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No Right to Classified Public Whistleblowing

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Abstract. Given the crucial role unauthorized disclosures can play in uncovering grave government wrongdoing, it makes sense to search for a defense of justified cases of what I call "classified public whistleblowing." The question that concerns me is what form such a defense should take. The main claim will be a negative one, namely, that a defense of whistleblowing cannot be based on individual *rights*, be they legal or moral, though this is indeed the most commonly proposed defense. In closing, I will outline a more appealing alternative, namely, a justification defense.

1. Introduction

Edward Snowden's disclosures sparked a global debate on the right balance between security and privacy, and revealed mass government surveillance of American citizens, which has been ruled to be unconstitutional and illegal.[1] Following his revelations, Congress voted for the USA Freedom Act, which introduced important reforms to the NSA's bulk data collection program, while the United Nations General Assembly (2013) declared online privacy to be a fundamental human right.

This is just one recent, particularly well-known example of the type of whistleblowing I will be concerned with. I will not discuss internal whistleblowing or disclosures to the appropriate external oversight bodies. Instead, the focus of the present paper will be on unauthorized *public* disclosures (typically to the media) of *classified government documents*. I refer to such whistleblowing as *classified public*

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[1] U.S. district court judge Richard Leon found the NSA's data collection program to be unconstitutional for violating the Fourth Amendment ban on unreasonable searches and seizures (Savage 2015); a federal appeals court ruled that the NSA's bulk collection of communications records was illegal (Stempel 2015).

whistleblowing.[2] Though such unauthorized disclosures are illegal, they do provide a crucial public service, as the above-mentioned consequences of Snowden's disclosures show. When, for example, oversight (by the courts or special committees) of the intelligence community fails, what means are left to address wrongdoing? Unauthorized disclosures by whistleblowers will often be our best and only chance of finding out about, and ultimately addressing, government wrongdoing. For this reason, many argue that whistleblowers ought to enjoy some measure of legal protection, lest a chilling effect cause potential whistleblowers to refrain from disclosing government wrongdoing in the future, leaving the public ignorant of such wrongdoing.

In this article, I will assume (but not argue) that classified public whistleblowing can be morally justified in certain cases. The question that concerns me in the present paper is what form a defense of justified whistleblowing should take. The main claim will be that a defense of whistleblowing cannot be based on individual *rights*, be they legal or moral, though this is indeed the most commonly proposed defense. Proponents of a legal rights-based defense of whistleblowing argue that the legal right to freedom of expression—understood broadly as a right to seek, receive, use, and impart information—covers acts of whistleblowing (provided certain conditions are met). In Section 2, I argue against such an individual legal rights-based defense of whistleblowing, because, first, there can be no such thing as a legal right to break the law; second, the conception of rights involved in the defense deviates significantly (and unappealingly) from the common understanding of rights; and third, the individual rights-based defense does not do justice to the fact that the importance of unauthorized disclosures lies in its *public* importance rather than in individual liberty; as a result, the defense ought not to be based on *individual* rights but on the whistleblowers' *public* role.

There might, however, be a *moral* right to classified public whistleblowing. In Section 3, I will consider whether David Lefkowitz's argument for a moral right to civil disobedience can be applied to the case of classified public whistleblowing. Ultimately, I will conclude that it cannot, given the significant differences between civil disobedience and whistleblowing. In particular, I will argue that the degree of wrongdoing involved in wrongful exercises of a moral right to whistleblowing leads us to reject such a right. If we wish to provide whistleblowers with a measure of protection, we must therefore look elsewhere. In Section 4, I will briefly discuss a justification defense as the most appealing alternative.

2. Problems with the Individual Legal Rights-Based Defense

The existence of whistleblower protection legislation in many countries shows that individuals have a legal right to engage in internal whistleblowing (whereby the reporting of wrongdoing is carried out within the organization) and external whistleblowing through the appropriate supervisory bodies. When it comes to disclosing state secrets to the public, however, whistleblower protection legislation

[2] "Classified" in the sense that state *secrets* are involved; "public" in the double sense that the information disclosed concerns *state* secrets and that it is disclosed *to the public* (typically via the media), as opposed to an internal or external supervisory body. From now on, when I speak of "whistleblowing" I will intend classified public whistleblowing, unless indicated otherwise.

as well as international standards are either considerably less clear, or they outright exclude any legal protection for those who make such disclosures. Thus, the Council of Europe's 2014 recommendation *Protection of Whistleblowers* merely states that disclosures to the media ought to be protected "when necessary" (COE 2014, § 14). The 2009 Dutch law on the addressing of wrongdoing by civil servants (including those in the intelligence community) (Binnenlandse Zaken 2009) does not even mention the option of going to the media.[3] The 2016 general Dutch whistleblower protection law states that the protection of disclosures to the media will need to be decided on a case-by-case basis.[4] By contrast, the UK's Official Secrets Act 1989 flatly denies (former) members of the security services the right, "even as a last resort and even in the face of the most serious iniquity, to make a general disclosure" (Bowers 2007, 315). Similarly, in the United States, federal government employees in general, let alone whistleblowers from the intelligence community, are granted no protection from retaliation if the information disclosed has been properly classified.[5]

