

Triumph of the Whistleblower

Author: Kathryn Elizabeth Weintraub

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Triumph of the Whistleblower

By Kathryn Weintraub

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Acknowledgments

To my Mom, who has given me, above all things, a code.

To Dr. Fishman, whose kind guidance made this extraordinary learning venture possible.

To those who are brave enough to blow the whistle.

“Always do right. This will gratify some people and astonish the rest.”

- *Mark Twain*

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CHAPTER ONE: INTRODUCTION

“The world is a dangerous place, not because of those who do evil, but because of those who look on and do nothing.”

- *Albert Einstein*

Overview

Today’s corporate culture has lost its sense of shame. After Massey Energy received nearly 500 safety violations in one year, its Upper Big Branch coalmine in Raleigh County, West Virginia exploded on April 5, 2010, resulting in the deaths of 29 miners (Paulson, 2010). In response to a pending federal criminal investigation into the company’s “negligent and reckless practices,” CEO Don Blankenship demanded that the Obama administration instead loosen regulations on his company: “Corporate business is what built America, in my opinion, and we need to let it thrive by, in a sense, leaving it alone” (Milbank, 2010). In the initial aftermath of the April 20, 2010 *Deepwater Horizon* oil spill, the largest accidental marine oil spill in the history of the petroleum industry, British Petroleum CEO Tony Hayward inserted a personal complaint into his apology to the residents of Louisiana: “We’re sorry for the massive disruption it’s caused their lives. There’s no one who wants this over more than I do. I would like my life back” (Goddard, 2010). Hayward also asserted that the environmental impact of the 210,000,000 gallons of oil spilled and 950,000 gallons of toxic dispersant used to clean it up would be “very,

very modest” (Goddard, 2010). Despite coming under major fire for failing to take responsibility for the crisis, Hayward managed to relax several weeks later at a yachting race on the Isle of Wight as workers fruitlessly attempted to stem the tide of oil (Leake, 2010). In 2007, Fabrice Tourre, one of Goldman Sachs junior vice presidents, labeled himself the ‘fabulous Fab’ in a now notorious email. In this correspondence he chuckled over his bold scheme to help client John Paulson’s hedge fund bet \$1 billion against the housing market: “The whole building is about to collapse anytime now...Only potential survivor, the fabulous Fab...standing in the middle of all these complex, highly leveraged, exotic trades that he created without necessarily understanding all the implications of these monstrosities!!!” (Shapiro, 2010). These snapshots of today’s corporate titans implicate a fundamental lack of corporate social responsibility. What developments have eroded ethical standards in business practices? What factors have contributed to the current economic climate where profit is valued over people’s lives? And who will assume responsibility for restoring a sense of right and wrong to the workplace?

To a large extent, the decay of business standards traces its roots to a pillar of Reaganomics—deregulation. During his presidency, Ronald Reagan initiated an economic revolution that restructured the U.S. corporate system. Reagan built his campaign on promises to provide regulatory relief for American business (Collins, 2007). To uphold that pledge, Reagan signed an executive order on inauguration day removing the federal government’s remaining price controls on oil and gasoline. He then appointed aggressive deregulators to leadership positions at the Council of Economic Advisors and

the Federal Trade Commission, among other financial agencies (Collins, 2007). On February 17, 1981, Reagan signed executive order 12291, which institutionalized cost-benefit analysis as the key criterion in determining whether the government should undertake new regulatory action (Collins, 2007). These measures in conjunction with across-the-board tax cuts spurred the vigorous deregulation of American business by government.

The U.S. economy was also profoundly altered by technological developments of the 1980s, the birth and diffusion of the personal computer, and the evolution of the Information Age (Collins, 2007). Technology continued to develop at an exponential rate throughout the 90s as corporate culture departed from an emphasis on security and equality to a focus on innovation and efficiency (Collins, 2007). This shift in emphasis coupled with the lack of government oversight depersonalized corporate culture. Because businesses were subject to fewer regulations, they could focus exclusively on expansion, keeping pace with technological growth, and generating profit.

During the 1990s, the United States enjoyed the longest uninterrupted economic expansion in its history. With this newfound economic security, whistleblowers began to emerge to fill the vacant regulatory role. For example, Jeffrey Wigand, former vice president for research and development at Brown & Williamson Tobacco Corporation, blew the whistle on big tobacco in 1995. In a candid interview with Mike Wallace on *60 Minutes*, Wigand became the first major tobacco insider to reveal that the cigarette companies were consciously trying to hook the public on nicotine (“Biography,” n.d.). By and large, however, whistleblowing was still not common. Although whistleblower

legislation began to be codified in laws like the upgraded False Claims Act of 1992, it generally was not put to the test.

The 2008 subprime mortgage crisis and ensuing, arguably still ongoing, recession can be attributed in part to a weakening of business regulation in the public interest, which is, to a large extent, a consequence of Reagan's deregulation policies (Toplin, 2008). In the absence of oversight, lending became a wildcat enterprise. Mortgage brokers easily deceived homebuyers by promoting sub-prime loans and passing on bundled documents to unwary investors (Toplin, 2008). Meanwhile, an increase in loan incentives such as easy initial terms encouraged borrowers to assume difficult mortgages, and leading brokerage firms on Wall Street did not fully disclose the details of risky mortgage investments to their customers (Toplin, 2008). The 2010 Supreme Court ruling in *Citizens United v. Federal Election Commission* that the government may not ban political spending by corporations in candidate elections further exacerbated corporations' unbridled power (Liptak, 2010). Because there are no official watchdogs to serve the interests of the public and investors, the economy has spiraled downward and continues to free-fall.

Over the past decade, as the economy and corporate culture have disintegrated, whistleblowers have increasingly emerged. Although whistleblowing is an incredibly costly activity for the whistleblower, the surging of this practice is indicative of our desperate times. These brave souls are willing to risk devastating consequences to their personal, professional, and financial lives in an effort to defend against unethical business practices and promote the greatest good for the greatest number. Proponents of

government regulation of industry argue that regulation adds stability to the economic environment and that regulators may be viewed as agents of consumers (Meiners & Yandle, 1989). Similarly, whistleblowers may be viewed as agents of the public and ethical regulators of corporate greed. In an August 10th interview on *Meet the Press*, former Secretary of the Treasury and CEO of Goldman Sachs Henry Paulson argued that “the stability of our capital markets” requires “a strong regulator” and that our regulatory system is badly “outdated” (Toplin, 2008). Whether government should regulate or not, whistleblowers are arguably the best and most effective regulators because they work inside the very industries themselves and know firsthand what needs to be changed.

This thesis explores the unique role of the whistleblower in today’s ever-shifting economic and corporate landscape. How is the role of the whistleblower developing? How can the role of the whistleblower serve and improve American work practices? Most vitally, how do we best protect these regulators of ethical standards in business and industry?

Methodology

This thesis uses a critical-historical methodology. It explores the dimensions and boundaries of the concept of the “whistleblower,” using case studies and historical data to support the analysis. The thesis is critical in that it analyzes the nature, scope and function of whistleblowing. This analysis includes an investigation into the shifting role of the whistleblower in society and whether legislative enactments have been able to support society’s need to protect current and future whistleblowers. It is historical in that

it summarizes the existing literature on whistleblowing and draws upon case studies to highlight important aspects of the concept.

Database

The database for this thesis includes various texts and articles from the extant whistleblower literature as well as relevant articles from newspapers, magazines, and business and law journals. It also includes transcripts of interviews with whistleblowers. More specifically, this database consists of three whistleblower case studies that span the past decade, each addressing a different type of organizational breach. Finally, this database includes relevant whistleblower legislation and protection programs.

Organization of the Thesis

The following is an outline of this thesis, which is divided into eight chapters:

Chapter One: Introduction to Thesis

This chapter includes an introduction to my topic area as well as an overview of the material on which my thesis will be based.

Chapter Two: Literature Review

This chapter defines the concept of the whistleblower. It then provides an overview of the history of whistleblowing in the United States. Finally, it explores the whistleblower stereotype in regard to the whistleblower's typical profile and fate.

Chapter Three: Case Study: WorldCom & Cynthia Cooper

This chapter explores the WorldCom fraud scandal and examines whether the whistleblower Cynthia Cooper conforms to or departs from the traditional whistleblower paradigm. It examines the implications of Cynthia Cooper's experience.

Chapter Four: Case Study: The Madoff Ponzi Scheme & Harry Markopolos

Chapter Four follows a similar format to the previous chapter, examining the Madoff Ponzi scheme, exploring how whistleblower Harry Markopolos compares to the whistleblower stereotype, and detailing the large-scale implications of this case.

Chapter Five: Case Study: Wikileaks & Julian Assange

Resembling the two chapters before it, Chapter Five addresses the controversy over Wikileaks and its founder Julian Assange. It explores the fine line between whistleblowing and treason and how Assange challenges the notion of the 'typical' whistleblower.

Chapter Six: Whistleblower Protections

This chapter begins with theoretical background about the symbolic purpose of laws and regulations. It then provides an overview of the development of whistleblower legislation and protection programs. Finally, it highlights the differences between theory

and practice, examining whether current whistleblower protections actually shield whistleblowers from negative repercussions.

Chapter Seven: Recommendations for Shining the Whistle

This chapter provides specific suggestions for opening the doors of communication in corporations and improving whistleblower protections so that whistleblowing practices are encouraged and handled effectively. Ideally, shining the whistle will promote ethical standards in corporate practice.

Chapter Eight: Conclusion

The conclusion neatly summarizes this thesis's findings about whistleblowers and recommendations for protecting whistleblowers more effectively.

**CHAPTER TWO:
THE WHISTLEBLOWER**

“To be a whistleblower is to step outside the Great Chain of Being, to join not just another religion, but another world. Sometimes this other world is called the margins of society, but to the whistleblower it feels like outer space.”

- C. Fred Alford

The Concept

The term whistleblower originates from sports where the referee blows the whistle on a player who commits a foul. A whistleblower refers to an employee, former employee, or member of an organization who reports misconduct within the organization to those in power in order to obtain corrective action (“Whistleblower,” 2011).

Whistleblowing typically entails reporting transgressions to a supervisor, the media, the government, or an external watchdog agency (“Whistleblower,” 2011).

Whistleblowers are complex figures that generate many diverse images and perceptions, ranging from the selfless martyr for the public’s or organization’s good to the tattletale pursuing personal glory and reward. The job of a whistleblower is a very difficult one in that those whistleblowers who report significant misconduct almost always suffer severe retribution for their actions (“Whistleblower,” 2011). Although the majority of whistleblowing cases receive little to no media attention, the punishments are

exacerbated for those who report significant transgressions and generate extensive media scrutiny.

From an ethical standpoint, whistleblowing is regarded as a positive good, and existing whistleblowing protections are intended to encourage the free flow of information to prevent ethical violations in the workplace (“Whistleblower,” 2011). To date, whistleblowers have emerged in all sectors of the work environment, including public and private industry, academe, and non-profits. In general, the consequences of whistleblowers’ actions pose challenging legal, ethical, and human resource questions that demand answers (Barton, 2011).

The term “whistleblower” historically has a negative connotation. Many reasons inhibit people from blowing the whistle even if they witness abhorrent actions in the workplace. This demotivation stems from employees’ fundamental lack of trust in the internal system, unwillingness to be labeled as “snitches,” misguided union solidarity, belief that management is not held to the same standard, fear of retaliation, and fear of isolation and alienation from peers (“Whistleblower,” 2011). Thus, the decision to blow the whistle carries with it many special burdens, especially the threat of retaliation.

Management and coworkers often feel that the whistleblower, whether intentionally or unintentionally, is actually doing a greater harm by undermining protocol and team spirit (Barton, 2011). The courts have increasingly disagreed with this charge, however, arguing that whistleblowing encourages healthy scrutiny and development of public policy. Speaking out about a perceived injustice can advance an organization if the charges can be proven, if they unveil an organizational or departmental deficiency, or if

they lead to one or more productive changes in the workplace (Barton, 2011). Other potential benefits include identifying workers and managers who act illegally or immorally, sending a message throughout the organization that unethical behavior will not be tolerated, and alerting coworkers that their valid complaints about other abuses will also be heard and adjudicated (Barton, 2011). Despite their enormous potential for promoting good, whistleblowers are usually perceived negatively. It is only when their revelations are enormous in scope and protect a large number of constituents that whistleblowers garner public appreciation and support (Barton, 2011).

Although the concept of the whistleblower is controversial and tends to raise more questions than it answers, two truths about whistleblowing are clear. First, choosing to blow the whistle is not a black-and-white decision. Rather, it is an ethical knot of tightly intertwined strands of morality, loyalty, invasion of privacy, isolation, intimidation, and even violence. Ultimately, those debating whether to blow the whistle must pit one value against another in the struggle to pursue the greatest good. Second, whistleblowing has increasingly become a better-understood, relevant and integral concept to the workplace. This social and business trend is not going away. In fact, it is only just beginning.

