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CALLING THE BOSS OR CALLING THE PRESS: A COMPARISON OF BRITISH AND AMERICAN RESPONSES TO INTERNAL AND EXTERNAL WHISTLEBLOWING

When *Time* magazine asked former “Person of the Year”¹ and WorldCom whistleblower, Cynthia Cooper, if she would blow the whistle again, she replied, “Yes, I would. I really found myself at a crossroads where there was only one right path to take.”² While Cooper believed that there was only “one right path to take,” many other whistleblowers do not know what to do when they find themselves at such a crossroads. A potential whistleblower faces a difficult choice: she can either stick her neck out and report misconduct, risking potential retaliation from her employer, or she can keep quiet, keep her job and keep her employer’s misconduct hidden.

Deciding whether to report, however, is only one fork in the road to blowing the whistle. After the whistleblower decides to disclose her employer’s wrongdoing, she finds herself at a second crossroads: she now must select her avenue of reporting. She can either blow the whistle internally to her employer, or externally.³ Her chosen path, whether internal or external, is critical in the American and British systems of whistleblower protection, as it determines what level of protection the whistleblower is granted. The American system gives greater protection to external reports, while the British system fiercely protects internal reports. Thus, contrary to Cooper’s aforementioned assertion, the difference between American and British preferences for reporting avenues demonstrates that there is not a universal “right path” to whistleblowing. In this Note I will argue that there need not be “one right path.” Rather, a model whistleblower protection law would not heavily favor either external or internal reporting; it would offer protection to both types of

1. On Dec. 30, 2002 *Time* magazine named three whistleblowers its “Persons of the Year.” The other two whistleblowers named “Persons of the Year” were Sherron Watkins, the Enron whistleblower, and Coleen Rowley, the FBI whistleblower. Richard Lacayo & Amanda Ripley, *Persons of the Year*, TIME, Dec. 30, 2002, at 30.

2. Amanda Ripley, *Q & A: Whistle-Blower Cynthia Cooper*, TIME, Feb. 4, 2008, <http://www.time.com/time/arts/article/0,8599,1709695,00.html>.

3. While an internal report ensures that the corporation has a chance to remedy the misconduct before it is publicly released, an employer who receives a report might be able to retaliate against the whistleblower without sanction. Thus, while external reporting might be perceived as “airing out” the corporation’s dirty laundry, such a report might also ensure that a corporation takes its internal complaints seriously, and that it has a sound procedure for receiving them. For a more detailed discussion of these points, see *infra* notes 100–08 and accompanying text.

reports in certain instances. My proposed hybrid model would allow for the appropriate balance between internal and external reporting, while still ensuring that the whistleblower does not find herself at a dead end.

Part I of this Note will examine American whistleblower protections, specifically focusing on the federal statutory⁴ and common law protections afforded to public and private employees. Part II will examine British whistleblower protections focusing on the Public Interest Disclosure Act (“PIDA”). In Part III, I will examine the preferences for, and benefits of, internal and external reporting. Finally, in Part IV, I will suggest a hybrid model of whistleblower protection that would give whistleblowers clearer guidance regarding which avenue of reporting is preferable, and would provide more appropriate protections for internal and external reports vis-à-vis the current American and British models.

I. THE AMERICAN SYSTEM

America has a convoluted “patchwork”⁵ of whistleblower protections for private and public employees. Yet despite the incomprehensibility of much of American whistleblower law, it still clearly favors external reporting.

A. Common Law Protections for the American Private Employee

While common law protections for the privately employed American whistleblower are limited, the law still evinces a slight preference for external reporting. American common law protection is limited largely because of the at-will employment doctrine.⁶ Recognizing the harshness of the American rule of at-will employment, specifically in the whistleblower

4. Individually, states also have common law and statutory protections for American whistleblowers. For brevity, and in order to ensure that this Note provides a proper analog for the British statutory scheme, this Note will only focus on federal whistleblower protections. For a comprehensive study of state whistleblower statutes, see Robert G. Vaughn, *State Whistleblower Statutes and the Future of Whistleblower Protection*, 51 ADMIN. L. REV. 581 (1999).

5. According to one American whistleblower scholar, Tom Devine, “the overall premise for US whistleblower law is chaos.” Tom Devine, *Whistleblowing in the United States*, in WHISTLEBLOWING AROUND THE WORLD: LAW, CULTURE AND PRACTICE 74, 83 (Richard Calland & Guy Dehn eds., 2004). He continues, “[U]nlike the consistent set of rules for all corporations and government workers relying on British . . . whistleblower statutes, the unstructured growth of US whistleblower law is saturated with arbitrary inconsistencies and contradictions.” *Id.*

6. Under this doctrine, there is a presumption that both the employee and the employer can terminate the employment relationship at any time, for any reason. See *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507 (Tenn. 1884). The *Payne* court, which founded this doctrine, specifically held that an employee who is not under a fixed term contract can be fired at will, and that the employer can condition the employee’s employment on anything he wishes. *Id.*

context, courts began limiting the employers' ability to terminate whistleblowers under the public policy exception to the at-will doctrine.⁷

The whistleblowing public policy exception "protects employees fired for reporting or complaining about their employer's unlawful acts."⁸ Whistleblower claims, however, are typically only protected under this public policy exception if the employee reports misconduct that implicates threats to public health and safety.⁹ For example, in *Hayes v. Eateries, Inc.*¹⁰ an employee was fired after he reported¹¹ and attempted to investigate another employee's attempt to embezzle from his employer.¹² The court held that it did not matter whether the *Hayes* employee reported internally or externally, he still had not reported pursuant to "a clear and compelling public policy."¹³

7. While the enforcement and application of the public policy exception to the at-will employment rule are largely state determined, this exception has been recognized in the federal court system. Accordingly, while the reader should note that this doctrine is largely state created and state enforced, the public policy exception still has had a large impact within federal whistleblower protection.

This public policy exception to the at-will rule of employment was first recognized in 1959 in the case of *Petermann v. International Brotherhood of Teamsters*, 344 P.2d 25 (Cal. Dist. Ct. App. 1959). The *Petermann* court specifically noted that "[i]t would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury . . ." *Id.* at 27.

The public policy exception protects four basic categories of cases. It can be used to seek redress for adverse employment actions when employees are fired for refusing to do an illegal act, *see Petermann*, 344 P.2d 25 (Cal. Dist. Ct. App. 1959), when the employee is fired for claiming a public right, *see Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973), where an employee is fired for fulfilling a public duty, *see Nees v. Hock*, 536 P.2d 512 (Or. 1975), and where an employee is fired for whistleblowing.

8. MARION G. CRAIN, PAULINE T. KIM, & MICHAEL SELMI, *WORKLAW: CASES AND MATERIALS* 188 (1st ed. 2005).

9. *Id.* at 193. Examples of successful whistleblower claims that were framed as public policy cases include *White v. General Motors Corp.*, 908 F.2d 669 (10th Cir. 1990) and *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984). In *White*, two plaintiffs alerted their employer to the fact that there were some flaws in their plant's brake installation procedures. *White*, 908 F.2d at 671. In *Garibaldi*, a milk truck driver noticed that some of the milk that he was carrying was spoiled and he reported this violation. *Garibaldi*, 726 F.2d at 1368.

10. 905 P.2d 778 (Okla. 1995).

11. The facts of *Hayes* do not note whether the *Hayes* plaintiff internally or externally reported his employer's misconduct. But, the court notes that regardless of the avenue of the reporting chosen, there was no clear and compelling public policy at stake when the *Hayes* plaintiff reported spoiled food and improper food labeling. *Id.* at 785-86.

12. *Id.* at 780.

