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TECHNOLOGICAL INVASION OF PRIVACY: THE NEED FOR APPROPRIATE RESPONSES TO THE NEW SURVEILLANCE SOCIETY IN GHANA

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■ Introduction

In this media-saturated postmodern era, the proliferation of portable, affordable digital electronic recording devices has facilitated individual agency, while creating hitherto unimaginable threats to privacy. For example, the average person today, using a smartphone, can record and disseminate evidence of police brutality, or similarly, record and disseminate intimate acts with loved ones without their permission. As an American privacy law expert points out, secret, privacy-invading surveillance has become easy and nearly irresistible due to contemporary technologies of data collection.¹ Renowned media ecologist Joshua Meyrowitz similarly observes that contemporary society is characterised by the proliferation of recordable communication technologies that are increasingly becoming smaller and more affordable, user friendly and more adaptable to multiple functions. At the same time, he notes, digital technology has made it increasingly easier, faster, and cheaper to disseminate the resulting surveillance products across space and preserve them over time.² Indeed, at the time of writing, reports confirm that Apple's innovative iCloud virtual media storage system has been hacked, allowing the

hacker to access and disseminate hundreds of intimate images stored in personal accounts by many female Western celebrities.³

It is for these reasons that critical communication scholars describe contemporary society as "surveillance society,"⁴ a society in which private space is increasingly attenuated by the ubiquity of seemingly innocuous surveillance technologies. This phenomenon has implications for both privacy and the public sphere.

Despite the fact that we are living in a surveillance society, it is unclear if Ghana's Executive and Parliament have given adequate attention to the privacy-infringing consequences of surveillance technologies, and the need to develop appropriate policy, legislative, and educational responses. This issue has been brought to the fore by a series of recent controversies including the Victoria Hammah tape incident as well as a rash of involuntary pornography cases. In this paper, we recall incidents of technological breach of privacy in recent Ghanaian history for purposes of context and

¹ See Allen, Anita (2008). "The Virtuous Spy: The Ethical Limits of Privacy," *The Monist*. <https://www.law.upenn.edu/institutes/cerl/conferences/cyberwar/papers/reading/Allen.pdf>

² See Meyrowitz, Joshua (2009). "We Liked to Watch: TV as Progenitor of Surveillance Society," *Annals of the American Academy of Political and Social Science* 625, 32-48.

³ See Buchanan, Rose T. (1 Sept, 2014). "Jennifer Lawrence nude pictures leak sparks fear of more celebrity hackings: 'A flagrant violation of privacy'," *The Independent* (UK). <http://www.independent.co.uk/news/people/jennifer-lawrence-naked-photos-spark-fear-of-mass-celebrity-hacking-9702902.html>; and Ryan, Andrew (22 Sept, 2014). "Second Wave of Nude Celebrity Photos Leaked," *The Globe and Mail* (Canada). <http://www.theglobeandmail.com/life/celebrity-news/the-a-list/second-wave-of-nude-celebrity-photos-leaked/article20718456/>

⁴ See for example, Deleuze, Gilles (1992). "Postscript on the Societies of Control," *October* 59, 3-7; and Meyrowitz, supra.

discussion. We conclude by recommending appropriate responses to the phenomenon of surveillance society in Ghana.

■ The Problematic Issues of Electronic Surveillance in the Ghanaian Context

1. The Victoria Hammah incident

In November 2013, an audio taped private conversation between Ms. Victoria Hammah (then a Deputy Minister of Communication in the John Mahama Administration) and a confidant was leaked via social and mass media. The conversation had transpired while the deputy minister was being chauffeured in her official vehicle. During this conversation, Ms. Hammah shared scuttlebutt about personality conflicts between fellow ministers at the Ministry of Gender, Children and Social Protection. She intimated her personal ambition to stay in politics until she had made \$1m. She also alleged that the Minister of Gender, Children and Social Protection had influenced Supreme Court judges to rule in favour of President John Mahama in the Election Petition case initiated by Nana Akufo-Addo, Dr. Mahamadu Bawumia, and the New Patriotic Party (NPP) after they had lost the 2012 elections to Mahama and the National Democratic Congress (NDC).

Once the tape was leaked, it went “viral” in the virtual media sphere, following which Ms. Hammah was relieved of her post by the President. Ms. Hammah, in turn, accused her chauffeur of surreptitiously recording and leaking the conversation. She referred the matter to the police, who detained the driver for 24 hours and released him on bail without charge. To date, the antecedents of the tape are yet to be resolved.