Historical Overview

Historically, the whistleblower is a relatively recent phenomenon. Attitudes toward whistleblowing have evolved considerably over the past 50 years in America. Prior to the 1960s, the “organization man” ethos prevailed; corporations could fire an employee at will for no reason, and employees were expected to be loyal to their

organizations at all costs (“Whistleblower,” 2011). The few exceptions to this norm were union workers and government employees. In private industry, though companies invariably claimed that they had an open-door policy, few real mechanisms existed for addressing employee concerns (“Whistleblower,” 2011). Although some brave workers attempted to blow the whistle, more often than not problems were concealed and complaints ignored. For example, although a significant association between asbestos manufacturing and lung disease was discovered in 1924, company officials successfully suppressed this information until a lawsuit prevailed in 1971 (Ravishankar, 2003). Only in the period since the 1960s has there been a steady stream of employees who expose policies that could endanger or defraud innocent people (Glazer & Glazer, 1989). Several interrelated social and political factors are responsible for this development.

During the 1960s and 70s, struggles over new regulations of the private sector, a growing disillusionment with the government’s and industry’s limited ability to control technological hazards, emerging public cynicism about the integrity of public officials in the aftermath of the Watergate Scandal, and rising civic activism post-Vietnam gave rise to the emergence of the whistleblower (Barton, 2011). As an environment of distrust began to permeate the workplace, Congress passed a host of new laws explicitly protecting workers who chose to report lawless actions in the work environment (Glazer & Glazer, 1989). Additionally, social activists inspired by the victories of the civil rights, peace, and student protest movements advocated for the expansion of this legislation to protect the rights of consumers and workers in dangerous industries. In response, Congress passed extensive new regulatory legislation and created a series of federal

agencies, including the Equal Employment Opportunity Commission, the Environmental Protection Agency, and the Occupational Safety and Health Administration, to administer the new laws, thus fundamentally altering the relationship between business and government to allow for 1) more direct government oversight and control, and 2) business accountability (Glazer & Glazer, 1989). The opposition of corporate executives to this regulatory legislation set the stage for increased corporate lawlessness. Many corporate executives believed the benefits of avoiding regulations far outweighed the risks; deviance was simply another expense of business-as-usual (Glazer & Glazer, 1989).

The upgraded level of corporate aberrance, in turn, further spurred the ethical resistance movement. Daniel Ellsberg precipitated a national political controversy in 1971 when he released the Pentagon Papers, a critical examination of the United States' involvement in Vietnam, to the *New York Times* ("Famous whistleblowers," n.d.). Karen Silkwood, an American labor union activist and chemical technician at the Kerr-McGee plutonium plant, died under mysterious circumstances in 1974 after vocalizing concerns about the plant's safety and investigating claims of irregularities ("Famous whistleblowers," n.d.). These two whistleblowing pioneers generated significant media attention that catapulted whistleblowing into the public consciousness. Other notable groundbreakers were Dr. Arthur Dale Console, who exposed unethical practices in the pharmaceutical industry, James Boyd and Marjorie Carpenter, who disclosed the financial improprieties of Senator Thomas Dodd, and Frank Serpico, who fought widespread corruption in the New York City Police Department (Glazer & Glazer, 1989).

Public protests against companies such as Nestle, Hooker Chemical, and General Motors continued to transform and develop previously simplistic and negative perceptions of the whistleblower (Barton, 2011).

During the late 1970s and 80s, military spending increased amid concerns that threats in the former Soviet Union and the Middle East could erupt into global war. Motivated by increased job security, military personnel and employees working in research often looked the other way when discrepancies occurred in the workplace (Barton, 2011). The whistleblowing movement backpedaled. The 1970s were particularly notorious for cases in which employees who knew of product defects or hazards resisted the urge to speak up (Ravishankar, 2003). And even in the few cases where whistleblowers did find their voices, they were not heeded. Perhaps the most grievous example was the case of Firestone. In 1972, Firestone's top management ignored a memo from Tire Director of Development Thomas A. Robertson warning that the Firestone 500 Radial was subject to belt-edge separation at high speeds (Ravishankar, 2003). Despite reports confirming this defect from major customers such as General Motors, Firestone's management kept the controversial tire on the market. By the time that accidents caused by blowouts had resulted in more than 41 deaths and hundreds of serious injuries, the company had already replaced 3 million tires and spent millions of dollars in personal injury lawsuits (Ravishankar, 2003). Sadly, Firestone did not learn from its terrible mistake, as this story repeated itself in 2000.

During the 1990s, widespread economic prosperity, driven by rapid advances in technology and the lack of any significant global military threat, increased job security

and renewed whistleblowing efforts. Indeed, as President Bill Clinton and Hillary Rodham Clinton learned in 1994, several former associates had leaked considerable details of the First Family's questionable investments in Whitewater Development Co. to investigators and the press (Barton, 2011). These revelations resulted in criminal allegations against President Clinton for pressuring an associate to provide an illegal loan. Although these allegations were never proved, the term Whitewater stuck and is sometimes used to include other controversies from the Clinton administration (Dumas, 2009).

Since these significant social and political developments throughout the latter half of the twentieth century, whistleblowers have emerged as prominent figures in the public and litigation arenas. Public outrage about heightened corporate misconduct over the last twenty years has cultivated an even more auspicious climate for whistleblowing (Ravishankar, 2003). The concept is particularly relevant today given the seamless access to information in the ever-shifting media landscape.

The Whistleblower Stereotype: Typical Profile and Fate

In every whistleblowing case, options are weighed and decisions made that cause variance in the process. There is not a consistent chain of action, timeline, or consequence; every case is unique. By extension, no whistleblower can be described as typical. The term itself connotes exception. Nevertheless, from a synthesis of several key whistleblower studies emerges a stereotype of sorts—a profile and fate to which the whistleblower tends to conform.

Whistleblowers are generally conservative people devoted to their work and their organizations (Glazer & Glazer, 1989). Rather than low performers with an axe to grind, whistleblowers are almost always well-educated achievers who have attained supervisory positions (Barton, 2011; Miceli & Near, 1992). They espouse a unique brand of professionalism that values loyalty to their constituents' best interests over profit and other bureaucratic priorities. Glazer and Glazer's (1989) comprehensive research on whistleblowers revealed the following:

Ethical resisters are among those who have taken the ideology of their professions most seriously...When asked to subordinate these values to meet the requirements of the bureaucracy, many conjured up a "red line," a point they could not cross...They rejected a definition of professional ethics that required only a narrow range of responsibilities to colleagues and clients...For them, a betrayal of those principles meant an erosion of their definition of self. (Glazer & Glazer, 69-70)

Perhaps most importantly, whistleblowers never *intend* to become whistleblowers; they perceive themselves as victims of circumstance who did not have any other alternative but to blow the whistle (Barton, 2011).

Typically, whistleblowers are older, have more service in their organization, and have a highly developed religious or belief system that drives ethical action (Glazer & Glazer, 1989; Miceli & Near, 1992). Additionally, they are often motivated by concern for the well-being of those around them (Glazer & Glazer, 1989). Studies have shown that more men blow the whistle than women and that whistleblowers tend to be married

versus single (Barton, 2011). Because whistleblowers often perform supervisory or managerial roles, they are in an advantageous position to observe irregularities or wrongdoing (Miceli & Near, 1992). Nevertheless, whistleblowers may be internal or external observers of the target organization, although the courts do not uphold this distinction (Wanguri, 2007; “Whistleblower,” 2011). Over the period from 1985 to 2007, perceptions of whistleblowing evolved in both theory and practice from a narrow view of this activity as involving only employee disclosures of information to a broader understanding of it as entailing disclosures of information by any concerned party. Whistleblowers typically act alone, and internal whistleblowers usually leave their organization voluntarily or involuntarily after blowing the whistle (Wanguri, 2007).

Most whistleblowers are motivated to take action for pure, unselfish reasons. Possible motivations include protecting the good name and reputation of the employer, protecting the public interest, creating publicity to prevent future abuse, promoting the greatest good for the greatest number, setting an example for other employees, and securing financial reward or seeking glory (Barton, 2011). In some cases, however, whistleblowers are motivated by anger and selfishness. Motivations may include failure to receive a promotion or pay raise, hope that their accusations will lead to the transfer or termination of a supervisor or colleague whom they dislike, a belief that their department has been “short changed” in recent budget or personnel allocations, and/or pure financial incentive (Barton, 2011). Although whistleblowing can help an organization, whistleblowers are rarely seen in a positive light and perceptions of them are polarized (Barton, 2011). From an ethical perspective, whistleblowing often seems the right thing

to do in order to encourage moral behavior in organizations; in practice, it is usually a win-lose process for the organization and whistleblower, respectively (Wanguri, 2007).

Most whistleblowers expect management to be more responsive to their initial complaints. While anticipating some resistance, few realize how damaging and extensive their retribution will be (Glazer & Glazer, 1989). Nevertheless, in the case of the whistleblower, there often exists the irony of retaliation; retaliation by management only intensifies the whistleblowers' commitment to press forward. Glazer and Glazer (1989) observed, "Retaliation itself thus became an integral and indispensable spur to ethical resistance...punishment, while personally costly to the resisters, serves a vital social function" (p. 136). Hence, the vicious cycle of corporate deviance and ethical resistance.

There is always a tension in whistleblowing between the severe private costs to the individual and the benefits to the larger constituency (Glazer & Glazer, 1989). Renowned whistleblower scholar C. Fred Alford (2001) described the choice to blow the whistle as a high-stakes trade-off, observing, "To remain within the system is to risk the dread of becoming dead to oneself. To step outside the system is to risk the dread of becoming dead to others" (p. 120). In the aftermath of blowing the whistle, most whistleblowers get fired or quit, experience extreme difficulty in finding work, and face bankruptcy and the inability to retire (Alford, 2001; Glazer & Glazer, 1989). According to Alford (2001), "A typical fate is for a nuclear engineer to end up selling computers at Radio Shack" (p. 20). Many who lose their jobs, a central source of self-esteem in American society, experience a profound sense of grief, characterized by physical debilitation, alcoholism, depression, and a relentless obsession with the case and its

resolution (Glazer & Glazer, 1989). Because whistleblower cases tend to drag on for years, they put a tremendous strain on families and often result in the loss of family and home. When spouses are loyal, they prove essential in helping whistleblowers survive the emotional and financial repercussions of their protests (Glazer & Glazer, 1989). Although all of these liabilities are significant, the greatest shock the whistleblower experiences is what he or she learns about the world—that nothing he or she believed was true (Alford, 2001). Broken and unable to assimilate the experience, most whistleblowers say they would not blow the whistle again if they had a choice (Alford, 2001).

Al Louis Ripskis, who was fortunate enough to keep his federal government job after blowing the whistle on the Environmental Protection Agency's failure to enforce its own rules, wrote, "My advice to potential whistleblowers can be summarized in two words: 'Forget it!'" (Glazer & Glazer, 2006). At the "Future of Whistleblowing," a conference organized by the Government Accountability Project, a nonprofit organization that promotes corporate and government accountability by protecting whistleblowers, every single attorney said he or she advised clients not to blow the whistle but to find another way; whistleblowing costs too much and hurts too much (Alford, 2001). Another irony of whistleblowing, however, is that whistleblowers do not perceive of themselves as having a choice. In recounting their experiences, they often resort to one of the following post-decisional justifications: a vivid imagination for consequences, a sense of the historical moment, identification with the victim, and a sense of shame for the wrongdoing (Alford, 2001). Each narrative thread is underpinned by the concept of

choiceless choice, an idea that offers some relief and explanation for the whistleblower's decision to risk self-destruction (Alford, 2001).

In the sobering picture of whistleblowing Alford (2001) painted, he examined the implications of the whistleblower's fate:

The fate of the whistleblower is not the worst problem our society faces, but it illuminates many others. With the whistleblower one sees not just the fate of the individual in mass democracy but the fate of the individual in the organization that is situated in mass democracy... The fate of the whistleblower heightens these issues, showing that not only does the modern organization do little to foster civic values but that it is committed to the destruction of the individual who displays them. (p. 35)

Glazer and Glazer (1989) situated this conclusion in a larger context:

...we examine whistleblowers and their role at the heart of a new social movement, devoted to the goal of assuring accountability by corporate and government bureaucracies whose leaders make decisions affecting the vital interests of millions of citizens... there are encouraging signs of society's readiness to support those of its members who are willing, even at personal risk, to defend its long-term health and interests. In confronting corruption, lawlessness, and threats to the common good, whistleblowers and their allies provide models for all of us and offer hope for a future where industry and government are accountable for the consequences of their actions. (p. 8)

Thus, just as the “stereotypical whistleblower” is an unclear phenomenon, so too is what it represents and foreshadows.

Conclusion

The concept of the whistleblower elicits polarized perceptions, and whistleblowers almost always face devastating consequences for exposing negative practices. As the practice of whistleblowing is on the upswing, it is critical to examine the whistleblower’s role in contemporary society. In a sense, whistleblowers are pioneers blazing a trail of corporate social responsibility. Does the whistleblower represent a future of accountability and enforced ethical standards in all sectors of the workplace? Though the whistleblower’s personal reality is grim, will he or she keep on blowing the whistle? Ultimately, will the whistleblower prevail?

CHAPTER THREE:
CASE STUDY: WORLDCOM

“I really found myself at a crossroads where there was only one right path to take.”

- Cynthia Cooper

Introduction

The following three chapters explore three case studies of whistleblowing—WorldCom (Cynthia Cooper), the Madoff Ponzi scheme (Harry Markopolos), and WikiLeaks (Julian Assange). All three occurred over the past decade, and each addresses a different type of illicit or unsanctioned activity coupled with a unique approach to blowing the whistle. In totality, these three cases and their whistleblowers round out the study of the concept of the whistleblower and raise significant questions and implications about the practice of whistleblowing.

