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UNRAVELLING THE SNARE: DISSECTING THE INTERPLAY OF ENTRAPMENT IN INVESTIGATIVE JOURNALISM AND ITS REPERCUSSIONS IN GHANA'S CRIMINAL JUSTICE SYSTEM

Joel Telfer*

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UNRAVELLING THE SNARE: DISSECTING THE INTERPLAY OF ENTRAPMENT IN INVESTIGATIVE JOURNALISM AND ITS REPERCUSSIONS IN GHANA'S CRIMINAL JUSTICE SYSTEM

Joel Telfer*

ABSTRACT

In democratic societies, the media, often dubbed the 'Fourth Estate,' serves as a critical watchdog, safeguarding transparency and accountability. Yet, an unsettling trend is emerging in Ghana's investigative journalism, namely, the use of entrapment to unveil corruption and other illicit activities. While effective in unmasking wrongdoers, entrapment raises serious ethical and legal quandaries that can jeopardise the integrity of criminal investigations and judicial proceedings. This paper offers an in-depth analysis of the legal and ethical ramifications of entrapment within Ghana's legal landscape. It posits that entrapment not only risks impairing the fairness of trials but also erodes public confidence in the judicial system and potentially violates the rights of the accused. A focal point of this inquiry is whether entrapment could negate mens rea, a cornerstone in establishing criminal liability. Drawing on an array of decided cases, statutes, and legal and ethical theories, this paper aims to contribute to the body of knowledge dissecting the complex interplay between investigative journalism and criminal prosecution in Ghana. The paper culminates in a clarion call for a comprehensive reevaluation of entrapment practices, advocating for the formulation of stringent legal frameworks to uphold individual rights and fortify the integrity of Ghana's judicial system.

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1.0 INTRODUCTION

“Human nature is frail enough at best, and requires no encouragement in wrongdoing. If we cannot assist another and prevent him from violating the laws of the land, we at least should abstain from any active efforts in the way of leading him into temptation.”¹

The Republic of Ghana boasts of a dynamic and flourishing media landscape, a direct result of the 1992 constitution that guarantees media freedom.² Consequently, the nation has witnessed a steady proliferation of media pluralism, with numerous TV and radio stations supplementing the traditional state broadcaster and state newspapers. Additionally, the advent of social media has fostered citizen journalism, providing individuals with internet access, and the ability to report on local events for global consumption.

Journalism encompasses a diverse array of forms and practices, each serving a specific purpose in informing, educating, and engaging the public. The various types of journalism contribute to a comprehensive understanding of events, issues, and phenomena that shape society.

Among the various forms, investigative journalism occupies a unique position.³ Distinguished by its meticulous and thorough approach, investigative journalism plays a critical role in holding power accountable, fostering transparency, and strengthening democratic institutions.

In Ghana, this type of journalism plays a vital role in shedding light on the myriad of challenges that occur behind closed doors, especially in public life. Several state institutions have been fraught with varying degrees of corruption that have significantly impaired the country's revenue generation efforts, efficiency of public service and general trust and confidence in state institutions.⁴ Investigative journalism has been a crucial tool in revealing some of the rot that exists and, in some cases, served as a basis for important reforms.

In the realm of investigative journalism, the methods used to uncover truths can sometimes pose significant ethical and legal challenges. One such challenge, particularly relevant to Ghana's legal landscape, is the concept of entrapment. While journalists aim to expose wrongdoing and bring hidden realities to light, there's a fine line between exposing criminal activities and inadvertently encouraging them. Entrapment, defined as the act of inducing or encouraging an individual to commit a crime they otherwise would not have committed,⁵ has emerged as a growing trend in investigative journalism in Ghana.

¹ People v. Saunders, 38 Mich. 218, 222 (1878).

² Article 162(1) of the 1992 Constitution provides; Freedom and Independence of the media are hereby guaranteed.

³ Hugo de Burgh, *Investigative Journalism: Context and Practice* (Routledge, 2008) 24-25.

⁴ Afrobarometer, 'Trust, Corruption, and Political Efficacy' (Afrobarometer Round 6) <https://www.afrobarometer.org/wp-content/uploads/migrated/files/media-briefing/ghana/gha_r6_presentation3_trust_corruption.pdf> accessed 26 July 2023.

⁵ Jonathan C. Carlson, 'The Act Requirement and the Foundations of the Entrapment Defense' (1987), 73 VA. L. REV. 1011.

Three instances that struck a nerve in the national discourse form the basis for the paper's analysis. The first, the 2015 premiere of Anas Aremeyaw Anas' film "Ghana in the Eyes of God," revealed a disconcerting underbelly of corruption within the judiciary. The second instance pertains to Anas Aremeyaw Anas' investigation into corruption within the Ghana Football Association (GFA) and the final one relates to an investigation that led to the resignation of a Minister in Ghana's government.

