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Allison Stanger

**DEMOCRACY'S  
TRIPWIRE**

Global Corruption  
and Whistleblowing  
in Europe and the U.S.



Minda de Gunzburg

Center for European Studies **Harvard**

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## About the Author

[Allison Stanger](#) is Russell Leng '60 Professor of International Politics and Economics at Middlebury College and an External Professor at the Santa Fe Institute. For the 2020-2021 academic year, she is Cary and Ann Maguire Chair in Ethics and American History at the Library of Congress and a Center for Advanced Study in the Behavioral Sciences Fellow at Stanford University. In 2019-2020, she was a Visiting Professor of Government at Harvard University's Minda de Gunzburg Center for European Studies. A general theme in her work has been the impact of technological innovation on democratic accountability and the blinders that existing theoretical paradigms for thinking about global markets and national governance may have imposed on what we see and value.

Allison Stanger

Department of Political Science, Munroe Hall

Middlebury College

stanger@middlebury.edu

## Abstract

Misconduct by those in high places is dangerous to reveal, even in political regimes that protect freedom of expression. Whistleblowers in democracies thus face a paradox: by challenging and exposing transgressions by the powerful, they perform a vital public service; yet without the sustained support of the voting public, they always suffer for it. This paper compares whistleblower protection politics in Europe and the United States to bring into fuller relief the vital role insider truth-telling plays in combatting global corruption, keeping elites honest, and sustaining liberal democracy. We begin in section one by exploring the differing perceptions of whistleblowing in authoritarian and democratic regimes to highlight the reasons why whistleblowers proliferate when democracy is threatened by autocratic forces. Section two tells the story of the world's first whistleblower protection law as a means for framing the recent deliberations in Europe. The third section explores the external factors that laid the groundwork for the European initiative and elucidates the political dynamics that made the seemingly impossible prospect of a European whistleblower directive reality. The fourth segment concludes with a comparison of the status of whistleblower protection in the United States and Europe and an assessment of its significance.

The rule of law requires both agreement on foundational principles and majority consensus that the laws are being fairly enforced. When elites in a democracy appear to be abiding by their own set of rules and not those that pertain to all citizens, resistance and mobilization to address the gap between ideals and reality is likely to follow, and whistleblowers are likely to feature prominently in that exercise. Whistleblowers disrupt the suppression of information that the electorate needs to render its best judgment on the challenges at hand to uphold the public interest. They expose facts that citizens need to govern themselves, and in the case of Covid-19, information that is needed to keep both themselves and their neighbors healthy. Especially in times of crisis, whistleblowers can be catalysts for reforms that renew democracy's promise.

Only a few years ago, experts would have considered the United States to be the gold standard in the arena of whistleblower legislation. Protection of whistleblowers was not uniform across the EU, and it was uneven across different policy areas. In 2015, the European Commission saw no legal basis and no political will for comprehensive whistleblower protection. Yet in October 2019, the European Parliament ratified legislation that in terms of both scope and ambition surpassed the United States in this realm of democracy fortification. How and why did Europe have its change of heart? How might we account for the EU's reversal of its earlier position?

Until very recently, whistleblower protection was perceived as an Anglo-American concept on the continent. When Legal Director of the [Government Accountability Project](#) (GAP) Tom Devine first came to GAP in 1977, the United States was the only country in the world with a national whistleblower protection law on the books. Britain followed only in 1998. With centuries of uninterrupted liberal democratic traditions that became more inclusive over time as the franchise was extended to all adults in the United States and the United Kingdom, whistleblowing as an instrument for exposing breaches of law resonated culturally. For European countries who had histories of both democracy and dictatorship, however, the concept at first had negative connotations. When the people mistrust their political leaders, supporters of the regime's laws and norms are condemned rather than celebrated. In any former police state, where neighbors routinely served as informants, whistleblowing has negative connotations of snitching rather than being understood as a positive means of amplifying democratic voice.

We begin in section one by exploring the differing perceptions of whistleblowing in authoritarian and democratic regimes to highlight the reasons why whistleblowers proliferate when democracy is threatened by autocratic forces. Section two tells the story of the world's first whistleblower protection law as a means for framing the recent deliberations in Europe. The third section explores the external factors that laid the groundwork for the European initiative and elucidates the political dynamics that made the seemingly impossible prospect of a European whistleblower directive reality. The fourth segment concludes with a comparison of the status of whistleblower protection in the United States and Europe and an assessment of its significance.

## **Democracy's Guardians**

Whistleblowing means something quite different for authoritarian regimes than it does for democracies. In China, for example, whistleblowers are viewed as enforcers of government regulations, rather than as watchdogs of government or exposers of elite misconduct. Dr. Li Wenliang, the doctor who died from the Coronavirus, who courageously warned the world of a pandemic, did not fit this model. In warning the Chinese people, Dr. Li was not reporting to the Party breaches of law by a fellow citizen; he was calling out the Party for failing to acknowledge the seriousness of the threat to public health and safety. The Chinese government initially censored Dr. Li and accused him of spreading falsehoods and subverting the social order. A groundswell of popular support subsequently forced the Party to spin Dr. Li and other outspoken doctors as heroes and agents of the government, although it was the government who had initially shot the messenger rather than acting on the message.<sup>1</sup>

Chinese public opinion perceived the truth-telling activities of Li Wenliang and others as whistleblowing on the Western model, while the Communist Party and Chinese law had a very different understanding of what legitimate whistleblowing entailed. Despite the Party's attempts retroactively to claim the outspoken doctors as allies, there are no laws protecting dissenters and free expression in China, and authoritarian regimes by definition do not tolerate challenges to their authority. In speaking truth to power, whistleblowers are subversive agents whenever dissent is not considered a virtue. In Hungary, whistleblowing is prevented by laws limiting freedom of expression, including a newly proposed draft law imposing a prison term of five years for promoting fake news.<sup>2</sup> In any deteriorating democracy, whistleblower protection is a

speed bump for all aspiring authoritarians. In understanding opposition and difference of views to be part of the democratic process, it renders illegal the prosecution or denial of legitimacy to those critical of government, thereby upholding civil liberties while providing alternative means for peaceful dispute resolution (rather than resolution through domination). It also upholds freedom of expression, another critical component of vibrant democratic life.

Whistleblowers are thus valuable in a democracy and should be considered traitors only in autocratic regimes. In this sense, the way democracies treat whistleblowers is a barometer of the vibrancy of civic life and a polity's commitment to civic norms. Debates over the proper role of whistleblowers tell us something important about a country's core values and the extent to which they are reflected in lived experience.

In their timely and incisive book, *How Democracies Die*, Steve Levitsky and Daniel Ziblatt present four warning signs for identifying an authoritarian leader when we see one. We should worry when a politician (1) rejects, in words or action, the democratic rules of the game, (2) denies the legitimacy of opponents, (3) tolerates or encourages violence, or (4) indicates a willingness to curtail the civil liberties of opponents, including the media.<sup>3</sup>

In the United States in the wake of Nixon's abuse of power, Congress put in place the Inspector General [IG] system as an additional watchdog. As Levitsky and Ziblatt argue, to consolidate power, aspiring authoritarians "must capture the referees, sideline at least some of the other side's star players, and rewrite the rules of the game to lock in their advantage, in effect tilting the playing field against their opponents."<sup>4</sup> From the start, President Trump demonstrated striking hostility toward the very idea of referees — law enforcement, intelligence, ethics agencies, and the courts, anyone who might criticize his actions and inactions. To place Comey's firing in proper context, write Levitsky and Ziblatt, "Only once in the FBI's eighty-two-year history had a president fired the bureau's director before his ten-year term was up — and in that case, the move was in response to clear ethical violations and enjoyed bipartisan support."<sup>5</sup> Purging the IGs and denying the importance of accountability watchdogs to whom whistleblowers report was one way to silence critics and break with longstanding bipartisan norms.

Both stable democratic regimes and whistleblower protection appeal to a higher principle of impartiality that transcends power or self-interest. When democracy is imperiled, it follows that contempt for whistleblowers and non-partisan whistleblower protection are likely. Populist

movements in democracies actively subvert faith in the rule of law and the importance of public servants not being corrupt by construing politics as a tool for continued elite exploitation of ordinary citizens. When democratic institutions are viewed as instruments of elite manipulation, only the populist movement can genuinely represent the people. In this way, populists systematically undermine the rule of law and the concept of nonpartisan whistleblowing by:

1. Undermining the norms that are essential for democratic life; populists present them instead as tools of elite manipulation.
2. Denouncing the institutions that are at the core of functioning liberal democratic government; populists claim they have been captured by the plutocrats.
3. Defying the very notion of an impartial judiciary, without which the rule of law cannot function; populists claim that all judging is political, so decisions should instead be popular rather than just.

The populist challenge to liberal democracy doggedly erodes these three components of the rule of law over time, blurring the line between fact and fiction. When the people are thoroughly confused about what democracy and the truth actually entail, only then do populists dispense with free and fair elections.

To summarize, whistleblowing in democracies is rooted in a rule of law tradition that safeguards freedom of expression. For our purposes, a whistleblower is an insider who has evidence of illegal or improper conduct and exposes it, either to the authorities or to the press. In government, misconduct is illegality or a violation of constitutional norms. In the corporate world, whistleblowing reveals illegality or the violation of company norms. Put another way, whistleblowers draw attention to abuses of power that undermine public trust. Whistleblowers often reveal misconduct involving the use of public power for private gain, otherwise known as corruption.

