

# The Partnership Called Whistleblowing

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## **Introduction**

When an individual blows the whistle, they enter a partnership. They become the partner of a representative taxpayer, a representative shareholder or a representative stakeholder whose interests they represent. They become the partner of the public interest. But the public interest is so poorly defined that a whistleblower typically does not know their partner or the terms of their partnership. Whistleblowing is such a singular exercise that the partnership called whistleblowing is not a standard partnership. Instead, it is very asymmetric, with the terms skewed against the whistleblower. But, while the singularity of whistleblowing underscores its status, it is the invisible partnership that underscores its importance.

For a whistleblower, the search for a partnership becomes their dominant strategy. The whistleblower searches for a partner with whom their interests are correlated. The search is necessitated by the risk of failure in their employment contract; but the search is weakened by the risk of free riding on their whistleblowing. A whistleblower trades off these risks to form a partnership. Most whistleblowers begin as employees in an employment contract or equivalent<sup>1</sup>. Blowing the whistle renders their employment contract riskier, and often abrogates their contract.

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<sup>1</sup> See a discussion of employees as corporate monitors by Moberly (2008, p.980).

Employment contracts are not written for whistleblowers,<sup>2</sup> and the codes of conduct attached to employment contracts are often designed to satisfy regulators rather than to be invoked. Employment contracts rarely cite the public interest. A whistleblower is caught between overlapping contracts, in particular

- (1) Their employment contract
- (2) A contract with the public interest
- (3) A contract with their conscience<sup>3</sup>

Like all employees, a whistleblower must resolve which of these contracts is most important to them. Whistleblowers tend to assign more weight to the public interest and to their conscience than other employees, and this generates conflict with their employment contract. When whistleblowers search for a partner, they are seeking to establish a new contract designed to resolve this conflict. This new contract is an implicit contract, but to prevent free riding it must be formalized.

Free riding is a significant issue for whistleblowers; whistleblowing often benefits everyone except the whistleblower. The benefits are frequently intangible, but always real. An employee who blows the whistle on bribery is the collective conscience of those silent employees who know that right is being done, but without a cost to them. A regulator who receives information from a whistleblower extracts information, but without incurring the cost of their own regulatory failure. A politician who receives a whistleblower's submission learns of problems in governance, but without the cost of losing their own job. A journalist who sources a whistleblower writes an article, but without a cost to their own reputation. Everyone can free ride on a whistleblower, and they usually do. Whistleblowing is markedly asymmetric in its allocation of costs and benefits; the costs are incurred almost

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<sup>2</sup> Moberly (2008) suggests that corporate codes potentially offer more protection than anti-retaliation measures.

<sup>3</sup> Haigh and Bowal (2012) argue that freedom of conscience underwrites whistleblowing.

exclusively by the whistleblower and the benefits accrue almost exclusively to others (see Moberly (2008, p.980) for a fuller discussion). For a whistleblower, free riding is as material as retaliation.

Whistleblowers must form partnerships because of the weakness in existing laws. Whistleblowing is relatively new as a workplace problem<sup>4</sup>, and the response to it has been a patchwork quilt of statutes and anti-retaliation measures<sup>5</sup>. Even in the drafting of legislation, whistleblowers have been marginalized; they are surveyed and listened to, but they are never empowered with the legislation that they would draft. As a consequence, a whistleblower must search for partners across diverse entities including, but not limited to, other employees or contractors, internal regulators, external regulators, lawyers, politicians, the media and representative stakeholders. Yet the partnership is rarely formalized and typically very unequal; there is subordination not present in other partnerships. It is the discount the whistleblower pays for blowing the whistle.

The whistleblowing partnership is prescribed only in one legislative act, the United States False Claims Act (FCA). The FCA is often described as the most powerful public-private partnership in the US. It is a partnership with three partners – the whistleblower, a law firm and the Federal government. In the FCA, the terms of the whistleblowing partnership are written down, in particular

- (i) The contractual arrangements of the partnership
- (ii) The role and obligations of each partner
- (iii) The protections for the whistleblower
- (iv) The risks for the whistleblower

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<sup>4</sup> As noted by Rapp (2013), the term whistleblower was first used by Ralph Nader in a *Conference on Professional Responsibility* in 1971.

<sup>5</sup> Moberly (2008, p.977) writes of the statutory and common law tort protections for whistleblowers as a patchwork, gap-filled approach.

- (v) The entitlements of the whistleblower
- (vi) The entitlements of the government
- (vii) The entitlements of the law firm.

