If the Watchdog Bites, Is It Put Down?  
A Response to Neil Levy on Journalism Ethics and Entrapment

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Abstract

In 2002 Neil Levy published an article in the Journal of Applied Philosophy (19, 2, pp. 121-130), “In Defence of Entrapment in Journalism (and Beyond)”. This response to Neil Levy’s recent assertion of a “right” of entrapment by journalists suggests that Levy’s argument is based on an inadequate conceptualization of both the function of journalism and nature of journalistic practice, and fails to take into account how the law currently impinges on journalistic practice. We put the proposition that legitimating journalistic use of entrapment by paralleling it with “proactive policing” is not established as an ethically – or legally - acceptable practice, and indeed in terms of the remerging neo-Aristotelian ethic of virtue, is more likely to corrupt the journalistic practitioner than result in revelations of malfeasance in the public interest.

Neil Levy challenges the view that deception by journalists should be frowned on as an ethically unsound practice. In fact he calls for greater use of entrapment to ensure journalists fulfill their watchdog role. Levy uses the following process of reasoning to justify this position.

- Entrapment is defined and analysis offered when police can legitimately utilize this practice.
- A counterfactual test to permissible entrapment is postulated.
- The role of journalists is defined the role of journalists in terms of fourth estate ideals, with the argument that the media have two main roles: providing information to enable people to participate in the political process and a “watchdog role” of alerting people to abuses of power.
- The watchdog role performed by journalists gives rise to a “right to engage in sting operations” targeting political and civil institutions. He equates the fourth estate “institutional” watchdog role to a policing role. The public interest in the public being informed of “public actions of the officials who claim to represent them or whose decisions impact significantly on their lives” is the source of the journalist’s right to entrap officials.
- However, Levy limits this right to institutional and official corruption arguing “there is no public interest in knowing whether” ordinary citizens are corrupt.
We challenge Levy’s call for journalistic use of entrapment on a number of grounds. First, we question Levy’s interpretation of the legitimacy of the use of entrapment tactics by enforcement agencies. We then question Levy’s conception of journalism as the fourth estate. Levy makes two basic assumptions about the role of journalists in contemporary society. The first relates to the profession of journalism. He argues journalism is a profession, which has specific roles including an institutional watchdog role. He then elevates the “profession” of journalism to a civil institution that derives rights from the public functions it performs. The fact that most often journalism is a business performed under the proprietorship of some of the most powerful media corporations in the world is ignored by Levy.

Levy’s second assumption about the role of journalists is extremely problematic. He equates the watchdog role of journalists to positive policing of institutional and official abuse. We argue a watchdog function is a far narrower concept than policing. We challenge Levy’s conception of journalism, arguing there is no real parallel between the role of journalism in society and the role of law enforcement. In fact, Levy’s call for greater use of entrapment journalism is tantamount to a call to outsource policing to international corporations, who are even more powerful than some sovereign states.

Finally on this point, we argue the laws regulating journalists – particularly defamation and contempt of court laws - focus on the content of publications. When gathering information for publication, journalists are bound by various laws, including information privacy laws, trespass, nuisance and the criminal law. However, they are under no duty to exercise reasonable care when gathering or disseminating information. Therefore, if journalists made greater use of entrapment tactics, they would have wider powers (and be far less accountable to the public) than law enforcement agencies.

In conclusion, we reflect on the moral status of entrapment as a form of consequentialist practice in which the end justifies the means. This is in contradistinction to the current code-based – and thus deontological - approach that dominates most contemporary discussion of journalism ethics. The influence of consequentialist approaches to ethics on the interpretation of codes is noted but the paper argues further questions need to be asked before sanctioning entrapment journalism. Recognising the growing influence of neo-Aristotelianism the question is posed: is entrapment permissible in an ethic based on character?

1. The legitimate, and morally permissible, use of entrapment

Entrapment is a legitimate practice for law enforcement agencies. Practices such as covert integrity testing have become an effective part of the arsenal of anti-corruption bodies, especially those concerned with policing. Nonetheless, a vigourous debate still flows about the circumstances in which entrapment by law enforcement agencies is defensible.

The distinction Levy makes between entrapment and “pro-active law enforcement” is problematic in that despite Levy’s attempt to make a distinction, the concepts are interchangeable. This is because the narrow, more restricted meaning he gives to the term “entrapment” applies to a legal defence, which by its very nature is
post hoc. What Levy defines as “pro-active law enforcement” can become illegal entrapment - in Levy’s sense of the term - if the courts so determine. The same practice or circumstance can be pro-active law enforcement one day and illegal entrapment the next, and on appeal may revert to being pro-active law enforcement.

