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Women & Whistleblowing

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Women & Whistleblowing

By Mary Saade

ABSTRACT

As more women in the United States take on leadership positions in the public and private sector, we have seen an influx of women whistleblowers. This Note examines whistleblower laws through a gender lens and offers insight to reveal why women blow the whistle, how women approach whistleblowing situations, and the effect current whistleblower laws have on women in the workforce.

This Note is divided into five parts. Part I includes an introduction and discusses competing definitions of whistleblower. Part II explores society's differing perception of men and women whistleblowers and what may motivate women to report wrongdoings. Part III examines current whistleblower laws. Part IV discusses aspects of the law that may affect women's ability to blow the whistle, including external reporting, internal reporting, and retaliation provisions. Lastly, Part V discusses possible policy changes that can address the gaps in whistleblower laws and create a more effective avenue for women to blow the whistle.

This Note's analysis is limited to the question of whether women and men approach the decision to blow the whistle differently and explores the way women respond to whistleblower laws. Therefore, the following analysis is very limited and does not address the more comprehensive inquiry of characteristics beyond gender such as race, class, religion, national origin, or sexual orientation. Considering these characteristics is encouraged and would provide a more complete analysis.

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INTRODUCTION

In July 2020, a nurse named Dawn Wooten blew the whistle on the horrific medical neglect at the U.S. Immigration and Customs Enforcement's Irwin County Detention Center (ICDC).¹ Wooten alleged that the ICDC refused to test detained immigrants for COVID-19 who were exposed and symptomatic, shredded medical requests, fabricated medical records, deported immigrants who they knew had COVID to other facilities, and also revealed that women were undergoing hysterectomies without informed consent.² Once Wooten raised these concerns internally, ICDC retaliated against her and she was demoted.³ But because of her bravery, her disclosure opened the door for 57 women to come forward with their stories, all due to her bravery. In December 2020, ten women victimized by these non-consensual hysterectomies were able to file a class action lawsuit.⁴

There have been numerous additional instances in the past five years. In 2021, Frances Haugen leaked confidential information from Facebook that revealed how the company played a role in spreading misinformation and helping fuel events like the insurrection at the U.S. Capitol on January 6, 2021.⁵ Haugen filed a whistleblower complaint with the SEC and reported to the press that she hoped public pressure would force Facebook to change their ideals of valuing profit over public safety.⁶ Additionally, in February 2017, Susan Fowler published a blog post about her experience facing sexual harassment as a software engineer at Uber. Fowler revealed how her manager repeatedly made sexual advances towards her and made sexist remarks.⁷ And in May 2020, Ifeoma Ozoma and Aerica Shimizu Banks quit their jobs at Pinterest and blew the whistle on systemic racism and gender discrimination within the company.⁸

1. Rachel Treisman, *Whistleblower Alleges 'Medical Neglect' Questionable Hysterectomies of ICE Detainees*, NPR (Sept. 16, 2021), <https://www.npr.org/2020/09/16/913398383/whistleblower-alleges-medical-neglect-questionable-hysterectomies-of-ice-detainees> [<https://perma.cc/B73G-MSMN>].

2. *Id.*

3. *Id.*

4. Sarah Hubbard, *Women Whistleblowers in the Trump Era: A Celebration of Women Who Refused to Be Silenced*, GOV'T ACCOUNTABILITY PROJECT (Mar. 31, 2021), <https://whistleblower.org/blog/women-whistleblowers-in-the-trump-era-a-celebration-of-women-who-refused-to-be-silenced-part-2/> [<https://perma.cc/NHR5-CRM6>].

5. Reed Albergotti, *Frances Haugen took thousands of Facebook documents: This is how she did it*, WASH. POST (Oct. 26, 2021), <https://www.washingtonpost.com/technology/2021/10/26/frances-haugen-facebook-whistleblower-documents/> [<https://perma.cc/9G29-FR9C>].

6. *Id.*

7. Amelia Tait, *Susan Fowler: 'When the time came to blow the whistle on Uber, I was ready'*, GUARDIAN (Mar. 1, 2020), <https://www.theguardian.com/world/2020/mar/01/susan-fowler-uber-whistleblower-interview-travis-kalanick> [<https://perma.cc/MYA7-PDUD>].

8. Nitasha Tiku, *Black women say Pinterest created a den of discrimination — despite its image as the nicest company in tech*, WASH. POST (July 4, 2020),

As more women in the United States take on leadership positions in the public and private sector, there has been an influx of women whistleblowers in the news. This led me to ask – are more women blowing the whistle? Do women’s motives to blow the whistle differ than men? And do they have different experiences blowing the whistle than men do?

