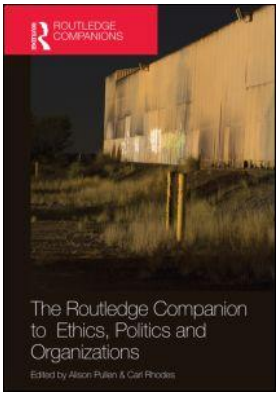

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Whistleblowing paradoxes

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Whistleblowing paradoxes

Legislative protection and corporate counter-resistance

Hilary Monk, David Knights and Margaret Page

For 40 years, there has been a growing public awareness of immoral and/or illegal conduct in the corporate world (Verschoor, 2010) a fraction of which may be a result of 'normal accidents' like those of Bhopal, the Challenger disaster and the Y2K debacle (Perrow, 2011). Although disasters and injustices in all areas of human activity may be partially attributable to the accumulation and multiple interactions of numerous small errors (ibid.), it is deliberate wrongdoing or the covering up of errors exposed by whistleblowers that we examine in the following discussion. Misconduct has been exposed in a wide range of society's sectors – environmental disasters with nuclear plants, oil rigs, mines and chemical producers, unethical pharmaceutical marketing and healthcare standards, discriminatory employment practices, large- and small-scale military malfeasance, accounting violations and the global financial upheavals of 2008 (Calhoun and Derluguian, 2011; Engelen et al., 2011). The dramatic scope of these problems suggests that traditional checks and balances on corporate activity are incapable of detecting even a significant fraction of wrongdoing (Dyck et al., 2010). As industry and professions become more specialized and complex, it is rare for an outsider to be able to recognize organizational misconduct. Increasingly, whistleblowers "may be the best hope for identifying their organization's wrongdoing" (Miceli et al., 2008: 31). The chapter examines what a review of the research reveals about understanding the relationship of corporate wrongdoing to the effectiveness of recent measures implemented to encourage and protect whistleblowers. There exists an underlying assumption that all those involved in the design of such measures have created them in good faith. Our analysis challenges this assumption by seeking to uncover why so much legislation seems ineffective in protecting whistleblowers (Earle and Madek, 2007), and proposes that researchers accept that some corporate interests deliberately sabotage whistleblower protection law as part of a wider corporate counter-resistance strategy.

Academic interest in whistleblowing has burgeoned in the fields of management, accounting, administration, finance, law, medicine, philosophy, sociology, education, psychology and psychoanalysis.[1] Interests of researchers may express the perspectives of the societal contexts in which they are embedded: "At any given time scholars in a particular field tend to share basic assumptions about their subjects. Social scientists [also] rely on a view . . . that is rarely questioned" (Kahnemann, 2011: 8). If the academy is an institution that reflects as well as helps

to construct socio-cultural reality, then tracing unstated thematic trends in the whistleblower literature may aid in gauging changing social attitudes as to what whistleblowing *means* with respect to the place and nature of corporate organizations and resistance against them. Our review reveals the preponderance of recent research centres around whistleblower protection legislation. This focus is the latest step in a movement of whistleblower research from a position of political naïveté where benevolent institutions inadvertently do wrong (Bok, 1980), to a more critical interpretation where corporate wrongdoing and retaliation against whistleblowers is believed to be deliberate (Rothschild and Miethe, 1999; Earle and Madek, 2007).

We make the case for research taking a further step in this direction, and will seek to show that corporate counter-resistance strategies not only react to whistleblowing and government pressure to adhere to protection legislation, but may be pre-emptive in encouraging political authorities to develop legislation that is less severe than might otherwise be the case.

In tracing the development of the major concerns of whistleblower research, we begin by considering ways in which research has defined whistleblowing, noting that attention is often deflected away from reported wrongdoing and onto the whistleblowers themselves. Such deflection may constitute an attempt to minimize the importance of the whistleblowers' concerns, or perhaps more significantly may represent an exercise of power which "manipulat[es] . . . agendas . . . ensur[ing] that issues threatening the dominant interests are never raised in the first place" (Sukhdev et al., 2013: 1).[2] Next, we turn to the literature's early debates about whether whistleblowers are heroes or traitors, and whether whistleblowing is morally justifiable. We recount how the development of the notion of 'rational loyalty', a concept separating an organization's stated aims and means from its behaviour, permitted a whistleblower to remain loyal to the legal and legitimate ideals of an organization, while exposing particular practices compromising these ideals. Then we consider studies that have attempted to unravel whistleblowers' motivations by identifying personal and organizational factors, ostensibly allowing for accurate predictions of who might blow the whistle and under what conditions. Here, the chapter examines several methodological limitations that may have produced significant distortions in understanding whistleblower motivation and a dearth of reliable findings. The next important phase we consider is the research arm devoted to retaliation against whistleblowers; here regardless of any moral justification, whistleblowing is presumed to be necessary (Rothschild and Miethe, 1999). Investigators consider how to encourage whistleblowing by, first, attempting to comprehend inhibitions against reporting misconduct, and then exploring whistleblower protection law. The chapter then assesses whether whistleblower protection legislation works as well as proponents claim, agreeing with some scholars that the protection exists only rhetorically, and questioning the "solution" of promising big payouts to potential whistleblowers. Lastly, in querying why so many calls for improvement of such legislation appear to be falling on deaf legislative ears (Transparency International (TI), 2012a, 2012b), the chapter makes explicit the intersection between politics, law and corporate strategies. Upon examining the close connections between state legislators and corporate lobbyists in the USA, we suggest that corporate involvement in legislation may be only one of a number of interactions between government and business demanding greater research effort to understand and respond effectively to their broader political impact.

What, exactly, is whistleblowing?