Whistleblowing is thus the insider exposure of illegal or improper activity. We know something is illegal when it violates the law, as determined by a court. We know something is improper when the relevant community of which the whistleblower is an insider deems it to be so. Whistleblowing is not a mere weapon for advancing partisan or personal interests in a fake news world. It is not what denigrates others or vindicates our own political biases. The extreme left and right may view any revelation of secret information that serves their political ends as whistleblowing, but that is to blur important lines.

All whistleblowers are leakers, but not all leakers are whistleblowers. Leakers expose secrets, but secrets are not always a cover for misconduct, even if their revelation can often embarrass individuals and destroy careers. In contrast, whistleblowers expose lies and wrongdoing, which their perpetrators would like to keep secret.

Just as all leaking is not whistleblowing, all dissent is not whistleblowing. All whistleblowers are certainly dissenters in that they refuse to accept current circumstances, but all dissenters are not whistleblowers. Whistleblowers reveal truths that the powerful do not want to be made public, whereas dissenters simply disagree.

Defined in this fashion, whistleblowing is a cousin of civil disobedience, although they are not one and the same. In the United States, the term civil disobedience was first coined by Henry David Thoreau. Resistance for Thoreau was more a symbolic act to highlight evil and a means to individual integrity rather than an instrument of specific political action, although his essay inspired both Gandhi's and Martin Luther King Jr's non-violent strategies for social change.<sup>6</sup>

In keeping with the understanding of Gandhi and King, Hannah Arendt writes: "civil disobedience arises when a significant number of citizens have become convinced either that the normal channels of change no longer function...or that, on the contrary, the government is about to change and has embarked upon and persists in modes of action whose legality and constitutionality are open to grave doubt."<sup>7</sup> John Rawls in *A Theory of Justice* defines civil disobedience as the "public, non-violent and conscientious breach of law undertaken with the aim of bringing about a change in laws or government policies."<sup>8</sup> For both Arendt and Rawls, then, civil disobedients break the law in order to change it and are willing to suffer the consequences. In this sense, just like whistleblowers, all civil disobedients are dissenters, but all dissenters are not civil disobedients.

Where civil disobedients contest the legitimacy of particular laws, whistleblowers instead appeal directly to the law, Constitution, or rule of law tradition for justice. Both variants of dissent require political judgment. Another way of thinking about the same thing is to point out that civil disobedients often aren't insiders; they're outsiders who draw attention to a system's injustice and hypocrisy, its failure to live up to its promises. In contrast, whistleblowers are insiders who expose secret wrongdoing, a gap between individual action and public purpose.

Whistleblowers challenge illegal, improper, or unconstitutional conduct that in normal times is recognized as such by the public at large.

Arendt saw civil disobedience as uniquely American. It was a manifestation of what Tocqueville deemed America's greatest strength, the vitality of its associations, more commonly known as civil society. "Civil disobedients," wrote Arendt, "are nothing but the latest form of voluntary association...quite in tune with the oldest traditions of the country."<sup>9</sup> Civil disobedience is "primarily American in origin and substance...no other country, and no other language has even a word for it...to think of disobedient minorities as rebels and traitors," Arendt continues, "is against the letter and spirit of a Constitution whose framers were especially sensitive to the dangers of unbridled majority rule."<sup>10</sup>

The same could be said of whistleblowers, who often illuminate the gap between ideals and a fact-based world, the real world, where ideals aren't often and usually are not realized. Whistleblowing is ultimately an indirect call to renew the rule of law through new legislation defining corruption and the abuse of power. Like civil disobedience, it is American in its origins. The Continental Congress passed the world's first whistleblower protection law before the ratification of the U.S. Constitution.

## **An American Innovation**

In the eyes of American patriots, the revolution was necessary to inoculate the new World from old World corruption. America's founders sought to build a new republic that might safeguard both liberty and equality from corruption and hypocrisy in Europe.

In 1777, during the revolutionary war, a group of ten American sailors revealed that their commodore, Esek Hopkins, had tortured captured British sailors. They submitted a petition to the Continental Congress alleging that Hopkins had "treated prisoners in the most inhuman and barbarous manner." Congress voted to remove Hopkins from his position, and Hopkins retaliated by accusing two of the whistleblowing sailors of libel and having them arrested.<sup>11</sup>

The first Commodore of the first United States Navy Esek Hopkins was a Rhode Island slave runner. He was also the catalyst for America's first 1778 whistleblower law, a forerunner of the First Amendment. To fight and win the Revolutionary War, the newly United States would need loyalty from its citizens that trumped parochial state allegiances. Because it involved

sacrificing financial opportunities built on America's original sin, Hopkins had difficulty taking that leap of faith and would attempt to hedge his bets.

Rhode Island is a state known for its celebration of tolerance. Rhode Island is less known for its tolerance of slavery. Rhode Island passed the first colonial anti-slavery statute in 1652, abolishing African slavery and stating that "black mankind," just like white mankind, could not be indentured for more than ten years. The law, however, was never enforced for blacks.<sup>12</sup> As a result, roughly a century later, Rhode Island merchants "sponsored at least 934 slaving voyages to the coast of Africa and carried an estimated 106, 544 slaves."<sup>13</sup> Because the business was just too lucrative to resist, Newport became North America's top slave-trading port. By 1750, Rhode Island had the highest percentage of enslaved humans in New England.<sup>14</sup> After the Revolution, Rhode Island merchants controlled between 60 and 90 percent of the American trade in African slaves.<sup>15</sup> Scholars estimate that for every one hundred human beings seized in Africa, only 64 would survive the march from the interior to the coast, only 57 would actually board the ship, and less than half—just 48—would live to be slaves in the New World.<sup>16</sup>

By focusing on Rhode Island's misdeeds and Esek Hopkins' role in them, the link between whistleblowing and the spirit of the American revolution can be illuminated in important ways. Slavery was an institutionalized lie. Its basic premise—that blacks were not human beings—was not only immoral but untrue. This violation of natural law codified in law is the very definition of corruption. American revolutionaries thus blew the whistle on British corruption while turning a blind eye to home-grown corruption all their own.

Rhode Island's stubborn refusal to ratify the Constitution even with the appended Bill of Rights and its enthusiastic pursuit of morally bankrupt profiteering in defiance of Congress helps explain the many references to wayward Rhode Island in the founding documents. For example, in Federalist 7, Alexander Hamilton refers to "enormities perpetuated by the Rhode Island legislature." In Federalist 63, James Madison cites "the iniquitous measures" of Rhode Island. In July 1787, at the Constitutional Convention, Nathaniel Gorham of Massachusetts proclaimed Rhode Island to be "a full illustration of the insensibility to character produced by a participation of numbers in dishonorable measures, and of the length to which a public body may carry wickedness and cabal."<sup>17</sup> Jonathan Dayton of New Jersey, in making the case for Supreme Court (or other federal) review of territorial claims, "mentioned the conduct of Rhode Island, as showing the necessity of giving latitude to the power of the United States on this subject."<sup>18</sup>

Finally, in a letter to Gouverneur Morris in 1789, George Washington predicted that North Carolina would ratify the Constitution, writing he would feel more confident that Rhode Island would do the same, “had not the majority of that People bid adieu, long since to every principle of honor—common sense, and honesty.”<sup>19</sup>

Esek Hopkins’ appointment in December 1775 to head the new Continental Navy was engineered, in part, by Rhode Island’s social elite in which his own family was prominent. Hopkins’ brother Stephen, a signer of the Declaration of Independence and the first chancellor of Brown University, chaired the Naval Committee that named Hopkins Commander in Chief. Hopkins also had the strong backing of John Adams, another prominent voice on Congress’ Naval Committee.<sup>20</sup>

Above and beyond Commodore Hopkins, Rhode Islanders dominated the new Navy more generally. Bringing a Continental Navy into being involved switching from the privateers that General George Washington had hired to back up his Continental Army to a more unified force answering solely to the Continental Congress.<sup>21</sup> In an October 1775 appropriation, the Naval Committee acquired four vessels for its new fleet. Hopkins’ son, John Burroughs Hopkins, was given command of Cabot. Abraham Whipple, commodore of the Rhode Island Navy (and Esek Hopkins’ brother-in-law) became captain of Columbus; Dudley Saltonstall (husband of Frances Babcock, the daughter of Joshua Babcock, who served on the supreme court of the Rhode Island colony) commanded Alfred; and Nicholas Biddle (the sole captain without a Rhode Island connection) headed Andrew Doria.<sup>22</sup> By early January, four more boats had been added: the sloops Hornet and Providence and the schooners Fly and Wasp. With the demise of the Naval Committee in 1776, the Marine Committee assumed oversight of the Navy.<sup>23</sup>

Christopher Gadsden of South Carolina, who also served on the Naval Committee, bestowed upon Hopkins as his personal standard what would later become known as the Gadsden Flag: a yellow flag bearing a serpent coiled above the slogan, “Don’t Tread on Me.”<sup>24</sup>

Given that the Navy was formed seven months before the Declaration of Independence, there were disputes from the start over how it was to be deployed. The southerners were having trouble with British raiders and wanted to see an initial engagement in the Chesapeake Bay. Hopkins received orders from Congress on January 5, 1776 to clear the southern coasts and then sail north to do the same in Narragansett Bay. But Hopkins had his own agenda. Disregarding

Congress entirely, he headed south to the island of New Providence in the Bahamas, without engaging the British at all until he had reached Nassau.<sup>25</sup>

Finding the British garrison undermanned, he seized more than one hundred cannons.<sup>26</sup> On April 4, while heading home, he also captured two British vessels off the eastern end of Long Island, as well as two merchant vessels bound from New York to London the following day; the latter two were taken as prizes. His renegade mission appeared wildly profitable.

