

Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations

Orly Lobel[†]

INTRODUCTION

In his classic work, *Exit, Voice, and Loyalty*, Albert Hirschman asserted that “[a]s a rule . . . loyalty holds exit at bay and activates voice.”¹ In 2006, however, the United States Supreme Court refused to extend constitutional protections to that activated voice. In a decision decried as the “worst whistleblower decision” in five decades,² the United States Supreme Court held that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.”³ In the 5-4 decision, the Court held in *Garcetti v. Ceballos* that, even when the speech concerns the illegality of organizational action, it is not protected when the employee communicates the illegality within his or her organization, as opposed to stepping outside the boundaries of the workplace.⁴ *Garcetti* exemplifies a distorted meeting of citizenship and organizational citizenship, driving a wedge between actions of the individual as a citizen and as an employee.

The notion of bifurcated loyalty—as a citizen and as an organizational

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[†] Associate Professor of Law, University of San Diego. S.J.D. 2006; LL.M. 2000, Harvard University, LL.B. 1998, Tel-Aviv University. Many friends and colleagues shared their thoughts, and I particularly thank Larry Alexander, On Amir, Kathleen Clark, Cindy Estlund, Yuval Feldman, Amiram Gill, Duncan Kennedy, Dave McGowan, Martha Minow, Guy Mundlak, Christine Parker, Charlie Sullivan, and Fred Zacharias for their valuable insights. I also thank the faculties at Univ. of North Carolina; Northwestern; Marquette; Alabama; ANU/Univ. of Melbourne; Tel-Aviv Univ.; SWUFE, China; Univ. of San Diego; Thomas Jefferson. This paper was selected for the Seton Hall Junior Faculty Forum on Employment and Labor Law, November 2007.

1. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* 78 (1970).
2. David G. Savage, *Supreme Court Limits Free Speech in Workplace for Public Employees*, SEATTLE TIMES, May 31, 2006, at A1.
3. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).
4. *Id.* at 423.

player—in turn produces two negative effects on organizational governance. First, it implies that for some (possibly most) employees, work does not include a duty to confront the illegalities of their institutions. Second, in Hirschman's terms, it prioritizes exit over voice by incentivizing external reporting while penalizing internal organizational problem solving.

Expanding the “bifurcated loyalties” critique beyond the context of public employment, this Article draws on recent whistleblower legislation and adjudication to uncover pathologies that exist in legal theory and practice in the context of group loyalty, individual dissent, and the conflicts that arise between citizenship and organizational citizenship. By broadening the inquiry to other concerted circles of obligations, including immunities for family members in criminal justice administration, the ethics of professional roles, and state tolerance of civil disobedience, this Article exposes a deep ambivalence within judicial and statutory doctrines about the role of individuals in resisting illegality in their group settings. This ambivalence corresponds to broader theoretical and policy debates in a socio-legal environment where U.S. senators, depending on their perspective of citizenship and organizational citizenship, have described government informants as either “patriotic” and “citizen crime-fighters” or “snitches” and “rats.”⁵ Rather than defending one of these extremes, this Article demonstrates that organizational citizenship must encompass not only deference to direct supervisory controls, but also a commitment to the process of compliance and legality. At the same time, this Article develops a model for sequenced legal protections of organizational dissent, which prioritizes internal problem solving over external reporting whenever possible.

This Article develops a conceptual framework that integrates new insights about the post-industrial economy, organizational theory, and regulatory effectiveness, arguing that the balance between exit, voice, and loyalty has changed. It links together three prominent developments: retaliatory discharge in constitutional and statutory law, the rise of new governance approaches to regulation, and lessons from institutional and behavioral research. Currently, the law is in a state of asymmetry. While recent regulatory reforms harness the internal compliance capabilities of organizations, heralding a new regime of private accountability, the laws of organizational voice have remained stagnant, and anti-retaliation protections prioritize exit over internal dissent. Invariably, reporting corrupt behavior in complex organizations produces deep tensions. Good governance requires loyalty, organizational accountability, and internal problem solving. At the same time, whistleblowing requires an individual to defy immediate authorities, even when the information disclosed is sensitive and its exposure may harm the organization. Despite pervasive judicial and statutory divides on the reach and application of whistleblowing protections,

5. See discussion of Senators Harry Reid and Charles Grassley *infra* Section V.

analysis of the principles underlying these questions is scarce.

First, this Article aims to provide analytical clarity and doctrinal coherence by unraveling the multiple rationales that underlie the laws of retaliatory discharge and organizational loyalty. Second, it endeavors to develop a normative framework to help guide the resolution of recurring legal challenges in mediating conflicting obligations. Third, this Article develops principles for protected communication and individual responsibility for organizational misconduct, and proposes ways to align the law of the workplace with recent business and regulatory developments. Overall, in order to reconcile the demands of citizenship and organizational citizenship in institutional settings, legal principles must be developed that regularize the interaction between the substance and form of dissent, prioritizing voice and internal resolution over exit, except under extraordinary circumstances. Furthermore, in-group loyalty must be connected to dynamic learning rather than to the status quo.

The Article begins by delineating two concepts of organizational citizenship—blind faith and enlightened commitment—demonstrating the longstanding theoretical difficulties of defining the boundaries of the duty of loyalty in fiduciary obligations. Part I describes the range of federal and state laws that incentivize the reporting of organizational illegality, including protections and monetary “bounties” for informants. Part II demonstrates how, paradoxically, in both private wrongful discharge law and First Amendment constitutional speech cases, courts regularly extend protection to employees who report illegality to outside authorities, but leave the internal whistleblower unprotected.

Part III argues that anti-retaliation law is both inconsistent and misguided due to the underlying confusion of rationales, arising from contract, torts, and rights theories. It then uncovers how legal distinctions at both the constitutional and tort levels have had the undesirable effect of excluding those who are most likely to identify and recognize illegality from the speech protections afforded to public and private employees. Employees who know more, are more involved in decision-making, have professional obligations (such as lawyers and accountants), and are therefore more likely to be in a position to blow the whistle, are in fact less protected in their attempts to improve their institution. Next, Part III introduces the notion of “sequencing the reporting” and discusses how this reporting process relieves threshold problems in anti-retaliation law.

Bringing together recent developments in regulatory and business strategies, Part IV demonstrates the increased need for reliance on individual reporting. Stemming from the need to react swiftly and flexibly to ever-changing economic conditions and from the introduction of new behavioral insights about groups and organizations, policymakers increasingly are experimenting with public-private collaborative processes. Regulatory and adjudicative lessons must be drawn from current developments in the areas of

civil liability, and organizational sentencing—all of which indicate ways in which private fora can provide desirable alternatives to public dispute resolution.

Part V moves toward a broader theory of legal mediation of conflicting obligations. Part V further compares American and European approaches to the challenge of conflicting obligations, exposing a continental clash on the role of individual citizen crime-fighters. By introducing parallel analyses in the debates in the area of family ties in criminal procedure, civic disobedience and illegal orders in military settings, and professional roles and legal ethics, the Article illuminates the pervasive need to connect between substance and form, or first-order and second-order reasons, when designing systems for following rules while maintaining independent judgment.

The discussion of roles and conflicting obligations serves as a springboard for the Article's critique of work law and organizational citizenship. Organizational citizenship is an important training ground for other areas of loyalty, including political citizenship. While the two realms of loyalty are distinct, the challenge in devising legal standards is essentially the same across both categories: policymakers must create legal incentives and remedies that maintain the bonds and discretionary power of groups, while increasing accountability and reducing illegal behavior. The Article concludes, in Part VI, with a reconsideration of the types of protections that are afforded to individuals when they face wrongdoing within their organization, arguing that the dilemmas of dissent and loyalty can be largely dissolved through a systemic linkage between the substance of reporting and its form. The Part develops the argument for sequenced protections, forming a reporting pyramid that prioritizes internal problem solving when feasible. This new reporting pyramid aligns with enforcement pyramids that have served policymakers in effective and legitimate regulatory processes. A new framework for designing reporting systems can promote genuine and effective commitment to resolving, rather than suppressing, the dilemmas of conflicting scales of citizenship.

I

TWO CONCEPTS OF ORGANIZATIONAL LOYALTY: BLIND FAITH OR ENLIGHTENED COMMITMENT?

The legal approaches to conflicts between organizational loyalty and legal compliance reveal a deep ambivalence about the role of individual dissent in group settings. This Part begins by describing two concepts of organizational citizenship—blind faith and enlightened commitment—demonstrating this ambivalence in the theoretical level. It then moves to show the same ambivalence in the more doctrinal level. As Part I.B describes, the legal rules about reporting range from strict disclosure prohibitions to generous monetary incentives for informants.

A. Employees: Fiduciaries, Citizens, and Organizational Citizens

What are the citizenry obligations of institutional players? What are the boundaries of organizational loyalty? Consider the following scenario:

Two individuals, Outsider and Insider, discover the same piece of information about a corporation, KinderSafe. The information involves a safety risk in the design of the company's new child car seat that is about to come out on the market. While Outsider has no special relationship with KinderSafe, Insider is a company employee. Insider has been involved in the company's marketing plans and knows of the vast resources that have been invested in bringing the product to market. She also knows her company's personnel and the company's policies and procedures for monitoring and reporting regulatory compliance. Outsider and Insider both have a moral and, under certain circumstances, legal duty to act upon the information they have. They both owe the public some form of action that would prevent unsuspecting parents from purchasing unsafe car seats. However, in choosing between various courses of action, Insider has additional factual information as well as moral considerations that factor into her decision-making process. While Outsider has no special relationship with KinderSafe and may choose any one of multiple forms of risk prevention, Insider must search for a course of action that would minimize possible harms to her company and her fellow employees. Insider must consider whether it is feasible to solve the safety problem within KinderSafe.

Insider faces a built-in dilemma. As an employee of KinderSafe, Insider is required to follow her supervisors' orders and to act for the benefit of the company. As a concerned citizen, she has a duty to take reasonable actions to prevent public harm. What courses of action are available to Insider and how should she choose among them?

Political philosophers have recognized that citizenship includes multiple obligations that can be classified into three categories: obedience, loyalty, and participation.⁶ The first category, obedience, involves recognition of rational authority and compliance with its rules and processes. The second category, loyalty, involves respect for and service to the community as a whole. The third category, participation, includes civic engagement in a myriad of public activities, exercising political voice through such actions as voting, serving on a jury, and voicing orderly dissent.

Organizational citizenship has much of the same characteristics as polity citizenship. Organizational Citizenship Behavior (OCB) is a term developed by organizational theorists to describe a set of actions in workplace contexts in which individuals voluntarily behave in ways that are beneficial to the

6. See generally JOSEPH H. CARENS, *CULTURE, CITIZENSHIP, AND COMMUNITY* (2000); CITIZENSHIP AND SOCIAL THEORY (Bryan S. Turner ed., 1993); DEREK HEATER, *A BRIEF HISTORY OF CITIZENSHIP* (2004); WILLEM MAAS, *CREATING EUROPEAN CITIZENS* (2007).

organization, even without explicit commands or reward systems. OCB involves a range of behaviors, including compliance with organizational norms, altruistic behavior toward others, and participation in one's institution.⁷ Research has shown that OCB has significant impact on the effectiveness, efficiency, and productivity of groups and organizations.⁸

Like polity citizenship, organizational citizenship involves all three elements of obedience, loyalty, and participation. Indeed, recalling the concept of service to one's country, one theorist has described organizational citizenship behavior as "the Good Soldier Syndrome."⁹ Thus, when an employee's duty to obey the law conflicts with her duties to the organization, the dispute can be remarkably difficult. But what is the precise nature of employee loyalty and where does its legal origin lie?

All employees are agents of the organization, and owe a duty of loyalty to their employer.¹⁰ Agency is a fiduciary relationship involving trust and reciprocal obligations.¹¹ Agents are expected to work "solely for the benefit of the principal in all matters connected with [their] agency."¹² Beyond this broad expectation however, a clear theoretical definition of fiduciary obligations and principles has eluded scholars for many decades, leading many to describe the law of fiduciary duties as "ill-defined."¹³

7. Brian J. Hoffman et al., *Expanding the Criterion Domain? A Quantitative Review of the OCB Literature*, 92 J. APPLIED PSYCHOL. 555, 555 (2007).

8. *Id.*

9. See generally DENNIS W. ORGAN, ORGANIZATIONAL CITIZENSHIP BEHAVIOR: THE GOOD SOLDIER SYNDROME (1988).

10. RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958); see also *Shager v. Upjohn Co.*, 913 F.2d 398, 404 (7th Cir. 1990) (stating that "all employees are agents"). Importantly, agency law, which applies to all employees in general and provides that agents owe a duty of loyalty to their principal, is not the same as law governing employees as fiduciaries, which applies when a fiduciary relationship is established because of the employee's special position in the high ranks of the corporation. In the latter case, fiduciaries have heightened duties, but even then, the fiduciary principle says little about the duties to others when they conflict. See generally *Sixteenth Annual Corporate Law Symposium: Agency Law Inside The Corporation*, 71 U. CIN. L. REV. 1167 (2003).

11. J. Dennis Hynes, *Freedom of Contract, Fiduciary Duties and Partnerships: The Bargain Principle and the Law of Agency*, 54 WASH. & LEE L. REV. 439, 442 (1997) ("[a] fiduciary relationship is a relationship of trust"); Rebecca Lee, *In Search of the Nature and Function of Fiduciary Loyalty: Some Observation on Conaglen's Analysis*, 27 OXFORD J. LEGAL STUD. 327, 327 (2007) ("It is now generally accepted that the distinguishing obligation of a fiduciary is an obligation of loyalty . . .").

12. RESTATEMENT (SECOND) OF AGENCY § 387 (1958).

13. Kathleen Clark, *Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57, 69; Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 908; Niels B. Schaumann, *The Lender as Unconventional Fiduciary*, 23 SETON HALL L. REV. 21, 24 (1992) ("[T]he use of similar language to refer to differing obligations and standards of conduct makes the underlying concepts of fiduciary law difficult to grasp."); Alan M. Weinberger, *Expanding the Fiduciary Relationship Bestiary: Does Concurrent Ownership Satisfy the Family Resemblance Test?*, 24 SETON HALL L. REV. 1767, 1780 (1994) ("A certain vagueness in fiduciary law may be essential to the purposes served by the doctrine."); see also Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in*

There are several reasons for the imprecision of fiduciary duties. First, fiduciary duties cover a broad spectrum of relationships, and cases tend to involve a highly contextualized and particularized treatment.¹⁴ Furthermore, courts have regulated fiduciaries with reference to moral standards, causing difficulty in defining the precise contours of these relationships.¹⁵ Courts use notions of “fidelity, faith, and honor” and portray the moral behavior of the fiduciary as “altruistic” and “voluntary.”¹⁶ As a result, judicial analysis of new cases continues to intertwine the legal obligations of a fiduciary with the moral demands of loyalty. In one early twentieth-century case, Justice Benjamin N. Cardozo equated these moral obligations of a fiduciary with “the duty of the finest loyalty,” explaining:

Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive . . . Loyalty and comradeship are not so easily abjured.¹⁷

Cardozo understood fiduciary loyalty to be unique and “undivided”¹⁸: once established, it cannot be subordinated to other interests.

More recently, in contrast to Cardozo’s strong notion of fiduciary loyalty, some scholars have argued that there is nothing distinct about fiduciary duties.¹⁹ Rather, these duties simply connote implied obligations that arise under contractual relations in various contexts.²⁰ Under this view, contractual relationships generally imply a certain set of obligations that evoke the idea of loyalty. The contractual perspective is consistent with an understanding of loyalty as a set of obligations “implied in every person’s sense of being historically rooted in a set of defining familial, institutional, and national relationships.”²¹

In employment relations, employee duty of loyalty is a moving target; its manifestation in legal doctrine constantly evolves with the reality of an ever-changing labor market. To better understand the evolution of the field, it is useful to draw a distinction between the pre-modern faithful servant and the

Fiduciary Representation, 1994 U. ILL. L. REV. 889, 896 (describing the law of fiduciary duties as “ill-defined”).

14. *Id.*

15. Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 829-30 (1983).

16. *Id.*

17. *Meinhard v. Salmon*, 164 N.E. 545, 546-47 (1928).

18. *Id.* at 546.

19. See Frank H. Easterbrook & David R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425 (1993); Arthur B. Laby, *Resolving Conflicts of Duty in Fiduciary Relationships*, 54 AM. U. L. REV. 75, 76 (2004) (“A large body of literature contends that fiduciary duties are barnacles on the ship of contract, default contractual terms to which the parties would agree if they had the benefit of unlimited resources.”).

20. See Easterbrook & Fischel, *supra* note 19; Laby, *supra* note 19, at 76.

21. GEORGE P. FLETCHER, *LOYALTY* 21 (1993).

modern loyal employee. Employment law originated from the laws of master-servant, where a servant was obliged to be faithful to his master at all times and under all circumstances.²² In this old economy, a faithful servant followed orders and exercised fidelity without question.²³ By contrast, today, a loyal employee must exercise independent judgment and recognize her role in assisting the organization in operating within the bounds of legality. While a faithful servant passively awaited directions from her supervisor and implemented them without reflection, a loyal employee must view the good of the organization as a whole and behave according to what is best for its future. Thus, the modern duty of loyalty within an organization balances conflicting obligations and commands, instead of requiring blind allegiance.

Still, the choice between blind faithfulness and enlightened loyalty is unsettled in employment law. Because employees are asked to exercise enlightened commitment instead of absolute faith, organizational loyalty must be understood as a relationship between the individual and the organization, rather than between two individuals: a supervisor and supervisee. In other words, in the modern corporation, the employee is an agent of the organization, rather than of any particular manager. Therefore, if management puts the company at risk by engaging in unlawful activity, then the employee exhibits loyalty to the firm by trying to stop the misconduct. In the following section, this Article turns to how an idea of enlightened loyalty is slowly transforming work relations from an absolute expectation of faithful obedience to a more nuanced notion of organizational citizenship.

B. From Faithful to Loyal: Prohibitory, Mandatory, & Compensatory Rules

The legal approaches to organizational citizenship are striking in their breadth, and puzzling in their discrepancies and inconsistencies. The spectrum ranges from prohibitions on reporting, to protections against retaliation, to monetary incentives for reporting, to active duties to report. Frequently, several of these treatments impose simultaneous, but conflicting, duties when several legal rules bear on a single set of circumstances. Failure to act on conflicting duties—such as speaking out against public wrongdoing and protecting sensitive government information—could expose an employee to civil liability and disciplinary action by his employer and a professional board. As described below, the speech rights and employment protections for reporting misconduct are largely unsettled, heatedly debated and “riddled with loopholes.”²⁴ The law

22. ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR* 16 (1991) (quoting English law treatise from the 1700s, referring to a servant’s duty of “allegiance”). The contours of loyalty are also key to other employment law contexts, primarily in the area of trade secrets, non-competes and post-employment competition. *See, e.g.*, *United States v. Martin*, 228 F.3d 1 (1st Cir. 2000) (employee who acted as a “spy” in passing company trade secrets to competitor).

23. H. G. WOOD, *A TREATISE ON THE LAW OF MASTER AND SERVANT* § 83, at 166 (1877) (stating that a servant has a duty to obey all of his master’s “reasonable commands”).

24. STEPHEN M. KOHN, *CONCEPTS AND PROCEDURE IN WHISTLEBLOWER LAW* 79 (2001).

remains ambivalent on how to reconcile such conflicting loyalties at work. A better understanding of the function of organizational loyalty can improve the current chaotic choice among prohibitory, mandatory, and compensatory rules for organizational loyalty and dissent.

Whistleblowing protections have developed as a patchwork of state, federal statutory, and common law doctrines. Mostly, they started as exceptions to the “at-will” regime. For over a century, the basic default in employment law was termination at-will, a rule that allowed employers to terminate their employees “for good cause, for no cause or even for cause morally wrong.”²⁵ However, over the last several decades, the at-will rule has been challenged by legislative and judicial decisions. As early as the 1930s, and more since the 1960s and 1970s, legislatures have enacted laws granting employees rights against discharge.²⁶ Congress first enacted the National Labor Relations Act (NLRA) and the Fair Labor Standards Act (FLSA) to regulate the rights of collective labor organizations and individual wage and hour rights, respectively.²⁷ These protective work laws later served as models for broader workplace legislation in discrimination, benefits, and safety and health.²⁸ In addition to granting work rights, these federal statutes include anti-retaliation provisions designed to enable employees to claim their rights without fear of retribution.

Beyond work regulation, over the years, financial scandals and environmental and safety disasters prompted new legislation, which often included anti-retaliation provisions that prohibit employers from taking adverse action against an employee who speaks out against violations of the various acts. For example, shocking stories of silence within the asbestos manufacturing industry prompted the incorporation of whistleblower protections into asbestos-regulating statutes.²⁹ Most recently, the Sarbanes-

25. Payne v. Western & Atl. R.R. Co., 81 Tenn. 507, 519-20 (1884).

26. See, e.g., National Labor Relations Act, 29 U.S.C. § 158 (2000); Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2(a)(1) (2000).

27. National Labor Relations Act, 29 U.S.C. § 158 (2000); Fair Labor and Standards Act, 29 U.S.C. §§ 201-219 (2000). For example, the National Labor Relations Act (NLRA) prohibits employers from retaliating against employees for engaging in legal activities of organizing. 29 U.S.C. § 158 (2000).

28. See, e.g., Civil Service Reform Act, 5 U.S.C. § 2302(b)(8)(A) (2006) (protecting federal employees from being terminated for blowing the whistle); Occupational Safety and Health Act, 29 U.S.C. § 660(c) (2000); Polygraph Protection Act of 1988, 29 U.S.C. § 2002 (2000).

