The Journal of Structural Power & Resistance

nulli di, nulli domini.

Volume 1, Issue 1, Summer 2025.

Silentium Fractum

("The Silence is Broken")

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Current Editorial Board:
Ashley Gjovik, B.S., J.D.

Journal Citation: Gjovik, Ashley. The Journal of Structural Power & Resistance, *Volume 1, Issue 1, Summer 2025, Silentium Fractum*. https://ashleygjovik.com.

About the Journal

The Journal of Structural Power & Resistance is an independent, interdisciplinary academic journal dedicated to the analysis of corporate power, legal systems, institutional violence, and tactical resistance. The journal's mission is to dissect the structures that enable unaccountable authority — and to publish work that equips readers to confront and dismantle those systems.

It exists to provide a forum for documenting how institutions exercise power through design, process, and doctrine—and how that power may be resisted, challenged, or exposed. It prioritizes work that bridges theory and praxis, drawing from law, ethics, philosophy, and lived experience. It rejects complicity with oppressive systems and embrace intellectual insurgency.

Our focus spans corporate law, political philosophy, and ethics, examining how structural power perpetuates itself and how individuals and movements disrupt these systems. This journal takes as its premise that law and policy do not operate in a vacuum. They are structured systems embedded with assumptions, incentives, and political compromises that shape how truth is constructed, whose voices are heard, and which harms are made legible. Too often, the architecture of rights and remedies serves to shield institutional actors from accountability, rather than expose or rectify misconduct.

This journal aims to document, analyze, and challenge the mechanisms by which systems of power are maintained—particularly through procedural obstruction, administrative evasion, retaliatory suppression, and narrative control. It welcomes work that crosses traditional boundaries: legal analysis informed by ethics and human rights; case studies grounded in lived experience; structural critiques sharpened by theory; and tactical frameworks developed through practice.

This journal is a project in public reasoning, democratic accountability, and epistemic clarity. I publish in the belief that documentation itself is a form of resistance, and that naming the design is a necessary first step toward its deconstruction. I believe that resistance requires documentation—and that truth, when carefully and publicly recorded, can outlast obstruction.

Volume 1, Issue 1 – Silentium Fractum focuses on the misuse of process: how litigation, regulatory procedure, and institutional policy are used to conceal wrongdoing and suppress dissent. The articles in this issue trace the contours of procedural violence, but also explore the tactical spaces within which truth may still be documented, preserved, and eventually heard.

Together, these articles form an indictment of how systems designed for justice are repurposed to protect power. These articles also offer counter-possibilities: that occupation of the system, with documentation, narration, and resistance within formal processes, has the potential to crack illusions of neutrality.

Our motto, *nulli di, nulli domini,* declares "*no gods, no masters.*" We believe systems of power are not inevitable. These systems are constructed — and anything constructed can be deconstructed.

Welcome to *The Journal of Structural Power & Resistance*.

From the Editor

This first issue of *The Journal of Structural Power & Resistance* emerges from lived experience, studied observation, and tactical analysis.

This journal reflects my commitment to understand not only how power operates, but how it can be subverted. It was created because no existing formal space will acknowledge and host these arguments.

The articles in this issue contain the kind of analysis I needed when I was still inside these systems. This is the work I searched for when I began to resist.

My hope is that these pieces serve as a blueprint for others who refuse to accept structural oppression as inevitable.

— *Ashley Gjovik, JD, PMP,* Editor-in-Chief

Ashley Gjovik, JD, PMP is a lawyer, program manager, and systems strategist with expertise in corporate power structures, procedural control mechanisms, and tactical resistance. Her work integrates legal scholarship, operational leadership in high-risk corporate environments, and direct engagement with regulatory enforcement, administrative litigation, and public accountability processes.

Gjovik's approach bridges theory and praxis, drawing from her years inside Silicon Valley's most secretive institutions and her subsequent legal challenges against them. She is the Principal of the D&G Center for Megacorporation Reform and the founder and Editor-in-Chief of *The Journal of Structural Power & Resistance* as well as the forthcoming *Journal of Decolonized Ecology & Evolution*. Her work is grounded in a commitment to systemic analysis, evidentiary documentation, and institutional deconstruction.

Keywords: structural power, institutional control, corporate governance, whistleblower retaliation, legal systems, procedural delay, ethical resistance, private government, systemic violence, asymmetrical power, corporate accountability, resistance strategy, legal mobilization, counter-governance, political theory, law and ethics, systems analysis, corporate law, litigation tactics, philosophy of law

Issue One: *Silentium Fractum*

The Operational Logic of Normative Violence: Whistleblowing and Corporate Retaliation

This article analyzes whistleblower suppression as a predictable form of structural violence. It frames whistleblowing as a moral confrontation with power.

Gjovik, Ashley. *"The Operational Logic of Normative Violence: Whistleblowing and Corporate Retaliation."* The Journal of Structural Power & Resistance, Volume 1, Issue 1, Spring 2025, Silentium Fractum. May 26 2025. https://ashleygjovik.com.

The Dark Theater: Retaliation Litigation as Institutional Obstruction and Legalized Harassment.

A conceptual analysis of retaliation litigation, this article explores how procedural form can be used to conceal truth and induce narrative unreality. It critiques the derealizing effects of institutional gaslighting, emphasizing the psychological and epistemic harms embedded in litigation structures.

Gjovik, Ashley. "*The Dark Theater: Retaliation Litigation as Institutional Obstruction and Legalized Harassment."* The Journal of Structural Power & Resistance, Volume 1, Issue 1, Spring 2025, Silentium Fractum. May 26 2025. https://ashleygjovik.com.

Offensive Counter-Control: Tactical Frameworks for Asymmetric Legal Resistance Against Corporate Power

This article outlines methods by which individual litigants and public interest actors can document, anticipate, and disrupt institutional retaliation. It introduces a tactical framework for leveraging internal inconsistencies, preserving contested facts, and reframing legal narratives in asymmetric contexts.

Gjovik, Ashley. "*Offensive Counter-Control: Tactical Frameworks for Asymmetric Legal Resistance Against Corporate Power,*" The Journal of Structural Power & Resistance, Volume 1, Issue 1, Spring 2025, *Silentium Fractum*. May 26 2025. https://ashleygjovik.com.

Panic in the Boardroom: Mask-Off Moments, Corporate Panic, Retaliation, and the Pattern of Escalatory Delegitimization

Using firsthand documentation and public records, this article analyzes how corporate legal teams respond to exposure with escalating procedural aggression. It situates such conduct within a broader pattern of delegitimization, reframing retaliation not as defensive posture but as institutional panic.

Gjovik, Ashley. *"Panic in the Boardroom: Mask-Off Moments, Corporate Panic, Retaliation, and the Pattern of Escalatory Delegitimization."* The Journal of Structural Power & Resistance, Volume 1, Issue 1, Summer 2025, Silentium Fractum. May 26 2025. https://ashleygjovik.com.

The Bureaucratic Shield: How U.S. Legal Institutions Enable Retaliation, Obscure Criminality, and Undermine Whistleblower Protection

This article critiques the design of legal and regulatory frameworks that allow institutional actors to evade accountability. It explores how doctrines of deference, procedural discretion, and symbolic compliance function as a bureaucratic shield against scrutiny, especially in whistleblower and anti-retaliation matters.

Gjovik, Ashley. "*The Bureaucratic Shield: How U.S. Legal Institutions Enable Retaliation, Obscure Criminality, and Undermine Whistleblower Protection.*" The Journal of Structural Power & Resistance, Volume 1, Issue 1, Summer 2025, Silentium Fractum. May 26 2025. https://ashleygjovik.com.

Beyond Zealous Advocacy: Strategic Misrepresentation in Litigation

Focusing on civil defense strategy in public interest and enforcement litigation, this article examines how procedural tools—including discovery tactics, declarations, and boilerplate denials—are used to shape misleading factual narratives. It proposes judicial reforms to recognize and address litigation-based obstruction when it distorts adjudicative outcomes.

Gjovik, Ashley. "*Beyond Zealous Advocacy: Strategic Misrepresentation in Litigation*" The Journal of Structural Power & Resistance, Volume 1, Issue 1, Summer 2025, Silentium Fractum. May 26 2025. https://ashleygjovik.com.

The Operational Logic of Normative Violence:

Whistleblowing and Corporate Retaliation

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Date: May 26 2025. (First version originally published April 25 2023).

Saint Sebastian at the Column (Albrecht Dürer, copper engraving, 1500).

Abstract: This article analyzes the mechanisms by which corporate systems operationalize retaliation against whistleblowers. Drawing on theories of structural violence, private governance, and institutional control, it argues that retaliation is not an aberration but an inherent function of corporate power preservation. The paper deconstructs the internal logic of employer retaliation — including dismissal, legal intimidation, narrative manipulation, and procedural attrition — and situates whistleblowing within broader systems of risk control and authoritarian corporate governance. Integrating scholarship from law, political philosophy, and ethics, it advances the concept of preemptive resistance: understanding and countering structural violence by anticipating corporate suppression tactics before they are deployed. The work proposes a framework for transforming the role of whistleblower from victim to system-level disruptor.

Keywords: whistleblower retaliation, structural violence, corporate governance, legal suppression, private government, institutional control, counter-strategy, procedural attrition, ethical dissent, power asymmetry

Gjovik, Ashley. "The Operational Logic of Structural Violence: Whistleblowing and Corporate Retaliation." *The Journal of Structural Power & Resistance,* Volume 1, Issue 1, Summer 2025, Silentium Fractum. May 26 2025. https://ashleygjovik.com.

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Introduction

Whistleblowers exist in the most precarious position within corporate ecosystems. They are individuals who recognize systemic harm and attempt to interrupt it from within. Their role is not simply that of dissenter, but of disruptor — their actions fracture the internal logic of control that corporations depend upon for self-preservation. (Anderson, 2017, p. 39).

Yet, retaliation against whistleblowers is rarely treated with the analytical rigor it deserves. Too often, it is framed as exceptional misconduct, an aberration from "normal" corporate governance (Galanter, 1974, p. 135). This framing obscures a deeper, more troubling reality: retaliation is not a malfunction of corporate systems. It is a predictable function embedded within them.

Drawing on the theory of structural violence (Galtung, 1969), this paper examines how corporate systems weaponize procedural distortion, legal intimidation, narrative manipulation, and institutional isolation to suppress internal dissent. These tactics do not arise from individual malice but from systemic incentives. Within corporate governance, whistleblowing represents an existential threat — a challenge to the organization's ability to monopolize risk management, control narrative flow, and contain reputational exposure. (Eskridge, 1994, p. 61).

Elizabeth Anderson's critique of *"private government"* provides essential framing here: corporations operate as autonomous regimes, exercising sweeping authority over internal participants while shielding their operations from external scrutiny. (Anderson, 2017, p. 45). In such closed systems, retaliation serves not only to punish individual whistleblowers but to deter collective resistance by creating exemplary consequences. (Habermas, 1991, p. 274).

This paper dissects the operational logic of such retaliation — not merely as a legal phenomenon, but as an engineered corporate function. It analyzes how retaliation is operationalized, how it reflects deeper patterns of institutional violence, and how understanding its predictability enables targeted resistance strategies.

By treating whistleblower retaliation as a function of structural violence rather than an accidental outgrowth of flawed leadership, we clarify both the stakes and the necessary responses. Recognition of this operational logic is essential not only for whistleblowers and their advocates, but for legal practitioners, regulators, and all those engaged in the broader project of corporate accountability.

Author's Note: *In 2021, I blew the whistle on my employer while I was still an employee. I expected they'd do the right thing, but when they didn't, I reported them to regulators and journalists. I was swiftly met with retaliation and an experience so destructive I didn't have the words to describe what happened to me. It left me feeling deeply undone and morally lost. I set out to learn if what happened to me is a known phenomena, and if so, if there is language and concepts to explain the experience. I found it is known and well studied.*

This article focuses on experiences like mine, where a still employed whistleblower takes disclosures of severe, systemic issues public due to inaction or coverups by the institution. This article doesn't intend to discount the other varieties of whistleblower experiences; but instead seeks to explain, expose, and validate the turmoil many whistleblowers in similar positions are often forced to walk through alone. You are not alone.

What is a Whistleblower?

The term *whistleblower* is thought to originate from Victorian England, where, when a crime was committed, policemen would blow a whistle while chasing the criminals to alert the public of the crime Today, much like those historic figures, modern whistleblowers that spot misconduct "*blow the whistle"* and alert the public of the threat. The whistleblower acts as an early warning signal and defense mechanism of the common good. (Hazlina, 2019; Devine, 2002).

The term *whistleblowing* can be used very broadly to refer to an act of dissent, or it can be defined in a precise way. Whistleblowing generally seeks to reveal abuse and malfeasance, and to promote accountability. Publicly known whistleblowing cases often concern issues of societal importance, like human rights violations, environmental damage, health and safety dangers, miscarriages of justice, and systematic corruption (Martin & Rifkin, 2004; Bloch-Wehba, 2023; Bjorkelo & Madsen, 2013; Alexander, 2004).

Despite the importance of their actions, named whistleblowers are often subjected to oppressive and stigmatized labels such as "*snitch*" or "*leaker*" (Nicholls et al., 2021; McClearn, 2003; Kenny et al., 2018). Discussions of whistleblowers frequently treat them as sympathetic antagonists; the person is publicized instead of the disclosures, and coverage is constrained to interpreting actions only through formal laws and norms with deference to industry and government.

Perhaps due to the potential disruption whistleblower disclosures can cause to established systems, there is a positivist urge to quantify and label whistleblowers. There have been extensive — and generally fruitless — studies searching for a special recipe of human characteristics that leads one to become a whistleblower. This is misguided and distracts from whistleblowing as a moral challenge anyone may have to face. Studies are predictably conflicted as to the whistleblower's most common gender, nationality, race, ethics, or age. There does seem to be positive association with education, honesty, strength of spiritual faith, and morality — only subjective characteristics. It is estimated as many as 44% of non-management employees do not report misconduct. Ultimately, the distinguishing factor that sets whistleblowers apart from other employees is the very act of speaking out. (Davis, 1996; Kenny et al., 2018; Martin, 2003; Martin & Rifkin, 2004; Nicholls et al., 2021).

The attempted classification of scientific categories to predict whistleblowing has been debunked and cautioned against for decades — yet it persists. Ignoring the issues that caused the person to come forward in the first place, many studies still instead focus on an endless search for data points to classify whistleblowers based on immutable and subjective categories. At best, this is perhaps researchers attempting to flag categories to screen potential risks to power structures; at worst, it is a disturbing quest to declare formal biological and social determinants of moral behavior. In modern history, "scientific studies" attempting to formally identify whether people with certain immutable characteristics are superior or deficient related to basic human behaviors and activities have often ended in tribunals

There is also a flawed tendency towards a Foucauldian view of whistleblowers, celebrating the idea of *"fearless speech"* and viewing the whistleblower as a political actor who performs an act of resistance by speaking truth to power. This view is nascent — and only relevant at the earliest stages of whistleblowing or for those who blow the whistle after they are well out of harm's way — while ignoring the predictable and devastating aftermath for those who blow the whistle while still employed. (Kenny, 2018; Martin, 2003).

Far from being some sort of fearless rebel, whistleblowers are often professional idealists and loyal organizational adherents who were not aware of the dangers and consequences of disclosing. Instead, whistleblowers often earnestly trusted their organization and believed it would take actions to address the issues raised. Similarly, military and intelligence whistleblowers are often conservative and patriotic. Many whistleblowers speak up because they believe in formal procedures and justice — never expecting an antagonistic response. Many also expect that taking the matter to a regulatory body will finally deliver law and order to the situation, but instead are often met with even more threats and retaliation — now by the very government agencies supposedly chartered to protect them (Kenny et al., 2018; Mistry & Gurman, 2020; Martin, 2004).

Rationalization & Intention

Deconstructing the process of blowing the whistle, there are two significant moral queries. The first is: when is it justified to blow the whistle at all? The second is: when is unjustifiable to not blow the whistle?

Justification for blowing the whistle requires: an organization, policy, action, or product poses a serious and considerable harm to the public; the employee reported the threat to their supervisor (if feasible); and if not addressed, the employee escalated further to the extent they exhausted all possibilities for resolution internally. If these requirements are satisfied, it becomes morally permitted to blow the whistle, though the person is not morally required to blow the whistle. (Davis, 1996; Tavani, 2014)

An employee becomes morally obligated to blow the whistle if the employee has accessible, documented evidence that would convince a reasonable and impartial observer that the whistleblower's view of the situation is correct; and the employee has good reason to believe that by going public the necessary changes will be brought about and harm will be prevented. (Tavani, 2014). Because managers are almost certain to deny wrong-doing, a whistleblower needs ironclad evidence in-hand, and a whistleblower who can obtain this is in a rare and impactful position.

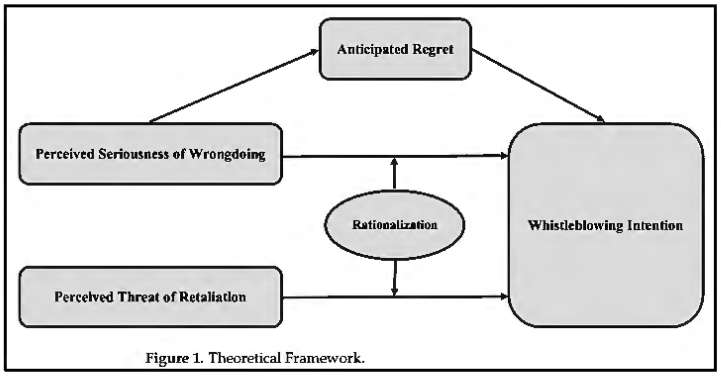

Figure 1. Theoretical Framework.

(Khan, 2022, page 4, figure 1).

When all five conditions are met, whistleblowing is a form of "*minimally decent Samaritanism*." Indeed, many whistleblowers have described themselves as involuntarily compelled to blow the whistle & "*having no other choice.*" (Apaza, et al, 2011; Davis, 1996; Kenny; 2018; Martin, 2003). This is often in direct contradiction to the way society wants to view whistleblowers.

For those in situations where whistleblowing would be justified but not morally required, there is a moral and personal reckoning process. Functional considerations may be at play such as social policy, individual prudence, legal protections, socioeconomic status, expectation of loyalty to the organization, or organization and professional norms. Regret functions to connect seriousness to intention, while fear of retaliation may trigger moral disengagement (i.e., dehumanizing victims) to reduce cognitive dissonance and throttle moral emotions. (Davis, 1996; Kenny, 2018; Khan, et al, 2022; Nicholls, 2021). In general, workers are most likely to blow the whistle on severe issues and intentional misconduct. In two thirds of cases the whistleblower went to a regulator because their complaint was ignored by the company and in ten percent of cases the whistleblower came forward because of a cover-up. (Dey, 2021).

Whistleblowing is a dynamic process that takes time to unfold. Most people do nothing until they are convinced the wrongdoing is alarming: morally offensive and has considerable threat of harm. Many people have no idea what they are about to face, and most do not have the information required to properly reckon with the decision to be made. Many disclosures are made in quiet good faith and the person would never think of themselves as a 'whistleblower,' and thus also did not gather sufficient evidence that could withstand an imminent cover-up, nor would they have the perspective to actively identify, document, and navigate the reprisals about to unfold. (Khan, et al, 2022; Martin, 2003; Nicholls, 2021; White, 2021).

Effectiveness in whistleblowing is considered to be "the extent to which the questionable or wrongful practice (or omission) is terminated at least partly because of whistleblowing and within a reasonable time frame." This may be displayed in the organization launching an investigation into the whistleblower's allegations (on their own initiative or required by a government agency), and/or if the organization takes steps to change policies, procedures, or eliminate wrongdoing. (Apaza, 2011). Very little is said about the welfare of the whistleblower.

Predictable Violence

Despite the appearance of whistleblower laws and protections in the United States, the inefficacy of these protections is demonstrated by the institutional violence used to silence, discredit, and ultimately forcibly remove the whistleblower from the workplace. Whistleblower retaliation is a severe form of violence and whistleblowers who disclose while still employed seldom anticipate the often-catastrophic consequences of their actions. (Garrick & Buck, 2020; McClearn, 2003).

On the other side, faced with a blown whistle, institutions instinctively react to minimize their culpability and damage. The standard management tactic is instigating mobbing by coworkers to then build a complaint against the whistleblower, which is then investigated and documented to impugn the whistleblowers credibility and assassinate their character, and during this counter-investigation with vague charges, the whistleblower is then formally isolated to 'protect' the new farcical investigation. (Garrick & Buck, 2020; Alam, 2019). Ultimately, around 70% of whistleblowers will find themselves swiftly fired or forced to resign – usually the whistleblowers who took their concerns outside the company. (Apaza, 2011).

Retaliation against whistleblowers is common and severe. Those who report externally and trigger adverse publicity are expected to meet "*comprehensive forms of retaliation.*" (Dworkin, 1998). Those who blow the whistle on serious wrongdoing are expected to suffer "*significant damage.*" (Khan, 2022). Whistleblowers often face retaliation to the extent it disrupts their core sense of self. The impact of whistleblower retaliation cannot be understated (Ahern, 2018; Apaza, 2011; Kenny, et al, 2019).

For the whistleblowers, disabling PTSD-like symptoms first start with self-doubt and then escalate in a spiral to a loss of sense of coherence, dignity, and self-worth. This anxiety is felt for years. Compared to the general population, whistleblowers have much more severe depression, anxiety, distrust, and sleeping problems. 88% of whistleblowers report intrusive thoughts and nightmares, 89% report feeling humiliated about the situation, and 87% reported belief there was a hostile mob organized against them. The psychological impact has been compared to the grief associated with death of a loved one, or a person's state two to three weeks after experiencing major natural disaster. (Ahern, 2018; Garrick & Buck, 2020; van der Velden, et al, 2019).

In addition to counter-accusations and job loss, retaliation may include: demotion, harassment, decreased quality of working conditions, threats, reassignment to degrading work, character assassination, reprimands, denigration, punitive transfers, increase in workload, demotion, smear campaigns, surveillance, rumors, denylisting from their field of work, denial of promotions, overly critical performance reviews, double-binding, the 'cold shoulder', referral to psychiatrists, manufacturing personal and/or professional problems, exclusion from meetings, insults, retaliatory lawsuits, stalking, ostracism, petty harassment, abuse, bullying, doxing, vandalism and destruction of personal property, police reports and arrests, and even harm to the whistleblower's own bodies through physical attacks and sexual assaults, to the extent of assassination (Alford, 2001;

Garrick & Buck, 2020; Kenny, et al, 2019; Martin, 2003; Marin & Rifkin, 2004; Worth, 2022).

There are several known, confirmed whistleblower assassinations in just the last few years, including:

In Georgia (USA), **Eliud Montoya** blew the whistle on a labor-trafficking scheme at his workplace where undocumented workers were hired and their pay was skimmed – with the perpetrators stealing more than $3.5 million. In 2017, Montoya reported the scheme to his company management (a subsidiary of Davey Tree Expert Company), then four months later also reported the situation to the U.S. EEOC.

Two days after Montoya took the complaint to federal regulators, three men at the company assassinated Montoya, shooting him to death. (Law & Crime, 2022; U.S. DOJ, 2022). In 2023, six years following Montoya's death, the assassin was sentenced to life in prison and the company was fined $4 million by U.S. DOJ. (U.S. DOJ, 2023).

In South Africa, **Babita Deokaran** was the chief director of financial accounting at a Department of Health agency. She blew the whistle on suspected corruption at Tembisa hospital, flagging nearly £43m of possibly fraudulent transactions. The corruption is now suspected to also be connected to an organized crime ring. In 2021, Deokaran was shot dead outside of her home in a 'hit-style' killing. Days before the murder she had warned her supervisors "*our lives could be in danger*."(Farmer & Thornycroft, 2022; News24, 2022-2023.

