Protecting National Security Whistleblowers in the U.S. and in the ECtHR: The Limits of Balancing and the Social Value of Public Disclosures

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Abstract

This article discusses the comparative responses from the U.S. and the European Court of Human Rights to the conundrum posed by whistleblowing in national security. Concluding that both systems have focused excessively on the subjective aspect of whistleblowing as a facet of freedom of speech, the article proceeds to propose an innovative, institutional framing of the conflict over public disclosures, building on the transnational precedent that confirms the social value of whistleblowing for democratic self-government and public accountability. Concretely, this means that when state secrecy covers illegal and illegitimate activities of the executive power, then whistleblowers should be entitled to protection against criminal sanctions. Such an approach shifts the criterion of protection from balancing between subjective rights and the public interest, to the legitimacy of the disclosed activity. At the same time, legitimate state secrecy should be protected through sanctions (primarily employment-related and only exceptionally criminal) to leakers.

Keywords: whistleblowing, national security, state secrecy, freedom of speech, comparative law, proportionality

I. Introduction: A restrictive framework for national security whistleblowers

In this article, I will explore the constitutional considerations that arise from whistleblowing within the setting of national security and the question of how to strike a balance between the social value of whistleblowing and the protected public interest that lies in state secrecy. Discussing the comparative case law of the U.S. and the European Court of Human Rights (ECtHR) on employee speech, I will argue that, contrary to the predominant 'subjective liberties paradigm', according to which whistleblowing may be protected as a facet of the freedom of speech of the employee, whistleblowing should be understood in its institutional dimension, as a counter-institution to the expansive tendencies of the national security system. In other words, the constitutional value of disclosures in the public interest is not limited to them being an instantiation of individual employee expression, but it rather lies in the function whistleblowing performs for the accountability of public institutions and the maintenance of the democratic character of state secrecy and security politics. Without having become decisive, such an understanding of whistleblowing's value already permeates existing case law. It is from this latent recognition of the social value of whistleblowing that I commence to outline a normative model for the protection of unauthorized disclosures in the public interest.

As 'whistleblowing' I understand the disclosure of wrongdoing that is legally protected, under conditions, by the respective legislative framework – the, so called, 'public interest disclosures'.[1] A necessary distinction to demarcate the limits of protection for whistleblowers

[1] In the UK, the 'Public Interest Disclosure Act (PIDA) of 1998 provides protection to employees making disclosures in the public interest. For a disclosure to be protected by the Act's provisions it must relate to matters that 'qualify' for protection under the Act. Such are, for example, criminal offences, the breach of a legal obligation, a danger to the health and safety of any individual, or damage to the environment. In a similar spirit, according to Transparency International's definition, whistleblowing is "the disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organizations

is that between *whistleblowing* and *leaking*. Leaking, according to Björn Fasterling and David Lewis, "refers to the situation where an insider gives ("leaks") an organization's confidential or unpublished information to an outsider"[2] – without necessarily disclosing wrongdoing. However, considering that whistleblowers also give inside information to outsiders, there seems to be a certain overlap between the two terms.[3] In fact, the differentiation takes place at the level of the legal definition of the conditions that grant protection to public interest disclosures. Whistleblowers are those who a) follow the designated procedures for reporting and b) whose disclosures refer to illegality and wrongdoing, as designated by the legislation. Leakers step out of the institutional framework to make disclosures that are not content-specific – they do not necessarily reveal wrongdoing. Yet, as the institutionalization of (internal) reporting mechanisms for national security whistleblowers is often very restrictive and inefficient, individuals that reveal wrongdoing do not always follow the designated reporting channels. For example, in the U.S., most of the prominent 'leaks' that arguably revealed wrongdoing, such as those of Manning, Snowden, and earlier that of Ellsberg, did not follow the designated procedures of reporting. As a result, the term 'whistleblowing', in its broad

(including perceived or potential wrongdoing) –which are of concern to or threaten the public interest– to individuals or entities believed to be able to effect action", Transparency International, WHISTLEBLOWING IN EUROPE: LEGAL PROTECTIONS FOR WHISTLEBLOWERS IN THE EU (2013). Unpacking this definition reveals, albeit without the necessary precision, the essential elements of whistleblowing: a) the existence of wrongdoing within organizations that threatens the public interest, b) the disclosure of this wrongdoing to individuals or entities capable to effect action.

[2] Björn Fasterling & David Lewis, *Leaks, legislation and freedom of speech: How can the law effectively promote public-interest whistleblowing?*, 153 INTERNATIONAL LABOUR REVIEW 71, 73 (2014).

[3] For example, Alexander J. Kasner, *National Security Leaks and Constitutional Duty*, 67 STANFORD LAW REVIEW 241 (2015) appears to be using the terms interchangeably. For the different characterizations of Edward Snowden by news agencies see, Erik Wemple, *Edward Snowden: 'Leaker,' 'source' or 'whistleblower'?,* THE WASHINGTON POST, Jun. 10, 2013.

ethical-political dimension[4] as the disclosure of wrongdoing with the aim to protect the public interest, became disconnected with its legal status in the Whistleblower Protection Act or related statutes, with individuals reporting serious wrongdoing actually being prosecuted as leakers. In order to preserve the ethical core of the term 'whistleblowing' without at the same time rendering meaningless the distinction performed by the law between reporting of wrongdoing that follows the set procedures and public disclosures that do not (e.g., disclosures to the press), an intermediary category needs to be conceptualized. For the sake of clarity, I propose a tripartite terminological distinction: *stricto sensu* whistleblowers, for those who follow the legal procedures and institutional channels to report wrongdoing (in principle internally to the organization or, more rarely, externally to a different agency), *lato sensu* whistleblowers, who also disclose wrongdoing but not through the prescribed channels, but, for instance, to the press, and *leakers*, who disclose classified information that does not involve wrongdoing.

A snapshot of the legal landscape around national security whistleblowing in the U.S. and Europe reveals how limited the protections and guarantees for national security whistleblowers are. Disclosing wrongdoing internally in the national security apparatus is strictly limited, while unauthorized public disclosures of confidential information face, as a rule, criminal sanctions. In the U.S., the reporting mechanisms for *stricto sensu* whistleblowers are too restrictive and convoluted, having as a result that individuals who want to report serious wrongdoing often resort to public disclosures. The Whistleblower Protection Act of 1998 excludes from its protection most government employees that might reasonably be expected to

[4] On the moral justification of whistleblowing either as an extraordinary individual conscientious act of indictment or as an ordinary dutiful organizational practice of answerability that enables the capacity of self-correction of an organization, see Emanuela Ceva & Michele Bocchiola, *Theories of whistleblowing*, 15 PHILOSOPHY COMPASS 563 (2020) See, also Mathieu Bouville, *Whistle-Blowing and Morality*, 81 JOURNAL OF BUSINESS ETHICS 579 (2008), William E. Scheuerman, *Whistleblowing as civil disobedience*, 40 PHILOSOPHY & SOCIAL CRITICISM 609 (2014).

have possession of classified information, such as those of the FBI and the CIA, and does not secure against the revocation of one's security clearance.[5] The Intelligence Community Whistleblower Protection Act of 1998 expanded protection to employees of intelligence agencies and to contractors reporting to the Inspector General, but it limited the subjects to those of 'urgent concern', it did not sufficiently encourage disclosures to Congress or protect against the revocation of security clearance, and, most importantly, it did not provide for judicial review for retaliation resulting from the disclosure.[6] The drawbacks of the Intelligence Authorization Act of 2014 are similar.[7] The Whistleblower Enhancement Act of 2012

[5] In addition, the Act protects the disclosure of any information a government employee reasonably believes constitutes "violation of any law, rule, or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety", but only insofar as it "is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs". Therefore, due to the Espionage Act, which precludes the dissemination of national security information to "anyone not entitled to receive it", and due to the classification system established by executive order, classified information may not be publicly disclosed under any circumstances. The exceptional regime for national security is in tension with the broader spirit of the Act, which aimed at enhancing democratic accountability of public institutions, including even a right to disobey illegal orders. Robert Vaughn rightly points out that the right to disobey illegal orders embodies the same broad concept of loyalty as the protections of whistleblowers: A loyalty that goes beyond the supervisor and the hierarchy to encompass the organization as a whole, the government as a whole, or even the society at large, ROBERT G. VAUGHN, WHISTLEBLOWER PROTECTION AND THE CHALLENGE TO PUBLIC EMPLOYMENT LAW (Marilyn Pittard & Phillipa Weeks eds. 2011) Federal employees covered by the statute may disclose wrongdoing that involves classified information to the Inspector General or the Special Counsel, as no such prohibition is listed. This information in turn has to be transmitted to the National Security Advisor and the House and Senate Permanent Select Committees on Intelligence, see 5 U.S.C § 2302(b)(8)(B) and 5 U.S.C § 1213(j).

[6] Unlike the WPA, no explicit mechanism for remedy in the cases of retaliation resulting from disclosures is provided. On the contrary, the actions of the Inspector General regarding the evaluation of a disclosure is not subject to judicial review, 50 U.S.C § 3033k(5)(F).

[7] Even though the Act eliminates the need for 'urgent concern' for disclosures and it permits disclosure to a number of instances beyond the Inspector General, including the Director of National Intelligence and a congressional intelligence committee, it still does not allow for judicial review and it does not include specific procedures whistleblowers may use to utilize their rights, 50 U.S.C § 3234(d).

eventually excluded national security employees and contractors,[8] while the Presidential Policy Directive 19 created a complicated internal mechanism, which grants agencies the final word in resisting a disclosure and which provided no remedy to the retaliated against employee.[9] These mechanisms, as Stephen Vladeck correctly points out, will be the *least* effective when whistleblowing is *most* important, namely in accountability leaks, where the unlawful secret was known and perpetrated by the top of the organizational hierarchy.[10] At the same time, the government enjoys a wide discretion for the criminal prosecution of *lato sensu* whistleblowers (those who disclose wrongdoing publicly) through the Espionage Act. The statute applies in the case of disclosure of information relating to national defence "to anyone not entitled to receive it".[11] This makes disclosures to the press punishable in the category of espionage, considering that "anyone not entitled to receive it" applies to whoever is not authorized according to the classification system.

In Europe the situation is not very different. In the UK, the Official Secrets Act has a broad scope, as it is aimed both at government employees and anyone else who might possess classified information. Members of the security and intelligence agencies who make an unauthorized disclosure are liable to criminal sanctions regardless of whether their disclosure was harmful to national security,[12] while other government employees or even journalists may

[8] See, Executive Office of the President, Statement of Administration Policy: H.R. 985 - Whistleblower Protection Enhancement Act of 2007 (2007).

[9] The Directive, by making clear that it "does not create any right or benefit, substantive or procedural, enforceable in law or equity by any party against the United States", restricts itself to an internal review process implemented by the agencies themselves, 5 U.S.C § 2302.

[10] Stephen I. Vladeck, *The Espionage Act and National Security Whistleblowing After Garcetti*, 57 AMERICAN UNIVERSITY LAW REVIEW 1531, 1544 (2008).

[11] 18 U.S.C. § 793(d), (e).

[12] Official Secrets Act 1989 s1(1). This indicates that the core of the criminalized behaviour is the betrayal of trust, rather than the risk to national security, see *R v. Shayler* [2002] UKHL 11, [2002] 2 WLR 754 [11, citing white paper cm 408, 41].

be penalized only when they make a 'damaging disclosure'.[13] National security whistleblowers are also excluded from the Public Interest Disclosure Act that protects other whistleblowers and the only route to a protected disclosure is through previous authorization.[14] In France, the unauthorized disclosure of classified information, regardless of its damaging nature, is a crime with severe sanctions under the Penal Code, while public employees are also bound by the obligation of discretion, a violation of which leads to disciplinary sanctions.[15] Once more, no institutionalized channels of disclosure or framework for protection exists for whistleblowers, who are not immunized against criminal or disciplinary sanctions.[16]

However, it can hardly be argued that national security is "a system of organizations and institutions, subject to all the imperfections and failures of all other organizations".[17] As a result, accountability mechanisms are essential within national security, as within any other organization. This warns against government opaqueness, inviting instead for 'democratic secrecy'. It is inconsistent with principles of procedural legitimacy and the Rule of Law to conceive of national security as a space potentially 'beyond-the-law', where the executive can

[13] Official Secrets Act 1989 s1(3).