29. The causal link between asbestos and lung disease was clearly known to manufacturing companies as early as 1924. Yet, it was not until the 1970s that product liability lawsuits were successfully launched against the industry. Evidence exists today of years of active suppression of the damaging information within the companies. Thus, the asbestos industry exemplified the dangers of employees who “swallow the whistle” rather than report illegal behavior. Alan F. Westin, *Introduction & Conclusion to WHISTLE-BLOWING!* 11-12, 152 (Alan F. Westin ed., 1981). In reaction, many non-labor statutes in areas of environmental, consumer, and financial regulation now include anti-retaliation provisions to persuade employees to report illegal behavior. See, e.g., Asbestos School Hazard Detection & Control Act, 20 U.S.C. § 3608 (2000)

Oxley Act (SOX) strongly prohibits retaliatory action against an employee who reports financial misconduct.³⁰ Hailed by scholars as “the gold standard in protection of employee whistleblowers,” the whistleblower provisions in SOX are broad, and include both a private right of action for aggrieved whistleblowers and criminal penalties for retaliating employers.³¹ The SOX bill emphasized the difficulties that employees in recent financial scandals experienced when they attempted to report fraud; the Act is intended to prevent such silencing in future cases.³²

As a parallel development to legislative limitations on at-will employment, the courts have also recognized common law exceptions to an employer’s privilege to fire employees at will. The most important judicial exception is the wrongful termination tort.³³ Under this tort, plaintiffs can overcome the hurdle of at-will employment by claiming that they were discharged for engaging in publicly beneficial activities, such as whistleblowing. Thus, even when a statute does not specifically include a cause of action for retaliatory discharge, courts have held that employees cannot be terminated for resisting statutory violations.³⁴ Different jurisdictions have applied this exception to the at-will doctrine to various types of employee conduct, including testifying in public investigations, claiming work rights, refusing to violate the law, and reporting possible violations.³⁵ In fact,

(prohibiting retaliation against whistleblowers reporting asbestos violations); Energy Reorganization Act, 42 U.S.C. § 5851(a) (2005) (prohibiting retaliation against whistleblowers).

30. The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

31. Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-regulation*, 105 COLUM. L. REV. 319, 376 (2005). Applying to millions of employees, Section 806 of the Sarbanes-Oxley Act of 2002 prohibits a publicly traded company from retaliating against an employee who reports alleged corporate fraud to a company supervisor, a government agency or a member of Congress. Pub. L. No. 107-204, § 806, 116 Stat. 745.

32. S. REP. NO. 107-146, at 5 (2002) (“[W]hen corporate employees at both Enron and Andersen attempted to report or ‘blow the whistle’ on fraud . . . they were discouraged at nearly every turn.”).

33. See, e.g., *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979) (employee fired for exercising statutory right not to submit to polygraph test); *Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119, 121-22 (Pa. 1978) (employee fired for performing jury duty).

34. See, e.g., *Ostrofe v. H.S. Crocker Co., Inc.*, 670 F.2d 1378, 1383-84 (9th Cir. 1982) (upholding claim of wrongful discharge for objecting to employer’s violation of Clayton Act, despite lack absence of anti-retaliation clause in order to promote “interests of antitrust enforcement”), *aff’d*, 740 F.2d 739 (9th Cir. 1984), *cert. denied*, 469 U.S. 1200 (1985).

35. See, e.g., *Brockell v. Norton*, 732 F.2d 664 (8th Cir. 1984) (police department employee who reported fellow employee for cheating on qualification exam protected by public interest in promoting police integrity); *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984) (retaliation for reporting to a local health department on contaminated milk is illegal termination); *Palmateer v. Int’l Harvester Co.*, 421 N.E.2d 876 (Ill. 1981) (termination of employee who reported a fellow employee’s criminal activities was held illegal); *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330, 1335 (Cal. 1980) (upholding cause of action for employee discharged for refusing to participate in illegal price-fixing scheme); *Parker v. M & T Chems., Inc.*, 566 A.2d 215, 218 (N.J. Super. Ct. App. Div. 1989) (New Jersey whistleblowing statute protects employee’s right not to violate law).

retaliation is the fastest-growing type of employment law claim.³⁶ However, as Part III will demonstrate, courts significantly disagree over the scope of the public policy exceptions to the at-will doctrine.

A final subset of legal incentives pertaining to whistleblowing and reporting is composed of programs that offer monetary incentives for employees who externally report illegal behavior. These “bounty programs” originated with *qui tam* suits under the False Claims Act (FCA). The FCA provides employees with a percentage of the recovery from a report of fraud by a government contractor.³⁷ Employees may file a *qui tam* suit on behalf of the public and, if successful in the suit, receive up to 25 percent of the recovery in compensation.³⁸ In 1986, Congress amended the FCA to prohibit retaliation against employees who sue under the Act,³⁹ but the bounty provisions remain the leading feature of its reporting scheme.

Similarly, the Internal Revenue Service (IRS) offers percentages of recovered taxes to those who report evasion.⁴⁰ The thirty-year-old tax recovery program receives tens of thousands of applications and pays millions of dollars in rewards per year.⁴¹ Since its establishment, it has led to the recovery of billions of dollars in federal taxes.⁴² In December 2006, Congress revamped the IRS whistleblower program by significantly expanding the rewards paid to informants.⁴³

In addition to the IRS and False Claims programs, a third bounty scheme was founded three decades ago when Congress passed the Insider Trading and Securities Fraud Enforcement Act.⁴⁴ The Act authorizes the Securities and Exchange Commission (SEC) to award bounties of up to 10 percent to a person

36. For example, the EEOC reports that retaliation charges for discrimination complaints have increased dramatically in the past decade, now representing almost 30 percent of all discrimination claims. See The U.S. Equal Employment Opportunity Commission, Charge Statistics FY 1997 Through FY 2007, <http://eeoc.gov/stats/charges.html> (last visited Oct. 10, 2008).

37. 31 U.S.C. § 3730(d)(1) (2000) (providing informants with at least 15 percent but not more than 25 percent, of the recovery, depending on the extent of the person’s contribution). Enacted during the Civil War, the FCA was designed to encourage reports of fraud by defense contractors. See S. REP. NO. 99-345, at 8-10 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5273-75.

38. A growing number of states are adopting “mini-FCAs.” Currently, twenty states have enacted false claims statutes containing *qui tam* provisions. Taxpayers Against Fraud Education Fund, The False Claim Legal Center, State False Claims Acts, <http://www.taf.org/statefca.htm> (last visited Oct. 10, 2008).

39. 31 U.S.C. § 3730(h) (2000).

40. 26 U.S.C. § 7623 (2000).

41. See Internal Revenue Service, Whistleblower Annual Report (2008), *available at* http://www.irs.gov/pub/whistleblower/whistleblower_annual_report.pdf.

42. *Id.*

43. Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 406, 120 Stat. 2922 (2006); Dennis J. Ventry, Jr., Whistleblowers and *Qui Tam* for Tax, 61 TAX LAW 357, 359, 361 (2008).

44. Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. 100-704, 102 Stat. 4677 (codified as 15 U.S.C. § 78, 80 (2006)).

who provides information that leads to the imposition of penalties for illegal insider trading.⁴⁵ Commentators supporting this bounty program argued that insider trading involves particularly secretive environments and difficulties of proof.⁴⁶ However, despite being modeled after the IRS scheme, and perhaps precisely because of the secretive environment, the SEC program has not significantly altered reporting and recoveries.⁴⁷

Bounty programs stand on one end of the spectrum, strongly prioritizing external reporting by promising monetary recoveries when government successfully utilizes the provided information. At the other end of the spectrum stand doctrines that dismiss employee claims for wrongful discharge in cases of reporting and deem such forms of reporting “disloyal” and a breach of an employee’s duty of confidentiality. As will be discussed in the following Part, the broad spectrum of reporting prohibitions, protections, and incentives reveals jurisprudential inconsistency about the desirable role of individual dissent in the face of illegality.

II

THE FORMS OF ORGANIZATIONAL (DIS)LOYALTY: INTERNAL VERSUS EXTERNAL REPORTING

Both in private wrongful discharge law and in First Amendment constitutional speech cases, courts regularly extend protection to employees who report illegality to outside authorities, but leave the internal whistleblower unprotected. This Part explores recent developments in private and public employee speech protections and demonstrates how, paradoxically, the forms of speech most likely to serve as channels for confronting organizational misconduct are often excluded from existing constitutional, statutory and common law protections.

A. Judicial and Statutory Protections

In 2002, the whistleblowers of the WorldCom and Enron financial debacles appeared on the cover of *Time Magazine* as “Persons of the Year.”⁴⁸ Both were internal dissenters. Cynthia Cooper of WorldCom requested an internal audit after discovering serious accounting misrepresentations.⁴⁹ Even

45. *Id.* § 21A(e).

46. *Insider Trading: Hearings Before the Subcomm. on Telecomm. & Fin. of the Comm. on Energy & Commerce*, 100th Cong. 117-18 (1988) (statement of James D. Cox) [hereinafter *Insider Trading Hearings*]; Marsha J. Ferziger & Daniel G. Currell, *Snitching for Dollars: The Economics and Public Policy of Federal Civil Bounty Programs*, 1999 U. ILL. L. REV. 1141, 1164-65.

47. Ferziger & Currell, *supra* note 46, at 1165.

48. Richard Lacayo & Amanda Ripley, *Persons of the Year 2002, Cynthia Cooper, Coleen Rowley and Sherron Watkins*, TIME, Dec. 22, 2002, available at <http://www.time.com/time/subscriber/personoftheyear/2002/poyintro.html>.

49. Amanda Ripley, *Q&A: Whistle-Blower Cynthia Cooper*, TIME, Feb. 4, 2008, available

though the company's chief financial officer asked Cooper to suspend the investigation, she chose to alert the Board of Directors' auditing committee about her suspicions.⁵⁰ Similarly, Sherron Watkins, a vice president at Enron, wrote a memo to the company's chief executive officer, Kenneth Lay, warning of accounting irregularities and "fuzzy off-the-books arrangements."⁵¹ At first she kept silent, believing that any complaint would result in retaliation.⁵² However, when things began to disintegrate at Enron and management specifically called all employees to utilize a newly formed comment box, Watkins wrote an anonymous memo describing the accounting violations she discovered.⁵³ She also met with Lay to voice her concerns.⁵⁴ After Enron's fall, Watkins discovered that "Lay's first action was not to look at my concerns, but to dump me on the street."⁵⁵ Email communication with Enron's outside legal counsel revealed that the company sought advice on whether Watkins could be fired under Texas law.⁵⁶ The law firm responded that Texas law allowed such firing without liability.⁵⁷ Despite their commitment to their respective organizations, Watkins's and Cooper's internal whistleblowing came at very late stages of their companies' demises, undoubtedly as a result of scarce legal protections within corporate cultures that discouraged dissent.

While most states recognize the whistleblowing public policy exception to at-will employment, states vary widely on the scope and content of the exception. Comparing different jurisdictions and statutes, the same act of reporting may receive extremely different treatment: an employee in one jurisdiction may receive monetary rewards while another in a different jurisdiction is condemned for a breach of loyalty. Interestingly, across these jurisdictions, a key variant in the treatment of whistleblowers is the external/internal (or in Hirschman's terms, exit/voice) distinction. Judicial and legislative protections significantly favor external reports over internal channels. All jurisdictions that recognize the public policy exception apply it

at <http://www.time.com/time/arts/article/0,8599,1709695,00.html>.

50. Kurt Eichenwald & Simon Romero, *Inquiry Finds Effort at Delay at WorldCom*, N.Y. TIMES, July 4, 2002, at C1.

51. Memorandum from Sherron Watkins to Ken Lay, Enron CEO (Aug. 14, 2001) [hereinafter Watkins Memo], available at news.findlaw.com/hdocs/docs/enron/empltr2lay82001.pdf; see also Jodie Morse & Amanda Bower, *The Party Crasher*, TIME, Dec. 30, 2002, at 55.

52. Jim Yardley, *With Warning on Enron, a Celebrity Is Born*, N.Y. TIMES, May 10, 2002, at A1.

53. Morse & Bower, *supra* note 51.

54. *The Financial Collapse of Enron: Hearing Before the House Subcomm. on Oversight and Investigations of the Comm. on Energy and Commerce*, 107th Cong. 15 (2002).

55. UK Fraud-Busting United Launched, BBC NEWS, Dec. 8, 2003, available at <http://news.bbc.co.uk/2/low/world/asia-pacific/3300445.stm>.

56. Morse & Bower, *supra* note 51, at 52.

57. The firm's email response cited *Austin v. HealthTrust, Inc.-The Hosp. Co.*, 967 S.W.2d 400, 403 (Tex. 1998), in which the Supreme Court of Texas denied a retaliatory discharge claim.

where the employee informs a government agency about her suspicions.⁵⁸ At the same time, courts frequently dismiss cases where an employee merely complains internally, without taking the “effective action” of turning to government authorities.⁵⁹ For example, in one case in which an employee was fired for reporting product safety problems, the New Jersey Superior Court dismissed the employee’s claim declaring that “no New Jersey case has recognized a claim for wrongful discharge based solely upon an employee’s internal complaints about a corporate decision, where the employee has failed to bring the alleged violation of public policy to any governmental or other outside authority”⁶⁰ Similarly, in *Biesler v. Professional Systems Corp.*, the Ninth Circuit rejected a wrongful termination claim of an employee who informed management that the company had been overcharging a client because no reporting had been made to outside authorities, as required by Nevada law.⁶¹

A leading reason that many courts offer for this distinction is that extending protections for internal reporting does not further the public interest of detection and enforcement.⁶² For example, in *Fox v. MCI Communications*, the Supreme Court of Utah stated that, “[a]lthough employees may have a duty to disclose information concerning the employer’s business to their employer, that duty ordinarily serves the private interest of the employer, not the public interest.”⁶³ Thus, the court held that firing an employee who internally reports does not fit into the public policy exception to the at-will doctrine.

Another explanation for declining to extend common law protections to internal whistleblowers has been the fear that such broad protections interfere with an employer’s managerial prerogative.⁶⁴ Courts often raise the concern of restructuring the employment relationship by the “limitless consequences” of protecting internal whistleblowing.⁶⁵

58. MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* 781-82 (3d ed. 2005) (“If a court is willing to recognize the whistleblower exception, it will, of course, recognize it where the employee has reported to appropriate law enforcement officials”).

59. *House v. Carter-Wallace, Inc.*, 556 A.2d 353, 358 (N.J. Super. Ct. App. Div. 1989), *cert. denied*, 564 A.2d 874 (N.J. 1989).

60. *Id.* at 356.

61. 177 Fed. Appx. 655, 656 (9th Cir. 2006).

62. *See Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1035 (5th Cir. 1984).

63. 931 P.2d 857, 861 (Utah 1997). *But see Ryan v. Dan’s Food Stores, Inc.*, 972 P.2d 395 (Utah 1998) (recognizing protection for an internal whistleblower when the report furthers a clear and substantial public policy).

64. *See NATIONAL WHISTLEBLOWER CENTER REPORT*, available at www.whistleblowers.org; *Ball v. Memphis Bar-B-Q Co., Inc.*, 228 F.3d 360 (4th Cir. 2000); *Groce v. Eli Lilly & Co.*, 193 F.3d 496 (7th Cir. 1999); *Smith v. Calgon Carbon Corp.*, 917 F.2d 1338, 1344 (3d Cir. 1990), *cert. denied*, 501 U.S. 1225 (1991) (granting no protection to an internal objection, unless the employee refused to violate law or obligated by statute); *Wiltsie v. Baby Grand Corp.*, 774 P.2d 432 (Nev. 1989); *McLaughlin v. Gastrointestinal Specialists, Inc.*, 696 A.2d 173 (Pa. Super. Ct. 1997); *Winters v. Houston Chronicle Publ’g Co.*, 795 S.W.2d 723 (Tex. 1990).

65. *See, e.g., Brown & Root*, 747 F.2d at 1035.

Nevertheless, some courts explicitly reject the external/internal distinction. These courts extend protection to internal reporting to eliminate “perverse incentives” to forgo internal reporting and directly turn to law enforcement agencies instead.⁶⁶ According to this view, prioritizing external whistleblowing would “penalize well-intentioned employees who attempt to rectify wrongdoing internally prior to taking public action.”⁶⁷ For example, the Seventh Circuit held:

A report to an employer does not transform a violation of the Illinois Criminal Code from a matter of public concern into a private dispute. The employee who chooses to approach his employer should not be denied a remedy simply because a direct report to law enforcement agencies might effectuate the exposure of crime more quickly.⁶⁸

The court thus explained that such a distinction between external and internal reporting would be “nonsensical.”⁶⁹

Similar to the judicial treatment of employee reporting, whistleblower statutes vary widely on the scope of protection afforded to employees. Like the case law, most statutory anti-retaliation provisions protect whistleblowers who report to a government agency; however, only a few statutes, such as the Sarbanes-Oxley Act, explicitly protect an employee who reports illegality to a supervisor or to another authority in the workplace.⁷⁰ In particular, at the state level, most whistleblower protection legislation protects only external whistleblowers, with variations as to which designated external recipient is included.⁷¹ Importantly, the state statutes protecting only external reporting generally cover only public employees; however, those protecting internal whistleblowing for the most part include private employees. Most likely, this is the result of effective lobbying by businesses that saw the inclusion of the internal route as in their self-interest.⁷²

66. *Belline v. K-Mart Corp.*, 940 F.2d 184, 187 (7th Cir. 1991).

67. *Id.* (citing *Hicks v. Clyde Fed. Sav. & Loan Ass’n*, 722 F. Supp. 501, 504 (N.D. Ill. 1989)).

68. *Belline*, 940 F.2d at 188 (quoting *Parr v. Triplett Corp.*, 727 F. Supp. 1163, 1166-67 (N.D. Ill. 1989)).

69. *Id.*

70. According to a 2006 report of the National Whistleblower Center, 58 percent of state whistleblower laws do not protect internal whistleblowers. RICHARD CARLSON, *EMPLOYMENT LAW 740* (Aspen Publishers 2005) (“In the case of whistleblowing legislation, one of the most frequent gaps is the lack of coverage of ‘internal’ whistleblowers.”); *see, e.g., Groce*, 193 F.3d 496 (noting that Indiana Occupational Safety and Health Act protects only employees who file a complaint or institute a proceeding with the state).

71. *See, e.g., DEL. CODE ANN.* tit. 29, § 5115 (2003) (requiring reporting to the office of Auditor of Accounts); *MD. ANN. CODE ANN., STATE PERS. & PENS.* §§ 3-301 to -306 (LexisNexis 2004) (Secretary of Personnel); *WASH. REV. CODE ANN.* § 42.40.010 (West 2006) (Office of State Auditor).

72. Terry Morehead Dworkin & Elletta Sangrey Callahan, *Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society*, 29 *AM. BUS. L.J.* 267, 281 (1991).

When a statute does not specify the scope of its anti-retaliation provision, the courts have interpreted and defined these protections. At the federal level, courts have generally interpreted anti-retaliation provisions of discrimination, safety, and environmental statutes to cover both external and internal reporting.⁷³ However, the “job duty” defense, excluding from protection those who report illegality as part of their normal work responsibilities, is a notable exception to this rule. For example, in the public employment setting, the federal Whistleblower Protection Act (WPA) explicitly protects government employees from retaliation for both internal and external reporting.⁷⁴ Yet courts have interpreted the Act to exclude protection when disclosures are made to immediate supervisors instead of an external government body authorized to hear complaints.⁷⁵

Additionally, courts interpret the Act to exclude protection when disclosure is made pursuant to the defined job duties of an employee.⁷⁶ In other words, under the “job duty” defense, employees who report illegality within the scope of their work duties do not receive protection from retaliation.⁷⁷ For example, in *Huffman v. Office of Personnel Management*, the Federal Circuit held that a law enforcement officer whose duties included the investigation and reporting of crime to his immediate supervisor was “a quintessential example” of an employee who should be excluded from WPA anti-retaliation protection.⁷⁸ Similarly, in *Langer v. Department of the Treasury*, the Federal Circuit held that an IRS employee did not engage in protected activity under the WPA when he informed a Department of Justice official that a grand jury investigation disproportionately targeted minorities, because the employee’s

73. See *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985) (interpreting anti-retaliation clause against an employee for taking “any action to carry out the purposes of the act” as including internal reports to a supervisor); *Mackowiak v. Univ. Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984) (same); see also Federal Mining Safety and Health Act of 1977, 30 U.S.C. §§ 801-962 (2000); Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1367 (2000); Clean Air Act of 1977, 42 U.S.C. § 7622 (2000).

74. 5 U.S.C. § 1213(a)(2) (2006) (extending whistleblower protection to disclosures made “to the Special Counsel or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures of information . . .”).

75. *Willis v. Dep’t of Agric.*, 141 F.3d 1139, 1143 (Fed. Cir. 1998); see also *Horton v. Department of Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995), cert. denied, 516 U.S. 1176 (1996).

76. *Willis*, 141 F.3d at 1145; see also, e.g., *Maturi v. McLaughlin Research Corp.*, 413 F.3d 166 (1st Cir. 2005) (False Claims Act); *Sassé v. U.S. Dep’t of Labor*, 409 F.3d 773, 780 n.2 (6th Cir. 2005) (“Sasse’s investigation and prosecution of environmental crimes were not protected activities because he had a duty, as an Assistant United States Attorney, to perform them.”); *Kodrea v. City of Kokomo*, 458 F. Supp. 2d 857 (S.D. Ind. 2006); *Gilder-Lucas v. Elmore County Bd. of Educ.*, No. 05-16561, 2006 U.S. App. LEXIS 16167 (11th Cir. June 26, 2006) (unpublished).

77. See, e.g., *Marano v. Dep’t of Justice*, 2 F.3d 1137 (Fed. Cir. 1993) (“job duties” rationale rejected); *Erickson v. City of Orr*, No. A05-481, 2005 WL 2277395 (Minn. App. Sept. 20, 2005) (unpublished) (“job duty” defense inquiry); *McGinn v. Pa. Rival Water Authority*, 2005 WL 373720 (Pa. Commw.Ct. 2005) (unpublished) (“job duties” defense inapplicable).