The three key issues emerging from the legal debate are first, the predisposition of the entrapped, secondly, the nature and scale of inducement, and thirdly, the risk of injury to innocent third parties or to the officers involved. Levy disagrees with Michael Gorr’s argument that entrapment is permissible by the state so long as there is no “outrageous inducement” which “is prohibited in all cases regardless of its likely social utility and regardless of the target’s degree of predisposition, because it is a fundamental violation of the right of due process” 7. Such circumstances might include the entrapped person being told that the criminal act they were being induced to commit was legal, or the level and nature of inducement being extraordinary, or indeed coercive. Levy chooses to focus only on Gorr’s discussion of what might be termed the “value of the inducement”, and asserts the key issue is the subjective one: would this person have committed a crime in the absence of any proactivity by law enforcement agencies?

In the United States the debate has been around the so-called “subjective test” – did the accused have a predisposition to commit a crime? - and its antonym the “objective test” which tests the conduct of the law enforcers – were their actions within the law? Canvassing both, George Felkenes concluded that, “no matter which approach is used …there is always the moral problem of possibly enticing a person to commit a crime who would otherwise not have done so” 8. Levy attempts to construct an alternative to the subjective/objective test dichotomy in terms of a “counterfactual test” – which is based on the likelihood of an offence being committed 9. How does one calculate such likelihood? On the balance of probabilities? Beyond reasonable doubt? And who carries the burden of proof?

The proposition put by Stitt and James that a judgement should be made on an evidentiary basis is a much more satisfactory one:

…it is legitimate for law enforcement officials to test to see if someone is corrupted, it is not legitimate for them to test to see if someone is corruptible. No one should be offered the opportunity to commit a crime unless there is probable evidence that he is engaged in ongoing criminal activity10.

Stitt and James advance a strong argument against entrapment on the basis that it is inconsistent with democratic rights – rights which, of course, the “fourth estate” are committed to upholding.

There is, however, a crucial difference between law enforcement agencies using entrapment and its use by journalists. In the case of law enforcement agencies, courts have the capacity to make a judgement as to whether the process of entrapment was unjust. As a result of this determination, the process triggered by the entrapment is either ceased (a complete defence to prosecution), the consequences of it are reduced (in terms of mitigation of sentence) or, if legitimately used, the prosecution succeeds. In the case of journalism, any determination of the court about the legitimacy of the entrapment must be in the form of injunctive relief, otherwise the court determination
on legitimacy will have no effect. The publication will still go ahead and sanctions sought will be retrospective. The watchdog role of journalists is expanded from positive policing to include adjudicators of right and wrong (functions usually reserved for courts of law). Watchdogs exceeding their powers face an uncertain fate.

There is a world of difference between establishing a set of criteria, as Levy does, which legitimate entrapment for the purposes of law enforcement and then applying these same criteria to the practice of journalism. This gives journalistic practice a legitimacy and status it does not inherently possess. Despite decades of rhetoric – mainly from journalists - about journalism as the watchdog of democracy, the constitutional arrangements of liberal democratic societies have not been changed to the point where the media are now a formal legislated part of those constitutional arrangements.

2. The functions of the media

Levy relies on the Fourth Estate ideal to legitimize his call for journalistic use of entrapment when investigating institutional and official corruption. He implicitly claims these watchdog roles give rise to a moral right of entrapment. He goes on to argue that journalistic use of entrapment is also justified to ameliorate the chilling effect of defamation laws. However, Levy does not give any detail of how a journalist's moral right to entrapment would be given effect.

In this next section, we deal with Levy's conception of journalism as the Fourth Estate, arguing his call for journalistic use of entrapment is based on an idealized view of journalism. We also discuss the regulatory environment in journalism is performed, arguing industry codes of ethics and laws which restrict journalistic publication already take account of the public interest issues raised by Levy through defences and guidance clauses. We conclude that journalists do not have a moral right to entrapment, pointing out the problems identified by Levy could be overcome by reforming the accountability processes of police, expanding recognised legal defences available to publishers, adopting ethical guidance clauses (similar to Australia's Media Entertainment Arts Alliance (Australian Journalists' Association) Code of Practice) and focussing more on developing journalistic virtues.

"The fourth estate"

As described by Levy, the media have two main functions in a democracy. First, to convey information and provide a forum for public debate which fosters an "informed and responsible" decision on electoral decision-making, and secondly, "A watchdog role, alerting the public to abuses of power"\textsuperscript{11}. Such a chaste theory of journalism is certainly the way many journalists see themselves and reflects a conceptualisation of the media as "the fourth estate". This notion is attributed to the nineteenth century English essayist, Thomas Carlyle, who in turn attributed the idea to Edmund Burke. In\textit{On Heroes} (first published in 1841), Carlyle wrote:

Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important
than they all...Whoever can speak, speaking now to the whole nation, becomes a power, a branch of government, with inalienable weight in law-making, in all acts of authority.

