

## BOOK REVIEW

**Whistle-Blowing! Loyalty and Dissent in the Corporation.** ALAN F. WESTIN. McGraw Hill Co., New York, 1981. Pp. vii, 181.

Thoughtful and attentive Americans have by now become accustomed to reading about skullduggery, crimes, conspiracies, negligence, waste, corruption, bribery, subornation, drug abuse, the inhuman uses of human subjects, and falsified scientific data, as well as about a variety of acts, decisions, initiatives, formulas and practices in high places that are, otherwise, either problematic or offensive to "community standards" of decency and civility. We encounter these scandals in print and through the electronic media with disturbing regularity.

Most of these tales—like those about rigged bids in the heavy electrical equipment industry, uncovered in the 1960's by TVA's then-director, General Vogel, after he was smarted by criticisms from the country's industry leaders for purchasing equipment from an English company—are told by "outsiders": FTC attorneys, wage and hour investigators, congressional committee staffers, Securities and Exchange enforcement officers, Internal Revenue agents, Justice or Treasury Department personnel and, most recently, by a new breed of "investigative reporters."

There is nothing essentially new in this type of report, either in legal or procedural terms. Journalists and regulatory personnel, after all, have professional obligations which virtually compel a reasonable effort to protect the public's interest in law, order, integrity, and decency, and thus to ferret out information. Nor are reports of the consequent efforts of parties aggrieved by such persons to intimidate witnesses and researchers at all novel. In this respect, Ralph Nader's successful suit against General Motors' harassment tactics is more than just noteworthy.

Considerably more novel, given the long-established rights of employers to "fire at will" all but the minority of Americans whose job claims are buttressed by provisions in collectively bargained agreements and contracts, are public reports by *employees* of the questionable ways and doubtfully acceptable behavior of their employers in the mills, shops, labs, forges, and offices in which they work. Thus, a well informed civilian Pentagon official defrocked the "high priests of waste" in the Department of Defense quite without the help of "deep throats" outside that organization.<sup>1</sup> President Carter's holdover Am-

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<sup>1</sup> A. FITZGERALD, *THE HIGH PRIESTS OF WASTE* (1972).

bassador to El Salvador did not need a *Ramparts* reporter to inform him of the hazards of projected policies toward the governing junta that have been regularly articulated since the 1980 election by Mr. Reagan's Secretary of State. Also, a small handful of dissenting CIA personnel did not require the assistance of *The New York Times* to discover and disclose information about a number of highly questionable undertakings, in the U.S. and elsewhere, even referred to by a former CIA director in private discussions with *Times* management as "The Company's family jewels."<sup>2</sup> In each of these instances of "whistleblowing," the publicist-accusers, to whom the majority of citizens (and more responsible leaders) quite clearly owe large debts, have lost their jobs or suffered reassignments to lesser positions.

Alert to the manifold issues having to do with the competing and otherwise complex rights, privileges, claims, immunities, and obligations, variously, of citizens, co-workers, managers, owners, consumers, competitors, and regulators, Alan F. Westin has afforded us usefully detailed descriptions of the experiences of ten Americans who "went public" with their misgivings or formal accusations against employers after having carefully exhausted intra-organizational remedies or mechanisms which might have been productive of changes in one or another procedure, policy, technique, or work process.

Westin has a fine reputation, going back to his civil rights activities in Florida in the late 1940's(!), for both acting upon and studying questions pertaining to the claims of individuals to their rights to privacy, to uses of public accommodations, to the franchise, and to due process. This reputation is deservedly enhanced by his newest excursion into terrain occupied by those who see only dangers to the republic if the endowments in the Bill of Rights cannot be literally locked out of public and private organizations. In this excursion, Westin offers us another measure of the depth of his concerns about individual rights: Westin reverses field by moving from a concern with preservation of individual privacy to a concern with the legitimacy of the breadth of the protective cover accorded *corporate* claims to privacy. Corporations emerge from Westin's explorations as one-sided spokesmen for privacy, favoring their own claims to protection while deploring those of employees and acting against them to the point of cruelty.

It needs to be said at the outset that the grievants' stories, in the book here under review, and the logic of their employers for rejecting their accusations and for harassing, threatening, abusing, demoting,

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<sup>2</sup> H. SALISBURY, WITHOUT FEAR OR FAVOR: AN UNCOMPROMISING LOOK AT *The New York Times* (1980).

