

No. 16-15360

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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NATIONAL ABORTION FEDERATION,  
*Plaintiff-Appellee,*

v.

CENTER FOR MEDICAL PROGRESS, ET AL.,  
*Defendants-Appellants.*

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On Appeal from the United States District Court  
for the Northern District of California,  
Hon. William H. Orrick, United States District Judge,  
Civil Action No. 15-cv-03522-WHO

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**BRIEF OF *AMICI CURIAE* JOURNALISM SCHOLARS AND  
JOURNALISTS IN SUPPORT OF PLAINTIFF-APPELLEE**

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici* are eighteen journalism scholars and journalists, all of whom have a vested interest in the protection and promotion of high standards of ethical behavior in journalism. *Amici* are:<sup>2</sup>

- *Helen Benedict*, professor at the Columbia University Graduate School of Journalism;
- *Clay Calvert*, the Brechner Eminent Scholar in Mass Communication and Director of the Marion B. Brechner First Amendment Project in the College of Journalism and Communications at the University of Florida;
- *Jerry Ceppos*, dean of the Manship School of Mass Communication at Louisiana State University;
- *Stephen Doig*, the Knight Chair in Journalism at Arizona State University's Walter Cronkite School of Journalism and Mass Communication;
- *Robert E. Drechsel*, the James E. Burgess Professor of Journalism Ethics in the School of Journalism and Mass Communication at the University of Wisconsin-Madison;
- *Todd Gitlin*, professor of journalism and sociology and chair of the Ph.D. program in Communications at Columbia University;
- *Theodore L. Glasser*, professor of communication at Stanford University and former director of Stanford's Graduate Program in Journalism;

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<sup>1</sup> *Amici* submit this brief with the consent of the parties. Pursuant to Fed. R. App. P. 29(b)(5), *amici* state that no counsel for a party authored this brief in whole or in part. No monetary contribution intended to fund preparing or submitting this brief was made by any person other than *amici curiae*, their members, or their counsel.

<sup>2</sup> Institutional affiliations appear for identification purposes only.

- *Tom Goldstein*, professor and former dean at the University of California at Berkeley Graduate School of Journalism and former dean of the Columbia University Graduate School of Journalism;
- *Roy S. Gutterman*, director for the Tully Center for Free Speech and an associate professor at Newhouse School at Syracuse University;
- *John Maxwell Hamilton*, the Hopkins P. Breazeale Professor in LSU's Manship School of Mass Communication and a senior scholar at the Woodrow Wilson International Center for Scholars in Washington, D.C.;
- *Mark Lee Hunter*, adjunct professor and senior research fellow at the INSEAD Social Innovation Centre in Fontainebleau;
- *Rachele Kanigel*, associate professor at San Francisco State University's Department of Journalism;
- *Scott Libin*, senior fellow at the University of Minnesota School of Journalism and Mass Communication;
- *Ken Light*, the Reva & David Logan Professor of Photojournalism at the University of California at Berkeley Graduate School of Journalism;
- *Dale Maharidge*, professor at the Columbia University Graduate School of Journalism;
- *Joseph Russomanno*, associate professor at Arizona State University's Walter Cronkite School of Journalism and Mass Communication;
- *Robert M. Steele*, the Nelson Poynter Scholar for Journalism Values at The Poynter Institute; and
- *Lee Wilkins*, Chair of the Department of Communication at Wayne State University, Professor Emeritus and Curator's Teaching Professor at the University of Missouri School of Journalism.

A fuller description of each of the individuals signing this brief as *amici curiae* appears in Appendix A.

There is no question that serious investigative journalists provide an invaluable service to society by revealing truthful information otherwise hidden from the public and helping to hold institutions and individuals accountable. But individuals who masquerade as investigative journalists, whose actions show a gross disregard for basic principles of journalistic ethics such as telling the truth, serve no valid purpose. Indeed, dubbing the activities of such individuals as “journalism” would risk undermining the credibility of real journalists and the important role they perform in our democratic society. Concern for upholding these principles compels *amici* to speak out against the unethical practices of Appellants and their sharp departure from standard journalistic practice.

