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## Whistleblowing, MNCs, and Peace

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# Whistleblowing, MNCs, and Peace

Terry Morehead Dworkin\*

## ABSTRACT

*This Article examines the relationship among whistleblowing, corporations, and international peace. The Author attempts to establish that whistleblowing is a vital part of transparency and good government. In Part II, the Author examines the rationale for whistleblowing. Part III addresses the cultural dimensions of whistleblowing and its practicability for global organizations. Finally, the Author looks at the advantages of whistleblowing in relation to both corporations and peace efforts.*

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## I. INTRODUCTION

Globalization of business is an accepted fact, as is the growing power of multinational corporations (MNCs).<sup>1</sup> A desire for peace also seems to be globally accepted.<sup>2</sup> What is less certain is whether the power of multinationals can be harnessed to help achieve peace. Desire is not enough. Practical policies and procedures must be implemented to help achieve this goal. Discussions of peace through commerce mention certain preliminary conditions such as establishing justice, good governance, transparency, and giving individuals a voice as necessary requirements.<sup>3</sup> A tool increasingly discussed and implemented to deliver and maintain these conditions is whistleblowing.

Whistleblowing is a procedural way to reinforce the transparency necessary to free trapped capital,<sup>4</sup> encourage foreign investment, and move economies—especially transitional ones<sup>5</sup>—away from reliance

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1. See generally DAVID C. KORTEN, *WHEN CORPORATIONS RULE THE WORLD* (1995); Phillip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 *YALE J. INT'L L.* 257, 260-61 (1999) (calling economic and commercial globalization "the most powerful force shaping the world as it enters the twenty-first century" and citing political fragmentation, or decision-making at the local level, as a complementary force); Alex Y. Seita, *Globalization and the Convergence of Values*, 30 *CORNELL INT'L L.J.* 429 (1997).

2. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 83-84 (1980); Timothy L. Fort, *Corporate Makahiki: The Governing Telos of Peace*, 38 *AM. BUS. L.J.* 301, 310-11 (2001).

3. See, e.g., *Responsible leadership in action*, in *RESPONSIBLE BUSINESS: A FINANCIAL TIMES GUIDE* 13 (2000); Advertisement, *Wouldn't it be better if we worked together?*, in *RESPONSIBLE BUSINESS: A FINANCIAL TIMES GUIDE* 24 (2000) (advertising that the heart of business practices of Norsk Hydro, a member of the PWBL Forum, are openness, accountability, and honesty); Fort, *supra* note 2, at 309; Timothy L. Fort & Cindy A. Schipani, *The Role of the Corporation in Fostering Sustainable Peace*, 35 *VAND. J. TRANSNAT'L L.* 389, 393 (2002) [hereinafter Fort & Schipani, *Sustainable Peace*].

4. Peter Wonacott, *Chinese Corruption Has Sliced Up to 16% Off GDP Over Decade, Study Estimates*, *WALL ST. J.*, Mar. 8, 2001, at A18. It can do this in two ways—by reducing bribery and giving citizens a voice in their government. Fort & Schipani, *Sustainable Peace*, *supra* note 3, at 403.

5. John Reed & Erik Portanger, *Bribery, Corruption Are Rampant in Eastern Europe, Survey Finds*, *WALL ST. J.*, Nov. 9, 1999, at A21. The story reports on a survey done by the World Bank and European Bank for Reconstruction and Development. *Id.* It found that companies pay bribes that amount to as little as 2% of annual revenue in Croatia to 8% in Georgia. *Id.* The "bribery tax" fell especially hard on small companies. *Id.*; David Hess & Thomas W. Dunfee, *Fighting Corruption: A Principled Approach; The C2 Principles (Combating Corruption)*, 33 *CORNELL INT'L L.J.* 593, 596 (2000) (noting that in the former Soviet Union, 60% of companies paid bribes compared to 15% of businesses in industrial countries); Peter Eigen, *The Transparency International Bribe Payers Survey*, at [www.transparency.de/documents/cpi.bps.html](http://www.transparency.de/documents/cpi.bps.html); Wonacott, *supra* note 4.

on personal relationships and bribes.<sup>6</sup> To the extent that there is a positive correlation between corruption, poverty, and violence,<sup>7</sup> the need for whistleblowing is reinforced. Empowering individuals to combat cronyism and call into question economic decisions made for personal gain rather than the general good should allow more resources to be allocated to those at the bottom of the economic scale.

Professors Fort and Schipani have persuasively argued that corporations can have the greatest impact on peace through mitigating internal—rather than international—conflicts; the way in which corporations are governed makes a significant difference in the ethical values leading to mitigation of these conflicts.<sup>8</sup> Whistleblowing as a governance tool becomes even more important in this context because it encourages responsive, and thereby responsible, governance practices. It gives individuals a say in their organization, and contributes to a feeling of procedural justice. Giving individuals a standardized way to speak and be heard also helps reinforce democratic ideas. This check on power is crucial for an effective democratic institution.<sup>9</sup> Globalization often leads to a feeling of disempowerment and creates conditions which allow the few to benefit at the expense of the many.<sup>10</sup> Whistleblowing leads to accountability, and accountability helps defuse the resentment<sup>11</sup> and opportunities for corruption.

When whistleblowing is used to enforce just treatment norms, inter-ethnic, inter-gender, and inter-religious interaction and notions of equal treatment can be fostered. This is already true in the United

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6. See, e.g., Hess & Dunfee, *supra* note 5, at 597-98, 606 (noting that secrecy is a defining characteristic of corruption); John Plender, *Weeding out corruption*, FIN. TIMES, Apr. 25, 2000, at 22; Lucinda A. Low & Katherine Cameron Atkinson, *Led by the U.S., the World Wages War on Corruption*, NAT'L L.J., Mar. 3, 1997, at B9. The Organization of American States, consisting of 34 Western nations, called for transparency and financial disclosure to help combat bribery in its Inter-American Convention Against Corruption. *Inter-American Convention Against Corruption*, Organization of American States, Third Plenary Session, Mar. 29, 1996, available at <http://www.oas.org/juridico/english/Treaties/b-58.html>.

7. Fort & Schipani, *Sustainable Peace*, *supra* note 3, at 397-98. The authors cite the Transparency International Corruption Perception Index, which ranks countries by perceived level of corruption and the Heidelberg Index of Violence which ranks conflicts by level of intensity. *Id.* Comparison of these indices indicates that the countries with the least amount of corruption were involved in the least number of violent conflicts; the most corrupt in the most violent conflicts. *Id.*

8. Fort & Schipani, *Sustainable Peace*, *supra* note 3, at 393; see also Fort, *supra* note 2, at 309.

9. Fort & Schipani, *Sustainable Peace*, *supra* note 3, at 436.

10. *Id.* at 33-34.

11. See, e.g., Don Clark, *Security Experts Are on Alert Over Wireless Hacking Technique*, WALL ST. J., Oct. 15, 2001, at B7. The ability of an individual to wreak havoc increases with the growing reliance on technology and electronic communication. *Id.*

States in terms of sexual harassment.<sup>12</sup> Such interaction<sup>13</sup> and enforced equality helps to defuse conflict.<sup>14</sup>

The growing dominance of multinational corporations allows them, in some respects, to act as independent states outside of the effective control of particular countries.<sup>15</sup> Thus, it is appropriate to consider the goals and restraints these multinationals impose on themselves, as well as those that are externally imposed.<sup>16</sup> In the United States, and to a lesser extent in other common law countries,<sup>17</sup> companies are being encouraged, or even compelled, to establish codes of conduct and whistleblowing procedures to enforce them. This Article discusses whether these practices and goals can be harnessed to help deliver on the promise of peace through commerce.<sup>18</sup>

Part II of the Article examines the rationale for whistleblowing, its growth in the United States, and the response to whistleblowing in other countries. Part III examines the cultural dimensions of whistleblowing and whether it is practical for multinational organizations to adopt it as a governance tool. Adoption is found to be feasible if appropriate reporting procedures and ethical norms are adopted, and if allowances are made for some cultural adaptation. Finally, the advantages of open reporting and communication procedures to the corporation and the peace effort are discussed in Part IV.

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12. See *infra* Part III.B.2.

13. Fort & Schipani, *Sustainable Peace*, *supra* note 3, at 432 (arguing that interaction creates personal relationships, which helps break through stereotypes).

14. Fort, *supra* note 2, at 309. "Violence occurs in many forms in addition to wars between nation states. Conflicts and grievances obviously arise when one person or group feels that they have not been justly treated." *Id.*

15. Clyde D. Stoltenberg, *Globalization, "Asian Values," and Economic Reform: The Impact of Tradition and Change on Ethical Values in Chinese Business*, 33 CORNELL INT'L L.J. 711, 712, 715 (2000); Jost Delbrück, *Structural Changes in the International System and its Legal Order: International Law in the Era of Globalization*, SWISS REV. INT'L & EUR. L. 34-35 (Jan. 2001).

16. Alan Pike, *An unrelenting pressure*, in RESPONSIBLE BUSINESS: A FINANCIAL TIMES GUIDE 4 (2000). As noted by Kofi Annan, U.N. Secretary General, this is a voluntary declaration of principles, not a legally binding compact. Carola Hoyos, *Principles of globalisation*, in RESPONSIBLE BUSINESS: A FINANCIAL TIMES GUIDE 6 (2000); Fort, *supra* note 3, at 303. Contractarianism and communitarianism share the premise that corporations will be primarily self-governing. Elletta Sangrey Callahan et al., *Integrating Trends in Whistleblowing and Corporate Governance: Promoting Organizational Effectiveness, Societal Responsibility, and Employee Empowerment*, 39 AM. BUS. L.J. 11 (forthcoming 2002).

17. Hess & Dunfee, *supra* note 5, at 624-25. Many European MNCs also have ethics officers and codes. This is in line with attempts to develop procedures for corporate disclosure on social issues, auditing procedures, and the Global Reporting Initiative. *Id.*

18. Nichols, *supra* note 1, at 263.

## II. THE GROWTH OF WHISTLEBLOWING

A. *Why Whistleblowing?*

The most commonly accepted modern definition of whistleblowing is "the disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action."<sup>19</sup> As indicated by this definition, it is seen today as an employee action. This has not always been the case. For example, the council of the city-state of Venice instituted whistleblowing to help fight corruption and to give citizens a more meaningful voice in their government.<sup>20</sup> The U.S. Congress, building on an idea adopted from much earlier English legislation, passed a whistleblowing law as a way to supplement governmental resources in fighting fraud during the Civil War.<sup>21</sup> The recent emphasis on whistleblowing, however, began with Ralph Nader's 1971 call for its implementation as a means to stem organizational wrongdoing.<sup>22</sup> There are many reasons why this is an idea whose time has come again.