Based on literature and findings from empirical research, I argue that women in the United States experience whistleblowing differently than men do. The decision to come forward is complicated, and despite the underlying common motivation to do the right thing, I argue gender differences exist when men and women experience whistleblowing. While men focus on principles of loyalty, women fixate on the ethics of care and place high importance on their perception by the general public when debating whether to blow the whistle. As a result, lawmakers must evaluate and consider sociological factors that affect gender in order to create the most efficient policy that accounts for gender disadvantages and therefore benefit the majority of the population. Lawmakers must impose a duty to report, rather than focus on monetary incentives which can actually produce counterproductive results. In addition, because women also experience more retaliation than men, flexible reporting requirements should be adopted in order to adequately protect women in the workplace who blow the whistle on corporate and government wrongdoing.

This Note is sectioned into five parts. Part I shares inspiring stories of women whistleblowers and offers competing definitions of whistleblower. Part II provides more background into whistleblowing and explores society’s differing perception of men and women whistleblowers, and what may motivate women to report wrongdoings. Part III examines current whistleblower laws and their reporting requirements. Part IV is where my analysis begins. It discusses aspects of whistleblower laws that may affect women’s ability to blow the whistle, including external reporting, internal reporting, and retaliation provisions. Lastly, Part V discusses possible policy changes that can address the gaps in whistleblower laws and create a more effective avenue for women to blow the whistle.

I. WHISTLEBLOWERS – WHO ARE THEY?

Whistleblowers play an important role in exposing government and private misconduct. But what is whistleblowing, and who is a whistleblower? The complicated nature of whistleblowing requires understanding the meaning of the word and those who may be considered whistleblowers. The legal definition of a whistleblower is important because it determines whether those that come forward can be provided legal protection for

exposing the misconduct.⁹ Furthermore, those who expose wrongdoings may also desire to portray themselves as whistleblowers to gain legitimacy.

A broad definition states 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.”¹⁰ This definition requires that the whistleblower must have currently or previously been an employee of the organization they are speaking out against.¹¹ A competing definition removes the employment element and defines whistleblowing as, “a deliberate non-obligatory act of disclosure, which gets onto public record and is made by a person who has or had privileged access to data or information of an organization, about non-trivial illegality or other wrongdoing whether actual, suspected or anticipated which implicates and is under the control of that organization, to an external entity having potential to rectify the wrongdoing.”¹²

For the purposes of this note I am adopting the first definition. This has been used in previous whistleblowing studies involving, federal employees, for-profit employees, and nurses.¹³ This definition also covers any form of wrongdoing in an organization, including wrongdoing that harms the organization itself (e.g., embezzlement), employees in the organization (e.g., sexual harassment or discrimination), or society (e.g., mismanagement of waste).¹⁴ In addition, this definition is useful because many whistleblower statutes include the employment element. For example, the Sarbanes-Oxley Act states that it protects employees covered by employers, which generally includes publicly traded companies and their subsidiaries, officers, contractors, subcontractors and agents.¹⁵ The California Whistleblower Protection Act prohibits retaliation against state employees who report waste, fraud, abuse of authority, violation of law, or threat to public health.¹⁶ The statute also includes former employees who met the criteria of “employee” during his or her employment as individuals who are protected under the Act for blowing the whistle.¹⁷

9. See Alex Bushnell, *Reframing the Whistleblower in Research: Truth-Tellers as Whistleblowers in Changing Cultural Contexts*, 14 SOCIO. COMPASS 1, 3-4 (2020) (noting how whistleblowers are theoretically given legal protection for disclosing certain information).

10. Janet Near et al., *Antecedents and Outcomes of Retaliation Against Whistleblowers: Gender Differences and Power Relationship*, 19 ORG. SCI. 221, 222 (2008).

11. Bushnell, *supra* note 9, at 4.

12. *Id.*

13. Near, *supra* note 10, at 222.

14. *Id.*

15. LISA J. BANKS & JASON C. SCHWARTZ, *WHISTLEBLOWER LAW: A PRACTITIONER'S GUIDE* § 2.03 (2022).

16. CAL. GOV'T CODE § 8547.1 (Deering, Lexis Advance through the 2022 Regular Sess.).

17. CAL. GOV'T CODE § 8547.2 (Deering, Lexis Advance through the 2022 Regular Sess.).

II. THE MOTIVE BEHIND WOMEN WHISTLEBLOWERS

A. SOCIETY'S PERCEPTION ON WOMEN WHISTLEBLOWERS

Whistleblowers are former or current employees who are in a unique position to recognize and report wrongdoing within their organization.¹⁸ Individuals who blow the whistle are essentially providing a service to their employer and the public by reporting wrongdoings that would otherwise go unrecognized. However, society's perception and feelings towards whistleblowers vary. While some perceive whistleblowers as heroes and public servants, the general public can look unfavorably upon employees who report and expose wrongdoings within their own organization.