The frailty of human nature, as poignantly highlighted in the opening quote, underscores the inherent responsibility and caution that must be exercised when delving into sensitive investigative practices. In Ghana's vibrant media landscape, investigative journalism stands as a beacon of truth and accountability. However, when journalistic endeavours toe the line between unveiling and unintentionally promoting wrongdoing, ethical and legal conundrums arise. The central focus of this paper is to critically examine the role of entrapment within investigative journalism in Ghana and to assess its wider implications on criminal prosecution.

The paper analyses the background of entrapment in Ghanaian law. Here, an exegesis is made of the state of the law on entrapment. Due to the dearth of case law and legislation on the subject in Ghana, reference is made to the practice as it pertains in two jurisdictions, the United Kingdom and the United States. These references offer insights into how Ghanaian Courts might approach the matter of entrapment. Further, a venture into the abstract realm is made, dissecting the theoretical and philosophical fabric that shapes the concept of entrapment. Profound notions such as individual autonomy, free will, the attributability of guilt and the likelihood of abuse by entrappers are analysed. Here, a critical eye is cast on the potential pitfalls of utilising entrapment to root out societal ills. Additionally, entrapment and the establishment of intent in criminal prosecutions are discussed. Here, the paper argues that entrapment can negate the establishment of *mens rea*. The paper then dovetails into a discussion of entrapment as it pertains to Ghana. Notable instances of entrapment, their outcomes and the likely consequences for the Ghana Legal System are discussed extensively. Finally, the paper offers compelling alternatives to the use of entrapment in investigative journalism.

2.0 BACKGROUND OF ENTRAPMENT IN GHANAIAN LAW

Entrapment is a legal concept that has seen limited development within Ghanaian law, necessitating a reliance on the rich jurisprudence of English common law and other common law jurisdictions. This section explores the concept, the attitude of courts, and specific decisions related to entrapment.

2.1 Entrapment under the Common Law

Under the Common law, entrapment is viewed as being fundamentally concerned with the conduct of state and private individuals in inducing persons to commit criminal acts and the



subsequent prosecution thereof. The definition can be discerned from the articulation of Lord Nicholls in *Regina v Loosely*:⁶

It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That would be entrapment. That would be a misuse of state power, and an abuse of the process of the courts. The unattractive consequences, frightening and sinister in extreme cases, which state conduct of this nature could have are obvious. The role of the courts is to stand between the state and its citizens and make sure this does not happen.

What then has been the attitude of the English Courts towards acts of entrapment? In the case of *R v Sang*,⁷ Lord Salmon noted that a Judge had no discretion to exclude evidence that proved an individual had committed an offence after he had been induced to do so by an *agent provocateur*. Following this decision, the Common Law has generally held that evidence is generally not rendered inadmissible by how it is obtained. If it is relevant and has a probative value which substantially outweighs any prejudicial value, it is admissible; irrespective of how it was obtained.⁸ This position is consistent with the Ghanaian position on the admissibility of evidence; it matters not how the evidence was obtained. Once the evidence is relevant and has probative value, it shall be admitted to establish a fact before the court.⁹

The English courts' attitude towards entrapment is multifaceted and indicates an approach that looks at balancing the state's duty to detect and prosecute crime and the need to safeguard individual rights and the integrity of the judicial process. Several key cases illustrate the tension in this issue.

2.1.1 *R v Governor of Pentonville Prison, Ex-Parte Chinoy*¹⁰

This case concerned the establishment of a bank account for money laundering linked to drug trafficking. The Court emphasised that if true entrapment were present, the proceedings would have been stayed. Still, the circumstances did not warrant the exclusion of evidence. The Court expressed that the detection and proof of specific criminal activities might require underhanded or even unlawful means.

2.1.2 *R v Latif*¹¹

Here, the accused was lured into England by deceit and convicted of being involved in drug importation facilitated by an undercover customs officer. The House of Lords upheld the conviction, refusing to stay the proceedings or exclude the evidence, despite the questionable means employed.

⁶ *Regina v Loosely; and Attorney – General Reference (No3) of 2000* (2001) 4 ALL ER 897 HL.

⁷ [1980] AC 402.

⁸ *R v. Leatham* (1861) 8 Cox CC 498.

⁹ Evidence Decree, 1975 (NRCD 323), 51(2).

¹⁰ (1973) 2 All ER 741.

¹¹ (1996) 1 WLR 106.

2.1.3 *DPP v Marshall*¹²

Charged with selling alcohol without a licence, the evidence was provided by plain-clothed officers posing as customers. The Court held that when a police officer merely provides an opportunity to break the law, and the accused freely takes advantage of it, an application to stay proceedings for entrapment will not succeed.

2.1.4 *Williams v DPP*¹³

This case involved a sting operation involving a van packed with valuables left unsecured. The Court ruled that the accused had a choice whether to succumb to temptation or not, and entrapment was not applicable.

2.1.5 *Ealing London Borough v Woolworths PLC*¹⁴

In this case, trading standards officers used a minor to purchase an age-restricted video. The appellate court held that the trial court had wrongly excluded the evidence.

2.1.6 *R v Christou*¹⁵

Police officers set up a jewellery shop to purchase stolen goods. The Court held that the accused were not forced or persuaded into their actions. The Court emphasised that not every trick producing evidence against an accused results in unfairness.

