Thinking Through
WHISTLEBLOWERS AND THE LAW

CLE Course at San Diego Law Library
1105 Front Street, San Diego, CA 92101
Tuesday, January 10, 2017 at Noon-1:00
given by Rafael Chodos, Esq.

I. INTRODUCTION

A. The Four Elements of whistleblowing.

Blowing a whistle is a "speech act": we blow a whistle to start a race; we blow a whistle to stop a group activity, which might be a race or a sporting event, or a pub brawl; we blow a whistle to capture the attention of those within earshot.

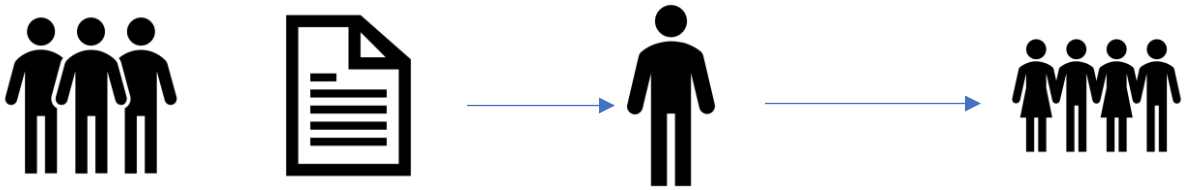
The referee blows a whistle when he sees a foul. --- Ralph Nader may have applied the term in that sense – which is the sense in which we are using it here -- when he spoke at a conference on Professional Responsibility in 1971.

1] **The Target Group** – e.g. the government, the corporation, a department inside the corporation

2] **The Target Item** - information or property that the Target Group does not want shared with anyone outside the people it designates – e.g. documents, codes, secret items, any information even though not documented.

3] **The Recipient** - the public in many cases, but might be another group, such as an auditing agency or a review board.

4] **The whistleblower** - the person(s) who blow the whistle



The Target Group | The Target Item | The Whistle-Blower | Recipient

B. How is whistleblowing different from …

1] **Spying**?
Spies keep the information secret, or pass it to a specified group
Whistleblowers publish it. But do they? Consider the case of Ernest Fitzgerald who gave information to a congressional committee: Not "spying" exactly….

2] **Gossiping**? Information which ought not to be passed on, is passed on. Is it the same as whistleblowing? What is the difference?

3] **Litigating/filing a complaint**?
Consider *The Story of the Eloquent Peasant,* Egyptian Middle Kingdom, c. 2000 BC. When the peasant took his complaint to the High Steward, and then to King Nebkaure, was he "blowing the whistle" on Nemtynakhte? -- What is the difference between that story, and the story of Joseph L. Dunn, former State Bar Executive Director?

C. **Modulations of the Legal Matrix**

	**THE TARGET GROUP**	**Governmental? Private?**

	**The Target Item**	**Defense-related? "Classified" Corruption? Crime? Abuse of power (My Lai) Systematic abuse (employment settings)**
	**The Whistleblower**	**A member of the Target Group or an outsider?** **A JOURNALIST? – Ability of the Govt. to force disclosure of the sources….**
	**The Recipient(s)**	**They are like rats: if there is one you can see, there are ten more you can't see. How much discovery is allowed?**

II. A very short history of whistleblowing

A. The subject is usually thought of as a 20th Century development. But …

1] We might begin a history of this sort of thing with the Old Testament Book of 2d Samuel, Chaps 11 and 12: The story of David and Bathsheba, and the Prophet NATHAN who "blew the whistle" on David.

Should we include Socrates (400 BC)? How about Jesus? Or Martin Luther? -- Whistle-blowing is different from advocating beliefs – isn't it?

2] And we might also include Hamlet, who worked to "catch the conscience of the King" in order to expose the murder of his father

3] Consider the case of Bartolome de las Casas - 1484-1566 - the Spanish bishop of "New Spain" who exposed the atrocities committed against the Native Americans by Spanish colonists. He published: *A Short Account of the Destruction of the Indies* and *Historia de las Indias*.