[14] Employment rights act 1996, s 193. The Official Secrets Act did not provide for a public interest defence, as such a provision, according to the government, would make it impossible to achieve maximum clarity in the law and its application, *R v. Shayler* [31]. Similarly with the WPA in the United States, this internal process of authorization runs the risk of being the least effective when the abuse disclosed is most crucial. See, also the appellant's contestation in *R v. Shayler* [34] that judicial review "was in practice an unavailable means since private lawyers were not among those to whom disclosure could lawfully be made under section 7(3)(a), and a former member of the service could not be expected to initiate proceedings for judicial review without the benefit of legal advice and assistance".

[15] Code Pénal, art. 410-1, 413-10, 413-11, Loi n° 83-634 du 13 juillet 1983 portant droits et obligations des fonctionnaires, dite loi Le Pors, art. 26.

[16] Two recent attempts to institutionalize some level of protection for national security whistleblowers (Loi relative au renseignement [Intelligence Act] and Loi relative à la transparence [Transparency Act]) were both not successful.

[17] Yochai Benkler, *A Public Accountability Defense For National Security Leakers and Whistleblowers*, 8 HARVARD LAW AND POLICY REVIEW 281, 284 (2014).

make evaluations and decisions based on self-developed criteria that do not have at least indirect democratic validation. According to Dennis Thompson's well-known maxim: "secrecy is justifiable only if it is actually justified in a process that itself is not secret. First-order secrecy (in a process or about a policy) requires second-order publicity (about the decision to make the process or policy secret)".[18] Indeed, government secrecy must be 'shallow', in the sense that citizens should be aware of the existence of a secret, even if the precise information is not known to them (it is thus a known-unknown), as opposed to deep secrecy (an unknown-unknown), where even the existence of the secret is hidden.[19] Shallow (or, rather, legitimate) secrecy can be achieved, for example, through the prevention of over-classification,[20] as well as through the establishment of systems of internal and external reporting of wrongdoing, involving inter-agency and inter-branch coordination. Mechanisms of protection for *stricto sensu* whistleblowing could be important in that regard, especially if accompanied with procedural rights and with the possibility of judicial review for retaliation arising from the reporting. Such legislative reform would be, of course, context-specific, taking into

[18] Dennis F Thompson, *Democratic Secrecy*, 114 POLITICAL SCIENCE QUARTERLY 181, 185 (1999).

[19] AMY GUTMANN & DENNIS F THOMPSON, DEMOCRACY AND DISAGREEMENT 121 (1996). According to David Pozen's elaborate definition, "a government secret is deep if a small group of similarly situated officials conceals its existence from the public and from other officials, such that the outsiders' ignorance precludes them from learning about, checking, or influencing the keepers' use of the information. A state secret is shallow if ordinary citizens understand they are being denied relevant information and have some ability to estimate its content". David Pozen, *Deep Secrecy*, 62 STANFORD LAW REVIEW 257, 274 (2010)

[20] Classification may conceal administrative failures or violations of the law, despite the relevant prohibition of classification for such purposes (Executive Order 13526, sec. 1.7[a]), ELIZABETH GOITEIN & David M. Shapiro, REDUCING OVERCLASSIFICATION THROUGH ACCOUNTABILITY (2011) The courts, convinced by the decision of the executive to classify the information or by the argument that they lack the expertise to judge if the information was rightly withheld from the public, show deference to the executive and do not challenge classification decisions, David McCraw & Stephen Gikow, *The End to an Unspoken Bargain?: National Security and Leaks in a Post-Pentagon Papers World*, 48 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW 473, 500 (2013). The lack of a formal legal procedure to challenge undue secrecy results in an increase of *lato sensu* whistleblowing instances.

consideration existing institutional formations.[21] A contemporary example in the direction of external reporting and inter-branch coordination can be drawn from Ireland's Protected Disclosures Act of 2014, which allows for a disclosure to be made to a judge appointed by the Prime Minister, who may refer the information for consideration to the relevant public office.

However, reiterating Vladeck's point, designated reporting mechanisms will encounter structural obstacles in becoming meaningful in situations of exceeding gravity. When disclosures expose systemic abuse and lack of accountability to the highest degree, perpetrated from those highest in hierarchy, it is might be unrealistic to expect from a system of internal

[21] For example, in the U.S., suggestions for reform have ranged from amending the Espionage Act in order to preclude prosecution for those who leak information to the media, to a call for an equivalent treatment of national security whistleblowers to other types of federal whistleblowers regarding the procedural and substantive remedies for retaliation, to timid efforts to introduce a 'three-tiered system' whereby protection is granted if the whistleblower tried to comply to the ICWPA and only leaked information to the press as a last resort. See, Josh Zeman, *"A Slender Reed Upon Which to Rely": Amending the Espionage Act to Protect Whistleblowers*, 61 WAYNE LAW REVIEW 149 (2015), Richard Moberly, *Whistleblowers and the Obama Presidency: The National Security Dilemma*, 16 EMPLOYEE RIGHTS AND EMPLOYMENT POLICY JOURNAL 51, 130 (2012) Michael P. Scharf & Colin T. McLaughlin, *On Terrorism and Whistleblowing*, 38 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 567, 579-580 (2007). One way to keep the national security system in check would be through Congress, which could be a recipient of disclosures, as was for example suggested in the Federal Employee Protection of Disclosures Act of 2005 or in the original Whistleblower Enhancement Act of 2007. Unlike the provisions of the Intelligence Authorization Act of 2014, reforms in favor of whistleblower protection should be accompanied with procedural rights regarding their utilization.

In the UK, it has been suggested that a recipient of disclosures could be the Intelligence and Security Committee (ISC) that oversees the work of intelligence agencies. Instead of being limited to a post facto review of events, the ISC could develop into a whistleblowing mechanism, ASHLEY SAVAGE, LEAKS, WHISTLEBLOWING AND THE PUBLIC INTEREST: THE LAW OF UNAUTHORISED DISCLOSURES (2016).

In France, the initial provision within the *Loi relative au renseignement* (2015) regarding the reporting to the Commission de Contrôle des Activités de Renseignement (CNCTR) of violations of privacy was a step in a good direction. The ample use of independent administrative authorities in regulation in France (for example the CNCTR and the Commission consultative du secret de la Défense nationale – CCSDN) indicates that this structure could also function as a recipient of disclosures in the public interest.

reporting to fulfil its promise of accountability.[22] A further step in the direction of an institutional redesign of democratic secrecy, and the main point of this article, is to expand freedom of speech rights for whistleblowers who disclosed to the press when internal means fail them or are bound to fail them. The constitutional, under conditions, protection of public disclosures against criminal sanctions could then constitute the ultimate safety valve for maintaining the democratic character of secrecy.

In Part II, I frame the constitutional debate, presenting the arguments against and in favor of some level of protection for *lato sensu* whistleblowers. I also highlight the social value of whistleblowing as a counter-institution against the expansion of rationalities of the national security system. This makes the conflict over whistleblowing not about the extent of subjective liberties of the whistleblowers themselves, but about democratic governance and democratic control of security politics more broadly. In Part III, I analyse the current balancing exercises undertaken by courts in the U.S. and the ECtHR. The comparative examination of case law indicates that whistleblowing in government is conceptualized as a conflict between subjective rights and public interest. In the U.S., a series of constitutional cases, including *Pickering, Connick, Garcetti,* and *Lane*, concretized a balancing test, which is nevertheless not applied for national security employees. The focus on the subjective liberty – freedom of speech –, rather than on the social value of whistleblowing, informs this restrictive idea of balancing. On the other hand, the ECtHR, after establishing a set of criteria for the resolution of the conflict between the duty of loyalty and freedom of expression in *Guja v. Moldova*, has progressively been placing increasing emphasis on the social value of public disclosures. This is indicated by

[22] In addition, there is a diffused sense of pessimism regarding the potential for legislative reform. According to Mary-Rose Papandrea, "given that statutory reform is not likely to occur in the near future, it is essential for courts to rethink the First Amendment implications of leak prosecutions", Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 BOSTON UNIVERSITY LAW REVIEW 449, 539 (2014).

the shift of focus to the criterion of 'public interest' of the disclosed information, as well as by the slight subsiding of the most clearly subjective criterion, the good faith of the whistleblower. The developments of the case law of the ECtHR, even if not conclusive of a general distancing from the subjective liberties paradigm, fuel my suggestion for an institutional model of whistleblowing protection, presented in Part IV. This model aspires to protect unauthorized disclosures against criminal sanctions when such disclosures reveal illegitimate secrecy. At the same time, legitimate state secrecy should be protected through – primarily employment-related and only exceptionally criminal – sanctions to leakers. In Part V, I offer some concluding observations and I examine some of the limits of my proposed institutional model of whistleblowing protection.

II. Framing the constitutional debate: The social value of whistleblowing

To the extent they reveal confidential information, it is contentious whether public interest disclosures related to wrongdoing within national security merit protection. The first and most straightforward argument against any form of rights-based protection for national security whistleblowers is that their disclosures do not constitute speech. The classified information these disclosures involve is government property and, therefore, they amount to theft.[23] This view gained strength in the U.S. following the decision of the U.S. Court of Appeals *United*

[23] This was the position of the US administration in *United States v. Rosen*, 445 F. Supp.2d 602 (2006), referring to the Morison case. *See*, GOVERNMENT'S SUPPLEMENTAL RESPONSE TO DEFENDANT'S MOTION TO DISMISS THE SUPERSEDING INDICTMENT 22, 29-30 (2006).

States v. Morison.[24] The jurisprudential uncertainty in what constitutes 'speech' makes this argument plausible.[25]

Another argument is that officials of the national security apparatus have waived their freedom of speech rights and that they are bound by professional obligation not to disclose information they acquire while performing their duties.[26] In other words, the employee engages in a relationship of trust with the government based on the premise of nondisclosure, an obligation he or she wilfully accepts when signing a nondisclosure agreement. In the famous case *Snepp v. United States*, the Supreme Court upheld a Non-Disclosure Agreement prohibiting Snepp, a former CIA agent, from publishing anything related to the CIA without prepublication clearance.[27] In the U.S., the signing of a contract is significant, considering that constitutional rights may be waived voluntarily.[28]

The 'executive discretion approach'[29] toward freedom of speech is underpinned by the premise of the exclusive legitimacy of the executive branch in steering public policy and

[24] *United States v. Morison*, 844 F.2d 1057, 1068-1070 (1988).

[25] For example the US Supreme Court has not consistently favored one legal theory over another. *See*, Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARVARD LAW REVIEW 1765 (2004).

[26] *United States v. Aguilar* 515 U.S. 593, 606 (1995). A concise summary of this position was pronounced in the case *Boehner v. McDermott* 484 F.3d 573, 579 (2007). In France, *see* CE, 5 février 2014, n° 371396, where the Conseil supported the view that only the hierarchical authority can relieve a public employee from the obligation of professional discretion.

[27] *Snepp v. United States* 444 U.S. 507 (1980).

[28] *See, Johnson v. Zerbst* 304 U.S. 458 (1938) on the waiver of a right to counsel.