There is thus no separate legal right to engage in what I have termed "classified public whistleblowing" in any of the above-mentioned countries.[6] In order to attempt to protect whistleblowers from retaliation nonetheless, lawyers and legal scholars tend to argue that unauthorized disclosures may enjoy protection under the right to freedom of expression. Accordingly, whenever a whistleblowing case has been brought before the European Court of Human Rights, the defendant has claimed that the state has violated her Article 10 right to freedom of expression. Similarly, in the American context, defendants may appeal to their First Amendment rights (see, e.g., Morse 2010). Proponents of a right to whistleblowing included in the right to freedom of expression construe the latter right broadly as a "right to seek, receive, use, and impart information" (Open Society Foundations 2013, Principle 1(a)). As a result, sanctions against whistleblowers are described as violations of *rights*, provided certain conditions are met.[7]

This appears to be the most straightforward defense of whistleblowing. It is also an extremely appealing defense, as the importance of free speech in democratic societies is generally recognized: without the free flow of information, public debate would be impoverished and political accountability impaired. Despite the apparent appeal of this defense, however, I will argue that an individual legal rights-based defense of whistleblowing has some serious conceptual and practical difficulties and must therefore be rejected.

First, how is it possible to reconcile the claim that "there is a legal right to whistleblowing" with the general prohibition of whistleblowing? Assuming that

[3] Binnenlandse Zaken, *Besluit melden vermoeden van misstand bij Rijk en Politie* (Decree regulating the addressing of wrongdoing by civil servants), 2009.

[4] Voorstel van wet van de leden Van Raak, Fokke, Schouw, Segers, Ouwehand en Klein tot wijziging van de Wet Huis voor klokkenluiders (Proposal for an amendment to the Dutch Whistleblowing Protection Law). *Kamerstukken II* 2014/15, 34105, 7. p. 23.

[5] 5 USC § 2302(b)(8) (2012).

[6] Indeed, to my knowledge no country grants citizens a right to legal protection from retaliation following a public unauthorized disclosure of classified materials.

[7] Different scholars and courts list different conditions. Some examples are: harm minimization, exhaustion of legal alternatives, the whistleblower's good faith, and of course that the disclosed information must contain evidence of wrongdoing of public concern.

the proponents of a right to whistleblowing (subsumed under the right to freedom of expression) accept that there is such a thing as legitimate state secrecy and that, as a result, the disclosure of state secrets ought (generally) to be prohibited, a general right to unauthorized disclosures, on the basis of which the whistleblower would enjoy legal protection, is extremely problematic. Once again, assuming that the unauthorized disclosure of state secrets ought to be illegal, a legally recognized right to whistleblowing would amount to the law recognizing a right to deliberately break the law. Even the staunchest defenders of civil disobedience have been forced by similar concerns to deny that there is such a thing as a legal right to civil disobedience,[8] and I cannot see why we ought to conclude any differently in the case of whistleblowing.

Second, the manner in which the individual rights-based defense is usually set up already shows that a possible right to whistleblowing would in no way be a right as we ordinarily understand it. For example, the European Court of Human Rights, in its first case dealing with classified public whistleblowing, held that, in order to ascertain whether an unauthorized disclosure will enjoy protection under the right to freedom of expression, the harm suffered by the public authority as a result of the disclosure may not outweigh "the interest of the public in having the information revealed."[9] In other words, the Court took the view that if we wish to determine whether a particular restriction of the right to freedom of expression is proportionate, we need to weigh the harm inflicted by the disclosure upon the public authority against the interest of the public in receiving the information involved. Similarly, the Tshwane Principles on National Security and the Right to Information argue for some legal protection for whistleblowers by appealing to a general right to information (which includes a right to free expression), but ultimately the authors frame their defense of unauthorized disclosures in terms of a balancing act between two public goods:[10] "the law should provide a public interest defense if the public interest in disclosure of the information in question outweighs the public interest in non-disclosure."[11]

In these two characteristic examples, one can see the language employed drifting away from individual rights and towards public goods. To be sure, many rights, including the right to freedom of expression, contain provisions limiting their scope in order to account for the rights of others, public health, national security, and the like. However, these other goods are usually weighed against the right in question. For example, in the case of hate speech the importance of the individual's ability to freely exercise her right to freedom of expression is weighed against the rights of others and public safety, among other things. The proposed defense of whistleblowing, however, is different. Here the decision as to whether an act of

[8] See, e.g., Brownlee 2012, 123. Brownlee does recognize a *moral* right to civil disobedience, which is equally puzzling, because, presumably, moral rights ought to be translatable into legal rights (though Brownlee rejects this presumption: ibid., 122ff.).

[9] *Guja v. Moldova* [GC], no. 14277/04, § 76, ECHR 2008.

[10] This shift in language from fundamental rights to public goods is telling in itself: By, ultimately, appealing to public goods rather than rights, the drafters of the Tshwane Principles, inadvertently to be sure, demonstrate that a defense based on rights is not a sensible approach.

