

# WHAT WOULD DE GEORGE and THE RABBIS SAY ABOUT SNOWDEN?: A COMPARATIVE BUSINESS ETHICS WHISTLE-BLOWING CASE STUDY

by Robert S. Wiener\*

## INTRODUCTION

Edward Snowden, moral hero or villain? What can we learn from studying his case about the ethical prohibition, permission, or requirement of whistle-blowing?

In this paper, I will analyze Richard De George's widely discussed analysis of whistle-blowing,<sup>1</sup> compare it to the approach of Jewish sources,<sup>2</sup> and apply both to the Snowden story<sup>3</sup> in order to gain enhanced insight into the basic business ethics question of what should one do when they see wrongdoing.

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<sup>1</sup> First presented in his analysis of the Pinto case, see Richard T. De George, *Ethical Responsibilities of Engineers in Large Organizations: The Pinto Case*, 1 BUS. & PROF'L ETHICS J. (1981) 1-14; and since developed in his textbook, RICHARD T. DE GEORGE, BUSINESS ETHICS (7th ed. 2013). Recent published analysis includes W. Michael Hoffman and Mark S. Schwartz, *The Morality of Whistleblowing: A Commentary on Richard T. De George*, 127 J. BUS. ETHICS (2015) 771-781.

<sup>2</sup> Largely selecting from and building on my unpublished paper, included below, Robert S. Wiener, *Blowing the Shofar: A Jewish Business Ethics Analysis of Whistle-Blowing*.

<sup>3</sup> Based primarily on the account in GLENN GREENWALD, NO PLACE TO HIDE: EDWARD SNOWDEN, THE NSA, AND THE U.S. SURVEILLANCE STATE (2014) and the 2015 Academy Award winning documentary, *Citizenfour* (Starz/Anchor Bay 2014) (DVD: release date August 25, 2015).

*For the ALSB conference I will provide a synopsis of the Snowden story, present De George's analysis, then compare and contrast it with the relevant Jewish sources. Finally, I will apply both approaches to the Snowden saga. What follows is predominantly a presentation and analysis of Jewish sources related to what we now call whistle-blowing.*

## BLOWING THE SHOFAR: A JEWISH BUSINESS ETHICS ANALYSIS OF WHISTLE- BLOWING

### INTRODUCTION

If the goal of business ethics is for people and companies to do the right thing in their business dealings, how can we best achieve that objective? Even when we can determine what action is ethical, merely teaching ethical rules may not be enough to get people to act ethically. As John Dewey wrote over 100 years ago, “There is nothing in the nature of ideas *about* morality, of information *about* honesty or purity or kindness which automatically transmutes such ideas into good character or good conduct.”<sup>4</sup> “We need to translate the moral into the conditions and forces of our community life, and into the impulses and habits of the individual. All the rest is mint, anise, and cumin.”<sup>5</sup>

Perhaps we can determine how to act ourselves, what should we do when we see others around us doing wrong?<sup>6</sup> This is a challenging problem and it may help to

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<sup>4</sup> JOHN DEWEY, MORAL PRINCIPLES IN EDUCATION I (1909).

<sup>5</sup> *Id.* at 58.

<sup>6</sup> In this paper I do not discuss how we know the right thing to do. For “observant” Jews answers are found in the *halakhah*.

investigate diverse perspectives for a solution.<sup>7</sup> In this paper I use Jewish wisdom literature<sup>8</sup> developed over thousands of years, including the *Tanakh*,<sup>9</sup> especially the Torah,<sup>10</sup> Biblical commentary, and Talmud,<sup>11</sup> all of which are source material for *halakhah*, Jewish law.<sup>12</sup> According to these texts, the primary reaction to wrongdoing should be a direct response of “rebuking” that gives a wrongdoer the opportunity for the corrective action of *t’shuvah* or repentance.<sup>13</sup> This approach may help to resolve disputes privately without escalation, especially if the onlooker’s perception of wrongdoing is erroneous or if the wrongdoer is behaving badly because they are unaware that their actions are improper. In a workplace, such a corporate culture of constructive criticism may promote better communication, enhanced morale, increased efficiency, reduced legal costs, and a positive perception of the firm in the marketplace. More ethical and legal behavior may even result in greater profitability.

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<sup>7</sup> For example, Confucian ethics has been used to provide guidance in business ethics. Tae Wan Kim, *Confucian Ethics and Labor Rights*. BUS. ETHICS QUARTERLY. Oct. 2014, Vol. 24 Issue 4, p565-594. 30p. And Christian concepts have been used to analyze the marketplace. Kenman L. Wong and Scott B. Rae, BUSINESS FOR THE COMMON GOOD: A CHRISTIAN VISION FOR THE MARKETPLACE (3<sup>rd</sup> ed. 2012); Andrew Gustafson, KENMAN L. WONG AND SCOTT B. RAE’S BUSINESS FOR THE COMMON GOOD: A CHRISTIAN VISION FOR THE MARKETPLACE (2011) (book review), 23 BUS. ETHICS QUARTERLY 145-47 (Jan 2013).

<sup>8</sup> Several books and articles have now been written using Jewish sources to provide insight into business practices. See, Moses Pava (ed.), BUSINESS ETHICS: A JEWISH PERSPECTIVE (1997); Moses Pava, *Developing A Religiously Grounded Business Ethics: A Jewish Perspective*, 8/1 BUS. ETHICS QUARTERLY 65-83 (Jan. 1998); Moses Pava and Aaron Levine (ed.), JEWISH BUSINESS ETHICS: THE FIRM AND ITS STAKEHOLDERS (1999); Moses L. Pava, *The substance of Jewish business ethics*, 17/6 JOURNAL OF BUS. ETHICS 603 (April 15, 1998); Moses Pava, LEADING WITH MEANING: USING COVENANTAL LEADERSHIP TO BUILD A BETTER ORGANIZATION (2003); Moses Pava, JEWISH ETHICS IN A POST-MADOFF WORLD: A CASE FOR OPTIMISM (2011); Levi Brackman and Sam Jaffe, JEWISH WISDOM FOR BUSINESS SUCCESS: LESSONS FOR THE TORAH AND OTHER ANCIENT TEXTS (2013); EDWIN M. EPSTEIN, *Contemporary Jewish Perspectives on Business Ethics: The Contributions of Meir Tamari and Moses L Pava: A Review Essay*, 10/2 BUS. ETHICS QUARTERLY, 523-41 (4/1/2000)

<sup>9</sup> *Tanakh* is Hebrew for the Bible. “Bible. The Hebrew Bible is composed of 3 parts: 1) *Torah* or Pentateuch (q.v.); 2) *Nevi'im* or Prophets...; 3) *Ketuvim* or Hagiographia....” *Id.* at 87.

<sup>10</sup> “Torah (Heb. Lit. ‘teaching,’ ‘doctrine,’ or ‘instruction’), Pentateuch....” *Id.* at 598.

<sup>11</sup> “Talmud (Heb. ‘study’ or ‘learning’). (4) Most commonly, the body of teaching which comprises the commentary and discussions of the amoraim on the Mishna of R. Judah ha-Nasi)....” *Id.* at 585.

<sup>12</sup> “Halakhah (Heb.), legal part of Talmudic and later Jewish literature....” ENCYCLOPEDIA OF JUDAICA 235 (Geoffrey Wigoder ed. 1974).

<sup>13</sup> The Hebrew term for “rebuking” or “reproval” is *hokhe’ach tokhi’ach*. Robert S. Wiener, *Rebuking: A Jewish Alternative to Whistle-Blowing*, 24 N.E.J.L.S. 66 (Fall 2010).

But what if the wrongdoer does not repent and persists even when aware of their wrongdoing? There may be more incentives to continue the wrongdoing than to stop it. Then direct rebuking may be ineffective at best and result in direct retaliation at worst.<sup>14</sup> In such a situation, how about communicating the wrongdoing to a third party, that is, using whistle-blowing as a Plan B?

## I. BLOWING THE WHISTLE

Whistle-blowing,<sup>15</sup> is reporting activities to authorities to punish past and deter future wrongful behavior.<sup>16</sup> The English language has long reflected the prevailing societal attitude toward such an action. Synonyms for whistle-blowing are rat, snitch, fink, inform, squeal, and tattletale,<sup>17</sup> and they are all negative. Why then would anyone do it, especially if it often does not work and may even result in retaliation against the whistleblower?<sup>18</sup> Because it is the right thing to do and we should just acknowledge that “no good deed goes unpunished”?

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<sup>14</sup> But friends and relatives may not be subject to retaliation for one’s protected activity. *Thompson v. N. Am. Stainless LP*, 131 S. Ct. 863 (2011).

