

*"All that is needed for evil to prosper is for people of good will to do nothing"*—Edmund Burke



# *The Whistle*

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### The psychology of whistleblowing

Kim Sawyer

I was recently reading an article in the *New Scientist* (24 January 2015) by Michael Bond titled “We could be heroes,” subtitled “What makes an ordinary person risk their life for a stranger?” It got me thinking about “What makes an ordinary person risk their career for the public interest?” and also thinking about a conversation that I had with Jean Lennane in Melbourne in 1995. Jean and I agreed that from our observations whistleblowers tend to be individuals who are conservative in the sense that they have a strong adherence to due process, to the rule of law and to natural fairness. In an interview in June 2013 with *Mother Jones*, Frederick Alford summarised this conservatism:

A whistleblower I spoke with whose name will never make the newspaper, he said something like, “I wasn’t against the system, I was the system! I just didn’t realize that there were two systems.”



Kim Sawyer

Of course, whistleblowers are not ordinary persons, but neither are whistleblowers heroes. Rather they are individuals exercising professional responsibility, as defined by Ralph

Nader in the 1971 Conference on Professional Responsibility. However, the psychology of whistleblowing is always of interest, and is always revisited whenever there is a major whistleblowing disclosure. Is Edward Snowden a hero or villain, credible or vengeful is the question asked when there are shades of grey; however the issue is more complex. The psychology of whistleblowing has at least three components; first the psychology of the person who blows the whistle, secondly the psychological game that follows blowing the whistle, and thirdly how the whistleblower survives the game. I will examine these three issues in turn.

Jean described whistleblowers as canaries in the coal mine. They are special types of canaries. The *New Scientist* article refers to a study by Samuel and Pearl Oliner in 1982 at Humboldt State University. It remains the largest study of altruistic behaviour, an assessment of 406 people who had risked their lives to rescue Jews in Nazi-occupied Europe, contrasted with 72 people who did nothing. In comparison to the bystanders, the rescuers were more empathetic, had values underwritten by fairness and personal responsibility which they learned from their parents; yet they were more tolerant. In short, as Kristen Monroe from the University of California Irvine described it, “Where the rest of us see a stranger, an altruist sees a fellow human being.” In my experience, whistleblowers share many of these attributes, but their commitment is to another type of stranger, the unknown other. A whistleblower knows that when a bureaucrat employs a relative, it is unfair to the unknown other employee. A whistleblower knows that when a company pays a bribe, it is unfair to the unknown other contractor. A whistleblower knows that when a company ignores safety procedures, it is unfair to the unknown other person at risk. Whistleblowers protect the interest of the unknown other. They don’t need codes of ethics; only their own responsibility perhaps learned from their parents (so don’t blame the whistleblower, blame their parents!). The whistleblower bases

their code on the interest of the unknown other, a code innate to them. And they risk a lot for that code.

Perhaps because of who they are, the whistleblower is unprepared for the psychological game that follows. The whistleblower believes in a system they think they know. But now they have to learn a new system, a system defined by a network which recognizes obligation rather than process. The mind game of whistleblowing is often a game of hate. And hate is a powerful emotion. Individuals who formerly have shown no propensity for hate find that propensity when someone blows the whistle. I remember an individual who was renowned for his tolerance declaring to me at the height of a whistleblowing problem:

“I supported your confirmation [as Associate Professor] but I would not support it now.”

Whistleblowing extracts an emotional game in which whistleblowers do not specialise. Targeting, bullying, smearing, ostracism, labelling are hate crimes of different degrees, but they are still hate crimes. Whistleblowing becomes a game of blame; the whistleblower must pay the price for breaking the seal on a hermetically sealed problem. My experience showed me how powerful the force of collective hate can be. The group rarely questions itself. Instead they question the whistleblower, and excuse themselves. We study forces in physics, electricity, gravity and magnetism, but we have little understanding of the psychological forces which control our lives. In a whistleblowing problem, these forces converge, and they converge on the whistleblower. The mind game becomes the test of inversion described in my paper “The test called whistleblowing.” Michael Bond (*New Scientist*, 24 January 2015), reports the result of laboratory games where altruism is tested; but it is doubtful that laboratory games could ever simulate the psychological complexities of whistleblowing. To study the psychology of whistleblowing requires case studies of the real; an insight into the mind of bystanders as well as whistleblowers, of respondents as well as

regulators. Regrettably, there has been no such psychological study; and possibly there never will be. Perhaps we do not want to break the seal on the psychological forces that bind us.

To survive the psychological game, necessarily the whistleblower must retreat to a system they know best; of due process and procedural fairness. But they must also detach from the psychological game of the network. They have to become an observer of their own condition. They have to form partnerships of trust. They have to diversify their life with new opportunities. And they have to let go, but not forget.

For whistleblowers, the psychological game becomes the main game. How we play that game determines our survival. Whistleblowers who survive learn how to detach and how to believe again in themselves. No laboratory game can simulate that. I'm sure Jean Lennane would agree.

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## Legal things to remember

Cynthia Kardell

The topics below are just four of the recurring themes in my conversations with whistleblowers and others over the years. It's only a snapshot of what is involved, so please treat it as a starter's pack.

### Your documents

You've seen a solicitor for a free quote and he is willing to take you on. The solicitor wants your documents. You agree. You can hear someone like me in your head, saying never part with your documents, only give them a copy. But in a rush you hand over your only copy anyway. The solicitor says he'll get you back to see him once he's been through your documents and drafts up a claim for your instructions.

Now you're having second thoughts, because you've actually found another solicitor who seems to be more on the same page with you. You tell the first solicitor you're not going ahead. But he wants his costs including the expense of copying your documents. You say, "but you haven't

done anything and they're my documents anyway." The solicitor explains, "I've read your file and started work on your case." After some argument the solicitor offers to settle for the cost of photocopying your documents. You agree. Then you receive a bill for a thousand dollars.

If you don't pay, can he keep your documents? Can he take action to recover his costs and expenses? Yes, to both questions. You hired him. He did some work and made a working copy of your documents, which is a legitimate expense. If payment is an issue, ask your new solicitor to arrange for the return of your documents in return for an undertaking from you to pay the debt from any award or settlement when your matter is concluded.



Cynthia Kardell

### Costs agreements

Solicitors are required by law to enter into a fee or costs agreement with their client, but sometimes the circumstances determine how that comes about. It should be in writing and as a minimum should record the nature of the dispute, the scope of the work, when/how the bills are to be issued and paid, the solicitor's hourly rate of pay and likely expenses (disbursements) and their cost, like a barrister's costs and photocopying charges.

If after issuing a draft costs agreement the client never gets around to signing the agreement even though the work gets under way, the law would

probably imply that the client had by his/her conduct agreed to the terms of the draft. Some costs agreements even build this eventuality into the terms of the agreement.

If there is no written agreement and a dispute develops, it may come down to a court's decision as to what the client knew from the solicitor, your and their conduct and an assessment as to cost based on what is usual and reasonable in the circumstances. That is, an oral agreement based on an unsigned document and conduct can be as binding as a signed written agreement.

No win, no pay agreements can seem attractive, but the devil is in the detail as to what might transpire if, on their advice, you refuse a reasonable offer to settle. Usually that means that the solicitor can sack you and hold you liable for their reasonable costs after all. This should not surprise you. Your solicitor runs a business, not a charity, which is why most 'no win, no pay' agreements limit a solicitor's risks in this way, thereby allowing them to recover their reasonable costs if you prove unwilling to accept their reasonable advice to settle up. So if you absolutely want your day in court then you had better be prepared to pay as you go.