At midnight on April 6, however, Hopkins' luck changed. Sailing near Block Island, the Navy encountered HMS Glasgow. Despite the Navy's overwhelming superiority, the Glasgow managed to elude capture and escape to Newport, leaving eleven Americans dead and seventeen wounded.<sup>27</sup>

Hopkins was roundly criticized for the Glasgow fiasco and the insubordination that led to it. In addition to ignoring the naval needs of his southern compatriots, Hopkins was accused of favoring Rhode Island in distributing the spoils as well. Congress had ordered him to turn over all of the captured cannons to Governor Trumbull of Connecticut, but Hopkins again defied orders and sent some of the cannons to his old friend, Governor Cook of Rhode Island.<sup>28</sup> On May 30, Congress intervened, ordering that six cannons be returned from Newport and fourteen from New London. Rather than take responsibility for his acts of insubordination, Hopkins blamed his underlings; both Andrew Whipple and John Hazard were court martialed for the Glasgow debacle. Whipple was cleared on the charge of poor judgment but not of cowardice and reprimanded; Hazard was dismissed for not following orders, embezzlement, and failure to do his duty.<sup>29</sup>

For Congress, however, the buck stopped with Hopkins. On May 8, 1776, the legislature appointed a special committee headed by John Adams to investigate Hopkins' behavior.<sup>30</sup> "I saw nothing in the conduct of Hopkins, which indicated corruption or want of integrity," wrote Adams in his autobiography. "Experience and skill might have been deficient in certain particulars; but where could we find greater experience or skill? I knew of none to be found."<sup>31</sup> Thomas Jefferson, however, saw the matter in another light. In his personal brief in preparation for the Hopkins' inquiry, he noted that Hopkins' suspicious conduct had continued after his return, as the U.S. Navy "has merely acted in defence of trade of Eastern colonies." According to Jefferson, "The objection is [not] that he did not exercise an honest discretion in departing from his instructions but that he never did intend to obey them."<sup>32</sup>

Despite Adams' unfailing support, Jefferson's perspective carried the day. Congress found Hopkins "guilty of not paying proper attention to his orders" and voted to censure him on August 16, 1776. Three days later, however, Congress ordered him to resume command. In Adams' view, "this resolution of censure was not in my opinion demanded by justice," but "I had the satisfaction to think that I had not labored wholly in vain in his defence."<sup>33</sup> After Congress' carefully administered slap on the wrists, Hopkins was given orders for a new expedition on August 22, 1776.<sup>34</sup> In order to conjure up scapegoats for his sanction and point the finger back at his nemesis John Paul Jones, he brought more court martials against the crew of the *Alfred* in October 1776.<sup>35</sup>

According to the Rhode Island Historical Society, the fall of 1776 found Hopkins in Providence, having difficulty manning his ships because of fierce competition from privateers. Simply put, a sailor could make better money in the private sector than serving in the Continental Navy. In an effort to prove his loyalty to the United States, Hopkins asked the Rhode Island General Assembly to declare an embargo on privateering until his Continental ships could be manned. Since many members of the assembly had vested interests in privateering, the motion was defeated.<sup>36</sup> The Continental Navy under Hopkins' command remained a chimera. On December 7, 1776, a British ship sailed into Newport uncontested and took possession of Rhode Island, shutting the American ships inside the bay.<sup>37</sup> After being reprimanded by Congress and losing control of Newport, Hopkins continued to look out for himself rather than fostering Continental collaboration. He reimbursed his own accounts first before considering the needs of others. John Hancock wrote to the Commander on January 21, 1777 urging him to pay his seamen the prize monies (share of captured spoils) they were due.<sup>38</sup> Hopkins responded by holding *Alfred* commander John Paul Jones responsible for the cash shortfall, asking Hancock to court martial Jones.<sup>39</sup> Captain Jones, however, was hardly to blame for not paying his debts. While residing on the docked *Warren*, Hopkins seems to have been withholding reimbursements of the *Alfred's* bill, despite the persistent requests of Captain Jones.<sup>40</sup>

Outrage at Hopkins' self-serving maneuvers reached its apex in February 1777 when Hopkins defied Congress yet again by issuing counter-orders to Joseph Olney of *Cabot*. Congress had wanted Olney to report immediately for a multi-ship mission under the direction of Captain John Paul Jones.<sup>41</sup> Hopkins instead instructed Olney to complete an already in progress six-week cruise. Hopkins' defiance of Congressional authority fatally undermined the loyalty of

his crew. On February 19, 1777, ten officers of the Warren delivered a petition to Congress demanding Hopkins' removal from command. Hopkins was guilty of defying Congressional orders on multiple occasions, the Glasgow fiasco, and multiple deficiencies of character that rendered him unfit for command of the Continental Navy.<sup>42</sup>

The collective testimony of the Warren officers accompanying the petition paints a portrait in broad strokes of a self-serving man with a profound sense of entitlement dwelling in a bygone era. One petitioner, Jas Sellers, said that Hopkins repeatedly cursed the Marine Committee as "a pack of damned fools." According to Sellers, he also said, "If I should follow their directions, the entire country would be ruined. I am not going to follow their directions, by God." In addition, Sellers maintained that he "treated prisoners in a very unbecoming and barbarous manner." Marven, Stillman and Lothrop referred to Hopkins as "a man destitute of principles, both of religion and Morality," who frequently profanes "the name of almighty God." Samuel Shaw testified that he heard Commodore Hopkins call the Continental Congress "a pack of damned rascals." John Reed maintained that Hopkins "treated prisoners in the most inhuman and barbarous manner" and believed that "no man yet ever existed who could not be bought."<sup>43</sup> Grannis' testimony describes Hopkins' mistreatment of prisoners in detail and refers to Hopkins' conduct in general as "wild and unsteady."<sup>44</sup> In response to the avalanche of condemnation, Congress suspended Hopkins on March 26, 1777, pending formal inquiry into the charges.<sup>45</sup>

With blood in the water, public criticism of Hopkins mounted. In a letter to John Adams on May 19, 1777 Joseph Ward lamented America's "sleepy navy," obliquely criticizing Hopkins' performance as Commander-in-Chief.<sup>46</sup> Admiral John Paul Jones, writing to the American Commissioners (of which Franklin was one) on December 5, 1777 complained of the jealousy of "the then Commodore Hopkins," who had deprived him of the ships he needed to fulfill an order from Congress.<sup>47</sup> Hopkins' crew blew the whistle on his character. Hopkins' peers focused on his insubordination, which they saw as having compromised the revolutionary war effort.

In bringing charges against Commodore Hopkins, the group of ten sailors were upholding principles that had been previously delineated in Congress' original January 5, 1776 "Orders and Directions for the Commander in Chief of the Fleet of the United Colonies." It stipulated that prisoners of war be "well and humanely treated." Congress also urged commanders to promote and protect whistleblowers: "You will...very carefully attend to all the just complaints which

may be made by any of the People under your Command and see that they are speedily and effectually Redressed—fectually (sic) redressed—for on a careful attention to these important Subjects the good of the service essentially depends.”<sup>48</sup> Congressional directives, however, were of limited interest to the Commodore. Once Hopkins became aware of the “plot” against him, he resorted to his tried and true tactic of court martialing his critics. One of the signatories, Richard Marven was tried by court martial aboard the ship Providence on April 3, 1777 (before the news of Hopkins’ March 26 suspension had reached him).<sup>49</sup> Marven was charged with insubordination, which rendered him “unworthy of holding a Commission in the American Navy.”<sup>50</sup>

Upon learning of the petition against him, Hopkins demanded to see it. Congress voted in May 1777 to share it with him, but Hopkins did not receive the petition until the fall.<sup>51</sup> Several months later, on January 2, 1778, Congress dismissed Hopkins from “the service of the United States.”<sup>52</sup> Enraged that his inferiors were giving him a bad name, Hopkins retaliated by filing a criminal libel suit against the ten petitioners. Richard Marven and Samuel Shaw had the misfortune of being Rhode Island residents in a colony where the Hopkins family ruled, so they were the only two of the ten who were imprisoned. The imprisoned sailors, Richard Marven and Samuel Shaw, again turned to Congress for justice. Again they were vindicated: Congress ruled that Marven and Shaw should be released from prison. But the legislators went even further: on July 30, 1778, they issued the first American whistleblower protection law. Its language captures the balance that the makers of the American Revolution sought between upholding whistleblower rights and maintaining the new republic they were bringing into being: “That it is the duty of all persons in the service of the United States, as well as all other inhabitants thereof, to give the earliest information to Congress or any other proper authority of any misconduct, frauds or misdemeanors committed by any officers or persons in the service of these states, which may come to their knowledge.”<sup>53</sup> America’s public servants were obligated, Congress maintained, to report wrongdoing in their ranks whenever they encountered it.

Congress did not stop at condoning whistleblowing as an expression of American values. It went on to enact legislation to protect whistleblowers from retaliation. Despite being at war and strapped for resources, Congress paid the legal fees of Marven and Shaw, the two maligned sailors, a sum of fourteen hundred and eighteen dollars.<sup>54</sup> The Congressional payment was in continental dollars, a currency that was only in use between 1775 and 1779, making it difficult to

calculate its equivalent today. Nevertheless, it seems clear that it was no insignificant amount, since the first issue of continental currency in 1775 was for two million dollars.<sup>55</sup> Congress clearly considered it crucial to support whistleblowers, as it also passed a law ensuring that future whistleblowers would have legal counsel to fight libel charges, just as Marven and Shaw did. In a final demonstration of their revolutionary convictions, they authorized all records related to Hopkins' removal to be released to the public, which is the reason why this story can today be told.

