

## Judging Deception

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### INTRODUCTION: POSNER'S MINIMALISM

The academic style is often to theorize and then, almost grudgingly, to apply the proposed theory to real cases, past, pending, and hypothetical, in order to demonstrate the theory's significance. Richard Posner, the academic, was well known for such theorizing, and rightfully remains so even after twenty-five years of judging. *A Theory of Negligence*,<sup>1</sup> for example, written long before Posner might have worried about the relationship between one person's academic and judicial work, is widely cited and paints with a broad brush. It famously suggested that the common law, through its use of the negligence principle or doctrine, is efficient.<sup>2</sup> Critics of such a broad, if elegant, theory are inclined to insist that there must be cultural and other influences on law, and they are apt to point to cases that appear to conflict with the ambitious theory. In contrast to academics, who are rewarded for elegant and ambitious theories, judges are discouraged from such theorizing and are likely to avoid reversal and disapproval by deciding cases narrowly and by situating their decisions within a precedential framework that incorporates many influences and rejects none, or at least none unnecessarily. Judges are subtly encouraged to be minimalists,<sup>3</sup> deciding one case at a time with most of their attention directed to consistency with (or careful departure from) past decisions, and only a modest amount of attention to the question of how

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<sup>1</sup> Richard A. Posner, *A Theory of Negligence*, 1 J Legal Stud 29 (1972).

<sup>2</sup> See id at 32–34.

<sup>3</sup> I adopt the term as used in Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* ix–xi (Harvard 1999) (distinguishing judicial minimalism by its preference to rule narrowly and “leave fundamental issues undecided”). Sunstein's project deals mostly with personal rights and thus with constitutional and administrative law. The minimalism he advocates is said to be typical of common law judging, though I will begin to suggest here that the matter is more complicated. In subsequent work I pay more attention to a theory of deception and, more importantly, significantly more attention to the common law process that benefits from or ignores such theories. See generally Saul Levmore, *A Theory of Deception and then of Common Law Categories*, 85 Tex L Rev 1359 (suggesting that common law judges are more often maximalists within subject areas of law as they strive to bring coherence to these specific domains).

today's decision will affect matters likely to appear in the future.<sup>4</sup> There are obvious costs and benefits to this minimalism, incrementalism, caution, narrowness, or undertheorizing, as we might alternatively call it. Future affairs might be better ordered if judges exercised more reach. Incrementalism risks making law more path dependent than it needs, or ought, to be. On the other hand, the cautious judge likely avoids unintended consequences, and might well minimize error costs. Richard Posner, the distinguished jurist whom we celebrate in this and accompanying Essays, has often chosen the path of caution, setting aside his capacity for theorizing when deciding cases, or at least when offering grounds for decisions.

One area in which Judge Posner has pursued minimalism in striking fashion is in decisions about deceit. It is necessary to add quickly that the very identification of an "area," or of a set of cases that are presumed to be linked, can be a statement about the observer's preferred level of theorizing or degree of judicial minimalism. And indeed, I will suggest, but defer, the question of whether Posner ought to have developed a general "Theory of Deception," rather than three narrower holdings, only one of which even rises to the level of a theory, and that about deception by private parties, alleged to be trespassers, who seek to gain access to information they plan to broadcast. The general theory, capable of positive or normative articulation, is neither sketched nor advanced in these decisions, though it will sound awfully Posnerian: deceit appears to be tolerated when it generates low costs but significant benefits.

The idea of efficient, tolerable, or even welcome deception will not surprise readers of law reviews, or consumers of popular culture. In criminal law, for example, there is the familiar practice of allowing police to deceive the naïve in order to gain access to premises that would otherwise require a search warrant, lure criminal suspects or parole violators to locations where they can be arrested, and much more.<sup>5</sup> One of the cases touched on in this Essay, *Alexander v DeAn-*

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<sup>4</sup> Sunstein, *One Case at a Time* at 259 (cited in note 3) ("Minimalists refuse to freeze existing ideals and conceptions; in this way they retain a good deal of room for future deliberation and choice.").

<sup>5</sup> Compare *United States v Andrews*, 746 F2d 247, 248 (5th Cir 1984) (concluding that evidence obtained in a consent search was admissible, although police obtained consent under pretense of a separate criminal investigation), overruled by *United States v Hurtado*, 905 F2d 74, 75-76 (5th Cir 1990) (en banc) (adopting a preponderance of the evidence standard for voluntariness of consent to search, and overruling prior cases where a clear and convincing standard was applied); *Crafton v State Board of Chiropractic Examiners*, 693 SW2d 320, 322 (Mo App 1985) (finding no entrapment where government agents posed as potential patients to obtain patently false disability certificates), with *People v Reyes*, 83 Cal App 4th 7, 98 Cal Rptr 2d 898, 900 (2000) (concluding that police overstepped boundaries of permissible conduct in luring defendant from his home under the guise of an invented auto accident). A theory of deception

*gelo*,<sup>6</sup> involves a sting operation, and it adheres to the view that “trickery is an accepted tool of criminal law enforcement.”<sup>7</sup> It might have been more interesting to say that trickery was an accepted tool, with no limitation on a goal or area of law, but again minimalism is the order of the day.