In 2002, Sheron Watkins, Coleen Rowley, and Cynthia Cooper were each featured on the cover of TIME magazine as their "Person of the Year" to honor their bravery for blowing the whistle on corporate misconduct.¹⁹ While the article praised each woman for their bravery, it also pushed common stereotypes about women.²⁰ The TIME's article emphasized that the women were reluctant to call themselves whistleblowers, and therefore resistant to take on this very public role.²¹ The article also strayed away from depicting these women as selfish or self-absorbed, and instead focused on portraying them as quiet, reluctant and humble, giving readers the impression that women can only earn praise after proving the humility of their motives.²²

Research shows that when whistleblowers are women, their actions are perceived unfavorably.²³ In the United States, women are expected to be compliant, unassertive, and not particularly vocal; these societal roles carry over to the workplace.²⁴ Whistleblowing is an openly assertive and challenges the status quo. Therefore, when women blow the whistle, they are exuding behavior that is contrary to how society expects them to behave.²⁵ On the other hand, whistleblowers are often viewed as brave individuals who are exposing serious wrongdoings. Bravery is a trait that is often associated with men, and as a result such bravery can be seen as inconsistent with the role society expects women to play.²⁶

18. Gerard Sinzdek, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements*, 96 CALIF. L. REV. 1633, 1635 (2008).

19. Clare Tilton, *Women and Whistleblowing: Exploring Gender Effects in Policy Design*, 35 COLUM. J. GENDER & L. 338, 356 (2018).

20. *Id.*

21. *Id.*

22. *Id.* at 357.

23. See Near, *supra* note 10, at 223 (stating study provides preliminary evidence that female whistleblowers may experience more retaliation than male whistleblowers).

24. *Id.*

25. *Id.* at 223-24.

26. Near, *supra* note 10, at 226.

B. WHY WOMEN MAY BLOW THE WHISTLE COMPARED AND CONTRASTED WITH WHY MEN BLOW THE WHISTLE

There are various complex reasons why individuals choose to blow the whistle. Generally, all whistleblowers share a common motivation - to do what is right.²⁷ But doing what is right can vary amongst different people. Motivation to do the right thing depends on one's ethical perspective, and research shows that ethical perspectives may vary depending on one's gender and status in the workplace. Studies show that women exhibit higher intentions to act ethically, focus more on the ethics of care, and deal with gender disparities in their places of work. Based on this previous literature and research, women have different ethical perspectives than men do, and therefore, may approach whistleblowing situations differently. These findings can be explained by gender construction and the expectations society places on women, rather than an inherent biological difference.

There are studies that focus on the role gender plays in ethical reasoning and whether women and men make ethical decisions differently.²⁸ Numerous empirical studies revealed women exhibit higher intentions to act more ethically than men do.²⁹ Women were also found to react more appropriately to questionable business activities than men.³⁰ A study conducted by the Aspen Institute found that more women than men judge a company by its ethical standards when considering a job offer, while more men than women see financial returns as a company's primary goal.³¹ Furthermore, research suggests women embrace work activities that are deemed ethically important while men tend to focus on the needs of the business/company.³²

One study found that ethical perceptions can depend on the component of proximity.³³ This concept of proximity argues that people tend to care more about others who are close to them socially, physically, and psychologically.³⁴ An employee's ethical evaluations and decisions can be affected and made differently when she is close in proximity to customers, coworkers, and managers.³⁵ Women arguably find proximity more important than men do when evaluating ethical issues.³⁶ One study found that

27. Linda Hunt Mitchell, *An Examination of the Role of Women Whistleblowers*, 9, INT'L BUS. RSCH. 17 (2016).

28. Sean R. Valentine & Terri L. Rittenburg, *The Ethical Decision Making of Men and Women Executives in International Business Situations*, 71 J. BUS. ETHICS, 125 (2007).

29. *Id.*

30. *Id.*

31. Fred C. Alford, *Women as Whistleblowers*, 22 BUS. & PRO. ETHICS J. 67, 68 (2003).

32. Mitchell, *supra* note 27, at 19.

33. See Tara J. Shawver & Lynn H. Clements, *Are There Gender Differences When Professional Accountants Evaluate Moral Intensity for Earnings Management?*, 131 J. BUS. ETHICS 557, 560 (2015).

34. Shawver & Clements, *supra* note 33.

35. *Id.*

36. *Id.* at 561.

when women are faced with an ethical dilemma, they tend to think about the relationship between the parties, and the ethics of care.³⁷ Men, in contrast, do not talk about these factors, but instead focus on loyalty, justice, and the need to follow the rules.³⁸

This idea of proximity and care is further supported by a study conducted by researcher C. Fred Alford. Alford attended whistleblower retreats and support groups where he heard firsthand the experiences of men and women whistleblowers.³⁹ He found that men and women whistleblowers talk about their experiences very differently.⁴⁰ When men talked about their whistleblowing experience, they brought up regret, fear, but above all, disloyalty.⁴¹ After blowing the whistle, almost every man described feeling as though they failed as team players, and that they let the founders of their organization down.⁴² In contrast, women did not talk about loyalty as often as the men did.⁴³ Instead, the most common feeling women expressed was care – when they told their stories, they expressed their frustration of working in an environment where caring felt impossible.⁴⁴ They explained their situations at work did not allow them to display the care they practice at home into their work environment.⁴⁵ Alford believes blowing the whistle allowed these women to feel relieved, because they were able to care again.⁴⁶ By blowing the whistle, these women could finally show that they cared for those in proximity to them – their employer, fellow coworkers, and those harmed by the company or government wrongdoings.

