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Secrets, Lies, and Lessons from the Theranos Scandal

LAUREN ROGAL[†]

Theranos, Inc., the unicorn startup blood-testing corporation, was ultimately laid low by a former employee whistleblower. The experience of that whistleblower during and after her employment illuminates detrimental secrecy practices within the startup sector, as well as legal and practical barriers to corporate accountability. Theranos sought to avoid exposure by cultivating an environment of secrecy and intimidation, and by aggressively extracting and enforcing non-disclosure agreements. The legal landscape for whistleblowers facilitated this strategy: while whistleblowing employees enjoyed certain protections under anti-retaliation statutes, trade secrets statutes, and common law contract principles, these protections were neither readily accessible nor certain. This Article critically examines the contours and ambiguities of those legal frameworks, using the Theranos case study, and offers observations on the need for a harmonized public policy to facilitate private sector whistleblowing.

[†] Associate Clinical Professor of Law, Vanderbilt Law School. This Article is based on a presentation given at the ComplianceNet 2019 Conference on Business Ethics at the Villanova University Charles Widger School of Law. I thank the facilitators and participants of the conference for their insights and suggestions. In addition, I thank Professors Peter S. Menell, Priya Baskaran, Gautam Hans, Jenn Oliva, and Lynnise Pantin for their comments and extraordinary support, and Jacqueline Chan and Janae Wilson for their research assistance.

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INTRODUCTION

Nondisclosure agreements (NDAs) have been making headlines. The #MeToo movement revealed a pattern of corporations extracting NDAs from sexual misconduct victims, effectively shielding the perpetrators, and perpetuating their behavior.¹ Former President Donald Trump notoriously required NDAs from employees at the Trump Organization and his presidential campaign.² Long an unquestioned staple of corporate legal risk management, NDAs have acquired a dubious reputation for concealing information that would be in the public interest to disseminate.

The case of Theranos, Inc., a blood-testing startup once valued at \$9 billion,³ invites critical assessment of NDAs and other mechanisms that curtail whistleblowing. Theranos ultimately imploded in a wave of headlines and indictments charging that the company fraudulently marketed diagnostic technology that it knew to be defective and unreliable. At its height, Theranos had over 800 employees,⁴ representing the best and brightest of Silicon Valley.⁵ From this sophisticated and professionally mobile staff, precious few whistleblowers emerged. By the time a young woman named Erika Cheung alerted regulators in 2015, Theranos had already exposed thousands of consumers to the risk of faulty blood tests and wasted millions in investor money.⁶

To prevent exposure by its workforce, Theranos's founder and Chief Executive Officer Elizabeth Holmes deployed two main strategies. First, she cultivated an environment of secrecy and intimidation.⁷ Staff were systematically isolated, monitored, and threatened or fired for questioning company practices.⁸ Second, the company aggressively extracted and enforced NDAs, threatening employees with crushing liability for revealing company

1. Heather Tucker, *USA Gymnastics Says It Will Not Fine McKayla Maroney if She Speaks Out Against Larry Nassar*, USA TODAY (Jan. 16, 2018, 10:40 PM), <https://www.usatoday.com/story/sports/olympics/2018/01/16/usa-gymnastics-mckayla-maroney-larry-nassar/1039025001/>; Ronan Farrow, *Harvey Weinstein's Secret Settlements*, NEW YORKER (Nov. 21, 2017), <https://perma.cc/C6GP-KEFM>; Emily Steel & Michael S. Schmidt, *Bill O'Reilly Settled New Harassment Claim, Then Fox Renewed His Contract*, N.Y. TIMES (Oct. 21, 2017), <https://www.nytimes.com/2017/10/21/business/media/bill-oreilly-sexual-harassment.html>.

2. Haven Orecchio-Egresitz, *How Trump Uses Money, Non-Disclosure Agreements, and Intimidation to Muzzle the People Close to Him*, BUS. INSIDER (June 18, 2020, 12:16 PM), <https://www.businessinsider.com/how-trump-non-disclosure-agreements-intimidation-silence-mary-trump-book-2020-6>; Scott Horsley, *Sworn to Secrecy: Trump's History of Using Nondisclosure Agreements*, NPR (Mar. 19, 2018, 6:28 PM), <https://www.npr.org/2018/03/19/595025070/sworn-to-secrecy-trumps-history-of-using-nondisclosure-agreements>.

3. JOHN CARREYROU, *BAD BLOOD: SECRETS AND LIES IN A SILICON VALLEY STARTUP* 183 (2018).

4. *Id.* at 295.

5. *See id.* at 30 (describing the recruitment of a cadre of Apple employees); *id.* at 95 (describing the recruitment of employees from NASA and SpaceX). While many of its employees boasted lofty credentials, Theranos also practiced nepotism, hiring, and promoting family members and friends with scant qualifications. *Id.* at 98–99.

6. *See infra* Part IV.

7. *See infra* Part IV.

8. *See infra* Part IV.

secrets.⁹ Holmes's approach, which perpetuated the deception in the short term, ultimately destroyed the company. There is much to be said about this culture, particularly the failures of corporate governance and the role of corporate lawyers who ought to have been fostering a culture of legal compliance.¹⁰ This Article, however, focuses on how Holmes's approach was abetted by the law. While whistleblowers enjoyed certain rights and protections, these proved difficult for employees to access.

The legal framework has improved considerably since 2015 due to the enactment of the Defend Trade Secrets Act and its explicit protections for whistleblowers.¹¹ Yet as the Theranos story illuminates, practical barriers and uncertainties remain. The company's implosion illustrates the need for enhanced and harmonized whistleblower laws that relieve workers of the burden of legal knowledge and effectively transmit notice of avenues for protected whistleblowing.

This Article proceeds in four parts. Part I relates the experience of Theranos whistleblower Erika Cheung. Part II explores the dynamics of corporate whistleblowing in the modern American workplace. Part III reviews the legal landscape for corporate whistleblowing and the rights and risks of the employer and employee. These include (1) anti-retaliation statutes, (2) trade secret protection laws, and (3) the contractual principles governing NDAs. Part IV sets Erika Cheung's experience in the context of these discordant legal frameworks, discusses the inaccessibility and uncertainties that beset them, and offers principles for enhancing and harmonizing legal protections.

I. THE FALL OF THERANOS

In September 2015, Erika Cheung composed an email to the Centers for Medicare and Medicaid Services (CMS), which oversees diagnostic laboratories.¹² She began by expressing trepidation: "I've been nervous to send or even write this letter. Theranos takes confidentiality and secrecy to an extreme level that has always made me scared to say anything . . ."¹³ She then painstakingly detailed her misgivings about her former employer's unorthodox (and, Cheung believed, illegal) laboratory protocols for its blood diagnostic technology.¹⁴

9. See *infra* Part IV.

10. See, e.g., G.S. Hans, *How and Why Did It Go So Wrong?: Theranos as a Legal Ethics Case Study*, 37 GA. ST. U. L. REV. 427 (2021); Brent T. Wilson, *Theranos and the Tale of the Disappearing Board of Directors*, 63-APR ADVOC. (IDAHO) 10 (2020).

11. 18 U.S.C. § 1833.

12. CARREYROU, *supra* note 3, at 281.

13. *Id.*

14. *Id.*

Cheung had been a freshly minted graduate of Berkeley's molecular and cell biology program when she took a position at Theranos in October 2013.¹⁵ Assigned to perform quality control tests, she had had an unusually direct window into the struggles of Theranos's blood-testing technology.¹⁶ The devices simply could not deliver reliable, replicable results.¹⁷ Even more unsettlingly, Cheung had observed that unfavorable quality control test results were deleted as anomalous.¹⁸ Worst of all, this had all happened while Theranos was installing its technology in Walgreens pharmacies, exposing the public to the risk of false blood test results.¹⁹

Theranos had developed tactics to prevent exposure by concerned employees like Cheung. Secrecy and fear permeated the company culture.²⁰ Employee teams were physically and intellectually segregated by means of partitions, fingerprint scanners, and strict rules regarding the sharing of information among teams.²¹ These communication barriers, while impediments to scientific progress, successfully obscured employees' full picture of Theranos operations.²² Due to her position in quality control, Cheung was among the few employees with full knowledge of the device failures.

The company also monitored, suppressed, and punished dissenting voices.²³ One such voice was that of Tyler Shultz, a friend of Cheung's and the grandson of Theranos director and former Secretary of State George Shultz. When Shultz raised his concerns about Theranos's quality control testing directly with executives, he received false assurances and a scathing rebuke from Theranos second-in-command Sunny Balwani.²⁴ Balwani then reviewed the company's email traffic and traced Shultz's information to Cheung, whom he berated and tacitly threatened with termination.²⁵ Shultz and Cheung were lucky: other employees who questioned company practices had been quickly fired.²⁶

15. Taylor Dunn, Victoria Thompson & Rebecca Jarvis, *Theranos Whistleblowers Filed Complaints Out of Fear of Patients' Health: 'It Started to Eat Me Up Inside': 'The Dropout' Episode 4*, ABC NEWS (Mar. 13, 2019, 9:56 AM), <https://abcnews.go.com/Business/theranos-whistleblowers-filed-complaints-fear-patients-health-started/story?id=61030212>.

16. *Id.*; CARREYROU, *supra* note 3, at 188.

17. Dunn et al., *supra* note 15; CARREYROU, *supra* note 3, at 188–90.

18. Dunn et al., *supra* note 15; CARREYROU, *supra* note 3, at 187–90.

19. Dunn et al., *supra* note 15.

20. *Id.*; CARREYROU, *supra* note 3, at 77 (describing employees' fear of Balwani); *id.* at 116 (citing a fired employee's email to Holmes and Balwani, in which she denounced "a work environment where people hide things from you out of fear").

21. CARREYROU, *supra* note 3, at 296–97.

22. *Id.* at 20, 32, 37, 142–43.

23. *Id.* at 297 (describing the monitoring of emails and internet browser histories); *id.* at 164 (describing how employees who raised concerns were marginalized or fired).

24. *Id.* at 191–94 (describing how Shultz was reassured first by Holmes and scientist Daniel Young); *id.* at 196 (describing how Balwani "belittled everything from [Shultz]'s grasp of statistics to his knowledge of laboratory science").

25. *Id.* at 198 (citing Balwani's parting words as "[y]ou need to tell me if you want to work here or not").

26. *See id.* at 48–51 (describing the firing of a sales executive and general counsel for warning board members about the company's unrealistic revenue projections); *id.* at 114–16 (describing how a scientist was

The Chief Financial Officer had been terminated on the spot when he questioned the soundness of financial projections given to investors.²⁷

Finally, Theranos relied on the aggressive use and enforcement of NDAs. Cheung signed an NDA before she even interviewed with Theranos,²⁸ and another when she resigned.²⁹ The final straw had been an unsuccessful joint attempt with Tyler Shultz to present his grandfather with their misgivings.³⁰ The next day, Cheung submitted her resignation.³¹ The colleague who processed her resignation demanded a fresh NDA, searched her backpack, and warned her against posting anything about Theranos on online forums.³² This appears to have been typical employee exit protocol. When one departing employee refused to sign an NDA, Balwani ordered Theranos security officers to block his exit from the property.³³ When that failed, Balwani called the police to report the man for theft, telling officers that the employee “stole property in his mind.”³⁴

Theranos outsourced NDA enforcement to the law firm of Boies Schiller Flexner LLP, where famed litigator David Boies often personally oversaw Theranos matters.³⁵ Cheung encountered Boies Schiller after Tyler Shultz convinced her to speak with *Wall Street Journal* reporter John Carreyrou, who was investigating Theranos. Shortly thereafter, Cheung received a letter from Boies Schiller accusing her of revealing Theranos trade secrets and demanding that she submit to an “interview” with Boies Schiller attorneys.³⁶ Because the letter was addressed to the home of a friend where Cheung was staying temporarily, she concluded that Boies Schiller agents must have followed her.³⁷ Boies Schiller was similarly aggressive in its confrontation of Carreyrou, Shultz, and another *Journal* source pseudonymously known as “Alan Beam.”³⁸

Months later, Cheung located a lawyer who provided a free consultation.³⁹ The attorney informed her that she could notify CMS about Theranos’s

threatened with termination for raising lab protocol concerns and fired shortly thereafter for calling attention to billing issues).

27. *Id.* at 8.

28. Rick Berke, *Interview: Theranos Whistleblower Erika Cheung Thinks Elizabeth Holmes Should Spend Years in Prison*, KQED (May 2, 2019), <https://www.kqed.org/science/1941045/interview-theranos-whistleblower-erika-cheung-thinks-elizabeth-holmes-should-spend-years-in-prison>.

29. CARREYROU, *supra* note 3, at 200.

30. *Id.* at 199.

31. *Id.*

32. *Id.* at 200.

33. *Id.* at 107.

34. *Id.* at 108.

35. *Id.* at 201.

36. *Id.* at 255–56.

37. *Id.* at 255.

38. *Id.* at 241–46 (relating a confrontation between Tyler Shultz and two Boies Schiller attorneys in his grandfather’s home); *id.* at 254 (describing the behavior of Boies Schiller attorneys during a meeting with Carreyrou); *id.* at 266 (describing Boies Schiller’s threats against Alan Beam).

39. Meera Jagannathan, *Theranos Whistleblower: How to Prevent Another \$600M Silicon Valley Disaster*, MARKETWATCH (May 17, 2019, 5:33 AM), <https://www.marketwatch.com/story/theranos-whistleblower-i-was-so-paranoid-about-theranos-and-them-spying-on-me-2019-05-15>.

regulatory noncompliance without legal exposure. The email triggered the avalanche that would ultimately destroy Theranos. Regulators descended within days,⁴⁰ leading to the closure of Theranos's laboratories,⁴¹ charges by the Securities and Exchange Commission,⁴² and federal indictments for wire fraud against Theranos founder and Chief Executive Officer Elizabeth Holmes and her deputy Balwani.⁴³

The Theranos story is singular in its sensational details, but it nevertheless echoes familiar themes and provides generalizable lessons. While most companies are not built entirely on fraudulent claims, Silicon Valley startups are famous for hyping "vaporware" products that are still under development and often never materialize.⁴⁴ Many observers recognized the seeds of Theranos's fall in the tech industry's pervasive "fake it till you make it" mentality.⁴⁵ Theranos's fanatical secrecy was also a more extreme version of common Silicon Valley practices; Holmes deliberately patterned her management after the famously secrecy-obsessed Steve Jobs.⁴⁶ Moreover, as the next Part explores, the intimidation and suppression of whistleblowers at Theranos shares much with the rest of the American workplace.