<sup>15</sup> The term “whistle-blower” is apparently no longer “Slang” as it was in 1992. “whis·tle·blow·er or whis·tle·blow·er or whistle blow·er n. One who reveals wrongdoing within an organization to the public or to those in positions of authority....” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1960-61 (4th ed. 2006), available at <http://dictionary.reference.com/browse/whistleblowing>; “Whistle blower ... Slang. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 2035 (3d ed. 1992).

<sup>16</sup> To legal authorities if the wrongful actions are illegal. Or to the media as the “whistle-blower Web site WikiLeaks” did. *WikiLeaks, Noam Cohen, Link by Link: Renegade Site, Now Working With the News Media*, N.Y. TIMES, August 1, 2010; WikiLeaks, Times Topics, available at <http://topics.nytimes.com/top/reference/timestopics/organizations/w/wikileaks/index.html>.

<sup>17</sup> The same is true in other cultures, for example, the Spanish term *chota* is used to label one who has committed a betrayal. URBAN DICTIONARY, available at <http://www.urbandictionary.com>.

<sup>18</sup> Therefore it does not necessarily have an advantage over rebuking which may also “provoke” retaliation. Marci Alboher Nusbaum, *Personal Business; Blowing the Whistle: Not for the Fainthearted*, N.Y. TIMES, February 10, 2002, at § 3, 10.

Could it be that whistle-blowing isn't even ethical itself?<sup>19</sup> Some business ethicists think that corporate whistle-blowing raises moral problems of betrayal of confidence, or even a breach of the duty of loyalty to one's employer.<sup>20</sup> Perhaps whistle-blowing there are competing duties and whistle-blowing can be justified as an act of loyalty to the larger community.<sup>21</sup> Whistle-blowing might be effective, creating outside leverage to discourage bad behavior and encourage good behavior. In fact, the threat of whistle-blowing may be even more effective than its actual use.<sup>22</sup>

What do the Jewish sources say we should do if rebuking fails? Blow the whistle?<sup>23</sup>

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<sup>19</sup> An article that addressed the moral issues concerning whistle-blowing is Gene G. James, *Whistle-blowing: Its Moral Justification*, in *ESSENTIALS OF BUSINESS ETHICS* (Peter Madsen & Jay Sfaritz eds., 1990).

<sup>20</sup> Sissela Bok, *Whistleblowing and Professional Responsibility*, 11 N.Y.U. EDUC. Q. 2-7 (1980); NORMAN BOWIE, *BUSINESS ETHICS* (1982); "whistleblowing ... violate(s) a prima facie duty of loyalty to one's employer," Ronald Duska, *Whistleblowing and Employee Loyalty* (1985) in *CONTEMPORARY ISSUES IN BUSINESS ETHICS* 142-46 (Joseph R. Des Jardins & John J. McCall eds., 2d ed. 1990). Jukka Varelius claims that "whistle-blowing merits serious moral consideration, perhaps along the lines already presented by philosophers like De George (2006) and Boatright (2003)." Jukka Varelius, *Is Whistle-blowing Compatible with Employee Loyalty?*, 85 J. BUS. ETHICS 263, 272 (2009). See R.T. De George, *BUSINESS ETHICS* (2006) and J.R. Boatright, *ETHICS AND THE CONDUCT OF BUSINESS* (4<sup>th</sup> ed. 2001).

<sup>21</sup> Some schools, such as the University of Virginia and Duke University, have Honor Codes that require whistle-blowing on cheating fellow students. "I will give prompt written notification to the appropriate faculty member and to the Dean of Trinity College or the Dean of the School of Engineering when I observe academic dishonesty in any course." Duke University Undergraduate Honor Code, GREGORY J. CIZEK, *DETECTING AND PREVENTING CLASSROOM CHEATING: PROMOTING INTEGRITY IN ASSESSMENT* 152 (2003), available at [www.math.duke.edu/undergraduate/Handbook](http://www.math.duke.edu/undergraduate/Handbook).

<sup>22</sup> However, a "mere" threat may still not be ethical itself. "International agreements apparently treat an unauthorized force and the actual use of force as equally grave, yet distinct, wrongs." Romana Sadurska, "Threats of Force" *The American Journal of International Law*, Vol. 82, No. 2, Apr. 1988, p. 239. [www.jstor.org/stable/220318](http://www.jstor.org/stable/220318)

<sup>23</sup> In this paper I include Jewish sources from different periods of Jewish history. Contemporary Jews, whatever their denomination, are largely Rabbinic Jews, rather than Biblical Hebrews. Rabbinic Judaism developed Judaism through interpretation of the verses of the Bible and the writings of prior rabbis. This conversation across the centuries and, at times, millennia, at times appears on a single page as if all the writers and engaged in contemporaneous conversation. At times in this paper I will invite the reader to participate in this interpretive process.

## II. BLOWING THE *SHOFAR*

The Bible and Talmud do not address the issue of whistle-blowing *per se*. This is not surprising. The term whistle-blowing is recent<sup>24</sup> and is most commonly used to refer to the reporting of bad deeds committed by a modern business entity, the corporation,<sup>25</sup> or a modern form of government — and modern is something that the Bible and Talmud are certainly not. Current business ethics research seems to be largely focused not on the propriety or even effectiveness of whistle-blowing, but on profiling who does or does not do it.<sup>26</sup> In this paper, however, I will concentrate on the question of whether or when whistle-blowing is appropriate. And I believe that principles derived from ancient and old Jewish texts can be applied to issues of modern whistle-blowing.

Use of the term whistle-blowing itself may polarize readers who have preconceived ideas as to whether it is a good or bad thing. Therefore, in order to somewhat neutralize<sup>27</sup> the act, I have chosen to coin the term blowing the *shofar*<sup>28</sup> for the purpose of this paper.<sup>29</sup> Indeed, the phrase might even have positive connotations due to the imagery of the blowing of the *shofarot*<sup>30</sup> at a battle at Jericho<sup>31</sup> and the gospel song

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<sup>24</sup> “‘Whistleblowing’ is a new label generated by our increased awareness of the ethical conflicts encountered at work.” Sissela Bok, *Whistleblowing and Professional Responsibility*, 11 N.Y.U. EDUC. Q. 2 (Summer 1980). “Whistle blower” did not appear in HENRY CAMPBELL BLACK, *BLACK’S LAW DICTIONARY* (rev. 4<sup>th</sup> ed. 1968).

<sup>25</sup> In the United States an early case concerning the corporation is the Dartmouth College case, *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (17 U.S.) 518 (1819).

<sup>26</sup> Abhijeet K. Vadera, Ruth V. Aguilera, and Brianna B. Caza, *Making Sense of Whistle-Blowing’s Antecedents: Learning from Research on Identity and Ethics Programs*, 19:4 Bus. Ethics Quarterly 553-86 (Oct. 2009).

<sup>27</sup> If not “positivize.”

<sup>28</sup> “Shofar (Heb.) An animal horn used as musical instrument.... In Temple times used during sacrificial rites and on solemn occasions....” *ENCYCLOPEDIA OF JUDAICA*, *supra* note 3, at 551.

<sup>29</sup> At the risk of being accused of being *kitschy*.

<sup>30</sup> Hebrew plural form of *shofar*.

<sup>31</sup> *Joshua* 6:1-27.

the story inspired.<sup>32</sup> Maimonides,<sup>33</sup> in his encyclopedic legal code, the *Mishneh Torah*,<sup>34</sup> described the purpose of the blast of the *shofar* during Elul, the month of *t'shuvah* leading to the Jewish High Holidays,<sup>35</sup> as follows: "Wake up, wake up, you sleepy heads! Wake up from your sleep, reflect upon your actions, remember your Creator and turn back to Him in Repentance!"<sup>36</sup> Does the blowing of the *shofar* relate only to one's relationship with God or should we awaken one another to our collective moral obligations? This question will be addressed by analyzing several texts exploring, in turn (1) internal reporting – reporting about one member of the "tribe"/group to another member of the "tribe"/group, (2) external reporting – reporting about one member of the group to others outside of the group, (3) *lashon hara* (bad speech), and (4) outsider speech<sup>37</sup> -- truthful speech about an "outsider" to an outsider.

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<sup>32</sup> "Joshua Fit (Fought) the Battle of Jericho," sung by Paul Robeson and others, *available at* <http://ctl.du.edu/spirituals/Freedom/source.cfm>.

<sup>33</sup> "Maimonides, Moses (Moses ben Maimon; Rambam; 1135-1204), outstanding rabbinic authority, codifier, philosopher." *ENCYCLOPEDIA OF JUDAICA*, *supra* note 3, at 393.

<sup>34</sup> "[Maimonides's] two greatest works were encyclopedic legal code *Mishneh Torah* and philosophical *Guide of the Perplexed*." *Id.*

<sup>35</sup> Rosh Hashanah and Yom Kippur.