"freezing-out," maligning, and firing them, are presented by the accusers themselves, by their friends, by their advisors, or by the sympathetic editors of the book. The stories of corporate executives and their attorneys are thus by no means fully reported in the book. Neither are the sides of union leaders explored who, in two cases, appear to have compromised their representational roles on behalf of victimized whistleblowers.

In some cases, moreover, the accusations seem a mite less meritorious now than they did to some of the whistleblowers at the time they tried to stop the company's actions. Thus, a woman doctor was manhandled, so to speak, for trying to dissuade a pharmaceutical company from using a saccharin solution to package a bitter-tasting concoction useful in the treatment of diarrhea. Dr. Pierce was cognizant of the fact that, as a physician, she was obliged to attend to professional medical-ethical constraints even though she was also obliged, as an employee, to march to the beat of commercial drummers. It was her point that a less potentially hazardous sweetener would be available for the medication in question not more than three months after the saccharin solution would be in practitioners' hands. As the editor of Dr. Pierce's sad tale correctly points out, the question of saccharin's side effects had not yet been settled in 1981. Since the last presidential election day, the term "benefit/cost analysis" has been elevated to the position of a national policy watchword; there will inevitably be readers of Dr. Pierce's story who will think of "tradeoffs" between six potential years of "foregone opportunities" for a business firm, on one side, and the potentially unharmed consumers of saccharin-coated pills on the other. The fact that Dr. Pierce had earlier resigned from the Food and Drug Administration when her whistle failed, for a year, to blow an end to the games being played about the side-effects of contraceptive pills, will lead many of the same readers to speculate about the balances of sound judgment, professional pique, supercautiousness, and downright crankiness in Dr. Pierce's approach to complex scientific, legal, ethical, and professional questions. Surely, some readers will be understandably skeptical of one or more of these tales of employer abuse on the ground that they are one-sided presentations.

Most readers, however, will be struck, very directly and forcefully, by the highly patterned quality of manager responses to employee observations and warnings about the unseemliness, danger, or legality of a given practice, action, or decision. These responses take the following form: (1) first, interested and polite attention to employee warnings, then (2) ritual review, followed by (3) benign neglect, by (4) polite admonition, by (5) warnings, by (6) insinuations

about the whistleblower's mental health, by (7) gratuitous employee performance reviews, by (8) demotions, "freeze outs," and, in a few cases, by (9) suspensions and terminations. In one case, not reviewed in the Westin volume, a whistleblower may have been murdered for her sins!<sup>3</sup>

Managers thus are tempted to respond to what are initially helpful efforts by a concerned employee in accord with a "scenario." It is simply not possible to believe that Westin's whistleblowers have compared notes and, thereafter, prepared parallel "tattletales" on their employers. In most of the cases, moreover, there are statements and observations by one or more corroborating witnesses from among co-workers who confirm a given whistleblower's basic statement. It is sad to note that in only a few cases do these corroborators actually join with the principals in living out the consequences of their shared misgivings about the matters in dispute.

The cases explored involve: (1) a serious design problem in an Eastern Airlines airplane, specifically the Lockheed L-1011 auto pilot system, which contributed materially to a steep dive and a crash in which 103 people died, though two responsible pilots discovered the problem during simulated flights *prior* to the system's commercial use; (2) engineering deficiencies in nuclear power systems discovered and reported by a systems application engineer at the Nuclear Services Corporation more than five years before the "meltdown" at Three Mile Island; (3) an apparently blatant case of sex discrimination against a woman in the *Wall Street Journal's* advertising department; (4) an almost stereotyped instance of sexual harassment of a private secretary by her supervisor at the New Jersey Public Service Electric and Gas Co.; (5) the discovery by an internal auditor who, like the physician at Ortho Pharmaceutical Co., has ethical obligations under the accounting profession's code, of billing errors by the Michigan Consolidated Gas Co. favoring welfare recipients in the amount of between \$2.6 million (in 1974) and \$12.3 million (in 1978); (6) a United Parcel Service truck driver who was obliged to certify as safe and to drive trucks with oil-soaked brake linings, broken brake drums, worn tires, broken wheel seals, and malfunctioning headlights; (7) an engineer of the infamous Ford Pinto gasoline tank; (8) an "in-house counsel" and the notorious case of the Associated Milk Producers' illegal campaign contributions; (9) two skilled heavy construction equipment operators and a manifestly unsafe electric supply wiring system, at a work site, during construction of the Metro transit system

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<sup>3</sup> R. RASHKE, *THE KILLING OF KAREN SILKWOOD* (1981).

in the nation's capital; and (10) Dr. Pierce in the matter of a drug sweetener at the Ortho Pharmaceutical Co.