[11] Open Society Foundations 2013, Tshwane Principle 43(a). A similar approach can be found in Kagiaros 2015.

whistleblowing ought to enjoy legal protection depends on the outcome of a balancing exercise, weighing the public good in disclosure against the public good in non-disclosure. The difference is that in the latter case the whistleblower's supposed right to disclose classified information (subsumed under the right to freedom of expression) does not enter the equation, and is apparently appealed to for mere rhetorical purposes. Furthermore, although the right to freedom of expression is indeed subject to the above-mentioned limiting provisions, its structure still differs fundamentally from that of a supposed right to unauthorized disclosures: The former right *always* allows one to express oneself as one wishes, except in a few limiting cases (which, furthermore, "must be narrowly interpreted and the necessity for any restrictions must be convincingly established");[12] by contrast, the latter right *never* allows the behavior the right supposedly protects, except if specific conditions are met.

The legal rights-based defense of whistleblowing thus appeals to a right to whistleblowing, yet this supposed right apparently plays no (or a negligible) role in the balancing exercise that is to decide whether a particular unauthorized disclosure ought to be protected by that right. Clearly, this approach to a defense based on legal rights involves a notion of rights that deviates significantly from how we habitually understand them. The function of rights is to ensure a sphere of autonomous action for the right-holder. Accordingly, my right to *X* imposes a correlative duty on all others (in the case of universal rights such as the right to freedom of expression) not to interfere with my exercise of this right. To state, then, that whether or not I will be allowed to exercise my right to *X* depends on the outcome of an intricate balancing exercise whereby various public goods are weighed against each other is essentially to state that I do not have the right to *X*. We need not even go as far as Dworkin and state that rights must always trump all other interests, such as general welfare, national security, or public health (Dworkin 2011, 329). Most scholars agree, however, that one typical characteristic of rights (certainly of fundamental rights) is their *peremptory force*:[13] The assertion of a right is not just another consideration to take into account, but a particularly weighty one that, in principle, cuts off further debate concerning what is to be done. All the more puzzling (and somewhat ironic) then that, instead of asserting at least the *prima facie* peremptory force of the right to whistleblowing, human rights lawyers and scholars (of all people) are proposing a right to whistleblowing, the enjoyment of which depends on an intricate process of balancing multiple interests, whereby the right itself plays no role of any significance. In this manner, the peremptory force that sets rights apart in normative discourse is lost.

A third and final point is that basing a defense of whistleblowing on individual rights misrepresents our reasons for wishing to protect whistleblowers. The reason is not that engaging in unauthorized disclosures constitutes a fundamental interest all people have that therefore ought to be protected (as is the case of fundamental rights). Rather, the reason is that unauthorized disclosures are often our main

[12] *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 63, Series A no. 239.

[13] See, e.g., Joseph Raz (1986, 192) on the interest side of the rights debate—stating that rights occupy a special place in normative discourse due to their peremptory force—as well as will theorists like H. L. A. Hart (1955, 191), for whom rights are about protecting a system of equal freedom, the great importance of which precludes any balancing of rights against public goods.

source for finding out about government wrongdoing. As Yochai Benkler (2014, 305) puts it: "The defense [of whistleblowing] is premised on the proposition that the leaker serves a public role, so the defense is public and systemic, rather than individual-rights based." As a result, an individual rights-based defense does not accurately explain the importance of whistleblowing and misrepresents our reasons for wishing to offer whistleblowers some protection.

3. No Moral Right to Classified Public Whistleblowing

Having ruled out a defense based on a *legal* right to whistleblowing, we might consider the possibility of a *moral* right to whistleblowing. Given that we ordinarily assume that it must be possible for a moral right to become a legal right,[14] and given that there can be no legal right to break the law, it seems there can also be no moral right to whistleblowing. Some scholars, however, have contested this "legal-right presumption," arguing for the existence of certain moral rights despite the fact that they cannot be translated into legal rights.[15] Though it may not provide much of an actual defense to whistleblowers, let us nonetheless explore this option. I will do so as follows: I will start by assuming that for there to be a moral right to whistleblowing, it must at least not be morally wrongful. Subsequently, I will give three reasons why the act of whistleblowing constitutes a *pro tanto* wrong, leading me to conclude that, as a result, there cannot be a moral right to whistleblowing. Perhaps, however, one could avoid this conclusion by positing a moral right to do wrong. In considering this possibility, I begin by expounding the argument for such a right in general, after which I offer some points of criticism, which render it problematic. Setting these worries aside, however, I will next consider whether specifically the defense of civil disobedience based on a moral right to do wrong, as expounded by David Lefkowitz, can be used to argue for a moral right to classified public whistleblowing. I will argue that, given significant differences between civil disobedience and whistleblowing, it cannot.