<sup>36</sup> MAIMONIDES, *MISHNEH TORAH, HILCHOT T'SHUVAH, LAWS OF REPENTANCE*, 3:4. "[A] kind of moral alarm clock." See Zoë Klein, *Reinterpreting the Dream*, in *REFORM VOICES OF TORAH*, September 10, 2007, *available at* <http://urj.org/Articles/>.

<sup>37</sup> [find a better term]

### *A. Internal Reporting*

In the Torah's book of Genesis<sup>38</sup> we read that Joseph reported his brothers' wrongdoing.

At seventeen years of age, Joseph tended the flocks with his brothers, as a helper to the sons of his father's wives Bilhah and Zilpah. And Joseph brought bad reports of them to their father. Now Israel loved Joseph best of all his sons, for he was the child of his old age.... And when his brothers saw that their father loved him more than any of his brothers, they hated him....<sup>39</sup>

The author does not tell us what the bad reports were.<sup>40</sup> Nor do we know Joseph's motivation, for example, whether he wanted his brothers' actions to stop or whether it was to gain favor with their father, Israel.<sup>41</sup> Nor does their father express approval or disapproval of Joseph's behavior. The text states that Israel loved Joseph best of all. This suggests that any disapproval Israel had for Joseph's whistle-blowing did not affect his love for Joseph, but the Israel, as a father, took no parental action to punish or to reward Joseph for tattling on his brothers and therefore did not directly teach Joseph values, positive or negative, concerning whistle-blowing.

Joseph might have interpreted Israel's silence as passive approval of Joseph's actions. And the words "Now Israel loved Joseph best of all his sons"<sup>42</sup> immediately following Joseph's reporting may suggest Israel's approval of Joseph's bad reports whether they were solicited or not. Perhaps Israel had even sent Joseph out to observe and to report back on his brothers. Maybe the father knew of his sons' propensities and wanted reliable feedback in order to be a good parent to them and to protect his financial interests.

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<sup>38</sup> "Genesis, Book of, (Heb. Bereshit, "in the beginning," from its first word), first book of Pentateuch." ENCYCLOPEDIA OF JUDAICA, *supra* note 3, at 207.

<sup>39</sup> *Genesis* 37:2-4 (NJPS).

<sup>40</sup> "The word *dibatam* always means in O.F. *parleriz*; Engl. *Gossip*: speak bad about them he told to his father." PENTATEUCH WITH RASHI'S COMMENTARY 180 (M. Rosenbaum & A.M. Silbermann trans. 1929) [hereinafter RASHI].

<sup>41</sup> "Israel, name of honor given to Jacob after struggle with angel (*Gen.* 32:22 f.)." ENCYCLOPEDIA OF JUDAICA, *supra* note 3, at 285.

<sup>42</sup> *Genesis* 37:4 (NJPS).



Joseph's brothers' hatred toward him is attributed to the favoritism of Israel rather than to Joseph's snitching;<sup>43</sup> but, apparently operating under the assumption that nothing in the Bible happens without a good reason, Rashi,<sup>44</sup> the best-known medieval Jewish Biblical commentator, sees implied divine disapproval of Joseph's actions by his subsequent history. Rashi explains that the bad things that happened to Joseph later — being sold into slavery<sup>45</sup> and imprisoned<sup>46</sup> -- resulted from his earlier tale bearing.<sup>47</sup>

Another understanding of these verses is that their proximity is purely coincidental — that Israel did love Joseph better, but not because of his tattling. In fact, a rationale for Israel's love is stated immediately after, “for he (Joseph) was the child of his old age (Israel).”<sup>48</sup> But this reading is problematic because, as Rashi notes, Benjamin and not Joseph was Israel's youngest son, the child of his oldest age.<sup>49</sup> What other reason could there be for Israel loving Joseph best? Rashi interprets *ben z'kunim*, “of his old age”, as meaning that Joseph was “a child with the mature wisdom of an older person.”<sup>50</sup>

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<sup>43</sup> “And when his brothers saw that their father loved him more than any of his brothers, they hated him so that they could not speak a friendly word to him.” *Genesis* 37:4 (NJPS).

<sup>44</sup> Rashi “(Solomon ben Isaac; 1040-1105), leading commentator on Bible and Talmud.” *ENCYCLOPEDIA OF JUDAICA*, *supra* note 3, at 499.

<sup>45</sup> *Genesis* 37:28.

<sup>46</sup> *Genesis* 39:20.

<sup>47</sup> “Their evil report -- whatever he saw wrong in his brothers, the sons of Leah, he reported to his father: that they used to eat flesh cut off from a living animal, that they treated the sons of the handmaids with contempt, calling them slaves, and that they were suspected of living in an immoral manner. With three such similar matters he was therefore punished. In consequence of his having stated that they used to eat flesh cut off from a living animal Scripture states, (v.31) “And they slew a he-goat” after they had sold him and they did not eat its flesh whilst the animal was still living. And because of the slander which he related about them that they called their brothers slaves -- *Ps.* 105.17 “Joseph was sold for a slave.” And because he charged them with immorality (39.7) “his master's wife cast her eyes upon him etc.” (GENESIS RABBA 84) RASHI Vol. 3, 87b; 180. Note that one of these acts, eating limb torn from animal while living, is even a violation of a Noachide Law.” *ENCYCLOPEDIA OF JUDAICA*, *supra* note 3, at 455.

<sup>48</sup> *Genesis* 37:4 (NJPS).

<sup>49</sup> “3. child of his old age. Benjamin was in fact younger, causing Rashi to understand these words (*ben z'kunim*) as ‘a child with the mature wisdom of an older person.’” *ETZ HAYIM: TORAH AND COMMENTARY* 227 (2001) [hereinafter *ETZ HAYIM*]. Israel may have loved Joseph better because he was the first born, a favored position, of Rachel, his favored wife; but there is no textual basis for that interpretation here.

<sup>50</sup> ““The son of his old age -- because he was a wise son to him” ... As the Talmud often takes *zaken* to be an abbreviation of *zeh shekanah chakhmah* one who as acquired wisdom.” RASHI Vol. 3, 87b.

What had Joseph done to reflect mature wisdom? Could it be it was Joseph's bringing of bad reports about his older brothers to his father? Was this the responsible thing to do even though it would not curry favor with his brothers? But this interpretation is not consistent with Rashi's disapproval of Joseph's reports. Is Rashi's disapproval limited to Joseph or does it establish a broader principle against tattling (1) about a family/group member to another family member as in this story? or (2) about a group member, whether within or beyond one's own family and (3) does it apply only to telling tales about a member of one's own family<sup>51</sup> or (5) to telling tales about anyone, that is, non-group members as well?

The following *midrash*<sup>52</sup> suggests that the rabbinic principle against bearing tales is a general opposition to reporting wrongdoing.

When R. Yose ben Halafta<sup>53</sup> was a boy, he used to play with other boys. A man saw him and called out, "Your father should be told that [instead of studying, you waste your time] playing with the boys." R. Yose answered, "What is that to you? If you tell my father, he will only spank me, whereas you will accustom your tongue to speaking slander<sup>54</sup>." <sup>55</sup>

The argument here against whistle-blowing relies upon an appeal to one's self-interest observing that any advantage to be gained by reporting<sup>56</sup> would be more than

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<sup>51</sup> Such as Bernard Madoff's sons turning in their own father. Alex Berenson & Diana B. Henriques, *Inquiry Finds No Signs Family Aided Madoff*, N.Y. TIMES, December 15, 2008; although such action may have significant consequences. Diana B. Henriques & Al Baker, *A Madoff Son Hangs Himself on Father's Arrest Anniversary*, N.Y. TIMES, December 11, 2010.

<sup>52</sup> "Midrash (Heb.), method of interpreting scripture to ... bring out lessons through stories or homiletics (Midrash Aggadah)." ENCYCLOPEDIA OF JUDAICA, *supra* note 3, at 415.

<sup>53</sup> "Yose ben Halafta (2nd c.) tanna, usually called simply R. Yose; pupil of R. Akiva." *Id.* at 640.

<sup>54</sup> Slander is used here to mean the bringing of a bad report that would hurt Yose's reputation with his father. This was also an older legal definition of slander; "Slander has been variously defined, but tersely stated it may be said to be "words falsely spoken which are injurious to the reputation of another." [BOUVIER'S DICTIONARY OF LAW]." *Butler v. Freyman*, 260 S.W. 523, 525 (Mo. 1924).

<sup>55</sup> Midrash Tehillim 50:3, 1 Yale Judaica Series 470 (1959), THE BOOK OF LEGENDS: SEFER HA-AGGADAH: LEGENDS FROM THE TALMUD AND MIDRASH 254:235 (Hayim Nahman Bialik ed. & Yehoshua Hana Ravnitzky trans. 1992).

