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PROTECTING WHISTLEBLOWERS BY CONTRACT

RICHARD MOBERLY*

Numerous statutes and the tort of wrongful discharge pur-port to prohibit companies from retaliating against employee whistle-blowers. However, whistleblowers often lose retaliation lawsuits because these statutory and common law tort protections depend upon a variety of nuanced factors, such as the employer for whom the whistleblower works, the kind of wrongdoing reported, the way in which the employee blew the whistle, and, under some laws, the willingness of an administrative agency to investigate the whistleblower's claim. Given these difficulties, this Article explores an alternate route for whistleblower protection: enforcing the existing contract protections that private employers currently provide employees when they report misconduct. Rules recently enacted by the major stock exchanges now require each publicly-traded company to publish a Code of Business Conduct and Ethics promising not to retaliate against employees. These Code anti-retaliation promises potentially provide broader whistle-blower protection than statutory and tort protections, and enforcing the Codes contractually could address the weaknesses of the traditional remedies. This Article highlights the benefits of breach of contract claims based on corporate Codes, addresses the potential difficulties that whistleblowers may face when asserting such claims, and presents possible solutions to these problems.

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INTRODUCTION

The contract between an employee and an employer forms the basis for much of employment law.[1] However, the parties typically cannot form an agreement that has pernicious effects on outside parties or that violates specific public policy norms.[2] For example, an employer cannot force an employee to commit perjury or to evade jury duty in exchange for keeping a job or accepting high wages.[3] Thus, "external" laws and public policy contained in statutes and the common law set minimum terms for employment relationships that limit the ability of employees and employers to reach agreements contrary to the public interest.[4]

Laws that protect employee whistleblowers illustrate the limits external law places on the employment contract. Numerous statutes prohibit companies from retaliating against certain employee whistleblowers, as does the tort of wrongful discharge in most jurisdictions.[5] These anti-retaliation protections supersede any private ordering between parties, including an at-will arrangement, that would permit an employer to fire or otherwise retaliate against an employee for reporting misconduct. Legislatures and courts intend these prohibitions to encourage private-sector employee whistleblowers and to deter corporate wrongdoing. When the law encourages whistleblowers to expose misconduct, society benefits from the reduction in dangerous and damaging conduct—conduct that likely would not otherwise be disclosed if employees could rely only

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1. *See* Rachel Arnow-Richman, *Foreword: The Role of Contract in the Modern Employment Relationship*, 10 TEX. WESLEYAN. L. REV. 1, 1 (2003) ("A central premise underlying modern employment law is that workplace relationships, at bottom, are contracts."); Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 379 (2006) ("The employment relationship is governed largely by contract, but with a heavy overlay of 'rights': minimum terms and individual rights that are established by external law and are typically non-waivable.").

2. *See, e.g.*, Estlund, *supra* note 1, at 379; Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943, 1950–53 (1996).

3. *See* Petermann v. Int'l Bhd. of Teamsters, Local 396, 344 P.2d 25, 26–28 (Cal. Dist. Ct. App. 1959) (forbidding an employer from firing an employee for refusing to testify falsely); Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975) (forbidding an employer from firing employee for fulfilling jury duty); *see also* Schwab, *supra* note 2, at 1950–53.

4. *See, e.g.*, Estlund, *supra* note 1, at 379.

5. *See* discussion *infra* Part I.

upon an at-will employment arrangement that contained no protection from retaliation.[6]

However, these statutory and common law tort protections often fail to protect employees sufficiently after they have blown the whistle because of the law's "patchwork," gap-filled approach.[7] Statutory whistleblower protection consists of numerous federal and state anti-retaliation laws that vary depending on the industry, the type of disclosure, and the individual to whom an employee makes a disclosure.[8] The common law tort of wrongful discharge in violation of public policy provides similarly disjointed coverage and depends heavily upon whether an employee makes a disclosure that fits narrowly-drawn "pigeonholes."[9] Recent empirical evidence suggests that such limited protections consistently fail to redress retaliation against whistleblowers, in large part because whistleblowers fail to fit their claim into the narrowly-drawn boundaries of the law.[10]

Assuming that a Congressional fix for this muddled landscape of statutory and tort protection remains unlikely, this Article explores a counterintuitive type of whistleblower protection: contract law. Although it might be unexpected for corporations to protect whistleblowers by contract (hence the need for statutory and tort protections), currently the vast majority of publicly-traded companies publish a Code of Ethics or Code of Business Conduct (hereinafter referred to collectively and interchangeably as the "Code" or "Codes") that promises protection from retaliation for *any* employee who reports *any* illegal activity in good faith. The unqualified breadth of this promise avoids many of the problems inherent in the current hodgepodge and nuanced regime of tort and statutory protection. Accordingly, whistleblowers who suffer retaliation by companies that publish Codes could return to the core foundation of em-

6. *See* Schwab, *supra* note 2, at 1950–53.

7. S. REP. NO. 107–146, at 19 (2002) (noting that corporate whistleblowers were "subject to the patchwork and vagaries of current state laws"); *see also* Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1129–30.

8. *See* discussion *infra* Parts I.A & I.B.

9. STEVEN L. WILLBORN, ET AL., EMPLOYMENT LAW: CASES AND MATERIALS 122–24 (4th ed. 2007) (discussing the "pigeonholes" of protection for wrongful discharge tort); *see also* Schwab, *supra* note 2, at 1954–56; discussion *infra* Part I.C.

10. *See* Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 106–20 (2007).

ployment law—the contract—and attempt to enforce their employers' anti-retaliation promises under contract law.[11]

The Article proceeds as follows. Part I summarizes the traditional protections for whistleblowers contained in statutory anti-retaliation provisions and tort law, and then examines the weaknesses of the current approaches.[12]

Part II describes the recent trend to include anti-retaliation protections in corporate Codes, which culminated in 2003 when the two largest U.S. stock exchanges, the New York Stock Exchange ("NYSE") and the National Association of Securities Dealers Automated Quotation System ("NASDAQ"), revised their corporate governance listing requirements. The new listing standards mandate that every listed company publish a Code of Business Conduct and Ethics protecting employee whistleblowers from retaliation. Also, Part II asserts that the breadth of these newly-required anti-retaliation promises could provide important substantive and procedural benefits to whistleblowers, as well as significant normative benefits to society.

Part III recognizes that the potential protections found in corporate Codes need to be enforceable in order to obtain these benefits. Unfortunately, courts inconsistently permit whistleblowers to bring claims based on anti-retaliation promises. This problem for whistleblowers results from the courts' tendency to evaluate Code claims under the analysis developed for claims based on employee handbooks. A rigidly-applied "handbook doctrine" undermines contract protection for whistleblowers because of three difficulties: the extreme level of specificity required for Codes to be enforceable; the difficulty of demonstrating sufficient employee reliance on the Code provision; and the likelihood of employers including an at-will disclaimer to undermine the contractual effect of an anti-retaliation promise.

Part IV asserts that this rigid application of the handbook doctrine fails to recognize a significant difference between the typical handbook case and these new Code anti-retaliation provisions. Unlike handbooks, Codes serve an important role in an overall corporate governance structure that includes en-

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11. Other commentators have briefly mentioned that Code anti-retaliation provisions might provide anti-retaliation protections to whistleblowers. *See* DANIEL P. WESTMAN & NANCY M. MODESITT, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE 182–86 (2d ed. 2004). However, this Article is the first to explore the issue thoroughly.

12. *See* discussion *infra* Part I.

couraging employees to report corporate misconduct. Relying on this important distinction, Part IV presents both doctrinal and regulatory solutions to address the difficulties posed by the handbook doctrine.

Lastly, Part V identifies some drawbacks to relying solely on contract claims to protect whistleblowers from retaliation.

To be clear, this Article does not advocate dispensing with tort and statutory protections or relying purely on unregulated contracts to protect whistleblowers; rather, the Article asserts that government-mandated Codes could serve as a valuable supplement to current protections.[13] In doing so, the Article joins a recent academic trend to re-examine private ordering in the employment relationship, including why parties agree to terms and conditions of employment that "exceed legally proscribed minimums or fall outside the scope of public regulation."[14] In this case, corporations choose, in their own self-

13. As I note below, contract protection often would provide *more* benefit than the current patchwork system, but *less* benefit than an ideal (currently nonexistent) comprehensive anti-retaliation statute. *See* discussion *infra* Parts II.B & V. To the extent this contractual solution is less ideal than a broader federal whistleblower statute, the contractual approach can be criticized as potentially undermining efforts to pass comprehensive whistleblower protection. While space constraints do not permit me to fully address this criticism here, a partial answer is that we should follow Voltaire's advice and not "let the perfect be the enemy of the good." *See* Voltaire, *La Bégueule*, *in* 3 RECUEIL DES MEILLEURS CONTES EN VERS 77, 77 (1778) ("*Le mieux est ennemi du bien.*"). A comprehensive statutory solution does not appear likely to pass in the near future. Furthermore, the information that results from this modest contractual approach might actually help the passage of further reform if it turns out that new contractual rights do not lead to a significant increase in "frivolous" employee filings, the immediate concern of those who resist more comprehensive statutory whistleblower protections. Moreover, information about the types of claims brought by whistleblowers under the contractual approach can help focus any future legislation and fix problems in the statutory structures of current anti-retaliation provisions. *See* Ian Ayres & Jennifer Gerarda Brown, *Privatizing Employment Protections*, 49 ARIZ. L. REV. 587, 587 (2007) ("[P]rivate imitation of potential public protection not only enhances the remedial benefits afforded by the private commitments in the short term, it also allows the private efforts to demonstrate what might happen in the longer term, when public protections are enacted."). And, as Ian Ayres and Jennifer Gerarda Brown noted in a similar context, "[w]hen push comes to shove, it is difficult to turn down the immediate 'bird in the hand' benefits of incremental progress." Ian Ayres & Jennifer Gerarda Brown, *Mark(et)ing Nondiscrimination: Privatizing ENDA With a Certification Mark*, 104 MICH. L. REV. 1639, 1688–90 (2006) [hereinafter Ayres & Brown, *ENDA*] (responding to similar criticism of their contractual solution to sexual orientation discrimination).

14. Arnow-Richman, *supra* note 1, at 1 (introducing symposium related to contract law and the employment relationship); *see also* Ayres & Brown, *ENDA*, *supra* note 13, at 1641 (suggesting that corporations should license a certification mark that would provide employees a cause of action as third-party beneficiaries of the license agreement for discrimination based on sexual orientation); Cynthia

interest, to provide broader protection than required by regulatory standards in order to better monitor their own internal compliance, to convince shareholders that they take compliance seriously, to curry favor with government regulators, or to effect some combination of these motivations.[15] Ultimately, this Article suggests that courts and regulators take steps to increase whistleblowers' ability to enforce the promises corporations voluntarily make.

I. CURRENT APPROACHES TO WHISTLEBLOWER PROTECTION

Encouraging employees to disclose their inside knowledge of wrongdoing is a critical step in discovering fraud and other corporate misconduct.[16] Yet, almost all the benefits of whistleblower disclosures go to people other than the whistleblower, while most of the costs fall on the individual whistleblower.[17] Society as a whole benefits from increased safety, better health,

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Estlund, *Something Old, Something New: Governing the Workplace by Contract Again*, 28 COMP. LAB. L. & POL'Y J. 351, 374 (2007) (suggesting a broader perspective on using contract law to protect workers' rights); Estlund, *supra* note 1, at 380–82 (examining two employment law doctrines that contain a blend of contract law and public law); W. David Slawson, *Unilateral Contracts of Employment: Does Contract Law Conflict with Public Policy?*, 10 TEX. WESLEYAN L. REV. 9, 24–25 (2003).

15. For a good discussion of why corporations might voluntarily take on potentially more liability than is otherwise required, see Ayres & Brown, *EDNA*, *supra* note 13, at 1669–87.

16. Employees often have an inside view of corporate misconduct. For example, a 2007 study found that fifty-six percent of employees reported that they had observed conduct that "violated company ethics standards, policy, or the law" in the previous twelve months. *See* ETHICS RESOURCE CENTER, NATIONAL BUSINESS ETHICS SURVEY 1 (2007), *available at* http://www.ethics.org/research/nbes.asp. Employees who report these observations of misconduct serve an important monitoring function. A recent report found that tips uncovered more corporate fraud than any other source (such as government or internal investigations), and that employees provided almost two-thirds of those tips. *See* ASSOC. CERTIFIED FRAUD EXAMINERS, 2006 ACFE REPORT TO THE NATION ON OCCUPATIONAL FRAUD & ABUSE 28–29 (2006), *available at* http://www.acfe.com/documents/2006-rttn.pdf. For a more complete discussion of the importance of employees as corporate monitors, see Moberly, *supra* note 7, at 1116–25.

17. *See* Detlev Nitsch et al., *Why Code of Conduct Violations Go Unreported: A Conceptual Framework to Guide Intervention and Future Research*, 57 J. BUS. ETHICS 327, 335 (2005) ("The incremental harm done to other stakeholders by ignoring a code violation is judged to be very small and diffuse, while the potential for harm to oneself, arising from reporting, is much clearer, more immediate, and painful."); *Hearing on Private Sector Whistleblowers: Are There Sufficient Legal Protections? Before the House Subcomm. on Workforce Protections, Comm. on Educ. & Lab.*, 110th Cong. 1–2 (May 15, 2007) (statement of Richard Moberly, Asst. Prof. of Law, Univ. of Neb. College of Law) [hereinafter "Moberly Statement"], *available at* http://law.unl.edu/people/resident#LAW_rmoberly2.

and more efficient law enforcement; shareholders benefit from increased transparency of corporate finances; and employees as a group benefit from improved working conditions. Whistleblowers, on the other hand, face significant retaliation, from isolation at work, to discharge, to physical violence.[18] The traditional view, then, has been that in order for society to gain the benefits of whistleblowing, the law must provide whistleblowers extra-contractual protection from retaliation to reduce the costs they must endure.[19] In addition to encouraging employees to come forward, anti-retaliation protections can remedy any retaliation that occurs and deter employers from retaliating in the first place.

Anti-retaliation protection for private-sector whistleblowers currently consists of a combination of federal and state statutory protections, as well as state common law protections under the tort of wrongful discharge in violation of public policy.[20] This Part briefly discusses each of these types of protections. As described in more detail below, despite the large number of whistleblower laws, each individual law often covers only a limited type of whistleblowing activity engaged in by a narrowly defined group of employees. Thus, even when considered together, anti-retaliation laws offer inconsistent relief to whistleblowers because of the wide variance in the scope of protections each provides.[21]

A. *Federal Statutory Protection*

Over thirty distinct federal statutes provide anti-retaliation protection for private-sector employees who engage in protected activities in a variety of areas, including workplace

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18. *See* Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?* 30–31 (NBER Working Paper No. 3, 2007, *available at* http://www.nber.org/papers/w12882 (reporting that employees reported retaliation in eighty-two percent of cases in a study of employee whistleblowers); Moberly, *supra* note 7, at 1130–31.

19. *See generally* Schwab, *supra* note 2. Employees consistently list "fear of retaliation" as a significant factor in why they do not report misconduct they witness. *See* ETHICS RESOURCE CENTER, *supra* note 16, at 6 (reporting results from 2007 survey finding that thirty-six percent of employees did not report misconduct they witnessed because they feared retaliation). It should be noted, however, that the most-cited reason employees provide for failing to report misconduct is a concern that nothing will be done to fix the problem. *Id.*

20. *See, e.g.*, Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistle-blower Protection*, 38 AM. BUS. L.J. 99, 100–13 (2000).

21. S. REP. NO. 107-146, at 19 (2002) (noting that corporate whistleblowers were "subject to the patchwork and vagaries of current state laws").

safety, the environment, and public health.[22] Statutes protect employees who disclose specific violations in certain safety-sensitive industries, such as mining,[23] nuclear energy,[24] and airlines.[25] Private-sector employees also may be protected if they disclose corporate fraud on the government[26] or on shareholders.[27] The list of protected employees includes some surprises, such as employees who participate in a proceeding regarding drinking water or who report an unsafe international shipping container.[28] In addition to protections directed specifically to whistleblowers in certain industries, many federal statutes aimed at other issues also include anti-retaliation protections for employees involved in enforcement of those statutes, such as civil rights legislation or laws related to fraud on the government.[29]

Although federal anti-retaliation protections collectively cover a broad range of industries, each of the individual statutes applies only to a specific type of employee who blows the whistle about a specific topic. This statutory framework results in a network of narrow protections that evolved on an ad hoc basis to support specific statutory schemes. Whether federal law protects a whistleblower "depends upon the employer for whom the employee works, the industry in which the employee works, the type of misconduct reported, the way in which the employee blew the whistle, and, under some statutes, the willingness of administrative agencies to enforce the law."[30] For example, the Federal Mine Safety and Health Act protects only miners who make disclosures related specifically to safety in mines.[31] Thus, federal whistleblower protection

22. *See* WESTMAN & MODESITT, *supra* note 11, at 319–20 (listing statutes).

23. *See* Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (2000).

24. *See* Energy Reorganization Act, 42 U.S.C. § 5851 (2000).

25. *See* Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121 (2000).

26. *See* False Claims Act, 31 U.S.C. § 3730(h) (2000).

27. *See* Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (Supp. IV 2004).

28. *See* Safe Drinking Water Act, 42 U.S.C. § 300j-9 (2000); International Safe Container Act, 46 U.S.C. § 80507 (2000).

29. *See* WESTMAN & MODESITT, *supra* note 11, at 189–202 (citing anti-retaliation protections of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2000), and the False Claims Act, 31 U.S.C. § 3730(h) (2000), as examples).

30. Moberly Statement, *supra* note 17, at 4; *see also* Moberly, *supra* note 7, at 1129–30.

31. *See* Federal Mine Safety and Health Act, 30 U.S.C. § 815(c) (2000).

takes what I previously called a "rifle-shot" approach because of each statute's narrow application.[32]

B. *State Statutory Protection*

State statutes provide inconsistent whistleblower protection as well. While most states statutorily protect public-sector workers who disclose government illegality and waste,[33] only seventeen state statutes protect private-sector whistleblowers.[34] Because of the moderate number of states that have enacted such protections, state statutes may protect employees across the country differently, depending on location, even where the employees work for the same company.

State protection for whistleblowers can be considered the converse of federal protection. State statutes tend to have broader coverage with regard to the type of whistleblowing considered a "protected activity," but because the statutes apply only to employees in a single state, these anti-retaliation provisions protect a smaller number of employees than many federal statutes. For example, Connecticut's whistleblower statute protects employees who report a broad range of misconduct, including a violation of any state or federal law, regulation, or municipal ordinance or regulation, unethical practices, mismanagement, or abuse of authority.[35] This broad protection, of course, applies only to workers in Connecticut.[36]

Thus, while state anti-retaliation statutes may provide broader protections than federal laws, the variability among states means that state statutes arguably have less impact.

C. *Tort Protections*

At least forty jurisdictions permit a whistleblower to bring a tort claim for wrongful discharge in violation of public policy against an employer.[37] Such broad coverage, however, suffers from the same interstate variability as state statutory protec-

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32. Moberly Statement, *supra* note 17, at 2.

33. *See* WESTMAN & MODESITT, *supra* note 11, at 67.

34. *See id.* at 77. This number does not include states that may include anti-retaliation protection in a fair employment statute similar to Title VII, in which an employee is protected when opposing discrimination or participating in a process related to a discrimination claim. *See id.* at 78.

35. *See* CONN. GEN. STAT. § 31-51m (2007).

