an opponent critical of defendant; economic motivation; sensationalism or “muckraking;” publication with full cognizance of the harm to the plaintiff or heedless of the consequences; prior attempts at deliberate falsification or omissions; a preconceived plan to discredit plaintiff; a preconceived view or slant.

Id. (citations omitted). As the *Restatement (Second) of Torts* has recognized, such factors “assist in the drawing of an inference that the publisher knew that his statement was false or acted in reckless disregard of its falsity.” RESTATEMENT (SECOND) OF TORTS § 580A, cmt. d (1977); see also *infra* Part V.B, C (discussing further two subspecies, respectively: a preconceived viewpoint, slant, or plan to discredit; and economic motivation).

274. See, e.g., *Rabinowitz*, *supra* note 23.

275. See *id.*

(and *provocateuses*),²⁷⁶ surely not a good sign of impartiality.

Is such ill will relevant, probative evidence of constitutional malice? In *Herbert v. Lando*,²⁷⁷ the Supreme Court unequivocally affirmed its viability and admissibility, concluding that the demanding *New York Times* standard and focus on “conduct and state of mind of the defendant” did not “suggest any First Amendment restriction on the sources from which the plaintiff could obtain the necessary evidence to prove the critical elements of his cause of action.”²⁷⁸ Among other evidence, the Court cited the defendant’s “motives in publishing the story.”²⁷⁹

A recent example of the importance of evidence of ill will and animosity where the defendant’s motive made it a participant-co-creator of the underlying story is *Celle v. Filipino Reporter Enterprises, Inc.*,²⁸⁰ where the court found substantial evidence of constitutional malice from the defendant’s ill will in publishing defamatory articles motivated by the plaintiff’s earlier articles detailing a criminal conviction of the defendant-editor’s daughter, in which the defendant thought that the plaintiff magnified the severity of the conviction.²⁸¹ In the court’s view, “[a] reasonable juror—considering the ill will, and the factual similarity between the basis for that ill will and the publication of the challenged statement here—could conclude that [the defendant-editor] was *imposing in-kind retribution* on [the plaintiff] by exaggerating the status of the legal proceedings against him.”²⁸²

Another example of a defendant’s employee’s ill motivation as antagonist-participant in *creating* a distorted, one-sided story is *Ball v. E.W. Scripps Co.*²⁸³ There, the defendant-newspaper’s pattern of “bias [and] hostility” toward the plaintiff-commonwealth attorney-prosecutor led the reporter to engage in a series of unethical practices reflecting a calculated attempt to build a case of prosecutorial incompetence.²⁸⁴ When he found court records supporting his slant, the reporter noted “good case” on them.²⁸⁵ Among other derelictions, he interviewed only parties hostile to the plaintiff, deliberately avoiding those who could contradict the

276. *See id.*

277. 441 U.S. 153 (1979).

278. *Herbert*, 441 U.S. at 160.

279. *Id.* at 161 n.6, 163–65.

280. 209 F.3d 163 (2d Cir. 2000).

281. *Id.* at 172, 190.

282. *Id.* at 186 (emphasis added).

283. 801 S.W.2d 684 (Ky. 1990), *cert. denied*, 499 U.S. 976 (1991).

284. *Id.* at 686–88.

285. *Id.* at 687.

sources selected.²⁸⁶ He constructed a misleading statistical comparison of adjacent counties' handling of persistent felony offender counts, while admitting to his editor that the comparison was deceptive because the two prosecutors handled the cases quite differently.²⁸⁷ In essence, he manufactured "junk science," aptly illustrating the old adage that "figures don't lie but liars do figure."

B. A Preconceived Slant and/or Story Line is Probative of Constitutional Malice

In *Harte-Hanks Communications, Inc. v. Connaughton*,²⁸⁸ the Supreme Court expressly recognized that motive, while not sufficient for constitutional actual malice, is "supportive," probative, and admissible evidence thereof.²⁸⁹ This supportive evidentiary posture is well-illustrated by the Court's own discussion of the defendant's earlier, non-defamatory editorial on October 30 as "set[ting] the stage" for the later defamatory

286. *Id.* The defendants also refused to review files proffered to them to establish their primary source's unreliability and ignored the comment of a judge with substantial experience with the source who deemed him "totally unreliable." *Id.*

287. *Id.* The reporter also admitted a separate miscalculation of the percentages of the plaintiff's conviction. *Id.* at 688. His statement that the plaintiff "lost about half" the cases taken to trial was false; the plaintiff had a seventy-three percent victory rate. *Id.* The unanimous opinion is worth reading as an illustration of the righteous anger exhibited between the lines, reflecting the court's collective disgust at the calculatedly malicious attempt to "get" the plaintiff. *See id.* at 686-88. It also aptly illustrates the awesome power of the media to do damage where they approach a story with a fixed viewpoint and then try to orchestrate the evidence to support and prove the foreordained thesis—the essence of a hidden camera case. One recent treatise provides the following compelling critique of misuse of scientific data in the news media:

What we will discover by examining specific cases of research reports gone awry are the potential missteps in the passage of events to our attention, missteps involving simple error, honest misunderstandings, subtle spin, or outright mendacity at virtually any stage in the process that daily drives our personal decisions and our public policy. . . .

The press has heeded our demands, and it tends to provide us with reports that are dramatic and unlikely to be hedged with doubt or complexity. We want answers to our questions, and it is in the interests of journalists to give them to us. The more stark and unexpected the findings, of course, the more compelling they seem. And the more the findings are dressed up with the appearance of certainty, the more fidelity we imagine we are getting. . . .

The research community, however, operates by a different set of rules than do journalists. For researchers, certainty is often an illusion, since knowledge is developing and liable to change with tomorrow's results. In the mind of scientists, "reality" is held inside a frame of contingency, an expectation that every number and conclusion is provisional.

MURRAY, SCHWARTZ & LICHTER, *supra* note 11, at 8-9.

288. 491 U.S. 657 (1989).

289. *Id.* at 666-68. The Court reaffirmed that a plaintiff can prove state of mind via circumstantial evidence and concluded "it cannot be said that evidence concerning motive . . . never bears any relation to the actual malice inquiry." *Id.* at 668.

article on November 1²⁹⁰ made with constitutional malice. The earlier editorial predicted “[a] lot could still happen” in the brief time before the election, opined that the race was still competitive, and then quoted an unidentified voter as resentful of voting for a person “who I later find has been deceitful or dishonest in campaigning.”²⁹¹ The Court noted that this “concern” was one “the then-uninvestigated and unwritten November 1 story would soon engender.”²⁹² In an extremely important discussion of the significance of such preconceived objectives or story line, the Court said:

Significantly, this editorial appeared before [the plaintiff] or any of the other witnesses were interviewed. Its prediction that further information concerning the integrity of the candidates might surface in the last few days of the campaign *can be taken to indicate that [the editor] had already decided to publish [the source’s] allegations, regardless of how the evidence developed and regardless of whether or not [the source’s] story was credible upon ultimate reflection.*²⁹³

An excellent recent example of evidence of a preconceived viewpoint as relevant to proving constitutional malice involved a situation where an electronic message was forwarded by the reporter to the original source of the tip (his “good friend,” the head of the election campaign), “promising a ‘wiseass article for Tuesday’ about the private investigator issue” (the plaintiff was the defamed “investigator”).²⁹⁴ The court concluded that this communiqué “supports an inference that [the reporter’s] motives in writing the articles were at least as political as they were journalistic.”²⁹⁵ A substantial number of precedents likewise find supportive evidence of constitutional malice in either a preconceived determination to discredit or disparage a plaintiff or in a preconceived slant or view.²⁹⁶ Thus, evidence

290. *Id.* at 684.

291. *Id.* at 675–76 (quotations omitted).

292. *Id.* at 676.

293. *Id.* 491 at 684 (emphasis added).

294. *Norris v. Bangor Publ’g Co.*, 53 F. Supp. 2d 495, 506–07 (D. Me. 1999).

295. *Id.* at 507.

296. Bezanson, *supra* note 11, at 905, 922–23 (discussing the common features of the *New York Times* standard and attacks on newsgathering illegalities, and concluding: “The press must be institutionally agnostic in its editorial choices.”); Smolla, *supra* note 11, at 18 (“[I]t is also settled that actual malice can be established through publication of a ‘pre-conceived’ story.”); Towery, *supra* note 88, at 2 (“[The] protective shield of *New York Times* vs. *Sullivan* notwithstanding—many of the stories you read and see have big-time hidden agendas lurking not too far below the surface.”); Glenn Harlan Reynolds, *The Op-Ed’s Hidden Agenda*, CENTER-RIGHT, at <http://www.center-right.org/articles/192.html> (Jan. 14, 2002) (critiquing media “[r]ecycling” and the snow-balling effect of relying on advocacy press releases, noting that this press release format “works best for left-leaning groups because editors and reporters, who tend

has been held probative of constitutional malice in cases involving: an overall “predetermined and preconceived plan” to portray a candidate as unfit for the presidency;²⁹⁷ earlier constitutionally protected coverage which reflected only one side of a controversy;²⁹⁸ participation in “a scheme or plan . . . to employ grossly exaggerated and patently untrue assertions” primarily in headlines to destroy a gubernatorial candidate’s character;²⁹⁹ prior constitutionally protected articles or editorials reflective of a predisposition to “get” the plaintiff-commonwealth attorney;³⁰⁰ a letter to the editor during the “heat” of a campaign to discredit a candidate done with a calculated assessment to influence voting;³⁰¹ evidence that the defendant-author was “at ‘war’” with the plaintiff-doctor and other doctors sharing the plaintiff’s views;³⁰² and a predetermined conspiracy “story line” and deliberate selection of an author with a “known and unreasonable propensity” for such a story line.³⁰³

to share these groups’ views, are less likely to recognize, or care, that they’re being used,” and concluding that many readers and viewers are becoming aware of this, a possible explanation for the continuing slippage of the traditional media’s journalistic reputation: “[W]hile they continue to claim that liberal bias is a myth, an amazing amount of what traditional media groups do comes straight from the fax machines of left-leaning advocacy groups. As long as that’s the case, their claims to exercise unbiased editorial judgment are going to ring very hollow.”)

297. *Goldwater v. Ginzburg*, 414 F.2d 324, 327, 337 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970), *reh’g denied*, 397 U.S. 978 (1970); *see also* *Falwell v. Flynt*, 797 F.2d 1270, 1277 (4th Cir. 1986) (approving the *Ginzburg* rule as a “functional definition of actual malice”), *rev’d on other grounds*, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

298. *McHale v. Lake Charles Am. Press*, 390 So. 2d 556, 564 (La. Ct. App. 1980), *cert. denied*, 452 U.S. 941 (1981).

299. *Sprouse v. Clay Communication, Inc.*, 211 S.E.2d 674, 680–81, 691 (W. Va. 1975) (Once such “an overall plan or scheme to injure has been established, an unreasonable deviation between [text and] headlines” was evidence of constitutional malice.), *cert. denied*, 423 U.S. 882 (1975).

300. *Ball*, 801 S.W.2d at 686–88; *see also* *Perk v. Reader’s Digest Ass’n, Inc.*, 931 F.2d 408, 411–12 (6th Cir. 1991) (applying *Harte-Hanks*, the court found no constitutional malice but did affirm that the motive to write with “a particular slant” was circumstantial evidence which might support a constitutional malice finding); *Brueggemeyer v. ABC, Inc.*, 684 F. Supp. 452, 466 (N.D. Tex. 1988) (“[E]vidence of bias, and lack of objectivity and evenhandedness, may be probative of intent to act with actual malice,” but was not alone sufficient.).

301. *Barber v. Perdue*, 390 S.E.2d 234, 237 (Ga. Ct. App. 1989), *cert. denied*, 498 U.S. 967 (1990).

302. *Renner v. Donsbach*, 749 F. Supp. 987, 993 (W.D. Mo. 1990) (allowing a reasonable jury to conclude the defendants “repeated whatever negative they heard about plaintiff in the most derogatory light possible without checking the accuracy of the facts or the inferences” drawn).

303. *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 539 (7th Cir. 1982), *cert. denied*, 549 U.S. 1226 (1983). There have been numerous cases that have found evidence of constitutional malice in a “muckraking” or equivalent philosophy. *See, e.g., Tavoulaareas*, 817 F.2d at 796–97 (The court affirmed the proposition “that evidence of managerial pressure to produce sensationalistic or high-impact stories with little or no regard for their accuracy would be probative of actual malice” but found no such “distortive pressure” in the case before it, “a thoroughly researched

Undoubtedly and justifiably, a preconceived story line and/or a preconceived slant with an intent to discredit, disparage, and inculpate a plaintiff is clear evidence of constitutional malice. This is the very essence of a hidden camera story. Such tactics “lend[] credence to other circumstances” evidential of constitutional malice³⁰⁴ and demonstrate that a media defendant “foreswore its role as an impartial reporter of facts and joined . . . in an overall plan or scheme to discredit the character”³⁰⁵ of the plaintiff. Indeed, as one court concluded in language eerily prescient of hidden camera tactics: “These factors [failure to disclose both sides of a controversy in earlier articles] are weights to put on the scales . . . because they suggest that the Press had obdurately made up its mind [the plaintiff] was a bad man and he ought to be exposed and put down.”³⁰⁶

As evidenced by *Food Lion v. Capital Cities/ABC, Inc.*,³⁰⁷ the quintessential example of the “bad man”/“ought to be exposed and put down” media preconceived mentality is the hidden camera “sting.” For another example, examine the case of *Stokes v. CBS, Inc.*,³⁰⁸ where the court found “the highly slanted perspective of each report” probative of constitutional malice.³⁰⁹ The court concluded the defendant’s tactics were more than “merely favoring” one version of the facts: “Through the use of ambush tactics and distorting visual and editorial techniques, both reports

and largely accurate story.” Moreover, the court found no evidence in the case before it suggested the defendant newspaper’s policy was understood to be one of encouraging investigative reporters to advance their careers via “reckless charges of wrongdoing” of the wealthy and powerful.), *cert. denied*, 484 U.S. 870 (1987); *Durso v. Lyle Stuart, Inc.*, 337 N.E.2d 443, 447 (Ill. App. Ct. 1975) (holding that where an author “set[s] out to write an exposé type book . . . in which it was his intention to ‘name names’ it is incumbent on an author to thoroughly check the facts to insure against harm to the reputations of innocent persons”); *Perez v. Scripps-Howard Broad. Co.*, 520 N.E.2d 198, 204 (Ohio 1988) (“Where sensationalism is sought at the expense of the truth, actual malice could be inferred . . . The distinction between sensationalism and [hard-hitting] investigative journalism lies in the attitude of the publisher toward the truth.” The court found the evidence did not show the defendants “sought sensationalism at the expense of the truth.”), *cert. denied*, 488 U.S. 870 (1988).

304. *Ball*, 801 S.W.2d at 686.

305. *Sprouse v. Clay Communication, Inc.*, 211 S.E.2d 674, 680 (W. Va. 1975), *cert. denied*, 423 U.S. 882 (1975).

306. *McHale*, 390 So. 2d at 564.

307. 194 F.3d 505 (4th Cir. 1999).

308. 25 F. Supp. 2d 992 (D. Minn. 1998).

309. *Id.* at 1004–05; *see also* *Braun v. Flynt*, 726 F.2d 245, 257 (5th Cir. 1984) (holding that malice in a false light-privacy case was “strongly supported” by evidence that the defendant-magazine’s employees used deception in getting photos of the plaintiff on two or more occasions; such deliberate and conscious deception as to the nature of the publication demonstrated the defendant’s awareness that the employer “would not have cooperated in or consented to the appearance of the picture in *Chic* if it had known of the true nature of that publication”), *cert. denied*, 469 U.S. 883 (1984).

actively contributed to the impression that [the plaintiff] committed the crime.”³¹⁰

*C. The Network's Use of Hidden Camera Stories to Increase Profits:
Economic Motivation as Proof of Constitutional Malice*

In *Harte-Hanks*, the Supreme Court discussed the link between constitutional malice and the defendant's economic motivation at some length, particularly the Sixth Circuit's reliance on: (1) the “bitter rivalry” between the defendant and its Cincinnati competitor for the local market where the campaign in question was being contested; (2) the fact that the competitor had “scooped” the defendant in doing an “initial exposé” of the “questionable operation” of the court by the incumbent supported by the defendant (and opposed by plaintiff-candidate), “a high profile news attraction of great public interest and notoriety” denominated by defendant's editor as “the most significant story impacting the campaign;” and (3) that by “discrediting” the plaintiff, the defendant was “effectively impugning” its local competitor, “undermining its market share” in the contested area.³¹¹

The Court emphasized that constitutional malice is “not satisfied merely [by] a showing of ill will or ‘malice’ in the ordinary sense of the term,”³¹² and that publication of defamation matter to enhance profits would not “suffice” for constitutional malice.³¹³ However, viewed as a whole, the Court of Appeals' decision did not “infer[] actual malice” solely from such economic and other motivation.³¹⁴ Those motivations were “merely supportive” of the constitutional malice determination.³¹⁵

The Court's discussion is consistent with its earlier decision in *Curtis Publishing Co. v. Butts*,³¹⁶ where the Court's opinions relied on in part the

310. *Stokes*, 25 F. Supp. 2d at 1004–05.

311. 491 U.S. at 665 n.6 (quoting *Connaughton v. Harte-Hanks Communications, Inc.*, 842 F.2d 825, 843 (6th Cir. 1988), *aff'd*, 491 U.S. 657 (1989)).

312. *Id.* at 666.

313. *Id.* at 667 (“If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels.”).

314. *Id.* The Court also discussed the defendant's bias—favoritism of and slant toward the incumbent whom the plaintiff opposed. See discussion *supra* Part V.B (discussing the impact of a preconceived slant or story line on the constitutional actual malice issue).

315. *Id.* at 668. The Court affirmed that courts “must be careful not to place too much reliance” on such but that such can be part of the circumstantial evidence of the plaintiff's state of mind: “[I]t cannot be said that evidence concerning motive . . . never bears any relation to the actual malice inquiry.” *Id.*

316. 388 U.S. 130 (1967).

defendant's institution of a policy of "sophisticated muckraking" because of declining advertising revenues.³¹⁷ Noting the defendant's position as a "major factor in the publishing business," Chief Justice Warren, whose opinion became the opinion of the Court, listed the following as synonyms: "muckrake, throw mud at, throw or fling dirt at, drag through the mud and bespatter."³¹⁸ The latter definition is the Siamese twin of hidden camera "infotainment."

Substantial other case law supports use of a defendant's economic motivation as "supportive" of constitutional malice.³¹⁹ Two lines of authority are particularly persuasive. The first focuses on use of defamatory matter in a format to maximize exposure and sale of a defendant's newspaper or other medium. Thus, one decision found evidence of constitutional malice in the defendant's decision to publish a six-day-old "needlessly false," unverified story on the front page—"to attract the interest of the reading public."³²⁰ More recently, the Ninth Circuit found three items of evidence cumulatively sufficient for a finding of constitutional malice in *Kaelin v. Globe Communications Corp.*,³²¹ a

317. *Id.* at 158 (Justice Harlan applied the "highly unreasonable conduct" standard never adopted by a majority of the Court.). "[T]he pressure to produce a successful exposé might have induced a stretching of standards." *Id.* at 169 (Warren, J., concurring in the result).

Apparently because of declining advertising revenues, an editorial decision was made to "change the image" . . . with the hope that circulation and advertising revenues would thereby be increased. The starting point for this change of image was an announcement that the magazine would embark upon a program of "sophisticated muckraking," designed to "provoke people, make them mad."

Id.; see sources cited *supra* note 303 (briefly discussing other "muckraking" cases).

318. *Butts*, 388 U.S. at 169 & n.6 (quoting from ROGET'S INTERNATIONAL THESAURUS § 934(3) (3d ed. 1924)). The Court also quoted a dictionary definition: "On April 14, 1906, President Roosevelt delivered a speech in which he used the term *muckrake* in attacking the practice of making sweeping and unjust charges of corruption against public men and corporations . . ." *Id.* (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 1606 (2d ed.)).

319. See *Brown v. Petrolite Corp.* 965 F.2d 38, 47 (5th Cir. 1992) (assessing whether the constitutional malice precondition for punitive damages was met, and citing the defendant's status as competitor of the plaintiff-oil services companies, i.e., that it was losing business and revenue to them); *Tosti v. Ayik*, 476 N.E.2d 928, 935-36 (Mass. 1985) (applying the *New York Times* standard in an action against a union for an article in a local union newspaper, and finding evidence of constitutional malice in the defendant's motivation for defamatorily portraying the plaintiff-foreman as doing "bargaining unit" or labor union work contrary to the union contract with the company: "The jury could therefore have found this motive led the defendant to either fabricate the other charges or to make his accusations based on suspicions and not facts."), *appeal after remand*, 508 N.E. 2d 1368 (Mass. 1987), *cert. denied*, 484 U.S. 964 (1987); *Reesman v. Highfill*, 942 P.2d 891, 901 (Or. Ct. App. 1997) (finding that the false light defendants' pecuniary motivation—to raise money to retire attorney fees generated by a public interest activity—was relevant evidence of constitutional malice), *review allowed*, 952 P.2d 63 (Or. 1998), *rev'd on other grounds*, 965 P.2d 1030 (Or. 1998).

320. *Mahnke v. Northwest Publ'ns, Inc.*, 160 N.W.2d 1, 11 (Minn. 1968).

321. 162 F.3d 1036, 1037 (9th Cir. 1998).

libel action based on a headline, “COPS THINK KATO DID IT,” implicating Kaelin in the murders of Nicole Brown Simpson and Ron Goldman. The third item was the testimony by the defendant’s agent that “the front page of the tabloid paper is what we sell the paper on, not what’s inside it.”³²² The court found the latter evidence was such as to “permit[] a reasonable juror to draw the inference that [the defendant] had a *pecuniary motive* for running a headline that, in [defendant’s agent’s] words, was ‘not very accurate to the story.’”³²³

The second line of authority is a defendant’s prototypical use of hidden camera stories during “sweeps weeks.” “Sweeps weeks” are certain weeks designated periodically throughout the year in the broadcasting industry where the ratings of each broadcast network are measured to determine its overall market share of the viewers.³²⁴ These ratings are then used as a basis to set advertising rates for each broadcaster.³²⁵ In the case of a “sweeps weeks” ratings period for a television audience, this may include publication of defamatory matters to twenty million viewers.³²⁶ This incestuous link between hidden camera stories and “sweeps weeks” has been pervasively established in the literature³²⁷ and constitutes compelling evidence of why hidden cameras—with their documented indicia of endemic unfairness—are so widely used: They make tons of money! Indeed, a leading decision by an esteemed state court has cited publication during “market ‘sweeps’ competition” as a reason for the defendant’s “glaring projection of [the plaintiff’s] name into the public’s eye” based on “rootless speculation.”³²⁸

322. *Id.* at 1042.

323. *Id.* (emphasis added).

324. See *SOS Report from NATPE*, Save Our Sailors (SOS) Campaign Headquarters, at <http://dau.physics.sunysb.edu/~ming/sos/news/natpe-report.html> (last visited Jan. 20, 2002).

325. See *supra* text accompanying notes 97–114.

326. TV news consultants to local television stations offer excerpts, scripts, shots, and even experts to interview—all for the purpose of increasing ratings. KOVACH & ROSENSTIEL, *supra* note 6, at 122.

327. See *supra* discussion Part III.A.

328. *Prozeralik v. Capital Cities Communications, Inc.*, 626 N.E.2d 34, 39 (N.Y. 1993). An appellate court subsequently upheld a judgment for \$6 million for loss of reputation and \$3.5 million for emotional and physical injury but modified the award, deleting punitive damages based on the absence of common law malice. *Prozeralik v. Capital Cities Communications, Inc.*, 635 N.Y.S.2d 913, 914–15 (App. Div. 1995), *appeal dismissed*, 667 N.E.2d 334 (N.Y. 1996), *leave to appeal denied*, 672 N.E.2d 605 (N.Y. 1996). Note that the Seventh Circuit referenced but did not resolve whether “sweeps” evidence was admissible on the constitutional malice issue, finding ample and sufficient evidence thereof on other grounds. *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1138 n.9 (7th Cir. 1987), *appeal after remand*, 14 Media L. Rptr. 1861 (7th Cir.), *cert. denied*, 485 U.S. 99 (1988).