In Part III, in pursuit of the idea that cases that may look very much related to the academic eye, through the common feature of deception, are nevertheless tackled as separate problems for the judge, I take a closer look at Posner’s decision in *Stromberger v 3M Co.*,<sup>8</sup> where an employer likely deceived an employee into accepting a termination option.<sup>9</sup> I devote the most effort to a well-known Posner decision, *Desnick v American Broadcasting Companies, Inc.*,<sup>10</sup> about deceptive investigative reporting.<sup>11</sup> The cases are interesting even when so carefully kept apart. In other work, I take on the questions of the impact and desirability of minimalism in common law cases. Here I am most interested in Judge Posner’s decisions, though I suggest that additional theorizing on his part might have made one or two of the decisions more convincing or even effective.

#### I. *DESNICK* AND DECEPTION BY INVESTIGATORS

The Desnick Eye Center was the subject of both open and undercover investigative reporting by employees of the ABC television network in preparation for the television program, *PrimeTime Live*.<sup>12</sup> The Center performed over ten thousand cataract operations a year, in twenty-five offices, and more often than not on elderly persons with Medicare coverage. ABC had promised the ophthalmic clinic’s owner, Dr. Desnick, that it would use neither “ambush interviews” nor undercover reporting, and that its program would be “fair and balanced.”<sup>13</sup> But ABC did send undercover crews to some clinic locations, where seven crew members posed as patients. The test “patients” who were under sixty-five were told they did not need surgery, but four of the five older test patients, those who would be presumed to have Medi-

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might suggest different results for private and public actors, but this, too, is a topic saved for another day.

<sup>6</sup> 329 F3d 912 (7th Cir 2003).

<sup>7</sup> *Id.* at 917.

<sup>8</sup> 990 F2d 974 (7th Cir 1993).

<sup>9</sup> See *id.* at 978.

<sup>10</sup> 44 F3d 1345 (7th Cir 1995).

<sup>11</sup> It appears in an important Torts casebook, Ward Farnsworth and Mark F. Grady, *Torts: Cases and Questions* 28 (Aspen 2004) (offering *Desnick* as the signature case in its chapter on trespass), and has been cited a great many times since penned. See note 34.

<sup>12</sup> See *Desnick*, 44 F3d at 1347.

<sup>13</sup> *Id.* at 1348.

care coverage, were encouraged to undergo surgery. ABC engaged an outside expert who strongly disputed these surgery recommendations. Various Desnick employees provided other incriminating information regarding recordkeeping, machine rigging, and questioning of patients. Several of the clinic's doctors sued for defamation, and the firm sued ABC for trespass.

Undercover reporting often involves gaining access to premises under false pretenses, so that the trespass claim presents the core question of whether some deception is tolerated by law in order to enable investigations that can turn out to be socially useful, even if one is inclined to exclude the social value of entertainment provided by *Prime-Time Live* and similar programs. In the decision's most important line of argument, Posner starts with the formulation of trespass as entry without consent, so that (for ABC to avoid the trespass claim) consent must be deemed effective though gained by fraud. This sets the stage for a variety of examples and comparisons. A restaurant critic is presumed licensed or otherwise enabled to gain entry, despite his concealed identity, for instance, though one who falsely claims to be a meter reader in order to enjoy the interior of a stranger's home is not.<sup>14</sup> Posner notes that various trespasses might be forgiven through the deployment of assorted privileges or (in the case of the restaurant critic) a kind of fair use argument, but he nicely suggests that these would be rationalizations or evasions; the fact is that we allow entry, or we imagine consent, even where we know very well that the owner of the property would, if fully informed, bar entry or very much want the law to discourage it.<sup>15</sup> Judge Posner ventures a short distance away from the law of undercover investigations in order to point to a related and puzzling pair of cases: one who knowingly uses counterfeit currency to gain sexual intercourse is not guilty of battery, but one who conceals venereal disease does commit battery.<sup>16</sup> Indeed, for a moment it appears that Posner is on the way to announcing a general theory of deception. But after whetting the reader's appetite with puzzles, he settles on a doctrinal claim that epitomizes common law minimalism:

Seduction, standardly effected by false promises of love, is not rape; intercourse under the pretense of rendering medical or psychiatric treatment is, at least in most states. It certainly is battery. Trespass presents close parallels. If a homeowner opens his door to a purported meter reader who is in fact nothing of the sort—just a busybody curious about the interior of the home—the

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<sup>14</sup> Id at 1351–52.

