THE MOUTH OF TRUTH

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Legal regulation of whistleblowing activity has evolved into a critical tool for identifying wrongdoing in both the private and public spheres, and at both the state and federal levels. Robust growth continues in the use and sophistication of statutes designed to promote whistleblowing. These include long-existing statutes, such as the False Claims Act, and newer laws—such as numerous state false claims acts, the Sarbanes-Oxley Act of 2002, the Dodd-Frank Act of 2010, and the Whistleblower Protection Enhancement Act of 2012. Implementation of these statutes, particularly those providing financial rewards to whistleblowers, has led to the revelation of scores of large-scale government and private sector frauds and the recovery of billions of dollars from wrongdoers.

These successes, however, mask numerous barriers encountered by whistleblowers within the complex legal framework designed to encourage disclosures. In many situations, whistleblowers are not protected from retaliation, and financial incentives are often denied for reasons inconsistent with legislators' intent to promote reporting. A more effective and cohesive approach to whistleblower incentives and protection across the U.S. has the potential to yield important benefits for law enforcement, government entities, businesses, and other organizations. We address barriers to whistleblowing by examining the current legal landscape and providing recommendations for strengthening whistleblower laws and policies. First, we review existing state and federal statutory measures protecting and encouraging whistleblowers to elucidate the evolutionary trends in whistleblowing law and policy approaches. Next, we identify the weaknesses in these existing frameworks before proposing a model comprehensive statutory approach. These recommendations maximize the likelihood that the primary goals of whistleblowing—deterring, exposing, and halting wrongdoing—will be achieved.

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The authors thank our respective institutions for supporting this work. We also thank Philip Dysert, Evelyn Liristis, Raine Richards, Kevin MacLeod, and Jane Zhang for their capable research assistance in support of this project. Any errors or omissions remain the responsibility of the authors.

I.
INTRODUCTION

Whistleblowing has a long history as a means of organizational control. Indeed, when Venice was a city-state, the government established a system to allow citizens to blow the whistle on official misconduct.[1] Citizens could insert anonymous reports of wrongdoing in the mouth of a carved-stone lion's head placed on the outside of the government's door. The "mouth of truth" was intended to expose, curtail, and deter misconduct.[2]

Like their historical counterparts, modern legislators view whistleblowing as "[a]n important source of information vital to honest government, the enforcement of laws, and the protection of the public health and safety."[3] More specifically, law enforcement resources that would otherwise be expended on investigation and monitoring are conserved; wrongdoing reported by an internal observer is often revealed and, thus, corrected more quickly than it would be if discovered by a government agency or other external party; and self-monitoring is

1. VENICE RECONSIDERED: THE HISTORY AND CIVILIZATION OF AN ITALIAN CITY-STATE, 1297-1797, 1395 (John Martin & David Romano eds., 2000).

2. 2. SUSIE BOLTON & CHRISTOPHER CATLING, VENICE & THE VENETO 88-89 (2001). The slot, or "bocca de leone," can still be seen in the Sala della Bussola in the Doge's Palace. *Id.* The system was established primarily to catch tax evaders and increase state security. *Id.*

3. STEPHEN M. KOHN & MICHAEL D. KOHN, THE LABOR LAWYER'S GUIDE TO THE RIGHTS AND RESPONSIBILITIES OF EMPLOYEE WHISTLEBLOWERS 1 (1988); *see* MARCIA P. MICELI & JANET P. NEAR, BLOWING THE WHISTLE 14 (1992) (whistleblowing increases societal safety and well-being). The United States Code specifically protects government employees from retaliation for disclosure of information relating to a "substantial and specific danger to public health or safety," unless that information must be kept secret for the sake of national security. 5 U.S.C. § 2302(b)(8)(A)(ii) (2012). The Sarbanes-Oxley Act was enacted in 2002 in response to the financial meltdown of several major corporations as a result of overreporting profits to investors, see the discussion of the Sarbanes-Oxley whistleblower protections. *See infra* Part I.A; *see also* James Fanto, A Social Defense of Sarbanes-Oxley, 52 N.Y.L. SCH. L. REV. 517, 532 (2007-2008) (the Sarbanes-Oxley Act "is fundamentally a reassertion of social values against the socially destructive aspects of the self-interest ideology"). The Fraud Enforcement and Recovery Act (FERA) of May 2009 amended the False Claims Act, 31 U.S.C. § 3729 (2006) to add misuse of Troubled Asset Relief Program (TARP) funds to the list of activities constituting "major fraud against the government." Fraud Enforcement and Recovery Act, Pub. L. No. 111-21, § 2(d), 123 Stat. 1617, 1618 (2009).

promoted to the extent that organization members are aware that wrongdoing may be exposed by those close to the operation.[4]

Whistleblowing, especially intra-organizational disclosures,[5] can also benefit the organization where the wrongdoing is occurring.[6] Whistleblowers are efficient and inexpensive sources of feedback about organizational mistakes[7] and can bypass obstacles to communication that often exist in large organizations,[8] effectively transmitting important information to persons who have the power to act.[9] Intra-organizational reports also facilitate the correction of misunderstandings and wrongdoing without the financial and reputational risks associated with external exposure.[10]

In pursuit of whistleblowing's benefits, state and federal legislators have enacted numerous measures that are designed to promote such disclosures.[11] Statutes providing a cause of action to whistleblowers who experience retaliation have been in place for nearly a century.[12] These measures remain highly regarded by legislators seeking effective tools to combat fraud and other malfeasance, as demonstrated by robust anti-retalia-

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4. Terry Morehead Dworkin & Elletta Sangrey Callahan, *Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society*, 29 AM. BUS. L.J. 267, 328 (1991). Impacts associated with the implementation of the 1986 amendments to the federal False Claims Act and the 2010 Dodd-Frank Act support the benefits whistleblowing may provide to law enforcement. *See infra* notes 110-125 and accompanying text.

5. *See infra* Part II.C.2.

6. DAVID W. EWING, DO IT MY WAY OR YOU'RE FIRED! EMPLOYEE RIGHTS AND THE CHANGING ROLE OF MANAGEMENT PREROGATIVES 182-84 (1983); *see* J.W. Graham, Principled Organizational Dissent: A Theoretical Essay, 8 RES. IN ORG. BEHAV. 1, 38 (Barry M. Staw & L. L. Cummings eds., 1986).

7. Elletta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273, 299 (1992); Janet P. Near, Whistle-Blowing: Encourage It!, BUS. HORIZONS, Jan.-Feb. 1989, at 2, 5.

8. Martin H. Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 U. MICH. J.L. REFORM 277, 313 (1983).

9. Callahan & Dworkin, *supra* note 7, at 300.

10. Elletta Sangrey Callahan & Terry Morehead Dworkin, *Employee Disclosures to the Media: When is a "Source" a "Sourcerer"?*, 15 HASTINGS COMM. & ENT. L.J. 357, 395 (1993).

11. Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 99-100 (2000).

12. *See infra* notes 37-45 and accompanying text. .

tion provisions in the Sarbanes-Oxley Act ("SOX")[13] and the Whistleblower Protection Enhancement Act of 2012.[14]

A key trend toward incentivizing whistleblowing through monetary rewards began with significant amendments to the federal False Claims Act ("FCA") in 1986.[15] This approach has gained momentum in response to the success of the FCA[16] and crises occasioned by corporate and financial wrongdoing. For example, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or "DFA"),[17] which was enacted in 2010 as a reaction to the role of corporate malfeasance in sparking the recent financial crisis, strengthened financial incentives for whistleblowers previously afforded protection by SOX.[18]

In addition to legislative favor, whistleblowing has garnered widespread societal interest. Media attention has been drawn to the staggering awards that may be made under laws providing financial incentives. In 2012, for example, $104 million was paid to a whistleblower who gave information to the Internal Revenue Service ("IRS") that led to uncovering a massive corporate tax evasion scheme.[19] A whistleblower lawsuit made headlines in early 2013 when the U.S. government joined an action against Lance Armstrong to recover monies related to the U.S. Postal Service sponsorship of his Tour de France teams over several years.[20] Extended international coverage was recently given to a rare CEO whistleblower for his

13. 18 U.S.C. § 1514A(a) (2006).

14. Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465.

15. *See* 31 U.S.C. §§ 3729-3733 (2012); Callahan & Dworkin, *supra* note 7.

16. *See infra* Part II,, for a discussion of exponential rise in FCA claims after 1986.

17. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841 (2010) [hereinafter Dodd-Frank Act]. This expansive piece of legislation addresses various financial reforms, with §922(a) of the act establishing whistleblower-related reforms. *Id.* Pursuant to its rulemaking obligations, the SEC established the Dodd-Frank whistleblower program via Rule 21F. 17 C.F.R. § 240.21F-9 (2012).

18. *See* 15 U.S.C. § 78u-6(b)(1) (2012).

19. *See* David Kocieniewski, Whistle-Blower Awarded $104 Million by I.R.S, N.Y. TIMES, Sept. 12, 2012, at A1, *available at* http://www.nytimes.com/2012/09/12/business/whistle-blower-awarded-104-million-by-irs.html.

20. *See, e.g.*, Erika Kelton, Investing: U.S. vs. Lance Armstrong: Understanding the Latest in the Floyd Landis Whistleblower Case, FORBES, http://www.forbes.com/sites/erikakelton/2013/02/27/u-s-vs-lance-armstrong-

real-life story of danger and intrigue when exposing fraud at the multinational public company Olympus.[21]

The promise of a more effective and cohesive whistleblower protection, reward, and incentive policy across the U.S. has been demonstrated by the billions of dollars of public funds that have been recovered as a result of reports of false claims,[22] and an untold additional amount that has been saved due to reformation of practices that facilitated fraud in industries such as defense contracting[23] and medical care.[24] In the private sector, whistleblowers have helped to control corporate wrongdoing,[25] which has been estimated to be more

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understanding-the-latest-in-the-floyd-landis-whistleblower-case/ (last visited Dec. 26, 2013).

21. *The Olympus Scandal, Paying a Price for Doing What's Right: What Really Happened at Japan's Premier Camera-Maker*, THE ECONOMIST, Nov. 24, 2012 (discussing the book "Exposure: Inside the Olympus Scandal: How I Went from CEO to Whistleblower" by former Olympus CEO Michael Woodford, including fears for his personal safety as a result of disclosing "$1.7 billion in suspicious transactions").

22. Peter Aronson, *The Whistleblower Juggernaut: Critics Gripe at Suits, Claiming U.S. Is Cheated out of Billions*, NAT'L L.J., Aug. 9, 1999, at A1, A12. The government had recovered approximately $13.6 billion from about 1986 to 2008. U.S. DEP'T OF JUSTICE, CIVIL DIV., *Fraud Statistics 1986-2008*, U.S. DEPT. OF JUSTICE (Nov. 2008), http://www.usdoj.gov/opa/pr/2008/November/fraud-statistics1986-2008.htm (last visited Dec. 26, 2013) [hereinafter *Fraud Statistics*]. There are indications that government recoveries continue to rise, including another $13.3 billion from 2009 through 2012. *See infra* note 63.

23. *See* Callahan & Dworkin, *supra* note 7, at 282-83; *Fraud Statistics*, *supra* note 22 (finding that, in cases in which the Department of Defense was the primary client agency, the United States recovered over $1.7 billion in *qui tam* actions between 1987 and 2008).

24. See Callahan & Dworkin, *supra* note 11, at 101. In cases in which the Department of Health and Human Services was the primary client agency, the United States recovered over $10 billion in *qui tam* actions between 1987 and 2008. *Fraud Statistics*, *supra* note 22; *see also* TAXPAYERS AGAINST FRAUD, http://www.taf.org/resource/fca/statistics (last visited Dec. 26, 2013) (providing additional annual data on FCA recoveries collected).

25. Two of the three whistleblowers cited by *Time* as 2002 "Persons of the Year" blew the whistle on the wrongdoing at WorldCom and Enron. Richard Lacayo & Amanda Ripley, *Persons of the Year*, TIME, Dec. 2002/Jan. 2003, at 30. However, corporate whistleblowers are less successful when no one is listening; the Ponzi scheme orchestrated by Bernard Madoff, before it became a public scandal, was brought to the SEC's attention by a whistleblower, but no significant action was taken in response. *See, e.g.*, Kara Scannell, et al., *Markopolos Testifies Fairfield Knew Little About Madoff*, WALL ST. J., Feb. 5, 2009, at C2.

costly than common crime.[26] Despite these benefits, legislative interest, and high-profile examples of whistleblowing's effectiveness, U.S. whistleblower policy remains fractured: a patchwork of statutes and case law has led to inconsistent outcomes and incentives, even as the power of whistleblowing in protecting the public interest by revealing malfeasance has become clear.

In Part I, we briefly review the existing state and federal statutory measures pertaining to whistleblowers, thus demonstrating the evolutionary trends in whistleblowing law and policy approaches. In Part II, we carefully identify the weaknesses in these existing frameworks. In Part III, we propose and explain a model comprehensive whistleblowing statute. The provisions we recommend are designed to maximize the likelihood that the primary goals of whistleblowing—deterring, exposing, and halting wrongdoing—will be achieved. A brief conclusion follows.

II.
EXISTING LEGAL PROTECTION FOR WHISTLEBLOWERS

We espouse the following widely-used definition: "whistleblowers are organization members (including former members and job applicants) who disclose illegal, immoral, or illegitimate practices (including omissions) under the control of their employers, to persons or organizations who may be able to effect action."[27] Policymakers at all levels of government have sought to reap whistleblowing's potential benefits[28]

26. *See, e.g., The Cost of Crime: Understanding the Financial and Human Impact of Criminal Activity: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 69 (2006), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:42938.pdf (statement of Jens Ludwig, Professor, Georgetown Public Policy Institute, Georgetown University). Professor Ludwig estimates annual losses associated with white collar crime at $730 billion, in comparison to $694 billion for social crime. *Id.*; *see also* MICELI & NEAR, *supra* note 3, at 2-3 (citing H.C. Finney & H.C. Lesieur, *A Contingency Theory of Organizational Crime*, in 1 RESEARCH IN THE SOCIOLOGY OF ORGANIZATIONS 255-56 (S.B. Bacharach ed., 1982) (white collar crime is significantly more costly than common crime).

27. Janet P. Near & Marcia P. Miceli, *Organizational Dissidence: The Case of Whistle-Blowing*, 4 J. BUS. ETHICS 1, 2, 4 (1985); Granville King III, *The Effects of Interpersonal Closeness and Issue Seriousness on Blowing the Whistle*, 34 J. BUS. COMM. 419, 420-21 (1997).

28. *See supra* notes 3-10 and accompanying text.

through legislation designed to spur disclosures.[29] There are myriad distinctions among these initiatives, but two differences are especially important.

First, a key distinction can be drawn based on the centrality of whistleblower protection to the statute's primary purpose. In "core" statutes, whistleblowing is the primary focus. New Jersey's Conscientious Employee Protection Act is a prime example of a core statute: the statute was passed to provide a cause of action to employee whistleblowers throughout the state.[30] In contrast, "adjunct" statutes protect persons who disclose violations of the law's focal provisions, which are related to other objectives. For example, the main legislative goal of the federal Clean Air Act ("CAA") is protecting and enhancing air quality,[31] not whistleblower protection, but the statute also prohibits discrimination against persons who blow the whistle on conduct in violation of its primary objectives.[32]

A second distinction can be drawn based on the benefit or protection the statute provides to the whistleblower. Nearly all measures provide a cause of action to whistleblowers who experience job-related retaliation as a consequence of their revelations.[33] In another approach, financial rewards, in addition

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29. *See infra* notes 50-94 and accompanying text.

30. *See* N.J. STAT. ANN. §§ 34:19-1 to -14 (West 2012).

31. 42 U.S.C. § 7622 (2012). The statute provides as follows:

> (a) Discharge or discrimination prohibited. No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)–
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> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,
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> (2) testified or is about to testify in any such proceeding, or
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> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

Id. § 7622(a).

32. *See id.*

33. *See, e.g.*, CAL. GOV'T CODE §§ 53296-53298 (West 2012); FLA. STAT. ANN. § 448.102 (West 2012); N.Y. LAB. LAW § 740 (McKinney 2013); N.Y. CIV. SERV. LAW §75-b (McKinney 2013); 43 PA. CONS. STAT. § 1423 (2012).

to protection from retaliation, are offered.[34] The federal FCA[35] and comparable state statutes[36] are good examples of this approach.

In sum, a core or adjunct statute may provide anti-retaliation coverage alone, or add financial incentives to protection from reprisals. The following sections build on these distinctions.

A. *Federal Legislation*

For many years,[37] Congress has added anti-retaliation provisions to remedial statutes.[38] The National Labor Relations

34. *See* Callahan & Dworkin, *supra* note 11, app. A, "specifics" column (comprehensive list of state whistleblowing laws; those with a particular occupation or industry identified would be included in the "adjunct statutes" category).

35. 31 U.S.C. §§ 3729-3733 (2012).

36. Thirty-one states and the District of Columbia have such statutes. *See infra* note 76.

37. The first protections were extended in the Railway Labor Act of 1926, 45 U.S.C. §§ 151-188 (2006), and the National Labor Relations Act (NLRA) of 1935, 29 U.S.C. §§ 151-169 (2006). These laws provided exceptions to the employment at-will doctrine by protecting employees from being fired for engaging in union-related activities. Protected activities under the NLRA include testifying or filing a charge concerning unfair labor practices. 29 U.S.C. § 158(a)(4).

38. *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2622(a) (2006); Sarbanes-Oxley Act, 18 U.S.C. § 1514A (2006); Age Discrimination in Employment Act, 29 U.S.C. § 623(d) (2006); Occupational Safety and Health Act, 29 U.S.C. § 660(c) (2006); Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. § 1855(a) (2006); Federal Surface Mining Act, 30 U.S.C. § 1293(a) (2006); Water Pollution Prevention and Control Act, 33 U.S.C. § 1367(a) (2006); Safe Drinking Water Act, 42 U.S.C. § 300j-9(i) (2006); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2006); Energy Reorganization Act, 42 U.S.C. § 5851(a)(1) (2006); Solid Waste Disposal Act, 42 U.S.C. § 6971(a) (2006); Clean Air Act, 42 U.S.C. § 7622(a) (2006); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9610(a) (2006); Surface Transportation Act, 49 U.S.C. § 31105(a) (2006); Job Training and Partnership Act, 29 U.S.C. § 1574(g) (repealed 1998). The Fraud Enforcement and Recovery Act of 2009 includes the exposure of fraud involving TARP funds under the amended anti-retaliatory provisions of the FCA. Pub. L. No. 111-21, § 2(d), 123 Stat. 1617, 1618 (codified as amended at 18 U.S.C. § 1031(a)); *see also id.* § 4(d), 123 Stat. at 1624-25 (codified as amended at 31 U.S.C. § 3730(h)) (amending the retaliatory provisions of the FCA).

Act ("NLRA"),[39] which is designed to protect employees engaged in union-related activities, was the first adjunct statute.[40] The whistleblower cause of action was appended to the law as an incidental means of enforcing employees' organizational rights.[41] Like the NLRA, most federal laws that were passed, and which later prohibited retaliation against whistleblowers, were enacted principally to address a different objective. Thus, those who disclose wrongful activity are covered only if their employment, disclosure, or both are related to the activities regulated by the statute. For example, employees reporting illegal water pollution may be shielded by the Safe Drinking Water Act,[42] and miners are protected by the Federal Mine Safety and Health Act.[43] Although the topic of the disclosure and persons protected tend to be narrowly focused under these statutes, the courts have liberally interpreted these provi-

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39. For the NLRA's employee protection provisions, *see* 29 U.S.C. § 158(a).

40. The statute contains a section protecting employees who testify or file charges concerning illegal unfair labor practices. *See id.* § 158(a)(4).

41. The NLRA's purposes are set forth as follows:

> Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.
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> It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Id. § 141(b).

42. 42 U.S.C. § 300j-9(i)(1).

43. 30 U.S.C. § 815(c) (2006).

sions to encompass a wide variety of activities[44] and report outlets.[45]

The continuing vitality of the adjunct approach is demonstrated by modern efforts to expose and deter corporate and financial misdeeds. SOX, enacted in 2002, prohibits retaliation[46] against employees[47] who report violations of federal fraud laws,[48] Securities and Exchange Commission (the "Commission" or "SEC") rules,[49] or federal laws relating to fraud against shareholders.[50] A protected disclosure under SOX may be made to a federal agency, Congress, or internally through the organization's reporting system.[51] While hailed as an im-

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44. *See, e.g.*, Roadway Express, Inc. v. U.S. Dep't of Labor, 495 F.3d 477, 482 (7th Cir. 2007) (holding that employee's testimony on behalf of coworker at a grievance hearing, asserting that a supervisor ordered the coworker to falsify his driving logs, was a protected activity under the Surface Transportation Assistance Act); Donovan *ex rel.* Anderson v. Stafford Constr. Co., 732 F.2d 954, 961-62 (D.C. Cir. 1984) (holding that secretary and bookkeeper for mining company was a protected "miner" as under the FMSHA, and that refusal to give false information regarding the wrongful termination of a coworker to company officers was a protected activity); *see also* Terry Morehead Dworkin, *Legal Approaches to Whistle-blowing*, in MICELI & NEAR, *supra* note 3, at 233-34.

45. *See, e.g.*, *Roadway Express*, 495 F.3d at 480 (noting that plaintiff filed claim with Occupational Safety and Health Administration (OSHA)); Haley v. Retsinas, 138 F.3d 1245, 1251 (8th Cir. 1998); Bechtel Constr. Co. v. Sec'y of Labor, 50 F.3d 926, 931 (11th Cir. 1995).

46. Defined as: to "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment." 18 U.S.C. § 1514A(a) (2006).

47. Employee is defined quite broadly in the regulations: "an individual presently or formerly working for a company or company representative . . . or an individual whose employment could be affected by a company or company representative." Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365, 1373 n.7 (N.D. Ga. 2004) (quoting 29 C.F.R. § 1980.101 (2002)).

48. These include: 18 U.S.C. §§ 1341, 1343, 1344, 1348 (2006). Sections 1341 and 1343 cover mail and wire fraud; § 1344 covers bank fraud; and, § 1348 covers securities fraud. The mail and wire fraud provisions broaden the reach of the Act beyond securities law and accounting standards violations. *See* Robert G. Vaughn, *America's First Comprehensive Statute Protecting Corporate Whistleblowers*, 57 ADMIN. L. REV. 1, 23-30 (2005).

49. 18 U.S.C. § 1514A(a)(1) (2012). The provision also allows for a wide variety of claims, including those involving violations of internal accounting controls. *Id.*

50. *Id.*

51. The disclosure may be made to a supervisor or "such other person working for the employer who has the authority to investigate, discover, or terminate misconduct." *Id.* § 1514A(a)(1)(C). An employee seeking redress

provement in the evolution of whistleblower laws, in the decade after SOX's passage as a response to corporate scandals, SOX was criticized for not providing enough protection for whistleblowers, for its lack of extraterritorial reach,[52] for being obtrusive,[53] and for not playing a role in exposing the high-

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under Sarbanes-Oxley must first file a complaint with OSHA within 180 days of the violation or the date on which the employee became aware of the violation. 29 C.F.R. § 1980.103(d) (2012). OSHA will then investigate. *Id.* § 1980.104. If the agency finds "reasonable cause to believe that a violation has occurred," it may issue a preliminary order providing relief, including reinstatement. *Id.* § 1980.105(a)(1). This is an unusual remedy: "Prior to the enactment of SOX, the threat of mandatory reinstatement prior to a final decision was almost unheard of in employment law." Michael Starr & Adam J. Heft, *Whistleblower Protections and the Sarbanes-Oxley Act: ALJ Decisions Apply Provisions to Broad Range of Conduct*, N.Y. L.J., Apr. 4, 2005, at 12. If the Board fails to render a decision within 180 days of the filing of the complaint, an employee may file a complaint in federal district court. 29 C.F.R. § 1980.114. Sarbanes-Oxley also creates criminal liability for an employer who retaliates against an employee who provides information about any federal offense. 18 U.S.C. § 1513 (2006). In part, that provision states:

> Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

Id. § 1513(e). Unlike the civil provisions of the act, this section is not limited to employees of publicly traded companies. California has a similar, if weaker, criminal provision in its whistleblower law. CAL. LAB. CODE § 1103 (West 2012); which states:

> Any employer who violates this chapter is guilty of a misdemeanor punishable, in the case of an individual, by imprisonment in the county jail not to exceed one year or a fine of not to exceed $1000 or both and, in the case of a corporation, by a fine of not to exceed $5000.