As the cases have established, entrapment, is no defence under Common Law. Despite these authoritative rulings on the effect of entrapment, the Court has also acknowledged that the detection and validation of certain criminal acts might necessitate unconventional or even illicit methods. A notable expression of this dilemma can be found in the case of *R. v. Mack*,¹⁶ where the Canadian Supreme Court outlined the possible difficulty with the *Sang* reasoning as follows:

The state does not wield an unchecked power to invade our personal lives or to capriciously test the virtue of individuals. There exists a genuine apprehension that techniques of entrapment may induce the commission of crimes by those who might otherwise have remained law-abiding... ultimately, we may recognize that there are intrinsic limits on the power of the state to manipulate people and events solely for the purpose of achieving convictions.¹⁷

These reservations and concerns found a definitive expression in the comprehensive judgments in *Loosely*, which crystallised the law into five main principles:

¹² (1988) 3 ALL ER 683.

¹³ (1993) 3 ALL ER 365.

¹⁴ (1995) Crim LR 58.

¹⁵ (1992) 4 ALL ER 599.

¹⁶ [1988] 2 SCR 903.

¹⁷ *Ibid.*

- i. Entrapment is not a substantive defence, but where an accused can show entrapment, the Court may stay the proceedings as an abuse of the Court's process or it may exclude evidence;
- ii. As a matter of principle, a stay of the proceedings rather than exclusion of evidence should normally be regarded as the appropriate response;
- iii. A prosecution founded on entrapment would be an abuse of the Court's process. Police conduct which brings about state-created crime is unacceptable and improper and to prosecute in such circumstances would be an affront to the public conscience;
- iv. In deciding whether conduct amounts to state-created crime, the existence or absence of a predisposition on the part of the accused to commit the crime is not the criterion by which the acceptability of police conduct is to be decided, because it does not make acceptable what would otherwise be unacceptable conduct on the part of the police or negative misuse of state power; and
- v. A useful guide is to consider whether the police did no more than present the accused with an unexceptional opportunity to commit a crime. The yardstick for these purposes is, in general, whether the police conduct preceding the commission of the offence was no more than might have been expected from others in the circumstances.

Loosely marks a notable shift in the English courts' stance on entrapment, reflecting a growing concern for the protection of individual rights and the integrity of the legal process. The ruling in this case crystallises a perspective that increasingly rejects entrapment as a legitimate method of law enforcement. By establishing that entrapment is not a substantive defence but can lead to either a stay of proceedings or the exclusion of evidence, the ruling emphasises the court's role in safeguarding the integrity of the judicial process. It sets clear guidelines for what constitutes unacceptable state-created crime, shifting the focus from the accused's predisposition to commit a crime to the nature of police conduct.

2.2 Entrapment under American Law

Entrapment, under American law, operates as a robust defence against criminal charges, founded on the principle that state agents must not engineer a criminal scheme and implant it within an innocent individual's consciousness for subsequent prosecution. As articulated in *Jacobson v. United States*,¹⁸ the defence rests on two interrelated components:

- (1) governmental initiation of the crime or inducement; and
- (2) the defendant's absence of predisposition to commit the criminal act. Among these, predisposition is the paramount factor.¹⁹

Inducement is the first essential element of the entrapment defence. It goes beyond mere encouragement or the use of deceptive tactics by government agents.²⁰ Instead, it focuses on some form of persuasion or coercion that could lead an ordinary person to commit a crime.

¹⁸ 503 U.S. 540, 548 (1992).

¹⁹ *Mathews v. United States*, 485 U.S. 58, 63 (1988).

²⁰ *Sorrells v. United States*, 287 U.S. 435, 451 (1932).

The state may use trickery or deceit to catch criminals, but that alone doesn't constitute inducement. The line is crossed when the tactics employed are so compelling that they might persuade an average law-abiding citizen to commit a crime.²¹

The second element, predisposition, is the cornerstone of the entrapment defence. It explores the defendant's readiness to commit the crime, regardless of the state's influence. Predisposition is not the same as intent. While intent refers to the mental state required to commit a crime, predisposition examines if the individual is already inclined to commit the crime without the government's influence. Even if the defendant has no previous criminal record, they can be predisposed to commit a crime. If they quickly accept an illegal offer, this might be enough to demonstrate a predisposition. Conversely, if the state's actions create a substantial risk that a non-ready person would commit the crime, the entrapment defence can succeed. If the person was not naturally inclined to commit the crime but was pushed into it, they might not be considered predisposed.²²

In both the English and American legal frameworks, the legality of entrapment is primarily associated with actions carried out by law enforcement officers, not private citizens. This is a crucial distinction, especially in the context of this paper, which focuses on entrapment activities in Ghana often initiated by investigative journalists. In the United States, the legal system adopts a dual focus, it scrutinises both the state's role in inducing the crime and the defendant's predisposition to commit it. A successful defence on these grounds can result in full acquittal. Conversely, English law prioritises the nature of police conduct and the ethical integrity of the judicial process. In cases of proven entrapment, the court may either stay the proceedings or exclude evidence.

