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3 A Business Ethics Theory of Whistleblowing:  
4 Responding to the \$1 Trillion Question

5  
6 by W. Michael Hoffman and  
7 Robert E. McNulty  
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11 When is it permissible to blow the whistle and when is it a duty? This is a worthy business  
12 ethics question. A good answer will be one that is grounded on sound theory and is able to  
13 hold up to scrutiny when applied to the practical affairs of business. The goal of this paper,  
14 therefore, is to provide an answer to that question that is both practicable and theoretically  
15 cogent. While our theory is intended to be universally applicable, it is grounded in the current  
16 conditions in the United States.

17 **To Be a Whistleblower: The Trillion Dollar Question**

18 To be or not to be a whistleblower is a question of considerable ethical complexity and personal  
19 significance. It is not, however, a question of theoretical significance only. According to a recent  
20 report by the Association of Certified Fraud Examiners (ACFE), the United States lost almost \$1  
21 *trillion* in fraud in 2008. Before Bernie Madoff's epoch-making swindling came to light and  
22 before the economic meltdown of 2008-09 was recognized as the worst economic crisis since the  
23 Great Depression, ACFE had already estimated that American businesses would lose \$994  
24 billion in fraudulent activities in 2008.<sup>1</sup> What makes this pertinent to our essay is how fraud is  
25 detected: according to the ACFE report, the number one source of fraud detection came from  
26 tips, i.e., from *whistleblowers*. Despite the extensive reporting required of businesses since the  
27 promulgation of Sarbanes-Oxley, in the end, it was whistleblowers that served as the primary  
28 bulwark against fraud.

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W. Michael Hoffman, Ph.D., Executive Director, Center for Business Ethics at Bentley University,  
Waltham MA, USA

Robert E. McNulty, Ph.D., Director of Programs, Center for Business Ethics at Bentley University,  
Waltham MA, USA

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<sup>1</sup> Association of Certified Fraud Examiners, "2008 Report to the Nation on Occupational Fraud & Abuse," (Austin, TX2008), 4. [Hereafter title abbreviated as "2008 Report".]

1 Although the social contribution of whistleblowing is gigantic, whistleblowers are often  
2 portrayed as disloyal or self-serving bounty hunters. However, whistleblowers frequently put  
3 themselves at great risk, and their situation is rendered more perilous by the failings of the US  
4 legal system. We would argue that the woeful state of legal affairs may be due in part to a lack  
5 of consensus on the parameters of legitimate whistleblowing.

6 In this paper, we take a step in responding to a perceived theoretical deficiency by drawing on  
7 what we hold to be core principles in business ethics. With this, we suggest when  
8 whistleblowing should be considered a duty and when one can be excused from  
9 whistleblowing. The position we will propose will serve as a basis to critique the US legal  
10 framework, which we claim fails to afford the needed protections to organizations and  
11 whistleblowers alike. It is our hope that by advancing a sound theoretical framework, we can  
12 contribute to the creation of stronger laws and organizational policies.

13

## 14 **First Steps: Defining “Whistleblowing”**

15 The term “whistleblowing” is thought to have its roots in two different but related activities:  
16 first, the term follows from the practice of police or bobbies who blew their whistles when  
17 attempting to apprehend a suspected criminal; secondly, it is thought to follow from the  
18 practice of referees during sporting events who blow their whistle to stop an action.<sup>2</sup> In this  
19 case, the basic justification for whistleblowing is this: the whistleblower perceives something  
20 that he or she believes to be unethical or illegal and reports it to authorities so that corrective  
21 measures may be taken.

22 Marcia Miceli and Janet Near provide a good formal definition of whistleblowing as “the  
23 disclosure by organization members (former or current) of illegal, immoral, or illegitimate  
24 practices under the control of their employees, to persons or organizations that may be able to  
25 effect action.” They continue by noting that “the whistleblower lacks the power and authority  
26 to make the change being sought and therefore must appeal to someone of greater power or  
27 authority.”<sup>3</sup> The term has come to refer generally to a person who reports on wrongdoings  
28 within or by an organization.<sup>4</sup> If an alleged wrongdoing is reported to a person in a position of  
29 authority within an organization, it is referred to as “internal” whistleblowing. If the alleged

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<sup>2</sup> Roberta Ann Johnson, *Whistleblowing: When It Works--and Why* (Boulder: Lynne Rienner Publishers, 2003), 4.