Overview

At the dawn of the twenty-first century, WorldCom was a symbol of the American Dream. It traced its roots to humble beginnings in Hattiesburg, MS in 1983, when its partners sketched out their idea for a long distance company on a napkin in a coffee shop (“WorldCom history,” 2002). Originally titled Long Distance Discount Services (LDDS), the telecommunications company based in Clinton, MS officially began providing service as a long distance reseller in 1984 and went public in August

1989 under the leadership of its CEO Bernard Ebbers. LDDS was renamed WorldCom in the late 90s (“WorldCom history,” 2002).

The company’s growth was fueled primarily through acquisitions and mergers during the 90s, the most notable being the acquisition of MCI in 1998 (“WorldCom history,” 2002). Michael Jordan, the most popular athlete in the world, provided commercial endorsements, and WorldCom’s stock hit a peak value of \$64.51 in June 1999. Several months later, in October 1999, WorldCom attempted to purchase Sprint in a stock buyout, but the Department of Justice vetoed the deal. With this setback, the company’s pillar of success began to crumble with an accumulation of debt and expenses, compounded by the fall of the stock market, long distance rates, and revenue (“WorldCom history,” 2002). Despite these serious checks, however, corporate managed to keep a tight lid on the dire nature of WorldCom’s financial situation. Then, quite suddenly, WorldCom’s cover was blown.

In June 2002, Vice President of Internal Audit Cynthia Cooper blew the whistle on the company’s fraudulent accounting methods over the previous year, unearthing \$3.8 billion in fraud over all four quarters in 2001 and the first quarter in 2002 (“Whistle Blower – Cynthia Cooper,” n.d.). On June 25, 2002, WorldCom officially announced that it had misstated its financial statements over the last five quarters. At the time, it was the largest fraud in corporate history, the inflated amount ultimately growing to some \$11 billion (Cooper, 2008). Ebbers resigned, and the stock value plummeted to less than that of a payphone call (“WorldCom history,” 2002). The SEC launched a lengthy investigation and established the WorldCom Victim Trust to distribute the proceeds of its

successful enforcement action against WorldCom to investors victimized by the fraud. In July 2002, WorldCom filed for bankruptcy protection in one of the largest such filings in U.S. history. On April 14, 2003, the company officially changed its name to MCI and relocated to Virginia (“WorldCom history,” 2002). WorldCom had devolved into *WorldCon*.

The Whistleblower: Cynthia Cooper

Cynthia Cooper, the whistleblower in the WorldCom case, never aspired to be a whistleblower. Reflecting on her experience, Cooper (2008) observed, “My team and I were ordinary citizens who found ourselves facing extraordinary circumstances” (p. vii). Like most workers who eventually blow the whistle, Cooper had no previous knowledge of whistleblowers and especially did not know that they often experience retribution. In fact, in a 2008 interview with *TIME* magazine, Cooper emphasized that knowledge of the whistleblower’s traumatic experience would have been immensely helpful prior to and during her own experience (Ripley, 2008).

In late May 2002, Cooper and her team launched WorldCom’s capital expenditure audit (Cooper, 2008). Soon into the process, they discovered that large amounts of money were shifting between many different accounts seemingly for no reason. After muddling through the material and eliminating all the intermediate channels, the team realized that money was being falsely transferred from the income statement to the balance sheet, thereby significantly increasing the company’s profit (Cooper, 2008). Cooper attempted to present her findings to management in the hopes of resolving them; however, her

superiors were extremely uncommunicative and said she was wasting her time (Cooper, 2008). Her suspicions aroused, Cooper led her team in working on the audit at night in order to fly under the radar. They discovered that management had been classifying operating costs as capital expenditures in an effort to mask the company's declining earnings and prop up the price of the its stock (Cooper, 2008). Although Cooper and her team offered management several more opportunities to explain these discrepancies, management was not forthcoming and offered a lot of resistance. In late June, Cooper and her assistant flew to Washington and presented their findings to the audit committee of WorldCom's board. The Audit Committee notified the SEC, and the SEC, in turn, launched its investigation. The SEC's final judgment against WorldCom was \$750 million, the largest in history against a public company (Cooper, 2008).

In 2004, Cooper left WorldCom to found Cynthia Cooper Consulting. Since then, she has devoted her career to speaking to corporations, associations, and universities about the importance of ethics and leadership in the business environment ("Whistle Blower – Cynthia Cooper," n.d.). In 2002, *TIME* magazine named Cooper and fellow whistleblowers Sherron Watkins (Enron) and Coleen Rowley (FBI) "Person of the Year" for their brave actions (Lacayo & Ripley, 2002). Coming to terms with her experience as a whistleblower, Cooper said exposing WorldCom's fraud was the hardest ordeal of her life ("Whistle Blower – Cynthia Cooper," n.d.)

The Typical Whistleblower? Implications of Cynthia Cooper's Experience

In some ways, Cynthia Cooper conforms to the typical profile and fate of the whistleblower. Like most whistleblowers, Cooper was a hard worker who did not plan to become a whistleblower and endure a poor reception for doing the morally right thing. "I never expected to be labeled a whistleblower. To many, the term has a negative connotation," she (2008) said (p. 275-276). The reality of this negative connotation was a crushing blow.

In the aftermath of blowing WorldCom's cover, Cooper suffered the usual feelings of depression and anxiety, overwhelmed by a sense of responsibility for her bosses' and company's fall from grace. These feelings also manifested themselves physically in the form of nausea and constant fatigue. Ever fearful about the pending trial and judgment, Cooper slept constantly to escape. She (2008) explained, "I've always considered myself a realist, accepting the fact that tragedy is a part of life, but this tragedy is different. There is so much coming at me all at once from different directions and at breathtaking speed" (p. 283). Like most cases of whistleblowing, WorldCom dragged on for years, the final sentences decreed over three years after the internal audit team identified the fraud (Cooper, 2008).

Like most internal whistleblowers, Cooper left her job (in this case, of her own volition) to pursue a new career. Knowing that many of her staff would lose their jobs as soon as she left, Cooper stayed on for two additional years until most of her staff had found other employment (Ripley, 2008). Additional characteristics that qualify Cooper as the stereotypical whistleblower include her initial overestimation of management's

response and her subscription to the irony of retaliation—management’s resistance only further provoked her whistleblowing efforts.

In many respects, Cynthia Cooper’s case significantly departs from the traditional whistleblower paradigm, however. She experienced unusual saving graces in her faith and a large support network of family and friends, drawing strength from Bible passages and regular church services (Cooper, 2008). Her husband Lance maintained stability in the household for their two daughters while Cooper recovered physically and emotionally. Both of her parents welcomed her back to her childhood home where she sought refuge, healing, and strength in the immediate aftermath (Cooper, 2008). Her mother counseled her, encouraging Cooper to push forward. Additionally, Cooper’s work team remained loyal to her. Her fellow auditor Dee Dalton bought Cooper’s suit to for the trial and comforted her, saying she would treat her like her own sister (Cooper, 2008). Although most whistleblowers lose the support of their loved ones and colleagues, Cooper found the strength to maintain perspective on her situation within this cocoon of loyalty and love. “As my dad told me as a young child, we each have our doors of adversity. This just happens to be mine,” Cooper (2008) reflected (p. 286). Reading about other whistleblowers’ experiences also proved helpful, reminding Cooper that she was not alone. The year 2002 was very unusual in that Sherron Watkins and Coleen Rowley also received extensive media attention. Although Cooper did not meet them personally until *TIME* interviewed all three, it energized her to know that somewhere out there two other women were fighting, and winning, the same battle (Lacayo & Ripley, 2002).

Another major characteristic that qualifies Cooper as an outlier from the whistleblower stereotype is her identity as a female. Cooper's most striking departure from the whistleblower stereotype, however, is that she was not intimidated from repeating her actions in the future (Ripley, 2008). When asked point-blank in her 2008 interview with *TIME* whether she would blow the whistle again, Cooper replied, "Yes, I would. I really found myself at a crossroads where there was only one right path to take" (Ripley, 2008). Despite the suffering she had endured, Cooper firmly maintained that the greater good of blowing the whistle far outweighed its personal costs.

Conclusion

The case of WorldCom and Cynthia Cooper is a hybrid case that both conforms to and significantly departs from the whistleblower stereotype, thus raising several important implications and questions. First, this case affirms that a support network is integral to a whistleblower's ability to prevail. Second, this case reveals that knowledge of other whistleblowers' experience is empowering, especially for those who are struggling over whether to blow the whistle. Finally, this case raises the question of the role of legislation in protecting whistleblowers; in this case, such legal protections were seemingly absent. How far do the laws go in protecting whistleblowers? Can they possibly protect whistleblowers from being isolated, "laid off," or pressured? Are whistleblower laws truly effective?

CHAPTER FOUR:
CASE STUDY: THE MADOFF PONZI SCHEME

“Numbers can’t lie, but the people who create those numbers can and do.”

- Harry Markopolos

Overview

Before his steep plunge from glory, Madoff was a titan of finance. Owner of one of Wall Street’s most successful broker-dealer firms Madoff Investment Securities LLC, former chairman of the NASDAQ, and a prominent New York philanthropist, Brooklyn native Bernard Lawrence Madoff had worked since the ripe age of 16, when he earned \$8.78 a day lifeguarding at Jacob Riis Park in Queens (Kirtzman, 2009). Inherently driven, Madoff’s blinding ambition would compel him to commit the greatest financial crime in history.

In 1999, Madoff ran the biggest hedge fund in the world, and it would only continue to grow. The great irony was that most market professionals did not even know he existed since the only entrance was through an approved feeder fund and actual investors could not ask questions (Markopolos, 2010). In 2007, the housing bubble burst, which triggered the American economy’s free-fall in early 2008. As Madoff’s investors grew increasingly paranoid about their holdings, they became concerned about his lack of transparency and demanded that he provide evidence of his trades. When Madoff could not deliver hard proof, his investors started lining up to take out their money (Kirtzman,

2009). Madoff anticipated running out of money to fund people's withdrawal orders in the very near future and began to panic.

On December 10, 2008, Bernie Madoff confessed his shocking crime to his two sons, who subsequently turned him in to the authorities (Kirtzman, 2009). He was running the largest Ponzi scheme of all time. A Ponzi scheme is a fraudulent investment operation that pays returns to its investors from their own money or the money paid by subsequent investors, rather than from any actual profit earned by the individual or organization running the operation ("Ponzi scheme," 2011). Madoff had taken money from over 339 funds of funds in over 40 countries. Almost 5,000 investors around the world lost an estimated \$65 billion, the largest incidence of financial fraud in history (Markopolos, 2010). Madoff was sentenced to 150 years in prison, and payoffs to investors are still being negotiated (Markopolos, 2010).

Just over one week later, on December 18, 2008, America discovered Madoff's whistleblower Harry Markopolos on the cover of *The Wall Street Journal*; sprawled across its pages was his incredible odyssey.

The Whistleblower: Harry Markopolos

Harry Markopolos never intended to become a whistleblower. His exposure of Bernie Madoff marks his first case as a whistleblower to the SEC (Markopolos, 2010). Markopolos is a quantitative analyst, meaning that he can look at numbers peripherally and very quickly understand highly complex associations between them (Markopolos, 2010).

In 1999, Markopolos worked as a derivatives portfolio manager for Rampart Investment Management Company in Boston. That year, one of Rampart's principals Frank Casey learned that Access International, a frequent trading partner of Rampart, used a hedge fund manager, Bernard Madoff, who consistently produced the spectacular rate of 1 to 2 percent net return each month (Markopolos, 2010). Casey saw a potentially strong business opportunity with Access if Rampart could create an options strategy that would allow Access to diversify its risk away from Madoff without sacrificing significant profit (Markopolos, 2010). In an effort to pursue this prospect, Casey asked Markopolos to analyze Madoff's strategy and unlock the secret to his success.

Within minutes of staring at Madoff's portfolio, Markopolos knew the numbers did not make sense; there was no mathematical model that could explain their consistency. Although Casey was persistent and kept asking if Markopolos was making progress, Markopolos insisted that it is impossible to compete with a man who creates fictitious numbers (Markopolos, 2010). Unintentionally, Markopolos found himself mired in a very sticky investigation. Initially, he had no specific objectives; he just wanted to figure out what Madoff was doing so he could rid himself of the pressure of competing with him (Markopolos, 2010). Through intense investigation and serious analysis, Markopolos and his team finally discovered that Madoff was running a giant Ponzi scheme. According to what they were able to piece together, it was at least three times the size of the largest known hedge funds (Markopolos, 2010).

In the spring of 2000, less than six months after first hearing about Madoff, Markopolos reported his findings to the SEC in a lengthy report that cited specific

financial discrepancies, representative of *many* others, that cumulatively indicated massive fraud (Markopolos, 2010). Although the SEC did not even respond to Markopolos, he continued to warn them in five separate, similarly detailed submissions over a nine-year period. The SEC eventually launched an investigation into Madoff on January 24, 2006, but it officially closed the inquiry on November 21, 2007, finding no evidence of a Ponzi scheme (Kirtzman, 2009). The SEC merely issued three technical deficiency notices of minor violations to Madoff's legitimate broker-dealer business, completely neglecting to realize that he was conducting his illicit Ponzi scheme operation just two floors below the main offices (Markopolos, 2010). Markopolos (2010) observed, "The magnitude of this Ponzi scheme is matched only by the willful blindness of the SEC to investigate Madoff" (p. 8). Despite his many whistleblowing efforts, Markopolos failed to stop the greatest financial crime in history, though he would eventually succeed in exposing the SEC as one of the nation's most incompetent financial regulators.