Both legal systems strive to strike a balance between effective criminal prosecution and the safeguarding of individual rights and the rule of law. However, they diverge in their underlying philosophies in the sense that, the American system values personal autonomy, while the English approach focuses on the ethical conduct of the state and the integrity of the judicial process. Despite these philosophical differences, it is evident that neither system condones entrapment, viewing it as detrimental to both individual liberties and the credibility of the legal process.

3.0 THE ENTRAPMENT CONUNDRUM: THEORETICAL AND PHILOSOPHICAL UNDERPINNINGS

The philosophical quandary presented by entrapment lies at the intersection of legal responsibility, individual autonomy, and moral agency. This complex issue raises critical questions about the nature of free will, the fairness of assigning guilt under inducement, and

²¹ *United States v. Nations*, 764 F.2d 1073, 1080 (5th Cir. 1985).

²² *Mathews*, 485 U.S. at 6.

the ethical consequences of leaving the inducer unpunished, especially when not acting on behalf of the state.

3.1 Individual Autonomy and Legal Responsibility

In legal and moral philosophy, the notion of individual autonomy is foundational to attributing responsibility for actions.²³ It is the idea that people should be able to make choices based on their reasoning and values. However, entrapment disrupts this autonomy by manipulating situations and influencing choices, often using coercion or exploiting weaknesses. This raises a critical question; can someone be held fully accountable when their ability to make free choices is compromised? The answer, as is a settled matter of legal philosophy, is no. Entrapment is problematic precisely because it undermines individual autonomy, making it difficult to fairly attribute responsibility.

3.2 Free Will and Moral Agency

The concept of free will is also central to the discussion of autonomy and responsibility. Philosophers have long debated the conditions under which an action can be considered a product of free will.²⁴ Classical liberal theories of free will stipulate that an individual must act voluntarily, without coercion, and in line with reason to be considered autonomous.²⁵ This principle is foundational in liberal democracies, emphasising the inherent value and dignity of each individual. In entrapment scenarios, the inducement, whether through deceit, threats, or manipulation, compromises the voluntariness of the individual's actions. Scholars argue that such inducement alters the nature of the choice, thereby undermining the moral culpability of the entrapped.²⁶

3.3 Ethical Implications and Legal Paradoxes

The dilemma deepens when considering that the one who has orchestrated the entrapment often walks free. This creates a paradox where the induced individual faces punishment for committing the crime, while the inducer, who has arguably engaged in an equally or more morally questionable act, faces no legal consequences. This dissonance between legal response and moral intuition raises issues of fairness and justice. From a Kantian perspective,²⁷ for instance, individuals should be treated as ends in themselves and not as mere means to an end. Entrapment arguably violates this principle, as individuals are used as instruments to achieve a broader goal, such as exposing corruption or reducing crime.

²³ John Christman, "Autonomy in Moral and Political Philosophy", *The Stanford Encyclopedia of Philosophy* (Fall 2020 Edition), Edward N. Zalta (ed.), available at <https://plato.stanford.edu/archives/fall2020/entries/autonomy-moral> accessed on 26 July 2023.

²⁴ H. Baumann, "Reconsidering Relational Autonomy. Personal Autonomy for Socially Embedded and Temporally Extended Selves," 2008 *Analyse and Kritik*, 30: 445–468.

²⁵ Ibid.

²⁶ Isaiah Berlin, "Two Concepts of Liberty," *Four Essays on Liberty* (London: Oxford University Press, 1969) 118–72.

²⁷ Ibid.

3.4 Balancing Social Goals and Ethical Principles

The justification for entrapment often rests on consequentialist grounds, where the ends, for example, uncovering corruption or protecting society are seen as justifying the means. However, this approach conflicts with deontological or rights-based ethics, which emphasise the intrinsic moral value of actions and the importance of respecting individual rights and dignity.²⁸ The challenge, therefore, lies in reconciling societal benefits with the preservation of individual autonomy and fair attribution of responsibility. If an action is not a product of free will, attributing criminal liability becomes not just unfair but also inconsistent with legal principles. In a legal system that aims for justice, the fair attribution of responsibility is paramount. Criminal sanctions should only be applied to actions that an individual freely and knowingly commits.²⁹ Entrapment, in overriding individual autonomy, renders this attribution of responsibility problematic.

3.5 Societal Impact and Legal Credibility

While the pursuit of societal benefits like crime prevention and corruption exposure is undoubtedly essential, it must not be pursued at the cost of eroding individual rights. The erosion of individual rights may create a slippery slope where the means justify the ends, leading to further infringements on civil liberties. This erosion can diminish public trust in the legal system and undermine the very social fabric that the law is meant to protect. Public fears of entrapment also create suspicion and insecurity. Public confidence in the legal system is paramount for its effectiveness and credibility. Entrapment, by its nature, can erode this confidence. When investigative journalists are seen as instigators rather than investigators, it leads to a perception that the system that leads to their prosecution is unjust and biased. As has been observed,³⁰ such erosion of trust has lasting implications for the democratic fabric, leading to cynicism and disengagement from the legal process.