There are those who express unease that the conversation was covertly taped and leaked. They argue that the Deputy Minister had a reasonable

expectation of privacy in her official car, and that the incident was a serious breach of privacy and even national security. In the United States, similar concerns about privacy have been expressed following the leakage of a tape on which Los Angeles Clippers owner Donald Sterling could be heard making racist comments.⁵

On the other hand, there is a contrary position that irrespective of her expectations of privacy, Ms. Hammah was a public figure and the conversation revealed potential abuse of office, tampering with the judiciary, as well as the fact that some ministers occupying sensitive positions in Ghana lack the requisite maturity. For these reasons, it is argued, the recording and leaking of the conversation makes a significant contribution to the discussion of matters of public concern.

2. Politics of leaked tapes in Ghana

The Hammah incident has precedents in contemporary Ghanaian politics. In October 1999, *The Statesman*, published by Nana Akufo-Addo (at that time an MP in the opposition NPP), published the contents of a leaked tape purported to be a recording of some members of then President J.J. Rawlings’ security detail confessing to state-sanctioned terrorist attacks against opposition elements, including Akufo-Addo. Although the police arrested and interrogated Akufo-Addo, some employees of the *Statesman*, and four employees of *Joy FM* (which played portions of the tape in its news review) with a view to preferring charges under the *False News* law,⁶ results of the investigation were inconclusive.

In November 2004, just weeks before the elections of that year, a tape was leaked of a conversation between Dr. Josiah Aryeh, then General Secretary of the NDC, and some NPP officials, in which he

⁵For example, African American basketball legend Kareem Abdul Jabbar asks “Shouldn’t we be equally angered by the fact that his [Sterling’s] private, intimate conversation was taped and then leaked to the media? Didn’t we just call to task the NSA [National Security Agency] for intruding into American citizens’ privacy in such an un-American way?” See Jabbar, Kareem A. (28 Apr, 2014). “Welcome to the Finger-Wagging Olympics,” *Time*<http://time.com/79590/donald-sterling-kareem-abdul-jabbar-racism/>. See also Comisso, Christina (30 Apr, 2014). “Donald Sterling’s Lifetime NBA Ban Sparks Invasion of Privacy Debate,” *CTVNews.ca*. <http://www.ctvnews.ca/sports/donald-sterling-s-lifetime-nba-ban-sparks-invasion-of-privacy-debate-1.1799387#ixzz3EpNXBOHX>

⁶S. 208, the *Criminal Code of Ghana, 1960* (Act 29)

made compromising statements to his audience.⁷ In August 2011, another tape surfaced of Deputy Information Minister Baba Jamal asking staff of the Information Services Department (ISD) to varnish the truth in order to burnish the image of the NDC. A year later, another tape surfaced, this time purported to be of Yaw Boateng-Gyan, National Organiser of the NDC, in which he made chilling references to the covert surveillance of top opposition functionaries, and intimated that party activists would be infiltrated into the national security apparatus to carry out operations on behalf of the NDC.

Two months following the emergence of the Boateng-Gyan tape, Ghanaian media published a tape on which, supposedly, Anthony Karbo, the NPP's National Youth Organiser, could be heard exhorting his audience that the NPP would bring in mercenaries to protect the party's stake in the 2012 elections. And in the midst of the epic Election Petition in 2013, yet another tape recording was circulated, on which a voice, allegedly that of Samuel Awuku, the NPP's Deputy Director of Communications, could be heard claiming that some of the judges hearing the petition would be attacked by his party's elements for unfavourable rulings.

Recently, President Mahama was "caught on tape" allegedly making offensive comments about Kumasi residents. The Presidency subsequently denied the authenticity of the tape, which had been aired by the media houses and had also gone viral. While the origins of the supposedly doctored tape are still

being investigated several months after the case, many are concerned that what the President admits he said was nonetheless in bad taste, as it had ethnocentric undertones. As well, media practitioners in the Ashanti Region have complained through the Ghana Journalists' Association (GJA) about the Government's media strategy for the Mahama visit, which ensured the exclusion of reporters belonging to media houses suspected by Mahama aides to be anti-NDC. The presidency's media strategy was inconsistent with best practices for government transparency. The degree of mistrust and animosity that this strategy provoked no doubt contributed to any mis-information or even falsehood regarding the President's comments.