But, be realistic about your claim because courts can be a bit of a lottery. If, for example, most of your case relies on competing oral testimony, unhelpful documents and your opponent's deep pockets, then take the offer to settle and get the best deal that you can. That is, *have the wisdom to know a win when you see it*, because a "win" rarely comes in the form that you've dreamed it might. And while there may be another opportunity to settle much closer to the trial, it will necessarily include a demand for their reasonable costs to that point to be factored into any settlement.

This might all sound a bit pessimistic, but I think pessimism pays if you're serious about winning.

### Gag clauses

You've agreed to settle the matter by deed of agreement between the parties and your former employer wants to insert a clause to stop you ever talking to anyone ever again about anything at all. You're outraged. You've heard

about these 'gag' clauses and you won't be gagged. Gag clauses are illegal, right?

Well mostly yes, but! Take a deep breath. Think. And get someone other than your solicitor to look at it for you, because it may not be what it seems at first blush.

You see, most deeds simply require you to keep confidential the terms of the deed, which essentially boils down to the nature of the dispute and the dollar amount being paid. The other side usually doesn't want anyone else coming back and saying, "s/he got (so much) and I'm worth more than him or her." They don't want to have to deal with a precedent.

If the offending clause is a non-disparagement clause, instruct your solicitor to demand that it's to be made mutual, which might well mean that the other side will decide (after all) not to press it. It was just a try on!

If they won't remove it and that is all it is, then either hedge your bets by giving a trusted friend a copy of the final draft upfront or just keep the terms confidential because by then your supporters all know your story anyway and, in my experience, most prefer others not to know the actual amount paid.

Finally, although nothing in life is without risk, if you have little or no assets then your detractor is probably unlikely to sue you for damages for breach of deed, even if you keep banging on about how awful they are to all and sundry. They might just content themselves with a few threatening letters. But get advice.

Now, if it is a real gag clause, which would if agreed stop you discussing anything, even the deed's existence with all others under threat of serious penalty, then you might consider refusing. Point out that as it's all out there anyway, you'll be making their demand as public so as to cause them maximum embarrassment ahead of any deal unless they withdraw their demand. This is not without risk, of course. Everything might come to a screaming halt, but any strategy depends on the circumstances so get good advice, independently of your solicitor, and then instruct your solicitor accordingly. Remember it is not unusual for it to take weeks to settle

the terms of a deed, so use that time well.

Assuming the worst, if you feel like your solicitor is helping the other side and the prospect of signing gives you a heavy, almost palpable feeling of dread and jeopardy, then don't do anything. Just delay. Any sensible excuse will do. Just get yourself out of there. Get some clear thinking space with someone you can trust.

### **Solicitor-client confidentiality or privilege**

Solicitor-client privilege means that your solicitor has to keep anything you say to him or her confidential, unless and until you give instructions to do otherwise. Or to put it another way, it is the solicitor's duty at law is to keep your business confidential. But keep in mind that in any dispute as to what is to be kept from the other side or the court, your solicitor's first duty by law is owed to the court, which means your solicitor might decide to sack you (as a client).

Solicitor-client confidentiality does not mean that you have to keep anything said or done between you confidential, although depending on the circumstances if s/he asks you not to and you do, then you may get yourself sacked.

### **Things to remember**

1. It's best not to give your original documents to anyone. Get a copy done at Officeworks or similar outlet. Keep the receipt. It will be much cheaper and if you win, you can claim that cost as a part of the settlement or award.

2. You can get your costs agreement sorted out to your satisfaction and, if at all possible, signed *before* any work is done. It is quite acceptable to bargain for a better deal.

3. Don't just be offended or outraged by a 'gag' clause! Get your wits about you and get the draft document amended so that you can live with it. If you can't, get some time out and better advice.

4. It's your solicitor who has a duty to keep your business confidential and not the other way around.

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## **Getting around the gag**

Brian Martin

Many whistleblowers are asked to sign so-called confidentiality agreements. There are various ways to get around them.



Here's a typical scenario: at your workplace, you report abuse, corruption or hazards to the public. As a result, you suffer reprisals, perhaps even losing your job. So you take your employer to court seeking compensation. The case is going to cost a huge amount of money, and your employer offers you a generous settlement. This is attractive, because it means you don't have to go to court. But there's a hitch. In the settlement agreement, there's a clause that bans you from saying anything about the settlement — and perhaps about the issues you raised originally.

Clauses like this, in legal agreements, are called confidentiality clauses. They can also be called gagging or silencing clauses.

You might say, "I'll agree to the settlement, but won't sign the confidentiality clause." Your employer might agree, but most do not. In fact, if you won't sign, they may not offer you any money at all.

With a gagging clause, you essentially accept money in exchange for a restraint on your free speech. Those with more money can, in this way, buy silence.

Gagging clauses are quite common. They affect many whistleblowers, and others too. Here I present five options for getting around gagging clauses.

### **Option 1: don't sign**

Quite a number of whistleblowers refuse to sign gagging clauses. Some



simply ask that the offending clause be removed, and employers agree. But when employers insist on including the clause, there is a difficult decision to be made.

Some individuals feel they have to sign. They have little money, and may have debts, including to their legal team. They may have to support children or parents. They may have disabilities and face destitution. A pay-out may be a lifeline, and they may feel obliged to sign. When it comes to a choice between family and free speech, family may have to take priority.

Confidentiality clauses also restrain the speech of employers. Some workers fear that if they don't sign, their employers may try to do more to damage their reputations and job prospects.

Luckily there are other options.

### **Option 2: inform others before signing**

Before you sign the document containing the confidentiality clause, you can give others copies of all the information about your case. Legally, you are bound by the confidentiality agreement, but others are not: they haven't signed anything preventing them from speaking out.

The basic idea in this option is to enable others to speak out about the issues, including your experiences and the fact that you aren't allowed to speak. So make sure you provide them with plenty of material: documents, emails, and a summary of the issues. The summary is important because otherwise they might have a hard time understanding what it's all about.

Who should you give the material to? This depends a lot on the case and what you hope will happen afterwards. Generally, you should approach people who are trustworthy, knowledgeable and sympathetic, and include some who will take the initiative to speak out. You should pick some individuals who are independent and not vulnerable to pressure from your employer or from others who want to keep the issue quiet.

One advantage of this option is that it is entirely legal. Even so, your employer might demand that you contact everyone to whom you gave information and ask them to return any

relevant documents and not to comment on the case. You can oblige. You ask recipients to return documents and request that they not comment. Just make sure that you gave the documents to people who will understand why you're asking them — and hence who will refuse your request.

### **Option 3: leak**

Suppose you signed the deed including the confidentiality clause, and you did this before giving others copies of relevant documents. However, your employer probably doesn't know whether or not you circulated the documents prior to signing. So what you do is provide the documents to others, just as in option 2, except you have to be much more careful about it, so there is little evidence that you've done so.

For example, you can go to a public library, use a public computer, set up a new email account under a false name and send the documents to your favoured recipients. In this way, if your employer goes into your regular email account, there is no record of what you've done.



Similarly, you need to be careful about who you talk to, because your employer may be able to obtain records of telephone calls, perhaps not what you've said, but the numbers you called, and when and how long. This is what is called metadata. (It's also possible that your phone might be tapped. This is only likely if the stakes are high, for example involving high-level corruption.)

In general, you need to think through the likely ways that your employer might try to collect evidence, and use methods that avoid these.

*Is it ethical?* You may think, "I signed an agreement. I should stick with it." Yes, indeed, but you signed

under duress, namely under the threat of losing a large amount of money. In such situations, the moral obligation to abide by the agreement is reduced or eliminated.

There's another consideration: confidentiality agreements are themselves questionable in a free society. Should anyone be allowed to sign away their right to free speech? If so, the implications would be far-reaching. It would mean that witnesses to crimes, abuse, misrepresentation and dangers could be paid to remain quiet. And of course that is exactly what is involved in many cases in which whistleblowers sign confidentiality agreements. They have spoken out about corruption (crimes), abuse or dangers to the public. Any law or arrangement that silences them is itself wrong, in that it aids and abets unethical, illegal and damaging behaviour.