78. 263 F.3d 1341, 1352 (Fed. Cir. 2001).

official duties were limited to reviewing the actions of the IRS's criminal division.⁷⁹

As with other boundaries in this field, though, some courts and regulators have rejected the "job duty" defense.⁸⁰ For example, the First Circuit has asserted that there is "no significant policy served by extending whistleblower protection only to those who carry a complaint beyond the institutional wall, denying it to the employee who seeks to improve operations from within the organization."⁸¹ Yet again, the jurisprudential inconsistency is apparent: where many courts insist on the significance of the external/internal distinction, other courts reject the logic of excluding internal speech from whistleblower statutory protections.

Finally, bounty programs clearly prefer external reporting to internal reporting. The False Claims Act (FCA) encourages external reporting by rewarding the original source of a governmental investigation and by encouraging *qui tam* suits.⁸² Under the FCA, the whistleblower must initiate litigation on behalf of the government to be eligible for the reward.⁸³ Only when the government recovers damages through a fine, penalty, or forfeiture does the informant receive a share of the recovery.⁸⁴ Moreover, the FCA precludes recovery if the information is already in the hands of the government agency at the time of the informant's report.⁸⁵

Here, as well, courts still struggle to define the effective boundaries of

79. *Langer v. Dep't of Treasury*, 265 F.3d 1259, 1267 (Fed. Cir. 2001).

80. *Passaic Valley Sewerage Comm'rs v. Dep't of Labor*, 992 F.2d 474, 478 (3d Cir. 1993) (Department of Labor asserted quality control personnel at nuclear plants engaged in protected activity even though their primary job duty is to identify and report such noncompliance); *White v. Osage Tribal Council*, No. 00-078, 2003 DOL Ad. Rev. Bd. LEXIS 23 (Apr. 8, 2003) (environmental inspector whose primary job responsibility was to monitor compliance with the Safe Drinking Water Act is protected when reporting non-compliance); *Jopson v. Omega Nuclear Diagnostics*, No. 93-ERA-0054, 1995 DOL Sec. Labor LEXIS 122, at *3 (Aug. 21, 1995); *Collins v. Florida Power Corp.*, Nos. 91-ERA-47, 91-ERA-49, 1995 DOL Sec. Labor LEXIS 175 (May 15, 1995) (a quality assurance specialist protected under the whistleblower protection provision of the Energy Reorganization Act); EPA GUIDANCE ON QUALITY ASSURANCE SPECIALISTS.

81. *Marques v. Fitzgerald*, 99 F.3d 1, 6 (1st Cir. 1996).

82. 31 U.S.C. § 3730(e)(4)(A) (2000).

83. Act of Mar. 2, 1863, § 3, 12 Stat. 698 (codified as amended at 31 U.S.C. § 3730 (2000)). A "relator" is one who relates the fraud action on behalf of the government. *See United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 225 (1st Cir. 2004) ("A 'relator' is '[a] party in interest who is permitted to institute a proceeding in the name of the People or the Attorney General when the right to sue resides solely in that official.'" (quoting BLACK'S LAW DICTIONARY 1289 (6th ed. 1990))). Informants also receive rewards where the government takes over the case. § 3730(d)(1). They receive a higher percentage when they litigate on behalf of the government. § 3730(d)(2).

84. § 3730(d)(1) (providing informants with at least 15 percent but not more than 25 percent of the recovery, depending on the extent of the person's contribution).

85. § 3730(e)(4)(A); *see United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997). *But see United States v. Johnson Controls, Inc.*, 457 F.3d 1009, 1015 (9th Cir. 2006) (rejecting the pre-public disclosure requirement established in *Findley*, requiring only that original sources report the information before filing an action).

protected employee action. Recently, in a 6-2 decision, the United States Supreme Court held that a *qui tam* plaintiff cannot rely upon information previously disclosed to the public.⁸⁶ In his dissenting opinion, Justice John Paul Stevens argued that “the Court has misinterpreted these provisions to require that an ‘original source’ in a *qui tam* action have knowledge of the actual facts underlying the allegations on which he may ultimately prevail.”⁸⁷

Notwithstanding the absence of monetary rewards in the case of internal reports, courts continue to be conflicted about the scope of public policy wrongful termination claims under the FCA. Here again, courts have introduced the internal/external reporting distinction, in addition to the “job duty” defense, as limitations on the scope of whistleblower protections. In a series of FCA decisions, courts have held that employees who confront their employer about possible violations are not protected when their job duties consist of assuring compliance and legality.⁸⁸ An illuminating example is *McKenzie v. BellSouth Telecommunications*, where an employee repeatedly complained to her supervisors about consumer fraud; she brought a newspaper article describing similar conduct that had been brought to light through FCA litigation to her workplace.⁸⁹ Yet the Sixth Circuit held that the plaintiff’s conduct was not protected because the complaint was internal.⁹⁰ Nonetheless, some court decisions reject the external/internal distinction in the context of government contractors because “blowing the whistle on fraud and false claims by a government contractor—even when that whistleblowing is confined within the company—is sufficiently important to command the invocation of the [at-will] exception.”⁹¹

In sum, although the external/internal distinction has been rejected by some courts, agencies, and legislatures, the distinction remains pervasive. As a general rule, employees must complain to an outside government agency in order to be protected under the laws of wrongful termination.⁹² An employee who chooses the internal path often receives less protection than if she opts for an immediate exit, calling a government agency to report the wrongdoing.

86. *Rockwell Int’l Corp. v. United States*, 549 U.S. 457 (2007) (overturning a *qui tam* claim of a former employee who won a \$4.1 million judgment for reporting radioactive contamination at nuclear weapons plant).

87. *Id.* at 479 (Stevens, J., dissenting).

88. *See generally* *Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861, 866 (4th Cir. 1999).

89. 219 F.3d 508 (6th Cir. 2000).

90. *See id.* at 517.

91. *Smith v. Mitre Corp.*, 949 F. Supp. 943, 951 (D. Mass. 1997); *see also* *Himmel v. Ford Motor Co.*, 342 F.3d 593 (6th Cir. 2003).

92. Frank J. Cavico, *Private Sector Whistleblowing and the Employment-At-Will Doctrine: A Comparative Legal, Ethical, and Pragmatic Analysis*, 45 S. TEX L. REV. 543, 601 (2004).

B. Garcetti v. Ceballos: The Constitutional Dimension

In May 2006, in a decision decried as “the worst whistleblower decision” in five decades,⁹³ the Supreme Court held that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”⁹⁴ Just as state courts are vastly divided on whether to extend common law protections to internal whistleblowing, the Supreme Court split 5-4 in *Garcetti v. Ceballos* on the issue of whether internal dissent of public employees is constitutionally protected.⁹⁵

The story of Richard Ceballos, a supervising deputy Los Angeles District Attorney, is illustrative. After a defense attorney contacted Ceballos and claimed that a warrant in his client’s file contained serious misrepresentations, Ceballos conducted his own investigation and affirmed that serious misrepresentations and inaccuracies plagued the affidavit.⁹⁶ After reading the case file, he contacted the deputy sheriff who had sworn to the affidavit.⁹⁷ Unsatisfied by the sheriff’s explanation, Ceballos wrote a memorandum recommending the dismissal of the case on the basis of government misconduct.⁹⁸ Ceballos then met with his supervisors to discuss the memo, a meeting that quickly became heated and accusatory.⁹⁹ Ceballos’s supervisor decided to proceed with the prosecution, and during the trial, the defense called Ceballos to testify about his judgment that the warrant was unlawful.¹⁰⁰

Although the trial court accepted the claims about misrepresentations in obtaining the search warrant, it denied the defense’s motion to invalidate the warrant, finding grounds independent of the challenged material sufficient to show probable cause for the warrant.¹⁰¹ After the trial, Ceballos claimed that his supervisor retaliated against him through a series of job reassignments, transfer to another courthouse, and denial of a promotion.¹⁰² Ceballos initiated an employment grievance, but it was denied based on a finding that he had suffered no retaliation. Ceballos then brought a U.S.C. section 1983 claim asserting a violation of his First Amendment rights.¹⁰³

The district court dismissed the claim on the grounds that Ceballos’s

93. Savage, *supra* note 2, at A1.

94. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

95. *Id.*

96. *Id.* at 415.

97. *Id.* at 413-14.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 415.

102. *Id.*

103. *Id.*

speech while acting as a district attorney was not constitutionally protected.¹⁰⁴ The Ninth Circuit reversed, holding that the memo intended “to bring wrongdoing to light,”¹⁰⁵ and was “inherently a matter of public concern.”¹⁰⁶ The Ninth Circuit balanced the protected speech interests and the interests of the employer, and concluded that the balance weighed in favor of Ceballos because his employer “failed even to suggest disruption or inefficiency in the workings of the District Attorney’s Office” as a result of the memo.¹⁰⁷

On appeal, in a 5-4 ruling, the Supreme Court reversed the Ninth Circuit’s decision.¹⁰⁸ Writing for the majority, Justice Anthony Kennedy held that public employees do not speak as citizens for First Amendment purposes when they make statements pursuant to their official duties.¹⁰⁹ Kennedy explained that the “controlling factor” was that the memo was made pursuant to Ceballos’s duties as a district attorney.¹¹⁰ According to the majority, restricting the speech which “owes its existence to a public employee’s professional responsibilities”¹¹¹ does not violate the employee’s speech rights as a private citizen, because he did not act as a citizen. Instead, “[w]hen he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee.”¹¹²

In response to the majority’s distinction between internal “job duty” speech and external “citizenry” speech, the dissent argued that it was “senseless” to allow constitutional protections for “exactly the same words hinge on whether they fall within a job description.”¹¹³ Justice Stevens called it “perverse” to create an incentive for employees to bypass their employer-specified channels of resolution and voice their concerns in public, namely through the media.¹¹⁴ Justice David Souter, in a separate dissent joined by Justices Stevens and Ruth Bader Ginsburg, recognized that a government employer has an interest in effective governance and control over the competence, judgment, and honesty of its employees.¹¹⁵ Yet, according to Souter, the line between official job duties and other employees or subject matters was “an odd place to draw a distinction.”¹¹⁶ Indeed, such a distinction would likely engender more litigation regarding the lines between actual and merely formal duties, allowing employers to further restrict the rights of

104. *Id.*

105. *Ceballos v. Garcetti*, 361 F. 3d 1168, 1178 (9th Cir. 2004) (internal quotation marks omitted).

106. *Id.* at 1174.

107. *Id.* at 1180.

108. *Garcetti*, 547 U.S. at 412.

109. *Id.*

110. *Id.* at 421.

111. *Id.*

112. *Id.* at 422.

113. *Id.* at 427 (Stevens, J., dissenting).

114. *Id.*

115. *Id.*

116. *Id.* at 430 (Souter, J., dissenting).

employees and to avoid liability by “setting duties expansively.”¹¹⁷

Most importantly, the dissent emphasized that Ceballos’s job was to “enforce the law by constitutional action: to exercise the county government’s prosecutorial power by acting honestly, competently, and constitutionally.”¹¹⁸ Justice Souter directly confronted the question of multiple loyalties by citing the Codes of Ethics for Federal Government Service: “‘Any person in Government Service should: . . . [p]ut loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department,’ and shall ‘[e]xpose corruption wherever discovered.’”¹¹⁹ A government employee must first and foremost fulfill her obligations as a citizen.¹²⁰

Additionally, the majority and dissent disagreed about the relationship between First Amendment rights and statutory protections afforded to whistleblowers. The majority relied on legislation as sufficient to encourage employees to voice their concerns about potentially unlawful government conduct.¹²¹ The dissent, however, pointed to the significant limitations of existing statutory protections, describing whistleblower law as a “patchwork, not a showing that worries may be remitted to legislatures for relief.”¹²² In particular, the dissent emphasized that, as explored in the previous section, internal speech frequently falls outside the statutory and judicial definitions of whistleblowing, “defined in the classic sense of exposing an official’s fault to a third party or to the public.”¹²³

The aftermath of *Garcetti* sheds light on the flaws of the doctrinal distinctions in the majority’s holding. In this particular case, Ceballos had, in fact, also engaged in external speech; he gave a speech to the Mexican Bar Association, as well as testified in court about his findings on the search warrant fabrication.¹²⁴ And indeed, immediately after the Supreme Court

117. *Id.* at 431 n.2.

118. *Id.* at 437.

119. *Id.* at 433 n.4 (quoting Code of Ethics for Government Service, H.R. Con. Res. 175, 85th Cong., 2d Sess. (1958), *repealed by* Office of Government Ethics Authorization Act of 1996, Pub. L. No. 104-179, § 4, 110 Stat. 1566).

120. “Indeed, the very idea of categorically separating the citizen’s interest from the employee’s interest ignores the fact that the ranks of public service include those who share the poet’s “object . . . to unite [m]y avocation and my vocation”; these citizen servants are the ones whose civic interest rises highest when they speak pursuant to their duties, and these are exactly the ones government employers most want to attract.” *Id.* at 432 (quoting Robert Frost, *Two Tramps in Mud Time*, in *COLLECTED POEMS, PROSE, AND PLAYS* 251, 252 (Richard Poirier & Mark Richardson eds., 1995)).

121. *Garcetti*, 547 U.S. at 425.

122. *Id.* at 440 (Souter, J., dissenting). Justice Souter further asserted that constitutional protections should not depend on “‘the vagaries of state or federal law.’” *Id.* at 439 (quoting *Bd. of County Comm’rs, Wabaunsee City v. Umbehr*, 518 U.S. 668, 680 (1996)). According to a 2006 report of the National Whistleblower Center, most state whistleblower laws indeed provide less protection than under constitutional law. NATIONAL WHISTLEBLOWER CENTER REPORT, *supra* note 64.

123. *Garcetti*, 547 U.S. at 440 (Souter, J., dissenting).

124. *Id.* at 413 (majority opinion).

decision, the case was settled. Although the terms are confidential, the settlement may have been very favorable for Ceballos.¹²⁵ The doctrinal anomaly of privileging exit over voice, in Hirschman's terms, is the key reason why Ceballos was likely to win on remand. The Supreme Court majority decision limited its analysis to the memo and the adverse employment actions taken in respect to the memo. However, on remand, the Court made clear that the Ninth Circuit would not be limited to looking at only the memo.¹²⁶ As Justice Souter's dissent explained, the Ninth Circuit, upon first impression, saw no need to address the protection of other statements besides the memo because the memo was enough to find in favor of Ceballos.¹²⁷ Yet, given the Supreme Court's narrow ruling on the memo, the Ninth Circuit was likely to address the First Amendment protections afforded to Ceballos's other *external* activities—the conference speech and the testimony on the stand.

Since *Garcetti*, courts have been struggling to understand the breadth of the holding and its implications.¹²⁸ In August 2007, the Third Circuit dismissed a constitutional retaliation claim by Delaware state troopers who complained up the chain of command and to a state auditor about safety problems at a shooting range.¹²⁹ The court cited *Garcetti* to explain that, because the troopers' jobs as shooting range operators included reporting safety concerns, they were barred from constitutional protections.¹³⁰ In another case, the Seventh Circuit denied constitutional speech rights to an employee, determining that the speech occurred while the employee was "on duty, in uniform, and engaged in discussion with her superiors, all of whom had just emerged from [a] briefing."¹³¹

Additionally, *Garcetti* has provoked a flood of critical commentary and legislation. One scholar called the majority ruling "not merely paradoxical but absurd."¹³² Moreover, the House of Representatives has approved current

125. Interview with Bonnie Robin-Vergeer, Lead Counsel for Ceballos (Oct. 2007).

126. *Garcetti*, 547 U.S. at 424.

127. *Id.* at 440 (Souter, J., dissenting). In regards to this other conduct, Justice Souter wrote: "Upon remand, it will be open to the Court of Appeals to consider the application of *Pickering* to any retaliation shown for other statements; not all of those statements would have been made pursuant to official duties in any obvious sense, and the claim relating to truthful testimony in court must surely be analyzed independently to protect the integrity of the judicial process." *Id.* During oral arguments, the Supreme Court addressed Ceballos's speech to the Mexican Bar Association and counsel for *Garcetti* admitted that this speech would be subject to the *Pickering* test. See Transcript of Oral Argument at 13, *Garcetti v. Ceballos* (2006) (No. 04-473), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-473b.pdf.

128. See, e.g., *Ruotolo v. City of New York*, 514 F.3d 184 (2d Cir. 2008) (reaffirming that a safety officer who drafted a report detailing significant health and environmental issues within his precinct was not entitled to First Amendment protection because he acted within the scope of his employment).

129. See *Foraker v. Chaffinch*, 501 F.3d 231 (3d Cir. 2007).

130. *Id.* at 247.

131. *Mills v. City of Evansville*, 452 F.3d 646, 648 (7th Cir. 2006).

132. Cynthia L. Estlund, *Harmonizing Work and Citizenship: A Due Process Solution to a*

legislation that would cancel the effect of *Garcetti*.¹³³ And in December 2007, the Senate passed the Federal Employee Protection of Disclosures Act to enhance protections for federal employee whistleblowers by expanding the scope of protected activity to cover complaints within an employee's chain of command.¹³⁴ Currently, a conference between the House and Senate is attempting to agree on final legislative language.¹³⁵

From the broader perspective, *Garcetti* not only drew constitutional boundaries for government employee speech, but also highlighted competing conceptions of an individual's role within organizational and political environments. Taken together, the constitutional and common law treatments of employee reporting reveal deep judicial ambivalence about mediating conflicts between polity citizenship and organizational citizenship.

III

CITIZENSHIP AND ORGANIZATIONS: SEQUENCING THE REPORTING

Anti-retaliation law has developed in "utter disarray"¹³⁶ largely due to

First Amendment Problem, 2006 SUP. CT. REV. 115, 151.

133. On March 14, 2007, the House enacted the Whistleblower Protection Enhancement Act. H.R. 985, 110th Cong. (2007). In a presidential statement, however, President Bush's executive office explained that he would veto the bill because, among other things, it would likely increase the number of frivolous complaints. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATIVE POLICY ON H.R. 985 – WHISTLEBLOWER ENHANCEMENT PROTECTION ACT OF 2007, at 1 (2007), available at <http://www.whitehouse.gov/omb/legislative/sap/110-1/hr985sap-h.pdf>.

134. S. 274, 110th Cong. (2007).

135. In 2009, the Stimulus Bill—the American Recovery and Reinvestment Act of 2009—was signed into law. Pub. L. No. 111-5, § 1553 (The whistleblower protections clauses are often referred to as the "McCaskill Amendment."). The Act includes "best practices" anti-retaliation rights for any workers at recipients of the new federal spending, including contractors, grantees, and state and local government employees. The Act protects employees that report wrongdoing concerning: (1) gross mismanagement of the agency contract or stimulus funds; (2) gross waste of stimulus funds; (3) abuse of authority in implementing or using the stimulus funds; (4) a violation of law, rule, or regulation related to an agency contract or grant using stimulus funds; or (5) a substantial and specific danger to public health or safety in the implementation or use of stimulus funds. The employee must have a "reasonable belief" that the information he/she possesses is evidence of wrongdoing falling in one of the above-listed categories. Third, the employee must disclose the wrongdoing to one of the following individuals or entities: (1) the Board, (2) an inspector general, (3) Comptroller General, (4) a member of Congress, (5) a state or federal regulatory or law enforcement agency, (6) a person with supervisory authority over the employee, (7) a court, (8) a grand jury, or (9) the head of a federal agency. So the Act, similar to SOX, protects both internal and external reporting. It in fact specifically states that the whistleblower protection applies to internal disclosures and disclosures made in the ordinary course of the employee's duties.

Thus, overturning the language of *Garcetti*. Again, the act applies to any employers accepting stimulus funds or awarded contracts using stimulus funds. The Act does not however extend these new whistleblowing rights to federal government workers, because the Senate would not agree on passing such a provision of the House bill.

136. Martin H. Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 U. MICH. J.L. REFORM 277, 280 (1983).

confusion about its goals. This Part begins by arguing that anti-retaliation law is both inconsistent and misguided, due to the underlying confusion of rationales arising from contract, tort and rights theories. It uncovers how legal distinctions at both the constitutional and tort levels have had the undesirable effect of excluding those who are most likely to identify and recognize illegality from the speech protections afforded to public and private employees. Employees who know more—who are more involved in decision making, have professional obligations, and are therefore more likely to be in a position to blow the whistle—are paradoxically less protected in their attempts to improve their institution. This Part develops the argument that statutory and judicial exceptions to at-will employment should have, as their purpose, preventing unlawful organizational behavior, not providing job security to employees. In other words, wrongful termination law for whistleblowers should further existing regulatory goals, not create new ones. It further asserts that anti-retaliation law should aim to reconfigure conflicts of loyalties by “sequencing the reporting,” which would offset strong incentives to remain silent in the face of illegality. Such a reconfiguration would significantly relieve important problems in anti-retaliation law. Conceptually, it is useful to recognize three distinct lenses through which courts have considered anti-retaliation exceptions to at-will employment: rights, contracts, and quasi-administrative torts. This Part argues that the tort perspective best exemplifies the realities of conflicting loyalties and the need for legal structures to mediate these conflicts.

A. Rationales of Anti-Retaliation Law

1. The Rights-Based Lens

The rights framework begins with the notion that, in order to be meaningful, rights must be accompanied by the ability to claim remedies.¹³⁷ Under the rights framework, which resonates with much of the development of employment law,¹³⁸ an employee has the right to resist illegal behavior, and thus should be able to claim protections.¹³⁹ Indeed, the development of anti-retaliation doctrines for private sector employees has been described as forming a “quasi-First Amendment doctrine for the workplace.”¹⁴⁰ Yet, the rights framework has several limitations.

First, the lens of work rights has meant that some courts have been much

137. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”).

138. Orly Lobel, *Form and Substance in Labour Market Policies*, in *THE INTERSECTION OF RIGHTS AND REGULATION* 23, 23 (Bronwen Morgan ed., 2007).

