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Dana L. Gold

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Introduction: Speaking Up for Justice, Suffering Injustice: Whistleblower Protection and the Need for Reform

Dana L. Gold*

The Pentagon Papers.[1] Enron.[2] Madoff's Ponzi scheme.[3] Pink slime in

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* Dana L. Gold is a Senior Fellow at the Government Accountability Project (GAP), the nation's leading whistleblower protection organization since 1977. She serves as an employee advocacy member of the Hanford Concerns Council. Ms. Gold is also the board chair of Hanford Challenge, a public interest organization focused on promoting safe and effective cleanup at the Hanford site by working with whistleblowers. Ms. Gold earned her BA from the College of William and Mary and her JD, cum laude, from Seattle University School of Law.

[1] In 1971, Daniel Ellsberg, one of the most legendary whistleblowers in US history, leaked internal documents known as the "Pentagon Papers," evidencing the Nixon administration's misrepresentations about the progress of the Vietnam War. *See* Mark Jenkins, *Ellsberg's 'Dangerous' Decision: To Tell the Truth*, NPR (Feb. 4, 2010, 7:30 PM), http://www.npr.org/templates/story/story.php?storyId=123370933&ps=rs. They were leaked to Congress and eventually to *The New York Times*. *Id.*

[2] The fall of the Enron corporation in late 2001 was, at the time, the largest bankruptcy in US history, followed by WorldCom in 2002 and Lehman Brothers in 2008. Shira Ovide, *MF Global: Likely Among the 10 Biggest Bankruptcies Ever*, WALL ST. J. DEAL J. (Oct. 31, 2011, 10:58 AM), http://blogs.wsj.com/deals/2011/10/31/mf-global-likely-among-the-10-biggest-bankruptcies-ever/?mod=e2tw. Sherron Watkins, then a Vice President at Enron, alerted Enron CEO Ken Lay that, after learning of accounting irregularities, the company "might implode in a wave of accounting scandals." Sherron Watkins, *Sherron's Bio*, SHERRONWATKINS.COM, http://www.sherronwatkins.com/sherronwatkins/Sherrons_Bio.html (last visited Oct. 5, 2012). Watkins's warnings were correct; she testified about her whistleblowing and what she discovered before Congressional committees investigating the disaster and ultimately received numerous honors for her demonstration of workplace ethics. *Id.*

[3] Harry Markopolis, an independent fraud investigator, alerted the Securities and Exchange Commission (SEC) on five separate occasions between 2000 and 2008 about the largest financial fraud in history, perpetrated by Bernard Madoff. *The Man Who Figured Out Madoff's Scheme*, CBSNEWS (June 14, 2009, 8:45 PM), http://www.cbsnews.com/2100-18560_162-4833667.html. The SEC refused to investigate Mr. Madoff despite the overwhelming evidence that Markopolis offered

ground beef.[4] Widespread home loan fraud.[5] Safety issues at the Hanford Nuclear site, the most contaminated site in North America.[6] Some of the most significant issues of social, environmental, and economic injustice have been brought to light and, subsequently, addressed, mitigated, or prevented because of whistleblowers.

Whistleblowers can generally be defined as employees who disclose a concern that evidences a reasonable belief of illegality, waste, fraud,

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pointing to an elaborate Ponzi scheme, which ultimately resulted in more than $50 billion lost from investors' accounts. *Id.*

[4] Kit Foshee, former director of food safety for BPI, the company that sold more than 70 percent of the ground beef consumed in the United States, blew the whistle on the company's false claims that the ammonia-treated beef, popularly referred to as "pink slime," created a safer, more nutritious product. *Where You Can Get 'Pink Slime'-Free Beef*, ABC NEWS (Mar. 9, 2012, 8:19 PM), http://abcnews.go.com/blogs/headlines/2012/03/where-you-can-get-pink-slime-free-beef; *70 Percent of Ground Beef at Supermarkets Contains 'Pink Slime,'* ABC NEWS (Mar. 7, 2012, 7:52 PM), http://abcnews.go.com/blogs/headlines/2012/03/70-percent-of-ground-beef-at-supermarkets-contains-pink-slime/ (reporting that USDA whistleblower knows 70 percent of ground beef sold contains pink slime). Hundreds of schools, grocery chains and fast-food restaurants announced in 2012 that they would discontinue using or selling BPI's "pink slime" products. *McDonald's Announces End to 'Pink Slime' in Burgers*, ABC NEWS (Feb. 1, 2012, 3:26 PM), http://abcnews.go.com/blogs/health/2012/02/01/mcdonalds-announces-end-to-pink-slime-in-burgers/; *The Beef with "Pink Slime" Continues as Supermarkets, Schools Drop Byproduct*, CBS NEWS (Mar. 22, 2012, 2:02 PM), http://www.cbsnews.com/8301-504763_162-57402492-10391704/the-beef-with-pink-slime-continues-as-supermarkets-schools-drop-byproduct/.