II. WHISTLEBLOWING IN THE AMERICAN WORKPLACE

Erika Cheung's experience aligns with much of the empirical research into corporate whistleblowing. Approximately half of American private sector employees claim to have personally witnessed misconduct in their workplace.⁴⁷ Among the most common transgressions are health violations and lying to external stakeholders.⁴⁸ This Part describes the data on how and when employees operate as a warning system for company problems.

40. CARREYROU, *supra* note 3, at 282.

41. *Id.* at 289.

42. *Id.* at 296.

43. Indictment, *United States v. Holmes*, No. 5:18-CR-00258-EJD, 2020 WL 666563 (N.D. Cal. Feb. 11, 2020), 2018 WL 3216817.

44. *Beware of Vaporware: Product Hype and the Securities Fraud Liability of High-Tech Companies*, 8 HARV. J. L. & TECH. 1–2 (1994).

45. CARREYROU, *supra* note 3, at 296; Erin Griffith, *Theranos and Silicon Valley's 'Fake It Till You Make It' Culture*, WIRED (Mar. 14, 2018), <https://www.wired.com/story/theranos-and-silicon-valleys-fake-it-till-you-make-it-culture/>; Howard Tullman, *Why Fake It Till You Make It Is Finished*, INC. (Mar. 14, 2019), <https://www.inc.com/howard-tullman/why-fake-it-til-you-make-it-is-finished.html>.

46. CARREYROU, *supra* note 3, at 151 (one former Apple employee was unperturbed by Theranos's secrecy practices, as Apple had been similar); *see also* Kif Leswing, *Apple Lawsuit Shows the Company's Extreme Focus on Secrecy*, CNBC (Mar. 11, 2021), <https://www.cnbc.com/2021/03/11/apple-lawsuit-shows-the-companys-extreme-focus-on-secrecy.html> (describing Apple's need-to-know system where employees are kept in the dark about other parts of their project).

47. ETHICS & COMPLIANCE INITIATIVE, *THE STATE OF ETHICS & COMPLIANCE IN THE WORKPLACE* 6 (2018), <https://43wli92bfqd835mbif2ms9qz-wpengine.netdna-ssl.com/wp-content/uploads/2018/05/GBES2018-Final.pdf>. This may include non-criminal conduct that violates company policies or professional ethics. This figure has hovered around 50% consistently since 2000. *Id.*

48. *Id.*

A large majority of employees who witness misconduct say that they report it, most often to a supervisor.⁴⁹ Employees are more likely to report wrongdoing if they feel institutionally empowered, financially secure, and supported by social and professional networks.⁵⁰ Managers have a relatively high reporting rate due to their sense of agency within the company and confidence that the report will have an impact.⁵¹ Unionized employees, who enjoy the protection of their collective bargaining contracts and fellowship of other members, also report at high rates.⁵² Employees who do not report misconduct cite several reasons, including the belief that the report would fall on deaf ears (59%), fear of retaliation (46%), inability to report anonymously (39%), and the belief that someone else would report in lieu of them (24%).⁵³ These data sets do not disaggregate according to whether the malefactor is in a managerial or non-managerial role, but it is reasonable to surmise that employees are more reluctant to report their supervisors than their subordinates or employees at their level of seniority.

The whistleblowing rate plummets in companies with a weak ethical culture.⁵⁴ The Ethics and Compliance Institute defines company culture as “the shared understanding of what really matters in an organization, and the way things really get done”—in short, the practices behind the window-dressing.⁵⁵ In addition to lower reporting rates, weak ethical cultures are characterized by much higher rates of observed misconduct, higher retaliation rates, and higher percentages of employees reporting that they experienced pressure to compromise their ethical standards.⁵⁶ Troublingly, a full 40% of the American workforce reported in 2017 that their company’s ethical culture was weak or weak-leaning.⁵⁷ Sixteen percent of employees reported experiencing pressure to compromise their ethical or professional standards, and 63% believe that their company rewards unethical behavior.⁵⁸ Forty-four percent of reporters say they experienced retaliation in 2017, which is double the percentage in 2013.⁵⁹ The spike in this figure may in part reflect greater sensitivity to the appropriate handling of whistleblower reports.

49. *Id.* at 7.

50. ETHICS RES. CTR., INSIDE THE MIND OF A WHISTLEBLOWER: A SUPPLEMENTAL REPORT OF THE 2011 NATIONAL BUSINESS ETHICS SURVEY 2 (2012), <https://www.corporatecomplianceinsights.com/wp-content/uploads/2012/05/inside-the-mind-of-a-whistleblower-NBES.pdf>.

51. *Id.* at 6.

52. *Id.* at 7.

53. *Id.* at 5.

54. ETHICS & COMPLIANCE INITIATIVE, *supra* note 47, at 10 (finding that 83% observed misconduct and 52% reported it).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 8.

59. *Id.* at 9.

External whistleblowing is rare in corporate America.⁶⁰ According to a 2011 survey, only 18% of whistleblowers ever reported outside the company, and 84% of those external whistleblowers attempted to report internally first.⁶¹ When asked what would motivate them to report externally, employees cited the gravity and persistence of the misconduct, the likelihood that remaining silent would result in harm to people or the environment, and the company's failure to redress their internal complaint.⁶² A minority cited the potential for monetary reward,⁶³ which certain public agencies offer.⁶⁴ While a weak ethical culture deters internal reports, it correlates to higher levels of external reporting.⁶⁵

Employees are generally better positioned to identify corporate malfeasance than resource-strapped regulators or other external stakeholders. Overwhelmingly, they prefer to counteract such misconduct through internal channels and are strongly disinclined to reveal their observations to external parties. This dynamic is heavily informed by the balance of risks to themselves versus others, which in turn is shaped by company culture, the employee's position in the company, and the employee's understanding of their legal rights. Part III describes the legal framework for whistleblowers.

III. THE WHISTLEBLOWER LEGAL LANDSCAPE

A whistleblower's rights, and a company's response, are governed by three main areas of law. First, state laws generally prohibit employers from retaliating against whistleblowers through termination, demotion, or other adverse action. In certain circumstances, federal law may also prohibit such retaliation. On the other hand, the law also generally gives companies the right to seek injunctive and monetary relief if the employee has misappropriated its trade secrets, or file suit for breach of contract if an employee has violated an NDA. This Part explores the contours of and tensions between the rights of employer and whistleblower.

A. ANTIRETALIATION LAWS

Employment in the United States is presumed to be at-will unless otherwise provided by law or private contract.⁶⁶ Nevertheless, most jurisdictions have long recognized a common law tort of wrongful discharge when an employee is

60. Jonathan L. Awner & Denise Dickins, *Will There Be Whistleblowers?*, 34 *REGULATION*, Summer 2011, at 36, 38–39.

61. *ETHICS RES. CTR.*, *supra* note 50, at 2.

62. *Id.* at 14–15.

63. *Id.* at 14.

64. For example, see the description of whistleblower rewards provided by the Securities and Exchange Commission in discussion *supra* Part II.A.2.

65. *ETHICS RES. CTR.*, *supra* note 50, at 13.

66. See *RESTATEMENT (THIRD) OF EMPLOYMENT* § 2.01 (AM. L. INST. 2015). For example, statutory exceptions to at-will employment prevent the termination of employees based on their protected characteristics, 42 U.S.C. § 2000e-2(a)(1), their request for family or medical leave, 29 U.S.C. § 2615(a)(2), or labor organization activities, 29 U.S.C. § 158(a)(4).

terminated for engaging in activities protected by “well-established public policy.”⁶⁷ Protected activities include refusing to commit a wrongful act, requesting a legally mandated employment benefit in good faith, and reporting “conduct that the employee reasonably and in good faith believes violates a law or an established principle of a professional or occupational code of conduct protective of the public interest.”⁶⁸ The cause of action also typically covers constructive discharge, where an employer knowingly creates working conditions so intolerable that a reasonable employee would resign, and, in some states, demotions and other disciplinary acts.⁶⁹

In the 1980s states began codifying these protections into whistleblower non-retaliation statutes.⁷⁰ Today, there is considerable variation in these laws, both with respect to the coverage provided and the burden placed on whistleblowers to comply with specific dictates in their reporting. Certain federal statutes also provide whistleblower protections against retaliation, though the availability and level of protection is uneven—reports of securities or tax fraud trigger substantial protections and potential rewards,⁷¹ while reporters to other agencies may not enjoy protection from retaliation at all.⁷²

1. State Whistleblower Protections

Every state has at least one whistleblower protection statute forbidding retaliation against employees who report misconduct, but the contours of these laws vary significantly. The overall landscape was described by one commentator as “murky, piecemeal, disorganized, and [variable] from jurisdiction to jurisdiction.”⁷³ For example, Massachusetts offers blanket protection only to public sector workers,⁷⁴ while next door, Rhode Island covers not only private sector employees but also independent contractors.⁷⁵ State laws

67. *Id.* § 5.01; Gerard Sinzduk, Comment, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements*, 96 CALIF. L. REV. 1633, 1643 (2008).

68. RESTATEMENT (THIRD) OF EMPLOYMENT § 5.02(a), (c), (e).

69. *Id.* § 5.01 cmt. c.; *Turner v. Anheuser-Busch, Inc.*, 876 P.2d 1022, 1028–29 (Cal. 1994); *Balmer v. Hawkeye Steel*, 604 N.W.2d 639, 642 (Iowa 2000); *Gormley v. Coca-Cola Enters.*, 109 P.3d 280, 282–83 (N.M. 2005); *Anderson v. First Century Fed. Credit Union*, 738 N.W.2d 40, 47 (S.D. 2007).

70. Kenneth G. Dau-Schmidt & Timothy A. Haley, *Governance of the Workplace: The Contemporary Regime of Individual Contract*, 28 COMPAR. LAB. L. & POL'Y J. 313, 342 (2007).

71. See 15 U.S.C. § 78u-6(b) (authorizing rewards to securities whistleblowers), § 78u-6(h) (prohibiting retaliation against whistleblowers); I.R.C. § 7623(a) (2019) (authorizing rewards to tax whistleblowers), § 7623(d) (protecting whistleblowers to the IRS from retaliation).

72. For example, private sector whistleblowers do not have protection from retaliation under the Federal Trade Commission Act, 15 U.S.C. §§ 41–55.

73. 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).

74. See MASS. GEN. LAWS ch. 149, § 185(a)(2) (2021). A bill proposed in 2019 would expand coverage to private sector employees. S.B. 1100, 191st Gen. Ct., Reg. Sess. (Mass. 2019). While excluded from the general whistleblower statute, certain private sector employees may find protection under subject matter-specific legislation. See, e.g., MASS. GEN. LAWS. Ch. 149, § 187(b) (forbidding retaliation against whistleblower employees of health care facilities).

75. 28 R.I. GEN. LAWS § 28-50-2(1) (2020).

also vary significantly with respect to (1) whether they cover disclosures of all legal violations, a subset of legal violations, suspected violations, or threats to public welfare that do not violate the law; (2) whether they protect internal whistleblowing or only reports to public authorities;⁷⁶ (3) whether they prohibit “retaliation” efforts to prevent whistleblowing; (4) whether an employee must exhaust internal reporting mechanisms to enjoy protection; (5) whether employers are required to alert employees to their rights; and (6) the scope of remedies available.

This diversity can perhaps best be illustrated by a comparison between California’s relatively pro-whistleblower framework and New York’s anemic protections. California offers broad coverage, expansive remedies, and mandatory notice to employees of whistleblower rights. New York is a minefield for whistleblowers, only protecting reports of actual legal violations and requiring exhaustion of internal remedies without fully protecting internal reports.

a. Pro-Whistleblower Statute: California

California’s whistleblower protection statute is unusually robust in most respects. It protects private and public employees who report, or testify before a public body, information they reasonably believe to reveal a violation of a federal, state, or local law or regulation.⁷⁷ The protection covers reports to supervisors, other employees with the power to investigate or correct the violation, and any government agency.⁷⁸ Employers may not adopt or implement any policy that prohibits employees from making such a report, and may not retaliate against any employee whom the employer believes has made a report or anticipates might make a report in the future.⁷⁹

California law provides speedy redress to whistleblowers. Courts must provide appropriate injunctive relief upon a showing of reasonable cause to believe that a violation of the whistleblower law has occurred.⁸⁰ Short of this showing, courts must determine whether an injunction is “just and proper,” considering the harm done to the employee as well as the “chilling effect on other employees asserting their rights” under the whistleblower law.⁸¹ These are relatively low thresholds for preliminary injunctive relief, which typically requires the complainant to show a likelihood of prevailing on the merits and of

76. Enron whistleblower Sherron Watkins did not enjoy whistleblower protection under Texas law because she reported accounting misconduct only to CEO Kenneth Lay and not to law enforcement. Sinzduk, *supra* note 67, at 1633.

77. CAL. LAB. CODE §§ 1102.5(a)–(b), 1106 (West 2021) (defining “employee” to include without limitation public sector employees).

78. *Id.*

79. *Id.*

80. *Id.* § 1102.62(c).