139. See, e.g., *Parker v. M & T Chems., Inc.*, 566 A.2d 215, 218 (N.J. Super. Ct. App. Div. 1989).

140. Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 *TEX. L. REV.* 1655, 1678 (1996).

more likely to recognize a wrongful termination claim when an employer violates a statute specifically designed to protect employees than when the violation is non-work related.¹⁴¹ This is true even when the claim is made by an employee other than the employee who was originally harmed, such as when an employee assists in resisting the discrimination of her co-worker.¹⁴² When the employer's violation is one of workplace regulation, courts have found it easier to justify a wrongful termination exception as merely "another facet of compensation for outrageous conduct" in the workplace.¹⁴³

The logic of the employment/non-employment rights distinction is puzzling. If a protective statute already offers a remedy for its violation, why extend additional remedies through a wrongful termination tort action? Countervailing reasons for recognizing or denying new rights for reporting a violation exist with regard to any type of organizational illegality. The policy concerns in these cases are similar to those where employee reports illegal behavior that may harm the environment, consumers, or general public welfare. There, significant reasons warrant caution in layering remedies on top of existing enforcement mechanisms. Legislatures and regulators may have envisioned a scaled penalty scheme imposing increasing penalties with each violation, for example, or may have intentionally kept penalties low in order to allow some optimal balance between compliance and experimentation, so as not to chill creative production and interpretation.¹⁴⁴ While there may be reasons to authorize private crime-fighters, the same hesitance for extending punitive damages when the statutory scheme provides lower penalties holds for both labor and non-labor violations.

A second limitation of the rights framework is its inability to explain why some forms of resistance to illegal behavior should not receive protection. The absolute nature of rights has obscured the administrative and managerial concerns when balancing multiple loyalties. The rights framework does not offer principles for distinguishing between the various courses of action that the individual may choose in confronting illegality.

2. *The Contracts-Based Lens*

Under a contract analysis, courts have found a universal implied term in the employment contract that requires an employee to uphold the law. Accordingly, an employee can sue for breach of contract if she is terminated for

141. *Ambroz v. Cornhusker Square Ltd.*, 416 N.W.2d 510 (Neb. 1987) (firing an employee for resisting illegal employee polygraph testing).

142. *See* Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 77 (2005).

143. *Firestone Textile Co. Div. v. Meadows*, 666 S.W.2d 730, 733 (Ky. 1983); *see also* Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943, 1963 n.115 (1996).

144. Ian Ayres & John Braithwaite, *Partial-Industry Regulation: A Monopsony Standard for Consumer Protection*, 80 CALIF. L. REV. 13 (1992); Schwab, *supra* note 143, at 1963.

doing precisely what her contract required: resisting illegal behavior. In contractual terms, when an employee is fired for performing duties such as ensuring compliance and reporting possible risks of violation, the termination is a breach of the implied covenant of good faith and fair dealing.¹⁴⁵ Courts have also long recognized the principle that contracting parties may not incorporate terms that are clearly injurious to the public.¹⁴⁶ Accordingly, the legal protection from wrongful termination balances the unequal power between employees and employers and prevents employees from facing a “Hobson’s choice”¹⁴⁷ and making a “Faustian bargain.”¹⁴⁸

The contractual model resonates with recent developments where corporations increasingly engage in self-regulation, signaling to their employees that part of their job is to advance legal compliance. The contractual framework is nevertheless limited because, like the rights framework, it does not explain why some forms of resistance to illegal behavior create legal claims (e.g., calling a government agency) while others receive no protection (e.g., confronting a supervisor or calling a reporter). It also cannot explain why most promises made while the employment contract is in effect, such as trivial matters or informal guarantees, do not alter the at-will employment regime, while other promises, such as supervisory requests for reports on consumers or environmental safety, may constitute the basis for a wrongful termination claim. Although the contract perspective is useful as an ex-post explanation, it does not offer ex-ante guidance on how to reconcile conflicting loyalties to the organization and to the rule of law under different circumstances.

3. *The Torts-Based Lens*

Under the law of wrongful termination, the tort of anti-retaliation protects the public interest. Unlike the rights and contracts framework, the quasi-administrative torts-based framework considers the broader effects of the employment relationship on third parties. This framework is designed to solve the problem of organizational externalities, where a second party—the employee who is an insider to the organization—is best situated to monitor

145. See, e.g., *Wieder v. Skala*, 609 N.E.2d 105, 109-10 (N.Y. 1992) (holding that an employer’s insistence that an employee act unethically and in violation of prevailing rules of conduct constitutes a breach of employment contract); *Mueller v. Union Pac. R.R.*, 371 N.W.2d 732, 735 (Neb. 1985) (breach after employees received assurances that “no one would lose their job” for participating in the company’s internal investigation); *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 551 (N.H. 1974) (implying a covenant of good faith and fair dealing into the employment contract). In the proposed Restatement of Employment Law, an employee retaliated against for performing obligations under contract has a good faith and fair dealing covenant claim. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 3.06 (Discussion Draft 2006).

146. *Palmateer v. Int’l Harvester Co.*, 421 N.E.2d 876, 878 (Ill. 1981).

147. *Balla v. Gambro, Inc.*, 584 N.E.2d 104, 109 (Ill. 1991).

148. Thomas E. Wheeler, II, *Striking a Faustian Bargain: The Boundaries of Public Employee Free Speech Rights*, 50 RES GESTAE 13 (2006), available at www.locke.com/documents/wheeler092606.pdf.

possible third-party harms. Thus, the public interest can be framed either in terms of workplace violations or in terms of non-labor related law. Employees are in the unique situation where they are likely to identify corporate wrongdoing precisely because they are organizational insiders. Unlike regular citizens who happen to witness wrongdoing, employees face inherent conflicts of loyalties with their organization and the legal regime. Wrongful termination protections thus offset the disincentives that result from these conflicting loyalties, rather than layer existing labor market regulations with additional employee protections or rights. Therefore, the tort perspective best exemplifies the realities of conflicting loyalties and the need for legal structures to mediate these conflicts. Furthermore, like with other tort litigation, the contours of the tort of wrongful termination are defined by the courts, who are often less well suited than administrative bodies to striking an optimal balance between prevention and efficient organizational practices. This balance must be drawn, albeit differently, in both public and private employment.¹⁴⁹ As I will argue in the following sections, the balance can best be achieved by connecting the content and the form of reporting.

The process of internal reporting can resolve disagreements between employees and managers, while avoiding the high costs of friction that outside reporting generates. As discussed below, the path of external reporting, by contrast, is neither desirable for the employee nor for the employer. Moreover, prioritizing external reporting is costly for enforcement agencies. When administrative agencies receive inside information about possible violations, they have limited resources to investigate and enforce such violations. Numerous reports can flood the agency's docket with false tips. Additionally, employers need to exercise discretion and control over their employees' actions and words in order to ensure efficient management.¹⁵⁰ Yet, the moral hazard of over-reporting is frequently offset by the strong disincentives of reporting. While loyalty may motivate change from within the organization, it may also motivate members of an organization to "suffer in silence."¹⁵¹ Indeed, empirical studies indicate that most employees will stay silent in the face of wrongdoing because they fear retaliation and believe that their complaints will be ignored.¹⁵² Whistleblower protections therefore must be designed to break the code of silence in organizations. In this framework, the public policy exception to at-will employment should focus on increasing the benefits of individual dissent, while minimizing the costs of disruption to organizational loyalty.

149. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

150. See *id.*

151. Brian Barry, *Review Article: 'Exit, Voice, and Loyalty,'* 4 BRIT. J. POL. SCI. 79, 97 (1974) (criticizing Hirschman for neglecting the possibility of silence within his concept of loyalty).

152. Terance D. Miethe & Joyce Rothschild, *Whistleblowing and the Control of Organizational Misconduct*, 64 SOC. INQUIRY 322, 330-33 (1994) (showing that levels of whistleblowing are low).

For government jobs, yet again, speech rights are essential not simply as individual rights, but as assurances of effective democratic processes.¹⁵³ The logic behind the public policy exception to at-will employment is that, under certain circumstances, the public interest in ensuring legality can outweigh the employer's interest of control over employees in the workplace. Thus, the instrumental value of protecting individual dissent and ensuring public accountability must guide the courts in determining the contours of the public policy exception. The exception is designed to create incentives for private citizens to resist their employer's illegal behavior. Similarly, First Amendment protections for public employee speech should allow employees to voice their opinions on matters of public concern and disclose information conscientiously. All employers, whether private or public, need "the services of the whistleblower to provide information necessary for its rules to be enforced."¹⁵⁴

The primary purpose of protecting public employee speech is the public interest in receiving reliable information about their government.¹⁵⁵ Protected speech provides a "checking value" against public officials' abuse of power.¹⁵⁶ Thus, there is an augmented reason to protect the speech of employees who hold positions in which they have firsthand knowledge of their departments' operations.

Whistleblowing should be understood as a way to ensure that corporations operate within legal bounds and ensure that criminal behavior is exposed.¹⁵⁷ Ultimately, the goal of the public policy exception is to reduce illegal behavior.¹⁵⁸ From an economic perspective, protecting employees against retaliation helps decrease the expected costs to the reporting individual. Conversely, such protections increase the expected costs of non-compliance to the corporation. Again, the goal of the legal treatment of whistleblowers should not be to create more rights to pursue litigation, but to create an effective process that encourages good governance. With this goal in mind, the Article now turns to the process of reporting.

153. See *Ceballos v. Garcetti*, 361 F.3d 1168, 1175 n.5 (9th Cir. 2004).

154. *Winters v. Houston Chronicle Publ'g Co.*, 795 S.W.2d 723, 728 (Tex. 1990) (internal quotation marks omitted).

155. See, e.g., *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam) ("Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues."); *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 470 (1995) ("The large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said.")

156. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527, 534.

157. *Joiner v. Benton Cmty. Bank*, 411 N.E.2d 229, 231 (Ill. 1980).

158. See *Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 876, 880 (Ill. 1981).

B. Reconfiguring Conflicts of Loyalties: Sequencing the Reporting

By definition, a whistleblower is an insider.¹⁵⁹ Organizational players who witness illegality have a choice between confronting the issue internally, and turning to regulatory authorities outside the organization. Whichever path is selected is heavily influenced by legal doctrine and organizational culture. When loyalty is understood as blind faith in one's institution, employees face a limited choice between defection or silence in the face of misconduct. When, on the other hand, loyalty is understood as an active duty to better the organization, a third choice of internal resolution is opened. In other words, when loyalty is understood as absolute faith—exemplified by strict legal prohibitions on breaches of confidentiality even in the face of misconduct and only the narrow possibility of external reporting—the law taxes individual dissent. By contrast, when loyalty is construed as organizational citizenship, the law protects channels of internal reporting and thereby provides an incentive for individual dissent.¹⁶⁰

In today's workplace, good governance principles generally require reporting to follow a sequence in which internal dissent is encouraged first, and external reporting is incentivized only when the internal reporting channel fails. The argument for this sequenced structure is both normative and pragmatic. As a matter of principle, resolving conflicts within an organization without external intervention is superior, because organizations are one locus of compelled integration that require groups of individuals "to get along."¹⁶¹ Inevitably, the workplace exerts coercive pressure on its members and creates a "forced community."¹⁶² Recalling the distinction between the faithful and loyal employee, loyalty should not mean the passive inaction of not leaving a collectivity, but rather an active willingness to bring positive change from within.¹⁶³ Stated more broadly, internal decision-making processes should command deference from the state if the decision is more likely to be rightly decided by "private government" than by the state.¹⁶⁴ In other words, the broader participatory processes of polity citizenship should defer to organizational citizenship when the latter can better achieve the desired goals of compliance and community.

159. Whistleblowing is the "disclosure by organization members . . . of illegal, immoral or illegitimate practices under the control of their employers." Janet P. Near & Marcia P. Miceli, *Organizational Dissidence: The Case of Whistle-Blowing*, 4 J. BUS. ETHICS 1, 4 (1985).

160. See Scott Gehlbach, *A Formal Model of Exit and Voice*, 18 RATIONALITY & SOC'Y 395 (2006).

161. GERALD E. FRUG, *CITY MAKING* 174 (1999); see also CYNTHIA ESTLUND, *WORKING TOGETHER* 3-5 (2003).

162. See Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1152 (2005).

163. Barry, *supra* note 151, at 98.

164. See Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144 (2003).

Sequencing the reporting to internalize dissent and strengthen organizational procedural justice also offers significant practical advantages over the existing rules that prefer exit. The current rules leave employees with the undesirable Hobson's choice of reporting outside the organization, or remaining silent. In many cases, external disclosure is an unlikely route, because it carries liability risks as well as social costs for the employee. In the public sector, government has been tightening security and warning its employees against information leaks.¹⁶⁵ In the private sector, revealing sensitive information may be deemed a breach of loyalty, or a breach of one's duty of confidentiality, creating liabilities when, for example, an employee reveals trade secrets or harms the institution by aiding a competitor.¹⁶⁶ As a result, internal speech is frequently the most reasonable, if not the only, path for an employee who witnesses organizational misconduct. A legal regime that prioritizes internal reporting over exit would strike the desired balance between the need for organizational efficiency, loyalty, and accountability. For employers, improving managerial practices must include active dissent within the organization.¹⁶⁷ Rather than suppressing dissent, organizations that encourage employees to voice objections and difficulties will have the upper hand in managing uncertainty and exercising judgment.¹⁶⁸ Internal dissent contributes to detection, problem solving, and organizational learning.¹⁶⁹ Moreover, allowing the employer to first investigate and correct possible violations prevents potential high costs to both the employee and the organization, which will avoid both reputational harms and the costs of undergoing a government investigation. From a public accounting perspective, internal resolutions also save enforcement costs by allowing agencies to focus on cases that mandate intervention. Most importantly, internal whistleblowing creates an emphasis on prevention and contributes to an ethical culture within the organization.

From the individual's perspective, external whistleblowing inherently encompasses moral conflict. Hirschman suggested the following model: when exit is possible, a member of an organization would be willing to resort to voice depending on the estimate of her ability to influence the organization and the calculation of trading off the certainty of exit against the uncertainties of

165. Dan Eggen, *White House Trains Efforts on Media Leaks*, WASH. POST, Mar. 5, 2006, at A1 (reporting plans to "target[] journalists and their possible government sources").

166. See, e.g., *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (television investigators who secured employment with grocery store chain target to conduct exposé of unsanitary food handling were in breach of employee loyalty).

167. See generally MICHAEL A. ROBERTO, *WHY GREAT LEADERS DON'T TAKE YES FOR AN ANSWER* (2005).

168. See also George Loewenstein, *Behavioral Decision Theory and Business Ethics: Skewed Trade-Offs Between Self and Other*, in *CODES OF CONDUCT* 214 (David M. Messick & Ann E. Tenbrunsel eds., 1996).

169. Jill W. Graham, *Principled Organizational Dissent: A Theoretical Essay*, 8 RES. ORG. BEHAV. 1, 38 (1986).

organizational improvement.¹⁷⁰ Hirschman theorized that long-term members who have developed loyalty to their organization are more likely to use internal reporting channels than to remain silent, because they have developed high stakes in the success of the corporation.¹⁷¹ In other words, Hirschman suggested that it is loyalty to one's organization that increases the likelihood that individuals will choose voice over exit when they face adversity. Individuals who are loyal to their organizations will choose to bring change from within. Recent empirical research confirms that whistleblowers indeed prefer internal speech to immediate outside reporting.¹⁷² Moreover, recent data show that external whistleblowers are more likely to experience retaliation by their employer and to be shunned by their social circles.¹⁷³

Finally, the inner struggle between conflicting loyalties may explain inconsistencies in the empirical literature on whistleblowing personalities. For example, while one lab experiment demonstrated that "highly moral" individuals were more likely to point out errors to their employer,¹⁷⁴ another study found that whistleblowing was associated with lower levels of moral development.¹⁷⁵ However, these results can be reconciled when examining the circumstances in which each individual was asked to report. In the first study, the whistleblower was directly asked to respond and report an error directly, while the second experiment compelled a third-party path of reporting.

C. Benefits of Sequencing: Relieving "Dirty Hands" and Other Threshold Requirements

Sequencing reporting such that a whistleblower first reports internally, and then reports externally if internal reporting is ineffective, significantly relieves other threshold problems in anti-retaliation laws. The lack of analytical clarity about the relationship between *form*, i.e., the process of reporting either internally or externally, and *substance* requirements, i.e., that the subject matter of the report will be a matter of public concern, impacts the coherence of the various doctrinal distinctions and interpretations of anti-retaliation protections. Nevertheless, and without an explicit analysis of this relationship, externalizing the report has often served as a proxy for courts to assess the substantive

170. HIRSCHMAN, *supra* note 1, at 77.

171. See also Oliver E. Williamson, *The Economics of Internal Organization: Exit and Voice in Relation to Markets and Hierarchies*, 66 AMER. ECON. REV. 369 (1976).

172. See Yuval Feldman & Orly Lobel, *Decentralized Enforcement in Organizations: An Experimental Approach*, 2 REG. & GOVERNANCE 165 (2008); see also Tim Barnett, *A Preliminary Investigation of the Relationship Between Selected Organizational Characteristics and External Whistleblowing by Employees*, 11 J. BUS. ETHICS 949 (1992).

173. See Janet P. Near et al., *Explaining the Whistle-Blowing Process: Suggestions from Power Theory and Justice Theory*, 4 ORG. SCI. 393 (1993).

174. Mary Brabeck, *Ethical Characteristics of Whistle Blowers*, 18 J. RES. PERSONALITY 41, 48-52 (1984).

175. Marcia P. Miceli, Janelle B. Dozier & Janet P. Near, *Blowing the Whistle on Data Fudging: A Controlled Field Experiment*, 21 J. APPLIED SOC. PSYCH. 271, 290-91 (2006).

“public” nature of the alleged wrongdoing. That is, when a matter is reported externally, the courts tend to view the substance of the report as a matter of public concern. In other words, the analysis becomes somewhat circular and dependent on the subjective behavior of the whistleblower in her choice between external and internal reporting. If the purpose of anti-retaliation protections is to reduce illegality in the workplace, then indeed there should be a focus on the public concern in the content of the report. Wholly private matters should not be the subject of whistleblowing protection. But it is important to note that this public/private distinction is about the substantive content of an alleged violation, not the process and mode of reporting. In order to better realize the goals of whistleblowing, the substantive requirements of “public” content as well as adequate reporting processes should be better linked.

Understanding the interaction between the legal requirements for protecting employee speech is particularly important in today’s workplace, which is filled with uncertainty and ambiguity. Employees frequently face possible illegal behavior, but the degree of unlawfulness is usually open to interpretation. Often, whistleblowing occurs not in the context of clear rule violations, but rather in environments where the “line between acceptable salesmanship and unlawful influence is a fine one.”¹⁷⁶ This problem is compounded when employees recognize that a co-worker who witnesses a violation in the workplace “put[s] at risk the loyalty and trust bonds that otherwise have been built.”¹⁷⁷

Accordingly, the willingness of employees to put themselves and their company at risk by external reporting is rare. Internal voice, on the other hand, offers a way to address possible illicit revelations while recognizing uncertainty. It allows open discussion and inquiry without immediate fear of sanction. The keystone of external whistleblowing is recovery, either through tort suits or statutory bounty offerings, while the focus of internal reporting processes is good governance and catching illegalities before they balloon out of control. As this Article argues, the primary goal of whistleblowing protections should be to prevent illegality, not to remedy employee maltreatment or to provide unlimited job security.

Existing contract doctrines already hold the key to making these distinctions, placing a burden on employees to show that their behavior was objectively reasonable and subjectively in good faith. Thus, an employee who

176. Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 95. In her famous memo, Sherron Watkins of Enron did not focus on accounting rules and technical requirements, but instead emphasized that “[t]he overriding basic principle of accounting is that if you explain the ‘accounting treatment’ to a man on the street, would you influence his investing decisions? Would he sell or buy the stock based on a thorough understanding of the facts? If so, you best present [such facts] correctly.” Watkins Memo, *supra* note 51, at 2.

177. Langevoort, *supra* note 176, at 86.

reports a perceived violation while exemplifying reckless disregard for the truth will not succeed in a retaliation claim.¹⁷⁸ Similarly, when it is reasonable to assume that internal reporting could resolve the matter, bypassing the company's channels should be deemed unreasonable. Indeed, just as some courts have found that retaliation for internal reporting may be justified if the report is disruptive and "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships . . . or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise,"¹⁷⁹ courts should find that going outside when internal reporting would have been effective may be grounds for dismissal.

Moreover, courts have inquired as to whether a particular report impairs operational function and harmony among co-workers, and whether it may have "a detrimental impact on close working relationships for which personal loyalty and confidence are necessary."¹⁸⁰ For example, when the individual's objections were inappropriately argumentative and obscene, they were found to be unprotected under a state whistleblower statute.¹⁸¹ Similarly, in Title VII retaliation cases, plaintiffs have been denied protection when continual complaints unnecessarily harm the workplace environment.¹⁸² Thus, the conditions for protected workplace speech already embody questions about the interaction between form and substance and the proportionality of the employee's reaction compared to the alleged illegality. To wit, courts should assess the substance of the alleged wrongdoing in relation to the processes that fit the type of report under the particular circumstances of alleged misconduct. For example, when the alleged violation is relatively minor, then addressing it by going all the way to the top of the corporate ladder would seem excessive. Conversely, when a violation presents an immediate significant threat to health and safety, bypassing internal channels and reporting the pertinent threat to law enforcement authorities may be deemed reasonable. Similarly, when employees take a job for the sole purpose of publicly exposing their employer as one engaged in illegal practices, they must face liability for organizational disloyalty.¹⁸³ Planned exposures stand in stark contrast to the balance that

178. For example, case law under the federal Whistleblower Protection Act of 1989, Pub. L. 101-12, 103 Stat. 16, requires an employee complaining of retaliation to show "irrefragable proof" of noncompliance.

179. *Locurto v. Giuliani*, 447 F.3d 159, 173 (2d Cir. 2006); *Lewis v. Cowen*, 165 F.3d 154 (2d Cir. 1999).

180. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

181. *Dunham v. Brock*, 794 F.2d 1037, 1041 (5th Cir. 1986).

182. *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222, 233 (1st Cir. 1976).

