Editors' Feedback. The chapter is almost ready for publication. We have left just a couple of little things that need to be resolved. Thanks so much for your continued work on the draft.

"Ventriloquists' dummies" or truth bringers? The journalist's role in giving whistle-blowers a voice.

Paul Lashmar

"It is imperative that whistle-blowers are not harassed, prosecuted in closed courts, or silenced. Their cause is your cause. It is for the public's sake that they risk their livelihoods – and sometimes their lives." Iraq war whistle-blower Katharine Gun (2019. para 7).

Introduction

Dr Li Wenliang, Edward Snowden, Sergei Magnitsky, Chelsey Manning, and Katherine Gun are among the most prominent contemporary whistle-blowers, and their cases illustrate starkly that whistle-blowing can result in death, arrest, prison, or exile. For journalists, working with whistle-blowers is one of the most testing of undertakings and usually falls to experienced reporters closely supported by their editors and legal teams. Whistle-blowing can have enormous impact, even on high levels of government and business. In the most famous cases, whistle-blowers have revealed information that ultimately forced national leaders, whether presidents or prime ministers, to resign and in other cases, prominent figures to be prosecuted. As an investigative journalist for over four decades, I have worked with sources and whistle-blowers, and it was always legally, ethically and emotionally demanding. As an academic for over a decade, I have sought to improve recognition that whistle-blowers are vital for a democracy and to improve protection for those who take this high-risk path and the journalists who help them. As discussed in more detail below, the United Kingdom (UK), like many other nations, now has some pro whistle-blower legislation, and more enlightened

organizations have adopted sensible policies for allowing staff to raise concerns, ideally negating the need to become whistle-blowers. However, as we shall see there is still much work to be done.

Recognition by civil society of the importance of whistle-blowers has seen the emergence of charities and NGOs dedicated to supporting them. The organization Protect, formerly known as Public Concern at Work, is the UK's leading advice organization for whistle-blowers. It provides this simple description of whistle-blowing:

> Sometimes whistle-blowing is called speaking up or raising a concern. It is all about ensuring that if someone sees something wrong in the workplace, they are able to raise this within their organization, to a regulator, or wider. Whistle-blowing ultimately protects customers, staff, beneficiaries, and the organization itself by identifying harm before it's too late. (Protect, 2019, para. 1)

Protect states that it has given advice to 40,000 potential whistle-blowers in the United Kingdom (UK) at the rate of about 3,000 a year.

The inherent psychological drama of whistle-blowing, the risks, the tensions, the isolation and impact, makes it an attractive plot line for Hollywood. Two of the most insightful movies that dramatize real cases are *The Insider (1999)* and *Official Secrets (2019)*. *The Insider* tells how Jeffrey Wigand (played by Russell Crowe), working with CBS reporter Lowell Bergmann (Robert de Niro), exposed the United States (US) tobacco industry for hiding the health consequences of smoking. *Official Secrets* explores how the British Government Communications Headquarters (GCHQ) whistle-blower Katherine Gun (Keira Knightley) leaked to *Observer* reporter Martin Bright (Matt Smith) a top-secret email from the US National Security Agency (NSA) requesting that GCHQ illegally spy on delegates at the

United Nations. These movies capture the intensity of the relationship that can develop between the journalist and the whistle-blower.

Some whistle-blowers go public without direct contact with the media. At the end of December 2019, Dr Li Wenliang, an ophthalmologist at Wuhan Central Hospital, treated a number of cases that seemed to be a serious Sars type of illness. He sent a message to fellow medics in a chat group warning them about the outbreak and advising them to wear protective clothing to avoid transmission. He was the first person to warn of what we now know as COVID-19, but all his warning did immediately was to get him into trouble with the local authorities. He was brusquely summoned to the Public Security Bureau where he was required to sign a document in which he was accused of "making false comments" that had "severely disturbed the social order." He was warned: "If you keep being stubborn, with such impertinence, and continue this illegal activity, you will be brought to justice - is that understood?" Dr Li was required to say. "Yes, I do." (Hegarty, 2020). Returning to the hospital, he caught the new virus from a patient. He was then hospitalized himself and seriously ill for nearly a month. At the end of January from his sick bed, Dr Li published a copy of the letter on Weibo and detailed what had happened. In the meantime, with the pandemic unleashed, the local authorities had apologized to him. A few days later he died (Hegarty, 2020).

While whistle-blowers using social media to go public is becoming more common, more often, whistle-blowers directly approach a journalist who they believe is reputable and can protect them. For instance, the NSA leaker Edward Snowden approached Glenn Greenwald then of *The Guardian* and Laura Poitras, a filmmaker. Sometimes, whistle-blowers are directed by their lawyers or whistle-blowing advice organizations to trusted journalists.

