Employee Disclosures to the Media: When Is a Source a Sourcerer

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Employee Disclosures to the Media: When Is a “Source” a “Sourcerer”?  

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Table of Contents

I. Legal Protection for Whistleblowers ........................ 361
   A. Statutory Protection ................................... 361
      1. State Statutes ...................................... 361
      2. Federal Statutes .................................... 365
   B. Nonstatutory Protection ............................... 369
      1. Public Employees and the First Amendment ...... 369
      2. Employees at Will and the Public Policy Exception ... 373
      3. Private Employees and “Just Cause” .............. 377
   C. Summary of Existing Legal Protection for Media
      Whistleblowers ......................................... 378

II. Legal Protection for the Media ............................ 380
   A. Existing Constitutional and Legislative Protection ..... 382
   B. Policy Arguments Relating to Protection ............. 385
   C. Trade Secret Laws .................................... 386

III. When is a “Source” a “Sourcerer”? ........................ 390
   A. The Media as an Effective Information Recipient ...... 390
   B. The Disadvantages of Whistleblowing to the Media ... 393

IV. Conclusion ................................................ 396

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Introduction

In June 1991, the *Wall Street Journal* published two articles reporting on adversities experienced by a division of corporate giant Procter & Gamble, based in Cincinnati, Ohio. These revelations were attributed, in part, to "current and former P&G managers." Procter & Gamble, determined to identify the reporter's sources for these articles after an internal investigation proved futile, persuaded local law enforcement agencies to take over its quest. The company alleged that leaking this information violated an Ohio criminal statute declaring the disclosure of an "article representing a trade secret" a felony.

As part of their month-long investigation, law enforcement officials subpoenaed telephone company records of calls made by Cincinnati-area residents. Officials questioned persons with a connection to Procter & Gamble, including former employees, about their calls to a *Wall Street Journal* office or to the home of the reporter who wrote the stories.

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6. Section 1333.81, making disclosure of confidential information a misdemeanor, applies only to employees. The felony section, § 1333.51, applies to "person[s]." *Ohio Rev. Code Ann.* §§ 1333.81, 1333.51 (Baldwin 1989). Presumably, therefore, former employees were being questioned under the latter section.

7. See Hirsch, *Procter & Gamble Brings In the Law, supra note 4.*
When details of this investigation became publicly known, reaction was swift and universally negative.  

Although the controversy surrounding this incident has abated, its implications are disturbing. The approach taken allowed both the corporation and the government to bypass legal protections extended by the First Amendment and by state law to reporters who refuse to reveal the names of confidential sources.  

Further, although the disclosures in this instance did not include allegations of wrongdoing by Procter & Gamble,  

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8. Legal scholars questioned the constitutionality of this use of the trade secrets law both because of First Amendment implications and because due notice of prohibited behavior was not given. See Hirsch, P&G Says Inquiry Was Proper, supra note 3. In addition, the scope of the subpoena raised privacy concerns because it covered telephone calls made from the entire area code to the Wall Street Journal and to the home of the reporter; thus, the records of many persons not associated with Procter & Gamble were included. See Hirsch, P&G Search, supra note 4. National press organizations, the Wall Street Journal, and First Amendment experts uniformly denounced the use of the trade secrets law in this manner, and decried Procter & Gamble's attempts "to intimidate current and former employees from talking to reporters." Hirsch, P&G Says Inquiry Was Proper, supra note 3 (quoting Paul E. Steiger, managing editor of the Wall Street Journal); see Hansen, supra note 5. Many Procter & Gamble employees also saw the incident as a "disgrace" and an "embarrassment." James S. Hirsch & Alecia Swasy, P&G Directors Support Action On News Leaks, WALL ST. J., Sept. 11, 1991, at A4. While Procter & Gamble's board of directors, after considering the legal and ethical issues of the incident, supported the company's actions, the company eventually admitted that it had "made an error in judgment" in asking for the search of the telephone records. Dana Milbank, P&G Admits "Error" in Effort To Trace Leaks, WALL ST. J., Sept. 5, 1991, at A3. The authorities determined that there was not sufficient evidence to prosecute Procter & Gamble for its actions regarding the search. Hirsch & Swasy, supra.  

Procter & Gamble is not the only company that has recently received unfavorable publicity about efforts to uncover and silence inside leaks. The Alyeska Pipeline Service Co., which commissioned Wackenhut Corp. to investigate leaks of information by an oil-industry critic to a congressional panel investigating the impact of the industry on Alaska's environment, was publicly embarrassed by news that the critic was placed under surveillance, his garbage searched, and his home and business electronically monitored. Michael Allen, Security Experts Advise Firms to Avoid Panic, Excess Zeal in Probing Data Leaks, WALL ST. J., Sept. 20, 1991, at B1, B3. The House Committee on Interior and Insular Affairs subpoenaed Wackenhut's documents and files. Allanna Sullivan, Congressional Committee Orders Results From Oil Firms' Surveillance Operation, WALL ST. J., Aug. 19, 1991, at A3. The critic, Charles B. Hamel, was not an employee of the groups involved, but the companies felt he had been fed information by their employees. Id. Wackenhut allegedly went so far as to set up a "sting" operation, forming a group called Ecolit, and using its alleged members to try to determine what information Hamel had regarding the companies, and who his sources were. Id. This case also allegedly involved unwarranted release of telephone records and the targeting of newspaper reporters. Allanna Sullivan, Surveillance Ordered by Oil-Firm Group May Have Broken Laws, Inquiry Finds, WALL ST. J., Sept. 26, 1991, at B5.  

In another incident, Rockwell International Corp. and Westinghouse Electric Corp. are being sued by an employee who brought safety concerns to the attention of a Congressional committee and reporters after the companies did not satisfactorily respond to his complaints. The companies recruited coworkers to report on the whistleblower. His suit alleges invasion of privacy and violation of his right to free speech. Allen, supra.  

9. Hansen, supra note 5, at 32. At present, 28 states have shield laws. See infra note 172.
the issue is presented whether trade secret laws could be manipulated in this manner to circumvent whistleblower protection laws.\textsuperscript{10} Broader questions of whether, and under what circumstances, employee whistleblowers may appropriately report organizational misconduct to the news media are also raised.

Every employee who contemplates the disclosure of his or her employer's wrongful activity must consider, among other things, to whom the whistle should be blown. Individuals may report wrongdoing within their employing organizations, becoming "internal" whistleblowers; persons who reveal such information to government authorities or the media are labelled external whistleblowers.\textsuperscript{11} Although definitions of whistleblowing found in the social science literature encompass reports to all of these outlets,\textsuperscript{12} the law's embrace tends to be more selective, favoring one recipient or another depending on the type of case. The lack of a consistent approach toward media-employee relationships in various legal contexts reflects two widely accepted, yet diametrically opposed, popular characterizations of whistleblowers: "sources," who are "compelled by altruistic concerns to disclose wrongdoing at significant personal risk of retaliation," and "sourcerers," who intend to manipulate, discredit, and disinform.\textsuperscript{13}

In circumstances where the legal system discourages whistleblowing to the media, a traditional interpretation of the agent's duty of loyalty\textsuperscript{14} and the courts' general disinclination to become involved in management disputes between employers and their employees\textsuperscript{15} are supported. Permitting such disclosures, on the other hand, promotes the exposure and reduction of wrongdoing\textsuperscript{16} and furthers democratic values that depend on maximizing the information available to the public through the media.\textsuperscript{17}

\textsuperscript{10} See infra notes 189-210 and accompanying text (discussing the relationship between laws governing trade secrets and whistleblowing).


\textsuperscript{14} See infra notes 127-36, 195-97, 201-02 and accompanying text (discussing agency principles generally and the role of loyalty in determining whether just cause existed for employee discharge).

\textsuperscript{15} See infra notes 82, 84-85, 92, 122, 126 and accompanying text (discussing this approach in contexts of public employee claims pursuant to the First Amendment and of the public policy exception to the traditional employment at will rule).

\textsuperscript{16} See infra notes 24-38 and accompanying text (describing state whistleblower statutes).

\textsuperscript{17} See infra notes 91-94, 181-88 (analyzing, respectively, First Amendment claims by public employees and policies underlying protection of media-source relationships).
This article evaluates whistleblowing to the media from a variety of perspectives, each involving one or more of the policy objectives noted above. The approaches of Congress, state legislatures, the courts, and arbitrators are examined, as is the interaction between the laws governing trade secrets and whistleblowing. The authors’ analysis and recommendations reflect the benefits and drawbacks of employee disclosures to the media.

I

Legal Protection for Whistleblowers

A. Statutory Protection

1. State Statutes

Since the early 1980s, whistleblowing has gained favorable attention from state legislators, who perceive such disclosures as a means to reduce fraud, misuse of funds, and other forms of organizational wrongdoing. Accordingly, thirty-five states have passed laws to protect whistleblowers. These statutes share the premise that whistle-

18. See infra notes 39-72, 171 and accompanying text.
19. See infra notes 24-38, 172 and accompanying text.
20. See infra notes 78-126, 173-80 and accompanying text.
21. See infra notes 127-36 and accompanying text.
22. See infra notes 189-210 and accompanying text.
23. See infra notes 211-52 and accompanying text.
blowing will be encouraged if whistleblowers are protected from retaliation.26

The great majority of these statutes also specify procedures to be followed by whistleblowers who seek their protection.27 Although most states identify appropriate recipients for whistleblowers' reports,28 the laws are notably diverse in their approach in this regard. The greatest number state a preference for external whistleblowing, or reporting outside the organization to which the whistleblower belongs.29 A smaller

26. See, e.g., COLO. REV. STAT. § 24-50.5-101 (1990), which states:

The general assembly hereby declares that the people of Colorado are entitled to information about the workings of state government in order to reduce the waste and mismanagement of public funds, to reduce abuses in government authority, and to prevent illegal and unethical practices. The general assembly further declares that employees of the state of Colorado are citizens first and have a right and a responsibility to behave as good citizens in our common efforts to provide sound management of governmental affairs. To help achieve these objectives, the general assembly declares that state employees should be encouraged to disclose information on actions of state agencies . . . .

A common assumption is that most whistleblowers suffer retaliation, and it is a fear of retaliation that keeps otherwise willing employees of conscience from reporting wrongdoing. Research has shown these assumptions to be largely unfounded; most whistleblowers do not suffer retaliation, and factors other than retaliation play a more important role in whether an employee chooses to blow the whistle. See, e.g., Marcia P. Miceli & Janet P. Near, The Incidence of Wrongdoing, Whistle-blowing, and Retaliation: Results of a Naturally Occurring Field Experiment, 2 EMPLOYEE RESPONSIBILITIES & RTS. J. 91, 100-02 (1989); Janet P. Near & Marcia P. Miceli, The Internal Auditor's Ultimate Responsibility: Reporting of Sensitive Issues, 1988 INST. INTERNAL AUDITORS RES. FOUND. 92, 92-95. But see DOE Cites "Fear of Retaliation" by Whistleblowers at Oak Ridge, 10 Employee Rel. Wkly. (BNA) 825 (July 27, 1992) (discussing Department of Energy report concluding that fear of retaliation inhibited employees of the Analytical Chemistry Division of the Oak Ridge National Laboratory from reporting "health, safety and environmental issues").

27. A minority of states, however, do not spell out procedures to be used, but instead broadly protect the reporting of violations, regardless of how it is done. ILL. ANN. STAT. ch. 5, para. 395/0.01-395/1 (Smith-Hurd 1993); MO. REV. STAT. § 105.055 (Supp. 1992); MONT. CODE ANN. § 39-2-902 (1991) (protection extended pursuant to a general "just cause" or wrongful discharge statute); NEV. REV. STAT. § 281.611 (Supp. 1991); S.C. CODE ANN. § 8-27-20 (Law. Co-op. Supp. 1991).

