

**THE NECESSARY ILLEGITIMACY OF  
THE WHISTLEBLOWER**

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**Abstract:**

This article examines the plight of the whistleblower using elements of organizational legitimacy theory. In recognizing the negative correlation between the actions of the organization and the whistleblower it becomes clear that the continuing legitimacy of the organization necessitates the illegitimacy of the whistleblower. This helps explain the continual blacklisting of the whistleblower and their vilification resulting in the destruction of both their professional career and their reputation. Only protective legislation will provide any guarantees for the whistleblower.

**Keywords:**

Blacklisting, conferring entities, corporate ethics, legitimacy, stakeholders, whistleblowing.

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## **THE NECESSARY ILLEGITIMACY OF THE WHISTLEBLOWER**

*"Yes, I would do it again. I can't believe it's over. But then again, it will never be over."*

James Alderson, whistleblower, in Porter (2003)

### **1. INTRODUCTION**

"Charles Niemer of the (United States) Public Company Accounting Oversight Board calls today's business environment 'the age of the whistleblower' – a new corporate culture in which 'informants' are more likely to be valued than harassed."<sup>1</sup> This is a long way from the vilification experienced by most whistleblowers, whose reputations are often tarnished and livelihoods compromised. Whistleblowers remain, as far as many employers are concerned, on a blacklist of unemployable potential re-offenders.

An Ethics Resource Center survey conducted in the US found that rather than value the whistleblower, as Charles Niemer believes, nearly a third of their survey respondents say their fellow workers showed respect for those who achieved success using unethical means and therefore implicitly condone the use of questionable ethical practices. Even though the survey indicated an overall increase in the reporting of misconduct, 44 percent of all non-management employees still did not report observed wrongdoing. Why? Two main reasons: one, they did not believe it would stop the practice; and two, they feared that their report would not be kept confidential.<sup>2</sup> These are the silent observers.

What then for the whistleblower? Are they to continue to experience victimization, redundancy, dismissal, resignation, transfer, constant scrutiny, verbal abuse, endless criticism, and even death threats.<sup>3</sup> This retaliation is so well-defined that, according to Rothschild and Miethe (1999), the act of whistleblowing becomes the whistleblower's 'master status'. This new status is viewed by others, both co-workers and management, with suspicion and the whistleblower is likely to be treated as an outsider. It is surprising therefore that Rothschild and Miethe (1999) find that 90 percent of the whistleblowers in their sample will still report misconduct if the circumstances arise again. This is critical to whistleblowing. Whistleblowers are highly likely to be repeat offenders. If management engage in systematic misconduct, employing a whistleblower is risky. The management response instead is to target and discredit the whistleblower. The paths of the whistleblower and the firm will then diverge. They are negatively correlated.

In order to understand this negative correlation and why it is so difficult for whistleblowers to preserve their careers, it is necessary to understand their relationship with the organization. What are the options for the organization in dealing with the whistleblower and other stakeholders? To analyse this issue, we use legitimacy theory based on the writings of Suchman (1995). Legitimacy theory provides insights as to how an organization and an individual derive their legitimacy and it is the cornerstone of our approach.

The remainder of this paper is organized as follows. Section two focuses on the identification of the organization's stakeholders and the conferring of legitimacy. Section three discusses whistleblowers and their relationship with the organization on which they blow the whistle. The blacklisting of whistleblowers is covered in section four where differences between formal and informal blacklisting are highlighted. In section five the need for whistleblowers to get legal protection is discussed. Conclusions are drawn in section six.

## **2. STAKEHOLDERS AND THE CONFERRING OF LEGITIMACY**

To understand the relationship between the whistleblower and the organization it is useful to understand how the organization derives its legitimacy. The concept of legitimacy has its origins in organizational theory where legitimacy is viewed as an attribute conferred on an organization by external parties that are affected by the organization's operations. Freeman (1984, p46) views these external parties as stakeholders who can affect or are affected by the achievement of the organization's objectives. This broad definition implies that stakeholders can be virtually anyone, only excluding those who do not have the power to affect the organization or are themselves unaffected by its actions. Narrower definitions try to limit stakeholders to groups/individuals with direct influence over the organization's core economic interests, thereby restricting stakeholders to those that are necessary for the organization's survival (Bowie, 1988; Freeman and Reed, 1983; Näsi, 1995).

It is the actions of these stakeholders that confers legitimacy on an organization. However, for any organization attempting to acquire legitimacy it is a balancing act between how the organization wants to behave and how those that confer legitimacy upon it believe it should behave. Given that the attitudes to corporate governance change over time, an organization's legitimacy is constantly at risk. Fortunately it is unnecessary for any organization to attempt to manage all of society's perceptions, it need only identify its stakeholders or conferring entities and choose actions which it believes will satisfy these entities, since only these groups are able to confer or withdraw legitimacy

Legitimacy is not limited to economic survival. It can be achieved at different levels, defined by Suchman (1995) as pragmatic, moral and cognitive. Each level of legitimacy requires the organization to exhibit a different set of characteristics. Bestowing pragmatic legitimacy on an organization is based merely on the perceived value to the conferring entities of the organization's activities, aims, objectives and policies. Moral

legitimacy is more difficult to achieve and is judged on whether the conferring entities believe that the organization's activities are 'the right thing to do' within a set of accepted social norms. Cognitive legitimacy relies on the provision of what conferring entities believe are plausible explanations for the organization's activities.

Although, in practice it is difficult to separate these attributes there is a subtle difference between pragmatic legitimacy and moral/cognitive legitimacy. Pragmatic legitimacy relies on the self-interest of conferring entities whereas moral and cognitive legitimacy rely more on the organization embracing current cultural and social norms.

Once conferred, legitimacy tends to be taken for granted. However, society's values change and conferring entities can vary over time, as can their attitudes. A failure to notice these changes may mean that support for any organization declines. When significant differences develop between the value systems of the organization and its conferring entities, conferring entities with power can threaten the organization's legitimacy by the use of legal, economic and/or social sanctions.

