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Optimizing Whistleblowing

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OPTIMIZING WHISTLEBLOWING

*Usha R. Rodrigues**

ABSTRACT

Whistleblowers have exposed misconduct in settings ranging from public health to national security. Whistleblowing thus consistently plays a vital role in safeguarding society. But how much whistleblowing is optimal? And how many meritless claims should we tolerate to reach that optimum? Surprisingly, legislators and scholars have overlooked these essential questions, a neglect that has resulted in undertheorized, stab-in-the-dark whistleblower regimes, risking both overdeterrence and underdeterrence.

This Article confronts the question of optimal whistleblowing in the context of financial fraud. Design choices, which play out along two axes, have profound effects on the successful implementation of whistleblowing policy. One axis varies by end goal to provide whistleblowers with positive monetary incentives or to make them whole with antiretaliation protection. The other axis centers on the mechanism for achieving that goal agency intermediation or a private cause of action in the courts.

The existence of three parallel financial-fraud whistleblowing regimes presents a unique opportunity to consider how different whistleblower policy approaches play out in the real world. First, using original, hand-collected datasets from these three regimes, this Article gathers and analyzes data from courts and administrative agencies. Second, it identifies structural whistleblower reforms rooted in the data. Finally, this Article develops a new analytical framework to help legislators and scholars design regimes to better protect and incentivize optimal whistleblowing.

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INTRODUCTION

Pilot Karlene Petitt blew the whistle at Delta Airlines, reporting safety issues including pilot fatigue and improper training.¹ The airline responded not by addressing her concerns but instead by referring her to a psychiatrist, who diagnosed her with bipolar disorder, which prevented her from flying for two years.² Subsequently, two other

1. Katherine Krems & Jason Zuckerman, *DOL Judge Awards Airline Pilot \$500,000 in Compensatory Damages in AIR21 Whistleblower Retaliation Case*, NAT'L L. REV. (Jan. 6, 2021), <http://www.natlawreview.com/article/dol-judge-awards-airline-pilot-500000-compensatory-damages-air21-whistleblower> [http://perma.cc/4BJE-BMQK].

2. Andy Pasztor, *FAA Chief Had Helped Delta Retaliate Against Whistleblower, Administrative Judge Rules*, WALL ST. J. (Dec. 27, 2020, 3:09 PM), http://www.wsj.com/articles/faa-chief-helped-delta-retaliate-against-whistleblower-in-previous-role-administrative-judge-rules-11609085771?mod=searchresults_pos1&page=1 [http://perma.cc/52JY-RNE2]. The doctor

psychiatrists found that she did *not* have the disorder after all—and the first psychiatrist retired after complaints surfaced alleging misconduct in his evaluations of other Delta pilots.³ This story has a happy ending for Ms. Petitt; she filed an action claiming that she had been retaliated against for blowing the whistle, and an administrative law judge (ALJ) agreed, awarding her \$500,000 in back pay and damages.⁴

In Ms. Petitt's case, it appears that the government provided well-deserved protection to a meritorious whistleblower.⁵ Not all whistleblowers are so deserving. Employers fear that whistleblower regimes can empower disgruntled employees seeking revenge against innocent bosses, forcing them to defend against meritless accusations. How can whistleblower regimes protect the Petitts of the world without also empowering nuisance suits?

Because whistleblowing protections can be both a shield for the sincere whistleblower and a sword for the vengeful ex-employee, two key questions arise. First, how much whistleblowing is optimal? And second, what mechanism should the government employ to sift the meritorious wheat from the vindictive chaff? In criminal law, an analogue of this question is raised by Blackstone's famous ratio: "[B]etter that ten guilty persons escape, than that one innocent suffer."⁶ Translated into whistleblowing terms, the question becomes, How many false reports is society willing to endure to ensure that a meritorious claim is protected?

These questions cannot be answered definitively—and this Article makes no claim to do so—but they implicate a weighing function that any sound whistleblowing policy necessarily must address. This Article confronts these questions head on, examines the data available by way of three different design schemes in a single subject-matter context (financial fraud), and provides a structured framework for policymakers going forward.

The first contribution of this Article is to develop a framework for addressing these fundamental questions that determine how to structure whistleblowing protection.

later surrendered his medical license in a settlement with state regulators after complaints into his handling over Delta pilot examinations. *Doc Who Called Delta Pilot "Bipolar" Surrenders Medical License*, CHRISTINE NEGRONI (Nov. 13, 2020), <http://christinenegroni.com/doc-who-called-delta-pilot-bipolar-surrenders-medical-license/> [<http://perma.cc/S5CF-CP4H>].

3. Pasztor, *supra* note 2; CHRISTINE NEGRONI, *supra* note 2.

4. *Id.* ("The ruling says that 'in this case, the squeaky wheel did not get the grease.'" (quoting Scott Morris, Department of Labor administrative law judge)). The case has received extra attention because the head of Delta at the time, Steve Dickson, later served as head of the Federal Aviation Administration (FAA). *See id.* ("The lengthy decision by a department administrative law judge concluded that Mr. Dickson, as Delta's senior vice president of flight operations, knew about and approved punitive moves against veteran co-pilot Karlene Petitt.").

5. Delta denies that any retaliation occurred and is appealing. *See id.* Whistleblowers regularly face demotion, firing, and other punishments as a result of their reporting. Tanya M. Marcum & Jacob Young, *Blowing the Whistle in the Digital Age: Are You Really Anonymous? The Perils and Pitfalls of Anonymity in Whistleblowing Law*, 17 DEPAUL BUS. & COMM. L.J. 1, 4 (2019) (discussing a study in which it was found that nearly two thirds of whistleblowers had experienced some form of retaliation, including: 69% losing their jobs or being forced to retire; 64% receiving negative employment performance evaluations; 68% having to work more closely monitored by supervisors; 69% being criticized or avoided by coworkers; and 64% being blacklisted from other jobs in their field).

6. WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 352 (Oxford, Clarendon Press 1769).

Section I explores these theoretical questions before turning to a survey of four basic design choices, which can be grouped in pairs by type of claim. The first two provide positive monetary rewards for whistleblowing.⁷ The second two attempt to make a whistleblower whole if she suffered from retaliation for her whistleblowing.⁸ These pairings in turn vary by how they achieve their goal—through a private cause of action or a government agency as intermediary.⁹

Design choices have profound effects on whistleblowing. An agency-based approach forces the federal government to internalize more of the initial costs of litigation.¹⁰ A whistleblower merely reports her tip or files her complaint, and the government shoulders the rest of the work. A private cause of action allows the plaintiff more control over the case—but at a cost.¹¹ Either the plaintiff herself pays court expenses, or she must convince an attorney taking the case on contingency to do so.¹² Ultimately, whistleblowers inevitably face a gatekeeper: either a public agency or a private lawyer determines whether a case goes forward.

It may be that granting a private cause of action spurs too many frivolous lawsuits, and that an agency-centered approach best protects against the danger of unscrupulous false whistleblowers. The converse could also be true. It could be that one benefit of the court system is that it forces would-be plaintiffs—or their attorneys—to internalize the cost of litigation, thus deterring more frivolous cases. In contrast, a disgruntled employee can file a complaint with the government relatively easily, guaranteeing an investigation, and thereby generating headaches for her employer.¹³ A similar version of this agency/private litigant question plays out in the whistleblower-reward (as opposed to retaliation) context.

The second contribution of the Article is to provide the first empirical study of available data regarding the relative success of three whistleblower protection mechanisms in a defined field—financial fraud—over an eight-year period.¹⁴ Until now, scholars have ignored a legislative accident that created parallel whistleblower protection regimes that use three distinct mechanisms to sort whistleblower claims in this arena.

Section II of this Article lays out these competing mechanisms. The Sarbanes-Oxley Act of 2002¹⁵ (“SOX”) created an agency-based system situated in the Occupational Safety and Health Administration (OSHA) to protect whistleblowers who allege financial fraud from retaliation.¹⁶ In contrast, the Dodd-Frank Wall Street Reform

7. See *infra* Part I.C.

8. See *id.*

9. See *infra* Part I.E.

10. See *infra* note 171 and accompanying text. The Sarbanes-Oxley Act of 2002 introduced such a mechanism for financial fraud claims. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

11. See *infra* note 73 and accompanying text. The False Claims Act is the original template for this sorting mechanism. 31 U.S.C. § 3730(c)(3).

12. See *infra* Part III.B.2. The Dodd-Frank Act of 2010 provides this form of whistleblower protection. 15 U.S.C. § 78u-6.

13. See, e.g., 18 U.S.C. § 1514A.

14. See *infra* Part III.C.

15. Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of the U.S.C.).

16. *Id.*; see *infra* Part III.B.1.

and Consumer Protection Act of 2010¹⁷ (“Dodd-Frank”) gives wronged whistleblowers a private right of action in district court.¹⁸ Thus, in Dodd-Frank, Congress chose the *courts*, rather than an agency, to serve as the key decisionmaker for whistleblower retaliation claims. Dodd-Frank also provided a separate, government-mediated whistleblower bounty system at the Securities and Exchange Commission (SEC), whereby whistleblowers can receive a percentage of the government’s recovery if it is over one million dollars.¹⁹

Section III describes and analyzes data from these parallel whistleblower regimes. There are key differences in coverage between the two protection regimes, but they are closely related; indeed, many complaints voice claims under both statutes.²⁰ Despite these variations, the data presented here constitute the best—indeed, the *only*—empirical evidence on U.S. financial-fraud whistleblowing that now exists.

The data reveal that the agency mechanism results in relatively fewer successful claims than does the private cause of action mechanism. Plaintiffs are roughly 60% more likely to be successful under the litigation-focused sorting mechanism of Dodd-Frank than the agency-focused mechanism of SOX.²¹ The third dataset, comprised of annual data released by the SEC’s Office of Whistleblower Protection (OWP), moves to the bounty context, where whistleblowers seek not to be made whole for past retaliation but rather to receive a monetary reward for reporting financial misconduct.²² These high-level data (again, the only ones available) suggest agency-mediated bounties generate a tremendously high number of false positives—i.e., meritless tips. The average success rate for such tips is vanishingly small (0.33%).²³

Taken at face value, it might appear that out of the three financial fraud reporting mechanisms, Dodd-Frank is the “best” in terms of efficiency. But upon reflection, these new data bring us ineluctably back to our first questions. Presuming that each mechanism is accurate at assessing merit, the data show that granting a private cause of action reduces the number of meritless claims the most.²⁴ Interviews with attorneys suggest that it does so by causing whistleblowers (more often, plaintiffs’ attorneys working on contingency) to internalize the costs of litigation, and only to bring forward those cases most likely to result in a high award. But those screened-out cases may contain reports of misconduct that impact society profoundly—each one potentially a missed opportunity to divine misconduct.

In contrast, SOX antiretaliation claims, based as they are at OSHA, impose far fewer costs on would-be claimants. All they need to do is file a form, which then launches an investigation and makes findings.²⁵ Finally, SEC’s bounty system requires still less

17. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered titles of the U.S.C.).