Id. See also Joshua L. Baker, *Chapter 484: The Strongest Whistleblower Protection Law in the Nation—Did We Need It, and Can We Really Afford It?*, 35 MCGEORGE L. REV. 569, 571 (2004).

> Indiana and Iowa statutes also impose criminal penalties on retaliators. *See* Robert G. Vaughn, *State Whistleblower Statutes and the Future of Whistleblower Protection*, 51 ADMIN. L. REV. 581, 614 n.119 (1999) (citing IND. CODE ANN. § 4-15-10-4(d) (West 1996); IOWA CODE ANN. § 70A.28 (West 1998)).

52. *See* Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1774-77 (2007).

53. *See id.* at 1778 (remarking that a decline in foreign securities filings on U.S. exchanges has been blamed on SOX and associated regulation).

profile frauds that precipitated the financial crisis and recession of 2008.[54] These perceived inadequacies contributed to the passage of the Dodd-Frank Act in 2010.

Faced with the daunting task of cleaning up after the 2008 economic crisis and the notorious Bernard Madoff massive Ponzi scheme, Congress chose to amend the SEC enforcement framework to include financial rewards for whistleblowers. The Madoff debacle also led to scrutiny of other aspects of the Commission's program,[55] under which rewards were optional and available only in relation to insider trading actions. Dodd-Frank expanded this coverage by providing a mandatory reward of ten to thirty percent for original information leading to successful monetary sanctions under all securities laws.[56]

The IRS enforcement program also illustrates an adjunct approach to whistleblower protection. Its discretionary reward provisions were made mandatory in 2006.[57] The statute currently authorizes a financial reward of at least fifteen percent, but not more than thirty percent, for information leading to the collection of taxes from a delinquent taxpayer.[58]

There are two key statutes at the federal level where whistleblower protection is the core objective. First, the Whistleblower Protection Act,[59] which was expanded under

54. *See* Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1 (2012) (contending that the two main shortcomings of SOX were its insufficient protection for whistleblowers from retaliation and its failure to prompt whistleblowers to play a significant role in the uncovering of the 2008 financial crisis).

55. OFFICE OF AUDITS, OFFICE OF INSPECTOR GEN., U.S. SEC. & EXCH. COMM'N, REPORT NO. 474, ASSESSMENT OF THE SEC'S BOUNTY PROGRAM, at ii (2010).

56. 15 U.S.C. § 78u-6(b)(1) (2012).

57. Tax Relief and Health Act of 2006, Pub. L. No. 109-432, § 406(a)(1), 120 Stat. 2922, 2958-59 (2006) (codified as amended at 26 U.S.C. § 7623 (2012)). The improved scheme also drew in part on the success of the False Claims Act.

58. 26 U.S.C. § 7623(b)(1) (2006).

59. *See* 5 U.S.C. § 2302(b)(8) (2006). As amended by the Whistleblower Protection Act of 1989, the Civil Service Reform Act of 1978 charged the Office of Special Counsel to protect federal employee whistleblowers, handle their claims, and investigate and pursue reports of wrongdoing. 5 U.S.C. § 1212(a)(1)-(5) (2012). Unfortunately, it has not proved very effective. *See* Dworkin, *supra* note 44, at 237-38. In an unsettling bit of irony, in 2008, the FBI raided the Washington, D.C. offices of Special Counsel Scott Bloch, who allegedly retaliated against his employees for revealing that he refused to

the 2012 Whistleblower Protection Enhancement Act,[60] provides general anti-retaliation protection to federal government employees. Second, the FCA rewards[61] whistleblowers who successfully prosecute lawsuits in the name of the government, known as *qui tam*,[62] against individuals or companies who have fraudulently claimed federal funds.[63]

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investigate any claims of discrimination based on sexual orientation. Ari Shapiro, *FBI Raids Office of Special Counsel*, NPR (May 6, 2008), http://www.npr.org/templates/story/story.php?storyId=90231909.

60. *See supra* note 14.

61. Whistleblowers receive up to thirty percent of all money recovered (including treble damages and $10,000 per false claim fine) if they prosecute the claim themselves, and up to twenty-five percent of the proceeds of the action if the government joins the suit. 31 U.S.C. § 3730(d)(1-2) (2006). Recovery for the United States government can also be substantial. In its fiscal year 2012 report, the Justice Department reported that it:

> secured $4.9 billion in settlements and judgments in civil cases involving fraud against the government. . .[and that [t]]his figure constitutes a record recovery for a single year, eclipsing the previous record by more than $1.7 billion, and brings total recoveries under the False Claims Act since January 2009 to $13.3 billion–which is the largest four-year total in the Justice Department's history and more than a third of total recoveries since the act was amended 26 years ago in 1986.

Press Release, Office of Public Affairs, U.S. Dep't of Justice, *Justice Department Recovers Nearly $5 Billion in False Claims Act Cases in Fiscal Year 2012* (Dec. 4, 2012), *available at* http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html (last visited Dec. 26, 2013). One source argues that the estimates of the Department of Justice's recovery under qui tam lawsuits may be lower than necessary because the estimates leave out criminal sanctions from *qui tam* recovery numbers. See *DoJ Hides Its Light Under a Barrel*, TAXPAYERS AGAINST FRAUD EDUCATION FUND, (Dec. 4, 2012), http://taf.org/blog/doj-hides-its-light-under-barrel (last visited Dec. 26, 2013).

62. These *qui tam* actions are designed to extend the government's ability to monitor federal funds without hiring more personnel, often allowing citizens to initiate suits and begin investigating issues that then allow the government to intervene in the existing lawsuit. *See* Callahan & Dworkin, *supra* note 11.

63. Other federal statutes have incorporated reward structures which are much more limited than those in the FCA. *See* Callahan & Dworkin, *supra* note 11, at 279-81. However, these statutes have proved less effective in spurring whistleblowing. *See* Callahan & Dworkin, *supra* note 24, at 102. In at least one instance, the U.S. Supreme Court passed up an opportunity to severely undermine the FCA's effectiveness. In an extraordinary move, the Court had called for the parties in *Vermont Agency of Natural Resources v. United States* to brief the issue of the standing of FCA plaintiffs under Article III. *See* 528 U.S. 1015, 1015 (1999) (directing parties to file briefs on the question of whether

Federal law also rewards employers who establish organizational whistleblowing procedures. The Corporate Sentencing Guidelines encourage "rightdoing" by mitigating sanctions, including fines, for corporate criminal defendants that have an effective compliance program.[64] An important part of such a program is a well-publicized and monitored employee communications process under which complaints are addressed without exposing the whistleblower to retaliation.[65] This incentive has prompted a number of major companies to establish such internal reporting procedures.[66]

"a private person ha[s] standing under Article III to litigate claims of fraud upon the government. . ."); *see also* Steve France, *Qui Tam Pop Quiz*, 86 A.B.A. J. 32, 32 (2002) (stating that the Court in *Vermont Agency* "asked the parties to brief the questions of whether realtors have constitutional standing to sue" under the FCA); *Focus On . . . Whistleblowers*, 15 INDIVIDUAL EMPL. RTS. MAN. (BNA) 14 (Nov. 30, 1999). This issue was not originally before the Court. *See, e.g.*, Vt. Agency of Natural Res. v. United States, 527 U.S. 1034 (1999), *cert. granted.* Certiorari had been granted to determine whether states' agencies fall within the FCA's definition of "persons." 528 U.S. 1015 (1999). In May of 2000, the Court ruled that the FCA could "reasonably be regarded as effecting a partial assignment of the Government's damages claim" on the plaintiff, which sufficed to confer standing. Vt. Agency of Natural Res. v. United States *ex. rel.* Stevens, 529 U.S. 765, 765-66 (2000).

More recent curtailment of *qui tam* lawsuits, however, came in *Schindler Elevator Corp. v. United States ex rel. Kirk* with the court holding that an agency's response to a FOIA request serves as report sufficient to trigger the FCA public disclosure bar to recovery for a *qui tam* suit. 131 S.Ct. at 1887.

64. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f)8 (2012). Other sanctions subject to mitigation include corporate probation, *see id.* § 8D1.1(a)(3) (convicted organizations of 50 or more employees without an effective compliance program are to be put on probation and ordered to institute such a program), and mandated negative publicity to publicize the wrongdoing, *see id.* § 8D1.4. Suggestions for compliance are discussed in Jeffrey M. Kaplan, *The New Corporate Sentencing Guidelines*, ETHIKOS & CORP. CONDUCT Q. (July/Aug. 2004), http://www.ethikospublication.com/html/guidelines2004.html. Notably, the formerly mandatory Federal Sentencing Guidelines have been rendered advisory by the U.S. Supreme Court in *United States v. Booker*, 543 U.S. 220, 245 (2005). *See also* Cass R. Sunstein, *Trimming*, 122 HARV. L. REV. 1049, 1061 n.51 (2009) (citations omitted) (discussing that in *Booker* "the Court found that certain judicial uses of the Federal Sentencing Guidelines violated the Sixth Amendment, but that the proper remedy was not to do away with the guidelines, but to use them in an advisory capacity").

65. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f).

66. Most commonly, organizations have created hotlines as a mechanism for employees to report misconduct. *See* Janet P. Near & Terry Morehead Dworkin, *Responses to Legislative Changes: Corporate Whistleblowing Policies*, 17 J.

B. *State Law Remedies*

In addition to the federal legislation introduced above, legislatures in each of the fifty states and the District of Columbia have enacted whistleblower protection statutes.[67] All of these laws contain anti-retaliation provisions.[68] In other respects, however, the statutes vary greatly, particularly with respect to the report recipients designated,[69] characteristics of protected whistleblowers,[70] and protected disclosures.[71] As is true at the federal level, many relevant state laws provide redress to whistleblowers as an adjunct to another legislative objective.[72] Nevertheless, a number of states have enacted core whistleblower protection statutes.[73] At least thirty-one states and the District of Columbia offer financial incentives for disclosures of fraud against the government through statutes based on the basic FCA model.[74]

BUS. ETHICS 1551, 1560 (1998). The United States Supreme Court has also established that companies with policies supporting disclosure of sexual harassment may insulate themselves from harassment claims. *See, e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 806-07 (1998); *see also infra* note 263 and accompanying text.

67. *See* Callahan & Dworkin, *supra* note 24, at app. A.

68. *See id.*

69. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1376 (2012); COLO. REV. STAT. § 8-2.5-101 (2012); CONN. GEN. STAT. § 4-61dd (2012); D.C. CODE § 1-301.115a(f-4) (2012); LA. REV. STAT. ANN. § 40:2009.17 (2012).

70. *See, e.g.*, ALASKA STAT. § 42.40.760 (2012); CAL. GOV'T CODE §§ 8547.1-.13 (West 2012); CAL. GOV'T CODE § 53298 (West 2012); COLO. REV. STAT. §§ 24-50.5-101 to -107 (2012); CONN. GEN. STAT. § 7-470 (2012); DEL. CODE ANN. tit. 14, § 4007 (2012); FLA. STAT. § 92.57 (2012); IDAHO CODE ANN. § 44-1904 (2012); 20 ILL. COMP. STAT. 415/19c.1 (2012); 210 ILL. COMP. STAT. 110/17 (2012); IND. CODE § 4-15-10-4 (2012).

71. *See, e.g.*, ALASKA STAT. § 23.10.135 (2012); COLO. REV. STAT. § 24-114-102 (2012); 70 ILL. COMP. STAT. 3605/9 (2012); 20 ILL. COMP. STAT. 415/19c.1 (2012); NEB. REV. STAT. § 48-824 (2012).

72. *See supra* notes 37-58 and accompanying text.

73. *See* Callahan & Dworkin, *supra* note 24, at tbl. I.

74. *See* CAL. GOV'T CODE §§ 12650-12655 (West 2012); DEL. CODE ANN. tit. 6, §§ 1201-1209 (West 2012); D.C. CODE §§ 2-381.01 to .09 (2012); FLA. STAT. §§ 68.081-.092 (2012); HAW. REV. STAT. §§ 46-171 to -177, -179 (2012) (false claims made to counties); HAW. REV. STAT. §§), 661-21 to -27, -29 (false claims made to state); 740 ILL. COMP. STAT. 175/1-/8 (2012); IND. CODE § 5-11-5.5-1 to -18 (2012); IOWA CODE ANN. §§ 685.1-.7 (West 2012); MASS. GEN. LAWS ANN. ch. 12, §§ 5a-5o (West 2012); MINN. STAT. §§ 15C.01-.16 (2012); MONT. CODE ANN. §§§ 17-8-401 to -407, -409 to -413 (2012); NEV. REV. STAT.

State courts have also provided recourse to at-will employees who blow the whistle. Traditionally, an at-will employment relationship may be terminated at any time, for any reason, by either party.[75] A well-recognized and widely-adopted exception to this rule holds that an at-will employee may not be discharged for taking an action public policy encourages, or refusing to do something inconsistent with public policy.[76] Em-

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§§ 357.010-.250 (2011); N.H. REV. STAT. ANN. §§ 167:61-b to -e (2012); N.J. STAT. ANN. §§ 2A:32C-1 to -18 (West 2012); N.M. STAT. ANN. § 27-14-12 (2012); N.Y. STATE FIN. LAW §§ 187-194 (McKinney 2012); N.C. GEN. STAT. §§ 1-605 to -618 (2012); OKLA. STAT. tit. 63 §§ 5053.1-.7 (2012); R.I. GEN. LAWS §§ 9-1.1-1 to -8 (2012); VA. CODE ANN. §§ 8.01-216.1 to .-.19 (2012). Several states' false claims act coverage is limited to health care fraud. *See* ARK. CODE ANN. §§ 20-77-901 to -911 (2012); COLO. REV. STAT. §§ 25.5-4-304 to -310 (2012); CONN. GEN. STAT. § 17b-301b (2012); GA. CODE ANN. §§ 49-4-1 to -15 (West 2012); LA. REV. STAT. ANN. §§ 46:439.1-.4 (2012); MD. CODE ANN., HEALTH-GEN. §§ 2-601 to -611 (West 2012); MICH. COMP. LAWS §§ 400.601-.615 (2012); TENN. CODE ANN. §§ 71-5-181 to -185 (2012); TEX. HUM. RES. CODE ANN. §§ 36.101-.117 (West 2011); UTAH CODE ANN. § 26-20-7 (West 2012); WASH. REV. CODE §§ 74.66.005-.130 (2012); WIS. STAT. § 20.931 (2011). Two major cities have also enacted false claims acts. *See* N.Y.C. ADMIN. CODE §§ 7-801 to -810 (2012); CHI. MUN. CODE §§1-21-010 to -030, 1-22-010 to -060, 2-152-171 (2012). For a discussion of twenty-nine state and two municipal FCA-like statutes, *see also* 6 JOEL M. ANDROPHY, *Substantive Crimes: Health Care Fraud*, in WHITE COLLAR CRIME § 42:32 (2d ed. 2012).

75. *See* Payne v. W. & Atl. R.R. Co., 81 Tenn. 507, 519-20 (1884), *overruled on other grounds* by Hutton v. Watters, 179 S.W. 134 (Tenn. 1915). The usually-accepted explanation for the development and rationale of this principle is discussed in Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1416-21 (1967). *But see generally* Deborah A. Ballam, *Exploding the Original Myth Regarding Employment-At-Will: The True Origins of the Doctrine*, 17 BERKELEY J. EMP. & LAB. L. 91 (1996); Deborah A. Ballam, *The Development of the Employment at Will Rule Revisited: A Challenge to Its Origins as Based in the Development of Advanced Capitalism*, 13 HOFSTRA LAB. & EMP. L.J. 75 (1995); Deborah A. Ballam, *The Traditional View of the Origins of the Employment-At-Will Doctrine: Myth or Reality?*, 33 AM. BUS. L.J. 1 (1995).

76. *See* Percival v. Gen. Motors Corp., 539 F.2d 1126, 1129-30 (8th Cir. 1976) ("The theory [behind the public policy exception] is that even if an employer has a general right to discharge an employee without cause or justification, a discharge is wrongful and actionable if it is motivated by the fact that the employee did something that public policy encourages or that he refused to do something that public policy forbids or condemns."). Paradoxically, several courts have held that internal reporting of wrongdoing does not fit within this public policy exception because internal reporting is essentially a matter of the employer's private interest, having no impact on the public good. *See* Orly Lobel, *Citizenship, Organizational Citizenship, and the*

ployees who are actually or constructively fired under these circumstances have a tort-based claim against their former employers.[77]

The public policy exception is recognized by a large majority of states.[78] Although the first court to adopt this approach did so in a whistleblowing case in 1959,[79] other jurisdictions were slow to extend the theory to whistleblowers.[80]

Laws of Overlapping Obligations, 97 CAL. L. REV. 433, 446 (2009) (citing Fox v. MCI Commc'ns 931 P.2d 857, 861 (Utah 1997)). *See also* Garcetti v. Ceballos, 547 U.S. 410, 426 (2006) (rejecting "the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties," particularly if they are internal).

77. *See, e.g.*, Haney v. Aramark Unif. Servs., Inc., 17 Cal. Rptr. 3d 336, 350-51 (Ct. App. 2004); William H. Carlile, *Jury Awards Employee $1.75 Million for Wrongful Termination by Best Western*, DAILY LAB. REP. (BNA) No. 100, May 25, 1999, at A-41 (discussing Murcott v. Best W. Int'l, Inc., 9 P.3d 1088 (Ariz. Ct. App. 2000)). Punitive damages are often awarded in these cases since the employers' actions are seen as especially wrongful. *See generally* Jane P. Mallor, *Punitive Damages for Wrongful Discharge of At Will Employees*, 26 WM. & MARY L. REV. 449 (1985). Some states have also recognized similar claims under a breach of contract theory. *See, e.g.*, Lord v. Souder, 748 A.2d 393, 404-05 (Del. 2000) (Lamb, V.C., concurring).

78. *See, e.g.*, Newman v. Legal Servs. Corp., 628 F. Supp. 535, 539 (D.D.C. 1986); Dicomes v. State, 782 P.2d 1002, 1006-07 (Wash. 1989); *see also* Richard E. Kaye, Annotation, *Liability Under Common Law for Wrongful or Retaliatory Discharge of At-Will Employee for In-House Complaints or Efforts Relating to Health or Safety*, 93 A.L.R. 5th 269 (2001); Genna H. Rosten, Annotation, *Wrongful Discharge Based on Public Policy Derived from Professional Ethics Codes*, 52 A.L.R.5th 405 (1997). But, for examples of state courts holding that their respective states' laws did not recognize the public policy exception, *see* Salter v. Alfa Ins. Co., 561 So. 2d 1050, 1053 (Ala. 1990); Hartley v. Ocean Reef Club, Inc., 476 So. 2d 1327, 1329 (Fla. Dist. Ct. App. 1985); Borden v. Johnson, 395 S.E.2d 628, 629 (Ga. Ct. App. 1990); Tolliver v. Concordia Waterworks Dist. No. 1, 735 So. 2d 680, 682 (La. Ct. App. 1999); Sabetay v. Sterling Drug, Inc., 506 N.E.2d 919, 920 (N.Y. 1987); Pacheco v. Raytheon Co., 623 A.2d 464, 465 (R.I. 1993) (per curiam).

79. *See* Petermann v. Int'l Bhd. of Teamsters, Local 396, 344 P.2d 25, 27 (Cal. Ct. App. 1959).

80. For examples of courts declining to cover whistleblowers under states' public policy exceptions, see *Swanzy v. Weatherford U.S., Inc., No. 95-780, 1995 U.S. Dist. LEXIS 9868, at *2-3 (E.D. La. July 12, 1995); Haburjak v. Prudential Bache Secs., Inc., 759 F. Supp. 293, 300 (W.D.N.C. 1991); Thigpen v. Greenpeace, Inc., 657 A.2d 770, 771 (D.C. 1995); Campbell v. Eli Lilly & Co., 413 N.E.2d 1054, 1056 (Ind. Ct. App. 1980); Peterson v. Glory House, 443 N.W.2d 653, 654-55 (S.D. 1989); Austin v. HealthTrust, Inc., 967 S.W.2d 400, 403 (Tex. 1998). See generally* Elletta Sangrey Callahan, *Employment at Will: The Relationship Between Societal Expectations and the Law*, 28 AM. BUS. L.J. 455, 460, 479

Now, however, nearly half of the states apply the public policy exception to whistleblowers,[81] despite the courts' tendencies to take a conservative approach in this context.[82]

(1990) (arguing that lower level of protection given to whistleblowers in public policy cases is not well reasoned).

81. For examples of states recognizing a public policy exception claim for whistleblowers, *see* Straughn v. Delta Airlines, 250 F.3d 23, 44 (1st Cir. 2001) (applying New Hampshire law); Hein v. All Am. Plywood Co., 232 F.3d 482, 486 (6th Cir. 2000) (applying Michigan law); Paolella v. Browning-Ferris, Inc., 158 F.3d 183, 190 (3d Cir. 1998) (applying Delaware law); Cummins v. EG & G Sealol, Inc., 690 F. Supp. 134, 136 (D.R.I. 1988); Knight v. Am. Guard & Alert, Inc., 714 P.2d 788, 792 (Alaska 1986); Wagner v. City of Globe, 722 P.2d 250, 257 (Ariz. 1986); Sterling Drug, Inc. v. Oxford, 743 S.W.2d 380, 385 (Ark. 1988); Phillips v. Gemini Moving Specialists, 74 Cal. Rptr. 2d 29, 32 (Ct. App. 1998); Rocky Mountain Hosp. & Med. Serv. v. Mariani, 916 P.2d 519, 527 (Colo. 1996); Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 388-89 (Conn. 1980); Parnar v. Americana Hotels, Inc., 652 P.2d 625, 631-32 (Haw. 1982); Roberts v. Bd. of Trs., Pocatello, Sch. Dist. No. 25, 11 P.3d 1108, 1111 (Idaho 2000); Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 877 (Ill. 1981); Schoff v. Combined Ins. Co. of Am., 604 N.W.2d 43, 47 (Iowa 1999); Moyer v. Allen Freight Lines, Inc., 885 P.2d 391, 393 (Kan. Ct. App. 1994); Collier v. Pellerin Milnor Corp., 463 So. 2d 47, 48-49 (La. Ct. App. 1985); Kramer v. Mayor and City Council of Baltimore, 723 A.2d 529, 538 (Md. Ct. Spec. App. 1999); Shea v. Emmanuel Coll., 682 N.E.2d 1348, 1350 (Mass. 1997); Freidrichs v. W. Nat'l Mut. Ins. Co., 410 N.W.2d 62, 64 (Minn. Ct. App. 1987); Olinger v. Gen. Heating & Cooling Co., 896 S.W.2d 43, 48 (Mo. Ct. App. 1994); Schriner v. Meginnis Ford Co., 421 N.W.2d 755, 759 (Neb. 1988); Wiltsie v. Baby Grand Corp., 774 P.2d 432, 433 (Nev. 1989); Wade v. Kessler Inst., 798 A.2d 1251, 1258 (N.J. 2002); Gandy v. Wal-Mart Stores, Inc., 872 P.2d 859, 860 (N.M. 1994); Hogan v. Forsyth Country Club Co., 340 S.E.2d 116, 126 (N.C. Ct. App. 1986); Kulch v. Structural Fibers, Inc., 677 N.E.2d 308, 319 (Ohio 1997); Burk v. K-Mart Corp., 770 P.2d 24, 28 (Okla. 1989); Dalby v. Sisters of Providence, 865 P.2d 391, 394 (Or. Ct. App. 1993); Hunger v. Grand Cent. Sanitation, 670 A.2d 173, 175-77 (Pa. Super. Ct. 1996) (dicta); Ludwick v. This Minute of Carolina, 337 S.E.2d 213, 216 (S.C. 1985); Clanton v. Cain-Sloan Co., 677 S.W.2d 441, 445 (Tenn. 1984); Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985); Fox v. MCI Commc'ns Corp., 931 P.2d 857, 861 (Utah 1997) (dicta); Payne v. Rozendaal, 520 A.2d 586, 589 (Vt. 1986); Lockhart v. Commonwealth Educ. Sys. Corp., 439 S.E.2d 328, 331 (Va. 1994); Shaw v. Hous. Auth., 880 P.2d 1006, 1009 (Wash. Ct. App. 1994); Harless v. First Nat'l Bank, 246 S.E.2d 270, 275 (W. Va. 1978); *see also* Hausman v. St. Croix Care Ctr., 571 N.W.2d 393, 394 (Wis. 1997) (recognizing narrow public policy exception for whistleblowers who experience retaliation as a result of carrying out statutory duty to report).