The whistleblower's role in relation to the organization is ambiguous. The whistleblower takes on the role of stakeholder and conferring entity but without the help of others to substantiate their own legitimacy, lack the power to influence the organization. The organization concerned does not recognise them as a stakeholder and typically tries to discredit them so that they do not have the credibility to influence other stakeholders who may be able to exert the necessary influence. This is formalised in section 3.

### **3. LEGITIMACY AND WHISTLEBLOWING**

The retaliation experienced by whistleblowers is well documented. There are many case studies of prominent whistleblowers where the retaliation against whistleblowers is evidenced in its entirety.<sup>4</sup> Case study information can also be extracted from the transcripts of formal inquiries, for example the Australian Senate Inquiry into Unresolved Whistleblowing Cases (1995).<sup>5</sup> Systematic studies of whistleblowing show the scale and the scope of the retaliation. A 1990 study of 233 US whistleblowers cited in Grace and Cohen (1998) found that 90 percent had lost their jobs or were demoted, 27 percent faced lawsuits and 26 percent had psychiatric or medical referrals subsequent to blowing the whistle. A comprehensive survey of US whistleblowers by Rothschild and Miethe (1999) of 761 individuals finds that:

- 69 percent of the whistleblowers lost their job or were forced to retire;
- 64 percent received negative performance evaluations;
- 68 percent had work closely monitored by supervisors;
- 69 percent were criticized or avoided by co-workers; and
- 64 percent were blacklisted from getting another job in their field.

Whistleblowing and retaliation appear to co-exist. Indeed, Rothschild and Miethe (1999) find that whistleblowers experience reprisals regardless of their age, gender, educational attainment or years of employment in their current job. Only retaliations against African Americans appear to be at a higher rate than for other employees. Rothschild and Miethe (1999) identify three factors which influence retaliation: the supervisory status of the whistleblower; the degree of wrongdoing; and whether the whistleblower discloses to an external body. Reprisals are more likely if the whistleblower is a non-supervisor, if the wrongdoing is severe, and if the whistleblower blows the whistle to parties external to the organization. The incidence of retaliation against external whistleblowers is on average 10-15 percent higher than for internal whistleblowers.

The Rothschild and Miethe (1999) study provides an insight into why organizations retaliate against a whistleblower. By blowing the whistle, the whistleblower assumes a role different from other employees. Their identity is now defined by their whistleblowing, not by their prior performance. Their legitimacy is now the legitimacy of a whistleblower, not that of an employee. As a stakeholder, their legitimacy becomes important to the organization because it is negatively correlated with the legitimacy of the organization. And it is this negative correlation that determines the whistleblower's future.

For an organization, its pragmatic legitimacy determines its operational viability. Organizations maintain their legitimacy with other entities through exchanges which increase the expected value of the other entity, through the joint influence of the organization and the other entity, and through shared values. For an individual, their pragmatic legitimacy can be similarly defined by their ability to exchange, influence and share values with other individuals and entities. When an organization retaliates against a whistleblower, they destroy the whistleblower's pragmatic legitimacy by destroying their ability to exchange, influence and share values with others. Dismissal, demotion, negative performance evaluations, and loss of authority all minimize the pragmatic legitimacy of the whistleblower.

A notable US example is the case of James Alderson, the Chief Financial Officer of North Valley Hospital, who blew the whistle on the secret accounting practices of the Quorum Health Group. He could not have anticipated the consequences of his action. Within five days he was sacked, within three years he had filed a whistleblower lawsuit under the False Claims Act<sup>6</sup>, and in the next ten years his family lived in five different towns.<sup>7</sup> Thirteen years after blowing the whistle, his case was settled. In the interim, the Hospital Corporation of America, the parent company of Quorum, had reimbursed the US government US\$840 million as a result of the whistleblower law suit. Alderson reflected *"Yes, I would do it again. I can't believe it's over. But then again, it will never be over."*<sup>8</sup>

Alderson's experience is not the experience of all whistleblowers. But, it is representative of the whistleblowing experience which, for most, involves significant retaliation. Surprisingly, this retaliation is

usually not anticipated by the whistleblower at the time of blowing the whistle. Blowing the whistle becomes a defining point for the whistleblower, establishing their moral legitimacy, but usually destroying their pragmatic legitimacy. It is this divergence between their moral and pragmatic legitimacies that places whistleblowing at the cornerstone of legitimacy theory.

### **3.1 The Negative Correlation Between the Organization and the Whistleblower**

The negative correlation between the legitimacy of the organization and the legitimacy of the whistleblower is pivotal to an understanding of whistleblowing. It explains many of the stylized facts found in case studies and in surveys. These are discussed in the following paragraphs. First, as Rothschild and Miethe (1999) discover, the more serious and systemic the wrongdoing, the more severe the retaliation. The identification of serious wrongdoing imparts significant risks to an organization's pragmatic legitimacy and, in particular, its ability to exchange with and influence other parties. A commensurate response is required, usually a significant reprisal. In law enforcement agencies, where significant wrongdoing often occurs, significant reprisals also occur.<sup>9</sup> Secondly, whistleblowers who disclose externally experience stronger retaliation than whistleblowers who disclose internally. By disclosing externally, the whistleblower has also disclosed their negative correlation with the organization. Retaliation usually follows. Internal whistleblowing imposes less risk on the organization and also implies that the whistleblower is less negatively correlated with the organization. Retaliation is less likely.