In Britain, the national public interest disclosure act banned the use of gagging clauses. But that didn't stop many hospitals from imposing them on dissident health personnel. To obtain settlements, doctors and nurses were gagged, even though gags were outlawed. So who is in the wrong?



If you signed an agreement, it may be legally risky to break it, but — depending on the circumstances — ethically defensible.

### **Option 4: have nothing to lose**

What happens if you signed a confidentiality agreement and you speak out in defiance of the ban? You might be sued by your employer, but this might not matter if you have nothing to lose. If you have no assets and not much income, you are in a good position to speak out. Your employer might take you to court, but with no money you decide not to defend. The court finds against you, but your employer can't collect the penalty.

It might be possible for the employer to charge you with a criminal offence, for example criminal defamation, but this would be unlikely. If it happens, you move to option 5.

You might decide to get rid of your assets, for example selling your house and giving away your money. You do need to live, though, and how to do this depends a lot on your circumstances. Perhaps your partner, family member or friend will support you. Another possibility is to move to another country, especially one where legal action from Australia is unlikely or ineffective.

Some people unfortunately have only a few months or years to live. For them, speaking out is relatively safe. By the time their employers get through the legal processes, they'll be dead and won't have to pay anything!

#### **Option 5: attempt to make censorship backfire**

A confidentiality agreement is a method of censorship. It is a restraint on free speech, and nearly everyone endorses the concept of free speech (even when hindering it in practice). Therefore, any attempt to prevent free speech may be seen as objectionable and potentially cause outrage.

The Hollywood celebrity Barbra Streisand learned the hard way that attempted censorship can backfire. Streisand's mansion at Malibu happened to be shown in an online collection of photos of the California coastline by photographer Kenneth Adelman. In 2003 she sued Adelman and a photo sales company for invasion of privacy, asking for damages of \$50 million. When her legal action was publicised, it generated huge interest in the photo. Prior to the publicity, the photo had been downloaded just six times. Afterwards, it was downloaded hundreds of thousands of times. Subsequently, counterproductive online censorship has been dubbed "the Streisand effect." Dozens of examples are listed on Wikipedia.

Similar dynamics can occur with confidentiality agreements. Phillip Bonaffini's wife died after an operation at Bridgeport Hospital in the US. He sued the hospital for failing to follow procedures to prevent infections. The case was settled and he signed a confidentiality agreement.

Later, Bonaffini was reported in the *Chicago Tribune* commenting about hospital infection prevention. Bridgeport Hospital considered this a violation of the settlement agreement and sued. However, when its legal action was publicised, Bonaffini received sympathy. The hospital was seen as being vindictive towards a grieving widower. After the publicity, it quickly withdrew its legal action.

Although censorship can backfire as in the Streisand and Bridgeport Hospital cases, these are the exceptions — there are vastly more cases in which censorship does not cause much concern. Censors have a variety of means to reduce outrage, for example by denigrating or intimidating the target of censorship. Furthermore, it can be costly to stand up to censorship.

For anyone who signs a confidentiality agreement under duress and decides that the injustice involved needs to be openly challenged, it is worth considering how to invoke the Streisand effect, namely make the gagging clause backfire. It is important to be able to publicise the issues — what you originally spoke out about, such as corruption, abuse or hazards to the public — through the mass or social media, getting to a large number of people, some of whom will be outraged by the information. The greater the publicity, the harder it will be for your employer to be able to justify coming after you.

You should be prepared for attempts to disparage you by releasing damaging information, false claims and so forth. The more upright and open you have been, and the better your reputation with co-workers and friends, the harder it will be for your employer to discredit you.

Your employer may try to escalate intimidation by threatening serious legal action. You need to be prepared to stand your ground and continue obtaining publicity — including publicity about the legal threats. Challenging censorship, especially when a wealthy and powerful organisation is involved, is not for the faint-hearted. It is useful to remember that leaders of most organisations detest adverse publicity more than anything, and don't mind spending hundreds of thousands of dollars to prevent it. That, after all, is why companies offer generous settle-

ments — with the addition of gagging clauses.



#### **Summary**

Gagging clauses are a blight on a free society. They are a type of bribery, buying silence about things that should be public. If you are put in the difficult situation of being asked to sign a gagging clause, you may be able to resist but, if not, it is worth considering other options. You can give your information to others in advance, which is entirely legal, but even after signing you may decide to provide your information to others, making sure this is done without leaving evidence. Finally, if you decide you really need to speak out, you should do what you can to make the gag backfire.

#### **More information**

Censorship backfire,  
<http://www.bmartin.cc/pubs/backfire.html#censorship>

See especially Sue Curry Jansen and Brian Martin, "The Streisand effect and censorship backfire," *International Journal of Communication*, vol. 9, 2015, <http://www.bmartin.cc/pubs/15ijc.pdf> — the Streisand and Bonaffini case studies are drawn from this article.

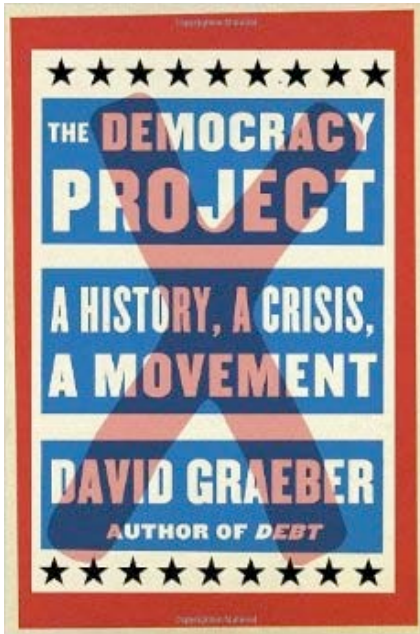
Gagging clauses in Britain's National Health Service: Phil Hammond and Andrew Bousfield, "Shoot the messenger," *Private Eye*, 2011, <http://www.bmartin.cc/dissent/documents/Hammond11.pdf>  
"Leaking: practicalities and politics," <http://www.bmartin.cc/dissent/documents/rr/leaking.pdf>

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### Mainstreaming bribery

David Graeber

*The Democracy Project* (London: Allen Lane, 2013), pp. 114–115



In the United States, ... the greatest taboo is to speak of the corruption itself. Once there was a time when giving politicians money so as to influence their positions was referred to as “bribery” and it was illegal. It was a covert business, if often pervasive, involving the carrying of bags of money and solicitation of specific favors: a change in zoning laws, the awarding of a construction contract, dropping the charges in a criminal case.

Now soliciting bribes has been relabeled “fund-raising” and bribery itself, “lobbying.” Banks rarely need to ask for specific favors if politicians, dependent on the flow of bank money to finance their campaigns, are already allowing bank lobbyists to shape or even write the legislation that is supposed to “regulate” their banks. At this point, bribery has become the very basis of our system of government.

There are various rhetorical tricks used to avoid having to talk about this fact — the most important being allowing some limited practices (actually delivering sacks of money in exchange for a change in zoning laws) to remain illegal, so as to make it

possible to insist that real “bribery” is always some *other* form of taking money in exchange for political favors.

I should note the usual line from political scientists is that these payments are not “bribes” unless one can prove that they changed a politician’s position on a particular element of legislation. By this logic, if a politician is inclined to vote for a bill, receives money, and then changes his mind and votes against it, this is bribery; if however he shapes his views on the bill to begin with solely with an eye for who will give money as a result, or even allows this donor’s lobbyists to write the bill for him, it is not. Needless to say these distinctions are meaningless for present purposes.