## **The Road to European Whistleblower Protection**

The idea that whistleblower protection could serve the cause of Europe is a relatively recent development. After four years of deliberation, the European Parliament in April 2019 passed a landmark whistleblower protection directive that surpasses its American counterpart in both breadth of issue areas covered, as well as the array of employees who fall under its protective umbrella. Broadly speaking, it defends democracy from elite corruption at odds with the public interest. On October 7, 2019, the European Union adopted the new rules, and member states have two years to transpose the new rules into their national law.<sup>56</sup>

Civil society organizations and trade unions played a critical role in moving the EU Directive from quixotic dream to legal reality. Their collaboration over multiple years has been fortified by the [Whistleblowing International Network](#) (WIN). WIN's first conference took place in Glasgow in September 2019 and brought together 80 delegates from 25 countries, from Nigeria to Serbia to Mauritius. WIN "strengthens and connects civil society organizations that protect and support whistleblowers."<sup>57</sup> Representatives from the main civil society organizations who worked together to make the new European law reality were in attendance at the September 2019 gathering. "When I first started work on these issues in London 18 years ago," WIN's Director, the Canadian-born lawyer Anna Myers told me, "the word whistleblower was considered American and had some negative connotations. It was more palatable in the UK to talk about whistleblowing as a matter of good governance, rather than free speech. Today, it has become a concept that belongs to the world and has increasingly positive and empowering connotations."<sup>58</sup> Myers also noticed that while governments and corporations routinely get together and talk about their common interests, civil society organizations did not. WIN and

Myers believe this needs to change, particularly if democracies are to remain or, even begin, to be true social compacts.

“We had to persuade people that whistleblowing was not an Anglo-Saxon Protestant concept,” elaborated Nicole Marie Meyer, a French whistleblower who helped draft France’s 2016 whistleblower protection law.<sup>59</sup> The French sociologist Francis Chateauraynaud coined the term *lanceur d’alerte* (alert launcher) to describe the whistleblowing activities within the scientific community, thereby circumventing the term’s negative connotations. According to the French sociologist Francis Chateauraynaud, corruption issues in France were best revisited through “a rapprochement with the Anglo-American whistleblower tradition,” which was been initiated by French scientists who were members of *Sciences Citoyens*, an organization dedicated to science for the common good, rather than for profit or knowledge alone. They used their collective expertise to expose multiple public health hazards, including climate change.<sup>60</sup>

Dragana Matović, a Serbian whistleblower and co-founder of *Pištjalka* (the whistle), reported that when she began her work, there was no Serbian word for whistleblower.<sup>61</sup> In the Czech Republic, the *Nadační fond proti korupci* (The Endowment Fund Against Corruption) initially deployed the Czech word *oznamovatele* (notifiers) to designate whistleblowers, since the first official translation of whistleblower into Czech was “*informator*” (informer).<sup>62</sup> The word *denunciante* (one who denounces), in Spanish has negative connotations of betrayal, so that is starting to be overcome in Spanish-speaking countries with the increased use of the term “*alertador* (alerter).”<sup>63</sup> A 2013 Transparency International report on whistleblowing in Europe included the original words for whistleblowers in countries across Europe, almost all of which were negative.<sup>64</sup> Whistleblowing had perhaps the worst connotations in post-communist Europe, especially for those of a certain age who could remember communist show trials.

The 2014 Luxembourg Leaks scandal otherwise known as LuxLeaks was one catalyst for a reshaping of European views on whistleblowing and what the public had the right to know. The whistleblower was a French national Antoine Deltour, an employee of PricewaterhouseCoopers Luxembourg. Deltour discovered that large multinationals, such as Pepsi, IKEA and Deutsche Bank, were colluding with the Luxembourg government to avoid tax obligations. Deltour shared the tax rulings for over three hundred multinational companies based in Luxembourg with a journalist.<sup>65</sup> According to Deltour, “The current economic situation promotes multinationals who are impossible to regulate.”<sup>66</sup>

Deltour was all of 28 years old when the LuxLeaks story broke. When asked some five years later in Glasgow why he blew the whistle, speaking fluent English, Deltour simply stated, “I thought it was wrong.”<sup>67</sup> How did Deltour detect maneuverings that had been designed to stay off the radar of public scrutiny? “I had to first gain the authority to audit on my own,” Deltour told me. “After two years on the job, I audited one small company very closely and noticed that it had no salaries, no employees, no economic activity, yet it was financing other entities, making millions of Euros in profits just by lending money to another institution in a high tax rate country.” When Deltour followed the financial flows, he noticed that profits that weren’t taxed in Luxembourg also weren’t taxed elsewhere either. What this meant was that the company he had been auditing was a shell company explicitly created for tax evasion purposes. Once he had identified one act of malfeasance, he could identify it when he saw the others, and when he did, it was clear what he was obligated to do. “The worst thing for a whistleblower,” said Deltour, “is not to be heard. The world then makes no sense.”<sup>68</sup>

The LuxLeaks revelations had an immediate impact in Brussels, because the newly appointed president of the European Commission, Jean-Claude Juncker, had been prime minister when many of Luxembourg’s tax avoidance rules had been enacted. As the EU was digesting their full implications, the Panama Papers leak in 2015 also exposed tax maneuvering that linked back to Europe. The Panama Papers were over eleven million documents leaked from a Panamanian law firm (hence the moniker) that detailed elaborate offshore tax haven schemes. They were a devastating scandal in Malta in particular, because they linked government officials to those ventures and the related money laundering.<sup>69</sup> The Maltese investigative journalist who exposed and interpreted this corruption for the public, Daphne Caruana Galizia, was murdered by a cell phone detonated car bomb in October 2017.

Joining the EU only in 2004, Malta is small and perfectly situated geographically between North Africa and Europe to serve as the hub of an international corruption network involving smuggling, money laundering, and passport fabrication. It is legal in Malta to buy citizenship, which then allows the Maltese passport bearer to roam Europe freely. Between 2014 and mid-2017, Malta—a country with a population of roughly 440,000—sold over 2,000 passports.<sup>70</sup>

Immediately before her death, Daphne had been investigating Malta’s citizenship for sale program. Russians in particular were buying Maltese passports, and while this was legal under

Maltese law, she believed the arrangement was a cover for something larger.<sup>71</sup> Her murder suggests she was onto something. The last lines Daphne Caruana Galizia published on October 16, 2017 were “There are crooks everywhere you look now. The situation is desperate.”<sup>72</sup> The Daphne project, which is committed to continuing Daphne’s work, is supported by the Open Society Foundations and USAID, among others. Its website is available in both English and Russian versions.<sup>73</sup>

Fighting crime that transcends borders cannot be fought by a single country. Malta’s Pilatus Bank, for example, which had been laundering money for Russians, Azerbaijanis and Iranians, could not be shut down until the U.S. intervened. It follows that if the United States is uninterested in fighting corruption, corruption multiplies exponentially throughout the world. Republican Congressman Devin Nunes, accused of meeting with Ukrainian former prosecutor-general Victor Shokin to discuss dirt on Joe Biden, also travelled to Malta to meet with Prime Minister Joseph Muscat in December 2018, while he was serving as Chair of the House Intelligence committee.<sup>74</sup>

While some people were initially arrested and questioned in the immediate aftermath of Caruana Galizia’s murder, the investigation went nowhere, drawing condemnation from the Council of Europe in May 2019, right on the heels of the European Parliament’s April 2019 approval of the Whistleblower Protection Directive.<sup>75</sup> People who would have to render a verdict must work under the shadow of Malta’s corruption network, which has links to organized crime. They, too, fear retaliation, so until there was external pressure, Maltese elites were able to sidestep investigating themselves.<sup>76</sup>

In summer 2019, three men were charged with murdering Caruana Galizia, but the question of who had ordered the killing remained murky until an alleged middleman came forward in September 2019, asserting that one of Malta’s wealthiest men, Yorgen Fenech, had funded the hit. Fenech had financial ties through offshore accounts to members of the Maltese government, relationships that Caruana Galizia had first revealed through her investigative explorations of the Panama Papers.<sup>77</sup> When Fenech was arrested in November 2019, the Maltese government could no longer credibly claim innocence. Maltese protestors took to the streets calling for Prime Minister Joseph Muscat’s resignation. Initially reluctant, Muscat announced he would resign, but not immediately, received another rebuke from the European Parliament, and finally relinquished his position in January 2020.<sup>78</sup>

In April 2020, the Daphne Caruana Galizia foundation joined an international coalition of whistleblowers calling for the protection of whistleblowers during and beyond the global pandemic crisis.<sup>79</sup> Meanwhile, former Prime Minister Muscat had joined forces with an Azerbaijani government-funded political think tank and lobbying group in Baku, where he reported in a YouTube interview that he was working on imagining new global governance structures to deal with the challenge of Covid-19.<sup>80</sup> The current Maltese president Robert Abela refused to disclose the terms of Moscat's severance package, which seems to have included compensation for serving as a consultant to the current Labor government—never mind the fact that public servants, who are not corporate CEOs, typically do not receive severance packages.<sup>81</sup>

The same brutal silencing of anti-corruption voices also took place in Slovakia, but the outcome of the regime-civil society standoff was quite different than in Malta. Four months after Caruana Galizia's car bomb detonated, 27-year old Slovak investigative journalist Jan Kuciak, along with his 27-year old fiancée, Martina Kusnirova, were brutally murdered, but the crime wound up bringing down the Slovak government. Kuciak had exposed the corrupt dealings of Slovak businessman Marian Kocner, who had long been suspected of having links to organized crime, with some of his money allegedly funneled to a Belize account via Malta. The massive public demonstrations that followed the news of his death eventually forced the resignation of Slovak Prime Minister Robert Fico and fueled the election of Slovakia's first female president, Zuzana Caputova on March 30, 2019. A liberal environmentalist, Caputova was a counter to Europe's populist wave and a breath of fresh air in a polarized Europe.<sup>82</sup> The murderer confessed to the crime and his cooperation with prosecutors led to the arrest and trial of Marian Kocner. The trial took place after the European Parliament had ratified the landmark whistleblower protection directive, and Kocner was convicted and sentenced to 19 years in prison.<sup>83</sup>

Mounting public alarm over the murder of journalists who were exposing abuses of the public trust thus created a growing sense of public urgency for pan-European whistleblower protection legislation. Yet both France and Germany, two of the EU's most powerful member states had been opposed to the European whistleblower protection directive when a draft was first introduced.