### **SUMMARY OF ARGUMENT**

By calling himself an “investigative journalist,” Appellant David Daleiden does not make it so. That is apparent when his so-called “journalistic” techniques are measured against the ethical standards that apply in the field of journalism. Applying those standards, it is evident that Mr. Daleiden’s “journalistic” techniques are grossly deficient.

The list of Mr. Daleiden’s ethical failures begins with his manipulation and distortion of his secret recordings to make it appear as if his targets were engaged in criminal activity, and then releasing some of those videos with false and

sensational labels. In no way can that conduct be reconciled with journalism's cardinal principle and purpose: reporting the truth to the public.

The deceptive techniques deployed by Mr. Daleiden and his associates in conducting their "investigation" are a no less deplorable departure from standards of ethical journalism. Mr. Daleiden used deception as a first—not a last—resort, without exhausting alternative investigative methods or considering the many ethical and legal issues raised by his deceptive techniques. He blatantly disregarded the law, securing fake IDs and making secret recordings in violation of confidentiality agreements he had signed. He also attempted to manufacture evidence of criminal wrongdoing by trying to trick his targets into making statements that supported his agenda. And, even though his undercover investigation uncovered no evidence of criminal activity, he released his misleadingly edited and labeled videos in complete disregard of (or perhaps intending) the devastating consequences his false accusations could have on his targets and other members of the public.

In our view, Mr. Daleiden's claimed "journalistic" techniques fall far outside any standards of ethical journalism. For this reason, we believe that accepting Mr. Daleiden's claim that he merely engaged in "standard undercover journalism techniques" would be both wrong and damaging to the vital role that journalism serves in our society.



## ARGUMENT

Mr. Daleiden calls himself an “investigative journalist.” (Appellants’ Br. at 3.) He claims that he and his group used “standard undercover journalism techniques.” (*Id.*) Aside from pointing to historical examples of undercover investigations (*id.* at 58), Mr. Daleiden provides no standards against which to evaluate his claim. We write to fill that gap.

As with the legal profession, there are codes and standards of ethics applicable to the practice of journalism. These standards are published by various professional journalism organizations, individual news organizations, and recognized leaders in the field of journalism. There are, of course, differences among these standards, but they each seek to ensure that the free exchange of information at the foundation of a democratic society is accurate, fair, and thorough. *See, e.g.*, Society of Professional Journalists, *SPJ Code of Ethics* (revised Sept. 6, 2014), *available at* <http://www.spj.org/ethicscode.asp>.

We evaluate Mr. Daleiden’s “journalistic” techniques in light of these standards.

### **I. MR. DALEIDEN’S FALSIFICATION AND DISTORTION OF EVIDENCE IS NOT A “STANDARD” UNDERCOVER JOURNALISM TECHNIQUE.**

It goes without saying that journalists should never falsify, distort, or misrepresent the results of their investigations. As Dr. Seow Ting Lee has written,

“Journalism’s cultural authority is realized only when people believe what they read or watch in the news.” Seow Ting Lee, “Lying to Tell the Truth: Journalists and the Social Context of Deception,” *7 Mass Communication & Society* 97, 111 (2004). “Hence, truthtelling is a duty without exceptions; deception is always wrong. Any active falsification of information to be aired or published, even in the name of the public good, is considered reprehensible, especially in the current climate of public distrust.” *Id.*

This cardinal principle of truthtelling in journalism is contained in nearly all codes of journalism ethics. For example, the Society of Professional Journalists’ (“SPJ”)<sup>3</sup> “Code of Ethics”—an important guide to ethical journalism—states that journalists should “[n]ever deliberately distort facts or context” and should “[t]ake special care not to misrepresent or oversimplify in promoting, previewing or summarizing a story.” *SPJ Code of Ethics. The New York Times’s Guidelines on Integrity* puts the point in starker relief: “No one needs to be reminded that falsifying any part of a news report cannot be tolerated and will result automatically in disciplinary action up to and including termination.” *The New York Times, Guidelines on Integrity* (last revised Sept. 25, 2008), available at