D. Constitutional Malice Is Shown by the Commission of Any Eavesdropping Tort and Crimes that Enable the Making of the Defamation

As early as the Talmud, the eavesdropper was deemed a violator of individual privacy.³²⁹ The common law of crimes later treated eavesdroppers as indictable and punishable by fine and sureties of future good behavior.³³⁰ Today, surreptitious surveillance by hidden camera is generally a tort³³¹ and often a crime.³³² Moreover, most courts (including the Supreme Court³³³) have rejected any suggestion that criminal or tortious newsgatherers can bootstrap themselves out of liability³³⁴ by attempting to justify such surveillance after the fact by a “look what we found!” assertion of newsworthiness or public interest.³³⁵ Implicit or explicit in the conclusion that the newsgatherer is not above the law³³⁶ and remains

329. SAMUEL H. HOFSTADTER & GEORGE HOROWITZ, *THE RIGHT OF PRIVACY* § 105 (1964).

330. *Id.* (quoting WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 169 (1966)).

331. ELDER, *PRIVACY*, *supra* note 18, § 2:5, at 34–39 & n.9; *id.* § 2:6, at 41 & n.26.

332. *See Can We Tape? A Practical Guide to Taping Phone Calls and In-Person Conversations in the 50 States and D.C.*, NEWS MEDIA & L., Apr. 1, 2000, 2000 WL 17664749.

333. *See Cohen v. Cowles Media, Co.*, 501 U.S. 663, 670 (1991) (rejecting First Amendment protection against liability on a promissory estoppel theory where the defendant was sued for breaching a promise of anonymity to a source).

334. ELDER, *PRIVACY*, *supra* note 18, § 2:17A, at 87–89 & nn.56–72.

335. *Cohen*, 501 U.S. at 671; *cf. id.* at 678 (Souter, J., with Marshall, J., Blackmun, J., and O'Connor, J., dissenting) (finding the speech in question was political speech “of the sort quintessentially subject to strict scrutiny,” therefore requiring balancing of competing interests). Under this view, “the circumstances of acquisition are [not] irrelevant to the balance . . . although they may go only to what balance against, and not to diminish, the First Amendment value of any particular piece of information.” *Id.* at 679. Here, however, the state’s interest in protection of confidentiality was outweighed by the interest in the “unfettered publication” of the information at issue. *Id.*

336. *Id.* at 669 (“The press may not with impunity break and enter an office or dwelling to gather news.”). Indeed many newsgathering torts sound in trespass or fraud and would give substantial impetus to any constitutional malice necessary to surmount any defamation or right of privacy claim. *See, e.g., O’Brien v. Papa Gino’s of Am., Inc.*, 780 F.2d 1067, 1074 (1st Cir. 1986) (upholding jury verdict that based its decision, at least in part, on employer’s personal grudge with employee); *Weber v. Multimedia Entm’t*, 26 Media L. Rep. 1376, 1379–80 (S.D.N.Y. 1998) (allowing fraud claim to proceed where Sally Jessy Raphael was alleged to have induced a consent to appear by the forgery of a juvenile’s signature of her mother); *Food Lion v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 820 (M.D.N.C. 1995) (allowing fraud and trespass claims to proceed where media assumed false identities to obtain footage); *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 758 (N.D. Cal. 1993) (allowing fraud claim to proceed where media entered plaintiff’s home under false pretenses); *W.C.H. of Waverly v. Meredith Corp.*, 13 Media L. Rep. 1648, 1649–50 (W.D. Mo. 1986) (denying summary judgment on common law fraud claim where journalist misrepresented himself to gather the news); *Belluomo v. KAKE TV & Radio, Inc.*, 596 P.2d 832, 844 (Kan. Ct. App. 1979) (Where a TV station obtained footage under false pretenses, “If the purported consent was fraudulently induced, there was no consent.”); *Dickerson v.*

subject to rules of general applicability³³⁷ is a conclusion that such excesses need to be deterred and sanctioned.³³⁸

Parallel public policies argue compellingly for treating such torts or illegalities as probative evidence of constitutional malice in defamation and false light cases. Where defendants stoop to illegality, they engage in anti-social behavior punishable criminally and/or in tort (via compensatory and punitive damages).³³⁹ Why? Because the law desires, in the strongest possible terms, to send a message to invading defendants, whether by fine, imprisonment, or imposition of damages that the extraordinarily culpable misconduct engaged in is unconscionable and will not be tolerated.³⁴⁰ Indeed, it seems clear that defendants willing to circumvent the law in pursuit of what they self-define³⁴¹ as the “truth”³⁴² and the greater good (but which is almost invariably a lie under another label³⁴³) should and must be told that this ends-justifies-whatever-means-used will, at minimum, reflect on the credibility³⁴⁴ of the defendants’ assertions of good faith at trial. Surely, there is nothing unique or unusual in this respect. The courts have repeatedly cited a laundry list of factors undermining a defendant’s credibility, including instances of deception, lying, evasiveness, and contradictory utterances in supporting a finding of constitutional malice.³⁴⁵

Raphael, 564 N.W.2d 85, 90–92 (Mich. Ct. App. 1997) (finding Michigan law was violated because of a hidden camera taping by Sally Jesse Raphael); *Special Forces Ministries v. WCCO T.V.*, 584 N.W.2d 789, 793–94 (Minn. Ct. App. 1998) (upholding denial of a motion for summary judgment on claims of fraud, trespass, and defamation by a hidden camera television investigation using undercover false employees); *Copeland v. Hubbard Broad., Inc.*, 526 N.W.2d 402, 405 (Minn. Ct. App. 1995) (holding a triable issue remained as to the scope of consent for trespass); *Buller v. Pulitzer Publishing*, 684 S.W.2d 473, 481–83 (Mo. Ct. App. 1984) (declining to find consent where the defendant newsreporter concealed her identity from the plaintiff-psychic).

337. *Id.* (“[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”).

338. *Id.* at 671–72 (The Court rejected an argument that liability would impose “legal incentives not to disclose” a confidential source’s newsworthy identity as merely an “incidental, and constitutionally insignificant, consequence of applying to the press a generally applicable law that requires those who make certain kinds of promises to keep them.”).

339. *See Logan, Masked Media*, *supra* note 11, at 164.

340. *See id.*

341. *See infra* text accompanying notes 372–90.

342. *See id.*

343. *See id.*; *see also* sources cited *supra* note 117 (discussing the ethics of lying).

344. *Logan, Stunt Journalism*, *supra* note 11, at 163 (“Deceit undercuts the credibility of the facts actually revealed.”).

345. In simple terms, society does not want its inhabitants to lie, as doing so is anti-social conduct; it especially does not want its journalists—those who are by “profession” manifested with the obligation to tell the truth—to lie in obtaining the same. Under the maxim *falsus in uno*,

Indeed, a presumption of constitutional malice should occur when tortious and/or criminal conduct is committed in the name of the First Amendment, when the gathering and presentation of a story do not meet fundamental minimum standards of fairness, obvious to anyone who can think rationally. If a journalist is willing to commit a crime and to lie, then why should the story or the journalist be believed at all? The typical torts and crimes are violations of federal and state eavesdropping statutes, trespassing intrusions, fraud and the like. Any of these violations should be

falsus in omnibus, a permissible inference for a trier of fact is that if a witness testifies falsely in one respect to a material fact, then a jury may infer that the witness testified falsely in all respects. *State v. Sturchio*, 22 A.2d 235, 236 (N.J. 1941); *Hargrave v. Stockloss*, 21 A.2d 820, 823 (N.J. 1941); CAL. JURY INSTRUCTIONS CIVIL (BAJI) § 2.22 (8th ed. 1994) (“A witness false in one part of his or her testimony is to be distrusted in others.”). This rule of common sense can be applied to the facts of most defamation cases, and certainly towards finding constitutional malice. If the story is obtained by a series of lies and deceits (often actual fraud), there is clear evidence of constitutional malice. Precedents cite factors relating to a defendant’s credibility on the constitutional malice issue. See *Harte-Hanks*, 491 U.S. 657, 684–85 (1989) (The Court opined that variances in the defendant’s employees’ testimony may have precipitated the jury to find “the failure to conduct a complete investigation involved a deliberate effort to avoid the truth.”); *Brown & Williamson*, 827 F.2d at 1134–36 (finding a “strong” or “compelling” inference of constitutional malice from bad faith destruction of documents); *Davis v. Schuchat*, 510 F.2d 731, 735–36 (D.C. Cir. 1975) (illustrating numerous instances of contradictory statements and evasion); *Sharon v. Time, Inc.*, 599 F. Supp. 538, 569–72 (S.D.N.Y. 1984) (Many factors were listed as affecting credibility: (1) a questionable construction of the story as non-defamatory; (2) prior discipline for exaggeration regarding sources; (3) less than complete disclosure at deposition; and (4) deposition explications inconsistent with earlier actions.); *Carey v. Hume*, 390 F. Supp. 1026, 1030 (D.D.C. 1975) (detailing misstatements regarding a source in a subsequent article), *aff’d*, 543 F.2d 1389 (D.C. Cir. 1976); *S. Air Transp., Inc. v. Post-Newsweek Stations, Fla., Inc.*, 568 So. 2d 927, 928–29 (Fla. Dist. Ct. App. 1990) (citing an on-the-air misrepresentation that the plaintiff refused to comment about omitting details undermining a source’s credibility and misstating her credibility, and implying criminality without a foundation for such), *rev. denied*, 581 So. 2d 166 (Fla. 1991); *Holter v. WLCY T.V., Inc.*, 366 So. 2d 445, 456 (Fla. Dist. Ct. App. 1978) (providing numerous examples of the defendant’s fabrication and misleading of his employer), *cert. denied*, 373 So. 2d 462 (Fla. 1979); *Durso v. Lyle Stuart, Inc.*, 337 N.E.2d 443, 447 (Ill. App. Ct. 1975) (Several factors injured an author’s credibility: (1) inability to explain how the error happened; (2) failure to produce the manuscript galley or page proofs; (3) an “unbelievable” statement (that he had not kept a copy of the manuscript); (4) variance of deposition from trial testimony; and (5) the lack of believability of an assertedly unintended inclusion of an erroneous nexus making the required link between the theme of politics and crime.); *Montana v. Smith*, 461 N.Y.S.2d 603, 604 (App. Div. 1983) (The defendant’s reiterated denials of knowing the plaintiff, in light of significant evidence to the contrary, were “unconvincing and seriously damage[d] his credibility.”); *Nev. Indep. Broad. Corp. v. Allen*, 664 P.2d 337, 345 (Nev. 1983) (showing material contradictions in author’s testimony); *Deloach v. Beaufort Gazette*, 316 S.E.2d 139, 141 (S.C. 1984) (explaining how the reporter “inadvertently destroyed” notes after litigation had been filed and failed to do a report required by the defendant-employer’s procedure explaining a factual error); *Savitsky v. Shenandoah Valley Publ’g Corp.*, 566 A.2d 901, 904 (Pa. Super. Ct. 1989) (The defendants’ testimony that it attached no significance to the allegedly defamatory statement (i.e., that a union official-candidate campaigned in a coal operator’s helicopter) was deemed incredible in a coal area with numerous labor controversies.).

sufficient to create a presumption of constitutional malice. Triers of fact should be allowed to consider the sheer weirdness of these concocted stories that constitute intentional interferences with the fabric of society using “actors”/“impersonators.” Journalists critical of hidden cameras have drawn parallel conclusions, particularly as to the “PrimeTime Live” story on Food Lion.³⁴⁶

Other cases have not limited the finding of probativeness to issues of credibility. In a false light case that has stunning similarities to a hidden camera case, the court upheld compensatory and punitive damage claims where the defendant’s agents publicized the plaintiff’s innocuous but unusual employment (involving a diving pig at an amusement park³⁴⁷) in a magazine that the court characterized as an essentially pornographic “glossy, oversized hard-core men’s magazine.”³⁴⁸ The plaintiff first became aware she had been featured when confronted by a stranger in a drive-in grocery store: a man approached her, stating “Hey, I know you!” and went to retrieve the magazine.³⁴⁹ She testified that her “legs were like jelly” and she felt “petrified.”³⁵⁰ When he returned and showed her her picture, the plaintiff “felt like crawling in a hole and never coming out,”³⁵¹ a feeling almost invariable shared by hidden camera victims.³⁵²

Sound familiar? Mrs. Braun’s worst dream, any woman’s (or man’s) unparalleled nightmare had happened. Hundreds of thousands (multiply that by major multiples for a nationally-broadcast hidden camera piece³⁵³)

346. Sjoerdsma, *supra* note 117. “When a journalist lies to get a story, she compromises the credibility of her sources, her product, her medium and . . . herself. She flat out abuses the public trust.” *Id.* “If ABC lied to get inside Food Lion, maybe it also lied about the bleach and the rewrapping. Maybe the employees it featured were disgruntled liars themselves: A number of them had sued Food Lion over wage violations. Maybe ABC distorted, exaggerated, manipulated its coverage, visual and otherwise.” *Id.*; see also Gunther, *Yikes*, *supra* note 104, at 232 (quoting Pam Rieder, editor of the *American Journalism Review*: “If a reporter tells not only one lie but a pattern of lies to get a story, how do you know the reporter is telling the truth about other things?”); Gunther, *Yikes*, *supra* note 104, at 232 (quoting counsel for Food Lion, Andrew Copenhaver, as to a co-producer-disloyal employee: “She’s lied to get in there. She’s lied to her fellow employees. Who can say whether she’s going to tell the truth about the dates on a piece of meat?”); see also Baker, *supra* note 97 (quoting the same Copenhaver comment); Gunther, *Lion’s Share*, *supra* note 95, at 20 (quoting Copenhaver: “Can anyone really trust ABC? . . . Lying is part of the very fabric of ‘PrimeTime Live.’”); Kalb, *supra* note 181 (“If journalists play games getting a story, then many people may feel that they play games reporting a story too.”).

347. *Braun*, 726 F.2d at 247–48, 258.

348. *Id.* at 247.

349. *Id.* at 248.

350. *Id.*

351. *Id.*

352. See Lissit, *Gotcha*, *supra* note 9, at 21.

353. See *id.*

saw her in the most negative of lights, while Mrs. Braun had no forewarning of the publicity, no reason to expect it, and of course no opportunity to respond.³⁵⁴ While the picture used of Mrs. Braun was a still photo, the fact that hidden cameras use live footage produces a more dramatic result. The moving images, often in black and white, magnify the damage and enhance the voyeuristic thrill³⁵⁵ for the viewer. Of course, the defendants knew that neither she nor her employer would volunteer a photo for the “Chic Thrills” section of the magazine, so they lied to the plaintiff’s employer about the nature of the magazine, implying that it had the same readership as *Redbook* or *McCalls*.³⁵⁶

The court rejected the defendant’s self-justifying “tap dancing”³⁵⁷ and found the employer’s transfer to be “fraudulently induced . . . the legal equivalent of no consent.”³⁵⁸ Moreover, these misrepresentations were neither “inadvertent [nor] immaterial” but were made by at least two employees to “consciously deceive”³⁵⁹ the employer, *knowing* that the employer would not have otherwise consented.³⁶⁰ The court found the juxtaposition of her picture among a series of vulgar cartoons and jokes to be a highly offensive actionable false light depiction *and* further held that the defendants were aware the placement of the photo would create such a false impression.³⁶¹

Sound familiar? It should, because it tracks the format of a typical hidden camera story, a calculated false impression by design, slant, juxtaposition, and omission.³⁶² And the court nailed the defendants for it, finding the constitutional malice required for punitive damages “strongly supported” by the defendant’s employees’ *conscious misrepresentations* to get the photo to make the story³⁶³—in other words, to get the photo to *create* the story.

In a similar case against *Hustler* magazine (owned by the same defendant, Larry Flynt),³⁶⁴ the court likewise found the defendant liable for

354. *Id.* Such a failure may be evidence relevant to constitutional malice. *See infra* text accompanying note 558.

355. *See supra* notes 94–96 and accompanying text.

356. *Braun*, 726 F.2d at 247–48.

357. *Id.* at 255.

358. *Id.*

359. *Id.* at 257.

360. *Id.*

361. *Id.*

362. *See supra* text accompanying notes 118–26; *see also* discussion *supra* Part V.B; *see also* discussion *infra* Part V.E.

363. *Braun*, 726 F.2d at 257.

364. *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985), *cert. denied*, 475

what equated to a theft of photographic images³⁶⁵ where the responsible photographic editor (whether employee or independent contractor was held immaterial³⁶⁶) was both vendor and purchasing agent for the defendant under respondeat superior.³⁶⁷ The agency relationship was the basis for a finding of constitutional malice due to the false representation that the plaintiff actress voluntarily associated with the defendants' sleazy magazine.³⁶⁸

In sum, two magazines were held liable in false light (where the constitutional malice applies, at least as to public figures³⁶⁹) based on fraudulent or quasi-criminal acquisition of images that were the bases for the false and highly offensive portrayals.³⁷⁰ The parallels to prototypical hidden camera cases are obvious. A hidden camera operative (often but not always an employee³⁷¹) fraudulently acquires film footage for use in a story where the defendant is aware, and indeed *intends* a false portrayal (or, at minimum, recklessly disregards the likelihood thereof). There is no difference in legal terms between fraudulent acquisition (no consent) and theft (appropriation without consent) in the latter cases and the prototypical hidden camera cases, except for damages—the footage is likely to be live and the market much larger.

U.S. 1094 (1986).

365. *Id.* at 1139 (analogizing the case to a common law copyright violation, i.e., a theft and unauthorized use of a manuscript); *id.* at 1138 (discussing *Wood v. Hustler Magazine, Inc.* 736 F.2d 1084 (5th Cir. 1984), *cert. denied* 469 U.S. 1107 (1985), where a woman had a right to sue over publication of a photo resulting from someone breaking into her home and stealing it).

366. *Id.* at 1140.

367. *Id.* (finding respondeat superior “fully applicable” to media defendants); see also ELDER, DEFAMATION, *supra* note 37, § 7.8 (providing a detailed discussion of respondeat superior in this context).

368. See *Douglass*, 769 F.2d at 1139–40.

369. See ELDER, PRIVACY, *supra* note 18, § 4:12A. The Supreme Court has never ruled on whether the pre-*Gertz* case of *Time, Inc. v. Hill*, 385 U.S. 374, 388–91 (1967) (holding that false light cases involving matters of public interest were subject to the *New York Times* standard without regard to status) remains viable. See *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 250 (1974) (The case presented no occasion to decide whether a state could adopt “a more relaxed standard” in private person-false light cases.); see also *Cox Broad. Corp. v. Cohn* 420 U.S. 469, 498 n.2 (1975) (Powell, J., concurring) (stating that *Gertz* “calls into question the conceptual basis” of *Time, Inc. v. Hill*); see also ELDER, PRIVACY, *supra* note 18, § 4:12B.

370. See ELDER, PRIVACY, *supra* note 18, § 4:4 (discussing the highly offensive standard in false light privacy cases).

371. See sources cited *supra* note 86 (discussing cases on vicarious liability in the constitutional malice context).

E. False Editing by Omission, Distortion and Juxtaposition May Be Defamatory and Made with Constitutional Malice

In a powerful critique of hidden camera journalism (and defense of publication damages in illegal newsgathering cases), eminent torts scholar Richard Epstein concludes that the “current literalist view of truth” allows an investigative reporter defendant to make a claim for “a literal but consciously nonrepresentative truth”³⁷² despite the investigative reporter’s being “consumed by selection bias”³⁷³ that virtually ensures the reporter “will select and cull information in a way that places its target in the most unfavorable light.”³⁷⁴ He cites *Food Lion* as an example of this manipulable tactic, where the segments of footage shown “were not shown in any way to be representative of the practices of Food Lion as a whole,”³⁷⁵ totally undermining the “entire social justification for the expose”—to allow better-informed consumers to make more intelligent decisions.³⁷⁶

Professor Epstein vigorously questions whether “the literal truth of any single episode” should be treated as “true” for privacy and defamation purposes and concludes: “If not, then in an important sense the exaggerated forms of reporting are more false than true, so that the boundary between defamation and invasion of privacy is shifted in the wrong direction.”³⁷⁷ He offers the following argument:

372. Epstein, *supra* note 4, at 1032.

373. *Id.* at 1020.

He enters multiple premises under false pretenses, but the only information he will publish is that known to be harmful to the plaintiff. That information, moreover, will be published in a form calculated to score a knockout blow. Any story that vindicates the plaintiff’s practices ends up on the cutting room floor. The plaintiff, therefore, wants to exclude this party because her expected utility from this entry is always negative.

Id.

374. *Id.* at 1031. Epstein cites typical examples of the method used:

The photographs chosen to be published can catch the target with jowls sagging in mid-sentence; they can be shot at odd angles; they can be cropped so as to show only parts of the face. Bits of dialogue can be taken out of context. Single instances that are not representative of the whole can be given undue prominence in the overall setting.

Id.

375. *Id.*

The reporters may have goaded the employees into participating in these practices. There was no effort to indicate the frequency of these occurrences at other Food Lion outlets, or to ask the question of whether the same rate of failure took place at the stores of any of its competitors.

Epstein, *supra* note 4, at 1031–32.

376. *Id.* at 1032.

377. *Id.*

[A]ll investigative reporting should be regarded as presumptively false (given the biased approach to its collection and dissemination) so that, whatever the initial burden of production, the statements should be treated as though they were false unless the defendant can show, by analogy to the record libel privilege, that they constituted a fair and accurate abridgment of the true state of affairs.³⁷⁸

Professor Epstein views it as a “virtual certainty that First Amendment exceptionalism” will bar adoption of his presumptive falsity proposition, with the corollary that many defamation cases will remain “improperly reclassified” as privacy cases.³⁷⁹ Professor Epstein may be too pessimistic. Given the doctrine of libel by omission³⁸⁰ (including even statements of opinion based on substratal facts that “are either incorrect or incomplete, or [the] assessment of them is erroneous”³⁸¹) and the plethora of constitutional malice precedent dealing with distortions and slants by omission of substantial mitigating or refutatory matter,³⁸² it is not at all clear that a single episode will always be deemed true instead of materially false and made with constitutional malice where evidence inconsistent therewith or substantially exculpatory thereof is deliberately ignored. Indeed, it is the authors’ position that such a scenario is the norm in hidden camera cases and that such a calculated media decision leaves the injured plaintiff with choices as to the theories to rely on, plead, and prove. These choices may well include economic considerations such as the measurably higher costs of processing a libel or false light claim with the plethora of defendant-protective hurdles constructed over time by a defendants’ bar and judiciary more concerned with an “uninhibited press” than the “equally compelling need for judicial redress of libelous utterances.”³⁸³

When libel plaintiffs and their lawyers start questioning the methodology used in “selection bias” (to use Professor Epstein’s

378. *Id.* at 1032 (citations omitted). See generally ELDER, FAIR REPORT, *supra* note 162, § 1:19B (discussing the “fair report” privilege, also known as the “record libel” privilege).

379. Epstein, *supra* note 4, at 1032.

380. See ELDER, DEFAMATION, *supra* note 37, § 1:2, at 19–20; see also Healey v. New England Newspapers, Inc., 555 A.2d 321, 326 (R.I. 1989) (“The ‘defamation’ at issue here really consists of what was left unprinted as well as what was actually printed.”); Memphis Publ’g Co. v. Nichols, 569 S.W.2d 412, 414, 420 (Tenn. 1978) (The omission of the fact that two other persons were present at the scene of a shooting made it appear the plaintiff was having an affair with the suspect’s husband at said location.).

381. Milkovich v. Lorain Journal Co., 497 U.S. 1, 18–19 (1990); see also *infra* text accompanying notes 408–15.

382. See, e.g., Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 516–17 (1991); *Harte-Hanks*, 491 U.S. at 692–93; *Herbert*, 441 U.S. at 172–73.