But the fact remains that the average senator or congressman in Washington needs to raise roughly \$10,000 a week from the time they take office if they expect to be reelected — money that they raise almost exclusively from the wealthiest 1 percent. As a result, elected officials spend an estimated 30 percent of their time soliciting bribes.

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### Whistleblowers who suffer harm must receive apology and practical redress, say MPs

Nicola Merrifield

*Nursing Times.net*, 21 January 2015

WHISTLEBLOWERS who have suffered as a result of speaking out should receive an apology and see action taken to remedy the harm done to them, according to the latest report by the health select committee into the handling of complaints within the NHS [UK National Health Service].

MPs said the treatment of whistleblowers remained a “stain on the reputation of the NHS,” which had led to “unwarranted and inexcusable pain” for a number of health care professionals, described as “courageous individuals.”

The committee has called for those staff who are proven to be vindicated

in their concerns to be issued with an apology and practical redress for any adverse effects they experienced as a result.

In its report, the committee says: “We recommend that there should be a programme to identify whistleblowers who have suffered serious harm and whose actions are proven to have been vindicated, and provide them with an apology and practical redress.”

In this fourth report — called *Complaints and Raising Concerns* — the committee makes 21 recommendations to improve the way staff and patients speak up about concerns.

It welcomed the progress made since its last inquiry, noting that patient safety and the treatment of complaints had become high profile issues, but said there was still significant scope for improvement.

A simplified, streamlined complaints system should be introduced, said MPs, who also highlighted there was a strong case for integrating social and health care complaints under the same umbrella system.

MPs also endorsed a suggestion from Sir Robert Francis QC that trusts should be required to publish summaries of anonymised complaints made against them, how they have been handled and the lessons learned.

The committee noted that Sir Robert’s own whistleblowing inquiry — due to be published early this year — has received more than 600 written submissions and 17,500 online responses and said it hoped the findings would provide a template for creating an open complaints reporting culture.

Committee chair Dr Sarah Wollaston said: “This report does not seek to undermine [NHS staff] commitment but to make sure that where poor standards do occur, these can be identified and put right at the earliest opportunity for the benefit of patients and staff alike.

“Concerns and complaints are an important source of information for improving services and it is vital that the NHS continues on the path of changing the way that these are viewed and handled.”

Commenting on the proposal that whistleblowers should receive practi-



cal redress, the NHS Confederation — which represents provider and commissioning organisations — welcomed the recommendation.

NHS Confederation chief executive Rob Webster said: “We support the calls for practical redress for those who have been harmed as a consequence of raising genuine concerns. We should apply the same golden thread of complaints handling to staff who have been failed.”



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## HMRC's use of powers against whistleblower “indefensible,” say MPs

Rajeev Syal

*The Guardian*, 26 March 2015

The decision by tax officials to use intrusive investigative powers to try to prove that a whistleblower had spoken to the *Guardian* has been severely criticised by British members of parliament.

HM Revenue and Customs used the Regulation of Investigatory Powers Act 2000 (Ripa) to examine the belongings, emails, internet search records and phone calls of their own solicitor, Osita Mba, and the phone records of his then wife.

HMRC justified the use of these powers by claiming that they wanted to find out if Mba had spoken to the *Guardian*'s former investigations editor, David Leigh.

Mba had not spoken to Leigh. Using the Public Interest Disclosure Act, the solicitor had written to the National Audit Office (NAO) and two parliamentary committees in confidence in 2011 saying that the head of tax, Dave

Hartnett, had “let off” Goldman Sachs from paying at least £10m in interest.

A report by MPs on the Commons public accounts committee praised Mba for exposing the “sweetheart” deal and called for further scrutiny of HM Revenue's use of Ripa powers.

“We consider that HMRC's use of powers, reserved for tackling serious criminals, against Mr Osita Mba was indefensible ... HMRC should tell us when it makes use of the powers granted to it under the Regulation of Investigatory Powers Act against whistleblowers from within HMRC,” the report said.

By using Ripa, HMRC can see websites viewed by taxpayers, where a mobile phone call was made or received, and the date and time of emails, texts and phone calls. According to the revenue website, these powers “can only be used when investigating serious crime.”



Mba, who trained as a barrister in Nigeria and completed his master's degree at Oxford, worked in the personal-tax litigation team that dealt with the Goldman Sachs tax issue. He told the NAO and two parliamentary committees that the bank's settlement had been agreed with a handshake by Hartnett, the permanent secretary for tax at HMRC.

Mba believed the deal could be illegal, and told auditors he was making the disclosure under whistleblowing legislation. His evidence led to Hartnett being accused of lying to parliament over his role in the Goldman Sachs deal, which he denied. He admitted, however, that his organisation had made a mistake by approving the deal. Mba eventually left the Revenue.

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## The sinister treatment of dissent at the BBC

*The Guardian*, 8 March 2015



Nick Cohen

*The whistleblowers who broke the Jimmy Savile story have seen their careers nosedive while executives protect their own status*

NOBODY from John Humphrys in the morning to Evan Davis at night dares mention a scandal at the BBC. It undermines their reporting of every abuse whistleblowers reveal. It reinforces the dirty common sense of British life that you must keep your head down if you want to keep your job.

The scandal is simply this: the BBC is forcing out or demoting the journalists who exposed Jimmy Savile as a voracious abuser of girls. As Meiron Jones put it to me: “There is a small group of powerful people at the BBC who think it would have been better if the truth about Savile had never come out. And they aim to punish the reporters who revealed it.”



Jimmy Savile

Jones was one of the BBC's best investigative producers. He had suspected that Savile was not the “national treasure” the BBC, NHS, monarchy and public adored, ever since he had seen Savile take girls away in his car from an approved school his aunt ran in the 1970s. He



broke the story which showed that Savile was one of the most prolific sex abusers in British history, and handed the BBC what would have been one of its biggest scoops. If it had run it. Which, of course, it did not. The editor of *Newsnight* banned the report. Thus began a cover-up which tore the BBC apart.

A week ago, Jones's managers told him that a temporary assignment on *Panorama* was over. He should have been able to go back to his old job. But there was no old job to go back to. He had been fired.

Jones's reporter on the Savile film was Liz MacKean, who documents the sufferings of the powerless — whether it be raped children in Britain or persecuted gay men in Putin's Russia.

But she spoke out, so the BBC forced her out too. "When the Savile scandal broke," she told me, "the BBC tried to smear my reputation. They said they had banned the film because Meirion and I had produced shoddy journalism. I stayed to fight them, but I knew they would make me leave in the end. Managers would look through me as if I wasn't there. I went because I knew I was never going to appear on screen again."

The BBC press office bridled when I described Jones and MacKean as "whistleblowers". As the Pollard review of the Savile scandal had concluded that BBC management had acted in "good faith," I must not call them that.

If you are tempted to agree, consider the sequel. *Panorama* responded magnificently to the news that the BBC had killed the Savile scoop. It broadcast a special documentary, which earned the highest audience in the programme's history. Jones and MacKean described how their journalism had been suppressed, and *Panorama* went on to document Savile's crimes. How open the BBC is, I thought. What other institution would subject itself to the same level of self-criticism?

What a fool I was. Since then, BBC managers have shifted Tom Giles, the editor of *Panorama*, out of news. Peter Horrocks, an executive who insisted throughout the scandal that the BBC must behave ethically, announced last September that he was resigning to "find new challenges." Clive Edwards,

who as commissioning editor for current affairs oversaw the *Panorama* documentary, was demoted. The television trade press reported recently that his future is "not yet clear" (which doesn't sound as if he has much of a future at all).