[29] Heidi Kitrosser, *Leak Prosecutions and the First Amendment: New Developments and a Closer Look at the Feasibility of Protecting Leakers*, 56 WILLIAM & MARY LAW REVIEW 1221, 1238 (2015). For a discussion of the structural issue of the legitimacy of the executive to keep secrets and withhold information, see also JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2006), William G. Weaver & Robert M. Palitto, *State Secrets and Executive Power*, 120 POLITICAL SCIENCE QUARTERLY 85 (2005), Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM LAW REVIEW 1931 (2007), Vicki Divoll, *The "Full Access Doctrine": Congress's Constitutional Entitlement to National Security Information from the Executive*, 34 HARVARD JOURNAL OF LAW & PUBLIC POLICY 493 (2011).

determining the public interest. Rahul Sagar supports that "officials, reporters, and publishers do not have the knowledge or the legitimacy to decide whether unauthorized disclosures are in the public interest".[30] He concedes that these individuals might, in the case of serious wrongdoing, be justified to disobey laws prohibiting unauthorized disclosures and yet, this 'justified' action should not be legally condoned. The justification must remain at the level of morality, because whistleblowers cannot know the extent to which their disclosures will harm national security and they cannot claim to act on behalf of the citizenry, as they are not elected.[31] This nexus of lack of knowledge and lack of legitimacy makes a powerful argument as it posits unauthorized disclosures in opposition to the principles and institutions of an organised polity, the rule of law, and democratic self-governance.[32]

The argument referring to the lack of knowledge of whistleblowers reflects the contemporary trust in expertise as a response to the complexity of the world.[33] Whistleblowers cannot properly estimate the harm their disclosures might cause to national security.[34] Moreover, whistleblowers, not being elected, cannot determine and decide the content of the public interest. In this sense, this position resembles the positivist view, according to which the 'exact' meaning of a norm is a fiction, such that no method of interpretation can be decisive from a scientific point view.[35] It is then the interpretation by the institutional instance of

[30] RAHUL SAGAR, SECRETS AND LEAKS: THE DILEMMA OF STATE SECRECY 126 (2013). Similarly, *see* Harry Kalven, JR, *The Supreme Court 1970 Term*, 85 HARVARD LAW REVIEW 3, 211 (1971).

[31] SAGAR, *supra* 30, at 13

[32] According to GABRIEL SCHOENFELD, NECESSARY SECRETS: NATIONAL SECURITY, THE MEDIA, AND THE RULE OF LAW 187 (2011), Ellsberg's revelations constituted an 'assault on democratic self-governance itself'.

[33] *See*, Aziz Rana, *Who Decides on Security?*, 44 CONNECTICUT LAW REVIEW 1417 (2012).

[34] According to Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARVARD LAW AND POLICY REVIEW 185, 194 (2007), public employees have no "First Amendment right to second-guess the classification system".

[35] PAUL AMSELEK, L'INTERPRÉTATION DANS LA THÉORIE PURE DU DROIT DE HANS KELSEN 43 (Stéphane Beaulac & Mathieu Devinat eds. 2011).

application that has an authentic character and makes law.[36] Similarly, whistleblowers cannot 'interpret' the public interest and cannot assess a program's legality. Furthermore, it is suggested that the whistleblower, even if he or she is right about the illegality of the reported conduct, does not understand the wider context of the disclosure.[37] This is an example of the application of the 'mosaic theory'. According to this theory, information that may at first appear insignificant becomes significant when combined with other information, similarly to the pieces of a mosaic. The theory has been supported by US case law[38] and it is most often used as a justification for the government's withholding of information from the public.[39] Whistleblowers may therefore consider their disclosures to be non-detrimental and yet, if they are seen in their larger context, they might be causing serious harm to national security interests.

The 'speaker protective approach'[40] tries to debunk these arguments. According to Robert Post, freedom of speech analysis becomes relevant when the values served by its constitutional protection are implicated.[41] These values do not correspond to abstract acts of communication,

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[36] HANS KELSEN, THÉORIE PURE DU DROIT 460 (1962). *See*, also MICHEL TROPER, LE PROBLÈME DE L'INTERPRÉTATION ET LA THÉORIE DE LA SUPRALÉGALITÉ CONSTITUTIONNELLE 138 (Marcel Waline ed. 1975)

[37] *Id.* at 117.

[38] Adherence to the mosaic theory by the courts results in deference to state privilege. *See*, US District Court Columbia. 598 F.2d 1 and *Snepp*, 444 U.S. 507 at 512.US Supreme Court. 444 U.S. 507.

[39] Jameel Jaffer, *The Mosaic Theory*, 77 SOCIAL RESEARCH 873 (2010). *See*, also David Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE LAW JOURNAL 628 (2005), David Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE LAW JOURNAL 628 (2005).

[40] Kitrosser, *supra* 29 at 1243. See, also Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 UNIVERSITY OF ILLINOIS LAW REVIEW 881 (2008), Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 JOURNAL OF NATIONAL SECURITY LAW AND POLICY 409 (2013), Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 INDIANA LAW JOURNAL 233 (2008), Mary-Rose Papandrea, *The Publication of National Security Information in the Digital Age*, 5 JOURNAL OF NATIONAL SECURITY LAW AND POLICY 119 (2011).

[41] Robert C. Post, *Recuperating First Amendment Doctrine'*, 47 STANFORD LAW REVIEW 1249, 1255 (1995).

but to social contexts that render them meaningful. It is then difficult to argue that national security whistleblowing does not constitute speech, when it relates directly to the operations of government and its possible abuses of power, fitting into what Cass Sunstein names 'the Jeffersonian conception of freedom of speech'.[42]

The arguments against the waiver justification focus on the structural consequences of the governmental imposition of curtailed speech rights. Free speech does not exist solely to protect individual autonomy, but also to guarantee a type of liberal government that allows for deliberative processes of the wider public.[43] Whistleblowing is meant to uncover wrongdoing and illegality. If the utmost aim of the secrecy agreement is to immunize the government against such phenomena, then the purpose of the agreements itself is unconstitutional. In any case, confidentiality agreements, according to the law of contracts, cannot be enforced if they violate public policy.[44] As far as it concerns their relationship of trust to the government, employees have overlapping obligations, not only toward their organization, but also to society at large.[45]

A similar position on the structural value of freedom of speech is employed in the counter-arguments against the lack of legitimacy of the whistleblowers. According to Heidi Kitrosser, "First Amendment rights are grounded not only in their individual interests, but also in their societal value as sources of information".[46] A total restriction of public disclosures would

[42] Cass R. Sunstein, *Government Control of Information*, 74 CALIFORNIA LAW REVIEW 889, 915 (1986). For the democratic self-government theory of freedom of speech, *see* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM (1960).

[43] *Id*. at 915.

[44] Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 BOSTON UNIVERSITY LAW REVIEW 449, 520 (2014).

[45] Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CALIFORNIA LAW REVIEW 433 (2009).

[46] *Id.* at 1244.

discourage and prevent disclosures even of vital importance for the public interest.[47] The 'speaker protective approach' underlines that unchecked power over the information flow and unfettered discretion on what is classified would be in disjunction with the very idea of the Constitution as a limitation to political power.[48] Classification by itself is not a sufficient reason for weaker freedom of speech rights. At least, the argument goes, there must be some balancing between the protected interest of national security and the value of the disclosure for democracy and public deliberation. It is, in my opinion, this line of thinking that also warns against an application of the 'mosaic theory': If there is a damage test to decide whether the unauthorized disclosure should be criminally prosecuted (as is for example the case in the UK Official Secrets Act for government employees other than the ones in intelligence and security agencies) the mosaic theory will almost always give a positive answer. This is because it does not require a necessary connection between the cause (the disclosure) and the effect (the harm) but it deems as sufficient a general connection of events that does not have to be proved and that can be claimed at the discretion of the executive branch. Only the supposition of someone ('a' terrorist) who has a broader overview and who can put things in context to the expense of national security interests is enough to prevent the disclosure.[49] The problem with the mosaic theory is not that it is not true; on the contrary, precisely because it is true all the time (there always might be a distant connection between seemingly unconnected events) it ceases to be a convincing reason for which to prevent a disclosure. Otherwise, all disclosures, even

[47] Richard Moberly, *Whistleblowers and the Obama Presidency: The National Security Dilemma*, 16 EMPLOYEE RIGHTS AND EMPLOYMENT POLICY JOURNAL 51, 137 (2012); Michael P. Scharf & Colin T. McLaughlin, *On Terrorism and Whistleblowing*, 38 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 567, 579-580 (2007).

[48] Kitrosser, *supra 29* at 1243-1244.

[49] Jaffer, *supra* 39 at 874, citing US District Court Columbia. 217 F.Supp.2d 58. *See*, also US District Court Columbia. 265 F.Supp.2d 20.

authorized, would have to be reconsidered as only complete opacity would prevent the mosaic effect.

Although the social value of whistleblowing is recognized by the 'speaker protective approach', both the arguments in favor and against expanding freedom of speech rights to *lato sensu* whistleblowers (and leakers) are framed within the conceptualization of the conflict of a subjective right – the freedom of speech of the whistleblower, with a legitimate state interest – national security. This approach underestimates the social function of human rights as mechanisms of protection and stabilization of a functionally differentiated society.[50] Human rights need to be understood not solely as individual entitlements, but rather as social and legal counter-institutions against the expansive tendencies of social systems.[51] According to such a system-theoretical perspective, human rights are not about intersubjective relations but about "the dangers to the integrity of institutions, persons and individuals that are created by anonymous communicative matrices".[52] They protect society against the risk that social systems – like the economy, national security, etc. – expand to the point of englobing other functional systems, thus dedifferentiating society and facilitating concentrations of power. In that direction, Andreas Fischer-Lescano correctly points out that the conflict over whistleblowing should not be conceived as concerning mostly subjective liberties – that would

[50] NIKLAS LUHMANN, GRUNDRECHTE ALS INSTITUTION: EIN BEITRAG ZUR POLITISCHEN SOZIOLOGIE (1974).

[51] ANDREAS FISCHER-LESCANO, PUTTING PROPORTIONALITY IN PROPORTION: WHISTLEBLOWING IN TRANSNATIONAL LAW 338 (Blome, Kerstin, et al ed. 2016).

[52] Gunther Teubner, *Transnational Fundamental Rights: Horizontal Effect?*, 40 NETHERLANDS JOURNAL OF LEGAL PHILOSOPHY 191, 210 (2011). According to Teubner, "The justice of human rights can, then, at best be formulated negatively. It is aimed at removing unjust situations, not creating just ones. It is only the counter-principle to communicative violations of body and soul, a protest against inhumanities of communication, without it ever being possible to say positively what the conditions of 'humanly just' communication might be", Gunther Teubner, *The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors*, 69 MODERN LAW REVIEW 327 (2006).

be an oversimplification – but instead as a conflict over impersonal autonomous spaces.[53] It is essentially an institutional conflict the resolution of which has profound impact on the functional logic of democratic governance. Protection of whistleblowers should then be understood as a legal counter-institution against the expansive tendencies of the national security system. Fischer-Lescano insists that "nothing less is at stake than society's ability to regain control of security policy".[54]

Furthermore, phrasing the conflict as an issue of subjective liberties complicates the question of proportionality and balancing. Assuming the balance is between the subjective right of the employee to exercise freedom of expression and the legitimate and protected public interest of national security would risk resolving the conflict in an over-deferential way for the executive. The proportionality doctrine, as it has been developed by jurisprudence and case law in different jurisdictions,[55] holds that a law that restricts freedom of speech, such as the laws that punish unauthorized disclosures of information for national security employees, can only be constitutional insofar as it is proportional. In general terms, it is proportional if a) it is meant to achieve a proper purpose, b) if the measures taken to achieve this purpose are both rational and necessary, and c) if the limiting of the constitutional right is *stricto sensu* proportional.[56]

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[53] *Id.* at 327. *See*, also the idea of a 'justification defense', Eric R. Boot, *No Right to Classified Public Whistleblowing*, 31 RATIO JURIS 70 (2018).

[54] Fischer-Lescano, *supra* 51, at 339.

