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

W. Michael Hoffman and Robert E. McNulty
Center for Business Ethics Bentley University
Waltham, U.S.A.

When is it permissible to blow the whistle and when is it a duty? This is a worthy business ethics question. A good answer will be one that is grounded on sound theory and is able to hold up to scrutiny when applied to the practical affairs of business. The goal of this paper, therefore, is to provide an answer to that question that is both practicable and theoretically cogent. While our theory is intended to be universally applicable, it is grounded in the current conditions in the United States.

1. To be a Whistleblower: The Trillion Dollar Question

To be or not to be a whistleblower is a question of considerable ethical complexity and personal significance. It is not, however, a question of theoretical significance only. According to a recent report by the Association of Certified Fraud Examiners (ACFE), the United States lost almost $1 trillion in fraud in 2008. Before Bernie Madoff’s epoch-making swindling came to light and before the economic meltdown of 2008-09 was recognized as the worst economic crisis since the Great Depression, ACFE had already estimated that American businesses would lose $994 billion in fraudulent activities in 2008. What makes this pertinent to our essay is how fraud is detected: according to the ACFE report, the number one source of fraud detection came from tips, i.e., from whistleblowers. Despite the extensive reporting required of businesses since the promulgation of Sarbanes-Oxley, in the end, it was whistleblowers that served as the primary bulwark against fraud.
Although the social contribution of whistleblowing is gigantic, whistleblowers are often portrayed as disloyal or self-serving bounty hunters. However, whistleblowers frequently put themselves at great risk, and their situation is rendered more perilous by the failings of the U.S. legal system. We would argue that the woeful state of legal affairs may be due in part to a lack of consensus on the parameters of legitimate whistleblowing.

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

Defining “Whistleblowing”

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

Marcia Miceli and Janet Near provide a good formal definition of whistleblowing as “the disclosure by organization members (former or current) of illegal, immoral, or illegitimate practices under the control of their employees, to persons or organizations that may be able to effect action.” They continue by noting that “the whistleblower lacks the power and authority to make the change being sought and therefore must appeal to someone of greater power or authority.” The term has come to refer generally to a person who reports on wrongdoings within or by an organization. If an alleged wrongdoing is reported to a person in a position of authority within an organization, it is referred to as “internal” whistleblowing. If the alleged misdeed is reported to outside authorities, such as to regulatory bodies, news media, or public interest groups, it is said to be “external” whistleblowing.
2. Toward a Theory of Whistleblowing

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

*De George’s Theory of Whistleblowing and the Problem of Duty*

In 1986 Richard De George published the second edition of his textbook, *Business Ethics*, in which appeared his essay entitled “Whistle Blowing.” De George’s piece has been so frequently cited in articles by other scholars that it is suitable to serve as a point of departure for our theory’s development.

De George specifies three positions regarding whistleblowing, i.e., whistleblowing as morally prohibited, as morally permitted, and as morally required. He begins by refuting the position that whistleblowing should be morally prohibited, but notes the cultural resistance to whistleblowing. “There is a strong tradition within American mores against ‘ratting’ or telling on others,” he states. He continues, “The most plausible and most commonly stated rationale for not blowing the whistle is given in terms of loyalty.” But even giving the norms of loyalty, De George holds that in some cases whistleblowing should be considered morally permitted or required. Let us look at the five criteria he proposes for determining whether whistleblowing would be morally permissible or required.

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

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

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

4. The whistleblower must have, or have accessible, documented evidence that would convince a reasonable, impartial observer that one’s view of the situation is correct, and that the company’s product or practice poses a serious and likely danger to the public or to the user of the products.

5. The employee must have good reason to believe that by going public the necessary changes will be brought about. The chance of being successful must be worth the risk one takes and the danger to which one is exposed.⁹

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

We admire the way in which De George structured his argument and distinguished between permitted and required whistleblowing. Our purpose in addressing De George is not to have a straw man to knock down, but because the contrast in our respective positions will help to illustrate how our underlying principles of business ethics lead us to a very different—more activist—view of whistleblowing.

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

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

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

However, such a concern, while not irrelevant, seems to focus on a secondary issue—the effects of public disclosure—rather than the primary issue, which is identifying the problem and finding a resolution. In some instances, reporting a problem internally might make matters worse by tipping off the perpetrators that their activities have been detected. If one’s supervisor or other superiors in the organization were directly or indirectly involved in the offending action or policy, reporting the offense to them would likely exacerbate a bad situation and possibly put the whistleblower at great personal risk.

3. Whistleblowing within the Context of Organizational Reporting

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

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

4. Establishing Foundational Ethical Principles for Business

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

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

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

To fulfill the prescriptive objective of business ethics, we propose a central principle from which subsidiary principles can follow, such as guidelines for ethical whistleblowing. As we understand it, the central ethical principle of business ethics is the recognition of the universal dignity or worth of all human beings and the necessity for all business actions to reflect respect for that dignity. The following is a more precise expression of that general principle:

All human beings have intrinsic worth or dignity by virtue of their humanity, and no individual or group has the moral authority to deny others their inherent dignity.