36. *See id.*

37. WESTMAN & MODESITT, *supra* note 11, at 95.

tion.[38] For example, jurisdictions vary on the permissible source of public policy that a whistleblower must claim has been violated by the employer's retaliation.[39] Some courts require the whistleblower to articulate a public policy based in constitutional, statutory, or common law grounds, while other courts permit a broader inquiry into public policy reflected in administrative regulations and even professional codes of ethics.[40] Further, courts differ on the extent to which they permit *federal* statutes or regulations to serve as the basis for *state* public policy.[41] Some courts consistently permit a wrongful discharge claim for whistleblowers who report violations of federal law.[42] Others take a much more circumspect approach, either by requiring the federal law to reflect *state* public policy[43] or by refusing to look to federal law as a source of public policy.[44]

State tort law also protects internal and external whistleblowers inconsistently. Some jurisdictions protect whistleblowers who report misconduct to a supervisor or another person inside the company,[45] while other states' common law protects only external whistleblowers, under the rationale that reporting misconduct internally does not sufficiently advance the public interest.[46] Even more narrowly, one Missouri court

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38. *Id.* at 131 ("Because the common law continues to evolve . . . there is currently no consensus among the jurisdictions in the United States regarding the circumstances under which active whistleblowers should or should not be protected by the law.").

39. *See* Nancy Modesitt, *Wrongful Discharge: The Use of Federal Law as a Source of Public Policy*, 8 U. PA. J. LAB. & EMP. L. 623, 625–26 (2006) (citing cases).

40. *See id.*

41. *See id.* at 627–32 (discussing three varied approaches taken by state courts when examining wrongful discharge claims in which federal law is the source of the alleged public policy).

42. *See, e.g.*, Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1090 (Wash. 1984) (relying on federal law as a "clear expression of public policy").

43. *See, e.g.*, Peterson v. Browning, 832 P.2d 1280, 1283 (Utah 1992) (refusing to adopt automatically all of federal law as a source of public policy).

44. *See, e.g.*, Oakley v. May Dep't Stores Co., 17 F. Supp. 2d 533, 536 (E.D. Va. 1998) (stating that Virginia does not appear to recognize federal law as a basis for public policy claims); Shrout v. TFE Group, 161 S.W.3d 351, 355 (Ky. Ct. App. 2005) (refusing to examine public policy claim based on federal regulation).

45. *See, e.g.*, WESTMAN & MODESITT, *supra* note 11, at 143 n.253–54.

46. *See id.* at 143 ("The jurisdictions are split on whether internal whistleblowing within the employer's organization is protected, as contrasted with external whistleblowing to appropriate government officials."); Schwab, *supra* note 2, at 1966; *see, e.g.*, Zumot v. Data Mgmt. Co., No. 2002-CA-002454, 2004 WL 405888, at *2 (Ky. Ct. App. Mar. 5, 2004); Wholey v. Sears Roebuck, 803 A.2d 482, 492–93 (Md. 2002).

found that the public policy tort did not apply to an employee who reported suspicions about a manager's violation of criminal laws because the employee reported the violation to that manager only, and not to an appropriate internal or external authority.[47]

Moreover, some jurisdictions make equally nuanced distinctions in other areas. Massachusetts, for example, protects whistleblowers who report suspected criminal activity[48] but not whistleblowers who complain about unfair and deceptive trade practices.[49] The Fifth Circuit has held that Mississippi's wrongful discharge tort applies only to whistleblowers who report criminal violations, not civil misconduct.[50] Other states do not protect whistleblowers who disclose violations of internal financial or business practices.[51] Some states protect employees who refuse to engage in illegal activity but not employees who actively report their employer's illegal activity.[52] These distinctions mean that whistleblowers often must know discrete and nuanced details about common law protection for the law to actually encourage whistleblowing.[53] Thus, as Professor Cynthia Estlund notes, the tort of wrongful discharge provides

47. *See* Faust v. Ryder Commercial Leasing & Servs., 954 S.W.2d 383, 391 (Mo. Ct. App. 1997).

48. *See* Shea v. Emmanuel Coll., 682 N.E.2d 1348, 1350 (Mass. 1997).

49. *See* Mistishen v. Falcone Piano Co., 630 N.E.2d 294, 296 (Mass. App. Ct. 1994).

50. *See, e.g.*, Wheeler v. BL Dev. Corp., 415 F.3d 399, 404 (5th Cir. 2005); Howell v. Operations Mgmt. Intern'l, Inc., 77 Fed. App'x. 248, 251 (5th Cir. 2003).

51. *See, e.g.*, Lord v. Souder, 748 A.2d 393, 400–01 (Del. 2000); Hayes v. Eateries, Inc., 905 P.2d 778, 788 (Okla. 1995); *see also* Moberly, *supra* note 7, at 1162 n.272.

52. For example, Indiana courts have permitted an employee who was fired for refusing to drive a truck that exceeded the state's weight limit to bring a wrongful discharge claim. *See* McClanahan v. Remington Freight Lines, Inc., 517 N.E.2d 390, 390 (Ind. 1988). However, they have not allowed a claim by a whistleblower who reported safety problems with pharmaceutical products. *See* Campbell v. Eli Lilly & Co., 413 N.E.2d 1054, 1061 (Ind. Ct. App. 1980). Texas also strictly limits claims to "passive" whistleblowers who refuse to engage in illegal activity; Texas courts do not protect "active" whistleblowers who report their employer's misconduct. *See, e.g.*, Austin v. HealthTrust, Inc.-The Hosp. Co., 967 S.W.2d 400, 401 (Tex. 1998); Laredo Med. Group Corp. v. Mireles, 155 S.W.3d 417, 421 (Tex. App. 2004); Mayfield v. Lockheed Eng'g & Scis. Co., 970 S.W.2d 185, 187 (Tex. App. 1998).

53. One commentator aptly summarized state law protection for whistleblowers by stating that, "state whistleblower law is murky, piecemeal, disorganized, and varies from jurisdiction to jurisdiction." Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1049 (2004).

inadequate security to employees and leaves in place "powerful incentives for employee compliance and silence."[54]

D. Loopholes and Barriers

The complex combination of federal and state statutory protection and the tort of wrongful discharge provide inconsistent anti-retaliation protection that depends substantially on whether the whistleblower is the "right" type of employee who works for the "right" type of employer in the "right" type of industry. Protection also depends upon whether the employee reported the "right" type of misconduct in the "right" way. As interpreted by one commentator, despite the abundant laws protecting whistleblowers, "most legal protection for whistleblowers is illusory; few whistleblowers are protected from retaliatory actions because of numerous loopholes and special conditions of these laws."[55]

These loopholes and conditions become significant procedural and substantive barriers for whistleblowers.[56] For example, a recent study of retaliation claims under the Sarbanes-Oxley Act,[57] purportedly one of the most protective anti-retaliation statutes in the country, found that whistleblowers frequently lost because they could not fit their claims into the legal boundaries of the Act.[58] Specifically, whistleblowers often lost their claims because they either worked for the wrong type of employer (Sarbanes-Oxley covers only employees of publicly-traded companies) or made the wrong type of disclosure (the Act protects only disclosures related to certain types of fraud).[59]

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54. *See* Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1657 (1996).

55. TERANCE MIETHE, WHISTLEBLOWING AT WORK: TOUGH CHOICES IN EXPOSING FRAUD, WASTE, AND ABUSE ON THE JOB 147–48 (1999); *see also* Mary Kreiner Ramirez, *Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power*, 76 U. CIN. L. REV. 183, 191 (2007). Miethe also adds that whistleblowers have a significant disadvantage in litigation as individual plaintiffs against corporate defendants with substantially more resources. *See* MIETHE, *supra*, at 147–48.

56. *Cf.* Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 181–82 (2007) (describing the danger of legal boundaries when an employee attempts "to squeeze their 'square peg' of a case into the 'round hole' of the applicable legal category").

57. 18 U.S.C. § 1514A (Supp. IV 2004).

58. *See* Moberly, *supra* note 10, at 91–120 (finding that Sarbanes-Oxley whistleblowers won only 3.6% of claims after an administrative agency investigation and only 6.5% of cases before an administrative law judge).

59. *See id.* at 109–20.

In addition, whistleblowers lost because they were found not to have an objectively "reasonable belief" that misconduct occurred, even if they had a good faith belief that wrongdoing happened.[60] The study demonstrated that administrative decision makers often narrowly interpreted the Act's legal boundaries as well.[61]

Thus, one prominent sociologist concludes that "[w]histleblowers think this means that caprice rules. It is hard to say they are wrong."[62] As a result, statutes and tort laws often do not protect whistleblowers. Additionally, such variability in the law undermines the other goals of encouraging whistleblowers and deterring corporate misconduct. Whistleblowers have little ability to predict whether the law will protect them if they disclose misconduct. The unpredictability of these nuanced requirements can only result in fewer whistleblower disclosures.[63] In fact, a 2007 study found that, even after the passage of purportedly strong whistleblower protection in the Sarbanes-Oxley Act,[64] employees played a smaller role in reporting misconduct compared to other monitors, such as the government or outside accountants, than before the Act's passage.[65] Another study recently found that forty-two percent of employees who observe misconduct at work do not report it, which is comparable to the pre-Sarbanes-Oxley figure of forty-four percent in 2000.[66] If statutory and tort anti-retaliation provisions do not protect employees, employees will be unwilling to report corporate malfeasance, and corporations may not be deterred from engaging in conduct harmful to society. In short, despite the best intentions of these anti-retaliation protections, taken collectively their narrow and nuanced approach undermines their commendable goals.

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60. *See id.* at 102 tbl.4. Sarbanes-Oxley will only protect a whistleblower who has a "reasonable belief" that a statutory violation occurred. *See* 18 U.S.C. § 1514A(a)(1).

61. *See* Moberly, *supra* note 10, at 128–31.

62. C. FRED ALFORD, WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER 112 (2001).

63. *See* Martin H. Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 U. MICH. J. L. REFORM 277, 286 (1983) ("[A]ny standard of whistleblower protection must offer the employee a considerable measure of predictability.").

64. 18 U.S.C. § 1514A.

65. *See* Dyck, *supra* note 18, at 35–36.

66. *See* ETHICS RESOURCE CENTER, *supra* note 16, at 3.

II. CONTRACT PROTECTION FOR WHISTLEBLOWERS

Even with these failings, tort and statutory remedies dominate the discussion of anti-retaliation protections for whistleblowers. However, because this piecemeal system protects only certain whistleblowers under precisely-defined conditions, another option for protecting whistleblowers is worth exploring. Whistleblowers who suffer retaliation by their employers should be able to bring breach of contract claims to enforce the anti-retaliation promises made by companies in their Codes.

This Part briefly explains why corporations make anti-retaliation promises and discusses the potential benefits of permitting whistleblowers to enforce these promises contractually. First, if enforceable, these Code promises often would provide broader protection to more employees than almost any other current statutory or tort law protection.[67] Second, enforcing Code promises may level the procedural playing field between whistleblowers and employers by providing a longer statute of limitations period than statutory protections and by permitting whistleblowers to avoid burdensome administrative procedures.[68] Third, providing contractual protection to whistleblowers should increase the effectiveness of the broader movement to encourage corporate self-regulation.[69]

A. *The Increasing Prevalence of Anti-retaliation Promises*

Three main phenomena contributed to the current prevalence of corporate anti-retaliation promises: a dramatic increase in corporations voluntarily publishing Codes; the government's use of incentives that encourage corporations to implement internal monitoring systems; and the recent requirement that publicly-traded companies issue formal Codes.[70]

1. Voluntary Efforts

Beginning in the 1970s, corporations voluntarily issued Codes in response to various corporate scandals publicized at

67. *See* discussion *infra* Part II.B.
68. *See* discussion *infra* Part II.C.
69. *See* discussion *infra* Part II.D.
70. *See infra* text accompanying notes 71–105.

the time.[71] For example, after corporations were accused of bribing foreign government officials in the 1970s, companies released Codes that made it corporate "policy" not to engage in corrupt practices.[72] Similarly, after several government contractors were found to have engaged in government fraud and over-billing in the defense industry in the mid-1980s, dozens of contractors voluntarily agreed to adopt an industry-wide code of conduct to encourage compliance with government procurement laws.[73] Also, after the insider trading scandals during the same time period, companies added anti-insider trading policies to their Codes.[74]

Companies published these Codes for several reasons: corporations attempted to convince shareholders and regulators that they were taking reasonable steps to ensure that their employees did not engage in illegality; Codes instructed employees as to the bounds of permissible employment activity; and companies hoped that the Code would reduce or even eliminate liability for actions taken by employees in violation of company policy.[75] Although scholars question the Codes' effectiveness at actually reducing corporate crime,[76] most corporations voluntarily published some sort of Code that described

71. *See* Wesley Cragg, *Ethics, Globalization and the Phenomenon of Self-Regulation: An Introduction*, *in* ETHICS CODES, CORPORATIONS AND THE CHALLENGE OF GLOBALIZATION 1, 10–11 (Wesley Cragg, ed. 2005); Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1585–86 (1990); Glen R. Sanderson & Iris I. Varner, *What's Wrong with Corporate Codes of Conduct?*, 66 MGMT. ACCT. 28, 28 (1984).

72. *See* Pitt & Groskaufmanis, *supra* note 71, at 1582.

73. *See* Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 497 (2003).

74. *See* Pitt & Groskaufmanis, *supra* note 71, at 1599 (noting that the insider trading scandals of the 1980s "reinforced the conclusion that corporate codes should be part of the repertoire of corporate self-governance"); *see also* Marisa Anne Pagnattaro & Ellen R. Peirce, *Between a Rock and a Hard Place: The Conflict Between U.S. Corporate Codes of Conduct and European Privacy and Work Laws*, 28 BERKELEY J. EMP. & LAB. L. 375, 383 (2007).

75. *See* RONALD E. BERENBEIM, CORPORATE ETHICS 13–14 (1987); Robert Jackall, *Whistleblowing & Its Quandaries*, 20 GEO. J. LEGAL ETHICS 1133, 1134 (2007); Katherine E. Kenny, Comment, *Code or Contract: Whether Wal-Mart's Code of Conduct Creates a Contractual Obligation Between Wal-Mart and the Employees of its Foreign Suppliers*, 27 NW. J. INT'L L. & BUS. 453, 457 (2007); Pagnattaro & Peirce, *supra* note 74, at 383–84.

76. *See, e.g.*, Krawiec, *supra* note 73, at 510–12. *But see* David Hess, *A Business Ethics Perspective on Sarbanes-Oxley and the Organizational Sentencing Guidelines*, 105 MICH. L. REV. 1781, 1791–95 (2007) (reviewing empirical studies of compliance programs and concluding that a properly implemented program can reduce fraud and increase whistleblowing).

the formal corporate policy on a number of potential illegalities, such as antitrust violations, insider trading, and corporate fraud.[77] During this period, various groups recommended several "model" Codes of Ethics that included anti-retaliation protection for whistleblowers.[78] However, Codes actually implemented by corporations rarely mentioned such whistleblower protection.[79]

2. Government Incentives

In the 1990s, however, the content of Codes began to change when the federal government, as well as various judicial decisions, provided corporations significant incentives to implement internal compliance systems to detect illegality within the corporation.[80] These compliance systems evolved to include at least three parts: (1) communication of compliance rules to employees; (2) a means for employees to report viola-

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77. *See* Pitt & Groskaufmanis, *supra* note 71, at 1601–03.

78. *See* PRESIDENT'S BLUE RIBBON COMMISSION ON DEFENSE MANAGEMENT, A QUEST FOR EXCELLENCE: FINAL REPORT TO THE PRESIDENT 251 (1986) (listing as one of the guiding principles of the Defense Industry Initiatives on Business Ethics and Conduct that "[e]ach company will create a free and open atmosphere that allows and encourages employees to report violations of its code to the company without fear of retribution for such reporting"), *available at* http://www.ndu.edu/library/pbrc/36Ex2AppC1.pdf; *see id.* at App. N (noting recommendation of Ethics Resource Center survey that whistleblower protection should be included in a code of ethics); TREADWAY COMMISSION, REPORT OF THE NATIONAL COMMISSION ON FRAUDULENT FINANCIAL REPORTING 35–36 (1987), *available at* http://www.coso.org/Publications/NCFFR.pdf ("The code of corporate conduct should protect employees who use these internal procedures against reprisal. Failure to adopt guarantees against reprisal as well as to provide an effective internal complaint procedure could undermine the vitality of codes of conduct . . . .").

79. *See* BERENBEIM, *supra* note 75, at 1–18 (broad survey of 227 corporate codes of ethics without mention of anti-retaliation protections); FOUNDATION OF THE SOUTHWESTERN GRADUATE SCHOOL OF BANKING, A STUDY OF CORPORATE ETHICAL POLICY STATEMENTS 24–25 (1980) (survey of ethical policies of 174 U.S. corporations without mention of anti-retaliation protections); PRESIDENT'S BLUE RIBBON COMMISSION ON DEFENSE MANAGEMENT, *supra* note 78, at 265 (reproducing 1986 survey of ninety-one defense contractors which found that twenty-one percent of the contractors' codes of ethics included whistleblower protection); Center for Business Ethics, *Are Corporations Institutionalizing Ethics*, 5 J. BUS. ETHICS 85, 85–91 (1986) (survey of 279 Fortune 500 companies' views on ethics without mentioning anti-retaliation provisions); Donald R. Cressey & Charles A. Moore, *Managerial Values and Corporate Codes of Ethics*, 25 CAL. MGMT. REV. 53, 53–77 (1983) (analysis of 119 corporate conduct codes from mid-1970s without discussion of anti-retaliation provisions); Pitt & Groskaufmanis, *supra* note 71, at 1601–03 (summarizing contents of many Codes); Sanderson & Varner, *supra* note 71, at 31.

80. *See infra* text accompanying notes 82–99.

tions of those rules; and (3) anti-retaliation protections for those whistleblowing employees.

First, in 1991, the federal government released its Organizational Sentencing Guidelines, which provided massive criminal penalty reductions for a corporation that implemented an "effective" compliance system.[81] Piggy-backing on the voluntary corporate efforts of the previous two decades, the commentary to the 1991 version of the Guidelines suggested that an effective compliance system should include a method for an organization to communicate its ethical regulations to its management and employees.[82] In 2004, this commentary was formally moved into the Guidelines' requirements.[83] Part of the accepted practice for corporations to comply with this "communication" element of the Guidelines was to release a corporate Code.[84]

Second, incentive programs went beyond the initial voluntary efforts of the 1970s and 1980s that merely recited corporate rules and policies. The incentive programs also explicitly required corporate compliance systems to implement a way for employees to report misconduct to the company. For example, under the current Organizational Sentencing Guidelines, organizations must have and publicize a system for employees to "report or seek guidance regarding potential or actual criminal conduct."[85] Similarly, courts released judicial decisions explicitly providing benefits to corporations that implemented a channel for employees to report misconduct.[86] In 1996, the Delaware Chancery Court issued an influential decision finding that a corporate director could avoid a claim of breach of fiduciary duty of care if the director had implemented an adequate "corporate information and reporting system."[87] Two years

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81. *See* Krawiec, *supra* note 73, at 498–99; Pagnattaro & Peirce, *supra* note 74, at 384.

82. U.S. SENTENCING GUIDELINES MANUAL § 8A1.2, Application Note 3(k)(5) (1991).

83. *See* Amendment 673 from the Supplement to Appendix C, Guidelines Manual (Nov. 1, 2004), *available at* http://www.ussc.gov/orgguide.htm (last visited Aug. 24, 2008).

84. *See* Krawiec, *supra* note 73, at 495–96.

85. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(4)(A) (2004), *available at* http://www.ussc.gov/guidelin.htm.

86. *See* Elletta Sangrey Callahan et al., *Integrating Trends in Whistleblowing and Corporate Governance: Promoting Organizational Effectiveness, Societal Responsibility, and Employee Empowerment*, 40 AM. BUS. L.J. 177, 190–93 (2002).