A woman's motivation to blow the whistle can also be buttressed by the findings that women do not feel included in the male network at many places of work.⁴⁷ Women continue to climb the corporate ladder and take on more leadership and executive roles; however, there still remains a disparity of women in relation to the number of men in executive positions.⁴⁸ As a result, there is often an imbalance of power in male dominated organizations. This imbalance may explain gender differences in the decision to blow the whistle. Women in male-dominated industries often feel that they are not a part of the "boys club."⁴⁹ Because women feel like they are an outsider to the male network in their workplace, they in turn feel they have

37. *Id.*

38. *Id.*

39. Alford, *supra* note 31, at 70.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 71.

44. *Id.* at 73.

45. *Id.* at 72.

46. *Id.* at 73.

47. Linda Hunt, *The Challenges Women Whistleblowers Face*, 3 INT'L BUS. RSCH. 3, 4 (2010).

48. Hunt, *supra* note 47, at 4.

49. *Id.*

less to risk by blowing the whistle.⁵⁰ In contrast, when men feel included in their work environment they feel a sense of loyalty to their coworkers, bosses, and organization as a whole. Therefore, men may be less inclined to blow the whistle because they do not want to jeopardize their work relationships.

III. CURRENT WHISTLEBLOWER LAWS AND PROTECTIONS

What protections do women whistleblowers have? There are three sources whistleblowers can turn to for protection: federal statutes, state statutes, and common law exceptions to the employment-at-will doctrine.⁵¹ In addition, most organizations have their own internal policies with the same intention – to protect whistleblowers from retaliation and prevent employer wrongdoing.⁵² Some whistleblower laws solely provide protection for employees who have made a good-faith effort to report wrongdoing from retaliation, while others, in addition to protection, aim to provide incentives to encourage reporting.⁵³ The anti-retaliation provisions in whistleblower laws aim to protect the reporting individual from adverse employment actions by their superiors.⁵⁴ Retaliation can include demotions, isolation and humiliation in the workplace, harassment, and termination. But whether a whistleblower receives retaliation protection for blowing the whistle depends on whether they reported internally or externally, on the statute, and on the jurisdiction.

A. REPORTING REQUIREMENTS FOR FEDERAL AND STATE WHISTLEBLOWER STATUTES, AND COMMON LAW TORT OF WRONGFUL DISCHARGE

Jurisdiction	Reporting Requirement	Caveats
Federal	Option to report either externally or internally	Only applies to federal employees
State	Majority of states require external reporting Minority of states require internal reporting Only Kansas, Minnesota,	Reporting requirement varies by state

50. *Id.*

51. Sinzdek, *supra* note 18, at 1638.

52. Hunt, *supra* note 47, at 3.

53. See Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1160 (2010) (discussing most widely used strategies from employers to encourage employee whistleblowing).

54. *Id.* at 1161.

	North Carolina, Pennsylvania, and West Virginia allow employees to report either externally or internally	
Common Law	The employee must meet their state's elements for wrongful discharge in violation of public policy claim	States differ on the elements of a wrongful discharge claim based on whistleblowing retaliation and on the types of legal violations that can support this public policy claim

Fig. 1. Summary of Reporting Requirements for Federal, State, and Common Law Tort of Wrongful Discharge

Federal Whistleblower Statutes

Federal whistleblower laws only protect reports of specific types of employer wrongdoings.⁵⁵ These are typically violations of enumerated federal laws.⁵⁶ For example, the Sarbanes Oxley Act only protects employees who report unlawful accounting at public companies.⁵⁷ Another notable aspect of some federal whistleblower laws is that they only apply to federal employees.⁵⁸ As a result, employees who report violations of state law and work at private companies are not covered by federal statutes and cannot seek federal whistleblower protection.⁵⁹ Most private employees rely on state whistleblower laws that provide protections for whistleblowers who report violations of any statute.⁶⁰ However, a positive aspect of federal whistleblower laws is that they give the reporting individual protection when he or she exercises the option to report externally or internally.⁶¹

State Whistleblower Statutes

Under state law, the statutory requirements that employees must meet in order to receive whistleblower protection varies.⁶² These statutory requirements include the class of protected employees (public v. private employee), the appropriate recipient of the employee's report, the nature of

55. See Sinzduk, *supra* note 18, at 1638, 1640-41 (describing the limitations of federal whistleblower laws).

56. *Id.* at 1638.