<sup>3</sup> Marcia P. Miceli and Janet P. Near, *Blowing the Whistle: The Organizational and Legal Implications for Companies and Employees* (New York: Lexington Books, 1992), 15.

<sup>4</sup> In this paper we will use the general word “organization,” to refer to any legally established grouping of people formally brought together to work for a collective purpose. In most cases, however, the kind of organization to which whistleblowing pertains is a “business.” Although the origins of our work are in the field of business ethics, the issues with which we are concerned apply to organizations irrespective of their commercial orientation.

1 misdeed is reported to outside authorities, such as to regulatory bodies, news media, or public  
2 interest groups, it is said to be “external” whistleblowing.<sup>5</sup>

### 3 **Toward a Theory of Whistleblowing**

4 It is our view that to articulate a coherent understanding of whistleblowing a theory is needed  
5 in which the nature and parameters of appropriate whistleblowing are specified. Such a theory,  
6 we hold, must be situated within the framework of ethics generally, and business ethics in  
7 particular. To this end, we seek to provide guidelines to help in assessing when whistleblowing  
8 can be thought of as a duty and when it is not. As a way of assisting in this analysis, we will  
9 first consider a long established theory on whistleblowing, that of Richard De George. We  
10 admire the way in which De George structured his argument and we find his theory relevant as  
11 a point of contrast to the view we will advance.

#### 12 **First Steps: De George’s Theory of Whistleblowing and the Problem of Duty**

13 In 1986 Richard De George published the second edition of his textbook, *Business Ethics*, in  
14 which appeared his essay entitled “Whistle Blowing.”<sup>6</sup> This essay was somewhat modified in  
15 subsequent editions, but the essential argument has remained intact. De George’s piece has  
16 been so frequently cited in articles by other scholars that it is suitable to serve as a point of  
17 departure for our theory’s development.

18 De George specifies three positions regarding whistleblowing, i.e., whistleblowing as morally  
19 prohibited, as morally permitted, and as morally required. He begins by refuting the position  
20 that whistleblowing should be morally prohibited, but notes the cultural resistance to  
21 whistleblowing. “There is a strong tradition within American mores against ‘ratting’ or telling  
22 on others,” he states. He continues, “The most plausible and most commonly stated, rationale  
23 for not blowing the whistle is given in terms of loyalty.”<sup>7</sup> But even giving the norms of loyalty,  
24 De George holds that in some cases whistleblowing should be considered morally permitted or

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<sup>5</sup> The idea of internal v. external whistleblowing is standard vernacular. There are some debates regarding whether an “internal whistleblower” engages in whistleblowing at all. For example, Miceli, Near, and Dworkin refer to a 1982 definition of whistleblowing by Norman Bowie, that specifies that the term “whistleblower” applies only to those who “inform the public.” See Norman E. Bowie, *Business Ethics* (Englewood Cliffs: Prentice-Hall, 1982), 142.. Miceli, Near, and Dworkin conclude, “...from the standpoint of the whistleblower, external whistleblowing is continuing a process — perhaps because internal efforts to get wrongdoing corrected have failed — rather than doing something radically different.” Marcia P. Miceli, Janet P. Near, and Terry Morehead Dworkin, *Whistle-Blowing in Organizations* (New York: Routledge, 2008), 8.

<sup>6</sup> Richard T. De George, “Whistle Blowing,” in *Business Ethics* (New York: Macmillan Publishing Company, 1986). We will refer to the original version of De George’s article, since we will also refer to a critique of his article by Gene James, which also refers to that version of his article. Although De George subsequently revised the article, our comments remain relevant because in subsequent versions, his essential arguments remain intact.

<sup>7</sup> *Ibid.*, 226.

1 required. Let us look at the five criteria he proposes for determining whether whistleblowing  
2 would be morally permissible or required.