87. *See In re* Caremark Int'l Inc., 698 A.2d 959, 970 (Del. Ch. 1996); *see also* Terry Morehead Dworkin, *Whistleblowing, MNC's, and Peace*, 35 VAND. J. TRANSNAT'L L. 457, 466 (2002); Moberly, *supra* note 7, at 1135.

later, in the twin cases *Burlington Indus., Inc. v. Ellerth*[88] and *Faragher v. City of Boca Raton*,[89] the U.S. Supreme Court provided an affirmative defense to an employer in a sexual harassment case if the employer had, among other things, an anti-harassment policy and an internal grievance procedure.[90]

Third, many of the incentive programs strongly suggested that an important part of any effective internal compliance system must be a corporate promise not to retaliate against any employee who discloses corporate misconduct. The Organizational Sentencing Guidelines explicitly require that corporations must offer a whistleblower disclosure channel that employees can utilize "without fear of retaliation."[91] Similarly, the EEOC advises that an anti-harassment policy and complaint procedure will not be effective unless the employer "make[s] clear that it will not tolerate adverse treatment of employees because they report harassment or provide information related to such complaints."[92] Indeed, courts conclude that, absent evidence to the contrary, an anti-harassment policy can presumptively satisfy the *Faragher/Ellerth* affirmative defense discussed above if the policy provides a "clear direction as to how to report sexual harassment and . . . includ[es] a confidentiality and anti-retaliation provision."[93] Conversely, several courts have found that the lack of a promise not to retaliate in an anti-harassment policy can contribute to a court finding that the employer failed to satisfy the *Faragher/Ellerth* affirmative defense.[94]

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88. 524 U.S. 742, 765 (1998).

89. 524 U.S. 775, 807 (1998).

90. An employer can utilize the affirmative defense if it made reasonable efforts to deter and correct illegally harassing behavior, which according to the Court includes having an anti-harassment policy and an internal grievance procedure. *See Burlington Indus., Inc.*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807; *see also* Moberly, *supra* note 7, at 1135.

91. U.S. SENTENCING GUIDELINES MANUAL §8B2.1(b)(5)(C) (2004).

92. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (June 18, 1999), *available at* http://www.eeoc.gov/policy/docs/harassment.html#VC.

93. Barrett v. Applied Radiant Energy Corp., 240 F.3d 262, 266 (4th Cir. 2001). *See also* Montero v. AGCO Corp., 192 F.3d 856, 861–862 (9th Cir. 1999) (finding the anti-harassment policy at issue to be effective because it contained, among other things, an anti-retaliation provision); Reed v. Cedar County, 474 F. Supp. 2d 1045, 1063 (N.D. Iowa 2007) (same); Garone v. United Parcel Serv., Inc., 436 F. Supp. 2d 448, 472 (E.D.N.Y. 2006) (same). *See generally* Elinor P. Schroeder, *Handbooks, Disclaimers, and Harassment Policies: Another Look at* Clark County School District v. Breeden, 42 BRANDEIS L.J. 581, 588 (2004).

94. *See* Williams v. Spartan Commc'ns, Inc., No. 99-1566, 2000 WL 331605, at

Ultimately, corporate Codes combined these three aspects of incentive programs into a single corporate policy document.[95] "Best practices" for internal control systems included implementing a viable and comprehensive whistleblower policy that encouraged employees to report misconduct and that included a promise not to retaliate against them.[96] Thus, the issuance of a Code evolved from a voluntary recitation of corporate rules and policies to an embodiment of an affirmative corporate structure designed to allow whistleblowers to disclose evidence of misconduct within the corporation. An important part of this new structure included an explicit promise not to retaliate against employees who utilized these whistleblower disclosure channels.[97]

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*3 (4th Cir. Mar. 30, 2000) (finding that the employer failed to state an affirmative defense because, among other things, the employer "disseminated an anti-harassment policy which failed to provide that complainants would be free from retaliation, and yet warned that false reports of harassment would subject a complainant to disciplinary action, 'including termination'"); Thomas v. BET Soundstage Restaurant, 104 F. Supp. 2d 558, 566 (D. Md. 2000) (noting that the employer's policy is "silent as to any prohibition against retaliation"); Miller v. Woodharbor Molding & Millworks, Inc., 80 F. Supp. 2d 1026, 1029–30 (N.D. Iowa 2000) (finding that a policy without an anti-retaliation provision was "woefully inadequate").

95. *See* Joshua A. Newberg, *Corporate Codes of Ethics, Mandatory Disclosure, and the Market for Ethical Conduct*, 29 VT. L. REV. 253, 262–64 (2005).

96. *See, e.g.*, Tim V. Eaton & Michael D. Akers, *Whistleblowing and Good Governance: Policies for Universities, Government Entities, and Nonprofit Organizations*, 77 CPA JOURNAL 66, 70 (2007) (listing current best practices for non-profit organizations to develop a whistleblower policy); Pagnattaro & Peirce, *supra* note 74, at 397–99 (citing to Deloitte and Corporate Board Member magazine study finding that ninety percent of surveyed companies implemented anonymous whistleblower reporting system). Scholars and other organizational experts recognized that whistleblowing policies must include a non-retaliation provision in order to be effective. *See, e.g.*, Tim Barnett et al., *The Internal Disclosure Policies of Private-Sector Employers: An Initial Look at Their Relationship to Employee Whistleblowing*, 12 J. BUS. ETHICS 127, 129 (1993); Eaton & Akers, *supra*, at 70 (discussing necessity of non-retaliation provision for non-profit organizations); Harold Hassink et al., *A Content Analysis of Whistleblowing Policies of Leading European Companies*, 75 J. BUS. ETHICS 25, 38 (2007); Mark S. Schwartz, *A Code of Ethics for Corporate Code of Ethics*, 41 J. BUS. ETHICS 27, 35, 39 (2002); Steven Weller, *The Effectiveness of Corporate Codes of Ethics*, 7 J. BUS. ETHICS 389, 394 (1988); TREADWAY COMM'N, *supra* note 78, at 35–36 ("The code of corporate conduct should protect employees who use these internal procedures against reprisal. Failure to adopt guarantees against reprisal as well as to provide an effective internal complaint procedure could undermine the vitality of codes of conduct . . . .").

97. *See, e.g.*, Barnett et al., *supra* note 96, at 131 (noting that results from a 1993 survey of human resource professionals indicated that about two-thirds of companies with internal disclosure policies promised protection from retaliation for employee whistleblowers); Pagnattaro & Peirce, *supra* note 74, at 398 ("Whistleblowing thus became a staple provision in corporate codes of conduct after these changes.").

3. Mandated Codes

The third, and most recent, phenomenon transformed these previous voluntary and incentive-based programs into a *requirement* that corporations publish Codes that include anti-retaliation promises for whistleblowers. After Enron's bankruptcy in February 2002, the Security and Exchange Commission ("SEC") requested that the stock exchanges examine their listing standards related to corporate governance.[98] In response, the exchanges issued new corporate governance standards for companies to satisfy in order to list corporate shares on their exchanges.[99]

The listing rules require corporations to promise broad whistleblower protection. First, the two major stock exchanges, NYSE and NASDAQ, require their listing issuers to adopt a Code that applies to all employees.[100] Second, the Code must provide for an enforcement mechanism to encourage prompt, internal reporting of violations of the Code.[101] The NYSE and NASDAQ listing requirements specifically mandate that the Code include corporate assurances that it will not retaliate against an employee for reporting violations of the Code.[102] The NYSE also requires that companies protect em-

98. *See* Securities and Exchange Commission, *NASD and NYSE Rulemaking: Relating to Corporate Governance*, Release No. 34-48745 (Nov. 4, 2003) (citing Commission Press Release No. 2002-23 (February 13, 2002)).

99. The stock exchanges actually proposed new listing standards to the SEC, which subsequently approved them. *See* Securities and Exchange Commission, *NASD and NYSE Rulemaking: Relating to Corporate Governance*, Release No. 34-48745 (Nov. 4, 2003) (approving NYSE and NASD listing standards); Securities and Exchange Commission, *Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change by the American Stock Exchange LLC and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 2 Relating To Enhanced Corporate Governance Requirements Applicable to Listed Companies*, Release No. 34–48863 (Dec. 1, 2003) (approving American Stock Exchange (AmEx) standards); Securities And Exchange Commission, *Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Boston Stock Exchange, Inc. to Amend Chapter XXVII, Section 10 of the Rules of the Board of Governors By Adding Requirements Concerning Corporate Governance Standards of Exchange-Listed Companies*, Release No. 34-49955 (July 1, 2004) (approving Boston Stock Exchange listing standards).

100. *See* NYSE LISTING MANUAL § 303A.10 ("Listed companies must adopt and disclose a code of business conduct and ethics for directors, officers and employees . . . ."); NASDAQ MANUAL ONLINE § 4350(n), *available at* http://wallstreet.cch.com/nasdaq/.

101. *See* NYSE LISTING MANUAL § 303A.10; NASDAQ MANUAL ONLINE § 4350(n).

102. *See* NYSE LISTING MANUAL § 303A.10; NASDAQ INTERPRETATIVE MANUAL ONLINE § IM-4350-7. The AmEx does not contain an explicit require-

ployees who make reports in "good faith,"[103] while the NASDAQ requires protection of those reporting "questionable behavior."[104] Third, the exchanges require that corporations publicize their Code; the NYSE goes further and specifically mandates that companies place their Code on their corporate websites.[105] In short, general *policies* about whistleblowing are not enough; these corporate governance standards require *promises* not to retaliate.[106]

B. *Substantive Benefits: Broader Protections*

If courts take the anti-retaliation promises contained in corporate Codes seriously, the Codes could provide broader whistleblower protection than traditional tort and statutory anti-retaliation remedies. For example, Wal-Mart, the world's largest private employer,[107] issued a Statement of Ethics in 2005 stating that all employees "are *required* to report any known or suspected violations of the law, applicable regulations or this Statement of Ethics or any Wal-Mart policy."[108] The Statement also states, in bold print and highlighted by a

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ment regarding retaliation. *See* AMEX COMPANY GUIDE, § 807.

103. *See* NYSE LISTING MANUAL § 303A.10 ("To encourage employees to report such violations, the listed company must ensure that employees know that the company will not allow retaliation for reports made in good faith.").

104. *See* NASDAQ INTERPRETATIVE MANUAL ONLINE § IM-4350-7 ("Each code of conduct must also contain an enforcement mechanism that ensures prompt and consistent enforcement of the code, protection for persons reporting questionable behavior, clear and objective standards for compliance, and a fair process by which to determine violations.").

105. *See* NYSE LISTING MANUAL § 303A.10 ("Each listed company's website must include its code of business conduct and ethics. The listed company must state in its annual proxy statement or, if the company does not file an annual proxy statement, in the company's annual report on Form 10-K filed with the SEC, that the foregoing information is available on its website and that the information is available in print to any shareholder who requests it."); NASDAQ MANUAL ONLINE § 4350(n) (requiring that the code be made "publicly available"); AMEX COMPANY GUIDE §807 (same).

106. In the context of attempting to provide contractual protection against sexual orientation discrimination, Ian Ayres and Jennifer Gerarda Brown note the importance of obtaining contractual promises of nondiscrimination rather than merely unenforceable nondiscrimination policies. *See* Ayres & Brown, *EDNA*, *supra* note 13, at 1692–93. The new listing standards seem to recognize that important distinction with regard to whistleblowers by demanding assurances that whistleblowers will not suffer retaliation.

107. *See* Fortune Global 500 List of Biggest Employers, http://money.cnn.com/magazines/fortune/global500/2007/performers/companies/biggest_employers/index.html (last visited Aug. 2, 2008).

108. *See* Wal-Mart Statement of Ethics, at 5 (emphasis in original), *available at* http://walmartstores.com/media/Investors/Ethics%20_Current.pdf.

surrounding box, that no employee "who in good faith reports a suspected violation will be subject to retaliation for having made the report."[109]

Two recent studies indicate that the Codes at many publicly-traded corporations utilize the same type of language as Wal-Mart's Code. The first study involved a preliminary examination of thirty Codes from companies randomly selected from NYSE-listed corporations that filed annual reports with the SEC in 2007.[110] The second study surveyed whistleblower provisions from the largest 100 European-listed companies.[111] As demonstrated by these two studies and discussed in more detail in the following sub-sections, Code anti-retaliation promises like Wal-Mart's can fill the important gaps in tort and statutory protections because they often (1) apply to all the company's workers; (2) protect a wide range of disclosures; and (3) require a whistleblower only to have a "good faith" belief in the accuracy of the disclosure.

1. Always the Right Employer and Employee

First, unlike many statutory protections, Code provisions obviously cover the employer that issued the Code and also typically cover all employees of the corporation.

Statutory protections provide more limited coverage. Federal anti-retaliation statutes often apply only to certain employers. For example, as noted above, the Sarbanes-Oxley Act applies only to publicly-traded corporate employers.[112] Although state statutes typically cover all private-sector employees,[113] some state statutes cover only employers with a mini-

109. *See id.*

110. The study eventually will include Codes from companies listed on the NASDAQ and the AmEx as well, and a full description of the study's methodology and results will be published elsewhere. *See* Richard Moberly, *Whistleblower Policies and Codes of Ethics* (forthcoming) (manuscript on file with author).

111. *See* Hassink et al., *supra* note 96, at 31. The European study surveyed companies found on the Ftse Eurotop-100 about their whistleblower policies. The study's final sample included responding companies from the survey (twenty-five percent response rate) as well as whistleblower policies located on the websites of other non-Ftse Europtop-100 companies listed on the Dutch AEX index and SWX Swiss Exchange. *Id.* Ultimately, the study examined whistleblower policies for fifty-six European companies. *Id.* Although European policies may not be directly relevant to American workers, the study provides data that supplements my study of NYSE-listed companies regarding current corporate practices related to whistleblower policies.

112. *See* 18 U.S.C. § 1514A(a) (Supp. IV 2004).

113. *See* WESTMAN & MODESITT, *supra* note 11, at 78–79 (noting that all but a

mum number of employees.[114] Such limitations can have bite during litigated whistleblower cases. Under Sarbanes-Oxley, 28.9% of the cases decided in favor of employers were resolved because the employer was not a publicly-traded company covered by the Act.[115]

Employees not afforded whistleblower protection by a specific statutory provision covering their employer may be able to use a breach of contract claim to avoid statutory restrictions. In *Brady v. Calyon Securities*,[116] a research analyst for a securities broker-dealer claimed that he was fired in retaliation for reporting alleged violations of securities laws, rules, and regulations.[117] This type of disclosure typically would fall squarely within the type of "protected activity" covered by the Sarbanes-Oxley Act.[118] However, the court dismissed the employee's Sarbanes-Oxley whistleblower claim because the defendant corporation was not a publicly-traded company.[119] At the same time, the court permitted the employee to bring a separate claim based on the same whistleblowing activity for violation of the company's Compliance Manual, which encouraged employees to report misconduct and promised not to retaliate against them if they did.[120] The clear applicability of the Compliance Manual to the company avoided Sarbanes-Oxley's statutory distinction between publicly-traded and privately-held corporations.

Moreover, because a corporate Code always applies to the company and its employees, enforcing a Code promise often avoids a debate about whether a worker is a "covered em-

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few state statutes protect all employees regardless of the size of the employer).

114. *See id.* at 79 (noting that Florida's anti-retaliation statute covers employers with ten or more employees, *see* FLA. STAT. § 448.101(3) (2004), and Louisiana's statute covers employers with twenty or more employees within the state each working day of twenty or more weeks in the current or previous calendar year, *see* LA. REV. STAT. ANN. § 23:302(2) (2004)).

115. *See* Moberly, *supra* note 10, at 109 (examining decisions of administrative law judges under the Act).

116. 406 F. Supp. 2d 307 (S.D.N.Y. 2005).

117. *See id.* at 310.

118. *See* Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (Supp. IV 2004) (protecting employees who make disclosures about violations of federal securities laws, among other things).

119. *See Brady*, 406 F. Supp. 2d at 318.

120. *See id.* at 316 (quoting the Compliance Manual as saying, "Calyon Americas shall not discharge, demote, suspend, threaten, harass, or in any manner discriminate against any employee in the terms and conditions of employment based upon any lawful actions of such employee in response to good faith reporting of Complaints or participation in a related investigation").

ployee." Some federal statutes apply only to certain types of employees. The Surface Transportation Assistance Act of 1982, for example, applies only to employees who are drivers of commercial motor vehicles, mechanics, or freight handlers who directly affect commercial motor vehicle safety in the course of their employment.[121] State statutes and tort law protect individual employees within the same multi-state corporation differently depending upon the state in which the employee resides or works. By contrast, a corporate Code that explicitly applies to all employees would cover a corporation's employees regardless of job duty or geographic location. For example, Wal-Mart's Statement of Ethics applies to all employees worldwide as well as the corporate Board of Directors.[122] In fact, while independent contractors and some contingent workers may still be excluded from some Codes' coverage, the Wal-Mart Statement even applies to the company's "suppliers, consultants, law firms, public relations firms, contractors, and other service providers," who are expected to comply with the Statement of Ethics.[123]

Corporate Codes generally mirror Wal-Mart's broad coverage. In the preliminary study mentioned above, one-hundred percent of the NYSE Codes applied to all employees.[124] Similarly, ninety-six percent of European whistleblower policies covered all employees of the company.[125] Thus, in many cases, the anti-retaliation promise contained in a corporate Code can reduce the chance that a whistleblower will not be protected because the whistleblower was not a "covered employee" or did not work for a "covered employer."

2. Broader Protected Activity

Second, Codes often create a broader scope of protected activity than statutory or tort protection. Federal anti-retaliation statutes typically protect only disclosures related to certain topics, such as fraud in the Sarbanes-Oxley context[126] or worker health and safety under the Occupational Safety and Health Act.[127] As with the "covered employer" determination,

121. *See* Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105(a).
122. *See* Wal-Mart Statement of Ethics, *supra* note 108, at 2.
123. *See id.*
124. *See* Moberly, *supra* note 110.
125. *See* Hassink, et al., *supra* note 96, at 32.
126. 18 U.S.C. §§ 1514A(a)(1) & (a)(2) (Supp. IV 2004).
127. 29 U.S.C. § 660(c)(1) (2000).

this "protected activity" decision can leave whistleblowers without coverage when they disclose misconduct not covered by a particular statute. In the Sarbanes-Oxley study mentioned above, administrative law judges dismissed 24.1% of whistle-blower cases because the employee did not disclose the right type of misconduct.[128] State statutory protection can provide broader "protected activity" coverage than federal law; however, only a minority of states statutorily protect private-sector whistleblowers.[129] Moreover, some states provide much more limited protection. New York's whistleblower statute, for instance, restricts protection to employees who report a violation of a law, rule, or regulation that poses a substantial danger to the public health or safety.[130]

Similarly, the wrongful discharge tort only protects employees who disclose a violation of "public policy"—a limitation that some courts interpret narrowly.[131] For example, courts often determine that whistleblowers who disclose seemingly private misconduct, such as corporate embezzlement or bribery, should not be protected because such wrongdoing does not affect the public at large.[132]

Corporate Codes, on the other hand, often promise to protect an employee who discloses *any* illegal or unethical activity occurring within the corporation. As noted above, the

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128. *See* Moberly, *supra* note 10, at 113–14; *see also* Robert P. Riordan & Leslie E. Wood, *The Whistleblower Provisions of Sarbanes-Oxley: Discerning the Scope of "Protected Activity"*, 24 HOFSTRA LAB. & EMP. L.J. 95, 97 (2006) (noting that administrative law judges narrowly construe the protected activity requirement of Sarbanes-Oxley).

129. *See* WESTMAN & MODESITT, *supra* note 11, at 77 (noting that seventeen state statutes protect private-sector whistleblowers). Unlike federal statutes that protect whistleblowers who report certain types of narrowly-defined misconduct, state whistleblower statutes often protect employees who report *any* actual or suspected violation of federal, state, or local laws. *See id.* at 80 (noting that a "majority" of the seventeen anti-retaliation statutes provide such protection); *id.* at App. B (listing states). For example, North Dakota's statute protects whistle-blowers who disclose *any* violation of federal, state, or local law, ordinance, regulation, or rule. *See* N.D. CENT. CODE § 34-01-20. Some of these statutes also protect reporting of additional types of misconduct, such as health care providers that violate ethical standards, *see* MINN. STAT. ANN. § 181.932(1)(d), or standards of patient care, *see* Conscientious Employee Protection Act, N.J. STAT. ANN. § 34:19-3 (West 2004).

130. *See* N.Y. LAB. LAW § 740.

131. *See* discussion *supra* Part I.C.

