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WHISTLEBLOWERS: CORPORATE ANARCHISTS OR HEROES? TOWARDS A JUDICIAL PERSPECTIVE

David Culp

This article explores the whistleblower's plight. Inside the corporation, everyone, or almost everyone, hates them. They are reviled by corporate management and shunned by co-workers. This article examines whether the legal system adequately protects whistleblowers and delineates the direction the law should take to safeguard them while at the same time protect companies against malicious or bad faith actions by disgruntled employees.

I. THE CHALLENGER LAUNCH - DISASTER IN THE EMERALD CITY

We all know the story. On January 28, 1986, in sub-freezing weather, the space shuttle Challenger began its lift-off from the Kennedy Space Center and exploded just seventy-three seconds into its flight, killing all seven astronauts trapped inside the inferno. The Rogers Commission, formed to investigate the disaster, concluded that the explosion occurred due to the seal failure of a solid rocket booster joint. The death of the astronauts should never have happened. Morton Thiokol, Inc. ("Morton Thiokol"), the company that manufactured solid fuel rocket boosters for the space shuttle program including those used on the Challenger, had previously warned the National Aeronautics and...
Space Administration ("NASA") of the dangers of a cold weather launch.\(^5\) Data from previous launches indicated that the rubbery O-rings designed to seal the boosters' segments lost their resiliency with a decrease in temperature. At low temperatures, the rings could lose so much resiliency that one could fail to seal properly causing a mid-flight shuttle explosion.\(^6\) On January 28, 1986, due to sub-freezing temperatures, an O-ring on the Challenger did not seal properly, releasing gases from the burning fuel propellant.\(^7\) Moments later the Challenger exploded in mid-takeoff, and seven lives were lost.\(^8\)

Engineers at Morton Thiokol knew the danger of O-rings failing to seal properly in cold weather flights. In July of 1985, six months prior to the Challenger disaster, Roger Boisjoly, an engineer and Senior Scientist at Morton Thiokol with over 25 years of experience and an acknowledged rocket seal expert,\(^9\) wrote a memorandum to his superiors expressing extreme urgency and concern that unless the solid rocket booster joints were redesigned, a space shuttle disaster involving the loss of human life could result.\(^10\)

Although Morton Thiokol did form a "Seal Erosion Task Force" to investigate the reasons for O-ring failure, the booster joints were never redesigned.\(^11\) By January 1986, Thiokol's engineers "had become particularly concerned [because] it was evident that the behavior of the rubber O-ring material could not be accurately predicted when temperatures dropped below thirty degrees."\(^12\) The ideal temperature to ensure O-ring integrity was fifty degrees.\(^13\)

On the night of January 27, 1986, as the Space Shuttle Challenger sat on its launch pad in sub-freezing weather, NASA officials conferred in teleconferences with Morton Thiokol managers regarding the safety of the launch the following morning.\(^14\) The forecast for the lift-off was eighteen degrees.\(^15\) Boisjoly and other engineers argued against the
launch, presenting thirteen charts and other evidence from previous space flights to show the effects of primary O-ring erosion and the difficulty in maintaining a reliable secondary seal as the temperatures dropped.\(^6\)

Initially, two Morton Thiokol vice-presidents supported their engineers and recommended that the launch be aborted.\(^7\) NASA officials, however, began pressuring Morton Thiokol management to recommend launching the Challenger. George Hardy, Deputy Director of Science and Engineering at NASA’s Marshall Space Flight Center, stated that he was “appalled” at the recommendation not to launch.\(^8\)

Sensing an attempt would be made to overturn the no-launch decision, Boisjoly again argued of the dangers of a cold weather launch, displaying photos of compromised joints from previous flights.\(^9\)

Despite the efforts of Boisjoly and other engineers, four Morton Thiokol vice-presidents, including the two who had initially recommended against the launch, met briefly and voted unanimously to support the launch.\(^10\) The decision to launch so upset Boisjoly that he returned to his office and made the following entry in his journal: “I sincerely hope this launch does not result in a catastrophe.”\(^11\)

On the morning of January 28, 1986, in sub-freezing weather, the Space Shuttle Challenger burst into flames shortly after lift-off and exploded.\(^12\) After the disaster, project supervisor Allen McDonald and Boisjoly “blew the whistle” on Morton Thiokol and testified before the Rogers Commission about their protestations against the launch.\(^13\)

During interviews with two members of the Rogers Commission, Boisjoly turned over his memoranda and activity reports concerning the launch and O-ring integrity.\(^14\) Almost immediately thereafter, Morton Thiokol reorganized its booster design operations and placed McDonald, Boisjoly, and others involved in the O-ring project out of direct contact with NASA.\(^15\) Although no engineer had been fired nor demoted, this was a realignment of retaliatory proportions.\(^16\)

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16. Boisjoly, supra note 2, at 221.
17. Those being Joel C. Kilminster, Vice President of Space Booster Programs and R.K. (Bob) Lund, Vice President of Engineering. Boisjoly, supra note 2, at 221.
18. Boisjoly, supra note 2, at 221.
20. Boisjoly, supra note 2, at 221-22.
22. Werhane, supra note 4, at 607.
23. Werhane, supra note 4, at 606.
24. Boisjoly, supra note 2, at 223.
25. Werhane, supra note 4, at 606-07.
26. See Boisjoly, supra note 2, at 223; Werhane, supra note 4, at 606-07.
Prior to testifying in a closed session before the Rogers Commission, Boisjoly was chastised by Ed Garrison, President of Aerospace Operations for Morton Thiokol, for “airing the company’s dirty laundry” by giving his memos to the Commission. At the hearing, Boisjoly testified about his change in job responsibilities. This testimony prompted a sharp response from Commission Chairman Rogers who rebuked Thiokol management:

> [I]f it appears that you’re punishing the two people or at least two of the people who are right about the decision and objected to the launch . . . and then they’re demoted or feel that they are being retaliated against, that is a very serious matter. It would seem to me . . . they should be promoted, not demoted or pushed aside.

Nevertheless, despite the Commissioner’s rebuke, according to Boisjoly, on May 16, 1986, the CEO of Morton Thiokol told McDonald and Boisjoly that the company was doing “just fine” until they testified about their job reassignments.

Although Congressional pressure eventually led to the restoration of both McDonald and Boisjoly to their former assignments, a major rift had developed within the corporation. Some co-workers believed Boisjoly’s testimony had hurt the company’s image, and co-workers sometimes described those who protested against the launch as “lepers.” Boisjoly and the others had become pariahs. Boisjoly’s emotional anguish following the Challenger disaster and its aftermath became so great that he eventually requested long-term disability leave for stress-related conditions.

II. THE WHISTLEBLOWER’S PLIGHT

The experiences of Boisjoly and McDonald as whistleblowers are not unique. Reviled by management and shunned by co-workers,

27. Boisjoly, supra note 2, at 223.
28. Boisjoly, supra note 2, at 223.
29. Boisjoly, supra note 2, at 223.
30. Boisjoly, supra note 2, at 223.
31. Boisjoly, supra note 2, at 223.
32. Boisjoly, supra note 2, at 223.
33. Boisjoly, supra note 2, at 223.
35. Id.; see also Boisjoly, supra note 2, at 223.
Whistleblowers face a lonely existence. "[T]he history of whistleblowers...is that most...have been fired, blackballed from their industry or profession, and have suffered personal problems." In fighting the retaliatory acts of their employers, they have incurred tremendous legal expenses which, when coupled with the loss of earnings resulting from termination, have resulted in disastrous financial consequences. Many whistleblowers have lost their homes and marriages as a direct result of their concern for the public health and welfare. A recent study of eighty-four whistleblowers revealed that 82% experienced harassment after blowing the whistle, 60% were fired, 17% lost their homes, and 10% admitted to attempted suicide.

