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## A TEST CASE FOR NEWSGATHERING: THE EFFECTS OF SEPTEMBER 11, 2001 ON THE CHANGING WATCHDOG ROLE OF THE PRESS

*By Amanda S. Reid\* & Laurence B. Alexander\*\**

On Tuesday morning, September 11, 2001, terrorists hijacked four commercial passenger jets, crashing two into the World Trade Center and one into the Pentagon.<sup>1</sup> The World Trade Center's "Twin Towers" subsequently crumbled, and part of the Pentagon burned.<sup>2</sup> Passengers and crew tried to retake control of the fourth hijacked plane, but it went down in a Pennsylvania field killing all on board.<sup>3</sup>

The public was outraged not only at the hijackers, but also at the substantial breach of airport security. "[T]he painful knowledge of Sept. 11 is still imprinted on the nation's psyche" with opinion polls two years later showing that "most Americans expect terrorists to attack U.S. territory again; many are worried about their own safety."<sup>4</sup> In the months following the hijackings, the media tried to piece together what lead up to this deadly terrorist attack.<sup>5</sup> The federal government responded to this crisis by increasing airport security.<sup>6</sup> On November 19, 2001, President George W.

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1. See *September 11: Chronology of Terror*, CNN.COM (Sept. 12, 2001), at <http://archives.cnn.com/2001/us/09/11/chronology.attack/index.html>.

2. *Id.*

3. *9/11 by the Numbers*, N.Y. METRO., at <http://www.newyorkmetro.com/news/articles/wtc/1year/numbers.htm> (last visited March 3, 2005) (reporting that as of Sept. 5, 2002, 2,819 people were killed in the 9/11 attacks, including 343 firefighters).

4. Doyle McManus, *State of Nation on Sept. 11: How Things Have Changed*, L.A. TIMES, Sept. 11, 2003, at A1.

5. See *Special Report: War Against Terror*, CNN.COM, at <http://www.cnn.com/SPECIALS/2001/trade.center/interactives.html> (last visited Feb. 28, 2005); *September 11: Chronology of Terror*, *supra* note 1.

6. See Transportation Security Administration, *Welcome to Transportation Security Administration*, at <http://www.tsa.gov/public/index.jsp> (last visited Feb. 23, 2005).

Bush signed into law the Aviation and Transportation Security Act, which among other things established a new Transportation Security Administration within the Department of Transportation.<sup>7</sup> In addition, Congress passed the USA PATRIOT Act in the wake of the terrorist attacks of September 11, 2001 with virtually no debate.<sup>8</sup> Two years later, Anthony Romero, Executive Director of ACLU, expressed his frustration because “both President Bush and Attorney General John Ashcroft seem unwilling to listen to an American public that is increasingly concerned about the USA PATRIOT Act and other powers the government grabbed for itself after the terrorist attacks.”<sup>9</sup>

Journalists soon became curious about the government’s claims of new and improved security measures.<sup>10</sup> These new security practices and procedures were put to the test around the annual anniversaries of September 11.<sup>11</sup> As one staff writer for the Atlanta-Journal Constitution commented:

The truth, of course, is that homeland security will always be a goal we are striving toward; it can never be considered a goal that is accomplished. And while no system devised by human beings can ever be perfect, that’s not an argument for doing less; it’s an argument for doing more, and doing it smarter.<sup>12</sup>

Thus, homeland security since 9/11 forces journalists to resolve legal and ethical conflicts, which include some recurring dilemmas for those investigating sensitive areas.<sup>13</sup>

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7. See Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (codified as amended at 49 U.S.C. §§ 40101–40129 (2004)); see generally Kent C. Krause, *Putting the Transportation Security Administration in Historical Context*, 68 J. AIR L. & COM. 233 (2003) (providing background information on the regulation of transportation).

8. See *Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept And Obstruct Terrorism (USA PATRIOT Act) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001); *Alien(h)ated*, 37 FIFTH ESTATE, July 1, 2002, available at 2002 WLNR 11585938; Thomas K. Pauley, *Voice of the People: Media Didn’t Give People the Facts*, HERALD (Rock Hill, SC), Dec. 19, 2002, at 6, available at 2002 WLNR 5471340.

9. Anthony Romero, *Two Years Later: As Nation Observes 2nd Anniversary of 9/11 Terrorist Attacks, the ACLU Asks Whether We Are Any Safer or Just Less Free*, ACLU, Sept. 11, 2003, at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=13548&c=206>.

10. See Paul M. Schoenhard, Note, *Disclosure of Government Information Online: A New Approach from an Existing Framework*, 15 HARV. J.L. & TECH. 497 (2002) (discussing the balance between public awareness of Government disclosure and national security on the Internet post-September 11, 2001).

11. See *infra* Part II.

12. *Sept. 11, Two Years Later: Homeland Security Lacks Focus*, ATLANTA JOURNAL-CONST., Sept. 11, 2003, at A14.

13. See Elizabeth Blanks Hindman, *Divergence of Duty: Differences in Legal and Ethical Responsibilities*, 14 J. MASS MEDIA ETHICS 213, 219 (1999) (examining the difference between

This article focuses on whether journalists are justified, legally or ethically, in breaking a law to expose the weaknesses of its enforcement, specifically journalists' tactics to test security measures after the terrorist attacks on the United States on September 11, 2001, and the appropriateness of pursuing their traditional watchdog role on government. In the post-9/11 environment, the press was concerned with examining the government's attention to basic security measures. To explore the consequences of media testing of government security measures, this research focuses on three highly-publicized accounts of such efforts.

Part II of this article examines three prominent examples of when journalists tested security measures after September 11: (1) CBS News sending its reporters through airport security scanners carrying lead-lined film bags that block x-rays to see whether the bags would be visually scanned or manually searched; (2) ABC News shipping a container of depleted uranium from the Middle East to New York Harbor to check the port's security measures; (3) the *New York Daily News* sending reporters aboard several flights in different airports with assorted banned items. These three instances are prime candidates for a case study because they show the range of ways the press have tested security and because they are among the most prominently publicized examples. Parts III and IV explore some of the legal and ethical issues surrounding these tests. In Part V, the legal and ethical principles are applied to the three examples discussed in Part II. This article concludes by offering a legal defense that seeks to strike an appropriate balance between a journalist's interest in reporting to the public and the government's interest in protecting national security. When charged with breaking the law in pursuit of a story of public importance, a journalist may respond to the statement "you broke the law" by proclaiming "But I'm a Journalist!" This "But I'm a Journalist!" defense is outlined in the conclusion of this article. The defense depends on three factors: (1) whether alternative channels are available for gathering the information; (2) whether the public's right to know outweighs the government's concern for national security; and (3) whether the investigative techniques used went no further than reasonably necessary to gather the information.

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legal and ethical duties of the journalists investigating the 1993 encounter between the Branch Davidians and the Federal Bureau of Alcohol, Tobacco, and Firearms outside Waco, Texas); Paul S. Voakes, *Rights, Wrongs, and Responsibilities: Law and Ethics in the Newsroom*, 15 J. MASS MEDIA ETHICS 29 (2000) (examining two theoretical models for how journalists view the relationship between law and ethics).