132. *See, e.g.*, Adler v. Am. Standard Corp., 830 F.2d 1303, 1305–07 (4th Cir. 1987) (involving whistleblower report of commercial bribery); Foley v. Interactive Data Corp., 765 P.2d 373, 375, 380 (Cal. 1988) (embezzlement); Hayes v. Eateries, Inc., 905 P.2d 778, 788 (Okla. 1995) (embezzlement).

NASDAQ requires Codes to protect any employee reporting "questionable" activity.[133] The Wal-Mart Statement of Ethics expands upon this language by prohibiting retaliation against anyone who reports a suspected violation of "the law, applicable regulations or this Statement of Ethics or any other Wal-Mart policy."[134] The study of NYSE-listed Codes found that many corporate Codes contain similarly broad language: 76.7% of the Codes explicitly protect employees who report *any* illegal activity, and ninety percent protect employees who report violations of the Code itself, which often includes illegalities as well as ethical lapses and violations of internal policies.[135] The European study found that over ninety-six percent of the whistleblower policies gave generalized examples of misconduct that should be reported: breaches of internal policies of a Code were mentioned in all of these policies, and sixty-six percent of the policies stated that violations of the law or other regulations should be reported.[136]

This broader coverage should enable courts and administrative decision makers to avoid determining whether a whistleblower technically engaged in "protected activity" by reporting wrongdoing specifically covered by the tort of wrongful discharge or by a particular statute. For example, in *Fraser v. Fiduciary Trust Co.*,[137] the court dismissed Sarbanes-Oxley claims based on two instances of whistleblowing because the employee's disclosure purportedly did not meet the Act's definition of "protected activity."[138] There, the employee wrote a memo to his employer's human resources department alleging that his supervisor ordered him to falsify the company's financial performance results.[139] He also wrote an email to the company's senior management asserting that the company failed to follow its internal investment guidelines.[140] The court dismissed both Sarbanes-Oxley claims because the disclosures did not allege any illegalities related to shareholder fraud.[141] The court, however, permitted other claims to go forward under a

133. *See* NASDAQ INTERPRETATIVE MANUAL ONLINE § IM-4350-7.
134. *See* Wal-Mart Statement of Ethics, *supra* note 108, at 5.
135. *See* Moberly, *supra* note 110.
136. *See* Hassink, et al., *supra* note 96, at 36–37.
137. 417 F. Supp. 2d 310 (S.D.N.Y. 2006).
138. *Id.* at 322–23.
139. *Id.* at 322.
140. *Id.* at 323.
141. *Id.* at 322–23.

breach of contract theory based on the employer's anti-retaliation policy.[142]

Employees have also asserted Code-based claims to avoid a narrow construction of the public policy tort. In *Greene v. Quest Diagnostics Clinical Laboratories, Inc.*,[143] an employee alleged that she internally reported misconduct that violated her employer's policies and several state and federal laws.[144] The court dismissed her claim for wrongful discharge in violation of public policy because South Carolina recognizes that tort in only two circumstances: (1) when an employee must violate a criminal law as a condition of employment and (2) when the act of discharging the employee is itself a violation of criminal law.[145] However, the employee's claim regarding the enforceability of a broad anti-retaliation promise in the employer's Compliance Manual survived summary judgment.[146]

Harsh-barger v. CSX Transportation, Inc.[147] provides another example. In that case, an employee reported his supervisor's harassing behavior to the company's human resources department and was later discharged.[148] The court dismissed the employee's wrongful discharge tort claim because the employee failed to identify a "clear mandate" of public policy that the employer violated, as required by West Virginia law.[149] However, the employee's claim for "equitable estoppel/detrimental reliance" survived because the employee sufficiently alleged that he relied on the anti-retaliation provision of the company's Code when he reported his supervisor's harassment.[150]

142. *Id.* at 325.

143. 455 F. Supp. 2d 483 (D.S.C. 2006).

144. *See id.* at 487–88.

145. *See id.* at 489 (citing Culler v. Blue Ridge Elec. Coop., Inc., 422 S.E.2d 91, 92-93 (S.C. 1992); Ludwick v. This Minute of Carolina, Inc., 337 S.E.2d 213, 214–16 (S.C. 1985)).

146. *See id.* at 492 (finding that a jury should determine whether the anti-retaliation promise was binding because the Compliance Manual did not contain a disclaimer). It should be noted that the court ultimately found as a matter of law that employee did not demonstrate that the employer breached the anti-retaliation policy. *Id.* at 492–93.

147. 478 F. Supp. 2d 890 (S.D. W. Va. 2006).

148. *See id.* at 892.

149. *See id.* at 895.

150. *See id.* at 895–96.

3. Good Faith Standard

Finally, Codes often protect employees who make whistleblower disclosures in "good faith," a more inclusive standard than those typically provided in statutory and tort whistleblower protections. Indeed, the NYSE requires that companies protect employees who make reports in "good faith."[151] Not surprisingly, the survey of NYSE-listed companies found that eighty percent included this standard, while two-thirds of the others utilized similar language by protecting reports of "actual or suspected" wrongdoing.[152] The European survey found that seventy percent of company policies protected an employee from retaliation if the employee made a "genuine/honest/legitimate" or "good faith" whistleblower disclosure.[153]

By contrast, many federal statutes require that whistleblowers have an objectively "reasonable belief" that the conduct they disclose violates the law.[154] State statutes vary with regard to the level of knowledge the whistleblower needs to have regarding the disclosed misconduct, requiring "objective reasonableness," "subjective good faith," or a disclosure that is "not knowingly false."[155] In addition, courts have interpreted some statutes, such as those in New York and Minnesota, to require that the whistleblower report an actual violation of law in order to be protected.[156]

As with statutory whistleblower protections, the common law also provides different levels of protection to a whistleblower depending on the whistleblower's knowledge regarding the violation disclosed.[157] Some jurisdictions protect a whistle-

151. *See* NYSE LISTING MANUAL § 303A.10. Wal-Mart's Statement of Ethics contains this same protection for "good faith" whistleblowers. *See* Wal-Mart Statement of Ethics, *supra* note 108, at 5.

152. *See* Moberly, *supra* note 110. Overall, only two of the thirty companies did not use one of these two phrases when describing the type of disclosure required for protection. Interestingly, these companies did not utilize any standard at all to describe the whistleblower's "belief" in the disclosure.

153. *See* Hassink et al., *supra* note 96, at 38 (noting that fifty-seven percent of the policies required that reports be made in "good faith" and thirteen percent required "genuine/honest/legitimate" reports).

154. *See, e.g.*, Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A(a)(1) (Supp. IV 2004).

155. WESTMAN & MODESITT, *supra* note 11, at 81; *see also* Cherry, *supra* note 53, at 1047.

156. *See* WESTMAN & MODESITT, *supra* note 11, at 82 (citing Bordell v. General Elec. Co., 667 N.E.2d 922 (N.Y. 1996) and Obst v. Microtron, Inc., 614 N.W.2d 196 (Minn. 2000)).

157. *See id.* at 142.

blower who has a "reasonable belief" that a legal violation occurred,[158] while others permit claims only from a whistleblower who demonstrates that an actual violation of the law took place.[159]

The difference between a "good faith" standard and more restrictive options presents more than a semantic choice. In the recent Sarbanes-Oxley study, 14.5% of whistleblowers lost their claim because an administrative law judge determined that the whistleblower did not have an objectively reasonable belief that an illegal activity occurred.[160] In application, this "reasonable belief" standard arguably requires the whistleblower, in order to be protected, to prove that he or she disclosed an actual violation of law.[161] The "good faith" standard set forth by many corporate Codes presents a burden more appropriately set to encourage rank-and-file employees to report misconduct with confidence that they will be protected even if they are mistaken about the illegality of the conduct they report.

C. *Procedural Benefits: Leveling the Playing Field*

In addition to providing broader substantive protections, enforcing anti-retaliation promises found in corporate Codes would decrease the procedural advantages currently enjoyed by employers in whistleblower litigation. By leveling the procedural playing field, contract protection can further encourage whistleblowing and deter retaliation.

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158. *See, e.g.*, Schriner v. Meginnis Ford Co., 421 N.W.2d 755 (Neb. 1988).

159. *See, e.g.*, Barker v. State Ins. Fund, 40 P.3d 463 (Okla. 2001).

160. *See* Moberly, *supra* note 10, at 102 tbl.4.

161. *See, e.g.*, Welch v. Cardinal Bankshares Corp., ARB No. 05-065, slip op. at 11–12 (May 31, 2007) (overruling an administrative law judge's determination that a CFO had a reasonable belief that his employer violated securities regulations); Allen v. Stewart Enterp., ARB No. 06-081, at 14 (July 27, 2006) (finding that a "reasonable belief" that a statute has been violated means a high certainty that the law has been broken). In *Allen*, the employee alleged that she examined "internal consolidated financial statements" and that these statements indicated that the company violated an SEC rule. *See id.* The ARB, however, found that her disclosure of this potential SEC rule violation was not protected because these internal reports did not have to be filed with the SEC, and therefore could not have violated the rule. *See id.* Based on this nuance, the ARB found that the employee could not have "reasonably believed" that a violation of the rule occurred. *See id.*; *see also* Jason M. Zuckerman, *SOX's Whistleblower Provision: Promise Unfulfilled*, 4 SECURITIES LIT. REPORTER 14, 16–17 (July/Aug. 2007); *cf.* Brianne J. Gorod, *Rejecting Reasonableness*, 56 AM. UNIV. L. REV. 1469, 1484–96 (2007) (criticizing the "reasonable belief" standard because courts may use it to improperly reject retaliation claims under the opposition clause of Title VII).

1. Longer Statute of Limitations

First, state contract claims typically provide a longer statute of limitations than many whistleblower statutes. Depending on the federal statute invoked, the statute of limitations for retaliation claims can range from 30 to 180 days.[162] The statute of limitations for retaliation under federal employee discrimination statutes can reach 300 days.[163] As with the federal laws, state statutes have a variety of procedural requirements. Some laws set forth limitations periods as short as ninety days.[164] Similar to the substantive boundaries discussed above, these short statutes of limitations can dramatically affect whistleblower claims. In the Sarbanes-Oxley study, administrative law judges dismissed over one-third of all cases because the whistleblower failed to file a claim within the Act's ninety-day statute of limitations.[165]

By contrast, most states have a statute of limitations for written contract claims of at least four years,[166] with some states' limitation periods extending as long as ten to fifteen years.[167] A longer statute of limitations can benefit whistleblowers in several ways. Most whistleblowers who consider bringing claims previously lost their jobs due to employer retaliation.[168] As a result, whistleblowers need time to resolve their immediate financial situation before they can decide whether to sue their former employer, to find a competent attorney to investigate the claim, and to initiate a lawsuit.[169]

162. *See, e.g.*, Solid Waste Disposal Act, 42 U.S.C. § 6971 (2000) (30 days); International Safe Container Act, 46 U.S.C. § 80507 (2000) (60 days); Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (Supp. IV 2004) (90 days); Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (180 days).

163. *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. § 626(d)(2) (2000).

164. *See* WESTMAN & MODESITT, *supra* note 11, at 85 (noting that Connecticut and Michigan have ninety-day limitations periods).

165. *See* Moberly, *supra* note 10, at 107–09.

166. *See* NATIONAL SURVEY OF STATE LAWS 531–45 (Richard A. Leiter ed., 6th ed. 2007) (showing that all but five states have limitations periods of four years or more for written contracts).

167. *See, e.g.*, IOWA CODE § 614.1(5) (2007) (10 years); OHIO. REV. CODE ANN. §2305.06 (2007)(15 years).

168. *See* Moberly, *supra* note 10, at 132 n.274 (noting that 81.8% of Sarbanes-Oxley whistleblowers alleged that they lost their job as part of an employer's retaliation).

169. *Cf.* Terry Morehead Dworkin, *Sox and Whistleblowing*, 105 MICH. L. REV. 1757, 1763 (2007) (noting that "[m]ost potential claimants don't realize what their rights are and how to pursue them in such a short [ninety-day statute of limitations] period").

Furthermore, the statute of limitations for several whistleblower laws begins to run when the whistleblower first experiences or receives notice of a retaliatory adverse employment action.[170] This rule can place the time the employee received notice of the action in dispute, often to the whistleblower's detriment.[171] A short limitations period exacerbates this kind of dispute, while a longer period likely makes such distinctions less problematic.[172]

2. Avoiding Administrative Investigations

Second, a whistleblower who brings a contract-based claim may avoid the burden of an investigation by an administrative agency. Although some federal statutes permit whistleblowers to file claims directly in federal court,[173] others require whistleblowers to file claims with administrative agencies, such as the Department of Labor.[174] In fact, fourteen federal statutes require whistleblowers to file claims with the Occupational Safety and Health Administration ("OSHA") within the Department of Labor.[175] Some of these statutes, like the Occupational Safety and Health Act, permit only the agency to investigate and prosecute retaliation claims on an employee's behalf.[176] Others permit employees to pursue their own claims by requesting an administrative investigation, from which appeals can be made to an administrative law judge, then an administrative review board, and ultimately to a federal court of appeals.[177] The Sarbanes-Oxley Act of 2002 includes an additional procedural nuance. Whistleblowers who first file a claim with OSHA are permitted to withdraw their claim and file in federal district court if the agency does not complete its review within 180 days.[178] Similarly, under New Hampshire's whistleblower statute, employees must file a claim with an administrative agency before filing a civil lawsuit.[179]

170. *See, e.g.*, Halpern v. XL Capital, Ltd., No. 04-120, at 3 (ARB Aug. 31, 2005) (applying rule to Sarbanes-Oxley case).
171. *See id.*
172. *See* Moberly, *supra* note 10, at 132–33.
173. *See, e.g.*, Federal Deposit Insurance Act, 12 U.S.C. § 1831j (2000).
174. *See, e.g.*, 29 U.S.C. § 660(c)(2) (2000); 18 U.S.C. § 1514A(b)(1)(B) (Supp. IV 2004).
175. *See* Moberly, *supra* note 10, at 78 n.59.
176. *See* 29 U.S.C. § 660(c)(§2).
177. *See, e.g.*, 29 C.F.R. §§ 1980.105, .106; .107, .110, & .112 (2006).
178. *See* 18 U.S.C. § 1514A(b)(1)(B) (Supp. IV 2004).
179. *See* N.H. REV. STAT. ANN. § 275-E:4(I)–(II) (2007).

Some evidence suggests that administrative agencies may not be as receptive to whistleblower claims as juries. In the Sarbanes-Oxley study, OSHA found in favor of a whistleblower in only 3.6% of its completed investigations.[180] Many claims were resolved as a matter of law because OSHA determined that they did not fall within Sarbanes-Oxley's coverage.[181] However, even in cases in which OSHA found that Sarbanes-Oxley covered the claim, whistleblowers won only 10.7% of the time.[182] By contrast, when whistleblowers can present a claim to a jury, they have more success. A study of California cases in 1998 and 1999 found that whistleblowers won wrongful discharge jury trials sixty-three percent of the time.[183]

Administrative procedures also impose unnecessary burdens on whistleblowers. At a minimum, statutes like Sarbanes-Oxley require a six-month holding period before a whistleblower can bring a claim in a judicial forum. For an employee who likely lost employment, this long delay can be a substantial barrier to relief. Of equal significance, administrative investigations may not be as thorough as the discovery process required for courtroom litigation. For example, under some statutes, administrative investigators do not have subpoena power to require an employer to produce documents and witnesses, and administrative regulations often require very little cooperation from employers.[184] Those statutes that provide more power to investigators, such as the Occupational Safety and Health Act, often give an administrative agency sole discretion over whether to bring a claim of retaliation against an employer, thus denying whistleblowers the opportunity to have their claims heard by a court.[185]

D. *Normative Benefits: Enforcing Corporate Self-Regulation*

Enforcing the anti-retaliation promises in corporate Codes could provide substantive and procedural benefits to whistle-

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180. *See* Moberly, *supra* note 10, at 91.

181. *See id.* at 103–04.

182. *See id.* at 120–21 (finding 10.7% win rate for "causation" cases).

183. *See* David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 538 (2003).

184. *See* Moberly, *supra* note 10, at 125–26.

185. *See* 29 U.S.C. § 660(c)(2) (2000).

blowers, which would lead to less retaliation and, correspondingly, more whistleblowing. As discussed above, more whistleblowing from insider employees provides a substantial public benefit. In addition, enforcing anti-retaliation promises could provide another, perhaps more subtle, normative benefit by encouraging the movement toward corporate self-regulation.

Although the movement has different labels,[186] at its core it involves attempting to make government regulation more effective by encouraging some level of self-regulation and permitting the regulated entities increased involvement in government oversight.[187] Both advocates and critics of the movement recognize that, to be effective, the government must either require or encourage corporations to adopt internal structures that will detect and deter wrongdoing.[188] In theory, these internal structures will supplement, replace, and, in some cases, create government oversight in areas in which such oversight is weak, compromised, or non-existent. Such internal structures might require whistleblower disclosure channels[189] and mandate the use of internal rules and Codes of Ethics.[190] In fact, a direct correlation exists between the increased use of Codes and the growing prevalence of conscious self-regulation

186. *See* Krawiec, *supra* note 73, at 489–90 n.9 (noting that, in addition to the author's label of "negotiated governance," a number of terms have been used to describe such models, including " 'contractarian,' 'collaborative,' experimentalist,' 'problem solving,' 'empowered participatory,' 'enforced self-governance,' 'responsive regulation,' 'set of negotiated relationships,' and 'government-stakeholder network structures' "); *see also* Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 324–25 (2005) (coining the term "monitored self-regulation").

187. *See* John Braithwaite, *Enforced Self-Regulation: A New Strategy for Corporate Crime Control*, 80 MICH. L. REV. 1466, 1467–70 (1982); Estlund, *supra* note 14, at 354–55 (describing "New Governance" advocates who believe that government regulation should "energize and motivate regulated actors themselves to collaborate in both the shaping and the enforcement of regulatory norms"); Krawiec, *supra* note 73, at 490.

188. *See, e.g.*, Braithwaite, *supra* note 187, at 1470–73 (proposing a model of corporate self-regulation involving internally written and enforced rules); Estlund, *supra* note 186, at 319, 320–25; Krawiec, *supra* note 73, at 489; Susan Sturm, *Second Generation Employment Discrimination*, 101 COLUM. L. REV. 458, 479–89 (2001).

189. *See, e.g.*, Sarbanes-Oxley Act of 2002 § 301, 15 U.S.C. § 78j-1(m)(4)(A) (Supp. 2002) (requiring corporations to implement avenues for employees to report misconduct to the Audit Committee of the company's Board of Directors); *see generally* Moberly, *supra* note 7, at 1138–41 (discussing this "structural model" to encourage corporate whistleblowers).

190. *See, e.g.*, Krawiec, *supra* note 73, at 489; Sarbanes-Oxley Act of 2002, § 406(a), 15 U.S.C. § 7264(a) (Supp. 2002) (requiring corporations to issue a Code of Ethics for senior financial officers).

strategies by the government.[191] Two prominent commentators suggest that the increased prevalence of corporate Codes partially results from the "deeply rooted" American concept "that self-regulation within an industry is preferable to and more effective than government regulation."[192]

Using structural requirements to encourage self-regulation can be problematic, however, because the government rarely enforces compliance with its mandates regarding these internal mechanisms. Once corporations implement self-regulatory structures, the government engages in little oversight to ensure their effectiveness.[193] For example, under Sarbanes-Oxley, corporations must disclose only whether they have implemented a Code of Business Conduct—the government plays no role in monitoring or enforcing the corporation's published Code. Similarly, although Sarbanes-Oxley requires corporations to enact a "whistleblower disclosure channel" to permit employees to disclose misconduct to the board of directors, no one monitors the effectiveness of these channels.[194]

Even where the government has a distinct role in assessing internal compliance programs, the evaluation rarely rises beyond a superficial, "check-the-box" approach. Courts presented with a *Faragher/Ellerth* affirmative defense, for example, simply require employers to produce harassment policies and provide sexual harassment training to employees.[195] Lax government oversight encourages corporations to implement "window-dressing": structures that appear effective but do little to change corporate culture or legal compliance.[196] Professor

191. Krawiec, *supra* note 73, at 489–90.

192. *See* Pitt & Groskaufmanis, *supra* note 71, at 1574.

