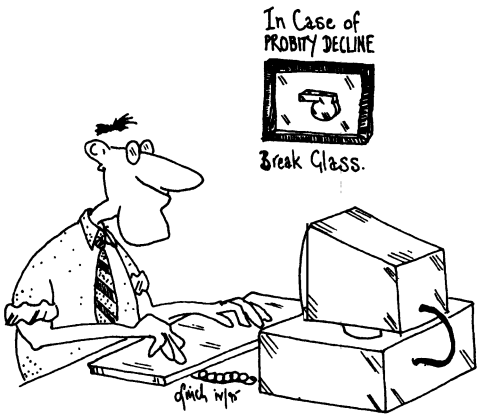
Welcome disclosure

Mark Vincent

The decline of whistleblowing as an ethical act.



The introduction to this article may seem to be a counter-intuitive response to the phenomenon of whistleblowing. After all, there is now heightened public awareness of the abuses that can be brought to light via whistleblowing, and the suffering that a whistleblower may have to endure after making disclosures. Further, legislation has been enacted and other safeguards have been set up, that give whistleblowers a more secure legal basis on which to act.

To continue to conceive of whistleblowing as an ethical question is incomplete; the ethical component in an individual's decision to 'go public' has been supplemented and indeed supplanted by technical considerations. Whistleblowing is becoming less of an exercise of moral judgment and has more of a functional role in the maintenance of proper administration. Whistleblowing can be seen to be increasingly valued as an administrative procedure in the exercise of power, whatever the motives of the whistleblower.

This, then, makes whistleblowing an eminently suitable issue for investigation of the intersection of science and social values. The political responsibility that lies at the heart of ethics is to some extent being exchanged for a technical response that adopts a morally neutral application of scientifically derived managerial technique.

I describe and analyse what I believe to be a developing form in the circumstances within which whistleblowing occurs, discuss what these developments seem to say about the ethical content of whistleblowing, and give my response to these developments. I consider the significance of the fact that whistleblowing appears to be a recent development, and any changes that have occurred in whistleblowing itself over the course of its history.

The definition of whistleblowing

Definitions of whistleblowing vary, reflecting the varying concerns held by different writers. All definitions require the whistleblower to be (or have been) an employed member of a group. All definitions require the whistleblower to disclose conduct (including omissions) of some part of the employing group. Other than that, the definitions vary in their requirements for the manner of making the disclosure, and the conduct that it can address. The definitions may include disclosures that have been: actively or passively made (an example of the latter would be disclosure forthcoming during a court case or political inquiry); formally or informally made; expressed internally within the organisation or made public; made altruistically or consistently with private benefit; and made outside or inside the individual's job specifications. The disclosures might address unlawful, improper, immoral, or wasteful conduct.

The most inclusive definition would seem to be that of Miceli and Near, sociologists, whose motive for using a wide definition seems to be so that they can catalogue the complete array of occurrences. They appear to have a functionalist analytical approach — an appraisal

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perhaps borne out by their idiosyncratic requirement that the disclosure be made to 'persons or organisations that may be able to effect action'.[1] Other definitions indicate a functional concern with efficiency. The Australian definitions, by McMillan and the Queensland Electoral and Administrative Review Commission (EARC) are the ones that include the ability to blow the whistle on 'wasteful' activity. Notably, these latter definitions are primarily concerned with public sector activity.[2]

Some writers want to place emphasis on the 'going public' aspect of whistleblowing. Amongst them, Rohr clearly states that he wants 'whistleblowing' to describe activity that extends beyond the duties that should normally accompany a job. He sees the term as describing a particular type of activity, undertaken as a last resort, that constitutes a form of 'organisational violence'. As such, he says, it places a heavy burden on the actor.[3]

Ethics and whistleblowing

The emphasis on public disclosure is sometimes linked to an emphasis on the ethical motivation of whistleblowers themselves, rather than with the wider consequences of their actions. This is certainly the case with Rohr. 'Conscientious whistle blowers with serious grievances should be able to explain their actions.' (p.15) Rohr's scheme for dealing with whistleblowing actions, by placing on the whistleblower the burden of showing the whistleblowing action to be 'explainable behaviour', sees the failure to do so as a personal moral issue. 'Fanatics and vindictive employees with purely personal grudges will be embarrassed, as they should be.' (pp.15-16) Accordingly, the embarrassment of exhibiting defective moral character is sufficient penalty. Rohr seems to be operating implicitly within virtue theory.