Germany's initial opposition was almost primordial, for it conjured up images of protecting Stasi and Nazi informers. Firsthand experience with totalitarian interpretations of what loyalty to the regime entailed obscured the potential contribution of whistleblowing to

democratic accountability, part of the reason why there were not whistleblower protection laws on the books in Germany under the Basic Law. In addition to the weight of the German past, Pam Bartlett Quintanilla, a Transparency and Democracy Campaigner for the Greens/EFA group in the European Parliament elucidated, there was a strong German tradition of loyalty to the employer. Germans were obsessed, she said, with what they called the escalation principle. They wanted whistleblowers to keep the complaint inside the organization and only go externally as a last resort. “Their reservations made no sense to most other countries,” said Bartlett.<sup>84</sup>

France’s concerns were different and remained remarkably consistent throughout the entire negotiation, according to multiple participants. On December 9, 2016, France had just passed its own whistleblower protection law, which was mainly applicable to private companies with at least fifty employees. It required firms to set up internal channels for reporting illegal or unethical conduct.<sup>85</sup> There was concern that a rival mandate from Brussels imposing a new conception of accountability could undermine or distort what had already been accomplished in France.

Yet just four years after the topic had been broached, both France and Germany were on board, and the EU directive became Union law. Two of the EU’s most powerful member states had serious concerns about multiple aspects of the proposal, yet at the last minute miraculously rallied behind concepts they had initially found to be problematic. How might we account for that? A coordinated and sustained civil society effort with strong leadership, a growing sense that corrupt transnational individuals and institutions were suppressing the people’s voice, and a series of strategic leaks of secret communications to journalists all played critical roles in Europe’s late-breaking change of heart.

A civil society coalition in support of Europe-wide whistleblower protection began working together in 2016 and drafted a proposal that showed there was a legal basis for such an initiative to be viable in the context of existing EU law. Thought was given to preempting legal arguments, which may be part of the reason why the original legislative proposal that the EU published on April 23, 2018 was both robust and ambitious. They easily could have gone for a more cosmetic win but instead aimed higher, which meant two things. First, there were all the more features that could make the entire initiative crash and burn, but second, there was also a strong baseline from which something significant might eventually be realized.

Having viable draft legislation already in hand when public sentiment changed helped the European Parliament envision the contours of success. “We drafted a model law that showed it was possible for the EU to protect whistleblowers and having that draft in hand made all the difference in changing attitudes from ‘it’s not possible,’ to ‘how can we make it work?’” noted Vigjilence Abazi, EU law professor at Maastricht University, who was one of the presenters of the first draft to the European Parliament in May 2016.<sup>86</sup> Eurocadres, the European trade union organization that represents six million European professionals and managers, launched Whistleblower Protection. EU, a coalition of 89 trade unions and non-governmental organizations who cooperated in advocating for the directive to protect whistleblowers. Eurocadres, the EU office of Transparency International, and WIN harmonized their networks and lobbying efforts to get disparate parties singing from the same score.<sup>87</sup> “It was only through sustained and coordinated efforts by diverse group of dedicated actors including civil society, trade unions, and journalists that the political tides turned in favor of stronger whistleblower protections,” wrote Nick Aiossa, head of advocacy – EU integrity, Transparency International EU office.<sup>88</sup>

The French welcomed the proposal as a response to the approach they had already undertaken in French law No. 2016/1691 of December 9, 2016, otherwise known as Sapin II. Their position throughout was to support anything that was consistent with Sapin II and to flag as problematic anything that introduced potential conflict with existing French law. A major point of controversy was the channels for reporting. The original directive supported flexible reporting, rather than requiring the whistleblower to report within the organization first. France supported the idea of a tripartite reporting structure, in which anyone witnessing wrongdoing should report it first internally, and only turn to law enforcement if that effort failed. Leaks to journalists were only to be used as a last resort. The French were firmly opposed to anything that undermined this hierarchy of obligation.<sup>89</sup> Their position dovetailed with that of the Germans.

The original proposal met with further opposition when it encountered the Council’s Legal Service. Council meetings take place behind closed doors, so it is impossible to ascertain a member state’s position unless they publish a position statement, which means the attitudes of members states are opaque unless they choose to disclose them. Alarm bells sounded when somebody leaked to the press the December 14, 2018 opinion of Council Legal Services, which revealed that the Council’s lawyers believed that the legal basis for the draft directive was

incorrect, and it should be broken up into five separate legal instruments. This was catastrophic for advocates of whistleblower protection, because not only did it propose to suck the vitality out of the originally robust and comprehensive draft legislation, it also introduced the possibility of divide and conquer blocking minorities on multiple fronts for the opponents of a pan-European approach to compliance and enforcement of EU law. Civil society organizations favoring the ambitious draft Directive were now faced with having to persuade a reluctant Council to ignore their own lawyers and endorse the original proposal with both its broad scope and its provisions for waiving the need to report internally first when circumstances demanded it.<sup>90</sup> A budding alliance of non-governmental organizations and politicians to combat corporate and government corruption had a serious obstacle in its path.<sup>91</sup>

The prospects for comprehensive EU-wide whistleblower protection becoming reality grew only all more daunting when a leaked German diplomatic cable dated February 20, 2019 revealed that France, Germany, Italy, Austria, and the Netherlands believed that the tripartite reporting path, which did not make reporting misconduct within the organization first mandatory, represented “a very red line.”<sup>92</sup> When it became public knowledge, however, insisting on internal reporting first became a political liability for politicians, especially Socialists and Greens, since whistleblowing and speaking truth to power are so critical for democratic voice. Advocates for the proposal, who saw the importance of flexible reporting in ensuring that all legitimate complaints are actually heard and acted upon, deployed that discomfort strategically to change hearts and minds.

The tactical leak of internal Council deliberations enabled Transparency International and other non-governmental organizations to put pressure on Germany and France to support the directive, as well as identifying other member states who needed to be won to the cause and persuaded that certain circumstances might require going outside the organization to address misconduct and the abuse of taxpayer trust. Media attention to the apparent hypocrisy in the public and private positions of countries on whistleblower rights helped the cause. German Justice Minister Katarina Barley, who was also the SPD’s lead candidate in the upcoming 2019 European elections, for example, was publicly accused of blocking better protection for whistleblowers.<sup>93</sup> Maintaining that position would have placed her in a difficult position with her European Parliament colleagues after the May elections, since the Directive was a Socialist and Greens (S & G) initiative. It also made Socialist MEPs and the civil society coalition advocating

for ambitious legislation natural allies with shared redlines. They could work together to persuade Ministers of Justice that they should be concerned about potential obstruction of justice, which is what mandatory internal reporting made more likely in some situations. Antoine Deltour's revelations, which exposed corporate tax evasion and government complicity on a massive scale, would have been unlikely to become public had he been required to report internally first.<sup>94</sup>

The parliament also solicited American whistleblower expertise in its deliberations. Government Accountability Project legal director Tom Devine referred to the EU directive before its passage as "a new paradigm for freedom of speech." If passed, he said, "Europe will surpass the United States free speech whistleblower rights."<sup>95</sup> American Attorney and Co-Chair of The National Whistleblower Center, Steve Kohn, was very concerned about the internal reporting requirements that were being backed by France and Germany, which were at odds with US precedent. "Every major U.S. anti-retaliation/whistleblower protection law," Kohn wrote in a February 7, 2019 letter to the European Parliament, "protects employees who report their concerns directly to the government. None require internal reporting in order to be protected. In fact, the opposite is the case." Requiring internal reporting, Kohn argued, was inconsistent with laws prohibiting obstruction of justice. Kohn warned that European whistleblowers would continue to use the US systems "if the EU Directive does not fully protect their rights."<sup>96</sup>

Permanent representative of Romania to the EU, Ambassador Luminita Odobescu, referenced the Cambridge Analytica and LuxLeaks scandals as demonstrating conclusively the importance of whistleblowers. "That is why we need to provide them with a high level of protection across the Union," said Odobescu. "We should not expect anyone to risk their reputation or job for exposing illegal behaviour."<sup>97</sup>

It came down to the wire, but in the last three days, France and Germany's positions flipped, and the European Parliament and EU Council produced a preliminary agreement directive that retained the comprehensive scope and allowed for flexible reporting, an enormous and unexpected last minute win for civil society and anti-corruption efforts.<sup>98</sup> The Commission, the Romanian Council presidency, and the skillful negotiating of the rapporteur played critical roles.<sup>99</sup>

At a more macro level, with the Brexit impasse as a backdrop and illiberal democracy on the rise, the optics of impeding or scuttling legislation aimed at upholding the rule of law in

Europe were significant. To renew Europe in a time of crisis, as President Macron had concurrently been urging his fellow Europeans to do, while thwarting an effort very much in line with that objective, became imprudent.<sup>100</sup> In the runup to the May 2019 European elections, no candidate for parliament wanted to be seen as supporting corruption and the suppression of information that the public has a right to know.