The FCA is effective because the terms of the partnership are formalized. The effectiveness of the FCA is measured by the recovery of fraud, by the deterrence of fraud, by the protection of whistleblowers, by the compensation of whistleblowers, and by the cost effectiveness of fraud recovery. With cumulative recovery of fraud using the FCA now close to \$40 billion, cumulative deterrence of fraud estimated to exceed \$100 billion, with whistleblowers receiving compensation close to 17% of recoveries, and with \$20 being recovered for every \$1 spent on investigations in the health services sector, the FCA is constantly reinforcing its legitimacy as a whistleblowing law.

Whistleblowing in general is a public-private partnership (PPP), but very different from the PPPs that have become the basis of infrastructure delivery. PPPs emerged in the late 1980s to enable governments to stabilize public sector debt (Greve and Hodge 2013, p.7). The standard PPP is a contract between a private entity and the government to deliver infrastructure with improved performance and accountability, greater innovation, reduced risk and less impact on the public sector borrowing requirement (Greve and Hodge 2013, p.7). The whistleblowing partnership also delivers accountability and reduced risk for government and, through fraud recovery and the mitigation of waste, it lowers the public sector borrowing requirement. But the whistleblowing partnership is different from other PPPs because it is not prescribed as a contract. Rather the contract is implicit, an implicit contract between the whistleblower and an undefined public interest. And it is a very unequal contract. The whistleblower typically delivers on their side of the contract. But those who benefit from the information rarely deliver on theirs.

In this paper, I consider the whistleblowing partnership in its context as a PPP. First, I briefly revisit the general framework of PPPs, then provide an analysis of the whistleblowing partnership, and an appraisal of the various partnerships in which the whistleblower can engage.

## **2. Public-private partnerships**

Following Monk et al (2012), a public-private partnership (PPP) is defined as a contract between a government agency and a private entity termed a Special Purpose Vehicle (SPV) with the following terms

- (i) The contract relates to a long lifetime project, typically public infrastructure, with an associated asset.
- (ii) The SPV is required to finance the project, often with the use of traded securities.
- (iii) The SPV is expected to design, build and operate the infrastructure for a minimum period, typically more than twenty years, and to be accountable to the government for performance.
- (iv) The SPV has rights to the project asset for a given period.
- (v) The government retains ownership of the infrastructure.

The terms of a PPP are relevant to the whistleblowing partnership considered in Section 3 below. The private entity in whistleblowing is the whistleblower, who acts as a private agent on behalf of the government. The asset is the information provided to the government, which retains ownership of the information. But unlike a PPP, the typical whistleblowing partnership does not define its contractual terms; and the whistleblower does not extract any rights to the information.

PPPs have a longer history than most would believe; Monk et al (2012) note that the Mission Toll Road in California was built in 1851 using a PPP. The most extensive

developments in PPPs began in Europe in the 1980s. In the United Kingdom, the concept of the PPP was formalized in the Private Finance Initiative (PFI) of 1992 and, as Iossa and Martimort (2013) detail, more than 250 billion Euros of projects have been capitalized in Europe in the two decades since 1990. The principle has been extended into other regions with PPPs permitting projects with a capital value exceeding US \$150 billion to be developed in East Asia and the Pacific between 2000 and 2010. The PPP is not equivalent to privatization of infrastructure. In a PPP, the private agent assumes some of the risk, some of the responsibility relating to the building, operation and performance of the infrastructure, and some of the rights attached to the cash flow generated by the infrastructure. But it does not own the asset, just as a whistleblower does not own the information. The government retains ownership and there is no divestiture into private hands.

The theoretical basis of PPPs is often attributed to the concept of X-efficiency developed by Leibenstein (1966). X-efficiency is the motivational efficiency which Leibenstein posited to be present in the input-output relation of firms. Leibenstein suggested that motivational efficiencies appear in three ways: intra-plant motivational efficiency, external efficiency and non-market input efficiency. As Leibenstein (1966, p.407) asserts

*“The simple fact is that neither individuals nor firms work as hard, nor do they search for information as effectively, as they could. The importance of motivation and its association with degree of effort and search arises because the relation between inputs and outputs is not a determinate one.”*

Leibenstein finds large X-efficiency effects in specific cases, principally generated by incentive schemes. He suggests that incentives can have the effect of increasing productivity across many settings; for example in Australian firms by 20 to 50 per cent, in the Netherlands by 36.5 per cent, and in the United Kingdom by 43 to 76 per

cent. The X-efficiencies that Leibenstein showed for the input-output mix of firms pertain to PPPs where the incentives are better prescribed than if a PPP is not undertaken. A PPP releases motivational efficiencies suppressed under standard public sector procurements; those motivational efficiencies relate to efficiencies in financing, design, building and operation. A PPP fashions an incentive structure negotiated to extract synergies between the public and private sectors. An optimal PPP is one which maximizes those synergies. And these synergies are relevant to whistleblowing.