82. *See, e.g.*, Wholey v. Sears Roebuck, 803 A.2d 482, 501 (Md. 2002) (limiting Maryland's wrongful discharge tort "to circumstances where an employee reports criminal activity to the proper authorities and is discharged as

III.
THE INADEQUACIES OF EXISTING WHISTLEBLOWER LAWS

Hundreds of state and federal statutes have been passed by U.S. legislators determined to promote whistleblowing. In most instances, however, the desired objective has not been realized due to statutory characteristics, judicial interpretations, and the complex nature of the interaction among whistleblower claims. In this Part, we discuss these shortcomings in detail.

A. *Impact on Likelihood of Disclosure and Incidence of Retaliation*

Media coverage of high-profile whistleblowers[83] and popular movies, such as *Silkwood*[84] and *The Insider*,[85] have dramatized the experiences of whistleblowers. The case of Jeffrey Wigand, profiled in *The Insider*, is illustrative. Wigand lost his job, his wife, and his home after reporting wrongdoing at Brown & Williamson Tobacco Corporation.[86] A thinly disguised story of Wigand's battle with the tobacco industry was also featured on an episode of Feds.[87] News reports and films such as these may have contributed to the societal perception that most whistleblowers suffer devastating consequences. The majority of whistleblowers, however, do not suffer severe retaliation,[88] although some sort of reprisal, such as ostracism, reas-

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a result of this reporting"); Henry v. City of Detroit, 594 N.W.2d 107, 113 (Mich. Ct. App. 1999), *cert. denied*, 606 N.W.2d 24 (1999); Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 508-10 (N.J. 1980); Geary v. U.S. Steel Corp., 319 A.2d 174, 183-84 (Pa. 1974) (Roberts, J., dissenting) (exception inapplicable in the absence of a clear violation of identifiable public policy).

83. *See, e.g.*, *supra* notes 17-21 and accompanying text.

84. SILKWOOD (20th Century Fox 1983).

85. THE INSIDER (Touchstone Pictures 1999).

86. *See* Richard Cohen, *Op-Ed, Dirty Business*, WASH. POST, Oct. 28, 1999, at A33; Alix M. Freedman & Suin L. Hwang, *Leaders of the Pact*, WALL ST. J., July 11, 1997, at A1, A8; *see also* Terry Morehead Dworkin & Elletta Sangrey Callahan, *Buying Silence*, 36 AM. . BUS. L.J. 151, 151-52 (1998).

87. *See* Ann Conway, *Smoke Signals*, L.A. TIMES, Aug. 4, 2002, at 2.

88. Callahan & Dworkin, *supra* note 10, at 362 n.26.

signment, or a reduction in benefits, is fairly common.[89] Retaliation may have increased among federal employees.[90]

Similarly, the presumption that protection from retaliation will spur whistleblowing is intuitively attractive.[91] There is no evidence, however, that state anti-retaliation statutes have increased disclosures or reduced reprisals.[92] Two studies of the earliest-enacted state statutes found that these measures had no impact on the number of lawsuits filed alleging employer retaliation for whistleblowing.[93] Further, in states that recognize a public policy exception to the at-will employment rule,[94] whistleblowers who experience reprisals are more likely to file claims based on violations of common law than applicable statutes.[95]

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89. Janet P. Near & Marcia P. Miceli, *Whistle-Blowing: Myth and Reality*, 22 J. MGMT. 507 (1996).

90. Marcia P. Miceli et al., Can Laws Protect Whistle-Blowers?: Results of a Naturally Occurring Field Experiment, 26 WORK & OCCUPATIONS 129 (1999).

91. This is the basic assumption behind much state legislation. *See, e.g.*, COLO. REV. STAT. § 24-50.5-101 (2008); RALPH NADER ET AL., WHISTLE BLOWING: THE REPORT OF THE CONFERENCE ON PROFESSIONAL RESPONSIBILITY (1972); Dworkin & Callahan, *supra* note 10, at 361-362; Miceli et al., *supra* note 90, at 130. *See generally* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67 (2006) ("Interpreting [Title VII's] antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends.").

92. Research measuring legislators' success in curtailing wrongdoing via whistleblowing laws suggests that anti-retaliation measures are relatively ineffective in this regard. MARCIA P. MICELI, ET. AL., WHISTLE-BLOWING IN ORGANIZATIONS 161 (2008).

93. Terry Morehead Dworkin & Janet P. Near, *Whistleblowing Statutes: Are They Working?*, 25 AM. BUS. L.J. 241 (1987); Near & Dworkin, *supra* note 66, at 1552.

94. Callahan & Dworkin, *supra* note 24, at 132-75.

95. *Id.* at 119. Some states, however, have interpreted their statutes as preempting common law claims. *See, e.g.*, Burnham v. Karl & Gelb, P.C., 745 A.2d 178, 183 (Conn. 2000); DeBarboza v. Cablevision of Bos., Inc., No. 98-4244-E, 1999 WL 65489, at *2-3 (Mass. Super. Ct. Jan. 29, 1999); Covell v. Spengler, 366 N.W.2d 76, 82-83 (Mich. Ct. App. 1985). Some state courts have also required plaintiffs to exhaust statutory administrative remedies before pursuing common law claims. *See, e.g.*, Pratt v. Brown Mach. Co., 855 F.2d 1225, 1237 (6th Cir. 1988) (applying Michigan law); Purvis v. Williams, 73 P.3d 740, 752 (Kan. 2003). Many state statutes allow less compensation and impose shorter statutes of limitations than common law-based whistleblower claims. Dworkin, *supra* note 44, at 244-45; Dworkin & Near, *supra* note 93, at 260-63.

At the federal level, the original Whistleblower Protection Act (WPA),[96] which established an independent special counsel to protect whistleblowers from retaliation and provided other procedural incentives,[97] appears to have led to increased reporting by U.S. government employees. Data gathered in studies conducted before and after the WPA's enactment[98] indicate that only thirty percent of federal employees who observed wrongdoing blew the whistle in 1980,[99] while fifty-one percent did so in 1992.[100] Even with these strides in reporting workplace wrongdoing, however, nearly half of the respondents protected by the WPA did not report observed malfeasance.[101] Further, the proportion of whistleblowers who experienced retaliation more than doubled during this period,[102]

96. 5 U.S.C. § 1201 (2012). The WPA was passed as an amendment to the Civil Service Reform Act, 5 U.S.C. § 2302 (2012).

97. The additional incentives include allowing employees to pursue their own cases against the retaliating agency if the Office of Special Counsel (OSC) refuses to take their case to the Merit Systems Protection Board, easing the required burden of proof for employees to prove they were harassed due to their whistleblowing, and preventing the OSC from responding to inquiries from prospective employers about employees who have sought its help. 5 U.S.C. § 1214 (2011).

98. *See* U.S. MERIT SYS. PROT. BD., A REPORT TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES, WHISTLEBLOWING IN THE FEDERAL GOVERNMENT: AN UPDATE (1993); U.S. MERIT SYS. PROT. BD., OFFICE OF MERIT SYS. REVIEW & STUDIES, BLOWING THE WHISTLE IN THE FEDERAL GOVERNMENT: A COMPARATIVE ANALYSIS OF 1980 AND 1983 SURVEY FINDINGS (1984); U. S. MERIT SYS. PROT. BD., OFFICE OF MERIT SYS. REVIEW & STUDIES, WHISTLEBLOWING AND THE FEDERAL EMPLOYEE (1981).

99. Marcia P. Miceli & Janet P. Near, *The Incidence of Wrongdoing, Whistle-Blowing, and Retaliation: Results of a Naturally Occurring Field Experiment*, 2 EMP. RESP. & RTS. J. 91, 100 (1989).

100. Miceli et al., *supra* note 90, at 142. The authors analyzed data collected in 1980, 1983, and 1992 by the Merit Systems Protection Board from several thousand federal employees of twenty-two agencies. *Id.* at 131.

101. This is consistent with other studies. In a 1997 study of responses from 3,288 civil and military members of a large U.S. military base, thirty-one percent of the respondents who had observed wrongdoing did not report it. Marcia P. Miceli & Janet P. Near, *Standing Up or Standing By: What Predicts Blowing the Whistle on Organizational Wrongdoing?*, 24 RES. IN PERSONNEL & HUM. RESOURCES MGMT. 95, 103 (2005). *See also* Marcia P. Miceli et al., *Blowing the Whistle on Data-Fudging: A Controlled Field Experiment*, 21 J. APPLIED SOC. PSYCHOL. 1 (1991).

102. Miceli et al., *supra* note 90, at 144. Retaliation rose from seventeen percent in 1980 to thirty-eight percent in 1992. *Id.* at 142. Although fear of retaliation may not be critical to a decision against disclosure, whistleblowing

and there was a significant increase in anonymous disclosures.[103] Thus, the existence of a cause and effect relationship between legal recourse for whistleblowers who experience retaliation and increased reporting is far from clear.

Research indicating that organizational characteristics and the relative significance of the alleged wrongdoing, rather than protection from retaliation, inform the decision to report illuminates analyses of the effects of anti-retaliation legislation on the incidence of whistleblowing.[104] In one large-scale study

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poses actual hazards to the discloser. Callahan & Dworkin, *supra* note 7, at 324-25; Nancy R. Hauserman, *Whistle-Blowing: Individual Morality in a Corporate Society*, 29 BUS. HORIZONS 4, 9 (1986); Janet P. Near et al., *When do Employees Blow the Whistle? Situational Predictors of Whistle-blowing Behavior* (2000) (manuscript at 3, on file with authors). Whistleblowers experience organizational reprisals, such as demotion and discharge, as well as industry and community ostracization. Callahan & Dworkin, *supra* note 7, at 324-25. *See generally* Near & Miceli, *supra* note 89, at 518-19. A recent KPMG survey of 2300 employees reported that sixty-one percent of observers of corporate wrongdoing in the last twelve months thought management would not administer impartial discipline. *See A Special Background Report on Trends in Industry and Finance*, WALL ST. J., May 11, 2000, at A1. This does not necessarily translate into fear of retaliation, but may provide one explanation for some observers' reluctance to report.

Several potential rationales for retaliation have been identified. See MICELI & NEAR, *supra* note 3, at 9-10. Retaliation is relatively likely where the organization is heavily invested in continuing the targeted activity. *See* Barry M. Staw et al., *Threat-Rigidity Effects in Organizational Behavior: A Multilevel Analysis*, 26 ADMIN. SCI. Q. 501 (1981). Management may perceive the report as an instance of insubordination, *see* MICELI & NEAR, *supra* note 3, at 9, or confuse the organizational problem with the employee who raises the issue. *See generally* Melissa S. Baucus & Terry Morehead Dworkin, *Wrongful Firing in Violation of Public Policy*, 23 GROUP & ORG. MGMT. 347 (1998); Barry M. Staw, *Rationality and Justification in Organizational Life*, 2 RES. ORG. BEHAV. 45 (1980).

103. Miceli et al., *supra* note 90, at 142. Incidences of identified whistleblowing fell from seventy-four percent in 1980 to fifty-five percent in 1992. *Id.* For a discussion on the drawbacks associated with anonymous reports, *see infra* notes 273-75 and accompanying text.

104. *Time's* whistleblowers featured as "People of the Year" did not report fear of retaliation as important in deciding to come forward with their information. *See* TIME, *supra* note 25. The lack of attention to potentially helpful social science research is not unique to this context. *See, e.g.*, Susan J. Stabile, *Motivating Executives: Does Performance-Based Compensation Positively Affect Managerial Performance?*, 2 U. PA. J. LAB. & EMP. L. 227, 232-33 (1999) ("A fundamental problem with the drive toward using contingent compensation as a means of motivating executives is that neither the boards of directors, who design compensation packages, nor the government agencies, who have

of whistleblowing, for instance, researchers investigated the differences between observers of wrongdoing who blew the whistle and those who did not choose to report.[105] Three key factors motivated observers who decided to blow the whistle: confidence that the report would effectively address the misconduct at issue; belief that the organization supported whistleblowing, in general; and the seriousness of the malfeasance.[106] Whistleblowers are also motivated by the desire to put "their" organization back on the right track.[107] The literature further suggests that longer organizational tenure[108] and higher job satisfaction[109] are associated with whistleblowing.

Experience with statutes providing financial incentives to whistleblowers, in contrast, strongly suggests that this approach, in contrast to protection from retaliation, spurs disclosures. This effect was first observed in response to 1986 revisions to the FCA.[110] Congress amended the statute to increase significantly the likelihood that a successful whistleblower would receive a large monetary award based on the whistleblowing disclosure.[111] Thereafter, most FCA whistleblowers in settled cases have recovered more than one million dollars[112] and many receive significantly greater

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adopted rules to encourage the use of performance-based compensation, have considered the social science literature discussing motivation and the extent to which external incentives, such as money, affect managerial behavior.").

105. *See generally* JANET P. NEAR ET AL., ENHANCING WHISTLE-BLOWING EFFECTIVENESS: WHAT REALLY WORKS (2001) (on file with authors).

106. *Id.* at 26-27.

107. Miceli & Near, *supra* note 99, at 103-05. The whistleblowers featured as *Time*'s "People of the Year" relate similar motives. *See* TIME, *supra* note 25.

108. *See generally* Terry Morehead Dworkin & Janet P. Near, *Whistleblower Statutes & Reality: Is There a Need for Realignment?*, 1990 PROC. PAC. S.W. BUS. L. ASS'N 73; Marcia P. Miceli & Janet P. Near, *The Relationships Among Beliefs, Organizational Position, and Whistle-Blowing Status: A Discriminant Analysis*, 27 ACAD. MGMT. J. 687, 701 (1984).

109. Near et al., *supra* note 102, at 23.

110. 31 U.S.C. § 3729 (2006), *amended by* Pub. L. No. 111-21, § 4(a), 123 Stat. 1617, 1621-23 (2009).

111. *See* Callahan & Dworkin, *supra* note 7, for a discussion of the revisions and their likely impact.

112. Even a decade and a half ago, the average award was $1.005 million. *Qui Tam Statistics: 1997 Year in Review*, 12 FALSE CLAIMS ACT & QUI TAM Q. REV. 15 (1998).

amounts.[113] The number of FCA-based reports of false claims for government funds increased from an average of six per year, pre-revisions,[114] to 450 in 1998,[115] and to almost two per day in 1999.[116] As of September 2012, U.S. Department of Justice statistics show that there have been more than $35 billion in total *qui tam* and non-*qui tam* settlements and judgments, as well as more than $3.8 billion in payments to FCA whistleblowers since the 1986 amendments.[117] The explosion of FCA suits strongly supports the conclusion that the availability of monetary awards promotes whistleblowing.[118]

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113. *Qui Tam Statistics: October 1, 1986 – September 20, 2001*, 2, 6 FALSE CLAIMS ACT & QUI TAM Q. REV. 1241 (2002). They report that relators have recovered $808,503,709 as their share of government recoveries from October 1, 1986 to September 20, 2001, plus hundreds of millions more recovered in subsection (h) and other personal claims. In *U.S. ex rel Harper v. Quorum Health Grp., No. CV-98-tmp-3218-M* (N.D. Ala. 2002), for instance, the three relators split their share of the $428,343 that Triad Hospitals of Dallas agreed to pay in settlement of the qui tam suit the relators had filed. *Judgments and Settlements*, 26 FALSE CLAIMS ACT & QUI TAM Q. REV. 14 (2002).

114. Steve France, *The Private War on Pentagon Fraud*, A.B.A. J., Mar. 1990, at 46, 48.

115. Bruce Japsen, *The Secret Inside the Box*, CHI. TRIB., July 18, 1998, at A1 (citing the Office of Special Counsel).

116. Aronson, *supra* note 22, at A12 (citing Joyce Branda, Department of Justice prosecutor and Deputy Director of the Department's Civil Fraud Section). To date, there have been no studies of FCA whistleblowers' motives. Financial incentives may be sufficient to offset the perceived risks of disclosure for observers of wrongdoing who make a cost-benefit assessment whether to blow the whistle. *See* Callahan & Dworkin, *supra* note 7, at 324-25. Rewards may also nudge those who are wavering for other reasons. *See id.* at 328-32; Near et al., *supra* note 102, at 6.

117. *See Fraud Statistics-Overview, October 1, 1987 - September 30, 2012*, TAXPAYERS AGAINST FRAUD, *available at* http://taf.org/DoJ-FCA-statistics-2012.pdf (last visited Dec. 26, 2013). For additional annual data on FCA recoveries, see TAXPAYERS AGAINST FRAUD, *supra* note 24.

118. These data also show that the amount of funds recovered through *qui tam* actions has outpaced non-*qui tam* cases by 150% during the same period, lending support to the case for the efficacy of citizen reports to law enforcement. *See* TAXPAYERS AGAINST FRAUD, *supra* note 117. The FCA was amended again by the Fraud Enforcement and Recovery Act of 2009 ("FERA"), Pub. L. No. 111-21, 123 Stat. 1617 (2009). Section 4 of the FERA, titled "Clarifications to the False Claims Act to Reflect the Original Intent of the Law," adopts the WPA's anti-retaliation policy. *Id.* § 4(d), 123 Stat. at 1624-25. The FERA extends the FCA's application beyond for-profit contracts, now encompassing any "grant, contract, subcontract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." *Id.* § 2(d), 123 Stat. at 1618. The FERA also raises the stakes by making available various stronger forms

In 2010, the Dodd-Frank Act added a ten to thirty percent reward for original information that leads to monetary sanction under *any* securities law to the anti-retaliation provisions in SOX.[119] Indeed, the history of Dodd-Frank demonstrates that the minimum reward provision was a critical component of the bill.[120] Although Congress did not provide for a *qui tam* action under this adjunct statute, the potential for financial reward remains significant. Moreover, Congress authorized a study[121] of this legislation to insure the process, including the payment of the award, is "clearly defined and user-friendly" such that it will encourage whistleblowing.[122] The first SEC report on Dodd-Frank's impact announced the first Dodd-Frank whistleblower award[123] and revealed that the Commission had received 3,001 whistleblower tips in the 2012 fiscal year, which came from all fifty states, Washington, D.C., Puerto Rico, and 49 other countries.[124] As former SEC Chairman Mary Schapiro observed, "[i]n just its first year, the whistleblower program already has proven to be a valuable tool in helping us ferret out financial fraud."[125]

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of relief. For instance, in addition to reinstatement in their position with the employer, wronged whistleblowers are entitled to twice their back pay with interest, plus special damages, costs and attorneys' fees. *Id.* § 4(d), 123 Stat. at 1624-25.

119. *See supra* note 59 and accompanying text.

120. U.S. SEC. & EXCH. COMM'N, ASSESSMENT OF THE SEC'S BOUNTY PROGRAM iii (Mar. 29, 2010), *available at* http://www.sec-oig.gov/Reports/AuditsInspections/2010/474.pdf.

121. U.S. SEC. & EXCH. COMM'N, *Office of Inspector General, Report No. 511, Evaluation of the SEC's Whistleblower Program* (Jan. 18. 2013), *available at* http://www.sec-oig.gov/Reports/AuditsInspections/2013/511.pdf (last viewed Dec. 26, 2013)(discussing the whistleblower reward program process and providing feedback on congressional questions on the Dodd-Frank Act provisions and SEC rules).

122. Dodd-Frank Act, *supra* note 17, at § 922.

123. U.S. SEC. & EXCH. COMM'N, Press Release, SEC Issues First Whistleblower Program Award, Aug. 21, 2012, *available at* http://www.sec.gov/news/press/2012/2012-162.htm (last viewed Dec. 26, 2013).

124. U.S. SEC. & EXCH. COMM'N, ANNUAL REPORT ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, FISCAL YEAR 2012 (Nov. 2012), at 4.

125. U.S. SEC. & EXCH. COMM'N, Press Release, *SEC Receives More Than 3,000 Whistleblower Tips in FY2012*, Nov. 15, 2012, *available at* http://www.sec.gov/news/press/2012/2012-229.htm (last viewed Dec. 26, 2013). Schapiro also commented on the benefits to law enforcement derived from whistleblowing: "When insiders provide us with high-quality road maps of

The success of the FCA also led states to adopt legislation that provides for a *qui tam* action or comparable financial rewards.[126] A majority of US states have enacted some form of *qui tam* statute,[127] while other states have enacted statutes that provide other financial rewards without *qui tam* procedures. However, a few states have rejected the financial incentives model. Indeed, Pennsylvania,[128] West Virginia,[129] and Wisconsin[130] explicitly withhold anti-retaliation protection from whistleblowers who act out of a desire for personal gain or benefit. One explanation may be that many of the state anti-retaliation statutes were passed before the effectiveness of the FCA and Dodd-Frank Act was evident.[131] Further, legislators often seem ambivalent about rewarding "tattle-tales."[132] Some commentators, as well, have derisively referred to rewards paid to whistleblowers as "bounties" that may encourage

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fraudulent wrongdoing, it reduces the length of time we spend investigating and saves the agency substantial resources." *Id.*

126. *See* Terry Morehead Dworkin & A.J. Brown, *The Money or the Media? Lessons from Contrasting Developments in US and Australian Whistleblowing Laws*, 11 SEATTLE J. SOCIAL JUSTICE 653, 669 (2013).

127. *See* the state and local statutes discussed, *supra* note 74; *see also* Coalition Against Insurance Fraud, State Legislation, *available at* http://www.insurancefraud.org/state_legislation.lasso (last visited Dec. 26, 2013) (noting the status of recently-introduced state false claims and other legislation).

Federal and state false claims acts providing significant financial incentives to whistleblowers should be distinguished from statutes offering much smaller rewards. Under South Carolina law, for example, a public employee who reports the violation of state or federal law or regulation by another public employee may recover twenty-five percent of the savings resulting from the disclosure in the first year, up to a maximum of $2,000. S.C. CODE ANN. § 8-27-20(B) (2012); *see also* 740 ILL. COMP. STAT. 175/1/8 (2012); WIS. STAT. ANN. § 230.83(2) (West 2011). The amounts available in these cases are so small that they are unlikely to have any impact on the incidence of whistleblowing. *See* Callahan & Dworkin, *supra* note 7, at 278-79. There are also federal statutes that provide for rewards to anyone "who provides original information which leads to the recovery of a criminal fine, restitution, or civil penalty." Financial Institutions Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. § 1831k (2012).

128. *See* 43 PA. CONS. STAT. § 1422 (2012).

129. W. VA. CODE § 6C-1-2(d) (2012).

130. WIS. STAT. ANN. § 230.83(2) (West 2011) (reward possible if offered by the government for the purpose of obtaining information to improve state administration or operations).

131. Dworkin, *supra* note 44, at 260-73 (listing state anti-retaliation statutes, their dates of passage, and relevant characteristics).

132. Callahan & Dworkin, *supra* note 7, at 319 n.183.

whistleblowers to report wrongdoing externally, rather than within the organization, to maximize personal reward.[133] Most critically, perhaps, it is difficult to devise a reward scheme in the absence of a related payment source, such as fines or reclaimed funds.

B. *Piecemeal Approach to Coverage*

Although every state has some form of whistleblower protection statute, many whistleblowers simply remain unprotected.[134] There is little uniformity among the states regarding who is protected or what kind of whistleblowing activity is protected, often varying based on the employee's status as a public or private sector employee,[135] as a non-employee whistleblower, or as working in a limited, narrowly-defined industry. This piecemeal approach leads to confusion, a failure of expected protection, and often, excessive litigation.

1. *Public Versus Private Employees as Whistleblowers*

Perhaps the biggest gap in whistleblower protection is that many states protect only government employees.[136] When consumer advocate Ralph Nader initiated public debate about whistleblowing in the early 1970s, he envisioned it as a way to control governmental malfeasance.[137] The focus on public employees in state whistleblowing laws suggests that many legislators continue to take this perspective. Most states offer general whistleblower protection to public employees (or, in a few cases, public employees and employees of public contractors),[138] while fewer than half offer the same protection to pri-

133. *See, e.g.*, Jean Eaglesham & Ashby Jones, *Whistleblower Bounties Pose Challenges*, WALL. ST. J., Dec. 13, 2010, at C1 ("Some companies have expressed concern that the rewards being offered by the SEC and CFTC will discourage whistleblowers from taking their concerns to employers first. Some whistleblower advocates assert that the system's proposed checks and balances will cause some tipsters to stay quiet.").