<sup>56</sup> Note that this midrash puts into question corporal punishment as an effective parental method of behavior modification. Cf. "He who spares his rod hates his son." *Proverbs* 13:24 (NJPS).

outweighed by negative consequences to the bearer of tales.<sup>57</sup> However, no direct support or proof text from the Torah is given for the rabbinic position against tale bearing. Perhaps the rabbis thought that the reason is obvious. What might it be? That Judaism believes that one should mind one's own business? Or that rebuking is preferable<sup>58</sup> and that whistle-blowing is generally improper? This is possible, but even that principle may not answer the question of whether whistle-blowing is ever ethical.

The characters in the story above of R. Yose ben Halafta are all Jews. Is the resulting principle against tale bearing limited to bearing tales about other Jews – in this case to another Jew? Such reporting was of great concern to the rabbis, especially reporting on Jews to non-Jewish authorities, and through most of the past two thousand years Jews lived in countries governed by non-Jewish authorities, similar to the experience of the Hebrews in Biblical Egypt. The later rabbis posed the question as they lived in their own diaspora, how did the Hebrews survive as a people, according to Biblical tradition, 430 years in a foreign land. By understanding the answer to this question, perhaps the later Jews could learn and apply the secret themselves. Here is a *midrash* as to the Hebrew's "secret sauce" of survival in the Egypt of the Bible.

R. Eliezer ha-Kappar<sup>59</sup> says: Did not Israel [in Egypt] possess four virtues than which nothing in the whole world is more worthy: that they were above suspicion in regard to chastity and in regard to tale bearing [*lashon hara*], that they did not change their names and that they did not change their language.<sup>60</sup>

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<sup>57</sup> Rabbi Yose's claim is that unethical behavior (speaking slander) is habit forming. Perhaps ethical behavior can also become habitual.

<sup>58</sup> See supra note 7.

<sup>59</sup> According to the JEWISH ENCYCLOPEDIA (1906), Eliezer ha-Kappar lived in the second century, available at <http://www.jewishencyclopedia.com/articles/5543-eleazar-eliezer-ha-kappar>

<sup>60</sup> Mekilta de-Rabbi Ishmael; critical edition on the basis of the manuscripts and early editions with an English translations, introduction and notes, by Jacob Z. Lauterbach, (1933-1935), Chapter 5 (Ex. 12.6), Vol. 1, p.34.

The connection between tale bearing and informing is underscored in later commentary.

And how do we know that they were above suspicion in regard to tale bearing and that they loved one another? It is said: “But every woman shall ask of her neighbour,” etc. (Ex. 3.22). They had this order for twelve months, and you did not find that one of them informed [*shehalshin*] against the other.<sup>61</sup>

The emphasis placed against reporting a fellow Hebrew to non-Hebrew authorities may reflect the concern of R. Eliezer ha-Kappar in his own time<sup>62</sup> for Jews reporting their fellow Jews to non-Jewish authorities.<sup>63</sup> This concern about reporting one another to outsiders can also be clearly seen in one of the nineteen blessings of the major daily prayer, the Shemoneh Esrei,<sup>64</sup> “And for slanderers [*V’lamalshinim*] let there be no hope.”<sup>65</sup>

Perhaps the principle that tale bearing is bad should be extended to telling tales about all others who might be seen as “brothers”. After all, in Psalm 133 we read “*Hine*

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<sup>61</sup> *Id.*, at p.35.

<sup>62</sup> See supra note 56. The second century.

<sup>63</sup> This is a contentious issue in communities, such as Brooklyn, N.Y., where Jews are called upon by the Brooklyn District Attorney’s office to report on other Jews accused of sexual molestation of minors. Resistance is often based on the claim that this is an internal (“family”) matter that should be resolved by a Jewish court (*beth din*). It also raises the question of the appropriateness of a Jew providing evidence about another Jew to non-Jewish authorities in order to enable the prosecution of the fellow Jew in exchange for a plea bargain for themselves. These, reportedly, are the facts of the expected testimony of Dr. Robert Taub against Sheldon Silver, Speaker of the New York State Assembly. See The New York Times, January 24, 2015.

<sup>64</sup> “*Shemoneh Esreh* (Heb. “eighteen”), popular name for Amidah prayer which originally consisted of 18 blessings.” ENCYCLOPEDIA OF JUDAICA, supra note 3, at 548.

<sup>65</sup> “*V’lamalshinim* And for slanderers let there be no hope; and may all wickedness perish in an instant; and may all Your enemies be cut down speedily. May You speedily uproot, smash, cast down, and humble the wanton sinners – speedily in our days. Blessed are You, Hashem, Who breaks enemies and humbles wanton sinners. As explained, “*Vlamalshinim* -- And for slanderers. Chronologically, this is the nineteenth blessing of *Shemoneh Esrei*; it was instituted in Yavneh during the tenure of Rabban Gamliel II as Nassi of Israel, some time after the destruction of the Second Temple in 70 C.E. The blessing was composed in response to the threats of such heretical Jewish sects as the Sadducees, Boethusians, Essenes, and the early Christians. They tried to lead Jews astray through example and persuasion, and they used their political power to oppress observant Jews and to slander them to the anti-Semitic Roman government. In this atmosphere, Rabban Gamliel felt the need to compose a prayer against the heretics and slanderers, and to incorporate it in the *Shemoneh Esrei* so that the populace would be aware of the danger. Despite the disappearance from within Israel of the particular sects against whom it was directed, it is always relevant, because there are still non-believers and heretics who endanger the spiritual continuity of Israel (Yaaros D’vash). THE COMPLETE ARTSCROLL SIDDUR 106 (Hebrew) – 107 (English)(3d ed. 1995).

*ma tov umahnaim, shevet ahim gam yahad,*”<sup>66</sup> “How good and how pleasant it is that brothers dwell together.”<sup>67</sup> This passage seems to apply beyond one’s nuclear family, at least to the *b’nei Israel*<sup>68</sup> of the Bible, if not to all others as human beings. The Biblical commentators do not address these questions interpreting the Joseph story, however elsewhere the rabbis of the Talmud do discuss Biblical verses relevant to the issue of the propriety of whistle-blowing.

### B. *Lashon Hara* (Bad Speech)<sup>69</sup>

The Jewish legal rule against gossip or, literally, bad speech, *lashon hara*,<sup>70</sup> is based on a commandment<sup>71</sup> from the Torah, “You must not carry false rumors.”<sup>72</sup> This limitation on freedom of speech extends to the listener as well as to the speaker.<sup>73</sup> A later Torah verse states the commandment as “Thou shalt not go up and down as a talebearer among thy people...”<sup>74</sup> or “Do not deal basely with your countrymen”<sup>75</sup> and is interpreted to establish

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<sup>66</sup> Transliteration of original Hebrew text.

<sup>67</sup> NJPS.

<sup>68</sup> Sons of Israel (Jacob), the Hebrew people.

<sup>69</sup> *Lashon hara* literally means bad speech.

<sup>70</sup> NACHUM AMSEL, THE JEWISH ENCYCLOPEDIA OF MORAL AND ETHICAL ISSUES 279-80 (1994).

<sup>71</sup> The Hebrew term for commandment is *mitzvah*. “Mitzvah (Heb.), ‘precept’ or religious duty....

Traditionally there are 613 precepts – 248 positive and 365 prohibitive.” ENCYCLOPEDIA OF JUDAICA, *supra* note 3, at 133.

<sup>72</sup> *Exodus* 23:1 (NJPS).

<sup>73</sup> “1. You must not carry. A midrash interprets this to prohibit receiving as well as spreading false and damaging rumors. Even to listen to such a rumor is to participate in its circulation and thereby participate in hurting another human being.” ETZ HAYIM 470.

<sup>74</sup> *Leviticus* 19:16 (OJPS, Old Jewish Publication Society). “This translation is preferred by Rashbam, ‘Rather, do not “go up and down as a talebearer.”’” THE COMMENTATORS’ BIBLE: THE JPS MIQRA’OT GEDOLOT, LEVITICUS 148 (Michael Carasik ed. & trans. 2009) [hereinafter THE COMMENTATORS’ BIBLE: LEVITICUS]; Samuel ben Meir (Rashbam; c. 1080-c. 1174), French biblical, talmudic commentator and tosafist; grandson of Rashi. His Pentateuch commentary has been frequently printed and is characterized by lucidity.” ENCYCLOPEDIA OF JUDAICA, *supra* note 3, at 528.