## I. THE PRESS AS WATCHDOG

Historically, in the United States, the press has been protected from interference by the government, namely by the First Amendment.<sup>14</sup> Within the First Amendment framework, scholars have identified protection for the press founded on the press's role as the Fourth Estate.<sup>15</sup>

The most common libertarian principle of a free press espoused by newspapers reveals their watchdog function as the Fourth Estate.<sup>16</sup> For example, investigative journalism is credited with uncovering deplorable conditions at New York's Blackwells Island Insane Asylum,<sup>17</sup> deficiencies in the meat packing industry,<sup>18</sup> and the Watergate scandal.<sup>19</sup> Journalists from all media have produced countless investigative news stories uncovering wrongdoing, injustices, and abuses of authority.<sup>20</sup> The public wants the media to perform its watchdog role through "timely, comprehensive and informative news coverage."<sup>21</sup> Bill Kovach and Tom Rosenstiel, leading journalism scholars, suggest "citizens intuitively know that the best and most reliable work of the press comes when it is providing independent information."<sup>22</sup>

The traditional watchdog role of the press developed the Fourth Estate function, where the press served as a check on the three branches of government.<sup>23</sup> The press, by informing the public about the government, keeps the government accountable for its actions or inactions and plays an important role in the democratic system.<sup>24</sup> Bob Steele, a prominent

14. See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press. . .").

15. The Mass Media as Fourth Estate, at <http://www.cultsock.ndirect.co.uk/MUHome/cshtml/media/4estate.html> (last visited Apr. 3, 2005) (defining the fourth estate as "the fourth 'power' which checks and counterbalances the three state 'powers' of executive, legislature and judiciary.").

16. See *The Maven's Word of the Day, Fourth and Fifth Estates*, RANDOMHOUSE.COM (Aug. 28, 2001), at <http://www.randomhouse.com/wotd/index.pperl?date=20010828> (quoting Thomas Carlyle's belief that "the growing power of the press . . . should serve as a guardian of democracy. . .").

17. See NELLIE BLY, *TEN DAYS IN THE MADHOUSE* (photo. reprint 1998) (1887).

18. See UPTON SINCLAIR, *THE JUNGLE* (Penguin Classics 1986) (1906).

19. See Lisa Friedman Miner, *Why Watergate Still Matters Thirty Years Later, Nixon's Scandal Remains the Ultimate Political Soap Opera*, CHI. DAILY HERALD, June 13, 2002, at 1.

20. See Bob Steele, *Beware the Dangers of 'Testing the System'*, POYNTERONLINE (Oct. 3, 2001), at [www.poynteronline.org/column.asp?id=36&aid=860](http://www.poynteronline.org/column.asp?id=36&aid=860).

21. See Bill Kovach & Tom Rosenstiel, *In Wartime, the People Want the Facts*, N.Y. TIMES, Jan. 29, 2002, at A21.

22. *Id.*

23. *The Mass Media as Fourth Estate*, *supra* note 15.

24. Bob Steele, *Can Ethics Trump Law?*, POYNTERONLINE, (Sept. 14, 2003), at

journalism ethicist, articulates it well when he says:

Journalists and news organizations have a professional duty to scrutinize our government and its ability to measure up, particularly on such weighty matters as national security. This scrutiny is part of the time-honored watchdog role of the press in a democracy. Journalists reveal important truths so that citizens are well-informed.<sup>25</sup>

Perhaps the press' performance during the Watergate scandal best illustrates how journalism supports democracy. "[T]he purpose of the press is [to investigate,] to promote, and indeed improve . . . the quality of public life."<sup>26</sup>

According to law professor Lillian BeVier, a representative democracy needs a marketplace of ideas that produces abundant and reliable information about the government.<sup>27</sup> Asymmetrical information between government officials and its citizens presents opportunities for officials to disregard public interests and pursue their own selfish goals.<sup>28</sup> Professor BeVier comments:

The more citizens know and understand about what their government is doing, and the more reliable their access to such knowledge and understanding, the more likely they will be to detect any shirking that might take place. And the more likely they are to detect shirking, the greater will be their ability to deter it *ex ante* and to punish it when it occurs.<sup>29</sup>

Legal historian Timothy W. Gleason, who traced the watchdog concept to the nineteenth century, found "no special protection for the institutional press, except the limited protection under common law freedom of the press principles established by the judges of that period."<sup>30</sup> He argues that the news reports that were the result of investigating governmental abuses contributed to the information citizens needed to

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[www.poynteronline.org/column.asp?id=36&aid=47873](http://www.poynteronline.org/column.asp?id=36&aid=47873).

25. *Id.*

26. Theodore L. Glasser & Francis L.F. Lee, *Repositioning the Newsroom: The American Experience With 'Public Journalism'*, in *POLITICAL JOURNALISM: NEW CHALLENGES, NEW PRACTICES* 203 (Raymond Kuhn & Erik Neveu eds., 2002) (describing the goals of the "Public journalism" movement and its progress).

27. See Lillian R. BeVier, *The Invisible Hand of the Marketplace of Ideas*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 233, 238 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

28. *Id.*

29. *Id.*

30. TIMOTHY W. GLEASON, *THE WATCHDOG CONCEPT: THE PRESS AND THE COURTS IN NINETEENTH-CENTURY AMERICA* 40 (1990).

carry out self-governance.<sup>31</sup> But their exercise of the watchdog role did not create any special rights for them that other citizens would not also enjoy.<sup>32</sup> So when the press demanded special rights as a result of the special role they played, it only served to “legally define standards of conduct and responsibility, not stronger rights than citizens.”<sup>33</sup> In addition to enhancing democratic self-governance, the checking value theory, as explained by Professor Vincent Blasi, acknowledges the important role of the First Amendment in serving as a check on abuse of government power.<sup>34</sup> Such freedom is required if reporters are going to be effective in using confidential-source relationships as well as the reporting of ordinary government operations. Thus, news media serves not only as an important mechanism to monitor the performance of public institutions, but also as an information source for the body politic in a democracy.

Although there are obvious differences between the watchdog concept and self-governance theory, the similarities between the two cannot be overlooked. Both provide the theoretical underpinnings for newsroom personnel to report on abuses of government power and disseminate it to citizens for them to use in voting, debate and discussions. The theoretical base includes the watchdog function, which is discussed extensively, and self-governance, which is discussed by Alexander Meiklejohn, a leading proponent of the centrality of the self-governance rationale for free speech.<sup>35</sup> In his book, Meiklejohn discusses the importance of the free trade of ideas to self-governance.<sup>36</sup> He feels it is important that whatever truths are known be made public.<sup>37</sup> Taking this notion a step further, Patrick Garry posits that the interests of self-governance are best served when the public is able to exchange ideas, determine truth, and participate in democratic debate on public issues.<sup>38</sup>

Other scholars have indicated that “the expectation in the United States and most Western democracies is that journalists will provide

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31. *Id.*

32. *Id.*

33. *Id.*

34. Laurence Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL'Y REV. 97, 105 (2002) (discussing Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977)).

35. Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (The Lawbook Exchange 2000) (1948).

36. *Id.* at 88-89.

37. *Id.*

38. PATRICK GARRY, *SCRAMBLING FOR PROTECTION: THE NEW MEDIA AND THE FIRST AMENDMENT* 112-14 (1994).

information the public needs to carry out the duties of citizenship and that the media will provide a forum for the circulation of ideas and opinions.”<sup>39</sup> Bob Steele also notes “[o]ver the years, some news organizations have tested the legal line to reveal great system failure by government agencies and to prove significant wrongdoing by powerful people who victimize the vulnerable.”<sup>40</sup>

Today, journalists are again investigating the “inner workings of the government,” not for a criminal conspiracy, as was the case in Watergate, but to assess “the competence of the government to protect the country against terrorism.”<sup>41</sup> Critics of the media first denounced investigative reporting on the government as reckless, even unpatriotic, “[b]ut the public has gradually come to want answers to the questions that journalists have been asking, and once again is starting to see the press not as a villain but a sentinel.”<sup>42</sup> For example, we all want to know that the airline or airplane we are traveling on is safe. We all would like to believe the government when it tells us that air travel is safe. “Trust us with your life,” is the implication. But how do we know that the government’s assurances of safety and security can be trusted? How do we put the government to the test in a democracy?