The risk of selective enforcement, where certain groups or persons are disproportionately targeted based on biases, prejudices, or political considerations, can lead to unequal application of the law. Investigative journalists can be influenced by a plethora of motives which will enhance their eagerness to create a state of affairs that leads to the commission of a crime. The journalist transcends into the boundary of an agent provocateur who instigates the crime he reports and then into a fabricator who invents them.³¹

In sum, while the pursuit of societal benefits like crime prevention and corruption exposure is undeniably important, it should not come at the expense of individual rights and autonomy. Entrapment disrupts this delicate balance, calling into question the fairness of attributing responsibility and eroding public trust in the legal system. This erosion can have far-reaching consequences, including the potential for selective enforcement and the

²⁸ J. Christman, J. Anderson (eds.), *Autonomy and the Challenges to Liberalism: New Essays*, (New York: Cambridge University Press, 2005).

²⁹ Ibid.

³⁰ Ibid.

³¹ Chafee, *Free Speech in the United States* (Cambridge, Mass., 1942) 215.

undermining of democratic principles. Given these complexities, it's imperative to critically examine and address the ethical and legal dimensions of entrapment. Only by doing so can we hope to maintain a legal system that is both just and effective, one that respects individual autonomy, upholds moral agency, and enjoys the confidence of the public it serves.

4.0 ENTRAPMENT AND THE ESTABLISHMENT OF INTENT IN CRIMINAL PROSECUTION

Article 19 of the 1992 Constitution guarantees an individual's right to a fair trial. Except in the case of strict liability offences, which are offences that do not require proof of intent, the establishment of criminal liability hinges on the establishment of two elements; *actus reus* and *mens rea* and the lack of a valid defence. The *actus reus* is the wrongful deed that comprises the physical components of a crime. The term *actus* connotes a 'deed,' a physical result of human conduct. When criminal policy regards such a deed as sufficiently harmful it prohibits it and seeks to prevent its occurrence by imposing a penalty for its commission. The *mens rea* on the other hand refers to the mental state or intention behind the act. In simple terms, *mens rea* evaluates whether the act was committed with purpose, knowledge, recklessness, or negligence. In essence, while *actus reus* examines 'what' was done, *mens rea* delves into 'why' it was done and whether it was done with guilty intent. For a crime to be established, these two elements typically need to converge: the guilty act must be accompanied by a guilty mind. Moreover, even if both elements are present, the presence of a valid defence can negate criminal liability, ensuring the principles of justice and fairness enshrined in article 19 of the 1992 Constitution.

The question of whether entrapment can negate the establishment of *mens rea* is a subject of considerable legal import, warranting an exploration. This paper posits that entrapment does undermine the concept of *mens rea*. *Mens rea* functions as an indicator that an act was committed not fortuitously but with a discernible level of conscious intent. However, the practice of entrapment introduces a significant perturbation into this foundational legal principle. Specifically, when investigative journalists employ persuasive tactics to induce individuals into committing crimes they would not have otherwise engaged in, a problem arises. This dilemma raises the question, can an individual be accurately ascribed a 'guilty mind' if their actions are substantially the product of external inducements rather than their volitional inclinations? If an act is precipitated by coercion, undue influence, or deceptive manoeuvres, it calls into question the very authenticity of the criminal intent behind the act. This is particularly significant given that the relationship between *mens rea* and free will is inextricably linked. Philosophically and legally, for one to possess a guilty mind, one's actions must stem from a place of autonomy and agency. Entrapment, by its very nature, compromises this autonomy, thereby raising a significant challenge in establishing the moral culpability of the act.

Moreover, the essence of criminal prosecution is rooted in the principles of justice and fairness. Entrapment challenges the moral integrity of a system that punishes individuals for



acts they might not have conceived or executed without external inducement. This point is vividly illustrated in the case of *Butts v. United States*,³² where the court noted that it was unconscionable, contrary to public policy, and the law of the land to punish a man for the commission of an offence of the like of which he never would have been guilty of if the officers of the law or private persons had not inspired, incited, persuaded and lured him to attempt to commit it.³³ This statement underscores the fact that the justice system should not only adjudicate based on the actions of an individual but must also scrutinise the environment and conditions under which such actions were undertaken.

Furthermore, a just legal framework extends beyond the letter of the law to its spirit. As suggested in *Woo Wai v. United States*,³⁴ it is crucial to distinguish between genuine criminal intent and acts committed under undue influence. Focusing solely on the act without considering the surrounding circumstances risks undermining broader public policy goals. This is particularly relevant when we consider that convicting an individual who has been deceived or manipulated into committing a crime runs counter to our innate sense of morality. Such a conviction not only raises questions about the role and ethics of law enforcement but also challenges our very definitions of guilt, intention, and responsibility.

In reflecting on the holding of the Court in *Ex-Parte Moore*,³⁵ where the court opined that upholding the conviction of someone lured into criminality by law enforcement would be both against sound public policy and morally objectionable, an ethical dimension that is central to the debate on entrapment is brought in view. Such a stance by the court not only challenges our fundamental moral intuitions about what constitutes guilt, intentionality, and responsibility, but it also raises serious ethical questions regarding the role of law enforcement in the justice system.