The negative correlation between the legitimacies of the organization and the whistleblower, strong at the time of blowing the whistle, becomes stronger if there is no resolution. Many whistleblower cases last many years, and some cases are never resolved. The thirteen year duration of James Alderson's battle with the Hospital Corporation of America is not uncommon. In the Australian Senate Inquiry in 1995 into 16 unresolved whistleblower cases, many of the cases were more than 10 years old. Public sector organizations and non-government organizations (NGOs), can repair and maintain their legitimacy through the diverse exchanges that they enter into, or through the government subsidies which make them viable. Public and private organizations can also reconstitute themselves through changes in their management and structure. No whistleblower can similarly reconstitute themselves. No whistleblower, except through Qui Tam lawsuits<sup>10</sup> in the US, can rely on the government to subsidize their case. The pragmatic legitimacies of the organization and the whistleblower will then diverge as the whistleblowing action becomes more distant. In general, if a whistleblower cannot resolve their case within a few years of blowing the whistle, they may not resolve it at all.

The least successful whistleblowers tend to be public sector whistleblowers who do not obtain an expeditious resolution and who are not supported by the government. The most successful whistleblowers fall into three categories:

1. Organization collapses that often elicit high profile and highly successful whistleblowers. The collapse of Enron, WorldCom, and HIH are but three examples. The collapse of an organization is its point of minimum legitimacy. It is also the point of maximum legitimacy for the whistleblower.
2. Share price falls which are associated with governance problems, often elicit very successful whistleblowers, for example, the National Australia Bank trading scandal.<sup>11</sup> The market is one of the best arbiters of legitimacy.
3. Public sector whistleblowers who receive the backing of other entities such as the Department of Justice in False Claims Act lawsuits, often survive and succeed.

A further recent example is provided by the Cole Inquiry into the dealings of the Australian Wheat Board (AWB) which allegedly provided kickbacks to Saddam Hussein's regime in Iraq. This has allowed a former regional manager for the AWB's Middle East Section to make public details he has of the alleged misconduct by the Board's top management.<sup>12</sup> The need for such an inquiry indicates a point of minimum legitimacy for the AWB and maximum legitimacy for this former employee as he blows the whistle on his former employer.

### **3.2 The Regulators**

The legitimacy of both organizations and whistleblowers is determined by conferring entities. Two types of conferring entity of particular relevance in a whistleblowing problem are the regulators and the bystanders who are typically not indifferent to the negative correlation between the organization and the whistleblower. These conferring entities often determine the outcome in a whistleblower problem. Regulators such as auditors, ombudsmen and securities commissions, are the agencies to whom external whistleblowers refer whistleblowing problems. Whistleblowers expect independence and truth from regulators. These expectations are often unmet. The most common complaint of whistleblowers appearing before the Australian Senate Inquiry into Public Interest Whistleblowing (1994)<sup>13</sup> was the lack of independence of external regulators. It is a recurring theme in the case studies of whistleblowers across the world.

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. 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.<sup>14</sup> 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.

Changes in management or organizational structure in the regulator's office can have dire consequences for the whistleblower as other views take precedence. For example, the (US) Office of the Special Council, an independent federal agency responsible for aiding and protecting whistleblowers within the government, was very responsive to whistleblower issues while under the leadership of the Clinton-appointed special council, Elaine Kaplan. However, President George W Bush's appointee to run the office, Scott Bloch, has been less than responsive to whistleblower issues and has been criticised by Jeff Ruch, executive director of the Public Employees for Environmental Responsibility (PEER) as providing 'a plumber's unit for the Bush administration, plugging leaks, blocking investigations and discrediting sources'.<sup>15</sup>

### **3.3 The Bystanders**

Bystanders are the other conferring entities important in whistleblowing. A bystander is an entity separate from the whistleblowing problem, that is, with no direct involvement in the problem and with no duty to resolve the problem. Examples of bystanders include employees of the organization, employees and management of other organizations, the media, politicians and taxpayers. It is the bystander that often determines the outcome of a whistleblowing problem. When bystanders do not get involved, whistleblowers usually lose. Bystanders remain bystanders because they are risk averse. The negative correlation between the whistleblower and the organization represents an unnecessary risk to their own pragmatic legitimacy. Furthermore, by not becoming involved, there is only a small risk to their moral legitimacy.

Individually, bystanders are small; collectively they are large. In an appeal to bystanders, whistleblower advocacy groups, such as Whistleblowers Australia, use the phrase (widely attributed to Edmund Burke) "*All that is necessary for the triumph of evil is that good men do nothing*". It is, of course the cry of those seeking the assistance of a Good Samaritan. As Sawyer (2002) noted:

*"The bystander problem was elevated to a syndrome, the Genovese Syndrome, by the killing of Kitty Genovese in New York on March 13, 1964. There were 38 witnesses to her murder, but only one called the police. But it was too late for Kitty Genovese. Thirty-eight people 'did not want to get involved.' The nonfeasance of the 38 bystanders determined Kitty Genovese's death. The nonfeasance of the bystanders also determines the outcome for a whistleblower. The silence of the bystander is the most powerful weapon of those who want to silence whistleblowers."*



Bystanders have different degrees of separation from a whistleblowing problem, and their degree of separation explains their involvement. Employees of the organization have one degree of separation from the problem: their legitimacy is usually positively correlated with the legitimacy of the organization. Fellow employees, except those with very high levels of risk tolerance, are typically reluctant to intervene on behalf of a whistleblower. There have been a number of studies on how organizational structure affects whistleblowing.<sup>16</sup>

An important set of bystanders are the management and employees of other organizations in the industry. Typically, a whistleblower is not only blacklisted by the organization on which they blow the whistle, but by all the organizations in the industry. Rothschild and Miethe (1999) find that 64 percent of whistleblowers in their sample were blacklisted from getting another job in their field. This finding is supported by anecdotal evidence which suggests that the whistleblowers who survive their experience often change careers or change countries. For example, Jeffrey Wigand, the tobacco industry whistleblower profiled in *The Insider*, became a teacher<sup>17</sup>, Stephen Bolsin, the whistleblower at Bristol Hospital in the UK, moved to Australia<sup>18</sup> and Phillip Bowman, the whistleblower on related party transactions in Coles-Myer in Australia, moved to the UK<sup>19</sup>. Mobility is important to a whistleblower's survival. The blacklisting of whistleblowers across an industry reinforces the view that organizations collude, at least in terms of their attitude to whistleblowers. Even the organization's competitors will not compete for a whistleblower. By blowing the whistle, the whistleblower establishes a risk profile, and it is a risk that most organizations are not prepared to absorb.