3.1 *Classified Public Whistleblowing as a* Pro Tanto *Wrong*

Presumably, for there to be a moral right to whistleblowing, the act of whistleblowing must be either morally obligatory or morally permissible, but not morally wrongful. Classified public whistleblowing, however, does not meet this condition as it constitutes a *pro tanto* wrongful act for three reasons: It involves a breach of (1) promissory obligations, (2) role obligations, and (3) the obligation to respect the democratic allocation of power.[16] Regarding the first reason, we may start by noting that civil servants are often made to swear an oath stating that they will refrain from disclosing classified documents that they encounter in the course of their work. Unauthorized disclosures constitute a violation of this promissory obligation and are therefore *pro tanto* wrongful. For reasons of space, I cannot go

[14] Raz 1979, 262: "if there is such a moral right then there is a presumption for giving it legal recognition."

[15] Brownlee 2012, 122–3. The right Brownlee has in mind is the right to civil disobedience.

[16] Elsewhere (Boot 2017) I have elaborately argued for these three reasons to view classified public whistleblowing as a *pro tanto* wrongful act.

into the vast body of literature regarding promises and how, exactly, they give rise to obligations to keep them.[17] Instead, I will briefly present an argument that is largely Kantian in nature. Kant (1996a, AK 4:424) views the breaking of one's promise as a violation of a perfect duty, since the maxim of this action cannot even be reasonably *conceived* as a universal law. After all, universalizing the maxim to make false promises whenever it suits oneself would result in the disappearance of the very condition of promising, namely, that the promisee believes the promisor will deliver on her promise (ibid., AK 4:422). We find a similar account of promissory obligations in Rawls, except that it is framed in terms of the duty of fair play: He argues that if you benefit from a just institution of promising, whenever you make a promise under this institution you incur an obligation to preserve the institution by fulfilling it, lest you become a free-rider (Rawls 1999, 305). Naturally, to say that promise-making has normative consequences is not to say that one could simply promise to do anything, however reprehensible, and be considered under an obligation to keep one's promise, even if to do so would involve grave wrongdoing. I am not bound to kill an innocent child just because, to paraphrase Lady Macbeth, "I had so sworn." There is, however, a significant difference between promising to do a (by definition) immoral act (say, killing an innocent person) and promising to respect the classified nature of certain government documents. In principle, the latter promise does not bind one to perform morally reprehensible acts, particularly if we presuppose (nearly) just conditions.

Regarding the second set of obligations prohibiting whistleblowing, we may start with some general remarks about role obligations. To start with, their scope is limited to the role-occupants. Furthermore, their content is determined by the institutional role in question. Finally, the normative force of role obligations originates in the role itself (Hardimon 1994, 334). In other words, role obligations do not rely on external moral justification.[18] As a result, it is possible for role agents (such as civil servants) to be *pro tanto* obligated to perform acts they consider to be wrongful. In such cases, the norms of their institutional role command them to perform acts, which they reject on the basis of external moral norms.

According to the civic conception[19] of civil servants' role obligations, which I endorse, a civil servant's ultimate responsibility is to the democratic constitutional

[17] For an excellent overview of the state of the art concerning research on promise-making, see Sheinman 2011.

[18] Though this is a common understanding of role obligations, some would dispute the claim that role obligations do not need to be prescribed by external moral rules. A. John Simmons, for example, views the prescriptions of a particular role to be morally neutral. He maintains that they can be morally binding on us only if the obligation in question can be justified externally. Such an external justification would be independent of the role prescribing the obligation (Simmons 1979, 16–23). I would argue, however, that Simmons's reductionist approach to role obligations is mistaken. This becomes apparent when we consider roles we do not assume voluntarily, such as the role of brother or son. A reductionist such as Simmons would have to trace the normative force of our duties to our parents or siblings to a more general obligation-generating principle, such as promise-making, consent, gratitude, or some supposedly fair distribution of burdens and benefits within a particular family. Instead, a non-reductionist would argue that our duties to our parents or siblings originate simply and solely in our roles as son or brother. Indeed, for most people, asking for an additional justification of the normative force of our duties toward our family members would involve "one thought too many."

[19] I borrow this term from Bovens 1998, 149.

state as such.[20] Ordinarily, a civil servant best fulfills this responsibility by obeying her superiors, thus enhancing democratic accountability[21] and helping to ensure the rule of law.[22] Consequently, civil servants are role-obligated to obey their superiors' orders, including orders to refrain from disclosing classified information.

Finally, the obligation to respect the democratic allocation of power prohibits civil servants from whistleblowing. The idea is that whistleblowers usurp the power to decide what is and what is not a legitimate state secret, whereas this is properly the prerogative of democratically elected officials. These officials have received a mandate from the people to decide, among many other things, on matters of state secrecy, whereas those engaged in whistleblowing have been elected neither by the people nor by its representatives. As Rahul Sagar Sagar (2013, 114) puts it: "When unauthorized disclosures occur, vital decisions on matters of national security are effectively being made by private actors, an outcome that violates the democratic ideal that such decisions should be made by persons or institutions that have been directly or indirectly endorsed by citizens."