In New York (USA), **Allyzibeth Lamont** discovered her boss was paying employees under the table (not deducting payroll taxes). She reported the issue to the New York Department of Labor, and planned to take the issue public. The employer testified he was nervous the labor complaint would now 'get in the way' of his plans to open a new location, so he hired someone to assist him in assassinating Lamont.

In 2019, Lamont was suffocated with a plastic bag over her head, then beat to death with a baseball bat and sledgehammer, followed by her body being dumped in a shallow grave next to a highway. The New York Labor Commissioner said Lamont's murder was "*the most heinous act of retaliation against a worker that the New York State Department of Labor has ever seen."*(Keller, 2021; Williams, 2021).

Babita Deokaran (The South African, 2022)

Frank Olson (Alchetron)

Karen Silkwood (TSHA)

In addition to formal homicides, there are also several notoriously suspicious whistleblower deaths which are suspected to be retaliatory murders, including:

Frank Olson was an executive in the CIA's Special Operations Division and MK-ULTRA program. Olson was involved in a number of ghastly secret chemical and biological warfare experiments and operations. Olson expressed shame about his involvement and compared some of the US' activities to *"what had been done to people in concentration camps."* He told his wife he was

deeply bothered about the germ warfare experiments in Korea, that he had *"made a terrible mistake,"* and contemplated quitting. (Kuzmarov, 2020). There were also suspicions Olson planned to blow the whistle on the CIA's connection to a mass poisoning event in Pont-Saint-D'ésprit, France in 1951. Shortly after failing a CIA interrogation in 1953, and a finding he breached security protocols, Olson then "*fell out of a window.*" (Kuzmarov, 2020).

The witness, another CIA executive, could not provide a coherent explanation of events leading up to the fall, yet right after the 'fall' he made a phone call to an unidentified source saying "*he's gone,*" to which the person replied "*that's too bad*" and hung up. An autopsy found a blow to Olson's head from the butt of a gun. The night before his death, Olson told his wife someone was trying to poison him and he feared for his safety. (Kuzmarov, 2020).

Karen Silkwood was a lab technician at a Kerr-McGee plutonium plant. In 1974, she reported to her labor union and U.S. Atomic Energy Commission that the plant had quality-control failures and insufficient safety procedures that put employees at risk of radioactive contamination. The union encouraged her to gather internal documents to corroborate her allegations. Less than two months later, she was contaminated with plutonium at work three days in a row. Then she also found plutonium contamination in her home. She alleged it was all acts of intimidation by Kerr-McGee. (History, 2009).

Silkwood persisted, obtained corroborating evidence, and got in her car to drive to meet with a New York Times reporter to share the documents. Silkwood was found dead in a car crash. The car had a fresh dent in the rear bumper and there were skid marks at the scene indicating a hit-and-run assailant forced Silkwood off the road. The documents Silkwood obtained to expose Kerr-McGee went missing. It was later revealed Silkwood likely unwittingly collected documents that also exposed a nuclear smuggling ring. (Kohn, 1997; Latson, 2014).

Cliff Baxter was a vice chairman at Enron and had raised a number of concerns internally about Enron's dubious off-the-books transactions with private partnerships. Fellow Enron whistleblower Sherron Watkins noted Baxter's dissent in her now famous memorandum to CEO Kenneth Lay. In 2002, two weeks after Baxter was first publicly named as an Enron whistleblower in Watkin's memo, Baxter was then found shot dead in his car with 'rat-shot' (an unusual type of ammunition not easily traced back to the gun it was fired from). Baxter had unexplained wounds on his hand and shards of glass on his shirt. A few days before his death, Baxter had commented about needing a bodyguard. At that time, Enron was engaged in the now notorious, extensive and obstructive shredding of incriminating documents and deletion of computer files (Martin, 2002; Oregan, 2002).

The capacity for retaliatory physical violence may often be present (especially if the whistle is blown on an institution with a large private security force), and threats of violence can be exceptionally effective in silencing witnesses. (Greitens, 2016).

However, threats of violence and attempts at assault are often not worth the risk to employers – as it may give the employee tangible proof of retaliation, an actionable complaint for law enforcement, and also lead to great publicity. Thus, employers seem to most often follow a playbook designed to initiate a self-destruction protocol through social and psychological violence, instead of direct physical assaults. (Alexander, 2004). Powerful employers may pursue direct terror through low-level violence and professionalized low-cost escalation. (Gross, 1980).

Still, based on the U.S.' history of incredibly violent responses to labor organizing, it is probably safe to assume that if large, powerful institutions could successfully murder their most threatening whistleblowers – they would not hesitate to do so. (Dubofsky, 2017; Lipold, 2014; Walters, 2015.).

Figure: Enron (BBC)

Figure: Enron (NYT)

Overall, 99% of whistleblowers report feeling harassed, 94% report bullying that left them fearful, 89% reported confrontation and threats. 14% of whistleblowers reported being physically and/or sexually assaulted. Retaliation is expected to be more severe when the person discloses information about systemic and deep-seated wrongdoing (as opposed to isolated incidents), or when whistleblowers go

outside their organization to report to a regulator or journalist. (Garrick & Buck, 2020; Kenny, 2018).

Management will often continue to allow, if not actively enable or instigate, retaliation by coworkers. The corporation will pressure other employees to collude against and inform on the activities of the whistleblower. The whistleblower will concurrently be ostracized and shunned, with their disclosures scrutinized and minimized, in order to thwart their sense of purpose and community (factors often associated with depression and suicide). Around 50% of whistleblowers admit to thoughts of suicide. (Garrick & Buck, 2020).

One of the most psychologically devastating forms of retaliation to a whistleblower is gaslighting. The corporation wants to deflect its wrongdoing, degrade their victims, and undermine the victim's credibility as a witness. To achieve this, the institution enables reprisals and retaliation, then explains those actions away with excuses and misdirection, and then claims the whistleblower is overreacting irrationally, while also creating a mirage of concern and respect for the whistleblower. This psychological manipulation protocol intends to cause the whistleblower to question their own memory, perception, and sanity. To onlookers without context, the whistleblower appears inconsistent and unstable (Ahern, 2018; Garrick & Buck, 2020).

Retaliation by official government channels is especially problematic. Similar gaslighting is likely to occur, however public opinion will generally view those processes as fair and independent. While, in reality, those agencies were often created and captured by business interests (Martin & Rifkin, 2004). Official channels also narrow the disclosures due to statutory terms and regulatory procedure, transforming the whistleblowers experience of retaliation into an administrative and technical matter – which may be dragged out for years before commonly being dismissed without proper investigation. The institutional systems put in place to squash whistleblowers intend to leave the whistleblower, and anyone watching, to feel there was no point in ever coming forward. (Alam, 2019; Martin & Rifkin, 2004; Weinberg, 2017).

Similarly, the press has been known to publish adversarial coverage of credible whistleblowers, even on matters of great public importance. The press and pundits may participate in smears and discredit the whistleblower through racist and classist ideology, while concurrently parroting the institution's unsubstantiated statements as conclusive fact. They may also frame the whistleblower and supporters as 'conspiracy theorists' or otherwise untrustworthy, and push a hero-traitor paradigm. These tactics can be quite intentional, fueled by professional and partisan politics, and business interests. Institutions, especially the US government, have even been known to reward journalists willing to push the institution's biased views, and punish the reporters who tell the truth. (Chomsky et al, 1988; Kein, 2007; Mistry, 2020).

Through the process of complex and holistic retaliation, a whistleblower's identity will be disrupted. In order to counter the gaslighting, the whistleblower must accept a variety of institutional betrayals and tend to their resulting moral injuries. They must reckon with a different view of the world they had before. This new knowledge of how the world really works does not fit in the existing frames and forms of society, and they must now walk in the world knowing what most do not, and wishing they never learned it themselves.

The whistleblower will avoid people and places that trigger traumatic memories and feelings of humiliation, paranoia, or despair. This is likely to include self-withdrawal from social contacts and abandoning hobbies. Most whistleblowers will also report an increase in physical pain and fatigue. 78% of whistleblowers suffer from declining physical health post-disclosure (Alford, 2002; Bryan, 2014; Garrick & Buck, 2020; Kenny, et al, 2019; Smidt & Freyd, 2018; van der Velden, et al, 2019).

Whistleblowers are embodied, relational beings – and like everyone, their minds and bodies are vulnerable to demise. The experience of whistleblower retaliation is chaotic. The identity crisis that results from the aftermath of blowing the whistle can lead to an un-doing of the person. Previously held and stable views of self are thrown into disarray, leading to an unraveling of one's identity and an experience of derealization. (Kenny, 2018; Kenny, et al, 2019; Kenny & Fotaki, 2023).

Instead of resembling the sort of rebellious, inspirational hero they are often depicted as – many whistleblowers suffer an existence comparable to Saint Sebastian (martyr) or Job (biblical figure). The media continues to personify the act of whistleblowing in the whistleblower (ignoring the institutional response), and the public often only engages with the grotesque truth if presented in beautiful aesthetic (i.e., Francisco Goya's "*Saturn Devouring his Son.*").

No one wants to accept an embodied and vulnerable person is made to suffer so severely in a sacrificial battle for the common good. (Alford, 2002).

Saturn Devouring His Son by Francisco Goya (1820-1823)

Retaliation robs whistleblowers of their identities as capable and successful professionals. Having spoken up, they are no longer seen as valid subjects deserving of basic respect, and so became targets of various kinds of retaliation and ridicule. Having spoken up, they are no longer seen as sufficiently valid to hire, and instead they are excluded from recruitment processes. They are also denied subjectivity in social interactions: they are seen as the 'other' and shunned by former friends. (Kenny, 2018).

This experience plunges whistleblowers into an existential crisis. The human mind works hard to avoid these crises, and may clutch on to the stigmatized, controversial identity of "*whistleblower*" as a psychic lifeline, seeing no other options for a normative identity and preferring it over "*leaker*" or "*activist*" or worse. The experience will often leave whistleblower's minds stuck in static time and their lives paralyzed by the trauma. (Kenny, 2018).

Those who are able survive severe retaliation intact, often live the remainder of their lives in a state the Japanese refer to as "*the freedom of one who lives as already dead"* as they *"become the disaster so as not to be destroyed by it.*" (Alford, 2002, page 58).

Power: the Dance of Dissent

In whistleblower conflicts, power is complex and circulating between the person being retaliated against and the organization who is retaliating. Some refer to this dynamic, initiated by the misconduct and whistleblower's complaints and disclosures, along with employer's likely responses, and then responses to those responses, the *"Dance of Dissent."* (Martin & Rifkin, 2004).

The nature and extent of retaliation can be viewed as a balance of power between whistleblower and wrongdoer. Retaliation will likely be worse when the institution senses a threat to its resources due to the disclosure: if their exposed conduct involves harm to the public, if the legitimacy of the organization is threatened, or if the wrongdoing has already become systemic to the organization. If the organization is heavily dependent upon the wrongdoing for resources, the more a whistleblower attempts to disrupt the wrongdoing, the more the corporation will resist and retaliate. (Alford, 2002; Kenny, et al, 2019; Martin, 2003; Sumanth, 2011).

If the whistleblower is a senior employee or a key role embedded in the institution, the company is more like to make an example of the "*defector*." Corporations may view these actors as insurgents and potential revolutionaries. In these situations, the corporate retaliation may even rise to intentional punishment, viewing the whistleblower disclosures as treason. Corporations may task their private security forces to engage in surveillance, intimidation, intelligence gathering, denylisting, propaganda, and private espionage. (Lubbers, 2012).

Individuals who are connected to the illicit actions in some ways are likely to view whistleblowers as threats to the system they are still a part of. Managers and coworkers who directly engaged in the exposed wrongdoing, or have been tacit observers to it, will have an immediate and knee-jerk response to deny or minimize the illicit behavior. Further, anyone who stands to benefit from the unethical activity is a candidate for administering punishment. (Sumanth, 2011).

Implicated individuals may be fearful of losing status, reputation, and material rewards. Faced with feelings of apprehension and helplessness caused by the thought of losing resources, individuals may see retaliation against the whistleblower as a way to prevent that from happening. Rather than risk losing the benefits they may reap from the unethical behavior, individuals are likely to try to discredit the whistleblower and the allegations, in an effort to keep the established system from unraveling. As the system continues, the potential threat of whistleblowers to this 'house of cards' becomes more dangerous and institutions will take various measures to dissuade anyone else from speaking out (Sumanth, 2011).

Defense of a collective identity may also trigger a negative response to a whistleblower's actions. Group members who share strong collective identities may feel overly protective of one another, and thus, choose to retaliate against whistleblowers they view as trying to disrupt these strong ties. Blowing the whistle on something like systemic corruption can represent a perceived threat to one's group or system. These threats, in turn, activate cognitive and

emotional processes. A norm of self-interest is likely to encourage the actor to do what is necessary to maintain the status quo (Sumanth, 2011).

Kenny et al explain that, "*Whistleblowing is an exemplar of how, in organizations, workers can "make trouble", specifically when work-ers' whistleblowing disclosures draw violent reprisals but they continue to speak regardless.*" Institutions design whistleblower reprisals as aggressive policing of their cultural norms and implement the retaliation through actions designed to silence the worker speaking out in defiance while generating "*chill*" that deters other, from speaking out, aiming to restore the status quo and normalize complicity. (Kenny 2024).

Finally, modern corrupt institutions tend to avoid the traditional "*open brutality*" and instead design and maintain a widespread system of positive reinforcement, including promotions and better living standards, which they use to coerce loyalty. (Gross, 1980). Coworkers are naturally fearful of receiving the retaliation they see directed toward the whistleblower. They are also instinctively drawn to protect their own identifies and communities. On top of this, they are softly lured to side with the institution through a network for rewards and positive reinforcement. The substance of the disclosures disappear, and the whistleblower becomes the only problem.

A Precarious Ledge

Whistleblowers are dependent on institutions and infrastructures (and their relational interdependence) for their material survival after speaking up against wrongdoing. The whistleblower is under relentless pressure in precarious living conditions. After losing their livelihood, profession, and income – whistleblowers may eventually be forced to give up their fight to avoid homelessness and/or bankruptcy. Many whistleblowers will eventually lose their homes and their families, and around half will file for bankruptcy. (Kenny, et al, 2019; Kenny, et al, 2023). "*A typical fate is for a nuclear engineer to end up selling computers at Radio Shack.*" (Alford, 2002).

After making disclosures, a whistleblower's income plumets while expenses rack up with relocation to a new home, legal costs, medical costs after losing insurance, costs for re-training in a new field, and credit fees and interest during the period of post-disclosure unemployment. The average shortfall during this period is $32,580 a year, and for those who were fired or otherwise lost earnings, the average shortfall is $76,291 a year. Even when whistleblowers are allowed to return to work, whistleblowers can expect their average earnings to drop 67% post-disclosure, (Kenny & Fotaki, 2023).

The time and work spent on disclosures and surviving the aftermath is entirely unpaid, unless there is an eventual lawsuit decision with compensatory damages, but that often takes years. However, the required activities of a whistleblower post-disclosure are a *"full-time, all-consuming job in and of itself."* 97% of whistleblowers report spending more than 100 hours on disclosure-related activities & 39% report spending more than 1000 hours. Only the whistleblower has the knowledge and experience to provide lengthy and detailed descriptions of the wrongdoing and any subsequent retaliation. Such work is often carried out alone, unsupported, and uncompensated. (Kenny & Fotaki, 2023).

Because whistleblowers are usually met with character assassination and smear campaigns, in addition to managing the disclosures, whistleblowers are also forced into a self-advocacy role as a necessary defense in this time of precarity. If the whistleblower's name was made public, a self-advocacy role is not optional and is essential to effective whistleblowing and personal survival. Time is spent seeking help from journalists, politicians, regulators, and lawyers – all of whom require different presentations of case information (Kenny & Fotaki, 2023).

If the whistleblower decides to also seek justice for the post-disclosure aftermath, it becomes a second campaign requiring as much cost and effort as the original claim. In both cases, time is required preparing for and engaging in lengthy court cases: compiling evidence, researching legal rights, studying organizational policies, assisting investigations, and advocating for political support (Kenny & Fotaki, 2023).

This time spent on disclosures might otherwise be devoted to seeking further employment, retraining, and engaging in the self-care required to mitigate the adverse health effects of whistleblowing related stress. Instead, that required work is postponed. Concurrently, whistleblowers often deny the vulnerability they experience. Many suffer severe financial loss, but prefer to hide it due to social stigma around wealth and status. Similarly, whistleblowers also find themselves coerced to subvert outward signals of their internal suffering and terror, *"in the name of effective lobbying."* (Alford, 2002; Kenny & Fotaki, 2023).

Pointless is the Point

Whistleblowers are an antithesis to cultures of secrecy, which are fertile for corruption due to the lack of sunlight. Whistleblowers are desperately needed, yet U.S. whistleblower protection laws (an inconsistent web of employment law protections claiming to encourage disclosures of evidence of wrongdoing by offering "*protections*" from retaliation) dependably fail to actually

protect employees and even participating in the retaliation themselves.

Existing schemes are not working for the majority they are supposed to serve and are based on flawed assumptions about the tangible and material experiences of speaking out. (Kenny & Fotaki, 2023). Some academics have gone so far to allege the current whistleblower laws are a "*cynical attempt to entrap whistleblowers in a procedural abyss"* and to fool employees into revealing their identity in order to make them easier targets for attack (Martin, 2003).

Indeed, it is a cruel lie to call these laws "*protections*" when the best they offer is a small chance of an insufficient, partial 'remedy' after the fact – and even that still requires years of additional abuse and subjugation to obtain. Further, once an employee goes to a regulator in the U.S., there is a significant chance the employee will face additional retaliation by the regulator on behalf of the corporation or in support of business interests generally. (Martin, 2003; Nyguyen, et al, 2015).

This societal structure of whistleblowing puts the burden on individuals to alleviate systemic informational problems. Yet at the same time, whistleblower laws focus on what is done to whistleblowers (retaliation) and frequently neglect investigation into the original issues the employee raised. When policies compel employees to put themselves at risk and fulfil their presumed ethical obligations to come forward and disclose wrongdoing, it raises a question if that compulsion is ethical due to the personal devastation that will likely follow. (Bloch-Webha, 2023, Kenny & Fotaki, 2023; Martin, 2003).

Because a successful whistleblower brings down corrupt people in high places simply by exposing information, it is foolish to not recognize the incredible risk inherent in threatening the status and livelihood of those in powerful positions, and the incentive they have to bury that information and anyone who knows about it. The bare minimum the U.S. must do today is formally criminalize retaliation against whistleblowers. The laws and precedent for such legislation already exist in prosecutions of people for obstruction of justice and for witness tampering but are rarely used outside of murder. (Edmonds & Weaver, 2006; Martin, 2003; Petruzzi & Kirshner, 2015; *United States v. Stoker*, 706 F.3d 643, 646 (5th Cir. 2013)).

A whistleblower who turned to regulators is ultimately a witness and informant, thus there is no reason the same laws that protect someone directly assisting the Department of Justice on a criminal investigation, should not apply to a whistleblower disclosing misconduct under other federal statutes. (18 U.S. Code §§ 1512, 1513).

There also needs to be an independent mechanism for this process outside of the captured labor agencies. As of now, the ability (if any) for labor agencies to refer cases to U.S. DOJ is unclear. Further, the process for seeking assistance directly from the U.S. DOJ is even more unclear and whistleblowers likely to face similar issues of capture, at least for intake, as the captured labor agencies (see for example: Brewster, 2018).

Until there is at least some deterrent for employers to stop retaliating against whistleblowers (i.e., jail time instead of a relatively small fine), we should expect the devasting experience that is destined in certain types of 'whistleblowing' to continue – which deters could-be whistleblowers from coming forward, instead of deterring institutions from engaging in misconduct. Further, any group encouraging whistleblowers to come forward publicly without assurances of legal and functional support, should be treated with skepticism.

Conclusion

Retaliation against whistleblowers is not an incidental failure of corporate governance — it is an expected function within systems engineered to suppress dissent and preserve control. The operational logic of corporate retaliation is both procedural and psychological: it seeks to isolate the whistleblower, weaponize legal ambiguity, and exhaust the resources of the dissenter before systemic critique can take root. Yet, as this analysis demonstrates, understanding the predictability of these mechanisms enables targeted countermeasures.

Through disciplined record-keeping, preemptive evidence capture, and strategic narrative control, whistleblowers and their allies can disrupt the presumed inevitability of suppression. Structural violence thrives in opacity and fragmentation; resistance grows in documentation and shared awareness. By revealing the operational logic of retaliation, this work aims to equip future actors not only to survive these systems, but to expose them, destabilize them, and ultimately, to force their reckoning.

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Acknowledgements

The author conceptualized the article, developed the theoretical framework, and conducted the review and synthesis of literature. This research received no external funding. All materials, equipment, and resources used in the study were personally funded by the author.

This article was originally published by Covert Action Magazine on April 25 2023. The article was previously republished on Big Tech Politics on July 1 2023.

The Dark Theater

Retaliation Litigation as Institutional Obstruction and Legalized Harassment

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Abstract: Whistleblower retaliation litigation is widely treated as a conventional employment dispute governed by neutral procedural rules. But when the retaliation stems from disclosures involving fraud against the government or other public harms, the legal process transforms. This article argues that in such cases, employer defenses routinely operate not as good-faith rebuttals but as systems of institutional deceit—anchored in fraud, obstruction, and psychological warfare. Using interdisciplinary evidence from law, organizational psychology, feminist theory, and whistleblower trauma studies, the article shows how retaliation lawsuits become a second act of employer retaliation: one staged inside the courtroom and performed through false declarations, manipulated discovery, psychiatric weaponization, and narrative control.

The legal system, as currently structured, rewards institutional dishonesty and punishes moral dissent. Judges frequently defer to employer narratives, minimize discovery abuse, and fail to sanction perjury or obstructive filings—even in the presence of falsified evidence. Meanwhile, whistleblowers are subjected to reputational erasure and emotional destabilization, often emerging from litigation more harmed than vindicated. Through the lens of "*derealization*" and *"impossible speech,"* this article reconceptualizes the courtroom not as a venue of truth, but as a stage where institutional betrayal is performed as law.

The article concludes with policy proposals for structural reform, including mandatory DOJ referrals for litigation fraud, discovery oversight mechanisms, trauma-informed legal processes, and the reclassification of whistleblower retaliation as a public law harm. Until such reforms are enacted, the legal system will remain a site of ritualized injustice, in which truth is discredited, and power narrates its own exoneration.

Keywords: whistleblower retaliation; retaliation litigation; institutional gaslighting; legal system complicity; procedural violence; derealization; narrative control; discovery abuse; employer fraud; legalized obstruction

Citation: Gjovik, Ashley. "*The Dark Theater: Retaliation Litigation as Institutional Obstruction, and Legalized Harassment."* The Journal of Structural Power & Resistance, Volume 1, Issue 1, Spring 2025, Silentium Fractum. May 26 2025. https://ashleygjovik.com.

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Acknowledgements

Introduction

In the architecture of American civil law, whistleblower retaliation claims are treated as conventional employment disputes, adjudicated within an adversarial system designed to weigh narratives, assess burdens, and resolve wrongs through compensatory relief. But when the retaliation stems from disclosures involving violations of federal law—fraud, safety breaches, or constitutional violations—the litigation ceases to function as a neutral forum. It becomes instead a continuation of the original wrongdoing, performed through law.