Building trust is a vital part of this journalist-whistle-blower relationship. At The Centre for Investigative Journalism's 2018 Logan Symposium in London, a panel of experts and journalists with experience dealing with whistle-blowers observed, "Often the reporter is the last person a whistle-blower will come to, so there's a need for journalists to prepare for this kind of 'pastoral' care, as well as a digital security care" (Sanderson, 2019, p. 23). The Logan panel made the point that the journalist's role is often similar to that of a counselor.
[1] The danger is always that the whistle-blower is telling the journalist something that the journalist wants to believe. The Logan Panel rightly noted, there is always a point when a journalist will need to step away from the relationship and say "'I need to write what I need to write' whether or not that's the story the source wants them to tell" (Sanderson, 2019, p. 23).

New technology has proved a double-edge sword for journalists. On the negative side, it has enabled government and the private sector to employ intrusive surveillance. On the positive side, it has allowed better protection for whistle-blowers. Exemplified by WikiLeaks, during the last twenty years, journalists have utilized encryption through a range of secure tools like Tor, PCP, Signal, and SecureDrop, so whistle-blowers can convey information without being identified by third parties. Indeed, sometimes the journalist does not know the identity of those sources, and this raises new ethical questions. At the 2019 Logan panel, several further questions around the ethics of the journalist and whistle-blower relationship were raised including:

- How far does the motive of the source matter?
- What ethical responsibilities does the journalist have toward the source?
- Where does that ethical responsibility end? (Sanderson, 2019)

This chapter seeks to consider answers to these and other pressing ethical questions.

Whistle-blowers' motives

The Logan panel wisely observed that whistle-blowers are "often very traumatized people and see things through a traumatized lens, even when they appear to be very together" (Sanderson, 2019, p. 23). Legal expert Richard Danbury notes that potential whistle-blowers are spread across a spectrum from those seeking revenge, to those who are obsessive conspiracy theorists, to those who are entirely honorable. As he puts it, journalists often face the impossible task of distinguishing between motives "while in the middle of a battle, without the benefit of hindsight" (R. Danbury, personal communication, September 14, 2019).

Some whistle-blowers start their relationship with a journalist as a confidential source. Over time, their status might change if problems within their organization get worse. The source may realize, whatever the malfeasance they want exposed, that being identified will authenticate and have far more public impact than remaining an anonymous source. A real person who can be seen, heard, and assessed by the public is generally more believable than a shadowy complainant. In the mid-1990s, I was the producer of a Channel 4 *Dispatches* program that revealed a series of failings of the cervical smear screening service at Kent and Canterbury Hospital in southeast England that was ultimately shown to have cost eight women their lives and many others their fertility and health (Lashmar, 1997). Our main confidential source was a biomedical scientist who had unsuccessfully tried to raise these serious failings within the hospital. For his trouble, he had come under considerable adverse pressure from medical staff to cease raising his concerns. Only then did he decide to go to the media. The scientist provided us with hard evidence that we were able to reinforce with data analysis. In the months of the program's preparation, the scientist was a confidential source

who was traumatized by the treatment he had received at the hospital. He needed a great deal of support from the program team and was reluctant to go public because of the stress, his career, and the potential impact on his family. It was not until the last possible day of filming that he decided to go public (Lashmar & Oliver, 1997). His interview was critical in bringing about a major inquiry into the scandal. The scientist was later given a Freedom of Information award for his courage in whistle-blowing. As this example shows, asymmetric power relations often play a part in the decision to turn whistle-blower. Retaliatory bullying or manipulation are common factors in hardening a concerned person's attitude against their organization.

From personal experience, I can say it is absolutely correct that a whistle-blower may be not only seeking to reveal information in the public interest but also settling scores within their organization. I have known whistle-blowers who wanted revenge on their estranged partners and who provided their former partner's secret documentation, revealing wrongdoing. Generally, though, motives are less intimate. Understanding the whistle-blower's motives is the only way to understand the world through their traumatized lens and to make sure the bias is not transferred into the published story.

I argue that the nature of the information revealed is the moral imperative, not the motive of the whistle-blower. Sometimes whistle-blowers do the right thing but for the wrong reasons. Dubious motives should be taken into account but do not necessarily undermine the importance of the information or bar publication. Not every journalist, however, sees it the same way as I do. I once had an intense argument with a well-known American journalist because I thought Snowden's revelations were in the public interest. The other journalist took the view that no journalist should have dealings with Snowden, let alone publish his

documents because Snowden was a "traitor" who had sided with Russia. Some critics argue that the role of the investigative journalist working with whistle-blowers is overblown. According to Feldstein, journalists are frequently just "ventriloquists" amplifying stories revealed by sources with particular agendas. "Often the journalist is merely the conduit, a nearly interchangeable vessel, selected as the vehicle for furthering the informant's objectives" (Feldstein, 2007, p. 505).