Whistleblowing definitions have tended to deflect attention away from reported wrongdoings onto the reporters. Since about 1972 – the year of Watergate, the "Pentagon Papers", and Ralph Nader's exposures of corporate misconduct (Harry Ransom Center, 2003; Ehrlich and

Goldsmith, 2010; Nader et al., 1972) – the press has defined as 'whistleblowing' a particular kind of resistance, when those with inside knowledge expose unethical practice publicly. Early debate about whether whistleblowing occurred often enough to constitute a phenomenon deserving of scrutiny (Perry, 1998) has been abandoned, as rates of reporting seem to be on the rise. Initially, researchers debated elements considered necessary to establish an act as an incidence of whistleblowing, without achieving consensus (Bok, 1980; Elliston, 1982). They debated concepts of harm (whether financial, psychological or physical, whether to members of organizations or to the public at large, whether deliberate or unintentional), communication (whether to internal or external agencies, whether recipients might/might not be able to remedy harm) and retaliation or reward. Several definitions of whistleblowing were developed (Nader et al., 1972; De George, 1980; Bok, 1980), the most widely used (Dasgupta and Kesharwani, 2010) being that of Near and Miceli:

> an organisational member's (former or current) disclosure of illegal, immoral, or illegitimate practices under the control of their employers to persons or organizations that may be able to effect action.
>
> (Near and Miceli, 1985: 4)

It comprises four elements: the reporter, the wrongdoing reported, the organization or a group within it committing the wrongdoing, and the recipient of the report of wrongdoing. Some versions of the definition have proved problematic in retrospect. For example, De George's work (1980) implied that 'real' whistleblowing be morally justifiable by its success. As most whistleblowers' expectations that reporting a wrongdoing will help to stop it prove inaccurate (Rothschild and Miethe, 1999), most whistleblowing would not qualify as such because of ineffectiveness (ibid.). Jubb's variation (1999) required that whistleblowing be external and "a target organisation held responsible" (p. 78). This constituted an attempt to differentiate whistleblowers – "[who] place limits on the abuse of power by power holders" (Uys, 2011: 165) – from "finks" (Gundlach et al., 2008: 40) – "informers [who] usually focus on promoting the ideology of interests of a power holder" (Uys, op. cit.). Some authors have excluded reporting to one's superiors, or acts done in the normal performance of one's job (e.g. as an internal auditor) from qualifying as whistleblowing (Dasgupta and Kesharwani, 2010). However, in certain industries (e.g. pharmaceutical research) externality does not necessarily come into play, and the definition of whistleblowing must take into account "the organizational and power structure differences" (Malek, 2010: 116) within these sectors. Additionally, Estlund (2005) describes a recent "shift from 'self-governance' to 'self-regulation'" (p. 319), wherein employees whose role has included the internal monitoring and implementing of systems and regulatory standards "have lost their institutional voices and are losing the protective oversight of courts and public agencies"(p. 319). Although the propensity to blow the whistle is greater where reporting is part of one's job (Arnold and Ponemon, 1991), increasingly, not all employees responsible for internal reporting can do so without negative repercussions. Researchers disagree whether internal reporting actually constitutes whistleblowing (Miceli et al., 2012), despite multinational research which shows consistently that most reporters of wrongdoing abandon their resistance when internal channels prove ineffective, and that those who do persist to the point of reporting externally begin internally (Miceli et al., 2008; de Graaf, 2010). Excluding internal reporting and unsuccessful whistleblowing focused attention away from those actions that prompted reporting in the first place. These exclusions sprang from presuming that most internal mechanisms for redress were effective because organizations providing them genuinely desired to remedy misconduct. Such assumptions have to be examined critically.

Whistleblowers – traitors or heroes?

Early discussions often debated whether whistleblowers were organizational traitors (Bok, 1980) or saintly heroes (Grant, 2002), depending upon whether they were seen as morally deviant or conforming to social values greater than company loyalty. Research into whistleblowing commenced from an initial position where "it was . . . axiomatic that whistleblowing was an act of disloyalty" (Duska, 1983: 80): "no matter what you saw inside an organisation, you would never make that information public, even if [it] . . . was unlawful" (Rocha and Kleiner, 2005: 80). Despite Duska's (1983) argument that businesses did not constitute appropriate objects of loyalty because they were merely instruments for the creation of profit, and that it was a moral error "to treat an instrument as an end in itself, like a person" (p. 338), other scholars wrestled with the notion of loyalty (Corvino, 2002; de Graaf, 2010). Some were concerned with outcome as the most significant determinant (De George, 1980; Davis, 1989), where betraying colleagues was justified if it definitely prevented harm. Alternatively, if an organization had either lost sight of or was actively ignoring right moral conduct, then an employee was not obliged to report within the organization and was justified in acting independently even against the wishes of that organization (Corvino, 2002).

Researchers began to rely on a notion of 'rational loyalty' (Vandekerckhove and Commers, 2004), separating an organization's legal and legitimate ideals – its "mission statement, goals, value statements and codes of conduct" (Dasgupta and Kesharwani, 2010: 61) – from its activities. A rationally loyal employee "owe[s no] loyalty towards the organization identified through organizational behaviour that runs counter to the kind of behaviour described in its mission statement" (Vandekerckhove, 2006: 77). Thus, paradoxically whistleblowers were understood to be the most loyal members of organizations (Lewis, 2011), not "disgruntled, disloyal and disillusioned malcontents" (Vandenabeele and Kjeldsen, 2011: 6). In this frame, whistleblowers only act against their organization's misbehaviour, not the organization itself, "unless the organization as a whole is set up for unjust purposes and the whistle-blowing insider does not want to be considered one of the wrongdoers" (Gasparski, 2011: 16). With this refined approach, whistleblowing no longer pitted public welfare against that of colleagues and employers.

Who blows the whistle . . . and when?