The preliminary agreement was approved by EU ministers on September 25, 2019, signed by the European Parliament on October 23, 2019 and published in the Official Journal on November 26, 2019.<sup>101</sup> The broad scope for which Council Legal Services had originally said there was no legal basis remained intact. While member states are obligated to have internal reporting channels, “the reporting person should be able to choose the most appropriate reporting channel depending on the individual circumstances of the case.”<sup>102</sup> Each country now has until December 17, 2021 to transpose the directive into national law.<sup>103</sup> Since the pandemic understandably produced a serious bandwidth problem, WIN launched a meter on June 22, 2020, to monitor transposition progress across Europe and keep the pressure on for completing the work of implementation.<sup>104</sup>

The new legislation protects whistleblowers who report breaches of Union Law, guarding them against dismissal, demotion, or other forms of retaliation. It also requires member states to train national officials in how to deal with whistleblowers properly as guardians of the public interest.<sup>105</sup> With a draft in hand as public support swung in their favor and critical support from American whistleblower protection organizations and lawyers, what had once seemed quixotic became reality. The Directive does not include worker rights, which became a major concern in the pandemic, when many companies receiving bailouts furloughed or fired employees.

The mobilization of civil society that led to the Directive’s passage had the fringe benefit of increasing public awareness of the critical role whistleblowers can play in renewing democracy. Whistleblower protection is akin to seat belts. When seat belts were first required, it seemed like an unnecessary precaution, but then as people grew accustomed to their routine use, we now cannot imagine auto safety without it.<sup>106</sup> We can hope that the same will one day be true for whistleblower protection, since whistleblower protection is to democratic sustainability what seat belts are to auto safety.

## Conclusion

There are interesting parallels between the origins of whistleblower protection in the U.S. and Europe. Both emerged out of concern with breaches of fidelity to the Union and the powerful pursuing their own interests at the expense of the public. As the case of Esek Hopkins illustrates, Congress blew the whistle on his loyalty to Rhode Island and the slave trade over the newly United States.<sup>107</sup> Whistleblower protection in Europe emerged to defend European values from self-interested acts of individual greed at odds with the public interest.

Making democracy work depends on a distinction between the public interest and elite self-interest. Whistleblowers fight corruption through truth-telling that supports the rule of law rather than criminal networks. Whistleblowing is thus not a mere weapon for advancing partisan or personal interests in a fake news world. It is not what denigrates others or vindicates our own political biases. The extreme left and right may view any revelation of secret information that serves their political ends as whistleblowing, but that is to render the term meaningless.

Another way of making the same point is to say that when the rule of law prevails, it is the judiciary that enforces contract. When trust is in short supply and the rule of law under challenge, organized crime can step in and enforce contract through coercion and fear. In other words, either the judicial system or the mob can order society. Whistleblower retaliation, said Head of Transparency International-Ireland John Devitt, is always executed through the Five Ds strategy: Downplay, deny, delay, distract, and discredit.<sup>108</sup>

Comparing the new EU law with the current status of whistleblower protection in the United States, three interesting patterns emerge. First, the scope of issue areas covered in a single European legislative instrument is comprehensive. The Directive covers public procurement; financial services, prevention of money laundering and terrorist financing; product safety; transport safety; protection of the environment; nuclear safety; food and feed safety, animal health and welfare; public health; consumer protection; and perhaps most interestingly, protection of privacy and personal data, and security of network and information systems.<sup>109</sup>

The EU Whistleblower Directive is the first ever EU law to provide protection to whistleblowers across the EU, covering 12 policy fields and encompassing both the public and private sectors.<sup>110</sup> In contrast, American whistleblower protection is a patchwork quilt of statutes that requires legal guidance to navigate. The same will be true for Europe after the transposition process is completed, but the comprehensive EU legislation provides an ideal to remind citizens of its democracy-enhancing purposes as it frames the differing instantiations in member states.

Second, the European Directive's flexible reporting channels and the possibility of sharing information with the press rather than internally when the circumstances require it does not rise to the protection levels of the First Amendment, but does push Europe more in that general direction. In the past, the American First Amendment has indirectly protected European media. For example, the *Guardian* was able to publish reporting on the pilfered Wikileaks war documents from Iraq and Afghanistan on-line via its New York Office that it was unable to publish in its print edition, which was governed by Britain's Official Secrets Act. European law also now requires all organizations with more than 50 employees to establish channels for internal reporting and protections for whistleblowers, whereas American organizations face no similar singular mandate, so that also draws closer the European and American approaches.<sup>111</sup>

Third, the EU directive covers a wide range of workers, from the self-employed to corporate and government employees to contractors, providing a powerful symbolic statement on the ways in which whistleblower protection amplifies the voice of the people. It also protects Europeans from corporate encroachments on their privacy, legislation long overdue in the United States. "Groups like GAP played a unique role in pointing out all the painful lessons learned from loopholes and weak links in U.S. law," Tom Devine told me. "The result is that the EU's Directive has more teeth than America's whistleblower laws. For example, it protects against criminal and civil liability, while U.S. rights are limited to workplace harassment."<sup>112</sup> And finally, as the Greens have pointed out in the European Parliament, it upholds a general European public interest that transcends the national interests of any particular member state.<sup>113</sup> In contrast, the American system of protection is segmented into separate legal constellations for corporate cases and for government, and the 1989 Whistleblower Protection Act did not provide full coverage for government contractors. Both European and American law do not provide protection to intelligence community whistleblowers.<sup>114</sup>

In April 2020, the French House of Whistleblowers released an open letter, signed by an international coalition of over 100 other civil society organizations to urge governments to protect whistleblower rights during the pandemic crisis as a contribution to public health and safety.<sup>115</sup> Many of the same organizations that lobbied for the EU Directive have today joined The Good Lobby, “a coalition to make whistleblowing safe during Covid-19 and beyond.”<sup>116</sup>

In the end, a sustained investigation of whistleblowing theory and practice in the United States and Europe reveals the extent to which the world’s liberal democracies will either stand or fall together. Since both corporations and corruption networks operate transnationally, the challenge transcends any one country and requires cooperation with others committed to the rule of law. Whistleblower protection is a powerful cause for mobilizing the demos against elite exploitation of public office for private gain and gated community approaches to pandemic response that put people of color at greatest risk. Since whistleblowers are the lifeblood of free societies, Europe and the United States here share a common cause, despite the current White House’s insistence to the contrary.

Perhaps unsurprisingly, there is a connection between Russian foreign electoral interference and the Trump campaign that runs through Malta and originates with a Maltese professor by the name of Joseph Mifsud, who brought the existence of the hijacked Clinton emails to the attention of the Trump campaign. The linkage helps illuminate the sources of President Trump’s animosity toward the US Attorney from the Southern District of New York, who was reported to be investigating Trump’s finances, and to his own State Department, who oversees USAID, a co-founder of the Daphne Project, which is committed to fighting the Maltese hub in the web of dark money. The State Department and USAID have long-established programs to battle international corruption that the Trump White House sought to undo, the case of Ukraine at the center of the Intelligence Community whistleblower complaint being exhibit A.

In early October 2019, U.S. Attorney General Bill Barr traveled to Italy to listen to tapes of Mifsud’s fears.<sup>117</sup> Mifsud has vanished from public view. Corruption thrives without limits in a world where the powerful are above the law, and global battle lines have been drawn between the rule of law and crony capitalism. When powerful and self-interested elites seek to abandon the most vulnerable in their moment of greatest need, whistleblowers remind us that self-government and democracy can function only when the voice of the people can be heard. “The people must know,” wrote Ida B. Wells, “before they can act.”<sup>118</sup>



## Notes

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<sup>1</sup> <https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/truth-distancing-whistleblowing-as-remedy-to-censorship-during-covid19/65BBF491CF53D1C6130D65CBC941CDCB/core-reader>

<sup>2</sup> <https://europeanjournalists.org/blog/2020/03/23/covid-19-journalists-threatened-with-imprisonment-in-hungary/>

<sup>3</sup> Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Crown, 2018), 24-25.

<sup>4</sup> Levitsky and Ziblatt, 78.

<sup>5</sup> Levitsky and Ziblatt, 178.

<sup>6</sup> Henry David Thoreau, “Civil Disobedience” (1849).

<https://www.walden.org/web/viewer.html?file=https://www.walden.org/wp-content/uploads/2016/03/CivilDisobedience.pdf>

<sup>7</sup> Hannah Arendt, “On Civil Disobedience,” *Crises of the Republic* (New York: Harcourt Brace, 1970), 74.

<sup>8</sup> John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 2005), 364.

<sup>9</sup> *Ibid.*, 96.

<sup>10</sup> *Ibid.*, 76.

<sup>11</sup> Stephen M. Kohn, “The Whistle-Blowers of 1777,” *New York Times*, June 12, 2011.