Compare their treatment with those who did nothing to advance the public interest. As the Savile crisis deepened in the autumn of 2012, the BBC brought in Adrian Van Klaveren, the then head of Radio 5, to supervise news. He allowed *Newsnight* to falsely imply that Lord McAlpine was a child abuser — an allegation that every journalist who had investigated the child abuse allegations in North Wales could have told him was ridiculous. The disaster of *Newsnight* covering up the abuse by the BBC's own celebrity rapist and then falsely accusing an innocent man led to the resignation of the director-general George Entwistle.



Jimmy Savile

But Van Klaveren has been promoted, not squeezed out. He is head of something called "strategic change." Helen Boaden, the BBC head of news at the time of the censorship, is now on the BBC's executive board. Peter Rippon, the *Newsnight* editor who blocked Jones and MacKean, now has a comfortable job managing the BBC's archive.

I could go on, but I am sure you are weary of bog-standard jobsworths. The wider point is that the interests of those at the top of an organisation and the

interests of the organisation can be miles apart.

If the BBC had exposed Savile, viewers would have admired its honesty. If it had bent over backwards to ensure that Jones and MacKean did not suffer for speaking out, everyone would say that it was behaving as a free institution should, rather than looking like the official broadcaster of a paranoid dictatorship or the board of directors of HSBC.

In the banks, the NHS, the police or the BBC, the greatest threats to those in charge, however, are not threats to the institution but threats to their status. If subordinates can contradict them, how can they justify their salaries and the prestige that goes with them? The Pollard review into Savile showed that status anxiety was generating real hatred at the top of the BBC.

A senior BBC press officer vowed to "drip poison about Meirion's suspected role." He was later promoted. Peter Rippon said that if Jones spoke freely: "I will throw shit at him."

The best aspect of modern culture is that it revolts against such hierarchical control. The computer revolution makes information sharing and co-operative ways of working easy to achieve. But hierarchies have men and women at their summits who will fight as ferociously as BBC executives to protect their position, and prevent democratic change.

The case of Jones and MacKean makes my point. I have reported on it in the *Observer* and *Private Eye* has covered it too. But the Tory press, which daily bashes the BBC, has avoided the story. You only have to look at the *Telegraph* to understand why it does not want to encourage insubordination. Its journalists must resign before they can protest against HSBC's control of its news pages.

The power of hierarchies is hard to break. But if you want to fight fraud in the City or the rape of children, it has to be broken. A start can be made by insisting that everyone from John Humphrys in the morning to Evan Davis at night tells the truth about the purge of the BBC's truth tellers.

## UNC “fake classes” whistleblower to get \$335K in settlement

Sara Ganim  
CNN, 17 March 2015

THE University of North Carolina (UNC) will pay whistleblower Mary Willingham \$335,000 to settle her lawsuit with the university, following the largest academic fraud scandal in NCAA [National Collegiate Athletics Association] history.

Willingham is the former athletics literacy counselor who blew the whistle about the fake classes that went on for nearly 20 years at the prestigious university.

Willingham spent years fielding attacks from university officials — including accusations that she was lying when she said that officials within the athletic department steered underprepared athletes into the fake classes to keep them eligible [for playing on university teams].

For nearly five years, UNC denied those claims, but Willingham refused to keep quiet. She first told her story to the *News & Observer* in Raleigh, North Carolina, and then to national media when the university refused to admit that the classes were well-known to faculty.



Mary Willingham

The added attention forced UNC to hire a new investigator and launch a new probe in 2014. That latest review, led by Ken Wainstein, a 19-year veteran of the U.S. Justice Department, found exactly what Willingham had always claimed — widespread and systematic cheating.

Willingham left her job last spring after complaining that she was being retaliated against.

“The University’s settlement with Mrs. Willingham resolves all of the outstanding legal issues in the case,”

said Rick White, associate vice chancellor of communications and public affairs. “We appreciate the efforts of the mediator to help us achieve a successful and timely conclusion to the mediation. We believe the settlement is in the best interest of the University and allows us to move forward and fully focus on other important issues.”

When she sued, Willingham said she hoped to accomplish what no other investigation has done — to subpoena documents and to depose university officials under oath. Her lawsuit never got that far.

Instead, she says she’s hoping that will be accomplished by a larger class-action lawsuit filed by powerhouse attorney Michael Hausfeld on behalf of two former UNC athletes.

Devon Ramsay and Rashanda McCants both sued in January, saying they were promised an education but didn’t get one because of the paper class scandal.

Hausfeld is the attorney who beat the NCAA last summer in federal court on behalf of former UCLA [University of California at Los Angeles] player Ed O’Bannon, winning a case that will forever change college sports by forcing the NCAA to eliminate the rule that forbids schools from paying players.

That lawsuit is the reason Willingham says she was OK with entering into mediation in her whistleblower suit. She shared the settlement document with CNN.

“It’s about the students and not about me. I don’t need it to be about me,” Willingham said. “I got an education, but those students left without one, and we still have a system that doesn’t work. And so I’m hopeful that (the Hausfeld lawsuit) will move forward and prove that (NCAA Division I) schools all across the country have a flawed system where a promise of an education isn’t happening, and therefore these students are getting nothing.”

Willingham is co-founder of Paper Class Inc., which serves as a portal and rallying point for the college sports reform movement and includes a program to give students reading help in middle school.

## Whistleblowers have a human right to a public interest defense, and hacktivists do, too

Carey Shenkman  
*Huffington Post*, 20 March 2015

THE United States’ war on transparency is making it an outlier in the international community. Just this week, a high-level European human rights body “urged” the United States to allow NSA whistleblower Edward Snowden to return home and be given a meaningful chance to defend himself.

International human rights law has been clear for decades: anyone engaged in exposing gross abuses through whistleblowing and publishing is entitled to protection. Yet, the Obama administration has waged war on transparency, prosecuting more people for disclosing information to the press than Richard Nixon and all other U.S. presidents combined.

Not a single one of those prosecuted has been allowed to argue that their actions served the public good. Chelsea Manning, the alleged WikiLeaks whistleblower, exposed human rights abuses worldwide and opened an unprecedented window into global politics. Her disclosures are to this day cited regularly by the media and courts. Thomas Drake exposed massive NSA waste, while John Kiriakou exposed waterboarding later admitted to be torture in the recent Senate CIA Torture Report. The story of Edward Snowden’s disclosures of widespread NSA surveillance recently won an Oscar.

Whistleblowers cannot argue that their actions had positive effects, known as a “public interest defense.” The United States treats disclosures to the press as acts of spying — no matter what good they lead to. In response, European and international human rights bodies are urging the United States to adopt better protections for whistleblowers.

These protections should apply not only to insiders who blow the whistle, but also to other transparency advocates such as hacktivists. A public interest defense should have been available to Aaron Swartz, the Creative Commons creator and Reddit co-

founder who tragically committed suicide following an overzealous government prosecution. His crime? Trying to make academic articles accessible to the public.



The defense could have helped Jeremy Hammond, who in 2013 was convicted for “computer trespass” and sentenced to 10 years for exposing that the private intelligence firm Stratfor spied on human rights activists. The Justice Department tried to cast Hammond as a cybercriminal. But Hammond’s supporters, which include human rights organizations and Pentagon Papers whistleblower Daniel Ellsberg, recognized that he was motivated to expose government and corporate surveillance.

In guaranteeing a fair trial for information disclosures, the United States lags behind other jurisdictions, including Canada, Denmark and Germany. Canada’s Security of Information Act offers a public interest defense, as does the Danish Criminal Code on disclosing state secrets. The defenses are not airtight, but they are better than nothing. For hacktivists, at least one German court has defended a digital sit-in as political speech, acknowledging that “hacker” does not equal “cybercriminal.”