Having agreed tacitly about the nature, significance and morality of whistleblowing, many researchers then attempted to determine predispositions and preconditions for whistleblowing. Despite claiming that understanding whistleblower motivation was "crucial" (Jos et al., 1989: 552), this phase of research simply assumed that adequate explanations of whistleblowing would emerge from identifying common features of personality and organizations in individual–organizational relations (Vadera et al., 2009).

Rozuel (2010) divides this stage of the literature into two 'waves'. The 'first wave' of organizational behaviour investigators (e.g. Nader et al., 1972; Nagel, 1978; Mitchell, 1981; Brabeck, 1984), "keen on integrating a wide range of psychological concepts" (Rozuel, 2010: 36), studied empirical measures of demographic and complex socially constructed variables characteristic of 'typical' whistleblowers, looking for correlations between personal factors and whistleblowing behaviour. They searched for antecedents such as: gender, age, marital status, education, ethnicity, pay, tenure, power, performance record, extra/introversion, rigidity, iconoclasm, religiosity, personal morality and dis/content. Rozuel's 'second wave' (e.g. Graham, 1986; Glazer and Glazer, 1989; Perry, 1998; Gundlach et al., 2008) absorbed "contributions

from sociology, philosophy, political sciences and popular culture" (Rozuel, 2010: 36), and framed whistleblowing activities contextually "within and between discursive and institutional structures" (Perry, 1998: 240) by examining organizational and management features. They searched for correlations between organizational variables and whistleblowing, such as: company size, structure, sector, management style, supportiveness of organizational 'culture', job roles requiring reporting and kinds of wrongdoing (Seifert, 2006; Vadera et al., 2009; Dasgupta and Kesharwani, 2010). However, agreement as to reliable correlations was elusive: "almost no sociodemographic characteristics . . . distinguish the whistle-blower from the silent observer" (Rothschild and Miethe, 1999: 107).

The lack of definitive correlations may have been due to problematic underlying assumptions. The first wave focus on whistleblower psychology dismissed social context as if psychology is context-independent. The second wave assumed that whistleblowing actions can be understood primarily in terms of discourse and social constructions external to the whistleblower. Both approaches distracted attention away from the content of whistleblowers' reports, by focusing on the right to disclose, devaluing insider knowledge and, instead, concentrating on whistleblowers' character or situations.[3]

Correlational studies cannot explain whistleblower motivations in any case. Describing whistleblowing behaviour and correlating it more or less strongly with personal or organizational traits cannot extend beyond descriptive adequacy (Buss, 2005). Weighting correlations cannot explain *why* a particular dimension appears to generate whistleblowing responses. Little wonder, then, that the field is said to be "restricted and plagued with inconsistent findings . . . we still do not [understand] the motives of potential whistle-blowers" (Vadera et al., 2009: 571).

Perhaps inconclusive findings result from rapidly changing social expectations around work, where growing evidence of corporate misconduct has yielded a widespread demand for integrity in support of the collective trust beyond those employed as public servants or health professionals (de Graaf, 2010): "unconditional loyalty to the employer has been replaced by a loyalty to society and issues . . . especially in cases involving public health, fraud, safety and abuse of office" (Rocha and Kleiner, 2005: 80). Methodological limitations might also have contributed to the lack of solid conclusions. On a theoretical level, much of the literature citing abstracted demographic and contextual characteristics yields discussion at a considerable distance from the ethical and embodied concerns of whistleblowers. As scholarly interest in whistleblowing was developing, there already existed major organizational research precedents using psychological instruments such as personality 'inventories' based on self-reporting surveys, and sociological analysis of hierarchical dynamics in organizations based on interviewing 'key players' (Kets de Vries, 1990). Because of such precedents scholars have tended either to study whistleblowers but exclude wrongdoing, or have treated all misconduct similarly by grouping them together in generic categories.[4] Since much of the literature derived from anonymous large-scale surveys of US federal employees (Miceli et al., 1988; Rothschild and Miethe, 1999), study conclusions could not make *specific* reference to *particular* practices. Some scholars sought to avoid this limitation by using hypothetical vignettes of ethical dilemmas (e.g. Seifert et al., 2010). Many of these measured 'intent' to blow the whistle, imagining that intent implied real 'action' (e.g. Chiu, 2002). Other studies relied on subjects who were mere students, or who may never have blown the whistle (e.g. O'Leary and Cotter, 2000; Miceli et al., 1988).

Jos et al. (1989) pointed to the most important deficit in many of these studies (e.g. Miceli and Near, 1988; Near and Miceli, 1996; Rothwell and Baldwin, 2007) – ignoring committed whistleblowers forced out of employment, "who . . . persisted in the face of substantial opposition and despite strong retaliation" (Jos et al., 1989: 552). Studying terminated subjects might have clarified whistleblower motivation. Moreover, employee statistics underrated the degree and

severity of retaliation. Many studies looking at actual whistleblowers had found that most suffered drastic reprisals, including loss of job, of reputation, of employability, of family support and even mental and physical health (Glazer and Glazer, 1989; Rothschild and Miethe, 1999; Lipman, 2012). In contrast, employee data supported the view that such retaliation against whistleblowers was exaggerated (Near and Miceli, 1996), that being fired or quitting was an 'extreme' response (Beck and Gable, 2012), and that most whistleblowers "function (reasonably) normally in the long run" (de Graaf, 2010: 776). Employee-based studies are still compromised by the probability that the subject matter of their resistance is not sufficiently entrenched or grave as to warrant termination,[5] inferring that their actions may not even qualify as whistleblowing (Rothschild and Miethe, 1999). Some research (e.g. de Graaf, 2010; Miceli et al., 2012) explicitly excluded subjects if they were experiencing ongoing legal disputes. Since severe retaliation often spurs whistleblowers on to engage in lengthy legal battles waged at personal expense (Jos et al., 1989), all studies citing employee-based data covertly exclude such cases. Research minimizing the incidence and severity of retaliation incidentally supports corporate efforts to hide wrongdoing. Tradeoffs in study design strengths and weaknesses have been called "particularly acute" in whistleblowing research (Miceli et al., 2012: 948) and the literature identifies "similar design flaws across multiple studies" (Miceli et al., 2008: 28). Even cross-cultural studies allegedly countering the paucity of whistleblowing research in non-western cultures (e.g. O'Leary and Cotter, 2000; Chiu, 2002; Patel, 2003; Park and Blenkinsopp, 2009) reproduce the same methodological shortcomings as the body of work produced in the West (Ab Ghani et al., 2011). Where research builds on prior research, flawed methods across the entire field may have a cumulative effect over time, making more recent understandings increasingly limited.