Verification

With the possibility that whistle-blowing may be a means of pursuing vendettas or score settling, it is vital to verify whistle-blowers claims. The Logan panel (2018) observed that what the journalist judges to be important could be very different from what the whistle-blowers considers to be important. Every possible fact needs to be checked, and the source's interpretations of events need to be tested. In a UK scandal that came to be known as the "VIP pedophile scandal," the failure to verify so-called whistle-blower's claims of sexual abuse by prominent public figures several decades earlier left some journalists and police discredited. The whistle-blower "Nick" made claims against figures who had died and were not in a position to defend themselves. The now defunct Exaro news agency fed Nick's sensational allegations to the *Sunday People* newspaper, where, once published, they were picked up by other news media outlets. Eventually, in July 2019, Nick, actually Carl Beech, a 51-year-old from Gloucester, was sentenced at Newcastle Crown Court for twelve counts of perverting the course of justice, one of fraud, and for several child sexual offenses. Justice Goss said Beech "repeatedly and maliciously told lies to the police" and showed "no remorse" for his actions (BBC, 2019, para. 2). While others were less rigorous, the BBC's *Panorama* program did its verification and in 2015 expressed concern that Nick was a serial liar and fantasist (BBC, 2015).

Legal aspects

In the US, strong protection for whistle-blowers was provided by the 1966 Freedom of Information Act, and then was gradually extended by additional laws, including the 1978 Civil Service Reform Act and the 1989 Whistle-blower Protection Act, which extended protection to the private sector. The European Union (EU) has also been vigorous in protecting legitimate whistle-blowers, and the EU Parliament passed a ground-breaking directive to protect legitimate whistle-blowers in April 2019. In the UK, whistle-blowers had no protection against being dismissed by their employer until 1998. However, they could avoid being sued by their organization for breach of confidence by arguing a public interest defense (Protect, 2019). After a series of high-profile whistle-blower cases, it became apparent to the government that there needed to be better mechanisms in public and private organizations to act upon internal complaints. In 1998, the Public Interest Disclosure Act (PIDA), an employment law, achieved Royal Assent, and it now provides protection for people who expose wrongdoing within their organization. Every journalist who deals with a potential whistle-blower needs to know the terms of PIDA because, provided certain steps are followed, the whistle-blower is protected by law. However, only certain kinds of disclosure qualify for protection under the PIDA. For example, the law does not protect anyone who whistle-blows in the national security sector.[2]

Whistle-blowers who claim they have been unfairly dismissed or have suffered detriment can bring a claim before an employment tribunal in the UK. However, according to Protect, implementation has been patchy and needs serious reform. This is reflected in a steady stream of people who have not been able to get remedy in their organizations so become whistle-blowers as the only way to generate pressure on policy makers. At the outset, PIDA seemed

able only to protect whistle-blowers who had gone public. This left potential whistle-blowers, who were in the early stages of undertaking action, without protection if their employers got wind of their intentions. Fortunately, employment tribunals are now taking a more robust approach, seeking to protect whistle-blowers at all stages of their action. In a July 2019 case, for example, a tribunal found in favor of an employee who had been suspended when his employer discovered he was researching how to whistle-blow. James Stuart Bilsbrough, a client service executive, had been researching how to blow the whistle on Berry Marketing Services Ltd, the company he worked for, to the UK Information Commissioner. When the company discovered Bilsbrough's line of inquiry, he was suspended. The tribunal held that researching how to whistle-blow was an integral part of making a disclosure, and Mr Bilsbrough had suffered unlawful detriment because the employer believed that he had considered making a protected disclosure.[3]

Journalist Bill Goodwin, a Logan panelist, has pointed out that whistle-blowing is not a step to take lightly. "If you blow the whistle, it is a life-changing decision, which is why [Protect's] advice is generally 'don't blow the whistle'" (Sanderson, 2019, p. 23). However, every year people choose to take this difficult course of action. And this course of action is important; whistle-blowers are sometimes the only means journalists have to find out what is going wrong in the more secretive reaches of government, the public sector, business, and crime.