International norms support the human right to a public interest defense. The UN Human Rights Committee, interpreting the International Covenant of Civil and Political Rights, the world’s farthest-reaching human rights treaty, noted that governments must take “extreme care” to ensure that laws relating to national security are not invoked “to suppress

or withhold from the public information of legitimate public interest.”

Additionally, the Johannesburg Principles, adopted since 1995 by international legal experts, stipulate that “No person may be punished on national security grounds for disclosure of information if ... the public interest in knowing the information outweighs the harm from disclosure.” This principle was reiterated in 2013 in the Tshwane Principles — agreed upon by UN experts, civil society and practitioners around the world. The Tshwane framework outlined in detail specific categories of disclosures, like corruption and human rights abuses, that should be protected.

Finally, the European Court of Human Rights, Europe’s high human rights court, has provided for whistleblower protection on numerous occasions. For instance, in *Guja v. Moldova*, the court protected as a matter of free speech a whistleblower’s right to disclose wrongdoing committed by a public prosecutor. In reaching its decision, the court weighed the perceived damage suffered by the public authorities against the public interest of the information revealed.



This week’s statements from the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe follow a tradition of long-standing norms which consistently support the right to a public interest defense in information disclosures. None of these norms depend on the defendant being a government whistleblower; they can certainly protect hacktivists as well.

The free flow of information is necessary for a democratic society, and this flow cannot be purely in the hands of government. This is why the rights to expression and a free and open press are among the most widely recognized

rights on earth. When those exposing wrongdoing cannot even defend themselves in court, this is ultimately a failure of the rule of law. It means that even judges cannot challenge the basis for government secrecy, undermining the basic tenets of democratic society.

Carey Shenkman is a human rights lawyer.

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## The DOJ isn’t interested in protecting FBI whistleblowers from retaliation

Tim Cushing

Techdirt, 23 March 2015

You don’t hear much about FBI whistleblowers. Many other agencies have had wrongdoing exposed by employees (and the government has often seen fit to slap the whistles out of their mouths with harsh prosecution), but the FBI isn’t one of them. *Forty-three years* ago, whistleblowers broke *into* the FBI and retrieved damning documents, but no one’s really broken *out* of the FBI to do the same. In fact, the FBI would rather not talk about whistleblowing *at all*.

An optimist might chalk this up to the FBI being a tightly-run organization that polices itself for malfeasance and wrongdoing. They’d be wrong, of course. Just within the past year, the FBI has twice thwarted its own oversight and may soon face budgetary constraints if it won’t turn over the documents the DOJ’s [Department of Justice] Inspector General is seeking.

There’s a reason no one blows the whistle at the FBI and this GAO report spells it out: unlike every other government agency, the DOJ’s internal policies contain nothing to shield FBI whistleblowers from retaliation.

*Unlike employees of other executive branch agencies, FBI employees do not have a process to seek corrective action if they experience retaliation based on a disclosure of wrongdoing to their supervisors or others in their chain of command who are not designated officials. This difference is due, in part, to DOJ’s decisions about how to implement the statute governing FBI whistleblowers. When issuing its regulations in 1999, DOJ officials*



did not include supervisors in the list of entities designated to receive protected disclosures, stating that Congress intended DOJ to limit the universe of recipients of protected disclosures, in part because of the sensitive information to which FBI employees have access.

To ostensibly protect means, methods and (presumably) the country itself, the DOJ eliminated several options whistleblowers could pursue when taking their complaints through official channels. A 2012 Presidential Policy Directive aimed at increasing whistleblower protections failed to move the needle.

In response to this requirement, DOJ reviewed its regulations and in an April 2014 report recommended adding more senior officials in FBI field offices to the list of designated entities, but did not recommend adding all supervisors. DOJ cited a number of reasons for this, including concerns about striking the right balance between the benefits of an expanded list and the additional resources and time needed to handle a possible increase in complaints. By dismissing retaliation complaints based on a disclosure made to an employee's supervisor or someone in that person's chain of command, DOJ leaves some FBI whistleblowers—such as the 17 complainants we identified—without protection from retaliation.

The DOJ is plainly uninterested in sheltering those who would point out FBI wrongdoing. It has set up a minefield most whistleblowers are unable to navigate.

We concluded that, without clear information on how to make a protected disclosure, FBI whistleblowers may not be aware that, depending on how they report their allegation, they may not be able to seek corrective action if they experience retaliation.

So, with no roadmap and extremely limited protections, whistleblowers who do manage to bring their complaints up through proper channels are often subjected to retaliatory actions for which they have no remedy.

[I]n 2002, former FBI agent Jane Turner filed a whistleblower complaint with DOJ alleging that her colleagues had stolen items from Ground Zero after the September 11, 2001, terrorist attacks. She was then given a “does not meet expectations” rating, placed on leave, and notified of proposed removal.

This retaliation was reported by Agent Turner to the DOJ, which then slowly ground its heavy wheels of so-called justice for more than a decade.

[The] DOJ ultimately found in her favor in 2013 — over 10 years later.



Turner's case isn't an anomaly. The GAO found that, while the DOJ was often quick to dismiss retaliation complaints simply because the whistleblower failed to properly navigate its labyrinthine reporting restrictions, it was seldom interested in moving quickly on behalf of those who managed to luck into complete compliance.

The 4 complaints we reviewed in our 2015 report that met threshold regulatory requirements and that DOJ ultimately adjudicated on the merits, took up to 10.6 years to resolve, and DOJ did not provide parties with expected time frames for its decisions throughout these cases.

The DOJ blames this on “case complexity” and “staffing priorities.” The latter excuse is likely the most honest. The DOJ is far more inclined to prosecute whistleblowers than protect whistleblowers. Blowing the whistle at the FBI means being subjected to vindictive actions with little to no recourse. The DOJ may

decide to take a whistleblower's case, but will do little, if anything, to escalate its response. In the meantime, whistleblowers are apparently supposed to take a number and wait things out in a hostile environment.

Will this GAO report result in better protections? Highly doubtful, considering a directive issued by the President's office itself failed to produce any significant change. Even the agency's inside oversight — the Office of the Inspector General — is finding the DOJ completely unresponsive to its complaints about FBI stonewalling and obfuscation. It's highly unlikely the DOJ will handle lower-level whistleblower complaints with more speed or openness.

The DOJ, along with the FBI, has successfully neutralized most forms of accountability. The OIG is openly ignored. FOIA requests are frequently greeted with massive amounts of withheld documents and redactions. When pressed, the nation's top law enforcement agency tends to wrap itself in a patchwork of undeclared wars (drugs, terrorism) and claims accountability will lead to an unsafe and unsecured country. Meanwhile, its own underling agencies go rogue while tangled, useless policies keep whistleblowers from ever opening their mouths.

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## Meet the woman JPMorgan Chase paid one of the largest fines in American history to keep from talking

Matt Taibbi  
Rolling Stone, 6 November 2014



SHE tried to stay quiet, she really did. But after eight years of keeping a heavy secret, the day came when Alayne Fleischmann couldn't take it anymore.

"It was like watching an old lady get mugged on the street," she says. "I thought, 'I can't sit by any longer.'"

Fleischmann is a tall, thin, quick-witted securities lawyer in her late thirties, with long blond hair, pale-blue eyes and an infectious sense of humor that has survived some very tough times. She's had to struggle to find work despite some striking skills and qualifications, a common symptom of a not-so-common condition called being a whistle-blower.

Fleischmann is the central witness in one of the biggest cases of white-collar crime in American history, possessing secrets that JPMorgan Chase CEO Jamie Dimon late last year paid \$9 billion to keep the public from hearing.

Back in 2006, as a deal manager at the gigantic bank, Fleischmann first witnessed, then tried to stop, what she describes as "massive criminal securities fraud" in the bank's mortgage operations.