This article contends that in high-stakes retaliation cases, the employer's legal defense often transforms into a system of fraud, obstruction, and institutional gaslighting, disguised as litigation strategy. Rather than rebutting the allegations in good faith, the employer frequently submits false declarations, falsified records, and strategic misrepresentations to courts and agencies. Discovery is manipulated, evidence is withheld or destroyed, and retaliatory accusations of litigation misconduct are engineered to discredit the plaintiff and bury the underlying claim. These are not anomalies or excesses of advocacy—they are core features of how institutions defend themselves against morally disruptive truth.

This practice is not only legally corrosive; it is morally devastating. The whistleblower, often acting at great personal risk to protect public interest, is forced to relive the retaliation inside the courtroom—this time under the imprimatur of legal process. The fraudulent defenses that follow serve not merely to avoid liability but to derealize the truth, reshaping the public record into a lie. What courts call "*defense*" is often a performance of institutional power against individual dissent, enabled by procedural norms that privilege formalism over epistemic justice.

Existing legal scholarship rarely addresses this dynamic as a systemic pathology. Doctrines such as "*fraud on the court,*" obstruction statutes, or anti-perjury rules are largely disconnected from civil employment litigation. Judicial culture often assumes that both sides are engaged in symmetrical contestation, despite widespread evidence that employers in retaliation suits frequently control the narrative, the records, and the rules of access. Meanwhile, whistleblower protection statutes offer minimal structural safeguards and almost no consequences for employer deception during litigation.

This article seeks to reframe retaliation litigation as a form of state-enabled institutional deceit, in which the legal system, as currently designed, fails to adjudicate truth and instead legitimizes the lie. It begins by situating whistleblowing within a broader political and philosophical frame: as a moral act of institutional dissent, not merely a private complaint. It then maps how employer defenses evolve into multi-layered systems of fraud and obstruction, supported by documented legal tactics. Drawing on psychological literature, feminist legal theory, whistleblower trauma research, and first-person accounts, the article exposes how litigation becomes a site of psychological abuse and derealization. Finally, it proposes structural reforms to restore the judiciary's function as a truth-seeking institution, including mandatory fraud audits, burden-shifting mechanisms, and criminal referrals for litigation misconduct in retaliation suits.

In what follows, the legal process is not defended. It is interrogated. This article does not ask how whistleblowers can better survive litigation; it asks why the law so often colludes in their erasure.

Whistleblowing as Disruption in a Neoliberal Legal Order

Whistleblowing is often framed as an act of corporate compliance or internal accountability. But in truth, it functions more like institutional disobedience—a direct challenge to the internal rationalities and mythologies of the modern organization. Especially when disclosures involve fraud against the government, constitutional violations, or public safety threats, the whistleblower exposes not just wrongdoing but institutional hypocrisy: the gap between what organizations say they are and what they actually do.

This tension becomes especially volatile under neoliberal legalism, where the dominant imperative is risk minimization, reputational control, and output efficiency—not moral integrity. Within such systems, loyalty is conflated with silence, and the internal rule-following takes precedence over external truth. Whistleblowers, then, are not merely seen as disrupters—they are existential threats to institutional legitimacy.

As Judith Butler argues, neoliberal power depends on the ability to determine whose lives are grievable, and whose harms are legible (Butler 1997). In this frame, whistleblowers are rendered "*ungrievable subjects*": their losses are delegitimized, their motives pathologized, and their speech deemed irrational. This process, which Varman and Al-Amoudi describe as "*derealization*," functions to protect the institution by structurally erasing the whistleblower's moral claim (Varman and Al-Amoudi 2017).

The act of whistleblowing is therefore both epistemic and political. It does not merely report an illegal fact; it shatters

a controlled narrative, often forcing the institution to face not just liability but moral incoherence. This explains why whistleblowers—even when protected by statute—are so often met with aggressive retaliation.

Research shows that whistleblowers often come forward not out of self-interest, but from a sense of civic duty or ethical compulsion (Saade 2023). Yet this ethical gesture is immediately cast as deviant behavior within managerial logic. As Kenny argues, whistleblowers speak in a way that is "*impossible*" within institutional grammars (Kenny 2018). Their truth cannot be received because it cannot be processed without undoing the self-image of the organization itself.

As a result, whistleblowers are isolated, often framed as emotionally unstable or professionally incompetent. Many are subjected to covert psychiatric undermining, both in the workplace and later in court, where mental health records are weaponized to delegitimize their claim (Kenny, Fotaki, and Scriver 2019). This is not collateral damage—it is part of the institutional response, aimed at invalidating the actor so the institution can preserve itself.

Thus, the whistleblower is not just a legal claimant. They are a philosophical antagonist—someone whose existence threatens the institutional fiction of virtue. And once that threat enters the courtroom, the system must either reckon with the truth—or, more often, move to silence it.

Employer Legal Defense as Fraud and Obstruction

When an employer has retaliated against a whistleblower, particularly one who disclosed violations of federal law, their legal defense typically involves far more than denial. It becomes an active system of misrepresentation, a performance designed to replace the moral record of what happened with a legally sanctioned lie. In these cases, the defense strategy is not merely adversarial—it is a continuation of the original wrongdoing through procedural and evidentiary fraud.

The first layer of fraud is the fabrication of a pretextual reason for the adverse action. Employers often assert that the employee was fired, demoted, or disciplined due to "*performance issues,*" "*insubordination*," or "*personality conflicts*," despite the existence of internal documents showing the real motive was the protected disclosure (Miceli, Near, and Dworkin 2008).

These false justifications are commonly paired with post hoc documentation: performance write-ups, disciplinary memos, and retrospective narratives created or curated after the retaliation to support the invented rationale (Saade 2023).

The second layer of fraud occurs inside the courtroom and during discovery. Employers routinely submit sworn declarations that contradict the record, misrepresent facts in pleadings, and withhold exculpatory materials that would corroborate the employee's version of events (Sanjour 2013). In many instances, they solicit or pressure other employees to submit statements supporting the false narrative (Kenny 2018).

These tactics constitute what the Supreme Court has termed *"fraud on the court"*—the intentional corruption of the judicial process through deceit (*Hazel-Atlas Glass Co. v. Hartford-Empire Co*. 1944).

In the regulatory realm, the deception extends to federal agencies. Employers frequently submit position statements to the EEOC or OSHA that include factual inaccuracies, omissions, or outright fabrications. These statements are treated as reliable evidence by courts and can influence agency decisions that undermine the employee's credibility before a lawsuit even begins (Petruzzi and Kirshner 2015).

When this conduct occurs in criminal proceedings, it would plainly meet the standard for obstruction of justice under 18 U.S.C. § 1505 and § 1519, or false statements to the government under 18 U.S.C. § 1001. Yet in civil retaliation cases, this same conduct is normalized as "*zealous litigation.*" The employer, having retaliated, is permitted to construct an entire fictional world, and the court—constrained by procedural formalism and asymmetric information—often accepts it as plausible.

Psychologically, this process enacts a form of institutional gaslighting. As Kenny and colleagues describe, employers often engage in deliberate reputational erasure, reframing the whistleblower as paranoid, unstable, or disruptive (Kenny, Fotaki, and Scriver 2019). This is later replicated in court through requests for mental health records, psychiatric evaluations, and character smearing. The goal is not only to win the case, but to obliterate the moral standing of the whistleblower.

This form of fraud has no meaningful consequences. Perjury is rarely investigated. Rule 11 sanctions are virtually never imposed against employers in retaliation litigation. Courts routinely ignore patterns of misrepresentation unless the deceit is caught and proven through rare smoking-gun evidence. The legal system, in effect, incentivizes obstruction so long as it is wrapped in the language of procedural compliance.

Thus, the employer's defense in a retaliation suit is not just a legal position. It is a political act: a defense of the institution's legitimacy, achieved by discrediting the truth-

teller and reconstructing reality to fit the needs of power.

Gaslighting, Derealization, and Psychological Abuse

Beyond factual misrepresentation and legal obstruction, employers often escalate retaliation within the litigation process itself, engaging in a form of procedural psychological warfare. What follows is not just adversarial strategy, it is systematic derealization, in which the whistleblower's identity, memory, and mental health are distorted, undermined, and ultimately weaponized against them. This stage constitutes a second retaliation, now performed under the protection of court rules.

Whistleblowers often describe post-retaliation litigation as more traumatic than the retaliation itself (Van der Velden, Das, and Bosmans 2019). This is not incidental. The employer, having committed the initial wrongdoing, now seeks to destroy the legitimacy of the person who revealed it. This is done through coordinated tactics: allegations of litigation misconduct, manufactured discovery disputes, extensive psychological probing, and procedural sabotage.

The gaslighting begins with procedural manipulation. Employers obstruct discovery, delay document production, then blame the employee for being unprepared or uncooperative. In some cases, they intentionally miscommunicate about deadlines or withhold necessary records, only to later accuse the plaintiff of spoliation or discovery abuse. (Miceli, Near, and Dworkin 2008). These engineered crises are then used to justify motions to dismiss or sanctions, flipping the script to make the whistleblower appear deceptive, incompetent, or aggressive.

Meanwhile, the employer initiates invasive discovery designed to shame or destabilize. Plaintiffs are asked to provide years of mental health records, social media content, employment history, and even submit to psychological evaluations. Courts rarely scrutinize the necessity of these requests, treating them as neutral fact-finding rather than what they often are: covert character attacks and gross invasions of personal privacy. (Kenny, Fotaki, and Scriver 2019).

This strategy is particularly acute for women, who are more likely to face psychiatric framing, emotional invalidation, and character smearing. Research shows that female whistleblowers experience more severe and more personalized retaliation. (Saade 2023). The litigation process magnifies this dynamic, using credibility challenges and gender-coded attacks to erode both public and internal self-trust.

The psychological toll of this process is immense. Studies have found that whistleblowers exhibit PTSD rates equivalent to or greater than war veterans and terminal cancer patients (Van der Velden, Das, and Bosmans 2019). Symptoms include hypervigilance, dissociation, insomnia, and profound social withdrawal—often worsened by judicial indifference or implicit collusion in the employer's narrative framing.

This form of retaliation is structurally unpunished. Judges rarely intervene in bad-faith discovery or dismiss retaliatory requests for psychiatric records. There are no institutional protocols to identify when an employer is using litigation as psychological violence. The whistleblower is left alone, both in argument and in reality, facing a system that not only fails to stop abuse—but becomes the site through which it is enacted.

Retaliation Through Procedure: Legal Violence and the Trap of Litigation

Retaliation litigation is not only a site of narrative manipulation and gaslighting—it is often a space of intentional legal violence, where employers use procedure not merely to defend, but to punish. Their goal may be to secure dismissal, but their tactics reveal a broader ambition: to injure, exhaust, and erase the whistleblower. This violence is not incidental to litigation—it is engineered into its structure, weaponized through filings, deadlines, motions, and silence.

Every procedural event becomes a vector of harm. Employers demand invasive discovery—mental health records, financial history, communications with family, therapy notes—not because they are relevant, but because they destabilize. They subpoena new employers to sabotage reputations. They file motions accusing the whistleblower of misconduct, delay, or bad faith, even when the employer has manufactured the very delays and conflicts they then cite. These are not only legal strategies; they are forms of institutional aggression.

Worse still, the whistleblower cannot easily escape. Once a claim is filed in federal court, the plaintiff cannot simply withdraw without risk. Under Rule 41 and related doctrines, employers can—and often do—seek sanctions or attorney's fees if the case is voluntarily dismissed. What should be a right to retreat becomes a procedural threat. The result is a kind of legal captivity: the whistleblower is trapped inside a machine that hurts them whether they proceed or stop. There is no off-ramp, no dignified exit—only submission or collapse.

Even with legal representation, the whistleblower may be

powerless to stop the harm. Many do not understand civil procedure. They do not see the strategic uses of delay, or the reputational violence of psychiatric framing, until it is too late. And their lawyers—bound to the adversarial game and incentivized by contingency fees—may discourage them from intervening, speaking out, or redirecting the case. Some attorneys pursue efficiency over truth, settlement over vindication, and control over collaboration. The result is often devastating: a retraumatized truth-teller, watching from the sidelines as their reality is dismantled in the name of advocacy.

This legal violence is compounded by the judiciary's passivity. Judges may view the motions and countermotions as standard adversarial noise, failing to recognize the deeper structure: that this litigation is being used not just to resist liability, but to complete the retaliation. The lawsuit becomes a second abuse—a theater of controlled harm where the whistleblower is punished not for losing, but for speaking in the first place.

What emerges is a procedural paradox: you cannot escape the violence without risking more violence. The whistleblower cannot move forward without enduring psychological attacks but cannot move backward without incurring financial ruin. This is not justice..

The Role of Silence

Retaliation litigation rarely ends with a trial. It ends in silence. But that silence is not a neutral outcome. It is often the final act in the institution's strategy: a systematic disappearance of truth, achieved through procedural control, psychological attrition, and legal agreements designed to contain the threat the whistleblower represents.

One of the most powerful tools used to engineer this silence is the blanket protective order. Employers petition courts for protective orders early in discovery—ostensibly to try to shield trade secrets or sensitive HR material—but then apply them to virtually all documents produced, regardless of content. These orders become catch-all cloaks, preventing whistleblowers from sharing even basic evidence of misconduct with journalists, friends, or advocacy groups. In effect, protective orders create private law silos: closed legal spaces where the truth can be known but never spoken.

The same logic extends into settlement. The vast majority of retaliation cases, especially those involving serious harm, are resolved through confidential settlement agreements. These agreements often include:

- **Non-disclosure clauses** prohibiting the employee from discussing the facts of the case.
- **Non-disparagement clauses**, effectively gagging public commentary on institutional misconduct.
- **No-rehire clauses**, which blackball the whistleblower from the industry they worked in.

These provisions are not benign. They are legal erasures, crafted to eliminate not just the claim but the claimant. The institution preserves its public image. The record is sealed. The truth-teller disappears. Courts rarely intervene, even when these agreements perpetuate retaliation by ensuring the whistleblower remains unemployed, silenced, and isolated.

In some cases, whistleblowers sign these agreements under coercive conditions: facing mounting legal fees, deteriorating mental health, and the threat of countersuit or sanctions. Others do so without full knowledge of what they are giving up, especially when plaintiff-side counsel pushes for fast resolution to secure a contingency fee. The result is a legal fiction: a case "*resolved*" not through accountability, but through containment.

This procedural and contractual silencing serves a broader institutional function. It ensures that:

- The wrongdoing remains non-precedential.
- The whistleblower remains unreliable or invisible.
- The institution retains total narrative control.

As a consequence, courts become not venues of public record, but sealed rooms of procedural forgetting. The litigation was never about the truth. It was about neutralizing the one person who could name it.

Protective orders and settlement clauses are thus not technicalities. They are ideological tools, through which legal systems help institutions convert dissent into disappearance. If the law is to serve justice—not just reputation management, it must confront how often it becomes an accomplice to silence.

Legal System Complicity and Structural Impunity

The acts of deception and psychological abuse carried out by employers during retaliation litigation are not merely tolerated by the legal system, they are often structurally enabled. From discovery rules to evidentiary burdens, civil procedure operates in a way that privileges institutional defendants, defers to employer narratives, and isolates whistleblowers. The result is not just a failure of justice, but a system that rewards fraud and punishes dissent under the guise of neutrality.

One of the most dangerous assumptions in employment litigation is that both parties enter the courtroom with

comparable power, credibility, and access to evidence. In retaliation cases, this is patently false. Employers control personnel records, email systems, and internal investigative procedures. They can shape or suppress key documents, coach or coerce co-workers, and retain legal teams before the employee even files a claim. Courts nonetheless apply discovery burdens symmetrically, forcing whistleblowers to prove intent, falsity, and causality without the very tools they need to do so (Miceli, Near, and Dworkin 2008).

When employees do succeed in uncovering evidence of falsification or deceit, courts rarely interpret it as obstruction. Instead, judges treat employer misstatements as routine litigation tactics. Perjury in declarations, contradictory performance records, or misleading communications with federal agencies are almost never prosecuted, even when demonstrably false. There are virtually no instances in which an employer facing a proven retaliation finding is referred to the Department of Justice for submitting false statements under 18 U.S.C. § 1001 or § 1519 (Petruzzi and Kirshner 2015).

Nor are there institutional checks to detect patterns of abuse. Unlike in criminal law, there is no equivalent of prosecutorial oversight or grand jury review to test the veracity of employer filings in civil retaliation claims. Judges are left to rely on motions and countermotions, and few have the resources or inclination to treat employer discovery misconduct as systemic rather than adversarial. As William Sanjour's EPA testimony revealed, agencies themselves may be complicit in hiding evidence, deleting documents, or facilitating internal cover-ups (Sanjour 2013). Yet courts rarely question the credibility of institutions, even when whistleblowers present extensive documentary support.

This legal blindness is compounded by a cultural tendency to defer to organizational narratives. Whistleblowers, by contrast, are often cast as disgruntled, unstable, or acting out of revenge. The social psychology of the courtroom—combined with the employer's control over documentation—frequently tips the interpretive scales against the employee. As Kenny (2018) argues, the speech acts of whistleblowers are is "*impossible speech*" and is rendered legally invisible, while the employer's procedural fluency legitimizes their falsehoods.

This is what makes civil litigation such a dangerous site for whistleblowers. The law presumes good faith by default, and institutions weaponize this presumption to protect themselves. Procedural rules become instruments of obfuscation; discovery becomes a terrain of asymmetric warfare; and judicial neutrality becomes a cover for institutional loyalty. When this dynamic is allowed to play out unexamined, the courtroom ceases to be a venue for truth—and becomes a dark theater where silence is scripted and dissent is erased.

The Forgotten Harm: How Retaliation Litigation Erases the Protected Activity

At the center of every retaliation claim is a protected activity: a disclosure of wrongdoing. A safety report. A fraud alert. A civil rights violation. A constitutional breach. Yet once the lawsuit begins, that original act of conscience is often sidelined—or intentionally erased—from the legal record.

This erasure is not incidental. It is procedural. In retaliation cases, employers may move to exclude evidence of the underlying misconduct from trial on the grounds that it is "*not relevant*" to whether retaliation occurred.

Under prevailing doctrine, retaliation is treated as a standalone employment harm, mostly distinct from the content of the complaint that prompted it. Ultimately, what matters is not what the whistleblower said—but whether the employer's stated reason for firing them can be proven false.

As a result, the substance of the whistleblowing itself may never adjudicated. Jurors may never learn what the employee actually reported. Courts may bar evidence about the employer's wrongdoing. Even agency findings of probable cause or internal audits confirming the disclosure may be excluded from trial as prejudicial. The law isolates the retaliation from the reason it was inflicted—a clean procedural cordoning that severs moral context from legal remedy.

This erasure has two devastating effects.

First, it invalidates the whistleblower's moral purpose. The law invites the public to see them as merely an aggrieved former employee, not a citizen acting to prevent fraud, harm, or abuse. It reframes their act of conscience as a workplace dispute, thereby shrinking its public significance and making the retaliator's narrative easier to accept.

Second, it leaves the original harm unaddressed. Rarely does anyone return to ask:

- Was the fraud ever stopped?
- Were the safety conditions ever fixed?
- Were the civil rights ever restored?
- Are people still being harmed?

In many cases, the answer is unknown. The whistleblower

is gone. The litigation is sealed. And the actual underlying misconduct, the thing that started it all, has vanished from the public record. Institutions learn not how to fix problems, but how to remove the people who notice them.

This is the final betrayal: that the protected activity, which federal law claims to valorize, becomes inadmissible in the very proceeding meant to protect it. The legal system doesn't just fail to prevent retaliation—it participates in forgetting the reason it happened.

Policy and Structural Reform Proposals

The systemic failure of retaliation litigation—where employer fraud is tolerated, whistleblower trauma is ignored, and courts enable institutional gaslighting—demands more than doctrinal refinement. It requires structural realignment: a reengineering of how truth, power, and protection are conceptualized in the legal process.

Current remedies assume that if whistleblowers receive backpay or are reinstated, justice has been served. But this model fails to address the institutional deceit, psychological abuse, and public interest betrayal that define retaliation in its most damaging forms and the severe harm it can cause.

Mandate Adverse Inference and Burden-Shifting in Fraud Cases

When an employer is found to have fabricated evidence, withheld records, or submitted materially false statements in a retaliation case, the burden should shift. Courts must treat proven fraud on the court not as an evidentiary hiccup, but as a reason to presume the underlying retaliation occurred. This would align retaliation cases with other areas of law—such as spoliation doctrine in tort litigation—where deceit has structural consequences (Miceli, Near, and Dworkin 2008).

This shift is not radical. It is a recognition that truth cannot flourish under asymmetry, and that the side caught lying should not be presumed credible. Without such mechanisms, employers will continue to treat litigation fraud as risk-free.

Automatic DOJ Referral for Employer Misconduct

Perjury, obstruction of justice, and false statements to government agencies are federal crimes. When retaliation plaintiffs uncover clear evidence that employers lied to courts or regulators, these cases should automatically trigger referrals to the Department of Justice. Civil courts, while not criminal prosecutors, are nonetheless part of the judicial system—and cannot continue to function as zones of procedural immunity for institutional actors (Petruzzi and Kirshner 2015).

Even if prosecution does not follow, formal referral processes would apply public scrutiny and investigative oversight, breaking the pattern of silent complicity that surrounds so much of retaliation litigation.

Discovery Monitoring and Special Masters in Retaliation Cases

Given the well-documented patterns of employer manipulation during discovery—such as document suppression, misleading disclosures, and false psychiatric narratives—courts should appoint independent discovery monitors or special masters in complex retaliation cases. These actors could oversee requests for mental health records, assess claims of privilege, and review withheld materials in camera.

This proposal draws from judicial practices in mass torts, financial fraud, and police misconduct litigation, where truth is too valuable to leave to adversarial manipulation alone (Kenny, Fotaki, and Scriver 2019).

Psychological Integrity Protections for Whistleblowers

Current litigation frameworks treat whistleblower mental health disclosures as fair game. Employers exploit this by demanding therapy notes, character depositions, and psychiatric exams—not to understand trauma, but to delegitimize the claimant. This is a form of secondary retaliation. It requires explicit protection.

Courts should impose strict limits on what mental health records are discoverable and prohibit psychiatric examinations unless compelling, specific evidence justifies them. Whistleblowers should also be offered trauma-informed legal processes, including the right to adversarial shielding during cross-examination when emotional harm is central to the claim (Van der Velden, Das, and Bosmans 2019).

Reclassify Whistleblower Retaliation as a Public Law Harm

Finally, retaliation for reporting fraud against the government, safety risks, or human rights abuses is not merely a private employment dispute; it is an attack on democratic accountability. Civil litigation should reflect this.

Just as certain crimes trigger automatic victim notification, retaliation should trigger public interest protections, including amicus opportunities for public agencies, and mandatory public findings when employer misconduct is proven. Whistleblowers are, in effect, deputized agents of

the public good. Their protection should not hinge solely on private rights of action.

Conclusion: Retaliation Litigation as State-Enabled Institutional Betrayal

Retaliation litigation in the United States is often framed as a neutral adjudication of workplace disputes—a procedural question of who said what, and why. But in reality, it is something far more consequential: a performance of institutional power, in which employers who have committed wrongdoing are permitted to rewrite the moral and factual record, and courts too often act as a passive stage.

Whistleblowers do not just report violations; they threaten the symbolic order of the institutions they serve. They reveal not just errors, but hypocrisies. For this, they are not merely fired, they are derealized. Their claims are reframed as delusions, their motives as bitterness, their character as defective.