18. 15 U.S.C. § 7202(b); *see infra* Part III.B.2.

19. *See infra* note 86 and accompanying text.

20. *See, e.g.,* Wadler v. Bio-Rad Labs., Inc., 141 F. Supp. 3d 1005 (N.D. Cal. 2015).

21. *See infra* Part IV.C Table 10.

22. *See* 17 C.F.R. § 240.21F-3(a) (2021).

23. *See infra* Part IV.A; SEC, 2020 OFFICE OF THE WHISTLEBLOWER ANNUAL REPORT 27 (2020) [hereinafter SEC, 2020 ANNUAL REPORT], http://www.sec.gov/files/2020%20Annual%20Report_0.pdf [<http://perma.cc/3BVM-P4JU>].

24. *See infra* Part IV.C Table 10 and accompanying text.

25. *See* 18 U.S.C. § 1514A(b).

effort—a whistleblower reports to the OWP, lets the government do its work, and cashes in if collections amount to over one million dollars.²⁶

The data tell us how these mechanisms are working—and that the courts are likely achieving their relatively high success rates by shifting screening costs to plaintiffs. Armed with this insight, we must return to Section I's questions, which get to the importance of the harm being reported and the tolerance we have for unworthy claims in service of ferreting out and redressing this harm. Both the SEC and Congress have ignored these questions in making whistleblower policy, as Section V makes plain.

Section V argues that it was a mistake from the outset for Congress to locate complicated financial fraud questions at an agency focused on workplace safety. Congress housed SOX whistleblowing at OSHA without any real thought—except that granting plaintiffs a private cause of action would encourage frivolous claims,²⁷ a fear that the data suggest was ill-founded. This Article's third contribution is to recommend that Congress consolidate federal financial-fraud reporting by moving responsibility for SOX whistleblowing to the SEC.²⁸

Section V next turns to the SEC in its own right. The agency recently moved to make smaller awards easier to obtain and proposed subjecting awards over one hundred million dollars to additional review, in the name of efficiency.²⁹ As was the case with legislative action in SOX, these reforms neglect to consider what *efficiency* means in the context of whistleblowing. To evaluate a mechanism's efficiency, one must first understand what goals one seeks to achieve.

The Article's fourth contribution thus comes full circle back to its first. Section V articulates a two-stage framework for a more thoughtful analysis of whistleblowing claims. The first stage focuses on assessing the nature of the underlying harm, considering its severity, systemic implications, susceptibility to false claims, and the salary level of the most likely reporters of misconduct.³⁰ The second stage focuses on considering various levers Congress might use, starting with whether to positively incentivize whistleblowing (through bounties)³¹ or to protect whistleblowers from retaliation. In particular, given the importance of attorneys to this process, Congress needs to consider whether the incentives and protections for low-earning whistleblowers are too low—as a matter of policy, and as a matter of equity.³²

26. See 17 C.F.R. § 240.21F-3(a) (2021).

27. See *infra* note 292.

28. See *infra* Part V.A.

29. Whistleblower Program Rules, 17 C.F.R. pts. 240 & 249 (proposed June 28, 2018), <http://www.sec.gov/rules/proposed/2018/34-83557.pdf> [<http://perma.cc/L7JE-JHQB>].

30. See *infra* Part V.C.1.

31. As Dodd-Frank did when it introduced a completely separate bounty mechanism at the behest of Harry Markopolos, the unheeded external whistleblower in the Bernie Madoff fraud. See *Oversight of the Securities and Exchange Commission's Failure To Identify the Bernard L. Madoff Ponzi Scheme and How To Improve SEC Performance*, Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs, 111th Cong. (2009) [hereinafter Senate Hearing Statement of Harry Markopolos] (statement of Harry Markopolos).

32. See *infra* Part V.C.2.

To make the application of this framework concrete, consider Boeing's 737 MAX. A software error led to two plane crashes and grounded hundreds of planes.³³ The loss of hundreds of lives obviously was a severe harm, and the grounding of the planes had systemic implications for the global economy.³⁴ What if an engineer making \$60,000 a year knew of the problem? Should Congress create a bounty to encourage the reporting of this kind of misconduct in aviation? Is make-whole, antiretaliation protection sufficient protection? Should an agency or a court provide redress? How many false positives are we willing to tolerate rather than suffer the harm of a false negative—that is, a whistle unblown? These are the kinds of questions the proposed framework prompts policymakers to think about in a systematic way.

I. THEORIZING WHISTLEBLOWERS

This Section introduces the current theory and literature of whistleblowers. A thorough survey of whistleblower literature would span fields including sociology, accounting, finance, psychology, and law. I will not attempt that here. Instead, I begin with a brief overview of whistleblower paradigms,³⁵ coupled with the vast amount that must remain unknown about whistleblowing behavior.³⁶ Part I.C describes a question of the relative merits of bounty systems, which positively incentivize whistleblowing, versus antiretaliation systems, which merely protect whistleblowers who are punished for their reporting. Part I.D describes experimental evidence on that question. Part I.E examines literature on the relative merits of courts versus agencies in the bounty context.

A. Whistleblower Paradigms

Society's view of whistleblowers is complicated, to say the least.³⁷ According to one view, the whistleblower is a "rat," a "scoundrel" whose defining trait is disloyalty to his or her organization.³⁸ Under this view, even whistleblowers reporting true misconduct are worthy of scorn. They are "lowlife[s] who betray[] a sacred trust largely for personal gain."³⁹

33. See Mariano Zafra, Robert Wall, Elliot Bentley & Merrill Sherman, *Boeing MAX: A Tale of Two Crashes*, WALL ST. J. (May 15, 2019, 5:30 AM), <http://www.wsj.com/graphics/boeing-max-tale-of-two-crashes/> [<http://perma.cc/G8YA-SBFP>]; see also *Boeing Grounds Entire 737 MAX Crash Aircraft Fleet*, BBC NEWS (Mar. 14, 2019), <http://www.bbc.com/news/business-47562727> [<http://perma.cc/L98Y-3H69>].

34. See Denise Lu, Allison McCann, Jin Wu & K.K. Rebecca Lai, *From 8,600 Flights to Zero: Grounding the Boeing 737 Max* 8, N.Y. TIMES (Mar. 13, 2019), <http://www.nytimes.com/interactive/2019/03/11/world/boeing-737-max-which-airlines.html> [<http://nyti.ms/3aZiKce>] (reporting that the two crashes killed 346 people and grounded over 340 planes and an estimated 8,600 flights per week).

35. See *infra* Part I.A.

36. See *infra* Part I.B.

37. See, e.g., 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, 1051–53 (2004).

38. *Id.* at 1052.

39. Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1159 (2010) (alteration in original) (quoting TERANCE D. MIETHE, *WHISTLEBLOWING AT WORK: TOUGH CHOICES IN EXPOSING FRAUD, WASTE, AND ABUSE ON THE JOB* 12 (1999)).

Sometimes these whistleblowers may not even be true whistleblowers at all—that is, they may not be reporting misconduct. Sometimes they have been fired for legitimate reasons or let go as part of a broader layoff.⁴⁰ In this model, the whistleblower is a “disgruntled employee with an axe to grind.”⁴¹ These whistleblowers act because of a grudge, to “get back at” their former employer.⁴²

In contrast, the other paradigmatic whistleblower model is the hero, speaking a lonely truth to protect the public from wrongdoing.⁴³ “This paradigm usually pits the conscience of one individual against the power and resources of a large organization.”⁴⁴ Miriam Cherry sees the myth of the heroic whistleblower as representing American individualism: “The individual worker, refusing to give up his or her morals and identity, instead stands up for what he or she believes is right in the face of overwhelming power and pressure to conform.”⁴⁵

A third possibility is the employee who sincerely blows the whistle but is mistaken either as to the underlying misconduct or as to the possibility of legal remedy.⁴⁶ In the case of mistaken whistleblowers, the primary problem is one of failure to understand the law completely, a gap that employers presumably have an incentive to remedy.⁴⁷ The solution in this third category is not one of recalibrating incentives, but some form of education or communication.⁴⁸

A fourth consideration is that would-be whistleblowers themselves can be complicit in the wrongdoing they report. Miriam Baer describes the different motivations attending these “complicit” whistleblowers, who face the real possibility that their whistleblowing—even if anonymous—risks a kind of self-incrimination by increasing the likelihood of criminal investigation.⁴⁹ Unfortunately, these complicit whistleblowers will likely be in possession of more valuable information than innocent ones—but be less likely to blow the whistle.⁵⁰

B. *Known Unknowns*

What we do not know about whistleblowing dwarfs what we do know. First, the overall incidence of fraud and misconduct is unknown. Believers in the power of markets, conservatives, and those more optimistic about human nature will be likely to

40. Cherry, *supra* note 37, at 1052.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. See Robert G. Vaughn, *America's First Comprehensive Statute Protecting Corporate Whistleblowers*, 57 ADMIN. L. REV. 1, 14 (2005).

47. See *id.*

48. In contrast, identifying who reports real misconduct but whose claim fails for procedural reasons, a combination of relaxing the law's requirements to make claims easier to bring and better education as to what legitimate claims look like, and when to bring them, offers the most promising path to reform.

49. Miriam H. Baer, *Reconceptualizing the Whistleblower's Dilemma*, 50 U.C. DAVIS L. REV. 2215, 2247 (2017). Complicating matters yet further, as Baer points out, innocent whistleblowers may mistakenly perceive themselves to be complicit, and complicit ones may mistakenly perceive themselves to be innocent. *Id.* at 2245.

50. *Id.* at 2242–44.

believe that fraud is relatively rare—the product of a few “bad apples.” Market skeptics, progressives, and cynics will be more likely to believe that the whole corporate barrel is rotten, and that most fraud remains undetected. While there are ways of approximating an answer to the question of how pervasive fraudulent corporate behavior is, an accurate answer is probably impossible because of its hidden nature. The importance of whistleblowing protections and policy depends in part on how much one thinks fraud is a problem, as an empirical matter.

Second, there is the problem of the dogs that do not bark—the reports that are never made. Let us imagine an employee who sees wrongdoing while on the job. He reports the misconduct to his supervisor. The supervisor reports up the chain of command, the wrongdoer is punished, and the fraud is corrected. These types of healthy organizations, intent on doing the right thing, will not show up in a whistleblower dataset.⁵¹ They will not be subject to any external governmental discipline. Importantly, they will have little incentive to publicize their response to wrongdoing because it would counter their interest to advertise that misconduct occurred at all, and going public would be unnecessary, in any event, because the problem has already been addressed.

A third risk follows from the fact that, even if the employer is guilty of misconduct, an employee may not recover in an antiretaliation lawsuit. Statutes of limitations and other requirements mean that whistleblowing can be hard to do.⁵² SOX’s current 180-day limit⁵³ is cramped at best, and from 2002 to 2010 that time limit was a mere 90 days.⁵⁴ Employees need time after suffering a retaliation to recognize that reporting the misconduct they witnessed might be protected activity and to figure out how to move forward. Some will never recognize their eligibility for such protection. Others, weighing the risks of filing a claim, will elect to move on and put their whistleblowing past behind them.