<sup>75</sup> *Leviticus* 19:16. “Do not deal basely with your countrymen.” “Literally, “Do not act as a merchant toward your own kinsmen.” A traveling merchant has fairly easy access to secret information and gossip. Here, no one should traffic in such information.” Commentary on *Leviticus* 19:16. ETZ HAYIM 696. Rashi interprets the initial passage “Rather, ‘Thou shalt not go up and down as a talebearer among thy people’ (OJPS).” Perhaps this would provide the basis for analysis of trading in insider information, especially since the following passage is “Do not profit by the blood of your fellow.” *Leviticus* 19:16 (NJPS).

an even broader prohibition.<sup>76</sup> This principle against tale bearing goes beyond the Anglo-American common law tort of defamation<sup>77</sup> in that truthfulness is not a defense.<sup>78</sup> As Gersonides<sup>79</sup> says, “Such tale bearing is not excused by the tale being true, if the teller’s purpose is to spark hatred and rivalry.”<sup>80</sup> In fact, the rabbinic ruling against this speech includes not only a ban against speaking bad things, but also against saying nice things about another because that raises the opportunity for others to speak ill of that person or of others by comparison.<sup>81</sup>

Concern is also raised by the ease,<sup>82</sup> rapidity, and irreversibility of distribution of such information.<sup>83</sup> The relationship of tale bearing to business is clear in the commentary of Ibn Ezra<sup>84</sup> who compares the transfer of words with the trading of goods.<sup>85</sup>

The commandment of *lashon hara*, the negative duty not to engage in bad speech, seems to conflict with the commandment of *hokhe’ach tokhi’ach*, the positive duty to

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<sup>76</sup> NACHUM AMSEL, THE JEWISH ENCYCLOPEDIA OF MORAL AND ETHICAL ISSUES 272-75 (1994).

<sup>77</sup> “1. communication to third parties of false statements about a person that injure the reputation of or deter others from associating with that person.” MERRIAM-WEBSTER’S DICTIONARY OF LAW (1996), available at <http://dictionary.reference.com/browse/defamation>.

<sup>78</sup> “Under modern legal and constitutional concepts, slander is limited to false remarks inasmuch as truth is an absolute defense to an action for slander.” STEVEN H. GIFIS, LAW DICTIONARY 445 (2d ed. 1984).

<sup>79</sup> “Levi ben Gershom (Ralbag, Gersonides; 1288-1344), mathematician, astronomer, philosopher, biblical commentator in Orange.” ENCYCLOPEDIA OF JUDAICA, *supra* note 3, at 370.

<sup>80</sup> Gersonides, THE COMMENTATORS’ BIBLE: LEVITICUS 149 .

<sup>81</sup> THE BOOK OF LEGENDS: SEFER HA-AGGADAH: LEGENDS FROM THE TALMUD AND MIDRASH 699:96 (Hayim Nahman Bialik ed. & Yehoshua Hana Ravnitzky trans. 1992).

<sup>82</sup> “Do not go back and forth from town to town carrying evil reports from one to another.” THE COMMENTATORS’ BIBLE: LEVITICUS 148.

<sup>83</sup> And the difficulty of correcting misinformation. See the midrash of the feather pillow. Marcia Lane, *The Gossip*, in SPINNING TALES, WEAVING HOPE: STORIES, STORYTELLING AND ACTIVITIES FOR PEACE, JUSTICE AND THE ENVIRONMENT (ED BRODY ET AL. EDS., 2002). Repeated in the film DOUBT (Miramax Films 2008).

<sup>84</sup> “Ibn Ezra, Abraham (1089-1164), Spanish poet, grammarian, biblical commentator, philosopher, astronomer, physician.... his Bible commentaries excel in depth and clarity of thought....” ENCYCLOPEDIA OF JUDAICA, *supra* note 3, at 276.

<sup>85</sup> “16 Do not deal basely with your countrymen. ‘Rather, “Thou shalt not go up and down as a talebearer” (OJPS).’ The Hebrew word literally refers to commerce: ‘They shall plunder your wealth and loot your merchandise’ (*Ezek. 26:12*); ‘all the powders of the merchant (*Song of Songs 3:6*). Just as the merchant buys from this one and sells to that one, so a slanderer tells this one what he heard from that one.’” THE COMMENTATORS’ BIBLE: LEVITICUS 148.

rebuke someone for their wrongdoing.<sup>86</sup> However the two principles can be reconciled by observing that only face-to-face, private, two party rebuking is permitted, and in fact required under *hokhe'ach tokhi'ach*, but communication to a third party that might affect another's reputation is prohibited under *lashon hara*.

Is whistle-blowing, the reporting of wrongdoing to a third party, therefore, always prohibited as *lashon hara*? To answer this question we must consider yet another commandment, a positive commandment in the same verse as *lashon hara*, “neither shalt thou stand idly by the blood of thy neighbor.”<sup>87</sup> What is the relationship between the *positive* (double negative) duty not to stand idly by and the negative duty of *lashon hara*? It is possible to interpret this commandment either (1) as unrelated to the preceding negative commandment, “Thou shalt not go up and down as a talebearer among thy people,” (2) in support of it as an example, explanation, or as justification for it, or (3) as an exception to it.

Or these two commandments may be unrelated. This seems to be the understanding of Rashi who chooses a literal or *peshat* interpretation of the second phrase.<sup>88</sup> “Rather, ‘neither shalt thou stand idly by’.<sup>89</sup> You may not stand and watch him die if there is a possibility that you might be able to save him – for example, if someone is drowning, or being attacked by a wild animal or a robber.”<sup>90</sup> The commandment in Jewish rabbinic law to act to prevent harm to others contrasts with Anglo-American tort

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<sup>86</sup> The principle of *hokhe'ach tokhi'ach* appears in *Leviticus* 19:16, the verse immediately following the verse used to establish the principle of *lashon hara*.

<sup>87</sup> *Lo ta'amod al dam rey'echa. Leviticus* 19:16 (OJPS). Alternatively translated as, “Do not profit by the blood of your fellow.” *Etz Hayim*.

<sup>88</sup> “*Peshat*, the literal meaning of a text (as opposed to *derash*, the homiletical interpretation.”

ENCYCLOPEDIA OF JUDAICA, *supra* note 3, at 476. See BRITANNICA ONLINE ENCYCLOPEDIA, available at <http://www.britannica.com/EBchecked/topic/453371/peshat>.

<sup>89</sup> OJPS.

<sup>90</sup> “Neither shalt thou stand against the blood of thy fellow” is interpreted as a duty to rescue. RASHI Vol. 3, 87b.

law where there is no such duty to rescue.<sup>91</sup> Rashbam makes explicit the extent to which one may act to aid another.<sup>92</sup> “Rather, do not ‘stand’ idly by.”<sup>93</sup> For it is permissible to save him even at the cost of his pursuer’s life.”<sup>94</sup> Thus, Rashi and Rashbam do not draw a connection between the first two phrases of this verse. The Talmud puts it this way,

Our Rabbis taught a Baraita<sup>95</sup> which offers a Biblical source for the law recorded in our Mishna<sup>96</sup> “From where do I know that if someone is pursuing another person with the manifest intent to kill him, one has the right and the duty to save the victim, even by killing the pursuer? This is derived from the verse that states ‘You shall not stand idly by the blood of your neighbor.’<sup>97,98</sup>

Jewish Biblical commentators assume that since the Torah is divine and God omits needless words<sup>99</sup> its meaning can be better understood by making connections among its phrases, especially those within the same verse.<sup>100</sup> Therefore it is not surprising that several commentators draw a connection between these two commandments. They

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<sup>91</sup> THE COMMENTATORS’ BIBLE: LEVITICUS 149.

<sup>92</sup> This distinguishes Jewish rabbinic law from Anglo-American tort law in which there is no duty to rescue. THANE ROSENBAUM, *The Non-Duty to Rescue Under American Law*, in THE MYTH OF MORAL JUSTICE 247 (2004).

<sup>93</sup> OJPS.

<sup>94</sup> Rashbam. THE COMMENTATORS’ BIBLE: LEVITICUS 149.

<sup>95</sup> “Baraita (pl. Beraitot; Aramaic, ‘outside’), statement of tanna not found in Mishnah. Term covers every halakhah, halakhic Midrash, and historical or aggadic tractate not included in Mishnah as compiled by Judah ha-Nasi.” ENCYCLOPEDIA OF JUDAICA, *supra* note 3, at 61.

<sup>96</sup> “Mishnah (Hebrew), legal codification of basic Jewish law; redacted and arranged by R. Judah ha-Nasi c.200 C.E. Contains basic Oral Law transmitted throughout generations. Nucleus of all halakhah and much aggadah, preserved in Talmud....” *Id.* at 419.

<sup>97</sup> *Leviticus* 19:16.

<sup>98</sup> “From where do I know that if someone sees another person drowning in a river, or being dragged away by a wild beast, or being attacked by bandits, he is obligated to save him? This is derived from the verse that states: ‘You shall not stand idly by the blood of your neighbor.’” THE TALMUD, (HE: TALMUD BAVLI) THE STEINSALTZ EDITION, VOL. 19, PART V, TRACTATE SANHEDRIN 73A, Gemara: Translation and Commentary 60-61 (Adin Steinsaltz, commentary 1999). “The Halakhah (Jewish law) is ‘If someone was pursuing another person with the manifest intent to kill him, everybody is obligated to save the pursued party, even by taking the pursuer’s life.’ (Rambam, Sefer Nezikin, Hilkhhot Rotzea’ah 1:6; Shulhan Arukh Hoshen Mispat 425:1:3)” *Supra* at 60?.