The retaliation continues through depositions, discovery abuse, and psychiatric weaponization. In the end, many are driven not only from their jobs, but from their professions, and their communities. Many also lose their public credibility and existing reputation. Some even lose their lives due to the employer's violence.

This is not a flaw in the system. It is a feature of its current design. The legal system, in its commitment to adversarialism and formal neutrality, becomes an enabler of obstruction and fraud.

It fails not only to protect whistleblowers, but to recognize that retaliation litigation is a second act of harm, a space where truth is not tested but buried.

If courts are to function as venues of justice rather than as instruments of silence, the system must change. Whistleblower retaliation must be treated not just as private harm but as a public threat. Until then, retaliation litigation will remain what it too often is today: a dark theater.

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Acknowledgements

The author conceptualized the article, developed the theoretical framework, and conducted the review and synthesis of literature. This research received no external funding. All materials, equipment, and resources used in the study were personally funded by the author.

Offensive Counter-Control:

Tactical Frameworks for Asymmetric Legal Resistance Against Corporate Power

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Incendie de la Plaine du Cap. Massacre des Blancs par les Noirs. (1791, Saint-Domingue - now known as Haiti)

Abstract: This paper proposes a tactical framework for resisting and dismantling structural corporate power through *offensive counter-control*. Drawing on legal mobilization theory, resistance studies, and institutional critique, it identifies and exploits the vulnerabilities inherent in corporate strategies of procedural delay, narrative control, mandatory disclosures, and institutional complacency. Rather than appealing to the moral compass of corporations — an entity that operates under internal logics of risk management and control, not ethical accountability — this approach systematically captures, analyzes, and weaponizes corporate mechanisms against their creators.

Anchored in the scholarship of I. Maurice Wormser's critique of corporate personhood, James C. Scott's theories of asymmetrical resistance, and Elizabeth Anderson's analysis of private government, this paper advances a method for transforming corporate tools of suppression into instruments of exposure and liability. It examines how disciplined documentation, preemptive evidence capture, and narrative amplification can disrupt the corporate advantage of information asymmetry and procedural inertia. In doing so, it positions the individual actor not as a passive target of corporate governance but as an active architect of systemic accountability.

This is not a speculative theory. It is operational practice, drawn from active litigation and regulatory proceedings. It demonstrates that even the most fortified structures of corporate control are susceptible to tactical dismantling — provided one knows where to cut.

Keywords: corporate accountability, litigation strategy, procedural delay, legal mobilization, private government, whistleblower protection, asymmetric resistance, evidence capture, narrative control.

Citation: Gjovik, Ashley. "Offensive Counter-Control: Tactical Frameworks for Asymmetric Legal Resistance Against Corporate Power," *The Journal of Structural Power & Resistance*, Volume 1, Issue 1, Summer 2025, *Silentium Fractum*. May 26 2025. https://ashleygjovik.com.

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Introduction

In 1931, I. Maurice Wormser warned in *Frankenstein, Incorporated*, that the modern corporation has outgrown, and subverted the laws and principles that originally justified its existence. His metaphor of the corporation as a Frankenstein's monster — animated by law, but no longer answerable to it — remains not only apt, but alarmingly current.

Nearly a century later, this condition has metastasized. Contemporary corporations, especially transnational enterprises, behave according to a self-contained logic that rewards risk externalization, regulatory capture, and narrative control. Corporate existence has evolved from legal privilege into near-constitutional immunity, protected by both structural inertia and procedural manipulation. Corporations operate with disciplined adherence to principles of control, obfuscation, and risk minimization.

This internal logic is hyper-rational — engineered to optimize legal survival rather than ethical accountability. The corporation's procedural aggressiveness, selective disclosure practices, and media narrative shaping are deliberate tactics within this logic of self-preservation.

> "The nation and the state must curb certain grave and vicious abuses in their corporate offspring. Against these abuses, war must be waged *à outrance* Otherwise like a cancerous growth, these may poison the body politic."

(Wormser, 1931, page v-vi).

This paper interrogates that architecture of impunity. It offers a tactical framework for what I term *offensive counter-control*: the practice of identifying, capturing, and weaponizing the corporation's own procedural and narrative mechanisms against its interests. Rather than appealing to the corporation's nonexistent moral compass, this approach strategically interrupts the internal logic of corporate power by exposing contradictions, amplifying involuntary disclosures, and reframing corporate delay and obfuscation as evidentiary vulnerabilities.

Drawing on interdisciplinary scholarship — including legal mobilization theory (Galanter, 1974), resistance studies (Goldam, 1910; Scott, 1985), and institutional critique (Habermas, 1991) — as well as direct engagement with contemporary corporate litigation, this article articulates a methodology of active resistance to corporate domination. It is not speculative theory. It is applied practice.

The rule of law itself can become a terrain of resistance when subordinate actors learn to engage legal processes strategically and to redefine what "*winning*" looks like. (Albiston, 1999, p. 898-902).

Capture and Repurpose Procedural Delay

Corporate litigants frequently rely on procedural delay as a primary defensive mechanism, exploiting the disparity in resources and time horizons between themselves and challengers. Marc Galanter's, *Why the "Haves" Come Out Ahead*, established that repeat-player defendants, such as large corporations, benefit disproportionately from their ability to stretch legal processes over extended periods, thereby exhausting adversaries with fewer resources (Galanter, 1974).

Tactically, procedural delay functions similarly to siege warfare or blockade strategies in military history, designed to exhaust the opposition not through immediate confrontation but through attritional deprivation. Historical examples such as the Siege of Leningrad (1941–1944) demonstrate the devastating efficacy of encirclement and resource deprivation to force capitulation. In litigation, the "resources" are time, capital, emotional endurance, and procedural bandwidth. (Glantz, 2001)

Intelligence services also exploit time as a method of erosion. In counterintelligence operations, delaying responses or manipulating information cycles is a known technique to degrade the morale and persistence of investigative adversaries (CIA Counterintelligence Training Manual, declassified). Corporate delay tactics operate on the same principle, betting that challengers will abandon pursuit as timelines stretch and clarity fades.

However, procedural delay, when systematically documented, ceases to function purely as a barrier and becomes evidentiary material. By capturing instances of stalling, obfuscation, and contradictory representations across procedural filings and regulatory responses, litigants can build a record of intentional obstruction.

James C. Scott, in *Weapons of the Weak*, describes a mode of resistance wherein the forms of resistance typically make use of the work routines and institutions of control themselves, turning them into a terrain of resistance. (Scott, 1985, p. 255). Procedural delay is one such "*routine*" — corporate actors assume it functions invisibly, but when catalogued rigorously, it becomes an artifact of resistance.

In practice, this approach transforms corporate delay tactics from a defensive strength into affirmative evidence of bad faith. Procedural delay then serves a dual purpose: it frustrates immediate adversarial goals but simultaneously

lays the groundwork for reputational and regulatory exposure.

Documenting these delays is not merely defensive — it is preparatory offense. In federal litigation against Apple Inc., for example, documented procedural delay patterns have been evidenced and argued as part of a larger evidentiary framework illustrating systemic obstructionism. When procedural tactics are not only recorded but critically analyzed and articulated in litigation and public discourse, they cease to be administrative noise and become material indicators of strategic intent. In doing so, the litigant reveals the corporation's reliance on procedural manipulation but as an inherently bad-faith mechanism to suppress scrutiny and evade accountability.

By reframing delay as affirmative evidence of obstruction, rather than a passive feature of litigation, the practitioner exposes the corporation's underlying hostility to transparency and its weaponization of process as a tool of suppression. Thus, delay is not merely an obstacle to endure; it is a weapon to wield — and, ultimately, to turn against its wielder.

Weaponize Corporate Misrepresentation

In corporate litigation, the divergence between a corporation's internal legal posture and its external public narrative is not an accident — it is an engineered strategy. Corporations habitually curate external narratives that minimize legal exposure and manage reputational risk, while maintaining far more defensive or contradictory positions within formal proceedings. This bifurcation is part of a calculated dual-track communication strategy.

This deliberate divergence between internal reality and public representation is not novel. In the Pentagon Papers, internal government memoranda acknowledged the untenable trajectory of the Vietnam War even as public statements projected confidence and progress (*New York Times Co. v. United States,* 403 U.S. 713 (1971)).

Corporate actors have employed similar strategies. During the Volkswagen emissions scandal, internal documents revealed systematic cheating on emissions tests, directly contradicting the company's public claims of environmental compliance and technological innovation (Ewing, 2017). Likewise, ExxonMobil internally confirmed the risks of climate change while publicly fostering doubt (Banerjee et al., 2015).

Such contradictions, when systematically archived and subjected to critical analysis, transform corporate narrative control from a defensive tool into a source of evidentiary vulnerability. Distorted communication erodes the legitimacy of institutional actors when their contradictions are publicly exposed. (Habermas, 1991, p. 171-175, 206-209).

By integrating these dissonances into legal and public advocacy, litigants convert public relations strategies into liabilities. Thus, corporate misrepresentation, properly documented and analyzed, shifts from public relations exercise to legal liability.

James C. Scott frames this dynamic in terms of *"public transcripts"* versus *"hidden transcripts"* (Scott, 1985, p. 241). The public transcript represents the official story, crafted for external audiences to project compliance and control. Yet the hidden transcript — the internal strategic positioning of the corporation — often diverges sharply, revealing intent to evade, suppress, or misrepresent.

Legal scholarship has long recognized the importance of public meaning in shaping institutional power. William Eskridge Jr., in *Dynamic Statutory Interpretation*, observes that the construction of meaning occurs not merely in courts but in the social arenas that shape public understanding of legality. (Eskridge, 1994, p. 61). In this light, public corporate statements can operate as quasi-legal instruments aimed at constructing alternative narratives of legality and legitimacy, irrespective of formal filings.

Amplify Mandated Corporate Disclosures

Corporations traditionally treat regulatory disclosures and settlement obligations as instruments of damage control — compliance formalities intended to quietly conclude enforcement actions without attracting undue scrutiny. Yet these mandated disclosures, properly understood, represent moments of involuntary transparency that can be leveraged to undermine corporate opacity.

The *Pentagon Papers* did not originate from voluntary government transparency but from leaked internal documents later published by *The New York Times*, exposing deep contradictions between public statements and private acknowledgments of failure (*New York Times Co. v. United States,* 403 U.S. 713 (1971)).

Within corporate contexts, compliance disclosures often contain admissions of fact that, while legally hedged, carry substantial narrative weight. Volkswagen's post-scandal compliance agreements, for example, required public acknowledgment of emissions manipulation — disclosures that reverberated far beyond the confines of regulatory compliance (Ewing, 2017).

Yet corporations routinely attempt to sanitize these moments of transparency through *"no admission of*

wrongdoing" clauses, designed to preserve public-facing legitimacy while conceding internally to substantive legal risk. These clauses function as narrative shields, projecting the illusion of ambiguity. In reality, they represent clear indicators of corporate calculation: the choice to settle despite public denial signals that the risks of continued litigation or regulatory escalation have exceeded acceptable internal thresholds.

As Wormser recognized nearly a century ago, corporate logic is not moral logic, but the logic of survival and domination. (Wormser, 1931). Settlement, even cloaked in non-admission language, is a tactical concession to preserve institutional continuity. No rational multinational corporation voluntarily concedes to nationwide policy revisions, public notice postings, or affirmative compliance measures unless internal risk assessments dictate that exposure has become unsustainable.

The willingness of a dominant party to settle, particularly with public-facing concessions, signals an implicit recognition of substantive risk. From a tactical perspective, these moments of compelled transparency must be treated as narrative entry points. Publicizing and framing these disclosures in clear, accessible terms transforms opaque compliance documents into tools of public education and corporate accountability.

Moreover, the performative nature of corporate compliance — such as public notice postings, internal policy changes, and mandated employee trainings — becomes a living record of institutional vulnerability when highlighted publicly. Even modest reforms take on greater significance when publicized and embedded in a continuing campaign of accountability. (Galanter, 1974, p. 141-143).

In recent federal enforcement actions against Apple Inc., mandatory revisions to nationwide employment policies — including speech restrictions, privacy rules, and disciplinary guidelines — were required as part of a national settlement. (Case No. 32 - CA-284428). Although procedurally confined to administrative remedy and shrouded in no-admission language, these mandated changes offer a rich evidentiary and narrative opportunity. By drawing public attention to such corporate concessions, litigants and advocates convert reluctant compliance into explicit acknowledgment of prior illegality.

Thus, compelled disclosures, often treated by corporations as private damage control, can be reframed as public admissions of institutional failure. When amplified effectively, they become potent tools in the architecture of offensive counter-control.

Exploit Institutional Complacency

The durability of corporate power depends in large part on institutional complacency. Corporations rely not only on internal strategies of control but also on external ecosystems of passive complicity: regulatory capture, procedural inertia, ignorant parties, and media deference to official narratives.

James C. Scott describes this phenomenon in his theory of *"public transcripts,"* whereby dominant actors sustain public compliance not solely through coercion but through normalized, unquestioned performance of authority (Scott, 1985). Institutional complacency is the quiet accomplice of this public transcript. Corporations operate under the presumption that their narrative will be accepted uncritically by media, regulators, and the courts alike. Over time, this produces an atmosphere of unearned invincibility, wherein dominant institutions.

Historically, the collapse of such complacency has triggered dramatic shifts in power. The financial press, for example, initially amplified Enron's manufactured image of profitability, until investigative scrutiny revealed underlying fraud (McLean & Elkind, 2003). Similarly, Volkswagen's reliance on environmental certifications shielded its *"clean diesel"* campaign until regulatory audits exposed systemic emissions manipulation (Ewing, 2017). In both cases, the corporation's overconfidence in media and institutional inertia contributed to its vulnerability.

Modern corporations continue to operate under this assumption of narrative insulation. Apple's litigation posture, for example, has benefitted from selective media reporting that often echoes its framing of legal disputes. Traditional media institutions, dependent on corporate access and press relationships, frequently reproduce such narratives without rigorous scrutiny. At times, even respected outlets have declined to report materially significant enforcement actions, thereby unintentionally fortifying corporate silence.

However, institutional complacency is not impenetrable. Critical to offensive counter-control is recognizing and bypassing these narrative gatekeepers. Specialized legal media can advance coverage based directly on public filings and first-party statements, sidestepping traditional dependencies on corporate press offices or reticent regulatory spokespeople.

Activists may also self-publish records and updates on blogs and social media accounts. This method of direct engagement with primary sources short-circuits corporate control over narrative timing and framing.

When communication is systematically distorted, the critique of ideology takes on an emancipatory significance. (Habermas, 1991, p. 93-102). By exposing and bypassing the passive complicity of institutional actors, litigants and advocates destabilize the presumed inevitability of corporate narratives and reveal the fragility of corporate legitimacy when stripped of external reinforcement. In fact, once exposed, the prior external praise of the company becomes evidence of fraud and/or conspiracy

Thus, what corporations mistake for enduring insulation is, in reality, institutional laziness ripe for exploitation. Complacency, once mapped and understood, becomes an exploitable weak point in the architecture of corporate control.

Records as Instruments of Counter-Governance

If corporate power thrives in conditions of secrecy and selective disclosure, it follows that deliberate and persistent documentation becomes not merely an act of record-keeping but an act of resistance. Through the systematic compilation of grievances, evidence of wrongdoing, records of misconduct, contradictions between public narrative and private conduct, and procedural abuses, the individual constructs a counter-archive — a form of evidence architecture capable of destabilizing the legitimacy of private government.

Elizabeth Anderson, in *Private Government* (2017), characterizes the modern corporation as a *"communist dictatorship in our midst,"* wherein employers exercise arbitrary and largely unaccountable power over their workers, extending even to off-duty life. (Anderson, 2017, p. 39). Crucially, she emphasizes that such regimes thrive on both overt control and the internalization of silence by those they govern. Public discourse is also mostly silent about the regulations employers impose on their workers. (Anderson, 2017, p. xix).

There is strategic significance of personal recordkeeping and public exposure: by documenting what the corporate state seeks to suppress, the individual transforms private suffering into public evidence, challenging the prevailing ideology that erases these abuses from public view.

Yet what elevates documentation from passive archive to active countermeasure is the exploitation of corporate complacency. Corporations of scale, accustomed to rapidly neutralizing internal dissent through fear, attrition, and non-disclosure agreements, do not expect sustained resistance. Their internal calculus presumes that most critics will fragment or capitulate before assembling a coherent evidentiary record. It is precisely when the assertion of power is most confident and unchallenged that it is most vulnerable to subversion from below. (Scott, 1985).

In practice, this miscalculation becomes fatal. Corporations often fail to recognize the threat posed by quiet, persistent documentation. They are structurally habituated to rely on their capacity to overwhelm individual adversaries early in conflict — presuming that no coherent archive will survive long enough to matter. When litigants defy this expectation and aggregate long-term evidence of abuse, procedural misconduct, and narrative contradictions, they exploit not just corporate tactics but corporate overconfidence itself.

In the context of Apple's litigation history, records, discovery responses, and enforcement timelines illustrate a corporation not engaged in isolated errors, but in a sustained architecture of control. These patterns emerged only through cumulative documentation and then are transformed into a library of evidence. This accumulation of facts serves two vital functions in offensive counter-control:

1. It preserves institutional memory against corporate erasure, ensuring that abuses cannot be buried beneath procedural layers.
2. It transforms complacent corporate delay into evidence of misconduct, by converting protracted litigation and evasion into a visible record of bad faith operations.

The evidentiary strategy thereby transforms defensive bureaucracy into offensive critique. When patterns of procedural delay, evasion, and obfuscation are not only recorded but analyzed, they reveal underlying corporate intent. (Galanter, 1974, p. 97-114).

The act of meticulous, personal recordkeeping reorients the narrative from passive victimhood to active documentation of systemic abuse, exploiting not only corporate tactics but also the very complacency that enables those tactics to persist.

Thus, what begins as a survival mechanism — the collection of grievances and case records — matures into an intellectual and legal arsenal. Through disciplined accumulation and public exposition of these records, individual actors challenge the corporation's manufactured invisibility, convert its complacency into liability, and create pathways toward structural accountability.

One of the most persistent tactics deployed by corporate employers to evade accountability is the manipulation of information asymmetry — particularly through the control, concealment, and eventual erasure of internal documentation. The pattern is well-established: when an employee begins raising internal concerns, particularly

through formal channels such as emails or memos, the corporation accelerates termination procedures, severs access to communication systems, and then claims proprietary privilege over the records that document its own misconduct.

This tactic operates under a simple logic: by severing the employee's access to the evidentiary record before litigation and then cloaking internal documents under protective orders and claims of confidentiality, the corporation can control the factual terrain of future disputes. Delay in discovery, coupled with selective disclosure, places the burden on the disempowered party while insulating the corporation from scrutiny.

The power to withhold information from public view is among the most effective tools for ensuring unaccountability in private regimes. Corporations, functioning as private governments, exercise this power liberally — deploying access policies and legal intimidation as mechanisms of information control.

However, preemptive evidence capture disrupts this power asymmetry. By systematically archiving contemporaneous correspondence, saving internal documentation to external media, and maintaining independent records of procedural communications, individuals preserve evidentiary integrity beyond the corporation's reach. Crucially, when such actions are conducted transparently and contemporaneously — as a declared effort to protect legal rights — they deprive corporations of plausible deniability and foreclose later claims of surprise or misconduct.

Preemptive capture also subverts the traditional discovery timeline. Whereas corporations rely on early termination and prolonged motions practice to exhaust claimants before meaningful document production, preemptive archives place critical evidence in the claimant's possession from the outset. This forces the corporation to contend not with theoretical claims but with hard, existing, unredacted proof of internal misconduct.

In the context of active litigation involving Apple Inc., for example, the preemptive preservation of thousands of internal records, collected prior to employment termination and before corporate systems could be sealed, neutralized typical corporate tactics of evidentiary obstruction. These records — maintained externally, unredacted, and outside protective order constraints — transformed the evidentiary posture of the dispute. The corporation, deprived of its customary advantage in discovery sequencing, was forced onto defensive terrain.

Power is most vulnerable where it is least expected to be challenged. Corporations rarely anticipate such disciplined archival resistance from individual actors, operating under the assumption that their control over internal systems is total. This complacency becomes their undoing.

Preemptive evidence captures converts information asymmetry from a corporate strength into a litigant's strategic advantage. When combined with disciplined documentation and systemic narrative exposure, it becomes a cornerstone of offensive counter-control — stripping corporations of their ability to monopolize factual narratives and placing critical truth in the hands of those they presumed to have silenced.

Strategic Lessons from the Việt Cộng

The Việt Cộng insurgency offers a powerful model for understanding how resistance movements succeed against overwhelming institutional power. Rather than confronting U.S. military forces through direct engagement, the Viet Cong employed decentralized, asymmetric, and adaptive strategies that allowed them to erode legitimacy, exploit institutional overreach, and outlast superior resources. Whistleblowers and labor organizers—who often confront similarly hierarchical and retaliatory systems—can learn from this model.

Just as the Việt Cộng framed their struggle as a moral campaign for national liberation, organizers must actively define their claims in ethical, not merely procedural, terms. Employers routinely reduce whistleblowing to *"internal policy disputes"*; the strategic counter is to publicly reframe disclosures as acts of public interest defense. As Ong (2007) notes, insurgents controlled narrative terrain by translating tactical disruption into moral legitimacy—making institutional repression look like overreach.

The Việt Cộng's success relied on flexible, cell-based organization. Even when one part of the network was neutralized, others continued the mission independently. Similarly, whistleblowers and labor advocates should avoid centralizing risk. A single lawsuit is vulnerable to isolation; a network of aligned legal, journalistic, and public advocacy efforts ensures continuity. Frisch (2012) emphasizes that decentralized insurgencies with embedded community ties often prove more resilient under pressure.

The Việt Cộng weaponized U.S. overreaction. U.S. bombing campaigns and village raids alienated civilians and recruited sympathizers. The Việt Cộng's strategic brilliance lay in how they used American overreach to build support. Every abuse was documented and translated into collective grievance.

Whistleblowers can similarly document and expose employer retaliation as a self-indicting act. When institutions overreach—through surveillance, psychiatric

weaponization, or gag orders—they reveal their own fragility. Cassidy (2004) describes how such overreach often collapses public support and creates new legitimacy crises for dominant institutions.

Further, the Việt Cộng never launched a military operation without assessing the political and psychological terrain first. Their guiding principle was that military action must support political objectives, not undermine them (Anderson et al., 1967, 52). Similarly, whistleblower efforts must be framed not only as legal or procedural challenges but as part of a broader social and ethical struggle, using narrative tactics that build solidarity and deny employers moral legitimacy. Like the Việt Cộng's "*propaganda teams,*" organizers today need to pre-emptively shape the public and legal Overton window before formal accusations are launched (Pike, 1966).

In addition, after every engagement, the Việt Cộng held self-criticism sessions and produced detailed after-action reports to identify weaknesses and test innovations—be it in countering helicopters, disrupting supply lines, or evading detection (Anderson et al., 1967, 53–57). Legal campaigns and internal complaints by whistleblowers could emulate this approach by institutionalizing reflective learning and peer case reviews to refine strategy and avoid repeated mistakes. The goal is to evolve tactics faster than employer institutions can adapt.

Just as the Việt Cộng used mobility and unpredictability to offset technological inferiority, whistleblower networks can improve resilience by operating through shifting venues (e.g., switching between labor boards, press, and courts), varied legal framing (e.g., health, discrimination, ethics), and maintaining operational ambiguity to delay employer retaliation.

Whistleblowers should similarly avoid relying on *only* courts or *only* internal channels. Success depends on hybrid tactics: legal complaints, FOIA campaigns, academic publication, and direct action. Peic (2014) shows that insurgencies with broad public-facing legitimacy and multiple entry points are harder to contain.