3 According to De George the criteria for *permissible* whistleblowing are as follows.

- 4 1. The firm, through its product or policy, will do serious and considerable harm to the  
5 public, whether in the person of the user of its product, an innocent bystander, or the  
6 general public.
- 7 2. Once an employee identifies a serious threat to the user of a product or to the general  
8 public, he or she should report it to his immediate supervisor and make his or her moral  
9 concern known. Unless he or she does so, the act of whistleblowing is not clearly  
10 justifiable.
- 11 3. If one's immediate supervisor does nothing effective about the concern or complaint, the  
12 employee should exhaust the internal procedures and possibilities within the firm. This  
13 usually will involve taking the matter up the managerial ladder, and, if necessary — and  
14 possible — to the board of directors.<sup>8</sup>

15 De George holds that whistleblowing becomes *morally required* when — in addition to the  
16 previous three criteria — the following two are also met:

- 17 4. The whistleblower must have, or have accessible, documented evidence that would  
18 convince a reasonable, impartial observer that one's view of the situation is correct, and  
19 that the company's product or practice poses a serious and likely danger to the public or  
20 to the user of the products.
- 21 5. The employee must have good reason to believe that by going public the necessary  
22 changes will be brought about. The chance of being successful must be worth the risk  
23 one takes and the danger to which one is exposed.<sup>9</sup>

24 We are troubled by the basic orientation of De George's analysis, but it is not our intention to  
25 provide a thorough critique of his piece as this was done very ably in an article by Gene James.<sup>10</sup>  
26 It is worth noting, however, that James aptly points out that De George sets the criteria for  
27 whistleblowing so high that many organizational wrongs such as sexual harassment, industrial  
28 espionage, insider trading, and many others would go unchallenged.<sup>11</sup>

29 We admire the way in which De George structured his argument and distinguished between  
30 permitted and required whistleblowing. Our purpose in addressing De George is not to have a

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<sup>8</sup> Ibid., 230-33.

<sup>9</sup> Ibid., 234.

<sup>10</sup> Gene G. James, "Whistle Blowing: Its Moral Justification," in *Business Ethics*, ed. W. Michael Hoffman (1990).

<sup>11</sup> Ibid., 336.

1 straw man to knock down, but because the contrast in our respective positions will help to  
2 illustrate how our underlying principles of business ethics lead us to a very different — more  
3 activist — view of whistleblowing.

4 To begin, we think De George's main distinctions between "morally permitted," and "morally  
5 required," is troubling because it seems to render highly tenuous the connection between duty  
6 and what is morally right since if something is permitted but not required, it would carry little  
7 moral weight. And yet, the conditions that would be covered by what he terms as "morally  
8 permitted," are in fact, very weighty. For example, in his first criterion De George indicates that  
9 it is permissible, but not obligatory, to blow the whistle when a firm through its products or  
10 policies "will do serious and considerable harm to the public." It is in his fourth and fifth  
11 principles that he clarifies that whistleblowing is morally required only with strong  
12 documentary evidence and good reasons to believe that the company will change. This suggests  
13 that even if someone believes an organization will do serious and considerable harm, that  
14 person is not required to blow the whistle.

15 De George's criteria imply that there is no a moral duty for self-sacrifice. Accordingly,  
16 whistleblowing might be permissible but not be required unless conditions 4 and 5 were met —  
17 conditions that would go far to minimize the risk of the whistleblowing from potential  
18 retaliation. We agree that the safety of the whistleblower is a real concern, but by setting the bar  
19 so high, one would be justified in almost never engaging in whistleblowing, even in cases of  
20 serious malfeasance. To illustrate the point, in early 2009 there was a peanut processing plant in  
21 the state of Georgia that was responsible for a massive salmonella outbreak that led to the  
22 deaths of eight people and sickened some 19,000 others. Based on De George's criteria, if I  
23 worked at that plant, I would have been fully excused for not blowing the whistle because I  
24 might have reasonably believed that so doing would not have resulted in a change in company  
25 policy.<sup>12</sup>

26 The other obvious problem with De George's criteria is his insistence that for whistleblowing to  
27 be permissible, the whistleblower must report it first to his or her supervisor and then if  
28 remedial actions are not taken, bring the concern up the corporate hierarchy. This principle  
29 seems geared toward keeping the problem "in house," perhaps because if the issue were  
30 publicly aired, it could cause unnecessary harm to the company.