[5] Whistleblowers Eileen Foster, former executive vice president of Fraud Risk Management at Countrywide and Bank of America, and Richard Bowen, former vice president of Citigroup, both blew the whistle internally on widespread home mortgage defects and fraud that were the ultimate causes of the 2008 financial meltdown. *60 Minutes: Prosecuting Wall Street*, (CBS television broadcast Dec. 4, 2011), *available at* http://www.cbsnews.com/8301-18560_162-57336042/prosecuting-wall-street/.

[6] Walter Tamosaitis, a supervising engineer at Hanford's Waste Treatment Plant, was reassigned after raising concerns about design defects of the plant that could contribute to system malfunctions that could cause nuclear reactions. Peter Eisler, *Problems Plague Cleanup at Hanford Nuclear Waste Site*, USA TODAY, Jan. 18, 2012, 11:36 AM, http://www.usatoday.com/news/nation/environment/story/2012-01-25/hanford-nuclear-plutonium-cleanup/52622796/1. His concerns have been validated by the Department of Energy and the Defense Nuclear Facilities Safety Board, and other whistleblowers have begun to come forward with additional concerns about safety problems with the plant. *Id.*

mismanagement, an abuse of power, or a substantial and specific danger to health, safety, or the environment.[7] A whistleblower might disclose this internally—for example, to their supervisors or through an employee concerns program—or externally—for example, to a legislator, an enforcement agency, a watchdog organization, or a journalist.[8]

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[7] Many federal laws contain whistleblower protection provisions that protect employees from retaliation if they provide information about a violation, file a complaint, or testify in a proceeding resulting from enforcement of the overarching law. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7622 (1977); Surface Transportation Assistance Act, 49 U.S.C. § 31105 (2007); Consumer Product Safety Improvement Act, 15 U.S.C. § 2087 (2008). More than twenty laws regulating workplace safety, airlines, environmental standards, financial reform, nuclear operations, food safety, and more are enforced by the Occupational Safety and Health Administration (OSHA). *See*, *Whistleblower Protection Program*, U.S. DEP'T OF LABOR, http://www.whistleblowers.gov/statutes_page.html (last visited Feb. 26, 2013). Other whistleblower laws cover specific types of workers, such as federal employees, and outline the kinds of activities that are protected. *See, e.g.*, Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8)(A). The Act protects:

> [D]isclosure of information by an employee which the employee or applicant reasonably believes evidences (i) a violation of any law, rule or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

Id.

[8] As I will explain in this article, whistleblower protection law is made up of a patchwork of legal protections that are found in nearly sixty federal statutes (not to mention state statutes and common law). *See* TOM DEVINE & TAREK F. MAASSARANI, THE CORPORATE WHISTLEBLOWER'S SURVIVAL GUIDE 247–50 (2011). Some laws protect many types of disclosures, both to internal management as well as to outside enforcement agencies and to the press. *See, e.g.*, Energy Reorganization Act, 42 U.S.C. § 5851(a)(1) (2005); *see also In Re* Joe Gutierrez, ARB Case No. 99-116, 2002 WL 31662915 (Dep't of Labor. Nov. 13, 2002) (final admin. Review) (holding that raising health and safety concerns about issues at the Los Alamos National Laboratory in internal reports, to Department of Energy officials, the newspaper, members of Congress, and a citizen group were all considered protected activity under the ERA). Other laws specifically define to whom a whistleblower can make disclosures to receive protection from retaliation. *See, e.g.*, Department of Defense Authorization Act, 10 U.S.C. § 2409 (2008) ("[A] Member of Congress, a representative of a committee of Congress, an

Whistleblowers promote corporate and government accountability by being the first line of defense against wrongdoing, and, as such, are one of the most effective and powerful tools for protecting the public interest.