The concept is now applied to describe the role and function of journalism in a liberal democratic society, in very much the terms suggested by Levy. However such a view does not account for the historical fixedness of the proposition, paralleling, as it did, the rise of the nation state, and drawing its essential function, that of “watchdog of democracy”, from the view that it was the encroaching power of the state which constituted the greatest threat to the freedom of expression. The rise of supra-national institutions of both governance and commerce renders such a linkage archaic and more thoughtful proponents of the idea now recognize such deficiencies. The notion of the fourth estate is a journalistic ideal to which journalists aspire. It does not reflect the reality of what journalism is.

Levy’s description of the functions of journalism does not account for alternative conceptualisations of the role and function of journalism, especially those which argue the social construction of news – that news represents what journalists want to report - and that news -most particularly that produced by commercial organisations - both reflects and represents the interests of the owners of the news organisations, the so-called “political economy of journalism”.

The social construction of news and the economic imperative of news organisations

Drawing on Luckman and Berger, Garfinkel, Goffman and Schutz, who themselves draw on Husserl, Bergson and Weber, Gaye Tuchman’s Making News. A Study in the Construction of Reality in 1978 was the first of many such sociological studies of newswokers and news organisations. “News,” writes Tuchman, “is a social resource whose construction limits an analytic understanding of contemporary life.” Secondly, with the exception of some publicly funded broadcast media such as the BBC in the UK, the ABC in Australia, the CBC in Canada, and the PBS in the US, the vast majority of media organisations – particularly in the print media – are commercial organisations for whom making a profit is an imperative equal to, or more important than, being a watchdog guarding against the abuse of power.

If we acknowledge the commercial imperative of the mass media, then to legitimate entrapment as a journalistic practice, is to licence commercial organisations to engage in a practice, which, whatever its public interest merits, also produces private gain for the media organisation’s shareholders. Moreover, the granting of such license is without the prospect of an open and transparent process of judicial review, which both circumscribes and validates the use of entrapment by law enforcement agencies, a process which ensures that both the public interest of exposing misconduct and the civil rights of the entrapped are preserved. Are newsroom decisions about entrapment as transparent, or as open to public scrutiny, as the decisions of law enforcement agencies? One can only imagine the response from commercial editors and producers when a public interest group asked to be present with video camera to record their next discussion about the publication of material gained through entrapment!
Together the social construction of news and the commercial imperative of media organisations mean that news outlets are not going to consistently broadcast or publish stories that are not in their commercial or professional interests. Once we move away from the notion of the “fourth estate”, which implicitly legitimises the use of entrapment as a journalistic tool, to account for both social constructivism and political economy in the role and function of journalism, then any moral argument for the legitimisation of entrapment falls away. Who legitimises commercial organisations, or even public broadcasters, to employ a practice, which is carefully scrutinised, subject to checks and balances, and yet still controversial, as an instrument of law enforcement? Levy’s argument justifying entrapment journalism is founded on an idealized view of journalism.

The legal status of journalism and entrapment

Journalism is part of the mass media, which in the Australian context for example, the Australian High Court has recognised as being the conduit by which individuals derive the information essential to take part in democracy. In the 1992 *Free Speech Cases* the High Court of Australia “distilled” from the Commonwealth Constitution an implied freedom of political communication. More recent Australian cases have acknowledged the role of the mass media, and in particular journalists, as the conduits by which the public access political and government information arising from particular sections of the constitution that guarantee representative democracy. The constitutional recognition of the role of journalists is limited to providing information “necessary for the effective operation of the system of representative and responsible government”. It is limited to communication between electors and the elected representative on political or government matters arising at a local, state, territory, federal or international level.

The notion of representative democracy in the Australian constitution works to limit laws that unnecessarily hinder the public's access to political and government information. The freedom derived from the Constitution does not extend to commercial speech or civil institutions that are non-political. It is not a positive right; it is a negative immunity that limits the application of any state, territory or federal law which burden freedom of communication about government or political matters. If this threshold is met, then it must be asked whether the law is reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the maintenance of the system of government prescribed by the Australian constitution?

These are the type of questions Levy needed to pose to justify journalistic use of entrapment. Does a journalist’s inability to entrap in the investigation of institutional and official abuse limit the communication of information on political and government matters? The next question he needs to ask is whether the laws relating to entrapment and the journalist's ability to investigate stories of institutional and official abuse are reasonably adapted and are appropriate? Is limiting entrapment to law enforcement agencies compatible with the maintenance of the constitutionally prescribed system of government? One expects courts will answer “yes” to this second question because the defence of entrapment is available against police and prosecutors, who have been delegated authority to investigate and prosecute claims of criminality. The common convenience and welfare of society does not require the
profession of journalism, whose system of accountability lacks any real teeth, taking on positive policing functions.