Readers will find Professor Westin's introductory and concluding chapters—the former, a brief historical review of employees' rights and the latter a discussion of a list of steps which might assure more Americans, as employees, of something like due process—to be measured and to be respectful of the need for privacy of managers and their organizations. His treatment of managers' need for authority, as owners or the owners' representatives in a society ruled by laws, is also thoughtful; Westin's analysis is not "anti-corporation." Thus, while those with legal training may disagree with a point here or a nuance there, Westin affords all his readers abundant room for cavils; but the margins for dissent are not wide. While many social scientists would hope for more detailed studies—"a 'for instance' is," notoriously, "not proof," as every junior highschooler knows—most will recognize that Westin's unpretentious, cogent, and well-executed essays and the cases adumbrated by principals or by editorial helpers, point to an extraordinarily significant cluster of issues in a society in which ever-larger numbers of citizens are employed in large corporations.

Westin, once again, has served the Bill of Rights well. He has managed to generate respect (not pity, with its undertones of contempt) for his subjects and has served both students of the law and of the social sciences by joining issues of truly joint interest. He has done so "without prejudice," as lawyers like to say, to the apparently obtuse, myopic, socially insensitive, interpersonally cloddish, and even totalitarian managers who were offended by his subjects' urgings and cautions.

A few of us in the social sciences are grateful, too, to Westin for presenting materials bearing, very significantly, on issues that go *beyond* those about individual rights; these issues would remain even if whistleblowers came to enjoy the protective measures Westin advocates in his perceptive closing essay. Consider that the problems attaching to the powers of large organizations would by no means be adequately confronted by simply extending the rights of a handful of intra-organizational critics. I would suggest that there is simply no reason to be confident that legally assured protections of the individual freedoms against corporate abridgements, by the ways and means urged by Westin, would actually encourage or inspire larger numbers of intra-organizational observers to report on the sometimes nefarious ways and means of their managers. We have lately become an increasingly passive, even apathetic, nation of voters, reluctant civil libertarians, and reluctant witnesses to crimes; we have abundant evidence of the self-censorship practices even of academicians, possessors of well-

developed claims to "academic freedom," during the McCarthy years; and we are currently threatened, in our schools, libraries and communities by self-styled, know-nothing religious fundamentalists. To protect individual freedoms is not to assure their practice by free men and women. This is an issue which goes beyond those joined by Westin, but which is closely related to Westin's immediate concerns.

Perhaps because I encountered Westin's new work during a summer period in which I read Harrison Salisbury's reconstruction of *The New York Times'* efforts to get to the bottom of a series of CIA actions, and heard news reports about proposed changes in corporate disclosure requirements and in restrictions on CIA activities, I come away from *Whistle-Blowing* with far less optimism about corporate power than is implied by the tone of Westin's proposals for change. Indeed, I come away from Westin's cases and from other current reading with a sharp sense of the insistent growing demands of large organizations and their protagonists for the protection of their ways against disclosure! Corporate preoccupations with secrecy are thus very evidently heightening in our organizations, public *and* private, at the very moment of Westin's lonely cry for more disclosure, or at least for the possibility of more candor about corporate activities. The heads of the Federal Trade Commission and the Securities Exchange Commission have both made strong statements against a number of corporate disclosure requirements and in favor of the curtailment of their agencies' regulatory concerns with disclosure.<sup>4</sup> One might add that these renewed preoccupations have increased even as the number of law and business school graduates—the former with training in constitutional law and the latter with exposure to courses in "business ethics" and "business and society"—have skyrocketed.

Corporate preoccupations with secrecy have also expanded as business school professors and consultants, in loud choruses, have been urging corporate clients to "reform" their personnel relations, taking particular care to stress the need for the widergoing participation of employees in decisionmaking. Westin, agreeing with the above, sees this "work reform movement," with its major theme of "worker participation," as an important prong in a multi-pronged attack which he urges should be mounted against secretive corporate miscreants who abuse their employees. I must confess that, had I read Westin's respondents' stories about their employers and the other thrusts against

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<sup>4</sup> See N.Y. Times, July 14, 1981, at D-6 (interview with John S.R. Shad); *id.*, Aug. 3, 1981, at D-1 (interview with John S.R. Shad); *id.*, Oct. 26, 1981, at D-1 (interview with John S.R. Shad); *id.*, Oct. 27, 1981, at A-18 (interview with William F. Baxter); Wall St. J., Oct. 27, 1981, at 6 (interview with William F. Baxter).

disclosure noted in previous paragraphs, I would have been able to make a *far* stronger case than I did, in a recent volume of my own, for the position that work reformers have almost no prospects for the successful implementation of their programmatic ideas. One readily infers from Westin's tale-bearers that managers already have *far* more "worker participation" than they can tolerate. Westin's respondents were participants in the best sense of the term by virtue of the tasks which they were employed to perform, but their employers restrained their participative modes to collaboration, in the worst sense of the term. The fact is that neither the nation nor corporations are democratic; we are a republic and corporations are, well, corporations.