Whistleblowers inevitably appeal to lawyers, politicians and the media, because they are the bystanders most separate from the organization. The media are often the most supportive bystanders; they can also be the most destructive. Programs such as CBS's *60 Minutes* can determine the outcome of a whistleblowing problem, as the cases of James Alderson<sup>20</sup> and Jeffrey Wigand<sup>21</sup> show. The media are a special type of bystander. The media defends the public's right to know, in common with the whistleblower. Whistleblowing stories sell newspapers, so that the negative correlation between the whistleblower and the organization is not usually a concern. However, the risks for the whistleblower are high. First, the priority of the media is to tell a simple story over a short-term. In contrast, whistleblowing problems are typically complex and long-term. The interests of the whistleblower and of the media soon diverge. Secondly, if one media group tells the whistleblower's story, a rival group may tell the organization's story. Competition between media groups distorts, but usually does not resolve, a whistleblowing problem. Thirdly, the media offers no protection for the whistleblower against retaliation and blacklisting. Exposure in the media increases the risk profile of the whistleblower, and decreases their probability of re-employment. Not surprisingly, for a whistleblower the media are the bystanders of last resort. This explains why whistleblowing legislation often differentiates between whistleblowers who resort to the media, and those who do not.

The negative correlation between the pragmatic legitimacies of the organization and the whistleblower explains much of the empirical and anecdotal evidence relating to whistleblowers: in particular, why there is retaliation, why whistleblowing cases persist for so long, why some whistleblowers are successful, and why bystanders do not get involved.

The typical whistleblower does not anticipate their negative correlation with the organization, nor its implied consequences. Rothschild and Miethe (1999) find that in almost no case did whistleblowers anticipate the retaliation. Why are whistleblowers so poor in forming expectations of the consequences of their actions? There are two main reasons. First, it is difficult to form expectations of that which you have not experienced and, for most whistleblowers, it is a once in a lifetime experience. Secondly, as Rothschild and Miethe (1999) find, the whistle is usually blown only after the whistleblower has observed repeated violations of proper governance. A letter, an email or a conversation is often a small additional step, which becomes very large after the whistle is blown. The irreversibility of blowing the whistle can never be fully estimated. Whistleblowing can neither be planned nor undone.

### **3.4 Moral Legitimacy**

For the whistleblower, the negative correlation with the organization underscores their pragmatic legitimacy. And it is their whistleblowing that underscores their moral legitimacy and identity. Rothschild and Miethe (1999, p. 121) describe this well:

*"It became clear to us that for many of these individuals the act of whistle-blowing had become what sociologists refer to as a 'master status'. One's master status is the critical bedrock of one's personal identity; it is how we first label ourselves and are recognized by others. For most of our whistle-blowers, the experience of whistle-blowing and its aftermath have been so traumatic that their 'master status' is now defined by their act of whistle-blowing. Their new identity - one based on the act of whistle-blowing - defines and engulfs nearly everything in their lives."*

Moral legitimacy takes over, and it is through moral legitimacy that the whistleblower expects their pragmatic legitimacy to be repaired. Whistleblowing then becomes a test of moral legitimacies, not just of the whistleblower and the organization, but of all their conferring entities. In the abstract, the moral legitimacy of whistleblowing is repeatedly reaffirmed. In increasing numbers, countries, states and organizations are adopting whistleblowing statutes to protect the unknown whistleblower. But in the particular, the story is different. It is easy to undermine the moral legitimacy of a particular whistleblower by questioning their moral legitimacy in other areas. While some have beatified whistleblowers,<sup>22</sup> most would not view themselves in this way. They are just employees who reveal wrongdoing. Smearing the whistleblower is common. Smearing weakens the whistleblower's moral legitimacy and, by implication, the legitimacy of their whistleblowing. As Sawyer (2004, p.7) observes:

*"There are now good whistleblowers and bad whistleblowers. The good whistleblower is the whistleblower who lives in another country, or who works for another organization (preferably a competitor), or who blew the whistle 50 years ago. The bad whistleblower is the whistleblower in your own organization who blows the whistle now."*

To survive, whistleblowers need to understand the divergence between their pragmatic and moral legitimacies. A singular focus on the moral legitimacy of their whistleblowing will not usually repair their pragmatic legitimacy, unless the organization collapses. A successful whistleblower diversifies, by combining their new moral legitimacy with new pragmatic legitimacies. Sometimes this entails changing careers or countries. In all cases, it entails diversifying their pragmatic legitimacy away from that derived as an employee of the organization on which they blew the whistle.

Whistleblowers confer both moral and pragmatic legitimacy on governments. When President Abraham Lincoln first introduced the False Claims Act in 1863, he called those who use the Act "*the eyes and the ears of the government*".<sup>23</sup> There is substantial evidence that whistleblowers confer pragmatic legitimacy on a country through changes in laws, statutes and procedures and through improvements in efficiency and standards.<sup>24</sup> However, these benefits are rarely recognized.<sup>25</sup> The good that whistleblowers do is buried in the hidden changes to procedures, statutes and laws. Their perceived disloyalty, however, lives on.

#### **4. BLACKLISTING OR CONCEALED RETALIATION**

As Rothschild and Miethe (1999) find, the blacklisting of whistleblowers is both pervasive and long-term. Sixty-four percent of the whistleblowers in their sample are blacklisted from getting another job in their field. This is a very strong and binding constraint, and we now consider why. The blacklisting of whistleblowers is a very special type of blacklist, originating from their negative correlation with the organization and their 'master status' as a whistleblower. A comparison of the blacklisting of whistleblowers with formal blacklisting provides insights into why the blacklisting of whistleblowers is so effective.