<sup>15</sup> See id.

<sup>16</sup> Id at 1352.

homeowner's consent to his entry is not a defense to a suit for trespass. And likewise if a competitor gained entry to a business firm's premises posing as a customer but in fact hoping to steal the firm's trade secrets.

How to distinguish the two classes of case—the seducer from the medical impersonator, the restaurant critic from the meter-reader impersonator? The answer can have nothing to do with fraud; there is fraud in all the cases. It has to do with the interest that the torts in question, battery and trespass, protect. The one protects the inviolability of the person, the other the inviolability of the person's property. The woman who is seduced wants to have sex with her seducer, and the restaurant owner wants to have customers. The woman who is victimized by the medical impersonator has no desire to have sex with her doctor; she wants medical treatment. And the homeowner victimized by the phony meter reader does not want strangers in his house unless they have authorized service functions. The dealer's objection to the customer who claims falsely to have a lower price from a competing dealer is not to the physical presence of the customer, but to the fraud that he is trying to perpetuate. The lines are not bright—they are not even inevitable. They are the traces of the old forms of action, which have resulted in a multitude of artificial distinctions in modern law. But that is nothing new.

There was no invasion in the present case of any of the specific interests that the tort of trespass seeks to protect. The test patients entered offices that were open to anyone expressing a desire for ophthalmic services and videotaped physicians engaged in professional, not personal, communications with strangers (the testers themselves). The activities of the offices were not disrupted.<sup>17</sup>

Posner relies here on conventional and, dare I say, old-fashioned, sensibilities by invoking “inviolable” interests. The claim is not entirely satisfactory. Inviolability does not help with the question of why deception on the part of one who pays for sex (with a counterfeit bill) is different from, or to be favored over, one who knowingly risks transmitting a sexual disease to an otherwise consenting partner who knows not of the infectious disease.<sup>18</sup> But of course in deciding a case

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<sup>17</sup> *Id.* (citations omitted).

<sup>18</sup> Compare Restatement (Second) of Torts § 892B, illustration 5 (1979) (indicating that consent to sexual contact is invalid when one partner conceals his venereal disease from the other), with Restatement (Second) of Torts § 892B, illustration 9 (indicating that consent to

about deception-to-investigate, the minimalist judge need not make complete sense of cases about deception-to-sex. The grounds for decision are not merely decorative; *Desnick* facilitates some undercover investigations by refusing to find trespass, but its notion of, and reliance on, inviolable interests is likely to encourage other courts to disapprove of, and therefore discourage, investigative reporting when such interests can be said to have been intruded upon.

In one significant case that came in *Desnick*'s wake, *Food Lion v Capital Cities/ABC, Inc.*,<sup>19</sup> two investigative reporters sought employment at a supermarket's meat department, and then broadcast the unsanitary conditions they found. The employer would not have hired the applicants, or given them access to the work area (out of view of customers), if the employer had known that the applicants were short-run visitors on a mission, who intended to use deception in order to develop a juicy news story. The court upheld a finding of, as well as a modest damage determination with respect to, trespass, but rejected on appeal separate fraud and punitive damages claims.<sup>20</sup> The result might be understood to take seriously the content of the second paragraph quoted from *Desnick*, meant perhaps to judge the importance of particular invasions of inviolable property interests. In *Food Lion*,

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sexual contact is valid when induced by a promise of money, even when the money tendered is counterfeit).

<sup>19</sup> 194 F3d 505 (4th Cir 1999). See also *Russell v American Broadcasting Co, Inc.*, 1995 US Dist LEXIS 7528, \*6 (ND Ill). *Food Lion* and *Russell* both examine the repercussions of investigative journalism and involve reporters acting undercover and gaining employment to further a story at the expense of the employer. In *Food Lion*, although the Fourth Circuit held that the reporters breached a duty of loyalty, the court awarded only nominal damages. See 194 F3d at 522. In *Russell*, which cites *Desnick*, the court allowed a false light invasion of privacy claim, but dismissed an intrusion upon seclusion claim. See *Russell*, 1995 US Dist LEXIS 7528 at \*6.

<sup>20</sup> The Fourth Circuit summarized its disposition as follows:

To recap, we *reverse* the judgment to the extent it provides that the ABC defendants committed fraud and awards compensatory damages of \$1,400 and punitive damages of \$315,000 on that claim; we *affirm* the judgment to the extent it provides that [the ABC investigative reporters employed by Food Lion] breached their duty of loyalty to Food Lion and committed a trespass and awards total damages of \$2.00 on those claims; we *reverse* the judgment to the extent it provides that the ABC defendants violated the North Carolina [Unfair and Deceptive Trade Practices Act]; and we *affirm* the district court's ruling that Food Lion was not entitled to prove publication damages on its claims.