134. Callahan & Dworkin, *supra* note 24, at app. A.

135. Approximately one-third of the state statutes protect both public and private whistleblowing. Elletta Sangrey Callahan & Terry Morehead Dworkin, *Who Blows the Whistle to the Media, and Why: Organizational Characteristics of Media Whistleblowers*, 32 AM. BUS. L.J. 151, 180-84 (1994).

136. Callahan & Dworkin, *supra* note 24, at tbl. I and app. A.

137. NADER ET AL., *supra* note 91.

138. *See, e.g.*, FLA. STAT. ANN. § 112.3187 (West 2010); IND. CODE ANN. § 22-5-3-3 (West 2012).

vate employees.[139] The types of malfeasance included within protected whistleblowing are also generally broader for public employees than for private employees.[140] For instance, the FERA, in addition to covering those who make false claims for reimbursement under federal programs, also covers "anyone . . . [who] buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property."[141] This reflects the legislative viewpoint that society has a more significant interest and stake in misconduct in governmental agencies than in the private sector.[142]

2. *Non-Employees as Whistleblowers*

Most whistleblowers are current employees of the organization against which their claims are directed. Nonetheless, an ex-employee, a job applicant, or another non-employee may benefit the public interest by reporting organizational wrongdoing. When non-employee whistleblowers suffer retaliation,

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139. Callahan & Dworkin, *supra* note 24, at 111, tbl 1.

140. Contrast, for example, Alaska's and Arizona's statutes, which protect only public employees, with California's and Hawaii's, which protect public and private employees. *Compare* ALASKA STAT. § 39.90.110 (2012) (public officers and employees are entitled to whistleblower protection if it is a matter for public concern), *and* ARIZ. REV. STAT. ANN. § 38-532 (2011) (a violation of any law, mismanagement, gross waste of money or an abuse of authority), *with* CAL. LAB. CODE § 1102.5 (West 2012) (a violation or noncompliance with a state or federal statute or regulation), *and* HAW. REV. STAT. § 378-62 (2011) (a violation or suspected violation of a state, local, or federal law or rule). A similar approach, on an intrastate basis, is manifest in Connecticut's statutes. *See* CONN. GEN. STAT. § 31-51m (2010) (private: violation or suspected violation of a state or federal law, rule or regulation; and public: corruption, unethical practices, violation of state law or regulation, mismanagement, abuse of authority).

141. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(a)(1), 123 Stat. 1621-22 (2012).

142. Callahan & Dworkin, *supra* note 24, at 111.

they often have difficulty obtaining recourse[143] because most statutes speak in terms of "employees."[144]

At the federal level, any "person" may seek an FCA reward, and former employees may be given redress under the statute.[145] In a related context, the Supreme Court has held that Title VII's[146] prohibition on employment discrimination applies to discharged employees who receive negative letters of recommendation.[147] This more expansive approach is consistent with both the objectives of whistleblowing laws and the definition of whistleblowing most frequently used in the social psychology literature,[148] which includes disclosures by current and former organization members.[149]

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143. *See, e.g.*, Beck v. Tribert, 711 A.2d 951, 957 (N.J. Super. Ct. App. Div. 1998). FCA anti-retaliation provisions have been held inapplicable to independent contractors. *See* Vessell v. DPS Assocs. of Charleston, Inc., 148 F.3d 407, 411 (4th Cir. 1998).

144. Dworkin, *supra* note 44, at 260-73 (indicating, in column 2, what types of employees are covered under various state anti-relation statutes); *see, e.g.*, DiCentes v. Michaud, 719 A.2d 509, 515 (Me. 1998) (holding that refusal to give a letter of recommendation is not covered by the statute); Zubrycky v. ASA Apple, Inc., 885 A.2d 449, 452 (N.J. Super. Ct. App. Div. 2005) (holding that the Conscientious Employee Protection Act (CEPA) does not protect plaintiffs from defendant's post-employment conduct). *But see* MD. CODE ANN., STATE PERS. & PENS. § 5-301 (LexisNexis 2012) (Maryland law extending whistleblower protection to job applicants for positions in the executive branch of state government).

145. The FCA states that "[a] person may bring a civil action" based on a false claim. 31 U.S.C. § 3730(b)(1) (2006). The FCA anti-retaliation provision, however, protects "employees." *See* 31 U.S.C. § 3730(h); *see also* Greer-Burger v. Temesi, 879 N.E.2d 174, 180 n.2 (Ohio 2007) (holding that because the state statute used the term "person" rather than "employee," a former employee still had a cause of action for antidiscrimination).

146. 42 U.S.C. § 2000e-3(a) (2012).

147. Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997). The Court held that the term "employee" is ambiguous, but allowing former employees to sue is consistent with the statute's purposes. *Id.* at 345-46; *see also* Nancy Montwieler, *EEOC Identifies Wide Scope of Coverage for Protection from Civil Rights Retaliation*, 66 U.S. L. WK. 2736, 2737 (1998).

148. *See* Michael Rehg, *An Examination of the Retaliation Process Against Whistleblowers: A Study of Federal Government Employees* 1, 2 (1998) (unpublished Ph.D. dissertation, Indiana University (Bloomington)) (on file with authors).

149. The definition was first articulated by Janet P. Near & Marcia P. Miceli. *See supra* note 27.

3. *Specified Industries and Occupations*

In addition, most state laws providing anti-retaliation protection to whistleblowers are narrowly-focused.[150] Typically, these provisions are intended to enhance the enforcement of a measure regulating the activities of an industry[151] or to encourage whistleblowing by members of a specific profession.[152] Many states' occupational safety and health acts, for example, include a provision protecting employees who report Occupational Safety and Health Act violations.[153] Another common measure focuses on elder care workers.[154]

It is praiseworthy and important to insert an anti-retaliation provision in a remedial statute or seek to encourage whistleblowing among persons employed in specific, high-impact occupations. The rationale behind fractured coverage of the resulting legislative scheme, however, may nonetheless be questionable. Some jurisdictions will protect a whistleblower who reports violations of state and municipal law,[155] but not cover those who report federal law violations. It is also problematic for state legislation to protect some workers but not others, based upon arbitrary distinctions. For example, under Kentucky law, firefighters who allege state labor law violations are explicitly protected, but police officers are not.[156]

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150. *See* Callahan & Dworkin, *supra* note 24, tbl. III.

151. *See, e.g.*, CAL. FIN. CODE § 6530 (West 2012); CAL. HEALTH & SAFETY CODE § 1539 (West 2012); CAL. WELF. & INST. CODE § 9715 (West 2012); FLA. STAT. § 651.111 (2012); HAW. REV. STAT. § 378-2 (2012); IDAHO CODE ANN. § 67-5009 (2012); 20 ILL. COMP. STAT. 105/4.04 (2012); IND. CODE § 12-10-3-11 (2012); KY. REV. STAT. ANN. § 216.541 (West 2012).

152. *See, e.g.*, ALASKA STAT. § 47.33.350 (2012); ARIZ. REV. STAT. ANN. § 41-1492.10 (2012); CONN. GEN. STAT. § 10-153e (2012); CONN. GEN. STAT. § 19a-532 (2012); R.I. GEN. LAWS § 27-18-45 (2012); R.I. GEN. LAWS § 27-20-32 (2012); TEX. AGRIC. CODE ANN. § 125.013 (West 2011).

153. *See, e.g.*, ALASKA STAT. § 18.60.089 (2012); ARIZ. REV. STAT. ANN. § 23-425 (2012); CAL. LAB. CODE § 6310 (West 2012); CONN. GEN. STAT. § 31-379 (2012); HAW. REV. STAT. § 396-8 (2012); 820 ILL. COMP. STAT. 220/2.2 (2012); KY. REV. STAT. ANN. § 338.121 (West 2012); ME. REV. STAT. ANN. tit. 26, § 570 (2012); MD. CODE ANN., LAB. & EMPL. § 5-604 (West 2012).

154. *See, e.g.*, CAL. WELF. & INST. CODE § 9715 (West 2012); HAW. REV. STAT. § 349-23 (2012); 20 ILL. COMP. STAT. ANN. 105/4.04 (West 2012); IND. CODE § 12-10-3-11 (2012); KAN. STAT. ANN. § 39-1403 (2012); N.H. REV. STAT. ANN. § 161-F:15 (2012); N.J. STAT. ANN. § 52:27G-14 (West 2012).

155. *See, e.g.*, ALA. CODE § 36-26A-3 (2012).

156. *See* KY. REV. STAT. ANN. § 345.050 (West 2012).

Nearly all states decline to protect whistleblowers who expose violations of professional codes of ethics, which is another limitation related to occupation.[157] Generally, such codes have not been interpreted to fall within the categories of "law, rule, or regulation" covered by the typical statute.[158] Nor do these codes tend to constitute sufficiently "public" policy to support application of an exception to the traditional at-will employment rule.[159] As some commentators have pointed out, this position is ill-advised: "[t]o the extent that industries [or occupations] are self-policing and self-correcting, societal resources need not be directed toward controlling organizations."[160]

Further, when viewed against the backdrop of state legislative schemes isolating narrow employee groups for whistleblower protection,[161] the refusal to give effect to ethical codes illustrates another arguably anomalous outcome of the piecemeal approach. The belief that there are some settings in which whistleblowers deserve special encouragement, presumably because of an enhanced risk of societal harm from wrongdoing, is implicit in the adoption of adjunct statutes. The same rationale underlying whistleblower statutes—the need to ensure protection to society because of the likelihood that misconduct will cause serious harm—underlies professional codes.[162] Moreover, there is widespread public recognition of

157. *But see* CONN. GEN. STAT. § 31-51m (2010) (applicable to unethical practices); 43 PA. STAT. ANN. § 1422 (West 2010) (defining "wrongdoing" to include non-trivial violations of "a code of conduct or ethics designed to protect the interest of the public or the employer"); W. VA. CODE § 6C-1-2 (2010) (same)

158. *See, e.g.*, Henry v. City of Detroit, 594 N.W.2d 107, 110-11 (Mich. Ct. App. 1999), *cert. denied*, 606 N.W.2d 24 (1999); Bohatch v. Butler & Binion, 977 S.W.2d 543, 547 (Tex. 1998); *see also* Dworkin, *supra* note 44, at 260-73 (indicating, in column 3, which violations are covered under various anti-retaliation statutes).

159. *But see* Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 512 (N.J. 1980).

160. MICELI & NEAR, *supra* note 3, at 14.

161. *See, e.g.*, ALASKA STAT. § 42.40.760 (2012); CAL. GOV'T CODE § 8547.10 (West 2012); ME. REV. STAT. ANN. tit. 26, § 1027 (2012); MICH. COMP. LAWS § 750.145p (2012);MINN. STAT. § 626.556 (2012).

162. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT Preamble ¶¶ 1, 9-10, 12 (2011). Although the Model Rules are not designed to provide a basis for a cause of action against an attorney, this does not prevent their use as a statement of public policy. *Id.* at ¶ 20. *See, e.g.*, State v. Ford, 24 So. 3d 249, 252-53 n.3 (La. Ct. App. 2009) (holding that Louisiana's Rules of Professional Con-

and support for strict standards of conduct in professions such as medicine,[163] law,[164] and accounting.[165]

C. *Illogical Prerequisites to Coverage*

Procedural and substantive prerequisites to the application of whistleblower laws may lead to uncertainty among potential plaintiffs and denial of coverage. Where these outcomes prevent exposing and deterring wrongdoing, they conflict with the fundamental goals of whistleblowing law.

1. *Actual Violation Versus Reasonable Belief*

Several courts have addressed the issue whether a mistaken belief that wrongdoing has occurred will support application of state whistleblower protection laws. Typically, the outcome turns on whether the whistleblower's mistaken view was reasonably held.[166] A majority of jurisdictions hold that an actual violation of law or regulation is not a prerequisite to recovery.[167]

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duct "have the force and effect of substantive law"); Post v. Bregman, 707 A.2d 806, 816 (Md. 1998) (observing, in a case in which another's violation of Maryland's Rules of Professional Conduct was used as a defense by an attorney in a breach of contract claim, that "[u]nquestionably, so thorough a regulation of an occupation and professional calling, the integrity of which is vital to nearly every other institution and endeavor of our society, constitutes an expression of public policy having the force of law").

163. *See* AM. MED. ASS'N, CODE OF MED. ETHICS (2010-11), *available at* http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics.shtml.

164. *See* MODEL CODE OF PROF'L RESPONSIBILITY Preliminary Statement (1983) (The Code's canons, ethical considerations, and disciplinary rules "define the type of ethical conduct that the public has a right to expect . . . of lawyers."). The American Bar Association's Model Rules have been adopted by a large majority of states. *See* Rachel S. Arnow Richman, *A Cause Worth Quitting For? The Conflict Between Professional Ethics and Individual Rights in Discriminatory Treatment of Corporate Counsel*, 75 IND. L.J. 963, 966 n.22 (2000).

165. *See* AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, CODE OF PROF'L CONDUCT (2010), *available at* http://www.aicpa.org/about/code/sec50.htm.

166. *See, e.g.*, Blackburn v. United Parcel Serv., Inc., 179 F.3d 81, 92 (3d Cir. 1999); Figueroa v. City of Camden, 580 F. Supp. 2d 390, 407 (D.N.J. 2008); Karch v. BayBank FSB, 794 A.2d 763, 775 (N.H. 2002); Kolb v. Burns, 727 A.2d 525, 530-31 (N.J. Super. Ct. App. Div. 1999).

167. *See, e.g.*, Green v. Ralee Eng'g Co., 960 P.2d 1046, 1059 (Cal. 1998); Obst v. Microtron, Inc., 614 N.W.2d 196, 200 (Minn. 2000); Hedglin v. City

The New Hampshire statute, which provides a typical illustration, protects from retaliation an employee who discloses "in good faith" conduct that he or she "has reasonable cause to believe" violates a law or regulation.[168] Based on this language, the New Hampshire Supreme Court concluded that the anti-retaliation law "does not require an actual violation, but only that the employee's belief that the law was violated was objectively reasonable."[169]

A handful of states use a different approach—denying protection or financial recovery to employees whose assertions are insufficiently investigated or ill-founded—to reach the same result as those requiring good faith. In Kansas, for example, a public employee who discloses information the "employee knows to be false or which the employee discloses with reckless disregard for its truth or falsity" may be lawfully discharged.[170] Similarly, a Colorado law exempts from its coverage employees who knowingly or recklessly disclose false information.[171] Courts in Colorado have given this language the effect of a good faith requirement.[172]

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of Willmar, 582 N.W.2d 897, 901-02 (Minn. 1998); Dzwonar v. McDevitt, 828 A.2d 893, 900 (N.J. 2003).

168. N.H. REV. STAT. ANN. § 275-E:2(I)(a) (2010). *See also, e.g.*, S.C. CODE ANN. § 8-27-20 (2009).

169. *In re* Osram Sylvania, Inc., 706 A.2d 172, 175 (N.H. 1998) (appeal from decision of state Department of Labor). The Minnesota courts, interpreting comparable language, have reached the same conclusion. *See* Hedglin v. City of Willmar, 582 N.W.2d at 897-98. The Ohio statute requires further that the whistleblower's reasonable belief be based upon a "good faith effort to determine the accuracy of any information . . . reported," but has been similarly construed. *See* Fox v. City of Bowling Green, 668 N.E.2d 898, 901 (Ohio 1996). Cf., e.g., Green 960 P.2d at 1065; Allum v. Valley Bank, 970 P.2d 1062, 1067-68 (Nev. 1998) (whistleblower claim based on public policy exception requires proof that disclosure was based on reasonable belief, rather than actual violation of law).

170. KAN. STAT. ANN. § 75-2973(e)(4)(a) (2006) (amended 2010); *see also* Connelly v. State Highway Patrol, 26 P.3d 1246, 1263 (Kan. 2001) (noting that whistleblowing must be done in good faith).

171. *See* COLO. REV. STAT. § 24-50.5-103(1)(a) (2012) (anti-retaliation protection unavailable to "[a]n employee who discloses information that he knows to be false or who discloses information with disregard for the truth or falsity thereof").

172. *See, e.g.*, Lanes v. O'Brien, 746 P.2d 1366, 1373 (Colo. App. 1987); Connelly, 26 P.3d at 1263 (quoting Palmer v. Brown, 752 P.2d 685, 690 (1988)).

The New York courts have established that reasonably held beliefs are insufficient to support application of the state's private sector whistleblowing statute.[173] The decisions have focused on the statute's reference to employer activity

173. In the key case, a health physicist was discharged from his job approximately one month after making a report to the Department of Energy (DOE) "based on his preliminary calculations . . . that [his co-workers] *might have been* exposed to radiation at levels sufficient to trigger the mandatory reporting requirements of [DOE regulations] *if* further factual investigation (which [the employer] prevented him from conducting) corroborated the scientific assumptions underlying the calculations." Bordell v. Gen. Elec. Co., 208 A.D.2d 219, 220 (N.Y. App. Div. 1995) (emphasis in original), *aff'd*, 88 N.Y.2d 869 (1996). *See* Matter of Brigandi v. Fin. Adm'r, 88 N.Y.2d 871, 871 (N.Y. 1996); Bordell, 208 A.D.2d at 221; *see also* Green v. Saratoga A.R.C., 650 N.Y.S.2d 441, 442 (N.Y. App. Div. 1996); Capobianco v. Am. Stock Exch., 649 N.Y.S.2d 688, 688-89 (N.Y. App. Div. 1996). The approach taken in the *Bordell* decisions is consistent with a line of New York cases in which the courts have declined to recognize exceptions to the traditional employment at-will rule, explicitly deferring such action to the legislature. *See, e.g.*, Sabetay v. Sterling Drug, Inc., 69 N.Y.2d 329, 336-37 (N.Y. 1987); Murphy v. Am. Home Prod. Corp., 58 N.Y.2d 293, 301-02 (N.Y. 1983). *See generally* Gary Minda, *The Common Law of Employment-at-Will in New York: The Paralysis of Nineteenth Century Doctrine*, 36 SYRACUSE L. REV. 939 (1985). These authorities, of course, do not compel the restrictive approach taken in Bordell, involving as it does the interpretation of a statute, rather than the common law-based at-will doctrine.

In an unusual case decided in Michigan, the mistaken party was the employer, who believed that the plaintiff had been the source of an anonymous report to a state agency. *See* Chandler v. Schlumberger, 542 N.W.2d 310, 310-11 (Mich. Ct. App. 1995), *aff'd*, 572 N.W.2d 210 (Mich. 1998). Although Chandler had complained internally about the defendant's regulatory noncompliance, he did not contact the government. He was fired, nonetheless, following agency action against his employer. *See id.* at 310-11. The appellate court sought primarily to achieve a result compatible with the purpose of the applicable law, chapter 15, sections 361 through 369 of the Michigan Compiled Laws, i.e., promoting whistleblowing. MICH. COMP. LAWS § 15.361-369 (2005). *See Chandler*, 542 N.W.2d at 314. It reasoned that providing protection for persons who had not made disclosures would not encourage others to make such reports. *See id.* The dissenting judge characterized this perspective as unrealistic:

> The majority . . . suggests that punishing an employer for firing an employee that the employer mistakenly thought had reported a violation of law "could discourage actual reporting." Such a suggestion ignores human nature and the reality of the workplace. If this employer is allowed to fire an employee just because it thought the employee had reported a violation, the message to workers will be clear and wrong. . . . Such a decision will . . . likely cause workers to ask themselves what the Court would allow an employer to do to an

that is "in violation of" law or regulation, noting the absence of language to suggest that something less than an actual violation would be sufficient.[174] Legislative history reinforces this view.[175] This approach represents a harsh outcome for employees whose disclosures are reasonably-based, but still erroneous.[176]

The issue of evidentiary strength is highly relevant to litigation regarding the application of a statute to employees while they are in the process of gathering information about the wrongdoing in order to determine whether to blow the whistle.[177] Accurate whistleblower disclosures benefit the

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employee who actually blew the whistle if it allows the firing of a loyal employee that was wrongly suspected of doing so.

Id. at 317 (Shelton, J., dissenting) (citation omitted).

Whether or not the appellate court's view regarding the impact on employees of a finding for the plaintiff is accurate, it fails to account for the effect on employers of the opposite result: discouraging retaliation. *See id.* at 317-18.

174. *See Bordell*, 208 A.D.2d at 221.

175. Three attempts to add a reasonable belief standard to the private sector whistleblower statute had failed. *Id.* But the public sector statute was modified in this manner. *See id.* at 221-22; Brigandi, 88 N.Y.2d at 871. Thus, the appellate court concluded that "the Legislature's failure to similarly amend [the law covering private sector employees] evidences an intent that it contain no corresponding provision." *Bordell*, 208 A.D.2d at 222.

176. Potential whistleblowers in jurisdictions in which this issue remains unsettled face a treacherous choice. In cases construing California's OSHA anti-retaliation measure, for example, appellate courts have split on the interpretation of language providing recourse for an employee who has made a "bona fide . . . complaint" about safety. Two decisions have held that plaintiffs need demonstrate only that the concerns they expressed about working conditions were made in good faith. *See* Hentzel v. Singer Co., 188 Cal. Rptr. 159, 165 (Cal. Ct. App. 1982); *see also* Cabesuela v. Browning-Ferris Indus., Inc., 80 Cal. Rptr. 2d 60, 63-64 (Cal. Ct. App. 1998) (*superseded by statute as stated in* Francis v. State of Cal., No. C 04-01309 SI, 2004 WL 1792627 (N.D. Ca. 2004) (the point of law superseded involved a California civil rights statute, not whistleblowing)). In a third case, however, the court held that the statute's coverage is limited to instances in which OSHA has actually been violated. See Muller v. Auto. Club, 71 Cal. Rptr. 2d 573, 586-87 (Cal. Ct. App. 1998) (superseded by statute as stated in *Bryan v. United Parcel Serv., Inc.*, 307 F. Supp. 2d 1108, 1113 at *10 (N.D. Ca. 2004) (the point of law superseded involved the Fair Employment and Housing Act, not whistleblowing)). The latter determination was not explained in the opinion, nor was the alternative interpretation acknowledged.

177. *See, e.g.*, Jones v. Bd. of Regents of Univ. Sys. Of Georgia, 585 S.E.2d 138 (Ga. Ct. App. 2003); Rothmeier v. Inv. Advisers, Inc., 556 N.W.2d 590

whistleblower, the organization, and society.[178] Indeed, a few laws require the whistleblower to satisfy an evidentiary burden.[179] In some cases, where an employee has been fired while collecting evidence, however,[180] the defendant has argued that an anti-retaliation provision is inapplicable because the employee had not yet reported the malfeasance.[181] In such cases, a court may read the statute literally and refuse to protect the employee because the disclosure has not yet been made.[182] A statute that is designed to promote whistleblowing should, logically, be interpreted to cover such situations that fall within the policy goals of the legislation. This includes situations where the employee has evidence of taking concrete steps to ascertain facts about the suspected wrongdoing, but has not yet had a chance to blow the whistle.

(Minn. Ct. App. 1996); Jose v. N.W. Bank N.D., N.A., 599 N.W.2d 293 (N.D. 1999). *See generally* Sullivan v. Mass. Mut. Life Ins. Co., 802 F. Supp 716, 724 (D. Conn. 1992) (noting that protection is available to an individual who discloses wrongdoing discovered by another: "[w]hile perhaps it is more heroic to be both an investigator and a whistleblower, the policies of the theory of liability are equally advanced by protecting those who learn of wrongdoing from others rather than discovering it firsthand").

178. Dworkin & Callahan, *supra* note 7, at 303-04.

179. *See, e.g.*, IND. CODE ANN. § 22-5-3-3(c) (West 2012) (reasonable attempt to ascertain correctness before disclosure); OHIO REV. CODE ANN. § 4113.52(C) (West 2012) (reasonable and good faith effort to determine accuracy).

180. *See, e.g.*, Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176 (3d Cir. 2001) (employees fired after investigating firm's billing practices); Jones, 585 S.E.2d at 141 (employee terminated because employer disapproved of his investigation of criminal activities of fellow employees); *Rothmeier*, 556 N.W.2d at 593 (employee fired while collecting evidence of securities fraud); Wholey v. Sears Roebuck, 803 A.2d 482 (Md. 2002) (employee fired for investigating theft); *Jose*, 599 N.W.2d at 298 (employee fired for participating in internal investigation); McClintick v. Timber Prods. Mfrs., Inc., 21 P.3d 328 (Wash. Ct. App. 2001) (employee fired for pursuing and investigation into practices of employer's trust and retirement plan).