383. *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976).

memorable phrase), media defendants and their lawyers engage in a cacophony of phony breast-beating about the horrors of second-guessing editorial decisions and the self-censorship that will be precipitated thereby.³⁸⁴ Courts have³⁸⁵ and should continue to view such with a barrel of salt and reject such self-interested, disingenuous knee-jerk reasoning. Indeed, the short answer is that the Supreme Court has repudiated such an approach in *Masson v. New Yorker Magazine, Inc.*³⁸⁶ by incorporating the “historical understanding”³⁸⁷ of the truth defense (“overlook[ing] minor inaccuracies” and focusing on “substantial truth”³⁸⁸) into the plaintiff’s burden of proving *material falsity*.³⁸⁹ Under this view a defendant *insubstantially* altering the plaintiff’s words or *insubstantially* misportraying the plaintiff in a defamatory fashion or false light “effects no material change in meaning, including any meaning conveyed by the manner or fact of expression, [and] the speaker suffers no injury to reputation that is compensable as defamation.”³⁹⁰

In sum, the well-documented rule is that the defendant’s right of editorial control exists *only* as to items, whether included or deleted, that do not effect the “substance” of the charge and render it *materially* false. Furthermore, as *Herbert v. Lando*³⁹¹ has forcefully demonstrated, inquiry into editorial choices is neither barred from discovery nor assessment at

384. See, e.g., *Newton v. NBC, Inc.*, 930 F.2d 662, 685–86 (9th Cir. 1990), *cert. denied*, 502 U.S. 866 (1991); *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir. 1977), *cert. denied*, 434 U.S. 834 (1977); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 366 N.E.2d 1299, 1308 (N.Y. 1977), *cert. denied*, 434 U.S. 969 (1977).

385. *Hotchner*, 551 F.2d at 914 (stating that “the change did not increase the defamatory impact or alter the substantive content” of the statement); see also *Newton*, 930 F.2d at 685–86 (rejecting the plaintiff’s argument over language choices and editing decisions).

Quibbles over the precise wording of a sentence [the plaintiff] concedes is true do not contribute meaningfully to the actual malice inquiry. . . . [T]he omission [contested by the plaintiff] has minimal probative value on the issue of actual malice. The sentence *does not mislead listeners* about the nature of the grand jury’s investigation.

Newton, 930 F.2d at 685 (emphasis added).

[T]he omissions . . . are not so material as to alter significantly the conclusion to be drawn from the episodes reported. . . . [O]mission of relatively minor details in an otherwise basically accurate account is not actionable. This is largely a matter of editorial judgment in which the courts, and juries, have no proper function.

Rinaldi, 366 N.E.2d at 1308.

386. 501 U.S. 496 (1991).

387. *Id.* at 517.

388. *Id.* at 516.

389. *Id.* at 517.

390. *Id.* at 516.

391. 441 U.S. 153 (1979).

trial.³⁹² The Court forcefully rejected the defendants' argument for an absolute immunity from inquiry, concluding that such a direct inquiry will produce "more accurate results" by placing the totality of evidence, direct and indirect, before the fact finder.³⁹³ The Court provided a powerful and tellingly appropriate (particularly for hidden camera aficionados) illustration for its conclusion:

Suppose, for example, that a reporter has two contradictory reports about the plaintiff, one of which is false and damaging, and only the false one is published. In resolving the issue whether the publication was known or suspected to be false, it is only common sense to believe that inquiry from the author, with an opportunity to explain, will contribute to accuracy. If the publication is false but there is an exonerating explanation, the defendant will surely testify to this effect. Why should not the plaintiff be permitted to inquire before trial? On the other hand, if the publisher in fact had serious doubts about accuracy, but published nevertheless, no undue self-censorship will result from permitting the relevant inquiry. Only knowing or reckless error will be discouraged . . . constitutional values will not be threatened.³⁹⁴

In *Harte-Hanks*, the Supreme Court itself counseled media defendants against "purposeful avoidance of the truth" for omitting to review a tape within its possession and failing to contact a "key witness" who could corroborate or refute defendants' source.³⁹⁵ If "an intent to avoid the truth" can be found in omission to review or interview under such circumstances, i.e., "inaction was the product of a deliberate decision *not to acquire knowledge* of facts that *might confirm* the probable falsity,"³⁹⁶ of the source's charges, then omission or distortion of *known* contradictory or refutatory information is even more compellingly culpable and actionable. The Court also cautioned defendants in *Harte-Hanks* they were not absolved of liability simply because some aspects of the source's account were confirmed by the plaintiff.³⁹⁷ The Court recited the aphorism: "[T]he

392. *Id.* at 173.

393. *Id.* at 172-73. This reasoning would support a plaintiff's right to review a defendant's outtakes. See *Williams v. ABC, Inc.*, 96 F.R.D. 658, 669 (W.D. Ark. 1983) ("It is clear that in false light cases, akin to defamation, wherein the false light is allegedly the result of selective editing, out-takes of film would be highly probative and in many cases the only proof of selective editing.").

394. *Id.* at 173 (citations omitted).

395. 491 U.S. at 692-93.

396. *Id.* at 692 (emphases added).

397. *Id.* at 691 n.37.

defamer may be [all] the more successful when he baits the hook with truth."³⁹⁸

Against this backdrop, it is important to examine the cases supporting a finding of constitutional malice as to investigative pieces by hidden camera "journalists" "consumed by selection bias"³⁹⁹ and who prototypically "select and cull information in a way that places its target in the most unfavorable light."⁴⁰⁰ One line of cases⁴⁰¹ permits a finding of constitutional malice where a defendant "knowingly or recklessly misstate[d] . . . evidence to make it seem more convincing or condemnatory"⁴⁰² than it in fact was. Similarly, defendants may be held liable where they calculatedly adopt "the most potential[ly] damaging alternative" construction of a statement or scenario.⁴⁰³ As a co-author of

398. *Id.* (quoting *Afro-American Publ'g Co. v. Jaffe*, 366 F.2d 649, 655 (D.C. Cir. 1966) (en banc)); see also *Tavoulares*, 817 F.2d at 787.

399. Epstein, *supra* note 4, at 1020.

400. *Id.* at 1031. One commentator compellingly critiqued the distorting impact of multiculturalism in the newsroom:

Stories that might have explored the downside of diversity, its wobbly, unexamined assumptions, or its internal contradictions were either ignored or reported with euphemism and embarrassment, as through a fog of avoidance. Unpalatable facts got an airbrushing, while critical voices remained unsought or unacknowledged. Instead of questioning whether multiculturalism was something we really wanted, and letting the American public decide, the press treated it as an immutable *fait accompli*, ignoring competing perspective and contradictory information that might have cast another light on the concept. The sins of omission were as bad as those of commission, and brought to mind Orwell's famous observation that propaganda is as much a matter of what is left out, as of what is actually said.

MCGOWAN, *supra* note 11, at 25–26.

401. *Westmoreland v. CBS, Inc.*, 596 F. Supp. 1170 (S.D.N.Y. 1984). The court provided illustrations:

If, for example, a publication asserts falsely and without basis that the charge was confirmed by an eyewitness, if in the editing process it distorts statements of witnesses so that they seem to say more than in fact was said, or if it falsely overstates a witness' basis for his accusation, these might raise triable issues of constitutional malice in spite of a sufficient foundation for the constitutionally protected publication of the basic charge.

Id. at 1174; see also *Sharon v. Time, Inc.*, 599 F. Supp. 538, 582 (S.D.N.Y. 1984) (The defendant "qualitatively transformed" an account from the defendant-magazine's view of the facts to "a finding by a widely respected, quasi-judicial body."); *Sprague v. Walter*, 516 A.2d 706, 723–24 (Pa. Super. Ct. 1986) (The defendant's rewrite that excised a reference to "hearsay" and realigned the word "allegedly" thereby "connot[ing] a meaning other than initially intended," was "not synonymous with innocent or negligent misstatements."), *aff'd*, 543 A.2d 1078 (Pa. 1988), *appeal dismissed*, 488 U.S. 988 (1988).

402. *Westmoreland*, 596 F. Supp. at 1174.

403. *Rebozo v. Wash. Post Co.*, 637 F.2d 375, 382 (5th Cir. 1981) (Adoption of such an interpretation as to a dispute whether the plaintiff knew certain stock was stolen or merely missing created a jury question as to actual malice.), *cert. denied*, 454 U.S. 964 (1981); see also *Catalano v. Pechous*, 419 N.E.2d 350, 360 (Ill. 1980) (The defendant inferred bribery rather than "[p]olitical motivations" from the "precipitous manner" in which a contract was awarded.), *cert.*

this article has concluded elsewhere, “[s]uch material, factual exaggerations created factual evidence for the jury as to whether the publications were indeed made with or without serious doubt as to truthfulness.”⁴⁰⁴

Defendants have likewise been held liable for deliberate omission of important data or information that would have “substantially modified, qualified, or eliminated”⁴⁰⁵ the defamatory thrust. Indeed, the cases reflect the view that “not to tell the whole truth was in effect to lie.”⁴⁰⁶ In other

denied, 451 U.S. 911 (1981); *Fopay*, 334 N.E.2d at 90–91 (Despite knowledge that the plaintiff had received authorization from a hospital administrator, the defendant continued to characterize a sale of x-rays as “illegal” or “dishonest,” construing questionable judgment by an administrator into illegality of the plaintiff and implying thereby that such was reached by higher authority.); *Warford v. Lexington Herald-Leader Co.*, 789 S.W.2d 758, 773 (Ky. 1990) (The defendant magnified ambiguous references by a source-athlete into an explicit statement by the source that the plaintiff-recruiter-coach “offered him money.”), *cert. denied*, 498 U.S. 1047 (1991) (following *Rebozo*); *Mahnke*, 160 N.W.2d 11 (The defendant gave “the most controversial view possible” of the change in the face of a warning that the matter at issue was “based entirely upon a misunderstanding.”); *Vasquez v. O’Brien*, 445 N.Y.S.2d 305, 307 (App. Div. 1981) (The defendant imputed a motive of personal gain to a request to him by the plaintiff-police chief to provide free towing.); *Akins v. Altus Newspapers, Inc.*, 609 P.2d 1263, 1266–67 (Okla. 1977) (The defendant transformed ambiguous statements about an investigation into whether a kidnapping had occurred into an unqualified allegation of kidnapping by gunpoint.), *cert. denied*, 449 U.S. 1010 (1980); *Stickney v. Chester County Communications, Ltd.*, 522 A.2d 66, 69 (Pa. Super. Ct. 1987) (The defendant enhanced an official source’s accidental version of an incident into one where the plaintiff-police officer “intentionally ‘rubbed’” the person’s face in the dirt.), *app. denied*, 533 A.2d 713 (Pa. 1987).

404. ELDER, DEFAMATION, *supra* note 37, § 7.12A, at 99.

405. *Id.* at 100–01.

406. *O’Brien*, 780 F.2d at 1073. A common variation is the single or double whammy distortion involving an expert. The single whammy distortion is where the defendant searches until it finds the expert it wants. This is a common media practice. See GOLDBERG, *supra* note 11, at 20.

Well, news fans, here’s one of those dirty little secrets journalists are never supposed to reveal to the regular folks out there in the audience: a reporter can find an expert to say anything the reporter wants—*anything!* Just keep calling until one of the experts says what you need him to say and tell him you’ll be right down with your camera crew to interview him.

Id. If one or more are not helpful, you just hang up until you find the right lackey. “It’s how journalists sneak their own personal views into stories in the guise of objective news reporting.” *Id.*; see also KOVACH & ROSENSTIEL, *supra* note 6, at 74 (“Journalists who select sources to express what is really their own point of view, and then use the neutral voice to make it seem more objective, are engaged in a form of deception. This damages the credibility of the whole profession by making it seem unprincipled, dishonest, and biased.”). In addressing the sense that the newsroom is “distant and alienated,” one response has been “abandoning the principle of independence” in favor of taking sides:

In this new incarnation, partisans function as “media people”—talk show hosts, commentators, or guests on TV or radio. Usually they purport to be independent experts—they are identified as former federal prosecutors, legal scholars, or other disinterested professionals—when in fact they are party surrogates. They might better be described as “media activists” . . . [T]hese people increasingly are far

words, a news magazine's deliberate decision to *omit* material matter *known* to the newsgatherer prior to the showing of the edited footage creates a distorted, inculpatory telecast evidencing, at best, a recklessly false depiction, and, at worst, a knowingly false portrayal, i.e., an orchestrated fabrication. As one court trenchantly stated in finding constitutional malice from the defendant's omission of part of a known public record, the defendant did so "simply because it refuted the point they were trying to make."⁴⁰⁷

In the leading exemplar, *Schiavone Construction Co. v. Time, Inc.*,⁴⁰⁸ the Third Circuit held that the defendant's decision to delete exculpatory matter, together with an editorial comment, was itself sufficient to sustain a finding of constitutional malice.⁴⁰⁹ In this case the defendants were sued for reporting that the Schiavone name "appeared several times in the bureau's reports on the 1975 disappearance of former Teamster Boss Jimmy Hoffa" together with an editorial comment that such a detail "would surely have intrigued" both the Senate committee that approved the cabinet nomination of Ray Donovan, company officer and stock holder, and the special prosecutor.⁴¹⁰ However, the defendants deleted the important qualification to the memo that "none of these [appearances in the Hoffa execution files] suggested any criminality, or organized crime associations."⁴¹¹

The court held the author-defendant's decision to "simply delete language that cast a very different and more benign light" on the facts

less expert than they pretend, and often have little regard for accuracy.

KOVACH & ROSENSTIEL, *supra* note 6, at 101–02. Of course, you can go a further step and farm for an expert, then spoon feed the expert selective information calculated to reach the preordained view you want him to parrot. This is what the authors call the double whammy distortion—selective selection of an expert and selective selection of the information upon which he or she bases the "expert" "opinion." Note that when an "opinion" is based on facts that "are either correct or incomplete, or if his assessment of them is erroneous," a statement of fact may be implied. *Milkovich*, 497 U.S. at 19 (The Court noted it would destroy the law of libel if a defendant could avoid liability for defamatory conduct by using—explicitly or implicitly—the words "I think."). Thus, an incomplete or incorrect set of substratal facts may imply an actionable false factual statement, such as in cases involving specific imputations of criminality. See ELDER, DEFAMATION, *supra* note 37, § 8:8[B], at 69–72. If it also creates a knowingly or recklessly false implication, the *New York Times* standard may be met. *Id.*

407. *Buratt v. Capital City Press, Inc.*, 459 So. 2d 1268, 1271 (La. Ct. App. 1984), *cert. denied*, 462 So. 2d 654 (La. 1985), *cert. denied*, 474 U.S. 817 (1985); see also *Schlieman v. Gannett Minn. Broad., Inc.*, 637 N.W.2d 297, 305 (2001) (A police officer was allowed to show he was libeled by statements that were omitted from a televised investigative report.).

408. 847 F.2d 1069 (3d Cir. 1988).

409. *Id.* at 1091–93.

410. *Id.* at 1072.

411. *Id.*

reported and the resulting “intrigued” insinuation was independently sufficient for a finding of constitutional malice.⁴¹² Why? The jury could reasonably conclude that the defendants’ “alteration implicitly recognized” that the story would lack “intrigue” *sans* this “significant falsification.”⁴¹³ Accordingly, a jury could decide the defendant knew of the “damning implications, and emphasized them by omitting the exculpatory clause and adding editorial comment to draw attention.”⁴¹⁴ Otherwise stated, a jury could find the “omission of the exculpatory clause significantly altered the message of the memorandum, that [the defendant] knew its implication was false, and that [the defendant] intended that false implication.”⁴¹⁵

Another persuasive case found the defendant liable where the defamation “consist[ed] of what was left unprinted as well as what was actually printed.”⁴¹⁶ The defendant’s reporter was in attendance at the scene where a person collapsed and died.⁴¹⁷ Despite knowing that the plaintiff-doctor, who was presiding at a meeting nearby, acted entirely appropriately, the reporter quoted the decedent’s angry and upset son suggesting that his father should have been given aid by a doctor (i.e., the plaintiff) or paramedic at the meeting.⁴¹⁸ The court found defamation by omission *and* constitutional malice by omission in not disclosing the known facts refuting any suggestion that the plaintiff had acted reprehensibly.⁴¹⁹ In two other cases arising from identical facts, the defendant similarly transformed innocuous professional conduct into heinous conduct by failing to disclose that a photo depicting a group of Mafia hoodlums included the plaintiff’s lawyers, who were acting in a purely representational capacity.⁴²⁰

Other constitutional malice cases involve a combination of conscious juxtaposition and deliberate omission of refutatory matter. For example, in a leading case a present and former head of the strike force on organized crime sued in part for a juxtaposition of their denials of corruption.⁴²¹ The editorial juxtaposition of the denials portrayed one or the other plaintiff as

412. *Id.* at 1092.

413. *Id.*

414. *Schiavone*, 847 F.2d at 1092.

415. *Id.*

416. *Healey*, 555 A.2d at 326.

417. *Id.* at 323.

418. *Id.* at 324, 326.

419. *See id.* at 326–28.

420. *Wasserman v. Time, Inc.*, 424 F.2d 920, 921–22 (D.C. Cir. 1970), *cert. denied*, 398 U.S. 940 (1970); *Time, Inc. v. Ragano*, 427 F.2d 219, 220–21 (5th Cir. 1970).

421. *See Crane v. Arizona Republic*, 972 F.2d 1511, 1522 (9th Cir. 1992).

lying.⁴²² However, the defendants knew but omitted disclosing that the apparently inconsistent nature of the denials was based totally on the timing of the phone calls made by the author to the plaintiffs.⁴²³ The court found this juxtaposition omission was “undertaken either knowingly or in reckless disregard of the false impression it would produce concerning [the plaintiffs’] own credibility,” particularly where the defendants’ “strategic use of the word ‘however’ intentionally or recklessly set up a contrast” that made the plaintiffs’ “protestations of innocence ring hollow.”⁴²⁴

In another case the defendant opened a column with the question, “Records Stolen?” and then stated that the plaintiff-general counsel of the Teamsters was seen with the union president “removing boxfuls of documents” from the latter’s office.⁴²⁵ Next the column referenced the plaintiff’s filing of a criminal complaint of burglary at union headquarters, which included “a boxful of miscellaneous items.”⁴²⁶ The column finished by stating: “The Justice Department is investigating.”⁴²⁷ In fact, the source had also disclosed that the records in question were moved from the union president’s office to the plaintiff’s, a factor the court suggested would “hardly seem newsworthy.”⁴²⁸ However, this distorting omission implied

422. *Id.*

423. *Id.*

424. *Id.* at 1524; *see also* *Montandon v. Triangle Publ’ns, Inc.*, 120 Cal. Rptr. 186 (Ct. App. 1975), *cert. denied*, 423 U.S. 893 (1975). There, the defendant’s publicity release for an upcoming show portrayed the plaintiff-author as the lone participant in a program on how a “party girl” can become a “call girl.” *Montandon*, 120 Cal. Rptr. at 188. The court viewed the defendants’ assertion that they lacked scienter as “fly(ing) in the face of reason.” *Id.* at 189. While the court noted that the defendant’s conduct was “apparently not intentional . . . [t]he conduct was more than negligence, [as] it amounted to an indifference to the impression being given to the general public.” *Id.* at 193; *see also* *Phoenix Newspapers, Inc. v. Church*, 537 P.2d 1345 (Ariz. Ct. App. 1975), *cert. denied*, 425 U.S. 908 (1976), *reh’g denied*, 425 U.S. 985 (1976). The defendant there juxtaposed the fact that the plaintiff-candidate had called for establishment of “peoples councils” with historical references to their use in totalitarian states, knowing the plaintiff did not intend to advocate such a specific use. *Phoenix Newspapers*, 537 P.2d at 1357. The court found such evidence of knowing falsity sufficient to justify submission to the jury. *Id.* at 1358; *see also* *Wilhoit v. WCSC, Inc.*, 358 S.E.2d 397 (S.C. Ct. App. 1987). The defendant there used a photograph of the plaintiff, a character witness in a criminal trial, in conjunction with a story on the convicted party’s sentencing even though the plaintiff objected vociferously and told the defendants she was not the criminal defendant. *Wilhoit*, 358 S.E.2d at 398, 402. The court found this evidenced “flagrant misconduct” and upheld presumed and punitive damages. *Id.* at 400–02; *see also* *Heekin v. CBS Broad., Inc.*, 789 So. 2d 355, 357, 359 (Fla. Dist. Ct. App. 2001). The court there held the plaintiff set out a false light claim where the defendant aired an interview with the plaintiff’s former wife, juxtaposing with it pictures and stories of women battered and killed by domestic partners. *Heekin*, 789 So. 2d at 357, 359.

425. *Carey*, 390 F. Supp. at 1028.

426. *Id.* (quotations omitted).

427. *Id.*

428. *Id.* at 1029.

that the plaintiff obstructed justice and explained it by a false official report of burglary.⁴²⁹

F. The Nature of the Intentionally Damaging Hidden Camera Depiction as Evidence of Constitutional Malice

Being on a hidden camera is fundamentally and by definition a deprivation of human dignity because it implicitly but unequivocally says to the viewer that the person therein is such a low life, so despicable, that he or she should not be allowed to present a defense via the rules of ordinary discourse and fair play, canons to which journalists ostensibly adhere. Think about it. Could anything be more inherently harmful to the interest in reputation, an interest that the Supreme Court has equated to an interest in free expression⁴³⁰ (and that most state constitutions specifically protect⁴³¹) than a hidden camera depiction, where everyone is made to look by definition as a bad guy/girl? As then “PrimeTime Live” Executive Producer Richard Kaplan stated, such are unpopular with people because it is not an American thing: “It reeks a little of the KGB.”⁴³²

429. *Id.*; see also *Turner v. KTRK TV, Inc.*, 38 S.W.3d 103 (Tex. 2000). In a public figure libel case, the court affirmed the libel by omission/juxtaposition doctrine adopted by many courts, allowing a plaintiff to pursue a claim for defamation “when discrete facts, literally or substantially true, are published in such a way that they create a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way.” *Turner*, 38 S.W.3d at 115 (emphasis added). Citing the Texas Constitution’s specific protection of reputation and explicit limitation of the right to publish with responsibility for “abuse” thereof, the court rejected greater protection under the state constitution for libel by omission/juxtaposition in public figure cases. *Id.* at 116–17. The court also concluded that no such additional protection was required by the First Amendment, discussing the high court’s jurisprudence. *Id.* at 116. However, despite a finding of material falsity, the court found no constitutional malice, emphasizing the technical legal nature of many of the errors committed by a non-lawyer and the “hot news” nature of the story. *Id.* at 121. A spirited partial dissent concluded “[h]alf-truths strung misleadingly together are no less destructive of democracy than an outright lie.” *Id.* at 137 (Baker, J., with Enoch, J., and Hankinson, J., concurring in part, dissenting in part).

430. *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976) (discussing the “equally compelling need for judicial redress of libelous utterance”); *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966) (recognizing society’s “pervasive and strong interest” in deterring and remedying reputational injuries).

431. One co-author has concluded that the Supreme Court has treated reputation as an interest of “quasi-constitutional stature.” David Elder, *Defamation, Public Officialdom, and the Rosenblatt v. Baer Criteria—A Proposal for Revivification: Two Decades After New York Times Co. v. Sullivan*, 33 BUFF. L. REV. 579, 660 & n.405 (1984). Among cited sources is a comment citing thirty-nine state constitutions as specifically protecting character or reputation. Michael B. Allport & Steven C. Baldwin, Comment, *Defamation and State Constitutions: The Search for State Law After Gertz*, 19 WILLAMETTE L. REV. 665, 665 & n.2 (1983).

432. Gunther, *Yikes*, *supra* note 104. It is also a deterrent to legitimate discourse about social issues because to respond to a hidden camera dignifies what was acquired by a crime and/or tort. Who in their right mind would feel obligated, or expected, to answer questions from

The calculated damage from such “hidden camera” “stings” where the victims are tried and convicted and their reputations executed before the American public is undeniable, and is magnified by the denial of any meaningful opportunity to respond. “Ambush” interviews, the only and occasional opportunity, do not equate to an honest effort to get the “other side of the story” but are intended to catch people unaware, to make them look flustered, evasive and unbelievable—indeed, to *frustrate* reasoned and thoughtful responsiveness.⁴³³ In sum, the hidden camera implicitly says to the viewer the person captured thereby is so scummy as to be denied that elemental assumption of civilized society—a reasonable right to be heard in self-defense.

Undoubtedly, given the cynical mood of the public and the pervasiveness of dissemination of information concerning all kinds of criminality, corruption, and malfeasance,⁴³⁴ in the typical defamation or false light case a plaintiff will be unable to rely on the nature of the harmful matter as particularly helpful evidence of constitutional malice.⁴³⁵ Clearly, such would not be sufficient in any event.⁴³⁶ However, the Supreme Court has recognized on several occasions that the nature of the harm may be some supportive evidence of constitutional malice. In *Butts* the majority and concurring opinions respectively noted that the editors of *Look* “recognized the need for a thorough investigation of the serious charges”⁴³⁷ but then “proceeded on its reckless course with full knowledge of the

a “journalist” who obtained footage via crimes and/or torts?