In the wake of the September 11, 2001 terrorist attacks, several news organizations set out to test the heightened security measures instituted by the government.<sup>43</sup> However, this testing of security measures is not new; in previous times of crisis the press tested airport security.<sup>44</sup> In 1996, two Belgian journalists “made their way effortlessly into the cockpit of a Sabena 737” at the Brussels Airport with fake airline employee security badges as part of an effort to test airport security.<sup>45</sup> The journalists were “charged with trespassing in high-security areas.”<sup>46</sup> They faced a penalty of one year in jail as well as fines if found guilty by a Brussels court.<sup>47</sup>

In 1989, two journalists, Bruce Frankel and Alain Chaillou, were arrested after testing airport security at Kennedy International Airport one

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39. STEPHEN KLAIDMAN & TOM L. BEAUCHAMP, *THE VIRTUOUS JOURNALIST* 5 (1987).

40. Steele, *supra* note 24.

41. Philip Seib, *Watergate Break-In Was Personal For Us All*, *MILWAUKEE J. SENTINEL*, June 15, 2002, at 1J, *available at* <http://www.jsonline.com/news/editorials/jun02/51416.asp>.

42. *Id.*

43. *See infra* Part II.

44. *See, e.g., Brussels Airport Officials Seek To Shore Up Security After Hoax Entry*, *AVIATION DAILY*, Dec. 24, 1996.

45. *Id.*

46. *Id.*

47. *Id.*



month after the Pan Am flight 103 explosion over Lockerbie, Scotland.<sup>48</sup> The journalists attempted to ship packages containing fake bombs from New York to Europe via airplanes.<sup>49</sup> The fake bombs were “made of modeling clay, wires and an alarm clock” and were sent with a note typed on the French TV network’s stationery.<sup>50</sup> The note greeted the finder of the bogus bomb with the message: “We will tell our 18 million viewers who watch our daily newscast at 8, that we found your company to be keen and consistent with security matters.”<sup>51</sup>

A federal prosecutor announced that the two journalists “would be charged with ‘willfully and maliciously’ conspiring to lie to airport personnel about the contents of the packages.”<sup>52</sup> Expressing a common government concern, the prosecutor stated that the incident might encourage others to try similar breaches of airport security.<sup>53</sup> U.S. Attorney Andrew Maloney said, “This type of irresponsible behavior can invite a lot of crackpots to do the same thing.”<sup>54</sup> The same day the two journalists were arrested in New York, an Amsterdam television station “filmed one of its reporters smuggling an attaché case” with a fake bomb onto an airplane at Amsterdam’s Schiphol Airport.<sup>55</sup>

Again after September 11, 2001, journalists in Europe tested new security measures. In England, an undercover reporter smuggled a replica 9mm semi-automatic pistol wrapped up as a present onto a flight from London Heathrow bound for Edinburgh.<sup>56</sup> British Airports Authority, owner of seven United Kingdom airports,<sup>57</sup> confirmed that the replica weapon should have shown up on the x-ray machine it passed through and kept the gun for staff training.<sup>58</sup> Another journalist carried a six-inch pair of scissors, hidden in a data planner, on flights within England.<sup>59</sup>

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48. *Air Security ‘Tests’ Net Arrests*, 13 NEWS MEDIA & THE LAW 45 (Winter 1989) [hereinafter *Air Security*].

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Air Security*, *supra* note 48.

54. 2 *In Fake-Bomb Case May Face Prosecution*, J. OF COMMERCE, Jan. 9, 1989, at 5B.

55. *Air Security*, *supra* note 48.

56. *Reporter Smuggles ‘Gun’ On To City Flight*, EDINBURGH EVENING NEWS, Sept. 5, 2002, available at <http://news.scotsman.com/archinve.cfm?id=988102002> [hereinafter *Reporter Smuggles*].

57. The World of BAA, Our Business, at [http://www.baa.co.uk/main/corporate/about\\_baa/our\\_business\\_page.html](http://www.baa.co.uk/main/corporate/about_baa/our_business_page.html) (on file with the Loyola of Los Angeles Entertainment Law Review) (last visited Mar. 16, 2005).

58. See *Reporter Smuggles*, *supra* note 56.

59. *Id.*

## II. TESTS OF POST-SEPTEMBER 11 SECURITY BY THE MEDIA

In the United States, public concern and fear after September 11, prompted government officials to heighten security measures around sensitive facilities.<sup>60</sup> To test the effectiveness of these new measures, news media used undercover reporting.<sup>61</sup> This article discusses three such examples of undercover reporting conducted by prominent, mainstream media organizations.

### A. CBS News

Post-September 11, 2001 several news organizations sent investigative journalists to “test” airport security. CBS News, on two occasions, sent reporters “undercover to test security at major American airports.”<sup>62</sup> The CBS reporters used lead-lined film bags that block x-rays from seeing the contents inside. On both occasions, “[seventy] percent of the screeners failed to check or even detect the film bags.”<sup>63</sup> Travelers routinely use this type of bag to protect film because they block x-rays from security scanners.<sup>64</sup> Therefore, film bags should always be checked. The only way for a screener to know whether there is a weapon or bomb inside is to open it and remove the contents.

### B. ABC News

ABC News also got into the game. On July 4, 2002, ABC reporters sent fifteen pounds of depleted uranium on a secret twenty-five-day, seven-country journey destined for the United States in a suitcase shielded by a steel pipe with a lead lining.<sup>65</sup> The depleted uranium was designed to look

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60. See generally *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001).

61. Employing undercover reporting to test laws is not a phenomenon restricted to post-September 11 security measures. As Bob Steele observed:

There are times when individuals choose to test the limits of the law. Some citizens have chosen civil disobedience—including law breaking—to honor what they believe to be a higher ethical purpose. Some citizens have broken the law to protest what they believe to be unfair or discriminatory laws. Others violate the law to make their point on issues of social injustice and violations of civil rights. Others have chosen to break the law to challenge government policy.

Steele, *supra* note 24.

62. *Airport Security Gets Another ‘F’*, CBSNEWS.COM, at <http://www.cbsnews.com/stories/2002/09/03/eveningnews/main520612.shtml> (Sept. 3, 2002).

63. *Id.*

64. *Id.*

65. Brian Ross, Rhonda Schwartz & David Scott, *Customs Fails to Detect Depleted*

the same as an actual radioactive shipment, however it was not dangerous.<sup>66</sup>

The reporters' suitcase started in Austria and traveled by rail through the Transylvanian Alps, across the fields of Bulgaria and into Turkey.<sup>67</sup> Throughout this whole trip the suitcase was not inspected once.<sup>68</sup> Turkey is reputed to be a hub of the world's nuclear black market.<sup>69</sup> In Turkey, the suitcase of depleted uranium was placed inside a cargo container for shipment by sea to the United States. It entered New York Harbor without a single inquiry.<sup>70</sup>

One year later ABC News replicated the test "to see if things had improved."<sup>71</sup> Fifteen pounds of depleted uranium were sent in a shipment from Indonesia, the site of two contemporaneous deadly bombings tied to Al Qaeda, to Los Angeles without detection.<sup>72</sup> Dr. Tom Cochran of the Natural Resources Defense Council said that if United States Customs screeners were unable to detect the depleted uranium that gives off much the same signature as weapons-grade uranium, then they "would be unable to detect the radiation signature from the highly enriched uranium."<sup>73</sup> Despite scanning the shipment with their best scanning equipment, security inspectors did not detect the depleted uranium. Senator Dianne Feinstein of California said "[t]his is a case in point which establishes the soft underbelly of national security and homeland defense in the United States."<sup>74</sup>

### C. *New York Daily News*

The *New York Daily News* performed a test of the security system at ten airports less than a month after the 2001 terrorist attacks to see if the

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*Uranium*, ABCNEWS.COM, Sept. 11, 2002 at <http://abcnews.go.com/WNT/story?id=129321&page=1>

66. *Id.* The legality of ABC News' transportation of uranium is not universally agreed upon. Dennis Murphy, Homeland Security Department spokesman, said "it appears they violated the law, and the Justice Department is taking a look at that." Because ABC News failed to accurately disclose the contents of the uranium in the teak trunk along with other furniture, it was a "false declaration." Howard Kurtz, *ABC Ships Uranium Overseas for Story*, WASH. POST, Sept. 11, 2003, at A21.