28. The protection of a number of statutes is limited by the content of the information that is disclosed. Louisiana, for example, only protects whistleblowing about environmental infractions. LA. REV. STAT. ANN. § 30:2027 (West Supp. 1992). Oklahoma has taken a novel approach to the privacy/public disclosure debate. A recently enacted revision to its Whistleblower Act excludes protection for whistleblowers who disclose information that the employee knows is confidential by law. See Oklahoma To Stem Frivolous Whistleblower Claims, 7 Individual Empl. Rts. Lab. Rel. Rep. (BNA) 2 (June 2, 1992).


Florida, New York, and Texas require reporting to a public body with authority to take action in response to the wrongdoing. FLA. STAT. ch. 112.3187 (1992); N.Y. CIV. SERV. LAW
number of states allow the employee to disclose internally or externally; either explicitly, by offering the employee a choice of outlets, or implicitly, by not covering the topic. Even fewer states require the employee to report the wrongdoing internally.

§ 75-b (McKinney Supp. 1993) (protection is granted to public employees who report to a governmental body after first making a good faith effort to provide the information to the appointing authority; private employees have different reporting requirements (N.Y. LAB. LAW § 215 (McKinney 1986 & Supp. 1992) and § 740 (McKinney 1988)); TEX. REV. CIV. STAT. ANN. art. 6252-16a (West Supp. 1993) (appropriate law enforcement authority).


Alaska allows the employer to determine whether the employee makes an internal or external disclosure by specifying that the employee must report to a public body unless the employer has required, in a written personnel policy, that the employee first submit to it a written notice to the supervisor first, then to public body; N.Y. LAB. LAW § 740 (McKinney 1988) (private employees: first to supervisor, then to public body); N.Y. CIV. SERV. LAW § 75-b (McKinney Supp. 1993) (public employees: first to supervising authority, then to governmental body).

31. See supra note 27 (identifying the state statutes that are silent on how the whistleblowing should proceed).

32. In most instances, the required internal report is only a preliminary path. See IND. CODE § 4-15-10-4 (1991) (first to supervisor or appointing authority, then to anyone); ME. REV. STAT. ANN. tit. 26, § 833 (West 1988) (first to person having supervisory authority with the employer, then to public body); N.H. REV. STAT. ANN. § 275-E:2(II) (Supp. 1992) (first to person having supervisory authority with the employer, after that no specific person to report to); N.J. REV. STAT. § 34:19-4 (1988 & Supp. 1992) (written notice to supervisor first, then to public body); N.Y. LAB. LAW § 740 (McKinney 1988) (private employees: first to supervisor, then to public body); N.Y. CIV. SERV. LAW § 75-b (McKinney Supp. 1993) (public employees: first to appointing authority, then to governmental body). Some statutes allow an employee to make an external report after giving the employer a reasonable amount of time to correct the problem. IND. CODE § 4-15-10-4 (1991) (external reporting permitted if a good faith effort is not made to correct the problem within a reasonable time); ME. REV. STAT. ANN. tit. 26, § 833 (West 1988) (reasonable opportunity to correct); N.H. REV. STAT. ANN. § 275-E:2(II) (Supp. 1992) (reasonable opportunity to correct the violation); N.J. REV. STAT. § 34:19-4 (1988 & Supp. 1992) (afford the employer a reasonable opportunity to correct); N.Y. LAB. LAW § 740(3) (McKinney 1988) (private employees only: afford the employer a reasonable opportunity to correct); OHIO REV. CODE ANN. § 4113.52 (Baldwin 1988) (if no good faith effort to correct within 24 hours; only protects whistleblowing pertaining to criminal offense or imminent risk).

While Ohio requires the employee to report first to a supervisor or other responsible officer of the employer, and then to the appropriate, listed public authority, it makes an exception for violations of the Air Pollution Control Act, the Solid and Hazardous Wastes Act, the Safe Drinking Water Act, and the Water Pollution Control Act. OHIO REV. CODE ANN. § 4113.52. If the employee becomes aware of a violation of these acts, which would be a
Despite the variety of approaches taken by the statutes toward recipient designation and the general preference exhibited for external outlets, there is surprising consistency in the view that the media should not be designated channels; no statute identifies the media as proper recipients of whistleblowers’ reports. Indeed, only one state, Kansas, has a statute that specifically protects whistleblowing to any nongovernmental external party as an initial channel. Colorado requires the employee to make a good faith effort to provide the information “to his supervisor or appointing authority or member of the general assembly” prior to the disclosure of information to “any person.” Two other states allow the employee to disclose wrongdoing to “anyone” after the employer has failed to make an adequate response to an internal report. Finally, five states are silent regarding the appropriate recipient. Thus, fewer than one-third of the state laws protect whistleblowing to the media at any point, and twenty-one of the statutes explicitly exclude this form of whistleblowing from their coverage by declaring what the appropriate channels are. 

criminal offense, he may directly notify “any appropriate public official or agency that has regulatory authority over the employer and the industry, trade, or business in which he is engaged.” Id. § 4113.52(A)(2).

33. Legislative antipathy to media whistleblowing is particularly anomalous because media stories about serious problems caused by unreported wrongdoing were the impetus for whistleblowing laws in several states. See Terry M. Dworkin & Janet P. Near, Whistleblowing Statutes: Are They Working?, 25 AM. BUS. L.J. 241, 241-47 (1987).


35. COLO. REV. STAT. § 24-50.5-102(2) (1990). “Disclosure of information” is defined as “the written provision of evidence to any person, or the testimony before any committee of the general assembly . . . .” Id. § 24-50.5-102(2). Oklahoma, in H.B. 1880, protects whistleblowing that involves “discussing the operations and functions of the agency, either specifically or generally with the Governor, members of the Legislature, or others.” 7 Individual Empl. Rts. Lab. Rel. Rep. (BNA) 2, 3 (June 2, 1992) (emphasis added). “Others” could include the media. Since the statute only applies to public employees, however, and lists government recipients first, “others” is likely to be interpreted as meaning other governmental recipients.


37. See supra note 27.


North Carolina’s statute uses language that could arguably be interpreted as encompassing third parties: “It is the policy of this State that State employees shall be encouraged to report verbally or in writing to their supervisor, department head, or other appropriate authority . . . .” N.C. GEN. STAT. § 126-84 (1991). The tenor of the statute, however, clearly con-
2. Federal Statutes

Legal recourse for whistleblowers was first provided in federal statutes. The statutes were designed to promote goals other than whistleblowing, and the protection afforded whistleblowers was incidental to those objectives. Thus, in contrast to the state laws discussed above, most federal statutes do not designate appropriate channels for reporting the wrongdoing. By implication, however, the appropriate recipient of a whistleblower’s report is the agency empowered to contend with the problem addressed by the statute. For example, information regarding an employer’s discriminatory policies would customarily be communicated to the Equal Employment Opportunity Commission.

templates only protecting whistleblowing to certain entities, so it was included in this category of statutes.

Kentucky’s statute is less clear. It lists a number of state executive, legislative, and judicial officers and their employees as appropriate whistleblowing recipients, and then states, “or any other appropriate body or authority...” Ky. Rev. Stat. Ann. § 61.102(1) (Baldwin 1986). No definition is supplied for “other appropriate body or authority,” so it will be left to the courts to determine whether to read the last phrase in light of the list going before it and demand that it be some governmental unit, or to take the plain meaning approach and allow whistleblowing to “appropriate” third parties.

39. The first protections were extended in the Railway Labor Act of 1926, 45 U.S.C. § 151-88(2) (1986), and the National Labor Relations Act (NLRA) of 1935, 29 U.S.C. § 158(a)(4) (1986). These laws provided exceptions to the employment at will doctrine by protecting employees from being fired for engaging in union-related activities. Protected activities under the NLRA include testifying or filing a charge concerning unfair labor practices.

38. Id.


42. For example, the Water Pollution Control Act, in protecting employees from retaliatory job actions because they have “filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or... testified or [are] about to testify in any proceeding,” implies that the appropriate channels are those which are used to pursue water pollution complaints. 33 U.S.C. § 1367(a) (1988).

43. 42 U.S.C. § 2000 e-4(a). Generally, the procedure that is spelled out is the proper channel employees should use to seek protection once they have suffered retaliation for the whistleblowing. For most federal statutes, the employee who suffers retaliation is to file a complaint with the Secretary of Labor. If the Secretary finds cause and issues an order with which the violator refuses to comply, suit can then be filed in a U.S. district court. See, e.g.,
The courts have consistently interpreted federal statutes of this type as protecting internal as well as external reporting, on the basis that such an approach supports the congressional goal of promoting "safety and quality." Indeed, recourse for a media whistleblower was explicitly granted on these grounds in Donovan v. R.D. Andersen Construction Co. In Andersen, a newspaper received information that asbestos dust was being released from trucks leaving a renovation site. A reporter who investigated these reports spoke with an employee involved in the construction and quoted him by name in an article about the dust. The employee, who was subsequently fired in retaliation for cooperating with the media, sought reinstatement under the Occupational Safety and Health Act (OSHA). The employer claimed that the protection granted by the Act, which prohibits retaliation for filing safety complaints, instituting proceedings, or testifying about safety violations, did not extend to discussing safety issues with the media. The court disagreed, holding that "the broad remedial purpose of the Act mandates that an employee's communication with a newspaper reporter regarding conditions of the workplace are protected." This result was reached although the media are not designated as complaint recipients by OSHA or by the applicable regulations, which detail appropriate methods of reporting safety violations.

The protection from retaliation for whistleblowers offered by OSHA is similar or identical to that granted by the federal statutes referred to above. Thus, Andersen should be viewed as precedent for judicial protection of whistleblowing to the media if the report concerns an area covered by these laws.


45. See, e.g., Kansas Gas & Elec. Co., 780 F.2d at 1512 (quoting Mackowiak, 735 F.2d at 1163).


47. Id. at 250.

48. Id.


50. See id. § 660(c).


52. Id. at 253.

53. See 29 C.F.R. § 1977.9(a)-(c), quoted in Andersen, 552 F. Supp. at 251.

54. See Dworkin & Callahan, supra note 11, at 269-72 (discussing in depth similarities of language and intent among these statutes); supra notes 39-43 and accompanying text.
More recent federal legislation incorporating whistleblower protection tends to be more specific about appropriate channels, typically exhibiting a preference for external reports to a government agency. For example, the Whistleblower Protection Act of 1989 (WPA), passed to strengthen provisions of the Civil Service Reform Act of 1978, designates the Office of Special Counsel as the recipient of whistleblowing reports. Federal workers protected by the Act can elect, however, to report to "any person."

The federal whistleblower statute that most clearly protects reporting to the media is the False Claims Act (FCA). The Act, significantly revised in 1986 to promote private sector whistleblowing, generously rewards whistleblowers for bringing successful suits in the name of the

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57. Id. § 2302(b)(8) (1982).

58. Id. § 1212(a)(3) (1989). The Office of Special Counsel is specifically charged with protecting whistleblowers. It is also charged with investigating and pursuing reports of wrongdoing. The statute provides that "[t]he Office of Special Counsel shall . . . receive, review, and, where appropriate, forward to the Attorney General or an agency head . . . disclosures of violations of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." Id. Under the Civil Service Reform Act, the Office of the Special Counsel served a similar function, Id. § 1206(b)(3)(A)(i), (c)(2) (1989), but that law failed to fulfill its mandate. Congress passed the WPA in an effort to refocus and strengthen the Special Counsel's office to support the whistleblower. See Thomas M. Devine & Donald G. Aplin, Abuse of Authority: The Office of Special Counsel and Whistleblower Protection, 4 ANTIOCH L.J. 5 (1986); Rhonda McMillan, Aiding Whistle-blowers, A.B.A. J., Mar. 1989, at 121; 3 Individual Empl. Rts. Lab. Rel. Rep. (BNA) 4 (Oct. 25, 1988).