In any event, there is cause to believe that public personalities often challenge the authenticity of covertly recorded tapes that disclose personal malfeasance merely as a self-serving ploy to avoid accountability.⁸ In most of the cases narrated above, persons supposedly caught on tape have vehemently protested their innocence, even if their protestations have been greeted with incredulity. Yet, while one may be incredulous about such protestations, the issue of authenticity exposes one of the dangers of covert, non-consensual recordings of conversations. The evolution of communication technology that has made these covert recordings possible has also made available software that facilitate the manipulation of audio or visual data, with potential inimical consequences not just for individuals, but also for society as a whole. The possibility of using digitally manipulated audio or visual data to incite violent

⁷ In a similar instance, in March 2012, following an acrimonious presidential primary in the NDC which Dr. J.E.A. Mills won against Nana Konadu Agyeman-Rawlings, the Deputy General Secretary of the NDC, Kofi Adams, a key Agyeman-Rawlings backer, was recorded in a telephone conversation with Gabby Otchere-Darko, a close associate of NPP Presidential Candidate Nana Akufo-Addo. Adams is heard intimating that the Agyeman-Rawlings faction would work to ensure that Mills lost the 2012 Elections. Both Adams and Otchere-Darko denied participating in any such conversation. However, unlike the other cases mentioned, it potentially involved the interception of a technologically transmitted conversation, and thus would be a crime under S.73 of Ghana's *Electronic Communications Act, 2008* (Act 775). Our focus in this paper is on communication surveillance practices that are not addressed by the existing legal regime in Ghana.

⁸ In a recent case, Bossman Osei – Hyiamang, the District Chief Executive (DCE) for Twifo Atti Mokwa in the Central Region was convicted of "Contempt of Court" and sentenced to a prison term by the High Court sitting in Cape Coast, after a covert tape recording by a court bailiff was used as evidence that he had unlawfully refused service of a court process, assaulted the bailiff, and cast aspersions on the integrity of the judiciary. However, Nii Ade Coker, a veteran politician and Greater Accra Chair of the NDC chided the DCE on television for not denying the authenticity of the tape and protesting the "violation of his privacy" (even though the recording was made in a public space). See Quaicoe, Chris J. (30 Sept 2014) "Jailed DCE Could Have Lied to Escape Punishment – Ade Coker," *Peacefmonline*. <http://elections.peacefmonline.com/pages/politics/201409/217071.php>. Although Mr. Coker spoke half in jest, the temptation to believe that he was informed by political convention is strong.

ethnic or political conflict, for example, cannot be ignored. As French philosopher Jean Baudrillard has argued, in this electronic age, the dichotomy between the original and the copy has been eliminated. The real is subverted by the hyperreal, and the “simulacrum” subverts the real object to the extent that it has become possible to manipulate any “original” to generate a new “original,”⁹ and much harm is caused thereby.

All the incidences narrated in this paper evince the existence of a panoptic surveillance regime consequent to the existence of the technologies and corresponding social attitudes toward the recording and dissemination of private information. In all but the Hammah incident, the recordings were made presumably by participants in the conversations. In Ms. Hammah’s case, it is being alleged that the recording was done by a non-participant. As well, in all the cases mentioned here, there were clear public interest implications that rationalised the potential intrusion of privacy involved. Indeed, in some of the cases, there did not appear to be any expectation of privacy involved. This cannot be said for cases of involuntary pornography, a subject discussed in the next section.

3. Invasion of Private Space: The Rise of Involuntary Pornography in Ghana

While all the cases referenced thus far involve politicians and public officials, there has been a rash of cases in which private citizens have been victimised by gratuitous intrusions into private spaces through the leakage of intimate images on social and mass media.

The proliferation of portable digital recording devices and social media in the Twenty-First Century society offers unbelievable opportunities for self-expression. Hitherto, the state, mass media, and corporate interests communicated with the individual in an asymmetrical flow of information.

The evolution of social media and the internet have reversed this trend. No longer is the individual satisfied with merely *consuming* media content: he or she now yearns to *produce* media content. A dimension of this trend is that amateur pornography now competes with professional pornography on the internet. As a result, it has become trendy for intimate partners to willingly record their sexual encounters or intimate images either for private consumption or for mass dissemination, sometimes through voluntary “leaks.” Unfortunately, involuntary leaks abound, with deleterious consequences for victims.

Involuntary pornography is the non-consensual distribution of intimate images, sometimes as a means of humiliating and exacting revenge on ex-intimate partners.¹⁰ Hence, in this paper, I adopt a definition of involuntary pornography to embrace any form of non-consensual recording of intimate acts and or the dissemination of intimate audio / visual/ audiovisual recordings.