Another lesson is to plan covertly. The Việt Cộng rehearsed operations using sand tables and kept even combatants unaware of targets until just before action—an approach that today might equate to tight confidentiality during complaint drafting and selective disclosure until action is inevitable. (Anderson et al., 1967, 91–93).

Organizers should also reduce the amount of opportunities they make available to the employer that could allow the employer to stop the organizer or sabotage its plans. It also does not hurt to leave false clues to mislead a snoopy and meddling employer, and let them become distracted while you prepare to implement your actual plan.

The Việt Cộng did not seek a conventional battlefield victory. They sought to exhaust, discredit, and outlast their opponent's moral claim to dominance. For whistleblowers and organizers, this means understanding that truth-telling is not a moment—it is a campaign.

As Frisch (2012) explains, insurgent movements gain strength not from formal recognition but from moral endurance and decentralized legitimacy. Whistleblowers must let go of the fantasy that a single court victory will vindicate them. Procedural outcomes often miss the point. The real power lies in continuing to tell the truth, preserve the record, and offer a counter-narrative to institutional silence. Endurance is its own resistance.

Countering the Attack

The five most common institutional responses to suppress potential public outrage about exposed misconduct, revealed by whistleblowers or labor organizing, are: cover-ups; devaluation of the target; reinterpretation of the events; referral of the matter to official channels that give the appearance of justice; and intimidation and bribery. (Smith and Martin, 2007). All five methods of inhibiting outrage are commonly used against whistleblowers (Martin and Rifkin 2004).

These tactics work to keep the institution's secrets, however, sometimes it backfires on the institution – with those actions becoming evidence of misconduct or even being a new basis for outrage against the institution. For instance, censorship can backfire if exposed, because it is commonly perceived as a violation of the norm of free speech (Jansen and Martin 2003, 2004).

Smith and Martin, suggests countering a cover-up by working as a group to obtain information about the issue or injustice and "*then to collaborate with others, such as community action groups or investigative journalists, to put the information into a form that is effective for raising concern.*" (Smith and Martin, 2007). They add,

> "Given the orientation of the mass media to employers, communication of workers' concerns through leaflets, newsletters, alternative newspapers, websites, and emails is often effective."

(Smith and Martin, 2007).

Further, to counter reinterpretation, they recommend that "*workers need to emphasize the evidence that shows injustice or some other widely recognized matter of concern. Exposing lies by employers is a part of this.*" (Smith and Martin, 2007).

Further, it is also a common tactic of those perpetrating

injustice to seek to demonize or devalue those who challenge it. (Smith and Martin, 2007). However, institutional violence can quickly backfire if the victims can expose the violence and the retaliation or censorship it is in furtherance of, and help the public understand and see the institutionalist misdeeds and motive. As Martin explains,

> "Violence against those who are peaceful, or in a position of relative weakness, is seen as unjust. Reprisals against a law-abiding citizen are also seen as unjust. What makes these reprisals especially upsetting is that whistleblowers set out to serve the public interest, by speaking out about corruption or dangers to the public. The discrepancy between what whistleblowers have done and what is done to them is so striking that there is a great potential for backfire."

(Martin, 2007, Ch. 6).

Conclusion: Turning the Monster Against Itself

The corporation, as Wormser observed, was never merely an economic entity — it is a creature of law, one whose survival depends on the careful maintenance of opacity, narrative control, and procedural dominance. Yet, like all creatures of law, it remains vulnerable to tactics that exploit its inherent blind spots.

What this paper has argued is that these vulnerabilities are not hypothetical but structural. Corporations depend on predictable mechanisms of power: procedural delay, narrative manipulation, the concealment of disclosures, the complacency of external institutions, and control over internal information systems. These strategies are not random; they are the natural extensions of a corporate logic optimized for risk aversion and liability minimization.

Yet this very predictability creates exploitable openings.

By seizing control of the evidentiary terrain through disciplined documentation, litigants transform passive grievances into structured indictments. By analyzing procedural delays as affirmative evidence of bad faith, they invert corporate defenses into vulnerabilities. By bypassing institutional gatekeepers and amplifying mandatory disclosures, they shift corporate attempts at quiet resolution into public acknowledgments of failure. And by preemptively capturing internal records — before the corporate firewall descends — they deprive corporations of their customary control over the factual narrative.

Corporate strategies presume attrition of opposition as inevitable. Yet individuals shaped by operational disciplines of persistence and escalation — trained to navigate failure states and execute under pressure — represent an unanticipated threat. For those who live by the logic of never abandoning critical processes regardless of adversity, corporate intimidation is not deterrence; it is a predictable failure mode to be managed.

In this way, the litigant can transform from a passive participant into an architect of active counter-control.

Corporations, lulled by habitual dominance, rarely anticipate resistance that arises from within their own terrain. The image is fitting: the insurgent, emerging from beneath terrain assumed to be fully controlled by the occupying power, carrying captured intelligence ready to be deployed against their creators.

Offensive counter-control is the process of weaponizing corporate architecture against itself. By appropriating the tools of control — documents, delays, disclosures, and narratives — and redeploying them in the service of accountability, litigants turn the very strategies of suppression into instruments of exposure.

The monster of modern corporate power is not invincible. It is a creation of law, and like all legal constructions, it remains vulnerable to tactical dissection by those willing to map its architecture and strike at its exposed seams.

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Acknowledgements

The author conceptualized the article, developed the theoretical framework, and conducted the review and synthesis of literature. This research received no external funding. All materials, equipment, and resources used in the study were personally funded by the author.

Panic in the Boardroom

Mask-Off Moments, Corporate Fear, Retaliation, and the Pattern of Escalatory Delegitimization

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Abstract: This article examines how powerful institutions, when confronted with lawful and credible challenges to their authority, often respond not with measured legal argument, but with disproportionate escalation. Drawing on political theory, labor law, and firsthand litigation experience against Apple Inc., this case study illustrates a phenomenon known as *escalatory delegitimization*. As Apple faced scrutiny over unlawful labor practices and an NLRB settlement, its counsel abandoned lawful engagement in favor of retaliatory tactics — including public threats— in an effort to suppress protected activity. This behavior exemplifies a "mask-off moment," where the performance of legitimacy collapses and desperation becomes visible. Through the lens of historical resistance movements and modern labor disputes, this article argues that such escalation is not evidence of strength, but of institutional fragility. Calm, lawful persistence in the face of overreach not only withstands intimidation but accelerates accountability. Ultimately, this study underscores how exposing panic within power structures transforms fear into an opportunity for reform.

Keywords: corporate authoritarianism; escalatory delegitimization; mask-off moment; labor rights; retaliation; NLRB; Apple Inc.; whistleblower; protected activity; Rule 11 sanctions; chilling effect; procedural intimidation; legitimacy crisis

Citation: Gjovik, Ashley. "Panic in the Boardroom: Mask-Off Moments, Corporate Fear, Retaliation, and the Pattern of Escalatory Delegitimization." *The Journal of Structural Power & Resistance,* Volume 1, Issue 1, Summer 2025, Silentium Fractum. May 26 2025. https://ashleygjovik.com.

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Introduction

For years now, I've been at the center of an intensifying legal and labor rights conflict with one of the most powerful corporations in the world: Apple Inc. What began as an effort to enforce basic employee rights under federal labor law quickly escalated into an aggressive campaign of retaliation and procedural intimidation.

After successfully reaching a settlement with the National Labor Relations Board (NLRB) concerning Apple's unlawful workplace policies, I sought to have that settlement recognized in my parallel civil case. What followed was not a reasoned debate over legal merits, but an unmistakable pattern of institutional panic.

Rather than addressing the substance of the settlement or acknowledging its implications for hundreds of thousands of Apple employees, Apple's litigation team attacked my credibility, accused me of fabricating legal authorities, and threatened sanctions simply for raising the settlement in court. (I swiftly followed a new NLRB charge, in addition to my response with in the civil litigation).

These tactics, while seemingly personal, are not unique. They represent a well-documented response by institutions that feel their dominance is slipping: an overcompensation designed to restore the illusion of control.

This is not merely a story of corporate litigation. It is a case study in authoritarian panic — what political theorists describe as the moment when *"soft coercion"* gives way to *"raw overreach."* Behind the glossy façade of legal formality, the cracks of desperation become visible. Threats of sanctions, exaggerated claims of misconduct, and attempts to suppress public scrutiny are not signs of institutional strength; they are signs of fragility.

This article explores that phenomenon through the lens of my ongoing litigation and advocacy. It examines the legal frameworks that govern retaliatory conduct, the psychological dynamics of authoritarian panic, and the tactical choices that can turn such panic into opportunity. Drawing lessons from historical resistance movements and contemporary labor disputes, I argue that moments of escalation — when the mask slips — are precisely when accountability becomes possible.

Escalatory Delegitimization: the "Mask-Off Moment"

Authoritarian power, whether wielded by a state or a powerful private institution, depends less on brute force than on perception. At its core, such power relies on a performance: of inevitability, of legal legitimacy, and of control. Erving Goffman described power as a staged performance, maintained through rituals of authority — formal titles, legal jargon, tightly controlled processes — all designed to project competence and stability, even in the face of internal decay (Goffman, 1959).

But this performance is fragile. When confronted with credible, public, and lawful challenges, authoritarian actors often abandon their polished façade. In an attempt to overwhelm their challengers and reassert control, they escalate disproportionately. This reflexive overreaction — moving from *"soft coercion"* (controlled processes, hidden pressures) to *"hard coercion"* (public retaliation, procedural abuse, and threats) — is what scholars of authoritarian behavior recognize as escalatory delegitimization (Arendt, 1951).

This term describes the process by which an authority, fearing a genuine threat to its dominance, overreaches in ways that expose its underlying weakness. Rather than neutralizing dissent, this escalation often accelerates the erosion of legitimacy. The governing illusion of lawful, procedural authority collapses, and what remains visible to observers is unvarnished aggression and desperation (Levitsky & Ziblatt, 2018).

Political science literature identifies this inflection point as a "mask-off moment." The term refers to the psychological and sociopolitical shift that occurs when an institution drops the pretense of legitimacy and engages in naked retaliation.

Historian Timothy Garton Ash, chronicling the collapse of Eastern European regimes, observed how brittle power structures became visible once state authorities resorted to disproportionate force against peaceful movements (Garton Ash, 1990). Similarly, in Serbia's resistance to Slobodan Milošević, the movement *Otpor!* successfully exploited these mask-off moments, using humor, resilience, and public exposure to highlight the absurdity of the regime's escalation (Sombatpoonsiri, 2015).

Importantly, escalatory delegitimization is not a demonstration of strength. It is a signal of internal weakness and insecurity. When an institution perceives those ordinary tools of control — secrecy, legal technicalities, private negotiations — are insufficient to contain dissent, it reaches for more aggressive tactics. However, this escalation often backfires by widening public awareness, galvanizing resistance, and shattering the illusion of competent authority (Chenoweth & Stephan, 2011).

In labor contexts, these patterns are strikingly familiar. When companies face credible challenges to unlawful workplace policies, especially in high-stakes settings involving regulatory findings, they sometimes abandon professional legal argumentation in favor of hostile retaliation. They deploy tools meant to frighten: accusations of bad faith, threats of sanctions, and demands for silence through protective orders. These tactics aim to isolate the whistleblower and deter others from following suit (Fagen, 1992). Yet, historically, such moves often have the opposite effect — they attract scrutiny, signal vulnerability, and empower collective action (Finkel, 2015).

Understanding this pattern is vital for those confronting entrenched institutional power. Recognizing the escalation not as a sign of impending defeat, but as an opportunity, shifts the strategic landscape. Documenting every retaliatory step, maintaining composure, and continuing lawful advocacy in the face of intimidation turns the institution's overreach into an indictment of itself (Sharp, 1973). This article proceeds to illustrate this dynamic in practice through the unfolding conflict between Apple Inc., myself, and the broader labor rights landscape. What follows is a case study in modern corporate authoritarianism — and how its mask slipped.

Apple: Case Study

The conflict between myself and Apple Inc. offers a striking contemporary example of escalatory delegitimization in corporate settings. This example concerns Apple's enforcement of unlawful workplace policies, the subsequent settlement with the National Labor Relations Board (NLRB), and the company's aggressive retaliation when those facts were brought to light in parallel civil litigation.

In 2023, after months of investigation, the NLRB concluded that Apple's workplace rules unlawfully restricted employee rights, including rights protected under Section 7 of the National Labor Relations Act (NLRA). Specifically, policies related to confidentiality and internal communications were found to violate federal labor law.

In 2025, Apple entered into a settlement agreement to revise these policies nationwide, impacting over 100,000 employees (Bloomberg Law, Law360, HR Grapevine, April 2025). The first press to cover the agreement was Law360, which published an article about it on April 9 2025. Additional articles then followed, and I was quoted in a European publication saying:

> "Apple thought fear could hold its system together… But unlawful policies don't become lawful just because people are afraid to challenge them. This federal enforcement action revealed how deeply Apple's power depended on silencing its workers — and how fragile that power truly is."

(The Register, April 10 2025).

As the charging party, I was a signatory to the settlement and continue to hold standing in its enforcement. Instead of complying in good faith, Apple's conduct in subsequent litigation demonstrated open defiance of the very obligations it agreed to under the NLRB settlement.

In my parallel federal civil case — *Ashley Gjovik v. Apple Inc.*, N.D. Cal. No. 3:23-cv-04637 — I sought judicial notice of the settlement, correctly asserting its legal relevance both to Apple's asserted defenses and the systemic labor violations at issue. My motion emphasized that the settlement impacted not only my personal rights but those of Apple's broader workforce, calling for public disclosure to promote transparency (Gjovik, Motion for Judicial Notice, Dkt. No. 194, Mar. 28 2025).

Rather than engage through lawful argument, Apple's counsel escalated aggressively. They accused me of fabricating legal authorities, attacked my credibility, and threatened me with Rule 11 sanctions — a severe procedural measure intended to deter misconduct in litigation (Apple's Opposition, Dkt. Nos. 202–204, April 10 2025). Note, this was immediate after and ruing the international press about the settlement agreement and for each article published, Apple PR had been asked to comment.

Significantly, Apple's attacks over the request for judicial notice were not peripheral to the litigation; they directly targeted my effort to enforce and champion the NLRB settlement, and occurred at the same time Apple was facing international public scrutiny over their misconduct underlying the agreement.

Here, Apple's behavior crossed a critical line. Their attorneys are fully aware of the legal significance of the settlement — it is an agreement between the corporation and the U.S. federal government, overseen by the NLRB. By actively opposing its judicial recognition and publicly attacking me for raising it, Apple revealed that its priority is not lawful compliance or even procedural engagement, but desperate preservation of control at any cost.

This is more than strategic litigation: it is a calculated disregard for their own legal obligations, and they cannot plausibly claim good faith. Apple's lawyers, experienced and well-versed in labor law, understand the risks of non-compliance. Yet, their escalation signals that fear of reputational and legal exposure has overtaken any remaining interest in the orderly resolution of the dispute.

As legal theorist Lon Fuller wrote, the *"inner morality of law"* collapses when participants abandon good faith adherence

to processes designed to resolve conflict justly. (Fuller, 1964).

The sequence of Apple's reactions thus perfectly aligns with the historical *"mask-off moment"* described in political science. When institutions experience a genuine threat to their authority — in this case, federal scrutiny and a legally binding settlement — they may abandon even the appearance of lawful participation, instead resorting to brute procedural force and public retaliation. (Garton Ash, 1990).

Further amplifying the significance, Apple's retaliatory posture unfolded under international media scrutiny. Apple's aggressive litigation strategy, therefore, was not conducted in private but performed on a public stage, increasing its potential legal and reputational consequences.

Moreover, Apple's actions extend beyond litigation tactics to impact the broader workforce. By portraying my lawful filings as illegitimate and threatening sanctions, Apple signaled to its employees — and the public — that attempts to assert labor rights or participate in protected activity will be met with disproportionate reprisal. This tactic fits squarely within the academic definition of escalatory delegitimization: exaggerated retaliation aimed not at legal success, but at suppressing participation and chilling lawful activity. (Chenoweth & Stephan, 2011; Finkel, 2015).

Throughout, I maintained a deliberate strategy of composure and transparency. I notified the NLRB regional office contemporaneously with Apple's escalation, preserved an official record of retaliatory conduct, and documented their attacks as evidence of panic rather than strength. In doing so, I mirrored the tactics of historic resistance movements, which leveraged institutional overreach to demonstrate bad faith and build public support. (Sharp, 1973; Sombatpoonsiri, 2015).

Ultimately, Apple's conduct illustrates with precision how institutional panic leads to self-exposure. Their disregard for the legal settlement, their procedural aggression, and their abandonment of good faith collectively confirm not institutional power, but institutional fragility.

Psychological and Social Dynamics

Understanding the psychological mechanics of escalatory delegitimization is essential to understanding why Apple's response — while aggressive — ultimately accelerates its own decline. Authoritarian systems, whether governmental or corporate, rely heavily on psychological control: the manufacturing of fear, isolation, and inevitability. Their power does not rest solely on legal instruments or institutional might but on the belief that they are too formidable to challenge (Reich, 1933).

When faced with lawful resistance, such systems reflexively deploy tactics designed to rekindle fear. Threats of sanctions, allegations of misconduct, and public smears function not only as legal maneuvers but as psychological weapons. Their goal is simple: to isolate the target, to portray resistance as futile, and to discourage others from joining (Fagen, 1992).

Apple's escalation fits this model precisely. The company's counsel did not limit themselves to arguing the legal irrelevance of the NLRB settlement — they attacked my character, accused me of fabricating legal authorities, and implied misconduct so severe as to warrant Rule 11 sanctions (Apple's Opposition, Dkt. Nos. 202–204, 2025). These accusations, unsupported by facts and lacking specific legal grounding, are designed to trigger fear: fear of professional ruin, fear of public discredit, and fear of procedural entanglement.

Yet psychological research and historical precedent both show that when these tactics are met with composure and methodical exposure, they tend to fail. Instead of isolating the target, they reveal the aggressor's desperation. Erving Goffman, in his seminal work on social performance, noted that when the "backstage" of power is exposed, and the orchestrators of control are seen flailing, public belief in their authority collapses rapidly (Goffman, 1959).

In authoritarian systems, this dynamic has been repeatedly observed. During the final days of Ceausescu's Romania, desperate public performances by the regime — televised speeches laden with paranoia and bluster — led to mass public disillusionment and rapid regime collapse (Deletant, Ceaușescu and the Securitate, 1995). Similarly, Serbia's *"Otpor!"* movement deftly used humor and composure to contrast the regime's panic, accelerating the erosion of Milošević's legitimacy (Sombatpoonsiri, 2015).

Apple's actions parallel these historical examples. Rather than quietly litigating, Apple escalated visibly and aggressively at precisely the moment their authority was questioned. In doing so, they inadvertently validated the significance of the NLRB settlement and confirmed their fear of public scrutiny.

For targets of such escalation, the counter-strategy is well established: maintain composure, document every retaliatory act, and expose the overreach publicly. These actions serve multiple functions:

- **Legal preservation:** Creating a clear evidentiary record of retaliation strengthens future claims and regulatory investigations.
- **Psychological fortification:** Maintaining calm denies

the aggressor their desired psychological victory.

- **Public education:** Exposing overreach demystifies the aggressor's power and encourages solidarity among observers.

My deliberate approach to documenting Apple's actions, notifying the NLRB, and publicly framing their escalation as a symptom of panic follows this model. Each public filing, each correspondence placed in the record, not only preserved my legal position but also undermined Apple's efforts to isolate and intimidate.

Additionally, the role of public attention cannot be overstated. As media outlets covered the developments, Apple's increasingly disproportionate actions were placed under broader scrutiny. This external observation compounds the psychological impact on the aggressor. Studies in resistance movements have found that when authoritarian actors realize their overreach is being witnessed by neutral or sympathetic audiences, they often experience internal fractures and morale collapse (Chenoweth & Stephan, 2011).

The interplay between Apple's panic and my composed response illustrates a vital lesson: escalation may increase personal pressure in the short term, but it simultaneously creates systemic vulnerabilities for the aggressor. By refusing to yield to intimidation and maintaining lawful, transparent advocacy, it is possible to invert the intended chilling effect and instead chill the aggressor's confidence in their own impunity.

Panic as Proof of Fragility

Apple's escalation of retaliation in response to my lawful enforcement of a binding NLRB settlement is not an anomaly—it is a textbook illustration of what institutions do when their veneer of invulnerability begins to crack. What Apple initially framed as procedural rigor quickly revealed itself as procedural aggression. Rather than engaging substantively with the legal implications of a federal settlement they knowingly signed with the United States government, Apple chose escalation—weaponizing litigation tactics that signal not strength, but fear.

This is a well-documented pattern. From authoritarian regimes facing uprisings to corporations confronted by whistleblowers or regulatory scrutiny, power does not always respond with lawful engagement. It responds with overreach. Political science refers to this as escalatory delegitimization—the moment when those in power abandon lawful resolution and instead attempt to discredit, intimidate, or isolate challengers (Arendt 1951; Chenoweth & Stephan 2011). In Apple's case, that escalation is not incidental—it's strategic.

Apple's legal team, seasoned and deeply familiar with labor law, understands the risks of ignoring or misrepresenting a federal settlement agreement. Their decision to proceed regardless leaves little ambiguity about intent. This is not good-faith participation in a legal process. This is an institution gambling on fear as a final defense—hoping that retaliation will suppress scrutiny, delay accountability, and exhaust my capacity to resist. But in doing so, Apple made its vulnerability visible.

One moment in particular crystallized this truth.

In October 2024, following an extremely unfavorable court decision in my case (now under appeal at the Ninth Circuit), I received a personal phone call from someone who identified herself only vaguely. She called during a workday, on my personal phone, told me she is watching my litigation against Apple, and asked a single question: *"Do you regret filing a lawsuit against Apple?"*

I later confirmed—through a reverse lookup —that this woman was a *Global Security & Legal Crisis Manager* at Apple. She failed to disclose this at the time, instead presenting herself as a detached observer. In hindsight, I suspect my voice was being projected on speakerphone during that call, with Apple executives listening silently.

The purpose of the call was not inquiry—it was psychological warfare. More disturbing, I directly witnessed my former employer constructing a spectacle of the suffering they caused, staged for the gratification of corporate leadership. In that moment, Apple was not simply retaliating; they were observing, measuring, and deriving satisfaction from the harm they inflicted.

In that moment, I understood Apple's strategy with clarity. They were not seeking resolution. They were hoping to hear me say what they needed to justify their campaign: that I regretted resisting, that I wished I had remained silent. That they had finally broken me.

They hadn't. And they won't.

That phone call revealed three essential truths:

1. Apple Legal and Apple Global Security are actively coordinating the retaliation I am experiencing in litigation.
2. Their motive is emotional harm—an intentional campaign of attrition and destabilization.
3. Beyond that, they seem to have no plan. Their strategy is not sophisticated. It is desperate and sloppy (like the *Crisis Manger* calling from her own phone number).

This moment, ironically, galvanized me. Their attempt at psychological sabotage backfired. I committed more deeply

to documenting their misconduct and countering it with precision. I saw clearly that they are not confident. They are afraid.

Social movement theory teaches us that these moments—where power reveals its desperation—are pivotal. When the mask slips and institutions abandon the performance of legitimacy, they open themselves to new forms of exposure. The escalation meant to silence instead becomes evidence.