Despite having been identified, these limitations are consistently overlooked. The *ad hominem* research focus on whistleblowers and their situations rather than on harm being done may come from researchers' attachment to the traditional methodologies of their particular academic disciplines. Unfortunately, this may result in a replication of some patterns of corporate resistance against whistleblowing, where deflecting the spotlight away from corporate malfeasance allows it to continue unchallenged.

Wrongdoing and retaliation against whistleblowers

Despite a tendency to gloss over the specifics of wrongdoing, there has developed an arm of the literature devoted to organizational retaliation. Authors look at categories of wrongdoing (Dasgupta and Kesharwani, 2010), variations in reprisal against whistleblowers and the effect of retaliation upon rates of whistleblowing (Miceli et al., 2008). Retaliation may include: snubbing by co-workers; management's tighter scrutiny of daily activities; withholding information/staff/access/security clearances necessary for job performance; verbal intimidation; poor performance appraisal; professional reputation damage; charges of committing an unrelated offence; denial of award, promotion or training opportunity; relocating work station unfavourably; assignment to less desirable/important duties; reassignment requiring geographical relocation; requiring a fitness-for-duty exam; suspension, demotion or termination (Rehg et al., 2008).

Reported incidence of retaliation has varied enormously, from 17–40 per cent for randomly selected samples of employees (Bjørkelo et al., 2011) to 60–80 per cent for self-selected whistleblowers (Jos et al., 1989; Dyck et al., 2010). Positive organizational reaction, although virtually absent from self-selected whistleblower data (Glazer and Glazer, 1989; Jos et al., 1989), is reported by 13–50 per cent of employees (Bjørkelo, et al., 2011).

Retaliation varies directly with the importance and systemic nature of the wrongdoing uncovered (Rothschild and Miethe, 1999). "The organization reserves its most explicit

discrimination and punishment for those who block the profit accumulation process by exposing the practices that undergird this process" (ibid.: 125). Management's most strenuous efforts to conceal wrongdoing aim at discrediting the whistleblower and stepping up retaliation. However, this response may renew the whistleblower's motivation to resist, both to remedy the wrongdoing and to vindicate the act of whistleblowing, producing the most "persistent resisters" (Glazer and Glazer, 1989).

Since the probability of retaliation is a consideration in deciding to whistleblow (Miceli et al., 1988; de Graaf, 2010), the *level* at which wrongdoing occurs is central to understanding its effects on whistleblowers' motivations. Throwing the various levels of misconduct into a common pot produces subtle, generally unremarked sequelae. A single example in the area of assessing the efficacy of whistleblower protection legislation illustrates this important point: since "laws that protect whistle-blowers from unjust discharge generally apply only when the alleged organizational wrongdoing violates the law" (Miceli and Near, 1988: 270), whistleblowing with respect to fraudulent reporting of expense accounts *will* be covered, whereas the law *will not* apply when the corrupt procedures of an entire industry put whole sectors of the public at risk, as with the misrepresentation of medical research data (Malek, 2010).

The literature's trope of characterizing reprisals as relatively innocuous and whistleblowers as suffering relatively little serves to mask contradictory findings. This reading of the research may be deliberately encouraged as an organizational strategy, disconnecting whistleblowing from retaliation. Where "the whistle-blower is not fired outright" (Lipman, 2012: 60), retaliation may be demoralizing, humiliating and stress-producing to the point where leaving is the only reasonable option (Alford, 2001). Any breakdown may then be viewed as an independent, pre-existing aspect of the whistleblower's personality, not due to retaliation.

Researcher naïveté may mirror that of their subjects. Researchers have called whistleblowers "organizationally naïve"[6] – whistleblowers consistently underestimate the severe consequences of reporting (Rothschild and Miethe, 1999) – and "overly trusting" (Jos et al., 1989: 556). Similarly, researchers have assumed the benevolence of organizations, and only reluctantly identify misconduct as premeditated. Research has been designed to support the notion that organizations genuinely want to reduce unethical practice; where corporations look as if they are protecting whistleblowers in their ranks, they "want to appear to be taking action but essentially . . . pursu[e] business as usual" (Earle and Madek, 2007: 3). Corporate mission statements outlining institutional mechanisms for reporting wrongdoing are often *pro forma*;[7] "informal norms and reward systems" may actually discourage high moral standards (Miceli and Near, 2002: 466).

Authors continue to exonerate organizations of deliberate wrongdoing: "Contrary to popular belief, these acts [of wrongdoing] do not enjoy the support of the organization but are perpetrated by some individuals or groups within the organization . . . [for] personal and selfish gain" (Dasgupta and Kesharwani, 2010: 67). Thus, research may have become one of a number of organizational counter-resistance strategies, created to make organizations appear, at best, dedicated to the well-being of their employees and the public, and, at worst, innocently unaware of wrongdoing.