A formal blacklist is imposed by a set of conferring entities, consisting of regulators, non-regulatory agencies, shareholders and/or analysts. There is no uncertainty as to who these conferring entities are, and there is no uncertainty as to why the organization/jurisdiction is blacklisted. The criteria for blacklisting and the blacklisting are fully disclosed and transparent. However, formal blacklisting is often tradable, through lobbying and other negotiation with regulators and other conferring entities. Entities on the blacklist typically have other attributes important to conferring entities. A country on a money laundering blacklist may, for example, be an oil exporter. Entities on the blacklist also usually have accountability to stakeholders who can lobby to have the blacklisting revoked. Furthermore, if the entity is removed from the blacklist, it is usually assumed that the probability of the entity re-offending is less than certain. The entity can also often hedge the

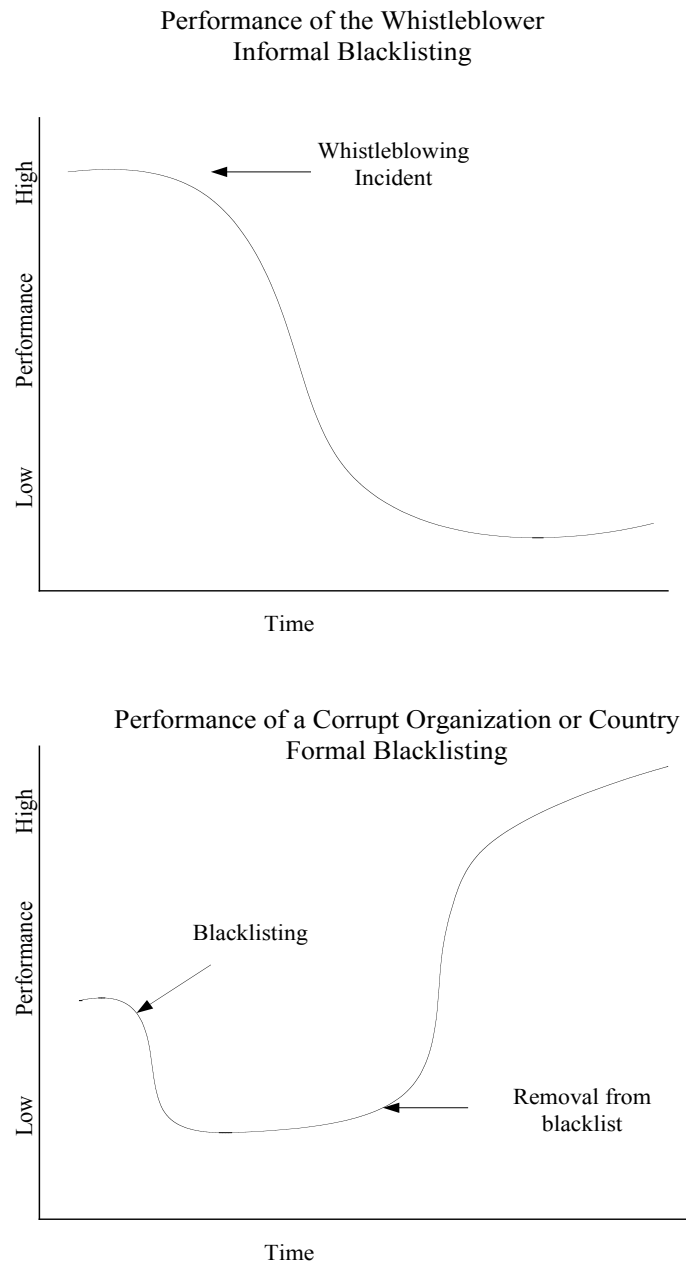
risk associated with a formal blacklist, by contracting with other entities and not disclosing those contracts. In sum, while a formal blacklisting is imposed with certainty and transparency, it is often temporary and can be negotiated away.

In contrast, the blacklisting of a whistleblower is imposed by an uncertain set of conferring entities, consisting of other employees, other organizations, regulators and bystanders. The criteria for blacklisting are never disclosed, nor is the blacklisting disclosed. The blacklisting is revealed through decisions in the workplace. The blacklisting is not typically negotiable, because the whistleblower typically cannot use other attributes to offset their negative correlation with the organization or their 'master status' as a whistleblower. Furthermore, it is normally assumed that the whistleblower will re-offend, that is, once a whistleblower, always a whistleblower. The whistleblower then has difficulty contracting with other entities. While their blacklisting is less certain and less transparent than a formal blacklisting, non-negotiability and an assumption that the whistleblower will re-offend combine to make their blacklisting very effective.

How does blacklisting affect the credibility and performance of those blacklisted? When an entity is formally blacklisted, their credibility is negatively affected, but the effect may not be permanent. An entity's credibility is determined by their probability of re-offending and by other factors which give them legitimacy; for example, their size, economic/strategic importance, transactions with other entities. If the probability of re-offending declines after blacklisting and if other factors are important, credibility will be repaired and the entity removed from the blacklist. The effect on performance is less clear. Many entities that are blacklisted have low performance prior to blacklisting. Corruption often compensates for poor performance. Blacklisting will initially impair performance but may have little impact over the longer term, particularly if the entity can continue to contract with other parties.

For the whistleblower, their credibility is determined almost entirely by their negative correlation with the organization, their probability of re-offending (usually assumed to be 1) and the probability that the organization on which they blew the whistle is regarded as corrupt. The credibility of the whistleblower will decline unless they diversify. The performance of the whistleblower is often catastrophically affected by whistleblowing. Blacklisting tends to significantly negate performance, because resources are now substituted into the whistleblowing, and away from their job. The decline in performance reinforces the decline in credibility. This is illustrated in Figure 1.