81. *Id.* § 1102.62(a)–(b).

irreparable harm.⁸² Moreover, the injunction in whistleblower cases may not be stayed pending appeal.⁸³ California also imposes criminal liability on employers that trample whistleblower rights. Violation of the statute is a misdemeanor punishable by a fine of up to \$5,000 for a corporation, or imprisonment of up to one year and a fine of up to \$1,000 for an individual.⁸⁴

California law actively seeks to raise public awareness of whistleblower rights and facilitate reports of wrongdoing. The Attorney General must maintain a whistleblower hotline and refer calls to the appropriate government authority.⁸⁵ This relieves whistleblowers of the need to identify the appropriate recipient for their report. While the law does not expressly permit anonymous reporting, it promises confidentiality during the “initial review” of the complaint.⁸⁶ Employers must also “prominently display in lettering larger than size 14 point type a list of employees’ rights and responsibilities under the whistleblower laws, including the telephone number of the whistleblower hotline.”⁸⁷

b. Pro-Employer Statute: New York

New York offers comparatively weak protections to private sector whistleblowers.⁸⁸ Where California covers any disclosure that the whistleblower reasonably believed revealed a violation of law, New York requires an *actual* violation of a “law, rule or regulation which . . . creates and presents a substantial and specific danger to the public health or safety, or which constitutes health care fraud.”⁸⁹ Moreover, disclosures are only protected if the employee previously reported the violation internally and provided the company with “a reasonable opportunity” to remedy the offending activity, policy, or practice.⁹⁰

New York employers may not take adverse action against an employee who discloses or “threatens to disclose” information under the statute.⁹¹ The term “threatens” has been construed narrowly to deny protection to an employee who merely expressed concern about a potential legal violation to the employer.⁹² This creates a conundrum for whistleblowers: the statute requires employees to report the violation internally and provide an opportunity to cure, but the act of doing so may not be protected conduct. An employee who

82. *See Winter v. Nat’l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

83. CAL. LAB. CODE § 1102.62(e).

84. *Id.* § 1103.

85. *Id.* § 1102.7(a)–(b).

86. *Id.* § 1102.7(c).

87. *Id.* § 1102.8(a).

88. An amendment was introduced in 2019 to strengthen the private sector whistleblower laws but has not been enacted. A.B. 7384, 2019 Leg., 243rd Sess. (N.Y. 2019). A separate statute protects civil servant whistleblowers. *See* N.Y. CIV. SERV. LAW § 75-b (McKinney 2021).

89. N.Y. LAB. LAW § 740(2)(a)–(c) (McKinney 2021).

90. *Id.* § 740(3). This doesn’t apply to situations where the employee gives information or testifies to a public body already conducting an investigation. *Id.* § 740(2)(b).

91. *Id.* § 740(2)(a).

92. *Roach v. Comput. Ass’n Int’l, Inc.*, 638 N.Y.S.2d 699, 700 (Sup. Ct. 1996) (stating that the statute’s “scope cannot be expanded to provide a remedy to employees who merely allege perceived or implied threats”).

complies with the law's command to report the violation internally may therefore have no recourse if the report triggers her dismissal. The inexorable conclusion is that the employee must include a threat to disclose when raising the violation with the employer. This exposes the employee to an even higher risk of retaliation if it turns out that the company did not actually violate the law. Moreover, unlike California, New York does not require any notice to employees of their rights as whistleblowers.

New York law is also less favorable for whistleblowers with respect to remedies. A prevailing complainant may receive an injunction, reinstatement, compensatory relief, and payment of all costs and attorneys' fees.⁹³ The employer is entitled to costs and attorneys' fees if the court determines that the claim was "without basis in fact or law."⁹⁴

As the comparison between California and New York illustrates, corporate whistleblowers face very different legal shields and hurdles depending on their jurisdiction. In addition to the general whistleblower protection statute, many states have additional non-retaliation provisions for specific offenses.⁹⁵ Such supplementary provisions, while protective, add an additional layer of potential uncertainty and confusion to employees seeking to determine their rights.

2. *Federal Whistleblower Protections*

Federal law offers piecemeal protection to private sector whistleblowers, the strength of which depends on the subject matter.⁹⁶ Erika Cheung, for example, reported violations of clinical laboratory regulations, which provide virtually no whistleblower protection. In contrast, Theranos executives were ultimately indicted for defrauding investors, an area of law that offers relatively strong whistleblower protection.

a. *Weak Whistleblower Protections: Clinical Laboratory Laws*

The Clinical Laboratory Improvement Amendments of 1988⁹⁷ (CLIA) mandates certification of and quality standards for clinical laboratories that test human specimens.⁹⁸ It is administered by the Centers for Medicare and Medicaid Services.⁹⁹ Federal law provides no specific whistleblower

93. N.Y. LAB. LAW § 740(5).

94. *Id.* § 740(6).

95. For example, most states have enacted a false claims act that shields whistleblowers who report fraud against state-funded programs. *State False Claims Act*, TAXPAYERS AGAINST FRAUD EDUC. FUND, <https://www.taf.org/state-laws> (last visited July 31, 2021).

96. A bill to harmonize and expand private sector whistleblower protections died in committee in 2012. H.R. 6409, 112th Cong. (2012).

97. Pub. L. No. 100-578.

98. 42 U.S.C. 263(a)-(b) (requiring certification), (f)(1) (requiring satisfaction of standards).

99. Centers for Medicare & Medicaid Services, *Clinical Laboratory Improvement Amendments (CLIA)*, <https://www.cms.gov/Regulations-and-Guidance/Legislation/CLIA> (last visited July 31, 2021).

protection to laboratory employees who report CLIA violations.¹⁰⁰ In certain circumstances, however, they may be covered by whistleblower protections under the False Claims Act (FCA). The FCA prohibits fraud against government programs, including Medicare and Medicaid.¹⁰¹ CLIA violations may give rise to FCA violations in certain cases, such as if the laboratory deficiencies rendered the billed services medically worthless¹⁰² or if the laboratory falsely certified CLIA compliance as a condition of payment.¹⁰³

Whistleblowers (called “relators”) may bring *qui tam* actions on behalf of the United States for violations of the FCA.¹⁰⁴ The government may opt to intervene and litigate the action, entitling the relator to an award of 15–25% of the proceeds, as well as reasonable expenses and attorneys’ fees.¹⁰⁵ If the government does not intervene, the relator is entitled to 25–30% of the proceeds, as well as reasonable expenses and attorneys’ fees.¹⁰⁶ Since 2009, the FCA has also entitled *qui tam* whistleblowers to “all relief necessary to make [the whistleblower] whole,” if the whistleblower is discharged, demoted, suspended, harassed, or otherwise discriminated against due to their (1) lawful acts done in furtherance of a *qui tam* action or (2) other efforts to stop violations of the FCA.¹⁰⁷ Relief may include reinstatement, double back pay, interest on back pay, and compensation for any special damages.¹⁰⁸

In order to access the FCA’s protections, the whistleblower must show that they were engaged in FCA-protected activity and that the employer knew their activity was protected under the FCA.¹⁰⁹ This presents a hurdle

100. U.S. Gov’t. Accountability Off., GAO-06-416, *Clinical Lab Quality: CMS and Survey Organization Oversight Should be Strengthened* 28 (2006). Legislation to protect laboratory whistleblowers was introduced in 2005 but died in committee. Clinical Laboratory Compliance Improvement Act of 2005, H.R. 686, 109th Cong. § 2 (2005).

101. 31 U.S.C. 3729(a)(1).

102. See *Chesbrough v. VPA, P.C.*, 655 F.3d 461, 468 (6th Cir. 2011); *U.S. ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1053–54 (9th Cir. 2001).

103. False certifications of legal compliance may create liability under the FCA when certification is a condition of receiving a government benefit. *U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997); *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266–67 (9th Cir. 1996). Whether CLIA compliance is a condition of Medicare payment is a contested issue. See *United States ex rel. New Mexico v. Deming Hosp. Corp.*, 992 F. Supp. 2d 1137, 1150 (D.N.M. 2013) (dismissing the FCA claim after finding that CLIA compliance is a condition of Medicare participation but not payment, and that CMS has administrative measures to address violations other than nonpayment); *United States ex rel. Porter v. HCA Health Servs. of Okla., Inc.*, Civil Action No. 3:09-CV-0992, 2011 WL 4590791, at *6 (N.D. Tex. Sept. 30, 2011) (declining to dismiss the relator’s claim under a false certification theory).

104. 31 U.S.C. 3730(b)(1).

105. *Id.* 3730(d)(1).

106. *Id.* 3730(d)(2).

107. *Id.* 3730(h)(1).

108. *Id.* 3730(h)(2).

109. *United States ex rel. Strubbe v. Crawford Cty. Mem. Hosp.*, 915 F.3d 1158, 1166 (8th Cir. 2019); *Singletary v. Howard Univ.*, 939 F.3d 287, 293 (D.C. Cir. 2019); *Fakorede v. Mid-South Heart Center, P.C.*, 709 Fed.Appx. 787, 789 (6th Cir. 2017).

for whistleblowers who merely report regulatory violations.¹¹⁰ To be protected under the FCA, they must reasonably believe the regulatory noncompliance has or will amount to fraud against the government.¹¹¹ Moreover, they must put the employer on notice that their protected activity relates to the filing of false or fraudulent claims.¹¹² A laboratory worker who simply identifies and reports CLIA violations without tying the issue to Medicare or Medicaid reimbursement is unlikely to receive FCA whistleblower protection.¹¹³

b. Stronger Whistleblower Protection: Securities Laws

Federal securities statutes contain comparatively robust whistleblower protections. Federal protection for employees who report suspected securities laws violations began with the Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley”). Enacted in response to the Enron and WorldCom accounting scandals and the role of whistleblowers in unearthing them,¹¹⁴ Sarbanes-Oxley forbade public companies and their agents from retaliating against employees who report or testify about what they reasonably believe to be securities violations or other fraud against shareholders.¹¹⁵ Protected reports could be directed to any federal regulator or law enforcement agency, member or committee of Congress, or internal supervisor.¹¹⁶ The U.S. Supreme Court later held that the protection

110. *See, e.g.*, Strubbe, 915 F.3d at 1167–68 (denying FCA whistleblower protection to hospital employees who complained about medical treatment and financial practices but did not give the hospital notice that its “behavior was fraudulent or potentially subjected it to FCA liability”).

111. Strubbe, 915 F.3d at 1167 (quoting *Schuhardt v. Washington Univ.*, 390 F.3d 563, 567 (8th Cir. 2004)); *Singletary*, 939 F.3d at 296; *Fakorede*, 709 Fed. Appx. at 790. In *Fakorede*, a cardiologist’s expressed concern over misattributed expenses and reminded the employer that an audit should verify compliance with federal law. The Sixth Circuit upheld dismissal of the retaliation claim because the allegations did not support the conclusion that he understood the relationship between the FCA and other federal law, or that his activity was motivated by this connection. *Id.*

112. Strubbe at 1167–68.

113. *See, e.g.*, *United States ex rel. New Mexico v. Deming Hosp. Corp.*, 992 F. Supp. 2d 1137, 1165 (D.N.M. 2013) (dismissing the retaliation claim of a medical technologist who repeatedly reported CLIA violations because “nothing...suggests that she raised any concerns with Defendants regarding fraudulent billing, false claims, or any other activity that might be covered under the FCA. To the contrary, her statements to Defendants raised concerns about quality control, documentation, and CLIA violations; there is no reference to any statements regarding fraudulent claims or Medicare billing practices.”) In contrast, the *Singletary* retaliation claim survived a motion to dismiss because the laboratory worker specifically told her employer that lab conditions violated the conditions of its federal grant funding and urged her employer not to submit false certification to the funding agency. *Singletary*, 939 F.3d at 301–302.

114. Enron’s vice president for corporate development blew the whistle internally to the CEO. *Text of Letter to Enron’s Chairman After Departure of Chief Executive*, N.Y. TIMES (Jan. 16, 2002), <https://www.nytimes.com/2002/01/16/business/text-of-letter-to-enron-s-chairman-after-departure-of-chief-executive.html>. WorldCom’s internal auditor blew the whistle about accounting fraud to the company’s board of directors. Anitha Reddy, *WorldCom Executive Sought Audit Delay*, WASH. POST (July 9, 2002), <https://www.washingtonpost.com/archive/business/2002/07/09/worldcom-executive-sought-audit-delay/685a340a-2eb4-4db1-9904-2aaf18756df3/>.

115. Sarbanes-Oxley Act of 2002 § 806, 18 U.S.C. § 1514A(a).

116. 18 U.S.C. § 1514A(a)(1).

from retaliation applied to independent contractors as well.¹¹⁷ Sarbanes-Oxley also required public companies to establish internal channels for whistleblowers to anonymously and confidentially report accounting and auditing concerns to the board of directors.¹¹⁸

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”) enhanced whistleblower protections in the securities arena by (1) extending their reach to privately-held companies,¹¹⁹ (2) permitting anonymous and confidential reports to the Securities and Exchange Commission (SEC),¹²⁰ (3) authorizing the SEC to enforce anti-retaliation provisions directly,¹²¹ and (4) mandating the payment of a bounty to whistleblowers who “voluntarily provided original information” to the SEC that led to sanctions of \$1 million or more.¹²² The “original information” requirement prevents people from piggybacking on the original whistleblower’s report in order to claim the bounty, which amounts to 10–30% of the aggregate sanctions imposed on the company.¹²³

The SEC also promulgated Rule 21F-17, which forbids employers from attempting to undermine its whistleblower programs by contract, stating that “[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications.”¹²⁴ During the Obama administration, the SEC enforced this rule against a number of companies that sought to silence whistleblowers by contract. In one case, the SEC fined Anheuser-Busch InBev for executing a separation agreement that imposed confidentiality requirements and liquidated damages of \$250,000 for any breach thereof.¹²⁵ The confidentiality provisions did not expressly forbid communication with the regulator, but neither did it include a carve-out for whistleblowing.¹²⁶ In 2014, the chief of the SEC Office of the Whistleblower threatened that, “if we find that kind of language, not only are we going to go to the companies, we are going to go after the lawyers who drafted it.”¹²⁷

117. *Lawson v. FMR LLC*, 571 U.S. 429, 433 (2014).

118. Sarbanes-Oxley Act of 2002 § 301, 15 U.S.C. § 78j-1(m)(4).

119. See 15 U.S.C. § 78u-6(h)(1)(A) (stating that “[n]o employer” may retaliate against whistleblowers).

120. Dodd-Frank Wall Street Reform and Consumer Protection Act § 922, 15 U.S.C. § 78u-6(d)(2)(A) (anonymity), (h)(2)(A) (confidentiality).

121. Sarbanes-Oxley provided only a private right of action. See 18 U.S.C. § 1514A(b)(1).

122. 15 U.S.C. § 78u-6(a)(1), (b)(1).