<sup>12</sup> [https://www.brown.edu/Facilities/John\\_Carter\\_Brown\\_Library/exhibitions/jcbexhibit/Pages/exhibSlavery.html](https://www.brown.edu/Facilities/John_Carter_Brown_Library/exhibitions/jcbexhibit/Pages/exhibSlavery.html)

<sup>13</sup> “A Multinational Enterprise,” Exhibit at the National Museum of African American History and Culture, Washington, DC.

<sup>14</sup> <http://time.com/4782885/rhode-island-antislavery/>

<sup>15</sup> “A Multinational Enterprise,” *op. cit.*

<sup>16</sup> “Enslaving an African,” Exhibit at the National Museum of African American History and Culture, Washington, DC.

<sup>17</sup> James Madison, Debates in the Federal Convention of 1787, Wednesday, July 18, in “The Constitutional Convention,” Gordon Lloyd, TeachingAmericanHistory.org, <http://teachingamericanhistory.org/convention/debates/0718-2/>.

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<sup>18</sup> James Madison, Debates in the Federal Convention of 1787, Thursday, August 30, in “The Constitutional Convention,” Gordon Lloyd, TeachingAmericanHistory.org, <http://teachingamericanhistory.org/convention/debates/0830-2/>.

<sup>19</sup> George Washington, letter to Gouverneur Morris, 13 October 1798, *Founders Online*, National Archives, [Original source: ed. Dorothy Twohig, ed, *The Papers of George Washington*, Presidential Series, vol. 4, 8 September 1789–15 January 1790, Charlottesville: University Press of Virginia, 1993, 176–179.] <http://founders.archives.gov/documents/Washington/05-04-02-0125>.

<sup>20</sup> Esek Hopkins and Alverda S. Beck, ed., *The Letter Book of Esek Hopkins* (Providence: Rhode Island Historical Society, 1932), 7-9.

<sup>21</sup> James Madison, *The Papers of James Madison*, (June 20, 1788): 3, 136-137.

<sup>22</sup> William M. Fowler, Jr., *Rebels Under Sail: The American Navy during the Revolution* (New York: Charles Scribner’s Sons, 1976), 54-58; 108.

<sup>23</sup> *Ibid.*, 65.

<sup>24</sup> Esek Hopkins and Alverda S. Beck, ed., *The Correspondence of Esek Hopkins: Commander-in-Chief of the United States Navy* (Providence: Rhode Island Historical Society, 1933), 12-13.

<sup>25</sup> William M. Fowler, Jr., *Rebels Under Sail: The American Navy during the Revolution* (New York: Charles Scribner’s Sons, 1976), 72-73; 96. For the letter issuing Hopkins’ orders both general and specific, see Hopkins and Beck, *Letter Book*, 1932, 15-17.

<sup>26</sup> Explanatory notes on Thomas Jefferson, “Outline of Argument Concerning Insubordination of Esek Hopkins,” 12 August 1776, *Founders Online*, National Archives. [Original source: Julian P. Boyd, ed., *The Papers of Thomas Jefferson*, vol. 15, 27 March 1789–30 November 1789, Princeton: Princeton University Press, 1958, 578–582.] <http://founders.archives.gov/documents/Jefferson/01-15-02-0547>.

<sup>27</sup> Hopkins and Beck, *Letter Book*, 1932, 20-21; Fowler, 98-99.

<sup>28</sup> Explanatory notes on Thomas Jefferson, “Outline of Argument,” 12 August 1776, *Founders Online*, National Archives. [Original source: Julian P. Boyd, ed., *The Papers of Thomas Jefferson*, vol. 15, 1958, 578–582.] <http://founders.archives.gov/documents/Jefferson/01-15-02-0547>.

<sup>29</sup> Hopkins and Beck, *Letter Book*, 1932, 22-25.

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<sup>30</sup> Explanatory notes on Thomas Jefferson, “Outline of Argument,” 12 August 1776, *Founders Online*, National Archives. [Original source: Julian P. Boyd, ed., *The Papers of Thomas Jefferson*, vol. 15, 1958, 578–582.] <http://founders.archives.gov/documents/Jefferson/01-15-02-0547>.

<sup>31</sup> John Adams autobiography in *The Works of John Adams* (Boston: Charles C. Little and James Brown, 1851), vol. 3, 65.

<sup>32</sup> Thomas Jefferson, “Outline of Argument,” 12 August 1776, *Founders Online*, National Archives. [Original source: Julian P. Boyd, ed., *The Papers of Thomas Jefferson*, vol. 15, 1958, 578–582.] <http://founders.archives.gov/documents/Jefferson/01-15-02-0547>.

<sup>33</sup> John Adams autobiography in *The Works of John Adams* (Boston: Charles C. Little and James Brown, 1851), vol. 3, 67.

<sup>34</sup> Hopkins and Beck, *Correspondence*, 1933, 59-60, notes 27, 28, and 30.

<sup>35</sup> John G. Coyle, ed., Edward C. McGuire, ed., Vincent F. O’Reilly, ed., *The Journal of the American-Irish Historical Society*, vol. 21, (New York: The American-Irish Historical Society, 1992), Google Books, 213, <https://books.google.com/books?id=TzFEAQAAMAAJ&pg=PA227&dq=richard+marven&hl=en&sa=X&ved=0ahUKEwjzxfTK8onNAhVWc1IKHW2vB08Q6AEIKDAC#v=onepage&q=richard%20marven&f=false>

<sup>36</sup> Hopkins and Beck, *Letter Book*, 1932, 30.

<sup>37</sup> Hopkins and Beck, *Letter Book*, 1932, 32.

<sup>38</sup> John G. Coyle, ed., Edward C. McGuire, ed., Vincent F. O’Reilly, ed., *The Journal*, Google Books, 222.

<sup>39</sup> Lincoln Lorenz, *John Paul Jones: Fighter for Freedom and Glory* (Annapolis: United States Naval Institute, 1943), 106-107.

<sup>40</sup> Leonard Jarvis, letter to Captain John Paul Jones, 21 May 1777, in Michael J. Crawford, ed., *Naval Documents of the American Revolution*, vol. 8 (1777), (Washington: Naval History Division, 1980), 1009-1010.

<sup>41</sup> John G. Coyle, ed., Edward C. McGuire, ed., Vincent F. O’Reilly, ed., *The Journal*, Google Books, 219.

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- <sup>42</sup> Robert J. Taylor, ed., *The Adams Papers*, vol. 5 (August 1776-March 1778), (Cambridge: Belknap Press, 1983), 113-114, footnote 3.
- <sup>43</sup> John G. Coyle, ed., Edward C. McGuire, ed., Vincent F. O'Reilly, ed., *The Journal*, Google Books, 226-228.
- <sup>44</sup> *Ibid.*, 229-232.
- <sup>45</sup> *Journals of the Continental Congress, 1774-1789*, ed. Worthington C. Ford et al., 7:204.
- <sup>46</sup> Robert J. Taylor, ed., *The Adams Papers*, vol. 5, 196-198.
- <sup>47</sup> William B. Wilcox, ed., *The Papers of Benjamin Franklin*, vol. 25 (October 1, 1777-February 28, 1778), (New Haven: Yale University Press), 247-248; Michael J. Crawford, ed., *Naval Documents of the American Revolution*, vol. 10 (1777), (Washington: Naval Historical Center, 1996), 1068.
- <sup>48</sup> Esek Hopkins, Alverda S. Beck, ed., *The Correspondence of Esek Hopkins: Commander-in-Chief of the United States Navy* (Providence: Rhode Island Historical Society, 1933), 24.
- <sup>49</sup> Hopkins and Beck, *Correspondence*, 1933, 77-82.
- <sup>50</sup> *Ibid.*, 77-80.
- <sup>51</sup> Hopkins and Beck, *Letter Book*, 1932, 34.
- <sup>52</sup> *Journals of the Continental Congress, 1774-1789*, ed. Worthington C. Ford et al., 10:13.
- <sup>53</sup> *Journals of the Continental Congress, 1774-1789*, ed. Worthington C. Ford et al. (Washington, D.C., 1904-37), 11:732.
- <sup>54</sup> *Ibid.*, 14:627.
- <sup>55</sup> "1600-1799," United States Department of the Treasury, last modified November 13, 2010, <http://www.treasury.gov/about/history/Pages/1600-1799.aspx>.
- <sup>56</sup> <https://www.consilium.europa.eu/en/press/press-releases/2019/10/07/better-protection-of-whistle-blowers-new-eu-wide-rules-to-kick-in-in-2021/?fbclid=IwAR09ioJWupnJDnKnT6x7q5-TPyYQfZcp0NQxibU507oqop7IBm6txuezqGY>
- <sup>57</sup> <https://whistleblowingnetwork.org/Home>
- <sup>58</sup> Author interview with Anna Myers, September 10, 2019.
- <sup>59</sup> Author interview with Nicole Marie Meyer, September 9, 2019.
- <sup>60</sup> Francis Chateauraynaud, Antoine Deltour, and Flore Vasseur, "L'alerte, un enjeu démocratique?" *Esprit*, April 2019, no. 453, p. 58.

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<sup>61</sup> Dragana Matović, Whistleblowing International Network Conference, Glasgow, September 10, 2019.

<sup>62</sup> Author interview with Karel Janeček, July 8, 2014.

<sup>63</sup> Email correspondence with Anna Myers, October 11, 2019.

<sup>64</sup> ([https://www.transparency.org/whatwedo/publication/whistleblowing\\_in\\_europe\\_legal\\_protection\\_for\\_whistleblowers\\_in\\_the\\_eu](https://www.transparency.org/whatwedo/publication/whistleblowing_in_europe_legal_protection_for_whistleblowers_in_the_eu) See pp. 20-2.