67. Ross et al., *supra* note 65.

68. *Id.*

69. *Id.*

70. *Id.*

71. Peter Jennings, *A Closer Look 9/11 ABC News Investigation*, WORLD NEWS TONIGHT WITH PETER JENNINGS, Sept. 11, 2003, available at 2003 WL 6680492.

72. *See id.*

73. *Id.*

74. *Id.*

government's claims of safety and thoroughness were true.<sup>75</sup> One *Daily News* reporter carried a razorblade cutter, similar to the weapons used in the 9/11 hijackings, on board a flight from La Guardia to Washington.<sup>76</sup> Another *Daily News* reporter cleared security at Newark Airport toting pepper spray, a utility knife, and scissors.<sup>77</sup> At three of the airports where the hijacked flights of 9/11 originated—Newark, Boston's Logan Airport, and Washington's Dulles International—*Daily News* reporters were able to get dangerous items past security.<sup>78</sup> In fact, "not a single airport security checkpoint spotted or confiscated any of the dangerous items, all of which have been banned from airports and planes by federal authorities."<sup>79</sup>

On Labor Day weekend of 2002, a year after the September 11, 2001 attacks, the *New York Daily News* sent reporters on fourteen flights from eleven airports with concealed contraband.<sup>80</sup> The items again included box cutters, rubber-handled razor knives, corkscrews, and pepper spray, all of which were never detected by airport authorities.<sup>81</sup> While the *Daily News* pointed out that none of the items the reporters carried onboard were illegal to possess outside airports, United Airlines spokeswoman Chris Nardella chastised them: "That is a violation of federal law that you guys knowingly took those items on an airline. You can be arrested."<sup>82</sup>

#### *D. Other Recent Examples of Security Breaches*

In May 2003, a reporter for the *Evening Standard* newspaper in London was found not guilty after going undercover to investigate Heathrow's airport security.<sup>83</sup> Judge Barrington Black, who ordered the not guilty verdict, said "[i]t is clearly in the public interest that a poor standard of safety and security should always be liable to exposure by a free Press, in the same way that bully boys and the greedy are liable to exposure."<sup>84</sup> Judge Black also said that it was "acceptable if some

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75. Maki Becker and Greg Gittrich, *Weapons Still Fly at Airports*, NEW YORK DAILY NEWS, Sept. 4, 2002, at 76, available at <http://nydailynews.com/front/story/16104p-15186c.html>.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. See Maki Becker and Greg Gittrich, *Weapons Still Fly at Airports*, NEW YORK DAILY NEWS, Sept. 4, 2002, at 76, available at <http://nydailynews.com/front/story/16104p-15186c.html>.

82. *Id.*

83. *Victory for the Freedom of the Press*, DAILY MAIL (U.K.), May 30, 2003, available at 2003 WL 55187396.

84. *Id.*

subterfuge is used, provided the matter is in the public interest.”<sup>85</sup>

In August 2003, a pair of *New York Times* journalists, reporter Corey Kilgannon and photographer Librado Romero, were apprehended by police while floating in a twenty-four-foot boat in a security zone in Jamaica Bay near New York City.<sup>86</sup> According to the journalists, they were working on a follow-up story about three fishermen who breached security at JFK Airport.<sup>87</sup> After the 9/11 terrorist attacks, the Coast Guard instituted a 100-yard security perimeter around local airports.<sup>88</sup> *Times* spokesman Toby Usnik said the newspaper was cooperating with authorities and when asked whether the journalists were trying to test security, Usnik said “No.”<sup>89</sup> In October 2003, twenty-year-old college junior Nathaniel T. Heatwole garnered FBI attention after he bypassed airport screeners while carrying bleach, modeling clay, and notes detailing his intention to test airport security.<sup>90</sup> While the media has an interest in testing airport security, legal and ethical implications of these methods still exist.

### III. LEGAL LIABILITY FOR MEDIA TESTING POST-9/11 SECURITY

In 1976, the Supreme Court, in *Nebraska Press Association v. Stuart*, noted “[t]he extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly—a duty widely acknowledged but not always observed by editors and publishers.”<sup>91</sup> Private testing of airport security, even by news organizations, is illegal under the security rules set in place in August 2001.<sup>92</sup> The rules, written before the September 11, 2001, attacks, seek to prevent airport security breaches by fake threats that may draw attention away from real ones.<sup>93</sup> These regulations provide that “no person may: [t]amper or interfere with, compromise, modify, attempt to

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85. *Id.*

86. Greg Gittrich, *Hot Water at JFK for Times Duo*, NEW YORK DAILY NEWS, Aug. 14, 2003, at 8.

87. *Id.*

88. *Id.*

89. *Id.*

90. Curt Anderson, *FBI Tries to Solve Puzzle of Airport Security Breaches*, DULUTH NEWS-TRIBUNE, Oct. 19, 2003, available at 2003 WL 59692356.

91. *Nebraska Press Ass'n v. Stuart*, 427 US 539, 560 (1975).

92. *Tests by News Organizations and Anyone Else Unauthorized of Airport Security Systems*, 18 AIRPORTS 41, at 4 (Oct. 9, 2001). See also 49 C.F.R. §§ 1540.105(a), 1540.111(a) (2003).

93. *Id.* See also Christopher Fotos, *New Airport Security Rules Impose Performance Standards, Sharpen Penalties*, 18 AIRPORTS 33, at 5 (Aug. 14, 2001), available at 2001 WL 6634528.

circumvent . . . any [airport] security system, measure, or procedure . . . .”<sup>94</sup> Furthermore, the new Transportation Security Administration regulations prohibit a person from having on their body, or accessible property, a weapon, explosive, or incendiary.<sup>95</sup>

#### A. Court Precedent for Investigative Journalism

To understand how courts may treat journalists who test airport security and are prosecuted, it is illuminating to review how the courts have treated investigative journalists in the past. The following two cases are the most recent opinions to focus on undercover reporting. These cases are also likely to serve as precedent if a court decides the legal liability of a journalist testing post-9/11 security measures.

##### 1. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*

In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, the U.S. Court of Appeals for the Fourth Circuit rejected ABC’s argument that the supermarket chain’s tort claims against the network had to be balanced against the First Amendment.<sup>96</sup> ABC News had aired a story about how Food Lion handles meat. In order to confirm reports that Food Lion was repackaging expired meat with new expiration labels, ABC had two reporters with bogus resumes get hired by the chain.<sup>97</sup> The reporters talked to other employees and used hidden cameras to record videotape and audiotape of conditions at the stores.<sup>98</sup>

After the story aired, Food Lion sued ABC, alleging fraud, breach of duty, trespass, and unfair trade practices. A jury found for Food Lion on the fraud, breach of duty, and trespass claims and awarded the supermarket chain about \$1,400 in compensatory damages and more than \$5.5 million in punitive damages.<sup>99</sup> The district court judge, however, reduced the total damage award to \$315,000.<sup>100</sup>

On appeal, a three-judge panel of the U.S. Court of Appeals for the Fourth Circuit dismissed the fraud claim and, with it, nearly all of the damage award, but it upheld Food Lion’s victory on the breach of duty and

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94. 149 C.F.R. § 1540.105(a) (2004).