59. The WPA states that "protected disclosure may be oral or written and to any person within or outside the agency." 5 U.S.C. § 1213(a) (1989).


61. Significant revisions included relaxing the definition of false claims, broadening the classes of people who can file under the Act, increasing the percentage of recovery available to a successful claimant, guaranteeing an award to a successful claimant, and easing and clarifying the burden of proof. Id. §§ 3729-30; see also Ted Gest, Why Whistle-Blowing Is Getting Louder, U.S. NEWS & WORLD REP., Nov. 20, 1989, at 64; John R. Phillips, Some Incentives for Whistleblowers, WALL ST. J., Apr. 22, 1986, at A28.

62. The whistleblower/claimant can receive from 15 to 25% of any treble damages and fines recovered from the defendant, plus costs and fees, if the government chooses to prosecute the suit. If the government does not join the suit, the relator is entitled to 25 to 30%. 31 U.S.C. § 3730 (1989). Huge awards are likely, especially in defense contractor cases. The Justice Department estimates that fraud comprises as much as 10% of the federal budget, or around $100 billion a year. See Mark Thompson, Stealth Law, CAL. L.AW., Oct. 1988, at 33.
United States against contractors who have defrauded the government.\(^6\) In order to reap the rewards and protection\(^6\) of the FCA, the *qui tam*\(^6\) claimant must, at some point, blow the whistle externally by bringing suit.\(^6\) Moreover, the Act specifically allows whistleblowers who first report the wrongdoing to the media to gain rewards and protections by later filing under the FCA.\(^6\) The basic premise of the Act is to promote whistleblowing and recovery of government funds without concurrently rewarding useless information.\(^6\) Thus, the FCA claimant must be the original source of the disclosure to the media; a person cannot base a claim on information obtained from the media.\(^6\)

The False Claims Act represents a new approach toward encouraging whistleblowing. The state statutes, and most federal laws, assume conscience should be the primary motivation for whistleblowing.\(^7\) The FCA considers motivation to be largely irrelevant; obtaining information is its primary goal.\(^7\) Thus, the FCA rewards a "source" who comes

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64. Under the False Claims Act, the employee is protected from retaliation for actions taken "in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section ... ." 31 U.S.C. § 3730(h).

65. "Qui tam" is Latin for "who as well ——." *BLACK'S LAW DICTIONARY* 1126 (5th ed. 1979). It comes from the phrase *qui tam pro domino rege quam pro si ipso in hac parte sequitur*, or, "who brings the action for the king as well as for himself." Steve France, *The Private War on Pentagon Fraud*, A.B.A. J., Mar. 1990, at 46, 47.

66. The action must be served on the United States first, and not the defendant. 31 U.S.C. § 3730(b)(2). Once the government receives notice of the suit, it has 60 days to decide whether to intervene and take over prosecution. If the government chooses not to intervene, the plaintiff can proceed with the suit, and if successful, recover a larger percentage of the damages and penalties. *Id.* §§ 3730(c)(3), (d)(2).

67. *Id.* § 3730(e)(4)(A). The statute provides:

No Court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

*Id.*

68. See Callahan & Dworkin, *supra* note 63, at 326.


70. See Callahan & Dworkin, *supra* note 63, at 319. Although the uniform approach of the states to encourage whistleblowing until this time has been to offer protection from retaliation, see *supra* notes 24-26 and accompanying text, Michigan is considering a false claims act modeled on the federal act. See Ernest A. Phillips, *A Proposed Michigan False Claims Act: Resurrecting Qui Tam as a Practical and Effective Weapon to Combat Fraud Against the Government*, 9 COOLEY L. REV. 59 (1992). Illinois has passed a reward bill for state workers. The Whistleblower Reward and Protection Act, Act 87-662, 1991 Ill. Legis. Serv. §§ 1-9 (West).

forward with useful information, no matter whether his or her decision to report was based on greed, a risk/benefit analysis, conscience, or something else. Indeed, a party who planned and initiated a false claim can recover under the FCA as long as he or she is not convicted of a crime arising from the false claim.\footnote{72}

This difference in focus may help explain why the FCA specifically recognizes whistleblowing to the media as worthwhile and the states do not. State legislators may view a media whistleblower as a “sourcerer,” primarily motivated by less noble instincts, such as revenge or a desire for publicity. From this perspective, a person whose primary objective is to correct wrongdoing is more likely to disclose it to his or her employer or a government agency responsible for oversight than to a reporter.

Thus, Congress has demonstrated a greater propensity than state legislatures to allow the whistleblower a choice between reporting internally or externally. Nevertheless, the preferred external channel, when one is indicated, is an agency or other governmental body.\footnote{73} With the notable exception of the False Claims Act, reporting to the media is no more encouraged by Congress than by state legislatures.\footnote{74}

B. Nonstatutory Protection

Several nonstatutory bases for recovery may be pursued by employee whistleblowers. In some cases, government workers who are penalized for their disclosures are protected by the First Amendment.\footnote{75} The public policy exception to traditional employment at will principles may afford redress to workers who are discharged for reporting employer misconduct.\footnote{76} Finally, collectively bargained “just cause” provisions may provide relief to whistleblowers employed pursuant to such agreements.\footnote{77}

I. Public Employees and the First Amendment

Under certain circumstances, the First Amendment to the U.S. Constitution protects government workers from employment-related retaliation for whistleblowing. Two Supreme Court decisions are univer-
Marvin Pickering, a public school teacher, was discharged for writing a letter to the editor of a local newspaper criticizing the Board of Education that employed him. Writing for the Court, Justice Marshall acknowledged the competing interests involved in such cases by noting the need to achieve a "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." The Court explicitly declined to articulate a specific standard for evaluating whether employee speech is protected. Nonetheless, the opinion identified several considerations as pertinent to judicial analysis in this context, including the effects of the speech on interpersonal relationships and productivity in the workplace. Concluding that Pickering's letter interfered with neither his work performance nor the functioning of the schools in general, the Court held that his First Amendment rights outweighed the interests of the Board of Education.

The balancing test enunciated in Pickering was refined fifteen years later in Connick v. Myers. Connick involved an assistant district attorney who was fired for distributing among her coworkers a questionnaire addressing office policies, working conditions, supervisor-subordinate relationships, and pressures to participate in political activities. Myers developed and disseminated the survey to bolster her position in a disagreement with her superiors regarding her pending intra-office transfer. The Supreme Court, reversing the decisions of the district court and the Fifth Circuit, held in favor of the public employer. More importantly,}(Vol. 15:357)
the Court identified a prerequisite to the courts' use of the *Pickering* balancing test: when the employee speech at issue "cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for [a court] to scrutinize the reasons for [the] discharge."91

The "public concern" requirement was explained in terms of the employer's interest in maximizing control and efficiency: "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."92 The Court indicated that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."93 Applying these principles, the *Connick* court held that only one of the survey questions, which asked whether respondents "ever feel pressured to work in political campaigns on behalf of office supported candidates," dealt with a topic of public concern.94

A two-part framework for analysis has emerged from these decisions. A court faced with an allegation that an individual has experienced employment-related retaliation for exercising his or her right to free speech will first determine whether the communication at issue involves a matter of "public concern." If so, the First Amendment interests of the employee will be balanced against the public employer's efficiency and productivity interests to determine who should prevail.95

91. *Id.* at 146. The Court stated further:

[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. *Id.* at 147.

92. *Id.* at 146.

93. *Id.* at 147-48. Four justices dissented from the Court's opinion in *Connick*, including Justice Marshall, who authored the Court's opinion in *Pickering*. *Id.* at 156. The *Connick* dissenters asserted, among other points, that the characterization of speech as involving "public concern is relevant to the constitutional inquiry only when the statements at issue—by virtue of their content or the context in which they were made—may have an adverse impact on the government's ability to perform its duties efficiently." *Id.* at 157 (Brennan, J., dissenting).

94. *Id.* at 149.

95. *Id.* at 146. See, e.g., *Boger v. Wayne County*, 950 F.2d 316, 322 (6th Cir. 1991); *Coughlin v. Lee*, 946 F.2d 1152, 1156-57 (5th Cir. 1991); *Hicks v. City of Watonga*, 942 F.2d 737, 744 (10th Cir. 1991); *Ezekwo v. New York City Health & Hosps. Corp.*, 940 F.2d 775, 780-81 (2d Cir. 1991); *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1038 (9th Cir. 1990); *Stewart v. Baldwin County Board of Education*, 908 F.2d 1499, 1505-06 (11th Cir. 1990); *Biggs v. Village of Dupo*, 892 F.2d 1298, 1301 (7th Cir. 1990); *Moore v. City of Kilgore*, 877
The Supreme Court has held that the First Amendment's protection in this context extends to public employees who suffer retaliation for expressing their views, even if the communication is made privately. Nonetheless, a number of lower court decisions identify the recipient of the speech at issue as relevant to satisfaction of the "public concern" criterion. Specifically, a communication is more likely to meet this threshold requirement if it is directed to the news media, although press contact is not dispositive of the "public concern" issue. Although the persuasiveness of this factor is apparently enhanced in cases where a reporter initiates contact with the employee, rather than vice versa, media interest is perceived to manifest "concern to the community" in the

F.2d 364, 369 (5th Cir. 1989); Kurtz v. Vickrey, 855 F.2d 723, 730 (11th Cir. 1988); Rode v. Dellarciprete, 845 F.2d 1195, 1201 (3d Cir. 1988).

Although the courts' characterization of the Connick-Pickering test is substantially consistent, minor differences appear. Most notably, some courts explicitly incorporate in their articulation of this analysis a causation requirement drawn from Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). See, e.g., Boger, 950 F.2d at 322 (plaintiff must establish "that the protected speech was a 'substantial' or 'motivating' factor in the decision to transfer or otherwise penalize the speaker"); Ezekwo, 940 F.2d at 780-81 (employee must demonstrate "that the speech played a substantial part in the employer's adverse employment action; i.e., that the adverse action would not have occurred but for the employee's protected actions"); Sanchez, 936 F.2d at 1038 (requiring proof that "the constitutionally protected expression is a 'substantial' or 'motivational' factor in the employer's adverse decision or conduct"). See generally Kurtz, 855 F.2d at 730-31 n.5 (discussing two interpretations regarding which part of the framework yields a determination whether the speech at issue is "constitutionally protected").

96. See Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 415-16 (1979) ("Neither the [First] Amendment itself nor our decisions indicate that . . . [the right to] freedom [of speech] is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."). The Connick majority distinguished its facts from those of Givhan, which was characterized as involving private expression "as a citizen on a matter of general concern, not tied to a personal employment dispute." 461 U.S. at 148 n.8.

97. See, e.g., Deremo v. Watkins, 939 F.2d 908, 911 n.3 (11th Cir. 1991); Brawner v. City of Richardson, 855 F.2d 187, 191 (5th Cir. 1988); Broderick v. Roache, 767 F. Supp. 20, 25 (D. Mass. 1991); see also, e.g., Kurtz v. Vickrey, 855 F.2d 723, 727 (11th Cir. 1988) ("[A]n employee's efforts to communicate his or her concerns to the public are relevant to a determination of whether or not the employee's speech relates to a matter of public concern.").

98. See, e.g., Ezekwo v. New York City Health & Hosps. Corp., 940 F.2d 775, 781 (2d Cir. 1991); Brown v. Texas A & M Univ., 804 F.2d 327, 337 (5th Cir. 1986); Broderick, 767 F. Supp. at 25. See generally, e.g., Fiorillo v. United States Dep't of Justice, 795 F.2d 1544 (Fed. Cir. 1986); Jurgensen v. Fairfax County, 745 F.2d 868 (4th Cir. 1984); Marquez v. Turnock, 765 F. Supp. 1376 (C.D. Ill. 1991), aff'd, 967 F.2d 1175 (7th Cir. 1992) (all involving disclosures to media held not to be matters of public concern).