31 However, such a concern, while not irrelevant, seems to focus on a secondary issue — the  
32 effects of public disclosure — rather than the primary issue, which is identifying the problem  
33 and finding a resolution. In some instances, reporting a problem internally might make matters  
34 worse by tipping off the perpetrators that their activities have been detected. If one's supervisor  
35 or other superiors in the organization were directly or indirectly involved in the offending

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<sup>12</sup> See Michael Moss, "Peanut Case Shows Holes in Safety Net " *New York Times* 2009. This article reports on another plant with similar circumstances. The article states, "The government finally demanded the records three years later, and verified the whistleblower's claims, after hundreds of people were sickened by salmonella-tainted peanut butter produced at the plant in 2007."

1 action or policy, reporting the offence to them would likely exacerbate a bad situation and  
2 possibly put the whistleblower at great personal risk.

### 3 **Whistleblowing within the Context of Organizational Reporting**

4 Frequently, whistleblowers are depicted as if they are on opposing sides with the organization.  
5 This, however, need not be the case. Let us return to the idea mentioned at the outset of this  
6 paper, i.e., the \$994 billion in estimated fraud in 2008. According to the report, "almost 50% of  
7 occupational fraud involved the accounting department or upper management."<sup>13</sup> Conversely,  
8 we can infer that about 50% does not involve accounting staff or upper management. In at least  
9 those cases, we would expect management to welcome whistleblowing — especially in those  
10 instances when it is conducted internally — because eliminating such cases of corruption would  
11 benefit the organization.

12 We hold that the appropriateness of whistleblowing depends to a large extent on the  
13 circumstances. The criteria used to determine the validity of whistleblowing (irrespective of  
14 whether it be considered "permitted" or "required") ought not to depend on the position of the  
15 person to whom one reports the misconduct. Instead, the focus should be on how to achieve  
16 the most ethical resolution. To put it simply, if there is organizational corruption, there is a  
17 victim. A good theory of whistleblowing should provide guidance in how to minimize harm to  
18 any of an organization's stakeholders.

### 19 **Establishing Foundational Ethical Principles for Business**

20 It is not enough to indicate that we are unsatisfied with De George's ethical theory of  
21 whistleblowing; to take this analysis further, we need to establish some ethical principles based  
22 on which we can justify a more robust theory of whistleblowing. To this end, let us first define  
23 our basic ideas, such as what do we mean by business ethics? To this, we answer:

24 *Descriptively*, business ethics is the discipline that seeks to understand the ethical dimensions of  
25 business.

26 *Prescriptively*, the purpose of business ethics is to provide guidance in the ethical conduct of  
27 business, including practices such as whistleblowing.

28 To fulfill the prescriptive objective of business ethics, we propose a central principle from which  
29 subsidiary principles can follow, such as guidelines for ethical whistleblowing. As we  
30 understand it, the central ethical principle of business ethics is the recognition of the *universal*

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<sup>13</sup> Association of Certified Fraud Examiners, "2008 Report to the Nation on Occupational Fraud & Abuse,"  
46.



1 *dignity* or worth of all human beings and the necessity for all business actions to reflect respect  
2 for that dignity.<sup>14</sup> The following is a more precise expression of that general principle:

3 *All human beings have intrinsic worth or dignity by virtue of their humanity, and no individual or*  
4 *group has the moral authority to deny others their inherent dignity.*<sup>15</sup>

5 We believe that this principle is strong and rationally defensible. However, for the purpose of  
6 this essay, we will take this principle as axiomatic. All other principles of business ethics follow  
7 from this axiom, including those of “minimal harm,” “just business practices,” “stakeholder  
8 theory,” and “ethical whistleblowing.”<sup>16</sup>

### 9 **A Universal Dignity Theory of Whistleblowing**

10 With this foundation, we are now ready to describe what we call the “Universal Dignity Theory  
11 of Whistleblowing” (UDTW). The essential principle of UDTW is this:

12 *Whistleblowing is both permissible and a duty to the extent that doing so constitutes the most*  
13 *effective means of supporting the dignity of all relevant stakeholders.*

14 This leads us to propose the following *conditions for ethical whistleblowing*:

- 15 1. Compelling evidence of nontrivial illegal or unethical actions done by an organization or  
16 its employees that are deemed to violate the dignity of one or more of its stakeholders.
- 17 2. A lack of knowledge within the organization of the wrongdoing or failure by the  
18 organization to take corrective measures.