95. 149 C.F.R. § 1540.111(a) (2004).

96. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 510 (4th Cir. 1999).

97. *Id.* at 510.

98. *Id.* at 510-11.

99. *Id.* at 511.

100. *Id.*

trespass claims.<sup>101</sup> The court noted that the torts of breach of duty and trespass did not single out the press for punishment.<sup>102</sup> Furthermore, the panel said that it was “convinced that the media can do its important job effectively without resort to the commission of run-of-the-mill torts.”<sup>103</sup>

## 2. *Desnick v. ABC*

*Desnick v. ABC*<sup>104</sup> is a federal appellate court case that also involved news gathering that allegedly violated the law. In *Desnick*, ABC News aired a hidden-camera story about the Desnick Eye Center clinics in the Midwest, which ABC claimed, in its *PrimeTime Live* story, had performed many unnecessary cataract surgeries on elderly patients.<sup>105</sup> The story included comments from Dr. J.H. Desnick, the clinics’ owner, as well as hidden-camera footage shot by “test patients” who went to Desnick Eye Centers for exams to see if they would be diagnosed, incorrectly, with cataracts.<sup>106</sup> ABC News obtained cooperation for parts of the story by promising Desnick that no “undercover” reporting or “ambush” interviews would be used, but both were.<sup>107</sup>

A federal district court dismissed the Center’s suit against ABC, but the U.S. Court of Appeals for the Seventh Circuit reinstated a defamation claim because there appeared to be facts in dispute.<sup>108</sup> However, the three-judge panel for the Seventh Circuit upheld the lower court’s dismissal of four other tort claims: trespass, invasion of privacy, unlawful electronic surveillance, and fraud.<sup>109</sup>

Chief Judge Richard Posner, writing for a unanimous panel, quickly dealt with most of the claims of the clinic and its doctors. He analogized the fake patients to “testers” who pose as prospective home buyers to uncover discriminatory real estate practices and noted that the “patients” sent by ABC News to the clinics did not gather embarrassing private facts.<sup>110</sup> Judge Posner also noted that the wiretapping statutes in question

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101. *Id.* at 524.

102. *Food Lion*, 194 F.3d at 510, 521.

103. *Id.*

104. *Desnick v. ABC*, 44 F.3d 1345 (7th Cir. 1995).

105. *Id.* at 1347-48.

106. *See id.* at 1348.

107. *See id.*

108. *See id.* at 1351. The defamation claim was later dismissed again in the district court and this time the Seventh Circuit affirmed the dismissal. *See Desnick v. ABC*, 233 F.3d 514 (7th Cir. 2000).

109. *See Desnick*, 44 F.3d at 1352-55.

110. *Id.* at 1353.

allowed one party to a conversation to record the conversation unless that person was doing so to commit a crime, tort, or “other injurious acts.”<sup>111</sup>

Judge Posner suggested that the ends justified the means with regard to the surreptitious taping at the clinics, saying that “[t]elling the world the truth about a Medicare fraud” could not be viewed as an “injurious act” under the electronic surveillance statutes.<sup>112</sup> As for the fraud claim, the panel said that any person “of normal sophistication” would know that an investigative reporter doing a story would likely break a promise to “wear kid gloves.”<sup>113</sup> For Judge Posner, newsgathering and the use of hidden cameras to expose wrongdoing deserved protection.

#### IV. ETHICAL RESPONSIBILITY OF MEDIA TESTING OF POST-SEPTEMBER 11, 2001, SECURITY

Critics argue that journalistic practices that test security and then report failures to the public teach terrorists how to circumvent security measures. Homeland Security Department spokesperson Dennis Murphy criticizes journalists for breaking the law in pursuit of news.<sup>114</sup> He analogizes testing security measures with the unethical act of robbing a bank to prove that the bank’s security is weak.<sup>115</sup> Bonnie Wilson, vice president for airport facilities and services at Airports Council International-North America, also expressed frustration with the media’s testing of airport security, stating “[w]e don’t need help from people who would like headlines.”<sup>116</sup> *Airports*, a weekly publication focusing on topics of concern to the aviation industry, reported that “[n]umerous figures, including private citizens, airline employees and reporters, continue to smuggle potential weapons past checkpoints to prove security has not improved.”<sup>117</sup>

The flipside of this argument, of course, is the great benefit to society in having a free press test airport security systems in a responsible manner. Jailing the journalists who perform undercover investigations of matters of public interest “only serves to divert attention from the bigger picture,”

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111. *Id.* (citing 18 U.S.C. § 2511(2)(d); WIS. STAT. § 968.31(2)(c)).

112. *Desnick*, 44 F.3d at 1353–54.

113. *Id.* at 1354.

114. Howard Kurtz, *ABC Ships Uranium Overseas for Story*, WASH. POST, Sept. 11, 2003, at A21.

115. *Id.*

116. Fotos, *supra* note 93 at 5.

117. *Tests by News Organizations and Anyone Else Unauthorized of Airport Security Systems*, *supra* note 92 at 4.



according to British media law solicitor Monica Bhogal.<sup>118</sup> Both the public and the government derive benefits from having journalists who take their watchdog role seriously. The journalists' stories provide prospective passengers greater detail about the degree of risk involved in flying and warn the government of cracks in the system before they are exploited by hijackers. Moreover, the information obtained from investigating the government can be measured against the results obtained from government self-testing.

Journalists justify testing public security post-September 11, 2001, with utilitarian principles. The basic utilitarian standard states that actions are right to the extent that they promote happiness and pleasure; they are wrong if they produce unhappiness or pain.<sup>119</sup>

John Stuart Mill is credited with introducing utilitarianism into the mainstream of Western ethical thought. His version of this philosophy is often described as "creating the greatest happiness for the greatest number of people."<sup>120</sup> This is contrasted with Immanuel Kant's moral imperatives and absolute duties, which would disallow lying and deception by investigative reporters, even if the ends justified the means.<sup>121</sup>

Utilitarianism is concerned with the consequences of an ethical judgment, focusing on the best outcome for the greatest number of people.<sup>122</sup> Thus, the deception used in undercover reporting is justified because of the greater good served and the bigger injustices revealed by the investigation. Mill's influential thesis *On Liberty* also introduced the notion that truth will emerge in a free marketplace of ideas, and therefore a free press is essential for an educated citizenry.<sup>123</sup>

Journalism professor Louis A. Day captures the essence of the utilitarianism principle and applies it to a situation that journalists often face in undercover reporting.