Unfortunately, employees who raise serious concerns about institutional wrongdoing do not typically receive bonuses, promotions, or other expressions of gratitude for bringing issues to light. Instead, whistleblowers disclose issues at great risk to their professional and personal lives. Frequently, and predictably, employers respond to employees who identify problems with various forms of retaliation; for example, whistleblowers can face overt hostility, accusations of poor performance and being a poor "team player," stripping of responsibility, and transfer to undesirable office locations (and, thus, denial of access to more information about wrongdoing), harassment by or isolation from coworkers, and even termination. The whistleblower is treated as the problem instead of the wrongdoing that he or she has reported.[9]

A legitimate fear of retaliation is one of the leading reasons employees stay silent, coupled with a belief that nothing will be done to address the problems that they identify.[10] Add to these barriers the complex societal perceptions of whistleblowers: we look down on "snitches," "squealers," "troublemakers," and "tattletales," but we condemn just as strongly those

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Inspector General, the Government Accountability Office, a Department of Defense employee responsible for contract oversight or management, or an authorized official of an agency or the Department of Justice.").

[9] DEVINE & MAASSARANI, *supra* note 8, at 16; ETHICS RES. CTR., RETALIATION: WHEN WHISTLEBLOWERS BECOME VICTIMS: A SUPPLEMENTAL REPORT OF THE 2011 NATIONAL BUSINESS ETHICS SURVEY 18–23 (2011), *available at* http://www.ethics.org/nbes/files/RetaliationFinal.pdf [hereinafter ERC RETALIATION REPORT].

[10] ETHICS RES. CTR., INSIDE THE MIND OF A WHISTLEBLOWER: A SUPPLEMENTAL REPORT OF THE 2011 NATIONAL BUSINESS ETHICS SURVEY 4 (2012), *available at* http://www.ethics.org/nbes/files/reportingFinal.pdf.

who "don't want to get involved" or who "look the other way."[11] We simultaneously believe in the right to privacy and the public's right to know. Whistleblowers are painted as disloyal and self-interested, and are also lauded as courageous, everyday heroes. The pressures to stay silent are real, as are the risks of speaking up—for every Sherron Watkins, Colleen Rowley, and Cynthia Cooper heralded as *Time Magazine*'s Persons of the Year in 2002,[12] hundreds of other employees receive no public validation or support for their contribution to justice, and, instead, suffer professional, financial, psychological, and personal trauma that affects them and their families and from which it can take years to recover.[13]

Despite the undeniably important role that whistleblowers play in service of promoting justice and accountability, the legal protections that exist to support employees of conscience largely fail to either encourage employees to serve as enforcement mechanisms for existing laws or to protect them if they suffer retaliation for raising concerns. Unlike protected classes of citizens against whom discrimination based on inherent characteristics, such as race, sex, national origin, or religion, is prohibited by the Civil Rights

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[11] DEVINE & MAASSARANI, *supra* note 8, at 10; Lilanthi Ravishankar, *Encouraging Internal Whistleblowing in Organizations*, SANTA CLARA UNIV. (2003), http://www.scu.edu/ethics/publications/submitted/whistleblowing.html (describing whistleblowers as "snitches" and "saviors.").

[12] Richard Lacayo & Amanda Ripley, *Persons of the Year 2002: The Whistleblowers*, TIME (Dec. 30, 2002), http://www.time.com/time/magazine/article/0,9171,1003998,00.html.

[13] According to a 2011 study published by the Ethics Resource Center, more than one in five employees who observe and report misconduct perceive retaliation after raising concerns, including verbal abuse from managers and coworkers, being excluded from decision making, physical harm, harassment online and at home, demotions, reduced hours, and termination. *See* ERC RETALIATION REPORT, *supra* note 9, at 2, 18–23; *see also* C. FRED ALFORD, WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER 18–20 (2001) (finding that most whistleblowers get fired, fail to get their jobs back, and have difficulty finding other work in their fields, and that many lose their houses, their families break apart, suffer from depression, or go bankrupt).

Act,[14] whistleblowers receive no such blanket protection, even though the action prompting the discrimination directly benefits the public interest. The legal regime that protects whistleblowers is instead a patchwork of federal, state, and local laws with holes through which it is too easy to fall.