In essence, using entrapment as a basis for conviction has profound legal implications. For a legal system to maintain its credibility, trust, and respect in the eyes of the public, it must be focused on ensuring that justice, in its truest form, is served. Convicting someone on the grounds of entrapment is not only contrary to public policy but also at odds with the very ideals of justice, fairness, and morality.

5.0 ENTRAPMENT AND INVESTIGATIVE JOURNALISM IN GHANA

In the Ghanaian context, entrapment has predominantly been the domain of investigative journalism. Entrapment in this realm involves a journalist orchestrating a scenario where a target is induced to commit an act that is criminal, immoral, or socially frowned upon. The

³² 273 Fed. 35, 38 (8th Cir. 1921).

³³ Ibid.

³⁴ 223 Fed. 412, 415 (9th Cir. 1915).

³⁵ 70 Cal.App. 483, 487; 233 Pac. 805, 806 (1924).

journalist not only procures the act but also ensures that it is traceable to the target, thereby enabling law enforcement agencies to prosecute or expose the individual.³⁶

Why might investigative journalists resort to entrapment as a method for exposing corruption and other illicit activities, as opposed to employing more conventional investigative techniques? One plausible explanation lies in the clandestine nature of these offences, which often involve consensual exchanges that leave no victims to sound the alarm or provide evidence. For instance, when a citizen bribes an official at the Ministry of Foreign Affairs to expedite passport processing, the citizen may not perceive themselves as a victim, given that the bribe ostensibly serves to simplify their life. Even if they did recognise their victimhood, the lackadaisical approach of law enforcement agencies and the fear of self-incrimination could deter them from reporting the incident. Furthermore, these offences often occur in secrecy, leaving scant evidence in their wake. Witnesses, typically close associates who benefit from the illicit activity, are generally unwilling to betray their principals or alert law enforcement agencies. This perhaps speaks to the motivations to expose crime through entrapment.

Prominent Ghanaian investigative journalist Anas Aremeyaw Anas has garnered national attention through his controversial employment of entrapment techniques. Anas has exposed corruption across various sectors, including the judiciary and executive branches, as well as the football industry, by strategically presenting individuals with opportunities to engage in illicit activities.

Anas Aremeyaw Anas's investigative approach often commences with allegations of corruption within a targeted organisation. In this process, a Tiger Eye representative becomes embedded within the target organisation, undertaking a preliminary examination to either corroborate or dismiss initial suspicions. At this stage, Tiger Eye's operatives might seek employment within the organisation in various roles like cleaners, labourers, or administrative staff. These individuals are tasked with strategically placing cameras at key locations to enable further surveillance.³⁷ They may then assist other team members in penetrating the organisation to conduct their investigation. The methodology frequently culminates in a form of entrapment, often involving the offer of a bribe or other inducements to the individual under investigation. This tactic is designed to serve as an integrity test, gauging the subject's propensity to engage in corrupt activities. The ultimate objective is to ascertain whether the individual will succumb to the temptation presented.³⁸

³⁶ Daniel J. Hill, Stephen K. McLeod and Attila Tanyi, 'The Concept of Entrapment' (2017) <https://doi.org/10.1007/s11572-017-9436-7> accessed 2 August 2023.

³⁷ Isaac Boaheng, *Assessing Anas' Methodology of Undercover Investigative Journalism in the Light of the Doctrine of Free Will*, E-Journal of Humanities, Arts and Social Sciences (EHASS) Volume 1 Issue 6 – October 2020, 228-233 Available online at: <https://noyam.org/journals/ehass/> <https://doi.org/10.38159/ehass.2020104>

³⁸ Ibid.

Anas' undercover film "Ghana in the Eyes of God," which premiered on 23 September 2015, used hidden cameras to capture judges and magistrates accepting bribes in a method akin to entrapment.³⁹ The hidden camera operation was not a passive observation of naturally occurring corruption but an active orchestration of scenarios where judges were offered enticements like money and consumables to influence their decisions in various court cases. This deliberate construction of scenarios may have exposed widespread corruption within the judiciary but it also provoked serious questions about whether the targets would have committed the acts without the enticement. The consequences of the film were profound, leading to a judicial crisis with 34 judges and magistrates caught in the act and 20 of them removed from office.⁴⁰ The public reaction to Anas' entrapment-like method was mixed. While it was not universally accepted, with some arguing that it unfairly lured individuals into committing crimes, the film also received considerable public support, as evidenced by songs, cartoons, and public shows that celebrated the exposure of corruption.

