

Whistleblowing and Crimes Against the Market: In Response to Bjørkelo and Madsen (2013)

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'Mark, I gotta ask ya, why you doing this?' - FBI Agent

'Because there are things that are going on I don't approve of. Suddenly I'm lying to people, and I feel really bad about that...I'm trying to do the right thing here.' - Mark Whitacre, *The Informant!*

Bjørkelo and Madsen's (2012) article about whistleblowers and neoliberalism is an important and timely assessment. By considering the example of whistleblowers, they bring into focus some of the ideological dimensions of neoliberalism that are so crucial to investigate and understand. When individuals alert authorities to malpractice, like in the case of Mark Whitacre from the film *The Informant!*, can it be seen as an ethical act, with collective intentions, or an act of individual self-interest? Is Whitacre blowing the whistle to protect himself, or because he feels a responsibility towards others? As the authors say, this is difficult to draw out, but what their article addresses is whether the character of acts of whistleblowing are different in a neoliberal context than any other? Does whistleblowing as an act exist independent of the particular ideological orthodoxy?

Bjørkelo and Madsen's principle argument is that the act of whistleblowing in a neoliberal context is fraught with complexity. The article flirts with what is essentially an empirical question: does neoliberalism, as both an ideological doctrine and as a set of policy practices, encourage or undermine whistleblowing? The authors are however principally concerned with the theoretical dimensions: does neoliberalism in *theory* encourage or undermine the activity of whistleblowing, and they bring in some empirical cases to illustrate. The question of whether or not cases of whistleblowing have increased or decreased in the last 30 years, a period when neoliberalism as a practiced set of policy decisions and as a broader ideology has been most dominant, is a different, and entirely empirical, question. This they suggest requires further analysis.

Acts of whistleblowing take place in a number of different settings for all manner of reasons. This commentary argues that analysing whistleblowing in a neoliberal context requires us to consider three dimensions: (1) industrial/sectoral context, (2) the position and motivation of the whistleblower themselves, and (3) how the act is subsequently reported. In this respect it is key to address the extent to which whistleblowing as a practice has been institutionalised and framed by neoliberal ideology, and subsequently to analyse how actual acts of whistleblowing occur and are reported on. Like Bjørkelo and Madsen suggest there seems to be a tension between the individual as a rational entrepreneur, and the more value-laden moral being. In this respect whistleblowing acts expose some of the paradoxes in contemporary neoliberalism, because as an ideology 'it relieves the discrepancy between economic and moral behavior [sic] by configuring morality entirely as a matter of rational deliberation about costs, benefits, and consequences.' (Brown, 2003, p.15) Do whistleblowing acts fall into description? Furthermore, there is a potential gap between the official rhetoric on whistleblowing, which sees support from organisations and authorities, and the actual experience of whistleblowers, something that also requires further empirical analysis.

Whistleblowing has seen official recognition in a variety of jurisdictions, in a variety of industrial sectors over the past few decades. It has had broad recognition from international organisations, from governments and from legal frameworks in order to address both public and private sector corruption¹. What is of interest here is the discursive practices around whistleblowing as an act of political dissent – under neoliberal ideology it is presented as a way to flag poorly functioning markets, and not that markets themselves might be the problem. In a neoliberal setting whistleblowers are encouraged if they support the status quo not if they radically challenge it.

One area of policy and law that has explicitly included a whistleblower dimension is competition policy, and the principles behind competition policy tally with neoliberal orthodoxy – deregulation, liberalisation and privatisation. Although the antecedents are in US Anti-Trust legislation, EU competition policy has been developing over the last three decades or so, and especially in light of the privatisation of a variety of previously state owned enterprises. This is particularly relevant to Article 101, which concerns collusion and cartels, as it is these particular practices that can be brought to light by whistleblowing. In both the UK and Norway, especially in the energy sectors where regulated industries have replaced state run enterprises, competition policy comes to frame how governments want the industries to function – by and large in the interests of consumers, rhetorically at least. Competition policy principally concerns the regulation of markets against anti-competitive and predatory behaviour, which include activities such as collusion and cartels. Whistleblowing is promoted as a safe-guard against these abuses.