Work organizations, both governmental and civil, are growing in size and complexity, and individuals are often little more than "cogs" in the organization in which they work.<sup>23</sup> Individual jobs have also grown in complexity, and as a result have become more specialized and expertise-based.<sup>24</sup> This, in turn, makes the detection of wrongful conduct more difficult due to both lack of knowledge and access to

19. MARCIA P. MICELI & JANET P. NEAR, *BLOWING THE WHISTLE* 15 (1992); Terance D. Miethe & Joyce Rothschild, *Whistleblowing and the Control of Organizational Misconduct*, 64 *SOC. INQUIRY* 322, 323 (1994).

20. SUSIE BOULTON & CHRISTOPHER CATLING, *VENICE & THE VENETO* 88-89 (2001). In the Sala della Bussola in the Doge's Palace, for example, there is a "bocca de leone" or lion's mouth. *Id.* The lion's mouth has a slit through which citizens could slip secret denunciations. *Id.* Catching tax evaders was one goal; another was state security. *Id.*

21. Act of Mar. 2, 1863, ch. 67, § 6, 12 Stat. 696; False Claims Act, 31 U.S.C. §§ 3729-33 (1988) (formerly the False Claims Act of March 2, 1863, 31 U.S.C. §§ 3729-33 (1988)). The objective of the Act was to punish government contractors who were, among other things, selling sawdust for gunpowder. Elletta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 *VILL. L. REV.* 273, 302 n.112 (1992) [hereinafter Callahan & Terry, *Do Good*].

22. Ralph Nader, Editorial, *A Code for Professional Integrity*, *N.Y. TIMES*, Jan. 15, 1971, at 43.

23. Timothy L. Fort & Cindy A. Schipani, *Corporate Governance in a Global Environment: The Search for the Best of All Worlds*, 33 *VAND. J. TRANSNAT'L L.* 829, 837 (2000) [hereinafter Fort & Schipiani, *Corporate Governance*]; Miethe & Rothschild, *supra* note 19, at 328.

24. Miethe & Rothschild, *supra* note 19, at 328. They have also become more professionalized. *Id.*

information.<sup>25</sup> At the same time, the information and technology revolutions have increased the opportunities for significant fraud and other harmful and illegal activities.<sup>26</sup> Whistleblowing is one way to obtain—or regain—societal control over the large organizations that increasingly dominate society.<sup>27</sup>

The premise behind recent governmental promotion of whistleblowing is that people of conscience work within these large, complex organizations, and would normally take action against wrongdoing except for fear of losing their jobs or other forms of retaliation.<sup>28</sup> Thus, if adequately protected from retaliation, they will come forward with evidence of wrongdoing before external detection is possible. Harms from the wrongdoing could be reduced, wrongful behavior stopped, and the expense of public oversight and investigation would be reduced if such reporting occurs.<sup>29</sup> Also, if whistleblowing proved a relatively common occurrence, wrongdoing would decrease because potential wrongdoers would be aware that their activities were not truly secret.

### B. *The U.S. Experience*

While initially discussed in the early 1970s, it took significant disasters such as the explosion of the Challenger,<sup>30</sup> mass accidental poisoning of food,<sup>31</sup> and publicity about extensive contractor fraud<sup>32</sup> for whistleblowing to become a common tool of control. All three branches of government, at both the federal and state levels, now

25. *Id.*

26. *Id.*; Fort & Schipani, *Sustainable Peace*, *supra* note 3, at 413.

27. George C.S. Benson, *Codes of Ethics and Whistleblowing*, in *WHISTLEBLOWING—SUBVERSION OR CORPORATE CITIZENSHIP?* 53 (Gerald Vinten ed., 1994). U.S. efforts to obtain or regain societal control over business organizations date back to the Industrial Revolution. *Id.*

28. Janet P. Near et al., *Explaining the Whistleblowing Process: Suggestions from Power Theory and Justice Theory*, 4 *ORG. SCI.* 393 (1993).

29. Terry Morehead Dworkin & Elletta Sangrey Callahan, *Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society*, 29 *AM. BUS. L.J.* 266, 305 (1991).

30. See, e.g., Laura McGinley, *NASA to Probe Transfer of Engineers At Thiokol After Damaging Testimony*, *WALL ST. J.*, May 14, 1986, at A4.

31. Terry Morehead Dworkin & Janet P. Near, *Whistleblowing Statutes: Are They Working?*, 25 *AM. BUS. L.J.* 241, 243 (1987). The first state to pass a whistleblowing statute, Michigan, did so after a poisonous fire retardant was mistakenly shipped to feed grain cooperatives instead of the intended nutritional supplement. *Id.* Farmers lost millions of dollars, and residents suffered serious health effects, some of which could have been avoided if employees had come forward. *Id.* at 244-45. They testified they did not because they had been warned they would lose their jobs if they did so. *Id.* at 245.

32. Callahan & Dworkin, *Do Good*, *supra* note 21, at 303.

have adopted measures designed to encourage whistleblowing.<sup>33</sup> While all measures protect the reporter from retaliation, other provisions vary considerably on issues<sup>34</sup> such as to whom the whistle should be blown,<sup>35</sup> whether motive should be considered,<sup>36</sup> whether the whistleblower may benefit from reporting,<sup>37</sup> what standard of evidence of wrongdoing should be required,<sup>38</sup> and what remedy should be provided to a whistleblower who suffers retaliation.<sup>39</sup>

As public policy supporting whistleblowing has matured, there has been a shift toward encouraging internal whistleblowing and away from the almost exclusive legislative emphasis on reporting outside the organization. This represents a change in emphasis away from a primary focus on punishment by governmental bodies toward earlier and more complete cessation of wrongdoing.<sup>40</sup> It also saves public funds. There are many other advantages to internal reporting. It accords with the actions of most whistleblowers,<sup>41</sup> is less harmful to the organization and the employee,<sup>42</sup> and is considered more ethical.<sup>43</sup> A variety of laws and decisions both directly and indirectly have caused employers to establish internal whistleblowing procedures in order to reap the benefits that these reports can deliver.<sup>44</sup>

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33. Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 100 (2000) [hereinafter Callahan & Dworkin, *The State*].

34. Other issues not addressed in the text include sanctions by some states against the individuals who retaliate against whistleblowers, whether the report of wrongdoing must be in writing and what the appropriate statute of limitations should be. MICELI & NEAR, *supra* note 19, at 232-73 (1992).

35. Dworkin & Callahan, *supra* note 29, at 268.

36. See generally Callahan & Dworkin, *Do Good*, *supra* note 21, at 318-25.

37. *Id.* at 280-83. There is more uniformity at the federal level, where legislators show less concern about motive and the identity of the report recipient and are more willing to allow significant financial rewards for useful information. *Id.* at 278-83.

38. MICELI & NEAR, *supra* note 19, at 137-38.

39. *Id.* at 236-37; see also Dworkin & Near, *supra* note 31, at 260-64.

40. Callahan & Dworkin, *Do Good*, *supra* note 21, at 306.

41. MICELI & NEAR, *supra* note 19, at 26.

42. Near et al., *supra* note 28, at 399. Studies of whistleblowers indicate that the best predictor of retaliation is external whistleblowing. *Id.*

43. SISSELA BOK, *SECRETS 221* (1989) (citing internal whistleblowing as more ethical if it is feasible, because sounding the loudest alarm first by reporting outside the organization is an act of disloyalty to colleagues and employees). If a problem can be solved internally, the destructive side-effects of external reporting can be avoided. *Id.*

44. Dworkin & Callahan, *supra* note 29, at 305-08 (discussing more thoroughly the benefits).



The most important direct cause of organizational establishment of internal whistleblowing procedures<sup>45</sup> is the Corporate Sentencing Guidelines.<sup>46</sup> The Guidelines, which determine penalties for corporations convicted of federal crimes,<sup>47</sup> take a "carrot and stick" approach toward curbing organizational wrongdoing. Convicted organizations that have made little or no effort to prevent or reduce wrongdoing suffer increased monetary penalties<sup>48</sup> and sanctions, including probation,<sup>49</sup> and mandated negative publicity.<sup>50</sup> Reduced fines and avoidance of sanctions are provided for organizations that, in good faith, have attempted to stop and detect misconduct.<sup>51</sup> A written code of ethics, a meaningful reporting system,<sup>52</sup> and protection of whistleblowers from reprisals are key characteristics of an acceptable deterrence and detection program that will qualify for reduced fines and sanctions.

The Supreme Court has also prompted organizations to establish codes and internal reporting procedures through its hostile environment sexual harassment decisions.<sup>53</sup> Most organizations, however, have established these procedures for the limited purpose of controlling harassment and not for the reporting of other kinds of

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45. Janet P. Near & Terry Morehead Dworkin, *Responses to Legislative Changes: Corporate Whistleblowing Policies*, 17 J. BUS. ETHICS 1551, 1560 (1998); Christopher Conte, *Labor Letter*, WALL ST. J., Sept. 24, 1991, at A1.

46. U.S. Sentencing Commission, *Sentencing Guidelines for Organizational Defendants*, 56 Fed. Reg. 22,786, 22,786-97 (May 16, 1991) [hereinafter *Sentencing Guidelines*].

47. *Id.* at 22,787. The Sentencing Reform Act, passed in 1984, established the Sentencing Commission. *Id.* The Commission, under a mandate to reduce disparities and judicial discretion in sentences, promulgated the Guidelines. *Id.* After establishing guidelines for individual felons, the Commission established the Corporate Sentencing Guidelines. *Id.*; see also Near & Dworkin, *supra* note 45, at 1551.

48. Penalties assessed in a given case depend on a "culpability score" which increases the multiplier for factors such as involvement of high-level corporate officers in the crime, or previous convictions for the same crime. *Sentencing Guidelines*, 56 Fed. Reg. at 22,787.

49. *Id.* at 22,791. A convicted organization with fifty or more employees that does not have an effective compliance program is to be put on probation and ordered to put such a program in place. *Id.*

50. *Id.*; Andrew Cowan, Note, *Scarlet Letters for Corporations? Punishment by Publicity under the New Sentencing Guidelines*, 65 S. CAL. L. REV. 2387 (1992). Other penalties include fines that are sufficiently large to divest the organization of its net assets. *Sentencing Guidelines*, 56 Fed. Reg. at 22,789.

51. *Sentencing Guidelines*, 56 Fed. Reg. at 22,789-91; *Organizational Sentencing Guidelines Focus Attention on Corporate Compliance*, 62 Antitrust & Trade Reg. Rep. (BNA) 195, 196 (Feb. 13, 1992).