Involuntary pornography of any type is a variant of cyberbullying. Cyberbullying is defined as:

... any electronic communication through the use of technology including, without limiting the generality of the foregoing, computers, other electronic devices, social networks, text messaging, instant messaging, websites and electronic mail, typically repeated or with continuing effect, that is intended or ought reasonably [to] be expected to cause fear, intimidation, humiliation, distress or other damage or harm to another person’s health, emotional well-being, self-esteem or reputation, and includes assisting or encouraging such communication in any way.¹¹

Last February, in a seminal decision, Accra Circuit Court Judge Ellen Amoah convicted one Henry Alibah on a charge of “Causing Emotional, Verbal or

⁹ Baudrillard, Jean (1998) “Simulacra and Simulations.” In *Jean Baudrillard, Selected Writings* (pp.166-184), ed. Mark Poster. Stanford University Press, 1998.

¹⁰ See Citron, Danielle K. & Mary Anne Franks (2014). “Criminalizing Revenge Porn,” *Wake Forest L. Rev.* 49 345-391 at p. 346. As the authors explain, involuntary pornography “includes images originally obtained without consent (e.g., hidden recordings or recordings of sexual assaults) as well as images originally obtained with consent, usually within the context of a private or confidential relationship (e.g., images consensually given to an intimate partner who later distributes them without consent.”

¹¹ Section 3(1) (b), *Cyber-Safety Act of Nova Scotia*, SNS 2013, c2.

Psychological Abuse, contrary to Sections 1 (b) (iv) and Section 3 (2) of the *Domestic Violence Act 737/07*.¹² Mr. Alibah had made good on a threat to publish intimate images of his ex-girlfriend via social media if she continued to reject him. Although Ghana does not have a statute on cyberbullying, provisions in the *Domestic Violence Act* served as effective tools in response to Mr. Alibah's actions. Many commented though that the *Domestic Violence Act* does not provide adequate sanctions for the enormity of revenge pornography. Mr. Alibah's conduct netted a sentence of four months in prison, relatively low considering the fact that, as the judge noted in her decision: "The images can be downloaded or reposted by initial recipients, and the chain of victimisation becomes infinite... Victims [of revenge pornography] suffer shame, degradation, loss of dignity, and sometimes, even jobs. For the rest of their lives, victims have to live with the dread of knowing that their intimate photos have become public property. It has not been unusual for victims to take their own lives rather than suffer the consequences of their victimisation."¹³ At most, Mr. Alibah faced a fine and a maximum sentence of two years in prison. Furthermore, the *Domestic Violence Act* would not have been applicable to him if he was not in a domestic relationship with his victim.

Ghana is predominantly a socially conservative country (censuses consistently show that a Ghanaian is a Christian, Muslim, or African Traditionalist) structured in patriarchal dominance. Female victims of involuntary pornography, therefore, risk public vilification and even extra-judicial sanctions. This is illustrated by a recent case of involuntary pornography that exposed several women in Tamale

who were recorded by a single male partner either in the nude or while having sex with him. Despite the fact that the women are not criminally liable for any of the acts recorded, news reports indicate that they have been banished by a traditional ruler¹⁴ and subjected to ridicule, causing many to flee from their communities and jobs. Involuntary pornography has the potential therefore to further victimise marginalised members of the society.

It is noteworthy that to date, the obscenity laws (especially Sections 280-283 of the *Criminal Code*) have not been applied against perpetrators of involuntary pornography. This is even more troubling when one considers that some instances of involuntary pornography are potentially in the realm of child pornography. This is illustrated by a recent case in Accra that compelled popular social networking site Whatsapp to block the distribution of the viral video as one of the parties identified in the video was a minor.¹⁵

■ Privacy: The Ethical Context and Public Interest

Proponents of constitutional privacy often invoke the seminal 19th Century article by American jurists Samuel Warren and Louis Brandeis who viewed the development of the portable camera and the emergence of celebrity journalism, a business practice, as a threat to the individual's "right to be left alone."¹⁶ For the authors, the right to privacy was necessary if citizens were to enjoy a fulfilled life in a democracy, and be free from undue intrusions by the all-powerful state and other individuals. The

¹² See *Rep v. Alibah*, Suit No. D21/602/14, unreported, at p. 6.