194 F3d at 524.

Alternatively, if one stresses the reversal on appeal, which wiped out the more significant trial victory for Food Lion, it is possible to say that no court takes the trespassing in these settings very seriously, so that the de facto rule is one that permits deception, or certainly makes little attempt to deter it. The modest damages can be seen as the price courts are willing to impose in order not to break too boldly with older precedents and conceptions. If we describe the case in this manner, then it need not be distinguished from *Desnick*, and the courts' appreciation of the value of socially useful information in both cases would easily be seen as a building block of a broad theory of deception. But inasmuch as the trespass claim did technically prevail in *Food Lion*, the sweeping description is probably too facile and too much of a rationalization.

the investigators *had* entered an area not open to the general public and had, perhaps, mildly disrupted the activities of the supermarket, if only because they required training.

I do not think there is any danger of overtheorizing if we explore Posner's musings rather than his (even) narrower grounds for decisionmaking, and try to distinguish or order the three identities assumed thus far by investigative reporters: supermarket employee, ophthalmic patient, and restaurant patron. Ideally, the same analysis would then separate, or at least illuminate, the two instances of deceit for sex.<sup>21</sup> In two of these circumstances, at least one court or Restatement<sup>22</sup> found the deceit and intrusion unacceptable. But what is it that puts the deceitful restaurant critic so beyond the law's reproach while the supermarket "employee" and disease-carrying sexual partner are regarded as committing trespass or battery? These two cases are not, it should be noted, easily dismissed as outliers. Where private lives and workplaces are invaded through deceit, courts find trespasses even though the deceptions were designed to uncover wrongful behavior.<sup>23</sup>

One idea worth trying here concerns the likely *ex ante* agreement that would be reached between investigator and subject. This is, no doubt, a source of the common intuition behind the restaurant critic's ability to trespass, which is to say the acceptability of this deceit. In the aftermath of a stinging review, a disappointed restaurateur might well claim that the critic gained access through fraudulent and thus tortious means. But viewed earlier in time, the critic offers the restaurant the potential of a positive, or even rave, review, followed by the patronage of many new customers. It is, therefore, safe to say that the overwhelming majority of restaurants would agree in advance to an undercover visit by a critic masquerading as a mere patron. That the

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<sup>21</sup> See text accompanying note 16.

<sup>22</sup> See Restatement (Second) of Torts § 892B, illustration 5 (cited in note 18) (indicating that consent to sexual contact is invalid when one partner conceals his venereal disease from the other).

<sup>23</sup> See, for example, *Johnson v K Mart Corp*, 311 Ill App 3d 573, 723 NE2d 1192, 1196–97 (2000) (allowing employees to bring an invasion of privacy claim against employer for using undercover detectives to ferret out theft and drug use in the workplace). Kmart hired a security company to perform undercover work because of concerns about theft and drugs. The investigators engaged in "consensual" conversation with "fellow" employees and learned a great deal about the employees' private lives. An appellate court thought this might well be an actionable invasion of privacy by Kmart.

See also *Dietemann v Time, Inc*, 449 F2d 245, 248–49 (9th Cir 1971). Here, a plumber who moonlighted as a healer, working with clay, minerals, herbs, and wands, was the subject of an undercover exposé by *Life* magazine. The healer sued the magazine after its article, "Crackdown on Quackery," led to his arrest for the unlicensed practice of medicine, and he recovered, albeit modest damages, for the invasion of privacy. The Ninth Circuit declared: "The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime." Id at 249.

critic even pays for the meal, in the manner of the typical patron, makes the case yet easier. It would, of course, defeat the strategy of anonymity, itself useful in order to experience the restaurant as readers would, if the critic actually arranged for consent in advance.<sup>24</sup> We might label the critic's strategy or intentions as symmetrical. A restaurant that received a disparaging review might, ex post, wish that trespass applied and that liability for trespass had discouraged the reviewer. But the prospect of a favorable review, and the fact that the critic will then publish such free advertising, more than compensates. If payments did not vitiate reviews, one suspects that most restaurants would in fact pay to be reviewed, even knowing that some reviews are harsh.