193. *See* Krawiec, *supra* note 73, at 536–37.

194. *See* Moberly, *supra* note 7, at 1167–72.

195. *See* Anne Lawton, *Operating in an Empirical Vacuum: The* Ellerth *and* Faragher *Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 212 (2004) (concluding after conducting an empirical study of federal court decisions regarding the *Faragher/Ellerth* affirmative defense that "the lower federal courts have interpreted the employer's obligations and burden of proof so that employers have little incentive to do anything besides promulgate policies and procedures that look good on paper"); *see also* Samuel Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 24 (2006) (summarizing research demonstrating that lower courts implementing the *Faragher/Ellerth* affirmative defense "have been satisfied by mere paper compliance").

196. *See* Krawiec, *supra* note 73, at 491 ("[A] growing body of evidence indicates that internal compliance structures do not deter prohibited conduct within firms, and may largely serve a window-dressing function that provides both market legitimacy and reduced legal liability."); *see also* Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls To Fight Fraud, Terrorism, Other Ills*, 29 J. CORP. L. 267, 314 (2003–04).

Kimberly Krawiec labels this problem "cosmetic compliance" and suggests that the lack of enforcement can fail to effectively deter corporate misconduct.[197]

Thus, although great promises can be made in corporate Codes, little external enforcement of these promises exists. Little internal enforcement exists either.[198] For a Code to work, employees must be sanctioned when they do not adhere to the Code's precepts.[199] Yet corporations have difficulty enforcing the provisions of their own Codes.[200] Social scientists note that "violations [of Codes] are frequent, and compliance is a major practical problem."[201] Empirical evidence suggests that, despite their pervasiveness, corporate ethics Codes rarely modify employee behavior.[202] Codes also fail to change organizational culture because they often lack internal "compliance institutions," such as an ethics committee, an ombudsman office, or an adjudication committee that can oversee and implement the lofty mandates set forth in Codes.[203] To work, Codes need these institutions to "interpret the [C]ode, clarify it, apply it to quandaries, resolve ambiguities and contradictions, communicate it, conduct ethical audits and enforce the Code by adjudicating on alleged violations and responding to those found

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197. *See* Krawiec, *supra* note 73, at 489–90.

198. *See* Harry W. Arthurs, *Corporate Codes of Conduct: Profit, Power and Law in the Global Economy*, *in* ETHICS CODES, CORPORATIONS AND THE CHALLENGE OF GLOBALIZATION, *supra* note 71, at 51, 52–53.

199. *See* Veronica Besmer, *The Legal Character of Private Codes of Conduct: More than Just a Pseudo-Formal Gloss on Corporate Social Responsibility*, 2 HASTINGS BUS. L.J. 279, 302 (2006).

200. *See* Earl A. Molander, *A Paradigm for Design, Promulgation and Enforcement of Ethical Codes*, 6 J. BUS. ETHICS 619, 629 (1987) ("The most problematic aspect of implementing an ethical code is code enforcement."); *see also* Pitt & Groskaufmanis, *supra* note 71, at 1602 ("[S]tudies suggest that the weakest element in compliance programs rests with enforcement."); Note, *The Good, the Bad, and Their Corporate Codes of Ethics: Enron, Sarbanes-Oxley, and the Problems with Legislating Good Behavior*, 116 HARV. L. REV. 2123, 2125–27 (2003) (arguing that corporate codes likely cannot decrease corporate crime because they are hard to enforce).

201. Andrew Brien, *Regulating Virtue: Formulating, Engendering and Enforcing Corporate Ethical Codes*, 15 BUS. & PROF. ETHICS J. 21, 22 (1996).

202. *See also* M. MATTHEWS, STRATEGIC INTERVENTION IN ORGANIZATIONS 76 (1988) (conducting survey of 212 codes from large companies and concluding that little relationship exists between codes and corporate violations of the law); Kimberly Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. L. REV. 571, 591 (2005) (noting that little empirical evidence suggests that codes of ethics modify employee behavior); *cf.* Schwartz, *supra* note 96, at 27–28 (reviewing studies of the influence of codes on corporate behavior and finding "mixed" results).

203. *See* Brien, *supra* note 201, at 22–23.

to have violated it."[204] Current Codes usually do not contain such enforcement provisions. When they do, the provisions are often general and vague.[205]

Permitting whistleblowers to enforce a Code's anti-retaliation protection can address these problems, at least in part, and improve the effort to encourage compliance through self-regulation.[206] First, whistleblowers can supplement weak formal enforcement mechanisms by providing informal internal enforcement.[207] For employees to successfully carry out this enforcement function, whistleblowers need to be protected by credible and enforceable promises of non-retaliation.[208] Without such promises, shareholders and other interested parties cannot rely on the effectiveness of an internal compliance system based in part on employee monitoring.[209] Allowing whistleblowers to enforce contractual promises of non-retaliation could encourage them by providing real promises upon which they can rely. Increasing the willingness of employees to blow the whistle on violations of corporate Codes should help enforce and improve internal compliance with the Code's other provisions.

Second, contractual enforcement of anti-retaliation promises will support recent efforts to encourage whistleblowers by providing structural disclosure channels or "hotlines" to facilitate internal reports of misconduct.[210] Some recent efforts

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204. *Id.* at 23–24.

205. *See* Pitt & Groskaufmanis, *supra* note 71, at 1604–05.

206. *Cf.* Estlund, *supra* note 186, at 374–77 (noting the importance of protecting whistleblowers from retaliation in order to create a program of corporate self-regulation).

207. *See* Brien, *supra* note 201, at 38 (arguing that an important part of "engendering" the code into corporate culture is enforcing the code by, in part, encouraging "reporting and disclosure" by employees); Pagnattaro & Peirce, *supra* note 74, at 392–93.

208. *See, e.g.*, TREADWAY COMMISSION, *supra* note 78, at 35–36 ("The code of corporate conduct should protect employees who use these internal procedures against reprisal. Failure to adopt guarantees against reprisal as well as to provide an effective internal complaint procedure could undermine the vitality of codes of conduct . . . ."); Barnett et al., *supra* note 96, at 129; Hassink et al., *supra* note 96, at 38; Schwartz, *supra* note 96, at 35, 39; Weller, *supra* note 96, at 394.

209. *See* Braithwaite, *supra* note 187, at 1483 (discussing the need for public monitoring of the corporation's private enforcement of its own rules); Pagnattaro & Peirce, *supra* note 74, at 392; *see also* Estlund, *supra* note 14, at 370; Schwartz, *supra* note 96, at 39–40 (noting that a survey of employees at four Canadian companies uniformly found that the company employees did not perceive the company as providing sufficient protection from retaliation for reporting violations of the code, "despite written guarantees in the codes").

210. *See generally* Moberly, *supra* note 7 (discussing the "structural model" to

stem from the Sarbanes-Oxley Act requirement that all publicly-traded corporations have hotlines for reporting accounting problems and fraud.[211] Permitting contractual enforcement of the anti-retaliation promises made as part of these whistleblower disclosure channels will make whistleblower hotlines more effective, because employees will be able to rely on employer promises not to retaliate against them for using the hotline. A breach of contract action against an employer that fails to operate whistleblower disclosure channels as promised provides another mechanism to force corporations to take their internal whistleblower hotlines seriously and helps ensure that whistleblower hotlines become an integral part of corporate monitoring.[212]

Third, contract protection could bring to light important information about the effectiveness of particular Codes. Shareholders and the government lack sufficient oversight over a corporation's enforcement of its own Code due, at least in part, to the fact that courts and prosecutors have difficulty evaluating the effectiveness of a Code-based internal compliance system. Yet as Professor John Braithwaite recognizes, two elements are necessary for enforced self-regulation to be effective: (1) public enforcement of internal rules and (2) public monitoring of private enforcement of the rules.[213] Permitting a whistleblower to bring a breach of contract claim will partially address those needs by enabling the public to glimpse the process by which a particular corporation implements its Code. Specifically, shareholders and the government would have a better sense of a corporation's efforts to detect fraud and other internal misconduct. In this way, a whistleblower's breach of contract claim may provide a unique perspective on at least one aspect of the true effectiveness of a corporation's compliance system.

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encourage whistleblowers).

211. *See* Sarbanes-Oxley Act of 2002 § 301, 15 U.S.C. § 78j-1(m)(4)(A) (Supp. IV 2004).

212. *See* Moberly, *supra* note 7, at 1141–61 (discussing benefits of whistleblower disclosure channels).

213. *See* Braithwaite, *supra* note 187, at 1483.

III. THE HANDBOOK DOCTRINE'S HURDLES TO CONTRACT PROTECTION

The anti-retaliation promises made by corporations in their Codes could potentially supplement current statutory and common law tort whistleblower protections and provide further societal benefits. However, most U.S. jurisdictions presume an at-will employment relationship with limited exceptions for employer promises.[214] Thus, contract protection depends upon whether whistleblowers can fit this new type of anti-retaliation protection into an at-will exception.

In recent years when employees attempted to enforce anti-retaliation promises found in corporate Codes, they primarily utilized the "handbook doctrine," an exception to the at-will rule for employer promises in employee handbooks or manuals.[215] This doctrine developed in the last few decades, and today a majority of U.S. jurisdictions accept that at-will employees may enforce some promises contained in employee handbooks.[216] While state-by-state variations occur in the details of the doctrine,[217] courts and employees most frequently rely upon "breach of implied contract" or "promissory estoppel" theories to examine handbook promises.[218]

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214. *See* Robert C. Bird, *Employment as a Relational Contract*, 8 U. PENN. J. LABOR & EMP. L. 149, 175 (2005) ("Courts have been reluctant to enforce corporate codes as enforceable promises."); *see also* Ayres & Brown, *ENDA*, *supra* note 13, at 1672–76 (describing the "uncertain legal effect of nondiscrimination policies" and noting that "in some jurisdictions the majestic language of 'policies' does not give rise to legally binding 'promises' ").

215. *See, e.g.*, Lobosco v. New York Tel. Co./NYNEX, 751 N.E.2d 462, 465 (N.Y. 2001); Korslund v. Dyncorp Tri-Cities Servs., Inc., 125 P.3d 119, 128 (Wash. 2005); Younker v. Eastern Assoc. Coal Corp., 591 S.E.2d 254, 258 (W. Va. 2003).

216. *See* Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 INDUS. REL. L.J. 326, 328, 334–35 (1992); Kenneth G. Dau-Schmidt & Timothy A. Haley, *Governance of the Workplace: The Contemporary Regime of Individual Contract*, 28 COMP. LABOR L. & POL'Y J. 313, 344 (2007).

217. *See, e.g.*, Rachel Leiser Levy, Comment, *Judicial Interpretation of Employee Handbooks: The Creation of a Common Law Information-Eliciting Penalty Default Rule*, 72 U. CHI. L. REV. 695, 718 (2005); Schroeder, *supra* note 93, at 582–83 (summarizing various judicial approaches to the handbook exception); J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Contracts: Resolving the Just Cause Debate*, 1995 WISC. L. REV. 837, 845–46.

218. *See* Befort, *supra* note 216, at 340–48 (noting that courts typically analyze handbook cases under a unilateral contract or a promissory estoppel theory, or both); Gabriel S. Rosenthal, *Crafting a New Means of Analysis for Wrongful Discharge Claims Based on Promises in Employee Handbooks*, 71 WASH. L. REV. 1157, 1167 (1996) (identifying "two main theories: unilateral contract and equitable principles"); Jason A. Walters, Comment, *The Brooklyn Bridge is Falling Down: Unilateral Contract Modification and the Sole Requirement of the Offeree's*

Under either theory, three aspects of the handbook doctrine play significant roles in whistleblower cases based on Codes: (1) proving a specific promise, (2) demonstrating a whistleblower's reliance on the promise, and (3) avoiding the inevitable employer attempt to disclaim any potential promise by emphasizing an employee's at-will status in the Code itself. Each of these three elements can be a daunting hurdle for an employee attempting to enforce a Code's anti-retaliation promise.[219]

A. *The First Hurdle: A Specific Promise*

First, to enforce a statement under the handbook doctrine, the statement's language must be definite enough that the employee could reasonably construe it as a promissory offer.[220] Broad policy provisions or vague language about job security typically cannot overcome the at-will presumption.[221] This element of specificity plays a strong role under both "implied contract" and "promissory estoppel" theories.[222] The more specific the language in the handbook, the more likely courts are to construe it as an "offer" for implied contract purposes.[223]

Assent, 32 CUMB. L. REV. 375, 379 (2002). Employees have brought claims for breach of implied contract, *see, e.g.*, *Lobosco*, 751 N.E.2d at 464; Nichols v. Xerox Corp., 825 N.Y.S.2d 847, 848 (N.Y. App. Div. 2003); *Younker*, 591 S.E.2d at 256, and using reliance theories, such as promissory estoppel or detrimental reliance, *see, e.g.*, Jordon v. Alternative Resources Corp., 458 F.3d 332, 348 (4th Cir. 2006) (asserting a detrimental reliance claim); Harshbarger v. CSX Transp., Inc., 478 F. Supp. 2d 890, 895 (S.D. W. Va. 2006) (asserting claim for "equitable estoppel/detrimental reliance"); Lord v. Souder, 748 A.2d 393, 398 (Del. Super. Ct. 2000) (asserting a promissory estoppel claim).

219. Generalizing the outcomes of the case law in this area can be difficult because the law varies among jurisdictions, and the particular wording of any particular promise obviously plays a crucial role in the decision in any individual case. However, the following review of the cases involving anti-retaliation promises in corporate Codes reveals that, regardless of the outcome in a particular case, these elements played important roles in courts' analyses.

220. *See, e.g.*, Duldulao v. St. Mary of Nazareth Hosp. Ctr., 505 N.E.2d 314, 318 (Ill. 1987); Pine River State Bank v. Mettille, 333 N.W.2d 622, 626–30 (Minn. 1983); *see also* Levy, *supra* note 217, at 705–06; Schroeder, *supra* note 93, at 583 ("[T]he major obstacle to handbook enforcement in the first generation of litigation about the doctrine was vague language. Lack of definitive employer promises has doomed many claims."); Verkerke, *supra* note 217, at 846.

221. *See* LEX K. LARSON, UNJUST DISMISSAL § 8.02[1] (2006); Deborah A. Schmedemann & Judi McLean Parks, *Contract Formation and Employee Handbooks: Legal, Psychological, and Empirical Analyses*, 29 WAKE FOREST L. REV. 647, 659–60 (1994).

222. *See* Schmedemann & Parks, *supra* note 221, at 658–60.

223. *See, e.g.*, *Duldulao*, 505 N.E.2d at 318 (noting that the handbook "must

Similarly, under a promissory estoppel theory, specific promises within a handbook increase the likelihood that a court will find that the employee reasonably relied upon the statement.[224]

Cases involving Code anti-retaliation provisions follow this same pattern. Courts rarely enforce general whistleblower policies and more frequently enforce specific anti-retaliation promises.[225] At one end of the spectrum, courts usually deny claims based on Code provisions that attempt to encourage whistleblowers, but that do not explicitly protect them from retaliation. For example, courts reject contract claims based on Codes that provide an "open door" policy for employees to report misconduct[226] or utilize broad language such as statements that employees should "feel free to make suggestions and complaints."[227] Courts reject employee claims for lack of specificity even where the Code requires or recommends that employees report misconduct.[228] At least one court refused to recognize a contract claim based on a statement that the employer would not "tolerate" retaliation against whistleblowers, because the statement lacked a specific anti-retaliation promise to the actual employee.[229]

contain a promise clear enough that an employee would reasonably believe that an offer has been made").

224. *See* Befort, *supra* note 216, at 344 ("[C]ourts tend to find 'promises' in circumstances similar to those in which they find 'offers' under a unilateral contract theory.").

225. *See infra* text accompanying notes 225–37.

226. *See, e.g.*, Catalane v. Gilian Instrument Corp., 638 A.2d 1341, 1350 (N.J. 1994) (holding that a policy that encouraged "open communication" was not enforceable as an implied contract for whistleblower protection); Adcox v. SCT Products, 1997 WL 638275, at *4 n.1 (Tenn. Ct. App. 1997) (finding that language in Code of Ethics and Business Conduct Guidelines, which stated that "[m]anagers and supervisors also are responsible for maintaining a work environment where constructive, frank, and open discussion is encouraged and expected, without fear of retaliation," failed to contain binding language).

227. Tripodi v. Johnson & Johnson, 877 F. Supp. 233, 238 (D.N.J. 1995) (finding that the Johnson & Johnson Credo "does not approach the definitiveness" required for enforcement).

228. *See, e.g.*, Belline v. K-Mart Corp., 940 F.2d 184, 189–90 (7th Cir. 1991); (noting that K-Mart's Policy on Integrity and Conflict of Interest recommended that employees report unusual activities to management); Sabetay v. Sterling Drug, Inc., 506 N.E.2d 919, 923 (N.Y. 1987) (Hancock, J., concurring) (noting that the Code on which the claim was based stated that, "It is the responsibility of every employee promptly to report to General Counsel any knowledge of infractions of this policy").

229. *See* Riel v. Morgan Stanley, 2007 WL 541955 (S.D.N.Y. 2007) (refusing to enforce corporate Code, which stated that employer "will not tolerate any kind of retaliation for reports or complaints regarding the misconduct of others that were made in good faith").

At the other end of the spectrum, some courts recognize that the specificity of an anti-retaliation promise can permit an employee to overcome the at-will presumption. In New York, courts find that a sufficiently explicit anti-retaliation promise limits an employer's termination rights,[230] despite the New York courts' traditional rejection of implied and good faith contractual limitations on at-will employment.[231] In *Korslund v. DynCorp Tri-Cities Services, Inc.*,[232] the Washington Supreme Court found that the specificity of a Code's anti-retaliation promise permitted a whistleblower's claim to go forward under the equitable promissory estoppel doctrine.[233]

At least one case made explicit the distinction between an unenforceable general policy statement on the one hand and an enforceable specific anti-retaliation provision on the other. In *Belgasem v. Water Pik Technologies, Inc.*,[234] the court refused to enforce anti-discrimination and anti-harassment policies contained in the company's "Ethics and Compliance Guidelines," because the policies were merely "general statement[s] of values" not enforceable under Colorado law.[235] By contrast, the court enforced another part of those same Guidelines, entitled "Duty to Report Violations," which stated: "It is the duty of every employee who discovers a violation of Company policy to report the violation immediately, *without fear of reprisal*."[236]

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230. *See, e.g.*, Loli v. Standard Charter Bank, 160 Fed. App'x 20, at *1 (2d Cir. 2005) (finding that anti-retaliation policy was "sufficiently committal under New York law to raise an issue of fact); Frasier v. Fiduciary Trust Co., Int'l, 417 F. Supp. 2d 310, 324–25 (S.D.N.Y. 2006); Brady v. Calyon Securities, 406 F. Supp. 2d 307, 315 (S.D.N.Y. 2005); Navarte v. Chase Manhattan Bank, N.A., No. 96CIV8133, 1998 WL 690059, at * 2 (S.D.N.Y. Oct. 2, 1998); Criado v. ITT Corp., 1993 WL 322837, at *2 (S.D.N.Y. 1993); Mulder v. Donaldson, Lufkin & Jenrette, 208 A.D.2d 301, 307 (N.Y. App. Div. 1995).

231. *See* Sabetay v. Sterling Drug, 506 N.E.2d 919, 922 (N.Y. 1987) (requiring an "express" limitation on the employer's right to discharge); Murphy v. Am. Home Prods. Corp., 448 N.E.2d 86 (N.Y. 1983) (same); *see also Brady*, 406 F. Supp. 2d at 315 ("New York law carves out only a few very narrow exceptions to the at-will employment doctrine."). *But see* Wieder v. Skala, 609 N.E.2d 105 (N.Y. 1992) (permitting law firm associate to sue for breach of implied contract based, in part, upon unique lawyer-client relationship).