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<sup>3</sup> Founded in 1909 as Sigma Delta Chi, the SPJ is “the nation’s most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. The SPJ has about 9,000 members nationwide. SPJ, *About the Society*, <https://www.spj.org/spjinfo.asp>.

<http://www.nytc.com/wp-content/uploads/Guidelines-on-Integrity-updated-2008.pdf>. The reporter's duty to tell the truth is no less applicable to investigative journalists. For example, the *Investigative Reporter's Handbook*—a well-known guide to investigative journalism—states: “Journalists should never invent facts, quotations or entire stories.” Brant Houston, *The Investigative Reporter's Handbook: A Guide to Documents, Databases and Techniques* 108 (Bedford/St. Martin's 2009); *see also* Lee, *supra*, at 111 (in an empirical study of investigative journalists, finding that “acts that directly deceive the audience such as fabrication, quote tampering, photo manipulation, staging, and putting a positive spin on a story are unanimously rejected, consistent with the journalistic mantra of factuality and objectivity”).

Mr. Daleiden's conduct fell well short of these standards. Mr. Daleiden has claimed that his secret recordings captured NAF attendees agreeing to explore, or expressing an interest in exploring, the illegal sale of fetal tissue for profit. (ER 9.) As the District Court found,<sup>4</sup> however, “[t]he products of [Mr. Daleiden's] Project . . . have not been pieces of journalistic integrity, but misleadingly edited videos and unfounded assertions . . . of criminal misconduct.” (ER 39.) Indeed, after reviewing the recordings relied on by defendants, the District Court stated:

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<sup>4</sup> Unless otherwise indicated, the facts discussed in this brief are taken from the District Court's February 5, 2016 Order Granting Motion for Preliminary Injunction. (ER 1-42.)

I find that no NAF attendee admitted to engaging in, agreed to engage in, or expressed interest in engaging in potentially illegal sale of fetal tissue for profit. The recordings tend to show an express rejection of Daleiden's and his associates' proposals, or at most, discussions of interest in being paid to recoup the costs incurred by clinics to facilitate collection of fetal tissue for scientific research, which NAF argues is legal.

(ER 13.)

The videos Mr. Daleiden and his group publicly released further demonstrate his utter failure to report the truth. For example, Mr. Daleiden released with one video a press release titled "Planned Parenthood's Top Doctor, Praised by CEO, Uses Partial-Birth Abortion to Sell Baby Parts." (ER 14.) That video, however, was edited to omit the doctor's statements that "nobody should be selling tissue," "[t]hat's just not the goal here," and that Planned Parenthood would not sell tissue or profit from tissue donations in any way. (*Id.*) Mr. Daleiden compounded his deception by labeling the press release accompanying the video with a false and sensational title, in an apparent effort to draw attention to the misleadingly edited video and shock the conscience of viewers.

Mr. Daleiden's falsification and distortion of evidence clearly distinguishes this case from the historical examples of undercover investigations cited in Appellants' Brief, as well as those cited in the amicus curiae brief filed by eleven First Amendment scholars in support of neither party. (*See* Appellants' Br. at 58-59; Ninth Cir. Dkt. No. 31 at 18-32.) As a law review article cited in both of those