There is no shortage of stories to confirm as a general rule that the whistleblower's fate has been rather bleak. Whether an individual is a coal miner or a noted scientist, the consequences of blowing the whistle can be equally disastrous. The experiences of Darla Baker and Judith Watts are examples of the consequences of whistleblowing.

Darla Baker, a West Virginia coal miner, accused her company of condoning sexual harassment at the worksite. After making her complaint, Ms. Baker was subjected to a vicious attack on her moral character and an inquisition into her sexual behavior by the coal company's defense counsel. Although the case was eventually settled in her favor, Baker's marriage deteriorated during the trial and she believes she was blackballed from the industry. Reflecting on the incident, Baker doubts that she would be as heroic in the future, given the outcome of this experience.

Judith Watts was a supervisor at the Department of Finance in New Orleans when she uncovered a scheme in which many local businesses gave kickbacks to politicians and bureaucrats in exchange for overlooking the collection of taxes. Watts attempted to pursue this matter

36. Werhane, supra note 4, at 615.
39. Id. at 18.
40. Dumas, supra note 37, at 67.
41. Dumas, supra note 37, at 67.
42. Dumas, supra note 37, at 67. Ms. Baker believed this because she was unable to find work in any other mines, even those where the "quota" of women had not been fulfilled. Dumas, supra note 37, at 67.
43. Dumas, supra note 37, at 67. Ms. Baker stated "[I]t would depend on the circumstances. It changed my life so drastically, that, well, I just don't know." Dumas, supra note 37, at 67.
44. Dumas, supra note 37, at 62.
through the proper internal channels and was rebuffed by her superiors.45 Watts’ supervisors told her to overlook these improprieties because no action was to be taken against certain companies that had lent support to the local administration.46 With internal channels closed, Watts turned her information over to the Federal Bureau of Investigation (“FBI”).47 Months later, this information was published in the newspaper and “all hell broke loose” for Watts.48 The publication of this information brought about her termination and what this author believes was a “trumped-up” grand jury proceeding, in which all charges were subsequently dropped.49 Although she was later reinstated, Watts was reassigned to a position “out of the loop,”50 just as McDonald and Boisjoly were given reassignments “out of the loop” with NASA.51 Watts subsequently resigned after her reassignment.52

There are numerous other accounts of the whistleblower’s plight.53 Stated simply, whistleblowers are considered disloyal to their companies and treated as outcasts by fellow employees. This author recently settled a whistleblower case in the nuclear industry in which the employee

45. Dumas, supra note 37, at 64.
46. Dumas, supra note 37, at 63-64.
47. Dumas, supra note 37, at 63-64.
48. Dumas, supra note 37, at 64.
49. Dumas, supra note 37, at 64.
50. Dumas, supra note 37, at 64.
51. Werhane, supra note 4, at 606-07.
52. Dumas, supra note 37, at 64; see also Leonard J. Brooks, Whistleblowers ... Learn to Love Them, 20 CANADIAN BUS. REV. 19 (Summer 1993). At that time Watts unsuccessfully ran for city council of New Orleans. Dumas, supra note 37, at 64. Watts is now working in the federal government at the Small Business Administration, in Washington D.C. Dumas, supra note 37, at 64.
53. For example, Dr. Richard Walker, a noted scientist with a Ph.D. in physics and nearly 20 years of experience working at A.T.& T.’s prestigious Bell Laboratories, experienced the penalty of being a whistleblower. In 1971, Walker was the head of a team working on a high-level project for the U.S. Navy, when he discovered significant miscalculations in the computer projections run by Bell Labs. Brooks, supra note 52, at 21. He gave this information to his immediate supervisor, suggesting that the Navy be informed about the problem. His supervisor refused. Brooks, supra note 52, at 21. Walker subsequently held a corporate seminar inside the company in which he pointed out the flaws in the project and implied that he felt it was wrong to withhold this kind of information. Brooks, supra note 52, at 21. Although Walker thought his message had been well-received within the company, he was soon transferred to another area at his supervisor’s request, with the Company citing his alleged incompetence as the reason for the transfer. Brooks, supra note 52, at 21. He was relegated to increasingly more mundane assignments until he was fired in 1979 for allegedly showing little interest in his work. Brooks, supra note 52, at 21. Walker responded by bringing suit in 1982 and after spending $50,000 of his own money in legal fees, and losing his wife, children, and home in a divorce, his case came to trial in 1987. Brooks, supra note 52, at 21. It was promptly dismissed by the trial judge, who cited a lack of evidence to support Walker’s allegations. Brooks, supra note 52, at 21.
repeatedly raised safety concerns at the power plant where he worked.\textsuperscript{54} In fact, his responsibilities involved reviewing the work of others to determine whether their work raised safety concerns. Management treated this employee with great disdain. He claimed that one of his supervisors had called him a “bastard.” He also stated that a colleague with whom he was friends said he did not want to be seen walking to the parking lot with him for fear that management would see them together.

My client gave no moral quarter to management. He did not believe in the “loyalty-to-his-company-at-all-costs” approach to his work. His loyalty was to what he believed was a higher morality. In seemingly being disloyal to his company, he sought to protect the rights and safety of the public. Oddly enough, in so doing, he may have been more loyal to the long-range viability of the company than all those corporate employees who turn their heads when wrongdoing occurs.

Unfortunately, a deep sense of institutional loyalty (as well as fear of retribution for blowing the whistle) lies within the heart of most employees, thus making them fiercely loyal to government agencies and private corporations, even in the face of damaging evidence of wrongdoing, and at the expense of their more altruistic co-workers.\textsuperscript{55} As a result, rather than being viewed with admiration by their peers, whistleblowers are treated with scorn and disdain and are often rewarded with labels such as “snitch,” “rat,” and “tattle-tale.”\textsuperscript{56} This is not to say that all whistleblowers should be viewed as heroes or knights in shining armor. Some may be ill-informed, meddlesome, troublemakers or ill-motivated and vindictive.\textsuperscript{57} The purpose of this article, therefore, is to design a

\textsuperscript{54} The name of the employee, as well as the name of the company, cannot be disclosed pursuant to a Settlement Agreement reached between the parties, as there is a confidentiality provision regarding both the facts of his case and the terms of the settlement reached. The confidentiality provisions, as well as the entire settlement, have been adopted by the Secretary of Labor and embodied in the Order of the Secretary.

\textsuperscript{55} See Joan Corbo, Note, Kraus v. New Rochelle Hospital Medical Center: Are Whistleblowers Finally Getting the Protection They Need? 12 Hofstra Lab. L.J. 141 (1994).

\textsuperscript{56} Brooks, supra note 52, at 19.