Investigators may have avoided concepts or ideas that have failed to attract institutional funding, or perhaps they are bound up by assumptions that obscure the driving forces of corporate practice. Having accepted whistleblowing as an effective internal control mechanism (Ab Ghani et al., 2011), many studies propose solutions which should convince organizations that collaborating with whistleblowers is profitable, "sav[ing them] millions if they take preventive steps to avoid law suits" (Rocha and Kleiner, 2005: 85). However, suggested solutions are vague – e.g. "ensure that mechanisms exist to bring about necessary change following reporting" (Firth-Cozens et al., 2003: 336) – and lack details of feasible implementation. Some research (Rocha and Kleiner,

2005) even claims that organizations have already changed their attitude toward whistleblowing, implementing whistleblowing protection measures because they "are growing weary with . . . the cost involved in litigations" (ibid.: 85).

If supporting whistleblowers were truly more lucrative than silencing dissent, it would already be the norm. Organizations devote billions of dollars of resources to developing tactics to increase profit; how likely is it that they are simply unaware of wrongdoing, or that they have merely overlooked whistleblowing as an important asset, or that they only need a reminder from researchers? Vadera et al. (2009: 566) respond succinctly – "How likely is this when so much money is at stake?"

Whistleblower protection – policy versus praxis

More current research turns to the whistleblower protection legislation supposed to corral organizational wrongdoing. This new direction demonstrates the tacit abandonment of the automatic assumption that organizational wrongdoing has been largely inadvertent, or simply due to the conduct of a limited number of individuals. Also, the idea that the onus of proof lies with the whistleblower has been dropped; whistleblower protection legislation requires that organizations implement mandatory internal disclosure mechanisms.

Leading-edge studies discuss the effect of financial incentives on rates of misconduct reported (Lipman, 2012; cf. Dworkin, 2007). Other work judges whether governments should broaden legal obligations to report wrongdoing[8] (Tsahuridu and Vandekerckhove, 2008), or whether 'organizational cultures' conducive to employee reporting suffice (Kaptein, 2011; Lipman, 2012). Still others explore the effectiveness of extant whistleblower protection legislation (e.g. Brickey, 2003; Earle and Madek, 2007). Proponents of whistleblower protection legislation assume that reducing retaliation will encourage whistleblowing, especially if there is monetary compensation. Some contradictory research points out that whistleblowers may not be motivated either by economic reward or the probable success of their efforts (Seifert et al., 2010), but rather by a heightened concern for public interest coupled with a lack of concern for job security (Dworkin, 2007; Vandenabeele and Kjeldsen, 2011). Counter-intuitively, this implies that better legislative protection may *not* encourage whistleblowing. Indeed, wider legal protections might not have made whistleblowers feel more secure, since these protections most often favour corporate defendants (Strack, 2011).[9]

Currently, "scandals have exposed an extensive disregard of vital standards of transparency, a neglect of fundamental accountability and a profound lack of integrity *at the highest levels*" (italics ours), "undermining public confidence" (TI, 2012a: 1) in our most important institutions. At the G20 summit of November 2010, whistleblower protection was prioritized in the "global anticorruption agenda" (OECD, 2010: 2). The Organisation for Economic Co-operation and Development (OECD) working group studied the main features of current whistleblower protection frameworks in the 31 signatory OECD nations as part of their "Anti-Corruption Action Plan" (A-CAP) (OECD, 2010). Non-profit watchdog groups (e.g. the EU's TI, the US's Government Accountability Project) hailed this as the initiative of a new corporate and governmental collaborative ethos. Project objectives included the creation of stand-alone whistleblower legislation which required transparent corporate mechanisms for anonymous whistleblowing, in both public and private sectors. The A-CAP stressed the need to support citizens revealing unethical behaviour at national and international levels.

Three years later, the working group was still calling for those "G20 countries that do not already have whistleblower protections" to put them in place, including promised guarantees that journalists and whistleblowers "exercise their function without fear of any harassment or

threat of private or government legal action" (OECD, 2013: 2). This extended lack of change caused critics to cry out for the regaining of "public trust" via socially responsible action, not just lip service, and for "a coherent programme of anti-corruption reform that is addressed *at the very highest level*" (TI, 2012a: 1; italics ours). Initial enthusiasm for what looked like an international sea change was dampened, and as yet there is no evidence of genuine follow-through in establishing necessary legislative frameworks. Further, when G20 nations have implemented proposed whistleblower protections, the legislation still fails to protect against retaliation. Demand continues for "legislation without loopholes . . . protect[ing] whistleblowers from all forms of reprisals", including "prompt, effective and independent follow-up of disclosures as committed to" in the 2010 A-CAP (TI, 2012a: 2). To date, NGOs have listed components of ideal whistleblower protection legislation (FAIR, 2012), but no research has endeavoured to analyse why at the national and international levels actual legislation fails to incorporate these features.

What did the OECD 2010 legislation actually promise? Whistleblowing legislation comes in various forms. It may appear as dedicated legislation (e.g. Japan's Whistleblower Protection Act, the UK's Public Interest Disclosure Act (PIDA)), which may include laws under criminal codes (e.g. SOX mandates that publicly traded companies implement internal mechanisms for reporting fraudulent activity) and may also protect employees in particular private sectors (e.g. the US Dodd-Frank Wall Street Reform and Consumer Protection Act for the securities field). There may also be whistleblower protection provisions in sectoral laws, such as anti-corruption laws, accounting laws, employment laws (e.g. France's Code du Travail), environmental protection laws, etc., or in legislation regulating public servants (e.g. Australia's Public Service Code of Conduct). Taken altogether, in most countries there are a plethora of laws, providing a patchwork of piecemeal protection. The A-CAP claims that, without "comprehensive, dedicated . . . stand-alone" legislation, whistleblowing does not command adequate public attention – that is, it has insufficiently "heightened visibility" – making it just "too difficult" for governments and employers to promote whistleblower protection measures effectively (OECD, 2010: 7).