183. See, e.g., *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (television investigators who secured employment with grocery store chain to conduct exposé of unsanitary food handling were in breach of employee loyalty); *Huntingdon Life Sciences, Inc. v. Rokke*, 986 F. Supp. 982 (E.D. Va. 1997) (animal rights organization investigator who secured employment with animal testing firm to conduct exposé breached duty of loyalty).

individuals must strike between civic and organizational loyalties.

In the same manner, speech that does not conform to the threshold requirements of form and substance would not receive First Amendment protection in the context of public employment. In *Garcetti*, both the majority and the dissents agreed that a government employer has the authority to take corrective action against an employee who writes an “inflammatory or misguided” memo.¹⁸⁴ However, the dissent emphasized that nothing in the facts of the case suggested that memo reflected either of these characterizations.¹⁸⁵ Whereas the majority collapsed the distinction between “inflammatory or misguided”¹⁸⁶ and simply “unwelcome” speech,¹⁸⁷ the dissents focused precisely on these two different categories.¹⁸⁸ In the case of the unwelcome speech—when an employee’s speech merely “reveals facts that the supervisor would rather not have anyone else discover” concerning organizational illegality—the employee should receive protection, both constitutionally and under the relevant whistleblower statutes.¹⁸⁹

A final threshold puzzle that has divided the courts when interpreting whistleblower laws involves an informant’s motivation and prior actions. Some courts have stated that they will not recognize whistleblower claims if the reporting employees are seeking personal gain or are reporting a violation in which they participated.¹⁹⁰ Again, the answer to the puzzle depends on the rationales and goals of protection. Since the primary goal of anti-retaliation protections is promoting legal compliance, the answer is that, as long as the whistleblower first tried to separate herself from the illegal behavior and attempted to resolve the issue internally, and second resorted to external reporting, her actions should be protected. The question becomes more difficult when the incentives to report include monetary rewards. For example, the IRS does not prohibit bounty rewards for participants in the tax fraud they subsequently report.¹⁹¹ By contrast, the SEC bounty program excludes those who participated in the illegality.¹⁹² Again, the question of “dirty hands” must be analyzed in terms of the purpose of speech protections. For the purpose of promoting organizational compliance, protections, and rewards, structures that incentivize voice should not involve an inquiry into the motivations and purity of the reporting individuals. As long as the process is appropriate—including

184. *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006).

185. *Id.* at 426 (Stevens, J., dissenting).

186. *Id.* at 423 (majority opinion).

187. *Id.* at 426 (Stevens, J., dissenting).

188. *Id.*

189. *Id.*

190. *See, e.g., Dahl v. Combined Ins. Co.*, 621 N.W.2d 163 (S.D. 2001).

191. 26 U.S.C. § 7623 (2000).

192. The Securities Exchange Act, 15 U.S.C. § 78u-1(e) (2006); U.S. Securities and Exchange Commission, Insider Trading Information on Bounties, <http://www.sec.gov/divisions/enforce/insider.htm> (last visited Oct. 12, 2008).

good-faith attempts to first protect the organization by reporting internally and only stepping outside one's institution in extreme cases—then the law should afford these protections for the public interest in good governance and compliance.

IV

THE ACCOUNTABILITY MESSAGE: ORGANIZATIONAL DNA AND TWENTY-FIRST CENTURY WORKPLACE REGULATION

The fields of regulation and organizational citizenship exemplify asymmetric developments in the law. While regulatory approaches to corporate compliance have shifted in recent years, the laws regarding mediation of the conflicts between civic and organizational obligations have been more stagnant and largely under-theorized. Building on lessons from business strategies and regulatory approaches, many administrative agencies are currently expanding their collaborative compliance programs, increasingly relying on internal self-regulation to complement traditional adversarial enforcement. At the same time, the preference for external reporting in the laws of organizational loyalty remains largely unmodified. Thus, the law of the workplace constitutes a system of mixed messages.

This Part demonstrates that new developments in management and regulatory philosophy increasingly depend on individual reporting to ensure compliance with the law. Regulatory and adjudicative lessons must be drawn from current developments in the areas of civil liability and organizational sentencing—all of which indicate ways in which private for a can become desirable alternatives to public dispute resolution. As regulators turn away from command-and-control rules and towards more autonomous self-regulation, the balance between exit, voice, and loyalty in those who might potentially blow the whistle must also be altered, in order to incentivize internal reporting and allow firms effectively to self-police.

A. From Individuated to Coordinated Work

In the aftermath of Enron's collapse, SEC Chair William Donaldson suggested to the Economic Club of New York that the single most important asset of a corporation is its "moral DNA."¹⁹³ Donaldson argued that a company must continually devote efforts to "the evaluation and understanding of their own group dynamic and the way that affects their decision-making process."¹⁹⁴ Donaldson further contended that, by determining the makeup of the company's moral DNA, and by establishing "a culture that puts ethics and

193. William H. Donaldson, Chairman, U.S. Sec. and Exch. Comm'n, Remarks Before the Economic Club of New York (May 8, 2003), *available at* <http://www.sec.gov/news/speech/spch050803whd.htm>.

194. *Id.*

accountability first,” companies are more likely to avoid the “common trap of mere compliance.”¹⁹⁵ For both managers and regulators, the concept of organizational DNA connotes the promotion of openness, learning, transparency, the challenging of beliefs, and institutional disentanglement.¹⁹⁶

In the early twentieth century, an era of industrial production, the prevailing human resources philosophy emphasized isolated, regularized work with narrow job descriptions and clearly defined hierarchies.¹⁹⁷ Frederick Taylor, the father of scientific management theory, considered groups of people working together to be less efficient than individuated and autonomous workers.¹⁹⁸ By contrast, a more modern approach understands that groups, on average, surpass individuals in decision-making and problem-solving capabilities.¹⁹⁹ Moreover, unlike yesterday’s scientific management theory, employers expect workers of the new economy simultaneously to exercise independent judgment and to be team players. Managers expect “spontaneous and innovative activity that goes beyond role requirements,”²⁰⁰ and encourage employees to suggest innovations that would improve the work, to be creative, and to work in multidisciplinary professional groups. By developing an “esprit de corps” of shared norms and beliefs, these organizations greatly impact the behavior of their individuals.²⁰¹ As management philosophy has shifted its emphasis from individuated to coordinated work, and from defined hierarchies and rigid job definitions to more discretion and creative production, organizational loyalty has become a key concept in organizational strategy. Widespread empirical data on motivation indicate that most employees view workplace loyalty as integral to their identity,²⁰² and that organizational commitment and shared identity increase productivity.²⁰³ Therefore, business scholars argue that the “loyalty factor”—fostering in-group trust, solidarity, and cooperation—is key to good business.²⁰⁴ Conversely, low levels of loyalty

195. *Id.*

196. David G. Knott & Gary Neilson, *Organizing to Execute: It’s in the DNA*, 70 IVEY BUS. J. 2 (2006) (“The good news is that, unlike human DNA, organizational DNA can be modified.”), available at www.iveybusinessjournal.com/view_article.asp?intArticle_ID=636.

197. KATHERINE W. STONE, FROM WIDGETS TO DIGITS 5 (2004); see also Orly Lobel, *The Four Pillars of Work Law*, 104 MICH. L. REV. 1539 (2006).

198. FREDERICK WINSLOW TAYLOR, *THE PRINCIPLES OF SCIENTIFIC MANAGEMENT* 72 (1911).

199. S. ALEXANDER HASLAM, *PSYCHOLOGY IN ORGANIZATIONS* 304-05 (2001); Norbert L. Kerr et al., *Bias in Judgment: Comparing Individuals and Groups*, 103 PSYCHOL. REV. 687, 691 (1996).

200. John Deckop et al., *Getting More Than You Pay For: Organizational Citizenship Behavior and Pay-For-Performance Plans*, 42 ACAD. MGMT. J. 420, 420 (1999).

201. IRVING L. JANIS, *GROUPTHINK* 35 (1982).

202. ELLIOTT SOBER & DAVID SLOAN WILSON, *UNTO OTHERS* 173 (1998).

203. See Lawrence E. Mitchell, *Trust and Team Production in Post-Capitalist Society*, 24 J. CORP. L. 869 (1999).

204. See generally CAROL KINSEY GOMAN, *THE LOYALTY FACTOR* (1991).

discourage innovation.²⁰⁵

As described above, organizational citizenship behavior (OCB), the discretionary behavior of employees that exceeds the requirements of specific role definitions, has become prominent in managerial strategic planning.²⁰⁶ Because OCB is positively correlated with job performance and productivity, managers attempt to elicit OCB from their employees by decentralizing some decisions and allowing lower-level employees to exercise discretion in their work.²⁰⁷ Thus, organizational citizenship is associated with a culture of trust, but not necessarily with stability or long-term job security. Indeed, Harvard Business School Professor Rosabeth Kanter has advised employers to build active “commitment” rather than passive “blind loyalty” to prevent employee turnover.²⁰⁸ In a similar line of studies, scholars have warned against too much supervision, which can curtail the self-motivations of organizational actors. Excessive surveillance, for example, can have counterproductive “boomerang effects” of mistrust and decreased motivation.²⁰⁹ The “embedded mistrust” signaled by tight controls and commands creates an expectation of wrongdoing and cynicism about compliance.²¹⁰ Top-down surveillance crowds out other mechanisms of compliance that are generated through ethical development and self-monitoring.²¹¹ Social psychologist Robert Cialdini explains:

[W]hen people perceive themselves performing the desirable monitored behavior, they tend to attribute the behavior not to their own natural preference for it but to the coercive presence of the controls. As a consequence, they come to view themselves as less interested in the desirable conduct for its own sake . . . and they are more likely to engage in the undesirable action whenever the controls cannot register the conduct.²¹²

A good example of a new workplace feature designed to induce loyalty and identification with one’s company without the negative effects of over-surveillance is the burgeoning system of employee stock options and bonus-type compensation. Stock options increase employees’ stake in the company

205. David Good, *Individuals, Interpersonal Relations, and Trust*, in TRUST 31, 35 (Diego Gambetta ed., 1988); Stephen Knack & Philip Keefer, *Does Social Capital Have an Economic Payoff? A Cross Country Investigation*, 112 Q.J. ECON. 1251, 1253-54 (1997).

206. STONE, *supra* note 197, at 95; *see also* ORGAN, *supra* note 9.

207. John P. Meyer et al., *Organizational Commitment and Job Performance: It’s the Nature of the Commitment that Counts*, 74 J. APPLIED PSYCHOL. 152, 155-56 (1989).

208. *See* ROSABETH MOSS KANTER, *EVOLVE!* 211-14 (2001).

209. Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 259 (1999).

210. Langevoort, *supra* note 176, at 98.

211. *See* Chip Heath, *On the Social Psychology of Agency Relationships: Lay Theories of Motivation Overemphasize Extrinsic Incentives*, 78 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 25 (1999); Tom R. Tyler, *The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities*, 1 PERSONALITY & SOC. PSYCHOL. REV. 323 (1997).

212. Robert B. Cialdini, *Social Influence and the Triple Tumor Structure of Organizational Dishonesty*, in CODES OF CONDUCT, *supra* note 168, at 44, 57.

and increase their commitment to the success of the firm. Empirical research indicates that companies that use employee stock option structures outperform comparable companies that do not.²¹³ Interestingly, one commentator has recently argued that, instead of operating as a motivating incentive to exert more effort during work, stock options primarily serve to monitor other employees, including one's supervisor.²¹⁴ Without stock option compensation, behavioral biases by employees, such as deferring to authority and overrating the status quo, would prevent most workers from adequately monitoring their co-workers.²¹⁵ Since employees with stock options suffer losses if their colleagues choose to damage the company, they will monitor others to ensure that they do not harm the firm.²¹⁶

In sum, the move from individuated to collaborative team production has generated new attention to the role of organizational and behavioral incentives in peer monitoring and internal compliance. Like the organizational literature, psychology studies distinguish between two kinds of law-abiding behavior: conformity and voluntary deference.²¹⁷ The next section turns to government perspectives on regulation and the efforts of policymakers to harness new insights regarding organizational DNA.

B. From Regulation to Governance

The term "new governance" signifies myriad recent regulatory approaches designed to enhance industry cooperation and self-regulation.²¹⁸ Instead of focusing on substantive prohibitions and adversarial enforcement, new governance approaches attempt actively to involve firms in the legal process, including the processes of complying with and interpreting legal norms.²¹⁹

213. Sharon Hannes, *Reverse Monitoring: On the Hidden Role of Employee Stock-Based Compensation*, 105 MICH. L. REV. 1421, 1444 (2007) (citing James C. Sesil & Maya K. Kroumova, *The Impact of Broad-Based Stock Options on Firm Performance: Does Firm Size Matter?* 3 (May 6, 2005) (unpublished manuscript), available at <http://papers.ssrn.com/abstract=717081>).

214. *Id.* at 1445.

215. *Id.*

216. *Id.* at 1441.

217. See Charles O'Reilly III & Jennifer Chatman, *Organizational Commitment and Psychological Attachment: The Effects of Compliance, Identification, and Internalization on Prosocial Behavior*, 71 J. APPLIED PSYCHOL. 492 (1986); Tyler, *supra* note 211, at 1293 ("voluntary deference refers to rule following in that subset of situations in which issues of detection are largely or completely irrelevant").

218. On new governance as a set of approaches to regulation, see generally Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007); Lobel, *supra* note 197; Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071 (2005) [hereinafter Lobel, *Governance of Workplace Safety*]; Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004) [hereinafter Lobel, *The Renew Deal*]; Orly Lobel, *Setting the Agenda for New Governance Research*, 89 MINN. L. REV. 498 (2004).

219. See Lobel, *The Renew Deal*, *supra* note 218.

These approaches share the understanding that an over-reliance on command-and-control regulation may in fact be ineffective.²²⁰ Over the past five decades, top-down rules and adversarial enforcement—the hallmark of command-and-control—have often failed to achieve their intended goals of increasing compliance and, at times, have been counter-productive in regulating private industry. In particular, as technology and production methods change rapidly, it is virtually impossible to address all the risks of production and work through universal standards.

Moreover, new governance theory views adversarial relations as having the potential to reduce firms' willingness to share information and to collaborate with the agency in mutually beneficial problem solving. New governance theory therefore encourages government agencies to foster a culture of compliance within regulated industries. Under the new governance model, the agency, when feasible, asks the regulated private companies to identify problems and risks and to continuously reflect on possible solutions—effectively, to self-regulate. In turn, the agency offers consultation and assistance. It also offers practical and reputational rewards through safe havens, variance accommodation, and the public certification of responsible practices.

In order to allow such continuous improvement through the self-monitoring of corporations, agencies frequently phrase their regulations as norms rather than rigid rules. In fact, these regulations are often deliberately ambiguous. Instead of regulating the details of behavior, agencies increasingly use broad policy goals such as “risk management” and allow the regulated industries to implement and interpret these mandates.²²¹ Today, due to a growing reliance on internal compliance systems, the significance of voice and active internal dissent by individual employees is even greater than in the past.

Building on these organizational and motivational insights, new governance recognizes that centralized command systems—whether by government agencies or within the hierarchy of private firms—entail social costs. In particular, centralized systems of control indicate that a company mistrusts its employees. Indeed, empirical evidence suggests that the structure of an organization has a significant impact on the likelihood that individuals will engage in unlawful behavior.²²² An emphasis on a culture of compliance within a workplace can carry over from one policy area to other areas; for example, if a firm is reflexively focused on workplace safety, it is also more

220. See generally LAW AND NEW GOVERNANCE IN THE EU AND THE US (Gráinne de Búrca & Joanne Scott eds., 2006).

221. See Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377 (2006).

222. See Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); Daniel J.H. Greenwood, *Enronitis: Why Good Corporations Go Bad*, 2004 COLUM. BUS. L. REV. 773; Canice Prendergast, *The Provision of Incentives in Firms*, 37 J. ECON. LITERATURE 7 (1999); Diane Vaughan, *Toward Understanding Unlawful Organizational Behavior*, 80 MICH. L. REV. 1377 (1982).

likely to emphasize diversity and environmental safety.²²³

Drawing on these empirical insights, many regulators are attempting to implement new modes of regulation that consist of self-regulation by private corporations and collaboration between private and public organizations.²²⁴ Agencies encourage transparency, participatory dialogue between industry actors, and inclusive decision-making processes.²²⁵ Agencies are beginning to use cooperative compliance techniques in diverse fields of regulation, including occupational safety and health,²²⁶ environmental hazardous substance regulation,²²⁷ food safety control,²²⁸ endangered species regulations,²²⁹ civil rights compliance,²³⁰ tax programs,²³¹ and securities regulation.²³² For example, in the discrimination context, policymakers increasingly recognize that the nature of the organization and its procedures can either contribute to or prevent a discriminatory work culture.²³³ For this reason, the Equal Employment Opportunity Commission (EEOC) and some state civil rights agencies have recently encouraged workplaces to engage in prevention through recurrent anti-discrimination training programs.²³⁴ Similarly, the federal Occupational Safety and Health Administration (OSHA) offers programs requiring private companies to identify, investigate, and monitor their own safety risks and near-miss accidents in return for certification as “star” members of the OSHA collaborative and assistance from the agencies’ officials.²³⁵

As regulators increasingly rely on concepts of corporations’ “organizational DNA” to promote reflexive regulation and self-monitoring, effective law enforcement becomes dependent on an individual’s ability to

223. See generally Christine Parker, *Reinventing Regulation within the Corporation: Compliance-Oriented Regulatory Innovation*, 32 ADMIN & SOC’Y 529 (2000).

224. For example, the European New Governance Project defines new governance as including (1) self-regulation by private firms; (2) co-regulation of public and private actors; and (3) voluntary collaboration by private firms and public agencies. New Modes of Governance Project, About, Research, Delegation, Hierarchy and Accountability, Project 05 Detail: New Modes of Governance in the Shadow of Hierarchy, http://www.eu-newgov.org/datalists/project_detail.asp?Project_ID=05 (last visited Oct. 13, 2008).

225. See Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795 (2005).

226. See Lobel, *Governance of Workplace Safety*, *supra* note 218.

227. Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. 27,282 (May 23, 1995).

228. See William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra* note 220, at 37.

229. See Lobel, *The Renew Deal*, *supra* note 218, at 428-30; see also The Endangered Species Act, 16 U.S.C. § 1539(a)(1)(B) (2006).

230. See Lobel, *supra* note 138.

231. See *id.*

232. 15 U.S.C. § 7262 (2006).

233. Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 650 (2005).

234. Equal Employment Opportunity Commission Compliance Manual, Section 15: Race & Color Discrimination, 1104-21 (Apr. 19, 2006), <http://www.eeoc.gov/policy/docs/race-color.html> (last visited Jan. 21, 2009), at 15-IX.

235. See Lobel, *Governance of Workplace Safety*, *supra* note 218.

report illegal conduct. Individual internal dissent is necessary to complement requirements of systematic self-monitoring. Undoubtedly, the move to new models of governance denotes augmented reliance on the ability of the individual actor to speak within the organization, and in extreme cases, to report externally, when one faces illegality and organizational corruption. Simply put, as government relies more on private parties to prevent improper behavior, the need for legal protections for whistleblowers increases. The legal mechanisms currently protecting whistleblowers aim to promote responsible practices and to counter incentives to conceal malfeasance. If the notion of new governance is to be taken seriously as an effort to diversify the ways workplaces improve work standards, then the balance between exit, voice, and loyalty, to use Hirschman's classic terms, must also be altered.

C. Structural Guidelines and Avoidable Harm: Trends in Organizational Liability

The use of non-judicial fora in many different contexts proves that alternative dispute resolution can aptly solve problems and resolve disputes. In the context of sexual harassment claims, the Supreme Court has held that an employee's failure to use his or her employer's internal grievance procedure limits the employer's liability for a hostile work environment.²³⁶ Before 1998, an employer was strictly liable for a supervisor's sexual harassment.²³⁷ In *Faragher v. City of Boca Raton* and *Burlington Industries v. Ellerth*, however, the Court held that an employer may assert a two-pronged affirmative defense to claims of sexual harassment, showing "(a) that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (b) that the . . . employee unreasonably failed to take advantage of any preventative or corrective opportunities by the employer or to avoid harm otherwise."²³⁸ The Court reasoned that this affirmative defense against a Title VII claim was appropriate because the statute's "primary objective" is "not to provide redress but to avoid harm."²³⁹ A year later, in *Kolstad v. American Dental Association*, the Supreme Court introduced an affirmative defense against Title VII claims for punitive damages when the organization had promulgated anti-discrimination policies and provided anti-discrimination education.²⁴⁰ The Court again explained that Title VII's primary objective is to prevent harm rather than to provide remedy and, therefore, employers should be encouraged to adopt formal anti-discrimination policies, training programs,

236. *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-08 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

237. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 70-71 (1986).

238. *Faragher*, 524 U.S. at 807; accord *Burlington Indus.*, 524 U.S. at 765.

239. *Faragher*, 524 U.S. at 806.

240. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545-46 (1999).

and inform their employees about anti-discrimination laws.²⁴¹

The “avoidable harm” principle, as developed in these recent discrimination cases, provides insight for developing a sequenced reporting system. The idea that an employer can avoid liability by demonstrating that the employee could have avoided the harm through reasonable effort stems from tort law, which generally holds that “a victim has a duty ‘to use such means as are reasonable to avoid or minimize the damages’ that result from violations of the statute.”²⁴² Under these tort principles, courts liberally interpret the reasonableness of the victim’s course of action to avoid harm.²⁴³ In addition, the application of the avoidable harm doctrine in the discrimination context indicates the limitations of the defense. In *Ellerth*, the plaintiff successfully demonstrated that, although she knew about the employer’s anti-harassment policy procedures, her conscious decision not to use them was reasonable because a complaint would likely have been futile.²⁴⁴ *Ellerth* demonstrates that, under some circumstances, internal inaction can be reasonable.²⁴⁵ Similarly, in *Sharp v. City of Houston*, the Fifth Circuit held that an employee’s failure to report harassment by her supervisor did not absolve the employer of liability because of a prevailing workplace “code of silence.”²⁴⁶ The police department in that case had an unwritten practice where anyone complaining of a fellow worker’s misconduct “would suffer such a pattern of social ostracism and professional disapprobation that he or she likely would sacrifice a career . . .”²⁴⁷

The “reasonable inaction” principle draws on the fact that, at times, internal reporting is ineffective and entails great costs. General and unexplained delays in reporting typically fail to satisfy the reporting requirement.²⁴⁸ Nevertheless, an employee may suffer greatly from reporting misconduct to a supervisor and may rightly fear that her employer will not adequately investigate his or her complaint.²⁴⁹ Mere unsubstantiated subjective fears are generally insufficient to excuse failure to report, however.²⁵⁰ The EEOC in its

241. *Id.* at 545.