433. See, e.g., Gunther, *Lion's Share*, *supra* note 95, at 22 (The “impression” created is of the “heartless villain,” “mostly because he was shown, repeatedly trying to avoid [the reporter-producer]” and “unhappy investors” in a “rollup” transaction.). As Gunther notes, however, “the truth, again, was more complex.” *Id.* The plaintiff, Levan, had several discussions off the record and agreed to an on-the-record interview on certain conditions, but the agreement broke down when it was clear the defendants wanted to inquire about his divorce. *Id.* Later, Levan offered to appear live or unedited, but the defendants declined, citing loss of editorial control. *Id.* Levan then offered to provide further background. *Id.* “This became ‘the man who wouldn’t talk to us.’” *Id.* This and other cited instances created an impression Levan was “hiding . . . a major theme of the story. . . .” *Id.* Ultimately, the case was vacated, the court finding no constitutional malice because the defendants had numerous objective sources for its story on the bad deal limited partners received in the “rollup” transaction. *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1240–44 (11th Cir. 1999).

434. See Jeff MacGregor, *Diluting the News into Soft Half-truths*, N.Y. TIMES, June 4, 1995, at H25.

435. ELDER, DEFAMATION, *supra* note 37, § 7:22, at 132, 136.

436. *Id.* § 7:22, at 132–33 & nn.53–54; see also *Greenbelt Coop. Publ’g Ass’n v. Bresler*, 398 U.S. 6, 10 (1970) (An instruction allowing constitutional malice to be inferred from the published defamatory language itself, indicative of falsehood and general hostility, was an “error of constitutional magnitude.”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 286 (1964) (holding neither falsity nor implied malice sufficed for constitutional malice).

437. 388 U.S. at 157 (Harlan, J.).

harm⁴³⁸ likely to result. A year later, in the pivotal case of *St. Amant v. Thompson*,⁴³⁹ the Court envisioned a situation where a good faith claim would not win out if the defamatory allegations were “so inherently improbable that only a reckless man would have put them in circulation.”⁴⁴⁰ In *Herbert v. Lando*,⁴⁴¹ the Court rejected the argument the editorial process was immune from inquiry, citing “the impact that publishing the article would have on the subject”⁴⁴² Most recently, in *Harte-Hanks*, the Court gave substantial significance to the fact of the defendant’s awareness of the “highly improbable” nature of the “most serious charge,” i.e., that the plaintiff intended to confront the incumbent judge (plaintiff’s opponent) with tapes to compel his resignation.⁴⁴³

The consensus view of the cases parallels this view, finding at minimum, that the gravity of the foreseeable, resulting harm is a relevant factor for the jury to consider in assessing the constitutional malice issue.⁴⁴⁴ An excellent example is the Kentucky case involving a charge that an assistant university coach-recruiter made an offer of money to a prospective basketball player.⁴⁴⁵ The defendant, among other horrific practices, sent a copy of the article charging recruiting improprieties to every potential future employer in college basketball and a hundred major newspapers in the country.⁴⁴⁶ The court quite reasonably concluded the defendants’ scienter of the gravity and potentiality of reputation disparagement from such a wide-spread and targeted dissemination “should have heightened [the defendants’] investigative efforts.”⁴⁴⁷ Failure so to do was evidence of constitutional malice.⁴⁴⁸

Arguably, in a particular hidden camera case the nature of the facts will meet the *St. Amant* “inherent improbability” criterion, as in the important California case imputing to the plaintiff-foreign journalist that he was the true assassin of Robert F. Kennedy despite the conviction, affirmation on appeal, and continued imprisonment of Sirhan Sirhan.⁴⁴⁹

438. *Id.* at 170 (Warren, C.J., concurring in the result).

439. 390 U.S. 727 (1968).

440. *Id.* at 732 (emphasis added).

441. 441 U.S. 153 (1979).

442. *Id.* at 160–61 n.6.

443. 491 U.S. at 691.

444. ELDER, DEFAMATION, *supra* note 37, § 7:22, at 133–34 & n.62.

445. *Warford*, 789 S.W.2d at 760.

446. *Id.*

447. *Id.* at 772.

448. *Id.* at 772–73.

449. *Khawar v. Globe Int’l, Inc.*, 965 P.2d 696 (Cal. 1998), *cert. denied*, 526 U.S. 1114 (1999). The failure to investigate in light of such “inherently incredible accusation[s]” evidenced

However, there appears to be compelling reasons for a strong inference of constitutional malice favoring hidden camera victims *as a class*. Why? Examine the characteristics of a typical hidden camera story: (1) the concession that such stories are, by definition, invariably negative⁴⁵⁰ (no media defendant in the history of such “journalism” has proffered a single example of a hidden camera subject made to appear high-minded or heroic); (2) the incestuous, feeding-frenzy, conflict of interest relationship between “journalist” producers and voracious marketing departments;⁴⁵¹ (3) the magnification of harm by the denial of an effective opportunity for rebuttal;⁴⁵² (4) the defendant’s knowledge of the harm caused by such stories and their intent to cause harm,⁴⁵³ or at least heedlessness of the consequences;⁴⁵⁴ (5) the schizoid and deceptive disconnect between the public personality projected (the white knight on the even whiter charger jousting altruistically in the public interest) and the non-public actuality (the unheroic, surreptitious “KGB-ish” creator of the news, using fundamentally unfair and deceptive methods with only the basest of private interests as motivation);⁴⁵⁵ and (6) the sheer extent of dissemination to vast audiences,⁴⁵⁶ feeding a voracious, lip-smacking demand for such by viewers.⁴⁵⁷

In sum, hidden cameras are the modern equivalent of the Star Chamber⁴⁵⁸ proceeding—with addenda. The media judges are hooded⁴⁵⁹ and function in a loose continuum as predetermined assessors of guilt and balaclava-clad executioners of reputation. Such a material breach of societal norms of civility and elemental fairness deserves, indeed *compels*,

that the defendant “purposefully avoided the truth.” *Id.* at 710–12.

450. Epstein, *supra* note 4, at 1031 (“[T]he investigative reporter will kill any story that reflects well on its target.”).

451. See discussion *supra* Part III.A.

452. See Lissit, *Out of Sight*, *supra* note 10, at 27.

453. ELDER, DEFAMATION, *supra* note 37, § 7:3, at 60–61 & n.9 (listing knowledge and intent as illustrative of common law malice).

454. *Id.* at 61 & n.10; see also *Gleichenhaus v. Carlyle*, 597 P.2d 611, 6114 (Kan. 1979) (Similar defamatory statements made by a party-defendant as to nonparties were “clearly relevant” to the “central issue” of constitutional malice: “The showing of a reckless indifference to the rights and reputations of others may furnish a basis for an inference the publication in controversy was malicious.”).

455. See discussion *supra* Part III.A.

456. See Lissit, *Out of Sight*, *supra* note 10, at 27.

457. See KOVACH & ROSENSTIEL, *supra* note 6, at 9.

458. The star chamber was an ancient English criminal court that proceeded inquisitorially. G.R.Y. RADCLIFFE & GEOFFREY CROSS, *THE ENGLISH LEGAL SYSTEM* 106–07 (G.J. Hand & D.J. Bentley, eds., 6th ed. 1977).

459. Rosenthal, *supra* note 116 (referring to hidden camera operatives as “reporters masquerading”).

a conclusion that such endemically harmful productions reek of constitutional malice.

G. Constitutional Malice Can Be Established by a Decision to Publish in the Face of Known Contradictory Information

A great volume of precedent has established a black letter rule concluding that “a publisher cannot feign ignorance or profess good faith where there are *clear indications present* which bring into question the truth or falsity of defamatory statements.”⁴⁶⁰ More particularly, “an inference of actual malice can be drawn when a defendant publishes a defamatory statement that *contradicts information known to him*, even though the defendant testifies that he believed that the statement was not defamatory and was consistent with the facts within his knowledge.”⁴⁶¹ The case consensus views an inference of constitutional malice as justified where the defendant has “actually seen ‘hard evidence’”⁴⁶² that rebuffed or contradicted the defendant’s charge. Such is viewed as “not simply a failure to investigate,”⁴⁶³ which is insufficient to establish constitutional malice under the *New York Times* standard.⁴⁶⁴ Rather, knowledge of such evidence is deemed a “failure to consider contradictory evidence already in [the defendant’s] possession.”⁴⁶⁵

The typical hidden camera piece’s distorted editing process will almost invariably provide the plaintiff with a potential treasure trove of sources of information at odds with the conclusion drawn.⁴⁶⁶ Counsel

460. *Gertz*, 418 F.2d at 538 (emphasis added).

461. *Hunt v. Liberty Lobby*, 720 F.2d 631, 645 (11th Cir. 1983) (emphasis added); *see also McHale*, 390 So. 2d at 568 (Constitutional malice was inferred where the defendants were “in possession of knowledge so completely at odds with the published statement that only a reckless disregard of the truth can account for its utterance.”), *cert. denied*, 452 U.S. 941 (1981).

462. *See, e.g., Murray v. Bailey*, 613 F. Supp. 1276, 1285 (N.D. Cal. 1985) (The defendant admitted having seen an arrest report that “explicitly stated that the charges were not as [the defendant] characterized them.”).

463. *Robertson*, 666 F. Supp. at 250.

464. *See* ELDER, DEFAMATION, *supra* note 37, § 7:2, at 12–16.

465. *Robertson*, 666 F. Supp. at 250; *see also* ELDER, DEFAMATION, *supra* note 37, § 7:2, at 12–16 (noting that “mere presence in defendant’s files of contradictory evidence” is insufficient to establish constitutional malice).

466. Gunther, *Lion’s Share*, *supra* note 95, at 20 (discussing *Food Lion* and *Levan*). Courts do and should ignore the breast-thumping mantra that courts are not the places for victims of unfair reporting to seek redress. *Id.* The response is that no effective alternatives exist. *Id.* Few media entities have “the time or inclination” to do stories on such unfairness. *Id.* Indeed, they clearly “tend to close ranks” when a network is sued. *Id.* And the plaintiffs and their lawyers know that only courts have the authority to “open up their newsgathering process to scrutiny—to answer questions about how and why they pursue stories and, especially, to give outsiders a look at the editing process.” *Id.*; *see also* sources cited *supra* note 5 (providing striking examples of

should and must scrutinize all available sources of information about *what* defendants knew and *when* they knew it (with the corollary that only information known at the time of publication is generally usable to prove constitutional malice⁴⁶⁷) and be extremely careful to explore such in detail in pretrial discovery—an effort media lawyers will undoubtedly fight tooth and nail.⁴⁶⁸ As a co-author has detailed elsewhere, the great volume of case law suggests such inferential of constitutional malice may come from a wide variety of sources.⁴⁶⁹ Of particular use as precedent in hidden camera cases will be those cases finding constitutional malice from information inconsistent with the defamatory imputation “resulting from defendant’s own investigation, knowledge, and actions.”⁴⁷⁰

Assume, *arguendo*, the following fictitious scenario (and compare it with the *Food Lion* case not litigated). Hidden Camera Infotainment TV

such “closing of the ranks”).

467. See ELDER, DEFAMATION, *supra* note 37, § 7:7. *But see* discussion *infra* Part V.J.

468. Gunther, *Lion’s Share*, *supra* note 95, at 21 (noting ABC’s lawyers engaged in a “hard-fought battle” to stop the release of “outtakes”); *see also* Noah, *supra* note 120, at 66. A media critic discussing the racial profiling allegations and the disputed nature of the issues of consent and provocation at issue in *Hornberger v. ABC, Inc.*, No. L1078697 (N.J. Super. Ct. 2000), stated: “Show me the tape. Since this was a hidden camera story the simple way to resolve these arguments would be: ‘Let’s go to the tape.’” Noah, *supra* note 120, at 66. Noah noted ABC’s refusal to release the tapes, citing its “longstanding policy” not to release “outtakes,” but responded that such a policy was usually to protect confidential sources, which was not an issue here, where the information was being kept from litigants. *Id.* He suggested ABC was “loath to set what it sees as a dangerous precedent . . . to invite further public scrutiny of its methods.” *Id.* He later noted that the town mayor asked to see them to resolve the racial profiling controversy and was denied access. *Id.* He wrote a letter of condemnation, concluding ABC had “something to hide.” *Id.* The dilemma for the plaintiffs may be whether the outtakes any longer exist. *See* Davidson, *supra* note 171, at 8.

Clearly, the lesson that some journalists will draw is to keep in one’s files only what is aired. “Routine expungement” of all but what was printed or broadcast is already the creed of some news organizations and journalists . . . Their philosophy is that “you can’t be hurt by what you haven’t got” or “destroy it now, or watch it haunt you later.”

Id.

469. ELDER, DEFAMATION, *supra* note 37, § 7:11, at 90–95.

[E]vidence in a record or report about plaintiff available to and read by defendant; statements, admissions, or other publications by defendant inconsistent with the defamatory charge; official reports, proceedings, or investigations; responsible contradictory sources; internal inconsistencies in the publication defendant has reportedly relied on; repudiation by a source; inconsistent information resulting from defendant’s own investigation, knowledge, and actions or an interview or communications with plaintiff; prior actions or contemporaneous decisions (including corrections or retractions) by defendant; refutatory information brought to defendant’s attention by plaintiff or a third party; contemporaneous or subsequent statements of defendant; defendant’s misstatement of its own motivation.

Id. (citations omitted).

470. *Id.* at 92 & n.85.

("HCI-TV") sends undercover employees posing as new employees with falsified credentials into eight branches of plaintiff's chain, Top O' The Market ("TOTM"), which sells upscale foodstuffs, including gourmet meals, to upper middle class patrons in yuppie suburbia. HCI-TV is acting on a tip from an employee that TOTM resells repackaged filet mignon that has passed its expiration date as "specially aged steak for beef gourmands"—at double the price per pound of regular filet mignon. At seven of the branches no evidence of such a practice is found and all hidden camera footage absolves the plaintiff. At the eighth branch, the one from which the insider tip came, an assistant meat manager, a rogue lone ranger, is filmed on hidden camera engaging in the reported fraudulent practice and stealing the real "specially aged steak" received from a reliable supplier for resale in his upscale steak restaurant.

HCI-TV does a high profile exposé featuring the footage of the single, rogue employee-thief, together with an ambush interview of TOTM's CEO on the sidewalk outside corporate headquarters with the corporate logo in the background. The CEO comes across as defensive, awkward, stunned, and evasive (unsuccessfully) of the intrusive mikes and cameras thrust in her face. That night HCI-TV does an eight-minute segment on TOTM in which it expressly charges TOTM "with fraudulent, deceptive and criminal consumer practices" as to its "specially aged steak." It also shows the hidden camera footage of the rogue employee, as well as the CEO's responses—both are accurate portrayals of what was in fact filmed. However, at no time does HCI-TV disclose: (1) its knowledge that the fraud was an aberrational frolic by a single employee stealing from his unknowing employer; (2) that the other seven branches were absolved of any wrongdoing; (3) that its check of the last year's records of meat inspections gave TOTM an overall "superlative" rating; and (4) the results of its interviews with five meat inspectors, whose consensus opinion based on knowledge of TOTM and its competitors was that TOTM had the "highest standards and best reputation" in the industry.

Several conclusions seem clear. First, HCI-TV's broad charge of wrongdoing is both defamatory *and* false—a broad-gauged charge of malfeasance based on the acts of a single rogue employee-thief acting on his own.⁴⁷¹ Given the broad nature of the charge, the defendant could not

471. *Id.* § 2:2, at 16–17; *see also* Golden Bear Distrib. Sys. v. Chase Revel, Inc., 708 F.2d 944, 949 (5th Cir. 1983) ("Although the individual statements . . . read out of context, were true," the truth defense was unavailable to the defendant where it knew that the implication—that the plaintiff-Texas corporation was engaging in the same fraudulent acts as a separately incorporated and independent corporation of the same name which had defrauded the plaintiff—was untrue because of omitted facts which refuted the impression given by the "literally true" facts.);

claim truth (or that the plaintiff had not shown material falsity) by focusing on the *literal truth* of the two segments of footage. Second, the information known to the defendant but ignored by it and never disclosed to the viewer in making its broad defamatory charge of corporate malfeasance would suffice to demonstrate constitutional malice because it was refuted by “hard evidence”⁴⁷² to the contrary known to the defendant from its own investigation. In other words, the real defrauder, the real malfeasant, the real antisocial actor is HCI-TV, fabricating a fraud, misleading the public, and doing irreparable harm to an above board corporate citizen to generate revenue.

To any hidden camera aficionado that says this is all hyperbole and not how we operate, we make this challenge: When sued for invasions of privacy (intrusions, etc.), defamation, and false light, make an unqualified offer to disgorge all video and audio tapes taken, all notes and reports, all earlier drafts using the footage, and make your reporters freely available for deposition without equivocation or reserve. Further allow the court and jury to decide—*what* did you know, *when* did you know it, and were your ultimate conclusions inconsistent therewith? Our bet is that such disgorgement will not occur for fear the court and jury would almost invariably find a “calculated falsehood.”⁴⁷³

H. Application by Analogy of the “Obvious Reasons to Doubt” Standard for Third Party Sources to the Format and Methodology of Hidden Cameras

In *St. Amant*, the Supreme Court’s most extensive analysis of constitutional malice, the Court provided detailed general instruction on the meaning of the “obvious reason to doubt” standard, i.e., where defendants’ “[p]rofessions of good faith will be unlikely to prove persuasive”⁴⁷⁴

Register Newspaper Co. v. Stone, 102 S.W. 800, 801 (Ky. 1907) (A past conviction for a single instance of petty larceny did not suffice to prove the plaintiff had a “mania for stealing.”); Chicarella v. Passant, 494 A.2d 1109, 1115 n.5 (Pa. Super. Ct. 1985) (A single conviction for transporting women for purposes of prostitution did not justify a conclusion the plaintiff was presently a “pimp.”).

472. See *Robertson*, 666 F. Supp. at 250.

473. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. . . . Hence the knowingly false statement and the false statement made with reckless disregard of the truth [i.e., calculated falsehood], do not enjoy constitutional protection.

Id.

474. 390 U.S. at 732.

Undoubtedly, the most important discussion is the one that is the most common focus of plaintiffs' attacks and defendants' defenses, i.e., "recklessness may be found where there are *obvious reasons to doubt the veracity of the informant or the accuracy of his reports*."⁴⁷⁵

As any libel litigant or lawyer on either side will attest, there is a huge volume of precedent interpreting this criterion,⁴⁷⁶ much of it exculpatory⁴⁷⁷ of defendants, some of it bending over backwards in interpreting in exceptionally broad and favorable terms defendants' protestations of misconduct.⁴⁷⁸ What is clear beyond debate is that negligent or even grossly negligent investigations or reportage are not actionable.⁴⁷⁹ However, this does not give defendants free rider status. As the Supreme Court affirmed, "[t]he finder of fact must determine whether the publication was indeed made in good faith."⁴⁸⁰ Otherwise, "mere swearing could, as a matter of law, defeat"⁴⁸¹ any claim of actual malice. A significant volume of case precedent lines up on each side of the constitutional malice divide—that, on the one hand, insufficient (i.e., at most, negligent or grossly negligent⁴⁸²), and that, on the other, sufficient⁴⁸³ for a jury to determine a defendant "in fact entertained serious doubts," i.e., had "obvious reasons to doubt the veracity"⁴⁸⁴ of the source or the accuracy of the source's charges.

Fortunately for plaintiffs, there is a significant volume of helpful precedent,⁴⁸⁵ though this is generally ignored by the plaintiffs' bar who are often solo practitioner libel lawyers less experienced than the well-organized and mutually supportive defendants' bar.⁴⁸⁶ The thesis of this

475. *Id.* (emphases added).

476. See generally ELDER, DEFAMATION, *supra* note 37, § 7:2, at 3–48.

477. *Id.* at 12–27.

478. See, e.g., cases cited *supra* note 46.

479. ELDER, DEFAMATION, *supra* note 37, § 7:2, at 12–27.

480. *St. Amant*, 390 U.S. at 732.

481. *Guam Fed'n of Teachers v. Ysrael*, 492 F.2d 438, 439 (9th Cir. 1974), *cert. denied*, 419 U.S. 872 (1974).

482. ELDER, DEFAMATION, *supra* note 37, § 7:2, at 12–27.

483. *Id.* at 27–36, 40–47.

484. *St. Amant*, 390 U.S. at 731–32.

485. ELDER, DEFAMATION, *supra* note 37, § 7:2, at 42–48.

486. See, e.g., *Rice v. Paladin Enters., Inc.*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998). Media defendants regularly support each other by *amici curiae* briefs, even in the wackiest cases and those engaging the most controversial examples of investigative and hidden camera journalism. See, e.g., Brief of Amici Curiae American Society of Newspaper Editors et al., *Sanders v. ABC, Inc.*, 978 P.2d 67 (Cal. 1999) (No. S059692). Media defendants also have a reporter system whose editorial board is dominated by experienced First Amendment-media lawyers. See *Media Law Reporter*, Bureau of National Affairs, Inc. (BNA), at <http://www.bna.com/products/ip/med.htm> (last visited Feb. 15, 2002). Many special programs

subsection is that an analysis of the cases delving into the obvious reason to doubt (interpreted by the Court as “reason to suspect”⁴⁸⁷) criterion discloses a laundry list of factors, that, if *redirected internally* to critique hidden camera investigative “journalism,” justify a presumption of constitutional malice. Otherwise stated, if in individual cases, a quite limited number of considerations suffice to take a particular case to a jury, cannot an even more compelling argument be made for jury resolution where the *very nature* of hidden camera “infotainment” exhibits a deeper and more invidious list of considerations weighing in favor of “obvious reasons to doubt” *any and all* stories emanating from such illegal or tortious newsgathering, and particularly hidden camera stories?

A detailed analysis of the precedent concluding there is no right to rely on sources where “obvious reasons to doubt” exist discloses the following, all of which parallel facets of the investigative “journalism” at issue in hidden camera cases: known involvement in criminal activity reflecting dishonesty or deceit⁴⁸⁸ or otherwise affecting trustworthiness;⁴⁸⁹

enable media lawyers to stay abreast of recent developments impacting media defendants. *See, e.g., Counseling Clients in the Entertainment Industry*, Practising Law Institute, at <http://www.pli.edu/public/displayProd.asp?ID=PR202G000W800H1> (last visited Feb. 15, 2002). Media defendants have a pro-media research and data gathering institute that sponsors regular seminars for media defense attorneys, the Libel Defense Resource Center (“LDRC”), and a public lobbyist, the Reporters Committee for Freedom of the Press (“RCFP”). *About the LDRC*, Libel Defense Resource Center, at http://www.ldrc.com/LDRC_Info/ldrcinfo.html (last visited Feb. 15, 2002) (identifying the LDRC’s organizers as “leading media entities”); *The Reporters Committee for Freedom of the Press*, at <http://www.rcfp.org/> (last visited Feb. 15, 2002) (describing the RCFP website as “designed to provide information to journalists and media lawyers at any time” and providing a toll-free number for “[j]ournalists needing help with specific questions or problems”). Moreover, big firm representation of media defendants effectively limits plaintiffs to small or solo practitioners given that insurance policies typically bar a firm doing media work from also taking plaintiff cases. Hickey, *Climate of Change*, *supra* note 20, at 54. And, most extraordinary of all, the media is occasionally successful in manipulating the law by getting a court to withdraw a prickly opinion when they can’t win on the merits. *See, e.g., Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*, 237 F.3d 1007, 1008 (9th Cir. 2001) (withdrawing an opinion that denied the defendant’s motion for summary judgment); *see also supra* note 171 and accompanying text (discussing the ability of a powerful media entity fulminating as complainant when criticized to get a detailed apology).

487. *Herbert*, 441 U.S. at 160.

488. *Harte-Hanks*, 491 U.S. at 692–93 & nn.38–40; *St. Amant*, 390 U.S. at 732; *Butts*, 388 U.S. at 157 (discussing the Saturday Evening Post’s decision to run a story based on information obtained from an unreliable informant with a known history of bad check charges); *Pep v. Newsweek, Inc.*, 553 F. Supp. 1000, 1001–1002 (S.D.N.Y. 1983); *Sprague*, 656 A.2d at 907–08 (stating that the defendant was on notice that special monitoring was required of a reporter who had been convicted of criminal wiretapping).