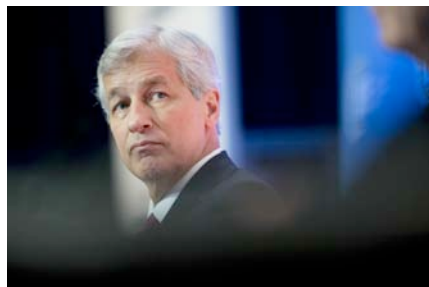
Thanks to a confidentiality agreement, she's kept her mouth shut since then. "My closest family and friends don't know what I've been living with," she says. "Even my brother will only find out for the first time when he sees this interview."

Six years after the crisis that cratered the global economy, it's not exactly news that the country's biggest banks stole on a grand scale. That's why the more important part of Fleischmann's story is in the pains Chase and the Justice Department took to silence her.

She was blocked at every turn: by asleep-on-the-job regulators like the Securities and Exchange Commission, by a court system that allowed Chase to use its billions to bury her evidence, and, finally, by officials like outgoing Attorney General Eric Holder, the chief architect of the crazily elaborate government policy of surrender, secrecy and cover-up. "Every time I had a chance to talk, something always got in the way," Fleischmann says.

This past year she watched as Holder's Justice Department struck a series of historic settlement deals with

Chase, Citigroup and Bank of America. The root bargain in these deals was cash for secrecy. The banks paid big fines, without trials or even judges — only secret negotiations that typically ended with the public shown nothing but vague, quasi-official papers called "statements of facts," which were conveniently devoid of anything like actual facts.



Jamie Dimon (Photo: Bloomberg/Getty)

And now, with Holder about to leave office and his Justice Department reportedly wrapping up its final settlements, the state is effectively putting the finishing touches on what will amount to a sweeping, industry-wide effort to bury the facts of a whole generation of Wall Street corruption. "I could be sued into bankruptcy," she says. "I could lose my license to practice law. I could lose everything. But if we don't start speaking up, then this really is all we're going to get: the biggest financial cover-up in history."

In 2006, after a few years at a white-shoe law firm, Fleischmann ended up at Chase. The mortgage market was white-hot. Banks like Chase, Bank of America and Citigroup were furiously buying up huge pools of home loans and repackaging them as mortgage securities. Like soybeans in processed food, these synthesized financial products wound up in everything, whether you knew it or not: your state's pension fund, another state's workers' compensation fund, maybe even the portfolio of the insurance company you were counting on to support your family if you got hit by a bus.

As a transaction manager, Fleischmann functioned as a kind of quality-control officer. Her main job was to help make sure the bank didn't buy spoiled merchandise before it got tossed into the meat grinder and sold out the other end.

A few months into her tenure, Fleischmann would later testify in a DOJ [Department of Justice] deposition, the bank hired a new manager for diligence, the group in charge of reviewing and clearing loans. Fleischmann quickly ran into a problem with this manager, technically one of her superiors. She says he told her and other employees to stop sending him e-mails. The department, it seemed, was wary of putting anything in writing when it came to its mortgage deals.

"If you sent him an e-mail, he would actually come out and yell at you," she recalls. "The whole point of having a compliance and diligence group is to have policies that are set out clearly in writing. So to have exactly the opposite of that — that was very worrisome." One former high-ranking federal prosecutor said that if he were taking a criminal case to trial, the information about this e-mail policy would be crucial. "I would begin and end my opening statement with that," he says. "It shows these people knew what they were doing and were trying not to get caught."

In late 2006, not long after the "no e-mail" policy was implemented, Fleischmann and her group were asked to evaluate a packet of home loans from a mortgage originator called GreenPoint that was collectively worth about \$900 million. Almost immediately, Fleischmann and some of the diligence managers who worked alongside her began to notice serious problems with this particular package of loans.



But when she and others raised objections to the toxic loans, something odd started happening. The number-crunchers who had been complaining about the loans suddenly



began changing their reports. The process she describes is strikingly similar to the way police obtain false confessions: The interrogator verbally abuses the target until he starts producing the desired answers. “What happened,” Fleischmann says, “is the head diligence manager started yelling at his team, berating them, making them do reports over and over, keeping them late at night.” Then the loans started clearing.

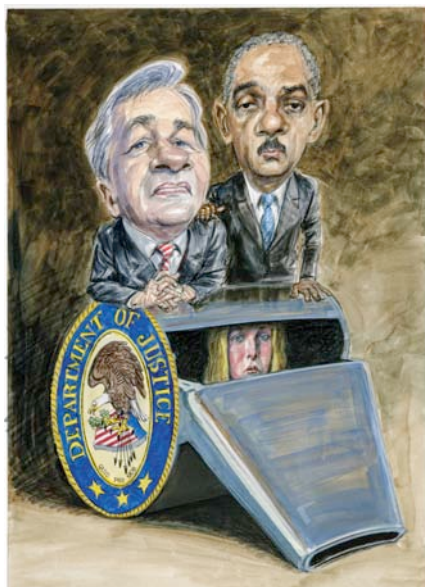


Photo: Illustration by Victor Juhasz

After that meeting, Fleischmann testified, she approached a managing director named Greg Boester and pleaded with him to reconsider. She says she told Boester that the bank could not sell the high-risk loans as low-risk securities without committing fraud. “You can’t securitize these loans without special disclosure about what’s wrong with them,” Fleischmann told him, “and if you make that disclosure, no one will buy them.”

This moment illustrates the most basic element of the case against Chase: The bank knowingly peddled products stuffed with scratch-and-dent loans to investors without disclosing the obvious defects with the underlying loans.

Years later, in its settlement with the Justice Department, Chase would admit that this conversation between Fleischmann and Boester took place (though neither was named; it was simply described as “an employee ... told ... a managing director”) and that

her warning was ignored when the bank sold those loans off to investors.

A few weeks later, in early 2007, she sent a long letter to another managing director, William Buell. In the letter, she warned Buell of the consequences of reselling these bad loans as securities and gave detailed descriptions of breakdowns in Chase’s diligence process.

Fleischmann assumed this letter, which Chase lawyers would later jokingly nickname “The Howler” after the screaming missive from the *Harry Potter* books, would be enough to force the bank to stop selling the bad loans. “It used to be if you wrote a memo, they had to stop, because now there’s proof that they knew what they were doing,” she says. “But when the Justice Department doesn’t do anything, that stops being a deterrent. I just didn’t know that at the time.”

In February 2008, less than two years after joining the bank, Fleischmann was quietly dismissed in a round of layoffs. A few months later, proof would appear that her bosses knew all along that the boom-era mortgage market was rotten. That September, as the market was crashing, Dimon boasted in a ball-washing *Fortune* article titled “Jamie Dimon’s SWAT Team” that he knew well before the meltdown that the subprime market was toast. “We concluded that underwriting standards were deteriorating across the industry.” The story tells of Dimon ordering Boester’s boss, William King, to dump the bank’s subprime holdings in October 2006. “Billy,” Dimon says, “we need to sell a lot of our positions. ... This stuff could go up in smoke!”

In January 2010, when Dimon testified before the Financial Crisis Inquiry Commission, he told investigators the exact opposite story, portraying the poor Chase leadership as having been duped, just like the rest of us. “In mortgage underwriting,” he said, “somehow we just missed, you know, that home prices don’t go up forever.”

When Fleischmann found out about all of this years later, she was shocked. Her confidentiality agreement at Chase didn’t bar her from reporting a crime, but the problem was that she couldn’t prove that Chase had committed a crime without knowing whether those bad loans had been sold. As it turned

out, of course, Chase was selling those rotten dog-meat loans all over the place.