On the federal level alone, there are nearly sixty statutes that contain provisions intended to protect and provide redress for whistleblowers.[15] Similarly, each state offers different statutory and common law protections for whistleblowers, with some offering robust protections and others offering almost none at all.[16] Determining whether any sort of legal protection exists requires a complex analysis of factors including, but not limited to, (1) the nature of the information the whistleblower wishes to or did disclose; (2) whether the whistleblower is a public or private employee; (3) how and to whom the disclosure was made; (4) the nature of the retaliation suffered by the whistleblower; (5) where the employee resides; and (6) when the employee became aware of any adverse actions taken against him or her for blowing the whistle (statutes of limitations can range from thirty days to three years or more depending on the applicable law).[17] This patchwork of protections makes whistleblower law an amalgamation of many legal disciplines, including employment law, constitutional law, environmental law, national security law, administrative law, consumer law, corporate law, financial law, tort law, and contract law: a fascinating area for both practitioners and scholars, but a confusing and vulnerable landscape for whistleblowers.

There is a growing body of interdisciplinary scholarship dedicated to whistleblowing as it is increasingly recognized as a critical tool for

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[14] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

[15] DEVINE & MASSARANI, *supra* note 8, at 247–50 (listing federal statutes containing corporate whistleblower provisions).

[16] MARCIA P. MICELI ET AL., WHISTLEBLOWING IN ORGANIZATIONS 160–62 (2008).

[17] *Id.* at 161.

promoting corporate and government accountability, but one which current legal structures, for the most part, inadequately support. Professor Terry Dworkin, one of the leading legal scholars in the United States on the subject of whistleblowing,[18] organized an academic conference at Seattle University School of Law on March 23–24, 2012, involving members of the International Academic Research Network who meet regularly to collaborate and exchange ideas on whistleblowing laws and practice.[19] The articles in this cluster come out of that conference and, taken together, highlight some of the weaknesses in the legal framework for dealing with whistleblowing, while also offering practical prescriptions and alternatives for more effective ways to address the need for more robust protection of employees who speak up about wrongdoing they witness in the workplace.

Professor Dworkin and Professor A.J. Brown, a prominent expert on whistleblowing from Australia,[20] offer an analysis and critique of US and Australian whistleblower protection laws in their article, *The Money or the Media? Lessons from Contrasting Developments in US and Australian Whistleblowing Laws*.[21] They note that the US model of whistleblower protection has historically focused on an "anti-retaliation" model of justice, which offers a remedy to whistleblowers who suffer reprisal for raising concerns, but fails to create safe mechanisms to address the actual wrongdoing through internal channels or to incentivize employee disclosures.[22] More recent legislation in the United States, specifically the

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[18] *Experts and Speakers Faculty Profile*: *Terry Morehead Dworkin*, IND. UNIV. NEWS ROOM, http://newsinfo.iu.edu/sb/page/normal/64.html (last visited Feb. 27, 2013).
[19] *Law School Hosts International Academic Whistleblower Conference*, SEATTLE UNIV. SCH. OF LAW (Mar. 1, 2012), http://www.law.seattleu.edu/x10920.xml.
[20] *See Professor A.J. Brown*, GRIFFITH UNIV. LAW SCH., http://www.griffith.edu.au/criminology-law/griffith-law-school/staff/a-j-brown (last visited Feb. 27, 2013).
[21] Terry M. Dworkin & A.J. Brown, *The Money or the Media? Lessons from Contrasting Developments in US and Australian Whistleblowing Laws*, 11 SEATTLE J. FOR SOC. JUST. 653.
[22] *Id.*

financial reform laws of the Sarbanes-Oxley Act of 2002 (SOX) and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), has taken a more proactive approach by offering, on the one hand, *structural reforms* that facilitate internal disclosures about financial problems (e.g., anonymous hotlines, ethics codes, whistleblower procedures, and corporate board audit committees),[23] and, on the other, a *reward model* that promotes disclosure of fraud by giving whistleblowers a percentage of the amount recovered by the Securities and Exchange Commission upon successful prosecution of civil or criminal actions.[24]

According to Dworkin and Brown, Australia has, by all accounts, been woefully unsuccessful in enacting meaningful whistleblower protection provisions in the public sector (and even less successful in the private sector) through either anti-retaliation or structural models of legislation; bounty or reward models have never been introduced.[25] However, recent court decisions have recognized disclosures to the media as part of "best practice" whistleblowing laws for public employees, noting that whistleblowers should be entitled to protection for disclosures to the press after reasonable efforts to deal with the issues internally, or if such avenues would be impractical or involve significant risk of retaliation.[26] Australia's

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[23] These types of structural reforms were all included in the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 800 (codified in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., 28 U.S.C., and 29 U.S.C.).