\textsuperscript{57} In the federal sector, the plight of the federal government whistleblower was delineated during Congressional hearings on the Whistleblower Protection Act of 1989. Pub. L. No. 101-12, 103 Stat. 16 (codified at 5 U.S.C. §1213 (1994)). Although the Civil Service Reform Act of 1978 had been in existence for 12 years and supposedly provided protection for federal whistleblowers, Congress still noted the need for subsequent legislation to provide greater protection. 135 Cong. Rec. S2786-88 (daily ed. March 16, 1989). In discussing the need for passage of the Whistleblower Protection Act of 1989, Senator Cohen noted that for too many years now, Federal employee whistleblowers had been treated shabbily. Too many have paid a personal price for the millions of dollars they have saved the Government. They have lost their jobs, had promising careers derailed or forfeited promotions as the price for exposing wasteful spending, illegal activity, or hazardous condi-
design a judicial approach that separates the chaff from the wheat, that protects companies from needless degradation of their reputations and products, and at the same time protects the whistleblower who has something to whistle about.

III. LEGAL STATUS OF THE WHISTLEBLOWER

The judicial approach to whistleblower issues has been mixed.\(^{58}\) Throughout our history, the states have traditionally adhered to an "at will" employment doctrine, whereby the employer and employee can terminate the employment relationship at any time, for any reason or for no reason, unless the employment contract provides otherwise.\(^{59}\) Over time, courts have tempered the severity of this rule by carving out limited exceptions to the "at will" doctrine.\(^{60}\) Courts delineated instances in which the "policy" of the state dictated that the "at will"
employment rule should not be followed. Thus, many states held that
an employer could not terminate an employee for refusing to perform an
illegal act for the employer. Many states have also held that an
employer could not discharge an employee for exercising a statutory
right, such as filing a worker’s compensation claim, and could not
terminate an employee for the employer’s complying with a statutory
duty, such as for obeying a subpoena to testify at a hearing or for serving
jury duty.

States carved out these limited exceptions for the “at will” employee
on the basis that the public policy of the state clearly called for such an
exception. Whistleblowers, however, were generally left unprotected
under these public policy exceptions. For example, in 1974, the Penn-
sylvania Supreme Court in Geary v. United States Steel Corp. held
that whistleblowers should not be protected from dismissal. George
Geary was a salesman employed by the United States Steel Corpora-
tion. After fourteen years of exemplary employment, the company
dismissed Geary after he alerted its officials that the tubular product he
was directed to sell to the oil and gas industry was unsafe. In his
complaint, Geary alleged that the product had not been adequately tested
and constituted a serious danger to anyone who used it. He told his
supervisors about his misgivings but was ordered to “follow direc-
tions.” Nevertheless, he continued to express his reservations, and at
one point spoke to a vice-president in charge of the sale of the prod-
uct. In the complaint, he alleged that the product was thereafter

61. E.g., Howard v. Dorr Woolen Co., 414 A.2d 1273 (N.H. 1980) (holding that under Monge
v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974), a discharge due to age or sickness does not
constitute a valid claim warranting recovery for breach of contract). The Howard court interpreted
Monge to apply “only to a situation where an employee is discharged because he performed an act
that public policy would encourage, or refused to that which public
policy would condemn.” Howard, 414 A.2d at 1274; see also Ness v. Hocks, 536 P.2d 512 (Or. 1975) (employee discharged
for accepting jury duty was entitled to recovery of compensatory damages since, under certain
circumstances, an employer which discharges an employee for a socially undesirable motive is
responsible for any injury caused).
62. See, e.g., Sterling Drug, 795 S.W.2d at 383-84.
63. Id. at 384.
64. Id.
65. Id. at 383.
67. Id. at 180.
68. Id. at 175.
69. Id.
70. Id.
71. Id.
72. Id.
reevaluated and withdrawn from the market. For his efforts on behalf of the Company, George Geary was terminated.

The trial court dismissed the complaint, and on appeal the Pennsylvania Supreme Court affirmed. The Supreme court noted that Geary had raised the question as to "whether the time had come to impose judicial restrictions on an employer's power of discharge." The answer from the six-member majority was a resounding "no." The court held that despite Geary's praiseworthy motives, the company had a legitimate interest in "preserving its normal operational procedures from disruption." The Pennsylvania Supreme Court held that George Geary could be fired because he had bypassed his immediate superiors and had taken his case to a company vice-president. "The most natural inference from the chain of events...is that Geary made a nuisance of himself, and the company discharged him to preserve administrative order in its own house." In addition, the majority argued that Geary was not an expert on product safety and was only involved in the sale of company products. "There is no suggestion that he possessed any expert qualifications, or that his duties extended to making judgments in matters of product safety." I believe that the court's rationale is similar to Freddy Prinze's comedy routine of the 1970s: "It ain't my job."

Whether Geary was correct in his assessment of the danger to consumers was irrelevant to the six-member majority. The majority also noted its concern over the "possible impact of such suits on the legitimate interest of employers in hiring and retaining the best personnel available."

The dissent argued that Geary was a responsible employee whose

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73. Id.
74. Id.
75. Id. at 175.
76. Id. at 176.
77. Id. at 176-80.
78. Id. at 180.
79. Id. at 179.
80. Id. at 178.
81. Id. at 178-79.
82. Id. at 179.
83. Prinze frequently appeared on national television in the 1970s and his most popular routine involved witnessing a variety of catastrophes to which his response consisted merely of the light-hearted utterance, "it ain't my job." Prinze was most well-known for his role in the popular network series "Chico and the Man," before he committed suicide in 1977.
85. Id. at 179.
discharge was "arbitrary and retaliatory." 86 His suggestion that the unsafe steel pipe be withdrawn from the market to protect both the public from danger and his employer from liability was in complete harmony with his employer's best interest. 87 Moreover, not only would the sale of a defective product subject his employer to liability, it also exposed Geary to civil liability. 88 The dissent argued that Geary was a loyal employee, 89 and noted that "had Geary not informed his superiors of the defective product, he may well have been discharged for his failure to do so." 90 The dissenter succinctly argued that the "manufacture and distribution of defective and potentially dangerous products [do] not serve either the public's or the employer's interest." 91

In addition to the issues the dissent raised, two other points also deserve mention. First, Geary did not (as the majority concludes) bypass the internal administrative order of the company. On the contrary, he first notified his supervisor of the dangerousness of the product, and only after his complaint fell on deaf ears did he escalate his concern to a vice-president of the company. 92 Thus, Geary did not seek to take his concern for the product's safety outside the confines of the company but rather handled the matter internally. Second, that Geary was not an expert in product safety is irrelevant. The question should be whether he had reasonable grounds to believe that the product was dangerous and not what his job description was.

Over twenty years later, the 1974 Geary decision continues to accurately delineate the state of Pennsylvania's private sector law. Although Pennsylvania has recently enacted legislation protecting whistleblowers in the public sector, 93 many states offer no protection to the whistleblower in either the public or private employment sectors. Nevertheless, during the last twenty years there has been some movement in the law to protect whistleblowers. One court described this movement as the "wave of the future." 94

86. Id. at 180-81.
87. Id. at 181.
88. Id.
89. Id.
90. Id.
91. Id. at 181.
92. Id. at 179 n.14.
The federal government has fared better at protecting whistleblowers than the states. Several federal statutes protect the whistleblower in exposing health and safety concerns. These statutes include the Energy Reorganization Act, which protects employees in the nuclear industry from discrimination and retaliation after notifying an employer of an alleged violation of the Act; the Clean Air Act, which protects employees who initiate or participate in proceedings under the Act; the Hazardous Substances Release Act, which protects employees who provide information to the government, file charges, or testify at proceedings; the Safe Drinking Water Act, which protects employees who institute, testify at, or participate in proceedings under the Act; the Solid Waste Disposal Act, which prohibits employers from using compliance with the Act as a justification for plant closings or layoffs, in addition to protecting employees who institute or participate in proceedings under the Act; the Water Pollution Prevention and Control Act and the Toxic Substances Control Act, both of which protect employees who institute or testify at proceedings under these Acts.