[55] For the comparative historical origins of proportionality, see M. Cohen-Eliya & I. Porat, *American balancing and German proportionality: The historical origins*, 8 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 263 (2010) See, also Eric Engle, *The history of the general principle of proportionality: an overview*, 10 DARTMOUTH LAW JOURNAL 1 (2012).

[56] AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 223 (2011). For an overview of how the regional tribunals of ECtHR, the Organization of American States (OAS) organs, and the African Commission on Human and Peoples' Rights apply the principle of proportionality using the three-part test, YUTAKA ARAI-TAKAHASHI, PROPORTIONALITY (Dinah Shelton ed. 2015) See, also Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 72 (2008), Charles-Maxime Panaccio, *In Defence of Two-Step Balancing and Proportionality in Rights Adjudication*, 24 CANADIAN JOURNAL OF LAW & JURISPRUDENCE 109 (2011).

Assuming for the moment that a law meets the first two requirements, then what remains to be balanced in the final test of proportionality *stricto sensu* is whether the benefits gained by the implementation of the law outweigh the harm caused to the constitutional right.[57] According to Aharon Barak, the normative rule that allows for this balancing between benefits and harms should be determined by the social importance of the benefits of the law in question and the social importance of the particular, *in concreto* harm inflicted upon a constitutional right.[58] The weight of the limitation being determined in context, it could be speculated that the harm to freedom of expression will more than likely be presumed to weigh less than the benefit for the public interest of national security. That is because when the subjective, personal interest of the employee to speak up and comment on public policy is taken into consideration, then the harm to limiting this right is restricted to one particular individual and his or her 'views' and 'opinions'. Such an approach undermines the true value of whistleblowing, which is to be a trigger of accountability, sparking and informing public debate and allowing citizens to exercise their communicative power and freedom in a meaningful way. Public disclosures are less about the subjective right of the employee to speak up and more about the collective right of the citizenry to know about abuses of power and to control security policy.

How can this suggested institutional – rather than subjective – framing of the conflict over whistleblowing be legally articulated in a way that would also allow for a better application of the principle of proportionality? Before answering this question, I will examine in detail how the balancing exercise between employee speech and national security is currently concretised in the 'subjective liberties paradigm' of the U.S. and the ECtHR.

[57] *Id.* at 340. See, also ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 102 (2002), according to whom "the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other".

[58] AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (2011), at 349.

III. Balancing employee speech and national security in the subjective liberties paradigm

The U.S.

The seminal case establishing the basis upon which the modern American constitutional doctrine of public employee speech was constructed is *Pickering v. Board of Education* of 1968. The case concerned a letter of Mr. Pickering, a school teacher, to the press, complaining about the board's policies on allocation of funds, which triggered the termination of employment of Mr. Pickering. In assessing whether the letter constituted protected free speech, the Supreme Court introduced a balancing test in order to achieve "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees".[59] This balancing test was conceived as flexible, depending on the particulars of each case, but it was dependent on the speech addressing questions of public interest. According to the Court, "teachers may not constitutionally be compelled to relinquish First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with operation of public schools in which they work".[60] The ruling of the Court seemed to suggest that the protection granted to the teacher was connected to the speech not being a product of the employment relationship and that, in fact, any citizen could have engaged in this form of criticism.[61]

[59] *Pickering v. Board of Education of Twp. High Sch. Dist. 205 Will Cty. Illinois* 391 U.S. 563, 568 (1968).

[60] *Id.* at 563.

[61] "However, in a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be", ibid [574]. The argument that the employee was actually speaking as a citizen and not within the duties of employment was put forward by Justice Kennedy in *Garcetti v. Ceballos* 547 U.S. 410, [2006] (US Supreme Court) [423-424], suggesting that

The Pickering standard was further refined in the following years. The case *Connick v. Myers* in 1983, regarding the termination of employment of Ms. Myers for preparing a questionnaire for her colleagues' views on the transfer policy, which was seen as insubordination, established that "whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record".[62] This emphasis on the context and the role of the employee, adding one more threshold in the quest for constitutional protection, has been described in the literature as a step backwards for civil liberties, when compared to *Pickering*.[63] Further interrogations into the question of the freedom of speech of public employees led either to reiterations[64] of the *Pickering-Connick* balancing doctrine or to clarifications.[65] The resulting balancing test consists of three prongs: A) The speech of the employee as a *citizen*, addressing a matter of public concern, B) a *stricto sensu* balancing on whether the interest of the employee to comment upon the topic outweighs the interest of the state in guaranteeing the efficiency of its services, and C) a requirement that the protected expression was a substantial or motivating factor in the adverse employment decision.[66] This balancing test suggests that revelations of whistleblowers should be covered by the First Amendment. Yet, the courts have not consistently ruled in favor of whistleblowing constituting 'public concern'. This is usually the

Ceballos did not represent such a remarkable shift from past case law. For a contrary interpretation of the Pickering ruling, see Beth A. Roesler, *Garcetti v. Ceballos: judicially muzzling the voices of public sector employees*, 53 SOUTH DAKOTA LAW REVIEW 397, 408-409 (2008).

[62] *Connick v. Myers* 461 U.S. 138, 147-148 (1983).

[63] Jessica Reed, *From Pickering to Ceballos: The Demise of the Public Employee Free Speech Doctrine*, 11 NEW YORK CITY LAW REVIEW 95, 103 (2007); Jeffrey A. Shooman, *The Speech of Public Employees Outside the Workplace: Towards a New Framework*, 36 SETON HALL LAW REVIEW 1341, 1363 (2006), calling it a 'doctrinal failure'.

[64] *Waters v. Churchill* 511 U.S. 661, 683 (1994)

[65] *See, Shands v. City of Kennett* 993 F.2d 1337, 1344 (1993), for the elaboration of specific factors, such as the degree of public interest, to be calculated for the specification of the balancing test.

[66] *Mt Healthy City School Dist. Bd. of Education v. Doyle* 429 US 274, 283-284 (1977).

case when the employee seems to have an ulterior personal motive for the revelation of the wrongdoing.[67]

The case *Garcetti v. Ceballos* (2006), concerning the retaliation against a deputy district attorney – Ceballos – for exposing government misconduct in a memorandum and decried as 'the worst whistleblower decision in five decades',[68] marked a major point in the development of the doctrine, by specifying when the employee does *not* speak as a citizen and therefore the *stricto sensu* balancing exercise is not necessary. The Court held that "when public employees make statements *pursuant to their official duties*, they are not speaking as citizens for First Amendment purposes"[69], thus significantly narrowing the scope of First Amendment protection for employees, especially for whistleblowers, who might often expose wrongdoing pursuant to their official duties. The majority, in its effort to safeguard the government's control over employees' speech and to prevent a 'constitutionalization' of employee grievances,[70] contented itself in the whistleblowing protection laws and labor codes as the means to encourage the exposure of wrongdoing and the protection of the employees.[71] According to the majority, restricting the speech which "owes its existence to a public employee's professional responsibilities"[72] does not violate the First Amendment, because the employee was not acting as a citizen. This indicates a further distancing from the *content* of the speech toward the role

[67] *See,* for example, *Barkoo v. Melby* 901 F2d 613 (1990). For a contrary example, where the personal interest was not deemed enough to disqualify an employee from freedom of speech protection, *Breuer v. Hart* 909 F2d 1035 (1990).

[68] David G Savage, 'Supreme Court Limits Free Speech in Workplace for Public Employees' *Seattle Times* (31 May 2006), A1.

[69] *Garcetti v. Ceballos* 547 U.S. 410, 421 (2006).

[70] *Id.* at 418-419.

[71] *Id.* at 425. On the contrary, according to Judge Souter dissenting, "statutory whistle-blower definitions and protections add up to a patchwork, not a showing that worries may be remitted to legislatures for relief", at 440.

[72] *Id.* at 421.

and nature of the *speaker*.[73] The Court's subjectivist approach can lead to a chilling effect against potential exposures of wrongdoing within the working place, incentivizing instead external disclosures.[74] The remaining external leeway has been brought up as an argument in favor of *Garcetti*, arguing that the decision does not discourage whistleblowing.[75] This position undermines the value of freedom of speech as an internal controlling mechanism, important for the entirety of the constitutional structure. Kitrosser correctly points out that *Garcetti*'s rule is at odds "with the notion that public employee speech has special value because of the distinctive insights and expertise it offers".[76] The 'special value' rationale for the protection of employees' freedom of speech corresponds to my suggestion of an institutional reading of the conflict over whistleblowing. In that sense, *Garcetti* failed to consider that a facet of employees' freedom of speech is its connection to a constitutional design of checks, limitations of executive action, and rule of law.[77]

A question that arose after Garcetti, particularly relevant to whistleblowers, was whether *all* speech that "owes its existence" to public employment is unprotected by the First Amendment, meaning also speech that simply conveys information acquired by virtue of one's employment.[78] In the 2014 case *Lane v. Franks*, the Court rejected this claim by evoking the

[73] *Id.* at 417-418.

[74] *See*, *Id.* at 427 (Stevens, J., dissenting).

[75] Kermit I. Roosevelt, *Not as Bad as You Think: Why Garcetti v. Ceballos Makes Sense'*, 14 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 631, 659 (2012).

[76] Heidi Kitrosser, *The Special Value of Public Employee Speech* THE SUPREME COURT REVIEW 301, 302 (2015).

[77] *See*, Kitrosser, *supra* 29, at 1244–46; Lobel, *supra* 45, at 451-456.

[78] This was the part of the argumentation in lower courts. Indicatively, see *Lane v. Central Alabama Community College* 523 Fed Appx 709, [2013] (US Court of Appeals, Eleventh Circuit) [712], *Abdur-Rahman v Walker* 567 F3d 1278, [2009] (US Court of Appeals, Eleventh Circuit) [1279, 1283]. In addition, whether the knowledge conveyed was gained through the employment factored in the argumentation, even if the outcome of the examination was positive for employee. For example, *McGunigle v. City of Quincy* 944 F. Supp. 2d 113, [2013] (US District Court Massachusetts) [122], even though the claim was dismissed at appellate because of stage c) of the balancing, i.e. causal connection between his speech and the adverse employment actions.

"special value" of employees' speech for societal interests.[79] The Court held that the speech necessary to prosecute corruption by public officials must be protected by the First Amendment,[80] stressing that "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee – rather than citizen – speech".[81] However, the fact that the case concerned specifically a subpoenaed testimony led to *Lane* being subject to a narrow reading.[82] Even if the post-*Lane* case law of lower courts is often contradictory as to whether speech that conveys information learned during the employment constitutes protected speech or not, the exposure of government misconduct seems to be a factor in favor of a broad reading of *Lane*, protective of employees-whistleblowers beyond the narrow scope of testimony.[83]

Despite the advancement of the cause of whistleblowers by *Lane*, there are still obstacles that have to be overcome in order for their speech to be protected under the First Amendment: A) Employees have to be speaking as citizens, which as I showed remains a point of contestation. The major post-*Lane* argumentation is that they do speak as citizens when they uncover wrongdoing, unless the speech at issue is itself ordinarily within the scope of their duties (for example if they are Detectives, etc.). B) The issue has to be of public concern, which may in general be the rule for whistleblowing cases, but it is also not irrefutable, especially if the motive of the whistleblower is taken to be personal grievance. C) Their disclosure must

[79] *Lane v. Franks* 134 S. Ct. 2369, 2373 (2014). The Court had already touched upon the social value of employee speech in previous cases, e.g. *City of San Diego v. Roe* 543 U.S. 77, 82 (2004). *See*, also Justice Souter dissenting, *Garcetti*, 547 U.S. 410 at 431.

[80] *Lane*, 134 S. Ct. 2369 at 2380.

[81] *Id.* at 2379.