One of the most important dimensions regarding whistleblowing in competition policy regimes is that of 'leniency programmes'. Various regulatory authorities in the UK, for example, have leniency programmes to encourage whistleblowing by firms and individuals involved in illegal practices. This includes the Office of Fair Trading (OFT), which: 'under our leniency programme, businesses that have participated in a cartel may have their financial penalty reduced substantially or they may be able to avoid penalty altogether. The individuals concerned also may be able to avoid criminal prosecution.'² The European Commission (EC) describes the whistleblowers as the *first* firm or individual to bring to the attention of a competition authority a cartel or collusive behaviour, and these firms or individuals can expect *complete* exoneration from potential fines, as set out in the commission's video on leniency³. In Norway the Competition Act of 2004 has a similar leniency programme in which: 'Undertakings [whistleblowers] can receive immunity (full leniency) or reduction of fines (partial leniency) by contributing to the detection of a cartel in which it participates.'⁴ Although showing the importance of whistleblowing to competition policy, what this assumes is that the whistleblowing party is guilty – that they are part of the malpractice, therefore also assuming that they are part of the management structure, and that ideals of 'organisational transparency' do not exist – most obviously in the case of activities that need to be kept secret. This leaves little room for the hierarchically low employee being the whistleblower – in this respect whistleblowing becomes something that managers of competing and colluding firms do to each other.

What this shows is that whistleblowing is a vital institutional device and provides an essential

1 Transparency International's 2009 report 'An Alternative to Silence: Whistleblower protection in 10 European countries'. Available here: <http://bit.ly/WqF0m8>

2 The OFT's leniency programme outline can be found here: <http://bit.ly/ZnlwhQ>

3 The EC video on leniency can be found here: <http://bit.ly/e7RC3B>

4 The Norwegian Competition Authority's Fact-sheet on leniency can be found here: <http://bit.ly/Qb6Jpj>

tactic to authorities trying to detect cartels and anti-competitive practices, which damage markets and, by extension, consumers. Whistleblowing, as an activity, is therefore more than encouraged as part of this policy practice – it is a fundamental element of it. What is key though is that this institutionalisation of whistleblowing as a vital strategy, are in the interests of the promotion of free-markets, and therefore fit into the neoliberal ideology. Whistleblowing here is outlined as an activity which is essentially about self-interest and self-preservation on the part of the individual/s blowing their whistles. The outcome might be of benefit to wider society, but the intentions of the leniency programmes are to appeal not to the ethical commitments of individuals, but to their self-interest. This would suggest that neoliberal ideology, of appealing to self-interest, in the context of competition policy, dominates. This might be axiomatic but serves to illustrate that the concept of whistleblowing is by no means fixed, but, like Bjørkelo and Madsen suggest, is context dependant, and that includes different contexts *within* neoliberal regimes.

However, a recent case in the UK where two separate whistleblowers have made claims about the fixing of energy prices in the UK wholesale gas markets, has a broader appeal framed in more ethical terms⁵, despite it still concerning the manipulation of an otherwise 'free' market. The individual whistleblowers in this case did not, on the face of it, seem to stand to gain personally, like the firms or individuals in cartel cases, so we might be able to assume that they were acting in respect of some collective conscience. Anecdotally this shows that neoliberalism is not necessarily a determining force in the act of whistleblowing, but more likely it is a determining force in how whistleblowing is both portrayed, understood and institutionalised. This is more in line with understandings of ideology that present a 'common sense' approach to the world, where the media, and other institutions play an active role in the 'creation, construction, articulation and communication,' (Allen and Savigny, 2012) of ideology. Neoliberalism as an ideology functions to make free-markets the 'common sense', and 'natural', way to organise social relations – there is little, or no, political debate about the place of the market⁶ and capitalism more broadly (Fisher, 2009)⁷. It has also been argued that in Norway neoliberal discourse in the media has reached a stage of 'extreme individualism', a discourse which 'undermines and potentially destroys the value foundations of the welfare state: the values of collective responsibility and human equality.' (Nafstad et al. 2007, p.324) This could potentially have a dramatic impact on both the character of whistleblowing, and subsequently how acts of whistleblowing are reported. If gas companies are seen to be manipulating the market then it will be that the system of regulation is not good enough, either too little or too much regulation, rather than that it is systematic to free-market capitalism. Again, the ideology of neoliberalism presents the problem as one of the markets not working properly, and being undermined to the cost of individuals, rather than being a systemic problem with how capitalism functions at the cost of collectives. This seems to fit what Bjørkelo and Madsen suggest about whistleblowing in neoliberalism; that the ideology has a determining impact on the way in which whistleblowing occurs, but that it also has an impact on how it is perceived.