That "specific laws exist and are available still begs the question whether they are utilized effectively" (Louw, 2011: 62). The true meaning of whistleblower legislation may be seen clearly only in specific cases where the law running its course actually protected or failed to protect the whistleblower (Earle and Madek, 2007). Evidently, when the outcomes of specific cases are tallied, whistleblower legislation exhibits so many shortcomings it may be accurately characterized as rhetorical window dressing (Earle and Madek, 2007; FAIR, 2012). Even in countries where labour and employee protection legislation is far more sophisticated than in the UK or North America, legislation often fails to protect whistleblowers, especially where businesses operate internationally (Strack, 2011).

FAIR's (Federal Accountability Initiative for Reform) list (2012) of the inadequacies of Canadian whistleblower legislation enumerates flaws common to most whistleblower legislation:

- the law's purpose and responsible parties are unclear;
- the scope of the law excludes too many individuals and/or the entire private sector;
- whistleblowers are barred from normal access to courts;
- going public precludes protection;
- whistleblowers must employ processes determined by their employer, thereby possibly subverting or preventing further action;
- whistleblowers are criminalized for minor procedural errors;
- responsible agents can choose not to deal with cases for any or no reason;

- most claims of retaliation are disqualified;
- no empowered authority corrects wrongdoing or sanctions wrongdoers;
- investigations are too fragmented to be thorough;
- short time limits for filing make reporting impracticable;
- the process is "shrouded in impenetrable secrecy".

Many of these regressive provisos buttress employers' interests (Lewis, 2011) by reinstating certain aspects of the definition of whistleblowing previously abandoned.[10] In most nations, protection is generally "so hemmed round with conditions that it offers no real protection" (Strack, 2011: 115–116) and almost anyone may be excluded.[11] Laws fail to mandate sufficient investigation to make facts available or to provide adequate resources for such investigation. Altogether then, whistleblowing protection laws amount to "a collection of praiseworthy principles" without "any real and concrete support" (Uys, 2011: 168).

Whistleblower protection and corporate counter-resistance

It is one thing to discern the minutiae of laws sabotaging whistleblowing outcomes; it is another to explain the inadequacy of so much of the legislation. A major clue appeared in the TI 2012 recommendations. Responding to the G20's lack of progress from 2010 through 2012, they stated, "legislation and procedures should be subject to consultation with relevant experts and civil society to . . . meet the standards of best practice" (2012a: 1). This statement infers that without a significant degree of public input and control into whistleblower legislation, corporate interests, not public interest, prevail (also Miceli et al., 2008). Further recommendations pinpoint "manag[ing] . . . conflicts of interest by strengthening rules on 'revolving doors' . . . for individuals who move between public office and the private sector, . . . and by implementing effective lobbying rules"(p. 2).[12]

Why would a watchdog organization realign its comments this way? TI found that, despite promising to adopt the OECD 2010 A-CAP, half of the world's 105 top listed companies operating in these nations still "do not publish information on their anti-corruption programmes" (2012a: 3), with the sorriest compliance evident in the financial industry. TI has ceased celebrating the OECD A-CAP and instead makes ominous statements suggesting dishonest covert intent. In the face of useless or unenforceable laws too easily ignored by those responsible for protecting whistleblowers, particularly after what seems to be a lot of impressive rhetorical posturing by nations supposedly committed to addressing these shortcomings, such a shift of perspective in groups like TI has to become the starting point of research.

Without ongoing public surveillance, whistleblower legislation is too easily co-opted in the design stage by corporate interests. Research needs to move beyond the assumption that, where wrongdoing is evident, organizations are either unaware or innocent of complicity, and further, beyond a naive belief that rhetorical commitment to the public interest constitutes action. This will clear the way for studies to explore how corporate strategies manage to reconcile commitment to act in the public interest while in truth silencing and subverting resistance (Shulsky and Schmitt, 2002; Gornall, 2009).

For a corporation to include whistleblower protection in its reconciling unethical business practice with rhetorical commitment to the public good, it must seek organizational and legal control of the way in which whistleblower laws are applied. This may occur in two ways: first, mandatory internal reporting channels may be established so as to appear to protect whistleblowers, while actually having minimal effect on the conduct of business (Earle and Madek, 2007; Lewis, 2011); second, courts may be convinced to interpret whistleblower protection

laws so as to minimize damage from whistleblowing, by manipulating through jurisprudence the meaning of various terms[13] in said laws or the severity of sentencing.[14]

However, it is far more efficient to control whistleblowing politically by controlling the crafting of whistleblowing laws. This may be achieved in two ways. The first, which is becoming uncomfortably familiar, is lobbying through overt mechanisms of campaign funding. Certain politicians succeed primarily because of massive cash infusions from corporate interests, in potential exchange for in-kind services (Gilson, 2010). Corporate and big industry "spending on [US] lobbyists surpassed $3.3 billion in 2011, triple the total in 1998" (Grier, 2012), "lending outsized influence to business interests over the concerns of average [citizens]" (Roos, 2012). The second, a strategy more powerful, less obvious and far more direct, has only recently come to light with indisputable evidence of collusion between corporations and elected politicians responsible for drafting legislation.

It is easy to discredit as too conspiratorial the claims that corporate counter-resistance include deliberate, planned, multinational pre-emptive strategies which short-circuit resistance before it organizes effectively. However, this is an area demanding careful assessment of the politics of the meshing of corporate and political interests. In moving away from their original naïveté around corporate intent, scholars have already begun to assign these notions some credibility by addressing different conditions and consequences of organizational life and markets (Knights and Tullberg, 2012), the blurring of divisions between private and public or state policies (Wedel, 2004) and movements at government levels (Crane and Matten, 2013).