The Stereotypical Whistleblower? Implications of Harry Markopolos's Experience

Like most whistleblowers, Markopolos and the four other members of his investigation team were well-educated achievers and high performers motivated by the pure belief that good ethics demand action (Markopolos, 2010). Their chances of a financial reward were extremely remote. By 2000, the SEC's bounty program had paid just one whistleblower the sum of \$3,500, and it did not cover any type of financial crime beyond civil cases of insider trading (Markopolos, 2010). Markopolos (2010) remarked, "The chances of us actually receiving a reward for turning in Madoff were only slightly

better than me pitching the first game of the World Series for the Red Sox” (p. 57).

Although Markopolos was initially an accidental whistleblower trying to rid himself of a competitor, his investigation quickly evolved into a major defense of public financial interest.

Markopolos did not draw inspiration for his crusade from religious ideology, but he did have an upstanding model in his father. Louis Markopolos was a tough man who did not tolerate any nonsense in the two diners and two bar-lounges he owned in Erie, Pennsylvania. Markopolos (2010) recalled:

I never saw my father back down. I saw him challenge customers who tried to walk out of his place with silverware. I remember him coming home from one of the bars some nights with his face swollen and his knuckles bloody because he'd had to throw a drunk out. I had learned right and wrong from him and that whatever the cost I was supposed to fight the bad guys. (p. 147-148)

Thus, Markopolos further conforms to the whistleblower profile in that he had a solid, though admittedly less traditional, basis for his ethical code.

During the years of his excavation into the cavernous depths of Madoff's fraud, Markopolos lived under a death sentence. He feared that some of the dangerous people who had invested with Madoff, including members of the Russian mafia and various drug cartels, as well as Madoff himself would threaten his safety and, more vitally, that of his wife and two young twin boys. Markopolos (2010) explained, “People kill to protect their money, and if my team was successful, a lot of people were going to lose a lot of money” (p. 105-106). Although Markopolos adheres to the whistleblower stereotype in that he

expected management, in this case the SEC, to be more responsive to his initial complaints, he also departs from it in his display of a heightened sensitivity to the possible danger of retaliation, lack of thorough managerial support, and emotional devastation. Throughout his investigation, he would not start his car without first checking under the chassis and in the wheel wells; at night he walked away from shadows and slept with a loaded gun nearby. He even enlisted the protection of his local town police department (Markopolos, 2010). Perhaps most importantly, Markopolos made copies of all his submissions to the SEC so when the SEC denied ever receiving them, he was able to call their bluff.

After several years of working on the case to no avail, Markopolos felt isolated and hopeless. Rather than ignoring these feelings, he immediately sought out whistleblower support by initiating a regular correspondence with Pat Burns, director of communications for Taxpayers Against Fraud, a whistleblower organization in Washington, D.C. (Markopolos, 2010). Through this alliance, attendance at annual whistleblower conferences, and camaraderie with his investigation team, Markopolos drew on a reserve of courage to pursue his case. Thus, Markopolos departs from the whistleblower paradigm in preparing to face some of the devastating physical and emotional repercussions, but he also reflects the paradigm in suffering loneliness and hostility and relying on familial and social support to persevere.

Markopolos's most remarkable deviance from the traditional whistleblower trajectory is that he unintentionally blew the whistle on the SEC. After Madoff's ruin, Markopolos (2010) remarked, "We'd won the biggest battle, but we hadn't won the war.

I believed the SEC remained a serious danger to the American people” (p. 216). Though superficially a traditional whistleblower fraud case, the controversy surrounding the Madoff Ponzi scheme transcends a much deeper level of government and corporate accountability.

According to the U.S. Securities and Exchange Commission (SEC) homepage, its mission is “to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation” (2011a). Franklin Delano Roosevelt established the SEC in 1934 to restore public trust in the financial markets and ensure that the financial abuses that contributed to the stock market crash of 1929 could never happen again (Markopolos, 2010). Essentially, the SEC is an independent and nonpolitical agency intended to regulate the entire securities industry and maintain a level playing field by ensuring that everyone—both investors and stockholders—has access to the same information as everyone else. According to the SEC’s mission, “One of the major sources of information on which the SEC relies to bring enforcement action is investors themselves” (2011a). Although Markopolos had never placed much confidence in the SEC’s *investigative* abilities, he believed that if he handed Madoff to the SEC with all the evidence neatly stacked against him, they would have to take action against him in a fashion true to their mission of protecting investors. This proved to be a classic case of overestimating management’s response. Markopolos (2010) later observed, “I didn’t think they would ignore me; I was handing them the largest case in their history... This was a tremendous opportunity for them to demonstrate to the nation that the SEC was a

bulldog when it came to protecting our financial markets” (p. 61-62). His prediction proved very wrong.

At the point when Madoff was forced to turn himself in, he was worth \$50 billion. If the SEC had reacted proactively to Markopolos’s evidence, an estimated \$43 billion might have been saved (Markopolos, 2010). After Madoff’s implosion, Markopolos got wind that the SEC was denying the existence of a whistleblower. In fact, it was only when the SEC learned Markopolos had given *The Wall Street Journal* his copies of his submissions that SEC Chairman Christopher Cox issued the following statement:

The Commission has learned that credible and specific allegations regarding Mr. Madoff’s financial wrongdoing, going back to at least 1999, were repeatedly brought to the attention of the SEC staff, but were never recommended to the Commission for action. I am gravely concerned by the apparent multiple failures over at least a decade to thoroughly investigate these allegations...In response...I have directed a full and immediate review of the past allegations regarding Mr. Madoff and his firm and the reasons they were not found credible, to be led by the SEC’s Inspector General. The review will also cover the internal policies at the SEC...and whether improvements to those policies are necessary. (Markopolos, 2010, p. 214)

Markopolos had backed the SEC into a corner as well as paved their way for the future.

Markopolos used the venues of several government hearings and a meeting at the SEC as part of their internal review to make specific recommendations. Markopolos (2010) remembered, “My goal was to make this the worst day in the entire history of the

SEC, not just because it had earned it, but because the only way it was ever going to improve was to hit rock bottom. I really did want it to be better; I wanted it to rebuild” (p. 226). Ultimately, Markopolos exposed the SEC on three counts. First, he implicated the lack of experience of SEC investigators and the tremendous mismatch in skills between the SEC regulators and the people they are supposed to regulate; sending lawyers to oversee capital markets professionals simply does not work (Markopolos, 2010). Second, he exposed the fact that the SEC had gone against its mission and fallen prey to the private industry it was intended to regulate; instead, it was protecting financial predators in the industry from investors (Markopolos, 2010). The SEC had even established a whistleblowers’ hotline that alerted companies under investigation so that they could stop or slow down those investigations (Markopolos, 2010). Finally, he severely criticized the SEC’s existing whistleblower program, encouraging comprehensive reform.

Markopolos’s (2010) most significant recommendation was that the SEC use whistleblowers extensively:

The only chance the SEC had to even the playing field was the extensive use of whistleblowers...People who come forward to expose corruption risk their jobs, their personal relationships, and even their lives...the truth is that many of them are sorry they ever got involved...The SEC whistleblower program was extremely limited in scope—it didn’t apply to Ponzi schemes, for example—as well as in the protections it offered. (64)

Specifically, Markopolos recommended that the SEC institutionalize a whistleblower program, similar to those of the Department of Justice and IRS, that makes the guilty

companies pay the government back treble damages and pays the whistleblowers between 15-30% of the settlement amount (Markopolos, 2010). To date, the SEC has taken several significant steps toward reform, including mandating its examiners participate in the Association of Certified Fraud Examiners training and certification program and hiring an independent firm to revamp its procedures for organizing and tracking the 800,000 whistleblower tips it receives annually. Markopolos is optimistic that the agency will continue to improve (Markopolos, 2010).

Finally, like Cynthia Cooper, Markopolos did not allow his disheartening experience to dissuade him from future whistleblowing activity. Although he conforms to the whistleblower stereotype in that he left Rampart voluntarily in 2004, he did so to pursue fraud investigation and whistleblowing as a full-time career; this choice qualifies Markopolos as a definite outlier. Markopolos (2010) even admitted, “Doing this work excited the hell out of me” (p. 119). As a Certified Fraud Examiner, Markopolos experienced tremendous rejection by the SEC. Within his first year or so, he submitted 20 cases of market timing amounting to \$20 billion, all of which were either ignored or rejected. It was not until October 20, 2009, five years after he had become a full-time fraud investigator, that Markopolos’s very first whistleblower case came unsealed (Markopolos, 2010). In a classic case of the irony of retaliation, Markopolos’s experience of successive rejection, both with the Madoff case and his separate whistleblowing pursuits, only fueled him more. He (2010) later reflected, “The greatest irony was that by failing to pay attention to my submissions the Securities and Exchange Commission had succeeded in giving me a national platform—which I intended to use to either help create

a new and functioning agency or put it out of America's misery" (p. 237). To this day, Markopolos (2010) claims he intends to remain in the business until he "can't find any more financial or Medicare frauds" (p. 265), seemingly a very long time.

Conclusion

Like Cynthia Cooper, Harry Markopolos is an interesting amalgam of traits that both resemble and defy the traditional whistleblower profile and fate. Like WorldCom, the Madoff case raises a unique set of larger implications and challenges. First, this case reaffirms the irony of retaliation in a very extreme and potent way. Second, this case reveals that regulation agencies themselves must be monitored; sometimes it is the unintended consequences of whistleblowing that prove most revealing. Finally, this case emphasizes the importance of effective whistleblower programs to functioning regulatory agencies. Markopolos (2010) emphasized, "If self-regulation is ever going to work, we need to find ways to advertise it, reward it, and measure it" (p. 281). Although this case, like WorldCom, implicates the absence of effective whistleblower legislative protections, it more importantly highlights the absence of whistleblower incentive programs. While whistleblower laws seemingly prevent negative outcomes, are promotion-oriented measures such as incentive programs also necessary to encourage whistleblower activity? Does striking a balance between prevention and promotion orientations represent a possible solution to protecting whistleblowers effectively and creating a climate of accountability in the work culture? What should these measures look like?

CHAPTER FIVE:
CASE STUDY: WIKILEAKS

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

- *Article 19, the Universal Declaration of Human Rights*

Overview

WikiLeaks is a non-profit media organization, largely supported by volunteers and dependent on public donations. Its purpose is to share important news and information with the public by providing an innovative, secure and anonymous way for sources to leak information to its journalists (WikiLeaks, 2011). Wikileaks publishes original source material alongside news stories so readers and historians can see evidence of truth and evaluate articles within the context of the facts (WikiLeaks, 2011).

WikiLeaks.org was registered as a domain name on October 4, 2006 (Domscheit-Berg, 2011). It published its first sources in December 2006, and in January 2007 announced 1.2 million documents waiting to be processed and published (Domscheit-Berg, 2011).

WikiLeaks is based on the following principles derived from Article 19 of the Universal Declaration of Human Rights—freedom of speech and media publishing, the improvement of our common historical record, and support of the rights of all people to create new history (WikiLeaks, 2011). Although Wikipedia began as a “wiki” or user-

editable site, its founder and colleagues quickly discovered that the need to remove dangerous or incriminating information rendered such a model impractical (Leigh & Harding, 2011, p. 52). Thus, WikiLeaks now presents news stories in the style of Wikipedia, although the two organizations are not otherwise related (WikiLeaks, 2011).

WikiLeaks accepts leaked material through a high security electronic drop box whose cutting-edge cryptographic information technologies assure anonymity (WikiLeaks, 2011). After being ousted from online retailer Amazon.com Inc.'s servers, WikiLeaks relocated its virtual headquarters to Swedish Internet host Bahnhof because Sweden has one of the world's strongest shield laws to protect confidential source-journalist relationships (Hennigan, 2010). WikiLeaks' servers are located throughout Europe and accessible from any uncensored web connection. Before publishing source materials or articles, WikiLeaks tests the veracity of submitted content through a forensic analysis and external verification processes. Winner of the 2008 Economist Index on Censorship Freedom of Expression award and the 2009 Amnesty International human rights reporting award in New Media, WikiLeaks has released more classified intelligence documents than the rest of the world press combined ("The secret life," 2010).

Australian Internet activist Julian Assange is generally credited as WikiLeaks' founder, editor-in-chief and director. In October 2010, he identified himself as "the heart and soul of this organization, its founder, philosopher, spokesperson, original coder, organizer, financier, and all the rest" (Burns & Somaiya, 2010). Transformed from an anonymous hacker into one of the most discussed people in the world, Assange is at once

reviled and lionized, pursued and shunned. This extremely controversial whistleblower is alternatively viewed as the cyber-messiah and America's public enemy number one.

The Whistleblower: Julian Assange

Born July 3, 1971 in Townsville, Australia, Julian Assange had an extremely untraditional childhood, marred by the absence of his biological father (Leigh and Harding, 2011). His mother married Brett Assange, a traveling actor and theatre director, and their touring lifestyle defined Assange's early years. He attended 37 different schools, emerging with zero qualifications (Leigh & Harding, 2011). This childhood rife with inconsistencies would years later influence the mobile and virtual nature of WikiLeaks, an organization that lacks a physical location. It also taught Assange how to live on the run, a skill that has helped him evade political authorities and consequences. Finally, and perhaps most importantly, Assange's unpredictable childhood explains the tremendous sway the logical world of computers and algorithms has always held over him. He became obsessed with hacking and in the mid-90s, was brought up on 31 hacking charges in Australia and fined \$2,100 (Leigh & Harding, 2011). This small incident only presaged times to come.