13. *See supra* note 11. This case exemplifies the relative futility of arguing a whistleblower case under the public policy exception, and demonstrates the early common law's belief that the avenue of reporting did not matter. The court noted:

In our view, neither external reporting, i.e. to outside law enforcement officials, or internal reporting, i.e. to company officials, of the crime of embezzlement from the employer, is

While the *Hayes* court did not favor either internal or external reporting, jurisdictions recognizing the public policy exception to the at-will rule often dismiss cases where an employee *only* internally reports wrongdoing¹⁴ on the theory that internal reporting “does not further the public interest of detection and enforcement.”¹⁵ Such internal reporting is also often discouraged because it disrupts an employer’s unfettered discretionary control of his workplace.¹⁶ Nonetheless, a limited minority of courts still extend common law protection to purely internal reports.¹⁷

The First Amendment sometimes provides an additional source of common law whistleblower protection for the private sector employee.¹⁸ Although First Amendment protection is traditionally only granted to public employees, private employees have received First Amendment protection, successfully arguing that this amendment is a valid *source of*

imbued with the necessary clear and compelling public policy sufficient to protect the employee from discharge

Although we believe most people, including the members of this Court, would agree that, generally speaking, the reporting of crimes to appropriate law enforcement officials should be lauded and encouraged, and that an employee’s reporting to appropriate company officials of crimes committed by co-employees against the interests of the employer is a likewise commendable endeavor, we must decide in this case whether the reporting of this particular crime against this particular victim . . . is so imbued with a clear and compelling public policy such that a tort claim is stated if the employer discharges the employee for so reporting. In our view, such reporting is not so protected.

Id. at 786.

14. Orly Lobel, *Legal Loyalties* 13 (Oct. 2, 2007) (unpublished manuscript, on file with author; published in modified form in Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CAL. L. REV. 433 (2009).

15. *Id.* (citing *Brown v. Donovan*, 747 F.2d 1029, 1035 (5th Cir. 1984)). See also *House v. Carter-Wallace*, 556 A.2d 353, *cert. denied*, 564 A.2d 874 (N.J. Super. Ct. App. Div. 1989); *Geary v. United States Steel Corp.*, 319 A.2d 174 (Pa. 1974); and *Fox v. MCI Commc’ns Corp.*, 931 P.2d 857 (Utah 1997). These cases underscore the public policy exception’s preference, if not requirement, for external reporting.

16. Lobel, *supra* note 14, at 13. This belief that internal reporting might disrupt an employer’s workforce is further addressed in this Note, in the section detailing First Amendment common law protection afforded to public employees and also later in Part III, which compares the benefits of internal and external reports.

17. *Id.* at 14. Lobel comments that “some courts have explicitly rejected the external/internal distinction” and some courts “extend protection to internal reporting in order to eliminate perverse incentives to “bypass internal channels altogether and immediately summon police.”” *Id.* (citing *Belline v. K-Mart Corp.*, 940 F.2d 184 (7th Cir. 1991)). Yet the overt preference for external whistleblowing is underscored by Elleta Sangrey Callahan and Terry Morehead Dworkin who noted that public policy cases “strongly suggest that an internal whistleblower is substantially less likely to prevail on the basis of [a public policy] claim than one who discloses information to a government agency.” Elleta 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, 160 (1994).

18. CRAIN ET AL., *supra* note 8, at 480–82. First Amendment whistleblower protection usually applies only to public employees because of the Constitution’s state action requirement.

public policy in its own right.¹⁹ Jurisdictions are mixed, however, regarding whether the Constitution is a valid source of public policy and, accordingly, whether the First Amendment can support a whistleblowing public policy exception claim. Only a handful of courts have ever afforded private employees First Amendment protection, and even when courts have recognized the First Amendment as a source, they have reasoned that the First Amendment's state action requirement is not met in a private employment relationship.

As with the traditional public policy exception cases, the First Amendment cases in the private sector demonstrate American ambivalence towards preferring internal or external avenues of reporting, leaving the private sector employee with little guidance regarding who he should report to should his employer commit malfeasance. Unfortunately, the landscape of whistleblower protection for public employees in the United States is no less convoluted.

B. Common Law Protections for the American Public Employee

As opposed to common law protection for the privately employed whistleblower, the common law protections for public employees are extensive²⁰ and explicitly favor external reporting. The First Amendment is the primary source of common law protection for public employee whistleblowers.

The First Amendment was established as a source of whistleblower protection for public employees in the landmark case of *Pickering v. Board of Education*.²¹ In this case, the Supreme Court held that a public school teacher could not be fired for speaking out on issues of public

19. For instance, the court in *Novosel v. Nationwide Insurance Co.*, 721 F.2d 894 (3d Cir. 1983) held that the Constitution can be a source of public policy, implying that a private employee who exercises his First Amendment rights by speaking out against his employer might have a whistleblower claim under the public policy exception. This implication, however, has been explicitly rejected by another line of cases exemplified by *Edmondson v. Shearer Lumber Products*, 75 P.3d 733 (Idaho 2003). Rejecting the reasoning of *Novosel*, the court in *Edmondson* held that the Constitution was not a valid source of public policy. Justice Walters, speaking for the majority declared that:

[T]he public policy adopted in *Novosel* has not been endorsed by any other court, not even the Pennsylvania state courts within the federal district of the Circuit that issued *Novosel*. . . .

Accordingly, we hold that an employee does not have a cause of action against a private sector employer who terminates the employee because of the exercise of the employee's constitutional right of free speech.

Id. at 738–39.

20. This is because public employers meet the Constitution's state action requirement that private employers cannot meet.

21. 391 U.S. 563 (1968).

concern.²² The resulting *Pickering* test requires that courts balance whether the employee was speaking as a citizen on a matter of public concern, against the employer's need for control and harmony in his workplace, when deciding if a termination based on the employee's comments violated the employee's First Amendment rights.²³ *Connick v. Myers*²⁴ subsequently amended this *Pickering* test in 1983 by adding a threshold requirement that the employee be speaking on a matter of public concern before the *Pickering* balancing test could even be applied.²⁵

Together, *Pickering* and *Connick* established that "employees speak on *matters of public concern* [sufficient for whistleblower protection] when they report dereliction of public duties, corruption, or threats to public health and safety."²⁶ While this public concern test affords whistleblowers some protection, this requirement has also effectively denied protection to employees who report what a court deems are "grievances or criticism concerning workplace conditions."²⁷ First Amendment whistleblower protection, therefore, inherently discourages internal whistleblowing since any sort of internal grievance might be viewed as just that—not as speech on a matter of public concern.

This explicit disdain for internal reporting was echoed in a recent First Amendment case, *Garcetti v. Ceballos*.²⁸ Known by some as "the worst whistleblower decision,"²⁹ *Garcetti* essentially held that "when public employees make statements pursuant to their official duties,³⁰ the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."³¹

22. Specifically, *Pickering* was a schoolteacher who was dismissed after he wrote a letter to the local newspaper which criticized the Board of Education's allocation of funds. *Id.* at 564.

23. The Supreme Court opined that in determining a public employee's rights of free speech, the Court must "arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568.

24. 461 U.S. 138 (1983).

25. *Id.* at 146.

26. Cynthia Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 115 (1995) (emphasis added) (citation omitted).

27. *Id.* (footnote omitted).

28. 547 U.S. 410 (2006).

29. See Lobel, *supra* note 14, at 17 (citing David G. Savage, *Supreme Court Limits Free Speech in Workplace for Public Employees*, SEATTLE TIMES, May 31, 2006, at A1).

30. Official duties are job duties. For example, in *Garcetti*, writing a legal memorandum was considered an "official duty" of the district attorney and was not protected speech. *Garcetti*, 547 U.S. at 421.