181. *See, e.g.*, *Sullivan*, 802 F. Supp. at 716; *Rothmeier*, 556 N.W.2d at 590; *Jose*, 599 N.W.2d at 293.

182. *See, e.g.*, *Rothmeier*, 556 N.W.2d at 593-94 (finding an employee's investigation of suspected unlawful activities did not constitute a report within the meaning of the act and, therefore, is not protected). *See generally Jose*, 599 N.W.2d at 298 (noting public policy exception not applicable to participation in internal employee investigation).

2. *Written Versus Oral Reporting and Other Outlet Limitations*

Several state statutes require that the whistleblower's report take a specific form. For example, some statutes offer protection only when the wrongdoing is reported in writing.[183] The sufficiency of the writing has been litigated,[184] as has the application of a statutory exception to the writing requirement.[185] The great majority of states do not specify the report form or allow both oral and written disclosures, and thus have avoided litigation and facilitated reporting.[186] Academic commentators support both communication methods.[187] Yet even where a state does not require a written complaint, courts are

183. *See, e.g.*, ALASKA STAT. § 39.90.110(c) (2010) (employer can require in its written personnel policy that the employee first submit a written report to the employer unless the employee reasonably believes there will not be a prompt response, the supervisor already knows of the wrongdoing, it is an emergency, or the employee fears reprisal or discovery); COLO. REV. STAT. § 24-50.5-104 (2010) ("Any employee in the state personnel system may file a *written* complaint . . ") (emphasis added); IND. CODE § 22-5-3-3(a) (2010) (in writing to supervisor or appointing authority unless he is the one in violation (public employee); in writing to employer (employee of public contractor)); N.J. REV. STAT. § 34:19-4 (2010) (written notice to supervisor first and allow a reasonable opportunity to correct unless fear physical harm in an emergency situation); WIS. STAT. § 230.81 (2010) (written report to supervisor or one of several named public bodies).

184. *See, e.g.*, Keefe v. Youngstown Diocese of the Catholic Church, 698 N.E.2d 1009, 1012 (Ohio Ct. App. 1997) (letter from employee's attorney to employer satisfied written notice requirement); Hutson v. State of Wisconsin Pers. Comm'n, 665 N.W.2d 212 (Wis. 2003) (single "work relief" memo does not constitute written disclosure).

185. *See, e.g.*, Ward v. Indus. Comm'n, 699 P.2d 960, 967 (Colo. 1985) (although statute required written disclosure, oral report also covered; protection should not hinge on disclosure method).

186. *See, e.g.*, CAL. LAB. CODE § 1102.7 (West 2012) (report may be made via state hotline); MICH. COMP. LAWS § 15.362 (2012) (written or oral report permitted); N.Y. LAB. LAW § 740(2)(a)-(b) (McKinney 2012) (report need not be in writing).

187. *See* Robert G. Vaughn et al., *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers*, 35 GEO. WASH. INT'L L. REV. 857, 863-68 (2003) (asserting that whistleblowers should be given several alternatives for disclosure; the authors propose a model whistleblowing law in which "any" disclosure should be covered, without consideration for "form, motive or context"); David C. Yamada, *Voices From the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKELEY J. EMP. & LAB. L. 1, 39-41 (1998) (arguing that formal, external reporting requirements work against the interests of both employees and employers).

still wary of oral reporting for evidentiary reasons. For instance, under Minnesota's statute, the form of reporting is not specified, but in *Buytendorp v. Extendicare Health Services, Inc.*, the oral-only reports of an employee did not provide enough support that a dismissal was retaliatory, with the Eighth Circuit stating, "In general, we believe that whistleblowers are employees who make good faith reports in spite of the risk of retaliation, not those who avoid such risk."[188]

In addition, one of the decisions faced by all potential whistleblowers relates to the recipient of the disclosure; put simply, to whom should the whistle be blown? Disclosure to a person within the organization, such as a supervisor or ombudsman, is referred to as "internal whistleblowing."[189] Reporting to a government agency, the media, or another outlet outside the organization is labeled "external whistleblowing."[190] An examination of federal whistleblower protection statutes shows virtually uniform protection of both internal and external whistleblowing.[191] In general, state statutes are more rigid and diverse in this regard, favoring or requiring external disclosure.[192]

Some commentators have stated that reporting wrongdoing to an immediate supervisor should not be considered whistleblowing because it is simply following the chain of command.[193] Most, however, include such disclosures within the

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188. 498 F.3d 826, 835 (8th Cir. 2007). In explaining the circumstances of that case, the trial court had determined:

> that Minnesota's own courts had interpreted the [whistleblower law] to require an official or formal report of wrongdoing before an employee could enjoy protection under the [whistleblower law] and that [plaintiff's] repeated comments to her superiors at Extendicare did not qualify as official or formal reports. The district court noted the availability of a mechanism to make such reports (a corporate compliance hotline) and [plaintiff's] failure to utilize that mechanism. The district court also noted that [plaintiff's] failed to make any written complaints, email any complaints, or make notes regarding the alleged illegalities or complaints.

Id. at 833.

189. *See, e.g.*, Dworkin & Callahan, *supra* note 24, at 268.

190. *See, e.g., id.* at 360.

191. *Id.* at 274.

192. *Id.* at 276.

193. Granville King, III, *The Effects of Interpersonal Closeness and Issue Seriousness on Blowing the Whistle*, 35 J. BUS. COMM. 419, 433 (1997); Near et al., *supra* note 102, at 5.

definition because the recipient is able to address the wrongdoing and capable of retaliating against the whistleblower.[194]

If the primary goals of whistleblowing are exposing and curtailing wrongdoing,[195] rather than prosecuting wrongdoers, and expedited problem resolution is beneficial,[196] then internal reports are more efficient and effective than those made externally.[197] Additionally, internal disclosures are much less disruptive to the interests of the employer.[198] Thus, intra-organizational whistleblowing should not be hampered.[199]

D. *Complex Interactions Among Legal Claims*

Workplace wrongdoing lawsuits are generally complex undertakings, often implicating various state and federal claims. Accordingly, a whistleblower seeking relief from retaliation may have more than one colorable legal basis for his or her claim. This section explores some of the complexities and the complications that can result from overlapping legal coverage. To begin, some state law causes of action are preempted by federal law. Moreover, several jurisdictions prohibit the simultaneous pursuit of common law and statutory whistleblower claims based on a single fact pattern. Whistleblowing laws also interact, and sometimes conflict, with other legislative initiatives, common law employer protections, and private confidentiality agreements.[200]

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194. Near et al., *supra* note 102, at 5.

195. *See, e.g.*, Dworkin & Callahan, *supra* note 24, at 306.

196. *See id.*

197. *See id.*

198. *See id.* at 300.

199. The availability of external whistleblowing must be maintained as an option in cases where internal disclosures lead to retaliation or are otherwise ineffective. *See infra* notes 275-80 and accompanying text.

200. With reference to lawyers, the Dodd-Frank Act and SOX whistleblower protections may end up directly conflicting with state professional responsibility codes that spell out duties of confidentiality and prohibit conflicts of interest. *See generally* Barry R. Temkin & Ben Moskovits, *Lawyers as Whistleblowers Under the Dodd-Frank Wall Street Reform Act*, 84 N.Y. ST. B. J. 10 (2012) (discussing the ethics conflict for lawyers who may fall under the exception that would allow the lawyers to engage in whisteblowing). *See also* Chinyere Ajanwachuku, *An In-House Counsel's Decision to Whistleblow*, 25 GEO. J. LEGAL ETHICS 379 (2012) (discussing general considerations in the decision to whistleblow).

1. *Preemption Issues: Competing State and Federal Schemes*

As a general rule, state laws that conflict with federal legislative schemes are preempted under the Supremacy Clause.[201] However, employment regulation is generally considered to be within the states' traditional police powers. Accordingly, the courts are somewhat disinclined to view state employment laws as preempted.[202]

Importantly, the U.S. Supreme Court has examined the preemptive effect of federal law on whistleblowers' claims on two occasions. In 1990, the Court held that the Energy Reorganization Act's adjunct anti-retaliation clause did not preempt a plaintiff whistleblower's state law claim for intentional infliction of emotional distress, despite the likelihood that its decision would affect decision-making related to nuclear safety.[203] Four years later, the Court considered the preemptive effect of the Railway Labor Act ("RLA").[204] The Court determined that the RLA's arbitration mandate was limited to disputes arising from collective bargaining agreements.[205] Because the anti-retaliation right the plaintiff sought to vindicate

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201. U.S. CONST. art. VI, cl. 2. Generally, the Supreme Court recognizes three circumstances in which state law is preempted. *See, e.g.*, English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990). The most straightforward situations are those in which the relevant federal legislation specifically articulates the boundaries of permissible state action. *See generally* Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) (ruling that New York's Human Rights Law was preempted with respect to ERISA benefit plans only insofar as it prohibited practices that were lawful under federal law). Absent explicit statutory language, a court may infer congressional intent to displace state law in a given context from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," and in "field[s] in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (citations omitted) (cited with approval by *English*, 496 U.S. at 79). State law that conflicts with federal law is preempted, as well. *See, e.g.*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

202. *See* Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 16-17 (1987).

203. *See English*, 496 U.S. at 72. The Court examined the issue within the three-stage framework described above. *See id.* at 80-90; *supra* note 201 (describing framework).

204. *See* Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246 (1994).

205. *See id.* at 255.

was not based in the contract, it was not preempted by the RLA.[206]

At present, district and circuit court decisions addressing the preemption of state law claims by federal laws providing adjunct protection to whistleblowers and state law claims lack consistency in analysis and outcomes. The preemption question has been answered both positively and negatively in cases involving, for example, the Atomic Energy Act,[207] the Federal Mine Safety Act,[208] the Labor Management Relations Act,[209] the National Labor Relations Act,[210] the Occupational Safety and Health Act,[211] and the Employee Retirement Income Security Act,[212] thus creating a wide array of inconsistent outcomes.

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206. *See id.* at 258, 266. In that it turns on the determination that the plaintiff's whistleblower claims were not subject to arbitration under the applicable collective bargaining agreement, this decision may be expected to influence cases involving the preemptive effect of the Labor Management Relations Act. The Supreme Court's decision speaks to this likelihood explicitly. *See id.* at 260-66. *See generally* Gregory G. Sarno, Annotation, *Federal Pre-Emption of Whistleblower's State-Law Action for Wrongful Retaliation*, 99 A.L.R. FED. 775 (1990).

207. *Compare, e.g.*, Snow v. Bechtel Constr., Inc., 647 F. Supp. 1514, 1517 (C.D. Cal. 1986), *with, e.g.*, Garg v. Narron, 710 F. Supp. 1116, 1117-18 (S.D. Tex. 1989).

208. *Compare, e.g.*, Brentwood v. Boeing Co., No. 97-35263, 1999 U.S. App. LEXIS 506, at *2 (9th Cir. Jan. 7, 1999), *with, e.g.*, Echard v. Devine, 726 F. Supp. 1045, 1048-50 (N.D. W. Va. 1989).

209. *Compare, e.g.*, Notice v. Chanler Lewis, Inc., 333 F. Supp. 2d 28, 30 (D. Conn. 2004), *with, e.g.*, Hagan v. Feld Entm't, Inc., 365 F. Supp. 2d 700, 712-13 (E.D. Va. 2005).

210. *Compare, e.g.*, Williams v. Comcast Cablevision of New Haven, Inc., 322 F. Supp. 2d 177, 187-88 (D. Conn. 2004), *with, e.g.*, Roussel v. Saint Joseph Hosp., 257 F. Supp. 2d 280, 285-86 (D. Me. 2003).

211. *Compare, e.g.*, Braun v. Kelsey-Hayes Co., 635 F. Supp. 75, 79 (E.D. Pa. 1986) *with, e.g.*, Phillips v. Gen. Elec. Co., 881 F. Supp. 1553, 1558-59 (M.D. Ala. 1995).

212. *Compare, e.g.*, Lockett v. Marsh USA, Inc., No. 08-3413, 2009 WL 4412326, at *988- 89 (6th Cir. Dec. 3, 2009), *and* Neumann v. AT & T Commc'ns, Inc., 376 F.3d 773, 779-81 (8th Cir. 2004), *with, e.g.*, King v. Marriott Int'l, Inc., 337 F.3d 421, 426-27 (4th Cir. 2003). The impact on state law of several additional federal laws has also been examined. *See, e.g.*, Hanold v. Raytheon Co., 662 F. Supp. 2d 793, 802 (S.D. Tex. 2009) (Americans with Disabilities Act); Braun, 635 F. Supp. at 79–80 (Toxic Substances Control Act); Marlow v. AMR Servs. Corp., 870 F. Supp. 295, 298-99 (D. Haw. 1994) (Airline Deregulation Act); Egger v. Local 276, Plumbers & Pipefitters Union, 644 F. Supp. 795, 802-03 (D. Mass. 1986) (Title VII).

2. *Multiple State Law-Based Claims*

This section explores another complicating factor: the interaction of multiple claims at the state level. Specifically, we discuss the following issues: when the plaintiff-whistleblower may choose among various claims, when state laws present a conflict of interpretation or rights, and when issues of contract complicate adjudication.

a. Adjunct Versus Core Whistleblowing Statutes: Plaintiff's Choice?

In some circumstances, two state statutes—one adjunct and one core—may be relevant to a single retaliatory act. Consider, for instance, a plaintiff who alleges that he or she was discharged for making a sexual harassment complaint. In some states, the whistleblower has a potential claim under both a general whistleblowing statute and the state's equal employment opportunity statute. The courts of Minnesota[213] and New York[214] have addressed this issue, arriving at opposite conclusions as to which law should prevail.

More frequently, questions have arisen regarding the interaction between a state whistleblower statute and a common law claim based on the public policy exception to the employment-at-will rule.[215] Generally, the courts have concluded that both causes of action are available.[216] Most analyses have

213. *See* Williams v. Saint Paul Ramsey Med. Ctr. Inc., 551 N.W.2d 483, 484 (Minn. 1996). To determine the relationship between Human Rights (HRA) and Whistleblower Acts claims, the Minnesota supreme court relied on the exclusivity provision of the HRA and a third statute giving precedence to specific over general laws in most instances where their provisions conflict. Accordingly, *Williams* held that the plaintiff could assert only the HRA claim. *See id.* at 485-86.

214. *See* Feinman v. Morgan Stanley Dean Witter, 752 N.Y.S.2d 229, 231 (N.Y. Sup. Ct. 2002). The New York statute applicable to private sector whistleblowers states that an action instituted thereunder has the effect of waiving other claims based on the same set of facts. *See* N.Y. LAB. LAW § 740(7) (McKinney 2010). Thus, when faced with a complaint alleging violation of both human rights and whistleblower protection provisions, the court held that the latter superseded the former. *See Feinman*, 752 N.Y.S.2d at 231.

215. *See supra* notes 78-84 and accompanying text (discussing public policy exception).

216. *But see* DeBarboza v. Cablevision of Boston, Inc., No. 98-4244-E, 1999 WL 65489 (Mass. Super. Ct. Jan. 29, 1999) (granting motion to dismiss plain-

hinged on: whether the applicable statute addresses the availability of other claims based on the same facts and, if so, the language of that provision;[217] the chronology of recognition of the pertinent common law and statutory causes of action;[218] and, whether the law permits the whistleblower to file a lawsuit directly or whether he or she must file a report with a government agent who may or may not pursue the action.[219]

b. State Law Claims Conflicting with Whistleblower Statutes

Although the interactions among causes of action are often complex, the claims discussed above are fundamentally consistent: all are designed to encourage reports of wrongdoing by deterring retaliation against whistleblowers. Legal theories that protect against the disclosure of information, however, directly conflict with both core and adjunct statutes.[220] One or more statutory, common law, or contractual claims may be available to an employer who seeks to maintain the privacy of firm matters from exposure by a whistleblower.

An employee who divulges information considered private by his or her employer risks both statutory and common

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tiff's wrongful discharge claim because the applicable human rights statute afforded a remedy for retaliation).

217. *See, e.g.*, Lepore v. Nat'l Tool & Mfg. Co., 540 A.2d 1296, 1299 (N.J.1988) (quoting N.J. STAT. ANN. § 34:6A-17 (West 1998)), *aff'd*, 557 A.2d 1371 (N.J. 1989).

218. *See generally* Hentzel v. Singer Co., 188 Cal. Rptr. 159 (Cal. Ct. App. 1982); Gutierrez v. Sundancer Indian Jewelry, Inc., 868 P.2d 1266, 1268 (N.M. Ct. App. 1993).

219. *See, e.g.*, Reed v. Mun. of Anchorage, 782 P.2d 1155 (Alaska 1989); Flenker v. Willamette Indus., Inc., 967 P.2d 295 (Kan. 1998); Cerracchio v. Alden Leeds, Inc., 538 A.2d 1292 (N.J. Super. Ct. App. Div. 1988); *Gutierrez*, 868 P.2d 1266.

220. *Compare, e.g.*, OR. REV. STAT. ANN. § 468.963(5)(b) (2012) (imposing liability for disclosure of information in environmental audit report), with 42 U.S.C. § 7622(a) (West 2012) (prohibiting retaliation for reporting violations of federal Clean Air Act). *See EPA Balks at Certain State Programs, Fearing Blanket Immunity*, 9 MINE REG. REP., June 28, 1996. But see KAN. STAT. ANN. § 75-2973 (2012) (requiring whistleblower protection provision be construed so as to not "authorize disclosure of any information or communication that is confidential or privileged under statute or court rule"). *See generally DOE Moves to Ensure Openness at Weapons Plants*, ENERGY DAILY, Jan. 15, 1997 (reporting that Federal Department of Energy officials have prohibited use of state audit privilege laws by department contractors who sought to preclude public access to environmental data).

law liability.[221] Protection for trade secrets is long-standing and comprehensive.[222] Confidential information that does not rise to the level of a trade secret is also protected in order to encourage free communication between principal and agent.[223] The employer's right to keep firm matters confidential is not absolute, however, and may be superseded by other interests in some cases.[224]

So-called "audit privilege" statutes and policies are a relatively new development in this context.[225] These measures are designed to promote remediation of environmental hazards by granting firms a privilege against disclosure of the results of

221. *See* Dworkin & Callahan, *supra* note 86, at 153-55.

222. *See, e.g.*, UNIF. TRADE SECRETS ACT, 14 U.L.A. 433 (amended 1985), 14 U.L.A. 433 (Supp. 1995); MELVIN F. JAGER, TRADE SECRETS LAW § 13.1 (2013).

223. *See, e.g.*, Coulter Corp. v. Leinert, 869 F. Supp. 732, 735 (E.D. Mo. 1994); Warner-Lambert Co. v. Execuquest Corp., 691 N.E.2d 545, 547 (Mass. 1998); RESTATEMENT (SECOND) OF AGENCY §§ 395-96 (1957); *see also* HENRY H. PERRITT, JR., TRADE SECRETS: A PRACTITIONER'S GUIDE 163-64 (1994).

224. *See, e.g.*, Merckle GmbH v. Johnson & Johnson, 961 F. Supp. 721, 732-33 (D. N.J. 1997); Church of Scientology v. Armstrong, 283 Cal. Rptr. 917, 925 (Cal. Ct. App. 1991) (personal interest in avoiding physical injury). *See also* RESTATEMENT (SECOND) OF AGENCY, *supra* note 223, at § 395 cmt. f; RESTATEMENT OF TORTS § 757 cmt. d (1939); UNIF. TRADE SECRETS ACT, 14 U.L.A. 433 (amended 1985), § 2(b) cmt. 14 U.L.A. 433 (Supp. 1995).

225. A majority of states employ these measures. The Environmental Protection Agency (EPA) maintains a catalog of current statutes and policies. *See* STATE AUDIT PRIVILEGE AND IMMUNITY LAWS & SELF-DISCLOSURE LAWS AND POLICIES, http://www.epa.gov/region5/enforcement/audit/stateaudit.html #audit (last viewed Dec. 26, 2013). For related legislative wrangling, see, for example, *The Federal-State Relationship: Environmental Self Audits: Hearings Before the Subcomm. on Oversight and Investigations of the H. Comm. on Commerce*, 105th Cong. (1998) [hereinafter "Hearings"] (testimony of David Ronald, Arizona Assistant Att'y Gen.); *Doyle Vetoes Environmental Loophole Law*, CAP. TIMES (Madison, Wis.), Dec. 6, 2003, at A4; Amy Silverman, *Controversial Self-Audit Bill Pushed Aside; Manufacturers Won't Put Privacy Issue on the Agenda this Year*, CHARLESTON GAZETTE (W.V.), Dec. 31, 1997, at 1A; *Time to Give Up on Self-Audit Bill*, ADVOC. (Baton Rouge, LA.), June 5, 1997, at 10B.

These laws have been debated at the federal level, as well. *See, e.g.*, State Environmental Audit Protection Act, S. 1332, 105th Cong., 1st Sess. (1997); Environmental Protection Partnership Act, S. 860, 105th Cong. (1997); Voluntary Environmental Self-Evaluation Act, H.R. 1884, 105th Cong. (1998).

The EPA's comprehensive audit policy is a key strategy in the agency's compliance efforts. *See* Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (Apr. 11, 2000); Compliance, *available at* http://www.epa.gov/compliance/index-c.html (last viewed Mar. 20, 2013).

compliance audits undertaken internally and voluntarily; most provide immunity from penalties for self-disclosed violations, as well.[226] Environmental groups,[227] government prosecutors,[228] and federal agencies[229] have criticized such grants of immunity on the basis that they insulate violators from both regulatory consequences and private litigation related to wrongdoing covered in an audit report.[230] The conflict and potential consequences for whistleblowers are obvious when self-audit provisions include penalties for the disclosure of information from audit reports.[231]

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226. *See* Alexander Volokh, *Carrots over Sticks: The Case for Environmental Self-Audits*, WASH. MONTHLY, June 1997, at 28 (noting that surveys of businesses suggest that audits are more likely to be undertaken when their results are kept confidential).

227. *See* Sierra Club and Others Raise Flag Over Bills, CAP. TIMES (Madison, Wis.), Apr. 27, 1998, at 1A.

228. *See* Hearings, *supra* note 225 (testimony of Linda A. Spahr, Esq., C., Envtl. Crime Unit, Suffolk County District Attorney's Office, and on behalf of the New York State District Attorneys Assn.).

229. *See id.* (testimony of Sen. Wayne Allard) (characterizing the EPA's approach in dealing with Colorado officials regarding the state's audit law in three stages: "1) deny; 2) dissemble; and 3) distort"); *Liability from Voluntary Environmental Audits: Hearings Before the S. Environment and Public Works Comm.*, 105 Cong. (1997) (opening remarks of Sen. John Chaffee, Chair); David Callender, *Environmental Audit Bill Tabled*, CAP. TIMES, (Madison, Wis.), May 7, 1998, at 5B (regarding Wisconsin proposal); Thomas A. Fogarty, *Bill Provides More Lenient Treatment for Firms That Report Their Violations*, DES MOINES REG. (Iowa), Mar. 31, 1988, at 4 (Metro); Elliott Zaret, *Colorado Defends Environmental Self-Audit Law*, STATES NEWS SERV., Mar. 17, 1998, *available at* LEXIS-NEXIS, Government & Political News.

230. These statutes may also interfere with prosecutions supported by evidence separate from a privileged report. The individuals who are best informed about potential violations are likely to have participated in an audit; thus, their testimony is very likely to be privileged. Hearings, *supra* note 225.