[24] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376 (2010) (current version at 15 U.S.C. § 78u-6 (2010)). This "bounty" or "reward" model is inspired by the success of the False Claims Act, 31 U.S.C. §§ 3729–3733 (1988), which, like the Dodd-Frank law, contains not only a reward provision that incentivizes disclosure of fraud, but also a separate anti-retaliation provision that is similar to the more traditional whistleblower protection laws that are embedded in various pieces of environmental, consumer protection, public health and safety, and other areas of legislation. *See* 31 U.S.C. § 3730(h) (False Claims Act anti-retaliation provision); 15 U.S.C. § 78u-6(h) (Dodd-Frank anti-retaliation provision).

[25] Dworkin & Brown, *supra* note 21.

[26] *Id.*

acknowledgment that promoting the integrity of public institutions is achieved most effectively through media attention on problems *and* whistleblower protection is an important reform that compensates for the country's lack of an equivalent to the US constitutional protection of free speech.[27]

Dworkin and Brown, recognizing the strengths and weaknesses of the legislative and judicial interpretations of protections afforded to whistleblowers, recommend that truly effective whistleblower laws, which would promote institutional accountability while protecting employees who raise concerns, demand an approach that integrates anti-retaliation, structural, reward, and media-disclosure models.[28] The new Dodd-Frank legislation attempts to integrate at least three of the four possible legislative models that encourage and protect whistleblowers, but it is limited to concerns relating to the financial sector.[29] While fraud has enormous implications for taxpayers and for the market stability on which so much of the world's financial systems depend, as we have seen in the most recent financial crisis, there remain other areas where structural, reward, and media-disclosure models of whistleblower laws would be equally valuable in promoting accountability, such as food integrity, environmental protection, and nuclear safety. One would hope that with continued corporate wrongdoing and political corruption occurring in an increasingly global marketplace, lawmakers will begin to introduce more comprehensive and effective whistleblower protection mechanisms that integrate the most successful elements described by Dworkin and Brown in order to promote legal compliance, mitigate problems before they escalate, and create safer conditions for employees who raise concerns in the workplace.

The patchwork of incomplete legal protections analyzed by Professors

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[27] *Id.*
[28] *Id.*
[29] *Id.*

Dworkin and Brown all originate in rights that, for the most part, are exercised through adjudicatory actions. In their articles, authors Angela Day and Professor Jonathan Brock discuss how alternative dispute resolution, rather than adjudication, may be uniquely effective in addressing both retaliation concerns as well as the underlying concerns raised by an employee in the context of whistleblowing. Both authors discuss the example of the Hanford Concerns Council (the Council), a unique alternative dispute resolution forum that resolves whistleblower disputes at the Hanford Nuclear Site, which has a long history of employees suffering reprisal for raising serious concerns about worker safety and environmental risks.[30]

Angela Day, in her article, *To Mediate or Adjudicate? An Alternative for Resolving Whistleblower Disputes as the Hanford Nuclear Site*, discusses some of the potential outcomes associated with a disputant's choice of either a traditional third-party, judicialized dispute resolution system (i.e., adjudication) or a consensual form of dispute resolution (e.g., mediation). She makes a strong case that consensual, non-adjudicatory resolution of issues offers such valuable potential outcomes as, (1) *greater control* of the resolution by using the parties' local knowledge, accounting for the parties' mutual interests, and defining appropriate solutions for the situation; (2) *lower costs* for participants; (3) the *development of trust* through working mutually toward resolution, boding well for improving future work relationships and resolving disputes; (4) *greater legitimacy* of outcomes due to joint settlement of issues; and (5) *sustainable outcomes* likely to be implemented rather than appealed.[31]

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[30] *See* HANFORD CONCERNS COUNCIL, www.hanfordconcernscouncil.org (last visited Oct. 5, 2012). In the interest of full disclosure, I currently serve on the Hanford Concerns Council as an employee advocate member, and can speak from direct experience to its operations.

[31] Angela Day, *To Mediate or Adjudicate? An Alternative for Resolving Whistleblower Disputes as the Hanford Nuclear Site*, 11 SEATTLE J. FOR SOC. JUST. 617.