Fourth, some of the barking dogs are crying wolf. Commentators and legislators are aware of the risk of frivolous or false reporting,⁵⁵ but there are no studies of its incidence. The lack of empirical research on this question is unsurprising,⁵⁶ given how difficult it

51. See Richard Moberly, *Sarbanes-Oxley’s Whistleblower Provision: Ten Years Later*, 64 S.C. L. REV. 1, 42–43 (2012) [hereinafter Moberly, *Ten Years Later*].

52. *Id.* at 15–17.

53. 18 U.S.C. § 1514A(b)(2).

54. Sarbanes-Oxley Act, Pub. L. No. 107-204, sec. 806, § 1514A(b)(2)(D), 116 Stat. 802–03 (2002).

55. See, e.g., Lucienne M. Hartmann, Comment, *Whistle While You Work: The Fairytale-Like Whistleblower Provisions of the Dodd-Frank Act and the Emergence of “Greedy,” the Eighth Dwarf*, 62 MERCER L. REV. 1279, 1305–06 (2011) (“[T]his ‘lottery mentality’ has, in the wake of the Dodd-Frank Act, already been adopted by whistleblowers and attorneys and will fuel the filing of frivolous complaints.”); Bruce Carton, *Pitfalls Emerge in Dodd-Frank Whistleblower Bounty Provision*, SEC. DOCKET (Sept. 9, 2010, 3:37 PM), <http://www.securitiesdocket.com/2010/09/09/pitfalls-emerge-in-dodd-frank-whistleblower-bounty-provision/> [<http://perma.cc/L8LM-PWZR>]; Kevin Gosztola, *FireDogLake: Financial Services Committee Hearing: Whistleblowers Likened to Bounty Hunters*, CONGRESSWOMAN MAXINE WATERS (May 12, 2011), <http://waters.house.gov/media-center/in-the-news/firedoglake-financial-services-committee-hearing-whistleblowers-likened> [<http://perma.cc/E5JN-Z8SX>]; USDOL/OALJ: *Sarbanes-Oxley (“SOX”) Whistleblower Digest: Frivolous Complaint; Sanctions; Complaint’s Participation in Wrongful Conduct*, DOL.GOV, http://www.dol.gov/agencies/oalj/PUBLIC/WHISTLEBLOWER/REFERENCES/REFERENCE_WORKS/SOX_DIGEST_FRIVOLOUS_COMPLAINT_SANCTIONS [<http://perma.cc/Z4HD-LHEK>].

56. One study suggests that “contrary to what some in the corporate lobby might fear, whistleblowing is rarely ‘frivolous, misleading, or unreliable.’” Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt*

would be to actually study such a topic. For instance, in an experimental setting or survey, how many individuals would answer affirmatively when asked whether they would make up a whistleblower antiretaliation claim to get back at their boss?

Thus, it is clear that false reporting exists in theory, but risk of its existence is the most that has been said about it. For example, Yehonatan Givati describes the risk of false reporting as “well noted by policy makers and those active in the area of whistleblowing.”⁵⁷ He cites in support of this proposition (1) a U.K. report that concluded against the payment of rewards to whistleblowers because, among other reasons, it “could lead to false or delayed reporting”;⁵⁸ (2) the *Financial Times*, which noted that “the scale of the potential pay-outs” under Dodd-Frank “could generate rogue tip-offs by disaffected employees”;⁵⁹ (3) the U.S. Chamber of Commerce, which observed that “[i]nstead of allowing companies to identify and fix problems, we are just creating a lottery”;⁶⁰ (4) a report by the law firm DLA Piper on whistleblowing that noted the risk of “malicious or unfounded allegations” against employers;⁶¹ and (5) academics Howse and Daniels, who observe that “corporations are vulnerable to false claims made by opportunistic whistleblowers.”⁶² Each of these sources, the reader will notice, observes that the current framework creates the potential for false reporting. The question, however, is not whether the risk of false reporting exists in theory, but *how much* of a risk it is in practice. Givati creates a model that accounts for the possibility of false reporting,⁶³ but the gap between the model and reality remains in question.

Part I.B has described the many “unknowns” associated with whistleblower behavior in order to emphasize the importance of the data that *are* available. Section III will examine those data. But before that, we must examine the available mechanisms for screening out more nonmeritorious claims.

To Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act, 2012 B.Y.U. L. REV. 73, 78 (2012).

57. Yehonatan Givati, *A Theory of Whistleblower Rewards*, 45 J. LEGAL STUD. 43, 51 (2015).

58. *Id.* at 51–52 n.5 (quoting PUB. CONCERN AT WORK & WHISTLEBLOWING COMM’N, REPORT ON THE EFFECTIVENESS OF EXISTING ARRANGEMENTS FOR WORKPLACE WHISTLEBLOWING IN THE UK 14 (2013), <http://s3-eu-west-1.amazonaws.com/public-concern-at-work/wp-content/uploads/images/2018/09/08222935/wbc-report-final.pdf> [<http://perma.cc/23QY-RZ8R>]).

59. *Id.* (quoting Jean Eaglesham & Brooke Masters, *US To Pay Big Sums for Wall St Tip-Offs*, FIN. TIMES (Aug. 8, 2010), <http://www.ft.com/content/efa8a32a-a31a-11df-8cf4-00144feabdc0> [<http://perma.cc/3UVV-XS9P>]).

60. *Id.* (quoting David S. Hilzenrath, *The Wall Street Snitch Pitch*, WASH. POST (Nov. 22, 2010, 12:59 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/22/AR2010112200513.html> [<http://perma.cc/H748-H4BQ>]).

61. *Id.* at 52 (quoting DLA PIPER, WHISTLEBLOWING: AN EMPLOYER’S GUIDE TO GLOBAL COMPLIANCE 6 (2d ed. 2015), <http://www.dlapiper.com/en/us/insights/publications/2015/06/whistleblowing-law-2015%20> [<http://perma.cc/38KM-6HMH>] (click “Read the report (PDF) >>”)).

62. *Id.* (quoting Robert Howse & Ronald D. Daniels, *Rewarding Whistleblowers: The Costs and Benefits of an Incentive-Based Compliance Strategy*, in CORPORATE DECISION-MAKING IN CANADA 525, 526 (Ronald J. Daniels & Randall Morck eds. 1995), http://repository.upenn.edu/cgi/viewcontent.cgi?article=1003&context=law_series [<http://perma.cc/FA5L-MWL9>]).

63. *Id.* at 51.

C. *Carrots or Shields? Bounties vs. Antiretaliation Protections*

A key inquiry in the literature examines the relative effectiveness of bounty systems (“I blew the whistle, therefore I get a cut”) as compared to antiretaliation systems (“I blew the whistle and suffered for it, so make me whole”). The underlying question bounties address is what motivates a whistleblower, with the goal being to encourage more meritorious reporting. Antiretaliation, in contrast, focuses on the separate, though related, goal of discouraging retaliation and thus preventing harm to whistleblowers. Antiretaliation measures may indeed encourage individuals to report misconduct, but only by way of neutralizing a disincentive, rather than providing a positive incentive to blow the whistle. These present a fundamental difference in approach, and weighing the pros and cons of each mechanism forms a key component of Section IV’s analytical framework.

Identifying the incentives for meritorious whistleblowing is crucial to balancing incentives and remedies properly. If we think of the whistleblower as a hero—acting courageously because of an inner moral compass that compels her to speak out in the face of wrongdoing—then an optimal design will merely offer protection from retaliation. In contrast, less morally motivated whistleblowers may well be enticed to report misconduct only if they see a personal upside for doing so. Thus, whether we choose an antiretaliation or bounty system depends on the fundamental motivations of individuals who report misconduct. This consideration in turn implicates our key questions: if we are worried about systematic underreporting, then a bounty becomes an attractive tool because it affirmatively encourages whistleblowing. In contrast, if we are concerned about false reporting in a given area, antiretaliation is a more appropriate policy instrument because it merely protects a person who voluntarily chooses (without monetary incentive) to report misconduct from retaliation.

But the situation is still more complicated. Offering a financial reward for whistleblowing to a morally motivated whistleblower would be a poor design choice, and not merely because it would overcompensate her. Even worse, reducing the act of reporting misconduct from an act of conscience to a financial transaction risks “crowding out” those whistleblowers motivated by ethical considerations.⁶⁴ That is, providing external rewards can undermine the intrinsic motivation to do the right thing because “when people attribute their behavior to external rewards, they discount any moral incentives for their behavior.”⁶⁵ Given the centrality of understanding whistleblower motivation, Part I.D turns to evidence on that subject.

D. *Experimental Evidence on Whistleblower Motivation*

Yuval Feldman and Orly Lobel conducted research on the question of which incentives best motivate whistleblowers in an experimental setting.⁶⁶ Their series of experiments used surveys to determine the effectiveness of various design choices.⁶⁷

64. See David Freeman Engstrom, *Whither Whistleblowing? Bounty Regimes, Regulatory Context, and the Challenge of Optimal Design*, 15 THEORETICAL INQUIRIES L. 605, 615 (2014) [hereinafter Engstrom, *Whither Whistleblowing*].

65. Feldman & Lobel, *supra* note 39, at 1178–79.

66. See *id.* at 1151.

67. *Id.* at 1176, 1187–89.

They examined three different types of whistleblower protections.⁶⁸ The first, antiretaliation protections, aimed to make the whistleblower whole for any harms she suffers as a result of her whistleblowing.⁶⁹ The second involved either imposing affirmative duties to report or, on the flipside, imposing liabilities for failure to report illegality.⁷⁰ The law typically imposes such duties on senior officers or professionals such as lawyers, accountants, doctors, and teachers.⁷¹ The third approach involved financial incentives, which can, in practice, resemble either the pure *qui tam* approach of the False Claims Act,⁷² which empowers private litigants to take the reins if the government declines to do so, or a bounty awarded at the discretion of an agency, such as the Internal Revenue Service (IRS) or SEC.⁷³

A basic question Feldman and Lobel sought to answer was the motivation of whistleblowers. As already observed, whistleblowers who are motivated from an internal sense of what is right might well be put off by an incentive system that rewards them monetarily for doing the right thing.⁷⁴ The authors did indeed find evidence of “crowding out”—in their words, the act of “framing reporting as a commodity with a price tag attached may actually suppress internally motivated action.”⁷⁵ Intriguingly, for misconduct perceived to be less severe, low financial rewards prompted the least likelihood to report.⁷⁶ In fact, “the introduction of small bounties may actually *decrease* the rate at which [less morally outrageous misconduct] is reported.”⁷⁷ This research may be especially relevant in the context of financial misconduct, which is often perceived to be less ethically problematic because of the absence of a harmed individual (as opposed to a whistleblower in air safety, for example, who may be acting in the interest of passenger safety).⁷⁸

Thus, Feldman and Lobel’s findings suggest that antiretaliation measures provide more effective incentives for whistleblowing than bounties do, at least in some settings for some whistleblowers.⁷⁹ There may not be one right answer—or rather, the answer may be contextual. Given the near ubiquity of compliance programs in corporate

68. *Id.* at 1156.