57. *Id.*

58. See *id.* at 1639-40 (stating one of the broadest federal statutes, the Whistleblower Protection Act, only applies to federal employees).

59. *Id.* at 1641.

60. See Sinzduk, *supra* note 18, at 1638.

61. See *id.* (discussing how Congress and federal courts give whistleblowers discretion when choosing report's recipient).

62. *Id.* at 1641.

the employer activity that the employer reports, whether the employee's report must be accurate or made in good faith, and the available remedies.⁶³

There are strict reporting requirements in state whistleblower statutes that restrict to whom a whistleblower can report to in order to receive whistleblower protection against retaliation.⁶⁴ The majority of state whistleblower statutes only protect whistleblowers who report externally, while a minority of states require internal reporting in order to receive protection.⁶⁵ Only Kansas, Minnesota, North Carolina, Pennsylvania, and West Virginia allow employees to report either externally or internally.⁶⁶ Almost every state does not deem reporting to third parties such as the media, an appropriate method of reporting in order to receive whistleblower protection.⁶⁷

Common Law – Public Policy Exception to Employment-at-Will Doctrine

In the United States, every state except Montana has adopted the employment-at-will doctrine. Employment-at-will means that employers can discharge employees for good cause or no cause.⁶⁸ But forty states recognize the common law tort of wrongful discharge in violation of public policy, which protects employees from being discharged when they report corporate or government misconduct that violates the law.⁶⁹ This includes employees who are fired for whistleblowing.⁷⁰ States differ on the elements of a wrongful discharge claim based on whistleblowing retaliation and on the types of legal violations that can support this public policy claim.⁷¹ Some states require that the employer's unlawful conduct violates state law, while other states protect whistleblowers who report either state or federal statute violations.⁷² For example, in California employers are forbidden from retaliating against an employee for disclosing information to another agency, employee, or person with authority over the employee with reasonable cause to believe that the information discloses a violation of either a state or federal statute.⁷³

63. *Id.* at 1641-42.

64. *Id.* at 1633.

65. *Id.* at 1642.

66. See KAN. STAT. ANN. § 75-2973 (2006); MINN. STAT. § 181.932 (2006); N.C. GEN. STAT. § 126-84 (2007); 43 PA. CONS. STAT. ANN. §1423 (West 2006); W. VA. CODE § 6C-1-2 (2006).

67. Sinzdak, *supra* note 18, at 1643.

68. Feldman & Lobel, *supra* note 53, at 1161-62.

69. *Id.* at 1162; Sinzdak, *supra* note 18, at 1643.

70. Sinzdak, *supra* note 18, at 1643.

71. Sinzdak, *supra* note 18, at 1643.

72. *Id.*

73. CAL. LAB. CODE § 1102.5(b) (West).

IV. ASPECTS OF WHISTLEBLOWER LAWS THAT MAY AFFECT GENDER

There are three notable characteristics of whistleblower laws: (1) the nature of the misconduct observed, (2) external and internal reporting provisions, and (3) retaliation provisions. Analyzing these characteristics through a gender lens reveals how women approach whistleblowing situations and the effects current whistleblower laws have on women in the workplace.

A. THE NATURE OF THE MISCONDUCT

Despite the possible gender differences that may motivate men and women to blow the whistle, whistleblowers generally are inspired by an internal ethical motivation to correct wrongdoing. However, the seriousness of the misconduct can affect the level of ethical motivation one may feel. The inclination to report also varies depending on one's gender.

When the nature of the misconduct is a situation that is morally offensive, there is a stronger ethical reaction, and therefore greater inspiration to report the wrongdoing. In contrast, when the nature of the misconduct is not morally offensive, there is a weaker ethical reaction and less motivation to report the wrongdoing. For example, research has found that most employees do not find financial fraud morally offensive, and there is a weaker ethical reaction to report the crime.⁷⁴ But morally offensive misconduct such as sexual harassment or health and safety violations inspire a stronger ethical reaction, and there is a greater motivation to report the wrongdoing.⁷⁵ In a study where researchers asked nurses whether they were likely to report a coworker who failed to wash their hands, or whether they were likely to report the administering of the wrong medicine to patients, the seriousness of the issue had a significant effect on whether these nurses would report the proposed wrongdoings to their supervisor.⁷⁶ Administering the incorrect medicine is clearly the more morally offensive wrongdoing, and there were more nurses who reported that the severity of this offense played a greater role in their decision of whether or not to report this wrongdoing to their supervisor.⁷⁷

The level of ethical motivation to report the wrongdoing based on the nature of the misconduct can in turn be affected by one's gender. Studies allege gender differences in ethical reasoning and whether men and women make ethical decisions differently. There are also mixed findings for gender differences between men and women in regard to whistleblowing intention. Some research has shown that women were more likely than men to report

74. Tilton, *supra* note 19, at 351.

75. *Id.* at 350-51.