In addition to these federal statutes, which either provide protection to employees within specific industries, such as the nuclear field, or protection for specific types of whistleblowing, such as in the area of environmental safety, Congress also attempted to provide general protection for federal whistleblowers with the passage of the Civil Service Reform Act of 1978 ("CSRA"). CSRA protects federal workers from reprisal for reporting waste, fraud, and abuse in the federal sector. As Professor Fisher noted in his article on the federal

96. Id. § 5851(a)(1)(A)-(F).
98. Id. § 7622(a)(1)-(3).
100. Id. § 9610(a).
102. Id. § 300j-9(i)(1)(A)-(C).
104. Id. § 6971(a).
105. Id. § 6971(e).
whistleblower, the areas in which the federal law protects whistleblowers include “violations of any law, rule, or regulation; mismanagement; gross waste of funds; abuses of authority; or substantial and specific danger to public health and safety.” In 1989, Congress sought to strengthen the protection afforded to federal whistleblowers by amending CSRA with the passage of the Whistleblower Protection Act of 1989. One of the changes was to amend the standard reporting requirements for CSRA claims. As Professor Fisher explains, the Federal Whistleblower Protection Act is not complete because certain federal agencies are exempt from coverage such as the FBI, the Central Intelligence Agency (“CIA”), the Defense Intelligence Agency, the National Security Agency, and the General Accounting Office. The federal act, therefore, enables some agencies to cover up their misconduct and abuse. Government corporations, such as the Resolution Trust Corporation involved in the Savings and Loan bailout, are also exempt from coverage under the Act.

Congress’ exclusion of particular agencies from the Federal

112. Id. at 375-76.
114. See Fisher, supra note 111, at 380-92; see also Fisher, supra note 111, at 397-407 (discussing other changes in the federal law).
115. Fisher, supra note 111, at 407-08.
116. Fisher, supra note 111, at 408.
117. Fisher, supra note 111, at 408-09.
Whistleblower’s Protection Act is questionable. The effect that these agencies can have on the moral well-being or malevolence of the country seems astronomical, as examples from Richard Nixon’s Presidency so clearly indicate. For instance, the release of Nixon’s infamous White House tapes reveal Nixon’s misuse of such federal agencies as the CIA and the Internal Revenue Service ("IRS"). In 1991, the release of sixty additional hours of White House tapes “came as a timely reminder,” wrote Margaret Carlson of Time magazine, that Nixon is “an unindicted co-conspirator who is lucky to have escaped prison.” Listen to any random conversation on the tapes, Carlson wrote, and “the mask of respectable elder statesman melts away to reveal a deceitful, lowbrow, vindictive character, dangerously armed with the full power of the IRS, FBI, and CIA, and all too willing to use it.” Thus, Nixon orders that his political enemies be audited: “‘We have to do it artfully so that we don’t create an issue by abusing the IRS politically,’ says Nixon, warming to the subject. And there are ways to do it. Goddam it, sneak in in the middle of the night.” At one point in the tapes, Nixon also spoke of “sacking IRS Commissioner Johnnie Walters for refusing to harass Nixon’s enemies: ‘Kick Walter’s ass out first, and get a man in there.’”

It is not in the country’s best interests to exclude the FBI, CIA, or General Accounting Office from the Federal Whistleblower Protection Act. All that is being asked is that these agencies follow the law and not engage in malfeasance. It is not an adequate reply to this premise to say that Nixon was a maverick President whose malfeasance perhaps exceeds other Presidencies. To so argue misses the point. If and when federal agencies engage in serious wrongdoing, a whistleblower should be protected from retaliation or firing, as the actions of the whistleblower

118. See Margaret Carlson, Watergate Revisited: Notes from Underground, Time, June 17, 1991, at 27 (discussing the release of taped conversations of former President Nixon in the Oval Office in 1974). In 1991, 60 additional hours of tapes were released which had heretofore “languished for nearly two decades in the National Archives while Nixon lawyers and the government argued how to release them.” Id. The tapes show “how coarse and ruthless a man” Nixon was. Id. “At one point he enthuses over a suggestion to recruit ‘eight thugs’ from the Teamsters Union — ‘murderers’ to gang up on peace protestors” against the Vietnam War. Id. “‘They’ve got guys who will go in and knock their heads off,” says Nixon.” Id. “‘Sure,’ adds [Bob] Haldeman [Nixon’s Chief of Staff], ‘Beat the s-- out of some of these people.’”) Id.

119. Id.
120. Id.
121. Id.
122. Id.
123. Id.
are serving to protect the public and the integrity of the agency for whom that whistleblower works.125

There are other structural weaknesses in the Federal Whistleblower Protection Act. For example, one provision turns over the investigation and report writing in response to the whistleblower's allegations to the very agency on which the whistle was blown.126 Moreover, even with the passage of the CSRA and the amendments to that Act in the Federal Whistleblower Protection Act, federal employees remain concerned about reprisals for reporting mismanagement and abuse.127 A survey of federal employees confirmed that the "fear of reprisal for reporting misconduct continues to be a concern for many federal employees."128

Although perhaps not perfect, the federal law has made significant strides to protect whistleblowers in federal agencies. In addition to the movement in the federal sector, many states also provide some protection for whistleblowers. Most of this protection has been provided through state legislation.129 In the absence of such legislation, state courts have been reluctant to create a public policy exception to the "at will" employment doctrine for whistleblowers,130 even where the whistleblower complains only internally and there exists a substantial risk of harm to the public due to the company's actions. Some states however, such as Massachusetts, have modified the common law "at will" employment doctrine to protect whistleblowers.

In Sullivan v. Massachusetts Mutual Life Insurance Co.,131 a federal district court determined that, under Massachusetts law, whistleblowers are protected.132 In Sullivan, the plaintiff had been hired by the defendant company as an assistant securities analyst.133 He stated that during his employment, he "became concerned that he would be subject to liability for possible insider trading violations at his job" with the defendant.134 The plaintiff repeatedly expressed these concerns to his superiors.135 He also acknowledged that he had very

125. Fisher, supra note 111, at 415.
128. Id.
129. See infra text accompanying notes 150-64.
130. See infra text accompanying notes 150-64.
132. Id.
133. Id. at 718.
134. Id. at 720.
135. Id. at 720.
little expertise in insider trading.\textsuperscript{136} His superiors instructed him to cease discussion of the issue with them and not to discuss the issue with anyone outside of the department.\textsuperscript{137} The plaintiff was told "that if he persisted in pursuing the matter, he would be 'out the door.'"\textsuperscript{138} He subsequently received a bad performance evaluation and was fired.\textsuperscript{139} At the oral argument on defendant's motion for summary judgment, the plaintiff acknowledged that he would not be able to prove that the defendant had actually violated the securities law.\textsuperscript{140} Nevertheless, the district court held that under the common law of Massachusetts, the plaintiff was a protected whistleblower, provided he could show that he was fired for raising the potential securities violations internally with the company.\textsuperscript{141}