69. *See id.* at 1161–63, 1176–77.

70. *Id.* at 1163–67.

71. *Id.* at 1163.

72. 31 U.S.C. §§ 3729–33.

73. Feldman & Lobel, *supra* note 39, at 1168.

74. *See id.* at 1154, 1202.

75. *Id.* at 1202. More specifically, they find offering low financial rewards to be the worst design mechanism, because they crowd out internally motivated whistleblowers. *Id.* In contrast, if financial rewards are sufficiently high, this crowding out effect largely disappears. *Id.*

76. *Id.* at 1194.

77. *Id.* at 1202 (emphasis added).

78. *See, e.g.,* David Craig, *Financial Crime: Bringing to Light the Cost of ‘Victimless’ Lawbreaking*, TABB F. (Oct. 20, 2017), <http://tabbforum.com/opinions/financial-crime-bringing-to-light-the-cost-of-victimless-lawbreaking/> [<http://perma.cc/WW9R-Z6ZU>]; Martin Ivezić, *What Are Financial Crimes? From Fraud to Terrorism*, MARVIN IVEZIC (Mar. 6, 2009), <http://cyberkinetic.com/fincrime/fincrim-fraud-terrorism/> [<http://perma.cc/6Y4C-S6FT>].

79. *See* Feldman & Lobel, *supra* note 39, at 1202–04.

America, with their emphasis on reporting wrongdoing internally, it may be that an external bounty does not deter internal whistleblowing much at all.

Indeed, heterogeneity among whistleblowers could mean that different incentives are best suited for different populations. David Engstrom, for instance, suggests that whistleblowers at more senior levels of management will have better information about misconduct “because of their more synoptic organizational view.”⁸⁰ However, these senior-level employees will also be more likely to have firm- or industry-specific skills and knowledge, making them less mobile and therefore more vulnerable.⁸¹ Thus, antiretaliation provisions and safeguards of anonymity might matter more to them than to rank-and-file employees.⁸² Engstrom argues that regulators could get higher quality information by focusing on antiretaliation protections rather than on bounties.⁸³

Beyond motivation, the literature has also examined the importance of institutional design—whether courts or an administrative agency should administer whistleblower incentives or protections. Part I.E examines this question in the bounty context.

E. Courts vs. Agencies

Some literature has focused on the organizational design question, specifically regarding the optimal design for a bounty mechanism of reward for whistleblower tips to the government. Understanding the insights this literature offers will be important for Section IV’s framework.

There are two basic models: a pure *qui tam* (with False Claims Act suits serving as the chief model), and a government-mediated bounty reward system (with Dodd-Frank and the IRS whistleblowing offices serving as exemplars).

The False Claims Act provides private litigants the ability to file suit on behalf of the federal government against those who have defrauded it.⁸⁴ The whistleblower files under seal and provides information on the fraud to the government.⁸⁵ The government then has sixty days to determine whether to intervene and take control of the lawsuit.⁸⁶ Importantly, if the government elects not to intervene, the whistleblower can continue her suit on her own and recover damages on behalf of the government.⁸⁷

Dodd-Frank introduced a modified *qui tam* model to reward successful whistleblowers. Dodd-Frank provided a mechanism where whistleblowers who report federal securities law violations to the SEC could earn bounties where the SEC obtained

80. Engstrom, *Whither Whistleblowing*, *supra* note 64, at 615.

81. *See id.*

82. *See id.*

83. *Id.*

84. 31 U.S.C. § 3730(b)(1).

85. *Id.* § 3730(b)(2).

86. *Id.* If it does so, the whistleblower collects 15–25% of any damages recovered. *Id.* § 3730(d)(1).

87. *Id.* §§ 3730(c)(3), 3730(d)(2). In this event, the whistleblower receives 25–30% of recovered damages. *Id.* § 3730(d)(2). If the government wishes to do so, it can dismiss the suit entirely. David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1271–72 (2012) [hereinafter Engstrom, *Harnessing the Private Attorney General*]. The Department of Justice must also consent to a private dismissal or settlement. *Id.* at 1272.

more than one million dollars in monetary sanctions paid by a wrongdoer.⁸⁸ Unlike the more venerable False Claims Act federal qui tam provision, however, Dodd-Frank whistleblowers have no independent standing to pursue violations.⁸⁹ That is, whistleblowers cannot pursue a case in the face of government inaction. Instead, whistleblowers only receive money if and when the government successfully pursues a claim and obtains more than one million dollars.⁹⁰ It may help to think of Dodd-Frank as offering a “cash for tips” system, as opposed to the true qui tam, which provides the plaintiff some control over whether the suit proceeds.⁹¹

A number of scholars have analyzed the theoretical risks and benefits of these two models—private litigation versus agency mediation for bounty-style rewards—side by side.⁹² Yet scholars have not attended to the data accumulated in almost eleven years of experience with Dodd-Frank’s “cash for tips” modified qui tam system. Section III attends to this deficiency.

1. Agency Enforcement

One obvious benefit of relying on agency enforcement is agency expertise. Agencies are comprised of specialists who train for years, building up both individual and institutional know-how.⁹³ What is more, even if these agencies are often described as “cash-strapped,” they still have access to resources far beyond the average plaintiff. Agencies are also able to centralize and control the volume and intensity of litigation.⁹⁴ Importantly, they are accountable to the public in a way that private litigants are not.⁹⁵

The counterweight to agency expertise is the risk of relying on government bureaucracy. The stereotypical bureaucrat may be more interested in safe cases and easy

88. The statute defines “monetary sanctions” as “any monies, including penalties, disgorgement, and interest, ordered to be paid; and . . . any monies deposited into a . . . fund . . . as a result of such action or any settlement of such action.” 15 U.S.C. § 78u-6(a)(4). Whistleblowers must voluntarily provide the SEC with original information about securities law violations. *See* Rapp, *supra* note 56, at 73, 144.

89. *See* 15 U.S.C. § 78u-6(a)(1) (defining “covered judicial or administrative action” as any action brought by the Commission).

90. *See* Rapp, *supra* note 56, at 78–79 (“[Dodd-Frank’s] biggest failure may be that it does not create true qui tam structures. That is, the law facilitates payments to whistleblowers, but provides no avenue for whistleblowers to pursue securities fraud actions directly. Instead, payments are only available in instances in which the SEC recovers civil fines.”). Dodd-Frank’s rules allow awards of between 10–30% of collected monetary sanctions. 15 U.S.C. § 78u-6(b)(1).

91. The SEC, not the Department of Labor, is the proper agency to report these tips to, and the determination of the 10–30% award is in the discretion of the agency. *See* 15 U.S.C. § 78u-6(c)(1)(A).

92. *See, e.g.,* Engstrom, *Harnessing the Private Attorney General*, *supra* note 87, at 1253; Anthony J. Casey & Anthony Niblett, *Noise Reduction: The Screening Value of Qui Tam*, 91 WASH. UNIV. L. REV. 1169, 1176–78, 1180 (2014).

93. *See* Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 747–67 (1996) (describing the need for agencies as expert bodies in complex societies while noting that “[t]he pressures for balancing the federal budget have resulted in stringent limitations on agency resources”).

94. *See* David Kwok, *The Public Wrong of Whistleblower Retaliation*, 69 HASTINGS L.J. 1225, 1242–43 (2018).

95. *See id.* 1242–44.

wins than in ferreting out and punishing cases of retaliation.⁹⁶ More insidious still is the risk of agency capture, the concern that industry exercises undue influence on agency action and subverts the agency's proper role of working for the public good.⁹⁷ The concern from a capture perspective would be that antiretaliation claims are underenforced by officials overly sympathetic to defendants.⁹⁸

Beyond capture, Engstrom points out that "more pedestrian" bureaucratic pathologies can lead to suboptimal enforcement.⁹⁹ For example, an agency might "seek to burnish its reputation and curry favor with legislative overseers by pursuing a mix of high-value, marquee cases and low-value, easy-to-win cases, leaving a swath of under-deterred misconduct in between."¹⁰⁰ And it might simply be that "cash-strapped" agencies lack the resources for optimal whistleblower retaliation enforcement.¹⁰¹ Of course, if the federal government had the will to bring to bear the sum of its resources against these claims, its capacity to pursue claims would outstrip that of a private litigant.

2. Qui Tam

A lawyer-driven qui tam model in many ways offers the mirror image of agencies' strengths and weaknesses. Contrasted against deep agency expertise is the countervailing consideration of lawyer expertise. Lawyers new to the field will certainly not have the same level of expertise as an agency. Set against this lack of knowledge and experience is their superior motivation—they are far more driven than their bureaucrat counterparts because they will be paid if, and only if, they obtain financial recompense for their clients.¹⁰² If unsuccessful, they will have expended considerable resources in anticipation of a payout that never materialized.¹⁰³ But the expertise factor does not weigh solely in the government's favor. If attorneys handle serial qui tam actions, they may develop expertise of their own. Specifically, repeat-player attorneys who specialize in whistleblowing cases may well fare better than their agency counterparts.¹⁰⁴ Empirical research reveals that, at least in the qui tam context, these experienced lawyers are more successful than less experienced ones.¹⁰⁵

96. See William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 25, 39 (1975) (arguing that an increase in fines leads to fewer cases but more deterrence).

97. See David Freeman Engstrom, *Agencies As Litigation Gatekeepers*, 123 YALE L.J. 616, 674 (2013) ("[R]egulated parties will exert disproportionate influence over agency gatekeepers, systematically bending gatekeeping decisions in their favor and thus compromising the agency's stewardship of zealotness, coordination, and legislative fidelity within the regime.").

98. See *id.*; Casey & Niblett, *supra* note 92, at 1179. As Casey and Niblett point out, this logic presumes that courts are immune to industry capture in a way that agencies are not. Casey & Niblett, *supra* note 92, at 1180.

99. Engstrom, *Whither Whistleblowing*, *supra* note 64, at 618.

100. *Id.*

101. See Kwok, *supra* note 94, at 1228, 1242 ("[W]histleblowers may also provide greater and further resources towards litigation in comparison to constrained government budgets.").

102. See J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 541, 624 (2000).

103. See *id.* at 624.

104. See Engstrom, *Harnessing the Private Attorney General*, *supra* note 87, at 1257–58.

105. *Id.* at 1249, 1298–99.