¹³ *Ibid.*

¹⁴ Calling for the dismissal of the women involved by their employers during an interview with a reporter, the Chief of Tamale, Naa Dapkema Dawuni Alhassan said "...they should drive them away from Tamale here because if this is the only way they think is good for them then they are going to bring something different to the northern youth over here. " The chief expressed bemusement that "gainfully employed ladies" would engage in consensual sex with a partner to whom they were not married. See Gadugah, Nathan (11 Aug, 2014) "Tamale Chief Wants Women in Tamale Sex Scandal Exorcised," *myjoyonline*, <http://www.myjoyonline.com/news/2014/august-11th/tamale-chief-wants-women-in-tamale-sex-scandal-exorcised.php>. In another interview, the chief regretted that some of the women were public servants and were still at post. Similar sentiments were expressed by other opinion leaders in Tamale, with one calling the "conduct" of the women "unreligious." See Naatogmah, Abdul K. (8 Aug, 2014). "Banish Girls in Tamale Sex Tape: Chief," *citifmonline*, <http://www.citifmonline.com/2014/08/08/banish-girls-in-tamale-sex-tape-chief/>.

¹⁵ Though Whatsapp blocked circulation of the video, it was available on other media platforms. See Nuhhu-Billa Quansah, Hadiza (8 Aug, 2014). "Tapes that Talk Sex," *The Mirror*, pp. 3 & 7.

¹⁶ Warren, Samuel D. and Brandeis, Louis D. (1890). "The Right to Privacy." *Harvard Law Review* 4 (5), 193-220 at 194.

Warren-Brandeis article has informed the ethos of the constitutional right to privacy.

The media are regarded as the oxygen of democracy, expanding the public sphere to promote informed citizen participation in a democracy, and holding public officials to account. It is also assumed that in the effective fulfillment of the media's democratic mandate, some degree of privacy intrusion cannot be avoided. For these reasons, critical literature and jurisprudence often favour the publication of surreptitiously recorded conversations and images in the media. The operating principle has been the public interest in the subject of discussion, though what constitutes the public interest is a slippery concept. The Watergate leaks in the United States, for example, are viewed as having served a public interest function. Such leaks, even if they result in some harm to their targets, benefit the public good, e.g., by exposing abuse of office, bribery, or other malfeasances against the state. Leaked sextapes that constitute involuntary pornography, it is argued, do not serve an important public interest function.

However, even when leaks are considered to be in the public interest, there is some ethical discomfort about the use of covert means to infringe on the privacy of people to record their information. Hence, even public interest leaks are expected to meet a certain ethical standard. Leaks motivated by self-interest, are regarded as not meeting this ethical standard, although it is not clear how self-interest can negate the public interest in most cases. Assuming, for example, that Ms. Hammah's chauffeur indeed recorded and leaked the information as result of a personal vendetta against his employer, does it negate the fact that the contents of the leaked conversation are certainly pertinent to the public interest?

Another standard used to rationalise privacy breaches is national security. Again, this can be a slippery concept, and it is often used in an Orwellian sense by repressive regimes to intimidate critics into silence.

However, thus far, public discussion of privacy breaches through covert recordings and leaks in Ghana have been motivated by the political implications for the individuals whose statements have been intercepted (in the case of politicians); or the sensational and scandalous implications for victims (in the case of individuals captured on sextapes). Hence reactions have often been partisan or flippant, ignoring the wider ramifications for privacy rights in Ghana.

■ The Ghanaian Legislative Context and International Best Practices

Ghana's constitutional provision on privacy states that:

No person shall be subjected to interference with the privacy of his home, property, correspondence or communication *except in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of the rights or freedoms of others.*¹⁷

The exceptions in italics remind us that this is a freedom structured by limitations. For example, with the advent of Whistleblower legislation, more space has been created for the covert recording of workplace conversations. These limitations however, do not attenuate the right to privacy to the extent that it can be infringed without cause.

As pertains to the Victoria Hammah case and the covert tape recording of private conversations, in most common law jurisdictions, the warrantless interception of private conversations is a crime if it is not consented to by at least one of the participants in the conversation. The criminalisation of intercepting private conversations is meant to give effect to constitutional privacy protections. Laws passed for this purpose, however, differ in ambit.

In Ghana, under the *Electronic Communications Act*:
A person who

- (e) knowingly obstructs or interferes with the sending, transmission, delivery or reception of communication,

¹⁷ Art 18(2), *Constitution of the Republic of Ghana*, 1992.