[R]eporters who use deception to uncover social ills often appeal

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118. Monica Bhogal, "But I'm one of the good guys!", THE GUARDIAN, Aug. 25, 2003, at 10, available at <http://www.macintyre.com/content/view/239/105/>. Bhogal also stated, "[w]hen reporters go undercover, it is often they who end up in trouble with the police instead of the people they are trying to expose." *Id.*

119. See WILLIAM H. SHAW, CONTEMPORARY ETHICS: TAKING ACCOUNT OF UTILITARIANISM 10–11 (Blackwell Publishers 1999).

120. LOUIS ALVIN DAY, ETHICS IN MEDIA COMMUNICATIONS 57 (4th ed. 2003).

121. *See id.*

122. *Id.*

123. See JOHN STUART MILL, ON LIBERTY (1859), reprinted in UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 102 (E.P. DUTTON & CO. 1951) ("The time, it is to be hoped, is gone by, when any defence [sic] would be necessary of the 'liberty of the press' as one of the securities against corrupt or tyrannical government."). *Id.*

to the principle of utility on the ground that, in the long run, they are accomplishing some moral good for the public they serve. In other words, the positive consequences for society justify the devious means in gathering the information.<sup>124</sup>

In that spirit, several news media efforts to check on airport security after September 11, 2001, involved editorial employees posing as regular passengers, without identifying themselves or their purpose, performing acts that would enable them to detect breaches in security.<sup>125</sup>

In his ethics book *The News at Any Cost*, Tom Goldstein lists several instances in which news reporters posed as other professionals and workers in an attempt to get an advantage in gathering the news.<sup>126</sup> Several of the reporters he noted were awarded the Pulitzer Prize for their achievement.<sup>127</sup> However, the use of deception in newsgathering reached new heights at the *Chicago Sun-Times* in 1978.<sup>128</sup> Because of the depth of deception, two members of the Pulitzer advisory board did not look favorably on the work.<sup>129</sup> The newspaper went to the extreme, setting up the equivalent of a sting operation by opening a tavern called the "Mirage." The purpose of the sting was to document the "official corruption that plagued Chicago's small-business owners."<sup>130</sup> Some reporters posed "as bartenders while photographers worked from a hidden room," taking pictures of city inspectors accepting payoffs "so they would disregard health and safety hazards."<sup>131</sup> The journalists felt the "Mirage" sting avoided technical entrapment because "it was all right to give somebody a chance to show off his normal talent for lawbreaking" without "nudg[ing] that person into committing crimes."<sup>132</sup> In the twenty-five-part series, the *Chicago Sun-Times* investigation also yielded evidence of shakedowns and tax fraud.<sup>133</sup>

Sissela Bok "suggests it may be permissible" only as a last resort, when "there is no alternative to subterfuge."<sup>134</sup> Goldstein recounts how

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124. DAY, *supra* note 120, at 58.

125. See Becker & Gittrich, *supra* note 75.

126. See TOM GOLDSTEIN, *THE NEWS AT ANY COST: HOW JOURNALISTS COMPROMISE THEIR ETHICS TO SHAPE THE NEWS* 127-151 (1985).

127. *Id.* at 132.

128. *Id.* at 130.

129. *Id.* at 131-32.

130. *Id.* at 130.

131. *Id.*

132. TOM GOLDSTEIN, *THE NEWS AT ANY COST: HOW JOURNALISTS COMPROMISE THEIR ETHICS TO SHAPE THE NEWS* 131 (1985).

133. *Id.* at 130.

134. See *id.* at 138 (citing SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 263 (1982)).

Neil Henry, a reporter for *The Washington Post*, posed as a bearded, destitute drifter for “an account of how men from the streets of Washington seek work in the fields of North Carolina.”<sup>135</sup> Editor Ben Bradlee distinguished “between planning any kind of a deception, however much the end might seem to justify the means, and embarking on a project where your occupation as a journalist is not advertised.”<sup>136</sup>

However, posing as a criminal and committing a crime to gather news hurts the credibility of the journalist. In 1981, Agnes Palazzetti, a reporter for the *Buffalo Evening News*, wrote a story on her experience in getting caught shoplifting.<sup>137</sup> This is not far removed from the recent case of a radio journalist who broke child pornography laws in order to test the system of detection.<sup>138</sup> Such a case can put law enforcement in a difficult position. For example, it could lead to frauds in which criminals attempt to pose as journalists, and the government and public are not able to separate one from the other.<sup>139</sup>

In her book, *Secrets: On the Ethics of Concealment and Revelation*, Sissela Bok points out that there are abuses that are “so serious, and kept so secret” that deception is the only way to gain entry and access.<sup>140</sup> There are times when “the police either cannot or will not take part in the investigation.”<sup>141</sup> In such instances, “[t]he government itself may be corrupt or the police may be inefficient or overworked, sometimes even prevented from investigating a problem.”<sup>142</sup> “When the government itself is at fault, or high officials within it,” the press may need to probe to a degree ordinarily thought to be excessive.<sup>143</sup> Moreover, “[b]ecause journalists lack means such as subpoenas and search warrants, they may be tempted more often to resort to deceit” than public authorities.<sup>144</sup>

Nonetheless, even if journalists conclude that no agencies could be trusted with carrying out the probe, “they must still weigh the moral arguments for and against deceptive infiltration or other surreptitious

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135. *See id.* at 143.

136. *Id.* at 144.

137. *See id.* at 144–45.

138. *United States v. Matthews*, 209 F.3d 338, 339 (4th Cir. 2000).

139. *See Clay Calvert & Kelly Lyon, Reporting on Child Pornography: A First Amendment Defense for Viewing Illegal Images?*, 89 KY. L. J. 13, 47 (2001); *see* GOLDSTEIN, *supra* note 126, at 145.

140. SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 262 (1982).

141. *Id.* at 263.

142. *Id.*

143. *Id.*

144. *Id.*

methods.”<sup>145</sup> They must consider three main factors. First, they must consider “whether their goal warrants the use of such methods.”<sup>146</sup> This could not involve an issue that is insignificant, but rather would have to involve an issue that is of “the highest importance.”<sup>147</sup> Moreover, “if such a necessity could be shown, then the case would offer persuasive grounds for using a limited deception.”<sup>148</sup> Second, they must consider “the effect on their own credibility and that of the media in general.”<sup>149</sup> Knowing “that public confidence in media reliability is already low . . . [t]he press can hardly afford to saddle itself with more grounds for mistrust” by acquiring information through elaborate hoaxes.<sup>150</sup> Third, they must consider whether the press gives “equally firm support to openness in their own practices,” as they give to openness in public discourse.<sup>151</sup> Until they do, “their stance will be inconsistent and lend credence to charges of unfairness.”<sup>152</sup>

The ethical nature of a journalist’s investigation is affected by whether the information can be accessed through legal channels. Since government records may be available through the Freedom of Information Act (FOIA), this avenue must be explored. FOIA was passed in 1966 as an amendment to the Administrative Procedure Act of 1946 (APA).<sup>153</sup> FOIA facilitates disclosure of federal government documents by requiring: (1) the agency to publish procedural rules, substantive rules, and statement of general policy in the Federal Register;<sup>154</sup> (2) final opinions and orders made in the adjudication of cases be made available for public inspection and

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145. *Id.*

146. SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 263 (1982).

147. *Id.*

148. *Id.* at 263–64.

149. *Id.*

150. *Id.*

151. *Id.*

152. SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 263 (1982). Bob Steele provides an alternative framework by identifying six factors a journalist must consider before breaking the law to “reveal important truths”: (1) whether the “information sought is of profound importance;” (2) whether “all other alternatives for obtaining the information have been vigorously examined and exhausted;” (3) whether the journalists are “willing to fully disclose their methods and the reasons for such actions;” (4) whether the journalists are committed to pursuing the story “fully and fairly;” (5) whether the journalists have balanced the ethical and legal issues and potential consequences to all parties involved; and (6) whether the journalists are willing to accept the consequences if charged for violating the law. Steele, *supra* note 24.