The qui tam incentive is a powerful one. Yet that incentive is not always positive. Empowering private litigants to undertake qui tam-style actions, which are “untempered by prosecutorial discretion,” may well result in the pursuit of cases best left unbrought, “yielding wasteful over-deterrence and unnecessary expenditure of social resources.”¹⁰⁶ Moreover, Engstrom suggests that these cases tend to push on the law’s boundaries, exploiting regulatory ambiguities rather than serving as a failsafe to ensure that clear wrongdoing is punished.¹⁰⁷ These can lead to qui tam actions that drift further from the core legislative purposes of the statute over time.¹⁰⁸ Another risk is that the efficiencies qui tam attorneys get from specialization may reduce their costs, allowing them to bring more marginal cases.¹⁰⁹

The *kinds* of harm may matter as well. Engstrom also suggests that “direct harms,” such as workplace safety, are more likely to involve a small number of employees that are directly affected.¹¹⁰ Thus, these employees are likely to report misconduct either to protect themselves or because of moral obligation.¹¹¹ In contrast, indirect harms, like securities fraud or tax fraud, lack the same moral disapprobation because the harm is “highly diffuse and evenly distributed among a large, and largely anonymous, group of people.”¹¹² He suggests that larger bounties would be more effective for these harms.¹¹³ Recall that, in response to the same concern, Feldman and Lobel find that antiretaliation provides stronger motivation.¹¹⁴ On the flipside, however, David Kwok argues that these indirect harms, where the whistleblower’s interest and the public interest do not align, pose a greater risk of questionable claims.¹¹⁵ On this reasoning, he argues that the government should prioritize control over tax antiretaliation above workplace safety claims.¹¹⁶ The kind of indirect harms SOX seeks to address may suggest that an antiretaliation mechanism is superior to a bounty mechanism for financial harms.

Thus, both the qui tam and agency mechanisms could result in suboptimal enforcement whether through the pursuit of cases best left unbrought, the neglect of worthy ones, or both. Especially in the fraught nature of whistleblower claims, some percentage of cases surely have merit, while others are just as certainly frivolous. The risk of overzealous plaintiffs’ attorneys extorting employers while overlooking meritorious but low-dollar-value claims is high. One answer to these suboptimal enforcement concerns is providing data to allow policymakers and researchers alike to examine sorting mechanisms—as Section III will do.

106. Engstrom, *Whither Whistleblowing*, *supra* note 64, at 619; *see also* Kwok, *supra* note 94, at 1243 (“[T]oo many people with weak retaliation claims may bring cases forward.”).

107. Engstrom, *Whither Whistleblowing*, *supra* note 64, at 619.

108. *Id.*

109. Engstrom, *Harnessing the Private Attorney General*, *supra* note 87, at 1260.

110. Engstrom, *Whither Whistleblowing*, *supra* note 64, at 621.

111. *See id.* at 622.

112. *Id.*

113. *Id.* at 623. The determinacy of the legal mandate being enforced is another variable Engstrom considers. *Id.* at 624–25. This factor is outside the concern of this Article because both SOX and Dodd-Frank focus on relatively determinate fraud mandates.

114. *See generally* Feldman & Lobel, *supra* note 39.

115. Kwok, *supra* note 94, at 1229.

116. *Id.*

Having compared the costs and benefits of entrusting enforcement to private litigants with those of empowering government agencies to pursue claims in the relatively well-documented *qui tam* context, it is time to examine that literature in the antiretaliation context. The choice comes down to agency bureaucracy versus private litigants. Generally, few commentators have focused on this design question in the antiretaliation context, as opposed to that of the bounty/*qui tam* context. The one exception to this silence is David Kwok. In *The Public Wrong of Whistleblower Retaliation*, he surveys several whistleblowing regimes but focuses much of his attention on OSHA's administration of SOX.¹¹⁷ Kwok argues that "the legislative focus on public enforcement is strong evidence that Congress recognizes the public importance of combating whistleblower retaliation."¹¹⁸ In Kwok's telling, Congress tasked an agency with sorting antiretaliation claims not for efficiency or competency reasons, but because of the public's interest in protecting these claims.¹¹⁹

There are two problems with this explanation. First, there is another, equally logical explanation for Congress to rely on an agency as an intermediary for whistleblower claims: if Congress had weighed the risk of spurious claims heavily, it may have judged agency interpolation to be the best protection against such a risk.¹²⁰

Second, Kwok reasons that the public wrong of whistleblower retaliation requires a public response—not only in the sense of empowering an agency to act on the public's behalf, but also in the sense of a *publicized* response.¹²¹ The public may indeed have an interest in learning the truth about retaliation.¹²² Yet this argument makes little sense in the case of SOX, given that the administrative proceedings are confidential to protect the whistleblower's identity.¹²³ While this justification may work for Dodd-Frank's direct cause of action, where defendants whose employees are willing to file a lawsuit will be subject to the publicity of a trial,¹²⁴ it does not apply to SOX's OSHA-mediated system.¹²⁵ Of course, Dodd-Frank's publicized cases are not examples of public enforcement at all, but rather are the products of *private litigants'* actions.¹²⁶ Indeed, as further evidence of the nonpublic governmental treatment of whistleblowers, even in the few successful Dodd-Frank bounty awards, the identity of the whistleblower is kept secret (although the fact of the award is trumpeted).¹²⁷

117. See generally *id.*

118. *Id.* at 1244.

119. See *id.* Kwok dismisses as an explanation that congressional approach merely evolved over time, or that Congress cared only about making a show of interest in whistleblower protection. *Id.* at 1241–42.

120. See *id.* at 1242. Indeed, Kwok himself acknowledges that Congress might not "trust private enforcement of these whistleblower retaliation claims." *Id.* at 1243.

121. See *id.* at 1244–46 ("The common congressional mandate for agency investigation suggests that the agency, and thus the public, has an interest in learning the truth about retaliation complaints.").

122. *Id.* at 1245.

123. See 29 C.F.R. §§ 1980.104(a), (c), (d) (2021).

124. See 15 U.S.C. § 78u-6(h)(1)(B).

125. See 29 C.F.R. § 1980.103(b) (2021).

126. See 15 U.S.C. § 78u-6(h)(1)(B)(i).

127. See, e.g., Press Release, SEC 2019-165, SEC Awards More Than \$1.8 Million to Whistleblower (Aug. 29, 2019), <http://www.sec.gov/news/press-release/2019-165> [<http://perma.cc/MQB8-2RU3>] ("[A]n award of more than \$1.8 million [was given] to a whistleblower whose information and assistance were critically important to the success of an enforcement action involving misconduct committed overseas. After alerting the

In fact, in terms of institutional design, Congress has been of two minds when it comes to whistleblower retaliation. With SOX, Congress chose not to empower individual plaintiffs, but instead to interpose an agency to evaluate claims and dispense awards.¹²⁸ With Dodd-Frank, Congress created a private right of action for antiretaliation,¹²⁹ but an agency-mediated bounty mechanism.¹³⁰

In closing this Section, it pays to emphasize the importance of antiretaliation. Engstrom and Casey devote much attention to the agency-versus-courts institutional design question in the bounty context, but there is reason to believe it is even more important in the antiretaliation context, particularly because antiretaliation claims address clear harms. At the most fundamental level, whistleblowers can face demotion or loss of a job.¹³¹ In the most egregious cases, whistleblowers can put their employers out of business and may further lose to the extent that they own shares in the company for which they work.¹³²

But these losses are not the only ones whistleblowers face. Their fellow employees may ostracize them, blaming them for exposing the company's ills.¹³³ Whistleblowers often speak of the many psychological harms they suffer.¹³⁴ They also fear, sometimes quite rightly, that being labeled a "whistleblower" might harm their future employment prospects in the industry.¹³⁵ Many whistleblowers report regret at having blown the whistle, knowing what they know now.¹³⁶ These losses are real harms that antiretaliation cannot address. They remain harms even if the ultimate "payoff" the government receives from the whistleblowing is relatively low in dollar amount. This category of cases, where there is a real mismatch between the harm suffered and the magnitude of a *qui tam* style recovery, merits attention.

Equally troubling are the cases where the inverse is true—a tipster who suffered no retaliation at all could win the OWP "lottery" and receive a multimillion-dollar payout, while a blue-collar whistleblower could be fired for her pains and receive nothing

agency to the violations, the whistleblower provided extensive and ongoing cooperation during the course of the investigation, including the review of documents and the provision of sworn testimony, and continued to provide additional new information that advanced the investigation."); Press Release, SEC 2019-81, SEC Awards \$3 Million to Joint Whistleblowers (June 3, 2019), <http://www.sec.gov/news/press-release/2019-81> [<http://perma.cc/493C-RKYL>] ("The Securities and Exchange Commission today announced an award of \$3 million to whistleblowers whose tip launched the SEC's investigation and subsequent successful enforcement action involving an alleged securities law violation that impacted retail investors. The whistleblowers submitted their tip jointly to the Commission and will share the award. In this case, the whistleblowers also undertook significant and timely steps to have their employer remediate the harm caused by the alleged violations.").

128. See 18 U.S.C. § 1514A(b)(2)(A).

129. See 15 U.S.C. § 78u-6(h)(1)(B)(i).

130. See *id.* §§ 78u-6(b)(1), (c)(1)(A).

131. Rapp, *supra* note 56, at 113.

132. See *id.* at 113, 117, 120. Enron stock made up sixty percent of the average Enron employee's 401(k), meaning that the company's bankruptcy not only cost an employee her job but also a substantial part of her savings. *The Post-Enron 401(k)*, FORBES (Oct. 20, 2003, 12:00 PM), http://www.forbes.com/2003/10/20/cx_aw_1020retirement.html?sh=5b03ef692824 [<http://perma.cc/CE3Y-H52U>].

133. Rapp, *supra* note 56, at 117.

134. See *id.*

135. See *id.* at 113–15.

136. See *id.* at 113.

because her potential damages are too low to tempt a lawyer working on contingency. Having assessed the theory of antiretaliation, it is time to move to the empirical literature.

II. EMPIRICAL LITERATURE

Part I.D described Feldman and Lobel's incentives matrix. Their work, while empirical in nature, focuses on the question of choosing between a bounty or antiretaliation regime and was thus discussed as a way to situate whistleblower theory. As a reminder, their findings suggest that people are more likely to respond to antiretaliation protections than to bounties.

Richard Moberly conducted the only empirical study of the Department of Labor whistleblower data from the initial SOX period of 2005–2006.¹³⁷ He obtained 470 initial OSHA decisions using a Freedom of Information Act¹³⁸ request and reviewed 236 published ALJ opinions.¹³⁹ Moberly found low win rates: 3.6% at the OSHA level and 6.5% at the ALJ level.¹⁴⁰ But there were several deficiencies in his method. First, the time period of Moberly's study was soon after SOX went into effect.¹⁴¹ OSHA's early administration of antiretaliation protection was truly dismal. In 2011, following several devastating governmental audits and reports, OSHA underwent a top-to-bottom review and overhaul.¹⁴²

More importantly, however, Moberly made a potentially problematic move by excluding settlements and withdrawals.¹⁴³ Presumably, defendants faced with a strong case will generally be inclined to settle. Given that SOX caps damages at back pay and costs, plaintiffs receiving a reasonable offer will be inclined to accept those offers; there would be little sense in holding out, since the possibility of high-dollar punitive damages is foreclosed. Thus, by excluding settlements, Moberly's study may provide a warped view of the cases. Moberly himself acknowledges this problem.¹⁴⁴

More philosophically, as Moberly recognizes in later work,¹⁴⁵ in order to evaluate win rates—or any kind of case outcome—one needs to know what the proper baseline is. In Moberly's own words: “[W]hat should the proper win rate be for a claim? That question might be difficult to answer because the ‘ideal’ win rate depends, in part, upon

137. See Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 70 (2007) [hereinafter Moberly, *Unfulfilled Expectations*].