31. *Id.* In *Garcetti*, the plaintiff was a Los Angeles District Attorney who, after uncovering a police affidavit that contained serious misrepresentations, wrote a memorandum to his employer

Aside from requiring employees to speak as citizens when reporting misconduct of their public employer, the Court in *Garcetti* was “divided on whether to extend common law protection equally between external and internal whistleblowing.”³² Justice Stevens in his dissent declared that the majority’s refusal to protect speech made by a public employee pursuant to his job duties created a “perverse” incentive whereby employees might “bypass their employer-specified channels of resolution and voice their concerns in public, namely through the media.”³³

Thus, *Garcetti*, *Pickering*, and *Connick* demonstrate that protection of whistleblower speech is largely contingent on a court’s fluid interpretation of what constitutes a matter of public concern, and what speech might disrupt the employer’s business objectives. Furthermore, these previously discussed common law protections, which only protect speech on matters of public concern while ignoring speech relating to the workplace, afford greater protection to external reports. These cases express a distinct preference for external reporting and this tacit encouragement of reports to the media stands in direct opposition to the United Kingdom’s approach to whistleblowing addressed in Part II.

recommending that the case be dismissed because of the affidavit’s inaccuracies. *Id.* at 414.

32. See Lobel, *supra* note 14, at 17.

33. *Id.* at 18. Stevens specifically commented that “it is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description. Moreover, it seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors.” *Garcetti*, 547 U.S. at 427. Employment law scholar Lobel concisely and poignantly articulated how the majority and the dissent’s differing opinions fit within the current web of American whistleblower law:

The majority relied on the “powerful network of legislative enactments—such as whistleblower protection laws and labor code—available to those who seek to expose wrongdoing” as sufficient to encourage employees to voice their concerns about potential unlawful government conduct. 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.” In particular, the dissent emphasized that . . . internal speech frequently falls outside the statutory and judicial decisions of whistleblowing, “defined in the classic sense of exposing an official’s fault to a third party or to the public.”

Lobel, *supra* note 14, at 19–20. This “perverse” irony was also noted by two American scholars even before the *Garcetti* decision. Callahan and Dworkin concluded that “a public employee whistleblower who directs disclosures to the press may be more likely to receive First Amendment-based protection than one who reports internally or to another external outlet.” Callahan & Dworkin, *supra* note 17, at 159. The Ninth Circuit Court of Appeals, which had initially granted the *Garcetti* plaintiff First Amendment protection, more vividly described these noted “perverse incentives” of discouraging internal reporting: “To deprive public employees of constitutional protection when they fulfill this employment obligation, while affording them protection if they bypass their supervisors and take their tales, for profit or otherwise, directly to a scandal sheet or to an internet political smut purveyor defies sound reason.” *Ceballos v. Garcetti*, 361 F.3d 1168, 1176 (9th Cir. 2004).

C. Statutory Protections for the American Employee

Statutory provisions are the chief source of American whistleblower protection as they offer more specific and explicit protection for those who choose to report. Some statutes apply to both private and public sector employees while others apply only to public employees.³⁴

1. Protections for Public and Private Employees

Similar to the common law/judicial protections that were previously discussed, statutory whistleblower protection largely favors external reporting over internal reporting.³⁵ Such statutory whistleblower protections come in two different varieties. The first type of statute has anti-retaliation provisions that have been “included in federal statutes regulating terms and conditions of employment, such as anti-discrimination laws, health and safety laws, minimum wage and maximum hour laws, and pension laws.”³⁶ The second type of statute “protect[s] information of concern outside the workplace to the public at large.”³⁷

Some examples of the first category of statutes are the National Labor Relations Act of 1935 (“NLRA”),³⁸ the Fair Labor Standards Act

34. Bounty statutes, which will not be discussed at length, are another form of whistleblower protection that apply to both public and private employees, and explicitly favor external reporting. Lobel, *supra* note 14, at 12. Under these laws, employees can file a “qui tam suit” and receive a portion of the money recovered pursuant to their report. A qui tam action, as defined by Black’s Law Dictionary, is “[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specific public institution will receive.” BLACK’S LAW DICTIONARY 1282 (8th ed. 2004). For more on qui tam actions, see Michael Cover & Gordon Humphreys, *Whistleblowing in English Law*, in WHISTLEBLOWING: SUBVERSION OR CORPORATE CITIZENSHIP? 89, 90–91 (Gerald Vinten ed., 1994); and Lobel, *supra* note 14 (manuscript at 11).

35. Lobel, *supra* note 14, at 13.

36. Estlund, *supra* note 26, at 117 (footnote omitted).

37. *Id.* For example, a pollution statute which regulates emissions might also have a provision within its statutory scheme that prohibits discharge of an employee for reporting a violation of the statute.

38. National Labor Relations Act of 1935, 29 U.S.C. §§ 151–169 (2006). The whistleblower protection appears in 29 U.S.C. § 158(a)(4). The Supreme Court has interpreted § 158(a)(4) broadly, allowing protection for employees who have not participated in formal NLRB proceedings though the employee still has to have had some interaction with an external reporting agency. *NLRB v. Scrivener*, 405 U.S. 117 (1972). *Scrivener* indicates that while the extent to which an employee participates in external reporting is not paramount, an employee must still make some contribution to an external reporting agency’s investigation of wrongdoing to be protected under the NLRA’s whistleblower protection section; an internal report alone will not suffice. One potential exception to the requirement for external whistleblowing is that non-union employees might receive whistleblower protection if speaking out against an employer pursuant to their § 7 rights if they are engaged in a concerted activity for employees’ mutual aid and protection, and are speaking out on conditions of employment. Though not specifically related to whistleblowing, this doctrine seems to extend whistleblower protection to

("FLSA"),³⁹ the Age Discrimination in Employment Act of 1967 ("ADEA"),⁴⁰ the Occupational Safety and Health Act of 1970 ("OSHA"),⁴¹ and Title VII of the Civil Rights Act of 1964 ("Title VII").⁴² These statutes generally protect employees when they report to a government agency, i.e. externally report.⁴³ However, when the statute does not specify whether it prefers an internal report or a report to a government agent, the decision regarding what types of disclosures will be protected has largely been left to the courts. Courts have consistently decided, though, that federal anti-retaliation statutes should be interpreted broadly to protect both internal and external reports.⁴⁴

The second category of statutes includes the Water Pollution Control Act of 1948 or the Clean Water Act ("CWA"),⁴⁵ the Clean Air Act of 1955

groups of individuals who internally or externally report hazardous work conditions. CRAIN ET AL., *supra* note 8, at 505. See also *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

39. Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2006). The whistleblower protections appear in 29 U.S.C. § 215(a)(3). Courts have interpreted the anti-retaliation provision of the FLSA differently. "Most federal courts have concluded that an internal complaint to the employer will satisfy the complaint filing requirement of 215(a)(3)." CRAIN ET AL., *supra* note 8, at 744 (citations omitted). Others "have held that a formal complaint to the government agency or a court is required to trigger protection." *Id.* (citing *Lambert v. Genesee Hosp.*, 10 F.3d 46 (2d Cir. 1993)).

40. Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. §§ 621–634 (2006). The whistleblower protection is found in 29 U.S.C. § 623(d). Section 623(d) has been interpreted similarly to the whistleblower protection language of Title VII. The anti-retaliation provision of Title VII encompasses an individual's complaints to supervisors regardless of whether she also files an EEOC charge. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964). Thus, it seems that Title VII and the ADEA each allow whistleblower protection for employees who report misconduct both internally and externally as both of these types of reporting fall within the "oppose any practice" language of the statutes.

41. Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. §§ 651–678 (2006). The whistleblower protection is found in 29 U.S.C. § 660(c). As noted by OSHA scholar, Monique Lillard, however, "the reference to 'filing' a complaint is an obvious reference to external whistleblowing." Monique C. Lillard, *Exploring Paths to Recovery for OSHA Whistleblowers: Section 11(c) of the and the Public Policy Tort*, 6 EMP. RTS. & EMP. POL'Y J. 329, 338 (2002). Yet both external and internal complaints under the OSHA have received protection. *Id.* at 339. For an in-depth discussion of the reporting mechanisms of the OSHA, see *id.* at notes 44–54 and accompanying text.