99. See, e.g., Moore v. City of Kilgore, 877 F.2d 364, 371 (5th Cir. 1989) ("The media in this case approached [plaintiff], asked him for his comments, and printed his responses."); Matulin v. Village of Lodi, 862 F.2d 609, 613 (6th Cir. 1988) ("The . . . finding of public concern is here strengthened by the fact that the plaintiff did not solicit the attention of the media, but simply responded to questions regarding an existing controversy."); Rode v. Dellarciprete, 845 F.2d 1195, 1201-02 (3d Cir. 1988) ("This was a matter of grave public concern . . . as evidenced by the news reporter's initiative in contacting" the plaintiff.).
context of the First Amendment cases; a whistleblower who directs his or her disclosures to the press is more likely to receive the courts' protection than one who reports internally or to another external outlet.

2. Employees at Will and the Public Policy Exception

Under traditional law, an employment at will relationship may be terminated by either party, for any reason, at any time.101 Although this principle retains vitality in most jurisdictions, it has increasingly become subject to a variety of constraints, including state and federal statutes and judicially created modifications.

Among the limiting theories developed by the courts, the most widespread acceptance has been gained by the so-called public policy exception to the employment at will rule.103 This qualification on the at-will employer's absolute right of discharge originated in 1959, when a California appellate court held that an employee's dismissal for refusing to commit perjury was actionable because it was contrary to public policy.104 A majority of state courts now recognize this principle.105

100. Connick, 461 U.S. at 146.


Two other judicially created exceptions to the employment at will rule have received more limited acceptance. The first recognizes a contract-based cause of action arising from promises implied in fact, often from employee handbooks and personnel manuals. See, e.g., Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880 (Mich. 1980); Pine River State Bank v. Mettilee, 333 N.W.2d 622 (Minn. 1983). The second imposes a covenant of good faith and fair dealing on at-will relationships. See, e.g., Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1977). Neither of these theories has been utilized to any degree in whistleblowing cases.


There are several fact patterns characteristic of cases involving the application of the public policy exception, including a group of decisions utilizing the exception to protect individuals who are discharged for blowing the whistle on the wrongful conduct of their employers or co-workers. Only one discovered case, however, evaluates the application of the public policy exception to an employee who was fired for disclosures to the media. In *Rozier v. St. Mary’s Hospital*, the plaintiff alleged that she was dismissed for divulging to a newspaper information about hospital employees’ inappropriate conduct toward patients. The Illinois appellate court upheld summary judgment in the employer’s favor, on two grounds: that the scope of the public policy exception in that state did not encompass the facts of the case; and that the cause of

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106. Cases utilizing the public policy exception typically involve one of four fact patterns. One protects employees who are discharged for fulfilling a public obligation, such as jury duty. See, e.g., *Nees v. Hocks*, 536 P.2d 512 (Or. 1975); see also, e.g., *Ludwick v. This Minute of Carolina, Inc.*, 337 S.E.2d 213 (S.C. 1985) (employee dismissed for complying with subpoena to testify before state Employment Security Commission had cause of action). A second group of cases permits recovery by individuals who are fired for exercising a statutory right, most often a workers’ compensation claim. See, e.g., *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973), and *Hansen v. Harrah’s*, 675 P.2d 394 ( Nev. 1984) (retaliatory discharge for filing a workers’ compensation claim actionable). A third common application of the exception gives redress to employees who are discharged for refusing to participate in illegal or unethical activity. See, e.g., *Hansrote v. Amer Indus. Technologies Inc.*, 586 F. Supp. 113 (W. D. Pa. 1984), *aff’d mem.*, 770 F.2d 1070 (3d Cir. 1985) (applying Pennsylvania law; refused to make commercial bribe); *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330 (Cal. 1980) (refused to participate in scheme to fix gasoline prices); *Trombetta v. Detroit, Toledo & Ironton R.R.*, 265 N.W.2d 385 (Mich. Ct. App. 1978) (refused to falsify state pollution control reports); *Phipps v. Clark Oil & Ref. Corp.*, 396 N.W.2d 588 (Minn. Ct. App. 1986), *aff’d*, 408 N.W.2d 569 (Minn. 1987) (declined to violate Clean Air Act by pumping leaded gas into automobile equipped for unleaded fuel only). Whistleblowers comprise the fourth category. See, e.g., *Sheets v. Teddy’s Frosted Foods*, 427 A.2d 385 (Conn. 1980) (fired for attempting to convince employer to comply with state labeling law); *Palmateer v. International Harvester Co.*, 421 N.E.2d 876 (Ill. 1981) (reported possible criminal activity of fellow employee to local law enforcement agency); *Harless v. First Nat’l Bank*, 246 S.E.2d 270 (W. Va. 1978) (reversing dismissal of complaint of bank employee who claimed he was discharged because of his attempts to force bank to comply with consumer credit protection laws). They are less likely to prevail, however, than other public policy exception plaintiffs. See generally Elletta Sangrey Callahan, *Employment at Will: The Relationship Between Societal Expectations and the Law*, 28 Am. Bus. L.J. 455, 460, 479 (1990) (distinction between refusals to act and whistleblowing in these cases is not well founded).

107. 411 N.E.2d 50, 51-52 (Ill. App. Ct. 1980). In her deposition, the plaintiff asserted that she was not, in fact, the source of the information published. As the court noted, however, “if her deposition testimony in this regard was true her firing was merely an exercise of an employer’s judgment and no significant public policy issues are involved.” *Id.* at 52. Accordingly, the court assumed that she had made the disclosures. *Id.*

108. *Id.* at 53-54. Previous state decisions led the *Rozier* court to conclude that Illinois recognized a public policy exception claim only in cases where an employee was discharged for exercising his or her workers’ compensation rights. *Id.* See generally supra note 106 (discussing category of public policy exception cases providing relief where employee is fired for exercising a statutory right). The reliance in the *Rozier* opinion on the reasoning of Palmateer v.
action should be disallowed, in any case, where a legitimate basis independent of the whistleblowing existed for the discharge.\textsuperscript{109}

The \textit{Rozier} opinion fails to address whether the recipient of the disclosure at issue was relevant to the outcome in that case. A review of cases involving whistleblowers who seek recovery based on the public policy exception, however, strongly suggests that the plaintiff's likelihood of success depends, among other factors,\textsuperscript{110} on the recipient of the report.\textsuperscript{111} Specifically, an individual who experiences retaliation for making a report of wrongdoing within his or her employing organization is substantially less likely to prevail in a public policy exception lawsuit than one who discloses information to a government agency.\textsuperscript{112}

Courts considering the claims of internal whistleblowers do not usually explain their determinations—which typically favor the employer—in terms of the recipient of the report.\textsuperscript{113} Three decisions, however, have specifically distinguished between internal and external whistleblowers in refusing relief to the employee.\textsuperscript{114}

\textit{Zaniecki v. P.A. Bergner and Co.}\textsuperscript{115} involved the claim of an employee at will who was discharged for reporting a coworker's suspected criminal activity to his employer's chief security officer. Contrasting these circumstances to those of the key state supreme court decision, which involved communicating allegations of theft by a fellow employee to law enforcement authorities,\textsuperscript{116} the \textit{Zaniecki} court explained that "[t]he fact that information is given to a public official [rather than a superior within the organization] is not trivial; these are people charged

\begin{footnotes}
\item[109] International Harvester Co., 406 N.E.2d 595 (Ill. App. Ct. 1980), was misplaced, however, as the Illinois Supreme Court subsequently overruled that decision. 421 N.E.2d 876 (Ill. 1981) (permitting claim of employee who reported possible criminal activity of fellow worker to local law enforcement officials).
\item[110] 411 N.E.2d at 54. Rozier's deposition testimony strongly suggested that she had lied to her supervisor about whether she had disclosed information about the patient-employee incidents. \textit{Id.} See generally Elleta Sangrey Callahan, \textit{The Public Policy Exception to the Employment At Will Rule Comes of Age: A Proposed Framework for Analysis}, 29 AM. BUS. L.J. 481, 498-503, 507-14 (1991) (recommending approach to public policy exception cases where plaintiff's discharge is based on both activity protected by public policy and legitimate business concerns).
\item[111] The most important determinants of success in a public policy exception claim are jurisdiction, \textit{see} Callahan, \textit{supra} note 109, at 482, and the plaintiff's ability to identify a public policy that has been violated by the defendant's retaliatory behavior. \textit{See} Dworkin & Callahan, \textit{supra} note 11, at 288.
\item[112] \textit{See} Callahan, \textit{supra} note 106, at 460; Dworkin & Callahan, \textit{supra} note 11, at 287-95.
\item[113] \textit{Id.} at 288-92.
\item[114] \textit{Id.} at 292-95 (discussing at length the decisions drawing explicit distinctions between internal and external whistleblowing).
\end{footnotes}
by the citizenry to ensure their welfare and to promote the common good." Although "[a] private employer burdens the communication and cooperation necessary to attain these public goals by discharging an employee in retaliation for such cooperation," the court found that no such obstruction is present in the internal whistleblowing context. Thus, it reasoned that no public policy violation was presented.

The Nevada Supreme Court, in Wiltsie v. Baby Grand Corp., relied on this reasoning several years later in characterizing an internal disclosure as "merely . . . private or proprietary," unlike reports to government authorities which, the court believed, further public objectives. In the third decision, House v. Carter-Wallace, Inc., an appellate court took a somewhat different approach and explicitly refused protection to an in-house whistleblower. Focusing on the employer-employee relationship, the court characterized internal reports essentially as management disputes: "a mere difference of professional opinion between an employee and those with decision making power in a corporation is not a sufficient basis to establish a wrongful discharge." In language more consistent with Zaniecki and Wiltsie, the House decision also assessed the relative social utility of reports within the organization vis-a-vis those made to government agencies, noting that no court in that state had upheld a public policy exception cause of action in favor of a whistleblower who "failed to bring the alleged violation of public policy to any governmental or other outside authority or to take other effective action in opposition to" employer misconduct.

These cases offer little support to the media whistleblower. Obviously, a report to the media is external to the organization, as is a report to the government. Nevertheless, an employee who reveals wrongdoing to a reporter communicates indirectly, at best, with law enforcement agencies. Thus, to the extent that these cases emphasize cooperation with such authorities as a defining characteristic of external whistleblowing, their usefulness to persons who make reports to the media will be limited. Further, although a disclosure to a reporter may well be "action in opposition" to organizational wrongdoing, it may be perceived as

117. 493 N.E.2d at 420-21.
118. Id.
119. Id.
120. 774 P.2d 432, 433 (Nev. 1989).
122. Id. at 357.
123. Id. at 356.
124. See generally Dworkin & Callahan, supra note 11, at 280-85, 295-308 (arguing that internal whistleblowing is generally more beneficial than external whistleblowing).
125. See House, 556 A.2d at 356; see also supra note 120 and accompanying text.
symptomatic of a management dispute, rather than a desire actively to counter misconduct.\textsuperscript{126}

3. \textit{Private Employees and \textquotedblleft Just Cause\textquotedblright}

Most employees covered by a collective bargaining agreement are shielded, either expressly or implicitly, from being discharged without just cause.\textsuperscript{127} This standard has provided surprisingly little protection for whistleblowers, however, against employers who argue that such disclosures are a manifestation of disloyalty justifying disciplinary action.\textsuperscript{128} The concept of loyalty in this context has been described as follows:

The duty of loyalty owed by an employee to an employer is based upon the very relationship itself. In theory, employers and employees have an identity of common interests and must be supportive of one another for common good. It is the duty of employees to enhance the best interests of their employer. An employee must not degredate [sic] her employer to the public, as to do so is against the best interests not only of her employer, but of her fellow employees as well.\textsuperscript{129}

The conflicting interests of employer and employee in such cases are also acknowledged: \textquotedblleft[\textit{n}either party has an absolute right in this regard: an employee cannot expect to disparage and harm an employer and retain his employment, nor can an employer stifle all public expression of dissatisfaction by its workers.\textquotedblright\textsuperscript{130}

Arbitrators in several cases have enumerated various factors when trying to accommodate these competing concerns. Consideration is commonly given to the recipient of the report.\textsuperscript{131} Like several of the public policy exception cases discussed above,\textsuperscript{132} the arbitration decisions distin-

\textsuperscript{126} See Callahan, \textit{supra} note 106, at 479 (questioning \textquotedblleft the assumption that a spiteful employee intent on revenge against the employer would resort to the media, while a worker concerned solely with public safety would go to law enforcement officials\textquotedblright).