4] And let's not forget Samuel Shaw and Richard Marven – naval officers during the Revolutionary War, who reported on the torture of British prisoners of war by Commodore Hopkins, then Commander-in-chief of the Navy (reminds us of Abu Ghraib). Hopkins dismissed them both from the Navy and then filed a criminal action against them. Congress was infuriated: it passed an act appropriating money for their defense and dismissing Hopkins from his high post.

B. But in fact, the whole idea came into prominence late in the 19th Century, as part of a movement to protect the government against fraud and contractor abuse.

The False Claims Act of 1863 - the "Lincoln Law" - gave people who reported fraud and abuse a share of the government's actual recovery. During the Civil War, there was a lot of fraud perpetrated against the Government.

Employees of govt contractors could also sue their employers-- but the original Act did not prevent employer retaliation against those employees

C. Whistleblowing arose largely as a response to industrialization: employees reported abuses by their employers. Over the 19th and 20th cneturies, there was Gradual expansion of protection for whistleblowers.

-- The False Claims Act was amended in 1986. 31 USC 3730(h) offers protection to whistleblowers

-- The whole conflict between employers and unions -

-- the tortured history of the Supreme Court's allowing employers to forbid unionization [*Coppage v Kansas* (1915) 236 US 1 – right of an employer to require employees to abstain from union membership]

-- The Clayton Act of 1914 - exempted labor unions from the federal antitrust laws. Employers had claimed that unionization, and collective bargaining, was criminal.

-- the Railway Labor Act (1926) - prohibited employers from trying to induce their employees either to join or not to join any labor organization

-- The Norris-LaGuardia Act of 1932. Federal courts should not issue injunction in labor disputes - no injunctions restraining the liberty of employees to organize

-- Post Depression, collective bargaining came to be seen as economically advantageous. National Labor Relations Act (the Wagner Act) of 1935 - encouraging collective bargaining

-- Aggressive (intrusive?) government regulation of business in the 1960s and forward: civil rights (Title VII 1964), worker safety (OSHA - 1970), environmental protection (Federal Water Pollution Control Act (1948, amended in 1972, Clean Water Act of 1977, Water Quality Act of 1987).

The Civil Service Reform Act of 1978

Sarbanes-Oxley 2002 - Expanded oversight and reformed the system by which securities issuers are regulated. Far-reaching protection for insiders who report abuse.

D. Individual Whistleblowers

NUCLEAR ABUSE Karen Silkwood - "nuclear" whistleblower. 1974 testimony, then died in a mysterious auto crash

GLOBAL SURVEILLANCE Perry Fellwock 1971 exposed the NSA.

Christopher Pyle – Military surveillance.

William Binne - NSA Surveillance.

Thomas Andrews Drake – Trailblazer project.

Daniel Ellsberg – the Pentagon Papers

The MyLai Massacre – Ron Ridenhour (outsider), Hugh Thompson (insider)

Bradley (Chelsea) Manning – US abuses – through WIKILeaks

Edward Snowden – NSA surveillance. What's wrong with government surveillance of its citizens? If the answer is "nothing" what harm did Snowden's revelations actually cause? -- Why is "privacy" important?

III. THE STATUTORY FRAMEWORK

There are two kinds of statutes involved

Statutes which prohibit whistleblowing

Statutes which protect whistleblowers.

Type 1: Prohibiting ….

The Espionage Act 18 USC 792-798

Conversion of Govt. Property 18 USC 641

False Claims Act 31 USC 3729

Type 2: Protecting ….

Civil service Reform Act

In California, whistleblower protection in certain fields: health care [Health and Safety Sec. 1278.5] and Labor Code 1102.5, general protection

The statutes vary from state to state, and different statutes govern different kinds of targets. -- UNLIKE England, where the Official Secrets Act covers all kinds of targets, and offers a uniform scheme.

Question: given the contradictory ethical considerations involved, how is it possible to legislate?

IV. ETHICAL ISSUES INVOLVED

1. Whistleblowing necessarily involves a breach of loyalty and obedience.

-- Are loyalty and obedience always virtues?

The Stanley Milgram experiments

2. Autonomy vs. group membership; integrity

-- Is orthodoxy of any type as an abdication of autonomy and, therefore, of personal responsibility? Or is it an expression of the highest kind of integrity?