In addition to his claim that journalists need recourse to entrapment to fulfil their fourth estate roles, Levy argues journalistic use of entrapment is justified to ameliorate the chilling effect of defamation. The question, which needs to be asked by Levy when attacking the restrictive nature of defamation law, is whether the legal and ethical restrictions facing journalists burden the public’s access to political and government information? If the public’s access to political information is unreasonably burdened is there a case for investing journalists with a right to entrapment or sanctioning the use of entrapment? Levy’s arguments in this area are unconvincing and he needs to do more to explain how the public’s access to political and government information is curtailed by limiting pro-active policing to the policing professionals.

Again, to use an Australian example, the Australian High Court has found that the "chilling effect" of defamation laws, in relation to political and government communications, is overcome by expanding the common law qualified privilege defence. As a result of the High Court decision in Lange v ABC, mass media publications are immune from liability in defamation suits where defamatory statements are of a political or government nature and they are published reasonably without malice. The joint judgements (delivered by Mason, Toohey and Gaudron) in Stephens v Western Australian Newspapers and Theophanous v Herald and Weekly Times described political and government information as “criticism of the views, performance and capacity of a Member of Parliament and of the member’s fitness for public office.” The High Court unanimously stated in Lange v Australian Broadcasting Corporation that a publication will not be reasonable unless the publisher had reasonable grounds for believing the imputation to be true, took proper steps to verify the accuracy of the material and did not believe the imputation to be untrue. This has become known as an expanded form of common law qualified privilege.

Verification of the accuracy of information is essential to attract the expanded qualified privilege defence in defamation actions. Therefore Australian journalists do have a constitutionally recognised watchdog role, in the sense that journalists must test the accuracy of political and government information before they publish in order to attract the expanded privilege defence. But the Constitutional acknowledgement of the "watchdog role" of journalism does not give rise to any rights beyond those of the average citizen. It limits laws that unnecessarily restrict the public's ability to access political and government information. It also permits publication of defamatory statements about political and government matters that are published reasonably without malice. This expanded common law privilege defence does not extend to non political or non-government information. Given the development of trans-national corporations, it may be arguable that the common convenience and welfare of society requires an expansion of the qualified privilege defence in relation to investigations into corporate corruption and abuse. The categories of privilege are not closed and can be expanded. But the expansion of common law privilege is dependent on the common convenience and welfare of society, not the "rights" of journalists.

The controversial decision of the Australian High Court in Dow Jones v Gutnick suggests the courts may be willing to entertain arguments about the
expansion of common privilege defences in defamation actions. Gleeson CJ, McHugh, Gummow and Hayne JJ stated the "reasonableness" of a publisher's conduct may be taken into account by courts where the publisher's conduct has occurred outside the jurisdiction. But the reasonableness of that conduct would be determined according to the legal standards of the jurisdiction in which the conduct occurred: in any jurisdiction (even the US) the use of deception to obtain information would be unlikely to be viewed as reasonable.

Defamation law is not the only obstacle to journalistic publication. We argue that despite the restrictions facing journalists, there is no justification for legitimising the use entrapment tactics when gathering information for publication. Previously, this article examined the parallels between journalism and police in relation to the duties they perform. It was acknowledged the courts adjudicated the legitimacy of police use of entrapment, whereas the courts could only retrospectively reflect on journalistic entrapment. This section seeks to examine the journalistic regulatory environment in more detail, arguing the current legal and professional accountability framework negates any expansion of journalistic forensic capabilities to include a right to entrap. At the most, account could be taken of the overriding public interest in the information published when determining liability arising from its circulation.

In Westminster style jurisdictions such as Australia and the UK, police are accountable to their employers (the Crown) through a system of internal discipline. They are also accountable at common law to the public they serve. Tronc \(^{31}\) concludes that police are subject to the law of negligence. He warns that statutory immunity of police from prosecution is capable of being limited on public interest grounds. The reasonableness of police behaviour in terms of negligence and statutory immunity is dependent on the overall circumstances and whether police have acted in accordance with training and instructions. Finally, Tronc warns that “police attending incidents must seek to obtain all the information they can and explore all the options open to them before taking any course which may result in injury”\(^{32}\).

Police officers are admitted to the police force after completing specific training and undergoing tests regarding their character. They are bound by rules and regulations, setting minimum standards of conduct, which are subject to internal review. While the effectiveness of police accountability processes is frequently questioned, police are open to professional scrutiny internally (internal review) and externally (tort of negligence). Sanctions open to internal review bodies range from apologies and or explanations, cautions, charging with a criminal offence to dismissal from the police force. Issues of inefficiency and ineffectiveness of these sanctions should be addressed in a review of the processes, procedures, sanctions and education and training of police officers; expanding the forensic capabilities of journalists.