52. *Sentencing Guidelines*, 56 Fed. Reg. at 22,793. The Guidelines specifically mention hotlines as an acceptable internal reporting mechanism. Additionally, to qualify for the reduced penalties, the organization is supposed to report the wrongdoing discovered through the internal reporting procedure to the government or cooperate with the government. *Id.*

53. See generally *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

wrongdoing.<sup>54</sup> In these decisions the Court recognized an employer defense to hostile environment sexual harassment suits for firms that make reasonable efforts to prevent and correct harassment.<sup>55</sup> An effective complaint procedure is a central element of such a program.<sup>56</sup> This defense is also applicable in cases claiming harassment on such bases as religion, race, national origin, and disability.<sup>57</sup>

Revisions to the False Claims Act (FCA)<sup>58</sup> have also spurred the establishment of intra-firm reporting frameworks.<sup>59</sup> While the Act itself encourages external reporting through filing lawsuits in the government's name, the extraordinarily large whistleblowers' awards, fines, and recoveries paid to the federal government, and the dramatic increase in FCA whistleblowing, have led many organizations, especially those in the defense and healthcare industries, to self-police.<sup>60</sup> Under the FCA, whistleblowers who successfully prosecute FCA claims against those who have fraudulently claimed federal funds receive up to thirty percent of recovered monies.<sup>61</sup> Because of the amount of fraud, treble damages, and fines as high as ten thousand dollars per false claim, the average recovery for a successful FCA whistleblower is over one million dollars.<sup>62</sup> The government recovered over three billion dollars

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54. Earlier decisions and political events such as the Clarence Thomas Supreme Court confirmation hearings also resulted in many large businesses establishing harassment reporting procedures. Terry Moorhead Dworkin & Ellen R. Peirce, *Is Religious Harassment "More Equal"*, 26 SETON HALL L. REV. 44, 63 (1995).

55. The defense requires the employer to prove that it exercised reasonable care to prevent and correct sexually harassing behavior and that the employee unreasonably failed to take advantage of employer-provided corrective measures. *Faragher*, 524 U.S. at 775; *Burlington Indus.*, 524 U.S. at 744.

56. See, e.g., MASS. GEN. LAWS ch. 151B, § 3 (2000) (providing that the Massachusetts Commission Against Discrimination has the authority to advise employers on employment and sexual harassment issues); R.I. GEN. LAWS § 28-51-2 (2001) (encouraging employers to conduct education and training programs on sexual harassment). In several states the requirement that employers provide education on sexual harassment, including information regarding internal reporting procedures, is imposed by statute.

57. Debbie M Kaminer, *When Religious Expression Creates a Hostile Work Environment: The Challenge of Balancing Competing Fundamental Rights*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 81 (2000); Dworkin & Peirce, *supra* note 54, at 76; *Harassment Rulings Reinforce Need for Policies and Procedures*, Fair Empl. Prac. Cas. (BNA) 76 (June 21, 2001) (discussing disability harassment).

58. 31 U.S.C. §§ 3729-33 (1988). See *supra* Part I for mention of this Civil War-era law.

59. Charles Pereyra-Suarez & Carole A. Klove, *Ring Around the White Collar: Defending Fraud and Abuse*, 18 WHITTIER L. REV. 31, 36-37 (1996).

60. Callahan & Dworkin, *The State*, *supra* note 33, at 101.

61. 31 U.S.C. § 3730(d)(1) (1988). If the government joins the suit, the whistleblower gets up to 25% of the recovery. The government has joined in about 15% of these suits. *Id.*; see also Callahan & Dworkin, *The State*, *supra* note 33, at 101 n.9.

62. *Qui Tam Statistics*, 12 FALSE CLAIMS ACT & QUI TAM Q. REV. 41 (1998).

between 1986, when the law was revised, and 1999.<sup>63</sup> FCA suits increased from an average of six per year to approximately two per day in 1999.<sup>64</sup>

The widespread judicial adoption of a tort-based theory of wrongful firing in violation of public policy provides a similar indirect incentive for companies to provide internal reporting channels.<sup>65</sup> In many states, courts have specifically recognized this theory in whistleblowing cases.<sup>66</sup> Because employers who use their power to subvert public policy are usually perceived as especially wrongful, recoveries in these cases commonly include punitive damages and are quite large.<sup>67</sup>

This discussion of incentives is not exclusive.<sup>68</sup> Decisions such as *In re Caremark International, Inc.*,<sup>69</sup> suggesting that the failure to have a code of ethics may be tantamount to a violation of management's fiduciary duty to shareholders, as well as pressure from NGOs,<sup>70</sup> have spurred organizations to examine their ethical stances and systems.<sup>71</sup> Whatever the incentive, it is clear that most

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63. *FCA News: Qui Tam Actions Return over \$3 Billion to Federal Treasury*, 18 FALSE CLAIMS ACT & QUI TAM Q. REV. 17-18 (2000). Representative Howard Berman, a main sponsor of the 1986 FCA amendments, stated another three billion dollars more was expected to be recovered from pending litigation. Peter Aranson, *Critics Gripe at Suits Claiming U.S. is Cheated Out of Billions*, NAT'L L.J., Aug. 9, 1999, at A1.

64. Aranson, *supra* note 63 (quoting prosecutor Joyce Branda). There are many other statutes that give rewards for whistleblowing, but none give the whistleblower as significant or sure an award. Barton H. Thompson, Jr., Symposium, *Innovations in Environmental Policy: The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 226 (discussing awards for information leading to convictions for environmental crimes); Callahan & Dworkin, *Do Good*, *supra* note 21, at 278-83.

65. See generally Callahan & Dworkin, *Do Good*, *supra* note 21, at 285-95.

66. See, e.g., *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380, 385 (Ark. 1988); *Wagner v. City of Globe*, 722 P.2d 250, 257 (Ariz. 1986) (en banc). For a complete list, see Callahan & Dworkin, *The State*, *supra* note 33, at app. 132-75.

67. See, e.g., *Paraclesus Health Care Corp. v. Willard*, 754 So.2d 437 (Miss. 1999); *Verdicts & Settlements*, NAT'L L.J., June 26, 2000, at A16.

68. See, e.g., Civil Service Reform Act, 5 U.S.C. § 2302 (1989), amended by Whistleblower Protection Act of 1989, 5 U.S.C. § 1201 (1989); FREDERICK ELLISTON ET AL., WHISTLEBLOWING 16-19 (1985) (explaining reporting procedures established by the Nuclear Regulatory Commission); Jamie R. Welton, *In the Wake of the Columbia/HCA Investigations: Plotting a Course for Medicare Compliance*, 7 ELDER L.J. 217, 247 (1999) (discussing the risks of Medicare noncompliance).

69. *In re Caremark Int'l*, 698 A.2d 959 (Del. Ch. 1996).

70. NGOs, or non-governmental organizations, are comprised of international charities, aid agencies, and other pressure groups, and are growing in number and influence. Alan Pike, *Confronting the critics*, in RESPONSIBLE BUSINESS: A FINANCIAL TIMES GUIDE 17 (2000).

71. John Plender, *Unpopular Capitalism*, FIN. TIMES, Sept. 11, 2000, at 24 (citing the Seattle riots, Greenpeace, and the presidential campaigns of Gore and Nader, among other factors); David Greising, *Shades of Seattle Riot as Clinton Addresses Elite Economic Forum*, CHI. TRIB., Jan. 30, 2000, at C13 (citing Davos protests).

large U.S.-based organizations, including MNCs, now have some form of reporting procedure.

### C. Whistleblowing in Other Countries

While whistleblowing as a control mechanism is most pervasive in the United States, it has been adopted or is being considered in many other countries. This development is most pronounced in countries with a common law tradition. Promotion of whistleblowing in these countries reflects the U.S. experience.<sup>72</sup> Initially, there is great reluctance to embrace whistleblowing. A precipitating scandal, which receives widespread publicity and involves insider knowledge of the problem, is usually the motivating factor that causes a country to move from denial to consideration or passage of legislation. It is assumed that knowledgeable insiders could have prevented the problem had their information reached the proper ears. It is also assumed or stated that, had the insiders been protected from retaliation, the information would have been appropriately conveyed.

In the United Kingdom, for example, legislation was spurred by well-publicized, often tragic events such as the "Lyme Regis canoe case," in which four children drowned because of inadequate safety equipment and training at a recreational facility.<sup>73</sup> After several years of consideration, the Public Interest Disclosure Act was enacted by Parliament in 1998.<sup>74</sup> The law shows a strong preference for internal whistleblowing.<sup>75</sup>

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72. See *supra* notes 30-32 and accompanying text (asserting that other countries have a common experience when adopting this mechanism).

73. See, e.g., Gary Slapper, *Will these deaths be avenged?*, *TIMES* (London), Mar. 5, 1996, at 37 (acknowledging the progress made in prosecuting him for manslaughter). This case was one of four featured on a program aired in January 1996, on BBC Channel 4, highlighting the retaliation against whistleblowers in Britain. In the Lyme Regis case, an employee had written a letter to her employer about safety problems and was dismissed. She made her letter public after the deaths. *Id.*

In another case that garnered much attention, 18,000 elderly investors lost their savings and taxpayers incurred a £150 million expense after the collapse of an investment firm. *Id.* Again, there was a noted failure of whistleblowing. *Id.* The official inquiry into the crash of the firm, Barlow-Clowes, noted that some of the employees must have known that they were engaging in something improper. *Id.* However, the inspectors also noted that, "the position of the 'whistle-blower' is frequently extremely uncomfortable. The most likely result of such 'whistle-blowing' would be an immediate—if wrongful—termination of employment." Don Touhig, *How to protect whistle-blowers*, *SUN. TIMES* (London), Feb. 25, 1996, at News Review 4.

74. Public Interest Disclosure Act, 1998, c. 23 (U.K.), available at <http://www.hmso.gov.uk/acts/acts1998/19980023.htm>. The Public Interest Disclosure Act amended the Employment Rights Act, 1996, c. 18 (U.K.), available at <http://www.legislation.hmso.gov.uk/acts/acts1996/1996018.htm>.