242. *Faragher*, 524 U.S. at 806 (quoting *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 n.15 (1982)).

243. CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 134 (1935).

244. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 748-49 (1998).

245. *See also* *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 36 (1st Cir. 2003) (“sometimes inaction is reasonable”).

246. 164 F.3d 923, 935 (5th Cir. 1999).

247. *Id.* at 931.

248. *See, e.g.*, *Gawley v. Indiana Univ.*, 276 F.3d 301, 312 (7th Cir. 2001).

249. *See* Heather S. Murr, *The Continuing Expansive Pressure to Hold Employers Strictly Liable for Supervisory Sexual Extortion: An Alternative Approach Based on Reasonableness*, 39 U.C. DAVIS L. REV. 529 (2006).

250. *Reed*, 333 F.3d at 35-36; *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001); *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001); *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1296, 1301-02 (11th Cir. 2000); *Caridad v. Metro-N. Commuter R.R.*, 191 F.3d 283, 295-96 (2d Cir. 1999); *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 813

enforcement guidelines maintains that an employee could reasonably believe that the employer's internal reporting system was ineffective if "he or she was aware of instances in which co-workers' complaints failed to stop harassment."²⁵¹ Similarly, reasonable inaction may occur when an employer fails to inform employees about its anti-harassment policy by failing to circulate the policy or post it on employee bulletin boards.²⁵²

Similar to the discrimination context, employers should be able to defend against whistleblower and retaliation claims if the employer set up an internal complaint investigation procedure and the employee failed to make use of it, unless it is reasonable to predict that the internal process would be patently futile due to past actions and surrounding circumstances.

New governance approaches have also appeared in the Organizational Sentencing Guidelines (OSGs), which mitigate a corporation's liability when the corporation can show it has an adequate internal process for reporting wrongdoing.²⁵³ The OSGs provide for reduced penalties when a corporation indicates that it has implemented an "effective program to prevent and detect violations of law."²⁵⁴ At minimum, an effective program includes (1) established standards and procedures that are reasonably capable of reducing the prospect of criminal conduct; (2) oversight by high-level personnel; (3) effective communication of the compliance program to all its employees, including training and the dissemination of published materials; and (4) active monitoring and auditing activities and the institution of a reporting system "whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution."²⁵⁵ Further, the OSGs require the corporation to enforce adequately its compliance procedures, using disciplinary measures and all reasonable steps to prevent and detect future violations.²⁵⁶

The OSGs also recognize that the precise features of the compliance program will vary across different corporations. For example, the larger the organization, the more formal the compliance program must be.²⁵⁷ The Guidelines also cite industry practices as a factor to consider in determining the

(7th Cir. 1999).

251. U.S. EQUAL EMPLOYMENT & OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999), available at <http://www.eeoc.gov/policy/docs/harassment.html>.

252. *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 1027-28 (10th Cir. 2001); *Boyd v. Snow*, 335 F. Supp. 2d 28, 36 (D.D.C. 2004); *Booker v. Budget Rent-A-Car Sys.*, 17 F. Supp. 2d 735, 747-48 (M.D. Tenn. 1998).

253. Dan K. Webb & Steven F. Molo, *Some Practical Considerations in Developing Effective Compliance Programs: A Framework for Meeting the Requirements of the Sentencing Guidelines*, 71 WASH. U. L.Q. 375, 378, 390 (1993).

254. U.S. SENTENCING GUIDELINE MANUAL § 8A1.2 cmt. n.3(k) (2001).

255. *Id.* § 8A1.2 cmt. n.3(k)(5).

256. *Id.* § 8A1.2 cmt. n.3(k)(6)-(7).

257. *Id.* § 8B2.1, cmt. n.2(c).

reasonableness of any particular program.²⁵⁸ With respect to fines, the OSGs allow a reduction in penalties by up to ninety-five percent if the corporation has an adequate compliance program in place.²⁵⁹ Conversely, the absence of a compliance program can lead to fines multiplied by up to 400 percent.²⁶⁰ State courts have also created incentives for corporations to implement monitoring, compliance and reporting systems.²⁶¹ Like the recent discrimination jurisprudence, in enacting the OSG framework, the legislature signaled that internal problem solving is key to prevention and that the legal system is willing to reduce liability and penalties in the interest of private structural compliance efforts.

In criminal law, certain cases have evidenced a similar development by finding liability not only for corporate officers, but also for mid-level employees.²⁶² This development indicates that employees must exercise individual judgment and decision making as to the legality of their actions, because they are no longer protected from criminal liability by following rules set by their supervisors. Just as a corporation can be criminally liable for criminal acts committed by its employees or agents, employees can be criminally liable for the criminal actions of their corporation.

V

LOYALTY REDUX: ON ROLES AND RULES

The conflicting duties of organizational and polity citizenship create a fundamental dilemma in most areas of law and moral philosophy. The presence of multiple loyalties means that, in many circumstances, individuals do not make decisions as neutral agents acting on an ad hoc balance of reasons. Rather, they are constrained by prior ties and affiliations.²⁶³ George Fletcher describes loyalty as “the beginning of political life, a life in which interaction with others becomes the primary means of solving problems.”²⁶⁴ In a similar vein, in *The Philosophy of Loyalty*, Josiah Royce contends that “[i]n loyalty, when loyalty is properly defined, is the fulfillment of the whole moral law.”²⁶⁵ Loyalty exists in “all orders of society” and indeed, it may be found both in ordinary relations and “amongst the loftiest of mankind.”²⁶⁶

258. *Id.* § 8B2.1 cmt. n.2(b).

259. *Id.* § 8C2.5(f).

260. *Id.* § 8C2.6.

261. *In re Caremark Int’l, Inc.*, 698 A.2d 959, 969 (Del. Ch. 1996).

262. *See* *United States v. Farm & Home Sav. Ass’n*, 932 F.2d 1256 (8th Cir. 1991); *United States v. Penagaricano-Soler*, 911 F.2d 833 (1st Cir. 1990); *United States v. Bank of New Eng., N.A.*, 821 F.2d 844, 856 (1st Cir. 1987). Other laws authorize disciplinary proceedings against supervisors who failed to adequately supervise their employees who violate the law, for example, section 15(b)(4)(E) of the Securities Exchange Act of 1934, ch. 404, 48 Stat. 881.

263. *See* SAMUEL SCHEFFLER, *BOUNDARIES AND ALLEGIANCES* 51 (2001).

264. GEORGE P. FLETCHER, *LOYALTY* 5 (1993).

265. JOSIAH ROYCE, *THE PHILOSOPHY OF LOYALTY* 15 (1908) (emphasis removed).

266. *Id.* at 54-55.

While the concept of loyalty is both historically and culturally contingent, in every country, the idea of loyal citizen is deeply embedded in the social fabric. A fundamental characteristic of loyalty is the meeting of the personal with the objective.²⁶⁷ Loyalty entails self-motivated normative judgment: consciously embracing a group as one's own, and subsequently basing decisions upon that initial decision. Therefore, it brings "our historical self" into our decision-making processes: "When I have loyalty toward something I have come somehow to view it as *mine*. It is an object of noninstrumental value to me in virtue (but not only in virtue) of its being mine."²⁶⁸ In other words, loyal action places the objective self in harmony with its subjective past.²⁶⁹

However, conflicting loyalties challenge this harmonious balance. In particular, the law should not always defer to private, intragroup loyalties, because such loyalties, at times, "must yield to society's commitments."²⁷⁰ At the same time, loyalty to society alone also has its costs. Recognizing that loyalty can lead to immoral behavior, Fletcher calls for a "modified case for loyalty":

We could hardly insist on total commitment . . . to friends, family, community, country or God. Loyalties, like religions, beget countless sins. Kinship ties prompt gifts and bequests that concentrate wealth in particular families. Nepotism favors friends over merit in filling important positions. The great sin of loyalty, of course, is war.²⁷¹

Fletcher thus proposes a concept of "enlightened loyalty," which includes evaluation of circumstances and exercise of reasoned choice.²⁷²

As demonstrated in the previous sections, employment relationships carry affirmative duties that surpass the duties that we generally owe each other as a feature of polity citizenship. Like other relationships, employment obligations are likely to conflict with broader, societal loyalties. The law of the workplace is thus not materially different from other contexts where dilemmas of conflicting duties occur. In the analysis of organizational citizenship lie the seeds for a more general theory of individual judgment in relational contexts.

Whether one is considering professional ethics, the laws of war, family obligations, or questions about global economic development, two general questions guide any inquiry: (1) What are our moral obligations? and (2) How do we mediate our conflicting obligations? The first question directs individuals to recognize the duties that come with their various familial, professional, and civic relationships. The second question, the focus of this article, presents several of the greatest dilemmas of moral and legal thought.

267. *Id.* at 42.

268. Andrew Oldenquist, *Loyalties*, 79 J. PHIL. 173, 175 (1982) (emphasis in original).

269. FLETCHER, *supra* note 264, at 25.

270. *Id.* at 100.

271. *Id.* at 151.

272. *See id.* at 123.

These dilemmas resurface in both public and private settings. In the following Part, this dilemma is analyzed in three contexts—family ties, civil disobedience, and professionalism—in order to demonstrate how each analysis tracks similar arguments and provides insights into how the law can resolve the conflicting demands of multiple loyalties.

At one extreme, family immunities generally require the individual to maintain information within the small, close-knit unit; this is evidenced by the strict longstanding exceptions in the laws of evidence and criminal procedure for family members. On the other end of the spectrum, in instances of civil disobedience, societal duties allow for only rare exceptions for individuals to disregard the law in favor of universal morality and beliefs. Professional responsibility and legal ethics stand in the middle of this spectrum. Professionals necessarily inhabit two worlds: the organizational and the professional. The law confronts the daily conflicts between the demands of each world and can reconcile them only by recognizing that the legitimacy of individual action depends on both the substantive reason that triggers resistance and the subsequent procedural form selected by the individual. Inherent in the competing pull of professional and ethical loyalties is the tension between automatic loyalty and automatic disloyalty, and the resulting ambivalence in the law regarding the treatment of whistleblowers.

A. *Familial Loyalties*

For over a century, loyalty to one's family has been deemed important enough to limit the criminal justice system's ability to retrieve relevant trial evidence, creating one of the few exceptions to the principle that "the public has a right to every man's evidence."²⁷³ The spousal communication privileges against testifying remain strong today in all states, with the rationale of securing open and free channels of communication.²⁷⁴ Fourteen states even prohibit prosecution for actively harboring family member fugitives, regardless of the crime.²⁷⁵ The reason for these strong protections lies in the notion that the law should not intervene in the strongest loyalty ties: those between family members. Individuals are even expected to suspend their positive moral duties to help others when a family member is involved.²⁷⁶

Regardless of its prevalence, a per se rule preferring intra-family loyalty over civic loyalties in criminal procedure has been subject to much critique.

273. Dan Markel et al., *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147, 1167 (quoting 8 JOHN H. WIGMORE, EVIDENCE § 2192 (John T. McNaughton ed., rev. ed. 1961)) (internal quotation marks omitted); see also Sanford Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631.

274. See Markel, *supra* note 273, at 1168.

275. *Id.* at 1158-59; see also *id.* at 1156 (discussing "the taboo against turning in one's family" when law enforcement asks an individual to turn in a relative).

276. SCHEFFLER, *supra* note 263, at 52-53.

Jeremy Bentham worried that granting absolute evidentiary privileges to family members would allow families to become “a den of thieves.”²⁷⁷ More recently, several scholars have critiqued the strong exemptions within the criminal justice system that stem from family ties from a cost-benefit perspective.²⁷⁸

Here lies one of the fundamental dilemmas of legal loyalties. When loyalty builds social ties in productive and socially desirable ways, the law aims to stabilize and strengthen these bonds. However, when loyalty ties serve undesirable ends, the law’s role is to destabilize trust among conspirators, provide incentives for defection from a conspiracy, and help law enforcement retrieve as much information from the defectors.²⁷⁹ When the law grants complete privilege to family members or allows an employer to retaliate against an employee for reporting illegality in the workplace, it creates, in Bentham’s words, “safe and unquestionable and ever ready accomplice[s] for every imaginable crime.”²⁸⁰ Largely, the law’s treatment of the conflict of obligations between citizenship and family in the criminal justice system completely favors the inner circle of family over the larger circle of citizenry.

B. Civic Loyalties

In contrast to the blanket exceptions granted in the case of family loyalty, the loyalties felt by those who practice civil disobedience receive very limited legal recognition. Here, the existing legal order conflicts with a universal sense of morality (as individually experienced). In other words, the conflict of loyalties is between the individual’s obligations as a law-abiding citizen and her obligations as a moral agent. The two central insights from debates about conscientious objectors concern the requirements that are needed to create exceptions to the default of following orders and the interaction between substance and process in recognizing this narrow exception.

In general, claims about loyalty and controlling dissent are varieties of “second-order reasons” to follow authority.²⁸¹ Second-order reasons refer to those rationales that lead individuals to make decisions and balance various direct concerns. Decision making based on second-order reasons can lead to deference to a different judgment than the direct judgment one would make in a given case thinking merely of first-order reasons. In the context of the workplace, a second-order reason for following authoritative commands might be: “if you are in disagreement with your supervisor, defer to your supervisor.” In the broader context of obeying the law and the exception of civil disobedience, Raz asserts that “[u]p to a certain point it is better that the law

277. JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 340 (1827).

278. See Markel, *supra* note 273.

279. Neal Kumar Katyal, *Conspiracy Theory*, 112 *YALE L.J.* 1307, 1333 (2003).

280. BENTHAM, *supra* note 277, at 338.

281. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 35-69 (1986).

and its interpretation be settled than that it be settled rightly.²⁸² Yet, as John Rawls describes, in any given case, each individual must make an independent decision about whether to accept authority:

[E]ach person must indeed make his own decision. Even though men normally seek advice and counsel, and accept the injunctions of those in authority when these seem reasonable to them, they are always accountable for their deeds. We cannot divest ourselves of our responsibility and transfer the burden of blame to others. This is true of any theory of political duty²⁸³

While Rawls's observations concern civil disobedience, the same principles hold in the context of organizational dissent. To a point, suppression of conflict is desirable and the supervisors' discretion is necessary. The line drawing depends on the circumstances. Central to Rawls's analysis is the understanding that individuals must make judgments not only about first-order reasons, but also about second-order reasons and their applications. For example, Rawls urges the civil disobeyer to first consider whether her actions, even if justified on all other grounds, would be pragmatically justified under particular circumstances, particularly when disobedience will cause great disruption and other harms.²⁸⁴ Similarly, Ronald Dworkin distinguishes between the substantive and procedural aspects of civil disobedience.²⁸⁵ Dworkin classifies forms of disobedience into two groups—persuasive and non-persuasive—and the substance of disobedience into justice and integrity-based.²⁸⁶ He argues that the most justifiable forms of disobedience are those that involve claims about justice, and are designed to persuade others.²⁸⁷ Both Dworkin and Rawls maintain that if civil disobedience is performed following the principles of substantive threshold and a sequenced process—to use the terms of this Article—courts should be lenient in convicting and sentencing the disobeyer.²⁸⁸

Undoubtedly, the military is one of the most hierarchical and authority-driven organizational settings. Although the military differs considerably from a regular workplace, the conceptual problem is similar. Since the aftermath of World War II, the international community has recognized that even soldiers must exercise autonomous judgment. As stated in one of the trials that followed

282. *Id.*

283. JOHN RAWLS, A THEORY OF JUSTICE 389 (1971).

284. *Id.* at 373-75.

285. RONALD DWORKIN, A MATTER OF PRINCIPLE 104, 109-10, 114 (1985) [hereinafter DWORKIN, A MATTER OF PRINCIPLE]. *See also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) [hereinafter DWORKIN, TAKING RIGHTS SERIOUSLY].

286. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 285, at 104, 109-10, 114. *See also* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 285.

287. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 285, at 104, 109-10, 114. *See also* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 285.

288. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 285, at 104, 109-10, 114. *See also* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 285; RAWLS, *supra* note 283.

the judgments of the Nuremberg Tribunal:

“The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. . . . The fact that a soldier may not, without incurring unfavorable consequences, refuse to drill, salute, exercise, reconnoiter, and even go into battle, does not mean that he must fulfill every demand put to him. . . .

The subordinate is bound only to obey the lawful orders of his superior and if he accepts a criminal order and executes it with malice of his own, he may not plead superior orders in mitigation of his offense.”²⁸⁹

Even today, scholars and jurists debate whether “following orders” is a valid defense for war crimes under international law. Those who argue that the defense is valid point to the failure of the international community to reject the defense explicitly.²⁹⁰ However, there is a relative consensus among experts that the defense does not hold for orders that are manifestly illegal.²⁹¹ In a narrow set of exceptions, even polity citizenship and military hierarchy must make way for more general set of loyalty principles.

C. Professional Loyalties

Ethicists regularly view the dilemmas of professional responsibility in terms of loyalty. Professional life inhabits two systems: the ethical and the organizational. This dual membership is established through restrictions on an organization’s ability to control the individual’s behavior.²⁹² For example, legal ethics attempts to reconcile an attorney’s loyalty to the client with her general loyalty to her profession and the public.²⁹³ Charles Fried, explicitly characterizing the key dilemma of legal ethics in terms of loyalty, asks whether “a decent and morally sensitive person can conduct himself according to the traditional conception of professional loyalty and still believe that what he is doing is morally worthwhile.”²⁹⁴ Fried analogizes the conflicts of loyalty that a lawyer experiences to those presented by friendship, arguing that both

289. Martha Minow, *Living Up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defense* 17-18 (Harvard Pub. Law Working Paper, Paper No. 07-11, 2007) (quoting United States v. Otto Ohlendorf (Einsatzgruppen Case), 4 Trials of War Criminals 1, 411, 470-71 (1950)), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1013632.

290. See Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 ARIZ. J. INT’L & COMP. L. 415 (1998).

291. Minow, *supra* note 289, at 23 (citing Rome Statute of the International Criminal Court art. 33, July 17, 1998, 2187 U.N.T.S. 90).

292. See W. Richard Scott, *Professionals in Bureaucracies-Areas of Conflict*, in PROFESSIONALIZATION 265 (Howard M. Vollmer & Donald L. Mills eds., 1966).

293. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1084-90 (1988).

294. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1065 (1976).

relationships present similar intrinsic values and obligations.²⁹⁵

Indeed, like loyalty among kin, the loyalty of lawyers to their clients was traditionally considered to be an almost absolute tie that should not be disrupted by conflicting obligations. Justice Warren Burger once noted that the lawyer is “loyal representative whose duty it is to present the client’s case in the most favorable possible light.”²⁹⁶ However, this absolute nature of attorney-client loyalty has long been challenged and may be weakening, particularly in the context of organizational loyalty. If creditors, shareholders, and the investing public are all excluded from the clientele of the corporate lawyer, only managers remain in the mix. William Simon disputes this result, claiming that the dignity of the lawyer’s professional role relies on his or her ability to prevent illegal activities.²⁹⁷ The lawyer must be loyal to the corporate client as a whole, rather than to management alone.²⁹⁸

Again, courts struggle with reconciling multiple loyalties in cases regarding professional responsibility. Courts have been ambivalent about wrongful termination protections and reporting requirements for lawyers in comparison to other employees.²⁹⁹ In addition, courts have dismissed retaliation claims by lawyers, warning against turning lawyers into “government informants.”³⁰⁰ In recent years, however, courts have generally shifted to a more balanced approach that recognizes the complexities of attorneys’ conflicting professional loyalties. In 2004, a new tax provision required lawyers who act as tax advisors to disclose information about possible tax evasion.³⁰¹ The ABA’s Model Rule of Professional Conduct 1.13, which served as the model for the regulation of lawyers under SOX, has also adopted a reporting approach when there is conflict between management orders and the good of the corporation at large.³⁰² The rule states that agents of the firm, namely managers, must act within their scope of their authority in order to be treated as the corporate client. If, however, the manager is acting illegally in a way that can harm the corporation, the lawyer must turn to the board.³⁰³ The new regulations under SOX also require “up-the-ladder” reporting by attorneys,

295. *Id.*; see also Ethan J. Lieb, *Friendship & the Law*, 54 UCLA L. REV. 631 (2007).

296. *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18 (1984).

297. William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 FORDHAM L. REV. 1453, 1460 (2006).

298. *Id.*

299. See generally Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties within 21st Century New Governance*, 77 FORDHAM L. REV. (forthcoming).

300. *United States v. Chen*, 99 F.3d 1495, 1500 (9th Cir. 1996) (“This valuable social service of counseling clients and bringing them into compliance with the law cannot be performed . . . [if] lawyers will be turned into government informants.”).

301. 26 U.S.C. §§ 6111(a), 6707 (2000).