The main benefits conferred by a PPP, aside from X-efficiency, are

- (i) Financing flexibility
- (ii) Risk transference
- (iii) Sustainability and
- (iv) Transparency

The principal reason for a PPP is the flexibility of financing and the ability to tap into capital markets through the issuance of securities. PPPs do not necessarily increase funding, but do price the risk and return associated with the funding, thereby releasing the constraint imposed by public debt limits. A PPP transfers public risk to the private sector such that the risk is priced by the market, rather than by future generations. In a PPP, there is risk sharing where risks are allocated to the partners who are best able to absorb it. This has important implications for the whistleblowing partnership where risks are nearly always misallocated. As a consequence of risk sharing, risk premiums for PPPs are usually higher than under traditional financing. Another benefit of a PPP is sustainability, for a PPP is typically a partnership with duration of at least 20 years. Sustainability is an understated benefit of a PPP; it implies certainty in the obligations and cash flows for both partners over a long period, a certainty missing from the typical whistleblowing partnership. In addition, a PPP offers the transparency that is not present under

traditional financing. Sadka (2006, p.4) notes that “*There is a widespread consensus among economists that transparency is crucial in the case of PPPs.*” This transparency relates to the accounting of public liabilities and risk, as well as the exchange of information and the sharing of equity. In a PPP, there tends to be monitoring and performance appraisal not seen under other government contracts, allowing for the precedent cases so important in the design of future PPPs.

What do we learn from PPPs that is relevant to whistleblowing? The main lesson is that for a public-private partnership to be sustainable, it must be fully specified in terms of financing, risk sharing and the exchange of information; only then can real transparency be imparted and the public benefit be fully realized. Regrettably, the partnership with the whistleblower is never fully specified, imposing substantial cost and risk on the whistleblower and allowing others to free ride. PPPs also imply that X-efficiencies cannot be ignored. Like PPPs, the whistleblowing partnership must structure incentives for both parties so as to maximize X-efficiencies; that is, incentivize the whistleblower.

### **3. The whistleblowing partnership**

The whistleblowing partnership is theoretically a partnership between the whistleblower and the public interest. Unsurprisingly, the first parliamentary inquiry into whistleblowing in Australia was entitled *In the Public Interest*.<sup>6</sup> Ho (2012) defines the public interest to be the ex-ante welfare of the representative individual. But in practice the public interest can never be prescribed because individual preferences are so heterogeneous. What is in the public interest for a journalist is often not the same as what is in the public interest for a regulator; and what is in the public interest for a regulator not the same as for a politician. The public interest for a representative individual depends on their self-interest in having information in

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<sup>6</sup> *In the Public Interest*. Report of the Senate Select Committee on Public Interest Whistleblowing. August 1994.

the public domain. The whistleblower encounters a distribution of such public interests. They blow the whistle to protect a public interest that is too diffuse to be protected. And that is the whistleblower's dilemma. In protecting the public interest, they need to identify whose interest they are representing across a heterogeneous distribution of interests. Often the representative individual whose welfare they are protecting cannot be identified; nor can the representative individual protect them. As a consequence, the whistleblower must search for partnerships with individuals whose interests do not necessarily align with those of the whistleblower. Such partnerships are required to restore them to their pre-whistleblowing status and to reverse what Rothschild and Miethe (1999) described as their master status as a whistleblower. But for most whistleblowers, the act of blowing the whistle is irreversible, at least in terms of their career (see Rothschild and Miethe 1999).

For a whistleblower, the principal objectives post-whistleblowing are

- (1) The truth to be independently tested
- (2) Protection from and compensation for retaliation
- (3) Restoration of their career

The imperative for the whistleblower in forming a partnership is to facilitate these objectives. Testing the truth tends to dominate all other objectives, at least in the embryonic stages of a whistleblowing problem. As Sawyer notes in *Courage Without Mateship* (2004)

*"Truth is the most important asset for the whistleblower, and the most important liability for those who have to respond to them. The offence of the whistleblower is that they commit a truth, a phrase used by Alford (2001). The truths that whistleblowers commit are the truths that others would like to cover-up. Those that cover-up the truth employ three strategies. The main strategy is to ensure that the truth is not tested, at least not independently."*

The optimal partnership for a whistleblower is a partnership which tests their truth, yet still protects them. For protection, the whistleblower often requires confidentiality or anonymity but, with confidentiality, the whistleblower foregoes the transparency they represent. This is one of the ironies of whistleblowing. Blowing the whistle can never be as transparent as it should be; it can never be as transparent as the public interest requires or as the whistleblower desires. Paradoxically, the most successful whistleblowers are sometimes the most transparent; they simply disclose to as wide an audience as possible<sup>7</sup>. They protect themselves through maximum disclosure. However, they are the exception and their circumstances are exceptional.