Source protection for whistle-blowers

Once the journalist has established a relationship with a potential whistle-blower, it is beholden on the journalist to explain what can and cannot be done. If the whistle-blower risks

prosecution, the journalist is under an ethical obligation to tell the whistle-blower that, and to inform the whistle-blower if the news organization will pay their legal costs. Ethical codes for journalists throughout the world emphasize the importance of source protection. Professional journalists know it is fundamental to protect a source, even if journalists face a prison sentence. The International Federation of Journalists (IFJ) Declaration of Principles on the Conduct of Journalists is clear on protecting sources (IFJ, 1986). And in the UK, the National Union of Journalists' (NUJ) Code states in Article 7 that a journalist shall protect confidential sources of information.[4] In the UK there is also some protection under Section 10 of the Contempt of Court Act. Additionally, there is protection provided by Article 10 of the European Convention of Human Rights (ECHR), which protects freedom of speech.[5]

Responsibilities

If a whistle-blower is subject to legal attacks after publication, responsible media organizations will help them with costs, legal advice, and pastoral care. Where, then, does ethical responsibility end? If the journalist has compelling evidence that the whistle-blower has lied and misled the journalist, then responsibility, in my view, ends. However, the journalist has to be sure that there was premeditated malice and not misinterpretation through the whistle-blower's traumatized lens. Journalism codes of practice emphasize the need to protect sources and whistle-blowers. What they do not usually deal with is the pastoral care of someone who has revealed wrongdoing. Often this is a matter between the journalist and their conscience. A journalist may be the only person who is in a position to judge the resilience of the person about to become a whistle-blower. Journalists then face the difficult ethical decision of either protecting a vulnerable source, who they realize may not be able to cope with the consequences of whistle-blowing, or the potentially career-enhancing major revelatory story that is in the public interest. The need for this decision may come many

months into the relationship shortly before the story is due to go public. It is a challenging decision, and it relies on the ethical stance of the journalist.

Currently there is too much discretion for a journalist to justify publication when it is not in the interest of the whistle-blower. But as Richard Danbury notes in correspondence with the author of this chapter, while whistle-blowing may be in the public interest, the whistle-blower and journalist might not be aware of the bigger picture in relation to the information they are exposing:

> [H]ere's the rub – our finding out what's going on may – *may* - inhibit the proper functioning of one of these activities. If so, the act of whistleblowing can be harmful to the public interest, rather than beneficial. In other words, the interesting question is less "does the public have a right to know?" but "*when* does the public have a right to know? And can we create some sort of way of assessing that?" (R. Danbury, personal communication, September 14, 2019)

As Danbury notes, an important challenge for journalism is to formulate a test to evaluate when the information *leaking* is in the public interest and when the information *itself* is in the public interest. In the Snowden case, it was often asserted by his critics that national security employees should never leak regardless of whether the information was in the public interest.

Even handing over documents provided by the source can result in the source being identified. In 1983, *The Guardian* received photocopied documents detailing when American cruise missile nuclear weapons would be installed in the UK. The documents set out the tactics that then Defense Minister Michael Heseltine would use to present such a controversial event to members of parliament and the public. The newspaper team did not

know the source of the documents but realized they should protect the source. The UK Attorney General brought legal action against *The Guardian*, seeking an order requiring the newspaper to reveal its source. *The Guardian* at first successfully argued that it was protected by Section 10 of the Contempt of Court Act. However, the Attorney General launched an appeal on the grounds that a civil servant capable of leaking documents protected by the Official Secrets Act might leak others, which could pose a threat to national security. *The Guardian* complied with a court order to hand over the documents, which were then identified as coming from a specific Foreign Office photocopying machine. The machine led to Sarah Tisdall, then a 23-year-old clerical officer. Tisdall pleaded guilty to breaching section 2 of the 1911 Official Secrets Act, and she was sentenced to six months in jail. Handing over the document was widely seen as a failure by *The Guardian* to protect its source, and it damaged the newspaper and the responsible editor's reputation.

While the ethical obligations of journalists are universally mandated, the legal framework varies. Another Logan panelist, Oxford academic Julie Posetti, analyzed laws in 121 countries and found improvements had occurred in 84 since 2007 (Posetti, 2017). In a few countries, journalists are covered by a source protection "shield law," and in some cases journalists are under a legal obligation to protect their sources. In Sweden, the legal concept of the protection of confidential sources is embedded in law, and journalists can be prosecuted for revealing a source's identity. In most countries, the law does not grant such an absolute recognition of confidentiality, and journalists can be legally compelled to reveal their source or face sanctions, prosecution, and imprisonment. Richard Danbury notes: "Legally, in the UK, you cannot protect sources who communicate information relating to

some types of terrorism activity. Where the legal line is drawn, and how it is interpreted, varies around the globe" (Danbury, forthcoming).