123. *Id.* § 78u-6(b)(1).

124. 17 C.F.R. § 240.21F-17 (2020).

125. Anheuser-Busch InBev SA/NV, Exchange Release Act No. 78957, at 24–27 (Sept. 28, 2016), <https://www.sec.gov/litigation/admin/2016/34-78957.pdf>.

126. *Id.*

127. Brian Mahoney, *SEC Warns In-House Attys Against Whistleblower Contracts*, LAW360 (Mar. 14, 2014, 5:16 PM), <https://www.law360.com/articles/518815/sec-warns-in-house-attys-against-whistleblower-contracts>.

Both state and federal anti-retaliation laws are characterized by their variability. A company and employee might find themselves subject to multiple laws at the state and federal levels with different subject matter coverage, reporting protocol, and remedies. One common theme, however, is that regardless of the law at issue, whistleblowers seldom prevail in their retaliation claims.¹²⁸ A 2013 study of state court decisions by Professor Nancy M. Modesitt found that employers succeeded the trial or administrative hearing level 93% of the time.¹²⁹ On appeal, decisions favoring the employer were affirmed 81% of the time.¹³⁰ Most often, courts deny whistleblowers relief for failure to show a causal connection between their protected activity and the adverse employment action.¹³¹ The record of Sarbanes-Oxley retaliation claims is equally dismal.¹³² Professor Richard Moberly examined the outcomes of administrative decisions by the Occupational Safety and Health Administration, finding that claimants prevailed less than 4% of the time.¹³³ In their analysis of decisions, both Modesitt and Moberly found that decisionmakers tend to interpret whistleblower protections narrowly and favorably to employers.¹³⁴ The paltry win rates are difficult to interpret, as they surely include unmeritorious claims and do not capture whether law has effectively deterred corporate retaliation.¹³⁵ That said, the severity of the skew towards employers speaks discouragingly of the protective power of anti-retaliation laws. This landscape grows even more complex and uncertain when considered in conjunction with trade secrets doctrine, discussed in the following Subpart.

B. PROTECTION OF TRADE SECRETS

Legal protection of trade secrets arose during the Industrial Revolution. Preindustrial society protected commercially valuable knowledge through the guild system and informal custom.¹³⁶ Large-scale manufacturing eroded those constraints, depersonalized production, and facilitated the unauthorized appropriation of trade knowledge.¹³⁷ By the mid-1800s, courts generally recognized a property right in commercial know-how and a cause of action for

128. Nancy M. Modesitt, *Why Whistleblowers Lose: An Empirical and Qualitative Analysis of State Court Cases*, 62 U. KAN. L. REV. 165, 181 (2013) (reviewing cases brought under state statute and the common law doctrine of wrongful discharge); Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S. CAR. L. REV. 1, 28–29 (2012) (reviewing administrative decisions under SOX).

129. Modesitt, *supra* note 128, at 181.

130. *Id.* at 179.

131. *Id.* at 184.

132. Moberly, *supra* note 128, at 28–29.

133. *Id.* His first study showed a success rate of 3.6% from the statute's enactment through mid-2005. His follow-up study showed that from 2005 to 2011, claimants only won 1.8% of cases decided by OSHA. Moberly partially attributed the low win rate to poor investigative practices and training at OSHA. *Id.* at 29–32.

134. Modesitt, *supra* note 128, at 189–92; Moberly, *supra* note 128, at 32–33.

135. Moberly, *supra* note 128, at 28.

136. Peter S. Menell, *Tailoring a Public Policy Exception to Trade Secret Protection*, 105 CALIF. L. REV. 1, 11 (2017).

137. *Id.* at 12.

the misuse or theft of trade secrets.¹³⁸ This has evolved into a complex web of state and federal law.

1. *State Trade Secret Protections*

Until the 1980s, trade secret protection was primarily adjudicated at the state level under the common law of unfair competition.¹³⁹ This changed with the American Bar Association's approval of the Uniform Trade Secrets Act (UTSA) in 1980 and its subsequent adoption by forty-eight states and the District of Columbia.¹⁴⁰ The UTSA expressly displaces all other civil remedies for misappropriation except those sounding in contract law.¹⁴¹

The UTSA defines a trade secret as:

[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.¹⁴²

This definition is broad but contains important boundaries. The first is that a trade secret must provide a “competitive advantage [to] its owner over competitors” that disclosure would undercut.¹⁴³ Courts therefore examine the realistic probability that disclosure will result in competitive harm, particularly if the information is dated or general in nature.¹⁴⁴ Some courts have also distinguished trade secrets from information that may “injure a company’s commercial standing [by exposing] defective products, poor or embarrassing

138. *Id.*

139. The Supreme Court held in *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 474 (1974), that constitutional and federal statutory provisions regarding patents do not preempt state trade secret laws. New York has not enacted trade secrets legislation but recognizes a common law cause of action for misappropriation. *Delta Filter Corp. v. Morin*, 485 N.Y.S.2d 143, 143 (Sup. Ct. 1985) (“New York has substantially adopted the approach of the original Restatement of Torts (1939) to the law of trade secrets.”); *see also Schroeder v. Pinterest Inc.*, 17 N.Y.S.3d 678, 690–91 (Sup. Ct. 2015) (applying the Restatement to a trade secret misappropriation claim).

140. *See Trade Secrets Act*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=3a2538fb-e030-4e2d-a9e2-90373dc05792> (last visited July 31, 2021).

141. UNIF. TRADE SECRETS ACT WITH 1985 AMENDMENTS § 7 (UNIF. L. COMM’N 1985). North Carolina has adopted distinct trade secrets legislation but utilizes a very similar definition of “trade secret.” *See* N.C. GEN. STAT. § 66–152(3) (2020). New York courts have applied a definition from the Restatement of Torts, which does not require efforts to maintain secrecy. *See Ashland Mgmt. Inc. v. Janien*, 624 N.E.2d 1007, 1012–13 (N.Y. 1993).

142. UNIF. TRADE SECRETS ACT WITH 1985 AMENDMENTS § 1(4).

143. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 n.15 (1984).

144. *See, e.g., Prairie Island Indian Cmty. v. Minn. Dep’t of Pub. Safety*, 658 N.W.2d 876, 887 (Minn. Ct. App. 2003) (discussing the competitive value of old financial information); *Formax Inc. v. Alkar-Rapidpak-MP Equip., Inc.*, No. 11-C-0298, 2014 WL 792086, at *1–3 (E.D. Wis. Feb. 25, 2014) (assessing the protection afforded to general customer and financial data).

business practices or similar commercial shortcomings.”¹⁴⁵ In one case, the Second Circuit scoffed that the fact of a company’s poor management is “hardly a trade secret,”¹⁴⁶ perhaps because such information, while embarrassing, does not confer a competitive advantage. In a similar vein, some courts have questioned whether trade secrets encompass “negative” information such as failed experiments,¹⁴⁷ but most authorities recognize that such information can constitute a trade secret if it helps competitors save time or money.¹⁴⁸

The second requirement is actual secrecy. In *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*,¹⁴⁹ the Supreme Court declared that trade secrets laws cannot substantially interfere with the use of information already in the public domain or discoverable from public sources.¹⁵⁰ Efforts to maintain secrecy must be “reasonable under the circumstances” but need not be extensive; in some cases, it may suffice to simply inform employees that certain information is a trade secret.¹⁵¹ More thorough measures may include systematically limiting disclosure to employees or instituting password protections on the information itself. Many companies introduced universal NDAs for employees to cover themselves with respect to this requirement.¹⁵²

Misappropriation encompasses two categories of conduct. First, it includes the *acquisition* of a trade secret by means that the acquirer knows or has reason to know are improper.¹⁵³ Improper means include bribery, theft, misrepresentation, espionage, and breach of a duty of secrecy,¹⁵⁴ but generally do not include reverse engineering.¹⁵⁵ Second, it includes the *unauthorized use*

145. *Mine Safety Appliances Co. v. N. River Ins. Co.*, 73 F. Supp. 3d 544, 580 (W.D. Pa. 2014); *see also* *Littlejohn v. Bic Corp.*, 851 F.2d 673, 685 (3d Cir. 1988) (holding, in a newspaper’s action for access to evidence used at trial, that “non-trade secret but confidential business information is not entitled to the same level of protection from disclosure . . . particularly where, as here, the commercial interest stems primarily from a desire to preserve corporate reputation”).

146. *Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982); *see also* *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1074 (3d Cir. 1984) (explaining where the company’s subsidiary was manufacturing scotch without a permit, “the ‘sensitive’ information at issue here is not the kind of commercial information that courts have traditionally protected, *e.g.*, trade secrets. It simply involves a matter of poor management.” (citation omitted)).

147. *See, e.g.*, *Hurst v. Hughes Tool Co.*, 634 F.2d 895, 899 (5th Cir.) (finding insufficient evidence of a trade secret where the information merely indicated “what not to do”), *cert. denied*, 454 U.S. 829 (1981); *Standard Brands, Inc. v. Zumpe*, 264 F. Supp. 254, 260 n.6 (E.D. La. 1967) (“[T]here is some doubt whether such negative values are protected as trade secrets.”).

148. *See* UNIF. TRADE SECRETS ACT WITH 1985 AMENDMENTS § 1 cmt. (UNIF. L. COMM’N 1985) (stating that the definition of a trade secret “includes information that has commercial value from a negative viewpoint, for example the results of lengthy and expensive research which proves that a certain process will *not* work could be of great value to a competitor”); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. e (AM. L. INST. 1995).

149. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989).

150. *Id.* at 146–47.

151. *See* UNIF. TRADE SECRETS ACT WITH 1985 AMENDMENTS § 1 cmt.

152. *See infra* Part III.C.

153. UNIF. TRADE SECRETS ACT WITH 1985 AMENDMENTS § 1(2)(i).

154. *Id.* § 1(1).

155. *Id.* § 1 cmt. Companies have sought to circumvent the UTSA’s permissive policy towards reverse engineering by introducing product licenses that disallow reverse engineering as a condition of accessing the product. The legal validity of such license provisions, and their ability to trump the long-standing permissive

or disclosure of a trade secret by a person who (1) obtained it through improper means; (2) knew or had reason to know both that it was a trade secret and that their acquisition of it arose from a mistake or accident; or (3) knew or had reason to know that they had a duty to protect or limit its dissemination, or that their information came through a third party who used improper means to obtain it or had a duty to protect it.¹⁵⁶

The UTSA provides for injunctive relief against actual or threatened misappropriation, provided that the injunction last no longer than necessary to eliminate the commercial advantage gained by misappropriation.¹⁵⁷ Prevailing plaintiffs may also receive damages for actual loss and unjust enrichment.¹⁵⁸ In the case of willful and malicious misappropriation, courts may award additional exemplary damages of up to two times the calculated award.¹⁵⁹ Attorneys' fees may be awarded in the case of certain bad acts, such as willful and malicious misappropriation, bad faith efforts to terminate an injunction, and bad faith claims of misappropriation.¹⁶⁰

The UTSA does not address the tension between protection of whistleblowing and protection of trade secrets. There is also no exception under the UTSA for trade secret disclosures made in the public interest, though the accompanying comments acknowledge that the public interest may sometimes override a party's interest in injunctive relief.¹⁶¹ *Republic Aviation Corp. v. Schenk*¹⁶² is cited as an example of such an overriding public concern.¹⁶³ In *Schenk*, the defendant integrated misappropriated trade secrets into its aircraft weapons control systems, which were sold to the U.S. Armed Forces.¹⁶⁴ Enjoining the use of the technology, the court found, would endanger American soldiers fighting in Vietnam.¹⁶⁵ The UTSA stipulates that in such "exceptional circumstances," courts may permit continued use of the trade secret with the payment of a reasonable royalty to the plaintiff.¹⁶⁶

policy towards reverse engineering under trade secret doctrine, remain the subject of scholarly dispute and judicial disagreement. Samuel J. LaRoque, Comment, *Reverse Engineering and Trade Secrets in a Post-Alice World*, 66 KAN. L. REV. 427, 441-42 (2017).

156. UNIF. TRADE SECRETS ACT WITH 1985 AMENDMENTS § 1(2)(ii).

157. *Id.* § 2 cmt.

158. *Id.* § 3(a).

159. *Id.* § 3(b).

160. *Id.* § 4.

161. See UNIF. TRADE SECRETS ACT WITH 1985 AMENDMENTS § 2 cmt.

162. *Republic Aviation Corp. v. Schenk*, 1967 WL 7717 (N.Y. Sup. Ct. Jan. 13, 1967).

163. UNIF. TRADE SECRETS ACT WITH 1985 AMENDMENTS § 2 cmt.

164. *Republic Aviation Corp.*, 1967 WL 7717, at *1-2; UNIF. TRADE SECRETS ACT WITH 1985 AMENDMENTS § 2 cmt.

165. *Republic Aviation Corp.*, 1967 WL 7717, at *7; UNIF. TRADE SECRETS ACT WITH 1985 AMENDMENTS § 2 cmt.

166. UNIF. TRADE SECRETS ACT WITH 1985 AMENDMENTS § 2(b).

2. *Federal Trade Secrets Protections*

One year after Erika Cheung blew the whistle on Theranos, the law of trade secrets got a shot in the arm. The Defend Trade Secrets Act of 2016 (DTSA) created a federal civil cause of action for trade secret misappropriation.¹⁶⁷ Passed unanimously in the Senate and by an overwhelming vote in the House of Representatives,¹⁶⁸ the statute closely mirrors the UTSA in many respects, while also resolving certain ambiguities that emerged in UTSA jurisprudence.