Lubbers (2009) connects the dots between "the politics and practices of reputation management" (p. 6) and the maintenance of corporate dominance in society by documenting "covert corporate strategy" (p. 1) in detail. She uncovers the extensive corporate networks of ex-military and ex-CIA operatives hired to "manage, manipulate and undermine their critics in NGOs and civil society" (p. 1).[15] Agents are systematically deployed, internationally and pre-emptively, to infiltrate and sabotage counter-corporate resistance groups before they achieve a stable mandate (Harding, 2014). The study demonstrates clearly that corporations do not simply respond to allegations of wrongdoing, but prevent accusations from ever arising. Where this proves impossible, they ensure the media present whistleblowing groups or individuals as so disorganized and plagued by internal struggles that their efforts are discredited (Turbeville, 2012), which portrayals are, of course, self-fulfilling. With this new evidence of strategies of covert corporate control, research investigators need to look beyond observing internal organizational malfeasance to wider counter-intelligence tactics.

Having accepted that corporations are capable of aggressive proactive strategies, it only makes sense that companies seek to participate directly in the political creation of proposed legislation and then to 'sell' it to legislative bodies. It would make even more sense for such companies to collaborate in effecting these plans. Enter the American Legislative Exchange Council (ALEC). Founded in 1973, ALEC is "composed of legislators, businesses and foundations which [produce] model legislation for state legislatures" (Center for Media and Democracy (CMD), 2013b). ALEC claims to promote free-market and conservative ideas, but the 'model' legislation it promotes invariably benefits ALEC's corporate members, often by reducing effective government oversight of private activities (Wedel, 2004; Potter, 2013),[16] or by eliminating smaller competitors.[17] In 2011, ALEC had assets of US$4.047m, and revenue of US$7.171m, more than enough to wine and dine elected and aspiring state representatives.[18] Its 'Board of Scholars' includes Victor Schwartz, one of Washington's 50 top lobbyists, a DC-based law and lobbying firm partner who has represented major players, in the tobacco (Philip Morris/Altria Group), pharmaceutical (Bristol-Myers Squibb, GlaxoSmithKline) and technology (Sprint Nextel, Microsoft and Sony) industries. Dr Schwartz is also law professor and dean at the University of Cincinnati College of Law (CMD, 2013a).

Researchers are becoming aware of the wider implications of groups such as ALEC, implications which ALEC members already appreciate: "members have begun to understand the tremendous influence that our legislator members have on national and international policy in spite of having no official jurisdiction on this policy" (ALEC, 2013: 6).

Whistleblowing for the greater good

Whistleblower research has moved from assuming corporate benevolence to considering that organizations may sabotage whistleblowers as part of a larger damage control strategy, in the USA and beyond.[19] The location of these strategies in the context of a purported "global network of corporations" (Vitali et al., 2011: 4) with interlocking interests across nations and organizations[20] significantly weakens the restraining effect of market competition upon corporate activity, at the level of individual organizations (Dyck et al., 2010), and international politics (Hudes, 2011[21]; Lipman, 2012). The increasing complexity of information-based economies (Earle and Madek, 2007) allows for "low public visibility . . . and explicit cover-ups" (Rothschild and Miethe, 1999: 126) of organizational wrongdoing, offering whistleblowing as the best hope for bringing these matters to public awareness (ibid.; Hudes, 2011). Accordingly, research into understanding whistleblowing as a central strategy of resisting corporate misconduct becomes crucial.

The study of organizational resistance typically focused upon formally organized, collective tactics, such as union-led labour initiatives (Burawoy, 1979), but more recently attention is being directed toward more informal and fragmented forms (Jermier et al., 1994; Hodson, 1995; Flyvbjerg, 2006; Pullen and Rhodes, 2013), including whistleblowing. Realizing that custom designing whistleblower legislation may be only one of a number of corporate strategies to disarm efforts to protect whistleblowers and generally to counter anti-corporate resistance, the act of whistleblowing takes on a more political character. Whistleblowers' unearthing of unethical micro-practices in organizations may serve a much larger purpose. When these practices are seen in combination to prevail across industries and entire sectors, then whistleblowing makes visible unethical political strategies which attempt to render invisible the actual workings of power (Miceli et al., 2008).

To comply with norms of social justice (Lindblom, 2007: 424), social institutions must protect individuals from being forced to choose unethical compliance or ethical non-compliance (Hasnas, 2006). Since legal structures are determined politically as much as ethically, legalistic attempts to suppress whistleblowing through *ad hominem* incrimination (as in the case of Bradley Manning) or disqualification of whistleblower claims (FAIR, 2012) may be interpreted as political suppression of free speech for, as Lindblom (2007: 424) argues, "when we have whistleblowing we have political speech". Consequently, the central ethical issue of whistleblowing is that of the tension between political free speech and loyalty to an organization engaging in wrongdoing (ibid.). In the broadest sense, protecting whistleblowers preserves the basic democratic liberty of free speech (Greenhouse, 2006[22]; Vandekerckhove, 2006). In examining the control of whistleblowing through legislation and other politico-legal means, we trust scholars will abandon research designs that mask or trivialize organizational misconduct and corporate counter-resistance strategies, and instead aim at accounting for wider political repercussions in the broad contexts within which organizations operate. Insofar as whistleblower protection is surrounded by much rhetoric resulting from the co-optation of certain legislative elements of the democratic process to serve a specific corporate agenda, this particular mechanism certainly deserves closer analysis.