231. Colorado's law, for example, imposes civil liability on all persons and criminal sanctions on public parties who disclose such information. *See* COLO. REV. STAT. § 13-25-126.5(5)(b) (2010); *see* Memorandum from Steven A. Herman, Assistant Adm'r, OECA & Mary Nichols, Assistant Adm'r, OAR to Jackson Fox, Reg'l Counsel, Region X (Apr. 5, 1996), at 6, *available at* http://www.epa.gov/Region7/air/title5/t5memos/auditmem.pdf (last viewed Dec. 26, 2013) (observing that sanctioning such disclosures would deter whistleblowing in a content in which "confidential informants are a critical source of leads").

c. Contract-Based Limitations

The whistleblower protection and encouragement regime is further complicated by contractual provisions including current and post-employment restrictions such as non-disclosure and confidentiality agreements, and, depending on the jurisdiction, covenants not to compete.[232]

Most relevant to the whistleblower protection calculus is that many employers will seek to enhance the privacy of their operations by requiring their employees to execute confidentiality agreements.[233] These contracts provide several key advantages to the employer, including deterrence of disclosures in the first place and relatively easy enforcement, via injunctive relief, in the event the promise of secrecy is broken.[234] When the subject of the disclosure is a matter of societal significance, however, a difficult issue is raised: should the power of the courts be used to keep such information confidential?[235]

There is a manifest conflict between whistleblower protection laws, which seek to encourage disclosure of organizational misconduct as a matter of public policy, and the legal theories and contractual terms available to an employer to shield against such potentially damaging disclosures. As a result, the courts that have struggled to accommodate these competing interests have had little legislative guidance.[236]

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232. *See generally* Norman D. Bishara & David Orozco, *Using the Resource-Based Theory to Determine Covenant Not to Compete Legitimacy*, 87 IND. L.J. 979 (2012) (discussing how employers use post-employment restrictive covenants to extend their reach over employees after the employment relationship ends and arguing for a reinvigoration of the public policy prong of noncompete enforcement). *See also* Norman D. Bishara & Michelle Westermann-Behaylo, *The Law and Ethics of Restrictions on an Employee's Post-Employment Mobility*, 49 AM. BUS. L.J. 1 (2012) (discussing the ethical implications of employer overreaching to create a chilling effect on employee mobility).

233. *See generally* Dworkin & Callahan, *supra* note 86 (discussing the enforceability of confidentiality agreements against whistleblowers).

234. *See, e.g.*, FLA. STAT. ANN. § 542.335 (West 2010).

235. *Compare, e.g.*, Baker ex rel. Thomas v. Gen. Motors Corp., 522 U.S. 222, 227-28 (1998), *and* E.E.O.C. v. Astra U.S.A., Inc., 929 F. Supp. 512, 520-21 (D. Mass), *modified*, 94 F.3d 738 (1996), *with* Uniroyal Goodrich Tire Co. v. Hudson, No. 95-1130, 1996 WL 520789, at *1-2 (6th Cir. Sept. 12, 1996).

236. *See* Dworkin & Callahan, *supra* note 86, at 153, 168-69.

IV.
PROPOSED SOLUTION: A MODEL STATE LAW

The previous section demonstrated how, collectively, state whistleblowing laws are not well-designed and, thus, fail to achieve a range of public policy goals. In addition, we argued that many of the distinctions drawn among groups of employees and occupations are irrational.[237] The characteristics required of covered disclosures are often inconsistent with timely and effective correction of the reported misconduct.[238] It is unlikely that their drafters considered the statutes' potential conflicts with other legal claims. The courts have tended to interpret these measures conservatively, particularly when resolving procedural issues.[239] Not surprisingly, the conduct the statutes seek to encourage—such as preventative disclosure of wrongdoing to avoid scandal, crisis, and other harms, as well as a deterrent impact on corporate fraud and malfeasance—has not been readily forthcoming.[240]

Thus, improvements to promote harmonization among whistleblowing laws have the potential to increase their effectiveness.[241] On the basis of research and experience, it is possible to identify and combine the provisions that will maximize the likelihood that the primary goals of whistleblowing—halting, deterring, and exposing malfeasance—will be achieved. We also aim to provide a cohesive model that incorporates the various and sometimes conflicting parts of the state and federal whistleblower protection and encouragement framework.[242]

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237. *See, e.g., supra* Part II.C.

238. For a discussion of the problematic and sometimes illogical prerequisites to the enforcement of whistleblower coverage, *see generally supra* Part II.C.

239. For an overview of court interpretations of whistleblower statutes, *see generally supra* Part II.D.

240. *See supra* notes 91–95 and accompanying text; *but see supra* notes 114–116 and accompanying text (discussing the success of the FCA).

241. *See generally supra* Part II (discussing the inadequacies of existing whistleblower laws).

242. This view is consistent with other scholar's understanding of existing whistleblower legislation, such as Richard Moberly's argument for a structural model encouraged by SOX that allows standardized employee reporting within organizations. *See* Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1109 (2006).

The recommendations outlined in the following sections were chosen with reference to two threshold inquiries. First, which communications need protection in order to expose, stop, and deter wrongdoing? Second, which statutory provisions will most effectively encourage those communications? These questions will be addressed in turn, after which we propose characteristics of a model whistleblower protection statute.

A. *Which Communications Should Be Encouraged?*

Business organizations have an important interest in operating without unnecessary legal interference. To what extent, then, do firms have the right to keep their affairs private and, when confidential information is divulged, to take action against the discloser? The answers to these questions depend on the interaction among three competing interests: society's interest in encouraging appropriate conduct and accountability, the organization's interest in confidentiality and control, and the individual's interest in exposing wrongdoing without exposing him or herself to retaliation.[243]

In the private sector context, to the extent that a dispute presents a conflict between only the interests of the organization and the individual, whistleblowing law should not apply. Here, the employer's investment in managerial control and its interest in protecting a competitive advantage trumps the employee's disclosure interest.

Many existing laws implicitly acknowledge that the public interest extends beyond conduct harmful to society as a whole. Numerous laws provide redress for disclosing conduct harmful primarily to a discrete group of employees, rather than the public. To illustrate, statutes covering occupational safety and health[244] and minimum wage violations,[245] which are very

243. *See* Dworkin & Callahan, *supra* note 7, at 268.

244. *See, e.g.*, ALASKA STAT. § 18.60.089 (2012); ARIZ. REV. STAT. ANN. § 23-425 (2013); CAL. LAB. CODE § 6310 (West 2013); CONN. GEN. STAT. § 31-379 (2013); HAW. REV. STAT. § 396-8 (2013); 820 ILL. COMP. STAT. 220 / 2.2 (2013); KY. REV. STAT. ANN. § 338.121 (West 2013); ME. REV. STAT. ANN. tit. 26, § 570 (2013); 2013 Md. Laws 538; MICH. COMP. LAWS § 408.1065 (2013).

245. *See, e.g.*, ALASKA STAT. § 23.10.135 (2013); ARK. CODE ANN. § 11-4-206 (2012); COLO. REV. STAT. § 8-4-120 (2013); D.C. CODE § 32-1010 (2013); GA. CODE ANN. § 34-5-3 (West 2013); HAW. REV. STAT. § 387-12 (2013); IDAHO CODE ANN. § 44-1509 (2013); 820 ILL. COMP. STAT. 105 / 11 (2013); MASS.

common, are significantly less "public" in their direct effects than most environmental protection laws.[246] Yet, anti-retaliation provisions in Occupational Safety and Health Act and minimum wage measures serve societal interests in employee safety and fair compensation, respectively.

A societal interest may be identified in the subject matter of a report,[247] the nature of the wrongdoer,[248] the character of the danger presented,[249] or all three. Frequently, a societal interest may be readily identified in the subject matter of a re-

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GEN. LAWS ANN. ch. 151, § 19 (West 2013); N.J. STAT. ANN. § 34:11-56a24 (West 2013); N.Y. LAB. LAW § 680 (McKinney 2013).

246. *Compare, e.g.*, 42 U.S.C.A. § 7622 (West 2013) ("No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) – (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan, (2) testified or is about to testify in any such proceeding, or (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter."), *with, e.g.*, N.Y. LAB. LAW § 680 (McKinney 2013) ("Any employer or his agent, or the officer or agent of any corporation, who discharges or in any other manner discriminates against any employee because such employee has made a complaint to his employer, or to the commissioner or his authorized representative, that he has not been paid in accordance with the provisions of this article, or because such employee has caused to be instituted a proceeding under or related to this article, or because such employee has testified or is about to testify in an investigation or proceeding under this article, shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than fifty dollars nor more than five hundred dollars.").

247. *See, e.g.*, ALA. CODE § 36-25-24 (2012); ALASKA STAT. § 18.80.220 (2012); ARK. CODE ANN. § 16-123-208 (2012); CAL. LAB. CODE § 1102.5 (West 2012); DEL. CODE ANN. tit. 19, § 726 (2012); N.H. REV. STAT. ANN. § 147-A:12 (2012); N.M. STAT. ANN § 30-47-9 (West 2012); N.D. CENT. CODE § 14-02.4-18 (2012).

248. *See, e.g.*, COLO. REV. STAT. § 24-114-102 (2012); FLA. STAT. ANN. § 39.203 (West 2012); 5 ILL. COMP. STAT. ANN. 315/10 (West 2012); LA. REV. STAT. ANN. § 42:1169 (West 2012); N.M. STAT. ANN. § 30-47-9 (West 2012); TEX. GOV'T CODE ANN. § 554.002 (West 2012); W. VA. CODE ANN. § 22A-1-22 (West 2012).

249. *See, e.g.*, ARIZ. REV. STAT. § 23-425 (2012); CAL. LAB. CODE § 6399.7 (West 2012); CONN. GEN. STAT. § 31-40t (2012); DEL. CODE ANN. tit. 16, § 2415 (2012); KAN. STAT. ANN. § 44-636 (2012); LA. REV. STAT. ANN. § 30:2027 (2012); MASS GEN. LAWS ch. 111F, § 13 (2012); N.H. REV. STAT. § 141-E:19 (2012); N.Y. LAB. LAW § 736 (McKinney 2012).

port because of an existing policy declaration.[250] The disclosure of conduct that contravenes a constitution, statute, or regulation manifestly supports that expression of public policy.[251] Well-established common law standards also provide a legitimate basis for protected whistleblowing.[252] Moreover, we recommend viewing professional codes of conduct—such as those for the traditionally self-governed professions like law, medicine, and accounting, but also for regulated occupations like securities dealers and financial planners—as expressions of societal interests. Such codes articulate objectively identifiable expectations shared by all members of a profession.[253] Additionally, these codes are designed to protect the public in relation to the activities of the specific professional group.[254] We note that this evolution in revisiting the role of professionals and professional codes is consistent with the whistleblower protections for lawyers found in the Dodd-Frank Act.[255]

Neglect, corruption, and impropriety by the government, at any level, threaten societal interests. Thus, exposure of any consequential[256] act outside the scope of the government's authority should be protected , whether or not it violates a law or regulation.[257] Finally, societal interests are served when impending or continuing health and safety threats are revealed. Disclosures regarding the release of toxic substances, sale of defective consumer products, or use of unqualified construction workers, for example, would fall into this category.

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250. *See, e.g.*, Winters v. Houston Chronicle Publ'n Co., 795 S.W.2d 723, 727-29 (Tex. 1990).

251. *See, e.g.*, English v. Gen. Elec. Co., 496 U.S. 72 (1990); Adolphsen v. Hallmark Cards, Inc., 907 S.W.2d 333, 336-37 (Mo. Ct. App. 1995); Kalman v. Grand Union Co., 443 A.2d 728 (N.J. Super. Ct. App. Div.1982); Dunwoody v. Handskill Corp., 60 P.3d 1135, 1142-43 (Or. Ct. App. 2003).

252. *See, e.g.*, Jermer v. Siemens Energy & Automation, Inc., 395 F.3d 655, 655-66 (6th Cir. 2005).

253. *See supra* Part II.B.2 and accompanying footnotes.

254. *See generally* MICELI & NEAR, *supra* note 3, at 14 (discussing ways in which codes of ethics benefit society).

255. *See generally* Temkin & Moskovits, *supra* note 200.

256. As noted by Miceli and Near, there is a distinction between activities that are "merely incorrect or undesirable, that is, technically misguided and potentially harmful" and wrongful practices. MICELI & NEAR, *supra* note 3, at 25.

257. *Id.*

B. *How Should a Statute Be Structured in Order to Encourage Those Communications Most Effectively?*

The main purposes of whistleblowing legislation are to deter, expose, and stop organizational wrongdoing. To achieve these goals, a statute should maximize those characteristics that have been shown to be important in encouraging whistleblowing and minimizing the negative results of reporting. To these ends, the statute must promote internal whistleblowing and include rewards for reporting wrongdoing and broad protection from retaliation.

1. *Organizational Policy*

There are a number of individual and organizational benefits associated with internal whistleblowing. Social psychology studies show that most employees report wrongdoing internally first, and report externally only after the employer's response proves inadequate to resolve the problem, the whistleblower suffers retaliation, or both.[258]

Research suggests that employees are more likely to blow the whistle if they believe their report will successfully address the wrongdoing revealed.[259] This is a manifestation of "self-efficacy":[260] individuals are more likely to engage in an activity if they feel they can perform it successfully.[261] High self-efficacy, in the context of whistleblowing, is associated with perceiving that reporting is a simple matter and that the conduct reported will be addressed if reported.[262] Studies also indicate that an individual who observes misconduct is more likely to report it if the possible whistleblower feels that he or she has leverage over the wrongdoer.[263] Further, disclosures are more

258. *Id.* at 148 (citing studies); Near et al., *supra* note 102, at 11.

259. Near et al., *supra* note 102, at 24.

260. *Id.* at 21. It is an "estimate of the knowledge, skills, abilities, and motivational force" that an individual can bring to bear on a specific situation. *Id.* (referencing Albert Bandura, Human Agency in Social Cognitive Theory, 44 AM. PSYCHOLOGIST 1175 (1989)).

261. Near et al., *supra* note 102. The authors also report that employees who have a feeling of high self-efficacy also are more likely to be able to cope successfully with organizational change. *Id.* Such change is likely to be a result of whistleblowing and whistleblowers would be more likely to take on the change if they felt they could handle it. *Id.*

262. *Id.* at 22.

263. *Id.* at 19-20.

likely when the subject perceives disclosure as role-prescribed.[264] Thus, establishing clear internal reporting procedures and effectively responding to disclosures likely promotes whistleblowing within organizations.[265] Moreover, social psychology research suggests that external whistleblowers are more likely to suffer retaliation, which tends to be more severe than the retaliation faced by those who report within the organization.[266] It follows that legal structures that support internal whistleblowing may reduce the incidence and severity of retaliation.

Organizations may gain significant benefits when disclosures of their questionable or wrongful conduct are made internally, rather than to government authorities, the news media, or other external outlets.[267] Ideally, these considerations alone should motivate organizations to encourage internal reporting, but this is not always the case.[268] Thus, the statute should further encourage organizations to establish and effectively administer internal whistleblowing procedures by allowing employers to require—with important exceptions—employees to report internally first, if clear and effective reporting procedures are in place.[269]

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264. *Id.* at 22.

265. Observers of wrongdoing were also more likely to report if they felt the whistleblowing was morally prescribed or that the wrongdoing personally affected them. *Id.* at 20.

266. Terry Morehead Dworkin & Melissa S. Baucus, *Internal v. External Whistleblowers: A Comparison of Whistleblowing Processes*, 17 J. BUS. ETHICS 1281, 1286-87 (1998); Dworkin & Callahan, *supra* note 7, at 301-02; Marcia P. Miceli & Janet P. Near, *Characteristics of Organizational Climate and Perceived Wrongdoing Associated with Whistle-Blowing Decisions*, 38 PERSONNEL PSYCHOL. 525, 537 (1985).

267. *See supra* notes 5-10 and accompanying text.

268. *See infra* notes 293-296 and accompanying text.

269. Prior to the Dodd-Frank Act's passage there was controversy over whether to qualify for an incentive employees should be required to report internally before external whistleblowing, with the SEC deciding that employers may not require internal whistleblowing first. This issue and its relationship to the definition of a whistleblower under the Act appears to be an issue of first impression for the courts, which was addressed recently by a district court in Kramer v. Trans-Lux Corp., No. 3:11-cv-01424, 2012 WL 4444820 (D. Conn. Sept. 25, 2012) (finding that either internal or external whistleblowing to the SEC is permissible). For a further discussion of exceptions embedded in our suggested model statute, *see infra* notes 275-80 and accompanying text.

At a minimum, an effective whistleblowing program would include the following important attributes:

1. adoption of a written company policy encouraging whistleblowing and banning retaliation;
2. establishment and maintenance of a clear, easily accessible reporting procedure with an alternative procedure if the designated recipient(s) is involved in the reported wrongdoing;
3. wide dissemination, top-down support, and regular reiteration of the policy and reporting procedures;
4. designation of a high corporate officer to be in charge of policy compliance;
5. effective and prompt investigation and follow-up procedures;
6. appropriate measures taken to correct the wrongdoing and discipline wrongdoers;
7. follow-up communication with the whistleblower regarding the investigation and resolution;
8. annual audits and reports of the types of wrongdoing reported and their resolutions; and,
9. financial incentives for disclosures, when appropriate.

In addition to reaping the benefits of internal whistleblowing, these procedures would be consistent with the Federal Corporate Sentencing Guidelines,[270] the Sarbanes-Oxley Act,[271] and the judicially-created incentive afforded organizations that establish and maintain effective sexual harassment reporting procedures.[272] Indeed, a single procedure could serve all these interests.

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270. U.S. SENTENCING GUIDELINES MANUAL § 8 (2012).

271. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended at 15 U.S.C. §§ 7201-66 (2012)).

272. The Supreme Court has held that if companies establish effective procedures and policies regarding sexual harassment, they can effectively protect themselves from successful sexual harassment claims. *See, e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 806-07 (1998); Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545 (1999); Pa. State Police v. Suders, 542 U.S. 129, 137-38 (2004); *see also* Joan Biskupic, *High Court Draws Line on Sexual Harassment; Employers Held Liable; Suit Threshold Eased*, WASH. POST, June 27, 1998, at A1; Joan Biskupic, *Supreme Court Goes Back to Basics on Harassment Law*, WASH. POST, Apr. 23, 1998, at A10; Linda Greenhouse, *The Supreme Court: The Workplace; Court Spells Out Rules for Finding Sex Harassment*, N.Y. TIMES, June 27, 1998, at A1.

An employer's attempt to create meaningful internal disclosure mechanisms may still be poorly executed. Notably, hotlines and general "open door" policies will not satisfy the employer's responsibility in this regard. Although hotlines have the perceived advantage of allowing anonymous whistleblowing, there are several problems with this form of reporting. Anonymous reporters are often seen as less persuasive or legitimate because they are unwilling to confront and face those they accuse, and because any personal credibility they may have within the organization due to reputation, position, or specialized knowledge is lost.[273] Also, follow-up and reporting back are difficult, if not impossible,[274] and the anonymous discloser is unable to exert pressure on the report recipient to respond.[275] Hotlines may be an acceptable supplement to other reporting procedures, but are inadequate as the only outlet. "Open door" policies whereby employees are encouraged to speak up publicly to company leaders are also inadequate: employees often perceive this approach as ineffective and, accordingly, it does not encourage whistleblowing.[276]

Notwithstanding the availability of effective employer programs, statutory exceptions to the mandatory internal disclosure option are needed, in part because intra-organizational reporting is not uniformly effective. In one study, for example, 11.1% of whistleblowers reported that the problem worsened after they acted and 53.7% reported that the problem continued.[277] Only 16.3% of those surveyed said the problem was partially resolved[278] and a mere 9.5% found the problem to be completely resolved.[279] Studies suggest that employer responsiveness is not always exemplary, particularly when the organization is significantly dependent on the misconduct or the

273. MICELI & NEAR, *supra* note 3, at 61, 74; James L. Perry, *The Organizational Consequences of Whistleblowing* 26 (Oct. 1990) (unpublished manuscript) (on file with the School of Public & Environmental Affairs, Indiana University Bloomington).

274. MICELI & NEAR, *supra* note 3, at 74-75.

275. *See* Callahan & Dworkin, *supra* note 11, at 168.

276. *See* Near & Dworkin, *supra* note 66, at 1557.

277. Miceli & Near, *supra* note 94, at 37-44.

278. Nine and a half percent of the whistleblowers reported the case was pending or that they did not know what happened. *Id.*

279. *Id.* at 27. The measure was based on the seriousness of the wrongdoing, assuming that an organization would not engage in serious wrongdoing if it was not dependent on it.

wrongdoers are highly placed in the organization.[280] External whistleblowing may also be justified when the malfeasance presents a serious risk of harm in the short term. Thus, to address these shortcomings, exceptions to the "internal first" requirement should be available when one of the following elements is present:

1. there is imminent danger of irreparable harm;
2. the whistleblower can show that he or she reasonably thought internal whistleblowing would be futile; or,
3. there is an inadequate organizational response within a reasonable amount of time.

The whistleblower should have to initially shoulder the burden of proof on these issues. These exceptions are somewhat broader than the exceptions in the few states that statutorily require whistleblowers to report internally in order to gain statutory protection.[281] If, in a particular case, the organization has failed to establish a program with the appropriate characteristics, the disclosure may be made to any internal or external recipient reasonably believed by the whistleblower to be capable of responding to the wrongdoing. In addition to government regulators and law enforcement officials, appropriate external recipients of a whistleblower's communication include the media.[282]

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280. *Id.*

281. The most similar exceptions are found in Maine and New Jersey. *See* ME. REV. STAT. tit. 26, § 833 (2011); N.J. REV. STAT. § 34:19-4 (2012).

282. *See generally* Callahan & Dworkin, *supra* note 135. Contempt citations were brought against *New York Times* reporter Judith Miller and *Time Magazine* reporter Matthew Cooper for not revealing Valerie Plame Wilson as a source for their individual stories regarding I. Lewis "Scooter" Libby. *See generally In re* Grand Jury Subpoena, Judith Miller, 493 F.3d 152 (D.C. Cir. 2007) (per curiam); *In re* Special Counsel Investigation, 374 F. Supp. 2d 238 (D.D.C. 2005). Libby was indicted by a federal grand jury in connection with the investigation and leak of the covert identity of Central Intelligence Agency officer Valerie Plame Wilson. Plame's relationship with the CIA was formerly classified information. In the subsequent federal trial, Libby was convicted on one count of obstruction of justice, two counts of perjury, and one count of making false statements. U.S. v. Libby, 467 F. Supp. 2d 1 (D.D.C. 2006). These activities effectively ended Valerie Plame's career as a CIA agent, but she did write a book about her experiences. VALERIE PLAME WILSON, FAIR GAME: MY LIFE AS A SPY, MY BETRAYAL BY THE WHITE HOUSE (2007). Plame's book has also been made into a movie that was released in November 2010. FAIR GAME (River Road Entertainment 2010).

The organizational policy concerns discussed in this section have ranged from the various benefits of encouraging whistleblowers to exercise their voices and organizational efficiency to the hallmarks of effective internal and external whistleblower policies. We also discussed factors affecting the balance between internal reporting and external reporting mechanisms.

2. *Financial Incentives*

Research and experience show that significant financial rewards are the most effective legislative incentive to whistleblowing.[283] Accordingly, a reward system should be established when funds are eventually recovered as a result of the disclosure. Financial incentives are most feasible when fines are collected, wrongfully claimed monies are recovered, or both. In these cases, the whistleblower should be awarded a significant portion of the amount recovered. Importantly, long-term experience with the False Claims Act indicates that twenty to thirty-five percent of the recovered sum would have the desired impact.

The FCA has been successful not merely because of the amount of the possible recovery, but also due to other factors such as the certainty of the award, the clarity of the procedures, and the degree of control the whistleblower has over the case.[284] Because of the proven effectiveness of its measures, the state reward scheme for recovered monies under our model whistleblower statute tracks the FCA.

Of course, there are many kinds of wrongdoing that do not directly involve government-levied fines or misspent public

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The Valerie Plame Wilson situation enhanced public concern about negative effects on whistleblowers and anonymous sources. Ryan J. Watson et al., *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Constitutional Law*, 74 GEO. WASH. L. REV. 676, 696 (2006) (discussing the potential "chilling effect" on the newsgathering function in the wake of decisions regarding reporter's privilege and confidential sources). However, "rumors of a new big chill have not deterred the whistle-blowers who have helped newspapers break big stories about secret prisons, secret NSA surveillance, and secret bank-monitoring programs." Jack Shafer, *The Case for Patrick Fitzgerald: The Libby Prosecutor Didn't Savage the First Amendment*, SLATE, Mar. 13, 2007, *available at* http://www.slate.com/articles/news_and_politics/press_box/2007/03/the_case_for_patrick_fitzgerald.html.

283. *See supra* notes 110-33 and accompanying text.