138. 5 U.S.C. § 552.

139. *Id.* at 87 n.111.

140. *Id.* at 91.

141. The law went into effect in October 2002. See *supra* note 15 and accompanying text. See generally Moberly, *Unfulfilled Expectations*, *supra* note 137 (covering only the first three years after the statute's enactment).

142. Press Release, Occupational Safety & Health Admin., US Department of Labor's OSHA Announces Measures To Improve Whistleblower Protection Program (Aug. 1, 2011), <http://www.osha.gov/news/newsreleases/national/08012011> [<http://perma.cc/P8KH-576A>].

143. See Moberly, *Unfulfilled Expectations*, *supra* note 137, at 92.

144. *Id.* at 98 (“Do settlements provide employees relief comparable to wins? It is difficult to say whether a settlement should be counted as an employee ‘win,’ given that both sides inevitably compromise their claims when they settle.”).

145. See Moberly, *Ten Years Later*, *supra* note 51, at 28.

the number of meritorious claims filed, which is likely impossible to reasonably determine.”¹⁴⁶ Again, we confront the problem of the unknowns.

Thus, there are two compounding problems with Moberly’s exclusion of settlements. One is the relatively commonsense point that strong cases will generally settle.¹⁴⁷ Layered atop this problem, there is specific reason to believe, based on the agency’s own reporting, that most successful Department of Labor plaintiffs settle.¹⁴⁸

Having sketched out whistleblowing’s problem-layered unknowns upon unknowns and reviewed the state of the literature, it is time to focus on the data at hand. For that, we must understand the three parallel whistleblowing regimes focusing on financial fraud, as well as Dodd-Frank’s bounty mechanism. Accordingly, Section III turns to the statutes at issue.

III. THE LAY OF THE LAND: SOX VS. DODD-FRANK

Section 806 of SOX instituted the first federal whistleblowing-protection statute in the securities arena.¹⁴⁹ Its stated goal was to provide “all relief necessary to make the employee whole,” including back pay with interest and attorneys’ fees.¹⁵⁰ The focus is not on the quality of information or gravity of misconduct alleged.¹⁵¹ Indeed, there need not even *be* any actual misconduct in the organization—that is, the employee may be wrong about the misconduct she reports on.¹⁵² The gravamen of the complaint is that the employee blew the whistle and was fired—or demoted or made to suffer in other ways—*because of* that whistleblowing activity.¹⁵³ Importantly, SOX provides relief for retaliation, but provides no extra incentive or bounty to reward whistleblowers.¹⁵⁴ Section 922 of Dodd-Frank similarly addresses retaliation claims, but has different coverage and remedies, as well as a markedly different procedure for addressing claims. Finally, Dodd-Frank introduced a bounty system, as described in the Part II.C. After surveying these whistleblower-protection and incentivization regimes, this Section concludes with some qualitative data, consisting of interviews with attorneys who work with whistleblowers to navigate these various mechanisms of relief and reward, to provide background on how these claims play out in the real world.

146. *Id.* (emphasis omitted).

147. The literature and common sense alike argue that weak cases will settle, and that cases only go to trial when the parties have conflicting views on the strength of their claims. See Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 124 (2009).

148. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-09-106, WHISTLEBLOWER PROTECTION PROGRAM: BETTER DATA AND IMPROVED OVERSIGHT WOULD HELP ENSURE PROGRAM QUALITY AND CONSISTENCY 4 (2009) [hereinafter WHISTLEBLOWER PROTECTION: BETTER DATA AND IMPROVED OVERSIGHT], <http://www.gao.gov/assets/gao-09-106.pdf> [<http://perma.cc/28XQ-Y2UL>].

149. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, sec. 806(a), § 1514A(c)(1)-(2), 116 Stat. 745, 803-04.

150. *Id.*

151. See *id.*

152. See *id.*

153. See *id.*

154. See *id.* Dodd-Frank, enacted eight years later, would provide the first bounty reward system. See 15 U.S.C. § 78u-6.

A. Coverage of Antiretaliation in Both Statutes

1. Subject Matter

SOX's antiretaliation protection applies to any employee who blows the whistle on conduct the employee "reasonably believes" constitutes a violation of the mail fraud, wire fraud, bank fraud, or securities laws.¹⁵⁵ Companies covered by the Act are those required to make filings under the 1934 Securities Exchange Act.¹⁵⁶ Thus, it covers, most commonly, publicly traded companies.¹⁵⁷ Companies are required to file if they list their securities on a national securities exchange or if they maintain more than \$10 million in assets whose securities are held by more than 500 unaccredited investors or 2,000 people total.¹⁵⁸ In contrast, Dodd-Frank protects whistleblowers who provide information solely regarding securities fraud.¹⁵⁹ While covering similar activities, SOX's subject-matter reach is broader than that of Dodd-Frank.¹⁶⁰

2. Reporting Requirement

An employee is protected by SOX's Section 806 if he or she reports information to, or an investigation is conducted by (1) a federal regulatory or law enforcement agency; (2) any member or committee of Congress; (3) any person with supervisory authority over the employee; or (4) any other person who has "the authority to investigate, discover, or terminate misconduct."¹⁶¹ Importantly, note that a plaintiff need not report the retaliation to an outside agency to obtain relief under SOX. A plaintiff who reports misconduct to their supervisor, and never reports that same misconduct externally, would still have an antiretaliation claim under SOX if fired.

155. 18 U.S.C. § 1514A(a)(1). This includes any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders. *Id.* Covered conduct includes an employee who "file[s], . . . testify[ies], participate[s] in, or otherwise assist[s] in a proceeding . . . relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." *Id.* § 1514A(a)(2).

156. Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78a-78qq).

157. See Andrew F. Fowler, *Registration Requirements Under Section 12 of the Exchange Act*, LEXIS, <http://plus.lexis.com/> [<http://perma.cc/5NN5-HSVW>] (last updated Oct. 20, 2020) (describing how there are two avenues to reach the need for registration under the Exchange Act and how Section 12(b) registration requirements result from the decision to list a company's securities on a national securities exchange, and registration is often taken as part of the IPO process).

158. *Id.*

159. See 15 U.S.C. § 78u-6. Covered conduct includes an employee who "provid[es] information to the [SEC] . . . initiat[es], testify[ies] in, or assist[s] in any investigation or judicial or administrative action . . . [or makes any securities] disclosures that are required [by law]." *Id.* § 78u-6(h)(1)(A). Section 922 of Dodd-Frank prohibits employers from discharging, demoting, suspending, threatening, harassing, directly or indirectly, or in any other manner discriminating against, a whistleblower who provides information to the SEC; initiates, testifies, or assists in any investigation or judicial or administrative action based upon or related to such information; or makes disclosures that are required or protected under the securities laws. *Id.*

160. See 17 C.F.R. § 240.21F-1 (2021) (Dodd-Frank protects only those whistleblowers who "provide the Commission with original information about violations the Federal securities laws.").

161. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, sec. 806(a), § 1514A(a)(1), 116 Stat. 745, 803.

In 2018, in *Digital Realty Trust, Inc. v. Somers*,¹⁶² the Supreme Court applied a different standard to whistleblower claims under Dodd-Frank.¹⁶³ Resolving a circuit split, the Court required that plaintiffs report to the SEC before being eligible to make a claim under Dodd-Frank's antiretaliation provisions.¹⁶⁴ This marked a significant departure that foreclosed a direct cause of action to whistleblowers who are fired after reporting misconduct internally. Accordingly, it created an incentive for whistleblowers to go straight to the SEC—at least if they understand whistleblower laws or obtain legal counsel before blowing the whistle.

3. Prohibited Retaliation

Employees who blow the whistle in these cases are protected from a broad swath of retaliation. An employer may not “discharge, demote, suspend, threaten, harass . . . or . . . discriminate against[] a whistleblower [as a result of that involvement].”¹⁶⁵ Dodd-Frank uses almost identical language in its attempt to provide similar protections to whistleblowers.¹⁶⁶

4. Statute of Limitations, Burden of Proof, and Remedy

Employees seeking relief originally had 90 days from the time the plaintiff knew or reasonably should have known about the retaliation to file a complaint.¹⁶⁷ Besides enacting its own whistleblower protections, Dodd-Frank amended several SOX whistleblower provisions to increase protection of whistleblowers.¹⁶⁸ Most importantly, it lengthened the statute of limitations for retaliation complaints under SOX from 90 to 180 days after the date on which the violation occurs or after the date on which the employee becomes aware of the violation.¹⁶⁹

162. 138 S. Ct. 767 (2018).

163. See *Somers*, 138 S. Ct. at 778 (holding that in order to be a “whistleblower,” one must provide information “to the Commission” before the retaliation).

164. See *id.*

165. 15 U.S.C. § 78u-6(h)(1)(A).

166. 18 U.S.C. § 1514A(a) (2010) (“No company . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment . . .”).

167. See Sarbanes-Oxley Act, Pub. L. No. 107-204, sec. 806, § 1514A(b)(2)(D), 116 Stat. 803 (2002).

168. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1845-47 (2010). Other amendments also added protection for employees from retaliation by nationally recognized statistical rating organizations (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c)) or their officers, employees, contractors, subcontractors, and agents. *Id.* § 922(b) (codified as amended at 18 U.S.C. § 1514A(a)). Section 922(c) of Dodd-Frank also provided parties with a right to a jury trial in district court actions brought under Sarbanes-Oxley’s “kick-out” provision, 18 U.S.C. § 1514A(b)(1)(B), which provides that, if the secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that there has been delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for de novo review in the appropriate district court of the United States, which will have jurisdiction over such action without regard to the amount in controversy. *Id.*

169. See Dodd-Frank § 922 (codified as amended at 18 U.S.C. § 1514A(b)(2)(D)). It further provided that whistleblower protection may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement. *Id.* (codified as amended at 18 U.S.C. § 1514A(e)). Accordingly, it provided that no predispute arbitration agreement would be valid or enforceable. *Id.* The SEC has taken several actions against corporations who have purported to preempt whistleblowing protections or make claims on whistleblowing rewards. See, e.g., Jonathan I. Nirenberg, *Federal Labor Laws Do Not Preempt Union Members*

Dodd-Frank claims and SOX claims differ in important ways in terms of statute of limitations and remedy. Dodd-Frank's statute of limitations, far more generous than SOX's original 90-day time period, or even the expanded 180-days, is six years after the date of the violation or three years after the date when the material facts were known or reasonably should have been known to a plaintiff.¹⁷⁰ And whereas SOX provides for reinstatement, back pay, attorneys' fees, litigation costs, and expert witness fees, plaintiffs under Dodd-Frank can seek all those remedies plus two times the amount of back pay owed.¹⁷¹

Finally, under Dodd-Frank, the whistleblowing behavior has to be the "but-for" cause for the retaliation; under SOX's more forgiving standard, the behavior need merely be a contributing factor.¹⁷² Under these causation standards, a court might well believe it could not make an award to a whistleblower with a poor performance record—even if she blew the whistle on actual misconduct.¹⁷³ Employees who fail the SOX "but-for" test in OSHA's initial review and do not appeal will not appear in a dataset. In contrast, those under Dodd-Frank will.