Notes

1 Examples from these areas include: management (Ab Ghani et al., 2011); accounting (Patel, 2003); administration (de Graaf, 2010); finance (Verschoor, 2010); law (Earle and Madek, 2007); medicine (Miethe and Rothschild, 1994); philosophy (Bouville, 2007); sociology (Evans, 2008); education (Bok, 1980); psychology (Keenan, 1990); and psychoanalysis (Alford, 2001).
2 Sukhdev et al. (2013: 1) draw on Bachrach and Baratz's notion (1962) of the "'negative' face of power", wherein dominant interests exert power, not through overt confrontation, but by the subtle manipulation of agendas.
3 E.g. in Bradley Manning's case, the court dealt only with whether *Manning's actions* were legal; not with the abuses he revealed, e.g. US military policy: ignores torture in Iraq (Spillius, 2010); conceals child abuse by US defense contractors (*Guardian*, 2010a); conceals accounts of 'collateral' civilian deaths in Iraq (*Guardian*, 2010b).
4 Treating wrongdoing homogeneously is problematic, e.g. "companies often believe that implementing anonymous hotlines is sufficient to comply [with South Africa's Public Disclosure Act] . . . but these are only good for stopping theft in firms, not ensuring ethical behaviour" (Uys, 2011: 166).
5 Occasionally organizations perceive whistleblowing as so threatening, that just alluding to it brings retaliation; Sheffield University suspended Dr Stuart Macdonald for having "mention[ed] a controversial incident", when Aubrey Blumsohn in 2003–2005 blew the whistle on Procter and Gamble and Sheffield's condoning of unethical research practices (Jump, 2012).
6 Interestingly, naïveté does not 'make' a whistleblower; non-reporters are also naïve, having high levels of "perceived organizational support" (not seeing wrongdoing) and "perceived channel justice" (believing someone else would report it) (Miceli et al., 2012).
7 Organizations should *appear* to help whistleblowers; a company's assets include intangibles such as 'goodwill'. Image has cash value.
8 Regulation already constrains some individuals to report wrongdoing, e.g. doctors must report suspected child abuse; internal auditors must report accounting fraud.
9 The Sarbanes-Oxley Act (SOX) was supposed to protect US whistleblowers against retaliation. From 2002 through 2009, only 21 out of 1,455 claims of retaliation under SOX were successful; 996 cases were dismissed (Lenitz, 2009).
10 E.g. PIDA demands that whistleblowers follow employer authorization even when reporting externally, including reporting to a "person who is responsible for the matter disclosed", and that no protection exists if whistleblowers stand to gain personally.
11 Australia's latest whistleblower laws are more restrictive. Not only do they not expand protections already in place, but additionally exclude anonymous reporting, claims questioning government policy or "breach[ing] legal professional privilege" (Brown and Latimer, 2011: 144).
12 Only 6 of 25 countries assessed have regulated lobbying, and frequently lobbyist registers are inadequate (TI, 2012b).
13 E.g. a pharmaceutical researcher turned whistleblower referred to terminology in a proposed law, with wording that principal researchers for pharmaceutical corporations have "complete access to data". Does this mean access to a summary chart of data? Were they able to access raw data in numeric form or in computer language? How long did they have access to printed data: for 2 hours, for 12 hours? Can researchers take the data home, or must they view them on corporate premises? Can they copy data, or is data 'proprietary' to the corporation? He also pointed out that these exact questions were, in principle, part of his university's ethics guidelines, but were not part of practice.
14 Sentencing so lenient that it seems absurd when measured against the harm caused may be one such mechanism. In the aftermath of the rig explosion that spawned the biggest offshore oil spill in US history and killed 11 workers, the Halliburton manager convicted of destroying evidence was fined $1,000, a year of probation and 100 hours of community service. Halliburton was fined a mere $200,000 in connection with this manager's conduct (Kunzelman, 2014).
15 Others writing in her field of "activist intelligence" (2009: 3) include *The Guardian*'s journalists (Monbiot, 2013), 'intelligence' scholars (Shulsky and Schmitt, 2002), sociologists (Vinthagen and Lilja, 2007) and anthropologists (Wedel, 2004).
16 In cooperation with 'agro-business', ALEC produced the model 'ag-gag' bill. Whistleblowing caused the largest meat recall in US history, but this new legislation criminalizes anyone sharing video evidence of animal abuse (Potter, 2013). Laws based on ALEC's model were enacted in three states in 2012, and introduced in nine more in 2013.

17 Georgia's state legislators "are pushing a bill to thwart locally-owned internet . . . the big 'incumbent' internet companies. . . managed to put off upgrading their networks because of near-monopoly power in many areas . . . Georgia would have been the twentieth state to . . . [pass] bills [derived from ALEC's] 'model' Municipal Telecommunications Private Industry Safeguards Act . . . a conduit for internet providers like AT&T . . . to eliminate competition" (Fischer, 2013).
18 ALEC is registered as a tax-exempt charity, not a lobbying organization. Congress funds ALEC's activities – making the taxpayer ante up so that corporations can ensure elected representatives support pro-corporate, not pro-public, legislation (CMD, 2013b).
19 Similarly to ALEC, the UK's Institute of Economic Affairs calls itself an "educational charity" functioning "as [a] learned societ[y]", providing 'education' for legislators in "the best interests of the public". While "purport[ing] to be independent . . . [it works] . . . for some very powerful US interests" (Monbiot, 2013).
20 Mathematical modelling of the web of ownership relations in 43,060 publicly traded transnational corporations (Vitali et al., 2011) finds a concentration of economic power amongst "'a tightly-knit' core of 147 corporations". Three-quarters are financial intermediaries that played major roles in the 2008 financial crisis (e.g. Bank of America, Bear Sterns, Citigroup, Credit Suisse, Deutschebank, Goldman Sachs, Lehman Brothers, et al.) (ibid.: fig. 2D).
21 Hudes's (2011) report of corrupt practices in the World Bank outlined threats such practices posed for democratic process worldwide.
22 In Garcetti *v.* Ceballos (361 F. 3d 1168), the US Supreme Court ruled that disclosures to shareholders and the Inland Revenue Service (IRS) by a Los Angeles District Attorney filing a whistleblower complaint were not protected as free speech, as the First Amendment does not protect employees from discipline for utterances made pursuant to professional duties (Cornell University Law School, 2006); "the National Whistleblowing Center decr[ies] th[is] decision for chilling whistleblowers" (Greenhouse, 2006).

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