**Figure 1**  
**Performance Before and After Blacklisting**  
**A Comparison of Formal and Informal Blacklisting**



The effectiveness of the blacklisting of whistleblowers is a challenge for policy makers. Whistleblower protection laws are designed to penalize retaliation by the organization. There is no legislation designed to redress the blacklisting conferred by other entities. How can whistleblowers be removed from their blacklist?

One possibility is to whitelist whistleblowers by certifying their credibility, but this may just serve to openly identify all whistleblowers and retaliation may become even more widespread. Undoubtedly, the best long-term policy response is through education and example. If corporate wrongdoing is prosecuted and not protected, if the settlements in whistleblowing cases are disclosed and not concealed, if retaliation against whistleblowers is prosecuted and not protected, and if the good that whistleblowers do is disclosed and not hidden, then whistleblowers will be removed from their blacklist.

## **5. THE NECESSITY FOR WHISTLEBLOWER LEGISLATION**

The moral and pragmatic legitimacy conferred by whistleblowers necessitates their protection by governments. The protection of whistleblowers is designed not only to underwrite the moral and pragmatic legitimacies of whistleblowers, but also the legitimacies of the government and organizations. There has been an explosion of whistleblower protection provisions in common law countries such as the US, UK, Canada and Australia, as well as in Europe, Asia and Latin America.<sup>26</sup> However, the enforcement of these laws has not matched the legislative zeal. In Australia, for example, where whistleblower protection in various forms has existed for nearly a decade, there has not been a prosecution for retaliation against a whistleblower.

The negative correlation between the pragmatic legitimacies of the whistleblower and the organization ensures that whistleblower protection laws are difficult to enforce. It appears that the protection laws have been enabled principally to deter, not to prosecute. Indeed, an economic impact study of the US False Claims Act amendments by Stringer (1996), suggests that more than two-thirds of their impact is attributable to the deterrence of wrongdoing. The risk, of course, is that if whistleblowers believe in the laws, they may be encouraged to come forward and rely on the protections. One critic of whistleblower laws referred to such laws as "The Good Citizen Elimination Act".<sup>27</sup>

Vaughn et al (2003) propose a model law of whistleblower protection. They emphasize seven principles of an ideal law, namely that it should:

1. Focus on the information disclosed, not the whistleblower.
2. Relate to freedom of expression laws.
3. Permit disclosure to different agencies in different forms.
4. Include compensation or incentives for disclosure.
5. Protect any disclosure, whether internal or external, whether by citizen or employee.
6. Involve whistleblowers in the process of the evaluation of their disclosure.
7. Have standards of disclosure.

These principles are a standard against which whistleblower laws can be benchmarked. Some of these principles are designed to enhance the enforcement of whistleblowing laws. In particular, if different agencies

are permitted to receive disclosures, the symbiotic relationship between regulators and the organizations they regulate may weaken.

The most powerful act in the United States is the False Claims Act, which was strengthened in 1986 to include provisions to protect whistleblowers. The False Claims Act has four features which help to repair the pragmatic legitimacy of whistleblowers. First, under the False Claims Act, a whistleblower can initiate a lawsuit against a fraudulent claimant on the government. The lawsuit can be pursued individually or jointly with the Department of Justice. The involvement of the Department of Justice imparts both moral and pragmatic legitimacy to the whistleblower. The Department of Justice becomes a conferring entity. Secondly, in a False Claims lawsuit, the onus of proof is placed on the organization, not the whistleblower. The balance between the pragmatic legitimacy of the whistleblower and the organization is restored. Under other whistleblowing laws, it is the whistleblower fighting for their legitimacy. Thirdly, the False Claims Act entitles the whistleblower to share between 15 and 30 percent of the funds recovered by the government. The whistleblower's pragmatic legitimacy is linked to fraud recovery. Finally, the whistleblower is protected from retaliation.<sup>28</sup>

The False Claims Act is the only whistleblowing legislation which repairs the pragmatic legitimacy of the whistleblower. And it is very effective. In 1985 before the Act was amended, fraud recoveries amounted to only US\$26 million. Since 1986, more than US\$6 billion has been recovered in nearly 4000 False Claims Act cases in the US. Annual fraud recoveries now average more than US\$1 billion, or nearly 50 times the rate before the Act was amended. The average recovery per case has been over US\$7 million, and the average amount to whistleblowers 18 percent of the cost recovery. More than 30 US states now have their own False Claims Acts. The False Claims Act works because the whistleblower is given the legitimacy required to root out corruption. Other whistleblowing laws, such as those in Australia, do not work because they do not legitimize the whistleblower.<sup>29</sup>

Legislation to protect whistleblowers is simply one dimension of the general problem of repairing the legitimacies of both the organization and the whistleblower. The negative correlation between the pragmatic legitimacies of the organization and the whistleblower complicates the joint reparation of their legitimacies. In Table 1, Suchman's (1999) analysis is extended to the joint problem of repairing the legitimacies of both the organization and the whistleblower. Each repair strategy is approached differently by the organization and the whistleblowers. As Table 1 shows, the negative correlation between the organization and the whistleblower implies that their strategies are also negatively correlated. In particular, while the organization acts to minimize the consequences of the wrongdoing, the whistleblower acts to maximize the consequences. While the organization seeks to conceal the truth, the whistleblower seeks to reveal the truth. While the organization emphasizes the importance of pragmatic legitimacy over moral legitimacy, the whistleblower emphasizes the importance of moral legitimacy over pragmatic legitimacy.