232. 125 P.3d 119 (Wash. 2005).

233. *See id.* at 128 (noting that the specific treatment claim "is not an implied or express contract claim, but is independent of a contractual analysis and instead rests on a justifiable reliance theory").

234. 457 F. Supp. 2d 1205 (D. Colo. 2006).

235. *Id.* at 1220. This section of the Guidelines stated that it was the company policy not to discriminate on the basis of any protected category and that the company would not tolerate sexual harassment. *See id.*

236. *Id.* (emphasis added).

The court found this language to be "sufficiently definite" to form a contractual obligation to not retaliate against whistleblowers.[237]

However, even when analyzing an employer's explicit anti-retaliation promise, courts do not consistently permit an employee to bring a claim based on that promise. For example, in *Younker v. Eastern Association Coal Corporation*,[238] the employer's Code of Business Conduct stated, "All employees are encouraged and obligated to report any known or suspected Code violations to the employee's supervisor and the appropriate Counsel. No disciplinary or other retaliatory action will be taken against an employee making such a report."[239] Despite the seeming specificity of this final sentence, the West Virginia Supreme Court denied a whistleblower's breach of contract claim because the Code provision "embodied only aspirational goals rather than contractual terms."[240] Similarly, in *Marsh v. Delta Air Lines, Inc.*,[241] the employer issued a document called "Help Preserve Delta's High Standard of Business Conduct" in which the employer stated that "[n]o disciplinary action will be taken against an employee solely for disclosing wrongdoing."[242] Again, despite a seemingly explicit promise of non-retaliation, the court refused to enforce the Code provision because the statements "do not set forth any employment terms, explain disciplinary procedures, or detail any prohibited conduct. Instead, the statements are best characterized as 'vague assurances' that cannot be the basis for an implied contract."[243]

Thus, for the most part, courts analyzing anti-retaliation promises follow the general handbook doctrine by enforcing statements construed as specific promises of non-retaliation and not enforcing statements construed as general or vague statements of policy. However, the at-will presumption remains strong enough in some jurisdictions, such as West Virginia and Colorado, that courts refuse to enforce even precise and explicit promises.

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237. *Id.* The court subsequently found that the employee did not produce sufficient evidence that the employer breached this contractual obligation. *See id.* at 1220–21.

238. 591 S.E.2d 254 (W. Va. 2003).

239. *Id.* at 257.

240. *Id.* at 259.

241. 952 F. Supp. 1458 (D. Colo. 1997).

242. *Id.* at 1466–67

243. *Id.* (quoting Vasey v. Martin Marietta Corp., 29 F.3d 1460, 1465–66 (10th Cir. 1994)).

B. *The Second Hurdle: Employee Reliance on the Promise*

Second, when courts apply the handbook doctrine, they typically require that the employee knows about a handbook promise and that the employee relies upon it.[244] Not surprisingly, the reliance element almost always appears in promissory estoppel cases.[245] However, even courts that examine an implied contract theory will consider the extent to which an employee relied upon a promise. Courts in those cases equate the promise with a contractual "offer," and reliance demonstrates the important contractual element that the employee had knowledge of the offer.[246]

Courts traditionally accept one of two theories regarding reliance. Under one theory, courts strictly interpret the reliance element to require that the employee-plaintiff demonstrate actual reliance on a handbook promise. For example, a court might require the employee to prove that the employee read the provision and acted because of the promise.[247] Other jurisdictions accept a broader view of reliance, typically based upon the seminal case, *Toussaint v. Blue Cross & Blue Shield of Michigan*.[248] In that case, the Michigan Supreme Court held that courts should presume an employee relies upon handbook promises when the employer publishes the handbook to the entire work force.[249] General distribution of a handbook satisfies the reliance element in jurisdictions that follow *Toussaint*, without the need for the employee to demonstrate actual, individualized reliance on the promise.

However, when courts apply the handbook doctrine to Code anti-retaliation promises, they consistently require individualized, rather than generalized, employee reliance. Even courts that approve of the "specificity" of a particular anti-

244. *See* Levy, *supra* note 217, at 705.

245. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981); Befort, *supra* note 216, at 344.

246. *See, e.g.*, Loli v. Standard Chartered Bank, 160 Fed. App'x 20, 2005 WL 3263831, at *2 (2d Cir. 2005) (noting that plaintiff met his burden of alleging reliance on an implied contract claim); Navarte v. Chase Manhattan Bank, N.A., No. 96CIV8133 (JGK)(SEG), 1998 WL 690059, at *2 n.3 (S.D.N.Y. Oct. 2, 1998); Criado v. ITT Corp., No. 92 CIV 3552, 1993 WL 17305, at *5–7 (S.D.N.Y. Jan. 19, 1993); Kurth v. Vencor, Inc., No. 02-C-0213-C, 2002 WL 32349402, at *4 (W.D. Wis. July 16, 2002).

247. *See, e.g.*, Korslund v. DynCorp Tri-Cities Servs., Inc., 125 P.3d 119, 131 (Wash. 2005); *see also* Befort, *supra* note 216, at 344–45.

248. 292 N.W.2d 880 (Mich. 1980).

249. *See id.* at 892; *see also* Befort, *supra* note 216, at 344–45.

retaliation promise seem to require a high level of reliance by the employee to bring a contract claim. In the *Korslund* case mentioned above, the Washington Supreme Court seemingly gave enhanced protection to whistleblowers by recognizing the enforceability of a very specific anti-retaliation promise.[250] But because the court relied upon a promissory estoppel theory, the court in the same case emphasized the importance of individualized reliance on the specific promise. The court required the whistleblower to establish that "the employee was aware of the specific promise allegedly breached and *that specific promise* must have induced the employee to remain on the job and not seek other employment."[251] The court rejected the *Touissant* conclusion that an employee could show reliance generally based upon "an atmosphere of job security and fair treatment" created by a handbook's promises.[252]

Similarly, courts that utilize a breach of contract theory also emphasize the importance of individualized reliance. New York courts that enforce anti-retaliation promises still require that to prevail, a whistleblower demonstrate specific reliance on the promise.[253] One court went so far as to assert that the whistleblower must allege reliance on the promise at the time the employee began employment, rather than when he blew the whistle.[254] Courts in other jurisdictions agree that employees who bring this type of breach of contract claim must satisfy the crucial element of reliance.[255]

In short, the "reliance" element of the handbook doctrine often proves to be more onerous to whistleblowers than the specificity requirement. Even if a court accepts the specificity of an anti-retaliation promise, an employee who reports misconduct also must demonstrate that the employee blew the whistle explicitly because of the employee's reliance on the employer's promise not to retaliate.

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250. *See Korslund*, 125 P.3d at 128.

251. *Id.* at 131. (emphasis added).

252. *Id.*

253. *See* Loli v. Standard Chartered Bank, 160 Fed. App'x 20, at *2 (2d Cir. 2005) (noting that employee "has met his burden [on summary judgment] by alleging that he relied on the speak-up policy in deciding to report perceived misconduct and in relocating from Peru to New York, away from his family"); Narvarte v. Chase Manhattan Bank, N.A., No. 96-Civ.-8133 (JGK)(SEG), 1998 WL 690059, at *2 n.3 (S.D.N.Y. Oct. 2, 1998).

254. *See* Mirabella v. Turner Broad. Sys., Inc., No. 01-Civ.-5563(BSJ), 2003 WL 21146657, at *3 n.5 (S.D.N.Y. May 19, 2003).

255. *See, e.g.*, Kruth v. Vencor, Inc., No. 02-C-0213-C, 2002 WL 32349402, at *4 (W.D. Wis. July 16, 2002).

C. *The Third Hurdle: Employers Disclaiming the Promise*

Third, courts typically will not enforce handbook provisions if the handbook contains a "clear and conspicuous" disclaimer that proclaims the employment relationship to be at-will.[256] For breach of implied contract claims, a disclaimer contradicts the employee's assertion that the employer intended a contractual obligation to arise out of a handbook promise.[257] For promissory estoppel claims, a disclaimer undermines the argument that the employee's reliance on a handbook promise was reasonable.[258] Although disputes may arise about whether courts should enforce a disclaimer that lacks sufficient prominence or whether any ambiguity or lack of clarity undermines the effect of the disclaimer, employers in most jurisdictions can avoid handbook claims on the basis of a well-drafted disclaimer.[259]

The presence of a disclaimer has prevented numerous employees from enforcing anti-retaliation promises in corporate Codes. Regardless of the specificity of the promise or the employee's reliance on it, courts routinely do not enforce an anti-retaliation promise if the employer issued a disclaimer that clearly announced the at-will status of the employee.[260] For example, although New York courts have upheld anti-retaliation promises in Codes without disclaimers,[261] the presence of a disclaimer can be dispositive. In *Lobosco v. New York*

256. *See, e.g.*, Befort, *supra* note 216, at 348–49; Fischl, *supra* note 56, at 195 (noting that state courts are "virtually unanimous" in enforcing clear and conspicuous disclaimers); Schroeder, *supra* note 93, at 583; *see also* Leikvold v. Valley View Community Hosp., 688 P.2d 170, 174 (Ariz. 1984); Woolley v. Hoffmann-La-Roche, Inc., 491 A.2d 1257, 1271 (N.J. 1985); Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1088 (Wash. 1984).

257. *See* Befort, *supra* note 216, at 349.

258. *See id.* at 349.

259. *See id.* at 351–56; Schmedemann & Parks, *supra* note 221, at 661–63.

260. *See, e.g.*, Belline v. K-Mart Corp., 940 F.2d 184, 189–90 (7th Cir. 1991); Jones v. Sabis Educ. Sys., Inc., 52 F. Supp. 2d 868, 874–75 (N.D. Ill. 1999); Lobosco v. New York Tele. Co./NYNEX, 751 N.E.2d 462, 465 (N.Y. 2001).

261. *See, e.g.*, Loli v. Standard Charter Bank, 160 Fed. App'x 20, at *1 (2d Cir. 2005) (finding that anti-retaliation policy was "sufficiently committal under New York law to raise an issue of fact); Frasier v. Fiduciary Trust Co., Int'l, 417 F. Supp. 2d 310, 324–25 (S.D.N.Y. 2006); Brady v. Calyon Securities, 406 F. Supp. 2d 307, 315 (S.D.N.Y. 2005); Navarte v. Chase Manhattan Bank, N.A., No. 96CIV8133, 1998 WL 690059, at * 2 (S.D.N.Y. Oct. 2, 1998); Criado v. ITT Corp., 1993 WL 322837, at *2 (S.D.N.Y. 1993); Mulder v. Donaldson, Lufkin & Jenrette, 208 A.D.2d 301, 307 (N.Y. App. Div. 1995).

Telephone Co./NYNEX,[262] the employer issued a Code stating that "NYNEX assures protection against any form of reprisal for reporting actual or suspected violations of our Code of Business Conduct."[263] On the page facing this statement, the employer made this disclaimer: "This [C]ode of conduct is not a contract of employment and does not contain any contractual rights of any kind between NYNEX and it[s] employees . . . NYNEX can terminate [employees'] employment at any time and for any reason . . . ."[264] The Court held that the disclaimer negated any protection the employee might have inferred from the Code's anti-retaliation promise.[265]

Some courts enforce at-will disclaimers no matter where they appear, even if they have only a tenuous connection to the Code anti-retaliation promise on which an employee relies. For example, one court refused to allow a contract claim based on a Code promise because a separate document, the employee's application, contained an at-will disclaimer.[266] However, other courts take a more employee-friendly approach when considering similar situations and refuse to enforce disclaimers located in documents other than the Code containing the anti-retaliation promise.[267]

An employer's ability to include a disclaimer reaffirming the employee's at-will status could be devastating to contractual enforcement of a Code's anti-retaliation provision.[268] To

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262. 751 N.E.2d 462, 465 (N.Y. 2001).

263. *See id.* at 464.

264. *See id.*

265. *See id.* at 465.

266. *See* Wolf v. F&M Banks, 534 N.W.2d 877, 879–80, 882 (Wis. App. 1995).

267. *See, e.g.*, Greene v. Quest Diagnostics Clinical Labs., Inc., 455 F. Supp. 2d 483, 486 (D.S.C. 2006) (finding that a jury must determine whether an anti-retaliation promise was binding because the promise was not accompanied by an at-will disclaimer); Korslund v. DynaCorp Tri-Cities Servs., Inc., 125 P.3d 119, 129–30 (Wash. 2005) (finding that an at-will disclaimer in an employment application did not preclude employee reliance on an anti-retaliation promise in the employee handbook); Nichols v. Xerox Corp., 825 N.Y.S.2d 847, 848 (N.Y. App. Div. 2003) (holding that Code of Ethics may be enforceable even though a separate employee manual contained an at-will disclaimer because the Code of Ethics itself did not contain a disclaimer). These differences among cases involving anti-retaliation provisions reflect the diversity of judicial views regarding the adequacy of the disclaimer, which according to one scholar are "all over the board." Schroeder, *supra* note 93, at 585.

268. *See* Jonathan Fineman, The Inevitable Demise of the Implied Employment Contract 40 (Sept. 17, 2007) (unpublished manuscript on file with author), *available at* http://ssrn.com/abstract=1015136 ("Over time, courts became increasingly likely to value employers' express disclaimer or at-will provision over employees' assertion that employers' conduct gave rise to an implied understand-

the extent that an employer does not want exposure for contract liability, the employer could simply include a sufficient disclaimer as part of any whistleblower policy. Most courts would dismiss an employee's contract claim based upon such a disclaimer. The next Part presents possible remedies for this problem.

IV. OVERCOMING THE HANDBOOK DOCTRINE'S HURDLES

Taken together, these cases demonstrate that courts' inflexible application of the handbook doctrine can present substantial difficulties to employees who attempt to enforce Code anti-retaliation promises. Some courts refuse to enforce the type of anti-retaliation promises currently required of publicly-traded companies if the promise lacks specificity. Moreover, even courts that might be willing to find a Code's anti-retaliation promise specific enough to overcome the at-will presumption also require individualized reliance on the promise by the employee. Furthermore, courts almost universally permit employers to avoid liability for any anti-retaliation promise with a sufficiently specific disclaimer reaffirming an employee's at-will status.

Such rigid application of the handbook doctrine to Code anti-retaliation promises ignores significant differences between Code promises and employee handbooks, and between the types of claims brought by employees to enforce statements made in both. As explained in more detail below, these differences suggest that advocates, courts, and regulators should adjust their view of Code-based contract claims in order to recognize the Code's interplay with broader corporate governance concerns.

A. *Distinguishing Codes from Handbooks*

A company uses an employee handbook to communicate a variety of information to its employees. As a result, these manuals contain a wide range of policies, from broad procedures regarding employment termination to minutiae about computer usage. The law does not require a company to publish and distribute a handbook; however, human resource professionals routinely recommend that employers maintain an

ing of job security.").

extensive employee manual for several reasons. Manuals can set employee expectations and inform workers of various workplace rules. Moreover, to the extent handbooks appear to implement a fair set of procedures and rules for employees, distributing handbooks can increase employee loyalty and morale.[269] Further, handbooks can limit managerial discretion about the application of various workplace rules, and thereby decrease an employer's exposure to liability. Thus, handbooks traditionally have focused on communicating information internally to employees and managers in order to achieve benefits for the company vis-à-vis these internal constituencies.

A Code also serves this internal function, and often substantial overlap exists between the content of a Code and a handbook. Additionally, though, Codes play a role in a larger corporate regulatory system aimed at providing information to an *external* audience of shareholders and regulators. As discussed above, the SEC and the stock exchanges now require publicly-traded companies to publish Codes on the internet or otherwise provide them to their shareholders so they can evaluate a company's corporate governance internal controls.[270] Although the regulations about Codes demand relatively few substantive provisions, a company must promise anti-retaliation protection to corporate employees as part of its Code.[271] This promise has thus become an important part of the overall corporate monitoring structure.

The benefits a company receives from a Code include substantial external benefits related to legal and regulatory compliance in addition to the internal benefits provided by more general handbooks. By publishing a Code with an anti-retaliation promise, a publicly-traded company receives the

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269. *See, e.g.*, In re Certified Question: Bankey v. Storer Broad. Co., 443 N.W.2d 112, 119 (Mich. 1989); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 892–95 (Mich. 1980) ("The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly."); Befort, *supra* note 216, at 337–38; Paul Berks, *Social Change and Judicial Response: The Handbook Exception to Employment-at-Will*, 4 EMPLOYEE RTS. & EMP. POL. J. 231, 265–68 (2000) (noting that many employers distributed handbooks in the midst of an anti-union battle); Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 921 n.77 (1985) (citing to cases in which employer receives "non-quantifiable yet tangible economic benefits" from handbook promises); Levy, *supra* note 217, at 721; Schmedemann & Parks, *supra* note 221, at 666 (citing studies that indicate employer policies may increase employee loyalty).

270. *See* discussion *supra* Part II.A.

271. *See* discussion *supra* Part II.A..

benefit of being able to maintain its listing on one of the largest stock exchanges in the country.[272] Moreover, the Organizational Sentencing Guidelines considers the Code's anti-retaliation promise an essential part of an "effective compliance system" that may lead to substantially reduced criminal penalties should a company ever violate criminal statutes.[273]

This distinction between the internal use of an employee handbook and the external focus of a Code suggests two approaches to strengthen contract enforcement of Code anti-retaliation promises, both of which are discussed in more detail below. The first is doctrinal. Advocates and courts should recognize that the handbook doctrine's requirements apply less persuasively to Code anti-retaliation promises because the Code promise differs in both substance and form from typical handbook statements. As a result, the anti-retaliation promise ought to be considered under principles reserved for express contracts rather than the implied contractual foundation of the handbook doctrine. Specifically, courts should consider a Code's anti-retaliation promise as a contract for specific treatment in a specific situation. Moreover, to the extent courts insist on examining these promises under the handbook doctrine, courts should recognize that the distinctive nature of the Code promise requires courts to relax the doctrine's "reliance" element and not require an employee to rely specifically upon the promise in order to receive protection.

The second approach is regulatory. As an initial matter, a requirement that employers notify employees of the Code anti-retaliation promise may help make the promise more enforceable by increasing the likelihood that an employee relies upon the promise when blowing the whistle. Moreover, regulation likely could reduce the incentive for a company to include a disclaimer in its Code, a behavior that inappropriately undermines the role of anti-retaliation protection in the overall corporate governance system.

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272. *See supra* text accompanying notes 104–112 (describing exchange rules of the NYSE and the NASDAQ).

273. *See* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(5)(C) (2004).

B. *Doctrinal Solutions*

1. The Anti-retaliation Promise as an Express Contract

In traditional handbook cases, at-will employees generally attempt to enforce broad statements regarding long-term employment or limits on an employer's right to discharge an employee, such as a detailed progressive discipline program.[274] Although these handbook provisions generally do not satisfy many of the contractual formalities of offer, acceptance, and consideration, courts recognize that these handbook statements may create reasonable expectations in employees that might lead to an enforceable obligation.[275] As a result, under the handbook doctrine, courts typically find that many contract elements are implied rather than expressly intended by the parties: the handbook contains an implied offer and the court finds acceptance and consideration implied from the employee's continued work.[276] Under a promissory estoppel theory that requires reasonable reliance on a promise rather than an exchange of consideration, courts either require individualized reliance or consider the reliance requirement satisfied by implication from the handbook's general distribution.[277]

However, relying on implications rather than express agreements creates an uneasy fit between the handbook doctrine and employment-at-will. When the default employment relationship permits discharge for any reason, courts may have difficulty finding implied promissory obligations from the employer to the employee. Thus, in some jurisdictions, the elements of specificity and reliance can take on disproportionate influence, and disclaimers can lead unquestionably to dismissal of employee claims.[278] Other jurisdictions simply refuse to ac-

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274. *See, e.g.*, Fineman, *supra* note 268, at 9–10.

275. *See* Befort, *supra* note 216, at 340–47, 370–72.