Glazer and Glazer also focus on the ethical element, to the extent of changing the terminology by which they describe whistleblowers. They term them 'ethical resisters' 'to denote their commitment to the principles we all espouse — honesty, individual responsibility, and active concern for the common good'.[4] Their approach seems to work within both deontological and virtue conceptions, since the duties that they refer to are those that would be seen as a grounding for good character.

On the other hand, writers primarily concerned with an employee's loyalty to the firm, such as Williams, who recommends few occasions when it is legitimate to blow the whistle even *within* the firm, see the whole matter in cost-benefit terms to the company, not the individual. In a way, this is a minimal form of act-utilitarian ethics.[5]

It would appear that whistleblowing is presently valued not primarily for what it says about the individual who has been placed in a difficult position, and must exercise ethical judgement, but for the results that it brings about. McMillan comments:

> The connection between whistleblowing and organisational ethics was drawn early in the United States . . . It is arguable that in subsequent developments there has been a narrowing of that broad focus. Whistleblower protection is usually perceived as an independent goal, with less emphasis given to its context in a larger ethical code . . . [In Australia] there has been unwavering support for whistleblowing reform, principally for the reason that improved ethical behaviour will induce more efficient and effective government. [pp.120-21]

McMillan's comments suggest that developing conceptions of whistleblowing do not necessarily tell us much about the ethics *in* whistleblowing. What type of ethics does whistleblowing tend to exhibit? To answer this we need to trace the historical development of whistleblowing, and trace the changing nature of management and administration in late capitalist societies. But first some general comments are in order.

Utilitarian approaches are probably the least likely ethical reasons used for deciding to be a whistleblower. A utilitarian or other consequentialist approach is almost bound to come to the conclusion that whistleblowing is not worth the risk, as the following passage indicates.

> The whistle blower is faced with a very difficult moral position. If, say, the issue is one of public safety (for example, from fall-out from a nuclear reactor), there would seem to be compelling consequentialist reasons why it is justifiable for a worker to break confidentiality. But either this must be done without the employer discovering the source of the 'leak', or the whistle blower can expect to pay very heavy penalties. Almost certainly, he or she will be dismissed (with obvious harmful consequences to spouses and families), or even worse.[6]

That diagnosis might change if the employee feared personal liability for the problematic activity. On the more positive side, legal schemes to protect whistleblowers might bring about an assessment of the risks at a discounted rate.

It would appear that deontological and virtue ethics are more likely to be adopted. Virtue ethics could explain the courage that would be required to be a whistleblower, having as it does the almost certain consequences of stress and misery.

In respect of deontological approaches, Glazer and Glazer note that a number of authors report whistleblowers as generally conservative people, who had been successful bureaucrats or managers until they were supposed to violate their own standards. 'Invariably, they believed that they were defending the true mission of their organisation by resisting illicit practices' (p.6). Hacker describes whistleblowers (at least those up to 1980) as 'middle Americans, with no intrinsic animus toward capitalism or record of political radicalism . . . None had lofty executive ambitions.'[7]

The beginnings of whistleblowing

Glazer and Glazer recount the early whistleblowing cases, and seek to offer some explanation for their occurrence. They consider whistleblowing arose, at least in the United States, during the 1960s. Its growth in Australia seems to have followed that lead. Despite their acknowledgment that in earlier times there were those who disclosed harmful practices to the public, they consider that whistleblowers were 'a historically new group'. They identify three major sets of factors, all of a social nature, leading to the emergence of whistleblowing at that time. Those factors were the battles for compliance with a new wave of attempted regulation of business activity, widespread public disillusionment with the capacity of industry and government to control the hazards accompanying increased technologisation of society, and increased public cynicism as to the integrity of public officials following disclosures concerning the running of the Vietnam War effort, and then Watergate. This third factor indicated a decline in governmental probity. 'Taken together', Glazer and Glazer say, 'these factors created an environment of distrust among employees who witnessed indifference to dangerous and illegal practices condoned by their superiors' (p.11).