Differences in subject matter, statutes of limitations, and remedies obviously matter when comparing across regimes. Nevertheless, these statutes offer real-world information about two radically different mechanisms whereby whistleblowers can seek relief. Having described the coverage of each statute, the next Part turns to the process by which they can vindicate their claims.

B. Procedure

1. SOX

Employees seeking relief under Section 806 of SOX must file a complaint with the Department of Labor.¹⁷⁴ The procedure for filing a complaint is fairly easy. Employees can visit or call their local OSHA office or send a written complaint to their closest

Whistleblower Claim, RABNER BAUMGART BEN-ASHER & NIRENBERG (Sept. 1, 2016), <http://www.njemploymentlawfirmblog.com/federal-labor-laws-not-preempt-union-members-whistleblower-claim/> [<http://perma.cc/7P9S-3UTG>]; Lisa M. Noller & Bryan B. House, *A Review of Recent Whistleblower Developments*, FOLEY & LARDNER LLP (Oct. 19, 2017), <http://www.foley.com/en/insights/publications/2017/10/a-review-of-recent-whistleblower-developments> [<http://perma.cc/Y6W6-MXPC>].

170. Dodd-Frank § 922 (codified at 15 U.S.C. § 78u-6(h)).

171. *Id.* § 1057(c)(4) (codified at 12 U.S.C. § 5567(c)(4)).

172. *Bechtel v. Admin. Rev. Bd.*, U.S. Dep't of Lab., 710 F.3d 443, 449 (2d Cir. 2013); 15 U.S.C. § 78u-6.

173. See Kwok, *supra* note 94, at 1237.

174. 18 U.S.C. § 1514A(b)(1). The secretary of labor has delegated authority for the enforcement of Section 806 to the assistant secretary for OSHA. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, sec. 806(a), § 1514A(b), 116 Stat. 745. Part C of this Section offers a short explanation for OSHA's role, but the focus of this Part is on the intra-agency procedure an employee-whistleblower follows after having filed a complaint.

OSHA regional or area office.¹⁷⁵ Complaints do not require any particular form or wording—indeed, complaints can be submitted in any language.¹⁷⁶

OSHA notifies the employer of the allegations in the complaint.¹⁷⁷ These allegations are redacted if necessary to protect the confidentiality of the employee.¹⁷⁸ The employer has a chance to respond with a written statement and may additionally request a meeting to present its position.¹⁷⁹ OSHA will dismiss the complaint “unless the complainant has made a prima facie showing that a protected activity was a contributing factor in the adverse action alleged in the complaint.”¹⁸⁰ Next, the employer has a chance to show, by clear and convincing evidence, that it “would have taken the same adverse action in the absence of the complainant’s protected activity.”¹⁸¹ If the employee has made a prima facie showing of retaliation, and the employer has not met its burden of showing that the action was not caused by the whistleblowing activity, then OSHA conducts an investigation.¹⁸² In practice, these investigations have been plagued with delays and understaffing, and there is reason to believe SOX claims raise special problems for OSHA investigators.¹⁸³

Within sixty days of the filing of the complaint, OSHA’s assistant secretary must issue written findings.¹⁸⁴ If the assistant secretary concludes that there is reasonable cause to believe a violation has occurred, the assistant secretary will accompany the findings with a preliminary order providing relief to the complainant.¹⁸⁵ The preliminary order will include all relief necessary to make the employee whole.¹⁸⁶ If the assistant secretary concludes that a violation has not occurred, they will notify the parties of that finding.¹⁸⁷

These findings are confidential, protecting the identity of the whistleblower. I made an unsuccessful Freedom of Information Act request in 2016 to try to obtain the

175. OSHA, OSHA FACT SHEET: FILING WHISTLEBLOWER COMPLAINTS UNDER THE SARBANES-OXLEY ACT (n.d.), <http://www.osha.gov/sites/default/files/publications/osha-factsheet-sox-act.pdf> [<http://perma.cc/J6L3-YQXU>] (last visited Feb. 1, 2022).

176. *Id.*; *Whistleblower Laws Enforced by OSHA*, U.S. DEP’T OF LAB., <http://www.whistleblowers.gov> [<http://perma.cc/V7GR-7LSN>] (last visited Feb. 1, 2022).

177. 29 C.F.R. § 1980.104(a) (2021).

178. *Id.*

179. *Id.* § 1980.104(b).

180. *Id.* § 1980.104(e)(1).

181. *Id.* § 1980.104(e)(4).

182. *Id.* § 1980.104(e)(5).

183. See Sarah N. Lynch, *Wells Fargo Complaints Show Flaws in Federal Whistleblower Program*, REUTERS (Oct. 13, 2016, 2:04 PM), <http://www.reuters.com/article/us-wells-fargo-accounts-whistleblower-idUSKCN12D2M0> [<http://perma.cc/5QSJ-4UXT>].

184. 29 C.F.R. § 1980.105(a) (2021).

185. *Id.* § 1980.105(a)(1).

186. *Id.* (“The preliminary order will include . . . reinstatement with the same seniority status that the complainant would have had but for the retaliation; back pay with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees.”).

187. *Id.* § 1980.105(a)(2).

underlying data for these initial complaints and findings.¹⁸⁸ Thus, information on OSHA's initial determinations is not available.¹⁸⁹ However, in early 2020, OSHA began making aggregate data available on its website.¹⁹⁰

Some readers may be wondering about the placement of financial-fraud whistleblowing at OSHA, rather than a financial regulator such as the SEC. Part V.A will describe the reason for housing financial-fraud whistleblowing in this unlikely location and its rocky beginnings. For right now, it is enough to observe that, while OSHA was ill-equipped at the outset to handle these SOX claims, it has developed expertise in this area. Still, SOX cases consume a disproportionately high amount of OSHA resources.¹⁹¹ The mismatch between agency and requirements of financial misconduct is a subject to which we will return.

2. Dodd-Frank

Besides enhancing SOX's protections, Dodd-Frank also includes separate protections against whistleblower retaliation, creating a private right of action for individuals to sue directly in the appropriate district court.¹⁹² In contrast to SOX's lengthy procedural requirements, Dodd-Frank's are relatively brief. Because it is a direct cause of action, the statute contains no discussion of procedure. A plaintiff simply files suit.

The reality is not so simple. Filing in federal court *pro se* requires a great deal of work, as well as some money for court filings. Hiring a lawyer, or convincing one to represent you on a contingent fee basis, takes additional resources. Most lawyers in this area work on a contingent fee basis.¹⁹³ The presence of a lawyer thereby serves as a type of screen because lawyers will generally only take cases they estimate to be worth what can be a considerable upfront investment of time and money.

SOX and Dodd-Frank thus provide plaintiffs with a stark contrast in terms of procedures for seeking relief from retaliation for their whistleblowing. SOX requires

188. The denial cited 15 U.S.C. § 78u-6(h)(2)(A), which protects records or information when disclosure could reasonably be expected to interfere with law enforcement proceedings; Exemption 6, release of the information would constitute a clearly unwarranted invasion of personal privacy; Exemption 7(A) protects from disclosure records compiled for law enforcement purposes, the release of which could reasonably be expected to interfere with enforcement proceedings. Under Exemption 7(C), release of the information could reasonably be expected to constitute an unwarranted invasion of personal privacy. Exemption (7)(D) provides protection for records or information compiled for law enforcement purposes which could reasonably be expected to disclose the identity of a confidential source which furnished information on a confidential basis. Richard Moberly received OSHA claims after a Freedom of Information Act request in 2006. Moberly, *Unfulfilled Expectations*, *supra* note 137, at 87 n.111.

189. See 15 U.S.C. § 78u-6(h)(2)(A).

190. See *Freedom of Information Act (FOIA)*, U.S. DEP'T OF LAB., <http://www.osha.gov/foia> [<http://perma.cc/2N6P-T32S>] (last visited Feb. 1, 2022).

191. See WHISTLEBLOWER PROTECTION: BETTER DATA AND IMPROVED OVERSIGHT, *supra* note 148, at 39–41 (“Officials and supervisors told us that the Sarbanes-Oxley Act is the statute on which specialized legal assistance is most often needed . . .”).

192. 15 U.S.C. § 78u-6(h)(1)(B)(i).

193. *How Contingency Fee Arrangements Empower Whistleblowers*, SARRAF GENTILE (June 24, 2020), <http://www.sarrafgentile.com/how-contingency-fee-arrangements-empower-whistleblowers/> [<http://perma.cc/X3R4-KJQ8>].

going through an elaborate administrative agency in order to obtain relief and may only go outside agency adjudication in limited circumstances (namely once appeals have been exhausted or if the agency is dilatory in its review). Yet the upfront costs are minimal. In contrast, Dodd-Frank provides direct access to the courts—although it requires, at least after the Supreme Court clarified matters in 2018 in *Digital Realty Trust*, a plaintiff to provide information relating to a violation of securities law to the SEC in order to be eligible for relief.¹⁹⁴ As importantly, successfully navigating the courts requires whistleblowers to convince an attorney that their case is worth pursuing.

C. Adjudication

Dodd-Frank gives whistleblowers a direct cause of action, meaning that they, or their attorneys as agents, shoulder the task of determining which suits are likely to be worth bringing. SOX, in contrast, tasks agency investigators with the initial sifting task. Investigators need a master's or law degree, or an associate's or bachelor's degree coupled with one year of experience in interpreting laws, regulations, or administrative procedures, to assess compliance or discrimination.¹⁹⁵

On the other hand, federal district judges, all of whom have at least a law degree, are the product of a rigorous Article III selection process.¹⁹⁶ District judges may therefore be more trustworthy, reliable identifiers of meritorious claims than agency investigators—although seasoned OSHA investigators have the advantage of specialization and expertise.

Table 1 below summarizes the distinctions between the two antiretaliation whistleblowing regimes.

194. See *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 778 (2018).

195. Job postings show applicants must have a GS-9 level qualifications. See *Investigator Job*, LENSEA, <http://lensa.com/investigator-jobs/kansas-city/jd/aed227f1d77dea52ffc08c11cec2a2cb> [<http://perma.cc/UZJ6-RCMY>] (last visited Feb. 1, 2022).

196. See DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., R43762, THE APPOINTMENT PROCESS FOR U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: AN OVERVIEW 8 (2016) ("It is a well-established practice, however, that candidates for nomination to circuit and district court judgeships are rigorously evaluated for their degree of professional qualification at successive points in the selection process.").