\textsuperscript{128} Id. To the authors' knowledge, Professor Malin was the first commentator to cast doubt on the widely-held assumption that just cause provisions afforded general protection for whistleblowers employed pursuant to collective bargaining agreements.

\textsuperscript{129} Davenport Good Samaritan Center, 1978-2 Lab. Arb. Awards (CCH) ¶ 8441 (Ross, Arb.); see, e.g., San Diego Gas & Elec. Co., 82 Lab. Arb. Rep. (BNA) 1039, 1041 (1983) (\textquotedblleft The relationship between an employer and employee is, in reality, a two-way street in that the employer has certain responsibilities toward his employee who, in turn, has obligations—including loyalty—to his place of employment\textquotedblright).

\textsuperscript{130} Ace Hardware Corp., 1981-2 Lab. Arb. Awards (CCH) ¶ 8577; see Malin, \textit{supra} note 127, at 288.

\textsuperscript{131} See, e.g., \textit{Ace Hardware}, 1981-2 Lab. Arb. Awards ¶ 8577, at 5535 (construing Zellerbach Paper Co., 75 Lab. Arb. Rep. (BNA) 869 (1980) (Gentile, Arb.)) (identifying one of five factors as \textquotedblleft to whom was the conduct or statements directed\textquotedblright); Town of Plainville, 77 Lab. Arb. Rep. (BNA) 161, 169 (1981) (noting relevance of \textquotedblleft [t]he means chosen by the whistleblower to communicate his information\textquotedblright) (emphasis omitted)).

\textsuperscript{132} See \textit{supra} notes 110-23 and accompanying text.
guish between internal and external whistleblowing. The logic underlying this distinction in the arbitration cases, however, differs completely from the courts' analysis in the employment at will context because that logic turns on the concept of employee loyalty. Accordingly, the key focus is typically whether the disclosure in question was made to any recipient external to the employing organization. For the purposes of this inquiry, no apparent distinction is drawn between whistleblowing to government authorities and to the media; either constitutes "go[ing] public," which is detrimental to the employer and, thus, disloyal.

Nonetheless, the employee's interest in communication may supersede his or her duty of loyalty where efforts to rectify a problem internally have been unsuccessful. Presumably, in such cases an employer would not have just cause to discharge or otherwise penalize an employee who blows the whistle to the media.

C. Summary of Existing Legal Protection for Media Whistleblowers

Legal responses to whistleblowing generally seek to accommodate the conflicting interests of the employer, the worker, and society. Whistleblowing laws, both federal and state, tend to give the most weight to the societal objectives of exposing and reducing misconduct. This emphasis is reflected in provisions favoring, either explicitly or implicitly, external reports to government agencies, or to internal sources who are then given the opportunity to correct the wrongdoing before the whistle can be blown externally. Given these legislative goals, it is curious that the media are generally not seen as valid vehicles for exposure and correction, since the power of the media to inform and influence is generally acknowledged.


135. Focusing more broadly on arbitration cases regarding whistleblowing, Professor Malin generally categorizes those decisions into two groups: those where such disclosures are treated as "disloyalty per se," and those in which a more balanced approach is taken. See Malin, supra note 127, at 289-91.

136. See, e.g., Plainville, 77 Lab. Arb. Rep. (BNA) at 169-70 ("[W]here there are good reasons for not using [regular channels], the employee has the right to go outside of channels."); Davenport, 1978-2 Lab. Arb. Awards ¶ 8441, at 5060 (employee may "go public" with well-founded complaint if employer is unresponsive to internal report).

137. See Callahan, supra note 106, at 456.

138. See supra notes 29, 32, 42-43, 55-59 and accompanying text.

Among the various nonstatutory causes of action involving media whistleblowers, the most consistent analytical thread is the reluctance of the courts and arbitrators to interfere with the employer's interest in maximizing efficiency and productivity. The emphasis placed on employee loyalty in arbitration decisions evaluating discharges in retaliation for external disclosures arises from this consideration, as does the inclination to characterize internal whistleblowing as a management dispute in cases applying the public policy exception to the traditional employment at will rule. Deference to legitimate managerial needs is also considered in the First Amendment cases, in both the threshold requirement that the expression at issue involve a "public concern" and the balancing test that weighs employee interests against employer efficiency and productivity concerns.

Although these three categories of cases share this point of analysis, they arrive at three different conclusions regarding the most appropriate recipient of employee disclosures: the arbitration cases favor internal whistleblowing; the public policy exception decisions tend to support external reports to government authorities; and the "public concern" criterion of the First Amendment cases is bolstered by external contact with the media. The disparate contexts of these causes of action explain, at least to some extent, these results. Yet, loyalty is no less desirable a trait in employees who do not enjoy just cause protection, and the likelihood that a whistleblower's report represents merely a management dispute is unlikely to be based on his or her status as an employee at will. Moreover, if media interest is an accurate proxy for societal significance, why should press coverage of misconduct originating in the private sector not also be relevant to whether the public interest advanced by a whistleblower's report is sufficient to outweigh the competing interest of his or her employer?

In sum, the legal approaches taken toward whistleblowing to the media, in terms of protecting the employee who conveys the information, lack cohesion and a firm conceptual foundation. Legal protection for the media recipient of such a disclosure, however, is evaluated and explained from a largely different perspective.

140. See supra notes 128-36 and accompanying text.
141. See supra notes 112, 122 and accompanying text.
142. See supra note 82 and accompanying text.
143. See supra notes 133-35 and accompanying text.
144. See supra notes 112, 114-20, 123 and accompanying text.
145. See supra notes 97-100 and accompanying text.
146. Because of their common foundation in the First Amendment, some conceptual overlap exists between the cases involving public employee whistleblowers who seek protection from retaliation (see supra notes 78-100 and accompanying text) and the decisions discussing
II

Legal Protection for the Media

Confidentiality agreements between representatives of the media and their sources are a routine component of the news-gathering process.\textsuperscript{147} In spite of their conventionality, these relationships generate tension between parties to a legal action and the media when the government or private litigants seek access to evidence held by journalists.\textsuperscript{148} Indeed, news organizations typically refuse to release all unpublished material, whether or not it was obtained in exchange for a promise of anonymity.\textsuperscript{149} The principles of the media in this regard were typified by an attorney who has represented \textit{The Washington Post} when he observed that "reporters are not fungible with other witnesses."\textsuperscript{150}

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\textsuperscript{147} See \textit{Dicke}, supra note 139, at 1563.


\textsuperscript{149} Bainbridge, supra note 148, at 68.

\textsuperscript{150} Id. (quoting David E. Kendall, Esq.).
Journalists seek immunity from subpoena based on their status. In this sense, the link between a reporter and his or her confidential source is comparable to attorney-client and physician-patient relationships. Unlike traditional privileges against non-disclosure, however, special treatment is extended to journalists in order to protect the community rather than the individual. This special treatment derives from the function of the media in a democratic society, and is designed to facilitate the dissemination of information.

151. Some commentators espouse the concept that members of the media occupy a favored role in a democracy. See, e.g., Sam J. Ervin, Jr., In Pursuit of a Press Privilege, 11 Harv. J. on Legis. 232, 234-35 (1974) (“[T]he press, while comprised of ordinary citizens with no special office, has an extraordinary function, tied to the heart of the democratic process.”). But see Branzburg v. Hayes, 408 U.S. 665, 685 (1972) (declining to recognize a constitutionally-based privilege for journalists, the Court noted that “the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury . . . ”).

152. A special problem is raised by in-house counsel who blow the whistle on their employers. Normally, information given to an attorney is confidential. In most states, and under the Model Rules of Professional Conduct of the American Bar Association, attorneys have a duty to disclose such information only when there is a danger that a client's actions will result in serious bodily harm or death. See In-House Counsel, A.B.A. J., Mar. 1992, at 72, 73. Cases brought by terminated in-house counsel whose whistleblowing did not involve serious bodily harm or death have presented directly to the courts the conflicting public policies of the need to know and the need for client privacy. See Sara A. Corello, Note, In-House Counsel’s Right to Sue for Retaliatory Discharge, 92 Colum. L. Rev. 389 (1992).

153. See Levi, supra note 13, at 655-56 (“In traditional professional and other fiduciary relationships . . . , confidentiality is enforced in large part because the professional or fiduciary has the opportunity and holds the position of power, information, and expertise that create the potential for abuse of the client.”).

154. See id. at 633, 635; Dicke, supra note 139, at 1566. The persuasiveness of arguments supporting a journalist's privilege against compulsory disclosure varies according to the category of proceeding at issue. See Confidential Sources & Information, News Media & L., Fall 1990, at 2. In the context of criminal cases, for example, the defendant's Sixth Amendment rights are a formidable obstacle to reporters' efforts to protect their sources. See Susan L. Dolin, Note, Shield Laws: The Legislative Response to Journalistic Privilege, 26 Clev. St. L. Rev. 453, 454 (1977); (when reporter's privilege is asserted in a criminal case, “the conflict is one between the free flow of information to the public and the fair and effective administration of justice . . . ”); Rood & Grossman, supra note 148, at 810. A party to a civil action, on the other hand, may appropriately have more difficulty in obtaining access to material in possession of the media. See Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 594 (1st Cir. 1980); Bainbridge, supra note 148, at 72; Dolin, supra, at 460; see also Zerilli v. Smith, 656 F.2d 705, 714 (D.C. Cir. 1981) (“distinction can also be drawn between civil cases in which the reporter is a party, as in a libel action, and cases in which the reporter is not a party.”). But see United States v. Burke, 700 F.2d 70, 77 (2d Cir. 1983) (“We see no legally-principled reason for drawing a distinction between civil and criminal cases when considering whether the reporter's interest in confidentiality should yield to the moving party's need for probative evidence.”); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980) (media's “interest in protecting confidential sources, preventing intrusion into the editorial process, and avoiding the possibility of self-censorship created by compelled disclosure of sources and unpublished notes does not change because a case is civil or criminal”), cert. denied, 454 U.S. 1056 (1981).
A. Existing Constitutional and Legislative Protection

Although the media's practice of refusing to reveal sources predates the formation of the United States, the first litigated claim of a constitutionally-based journalistic privilege occurred in 1958. Garland v. Torre was an action for breach of contract and defamation against a newspaper columnist. During her deposition by plaintiff's counsel, the defendant refused to disclose the source of allegedly defamatory remarks quoted in her column and was held in criminal contempt following a proceeding to compel her response. On appeal, the defendant argued that the First Amendment's free press guarantee shields journalists from compulsory identification of confidential sources. Alternatively, she argued that a qualified privilege independent from the Constitution should be extended on the basis of "the societal interest in assuring a free and unrestricted flow of news to the public."

Acknowledging the possible restrictive effect of its determination on news availability, the Second Circuit held, nonetheless, that freedom of the press, in this context, was subordinate to "a paramount public interest in the fair administration of justice." Citing state and federal precedents, the court also declined to recognize a common law evidentiary privilege against disclosure.