302. MODEL RULES OF PROF’L CONDUCT R. 1.13 (1983), available at http://www.abanet.org/cpr/mrpc/rule_1_13.html.

303. *Id.* R. 1.13(a).

recognizing the need to report potential illegality internally.³⁰⁴ But the rules leave much uncertainty, especially in circumstances when the board is “on board” with financial puffing or “earnings management.”³⁰⁵ In other words, the rules do not outline the needed sequencing of internal-to-external reporting proposed by this article. The SEC has recently proposed to add a requirement for public companies to report their attorney’s “noisy withdrawal”—ceasing to represent their company “for professional reasons.”³⁰⁶

These proposed rules have been controversial and the conflict between the professional loyalties of lawyers is still unsettled. Nevertheless, these trends signal a movement away from the traditionally rigid notion of attorney-client confidentiality to a new conception of professional loyalty.³⁰⁷ Analyzing these developments, one legal ethicist asserts that “[c]orporate confidentiality is dead.”³⁰⁸ Despite the fact that lawyers tend to identify their corporate clients with management, client loyalty should in fact be understood as substantive compliance for the corporation at large.³⁰⁹

This more complex understanding of attorney-client loyalty in the organizational context resonates with general principles of roles and rules. Arthur Applbaum defines the term role as “positions with some degree of regularity and durability,” with “collective expectations, however informal or contested, about the content of the position’s duties, values, and virtues.”³¹⁰ All professionals—doctors, lawyers, civil servants, accountants, engineers, teachers, and indeed any prototypical new economy employee—“must always qualify their loyalty and commitment to the vertical hierarchy of an organization by their horizontal commitment to general professional norms and standards.”³¹¹

Otherwise, taking the medical profession as an example, we would be living in a world of “schmoctors,” who “do not enter into a fiduciary relationship with patients; rather, they are contract employees of for-profit health care provider who in turn have contractual relationships with consenting

304. 15 U.S.C. § 7245 (2006).

305. William H. Simon, *Earnings Management as a Professional Responsibility Problem*, 84 TEX. L. REV. 83 (2005); see also William H. Simon, *Whom (Or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CALIF. L. REV. 57 (2003).

306. Letter from 79 Law Firms to Jonathon G. Katz, Secretary, Sec. & Exch. Comm’n (Apr. 7, 2003), available at <http://www.sec.gov/rules/proposed/s74502/79lawfirms1.htm>. Companies are required to do so currently with respect to accountants.

307. Simon, *supra* note 293, at 1143.

308. Simon, *supra* note 297, at 1454.

309. *Id.* at 1471 (“The high road requires lawyers to interpret their professed commitment to law in terms of spirit and purpose rather than literal terms, and requires them to confront explicitly the tensions of organizational client loyalty, especially the tension between client loyalty and managerial trust.”).

310. ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES* 47 (1999).

311. Robert C. Post, *Essay, Subsidized Speech*, 106 YALE L.J. 151, 172 (1996) (footnote omitted).

adult customers.”³¹² In the world of “schmoctors,” the rules of the practice of medicine are not restricted by social understandings of morality. Applbaum contends that although “actual role prescriptions are not in themselves moral prescriptions, reasonable role prescriptions may be. To the extent that what the role is tracks what the role morally should be, the role is, in this sense, directly moralized.”³¹³ While schmoothing is plausible as a positive description, “[t]he challenge, of course, is to continue to articulate in a clear and reasoned voice to both doctors and patients what would be lost if the practice of doctoring gave way, in substantial measure, to the various forms of schmoothing”³¹⁴

For public employees, again, citizenship cannot be collapsed into the unitary obligations of their official role.³¹⁵ For some, civil service demands absolute loyalty and “unstinting devotion” to promote and serve the ends of their elected officials.³¹⁶ This may be true about political directions that the Administration takes, where even if one is in substantial disagreement with a particular policy, as a professional government official one must strive to carry out her leader’s chosen path to the best of her ability.³¹⁷ However, when the conflict pertains to illegality, the government employee must dissent.

Roles cannot permit what is forbidden, but they can require what is permitted.³¹⁸ As noted in previous Parts, one can have two legitimately conflicting reasons to follow the actual prescription of her role or to disregard it. Again, the central insight is that of combining judgment about the substantive order/violation and the process adopted either to comply or to resist. A role includes not only the substantive orders about what to do but also the processes under which the substance is generated.³¹⁹ Because each step in the analysis requires judgment, the structure of the second-order reasoning within roles is no different from first-order reasoning. Not only are the legitimate boundaries of substantive role prescriptions to be determined through moral reasoning; the legitimate constructions of the authority of role prescriptions must be agreed upon as well.³²⁰

As argued in Part IV, new governance approaches to regulatory policy and the internalization of law enforcement activities within corporations have altered the rules of the game. Acting legally is within the reasonable role of any organizational players, and is thus within their first-order reasoning. Employees have second-order reasons to obey the rules set by their employer, but all

312. APPLBAUM, *supra* note 310, at 51.

313. *Id.* at 54.

314. *Id.* at 60.

315. See Arthur Isak Applbaum, Commentary, *Professional Detachment: The Executioner of Paris*, 109 HARV. L. REV. 458 (1995).

316. APPLBAUM, *supra* note 310, at 61.

317. Michael Quinlan, *Ethics in the Public Service*, 6 GOVERNANCE 538, 542 (1993).

318. APPLBAUM, *supra* note 310, at 259.

319. *Id.* at 55.

320. *Id.*

employees must also recognize that employment entails serving two masters: their organization and the legal regime that governs it.

D. The Dissent Dilemma

1. Inherent Tension: Blind Disloyalty vs. Blind Loyalty

In *Eichmann in Jerusalem: A Report on the Banality of Evil*, Hannah Arendt described the Nazi bureaucracy, where absolute identity between morality and obedience perpetuated subservience to the Nazi authority.³²¹ The Nazi motto, “My Honor is my Loyalty,” meant that obeying orders fulfilled all moral duties as well. Personal responsibility was completely absent. For Adolph Eichmann, “Officialese” [*Amtssprache*] became the only language; he became “genuinely incapable of uttering a single sentence that was not a cliché The longer one listened to him, the more obvious it became that his inability to speak was closely connected with an inability to *think*, namely, to think from the standpoint of somebody else.”³²² Eichmann believed that he was “free of all guilt” because he was following the orders of his superiors.³²³ Arendt described the morally repugnant environment in which Eichmann operated as a mid-level officer:

Eichmann was not Iago and not Macbeth, and nothing would have been farther from his mind than to determine with Richard III ‘to prove a villain.’ Except for an extraordinary diligence in looking out for his personal advancement, he had no motives at all. And this diligence in itself was in no way criminal; he certainly would never have murdered his superior in order to inherit his post. He *merely*, to put the matter colloquially, *never realized what he was doing*³²⁴

In Arendt’s words, “[E]verybody could see that this man was not a ‘monster,’ but it was difficult indeed not to suspect that he was a clown.”³²⁵

The Banality of Evil represents the horrors of equating top-down orders with morality. It is a warning against the collapse of multiple loyalties into singular reasoning. The lessons of history and social psychology warn us that groups have enormous impact on the ability of individuals to resist immoral conduct. Whether orders come from one’s government or one’s employer, we expect individuals to exercise a certain amount of independent moral judgment. At the same time, we expect that dissent will be proportional and at times moderate to allow loyalty and trust to flourish. An excessive reliance on peer monitoring and informants risks creating a culture of suspicion and duplicity. Both concerns of blind disloyalty (leading to a “society of snitches”) and blind

321. HANNAH ARENDT, *EICHMANN IN JERUSALEM* 114 (Penguin Classics 2006) (1964).

322. *Id.* at 48-49 (emphasis in original).

323. *Id.* at 114 (internal quotation marks omitted).

324. *Id.* at 287 (emphasis in original).

325. *Id.* at 54.

loyalty (leading to a “dens of thieves,” or worse, evil officials) must be recognized when designing a balanced system of conflicting obligations and legal loyalties.

Studies of conformity indicate that individuals readily accept the mistakes of their superiors and group members, even when the source of the error is easily identifiable.³²⁶ Social psychologists find that the pressures of uniformity and group loyalty can seriously circumvent moral judgment and rational decision making.³²⁷ Moreover, groups are likely to suppress dissent and are more likely to engage in risky behaviors than individuals.³²⁸ Psychologists Herbert Kelman and V. Lee Hamilton studied authority structures and their impact on what the scholars termed “crimes of obedience,” including organizational crime.³²⁹ They found that individuals were likely to commit crimes of obedience when they were not initially charged with responsibility for moral decision making, but were simply asked to follow orders.³³⁰ Crimes were likely when decision-making processes were routine, where the focus was on the details of the execution of the decision, and where there was no opportunity to raise moral challenges to the decision itself.³³¹ Other studies have similarly shown that organizational performance pressures induce individual silence and that a diffusion of responsibility in an organization blunts individual moral decision making.³³²

Parallel to the fear of conformity and lack of dissent is an equally strong fear of too much dissent. First, whistleblowers can disrupt the organizational fabric and impede effective and accurate reporting of wrongdoing. Second, too much dissent generally means that the organization wastes resources on frivolous complaints. The resultant ossification of business processes is as undesirable as a culture of blind faith.

Moreover, for the reporting individual, employer retaliation is just one of many possible costs. As a result of the societal attitudes towards whistleblowers, reporting often includes subjective emotional costs, such as fear and guilt.³³³ There are many other, more objective harms to the

326. STEPHEN P. ROBBINS, ORGANIZATIONAL BEHAVIOR 257 (8th ed. 1998) (citing studies by Solomon Asch about group conformity).

327. See Philip E. Tetlock et al., *Assessing Political Group Dynamics: A Test of the Groupthink Model*, 63 J. PERSONALITY & SOC. PSYCHOL. 403 (1992); see also Margaret Wetherell, *Group Conflict and the Social Psychology of Racism*, in IDENTITIES, GROUPS AND SOCIAL ISSUES 175, 203 (Margaret Wetherell ed., 1996).

328. See, e.g., Noah E. Friedkin, *Choice Shift and Group Polarization*, 64 AM. SOC. REV. 856 (1999); David G. Myers & Helmut Lamm, *The Group Polarization Phenomenon*, 83 PSYCHOL. BULL. 602 (1976); Charles Pavitt, *Another View of Group Polarizing: The "Reasons for" One-Sided Oral Argumentation*, 21 COMM. RES. 625 (1994).

329. See HERBERT C. KELMAN & V. LEE HAMILTON, CRIMES OF OBEDIENCE (1989).

330. See *id.*

331. Crimes of obedience also were more likely to occur when the victims of the crimes were invisible, distant, or dehumanized. See *id.*

332. See generally Langevoort, *supra* note 176.

333. MARCIA P. MICELI & JANET P. NEAR, BLOWING THE WHISTLE 511-15 (1992).

whistleblower's livelihood as well, including blacklisting within her industry or profession and retaliation against family members. Employees become "untouchable"—shunned and stigmatized—as a result of their whistleblower status.³³⁴ In case studies describing retaliation against whistleblowers, the harm ranged from physical, mental, and emotional suffering to threats on their lives.³³⁵ Whistleblowers are often ostracized by co-workers and mistreated by their supervisors.³³⁶ Whistleblowing can thus become a form of professional suicide, effectively ending careers.³³⁷ As a result, many whistleblowers report psychological and physical health issues and financial loss after discharge, demotion, or forced relocations.³³⁸ Even if an employee wins in litigation, she pays the heavy price of alienation from colleagues and co-workers, in addition to the emotionally taxing period of conflict with her employer. It is not uncommon to find descriptions of whistleblowers as "lowlifes who betra[y] a sacred trust largely for personal gain."³³⁹

It is because of this inherent tension between too little and too much dissent that the law continuously displays an ambivalent attitude towards whistleblowers. On one hand, the legal system depends on the whistleblower's reports to enforce the law.³⁴⁰ On the other hand, many still perceive the whistleblower as an informant who has betrayed the trust of those close to her, and the state may wish to distance itself from such behavior, and whistleblowers face great costs in both their personal and professional lives. Understood this way, the more the state relies on insider informants, the more it perpetuates distrust, decreases loyalty, and requires government intervention in private market relations. This ambivalence reflects the law's larger dilemma concerning these overlapping circles of obligation.

An example of the deep ambivalence in law and society toward the societal role of whistleblowing is the ongoing debate about bounty programs. Although federal bounty programs were established many years ago, there is recurrent moral opposition to them. Critics have described bounty programs as "unseemly" and "distasteful."³⁴¹ Even when bounties are codified by statute, government agencies and courts are uncertain about the morality of rewarding

334. FRANK ANECHARICO & JAMES B. JACOBS, *THE PURSUIT OF ABSOLUTE INTEGRITY* 63-73 (1996).

335. JAMES GOBERT & MAURICE PUNCH, *RETHINKING CORPORATE CRIME* 33-36 (2003).

336. WHISTLE-BLOWING!, *supra* note 29, at 132-33.

337. See Natalie Dandekar, *Can Whistleblowing Be Fully Legitimated? A Theoretical Discussion*, 10 *BUS. & PROF. ETHICS J.* 89 (1990).

338. MICELI & NEAR, *supra* note 333, at 79-80.

339. Lilanthi Ravishankar, *Encouraging Internal Whistleblowing in Organizations*, MARKKULA CENTER APPLIED ETHICS (2003), available at <http://www.scu.edu/ethics/publications/submitted/whistleblowing.html> (quoting TERANCE D. MIETHE, *WHISTLEBLOWING AT WORK* (1999)).

340. Indeed, recent scandals have brought a renewed appreciation of the critical role that whistleblowers play in revealing corruption and wrongdoing in a multitude of areas and spheres.

341. *Insider Trading Hearings*, *supra* note 46, at 116.

the informants for their efforts. As one court described when overturning the Justice Department's decision to deny an informer against General Electric the legislative bounty:

No one likes "snitches," but they can be valuable. In view of their widespread use, it is worthy of note that the Department of Justice has considered such individuals as adversaries rather than allies. This is not the first case where this Court has noted the antagonism of the Justice Department to a whistleblower. The reason continues to be unknown, but the attitude is clear.³⁴²

Similarly, in 1998, Senator Harry Reid tried to convince his fellow senators to abolish the IRS bounty program, referring to the program as "Reward for Rats," taking "advantage of individual greed or desire for revenge to identify, rightly or wrongly, citizens who have failed to pay their taxes"³⁴³ Less emphatically, some have argued that employees should voluntarily divulge information about illegal behavior to government, since detection of fraud is its own reward.³⁴⁴

There are, however, indications of a change in the common perceptions of whistleblowers. One effect of the Enron-like scandals has been a cultural shift toward appreciation of whistleblowers, or at least toward the recognition that bounty-paid informants can provide some societal benefits. In 2007, Senator Charles Grassley, speaking of the IRS bounty program, praised IRS informants as "patriotic" and described them as protectors not only of the public's safety and health, but also of the federal Treasury and taxpayer dollars.³⁴⁵ More recently, as mentioned earlier, in 2002 *Time Magazine* featured three whistleblowers on its cover as "Persons of the Year."³⁴⁶ Still, the pervasive ambivalence about how to reconcile organizational loyalty and individual loyalty remains strong. For example, some viewed Mark Felt, a former FBI agent who was recently revealed as the Watergate scandal's "Deep Throat," as the ultimate courageous official, while others condemned him as "a selfish spiteful snitch [who is] no American hero."³⁴⁷ These opposing perceptions

342. *United States v. Gen. Elec.*, 808 F. Supp. 580, 584 (S.D. Ohio 1992) (footnote omitted). Another judge was less subtle about his sentiments toward whistleblowers, stating: "I don't think that turkeys like that ought to receive a dime of my money." Sydney P. Freedberg, *Some Informants Got Rich Quick*, ORANGE COUNTY REG., Sept. 15, 1991, at A28 (quoting Judge Alcee Hastings).

343. Ferziger & Currell, *supra* note 46, at 1192 (quoting 144 CONG. REC. S4379, S4397-98 (daily ed. May 6, 1998) (statement of Sen. Reid)) (internal quotation marks omitted).

344. *Id.* at 1193.

345. 153 CONG. REC. S6034-35 (daily ed. May 14, 2007) (statement of Sen. Grassley); 93 BNA TaxCore (May 15, 2007).

346. Richard Lacayo & Amanda Ripley, *Persons of the Year 2002*, Cynthia Cooper, Coleen Rowley and Sherron Watkins, TIME, Dec. 22, 2002, available at <http://www.time.com/time/subscriber/personoftheyear/2002/poyintro.html>.

347. Letters to the Editor, *Deep Throat Exposed: A Leaker is No Hero*, N.Y. POST, June 2, 2005, available at <http://www.freerepublic.com/focus/f-news/1415012/posts>.

reflect the continuing deep tension in our society between understanding the morality of loyalty and creating legal protections for whistleblowing.

2. Whistleblowing Protections: A Continental Clash?

In comparison to the United States, Europe has been even less consistent in adopting whistleblowing protections than the United States.³⁴⁸ Some resistance to the American post-Enron legal protections stems from perceptions of informants in totalitarian or communist regimes, where informants were commonly used as a type of vigilante thought police.³⁴⁹ Studies of European mid-twentieth century practices using informants for enforcement indicate significant harms to a country's social fabric. One study in East Germany revealed social and psychological damage—a “malaise” or “schizophrenia,” stemming from submission to constant surveillance.³⁵⁰ The excessive reliance on informants created a culture of suspicion and duplicity. Drawing on these studies, some American commentators warn against the overuse of informants by government in law enforcement.³⁵¹

Similarly, the question of anonymous reporting has triggered a cross-continental divide. The United States bounty programs offer anonymity to whistleblowers, unless public interest requires disclosure. The IRS, FCA, SEC, and Customs bounty schemes all assure anonymity in at least the first stages of the process.³⁵² In fact, an IRS informant's identity is guaranteed to remain secret throughout the entire process, and is specifically protected from Freedom of Information Act requests.³⁵³ Most recently, the SOX whistleblower protection provisions also require ensuring anonymity for the reporting employee.³⁵⁴ European authorities have reacted with resistance to SOX whistleblower protections, again referencing twentieth century histories where anonymous informants were used to silence opposition in repressive regimes.³⁵⁵

348. Moreover, for the most part, the American model of offering monetary incentives to whistleblowers is unique. See generally WHISTLEBLOWING AROUND THE WORLD (Richard Calland & Guy Dehn eds., 2004).

349. Michael Dynes, *EU Told to Protect 'Fraud Busters'*, TIMES (London), June 2, 1995.

350. See Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645 (2004).

351. *Id.* at 645-48.

352. Insider Trading and Securities Fraud Enforcement Act of 1988, 15 U.S.C. § 78u (2006); 19 U.S.C. § 1619 (2006); 31 U.S.C. § 3730(b)(2) (2000); 19 C.F.R. § 161.15 (2008); Treas. Reg. § 301.7623-1(e) (2007); INTERNAL REVENUE SERV., PUB. NO. 733, REWARDS FOR INFORMATION PROVIDED BY INDIVIDUALS TO THE INTERNAL REVENUE SERVICE (1997) [hereinafter 1997 IRS Pub. No. 733].

353. 1997 IRS Pub. No. 733, *supra* note 352; *Sands v. Murphy*, 633 F.2d 968, 970-971 (1st Cir. 1980); see also INTERNAL REVENUE SERV., GUIDE TO THE FREEDOM OF INFORMATION ACT (2004), available at http://www.irs.gov/pub/irs-utl/irs_foia_guide.pdf;

354. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745, 775-76.

355. Daniel P. Westman, *Europe's Reaction Against the Sox Anonymous Whistleblower Rule*, 11 CORP. COMPLIANCE & REG. NEWSL. 1 (2006).

European courts have interpreted the EU data protection law³⁵⁶ to place strict limits on anonymous whistleblowing.³⁵⁷ In 2006, the EU Data Protection Authorities issued an opinion allowing for anonymity in whistleblowing with severe restrictions, including limiting anonymous reporting to issues of accounting, auditing, banking and financial corruption.³⁵⁸ The EU opinion further recommended that companies “encourage employees to identify themselves when making complaints, discourage anonymous employee complaints, not advertise the existence of anonymous channels, and clearly inform employees that whistleblowing is voluntary.”³⁵⁹ Moreover, it recommends that employers warn employees that allegations made in bad faith may result in disciplinary action or legal proceedings.³⁶⁰

More generally, the EU opinion states that data collected through whistleblowing must comply with a “proportionality principle,” limiting collection to what is strictly necessary for the report and investigation.³⁶¹ Indeed, the proportionality principle underscores the need to balance the competing interests of accountability and trust, and to mediate between conflicting loyalties.

Accordingly, the dilemmas of reconciling group loyalty and law abidance—membership and citizenship—are not unique to the United States. Moreover, these dilemmas can be affected by a country’s sociopolitical history and contemporary legal regime. The dilemmas of conflicting citizenships are similar, but the equilibriums drawn by each legal system to mediate the

356. Council Directive 95/46, 1995 O.J. (L 281) 31 (EC); see also Donald C. Dowling, Jr., *Sarbanes-Oxley Whistleblower Hotlines Across Europe: Directions Through the Maze*, 42 INT’L LAW 1 (2008); Renzo Marchini, *Conflict of Laws: Anonymous Whistleblowing Hotlines Under Sarbanes-Oxley and European Data Protection Laws*, 2006 PRIVACY & DATA SECURITY L. J. 575 (2006); Bruce Zargis, *Working Party Issues Opinion on Application of EU Data Protection Rules to Internal Whistleblowing Schemes in the Context of Accounting and Financial Crime*, 22 INT’L COOPERATION & ECON. INTEGRATION 1 (2006).

357. David Reilly & Sarah Nassauer, *Tip-Line Bind: Follow the Law In U.S. or EU?*, WALL ST. J., Sept. 6, 2005, at C1.

358. The Article 29 Data Protection Working Party, Opinion 1/2006 on the Application of EU Data Protection Rules to Internal Whistleblowing Schemes in the Fields of Accounting, Internal Accounting Controls, Auditing Matters, Fight Against Bribery, Banking and Financial Crime, available at http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2006/wp117_en.pdf [hereinafter Article 29 Opinion]. On the European Data Protection Authorities more generally, see <http://edps.europa.eu/EDPSWEB/>.

359. Daniel P. Westman, *SOX Whistleblowing Rule Triggers a Continental Divide*, CORP. COMPLIANCE & REG. NEWSL. (July 7, 2006), available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1152176726157>.