By contrast the regulatory environment in which journalists operate is quite different. First, journalism is an open profession and there is no formal assessment of character relating to an individual’s entry into the profession/craft. Anyone can describe himself or herself as a journalist. There are various self-regulatory bodies to which journalists may be accountable. But most of these bodies are voluntary, in the sense that journalists must become members to be bound by the codes. Self-regulatory bodies have limited sanctions to encourage good conduct. In Australia, for example, these sanctions range from publication of adjudications \(^{33}\) to fines imposed on the
At present, journalists and media proprietors have no duty of care to publish the truth, they have “a duty not to defame without justification or privilege or otherwise than by way of fair comment”35. Justice Levine, in *Sattin v Nationwide News Pty Ltd*36, observed:

Publications in instruments of mass communication involve competing questions of freedom of speech and protection of reputation…the law deals with those competing questions by means of ‘compromises’. The resolution of that tension between the two competing interests is represented by the law of defamation at common law and by its statutory modifications…. The introduction into the law of defamation especially involving instruments of mass communication of some common law duty of care to “get the publication right” would amount to an unacceptable distortion of the principles of common law (as affected by statute) in the law of defamation relating to the balancing of freedom of speech and protection of reputation37.

By the same token, journalists are not under a duty of care when gathering information for publication other than to respect confidences and not to unlawfully intrude into private aspects of people’s lives as prescribed by the laws of trespass, nuisance and information privacy. Therefore, a journalist engaged in entrapment would be less accountable than police officers, who undergo specified training to engage in these practices. The common convenience and welfare of society does not justify sanctioning journalistic use of entrapment. Decisions about the legitimacy of journalistic investigations will be assessed in light of the public interest they serve. It is hard to envisage a situation where the public interest will be served by perpetrating a deception: but in extreme situations it may be arguable that such tactics do serve the public interest. Then the publisher would need to show that the conduct of the journalist did not go beyond what was necessary to satisfy the public interest.

Another area of law, which needs to be discussed in relation to journalistic entrapment, is the contempt of court rules. In the system derived from the English common law, the *sub judice* rules preclude the publication of material posing a serious risk or tendency to prejudice pending proceedings. The laws aim to balance fundamental human rights: the right of freedom of speech38 against the need to protect the proper administration of justice, particularly the right of an individual to a fair trial39. In criminal proceedings, the *sub judice* period begins at the time of arrest or at the time of charging in Australia and in England it is when charging is imminent. Unless journalists can prove there is an overriding public interest, publication of information relating to pending proceedings is limited to the bare facts including the name, age and address of the accused person and the circumstances of the arrest. Any material that is likely to be in issue during the trial (including the physical identification of accused) cannot be published until the *sub judice* period ends, or as a fair and accurate report of the proceedings.

The contempt laws specifically limit the role of journalists if the performance of their duty interferes with the administration of justice. The contempt laws will
become an absurdity if a journalist becomes involved in the investigation and arrest of a person suspected of committing a crime and report on their involvement. Journalists will be assuming the role of the courts, and the accused is denied their right to a fair trial. Thus the administration of justice is undermined. If they do not report the story, their involvement in the investigation becomes redundant (because the public does not hear of the corruption). This makes journalistic involvement in the investigation of crime a business absurdity.

The contempt laws do recognise a public interest defence, but this has rarely been successful and the assessment of public interest is retrospective. The defence is used to justify publication after the damage has been done: the accused person has been tried by the media and the official role of the judicial system usurped.

There are several points to draw from this discussion:

- The use of entrapment by journalists changes their role from a watchdog to a positive policing and judicial role, because the media will arbitrate before the court will have the opportunity to hear the case.
- Public interest defences take account of the fact that the public's need to access information may override the individuals’ rights of privacy or fair trial.
- The privilege defences take account of where the public interest in receiving information overrides and individual's right to protect their reputation.
- The conduct of the journalist must not be assessed according to rights and duties but according to the public interest being served. The rights vest in the public not journalists.
- Given the perceived corruptibility of journalists, the law should not sanction a right of entrapment.

Finally in this section we need to look at the effects of journalistic entrapment. If the watchdog functions arising under the Australian Constitution were seen to give rise to a moral/legal right of entrapment for journalists, the courts would require the journalist to carry the burden of proof that their conduct was reasonable. The “right” of entrapment would potentially threaten the confidential relationship between sources and journalists. While journalists have no general right not to reveal their sources, the *Newspaper Rule* acknowledges that a publisher defendant “will not be compelled during preliminary proceedings to disclose the name of the writer of the article or the sources upon which it was based” ⁴⁰. If journalists were seeking to justify entrapment tactics, according to the tests set out previously they would need to reveal the source of information which formed the basis of their suspicions in order to justify their actions. This raises the question of moral and legal priority.