75. Whistleblowers are protected under the Act if they make a "qualifying disclosure." Public Interest Disclosure Act § (adding new section 43B to the Employee Rights Act). A qualifying disclosure is made "if the worker makes the disclosure in good faith—(a) to his employer" or someone designated by the employer. *Id.* (adding

Whistleblowing legislation introduced in New Zealand<sup>76</sup> followed a scant four months after a well-publicized incident there.<sup>77</sup> Australian statutes followed well-publicized retaliation against whistleblowers as well.<sup>78</sup>

As in the U.S. legislation, all these laws protect the whistleblower from retaliation, but they vary in most other respects, including the kind of information about which protected disclosures can be made, the evidence of wrongdoing required, the motive for the whistleblowing, whether the whistleblower can benefit from the disclosure, and the report recipient.<sup>79</sup> While the details vary, it is clear that the idea of whistleblowing as an organizational control mechanism is spreading through common law countries.<sup>80</sup> Legislative spurs for organizations to establish internal reporting mechanism are not yet as powerful as in the United States. As in the United States, though, the idea of promoting internal whistleblowing is also being established through rules about sexual harassment.<sup>81</sup>

There has been greater reluctance to adopt whistleblowing in other countries for reasons that are discussed below. While EC countries other than the United Kingdom have not embraced whistleblowing, they were made aware of it and the need for protection of whistleblowers through the case of Stanley Adams. Adams, a senior executive at the Swiss company Hoffman-La Roche, reported the company's anti-competitive conduct to the EEC

new sections 43C(1)(a) and 43C(2) to the Employee Rights Act). The worker is allowed to go outside the employer to report, if it is reasonably necessary. *Id.* (adding new section 43G(2) to the Employee Rights Act).

76. Protected Disclosure Act, 2000 (N.Z.), available at <http://www.ombudsmen.govt.nz/protecte.htm>.

77. Catherine Weber, *Whistleblowing and the Whistleblowers Protection Bill 1994*, 7 AUKLAND U. L. REV. 933, 935-37 (1995).

78. Protected Disclosures Act, No. 92, N.S.W. ACTS (N.S.W. 1994); Whistleblowers Protection Act, No. 21, S. Austl. Acts & Ord. (S. Austl. 1993); Robert Baxt, *The public interest or improper use of information—the dilemma for the insider environmental whistleblower*, 24 AUSTL. BUS. L. REV., 319, 322 nn.2, 3 (1996); Richard Evans, *When honesty doesn't pay*, 68 LAW INST. J. 459 (1994). A commission was appointed in 1993 to examine the form that federal legislation should take, and whistleblowing legislation had been debated even earlier. David Lewis, *Employment Protection for Whistleblowers: On What Principles Should Australian Legislation Be Based*, 9 AUSTL. J. LAB. L. 135, 135-36 (1996). See also Public Service Act, 1999, c. 16, § 16 (Austl.).

79. Terry Morehead Dworkin, *Models of Whistleblowing in the International Environment 4-12* (2002) (unpublished manuscript) (on file with Author).

80. Ireland and Canada have also considered whistleblowing legislation. See Jane Baker Jones, *Whistleblowing: No longer out of tune*, AUSTL. ACCT., Aug. 1996, at 56; A & L Goodbody, Irish Law Newsletter, *Pension Trustee—As "Whistleblower" and Other Developments*, BUS. MONITOR, Feb. 1, 1996.

81. See, e.g., Sex Discrimination Act, 1984, 20 F.C.R. 217 (Austl.). Additionally, companies operating in the United States are likely to have reporting procedures in those operations, even though they may not have them in their operations outside the United States.

Commission for Competition.<sup>82</sup> Switzerland signed the Free Trade Agreement with the EC in 1972, and Adams assumed his disclosure would be protected under this agreement.<sup>83</sup> Adams asked the Commission to keep his identity confidential, and the Commission did not begin investigations until after Adams resigned and moved to Italy.<sup>84</sup> During the investigation, Adams' identity was inadvertently revealed to his former employer, which had him arrested when he returned to Switzerland.<sup>85</sup> He was held incommunicado for three months.<sup>86</sup> Adams' Italian business ventures failed, his wife committed suicide, and he was found guilty of economic espionage.<sup>87</sup> He was later imprisoned in Italy after the failure of his businesses there. Hoffman-La Roche was found guilty of anti-competitive activities.<sup>88</sup> This case received wide publicity, and the European Parliament adopted a resolution instructing its Legal Affairs Committee to consider the implications of the case.<sup>89</sup> However, no protective legislation resulted.<sup>90</sup>

Whistleblowing in the EC has also been considered in response to the amount of fraud that has been discovered.<sup>91</sup> Initially discussed

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82. Neville March Hunnings, *The Stanley Adams Affair or The Bitter Bit*, 24 COMMON MKT. L. REV. 65, 71 (1987).

83. *Id.* at 70-71.

84. YVONNE CRIPPS, *THE LEGAL IMPLICATIONS OF DISCLOSURE IN THE PUBLIC INTEREST* 13 (2d ed. 1994).

85. Hoffman-La Roche instituted proceedings in Switzerland for the theft of its documents when it learned that the European Community had received information contained in the company's documents. Adams was arrested on charges of economic espionage in violation of Section 273 of the Swiss Penal Code. *Id.*

86. *Id.*

87. Hunnings, *supra* note 82, at 73.

88. The company was found guilty of violating Article 86 of the Treaty of Rome because it abused its dominant position in the vitamin market. CRIPPS, *supra* note 84, at 13. The company was fined the equivalent of £180,000. This was reduced by one-third on appeal. *Id.*

89. *Id.* at 14.

90. As a result of the report to the European Parliament, the Parliament requested that the Commission of the European Community make a payment to Adams to compensate him for the psychological and physical consequences of his whistleblowing. *Id.* He was paid £25,000, which was less than his expenses. *Id.* He appealed his claim for damages to the European Court of Justice, and was partially successful. *Id.* The court found in his favor, but allowed only half the damages claimed as they found Adams to be partially responsible for his damages, because he did not inform the Commission that it was possible to infer his identity from the documents that were handed over to Hoffman-La Roche, he did not ask to be kept informed about the progress of the investigation, and he returned to Switzerland without investigating the progress of the investigation. *Id.* The Parliament also asked the Commission to give the Legal Affairs Committee an assurance that, in the future, people who revealed information of activities that were contrary to the EEC-Switzerland trade agreement would not be prosecuted in the Swiss courts. *Id.*

91. Michael Dynes, *EU told to protect 'fraud busters'*, TIMES (London), June 2, 1995, at Overseas News. The amount of detected fraud in 1994 exceeded £816 million, and this was estimated to be only the "tip of the iceberg." *Id.*

in the early 1990s, it arose again several years later when Paul van Buitenen blew the whistle on the Commission's failure to deal with fraud.<sup>92</sup> Although his coming forward eventually led to the mass resignation of the Commission and several changes of control within the bureaucracy, no measures were adopted to protect whistleblowers who, like van Buitenen, suffered retaliation.<sup>93</sup>

### III. CAN WHISTLEBLOWING BE GLOBALLY APPLIED?

The initial question posed by this Article is whether the increasing adoption by MNCs of codes of ethics and whistleblowing procedures could be harnessed to help deliver on the promise of peace through commerce. The impact of these mechanisms will be greatly limited if they can only be applied when companies operate in common law countries. As the *Adams* and *van Buitenen* cases illustrate, there is still great reluctance to embrace whistleblowing procedures. This, then, raises the question of whether it is practical or ethical for MNCs to try to enforce such procedures regardless of where they operate. This Article answers yes, despite the varying cultural norms involved.

#### A. *The Cultural Dimension*

The reluctance to consider or encourage whistleblowing has a definite cultural component that varies by country. As discussed above, modern, non-political<sup>94</sup> whistleblowing is a Western phenomenon. The countries that have adopted it have common law-based legal systems and societies that prizes individualism. While "snitching" is not generally condoned, the idea of citizen law enforcement has long roots in the United Kingdom and the United States, and whistleblowing has been advocated as a way to control large organizations for over thirty years.<sup>95</sup> In some Western countries such as France, Greece, and Luxembourg, however,

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92. Neil Buckley, *Europe: Kinnock ushers in cultural revolution*, FIN. TIMES, Jan. 20, 2000, at 7.

93. *Avenue of the Americas: Lucky Guy*, FIN. TIMES, Jan. 20, 2000, at 11. While van Buitenen has not retained his position, he has received several awards for his whistleblowing, including being named "European of the Year" by Reader's Digest. *Id.* He received \$10,000 in prize money and intended to put it into a fund to help other whistleblowers around Europe. *Id.*

94. BOK, *supra* note 43, at 213 (distinguishing legitimate whistleblowing from government-endorsed reporting for ideological or religious persecution purposes).

95. *But see* George C. Benson, *Codes of ethics and whistleblowing*, 7 MANAGERIAL AUDITING J. 37, 39 (1992) (citing Peter Drucker, analogizing whistleblowing to "informer systems set up by monarch dictators"). Benson supports internal whistleblowing. *Id.*

whistleblowing is seen as little different from informing the government about a neighbor's dissident views. This, in turn, is frowned on at least in part because it is considered an attribute of totalitarian or Communist states.<sup>96</sup> In Germany, whistleblowing is thought unnecessary because of moral superiority.<sup>97</sup>

The idea of reporting the wrongdoing of one's group is alien to many other cultures in which group membership rather than individualism is the norm. In Japan, for example, the traditions of consensus, company mentality, and lifetime employment make whistleblowing almost unheard of and highly risky.<sup>98</sup> One employee who defied this tradition, an ex-Honda engineer who allegedly quit in a dispute over safety issues, is now a plaintiff's expert witness in the United States in suits against Honda.<sup>99</sup> His testimony provides an income that he could no longer earn in Japan because of his dissent.<sup>100</sup>

An explanation for these differences can be drawn from several studies that show basic differences in value systems between national cultures.<sup>101</sup> The differences can be described in several ways, but one

96. See Dynes, *supra* note 91.

97. Peter Norman, Comment & Analysis, *A hidden hand of corruption*, FIN. TIMES, June 5, 1996, at 27. Norman discusses a cultural denial of corruption and financial malpractice in Germany, despite clear evidence to the contrary including fraud surveys conducted by KPMG in eighteen countries and statements from officials. *Id.* Wolfgang Schaupensteiner, Frankfurt's top anticorruption prosecutor, called the corruption in the building industry in terms of bribes paid to government officials for public works contracts as being on a "Sicilian scale." *Id.* The Deputy Director of the Christian Democratic Union in the Bundestag stated, "[A] few years ago [corruption] was almost a foreign word in Germany." *Id.* He also stated that, "[s]een internationally, I am convinced that we still have relatively healthy structures." *Id.*

When the Author discussed the idea of whistleblowing with lawyers and law professors in Germany in 1996, no one had heard of the idea, and their reaction was that it was a peculiar idea, at best; the more common reaction was that it was bizarre, destructive, and unnecessary.