Glazer and Glazer give a general description of the increased regulation of business corporations following their growth after the Second World War. Much corporate activity was seen to involve abuses of power, against which community groups and then state legislatures reacted. Decisions that had formerly been mainly the preserve of business became subject to regulation. The regulation encompassed environmental concerns, worker health and safety, and consumer rights. Further, in comparison to earlier regulation of business, the new body of regulation was less industry specific and more generally applied to all corporate activity. A whole platform of new or revamped regulatory agencies were set up. These would of necessity have tended not have a close mutually supportive relationship with particular firms or industries.

The corporations were often resistant to the new regulation. 'By the mid-1970s, there was unprecedented regulation of the private sector and a brewing reaction by industry that had never fully accepted the premises of, or the limitations imposed by, the new laws.' (p.13) The new regulations had made various business practices illegal, or subject to licence. New costs were imposed. Yet the reaction by business was often not framed in terms of argument about cost. The debate was more expressly politicised, as business leaders claimed that the regulatory agencies were too powerful — and were thus oppressive and illegitimate. This corporate resistance invoked a pattern of 'a new level of corporate lawlessness' that in turn provoked a response of whistleblowing. As indicated above, such whistleblowers would be duty-minded employees who could not condone their employers' breaches of law.

Resistance to regulation was not confined to business. Some public officials in the regulative agencies colluded in lax or non-enforcement of regulatory requirements. Such behaviour of regulatory officials might heighten the possibility of whistleblowing action, since not only would some employees find the organisational behaviour reprehensible, but they might have gone to work for such an agency precisely because of its regulatory role.

The nature of corporate capitalism

Part of what Glazer and Glazer are documenting is the process by which the welfare state has become constituted. This experience has been common to the Western industrialised world, and accordingly it should be no surprise that whistleblowing has developed in Australia as it has in the United States. Within welfare capitalism, the interconnectedness of the parts of industry and society is increased to such a point that unrestrained action by private capital can readily become dysfunctional and a threat to the stability of the system. Regulation becomes necessary for private capital to survive. The growth of capitalist enterprises means that their activity has widespread public ramifications. Not only will industrial pollution be an environmental and health issue, for example, but it may also be a threat to the viability of other industries such as agriculture or fishing. Yet from the point of view of a particular industry or firm, general regulation will likely appear as an inconvenience to free decision making on economic grounds, and oppressive. As documented by both Habermas and Offe, among others, this leads to changed forms of rationality by which both capitalist and state activity are legitimated in society.[8] However, especially during transitional periods, there will be conflict between the forms of rationality, and thus conflict over what actions are seen to be legitimate. Whistleblowing arose during a transitional period, when there was competition between sets of values by which the common good was to be achieved.

Theories of corporate governance

Competing legitimations are expressed in competing theories of corporate governance. In order to be seen as legitimate, whistleblowing has to overcome those competing values. The foremost of these is that of loyalty. The following statement made in 1971, by James Roche, the then chairman of the board of General Motors Corporation, puts this point of view forcefully:

> Some critics are now busy eroding another support of free enterprise — the loyalty of a management team, with its unifying values of cooperative work. Some of the enemies of business now encourage an employee to be disloyal to the enterprise. They want to create suspicion and disharmony, and pry into the proprietary interests of the business. However it is labelled — industrial espionage, whistle blowing, or professional responsibility — it is another tactic for spreading disunity and creating conflict.[9]

Roche clearly sees whistleblowing as a threat. It is a threat to the proprietary interests of a corporation because it interferes with the duty of employees to unreservedly follow the directions of those in authority. Thus we can see an indication that whistleblowing is inconsistent with a certain type of authority — absolute authority. For the whistleblower there will be competing authoritative principles commanding obedience. These competing principles may be an internalised (ethical) response on the part of the whistleblower that has a reference point to some external consideration, such as the law.

It is clear that someone like Roche considers that proprietary interests are the guiding principle for the conduct of a corporation and its employees, and the affairs of the corporation are seen as an entirely private matter. Those proprietary interests will be determined by the will of the owners of the corporation. Roche's view is a common conception of the legitimate structure of corporate governance. It is not the only one.

In the 19th century the German social theorist Otto von Gierke spoke of the competing principles of 'fellowship' and 'lordship' operating within the corporate form.[10] 'Lordship' is the hierarchical principle of political authority and 'fellowship' the egalitarian principle. Together they made up the corporate interest, an interest that is distinct from those of its constituent members. Gierke wrote of the history of corporations before they became identified with business entities. Up to his time, the majority of corporations had been governmental bodies, such as cities or towns, or occupational groupings, such as gilds. In both these types of bodies there was considerable room for the 'fellowship' principle to operate. Even trading corporations, such as the East India Company, had a substantial governmental role. Gierke's fear, that appears to have been borne out, was that if business corporations were organised on the principle of rights belonging only to ownership of capital then they would operate solely under the principle of 'lordship'.