42. Title VII's whistleblower protections are codified in 42 U.S.C. § 2000e-3 (2006). See *supra* note 40 and accompanying text.

43. Lobel, *supra* note 14, at 14.

44. *Id.* at 14–15. While it is beyond the scope of this article, state whistleblower laws generally only protect external reporting. *Id.* at 14. "According to a 2006 report of the National Whistleblower Center, 58% of state whistleblower laws do not protect internal whistleblowers." *Id.* at 14 n.63. For a larger discussion of internal versus external reporting in the context of state whistleblower statutes, see Robert G. Vaughn, *State Whistleblower Statutes and the Future of Whistleblower Protection*, 51 ADMIN. L. REV. 581 (1999).

45. 33 U.S.C. §§ 1251–1387 (2006). The whistleblower protection is found in 33 U.S.C. § 1367 (2006).

(“CAA”),⁴⁶ the Federal Mine Health and Safety Act (“FMHSA”),⁴⁷ and the infamous Sarbanes-Oxley Act of 2002 (“SOX”).⁴⁸ These more individualized whistleblowing statutes offer varied protection similar to the anti-retaliation statutes.

In sum, both categories of federal whistleblower statutes seem to protect employees who make external reports while some only protect internal reporting. Moreover, protection for employees who make internal reports is often left to the whim of the courts. Regardless, America’s preference for external reporting is once again apparent.⁴⁹

2. Protection Specifically for the Public Employee

The Whistleblower Protection Act of 1989 (“WPA”),⁵⁰ is the primary

46. 42 U.S.C. §§ 7401–7671 (2006). The whistleblower protection is found in 42 U.S.C. § 7622. On their faces, the CWA and CAA do not seem to protect internal whistleblowers. Each statute forbids discrimination or adverse employment action against employees for conduct only related to the commencing, testifying or assisting (only the CAA includes the word assist) in a proceeding initiated under the statute, which requires external reporting to the appropriate agency. But because these statutes do not specifically proscribe internal reporting, courts have often protected both internal and external reporting under these acts. Lobel, *supra* note 14, at 14–15.

47. 30 U.S.C. §§ 801–965 (1977). The whistleblower provision is found in 30 U.S.C. § 815(c).

48. Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (2002). The whistleblower protection is provided in 18 U.S.C. § 1514A (2006). SOX prohibits employers from taking adverse employment actions with respect to employees who report activity that they reasonably believe is a violation of federal securities law. Unlike the aforementioned anti-retaliation statutes, SOX explicitly spells out that it protects both internal and external whistleblowers in section 1514A(a). It protects disclosures to: “(A) a federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (C) a person with supervisory authority over the employee.” § 1514A(a)(1).

49. Notably, as of 1994, thirty-seven states have enacted statutes that protect whistleblowers and the majority of these statutes specifically state what the preferred reporting channel is. The majority of these state statutes also prefer external reporting, yet most statutes do not protect disclosures to the media. Callahan & Dworkin, *supra* note 17, at 156. These authors comment that “[n]o statute identifies the media as a proper recipient of a whistleblower’s report, fewer than one-third of the state laws protect whistleblowing to the media at any point, and twenty-four states explicitly exclude this form of whistleblowing from their coverage.” *Id.* at 157 (footnote omitted). Moreover,

[R]eporting to the media is encouraged by neither Congress nor state legislatures. Federal legislators have been more willing than their counterparts at the state level to allow whistleblowers to choose between internal and external outlets. Nevertheless, federal statutes that indicated an external preference designated an agency or other governmental body.

Id. at 158. This distrust of the media will be further illuminated when discussing the British model.

50. The Whistleblower Protection Act of 1989, Pub. L. No. 101–12, 103 Stat. 16 (codified at 5 U.S.C. §§ 1201–1222 (1994 & Supp. III 1997)). The WPA amended the prior Civil Service Reform Act of 1978, Pub. L. No. 95–454, 92 Stat. 1111, which was the first major piece of federal whistleblower legislation. For a good discussion of these acts and their interaction see Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L. REV. 531, 533 (1999).

The proceedings under the WPA are largely administrative, and individual whistleblowers have no right to bring their claims to federal courts, though they might be able to bring an individual right of

federal statute that protects public employee whistleblowers. The WPA protects federal employees who report “information which they reasonably believe evidences a violation of law, rule or regulation, a gross waste of funds, gross mismanagement, abuse of authority or a substantial and specific danger to public health and safety.”⁵¹ While this statute facially allows both internal and external reporting, some courts recognize exceptions to its protection, which inherently limit the protection afforded to many types of internal reports.⁵²

There are two major exceptions provided by the WPA that tend to minimize protection for internal reports. First, an employee’s disclosure is not protected if she makes “a disclosure . . . in the ordinary course of an employee’s duties.”⁵³ Second, courts occasionally interpret the WPA to exclude protection for employees who report to their immediate supervisors instead of to a government body that is qualified to hear the disclosure.⁵⁴ Therefore, similar to the aforementioned common law protection, “the jurisprudential inconsistency is apparent—whereas many courts insist on the significance of the external/internal distinction, other courts reject the logic of including internal speech from whistleblower statutory protections.”⁵⁵

II. THE BRITISH MODEL

In stark contrast to the patchwork of protection demonstrated by American whistleblower law, whistleblower protections in the United Kingdom are governed by a single statute,⁵⁶ which applies to both private

action after they have exhausted some administrative remedies. Robert G. Vaughn et al., *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers*, 35 GEO. WASH. INT’L L. REV. 857, 875 (2003). See also Bruce D. Fisher, *The Whistleblower Protection Act of 1989: A False Hope for Whistleblowers*, 43 RUTGERS L. REV. 355 (1991) for a detailed examination of the WPA and its provisions and shortcomings.

51. Vaughn et al., *supra* note 50, at 874–75 (citing 5 U.S.C. § 1213(a)(1)). In addition to providing good background information on the WPA and PIDA, Vaughn’s article also discusses the proposal of a model whistleblower law. While that topic is beyond the scope of this project, it might be interesting to compare in-depth my proposed whistleblower law to Vaughn’s suggested model.

52. Lobel, *supra* note 14, at 15.

53. *Id.* This is commonly referred to as the “job duty” defense and is highly reminiscent of the common law protection defined in *Garcetti* above. *Id.*; see *supra* notes 30–31. As mentioned in the text, this “job duty” defense has not been universally adopted. See Lobel, *supra* note 14, at 15 n.71, for case law that rejects the “job duty” defense.

54. Lobel, *supra* note 14, at 15.

55. *Id.* at 15–16.

56. While the British model’s single statute might seem to be an improvement over America’s “patchwork,” the initial results of PIDA have shown that it, too, might be ineffective in curing the ills of whistleblower law. Myers mentions that within the first three years of PIDA’s enactment, 1,200

and public employees.⁵⁷ This Public Interest Disclosure Act⁵⁸ offers a tiered-disclosure model, which evinces British distaste for external reporting.

A. Common Law Protection and Early Statutory Laws

The scant whistleblower protections available at British common law emanated from the implied duties of the employment relationship, which explicitly barred British employees from publicly discussing private employment matters. At common law, while the British employer had an implied duty to lend reasonable support in cases where an employee was victimized by fellow employees,⁵⁹ British employees also owed a duty of loyalty and confidentiality to their employer.⁶⁰ Accordingly, British employers at common law often framed whistleblower claims as a breach of the employer's confidence, or as disloyalty. Agreeing with the employer's argument, British courts often deemed whistleblowing a breach of the employee's employment contract,⁶¹ giving British employees little protection from an adverse employment action if they blew the whistle.⁶²

As evidenced above, like in the American model, British whistleblower protection at common law was scant, but the British common law differs from its American brother, however, in that it explicitly disfavors external reporting except where the disclosure involves serious wrongdoing.⁶³ Specifically, at British common law, only in a case of serious wrongdoing coupled with a heightened public interest could an employee breach his

claims were filed by whistleblowers alleging some form of victimization. Decisions were reached in only 152 of these cases, and over half of these employees did not receive a favorable judgment. Of those who won, only half of them actually won under PIDA, the rest won under other employment discrimination law. Over two-thirds of the claims brought under PIDA never made it to court. Ann Myers, *Whistleblowing—The UK Experience*, in *WHISTLEBLOWING AROUND THE WORLD: LAW, CULTURE AND PRACTICE* 101, 111 (Richard Calland & Guy Dehn eds., 2004).