284. Callahan & Dworkin, *supra* note 7.

funds, but other incentives may be motivational in these instances. In some cases, such as sexual harassment and harmful product design, a whistleblower who is the victim of the wrongdoing has an obvious non-monetary incentive to come forward. Other observers may be encouraged to report by organizational procedures that facilitate reporting, in combination with tangible, non-monetary benefits. Social psychology research suggests that job promotion or other company-provided benefits could serve this purpose if those benefits are sufficiently meaningful, and publicly acknowledged as whistleblowing rewards.[285]

Alternatively, state or federal officials could establish whistleblower reward programs that could be funded by a "tax" on punitive damage awards, fines, or both. The DFA included a step in this direction, creating a system that requires any monetary sanction collected under securities laws to be placed in a fund, which will then be used for paying awards to whistleblowers and funding activities of the Inspector General under the Act.[286] The effectiveness of this approach, at least in the context of securities law violations, is evidenced by the early success of the Dodd-Frank funding scheme: more than three thousand disclosures were made during Dodd-Frank's first year of operation.[287] The largest Dodd-Frank whistleblower payment to date is $14 million.[288] The DFA places a $300 million cap on the fund.[289] Although the DFA does not expressly allow these funds to be used to support non-monetary whistleblowing, as the fund grows under proper

285. *See, e.g.*, Callahan & Dworkin, *supra* note 11, at 285 and nn. 41-44 (suggesting that promotions and other work-related benefits are "extrinsic rewards" that may be used, in addition to money, to affect employee behavior).

286. Dodd-Frank Act, *supra* note 17, at §922; 15 U.S.C.S. § 78u-6(g)(3)(A) (2012), amending § 21F of the Securities Exchange Act of 1934.

287. *See supra* notes 141-42 and accompanying text.

288. Press Release, *SEC Awards More than $14 Million to Whistleblower*, SEC. & EXCH. COMM'N (Oct. 1, 2013), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854258 (last visited Dec. 26, 2013).

289. 289. Dodd-Frank Act, *supra* note 17, at §922; 15 U.S.C.S. § 78u-6(g)(3)(A) (2012), amending § 21F of the Securities Exchange Act of 1934.

management it could soon become possible to reward whistleblowers who otherwise lack financial incentives.[290]

At the state level, there exists precedent for imposing fines for retaliation against whistleblowers[291] and, therefore, a potential funding source for whistleblower reward programs. Unlike the FCA and Dodd-Frank structures, however, current fines imposed for retaliation under state statutes are unlikely to be adequate to support a comparable program on the state level.[292] Thus, if this approach were followed, these fines would have to be significantly increased or additional punitive fines would have to be assessed. However, we still recommend that states begin channeling fines or punitive damages from whistleblowing actions into similar funds. This seems to be the only way to ensure financial support of whistleblowing protection and incentive programs, with the possibility of creating a non-monetary whistleblowing program in the future.[293]

3. *Protected Whistleblowers*

Some people, including some lawmakers, view whistleblowers as "tattletales" or "snitches."[294] These derogatory labels imply that employees who report organizational wrongdoing do so principally to benefit themselves, harm others, or both. This perspective misses the point.[295] At its core, debate regarding whistleblowers' motives is about the le-

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290. Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 BYU L. REV. 73, 93 (2012) (stating that with the funding scheme the fund is unlikely to ever be insolvent).

291. *See* Dworkin, *supra* note 44, at 260-73 (listing employer sanction provisions from various state anti-retaliation statutes).

292. *See* Callahan & Dworkin, *supra* note 7, at 297-99 and nn. 89-96 (discussing characteristics of effective employer money reward systems). There is no bright line test for amount sufficiency, rather "the reward is a motivator only if it is perceived as sufficiently substantial to justify the required effort" and, presumably, risk, in the context of whistleblowing. *Id.* at 298.

293. *See, e.g.*, HAW. REV. STAT. § 378-65 (2012) (fine up to $5000); ME. REV. STAT. tit. 26, § 836 (2011) (fine of $10 per day for each day of willful violation). An exception is Alaska, which allows for a fine of up to $10,000. ALASKA STAT. § 39.90.120 (2012).

294. Callahan & Dworkin, *supra* note 7, at 319 n.183.

295. Social science research strongly suggests that this perspective is also erroneous; most whistleblowers are motivated by a desire to protect the organization. MICELI & NEAR, *supra* note 3, at 117-19.

gitimacy of legal protection for such individuals (i.e., whether it is appropriate for the government to encourage private action to deter, expose, and stop wrongdoing).[296] If, in a particular instance, society's need to know trumps the organization's interest in confidentiality, society's interest in disclosure surely overcomes any less-than-worthy agenda of the whistleblower.[297] By the same token, if the communication in question deserves protection, according to the criteria herein,[298] the relationship between the whistleblower—broadly defined to include an employee, independent contractor, volunteer, or others—and the organization is irrelevant.[299]

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296. Consider the reasoning in *Jackson v. Birmingham Board of Education*, where the Supreme Court held that Title IX's private cause of action encompasses retaliation against a person because that person complained about sex discrimination, regardless of whether that individual was the subject of the original complaint. 544 U.S. 167, 179 (2005). Thus, whistleblowers who accuse educational institutions of sex discrimination are protected from retaliation under federal law. The fundamental issue and decision by the dissent in this case clearly involved the question of legislative intent, i.e., who should be protected. The dissent compares the specific language of Title VII and Title IX. *Id.* at 189-90. Congress enacted a provision in Title VII that specifically addresses retaliation, therefore if Congress had intended Title IX to authorize private retaliation actions, it would have specifically enacted a provision within Title IX. *Id.*

297. Moreover, it is often difficult to determine a person's motives for whistleblowing; they are usually derived from multiple sources. Rehg, *supra* note 148, at 13. Further, at least one study indicates that the whistleblower's motive does not correlate to the effectiveness of the whistleblowing. Whistleblowers were asked whether they reported the wrongdoing because they felt morally compelled to do so, because their job required it, because of the personal effect of the wrongdoing on the whistleblower, or some combination of those factors. There was no correlation between the answers and the effectiveness of the whistleblowing. Near et al., *supra* note 102, at 26. *See generally* Callahan & Dworkin, *supra* note 10, at 318-25 (discussing the relevance of motive to a Federal False Claims Act action).

298. For criteria proposed to determine which communications should be legally protected, *see supra* Part III.A, notes 259-73 and accompanying text.

299. The Supreme Court decision in *Robinson v. Shell Oil Co.* illustrates the importance the courts attach to protection from retaliation in accomplishing statutory goals. 519 U.S. 337, 339-40 (1997). The Court expansively read Title VII's statutory language referring to "employees or applicants," *id.* at 341 (citing Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2006)), to include former employees, because to limit protection to current employees would be "destructive of [the] purpose of the antiretaliation provision. . ." *Id.* at 346. The unanimous decision reversed the Fourth Circuit Court of Appeals decision. Broad protection against retaliation is important not only to the sufferer, but also to other employees and the policy behind the stat-

The "validity" of the reason for a whistleblower's report, however, must be differentiated from its validity in fact. Some argue that a disclosure must be accurate to warrant protection.[300] The alternative approach, however – placing on the whistleblower the burden of demonstrating, from an objective standpoint, that he or she reasonably believed the report to be true at the time of disclosure[301]—is far less likely to deter legitimate disclosures.[302] In most cases, proof of reasonable belief will consist of information regarding an investigation conducted before the report was made.[303] We recommend avoiding the term "good faith" to describe the reasonable belief requirement, in order to further the distinction between the accuracy of the report and the motive for it. Clearly, individuals who knowingly or recklessly report false information should not be protected.

4. *Protection from Retaliation*

A whistleblower may suffer negative consequences when an organization and its members respond to his or her disclosure.[304] Retaliatory discharge is possible, as are ostracism, isolation, blacklisting, defamation, job stagnation, and personal

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ute. An employer whose retaliation against whistleblowers stops short of discharge nonetheless sends the message to other employees that they should not complain. *Id.*; *see also* Hashimoto v. Dalton, 118 F.3d 671, 676 (9th Cir. 1997).

The Supreme Court decision in *Jackson v. Birmingham Board of Education* broadly interpreted Title IX's plain language prohibiting discrimination "on the basis of sex" to include protection from retaliation to those who report sex discrimination, not simply to those who are the subject of the original complaint. 544 U.S. at 178. The Court emphasized that reporting would be discouraged and the enforcement scheme of Title IX threatened if retaliation against those who report sex discrimination went unpunished. *Id.*

300. Whistleblowing can be harmful to the whistleblower, as well as to the organization and its other members, if the report is specious, erroneous, or ineffective. Near et al., *supra* note 102, at 2.

301. For a discussion of the role of the employee-whistleblower's reasonable belief in the reported wrongdoing, *see supra* Part II.C.1.

302. *See supra* notes 166-176 and accompanying text.

303. The defendant should not be permitted to claim that the plaintiff's belief was not reasonable in instances where the defendant has prevented or impeded the plaintiff's investigation.

304. *See supra* note 35 and accompanying text.

consequences such as depression and family problems.[305] Legal protection from retaliation is presumed to increase whistleblowing by reassuring persons who observe wrongdoing but fear such consequences.[306] Accordingly, all states have enacted anti-retaliation statutes.[307] When these laws are interpreted to apply only to the most severe reprisals, however, whistleblowers who have suffered significant harm may nonetheless be denied recourse.[308] This is inconsistent with the beneficial potential of protection from retaliation. Courts interpreting these laws, however, often take a narrow approach to the range of retaliation forms covered[309] and even vindicated whistleblowers face harsh consequences.[310] The actual effect of anti-retaliation provisions on the incidence of whistleblowing may remain unclear, but post-disclosure problems for whistleblowers are not insignificant.[311]

Courts' approaches to applying non-discrimination statutes—to determine instances in which retaliation other than discharge should be protected—are perhaps not fully coher-

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305. For a variety of retaliatory actions that fall short of firing but caused the employee severe problems and led to her resignation, see *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 705-06 (5th Cir. 1997).). *See also* Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996) ("The law deliberately does not take a 'laundry list' approach to retaliation, because unfortunately its forms are as varied as the human imagination will permit.").

306. Dworkin & Callahan, *supra* note 4, at 275.

307. *See supra* notes 69-73.

308. *See, e.g.*, Callahan & Dworkin, *supra* note 11, at 114-20. Courts applying the public policy exception to employment at will, however, often recognize the constructive discharge theory. *See id.*

309. *Id.*

310. *See* Rapp, *supra* note 290, at 113-18 (detailing the potential subsequent harms to even vindicated whistleblowers, such as suspicion of their loyalty by other employers, protracted legal battles, and financial and personal costs); Michael Regh et al., *Antecedents and Outcomes of Retaliation Against Whistleblowers: Gender Differences and Power Relationships*, 19 ORG. SCI. 221 (2008) (discussing gender differences in the treatment and stereotyping of whistleblowers); Richard D. Fincher, *Mediating Whistleblower Complaints: Integrating the Emotional and Legal Challenges*, DISP. RESOL. J. (Feb.-Apr. 2009).

311. *See* 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, 1051-52 (2004) (asserting that "not only has the law been generally unsympathetic to whistleblowers, but so have co-workers and others outside the organization who do not support a decision to report wrongdoing" and that whistleblowers incur "extreme societal disapproval").

ent,[312] yet remain instructive. With respect to Title VII, the United States Supreme Court's decision in *Burlington Northern*[313] provides helpful guidance. The *Burlington Northern* Court adopted a broad approach to actionable retaliation: "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[314] This rule is consistent with the majority of lower courts that have declined to limit Title VII-based anti-retaliation protection to "ultimate employment decisions."[315] The *Burlington Northern* Court required material adversity in order

312. *See* Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 415-30 (2010) ("Taken together, the six recent Court opinions dealing with retaliation appear untethered to any consistent judicial philosophy").

313. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). The Supreme Court first determined that Title VII's anti-retaliation provision has a broader scope than the statute's anti-discrimination provisions. That is, although employers are prohibited by Title VII from discriminating against employees in work-related matters, a non-workplace-related retaliatory act may be covered. *See id.* at 59-67. In 2008, the Supreme Court stated that its decision in *Burlington Northern* did not suggest that Congress must separate the status and conduct distinctions of Title VII (i.e. discrimination that harms individuals because of who they are (status) and discrimination that harms individuals because of what they do (conduct)). CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008). The Court also emphasized its position in *Burlington Northern* that Title VII's anti-retaliation provision was not redundant and it "had a broader reach then the statute's substantive provision." *Id.* at 454-57.

314. *Burlington Northern*, 548 U.S. at 68 (internal quotations and citations omitted).

315. *See* Eric M.D. Zion, *Overcoming Adversity: Distinguishing Retaliation from General Prohibitions Under Federal Employment Discrimination Law*, 76 IND. L.J. 191, 194 (2001); *see also* E.E.O.C. v. United Parcel Serv., Inc., 249 F.3d 557, 560 (6th Cir. 2001) (encouraging employee to quit and reapply at a different site to accommodate his allergy, then refusing to rehire him under a company policy prohibiting hiring of employees who quit, was an adverse employment action). Courts' liberal interpretation of what retaliation encompasses, and a lack of employer action to limit retaliation, has led to a surge in discrimination cases: retaliation claims to the EEOC have nearly tripled since 1992 and made up over one third of all claims filed with the agency in fiscal year 2008. *See* Cari Tuna, *Employer Retaliation Claims Rise*, WALL ST. J., Oct. 5, 2009, at B7; *see also* Peter M. Panken, *Retaliation: The New Vogue in Employment Litigation Don't Get Mad, Don't Get Even, Just Be Savvy*, SS006 ALI-ABA 813, 818 (2010).

to distinguish "normally petty slights, minor annoyances, and simple lack of good manners" from actions that would deter disclosures.[316] The Court explained that it espoused an objective, "reasonable worker" standard in order to facilitate application across cases. However, the Court declined to specify qualifying retaliatory acts because "[c]ontext matters";[317] a schedule change, for instance, might be relatively unimportant to some employees, "but may matter enormously to a young mother with school age children."[318] The provision may be applied to acts that do not affect employment or prospective employment,[319] such as filing a lawsuit.[320]

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316. *Burlington Northern*, 548 U.S. at 68. Retaliation has been found to be insufficiently adverse in a number of cases. In *Hicks v. Barnes*, allegations that a supervisor submitted false memoranda concerning employee's work was insufficient to demonstrate adverse employment action, but allegations that a supervisor adjusted employee's shift times was sufficient to demonstrate adverse employment action. 593 F.3d 159, 168-69 (2d Cir. 2010).

Additionally, in *Stewart v. Mississippi Transportation Commission*, adverse employment action was not found even though: the employee was placed on administrative leave for three weeks; reassigned a new supervisor with a heavier workload; personal items were taken from the employee's desk; the locks on the employee's office were changed and the employee was not allowed to close her door; and the employee was chastised by superiors and ostracized by co-workers. 586 F.3d 321, 331-32 (5th Cir. 2009). *See also* Sutherland v. Mo. Dep't of Corr., 580 F.3d 748, 752 (8th Cir. 2009) ("A lower satisfactory evaluation, by itself, does not provide a material alteration . . . and is not actionable."). In *Mattern v. Eastman Kodak Co.*, for example, actions such as refusal of coworkers to acknowledge the employee, mutterings that "accidents will happen," poor evaluations, having her locker broken into and her tools stolen, and receiving a reprimand for attending a human resource department meeting were insufficient to constitute retaliation under Title VII. 104 F.3d 702, 705-07 (5th Cir. 1997); *see also, e.g.*, Ray v. Henderson, 217 F.3d 1234, 1240-41 (9th Cir. 2000); Hollins v. Atlantic Co., 188 F.3d 652, 662 (6th Cir. 1999); Kocsis v. Multi-Care Mgmt., Inc., 97 F.3d 876, 885-86 (6th Cir. 1996); Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996) ("[N]ot everything that makes an employee unhappy is an actionable adverse action."); Flaherty v. Gas Research Inst., 31 F.3d 451, 456-57 (7th Cir. 1994). In Breaux v. City of Garland, the court found the retaliation insufficiently severe for a First Amendment claim. 205 F.3d 150, 152 (5th Cir. 2000).

317. *Burlington Northern*, 548 U.S. at 68.

318. *Id.* at 68-71.

319. *Id.* at 60-68; *see also* E.E.O.C. v. Outback Steakhouse of Fla., 75 F. Supp. 2d 756, 758 (N.D. Ohio 1999).

320. *See, e.g., Outback Steakhouse of Fla.*, 75 F. Supp. 2d at 757; Harmar v. United Airlines, Inc., No. 95 C 7665, 1996 WL 199734, at *1 (N.D. Ill. Apr. 23, 1996); E.E.O.C. v. Va. Carolina Veneer Corp., 495 F. Supp. 775, 777-78 (W.D. Va. 1980). *But see* Brower v. Runyon, 178 F.3d 1002, 1005 n. 3 (8th Cir.

We recommend application of the *Burlington Northern* approach to retaliation in the whistleblowing context. Employees who suffer reprisals for exposing malfeasance should be entitled to bring a claim regardless of the form the retaliation takes, so long as the retaliatory conduct would have a deterrent effect on a reasonable employee.[321] Adverse actions potentially presenting a colorable claim include discharge, refusal to hire, denial of promotion, denial of benefits, demotion, suspension, threats, reprimands, negative evaluations, harassment, barriers to accessing an internal grievance procedure, and negative references.[322] A case-by-case approach should be implemented to determine "material adversity" beyond these examples, with guidance gleaned from Title VII and other cases.[323]

1999); Ginsberg v. Valhalla Anesthesia Assocs., 971 F. Supp. 144, 149 (S.D.N.Y. 1997).

321. An accumulation of actions, none of which on their own would be sufficient, may collectively satisfy this standard. *See* Rousselle v. GTE Directories Corp., 85 F. Supp. 2d 1286, 1292 (M.D. Fla. 2000).

322. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC COMPLIANCE MANUAL s8-II-D, http://www.eeoc.gov/.

323. Constructive discharge cases will also be useful in this context. This theory was created by the courts to allow plaintiffs who suffer serious retaliation short of discharge to bring suit under a theory of wrongful firing in violation of public policy. *See, e.g.*, Shoaf v. Dep't of Agric., 260 F.3d 1336, 1342 (Fed. Cir. 2001); Colores v. Bd. of Tr., 130 Cal. Rptr. 2d 347, 356-57 (Cal. Ct. App. 2003). If the retaliatory action is sufficiently severe that the employee is compelled to quit or is justified in quitting, the employee is allowed to sue for tort damages. *See id.* at 357. The plaintiff's proof requirements vary from state to state. Some states require a plaintiff to prove that a reasonable person in plaintiff's situation would have resigned. *See, e.g.*, Zilmer v. Carnation Co., 263 Cal. Rptr. 422, 425 (Cal. Ct. App. 1989), *overruled as recognized* in Turner v. Anheuser-Busch, Inc., 876 P.2d 1022, 1027 (Cal. 1994) (holding, however, that *Zilmer*'s "reasonable person" standard is still viable); Karch v. BayBank FSB, 794 A.2d 763, 774 (N.H. 2002). Alternatively, the plaintiff may be required to show that working conditions were intolerable. *See, e.g.*, Strozinsky v. Sch. Dist. of Brown Deer, 614 N.W.2d 443, 464 (Wis. 2000). A few courts have held that defendant intentionally created an intolerable environment in order to cause the plaintiff to resign, *see, e.g.*, Skold v. Am. Int'l Group., Inc., 81 Fair Empl. Prac. Cas. (BNA) 126, 131, 1999 WL 405539 (S.D.N.Y. 1999); Parrish v. Immanuel Med. Ctr., 92 F.3d 727, 732 (8th Cir. 1996), but this is clearly a minority position. Most courts that require the plaintiff to establish that working conditions were intolerable are satisfied by a showing that the employer knew or should have known about the conditions and did nothing. *See, e.g.*, *Strozinsky*, 614 N.W.2d at 464; *Zilmer*, 263 Cal. Rptr. at 425-26. The first—the reasonable person standard—

5. *Remedies*

Careful consideration must be given to the nature and significance of available remedies. Whistleblower studies clearly indicate that financial incentives are the most successful spur to disclosure.[324] Other meaningful remedies may also stimulate whistleblowing.[325] Many existing state statutes, however, limit recovery to make-whole remedies such as reinstatement and back pay.[326]

In light of the benefits associated with exposing and deterring misconduct and the risks inherent in blowing the whistle,[327] a full range of remedies, including punitive damages, should be authorized by statute. The availability of punitive damages would provide a deterrent to future retaliatory acts[328] and facilitate the process of obtaining representation for complainants,[329] as well as potentially encouraging disclosures. This recommendation is consistent with the approach taken by courts in tort-based wrongful discharge claims,[330] as well as

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is most analogous to the determination of whether the retaliation is "materially adverse." The Supreme Court recognizes that Title VII encompasses employer liability for a constructive discharge. Pa. State Police v. Suders, 542 U.S. 129, 142-44 (2004).

324. *See, e.g., supra* note 110-190 and accompanying text (discussing the financial recovery related to the FCA).

325. *See* Dworkin & Near, *supra* note 93, at 260-63.

326. *See, e.g.*, DEL. CODE ANN. tit. 29, § 5115 (2007) (injunctive relief, actual damages); UTAH CODE ANN. § 67-21-5 (West 2007) (reinstatement, back wages, benefits, actual damages). For a more complete listing, *see* Dworkin, *supra* note 45, at 260-73 (listing, in column 7, employee remedy provisions from various state anti-retaliation statutes).

327. *See* Dworkin & Near, *supra* note 93, at 262.

328. In 2008, the Supreme Court determined that punitive damages are mostly not aimed at compensation, but rather at retribution and deterring harmful conduct. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2621 (2008); Philip Morris USA v. Williams, 127 S. Ct. 1057, 1062 (2007).

329. *See, e.g.*, TVT Records v. Island Def Jam Music Grp., 279 F. Supp. 2d 413, 425-26 (S.D.N.Y. 2003) (discussing the role of punitive damages in encouraging "private attorneys general"), *rev'd*, 412 F.3d 82 (2d Cir. 2005); *see also* Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 92 MINN. L. REV. 83, 91-92 (2007). Punitive damages help pay attorney fees and costs, thereby allowing the employee full compensation for actual damages. See Leo M. Stepanian II, Comment, *The Feasibility of Full State Extraction of Punitive Damages Awards*, 32 DUQ. L. REV. 301, 323-25 (1994).

330. *See* Hysten v. Burlington N. Santa Fe Ry. Co., 530 F.3d 1260, 1279-80 (10th Cir. 2008); Carol Abdelmesseh & Deanne M. DiBlasi, *Why Punitive*

courts deciding retaliatory discharge claims based on federal statutes.[331]

The ability to seek attorney fees and costs should also be allowed to encourage meaningful disclosures in furtherance of public policy.[332] Courts and legislatures have provided for these expenses as an exception to the "American rule"[333] when litigants are acting as "private attorneys general" and furthering public policy through their suits.[334] Whistleblowing is the essence of law enforcement through private action; whistleblowers who suffer retaliation should not be deterred from pursuing their rights because of apprehension over the costs of substantively justified litigation.[335]

Three potential attorney fee award models exist: mandatory fees for prevailing plaintiffs,[336] permissive awards limited to specific parties,[337] and awards to either the plaintiff

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Damages Should Be Awarded For Retaliatory Discharge Under The Fair Labor Standards Act, 21 HOFSTRA LAB. & EMP. L.J. 715, 731-33 (2004).)

331. *See* Civil Rights Act of 1991, 42 U.S.C. § 1981a (1991); Abner v. Kansas City S. R.R. Co., 513 F.3d 154, 163 (5th Cir. 2008) (holding that punitive damages "uphold Congress's purpose in enacting the 1991 amendments to Title VII-to provide 'additional remedies' in the form of damages, to prevent discrimination in the workplace."). *See generally* Abdelmesseh & DiBlasi, *supra* note 330.

332. *See* Jennifer Baugh, *Punitive Damages and the Anti-Retaliation Penalties Provision of the Fair Labor Standards Act*, 89 IOWA L. REV. 1717, 1725 n.63 (2004).

333. Under the American rule, litigants pay their own fees. *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 260 (1975).

334. "[U]nder some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation." *Id.* at 263. *See also* Clayton Act, 15 U.S.C. § 15 (2012); 42 U.S.C. § 2000e-5(k) (2012) (Title VII); Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 265-66 (1972) (discussing antitrust law); Newman v. Piggie Park Enters., 390 U.S. 400, 401-02 (1968).

335. Richards M. Stephens, *The Fees Stop Here: Statutory Purposes Limit Awards to Defendants*, 36 DEPAUL L. REV. 489, 497 (1987); *see also* Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives For Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 114 (2007).