The conception of appropriate management practice that corresponds to the 'lordship' aspect of corporate authority is that of management prerogative. Management prerogative is challenged within and from outside the corporation by various forms of collective labour power. There are often calls for workplace democracy. These calls mirror the conflict in wider society between despotic and representative govern-

ment. The competing organisational principles in corporate form are the same as the competing principles by which modern democratic states operate — the state has authority over the citizenry, but the processes of state governance are responsible to all citizens — except that in the modern democratic state absolutism no longer holds sway. In a way a corporation forms a miniature state. '[T]here seems to be a genus of which state and corporation are species. They [both] seem to be permanently organised groups of men.'[11] Whistleblowers look to their membership of the wider group.

The legitimation of whistleblowing

Much of the literature on whistleblowing discusses a number of prominent early cases. These cases helped establish that significant benefits can accrue to society from the disclosure of wrongful activity by whistleblowers, and that, accordingly, whistleblowing could serve a useful role in the maintenance of social values. It was for such reasons, of course, that a number of whistleblowers chose to speak out.

More specifically, whistleblowing can be a useful mechanism of maintaining a particular form of capitalism — welfare capitalism. Legal and other mechanisms currently being put in place to bring about the administrative objectives that welfare capitalism possesses will surely progressively hollow out the ethical content within whistleblowing.

To say this is not to deny the reality of the difficult ethical position within which a potential whistleblower finds herself or himself. Individually, each of them needs to summon the internal resources to challenge what is going on. If the regulatory system recognises and validates whistleblowing in some way, then it will most likely be because it is in accordance with or promotes certain system-wide objectives. It will not be in order to reward the character or actions of whistleblowers (the sort of thing that is usually done via medals, anyway). It will have been no accident that the phenomenon of whistleblowing emerges at a certain point in social history where there is conflict between *laissez-faire* and more bureaucratic forms of capitalist society, and then that it becomes fairly quickly institutionalised by a set of legal safeguards and protections once the more bureaucratic form is well established.

Most of the literature of whistleblowing speaks positively of its occurrence, and that whistleblowers are deserving of protection. The writers are not overly concerned that 'loyalty' is undermined, they are too aware of the public interests involved. As an absolute value loyalty seems to have had its day. The concern writers express is the risk that malicious and false whistleblowing claims will be made. Many of the submissions to EARC recommend penalties for false disclosures. They assume that they *will* occur and that safeguards need to be instituted. False or malicious claims, they say, are to be guarded against and penalised. Given the continuing odium that attaches personally to whistleblowers, how likely is it that false claims will be made by someone of sound mind? It seems that the concern is once again administrative — over the damage that will result from a false claim. For these reasons, then, false claims must be deterred.

On a lesser note, McMillan considers that it is 'inevitable too that some whistleblowers will be motivated by a desire to advance their self-interest or to injure a colleague; upholding the public interest may be secondary or irrelevant' (p.128). In contrast Rohr, although he too speaks of the risk of *mala fides*, considers it its own punishment.

Some discussions of whistleblower protection schemes have spoken in terms of the whistleblower having to have 'good faith'. It is difficult to assess someone's state of mind. McMillan says: 'In practice too it is hard to measure a feature so highly subjective or personal as the motivation of a whistleblower' (p.129). In essence, then, there is concern over the non-objective nature of motivation. The *bona fides* of the whistleblower is problematic to determine. If the functional utility of whistleblowing to the economic and administrative systems is the primary concern of those bodies seeking to institutionalise whistleblowing procedures, then the motivational issue, the ethical issue, is of little interest. It can be sidestepped. In such circumstances a more objective criterion by which to assess the whistleblower's conduct would be sufficient for systemic purposes. Indeed, the motivational reasoning of the whistleblower could be quite at odds from the benefit the system gets out of his or her act. This is clearly stated in the following extract from a submission to EARC.