<sup>99</sup> As though God follows “Elementary Principles of Composition 17. Omit needless words.” WILLIAM STRUNK & E.B. WHITE, *ELEMENTS OF STYLE* (4<sup>th</sup> ed. 2000).

<sup>100</sup> The argument for a connection between the two phrases would be strengthened by the conjunction “v” which might be translated in Biblical Hebrew as either “and” or “but” – but the same observation might be raised against use of the second phrase as an example in support of the first or as an exception.



observe that “publication”<sup>101</sup> of harmful communications may result in physical retaliation against the “slanderer”. Ibn Ezra says, “Rather, ‘do not take a stand against the blood of your fellow’ – do not conspire with violent men against him. It is obvious that many people have been murdered and otherwise killed on account of tale bearing. For proof, read where Doeg the Edomite rats on David, telling Saul where to find him with the result that an entire town is wiped out.”<sup>102</sup> In other words, Ibn Ezra learns from the second phrase that the prohibition against tale bearing is intended to avoid its possible serious consequences. Bekhor Shor<sup>103</sup> agrees, interpreting the second phrase as a result of failure to follow the first commandment. “If you do ‘go up and down as a talebearer’ (as this really means), you will ‘stand idly by the blood of your neighbor’ – if you tell a man that So-and-So is slandering him, he may well kill him. If the commandment not to ‘stand idly by’ were introduced with *and*, I would understand that it was a separate commandment; as written, it is clearly a result of violating the commandment against tale bearing [and, therefore, part of the same, single commandment].”<sup>104</sup>

However, the second commandment may establish an important exception to the rule against tale bearing; that although the general principle is not to bear tales, one may, indeed must act when failure to do so might result in material harm. For example, if someone threatens to harm another, speech that would otherwise constitute prohibited

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<sup>101</sup> “Publication is the act of offering something for the general public to inspect or scrutinize.” WEST’S ENCYCLOPEDIA OF AMERICAN LAW (2d ed. 2008), available at <http://www.legal-dictionary.thefreedictionary.com/publication>.

<sup>102</sup> I Samuel 22. See Ibn Ezra, THE COMMENTATORS’ BIBLE: LEVITICUS 148-49.

<sup>103</sup> “Bekhor Shor, Joseph ben Isaac (12<sup>th</sup> c.), N. French exegete, tosafist, poet. His commentary on Pentateuch is in spirit of literal rational interpretation.” ENCYCLOPEDIA OF JUDAICA, *supra* note 3, at 70.

<sup>104</sup> Bekhor Shor. THE COMMENTATORS’ BIBLE: LEVITICUS 148-49. Bekhor Shor argues that inclusion of the Hebrew word “and”, the letter vav, would indicate separate rather than connected ideas, however in Biblical Hebrew a vav sometimes means “but” and would signal a connected rather than an unconnected commandment, albeit one distinguished from the first.

*lashon hara*, communication of the threat to the threatened party so they can protect themselves may be permitted. Indeed, this commandment may even include a duty to speak out.<sup>105</sup> The fact that the commandment in the very next verse is to act through speech to “rebuke” or “reprove” your neighbor/kinsman<sup>106</sup> supports this interpretation.<sup>107</sup>

If there is a limited commandment to “blow the *shofar*” under the principle of a duty to rescue, when does it apply so that one obligated to speak out? To speak out only about one’s immediate family to one’s immediate family as Joseph did?<sup>108</sup> Or does the Hebrew term for neighbor/kinsman here, *ra’acha*, apply to other *b’nei Israel*, sons of Israel, or even to all human beings? Whatever *ra’acha* might have meant in the time of the writing of the Torah, Judaism<sup>109</sup> came to interpret *ra’acha* as including all people. The phrase *v’ahavta l’ra’acha kamocho*, “Love your fellow as yourself,” appears only two verses later.<sup>110</sup> The prominent Talmudic rabbi Hillel,<sup>111</sup> when asked by a non-Jew for the meaning of the Torah in a single sentence referred to this passage as a kind of Golden Rule with general application.<sup>112</sup> In fact, the principle of *tikkun olam*,<sup>113</sup> the duty

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<sup>105</sup> Consider the duty of a psychologist to disclose confidential patient communications when they constitute a credible threat to another.

<sup>106</sup> *Leviticus* 19:17. “Rebuke” in OJPS and “reprove” in NJPS translations.

<sup>107</sup> Although no rabbinic Biblical commentator seems to have suggested this interpretation.

<sup>108</sup> But Joseph’s speech is criticized by Jewish Biblical commentators, perhaps because his reports did not rise to the necessary significance.

<sup>109</sup> That is rabbinic Judaism as it has developed through the period of the Talmud and beyond.

<sup>110</sup> *Exodus* 16:18.

<sup>111</sup> “Hillel (the Elder; 1<sup>st</sup> c. B.C.E.–1<sup>st</sup> c. C.E.), greatest sage of Second Temple period; founder of school of Bet Hillel (q.v.), pres. Of Sanhedrin, and ancestor of dynasty of patriarchs which held office until 5<sup>th</sup> c.; b. Babylonia, settled in erez Israel. Noted for wisdom, humility, and teaching of leniency (which contrasted with severity of his colleague Shammai). Instituted *prosbul*; laid down seven rules of Bible interpretation; author of several ethical religious teachings.....” *ENCYCLOPEDIA OF JUDAICA*, *supra* note 3, at 258.

<sup>112</sup> “When Hillel was asked by a gentile to summarize the Torah in one sentence, he offered a version of this: ‘What is distasteful to you, don’t do to another person. The rest is commentary; now go study the commentary’ [Babylonian Talmud *Shabbat* 31a].” *Commentary on Exodus 16:18*, ETZ HAYIM 697.

<sup>113</sup> The principle of *tikkun olam* is expressed at the end of the Aleinu prayer. “*l’takeinn olam b’malchut Sha-dai. L’takayn olam* perfect the world (Establishing the Kingdom of God on earth).” REUVEN HAMMER,

of Jews to act to perfect the world, may be relevant here. *Tikkun olam* might require that Jews report the wrongdoing not only of Jews to Jews, but also of any person whose actions work against perfecting the world to anyone who may be able to ethically move us closer to that goal.

Perhaps the basic test as to one's duty to speak out and whistle-blow, despite the principle against *lashon hara*, is the reference to "blood," that one should communicate another's words only if "your neighbor's blood" may be spilled as a result of your inaction. In other words, speak out when the consequences of not doing so are significant, such as causing the loss of "blood," although not necessarily limited to physical injury.

The verse ends with "I am the LORD."<sup>114</sup> This may provide authority for the preceding commandments. Rashi interprets its inclusion as incentive beyond that provided by human legal authorities for following these directives, "I [God] can be relied on to grant reward and to inflict punishment."<sup>115</sup> Ibn Ezra assures those who think they can get away with sin through subterfuge that "I [God] am aware of what you do in secret."<sup>116</sup> Both interpretations reinforce the importance of this commandment to not stand idly by the blood of your neighbor/kinsman.

### *C. External Reporting*

An early Moses story implies reporting on a fellow-Hebrew to non-Hebrews, the secular Egyptian society. "He [Moses] saw an Egyptian beating a Hebrew, one of his kinsmen

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OR HADASH: A COMMENTARY ON SIDDUR SIM SHALOM FOR SHABBAT AND FESTIVALS 182-83 (2003). See NATHAN J. DIAMENT, *TIKKUN OLAM: SOCIAL RESPONSIBILITY IN JEWISH THOUGHT AND LAW* (1997).

<sup>114</sup> translation? THE COMMENTATORS' BIBLE: LEVITICUS 148.

<sup>115</sup> *Id.* at 149. translation?

<sup>116</sup> Ibn Ezra. *Id.*

He struck down the Egyptian and hid him in the sand.” When Moses tries to intercede in a dispute between two Hebrews, one retorted “Who made you chief and ruler over us?”<sup>117</sup> Once Moses hears this, he deduces (correctly, it seems<sup>118</sup>), that his fellow-Hebrew plans to report on him to the non-Hebrew authorities.

Another Torah story relevant to whistle-blowing is the scouting of Canaan.<sup>119</sup> “Moses, by the LORD’S command”<sup>120</sup> selected twelve chieftains to scout the land and its inhabitants. Ten of the twelve scouts included in their report that they were too weak to attack.<sup>121</sup> Eventually, the LORD got the LORD’S way. The Hebrews attacked and conquered Canaan, but the ten scouts “died of plague, by the will of the LORD.”<sup>122</sup>

Is the lesson not to ignore the LORD’S commands? Or is it not to include in a report to your manager qualitative evaluation when you were only asked for quantitative information? Is the report itself an evil report? Or is there some other principle to be learned?