**Table 1**  
**Repairing Legitimacy**

<b>Legitimacy Form</b>	<b>Strategies</b>	<b>Organization's Actions to Repair Legitimacy</b>	<b>Whistleblower's Actions to Repair Legitimacy</b>
<b>Pragmatic</b>	Denial	<ul style="list-style-type: none"> <li>• Deny there is a problem</li> <li>• Discredit the whistleblower</li> <li>• Minimize the influence of the whistleblower</li> </ul>	<ul style="list-style-type: none"> <li>• Not applicable</li> </ul>
	Truth	<ul style="list-style-type: none"> <li>• Conceal the truth</li> </ul>	<ul style="list-style-type: none"> <li>• Showing the truth of the allegations</li> </ul>
	Appeal to conferring entities	<ul style="list-style-type: none"> <li>• Get regulators on side</li> </ul>	<ul style="list-style-type: none"> <li>• Seek higher and higher courts (hierarchical)</li> </ul>
	Creation of a monitor (bond against future recidivism)	<ul style="list-style-type: none"> <li>• Change of procedures</li> <li>• External Monitoring for short periods (transference of risk)</li> </ul>	<ul style="list-style-type: none"> <li>• Probationary employment</li> </ul>
	Stress other attributes	<ul style="list-style-type: none"> <li>• Importance of organization to country / regulator</li> <li>• Importance of organization to stakeholders (e.g., taxpayers, employees, investors)</li> </ul>	<ul style="list-style-type: none"> <li>• Importance of individual to organization / country</li> </ul>
<b>Moral</b>	Make excuses	<ul style="list-style-type: none"> <li>• Through no fault of their own</li> <li>• Procedures not defined</li> </ul>	<ul style="list-style-type: none"> <li>• Procedures unclear</li> </ul>
	Justify Actions	<ul style="list-style-type: none"> <li>• Prevailing practices (moral and cognitive beliefs)</li> </ul>	<ul style="list-style-type: none"> <li>• Moral imperative</li> </ul>
	Partial Restructure	<ul style="list-style-type: none"> <li>• Selective and minimal</li> </ul>	<ul style="list-style-type: none"> <li>• New career</li> </ul>
	Structural Change	<ul style="list-style-type: none"> <li>• Continuous restructuring</li> </ul>	<ul style="list-style-type: none"> <li>• Mobility</li> </ul>
<b>Cognitive</b>	Explanation	<ul style="list-style-type: none"> <li>• Explain</li> <li>• Justify</li> <li>• Minimize the problem</li> </ul>	<ul style="list-style-type: none"> <li>• Explain</li> <li>• Justify</li> <li>• Maximize the problem</li> </ul>

The preceding arguments have shown that legitimacy theory provides a number of insights into whistleblowing. The negative correlation between the legitimacy of the organization and the whistleblower dominates the whistleblowing problem. The moral legitimacy of whistleblowing, as demonstrated by the global rush to protect whistleblowers, is almost entirely negated by the negative correlation between the



organization and the whistleblower. Only whistleblowing legislation which directly repairs the whistleblower's pragmatic legitimacy is effective.

## **6. CONCLUSIONS**

Nierner's view of a changing corporate culture, one that appreciates and values the whistleblower, may be some time coming. What we find is that the consequences of a whistleblower's actions equate more to the consequences of committing a criminal act than attempting to right a wrong doing. For the whistleblower the outcomes are two fold: the impact on their pragmatic legitimacy is severe; and their reputation is tarnished for years.

Within the organization, survival of the organization becomes the ultimate goal of management. The negative correlation between the legitimacy of the organization and the whistleblower means that this is at the cost of the whistleblower's legitimacy, resulting in continual blacklisting. Whistleblower legislation should be designed to protect against the retaliatory actions of the organization, secure pragmatic legitimacy and safeguard a whistleblower's moral integrity.

Even though the whistleblower's ethics are unfairly questioned, the truth means they maintain the moral high ground, but without the protection of legislation, even a moral victory may necessitate a change in career and / or country. Being able to relocate may be the key for whistleblower survival where some measure of pragmatic legitimacy can be attained.

The key to whistleblower survival is protective legislation with some means to repair their pragmatic legitimacy and prosecution of organizations which retaliate against whistleblowers. Until retaliation has consequences for the organization concerned, persecution of whistleblowers will continue regardless of the public benefit derived from their actions.

Endnotes:

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- <sup>1</sup> Quoted in Verschoor (2005) p. 17.
- <sup>2</sup> '2003 National Business Ethics Survey', The Ethics Resource Center, <[www.ethics.org](http://www.ethics.org)>.
- <sup>3</sup> See details in Lennane (1995).
- <sup>4</sup> See, for example, Glazer and Glazer (1989), Alford (2001), De Maria (1996).
- <sup>5</sup> 'The Public Interest Revisited', Senate Committee on Unsolved Whistleblower Cases, Parliament of Australia, Paper No. 344/95, October 26, 1995.
- <sup>6</sup> (USA) Federal False Claims Act, 31 U.S.C. § 3729.
- <sup>7</sup> See Porter (2003).
- <sup>8</sup> See Porter (2003) p. 53.
- <sup>9</sup> 'The Public Interest Revisited', Senate Committee on Unsolved Whistleblower Cases, Parliament of Australia, Paper No. 344/95, October 26, 1995; 'In the Public Interest (including consideration of the Whistleblowers Protection Bill 1993)', Senate Committee on Public Interest Whistleblowing, Parliament of Australia, Paper No. 148/94, August 31, 1994.
- <sup>10</sup> A whistleblower law known as the False Claims Act allows whistleblowers to bring 'qui tam' lawsuits — basically civil fraud lawsuits filed on behalf of the government — against companies and individuals that are cheating the government. Liable defendants in qui tam cases must pay the government for its losses and pay penalties for fraud. Source: All about Qui Tam, <<http://www.allaboutquitam.org/>>
- <sup>11</sup> The National Australia Bank suspended four staff in January 2004, for unauthorized foreign currency trading which cost the bank A\$360m (US\$277m); £153m). According to reports, this was initially exposed by a staff member on the trading desk in Melbourne.
- <sup>12</sup> 'Manager blows whistle on AWB kickbacks', ABC News Online, February 2, 2006.
- <sup>13</sup> 'In the Public Interest (including consideration of the Whistleblowers Protection Bill 1993)', Senate Committee on Public Interest Whistleblowing, Parliament of Australia, Paper No. 148/94, August 31, 1994.