These five factors are particularly relevant considerations in the context of whistleblowing disputes, which Day highlights through reference to the Hanford Concerns Council and which Brock expands upon in his contribution, *Filling the Holes in Whistleblower Protection Systems: Lessons from the Hanford Council Experience*.[32] The Council, which has operated (in two incarnations) over a period of sixteen years, is a unique mediation system that offers an avenue for employees of companies that have elected to participate in the Council to seek redress for alleged reprisal for having raised concerns related to workplace and environmental safety and health.[33] The Council is non-adversarial and its proceedings are bound by the confidentiality rules applicable to mediations in Washington State.[34] It is made up of members who serve the roles of employee advocates, company representatives, and neutrals who, together, make a recommendation for "full, fair and final resolution" by consensus after engaging in significant independent assessment of the issues raised by the employee.[35] The employee may choose to accept the Council's recommendation or pursue other options; the member company President is committed by the Council charter to presumptively implement the Council's recommendation if accepted by the employee.[36] The Council has successfully resolved 100 percent of the cases it has accepted; while some of the cases have involved a monetary award as part of the settlement, most

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[32] Jonathan Brock, *Filling the Holes in Whistleblower Protection Systems: Lessons from the Hanford Council Experience*, 11 SEATTLE J. FOR SOC. JUST. 573.

[33] *Hanford Concerns Council Charter*, HANFORD CONCERNS COUNCIL § 1.1 (June 1, 2008), *available at* http://hanfordconcernscouncil.org/download/council_charter.pdf.

[34] *Id.* at § 5.6.

[35] *Id.* § 1.1.1 (Roles and scope); §4.2 (Membership); *see also 2010 Progress Report*, HANFORD CONCERNS COUNCIL 5–6 (2010), *available at* http://hanfordconcernscouncil.org/download/report_progressreport2010.pdf.

[36] *See Bringing Concerns to the Council, Typical Steps*, HANFORD CONCERNS COUNCIL, http://www.hanfordconcernscouncil.org/doc/bring_steps.htm (last visited Oct. 5, 2012); *see also Hanford Concerns Council Charter*, *supra* note 233, § 2.6.

cases have included such remedies as addressing the safety concerns raised by the employee and creating system improvements, restoring an employee's career path and improving workplace relationships, and instituting training on a safe and reprisal-free work environment.[37]

Hanford presents an ideal environment in which a unique dispute resolution system like the Council can succeed because of several factors: active public interest organizations engaging in oversight at the nuclear site, a pattern of reprisal against employees who have spoken out about serious safety and environmental problems, adverse media coverage, protracted litigation, congressional investigations, and its function of performing highly regulated, urgent, and dangerous nuclear cleanup work by government contractors.

Professor Brock identifies numerous weaknesses embedded in current legislative options, such as those described by Professors Dworkin and Brown, that undermine the objectives of protecting and encouraging employees to identify serious concerns. Some of these weaknesses include the following:

- No mechanisms to address the substantive issues prompting the whistleblower's claim of retaliation.
- Fault-finding focus of adjudication creates defensiveness and precludes discussion to address and solve issues.
- Limited to no protection for employees during processes, exacerbating potential financial insecurity, emotional stress, and workplace conflict.
- Lack of confidentiality in processes contributes to employee vulnerability and unwillingness of employer to engage in candid discussions to learn from situation and reach constructive resolutions.

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[37] Brock, *supra* note 32.

- Perception that third-party programs are biased and lack objectivity (e.g., internal employee concerns programs perceived as management tool by employees; government agencies perceived as biased against employers).
- Adjudicated solutions not stable because win/lose system encourages appeals, defensiveness, and ongoing conflict.[38]

As Brock argues in his article, and consistent with Day's analysis of the beneficial factors of mediation, alternatives like the Council or other alternative dispute resolution forums are uniquely positioned to fill the gaps in the current legislative patchwork of whistleblower protection laws and, more importantly, to resolve real problems with legal compliance or potential harm posed by government and corporate institutions that are identified by the whistleblowers. The Hanford Concerns Council process specifically, and alternative dispute resolution options more generally, can address these weaknesses that are endemic to adjudication and that are exponential in the context of whistleblower disputes. For instance, mediation can create more equal bargaining power between an employee and an employer in order for both to contribute their knowledge of the institution's unique culture and challenges towards a creative solution that can address underlying problems and promote workplace norms that support raising concerns.[39]

Similarly, the costs of alternative dispute resolution are lower for both the employee and the employer.[40] For whistleblowers, many of whom suffer termination, the costs of adjudication can be prohibitive, with cases taking many years to ultimately resolve.[41] For employers, the costs can be significant, too, including not only expensive litigation costs but also adverse media attention and reputational threat, government investigations,

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[38] *Id.*
[39] Day, *supra* note 31.
[40] *Id.*
[41] *Id.*

costs of compliance, workplace disruption, and a chilled work environment with low employee morale.[42] Resolving a dispute more quickly and creatively out of the public eye can be invaluable to both parties.