- (f) intercepts or procures another to intercept, without authorisation of the provider or user, or a court order, or otherwise obtains or procures another to obtain, *unlawful access to communication transmitted over an electronic communications network*,
- (g) uses, or attempts to use, the content of any communication, knowing or having reason to believe that the content was obtained through unlawful interception or access under paragraph (e),
- (h) is not the sender or intended recipient of a transmitted message or data but who interferes with, alters or modifies, diverts, unlawfully discloses or decodes the transmitted message or data, or facilitates the commission of these act,
- (i) steals a transmitted message or data, ... commits an offence and is liable to conviction.¹⁸

Similar provisions can be found in Section 82 of the *Telecommunications Act* of Barbados and Section 9 of Canada's *Radiocommunication Act*, which target the abuse or illegal use of radio spectrum and other channels of transmission. These are legislation relating to technological transmission of communication.

In contrast to the model in the *Electronic Communications Act*, some jurisdictions also have

laws explicitly proscribing the unapproved covert interception of both oral communication *simpliciter* (such as in-person conversations) and technologically mediated communication if they constitute private communication. A classic example is the provision in the *Canadian Criminal Code*, which reads as follows: "Everyone who, by means of any electro-magnetic, acoustic, mechanical or other device, wilfully intercepts a private communication¹⁹ is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years."²⁰ Similarly, American states such as Massachusetts, Michigan, and California proscribe surreptitious tape recordings of private conversations (some states require one-party consent, while others require two-party consent).²¹ Such provisions recognise the evolution of recording devices, anticipate a wider range of surveillance activities, including the covert recording of conversations with a rudimentary recording device, and deal more adequately with the potential abuse of surreptitious recordings.

What about involuntary pornography? In some jurisdictions, there are laws that prohibit either covert recordings or non-consensual dissemination of images taken in places where participants have reasonable cause to expect privacy. All states in the United States, which has a strong free speech (or "First Amendment") culture, have laws of this nature. These laws evolved in response to the emergence of technologies that make such recordings possible. Recently, a court in the state of New Jersey convicted

¹⁸ S. 73.

¹⁹ According to S. 183 of the *Criminal Code* of Canada, "'intercept' includes listen to, record or acquire a communication or acquire the substance, meaning or purport thereof." Note that unlike S. 73 (f) of Ghana's *Electronic Communications Act*, S. 184 of the Canadian *Criminal Code* does not narrow the scope of communication protected from interception to "*communications transmitted over an electronic communications network*." As well, "communications" is defined as technologically mediated communication or systems for transmitting information, while "communication" refers to the practice of sharing information. For an example of this distinction, see the online *Merriam-Webster Dictionary* <http://www.merriam-webster.com/dictionary/communication>. Hence, S. 183 of the *Criminal Code* of Canada defines Private Communication as follows:

"private communication" means any *oral communication*, or any telecommunication, that is made by an originator who is in Canada or is intended by the originator to be received by a person who is in Canada and that is made under circumstances in which it is reasonable for the originator to expect that it will not be intercepted by any person other than the person intended by the originator to receive it, and includes any radio-based telephone communication that is treated electronically or otherwise for the purpose of preventing intelligible reception by any person other than the person intended by the originator to receive it.

²⁰ S. 184.

²¹ See guidelines for journalists in the United States in Rasmussen, Kristen, Jack Komperda, and Raymond Baldino (2012). "Can We Tape? A Journalist's Guide to Taping Phone Calls and In-Person Conversations in 50 States and D.C." Arlington, Va.: The Reporters Committee for Freedom of the Press. <http://www.rcfp.org/rcfp/orders/docs/CANWETAPE.pdf>

two persons on charges of “Invasion of Privacy”²² after they had covertly streamed video of two men having sex, leading to the suicide of one of the victims.²³ Similarly, Canada updated its *Criminal Code* in 2005 to account for the crime of “Voyeurism,” again, in response to the radical changes in the media ecosystem brought about by the digital wave in the evolution of communication technology.²⁴ This criminal law provision regards voyeurism as the use of technology for the purposes of surreptitious and non-consensual viewing or visual recording of nudity and intimacy for sexual purposes in circumstances where the victim has a reasonable expectation of privacy. The distribution of such recordings also constitutes an offence.²⁵

While victims may also proceed in court against perpetrators of involuntary pornography invoking privacy tort protections, this option may be beyond the means of marginalised members of society. As well, civil action against perpetrators of involuntary pornography will be a wasted effort if the defendant is penniless.

■ Conclusion

The foregoing provides context for reflecting on the subject of leaked tapes and involuntary pornography. It also raises questions regarding the sufficiency of the existing legal regime in Ghana vis-à-vis interdicting the surreptitious recording and dissemination of private conversations and intimate content.