57. Two British scholars, comparing U.S. whistleblower legislation to British legislation, noted that “[i]n stark contrast to the USA, the UK is a virtual ‘legislative desert’ when it comes to whistleblower statutes.” Michael Cover & Gordon Humphreys, *Whistleblowing in English Law*, in *WHISTLEBLOWING—SUBVERSION OR CORPORATE CITIZENSHIP?* 89, 93 (Gerald Vinten ed., 1994).

58. Public Interest Disclosure Act, 1998, c. 23 (Eng.).

59. This essentially provided a whistleblower protection from harassment after making a disclosure. Cover & Humphreys, *supra* note 57, at 94.

60. Lucy Vickers, *Whistling in the Wind*, 20 *LEGAL STUD.* 428, 430 (2000).

61. *Id.* at 431.

62. *Id.*

63. *Id.* at 433. Vickers further explains, “There is no breach of confidence if serious wrongdoing is disclosed, even if commercially sensitive information is involved.” *Id.* at 430 (footnote omitted).

duties of confidence and loyalty.⁶⁴ Yet, even this exception was limited in the British model as some employees could never externally report, even in a case of serious misconduct, if they were contractually obligated to report wrongdoing first to their employer, or if they were required to abide by a strict professional code of conduct.⁶⁵

*B. The Public Interest Disclosure Act of 1998*⁶⁶

The harshness of British common law and its inadequate whistleblower protection received national attention in the United Kingdom in the 1990s when a series of industrial disasters and a child abuse scandal⁶⁷ rocked the country. Reacting to these unfortunate tragedies, which feasibly could have been prevented had an employee blown the whistle on misconduct he had observed, the United Kingdom finally began to enact statutory whistleblower protections.⁶⁸ First, in 1993, the United Kingdom founded Public Concern at Work (“PCaW”) “to tackle whistleblowing.”⁶⁹ The goal of this charitable organization was to encourage whistleblowers to speak without fear of reprisal.⁷⁰ Next, in

64. *Id.* Commenting on what issues touch on the public interest, Vickers noted, “Relevant factors [in defining whether an issue touches on the public interest] include the subject matter of and timing of the disclosure, the identity of the person to whom disclosure is made, and the motive of the person making the disclosure.” *Id.* at 430–31.

65. James Gobert & Maurice Punch, *Whistleblowers, the Public Interest, and the Public Interest Disclosure Act 1998*, 63 MOD. L. REV. 25, 37 (2000). At common law, the “duty of confidence together with the limitations of the protection against unfair dismissal, demonstrate the inadequacy of legal protection available to those who blow the whistle at work.” Vickers, *supra* note 60, at 431 (footnote omitted).

66. For a succinct summary of PIDA and American whistleblower protections, see Vaughn et al., *supra* note 50, at 891–93.

67. Such disasters included a ferry capsizing off Zebrugge that killed 193 people, the Piper Alpha disaster where an oil platform exploded, killing 167 people, a commuter train crash that killed thirty-five and injured 500, and large thirteen-year long child abuse scandal.

In each of these cases, public inquiries were established to uncover what went wrong and learn [sic] lessons for the future. In each case it was discovered that staff knew of serious problems and either turned a blind eye, were too scared to speak up or tried to raise their concerns but to little effect.

Myers, *supra* note 56, at 102. See also LUCY VICKERS, FREEDOM OF SPEECH AND EMPLOYMENT 116 (2002).

68. In 1992, Britain enacted the Offshore Safety Act, 1992, c. 15 (Eng.), which was later expanded to protect employees who raised concerns about health and safety pursuant to their job as safety representatives. Employment Rights Act (ERA), 1996, c.18, §§ 44, 100 (Eng.), cited in Vickers, *supra* note 60, at 431 n.23; VICKERS, *supra* note 67, at 9. Shortly after this law was introduced, the National Health Service also published guidance, which “confirm[ed] that employees’ free speech should be encouraged because of its role in improving the health service.” VICKERS, *supra* note 67, at 9 (citing “Guidance for Staff on Relations with the Public and the Media” (1993) NHS Executive).

69. Myers, *supra* note 56, at 104.

70. *Id.*; VICKERS, *supra* note 67, at 9. The PCaW “set up a confidential legal helpline to advise

1995, following PCaW's lead, a British committee recommended the introduction of whistleblower laws for public employees⁷¹ and "set out what it considered the essential elements of an effective internal reporting system."⁷² These recommendations by the committee were followed by a series of bills in Parliament that ultimately led to the introduction of the Public Interest Disclosure Act of 1998 ("PIDA" or "Act").⁷³

The Public Interest Disclosure Act, which cemented the British preference for internal reporting, was once described as "one of the most far-reaching whistleblower protection laws in the world,"⁷⁴ and "striking for the breadth of its coverage."⁷⁵ The legislators' primary challenge when formulating the Act was achieving the appropriate balance between the "rights of employees to speak [and] the interests of employers in preserving legitimate confidentiality."⁷⁶ According to one British legal scholar, "PIDA [sought] to achieve this balance by closely defining the subject matters on which disclosures [we]re allowed, and by setting out

anyone with a concern about malpractice, risk or danger at work . . . [P]ractical advice . . . enable[d] a genuine whistleblower to communicate the concern responsibly and to the right people so that a serious problem [could] be . . . addressed." Myers, *supra* note 56, at 104. Officially, the purpose of the PCaW was "[t]o promote ethical standards of conduct and compliance with the law by . . . relevant organisations in their administration and management, treatment of personnel, health safety and commercial practices and protection of the natural environment." Evelyn Oakley & Anna Myers, *The UK: Public Concern at Work*, in *WHISTLEBLOWING AROUND THE WORLD: LAW, CULTURE & PRACTICE* 169, 171 (Richard Calland & Guy Dehn eds., 2004). The PCaW has the equivalent of only six full-time staff members and its helpline is its main avenue for aiding employees since it does not litigate whistleblower cases. *Id.* at 171–72. The PCaW has also worked alongside the Government Accountability Project ("GAP"), which is its United States counterpart. *Id.* at 177. GAP was founded in 1977 and has a staff of thirty full-time or part-time employees and fifty interns and volunteers. Tom Devine, *The USA: Government Accountability Project*, in *WHISTLEBLOWING AROUND THE WORLD: LAW, CULTURE & PRACTICE* 158, 158 (Richard Calland & Guy Dehn eds., 2004). According to Devine, "[i]nitially GAP primarily served as a hotline for personal support and a matchmaking service for whistleblowers with kindred spirits and potential allies in Congress or the media," but later became a significant lobbying organization for whistleblowers, leading Congress to pass the Civil Service Reform Act ("CSRA") of 1978. *Id.* at 159. GAP's website, <http://www.whistleblower.org>, contains a summary of the organization's recent activity. *Id.* at 160.

71. Myers, *supra* note 56, at 105; VICKERS, *supra* note 67, at 10 (citing First Report of the Committee on Standards in Public Life, 1995, HMSO Cm 2850 I–II).