In another illustrative case led by Anas Aremeyaw Anas and his Tiger P.I. team, an elaborate entrapment strategy was devised to probe potential corruption within Ghana's Akufo-Addo administration. The undercover investigators masqueraded as representatives of a well-known Islamic bank based in Bahrain, expressing an intent to establish a bank in Ghana with a stated capital of US\$500 million.⁴¹ To lend credibility to their operation, they enlisted the services of a prominent Ghanaian law firm and leveraged contacts within the Ministry of Finance to arrange high-level meetings. Their initial target was Charles Adu-Boahen, then the Deputy Minister for Finance. Through meticulous planning, a meeting was orchestrated in Dubai in February 2018, which became a pivotal moment in the investigation. This encounter was rigorously documented and later featured as a central element in the ensuing investigative report. Unsatisfied with merely engaging the Deputy Minister, the Tiger P.I. team aimed higher, securing a meeting with Finance Minister Ken Ofori-Atta in Dubai in April 2018. During this meeting, Ofori-Atta was offered a "gift" by the purported investors, which he declined, exiting the meeting visibly irritated. This operation employed a multifaceted approach, including impersonation of legitimate business entities, strategic coordination with insiders, utilisation of legal services, and targeted engagement with key political figures. The objective was ostensibly to entice these high-profile individuals into committing a crime.

It is noteworthy that Anas Aremeyaw Anas has neither been prosecuted nor accused of criminal conduct, suggesting that his investigative methods, while ethically and legally contentious, have not been formally recognised as criminal. This lack of legal scrutiny could be attributed to the reluctance of law enforcement agencies to critically assess the legality of

³⁹ M Mark and M Monica, 'Ghana's top undercover journalist masters disguise to expose corruption' (The Guardian, 24 September 2015) <<https://www.theguardian.com/world/2015/sep/24/anas-aremeya-anas-ghana-corruption>> accessed 21 July 2023.

⁴⁰ Ibid.

⁴¹ W.Asare, "Tiger Eye Entrapment": Adu Boahen claims Anas targeted him and others" (Citinews, 14 November 2022) <<https://citinewsroom.com/2022/11/2018-tiger-eye-entrapment-adu-boahen-claims-anas-targeted-him-and-others>> accessed 21 January 2024.

his actions for fear of public backlash as Anas' methods enjoy considerable support among the citizenry who have a huge mistrust for the state and its institutions. The general position of the law, is that a private individual who participates in a crime without communicating same with law enforcement, even if it is to uncover evidence or expose another crime is guilty.⁴² For instance, in the English case of *Smith*,⁴³ the defendant was convicted for offering a bribe, despite his claim that the action was intended to expose corruption within local government.⁴⁴ Even when it comes to law enforcement officers, entrapment activities are generally proscribed. In *Ahenkora v the Republic*,⁴⁵ Justice Crabbe cited Lord Goddard C.J.'s dictum in *Brannan v. Peek*,⁴⁶ emphasising that it is "wholly wrong" for police officers to commit an offence to detect another person's offence. In *Brannan*, Lord Goddard C.J noted that:

The court observes with concern and disapproval the fact that the police authority at Derby thought it right to send a police officer into a public house to commit an offence. It cannot be too strongly emphasized that, unless an Act of Parliament provides for such a course of conduct—and I do not think any Act of Parliament does so provide—it is wholly wrong for a police officer or any other person to be sent to commit an offence in order that an offence by another person may be detected. It is not right that police authorities should instruct, allow, or permit detective officers or plain clothes constables to commit an offence so that they can prove that another person has committed an offence. It would have been just as much an offence for the police constable in the present case to make the bet in the public house as it would have been for the bookmaker to take the bet if in doing so, he had committed an offence.

Anas' entrapment methodology brings to light the very dilemma that underpins the discussion around entrapment in the legal sphere. His methods challenge the traditional notions of legality and fair play. While the intention is to expose corruption, the tactics employed can be seen as coercive and criminal conduct long repudiated by our Courts. The orchestration of scenarios where individuals are offered bribes poses the question of whether those targeted would have engaged in such behaviour without the inducements. The Ghanaian legal system, which is undergirded by principles of justice, fairness, respect for individual autonomy, and the rule of law, must not be seen to encourage unsound and ethically questionable practices in an attempt to combat corruption or illicit activities in society.

⁴² *Ahenkora v the Republic* [1968] GLR 625.

⁴³ [1960] 2 Q.B. 423.

⁴⁴ *Ibid.*

⁴⁵ [1968] GLR 625.

⁴⁶ (1947) 2 All E.R. 572, D.C.

5.1 Alternative Strategies to Entrapment in Uncovering Corruption

Entrapment undeniably has its appeal in the field of investigative journalism, particularly when it comes to exposing corruption and other hidden malfeasances. It must be noted, however, that as has been explored in previous sections of this paper, the demerits of entrapment are significant and deeply concerning. Entrapment is bad for journalists in several ways. Journalists have to go to dizzying heights to engage in trapping. In the course of acting as criminals, they would often be asked to commit crimes other than what they are seeking to gain evidence of with risks to their integrity. The secrecy with which many of these offences are committed means an increase in journalistic corruption. A journalist can appear to be helping expose the rot when in fact he is using the material obtained in such ventures to induce payments from criminals in exchange for the journalist's silence.