3.2. *A Moral Right to Do Wrong?*

Despite the fact that these are *pro tanto* obligations which are liable to be defeated by weightier moral reasons, possibly rendering a particular act of whistleblowing justified, they do establish the *pro tanto* wrongfulness of whistleblowing. As a consequence, arguing that there ought, nonetheless, to be a moral right to whistleblowing seems to be ruled out, as we would, in effect, be proposing a moral right to do wrong. However, there are those who argue for precisely such a right. They do so on the basis of what they perceive to be the function of rights. The idea is that a right has nothing to say about the moral value of this or that action; all it does, is protect decision-making in a particular area, in which the agent is to be safe from interference: "To protect decision-making is not to provide a reason for the making of any particular decision" (Waldron 1981, 35). It follows that one has a right[23] to participate in morally wrongful behavior: One thus has a right to participate in a demonstration in support of a political party with openly racist views; one has a right to donate nothing to charity though one has the means to do so;

[20] It must be noted here that I am supposing (near)ideal circumstances, in which the state is reasonably just and democratic, policy is generally drafted for the public interest, and officials are mostly not corrupt but in which, nevertheless, cases of grave injustice may occur.

[21] After all, policy-makers can only be fully accountable if their policy plans are being executed in a loyal and diligent manner by public servants.

[22] As policy is put into effect by a great many civil servants, chaos would likely ensue if each of them were to act in accordance with her own moral beliefs rather than with institutional guidelines. As a consequence, citizens would be left in uncertainty regarding what they may legitimately expect of their government and their fellow citizens (as well as vice versa), thus endangering the rule of law. By contrast, strict compliance with superiors' orders can function as a bulwark against arbitrariness and thus help provide and maintain legal certainty.

[23] Though perhaps one ought to speak of Hohfeldian "privileges," rather than rights. According to Hohfeld, if A has a privilege to Φ, then A is under no duty not to Φ. Furthermore, if A has a privilege to Φ, it follows that B has no right (or claim) that A refrain from Φ-ing. In short, Hohfeldian privileges (at times also referred to as "liberties") thus show what the holder of the privilege has no duty not to do (Hohfeld 1913, 32ff.). So, for instance, I am under no duty to provide strangers with accurate directions to the railway station. Conversely, they possess no right (i.e., no *claim*) to receive correct information from me.

one has a right to deliberately provide false information to hapless strangers asking for directions. Having a right in these cases does not imply any judgment concerning the moral worth (or rather lack thereof) of the actions protected by the right: It merely ensures protection from interference in a particular sphere of action.

According to its proponents, the moral right to do wrong is of great importance because without it we would not be able to make truly autonomous choices: We would not, in other words, be able to freely determine the course of our life and the content of our character. If our rights only grant us protection from interference with rightful conduct, then we are no longer able to make meaningful choices in life. Making morally sensitive choices is central to our self-constitution: They play a large part in determining who we are. If we are not free to make morally wrong decisions, but may instead only perform morally obligatory and permissible acts, then the scope of our freedom of choice is greatly restricted, essentially robbing us of any meaningful choice at all (Herstein 2012, 355). As Jeremy Waldron (1981, 36) puts it, rights would then only protect free choice in those areas of conduct that concern the "banalities and trivia of human life."

There are, however, serious concerns about this supposed moral right to do wrong, especially concerning the value of autonomous wrongdoing. Autonomy, according to the advocates of such a right, resides in the unimpeded freedom to choose to act however one wishes, whether one chooses morally right or morally wrongful actions. Therefore, if one's freedom to choose is reduced to actions that are morally required or merely permissible, the scope of one's freedom of choice is diminished, resulting in a loss of autonomy. However, one might argue that autonomously choosing to perform a wrongful act is an oxymoron, as it was for Kant. Autonomy, for Kant, resides in obeying our own lawgiving will, which, ideally, is synonymous with the moral law. An immoral act can thus *per definitionem* not be an autonomous act (Kant 1996b, AK 6:226; 1996a, AK 4:447). If, however, one finds Kant's rather thick understanding of autonomy unappealing, one may point out with Raz that "autonomy is *valuable* only if exercised in pursuit of the good" (Raz 1986, 381; emphasis added). It follows that, though wrongful acts may still be viewed as autonomous, they lack any value. Indeed, one might go further and argue that autonomously choosing to do wrong is morally worse than doing so non-autonomously. If this is the case—if autonomous wrongdoing has no moral value or even a negative moral value—then what reason could we possibly have in advocating for a right to do wrong? Or as Raz puts it: "Since autonomy is valuable only if it is directed at the good, it supplies no reason to provide, nor any reason to protect, worthless let alone bad options" (ibid. 411).

Furthermore, one could reply to the proponents of a right to do wrong that, contrary to what they claim, choosing among morally permissible actions includes a great many relevant choices (Galston 1983, 322). Think of choosing a faith, a political party, a profession, a life partner. These are choices that constitute who we are. As a result, they by no means concern solely banalities and trivialities.