489. *Wells v. Liddy*, 186 F.3d 505, 542–44 (4th Cir. 1999) (finding a genuine issue of material fact regarding the existence of malice where the defendant admitted the sole source was unreliable, i.e., a known convicted felon and disbarred attorney with a history of mental illness), *cert. denied*, 528 U.S. 1118 (2000); *S. Air Transp.*, 568 So. 2d at 929 (reversing summary

other indicia of lying or deception;⁴⁹⁰ evidence of self-interest⁴⁹¹ and/or questionable motives;⁴⁹² known propensity to make inflammatory, defamatory, or sensational comments;⁴⁹³ non-disclosure of factors affecting credibility;⁴⁹⁴ unreliability in part in past;⁴⁹⁵ lapse of time and dated nature of information;⁴⁹⁶ hostile source(s);⁴⁹⁷ sources reflecting ill motivation toward the plaintiff or a preconceived disposition to injure the plaintiff;⁴⁹⁸ editor's awareness of a reporter's limited training or experience;⁴⁹⁹ sources

judgment for the defendant publication where the defendants had no evidence of extensive drug trafficking history but their publication implied otherwise)); *Fields*, 259 N.E.2d at 664 (finding evidence of actual malice where the defendant's reporter made no effort to verify the informant's story, even though he was a petty criminal with an unsavory reputation, and he was "obviously making a deal to gain his freedom").

490. *Alioto v. Cowles Communication, Inc.*, 519 F.2d 777, 780 (9th Cir. 1975), *cert. denied*, 423 U.S. 930 (1975); *Alioto v. Cowles Communication, Inc.*, 430 F. Supp. 1363, 1370 (N.D. Cal 1977) (finding libel, on remand, where the managing editor regarded the informant as "a notorious hoodlum who could not be trusted, a 'liar,' and a 'name dropper'"), *aff'd*, 623 F.2d 616 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981).

491. *See, e.g.*, *Burns v. McGraw-Hill Broad. Co.*, 659 P.2d 1351, 1361-1362 (Colo. 1983) (finding such self-interest where the sources were the plaintiff's bitter ex-spouses); *Stevens v. Sun Publ'g Co.*, 240 S.E.2d 812, 814-815 (S.C. 1978) (finding such self-interest where the sources were the plaintiff's bitter ex-in laws), *cert. denied*, 436 U.S. 945 (1978).

492. *S. Air Transp.*, 568 So. 2d at 928. (finding a motive to lie would be a questionable motive).

493. *Gertz*, 680 F.2d at 539 (evaluating a libel claim where the writer had a known propensity to label people as Communists); *Mehau v. Gannett Pac. Corp.*, 658 P.2d 312, 322 (Haw. 1983) (finding a factual dispute with respect to malice where the source was a new tabloid with a demonstrated tendency to sensationalize and where some pivotal charges were anonymous); *Miller v. Argus Publ'g Co.*, 490 P.2d 101, 111 (Wash. 1971) (considering the malice issue where the source of the story was an underground tabloid "emphasizing sex and marijuana"), *overruled on other grounds by Taskett v. King Broad. Co.*, 546 P.2d 81, 86 (Wash. 1976).

494. *Nash v. Keene Publ'g Corp.*, 498 A.2d 348, 355 (N.H. 1985) (The publisher failed to disclose a prior legal confrontation with the plaintiff).

495. *See S. Air Transp.*, 568 So. 2d at 928.

496. *Celle v. Filipino Reporter Enters., Inc.*, 209 F.3d 163, 190 (2d Cir. 2000) (focusing on the fact that the sole source lacked "current knowledge" as to the defamation statement at issue); *Widener*, 142 Cal. Rptr. at 315 (concluding that the PG&E executives had cause to question the veracity of the source when five months had passed since the event).

497. *See, e.g.*, *Fisher v. Larsen*, 188 Cal. Rptr. 216, 225 (Ct. App. 1982) (noting the defendant's knowledge of strained relations between the source and the plaintiff); *Widener*, 142 Cal. Rptr. at 315 (noting the defendant's knowledge that the source was angry).

498. *Lyons v. New Mass Media, Inc.*, 453 N.E.2d 451, 456-57 (Mass. 1983) (The defendant relied solely on two union people in "serious, acrimonious disputes" with the plaintiff-union and officers.); *see also Glenn v. Gidel*, 477 S.W.2d 331, 332-33 (Tex. App. 1972) (noting that the source had an "ax to grind").

499. *Stone v. Essex County Newspapers, Inc.*, 330 N.E.2d 161, 174 (Mass. 1975) (finding sufficient evidence to submit the case to a jury where the editor conceded surprise at the information about the plaintiff, a person who was known to be reputable).

with “difficulty differentiating between reality and nonreality;”⁵⁰⁰ knowledge of the gravity of the charge and harm to the plaintiff;⁵⁰¹ knowledge of the source’s lack of success in investigation;⁵⁰² knowledge that the extreme nature of the charge “far outpaced” the source’s evidentiary foundation,⁵⁰³ including a “rush[] to judgment”;⁵⁰⁴ ignoring other plausible interpretations⁵⁰⁵ or possible exculpatory matter;⁵⁰⁶ neglecting or declining to pursue other promising evidence⁵⁰⁷ or to pose key questions to pivotal figures;⁵⁰⁸ ignoring the plaintiff’s denials⁵⁰⁹ or failing to provide an effective opportunity to respond;⁵¹⁰ knowledge the information is of dubious value;⁵¹¹ and knowledge the source is of an

500. *Wells*, 186 F.3d at 543.

501. *Widener*, 142 Cal. Rptr. at 315.

502. *Stokes*, 25 F. Supp. 2d at 1004.

503. *Id.* (This was evidenced by the defendant’s reporter’s warning to the source about the innocence presumption, and the reporter’s comment that the source was acting on “gut feelings.”); *cf.* *Seitz*, *supra* note 118 (“[T]he story [at issue in the *Hornberger* racial profiling case] proved only that young people in fancy cars who call attention to themselves in rough neighborhoods will be pulled over, frisked and treated rudely by police.”).

504. *Stokes*, 25 F. Supp. 2d at 1003.

505. *See id.* at 1003; *Mahnke*, 160 N.W.2d at 11 (finding potential malice where the defendant publishers had been warned by a police official that the allegation was based entirely upon a misunderstanding); *Chase v. Daily Record, Inc.*, 515 P.2d 154, 158 (Wash. 1973) (reporting a defamatory interpretation of an ambiguous event after being given an interpretation eliminating any implication of malfeasance).

506. *Ball*, 801 S.W.2d at 687–88 (The defendants refused to look at documents provided by the plaintiff that reflected on a police source’s reliability.); *see also Stokes*, 25 F. Supp. 2d at 1003.

507. *Widener*, 142 Cal. Rptr. at 315 (No one, including the source, had viewed the film that resulted in the defamation.); *see also Stokes*, 25 F. Supp. 2d at 1003.

508. *Stokes*, 25 F. Supp. 2d at 1003.

509. *Airlie Found., Inc. v. Evening Star Newspaper Co.*, 337 F. Supp. 421, 426 (D.D.C. 1972); *Gray v. WALA-TV*, 384 So. 2d 1062, 1066 (Ala. 1980) (containing denials by the plaintiff and attorney); *Fisher*, 188 Cal. Rptr. at 224–26.

510. *Gray*, 384 So. 2d at 1066 (noting that a news director allegedly failed to send a reporter to talk to the plaintiff after the plaintiff complained about inaccuracies).

511. *Harte-Hanks*, 491 U.S. at 691 (referring to a tape that demonstrated the source was “hesitant, inaudible, and sometimes [spoke in an] unresponsive and improbable tone”); *Fitzgerald v. Penthouse Int’l Ltd.*, 691 F.2d 666, 671 (4th Cir. 1982) (stating that communications to the defendant involved extraordinary assertions “invit[ing] skepticism”), *cert. denied*, 460 U.S. 1024 (1983); *Alioto v. Cowes Communications, Inc.*, 519 F.2d 777, 780 (9th Cir. 1975) (dated and vague hearsay); *Sargeant v. Serrani*, 866 F. Supp. 657, 666–67 (D. Conn. 1994) (expressing disapproval of the defendant’s reliance solely on a newspaper “despite [the defendant’s] disbelief in the newspaper’s credibility”); *Alioto v. Cowles Communication, Inc.*, 430 F. Supp. 1363, 1370 (N.D. Cal 1977) (holding consistently with the circuit court on remand), *aff’d*, 623 F.2d 616 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981); *S. Air Transp.*, 568 So. 2d at 928 (noting the source’s unreliability in the past and evidence of irrational behavior); *Mehau*, 658 P.2d at 322 (noting that some of the pivotal allegations in the publication were anonymous); *Fields*, 259 N.E.2d at 661–63 (finding improbable the statements of a source who twice repudiated his story

unreliable nature.⁵¹²

I. Deviation from "Professional Standards" as Evidence of Constitutional Malice

The exacting *New York Times* standard necessitates proving "subjective awareness of probable falsity,"⁵¹³ i.e., that the defendant had a "mordant unconcern with the truth"⁵¹⁴ or knew or had reason to suspect falsity.⁵¹⁵ This standard bars imposing liability merely based on "a normative conclusion that the publisher should have known of the falsity of the statement"⁵¹⁶ or that the defendant lacked reasonable grounds for belief in the truth of the publication.⁵¹⁷ In other words, constitutional malice is not defined solely under a "reasonable man or prudent publisher"⁵¹⁸ standard and a "[f]ailure to investigate does not itself establish bad faith."⁵¹⁹

before publication); *King v. Globe Newspaper Co.*, 512 N.E.2d 241, 251 (Mass. 1987) (emphasizing the fact that the journalist relied on hearsay and neither disclosed the identity of the source nor vouched for the reliability of the source), *cert. denied*, 485 U.S. 940 (1988), *cert. denied*, 485 U.S. 962 (1988); *Mahnke*, 160 N.W.2d at 14 (considering an irate source repeating hearsay from another agitated person); *Stevens*, 240 S.E.2d at 815 (observing that the defendant's reporter had been warned that the source's facts were "biased, unreliable and untrue"); *Schuller v. Swan*, 911 S.W.2d 396, 398 (Tex. App. 1995) (considering the use of unnamed and unidentified law enforcement sources).

512. *Field Research Corp. v. Patrick*, 106 Cal. Rptr. 473, 477 (Ct. App. 1973) (evaluating reliance on a secondary source while believing the source had "no information 'that was useful to [the defendant]'", *cert. denied*, 414 U.S. 922 (1973); *Lewis v. Newsday, Inc.*, 668 N.Y.S.2d 377, 378-79 (App. Div. 1998) (considering alleged defamatory statements derived from "bar talk" passed on by other editors as "conduits for unverified rumor"); *Prozeralik*, 626 N.E.2d at 39 (explaining that the defendants had little evidence other than employees' "rootless speculation" for the charges); *Martin v. Wilson Publ'g Co.*, 497 A.2d 322, 330 (R.I. 1985); *Wollman v. Graff*, 287 N.W.2d 104, 106 (S.D. 1980) (noting that the source described the information as a rumor).

513. *Gertz*, 418 U.S. at 334-35 n.6; *Garrison*, 379 U.S. 64, 74 (1964) (noting "the high degree of awareness of probable falsity"). Occasionally, courts will find a *knowing* falsehood. *See, e.g., Cantrell*, 419 U.S. at 253 (finding a *knowing* falsehood where the defendant's reporter, for whose acts the defendant was vicariously liable, gave accounts of the plaintiffs' dire poverty and a co-plaintiff's emotional status at odds with all the facts—the reporter did not even have contact with the latter plaintiff); *see also* ELDER, DEFAMATION, *supra* note 37, § 7:2, at 4-5 n.18.

514. *Nat'l Ass'n of Gov't Employees, Inc. v. Cent. Broad. Corp.*, 396 N.E.2d 996, 1003 (Mass. 1979), *cert. denied*, 446 U.S. 935 (1980).

515. *Herbert*, 441 U.S. at 160.

516. *Vandenburg v. Newsweek, Inc.*, 507 F.2d 1024, 1026 (5th Cir. 1975).

517. *St. Amant*, 390 U.S. at 731-32; *Garrison*, 379 U.S. at 78-79. *But see McDonald v. Smith*, 472 U.S. 479, 485 (1985) (approving "without probable cause or without checking for truth by the means at hand" as an alternative definition of malice).

518. *St. Amant*, 390 U.S. at 731.

519. *Id.* at 733.

The Supreme Court plurality in *Butts* adopted a lower objective standard for public figures in affirming a large plaintiff judgment,⁵²⁰ i.e., “highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers,”⁵²¹ and cited several factors relevant thereto: gross inadequacy of the investigation in light of the serious nature of the charges; the defendant’s concession of a “need for a [more] thorough investigation;” and the fact the defamatory matter was not “hot news” requiring “immediate dissemination.”⁵²² In *Harte-Hanks*,⁵²³ the Court returned to this issue and the Sixth Circuit’s partial incorporation of the *Butts* plurality criterion.⁵²⁴ The Court reaffirmed that the latter had been “emphatically rejected” in favor of the “stricter” *New York Times* standard⁵²⁵ and that the “professional standards rule” had “never commanded a majority of this Court.”⁵²⁶

Viewed in context, however, the Court found that the appellate court’s use of the *Butts* criteria was not error.⁵²⁷ However, the Court reaffirmed that the “elusive constitutional standards”⁵²⁸ required “more than a departure from reasonably prudent conduct,”⁵²⁹ and could not be met

520. 388 U.S. at 156–58. The Court awarded Coach Butts the then-kingly sum of \$460,000. *Id.* at 138.

521. *Id.* at 158.

522. *Id.* at 157–58; see also *id.* at 168–70 (Warren, C.J., concurring in the result). Compare *id.* at 157–58 with *Associated Press v. Walker*, 388 U.S. 130 (1967). In *Walker*, argued before the Court as a companion case to *Butts*, a news dispatch characterized the plaintiff as having incited a riot. See *Walker*, 388 U.S. at 140. The Court, declining to find the *New York Times* standard satisfied, found the dispatch to be the product of an eyewitness account from a trustworthy, competent correspondent. *Id.* at 158. Given the internal consistency of the correspondent’s reports, and in light of the “necessity for rapid dissemination, nothing in this series of events gives the slightest hint of a severe departure from accepted publishing standards.” *Id.* at 158–59.

523. 491 U.S. 657 (1989).

524. *Connaughton v. Harte-Hanks Communications, Inc.*, 842 F.2d 825, 844–45 (6th Cir. 1988).

525. *Harte-Hanks*, 491 U.S. at 666.

526. *Id.*

527. *Id.* at 668.

528. *Id.* at 686. The Court has repeatedly criticized the use of the term “actual malice.” See, e.g., *Masson*, 501 U.S. at 511 (admitting that the use of the common law term as a “shorthand” synthesis might be confusing in the constitutional context and suggesting the use only of “knowledge of falsity or reckless disregard as to truth or falsity”); *Harte-Hanks*, 491 U.S. at 666 n.7 (“By instructing the jury ‘in plain English’ at appropriate times during the course of the trial concerning the not-so-plain meaning of this phrase, the trial judge can help ensure that the *New York Times* standard is properly applied.”); *Cantrell*, 419 U.S. at 251& n.4; *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 n.18 (1971) (suggesting the use of “knowing or reckless falsity”).

529. *Harte-Hanks*, 491 U.S. at 688.

merely by proof of a “failure to investigate before publishing, even when a reasonably prudent person would have done so.”⁵³⁰ The Court reinterpreted both the opinions in *Butts* as involving subjective awareness—i.e., an “unreliable informant’s false description”⁵³¹ where the magazine had “reason to question the informant’s veracity.”⁵³²

In other words, *Harte-Hanks* adopted the consensus view⁵³³ of the decisions that absence of “hot news” and a negligent or grossly negligent investigation do not suffice for constitutional malice, and tacitly affirmed the view that “press responsibility is not constitutionally mandated.”⁵³⁴ However, the Court also took pains to distinguish *sufficiency* from *relevance* of such “investigatory deficiencies or other negligent acts or omissions”⁵³⁵ as *supportive* evidence of constitutional malice.⁵³⁶ The Court confirmed the general approach of the case law⁵³⁷—that such deficiencies, when combined with other evidence, may indicate malice⁵³⁸—when it stated “it cannot be said that evidence concerning . . . care never bears any relation to the actual malice inquiry.”⁵³⁹ More recently, the Court reaffirmed the validity of the “hot news” versus non-hot news dichotomy as a relevant constitutional malice factor in the so-called “fabricated quotes” case of *Masson*.⁵⁴⁰

Against this backdrop, several overlapping issues arise. Is there a consensus on the professional journalistic standards applicable to hidden cameras? Is there a definite statement thereof binding on journalists? Is the latter a necessary precondition to inquiry into a media defendant’s deviation from journalistic standards? What is the relevance of a deviation from the particular defendant’s own acknowledged internal rules on point, such as the rush to use undercover hidden cameras without exhausting alternative sources?

The latter is an easy scenario to resolve. The cases clearly disallow liability solely based on deviation from a media defendant’s own contrary

530. *Id.*

531. *Id.* at 692.

532. *Id.*

533. ELDER, DEFAMATION, *supra* note 37, § 7:2, at 11–12 & n.58.

534. *McCoy v. Hearst Corp.*, 727 P.2d 711, 727 (Cal. 1986), *cert. denied*, 481 U.S. 1041 (1987); *see also* ELDER, DEFAMATION, *supra* note 37, § 7:2, at 12–18.

535. ELDER, DEFAMATION, *supra* note 37, § 7:2, at 18.

536. *Harte-Hanks*, 491 U.S. at 666–68.

537. ELDER, DEFAMATION, *supra* note 37, § 7:2, at 18–20 & nn.92–98.

538. *Warford*, 789 S.W.2d at 772; *see also* *McHale*, 390 So. 2d at 566.

539. *Harte-Hanks*, 491 U.S. at 668.

540. *Masson*, 501 U.S. at 521.

established policy and/or of journalistic standards or ethics.⁵⁴¹ However, substantial case law reflective of the approach of the Supreme Court stated above⁵⁴² supports use of such as circumstantial evidence relevant to and supportive of constitutional malice. Moreover, reliance on failure to comply with the defendant's own internal policies as probative of culpability is consistent with and parallels the time-honored rule in tort law generally⁵⁴³—that where the defendant recognizes foreseeable harm, adopts a feasible measure to respond thereto and fails to follow such, this is relevant evidence of culpability.⁵⁴⁴ Such evidence will be available in almost all hidden camera cases, as broadcast executives invariably “peddle the line” that hidden camera stories are justifiable if there is no other way to get a story,⁵⁴⁵ a view criticized as “patently false” by one commentator.⁵⁴⁶

541. *Chang v. Michiana Telecasting Corp.*, 900 F.2d 1085, 1089–90 (7th Cir. 1990). The court concluded that an ambush videotape placed on the air without disclosing that the reporter did not know the source of his information did “not inspire rave reviews,” but did not prove constitutional malice. *Id.* The court explained that state law did not use libel to “enforce journalistic ethics.” *Id.*; see also *Wanless v. Rothballer*, 503 N.E.2d 316, 321–22 (Ill. 1986) (Although an editor conceded a “truncated conference” did not meet “the usual standard of journalism,” the court rejected any suggestion that journalists were required to “serve an apprenticeship to earn their first amendment protections,” or were held to “higher expectations of accuracy” than the general public.), *cert. denied*, 482 U.S. 929 (1987); *Journal-Gazette Co. v. Bandido's Inc.*, 712 N.E.2d 446, 462 n.25 (Ind. 1999) (holding non-compliance with the publication's own policy on headlines might be evidence of “extreme departure from professional standards,” but would not suffice under *Harte-Hanks*), *cert. denied*, 528 U.S. 1005 (1999); see also ELDER, DEFAMATION, *supra* note 37, § 7:2, at 16–17 & n.87.

542. See *infra* notes 548–54 and accompanying text (discussing deviation from journalistic standards as evidence of constitutional malice); see also *Posadas v. City of Reno*, 851 P.2d 438, 443–44 (Nev. 1993) (discussing deviation from the defendant's own “usual manner” of handling an investigation as evidence of constitutional malice).

543. DAN B. DOBBS, *THE LAW OF TORTS* 402 (2000).

544. *Id.* at 401–02. As Professor Dobbs has indicated, “[t]he defendant's internal rules may even be introduced as bearing on the care a reasonable person would provide.” *Id.* at 402.

545. Jonathon Alter, “*Candid Camera*” *Gone Berserk?*, *NEWSWEEK*, Aug. 30, 1993, at 36; see also Kaplan, *supra* note 93 (quoting ABC News spokesperson Eileen M. Murphy as “proud” of the Food Lion story and as consistent with ABC's policy of allowing undercover operations only where a story is “important and there's no other way to get it”); O'Brien, *supra* note 23 at 10–11. O'Brien conducted an interview with Kerry Marash, the “standards and practices guru” at ABC News. O'Brien, *supra* note 23 at 10–11. ABC News is known to be one of the “most frequent practitioners” of the hidden camera technique. *Id.* Marash is quoted as indicating that ABC examines the source's reporters and producers to ensure that they have “exhausted every other avenue of getting” the needed information. *Id.* She explained that the network uses the “the same guidelines” they have always used, and that “most” hidden camera stories are rejected, “sometimes with marching orders: Do more reporting.” *Id.* at 11. See generally Logan, *Stunt Journalism*, *supra* note 11, at 159 n.65 (discussing *Food Lion* and citing authority to the effect that most newspapers had adopted ethics codes by the mid-1980s).

546. Alter, *supra* note 545, at 36.

Substantial case law has delved into the utility and usability of deviation from professional standards evidence. The exceptionally thoughtful opinion in *Hinerman v. Daily Gazette Co.*⁵⁴⁷ *should* (but probably *won't*) make every hidden camera television newsmagazine producer-apologist squirm in discomfort. In upholding a public official/constitutional malice finding, the court analyzed recent “subtle but important shifts” in Supreme Court libel jurisprudence, “reflect[ing] an ebbing tolerance for irresponsible media behavior,”⁵⁴⁸ including recognition of ill will and “egregious deviation from accepted standards of journalism”⁵⁴⁹ as admissible circumstantial evidence of constitutional malice. The court discussed in extended detail the rationale for admitting these types of circumstantial evidence, emphasizing that “more sinister, self-serving forces [are] at work in both the print and broadcast media that evoke a widespread demand among the public for greater media accountability.”⁵⁵⁰ Specifically, the court noted that there had been “a rediscovery that the popular media are in the *entertainment* business far more than they are in the information business.”⁵⁵¹ In essence, the court concluded the public (and the courts) has recognized once again, after the “euphoria” of the press’ idealistic period of the 1960s–1970s (when the press powerfully advocated civil rights, disengagement from Vietnam, investigation of Watergate, and honest government), the well-documented excesses of “yellow journalism.”⁵⁵² The court focused on the modern version of such sensationalist journalism, “mankind[’s] . . . inveterate predilection to rejoice in the suffering and degradation of others,”⁵⁵³ a focus necessitated by modern mass media economics. As the court said, “[u]nfortunately, a large measure of the economic success of any newspaper or broadcast news department is dependent upon sensational or ‘entertaining’ scandal.”⁵⁵⁴

Broadly construing journalistic standards, the court first found “gross deviations from professional journalistic standards” in the defendant’s failure to contact the plaintiff to determine whether he could provide refutatory or mitigating information.⁵⁵⁵ It then found evidence of

547. 423 S.E.2d 560 (W. Va. 1992).

548. *Id.* at 572.

549. *Id.* at 573; *see also supra* notes 248–310 and accompanying text (discussing motivation and ill will).

550. *Hinerman*, 423 S.E.2d at 575.

551. *Id.*

552. *Id.*

553. *Id.*

554. *Id.*; *see also* discussion *supra* Part III.A.

555. *Hinerman*, 423 S.E.2d at 576–77; *see also* Weinberg, *supra* note 171, at 1 (citing “the

constitutional malice also in the editor's express admission that he would not have published the defamatory matter but for the intervention and "explicit direction" of the publisher, to whom he had previously explained his misgivings.⁵⁵⁶ In other words, liability was found in substantial part because the *publisher's* interests *superseded* that of an unwilling and dubious *editor*. Sound familiar? It should!