Trust is typically phenomenally low in whistleblower cases; often, whistleblowers have high trust in their employers before raising a concern, and then experience a sense of betrayal and surprise when their disclosures are met with reprisal rather than having the issues addressed.[43] The employer, in turn, has low trust in the employee as someone willing to expose problems that can cause embarrassment, costs, and potential liability; this is the general motivation for retaliation.[44] Mediation, unlike adjudication, can create a forum that humanizes rather than demonizes both the employee and employer, thus creating room to see other perspectives and even create conditions for rehabilitating a valuable employee back into the workplace with improved conditions for other workers and better opportunities for the company to improve compliance.[45]

Both Brock and Day discuss the value a mediated resolution contributes to legitimacy of a final resolution. For instance, if a judge orders a whistleblower back in to the workplace after years of expensive, acrimonious litigation, neither the employee nor the employer would expect that reentry to be comfortable or simple. If, however, both parties come to a mutual agreement about the terms of settlement, that resolution would have

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[42] *Id.* (citing Jonathan Brock, *Full and Fair Resolution of Whistleblower Issues: The Hanford Joint Council for Resolving Employee Concerns, A Pilot ADR Approach*, 51 ADMIN. L. REV. 497, 501, 525 (1999)).

[43] ERC RETALIATION REPORT, *supra* note 9, at 2, 12–13 (2011) (reporting the surprising conclusion that employees who feel greater support for raising concerns in a culture purportedly committed to ethics actually suffered a greater incidence of retaliation than other employees).

[44] MICELI ET AL., *supra* note 16, at 111–14 (noting that predictors for retaliation include the seriousness and type of wrongdoing upon which the employee has blown the whistle, which can lead to embarrassment for the organization as well as "fines, negative publicity, increased regulation, or even criminal prosecution").

[45] *See* Brock, *supra* note 32.

legitimacy in the eyes not only of both parties, but also others in the workplace as well as external stakeholders (including regulators and watchdog groups) with interest in the inherently public-interest based dispute.[46]

Notably, the element of confidentiality, stressed by Brock as a factor that can contribute to successful resolution in a mediation context, can also potentially undermine the legitimacy of a resolution. While it can indeed be a critical motivator of employers to engage in the mediation process, as well as offer comfort to employees who fear the stigma of being a "whistleblower" even when they have become one, confidential proceedings and settlements can create a degree of opaqueness to the other stakeholders concerned about the issues who, not knowing the final terms of a consensus-based resolution, may question whether the underlying substantive issues and workplace conflicts have been adequately addressed.[47] Regulators, other employees and managers, and public interest organizations, deeply invested in the concerns raised by the whistleblower and in the expectations for how issues should be raised and addressed in the future, are compelled to trust a resolution of issues that has inherent public interest implications but that is reached and finalized in a black box.

Despite the value alternative dispute resolution creates by offering a more effective means to deal with both the personnel and substantive problems at issue in a typical whistleblower complaint, there are situations where it can be important to adjudicate concerns in court. Publicly litigated claims can

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[46] *See* Day, *supra* note 31.

[47] In fact, to address the risks posed by confidentiality and to ensure the legitimacy of a confidentially negotiated settlement of a whistleblower claim, filed under one of the several whistleblower statutes under Department of Labor jurisdiction, the regulations require that all settlements must include written terms that address the alleged retaliation, specify the relief, and address the employer's effort to alleviate the chilling effect of retaliation of whistleblowers on the remaining employees before they can be approved. *See* U.S. DEP'T OF LABOR, WHISTLEBLOWER INVESTIGATIONS MANUAL Ch. 6, § IV (A)(3) (2003), *available at* http://www.osha.gov/OshDoc/Directive_pdf/DIS_0-0_9.pdf.

generate valuable media attention on the compelling human interest stories of employees who suffered reprisal for speaking up about issues that affect the public interest. Impact litigation and media exposure can do several important things, including send powerful messages to corporate and government institutions about the consequences of failing to listen to whistleblowers; educate the public, including workers and managers, about the importance of raising concerns in the workplace free of reprisal; and drive legislative reforms that improve gaps in whistleblower protection and create greater accountability in areas that pose risk to the public interest.[48]