> It would be extremely difficult in any case to determine an employee's motivation for disclosing information. There are likely to be a mixture of motives. Thus 'good faith' is a less satisfactory criterion on which to base protection of the whistleblower. An employee may be motivated by good faith but may be careless in checking the true position and make disclosure based on suspicion not supported by any reasonable belief.
>
> On the other hand, the employee may be motivated by malice or vengeance but the subject of the disclosure may well justify its exposure. Thus it would appear that 'motivation' is not relevant but that a more important test is whether the employee 'reasonably believes' the substance of the information.[12]

The utility of a 'reasonable belief' test is that it fits into common legal criteria by which a person's conduct is judged. It contains an admixture of subjective and objective elements: what an objectively determined reasonable person would do or believe in the particular circumstances the whistleblower found themselves in. The 'reasonable belief' test was ultimately recommended by EARC. The Commission commented: 'a good faith requirement . . . is unnecessary in securing the objects of the scheme'.

Accordingly, even though legislative schemes are being adopted, they do not give much play for ethical responses, even on consequentialist or deontological grounds, because the *legalisation* of whistleblowing is not being done with the ethical issue in mind. The new scheme might make it *easier* for someone to be a whistleblower, but the exercise of ethical judgement can itself be suspended. There is no need for a person to articulate a personal ethic in any fuller sense than that of obedience to the laws of the day.

Scientised administration

That there can be danger in treating whistleblowing in a legalistic or formalised way has been recognised. McMillan has argued that 'it is only by putting whistleblowing back into the context of ethical administration that a holistic approach to managing dissent in the workplace emerges' (p.121).

Yet we need to remember that our present administrative structures in both the public and private sectors work within the legacy of scientific management, that is not disposed to recognising or allowing ethics in other than utilitarian terms. As we have seen, utilitarian ethics are unlikely to be of much use to whistleblowers. The problem is a political one. The issue, as Rohr sees it, is to legitimise the participation of administrators in the governance of society when they are not

responsible to the electorate (p.23). In order to be legitimate, bureaucratic power has needed to be anonymous and impartial, since it is power delegated from the democratically responsible government or the board of directors. Political judgment needs to be separated from administration of policies. The theory to sustain these conceptions was formulated by Woodrow Wilson in the United States, from whence it made its way to other English-speaking countries.

> [Wilson's] distinction between politics and administration . . . gained wide acceptance among political scientists and harmonized nicely with the scientific management movement that dominated private industry in the early decades of the twentieth century. Thus, industrial management and public administration coalesced to form a 'science' of administration — a 'business-like' approach to government based on 'principles' common to any type of organisation and designed to promote 'economy and efficiency' in executing policies determined by the administrator's political (that is, elected) superiors.[13]

The only likelihood of ethical space being given to whistleblowing would be to the extent that it can remain independent of administration as we know it — or if administration itself was to be radically transformed.

Retaining ethics in whistleblowing

Ultimately the foundations for whistleblowing lie outside administration and whistleblowing can only retain a significant ethical element to the extent that it continues to do so. Two means for attaining this are apparent. One is to do with social resistance to technocratic power itself, the other is grounded in the importance of membership of some group or community —a matter of loyalties.

The set of concerns that Glazer and Glazer identified about the increasing technological turn of society, although related to the issue surrounding the need to regulate individual corporations activity for the good of the greater whole, were an attempted brake on the autonomy of technological development itself. In the United States, those debates crystallised around the issue of nuclear power, but in addition the use and abuse of pharmaceuticals such as Thalidomide and chemicals such as DDT focused awareness on the existence of risk associated with new technological developments. Fears were held that the knowledge associated with the new technologies was incomplete, and, therefore, possibly wrong.

Such generalised suspicion of technological development necessarily spills over into a critique of technocratic conceptions of power and scientific management. This has been recognised by some whistleblowers. Glazer and Glazer recount that Roger Boisjoly, one of the engineers who spoke out after the failure of the *Challenger* spacecraft, stresses in public lectures that 'technical education is insufficient in the face of the challenges of working in the modern age' (pp.252-3).

A further possible response stressed by Boisjoly, and endorsed by Glazer and Glazer, is for employees who are professionals to use their professional organisations as communities within which to articulate ethics that can inform whistleblowing (pp.252-3). Membership of a professional body can give security and assistance to whistleblowers, without the ethical principles being reduced to an administrative code. Identifying with a professional (or union) group can meet the needs for belonging and responsibility, in the same way as does membership of a community or society generally.

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