The DTSA's definition of "trade secret" comes from the Economic Espionage Act of 1996, which imposes criminal sanctions for the misappropriation of certain trade secrets.¹⁶⁹ This definition generally aligns with the UTSA definition and adds a list of examples.¹⁷⁰ Likewise, the definitions of misappropriation and improper means generally align with the UTSA.¹⁷¹

The DTSA provides ample redress for companies that have suffered misappropriation. Plaintiffs may receive damages for actual losses and unjust enrichment, or, alternatively, the court may impose a reasonable royalty payment.¹⁷² In the case of "willful and malicious" misappropriation, the court may also award exemplary damages up to two times the calculated damages¹⁷³ and reasonable attorney's fees.¹⁷⁴ A court may, in "extraordinary circumstances," order the seizure of the defendant's property as necessary to prevent disclosure of the trade secret.¹⁷⁵

Unlike state laws derived from the UTSA, the DTSA directly tackles the tension between whistleblower rights and trade secret protection. Section 1833 grants immunity from criminal and civil liability for the disclosure of a trade secret (1) in confidence to a government official or attorney for the sole purpose of reporting or investigating a suspected violation of law, or (2) in a complaint or other document under seal in a legal proceeding.¹⁷⁶ Professor Peter S. Menell, whose scholarship heavily influenced the provision, noted that, "the whistleblower immunity provision is structured as an *immunity* and not a defense. . . . Hence, courts should allocate the burden of proof on the trade secret owner seeking to impose liability on a potential whistleblower."¹⁷⁷ This would allow dismissal of the claim early in the proceedings, reducing the employee's

167. Defend Trade Secrets Act § 2, 18 U.S.C. § 1836(b).

168. S. REP. NO. 114-220, at 5 (2016); H.R. REP. NO. 114-529, at 5-6 (2016).

169. 18 U.S.C. § 1832(a) (criminalizing misappropriation); *id.* § 1839(3) (defining "trade secret" under both the DTSA and Economic Espionage Act).

170. *Id.* § 1839(3).

171. *Id.* § 1839(5)-(6).

172. *Id.* § 1836(b)(3)(B).

173. *Id.* § 1836(b)(3)(C).

174. *Id.* § 1836(b)(3)(D).

175. *Id.* § 1836(b)(2)(A)(i).

176. *Id.* § 1833(b)(1)(A)-(B).

177. Peter S. Menell, *The Defend Trade Secrets Act Whistleblower Immunity Provision: A Legislative History*, 1 *BUS. ENTREPRENEURSHIP & TAXL. REV.* 398, 425 (2017).

litigation burden and, therefore, the ability of employers to intimidate whistleblowers with the threat of lawsuits.¹⁷⁸

The DTSA has several other features that recognize the importance and realities of workplace whistleblowing. First, it includes independent contractors and consultants in the definition of “employee.”¹⁷⁹ In an economy where independent contractors comprise a substantial and growing share of the workforce,¹⁸⁰ depriving them of immunity would irrationally obstruct a significant source of whistleblower information. Moreover, their experience with a range of employers may equip them to detect suspicious practices more readily than employees. Second, the DTSA expressly permits whistleblowers to disclose trade secrets in confidence to an attorney for the purpose of whistleblowing and the purpose of filing an anti-retaliation lawsuit.¹⁸¹ This increases the likelihood that whistleblowers will proceed through lawful channels and enjoy maximal protections. Third, employers are required to provide notice to employees of whistleblower immunity under the DTSA in any contract that governs the use of trade secrets or confidential information.¹⁸² As an alternative, the employer can simply cross-reference a company policy that sets forth the provision.¹⁸³ Failure to notify an employee in this manner may result in the denial of exemplary damages or attorney’s fees against the employee.¹⁸⁴

The DTSA did much to clarify the intersection of whistleblower and employer rights, but certain gaps remain. First, in the few cases adjudicated thus far, the DTSA’s immunity provision has not generally resulted in dismissal of trade secrets claims at the pleadings stage.¹⁸⁵ Rather than treating the provision

178. *See id.* at 417.

179. 18 U.S.C. § 1833(b)(4).

180. There is dispute over the precise number of independent contractors. The Department of Labor reported that independent contractors comprised 6.9% of the labor market in 2017. Press Release, Bureau of Lab. Stat., U.S. Dep’t of Lab., Contingent & Alternative Employment Arrangements—May 2017 (June 7, 2018), <https://www.bls.gov/news.release/pdf/conemp.pdf>. This figure is likely an underestimate, as the report’s methodology omitted workers who do contract work to supplement their primary employment, or who did not do contract work within the week the survey was conducted. *Frequently Asked Questions About Data on Contingent and Alternative Employment Arrangements*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/cps/contingent-and-alternative-arrangements-faqs.htm> (Aug. 7, 2018).

181. 18 U.S.C. § 1833(b)(1)(A)(i).

182. *Id.* § 1833(b)(3)(A).

183. *Id.* § 1833(b)(3)(B).

184. *Id.* § 1833(b)(3)(C).

185. *See, e.g.,* Unum Grp. v. Loftus, 220 F. Supp. 3d 143, 147 (D. Mass. 2016); 1-800 Remodel, Inc. v. Bodor, No. CV 18-472-DMG (EX), 2018 WL 6340759, at *6 (C.D. Cal. Oct. 17, 2018); Garcia v. Vertical Screen, Inc., No. CV 19-3184, 2020 WL 2615624, at *5 (E.D. Pa. May 22, 2020); Argos USA LLC v. Young, No. 1:18-CV-02797-ELR, 2019 WL 4125968, at *6 (N.D. Ga. June 28, 2019). Conversely, in *Christian v. Lannett Co.*, the court held that the employee’s disclosures fell within the DTSA’s immunity provision. *Christian v. Lannett Co.*, No. CV 16-963, 2018 WL 1532849, at *4–5 (E.D. Pa. Mar. 29, 2018). The employee in *Lannett* filed discrimination claims against the company, which counterclaimed trade secret misappropriation. *Id.* at *4. The court found that the only disclosures made after the DTSA’s enactment occurred pursuant to a discovery order in the discrimination case and that “despite numerous opportunities to conduct discovery on this issue,

as akin to sovereign immunity, as Professor Menell intended, courts have treated it as an affirmative defense.¹⁸⁶ As such, a motion to dismiss may only be granted if the complaint contains sufficient facts to establish the defense.¹⁸⁷ In a well-drafted complaint for misappropriation, the company's lawyers can avoid including sufficient facts to establish all of the elements of the whistleblower defense.¹⁸⁸ In particular, it may be difficult to establish that the whistleblower disclosed the trade secrets "in confidence" and "for the sole purpose of reporting or investigating a suspected violation of law."¹⁸⁹ In one case where an employee gave documents to his attorney, the court ruled that:

it is not ascertainable from the complaint whether [the employee] turned over *all* of [the company's] documents to his attorney, which documents he took and what information they contained, or whether he used, is using, or plans to use, those documents for any purpose other than investigating a potential violation of law.¹⁹⁰

In short, because courts have treated Section 1833 as an affirmative defense rather than an immunity, it has not protected whistleblowers from potentially costly and extended litigation.

Second, the DTSA leaves whistleblowers exposed to several sources of liability. The protections of Section 1833 cover the disclosure but not the improper *acquisition* of trade secrets.¹⁹¹ A whistleblower who emails company data to their personal email account to preserve it for a covered disclosure may thus be liable for misappropriation.¹⁹² Whistleblowers who take company files may also have liability under statutes such as the Computer Fraud and Abuse Act (CFAA),¹⁹³ which forbids accessing a computer and taking information without authorization, or in excess of authorization.¹⁹⁴ Because whistleblowers

Defendant has failed to provide any facts which would enable the Court to discern whether Plaintiff intentionally or accidentally disclosed the alleged trade secrets." *Id.* at *5.

186. See *supra* note 185; Peter S. Menell, *Misconstruing Whistleblower Immunity Under the Defend Trade Secrets Act*, 1 NEV. L.J.F. 92, 95 (2017) ("Rather than recognize that [the defendant] enjoyed immunity from liability, the court [in *Unum*] treated the whistleblower provision merely as an affirmative defense. . . . This is precisely the murky situation that Congress expressly corrected when it immunized employees and contractors.").

187. See *Rodi v. S. New Eng. Sch. of L.*, 389 F.3d 5, 12 (1st Cir. 2004); *Bethel v. Jendoco Constr. Corp.*, 570 F.2d 1168, 1174 n.10 (3d Cir. 1978); *EPCO Carbon Dioxide Prods., Inc. v. JP Morgan Chase Bank, N.A.*, 467 F.3d 466, 470 (5th Cir. 2006).

188. See *Unum*, 220 F. Supp. 3d at 147; *Garcia*, 2020 WL 2615624, at *5; *1-800 Remodel*, 2018 WL 6340759, at *6.

189. See 18 U.S.C. § 1833(b)(1)(A)–(B).

190. *Unum*, 220 F. Supp. 3d at 147.

191. See 18 U.S.C. § 1833(b)(1).

192. See *1-800 Remodel*, 2018 WL 6340759, at *5 (denying a motion to dismiss where the defendant "forwarded Plaintiff's confidential and proprietary information from her work email account to her personal email address. . . . These allegations also give rise to the plausible inference that Defendant committed theft to acquire this information, which constitutes 'improper means' for the purposes of the DTSA"); *Henry Schein, Inc. v. Cook*, 191 F. Supp. 3d 1072, 1077 (N.D. Cal. 2016) (holding that the plaintiff stated a valid claim under the DTSA when an employee forwarded trade secrets to her personal email account and devices).

193. 18 U.S.C. § 1030.

194. *Id.* § 1030(a)(1).

often retrieve electronic files to substantiate their report of suspected lawbreaking, CFAA claims often appear alongside misappropriation claims.¹⁹⁵ Moreover, virtually every state also has a version of the CFAA that provides companies with a cause of action.¹⁹⁶ Professor Menell rightly contends that because the DTSA whistleblower immunity covers the *use* of the files, damages for wrongful acquisition alone would likely be quite limited.¹⁹⁷ Nevertheless, the prospect of litigation and liability under these laws may deter potential whistleblowers who believe their disclosure will be fruitless without supporting documentation. It could also blindsides whistleblowers who were reassured by the DTSA notice of immunity in their contract or company policy but did not think to distinguish between acquisition and disclosure. Finally, the DTSA does not expressly preclude liability for breach of contract.¹⁹⁸ The next Subpart explores the contractual principles governing the enforceability of NDAs in the whistleblower context.

C. CONTRACTS FOR NONDISCLOSURE

Employee nondisclosure agreements (NDAs) are prevalent in the modern workplace, particularly in the technology sector.¹⁹⁹ Employers may introduce standalone confidentiality agreements or include nondisclosure provisions in employment contracts or binding employee policies or handbooks.²⁰⁰ This Subpart examines the utility, content, and enforceability of NDAs extracted as a condition of employment.²⁰¹

NDAs serve several functions for employers.²⁰² First, by specifying the precise type of information that the company considers confidential, NDAs put employees on notice of their obligations and increase the likelihood of compliance.²⁰³ Second, NDAs demonstrate that the listed information is “the subject of efforts . . . to maintain its secrecy” and thus meets the definition of a

195. See, e.g., *Argos USA LLC v. Young*, No. 1:18-CV-02797-ELR, 2019 WL 4125968, at *10–11 (N.D. Ga. June 28, 2019); *Christian v. Lannett Co.*, No. CV 16-963, 2018 WL 1532849, at *6 (E.D. Pa. Mar. 29, 2018); *1-800 Remodel*, 2018 WL 6340759, at *6–7.

196. See, e.g., Comprehensive Computer Data Access and Fraud Act, CAL. PENAL CODE § 502 (West 2021); Personal and Commercial Computer Act, TENN. CODE ANN. § 39-14-601–606 (2021).

197. Menell, *supra* note 177, at 426 (“If DTSA immunity applies, then the harm in such other causes of action is limited to the cost of the paper, ink, or laptop computer that was allegedly stolen or damaged, and cannot extend to the value associated with information contained on such media or device. Otherwise, the very chilling effects that Congress sought to prevent through the DTSA whistleblower immunity provision would be circumvented through these other causes of action.”).

198. See 18 U.S.C. § 1833(b)(1).

199. Jeff John Roberts, *Why You Should Be Worried About Tech’s Love Affair with NDAs*, FORTUNE (Apr. 29, 2019, 3:30 AM), <https://fortune.com/2019/04/29/silicon-valley-nda/> (reporting that every low-level employee and contractor at tech giants Google, Apple, and Amazon must sign nondisclosure agreements).

200. Richard Moberly, *Confidentiality and Whistleblowing*, 96 N.C. L. REV. 751, 761 (2018).

201. Employers often require NDAs as a condition of severance pay or as part of the settlement of claims.

202. See Terry Morehead Dworkin & Elletta Sangrey Callahan, *Buying Silence*, 36 AM. BUS. L.J. 151, 157 (1998).

203. *Id.*

statutorily protected trade secret.²⁰⁴ Third, companies with NDAs on file have the option of bringing a contractual claim in addition to, or in lieu of, any other causes of action that may be available against an employee who discloses covered information.²⁰⁵ If another cause of action—such as trade secret misappropriation—falters, the employer may retain a viable contractual claim.

Fourth, employers often use NDAs to conceal information that does not constitute a trade secret.²⁰⁶ The hallmark of a trade secret is that it offers some sort of business or competitive advantage that disclosure would undercut. NDAs may cover more generic categories of “confidential” or “proprietary” information.²⁰⁷ Some authorities claim that these terms are coextensive with trade secrets,²⁰⁸ but many recognize confidential and proprietary information as encompassing a broader category of protectable information, such as financial forecasts and performance data.²⁰⁹ NDAs may introduce their own definitions of confidential or proprietary information, with broad formulations such as “information . . . that would . . . otherwise appear to a reasonable person to be confidential or proprietary in the context and circumstances in which the information is known or used.”²¹⁰ They may even take on the flavor of non-disparagement agreements, covering information that is merely embarrassing, such as incidents that reveal incompetence or bad character.²¹¹ The NDA used by Donald Trump’s 2016 presidential campaign exhibits the remarkable breadth

204. Menell, *supra* note 136, at 16 (quoting UNIF. TRADE SECRETS ACT § 1(4) (UNIF. L. COMM’N 1985)).

205. *See, e.g.,* Garcia v. Vertical Screen, Inc., No. 19-3184, 2020 WL 2615624, at *1 (E.D. Pa. May 22, 2020).

206. Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789, 810 (2015) (“Contractually, it has become standard to include broad and open-ended lists of confidential information that goes beyond the statutory definition of trade secrets.”); Norman D. Bishara, Kenneth J. Martin & Randall S. Thomas, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 43 (2015) (“[T]he majority of firms will seek the broadest possible restrictions.”).