Another deviation from a "professional standards" decision involved the defendant's unjustified decision to rely on memory rather than investigative research.⁵⁵⁷ A third case cited the utter absence of adequate investigation prior to publication, reliance on speculative, accusatory inferences, and the absence of "effective editorial review."⁵⁵⁸ Lastly, and bearing eerily striking parallels to the typical hidden camera case, a court found recklessness in the defendant's methodology—to write the story first, "complete with theme and slant," and then utilize a reporter to generate "colorful descriptions and quotes" to distinguish it from a "story idea" taken from a newspaper item.⁵⁵⁹ As the court concluded, "[f]actual inaccuracies to make [the plaintiff] fit the preconceived 'tripwire' [Vietnam veteran] stereotype in the story idea" might be perceived as reckless disregard for the truth.⁵⁶⁰

failure to uphold journalistic standards of fairness by not seeking [complainants'] responses before publication").

556. *Hinerman*, 423 S.E.2d at 577.

557. *Kerwick v. Orange County Publ'ns Div. of Ottaway Newspapers, Inc.*, 420 N.E.2d 970, 970 (N.Y. 1981); *see also Fils-Aime v. Enlightenment Press, Inc.*, 507 N.Y.S.2d 947, 950 (App. Div. 1986) (finding liability hinged on "[w]hether the defendant's methods of publication and verification of copy deviated substantially from accepted standards of practice," which could be established only by expert testimony); *Greenberg v. CBS, Inc.*, 419 N.Y.S.2d 988, 996 & n.1, 998 (App. Div. 1979) (finding such fault where the defendant declined to ask "many of the elementary questions" basic to the journalistic profession). *See generally* ELDER, DEFAMATION, *supra* note 37, § 6:10, at 45–46 (discussing New York's "gross irresponsibility" standard applicable in private person/public concern cases). *See also M.G. v. Time Warner, Inc.*, 107 Cal. Rptr. 2d 504 (Ct. App. 2001). The court there upheld the privacy claims of the members of a boys' baseball team whose manager pled guilty to sexually abusing children while working in the team's league. *Id.* at 507. *Sports Illustrated* published a team photo of the members—only some of whom were victims—in connection with a report on the manager's crimes. *Id.* The court relied in part on the fact that journalistic professional standards favored non-identification of molestation victims and cited declarations of journalistic experts that use of pictures of team members was "not consonant with journalistic standards and practices." *Id.* at 514.

558. *Frisk v. The News Co.*, 523 A.2d 347, 351 (Pa. Super. Ct. 1986), *appeal denied*, 530 A.2d 867 (Pa. Super. Ct. 1987).

559. *Sisemore v. U.S. News & World Report, Inc.*, 662 F. Supp. 1529, 1536 (D. Alaska 1987).

560. *Id.*

Several things seem clear. The courts have rejected any First Amendment exceptions for investigative newsgathering.⁵⁶¹ Also, undeniably, there is no binding system of ethical rules that can be implemented by an authoritative decision-maker parallel to the professional discipline of lawyers or judges.⁵⁶² In this sense, a claim can be made that journalists as a collective group lack professional status and stature.⁵⁶³ But the Supreme Court's analysis in *Harte-Hanks* and the decisions discussed above neither demand nor discuss such a rigid threshold requirement, but instead operate at a broader level of generality, examining whether the defendant's act or omission (failure to contact the plaintiff, reliance on memory alone, failure to investigate, reliance on speculative, accusatory inferences without editorial review, and finding evidence to implement a preconceived storyline) violated broad concepts of journalistic integrity. Viewed in this light, there are general standards that courts can and do fashion and rely on in assessing constitutional malice in the hidden camera milieu.

Examining the journalistic literature and commentary suggests convincingly that there is a strong consensus⁵⁶⁴ on many basic points

561. See *Davis*, 510 F.2d at 734 (rejecting any "extra First Amendment importance" and protection based on the "allegedly peculiar nature" of the job and the necessary corollary thereto that the investigative reporter "must be allowed to make statements in interviews that he (or anyone else) would not be permitted to say in a final context"); accord *Carey*, 390 F. Supp. at 1030 n.15.

562. See William A. Henry III, *When Reporters Break the Rules*, TIME, Mar. 15, 1993, at 54. Author Henry reports:

News consumers may . . . wonder if journalism has any rules at all. The honest answer: not really . . . [J]ournalism as a whole, unlike law or medicine, has no licensing procedure, no disciplinary panels, no agreed-upon code of behavior. Practices . . . perfectly acceptable to some major news-gathering institutions—such as going undercover to expose wrongdoing—are forbidden at others.

Id.; see also *Hinerman*, 423 S.E.2d at 576 n.26 (noting that, unlike the media, judges are subject to "strict and enforceable" ethical canons with a forum in which sanctions can be imposed, an imperfect system "better than anything the media have").

563. See Logan, *Stunt Journalism*, *supra* note 11, at 157. Logan concludes journalism lacks three if not all four of the characteristics of a profession:

- (1) Substantial formal training;
- (2) The provision of services, the quality of which a client cannot adequately evaluate;
- (3) Sublimation of self-interest to the public good; and
- (4) Self-regulation, that is, the group is organized to assure the public that its members are competent, do not violate trust, and transcend self-interest.

Id. at 157–58; see also Jane E. Kirtley, *Vanity and Vexation: Shifting the Focus to Media Conduct*, WM. & MARY BILL RTS. J. 1069, 1083 (1996) (noting that journalists are not licensed and do not subscribe to universal canons of professionalism—any existing codes are "aspirational rather than mandatory" in nature).

564. See Logan, *Stunt Journalism*, *supra* note 11, at 162–64 (summarizing the "critiques of stunt journalism"); Paterno, *supra* note 23 (citing a survey tallying only twenty-two percent of

among print journalists⁵⁶⁵ and television newsroom journalists,⁵⁶⁶ at least at the national network level,⁵⁶⁷ who have examined the big picture of the modern media milieu. There is concern over: the blurring of the news-entertainment dichotomy;⁵⁶⁸ the concomitant “dull[ing]” of ethical

journalists queried believed “claiming to be someone else” was justified to get a story, approximately the same as in the early 1980s).

565. See Lissit, *Gotcha*, *supra* note 9, at 18 (noting most newspapers deem hidden camera stories inappropriate, citing the sting at The Mirage bar in 1978 and the ensuing broad criticism thereof); see also Kalb, *supra* note 181. Rejecting hidden camera usage, Kalb explains:

Central to the craft is the guiding principle that journalists should be truth-tellers, which means they should not . . . sneak in the back [door] and rationalize the deception by claiming it was the only way to get at the truth. Exceptions . . . do exist, but only for extreme, life-or-death situations—not for ratings, not for reasons of laziness, not for sensationalism, not for a snappy headline. Exceptions to deceptive practices are exceptions; today they seem to be the rule.

Kalb, *supra* note 181; see also Baker, *supra* note 97 (citing ABC’s expert, Dr. Louis Hodges, as conceding that most of the nation’s prestigious newspapers barred all deception in gathering news); Baker, *supra* note 97 (quoting Time Inc.’s rule of routine disclosure of a reporter’s identity, magazine’s identity and that a story for publication was in progress—unless an exception was granted by the editorial hierarchy); Paterno, *supra* note 23, at 42 (concluding many newspapers forbid reporters from engaging in deceit to get a story and quoting Ben Bradlee of the *Washington Post*: “I don’t think reporters should misrepresent themselves. Period.”). But see MacKenzie, *supra* note 119 (noting that most responsible newspapers do not allow reporters to act as deceptive poseurs but that television “hasn’t embraced that message, hasn’t learned that lesson”). The differing attitudes of the print and television media toward hidden cameras is aptly found in a comment by Ira Rosen, who supervised the “PrimeTime Live” unit and was a co-defendant in *Food Lion*. Baker, *supra* note 97. He disparaged the print media critics of “PrimeTime Live” as “the high and mighty print press” and noted that newspapers are not “primarily about pictures.” *Id.*

566. See discussion *supra* Part III.A.

567. Kovach, *A First Step*, *supra* note 13 (noting that the only group of journalists surveyed who were “not troubled” by the influence of prime time newsmagazines were local television entities, who were “increasingly . . . adopting many of the story-telling devices and limited definitions of what is news” of such programs).

568. See Jonathan Yardley, *The Food Lion Jurors’ Reverberating Roar*, WASH. POST, Jan. 27, 1997, at C2. Yardley comments:

No matter how many highfalutin words people in television use to describe the likes of “PrimeTime Live” and “20/20” and “60 Minutes” and “Dateline” and other such shows, the fact remains that they are not journalism but entertainment, not news reports but shows . . . it is a smoke screen and a deceit to argue that these [First Amendment] rights devolve upon them because of their existence as “news” programs . . . to equate them with the broadcast and printed material that really is news merely drags the latter down to their level.

Id.; see also Logan, *Stunt Journalism*, *supra* note 11, at 166 (comparing earlier periods when newsroom personnel and activities were “scrupulously separated and protected” from entertainment to the current state of the media: “Now news is right there in the pit, clawing for ratings with programs featuring dramatized murder and mechanized laugh tracks”); Jicha, *supra* note 96 (“The issue of hidden cameras isn’t one of good reporting but of good television. A president was brought down in the Watergate investigation without hidden cameras. Solid journalism was all it took.”); MacKenzie, *supra* note 119 (“When you’re talking about looks, inflection, make-up, hair spray, ‘talent,’ color-coordinated attire, stage direction, the tilt of the

constraints⁵⁶⁹ from the dominance of the “bottom line”⁵⁷⁰/“show-biz imperative”⁵⁷¹ mentality and its incestuous offspring, the hidden camera; the indifference to the plight of victims of hidden camera stories “caught in the media’s crosshairs”⁵⁷² and the overuse⁵⁷³ of hidden cameras in an expanding market to minor stories of a “pipsqueak,”⁵⁷⁴ “gimmicky,”⁵⁷⁵ or “two-bit”⁵⁷⁶ nature not justified by the lies, dishonesty, and intrusiveness

head, how well one reads aloud, and out-of-sight salaries, where does entertainment end and journalism begin (if it ever does?)”); Schorr, *supra* note 93 (“For TV journalists, the show-biz imperative has blurred the line between reality and pretense.”); Kovach, *A First Step*, *supra* note 13 (A “broad majority”—about seventy percent—of professional journalists believe the news media have “blurred the lines between news and entertainment and that the culture of argument is overwhelming the culture of reporting.”); STRIKING THE BALANCE: BUSINESS AND PUBLIC PRESSURES, *supra* note 89 (Overwhelmingly, news media professionals say the lines have blurred between commentary and reporting and between entertainment and news.); see also Joseph Wharton, *Hidden-Camera Cases Test Scope of Media Protections*, A.B.A. J., Apr. 1997, at 22 (quoting George Freeman, assistant general counsel of *The New York Times* and co-chair of the ABA Litigation Section’s First Amendment and Media Litigation Committee: “The media is in disrepute with many juries because of the blurring line between entertainment and news.”). This concern over “blurring” of the news-entertainment dichotomy is an international one. See *Blurring the Boundaries*, *supra* note 90.

569. Schorr, *supra* note 93.

570. Gunther, *Lion’s Share*, *supra* note 95, at 20 (quoting a “prominent network executive”: “Once you get into this business of competing for prime time ratings, it’s a downward spiral.”); see also STRIKING THE BALANCE: BUSINESS AND PUBLIC PRESSURES, *supra* note 89.

571. Schorr, *supra* note 93.

572. Logan, *Stunt Journalism*, *supra* note 11, at 170; see also Brill, *supra* note 124, at 7 (“Hurting people is inevitable. But the hurt ought to have some countervailing value other than profit by entertainment.”).

573. Even the veteran Mike Wallace of “60 Minutes” says his show now uses deceit in newsgathering only rarely, primarily because “it is not necessary. If you really want to find out what’s going on, there are ways to find out without lying.” Paterno, *supra* note 23, at 43.

574. Alter, *supra* note 545, at 36 (“The real means-versus-ends question—is the story so important that it’s worth violating someone to get—isn’t asked often enough.”). A Virginia appliance repair shop won a mere one dollar in damages, yet the jury tendered a note to the defendant admonishing ABC about the “goals and objectives” of its “PrimeTime Live” newsmagazine: “Be sure that the kind of reporting coming from this show is what you, as an outstanding news organization, want to put your name to.” Gunther, *Lion’s Share*, *supra* note 95, at 23; see also O’Brien, *supra* note 23, at 12 (quoting Bob Steele, the Poynter Institute’s “resident media ethicist” and former reporter and producer for television, that the good instances of hidden camera stories “are outweighed by the glut of hidden camera stories focusing on small-scale consumer scams, ‘gotcha’ pieces targeting someone for a minor breach of behavior, or weak investigative reports that simply don’t justify the deception”).

575. O’Brien, *supra* note 23, at 12 (quoting Charles Lewis, formerly of ABC and a producer for “60 Minutes” and now executive director for the Center for Public Integrity: “Where I have a problem is when it’s gimmicky and it’s used week after week for things that aren’t important.”).

576. Logan, *Stunt Journalism*, *supra* note 11, at 163 (“Stunts titillate rather than inform, often targeting two-bit criminals rather than the perpetrators of widespread serious harm.”); see also KOVACH & ROSENSTIEL, *supra* note 6, at 122 (criticizing exposés involving matters that are matters of simple common sense or self-evident as belittling investigative journalism: “The press becomes the boy who cried wolf. It is squandering its ability to demand the public’s attention

inherent therein; the decline in public respect for journalism⁵⁷⁷ as a result of this “degradation of the culture of news;”⁵⁷⁸ and the compelling need to

because it has done so too many times about trivial matters. It is turning watchdogism into a form of amusement.”); Baker, *supra* note 97 (detailing ABC’s counsel’s examples of appropriate hidden camera use and noting that he did not mention stories that “cheaped the show and diminished the argument for hidden cameras”); Paterno, *supra* note 23, at 43 (citing stories involving misrepresentation to land jobs as telephone psychics and undercover tactics at bars to discover great “pick up” lines and “[c]ountless other undercover exposes of marginal import”); Paterno, *supra* note 23, at 43 (The public feels the media used “a bazooka to kill a fly.”); Meier, *supra* note 88 (quoting Tom Rosenstiel, director of the Project for Excellence in Journalism of the Pew Charitable Trust that *Food Lion* involved “the excessive and trivial use of hidden cameras”).

577. See Logan, *Stunt Journalism*, *supra* note 11, at 162–64, 168–71, 175; see also Kalb, *supra* note 181 (noting that Americans end up “lumping” journalists together with politicians because of their “similar yarn(s),” i.e., that lying or other unethical or illegal behavior was necessitated by the public interest, and citing a recent Roper poll that only two percent believed all they read in newspapers (five percent on network news) and a University of Chicago National Opinion Research Poll finding only eleven percent had “a great deal of confidence” in the press).

[U]nlike in the glory days of Woodward and Bernstein, the public cannot distinguish between a journalist’s lying for the public good and just lying. The relentless Geraldo-ization of network news magazines has led them to use hidden cameras as an audience-grabbing stunt rather than as a considered last resort, at the cost of equating all journalism with that practiced by the *New York Post* and *The National Enquirer*.

Alterman, *supra* note 104, at 5. Alterman also quoted a recent Gallup Poll showing only seventeen percent of the public viewed even newspaper reporters’ ethics as “high” or “very high.” *Id.*; see also STRIKING THE BALANCE: BUSINESS AND PUBLIC PRESSURES, *supra* note 89 (“Lack of credibility is the single issue most often cited by the news media as the most important problem facing journalism today.”). “Lawyers don’t come close to the press when it comes to unaccountability and self-righteousness in pursuit of self-interest and money.” Brill, *supra* note 124, at 5. Brill continues by citing a new joke about lawyers: “*Question*: Why should lawyers love the press? *Answer*: Journalism is the only profession that makes lawyers look good.” *Id.* Brill disapprovingly explains: “At a time when they are needed more than ever to explain an increasingly complicated, fast-changing world to people who increasingly have the power to govern themselves, they are just plain not trusted.” *Id.*

578. Kovach, *A First Step*, *supra* note 13 (explaining the change as follows: “[F]rom one that was steeped in verification and a steadfast respect for the facts, toward one that favors argument, opinion-mongering, haste and infotainment”); see also Ken Auletta, *Battle Stations: How Long Will the Networks Stick with the News?*, *NEW YORKER*, Dec. 10, 2001, at 60, 61 (quoting Dan Rather as “blam[ing] warped values for the drop in international-news coverage—‘the Hollywoodization and “frivolization” of the news’—and he blames the networks, including his own: ‘Entertainment values began to overwhelm news values.’”); *Dateline’ Scoops Again*, *supra* note 118 (“The profusion of sensationalist TV news shows has left all the networks scuffling and scraping for stories and not caring very much how or where they get them.”). Author Don Hewitt comments:

The sad fact of life about television today is that the economics of commercial broadcasting have in large measure driven the networks out of the expensive and high-risk entertainment business, which they used to be very serious about and did very well, and into the less expensive and less risky news business, which they’re not very serious about and don’t do very well. . . .

Today, a lot of what passes for news on television couldn’t hold its own with a supermarket checkout counter.

Today, the only measure that counts is what kind of promotable nonsense you can

ensure and protect the independence of the newsroom from the business side of the operation.⁵⁷⁹

Although occasional critics have viewed “press ethics”⁵⁸⁰ as a contradiction in terms,⁵⁸¹ oxymoronic,⁵⁸² or irredeemably vague,⁵⁸³ there

come up with to draw people away from the sitcom that’s opposite you on another channel. News competing with entertainment has to mean cutting corners. You can’t compete with a sitcom unless you have no compunction about being something you aren’t, or, at the very least, being something you shouldn’t be.

HEWITT, *supra* note 108, at 220–21.

579. See Kovach, *A First Step*, *supra* note 13.

580. TOM GOLDSTEIN, *THE NEWS AT ANY COST: HOW JOURNALISTS COMPROMISE THEIR ETHICS TO SHAPE THE NEWS* 13 (1985); see also KOVACH & ROSENSTIEL, *supra* note 6 (“Since there are no laws of journalism, no regulations, no licensing, and no formal self-policing, and since journalism by its nature can be exploitative, a heavy burden rests on the ethics and judgment of the individual journalist and the individual organization where he or she works.”).

581. See GOLDSTEIN, *supra* note 580, at 12 (“The almost universal response [to a book in progress on press ethics] was: ‘Short book.’”). One commentator asked, after mentioning that the judiciary protected privacy from police intrusion, who similarly “monitors” TV journalists? Jicha, *supra* note 96. Jicha noted Ted Koppel’s response in the “Nightline/Viewpoint” follow-up to the Food Lion program controversy: “Journalists are watching journalists.” *Id.* The critic’s response: “As long as ratings are the priority, that’s not good enough.” *Id.*

582. MacKenzie, *supra* note 119 (posing the question whether “serious television journalism” was an oxymoron); see also GOLDSTEIN, *supra* note 580, at 12.

583. See, e.g., Logan, *Stunt Journalism*, *supra* note 11, at 159. Professor Logan notes that any attempts result in codes or guidelines “full of gauzy generalities” without enforcement provisions. *Id.* He cites several reasons for this, including fear that they will be used by plaintiffs in litigation. *Id.* at 159–60. He references the response of Bruce W. Sanford, experienced media lawyer-author, as never having seen a successful use of a breach of an ethics code provision against a defendant. *Id.* at 160 n.73; see also Keeton, *supra* note 11, at 135 (criticizing the ethics code adopted by the Society of Professional Journalists as “leav[ing] far too much discretion in the hands of journalists to determine what information is ‘vital to the public’ by providing no specific guidelines to follow”). The author proposes the adoption of “clearer mandatory guidelines” by the media for undercover operations. Keeton, *supra* note 11, at 136; see also Henry, *supra* note 562 (asking if journalism has any binding rules at all, he replied, “The honest answer: not really.”).

That journalists are not subject to any ethical standards is a tragedy; there is no code of ethics with any teeth (and no body for enforcement of the same), only vague generalizations. See Keeton, *supra* note 11, at 135. One commentator notes they “tend to be either so narrow as to have no significant impact, or so sweeping as to discourage legitimate newsgathering.” Jane E. Kirtley, *Freedom of the Press: An Inalienable Right or a Privilege to Be Earned?*, 9 U. FLA. J.L. & PUB. POL’Y 209, 218 (1998). Journalist textbooks further provide only simplistic, virtually useless analysis. See, e.g., STEVEN WEINBERG, *THE REPORTERS’ HANDBOOK, AN INVESTIGATOR’S GUIDE TO DOCUMENTS AND TECHNIQUES* (3d ed. 1996). That text fails to discuss any of the bright lines, cross-roads, and potential legal liability facing any journalist who is weighing the commission of a crime or tort. See *id.* The author’s best advice is to follow “the golden rule.” *Id.* at 492–93. This is a pathetic, enigmatic, unenlightening mandate for determining when it is allowable to commit a crime or a tort in the name of the truth. The Code of Ethics of the Society of Professional Journalists, the trade organization, is hopelessly vague in terms of giving guidance to would-be spies. See Logan, *Stunt Journalism*, *supra* note 11, at 161. Steven Brill has complained of serious, systemic problems current in the world of journalism,

specifically, the utter lack of ethical criteria and standardization for journalists. See Brill, *supra* note 124, at 5. Brill comments:

I'd rather focus on the press—which actually does a lot worse than lawyers when it comes to asserting professionalism.

For starters, at least lawyers *have* a Code of Professional Responsibility.

Journalists don't. Efforts to promulgate a real code, let alone enforce it, have never gotten anywhere.

That's because to many journalists the only code of professional responsibility is the First Amendment, which, rightly, gives us a legal right to do almost anything. In other words, too many journalists—perhaps jaded by the experience of having too many lawyers advise them on what they can get away with—take the attitude that what is legally okay is always ethically okay. . . .

1. A journalist should never lie or mislead a reader in any way, either by commission or omission. . . .

3. A journalist and an organization wishing to call itself a journalism organization should take care that photos, photo captions, headlines, and promotional material associated with stories it is publishing or broadcasting do not overstate or distort what is reported in the story. . . .

4. A journalist should always be candid about the quality and certainty of his or her information. . . .

5. To ensure accuracy and fairness, a journalist should make sure that no one who is the subject of a story, even a tangential subject, is surprised to have been written about in the way they were written about when the story is published or broadcast. . . .

8. It is completely appropriate that journalists and journalism organizations be concerned with the long-term profitability of their work; and, with that in mind it is not inappropriate for journalists to try to be interesting and even entertaining as well as informative. Nonetheless their first priority, if they are to assert that they are engaged in journalism, is not to entertain or otherwise attract an audience or please advertisers but to give people information that they think is important for them to know. . . .

9. Under the banner of “the public’s right to know,” journalists should not fail to balance the importance of what they want to report with the negative consequences of reporting it.

I'm taking this idea from my friend Jeff Greenfield of ABC News, who recently gave a talk in which he emphasized that journalists ought to add a “what?” to their “public’s right to know” mantra. (As in, “The public’s right to know what?”) Yes, the public may have some kind of right to know about how Simpson’s young children are now faring—or at least the press may have a right to report it. But does that mean journalists should report it, with paparazzi hovering around their school? Shouldn't we weigh the damage we might do against the value of the information we are providing? Sure, the Court TV camera has the “right” to leer at the family of Nicole Simpson sitting in the courtroom while the coroner is reading his autopsy report from the witness stand. But does that mean we should? . . .

Hurting people is inevitable. But the hurt ought to have some countervailing value other than profit by entertainment.

10. Journalists and journalism organizations should make themselves as accountable as those they seek to cover:

i) by printing or broadcasting corrections of mistakes of fact or of fairness and context at least as prominently as any original mistake;

ii) by candidly explaining the mistake and naming the reporters, editors, or producers who made it;

iii) by regularly and prominently printing or broadcasting information regarding the way in which readers can communicate complaints and requests for corrections; . . .

v) by always listing and making clear in any publication or broadcast the

appears to be strong support for and acceptance of some general guidelines as to the appropriate use of active deceit⁵⁸⁴ and hidden cameras, and the imposition of some controls on the end-justifies-the-means auto-determination of appropriateness by the journalist.⁵⁸⁵ The use thereof would be permitted only where: (1) traditional investigative methods have not worked (in other words, as a last alternative);⁵⁸⁶ (2) it would be limited

name of the person who—whether he actually exercised it or not in that particular case—has final responsibility for the decision to publish or broadcast the publication or program in question.

Id. at 5–7, 85.