Assange understands the defining human struggle not as left versus right, or faith versus reason, but as individual versus institution (Khatchadourian, 2010). A firm subscriber to the anti-totalitarian philosophies of Kafka, Koestler, and Solzhenitsyn, Assange believes that institutions corrupt truth and destroy the human spirit (Khatchadourian, 2010). Thus, he thinks that the best method to combat institutional

influence is to disrupt internal lines of communication by leaking information to the public. In creating WikiLeaks, Assange sought to establish a new standard of “scientific journalism” whereby readers could verify that what they are being told is true (Khatchadourian, 2010). Wholly committed to this mission, Assange did not eat or sleep throughout the WikiLeaks development process (Leigh & Harding, 2011). On October 4, 2006, the website domain was established; it officially launched in January 2007 (Domscheit-Berg, 2011).

At the helm of WikiLeaks, Assange has directed the publication of thousands of confidential documents, including several shattering expositions. The first major release was the *Collateral Murder* video on April 5, 2010. This 38-minute footage of aerial video and conversations between pilots in two American helicopters as they open fire on a street in Baghdad exposed the indiscriminate slaying of a dozen people, including two Reuters employees (Bumiller, 2010). At a follow-up news conference at the National Press Club, WikiLeaks stated it had acquired the video from whistleblowers in the military (Bumiller, 2010). In May 2010, Private Bradley Manning, a 22-year-old intelligence analyst with the United States Army in Baghdad, was arrested for leaking confidential military documents to WikiLeaks, including the *Collateral Murder* footage. The arrest of this whistleblower was a crippling moment for WikiLeaks, causing people to think twice before blowing the whistle via this medium (Domscheit-Berg, 2011).

In July 2010, WikiLeaks published the Afghan War Diary, a collection of more than 92,000 records of actions of the U.S. military in Afghanistan between January 2004 and December 2009. These documents painted an unvarnished, unflattering picture of

some American soldiers' casual disregard for innocent lives lost in the Afghanistan conflict. The follow-up October 2010 release of the Iraq War Logs, 391,832 secret US military documents, implicated U.S. commanders in ignoring evidence of torture by the Iraqi authorities. The files further revealed that the United States kept records of civilian deaths, despite previously denying it. The overall death toll was adjusted to 109,000, of whom 66,081 were civilians ("Huge WikiLeaks release," 2010). These documents on the Iraqi war constitute the most comprehensive and detailed account of any war ever to have entered the public record (Burns & Somaiya, 2010). Finally, WikiLeaks collaborated with major global media organizations, including the *Guardian* and *The New York Times*, to release redacted U.S. State department diplomatic cables in a major issuance later termed CableGate (Domscheit-Berg, 2011). Although none of the dispatches were particularly shocking, their confidential nature and the global reach of the political figures involved generated widespread public interest. Behind all these varied and fantastic revelations stood one lone figure—Julian Assange.

Assange's actions have generated a whirlwind of legal controversy. While courts have traditionally upheld the First Amendment's protection of anonymous political discourse, there are no clear answers with regard to WikiLeaks. Precedent, most notably the Pentagon Papers case, would seem to indicate that the First Amendment protects WikiLeaks for publishing leaked documents (Light, 2010). But is WikiLeaks truly part of the "media" if it is entirely devoted to leaking documents? Furthermore, there is wording in some Espionage statutes suggesting that anyone who publishes information threatening national security is liable for an espionage act violation. In answer to these complicated

questions, Assange views WikiLeaks as a whistleblower protection intermediary (Light, 2010). Rather than leaking directly to the media and therefore fearing exposure and retribution, whistleblowers can leak to WikiLeaks, which then leaks to the press for them (Light, 2010). Since its inception, WikiLeaks has faced only one lawsuit, which proved unsuccessful largely due to public pressure for WikiLeaks' continued existence (Domscheit-Berg, 2011).

WikiLeaks has faced legal charges of a different nature, however. On August 20, 2010, Swedish prosecutors charged Julian Assange with two counts of attempted rape (Domscheit-Berg, 2011). Already known as somewhat of a chauvinist, Assange was accused of sexually assaulting two women at separate points during his brief stay in Stockholm in August 2010 for a seminar sponsored by "the Brotherhood Movement," an organization of the Christian members of the Swedish Social Democratic Party ("Julian Assange rape accusations," 2011). After Assange was denied residency in Sweden and the Swedish police subsequently issued an international arrest warrant, Assange turned himself in to London authorities in December. Almost a full year later, on November 2, 2011, Assange lost his High Court appeal against extradition to Sweden to face allegations (Booth, 2011). His only option left is to take the case to the Supreme Court on the grounds that it raises issues of public importance ("Julian Assange rape accusations," 2011). Assange believes that the demand for his extradition is the result of covert pressure from the U.S. government, who wants a legal precedent to extradite him to the United States and bring him up on charges related to WikiLeaks (Leigh & Harding, 2011, p. 163) This complex situation has further muddied the legal waters of WikiLeaks and

crippled donations. On October 24, 2011, WikiLeaks was forced to temporarily suspend publishing in order to concentrate its efforts on fighting a “financial blockade” in the form of a boycott by banks and other financial institutions (E.L., 2011). The website remains dormant.

In addition to these external legal battles, internal discontent with the WikiLeaks creator has been fermenting. Disillusioned volunteers criticizing Assange’s dictatorial style are leaving the organization steadily. Further defections could paralyze this already small organization of 40 core volunteers and 800 part-time volunteers, all unpaid (Burns & Somaiya, 2010). Though Assange remains sustained by his sense of mission, this commitment to truth is waning among his followers, overshadowed by Assange’s intensity to publish truth at *all* costs. The future of WikiLeaks hangs uncertainly in the balance.

The Stereotypical Whistleblower? Implications of Julian Assange’s Experience

Like Cynthia Cooper and Harry Markopolos, Julian Assange is a unique brand of whistleblower, both conforming to and departing from the whistleblower stereotype and fate. Assange strongly exemplifies the whistleblower paradigm in spurring immense controversy and becoming such a controversial figure himself. His leaks are polarizing, just like him. On the one hand, the argument can be made that his revelations of flagrant human rights issues and political abuses are in the public interest. On the other hand, Assange has endangered people’s lives for the sake of freedom of speech. Therefore, wide-ranging perceptions of this mysterious whistleblower abound, even among those who know him best. Daniel Domscheit-Berg (2011), Assange’s former right-hand man

and the public face of WikiLeaks until September 2010, admitted, “On the one hand, I found Julian unbearable and, on the other, unbelievably special and lovable” (p. 68). Like the vast majority of whistleblowers, Assange is suffering severe retribution for his actions. In an abnormal twist, however, he has been brought up on charges totally unrelated to his whistleblowing activity. It remains to be seen whether the United States will successfully bring legal charges against the world’s most prominent and simultaneously elusive figure.

By achieving tremendous notoriety through the impact of WikiLeaks’ revelations and his own personal choices, Assange has catapulted whistleblowing into the next stage of its historical evolution—branding. Branding is essential to whistleblowing’s becoming a staple of the workplace, especially considering the public’s commercially oriented mindset. Ian Katz, the *Guardian*’s deputy editor, commented, “I think Julian has used his profile very cleverly and what he is doing is trying to make himself the brand that is synonymous with whistleblowing...” (Leigh & Harding, 2011, p. 246). Julian Assange is not a whistleblower; he is The Whistleblower.

In addition to branding whistleblowing, Assange has departed from the whistleblower paradigm by redefining the concept of whistleblowing and its place in the scheme of media. The traditional model of whistleblowing entails reporting transgressions to a supervisor, the media, the government, or an external watchdog agency. WikiLeaks, however, has asserted itself as safe channel or medium for leaking whistleblowers’ information and protecting them from subsequent retaliation. As Domscheit-Berg (2011) explained, “We ourselves actively did not want to know who our

sources were—that was part of the WikiLeaks security concept. All we asked from our whistleblowers was a reason why they thought their material was worth publishing...Protecting our informants was our top priority” (p. 165). The process of gathering secrets in bulk, storing them beyond the reach of governments and others determined to retrieve them, and then releasing them instantly and globally has revolutionized the format and scale of whistleblowing (Burns & Somaiya, 2010).

Whistleblowing is traditionally perceived as an ethical good. Although Assange’s revelations are arguably in the public interest of free speech and informed decision-making, in another ironic twist, they pose the unethical danger of risking innocent lives. Initially, Assange did not want to make any redactions in source documents, regardless of their potentially bloody repercussions. His tunnel vision can be attributed to his simplistic ideology. While most whistleblowers are motivated for religious or ethical reasons, Assange’s perspective was simpler. *Guardian* reporter Nick Davies observed, “The problem is, he’s basically a computer hacker. He comes from a simplistic ideology, or at that stage he did, that all information has to be published, that all information is good” (Leigh & Harding, 2011, p. 112). Collaborating with traditional media forced Assange to revisit his view, and by the time CableGate was published, he had entirely embraced the logic of redaction (Leigh & Harding, 2011). Furthermore, WikiLeaks has since implemented a “harm-minimization policy,” whereby people named in certain documents are contacted before publication (WikiLeaks, 2011). Despite these major ethical steps, Assange admits that members of WikiLeaks will inevitably get blood on their hands

(Khatchadourian, 2010). Thus, this unusual whistleblower demonstrates a certain level of moral flexibility that forces us to reexamine the overlapping bounds of ethics and truth.

In a reversal of the typical whistleblower who is dissuaded by retaliation from blowing the whistle in the future, Assange quit his on-the-run lifestyle to face his sexual assault charges as well as WikiLeaks scrutiny. Media, legal, and financial opposition has made him all the more determined to stay on the rocky path of whistleblowing; therefore, like Cynthia Cooper and Harry Markopolos, Julian Assange exhibits the irony of retaliation. Nevertheless, at times he offers glimpses into an alternative desire to abandon the whistleblowing lifestyle. “When it comes to the point where you occasionally look forward to being in prison on the basis that you might be able to spend a day reading a book, the realization dawns that perhaps the situation has become a little more stressful than you would like,” Assange admitted in an October 2010 interview (Burns & Somaiya, 2010). Furthermore, while most whistleblowers are silenced by fear, Assange’s growing celebrity has been matched by an increasingly tyrannical, eccentric, and impulsive style. In an online exchange with one volunteer, Assange warned that WikiLeaks would disintegrate without him, stating, “We’ve been in a Unity or Death situation for a few months now” (Burns & Somaiya, 2010). Thus, in the case of Assange, the irony of retaliation manifests itself arguably to the extreme. Daniel Domscheit-Berg, who split from Assange over personal differences, wrote, “He thinks of himself as the autocratic ruler of the project and believes himself accountable to no one” (Leigh & Harding, 2011, p. 167). As an alternative to WikiLeaks, Domscheit-Berg has created an online platform called OpenLeaks. While WikiLeaks encompasses the entire

whistleblowing process and is driven almost entirely by Assange, OpenLeaks offers only the technical infrastructure for whistleblowers and shares responsibility among many people (Domscheit-Berg, 2011). It remains to be seen which platform is more helpful to whistleblowers.

Conclusion

The case of WikiLeaks and its whistleblower Julian Assange raises many more questions than it answers. First, this case highlights the fact that the laws regarding protected political speech and espionage need to be clarified in the context of hybrid platforms like WikiLeaks. Second, Assange himself tests the boundaries of the whistleblower, evidencing that there is danger in taking whistleblowing to the extreme. Finally, WikiLeaks reveals that the definition of whistleblowing is fluid and mutable in this age of instant information. Will future whistleblowers rely on secure technological intermediaries like WikiLeaks and OpenLeaks to do their whistleblowing for them? Will these revolutionary platforms mitigate the threat of devastating consequences for whistleblowers, thereby encouraging increased whistleblower activity? Perhaps even more fundamentally, is there ever a point where *too much* information is revealed? Will the constant dissemination of material create information overload? Could too much whistleblowing blur, versus clarify, ethical principles?

CHAPTER SIX:
WHISTLEBLOWER PROTECTIONS—A FOREGONE ILLUSION

“Manipulation of social images makes it possible for members of society to believe that they live not in a jungle, but in a well organized and good society.”

- *Susanne Langer*

Introduction

Legislation does not always achieve its intended function. Like other political instruments, it has the dangerous potential to devolve into symbolic, versus practical, meaning. This tendency is especially true of legislation that addresses complex and controversial issues like whistleblowing. The three case studies just discussed raise an abundance of questions, many of which involve whistleblower legislation and protection programs. Are whistleblower laws and protection programs serving their intended purpose? More vitally, what *is* their true purpose?

The Symbolic Nature of Laws and Regulations

Men have always trusted the pictures they form in their minds. In his critical assessment of functional democratic government *Public Opinion*, American intellectual Walter Lippmann (1922) observed, “It is clear enough that under certain conditions men respond as powerfully to fictions as they do to realities, and that in many cases they help to create the very fictions to which they respond” (p. 10). A pseudo-environment exists

between man and his actual environment. This pseudo-environment comprises fictions or representations of the environment created by man himself; furthermore, it is subject to man's individual stereotyped expectations and vested interests (Lippmann, 1922). Man's construction of a pseudo-environment in the process of understanding raises the question of how the general public makes sense of complex ideas and concepts.