276. *Id.* at 342–43, 370; Dau-Schmidt & Haley, *supra* note 216, at 344 ("Because implied-in-fact arguments rely on the representations and reasonable expectations of the parties they can be thought of more as a less rigid application of traditional contract principles, rather than as an exception to contract principles.").

277. *See* Befort, *supra* note 216, at 371.

278. For example, some courts require a very specific promise to make up for the lack of an intended offer. Others require individualized employee reliance on the handbook to balance the lack of formal contractual acceptance. Finally, many courts broadly enforce employer disclaimers, which seems to give voice to the assumption that employers rarely intend to be bound by their handbook provisions.

cept the handbook doctrine.[279] Indeed, looking broadly at the cases in the previous Part, when employees try to enforce a corporate Code's anti-retaliation provision through implied contract principles, these doctrinal hurdles can lead to mixed results for employees.[280]

Rather than continuing to analyze Code claims under the handbook doctrine, courts should recognize that a claim of retaliation for whistleblowing often rests on the breach of an express, rather than implied, contract contained in the corporate Code. This contract may be either unilateral or bilateral. A unilateral contract can be formed when one party makes a promise that can be accepted by performance from another party. Codes often contain very specific promises dependent on acceptance from an employee through performance: the employer promises not to retaliate if the employee engages in the performance of reporting misconduct. As with any unilateral contract, the consideration is the performance: blowing the whistle. By contrast, a bilateral contract involves an exchange of promises, which may be formed by some Code provisions in which employers *require* employees to report any misconduct that they witness. The employer promises not to retaliate in exchange for the employee promise to report any misconduct as part of their employment duties.

Courts in the state of Washington have developed a doctrine that expresses this idea nicely: an employee may bring a claim for breach of a promise of specific treatment in a specific situation.[281] Although the Washington court found that this doctrine rested on promissory estoppel principles,[282] the rule is better viewed as a description of an express contract. Rather than lump anti-retaliation promises in with vague handbook

279. *See* Dau-Schmidt & Haley, *supra* note 216, at 344 n.119 (noting that nine jurisdictions either do not allow or have not decided whether employees can enforce promises made in employee handbooks).

280. *See* discussion *supra* Part III.

281. *See* Korslund v. DynCorp Tri-Cities Servs., Inc., 125 P.3d 119, 128 (Wash. 2005); *accord* Corluka v. Bridgford Foods of Ill., 671 N.E.2d 814 (Ill. App. Ct. 1996) (finding a valid contract based on an employer's promise that no one would be penalized for reporting harassment). The Washington Supreme Court explained the rationale for enforcing such promises in an earlier case: "[I]f an employer, for whatever reason, creates an atmosphere of job security and fair treatment with promises of *specific treatment in specific situations* and an employee is induced thereby to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship." Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1088 (Wash. 1984).

282. *See Korslund*, 125 P.3d at 128.

promises of lifetime employment and rigid progressive disciplinary systems, advocates should accentuate and courts should recognize the differences between the two types of employer statements. In contrast to the vague promises of long-term employment litigated in many handbook cases, a corporate Code's anti-retaliation promise can involve an express exchange of consideration regarding one specific aspect of an employee's work. The employee promises to or actually does report misconduct and, in return, the employer promises not to retaliate against the employee. In other words, a specific promise (i.e., no retaliation) in a specific situation (when an employee blows the whistle).

Framing the issue as a breach of an express, rather than an implied, contract may persuade some courts to enforce the anti-retaliation promise when they normally would not enforce a promise under the handbook doctrine. Under the implied contract or promissory estoppel theories of the handbook doctrine, courts have legitimate concerns about holding employers liable for long-lasting promises that the employer never intended to make and that greatly restrict employer discretion. Anti-retaliation promises present less of this type of danger because they do not guarantee life-time tenure or initiate a rigid disciplinary process. Moreover, an anti-retaliation promise likely expresses the employer's intent to be bound because of the many legal advantages employers receive from making such a promise, including benefits under the Organizational Sentencing Guidelines and the ability to list corporate shares with the country's major stock exchanges.[283] Further, to be protected by the anti-retaliation promise, employees make an affirmative act in response to the promise, as opposed to the handbook doctrine, which often implies acceptance and consideration when the employee simply continues to perform at work. Recognizing the difference between the two types of promises underscores the true exchange of consideration that occurs when an employee blows the whistle after an employer promises not to retaliate.

2. The Handbook Doctrine and Reliance

Some jurisdictions may be unwilling to consider a Code's anti-retaliation promise as an express contract because of re-

283. *See* discussion *supra* Part II.A.

luctance to find contractual commitments in the face of the at-will doctrine. Moreover, not all factual circumstances will fit neatly into the express contract theory.[284] In these cases, courts likely will continue to utilize the handbook doctrine and advocates will continue to face the large hurdle of proving employee reliance on the anti-retaliation promise.[285]

For some cases in which the employee can claim that he or she relied on anti-retaliation promise, this element should not present a problem. The current handbook cases overwhelmingly permit claims with a showing of individualized reliance.[286]

However, a likely alternative scenario will be that a whistleblower reports misconduct without any knowledge of an anti-retaliation promise made in the employer's Code. In many jurisdictions, an implied contract or promissory estoppel claim would fail because the lack of individualized employee reliance undermines the acceptance and consideration elements.[287]

To solve this problem doctrinally, courts should rethink this "individualized reliance" requirement as applied to Code anti-retaliation provisions. Instead, to recognize the larger corporate governance role played by Code anti-retaliation provisions, these courts should infer reliance from the general publication of a Code. Although some courts, most notably the

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284. For example, the express contract argument may apply only when a Code contains a specific promise not to retaliate, as opposed to a more general policy of punishing retaliators or encouraging whistleblowers to come forward. Additionally, because a strict contract interpretation may require a party to have knowledge of an offer in order to accept it, some courts may require that the whistleblower know about the Code provision and report the misconduct because of the anti-retaliation promise.

285. The "specificity" element of the handbook doctrine will be a relatively small hurdle under the new listing standards. As mentioned above, many Codes now contain very specific anti-retaliation promises because generalized "policy" statements likely do not satisfy the new NYSE and NASD listing standards. *See* discussion *supra* Part II.A. The new generation of anti-retaliation promises required by the NYSE and the NASD would appear to be "specific enough" to satisfy the handbook doctrine's requirements. *See* discussion *supra* Part II.A. However, a few jurisdictions, like West Virginia and Colorado, continue to insist that even these specific promises are too general. Although advocates should highlight the differences between these promises and general policy statements as discussed above, whistleblowers simply may not have the ability to rely on Code promises in these states until the law changes.

286. *See, e.g.*, Loli v. Standard Chartered Bank, 160 Fed. App'x 20, at *2 (2d Cir. 2005); Narvarte v. Chase Manhattan Bank, N.A., No. 96-Civ.-8133 (JGK)(SEG), 1998 WL 690059, at *2 (S.D.N.Y. Oct. 2, 1998).

287. *See, e.g.*, Korslund v. DynCorp Tri-Cities Servs., Inc., 125 P.3d 119, 131 (Wash. 2005); *see also* Befort, *supra* note 216, at 344–45.

court in *Toussaint v. Blue Cross & Blue Shield*,[288] have accepted generalized reliance in a typical handbook case, the distinctive nature of the new Code promises may provide a stronger argument for a broader adoption of this rationale in retaliation cases.[289]

The *Toussaint* court relied on two characteristics of employee handbooks to justify inferring reliance from the general publication of an employee handbook, even if the plaintiff-employee never actually relied on the handbook. First, as noted above,[290] employers receive significant benefits from distributing an employee handbook, including increased employee productivity, improved loyalty, better compliance with workplace rules, and enhanced employee morale.[291] Second, these benefits often result directly from encouraging employee expectations regarding the statements in a handbook.[292] As the Michigan Supreme Court later articulated, handbook promises should be enforced if they create an "environment conducive to collective productivity" because of increased employee expectations.[293]

a. Employer Benefits from Code Anti-retaliation Promises

The benefits to an employer of publishing a Code surpass the benefits a corporation receives from an employee handbook generally, as set forth by the *Toussaint* court. For example, when employees feel free to report corporate wrongdoing with-

288. 292 N.W.2d 880, 892–95 (Mich. 1980).

289. Some commentators also refer to this concept as "employer estoppel," meaning that employers make unilateral statements in their self-interest and, therefore, the statements should be binding on the employer. *See* RESTATEMENT (THIRD) EMPLOYMENT LAW § 3.04 cmt. b (Preliminary Draft No. 4, 2007).

290. *See supra* text accompanying notes 269–73.

291. *See, e.g., In re* Certified Question: Bankey v. Storer Broad. Co., 443 N.W.2d 112, 119 (Mich. 1989); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 892–95 (Mich. 1980) ("The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly."); Befort, *supra* note 216, at 337–38; Berks, *supra* note 269, at 265–68; Farber & Matheson, *supra* note 269, at 921 n.77 (1985); Levy, *supra* note 217, at 721; Schmedemann & Parks, *supra* note 221, at 666 (citing studies that indicate employer policies may increase employee loyalty).

292. *See, e.g., Toussaint*, 292 N.W.2d at 892-95; Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1088 (Wash. 1984) (noting that, by expecting employees to comply with policy manuals, employers "create an atmosphere" in which employees reasonably expect employers to abide by the policies); Befort, *supra* note 216, at 338–39.

293. *In re* Certified Question: Bankey, 443 N.W.2d at 119.

out fear of retaliation, the corporation itself benefits from a more ethical corporate climate.[294] This environment should, in turn, improve employee morale and boost productivity.[295]

These benefits primarily relate to the corporation's internal community of employees. As mentioned earlier, however, Code promises also lead to increased benefits related to a corporation's external constituencies because of the very public nature of these commitments. By publishing in its annual report and on its website a promise not to retaliate against employees, a corporation assures nervous shareholders and curious government regulators that the company encourages its employees to report misconduct.[296] Corporations typically do not make their employee handbooks publicly available to the same extent as Code provisions, and therefore handbook promises likely do not result in a similar gain in goodwill from external corporate constituencies. The external benefits companies receive from Code anti-retaliation promises also include those mentioned previously: the ability to list a company's shares on national stock exchanges and potential penalty reductions under the federal Organizational Sentencing Guidelines.[297] Further, by promising not to retaliate against an employee whistleblower when the whistleblower discloses via the publicized channel, an employer may avoid an employee reporting misconduct externally, which can lead to greater costs than if the employee reports internally.[298]

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294. *See* Hess, *supra* note 76, at 1802–03; Moberly, *supra* note 7, at 1159.

295. *See* Callahan et al., *supra* note 86, at 196 (asserting that increased employee morale occurs "when employees understand that they can stop wrongful conduct and contribute to shaping a working environment in which they can take pride").

296. *Cf.* Amitai Aviram, *In Defense of Imperfect Compliance Programs*, 32 FLA. ST. L. REV. 763, 770 (2005) (noting that "[c]orporations are spending vast amounts of money on [compliance] programs that are intended to persuade the public that they do not violate norms held by their patrons or employees"); Besmer, *supra* note 199, at 280 ("A private code of conduct enhances such a [corporate social responsibility] commitment by adding an air of formality. It articulates the standards by which a corporation professes to be bound."); Emily F. Carasco & Jang B. Singh, *The Content and Focus of the Codes of Ethics of the World's Largest Transnational Corporations*, 108 BUS. & SOC'Y REV. 71, 72 (2003); Newberg, *supra* note 95, at 269–70; Eaton & Akers, *supra* note 96, at 70 ("A whistleblower policy and effective enforcement has the potential not only to significantly reduce fraudulent activity but also to send a signal to both internal and external constituencies that the organization exercises good corporate governance.").

297. *See supra* discussion accompanying notes 272–73.

298. *See* Moberly, *supra* note 7, at 1151–52 (discussing corporate benefits of internal reporting compared to whistleblower disclosures made externally).

b. *Employee Expectations*

Codes also exist as part of an overall regulatory system that may drive employees to expect protection from retaliation. Even if an employee does not directly rely on a Code's anti-retaliation promise, employees receive substantial other signals that the corporation encourages whistleblowing and will protect whistleblowers. A survey completed in the early 1990s found that seventy percent of large corporate respondents had a formal internal disclosure policy for whistleblowers to use when reporting misconduct.[299] Moreover, as mentioned above, numerous outside regulatory regimes provide corporations incentives to implement effective internal compliance systems, such that today nearly all publicly-traded corporations have whistleblower policies. The Sarbanes-Oxley Act requires that companies install a whistleblower disclosure channel so that employees can report wrongdoing directly to a corporation's Board of Directors.[300] Companies often post signs providing the phone number for the whistleblower hotline.

Although these compliance regimes have been criticized for being superficial,[301] employees nevertheless may take them seriously and develop expectations based upon them. In other words, when evaluating employee expectations, the existence of the compliance system matters, not its quality. These compliance efforts, of which the Code is an important part, send the message that whistleblowing is permitted, encouraged, and expected.[302] Even if an employee never reads the specific anti-retaliation promise contained in the Code, the unspoken message of these numerous compliance efforts includes an understanding that any employee who witnesses misconduct will not face retaliation for reporting it.[303] Indeed, Professor Pauline Kim reports that seventy-nine percent of employee-respondents

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299. *See* Barnett et al., *supra* note 96, at 129–31.

300. *See, e.g.*, Sarbanes-Oxley Act of 2002 § 301, 15 U.S.C. § 78j-1(m)(4)(A) (Supp. IV 2004).

301. *See, e.g.*, Krawiec, *supra* note 73, at 489–91.

302. *See* Arthurs, *supra* note 198, at 53 (discussing the "symbolic" significance of Codes); *cf.* Hess, *supra* note 76, at 180 ("The presence of a compliance program helps potential whistleblowers believe that they will be satisfied with the consequences of reporting.").

303. *See* Bird, *supra* note 214, at 170, 177–78 (arguing that corporate codes are an important part of the "relational contract" between an employer and an employee, and that such policies and procedures should be examined when determining whether an employee reasonably relies on his or her relationship with an employer to protect the employee from discharge).

to her survey incorrectly believed that an employer cannot fire an employee who reports theft of property by another to a supervisor.[304] Companies may lure employees into a sense of security regarding their protection from retaliation simply by providing an internal disclosure channel for whistleblowers.

The combination of the benefits employers receive for publishing a Code anti-retaliation promise and the heightened expectations among employees driven by corporate compliance efforts provide exactly the type of environment—"instinct with an obligation"—discussed by the *Toussaint* court.[305] This atmosphere led the *Toussaint* court to infer individualized reliance from a similar generalized understanding of protection. Given this strong similarity, courts should adopt the *Toussaint* inference for Code anti-retaliation promises if an employee did not actually rely on a specific Code provision. Anti-retaliation promises appearing in Codes that employers publish in annual reports, corporate filings, or on the internet should be considered enforceable regardless of whether an individual whistleblower actually saw and relied upon the promise. Applying the *Toussaint* approach to anti-retaliation Code promises would enhance fairness by recognizing the benefits corporations receive for publicizing Codes and the expectations employees have from corporate compliance efforts generally.

C. *Regulatory Solutions*

Several regulatory solutions also may assist in the contractual enforcement of Code anti-retaliation promises. The first relates to the issue just discussed: whether an employee actually relies on the promise when disclosing misconduct.

1. Requiring Notice to Employees

In order to minimize the number of cases in which whistleblowers failed to know of or rely upon a Code's anti-retaliation promise, companies should be required to provide notice of the Code to employees. While most companies post the Code on their website,[306] employers also should distribute it regularly

304. *See* Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 134 (1997).

305. *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 892 (Mich. 1980).

306. *See* Moberly, *supra* note 110 (finding that ninety-seven percent of compa-

to employees and highlight the Code's anti-retaliation provision to ensure that it is not drowned out by the other information employers provide to employees. For example, employers should provide notice of the anti-retaliation promise in the same place and manner in which they post notice of how to make a whistleblower disclosure. In other words, posters that inform employees of a company's whistleblower hotline should also indicate that no retaliation will occur against any employee who utilizes the hotline.

Either Congress, the SEC, or the individual stock exchanges could impose the disclosure requirement. Additionally, agencies or courts that give incentives to corporations for implementing internal compliance systems could mandate the notice as a requirement for receiving the incentive. For example, part of the analysis for a penalty reduction under the Organizational Sentencing Guidelines could include a requirement that any internal compliance system must provide broad notice to employees of the company's anti-retaliation promise in order to be considered "effective." Such a disclosure requirement would not prove onerous to corporations because they already provide employees with a tremendous amount of information when it is in the corporation's interest. This additional requirement would simply mandate that they highlight the anti-retaliation promise as part of this informational process.

SEC regulations and the stock exchanges already require disclosure to shareholders and government regulators of the fact that an anti-retaliation promise exists.[307] Yet, employee ignorance about the promise does not serve the purpose behind the promise: encouraging employees to become whistleblowers. Indeed, without employee knowledge of the promise, disclosing the promise to shareholders and the government appears deceiving. The government and shareholders may believe that employees feel safe to report misconduct when in reality employees do not know that they would be protected if they blew the whistle. Moreover, should an employee blow the whistle anyway, the employee would not succeed in a subsequent contract claim based on the anti-retaliation promise if the employee did not know specifically about the promise at the time the employee blew the whistle, further undermining the effec-

nies placed the Code on their website).

307. *See* discussion *supra* Part II.A.

tiveness of the compliance system. In short, without a notice requirement, the compliance system would appear stronger to external constituencies than it actually operates in practice. Accordingly, the government and the stock exchanges should require that corporations disclose and emphasize any Code anti-retaliation promise to their employees.

2. Rethinking Disclaimers

Two other regulatory suggestions relate to the powerful role that disclaimers play in litigation over the enforceability of anti-retaliation promises. Under either the express or the implied contract theory, the ability of an employer to disclaim any anti-retaliation promise may make a Code's anti-retaliation promise unenforceable. Interestingly given the power of at-will disclaimers, less than half (46.7%) of the Codes in the NYSE study contained them.[308] Although other employment documents may contain a disclaimer, some courts hold that, to be effective, a disclaimer must appear in the same document as the anti-retaliation promise.[309] Also, in cases involving handbook promises more generally, courts often do not enforce an at-will disclaimer in similar situations in which a promise appears in one document and the disclaimer appears in another.[310] In these cases, some courts deny summary judgment because a question of fact exists regarding the effect of the disclaimer.[311] Thus, in the near future, the lack of disclaimers in Codes may permit employees to avoid this employer defense to either an express or implied breach of contract action, even if an at-will disclaimer appears elsewhere in the employment materials.

Yet, ultimately, the almost universal ability of a disclaimer to negate an employer's promise may pose long-term difficulties

308. *See* Moberly, *supra* note 110.

309. *See, e.g.*, Greene v. Quest Diagnostics Clinical Labs., Inc., 455 F. Supp. 2d 483, 486 (D.S.C. 2006) (finding that a jury must determine whether an anti-retaliation promise was binding because the promise was not accompanied by an at-will disclaimer); Korslund v. Dyncorp Tri-Cities Servs., Inc., 125 P.3d 119, 129–30 (Wash. 2005) (finding that an at-will disclaimer on an employment application did not preclude employee reliance on an anti-retaliation promise in the employee handbook); Nichols v. Xerox Corp., 825 N.Y.S.2d 847, 848 (N.Y. App. Div. 2003) (holding that Code of Ethics may be enforceable even though a separate employee manual contained an at-will disclaimer because the Code of Ethics itself did not contain a disclaimer).

310. *See* Befort, *supra* note 216, at 365–68.