briefs explains: “One thing is not disputed about these or the multitude of other successful undercover journalistic investigations conducted by journalists: *the truth of what they reported.*” Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 Vand. L. Rev. 1435, 1461 (2015) (emphasis added). For example, Upton Sinclair’s undercover investigation and reporting of Chicago’s meatpacking industry in *The Jungle* has been praised for Mr. Sinclair’s “‘accurate touch’” and his “‘enormous dossier of irrefutable detail, straightforwardly presented and linked to an affecting human drama.’” Brooke Kroeger, *Undercover Reporting: The Truth About Deception* 83, 90 (Northwestern University Press 2012) (quoting Morris Dickstein, introduction to *The Jungle*, by Upton Sinclair xiv (New York: Bantam Books 1981)); *see also Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 511 (4th Cir. 1999) (“The truth of the *PrimeTime Live* broadcast was not an issue in the litigation.”). In other words, Mr. Sinclair and journalists in other successful undercover investigations deceived the targets of their investigations to reveal important truths to the public. Here, in contrast, Mr. Daleiden deceived the targets of his investigation and then deceived the public to mask the truth.

Writing for Slate, Dahlia Lithwick aptly summed up Mr. Daleiden’s conduct in this way:

Daleiden “has no right to call himself a journalist,” in part because when the hours of footage he shot failed to turn up any examples of

criminal conduct on the part of Planned Parenthood, Daleiden didn't back off the story but doubled down on it. Indeed he allegedly falsified evidence, so the videos would show through trickery—including flawed transcripts and stock images—that which he could not prove. . . . The difference between journalism and what CMP did is that journalists seek truth, while Daleiden seeks to show that somewhere in between the edited seams and faked voiceovers of his films there lies a truth he cannot quite prove but wants us to believe anyhow. That can be called many things, but “journalism” probably isn't one of them.<sup>5</sup>

In our view, Mr. Daleiden's false and misleading reporting fell well short of all journalists' duty and responsibility to report the truth.

## **II. THE DECEPTIVE TECHNIQUES EMPLOYED BY MR. DALEIDEN IN HIS INVESTIGATION ARE NOT “STANDARD” UNDERCOVER JOURNALISM TECHNIQUES.**

Apart from Mr. Daleiden's deceptive reporting, Mr. Daleiden and his group employed a number of deceptive techniques in their investigation of NAF. We evaluate these investigative techniques below.

### **A. Mr. Daleiden Used Deception as a First Resort, Not a Last.**

The record before the District Court suggests that Mr. Daleiden's first—and only—plan was to go undercover. At the outset of his investigation, he created a phony company with the express purpose of infiltrating NAF's annual meetings to

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<sup>5</sup> Dahlia Lithwick, “Is an Anti-Abortion Activist With a Camera a Journalist?” *Slate* (Feb. 2, 2016), available at [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2016/02/david\\_daleiden\\_claimed\\_to\\_be\\_an\\_undercover\\_journalist\\_when\\_he\\_investigated.single.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/david_daleiden_claimed_to_be_an_undercover_journalist_when_he_investigated.single.html) (quoting Amanda Marcotte of *Salon*).

“gather video and documentary evidence of the fetal body parts trade and other shocking activities in the abortion industry.” (ER 4.)

While issues of great importance can justify certain deceptive techniques, the use of deception is generally regarded as a last resort after all other means have been exhausted, or where a journalist’s safety is at risk. For example, the *SPJ Code of Ethics* states: “Journalists should . . . [a]void undercover or other surreptitious methods of gathering information unless traditional, open methods will not yield information vital to the public.”); *see also* Houston, *supra*, at 112 (noting that when considering undercover work journalists should consider if it is “possible to get convincing evidence through documents and interviews instead”); *NPR Ethics Handbook* 27-28 (updated May 2, 2012), *available at* <http://ethics.npr.org/wp-content/uploads/2012/05/NPR-Ethics-Handbook-5.2.2012-Final-Edition.pdf> (stating that deception might be warranted in “highly unusual and extremely important situations” such as reporting in a “war zone” where a journalist “feels endangered” or reporting in a “repressive regime” where “the only way to have conversations with people might be to keep our identities under wraps.”).<sup>6</sup> Moreover, when undercover methods are considered, it is vital that the