19 If the above justificatory conditions were met, whistleblowing would be ethically called for  
20 unless the following *exempting conditions* from whistleblowing prevailed:

- 21 3. One would be conditionally exempted from the duty to blow the whistle if one had  
22 credible grounds for believing that by doing so one would be putting oneself or others at  
23 risk of serious retaliation.

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<sup>14</sup> For a fuller investigation of this topic, please see Robert E. McNulty and W. Michael Hoffman, “Business Ethics Perspectives on International Negotiations,” in *ABA Guide to International Negotiations*, ed. Jeffery Aresty (Chicago: American Bar Association, 2009).

<sup>15</sup> We do not claim originality in this principle. Rather, it is consistent with well established moral principles recognized in cultures everywhere, including the Golden Rule and Kant’s categorical imperative. For discussions of each of these, please see Jeffrey Wattle, *The Golden Rule* (Oxford: Oxford University Press, 1996). and Immanuel Kant, *Grounding for the Metaphysics of Morals*, trans. James W. Ellington, Kant’s Ethical Philosophy (Indianapolis: Hackett Publishing Company, 1983/1785).

<sup>16</sup> One of the earliest expressions of stakeholder theory appears in R. Edward Freeman, *Strategic Management: A Stakeholder Approach* (Boston: Pitman, 1984).

1 Of these three conditions for ethical whistleblowing, the exempting condition is most difficult to  
2 adequately define. The difficulty lies in the fact that as the gravity of an unethical action  
3 increases, the justifiability of exemption decreases. Hence, to refer to the previous example of  
4 salmonella contamination at a peanut processing facility, there was a risk that people might die  
5 as a result of company negligence. In such a case, even if one believed that whistleblowing  
6 might put one's livelihood at risk, given the gravity of the misconduct, we would consider such  
7 a risk insufficient to exempt one from the whistleblowing duty. If, however, one believed that  
8 whistleblowing would put one's life at risk, then this would be a different matter. We leave it  
9 for further study to define this exempting condition with greater precision, but we trust that the  
10 essential principle is clear.

### 11 **Elaborating on the Theory**

12 The Universal Dignity Theory of Whistleblowing essentially reverses the perspective on  
13 whistleblowing from that of De George. In the next few paragraphs we'd like to consider why  
14 this is the case, how this affects the interpretation of whistleblowing as a reporting practice, and  
15 why we hold this is a better ethical understanding of the place of whistleblowing within  
16 organizational reporting.

17 According to De George's position, unless stringent conditions are met, it is beholden on the  
18 individual *not to blow the whistle*. By contrast, according to UDTW, if an employee has  
19 compelling evidence of organizational misconduct, he or she has *a duty to blow the whistle* unless  
20 that person has reason to believe that his or her own dignity would be seriously harmed by so  
21 doing.

22 These differences follow from fundamentally different interpretations of the ethics of  
23 whistleblowing. De George states, "In all cases, because whistleblowing involves disloyalty or  
24 disobedience at some level, we start by requiring that it be justified, rather than assuming it  
25 needs no justification."<sup>17</sup> We disagree. As we see it, the charge that whistleblowing is an act of  
26 disloyalty follows from a misunderstanding of the nature of loyalty and whistleblowing.  
27 Arthur S. Miller, for example, sensibly asserts, "Surely, an employee owes his employer enough  
28 loyalty to try to work, first of all, within the organization to attempt to effect change."<sup>18</sup> We  
29 concur, but we object to views of disloyalty such as that of James Roche, the former president of  
30 General Motors, who stated:

31       Some critics are now busy eroding another support of free enterprise—the loyalty of a  
32       management team, with its unifying values and cooperative work. Some of the enemies  
33       of business now encourage an employee to be disloyal to the enterprise. They want to  
34       create suspicion and disharmony, and pry into the proprietary interests of the business.

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<sup>17</sup> De George, "Whistle Blowing," 237.

<sup>18</sup> Arthur S. Miller, "Whistle Blowing and the Law," in *Whistle Blowing*, ed. Ralph Nader, Peter J. Petkas, and Kate Blackwell (New York: Grossman Publishers, 1972), 30.