In *The Narrow Corridor*, Acemoglu and Robinson describe the "Paper Leviathan": a state-like entity that projects authority in limited domains but lacks coherence or legitimacy in others. "*These are entities that have the appearance of a state… but that power is hollow; it is incoherent and disorganized in most domains"* (Acemoglu & Robinson 2018, 338–344). Apple's conduct is not the behavior of a sovereign actor in control—it is the behavior of a Paper Leviathan.

Retaliation is not the end of a story—it is the middle of one. When met with composure and transparency, it becomes evidence of institutional fragility, not strength. It reveals the true nature of power when challenged: anxious, brittle, and exposed.

Conclusion

For individuals and movements facing similar overreach, the lesson is clear: maintain precision, uphold lawful advocacy, and document relentlessly. Panic in an adversary is not merely noise — it is evidence. It is confirmation that pressure is working. It is a signal that the illusion of control is fracturing.

As I continue to pursue justice, engage with regulators and law enforcement, and expose Apple's tactics publicly, I do so with the knowledge that Apple's escalation is not a sign of their enduring power, but a symptom of their erosion. Their panic is their tell and their mask has fallen.

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Acknowledgements

The author conceptualized the article, developed the theoretical framework, and conducted the review and synthesis of literature. This research received no external funding. All materials, equipment, and resources used in the study were personally funded by the author.

The Bureaucratic Shield

How Legal Institutions Enable Retaliation, Obscure Criminality, and Undermine Whistleblower Protection

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"*The Curse of California,"* Tinted lithograph, 19 August 1882.

Abstract: Whistleblower protections in the United States are often presented as robust safeguards against retaliation. In practice, they are fragmented, narrow, and structurally incapable of confronting misconduct that straddles criminal, civil, and administrative domains. This article explores how institutional retaliation is permitted—even enabled—when employers cite lawful motives that appear non-retaliatory under specific statutes, even if those motives are ethically indefensible or illegal under other laws. This legal maneuver—rarely examined outside critical scholarship—functions because agencies and courts refuse to adjudicate beyond their statutory silo, allowing actors to obscure retaliatory motives through facially legitimate explanations (Alford 2001; Bandes 1999).

The article argues that this is not merely doctrinal failure, but an epistemic design flaw in the legal system: by prioritizing statute-specific reasoning over a holistic view of wrongdoing, enforcement bodies become unwitting enablers of impunity. Drawing on interdisciplinary literature, historical comparisons, and contemporary case evidence, will show how retaliation becomes legally invisible when it arises from criminal or cross-domain reporting. The more serious the misconduct is, the less likely it is to fall under a single agency's purview—and the more protected the employer becomes.

Keywords: whistleblower retaliation; administrative law; institutional impunity; cross-jurisdictional governance; legal fragmentation; statutory myopia; epistemic injustice; organizational power; symbolic compliance; judicial restraint; retaliatory justification; bureaucratic design; public interest disclosure; environmental justice; cognitive dissonance; allegory of the cave; legal ethics; state-sponsored silence; procedural harm; regulatory failure

Citation: Gjovik, Ashley. "The Bureaucratic Shield: How U.S. Legal Institutions Enable Retaliation, Obscure Criminality, and Undermine Whistleblower Protection." *The Journal of Structural Power & Resistance,* Volume 1, Issue 1, Summer 2025, Silentium Fractum. May 26 2025. https://ashleygjovik.com.

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Introduction

In the U.S. enforcement landscape, the legal architecture governing labor, civil rights, environmental compliance, and public fraud is not designed to coordinate—and often not authorized to care—about misconduct outside its narrow procedural remit.

This system enables a dangerous contradiction: when whistleblowers identify systemic illegality, retaliation is often dismissed or excused on the grounds that it does not violate the specific statute under review. And in such cases, the institutions responsible for redress abdicate responsibility, claiming that another body—somewhere else—should handle it.

This compartmentalization has been well-documented in environmental justice (Pellow and Park 2002), whistleblower trauma (Alford 2001), and organizational surveillance regimes (U.S. GAO 2024), all of which show how agencies and courts disaggregate human harm into regulatory fragments.

In theory, whistleblower statutes offer meaningful protection. In practice, these protections collapse when retaliation stems from disclosures about criminal or interdisciplinary misconduct. The legal standard requires only that the employer offer a "*legitimate, non-retaliatory reason.*" Courts and agencies rarely ask whether that reason itself might violate other laws, ethical duties, or public safety norms. This produces what I describe as institutionally sanctioned retaliation.

We explore this structure not as a flaw in application but as a systemic design—one that encourages retaliation and discourages accountability. Drawing on legal, sociological, and historical perspectives, including the San Francisco graft trials of the early 1900s (Hichborn, 1915), and environmental worker exploitation in Silicon Valley (Pellow and Park 2002), we show how the U.S. system defends itself from whistleblowers by refusing to see the whole of the wrongdoing they expose.

This article is about institutional impunity, and the legal mechanisms that ensure those who speak the truth are the first to be cast out.

Selective Accountability: A Political History of Performative Prosecution

The famed 1907 San Francisco graft trials stand as a case study in how elite institutions navigate the threat of exposure: not through systemic reform, but through strategic sacrificial prosecution. When scandal is unavoidable, the tactic is not to uproot the corrupt architecture, but rather to perform its purification. This dynamic — of selective accountability used to preserve legitimacy — has echoed across American governance ever since, especially when whistleblowers or external crises reveal systemic rot.

San Francisco's corruption trials began not with a public interest crusade, but with a class conflict among the city's elite. As labor-aligned politicians like Mayor Eugene Schmitz and power broker Abe Ruef gained traction through the Union Labor Party, the city's business elite — including Rudolph Spreckels and the Merchants' Association — responded with a purge. Their aim was not to eliminate graft, in which they were deeply complicit, but to re-establish bourgeois hegemony after labor′s temporary ascendancy (Hichborn, 1915; Walker 1987, 49–51).

Even the reformers were elite dissidents — not radicals, but industrialists from outside the bribery stream. They opposed corruption not on moral grounds, but because it made governance unpredictable and expense accounts volatile. As Rebecca Menes notes in her empirical study of Progressive Era cities, corruption became intolerable not when it undermined democracy, but when it interfered with efficient extraction and profit stability (Menes 2003, 3–10).

In practice, the prosecution focused narrowly. While Ruef went to prison, every corporate executive who paid bribes walked free. The phone, water, and trolley magnates who benefited from the bribery ring were never seriously investigated. This was scapegoat justice, in which public accountability operates as a vent to release pressure while keeping the underlying system intact (Hichborn, 1915; Walker 1987, 50–51).

Gray Brechin's *Imperial San Francisco* sharpens the historical lens. San Francisco was built as a project of extractive imperialism: gold, copper, water, and war contracts. Its ruling class — the Hearsts, De Youngs, Spreckelses — were not aberrations but archetypes. (Brechin 1999, 41–63).

They owned the newspapers, wrote the editorial narratives, and commissioned monuments to their own virtue. This "*monumentalism*" was used to overwrite memory — to convert class violence into civic pride, and to displace political atonement into architecture. (Brechin 1999, 41–63; Hichborn, 1915).

What emerged was a form of elite-managed moral accounting. Scandal became a purification ritual, orchestrated to reaffirm public faith while minimizing systemic change. Political machines might fall, but the financiers behind them often rose. The city would rebrand — cleaner, more rational, and just as profitable.

This template persists. Whether through corporate compliance agreements, university Title IX reviews, or symbolic firings following whistleblower disclosures, modern institutions continue to perform this strategy. They concede individual fault while denying systemic intent. A fight breaks out, a politician resigns, and the enterprise rolls on.

The Architecture of Silence: Institutional Epistemology and Legal Invisibility

Many public discussions about the enforcement of whistleblower rights frame the problem as one of enforcement breakdown or bureaucratic inefficiency. But this view presumes that the institutional goal is justice. In reality, many systems of governance are designed to filter, deflect, and obscure forms of knowledge that pose a threat to institutional legitimacy. Whistleblower disclosures don't just challenge facts — they threaten the narrative coherence of the organization itself.

Whistleblowers resistance is excruciatingly documented. It arrives with emails, timelines, FOIA requests, policy violations, legal citations, sometimes PowerPoints. And yet, their evidence is often met with erasure, fragmentation, denial. Their knowledge is rendered inadmissible, in court, in the structure of recognition itself.

It is a form of institutional anti-memory: systems respond to too much knowledge by dispersing it, labeling it out of scope, or designating it for separate handling. Alford (2001, 39–41) describes how organizations often convert whistleblower truth into psychological pathology. The disclosure is not rebutted — it is reframed as obsession, miscommunication, personal grievance. The person telling the truth becomes the problem to be solved.

Inside legal systems, this reframing is institutionalized. Agencies limit their review to only that which violates their own statute. Courts refuse to hear facts that arise from other jurisdictions. The more serious the wrongdoing — and the more agencies it touches — the less likely anyone is to act. As Pellow and Park (2002, 101–102) observe in the context of environmental injustice, the atomization of responsibility is a design feature, not a flaw.

This architecture of silence has consequences. It produces not just failed investigations but epistemic violence — the structural denial of truth. Whistleblowers are not just ignored; they are disassembled by procedure. Each piece of their report is routed elsewhere. The safety violation goes to OSHA. The fraud to DOJ. The discrimination to EEOC. The labor issue to NLRB. And none of those entities are authorized — or willing — to see the whole picture.

The result is a kind of bureaucratic exile: the whistleblower becomes a jurisdictional orphan, carrying a body of knowledge that no part of the state is equipped — or incentivized — to receive.

Moral Recognition Without Legal Remedy: The Limits of Judicial Disgust

In whistleblower cases, retaliation is often visible — sometimes overwhelmingly so. Termination follows quickly after a report. Coworkers are warned not to speak to the complainant. Responsibilities are stripped. Access is revoked. Evaluations shift from positive to punitive in days. And yet, courts and agencies frequently decline to intervene.

Why? Because retaliation law — like much of U.S. administrative law — doesn't revolve aroundwhether harm occurred. It asks whether the employer's stated reason for their action violates the narrow terms of the statute. If the employer claims a motive that is lawful under that statute, the inquiry often stops — regardless of whether the motive would be illegal, unethical, or retaliatory under other legal frameworks.

Faced with this paradox, some judges or agency officials engage in a form of moral signaling. They acknowledge, sometimes explicitly, that what the whistleblower suffered was unjust, even retaliatory in spirit. But they disclaim the authority to act. Susan Bandes (1999) refers to this phenomenon as "*judicial disgust*" — a moment where moral repulsion enters the legal process but it is then compartmentalized as irrelevant to adjudication.

This performance of empathy functions as a kind of legal palliative care. It offers rhetorical recognition — sometimes even sympathy — but no recourse. Bandes identifies this as a modern problem of jurisprudence: the law purports to be rational, but its rationality often becomes a screen against moral responsibility (Bandes 1999, 10–15).

C. Fred Alford (2001) offers a deeper critique: the disgust is not about the whistleblower's suffering, but about the inconvenience of their truth. He recounts cases where investigators privately admitted the whistleblower was probably right — but closed the case, anyway, citing lack of jurisdiction or insufficient standing. They believe the whistleblower, but they also know what it would cost them to act to protect the whistleblower. (Alford 2001, 41).

In this way, judicial disgust becomes a ritualized discharge of guilt. It preserves the moral self-image of the institution while avoiding substantive consequences. The judge regrets. The investigator sympathizes. The agency laments

the complexity. The retaliation remains untouched.

This phenomenon also allows the system to preserve its narrative integrity. If a whistleblower's experience is too damning, too systemic, then to rule in their favor would be to admit that the system itself enabled the harm. Moral discomfort becomes a pressure valve. It allows the system to feel bad without changing anything.

The Cave and the Court: Epistemic Threat and the State's Psychological Defense

The failure to protect whistleblowers is not just legal. It is epistemological. When a worker exposes misconduct that is systemic, violent, or deeply embedded in institutional culture, they are not just making a complaint. They are forcing the state to confront its own reflection.

Plato's allegory of the cave offers a template. In the cave, prisoners face a wall where shadows play. One escapes, sees the world outside, and returns — only to be ridiculed or destroyed. His knowledge is not welcomed; it disrupts the internal logic of the cave (Plato, *Republic*, Book VII). The whistleblower is returning prisoner: not just rejected but punished for seeing too much.

But the modern cave is not made of ignorance — it is made of legal doctrine, institutional incentives, and bureaucratic design. The shadows on the wall are policy compliance, contract terms, and risk matrices. The goal of the system is not to discover truth, but to maintain a stable field of acceptable knowledge.

When a whistleblower breaks that field — when they reveal criminal conduct, environmental destruction, financial fraud, systemic racism — their claim is not just inconvenient, it is existentially threatening. To validate it would require:

- Admitting the violence embedded in institutional norms.
- Recognizing that harm is not anomalous, but operational.
- And abandoning the idea that the law is neutral, fair, or restorative.

In psychological terms, this produces cognitive dissonance at the state level. Leon Festinger (1957) theorized that when individuals hold two contradictory beliefs — for example, *"we live under the rule of law"* and "*this person was punished for reporting crimes*" — they resolve the tension not by changing belief, but by discrediting the source of disruption. The whistleblower becomes the distortion. The system remains intact.

This dissonance is particularly acute in the U.S., where national identity is tethered to procedural justice. As Bandes (1999) explains, the legal system is a theater of rationalism: its power lies not in what it delivers, but in the illusion of coherence.

As a result, legal actors reflexively:

- Narrow the scope of review.
- Demand "objective" proof from inside compromised systems.
- Or express sympathy while dismissing the case.

This is an institutional survival instinct — a kind of state-level ego defense.

Fragmented Harm: Environmental Justice as a Model of Institutional Non-Responsiveness

Environmental justice movements have long understood that when harm is spread across multiple legal categories, it becomes legally invisible. The more severe, interdisciplinary, or layered the abuse, the less likely any single agency is willing—or able—to act.

David Pellow and Lisa Sun-Hee Park's *Silicon Valley of Dreams* (2002) offers one of the most acute illustrations of this pattern. In the high-tech corridors of Northern California, workers—primarily immigrant women—were routinely exposed to toxic chemicals, reproductive hazards, and cover-ups of environmental spills.

These were manufactured invisibilities, the result of overlapping but uncoordinated regulatory bodies, each of which refused to acknowledge the full scope of harm.

- The chemicals were legal under OSHA.
- The zoning was legal under the municipal code.
- The waste was stored under EPA thresholds.
- The workers were not unionized and so had limited NLRA protections.
- Immigration concerns prevented many from speaking publicly.

And so, no one acted, and people were injured and killed.

Pellow and Park (2002, 101–105) describe how this "*hyper-fragmentation of responsibility*" is not merely accidental — it is the mechanism through which power protects itself. By distributing accountability, institutions can absorb enormous harm without triggering institutional consequences. The state's role becomes not remediation,

but orchestration: ensuring that each body, each claim, each violation is managed in isolation.

This fragmentation has become the dominant structure in whistleblower retaliation as well. When an employee reports criminal conduct that overlaps with labor law, public health, environmental compliance, and civil rights violations, they are shattered across the state. Their retaliation claim is deemed "*not labor-focused*" by NLRB, "*not safety-focused*" by OSHA, "*declined to prosecute*" by DOJ, and "*out of scope"* by DOE or EPA. No agency is authorized to see what the employee sees: a total system failure.

In legal terms, this becomes a jurisdictional problem. In human terms, it becomes a form of cognitive atomization. The whistleblower is forced to explain the wrongdoing in statute-compliant fragments — each one stripped of its context and urgency. What began as a story of corruption or abuse becomes a set of disconnected complaints, none of which meet the threshold for action.

This is not bureaucratic incompetence. It is governance by disaggregation — a method that allows states to perform procedural legitimacy while ensuring that no one has to account for the totality of harm.

Whistleblowers and frontline environmental victims experience the same consequences: disbelief, exhaustion, and isolation. They are told that what they've seen is real, but not actionable. Their injury does not exist in the right format. Their story exceeds the filing system limitations. And so, the harm continues — not as a glitch in the system, but as its core logic. No one is responsible because everyone is responsible.

Statutory Myopia: How Legal Frameworks Codify Retaliation

Whistleblower protection laws in the United States frequently function as instruments of statutory myopia—narrowly defined legal frameworks that inadvertently codify retaliation by constraining the scope of protection.

At first glance, the landscape of whistleblower laws appears robust. Over 20 federal statutes, including the Whistleblower Protection Act (WPA), Sarbanes-Oxley Act (SOX), and the Criminal Antitrust Anti-Retaliation Act, offer various forms of protection.

Yet, these laws are often siloed, each addressing specific sectors or types of misconduct. This compartmentalization means that a whistleblower exposing multifaceted wrongdoing may find that no single statute offers comprehensive protection, even neutralize each other, leaving a vulnerable whistleblower without redress.

Legal standards within these statutes frequently place an onerous burden on whistleblowers. For example,, statutes often impose strict filing deadlines and procedural requirements. Missing a deadline or failing to navigate complex administrative processes can result in the dismissal of a claim, regardless of its merits.

Many statutes require that the whistleblower′s disclosure be based on a *"reasonable belief"* of wrongdoing. While this standard is intended to protect individuals who report in good faith, it can be interpreted narrowly, allowing employers to challenge the whistleblower′s perception and intent.

The fragmented nature of whistleblower laws leads to jurisdictional challenges. Different agencies enforce different statutes, and overlapping jurisdictions can create confusion and inconsistency in enforcement. This fragmentation can result in a lack of accountability and protection for whistleblowers.

The cumulative effect of these legal limitations is a system that, while purporting to protect whistleblowers, often codifies retaliation by:

- Imposing stringent procedural requirements that are difficult to navigate.
- Limiting the scope of protected disclosures.
- Placing the burden of proof on the whistleblower.
- Allowing for narrow interpretations of key legal standards.

This statutory design does not merely fail to prevent retaliation; it structurally enables it by creating legal pathways for employers to retaliate without consequence. What remains is a statutory scheme of laws which claim to protect whistleblowers, but which offer the performance of integrity at best. (Rose-Ackerman and Palifka, 2016).

Smith and Martin explain, "*the tribunal itself is set up to control conflict. Its aim is to manage disputes; it was established originally to help ensure that the relations between capital and labor run smoothly. It will therefore advocate compromise wherever possible, and at least part of this compromise involves ensuring that businesses can continue their activities unless they are blatantly illegal or harmful*." (Smith and Martin, 2007).

The Overton Window in Retaliation Litigation

In whistleblower retaliation litigation, employers often exert systemic control over the scope, narrative, and framing of the legal process—effectively constructing an institutional *Overton window* within the court. Just as political actors shift the boundaries of publicly acceptable discourse to render

some ideas thinkable and others unutterable, employers in litigation strategically shape what is legally admissible, factually plausible, and morally legible. (Lambert, 2024).

This narrowing begins with pretextual framing. Employers redefine the dispute as a routine workplace conflict (performance issues, interpersonal friction, or policy violations), rather than a public interest disclosure or a challenge to institutional wrongdoing.

Procedural motions are then used to exclude evidence of the underlying misconduct, severing the act of whistleblowing from the retaliation that followed. In doing so, the employer establishes a narrowed evidentiary corridor: one in which the legitimacy of the disclosure is sidelined, and only the credibility of the whistleblower is on trial.

The court often accepts this narrowed frame as neutral. But it is not. It is engineered. Protective orders, motions *in limine,* discovery limitations, and mental health fishing expeditions are deployed not only to win the case, but to delimit what truth is permitted to appear within the record.

The result is a litigation process in which moral dissent is rendered procedurally incoherent: disclosures become irrational, whistleblower motives suspect, and retaliation reinterpreted as justified employment discipline.

In this way, employers not only defend themselves—they define the boundaries of adjudicable reality. They convert institutional wrongdoing into a contested HR file and transform whistleblower resistance into a question of character.

The legal system, rather than correcting this distortion, often becomes its stage. Like the political manipulation of the *Overton window,* this judicial narrowing enforces silence not through explicit censorship, but through strategic framing that reclassifies dissent as disorder and truth as irrelevance.

The Aesthetics of Compliance: How Institutions Perform Accountability

When an institution is confronted with allegations of serious wrongdoing — whether criminal conduct, workplace violence, regulatory fraud, or systemic abuse — its first response is rarely a full reckoning. Instead, it responds with a performance of compliance. This response is not superficial. It is procedural, media-ready, and deeply embedded in how contemporary institutions preserve legitimacy.

Universities launch "*independent investigations.*" Tech companies retain law firms. Government contractors issue statements of zero tolerance. Boards form special committees. Employees are told not to speculate. Legal teams prepare position statements.

As Susan Bandes (1999) argues in her analysis of legal affect, institutional actors often express *"judicial disgust"* at injustice but disclaim the authority to act. Their language reveals moral dissonance, within a system built to disclaim accountability unless a violation falls neatly within jurisdictional bounds. Goldman warned us more than a hundred years ago that legal oppression and bureaucratic neutrality were functions of imperial power. (Goldman, 1910; Schriempf, 1997).

What is being protected is not the truth, but the organization's public identity — its *"brand of responsibility."* Compliance becomes an aesthetic. A polished surface that gestures toward reform while protecting the architecture of impunity beneath it. C. Fred Alford (2001) describes how organizations co-opt the language of accountability to immunize themselves from its demands. Whistleblowers often confront institutions that respond with the form of ethics but not the substance, issuing new codes of conduct and trainings without addressing the underlying violence (Alford 2001, 81–85).

This is by design. For example, Joel Bakan explained that Enron *"used political influence to remove government restrictions on its operations and then exploited its resulting freedom to engage in dubious, though highly profitable, practices."* (Bakan, 2003, page 99). We know Enron was able to get away with this deception and egregious misconduct for years.

This logic mirrors Gray Brechin's analysis of monumentalism in *Imperial San Francisco* — how the city's robber barons built civic temples and art museums to launder the reputational violence of their extraction. The civic façade was erected not in spite of the violence beneath it, but because of it. (Brechin 1999, 44–46).

Today, the façade is procedural. It is a DEI training in the midst of systemic racism. A Title IX office with no teeth. A whistleblower hotline staffed by corporate risk consultants. In this regime, the institution's goal is not to eliminate harm, but to contain its narrative consequences.

Whistleblowers who persist in naming the truth are increasingly treated as threats to this containment. The problem is not just what they reported — the investigation is "*ongoing*," after all — but that they are disrupting the institutional timeline. They refuse to let the matter resolve itself through messaging. And so, they must be removed.

This is the next layer of retaliation: not the punitive firing or the dead-end transfer, but the symbolic denouncement. The suggestion that the whistleblower is unprofessional,

disruptive, or irrational — not because they lied, but because they refused to submit to the choreography of procedural checklists (failure to cooperate, failure to exhaust administrative options, breach of loyalty, etc.).

In this environment, retaliation is not hidden. It is a consequence of non-compliance with the script. To seek structural change, to demand full recognition of institutional violence, is seen not as courage but as instability. The performance continues. The institution is praised for its transparency. The contract remains in place. And the whistleblower is gone.

Toward Systemic Accountability: Reforms That See the Whole

The institutional failures documented in this article — jurisdictional silos, retaliatory justification doctrines, symbolic compliance, and state-level cognitive dissonance — are not isolated. They are mutually reinforcing design features of the U.S. administrative and legal enforcement landscape.

Real accountability will not come from adding another hotline or compliance module. It will require changes to the structure, scope, and epistemology of institutional oversight. The proposals below are not exclusive, but attempt to show examples of potential opportunities and a new way of viewing these issues.

Create a Cross-Jurisdictional Retaliation Review Mechanism

Most whistleblower retaliation cases fail because they are routed into statutory lanes too narrow to carry the weight of what actually happened. I propose a federally mandated mechanism to receive, consolidate, and coordinate multi-domain claims of retaliation — especially where the alleged misconduct involves:

- Fraud against the government
- Active environmental or public health risk
- Criminal activity by federal grantees or contractors
- Retaliation involving multiple adverse actions over time, or post termination harassment.