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<sup>6</sup> These standards are consistent with Dr. Lee’s empirical study of investigative journalists. In that study, Dr. Lee found that “it is highly acceptable to deceive and lie in self-defense, when a journalist is confronted by a life-threatening situation.” Lee, *supra*, at 100. Dr. Lee also found that “[d]eception is viewed as a strategy for

journalists involved have thoroughly considered the ethical and legal issues raised by their contemplated use of deception. *See, e.g.*, Bob Steele, “Deception/Hidden Cameras Checklist,” Poynter.org (July 5, 2002), <http://www.poynter.org/2002/deceptionhidden-cameras-checklist/744/>.

Here, Mr. Daleiden’s decision to use deception is inconsistent with these standards. Based on the record, it appears that Mr. Daleiden turned to deception as his first resort, not his last. (*See* ER 4-5.) There is no indication that Mr. Daleiden attempted to use—or even considered using—the traditional, open means that most investigative reporting involves, such as researching, reviewing documents, interviewing, and talking with experts. *See* Houston, *supra*, at 3-86 (describing investigative journalism techniques).

Further, this was not a situation where Mr. Daleiden’s life would have been placed in danger by identifying himself as a journalist. As Mark Lee Hunter—an adjunct professor and senior research fellow at the INSEAD Social Innovation Centre and founding member of the Global Investigative Journalism Network—recently wrote:

The right approach is not to go undercover in the first place unless revealing our true identities would put us in physical danger or make an important story disappear. Planned Parenthood isn’t going away; there are numerous open ways to document its activities. Daleiden may think Planned Parenthood kills babies, but there was no risk

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gathering information that is of vital public service” and “is ideally a last resort, when all other means have been exhausted.” *Id.* at 102.



whatsoever that its managers would have killed him, or even slapped him, if he approached them openly.<sup>7</sup>

There also is no evidence suggesting that Mr. Daleiden and his group examined the ethical and legal issues raised by their chosen methods, or maintained any system of independent oversight. Instead, the group's efforts were spearheaded by Mr. Daleiden—a then 25-year-old college graduate—who thought “it would be cool” if they could trap their targets into “saying something really messed up, like yeah, like, I’ll give them, like, live everything for you. You know.” (ER 9.) The only oversight appears to have come from Appellant Troy Newman—CMP’s former secretary and board member and the president of another organization that posts the names and work addresses of abortion providers on its websites—who hoped that Mr. Daleiden’s investigation would result in the prosecution of abortion providers, investigations, and the defunding of Planned Parenthood. (ER 4.)

The undercover investigations Mr. Daleiden and the eleven First Amendment scholars cite serve only to illustrate just how non-“standard” Mr. Daleiden’s use of deception was.<sup>8</sup> (*See* Appellants’ Br. at 58-59; Ninth Cir.

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<sup>7</sup> Mark Lee Hunter, *Why David Daleiden Is Not An Investigative Reporter*, Global Investigative Journalism Network (Feb. 9, 2016), <http://gijn.org/2016/02/09/whos-an-investigative-journalist-not-david-daleiden/>.

<sup>8</sup> The eleven First Amendment scholars “offer no view on whether defendants-appellants in this case gathered information in a way that some or many deem unethical or illegal.” (Ninth Cir. Dkt. No. 31 at 18-19.) Given their stated

Dkt. No. 31 at 18-32.) For example, Mr. Daleiden obviously did not face the danger that exposing the practices of slavery and the KKK involved. (*See* Ninth Cir. Dkt. No. 31 at 19-21.) In the *Chicago Sun-Times*'s Mirage Tavern investigation of corruption in Chicago, the reporters worked closely with editors and lawyers and "considered all the pitfalls, ethical and legal" before setting up their phony bar. Kroeger, *supra*, at 260. Even then, the *Sun-Times*' use of deceptive tactics was controversial among journalists, *id.* at 264-65, and ultimately cost the newspaper the Pulitzer, not because of the quality of the reporting, but because endorsing such deceptive techniques "could send journalism on a wrong course" in the words of then-Pulitzer board member Ben Bradlee. *Id.* at 269.