1           However this is labeled—industrial espionage, whistle blowing, or professional  
2           responsibility—it is another tactic for spreading disunity and creating conflict.<sup>19</sup>

3           We would argue that loyalty is not a moral good in itself. At stake are two forms of competing  
4           loyalty, i.e., loyalty to a group and loyalty to the principles of ethical business. Group loyalty is  
5           a virtue to the extent that the group is committed to virtuous conduct. Loyalty to unethical  
6           principles can lead to ruination.<sup>20</sup> According to the Universal Dignity Theory of  
7           Whistleblowing when faced with a choice between loyalty to an organization and loyalty to  
8           ethical conduct, ethics should prevail. This is not only due to a commitment to ethical principle,  
9           but also because, in fact, it is when organizations act ethically that they act in the interests of all  
10          the organization's relevant stakeholders.

11          Therefore, as we see it, failure to blow the whistle without an exempting justification is disloyal  
12          to the company broadly understood; it is an example of remaining impassive in the face of  
13          conditions that damage the organization itself. It is worth noting that according to the  
14          Association of Certified Fraud Examiners, "In nearly two-thirds of the fraud schemes covered  
15          by our study, the perpetrators acted alone...."<sup>21</sup> Such fraudsters violate the organization's  
16          dignity and by reporting the malfeasance, the whistleblower acts as the organization's defender.

17          There is, however, a strong cultural resistance to whistleblowing, which is evidenced in some  
18          important research done by the Ethics Resource Center. According to their fifth National  
19          Business Ethics Survey, 56% of employees indicated that they had personally observed conduct  
20          that violated company ethics standards, policy, or the law, and yet 42% did *not* report the  
21          observed misconduct. Among those who did not report, 54% indicated that they failed to report  
22          because they didn't believe it would make any difference and 36% indicated that they feared  
23          retaliation.<sup>22</sup> This suggests that there is a widespread belief that companies are unsupportive of  
24          whistleblowing. But, referring back to the idea that most fraud is detected through  
25          whistleblowing, companies would do well to provide greater support to whistleblowers,  
26          particularly by helplines as well as through programs that better train managers how to create  
27          ethical cultures that instill responsibility and accountability in all employees to actively protect  
28          the integrity of the organization.

29          Some observers note that whistleblowing it is sometimes done out of vengeance or in order to  
30          collect a "bounty," and it is naïve to see in it a virtuous intent. According to Jeffrey Newman, an

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<sup>19</sup> Quoted in Ronald Duska, "Whistleblowing and Employee Loyalty," in *Honest Work: A Business Ethics Reader*, ed. Joanne B. Ciulla, Clancy Martin, and Robert C. Solomon (New York: Oxford University Press, 2007), 409.

<sup>20</sup> The obvious example here is Nazism. There are copious examples of how loyalty was exploited by Hitler and the Nazi hierarchy in a way that supported the abdication of other moral norms. See, for example the discussion of this by Hannah Arendt. Hannah Arendt, "Banality and Conscience," in *The Portable Hannah Arendt*, ed. Peter R. Baehr (New York: Penguin Books, 2000), 338.

<sup>21</sup> Association of Certified Fraud Examiners, "2008 Report to the Nation on Occupational Fraud & Abuse," 46.

<sup>22</sup> Ethics Resource Center, "2007 National Business Ethics Survey," (Washington, DC2008), pp. 1, 3, 6.

1 expert in the legal aspects of whistleblowing, whistleblower lawsuits are frequently made by  
2 “former employees which have been terminated by a company for disclosure of the  
3 wrongdoing.”<sup>23</sup> Moreover, under the False Claims Act, successful whistleblowers are eligible  
4 for a bounty of up to 30 percent of the government’s recovery,<sup>24</sup> which could amount to a  
5 considerable sum.

6 However one interprets facts such as these, the UDTW intends to protect the dignity of all  
7 stakeholders. If a vengeful spirit leads someone to trump up false charges, the UDTW would  
8 lead to the protection of the offended stakeholder, which might well be the organization itself.  
9 And if a whistleblower is motivated by monetary gain, that is precisely the intent behind any  
10 bounty, which does not affect the validity of the allegation. In any case — whether the  
11 whistleblowing is motivated by vengeance, greed, or a sense of duty — it is important that the  
12 focus on whistleblower motivation does not result in drawing away attention from the alleged  
13 misconduct.