98. Benjamin Weiser, *An Ex-Employee As Hostile Witness: Honda Faces Unusual Critic*, INT'L HERALD TRIB., Mar. 6, 1996. Whistleblowing is "very much out of character and rare" in Japan. *Id.* (quoting Professor Daniel Foote of the University of Washington School of Law). Professor Setsuo Miyzawa of Kobe University is quoted as saying, "A whistleblower would become 'a marked man.'" *Id.*; see also Valerie Reitman & Michael Schuman, *Men's Club: Japanese and Korean Companies Rarely Look Outside For People to Run Their Overseas Operations; Some Think Its Time To Change*, WALL ST. J., Sept. 26, 1996, at R17. "[T]he likely reaction of a Japanese worker who stumbles on alleged wrongdoing would be to protect his company's image and reputation, to save face at any cost." *Id.*

99. *Id.*

100. "In America, 'the squeaky wheel gets the grease.'" In Japan, "the nail that stands out gets pounded down." Hazel Rose Markus & Shinobu Kitayama, *Culture and the Self: Implications for Cognition, Emotion, and Motivation*, 98 PSYCHOL. REV. 224, 224 (1991). These sayings exemplify the differences in the acceptance of dissent in the United States and Japan.

101. See, e.g., ALFONSO TROMPENAARS, *RIDING THE WAVES OF CULTURE: UNDERSTANDING DIVERSITY IN GLOBAL BUSINESS* (1994); GERT HOFSTEDÉ, *CULTURE'S*



which incorporates dimensions relevant to whistleblowing is that proposed by Hofstede.<sup>102</sup> He identifies five dimensions on which cultures vary: power distance, individualism, uncertainty avoidance, masculinity, and Confucian dynamism.<sup>103</sup> These dimensions influence ethical decision-making and, in turn, affect support for whistleblowing. Of these five, power distance, individualism, and Confucian dynamism are most relevant to examining whistleblowing among cultures. Cultures with a high power distance are more willing to accept that power is unequally distributed among individuals and are therefore more willing to accept inequality, autocratic leadership, and centralization of authority.<sup>104</sup> Cultures high in individualism have a loosely-knit social framework in which people believe they are responsible for themselves and their immediate family instead of believing that they are members of an in-group which will look out for them.<sup>105</sup> A society which scores high in Confucian dynamism is a dynamic, future-oriented society, while a society low in this dimension tends to be tradition-bound and static.<sup>106</sup>

These classifications are, of course, only tools of analysis, and countries may vary along a continuum in each dimension.<sup>107</sup> Nonetheless, they may help explain why the United States, Australia, and the United Kingdom are some of the first countries with whistleblower legislation, and other countries are more reluctant to accept the idea. Japan is a low-scoring country on individualism, relatively low-scoring on dynamism, and high-scoring on power distance.<sup>108</sup> People living in a low individualistic, high power distance country are less likely to challenge authority, and those in

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CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK RELATED VALUES (1980); see also Markus & Kitayama, *supra* note 100, at 224; David Vogel, *Business Ethics: New Perspectives on Old Problems*, 33 CAL. MGMT. REV. 101 (1991).

102. See generally GERT HOFSTEDÉ, *CULTURE'S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK RELATED VALUES* (abridged ed. 1984).

103. *Id.*

104. *Id.* at 65-109.

105. *Id.* at 148-75.

106. Stoltenberg, *supra* note 15, at 719 (describing the influences of the Confucian theory on a corporation). "[T]he practice of civility and mutual respect encouraged by Confucian teaching was commonly regarded as a 'humane' and superior alternative to the enforcement of laws on 'unwilling or recalcitrant subjects.'" *Id.* at 721.

107. There are also individual variations within a culture. Markus & Kitayama, *supra* note 100, at 226.

108. See *id.* at 227 (discussing non-Western views, especially Japanese, of the self as part of an encompassing social relationship in which, "one's behavior is determined, contingent on, and, to a large extent organized by what the actor perceives to be the thoughts, feelings, and actions of *others* in the relationship."). This contrasts with a Western view of the self, "whose behavior is organized and made meaningful primarily by reference to one's own internal repertoire of thoughts, feelings, and action . . ." *Id.* at 226.

authority are less likely to tolerate challenges. Additionally, loyalty to the group will be stronger in this climate, thus making reporting on someone within the group less likely.<sup>109</sup> Finally, going against societal norms to blow the whistle is less likely in a low-dynamic society.

The United States, Australia, and the United Kingdom, by contrast, are countries which score at the high end on the individualism and dynamism dimensions, and low on power distance.<sup>110</sup> Thus, people in these societies are more likely to challenge authority, and doing so is more likely to be socially acceptable. Even if it is frowned upon, people are more likely to do so if they, as individuals, feel it is the right thing to do.

This analysis does not imply that whistleblowing procedures cannot be successfully implemented in countries like Japan.<sup>111</sup> It does indicate that it will be more difficult, and MNCs will have to carefully consider and structure what they ask their employees to do if internal reporting is to be used as an ethical control mechanism. This may be easier now than it would have been even a decade ago for two reasons. First, the societies studied are dynamic.<sup>112</sup> Japan, for example, is slowly moving away from life-time employment as its economy worsens, and independent thinking and challenges to authority are becoming more common.<sup>113</sup> Second, whistleblowing is

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109. This is because the society will be more collectivist in nature. See generally Joseph Sanders et al., *The Institutionalization of Sanctions for Wrongdoing inside Organizations: Public Judgments in Japan, Russia, and the United States*, 32 LAW & SOC'Y REV. 871 (1998) (discussing, in part, collectivist views and the view of sanctions in Moscow, Tokyo, and Washington). One finding was that the Japanese were more likely to think that individuals should apologize and resign rather than have sanctions imposed against the organization. *Id.*

110. HOFSTEDE, *supra* note 101, at 269.

111. Markus & Kitayama, *supra* note 100, at 225, 228 (stating that non-Western attributes also apply to countries like China, with its Confucian emphasis on interrelatedness and kindness, and Latin America, Africa, and certain Southern European cultures).

112. Stoltenberg, *supra* note 15, at 9 (regarding China); Philip M. Nichols, *The Viability of Transplanted Law: Kazakhstani Reception of a Transplanted Foreign Investment Code*, 18 U. PA. J. INT'L ECON. L. 1235, 1275-79 (1997) (discussing how Western laws can change society due to the dynamic relationship between culture and law).

113. See, e.g., Peter Landers, *The Mighty Pen*, WALL ST. J., Oct. 1, 2001, at R5; Yumiko Ono, *Ask the Iconoclast: To Understand Itself, Japan Calls a Novelist*, WALL ST. J., Aug. 23, 2001, at A1; *Japanese business ethics: Blow whistles while you work*, ECONOMIST, Apr. 28, 2001, at 68; Peter Landers, *Teed Up: Unbuilt Golf Course Land Japanese Firm In Fight Over Secrecy*, WALL ST. J., June 13, 2000, at A1 (describing a court and publicity battle by a top executive of Mitsukoshi Ltd., Japan's most prestigious department store chain, to obtain information about the company spending \$550 million to buy land for a golf course in the 1980s that it never built; the deal was kept secret from him and others, and he was ordered to resign when he tried to find out about it); Gillian Tett, *Japan's ethical clampdown puts golf out of bounds*, FIN. TIMES,

increasingly being discussed and considered on an international scale, so it is not as radical an idea as it once may have appeared. South Korea, a country that lies along the same dimensions as Japan on Hofstede's scale, is considering whistleblowing legislation as part of its anti-corruption efforts.<sup>114</sup>

### B. *How to Overcome These Differences*

For companies to implement successfully global ethical codes and internal reporting procedures, especially in countries that have yet to embrace whistleblowing, three things are essential. First, reporting procedures must be clear, easy to access, and strongly supported by top management. Second, ethical norms should concern relatively few issues which can garner wide acceptance or understanding. Finally, allowances must be made for some cultural adaptation.

#### 1. Reporting Procedures

A large number of studies have been conducted on whistleblowers, particularly on what distinguishes observers of wrongdoing who blow the whistle from those who do not.<sup>115</sup> The most important predictor is whether there is a clear reporting procedure that is seen as effective.<sup>116</sup> Fear of retaliation and protection from retaliation do not seem to play as significant a role.<sup>117</sup> Additionally, to help overcome the reluctance of employees to report wrongdoing, especially where it is counter-cultural, the organization must convince employees that adherence to its principles and procedures is for the common good of the organization.

In terms of micro-level theories of deviance, whistleblowing needs to be seen as normative behavior rather than deviant behavior. In situations where great emphasis is placed on organizational conformity and loyalty to co-workers and the organization, the organization must convince employees that whistleblowing is

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May 19, 2000, at 20 (describing new rules for bureaucrats instituted to help combat corruption).

114. See generally HEUNGSIK PARK, *THE LOGIC OF WHISTLEBLOWING* (1999). Professor Park has been the Associate Director of the Whistleblower Protection Center (The Chamyeyeondai) since 1994.

115. Elletta Sangrey Callahan & Terry Morehead Dworkin, *Who Blows the Whistle to the Media and Why: Organizational Characteristics of Media Whistleblowers*, 32 AM. BUS. L.J. 151, 163 n.73 (1994) (citing studies) [hereinafter Callahan & Dworkin, *Media Whistleblowers*]; MICELI & NEAR, *supra* note 19, at 148-52 (and studies cited therein); Near et al., *supra* note 28, at 398-99.

116. Near et al., *supra* note 28, at 398-99; Callahan & Dworkin, *Media Whistleblowers*, *supra* note 115, at 178; MICELI & NEAR, *supra* note 19, at 127-28.

117. Dworkin & Near, *supra* note 31, at 261.

normative and desired.<sup>118</sup> Social learning theory can also help explain how whistleblowing can be seen as normal rather than deviant. Learning takes place through interaction with significant others. If organizational leaders, co-workers, or society view whistleblowing as appropriate, then whistleblowing will be seen as normal and should increase.<sup>119</sup> Even if viewed as deviant within a group, support from important external constituents can give a person sufficient rationalization to engage in whistleblowing.<sup>120</sup> Reporting requirements, if implemented and seriously followed, will help achieve this "normative" behavior.

To have an effective compliance program an organization should:

- Establish a written compliance program. Written compliance programs should be clearly written, easily understood, relatively brief, and lack legal verbiage. To the extent feasible, employees from all sectors of the organization should participate in the formation of the requirements. This has two benefits: greater investment in the program from the employees and a greater probability that the code will respond to real issues.<sup>121</sup>
- Train employees regarding compliance. Training should be done in a way that engages the employees and causes them to think about what is required.<sup>122</sup> Policies should stress that employees can be held personally liable for failure to comply<sup>123</sup> and that the organization may be legally liable for compliance failure.<sup>124</sup> Corporations should stress that non-retaliation is an integral part of the policy.
- Establish a simple reporting procedure. An individual or office should be designated as the report recipient. Establishing a special person for this purpose sends the message that the organization takes the issues seriously and is open to dissent.<sup>125</sup> Having someone like an ombudsperson, independent of

118. Miethe & Rothschild, *supra* note 19, at 325.

119. *Id.* at 326.