We believe that Mr. Daleiden's decision to use deception as a first resort, without exhausting alternative methods and without examining the ethical and legal issues involved in his use of deception, does not measure up to standards of ethical journalism.

**B. Mr. Daleiden Blatantly Disregarded the Law.**

In pursuing his story, Mr. Daleiden appears to have set out to break the law from the start. He knowingly secured and used false identification and obtained secret recordings in violation of agreements he had signed. (ER 1.)

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agnosticism about the case at bar, if their primary point is that some past undercover investigations have served the public good and are regarded by some journalists as ethical, that is not a point of any dispute.

No professional journalists or news organizations we know of would condone an investigation that, from its inception, blatantly sets out to break the law. Most explicitly prohibit it. For example, *The New York Times's Guidelines on Integrity* states: “Staff members must obey the law in pursuit of the news” and “may not record conversations without the prior consent of all parties to the conversations.”<sup>9</sup> Similarly, the *NPR Ethics Handbook* states: “If we ever do consider taking the highly unusual step of recording an interview without the knowledge of one or more party, we follow the applicable state and/or local laws about the taping of conversations.”<sup>10</sup>

Mr. Daleiden would have the Court believe that it is “standard” for journalists to break the law. The examples he cites, however, show the opposite. In the *Chicago Sun-Times* Mirage Tavern investigation, the reporters worked closely with lawyers and took numerous precautions to avoid breaking the law:

To avoid invasion of privacy, the *Sun-Times* would protect the identity of anyone who told a personal story. If a criminal act were

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<sup>9</sup> *The New York Times, Guidelines on Integrity* (last revised Sept. 25, 2008), available at <http://www.nytc.com/wp-content/uploads/Guidelines-on-Integrity-updated-2008.pdf>

<sup>10</sup> *NPR Ethics Handbook* 28, available at <http://ethics.npr.org/wp-content/uploads/2012/05/NPR-Ethics-Handbook-5.2.2012-Final-Edition.pdf>; see also *The San Francisco Chronicle: Ethical News Gathering*, available at: <http://asne.org/content.asp?pl=236&sl=324&contentid=324> (“The Chronicle does not use illegal means to gather information”; “Taping of face-to-face interviews requires the consent of the person being interviewed unless the interviewee indicates that he or she does not expect the interview will be kept confidential and neither quoted nor paraphrased.”).

committed, the newspaper would reveal names, dates, places, and amounts. Since Illinois law required a court order for the use of secret sound-recording devices, the *Sun-Times*, for documentation would rely on hidden photographers, multiple witnesses, and detailed memos. The newspaper also agreed to assume all general liability.

Kroeger, *supra*, at 261.

Similarly, in Ken Silverstein's investigation of Washington lobbyists, Mr. Silverstein abandoned his initial idea of actually hiring a lobbying group and winning congressional earmarks, to avoid breaking the law. *Id.* at 282-83. Instead, Mr. Silverstein limited his deception to printing some business cards with a fictitious name and company in London, purchasing a cell phone with a London phone number, and creating an email address and a rudimentary website. *Id.* at 55; Ken Silverstein, "Their Men in Washington: Undercover with D.C.'s Lobbyists for Hire," *Harper's Magazine* 53, 55 (Jul. 2007), available at [http://faculty.maxwell.syr.edu/rdenever/NatlSecurity2008\\_docs/Silverstein\\_MenWashington.pdf](http://faculty.maxwell.syr.edu/rdenever/NatlSecurity2008_docs/Silverstein_MenWashington.pdf). Nonetheless, Mr. Silverstein was sharply criticized for using deception: "Rather than being praised . . . , Silverstein was taken to task by, of course, the targets of his investigation, and by other journalists, for engaging in unethical behavior." Chen, *supra*, at 1459.<sup>11</sup>