153. See 5 U.S.C. § 552 (2000).

154. *Id.* § 552(a)(1).

copying;<sup>155</sup> and (3) a federal agency to respond to a direct request from the public for any non-exempt document.<sup>156</sup> FOIA authorizes nine exemptions, including national security information, inter-agency documents, and law enforcement records.<sup>157</sup>

In the wake of September 11, the government clampdown on Internet information means that content which once was part of the public domain is no longer available and “its return to the public domain is uncertain if not doubtful.”<sup>158</sup> “Acting in his role as Commander-in-Chief, the President called up the armed services, instituted military tribunals, and shrouded the Executive Branch in secrecy.”<sup>159</sup> Harvard law student, Paul Schoenhard, observed that agency websites were removed and this was a “sudden and dramatic change in online information disclosure by the Government.”<sup>160</sup>

According to Schoenhard, “[t]he Executive Branch’s mass removal of [Internet] information sets a precedent for future administrations and undermines the public’s right-to-know.”<sup>161</sup> Tom Beierle and Ruth Greenspan note in *The Christian Science Monitor* that “[y]ears of hard-won battles that turned FOIA into a fundamental routine bulwark against government secrecy were undermined in a day.”<sup>162</sup> They also lament that, for the current administration, “the presumption is that information is inherently risky.”<sup>163</sup>

Steven R. Shapiro, Legal Director for ACLU, empathizes that September 11, 2001, was terrible and tragic; however, he states the current administration “has conducted an investigation designed to minimize any outside scrutiny of its actions and frustrate the system of checks and balances.”<sup>164</sup> Furthermore, Shapiro asserts, “[the current administration] has deprived the American public of the basic information it needs to judge

155. *Id.* § 552(a)(2).

156. *Id.* § 552(a)(3).

157. *Id.* § 552(b)(1)–(9).

158. See Schoenhard, *supra* note 10, at 502.

159. See *id.* at 503. For a thorough discussion of the scope and history of presidential power in the form of “executive privilege,” see Mark J. Rozell, *Executive Privilege Revived?: Secrecy and Conflict During the Bush Presidency*, 52 DUKE L.J. 403 (2002).

160. See Schoenhard, *supra* note 10, at 503.

161. *Id.* at 509.

162. Tom Beierle & Ruth Greenspan Bell, *Don't Let 'Right to Know' Be a War Casualty*, CHRISTIAN SCI. MONITOR, Dec. 20, 2001, at 9.

163. *Id.* See also Adam Cohen, *Rough Justice: The Attorney General Has Powerful New Tools to Fight Terrorism. Has He Gone Too Far?*, TIME, Dec. 10, 2001, at 30 (outlining concerns raised by new levels of secrecy in the federal government after September 11, 2001).

164. Steven R. Shapiro, *ACLU Joins Coalition in Filing FOIA Lawsuit on Detainees*, ACLU.ORG, Dec. 5, 2001, at <http://www.aclu.org/ImmigrantsRights/ImmigrantsRights.cfm?ID=9853&c=95>.

for itself how the government is doing its job.”<sup>165</sup>

In the wake of September 11, 2001, the Sixth Circuit Court of Appeals held that the First Amendment confers a public right of access to deportation hearings.<sup>166</sup> Sixth Circuit Court of Appeals Judge Damon J. Keith pronounced that “[s]elective information is misinformation,” and also that “[d]emocracies die behind closed doors.”<sup>167</sup> To discover even the most basic information regarding post-September 11 detainees, namely their identity, the ACLU has had to resort to recourse through the judicial system.<sup>168</sup> Any attempt by the public to obtain agency records on the success rates of airports’ contraband materials seizures will probably be equally as challenging, as that information will also be kept closely guarded under the mantle of national security.<sup>169</sup> While FOIA is a legitimate legal route to ascertain how well our airports new and improved security measures are faring, it is unlikely to be a fruitful one.

## V. DISCUSSION

Although the actions undertaken by journalists to test government security after September 11, 2001, crossed traditional legal and ethical lines, they are justified. The results of their reporting will help make transportation safer in the long run. The three examples of the specific actions undertaken by those journalists will be discussed in turn.

### A. Columbia Broadcasting System

In the CBS story with the lead-lined film bags, the Transportation Department officials would not comment on the details of a government security audit conducted back in March 2002.<sup>170</sup> Officials said the results were “too sensitive to reveal publicly.”<sup>171</sup> However, unlike the Transportation Department, the news media are under no such restrictions to keep the results of their tests confidential.<sup>172</sup> Quite the contrary, they test

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165. *Id.*

166. *See* *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

167. *Id.*

168. *See* Shapiro, *supra* note 164.

169. 5 U.S.C. § 552(b)(1) (2000) (section 552(b)(1) excepts from the public disclosure requirement of subsection (a) all “records or information compiled for law enforcement purposes”).

170. *Airport Security Gets An ‘F’*, CBSNEWS.COM, March 25, 2002, at <http://www.cbsnews.com/stories/2002/03/25/attack/main504553.shtml>.

171. *Id.*

172. MARILYN S. GREENWALD & JOSEPH BERNT, *THE BIG CHILL: INVESTIGATIVE REPORTING IN THE CURRENT MEDIA ENVIRONMENT* 123 (Iowa State University Press 2000).

to publish, and they publish to survive.<sup>173</sup> For CBS, there was nothing illegal about toting a lead-lined bag through security. Neither was there an ethical dilemma involving deception for CBS because no deception was required to send the bags through security checkpoints.<sup>174</sup> The flaw was the agents' failure to inspect these bags closer since security devices could not see into them. Some may wonder, however, if the information gathered as a result of the investigations is supplying security-breaching intelligence to would-be terrorists. While this concern exists, it is outweighed by the need to educate the public about airport security breaches. Arguably, the news media were merely upholding their end of the bargain by testing the government's security procedures.

### B. American Broadcasting Company

ABC's smuggling of a depleted uranium shipment clearly revealed shortcomings in the customs screening process.<sup>175</sup> It also exposed an expedient method of bringing dangerous materials into the United States.<sup>176</sup> Federal authorities were reportedly angry that they "had to spend time on ABC's experiment."<sup>177</sup> Dean Boyd, U.S. Customs Service spokesman, complained that "[t]he American public wants us to focus on real threats, not fake ones," and because of the fake threat the agency was forced to divert resources and manpower to address the problem.<sup>178</sup> Paul Friedman, executive vice president of ABC News, defended the actions and said the press "plays an important role in testing how well government is protecting its citizens."<sup>179</sup> While the reporting in this instance was legal, some may fault the news media for tipping its hand to the terrorists, who now know that customs officials are not adequately screening imports.

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173. *Id.* (noting "[t]he fundamental ethical dilemma for journalism is that while it is a social institution responsible for informing the public and making the world safe for democracy, it is at the same time a business like any other: it is extremely focused on making money"). See also Leonard Silk, THE ETHICS AND ECONOMICS OF JOURNALISM, IN THE RESPONSIBILITIES OF JOURNALISM 86 (Robert Schmuhl ed., University of Notre Dame Press 1984) (noting that "[i]n our country, journalism is a business").

174. See generally *Airport Security Gets An 'F'*, *supra* note 165 (indicating that the lead-lined bags passed security screenings unchecked 70% of the time).