This function should be modeled on cross-agency task forces and should include binding coordination mandates between DOJ, DOL, NLRB, EPA, NSF OIG, and others — not informal, invisible, discretionary referrals.

Create a Doctrine of Cross Statutory Illegality

Agencies and courts should be required to assess whether an employer's claimed "*legitimate reason*" for adverse action would be unlawful under any other federal law or regulation. This doctrine of cross-statutory illegality would prevent the laundering of retaliatory motives across jurisdictions.

If an employer fires a worker for organizing with coworkers to report the employer's criminal acts, the NLRB should not be allowed to accept an employer's justification for the termination due to the employee "*reporting crimes*" as a valid justification, simply because the NLRA does not expressly protect "*reporting crimes.*"

The motive should be weighed holistically — and illegality under one regime should preclude justification in another. Certainly, the Congress intended the NLRA would protect workers who chose to organize for mutual aid and protection specific to wanting a crime-free workplace.

What "Protecting" Workers Would Look Like

When whistleblowers come forward—risking careers, livelihoods, and reputations to expose institutional corruption, fraud, abuse, or threats to public safety—they should be met with meaningful legal protection, not procedural traps. Unfortunately, in many cases, our current legal architecture betrays the very people it's designed to protect.

Under a protective framework, once a whistleblower demonstrates that their protected activity was a *contributing factor* to the adverse action taken against them—whether it's termination, demotion, or harassment—the burden must shift decisively to the employer. The employer should then be required not only to prove that retaliation *wasn't* a factor, but also to justify what consequence they themselves deserve if retaliation did occur—not whether any consequence is warranted.

The employer-employee relationship is structurally asymmetrical. Employers control the workplace, documentation, internal investigations, and access to records that often contain the evidence of misconduct. Expecting whistleblowers to meet an onerous causation standard like "but for" or "because of" causation is legally and practically impossible in most cases. *Lawson v. PPG Architectural Finishes, Inc.*, 12 Cal. 5th 703 (2022).

Instead, as articulated in *Lawson v. PPG Architectural Finishes, Inc.*, 12 Cal. 5th 703 (2022), whistleblowers should only need to prove "*contributing factor*" causation by a preponderance of the evidence. This is the standard used in California and several federal whistleblower statutes. It recognizes the reality that retaliation is often complex—and that protected activity need only play a part in the

employer's decision to act.

Conversely, the employer must meet a higher evidentiary bar: *clear and convincing evidence* that it would have taken the same action independent of the protected activity. This framework has precedent in both state and federal law, and mirrors burden-shifting mechanisms in civil rights and mixed-motive discrimination cases (*see McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *see also Texas Dep't of Cmty. Affs. v. Burdine,* 450 U.S. 248 (1981)).

Perhaps the most disturbing and predatory loophole in modern whistleblower litigation is the "After Acquired Evidence" doctrine. Introduced in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), this doctrine allows an employer to conduct post-termination investigations to uncover past misconduct by the employee—even after the employer has been found to have retaliated unlawfully.

If the employer can uncover some past infraction (no matter how minor or unrelated), courts can limit or even eliminate remedies, including back pay, reinstatement, or other damages. This doctrine is wielded to retroactively justify illegal retaliation and insulate employers from consequences. *Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368 (1st Cir. 2004).

This effectively deputizes employers as private investigators, greenlighting invasive post hoc inquiries that resemble character assassination more than legal defense. It's an open invitation to dig up "*dirt*," compile dossiers, and weaponize surveillance against whistleblowers.

The current system thus provides perverse incentives:

- Employers who retaliate illegally can still win on remedies by finding unrelated faults in the employee's past.
- Courts may acknowledge illegal retaliation but simultaneously deny meaningful justice and authorize punitive measures like invasive surveillance and data collection.
- Employees, even after prevailing on the merits, can walk away with nothing.

This undermines the core intent of whistleblower protection statutes: to encourage employees to speak up without fear of reprisal. In other domains, such as criminal or sexual assault cases, attempts to smear a victim's character during or after litigation can amount to harassment or obstruction of justice. Yet in whistleblower cases, this behavior is normalized and even incentivized by doctrines like *after-acquired evidence.*

To truly protect whistleblowers, courts and legislatures must:

- Codify "*contributing factor*" causation as the standard for liability.
- Mandate "*clear and convincing*" evidence for employer defenses.
- Prohibit or severely restrict the use of *after-acquired evidence*, particularly when unrelated to the misconduct at issue.
- Refocus litigation on the employer's conduct, not the employee's character.
- Recognize the chilling effect doctrines have on future whistleblowers.

Statutes designed to protect whistleblowers should not be neutralized by doctrines that were never intended to apply to them. If we are serious about rooting out corruption, fraud, and abuse, we need legal systems that amplify the voices of whistleblowers—not ones that punish them for speaking.

Expand Criminal Whistleblower Protections and Provide Provisional Status

Currently, there is no general-purpose federal statute protecting whistleblowers who report potential criminal violations outside sector-specific contexts.

Congress must enact a universal protection statute — one that includes:

- Immediate provisional protected status once reporting is made in good faith.
- Emergency injunctive relief from adverse employment action
- Civil damages and criminal penalties for retaliators
- Protections against security clearance revocation or visa coercion.

Until then, DOJ and FBI should adopt internal policy guidance to recognize such retaliation as potential obstruction or witness tampering and offer affirmative communications to regulatory bodies to prevent case dismissals.

Conclusion: A System That Protects Itself

When whistleblowers step forward — especially those who reveal criminal conduct, institutional violence, or state-aligned corruption — they are not only naming misconduct. They are presenting an existential threat to the story the

system tells about itself. And so, they are cast out, because accepting their truth would demand a reckoning.

In this context, even moral outrage becomes strategic. Judges and agencies acknowledge harm with language they know will have no legal effect. They perform disgust in the absence of power. Institutions perform compliance in the absence of justice. And all the while, the machinery of harm continues to turn — intact, uninterrupted, and immunized by design. (Goldman, 1910; Schriempf, 1997).

The real lesson of whistleblower retaliation in the United States is not that the system is broken. It is that the system is working — for those it was built to serve. And unless we confront the political logic of our enforcement architecture, no amount of procedural reform will change that. The question, then, is not whether we need new policies. It is whether we are willing to tell the truth about what the current ones are protecting.

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Acknowledgements

The author conceptualized the article, developed the theoretical framework, and conducted the review and synthesis of literature. This research received no external funding. All materials, equipment, and resources used in the study were personally funded by the author.

Beyond Zealous Advocacy

Strategic Misrepresentation in Litigation: A Judicial Framework for Addressing Litigation-Based Obstruction

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Abstract: This article examines how federal civil litigation, particularly in cases involving public enforcement claims such as fraud, whistleblower retaliation, and regulatory violations, is increasingly used by corporate defendants not as a forum for truth-seeking, but as a procedural mechanism to obscure misconduct. Drawing on case law, procedural rules, ethics doctrine, and human rights theory, the article documents how defense counsel often deploy evasive pleadings, obstructive discovery tactics, misleading declarations, and inconsistent narratives to shape outcomes while shielding key facts from judicial scrutiny. Although courts have inherent authority to sanction such conduct and remedy judgments obtained through fraud on the court, they rarely apply heightened scrutiny in these contexts. The article proposes a structured framework for judicial intervention, particularly under Rule 60(d)(3)—that aligns the court's institutional duty with the public interest functions of enforcement litigation. In doing so, it calls for a principled shift toward stricter scrutiny of defense-side conduct in matters were procedural manipulation risks not only harm to plaintiffs, but distortion of the adjudicative process itself.

Keywords: civil procedure; public interest litigation; whistleblower retaliation; fraud on the court; discovery abuse; rule 60(d)(3); corporate accountability; litigation misconduct; institutional integrity; judicial discretion; false claims act; adversarial process; human rights and legal ethics; restorative justice; legal obstruction

Citation: Gjovik, Ashley. "Beyond Zealous Advocacy: Strategic Misrepresentation in Litigation" *The Journal of Structural Power & Resistance,* Volume 1, Issue 1, Summer 2025, Silentium Fractum. May 26 2025. https://ashleygjovik.com.

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Introduction

Litigation is meant to be a truth-finding process. At its core, federal civil procedure exists to uncover facts, adjudicate disputes fairly, and provide a public forum for resolving harm. But in high-stakes cases involving allegations of corporate fraud, obstruction of justice, or whistleblower retaliation, the adversarial process often functions quite differently. Rather than revealing misconduct, litigation itself becomes a continuation of the cover-up.

Technically, under rules such as Federal Rule of Civil Procedure 11, attorneys are obligated to ensure that factual assertions are made after a reasonable inquiry and with evidentiary support. Ethical duties under the ABA Model Rules of Professional Conduct and their state analogues—including Rules 3.3 (Candor Toward the Tribunal), 4.1 (Truthfulness in Statements to Others), and 8.4(c) (Misconduct Involving Dishonesty or Fraud)—further prohibit attorneys from knowingly presenting false or misleading information to the court.

Yet, in practice, attorneys, particularly those representing institutional defendants, often face minimal risk for strategic misrepresentations. As David Barnhizer argues in *Abandoning an Unethical System of Legal Ethics*, legal ethics are frequently honored in the breach, serving more as rhetorical guardrails than enforceable rules.

This article confronts an uncomfortable but necessary reality: that defense counsel representing corporate clients frequently use the litigation process to suppress the very evidence that would expose unlawful conduct. They do so not only through aggressive advocacy, but through tactical exploitation of discovery rules, evasive pleadings, strategic denials, and the misuse of privilege. The result is not a failure of individual ethics, but a systemic design flaw—one that transforms procedure into a tool of substantive obstruction.

The problem is compounded by courts' reluctance to police attorney deception or revisit judgments tainted by litigation misconduct. Judges are encouraged to maintain neutrality, prioritize finality, and afford wide latitude to defendants invoking their right to contest claims. Meanwhile, whistleblowers and public interest plaintiffs who challenge entrenched corporate wrongdoing find themselves entangled in a system that demands impossible proof while enabling strategic silence and procedural manipulation.

What emerges is a disturbing pattern: the more serious the defendant's underlying wrongdoing, the greater the incentive to weaponize litigation as a shield. The very rules designed to facilitate justice are instead used to deny it.

Judicial remedies, while theoretically robust, are rarely invoked. Rule 11 sanctions are limited by procedural hurdles such as *"safe harbor"* provisions, and courts often resist interpreting aggressive lawyering as sanctionable dishonesty. Disciplinary bodies infrequently pursue sanctions unless conduct is egregious and public. As Bruce Green and others have documented, disciplinary enforcement is discretionary, sporadic, and sometimes politically inflected. (Green, 2014).

This article aims to chart the terrain of attorney misrepresentation in litigation, with an emphasis on corporate defense counsel in civil cases. It begins by exploring the relevant ethical and procedural frameworks and then examines how these rules are enforced in practice. Particular attention is paid to instances where courts have relied on false statements to reach substantive rulings.

The analysis draws on primary sources including the *Restatement (Third) of the Law Governing Lawyers*, the *California Practice Guide: Professional Responsibility*, and leading academic articles such as Frank Mastro's "Exposing Litigants Who Fabricate Evidence." Case law, including *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* (322 U.S. 238); *Sun World, Inc. v. Olivarria*, 144 F.R.D. 384 (E.D. Cal. 1992); and more recent federal district and circuit court opinions, serve to illustrate both the potential and the limitations of the current doctrinal tools.

These principles are echoed in the *Restatement (Third) of the Law Governing Lawyers*, which similarly holds that attorneys may not "*knowingly make a false statement of fact or law to a tribunal"* and must *"take reasonable remedial measures"* when falsehoods arise in litigation. The commentary to Restatement §120 emphasizes that these obligations extend to avoiding the omission of material facts when necessary to prevent misleading the court.

Ultimately, this article argues that when attorney falsehoods materially influence judicial decisions, the harm transcends adversarial gamesmanship. It becomes a matter of institutional failure, requiring not just sanctions but systemic reform.

The Legal Landscape: Formal Duties of Candor and Integrity

The architecture of American civil litigation is premised on the pursuit of truth through a structured adversarial process. At its core, the system is intended to resolve disputes fairly, ensure access to relevant information, and uphold institutional legitimacy by providing remedies grounded in evidence and legal merit. These goals are operationalized through the Federal Rules of Civil

Procedure and the ethical obligations imposed on legal practitioners, which together form a normative framework of procedural integrity.

This system relies on the foundational assumption that attorneys will not knowingly deceive the courts before they appear. This principle is codified across several intersecting domains of law: professional ethics rules, procedural doctrines, and court-sanctioning authority.

Procedural Duties Under Federal Rules

Federal Rule of Civil Procedure 11 requires attorneys to certify that all pleadings, motions, and other papers submitted to the court are grounded in fact, legally tenable, and not filed for improper purpose. This includes a duty of reasonable pre-filing inquiry. However, the rule contains a "*safe harbor*" provision that gives counsel an opportunity to withdraw or correct challenged filings within 21 days, limiting its effectiveness as a deterrent.

Rule 26(g) governs discovery responses and similarly demands that counsel certify responses are "*complete and correct as of the time made.*" Yet discovery misconduct—such as misrepresenting document timelines or falsely denying knowledge—often goes unpunished unless it results in discovery obstruction significant enough to prompt a motion to compel or sanctions hearing.

Finally, Federal Rule of Evidence 502 and privilege doctrines impose duties of good faith in the assertion of privileges. Strategic misuse of privilege logs to obscure discoverable facts or construct misleading narratives is rarely punished but raises significant ethical and procedural concerns.

Procedural Mechanisms and the Duty of Candor

Federal procedural rules are designed to promote substantive justice by facilitating full and fair disclosure. Rule 1 of the Federal Rules of Civil Procedure affirms that the rules:

> "Should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

(Federal Rules of Civil Procedure, Rule 1).

To that end, Rule 26(a) mandates the disclosure of core information without awaiting discovery requests, while Rule 26(b) authorizes broad access to nonprivileged materials relevant to the claims or defenses presented (FRCP).

Overlaying this procedural scheme are the ethical duties codified in the ABA Model Rules of Professional Conduct. These include Rule 3.3, which prohibits attorneys from knowingly making false statements to the court or failing to correct previous misstatements; Rule 4.1, which governs truthfulness in communications with others; and Rule 8.4(c), which defines professional misconduct to include dishonesty, fraud, and deceit (ABA 2023).

Collectively, these provisions establish an expectation that attorneys will not only refrain from affirmatively misleading the court but will also take affirmative steps to ensure the accuracy of the factual record upon which judicial determinations depend.

The procedural and ethical regimes are therefore mutually reinforcing they are designed to channel party conduct toward transparency and accuracy, both to ensure fair adjudication in individual cases and to maintain public confidence in the integrity of the legal system.

Limitations of the Litigation Privilege

Compounding the enforcement problem is the expansive doctrine of litigation privilege, particularly in states like California. Under Cal. Civ. Code § 47(b), communications made in connection with judicial proceedings are generally privileged even when knowingly false or malicious. While this doctrine supports zealous advocacy, its overextension has led to the effective immunization of certain types of strategic deceit.

Some narrow exceptions to this privilege, as identified in *An Immunity for Tortious Litigation-Related Conduct*, include noncommunicative misconduct (e.g., spoliation or surveillance), crimes, and fraud on the court. But courts are reluctant to pierce the privilege even when evidence of falsehood is strong, creating a systemic tolerance for misrepresentations made under the veil of advocacy.

Corporate Responsibility and Global Normative Expectations

Beyond domestic procedural and ethical standards, an additional layer of normative guidance has emerged from global governance frameworks. The United Nations Guiding Principles on Business and Human Rights articulate a corporate responsibility to respect human rights, including by avoiding actions that undermine the rule of law or obstruct access to remedy (United Nations 2011). This responsibility encompasses not only the conduct of business operations, but also the manner in which corporations respond to legal challenges concerning labor rights, environmental harm, and retaliatory practices.

The Corporate Human Rights Benchmark (CHRB), among other evaluative tools, emphasizes that corporations are

expected to disclose material risks, engage transparently with affected stakeholders, and avoid impeding the remediation of harms (CHRB 2020). In this context, litigation is not a self-contained tactical contest, but part of a broader system of accountability. Legal process functions alongside other institutional mechanisms—regulatory oversight, public reporting, and grievance procedures—as a site for transparency, redress, and trust-building.

When corporate litigants participate in the judicial process, their conduct carries implications not only for the immediate outcome of a dispute but for the wider project of democratic legitimacy and institutional coherence. The integrity of civil litigation, particularly in cases implicating public harm, therefore bears both legal and ethical dimensions.

Restorative Justice and Institutional Legitimacy

Restorative justice theory, while often applied in the context of criminal law, provides a valuable perspective on the ideal role of civil adjudication in addressing corporate misconduct. At its foundation, restorative justice emphasizes acknowledgment of harm, inclusive dialogue, and commitment to repair. It positions the legal process as a means of restoring disrupted relationships—whether between individuals, institutions, or the broader public.

Scholars such as Gabbay (2011) and Rex (2011) have proposed that this model may be especially relevant in cases involving white-collar and institutional wrongdoing, where the injury is often systemic and diffuse. Within a restorative framework, the legitimacy of the legal process depends not only on procedural correctness, but on the extent to which it enables truth-telling, recognition of harm, and meaningful accountability (Gabbay 2011; Rex 2011).

Thus, the design of the civil justice system, when viewed through both procedural and ethical lenses, is not merely to adjudicate disputes efficiently but to affirm a broader commitment to transparency, accountability, and public trust.

Litigation as a Mechanism of Procedural Obstruction

While the formal design of civil procedure aims to produce accurate factual records and fair outcomes, the adversarial nature of litigation creates opportunities for strategic behavior that undermines those aims. Particularly in complex cases involving alleged corporate fraud, retaliation, or regulatory violations, the defense counsel may engage in litigation tactics that are not simply aggressive but obstructive, deployed not to clarify the legal issues, but to control, distort, or suppress access to information that could reveal liability.

This section identifies several common forms of litigation conduct that subvert procedural transparency. While these tactics often exist within the margins of what is formally permissible, they cumulatively erode the truth-seeking function of litigation and contribute to institutional opacity.

Evasive and Misleading Pleadings

Under Rule 8(b) of the Federal Rules of Civil Procedure, a party must *"admit or deny the allegations asserted against it,"* and denials must "*fairly respond to the substance of the allegation"* (FRCP 2023, Rule 8). However, in practice, defense pleadings often consist of sweeping denials that obscure rather than clarify the factual record. Denials of knowledge that are later contradicted by internal documents—such as emails or privilege logs—raise serious concerns about the candor of those pleadings.

Courts have shown substantial tolerance for such tactics, interpreting them as permissible "*non-admissions*" rather than misleading assertions (McGuire 1990). The liberal pleading standards established in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), permit general denials at preliminary stages, provided there is no demonstrable bad faith. Yet, when pleadings are later revealed to contradict discoverable facts, the legal system often lacks mechanisms to revisit or redress that initial obfuscation.

Strategic Use of Boilerplate Discovery Responses

Federal Rules 26 and 34 require parties to conduct reasonable inquiries into the existence of discoverable information and to produce it in good faith. Nevertheless, defense counsel often respond to document requests with generalized objections that fail to specify the grounds for withholding or the scope of any privilege claim. This practice—commonly referred to as "*boilerplate*"—has been widely criticized as a systemic barrier to effective discovery (Shachmurove 2022).

Judges have called for greater specificity in discovery responses, and Rule 34 was amended in 2015 to curtail boilerplate objections. Yet enforcement remains inconsistent. As Shachmurove (2022) notes, boilerplate persists because the sanctions for evasive discovery are minimal, and the incentive to obscure damaging information is strong in high-stakes corporate litigation. The result is a discovery process that becomes not a vehicle for factual development, but a filter for narrative control.

Withholding or Mischaracterizing Key Evidence

In some cases, evidence is not merely delayed but actively concealed. This may occur through overbroad privilege assertions, failures to update disclosures as required by Rule 26(e), or strategic omissions in custodial searches. Courts have inherent authority to sanction such conduct, and Rule 37 provides a statutory basis for doing so. However, sanctions under Rule 37 require a clear showing that the nonproduction was without substantial justification and caused prejudice to the opposing party (FRCP).

In whistleblower retaliation cases, for example, defense counsel may deny knowledge of protected disclosures, only for subsequent privilege logs or internal correspondence to reveal that senior management discussed those very disclosures at the time adverse action was taken.

Misleading Declarations and Inconsistent Statements

Declarations submitted under the penalty of perjury are among the most persuasive forms of early evidence in civil litigation. Yet they can also be crafted to exclude, minimize, or misstate material facts without crossing the threshold into outright falsehood. Declarations by corporate officers or legal counsel often present a selective account of events, omitting context or framing internal knowledge in ways that delay the discovery of truth.

This becomes particularly problematic when defense counsel reference or incorporate prior agency position statements, such as filings with the EEOC or OSHA, which were themselves premised on incomplete or contested factual accounts. By invoking these statements in court, litigants effectively launder strategic misrepresentations across legal forums, reinforcing the appearance of consistency without exposing the underlying factual contradictions.

This form of cross-forum misrepresentation creates what could be called "distributed litigation fraud." As discussed in *Abandoning an Unethical System of Legal Ethics*, the professional responsibility framework lacks the cross-institutional mechanisms to detect these contradictions, much less penalize them in a coordinated way. Bar authorities rarely examine agency filings. Courts rarely investigate pre-litigation or parallel statements unless they are specifically challenged. Agencies have limited litigation oversight powers. In short, no one body sees the whole picture—and the result is accountability by segmentation.

These practices are not uniformly condemned or sanctioned. Instead, they often fall within a procedural gray zone where courts emphasize formal compliance, burden-shifting, or interpretive ambiguity. The result is a litigation environment in which strategic suppression is not only tolerated, but structurally incentivized.

What ties these patterns together is a structural problem: counsel are able to construct and defend misleading factual narratives by distributing misrepresentations across pleadings, discovery, declarations, agency responses, and oral arguments, such that each individual component appears facially plausible or technically defensible. Only when documents like privilege logs or metadata emerge in later phases does the contradiction become clear—and by then, the damage may be done.

The litigation record in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), is illustrative: a fabricated article submitted in support of a patent was later used to obtain a judgment against a competitor. The Supreme Court described this as a "*wrong against the institutions"* of justice, not merely the opposing party. *Id* at 246. Where counsel construct timelines or interpret documents in ways that contradict known facts—and then use these reconstructions to obtain dispositive rulings—the institutional harm is similar.

Misuse of Privilege and Discovery Evasion

Another tactic is the strategic misuse of attorney-client privilege and work-product protections to shield relevant information. In *EEOC v. BDO USA, LLP*, 876 F.3d 690 (5th Cir. 2017), the court criticized the defense's privilege log for failing to provide enough detail to establish the legitimacy of its assertions, particularly when the underlying documents appeared relevant to a claim of discrimination. The ability to selectively withhold and later contradict factual assertions using protected communications illustrates how privilege can be weaponized to mislead both the court and opposing counsel.

In addition, in the *Restatement (Third) of the Law Governing Lawyers* acknowledges that privilege does not extend to communications "*in furtherance of a crime or fraud"* (§82), yet courts are reluctant to compel production absent a prima facie showing—a standard difficult to meet without discovery access to the very documents in question.