76. Tilton, *supra* note 19, at 351 n.50.

77. *Id.*

wrongdoing once, and males were more likely than females to report wrongdoing two or more times.⁷⁸ In a study on Chinese and American managers and their likelihood to blow the whistle on wrongdoing, there was no significant difference based on gender.⁷⁹ This, however, may be culturally constructed.

Research has shown, however, that when the activity is directed towards the whistleblower, there is a greater likelihood that they will blow the whistle.⁸⁰ This is especially true when the wrongdoing is something that occurs frequently, such as bullying, discrimination, and sexual harassment.⁸¹ People who report discrimination or sexual harassment are often the ones suffering directly from the harm.⁸² Women report experiencing sexual harassment more than men do, and women report sexual harassment at higher rates than men. Therefore, a woman in the workplace may feel a stronger ethical reaction if she observes or experiences sexual harassment, than a man would. Women who blow the whistle or bring forth a claim of sexual harassment hope and believe that alerting someone of this wrongdoing will deter other companies and organizations from turning a blind eye to sexual harassment in the workplace and in general.⁸³ For example, in February 2017, Susan Fowler published a blog post about her experience dealing with sexual harassment as a software engineer at Uber.⁸⁴ One of her superiors repeatedly made sexual advances toward her and another superior told her sexist remarks.⁸⁵ Fowler hoped that people would see her as the “woman who spoke up about harassment at Uber” rather than “the woman who was harassed at Uber.”⁸⁶ Because there is a stronger ethical reaction when the nature of the misconduct is something that is morally offensive, women may be more inspired to blow the whistle.

B. RETALIATION PROVISIONS

Retaliation is very commonly experienced by whistleblowers, regardless of gender. However, although both men and women will experience retaliation (e.g., demotions, isolation and humiliation in the workplace, and termination) there is research that offers insight as to whether gender plays a role in why women are retaliated in certain ways that differ to men.

78. Shawver & Clements, *supra* note 33, at 559.

79. *Id.* at 559.

80. PETER ROBERTS, *Motivations for Whistleblowing: Personal, Private and Public Interests*, in INT'L HANDBOOK ON WHISTLEBLOWING RSCH. 207, 210 (A.J. Brown ed., 2014).

81. *Id.*

82. Natalie Dandekar, *Contrasting Consequences: Bringing Charges of Sexual Harassment Compared with Other Cases of Whistleblowing*, 9 J. BUS. ETHICS 151, 153 (1990).

83. *Id.*

84. Tait, *supra* note 7.

85. *Id.*

86. Tait, *supra* note 7.

Still, women whistleblowers experience more retaliation than men whistleblowers.⁸⁷ In a study, researchers mailed a survey to over 9,000 employees at a U.S. Air Force base to examine whether the gender and position of the whistleblower affected the retaliation they faced. Of the respondents who answered the survey, 37 percent reported they had observed wrongdoing, and of that 37 percent, 26 percent reported the wrongdoing. In addition, of the 26 percent of whistleblowers who reported the wrongdoing, 37 percent answered that they experienced retaliation. After examining the respondents who reported that they experienced retaliation, it was apparent that more women reported experiencing retaliation than men, and that a woman's higher position and authority did not protect her from retaliation in the same way it protects some men from retaliation.⁸⁸

There are two theories that pose the relationship between gender and retaliation. First, social role theory argues that women face more retaliation than men because when women blow the whistle, they are going against societal gender norms.⁸⁹ Women are traditionally expected to be acquiescent and compliant followers rather than leaders who voice their opinions. These expectations carry into the workplace, even if they conflict with the job requirement.⁹⁰ As a result, women tend to face more retaliation for blowing the whistle. Although men may still be viewed in a negative light for blowing the whistle, they are not acting in a way that is inconsistent with gender norms.⁹¹

Status characteristic theory, on the other hand, argues that one's influence in the workplace derives from her status in the workplace.⁹² As a result, employees with lower positions and less power are more likely to suffer retaliation.⁹³ Corporate and tech jobs are industries notoriously dominated by men, therefore, there is a higher likelihood that women hold lesser positions than men and are more likely to suffer retaliation. In addition, women whistleblowers who are high level supervisors may experience greater retaliation than women who are not supervisors.⁹⁴ Society can perceive a female supervisor in a male dominated industry as violating the expectation that women should be obedient followers, rather than trailblazing leaders.⁹⁵ As a result, women whistleblowers who are supervisors are seen as violating their gender role to a greater extent than women who are in lesser positions.⁹⁶ Therefore, women's status as supervisors may not protect

87. Near, *supra* note 10, at 223-24.

88. *Id.* at 224.

89. *Id.* at 223-24.

90. *Id.* at 223.

91. *Id.* at 224.