72. Myers, *supra* note 56, at 105 (footnote omitted).

73. Public Interest Disclosure Act § 1, codified at ERA 1996 § 43J. This bill was initially introduced by Richard Shepherd as a private members bill, but it received virtually unanimous support in Parliament. VICKERS, *supra* note 67, at 10.

74. Oakley & Myers, *supra* note 70, at 173.

75. See Vaughn et al., *supra* note 50, at 891.

76. Vickers, *supra* note 60, at 432. Note that these interests, which the Act tries to balance, closely resemble the *Pickering* test established by the United States Supreme Court in 1968. The chief difference is that the British law emphasizes protecting employer confidentiality, while the American law seeks to allow the employer discretion in managing his workplace.

procedures by which disclosure must be made in order to qualify for protection.”⁷⁷

PIDA applies to all employees whether private or public, and even to independent contractors.⁷⁸ The Act, based on British unfair dismissal law, presumes that all dismissals pursuant to making a protected disclosure are unfair,⁷⁹ and accordingly the Act grants remedies traditionally available under British unfair dismissal law.⁸⁰ Protection under the Act, however, is limited and is only granted to specific disclosures relating to: (1) criminal offenses, (2) failure by a person to comply with a legal obligation, (3) miscarriages of justice, (4) dangers to health and safety, (5) dangers to the environment, or (6) concerns that information about one of these matters is being deliberately concealed.⁸¹

Unlike American law, PIDA also sets up a procedure-laden⁸² “tiered disclosure regime,”⁸³ where wider disclosures and external reports are *specifically discouraged*. To make external disclosures largely unnecessary, the Act aims at encouraging individual workplaces to institute their own internal procedures for reporting misconduct.⁸⁴ Moreover, most internal disclosures pursuant to the Act are automatically protected,⁸⁵ allowing for additional safeguards when an employer’s

77. *Id.*

78. Vickers, *supra* note 60, at 432–33; Myers, *supra* note 56, at 107 (citing ERA 1996 § 43K).

79. ERA 1996 § 47A.

80. These remedies include reinstatement, re-engagement, or compensation. Compensation is unlimited. VICKERS, *supra* note 67, at 153.

81. ERA 1996 § 43B. Listing the exclusive types of disclosure that will be protected has the advantage of providing greater certainty for employees in knowing what types of disclosure will be protected. Adopting this approach has resigned PIDA to a position of limited flexibility, unlike in American whistleblower law, since the protected disclosure section in PIDA has no catch-all provision. Vickers, *supra* note 60, at 434. Accordingly, PIDA might not protect disclosures for everything that is in the public interest. The holes of PIDA are illuminated when it is compared to the WPA, which protects broader categories of disclosure including “‘gross mismanagement,’ ‘gross waste of funds,’ and ‘abuse of authority.’” VICKERS, *supra* note 67, at 155. But depending on subsequent court interpretations, the “failure to comply with a legal obligation,” in PIDA § 43B, *id.*, might allow protection for other disclosures.

82. Lobel, *supra* note 14, at 53. Lobel contends, “[S]tudies find that procedural justice has a more significant effect on employees’ willingness to follow rules and is more effective in encouraging ethical behavior” *Id.* Yet Vickers stresses that because there are different procedural requirements for the different types of disclosures under PIDA, unless the whistleblower is an experienced lawyer, or has consulted with a lawyer, the highly technical PIDA might leave whistleblowers unsure about its afforded protection, perhaps chilling whistleblowers. VICKERS, *supra* note 67, at 173.

83. Myers, *supra* note 56, at 107.

84. VICKERS, *supra* note 67, at 152.

85. *Id.* “Internal disclosure includes disclosure to the employer, or to a third party where the malpractice is caused by that third party or is his legal responsibility.” Vickers, *supra* note 60, at 436 (citing ERA 1996 § 43C). PIDA also considers an employee’s disclosure of misconduct to a “relevant minister of the Crown” an internal disclosure. *Id.* (citing ERA 1996 § 43E). Lobel points out that

reputation is at stake.⁸⁶ An employee only has to make a report in good faith⁸⁷ and have a reasonable suspicion that wrongdoing has occurred in order to receive protection under PIDA.⁸⁸ This heightened protection of internal disclosure comports with the aforementioned British common law, which protects disclosures as long as there has not been a breach of confidence.⁸⁹

This deleterious effect of breaching employer confidence weighs more heavily, though, in the case of external disclosures; therefore, PIDA requires that more criteria be met before an external disclosure is granted protection under the Act. There are two main types of external disclosures: a disclosure made to an “authorized regulator,” and a disclosure made to the media or what PIDA deems a “wider disclosure.”

The main additional other requirement for an external disclosure is that such a disclosure has to meet a heightened standard of suspicion. Generally, an external disclosure “is only protected where the worker acts

British law’s prioritization of internal disclosure in this manner “allows the British law to define other thresholds more broadly, at the same time as it provides strong protection against retaliation when an employee chooses the internal path.” Lobel, *supra* note 14, at 51. Moreover, Lobel concludes that “[b]y emphasizing internal problem-solving over top-down government enforcement, the British approach of internal reporting sends a message of a culture of compliance that can be created and maintained within corporations.” *Id.*

86. VICKERS, *supra* note 67, at 158. Noting that this part of the Act is pro-employer the author suggests, “To a large extent [the statute is pro-employer] because if the concern turns out to be unfounded, no damage is likely to have been done to the external reputation of the organisation as the matter will have remained internal to it.” *Id.* at 157–58. According to Vickers:

The balance between the wider public interest in preventing wrongdoing, and the employer’s interest in protecting the internal reputation of staff and preventing the waste of staff time, is probably struck in the right place here. Protection is given to those with reasonable suspicions but not to those who just spread rumors.

Id. at 158.

87. Some legal scholars suggest that PIDA’s “good faith” standard might be a trap. Gobert and Punch allege: “Experience has shown that organisations are adept at getting back at those whom it regards as troublemakers Unsuspecting and naïve workers thus may be led down a turbulent path by PIDA that will result in considerable personal suffering, and perhaps to little avail.” Gobert & Punch, *supra* note 65, at 48–49.

88. ERA 1996 §§ 43B, 43C. Vickers surmises that:

The employee does not need to believe that the wrongdoing has definitely occurred, but does need to believe that the evidence suggests that it has. . . . The reporting of mere rumours is not protected, but an employee is enabled to report genuine concerns or suspicions without needing to wait for proof

VICKERS, *supra* note 67, at 157. “Good faith” refers to “an honest belief in the truth of an allegation.” Gobert & Punch, *supra* note 65, at 40. Yet, it might prove difficult to conceptualize “good faith” in a hearing, perhaps leading to decreased whistleblower action for fear that their motives might be questioned. *Id.* at 41. Interestingly, when an employee is reporting a violation of health and safety he need not be reporting in “good faith.” *Id.*

89. VICKERS, *supra* note 67, at 159; Vickers, *supra* note 60, at 436.

in the reasonable belief that the information disclosed and any allegations made are *substantially true*.⁹⁰

Specifically, the first type of external disclosure to an “authorized regulator”⁹¹ must meet this heightened standard of suspicion; a standard that ensures that regulatory bodies are not subjected to countless spurious claims, while guaranteeing that employees are not subjected to an adverse employment action for reporting misconduct that is clearly within the scope of the body’s regulatory and investigatory powers.⁹²

When making the second type of external disclosure to the media, the police, Members of Parliament (“MPs”), unions, or any other external body with an interest in the misconduct,⁹³ the whistleblower has to meet additional criteria, which effectively deter employees from making these wider disclosures.⁹⁴ To receive protection when making a wider disclosure, first, the employee’s allegations must have been made in good faith with a reasonable belief that they are true, *and* the disclosure must not be made for the purpose of personal gain.⁹⁵ Second, the employee must have first tried to raise the concern internally or with a prescribed regulatory body.⁹⁶ However, protection will still be granted without such a prior report if the employee reasonably believes that he will be victimized if he makes the disclosure internally, if he reasonably believes that evidence will be destroyed or concealed if raised internally, or if there is no regulatory body with whom to raise the concern. Finally, in addition to

90. VICKERS, *supra* note 67, at 162 (citing ERA 1996 § 43G(1)(b)). Elaborating on the requirements for external disclosure, Vickers contends, “External disclosure of a bare suspicion would not be protected; the worker must believe that the allegation is actually true, and have reasonable grounds for that belief. Supporting evidence is probably necessary.” *Id.*

91. Under the Public Disclosure Order 1999, specific regulatory bodies were mentioned including the Financial Services Authority, the Health and Safety Executive, and the Commissioners of the Inland Revenue, but this list is not exclusive nor exhaustive. Vickers, *supra* note 60, at 437 (citing the Public Interest Disclosure (Prescribed Persons) Order 1999 (SI 1999/1549)).