<sup>65</sup> [https://www.opensocietyfoundations.org/voices/how-civil-society-came-together-protect-eu-whistleblowers?utm\\_source=news&utm\\_medium=email&utm\\_campaign=news\\_042019&utm\\_content=2LAPSBsTfZP6wtEjY0GgSH4cTjFIEO3zpEeTW0wXAvC](https://www.opensocietyfoundations.org/voices/how-civil-society-came-together-protect-eu-whistleblowers?utm_source=news&utm_medium=email&utm_campaign=news_042019&utm_content=2LAPSBsTfZP6wtEjY0GgSH4cTjFIEO3zpEeTW0wXAvC)

<sup>66</sup> Francis Chateauraynaud, Antoine Deltour, and Flore Vasseur, “L’alerte, un enjeu démocratique?” *Esprit*, April 2019, no. 453, p. 68.

<sup>67</sup> Whistleblowing International Network Conference, Glasgow, September 11, 2019.

<sup>68</sup> Author interview, Whistleblowing International Network Conference, Glasgow, September 11, 2019.

<sup>69</sup> <https://www.icij.org/investigations/panama-papers/>

<sup>70</sup> [http://transparency.eu/wp-content/uploads/2018/10/REPORT-European-Getaway-Inside-the-Murky-World-of-Golden-Visas\\_web.pdf](http://transparency.eu/wp-content/uploads/2018/10/REPORT-European-Getaway-Inside-the-Murky-World-of-Golden-Visas_web.pdf). Austria, Bulgaria and Cyprus are the other EU member states who also directly sell citizenship. Twelve EU member states (including Bulgaria, Cyprus, and Malta) also have golden visa schemes, where residency can be swapped for investment in the country, which can lead to citizenship. The United States also sells permanent residency.

<sup>71</sup> <https://www.nytimes.com/2015/05/01/business/dealbook/malta-offers-citizenship-and-all-its-perks-for-a-price.html?searchResultPosition=2>; <https://www.thedailybeast.com/murdered-journalist-daphne-caruana-galizia-and-maltas-passport-racket>

<sup>72</sup> <https://daphnecaruanagalizia.com/2017/10/crook-schembri-court-today-pleading-not-crook/>

<sup>73</sup> <https://www.occrp.org/en/thedaphneproject/>

<sup>74</sup> <https://theshiftnews.com/2020/05/25/us-congressman-uses-meeting-with-muscat-as-alibi-in-cnn-case/>

<sup>75</sup> <http://www.assembly.coe.int/LifeRay/JUR/Pdf/TextesProvisoires/2019/20190529-CaruanaGaliziaAssassination-EN.pdf>

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<sup>76</sup> Author interview, Corrine Caruana (Daphne Caruana Galizia’s sister), Workshop on “Empowering Public Voices,” Brussels, September 20, 2019.

<sup>77</sup> [https://www.theatlantic.com/international/archive/2019/12/daphne-caruana-galizia-malta/602923/?utm\\_source=facebook&utm\\_medium=social&utm\\_campaign=share&fbclid=IwAR0i\\_ICsc0pHJ4nLyOgAyMxv\\_i5qycvjqZwB9E2hy457SdfA9nc9cCUyZ8Q](https://www.theatlantic.com/international/archive/2019/12/daphne-caruana-galizia-malta/602923/?utm_source=facebook&utm_medium=social&utm_campaign=share&fbclid=IwAR0i_ICsc0pHJ4nLyOgAyMxv_i5qycvjqZwB9E2hy457SdfA9nc9cCUyZ8Q)

<sup>78</sup> <https://www.theguardian.com/world/2019/dec/18/eu-parliament-calls-on-malta-pm-joseph-muscat-to-resign-over-daphne-caruana-galizias-case>

<sup>79</sup> [https://fibgar.org/upload/noticias/593/Comunicado\\_English.pdf](https://fibgar.org/upload/noticias/593/Comunicado_English.pdf)

<sup>80</sup> <https://theshiftnews.com/2020/05/23/joseph-muscat-joins-think-tank-funded-by-azerbaijani-government/>; <https://youtu.be/eowlH2zn-FQ> .

<sup>81</sup> <https://timesofmalta.com/articles/view/opm-blocks-information-on-muscat-severance-package.774707>

<sup>82</sup> <https://www.nytimes.com/2019/03/14/world/europe/slovakia-jan-kuciak-kocner.html>

<sup>83</sup> <https://www.nytimes.com/2020/02/28/world/europe/jan-kuciak-marian-kocner-trial.html>

<sup>84</sup> “Workshop: Empowering Public Voices,” Maastricht University (Brussels Campus), September 20, 2019.

<sup>85</sup> <https://www.hec.edu/en/knowledge/articles/protection-whistleblowers-what-does-law-say-france-and-us>

<sup>86</sup> Email correspondence with Vigilencia Abazi, October 8, 2019.

<sup>87</sup> WIN EU Whistleblowing Meter Press Release, June 22, 2020.

<sup>88</sup> Email correspondence with Nick Aiossa, October 11, 2019.

<sup>89</sup> Note from the legal affairs commission, 7/18/18 (Roziere). Document in author’s possession.

<sup>90</sup> Leaked opinion of the Council legal service 12/14/18. Document in author’s possession.

<sup>91</sup> Emails from civil society organizations to EC reps re Council legal opinion, January 2019. Documents in author’s possession.

<sup>92</sup> “FRA, DEU, ITA, AUT, NLD erklärten, dass der dreigliedrige Berichtsweg und die Vorgaben für geringfügige Fälle eine sehr rote Linie darstellen, Zum Anwendungsbereich stellten sich eher juristische Fragen.” (FRA, DEU, ITA, AUT, NLD stated that the tripartite reporting path and the requirements for minor cases represent a very red line. The area of application raised more of a legal question.) German diplomatic cable in author’s possession, February 20, 2019.

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- <sup>93</sup> <https://rp-epaper.s4p-iapps.com/artikel/847253/10825807>
- <sup>94</sup> WIN letter to Dutch Minister of Justice, March 7, 2019. Document in author's possession.
- <sup>95</sup> <https://www.whistleblowersblog.org/2019/01/articles/whistleblower-news/strengthen-eu-whistleblower-laws/>
- <sup>96</sup> <https://www.whistleblowers.org/wp-content/uploads/2019/02/EU-WB-Directive-Letter-2.7.19.pdf>
- <sup>97</sup> [https://www.consilium.europa.eu/en/press/press-releases/2019/01/25/better-protection-of-whistleblowers-council-adopts-its-position/?utm\\_source=dsms-auto&utm\\_medium=email&utm\\_campaign=Better+protection+of+whistleblowers:+Council+adopts+its+position](https://www.consilium.europa.eu/en/press/press-releases/2019/01/25/better-protection-of-whistleblowers-council-adopts-its-position/?utm_source=dsms-auto&utm_medium=email&utm_campaign=Better+protection+of+whistleblowers:+Council+adopts+its+position)
- <sup>98</sup> Virginie Roziere (S&G), Committee on Legal Affairs rapporteur, speaking in Glasgow, September 12, 2019.
- <sup>99</sup> <https://transparency.eu/project/whistleblowing/>
- <sup>100</sup> <https://www.elysee.fr/emmanuel-macron/2019/03/04/for-european-renewal.en>
- <sup>101</sup> <https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-whistle-blower-protection-proposal> The intermittent May 2019 elections made April and October parliamentary approval necessary.
- <sup>102</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937&rid=4>
- <sup>103</sup> <https://www.loc.gov/law/foreign-news/article/european-union-new-directive-on-whistleblower-protection-enters-into-force/>.
- <sup>104</sup> <http://euwhistleblowingmeter.polimeter.org/>
- <sup>105</sup> <https://www.bbc.com/news/world-europe-47936682>
- <sup>106</sup> <https://www.opensocietyfoundations.org/sites/default/files/20181120-whistleblowers-for-change-report.pdf>, p. 1.
- <sup>107</sup> <https://www.theatlantic.com/ideas/archive/2019/09/what-first-whistle-blowers-taught-america/598738/>
- <sup>108</sup> Whistleblowing International Network Conference, Glasgow, September 10, 2019.
- <sup>109</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0218>
- <sup>110</sup> Vigjilencja Abazi, "The European Union Whistleblower Directive: A 'Game Changer' for Whistleblowing Protection?" *Industrial Law Journal*, forthcoming in 2020.

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<sup>111</sup> <https://www.bakermckenzie.com/en/insight/publications/2020/01/the-new-eu-whistleblowing-directive>

<sup>112</sup> Email correspondence with Tom Devine, October 10, 2019.

<sup>113</sup> <https://whistleblowerprotection.eu/blog/why-cross-border-coherence-matters/>

<sup>114</sup> <https://whistleblower.org/blog/assessment-of-european-union-whistleblower-directive/>

<sup>115</sup> <https://mlalerte.org/une-coalition-pour-protger-les-lanceurs-dalerte-en-temps-de-pandemie/>

<sup>116</sup> <https://thegoodlobby.eu/2020/04/06/coalition-to-make-whistleblowing-safe-during-covid-19-and-beyond/>

<sup>117</sup> <https://www.nytimes.com/2019/10/06/us/politics/italy-russia-mifsud-trump.html>

<sup>118</sup> <https://www.gutenberg.org/files/14975/14975-h/14975-h.htm>