3.3. Civil Disobedience and the Right to Do Wrong

But even if we were to put aside these objections and accept, for the sake of argument, the coherence of a right to do wrong, a moral right to whistleblowing would still remain problematic. According to their own reasoning, those who support a

right to do wrong must allow whistleblowing even when it is not the right thing to do. Such a train of thought led Raz (1979, 268) to caution proponents of a moral right to civil disobedience as follows: "Those who hold that there is a right to civil disobedience are committed to the view that in general the rightness of the cause contributes not at all to the justification of civil disobedience." A right to civil disobedience would thus entitle one to disobey even when one ought not to. Proponents of a moral right to civil disobedience, however, have bitten the bullet and affirmed that even if an agent engages in civil disobedience with the aim of amending a just law and substituting it with a law she deems more just but which is actually worse (from the standpoint of justice), she still acts within her moral rights (Lefkowitz 2007, 224ff.; cf. Brownlee 2012, 141). Let us consider one such argument, put forward by David Lefkowitz.

His reasoning is as follows: Though I may recognize the political beliefs of others to be reasonable, I can still conclude that they are erroneous. I cannot, however, (nor can society as a whole) demand that they refrain from advocating their reasonable but wrong beliefs. The reason why is grounded in Rawls's concept of reasonable disagreement. Rawls (2005, 58) maintains that "[m]any of our most important judgments are made under conditions where it is not to be expected that conscientious persons with full powers of reason, even after free discussion, will arrive at the same conclusion." Given the burdens of judgment, we therefore ought to recognize the "right to advocate for the adoption in law or policy of reasonable views [people] sincerely believe to be true, even when they are not" (Lefkowitz 2007, 232). We ought to recognize, in other words, the right to do wrong in the sphere of politics. If, instead, one limits the sphere of free political agency to the promotion of ends we believe to be morally valuable, that would prevent us from leading an autonomous life, one in which agents themselves decide on the direction their lives will take.

The next crucial step made by proponents of a moral right to civil disobedience is to subsume the said right under the more general right of political participation (ibid., 213) or freedom of expression (Brownlee 2012, 140ff.). Lefkowitz, for example, argues that members of a position that is not supported by the majority in a vote may well be justified in feeling that if there had been more time to deliberate and if they had had more resources to help spread their message, perhaps they would have gained more support and eventually won over the majority. Acknowledgment of this fact leads us to recognize that the right to political participation not only consists in a right to vote, but also in a right to continue to challenge the decision reached by a majority rule procedure, not only by means of legal forms of protest but also through civil disobedience (Lefkowitz 2007, 213). Punishing a person for engaging in an act of civil disobedience thus demonstrates the state's lack of respect for that person as someone who has a moral right like anyone else to participate in the decision-making process that determines the laws and policies regulating our collective life, even after a decision has been made. Consequently, Lefkowitz concludes that "to punish a person for engaging in public disobedience is equivalent to punishing a person for exercising the right to vote or the right to free speech" (ibid., 219). Furthermore, given reasonable disagreement about what justice requires, it becomes problematic to limit the moral right to civil disobedience to the promotion of what we consider to be morally good causes. The moral right to civil disobedience must therefore include a right to

engage in civil disobedience in order to promote *wrongful* ends. An additional reason Lefkowitz gives is that, although we may wish to encourage agents to only autonomously choose morally good ends, the "only way to do so [...] involves creating space within which agents may choose their ends, projects, and so on" (ibid. 227), be those ends good or bad. If instead we only grant agents the right to engage in political participation when we judge their decisions to be morally just, we are in effect denying them the possibility of an autonomous life.

I do not have the space to discuss the merits of this argument with regard to civil disobedience, though there are certainly some problematic assumptions, particularly the strong claims that a state's authority is only legitimate if the state recognizes a moral right to civil disobedience (ibid. 209), and that treating its citizens as persons requires the state to acknowledge such a right (ibid., 219). Instead, what I wish to show is merely that this argument does not succeed in justifying a moral right to classified public whistleblowing.

3.4. No Moral Right to Classified Public Whistleblowing Based on a Moral Right to Do Wrong

As an (ideally) public-spirited breach of one's obligations, one might be inclined to compare whistleblowing to civil disobedience. There are, however, significant differences.[24] Most relevant for our purposes is, first, the observation that the *effects* are different: Usually, an act of civil disobedience does not immediately result in the reform or repeal of the contested law. It is more often a long process that requires the involvement of a great many people, both within and without the sphere of government, to bring about change. By contrast, a whistleblower can, all by herself, disclose a great many classified documents, thus immediately undoing the decision made by our democratically elected leaders to keep something secret. Second, civil disobedience and whistleblowing differ significantly in terms of the possible *harm* they involve. For example, the former does not generally involve a threat to national security, whereas this is a possibility in the case of whistleblowing, given the nature of the documents disclosed. Additionally, unauthorized disclosures may result in harm to undercover agents or to ongoing military operations. These two important differences lead to the conclusion that, whatever the case may be regarding civil disobedience, there can be no right to whistleblowing based on a moral right to do wrong.