The other irony in the whistleblowing partnership is that many of the potential partners are potential competitors of the whistleblower. Whistleblowers are corporate monitors, and they compete against other corporate monitors such as the regulators to whom they disclose. Sawyer, Johnson and Holub (2010) provide an insight into why whistleblowers are potential competitors of regulators

*“Legitimacy theory provides insights as to why regulators are often unresponsive to whistleblowers. The legitimacy of a regulator is determined in three ways. First, the regulator acts to minimize the legitimacy risk of all organizations in an industry. If a whistleblowing problem increases that risk, there is an incentive to minimize the risk by silencing the whistleblower, rather than righting the wrong. The regulator requires that the organization must not repeat the wrongdoing, but also not correct it. Risk is then minimized. Secondly, the legitimacy of a regulator is determined through its monitoring role. Regulators oversee the implementation and application of the legislation. When a whistleblower appears, it often suggests that the monitor is not monitoring, at least not with maximum efficiency.*

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<sup>7</sup> Moberly (2006, p.1117) asserts that the successful whistleblowers succeeded by simply speaking out directly to traditional corporate monitors.

*Whistleblowers then assume the role of the independent regulator and become competitors of the regulator. Thirdly, the legitimacy of a regulator is determined by its exchanges with the organizations it regulates. The organization is a conferring entity for the regulator, just as the regulator is a conferring entity for the organization. Organizations and those that regulate them establish a network of trust and influence which imparts a joint legitimacy. The whistleblower is the outsider to this network, particularly when the network is small and tight. The negative correlation between the whistleblower and the organization becomes a negative correlation between the whistleblower and the regulator. Not surprisingly, regulators often protect the organization and not the whistleblower.”*

The competitive role of whistleblowers is shown in a study of corporate fraud by Dyck, Morse and Zingales (2010). They find that in a sample of 230 corporate frauds, 50% of the frauds were revealed by monitors who had no direct role in the investment markets (media, non-financial market regulators and employees), and only 6% by the Securities and Exchange Commission. Regulators also often impose cumbersome restrictions on whistleblowers, restrictions which inhibit their whistleblowing. As noted by Moberly (2006, p.1128), in the implementation of Sarbanes-Oxley prior to September 30, 2006, of the 784 cases resolved at the initial investigative level, the Occupational Safety and Health Administration found only 17 to have merit, while another 106 cases settled. The corporate monitors who are mandated to monitor are not always optimal partners for whistleblowers.

The natural partner for a whistleblower is the government because they represent, at least in theory, the public interest. When the False Claims Act was introduced in the 1860s, the intention was for whistleblowers to be the eyes and ears of the government but evidently not the mind of the government; for governments like other partners have tended to free ride on whistleblowers. Governments have been reactive rather than proactive, refining anti-retaliation measures as whistleblowing

has evolved.<sup>8</sup> The result is a set of fragmented anti-retaliation laws in every country which vary with the category of whistleblower, their belief, their firm, their industry, and their whistleblowing.<sup>9</sup> Anti-retaliation laws<sup>10</sup> are an incomplete substitute for a well-defined public-private partnership which allocates risk between the whistleblower and the government. The alternative approach is an encompassing model<sup>11</sup> of comprehensive whistleblowing legislation and a stronger corporate monitoring role for employees in their employment contracts (Moberly 2008). Comprehensive whistleblowing legislation now exists in more than thirty countries, and there are many international anti-corruption conventions which now recognize the significance of whistleblowing and the significance of the whistleblowing partnership.<sup>12</sup> But whistleblowing legislation only represents a framework, not a partnership. Legislation has mostly failed the expectations of whistleblowers for a variety of reasons, inter alia

- (1) There has been too much emphasis on the whistleblower and not their information.<sup>13</sup>
- (2) There has been too much legislative uncertainty. In Australia, following the first inquiry into public interest whistleblowing, it has taken twenty years for comprehensive legislation to be enacted. Australia is not alone in this uncertainty.<sup>14</sup> Uncertainty in legislation has compounded the uncertainty for whistleblowers in all countries.
- (3) The existing evidence suggests whistleblowers continue to experience retaliation without redress.<sup>15</sup> And retaliation has taken more subtle forms. All employees now understand the risks of whistleblowing; if they were not deterred twenty

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<sup>8</sup> Banisar (2011, p.20)

<sup>9</sup> Moberly (2010)

<sup>10</sup> Moberly (2010) provides a full discussion of the US Supreme Court's anti-retaliation principle.