The Hebrew word *dibah*,<sup>123</sup> used for the report of the ten scouts, is the same word used to describe Joseph’s report to his father, however here the adjective “bad” is omitted.<sup>124</sup> Why then are the scouts punished for their report if it is not a “bad report”? Is their report as to the nature of the land and its inhabitants untrue? Several commentators say that it was true,<sup>125</sup> although others say that the word *dibah* is negative here even

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<sup>117</sup> Exodus 3:11-15. *Etz Hayim* 324-25.

<sup>118</sup> “When Pharaoh learns of the matter.”

<sup>119</sup> *Numbers* 13:1-14:45.

<sup>120</sup> *Numbers* 13:3 (NJPS).

<sup>121</sup> *Numbers* 13:31. The two remaining scouts, Caleb and Joshua, arrived at a different conclusion – that the land could be conquered despite the challenge. *Numbers* 14:6-9.

<sup>122</sup> Caleb and Joshua, die natural deaths. *Numbers* 14:37 (NJPS).

<sup>123</sup> *Numbers* 13:32 and 14:36.

<sup>124</sup> “*Diba ra’a*, literally bad (*ra’a*) reports.” *Genesis* 37:2.

<sup>125</sup> *Numbers* 13:30. “Caleb does not contradict the content of the other scouts’ reports, only their conclusions.” THE JPS TORAH COMMENTARY, NUMBERS =BA-MIDBAR 106 (Jacob Milgrom commentary 1989).

without being called “bad”.<sup>126</sup> Regardless of the accuracy of the quantitative contents of the report, the conclusion of the ten scouts did run counter to the objective of the Lord, to give the land of Canaan to the Hebrews,<sup>127</sup> and it is generally not a wise career move to cross the boss. However this begs the question of whether their report was unethical.<sup>128</sup>

A more compelling reason for the punishment of the ten scouts, relevant to this issue of whistle-blowing, is not the contents or even the nature of their report, but their communication of the report. As a matter of “chain of command” their report should have been given directly to Moses, their commander, who had sent them on their mission. Instead of meeting with Moses in closed session, the ten scouts shared their report with *b’nei Israel*, the Hebrews.<sup>129</sup> Moses was God’s agent<sup>130</sup> and therefore this sin was against God, opposing fulfillment of God’s promise to give the land of Canaan to the people of Israel.<sup>131</sup> This was wrongdoing worthy of punishment – although in modern times death may seem extreme.<sup>132</sup>

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<sup>126</sup> Perhaps the concern of those commentators is that the ten scouts die unnatural deaths; therefore there must be something seriously improper as to their report. Their solution is to interpret the meaning of *diba* as a bad report even though the reports were apparently accurate. While this resolves one problem, it raises others unnecessarily. One problem raised is why is the word *ra’ a* used in the Joseph story if *diba* means a bad report without it? There is a basic principle of interpretation of the Torah that it contains no superfluous words and this interpretation would make the use of *ra’ a* in the Joseph story superfluous. Furthermore, there is another possible reason for the punishment of the ten spies, other than Caleb and Joshua, and that is their method of reporting. This is an example of whistle-blowing in that it represents unauthorized communication to third parties. Numbers 13:32. “Hebrew *hotsi’ dibba*, a false report, must be distinguished from *mevi’ dibba* (Gen. 37:2), a true report; so Ibn Ezra, Ramban, Radak.” THE JPS TORAH COMMENTARY, NUMBERS = BA-MIDBAR 106 (Jacob Milgrom, commentary 1989). However, the interpretation above also explains *hotsi’ dibba* which in contemporary Hebrew literally means to “publish” a report as in the concept of “publication” in Anglo-American common law dealing with defamation.

<sup>127</sup> “Send men to scout the land of Canaan, which I am giving to the Hebrew people....” *Numbers* 13:2 (NJPS).

<sup>128</sup> This observation raises the question of whether the actions of the LORD are *ipso facto* ethical.

<sup>129</sup> Numbers 13:32. “[A]mong the Hebrews Implied is that the scouts bypassed Moses and Aaron (v. 26) and spread the following calumnies (vv. 32-33) directly among the people.” THE JPS TORAH COMMENTARY, NUMBERS = BA-MIDBAR 106 (Jacob Milgrom commentary 1989).

<sup>130</sup> “Moses, by the LORD’S command.” *Numbers* 13:3.

<sup>131</sup> *Numbers* 13:2.

<sup>132</sup> Under the U.S. Constitution treason is not automatically a capital offense. U.S. CONST. art. III, § 3.

Was God's response ethical? Even if communication to third parties is unauthorized in this case, why would such speech be unethical, even if it goes against the will of the LORD? Is there justification for such a limitation on one's freedom of speech? Is there a reasonable rationale for requiring reporting to a select few rather than to the entire community? Isn't this undemocratic?<sup>133</sup> Or is there an inherent value in having certain decisions made internally without transparency and full disclosure, perhaps even by a "commander-in-chief", rather than in public forum?

#### *D. Outsider Speech*

An example from the *Tanakh* of outsider speech<sup>134</sup> -- truthful speech about an "outsider" to an outsider, is the story of Mordechai, Esther's uncle, in the Book of Esther. Mordechai reports a planned assassination of the king<sup>135</sup> and is later rewarded for that act.<sup>136</sup> In fact, according to the *megillah*, that act of whistle-blowing is responsible for the survival of the Jewish people who are given the right to defend themselves against genocide.<sup>137</sup> However the commentators do not applaud Mordechai's actions. Perhaps this is seen as an atypical situation and Mordechai should not be taken as a role model for others because (1) Mordechai reports on non-Jews and not Jews, (2) Mordechai reports to a non-Jew and not to a Jew, (3) Mordechai's report is transmitted through Esther, the king's queen, and (4) it is interpreted in Biblical commentary that Mordechai is a paid informant and that is why he "was sitting in the palace gate," a place where he could eavesdrop on the plotters.<sup>138</sup>

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<sup>133</sup> This concept of democracy is a relatively modern notion and therefore this question is anachronistic.

<sup>134</sup> [find a better term]

<sup>135</sup> *Esther* 2.21-23.

<sup>136</sup> *Esther* 6.1-11.

<sup>137</sup> *Esther* 8.1-17.

<sup>138</sup> *Esther* 2.21 (NJPS).

The Jewish Biblical commentators do not address these questions discussing this text, however elsewhere the rabbis of the Talmud prohibit publication in the context of legal proceedings in order to achieve greater confidentiality. When a dispute has been resolved through litigation the vote of the judges is to remain secret.

What is the proof that [after a trial is over] and one of the judges leaves [the court], he may not say, “I was for acquittal, but my colleagues were determined to convict. So what could I do, since they were the majority?” Of such a leak, Scripture asserts, “He who revealeth that which is to remain secret is a talebearer.”<sup>139</sup>

Judaism asserts that just decision-making is best achieved privately, behind closed doors, in a confidential hearing. Then judges and other decision-makers are free from external influences.<sup>140</sup>

### III. MODERN BUSINESS APPLICATION OF JEWISH ETHICAL PRINCIPLES

A more recent example of whistle-blowing in the military resulted in similar consequences. General Stanley A. McChrystal gave an unauthorized negative interview to Rolling Stone magazine and United States President Barack Obama relieved him from command as the top U.S. Afghanistan war commander.<sup>141</sup> President Obama removed

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<sup>139</sup> *Proverbs* 11:13 (NJPS?) ; Babylonian Talmud, Tractate Sanhedrin 29a. THE BOOK OF LEGENDS: SEFER HA-AGGADAH: LEGENDS FROM THE TALMUD AND MIDRASH 699:103 (Hayim Nahman Bialik ed. & Yehoshua Hana Ravnitzky trans. 1992).

<sup>140</sup> Violation of a judge’s “gag order” may result in serious negative consequences. Here is a case concerning whistle-blowers engaging in banned speech. R. Robin McDonald, *Whistleblowers Fined \$1.6M for Talking to Reporters While Case Was Sealed*, DAILY REPORT (Jan. 26, 2015), available at <http://www.dailyreportonline.com/id=1202716103739/Whistleblowers-Fined-16M-for-Talking-to-Reporters-While-Case-Was-Sealed#ixzz3Q7i6FeZQ> .

<sup>141</sup> “President Obama on Wednesday fired his top Afghanistan war commander after only a brief meeting in the Oval Office, replacing Gen. Stanley A. McChrystal. . . . Speaking in the Rose Garden to reporters, Mr. Obama said he did not fire General McChrystal for critical comments about him and his staff in Rolling Stone magazine, nor “out of any sense of personal insult.” Rather, the president cited the need for his team to unite in pressing the war effort.” Helene Cooper & David E. Sanger, *Obama Says Afghan Policy Won’t Change After Dismissal*, N.Y. TIMES, June 23, 2010, available at <http://www.nytimes.com/2010/06/24/us/politics/24mccrystal.html>.