A case like *Desnick* or *Food Lion* is more difficult than that of the restaurant, I think, because programs like *PrimeTime Live*, and even the evening news, see nothing newsworthy or entertaining about a finding that an eye clinic treats patients as it should, or that a meat department is clean. "Dog does not bite man" is not interesting. Nor does the absence of a story do the subject much good. The overwhelming majority of clinics and supermarkets go uninvestigated; a regular viewer could not conclude that the absence of a story about an eye clinic, even over a five-year period say, shows that the clinic must have been investigated and found well-behaved, which is to say too dull for broadcast purposes. It is therefore quite plausible that while restaurants welcome deceit by investigators, most eye clinics would not. They *might* welcome a deceitful investigator who planned to sample a number of competing enterprises and then report on all the experiences, as is sometimes the case for some service providers. But, apparently, there is a market for columns and programs on excellent restaurants but not much of one for news of good clinics or sanitary meat counters.<sup>25</sup>

Seen through this lens, *Food Lion* is a better case for the plaintiff than is *Desnick*—and of course it is in *Food Lion* that the plaintiff had some success. Even a perfectly well-behaved ophthalmic clinic might not value a surreptitious reporter (or even seven such visitors, as apparently tested the Desnick Eye Center) as much as a restaurant

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<sup>24</sup> Theater and film critics are often given free tickets because their presence does not alter the performance to be reviewed. But the fact that they are given free tickets might be taken as evidence (though applied to a different industry) that, if not for this problem, restaurant critics would also be welcomed in this manner.

<sup>25</sup> This is not the place to develop a general theory of investigative reporting and consumer preferences, but it is interesting to look for the difference between restaurants, films, theater performances, books, new cars, and other items that attract regular reviews, and then shoe stores, hotels, and hair salons, which do not. Broad participation on the World Wide Web, and before that consumer magazines, has softened this difference, inasmuch as there are now consumer reviews of virtually everything. If there remains a puzzle, it is to understand when professional reviewers find a market.



would, but there is some chance, and surely more than I have described thus far, that a good “patient” experience on the part of the investigator will generate positive coverage and additional paying patients. But even if the investigator is sure to be asymmetrical in reporting on the experience, which is to say silent and essentially disappointed if the experience is a good one, at least the investigative reporter pays for the medical visit. The net cost to the clinic is low, and perhaps even negative.<sup>26</sup> (If not, as might be the case if the clinic offers free diagnostic visits in the hope of generating profitable surgical patients, then the argument is weakened.) But Food Lion is made worse off by the reporters’ masquerading as employees. Despite the fact that while employed they, presumably, do a fair day’s work for a day’s pay, when these decidedly temporary employees quit, with or without story in hand or in camera, the store must hire and train replacements. To be sure, any employee has the freedom to quit Food Lion, leaving that employer with the need to search and train anew. But at least with other employees there is a distribution of expected length of employment; Food Lion would be most unlikely to hire and train applicants for its meat department if the applicants revealed at the outset that for personal reasons they would be unable to remain on the job for more than two or three weeks.

The small theory developed thus far is that we should not be surprised to find that deception is least likely to be forgiven—despite the obvious benefits of uncovering crimes, fraud, and medical malpractice—where substantial costs were imposed on the subject, or property owner, and would have been so even if a similarly situated owner were perfectly well-behaved. The restaurant, *ex ante*, welcomes the critic; a well-behaved eye clinic is close to indifferent; an employer who must train employees or advertise for them episodically would, however, regard the short-run intention of the investigator as a cost to be avoided.

This emphasis on hypothetical contract or consent raises the obvious question of less convenient cost self-assessments, or simply of idiosyncratic reactions. What if a restaurant does not want to be reviewed and posts a sign that says, in effect, “If you are on our property to write a review, then you are trespassing”? If the sign were directed at testers sent by a government agency to check on housing discrimination, for example, we would expect courts (or a statute itself) to allow the unauthorized visits. We could imagine or even prefer a legal system that required a warrant, but not one that required a warrant

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<sup>26</sup> Even though the reporter pays, there is some chance that the reporter will have an unusually bad experience, so that the clinic might regard the net cost as positive (but low) on average. Few clinics, for example, seek to bar lawyers as patients, though there is some joking about the presumed higher likelihood of a malpractice claim.

and its disclosure to the property owner when inspectors entered the premises in a manner that would almost surely be barred by many law-abiding property owners who had free choice in the matter. An owner has little to gain and much to lose at the hands of government inspectors. But we have come to expect that, in a variety of circumstances, the government's tax agents, health inspectors, and housing discrimination testers may enter private property, often by deceit and without warrant, so long as the intrusion is not regarded as an undue invasion of privacy.<sup>27</sup>

And as for other investigators, the question of the inhospitable restaurant or eye clinic is difficult but unrealistic. A restaurant or clinic that posted such a sign would surely chase away a large number of patrons. One who screams out against inspection, or erects barriers denying access, is likely to be regarded as having something to hide, and that will be bad for business. The question may therefore be avoided as too hypothetical.<sup>28</sup>