120. Markus & Kitayama, *supra* note 100, at 230 n.3; James W. Michaels & Terance D. Miethe, *Applying Theories of Deviance to Academic Cheating*, 70 SOC. SCI. Q. 870 (1989).

121. See generally Callahan et al., *supra* note 16.

122. See, e.g., LUIS R. GOMEZ-MELJIA ET AL., *MANAGING HUMAN RESOURCES* 268-74 (2001) (providing ways to engage employees including workshops, live presentations, and videos); Markus & Kitayama, *supra* note 100, at 231-32 (asserting that whistleblowing is more likely to occur in Asian societies when there is a clear definition of what is wrongful).

123. Janet P. Near & Terry Morehead Dworkin, *Responses to Legislative Changes: Corporate Whistleblowing Policies*, 17 J. BUS. ETHICS 1551, 1558 (1998).

124. Markus & Kitayama, *supra* note 100, at 228 (presenting evidence that Asians are less likely to do a cost-benefit analysis and more likely to report for the good of the group).

125. Callahan & Dworkin, *Media Whistleblowers*, *supra* note 115, at 165-66.

management, reinforces this message.<sup>126</sup> It also increases the likelihood of reporting and reduces the fear of retaliation.<sup>127</sup>

- Investigate and respond quickly. To the extent possible, the privacy of the parties involved should be maintained during the investigation. The response should include a report back to the whistleblower to demonstrate that the company has listened and taken action.

- Maintain strong auditing. Someone high in the organization or on the board, depending on how the reporting procedure is established, should ensure that the system is working as planned and that responses to reports are appropriate.<sup>128</sup> If patterns of unwanted behavior emerge, this person should also ensure these are addressed through further training or other action.

- Republish and report. An annual report should be issued to all employees summarizing activities.<sup>129</sup> The report should come from the head of the organization. This shows that the leadership believes the program is important,<sup>130</sup> reinforces the message that dissent is allowed, and that management listens to employees. It is also an opportunity to re-publish the policies and bring them to employees' attention.

Many MNCs already have most of these policies in place because they meet the requirements of the Corporate Sentencing Guidelines and other legal spurs.<sup>131</sup> One of the main differences between these suggestions and what many U.S. companies have established in response to the Guidelines is the establishment of an ombudsperson rather than a hotline. The former is preferred because it makes

126. This is especially important when managers are involved in the wrongdoing. *Id.* at 165.

127. Callahan et al., *supra* note 16, at 24.

128. HOFSTEDE, *supra* note 101, at 274-75 (noting the importance of feedback channels in effectively managing multicultural organizations).

129. Hess & Dunfee, *supra* note 5, at 623-25 (regarding the importance of companies reporting progress in fighting bribery). They state that this lends credibility, and cite with favor the Global Reporting Initiative. *Id.* at 624 n.181. The reporting must be done consistent with individual privacy concerns.

130. The impression that top-level managers are exempt from the rules is the most likely factor to undermine acceptance and observance of the rules. See Gary R. Weaver & Linda Klebe Trevino, *Compliance and Values Oriented Ethics Programs: Influences on Employees' Attitudes and Behavior*, 9 BUS. & ETHICS Q. 315, 323, 330; Robert C. Ford & Woodrow D. Richardson, *Ethical Decision Making: A Review of the Empirical Literature*, 13 J. BUS. ETHICS 205, 212 (1994). Alternatively, strong support from the top is likely to encourage reporting in Asian societies. The Chinese, for example, emphasize being loyal and pious to their superiors and obey them, "whether they are parents, employers, or government officials." Markus & Kitayama, *supra* note 100, at 233; see also HOFSTEDE, *supra* note 101, at 259.

131. See *supra* notes 40-71 and accompanying text; see also Hess & Dunfee, *supra* note 5, at 29-30 (recommending C2 Principles consistent with suggestions).

investigation and follow-up reporting more feasible, and the personal contact is important to foster compliance.<sup>132</sup>

## 2. Appropriate Ethical Norms and Cultural Adaptability

People will not become whistleblowers if they do not consider the observed activity wrongful, no matter how good the reporting procedures may be. What is considered wrongful is affected by culture.<sup>133</sup> Thus, the more globally an MNC's code is to be applied, the more difficult it will be to have buy-in from all employees. To foster participation, the code should concern relatively few issues that can garner wide acceptance or understanding. Also, in order to make it the most effective, allowance must be made for some cultural adaptation. While this is not easy, it can be done.

The easiest norm for employees to understand is compliance with the law. Other norms on which a company could get broad agreement are fair treatment of employees, protection of the environment, and rules against bribery. Within these broad categories, however, there is much room for interpretation. The following discussion, which focuses on harassment, serves as an example. Harassment is chosen because it is almost universally banned or frowned upon in its most egregious forms, legal rules regarding it have led many MNCs to adopt codes and reporting procedures, it has distinctive cultural interpretations, it involves ethical duties, and there is evidence of a positive correlation between gender equality and nonviolence.<sup>134</sup>

The recognition of sexual harassment as a legal and moral issue is relatively recent. Even after the adoption of Title VII in the United States in 1964, which laid the legal basis for equal gender treatment in the U.S. workplace, harassment was not initially recognized as falling within this law. It is only in the last two decades that protection from harassment has become a widespread legal right in the United States.<sup>135</sup> Today, two forms of sexual harassment are recognized by the courts: quid pro quo harassment and hostile environment sexual harassment. A quid pro quo cause of action arises when a supervisor offers or threatens to withhold a job or job benefit in exchange for sexual favors.<sup>136</sup> Hostile environment cases

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132. Many hotlines allow anonymous reporting. MICELI & NEAR, *supra* note 19, at 61, 74-75 (asserting that anonymity, while reducing chances of retaliation, undermine credibility and effectiveness); U.S. GENERAL ACCOUNTING OFFICE, 9-YEAR GAO FRAUD HOTLINE SUMMARY (1988); Callahan & Dworkin, *Media Whistleblowing*, *supra* note 115, at 168-69.

133. See, e.g., HOFSTEDE, *supra* note 101, at 13-38; Markus & Kitayama, *supra* note 100, at 223-29.

134. Fort & Schipani, *supra* note 3, at 434 n.256.

135. See, e.g., *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (showing the Supreme Court's first recognition of sexual harassment).

136. The employer is strictly liable for such actions. See generally *id.*

arise when unwelcome sexual conduct from any employee unreasonably interferes with individual job performance, or creates an intimidating, hostile, or offensive work environment.<sup>137</sup> The latter is the type for which the Supreme Court recognized a defense if employers make reasonable efforts to prevent and correct it, including effective policies and complaint procedures.<sup>138</sup>

Other countries and trade organizations have followed the United States and recognized these forms of sexual harassment, and often adopt the same language.<sup>139</sup> However, cultural and legal differences have resulted in the concept having different meanings and results. The European Commission, for example, prepared a Code of Practice that enunciated official recommendations on workplace sexual harassment.<sup>140</sup> The Commission used the language adopted in the United States to define both kinds of sexual harassment, but the Code contained no sanctions and was non-binding on Member States.<sup>141</sup> This left the Member States to deal with harassment in their own way.<sup>142</sup> France chose to distance itself from the U.S. approach, dealing only with quid pro quo harassment, but making it a crime.<sup>143</sup> Prosecution, however, is generally limited to situations where the harassment was essentially equivalent to

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137. *Id.*

138. *See supra* notes 53-57 and accompanying text.

139. *See generally* Michael Starr, *Who's the Boss? The Globalization of U.S. Employment Law*, 51 BUS. LAW. 635 (1996); Beverly H. Earle & Gerald A. Madek, *An International Perspective on Sexual Harassment Law*, 12 LAW & INEQ. 43 (1993).

140. In 1990, the Council of Ministers passed a resolution entitled, "The Protection of the Dignity of Men and Women at Work." The resolution defined sexual harassment in the same terms as those used in the United States, and urged the European Commission to prepare a Code of Practice. The Commission found that sexual harassment was a serious problem for many working women after reviewing research, and prepared the Code of Practice. *See generally* MICHAEL RUBENSTEIN, *HOW TO COMBAT SEXUAL HARASSMENT AT WORK: A GUIDE TO IMPLEMENTING THE EUROPEAN COMMISSION CODE OF PRACTICE* (1993); MICHAEL RUBENSTEIN, *THE DIGNITY OF WOMEN AT WORK: A REPORT ON THE PROBLEM OF SEXUAL HARASSMENT IN THE MEMBER STATES OF THE EUROPEAN COMMUNITIES* (1987).

141. Anita Bernstein, *Law, Culture, and Harassment*, 142 U. PA. L. REV. 1227 (1994). Bernstein posited that the lack of sanctions resulted from the fact that sexual harassment was not widely viewed as a legal wrong in the EU Member States. *Id.*

142. In response to a proposal from the European Commission (2000 O.J. (E 337) 196), the Council issued a decision on December 20, 2000, which established a program for a Community framework strategy on gender equality. 2001 O.J. (L17/22) 19.1. It does not specifically mention sexual harassment.

143. Abigail C. Saguy, *Employment Discrimination or Sexual Violence? Defining Sexual Harassment in American and French Law*, 34 LAW & SOC'Y REV. 1091, 1092 (2000).

sexual violence.<sup>144</sup> In Germany, some of the states adopted laws, but they varied among themselves.<sup>145</sup>

Other countries demonstrate widely divergent attitudes toward sexual harassment. In the Czech Republic, for example, many viewed with disapproval what they saw as the extremes of U.S. jurisprudence and the media attention paid to the issue.<sup>146</sup> Additionally, many women did not view the issue as one of individual rights or one that required laws to protect them,<sup>147</sup> and many women viewed verbal remarks favorably.<sup>148</sup> No laws addressed the issue and Czech companies lacked policies pertaining to it.<sup>149</sup> Japan also had no laws specifically pertaining to harassment and harassment was dismissed as trivial by both companies and businessmen.<sup>150</sup> Nonetheless, a Japanese court in 1992 awarded damages to a Japanese woman who was verbally harassed by her employer.<sup>151</sup>

These are but a few examples of national differences toward sexual harassment. Not only does this diversity present a challenge to implementing global policies for MNCs,<sup>152</sup> it also leads to dilemmas for many nationals working abroad.<sup>153</sup> One way to approach these

144. *Id.* at 1098.