A majority of the United States Supreme Court adopted a similar position in Branzburg v. Hayes. In Branzburg, the cases of three journalists who had been subpoenaed by state and federal grand juries conducting criminal investigations were consolidated. Writing for the majority, Justice White held that the First Amendment's free press and free speech rights did not legitimize the reporters' refusals to testify. Justice Powell, however, one of the five-justice majority, wrote a concur-

155. See, e.g., Rood & Grossman, supra note 148, at 788.
158. Id. at 547.
159. Id. at 547-48.
160. Id. at 548. The defendant further argued that she was entitled to a protective order under the Federal Rules of Civil Procedure. Id.
161. Id.
162. Id. at 549. Justice Stewart noted that "Freedom of the press, hard-won over the centuries by men of courage, is basic to a free society. But basic too are courts of justice, armed with the power to discover truth." Id. at 548.
163. Id. at 550 ("The privilege not to disclose relevant evidence obviously constitutes an extraordinary exception to the general duty to testify.")
165. Id. at 667-79. Branzburg had reported on the manufacture and use of illegal drugs; Pappas and Caldwell, the reporters whose cases were consolidated with Branzburg's, were subpoenaed to testify about the activities of the Black Panther Party. Id.
166. Id. at 667, 690.
ring opinion to clarify that journalists in such cases were not "without constitutional rights with respect to the gathering of news or in safeguarding their sources." Noting the availability of a motion to quash, Justice Powell advocated an approach whereby "[t]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." Four justices dissented, arguing that confidential journalist-source relationships are constitutionally privileged.

In Branzburg, Justice White explicitly invited legislatures at both the federal and state levels to consider statutory protection for reporters. Congress accepted immediately, but ultimately failed to enact a law. Legislative efforts at the state level have been more successful. Twenty-eight states now have some type of "shield law" in place.

In jurisdictions in which shield law protection is unavailable, state and federal courts have interpreted Branzburg in several ways. Some-what ironically, given the actual holding in that case, the most common

167. Id. at 709 (Powell, J., concurring). Justice Powell joined Justice White's opinion for the Court and wrote a separate concurrence as well.
168. Id. at 710.
169. Id. at 711-25 (Douglas, J., dissenting), 725-52 (Stewart, J. dissenting, joined by Justices Brennan and Marshall).
170. Id. at 706.
171. See Rood & Grossman, supra note 148, at 794-96 (discussing Congressional reaction to Branzburg and reasons for eventual failure to act).
172. A listing of the statutes may be found in Rood & Grossman, id. at 794 nn.89-90; Richard Rosen, Note, A Call for Legislative Response to New York's Narrow Interpretation of the Newsperson's Privilege: Knight-Ridder Broadcasting Inc. v. Greenberg, 54 BROOK. L. REV. 285, 299-300 nn.62-63 (1988); and Confidential Sources & Information, supra note 154, at 9. Eleven of these statutes have been passed since the Branzburg decision. See Rood & Grossman, supra note 148, at 794; Confidential Sources & Information, supra note 154, at 9. The content of state shield laws varies considerably in terms of the categories of journalists covered, the scope of the privilege (i.e., absolute versus qualified), the types of material included (e.g., published versus unpublished), and whether a confidentiality agreement between the reporter and the source regarding the information sought is a prerequisite to its protection. A useful tabular presentation of this information is provided in Confidential Sources & Information, supra, at 10-12. See also Rood & Grossman, supra note 148, at 796-801.

Disparities among the state shield statutes have led some commentators to press for Congressional action to protect journalists. See, e.g., id. at 801 ("It is entirely likely that the party seeking disclosure by a national news organ would shop for the forum with the least protective reporter's shield law.").

approach has been a fact-sensitive balancing analysis based on either Justice Powell's concurring opinion or Justice Stewart's dissent. United States v. Blanton, for example, involved a motion to quash a subpoena served on a newspaper writer, Patrick Malone, in the context of Blanton’s criminal prosecution for selling illegal drugs. The federal government sought Malone’s testimony confirming that quotations in a published article attributed to the defendant were, in fact, made by Blanton. The district court evaluated whether the subpoena should be enforced in terms of a three-part standard, requiring the government to show that:

(a) The reporter has information relevant and material to proof of the offense charged of the defendant’s defense;
(b) There is a compelling need for disclosure sufficient to override the reporter’s privilege; and
(c) The party seeking the information has unsuccessfully attempted to obtain other sources less chilling of the First Amendment freedoms.

Despite the absence of a confidentiality agreement between Malone and Blanton, the motion to quash was granted because the government did

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174. See, e.g., United States v. Steelhammer, 539 F.2d 373, 375 (4th Cir. 1976) (holding that such decisions are “the product of a balancing of two vital considerations: protection of the public by exacting the truth versus protection of the public through maintenance of free press”); see also Rosen, supra note 172, at 308.


176. Justice Stewart stated:

[W]hen a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.


178. Id.

179. Id. at 297. This language is very similar to that proposed by Justice Stewart in his dissent in Branzburg. Compare id. with Branzburg, 408 U.S. at 743.
not demonstrate that it had pursued alternatives to Malone's testimony to establish its case against Blanton.¹⁸⁰

B. Policy Arguments Relating to Protection

Policy-based assertions in favor of shielding journalists from compulsory disclosure of their sources' identities are founded on the importance of well-informed citizens to the vitality of a democracy. Most commonly, legal protection for journalist-source relationships is defended on the basis that it is necessary to the newsgathering process. Reporters believe that both current and potential sources will be deterred from providing them with information if media representatives can be compelled by the government to breach confidentiality agreements.¹⁸¹ Further, news availability is chilled to the extent that journalists and editors are deterred from pursuing controversial topics by the threat of becoming embroiled in a conflict with the government over access to information.¹⁸² With reference to democratic values, reducing the amount of news that would otherwise be available to the public has negative consequences on two levels: in individual terms, self-determination and self-fulfillment are curtailed,¹⁸³ and, on a societal level, well-informed collective decisionmaking is impeded.¹⁸⁴

Protection for reporters also facilitates the media's role as primary "watchdogs" of the government. Accordingly, confidential agreements permit journalists to discover and reveal government wrongdoing.¹⁸⁵

¹⁸⁰ 534 F. Supp. at 297. The government's case was weakened by evidence that prosecutors failed to cooperate with the efforts of the reporter's counsel to identify alternative sources for the information at issue. See id. at 296-97.


¹⁸² Rosen, supra note 172, at 307-08.

¹⁸³ See Rood & Grossman, supra note 148, at 787-88 ("The marketplace of ideas is a valuable tool for individual development."); Dicke, supra note 139, at 1558 ("[T]he press is protected because it supplies members of the public with the diverse information they need to exercise their democratic sovereignty.").


¹⁸⁵ See Bainbridge, supra note 148, at 68; Levi, supra note 13, at 712; Rood & Grossman, supra note 148, at 806 ("The public relies on the press to act as its major source of surveillance of the government."); Tofel, supra note 174, at 9 ("The examples of Daniel Ellsberg and the Pentagon Papers and 'Deep Throat' and Watergate are sufficient to recall that revelation of the most important facts regarding public affairs is sometimes made possible only because the press is able to convince confidential sources that their identities will be protected."); Rosen, supra note 172, at 296.
and, at the same time, the threat of such exposure may deter misconduct.\textsuperscript{186}

It is obvious that the media will effectively oversee the government only to the extent that their independence from the government is assured.\textsuperscript{187} The importance of a functional separation between these institutions provides a further rationale for shielding reporters from subpoena, and also discourages the perception that journalists "will be seen as agents for the investigative process."\textsuperscript{188}

C. Trade Secret Laws

The Procter & Gamble incident\textsuperscript{189} brought to light the potential interaction between trade secret laws and shield laws, and raised the novel issue whether trade secret laws can be used to circumvent the shield protections. An examination of the term "trade secret," as it is defined in

\textsuperscript{186} See Dicke, supra note 139, at 1558-59 ("[T]he press serves as a check on government power, assuring that the government is accountable to the people."); Dolin, supra note 154, at 477. See generally Rood & Grossman, supra note 148, at 781 ("[T]he primary objective of a reporter's testimonial privilege or shield law is to strengthen first amendment rights in times when intolerance of unorthodox views is most prevalent and when governments are most popular and/or most likely and able to stifle dissent.").

\textsuperscript{187} See Levi, supra note 13, at 618, 633; Rosen, supra note 172, at 286; Confidential Sources & Information, supra note 154, at 2. See generally Editorial: Like Previous Administrations, The Bush Team Has Set Its Sights on Leakers; Unlike Most, It Wants to Subpoena Reporters to Catch Information 'Thieves', NEWS MEDIA & L., Fall 1989, at i ("The notion that the press has a responsibility to help keep the government's secrets for it is simply absurd.").

The relationship between the media and the government has been, at various times, either collaborative or confrontational. See Levi, supra note 13, at 676-87; see also Rood & Grossman, supra note 148, at 790 ("[T]he 1960s heralded a change in the press-government relationship from accommodating and cooperative to adversarial.").

\textsuperscript{188} Rosen, supra note 172, at 307; see id. at 295-96; Dicke, supra note 139, at 1565. At the same time, it has been argued that the reduction in published information resulting from a lack of legal protection for journalist-source relationships (see supra notes 181-82 and accompanying text) will deprive law enforcement agencies of the fruits of reporters' investigations. See Ervin, supra note 151, at 242.

Although the perception that the media is fiercely independent of the government is widely held, the interaction of these institutions is considerably more nuanced than the traditional argument in support of protection for journalists assumes. See Levi, supra note 13, at 617-18, 689. Newsmakers rely heavily on the media: "Politicians and government bureaucrats, not to mention business interests, seek favorable, predictable, and frequent press coverage. News coverage reaches a large percentage of the public, appears more disinterested than paid advertisements, and is thought to influence public opinion." Id. at 687-88. Similarly, news-gatherers rely heavily on the government: "[C]ompetitive and careerist motivations of reporters reinforce[e] their reliance on powerful sources. News sources are the gatekeepers for the very commodity on which reporters rely for their career advancement. And they are gatekeepers who can choose among fiercely competitive journalists in the dissemination of their information." Id. at 682. Professor Levi notes, in summarizing the complexity of the press-government relationship, that "[a] realistic image of the press requires the recognition of the simultaneously powerless and powerful character of modern media." Id. at 689.

\textsuperscript{189} See supra notes 1-8 and accompanying text.
variety of sources, indicates that trade secret principles cannot legiti-
mately be used to defeat protection for the media or the whistleblower.

Trade secret protection has two major objectives: “to encourage
and protect invention and commercial enterprise” and to “ensure stan-
dards of commercial ethics.” Both of these purposes are reflected in
protection afforded by common law tort and agency principles, as
well as more recent trade secret statutes. All sources of trade secret
law observe certain limitations, explicitly or implicitly excluding from
protection information concerning wrongdoing.

The Restatement (Second) of Agency defines the duty of loyalty an
employee owes to his or her employer to include obedience and confiden-
tiality, as well as loyalty. The Restatement specifies the circumstances
under which revealing confidential information is a breach of that
duty. It recognizes that the duty of loyalty is not absolute, and con-
tains an exception for revealing information for “the protection of a supe-
rior interest of . . . third [parties],” such as information about illegal
acts.