<sup>11</sup> Haigh and Bowal (2012) use the term *encompassing* to designate comprehensive legislation.

<sup>12</sup> Banisar (2011)

<sup>13</sup> Vaughn, Devine and Henderson (2003)

<sup>14</sup> Rapp (2013) describes the evolution in US whistleblowing laws and the evolving uncertainty.

<sup>15</sup> Moberly (2008, p.986) and Ramirez (2007) both suggest that the protection for whistleblowers is illusory.

years ago, almost certainly they are now.<sup>16</sup> Whistleblowing data exhibits a selectivity bias; the whistleblowing observed is only a sample of that which could be observed if there were not such a deterrent to blowing the whistle.

- (4) Confidentiality, not transparency, has become the legislative mantra. Confidentiality is designed to protect the whistleblower, but it often protects the wrongdoer.
- (5) Legislation has been enacted to protect existing employment when future employment is as important. The whistleblower becomes a high risk employee of the future and it is this risk that must be de-risked. Legislation protects the short-term, but it is not sustainable.
- (6) In contrast to other PPPs, legislation has provided no incentive for whistleblowers to extract X-efficiencies. The FCA is the exception. Whistleblowing risk is then not priced.
- (7) To operationalize legislation, regulators have been mandated to receive disclosures. Mandated regulation establishes regulatory monopolies which, like all monopolies, extract rents. Regulatory rents are revealed by decisions that cannot be appealed, leaving whistleblowers with no redress except through the courts. Whistleblowers represent a new competitive model of regulation that exposes the monopoly power of mandated regulators. Legislation has been anti-competitive; it has reinforced that monopoly power.

To be sure, both whistleblowers and governments have had unrealistic expectations of the power of legislation. Whistleblowing is both a legal and social problem which cannot be resolved by legislation alone. Whistleblowing involves a complexity not observed in many other problems; for the whistleblower it is a complex of conflicting contracts, conflicting loyalties, conflicting risk assessments and conflicting evaluations of self-worth. The whistleblower experiences an inversion of

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<sup>16</sup> Moberly (2008, p.987) reports on a study that forty-two percent of employees who observe misconduct at work do not report it.

right and wrong, an inversion that cannot be easily righted. As the repository of whistleblowing experience has expanded, so has the repository of insight into the problem and its many subtleties. And these insights have shown that there is a need to protect whistleblowers in the particular, not just in the abstract. For every firm, every jurisdiction, and every government, whistleblowing is a problem here and not just over there.

Governments have failed to understand the importance of the whistleblowing partnership. Whistleblowers require transparency; governments have delivered uncertainty. Transparency entails transparency of legislation and its prosecution, transparency of information and its dissemination, and education of representative taxpayers. Legislation may exist in more than thirty countries, but prosecutions are rare and, without prosecutions, legislation does not deter. Whistleblowing data is perforated by problems of confidentiality and selectivity. Aside from False Claims lawsuits, settlements in whistleblowing cases are almost always confidential, net benefits rarely documented and case histories not tabulated.<sup>17</sup> Most importantly, whistleblowers are never tracked long after they have blown the whistle. There are no longitudinal studies of whistleblowers, only cross-sectional studies across short windows after the whistle is blown. And with poor data, it is difficult to educate taxpayers of the benefits conferred by the whistleblowers who represent them. Governments have been remarkably reluctant to do so; a half-time Super Bowl advertisement that details the net value of whistleblowing is a long way from production. Even the FCA, for which data is more transparent, is not widely known outside whistleblowing circles. For whistleblowers the most logical partnership, the partnership with the government, has not been a partnership at all.

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<sup>17</sup> One of the recommendations of the report *In the Public Interest, 1994, op cit.* was to establish a comprehensive database of whistleblowing in Australia. It was never enabled.

The failure of the partnership with the government has compelled whistleblowers to search for alternatives which approximate a public-private partnership. Those alternatives include partnerships with lawyers, with politicians, with journalists and with whistleblowing intermediaries including WikiLeaks. These partnerships are partnerships between the whistleblower and another private agent who purports to represent the public interest. None of these partnerships is a PPP, but they are designed to simulate a PPP and to extract the benefits of a PPP. And they can be assessed in terms of the attributes of a PPP; that is, financing, risk transference, X-efficiency, sustainability, and transparency. These partnerships are considered in sequence.