Bjørkelo and Madsen's article demands, and this commentary supports, that we ask questions about whistleblowing, and its relationship to neoliberal ideology. For example: What is, and what is not, acceptable whistleblowing? Does neoliberalism, through policies like competition legislation, encourage a particular type of whistleblowing that emphasises the responsibility

5 See articles here: <http://bit.ly/VXyJhA>, and here: <http://bit.ly/X2ZthW>

6 This has begun to change since the financial crisis with oppositional voices from the Occupy movement for example, but neoliberalism still maintains a fairly steadfast foot-hold as outlined by Crouch (2011).

7 This is not to mention the moral implications of conducting social relations through market mechanisms, as covered by moral and political philosophers such as Sandel (2012).

to 'working markets' and 'consumer welfare', rather than broader civil rights and social justice? I would not suggest that collusion, cartels and price fixing are in any way a good thing, quite the opposite, but that these types of corruption are taken particularly seriously in a context in which markets are seen to be the most effective, or only, solution. It is the market that is being effected, not citizens as a collective.

However, whistleblowing is of course not a determined practice, and exists in different industrial settings, in both public and private arenas, and in different cultural contexts, where even the understanding of corruption itself is culturally specific (Gephart, 2012). What therefore needs to be understood is whether or not there is something particular about whistleblowing in a neoliberal context. Whistleblowers, as part of a competition policy regime, play an important role in unsettling and exposing practices of corruption. However, it could be argued that these whistleblowers are neoliberal apologists, as the whistleblowing takes place in a framework which says 'these organisations are undermining something that would be otherwise work perfectly well', rather than 'businesses taking advantage of their position is hardly a surprise, the system is rigged in their favour anyway'. Another interesting dimension would be to address the instances where whistleblowing does *not* happen, but later on major corruption is exposed – the most famous being the Enron scandal. This could show us why particular individuals, at various levels in the company and at various stages of the transactions, did not choose to come forward. Enron was, if nothing else, a story about people and ideology, not about complicated financial transactions⁸.

Therefore, in order to understand the practice of whistleblowing in a neoliberal context, we need to take account of the three dimensions that were set out at the start: (1) industrial/sectoral context; whether or not it is public or private sector, the relative importance of the industry (greeting cards versus utilities), the size and number of firms in the market, and the national or international reach of the organisation, (2) the position and motivation of the whistleblower themselves; whether they are owners, managers or employees and whether or not their rationale is obviously self-serving or socially responsible, and (3) how the act is subsequently reported; what narratives are adopted in the media and whose voices are represented. When analysing whistleblowing activities, this framework can be used to ask whether or not whistleblowing can be seen as a challenge to the political or economic orthodoxy, or as merely supporting neoliberal hegemony?

Through this commentary I hope that further clarity can be brought to the complex relationship between the act of whistleblowing and neoliberalism. Whether or not neoliberal ideology has a determining impact on the extent to which whistleblowing as an activity occurs, or the ways in which it is reported in the media, are essentially empirical questions that need to be addressed in the future. What this commentary has attempted to do is unpack some of the discourse around whistleblowing in a neoliberal context, and set out a possible framework for future investigation.

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⁸ Bethany McLean interviewed in *Enron: The Smartest Guys in the Room*. (2005). Dir. Alex Gibney. USA: Jigsaw Productions.

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