This discussion suggests the courts are unlikely to recognise the rights of journalists to engage in pro-active law enforcement functions. Levy’s arguments to legitimise journalistic use of entrapment are simply unsustainable in the current legal environment. But we go further to argue journalistic use of entrapment should not be sanctioned because it contravenes the values of journalistic excellence.
3. The moral status of entrapment

Finally in this response to Levy’s article, we investigate the moral status of entrapment. We see the central problem of Levy’s argument is that it is based on casuistry. While casuistry may have a place in assisting the resolution of particular ethical issues where the participants hold to competing principles, there is a remarkable level of unanimity among journalists about the moral principles upon which their practice is based. These principles – fairness, accuracy, balance - are reflected in the codes of various organisations of journalists.

Casuistry seeks to work inductively from cases, comparing like with like, whereas deontological moral reasoning is deductive. Until recently it was largely discredited as a form of moral reasoning. It has been revived, largely in the field of bioethics, through the work of Stephen Toulmin and Albert Jonsen, but not without some trenchant criticism. The advantage of using such a method is that people who hold different principles can often come to agreement on the solution to a particular problem without the necessity to compromise on the principles they hold. However, casuistry is an explicitly non-principled form of moral reasoning, and still has some way to go before it is rehabilitated as a universally acceptable form of moral reasoning. Boeyink makes a case for the use of casuistry in journalism ethics, but not a convincing one. Skating over casuistry’s problematic past in one paragraph, Boeyink posits casuistry as a middle way between a situation ethics which sees each case as unique and an “absolutism” in which cases are “the passive raw material to which moral principles are applied”, a sort of systematized situationalism. It would seem that a newsroom culture that defined its ethical values on evolving precedents was at greater risk of unethical conduct than one based on a shared and agreed set of principles (deontology) or on dispositions of character (virtue).

The core of the argument for legitimising the use of entrapment is that the end – the public exposure of graft, corruption or misconduct – justifies the use of subterfuge and deception in exposing the conduct under question. There is of course, no guarantee that when a journalist exposes such activities and behaviour that criminal sanctions will result. The journalist is principally interested in the story, not the admissibility of evidence in a criminal court where a higher standard of proof is required than is usual in a defamation case, which, except in exceptionally rare circumstances, is a civil case. On the other hand, law enforcement agencies are concerned to acquire admissible evidence; their motivation and intent is to secure a criminal conviction. That is their public duty. Because of these different interests, journalists are likely to be less thorough – and perhaps less effective - in their exposure of corruption. They only need sufficient evidence to avoid a defamation case; law enforcement agencies need sufficient evidence to secure criminal convictions.

This consequentialist approach which essentially places the self interest of the journalist and their news organisation ahead of the public interest, somewhat undermines the moral high ground upon which proponents of the use of entrapment by journalists might like to stand. Indeed, philosophers such as John R S Wilson would argue that (morally unacceptable) entrapment by journalists leads to even more morally unacceptable exploitation: “If entrapment is the treacherous acquisition of power over a person, exploitation is the exercise of such power for selfish ends.”
In his arguments for the use of entrapment by journalists, Levy offers a number of suggestions about why inducements should be part of the investigative journalists’ arsenal. First, entrapment may be the only way to discover the existence of corruption. Secondly, fear of defamation proceedings may deter journalists and media organisations with well-grounded suspicions but insufficient proof, and finally, reporting to police may be untenable if police are suspected of corruption.

In the following sections we examine these claims arguing that Levy has ignored the legal ramifications of vesting journalists with policing powers. In addressing Levy’s arguments on defamation, we see a need to give particular attention the wider regulatory environment within which journalists operate.

**Entrapment**

It is correct that entrapment may well be the only way to discover corruption. The real question is: who does the entrapment? Covert integrity testing is now widely used in policing as a means of identifying corrupt officers. This is a legitimate and appropriate use of entrapment. As the risk of being accused of engaging in casuistry by citing a case, the legal and moral uncertainty surrounding the use of entrapment by “journalists” is well illustrated by a recent Australian court case in which the Brisbane *Courier-Mail* reported:

A freelance reporter was yesterday convicted of faking an illness to obtain a medical certificate using a hidden video camera to tape the visit for a segment on Channel 9’s *A Current Affair* program\(^45\). [John Michael] …Chapman, 40, a freelance reporter and licensed private investigator, yesterday pleaded guilty in the Brisbane Magistrate's Court to a charge of false representation. Solicitor Nicholas Bailey, for Chapman, said his client had been employed as a reporter by Nine at the time of his visit to Dr Dutton and was acting on instructions when he posed as a patient in distress. He said Chapman was a pawn in reporting the story using a hidden camera and was unaware that his actions were an offence under the law. The court was told Chapman believed his actions were in the public interest, but admitted the way in which he obtained the certificate was a case of false representation. Magistrate Stephanie Tonkin told Chapman he should consider himself lucky he had been charged under the Vagrants, Gaming and other Offences Act 1931 -- as the offence carried a maximum penalty of $100. She then fined him that amount\(^46\).