207. The Restatement of Employment Law states that employers have a legitimate interest in protecting “other protectable confidential information that does not meet the definition of trade secret.” RESTATEMENT OF EMP. L. § 8.07(b)(1) (AM. L. INST. 2015). The comments, in explaining confidential information, are unhelpful in that they effectively restate the definition of a trade secret and cite no illuminating examples. *See id.*

208. *See, e.g.,* United Rug Auctioneers, Inc. v. Arsalen, No. CA03-0347, 2003 WL 21527545, at *6 (Mass. Super. Ct. Apr. 11, 2003) (“Trade secrets and confidential information are essentially identical concepts.”).

209. *See, e.g.,* Erhart v. Boffl Holding, Inc., No. 15-CV-02287-BAS-NLS, 2017 WL 588390, at *9 (S.D. Cal. Feb. 14, 2017) (recognizing that the company “has an interest in protecting other confidential business information that may not qualify for trade secret protection”); Orthofix, Inc. v. Hunter, 630 Fed. App’x 566, 571–74 (6th Cir. 2015) (holding that, under Texas law, protectable confidential information does not need to have trade secrets status “so long as it does not encompass publicly available information or an employee’s general knowledge or skills”); FLA. STAT. § 542.335(1)(b)(2) (2021) (deeming “[v]aluable confidential business or professional information that otherwise does not qualify as trade secrets” protectable); Revere Transducers, Inc. v. Deere & Co., 595 N.W.2d 751, 765 (Iowa 1999); *What Is Proprietary Information?*, LAW DICTIONARY, <https://thelawdictionary.org/proprietary-information/> (last visited July 31, 2021) (stating that proprietary information “can relate to budget information and research results”).

210. This language is provided in the Westlaw Practical Law sample employee confidentiality agreement. *Employee Confidentiality and Proprietary Rights Agreement*, THOMSON REUTERS (2020).

211. Moberly, *supra* note 200, at 766–67 (finding that 64.1% of settlement agreements in Sarbanes-Oxley whistleblower retaliation cases contained a non-disparagement provision).

of some agreements, defining “Confidential Information” to include “any information that Mr. Trump insists remain private or confidential,” including information about the personal life, political affairs, and business affairs of members of the Trump family.²¹² Such constructions provide minimal guidance to employees and maximum recourse to employers.

Finally, NDAs serve to chill even protected employee disclosures. Because employee NDAs often protect their own contents from disclosure, our knowledge of their contents is largely anecdotal, based on accounts of employment lawyers and the small percentage of NDAs that become public through legal proceedings.²¹³ This sampling nevertheless reveals a tendency towards severe terms, including terms designed to intimidate whistleblowers out of exercising their legal rights. For example, NDAs may require employees to inform the employer any time they reveal information to the government.²¹⁴ This tactic was employed by the engineering firm KBR, Inc., which required internal investigation witnesses to sign an NDA that threatened discipline or termination if they revealed matters to outside parties without the prior approval of the KBR’s legal department.²¹⁵ Other draconian features include mandatory arbitration, hefty liquidated damages, and/or employee indemnification of the company’s enforcement costs.²¹⁶ Some lawyers have sought to undermine whistleblower bounty programs by drafting NDAs that waive the employee’s right to government awards or even assign those awards to the company.²¹⁷ The inclusion of these provisions may chill whistleblowing even if they are likely to ultimately prove unenforceable.²¹⁸ The next section explores the contours of NDA enforceability.

1. *Enforceability of NDAs Against Whistleblowers*

Courts presumptively enforce private commercial contracts in order to provide predictability in the market economy and lower the transaction costs of

212. *READ: 2016 Trump Campaign Nondisclosure Agreement*, CNN (Aug. 14, 2018, 4:37 PM), <https://www.cnn.com/2018/08/14/politics/trump-campaign-nda-omarosa/index.html>.

213. Moberly, *supra* note 200, at 763–64.

214. Richard Moberly, Jordan A. Thomas & Jason Zuckerman, *De Facto Gag Clauses: The Legality of Employment Agreements That Undermine Dodd-Frank’s Whistleblower Provisions*, 30 ABA J. LAB. & EMP. L. 87, 88 (2014).

215. KBR Inc., Exchange Act Release No. 74619, at 2 (Apr. 1, 2015), <https://www.sec.gov/litigation/admin/2015/34-74619.pdf>. This resulted in a fine of \$130,000. *Id.* at 4.

216. *See READ: 2016 Trump Campaign Nondisclosure Agreement*, *supra* note 212.

217. Moberly, *supra* note 200, at 766–67 (finding that 43.8% of settlement agreements in Sarbanes-Oxley whistleblower retaliation cases contained a waiver of future reward or recovery).

218. This is believed to be true of unenforceable contract provisions in general. *See* Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 682–83 (1960) (postulating that in the context of invalid noncompete agreements, “[f]or every covenant that finds its way to court, there are thousands which exercise an in terrorem effect on employees who respect their contractual obligations[.]”). Recognizing this reality, the Dodd-Frank Act prohibits any contractual waiver of rights or remedies provided for in its whistleblower protection provisions, including the right to independent counsel. 15 U.S.C. § 78u-6(d)(1), (h)(3); *see also* 17 C.F.R. § 240.21F-17 (2020).

business.²¹⁹ In rare instances, however, public policy may override the terms of an otherwise valid agreement.²²⁰ Such public policy exceptions may be codified by statute²²¹ or, more controversially, pronounced by courts.²²² Because no statute (save Rule 21F-17) expressly bans the contractual silencing of whistleblowers, this Subpart explores how courts have approached questions of whether and when to enforce NDAs against them.

The Restatement (Second) of Contracts states that contracts are enforceable unless the interests of the party seeking enforcement are “clearly outweighed” by the public policy imperative.²²³ In this balancing test, three factors weigh in favor of enforcement: (1) the justifiable expectation of one or more parties that the contract was enforceable;²²⁴ (2) whether the party seeking enforcement would suffer a forfeiture, or the party seeking avoidance would be unjustly enriched;²²⁵ and (3) whether there is any special public interest in favor of enforcement.²²⁶ These factors must be weighed against: (4) the strength of the public policy, particularly whether it is rooted in important legislation or regulations;²²⁷ (5) the nexus between the contract and the public policy (that is, the extent to which the court would further or undermine the policy by its treatment of the contract);²²⁸ and (6) whether the contract involves

219. See Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *YALE L.J.* 541, 565 (2003) ([T]he state reduces social costs by giving parties that function in volatile markets the opportunity to make enforceable contracts for future delivery.”).

220. See *Balt. & Ohio Sw. Ry. Co. v. Voigt*, 176 U.S. 498, 505 (1900) (“[T]he right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear [sic] that they contravene public right or the public welfare.”).

221. *Holden v. Hardy*, 169 U.S. 366, 391 (1898) (“This right of contract, however, is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers.”). Many states, for example, have forbidden health management organizations from contractually restricting the freedom of physicians to discuss treatments. Robert Pear, *Laws Won't Let H.M.O.'s Tell Doctors What to Say*, *N.Y. TIMES* (Sept. 17, 1996), <https://www.nytimes.com/1996/09/17/us/laws-won-t-let-hmo-s-tell-doctors-what-to-say.html>. In 2016, Congress banned companies from using form contracts to prohibit or penalize customers who post negative reviews. 15 U.S.C. § 45b(b)(1).

222. See, e.g., Walter Gellhorn, *Contracts and Public Policy*, 35 *COLUM. L. REV.* 679, 682 (1935) (“[T]he courts have persisted in speculating (and in reaching divergent conclusions) as to whether the legislature ‘intended’ contracts to be treated as void when they ran afoul of laws which penalized some act of the contractors but which said nothing concerning enforcement of the bargains.”); M.P. Furmston, *The Analysis of Illegal Contracts*, 16 *U. TORONTO L.J.* 267, 308 (1965) (“It is well known that it is usually easier to decide a case than to give reasons for the decision. Nowhere is this more evident than in the field of public policy where the courts are, *ex hypothesi*, dealing with matters outside their usual experience. The result has been an unusually large proportion of decisions unquestionable in the result, but based on reasoning not convincingly or completely adumbrated.”).

223. RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (AM. L. INST. 1981).

224. *Id.* § 178(2)(a).

225. *Id.* § 178(2)(b).

226. *Id.* § 178(2)(c).

227. *Id.* § 178(3)(a). The Restatement cautions against assigning undue weight to minor or attenuated legislation or regulations. *Id.* § 178 cmt. c.

228. *Id.* § 178(3)(b), (d).

“misconduct,” such as a promise or inducement to commit a tort or violate a fiduciary duty.²²⁹

In practice, few courts explicitly utilize this balancing test, and observers have long lamented the absence of a uniform judicial approach.²³⁰ One consistent theme, however, is the importance of a legislative or regulatory hook for the policy. The Supreme Court has cautioned that overriding a contract requires “explicit public policy” that is “well defined and dominant [and ascertainable] ‘by reference to the laws and legal precedents and not from general considerations of supposed public interests.’”²³¹ A recent empirical study of contract cases found that public policy arguments rooted in a statute or regulation had nearly twice the success rate of those appealing to general public policy concerns.²³²

The enforcement of employee NDAs against whistleblowers pits the commercial interest in confidentiality against the public interest in stopping corporate misconduct. Whether courts enforce covenants for silence against whistleblowers depends on a range of circumstances, including the policy implicated, the manner of whistleblowing, and the extent of the disclosure. As described below, courts are more receptive to public policy arguments where the disclosure occurs in a legally prescribed and confidential manner and consists only of information relevant to the misconduct. Cases can be broadly grouped according to the specific public policy asserted:

- *Reporting Unlawful Activity.*
Public policy strongly favors reporting criminal activity to law enforcement.²³³ In a recent case, a federal court construed this public policy more broadly than the protections of the state whistleblower

229. *Id.* § 178(3)(c); *see also id.* § 178 cmt. d, illus. 6–16. The comments give the example of a contract that induces a party to vote in a particular way, and notes that although voting is not objectionable behavior, the inducement thereof is offensive to democratic norms and expectations. *Id.*

230. *See, e.g.,* Richardson v. Mellish (1824) 130 Eng. Rep. 294, 303; 2 Bing. 229, 252 (Burrough, J.) (Eng.) (likening the public policy doctrine to a “very unruly horse,” in that “when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail”); *see also* David Adam Friedman, *Bringing Order to Contracts Against Public Policy*, 39 FLA. ST. U. L. REV. 563, 613–14 (2012) (examining a six-month range of cases and finding few uses of the Restatement’s balancing test). State jurisprudence can vary considerably in its receptiveness to public policy arguments. One study found that New York decisions show a broad indisposition towards them, while California courts exhibit greater readiness to upset contracts that undermine good morals or “that sense of security for individual rights, whether of personal liberty or private property, which any citizen ought to feel.” Geoffrey P. Miller, *Bargaining on the Red-Eye: New Light on Contract Theory* 25–27 (N.Y.U. SCH. OF L., CTR. FOR L. & ECON., Working Paper No. 08-21, 2008), <https://ssrn.com/abstract=1129805>.

231. *W.R. Grace & Co. v. Loc. Union 759*, 461 U.S. 757, 766 (1983) (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

232. Friedman, *supra* note 230, at 566.

233. *See Branzburg v. Hayes*, 408 U.S. 665, 696–97 (1972) (“[I]t is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy.”); *Fomby-Denson v. Dep’t of Army*, 247 F.3d 1366, 1377–78 (Fed. Cir. 2001); *Bowman v. Parma Bd. of Educ.*, 542 N.E.2d 663, 666–67 (Ohio Ct. App. 1988) (holding that contracts cannot require the suppression of criminal conduct).

statute.²³⁴ An internal auditor identified securities law violations and emailed incriminating documents to his mother to prevent their destruction.²³⁵ The court declined to enforce the auditor's NDA in subsequent litigation, citing the fact that the auditor had carefully selected incriminating documents and released them only to prevent their destruction.²³⁶

- *Asserting Fraud Against the Government.*

Courts generally decline to enforce NDAs against plaintiffs in *qui tam* suits under the False Claims Act.²³⁷ A 2011 case suggests, however, that this safe harbor may depend on the breadth of the whistleblower's disclosure. In *Cafasso v. General Dynamics*,²³⁸ the Ninth Circuit affirmed summary judgment for the company and reserved judgment on a public policy exception to NDAs in *qui tam* suits, finding that "[e]ven were we to adopt such an exception, it would not cover Cafasso's conduct given her vast and indiscriminate appropriation" of company files.²³⁹ The court fretted that an exception broad enough to protect Cafasso, who copied nearly eleven gigabytes of data, "would make all confidentiality agreements unenforceable as long as the employee later files a *qui tam* action."²⁴⁰ If the court were to adopt such a public policy exception, it warned that *qui tam* plaintiffs would need to justify with a "particularized showing" that the NDA violation was reasonably necessary to pursue the fraud claim.²⁴¹

- *Participating in Government Investigations.*

Courts have overridden NDAs in favor of allowing participation in government investigations. In one case, the First Circuit applied a balancing test to determine that, despite the public policy strongly favoring voluntary settlement of employment discrimination claims, settlement agreements prohibiting communication and cooperation with the Equal Employment Opportunity Commission are void as against public policy.²⁴²

- *Providing Information in Litigation.*

234. *Erhart v. Bofl Holding, Inc.*, No. 15-CV-02287-BAS-NLS, 2017 WL 588390, at *13–15 (S.D. Cal. Feb. 14, 2017).

235. *Id.*

236. *Id.*

237. *See, e.g., United States ex rel. Head v. Kane Co.*, 668 F. Supp. 2d 146, 152 (D.C. Cir. 2009). The court held that a private agreement was unenforceable insofar as it required the *qui tam* plaintiff to return documents that would likely be needed as evidence at trial. *Id.* Because Congress enacted the *qui tam* provision to encourage disclosures of fraud against the government, and the FCA requires plaintiffs to submit all relevant evidence that they possess, enforcing such an agreement would "unduly frustrate the purpose" of the law. *Id.*

238. *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047 (9th Cir. 2011).