The court delineated very expansive protection for whistleblowers.\textsuperscript{142} The defendant argued that the plaintiff should not be a protected whistleblower since the whistleblowing activity in which he was engaged did not involve an issue of public health or safety. The court disagreed,\textsuperscript{143} holding that "while many whistleblowing cases do concern health and safety, the cases themselves do not purport to state such a limitation."\textsuperscript{144} The defendant also argued that the plaintiff should not be a protected whistleblower since he had not reported the suspected securities violation to the authorities.\textsuperscript{145} Again, the court disagreed with the defendant, stating that a rule permitting the employer to fire a whistleblower with impunity before the employee contacted the authorities would encourage employers promptly to discharge employees who bring complaints to their attention.\textsuperscript{146} In addition, such a rule would give employees an incentive to bypass management and go directly to the authorities.\textsuperscript{147} Such a rule would, in turn, deprive management of the opportunity to correct oversights or wrongdoing on its own.\textsuperscript{148} As the court noted, "a contrary rule would be needless pub-

\begin{itemize}
\item \textsuperscript{136} Id.
\item \textsuperscript{137} Id.
\item \textsuperscript{138} Id.
\item \textsuperscript{139} Id. at 721.
\item \textsuperscript{140} Id.
\item \textsuperscript{141} Id. at 723.
\item \textsuperscript{142} Id. at 723-26.
\item \textsuperscript{143} Id. at 723-24.
\item \textsuperscript{144} Id. at 724.
\item \textsuperscript{145} Id.
\item \textsuperscript{146} Id. at 724-25.
\item \textsuperscript{147} Id. at 725.
\item \textsuperscript{148} Id.
\end{itemize}
lic investigations of matters best addressed internally in the first instance."\textsuperscript{149}

The \textit{Sullivan} court held that a whistleblower should be protected if he is discharged for reporting suspected violations of the law, where the belief is reasonable and in good faith.\textsuperscript{150} The court reasoned that "a standard of reasonable belief encourages a whistleblower to come forward, rather than remain silent out of fear that he might be wrong."\textsuperscript{151} The court noted that although some states have statutes which protect whistleblowers, in Massachusetts, "the employees' whistleblowing rights are now largely the product of evolving common law."\textsuperscript{152}

The Massachusetts approach seems to have much to offer where the whistleblower is merely raising concerns internally within his/her company and is acting in good faith. After all, raising an employee's concerns within the company does not damage the public reputation of that company, nor does it detrimentally affect the sale of the company's products. Instead, such an "open-door" management policy encourages employees, without fear of retribution, to raise issues of moral concern with the company. This, in turn, may be beneficial to the company in the long run. In \textit{Sullivan}, the plaintiff may have been misguided in his concern about insider trading violations, but if he was acting in good faith, there was virtually no harm to the company. Open communication between management and employees should be encouraged, not discouraged.

Another state that has judicially carved out an exception to the "at will" employment doctrine is Kansas. In \textit{Stuart v. Beech Aircraft Corp.},\textsuperscript{153} the federal district court noted that in 1988 the Kansas Supreme Court in \textit{Palmer v. Brown} had extended the tort of retaliatory discharge to cases involving "whistleblowing."\textsuperscript{154} The \textit{Palmer} court outlined the parameters of the Kansas law, holding that public policy requires citizens to be protected from reprisals for reporting serious infractions of rules, regulations, or the law pertaining to public health, safety, and the general welfare.\textsuperscript{155} In order to recover for wrongful discharge, the whistleblower must prove, by clear and convincing evidence, that a reasonably prudent person would have concluded that the

\textsuperscript{149} Id. at 725.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id. at 726.
\textsuperscript{154} Id. at 324 (quoting Palmer v. Brown, 752 P.2d 685, 689-90 (Kan. 1988)).
\textsuperscript{155} Palmer, 752 P.2d at 689.
employer was engaged in activities in violation of the law. The report must also be "done out of a good faith concern over the wrongful activity reported rather than from a corrupt motive such as malice, spite, jealousy, or personal gain." The court further held that a whistleblower was protected whether he reported the infraction "to either company management or law enforcement officials." In delineating its whistleblower rule, the Kansas court infused elements into that rule that many other courts have not. Most notably, the Kansas judiciary has established that the plaintiff must prove his case of retaliatory discharge for whistleblowing by clear and convincing evidence. The Palmer court held the plaintiff to a higher burden of proof than the preponderance of the evidence standard because of its concern over frivolous whistleblowing claims. Unlike some other jurisdictions, the Kansas rule also requires that a "serious" infraction be at issue, thus attempting to eliminate whistleblowing claims for trivial matters. However, given the strictness of the Kansas rule, there is no requirement that the whistleblower raises his/her concerns internally before going to law enforcement officials. The Kansas whistleblower may bypass his company and go directly to a law enforcement agency.

Although in the last several years, some states, such as Massachusetts and Kansas, have judicially created protection for whistleblowers through the evolution of their common law, most states, such as Missouri, have left the issue of whistleblower protection to the legislature. In varying degrees, several state legislatures have enacted protection for whistleblowers. For example, Colorado, Iowa, Texas, and Pennsylvania all have statutes that protect only public sector employees who blow the whistle on their employers. In Colorado, state employees are protected from retaliation for the disclosure of any action, practice, or procedure that relates to, inter alia, the waste of public funds, abuse of authority, or mismanagement of any state agency. Furthermore, the statute does not provide a de minimis standard whereby only

156. Id. at 690.
157. Id.
158. Id.
159. Id.
160. Id.
161. Id.
significant allegations of wrongdoing are protected, as the Kansas courts have done by judicial decision.\textsuperscript{165}

In contrast, Iowa protects an employee of a political subdivision of the state for the disclosure of information which "the employee reasonably believes evidences a violation of law or rule, mismanagement, . . . or a substantial and specific danger to public health or safety."\textsuperscript{166} Iowa, therefore, at least as the section relates to public health or safety, does require that a substantial and specific danger exist.\textsuperscript{167}

On the other hand, Texas provides that a local government body cannot retaliate against a public employee who "reports a violation of law to an appropriate law enforcement authority" if the report is made in good faith.\textsuperscript{168} Thus, the law apparently protects a public employee only if the employee complains to a law enforcement authority, and the employee may not be protected if he/she reports the violation internally.

Although some states have enacted legislation protecting only employees in the public employment sector who "whistleblow" on the government,\textsuperscript{169} other states have enacted more sweeping legislation and offer protection to private sector employees.\textsuperscript{170} In this regard, three state statutes are indicative of the range of legislation covering whistleblowers in the private employment sector.\textsuperscript{171} They are Florida, New Jersey, and Michigan.