In the past, while journalists could never guarantee that they could protect their source from being identified, they could be reasonably sure that if they engaged in carefully reporting methods, there would be minimal chance that they would be responsible for exposing their sources. Since the whistle-blower and former National Security Agency contractor Edward Snowden went public in June 2013, it has been clear that the "Five Eyes"[6] electronic intelligence agencies are capable of global surveillance and can access communications metadata and, under certain circumstances, the communications themselves. Since then, journalists have been evaluating the impact of Snowden's material on their professional practice. I interviewed thirteen investigative journalists from across the Five Eyes countries who specialize in national security reporting and asked them about the impact of the revelations on their tradecraft. Some felt it was impossible to guarantee any kind of protection to sources, but others have said they have updated their methods to maintain source protection with techniques such as encrypted communication, secure electronic share folders, or avoiding electronic communication altogether (Lashmar, 2017).

Kickback

One thing is certain, the whistle-blower's organization will not accept their disclosures as accurate or thank the whistle-blower. Rather, they will try every legal avenue – and in some cases illegal avenues – to limit the damage of a whistle-blower's revelation. Hell hath no fury like an organization that has been exposed by a whistle-blower. Two well-known examples illustrate this point: In 1970 Richard Nixon's administration organized the burglary of the psychiatrist's office of Dan Ellsberg, who leaked the Pentagon Papers, in an effort to get his

medical records and use them to discredit him. Then in the early 1990s the tobacco industry orchestrated a nasty but unsuccessful smear campaign against the whistle-blower Jeffrey Wigand (Brenner, 1996).

For civil servants who blow the whistle on governments, officials will seek to prosecute wherever possible. A much-used instrument in the UK is the Misconduct in Public Office Act, a common law offense that does not have a public interest defense. Another tool for the UK government is the Official Secrets Act. The 1911 Act had a public interest defense for the disclosure of classified information, but this protection was closed down by the amendments of the 1989 Official Secrets Act. Protect argues that the jurisdiction of the OSA is also somewhat unclear.[7] This leaves civil servants and government employees in general unwilling to raise concerns for fear of breaching the act, even when they would be legally entitled to do so. In the wake of the Snowden case, a number of countries implemented tougher legalization to help eavesdropping agencies. In the UK, the enactment of the Investigatory Powers Act (IPA) in 2016 has enhanced state powers of intrusion. Law enforcement officers no longer need to request material from journalists to identify sources; they can go straight to a telecommunications provider. During the Logan panel, Posetti noted, "We've seen overreach of national security and anti-terrorism law in combination with the surveillance state, bringing disruptions to the practice of investigative journalism and enormous risks to journalists and their sources" (Sanderson, 2019, p. 21). Worryingly, although the IPA was meant to replace the Police and Criminal Evidence Act 1984 (PACE), the author has been told in private personal communications by a number of informed lawyers and journalists that PACE is still being used as a "work around" to avoid the greater scrutiny implicit in IPA. What is worse, the police apparently use poorly worded and very wide applications to seek journalists' source information.

Conclusions

Technology provides a method for government agencies to get around existing protections for journalists, sources, and whistle-blowers (see Townend & Danbury, 2017). In recent years, the UK government, like many other nations has implemented policies and sought new legislation that weakens the protection of sources, particularly in national security cases. The IPA is a draconian law even with additional oversight, and its codes of practice need to be tightened to protect whistle-blowers and journalists. At the time of writing, there have been intimations that there will be a new UK espionage law sometime in 2020 that may criminalize journalists, but progress on a new OSA has halted during the COVID-19 pandemic. Despite some improvements, when it comes to whistle-blowing in the private sector, the balance between government – which now often has a huge surveillance capability and draconian laws – and the fourth estate has been tipped askew. The importance of whistle-blowing as a form of exposing wrongdoing in the public interest is clear, as is the need for stronger legal protection for whistle-blowers and for journalists to protect their sources in both the private and public sectors of many nations.

Further reading:

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[1] Logan Symposium Panel members: Gill Phillips, Phil Chamberlain, Bill Goodwin and Julie Posetti.

[2] http://www.legislation.gov.uk/ukpga/1998/23/contents
[3] https://www.gov.uk/employment-tribunal-decisions/mr-james-stuart-bilsbrough-v-berry-marketing-services-ltd-1401692-2018
[4] https://www.nuj.org.uk/about/nuj-code/
[5] https://www.echr.coe.int/Documents/Convention_ENG.pdf
[6] The 'Five Eyes' is term used for the cooperation pact between signal intelligence agencies of the United States, the United Kingdom, Canada, Australia and New Zealand.
[7] https://protect-advice.org.uk/legal-threats-to-whistleblowers/