√ The reality is that Ghana’s existing legal regime does not adequately respond to the subject of the covert recording and dissemination of private conversations. People may surreptitiously record and leak private conversations secure in the knowledge that no meaningful legal sanctions would follow. This calls for *Criminal Code* provisions specifically proscribing the surreptitious recording or interception and dissemination of private communication (not just communications) except in justifiable public interest cases. This may be necessary, if the sanctity of private communication is to be preserved. At the same time, there is a concern that unwittingly, new laws may further criminalise communication, leading to a slippery slope.

²² N.J.S.A. 2C 14-9a.

²³ See Ahrens, Deborah (2012). “Schools, Cyberbullies, and the Surveillance State,” *American Criminal Law Review* 49 (4) 1695-1722.

²⁴ S. 162(1) of the *Criminal Code of Canada* creates the offence of “Voyeurism.” In 2005, Irwin Cotler, then Justice Minister, explained to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness of the Canadian House of Commons that the law “seeks to modernise the criminal law’s response to the new ways in which acts of voyeurism are being committed today. The “peeping Tom through the window” offender, as he or she has been known from even just a few years ago, has largely been replaced today by persons who, with the advent of the Internet and the miniaturisation of cameras and recording devices, can now peep and record viewing through a camera smaller than a pen that is hidden in a room miles away.” See Canada. Parliament. House of Commons. Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness. *Evidence*. (Meeting No. 22, Feb 22, 2005) 38th Parliament, 1st Session, p. 3. (Online). Available: <http://www.parl.gc.ca/content/hoc/Committee/381/JUST/Evidence/EV1655182/JUSTEV22-E.PDF>. In *Voyeurism as a Criminal Offence* (<http://semainedesvictimes.gc.ca/eng/cons/voy/toc-tdm.html>), a consultation paper prepared by the Canadian Department of Justice, it was explained that

“The rapid technological developments of recent years have brought many benefits to Canadian society, but they have also had implications for such basic matters as privacy and the role of the law. Web cameras, for example, which can transmit live images over the Internet, have raised concerns about the potential for abuse, notably the secret viewing or recording of citizens for sexual purposes or where the viewing or recording involves a serious breach of privacy...”

There is currently no specific offence in the *Criminal Code* that addresses voyeurism or the distribution of voyeuristic materials. It is true that existing provisions of the Code apply in some cases of voyeurism, such as those that involve child pornography or trespassing at night. However, with the new technology, voyeurism itself may now involve a breach of privacy much greater than could have been foreseen when the Code was drafted – one that undermines basic notions of freedom and privacy found in a democratic society.

In the same vein, the British have also criminalised voyeurism (S. 67 & 68 of the *Sexual Offences Act* 2003 (c.42)).

²⁵ S. 164(2) of the *Criminal Code of Canada*.

√ In fact, as it has been persuasively argued, the repeal of the criminal libel laws in Ghana is not enough to open up the Ghanaian public sphere, as legislation still exist to criminalise speech.²⁶ On the other hand, the increasing cases of covert recording of private conversations create the risk of abuse, especially when one accounts for the potential of such covert recordings to be digitally manipulated. The Ghanaian legal system must account for this abuse. A law addressing the subject of recording private conversations should accommodate public interest exceptions, such as the recording of public officials, to ensure that communication technologies can still be used as tools to keep them accountable. The inclusion of exceptions accords with what Warren and Brandeis conceptualised as the ideal approach to privacy protection but more importantly is consistent with the evolution of the right to privacy in democratic societies.

√ Where there is a need to protect sensitive national security related conversations, it is

also important to implement a confidentiality regime, as exists under the *State Secrets Act*,²⁷ to bind all employees who work in close contact with government ministers, judges, members of parliament, and senior bureaucrats. As well, all quasi-state employees such as chauffeurs, bodyguards and other aides privately engaged by public officials must be required to sign confidentiality and non-disclosure agreements with criminal sanctions attending to any breaches of same.²⁸ For all these employees, exceptions must be made where a breach of confidentiality is in pursuance of a whistleblowing objective.²⁹ These employees must also be given the benefit of an orientation program to sensitise them to the ethical responsibilities contingent to their positions.³⁰ Anecdotal evidence suggests, however, that often, quasi-state employees in particular receive little or no professional training and owe employment purely to familial or political ties. Officials who privately engage such employees must therefore be made responsible for ensuring

²⁶ See Anku-Tsede, Olivia (2013). “The Media and the Offence of Criminal Libel in Ghana: Sankofa,” *Journal of Law, Policy and Globalization* 9, 2224- 3240

²⁷ Act 101 of 1962. It must be noted that an official secrets law is not unique to Ghana. See for example, S. 4 of the *Canadian Security of Information Act* (R.S.C., 1985, c.O5) that prohibits the “wrongful communication of information.” S. 14 of the *Canadian Act* prohibits “unauthorised communication of special operational information.” This law also designates “persons who are permanently bound to secrecy” by virtue of their appointments.