239. *Id.* at 1062.

240. *Id.*

241. *Id.*

242. *E.E.O.C. v. Astra U.S.A., Inc.*, 94 F.3d 738, 744 (1st Cir. 1996). Title VII expressly protects employees from retaliation for participating in investigations. 42 U.S.C. 2000e-3(a).

Courts generally hold that NDAs cannot enjoin witness testimony in official proceedings.²⁴³ The more complicated questions concern whether NDAs enjoin employees from conferring with litigants and providing information to develop their claims. To resolve these questions, courts balance the interests of the litigants as well as any broader public interest.²⁴⁴ Some courts have agreed to enjoin NDA enforcement for interviews conducted under controlled conditions, such as court preapproval of the questions, notice to the company and an opportunity to attend the interview, and a prohibition on interviewees disclosing privileged information or trade secrets.²⁴⁵ Conversely, they have generally enforced NDAs against employees who initiate contact with plaintiffs and provide information without court oversight.²⁴⁶

- *Protecting Public Health, Safety, and Welfare.*

Some scholars contend that NDAs should not be enforced against employees who disclose risks to public health, safety, or the environment, regardless of whether there is a legal violation.²⁴⁷ Courts have considered but not generally validated this view,²⁴⁸ though they have occasionally shown sympathy for employers that violate the nondisclosure provisions of severance agreements to

243. See, e.g., *E.E.O.C. v. Severn Trent Servs. Inc.*, 358 F.3d 438, 441 (7th Cir. 2004) (“The Commission could have sought and obtained judicial enforcement of the subpoena, since obviously Murphy could not by signing a contract excuse or disable himself from testifying.”); *Zanders v. Nat’l R.R. Passenger Corp.*, 898 F.2d 1127, 1133 (6th Cir. 1990) (opining in dicta that “[i]f we were compelled to address Zanders’ public policy argument, we would nevertheless find it without merit . . . [W]e note that the severance contract at issue here expressly provides that the agreement would not bar her participation in proceedings when ‘required by law’”). There are, however, countervailing cases, most notably that of former tobacco executive Jeffrey Wigand, who reported to regulators and on national television that Brown & Williamson knew nicotine was addictive and included chemical additives to increase its effects. Brown & Williamson successfully obtained an injunction preventing him from testifying in lawsuits against the company. Rebecca Leung, *Battling Big Tobacco: Mike Wallace Talks to the Highest-Ranking Tobacco Whistleblower*, CBS NEWS (Jan. 13, 2005), <https://www.cbsnews.com/news/battling-big-tobacco/>; Jodi L. Short, *Killing the Messenger: The Use of Nondisclosure Agreements to Silence Whistleblowers*, 60 U. PITT. L. REV. 1207, 1209–11 (1999).

244. See, e.g., *Astra U.S.A.*, 94 F.3d at 744.

245. See, e.g., *In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d 1127, 1137–39 (N.D. Cal. 2002) (holding that questions must be submitted and approved by the court, and enjoining employees from disclosing privileged information or confidential business methods in securities litigation); *Chambers v. Cap. Cities/ABC*, 159 F.R.D 441, 445–46 (S.D.N.Y. 1995) (holding that the defendant must have notice and an opportunity to attend interviews in age discrimination litigation).

246. See, e.g., *Saini v. Int’l Game Tech.*, 434 F. Supp. 2d 913, 921–23 (D. Nev. 2006) (holding that the interest in enforcing the agreement overrode the public interest in uncovering defective products that did not threaten public safety or wellbeing, and also that the former employee did not deserve classification as a whistleblower because he acted from private rather than public motives in products liability litigation); *Uniroyal Goodrich Tire Co. v. Hudson*, 97 F.3d 1452, 1996 WL 520789, at *10 (6th Cir. 1996) (per curiam) (affirming an injunction against a former employee who went to work for the plaintiff as an expert witness and consultant in products liability litigation).

247. See, e.g., Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627, 681–82 (1999) (arguing that public health and safety should be considered perhaps the most important public policy); Short, *supra* note 243, at 1212.

248. See *Saini*, 434 F. Supp. 2d at 921.

warn that a former employee poses a risk to the public.²⁴⁹ Courts are particularly unsympathetic to employees that report health and safety concerns to the media.²⁵⁰ In one case, an employee allowed press to enter the company premises after internal reports of contamination went unheeded.²⁵¹ The court found that this action was “not protected by any public policy.”²⁵²

In balancing these public policy concerns against the employer’s interest in confidentiality, courts have typically shown deference to the employer’s trade secrets.²⁵³ This is reasonable in that many types of corporate wrongdoing, such as employment discrimination, can be reported and adjudicated without the disclosure of corporate trade secrets. In other cases, however, the facts evidencing wrongdoing may not be cleanly divisible from legitimate trade secrets. In the Theranos example, explaining the rigging of proficiency tests might require the disclosure of protected details of the device mechanism itself. In such cases, the DTSA’s immunity provision, while not expressly protecting whistleblowers from contractual liability, strengthens and lends an important statutory hook to a public policy defense. Moreover, the law may help to ensure that any liability under an NDA results in minimal damages.

Even if an NDA ultimately proves unenforceable, it still serves the employer’s interests in chilling disclosures. In many enforcement suits, the employer’s goal is probably not to obtain damages – most workers are effectively judgement-proof – but to intimidate the target and other potential whistleblowers. Wealthy whistleblowers are better positioned to withstand the threats and costs of lawsuits. This is evident in the Theranos case, where Alan Beam (middle class and with a family to support) agreed to settle and Tyler Shultz (from a wealthy family and without any dependents) did not.

An employee who contemplates whistleblowing ventures into a complex and ambiguous legal landscape. Whistleblower protection statutes vary substantially in their protectiveness based on the jurisdiction and subject matter. Trade secret laws offer somewhat more uniformity, and the DTSA in particular has taken important steps to harmonize how courts treat whistleblowers who disclose trade secrets. Contractual principles, which govern the enforceability of NDAs, may provide an additional cause of action to employers. They also

249. *Giannecchini v. Hosp. of St. Raphael*, 780 A.2d 1006, 1012–14 (Conn. Super. Ct. 2000) (considering the health and safety argument, but ultimately holding hospital liable for breaching the NDA that protected a nurse’s personnel records); *Bowman v. Parma Bd. of Educ.*, 44 Ohio App.3d 169, 176–78 (Ohio Ct. App. 1988) (refusing to enforce a confidentiality agreement protecting a teacher’s record of child molestation).

250. *See, e.g., Erhart v. Bofl Holding, Inc.*, No. 15-CV-02287-BAS-NLS, 2017 WL 588390, at *15 (S.D. Cal. Feb. 14, 2017); *Gosa v. Nu-World Amaranth, Inc.*, No. 10-CV-2074-LRR, 2012 WL 463023, at *4 (N.D. Iowa Feb. 11, 2012).

251. *Gosa*, 2012 WL 463023, at *2.

252. *Id.* at *5.

253. *See, e.g., In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d 1127, 1134–37, 1139 (N.D. Cal. 2002) (excluding confidential business methods from the scope of information that may be disclosed by employees during pre-deposition interviews); *McGrane v. Reader’s Digest Ass’n*, 822 F. Supp. 1044, 1052 (S.D.N.Y. 1993) (“Disclosures of wrongdoing do not constitute revelations of trade secrets . . .”).

introduce an additional measure of uncertainty for whistleblowers regarding whether public policy in favor of protecting whistleblowers will preclude enforcement of an NDA. As discussed further in Part V, whistleblowers may find themselves in legal limbo at the intersection of these laws.

V. LESSONS FROM THERANOS

The Theranos story illustrates the plight of whistleblowers lost in an unethical corporate culture and a discordant legal landscape. The result, as the experience of Erika Cheung reveals, is needless legal exposure for whistleblowers and delayed accountability for employers. This Part begins by tracing Cheung's long and risky path to legal protection. It then critically assesses the whistleblower legal regimes, identifying flaws that contributed to Cheung's legal jeopardy and the perpetuation of Theranos's misconduct. Finally, it offers suggestions on reforming the law to secure reliable and accessible protection for workplace whistleblowers.

A. THE ROAD TO PROTECTION AT THERANOS

Erika Cheung reported wrongdoing in three stages: internally to higher-ups; to a *Wall Street Journal* reporter; and finally, to the federal regulator. Her trajectory, which put her in significant professional and legal jeopardy, illuminates certain legal and practical obstacles to reporting corporate misconduct.

Internal Reports. Cheung, along with her colleague Tyler Shultz, began by expressing concerns to company leaders. California's anti-retaliation statute would only have protected these reports if she reasonably believed she was reporting unlawful behavior. While Cheung plainly considered the proficiency testing practices to be unethical and dangerous, it is not clear whether she believed them unlawful or, indeed, whether she contemplated their legality at all. It is therefore uncertain whether she would have been protected by California law. Cheung certainly would not have enjoyed protection under federal law. The FCA's whistleblower provision would only have applied if she had expressly connected her concerns to Medicare or Medicaid reimbursement. There is no indication that she did so.

Media Reports. After resigning from Theranos, Cheung spoke to a reporter on the condition of anonymity. These disclosures nevertheless proved traceable to her, exposing her to liability under her NDA and perhaps also under California's trade secrets statute. The latter's application depends on whether she revealed trade secrets. A generic claim of corporate lawbreaking would not constitute a trade secret, but her substantiating details about the blood testing technology and protocols could conceivably fall within the trade secret ambit. California's trade secrets law, which is essentially coterminous with the UTSA, contains no express exception for whistleblowing. Even the DTSA (which had not yet been enacted) does not protect reports to the media. Likewise, courts will

not shield employees who blow the whistle to the media from contractual liability. In short, Cheung enjoyed no protection at this stage.

CMS Report. After receiving pro bono legal advice, Cheung reported Theranos to CMS. By then, she had concluded that Theranos's practices violated proficiency testing regulations. She also directed her report to the appropriate regulating agency. These factors would weigh strongly against enforcing her NDA, provided that the scope of her disclosures was commensurate with the legal violations. If her disclosures were found to contain trade secrets, however, Cheung could still have faced potential liability under California's trade secrets statute. Today, the report to CMS would entitle Cheung to the DTSA's protections against liability under federal or state trade secrets laws. After years of Theranos endangering the public with faulty blood tests, Cheung found a somewhat secure path to holding her old company accountable.

Cheung's inability to swiftly and securely report Theranos's behavior illuminates several flaws in the whistleblower legal framework. The following section traces the obstacles she encountered to fundamental weaknesses in the America's patchwork of legal protections.

B. FLAWS IN THE PATCHWORK

The purpose of whistleblower protection is to promote legal compliance by encouraging reports of corporate misconduct to internal supervisors and regulators.²⁵⁴ In the case of Theranos, it failed spectacularly. In the absence of clear, navigable, and reliable legal protections, the whistleblowers resorted to ad hoc measures, which ultimately delayed actionable reports and put the whistleblowers in significant jeopardy. This Subpart explores the purpose of whistleblower protection and identifies weaknesses in the existing framework that impede this purpose.

1. Whistleblower Protection in Theory

Behavioral economics informs us that individuals blow the whistle when they believe the benefits will exceed the costs.²⁵⁵ The salient benefits and costs may be intrinsic (i.e., feelings of gratification or guilt) or extrinsic (i.e., social and material rewards or sanctions).²⁵⁶ The law can shape extrinsic incentives through several mechanisms, including whistleblower protection.²⁵⁷ By

254. Robert G. Vaughn, *State Whistleblower Statutes and the Future of Whistleblower Protection*, 51 ADMIN. L. REV. 581, 586 (1999) (asserting that whistleblower protection "vindicates important interests supporting the enforcement of criminal and civil laws"); *Id.* at 599 (explaining that protection of internal disclosures "allows employers to address and resolve problems").

255. *Id.* at 1183.

256. *Id.*

257. Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1161-71 (2010). Other

insulating workers from extrinsic costs imposed by employers, whistleblower protection alters the balance of incentives. Protection is a particularly salient factor for employees whose motivations are “intrinsic and moralistic” rather than guided by self-interest.²⁵⁸ In addition to shaping extrinsic incentives, laws may affect intrinsic motivations by coding certain behaviors as moral or immoral.²⁵⁹ Through this “expressive power,” whistleblower protection may reinforce the wrongness of corporate misconduct and the rectitude of whistleblowing.²⁶⁰

In order to effectively shape motivations and behavior, whistleblower protections must be known, navigable, and perceived as reliable by the workers they target. Yet the protection cannot be so broad as to facilitate false or frivolous accusations, which damage corporate reputations and overburden regulators.²⁶¹ The goal, then, is to encourage reports of misconduct to internal or external authorities while protecting legitimate business interests in confidentiality. The Theranos case study illustrates several problems in the framework that impede this policy goal. These are discussed below.

2. Weaknesses in the Legal Landscape

Part III explored some of the weaknesses in each of the three legal frameworks. Together, they form a landscape with two broad deficiencies: inaccessibility and uncertainty. These weaknesses increase the costs of reporting misconduct and therefore tilt the balance of incentives against whistleblowing. In the event that whistleblowers do proceed with their reports, the obstacles and liabilities they encounter may ultimately deter others.

a. Inaccessibility.

Whistleblower protections can encourage reporting only if they are known and navigable by employees. As the Theranos case study demonstrates, workers are often unaware of their whistleblowing rights or how to vindicate them. This is unsurprising, as the law entails little notice and much complexity.

mechanisms include affirmative reporting duties, penalties for non-reporting, and monetary awards for reporting. Feldman and Yuval distill this spectrum to the shorthand of “protect, command, fine, pay.” *Id.* at 1157.

258. *Id.* at 1176. In a series of experiments, Feldman and Lobel found that where the intrinsic motivation is high and protection is assured, other extrinsic incentives do not increase reporting levels. *Id.* at 1192–95. They also found that women are much more motivated by the presence or absence of legal protection than men, who are more motivated by rewards. *Id.* at 1196–97. Interestingly, they found that the insertion of extrinsic incentives such as penalties or awards “may undermine the likelihood that misconduct will be reported by producing a crowding-out effect in which the presence of external rewards dilutes the moral dimension of the act.” *Id.* at 1174–75 (citing On Amir & Orly Lobel, *Stumble, Predict, Nudge: How Behavioral Economics Informs Law & Policy*, 108 COLUM. L. REV. 2098, 2109 (2008)). Indeed, awards may even carry a stigma. *Id.* at 1205.