The Restatement of Torts section dealing with liability for disclosure
or use of another’s trade secret begins with the following language: “One
who discloses or uses another’s trade secret, without a privilege to do so, is
liable to the other . . . .” An official comment to the Restatement notes

Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 481 (1974)).
192. Until the adoption of the Uniform Trade Secrets Act, “the most widely accepted rule
of trade secret law” was § 757 of the Restatement of Torts. UNIF. TRADE SECRETS ACT, 10
U.L.A. 369, 370 (1989). This section was not included in the Restatement (Second) of Torts
(1978). See also Don Weisner & Anita Cava, Stealing Trade Secrets Ethically, 47 MD. L. REV.
1076, 1078 (1988).
194. See, e.g., UNIF. TRADE SECRETS ACT, 10 U.L.A. 369 (1989). Ohio’s trade secret law
is not based on the Uniform Act. See OHIO REV. CODE ANN. § 1333.51 (Baldwin 1989).
195. RESTATEMENT (SECOND) OF AGENCY §§ 387-98.
196. Id. § 395. The Restatement captures the common law notion that the agent’s own
economic interests should not hamper the agent’s zeal or single-minded devotion to pursuing
the principal’s economic interests. See Phillip I. Blumberg, Corporate Responsibility and the
Employee’s Duty of Loyalty and Obedience: A Preliminary Inquiry, 24 OKLA. L.J. 279, 288-89
(1971). Blumberg explores when the agent’s duty as a citizen transcends the principal’s econ-
omic interests. He views the whistleblower as someone who is not acting with an intent of
economic gain, but is motivated by a desire to promote the public good, and who does so at his
own considerable economic peril. Id.
197. RESTATEMENT (SECOND) OF AGENCY, § 395, cmt. f (“An agent is privileged to reveal
information confidentially acquired by him . . . . in the protection of a superior interest of him-
self or of a third party. Thus, if the confidential information is to the effect that the principal is
committing or is about to commit a crime, the agent is under no duty not to reveal it.”).
198. RESTATEMENT OF TORTS § 757 (1939) (emphasis added). Because the Restatement
(Second) of Torts omitted the trade secret section, many courts still rely on the original Re-
that the law may grant such a privilege in order to promote a public interest, even in the absence of consent by the party who opposes disclosure of the information. The comment also observes that courts can take measures, if necessary, to safeguard trade secrets from public disclosure when their disclosure is legally compelled or authorized.

By definition, whistleblowing involves the disclosure of information about acts harmful to the public good. Therefore, according to agency law principles as summarized in the Restatement, an employee whistleblower does not violate his or her duty of loyalty by disclosing such information; rather, he or she is empowered to protect the greater public good. Similarly, under the tort law concepts outlined above, whistleblowers clearly have a privilege to reveal information regarding wrongdoing, even if in so doing they also disclose trade secrets.

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199. RESTATEMENT OF TORTS § 757 cmt. d (1939).


201. See, e.g., Miceli & Near, supra note 12, at 15.

202. Of course, the information revealed about Procter & Gamble, see supra notes 1-8 and accompanying text, was not evidence of wrongdoing, so it would fall under a conventional interpretation of "trade secret," and may, indeed, have been protected.

203. See, e.g., Nicholas M. Rongine, Toward A Coherent Legal Response to the Public Policy Dilemma Posed by Whistleblowing, 23 Am. Bus. L.J. 281, 286 (1985) ("When the organization engages in illegal or immoral activity that would be injurious to the society, then the employee has the (moral) right to blow the whistle."); Blumberg, supra note 196, at 288-89; cf. RESTATEMENT OF TORTS § 767(e) (1939) (in determining whether an act which would normally be considered to be a tortious inducement of breach of contract is privileged, an important consideration is "the social interests in protecting the expectancy. . ."). The Rongine
The Uniform Trade Secrets Act "codifies the basic principles of common law trade secret protection . . . ."204 Thus, the exceptions from protection for information about wrongdoing under tort and agency law are incorporated into the Uniform Act, and also into the laws of those states that have adopted the Act.205 Accordingly, no legitimate conflict exists between trade secret laws and existing legal protection of press-source relationships,206 for the simple reason that evidence of wrongdoing cannot constitute a "trade secret" as that term is defined in any area of the law.207 Thus, trade secret laws cannot be manipulated to obtain information that would otherwise be protected by shield laws or common law media privileges.208

For the same reasons, whistleblower protection laws should be interpreted to resist circumvention by trade secret principles. Although statutory schemes vary widely, their universal goal is to encourage whistleblowing as a method of exposing and reducing wrongdoing.209 The societal interests implicated in this context are superior to any interest the employer might assert in the confidentiality of information regarding misconduct. However, an employer would be able to seek redress for a disclosure that would otherwise be a trade secret, if it were subsequently determined not to provide evidence of unlawful or harmful activity.210

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205. Thirty-six states have trade secret laws; the majority of them have adopted the Uniform Trade Secrets Act. See UNIF. TRADE SECRETS ACT, 14 U.L.A. 433 (1990). One justification given for promulgating the Uniform Trade Secrets Act is that the Restatement (Second) of Torts failed to put the rule regarding trade secrets from the first Restatement into the second. Id. at 433.
206. See supra notes 155-80 and accompanying text.
208. See Initial Services, Ltd. v. Putterill, 3 W.L.R. 1032 (1967) (employee who quit and turned employer's documents over to the Daily Mail showing the employer was engaging in price-fixing protected from suit by the employer for breach of confidential information because the employer's actions were violations of the Restrictive Trade Practices Act and the Monopolies and Merger Act); cf. Nadler v. United States Dep't of Justice, 955 F.2d 1479 (11th Cir. 1992) (holding that revealing information to the FBI carries an implicit assurance of confidentiality, and therefore the identity of an informant who provided information that a judge had accepted a bribe could not be discovered under the Freedom of Information Act without a showing that it would be unreasonable to infer that confidentiality had been granted, despite fact that charges were never substantiated; failing to extend such protection would harm the FBI's ability to gather information).
209. See supra notes 24-26, 45 & 71 and accompanying text.
210. In those states having statutes that allow whistleblowing to the media, the employee may still be protected from retaliation so long as she or he blew the whistle in good faith. See
III

When Is a "Source" a "Sourcerer"?

From a legal perspective, whistleblowing to the media is a risky venture. Legislators, for the most part, have taken a dim view of media whistleblowers.211 Judicial and arbitral approaches are inconsistent, at best.212 The theoretical foundations of whistleblowing belie the generally restrictive nature of the law's position regarding reporting to the media.

A. The Media as Effective Information Recipients

Social scientists, who are primarily responsible for providing the theoretical context for the debate about whistleblowing's legitimacy, fully support disclosure to media recipients. Social science literature regarding whistleblowing does not draw a distinction between the media and other recipients of information regarding wrongdoing. Rather, the legitimacy of a report is evaluated in terms of whether it is disclosed to "persons or organizations that may be able to effect action"; if so, it is considered worthy of protection and encouragement.213 This typical definition encompasses both whistleblowing within and outside the organization. A few social scientists believe that external disclosure is a prerequisite for legitimate whistleblowing,214 while others assert that the whistleblower must use all available internal procedures to stop misconduct before he or she resorts to external disclosure.215 No discovered authority, however, argues that reporting to the media, as opposed to other external recipients, is inappropriate.

Almost by definition, whistleblowing involves conflict between entities with unequal power.216 The ability of the media to expose wrongdoing to public scrutiny is a way to neutralize the inherent advantages organizations hold over their members; the media can serve as vehicles both to achieve redress of wrongdoing and to gain protection against or-

Terry Morehead Dworkin, Legal Approaches to Whistle-blowing, in MICELI & NEAR, supra note 12, at 260-61 (Table 6.2, State Chart).

211. See supra notes 33-38, 41-43 & 55-59 and accompanying text. It is unclear who is viewed as the sourcerer by legislator-politicians: the reporter, who has the ability to transform information into scandal, or the whistleblower, who chooses the media to receive the report. Whichever view predominates, the result is the same for the media whistleblower.

212. See supra notes 78-146 and accompanying text.

213. MICELI & NEAR, supra note 12, at 15.

214. Id. at 25.


The possibility of public exposure may inhibit wrongdoing in the first instance as well.218 The power of the press to expose and publicize wrongdoing219 is likely to provide a disincentive to misconduct of comparable weight to the threat of governmental sanction. Indeed, the media can often be more effective report recipients than the government, because the media are uniquely qualified to apply pressure to public officials or agencies that ignore or do not respond aggressively to reports of wrongdoing.220 The failure of government agencies to respond to their own whistleblowers is well documented,221 as is their propensity to be lenient with those they oversee.222 The media have often served as an avenue of last resort for whistleblowers who have been ignored when "going through channels."223

217. This power is often put to use for consumers, who view it favorably. In a study of people who had suffered consumer and other problems and took action by contacting a third party, more contacted a media action line than any other type of party that could have helped resolve the problem. Clearly, these individuals saw the media as more effective in getting their problems resolved. See Neil Vidmar & Regina A. Schuller, Individual Differences and the Pursuit of Legal Rights, 11 LAW & HUM. BEHAV. 299, 302-04 (1987). The study, undertaken in Ontario, Canada, offered respondents the following third-party outlet choices: Better Business Bureau, Ministry of Consumer and Commercial Relations, newspaper or radio action line, elected official, Rent Review Board, or some other third-party agency. Id.


220. See supra notes 185-87 and accompanying text (discussing role of press as the government’s "watchdog").

221. See Callahan & Dworkin, supra note 63, at 310-14; see also Jack Anderson, A Haven for Whistleblowers, PARADE MAG., Aug. 18, 1991, at 16 (describing the government's attempts to have whistleblowers declared "unbalanced" and unfit for duty so they could be fired); Jeff Goldberg, Truth & Consequences, OMNI, Nov. 1991, at 76.

222. For example, at a March 27, 1992, news conference, former employees of the Hanford nuclear weapons compound reported that Westinghouse Hanford Co. had allowed billions of gallons of radioactive-contaminated runoff to go into the Columbia River in Washington. They were upset with, among other things, the Department of Energy's failure to report leaks from the nuclear waste tanks. See 7 Individual Empl. Rts. Lab. Rel. Rep. (BNA) 4 (Apr. 7, 1992). The news conference was organized by the Government Accountability Project, a whistleblower advocacy group, to urge the passage of a bill to protect Department of Energy whistleblowers. Id.; see also Callahan & Dworkin, supra note 63, at 303-04 (identifying Congressional concern regarding underenforcement of the law as a factor underlying the 1986 amendments to the False Claims Act); Marianne Lavelle & Marcia Coyle, Flexing New Enforcement Muscle, NAT'L L.J., June 8, 1992, at 11. The HUD and BCCI incidents are recent, well-publicized situations where failure of oversight contributed to substantial harm.

223. See Goldberg, supra note 221, at 76.
The media can also spur action when a private firm has ignored reports of wrongdoing or penalized a whistleblower. Studies show that most whistleblowers first report internally, and that retaliation causes them to seek redress outside the organization. Further, when external whistleblowers are compared to those reporting internally, the "externals" tend to belong to organizations where the incidence of retaliation and wrongdoing were high. This research strongly suggests that the greater the resistance of the organization to change, the greater the need for the whistleblower to seek external support.

Policy arguments in favor of protecting confidential press-source relationships also support employees and others who choose to blow their whistles to the media. Whistleblowers who share with reporters information that would not otherwise be publicly available contribute to the marketplace of ideas, central to the functioning of a democratic society. This result has benefits in terms of both personal growth and societal participation. In addition, the media's watchdog function, which is thought to be furthered by protecting confidential press-source relationships, is enhanced when reporters are given access to information about wrongdoing in government and business. Permitting whistleblowing-

224. See John R. McCall, Whistle-Blowers: Curse or Cure?, NAT'L L.J., June 26, 1989, at 13, 14 (observing that management needs to devise a structure to assure whistleblowers that their concerns will be addressed with fairness "so that they do not need to dash to the media"). Whistleblowers commonly are forced to build coalitions of supporters within the organization in order to promote the correction of wrongdoing. See Perry, supra note 216, at 19.

225. See Miceli & Near, supra note 12, at 79; see also Driscoll, supra note 218, at 36 (noting that whistleblowers currently pursue external channels due to fear of retaliation, Driscoll advocates aggressive encouragement of whistleblowing by organizations).

226. See Terry M. Dworkin & Janet P. Near, Perceptions of Whistleblowing: The Medium is the Message 14 (June 1992) (unpublished manuscript, on file with the authors).