Political symbols capitalize on and dominate man's pseudo-environment.

Symbolic politics refers to a publicly displayed deception or surrogate action that detracts from actual political reality (Sarcinelli, 2008). Symbolic politics is a policy of signs, including pictures, gestures and rituals. In contrast, substantial policy is a revisable succession of political decisions, including legislation, contracts and taxes (Sarcinelli, 2008). Symbolic politics can help communicate, implement or avert substantial policy (Sarcinelli, 2008).

People read their own meanings into ambiguous or emotionally laden situations because people tend to see and think in terms of stereotypes, personalization and oversimplifications. In addition, people often cannot tolerate complex situations and therefore respond chiefly to symbols that oversimplify and distort (Edelman, 1964). In *The Authoritarian Personality*, German sociologist Theodor W. Adorno observed:

Since political and economic events make themselves felt apparently down to the most private and intimate realms of the individual, there is reliance upon stereotype and similar avoidance of reality to alleviate psychologically the feeling of anxiety and uncertainty and provide the individual with the illusion of some kind of intellectual security. (as cited in Edelman, 1950, p. 32)

Research in political science has revealed a wide discrepancy between people's assumptions about what political institutions do and what these constructs actually do (Edelman, 1964). Many business regulation and law enforcement policies confer tangible benefits on the regulated businesses while conveying only symbolic reassurance to their ostensible beneficiaries, the consumers (Edelman, 1964). In other words, in a situation of great irony, government programs create and sustain an impression of acting in the "public interest," when in reality they are economic and political instruments of the parties they supposedly regulate. In successfully maintaining this false impression, these agencies alleviate public concern while creating either a) a bureaucracy with a vested interest in preserving the problem it was created to solve, or b) a set of ritualistic procedures that do not have a functional impact. Neither of these two outcomes represents a solution.

The most intensive dissemination of political symbols attends the enactment of legislation (Edelman, 1964). In this picture, there is a direct line of influence from the people to the government. Statutes reflect the public will, and courts and administrative agencies dutifully implement and adhere to these regulations. It is less significant that this myth is so commonly presented than that it finds so ready and strong a response among the public (Edelman, 1964). Leading American political scientist and communication theorist Harold Lasswell reflected:

It should not be hastily assumed that because a particular set of controversies passes out of the public mind that the implied problems were solved in any fundamental way. Quite often a solution is a magical solution which changes

nothing in the conditions affecting the tension level of the community, and which merely permits the community to distract its attention to another set of equally irrelevant symbols. The number of statutes which pass the legislature, or the number of decrees which are handed down by the executive, but which change nothing in the permanent practices of society, is a rough index of the role of magic in politics...Political symbolization has its catharsis function... (as cited in Edelman, 1964, p. 33)

Legislation, as symbol and ritual, thus legitimizes and promotes elite objectives.

Ultimately, regardless of whether a statutory standard is couched in normative language or phrased as a directive to seek a particular objective, it means what its administrators do about it (Edelman, 1964). In this sense, whistleblowing laws are designed to allay public concerns, but they primarily provide the government with a veneer of authority while doing very little to solve the problem. The fears of the public are reduced while the authority of government is increased but without real desire to enforce the restrictions.

In functional analysis, a related political theory, manifest functions are those objective consequences contributing to the adjustment or adaptation of the system that are intended and recognized by participants in the system (Merton, 1949). Latent functions, correlatively, are those consequences neither intended nor recognized. For example, the manifest function of a political party is to create a platform and promote ideas that the public can support, while the latent function of a political party is to distribute political jobs for people and control the appointments of judges to the bench. This discrepancy between manifest and latent functions significantly applies to legislation. Because

administrators survive only as long as they respond to the demands of the groups with sanctions over them (particularly their financial backers), legislators are incentivized to facilitate evasion of the formal rules by the “regulated” (Edelman, 1964). Legislation thus symbolizes protection of a wide public (manifest function) while in reality protecting the regulated (latent function) (Edelman, 1964). Ambiguous legal and administrative language only compounds this issue of halfhearted law enforcement. Subjecting whistleblower legislation, one of the most complex political regulations, to symbolic politics and functional analysis illustrates the need to examine whether or not it is effective in practice.

In Defense of the Whistleblower:

The Evolution of Whistleblowing Legislation and Protections

Whistleblowing protection is embedded in the language of the First Amendment (Kohn, 2001). As applied through the Fourteenth Amendment and the Civil Rights Act of 1871, the First Amendment allows employees of state and local governments to obtain injunctive and monetary relief if they are discriminated against on the basis of whistleblowing. Whistleblowing legislation also traces its roots to the Civil War. In 1863, the first False Claims Act was established to offer incentives to individuals who reported sales of fake gunpowder to the Union (Eaton & Akers, 2007).

In the late 1970s in the wake of the civil rights movement, federal and state laws were enacted to protect employees in private industry, including anti-discrimination

legislation to regulate hiring and firing policies (Ravishankar, 2003). Many of these laws contained provisions forbidding an employer to retaliate against employees for reporting violations to public authorities. Complaints about reprisals could be filed with agencies such as the Equal Employment Opportunity Commission and the Occupational Safety and Health Administration (Ravishankar, 2003). In addition, new federal and state legislation, such as the Truth in Lending laws, the Fair Credit Reporting Act, and the Environmental Protection Act, protected the public from illegal or unethical business practices (Ravishankar, 2003).

In 1978, Congress passed the Civil Service Reform Act to protect the rights of government employees who reported wrongdoing (“Whistleblower,” 2011). Then, in 1989, the federal government extended whistleblowing protection to nongovernmental employees through an updated False Claims Act, which allows private individuals to sue government contractors if they believe the government is being defrauded; it also gives whistleblowers the incentive of collecting at least 15% of the damages awarded to the government (Ravishankar, 2003). In the late 1980s, states began to provide whistleblower protection to employees as a result of the erosion of the at-will employment doctrine, which until very recently meant that private, nonunionized employees could be fired for any reason, including blowing the whistle. The courts began to recognize it was against public policy for employees to be subject to termination for the exercise of a legislatively created right, such as refusing to break the law on behalf of an employer. Thus, courts considered it a contravention of the law for employers to be able to fire an employee at will for reporting unsafe or illegal conduct (Ravishankar, 2003). In 1992, President

George Herbert Bush passed another upgraded version of the False Claims Act that promised to pay an ordinary citizen up to twenty-five percent of any loss, cost overrun or fraud that is proven (“Whistleblower,” 2011).

The most important recent law on behalf of whistleblowers is the Sabanes-Oxley Corporate Reform Act of 2002, which extends whistleblower protection to all employees in publicly traded companies for the first time in U.S. history (Ravishankar, 2003). The key provisions of Sabanes-Oxley are the following: 1) It is illegal to discharge, demote, suspend, threaten, harass or in any manner discriminate against “whistleblowers”; 2) Criminal penalties of up to ten years exist for executives who retaliate against whistleblowers; 3) A board audit committee must establish procedures for hearing whistleblower complaints; 4) The Secretary of Labor may order a company to rehire a terminated employee with no court hearing; and 5) Whistleblowers have the right to a jury trial, bypassing months or year of administrative hearings (Ravishankar, 2003). In general, the business climate in the wake of Enron and WorldCom, coupled with Sabanes-Oxley, is one in which organizations have recognized the importance of instituting ethics policies and codes of conduct and employees feel more empowered to report ethical or legal violations (Ravishankar, 2003).

In 1986, 18 of the nation’s top defense companies formed the Defense Industry Initiative (DII), a pan-industry initiative to establish written codes of business ethics and train employees to comply with the codes (Defense Industry Initiative, 2010). The DII set an early benchmark for ethics management in corporations. The passage of the Federal Sentencing Guidelines for Organizations in 1991 further encouraged best practices with

regard to corporate ethics training and whistleblowing protections (Ethics Resource Center, 2005). These guidelines imposed harsh penalties upon organizations whose employees or other agents committed federal crimes. EMC, a global leader in storage hardware solutions that promote data recovery and improve cloud computing, takes whistleblowing very seriously and adheres to best practices. One hundred percent of new hires are required to complete ethics training, which includes EMC's Business Conduct Guidelines of the corporate compliance program, as well as anti-harassment, insider trading, and anti-trust policies (EMC, 2011). Additionally, employees can report potential ethical violations through one of several channels, including the Office of the General Counsel, EMC's hotline or secure web report, or the Audit Committee of the Board of Directors (EMC, 2011).

Over 30 different federal laws protect whistleblowers, including those in the airline, banking, environmental, health, mining, securities, and transportation industries (Johnson, 2008). Protection is also granted to government and civil service employees, as well as employees who report contractors that defraud the U.S. government (Johnson, 2008). Additionally, some 35 states have passed whistleblower statutes, and 11 of these states prohibit any employer, private or public, from firing a worker who discloses information that falls under the umbrella of "public interest" disclosures (Barton, 2011).

Developments in whistleblower legislation continue to unfold. As recently as August 12, 2011, the SEC launched a new whistleblower program (SEC, 2011b). The Dodd-Frank Wall Street Reform and Consumer Protection Act, signed into law July 21, 2010, provided the SEC with the authority to pay financial rewards to whistleblowers

who provide new and timely information about any securities law violation. Among other things, to be eligible, the whistleblower's information must lead to a successful SEC enforcement action with more than \$1 million in monetary sanctions. The SEC's new whistleblower program strengthens the SEC's ability to protect investors in several ways, including an updated webpage that facilitates reporting violations by providing information on eligibility requirements, comprehensive directions on how to submit a tip or complaint, instructions on how to apply for an award, and answers to frequently asked questions (SEC, 2011b). Prior to the Dodd-Frank Act, the SEC only had authority to reward whistleblowers in insider trading cases.

Even though whistleblower statutes only cover workplace-related retaliation, provisions in non-whistleblower laws such as Title VII of the Civil Rights Act of 1964 now protect against out-of-work retaliation. Before 2006, most United States courts of appeal required a Title VII plaintiff to prove an adverse employment action to recover for retaliation. In *Burlington Northern & Santa Fe Railway Co. v. White*, however, the Supreme Court eliminated that requirement, holding that Title VII also protects against non-workplace-related retaliation. The Court cited significant public policy reasons for doing so. It also justified its holding based on Title VII's language, which, unlike whistleblower laws, does not specifically require retaliation to affect the terms or conditions of employment. This landmark ruling now presents a fundamental inconsistency between whistleblower retaliation laws and non-whistleblower retaliation laws. This discrepancy presents an interesting issue because whistleblower retaliation case law has generally adhered to Title VII precedent (Johnson, 2008).

Despite different statutes for each industry or class of employees, almost all whistleblower laws follow the same standard scheme because they are modeled after then-existing laws (Johnson, 2008). Furthermore, because the same agencies enforce many different whistleblower statutes, the regulations and procedures are often the same for many different laws. For example, investigation of retaliation against whistleblowers under 21 federal statutes falls under the jurisdiction of the Office of the Whistleblower Protection Program of the Occupational Safety and Health Administration (OWPP, 2011). Whistleblower legislation and protection programs are complex models that raise controversy and provoke the question of whether or not they are effective in practice.

Theory vs. Practice: Are Whistleblower Protections Effective?

From its inception, whistleblower legislation has had limited success at thoroughly addressing whistleblowers' cases and protecting whistleblowers from negative repercussions. As early as 1976, a study of the Occupational Safety and Health Administration (OSHA) revealed that only 20% of the complaints filed that year were considered valid and of the 60 claims taken to court, only one was won (Ravishankar, 2003). As recently as August 20, 2009, the Treasury Inspector General for Tax Administration reported that of the 1,973 whistleblower claims filed under Section 7623(b) of the Internal Revenue Code (provides that the IRS will pay between 15-30% of the amount it collects to a whistleblower if the collection is the result of information provided by the whistleblower) only 69 (3.5%) have reached the audit stage and no awards have been made (FraudFighters, 2009).

Whistleblower laws give the illusion of protection. In the closing statement of its conference report on the Employee Protection Provisions section of the 9/11 Commission Act of 2007, Congress stated, “The intent of this provision is to ensure that employees can report their concerns without the fear of possible retaliation or discrimination from employers” (H.R. Rep. No. 110-259, 2007). Although the government’s introduction of whistleblower laws can be understood as a sincere attempt to help whistleblowers, it can alternatively be regarded as a form of symbolic politics to alleviate the fears of concerned citizens or a cynical attempt to entrap whistleblowers in procedural red tape (Martin, 2003). In terms of functional analysis, whistleblower legislation’s manifest function is to protect whistleblowers from retaliation and uphold ethical standards in business; its latent function is to defend corporate interest, whether financial or otherwise, and lull whistleblowers into a false sense of security. The most common approach to whistleblower protection is the establishment of official channels, including grievance committees, ombudsmen, auditors-general, anti-corruption agencies, courts and whistleblower laws (Martin, 2003). In practice, however, official channels distract attention from more effective avenues of intervention and do not address the root of the problem.