### *The legal partnership*

When a whistleblower institutes a legal action, whether an anti-retaliation action, a *qui tam* action or otherwise, they enter a partnership with a law firm. This legal partnership is the one most similar to a PPP. A law suit has a financial dimension absent from other whistleblowing partnerships; it makes monetary compensation possible and allows for possible career restitution. Legal partnerships prescribe contractual terms; the whistleblower transfers information in exchange for compensation. In a legal partnership, whistleblowing risk is priced and compensated for, there is an incentive structure for the whistleblower, and there is some transparency and sustainability, at least while the legal action ensues. The problem for whistleblowers is that the legal partnership is under prescribed. In legal actions other than False Claims actions, there is no specification of the minimum compensation for a whistleblower, nor is this related to the magnitude of the transgression on which the whistle was blown; and nor does it protect the future career of a whistleblower. A *no win no fee* case often results in a negligible payout for a whistleblower; the law firm shares the risk but receives a disproportionate share of the return. Settlements in legal actions other than False Claims usually do not satisfy the whistleblower's objectives of the testing and dissemination of the truth; the risk

in a legal case is not the risk of the truth but the risk that legal argument will dominate the truth. And there is no risk sharing with the government as a whistleblower would require if it were a PPP. The legal partnership is a poor substitute for a PPP, unless it is underwritten by the government as under the provisions of the FCA.

### *The political partnership*

Many whistleblowers seek partnerships with politicians to represent their case. The political partnership offers no financial compensation or financial incentive; nor does it protect the future career of the whistleblower. However, under privilege, the whistleblower has immunity from prosecution so that truth can be better disseminated. Blowing the whistle to a Senate inquiry offers more transparency than blowing the whistle to a mandated regulator<sup>18</sup>. There are three main problems with the political partnership. First, the whistleblower absorbs the risk of the politician. Perforce, political partners of whistleblowers are typically government opponents or independents; their objective is political and not necessarily substantive. Secondly, the partnership is short-term and only for the life of the political cycle. It is not sustainable beyond the life of the parliamentary or congressional term. Thirdly, blowing the whistle to the parliament or Congress often only leads to resolution if the matters are material enough for political debate; in the pecking order of corruption, matters of life and death dominate fraud.

The political partnership is transparent, but it is risky and will never generate the X-efficiencies of a PPP.

### *The media partnership*

When a whistleblower approaches a journalist, they enter a partnership with the journalist; and they also enter a partnership with a newspaper and a media group.

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<sup>18</sup> In Australia, there have been three parliamentary inquiries into whistleblowing (in 1994, 1995 and 2008) and they represent some of the best whistleblowing testimony in Australia.

Whistleblower-journalist partnerships have profiled whistleblowing, for example *Deep Throat* and Woodward and Bernstein, Jeffrey Wigand and Lowell Bergman. However these examples are exceptional and not representative; they have distorted the real whistleblower-journalist partnership which is short-term and asymmetric. The whistleblower who approaches a journalist trades off significant risk with significant transparency. The partnership with a journalist is the most risky and the most transparent of all. Whistleblowers enter partnerships with journalists because of their primary objective for the truth to be tested. But a newspaper rarely tests the truth; there are insufficient pages to detail the truth and there are insufficient readers to understand the truth.

The partnership with a journalist is the partnership most dissimilar to that of a PPP. There are no financial incentives unless the whistleblower except in rare circumstances, there is no contractual arrangement, there is no protection for the future career of the whistleblower, and no risk is transferred to the journalist. A recurring issue for legislators is whether disclosures to journalists should be protected, and whether journalists should be required to reveal their sources.<sup>19</sup> The legislative focus on disclosures to the media illustrates the riskiness of the whistleblower-media partnership. But aside from this riskiness, there are three problems with the partnership

- (i) With a 24-hour news cycle, many journalists value clicks over credibility. Their premium is the new rather than the credible, they often write opinion as fact, and they often implicitly smear as those who retaliate against whistleblowers smear, but with an expectation that any litigation will be costly and protracted. It is usually not a partnership of equals, at least not in terms of ethics. For many whistleblowers, a partnership with a journalist can be like a partnership with a retaliator.

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<sup>19</sup> Journalist shield laws have been passed in many jurisdictions protecting both journalists and sources.

- (ii) There is a direct correlation between whistleblowers and the revenue of newspapers; but whistleblowers are rarely compensated the way celebrities are compensated for their interviews. Whistleblowers are paid not in money but in anonymity; yet nearly everyone can guess their identity. It is a false compensation.
- (iii) The partnership with a journalist is not sustainable. Journalists are like miners; when the mine is exhausted, they are no longer interested. The journalist who writes about a whistleblowing case is not there twenty years or even one year later. They are short-term, not long-term, agents. They are agents for a sub-editor who requires impact, not accuracy; they are agents for an editor who requires sales, and not necessarily the truth.