This tension between the potential benefits and the profound drawbacks of entrapment forms the basis for the exploration of alternatives. In recognising the necessity to continue the fight against corruption and uphold confidence in the governance system, there is an urgent need to identify methods that retain the effectiveness of entrapment without succumbing to its pitfalls.

Whistleblower protection under Ghana's Whistleblower Act, 2006⁴⁷ presents a good alternative to the controversial method of entrapment. Unlike the direct and sometimes deceptive inducements associated with entrapment, whistleblower protection relies on the voluntary disclosure of information relating to unlawful or illegal conduct or corrupt practices. The effectiveness of whistleblower protection hinges on public awareness, trust, and a rigorous adherence to the procedures set out in the Act. It offers a legal channel for individuals to come forward with critical information without fear of reprisal. In a society where corruption can be deeply rooted, the Whistleblower Act has the potential to encourage more individuals to expose wrongdoing, leading to a higher likelihood of uncovering corruption. However, the lack of success of this approach is intricately tied to its implementation and the government's lack of capacity to investigate claims diligently. To this extent, several steps must be taken to enhance the Whistleblower Act's relevance in Ghana. These include raising public awareness through educational campaigns and ensuring that citizens understand the protections offered by the Act. Strengthening enforcement through clear procedures and dedicated resources is essential. Finally, the government must consider enhancing the reward system within the Act to provide fair incentives for disclosure without encouraging false claims.

Again, the inherent strength of collaborative investigations, data-driven reporting, and community engagement lies in their collective synergy and legal propriety, placing them as a powerful alternative to entrapment in investigative journalism. First, collaborative investigations offer a breadth and depth that solitary efforts cannot match. Alliances between

⁴⁷ (Act 720).

different media houses, investigative bodies, and international organizations, can ensure journalists can overcome financial and geographical constraints, accessing expertise and resources that would otherwise be unavailable. This approach also minimises the risk of subjective bias and promotes a culture of openness and accountability. Unlike entrapment, which often involves deceptive practices and can lead to legal challenges, collaborative investigations operate within a transparent and ethical framework, enhancing their credibility and societal acceptance.

Second, data-driven reporting introduces a layer of empirical rigour to investigative journalism. The use of statistical analysis, data visualisation, and advanced computational tools, would allow journalists to unearth hidden connections, trace financial irregularities, and expose systemic malpractices. Unlike entrapment, which may lead to entangling innocent individuals or inducing criminal behaviour, data-driven reporting relies on existing evidence and logical inference. It provides a more objective and legally sound method for uncovering wrongdoing, strengthening the public's trust in the media's integrity.

In comparison to entrapment, these alternatives offer a more legally sound, ethical, transparent, and effective approach to investigative journalism. While entrapment may yield quick results, the accompanying risks of legal complications and potential harm to innocent individuals make it a perilous tool. The alternatives are proposed to align investigative journalism with democratic values and legal norms, reinforcing its vital role as a guardian of public interest in Ghana and beyond. This makes them not only more compelling but also more sustainable alternatives, capable of enduring scrutiny and contributing positively to the media landscape.

6.0 CONCLUSION

The importance of investigative journalism in Ghana cannot be overemphasised. Yet, the very tool that has been used to expose the hidden shadows of malfeasance, and entrapment, has become a subject of intense scrutiny and debate. Entrapment is a snare. It's a problematic concept, especially in the realm of investigative journalism, and even more so when we look at its application in Ghana. From the days of Eve and the Serpent⁴⁸ and also the Lord's prayer, our traditions have historically abhorred the principle of deliberate tempting. This paper delved into the process of exploring the fine line between capturing the wrongdoers and crossing legal boundaries. While entrapment has uncovered some uncomfortable truths, especially in high-profile cases, it's not without its pitfalls. It may trap those who are guilty, but what if it also ensnares principles of fair play, autonomy, and ethics? This paper by dissecting the legal landscape, analysing philosophical underpinnings, and reflecting on some instances as have occurred in Ghana, grapples with these tough questions.

⁴⁸ "Then the Lord God said to the woman, 'What is this that you have done?' The woman said, 'The serpent beguiled me, and I ate.'" Genesis 3:13, HOLY BIBLE (Rev. Stan. ed. 1952).

The law is not and should not be exclusively concerned about right and wrong or black-and-white answers. The law must also make a journey into the gray areas, where the law meets real life, where good intentions might lead to unintended consequences. In the end, this paper turns on one thing, entrapment might seem like a handy tool, but it's a snare that might just trap us all. Innocent bystanders may be entrapped rather than the intended victim and even if the entrapper tells the truth as to what occurred, he has the power to make any man a criminal which he may abuse.

The concluding reflections of this paper will be to provide a new rendition of the stern warning issued by Lord Nicholls in the *Losey* case.

The practice of private individuals enticing citizens to break the law under the guise of investigative journalism, only to then call for state prosecution, is entirely unacceptable. This is entrapment, a blatant abuse of power and a flagrant disregard for individual self-determination. The potential consequences of such journalistic conduct, which can be frightening and sinister in extreme cases, are clear. The courts and society must serve as a buffer between the state, investigative journalists, and citizens to prevent this from occurring.