[82] The Fifth Circuit, in its determination of whether a police officer's report of wrongdoing was made as from a citizen, argued that speech is not necessarily made 'as a citizen' whenever corruption is involved and cautioned against an expansive reading of Lane, *Gibson v. Kilpatrick* 773 F.3d 661, 669 (2014); *See* also, *Amirault v. City of Malden* 241 F. Supp. 3d 288 (2017).

[83] For example, in *Hunter v. Mocksville, North Carolina* 789 F.3d 389 (2015).

satisfy the Pickering balance, meaning whether the interest of the employee to comment upon the topic outweighs the interest of the state in guaranteeing the efficiency of its services. The Supreme Court has noted that "the interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it".[84]

The balancing test formed by *Pickering*, *Garcetti*, *Lane*, and other decisions, applies in case of civil sanctions. So far, it has not applied to national security employees. Deciding on the case *Snepp v. United States* (1980), concerning the publication – without prior approval – by an agent of a book critical to CIA's activities, which nevertheless did not contain classified information, the Supreme Court held that freedom of speech could not invalidate the non-disclosure agreement, which required prior governmental approval for publication.[85] The *Snepp* case may not be a *lato sensu* whistleblowing case, where wrongdoing or misconduct is brought to the public, but it showcased the limits of the First Amendment as a constitutional defense against national security. The Court accepted that "the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment".[86] Even if it can be conceded that the Court probed the reasonableness of the restriction, it did not examine the potentially opposing interests, as it would if it followed *Pickering*.[87] *Snepp* has been heavily criticized.[88]

As far as criminal sanctions are concerned, the U.S. government has either dismissed or obtained guilty pleas in most of its prosecutions of unauthorized disclosures. The single

[84] *City of San Diego*, 543 U.S. 77 at 82.

[85] *Snepp*, 444 U.S. 507 at 510

[86] *Id.*

[87] James A. Goldston, *A Nation Less Secure: Diminished Public Access to Information*, 21 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW 409, 442 (1986). *See*, also the Court's examination in *McGehee v. Casey* 718 F.2d 1137, 1142-1143 (1983).

[88] Goldston, *supra* 87, at 441-442; Thomas I. Emerson, *National Security and Civil Liberties*, 9 YALE JOURNAL OF INTERNATIONAL LAW 78, 100 (1982); RONALD DWORKIN, A MATTER OF PRINCIPLE (1985) 393.

appellate case on the constitutional protections from prosecution owed to *lato sensu* whistleblowers or leakers is *United States v. Morison* (1988), where Morison's actions of sending top secret intelligence photos to a magazine were characterized as pure theft, not falling within the scope of the First Amendment.[89] According to the Court, the First Amendment cannot be considered as 'asylum' simply because information is transmitted to the press.[90] Nevertheless, it is worth mentioning that the two concurring opinions in Morison did not rule out First Amendment implications, even if they did not explore the topic in depth.[91]

Lower courts have also refused to enter into *Pickering* balancing or any other consideration of First Amendment implications in cases of *lato sensu* whistleblowing or leaking. The U.S. Court of Appeals for the D.C. Circuit, deciding on *Boehner v. McDermott* (2007), stated that "those who accept positions of trust involving a duty not to disclose information they lawfully acquire while performing their responsibilities have no First Amendment right to disclose that information".[92] This statement was repeated in *United States v. Kim*.[93] Kitrosser insightfully points out that this precedent, which traces its roots in *Snepp*, focuses excessively on the 'voluntary' aspect of the assumption of duty to preclude the invocation of freedom of speech. However, public employees do not renounce their citizenship or relinquish their constitutional rights by taking up public employment.[94]

It becomes apparent that national security matters render the invocation of freedom of speech even more difficult than in other sectors of public employment. This development may

[89] *United States v. Morison* 844 F.2d 1057, 1077 (1988), "To use the first amendment for such a purpose [handing confidential information to the press] would be to convert the first amendment into a warrant for thievery".

[90] *Id.* at 1068.

[91] *Id.* at 1081, 1085.

[92] *Boehner v. McDermott* 484 F.3d 573, 579 (2007).

[93] *United States v. Kim* 808 F. Supp. 2d 44, 56-57 (2011).

[94] Kitrosser, *supra* 29, at 1236-1237. *See, Lane*, 134 S. Ct. 2369 at 2377.

be attributed to freedom of speech being confined in a subjectivist reading that foregoes the social value of the information disclosed by the whistleblowers. Before going into my normative framework, it suffices here to say that balancing national security interests with freedom of speech is predicated upon the legitimate character of these interests, which cannot be taken for granted when the disclosures relate to government wrongdoing and misconduct. The subjectivist paradigm focusing on the individual and his or her interest 'to comment upon matters of public concern' risks overlooking the instances where balancing itself is problematic.

The ECtHR

In *Guja v. Moldova* (2008), the ECtHR, the case law of which has quasi-constitutional influence for the application of fundamental rights in the Contracting States, elaborated specific proportionality criteria for employees' freedom of speech. This case involved the dismissal of a public employee from the Prosecutor's Office for the disclosure to the press of two letters that allegedly revealed political interference in pending criminal proceedings related to the parliamentary elections. The application was dismissed on the basis that these letters were internal secret documents, to which the applicant gained access only by virtue of his employment, effectively 'stealing' them, according to the Government.[95] Contrary to this narrative, the applicant claimed the status of a whistleblower acting in good faith and exposing corruption and the lack of independence of the Prosecutor's office.[96]

The Court first stated that the applicant's dismissal amounted to an "interference by public authority" with the right to freedom of expression, as provided under Article 10 of the Convention, since it has been established by the Court that Article 10 applies to the workplace

[95] *Guja v. Moldova* App no 14277/04, 65 (2008).

[96] *Id.* at 60, 61.

and to public employees in particular.[97] The Court then followed the tripartite scrutiny of whether the interference was legitimate or whether it violated the Convention by examining a) whether it was prescribed by law, b) whether it pursued a legitimate aim, and c) whether the interference was necessary in a democratic society. The Court was convinced that the interference was prescribed by law and that it pursued a legitimate aim, i.e. the prevention of disclosure of information received in confidence.[98]

As far as it concerns the condition of the interference being "necessary in a democratic society", the Court referred first to its established case law.[99] It clarified that 'necessary' implies a 'pressing social need', for which the Contracting States enjoy a margin of appreciation but only under European supervision. This supervision consists in not only ascertaining whether the discretion of the state was reasonably exercised, but whether the interference was indeed proportionate and sufficiently justified by national authorities. Civil servants may invoke Article 10, but they are still bound by a duty of loyalty and discretion. How to balance the occasionally conflicting interests of the duty of loyalty and freedom of expression? The Court articulated a list of criteria that should determine whether public disclosures should be protected under freedom of speech:[100]

Reporting to the appropriate channels. The Court prioritizes disclosures to the hierarchical authority or the competent authority, when such a body exists. Disclosures to the press should be the last resort.

Public interest. There is little scope for restrictions on debate on questions of public interest. According to the Court, "in a democratic system, the acts or omissions of government must be

[97] *Id.* at 52, 55, citing *Vogt v. Germany* 21 EHRR 205 (1996).

[98] *Guja*, 14277/04 at 58, 59.

[99] *Id.* at 69; *Jersild v. Denmark* App no 15890/89, 31 (1994); *Hertel v. Switzerland* 59/1997/843/1049, 46 (1998); *Steel & Morris v. United Kingdom* App no 68416/01, 87 (2005).

[100] *Guja*, 14277/04 at 73-78.

subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence".[101]

Authenticity of the disclosed information. Freedom of expression carries duties and responsibilities and any person willing to make a public disclosure should review the information as carefully as possible. The lack of elaboration of this criterion makes it difficult to determine whether it constitutes a 'reasonable belief test' or whether it requires the information to be actually true. The case *Bucur v. Romania* (2013) seems to advocate in favor of the former, rather than the latter, meaning.[102]

Balancing the damage. The Court must weigh the damage suffered by the public authority as a result of the disclosure and determine whether this damage outweighs the public interest in having the information revealed. This represents a *stricto sensu* test of proportionality.

Good faith. The Court correlates the protection of a public employee engaging in public disclosures of government malfeasance or wrongdoing with his or her motivations. Had the individual been motivated by personal interests or private antagonisms, then a strong level of protection is not justified. Instead, the individual must be motivated by the public interest in the disclosure. The individual must have acted in good faith (good faith test) and in the belief that the information was true (reasonable belief test).

Proportionality of the penalty. In case sanctions are imposed, they must be proportional to the offence committed.

In this particular case, the Court determined that these criteria were met, including the *stricto sensu* proportionality test that "the public interest in having information about undue pressure and wrongdoing within the Prosecutor's Office revealed is so important in a

[101] *Id.* at 74.

[102] *Bucur and Toma v. Romania* App no 40238/02, 107 (2013).

democratic society that it outweighed the interest in maintaining public confidence in the Prosecutor General's Office".[103]

However, it is questionable whether the balancing criteria adopted by the Court represent an ideal resolution of the conflict. More specifically, the subjectivist reading of the conflict leads the Court to take into consideration factors of doubtful relevance from the perspective of the legitimate interests truly at stake. In fact, it seems that the Court itself has progressively advanced a more objective-institutional understanding of the conflict of public disclosures of wrongdoing. This has happened by accentuating the importance of the criterion of public interest and by undermining the most clearly subjective criterion, good faith. In several of its decisions on questions of whistleblowing, the Court has advanced a functionalist reading of freedom of expression, balancing the importance of the information for public debate. This highlights the preoccupation of the Court to protect the facets of Article 10 that function as safeguards for democratic deliberation.

The importance the Court attributes to the information being of public interest bridges the case law on whistleblowing with the case law on right to information. The Court establishes a functional reading of the Article 10 in these cases, underlining that what is really being examined is the extent to which the information is important for a deliberating public.[104] The

[103] *Guja,* 14277/04 at 91. It is important to note that the Court has referred to these criteria also in cases involving private employees. In particular, in the case *Heinisch v. Germany* (2011).

[104] *Társaság A Szabadságjogokért (Hungarian Civil Liberties Union) v. Hungary* 53 EHRR 3, [2009] (ECtHR). The Court highlighted that it "has recently advanced towards a broader interpretation of the notion of 'freedom to receive information' and thereby towards the recognition of a right of access to information" [35]. Regarding the identity of the applicant, the Court is satisfied that the purpose of the applicant's activities was to inform public debate. The functional reading of the right to information, meaning its connection with and protection depending on its effect on public deliberation, underlines that what is essentially protected is the essential value of public debate to the democratic processes.

In *Magyar Helsinki Bizottság v. Hungary* App no 18030/11, [2016] (ECtHR), the Court clarified that the need for disclosure exists where "disclosure provides transparency on the manner of conduct of public affairs and on

case *Bucur v. Romania* (2013) addressed the question of national security whistleblowers. This time, the applicant, an employee of the Romanian Intelligence Service, brought concerns regarding illegal surveillance practices to the public, resulting in him facing criminal sanctions for theft and transmission of state secrets. The Court repeated the criteria set in *Guja* and applied them to the specific case. In the process of making its evaluation, the Court confirmed that the information brought forward by the applicant referred to "very important questions relevant to political debate in a democratic society, of which the public opinion has a legitimate interest in being informed".[105] After accepting that the requirement of authenticity was met by the reasonable belief of the whistleblower that the information was indeed true,[106] the Court underscored that national courts failed to verify whether the classification of the information as 'top secret' was justified and whether the interest in maintaining the confidentiality of the information trumped the public interest in being informed about the alleged illegal surveillance practices.[107] In its *stricto sensu* balancing, the Court came to the important conclusion that "the public interest in the disclosure of reports of illegal activities within the [secret service] is so important in a democratic society that it outweighs the desirability to maintain public

matters of interest for society as a whole and thereby allows participation in public governance by the public at large" [161]. Even though the Court refers only to the role of the press and social 'watchdogs' in "imparting information on matters of public concern", it is because of their function in a democracy that their actions receive protection. This functional reading of the right to information and its connection with public interest can potentially be used to encompass the disclosures of whistleblowers on topics of public interest.