Let us start with fleshing out the consequences of the first difference. The difference is that civil disobedience, just like whistleblowing, may involve the violation of law, but that acts of civil disobedience do not immediately result in the repeal of the contested law. On the other hand, whistleblowing, immediately, performatively as it were, undoes the decision to classify certain information. What distinguishes whistleblowing from civil disobedience, then, is that it involves a *usurpation of power*, the power to classify information, whereas civil disobedience activists merely protest against a particular policy that they oppose and aim to have reformed or repealed entirely by the democratic authority. Whistleblowers can

[24] Here I partially follow Candice Delmas's (2016) first two differences between whistleblowing and civil disobedience. Her third difference is not relevant for my purposes, namely, that the penalties are significantly higher for whistleblowing than for civil disobedience.

certainly have a similar aim, but the act of whistleblowing, in addition, involves the appropriation of the power to determine what ought and what ought not to be a legitimate state secret, whereas this is properly the prerogative of our democratically elected officials and not of private individuals.[25] This renders whistleblowing wrongful in a way not imagined by Lefkowitz in his discussion of civil disobedience. The problem is not merely that whistleblowers may pursue morally problematic ends, but that, in whistleblowing, they arrogate to themselves political power that properly belongs to our democratic representatives. The question is whether the right to do wrong can also accommodate such wrongdoing.

The second difference between civil disobedience and whistleblowing was that the effects of whistleblowing may also be more harmful than those of civil disobedience. Granting a moral right to whistleblowing that would include the right to disclose classified information even when it is the wrong thing to do (as argued with regard to the moral right to civil disobedience), is therefore not advisable. It is widely acknowledged among the advocates of a moral right to do wrong that certain wrongs are so grievous that they cannot be protected by the right.[26] It is my contention that the wrong involved in wrongful whistleblowing is precisely of this sort. An injudicious disclosure could have serious consequences, more so than an ill-advised exercise of civil disobedience. Naturally, there may be harm involved in civil disobedience, but the potential harm that could ensue from whistleblowing is of a different degree. Classified information may fall into the wrong hands, potentially endangering national security, field agents, or ongoing military operations. The case of Morton Seligman (Brennan 2013) offers a clear illustration of the risks involved in a right to engage in wrongful whistleblowing: During the Second World War, Seligman leaked decoded messages of the Imperial Japanese Navy to a journalist. Subsequently, the *Chicago Tribune* ran an article stating that the U.S. Navy was in possession of details of the Japanese navy's battle plans without, however, explicitly revealing the fact that the Americans had broken the Japanese code. Somehow, the Japanese never caught on, but if they had, Seligman's actions could have significantly harmed the American war effort, as the Japanese would almost certainly have developed another code. Given the possibility of such serious harm involved in wrongful disclosures, there can be no moral right to engage in wrongful or misguided whistleblowing, even with the help of a moral right to do wrong.

4. A Justification Defense for Whistleblowers

In this article I have argued that the most common defense of whistleblowing, which is based on individual rights, be they conceived as legal or moral rights, fails as a defense of whistleblowing. If the defense is based on *legal* rights it fails, first because there can be no such thing as a legal right to break the law; second, because the conception of rights involved in the defense deviates problematically from our common understanding of rights. Third, and finally, the legal

[25] We discussed this point earlier when identifying the third reason why classified public whistleblowing constitutes a *pro tanto* wrong, namely, because it violates the obligation to respect the democratic allocation of power.

[26] See, e.g., Herstein 2012, 359: "one's autonomy interests in a right to do wrong are most likely never weighty enough to justify a right to highly egregious wrongdoing."

rights-based defense misrepresents the reasons for offering some protection to whistleblowers: We do not wish to grant a defense because whistleblowing is a fundamental human interest to which all individuals have a right. Instead, unauthorized disclosures are of *public* importance; as a result, the defense ought not to be based on individual rights but on the public role of whistleblowers.

Subsequently, granting the problematic position that moral rights need not necessarily be possible legal rights, and granting that it makes sense to speak of a moral right to do wrong (despite the availability of strong arguments against it), I considered the argument for a moral right to civil disobedience even when such disobedience serves a cause that is less just than the status quo in order to see whether it could be applied to the case of whistleblowing. I concluded that it could not, given the significant differences between civil disobedience and whistleblowing. In particular, due to the degree of wrongdoing involved in wrongful exercises of a supposed right to whistleblowing, such a right is out of the question.

In closing, having established that there are insurmountable problems with a defense of whistleblowing based on individual rights, be they moral or legal rights, I will briefly consider a possible alternative defense for whistleblowers. The most attractive option seems to be a *justification defense* that can function either as a complete defense or as a sentencing mitigation factor.[27] If one claims the action was *justified*, one concedes criminal wrongdoing, but denies that it was, all things considered, the wrong thing to do (e.g., *A* admits to having assaulted *B*, but argues that her action was justified, given the fact that *B* had assaulted her first and she therefore acted out of self-defense). By comparison, when invoking an *excuse*, one concedes that the action was wrongful (both criminally and morally), but seeks to avoid the attribution of responsibility for that action (e.g., *A* admits to having wrongfully assaulted *B*, but given her mental condition it would be wrong to attribute responsibility for the act to her).[28] In practice, the statement that classified public whistleblowing may be justified, means, according to this understanding of justification, that such whistleblowing remains criminal. This enables the law to still attach significant risks to whistleblowing, which can help prevent the occurrence of frivolous and willfully false disclosures, while at the same time offering protection to those cases of whistleblowing that are justified. A justification defense thus achieves the right balance between the prevention of undesirable acts and the protection of justified whistleblowing, allowing the latter to continue to fulfill its vital public function of bringing grave government wrongdoing to light.