## 14 **Blowing the Whistle on the Law**

15 Unfortunately, our ethical analysis of whistleblowing is complicated when we consider the  
16 place of the law. From different perspectives, both ethics and the law are concerned with rights  
17 as well as with what is right. Laws, as legal statutes, are regulatory conventions established  
18 through governing authorities that may or may not be ethical. An important role of ethics is to  
19 serve as a basis for critiquing laws. The tension between ethics and the law is particularly stark  
20 as it pertains to the problem of whistleblowing, because at least in the United States, the laws  
21 governing whistleblowing are in such disarray.<sup>25</sup> This problem was recognized by Vermont  
22 senator, Patrick Leahy, who stated:

23 Corporate employees who report fraud are subject to the patchwork of vagaries of  
24 current state laws, even though most publicly traded companies do business  
25 nationwide. Thus, a whistleblowing employee in one state (e.g. Texas) may be far more  
26 vulnerable to retaliation than a fellow employee in another state who takes the same  
27 action.<sup>26</sup>

28 The United States has a long history of legislation created to support whistleblowers, stretching  
29 back to 1863 and the administration of Abraham Lincoln. At that time, the United States was  
30 engaged in the Civil War and in order to provide itself with legal remedies against those who  
31 sought to unduly profit by selling substandard goods at premium prices, the government

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<sup>23</sup> Jeffrey A. Newman, "The Federal False Claims 'Qui Tam' Actions -- Successful Preparation," in *Handling Federal False Claims (Qui Tam) Whistleblower Cases*, ed. Jeffrey A. Newman, et al. (Boston: Massachusetts Continuing Legal Education, Inc., 2000), 8.

<sup>24</sup> See the FAQs at <http://whistleblowerlaws.com/index.php>

<sup>25</sup> For an insightful review of whistleblowing laws, see Gerard Sinzdak, "An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements," *California Law Review* 96, no. 6 (2008).

<sup>26</sup> Patrick Leahy, "Congressional Record -- Senate," (Washington, DC2002), S7420.

1 passed the False Claims Act (FCA), which provided whistleblower protections.<sup>27</sup> This was an  
2 excellent beginning, but despite the value of the FCA, it is too limited in its scope because it  
3 applies only to contractor malfeasance in their dealings with the federal government. In the  
4 intervening time since passage of the FCA, many laws have been promulgated, each of which  
5 provides protections for various types of whistleblowers, but none of which is comprehensive.  
6 For example, the site Whistleblowers.org lists over 120 federal laws pertaining to  
7 whistleblowing.<sup>28</sup> There are laws that pertain to illegal acts done by federal agencies and others  
8 that pertain to the military.<sup>29</sup> There are laws that pertain to publicly traded companies, but not  
9 to privately held companies. Most states have some whistleblowing laws, but they vary greatly  
10 from state to state. To further complicate matters, if a person claims to have suffered retaliation  
11 for whistleblowing, the federal statutes of limitations for reporting may vary from 30 days to  
12 180 days depending on which law applies to one's particular case.<sup>30</sup> Moreover, states also have  
13 their own statutes of limitations.

14 The Sarbanes-Oxley Act of 2002 (SOX) was created in response to high levels of corruption  
15 among a number of American firms. SOX has placed onerous reporting requirements on  
16 publicly listed companies, but symptomatic of the problem with whistleblower laws generally,  
17 the loopholes in SOX greatly undermine its value. For example, the way SOX has been  
18 interpreted, the whistleblower protections it affords do not apply to private companies or to the  
19 subsidiaries of publicly traded companies.<sup>31</sup>

20 The upshot of the legal morass is that the laws offer little protection to whistleblowers. For  
21 example, according to Richard E. Moberly, one of the leading US experts in whistleblowing, in  
22 FY 2006, out of 159 SOX whistleblowing cases that were decided by OSHA, not a single case  
23 was won by the whistleblower.<sup>32</sup>

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<sup>27</sup> Larry D. Lahman, "Bad Mules: A Primer on the Federal False Claims Act," *Oklahoma Bar Journal* 76, no. 12 (2005).