584. See O'Brien, *supra* note 23, at 12 (quoting Bob Steele); *Questions About Investigative Techniques*, NEWS PHOTOGRAPHER, Mar. 1, 1997, at 28, 1997 WL 10391830 (quoting NPPA consulting attorney Mark Eissman distinguishing hidden camera cases with lying and/or trespassing from other hidden camera stories); see also Logan, *Stunt Journalism*, *supra* note 11, at 154 n.24 (discussing the reemergence of hidden cameras, often from a van on a public street, which do not involve deceit but surreptitious observation of which the public generally can view). Where several Congressmen were wine and dined by lobbyists and filmed by hidden camera on a public beach, apparently no “reasonable expectation of privacy” was involved. Jicha, *supra* note 96. Some commentators have also discussed the distinction between affirmative misrepresentation and non-disclosure of an intent to expose, “allowing the perception to form” that the agent is just another employee. Baker, *supra* note 97. One commentator has responded: “But precisely how different is a matter of debate for philosophers and lawyers. And it remains true that people and institutions with something to hide aren’t about to invite journalists in to do their thing.” *Id.* Note that the RTNDA Code of Ethics provides the following ambiguous guideline: “Professional electronic journalists should . . . [r]efrain from ordering or encouraging courses of action that would force employees to commit an unethical act.” RADIO-TELEVISION NEWS DIRECTORS ASS’N & FOUNDATION, CODE OF ETHICS AND PROFESSIONAL CONDUCT, <http://www.rtna.org/ethics/coe.shtml> (rules adopted Sept. 14, 2000) (emphases added).

585. See Jicha, *supra* note 96 (“If police were allowed to search homes without a warrant, we could put huge dents in crime. But do we want to become a police state to achieve this end?”).

586. See O'Brien, *supra* note 23, at 12 (quoting RTNDA President Barbara Cochran that the “mania” for hidden camera stories has “definitely waned. . . . Most people use hidden camera stories now as a tool of last resort.”); *id.* at 14 (quoting the RTNDA Code of Ethics: “[N]o other way to obtain”); *id.* (quoting the Society of Professional Journalists’ Code of Ethics: “Avoid undercover or other surreptitious methods of gathering information except when traditional open methods will not yield information”); see also KOVACH & ROSENSTIEL, *supra* note 6, at 83 (“Journalists should not engage in masquerade unless there is no other way to get the story.”); Lidsky, *supra* note 11, at 233, 239 (noting the Food Lion story could have been done by “less intrusive means” and proposing a qualified privilege with a requirement that the methods not be “substantially more intrusive than necessary” to get the documentation); Logan, *Stunt Journalism*, *supra* note 11, at 162–63 (“Critics of stunt journalism counter [that a] journalist should use deceit only . . . as a last resort, when traditional reporter techniques have failed [E]fforts should first be made to get the story ‘through the front door.’”); Logan, *Stunt Journalism*, *supra* note 11, at 161 (quoting the guidelines adopted by the Society of Professional Journalists: “Avoid undercover or other surreptitious methods of gathering information except when traditional open methods will not yield information vital to the public.”); Paterno, *supra* note 23, at 42 (citing, to the same effect, the “handbook” of the Society of Professional Journalists); Lissit, *Gotcha*, *supra* note 9, at 21 (quoting the proposed guidelines adopted by the Society of Professional Journalists and the Poynter Institute for Media Studies in 1992: “[W]hen all other alternatives for obtaining

to the unusual cases of vital or compelling public interest,⁵⁸⁷ (3) there would be revelation-disclosure of the surreptitious methods used and an explanation for the deception and why this method was the only way to get at the facts of the story⁵⁸⁸ in augmenting other traditional modes of

the same information have been exhausted"); McMasters, *supra* note 154, at 18 (stating hidden cameras are more acceptable when there is "no other way to get the story without employing undercover techniques and some deception"); Rosenberg, *supra* note 156 ("Thank goodness also for journalists who realize that [hidden cameras] should be used . . . *only as a final resort.*" (emphasis added)); Starobin, *supra* note 23 (concluding "ABC could have done a devastating story" on Food Lion without the deception with the on-record interviews with seventy current and former employees); RADIO-TELEVISION NEWS DIRECTORS ASS'N & FOUNDATION, CODE OF ETHICS AND PROFESSIONAL CONDUCT, <http://www.rtnda.org/ethics/coe.shtml> (rules adopted Sept. 14, 2000) (delineating "Professional electronic journalists should . . . [u]se surreptitious newsgathering techniques, including hidden cameras or microphones, only if there is no other way to obtain stories of significant public importance and only if the technique is explained to the audience."). Academic press ethicist Professor Louis W. Hodges, who testified as an expert on behalf of ABC in *Food Lion*, has proposed a slightly lower standard emphasizing efficiency considerations: "[T]here must be no reasonable likelihood that comparably accurate and reliable information could be obtained as efficiently through conventional investigative techniques." Louis W. Hodges, *Undercover, Masquerading, Surreptitious Taping*, J. MASS MEDIA ETHICS, Fall 1988, at 26, 31.

587. See O'Brien, *supra* note 23, at 14 (quoting the RTNDA Code of Ethics: "[S]tories of significant public importance"); *id.* (quoting the Society of Professional Journalists' Code of Ethics: "[I]nformation vital to the public"); *id.* (quoting Bob Steele: "We can only justify that inconsistency [i.e., deceit to pursue truth] . . . when we truly serve a greater principle, such as pursuing a highly important (and otherwise elusive) truth."); see also KOVACH & ROSENSTIEL, *supra* note 6, at 83 ("The information must be sufficiently vital to the public interest to justify deception."); Hodges, *supra* note 586 ("[T]he information must be of overriding public importance."); Lidsky, *supra* note 11, at 239 (suggesting reporters be required to show "probable cause" to believe a "significant threat to the health, safety, or financial well-being of others" existed); Logan, *Stunt Journalism*, *supra* note 11, at 162-63 ("Critics of stunt journalism counter [that a] journalist should use deceit only to expose very serious wrongdoing."); Logan, *Stunt Journalism*, *supra* note 11, at 161 (quoting the rule adopted by the Society of Professional Journalists: "[I]nformation vital to the public"); Paterno, *supra* note 23, at 42 (quoting the "hand book" of the Society of Professional Journalists: "[T]he story illuminates an extremely serious social problem or prevents profound harm to individuals"); Lissit, *Gotcha*, *supra* note 9, at 21 (quoting from the 1992 proposed guidelines by the Society of Professional Journalists and the Poynter Institute for Media Studies: "[W]hen the information obtained is of profound importance. . . of vital public interest, such as revealing great 'system failure' at the top levels, or it must prevent profound harm to individuals"); McMasters, *supra* note 154, at 18 (explaining that hidden camera techniques should only be used on "a significant story serving the public interest"). While defending the Food Lion story as justified, one author still declared that hidden camera undercover stories should be done "judiciously and deployed only in the gathering of stories that are truly epic and broadly affect the public well-being . . ." Rosenberg, *supra* note 156. Of course, the author acknowledged, "[u]nfortunately, the latter [i.e., the journalist who abides by this declaration] is too rarely the case." *Id.* Further still, the author recognized "there has been far too much gratuitous eavesdropping by news cameras." *Id.*

588. See O'Brien, *supra* note 23, at 14 (quoting RTNDA Code of Ethics: "[O]nly if the technique is explained to the audience"); *id.* (quoting the Society of Professional Journalists' Code of Ethics: "Use of such methods should be explained as part of the story."); see also KOVACH & ROSENSTIEL, *supra* note 6, at 83 ("Journalists should reveal to their audience

investigative reporting;⁵⁸⁹ (4) the harm prevented outweighed any harm from “the act of deception”;⁵⁹⁰ and (5) the journalists have engaged in “a meaningful, collaborative, and deliberative” process of decision-making.⁵⁹¹ Concededly, there may be a difference between theory and reality;⁵⁹² further the consensus is stronger as to the circumstances identified in (1)–(3) than those in (4) and (5).

Under the aforesaid broad criteria used by the courts, non-compliance with applicable journalistic standards would appear to be at least admissible evidence⁵⁹³ on the issue of constitutional malice, both in terms of the credibility⁵⁹⁴ of the defendant (particularly where it also deviates from the defendant’s own internal policies) and deviation from widely

whenever they mislead sources to get information, and explain their reasons for doing so, including why the story justifies the deception and why this was the only way to get the facts.”); Paterno, *supra* note 23, at 42 (citing the “handbook” of the Society of Professional Journalists and revealing their “deception to the public”); McMasters, *supra* note 154, at 18 (disclosing “[t]he internal review process] and the undercover techniques used during the airing of the story”).

589. See O’Brien, *supra* note 23, at 13 (quoting Bob Lissit that hidden cameras are appropriate “when they supplement ‘extraordinarily good research and document reporting’”); Lissit, *Gotcha*, *supra* note 9, at 21 (quoting the guidelines proposed by the Society of Professional Journalists and the Poynter Institute for Media Studies: “[W]hen the individuals involved and their news organization[s] apply excellence, through outstanding craftsmanship as well as the commitment of time and funding needed to pursue the story fully”). *But see* Logan, *Stunt Journalism*, *supra* note 11, at 160–61 (noting that the above proposal was rejected by the Society of Professional Journalists).

590. See Paterno, *supra* note 23, at 42 (citing the “handbook” of the Society of Professional Journalists); Lissit, *Gotcha*, *supra* note 9, at 21 (quoting from the Code of Ethics proposed in 1992 by the Society of Professional Journalists and Poynter Institute for Media Studies). *But see* Logan, *Stunt Journalism*, *supra* note 11, at 160–61 (noting the Society of Professional Journalists deleted this proposal). This was one of several significant things

[P]rovid[ing] reporters broad leeway in deciding whether to lie in order to get a story. Gone are a duty to exhaust traditional open techniques before proceeding by deception, the need to take into account not just the importance of the story, but also any harm the deception will cause, and the obligation to consult with others in the news process.

Id. at 161.

591. See Logan, *Stunt Journalism*, *supra* note 11, at 160–61 (noting that this proposal was deleted in the final version); McMasters, *supra* note 154, at 18 (reporting that it was imperative to “[make] sure the ethical and legal aspects of these reporting techniques were discussed in detail among reporters, newsroom supervisors, and legal counsel” before proceeding). Of course, media defendants seemingly *all* claim they engage in such a process.

592. See Paterno, *supra* note 23, at 42 (“In reality, the rules have been widely interpreted . . . usually due to competitive pressures.”).

593. See *supra* notes 533–61 and accompanying text.

594. See *supra* notes 345–46 and accompanying text. Indeed, it would be rare for a defendant to deny there were any internal standards for determining when to use hidden cameras. More commonly, the defendant, through the responsible editor and/or counsel, will attempt to explain what the standards were and how and why they were met. The jury will arguably then be allowed to determine whether they credibly met their own internal guidelines.

accepted professional norms.⁵⁹⁵ In addition, a separate issue may arise as to the significance of the failure of the “profession” (giving it the benefit of the doubt on this issue) to adopt more precise and binding rules on point. What is the significance of what appears to be a calculated decision to leave the rules warm and fuzzy with maximum flexibility and deniability?⁵⁹⁶ As one critic has suggested, pointing to the absence of any code and the adoption of aspirational rules at best, “[W]ho can blame the media for using the ‘I didn’t know any better’ defense?”⁵⁹⁷

In light of the problems inherent in use of hidden cameras⁵⁹⁸ (possibly illustrated by, but not limited to, the unlitigated *Food Lion* scenario discussed above),⁵⁹⁹ is the failure of individual defendants and/or the television media in general to provide detailed guidance, direction, and supervision in and of itself the type of callous indifference to the victim’s rights (including the personal interests in preserving reputation and avoiding portrayal in a damaging false light) that should be deemed evidence of constitutional malice? As one commentator asked, “[D]o you want someone like Geraldo [Rivera] deciding when it’s OK to peep into your home or business?”⁶⁰⁰ Given the institutional defects⁶⁰¹ of hidden camera stories delineated above, common sense, public policy, and a measured respect for reputation and human dignity demand that hidden camera producers’ work, at a minimum, “require(s) special monitoring”⁶⁰²

595. See *supra* notes 541–61 and accompanying text.

596. See *supra* notes 583, 583–92 and accompanying text.

597. Keeton, *supra* note 11, at 135.

598. See discussion *supra* Part III.

599. See *id.*; see also Paterno, *supra* note 23, at 40 (delineating the comment of the jury foreman in *Food Lion* after issuing the \$5.5 million punitive damages verdict: “You did not have guidelines before . . . You now have them. Let’s find a way to work within those guidelines.”). The foreman, Gregory Mack, was quoted: “You didn’t have boundaries when you started this investigation. . . . You kept pushing on the edges and pushing on the edges. It was too extensive and fraudulent. . . . The hidden cameras were not the issue.” Paterno, *supra* note 23, at 43. Counsel for Food Lion, Andrew Copenhaver, had suggested that the jury be “the policemen on the media highway.” Huler, *supra* note 94.

600. Jicha, *supra* note 96.

601. See Paterno, *supra* note 23, at 44 (quoting Donovan Webster to the effect that journalists who deceive “usually don’t want to spend the time on the story that it would take to do it right. Their editors don’t want to spend the months and months it would take. Time makes editors nervous.”); *id.* at 45 (quoting Harvard’s Marvin Kalb: “There are ethical standards that are supposed to exist in society. There are limits. Democracy is hard work. It requires constant effort. And, . . . it often doesn’t yield its best work when you take a shortcut.”); see also Yardley, *supra* note 568 (“In the pursuit of ‘investigative journalism,’ violations of ethical standards, if not the law itself, are more commonplace than most of us would care to admit.”).

602. *Sprague*, 656 A.2d at 908. The court found evidence supportive of constitutional malice where superiors knew of factors affecting a reporter’s credibility: (1) another media entity had fired the reporter for mental instability and drinking; (2) the reporter was convicted of a

efforts of an ongoing nature, prior to, during, and subsequent to the story's creation and before publication. The absence of such a process, if proved or conceded, may be viewed as reflecting an "I don't care" attitude to the publication of falsity,⁶⁰³ the "reckless indifference," "ostrich" or "wilful

wiretapping crime in a case in which the plaintiff was prosecutor; (3) the reporter made numerous threats to harm the plaintiff's public reputation because he blamed the plaintiff for the conviction; and (4) the threats were evidenced by a list of people who would so testify sent to the reporter's executive editor. *Id.* This evidence put the defendant-newspaper "on notice that [the reporter's] work required special monitoring." *Id.* *But see Bandido's*, 712 N.E.2d at 467 (holding that a few "isolated instances of inaccuracy" by a reporter made reliance on her "at most negligent"). *See also Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984). The court there concluded that evidence of constitutional malice could be found in the failure of superiors to "more closely supervise[]" a reporter whose history reflected "bias . . . or a lack of concern with truth." *Id.* at 572. This would seem especially true in light of the "troubling phenomenon" in network television noted by one producer for a number of television magazines such as "PrimeTime Live," "20/20," and "Dateline NBC": "While seasoned reporters fill the top ranks, many of the support staffers—who actually do much of the reporting—have little or no journalism training." Olive Talley, *Determining the Line Between Fact and Fiction*, NIEMAN REPORTS, Summer 2001, at 61. Others have expressed concerns about the quality of producers available to meet the enhanced demand. *See, e.g.*, Lissit, *Out of Sight*, *supra* note 10, at 33 (quoting several authorities, including Howard Rosenberg of the *Los Angeles Times*: "'But when has that ever stopped TV news before?'").

Of course, challenging the monitoring issue can be difficult given the frequent advice not to make a "paper trail." This was a problem for Food Lion in that ABC's in-house counsel, Jonathan Barzilay, testifying by video deposition, was quite vague as to his memory of advice given the co-producers. Baker, *supra* note 97. They had testified he had assured them no laws were being broken. *Id.* The jurors were apparently very suspicious of the absence of records. *Id.* As Ms. Bozman, the juror who promoted imposing \$1 billion in punitives, said: "When you're working for a big business and going into an important, important thing like this, wouldn't a smart lawyer keep papers on it?" *Id.*

603. *Guccione v. Hustler Magazine*, 632 F. Supp. 313, 319 (S.D.N.Y. 1986) (finding evidence of constitutional malice through "admissions" by the defendant's owner-publisher in contemporaneous litigation of "I don't care" and "I didn't care" when asked about a publisher's right to publish false statements), *rev'd on other grounds*, 800 F.2d 298 (2d Cir. 1986), *cert. denied*, 479 U.S. 1091 (1987); *see also* Lissit, *Gotcha*, *supra* note 9, at 21 (quoting Everett E. Dennis, executive director of the Freedom Forum, criticizing hidden camera stories as a "'lazy kind of journalism, driven by ratings and people who don't have a clue about ethics. It's a bulldozer over a lot of things people hold dear.'"); MacKenzie, *supra* note 119 (listing "inaccuracy by intent" as one of several fallacies having no "legitimate place in a television news operation coveting—as it should—respect for honesty and truth"); *'Dateline' Scoops Again*, *supra* note 118 ("The profusion of sensationalist TV news shows has left all the networks scuffling and scrapping for stories and not caring very much how or where they get them.").

The "special monitoring" obligation has particular application to a system of checks and balances to monitor the producer of the hidden camera story and his or her spies. The newsgatherer should and must have a system in place to see if a "rogue producer" unfairly gathers the information or edits unfairly. Often times, there is no system of checks and balances; rather, it's a love-fest of mutual respect and back-slapping. This failure to meaningfully supervise a producer may be probative evidence of recklessness. Likewise, the "operatives," the spies in hidden camera stories, usually come in two species. The first type are professional mercenaries who generally will simply do whatever they are told, will make false statements, impersonate, and will do so repeatedly as a way to make their living. They include Mitchell Wagenberg of

blindness” that is a commonality of both cases applying the *New York Times* standard and cases addressing constitutional tort liability.⁶⁰⁴

J. Failure to Retract Supports an Inference of Constitutional Malice

When defendants do a hidden camera story with its predetermined thesis and “reporters” acting as both creator and participants, they get what they intend—a defamatory/false light portrayal, an orchestrated mugging of the plaintiff. Needless to say, what they deem to be the “truth”—and have orchestrated as the “truth”—can never be false as they define falsity. Consequently, generally there is no need (according to such defendants) for a retraction or an apology, even when specifically requested with a detailed analysis of why the portrayal is a false depiction.⁶⁰⁵

New York City, who with his brother, Eric, works for all the networks and other publicity averse entities. See Neil Hickey, *Where TV Has Teeth*, COLUM. JOURNALISM REV., May/June 2001, at 42, 46. The former was named as a defendant in *Hornberger v. ABC, Inc.*, No. L1078697 (N.J. Sup. Ct. 2000), currently on appeal. Plaintiff’s Second Amended Complaint at 3, *Hornberger v. ABC, Inc.*, No. L1078697 (N.J. Sup. Ct. 2000). Another professional spy is Beth Corwin, a.k.a. Samantha Bass, of Fort Bragg, California, who was the hidden camera person in a Virginia case where the jury sent back a note with a verdict in favor of the plaintiff to ABC saying: “Take another look at ‘PrimeTime’s’ [sic] goals and objectives. Be sure that the kind of reporting coming from this show is what you, as an outstanding news organization, want to put your name to.” Gunther, *Lion’s Share*, *supra* note 95, at 23. Ron Hill and Steve Bell of Salt Lake City were operatives in a number of these “hidden camera” cases. See, e.g., *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 815 (M.D.N.C. 1995); *Kersis v. Capital Cities/ABC, Inc.*, No. BC 077553, 1994 WL 774531 (Cal. Super. Ct. (L.A.) Apr. 25, 1994). Bell, in fact, was found liable as a defendant in the lower court companion case to *Sanders v. ABC, Inc.*, 978 P.2d 67 (Cal. 1999). See *Kersis*, 1994 WL 774531, at *6. Jeff Cooke, the spy and named defendant in *Med. Labs. Mgmt. Consultants v. ABC, Inc.*, 30 F. Supp. 2d 182 (D. Ariz. 1998), testified in 1997 that he spent 120 days a year for ABC secretly taping other Americans, effectively a full-time spy for ABC. Reply to Supplemental Brief of Defendants and Appellants at p. 4–5 n.8, *Sanders*, 978 P.2d 67 (Cal. 1999) (No. S05692). None of these individuals have any training in journalism and cannot be considered legitimate journalists. See Talley, *supra* note 602, at 61. Ironically, these professional spies habitually claim privacy rights when asked for personal information at depositions, such as their home addresses. See, e.g., Reply to Supplemental Brief at 3 n.8, *Sanders* (No. S05692). The others are often “interns” duped by the “show” to impersonate without any understanding of what they are getting into and that they are committing a crime and a tort, e.g., Stacey Lescht, who was a former intern hired by ABC to impersonate a telepsychic. *Sanders*, 978 P.2d at 69.

604. *Desnick v. ABC, Inc.*, 233 F.3d 514, 517 (7th Cir. 2000). The court stated:

Reckless indifference [connotes] . . . knowledge by the defendant that there was a high risk of harm to the plaintiff coupled with a failure to take any feasible measure to counter the risk, either by investigating further to see whether there really is a risk and how serious it is or by desisting from the risky activity.

Id.

605. See sources cited *supra* note 171 (discussing the bended knee “apologies” given by an investigative reporter’s journal to fellow media types). No non-media plaintiff should expect (or will likely get) such *mea maxima culpa* treatment.

Any defendant's self-righteous, unjustified refusal to retract provides additional probative evidence of constitutional malice. As the Restatement (Second) of Torts provides, "[U]nder certain circumstances evidence to this effect [of a failure to retract after a demonstration to the defendant that the matter is false and defamatory] might be relevant in showing recklessness at the time the statement was published."⁶⁰⁶ The substantial consensus of the case law agrees,⁶⁰⁷ treating a failure to retract as relevant and admissible evidence on the "overall question[]"⁶⁰⁸ of knowing or reckless disregard of falsity. As one court has pointed out, such a failure to retract "underscored defendant's reckless attitude as to the consequences"⁶⁰⁹ of its publication.

VI. CONCLUSION

Television newsmagazines have been engaged in a vicious war for ratings while viewership inexorably diminishes in a world of cable and satellite.⁶¹⁰ For over twenty years hidden camera purveyors have been playing a game of "chicken" with trial and appellate courts throughout the United States, intentionally testing the limits of fraud, eavesdropping, privacy, and defamation via the use of hidden cameras.⁶¹¹ News has become entertainment. Stories are now "created" by "producers" making "reality" television shows, who attempt to clothe themselves in First Amendment rhetoric, but at the end of the day produce tawdry hidden camera stories. Like gods, and as in *Sanders v. ABC, Inc.*⁶¹² and *Food*

606. RESTATEMENT (SECOND) OF TORTS § 580A cmt. d.

607. *Nat'l Ass'n of Gov't Employees v. Nat'l Fed'n of Fed. Employees*, 844 F.2d 216, 221 (5th Cir. 1988); *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1071 (5th Cir. 1987) (dicta); *Golden Bear*, 708 F.2d at 950; *Morgan v. Dun & Bradstreet, Inc.*, 421 F.2d 1241, 1243 (5th Cir. 1970); *Church of Scientology v. Dell Publ'g Co.*, 362 F. Supp. 767, 770 (N.D. Cal. 1973); *Holbrook v. Casazza*, 528 A.2d 774, 780-81 (Conn. 1987), *cert. denied*, 484 U.S. 1006 (1988); *Abelsayed v. Narumanchi*, 668 A.2d 378, 381 (Conn. App. Ct. 1995), *appeal denied*, 676 A.2d 397, *cert. denied*, 519 U.S. 868 (1996); *Durso v. Lyle Stuart, Inc.*, 337 N.E.2d 443, 448 (Ill. App. Ct. 1975); *Ball*, 801 S.W.2d at 690; *Peisner v. Detroit Free Press, Inc.*, 304 N.W.2d 814, 816 (Mich. Ct. App. 1981), *modified on other grounds*, 364 N.W.2d 600 (Mich. 1984); *Mahnke*, 160 N.W.2d at 11-12.

608. *Church of Scientology*, 362 F. Supp. at 770.

609. *Mahnke*, 160 N.W.2d at 11. Note that the *Restatement (Second) of Torts* has suggested: "[I]t is also possible that the Supreme Court would hold that a State can constitutionally treat a deliberate refusal to retract a clearly false defamatory statement as meeting the knowledge-or-reckless-disregard standard, even though the conduct occurred subsequent to the publication." RESTATEMENT (SECOND) OF TORTS § 580A cmt. d.