²⁸ S. 3(1)(a) of the *State Secrets Act* deals with “Wrongful Communication of Information” and provides as follows:

“Any person who, having in his possession, or control, any secret official code word, or password, or any sketch, plan, model, article, note, document or information that relates to or is used in a prohibited place or anything in such a place, or that has been made or obtained in contravention of this Act, or that has been entrusted in confidence to him by any person holding office under the Republic or owing to his position as a person who holds or has held office under the Republic, or as a person who holds or has held a contract made on behalf of the Republic, or a contract the performance of which in whole or in part is carried out in a prohibited place, or as a person who is or has been employed under a person who holds or has held such an office or contract, communicates the code word, password, sketch, plan, model, article, note, document or information to any person, other than a person to whom he is authorised to communicate with, or a person to whom it is in the interest of the Republic his duty to communicate it... commits an offence under this Act.”

For an identical law, see S4(1)(a) of the *Canadian Security of Information Act*. See also S.3 of the *Canadian Security of Information Act* on what constitutes “Prejudice to the Safety or Interest of the State.” The existence of the *State Secrets Act* in Ghana and its application to the wrongful communication of information in this context might however be a cause of nervousness for some, given the tendency of Ghanaian State officials to conflate regime popularity with national security and the national interest, as illustrated by the recent case in which the Mayor of Accra, Dr. Alfred Oko Vanderpuije, caused the arrest of media personnel producing a documentary in Accra because they were engaging in “fabrications” to make the Mahama Administration unpopular. See Daabu, Malik A. (13 Sept, 2014). “Mahama Must Sack Accra Mayor: Kweku Baako Declares,” *myjoyonline*, <http://www.myjoyonline.com/news/2014/September-13th/mahama-must-sack-accra-mayor-kweku-baako-declares.php>.

²⁹ Note that the law against “Wrongful Communication of Information” in the *State Secrets Act* makes an exemption where there is a duty to communicate information “in the interest of the Republic” (S.3(1)(a)).

³⁰ S3(1)(d) of the *State Secrets Act* makes the failure to reasonably guard official secrets an offence. This creates a responsibility for state officials to take reasonable steps to ensure that confidential information is not leaked.

that these persons sign and fully comprehend the import of the required confidentiality agreements.

- √ On the issue of involuntary pornography, there is a need to protect victims by the investigation and prosecution of persons who disseminate such material without the consent of both parties. Self-expression is fundamental to the achievement of self-actualisation and individual agency. It is the right of participants to voluntarily record scenes of mutual nudity and intimacy, and it is their right to refuse to share resulting media products with the public. The provision of counselling and appropriate therapy to victims of involuntary pornography must be taken seriously.
- √ The Ghanaian legislative regime must also have a response to child pornography, which has proliferated in the current digital media environment. Consequently, the Minister for Gender, Children and Social Protection, together with the Minister for Justice must take the lead in proposing viable legislative solutions to Parliament.
- √ The foregoing policy and legislative interventions, however, must be complemented with public education. It is feared that as we increasingly communicate through technological interfaces, we become

desensitised to the ethical consequences of social infractions. The anonymity of the internet and social media insulates perpetrators of cyberbullying from the pain caused to their victims. Minors are also especially vulnerable to victimisation online because they are often unaware of dangerous elements preying on others in cyberspace. Our society needs to better appreciate cybercrime and the harmful effects of involuntary pornography. This can come about through a national conversation around these issues.

- √ Finally, there is a need for Parliament to comprehensively consider the implications of new digital communication technologies for individual privacy, and to originate legislation accordingly. Other democratic jurisdictions are doing this in the face of increasing cases of cyberbullying. A dedicated and comprehensive Ghanaian cybercrime legal regime is virtually non-existent. The recent signing of a memorandum of understanding between Ghana and Commonwealth Cybercrime Initiative (CCI) on the best approaches to deal with the threats associated with Internet use is a step in the right direction, but will be of no real consequence if domestic legislative initiatives do not follow.

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☞ *CDD-Ghana Briefing Papers are generated from commissioned research on topical issues, as well as presentations at round-table discussions at the Center.*

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