See, also the cases *Kenedi v. Hungary* App no 31475/05, [2009] (ECtHR*), Österreichische vereinigung zur erhaltung, stärkung und schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen grundbesitzes v. Austria* App no 39534/07, [2013] (ECtHR), *Youth Initiative for Human Rights v. Serbia* App no 48135/06, [2016] (ECtHR)

[105] *Bucur*, App no 40238/02 at 103.

[106] *Id.* at 107 making explicit reference to CE Parliamentary Assembly, 'Resolution 1729 (2010): Protection of "whistle-blowers"' (2010).

[107] *Bucur*, App no 40238/02 at 111.

confidence in this institution (...). A free discussion of public issues is essential in a democratic state and it is important not to discourage citizens to decide on such issues".[108]

As far as it concerns good faith, even though it figures on a number of international instruments involving the protection of whistleblowing, such the Recommendation CM/Rec(2014)7 of April 2014 of the Committee of Ministers, it seems hardly relevant in this particular context. It suffices to wonder, what if the whistleblower is indeed motivated by antagonistic concerns or personal interest but nevertheless discloses serious government wrongdoing and lack of accountability? Why should he or she be deprived of protection in such a case, where the importance of the disclosure for the public interest is acknowledged? Interestingly, the criterion of good faith has been inconsistently and loosely interpreted in the case law of the ECtHR.[109] In *Guja v. Moldova*, bad faith is inferred to be the motivation "by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain".[110] Yet, in the case *Soares v. Portugal* (2016), a different approach was adopted. The Court, balancing this time freedom of expression in the workplace and the protection of reputation, distinguished between statements of fact and value judgements and placed the allegations of the applicant about the supposed engagement of a Commander of the Portuguese National Guard in corruption in the category of factual claims.[111] The allegation of misuse of public money being a very serious category, the Court underlined the need for a factual basis, which the applicant did not provide, basing his accusations entirely on rumours.

[108] *Id.* at 115.

[109] The flexibility of taking into consideration –or not– 'good faith' as defined by *Guja* could be interpreted as a component of the 'open-ended' nature of balancing tests in the ECtHR, whereby the Court can freely decide which criteria it will resort to in any given case. *See,* STIJN SMET, CONFLICTS BETWEEN HUMAN RIGHTS AND THE ECTHR: TOWARDS A STRUCTURED BALANCING TEST 40 (Stijn Smet & Brems Eva eds. 2017).

[110] *Guja,* 14277/04 at 77.

[111] *Soares v. Portugal* App no 79972/12, 45-46 (2016).

Thus, the claim that he did not act in 'good faith' was justified.[112] Indeed, "the applicant, knowing that his allegations were based on a rumour, made no attempt to verify their authenticity before reporting them to the General Inspectorate of Internal Administration".[113] This interpretation of good faith approaches the 'reasonable belief' test. What is claimed by the Court for justifying the lack of good faith is not the ulterior personal interest or antagonistic motivation, but the fact that the applicant did not attempt to verify the authenticity of the information, failing thus the reasonable belief test.

The unsuitability of the 'good faith' criterion is even more striking in *Aurelian Oprea v. Romania* (2016). This time the applicant, himself an associate professor who had been denied multiple times full professorship, exposed corruption at university level by informing the press. The Court found that "the applicant's statements concerned important issues in a democratic society, about which the public had a legitimate interest in being informed".[114] This is a key phrase, indicating that in the final analysis the protected interest is public deliberation and the right to know of the citizenry. Therefore, the good faith of the individual immediately becomes less significant. The Court opted to place it in the background, minimizing the requirements of good faith to a sheer minimum: "[E]ven assuming that the applicant's frustration as a result of not being promoted to a position of professor might have been an additional motive for his actions, the Court has no reason to doubt that the applicant acted in good faith and in the belief that it was in the public interest to disclose the alleged shortcomings in his University to the public".[115] The Court continues to evaluate good faith as one of its criteria but seems unwilling

[112] *Id.* at 46.

[113] *Id.* at 47.

[114] *Aurelian Oprea v. Romania* App no 12138/08, 65 (2016).

[115] *Id.* at 71.

to block its protective approach for this reason alone, as long as the information provided is deemed to be of public interest and important for democratic societies.[116]

The Court has in general adopted a very protective perspective on freedom of information on matters of general interest, important for the public debate.[117] Its emblematic statement that "in a democratic state governed by the rule of law the use of improper methods by public authority is precisely the kind of issue about which the public has the right to be informed"[118] indicates the high value of the right to know against undue secrecy. This recognition of the social value of public disclosures makes the ECtHR case law more protective of *lato sensu* whistleblowers than the U.S. case law. This, nevertheless, means that the original balancing exercise as defined by *Guja v. Moldova* is ill-suited to address situations where the disclosure under question constitutes well-founded allegations of government wrongdoing. In that case, not only good faith, but in fact even the *stricto sensu* balancing test becomes problematic. Because, if the disclosures of the whistleblower reveal illegalities and illegitimate secrecy, it becomes questionable whether the potential harm to the reputation of the institution should be

[116] *See*, also *Rubins v. Latvia* App no 79040/12 (2015), where the Court decided in favor of an academic who, previously to his disclosure of corruptions within the university, had sent a letter to the Rector of the University threatening to make his allegations public, if he were to not see his demands regarding the revocation of an order merging his departments met. The reasons for this decision were the public interest in the information [85] and not finding the applicant to be of bad faith [88]. *See*, also JEREMY LEWIS & et al eds., WHISTLEBLOWING: LAW AND PRACTICE 18.35 (3rd ed. 2017), commenting on *Kharlamov v. Russia* App no 27447/07 (2015), noting that the importance of protecting expression on matters of public interest may outweigh duties of good faith in the work environment.

[117] *See*, also *Matúz v. Hungary* App no 73571/10 (2014); *Bargão and Domingos Correia v. Portugal* App no 53579/09 and 53582/09 (2013); *Sosinowska v. Poland* App no 10247/09 (2012); even the case *Rubins* App no 79040/12, as above. Furthermore, the Court has many on many occasions protected freedom of expression of journalists against alleged violations of privacy or supposed defamatory statements, especially when the information published reveals illegal activities of public interest. Most importantly, *see Axel Springer AG v. Germany* (no. 1) App no 39954/08 (2012) (ECtHR). *See*, also, DIRK VOORHOOF, FREEDOM OF EXPRESSION VERSUS PRIVACY AND THE RIGHT TO REPUTATION: HOW TO PRESERVE PUBLIC INTEREST JOURNALISM 154 (Stijn Smet & Brems Eva eds. 2017).

[118] *Voskuil v. The Netherlands* App no 64752/01, 70 (2007) on the protection of journalists' sources.

taken into consideration. The reputation of the institution is valuable to the extent that it fulfils a certain legitimate function in a democratic society. Admitting some form of legitimate interest that should counter-balance the public interest in the disclosure, such as for example the potential harm to national security, implies a blank check to the executive to even break the law, insofar as it purports to protect national security. It implies that illegitimate secrecy may at times be condoned, an assumption that is in irreconcilable tension with fundamental principles of liberal democracy. In the next Section I will propose a set of distinctions as to when a balancing test is indeed necessary and based on which criteria.

IV. Restructuring the balancing test

For the purposes of outlining my normative suggestion regarding the balance between freedom of speech and national security interests, I would like to briefly capture some of its premises: A) It is a principle arising from both European and American constitutional traditions and institutions that the limitations to the right of the people to know about government's activities must be strictly defined by law (e.g. classification law), necessary to achieve their purpose of protecting national security, and proportional to the detriment inflicted on open, public deliberation. In liberal democracies, state secrecy must be the exception, not the rule.[119]

[119] In the U.S., the 1970s were a time of a cultural shift in favour of government openness, which was institutionalized in the passage of the Freedom of Information Act (FOIA) amendments and the Foreign Intelligence Surveillance Act (FISA). Although these acts did not establish a general right to know which could always be invoked, they highlighted that the normative orientation of the U.S. constitutional framework is towards government openness, a restrained executive, and an informed and deliberating public. According to Pozen, "FISA and FOIA are the closest thing we have to a constitutional amendment on state secrecy", David Pozen, *Deep Secrecy*, 62 STANFORD LAW REVIEW 257 (2010). The courts have exhibited a reliance on the capacity of political processes to force government disclosure and have generally proven unwelcoming to the recognition of the constitutionality of a right to know, see Antonin Scalia, *The Freedom of Information Act Has No Clothes*, 6 REGULATION 14 (1982) However, the First Amendment, its interpretation in *Richmond Newspapers, Inc. v.*

B) Legitimate secrecy is 'shallow secrecy', meaning that the citizenry must be aware of the existence of a secret, even if the precise information is not known to them. Secrecy – through for example classification – cannot and should not function as a cover-up for illegality, wrongdoing, and government misconduct. C) Undue secrecy should be first addressed in a preemptive way through the regulation of over-classification and then through the establishment of an efficient inter-agency and inter-branch system of reporting of wrongdoing. Constitutional protection, through freedom of speech, against prosecution and potentially against civil and administrative sanctions imposed on *lato sensu* whistleblowers constitutes the ultimate safety valve for maintaining the democratic character of secrecy. D) *Lato sensu* whistleblowing, meaning public disclosures about government wrongdoing, does not entail so much a conflict over subjective liberties (e.g., the freedom of speech of the whistleblower), but an institutional conflict over the content of democratic governance and the ultimate control over security policies. It is the social value of whistleblowing that has to be protected, its function as a legal counter-institution against the expansive tendencies of the national security system.

It is in this frame that my normative proposal on the conditions of constitutional protection for whistleblowers and leakers unfolds. In the effort to find an elegant solution for the competing interests, scholars have been tempted to outline an all-encompassing balancing test. In that sense, the *Pickering* test has been suggested as appropriate for national security whistleblowers,[120] while a more generic test of "whether the potential harm to the national

Virginia, the legislation limiting state secrecy, and the broader principle of separation of powers, lead to the conclusion that government secrecy is legitimate under restrictions and that whenever these restrictions are not respected, there is a corresponding right to know of government's actions.

For the right to know in the ECtHR case law, see *supra* 103. See, also *Stoll v. Switzerland* App no 69698/01, [2007] (ECtHR) for a case where secrecy is legitimate and therefore freedom of expression is rightfully limited, without a corresponding right to know, despite considerable public interest in the disclosure.

[120] Goldston, *supra* 87, at 438-439.

security outweighs the value of the disclosure to public discourse"[121] has been proposed as an ideal constitutional standard, despite its admittedly difficult implementation.[122] I argue that the potential normative suggestions regarding the balancing of the social value of whistleblowing and national security need to take into consideration the different context and nuances of whistleblowing in practice. The distinctions of a) *lato sensu whistleblowing versus leaking* (corresponding to the distinction of illegitimate/deep and legitimate/shallow secrecy) and b) *criminal versus employment-related sanctions* will be instrumental in outlining the normative suggestion.

A. Lato sensu whistleblowing

i) Criminal sanctions

Balancing, in the case of whistleblowers exposing deep secrecy, is, for a number of reasons, not an appropriate solution when criminal sanctions are considered. First and foremost, balancing requires competing legitimate interests, which is not the case in this particular situation. The proportionality test is made up of the prongs of suitability, necessity, legitimate purpose, and *stricto sensu* proportionality. The criminal sanctions imposed on the whistleblower, following the various criminal laws, must be able to meet these requirements against the constitutional defence of freedom of speech. In fact, before even getting into the question of the *stricto sensu* proportionality test where, as it has been pointed out, it is the social value of whistleblowing that should be weighed, the absence of a legitimate purpose of the sanction renders the balancing an inappropriate solution to the conflict. Sanctions like those included in the U.S. Espionage Act, or in the UK Official Secrets Act, or in the French Penal Code serve the legitimate aim of preventing harm to national security, safeguarding state

[121] Geoffrey R. Stone, *Free Speech and National Security*, 84 INDIANA LAW JOURNAL 939, 961 (2009).