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<sup>11</sup> See also Mark Lisher, "Lying to Get the Truth," *American Journalism Review* (Oct./Nov. 2007), available at <http://ajrarchive.org/Article.asp?id=4403> ("Without at least some standard, . . . the 230,000 subscribers to Harper's are on their own, trusting that liars and deceivers are telling them the truth"); Howard Kurtz, "Stung by Harper's In a Web Of Deceit," *The Washington Post* (June 25, 2007) ("no

There is nothing “standard” about journalists setting out to break the law. While what is ethical may not always be what is legal, breaking the law is hardly “standard” journalistic procedure and never a first resort.

**C. Mr. Daleiden Attempted to Trap His Subjects into Making Statements That Support His Predetermined Theory.**

As the District Court found, Mr. Daleiden instructed an associate to target a particular doctor “now that she’s been drinking.” (ER 8.) The “goal” was to trap people into “saying something really messed up,” like the words “fully intact baby.” (ER 9.) They led and lured their subjects, telling them that they could “make [fetal tissue donation] extremely financially profitable” as long as they were “willing to be a little creative with [their] technique.” They asked, “what would make it profitable for you? Give me a ballpark figure,” and “[i]f it was financially very profitable for you to perhaps be a little creative in your method, would you be open to” providing patients with reimbursements for tissue donations. (ER 9.)

Ethical journalistic practice does not include preying on vulnerable subjects and trying to lure them into making statements that support a preconceived thesis. Instead, the task is to uncover the truth, not manufacture it. *See, e.g., SPJ Code of Ethics* (“Seek Truth and Report It”). It should go without saying that subjects of journalistic inquiries ought to be treated with respect, not as targets of abuse. *See,*

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matter how good the story, lying to get it raises as many questions about journalists as their subjects”).

*e.g., id.* (“Ethical journalism treats sources, subjects, colleagues and members of the public as human beings deserving of respect.”).

On examination, the undercover investigations that Mr. Daleiden and the eleven First Amendment scholars cite for support are not truly comparable. (*See* Appellants’ Br. at 58-59; Ninth Cir. Dkt. No. 31 at 18-32.) For example, to avoid any appearance of entrapment, the reporters in the *Chicago Sun-Times*’s Mirage Tavern investigation maintained strict ground rules prohibiting themselves from offering anybody a bribe: “We couldn’t say, how much would it cost me to ignore this?” one of the reporters later explained.<sup>12</sup> “The only act would be to open a tavern—and then let the visitors take it from there,” the reporters explained. Kroeger, *supra*, at 261, 266.

To be sure, some amount of leading may be acceptable in journalistic investigations. But pushing and pushing to take advantage of a subject drinking isn’t real journalism; it’s malpractice.

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<sup>12</sup> Dan Weissmann, “The Mirage: A fake tavern that exposed real corruption, ten bucks at a time,” *WBEZ* (Jan. 16, 2012), *available at* <https://www.wbez.org/shows/wbez-blogs/the-mirage-a-fake-tavern-that-exposed-real-corruption-ten-bucks-at-a-time/9f9adc7e-38f5-418f-8383-e326adc359f4> (quoting Pam Zekman, lead reporter in *Sun-Times* investigation).

**D. Mr. Daleiden Completely Disregarded the Harm That Publicly Reporting His False Accusations Would Have.**

Investigative journalism most often seeks to reveal and document the breakdown of social or justice systems. *See* Houston, *supra*, at v. In those situations, using deception is viewed by some journalists as “just treatment for unethical persons or those who are involved in illegal acts.” Lee, *supra*, at 108. But when, as here, an undercover investigation uncovers no such acts, that justification for the journalist’s use of deception disappears. That did not deter Mr. Daleiden from misleadingly editing his secret recordings to create the appearance of illegal activity and releasing some of those videos to the public.