92. VICKERS, *supra* note 67, at 164.

93. Vickers, *supra* note 60, at 437 (citing ERA 1996 § 43G).

94. VICKERS, *supra* note 67, at 164. Section 43H requires that “[w]here the matter disclosed is of an exceptionally serious nature, PIDA removes most of the preconditions to protection, in recognition that the public interest can override most other interests.” *Id.* at 171 (citing ERA 1996 § 43H).

95. “Because the term ‘personal’ and not ‘pecuniary’ gain is used, Parliament may have envisaged other types of indirect benefits to the informant or his family in addition to direct cash payments” Gobert & Punch, *supra* note 65, at 44. This provision, however, is probably chiefly directed at “chequebook journalism.” VICKERS, *supra* note 67, at 165.

96. Gobert and Punch assert:

If the benefits of establishing internal whistleblowing procedures were not by now already apparent to employers, [PIDA] adds a further inducement to their creation by identifying compliance with internal procedures as one of the factors to be considered in evaluating the reasonableness of a whistleblower’s decision to go public.

Gobert & Punch, *supra* note 65, at 45 (footnote omitted).

meeting these requirements, the disclosure must be reasonable⁹⁷ under the circumstances.⁹⁸

Because of these strict requirements for wider disclosures, reports to the media will very rarely be protected under PIDA.⁹⁹

III. INTERNAL VS. EXTERNAL REPORTING: IS THERE “ONE RIGHT PATH”?

The chosen method of disclosure has a wide-ranging impact on the protection afforded and the institution’s response to the whistleblower and his report. There are costs and benefits to each method of reporting demonstrating that there is not “one right path” when blowing the whistle. Below I will delineate the reasons why an employee might choose to report internally versus externally.

A. *The Internal Report*

A whistleblower often speaks out to get his organization “back on track.”¹⁰⁰ Accordingly, most whistleblowers choose to report misconduct internally since they believe that this type of report will better target the ills of their workplace, and that this type of report will be less likely to end

97. Section 43(G)(3) specifically delineates factors that will be considered when deciding if an external disclosure should be protected under PIDA. These factors include the identity of the person to whom disclosure is made; the seriousness of the failure; whether the failure is continuing; whether disclosure is made in breach of a duty of confidence owed by the employer to another; whether an internal disclosure has been made and whether any action was taken by the employer or the relevant regulatory body; and, where there has been an initial internal disclosure, whether the worker had complied with internal whistleblowing procedures. ERA 1996 § 43(G)(3). Generally, the more serious the misconduct that is being reported, the more likely external reporting will be seen as reasonable. Vickers, *supra* note 60, at 438 (citing *Lion Laboratories Ltd. v. Evans*, [1985] 1 Q.B. 526). Vickers specified, “The decision on the reasonableness of external disclosure is really the only area of the PIDA that is open to the discretion of the tribunal or court . . . Other issues . . . could all be considered by a tribunal after it had given particular regard to the matters listed.” VICKERS, *supra* note 67, at 170.

98. *Id.* at 164–65 (citing ERA 1996 § 43(G)). Section 43(G) “reflects the concern that disclosures on a wider scale should not be justified too readily, because they are more likely to be damaging to the employer’s interests.” *Id.* at 165.

99. VICKERS, *supra* note 67, at 169.

100. Callahan & Dworkin, *supra* note 17, at 166. Thus, whistleblowing can be seen as a “pro-social act” of the employee. *Id.* However, Gobert and Punch noted that “[a]ny legal protection offered the whistleblower by PIDA may pale in comparison to the social pressures not to whistleblow.” *Id.* at 48. Generally, the main reason that whistleblowers have been unwilling to report misconduct is because they fear reprisal. Research “indicates that many employees who observe wrongdoing do not report it, that many of those who do so perceive employer retaliation, albeit of a comparatively mild variety, and that many of those who do not report wrongdoing attribute their unwillingness to speak out to the fear of retaliation.” Estlund, *supra* note 26, at 120.

in sanction.¹⁰¹ Employers also often prefer internal reports since these reports “prevent the negative publicity, investigations, and administrative and legal actions that usually ensue after external whistleblowing.”¹⁰² An internal report also allows the institution an opportunity to correct its misconduct earlier. Finally, an internal report allows the focus of the disclosure to be on the message as opposed to the messenger, further ensuring whistleblower anonymity and corporate efficiency in fixing the problem.¹⁰³

B. *The External Report*

Why, then, would a whistleblower ever report externally if an internal report is preferred by the whistleblower and his employer? Generally, research has shown that whistleblowers resort to external reporting only when employees believe that internal reports would be futile,¹⁰⁴ or when

101. *Id.* Summarizing the risk of reporting to the employees, Lobel notes:

[W]illingness 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, while the focus on internal processes is good governance.

Lobel, *supra* note 14, at 28.

102. Terry Morehead Dworkin & Janet P. Near, *Whistleblowing Statutes: Are They Working?*, 25 AM. BUS. L.J. 241, 242 (1987).

103. *Id.* Myers, in *Whistleblowing-The UK Experience*, often praised British law for emphasizing the message rather than the messenger. She thinks that focus on the messenger, e.g. *Time* magazine’s featuring three American whistleblowers as “Persons of the Year,” “can obfuscate and diminish the message.” Myers, *supra* note 56, at 117. See *supra* notes 1–2. The British approach to whistleblowing seeks to shift the focus of whistleblowing from the messenger to the message in order to “tak[e] the ‘heat out of’” whistleblowing. Richard Calland & Guy Dehn, *Conclusion: Whistleblowing Around the World*, in *WHISTLEBLOWING AROUND THE WORLD: LAW, CULTURE AND PRACTICE* 199, 201 (Richard Calland & Guy Dehn eds., 2004).

104. Lobel, *supra* note 14, at 49. This futility is “either because of the gravity and global involvement of the corporation or because previous attempts to report were ignored.” *Id.* Callahan & Dworkin, *supra* note 17, at 170–80 (discussing results of research on employees’ whistleblowing tendencies). Calland and Dehn succinctly summarize the balance sought by PIDA in protecting internal disclosures more vigorously:

At [PIDA’s] heart lies a core deal: that in return for the whistleblower making the disclosure internally first, the organisation will take the message seriously and not harm the messenger. When, in the absence of any guidance, whistles are blown externally first or concerns are not raised then unjustified harm can be done to the reputation of the organisation and those it serves. . . .

There are significant benefits for the organisation in a system in which the whistle is not, therefore, in the first instance blown externally and employees have an alternative to silence. The corresponding benefit for the employee is that the stakes are lower and that a calmer, less intimidating environment is available for him or her to make the disclosure. But this, in turn, is premised on the organisation not only taking whistleblowing seriously, but having

they believe that their employer's internal reporting procedure is inherently unfair.¹⁰⁵ Specifically, a whistleblower is likely to make an external report: (1) where the organization depends on the misconduct that is the subject of the disclosure;¹⁰⁶ (2) when the offender is a high-ranking employee in the organization;¹⁰⁷ and (3) where the workplace is known to be hostile to dissent.¹⁰⁸ Thus, since a whistleblower often has no choice but to report externally, despite the preference for internal reporting, a model whistleblower law would afford protection to both types of reports.