This case raises several issues. If, as Levy argues, entrapment is a legitimate proactive tool in the fight against crime and misconduct, and journalists can be trusted to use it responsibly within appropriate limits, why was the defendant, on the admission of his solicitor, ignorant of the basics of the law under which he was charged? Secondly, why were not those who gave the instructions – the program’s producers - brought before the court to explain their role in commissioning an offence? Thirdly, why was it that the television network hired private investigators as reporters, and did not use their staff reporters or producers? A tacit admission – well founded, as it turned out – that there was quicksand underfoot. Finally, the case raises the possibility that Chapman was himself the victim of entrapment; being induced by payment from the
network to engage in conduct which he professed not to know was illegal. Surely, in commissioning him, the producers were morally obliged to warn him that he was about to commit a crime, albeit in the cause of a greater public interest. Or was Chapman left exposed on the frontline, the victim of a newsroom culture that held him to be an expendable mercenary in the ratings war?

Journalism commentators have struggled with the use of deceptive practices to gather information. Elliott\textsuperscript{47} refers to four degrees of deception. She identifies these deceptions, ranking from the most acceptable to the most heinous. The four levels of deception are:

1. A \textit{primary lack of identification}. According to Elliott, lack of identification is the most acceptable form of journalistic deception stating that journalists are under no duty to disclose their identity when checking out every story.\textsuperscript{48} But she states that a source’s right to privacy gives rise to a right to know the identity of a reporter once an interview is commenced.

2. \textit{Passive misrepresentation}, where a journalist is present at a meeting where participants do not realise there is media coverage. Elliott states journalists are under a duty to provide identification as soon as practicable.\textsuperscript{49}

3. \textit{Active misrepresentation}, which Elliott claims should be condemned because of the “feelings of betrayal that inevitably arises and because of the diminished trust it produces”\textsuperscript{50}.

4. \textit{Masquerading}, which Elliott claims is generally eschewed because if “the great damage it does to the trust that people need for general societal relationships and for relationships with journalists in particular”\textsuperscript{51}.

Elliott is employing an approach to ethics in which she measures the morality of the action by the effect it produces and if it produces the greatest good for the greatest number of people then the action is ethical. While focussing on outcome of the action, Elliott described “rules” of practice which should govern conduct “the general acceptance of which would produce the greatest balance between pleasure over pain”\textsuperscript{52}. Elliott is adopting a rule utilitarian approach to deception.

Hodges\textsuperscript{53} criticises Elliott’s thesis as fundamentally flawed for two reasons. First, at all levels of deception the intent is the same “to gain some advantage by deception by not letting the other party know exactly what is going on”. Secondly, the source/subject is equally deceived and equally taken in at all levels. Hodges\textsuperscript{54} argues that “the journalist’s decision to deceive by passive means, by not telling, is every bit as active or deliberate as the decision to deceive by active means”. However, Hodges\textsuperscript{55} claims all levels of deception are justifiable by the same rules which include:

- The information sought must be of overriding public interest\textsuperscript{56}
- There must be no reasonable likelihood that comparably accurate and reliable information could be obtained as efficiently through convention investigative techniques\textsuperscript{57}
- Would the deception seriously endanger innocent people?\textsuperscript{58}
Hodges opts for a deontological approach to justifying journalists employing deceptive practices when gathering information for publication, prescribing rules, which determine whether the practice is ethical. Such approaches tend to support Levy’s contention that entrapment tactics can be justified where there is an overriding public interest.

However, there are signs, small signs, that journalism as a profession is beginning to move away from a deontological approach to ethics to one based on character. The first step along the path towards virtue is to construct codes in terms of values rather than rules. For example, the recent re-write of the code of ethics for Australian journalists saw prominence given to the values of honesty, fairness, independence and respect for the rights of others. In an ethic of virtue “…moral virtue comes about as a result of habit”, and according Aristotle,

… the virtues we get by first exercising them, as also happens in the case of the arts as well. For the things we have to learn before we can do them, we learn by doing them, e.g. men become builders by building and lyre players by playing the lyre; so too we become just by doing just acts, temperate by doing temperate acts, brave by doing brave acts…Thus, in one word, states of character arise out of like activities. This is why the activities we exhibit must be of a certain kind.