228. See Perry, supra note 216, at 20; Amal Kumar Naj, Internal Suspicions, GE's Drive to Purge Fraud Is Hampered by Worker's Mistrust, WALL ST. J., July 22, 1992, at A1.

229. See supra notes 181-88 and accompanying text. A number of responses to the assertions advanced above have been made which call into question the advisability of protecting the media from revealing its sources. See, e.g., supra note 154 (discussing conflict with Sixth Amendment in criminal cases); Levi, supra note 13, at 698-99 (noting that identification of the source of particular information often is relevant to the meaning given that information: "Since sources are in large part the news, attributing stories to faceless officials or to the very ether eliminates precisely those explanatory signals which would situate the reader."). Although they may be persuasive in the context of a discussion of the advisability of shielding media-source relationships, these arguments fail to illuminate the issues that are the focus of this article.

230. See supra notes 181-84 and accompanying text.

231. Id.

232. See supra notes 185-87 and accompanying text.
ing to the media has the potential to expose, and therefore to allow public discussion of, societally harmful conduct.

The option of media disclosure is also attractive to potential whistleblowers who seek both anonymity and the correction of wrongdoing. In these circumstances, whistleblowers gain two benefits from reporting to the press: the media can serve as proxies for employees in generating responses to misconduct, and whistleblowers may be insulated from identification by legal principles protecting press-source relationships. It has not been uncommon for public employees to pursue this indirect route.

B. The Disadvantages of Whistleblowing to the Media

Government and the media are the two primary external outlets for a whistleblower's information. The key difference between them is that government agencies that have enforcement and oversight responsibilities are "charged with serving the public interest." The media are more subject to the economic pressure of competition, and may be driven more by a desire to capture an audience than to serve societal interests. "Newsworthiness" is not a measure of the public good. If evaluated in terms of its social significance, news coverage can be characterized as both overinclusive (e.g., including issues that are relatively trivial, but of interest to a particular constituency) and underinclusive (e.g., focusing on a relatively small part of a much greater problem). Presumably, however, there is a direct relationship between the significance of wrongdoing and the likelihood that it will be considered newsworthy. Thus, in most instances, the problems most requiring resolution will be subject to the most intense scrutiny.

Permitting whistleblowing to the media may ameliorate another consequence of the fierce competition among news organizations for

233. See MICELI & NEAR, supra note 12, at 75-76.
234. See supra notes 164-80 and accompanying text (outlining existing protections in this area).
238. See generally Rongine, supra note 203, at 283 (asserting that a whistleblower must have evidence that specific policies or actions of the employer will cause grave danger imminently in order legitimately to come forward); WESTMAN, supra note 236, at 40 (arguing that because disclosures may be broadcast for their newsworthiness rather than a desire to prevent imminent harm to the public, disclosure to the news media should be made only as a last resort).
239. See generally supra notes 97-100 and accompanying text (discussing relevance of media attention to existence of public concern in context of First Amendment cases).
market shares. The financial and technological constraints inherent in these rivalries promote the media's utilization of official news sources: "The competitive pressures to obtain scoops, the 'dailiness' and event orientation of journalism, [and] the stringent time deadlines . . . [make] prepackaged news and authoritative sources convenient and efficient for the press."\(^{240}\) As the government, particularly at the federal level, has grown larger and more complex, efforts systematically to control the news have also increased.\(^{241}\) Whistleblowers may well offer unpasteurized perspectives which have the potential to contribute significantly to public understanding of societally significant events. Additionally, these sources facilitate the media's independence from government by decreasing the media's reliance on officially packaged information.

Nonetheless, public reports may convey a skewed view of organizational responses to whistleblowing. Employees whose concerns about wrongdoing are appropriately addressed are unlikely to come to a reporter's attention. Thus, most whistleblowers represented in the media are those who have suffered retaliation or, at minimum, have been ignored.\(^{242}\) This may perpetuate the assumption, which has been refuted in the social science literature, that most whistleblowers experience retaliation.\(^{243}\) Further, these reports imply that corporations are indifferent to

\(^{240}\) Levi, supra note 13, at 682 (footnote omitted). See generally supra note 188 (discussing institutional interdependence of government and media).

\(^{241}\) Professor Levi describes these developments as follows:

The 20th Century saw a tremendous growth in the size and complexity of the federal government. This growth was accompanied by an explosion in government public relations staffs; the adoption of a classification system and the growth of the isolated national security establishment; the centralization of access to government information; the systematization of government "news management"; and the growth of the imperial presidency. The government's control of access to information and its centralized, aggressive publicity efforts made it both necessary and convenient for the press to rely on official sources in its reporting of the news, particularly with respect to the executive branch.

Levi, supra note 13, at 678-79.

Although dependence on official news releases decreased during the late 1960s and early 1970s, the factors contributing to such reliance remain substantially in place. See id. at 686-87. Remarkable governmental efforts to control the content of news reports were exhibited in 1991, during the war in the Persian Gulf. Some journalists who attempted to circumvent the official "pool" system had wheels removed from their cars; another was detained in his car for six hours by armed U.S. marines. Christopher Walker, Strong-Arm Tactics Used to Curb War Reporting, THE TIMES (London), Feb. 8, 1991, at 1; see also Pentagon Rules on Media Access to the Persian Gulf War: Hearing Before the Senate Comm. on Government Affairs, 102d Congress, 1st Sess. (1991).

\(^{242}\) See Dworkin & Near, supra note 226, at 3.

Also, private employee whistleblowers seldom go to the media despite the impression given by news stories on whistleblowing.\textsuperscript{245} In addition, the damage caused by a wrongfully aroused public can be substantial. "Witchhunts" like those conducted by the House Unamerican Activities Committee are an example.\textsuperscript{246} Defamation law and the considerable expense involved in defending lawsuits, however, act as a check on the misuse of the press in this regard.\textsuperscript{247}

From an organizational perspective, the drawbacks to whistleblowing are minimized, and its advantages enhanced, if disclosures are made internally.\textsuperscript{248} To the extent that a whistleblower's report is harmful to the organization, its disclosure to a reporter tends to magnify the adverse impact, particularly in terms of negative publicity and government scrutiny. Nonetheless, reporting to the media, as opposed to another external recipient, is unlikely to involve a significant increase in consequences of this nature. Additionally, the societal importance of exposing wrongdoing clearly supersedes an organization's interest in shielding itself from public embarrassment or government sanction.

In sum, whistleblowing is a valuable tool to combat wrongdoing and to help control the large organizations that dominate our society.\textsuperscript{249} Employees, as members of those organizations, have early access to informa-

\textsuperscript{244} Another way in which media whistleblowing may cloud the true picture is that the majority of media-reported incidents have involved safety issues. One study, at least, indicates that safety is not a primary motivator for whistleblowers. See Dworkin & Near, supra note 226, at 8.

\textsuperscript{245} In one study of 8,600 federal employees, only two percent of those employees who saw wrongdoing and reported it went to the media. Office of Merit Systems Review & Studies, U.S. Merit Systems Protection Board, Whistleblowing and the Federal Employee 24 (1981); cf. Marcia P. Miceli & Janet P. Near, Characteristics of Organizational Climate and Perceived Wrongdoing Associated with Whistleblowing Decisions, 38 Personnel Psychol. 525 (1985); Miceli & Near, supra note 227, at 687-705.


\textsuperscript{247} Indeed, the press, under defamation laws, must meet a higher standard than whistleblowers seeking protection under state statutes. The statutes do not require whistleblowers to seek verification of their information; they only have to act in good faith. See Dworkin, supra note 210, at 260-73. If the media reported an individual's criminal activity without verifying this information, however, and the report were false, the media would be liable for showing a reckless indifference to the truth. See Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times v. Sullivan, 376 U.S. 254 (1964).

\textsuperscript{248} See Dworkin & Callahan, supra note 11, at 300. The authors note the following organizational benefits of internal whistleblowing:

Utilization of in-house channels often gives the concerned employee access to more complete information, resolving the situation in its entirety. If problems exist, the employer has the opportunity privately to take corrective action and thereby reduce the likelihood of lost business, adverse publicity, litigation, fines or other criminal sanctions, and other adverse consequences.

\textit{Id.} (footnote omitted).

\textsuperscript{249} See, \textit{e.g.}, supra notes 24, 26, 45 & 52-53 and accompanying text.
tion about misconduct and are in a favorable position to convey such information to those who have the ability to foster corrective action.\textsuperscript{250} Policies that impede the main goals of whistleblowing—to expose and reduce wrongdoing—should be changed in the absence of an overriding public good realized by their retention. Clearly, discouraging employee reports to the media hinders these objectives. In this light, the costs of the legal system’s current approach toward employee disclosures to the media clearly outweigh the benefits.

IV Conclusion

Consideration of whistleblowing to the media strongly suggests that the legal system distinguishes among whistleblowers on the basis of the recipients of their reports. Unfortunately, no coherence is exhibited among the Congress, state legislators, courts, and arbitrators in this regard. It is anomalous, for example, that government fraud may be reported to the media if the offending agency operates at the federal level, but not at the state level; that a whistle blown to the press regarding organizational misconduct in the private sector is more likely to involve merely a management dispute than one based on the same activity in government; that journalists are protected from revealing their sources, but the sources themselves are not protected when they convey socially important information that might not otherwise come to light. The lack of cohesion is especially unwise in view of increasing reliance on whistleblowing as a mechanism for organizational control.

Media whistleblowers cannot be summarily characterized either as “sources” or “sourcerers.” Little evidence exists to support the perception that the media are likely to be the recipients of choice by employees with groundless claims or those motivated by revenge.\textsuperscript{251} Yet, because of the potential for negative consequences, in most instances the media should not be the initial recipients of a whistleblower’s report.

\textsuperscript{250} See generally S. REP. NO. 969, 95th Cong., 2d Sess. 3 (1978), \textit{reprinted in} 1978 U.S.C.C.A.N. 2723, 2723-24 (“In the vast Federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. . . . What is needed is a means to assure [employees] that they will not suffer if they help uncover and correct administrative abuses.”).

\textsuperscript{251} But see Sissela Bok, \textit{Whistleblowing and Professional Responsibility}, 11 N.Y.U. EDUC. Q. 1, 4 (1980) (“[T]he disappointed, the incompetent, the malicious and the paranoid all too often leap to accusations in public . . . [while] ideological persecution throughout the world traditionally relies on insiders willing to inform on their colleagues or even on their family members.”). \textit{See generally} Callahan, \textit{supra} note 106, at 479 (reporting survey results showing that respondents were significantly more likely to support legal protection for external whistleblowers whose reports were made to law enforcement authorities than to media).
With reference to public employee whistleblowers, information about organizational misconduct may be conveyed legitimately to the media in instances where intragovernmental authorities have failed to respond, have not responded in an adequate manner, or where the whistleblower has experienced retaliation for reporting. A private sector employee may appropriately contact the press regarding wrongdoing when use of internal and governmental channels has been unavailing, or where he or she has suffered retaliation. In both cases, absent an imminent threat to public health or safety, the whistleblower should permit internal or government report recipients, or both, to investigate and respond to his or her complaint prior to disclosing the information to the press.

Media whistleblowing should be encouraged, however, in situations where these predicates have been satisfied; the considerations discussed above strongly suggest that the media can be highly effective recipients of information about organizational misconduct in such circumstances. Accordingly, where financial incentives are provided by statute for whistleblowing, they should be extended in these situations; in jurisdictions or circumstances where money rewards are unavailable, legislators, courts, and arbitrators should use other appropriate means to convey support for media whistleblowers.

The positive attributes of media disclosure are more clearly outweighed in cases other than those described in the preceding paragraphs. Thus, outside those parameters, whistleblowing to the media should not be actively encouraged. Neither, however, should protection from retaliation be withdrawn in other cases from an individual who chooses a media recipient for a report made on the basis of his or her good faith belief that wrongdoing is occurring, or has occurred. This approach well serves the goals of exposing, correcting, and reducing wrongdoing.