## II. DECEPTION AND REMEDIES

But what of the cases where deception leads to sex, and where no one who complains of deceit *ex post* can be thought to have implicitly agreed to it? If we are to steer clear of a general theory of deception, the cases will require a different explanation, especially because the deceived party will be able to say that nonconsensual sex crosses the boundary into "inviolable interests." In *Alexander*, the government

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<sup>27</sup> Posner mentions this issue in *Desnick*, 44 F3d at 1353, and cites a case where the court approves deception by the Internal Revenue Service, but he follows the minimalist strategy of setting the problem aside. See *United States v Centennial Builders, Inc.*, 747 F2d 678, 682–83 (11th Cir 1984) (concluding that an undercover IRS agent's misrepresentation of his identity to obtain evidence of income skimming violated neither IRS regulations nor constitutional rights).

I prefer not to say that there are some "inviolable interests" that the government may not deceitfully invade, because the invasion in *Food Lion*, say, seems no different from what a health inspector would do. But perhaps that is because I would rush ahead to a general theory of deception, under which courts (act as if they) weigh the social costs and benefits of deception and then fashion trespass doctrine and rhetoric accordingly. They do much the same, I think, in contract law where there is an argument for "optimal dishonesty." See Saul Levmore, *Securities and Secrets: Insider Trading and the Law of Contracts*, 68 Va L Rev 117, 140–42 (1982) (suggesting that courts might permit dishonest disclosures in business transactions when "misinformation would only cause the misinformed party to behave as he would have without the information"). But I have promised to leave the general theory of deception for another effort.

<sup>28</sup> But perhaps most "good" firms with nothing to hide will admit investigators, while others, along with the "bad" ones, will deny entry, and likely charge customers a bit less. The good, closed firms can be seen as saying that they prefer to be evaluated by patrons rather than by critics. After all, investigators can make mistakes, or catch firms on a bad day, and a risk-averse firm may not want to take that chance. Such a firm might even offer a money-back guarantee with respect to a customer's first visit. I am indebted to my colleague, Jake Gersen, who no doubt identifies with the idea of skeptical dissenters, for this point. I like to think that the more a market with such multiple equilibria appeared to be well-functioning the less the deception would be tolerated.

pressured an informant to deliver sexual favors to a police officer it sought to apprehend, and Posner dismissed the targeted officer's claim under § 1983 because of the importance of preserving deceptive practices as police tools.<sup>29</sup> This result seems like a straightforward application of the idea that when social benefits exceed private costs, deception is permitted. And yet this idea is inconsistent with the notion of inviolable interests (including, presumably, sexual contact), which sounds like a formulation meant to trump a cost-benefit analysis. Put differently, it is not obvious why this deception power should be limited to police. Indeed, in other areas of criminal procedure it is arguable that private parties have more freedom to invade the rights of others with impunity than do the police.<sup>30</sup> The minimalist can certainly decide the case by referring to other cases where deception by the police is ratified, but in a way this begs the question of why we would want to do this for police and not for other activities.

The deception-to-sex cases are best seen as part of the somewhat broader question of providing necessary deterrence rather than as part of the narrower question of when deceit destroys consent and therefore generates a good claim for battery. I do not mean to quibble regarding the relative breadth of categories; neither is broad enough to include trickery by police. My suggestion is that we might think of the question here as one of choosing an appropriate remedy. Where the law seeks to deter something conventionally regarded as requiring such an incentive, it need not be particular about consistency with a local doctrine, though that is certainly the minimalist's instinct.<sup>31</sup>

Consider the pair of puzzling deception-to-sex cases. He who knowingly uses a counterfeit bill to gain sex is not guilty of battery, but he who fails to disclose a sexually transmitted disease is guilty.<sup>32</sup> From

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<sup>29</sup> Id at 917–18.

<sup>30</sup> This is not the place for the argument, but it starts with the idea that the American exclusionary rule does not apply to private parties, and is complicated by the question of whether, when private parties are involved, there are other remedies that deter the invasions. See, for example, *Commonwealth v Crowley*, 43 Mass App Ct 919, 684 NE2d 5, 6 (1997) (declining to suppress a privately made recording of a child beating because no state action was involved in the tape's creation). See also Craig M. Bradley, *The Exclusionary Rule in Germany*, 96 Harv L Rev 1032, 1042–49 (1983) (contrasting the American exclusionary rule, which bases admissibility on whether evidence was obtained through proper police procedure, with the German approach, which considers whether the evidence would significantly impact the defendant's privacy interests). As a matter of remedies, there may be reason to be uncertain as to whether a private citizen, *A*, seeking evidence for a divorce from *B* or hoping to embarrass a business rival, *C*, can use deceit to gain incriminating photographs of *B* or *C*.