336. 5 U.S.C. § 1221(g)(1)-(2) (2006). *See also* MASS. GEN. LAWS ch. 149, § 185(d)(5) (2005); Bohac v. Dep't of Agric., 239 F.3d 1334, 1343 (Fed. Cir. 2001); Larch v. Mansfield Mun. Elec. Dep't, 272 F.3d 63, 75 (1st Cir. 2001); Blackwell v. Foley, 724 F. Supp. 2d 1068, 1074 (N.D. Cal. 2010).

337. *See* 31 U.S.C. § 3730(d)(1), (2), (4) (2006); Hopper v. Solvay Pharm., Inc., 590 F. Supp. 2d 1352, 1357 (M.D. Fla. 2008).

or defendant at the court's discretion.[338] We recommend that prevailing plaintiffs be awarded fees and costs. Since whistleblowers are "the chosen instrument[s]" of legislatures to vindicate public policy,[339] they should receive special protection against the violator of the law. Further, awarding fees and costs only to successful plaintiffs will help discourage frivolous suits by disgruntled employees.[340]

Employers preferring alternative dispute resolution (ADR) should be allowed to take whistleblowing disputes to arbitration only if they establish meaningful rewards for whistleblowers, ensuring that opting for ADR neither harms the employee's substantive rights nor undermines the policy goals of the legislation. Consistent with this recommendation, the statute should prohibit employers from requiring whistleblowers who suffer retaliation to arbitrate their disputes. This recommendation must be considered, however, in the context of developing decisional authority within the courts.

For example, in *Guyden v. Aetna Inc.*,[341] the Second Circuit considered arbitration under the SOX whistleblower protection provision. Plaintiff alleged her employer terminated her employment to prevent her from bringing attention to deficiencies in her employer's internal controls.[342] When the plaintiff filed suit against Aetna in the district court, Aetna, the defendant-employer, moved to dismiss the complaint and compel arbitration based on an arbitration agreement between the employee and employer, which had been signed by plaintiff.[343] Aetna filed a number of documents signed by the plaintiff at various stages of employment—her initial application for employment, acceptance of her offer letter for em-

338. *See* Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 416 nn.5-7 (1978); Saint John's Organic Farm v. Gem Cnty. Mosquito Abatement Dist., 574 F.3d 1054, 1059 (9th Cir. 2009).

339. *Christiansburg Garment Co.*, 434 U.S. at 418 (quoting *Newman*, 390 U.S. at 402); *see also* Guyden v. Aetna, Inc., 544 F.3d 376, 382 (2d Cir. 2008) (noting that "an individual who brings a SOX whistleblower claim is acting as a private attorney general").

340. *See Christiansburg Garment Co.*, 434 U.S. at 420; Thorpe v. Ancell, 367 Fed. App'x. 914, 919 (10th Cir. 2010).

341. 544 F.3d 376 (2d Cir. 2008).

342. *Id.* at 379-80.

343. *Id.*

ployment, and a stock incentive agreement—reflecting the plaintiff's agreement to arbitrate employment- related disputes.[344] Plaintiff challenged Aetna's motion to compel arbitration on two grounds: she argued that SOX whistleblower claims are categorically non-arbitrable and "that certain components of this specific arbitration process would prevent her from vindicating her statutory rights."[345] Ultimately, the district court granted the defendant's motion to dismiss the complaint in favor of arbitration, finding no inherent conflict between arbitration and the purposes underlying SOX.[346] The district court "also found that because confidentiality is a common aspect of arbitration, the confidentiality clause did not render the arbitration process created by the [stock agreement] unfair."[347]

The Second Circuit, finding no inherent conflict between the purpose of the SOX whistleblower protection provision and mandatory arbitration, affirmed the district court's decision.[348] The Second Circuit listed four factors the court must use to determine whether to stay proceedings pending arbitration:

> [F]irst, it must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the case are arbitrable, it must then decide whether to stay the balance of the proceedings pending arbitration.[349]

In *Hill v. Ricoh Americas Corp.*,[350] the Tenth Circuit also considered arbitration under the whistleblower protection provision of SOX. In that case, the plaintiff filed a complaint with the Occupational Safety and Health Administration

344. *Id.* at 380-81.

345. *Id.* at 381.

346. *Id.*

347. *Id.*

348. *Id.* at 384.

349. *Id.* at 382 (quoting Oldroyd v. Elmira Sav. Bank, 134 F.3d 72, 76 (2d Cir. 1998)).

350. 603 F.3d 766 (10th Cir. 2010).

("OSHA") claiming his employer had discharged him as retaliation for reporting evidence of fraud by the company, and OSHA dismissed his complaint.[351] After plaintiff brought suit against his employer alleging his termination was in violation of SOX and Kansas common law prohibiting retaliatory discharge, his employer moved to stay the case and compel arbitration.[352] Both parties acknowledged the plaintiff's employment contract contained an arbitration clause.[353] The plaintiff contended that arbitration was inappropriate on several grounds: the employment agreement had been superseded by a retention bonus agreement, the arbitration clause did not guarantee his rights under SOX would be vindicated through arbitration, and the employer waived its right to arbitrate by its conduct in the dispute.[354] The district court ruled that the employer had waived its right to arbitration, rejected the plaintiff's supersession argument, and declined to rule on the plaintiff's SOX argument.[355] The Tenth Circuit reversed the district court's order and held SOX did not render the arbitration clause unenforceable.[356]

In *Circuit City Stores, Inc. v. Adams*,[357] the U.S. Supreme Court allowed an employer to impose mandatory arbitration of workplace disputes. The plaintiff, Adams, signed an application form stating he agreed to take all employment-related disputes to arbitration.[358] Two years after he was hired, Adams filed suit against Circuit City asserting discrimination and tort claims.[359] Adams argued that he should not have to arbitrate his claims because the Federal Arbitration Act excluded em-

351. *Id.* at 770.

352. *Id.* at 769.

353. *Id.* at 769-70.

354. *Id.* at 770.

355. *Id.*

356. *Id.* at 780.

357. 532 U.S. 105 (2001). *See* Palcko v. Airborne Express, Inc., No. Civ.A. 02-2990, 2003 WL 21077048 (E.D. Pa. Apr. 23, 2003); Kelly Burton Beam, Note, *Administering Last Rites to Employee Rights: Arbitration Enforcement and Employment Law in the Twenty-First Century*, 40 HOUS. L. REV. 499 (2003), for further interpretation of who is exempted from the FAA; *see also* Circuit City Stores, Inc. v. Najd, 294 F.3d 1104 (9th Cir. 2002); Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1312 (11th Cir. 2002).

358. *Adams*, 532 U.S. at 105.

359. *Id.* at 110.

ployment contracts from its coverage.[360] The Supreme Court, citing the consensus in all circuits but the Ninth,[361] construed the Act to include employment contracts.[362]

The *Adams* decision has been controversial.[363] Several congressional representatives introduced the Preservation of Civil Rights Protections Act[364] to counteract the decision.[365] This bill would have made non-union employment arbitration agreements unenforceable unless the employee and employer voluntarily agreed to arbitrate the dispute after the dispute arose. Other bills have been introduced in Congress to amend discrimination laws to prohibit involuntary arbitration of disputes,[366] and an additional bill would have amended the FAA to give the employee the right to reject an arbitration agreement after a dispute arises.[367] Similarly, reform bills have also

360. Section 1 of the Act excludes from coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1947).

361. *See generally* Circuit City Stores, Inc. v. Adams, 194 F.3d 1070 (9th Cir. 1999), rev'd, 532 U.S. 105 (2001).

362. *Adams*, 532 U.S. at 119 (the Court construed the exclusion to apply only to contracts of employment of transportation workers).

363. *See generally* Adrienne B. Koch, *Outside Counsel Framing a Coda to 'Circuit City'*, N.Y. L.J. 4, May 24, 2002; David J. Kaufman, *The End of Arbitration in Franchising?*, N.Y. L.J. 3, Feb. 28, 2002; Melissa G. Lamm, *Who Pays Arbitration Fees?: The Unanswered Question in Circuit City Stores, Inc. v. Adams*, 24 CAMPBELL L. REV. 93 (2001); Keith A. Becker & Dianne R. LaRocca, *Divided Court Crosses Wires Over Circuit City Decision: Holding Casts Doubt on Ninth Circuit's Duffield Decision*, 7 HARV. NEGOT. L. REV. 403 (2002).

364. H.R. 2282, 107th Cong. (2001). However, the Preservation of Civil Rights Protections Act was never signed into law. *H.R. 2282 (107th):: Preservation of Civil Rights Protections Act of 2001*, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=h107-2282 (last visited Dec. 26, 2013).

365. Chief Sponsors were Kucinich, Frank, Markley, Conyers, and Nadler. In all, thirty-five members signed on as co-sponsors. *Five House Democrats Introduce Legislation to Overturn High Court's Circuit City Ruling*, 17 Emp. Discrimination Rep. 5 (July 4, 2001). In addition, twenty-one civil rights, legal, labor, and other organizations endorsed the bill. *Id.* Senator Feingold introduced a bill repeatedly since 1994 that would prohibit mandatory arbitration, and is considering introducing the Preservation bill in the Senate. *Id.*

366. S. 163, 107th Cong. (2001); H.R. 1489, 107th Cong. (2001). However, the Civil Rights Procedures Protection Act of 2001 was never signed into law. *S. 163 (107th): Civil Rights Procedures Protection Act of 2001*, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=s107-163 (last visited Dec. 26, 2013).

367. The Preservation of Civil Rights Protections Acts of 2001, H.R. 2282, 107th Cong. (2001); *see also* The Civil Rights Procedures Protection Act of

been introduced in state legislatures.[368] The Equal Employment Opportunity Commission ("EEOC") has taken the position that employers violate Title VII when they require arbitration of employment disputes as a condition of employment.[369]

Other courts have allowed plaintiffs to avoid mandatory arbitration[370] by finding the arbitration agreement: lacks mutuality,[371] is too one-sided,[372] is too indefinite,[373] is too costly to plaintiff,[374] and lacks consideration,[375] among other reasons.[376] In these decisions, the courts have looked to traditional contract law principles.[377] Some criticisms of such agree-

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2001, H.R. 1489, 107th Cong. (2001) and The Civil Rights Procedures Protection Act of 2001, S. 163, 107th Cong. (2001).

368. Reynolds Holding, *Private Justice*, S.F. CHRON., Oct. 7, 2001, at A1.

369. *Ex-E.E.O.C. Chairwoman Expresses Concern Over Agency Direction in Bush Administration*, DAILY LABOR REP. (BNA), 163 DLRB-1 (Aug. 23, 2001). *See also* E.E.O.C. NOTICE 915.002, POLICY STATEMENT ON MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AS A CONDITION OF EMPLOYMENT (July 10, 1997) (setting out the EEOC's policy on mandatory binding arbitration).

370. *But see* Safrit v. Cone Mills Corp., 248 F.3d 306, 308-09 (4th Cir. 2001); Nur v. K.F.C., USA, Inc., 142 F. Supp. 2d 48, 50-52 (D.D.C. 2001); Roberson v. Clear Channel Broad., Inc., 144 F. Supp. 2d 1371, 1374-75 (S.D. Fla. 2001); Prescott v. N. Lake Christian Sch., No. 01-475, 2001 U.S. Dist. LEXIS 9793, at *2-3 (E.D. La. June 29, 2001).

371. Se. Stud & Components, Inc. v. Am. Eagle Design Build Studios, L.L.C., 588 F.3d 963, 966-67 (8th Cir. 2009).

372. Nino v. Jewelry Exch., Inc., 609 F.3d 191, 207 (3rd Cir. 2010).

373. Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 315 (6th Cir. 2000).

374. *Cf.* Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 89-93 (2000) (holding that a lack of specifics regarding costs will not automatically make an arbitration agreement unenforceable); *see also* Cooper v. MRM Inv. Co., 367 F.3d 493, 509 (6th Cir. 2004).

375. McMullen v. Meijer, Inc., 355 F.3d 485, 490 (6th Cir. 2004).

376. *See generally*, e.g., Int'l Bhd. of Elec. Workers, Local Union No. 545 v. Hope Elec. Corp., 380 F.3d 1084 (8th Cir. 2004); Cruz v. PacifiCare Health Sys., 66 P.3d 1157 (Cal. 2003) (holding that arbitration is not compelled where a restitution claim is ancillary to injunctive relief sought under a statutory scheme whose primary purpose is to protect the public by punishing wrongdoing and deterring future violations rather than compensate individual plaintiffs).

377. *See, e.g.*, Century Indem. Co. v. Certain Underwriters at Lloyd's, London, 584 F.3d 513, 524 (3d Cir. 2009); Melton v. Phillip Morris, 17 Indiv. Empl. Rts. Cas. (BNA) 1859, 1860-61 (D. Or. 2001) ("Arbitration is a matter of contract . . . . In determining whether a valid arbitration agreement arose . . . a federal court should look to the state law."), *rev'd*, 71 F. App'x 701 (9th Cir. 2003).

ments include whether there was a knowing and intelligent waiver of a right to a trial,[378] and whether there is adequate due process in areas such as discovery and remedies.[379] The DFA, taking note of these policy arguments, allows the SEC to bar enforcement of pre-hire arbitration agreements, including in whistleblowing cases.[380]

In addition to these issues, there are two other significant problems with forcing whistleblowers into arbitration: secrecy and limited damages. One of the acknowledged benefits of arbitration, from the employer's point of view, is that the proceedings are not public and negative publicity can be avoided.[381] Yet, the desire for public oversight and the goal of exposing and reducing misconduct are the primary motivations behind whistleblowing legislation.[382] Since the courts look to legislative intent in interpreting the FAA[383] and the Supreme Court, in *Adams*, deferred to the legislature's expertise balancing political forces in writing statutes,[384] whistleblowers should, consistent with the decision, be exempted. At least one court has allowed a whistleblower who

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378. "[I]n all contexts other than arbitration clauses, federal courts have consistently ruled that such waivers [of a constitutional right to a jury trial] must be 'knowing, voluntary and intentional.'" Holding, *supra* note 368, at A1 (quoting University of Missouri Law Professor Jean Sternlight).

379. John Gibeaut, *Detoured to ADR: A New Round of Employment Issues Is Coming to Court as Companies Refine the Wording of Workers' Contracts*, A.B.A. J., Oct. 2001, at 50, 52.

380. Dodd-Frank Act, *supra* note 17, at § 921, 124 Stat. at 1841. Moreover, in federal contracts valued over $1 million, a general contractor must agree not to put in contracts, or not enforce terms in existing contracts, any agreements to arbitrate disputes related to Title VII or torts related to sexual harassment or assault. The general contractor must also have such agreements in its contracts with subcontractors. *Id.* at § 8116(b).

381. *See* Schueler v. Roman Asphalt Corp., 827 F. Supp. 247, 261 (S.D.N.Y. 1993); *see also* Henry v. Gonzalez, 18 S.W.3d 684, 693 (Tex. App. 2000); Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 268 (Tex. 1992). *See generally* Cal Keith & Julie Sherman Lucht, *Can E.E.O.C. Go to Court?*, NAT'L L.J., Dec. 3, 2001.

382. Dworkin & Callahan, *supra* note 10, at 378.

383. Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 194-96 (2000). *See also* Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148, 151 (4th Cir. 1993); Woodmen of the World Life Ins. Soc'y v. White, 35 F. Supp. 2d 1349, 1350 (M.D. Ala. 1999).

384. Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 560-61 (2001).

suffered retaliation to avoid an arbitration agreement, giving deference to the whistleblower's statutory right to a tort claim over the public policy arguments favoring arbitration.[385]

Another advantage of arbitration, from the employer's perspective, is that damages are generally lower than those damages ordered in traditional trials.[386] A primary reason for this is that punitive damages are seldom awarded in arbitration.[387] We have argued that punitive damages further the goals of non-retaliation and encourage whistleblowing.[388] The case of *E.E.O.C. v. Waffle House, Inc.*[389] involved the issue of being able to pursue adequate damages.[390] In that case, the Supreme Court held that the EEOC could pursue a claim for damages for an employee despite the fact that the employee had signed an arbitration agreement that prevented him from suing the employer via the court system. The Court further stated that, "punitive damages . . . serve an obvious public function in deterring future violations. . . . Punitive damages may often have a greater impact on the behavior of other employers than the threat of an injunction."[391]

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385. Jones v. Halliburton Co., 583 F.3d 228, 235-40 (8th Cir. 2009); Young v. Ferrellgas, L.P., 21 P.3d 334, 337 (Wash Ct. App. 2001). *See also* Smith v. Bates Technical Coll., 991 P.2d 1135, 1142-43 (Wash. 2000); Wilson v. City of Monroe, 943 P.2d 1134, 1139 (Wash. 1997); Cruz v. PacifiCare Health Sys., Inc., 111 Cal. Rptr. 2d 395, 339-40 (Cal. Ct. App. 2001) (arbitration not compelled where a restitution claim is ancillary to injunctive relief sought under a statutory scheme whose primary purpose is to protect the public by punishing wrongdoing and deterring future violations rather than compensate individual plaintiffs). *But see* Tuskey v. Volt Info. Sci., Inc., No. 00 Civ. 7410 (DAB) (GWG), 2001 U.S. Dist. LEXIS 10980, *7-*12 (S.D.N.Y. Aug. 3, 2001) (arbitration not excluded even when the claims include retaliation).

386. Estreicher, *supra* note 384, at 559.

387. *See* E. Allan Farnsworth, *Punitive Damages in Arbitration*, 20 STETSON L. REV. 395, 400-01 (1991). *See generally* Stephen P. Bedell, *Punitive Damages in Arbitration*, 21 J. MARSHALL L. REV. 21 (1987); Melvin M. Belli, Sr., *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 U.M.K.C. L. REV. 1 (1980); Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 FORDHAM L. REV. 2035 (2011).)

388. *See supra* notes 328-31 and accompanying text.

389. 534 U.S. 279, 297 (2002).

390. Gibeaut, *supra* note 379, at 53.

391. 534 U.S.279, 295.

6. *Statutes of Limitations*

The statute of limitations should be sufficiently long to allow whistleblowers to meaningfully pursue their rights. This is consistent with the approach of the DFA, which provides for a statute of limitations extending three years from the retaliatory conduct, and with the DFA's extension of the SOX reporting period from 90 to 180 days.[392] We recommend that the state tort statute of limitations be adopted in the whistleblowing context. This strikes an appropriate balance between protecting defendants from unfair surprise and prejudice that can result from stale claims[393] and giving plaintiffs adequate time to raise claims.[394] It is also consistent with states' treatment of retaliatory firing in violation of public policy as a tort,[395] and is in line with the limitations periods already adopted by numerous states' whistleblower statutes.[396] We also recommend that equitable tolling be allowed where appropriate.[397]

In drafting the whistleblowing statute, legislators should address possible interactions with other statutes. In general, the whistleblowing statute should not have a preemptive effect on other causes of action, such as common law wrongful discharge claims, that could benefit whistleblowers. This lack of preemptive effect would be consistent with the goal of allowing a full range of remedies and encouraging reporting. Likewise, confidentiality agreements and arbitration agreements should not be used to trump disclosures in the public

392. Dodd-Frank Act, § 922(c). The Act also makes clear that the employee is entitled to a jury trial on the retaliation claim. *Id.*

393. *See* Occidental Life Ins. Co. v. E.E.O.C., 432 U.S. 355, 372 (1977); Kathryn Doi, Comment, *Equitable Modification of Title VII Time Limitations to Promote the Statute's Remedial Nature: The Case for Maximum Application of the Zipes Rationale*, 18 U.C. DAVIS L. REV. 749, 757 (1985).

394. *See* Burnett v. Grattan, 468 U.S. 42, 45 (1984).

395. *See, e.g.*, Rothrock v. Rothrock Motor Sales, Inc., 810 A.2d 114, 118 (Pa. Super. Ct. 2002); Lins v. Children's Discovery Ctrs. of Am., Inc., 976 P.2d 168, 171 (Wash. Ct. App. 1999).

396. Approximately half of the states with whistleblower statutes established statutes of limitations. These range from a 30-day period in Missouri and Connecticut to two years in Washington and three years in Rhode Island. The most common limits were ninety days (eight states), and one year (eight states). *See* Dworkin, *supra* note 44, at 260-73 (listing, in column 6, the statutes of limitations for various state anti-retaliation statutes).

397. *See, e.g.*, Zipes v. Trans World Airlines, 455 U.S. 385, 393 (1982); Doi, *supra* note 393, *passim.*

interest or to foreclose actions. If federal laws provide a good example of protecting and encouraging whistleblowing, the federal laws should be considered as a model. An explanation should accompany the state law that it is intended to work with—not be preempted by—such federal legislation where state law is equally or more generous and protective.

In this Part, we have argued that a whistleblowing statute will best accomplish the desired goals of exposing, halting and deterring wrongdoing, if it incorporates broad definitions of protected disclosures and report recipients, including the media, as well as a broadly-defined class of protected whistleblowers. Whistleblowers should, of course, be protected from retaliation. The definition of retaliation should be broad enough to encompass actions that would deter a reasonable person from reporting. Additionally, if retaliation occurs, the whistleblower should be able to pursue a full range of remedies—including punitive damages—and attorney fees and costs. Organizations should be encouraged to facilitate whistleblowing so that wrongdoing can be halted sooner, with fewer repercussions for the whistleblower and the organization and its members. Finally, financial reward structures should be used where feasible to further encourage whistleblowing.

V.
CONCLUSION

In sum, we recommend that states adopt a single, comprehensive whistleblowing statute with all of the characteristics we discussed above. As noted above, distinctions observed in many jurisdictions among occupations, industries, or both are not well-founded.[398] Other differences among such provisions, such as the applicable statute of limitations,[399] are equally indefensible. If a comprehensive measure is enacted as a substitute for an existing, piecemeal scheme, there will be a minimal number of conflicts with other state laws, if any. When core and adjunct statutes exist side-by-side, all applicable causes of action should be permitted in cases presenting qualifying facts; similarly, wrongful discharge claims should be allowed. In other words, broader and more inclusive statutes are desira-

398. *See supra* Part II.B.3.
399. *See supra* Part III.B.6.

ble to protect whistleblowers and promote the public interest that comes with exposing organizational wrongdoing.

Existing state statutes and the common law tend to safeguard trade secrets and other confidential firm matters.[400] To bolster this protection, many organizations utilize confidentiality agreements that prohibit employees from divulging private information without the employer's permission.[401] None of these sources of protection is absolute, however.[402]

In cases where the organization's interest in confidentiality is enhanced by legal or contractual protection, or both, the whistleblower appropriately bears an enhanced obligation to show that his or her communication should be protected. Thus, we believe that a presumption in favor of privacy should be recognized in cases in which contractual confidentiality provisions, trade secret laws, audit privilege measures, and the like are involved, unless the wrongful acts involve violation of federal or state statute or regulation, or purport to prohibit the promisor from cooperating with government investigations or compliance efforts. In each of these cases, the whistleblower should bear the burden of proving that society's interest in exposure supersedes the organization's interest in secrecy. Two fact-specific factors are critical to this consideration: the explicitness and importance of the public policy violated by the employer conduct complained of by the whistleblower[403] and the likelihood that misconduct will be curtailed, corrected, and deterred because of the disclosure.[404]

Finally, comprehensive state whistleblowing statutes should not be considered preempted by federal law.[405] The states' traditional police powers include regulation of employment relationships.[406] Thus, even in areas comprehensively regulated by federal law, the states' interests should be acknowledged. At a minimum, Congress should explicitly address preemption in statutes with whistleblowing provisions.

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400. *See supra* notes 212-16 and accompanying text.

401. *See* Dworkin & Callahan, *supra* note 86, at 152-53.

402. *See id.* at 158-71.

403. *See supra* notes 77-84 and accompanying text.

404. *See* Dworkin & Callahan, *supra* note 86, at 179-90 (evaluating considerations against enforcement of confidentiality clauses).

405. *See supra* notes 189-92 and accompanying text.

406. *See* Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 20-22 (1987).

State whistleblowing statutes have matured to a point at which thoughtful reflection is both possible and necessary. Despite the success of some efforts to spur whistleblower disclosures, our society remains distrustful of those who "tell" about others' wrongdoing. Thus, our enthusiasm for exposure is tempered by unspoken reservations about those who have come forward. The significant societal benefits that have been achieved through federal whistleblowing statutes demonstrate that we must leave behind the rules of the playground. Society has much to gain from forthright acceptance of the public contribution of whistleblowers.