610. Clay Calvert, *The Voyeurism Value in First Amendment Jurisprudence*, 17 CARDOZO ARTS & ENT. L.J. 273, 279 & n.34 (1999).

611. *See id.* at 288 & n.76.

612. 978 P.2d 67 (Cal. 1999).

Lion, Inc. v. Capital Cities/ABC, Inc.,⁶¹³ these producers and their lawyers (who may in the future suffer legal liability for aiding and abetting criminality and tortious misconduct in the newsgathering process,⁶¹⁴ and in condoning and fostering an environment of calculated falsehood in libel/false light hidden camera cases) have been deciding whose lives and reputations will be ruined. The resulting unfair shame of hidden camera has become the new version of *The Scarlet Letter*,⁶¹⁵ the very real effects of the hidden camera. The victims of the hidden camera are real, live, human beings, who have faces, families, lives, and want to see a future filled with hope and promise after being blind-sided by these nasty, inculpatory, and entirely unnecessary set-ups. Fortunately, the television media is beginning to realize (but needs to be repeatedly reminded) that the people of this nation are “mad as hell” and are not going to take it any longer.⁶¹⁶

Undeniably, a television newsmagazine would howl if the *New York Times* sent in a false worker to secretly record its inner operations in planning its spying missions, and then broadcast this to the world. The “real news” about hidden cameras is of entities which intentionally and constantly test the limits of (and break) the law of privacy, and commit other torts literally to manufacture news and to excoriate and exploit those who are powerless and who cannot fight back unless their attorneys are willing and able to spend millions of dollars engaging high-priced, extremely sophisticated defense law firms with unlimited budgets funded from the huge profits generated by hidden camera stories and a steely determination borne out by history and practice to “appeal to the end.”⁶¹⁷ In sum, the networks and local stations seem to view hidden cameras as a sport in which they clearly understand that rights of privacy and reputation are going to be trashed while they try to figure out ways to outsmart the common person, the common law and common decency—they are testing indeed taunting courts and all citizens—to try and stop them. It is a taunt

613. 194 F.3d 505 (4th Cir. 1999).

614. See *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 254 (4th Cir. 1997) (upholding an aiding and abetting battery claim against the publisher of a “hit man manual,” “boldly proselytizing and glamorizing” murder as a profession while “dispassionately instruct[ing] on its commission”), cert. denied, 523 U.S. 1074 (1998); see also ELDER, PRIVACY, *supra* note 18, § 2:9 at 55–56.

615. As punishment for her adultery, the character Hester Prynne must wear an embroidered letter “A” on her clothes. *SparkNotes: The Scarlet Letter*, <http://www.sparknotes.com/lit/scarlet/summary.html> (last visited Mar. 1, 2002). See generally NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Bantam Books 1986) (1850).

616. See NETWORK (Warner Studios 1976) (“I’m as mad as hell, and I’m not going to take this anymore!”) (dialogue of the news anchor character Howard Beale, played by Peter Finch, after being fired as the cause of poor ratings).

617. See Lidsky, *supra* note 11, at 207, 217–18.

that citizens and the courts should take on.

Who is harmed by these Scylla and Charybdis⁶¹⁸ twin monsters of illegal and tortious newsgathering and calculated falsehoods—both types of “calculated misdeeds”⁶¹⁹ beyond the pale of First Amendment protection? Clearly, the individual victim, but even more clearly, the collective soul of the country, is victimized by these massive entertainment frauds masquerading as “news.” Without doubt, true speech in most cases fosters and improves public debate, while false speech undermines and degrades it.⁶²⁰ States have both the duty and the right to eliminate this taint as the Supreme Court has unequivocally recognized: “False statements of fact harm both the *subject* of the falsehood and the *readers* [and viewers] of the statement. New Hampshire may *rightly employ its libel laws to discourage the deception of its citizens*. There is no ‘constitutional value in false statements of fact.’”⁶²¹

As *Food Lion*, *Sanders*, and *Shulman v. Group W. Productions, Inc.*,⁶²² powerfully demonstrate, courts are becoming increasingly willing to punish the monster Scylla for newsgathering illegalities and torts.⁶²³ To do

618. Scylla was a nymph who turned into a monster after being poisoned by Circe. *Scylla*, The Encyclopedia Mythica, at <http://www.pantheon.org/articles/s/scylla.html> (last visited Feb. 28, 2002). Scylla thereafter lived under a rock on one side of the Strait of Messina. *Id.* Charybdis was a nymph cursed by Zeus to live in a cave at the other side of the Strait of Messina, sucking water in and out three times a day. *Charybdis*, The Encyclopedia Mythica, at <http://www.pantheon.org/articles/c/charybdis> (last visited Feb. 28, 2002). Together the monster and whirlpool posed a dangerous threat to passing ships, including the ship of Odysseus, the title character from Homer’s epic. *See id.* *See generally* HOMER, THE ODYSSEY (Robert Fitzgerald, trans., Farrar, Straus and Giroux, Inc. 1998) (1961).

619. *Dietemann v. Time, Inc.*, 449 F.2d 245, 250 (9th Cir. 1971).

620. Epstein, *supra* note 4, at 1011 (“False information leads members of the public to make wrong decisions in both their personal lives and in their public activities. It therefore becomes highly problematic, to say the least, to afford false statements any constitutional protection at all.”).

621. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) (emphases added) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)). The Court cited to New Hampshire’s criminal defamation statute, making it a *misdemeanor* for any person to “purposefully communicate . . . to any person, orally or in writing, any information which he knows . . . will tend to expose any other living person to public hatred, contempt or ridicule.” *Id.* at 777 n.6 (emphasis omitted); *see also* *Herbert v. Lando*, 441 U.S. 153, 158 (1979) (finding civil and criminal liability were “well established” at common law and there was “no indication that the Framers intended to abolish such liability”). The Court has indicated a prosecution of a public official for defaming other public officials is allowable if the “calculated falsehood” standard is met. *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964); *see also* ELDER, DEFAMATION, *supra* note 37, § 4:4 at 12–15 (discussing the First Amendment and Due Process limitations on criminal defamation prosecutions).

622. 955 P.2d 469 (Cal. 1998).

623. *See* sources cited *supra* notes 17, 19, 21, 26; *see also* cases cited *supra* note 607 (discussing cases permitting the absence of retraction to evidence malice).

so adequately, publication damages are an absolute necessity. Otherwise, many, if not most, plaintiffs will be essentially remediless. Why? Because they are, almost by definition, unaware of the highly offensive intrusion until the publicity rears up in their shell-shocked faces on television. We are confident that eventually the Supreme Court will follow the Ninth Circuit's granting of such enhanced damages in *Dietemann v. Time, Inc.*,⁶²⁴ the consensus view of the common law, and clarify the ambiguity in *Cohen v. Cowles Media*⁶²⁵ and the gross perversion of justice by the Fourth Circuit in *Food Lion*.⁶²⁶

As for the co-monster Charybdis, the shredder of reputation by calculated falsehood, what is the appropriate remedy? Ideally one should get one's reputation back after it has been unfairly ruined, but this is an impossibility. Just ask Raymond Donovan, the Secretary of Labor under Ronald Reagan, who was forced to step down from office to defend himself successfully by bringing a libel action concerning allegations he had been involved with the Mafia.⁶²⁷ Remember his plaintive rhetorical query after the verdict on the courthouse steps, where should he go to apply to get back his reputation?⁶²⁸ Given the unlikelihood of an apology and retraction, he did what plaintiffs do in torts cases—he sought substitutional relief, damages to make him whole to the extent this rough-hewn remedy can do so, and punitive damages⁶²⁹ to punish and deter defendants and those similarly situated from engaging in similar “wilful blindness”⁶³⁰ in the future.

The common law and the First Amendment provide no protection against “calculated falsehood,” knowing or reckless falsehood, as the Supreme Court has repeatedly recognized.⁶³¹ To protect the victims of hidden camera infotainment and tabloidism, the courts need to continue to

624. 449 F.2d 245 (9th Cir. 1971).

625. 501 U.S. 663 (1991).

626. See sources cited *supra* note 207.

627. See *supra* text accompanying notes 408–15. Two American jurisdictions, Minnesota and Washington, have press councils to examine complaints against the media. See *Minnesota News Council*, at <http://www.mtn.org/newscncl/texttarget.html> (last visited Jan. 21, 2002); *Washington News Council*, at <http://www.wanewscouncil.org/> (last visited Jan. 21, 2002). Similarly, Great Britain has the Press Complaints Commission. See *Press Complaints Commission*, at <http://www.pcc.org.u.k./about/whatis.html> (last visited Jan. 21, 2002).

628. Elkan Abramowitz, *Cases Against Politicians: A History of Failed Prosecutions*, N.Y. L.J., Jan. 3, 1995, at 3; Monroe Freedman, *Silencing Defense Lawyers*, LEGAL TIMES, May 6, 1991, at 22.

629. D.D. Guttenplan, *Settlement Reported in Time Libel Suit*, NEWSDAY, Aug. 16, 1998, at 30.

630. Smolla, *supra* note 11, at 18.

631. See *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964); see also cases cited *supra* note 528.

recognize and affirm certain self-evident (to all but the breast-beating apparatchiks of and for the media) truths:

First, the defense of truth and First Amendment mandated plaintiff proof of material falsity (where mandated by the First Amendment) must be viewed through the prism of the big tent—of the broad brush, implication, juxtaposition, insinuation, innuendo, selective omission—not the little tent of literal truth.⁶³² Where defendant's newsgathering tactics and selective end product transform a few isolated incidents into the broad-brush of massive or general malfeasance, courts should and must require that a defendant asserting truth show that the broad charge is true. There is nothing revolutionary about that. This is the common law and reflects common sense.⁶³³ As a corollary, let the plaintiff show, in proving material falsity, that the defendant magnified isolated and atypical practices into broad charges of wrongdoing,⁶³⁴ as may have happened in the story on Food Lion.

Second, in light of the corrosive, corrupting, and inculpatory nature of hidden cameras (possibly exemplified by the unlitigated Food Lion case), the courts should, in the unique context of hidden camera stories, presume they are false and presume that they are made with constitutional malice, i.e., published in knowing or reckless disregard of falsity.⁶³⁵ In any event,

632. See discussion *supra* Part V.E.

633. See discussion *supra* Part V.E.

634. See discussion *supra* Part V.E.

635. Of course, media defendants may assert the case consensus always places the burden on the plaintiff to prove falsity and fulfill the requisite First Amendment fault burden, whether negligence or constitutional malice. See, e.g., *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776–77 (1986). However, hidden camera reporting is a far cry from the traditional or historically typical news story of the sort at issue in *Philadelphia Newspapers*. See Felicity Barringer, *Journalism's Greatest Hits: Two Lists of a Century's Top Stories*, N.Y. TIMES, Mar. 1, 1999, at C1, LEXIS, News, News Group File, All (cataloging a list of the one hundred greatest news stories of the twentieth century, none of which used hidden cameras). Further, the Supreme Court has clearly suggested that, at least in certain contexts, the defendant may retain the burden of proving accuracy. See *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976) (holding that in the libel context the defendant, *Time*, “must . . . establish not merely that the item reported was a conceivable or plausible interpretation of the decree, but that the item was *factually correct*” (emphasis added)). Hidden camera footage is inaccurate reporting, where by design the depiction is negative, the defendants are participants who create the story supporting this negative depiction, and the defendants have a strong self-interest—economic and otherwise—in portraying the plaintiff as the “villain” or “bad guy” and themselves as the champions of justice. See discussion *supra* Part III. In these unique circumstances presumptions of falsity and constitutional malice are constitutionally permissible. See ELDER, FAIR REPORT, *supra* note 162, § 3:05, at 345–46 (suggesting that in “fair report” cases, *Philadelphia Newspapers* would not bar a court from imposing the burden of proving accuracy on the defendant). Like Professor Elder’s “four corners” approach therein, placing the burden of proof of truth and freedom from constitutional malice on defendants in hidden camera cases is likewise “inherently doable.” *Id.* Defendants have all the necessary evidence—in large part they themselves created it. There is

if not presumed, material falsity and constitutional malice should be provable following the analysis aforementioned.⁶³⁶ Presuming such, however, would measurably lighten the substantial and expensive burden for plaintiffs and plaintiffs' counsel of getting at the wealth of information relevant to the production of hidden camera stories—including access to unused or selectively used outtakes (if still available and not destroyed pursuant to a policy of routine expungement) and other indicia of editorial choice. Under this approach, if the defendant desires to defend its editorial process (having the burden to do so), it will do so with a vengeance, trotting out the vast array of media personnel and evidence at its disposal with a war chest to fund its defense. If it chooses not to do so, the unrebutted inferences of falsity and constitutional malice will remain—the latter justified by the plethora of damning factors common to hidden camera stories delineated above.⁶³⁷

One can imagine, with a grin and some glee, the Chicken Little “sky-is-falling”⁶³⁸ response to the above suggestions. But these modest suggestions only enhance what plaintiffs and plaintiffs' lawyers do and can do if they have remotely comparable access to resources. And the benefits are compelling. As the demand for hidden camera tabloidism and its profit-driven motivation demonstrate, there is little interest in or inclination for television newsmagazines to forego hidden camera stories, the proverbial case of the fox guarding the henhouse. In fact, the interest in hidden camera production seems to have revived after the Fourth Circuit's decision in *Food Lion* despite the twin disasters in *Shulman* and *Sanders*.⁶³⁹

Clearly, whatever the concerns of newsroom journalists—and they are deep and abiding—they are essentially powerless in the face of the

thus neither inequity nor a constitutional problem with imposing on them the burden of justification or truth and proving the absence of constitutional malice. See *id.* Note that the courts have emphasized defendants' control of evidence in finding constitutional malice in other contexts. Cf. *Brown & Williamson Tobacco Co. v. Jacobson*, 827 F.2d 1119, 1134–36 (7th Cir. 1987) (finding the bad faith destruction of a reporter's notes after notice of pending or threatened litigation constituted “strong” and “compelling” evidence of constitutional malice), *appeal after remand*, 14 Media L. Rptr. 1861 (7th Cir.), *cert. denied*, 485 U.S. 993 (1988); ELDER, DEFAMATION, *supra* note 37, § 7:2, at 28 n.29.

636. See discussion *supra* Part V.

637. See discussion *supra* Parts III, V.

638. Chicken Little believes the sky is falling when a seed falls on his tail. Harriette Taylor Treadwell & Margaret Free, *Chicken Little*, in *READING-LITERATURE: THE PRIMER*, at <http://www.mainlesson.com/display.php?author=treadwell&book=primer&story=chickenlittle> (last visited Feb. 28, 2002). A fox convinces Chicken Little and his easily convinced friends to hide in his den, from which they never emerge. *Id.*

639. See generally sources cited *supra* note 19 (discussing *Sanders* and *Shulman* in detail).

profit monster.⁶⁴⁰ The resultant blurring of the entertainment-news dichotomy and the downward spiral in the content and quality of television news makes the “vast wasteland”⁶⁴¹ of American television of four decades ago look like a Periclean Golden Age by comparison to the sensationalist drivel that permeates and largely dominates the television newsmagazines, much of network television and the media generally at the dawning of the new millennium. Journalistic critics have been vociferous in condemning hidden camera stories and tabloidism generally,⁶⁴² but to little discernible avail or impact. It is time for the courts to intervene—sternly and with a severe warning.

Despite the “Chicken Littlists,” the net impact of our proposals will be positive. A presumption of falsity and constitutional malice will enhance the likelihood of plaintiff success, increasing the pressure on network and local television to segregate the editorial function from the profit monster or suffer the financial losses that they will incur and, more importantly, the taints to reputation and integrity from findings of calculated falsity. As a corollary, reputable and serious providers of news will benefit by enhanced reputations and wider viewership and readership, whose competences and abilities as citizen-decisionmakers will be measurably broadened by better quality, more challenging and less sensationalist and biased news coverage. Maybe network and local televisions will be nudged into reportage with a revitalized sense of the public interest rather than the currently pervasive profit culture and its debilitating effects.⁶⁴³ The net impact will be a more dynamic, less

640. See discussion *supra* Part II.B.

641. Newton N. Minow, *Second Chance*, 47 FED. COMM. L.J. 2 (Dec. 1994), at <http://www.law.indiana.edu/fclj/pubs/v47/no2/minow.html>.

642. See, e.g., Ernest Hooper, *Hidden Camera Use Stirs Ethics Debate*, ST. PETERSBURG TIMES, May 10, 1996, at 2C; Kalb, *supra* note 181; A.M. Rosenthal, *On My Mind: Reporters with Masks*, N.Y. TIMES, Dec. 27, 1996, at A39.

643. The public gave the media an appalling review in a recent poll:

The American public, fed up with what it increasingly views as unfair, inaccurate and sensational journalism, is paying less attention to mainstream news media and watching or reading with far less enthusiasm than 10 years ago, according to a new nationwide poll.

The public is especially critical of . . . network news It found that only 26% of Americans say that they enjoy watching network news “a great deal,” down sharply from 42% in a 1985 poll. . . .

Past polls also have found increasing public criticism of the news media but the latest Pew Center survey paints a much starker picture of press credibility and the public’s growing alienation from the mainstream media.

The survey comes as news organizations, as well as newspaper and network television executives, are studying ways to establish better rapport between the media and a public that is spending less time reading newspapers and watching television news. Favorable ratings for network television news have fallen steadily from 30% in 1985 to 27% in 1992 to just 15% this year registering a “very

economically (if not suffocatingly) fettered television, a more meaningful marketplace of ideas.⁶⁴⁴

In sum, we do not seek any substantial “liberalization” of applicable law. We are merely asking for a judicial acknowledgement of the logical legal effects of a deleterious practice that taints the public weal and private reputation. Hidden camera stories can and do violate applicable law in a variety of ways. Doing so has become an accepted, indeed expected, part of its corporate culture because the hidden camera is a sexy way to keep viewer’s interest. Violation of privacy, penal codes, frauds, libels, and other torts are an inevitable result when an entity engaging in journalistic endeavors determines that laws are made to be broken. Sloppy and corrupt journalism is inevitable when there is a tortious and criminal mind-set to gather hidden camera footage. Powerful courts across the nation have weighed in against these hurtful practices, indicating that investigative journalism and the First Amendment are not blackjacks and do not provide unfettered immunity from wrongdoing.⁶⁴⁵ In American culture, a “fair fight” is the norm and expected.⁶⁴⁶

favorable” opinion. Network news viewership has also fallen sharply, with only 40% saying that they watch nightly network news regularly, compared with 60% in 1993. . . .

A majority of the public—56%—now believes news stories are often inaccurate. In 1985, by contrast, 55% said news organizations generally got their facts straight.

Jack Nelson, *Major News Media Trusted Less, Poll Says*, L.A. TIMES, Mar. 21, 1997, at A21.

644. See KOVACH & ROSENSTIEL, *supra* note 6, at 18.

The new danger is that independent journalism may be dissolved in the solvent of commercial communication and synergistic self-promotion. The real meaning of the First Amendment—that a free press is an independent institution—is threatened for the first time in our history even without government meddling. . . .

The conglomeration of the news business threatens the survival of the press as an independent institution as journalism becomes a subsidiary inside large corporations more fundamentally grounded in other business purposes.

This conglomeration and the idea behind much corporate synergy in communications—that journalism is simple content, or all media are indistinguishable—raise another prospect. The First Amendment ceases to imply a public trust held in the name of a wider community. Instead it lays claim to special rights for an industry akin to the antitrust exemption for baseball. In this world the First Amendment becomes a property right establishing ground rules for free economic competition, not free speech. This is a fundamental and epic change with enormous implications for democratic society.

Id. at 18, 32–33.

645. See, e.g., *Sanders*, 978 P.2d at 69; *Shulman*, 955 P.2d at 495.

646. *Associated Press v. Nat’l Lab. Relations Bd.*, 301 U.S. 103, 132–33 (1937) (A reporter has “no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.”). First Amendment decisions “do not stand for the proposition that the press and its representatives are immune from liability for crimes and torts committed in news gathering activities simply because the ultimate goal is to obtain publishable material.” *Nicholson v. McClatchy Newspapers*, 223 Cal. Rptr. 58, 63 (Ct. App. 1986); see also *Galella v. Onassis*, 487 F.2d 986, 995 (2d Cir. 1973); *KOVR-TV, Inc. v. Superior Court*, 37 Cal.

By contrast, hidden cameras are the equivalent of tying the hands of the victims of the hidden camera behind their backs, and annihilating them as if they are defenseless gladiators in an arena owned by, and a spectacle presented by the broadcaster, featuring hidden cameras instead of lions.⁶⁴⁷ Journalists at all levels who “cover themselves” and set up stings with hidden cameras can be excellent targets for wronged plaintiffs, and risk economic and reputational ruin if they engage in such conduct. Perhaps a few major judgments in libel and/or in false light cases will moderate or redirect current thinking and methodology, epitomized by hidden cameras but infecting and tainting journalism in general. Undoubtedly, there is no place to go but up, as Jim Lehrer’s recent pessimistic and dispirited (and needless to say, dispiriting) comments amply demonstrate.⁶⁴⁸ It is time for the courts to intervene and help reinvigorate American news and

Rtpr. 2d 431 (Ct. App. 1995). In the latter, the court found that a question of fact existed under the intentional infliction-“outrage” tort as to whether the defendant was bent upon making news by “elicit(ing) an emotional reaction from the minors for the voyeuristic titillation of [the defendant’s] viewing audience” by confronting immature minors in their home with information of the homicide deaths of neighbor playmates and the suicide of the mother. *KOVR-TV*, 37 Cal. Rtpr. 2d at 435–36. The court found such a “shameless exploitation of defenseless children . . . not the gathering of news which the public has a right to know. A free press is *not* threatened by requiring its agents to operate within the bounds of *basic decency*.” *Id.* (emphases added).

647. When ABC lost *Food Lion*, it spent an hour defending the hidden camera and railing against the court system on “PrimeTime Live,” and another one and one-half hours on a “Nightline Town Hall” hosted by Ted Koppel the same evening; Diane Sawyer was an apologist for hidden cameras on both shows. Peter Johnson, “*PrimeTime*,” “*Nightline*” *Take Hard Look in Mirror*, USA TODAY, Feb. 12, 1997, at D4. ABC never apologized to Mark Sanders after it paid him nearly \$1 million, nor to the American public, nor did it report to the American public that it had been vanquished and chastised by the California Supreme Court. A few such well-publicized judgments might equate to what one insider has suggested would be appropriate for paid political commercials. See HEWITT, *supra* note 108, at 248–49. Paraphrased, the judicially imposed imprimatur for hidden camera stories would be: “Caution: Watching a [hidden camera story] could be injurious to your mental health and an affront to simple truth.” See *id.* at 249.

648. Jim Lehrer of “The News Hour with Jim Lehrer” recently gave the following advice to the graduating class of Tufts University:

I wish that I could change the tune a bit today for you, and report that journalism has been born again and all is well. But I cannot do that.

It continues at times to embarrass me, to annoy me, anger me even occasionally. The causes of my concern are out there for all to see, of course—a tendency of journalism to be something akin to professional wrestling, something to watch rather than to believe. The savagery of some of the so-called new journalism, marked by predatory stake-outs, coarse invasions of privacy, talk show shouting, no-source reporting and other techniques, the stunning new blurring of the old lines between straight news, analysis and opinion.

A most unjustified arrogance that seems to have afflicted some of my colleagues. It can be seen in a stench of contempt in their approach, words, sneers and body language that say loud and clear, “Only the journalists of America are pure enough to judge all others.”

Jacques Steinberg, *At College Graduations, Wit and Wisdom for the Price of Airfare*, N.Y. TIMES, May 28, 2001, at B6.

journalistic and ethical standards, reversing the downward spiral into the miasma of tabloid journalism.⁶⁴⁹

649. After a revival of the grand tradition of news coverage by the events of September 11, 2001, this generation's Pearl Harbor, there is strong evidence the media is once again reverting to its "bottom line"/ratings-driven/profit obsession. *See generally* Auletta, *supra* note 578, at 65–67. The myth of the benefits of undercover reporting is obvious when one considers that of the top one hundred journalism stories of the last century as decided by thirty-six judges under the direction of the New York University School of Journalism, none involved the use of hidden cameras, the seeking of employment under false pretenses, or impersonation. *See* Felicity Barringer, *supra* note 635.