I have argued that classified public whistleblowing is to be viewed as a *pro tanto* wrong (for the reasons given early in Section 3.1). Calling an action *X pro tanto* wrong means that there are moral reasons against performing it. Accordingly, if one performs *X* anyway, a justification will be needed. Let me end by providing an outline[29] of the conditions that, when met, could justify unauthorized disclosures.

[27] Yochai Benkler's (2014) public accountability defense would be an example of such a defense.

[28] See for such accounts of the distinction between justifications and excuses, among others: Austin 1956, 2, and Fletcher 2000, 759.

[29] For lack of space, I cannot discuss these conditions as elaborately as I would like. For a more exhaustive treatment of these conditions (and their application), see Boot 2017. I have been influenced here mainly by the conditions developed by the European Court of Human Rights in its case law (see, e.g., *Guja v. Moldova* at n. 10), though I do not accept all of those conditions. In particular, I reject the good faith requirement.

First, and most importantly, such disclosures ought to reveal grave government wrongdoing, understood both in a substantive and a procedural sense. Examples of *substantive wrongdoing* are corruption, human rights violations, and abuse of power. *Procedural wrongdoing* consists not so much in carrying out clearly unjust policies, but rather in surreptitiously executing policies and programs of great magnitude on the justness and desirability of which reasonable people may disagree, thus rendering public debate on matters of public concern impossible. To clarify the distinction, consider Snowden's disclosures. As the NSA surveillance programs constituted a violation of constitutional rights (e.g., to privacy), his disclosures unveiled *substantive* wrongdoing. However, they also revealed *procedural* wrongdoing: Due to the secretive nature of certain surveillance programs, there had been no public debate about their desirability. As a result, no real democratic engagement with these matters had taken place prior to Snowden's disclosures, which can thus be said to have had a democracy-enhancing effect. When the information disclosed reveals either substantive wrongdoing or demonstrates the willful obstruction of the democratic process in cases in which policies of great magnitude are at stake (i.e., procedural wrongdoing), then the information is of fundamental public interest. Let us call this first, most important condition the *public interest condition*.

In addition, there are two procedural conditions: The *ultimum remedium condition*, first of all, stipulates that one ought to exhaust all alternative, more discreet channels of addressing wrongdoing before going public. In practice, this means one ought to first address the matter internally or to an external supervisory body. Both options make it possible to investigate and address the wrongdoing (including taking measures against those responsible) or to explain why, in fact, no wrongdoing has occurred, without immediately involving the larger public. However, if both these channels have been exhausted to no effect, or if the whistleblower reasonably believes that pursuing them would be futile, or that they would result in the destruction of evidence, or lead to reprisals against the whistleblower or a third party, or if the information concerns an imminent risk or threat "to the life, health, and safety of persons, or to the environment" (Open Society Foundations 2013, Tshwane Principle 40(a)), then the information may be disclosed to the public, ideally through an established media outlet.

Unauthorized disclosures can have various harmful consequences: They may disclose the identities of undercover agents, thus placing them at great risk; national security could be harmed by publicizing military documents which the enemy could use to its advantage; and public trust may be needlessly damaged if the disclosed information proves to be untrue or biased. In order to prevent such harm, whistleblowers must comply with the *harm minimization condition*, which requires them to diligently edit the information, redacting any information not strictly needed to demonstrate the wrongdoing in question, and to refrain from disclosing any information that may lead to harm to private individuals or to national security. In order to comply with this condition, whistleblowers would be well-advised to collaborate with news outlets that have the required expertise and experience to carefully edit the information and to place it in the right context to enable the public to adequately receive and comprehend it.

Depending on whether all or only one or two of the conditions are met, this justification defense can function either as a full defense or as a sentencing

mitigation factor. Here it must be noted that the three conditions do not carry equal weight. Rather, the public interest condition is a *threshold condition*. In other words, if it is not met, the whole process of assessing the justifiability of a concrete case of whistleblowing ends immediately. Viewing the public interest condition as a threshold condition indicates its preponderance over the two procedural conditions. The reason is that civil servants do not blow the whistle in order to minimize harm or to verify the authenticity of documents. Instead, they do so in order to reveal grave government wrongdoing. One may have taken measures to mitigate harm, but that alone does not justify an act of whistleblowing if the disclosed information is not of fundamental public concern.

Although I have admittedly provided only an outline of this justification defense for whistleblowers, and its application in practice still needs to be clarified, I hope to have shown at least its general shape and function as well as why it is such an appealing option. A justification defense would avoid the problems shown to exist with an individual rights-based defense, while maintaining the prohibition of unauthorized disclosures (the deterrent effect of which can help prevent misguided or willfully false disclosures), and providing legal protection for those whistleblowers whose actions are justified.

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