One may also note in passing that the CIA's employees refer to their organization as "the Company"; big organizations are big organizations, public or private, and their managers indubitably have much in common. Harrison Salisbury's recent volume about *The New York Times* tells of many whistleblowers in several CIA cases and in the legal case of "the Pentagon papers."<sup>5</sup> The reader is struck by the extraordinary degree of secrecy practiced, not to protect knowledge in the name of the republic's security but, instead, to protect the inanities and stupidities of CIA figures or of related actors.

John S.R. Shad, chairman of the Securities Exchange Commission in the administration appointed by President Reagan, declared in an interview with Jeff Garth of *The New York Times* on August 3, 1981, "that a positive corporate image is essential for the successful marketing of corporate securities,"<sup>6</sup> an image, he says, that is "hurt by disclosing too much unfavorable information."<sup>7</sup> Mr. Shad places less emphasis "on his agency's legislative mandate as an independent regulatory agency intended to protect investors and more on helping the Reagan administration's economic policies and promoting the securities industry."<sup>8</sup>

Mr. Shad was not asked about the rights of whistleblowers whose revelations blot corporate logos, but one may safely conclude that he would deplore efforts to limit managers from striking blows for corporate privacy. It is his aim in office, he said, "to facilitate the accumulation of capital by public corporations by removing regulations."<sup>9</sup> Among the apparent facilitating ways and means to accomplish this would be to "roll back a requirement that corporations disclose finan-

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<sup>5</sup> H. SALISBURY, *supra* note 2.

<sup>6</sup> N.Y. Times, Aug. 3, 1981, at D-1.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at D-8.

<sup>9</sup> *Id.*

cial information about their relationships with outside accountants who often come from firms that afford lucrative consulting services to the clients whose books they audit.”<sup>10</sup> Mr. Shad also wants “to limit negative information that corporations disclose in the annual report, the 10-K form, that they file with the SEC.”<sup>11</sup> Some attorneys, he averred, “overcomply” with SEC regulations; “what is needed is more ‘balanced disclosure.’”<sup>12</sup> Companies thus ought not list litigation pending against them but they should report, as the Metro-Goldwin-Mayer Film Company, a former client of Mr. Shad’s, did not, “that its film inventory was sharply undervalued.”<sup>13</sup> One cannot help but wonder whether the Pittsburgh Plate and Glass Co. (PPG) was advised by consultants from their outside auditor’s firm to delay for a decade informing auto body repairshop employees, by appropriate labels, about the highly toxic effects of additives in their paints. The story, recounted in several news reports at the time of this writing, about a recent out-of-court settlement between PPG and an injured auto painter, indicates that PPG’s scientific personnel urged that labels contain warnings about the need for respiratory masks, but that these humane employees lost out, for nearly ten years, to marketing executives in their company who feared that such a warning would have adverse effects on sales.

The point is clearly not that we have not been well served by Westin’s whistleblowing respondents. Nor is it at all the point that Westin’s arguments for organizational and legal reforms which might protect those who have reason to question their employers’ ways are not compelling. Rather, the point is that we are heading into a period in which the relevant initiatives of many corporate leaders and their friends in Washington are moving us in the direction of *less* not *greater* disclosure.

We may someday follow the excellent counsel Westin affords us in his own closing chapter. The Civil Rights Act of 1964 was passed, after all, not quite 20 years after the efforts of Westin and his compatriots in Florida in the 1940’s. We can only hope that we will overcome present-day employer resistance against employees who seek to persuade their employers to change their course of action before they blow whistles on them in public. And we may hope that we can do so, as Westin suggests, without denying corporations *their* essential rights.

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*



The short run prospects for Westin's proposals for a workers' version of due process are, most assuredly, dim. Such prospects, however, did not stop Westin from mobilizing his formidable legal and social science skills in his earlier rounds with dark forces. Onward! Excelsior!

*Ivar Berg\**

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\*A.B., Colgate University; Ph.D., Sociology, Harvard University; Chairman, Department of Sociology, University of Pennsylvania.