[122] Geoffrey R. Stone, *Secrecy and Self-Governance*, 56 NEW YORK LAW SCHOOL REVIEW 81, 84 (2011).

secrets, and maintaining trust in government operations that require secrecy in order to operate efficiently. However, to the extent that it is not the constitutionality of the law in abstract that is being judged, but rather its application in the particular context, it is the legitimate aim of the law's application that should be evaluated.[123] If the application of the law, meaning the enforcement of the sanction for a public disclosure, is carried out despite the illegality of the particular form of secrecy the whistleblower is unveiling, then where does the legitimate aim lie? In other words, if it can be established that the secrecy under consideration was deep, meaning that it covered illegal activities or at least activities of contested legality that were insulated from public accountability, then there is no legitimate interest that this instance of secrecy could protect.[124] This covers the defence of 'improper classification',[125] to the extent that the classification of violations of law is prohibited. The major counter-argument – namely harm to the national security –can be claimed even if the secrecy was itself illegal and it must be rebuked because it essentially places the executive's determination of national security interests beyond the reach of law. It implies that the importance of national security is such that it could justify violations of the law – a claim that is in direct contradiction with the rule of law.[126] Safeguarding state secrets to the benefit of national security interests is legitimate, only

[123] Barak, *supra* 55, at 350-351 on the marginal effects caused by the law.

[124] Tsakyrakis is right when suggesting that "some types of justification are not just less weighty than the right with which they conflict […] Rather, their invocation is incompatible with the recognition of that right", Stavros Tsakyrakis, *Proportionality: An assault on human rights?*, 7 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 468, 488 (2009).

[125] Patricia L. Bellia, *WikiLeaks and the Institutional Framework for National Security Disclosures*, 121 YALE LAW JOURNAL 1448, 1523 (2012), suggesting that the improper classification defence could be an amendment to the Espionage Act. According to Kitrosser, *supra* 29, at 1265, the reasonable belief that the material was improperly classified should be sufficient.

[126] For example, according to Sagar, *supra* 30, at 128, "a secret surveillance program may violate the privacy of citizens but also uphold public safety". Yet, the authority of the executive to make this kind of evaluation goes against democratic principles, not least because decisions about safety are decisions in which the citizens must partake. In fact, Sagar goes further to argue that clearly unlawful conduct, such as 'enhanced interrogation

to the extent that it respects the restrictions placed by democratic governance, separation of powers, and the rule of law. State secrecy cannot be a ticket to unaccountability. The disclosure of deep secrecy is therefore not interfering with the general (and in abstract legitimate) purpose of restricting the flow of information to the general public, but rather with the particular (and illegitimate) purpose of engaging into unchecked and unaccountable activity by the executive. The only argument that could be made in favor of proceeding to balancing in such a scenario of a public disclosure pertains to the legitimate aim of maintaining trust in government operations that legitimately require secrecy for their operations. Indeed, this seems to be the case in the UK Official Secrets Act, where members of security and intelligence agencies making unauthorized disclosures are liable to criminal sanctions regardless of whether their disclosure was harmful to national security. This extreme focus on internal loyalty and trust overlooks the loyalty public servants owe to society as a whole and to the Constitution.[127] It is reasonable that the government may restrict the freedom of speech of employees in order to maintain trust and loyalty in its institutions, but that can be expressed through employment-related sanctions, as I will show in the next subsection. Thus, even if it can be conceded that the maintenance of trust is a legitimate purpose of sanctions against disclosures and such a legitimate purpose is not trumped by the illegality of the secrecy (because they are questions of different order), then criminal sanctions would still not be necessary. Deterrence in that sense can be achieved through lesser sanctions, while the restoration of the rule of law and of public accountability is of paramount importance.

techniques' should not always count as wrongdoing, as for the evaluation of a violation of law, the "broader context within which the violation has occurred" has to be taken into consideration, at 129.

[127] It has also been supported that there is a constitutional duty, at least in the U.S., to affirmatively support the Constitution, which could entail an obligation of leaking, Alexander J. Kasner, *National Security Leaks and Constitutional Duty*, 67 STANFORD LAW REVIEW 241 (2015). *See*, also EMANUELA CEVA & MICHELE BOCCHIOLA, IS WHISTLEBLOWING A DUTY? (2019).

Second, a broad balancing test which balances the contribution of the whistleblower to democratic deliberation against the harmfulness of the disclosure is unworkable and risks politicising the decision through 'judicial decisionism'.[128] This touches upon the established criticism of the incommensurability of opposing values and of the 'irrationality' of balancing.[129] From the perspective of irrationality,[130] objections to balancing can only be stronger when the elements on scale are increasingly abstract. The irrationality critique captures the epistemic problem of the lack of standards that would permit a rational reconstruction of the argumentation leading to a particular decision. According to Grégoire Webber, "without an identified common measure, the principle of proportionality cannot direct reason to an answer. It can merely assist reason in identifying the incommensurable choice that one must make."[131]

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[128] Ernst-Wolfgang Böckenförde, *Grundrechtstheorie und Grundrechtsinterpretation*, 27 NEUE JURISTISCHE WOCHENSCHRIFT 1529, 1534 (1974). *See*, also Poscher's argument of 'intuitionism', RALF POSCHER, THE PRINCIPLES THEORY: HOW MANY THEORIES AND WHAT IS THEIR MERIT? (Matthias Klatt ed. 2012).

[129] JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 259 (1996), arguing that balancing lacks 'rational standards'.

[130] A slightly different strain of objections starts from incommensurability to express a profound scepticism regarding proportionality's 'utilitarianism' and its aptitude to protect rights, which should enjoy priority over competing interests. These would be approaches internal to the subjective liberties paradigm. For example, according to Dworkin rights are 'trumps', prevailing over policy decisions relating to public interest, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 184-205 (1978). Tsakyrakis considers balancing a potential 'assault' on human rights, as it tends to neglect moral reasoning, which is necessary in the prioritization of values Tsakyrakis, *supra* 123, at 474-475. In a not so different vein, Aleinikoff suggests that balancing risks replicating the legislative process, when what is sought is the maximization of social welfare through an examination of similar variables in similar ways. Alexander T. Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE LAW JOURNAL 943, 991-992 (1987). This renders the constitutional protection of rights futile, as protection is always conditional on various circumstances and on the outcome of the balancing. According to Jeremy Waldron, a non-utilitarian justification of human rights implies that they cannot be surrendered for efficiency or 'for any aggregate of lesser interests under the heading of the public good, Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD JOURNAL OF LEGAL STUDIES 18, 30 (1993).

[131] GRÉGOIRE C. N. WEBBER, THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS 97 (2009). See also Grégoire C. N. Webber, *Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship*, 23 CANADIAN JOURNAL OF LAW & JURISPRUDENCE 179, 191 (2010), according to whom proportionality is

How can the judge make a decision that is not arbitrary amidst such wide discretion? Robert Alexy's 'Law of Balancing', according to which "the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other",[132] cannot be applied if the detriment to one principle (say, national security) or the satisfaction of the competing principle (democratic deliberation) cannot be established using set criteria.[133] The very broad spectrum of discretion of the judge in the evaluation of the two parameters leads to the conclusion that the balancing test in such a scenario will necessarily rely on a personal decision not sufficiently informed by verifiable and reproducible standards.[134]

These arguments are not meant to oppose balancing altogether, a topic of extensive scholarly and jurisprudential analysis. The much more modest goal is to highlight the unsuitability of proportionality balancing between the contribution of the disclosure to democratic deliberation and potential harm to national security. Considering the established tendency of the judiciary to trust the expertise of the executive in matters of national security, the deterrent effect of the unpredictability of the outcome of the balancing, as well as the potential media interest in such cases, it is, in my opinion, to the benefit not only of human rights protection, but also to the benefit of separation of powers and of the system of checks

responsible for de-politicizing rights claims and transforming moral and political discourses into technicalities of weight and balance. See also Panaccio, *supra* 58.

[132] ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 102 (2002). Similarly, Barak, *supra* 55, puts forward the 'relative social importance' of the public purpose or the right as the common denominator. Jeremy Waldron suggests a distinction between 'strong' and 'weak' incommensurability, Jeremy Waldron, *Fake Incommensurability: A Response to Professor Schauer*, 45 HASTINGS LAW JOURNAL 813 (1994).

[133] *See*, Rahul Sagar, *Creaky Leviathan: A Comment on David Pozen's Leaky Leviathan*, 127 HARVARD LAW REVIEW FORUM 75 (2013) for the impossibility of calculating national security harm.

[134] *See*, also LORENZO ZUCCA, CONSTITUTIONAL DILEMMAS: CONFLICTS OF FUNDAMENTAL LEGAL RIGHTS IN EUROPE AND THE USA 88 (2007). For an answer to this type of critique, see ROBERT ALEXY, PROPORTIONALITY AND RATIONALITY 23 (Vicki C. Jackson & Mark V. Tushnet eds. 2017); Alexy, *supra* 57 at 106; Barak, *supra* 55, at 485-486.

and balances if judicial discretion is kept to a minimum.[135] Therefore, the judge should first determine whether the *ad hoc* problem belongs to the category of *lato sensu* whistleblowing, meaning the disclosure of undue secrecy, or to the categories of espionage or treason.[136] If the former is the case, then my suggestion is that no balancing should take place and criminal sanctions, a direct and extremely serious restriction of speech and personal freedom, should be ruled out as a possibility.

ii) Employment-related sanctions

The answer for administrative, employment-related sanctions is not equally clear-cut. In cases of whistleblowing disclosing illegal secret practices, the government is still the employer. According to the ECtHR, the employee has a duty of loyalty, reserve, and discretion to the employer and, according to *Pickering* and its progeny, the government has a legitimate interest in guaranteeing the efficient functioning of its operations. Therefore, the legitimate purpose of the sanctions exists irrespectively of the (il)legitimacy of the secrecy involved. This is the major differentiation with the case of criminal sanctions, where, as I argued, there is no legitimate purpose pursued by the sanctions. This does not mean that freedom of speech cannot invalidate a Non-Disclosure Agreement, as the US Supreme Court decided on the *Snepp* case, but it does mean that the duty of loyalty that Non-Disclosure Agreements prescribe is not automatically moot because of the existence of wrongdoing within the institution that is covered by secrecy.

Assuming therefore that employment-related sanctions are also suitable and necessary, they must also satisfy the question of proportionality between the satisfaction of democratic deliberation and the detriment to the duty of loyalty. The abovementioned scepticism to the rationality of the balancing test notwithstanding, this time the test appears much more defined

[135] This answers to Barak's point regarding proportionality critics that "[a] more adequate argument would show that the use of this seemingly too wide a discretion leads to negative effects", *Id.* at 487.

[136] For the distinction, *see* Papandrea, *supra* 23, at 534-543.

and workable, under a standard that may guide the judge and frame his or her evaluation. The criterion for the particular balancing exercise is whether the whistleblower exhausted the internal means of reporting the wrongdoing, or whether such means did not exist, *or whether it would have been futile to pursue reporting through internal procedures.* This criterion is the first step of evaluation in the *Guja* case and it also figures, in different variations, in the relevant scholarship.[137] If official channels of reporting exist, then it is reasonable to expect the employee to make use of them, as disclosure directly to the media may carry additional reputational costs for the public institution. If reporting first to the organization were not necessary, the organization would lack the incentives to develop internal mechanisms of reporting. In turn, the lack of internal reporting mechanisms might lead to underreporting, especially for relatively minor cases of wrongdoing, where the employee might lack the motivation to face the difficulties entailed by external reporting and where the organization could have indeed resolved the situation. If the employee deliberately ignores this possibility, then the detriment to the duty of loyalty outweighs the social value of the disclosure, because democratic deliberation does not rule institutional mediation and the social value of the disclosure could have been achieved by means less costly for the institutions. However, the whistleblower, carrying the burden of proof, should be able to argue that despite the existence of channels of reporting, pursuing them would have been to no avail, for instance in cases where the channels of reporting are controlled by the perpetrators of the wrongdoing. In such a case, the futility of following the internal reporting amounts to a defence of the whistleblower against employment-related sanctions. This is because the purpose of a constitutional protection of whistleblowers is to function as the last safety valve of the rule of law, accountability, and democratic legitimacy through the right of the public to know. If David

[137] *Guja*, 14277/04 at 73 and, indicatively, Scharf and McLaughlin, *supra* 21, at 579-580, Kitrosser, *supra* 29, at 1273-1275.