The Florida whistleblower statute\textsuperscript{172} covers every private employer that "employs ten or more persons."\textsuperscript{173} The Act provides that:

\begin{quote}
[A]n employer may not take any retaliatory personnel action against an employee because the employee has . . . disclosed, or threatened to disclose, to any appropriate governmental agency . . . an activity, policy, or practice of the employer that is in violation of a law, rule, or regulation. However, this subsection does not apply unless the employee has, in writing, brought the activity, policy, or practice to the attention of a supervisor or the employer and has afforded the employer
\end{quote}

\begin{footnotes}
\item[166] IOWA CODE ANN. § 79.29 (West 1991).
\item[167] Id.
\item[168] TEXAS GOV'T CODE ANN. § 554.002 (West 1994).
\item[169] IOWA CODE ANN. § 79.29 (West 1991).
\item[170] See, e.g., MICH. COMP. LAWS ANN. § 15.361-369 (West 1994).
\item[173] Id. § 448.101(3).
\end{footnotes}
a reasonable opportunity to correct the activity, policy, or practice.\footnote{174}{Id. § 448.101.}

The Act defines "law, rule, or regulation" to include any statute, ordinance or regulation adopted by a government body.\footnote{175}{Id. § 448.101(4).}

Several provisions of the Florida Act merit attention. First, the Act provides protection to a private sector whistleblower for \textit{de minimis} violations of statutory law.\footnote{176}{Id. § 448.101-102.} Second, the Act only provides a whistleblower protection if the employee can show that there is, in fact, a violation of a statute.\footnote{177}{Id.} Thus, the George Gearys\footnote{178}{See Geary v. U.S. Steel Corp., 319 A.2d 174 (Pa. 1974).} of the world who protest the sale of dangerous products apparently are not protected under the Florida statute. Third, the whistleblower does not receive the protection of the statute unless the employee first informs her employer and allows the employer the opportunity to correct the problem.\footnote{179}{FLA. STAT. ANN. § 448.102(1)-(2).} Fourth, the whistleblower is protected for disclosing, or "threatening to disclose" to any appropriate government agency a violation of the statutory law.\footnote{180}{Id. § 448.102(1)-(2).} The whistleblower is therefore protected if he threatens disclosure, but is not protected if he disseminates the information to the public or to interested persons. Protection is available only if the disclosure outside the company is to an appropriate government agency.\footnote{181}{Id. § 448.102(1)-(2).} Although this limitation may sound like a good idea, as it seemingly balances the employer's interest of preserving its reputation with the interest of disclosure, in some instances this limitation would be unreasonable. For example, in cases where the company refuses to correct the wrongdoing, it may be necessary to go directly to the persons being harmed instead of reporting the employer's activity to a government agency. More specifically, if a company is selling a product that harms the public, such as A.H. Robbins' sale of the interuterine device, the Dalkon Shield,\footnote{182}{See George A. Steiner & John F. Steiner, Business, Government and Society: A Managerial Perspective, Text and Cases, 205-14 (5th ed. 1991) (explaining the Dalkon Shield case). The Dalkon Shield, an I.U.D. designed to prevent pregnancy, was marketed in the 1960's by the A.H. Robins Company. \textit{Id.} A.H. Robins did no research on the Dalkon Shield's safety before selling it to an unsuspecting public. The Dalkon Shield was defective, causing unwanted pregnancies in some women, sterility in others, and death in some cases due to toxic shock syndrome, in which death ensued within 31 to 72 hours of the onset of infection. Technicians at A.H. Robins discovered
problems, including in some cases sterility and even death, then going to a government agency may do little good. 83

New Jersey also provides protection to whistleblowers in the private employment sector. 84 Entitled the Conscientious Employee Protection Act ("CEPA"), the New Jersey Act is similar to Florida’s statute in that it prohibits an employer from taking any retaliatory action against an employee where the employee “discloses or threatens to disclose to a supervisor or to a public body any activity, policy or practice of the employer that the employee reasonably believes is in violation of law, rule or regulation.” 85 An employer is defined as any individual, partnership, association, or corporation, and CEPA does not require, as does the Florida statute, that the employer have a minimum of ten employees before invoking its proscriptions. 86 As in Florida, New Jersey requires that the employee first disclose the wrongdoing to the employer. 87 However, unlike Florida, disclosure to the employer is not required where the situation is “emergency in nature.”

Although the language in the New Jersey statute is all-inclusive, in Littman v. Firestone Tire & Rubber Co., 88 a federal district court held that the statute is only concerned “with illegal activity which harms the public.” 89 Because the plaintiff complained only of fraudulent activity committed by management within the company itself, the court held that the plaintiff was not entitled to protection under the New Jersey whistleblower statute. 90

In addition to Florida and New Jersey, Michigan has also enacted a statute protecting the whistleblower in the private employment

that the filament string or tail to the Shield collected bacteria and caused much of the Shield’s problems. For 6.1 cents, the string could have been changed, making the Shield safer. The company chose not to take such action. Id. at 209. No employee at the company disclosed this information to the women who had set these time bombs within their bodies.

83. The Food and Drug Administration moved slowly on the Dalkon Shield problem. In 1974, in spite of its mounting evidence of the Shield’s danger to women, the Food and Drug Administration “recommended” that Robins take the Shield off the market but did not force the company to do so. Id. at 210. In 1984, Robins finally recalled the Shield from the market. Id. at 212.

85. N.J. STAT. ANN. § 34:19-3(a).
88. Id.
90. Id. at 93.
91. Id.
In fact, Michigan was the first jurisdiction to provide general statutory whistleblower protection when it enacted the Michigan Whistleblowers Protection Act in 1981. The Michigan statute provides that an employer shall not retaliate or discriminate against an employee "because the employee . . . reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule . . . to a public body, unless the employee knows that the report is false." 

Unlike the Florida and New Jersey statutes, the Michigan statute does not require the whistleblower to report wrongdoing within the company before reporting the wrongdoing to a public body. One commentator critical of this omission argued that it "not only fails to give employers the initial opportunity to correct their own violations, but may actually encourage employees to bypass their employers' internal procedures."

In addition, as opposed to the Florida and New Jersey statutes which require that the whistleblower act reasonably (an objective standard), the Michigan statute provides the whistleblower protection unless he knows that his "report is false" (a subjective good faith standard). In this regard, Michigan affords greater protection to a whistleblower than New Jersey and Florida. Whether this added protection is justified, or whether it subjects the employer to defamatory harm as a result of careless actions on the part of its employee, is another matter. In fact, Michigan's subjective good faith standard may be inappropriate where the employee goes outside the company to a government agency or to the public to report suspected wrongdoing, as it "may actually discourage employees from investigating and verifying their suspicions before reporting their employers." By contrast, an objective good faith standard "could result in an implied duty to make a reasonable investigation prior to blowing the whistle." Since false accusations can seriously harm the employer's reputation and business, requiring the employee to make a reasonable investigation prior to blowing the whistle

195. Malin, supra note 193, at 305.
196. Malin, supra note 193, at 305.
198. Malin, supra note 193, at 306.
199. Malin, supra note 193, at 306.
externally and vilifying the employer does not seem too much to ask.

IV. TOWARDS A JUDICIAL PERSPECTIVE

In summary, although there has been a movement to protect the whistleblower during the past several years, the protection afforded the whistleblower has been inconsistent from state to state. Some states provide no protection, others provide protection only to government employees, while others provide protection in varying degrees to private sector employees. The courts and legislatures have struggled with where to draw the line in the sand to protect whistleblowers, no doubt fearing an avalanche of cases. Implicit is the belief (perhaps overstated and outdated in today's society) that an employer should have an unfettered right to run its business as it sees fit and to select and retain whatever employees it wishes.

The problem this raises is that when business is engaged in wrongdoing, the failure to protect whistleblowers becomes tantamount to the law encouraging employees to behave immorally. The legal system in such an instance is telling the employee to be loyal to the company at any cost because the price to pay, the loss of one's job, is more than many employees are willing to bear.²⁰⁰ So, employees rationalize their

²⁰⁰ Although most employees are unwilling to put their careers on the line by blowing the whistle, some employees have been successful in winning whistleblowing cases. For example, in Mehlman v. Mobil Oil Corp., No. L-17014-90 (Mar. 24, 1994), a New Jersey state trial court returned a verdict for a whistleblower for a case he brought under New Jersey's whistleblower statute. See 10 NAT'L JURY VERDICT REV. & ANALYSIS 3 (Dec. 1994). The whistleblower plaintiff claimed he had been wrongfully "terminated in retaliation for his advising managers at the Japanese subsidiary corporate offices that changes in the manufacturing [of gasoline] would be required, notwithstanding the cost of several hundred million dollars per plant, because of the high level of benzene in the gasoline and the resulting health hazards." Id. at 4. The plaintiff, who had been earning in excess of $300,000 a year, claimed that he could never again work in the private sector in his field. Id. "The jury found for the plaintiff... and awarded $3,440,000 in compensatory damages and $3,500,000 in punitive damages." Id. The trial court set aside the compensatory damage verdict, but held that the punitive damage award was appropriate. Id.