A fundamental issue with whistleblower legislation is that it usually comes into play only after disclosures have been made and reprisals have begun (Martin, 2003). Additionally, whistleblower laws focus on whistleblowers and what is done to them while neglecting the original issue about which the employee spoke out; their agenda does not address organizational reform. Perhaps the most remarkable deficiency of

whistleblower legislation, however, is the lack of one comprehensive whistleblower law. Although many laws protect the whistleblower as employee, supplier or buyer in a government or public context, there exist few protections for whistleblowers in private industry (Ravishankar, 2003).

Although various whistleblower laws cover a significant cross-section of the American workforce, their protections are riddled with loopholes (Johnson, 2008). Most legislation is industry-specific, including Sabanes-Oxley, which broadly regulates corporate governance and accounting (Johnson, 2008). In 2007, Congress extended whistleblower protection strictly to public transportation, railroad and commercial motor carrier employees (Johnson, 2008). Because proposed legislation is often a reaction to a national crisis, it tends to focus on the specific area in which there was an emergency. For example, the Consumer Product Safety Commission Reform Act of 2007, proposed just after many toys were recalled for lead contamination, would have granted whistleblower protection to employees of manufacturers and retailers in an attempt to “provide greater protection for children’s products” and “improve the effectiveness of consumer product recall programs” (Johnson, 2008). Ultimately, this piecemeal approach to whistleblower legislation is confusing, frustrating, and largely ineffective.

Despite different statutes for each industry or class of employees, almost all whistleblower laws follow the same standard scheme, which requires that the plaintiff prove that the retaliatory act directly affected an aspect of his employment (Johnson, 2008). Additionally, the complainant must demonstrate the following four elements: 1) The employee engaged in a protected activity; 2) The respondent knew or suspected,

actually or constructively, that the employee engaged in the protected activity; 3) The employee suffered an unfavorable adverse action; and 4) The circumstances were sufficient to raise the inference that the protected activity was a motivating factor in the unfavorable action (Johnson, 2008; “The Whistleblower Protection Program,” 2011). Thus, whistleblower protection significantly excludes out-of-work retaliation that does not affect current or future employment, and employers retain many methods of undermining employees including rumors, ostracism, and petty harassment, all of which are virtually impossible to document (Martin, 2003). Additionally, in the recent Supreme Court case *Welch v. Chao*, the court dismissed an accountant whistleblower’s complaint, ruling that even if the accountant’s charges proved correct, he had nonetheless failed to explain successfully under Sabanes-Oxley how he could have an objectively reasonable belief that he was fired on the basis of his whistleblowing action (*Welch v. Chao*, 2009). This case, along with the recent cases of *Allen v. Administrative Review Board* (2008), *Livingston v. Wyeth Inc.* (2008), and *Platone v. U.S. Department of Labor* (2008), all yielding similar results and arguments, reveals that the court generally does not classify the actions of a whistleblower as protected conduct unless the four criteria cited above are explicitly demonstrated, a near impossible task in most cases. Without their actions classified as protected, whistleblowers stand no chance of winning their claim.

Although the 2002 Sabanes-Oxley Corporate Reform Act (SOX) represents the most comprehensive whistleblower legislation to date, in practice whistleblowers have not been successful (Mowrey, Cash, & Dickens, 2010). Out of the 491 filings by employees in the first three years after SOX was enacted, 361 cases were actually

resolved by OSHA—the federal agency charged with the initial investigations of SOX whistleblower complaints—and of those claims only 3.6% were successfully argued by the employee (i.e., 13 of the 361) (Mowrey et al., 2010). Furthermore, even if an employee can successfully obtain SOX protection, information concerning widespread fraud may kill a firm, in which case the employee loses both a job and a source of damages. Alternatively, if the firm survives, current or future employees may label the whistleblower as disloyal, and the safety net offered through SOX is of limited use (Mowrey et al., 2010).

Another weakness of whistleblower legislation is its selective application. Although whistleblower policies have a strong corporate presence, they have yet to be implemented in most universities, governmental entities, and nonprofit organizations (Eaton & Akers, 2007). Relatedly, the IRS Whistleblower Office, which pays money to people who blow the whistle on persons and/or companies who fail to pay their taxes, is selective in that it only promises awards for returns of \$2 million or more, thus only accounting for large instances of fraud and other illicit activity (Dale, 2011). According to Patrick Burns, a spokesman for Taxpayers Against Fraud, a nonprofit whose members include many lawyers for whistleblowers, “This law is designed not to snag the guppies, but to harpoon the whales” (Dale, 2011). So where does this leave smaller but equally valid cases?

The first successful complaint filed under the IRS Whistleblower Office was filed in 2007 and took four years to reach fruition, at which point the plaintiff was awarded \$4.5 million (Dale, 2011). The anonymous plaintiff’s lawyer, Eric L. Young, labeled the

official whistleblowing process as “time-consuming, arduous, and stressful, from both a personal and professional standpoint” (Dale, 2011). In the end, for most whistleblowers, the ends very rarely justify the means.

Conclusion

Whistleblowing legislation and protections epitomize symbolic politics and the tension between political symbols’ manifest and latent functions. Though “intended” to protect whistleblowers from retribution and encourage future whistleblowing activity, whistleblowing legislation and programs only give the illusion of protection. Much inefficiency governs whistleblower protections—official channels create red tape, legislation is industry-specific, and protections significantly exclude out-of-work retaliation and harassment. These problems only compound the issue of symbolic politics, promoting protection of the regulated businesses while exposing whistleblowers to corporate vindictiveness. Furthermore, the statistics themselves offer incontrovertible evidence of whistleblower protections’ major discrepancy between theory and practice. Without a doubt, whistleblower legislation and protection programs must be significantly reexamined and revised in order to align their manifest and latent functions. In light of their practical failure, the following chapter provides specific suggestions for opening the doors of communication in corporations and improving whistleblower legislation and protections. Ideally, shining the whistle will affirm ethical standards in corporate practice.

CHAPTER SEVEN:
SHINING THE WHISTLE

Whistleblower rights are human rights.

- Government Accountability Project

Recommendations

To some extent, the fundamental issue with whistleblower legislation and grievance systems resides in society's polarized perception of whistleblowers as either martyrs or snitches (Ravishankar, 2003). Even with legal protections, whistleblowers may face retaliation in being shunned by co-workers, suffocated by supervisors, or simply feeling alienated. Nevertheless, several important measures can be taken to improve whistleblower protections.

Recommendation One – Less Ambiguous Legal Language

Whistleblower legislation is rife with obtuse and ambiguous legal language that confuses the process. For example, the Whistleblower Protection Act (WPA) prohibits a federal agency from taking an adverse "personnel action" against civil servants in retaliation for whistleblowing (Kohn, 2001, p. 100). The WPA defines protected whistleblower activity as "a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences, (i) a violation of any law, rule or regulation, (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety" (Kohn, 2001, p. 100). This

definition is somewhat ambiguous, however. Instead of protecting employees who simply raise “public health or safety” concerns, the law requires that the concern also be “substantial and specific.” Similarly, the law protects employees who make “disclosures,” yet the term “disclosure” is never clarified. Although Congress has repeatedly stated that the WPA should be broadly interpreted to encourage employee whistleblowing, interpretations continue to be narrow and hypertechnical (Kohn, 2001).

Whistleblower statutes are also ambiguous as to appropriate report recipients. For example, under the Clean Water Act, it is unlawful for an employer to fire or discriminate against any employee who “has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter” (Sinzdak, 2008). Since the Environmental Protection Agency (EPA) enforces the Clean Water Act, this provision is often narrowly read as requiring a formal “proceeding” with the EPA, thereby significantly excluding internal complaints (Sinzdak, 2008).

Relatedly, a great ball of red tape delays the whistleblowing legal process. A 2006 law championed by Sen. Charles Grassley (D - IA) requires the IRS to pay whistleblowers a reward of 15-30% for identifying cases involving \$2 million or more in unpaid taxes (Hudson, 2011). In the four and a half years since the program was implemented, during which the agency fielded more than 3,000 tips in the first two full years, just one cash award has been made public (Hudson, 2011). Spokesman Patrick Burns for Taxpayers Against Fraud, a group that lobbies for whistleblowers and whistleblower attorneys, cited the IRS’ overarching concern with protecting the privacy

of fraudsters and the IRS chief counsel's confounding legal hurdles as crippling its whistleblowing operations (Hudson, 2011). Grassley argued that the IRS' program is not comprehensive enough, arguing, "Blowing the whistle on improper deductions, such as net operating losses, is just as important as blowing the whistle on unreported or underreported income...The IRS needs to put on its thinking cap and figure out a way to reward whistleblowers whose tips don't result in immediate tax collections" (Hudson, 2011). Thus, at both the state and federal level, the language composing whistleblower legislation and protections must be clarified and reconciled with its practical implications to cut down the red tape.

Recommendation Two – Capitalizing on the Title VII Discrepancy

In the recent Supreme Court case *Burlington Northern & Santa Fe Railway Company v. White*, an employee sued her employer, alleging retaliation in violation of Title VII of the Civil Rights Act of 1964 (*Burlington Northern v. White*, 2006). Specifically, she alleged that her employer retaliated against her for complaining about her supervisor's sexual harassment. Title VII of the 1964 Civil Rights Act states that an employer cannot discriminate on the basis of race, color, religion, sex, or national origin with regard to 1) hiring or discharging an employee (or refusing to hire or discharge an employee), and 2) limiting and segregating employees or applicants for employment (Dessler, 2012). In the final judgment, the court ruled that the anti-retaliation provision (Title VII) was not limited to discriminatory actions affecting the terms and conditions of employment, thus creating a fundamental inconsistency between whistleblower retaliation laws and non-whistleblower retaliation laws. While the former require an

adverse employment or personnel action, the latter do not (Johnson, 2008). This Title VII discrepancy offers a unique opportunity to amend whistleblower legislation to provide meaningful protection against *all* types of retaliation, not just those affecting the whistleblower's terms or conditions of employment. Amending all federal whistleblower statutes to incorporate Title VII's retaliation provision would dramatically expand the scope of their judicial interpretation, harmonizing retaliation claims across all industries and providing practical protection against retaliation occurring outside of work or after the whistleblower is fired or has quit (Johnson, 2008).

Recommendation Three – One National Law

The passage of a uniform, comprehensive national whistleblower protection act is long overdue (Kohn, 2001). While protections for other areas of labor relations such as age discrimination, race discrimination, and discrimination against union members have been codified in national law, over 30 separate federal statutes govern various types of whistleblowing and some 35 states have developed their own statutory approaches (Barton, 2011; Kohn, 2001). This model law must address and clarify the following terms as they relate to cases of whistleblowing: definition of employer and employee; definition of “public body” and supervisor”; definition of retaliation; patient care; definition of protected activity; prior reporting to supervisor; the forum; burdens of proof; remedies; reverse attorney fees; posting notice; preemption and preclusion; and settlement (Kohn, 2001). Although the piecemeal approach to drafting whistleblower legislation served a valid purpose during the early development of whistleblower protections, comprehensive

whistleblower legislation on the federal and state level is necessary to facilitate whistleblowing claims (Kohn, 2001).

Recommendation Four – Expanding Application

Most whistleblower legislation is industry-specific and geared toward gross instances of illegality or unethical behavior involving large sums of money (Eaton & Akers, 2007). In addition to being more comprehensive, whistleblower laws and policies should effectively address *both* large and small cases; wrong behavior is unacceptable in any context.

Although the IRS Whistleblower Office has its share of flaws, it has established a tiered system for separating smaller cases from larger with separate reward programs for each. If the taxes, penalties, interest, and other amounts in dispute exceed \$2 million and a few other qualifications are met, the IRS will pay 15-30% of the amount collected (IRS, 2011). Those who do not meet the \$2 million threshold are eligible for a maximum award of 15% up to \$10 million (IRS, 2011). This system provides a helpful model for other whistleblower policies, emphasizing that smaller cases, while perhaps requiring different grievance processes, should not go ignored.

Recommendation Five – Improving Organizational Ethics

Another school of thought argues that no matter how well-intentioned and well-crafted legislative measures may be, they fail to address the fundamental function of whistleblowing protections—to encourage greater reporting of misconduct for the purpose of creating a more ethical workplace (Desio, 2008). Although the federal whistleblower model commendably seeks to protect the job and livelihood of the

whistleblower, it is limited in that it cannot shield the employee from peer ostracism and expressions of resentment in the community, fallout that many whistleblowers find to be the most devastating result of their well-motivated actions (Desio, 2008).

The Ethics Resource Center's (ERC) 15 years of research into employee perceptions of their workplace suggests that a fundamental and comprehensive reorientation toward ethics is needed, from a strictly legal framework to an approach that embraces the role of culture and internal operations (Desio, 2008). Ethical or reputational risk to an organization is defined as the frequency of workplace misconduct and it being reported to management, which is presumed to act to preventatively when misconduct is reported (Desio, 2008). Therefore, reducing the rate of observed misconduct and increasing the rate of reporting to management significantly diminishes ethical risk in the workplace. The ERC's national surveys consistently demonstrate that employees in all sectors are increasingly working in environments conducive to misconduct and that interventions by management proven to reduce ethics risks are not very common (Desio, 2008). Furthermore, the ERC's longitudinal research indicates that a complementary focus on well-implemented ethics and compliance programs and a strong ethical culture can diminish workplace misconduct and all the attendant reputational risk that accompanies it (Desio, 2008).