New York Attorney General Eric Schneiderman (left) speaks while Attorney General Eric Holder listens during a news conference at the Justice Department on 27 January 2012. (Photo: Mark Wilson/Getty)

Later, the SEC fined Chase \$297 million for misrepresentations in a deal with a mortgage company called WMC. On the surface, it looked like a hefty punishment. In reality, it was a classic example of the piecemeal, cherry-picking style of justice that characterized the post-crisis era. “The kid-gloves approach that the DOJ and the SEC take with Wall Street is as inexplicable as it is indefensible,” says Dennis Kelleher of the financial reform group Better Markets, which would later file suit challenging the Chase settlement. “They typically charge only one offense when there are dozens. It would be like charging a serial murderer with a single assault and giving them probation.”

Soon Fleischmann’s hopes were raised again. In late 2012 and early 2013, she had a pair of interviews with civil litigators from the U.S. attorney’s office in the Eastern District of California, based in Sacramento.

One of the ongoing myths about the financial crisis is that the government is outmatched by the legal talent representing the banks. But Fleischmann was impressed by the lead attorney in her case, a litigator named Richard Elias. “He sounded like he had been a securities lawyer for 10 years,” she says. “This actually looked like his idea of fun — like he couldn’t wait to run with this case.”

She gave Elias and his team detailed information about everything she’d seen: the edict against e-mails, the sabotaging of the diligence process, the bullying, the written warnings that



were ignored, all of it. She assumed that it wouldn't be long before the bank was hauled into court.



Instead, the government decided to help Chase bury the evidence. It began when Holder's office scheduled a press conference for the morning of September 24th, 2013, to announce sweeping civil-fraud charges against the bank, all laid out in a detailed complaint drafted by the U.S. attorney's Sacramento office. But that morning the presser was suddenly canceled, and no complaint was filed. According to later news reports, Dimon had personally called Associate Attorney General Tony West, the third-ranking official in the Justice Department, and asked to reopen negotiations to settle the case out of court.

It goes without saying that the ordinary citizen who is the target of a government investigation cannot simply pick up the phone, call up the prosecutor in charge of his case and have a legal proceeding canceled. But Dimon did just that. "And he didn't just call the prosecutor, he called the prosecutor's boss," Fleischmann says. According to *The New York Times*, after Dimon had already offered \$3 billion to settle the case and was turned down, he went to Holder's office and upped the offer, but apparently not by enough.

A few days later, Fleischmann, who had by then moved back to Vancouver and was looking for work, was at a mall when she saw a *Wall Street Journal* headline on her iPhone: JPMorgan Insider Helps U.S. in Probe. The story said that the government had a key witness, a female employee willing to provide damaging testimony about Chase's mortgage operations. Fleischmann was stunned. Until that

moment, she had no idea that she was a major part of the government's case against Chase. And worse, nobody had bothered to warn her that she was about to be effectively outed in the newspapers. "The stress started to build after I saw that news," she says. "Especially as I waited to see if my name would come out and I watched my job possibilities evaporate."

Fleischmann later realized that the government wasn't interested in having her testify against Chase in court or any other public forum. Instead, the Justice Department's political wing, led by Holder, appeared to be using her, and her evidence, as a bargaining chip to extract more hush money from Dimon. It worked. Within weeks, Dimon had upped his offer to roughly \$9 billion.

Other investors bilked by Chase also tried to speak to Fleischmann. The Federal Home Loan Bank of Pittsburgh, which had sued Chase, asked the court to force Chase to turn over a copy of the draft civil complaint that was withheld after Holder's scuttled press conference. The Pittsburgh litigants also specified that they wanted access to the name of the state's cooperating witness: namely, Fleischmann.

In that case, the judge actually ordered Chase to turn over both the complaint and Fleischmann's name. Chase stalled. Later in the fall, the judge ordered the bank to produce the information again; it stalled some more.



Then, in January 2014, Chase suddenly settled with the Pittsburgh bank out of court for an undisclosed amount. Months after being ordered to allow Fleischmann to talk, they once again paid a stiff price to keep her testimony out of the public eye.

Chase's determination to hide its own dirt while forcing Fleischmann to keep her secret was becoming more and more absurd. "It was a hard time

to look for work," she says. All that prospective employers knew was that she had worked in a department that had just been dinged with what was then the biggest regulatory fine in the history of capitalism. According to the terms of her confidentiality agreement, she couldn't even tell them that she'd tried to keep the bank from committing fraud.

In today's America, someone like Fleischmann — an honest person caught for a little while in the wrong place at the wrong time — has to be willing to live through an epic ordeal just to get to the point of being able to open her mouth and tell a truth or two. And when she finally gets there, she still has to risk everything to take that last step. "The assumption they make is that I won't blow up my life to do it," Fleischmann says. "But they're wrong about that."

Good for her, and great for her that it's finally out. But the big-picture ending still stings. She hopes otherwise, but the likely final verdict is a Pyrrhic victory.

Because after all this activity, all these court actions, all these penalties (both real and abortive), even after a fair amount of noise in the press, the target companies remain more ascendant than ever. The people who stole all those billions are still in place. And the bank is more untouchable than ever — former Debevoise & Plimpton hot-shots Mary Jo White and Andrew Ceresny, who represented Chase for some of this case, have since been named to the two top jobs at the SEC. As for the bank itself, its stock price has gone up since the settlement and flirts weekly with five-year highs. They may lose the odd battle, but the markets clearly believe the banks won the war. Truth is one thing, and if the right people fight hard enough, you might get to hear it from time to time. But justice is different, and still far enough away.

[This is an abridged version of Matt Taibbi's lengthy article.]

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## Whistleblowers Australia contacts

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**Postal address** PO Box U129, Wollongong NSW 2500  
**Website** <http://www.whistleblowers.org.au/>

### New South Wales

**“Caring & sharing” meetings** We listen to your story, provide feedback and possibly guidance for your next few steps. Held by arrangement at 7.00pm on the 2nd and 4th Tuesday nights of each month, Presbyterian Church (Crypt), 7-A Campbell Street, Balmain 2041. Ring beforehand to arrange a meeting.

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### Whistle

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## Peter Gøtzsche on big pharma threats

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Threats can be particularly malignant when scientists have found lethal harms with marketed drugs that the companies have successfully concealed. Such threats have included frightening telephone calls from the company warning that “very bad things could happen,” cars waiting near the researcher’s home through the night, a ghoulish funeral gift, or an anonymous letter containing a picture of the researcher’s young daughter leaving home to go to school. Not much difference to organised gang crime there.

Journalists have often been threatened with reprisals. A lawyer phoned a journalist who had written critically about the drug industry based on my research and said he called on behalf of a friend. He was interested in knowing how she had gotten access to documents that the company considered strictly confidential. He wouldn’t reveal who his client was. He called again and threatened her by saying that journalists who are critical towards the drug industry may lose everything, their family, friends and job. The journalist got very scared and didn’t sleep much that night.

Even researchers who have contracts giving them permission to publish, or who do not collaborate with the industry at all, may face legal threats if they wish to publish papers that don’t fit with the industry’s propaganda machine. Immune Response filed a \$7 million legal action against the University of California after researchers published negative findings from a clinical trial of an AIDS vaccine, having refused to let the company insert its own misleading analysis in the report. This occurred despite the fact that the contract gave the researchers permission to publish. The company also tried to prevent publication by withholding some of the data.

— Peter C. Gøtzsche, *Deadly Medicines and Organised Crime: How Big Pharma Has Corrupted Healthcare* (London: Radcliffe, 2013), chapter 19, “Intimidation, threats and violence to protect sales”

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Membership of WBA involves an annual fee of \$25, payable to Whistleblowers Australia. Membership includes an annual subscription to *The Whistle*, and members receive discounts to seminars, invitations to briefings/ discussion groups, plus input into policy and submissions.

To subscribe to *The Whistle* but not join WBA, the annual subscription fee is \$25.

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