From this we can draw the conclusion that in Aristotle’s view, subterfuge and misrepresentation, the qualities which characterise entrapment, will foster the habits of subterfuge and misrepresentation. By engaging in entrapment as a constant practice, the habits of subterfuge and misrepresentation become part of the character of the individual. An ethic of virtue is thus intolerant of entrapment as a legitimate work practice.

Based on a virtue approach to ethics, the practice of entrapment is unsustainable. But legally there are problems with Levy’s approach, even in the Australian context where the High Court of Australia has given some constitutional recognition to the watchdog role of journalism.

Official corruption

At an international level there are protocols against the bribery of corrupt foreign officials since the United States, for example, passed the Foreign Corrupt Practices Act in 1977.

There has been a concerted international effort to eradicate corruption - particularly the payment of bribes to foreign officials. Since the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions came into force in 1999, jurisdictions within the OECD, including Austria, Bulgaria, Finland, Greece, Hungary, Iceland, Norway, South Korea, Canada, Germany, Japan, the United Kingdom, Australia as well as the United States are taking steps to legislate for criminal sanctions against bribery of foreign officials.
At a jurisdictional level there are a growing number of corruption prevention and investigation agencies. In Hong Kong, the Independent Commission Against Corruption, was established in 1974 and established a fearsome reputation as a corruption buster. In the Australian state of NSW a similarly named body was established in 1988, while in the neighbouring state of Queensland, the Crime and Misconduct Commission (formerly the Criminal Justice Commission) has maintained the powers of a standing Royal Commission since 1989.

Again in Westminster style jurisdictions there have been are a range of other state institutions and mechanisms which emerged during the second half of the twentieth century to protect individuals and groups against the abuse of power: practices such as judicial review, the creation of ombudsmen, the establishment of anti-discrimination and human rights commissions and administrative appeals tribunals, whistle blower protection legislation, the expanded role of parliamentary committees, legislation to protect privacy, and to permit freedom of information, and the assertion of a more vigorous role by Auditors-General. Diligence in reporting the activities of such agencies, and following through on the cases they pursue, will engage the attention of eager investigative journalists with the need to resort to subterfuge. In the golden days of yellow journalism, before the establishment of such institutions and mechanisms as part of the apparatus of the well-governed liberal democratic state, there was perhaps a legitimate role for media organisations to play in using entrapment to expose graft and corruption.

Conclusion

Levy has pursued the notion of a “right” of entrapment for journalists, first by creating an argument based on the principles of pro-active law enforcement – an essentially legal argument - and secondly by suggesting a moral imperative for the use of entrapment by journalists – essentially a moral argument. Entrapment by journalists is not legally or ethically permissible, even where there is overriding public interest in the outcome of the action. It is not permissible because it is not morally or legally justifiable for journalists to perform policing roles. At the highest level of their role in society, journalists are watchdogs. A “watchdog” is “watchful guardian as of morals, standards” 61. Journalists who utilise methods of entrapment cannot be watchful guardians of the morals or standards of society; they simply work to undermine the integrity, standards and traditions of journalism and any vestiges of legitimacy that performance of a watchdog role may have in a world increasingly dominated by globalised, commercial media.

2 Ibid. p. 122-3.
3 Ibid. p.124.
4 Ibid. p.127.
5 Ibid. p.128.
6 Ibid.
8 G. FELKENES (1987) Ethics in the Graduate Criminal Justice Curriculum Teaching Philosophy 10, 1, p.30
9 Levy op. cit., p.125.
11 Levy op. cit., p.125.
17 Nationwide News Pty Ltd v Wills (1992) 177 CLR 1; Australian Capital Television Pty Ltd v The Commonwealth (1992) 177 CLR 106.
25 This issue will be addressed in more detail later in this paper when we examine the regulatory environment.
28 Theophanous v Herald and Weekly Times (1994) 124 ALR 1, 12; Stephens v The Western Australian Newspapers (1994) 124 CLR 80, 90.
32 Ibid.
33 By the Australian Press Council.
34 Breaches of MEAA (AJA) Code of Ethics can attract a $1000 fine; The Australian Broadcasting Authority can impose fines and other conditions on licensees.
36 (1996) 39 NSWLR 32 at 43
37 Ibid.
38 International Covenant on Civil and Political Rights (ICCPR) Article 19.
41 Casuistry was used by Cicero and the Stoics, and was widely used in the medieval Church, but its usage became corrupted and it was attacked by the Protestant Reformers, as well Catholic Jansenists such as Blaise Pascal.


45 Australia’s top rating television current affairs program.


53 HODGES, *op. cit.*

54 Ibid. p. 31.

55 Ibid.

56 Ibid.

57 Ibid.

58 Ibid. p. 33.