<sup>31</sup> See Saul Levmore, *The Wagon Mound Cases: Foreseeability, Causation, and Mrs. Palsgraf*, in Robert L. Rabin and Stephen D. Sugarman, eds, *Torts Stories* 129, 146–50 (Foundation 2003) (suggesting that the proximate cause doctrine sometimes bends to accommodate the need to deter one of multiple tortfeasors, especially in the absence of comparative negligence).

<sup>32</sup> See text accompanying note 18.

the remedies, or deterrence, perspective the distinction is surprisingly easy. One who knowingly passes a counterfeit bill will face civil and perhaps criminal sanctions, not to mention the small possibility of prosecution for, or embarrassment regarding, soliciting a prostitute. The deceiver is thus deterred without any resort to trespass or battery. The law has no reason to find the use of counterfeit currency worse when used to buy sex than to acquire a book, and so the wrongdoer faces the same remedies in the two cases. The seller of sex has the same remedy as the bookseller, and the state can prosecute as it likes. On the other hand, in the case of the sexually transmitted disease, there is no other remedy and deterrence, especially where the case involves a spouse, or normally agreeable partner. We might then understand the deployment of battery as something of a remedy of last resort, or one used where to do so would not create an odd asymmetry as it would in the case of prostitution.<sup>33</sup>

In any event, Posner makes no attempt to link *Desnick* to *DeAngelo*. He seems eager to rein in his own theoretical ambitions and curiosity, and to decide cases in ways that will attract rather than bait other judges. *Desnick* has indeed become the lodestar for cases about deceit in undercover reporting.<sup>34</sup> That is a narrow category, but it reflects just the sort of boundary drawing that judges like, and the kind that some academics implicitly recommend when they exalt minimalism. Had *Desnick* been decided with a more general theory of deception, I doubt that it would be much followed, and so Posner succeeded in an important way by venturing very little outside the narrow category to which *Desnick* is most easily assigned. He notes the case of the restaurant critic and the deception-to-sex puzzle, as perhaps is to be expected of a theorist-turned-jurist, but, in saying that the cases are to be understood by way of inviolable interests, he speaks the language of judges. Posner sets the stage for a general theory but then declines to play on it.

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<sup>33</sup> Admittedly, this remedy-based approach is more effective in the narrow category of sexual encounters than it would be alongside a more ambitious theory of deception. In *Desnick*, for example, an optimist might say that between government regulation of fraudulent Medicare claims and medical malpractice suits, there is no need for another remedy, so that the social benefit provided by investigative reporters is low.

<sup>34</sup> See Andrew B. Sims, *Food for the Lions: Excessive Damages for Newsgathering Torts and the Limitations of Current First Amendment Doctrines*, 78 B U L Rev 507, 517 (1998) ("The strongest and most frequently cited judicial support for a media privilege or immunity from liability for minor newsgathering torts is the Seventh Circuit decision in *J.H. Desnick, M.D., Eye Services, Ltd. v. ABC*, authored by Judge Richard A. Posner."). To date, Posner's *Desnick* opinion has found its way into 113 subsequent decisions. LEXIS search, Apr 2007.

### III. THE PRICE OF MINIMALISM

*Stromberger v 3M Co* arose out of a plan by the 3M corporation to reduce a sales force by some two hundred employees. It announced new sales quotas and a plan to terminate employees, as was its legal right, who did not meet the new, higher goals. Salespersons were given the option of resigning and receiving economic benefits greater than those available to those who remained but were then terminated. Stromberger resigned but when he later observed that 3M did not terminate all who failed to meet the new quotas, he regretted the resignation and claimed fraud. Posner dismissed the claim because Stromberger, as an at-will employee, had no right to continued employment, and could not show that he would have been better off if the alleged fraud had not occurred: “The case might be different if Stromberger could show that, but for the alleged fraud, he would not have quit *or* been fired.”<sup>35</sup> It is safe to say that the case is about deception but, as in *DeAngelo* (and not in *Desnick*), Posner displays no props for use in a general theory; he simply discredits the fraud claim as missing the necessary causal link to Stromberger’s damages.

The decision leaves room for future litigation regarding counterfactuals. Even in the present case we might expect most judges or juries to find that there was a more-likely-than-not chance that the alleged fraud made the employee worse off. Future plaintiffs will bring witnesses to assess the likelihood that they would not have been fired had they not resigned, though I do not think Posner really means for courts to sift through such evidence.<sup>36</sup>

There are many ways to describe the employer’s strategy in the case, but one plausible story is that 3M sought to downsize, and that it hoped to do so by having employees self-assess their own likelihood of future improved performance. If too few of the employees had accepted the offer associated with immediate separation, 3M would likely have terminated a good number, and an inability to meet quotas would surely have figured prominently in the selection process. But if many employees identified themselves as unlikely to meet the new quotas, perhaps because they were risk averse (itself something 3M might have judged to be a proxy for poor performance) or perhaps because they preferred to work less rather than more in the future, then 3M would not need to terminate any who remained. It is also likely that resignations would cause the remaining salespeople to show increased sales, simply because customers and locales would be

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<sup>35</sup> *Stromberger*, 990 F2d at 978.