In Pennsylvania, a jury returned a verdict for a plaintiff under that state's whistleblower law protecting public employees. See 5 NAT'L JURY AND VERDICT REV. & ANALYSIS 43 (Apr. 1990) (discussing McDonald v. McCarthy, No. CIV.A.89-319, 1990 WL 131393 (E.D. Pa Sept. 7, 1990)). In McDonald, the plaintiff contended that he was terminated from his position as a part time police officer in retaliation for his videotaping a city councilman allegedly dumping debris within a city park. Id. He claimed that he brought this to the attention of his superiors and was terminated within a few days. Id. The jury awarded the plaintiff $25,000 in compensatory damages and punitive damages in the amount of $15,000. Id.

In another case, Speck v. Denihan, No. C2-89-107 (July 24, 1990), a whistleblower received a $225,336 jury verdict in an Ohio state court for being disciplined in retaliation for his reporting allegations of government corruption and for suffering mental anxiety, humiliation, and emotional
behavior and turn their heads away from corporate wrongdoing. The movement to protect whistleblowers is a movement to bring one’s moral obligations to society in line with the law. The question remains, of course, as to where to draw the line in the sand. The question remains as to how to protect the employer against malicious and harmful actions of its employees while concurrently protecting employees who swim against the corporate culture to enforce what they believe is a higher morality.

In this regard, a cause of action should be provided to whistleblowers not only in the public sector but also in the private employment arena. I propose a two-tier approach in both the public and private sectors. The standard for allowing an employee to raise concerns about his employer’s activity should shift, depending on whether the employee is raising the issue internally (within the company) or externally (outside the company to a government agency or directly to the public). If the employee raises an issue within the company as to the company’s suspected malfeasance, the employee should be protected from retaliation or loss of his/her job where the employee’s concerns are reasonable and in good faith, and not motivated out of ill will, malice, or spite. In such a situation, there is little if any detriment to the company. The employee, after all, is not airing the company’s dirty linen in public.

A responsible employer should encourage its employees to come forward with information or concerns about the company’s alleged mismanagement, negligence, or abusive practices. Such an open-door policy and dialogue between management and the employee may result in the company’s focusing clearly and thoroughly on a problem, the resolution of which may save the company substantial sums of money by decreasing the potential for lawsuits.

distress. See 6 NAT’L JURY VERDICT REV. AND ANALYSIS 37-38 (June, 1991). In Benecke v. Lockheed Corp., No. C 621967 (Nov. 15, 1990), three plaintiffs alleged that they were terminated after raising safety concerns with their company. See 6 NAT’L JURY VERDICT REV. AND ANALYSIS 47 (Feb., 1991). The jury awarded one plaintiff “$167,065 lost earnings, $35,000 emotional distress damages, and $15,000 punitive damages [the second plaintiff] $45,660 lost earnings, $46,000 emotional distress damages; and $15,000 punitive damages [and the third plaintiff] $27,281 lost earnings, $55,000 emotional distress damages, and $15,000 punitive damages.” Id.

Lastly, in Bartz v. Bowles Distribution, Inc., No. 87-2-01072-3 (Feb. 20, 1990), a Washington state jury awarded the plaintiff whistleblower $50,000 after she was terminated for reporting to the police the illegal activity of a preferred customer of the defendant employer. Id. at 48. Nonetheless, in spite of these verdicts in favor of the whistleblower, the risks to one’s career for blowing the whistle still remains great and cannot be ignored.
One example of this is the case of George Geary, who raised concerns with management over the danger of a product he was charged with selling. Although the product was later taken off the market because of its dangers and Geary may have saved his company substantial sums of money, he was still discharged. The Pennsylvania Supreme Court upheld the termination, refusing to create a judicially-crafted whistleblower rule in the private sector. That case was wrongly decided.

In addition to imposing a “good faith” requirement on the whistleblower, the legal system should require employees, in all but the most exigent of circumstances, to raise their concerns initially through internal corporate channels before blowing the whistle externally to either a government agency or the public. This would “give employers the initial opportunity to correct their own violations,” and encourage resolution within the company.

Those employees who blow the whistle externally should face a more difficult burden before receiving protection under the law. In such a case, there is a significant possibility of harm to the company’s reputation and to its financial viability for wrongful accusations. In addition to the “good faith” requirement and the requirement that the employee should normally first raise the issue internally, an employee who blows the whistle to those outside the corporation should face the following additional burdens. First, the employee must be motivated by a legitimate and substantial interest in protecting the public or others. The employer should not be subjected to the gauntlet for every de minimis violation of a statute where there is little harm to the public. Second, before an employee should be allowed to blaspheme his employer outside the company, he should be required to make a reasonable investigation prior to blowing the whistle. Failure to conduct a reasonable investigation would be irresponsible and akin to negligent defamation of the company if the information disseminated by the

203. Id.
204. Id. at 175.
205. Id. at 176-80.
206. Malin, supra note 193, at 305.
207. Malin, supra note 193, at 305.
whistleblower is false.\textsuperscript{208} Third, the employee should be protected for blowing the whistle externally only if the employee was correct about the corporate wrongdoing. As noted in \textit{Clark v. Modern Group Ltd.},\textsuperscript{209} "A company acting within the law is presumed to pose no threat to the public at large."\textsuperscript{210} Thus, protecting a whistleblower who incorrectly believes that the company has violated the law offers little benefit to the public but could result in serious harm to the business. As described in \textit{Clark}, to protect an employee who incorrectly, but in good faith, believes that there is corporate wrongdoing means that a company would be "free to act only at the sufferance of its employees whenever reasonable men or women can differ about the meaning or application of a law governing the action the employer proposes."\textsuperscript{211} Moreover, to require that a whistleblower move cautiously and make sure of his/her facts seems prudent and a proper balancing of the interests involved. That is, protecting the public interest on the one hand, and the company's reputation and good name on the other.

In other areas, however, the whistleblower's protection should be broader than is generally true in those jurisdictions that, in varying degrees, protect the whistleblower. Many states protect the whistleblower from retaliation only if the whistleblowing is in regard to the company having violated a law, rule, or regulation.\textsuperscript{212} The implication of such a rule is that unless the whistleblower can pinpoint a statute that the company has violated, she may not be protected. But whistleblowers should be protected if they "blow the whistle" on corporate wrongdoing regardless of whether a specific statute has been violated. Thus, whistleblowers should be protected from retaliation if they report their company's negligence which harms the public even if a specific statute has not been violated. Not only have legislators set out the rules by which a business must play, but the judiciary, through its application and molding of the common law, has also set the boundaries for corporate behavior. The law should protect the whistleblower in such instances.