360. *Id.* Similarly, French and German courts held that U.S. companies with anonymous whistleblowing mechanisms are in conflict with their laws. In France, the Data Protection Authority modified the court’s decision by issuing guidelines allowing anonymous whistleblowing, albeit subject to strong restrictions. COMMISSION NATIONALE DE L’INFORMATIQUE ET DES LIBERTÉS, GUIDELINE DOCUMENT FOR THE IMPLEMENTATION OF WHISTLEBLOWING SYSTEMS (Fr. 2005), available at www.cnil.fr/fileadmin/documents/uk/CNIL-recommandations-whistleblowing-VA.pdf.

361. Article 29 Opinion, *supra* note 358.

inevitable tensions differ according to the nation's sensibilities regarding in-group cohesion and dissent. While in recent years, the United States' trend has been to focus on the ability of informants to report illegalities freely and safely, and even anonymously, the EU has been more hesitant about protecting citizen reporting at the expense of group trust and cohesion. The lessons of these different regimes provide some insight into the real dilemmas facing policymakers in structuring reporting systems and mediating the tension between organizational and citizenship loyalties.

VI

ORGANIZATIONAL PROCEDURAL JUSTICE

The emergence of a consensus as to the importance of organizational DNA and OCB, together with the shifts from traditional regulation to new governance approaches, requires a new type of legal inquiry. It raises the question of how to productively combine information, structure, decision rights, and incentives for actions that rely on organizational loyalty and individual dissent.

Empirically, the decision of whether and how to blow the whistle appears to be a long process with several crucial stages.³⁶² Research indicates that whistleblowers will seek external reporting only when they believe that internal reporting is futile, either because of the gravity and global involvement of the corporation or because their previous attempts to report internally were ignored.³⁶³ When employees view internal reporting procedures as effective and fair, they are more likely to exercise individual dissent rather than opt for external reporting.³⁶⁴ In other words, the predominant variable determining whether whistleblowers will go public with their information is the availability of internal reporting channels and the assessment of whether using those channels will successfully end the wrongdoing.³⁶⁵

The legal regime of concerted circles of obligation described in this Article leads to the normative theory that, when internal reporting is equally

362. MICELI & NEAR, *supra* note 333, at 48-92.

363. Elletta Sangrey Callahan & Terry Morehead Dworkin, *Who Blows the Whistle to the Media, and Why: Organizational Characteristics of Media Whistleblowers*, 32 AM. BUS. L.J. 151, 170-79 (1994).

364. Near, *supra* note 173, at 395-96; *see also* Elletta Sangrey Callahan & John W. Collins, *Employee Attitudes Toward Whistleblowing: Management and Public Policy Implications*, 11 J. BUS. ETHICS 939 (1992); Callahan & Dworkin, *supra* note 363.

365. MICELI & NEAR, *supra* note 333, at 511-15, 519-23; Terry Morehead Dworkin & Janet P. Near, *A Better Statutory Approach to Whistle-Blowing*, 7 BUS. ETHICS Q. 1, 6-8 (1997). For example, in the government setting, the establishment of an independent special counsel that receives whistleblower information and is charged with anti-retaliation protection under the Whistleblower Protection Act increased reporting by over 50 percent, indicating that the procedures may matter more than the substantive rights of non-retaliation. MARCIA P. MICELI ET AL., *THE ROLE OF INDIVIDUAL DIFFERENCES IN PERCEIVED ORGANIZATIONAL WRONGDOING AND WHISTLE-BLOWING* 15-20 (2001).

effective in preventing illegal behavior as external reporting, employees should only be protected when they report within the organization. If an employee's dissent is adequately heard, investigated, and addressed, then an employer may request that the complaints cease when they become disruptive.³⁶⁶ Nevertheless, there will be circumstances when internal reporting is ineffective or undesirable. When meetings with company administrators and the internal review process are clearly unproductive and are conducted in non-responsive standards, it becomes reasonable for an employee to step outside the organization.³⁶⁷

A. Existing Templates

Though the contemporary trend in business regulation is toward internal autonomy, the current U.S. legal structure still prioritizes external reporting. Other countries provide useful examples of a different legal approach. In the United Kingdom, for example, whistleblowers are generally only protected if they first attempt to report internally.³⁶⁸ If it is likely that internal whistleblowing would result in an attempt to conceal the wrongdoing or induce retaliation, then external reporting is permitted.³⁶⁹ The British Public Interest Disclosure Act of 1998 (PIDA) requires that whistleblowers must first report the violation internally; only then may the whistleblower take the information to the appropriate government agency. Finally, under only exceptional circumstances, employees can divulge information to other recipients, including the media.³⁷⁰ A whistleblower can skip the initial internal stage only if there is a reasonable belief that internal reporting would be ineffective and the report would be suppressed.³⁷¹ Media disclosures are generally prohibited, with a narrow exception for instances in which the whistleblower (1) acts in good faith; (2) reasonably believes the allegations are substantially accurate; (3) does not seek personal gain; (4) has previously disclosed substantially identical information internally, unless there is reasonable belief that such reporting would lead to a cover-up; and finally, (5) the employee must act reasonably.³⁷²

366. See, e.g., *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505 (N.J. 1980) (denying cause of action when employer complied with public policy but employee continued to protest).

367. See, e.g., *Wrighten v. Metro. Hosps. Inc.*, 726 F.2d 1346, 1355-56 (9th Cir. 1984) (holding press conference was reasonable after meetings with administrators to improve Black patient care were unproductive).

368. Public Interest Disclosure Act, 1998, c. 23, §§ 43A-43H, 43J-43L (Eng.), available at <http://www.opsi.gov.uk/acts/acts1998/19980023.htm>.

369. See *id.*

370. See *id.*

371. See James Gobert & Maurice Punch, *Whistleblowers, the Public Interest, and the Public Interest Disclosure Act of 1998*, 63 MOD. L. REV. 25, 25-28 (2000); David Lewis & Maureen Spencer, *The Law Relating to Whistleblowing*, in *WHISTLEBLOWING AT WORK* 10, 10-24 (David B. Lewis ed., 2001).

372. Public Interest Disclosure Act, 1998, c. 23, § 1(43G)(1) (Eng.), available at <http://www.opsi.gov.uk/acts/acts1998/19980023.htm>.

Reasonableness is assessed by examining factors like the identity of the report recipient, the severity of the allegations, the recurrence or continuance of the illegal behavior, whether the disclosure breaches a duty of confidentiality, the first recipient's response to the report, and whether the whistleblower followed the employer's internal reporting procedures, if such procedures exist.³⁷³ The statute thus emphasizes that employees have a duty to maintain loyalty and confidentiality by requiring internal reporting first, and allowing only good faith external reporting. In fact, prioritizing internal disclosure allows the British law to define other thresholds more broadly, at the same time as it provides strong protections against retaliation when an employee chooses the internal path.³⁷⁴ By emphasizing internal problem solving over top-down government enforcement, the British approach of internal reporting sends a message that a culture of compliance can be created and maintained within corporations.

Several existing U.S. state statutes also employ a similar sequencing requirement. Currently, a small minority of states expressly require whistleblowers first to report internally, if reasonably possible. Among the minority of states that protect both internal and external whistleblowing in their general labor codes, eight states require or encourage that the internal path be exhausted before sanctioning external reporting.³⁷⁵ In those states, similar to the British PIDA, the statutes only protect external reporting when an employer does not respond to the employee's information, or when there is reason to believe that internal reporting will be ineffective. For example, the Maine whistleblower statute provides that its protections only apply when an employee "first brought the alleged violation . . . to the attention of a person having super-visory authority with the employer and has allowed the employer a reasonable opportunity to correct that violation."³⁷⁶ New Jersey requires the same sequencing, and additionally requires that the employee give her employer "written notice" of the alleged violation.³⁷⁷ Alaska's law provides that if an employer's written policy requires internal reporting, external reporting before filing an internal report is not protected unless, *inter alia*, the employee reasonably believes that internal reporting would not result in prompt action or the employee reasonably fears retaliation.³⁷⁸ These statutory

373. *Id.* § 1(43G)(3).

374. Callahan & Collins, *supra* note 364, at 906 ("The U.K. law, for instance, defines 'qualifying disclosures' very broadly.").

375. These states are Alaska, Indiana, Maine, New Jersey, New Hampshire, New York, Ohio, and Utah. ALASKA STAT. § 39.90.110(c) (2006); IND. CODE ANN. § 4-15-10-4(c) (West 2002); ME. REV. STAT. ANN. tit. 26, § 833(2) (2007); N.H. REV. STAT. ANN. § 275-E:2(II) (Lexis 2008); N.J. STAT. ANN. § 34:19-4 (West 2000); N.Y. LAB. LAW § 740(3) (McKinney 2002); OHIO REV. CODE ANN. § 4113.52 (LexisNexis 2007); UTAH CODE ANN. § 34A-6-203 (2005).

376. ME. REV. STAT. ANN. tit. 26, § 833 (2007); *see also* N.Y. LAB. LAW § 740 (McKinney 2002).

377. N.J. STAT. ANN. § 34:19-4 (West 2000).

378. ALASKA STAT. § 39.90.110(c) (2006).

sequencing requirements grant the employer a good faith period of addressing the complaint and remedying any wrongdoing before allowing the employee to turn outside the organization. Both the British and minority U.S. laws have the effect of incentivizing internal and good faith reporting, institutional compliance, and individual and organizational loyalty.

B. The Reporting Pyramid

As regulators seek ways to create increased corporate willingness to self-monitor and self-regulate, processes of regulation must be consistent with, and complementary to, the processes of reporting. The reporting pyramid developed in this Article (see figure 1) correlates with the new governance strategies of sequenced regulation. In an advanced regulatory pyramid, by contrast, self-regulation constitutes the base of the pyramid with escalated forms of enforcement—command regulation and punishment—at the top.³⁷⁹ The regulatory pyramid builds on the intuitive tit-for-tat compliance model. The model combines deterrence with persuasion, layering enforcement tools with a graduated escalation of punitive responses to misconduct. An enforcement pyramid, by way of a third contrast, will frequently begin with persuasion, move to a warning notification, and if that fails to bring compliance, the regulator will impose civil monetary penalties. The next step in the pyramid is then criminal prosecution, and if that proves insufficient, the next phase of enforcement escalation is plant shutdown or temporary suspension of a license, and then, all the way to the top of the pyramid, license revocation.³⁸⁰

The reporting pyramid introduced below reflects this notion of a regulatory pyramid. In fact, it produces a mirror inverse escalation from within the organization all the way to the “biggest guns” of external enforcers. The reporting pyramid begins with internal confrontation through the immediate chain-of-command channels: on-the-job dissent. It then provides specialized internal protocols designed to monitor, investigate, and promote self-regulation. Only thereafter does it allow escalation to regulatory agencies and, in rare cases, the media.

379. See Ayres & Braithwaite, *supra* note 144, at 35-41.

380. *Id.* at 36.

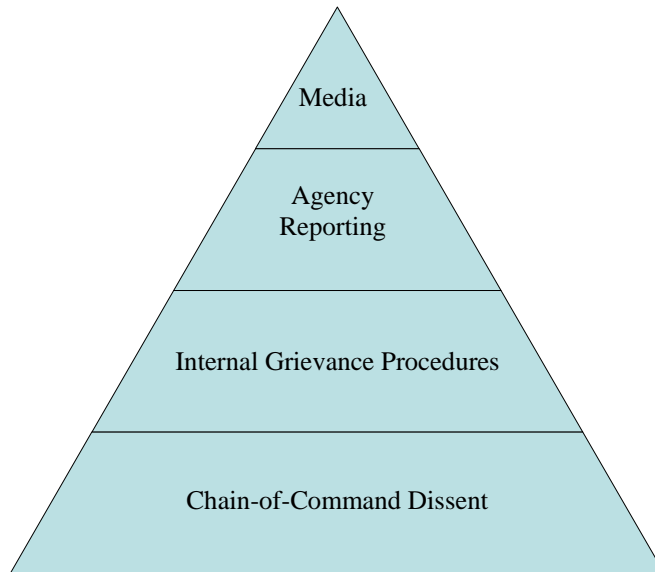


Figure I: The Reporting Pyramid

In addition to mirroring new governance regulatory structures, the reporting pyramid capitalizes on individual employee psychology. Organizational research indicates strong correlations between employees' perceptions of procedural justice in their workplace and their willingness to follow corporate strategic policy decisions.³⁸¹ Most importantly, a procedurally just work environment is conducive to employee rule abidance and ethical compliance.³⁸² Procedural justice affects employees' views of authority and the legitimacy of rules.³⁸³ The goal of promoting organizational procedural justice is to encourage employees to report problems internally, while simultaneously enabling resolution and minimizing harm to the organization.³⁸⁴ A good internal grievance procedure also signals to other workers that the organization cares about compliance.³⁸⁵

381. See W. Chan Kim & Renée A. Mauborgne, *Procedural Justice, Attitudes, and Subsidiary Top Management Compliance with Multinationals' Corporate Strategic Decisions*, 36 ACAD. MGMT. J. 502 (1993).

382. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

383. See Jennifer A. Chatman, *Matching People and Organizations: Selection and Socialization in Public Accounting Firms*, 36 ADMIN. SCI. Q. 459 (1991).

384. Dennis W. Organ, *The Motivational Basis of Organizational Citizenship Behavior*, in 12 RESEARCH IN ORGANIZATIONAL BEHAVIOR 43 (Barry M. Staw & L.L. Cummings eds., 1990).

385. This is not unlike the expressive function of the legal regime at large. See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA.

These theories of procedural justice have been supported empirically. Studies in workplace settings consistently reveal that workers care about procedural fairness apart from substantive outcomes.³⁸⁶ Indeed, these studies show that procedural justice has a more significant effect on employees' willingness to follow rules and is more effective in encouraging ethical behavior in the workplace than a fair outcome, or substantive justice.

Procedural justice includes four components. First, it includes the quality of decision making, which includes decision-maker neutrality, the objectivity and factuality of decision making, and the consistency of rule application. Second, it includes the quality of interpersonal treatment, including the concerns shown for people's dignity and rights. Third, procedural justice includes the formal rules and structures of the organization, statements of organizational values, and communication of information about organizational procedures. Fourth, it implicates the discretion of informal organizational authorities, such as the daily interactions between co-workers and between employees and supervisors.³⁸⁷ If all four components are present, the structure is procedurally just.³⁸⁸ The degree of fairness can vary, however; some widely used measures of organizational procedural justice include consistent bias-free application, accurate information usage, an appeal mechanism to correct inadequate decisions, and conformity to broadly prevailing norms and ethics.³⁸⁹

To construct a procedurally just work environment, and thereby foster a responsive compliance system, reporting channels must be independent and accessible. One common flaw in early corporate reporting systems was that the bodies that received reports were often embedded in the organization.³⁹⁰ Corporations often used regular management channels as the single process for reporting concerns about illegal conduct.³⁹¹ However, now, there is a growing

L. REV. 1503 (2000). Tyler and Blader found that only approximately 10 percent of the variance in employee behavior is shaped by sanctions and incentives in the work environment. This emphasizes that self-regulation is often more effective than external monitoring. See Tom R. Tyler & Stephen L. Blader, *The Group Engagement Model: Procedural Justice, Social Identity, and Cooperative Behavior*, 7 PERSONALITY & SOC. PSYCHOL. REV. 349, 349-61 (2003).

386. See LIND & TYLER, *supra* note 382.

387. *Id.*; Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 115, 175-76 (1992); Tyler & Blader, *supra* note 385, at 349-61.

388. *Id.*; Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 115, 175-76 (1992); Tyler & Blader, *supra* note 385, at 349-61.

389. Jason A. Colquitt et al., *Justice at the Millennium: A Meta-Analytic Review of 25 Years of Organizational Justice Research*, 86 J. APPLIED PSYCHOL. 425, 426 (2001).

390. CORPORATE CRIME IN AMERICA 127 (U.S. Sentencing Comm'n 1995).

391. Similarly, government employees are to report wrongdoing to the Office of Special Counsel (OSC). Some have argued that the OSC has been biased against employees and has prevented information to go out to the public. Thomas M. Devine & Donald G. Aplin, *Abuse of Authority: The Office of the Special Counsel and Whistleblower Protection*, 4 ANTIOCH L.J. 5, 20 (1986) ("The purpose of the OSC whistleblowing disclosure channel was 'to encourage employees to give the government the first crack at cleaning its own house before igniting the

understanding that, in order to motivate employees to respond to unlawful behavior, employers must create procedures that allow third-party review and impartial judgments.³⁹² Employees are more likely to use internal procedures when the procedures are formally established and the corporation asserts its commitment to a fair process.³⁹³ Thus, many companies have created an ombudsman position within the firm, who specializes in hearing complaints, managing conflicts, and resolving disputes. These ombudsmen, and other professionals whose full-time job is to monitor legal compliance, serve as quasi-independent parties within the corporation.

There are many other examples of procedures designed to ensure independent review. For example, under SOX, reports must go directly to the board of directors.³⁹⁴ Many companies also routinely have instituted mechanisms that name a person other than an employee's direct supervisor to make decisions about the employee after she has reported her supervisor's violation.³⁹⁵ These internal grievance procedures that institute reporting channels outside the chain-of-command build on the understanding that an employee is highly unlikely to risk reporting directly above her especially when supervisors are implicated in the alleged illegal behavior.³⁹⁶

Finally, anonymous reporting, even though resisted in Europe, is an important way to encourage internal reporting without fear of retribution. SOX, for example, requires audit committees to institute processes by which employees can report wrongdoing anonymously.³⁹⁷ Indeed, partly in response to these new requirements, many organizations have recently implemented internal anonymous hotlines and off-site locations to report misconduct, including complaints on issues beyond financial regulation.³⁹⁸

Another risk in relying on internal compliance mechanisms is that corporations will engage in only cosmetic compliance. It is easy to imagine the creation of a formal corporate reporting process where the corporation is still unreceptive to the complaints.³⁹⁹ To overcome this, some regulatory schemes

glare of publicity to force correction.”).

392. Empirical work is still greatly needed. See Feldman & Lobel, *supra* note 172; see also Yuval Feldman & Orly Lobel, *The Incentives Matrix* (2008) (unpublished manuscript).

393. See Mark R. Attwood, *When the Whistle Blows: Renewed Enthusiasm Among Employee Watchdogs*, in PLI, *ADVANCED CORPORATE COMPLIANCE* 1157 (2003).

394. See Estlund, *supra* note 31 (describing SOX's signaling effect in strengthening internal reporting systems).

395. Murr, *supra* note 249, at 625-26.

396. Elletta Sangrey Callahan et al., *Integrating Trends in Whistleblowing and Corporate Governance: Promoting Organizational Effectiveness, Societal Responsibility, and Employee Empowerment*, 40 AM. BUS. L.J. 177, 205 (2002).

397. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745.

398. Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1074 (2004).

399. Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1167.

now require companies to disclose information about their internal grievance processes, including how files are reviewed and screened, and information about the types, number, and results of complaints within the system.⁴⁰⁰

As for the role of the judiciary, courts must develop more nuanced measures to scrutinize the procedures that ensure that companies are not engaging in “file-cabinet compliance.”⁴⁰¹ As the process of self-initiated compliance becomes a more prominent aspect of regulation, the role of courts must be geared to determining whether private processes are adequate and fair.⁴⁰² Similarly, regulatory agencies must now assume the role of retrieving more data on internal grievance procedures and learning which policies and structures are the most effective among various industry practices.⁴⁰³

Overall, the sequencing model and reporting pyramid attempt to mirror contemporary regulatory trends to support procedural justice, encourage independence and accessibility in reporting mechanisms, and reinforce internal reporting through meaningful oversight.

CONCLUSION

Organizational loyalty doctrines exist in confusion. This disarray reflects both deep ambivalence about the role of individual dissent and lack of knowledge about the effectiveness of organizational self-regulation and internal compliance systems. Because of the great impact that new reporting laws have in the new economy, a dire need exists for a more sophisticated understanding of what processes best mediate conflicting obligations. Further efforts to understand the function and efficacy of different forms of internal compliance systems are warranted.

Tensions between conflicting intragroup and citizenship loyalties are real

400. *Id.*

401. Murr, *supra* note 249, at 623; *see also* David Sherwyn et al., *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 *FORDHAM L. REV.* 1265 (2001).

402. There are emerging examples of this analysis. For example, in employment discrimination complaints, courts have accepted external reports without an attempt at internal grievance, where the employer's complaint procedure was unclear, or when the employee was told not to pursue her complaint. *See, e.g.*, *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305 (11th Cir. 2001).

403. In the federal system, for example, government agencies must disclose statistics on the number of complaints and their end resolution in cases of alleged discrimination. Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, Pub. L. No. 107-174, § 301, 116 Stat. 566. There are also important examples of large private companies who are voluntarily collecting data about the effectiveness of various aspects of their compliance system, including hotlines, internal audits and third party monitoring. INTEL keeps track of the effectiveness of its internal disputes resolution program by monitoring the number of internal complaints, as compared to external complaints, as well as their resolution and their effectiveness in the eyes of management and employees. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 *COLUM. L. REV.* 458, 507 (2001).

and pervasive. A challenge to authority invariably entails costs. However, employees and employers share the fate of legal loyalties. Whistleblowing can also be significantly disruptive, since it has the potential to challenge managerial authority, implicate members of the organization and create grave distrust. Ideally, whistleblowing serves to prevent wrongdoing, detect emerging problems, and provide ways to solve problems that might otherwise lead to an Enron-like fate.

The intermediate form of action proposed by this Article—between silence and exit, between blind faith and overzealous informants—reconciles these tensions by allowing private corporations and public organizations to investigate and correct any alleged wrongdoing from within. By connecting the substance and form of reporting, the proposal also fits well with new managerial and regulatory trends. Moreover, the argument for a need to increase voice within the organization is consistent with the move away from a traditional regulatory system of command-and-control. Employers must recognize, rather than suppress, the conflicts inherent in productive social enterprises. Regulators and courts must now design an individual dissent system and promote principles of organizational loyalty, integrating insights from organizational behavior studies and management theory. The logic of recent regulatory and corporate accountability trends is to allow more innovation and flexibility while at the same time preventing illegal behavior. The corollary to skepticism about government's ability to remedy organizational illegalities is the trust in the ability of individuals to solve problems within their organizations.