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- <sup>14</sup> Philip Bowman, the whistleblower on the Coles Myer Yannon transaction, recently observed that 'Australia's small and tight knit business community poses a particular governance risk.' (Source: Australian Financial Review, June 7-9, 2003).
- <sup>15</sup> Graham-Felsen, S. 2006, 'Whistling in the wind', Altnet website at <http://www.altnet.org/story/30900/> article downloaded January 20, 2006.
- <sup>16</sup> See King (1999).
- <sup>17</sup> Gleick, E., (1996), 'Jeffrey Wigand doesn't live here anymore', Time Magazine, March 11, 1996.
- <sup>18</sup> 'Bolsin: the Bristol whistleblower', BBC News: Health, November 22, 1999.
- <sup>19</sup> Australian Financial Review, June 7-9, 2003.
- <sup>20</sup> See details in Porter (2003).
- <sup>21</sup> See 60 Minutes interview with Mike Wallace, CBS 60 Minutes correspondent, February 4, 1996. <[www.jeffreywigand.com/insider/60minutes.html](http://www.jeffreywigand.com/insider/60minutes.html)>.
- <sup>22</sup> See Grant (2002).
- <sup>23</sup> See Devine (1997).
- <sup>24</sup> See, for example, Devine (2002).
- <sup>25</sup> The notable exception is Time's nomination of three whistleblowers as Persons of the Year in 2003.
- <sup>26</sup> See Vaughin et al (2003) p. 861.
- <sup>27</sup> See Vaughin et al (2003) p. 860.
- <sup>28</sup> The False Claims Act 31 U.S.C. § 3730(h) – Whistleblower Protection: The False Claims Act provides a separate cause of action for whistleblowers and witnesses who lose their jobs or suffer other retaliation as a result of their efforts to combat fraud by their employers. A claim under section 3730(h) may be brought as part of a qui tam action under section 3730(b), or as a separate action. Indeed, an employee may have a claim under section 3730(h) even if his/her activities never lead to evidence of a False Claims Act violation. As long as the employee is acting in furtherance of a potential claim under section 3730, his/her activities are protected.
- <sup>29</sup> See, for example, Sawyer, K.R., The Age, January 13, 2003.

## REFERENCES

- Alford, C. F.: 2001, *Whistleblowers: Broken Lives and Organizational Power* (Ithaca, Cornell University Press, New York).
- Bowie, N.:1988, 'The Moral Obligation of Multinational Corporations' in Luper-Foy, S. (Ed.), *Problems of International Justice*, 97-113 (Colorado Westview Press, Boulder).
- De Maria, W.: 1996, 'Open Spaces, Secret Places: Workplace Violence Towards Whistleblowers', in P. McCarthy, M. Sheehan and W. Wilkie, *Bullying: from Backyard to Boardroom* (Millenium Books, Sydney).
- Devine, T.: 1997, 'The Whistleblower's Survival Guide' (Government Accountability Project, Washington, DC).
- Devine, T. 2002, 'Blowing the Whistle on Corporate Wrongdoing', *Multinational Monitor* 23(10/11), 33-36.
- Freeman, R.E.:1984, *Strategic Management: A Stakeholder Approach* (Pitman, Boston).
- Freeman, R.E. and D.L. Reed,: 1983, 'Stockholders and Stakeholders: A New Perspective on Corporate Governance', *California Management Review* 25(3), 93-94.
- Glazer, M. and P. Glazer: 1989, *The Whistle Blowers: Exposing Corruption in Government and Industry* (Basic Books, New York).
- Grace, D. and S. Cohen: 1998, *Business Ethics: Australian Problems and Cases* (Oxford University Press, South Melbourne, Australia).
- Grant, C.: 2002, 'Whistle Blowers: Saints of Secular Culture', *Journal of Business Ethics* 39(4), 391-399.
- King, Granville III: 1999, 'The Implications of an Organization's Structure on Whistleblowing', *Journal of Business Ethics* 20(4), 315-326.
- Lennane, J.: 1995, 'The Canary Down the Mine: What Whistleblowers' Health Tells Us about their Environment', paper given at the Whistleblowers: Protecting the Nation's Conscience Conference (Melbourne University, November 17).
- Näsi, J.: 1995, ' What is Stakeholder Thinking? A Snapshot of Social Theory of the Organization' in J.Näsi (Ed.) *Understanding Stakeholder Thinking*, 19-32 (LSR-Julkaisut Oy, Helsinki).
- Porter, G.: 2003, 'Whistleblowers a Rare Breed', *Strategic Finance* 85(2), 50-53.
- Rothschild, J and T. Miethe: 1999, 'Whistle-Blower Disclosures and Management Retaliation', *Work and Occupations* 26(1), 107-128.
- Sawyer, K.: 2002, 'Whistleblowing and the Trial', paper presented to Victorian Existential Society Meeting (Melbourne, Australia).
- Sawyer, K.: 2004, 'Courage Without Mateship', paper presented to Australian National Whistleblower Conference (Melbourne, Australia).
- Stringer, W.: 1996, 'The 1986 False Claims Act Amendments: An Assessment of Economic Impact', *Taxpayers Against Fraud* (The False Claims Act Legal Center, Washington DC).

Suchman, M.: 1995, 'Managing Legitimacy: Strategic and Institutional Approaches', *Academy of Management Review* 20(3), 571-610.

Vaughin, R., Devine, T. and K. Henderson: 2003, 'The whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers', *The George Washington International Law Review* 35(4), 857-902.

Verschoor, C.C.: 2005, 'Is this the Age of the Whistleblower', *Strategic Finance* 86(7), 17.