We believe that this principle is strong and rationally defensible. However, for the purpose of this essay, we will take this principle as axiomatic. All other principles of business ethics follow from this axiom, including those of “minimal harm,” “just business practices,” “stakeholder theory,” and “ethical whistleblowing.”
5. A Universal Dignity Theory of Whistleblowing

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

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

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

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

If the above justificatory conditions are met, whistleblowing is ethically called for unless the following exempting conditions from whistleblowing prevailed:

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

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

6. Elaborating on the Theory

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

According to De George unless stringent conditions are met one is
not obliged to blow the whistle. By contrast, according to UDTW, if an
employee has compelling evidence of organizational misconduct, he or
she has a duty to blow the whistle unless that person has reason to believe
that his or her own dignity would be seriously harmed by so doing.

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

Some critics are now busy eroding another support of free enterprise-the loyalty of
a management team, with its unifying values and cooperative work. Some of the
enemies of business now encourage an employee to be disloyal to the enterprise.
They want to create suspicion and disharmony, and pry into the proprietary interests
of the business. However this is labeled—industrial espionage, whistle blowing, or
professional responsibility—it is another tactic for spreading disunity and creating
conflict.¹⁸

We would argue that loyalty is not a moral good in itself. At stake are
two forms of competing loyalty, i.e., loyalty to a group and loyalty to
the principles of ethical business. Group loyalty is a virtue to the extent
that the group is committed to virtuous conduct. Loyalty to unethical
principles can lead to ruination.¹⁹ According to the Universal Dignity
Theory of Whistleblowing when faced with a choice between loyalty to
an organization and loyalty to ethical conduct, ethics should prevail. This
is not only due to a commitment to ethical principle, but also because,
in fact, it is when organizations act ethically that they act in the interests
of all the organization's relevant stakeholders.

Therefore, as we see it, failure to blow the whistle without an exemp-
ting justification is disloyal to the company broadly understood: it is an
example of remaining im passive in the face of conditions that damage
the organization itself. It is worth noting that according to the Association of Certified Fraud Examiners, "In nearly two-thirds of the fraud schemes covered by our study, the perpetrators acted alone..." Such fraudsters violate the organization’s dignity and by reporting the malfeasance, the whistleblower acts as the organization’s defender.

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

Some observers note that whistleblowing is sometimes done out of vengeance or in order to collect a “bounty,” and it is naive to see in it a virtuous intent. According to Jeffrey Newman, an expert in the legal aspects of whistleblowing, whistleblower lawsuits are frequently made by “former employees which have been terminated by a company for disclosure of the wrongdoing.” Moreover, under the False Claims Act, successful whistle-blowers are eligible for a bounty of up to 30 percent of the government’s recovery, which could amount to a considerable sum.

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

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

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

The United States has a long history of legislation created to support whistleblowers, stretching back to 1863 and the administration of Abraham Lincoln. At that time, the United States was engaged in the Civil War and in order to provide itself with legal remedies against those who sought to unduly profit by selling substandard goods at premium prices, the government passed the False Claims Act (FCA), which provided whistleblower protections. This was an excellent beginning, but despite the value of the FCA, it is too limited in its scope because it applies only to contractor malfeasance in their dealings with the federal government. In the intervening time since passage of the FCA, many laws have been promulgated, each of which provides protections for various types of whistleblowers, but none of which is comprehensive. For example, the site Whistleblowers.org lists over 120 federal laws pertaining to whistleblowing. There are laws that pertain to illegal acts done by federal agencies and others that pertain to the military. There are laws that pertain to publicly traded companies, but not to privately held companies. Most states have some whistleblowing laws, but they vary greatly from state to state. To further complicate matters, if a person claims to have suffered retaliation for whistleblowing, the federal statutes of limitations for reporting may vary from 30 days to 180 days depending on which law applies to one’s particular case. Moreover, states also have their own statutes of limitations.
The Sarbanes-Oxley Act of 2002 (SOX) was created in response to high levels of corruption among a number of American firms. SOX has placed onerous reporting requirements on publicly listed companies, but symptomatic of the problem with whistleblower laws generally, the loopholes in SOX greatly undermine its value. For example, the way SOX has been interpreted, the whistleblower protections it affords do not apply to private companies or to the subsidiaries of publicly traded companies.³⁰

The upshot of the legal morass is that the laws offer little protection to whistleblowers. For example, according to Richard E. Moberly, one of the leading U.S. experts on whistleblowing, in FY 2006, out of 159 SOX whistleblowing cases that were decided by OSHA, not a single case was won by the whistleblower.³¹

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

8. Whistleblowing and Supererogation

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

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

9. Concluding Thoughts: Whistleblowing and the Pursuit of Justice

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

Notes

1. 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
   We would like to express our gratitude to Ms. Christina Herron for her valuable research assistance.
   Association of Certified Fraud Examiners, “2008 Report to the Nation on Occupational Fraud & Abuse,” (Austin, TX, 2008), 4. [Hereafter title abbreviated as “2008 Report”]


4. 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.

5. 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

6. 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.

7. Ibid., 226.
8. Ibid., 230-33.
9. Ibid., 234.

11. Ibid., 336.
12. 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.”


15. 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 Warrick, *The Golden Rule* (Oxford: Oxford University Press, 1996), and Immanuel Kant, *Grounding for the Metaphysics of Morals*, trans. James W. Ellington (Indianapolis: Hackett Publishing Company, 1983).


19. 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.


23. See the FAQs at http://whistleblowerlaws.com/index.php
Whistleblowing

27. See http://www.whistleblowers.org/index.php?option=com_content&task=view&id=816&Itemid=129
28. 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 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.” See David A. Drachser, “Public Employee Whistleblowers after Garcetti v. Ceballos,” Labor Law Journal 59, no. 2 (2008): 201.
crat 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.”

References