The Recursive Structure of Obstruction

The litigation tactics described in the previous section are not isolated procedural excesses; they form part of a broader structural pattern in which litigation itself becomes an instrument for concealing the very wrongdoing it is meant to adjudicate. In this recursive dynamic, corporate actors

accused of fraud, obstruction, or retaliation utilize procedural mechanisms not only to defend themselves, but to deepen their insulation from accountability. What begins as misconduct outside the legal process becomes shielded—if not effectively legitimized—by the process itself.

Corporate defendants in high-risk civil litigation face powerful incentives to limit the factual record. Unlike routine contractual or tort disputes, cases involving whistleblower retaliation, regulatory evasion, or systemic fraud often center on internal knowledge, intent, and motive—factors that reside almost entirely within the defendant's control. In these contexts, litigation strategies aimed at suppressing or reframing that internal narrative serve not merely defensive purposes but functionally amount to a second-tier cover-up.

In addition to misrepresenting facts, defense strategies often rely on delay to weaken the evidentiary foundation of the plaintiff's case. Discovery schedules may be contested, document productions slow-walked, and interview notices resisted—all under the cover of formal process. Meanwhile, key witnesses leave the company, memories fade, and metadata or documents fall outside retention periods.

Although courts have discretion to manage these delays, they are often constrained by docket pressures and the principle of adversarial balance. As Pollis (2022) observes, procedural skirmishing is routinely framed as aggressive but acceptable lawyering. The cumulative effect, however, is that evidence critical to proving underlying misconduct is either diluted or lost entirely by the time the case reaches its merits stage.

The recursive nature of litigation-based obstruction is reinforced by the judicial system's own structural preferences. Courts are institutionally disposed toward finality, procedural neutrality, and respect for the adversarial process. As a result, even when inconsistencies or concealments are later revealed, courts are often reluctant to reopen the record or impose significant sanctions unless the misconduct was egregious and well-documented.

The doctrine of fraud on the court, as recognized in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), offers a theoretical avenue for addressing litigation misconduct that subverts the judicial process. Modern courts interpret this doctrine narrowly, reserving it for only the most extreme cases of deliberate deception. (Hauge, 2021). For most forms of strategic suppression, there remains no reliable corrective mechanism.

What emerges is a recursive system in which the litigation process not only fails to expose wrongdoing but actively reinforces its concealment. The legal architecture—designed to ensure fairness and truth—can be co-opted to deny both. In the next section, we explore the implications of this design failure and propose reforms that could restore the integrity of litigation in cases involving serious corporate misconduct.

Doctrinal Tools and Limitations in Responding to False Statements

Though the legal system recognizes the harms of attorney misconduct, particularly false representations to the court, the tools available to address such conduct are fragmented, procedurally limited, and often underused. This section surveys the key doctrinal mechanisms available—ethical rules, federal procedural rules, courts' inherent powers, and disciplinary systems—while emphasizing why they have failed to consistently deter or remedy misrepresentation by defense counsel in civil litigation.

Rule 11 and the "Safe Harbor" Constraint

Federal Rule of Civil Procedure 11 is often cited as a primary bulwark against improper attorney conduct. It requires that all papers filed with the court be warranted by existing law, supported by factual evidence, and not interposed for any improper purpose. Attorneys must conduct a reasonable prefiling inquiry into the facts and law, a point emphasized in treatises like *California Practice Guide: Civil Procedure Before Trial*.

However, the "safe harbor" provision under Rule 11(c)(2) severely blunts its deterrent power. Parties seeking sanctions must serve their motion on opposing counsel 21 days before filing it with the court, giving the offending party the opportunity to withdraw or correct the challenged filing. This often results in strategic withdrawals rather than accountability, especially where the misrepresentation has already influenced judicial perception or harmed discovery access.

Moreover, courts are hesitant to impose Rule 11 sanctions in close factual disputes, erring on the side of protecting advocacy. The consequence is a standard that formally prohibits misrepresentation but functionally tolerates it unless egregious and easily proven.

Courts' Inherent Sanctioning Authority

Independent of the Rules, federal courts have inherent authority to sanction parties and attorneys for conduct that abuses the judicial process. The Supreme Court in *Chambers v. NASCO*, 501 U.S. 32 (1991), confirmed that

this power includes issuing attorney's fees, dismissals, or other remedies where a party has acted in bad faith.

However, this power is bound by several limitations:

- Due process protections require notice and opportunity to respond before sanctions are imposed.
- Sanctions must be limited to fees and costs incurred as a direct result of the misconduct (*Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101 (2017)).
- Courts often require a clear showing of bad faith, rather than mere negligence or strategic ambiguity.

As summarized in the *California Practice Guide: Professional Responsibility*, courts may revoke pro hac vice admission, disqualify counsel, or exclude evidence where counsel's conduct undermines litigation fairness—but these are reactive, discretionary measures, and rarely invoked for misstatements unless incontrovertibly documented.

Bar Discipline and Professional Sanctions

Misrepresentation to courts can also trigger professional discipline. Under state and ABA Model Rules, attorneys may be disciplined for conduct involving dishonesty, fraud, deceit or reckless or intentional misrepresentation.

Yet, as Bruce Green and David Barnhizer note, disciplinary enforcement is selective, underfunded, and rarely applied to litigation conduct short of perjury or criminal acts. In *Selective Disciplining of Advocates*, Green illustrates that disciplinary boards often defer to courts, which in turn decline to make findings that would compel a referral. This creates a closed loop of non-enforcement.

Moreover, even where a court issues factual findings about a lawyer's dishonesty, state bars may impose minimal sanctions or opt for private reprimands, particularly if the misconduct was not public or did not involve client harm.

Limits of Civil Remedies for Litigation Fraud

Beyond sanctions and discipline, litigants may seek redress for litigation fraud through tort claims or Rule 60 motions. However, these avenues are narrowly construed.

- Civil claims for fraud or abuse of process are frequently barred by the litigation privilege, especially in states with strong immunities for in-court statements.
- Relief from judgment under Rule 60(b)(3) (fraud or misrepresentation) is limited to one year after entry of judgment.
- Rule 60(d)(3) allows courts to vacate judgments for "fraud on the court," but requires clear and convincing evidence that the misconduct corrupted the judicial process itself, as in *Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944)*.

Because these standards are so high, courts are reluctant to vacate judgments unless the misconduct is egregious, well-documented, and shows intent to mislead the tribunal.

Substantive Harm: When False Statements Influence Judicial Outcomes

Much of the legal and ethical architecture surrounding attorney conduct treats misrepresentation as a procedural defect—troubling but correctable. Yet a critical rupture occurs when courts rely on material falsehoods to make substantive decisions: dismissing meritorious claims, granting summary judgment, or entering final orders based on fabricated or misleading narratives. In such cases, the harm extends beyond the injured party to the legitimacy of the judicial process itself.

The Elevated Stakes of Reliance-Based Harm

Procedural rules like Rule 11 and Rule 26(g) focus on filings and discovery compliance, but they do not distinguish between harmless and outcome-altering misrepresentations. This doctrinal blindness to consequence obscures an essential truth: false statements that shape dispositive rulings cause systemic damage. When the court itself becomes the conduit for fraud, the injury is constitutional and institutional, not merely adversarial.

Rule 60(d)(3): Fraud on the Court

Federal Rule of Civil Procedure 60(d)(3) codifies the court's inherent power to set aside a judgment for "fraud on the court." This standard is narrower than Rule 60(b)(3) (which governs fraud by a party) and is reserved for conduct that "seriously affects the integrity of the normal process of adjudication."

To succeed under Rule 60(d)(3), the moving party must show:

- A deliberate scheme to directly subvert the court's ability to impartially adjudicate,
- Misconduct that prevented the full presentation of the case,
- And clear and convincing evidence of the fraud.

The First Circuit's ruling in *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115 (1st Cir. 1989), applied this framework to dismiss a case where the plaintiff attached a fabricated purchase

agreement to the complaint. The court found this "a near-classic example of fraud upon the court," emphasizing that once litigation begins, false documents introduced to influence judicial evaluation are an affront to the rule of law.

While *Aoude* and *Hazel-Atlas* involved plaintiffs, their logic is symmetrical: when defense counsel misrepresents timelines, knowledge, or document existence—and the court rules based on those assertions—fraud-on-the-court doctrine should apply.

Missed Opportunities for Judicial Correction

Despite this doctrinal clarity, many courts decline to revisit judgments even when post hoc evidence reveals material falsehoods in earlier filings. One barrier is the judiciary's preference for finality. Another is the absence of cross-phase verification: courts often assume, wrongly, that misconduct during discovery or agency review does not taint dispositive motion practice.

For example, in whistleblower retaliation cases, a defense team may claim ignorance of protected activity at the time of termination. If that representation supports a successful motion to dismiss or for summary judgment, but a later-produced privilege log reveals internal emails contradicting the claim, the ruling was substantively infected. However, unless the opposing party reopens the record, the court's reliance stands unchallenged.

Such dynamics are not hypothetical. In litigation examined by Frank J. Mastro in "Exposing Litigants Who Fabricate Evidence," courts routinely granted relief when falsehoods came to light—but only when the misconduct was obvious, documented, and extraordinary. Most false statements are subtler: omissions, denials of knowledge, or distorted timelines that are hard to disprove in the moment but clearly contradicted by later evidence.

Reframing the Harm: From Adversarial Misconduct to Institutional Failure

Courts tend to treat these episodes as adversarial missteps: bad faith tactics to be sanctioned, if at all, within the logic of the dispute. But this misses the broader policy concern. When a false factual narrative becomes embedded in a dispositive order, the judiciary unwittingly endorses and amplifies falsehood.

This transforms attorney dishonesty into something larger: a procedural due process violation, a public law failure, and a threat to legitimacy and trust in adjudication.

As the *California Practice Guide: Professional Responsibility* notes, "conduct prejudicial to the administration of justice" is itself a sanctionable offense under CRPC 8.4(d). Yet if such prejudice arises not from dramatic courtroom outbursts, but from cumulative misstatements embedded in dispositive rulings, courts often lack the doctrinal vocabulary—or political will—to respond proportionally.

Systemic Accountability Gaps and Public Policy Risks

Despite the formal rules, judicial doctrines, and professional codes designed to ensure truthful litigation conduct, the American legal system exhibits a persistent failure to respond meaningfully when attorneys—especially those representing institutional defendants—make false or misleading statements in court. This failure is not merely doctrinal; it reflects a structural and institutional tolerance for deception that prioritizes procedural finality and adversarial efficiency over accuracy, fairness, and public trust.

Fragmentation of Oversight

One of the most consequential factors contributing to this gap is the fragmentation of institutional oversight. Litigation conduct is governed simultaneously by:

- Trial courts,
- Appellate courts,
- State bar disciplinary authorities,
- Federal agencies, and
- Internal corporate legal compliance units.

Each of these actors operates under a separate mandate, with limited visibility into cross-forum conduct. A defense attorney who denies knowledge of protected activity in federal court may contradict that position in agency filings or later be revealed (via privilege logs) to have advised on retaliatory action. Yet no single entity is responsible for tracing those contradictions across institutional boundaries.

This gap has been recognized in commentary such as *Abandoning an Unethical System of Legal Ethics*, where David Barnhizer observes that legal ethics often operate in a closed system of self-regulation that insulates lawyers from meaningful scrutiny, especially when they represent powerful clients.

Misalignment Between Harm and Remedy

The current enforcement mechanisms are poorly aligned with the nature of the harm caused by litigation dishonesty:

- Rule-based sanctions (e.g., Rule 11, Rule 60) address procedural defects, not narrative falsification that leads to a misleading but procedurally valid decision.

- Civil tort remedies (e.g., fraud, abuse of process) are often barred by litigation privilege.
- Disciplinary systems focus on client harm, not third-party or institutional damage.

The effect is a regime that prioritizes doctrine over substance: even when a claim is dismissed based on a knowingly false timeline or misstatement of fact, courts hesitate to revisit the ruling absent procedural error or unmistakable bad faith.

This failure has real-world implications for whistleblowers, civil rights plaintiffs, and public interest litigants. When defense counsel are allowed to shape dispositive outcomes through misleading filings—then retroactively shield those misstatements behind procedural finality or privilege—the system invites, rather than deters, strategic dishonesty.

Judicial Culture and Political Disincentives

Judges themselves are part of the problem. Many are understandably reluctant to:

- Accuse officers of the court of deceit,
- Reopen closed cases, or
- Refer colleagues or repeat players for discipline.

As *Trial Lawyers in Trouble: Litigation Misconduct and Its Ethics Fallout* notes, judicial inertia is compounded by a cultural reluctance to call attorney misconduct by its name—particularly when it occurs in civil litigation rather than criminal trials. (Dolak, 2013).

Moreover, courts may fear the political ramifications of disciplining prominent attorneys or overturning judgments based on misconduct, especially in high-stakes, high-profile cases. This judicial hesitancy reinforces a professional norm of tolerating "strategic mischaracterization" so long as it falls short of perjury.

Public Confidence and Institutional Legitimacy

The cumulative impact of these gaps is a measurable erosion of public confidence in the legal system. When litigants—and especially whistleblowers or civil rights claimants, see their cases dismissed on the basis of false but unchallenged narratives, the message is clear: truth is secondary to procedure.

Legal scholars and practitioners alike have expressed concern that such tolerance undermines the legitimacy of the judiciary itself. As Justice Black noted in *Hazel-Atlas*:

> "[T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society."

Hazel-Atlas, 322 U.S. at 246.

Yet current procedural rules, enforcement cultures, and institutional silos make such tolerance not only possible, but predictable.

Policy and Practice Reforms: Toward an Integrity-Centered Litigation System

Given the demonstrable gap between formal legal doctrines and their enforcement in cases involving attorney misrepresentation, especially when such conduct directly influences judicial outcomes, this concluding section proposes a series of reforms aimed at restoring integrity, transparency, and public accountability to federal civil litigation. These reforms are grounded not only in legal doctrine but in systems thinking, ethics, and democratic institutional design.

The Need for a Heightened Standard of Review in Rule 60(d)(3) Motions

Federal courts have long recognized that certain civil cases serve public interests that go beyond the resolution of private disputes. Lawsuits brought under statutes such as the False Claims Act (FCA), Title VII of the Civil Rights Act, the Clean Air Act, Sarbanes-Oxley, and various whistleblower protection laws serve not only remedial purposes but also regulatory, deterrent, and democratic accountability functions. In these cases, the plaintiff—whether an individual, relator, or private attorney general—acts, in effect, as a proxy for public enforcement (Kohn 2020; *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928 (2009)).

Yet despite the public stakes involved, courts often review litigation conduct in these cases using the same standards of procedural deference applied in routine commercial or tort litigation. This section proposes a doctrinal recalibration: in cases that implicate public enforcement functions, courts should apply a stricter form of judicial scrutiny to defense-side litigation conduct—especially where there are plausible indications that such conduct has distorted or obstructed the fact-finding process.

The justification for heightened scrutiny arises from structural asymmetries inherent in public interest litigation. Plaintiffs in such cases typically lack access to internal

corporate records, while defendants not only possess the relevant evidence but also exercise control over how and when it is disclosed. When combined with procedural tools such as privilege assertions, strategic boilerplate objections, and selective declarations, this control can be used to delay, deflect, or obscure material facts—particularly those relating to intent, knowledge, or retaliation (Shachmurove 2022; Pollis 2022).

This asymmetry is compounded by the fact that many of these claims are decided at early procedural stages. Courts regularly dismiss FCA, and whistleblower retaliation claims on the pleadings or at summary judgment, often before the plaintiff has had meaningful access to internal discovery. In such circumstances, courts must be alert to the possibility that litigation conduct—rather than legal merit—is shaping the outcome.

Nowhere is this concern more acute than in post-judgment motions under Rule 60(d)(3), which permits courts to set aside judgments obtained through "fraud on the court." Although the doctrine has traditionally been construed narrowly, courts retain wide discretion to assess whether litigation conduct has compromised the court's adjudicative function (*Hazel-Atlas Glass Co. v. Hartford-Empire Co*., 322 U.S. 238 (1944); *Aoude v. Mobil Oil Corp.,* 892 F.2d 1115 (1st Cir. 1989)).

In public enforcement cases, courts considering a Rule 60(d)(3) motion should adopt a more structured inquiry. Specifically, they should evaluate whether:

- The defendant engaged in patterned conduct that impeded the court's access to material facts.
- Evidence of contradictions across procedural phases or forums (e.g., between agency filings and court declarations) suggest narrative engineering; and
- The litigation conduct, if left uncorrected, would perpetuate harm to a regulatory regime, injure constitutional rights, or chill future public interest enforcement.

In this context, stricter scrutiny does not require relaxing the evidentiary burden for fraud. Rather, it calls for the court to interpret the surrounding litigation behavior not as isolated infractions, but as potentially part of a broader strategy to obstruct the administration of justice.

The proposed shift is supported by existing judicial principles. Courts already apply tiered levels of scrutiny in other areas of law—such as constitutional rights adjudication, administrative review, and equal protection analysis—based on the importance of the interests involved (Fallon 2007). Similarly, in the context of public enforcement litigation, where the rights at stake implicate due process, statutory protections, and the integrity of federal enforcement schemes, courts are justified in adopting a more exacting standard of review for procedural behavior.

Moreover, this approach is consistent with the judiciary's inherent authority to protect the legitimacy of its own proceedings. Ensuring that litigation conduct does not preclude the court from accessing material facts is not a punitive exercise, it is an institutional necessity.

This proposal neither expands nor redefines the court's powers. It clarifies the circumstances in which those powers should be exercised with heightened vigilance. When civil litigation functions as a delegated mechanism of public enforcement, the courts themselves have a heightened duty to ensure that the process is not used to frustrate the very accountability it was designed to deliver.

Recalibrating Judicial Doctrine Around Substantive Harm

Current sanctions regimes—especially under Rule 11 and the inherent powers doctrine—are functionally reactive and procedurally constrained. To address the unique harm posed by misrepresentations that alter substantive outcomes, courts should adopt a "structural harm" test that emphasizes:

- The extent to which a misstatement influenced a dispositive decision,
- Whether the misstatement was contradicted by later-produced evidence,
- And whether the court would have ruled differently had the true facts been known.

In such cases, courts should be presumptively empowered to revisit judgments *sua sponte* under Rule 60(d)(3), even absent a formal motion, and should be encouraged to issue public findings of institutional concern.

In addition, the judiciary must be educated to view attorney dishonesty not merely as bad manners or sharp practice, but as a threat to the legitimacy of the adjudicative process itself. Judges should be trained to:

- Identify patterns of strategic misrepresentation,
- View misstatements through the lens of structural harm, and
- Understand their own role as institutional stewards, not passive referees.

This reframing echoes the call in *What Does It Mean to Say That Procedure Is Political?* to recognize that seemingly neutral rules often serve existing power structures unless designed to correct them. (Reda, 2017).

Concurrently, practical education and training about whistleblower retaliation, trauma, PTSD, and labor rights also seems beneficial.

Formal Disclosure Requirements for Contradictory Evidence

When privilege logs, internal correspondence, or discovery responses contain information that flatly contradicts factual assertions made in court, the rules of civil procedure should impose an affirmative duty to disclose and correct the record.

This could be achieved via:

- An amendment to Rule 26(e) requiring disclosure of "contradictory internal knowledge" relevant to any prior filing or declaration.
- Judicial adoption of standing orders requiring updated declarations when new information emerges.

Much like *Brady* obligations in criminal law, such a requirement would recognize the court's interest in receiving accurate information, independent of adversarial advantage.

Given the prevalence of *"distributed deception"*—where misstatements are spread across agency filings, court documents, and discovery correspondence—there is a need for cross-forum ethical auditing. Specifically:

- Courts should require attorneys to certify the consistency of representations made in litigation with prior agency submissions (e.g., position statements).
- In cases where post-judgment evidence contradicts earlier denials of knowledge or involvement, a mandatory in-camera review should be triggered under Rule 26(c) or pursuant to inherent authority.

These changes would address the *"accountability by segmentation"* problem identified earlier, in which no single institution sees the full scope of deceptive narrative construction.

Where courts find that defense counsel have made material misrepresentations, especially in sworn declarations or oral arguments, they should be required to:

- Report the conduct to the relevant state bar authority,
- Publish non-confidential summaries of findings in the docket, and
- Refer the matter to the relevant federal agency (if public interest or enforcement proceedings are implicated).

This reporting model would disrupt the current system of silent non-enforcement, in which courts often find misconduct but decline to take broader institutional action.

Conclusion

Civil litigation plays a central role in the American legal system—not only as a means of resolving disputes, but as a public institution that upholds transparency, accountability, and the rule of law. Nowhere is this role more vital than in cases involving corporate fraud, whistleblower retaliation, and other forms of public harm, where the courtroom may be the only venue capable of surfacing truths that would otherwise remain hidden.

Yet as this article has shown, the litigation process itself is increasingly being used to conceal the very misconduct it is meant to uncover. Through evasive pleadings, obstructive discovery practices, misleading declarations, and cross-forum narrative manipulation, defense counsel in high-stakes civil cases often employ procedural tools to suppress evidence and shape false factual narratives. While these tactics may fall within the outer bounds of adversarial practice, their cumulative effect is to distort the judicial process and frustrate the enforcement of legal and regulatory standards designed to protect the public.

The problem is not a lack of rules. Model Rules, Federal Rules of Civil Procedure, and courts' inherent powers all formally prohibit dishonesty. Nor is it a lack of theoretical remedies: sanctions, disqualification, referral, and even judgment reversal are all doctrinally possible.

The current legal framework—while formally capable of addressing misconduct—lacks a structured means of identifying when litigation conduct threatens the integrity of adjudication. Courts tend to interpret misconduct in isolation, rather than as part of a broader pattern of obstruction, and they often apply the same threshold of scrutiny to public interest cases as they do to private financial disputes.

The problem lies in a design failure. The current system is procedurally fragmented, institutionally cautious, and structurally permissive. It grants defense counsel wide rhetorical and tactical latitude, rarely holds them accountable for factually false or misleading statements, and often allows judgments to stand even when tainted by deception. This failure is most acute were courts base dispositive rulings on misrepresentations, causing not just adversarial harm, but a rupture in the integrity of the judicial process itself.

The article has proposed reforms rooted in institutional design: enhanced disclosure requirements, cross-forum consistency mechanisms, clear standards for Rule 60(d)(3) fraud, and mandatory reporting of confirmed misconduct. These proposals aim to shift the focus from lawyer conduct

as private professional failure to misrepresentation as a public institutional threat.

As shown through doctrinal review, case law, professional literature, and policy analysis, this accountability gap is not a marginal problem. It is a systemic one—embedded in the rules, norms, and political incentives that shape modern litigation. Left unchecked, it risks transforming the adversarial process into a forum not for truth-seeking, but for narrative manipulation insulated by privilege and inertia.

This article argues for a recalibration. In cases where plaintiffs serve a quasi-enforcement role and the litigation implicates public regulatory or constitutional interests, courts should apply stricter scrutiny to defense-side conduct, particularly when evaluating motions for relief under Rule 60(d)(3) or making decisions that depend heavily on factual representations made in pleadings and declarations. This form of scrutiny does not require a change in law—it requires a change in judicial posture, grounded in an appreciation of the public stakes at issue.

Ultimately, the legitimacy of the civil legal system depends not only on procedural fairness, but on its capacity to function as a reliable site for truth-seeking in matters that affect democratic institutions and public welfare. To preserve that legitimacy, courts must be prepared to recognize when procedural form has been weaponized to suppress substantive accountability—and must respond with clarity, authority, and resolve.

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Acknowledgements

The author conceptualized the article, developed the theoretical framework, and conducted the review and synthesis of literature. This research received no external funding. All materials, equipment, and resources used in the study were personally funded by the author.