The riskiness of the whistleblower-journalist partnership renders it the most problematic of all partnerships. Even if there is a partnership of trust with the journalist, the whistleblower can never control the risk. There are three risks, in particular, that whistleblowers do not anticipate

- (i) The journalist provides an independent assessment and an independent writing style. They frame the whistleblowing in their frame, not the frame of a lawyer or the frame of legal argument. The behavioral bias of the journalist nearly always disturbs the truth of the whistleblowing. The problem is that most whistleblowing cases are complex, two-sided not one-sided, and involve a plethora of parties including the indifferent. A newspaper article or a “60 Minutes” story represents an information release, but a very noisy information release. Noise is a significant risk for the whistleblower because credibility is their main asset; and noise becomes their main liability.
- (ii) A whistleblowing story in a newspaper has two components, the article and the headline. In an era of the dot point and the tweet, readers scan for key points. Most readers, except those closely connected to a whistleblowing case, read only the headline; and occasionally the first few paragraphs. The headline often

frames perceptions. A whistleblower can never control the headline, or the other behavioral biases associated with an article such as where the article is placed. Even if a journalist fully represents the whistleblowing position, sub-editorial and editorial biases generate unintended risk.

(iii) There is a third risk. When an article appears in a newspaper, there is an incentive for a respondent (the other side of the whistleblowing problem) to respond in kind, typically in a rival newspaper. Whistleblowing is a competitive problem; the whistleblower and respondent compete for credibility; and journalistic rivalry underwrites the competition. No whistleblower can ignore the risk of a noisy response.

Unsurprisingly, because of the attendant problems and attendant risk, a partnership with a journalist should be the last resort for a whistleblower. However, it is often the first resort.

### *The WikiLeaks partnership*

WikiLeaks is like a whistleblowing exchange. It was founded in 2006 to enable whistleblowers to deposit information to be accessed by other users especially journalists. WikiLeaks acts as a broker<sup>20</sup> between whistleblowers and the media, and more generally between whistleblowers and the public interest. WikiLeaks protects whistleblowers through anonymous disclosure and data encryption. But, like direct disclosures to the media, there are no financial incentives, there is no protection for the future career of the whistleblower, and the partnership is not sustainable. The whistleblower who discloses to WikiLeaks puts the truth above their own transparency, and their own financial compensation. They exchange the truth for the risk transferred to WikiLeaks.

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<sup>20</sup> There are other brokers for whistleblowers; for example in Australia YourCall and Stopline.

More than the partnerships discussed hitherto, the whistleblower-WikiLeaks partnership is seen as a partnership, a perception that has been elevated by the case of Bradley Manning and Julian Assange. The Manning-Assange case highlights the uncertainty of the whistleblowing partnership, in particular whether the whistleblowing is in the public interest, whether the whistleblower is traitor or hero, and whether WikiLeaks is an exchange or just another medium. The uncertainty that underscores WikiLeaks is a sample of the greater uncertainty that is the story of whistleblowing. The whistleblower-WikiLeaks partnership shows the variance of the whistleblowing partnership from the standard PPP. The standard PPP emphasizes transparency, risk transference, sustainability and X-efficiency. None of these, except the transference of risk, is embedded in a disclosure to WikiLeaks.

For each of the partnerships above, we can assess their PPP attributes of risk, transparency, sustainability and X-efficiency. The assessments are tabulated in Table 1, and are necessarily subjective. They are the assessments of a whistleblower who has sampled the partnerships.

**Table 1**  
**Whistleblowing partnerships as public-private partnerships**

	<i>Risk</i>	<i>Transparency</i>	<i>Sustainability</i>	<i>X-Efficiency</i>
<i>Legal</i>	<i>low</i>	<i>medium</i>	<i>some</i>	<i>some</i>
<i>Political</i>	<i>low</i>	<i>medium</i>	<i>some</i>	<i>no</i>
<i>Media</i>	<i>high</i>	<i>high</i>	<i>no</i>	<i>no</i>
<i>WikiLeaks</i>	<i>high</i>	<i>high</i>	<i>no</i>	<i>no</i>

In forming partnerships with other entities, whistleblowers tend to ignore the principles of public-private partnerships of risk transfer, transparency, sustainability and whether X-efficiencies are generated. There is a tendency to establish

partnerships which can immediately realize the transparency that the whistleblower desires rather than the sustainability they need. Partnerships with the media and WikiLeaks immediately offer transparency of information, but they are usually not sustainable, and they are risky and fail to deliver any X-efficiencies. Partnerships with law firms are more sustainable and more likely to generate X-efficiencies, but they do not deliver immediate returns. The whistleblower must then trade-off the more immediate, risky, and transparent media partnership against the more sustainable, less transparent legal partnership. In many cases, a whistleblower hedges and forms both.