It is a risky business casting blame on even a pretend journalist for the actions of fanatics who act violently or illegally in response to that “journalist’s” stories. But, in this case, there were extremely serious consequences to Mr. Daleiden’s falsification of evidence and departure from the truth. As the District Court found, the release of Mr. Daleiden’s videos “directly led to a significant increase in harassment, threats, and violence directed not only at the ‘targets’ of CMP’s videos but also at NAF and its members more generally.” (ER 36.) The subjects of those videos received a large amount of harassing communications, including death threats. (ER 17.) Harassment and violence directed at abortion providers increased nine-fold year-over-year. (*Id.*) The FBI reported an increase in attacks on reproductive health care facilities, and there were

four incidents of arson at Planned Parenthood and NAF-member facilities. (*Id.*)

Most significantly, the clinic where one of the subjects of Mr. Daleiden's released videos is medical director was attacked by a gunman, resulting in three deaths.

(*Id.*) The address of that clinic was listed on a website operated by Mr. Newman's group. (*Id.*)

We do not know if the express purpose of Mr. Daleiden's deceptive actions and false reporting was to inflict such harm on the targets of his investigation or others affected by the coverage. But that result is surprising to no one, given Mr. Daleiden's sensational and false reporting and the extreme views on abortion in this country. Mr. Daleiden's release of those false accusations hardly reflects the balance that ethical journalists attempt to strike between the public's need for truthful information and the potential harm that release of that information could cause. *See, e.g., SPJ Code of Ethics* ("Journalists should . . . [b]alance the public's need for information against potential harm or discomfort" and "[s]how compassion for those who may be affected by news coverage."); Houston, *supra*, at 110 (noting that investigative journalists should ask themselves, "Can the potential harm to an individual, institution or society be justified because it benefits society?").

The direct consequences of Mr. Daleiden's false accusations certainly do not reflect the central purpose of investigative journalists: to hold people and



institutions accountable for actions that harm the public and its interests by revealing the truth. Here, under the guise of investigative journalism, Mr. Daleiden accused his subjects of things they never said or did (except in his own fictitious accounts) without regard to how his false accusations could hurt his subjects or other members of the public. That is a gross perversion of investigative journalism, if it can be called that at all.

\* \* \*

Contrary to Mr. Daleiden's assertion, it is not "standard" investigative journalistic technique to employ deception as a first resort, obtain and use fake IDs, make multiple false representations to gain entry to a meeting of private citizens, surreptitiously record conversations in violation of confidentiality agreements, purposefully manipulate recordings of those conversations, and label those recordings with incendiary rhetoric designed to maximize harm to those who hold views with which the "journalist" disagrees. Some journalists will say there might be circumstances where some of the techniques Mr. Daleiden and his group employed may be warranted. But considering the depth and nature of the fraud and deception deployed by Mr. Daleiden, this "investigation" was a breathtaking departure from ethical journalism.

## CONCLUSION

The District Court was right to reject Mr. Daleiden's assertion that he merely "use[d] widely accepted investigatory journalism techniques." (ER 39.)

Accepting that assertion would both ignore reality and insult an honorable and necessary profession.

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Respectfully submitted,

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**Lee Wilkins** is the Chair of the Department of Communication at Wayne State University, Professor Emeritus and Curator’s Teaching Professor at the University of Missouri School of Journalism, former editor and member of the founding and current editorial boards of the Journal of Mass Media Ethics (now the Journal of Media Ethics), and the co-author of “Media Ethics: Issues and Cases,” one of the most widely used college media ethics texts. She also co-edited the *Handbook of Mass Media Ethics* and is a former newspaper reporter and editor.

## CERTIFICATE OF COMPLIANCE

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6,478 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: June 7, 2016

s/ Mark Poe  
Mark Poe

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## CERTIFICATE OF SERVICE

9th Circuit Case Number: 16-15360

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on **June 7, 2016**.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Mark Poe  
Mark Poe