145. See, e.g., Monica Bhattacharyya, *From Nondifferentiation to Factual Equality: Gender Equality Jurisprudence Under the German Basic Law*, 21 *BROOK. J. INT'L L.* 915 (1996).

146. *Why Feminism is Doing Poorly in the Czech Republic*, *CTK NAT'L NEWS WIRE*, Mar. 27, 1996, available in LEXIS, News Library, *CTK Nat'l News Wire File*.

147. Alex Friedrich, *Harassment Allegations Seen as Czech Anomaly*, *PRAGUE POST*, July 19, 1995, available in LEXIS, News Library, *Prague Post File*.

148. *Id.*; see also Emma McClune, *Media Leads Dialogue About Whether Sexual Harassment Does Exist*, *PRAGUE POST*, Aug. 2, 1995, available in LEXIS, News Library, *Prague Post File* (noting that some public officials were content with the "state of sexual relations in the Czech Republic").

149. See Friedrich, *supra* note 147.

150. Daniel Niven, *The Case of the Hidden Harassment*, *HARV. BUS. REV.*, Mar.-Apr. 1992, at 12.

151. Nancy Patterson, Recent Development, *No More Naki-Neiri? The State of Japanese Sexual Harassment Law: Judgment of April 16, 1992, Fukuoka Chiho Saibansho, Heisei Gannen (1989) (wa) No. 1872, Songai Baisho Jiken (Japan)*, 34 *HARV. INT'L L.J.* 206 (1993).

152. In addition to the challenges already mentioned, MNCs face an ethical dilemma: Do MNCs have a moral obligation to enforce higher standards no matter where they operate because of the physical and emotional costs of harassment and its reinforcement of unequal treatment. See, e.g., Terry Morehead Dworkin et al., *Theories of Recovery for Sexual Harassment: Going Beyond Title VII*, 25 *SAN DIEGO L. REV.* 125 (1988); Ben Bursten, *Psychiatric Injury in Women's Workplaces*, 14 *BULL. AM. ACAD. PSYCHIATRY & L.* 245 (1986); Peggy Crull, *Stress Effects of Sexual Harassment on the Job: Implications for Counseling*, 52 *AM. J. ORTHOPSYCHIATRY* 539 (1982).

153. For example, if U.S. employees are part of a joint venture where they are working alongside employees of the host country, should they impose their values if they see something that would clearly be wrong at home? Can they demand that they be treated in a manner similar to what they would expect if working in their home country? Alternatively, can they ignore the stricter home constraints if they are working in a country that lacks them? See, e.g., Andrew B. Thorson, *The 1953 United*



questions is through the perspective provided by Professors Donaldson and Dunfee in their integrative social contracts theory, which recognizes ethical obligations based on macrosocial and microsocial contracts.<sup>154</sup> Companies can build on this to develop ways to resolve ethical issues in a global context, using a generic stakeholder theory that is not culturally bound.<sup>155</sup>

Dunfee argues that hypernorms can be used to border or limit the cultural relativism of micronorms. If non-harassment is a hypernorm, or if there are hypernorms limiting microsocial treatment of harassment, then universal rules about harassment could be ethically applied. A hypernorm is a principal "so fundamental to human existence that [it serves] as a guide in evaluating lower level moral norms."<sup>156</sup> Because of its importance, the hypernorm is likely to be reflected in global principles that are generally recognized in a variety of ways. Often hypernorms are cast in the language of rights. This raises the question of whether there are hypernorms that support a right to work in an environment free of harassment.

An examination of numerous global and regional declarations and other documents, such as the 1948 Universal Declaration of Human Rights,<sup>157</sup> the UN Convention on the Elimination of All Forms of Discrimination Against Women,<sup>158</sup> OECD Guidelines for Multinational Enterprises,<sup>159</sup> the Council of Europe's 1996 Social Charter,<sup>160</sup> EC Directives and Codes of Practice, as well as the laws and philosophies of particular countries, suggest there are three hypernorms relevant to harassment: personal security,<sup>161</sup> respect for human dignity,<sup>162</sup> and nondiscrimination.<sup>163</sup> At a minimum, these hypernorms support global rules against quid pro quo harassment.

*States Japan FCN Treaty: Can Title VII Protect American Women?*, 3 B.U. PUB. INT. L.J. 315 (1993).

154. Thomas Donaldson & Thomas R. Dunfee, *Toward A Unified Conception of Business Ethics: Integrative Social Contracts Theory*, 19 ACAD. MGMT. REV. 252 (1994); see also THOMAS DONALDSON & THOMAS W. DUNFEE, *TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS* 49-81 (1999).

155. Thomas R. Dunfee, *Does Stakeholder Theory Make Sense In a Global Context?*, Paper Presented at the Annual Meeting of the International Association of Business and Society, Vienna (June 1995) (on file with Author).

156. Donaldson & Dunfee, *supra* note 154, at 265.

157. The Universal Declaration of Human Rights, U.N. GAOR, 3d Sess., 67th plen. mtg., at 1, U.N. Doc. A/811 (1948). This document was part of the International Bill of Human Rights. U.N. GAOR, 3d Sess., Supp. No. 1, at 71, U.N. Doc. A/565 (1948).

158. Convention on the Elimination of All Forms of Discrimination Against Women, 19 I.L.M. 33 (opened for signature on March 1, 1980).

159. Clarification on Environmental Concerns in OECD Guidelines for Multinational Enterprises, 25 I.L.M. 494 (1986).

160. European Social Charter, Europ. T.S. No. 163, 36 I.L.M. 31 (1997).

161. W.C. Frederick, *The Empirical Quest for Normative Meaning: Introduction and Overview*, 2 BUS. ETHICS Q. 91 (1992).

162. Donaldson & Dunfee, *supra* note 154, at 267.

163. THOMAS DONALDSON, *THE ETHICS OF INTERNATIONAL BUSINESS* 87 (1989).

Being forced to trade sexual favors for the right to employment and its benefits threatens personal security, undermines human dignity, and is generally acknowledged to be discriminatory. It is not endorsed by any country.

Environmental sexual harassment is more problematic, since it seldom involves personal security and there is no general consensus—even in the United States—as to what constitutes a harassing environment. Staring, verbal comments, jokes, and the like are not viewed as harassment of women in many countries.<sup>164</sup> To the extent that such harassment erodes human dignity and is discriminatory, it violates two of the hypernorms. Thus, organizations can ban demeaning and discriminatory treatment. What constitutes such treatment, though, should be determined on a microsocial basis. Cultural imperialism must also be avoided.<sup>165</sup>

Part of the effective complaint procedure discussed above is having a clearly-written compliance program, along with training. This is where cultural differences should be taken into account.<sup>166</sup> Exploration of what constitutes a harassing environment in a particular location should be addressed through seminars, focus groups, and by other means. It is unrealistic to expect that the U.S. standard for what constitutes a harassing environment would be accepted elsewhere. However, respecting cultural differences does not mean respecting the lowest common denominator.<sup>167</sup> A minimum standard should be set, and the chance to appeal outside the local system should be allowed. This appeal could be taken to the person doing the auditing, who then would be responsible for ensuring that local interpretations do not set the bar too low.

MNC implementation of global equal treatment standards that are reinforced by reporting procedures is not only feasible, but can help reduce conflict. Some studies indicate there is a positive correlation between gender equality and nonviolence.<sup>168</sup> Creating an atmosphere where inter-group interactions are fostered under conditions of equal treatment helps reduce conflict.<sup>169</sup> It can help

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164. See, e.g., Sandra Orihuela & Abigail Montjoy, *The Education of Latin America's Sexual Harassment Law: A Look at Mini-Skirts and Multinationals in Peru*, 30 CAL. W. INT'L L.J. 323 (2000).

165. Richard T. DeGeorge, *International Business Ethics*, 4 BUS. ETHICS Q. 1 (1994); Derek G. Barella, Note, *Checking the "Trigger-Happy" Congress: The Extraterritorial Extension of Federal Employment Laws Requires Prudence*, 69 IND. L.J. 889, 913 (1994). Cf. Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481 (1985) (arguing that contractarianism and other business ethics arguments have a Western bias).

166. HOFSTEDE, *supra* note 101, at 276.

167. Nichols, *supra* note 1, at 299. Donaldson and Dunfee suggest that a prioritization rule can help resolve norm conflicts, but that it must be tested against universal principles. DONALDSON & DUNFEE, *supra* note 154, at 185-86, 226-30.

168. Fort & Schipani, *supra* note 3, at 434.

169. See *supra* notes 13-14 and accompanying text.

defuse resentment and limit disruptive behavior by contributing to a feeling of psychological security<sup>170</sup> and increased physical security.<sup>171</sup>

A similar analysis could be conducted regarding bribery.<sup>172</sup> Professors Salbu and Nichols, in their recent articles debating the wisdom of attempting to control bribery through implementation of global laws, illustrate the cultural variations in interpreting what constitutes bribery.<sup>173</sup> Professor Salbu notes that without true global unity, respect must be paid to cultural diversity.<sup>174</sup> He states that the world today is culturally pluralistic, and argues against a forced fit between externally imposed law and divergent cultures.<sup>175</sup> In furthering this argument, Salbu illustrates the cultural variations in the views of gifts versus bribes. Professor Nichols focuses on the harm bribery causes, including loss of respect for the law, inequitable distribution of wealth that further adds to social tension, undermining democracy, and possibly leading to coups,<sup>176</sup> and loss of peace.<sup>177</sup> He believes it is possible to ban transnational bribery.

Despite the lack of uniformity, it is feasible for an MNC to ban bribery. Every country in the world prohibits bribery of its officials.<sup>178</sup> This would be the starting point of such a code,<sup>179</sup> along with compliance with local laws. However, allowance for legitimate

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170. Fort & Schipani, *supra* note 3, at 432.

171. MICELI & NEAR, *supra* note 19, at 11.

172. Professor Dunfee has recently argued for the control of bribery through corporate action. Hess & Dunfee, *supra* note 5, at 594.

173. Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 223, 226 (1999); *see also* Nichols, *supra* note 1, at 279.

174. Salbu, *supra* note 173, at 226.

175. *Id.* at 230-31.

176. Hess & Dunfee, *supra* note 5, at 596. "Corruption limits a government's ability to perform vital functions and may even threaten its overall effectiveness." *Id.*

177. Nichols, *supra* note 1, at 279. "The ability of law enforcers to dispense with the law and of bribe-givers to buy their way around the law renders the system meaningless . . . . Ultimately, bribery undermines the legitimacy of governments, especially democracies . . . . Citizens may come to believe that government is simply for sale to the highest bidder." *Id.*; *see also* Timothy L. Fort & James J. Noone, *Gifts, Bribes and Exchange: Relationships in Non-Market Economies and Lessons for Pax E-Commercia*, 33 CORNELL INT'L L.J. 515, 520 (2000) (noting how bribery may lead to "even possible revolution"). Hess and Dunfee note that bribery can influence government spending by moving it out of vital functions to areas where the bribe-takers can earn more. Hess & Dunfee, *supra* note 5, at 597.