Representing whistleblowing as a public-private partnership has important implications for the strategic behavior of whistleblowers. Their strategy must be to first recognize whistleblowing as a PPP, and to recognize that any partnership they form is an approximation to a PPP. In approaching a journalist, a lawyer or a politician, a whistleblower must recognize that this is a partnership and be cognizant of the attributes of that partnership. Apodictically, the whistleblower needs to consider the risk and their risk tolerance, their need for transparency, the sustainability of the partnership and whether the partnership allows for X-efficiencies, the incentives which deliver financial compensation. Just as in a standard PPP, whistleblowers need to consider formalizing the partnership; that is, the implicit contract to be made more explicit. Consider two examples

***Example 1     The legal partnership***

In formalizing a partnership with a law firm, a whistleblower must protect their compensation and protect their future career.

*(i) Compensation*

The *no win-no fee* arrangement that many whistleblowers enter limits the downside risk of a legal action, but does provide compensation for the risk of their

whistleblowing. Formally, the *no win-no fee* compensation can be structured like the payoff on a call option as

$$\text{Compensation} = \max [0, \text{Payout} - \text{Legal Fee}]$$

There are alternatives which provide more incentives for whistleblowers, for example

$$\text{Compensation} = \max [0, 15\% * \text{Payout}]$$

This arrangement is consistent with the FCA, where a whistleblower's legal fees are paid by the government and the whistleblower is entitled to a minimum of 15% of the fraud recovered. In general, whistleblowers need to negotiate ex-ante contractual terms which incentivize their whistleblowing.

(ii) *Future career*

For whistleblowers, protection of their future career is as important as an anti-retaliation statute. Confidentiality agreements in whistleblowing law suits do not protect future careers. The alternative is for whistleblowers to negotiate a more transparent outcome, both in the ex-ante discussion with their law firm and in the final settlement with the respondent. Transparency tends to protect the whistleblower's future; confidentiality tends to protect the respondent. An example of a pro-forma statement which could be released as part of a settlement is

- *The matter between the respondent and the whistleblower has been resolved.*
- *The respondent acknowledges that the whistleblower acted in good faith.*
- *The whistleblower's actions were beneficial to the firm.*
- *The whistleblower has received a citation for good corporate conduct.*

Protecting compensation and the future career are important components of the contract a whistleblower enters into with a law firm. Those protections ensure the legal partnership simulates a public private partnership.

### *Example 2 The media partnership*

The partnership with a journalist is markedly asymmetric. The journalist receives information; the journalist acquires sovereignty over that information; the journalist assumes a right to present the information in their own reference frame; and the whistleblower is compensated only by anonymity. The media partnership provides no protection against the behavioral bias of the journalist or newspaper, and no protection for the future of the whistleblower. Whistleblowers must consider formalizing their implicit contracts with journalists. For example, in relation to an article by a journalist based on the information released, the whistleblower should consider negotiating to

- (i) Retain the right to comment on the article before publication, so as to correct any misrepresentations.
- (ii) Retain the right to comment on the headline of the article before publication, so as to correct any misrepresentations and
- (iii) Publish a retrospective article x years hence.

Newspapers depend on whistleblowers; and whistleblowers must consider extracting more property rights from the partnership, just as a private partner negotiates a better return from a PPP.

The above examples illustrate one of the principal tenets of this paper. When whistleblowers recognize that their associations with law firms, journalists and politicians are a proxy for a public-private partnership, those associations can be strengthened by formalizing them as partnerships with contractual obligations attached. Prescribing those partnerships allows whistleblowers to extract attributes of a PPP; transparency, risk transference, sustainability and X-efficiency. It is the payoff for strategic behavior, and the payoff from insights into whistleblowing.

#### 4. Conclusion

Whistleblowing is like a public-private partnership but, unlike other PPPs, the partnership is not well specified. Governments have failed whistleblowers because the implicit contract with the public interest has been too uncertain to price whistleblowing risk. Instead, through associations with lawyers, journalists and politicians, whistleblowers have sought to form partnerships which substitute for a PPP. These partnerships do not deliver the transparency, sustainability and X-efficiency of a PPP, but they can be strengthened through negotiation to generate better outcomes for whistleblowers.

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