IV. FUSING THE AMERICAN AND BRITISH MODELS

I propose that fusing the American and British whistleblower protection models would most effectively balance the public interest and an employer's need to control his workplace, and would more appropriately protect internal and external reports than either model alone. First, a model whistleblower protection law would more closely resemble the United Kingdom's PIDA. As described above, American whistleblower protections emanate from myriad sources including statutes, tort law, and the Constitution, making the law, in itself, not uniform and hard to find. Moreover, the protections each American source affords the whistleblower are often dependent upon whether the employee is a private

sufficient commitment to the idea, with a longer term vision in mind, to re-shape the internal culture so as to reflect the new "common interest" that is expressed in [PIDA].

Calland & Dehn, *supra* note 103, at 201.

105. Lobel, *supra* note 14, at 49. Lobel contends, "When an internal reporting procedure is viewed as effective and fair by employees, employees are more likely to exercise individual dissent rather than opt for external reporting." *Id.* Underscoring this point, Callahan and Dworkin cited the philosopher Frederick Elliston who said that, "dedicated and highly principled employee[s] . . . will not embarrass the company by washing their [sic] dirty linen in public." Callahan & Dworkin, *supra* note 17, at 165 (quoting FREDERICK ELLISTON, JOHN KEENAN, PAULA LOCKHART & JANE VAN SCHAICK, WHISTLEBLOWING 135-38 (1985)).

106. Callahan & Dworkin, *supra* note 17, at 165.

107. *Id.* Examining the tendencies of the workplace, the authors assert that:

When a practice is questioned, there is commonly a tendency to respond with "retrospective rationality" and a marshalling of forces to justify the challenged decisions. The flow of information may be restricted, and there may be attempts to "kill the messenger." The wrongdoer's success in resisting change, suppressing information, and retaliating depends on his or her organizational influence. Thus, when the wrongdoing involves powerful individuals, the whistleblower is more likely to make disclosures to an external recipient, such as a reporter, who is perceived to have clout.

Id. at 165-66 (footnotes omitted).

108. *Id.* at 166. The authors continue, "[O]rganizations . . . may establish written policies favoring such communication, conduct surveys or internal audits, hire ombudspersons, or install hotlines or suggestion boxes. If there are few meaningful avenues for dissent, a history of retaliation, or both, employees will perceive that there is little utility in blowing the whistle internally." *Id.* at 166. This article also mentions two studies' empirical findings to support this data. *See id.* at 169-79.

sector or public sector employee. In contrast, the British model has one statute that covers all employees. A model law should have a single source of protection so that an employee can know where to look to see if his speech is protected.

Second, my proposed statute would adopt the American definition of “public concern”¹⁰⁹ and would protect disclosures made pursuant to it. Under the British model, i.e. PIDA, only six types of disclosures are afforded protection and there is no catch-all provision.¹¹⁰ A model law that adopts the broad American approach to what is a matter of public concern, would allow for greater judicial interpretation of the term, and thus would allow the definition to morph as values and mores change over time.

Third, my proposed model whistleblower law would explicitly announce its preference for internal or external reporting. I believe the best way to accomplish this goal would be to follow the tiered-disclosure regime of PIDA, but with some modifications. Internal reports should be given almost automatic protection. This preference for internal disclosure will not only diminish the incidence of reprisal against whistleblowers, but will also promote good corporate governance and ensure effective resolution of the reported misconduct.

While internal disclosures should be granted greater protection than external disclosures, a model law should have fewer preconditions to external disclosure protection than the British model. However, I would keep PIDA’s requirement that an external disclosure should be made with a reasonable belief that the allegations are substantially true, as this will weed out spurious claims. Similarly, PIDA’s requirement that the disclosure not be made for personal gain should be kept, since it will discourage whistleblowing for profit.

However, the two additional preconditions that exist under British law, that the report first be made internally and that the disclosure must be reasonable under the circumstances, should be incorporated into one precondition under the proposed model law. After an employee has made an allegation with a reasonable belief that it is substantially true, the employee’s report should be protected as long as it was reasonable to report it externally. The availability and plausibility of reporting the matter

109. Recall that the American approach either has broad and expansive terms or categories which define what a significant public interest or public concern is, as in the WPA, and that in constitutional cases courts weigh the employer’s interest in speaking on a matter of public concern against the employer’s interest in controlling his workplace.

110. Despite its flaws, scholars have noted that PIDA has started a “quiet revolution.” Calland & Dehn, *supra* note 103, at 202. According to Myers, a survey in 2002 discovered that half of the randomly selected employers had a whistleblowing policy in place. Myers, *supra* note 56, at 114.

internally can easily be incorporated into this reasonableness test.¹¹¹ Moreover, this more loosely defined precondition will eliminate some of the technical aspects of the British model, allowing for easier compliance with the law and less deterrence of good faith whistleblowers.

Finally, under a model law, wider disclosures to the media should be treated completely differently. A model law should allow for disclosure to the media, but only if an internal report and an external report have proven to be ineffective. This type of proposed provision accounts for the American and British distaste for wider disclosure and ensures that an organization's dirty laundry will not be broadcasted too hastily, while still allowing the media to check ineffective corporate governance.

I acknowledge that there are several arguments against my proposed fusion model law. Mainly, one could argue that this type of model would create conflict of law issues,¹¹² that it might be too cumbersome,¹¹³ and that its definition of "public concern" would be overly broad.¹¹⁴ While these are valid arguments, I propose that the benefits of the proposed model law would far outweigh any of these costs.¹¹⁵

V. CONCLUSION

As this Note demonstrates, the American and British models of whistleblower law are very different with respect to what they protect, how they protect it, and the preferred avenue of reporting. While each system has beneficial elements, the American and British models each

111. PIDA actually looks twice to whether the report could have been made internally, once as a second precondition, and once as it relates to reasonableness. *See* Vickers, *supra* note 60, and Gobert & Punch, *supra* note 96.

112. Perhaps the reason why the United States has not enacted a model like the one I have proposed here is because of potential conflict of law issues. A uniform statute like the one proposed would conflict with the countless whistleblower statutes and common law doctrines that have been discussed. Perhaps the best solution to this problem would be to include in my proposed model law a provision which states that "this law supersedes any prior whistleblower law," thus mitigating any potential conflicts.

113. As mentioned previously, scholars have noted that British employees who attempt to employ PIDA are often confused regarding what actions they should take. Vickers noted that the statute was almost impossible for an employee to traverse without the aid of a lawyer. *See supra* note 82. However, while a procedure-laden doctrine might be procedurally difficult, it can be no more difficult than interpreting America's current "patchwork" of protections.

114. While this open-endedness might be criticized as providing little to no guidance to whistleblowers regarding what disclosures are protected, the trade-off of having a defined set of protected disclosures would prove to be far more unworkable and deleterious to the public interest. The definition of what is in the public interest or what is a public concern must be able to change over time or else the law will not adequately protect whistleblowers down the line.

115. *See supra* notes 112–14 for my responses to the proposed counter-arguments.

have flaws. A combination of the two models would better serve to protect the whistleblower, which should be a greater priority.

Applying the aforementioned changes to American and British whistleblower law, as proposed in my model law, will mitigate the harmful aspects of America's patchwork and Britain's technical statute, and will achieve the right balance of protection for both internal and external reporting. While my proposed model law does not suggest "one right path," it offers a more appropriate roadmap for whistleblower protection. The procedural signposts and the protection afforded to internal and external reports in my model law will better ensure that a whistleblower will not find herself at a dead end when choosing her avenue of reporting.

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