259. *Id.* at 1183–84.

260. *Id.*

261. See Christina Orsini Broderick, *Qui Tam Provisions & The Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 975 (2007) (inferring from the 73% dismissal rate of *qui tam* actions that a significant portion are frivolous).

First, workers do not receive effective notice of their rights. Although California's anti-retaliation statute requires employers to post a notice of whistleblower rights, Cheung and Shultz were unaware of them. It appears that Theranos either did not comply with the notice requirement, posted the notice in a location where it escaped attention, or that this is simply not an effective way to raise awareness. In the trade secrets domain, the DTSA requires companies to include a whistleblower notice in any contract that addresses the confidentiality of trade secrets. Failure to do so precludes certain damages and attorneys' fees. While this is a welcome measure, gaps remain: the DTSA does not require employers to make the notice conspicuous or in plain English, or provide workers with a copy for future reference. Moreover, the notice only needs to cover trade secrets and not the myriad other information protected by NDAs. With respect to this other proprietary information, employees receive no notice of any potential exceptions to the NDA.

Second, many whistleblower protections require workers to exercise a degree of legal awareness and judgment that may not be realistic. Many anti-retaliation statutes only protect employees who "reasonably believe" their report reveals a legal violation. Even the statutes with less demanding standards, such as "suspect" or "believe in good faith," effectively require that employees contemplate the legality of the employer's conduct, when in reality they may be concerned about violations of internal policies, professional standards, industry best practice, or simple common sense. It is not clear, for example, that Cheung and Shultz believed Theranos was violating the law when they first raised concerns internally. Ultimately, they demonstrated an unusual level of tenacity and initiative, researching proficiency testing rules.²⁶² This is not a realistic expectation of the average worker.

Third, the legal landscape for whistleblowers, with its many piecemeal, inconsistent, and overlapping provisions, is simply too complex for most non-attorneys to navigate successfully on their own. To secure protection, a whistleblower must incur the transaction costs of identifying each liability risk, determining whether it has whistleblower protections, and satisfying all applicable standards and reporting protocols. When legal frameworks become too complex, the cost of deciphering the complexity may exceed the benefits of compliance.²⁶³ At that point, an actor can either abandon the regulated activity or abandon the legal safe harbor.²⁶⁴ A prospective whistleblower who is confounded by the legal patchwork will likely refrain from whistleblowing or blow the whistle in an unprotected manner.

One remedy for inaccessible laws is to consult counsel. This presents a chicken-or-egg dilemma, though, since workers are unlikely to proactively seek an attorney's assistance unless they are already aware of the existence of whistleblower protections. In the Theranos case, Cheung sought an attorney only

262. CARREYROU, *supra* note 3, at 194.

263. Adam I. Muchmore, *Uncertainty, Complexity, and Regulatory Design*, 53 HOUSTON L. REV. 1321, 1335-37 (2016).

264. *Id.* at 1337.

after exposing herself to legal liability by speaking to a reporter.²⁶⁵ Moreover, consulting counsel does not ensure sound legal advice on whistleblower laws. Cheung was unique among the Theranos whistleblowers to find an attorney who advised her at no cost and understood the relevant laws. Tyler Shultz initially sought advice from his grandfather's estate attorney, who later referred him to a boutique firm specializing in business disputes. He ultimately accumulated over \$400,000 in legal bills, but remained "completely unaware" of whistleblower protections.²⁶⁶ The pseudonymous lab director "Alan Beam" unsuccessfully tried to contact a boutique whistleblower firm before, in desperation, paying a retainer to the first attorney who appeared in his internet search.²⁶⁷ That lawyer's expertise was in medical malpractice and personal injury law.²⁶⁸ Rather than advise Beam on avenues for whistleblowing, she recommended that he acquiesce to Boies Schiller demands by deleting evidence of Theranos wrongdoing from his computer.²⁶⁹ Finally, if consulting counsel is effectively required to secure whistleblower protections, this strongly disadvantages the many Americans who cannot afford an attorney.²⁷⁰

b. Uncertainty.

Even if a whistleblower ascertains their rights in advance, their path forward is laden with uncertainties. The importance of legal certainty depends on the purpose and context of the law.²⁷¹ When a law is designed to disincentivize undesirable behavior, setting precise limits can encourage people to venture very close to that limit without fear of enforcement.²⁷² It can also

265. Erika Cheung, *A Journey to Speaking Truth in Power*, TEDXBerkeley, https://www.ted.com/talks/erika_cheung_a_journey_to_speaking_truth_in_power/transcript?language=en (last visited July 31, 2021).

266. CARREYROU, *supra* note 3, at 245; *Id.* at 287 (describing the toll of the legal threats on Shultz's family); Stephen Kurczy, *Lessons from the Theranos Whistleblower*, COLUM. BUS. SCH. (Apr. 8, 2019), <https://www8.gsb.columbia.edu/articles/ideas-work/lessons-theranos-whistleblower> ("There actually are a lot of protections for whistleblowers that I was completely unaware of when I was doing all this.").

267. CARREYROU, *supra* note 3, at 214, 217.

268. *Id.* at 217.

269. *Id.* at 217–18.

270. A 2017 survey indicated that 86% of the time low-income Americans receive inadequate or no professional help for civil legal problems. LEGAL SERVICES CORPORATION, THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 30 (June 2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>.

271. Yuval Feldman & Shahar Lifshitz, *Behind the Veil of Legal Uncertainty*, 74-SPG LAW & CONTEMP. PROBS. 133, 133 (2011); Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1919 (1998) ("In corporate law, business planning needs render legal determinacy vital."). Justices Oliver Wendell Holmes and Antonin Scalia were vocal advocates for greater certainty in law. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 127 (1881) ("[T]he tendency of the law must always be to narrow the field of uncertainty."); Antonin Scalia, *The Rules of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) ("Predictability... is a needful characteristic of any law worthy of the name. There are times when even a bad rule is better than no rule at all.").

272. Muchmore, *supra* note 263, at 1360.

facilitate the exploitation of loopholes.²⁷³ Conversely, a law intended to encourage desirable behavior may do so more effectively when the incentives are clear and reliable. Whistleblower protections are principally designed to encourage whistleblowing by reducing the associated risk *ex ante*. In this context, uncertainty impedes risk reduction and therefore subverts the purpose of the law.

The whistleblower landscape produces several types of uncertainty. The first type of uncertainty arises when different legal frameworks intersect. The nonretaliation, trade secrets, and contract laws exist in parallel silos. Antiretaliation statutes do not expressly shield whistleblowers from liability. The DTSA only shields whistleblowers from liability under trade secrets laws. With respect to contracts, the public policy doctrine provides a tool to navigate tensions between NDAs and whistleblower protections, but its contours are uncertain. Because these frameworks are not harmonized, a whistleblower may need to satisfy different and potentially conflicting standards to secure protection.

The second type of uncertainty arises in the process of vindicating whistleblower protections. The duration, costs, and outcomes are not sufficiently predictable to provide reassurance. Courts and administrative agencies generally interpret nonretaliation laws narrowly and unfavorably to employees. The DTSA suffers from a language ambiguity,²⁷⁴ labeling its whistleblower provision an “immunity” but not specifying the procedural implications of that term. Without a clear directive, courts have thus far defaulted to treating the provision as an affirmative defense, much to the detriment of whistleblowers who cannot have cases dismissed at the pleadings stage. Finally, courts are far from uniform in their approach to public policy defenses against NDA enforcement. The outcome of a contract enforcement action may depend on the nature of the misconduct, the scope of the disclosure, and the particular court’s disposition towards policy arguments. In sum, even whistleblowers who are informed of their rights may face lengthy, costly, and uncertain litigation.

A third type of uncertainty comes from the use of standards instead of rules in the whistleblower laws.²⁷⁵ Standards require *ex post* examination of the circumstances, whereas rules are determinable *ex ante*.²⁷⁶ In practice, these poles are situated on a spectrum rather than discrete categories.²⁷⁷ In the whistleblower

273. Kyle D. Logue, *Optimal Tax Compliance and Penalties When the Law is Uncertain*, 27 VA. TAX. REV. 241, 249 (2007) (explaining that *ex ante* rulemaking creates unintended loopholes that authorities lack the flexibility to punish).

274. Yuval Feldman & Doron Teichman, *Are all Legal Probabilities Created Equal?*, 84 N.Y.U. L. REV. 980, 988–89 (2009) (describing uncertainty that arises from ambiguities in language).

275. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–60 (1992).

276. *Id.* For example, a speed limit of 50 mph is a rule because motorists know exactly what compliance entails and how to avoid violating the law. Requiring motorists to drive a “reasonable speed” is a standard because motorists do not know exactly how fast they can drive until it is adjudicated after the fact. *See also* Muchmore, *supra* note 263, at 1333.

277. Muchmore, *supra* note 263, at 1333.

context, many statutes only protect reporters who “reasonably believe” they are reporting a legal violation.²⁷⁸ Such standards make whistleblowers vulnerable to courts that may decide their belief was unreasonable. Unfortunately, it may not be feasible to eliminate this uncertainty. A more objective rule could entail protecting *all* reports, but this would facilitate frivolous or false accusations. Alternatively, a more objective rule could require an *actual* violation of law, but this would put the burden on workers to exercise legal judgment before reporting. Given the downsides to making the standards more rule-like, it may suffice to make the standards more favorable to whistleblowers. A “good faith belief” or “suspected” standard is more forgiving than a reasonableness standard. They also provide more certainty, since whistleblowers have more insight into their own mental state than they have knowledge of the law.

In light of the weaknesses explored above, the following Subpart offers principles for a legal framework that will more effectively facilitate whistleblowing.

C. AN AGENDA FOR REFORM

The weaknesses detailed above militate for reform to improve the accessibility and certainty of whistleblower protections. This Subpart highlights features that will reduce the costs of whistleblowing and thus encourage reports of misconduct. They do not comprise an exhaustive blueprint, but a starting point to remediate certain weaknesses that emerge from the Theranos case study and examination of the legal landscape.

Harmonized Minimum Protections. The patchwork of legal protections creates unnecessary complexity and risks for potential whistleblowers. The simplest and most effective way to address this weakness is by harmonizing minimum protections into a single federal statute that expressly inoculates private sector whistleblowers from both retaliation and all forms of liability, including contractual, tort, and statutory liability. This would provide prospective whistleblowers with more reliable protection and a single, accessible path to protected disclosure. State and federal policymakers could, of course, offer enhanced protections and rewards for specific legal violations that they deem to be especially pernicious.

Swift Path to Dismissal of Claims. Current law subjects whistleblowers to the prospect of lengthy and expensive litigation. To mitigate this problem, Professor Menell intended and advocated for the DTSA’s whistleblower protection to be treated as an immunity rather than an affirmative defense. Such an interpretation would curtail legal actions initiated against whistleblowers for the purpose of intimidation or deterrence. It would also help to assure whistleblowers that any litigation could be concluded with relative speed. Given the courts’ failure to interpret the provision as intended, a harmonized statute

278. See, e.g., DEL. CODE ANN. tit. 19, § 1703(1) (2021).

should explicate the procedural implications of immunity with greater specificity.

Forgiving Standard. Knowledge of the law and access to legal counsel are significant barriers to protected whistleblowing. A harmonized statute should recognize this reality by minimizing the burden of legal knowledge on the part of whistleblowers. This means covering information that the worker “believes in good faith” or “suspects” constitutes a violation of any federal, state, or local law or regulation, or a danger to the health and safety of employees or the public.

Effective Notice. To facilitate whistleblowing through official channels and minimize employer intimidation, the law must mandate effective notification to workers of their rights. Here, the DTSA and SEC rules provide instructive but incomplete models. Employers should be required to provide written notice of whistleblower protections to all workers, in plain language mandated by law. Such language should make clear that whistleblower protections override any other contractual commitments or duties to the company. As under the DTSA, failure to provide such notice should reduce the employer’s right to damages under any theory of law for acquisition, use, or disclosure of its otherwise protectable information.

There is probably an absolute limit to the effectiveness of any written notice. Studies have repeatedly shown that the public often does not read, understand, and/or use the information contained in mandated disclosures.²⁷⁹ This is true even of disclosures designed to be simple, like nutrition labels.²⁸⁰ Professors Omri Ben-Shahar and Carl E. Schneider attribute the failure of mandated disclosures to an “overload effect” (disclosures are far too long and technical for people to understand) and an “accumulation problem” (disclosures are too ubiquitous in American life for people to engage with them meaningfully).²⁸¹ That said, a prospective whistleblower concerned about liability risk is probably more likely than the average employee to consult the language of their NDA. To the extent that notice can make a marginal difference in employees’ awareness of their whistleblower rights, it remains worthwhile.

VI. CONCLUSION

The rise and fall of Theranos offers insights and critical lessons regarding the legal treatment of whistleblowers. The woman who triggered the first regulatory response to Theranos’s dangerous and unlawful practices contended with an unfavorable internal and external environment, from the company’s repressive and unethical culture, to an uncertain and inaccessible web of legal protections.

279. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 665–79 (2011).

280. *Id.* at 675–76.

281. *Id.* at 687–90.

Erika Cheung's experience illuminates shortcomings in the whistleblower legal regime that needlessly expose whistleblowers to liability and deter reports of misconduct. These shortcomings create individual, institutional, and public costs. All three Theranos whistleblowers endured legal threats and professional dislocation, and two incurred substantial financial losses. The delay in actionable reports also spelled disaster for the company's stakeholders. While bankruptcy was likely inevitable, earlier exposure could have spared investor capital. Finally, the public was unnecessarily subjected to the risk of faulty blood tests.

The Theranos case study should prompt consideration of a harmonized legal framework that will increase the certainty and accessibility of whistleblower protection. In a culture that valorizes dynamic startups and founders who promise to change the world, Theranos is a reminder of the importance of empowering the workers with the levers of accountability.