<sup>36</sup> The case also encourages lawyers to advise employees in the future to create a paper trail that might help in the event of future litigation.

spread among fewer salespeople. Moreover, by giving the volunteers a positive incentive, 3M gained a good reputation and avoided the demoralization of its remaining work force. All in all, 3M's deceptive strategy might have generated efficiency, at least in one sense of that word, with the better salespeople remaining on the job. In the absence of the deception, or the promise of termination in the event that quotas were unmet, employees would have no reason to self-identify, and indeed might simply stay on the job because of a kind of collective action problem in which all employees remain, hoping that others will depart.

The *Stromberger* decision leaves employers like 3M uncertain about the wisdom of future deceptions. They know that plaintiffs need to show a causal link between alleged losses and the employer's alleged fraud, but it will be hard to know when that requirement can be satisfied. In *Stromberger* itself, the question of whether the employee would have been fired likely depends on how many other employees depart voluntarily. A decision that tied the outcome to the question of whether 3M's deception did more good than harm would have served future employers better. And it could have gone this way without broadening its reach to deception writ large by restricting its holding to cases where employers' deception likely benefits employees as well as themselves. But of course any such holding would let the cat out of the bag and beg a general theory of deception. A judge who sought to be minimalist by saying, "It can be acceptable for an employer to deceive employees about the likelihood of layoffs if it does so not so much to save itself money but rather to trim the workforce in a reasonable manner and to save the jobs of other employees," would immediately raise the (maximalist) question of when deception might be similarly acceptable in other areas of law.

And so in *Stromberger* the plaintiff loses because he did not show that he was really hurt by the employer's deception. We can be sure that some employees were hurt by the deception, but we may not be able to know which employees would have resigned anyway, but then found it convenient to say they would not have done so. If Posner (and we) did not think that there was a good chance that 3M's deception was in fact socially useful, I am sure he or other judges would find ways to give the employee the benefit of the causation doubt, or at least a probabilistic recovery.

But note that *Stromberger* is hardly a good case for advancing a general theory, or for openly declaring deceit to be acceptable because of a larger goal, or benefit, that is perceived as driving that otherwise repugnant behavior. Even if the employer and many employees are better off in a world where deceit is permitted, in order to encourage self-selection rather than a blunt layoff policy, there is no guarantee

that an individual employee such as Stromberger would have (ex ante) acceded to the deceit.<sup>37</sup>

#### IV. FROM THEORIST TO MINIMALIST

In *Desnick*, Posner did well as a judicial minimalist. He fashioned the case as one about deceptive journalists, but reached the same result as one almost surely would by beginning with a general theory of deception, while preserving many of the benefits of case-by-case decisionmaking. Still, Posner the theorist is not entirely absent. By situating the investigative reporter in *Desnick* in the same world as the restaurant critic and the patron who uses counterfeit currency, Posner signals an interest in a general theory.

*Desnick* is the best known and most masterful of the cases discussed here. It succeeds by suggesting that it is part of a grander universe of law (incorporating the deception-to-sex cases, the restaurant critic, and the other evidence Posner submits) that is brought to its knees, or at least down to earth, with traditional, or at least traditional-sounding, tools. The three decisions highlighted here all adhere to the practice of deciding cases with reference to “similar” cases, without venturing into facts or precedents that previous judges had regarded as belonging to other areas of law. I have not suggested that any of the decisions is “wrong,” or that a more adventurous theory of deception would have generated different results, at least in these cases. I have advanced the notion, however, that there is more to each than meets the eye. There is the question of whether an investigative reporter is apt to broadcast good behavior as well as bad; the question of whether law has another available tool to penalize deception-to-sex; and the question of whether an employer might need to use deception in order to encourage efficient self-selection by employees. But of course each of these embellishments subtly broadens a category, or area of law, and encourages the notion that the category is a false one, and that the real task is to confront the question of when law tolerates deception. When the right cases are assembled, a theory of deception may well emerge, much as a theory of negligence came to take shape, albeit at the academic rather than judicial workbench. Meanwhile, our best judges put forth different rules applicable to trespass, police behavior and Fourth Amendment law, employment law, and battery.

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<sup>37</sup> It is as if Stromberger might have been the sort of person who would have posted a sign warning, “Please do not deceive me for my own benefit; I value honesty especially because I know that self-identification will harm me.” See note 28 for the corresponding behavior and argument in the context of investigative reporting.