<sup>28</sup> See [http://www.whistleblowers.org/index.php?option=com\\_content&task=view&id=816&Itemid=129](http://www.whistleblowers.org/index.php?option=com_content&task=view&id=816&Itemid=129)

<sup>29</sup> Moreover, legal protections afforded to whistleblowers have been diminishing. For example, based on the 2006 Garcetti v. Ceballos Supreme Court Decision, public employees may be disciplined, even fired, for blowing the whistle about on one's department if the statement is made "in his capacity as an employee and not as a citizen and carries no First Amendment rights." Add Drachler citation "Public Employee Whistleblowers..." p. 201.

<sup>30</sup> OSHA, "Your Rights as a Whistleblower," *OSHA FactSheet*(2007), [http://www.osha.gov/OshDoc/data\\_General\\_Facts/whistleblower\\_rights.pdf](http://www.osha.gov/OshDoc/data_General_Facts/whistleblower_rights.pdf).

<sup>31</sup> See, for example, Jennifer Levitz, "Whistleblowers Are Left Dangling," *Wall Street Journal*, Sept. 4 2008. This article states, "Sen. Patrick Leahy, a Vermont Democrat who helped craft the whistleblower provision – part of the Sarbanes-Oxley corporate governance act – says the law was meant to cover workers in corporate subsidiaries. 'Otherwise, a company that wants to do something shady, could just do it in their subsidiary,' he said."

<sup>32</sup> Richard E. Moberly, "Private Sector Whistleblowers: Are There Sufficient Legal Protections?," *Statement Before the Subcommittee on Workforce Protections*(2007).

1 Because there is a considerable gap between the UDTW and the pertinent laws, we suggest that  
2 the business ethics of whistleblowing should serve as a basis for legal reform that brings justice  
3 and consistency across economic sectors and geographic boundaries.

#### 4 **Whistleblowing and Supererogation**

5 Earlier we provided a condition that would exempt someone from the duty of whistleblowing,  
6 namely, "One would be conditionally exempted from the duty to blow the whistle if one had  
7 credible grounds for believing that by doing so one would be putting oneself or others at risk of  
8 retaliation." The reason for this exemption is that we cannot expect someone to engage in  
9 whistleblowing if doing so would result in putting him or herself or others in harm's way.

10 It is here that we can see the intersection between business ethics and the law, because if the law  
11 does not afford adequate protection, the exemption from the whistleblowing duty could  
12 become the norm, and opportunities to rectify injustice will be relatively few.<sup>33</sup> It could be  
13 argued that it would be unreasonable to expect a whistleblower to bring harm on him or herself  
14 under any circumstances, and that the act of willingly accepting personal harm for the sake of  
15 justice is supererogatory and cannot be required. This is where the important but uneasy  
16 relation between ethics and the law is relevant. If laws are crafted to provide comprehensive  
17 protection to whistleblowers, then the act of whistleblowing would *not* be deemed to be  
18 supererogatory, because the whistleblower would typically not be putting him or herself at  
19 substantial risk. For this reason we argue that it is imperative that laws be drastically reformed  
20 so as to provide comprehensive protections to whistleblowers. In so doing we can minimize the  
21 instances of exempting conditions to the whistleblowing duty.

#### 22 **Concluding Thoughts: Whistleblowing and the Pursuit of Justice**

23 We began this essay by noting that according to one estimate, in the United States almost \$1  
24 trillion is lost to corruption on an annual basis, and that the most important contributor to  
25 detecting fraud is whistleblowing. This illustrates in monetary terms the value and importance  
26 of whistleblowing. However, we suggest that a good theoretical framework for whistleblowing  
27 could contribute to creating more ethical business cultures generally as well as provide a  
28 theoretical foundation for legal reform. In so doing, all the organizational stakeholders would  
29 be better served, and given the state of international economic interdependence, this would  
30 contribute to creating a morally stronger global community.

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<sup>33</sup> Such criteria draw us into ethical calculations which are notoriously unreliable. Therefore, the criterion here proposed can be considered, at best, a rule of thumb.

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