178. Nichols, *supra* note 1, at 258, 278. It is also condemned by the world's major faiths. Hess & Dunfee, *supra* note 5, at 594.

179. Professors Donaldson and Dunfee establish a series of hypernorms against bribery including "necessary social efficiency" in their book. DONALDSON & DUNFEE, *supra* note 154, at 117. Necessary social efficiency bears some resemblance to Professor Patricia Werhane's "basic rights." *Id.*

gift-giving can be made on a microsocial basis with appropriate discussion and training.<sup>180</sup>

As stated in the introduction, bribery can cause conflict. One important reason is that it undermines free trade, and free trade helps foster peace.<sup>181</sup> Corporations that adopt bribery bans and enforce them through reporting procedures potentially contribute to peace by allowing better utilization of resources.<sup>182</sup> This, in turn, frees up more resources for those at the bottom of the economic rungs,<sup>183</sup> and will have an increased impact in the emerging economies that are most harmed by bribery.<sup>184</sup> Current writers on bribery all stress the need for transparency.<sup>185</sup> Rules reinforced by whistleblowing can help to deliver transparency.

#### IV. THE CONTRIBUTIONS OF OPEN REPORTING AND COMMUNICATION TO THE CORPORATION AND TO PEACE

Discussions of bribery and harassment contemplate consideration of local norms in order to be effective. The interaction between rules and local norms is best explained through small-group training and discussions. Imposition of rules without an understanding of the rationale behind them is not very effective.<sup>186</sup> Local, small-group discussions allow explanations in culturally-

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180. Hess & Dunfee, *supra* note 5, at 605 (noting that the International Chamber of Commerce's (ICC) recommendation that businesses adopt their own rules of conduct based on the ICC's bribery rules, but adapted to their particular situations).

181. Fort & Noone, *supra* note 177, at 517.

182. Nichols states that bribery could be globally banned by making it a crime when it is prohibited by the laws of the host country. Nichols, *supra* note 1, at 288.

183. Fort & Noone, *supra* note 177, at 521; DONALDSON & DUNFEE, *supra* note 154, at 228.

184. See *supra* notes 4-7 and accompanying text.

185. Nichols, for example, states that effective policing will require transparent decisionmaking in host countries and voluntary codes of corporate conduct. Nichols, *supra* note 1, at 259. These are precisely the processes that whistleblowing promotes. Opaque regulatory procedures, when combined with weak enforcement, create conditions which help promote bribery. *Id.* at 273; see also Hess & Dunfee, *supra* note 5, at 605 (noting international attempts to create more transparent regulatory procedures); Fort & Noone, *supra* note 177, at 542 (discussing mediating institutions that may reduce bribery).

186. See, e.g., OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 41 (1881). "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community . . ." *Id.*; Fort & Noone, *supra* note 177, at 528. The more culturally diverse the organization, the more difficult it is to achieve "major learning" or to change norms, values, and worldviews. Arvind Parkhe, *Interfirm Diversity, Organizational Learning, and Longevity in Global Strategic Alliances*, 22 J. INT'L BUS. STUD. 579, 591 (1991).

understandable terms.<sup>187</sup> While whistleblowing is usually an individual activity, sensitivity to the desired norms can be accomplished on a group basis. Understanding of the norms should lessen misunderstandings and unintentional false alarms. Additionally, feeling that one can make an impact at the local level makes one more likely to adopt community norms.<sup>188</sup> To the extent that the rules have personal meaning, they are more likely to be followed.<sup>189</sup> Professors Fort and Noone urge this approach in combating bribery.<sup>190</sup> Many Australian companies train against sexual harassment by having male employees, in small groups, visualize the acts of harassment happening to their wives, daughters, and mothers.<sup>191</sup> Engagement fosters absorption and understanding, and engagement is easiest in small numbers where personal interaction is facilitated.

Internal whistleblowing procedures and codes of ethics will operate more effectively when organizations operate as mediating institutions.<sup>192</sup> Mediating institutions are relatively small organizations where moral identity and behavior is formed.<sup>193</sup> Studies indicate that as the size of an organization increases, individual ethical decision-making behavior decreases.<sup>194</sup> Thus, for large multinational corporations, the need for training in relatively small groups at the local level is heightened. To the extent that corporate employees cooperate with one another, it may be because they have internalized trust learned within the organization.<sup>195</sup> Again, this is easier learned through face-to-face, personal interaction.

There are benefits to the organization that adopts these policies and procedures. Global strategic alliances represent a type of competitive weapon. In order to take the best advantage of the

187. Fort & Noone, *supra* note 177, at 536. The relative size the categories the labor force is broken down into, and work structuring and coordination varies by culture. HOFSTEDE, *supra* note 101, at 265.

188. Fort & Noone, *supra* note 177, at 544.

189. See, e.g., David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811 (2001).

190. Fort & Noone, *supra* note 177, at 543-46.

191. Geoffrey Glaser, *Sexes See Harassing Differently* (April 1996), at <http://www.hrstore.com/free/free40f.html> (noting the use of the "M/W/D" (Mother/Wife/Daughter) test to train employees).

192. Callahan et al., *supra* note 16, at 17; HOFSTEDE, *supra* note 101, at 274 (noting that "[a] shared company subculture between people of otherwise different national cultures considerably facilitates communication and motivation.>").

193. See TIMOTHY L. FORT, *ETHICS AND GOVERNANCE: BUSINESS AS MEDIATING INSTITUTION* (2001).

194. Robert C. Ford & Woodrow D. Richardson, *Ethical Decision Making: A Review of the Empirical Literature*, 13 J. BUS. ETHICS 205, 217 (1994).

195. Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1738 (2001).

alliance, organizations must listen to multicultural perspectives.<sup>196</sup> Additionally, firm-specific fairness norms promote efficiency.<sup>197</sup>

Organizations that foster internal reporting and open discussion are likely to find that external reporting will be virtually nonexistent.<sup>198</sup> Problems can be raised and resolved earlier if employees feel free to engage in discussion and dissent. Open communication within the organization has many other organizational benefits as well.<sup>199</sup>

#### IV. CONCLUSION

Stakeholders have the ability to wreak “fatal havoc” in business and the world.<sup>200</sup> This is true of internal stakeholders—employees—as well as external stakeholders, especially with the increased reliance on computers and information.<sup>201</sup> Failure to listen to employees and deal fairly with them can provide conditions that foster disruption and possible havoc. We saw the ability of a few individuals to create debilitating and tragic havoc outside their organizations on September 11.

“Corruption and unethical practices in the workplace are . . . thought to result in declining confidence in major institutions and to contribute to the alienation and anomie experienced in modern society.”<sup>202</sup> MNCs that foster reasonable codes and meaningful reporting procedures can help to defuse disruptive situations. Combining whistleblowing and reporter protection with a code significantly aids in several ways: it shows the company means what it says, it gives employees a way to make sure the organization is legal and ethical, it shows that open communication will be practiced, and it shows that people who speak up will be dealt with fairly.<sup>203</sup>

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196. Parkhe, *supra* note 186, at 598. Parkhe notes that this may be particularly difficult for Japanese companies because of the historically closed nature of Japanese society. *Id.*

197. Robert Cooter & Melvin A. Eisenberg, *Fairness, Character, and Efficiency in Firms*, 149 U. PA. L. REV. 1717 (2001).

198. Callahan et al., *supra* note 16, at 33.

199. For example, to the extent that fairness norms are internalized, efficiency is bolstered. Cooter & Eisenberg, *supra* note 197, at 1717-18. Externally, companies that are seen as weak on transparency may be susceptible to public disapproval. Hess & Dunfee, *supra* note 5, at 607.

200. Fort, *supra* note 2, at 309; Pike, *supra* note 16.

201. Fort, *supra* note 2, at 309-10.

202. Miethe & Rothschild, *supra* note 19, at 322.

203. Fort, *supra* note 2, at 336. “[T]he very commitment to communicate is a validation of human respect and dignity.” Fort cites Lon Fuller as one who argued for communication as the central natural law principle. *Id.* at 359.

MNCs can help in the evolution of a normative global village.<sup>204</sup> They can create conditions that socialize and empower individuals<sup>205</sup> and give them the tools to interact more successfully in their society.<sup>206</sup> To the extent that ideas such as fairness and responsibility for compliance are learned within the company and are then taken externally, organizations have the ability to have an impact far beyond their individual realm.<sup>207</sup> At the same time, exporting the idea of whistleblowing helps promote transparency and good government in larger society.<sup>208</sup> Organizational norms matter most when law is the weakest.<sup>209</sup>

As countries shift in their commercial institutions from a "relational orientation" to a more Western "formal orientation" based on the rule of law,<sup>210</sup> whistleblowing can be a helpful procedure in the transition.<sup>211</sup> It is designed to allow individuals to enforce the rules despite the individual connections of those in power. In the words of Alan Watson, "[i]n most places, at most times, borrowing is the most fruitful source of legal change."<sup>212</sup> Borrowing from the MNCs who set the bar higher can also be a fruitful source of change.

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204. "Individual firm action is a vital component of the ultimate mix of policies and strategies that are likely to make a significant difference in the practice of corrupt payments." Hess & Dunfee, *supra* note 5, at 615.

205. Fort, *supra* note 2, at 331. In addition, the emergence of an information-based society can lead to increased power for individuals vis-à-vis the government. Stoltenberg, *supra* note 15, at 712-13.

206. Fort, *supra* note 2, at 331.

207. *Id.* at 332. Mediating institutions can promote peace by "humanizing the relationships that exist within an organization." *Id.*

208. Giving people a say in the organization's behavior reinforces democratic ideas. Fort & Schipani, *supra* note 3, at 436.

209. John C. Coffee, Jr., *Do Norms Matter? A Cross-Country Evaluation*, 149 U. PA. L. REV. 2151, 2175 (2001).

210. Nichols, *supra* note 1, at 281.

211. Stoltenberg, *supra* note 15, at 725 (noting that "the strong capitalist economy that has emerged recently in South Korea is contributing to the development of an ethical decision pattern similar to that of the Western countries . . .") (quoting John M. Etheredge & Carolyn B. Erdener, *Ethical Decision Patterns in Four Countries: Contrasting Theoretical Perspectives*, in INTERNATIONAL BUSINESS ETHICS: CHALLENGES AND APPROACHES 61 (George Enderle ed., 1999)).

212. Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335 (1996).