According to federal sentencing guidelines, an ethics and compliance program is well-implemented when the following elements are present: willingness to seek ethics advice; receipt of positive feedback for ethical conduct; employee preparedness to handle instances of misconduct; management can be questioned without fear; incentives,

support, and encouragement to follow ethical standards; questionable means of conduct are not rewarded; the organization encourages ethical conduct; employees believe the organization is ethical (Desio, 2008). The corollary component, a strong ethical culture, develops when the following elements are present: ethical leadership (“tone at the top”), supervisor reinforcement, peer commitment to ethics, and embedded ethical values (Desio, 2008). These guidelines represent best practices. Therefore, greater emphasis should be put on encouraging internal operations that foster all the elements of a well-implemented ethics and compliance program as well as strengthen ethical culture. Advocates for future legislation should partner with their counterparts in ethics and compliance to support these initiatives.

Recommendation Six – Building Practical Skills

A related school of thought argues that far more helpful to whistleblowers than official grievance channels are practical skills at understanding organizational dynamics, collecting data, writing coherent accounts, and building alliances with the media (Martin, 2003). While official channels tend to empower bureaucrats and lawyers, skill development empowers the whistleblower. Therefore, organizational ethics programs should incorporate an inventory of skills needed and corresponding training sessions. The spread of this knowledge, in turn, could enhance the effectiveness of official channels themselves and encourage whistleblowing activity more naturally.

Recommendation Seven – The Intermediary Model

The WikiLeaks intermediary model offers a revolutionary best practice for protecting whistleblowers and promoting corporate social responsibility. When Daniel

Domscheit-Berg defected from WikiLeaks in September 2010 to create OpenLeaks, he predicted the creation of copycat websites (Greenberg, 2010). In December 2010, a group of former European Union officials and journalists launched BrusselsLeaks, a site focused on obtaining and publishing leaked internal information about the backroom dealings and secrets of the E.U. (Greenberg, 2010). Other copycat websites inspired by the WikiLeaks.org concept include RevenueWatch, ScienceLeaks, and CorporateLeaks, among others, and new concept leak websites in addition to OpenLeaks include TradeLeaks and MurdochLeaks. The rapid proliferation of these leaking sites indicates that this model may be an up-and-coming method of supplementing traditional whistleblower legislation and protections in today's Internet age. This intermediary model is unique in avoiding the potential pitfall of lack of proper enforcement by government agencies (Johnson, 2008). Their legal status awaits clarification, however.

Recommendation Eight – Improving Understanding

Perhaps most fundamentally, resolving the dichotomous perceptions about whistleblowers and, in turn, promoting the view that whistleblowing is essential to upholding ethical standards in the workplace must underpin all of the former recommendations. Whistleblowers are rapidly emerging in today's gloomy economic climate. According to a report out May 20, 2009 from the Network, a U.S. firm that runs compliance and corporate-governance hotlines for about half the Fortune 500, fraud-related calls amounted to 21% of all reports in the first quarter of this year, up from 14% in the same period in 2007 (Smith, 2009). The surge in cases of deceit during times of recession can be attributed to companies' restructuring and detailed examination of their

records as well as employee desperation for money, whether through stealing or whistleblowing for a reward (Smith, 2009). Furthermore, following the 2008 economic downturn largely caused by corporate malfeasance, there is a growing desire on the part of citizens to step up when they see wrongdoing (Tahmincioglu, 2011). The Occupational Safety and Health Administration, which administers a host of whistleblower protections under 21 different laws, has seen a jump in whistleblower charges, reaching 2,339 through September 14, 2011, compared to a total of 2,319 for all of 2010, and 2,158 in 2009 (Tahmincioglu, 2011). Today, whistleblowers have their work cut out for them, but it will come to no avail if it is chronically misunderstood.

Conclusion

On August 5, 2011, in response to a critical report from the Government Accountability Office (GAO), the Occupational Safety and Health Administration (OSHA) announced that it is implementing measures to strengthen its Whistleblower Protection Program (“OSHA aims to improve,” 2011). The GAO’s 2009 and 2010 audits of the OSHA’s whistleblower program uncovered issues related to transparency and accountability, training for investigators and managers, and the internal communications and audit program. To address these problems, OSHA is making changes to the Whistleblower Protection Program in the areas of restructuring, training, program policy, and internal systems (“OSHA aims to improve,” 2011). Some specific measures include establishing a separate line item for the program in the OSHA budget, adding 25 new investigators, and revising and issuing an updated edition of the Whistleblower

Investigations Manual (last updated in 2003). OSHA Assistant Secretary Dr. David Michaels issued the following statement:

OSHA is committed to correcting the issues brought to light by the GAO report and our own review. The ability of workers to speak out and exercise their legal rights without fear of retaliation is crucial to many of the legal protections and safeguards that all Americans value. The new measures will significantly strengthen OSHA's enforcement of the 21 whistleblower laws that Congress charged OSHA with administering. (“OSHA aims to improve,” 2011)

These significant steps taken by the OSHA, the largest administrator of whistleblower protections, offer hope for the future of whistleblowing and reaffirm the importance of shining the whistle.

CHAPTER EIGHT: CONCLUSION

“Honesty without Fear.”

- *The National Whistleblowers Center*

Whistleblowing: The Next Frontier

A whistleblower is an employee, former employee, or member of an organization who reports misconduct within the organization to those in power in order to obtain corrective action (“Whistleblower,” 2011). Traditionally, whistleblowing involves reporting transgressions to a supervisor, the media, the government, or an external watchdog agency (“Whistleblower,” 2011). The job of a whistleblower is a very difficult one in that those whistleblowers who report significant misconduct almost always suffer severe retribution for their actions (“Whistleblower,” 2011). Whistleblowers are complex figures that generate polarized perceptions, alternating from the selfless martyr for the public or organization’s good to the tattletale pursuing personal glory and reward.

The whistleblower profile is a well-educated, conservative person, typically a married male, devoted to his work and organization (Barton, 2011; Glazer & Glazer, 1989). Whistleblowers rarely intend to become whistleblowers; rather, they perceive themselves as victims of circumstance who did not have any other choice (Barton, 2011). While most whistleblowers are motivated by ethical reasons (e.g. protecting the public interest), some are driven by anger and selfishness (e.g. failure to receive a promotion).

Although, from an ethical standpoint, whistleblowing helps an organization, whistleblowers are rarely seen in a positive light and perceptions of them are polarized (Barton, 2011).

There is always a tension in whistleblowing between the severe private costs to the individual and the benefits to the larger constituency (Glazer & Glazer, 1989). In the aftermath of blowing the whistle, most whistleblowers get fired or quit, experience extreme difficulty in finding work, and face bankruptcy and the inability to retire (Alford, 2001; Glazer & Glazer, 1989). Many who lose their jobs, a central source of self-esteem in American society, experience a profound sense of grief, characterized by physical debilitation, alcoholism, depression, and a relentless obsession with the case and its resolution (Glazer & Glazer, 1989). Although all of these liabilities are significant, the greatest shock the whistleblower experiences is what he or she learns about the world—that nothing he or she believed was true (Alford, 2001). Broken and unable to assimilate the experience, most whistleblowers say they would not blow the whistle again if they had a choice (Alford, 2001).

The whistleblowers in the three case studies of WorldCom, the Madoff Ponzi scheme, and WikiLeaks are unique hybrids that both conform to and depart from the whistleblower profile and fate. Cynthia Cooper blew the whistle on her own company WorldCom for committing massive fraud in the amount of \$11 billion (Cooper, 2008). Though Cooper initially overestimated management's response and later exhibited the irony of retaliation, she ultimately prevailed through the unwavering support of family and friends (Cooper, 2008). This case implicates the absence of effective whistleblower

legislation and protections. Harry Markopolos intended to blow the whistle on the largest Ponzi scheme of all time. Not only did he succeed in exposing Madoff, but also he unintentionally blew the whistle on the SEC as a puppet of big business. Although, like Cooper, Markopolos initially expected management to respond to his findings, he prepared for retaliation and sought solace through a whistleblower support network (Markopolos, 2010). This case reveals that regulatory agencies themselves must be monitored and that whistleblowers should be incentivized and rewarded for their efforts. Julian Assange spearheaded WikiLeaks, a secure whistleblower intermediary channel that has published government and military records exposing grievous corruption and war crimes. Though Assange epitomizes the controversial and polarizing whistleblower, he demonstrates a unique degree of moral flexibility and an extreme commitment to truth. This case reveals that the definition of whistleblowing is keeping pace with rapid technological development. Cynthia Cooper, Harry Markopolos, and Julian Assange are most significantly outliers from the whistleblower stereotype in that they would choose to blow the whistle again, despite the immense personal sacrifice. Ultimately, these cases raise the question of whether such sacrifice and suffering is preventable through effective whistleblower protections.

Whistleblower legislation subscribes to symbolic politics and functional analysis. Whistleblower laws are designed to allay public concerns, but they primarily provide the government with a veneer of authority while doing very little to protect whistleblowers. Thus, whistleblower legislation gives the illusion of protection. Some fundamental problems with whistleblower laws include layers of bureaucracy, a diffusion of many

different laws across various industries, and the exclusion of out-of-work retaliation. Disheartening statistics on whistleblower success rates implicate the need for improvements to existing whistleblower laws and protection programs. Some important recommendations include clarifying the legal language, capitalizing on the Title VII discrepancy, and creating a comprehensive national law.

Recently, on November 4, 2011, former Pennsylvania State University football assistant coach Gerald “Jerry” Sandusky was indicted on 40 counts of sex crimes dating from 1994 to 2009 against eight young boys, following a three-year grand jury investigation (Ganim, 2011). He was arrested on November 5 and charged with seven counts of involuntary deviate sexual intercourse, as well as eight counts of corruption of minors, eight counts of endangering the welfare of a child, and seven counts of indecent assault, among other offenses (“Penn State ex-coach,” 2011). In December 2010, assistant coach Mike McQueary testified that he had witnessed Sandusky sodomizing a young boy and that he had reported the incident to Joe Paterno, who informed Athletic Director Tim Curley (Palazzolo, 2011). Ultimately, the only action taken by Curley and Gary Schultz, senior vice president for finance and business and overseer of the Penn State police department, was to order Sandusky not to bring any children from The Second Mile, Sandusky’s charity to help troubled male youth, to the football buildings (Wetzel, 2011). University president Graham Spanier approved this action (Wetzel, 2011).

In their testimony before the grand jury, Paterno, Curley, and Schultz rejected the version of the incident presented by McQueary, claiming that they were never told about

alleged anal intercourse. Paterno testified that he was only told about Sandusky “fondling or doing something of a sexual nature” to the victim, while Curley and Schultz described the conduct as “horsing around in the shower” (Pennsylvania Attorney General, 2011). In the wake of the scandal, Spanier issued a statement of support for Curley and Schultz while offering no message to the potential victims of Sandusky’s abuse (Wetzel, 2011). Schultz and Curley have been charged with failing to report suspected child abuse and perjury in falsely telling the grand jury that McQueary never informed them of sexual activity (“Penn State AD charged with perjury,” 2011). Although Paterno has not accused of legal wrongdoing, since he fulfilled his obligation to report the incident to his immediate supervisor, he has been harshly criticized for not reporting the incident to policy or at least seeing to it that it was reported (Brent, 2011). The university has responded by ousting both Joe Paterno and Graham Spanier, as well as placing McQueary on indefinite paid administrative leave (“Sandusky, Penn State case timeline,” 2011).

These conflicting stories and allegation have given rise to much debate about whether Mike McQueary is a whistleblower. McQueary went beyond simply reporting Sandusky’s misconduct to his supervisor, Joe Paterno. He also claimed that he reported what he saw to high-ranking Curley and Schultz, who had supervisory authority over campus police, as well as related his version of events to the grand jury (Pennsylvania State Attorney, 2011). The Pennsylvania whistleblower law protects employees who “report” wrongdoing “verbally” to their “superior” or to an “agent of the employer” (Kohn, 2011). Thus, McQueary’s testimony concerning Sandusky to the grand jury is

protected whistleblower speech. The public interest is served when employees provide truthful testimony about their employer's misconduct. According to the grand jury report, Schultz was "very unsure" about what McQueary told him, testifying that McQueary's allegations were "not that serious" and that there was "no indication that a crime had occurred" (Kohn, 2011). Similarly, Spanier testified to the grand jury that Sandusky's questionable actions on campus property were inconsequential and simply made a staff member "uncomfortable" (Kohn, 2011). Although serious questions remain as to what happened between McQueary's report in 2002 and his testimony to the grand jury in 2010, without his testimony the convenient version of events relayed by Curley, Shultz, and Graham would not have been contradicted.

This deeply troubling case, reminiscent of the Catholic Church sex abuse scandal, serves as an important reminder that the vast majority of people who witness misconduct never report it outside their chain of command. Even child abuse is not immune to the frozen, closed-mouth culture that is pervasive in our society. Nevertheless, this culture is slowly but surely thawing as whistleblowers blaze a trail to the next frontier of corporate social responsibility. In this time of economic recession and confusion about the often-incestuous relationship between business and government, whistleblowers are increasingly emerging to regulate. Brave souls like Cynthia Cooper, Harry Markopolos, and Julian Assange offer models of truth and justice. Whistleblower legislation and protection programs, though far from perfect, have come a long way in protecting the whistleblower from retribution. Finally, shining the whistle through various best practices will continue to uphold ethical standards and restore corporate culture's sense of shame.

Returning to the opening words of Albert Einstein, danger is a result of complacency in the face of evil. We must do something.

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