92. *Id.*

93. Near, *supra* note 10, at 224.

94. *Id.*

95. *Id.*

96. *Id.*

them from retaliation to the same extent that it can protect male whistleblowers who are supervisors.⁹⁷ Indeed, one study concluded that for men there was correlation between their high-level position and the less retaliation they faced, but for women there was no clear relationship between these two factors.⁹⁸ Because women in general tend to have lower-status roles in male-dominated industries, they are likely to face more retaliation in those organizations.

C. EXTERNAL V. INTERNAL REPORTING

Whistleblower laws, whether federal, state, or common law, have requirements for whom a whistleblower may report to in order to receive protection from retaliation. There are three reporting options for whistleblowers under both federal and state whistleblower laws: (1) employees must report internally to a supervisor or a senior executive, (2) employees must report externally to a government agency, or (3) employees must either report internally to a supervisor, or externally to a government agency.⁹⁹ Federal whistleblower laws give a choice between external and internal reporting, and state whistleblower laws vary depending on the state.¹⁰⁰ Research indicates that whistleblowers choose to report internally or externally based on the whistleblower's employee status in the organization, the position of the wrongdoer, the company's culture, and the seriousness of the wrongdoing.¹⁰¹ Examining these factors through a gender lens may reveal why women may prefer to report internally, externally, or the choice between the two reporting requirements.

We know that women tend to feel like outsiders at the workplace. It can be argued that because women do not feel the same sense of loyalty to their employer as men do, that women have no problem reporting wrongdoing internally. Since women tend to feel like outsiders in the male network of their workplace, they may feel that they are not risking any relationships by reporting internally. Furthermore, the concept of proximity may lead women to feel a sense of care for those they work with. Therefore, women may want to report internally in order to bring the issue forth to those they care about instead of reporting externally and feeling like they are going behind their backs.

However, I argue that because women feel like outsiders in their work environment, they are more comfortable reporting externally rather than internally. Women may especially feel like outsiders in male-dominated industries and fear that their internal reports will not be taken seriously or they will face aggressive retaliation due to the imbalance of power. In

97. *Id.*

98. *Id.*

99. Sinzduk, *supra* note 18, at 1637.

100. *Id.* at 1638.

101. *Id.* at 1634.

addition, some studies show employees prefer internal reporting due to feelings of loyalty to an employer.¹⁰² Since women place a higher value on the ethics of care rather than the principle of loyalty to their employer (a quality most men whistleblowers reflected on), internal reporting requirements may not be the best avenue to encourage women to blow the whistle.

Furthermore, the nature of the misconduct can affect a woman's desire to report internally or externally. If the wrongdoing involves sexual harassment or bullying, women may feel hesitant to report the wrongdoing internally. For example, Susan Fowler tried to get Uber to care about the systemic sexism for a year while she was employed there, but her complaints went nowhere.¹⁰³ Uber's CEO at the time, Travis Kalanick, knew about the sexual harassment allegations, but he himself had a reputation for sexist and harassing behavior.¹⁰⁴ In an interview with *The Guardian*, Fowler stated, "I was speaking the truth in a system that doesn't value the truth, but as soon as you go out of it, then speaking the truth actually has an impact. It turns out a lot of people care... not everybody is interested in ignoring bad behavior. I learned I had to go outside the system."¹⁰⁵

V. SUGGESTED CHANGES TO CURRENT WHISTLEBLOWER LAWS TO CREATE A BETTER AVENUE FOR WOMEN TO BLOW THE WHISTLE

Congress has recognized employees need an effective avenue and adequate protections for reporting corporate and government wrongdoings. However, lawmakers use diverging approaches that leave us with conflicting factors and policy goals. Whistleblower laws are made to protect from retaliation, assure confidentiality, and/or provide¹⁰⁶ But should whistleblower laws provide incentives, and which incentives are the most effective? A law that includes unnecessary incentives or inadequate anti-retaliation protections with strict reporting requirements may lead to counterproductive results.

Policy designers of whistleblower legislation must consider the challenges women whistleblowers face when determining rules and incentives. I argue that monetary incentives may be detrimental for women whistleblowers, and instead, lawmakers should focus on including a duty to report requirement. In addition, the best option to encourage women whistleblowers, is the choice to report externally or internally. When exercising either option, their whistleblower identity should remain anonymous to avoid retaliation.