General McChrystal from his post not because McChrystal disagreed with top administration officials, but because he failed in “strict adherence to the military chain of command.... [and that] the reasons that led me to this decision are the same principles that have supported the strength of our military and our nation since the founding.”<sup>142</sup>

Is it possible that the whistle-blowing not tolerated by God or by President Obama was unethical but would be ethical in a non-military, business context? Or is business a form of warfare?<sup>143</sup> Is similar behavior by an employee a similar breach of loyalty?

Several of the examples in the Jewish sources reflect an “us vs. them” mentality as to reporting a member of the “tribe” to those outside the tribe. This might give some insight as to why whistle-blowers are sometimes seen as violating their duty of loyalty to the company rather than doing the right thing themselves. Alternative, and perhaps superior solutions might include the direct critique preferred in Judaism or uniform group action reproof<sup>144</sup> through a change of corporate culture or even a change of company behavior so that whistle-blowing against the business organization would be unnecessary and therefore unthinkable.

Opposition to whistle-blowing is more persuasive in a business organization if there are reasonable opportunities within the company for “rebuking” or “internal whistle-blowing”.<sup>145</sup> Then, under the Jewish ethical principles discussed, an ethical issue

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<sup>142</sup> “The conduct represented in the recently published article.... [It]Undermines the civilian control of the military that is at the core of our democratic system. And it erodes the trust that’s necessary for our team to work together to achieve our objectives in Afghanistan.” Statement by the President in the Rose Garden, June 23, 2010, *available at* <http://www.whitehouse.gov/the-press-office/statement-president-rose-garden>.

<sup>143</sup> The Wall Street Journal has a discussion group on Sun Tzu’s ART OF WAR. “GROUP: Application of Sun Tzu’s Art of War: Discussion on how to apply Sun Tzu’s ART OF WAR in business and life in general.” SUN TZU, ART OF WAR, *available at* <http://online.wsj.com/community/groups/application-sun-tzus-art-war-662/topics>.

<sup>144</sup> “Positive peer pressure.”

<sup>145</sup> The principal reason why observers of wrongdoing do not report is if they think that it would do no good. Janet P. Near et al., *Does Type of Wrongdoing Affect the Whistle-Blowing Process?* 14 BUS. ETHICS Q. 219 (2004).



of loyalty to the organization might make immediate external whistle-blowing unethical. However, if management fails to provide such alternatives and the concerns are sufficiently significant or if there is a history of retaliation for such non-public reporting<sup>146</sup> employees may be justified in reporting outside the “chain of command”.

Wrongdoing is likely to persist if businesses use the claim of confidentiality as a rationale to control and “manage” information that might be perceived as harmful to the company if made public, even when that information is accurate and discloses that the business may cause or is causing significant harm to others. BP’s action in the Gulf of Mexico seems to be a case study.<sup>147</sup> Companies that retaliate against employees who alert the company of their concerns directly are likely to discourage internal whistle-blowing, leaving them with only two alternatives -- external whistle-blowing or silence.<sup>148</sup>

## CONCLUSION

There is no single source of Jewish law and ethics, but the Jewish texts discussed provide insights applicable to business ethics and whistle-blowing. According to this material we are responsible to each other to make the world a better place. To achieve that goal,

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<sup>146</sup> See *Thompson v. N. Am. Stainless LP*, 131 S. Ct. 863 (2011).

<sup>147</sup> “A series of internal investigations over the past decade warned senior BP managers that the company repeatedly disregarded safety and environmental rules and risked a serious accident if it did not change its ways [of oil-drilling].” Abraham Lustgarten, *Years of Internal BP Probes Warned That Neglect Could Lead to Accidents*, PROPUBLICA, June 7, 2010, available at <http://www.propublica.org/article/years-of-internal-bp-probes-warned-that-neglect-could-lead-to-accidents>.

<sup>148</sup> Retaliation against those who report wrongdoing is a significant deterrent against whistle-blowing. Janet P. Near et al., *Does Type of Wrongdoing Affect the Whistle-Blowing Process?* 14 BUS. ETHICS Q. 219 (2004). “A 2004 inquiry found a pattern of [BP] intimidating workers who raised safety or environmental concerns.” *Supra* at note 124.

when faced with wrongdoing, and “rebuking” is inadvisable or unsuccessful, we should not stand idly by when action might prevent significant harm.<sup>149</sup>

Opposition to whistle-blowing is more persuasive in a business organization if there are reasonable opportunities within the company for “rebuking” or “internal whistle-blowing”.<sup>150</sup> Then, under the Jewish ethical principles discussed, an ethical issue of loyalty to the organization might make immediate external whistle-blowing unethical. However, if management fails to provide such alternatives and the concerns are sufficiently significant or if there is a history of retaliation for such non-public reporting<sup>151</sup> employees may be justified in reporting outside the “chain of command”.

In corporations business managers can provide employees with opportunities and incentives to provide internal feedback and encourage doing the right thing without fear of retaliation.<sup>152</sup> Management would thereby have the opportunity to investigate and explain or correct questionable acts thereby possibly avoiding the negative effects of “external whistle-blowing” to governmental authorities. Development of honest partnership for a common purpose could develop a positive sense of teamwork, greater efficiencies throughout the organization, and a corporate culture of community that could both promote ethical behavior and increase profits.<sup>153</sup>

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<sup>149</sup> “Whistleblowing on organization wrongdoing has the potential for many positive outcomes for the organization.” Jessica R. Mesmer-Magnus & Chockalingan Viswesvaran, *Whistleblowing in Organizations: An examination of Correlates of Whistleblowing Intentions, Actions, and Retaliation*, 62 J. BUS. ETHICS 277, 293 (2005).

<sup>150</sup> The principal reason why observers of wrongdoing do not report is if they think that it would do no good. Janet P. Near et al., *Does Type of Wrongdoing Affect the Whistle-Blowing Process?* 14 BUS. ETHICS Q. 219 (2004).

<sup>151</sup> *Thompson v. N. Am. Stainless LP*, 131 S. Ct. 863 (2011).

<sup>152</sup> Perceived vulnerability to retaliation is a significant disincentive against whistle-blowing. Jessica R. Mesmer-Magnus & Chockalingan Viswesvaran, *Whistleblowing in Organizations: An examination of Correlates of Whistleblowing Intentions, Actions, and Retaliation*, 62 J. BUS. ETHICS 277, 295 (2005).

<sup>153</sup> These recommendations are largely consistent with recent research on whistle-blowing by social scientists and legal scholars. Marcia P. Miceli et al., *A Word to the Wise: How Managers and Policy-Makers can Encourage Employees to Report Wrongdoing*, 86 J. BUS. ETHICS 379 (2009).

Wrongdoing is likely to persist if businesses use the claim of confidentiality as a rationale to control and “manage” information that might be perceived as harmful to the company if made public, even when that information is accurate and discloses that the business may cause or is causing significant harm to others. BP’s action in the Gulf of Mexico seems to be a case study.<sup>154</sup> Companies that retaliate against employees who alert the company of their concerns directly are likely to discourage internal whistle-blowing, leaving them with only two alternatives -- external whistle-blowing or silence.<sup>155</sup>

Individuals may still occasionally feel obligated to “blow the *shofar*”, especially if the company for which they work does not value ethical action or good faith feedback. But insofar as good ethics and good business are compatible and people are persuaded of the importance of business ethics, ethical business behavior will increase while discouraging disruption and dissension.

Thus the Jewish sources reviewed are both wise and practical. It is up to top executives to act as positive role models and provide leadership so that their businesses will be both ethical and profitable without the need for anyone to “blow a *shofar*.”

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<sup>154</sup> “A series of internal investigations over the past decade warned senior BP managers that the company repeatedly disregarded safety and environmental rules and risked a serious accident if it did not change its ways [of oil-drilling].” Abraham Lustgarten, *Years of Internal BP Probes Warned That Neglect Could Lead to Accidents*, PROPUBLICA, June 7, 2010, available at <http://www.propublica.org/article/years-of-internal-bp-probes-warned-that-neglect-could-lead-to-accidents>.

<sup>155</sup> Retaliation against those who report wrongdoing is a significant deterrent against whistle-blowing. Janet P. Near et al., *Does Type of Wrongdoing Affect the Whistle-Blowing Process?* 14 BUS. ETHICS Q. 219 (2004). “A 2004 inquiry found a pattern of [BP] intimidating workers who raised safety or environmental concerns.” Abraham Lustgarten, *Years of Internal BP Probes Warned That Neglect Could Lead to Accidents*, PROPUBLICA, June 7, 2010, available at <http://www.propublica.org/article/years-of-internal-bp-probes-warned-that-neglect-could-lead-to-accidents>.