175. David Bauder, *ABC Tests Border Security by Smuggling Case of Depleted Uranium into Country*, TALK DISNEY.COM, Sept. 6, 2002, available at <http://www.talkdisney.com/forums/showthread.php?s=&threadid=3395&goto=nextoldest> (last visited Mar. 31, 2005).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

Howard Kurtz, a *Washington Post* reporter, commented “as an American, I’m very glad that ABC NEWS exposed this apparent weakness in the U.S. security system.”<sup>180</sup> However, “[a]s a media reporter, I’m still made uncomfortable by the inevitable level of some deception involved.”<sup>181</sup> Nonetheless, Kurtz note that he “was just stunned that the Justice Department and other U.S. authorities are more interested, apparently, in harassing and blaming journalists who are trying to illuminate problems with American security than they are in perhaps fixing the problem that Brian Ross and his [ABC News] colleagues exposed.”<sup>182</sup>

Commenting on the ABC News shipment of depleted uranium, media critic Neal Gabler noted “there’s another story here and that is the fact that the Homeland Security Office immediately jumped on these guys not because they thought they were terrorists . . . but because they didn’t want the story to come out. So there’s a cover-up in addition to the original story.”<sup>183</sup>

### C. *New York Daily News*

The newspaper article by the *New York Daily News*<sup>184</sup> provided some interesting insights. First, “razors are generally ‘very difficult to detect.’”<sup>185</sup> Second, the journalists reported that “security employees appeared less diligent when searching [the journalist’s] carry-on bags if [they] were cooperative and friendly—or demonstrated a familiarity with [security personnel’s] routine.”<sup>186</sup> While some public benefit came from the newsgathering, the methods used were illegal. By smuggling box cutters, rubber-handled razor knives, and corkscrews onto airplanes, the *Daily News* journalists violated regulations that keep people from “attempt[ing] to circumvent any [airport] security system, measure, or procedure. . . .”<sup>187</sup>

Whether the *Daily News* employees were justified in breaking the law to test the security system turns on reviewing their objectives in light of the ethical standards outlined in the preceding section. Stashing contraband before boarding an airplane to test government security is a far cry from the

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180. *International Correspondents* (CNN television broadcast, Sept. 19, 2003).

181. *Id.*

182. *Id.*

183. *Fox News Watch* (Fox News Network, LLC television broadcast, Sept. 13, 2003)

184. Becker & Gittrich, *supra* note 75, at 7.

185. *Id.*

186. *Id.*

187. *See* 49 C.F.R. § 1540.105(a)(1) (2003).



extreme case of deception set forth when the Chicago newspaper opened its own tavern to observe illegal practices involving small businesses. In this instance, journalists are merely posing as passengers—the kind who may pose a threat to the security of the carrier—trying to board with the banned articles in their possession. Also, unlike the elaborate deception schemes in which journalists have dressed in various disguises, the *Daily News* reporters just carried on one or more of the forbidden items and boarded the flight just like all the other passengers. It is true that the journalists boarded these flights without announcing their occupation or intent, but doing so would have jeopardized their efforts to gather truthful information about airline security. After all, journalists often must become airline passengers themselves when their jobs require travel.

Bok suggests three points to consider before using deception as a newsgathering device.<sup>188</sup> First, newsgatherers should consider “whether their goal warrants the use of such methods.”<sup>189</sup> Certainly, one can argue that it is warranted because it involves a significant public issue—the safety and security of the airlines. Coming in the aftermath of the attacks of 2001, these inquiries could even be considered a life-and-death investigation. Additionally, it was necessary to use these methods because there is no other way of obtaining this kind of data. As noted earlier, the government sent its own testers through security checks, but those results were not made public despite the substantial public interest in airport security.

The second consideration involves the effect of the action on media credibility in general.<sup>190</sup> In the example above, the use of deception was on a very limited scale. Items were carried on just to see if they would go undetected in the security system. There was no effort by the press to plan an elaborate sting operation. The methods, motives, and results could be clearly understood by the public. Further, they should make this information public to allow the public to make informed choices concerning air travel, and as an attempt to hold the government accountable.

The third consideration whether the press is giving the same support to its openness<sup>191</sup> is an institutional question for the individual media organizations to answer. Bok notes that the press must give equal support to its own openness in its own practices as it gives to openness in public discourse. Until then, their stance will be inconsistent and lend credence to

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188. BOK, *supra* note 140, at 263-264.

189. *Id.* at 263.

190. *Id.* at 264.

191. *Id.*

charges of unfairness.

In the three examples outlined above, the journalists' behavior was justified, legally and ethically. The deception was slight in comparison to the potential life-saving information that such deceptive schemes yield. To facilitate the protection of journalists' investigative techniques, the following section outlines a legal defense courts could use to determine whether legal liability can be avoided when a law is broken in the pursuit of a story of public importance.

## VI. CONCLUSION

Charles E. Grassley, Chairman of the Senate Finance Committee, sent a pointed letter to Attorney General John Ashcroft and Homeland Security Secretary Tom Ridge in the wake of ABC News' second successful importation of uranium.<sup>192</sup> In his letter he wrote: "I would urge that significant caution must be used by the federal government to ensure that legitimate reporting is not chilled."<sup>193</sup> He further stated "[i]f my neighbor told me my barn was on fire, my first instinct would be to thank my neighbor and get some water for the fire . . . . Time and again, I find federal agencies devoting enormous time and energy to attacking whoever put the spotlight on a government mistake."<sup>194</sup>

Journalists must remain free to test the system wherever they can. Sometimes the seriousness of the matter being tested and the lack of such trustworthy information from other sources might prompt newsmen to consider breaking the law. Clearly, before taking this step, journalists ought to satisfy themselves and their editors that all legal means to obtain the necessary information have been exhausted. Even when legal or ethical lines are crossed, the newsgatherer must take the deception no further than necessary to achieve the journalistic watchdog purpose.

Courts could adopt the following three part test to determine if a journalist deserves a defense or privilege for breaking a law while pursuing a story of public importance. The "But I'm a Journalist!" defense's first prong would examine whether normal, lawful means for gathering the information are available. If they are, then there is little justification for breaking the law. However, if a court determines that normal means are unavailable, or that there are substantial obstacles in acquiring the information, that determination would trigger the second prong of the test.

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192. Howard Kurtz, *ABC Ships Uranium Overseas for Story*, WASH. POST, Sept. 11, 2003, at A21.

193. *Id.*

194. *Id.*

Prong two is a balancing test in which a court would balance the competing interests of the public's right to know versus the government's claim of national security. These are not the only possible interests at stake, but they are the most prominent interests with regard to information about current security measures. If the public's right to know the information trumps the government's concern for national security, then prong three would come into play.

Prong three asks whether the journalist went no further than necessary to achieve the watchdog purpose. A court would examine how intrusive the means used were. For example, a journalist could not actually hijack an airplane to test airline security. This method of gathering information on airport security would clearly fail the third prong of this test.

To avail themselves of the "But I'm a Journalist!" defense, the defendant would need to prove these elements by clear and convincing evidence. It would be the journalist's responsibility to carry the burden of proof for these three prongs. The watchdog must prove that no normal avenues are available for gathering the information, the public's right to know is indeed compelling, and that the means adopted were no more extreme, although illegal, than necessary.

Any organization or individual meeting the three prongs of this defense would be allowed to call themselves a "journalist." No court would be faced with deciding the agonizing question of who is a journalist *a priori*. Rather a court would be able to conclude that anyone satisfying these three criteria would have proven themselves to be a journalist. A journalist would be defined in the eyes of the court on a case-by-case basis.

Adopting the "But I'm a Journalist!" defense for newsgathering of stories of public importance would provide at least two compelling benefits. This test would protect a valuable institution by allowing journalists some measure of protection for investigating stories the public wants and needs to know about. Second, it would provide some predictability in this area of the law. Journalists, editors, and publishers could evaluate, ahead of time, their chances of success under these three factors before beginning an investigation. If this test were widely adopted, it would minimize the chilling effect that the threat of litigation brings. In addition, this test could restore the proper weight to the free press side of the constitutional balance as the news media perform their important watchdog role.