102. Sinzdek, *supra* note 18, at 1652.

103. Tait, *supra* note 7.

104. *Id.*

105. *Id.*

106. Tilton, *supra* note 19, at 340.

A. REQUIRING A DUTY TO REPORT AND LIMITING MONETARY INCENTIVES

Including a duty to report in whistleblower laws could potentially enhance the prevalence of more women whistleblowers. The study conducted by Feldman and Lobel concluded that women respond more strongly when there is an established duty to report.¹⁰⁷ In the study, women were significantly more likely to report wrongdoing when there was a duty to report requirement, while men reported they cared more about financial incentives.¹⁰⁸ When women participants were presented with misconduct and a duty to report but no reward, women said they would blow the whistle at a higher rate than when they were presented with a lower reward.¹⁰⁹

Monetary incentives in whistleblower laws can lead to counterproductive results. As previously discussed, when the nature of the misconduct is morally offensive, there is a stronger ethical reaction and, therefore, greater inspiration to report the wrongdoing. Research suggests when misconduct instills strong ethical motivation, statutes that offer monetary rewards may be unnecessary or even counterproductive.¹¹⁰ This may be especially true for women. Because women may feel a stronger ethical motivation to blow the whistle on morally offensive misconduct, monetary incentives are unnecessary.

Furthermore, women are already more prone to being perceived unfavorably by the public when they blow the whistle. Many women whistleblowers may be hesitant to blow the whistle for fear that they will be perceived even more unfavorably when the public finds out they received a monetary award for blowing the whistle. The survey conducted by Feldman and Lobel found that women were more concerned about societal norms and the reactions of their friends and family than men were in determining whether to blow the whistle.¹¹¹ Many women were concerned about whether they would be seen as the hero, or the snitch.¹¹² When women are able to fall back on a statutorily required legal duty to report wrongdoing, they can feel and be perceived as though they are bound by a legal requirement, not by greed.

No duty to report requirements exists in the Dodd-Frank Act or in state False Claims Acts.¹¹³ Furthermore, the duty to report in whistleblower laws has been limited to only apply to whistleblowers in certain professions (i.e., lawyers.)¹¹⁴ Lawmakers should not limit the duty to report to certain

107. *Id.* at 355.

108. *Id.*

109. *Id.* at 362.

110. Feldman & Lobel, *supra* note 53, at 1155.

111. Feldman & Lobel, *supra* note 53, at 1197.

112. Tilton, *supra* note 19, at 359.

113. *Id.* at 363.

114. *Id.* at 355.

professions and instead make it a requirement in all whistleblower laws. This could encourage more women whistleblowers to step forward without the fear of being perceived as “tattle tails” or disgruntled employees motivated by greed.

B. THE OPTION TO REPORT EITHER EXTERNALLY OR INTERNALLY
AND ADEQUATE ANTI-RETALIATION PROVISIONS

Research shows that women value anti-retaliation provisions and assurances of confidentiality more than men.¹¹⁵ But as previously discussed, receiving statutory whistleblower protections depends on who whistleblowers report to. To the extent that we assume whistleblowers know their rights, rigid report requirements can deter potential whistleblowers. I argue that in order to create a better avenue for women to blow the whistle, whistleblower laws should provide the choice to report internally or externally and include strict anonymity.

Research shows that most whistleblowers report internally.¹¹⁶ However, flexible reporting requirements would adequately consider the diverse situations women whistleblowers find themselves in. A strict internal reporting requirement leaves more opportunity for an employer to cover up and retaliate.¹¹⁷ This is especially true in situations of systemic discrimination within a company or agency. As previously mentioned, if the wrongdoing involves sexual harassment or bullying, it is likely that women may feel hesitant to report the wrongdoing internally or will face the worry of not being taken seriously. On the other hand, a statute that strictly requires external reporting would cause an employee to lose that relationship with her employer, and the public tends to look unfavorably on an employee who fails to bring the situation forth to her employer first before turning to external sources.

In addition, research suggests women prefer to report wrongdoings anonymously. One study found that women’s reporting intentions for anonymous reporting channels were significantly higher than males’ reporting intentions.¹¹⁸ As previously discussed, women place greater focus on societal norms and the reactions of their friends and family than men in determining whether to blow the whistle. In the study conducted by Yuval Feldman and Orly Lobel, research found that because women fear being shunned by their coworkers and the community, they prefer to “fly under the radar.” A strict reporting requirement that requires whistleblowers to report the wrongdoing internally would destroy any chance of anonymity and expose women to psychological and social consequences of being shunned by the members of their work and personal community.

115. *Id.*

116. Sinzduk, *supra* note 18, at 1652.

117. *Id.* at 1655.

118. Shawver & Clements, *supra* note 23, at 559.

CONCLUSION

There is no one-size-fits-all policy design, but lawmakers must evaluate and consider the psychological and sociological factors that affect gender in order to create the most efficient policy that can benefit the majority of the population. The decision to blow the whistle is complicated. Despite the common underlying motivation to do the right thing, gender differences exist when men and women discuss their whistleblowing experiences. While men focus on principles of loyalty, women fixate on the ethics of care and place high importance on how they are perceived by the general public when debating whether to blow the whistle. This is why lawmakers need to impose a duty to report rather than focus on monetary incentives, which can actually produce counterproductive results. In addition, because women also experience more retaliation than men, flexible reporting requirements should be adopted in order to adequately protect women in the workplace who blow the whistle on corporate and government wrongdoing.