Pozen is right in that interbranch and interagency disclosures should be the first priority in avoiding deep secrecy,[138] public disclosures still have to be protected as a means of last resort, first, because internal channels are bound to occasionally fail and second, because this protection acts as a deterrent against any efforts to prevent the disclosure of deep secrecy by controlling the internal reporting channels.

B. Leaking

i) Criminal sanctions

This case involves disclosures of shallow secrecy, in other words legitimate secrecy. Therefore, the persons who disclose the information are by definition 'leakers', not *lato sensu* whistleblowers, as they do not disclose any wrongdoing. In this case, under the institutional model I have been describing, there is little, if any, social value in the disclosure of the leaker. Does this mean that criminal sanctions are in order? Here I second Papandrea's point that the government should not be allowed to punish its employees criminally unless it makes the same showing that it must make for government outsiders.[139] This follows my previous point that disjoints criminal sanctions from the duty of loyalty and from the special status of public employees. However, the standards the government must meet for the criminal punishment of outsiders when it comes to speech are also not clear. Papandrea in this case refers to the American standards for prior restraints as confirmed by the seminal *Pentagon Papers* case,[140] meaning grave and irreparable danger to national security that, if proved, may constitute an exception to the heavy presumption in favor of freedom of speech.[141] In liberal democracies the power of the government to prosecute the publication or dissemination of information under

[138] Pozen, *supra* 19, at 324.

[139] Papandrea, *supra* 22, at 543.

[140] *See, New York Times Co. v. United States* 403 U.S. 713 (1971)

[141] Papandrea, *supra* 22, at 544

the broader public purpose of national security must be met with the highest scrutiny in order to protect the unobstructed exercise of political rights that is necessary for the functioning of democracy. However, if the information is legitimately classified and the leaker has an objectively reasonable basis to believe that the information may inflict grave damage to national security, then the application of statutes such as the Espionage Act or the Official Secrets Act is justified.[142] A relatively straightforward example would be the disclosure (by an employee or even a journalist, as the same standards should apply) of the names of intelligence agents working undercover. On the contrary, if the information disclosed by the leaker is already available to the public, then this is a strong indication that it is not harmful to national security and therefore should not be criminally punished.[143]

ii) Employment-related sanctions

I suggest that this is an easier case, as there is no convincing argument as to why the unauthorized disclosure of legitimate state secrecy should not entail employment-related sanctions for leakers. The government as an employer, rather than as a sovereign, may use sanctions to regulate the flow of information and to protect sensitive information. Employment-related sanctions are a sufficient deterrent, not only for its economic and social impact (e.g. in

[142] Nevertheless, the "objectively reasonable basis to believe" the information was harmful does not necessarily mean 'bad faith', which focuses on the 'selfish' motivations of the leaker. This moralistic approach does not feature in my analysis. For a contrary analysis, *see*, Patrick M. Rahill, *Top-secret - the defense of national security whistleblowers: Introducing a multi-factor balancing test*, 63 CLEVELAND STATE LAW REVIEW 237, 251-253 (2014).

[143] Although the protection of journalistic sources is not discussed in this article, it should be noted that disclosures of shallow secrecy should be covered under its auspices, to the extent that they are not damaging to national security. The syllogism should be the same like the one presented in this Subsection. Therefore, even if the existence of a system for classifying publishing companies and journalists according to whether they were "favorable" or "hostile" to the armed forces is considered an instance of shallow secrecy, the government may not interfere with the freedom of the press to publish the story, or violate the protection of sources in order to locate and punish the source, *see* the analysis in *Görmüş a.o. v. Turkey* App no 49085/07 (2016)

the case of dismissal), but also because it could have a permanent impact on one's career paths and life, for example through the revocation of one's security clearance and the subsequent record, which would prevent future employment opportunities in the national security sector or even more broadly in the federal government sector.[144]

V. Concluding thoughts and nuances: The reach of the institutional model of whistleblowing protection and the challenge of 'hard cases'

A legal maxim, sometimes attributed to Justice Oliver W. Holmes, is that 'hard cases make bad law'. Following this maxim, I would like to defend the general structure of my normative suggestion, which might be exceedingly difficult to implement in a few hard cases, but it will offer balanced solutions for the great majority of whistleblowing and leaking cases. The axes of my institutional model are the following: 1) Construct a jurisprudential model that focuses on the protection of unauthorized disclosures of information against – at least – criminal sanctions when they reveal illegitimate secrecy, in order to restore accountability of the executive and to safeguard the rule of rule, the separation of powers, and the right to know, an integral element of democratic governance. 2) Protect legitimate secrecy through sanctions to leakers, which should nevertheless remain on the level of employment-related sanctions and only in exceptional circumstances, after heavy justification from the government, allow for criminal punishment. 3) Minimize the discretion of the judiciary through a categorization that allows for limited balancing through established criteria. 4) Place less emphasis on questions

[144] *See*, 'Report of the Interdepartmental Group on Unauthorized Disclosures of Classified Information' (1982), A-5

of good faith, focusing instead on the social value of whistleblowing and its function as a counter-institution against undue secrecy.[145]

This model will work well in cases where the nature of secrecy is clear. For example, in cases where the *lato sensu* whistleblower came to the objectively reasonable conclusion that wrongdoing, abuse of authority, waste, or threat for public health and safety were concealed by state secrecy, then the described model is functional. Being based on the distinction between deep and shallow secrecy, rather than on the distinction between the legality or the illegality of the disclosed programs and actions, it has the advantage of maintaining the model's functionality in cases where the legality might be in a grey zone, but the secrecy did not permit any substantial accountability. Deep secrecy and illegality do not always overlap, as deep secrecy connotes a field larger than mere illegality to include programs or activities "the legality of which is subject to reasonable debate".[146] For example, in the U.S., warrantless wiretapping programs, as well as interrogations that included violations of human rights, had been justified by "internal executive branch memoranda produced by the Office of Legal Counsel (OLC) under exceedingly insular conditions".[147] According to Jack Goldsmith, the relevant legal opinions were written by a tiny, like-minded group, which disregarded statutes of which they did not approve.[148] Similarly, with regards to Snowden's disclosures, even though the existence of the bulk data collection program operated by the National Security Agency was approved by the Foreign Intelligence Surveillance Court, its legality remains

[145] By this I do not mean that whistleblowers should not be treated as end in themselves - a fundamental principle of constitutional and criminal law, *see* Mordechai Kremnitzer, *Constitutional Principles and Criminal Law*, 27 ISRAEL LAW REVIEW 84 (1993). Instead, I suggest that good faith, meaning the motivation of the whistleblower being the public good, should not constitute a requirement the lack of which would entail an absence of protection and sanctioning of the whistleblower.

[146] Kitrosser, *supra* 29, at 1272.

[147] *Id.*

[148] JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 181 (2009).

contested, with strong arguments supporting its illegality.[149] However, as Benkler has supported, even if the bulk data collection program is itself legal, "it is the kind of decision, affecting Americans and innocent civilians in other nations, that merits public debate and a democratic decision".[150] Therefore, in cases of illegal government activity or activity of contested legality that had been insulated from public accountability, the suggested institutional model can apply without shortcomings.

On the contrary, for the few cases that it is difficult to determine whether the secrecy was shallow or deep, then the model might encounter some difficulties. To use the classic example of the development of the nuclear bomb during World War II, it is a difficult assessment whether this constitutes a deep or a shallow secret, because it depends on the unit of analysis. If that is the development of a weapons program, then it is a shallow secret, while if the unit of analysis is the development of weapons of *nuclear technology*, then it is a deep secret as it entails consequences citizens could not have fathomed.[151] In such hard cases, the judge inevitably will have to determine the nature of the secrecy disclosed and resolve the conflict accordingly. Yet, there will only be a few cases that will not fall clearly within the spectrum of deep or shallow secrecy. In general, the standards set in this article cannot preclude judicial discretion in its entirety, as it falls upon the judge to decide the legitimacy of the secrecy.

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[149]According to Judge Leon the bulk program could constitute a violation of the Fourth Amendment: "[t]he Court concludes that plaintiffs have standing to challenge the constitutionality of the Government's bulk collection and querying of phone record metadata, that they have demonstrated a substantial likelihood of success on the merits of their Fourth Amendment claim, and that they will suffer irreparable harm absent preliminary injunctive relief". *Klayman v. Obama* 957 F.Supp.2d 1, 9 (2013). According to Laura Donohue, the bulk collection program ignored the public purpose of FISA, violated statutory language, and gave rise to serious constitutional concerns, Laura K. Donohue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 HARVARD JOURNAL OF LAW & PUBLIC POLICY 757, 763-766 (2014). For a contrary legal opinion, *see* John Yoo, *The Legality of the National Security Agency's Bulk Data Surveillance Programs*, 37 HARVARD JOURNAL OF LAW & PUBLIC POLICY 901 (2014).

[150] Benkler, *supra* 17, at 322.

[151] Pozen, *supra* 19, at 272-273.

What will be more often the case is that disclosures include elements of both deep and shallow secrecy. A characteristic example is the disclosures of Chelsea Manning, who leaked thousands of reports to Wikileaks, ranging from footage of airstrikes that indiscriminately targeted civilians and journalists, to war logs revealing violations of human rights, to thousands of diplomatic cables, the vast majority of which did not contain any violations and which were legitimately secret under the prerogatives of foreign affairs and international diplomacy. What matters in this case is how the information is disclosed, meaning whether it has gone through a rigorous process of selection or whether it is a data dump, as well as to whom the information is disclosed. In such a scenario of 'mixed' disclosures, the whistleblower/leaker should be sanctioned proportionately to his or her disclosures of legitimate secrecy.[152] This would necessarily entail the possibility of employment-related sanctions, as well as the possibility of criminal punishment under the condition of grave and irreparable danger to national security. Nevertheless, the disclosure of deep secrecy and the subsequent contribution to democratic deliberation should function as a mitigating factor.

In conclusion, the merits of the institutional model for which I have been advocating outweigh the difficulties posed by hard cases, where the role of the judge will necessarily be more determinant. The shift from the extent of the freedom of speech or the motivation and the good faith of the whistleblower/leaker to the legitimacy of the secrecy is consistent with the jurisprudence on the right to receive information and on separation of powers, as well as with the premises of deliberative democracy and political liberalism. The protection of unauthorised

[152] For example, Benkler, *supra* 17, at 321-324 points out that while the disclosures of the bulk collection program, the 'Bullrun' program, and the limitations of the oversight process should be protected disclosures, the disclosure of the 'Tailored Access Operations' (TAO) program, aimed at targeting specific computers, cannot be protected "unless one completely abandons espionage as a tool". This is because such a targeted counterterrorism program that does not extend its reach beyond specific targets cannot be said to be a deep secret. Yet, according to Benkler, "given the significance" of the other disclosures, Snowden should not be denied the protection of the 'public accountability defense'.

disclosures of deep secrecy functions as a safeguard of the democratic control of security politics, the rule of law, the separation of powers, and the institutional limits to executive action.