3. What protection can really be made available to the whistleblower?

Back pay. With interest? Reinstatement?

4. Must the whistleblower first approach his superior/internal monitor? New structures are being introduced to make sure the whistleblower can maintain anonymity. But is this ethically sound? -- Some whistleblowers mentioned above (Binne, Drake) did go through "channels" but still suffered consequences.

5. With regard to government secrets, Is there ever any justification for the government to hide the truth from the citizenry?

-- could there be a government without secrets?

-- could any group, or individual, function without secrets? Without privacy?

V. CASES ABOUT THE FIRST AMENDMENT AND THE RIGHTS OF GOVERNMENT EMPLOYEES

Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., (1968) 391 US 563. The balancing test.

Garcetti v Ceballos (2006) 547 US 410

Lane v Franks (2014) 134 S.Ct. 2369 -

Related Issue: Does a whistleblower have to approach his superior before blowing the whistle? Is this analogous to the idea that administrative remedies must be exhausted before civil court remedies can be sought?

VI. HOW DOES WHISTLEBLOWING COME UP IN YOUR PRACTCE?

- Defending an accused leaker/traitor?
- Seeking compensation for an illegally terminated or demoted employee
    - Current case: Chairman of State Bar – suing Supreme Court etc.

FURTHER READING

In today's world, a great deal of information is available on the internet. Texts of most of the opinions listed here, and of the statutes cited to, are all available online.

The Wikipedia articles titled "Whistleblowing" and "Whistleblower Protection in the United States" are not particularly deep but may provide a useful introduction. And the articles on the particular laws mentioned in Sec. III above are very helpful. Also helpful are the articles on individual whistleblowers.

A few Useful Cases (in addition to those mentioned in Sec. V above):

Maxwell v. Beverly Enterprises (1998, CA1/1) 75 Cal.Rptr.2d 222 – plaintiff sues for wrongful termination and wins against the defense that the parties who actually terminated him were not "managing agents".

Green v. Ralee Engineering (1997, CA 2/7) 61 Cal.Rptr.2d 352. Plaintiff sues for wrongful termination which, he alleges, was based on his repeated complaints about the inferior quality of the aircraft parts his employer was shipping. Trial

court granted summary judgment in favor of the employer holding that since employee was "at will" the employer could terminate without cause. Court of appeal reversed, finding an exception to that general rule when public interests are at stake. Finding also that Labor Code 1102.5 provided a basis for plaintiff's claim.

Mitchell v. Superior Court (1984) 37 Cal.3d 268. First California Supreme Court case asking whether, in a civil case, the reporters can be required to disclose their sources. The Mitchells wrote books "exposing" the Synanon Church as a fraud. When sued, the trial court issued discovery orders requiring them to turn over their sources. They sought a writ – and the Supreme Court held that the discovery orders should not be enforced.

Armin v. Riverside Community Hospital (2016) 5 Cal.App.5th 810. Armin is terminated from the hospital staff – claims his termination was wrongful, and sues under the hospital whistleblower statute, Health and Safety Code section 1278.5. He sued both the hospital and the individuals involved in the decision to terminate him. The hospital contends that he was required to complete the internal peer review process before suing; and contends also that the individuals could not be sued. Additional complications came from anti-SLAPP motion made by the hospital. The trial court sided with the hospital and awarded attorney fees against Armin – but the court of appeal reversed, except that it agreed the individual doctors could not be sued.

Books I found useful:

Whistleblowers, Leaks and the Media: The First Amendment and National Security (2014, American Bar Assn.) Paul Rozenzweig et al., editors

The Successes and Failures of Whistleblower Laws (2012, Edward Elgar) Robert G. Vaughn

Whistleblowing: The Law of Retaliatory Discharge (2d Edition, 2004) Daniel P. Westman and Nancy M. Modesitt

Whistleblowers: A Comprehensive Reference Source and Overview (2016, self-published in San Bernardino, 470-page paperback) Patrick H. Lee and Miranda Hughes - A large collection of stories of individual whistleblowers.

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