Moreover, the most obvious omission in the legislation and judicial

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\textsuperscript{208} Defamation is defined as "that which tends to injure 'reputation' in the popular sense; to diminish esteem, respect, goodwill or confidence on which the plaintiff held, or to excite adverse, derogatory or unpleasant feelings or opinions against him." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 777 (5th ed. 1984).
\textsuperscript{209} 9 F.3d 321 (3d Cir. 1993).
\textsuperscript{210} \textit{Id.} at 332.
\textsuperscript{211} \textit{Id.}
\textsuperscript{212} \textit{See supra} note 67 and accompanying text.
\end{flushleft}
decisions which have sought to protect whistleblowers is that neither protects the whistleblower when he contacts the media or public with his concerns. Although those jurisdictions that have protected whistleblowers allow the employee to "sing" to government agencies, none have provided broader protection. And yet, where there is substantial harm to the public or to individuals, as in the case of the space shuttle Challenger, the law should protect the whistleblower from retaliation regardless of the party to whom the employee reports corporate wrongdoing. In the Challenger case, Roger Boisjoly and other engineers at Morton Thiokol emphatically and continually raised concerns internally within the company as to the likelihood of the Challenger's solid-rocket boosters malfunctioning in a cold weather launch. Nevertheless, Boisjoly's protection and continued employment should not turn on whether he thereafter notified an appropriate government agency or went public with the information. Given the emergency situation that confronted Boisjoly and the other engineers on January 27, 1986, the night before the ill-fated lift-off, Boisjoly would have been justified in calling the astronauts directly and relaying his concerns to them about the launch.

At least one commentator has suggested that the night before the Challenger launch, the engineers should have taken further steps, both inside and outside the corporation, to "pursue their instincts about the launch." That commentator suggests that an engineer, such as Boisjoly, who knew "more about o-rings than anyone" and who "eats, sleeps, and drinks o-rings," should have made an end-run around management directly "to the CEO of Morton or to the press to question the launch decision before the fact." I would go one step further.

It seems to me that the engineers had a right, and indeed a moral responsibility, to go directly to the seven astronauts and voice their concerns about the launch to them. This would have given the astronauts the ability to shape their own destiny. They could have decided to fly, or they could have refused to board the Challenger for lift-off. Instead, just as the public was unsuspecting of the time-bomb I.U.D. in the Dalkon Shield case, the astronauts lifted off on that disastrous day of January 28, 1986 absolutely oblivious to the dangers before them.

213. See Werhane, supra note 4, at 605. Ms. Werhane is the Wirtenberger Professor of Business Ethics at Loyola University of Chicago. She is one of the founding members and a past president of the Society for Business Ethics. She has also been the editor-in-chief of Business Ethics Quarterly.
214. Werhane, supra note 4, at 608.
215. Werhane, supra note 4, at 611.
If Boisjoly or another engineer had, in fact, gone to the CEO, the press, or directly to the astronauts, then the legal system should protect him from being discharged, demoted, or otherwise discriminated against for such whistleblowing activity. In other words, in some situations the employee must be able to blow the whistle directly to the public, where the need is great and where the company and appropriate government agencies have turned a deaf ear to the likelihood of serious harm to others. In those instances, the employee's job should be secure because that employee has benefitted the public as well as the employer. As discussed previously, several state whistleblowing statutes provide that an employee must first raise his concerns internally within the company, and then after giving the employer a reasonable amount of time to correct the wrongdoing, the employee can blow the whistle with the appropriate governmental agency. The statutes, however, do not protect an employee who blows the whistle directly to the public. I am suggesting that these statutes are too narrow and rigid. In most circumstances it certainly makes good sense to have the employee raise his concerns internally within the company before proceeding to the appropriate government agency if the company’s response is unsatisfactory. Nevertheless, in some situations, the employee should be permitted to blow the whistle directly to the public or to the people affected where the potential for harm is great and time is of the essence.

Another example of such a situation is Ford's marketing of the Pinto, even though the Ford Company knew that the rear end collapsed in low speed crashes, causing the gas tank in some instances to explode. Ford Motor Company began selling the Pinto in 1971. Ford rushed the car into the market in much less than the usual time because it was fighting stiff competition from Volkswagen for the small-car market. The design of the car, however, placed the fuel tank such that if the car was hit from the rear at a speed above 20 miles per hour, it would be punctured by a bolt from the bumper and could

216. It is unlikely that the standard I am suggesting will result in a flood of frivolous lawsuits or needless defamation of corporations. Rather, the legal standard is sufficiently difficult for the employee who goes “public” with the information of possible corporate wrongdoing that I do not believe that the employee will embark upon such a course, except in the most extreme of circumstances, where there is serious harm to the public.

217. See, e.g., supra notes 172-81.


220. See Dowie, supra note 218, at 203.
possibly burst into flame." Ford conducted a study and "determined that if a baffle (estimated at costing between $6.65 and $11.00) were placed between the bumper and the gas tank, the Pinto would be comparable to other cars of its class with respect to the danger of fire from rear-end impact." Conducting a cost-benefit analysis, however, the company concluded that it would be cheaper to pay off burn victims injured or killed by such exploding gas tanks than place a baffle between the bumper and the gas tank. It has been estimated that Pinto crashes caused between 500 and 900 burn deaths before Ford, in 1978, finally recalled the Pinto to insert the baffle. During the eight years that Ford marketed the Pinto before recalling it, Ford, of course, never informed the public that the car was "less safe than comparable cars with respect to rear-end impact" nor did the company even offer consumers "the option of purchasing the baffle." The company stood by, silently, while many needless victims died.

In the Pinto case, a Ford employee should certainly have been able to raise his concerns within the company, and it would make sense for him to raise those concerns internally before going elsewhere. But at some point, it also makes good moral sense for the employee to proceed to a government agency or to the public with this information. In such a situation, the employee should not lose his job, as he/she has accurately disseminated information about a serious risk of injury to consumers and the public.

Lastly, the question remains whether the whistleblower must prove
his case by a "preponderance of the evidence,"9229 or by "clear and convincing evidence."9230 My proposal is that the "external" whistleblower should be protected only if he makes a good faith, reasonable investigation of wrongdoing, and only where there is actual corporate wrongdoing. This burden is sufficiently difficult for the whistleblower and would seem to protect a company from precipitous actions on the part of the employee. At the same time, this burden protects the public where there has been evidence of wrongdoing. As a result, the judiciary or legislature should not erect an additional barrier to a whistleblower such as forcing him to prove all the elements of his cases by clear and convincing evidence.

In a whistleblowing case, the "preponderance of the evidence" rule would seem to suffice to protect the interests of both the business and the public. To require the whistleblower to prove the elements of his case by clear and convincing evidence would, I fear, chill whistleblowers from pointing out corporate wrongdoing.

Where to draw the line in the sand to protect the whistleblower while concurrently protecting a business which has been wrongly accused of malfeasance is line-drawing the judiciary must do.9231 Simply stated, the judiciary should carve out a public policy exception to the "at will" employment doctrine and provide protection for the whistleblower. For the judiciary not to step into this arena and be counted means simply that the judiciary is fostering a dichotomy between one's moral obligations to society and the legal system and yet the better part of jurisprudence is for the legal system and morality to come together and bond. To do otherwise means that the legal system has failed — for without legal protection, whistleblowers "very often must choose between silence and driving over a cliff."9232 Without legal protection "blowing the whistle can be like playing Russian roulette with five or even six out of six bullets in the cylinder."9233 It is incumbent upon the legal system "to lower the drop from the cliff or reduce the number of bullets in the cylinder as much as possible."9234

233. Id. at 619.
234. Id.