311. *See id.*

for whistleblowers who attempt to enforce a Code's anti-retaliation promise.[312] Eventually employers will add disclaimers to Codes to avoid contract liability. Indeed, we have seen this before: courts enforce a handbook promise, but provide employers a defense if they make clear that these promises do not negate the background at-will basis of the employment relationship.[313] Subsequently, employers learned to draft policies that included at-will language negating the ability of employees to bring contract-based claims in an at-will relationship.[314] As Professor Franklin Snyder notes, "employers have good lawyers, and given enough time, good lawyers can get around every contract problem."[315]

Wal-Mart already has learned this lesson. As we saw earlier, Wal-Mart's Statement of Ethics contains an extraordinarily broad anti-retaliation promise.[316] However, on the first page of this same document, Wal-Mart asserts that the Statement "is not intended to create an express or implied contract of employment in and of itself. . . . Employment at Wal-Mart is on an at-will basis."[317] The sample Code of Business Ethics & Conduct published by the Association of Certified Fraud Examiners also exemplifies this dilemma. The Code claims to "strictly prohibit[ ]"reprisal against whistleblowers, but it also reaffirms the corporation's right to terminate employment "at any time, with or without cause."[318] Similarly, the NYSE re-

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312. *See* Fineman, *supra* note 268, at 40 ("Over time, courts became increasingly likely to value employers' express disclaimer or at-will provision over employees' assertion that employers' conduct gave rise to an implied understanding of job security.").

313. *See* Wooley v. Hoffmann-La Roche, Inc., 491 A.2d 1257 (N.J. 1985), *modified*, 499 A.2d 515 (1985). As the court noted in one of the first handbook cases:

> What is sought here is basic honesty: if the employer, for whatever reason, does not want the manual to be capable of being construed by the court as a binding contract, there are simple ways to attain that goal. All that need be done is the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind by the employer contained in the manual . . . and that the employer continues to have the absolute power to fire anyone with or without good cause.

Id. at 1271.

314. *See* Fineman, *supra* note 268, at 5–6, 26–34; Fischl, *supra* note 56, at 195 (noting that after courts announced the handbook rule, employers "rewrote materials to opt back into the employment-at-will rule via disclaimers of job security").

315. Franklin G. Snyder, *The Pernicious Effect of Employment Relationships on the Law of Contracts*, 10 TEX. WES. L. REV. 33, 64 (2003).

316. *See supra* text accompanying notes 108–09.

317. *See* Wal-Mart Statement of Ethics, *supra* note 108, at i.

318. *See, e.g.*, ASSOCIATION OF CERTIFIED FRAUD EXAMINERS, SAMPLE CODE OF BUSINESS ETHICS & CONDUCT, 1 (2003), *available at* http://www.acfe.com/

quires companies to include anti-retaliation protections as part of a Code, but also states in the commentary to another part of that rule that "[l]isted companies may write their Codes in a manner that does not alter existing legal rights and obligations of companies and their employees, such as 'at will' employment arrangements."[319] This caveat is contained in the section discussing an employer's duty to deal fairly with an employee—not the anti-retaliation section. However, the comment serves as a reminder of the effect of the background at-will rule on any discussion of enforceable employment promises.

Two regulatory changes would counteract the willingness of an employer to simply add a disclaimer to the anti-retaliation provisions of a Code. First, any disclaimer should eliminate the ability of the employer to receive a benefit from the anti-retaliation promise. As mentioned above, an employer utilizes an anti-retaliation promise for several reasons, including to receive a benefit under the Organizational Sentencing Guidelines by having an "effective compliance system" and, most recently, to satisfy the listing standards of a stock exchange.[320] Prosecutors and courts should refuse to give sentencing reductions and credits to a corporation that includes an at-will disclaimer in its Code, at least as the disclaimer relates to provisions regarding whistleblowers. A compliance system can hardly be "effective" if an employer can retaliate against whistleblowers without fear of liability. Similarly, stock exchanges should de-list a company that waters down an anti-retaliation promise with an at-will disclaimer. Shareholders cannot expect to benefit from encouraging employees to become internal monitors when a disclaimer makes an anti-retaliation promise unenforceable.

Analogous arguments in favor of this suggestion exist in the sexual harassment context. In order for an employer to utilize the *Faragher/Ellerth* affirmative defense for such cases, it must demonstrate that its anti-harassment compliance procedure is "effectively enforced" and that an employee unreasonably failed to utilize the procedure.[321] Courts have held that an employer can lose that affirmative defense if the employer retaliates against an employee who utilizes the proce-

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documents/code_of_business_ethics.pdf.

319. *See* NYSE, CORPORATE GOVERNANCE STANDARDS § 303A.10 cmt. (2004).

320. *See* discussion *supra* Part II.A.

321. *See, e.g.*, White v. BFI Waste Servs., LLC, 375 F.3d 288, 299 (4th Cir. 2004).

dure or even if the anti-harassment policy does not contain sufficient promises against retaliation.[322] As the Fourth Circuit noted, "[e]mployers who trap employees by firing those who use their antiharassment reporting procedures could very well lose their affirmative defense in cases where employees do not report suspected violations."[323] Although courts have not evaluated specifically the effect of a handbook disclaimer on an employer's affirmative defense,[324] employees seemingly would have a strong argument that a policy that disclaims its own promises cannot be "effective."[325] The same argument should be recognized in other contexts involving whistleblower anti-retaliation provisions.

If an employer refuses to stand by its promise to protect whistleblowers, then the employer should not receive credit for having a compliance system in place. Under this proposal, employers either could remove such at-will disclaimers (thereby permitting employees to enforce the company's "no retaliation" promise), or the employer would not receive the benefits offered by courts, prosecutors, and stock exchanges for promising anti-retaliation protection.

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322. *See* Cardenas v. Massey, 269 F.3d 251, 267 (3d Cir. 2001) (denying summary judgment on the issue of whether a policy satisfied the *Faragher/Ellerth* affirmative defense in part because of a fact question as to whether the plaintiff was retaliated against for using a compliance system); Madison v. IBP, Inc., 257 F.3d 780, 795–96 (8th Cir. 2001) ("There was evidence that IBP did not have effective procedures in place to encourage employees to come forward with employment complaints or to protect them from retaliation."), *overruled in non-relevant part by* Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369 (2004) ; Barrett v. Applied Radiant Energy Corp., 240 F.3d 262, 266 (4th Cir. 2001) (noting that any presumption of "reasonable care" arising from the distribution of an anti-harassment policy can be rebutted through proof that the policy was adopted or administered in bad faith or that the policy was otherwise defective or dysfunctional); Williams v. Spartan Commc'ns, Inc., No. 99-1566, 2000 WL 331605, at *3 (4th Cir. Mar. 30, 2000) (finding that employer failed to satisfy an affirmative defense because, among other things, the employer "disseminated an anti-harassment policy which failed to provide that complainants would be free from retaliation, and yet warned that false reports of harassment would subject a complainant to disciplinary action, 'including termination'"); Dinkins v. Charoen Pokphand USA, Inc., 133 F. Supp. 2d 1237, 1253–54 (M.D. Ala. 2001) ("It goes without saying a shield cannot double as a sword; an employer may not protect itself by strewing mines throughout its safe harbor.").

323. Jordan v. Alternative Resources Corp., 458 F.3d 332, 343 (4th Cir. 2006).

324. *See* Schroeder, *supra* note 93, at 593 (recognizing that the presence of a disclaimer may lead to arguments about an anti-harassment policy's effectiveness, but asserting that litigants rarely have the incentive to litigate the issue).

325. *But see id.* (noting that employees rarely win cases attacking the effectiveness of an anti-harassment policy).

A second option could be based on the Sarbanes-Oxley requirement that any waivers of Codes of Ethics provisions must be disclosed to the public and shareholders.[326] The stock exchange listing regulations require similar disclosures when a company waives its Code of Ethics for directors or executive officers.[327] The stock exchanges should extend this waiver provision to apply anytime the company relies upon a disclaimer to defend against a whistleblower's claim of retaliation. This suggestion operates under the same rationale as the rule currently in place for directors and executive officers: corporations should not mislead shareholders by secretly waiving rules that have been disclosed publicly.[328] Corporations should not be permitted to promise publicly not to retaliate against whistleblowers, while also claiming in private litigation that the promise is not enforceable.[329]

Thus, while the stock exchanges' listing standards may help employees satisfy the "specificity" requirements of the current handbook test,[330] the "reliance" and "disclaimer" elements will remain significant stumbling blocks for employee enforcement of these promises. If advocates, courts, and regulators recognize the distinctive nature of Code anti-retaliation promises, however, then whistleblowers will have a better opportunity to overcome these hurdles. Doctrinally, advocates should argue and courts should accept that that Code anti-retaliation promises can be analyzed better as express rather than implied contracts. Moreover, even under the implied contract principles of the handbook doctrine, reinvigorating the *Toussaint* analysis regarding generalized "reliance" is appropriate for anti-retaliation promises that provide the employer numerous corporate governance benefits. Regulatory changes

326. *See* Sarbanes-Oxley Act of 2002 § 406, 15 U.S.C. § 1763 (Supp. 2002).

327. *See* NYSE, CORPORATE GOVERNANCE STANDARDS, § 303A.10; NASD Rule 4350(n).

328. *Cf.* NYSE, CORPORATE GOVERNANCE STANDARDS, § 303A.10 cmt. (2004) ("Each code of business conduct and ethics must require that any waiver of the code for executive officers or directors may be made only by the board or a board committee and must be promptly disclosed to shareholders. This disclosure requirement should inhibit casual and perhaps questionable waivers, and should help assure that, when warranted, a waiver is accompanied by appropriate controls designed to protect the listed company. It will also give shareholders the opportunity to evaluate the board's performance in granting waivers.").

329. *See* Richard F. Ober, Jr. & Ian Ayres, *The Hollow Promise: Sexual Orientation Nondiscrimination Policies*, 24 Association of Corporate Counsel Docket 48, 50 (Oct. 2006) (discussing problems with corporations that make "hollow promises" of nondiscrimination).

330. *See supra* note 285.

may also help. Employers should be required to give employees notice of the Code anti-retaliation promise. Also, employers should not receive benefits from publishing a Code anti-retaliation promise if they disclaim contractual responsibility for the promise.

V. THE DOWNSIDE FOR WHISTLEBLOWERS

Although bringing a contract claim may be a good option for a whistleblower, it is not a perfect solution. At best, the claim supplements and fills in some of the gaps created by inconsistent tort and statutory protections. Of course, given the breadth of these gaps, this supplemental role could prove valuable. However, whistleblower advocates and policymakers also should understand that the contract claim presents some drawbacks compared to protection provided by torts and statutes.

A. *More Limited Damages*

The contract theory of recovery likely will lead to lower damages for whistleblowers than either a tort or statutory claim. The tort of wrongful discharge often provides the possibility of both economic damages and non-economic damages, such as emotional distress and mental anguish.[331] Courts also often permit an employee-plaintiff to recover punitive damages.[332] Although statutory damages provisions vary considerably,[333] many anti-retaliation statutes provide compensatory[334] and punitive damages,[335] as well as explicit litigation costs and attorneys' fees provisions.[336]

By contrast, a contract claim may provide a significantly lower damages award. First, contract damages rarely will include non-economic damages or punitive damages.[337] Second,

331. *See* LARSON, *supra* note 221, at § 9A.03[1][a]-[b].

332. *See id.* at § 9A.03[1][c].

333. *See id.* at § 9A.04 ("Statutory remedies are extremely varied, ranging from those with almost no remedy at all, to those including tort-like damages for emotional distress and punitive damages.").

334. *See, e.g.*, 42 U.S.C. § 7622 (2000); 42 U.S.C. § 5851 (2000); LA. REV. STAT. ANN. § 23:967v (2007).

335. *See, e.g.*, MONT. REV. CODE ANN. § 39-2-905(2) (2006); N.J. STAT. ANN. § 34:19-5 (2006).

336. *See, e.g.*, 18 U.S.C. § 1514A (Supp. IV. 2004); FLA. STAT. ANN. § 448.103 (2007).

337. *See* LARSON, *supra* note 221, at § 9A.02[1].

because the damages calculation for a breach of contract consists of determining "expectation damages"—that is, compensating the employee for any foreseeable loss caused by the employer's breach by placing the employee in the position the employee would have obtained had the contract not been breached[338]—it may be difficult for an at-will employee to receive any expectation recovery. After all, an at-will employee, by definition, should have no expectation of future employment because the employer could terminate the employment at any time, for any reason or no reason. Thus, some courts conclude that at-will employees may recover only nominal damages for breach of an at-will contract because the employee could have been legally discharged immediately after the illegal termination.[339] Other courts conclude that damages in the at-will context are not readily ascertainable because the employee could be fired at any moment.[340] For example, a North Carolina court has held that an at-will employee cannot recover damages for a breach of contract action without a showing that the employee would have been retained for some length of time.[341]

Fortunately, courts rarely have taken such a cramped view of damages when at-will employees bring contract-like claims. The more common damages calculation presumes that employment would have continued but for the wrongful termination.[342] Under this view, a contractual claim would permit back pay, which would make the employee "whole,"[343] and the back pay calculation would run from the date the employment terminated to the date of judgment.[344] Additionally, courts may permit reinstatement[345] and front pay,[346] although the availability of these remedies is far from universal.[347]

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338. *See* RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981).

339. *See* LARSON, *supra* note 221, at § 9A.02[4].

340. *See id.* at § 9A.02[4].

341. *See* Bennett v. Eastern Rebuilders, Inc., 279 S.E.2d 46 (N.C. App. 1981).

342. *See, e.g.*, Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983).

343. *See, e.g.*, Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 841 (Wis. 1983).

344. *See, e.g.*, Pokora v. Warehouse Direct, Inc., 751 N.E.2d 1204 (Ill. App. Ct. 2001).

345. *See, e.g.*, *Brockmeyer*, 335 N.W.2d at 841.

346. *See, e.g.*, Duder v. Donaldson, Lufkin & Jenrette Futures, Inc., 3 I.E.R. Cases 97 (D. Minn. 1986); Torosyan v. Boehringer Ingelheim Pharm., Inc., 662 A.2d 89 (Conn. 1995); Smith v. Smithway Motor Xpress, Inc., 464 N.W.2d 682 (Iowa 1990).

347. *See, e.g.*, Jeter v. Jim Walter Homes, Inc., 414 F. Supp. 791 (W.D. Okla. 1976); Sterling Drug, Inc. v. Oxford, 743 S.W.2d 380, 386–87 (Ark. 1988) (permitting back pay from the day of termination to the day of trial, but refusing to

The doctrinal differences in available remedies between contract claims on the one hand and tort and statutory claims on the other have an impact in the real world. One study reported that the average tort retaliatory discharge award outpaced the average employment breach of contract claim by almost $400,000.[348] This sizable difference may cause attorneys to refuse to take a contract claim because it may not be cost-effective, particularly for a lower-wage worker. Moreover, the lack of a "full" damages award that would include punitive damages and damages for mental anguish or pain and suffering may not give employees sufficient incentive to become whistleblowers in the first place.[349]

B. *No Claims Against Individuals*

Some anti-retaliation statutes permit whistleblowers to bring claims against individuals who retaliate against them, as well as their employer. For example, the Sarbanes-Oxley Act states that no officer, employee, contractor, subcontractor, or agent of a publicly-traded company may discriminate against an employee for blowing the whistle.[350] Administrative law judges hold that employees may bring Sarbanes-Oxley claims directly against individuals who retaliated against them.[351]

By contrast, whistleblowers likely could not bring a breach of contract claim based on a Code anti-retaliation promise against individuals. The employer's issuance of the Code likely would make it the proper defendant and exclude any claim against an individual manager or executive.[352]

Interestingly, although Sarbanes-Oxley permits whistleblowers to bring claims against individuals,[353] they rarely did

award future damages); WILLBORN et al., *supra* note 9, at 185 (noting that courts are "reluctant to order reinstatement" in common law tort and contract cases).

348. *See* LARSON, *supra* note 221, at § 9A.01 (citing study of 326 California cases in the 1980s which found that the average retaliatory discharge award was $579,974 and the average breach of contract award was $193,898).

349. *See* Dworkin, *supra* note 169, at 1763.

350. *See* 18 U.S.C. § 1514A(a) (Supp. IV 2004).

351. *See* Jordan v. Sprint Nextel Corp., 2006-SOX-41 (Dep't of Labor Mar. 14, 2006); Gallagher v. Granada Entert. USA, 2004-SOX-74 (Dep't of Labor Oct. 19, 2004).

352. *See* WESTMAN & MODESITT, *supra* note 11, at 151–52 ("Typically, actions for breach of contract may be pursued against only parties to the contract, which in the employment context includes the employing entity but not individual managers.").

353. *See* 18 U.S.C. § 1514A(a) (Supp. IV 2004).

so,[354] perhaps because the employer provides a substantially deeper pocket. Moreover, employment-related tort claims against individuals, while possible, rarely succeed.[355] Thus, the practical effect of this difference between contract and statutory protections may be minimal. However, at the margins, the option of including individual managers and executives as defendants could deter them from retaliating against whistleblowers. The failure of the breach of contract theory to permit this type of claim reduces the level of this deterrence.

C. *Requiring Internal Disclosure*

Finally, to the extent courts accept breach of contract claims based on Code anti-retaliation promises, employers will react in ways to reduce their liability. In addition to adding a disclaimer,[356] another possible reaction may be that employers will impose procedural requirements for anti-retaliation protection. An employer may condition its promise not to retaliate on the whistleblower reporting misconduct internally or to a specific source. Employees who fail to follow these instructions will be forced to overcome the argument that the employee did not satisfy a condition precedent to protection. Employers might be able to justify such requirements on the ground that the company needs a standardized means of receiving reports in order to control rogue agents who might retaliate against whistleblowers without authorization.

Court reaction to this gambit will likely vary depending on the facts of the case, such as whether the employee received notice of the procedural requirement and whether the procedure was reasonable under the circumstances. For whistleblowers, such requirements will erect more procedural hurdles to overcome. But, the consequences may not be entirely negative. Whistleblowers who actually utilize the procedure may experience less retaliation because they would be protected by the corporation's official compliance system rather than exposed to the whims of managers and supervisors.[357] Moreover, the re-

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354. In a study I conducted of 491 Sarbanes-Oxley whistleblower claims, employees named an individual as a respondent in only 5.3% of the cases. The general results from this study were published in Moberly, *supra* note 10; however, this specific data was not included in the published results.

355. *See* WESTMAN & MODESITT, *supra* note 11, at 152 (citing cases).

356. *See* discussion *supra* Part IV.C.2.

357. Some social science research suggests that whistleblowers who report misconduct internally experience retaliation less frequently than whistleblowers who

quirements could encourage internal whistleblowing, which has numerous societal advantages, including permitting an early response to misconduct and an overall reduction in the harm from corporate wrongdoing.[358]

CONCLUSION

Recommending a contractual solution to an employment problem can be quixotic. If the proposed contract terms infringe too much upon employer prerogatives by undermining the at-will rule, then employers will simply change the terms of the bargain.[359] Employers will add disclaimers to handbooks, narrow the scope of their promises, or remove their promissory statements altogether. However, the anti-retaliation promises in Codes may withstand these attempts because the benefits employers receive from issuing such promises likely outweigh the costs of increased exposure to whistleblower claims. Employers can list their stocks on the country's largest stock exchanges, receive reduced criminal sanctions, better defend against employee harassment claims, and send a message of "good corporate governance" to their shareholders and regulators. Less visibly, perhaps, employers that take anti-retaliation promises seriously should reduce their own wrongdoing by encouraging more employee monitoring.

Nonetheless, permitting contractual enforcement of these anti-retaliation promises does not optimally encourage whistleblowers. The damages remedy may not be sufficient, particularly for lower-wage workers, and the anti-retaliation promise will vary from corporation to corporation. Eventually, broader statutory and tort protections may be necessary in order to provide more universal and consistent protection. But until then, permitting whistleblowers to enforce a corporate promise not to retaliate through a breach of contract action could serve as a valuable supplemental remedy for and deterrent to retaliation. Contractual enforcement can protect whistleblowers who fall through the gaps of current statutory and tort coverage, and many employees and their attorneys will likely consider any recovery better than no recovery at all.

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report to a source outside of the organization. *See* Terry Morehead Dworkin & Elletta Sangrey Callahan, *Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society*, 29 AM. BUS. L.J. 267, 301–02 (1991).

358. *See* Moberly, *supra* note 10, at 1151–52.

359. *See* Snyder, *supra* note 315, at 64.