While there are some benefits to adjudicating disputes without the blanket of confidentiality, two other factors identified by Day and Brock recommend mediation over adjudication. The element of sustainability over the long-term is particularly important in the context of a whistleblower dispute.[49] Whistleblower litigation can take years, with multiple appeals from both sides.[50] Employees are frequently motivated by a sense of injustice and a need for vindication, and employers are often motivated by wanting to justify their employment decisions and even to send a message to the existing workforce about the consequences of blowing the whistle.[51]

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[48] For example, the Food Safety Modernization Act, which included new whistleblower protection provisions as well as food safety improvements, was passed in 2011 in part because of E.coli contamination in peanuts that killed at least nine people and sickened hundreds. The disclosures of whistleblower Kenneth Kendrick, former assistant manager at the at the Peanut Corporation of America (PCA) plant in Texas, prompted the largest food recall in US history and was a driver behind the new legislation. *See* Steve Karnowski, *New Food Safety Law Contains Little-Noticed Whistleblower Protection*, HUFFINGTON POST (Feb. 11, 2011, 3:09 AM), http://www.huffingtonpost.com/2011/02/11/food-safety-law-protects-whistleblowers_n_821989.html.

[49] Day, *supra* note 31.

[50] *Id.* (describing Hanford whistleblower case that involved multiple appeals before and after a jury trial, resolving eleven years after the original retaliation claim was filed); DEVINE & MAASSARANI, *supra* note 8, at 161 (explaining that the typical process for resolving whistleblower claim through federal administrative procedures involves at least two or three years for an initial decision, not including appeals).

[51] Brock, *supra* note 32.

A consensus-based solution speaks to both parties' desire for finality and closure and creates a high level of investment in sustaining the resolution.

The aspect of a mediated resolution of whistleblower issues perhaps most worth highlighting is the creativity the process affords for reaching a complex, appropriate, and forward-looking resolution that can offer an individual employment remedy, improve the workplace culture for addressing problems raised by employees, and address the underlying substantive concerns to mitigate and prevent noncompliance or unsafe practices. Outside of the reward provisions of the Dodd-Frank financial reform legislation and False Claims Act that are rooted in identifying and combating fraud, litigation is largely limited to an anti-retaliation model focused on an employment remedy that utterly fails to consider the problems disclosed by the whistleblower.[52] The settlements reached through the Hanford Concerns Council process are great examples of creative resolutions that have restored employees to meaningful work with trust in management's commitment to a safe, reprisal-free workplace while also recommending structural improvements to safety processes and systems to support future compliance with safe practices and legal requirements.[53] Almost any whistleblower dispute involving serious matters of public concern—food and drug safety, environmental issues, fraud, police misconduct, human rights—could, through a more creative, consensus-based approach to resolution, become a powerful instrument for employee protection, institutional accountability, and preventing harm to the public interest.

Together, the articles in this cluster highlight the limitations of the current legal framework in addressing the complex and unique issues presented by whistleblowing. Dworkin and Brown offer a legislative

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[52] MICELI ET AL., *supra* note 16, at 154.
[53] Brock, *supra* note 32; DEVINE & MAASSARANI, *supra* note 8, at 205–06.

prescription of integrating anti-retaliation, structural, reward, and media disclosure aspects to create whistleblower protection laws that could achieve, through adjudication, some of the same results achieved through mediation or models like the Hanford Concerns Council described by Day and Brock. Aspirationally, what is needed is an über-Whistleblower Protection Act that could supplement or replace the current legislative patchwork; it would apply to all corporate and government employees, integrate all of the elements recommended by Dworkin and Brown, and include incentives or mandates for mediation efforts in dispute resolution.

Ultimately, these contributions support the conclusion that legal reform is critically needed to offer more support to employees—employees who are the eyes and ears that protect us from the corporate and government abuse or neglect that occurs because corporate and government institutions are often motivated by interests other than social justice. Corporations are, as a matter of law, focused on maximizing profit, and government agencies are plagued with both limited resources for enforcement and the revolving door with the corporate world that funds our political system. Employees who blow the whistle on wrongdoing present our best warning system for preventing even bigger problems, but they too often suffer the worst injustice in the course of taking ethical, courageous action. Our legal system, and the public as a whole, owes them more.