TABLE 1: SOX AND DODD-FRANK ANTIRETALIATION REGIME DISTINCTIONS

Category	SOX	Dodd-Frank
Time period	1/1/2003–9/5/2019	7/22/2010–6/30/2019
Ease of filing claim	Simple report, oral or written	Court filing
Subject matter	Mail fraud, wire fraud, bank fraud, securities fraud	Securities fraud
External reporting requirement	No	Yes (post-2018)
Statute of limitations	180 days (90 days pre-2010)	6 years
Damages	Reinstatement, back pay, attorneys' fees, litigation costs, expert witness fees	Reinstatement, 2x back pay, attorneys' fees, litigation costs, expert witness fees
Initial sorter	OSHA Investigator	Plaintiff/Attorney
Adjudicator of appeal	ALJ	District Judge
Burden of proof	Whistleblowing activity was a "contributing factor" for adverse action	Whistleblowing activity was a "but-for factor" for adverse action

D. Dodd-Frank Whistleblower Tips

Moving from the antiretaliation context that has occupied us thus far, this Part turns from protection to incentivization—to the bounty-style award system Dodd-Frank created. Note that here, while dealing with an agency-mediated system rather than the pure *qui tam* of the False Claims Act, we shift agencies from OSHA to the SEC.

Would-be claimants begin the whistleblowing process by submitting tips on a standard form either through the SEC's online portal or by mailing or faxing them on Form TCR to the OWP,¹⁹⁷ a separate division within the SEC that handles these tips.¹⁹⁸ All whistleblowing tips implicating securities violations are evaluated by an office in the SEC's enforcement division.¹⁹⁹

The SEC evaluates the tips for "high-quality information" that justifies "the additional allocation of Commission resources."²⁰⁰ Some tips are forwarded to another division within the SEC with particular expertise.²⁰¹ If the tip relates to an existing investigation, it is forwarded to staff working on that investigation.²⁰² And if warranted, the SEC will open a new investigation based on the tip.²⁰³ The SEC's guidance advises that tips that are "specific, credible, and timely, and that are accompanied by corroborating documentary evidence" are most likely to be forwarded to the next stage of the process.²⁰⁴

197. See 17 C.F.R. § 240.21F-9(a) (2021).

198. See *id.*

199. SEC, 2020 ANNUAL REPORT, *supra* note 23, at 4, 8. This point will be important later—not all whistleblower reports filed at OSHA are communicated to the SEC. See *infra* note 310 and accompanying text.

200. SEC, 2020 ANNUAL REPORT, *supra* note 23, at 31.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 32.

Not all of these forwarded tips will bear financial fruit for the tipper, however. Tipplers will only receive an award if the government collects at least one million dollars in monetary sanctions.²⁰⁵ The process of obtaining an award, in this limited set of cases, is a somewhat convoluted one. Once an SEC enforcement action has resulted in over one million dollars in sanctions, the agency posts a Notice of Covered Action on its website.²⁰⁶ Once this notice is posted, whistleblowers have ninety days to apply for their share of the award.²⁰⁷

The OWP, in consultation with the SEC investigators who led the enforcement action, evaluates the claims to determine the contribution or involvement of the whistleblower. OWP attorneys then make a recommendation as to whether the claimant meets the criteria for an award, and the amount of an award. This process has recently been reformed, as described in Part V.B. For now, it is enough to observe that the SEC looks at positive factors, including the significance of the information provided, the law enforcement interests at stake, the level of the whistleblower's assistance, and whether the whistleblower first reported the misconduct internally.²⁰⁸ Factors that decrease an award include the whistleblower's own culpability, including whether he "financially benefited from the misconduct, interfered with internal compliance systems, or unreasonably delayed in reporting the violation to the Commission."²⁰⁹ The SEC then issues a Preliminary Determination, and the whistleblower has a limited amount of time to review the record, request reconsideration, and in some cases, appeal.²¹⁰

E. *Qualitative Data on Attorney Compensation*

Turning from this general description of whistleblower regimes relating to federal financial misconduct, in order to paint a clearer picture of these claims, I interviewed seven attorneys, both in small and large firms from around the United States. Some of these attorneys work on whistleblower bounty cases and others work in antiretaliation. The latter classify themselves as employment lawyers, although all reported doing some *qui tam* work.

These interviews reveal that the norm for most representation is to work on a contingent fee basis. One lawyer reported sometimes employing a "hybrid" model, where the client would pay a reduced hourly rate and the lawyer would recover a lower

205. See 15 U.S.C. § 78u-6(a)(1), (b)(1).

206. SEC, 2020 ANNUAL REPORT, *supra* note 23, at 6, 19. Whistleblowers can sign up to receive updates whenever a new Notice of Covered Action is posted. *Id.* at 19.

207. *Id.* at 20. "Only claimants who have a clear nexus between the information they provided to the Commission and the charges in the underlying action should apply for an award." *Id.* Claimants are urged to consider whether they communicated with the SEC enforcement staff who brought the action and review the relationship between the information the claimant provided and the specific charges the SEC brought. *Id.*

208. See *id.* at 21.

209. *Id.*

210. See *id.*; 15 U.S.C. § 78u-6(b)(1). There is no appeal unless outside the 10–30% of the sanctions. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1842 (2010).

percentage of the recovery in any settlement or adjudication on the merits.²¹¹ But in all cases, the attorneys I spoke with were operating on some type of contingent fee.

All attorneys reported being extremely selective in accepting cases. One interviewee broke down evaluation of a case into two components: liability and damages.²¹² Echoing the process of other attorneys, he cited the importance of gathering information to see if the plaintiff could meet the basic elements of a whistleblowing claim.²¹³ Several attorneys cited the importance of written documentation of the whistleblowing. As important as concrete evidence was causation, the need to tie the adverse employment action to the whistleblowing activity.

But beyond the merits of the particular case, each attorney who worked with whistleblower cases admitted the importance of potential damages in assessing the claim—a calculation which necessarily favors well-compensated clients. Attorneys mentioned general counsels, CEOs, and CFOs as strong potential claimants.²¹⁴

A final point several lawyers emphasized was the strategic importance of pre-litigation (or prefiling with OSHA for a SOX claim) practice.²¹⁵ If the whistleblower consults an attorney early on (remember SOX's 180-day statute of limitations), then the attorney will first assemble the facts, frame the plaintiff's case, and send a letter outlining that case to the corporation as a prelude to settlement negotiations. Similar preparation occurs before the filing of a tip with the SEC seeking a whistleblowing award.²¹⁶ Especially when it comes to high-level executives or general counsels, this route preserves confidentiality for both employee and employer.

These cases can be strong on the merits and never be filed with a court or agency. Precisely *because* of their strength, employers are anxious to settle. Settlement also can work to the advantage of the employee. Beyond a monetary settlement, the agreement may contain nondisparagement provisions and the requirement of customary letters of reference to aid a fired employee in seeking new employment. These post-retaliation settlements underline the “shadow” whistleblower protection laws cast, far larger effects than those we see in courts or administrative proceedings.²¹⁷

We have summarized the landscape and literature of whistleblowing. This Part described the statutory framework and provided the perspective of attorneys who work with whistleblowers every day. Section IV will describe empirical findings relating to three different design mechanisms.

211. Telephone Interview with Attorney I (Jan. 23, 2020); *see also* Telephone Interview with Attorney III (Jan. 28, 2020); Telephone Interview with Attorney VII (Jan. 28, 2020).

212. Telephone Interview with Attorney VII (Jan. 28, 2020).

213. *Id.*

214. *Id.*; Telephone Interview with Attorney III (Jan. 28, 2020).

215. Telephone Interview with Attorney IV (Jan. 28, 2020).

216. Telephone Interview with Attorney I (Jan. 23, 2020).

217. *See generally* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (discussing how the law can impact the way actors behave outside of the legal system, using divorce negotiations as an example).

IV. DATA

I constructed three datasets. The first focuses on agency-mediated tips—Dodd-Frank’s cash for tips bounty-style program. The second and third shift to the antiretaliation side of enforcement and examine data from two different contexts: SOX’s agency-based remedy and Dodd-Frank’s litigation-based method of redress. The datasets reveal clear distinctions in the success rates of the plaintiffs who navigate these three regimes. The least successful, in terms of numbers, is the first.

A. Bounty-Style Awards (Dodd-Frank)

The first data we turn to concern the tip-based, government-mediated bounty model Dodd-Frank introduced, housed at the SEC. Federal law requires the SEC to make an annual whistleblower report.²¹⁸ I mined these annual reports for data on tips.²¹⁹ The SEC trumpets the success of its awards in these reports, its press releases, and on its website.²²⁰

218. 15 U.S.C. § 78u-7(d).

219. U.S. SEC. & EXCH. COMM’N, ANNUAL REPORT ON THE DODD-FRANK WHISTLEBLOWER PROGRAM (2011), <http://www.sec.gov/files/whistleblower-annual-report-2011.pdf> [<http://perma.cc/V4H4-ZCN3>]; U.S. SEC. & EXCH. COMM’N, ANNUAL REPORT ON THE DODD-FRANK WHISTLEBLOWER PROGRAM (2012), <http://www.sec.gov/files/annual-report-2012.pdf> [<http://perma.cc/BF4W-2AFZ>]; U.S. SEC. & EXCH. COMM’N, 2013 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM (2013), <http://www.sec.gov/files/annual-report-2013.pdf> [<http://perma.cc/SMM6-DVEJ>]; U.S. SEC. & EXCH. COMM’N, 2014 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM (2014), http://www.sec.gov/files/owb-annual-report-2014_2.pdf [<http://perma.cc/JA8G-CB4W>]; U.S. SEC. & EXCH. COMM’N, 2015 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM (2015), <http://www.sec.gov/files/owb-annual-report-2015.pdf> [<http://perma.cc/UJ93-WJL9>]; U.S. SEC. & EXCH. COMM’N, 2016 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM (2016), <http://www.sec.gov/files/owb-annual-report-2016.pdf> [<http://perma.cc/56D6-NZRQ>]; U.S. SEC. & EXCH. COMM’N, 2017 ANNUAL REPORT TO CONGRESS WHISTLEBLOWER PROGRAM (2017), <https://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf> [<http://perma.cc/3H5H-2L6M>]; U.S. SEC. & EXCH. COMM’N, 2018 ANNUAL REPORT TO CONGRESS WHISTLEBLOWER PROGRAM (2018), <http://www.sec.gov/files/sec-2018-annual-report-whistleblower-program.pdf> [<http://perma.cc/3N37-6THN>]; U.S. SEC. & EXCH. COMM’N, 2019 ANNUAL REPORT TO CONGRESS WHISTLEBLOWER PROGRAM (2019), <http://www.sec.gov/files/sec-2019-annual-report-whistleblower-program.pdf> [<http://perma.cc/SL39-PRAK>].

220. For example, on October 22, 2020, the SEC announced its largest ever award, amounting to approximately \$114 million. Press Release, SEC No. 2020-266, SEC Issues Record \$114 Million Whistleblower Award (Oct. 22, 2020), <http://www.sec.gov/news/press-release/2020-266> [<http://perma.cc/EFV5-89WM>] (“The combined \$114 million reward marks the highest award in the program’s history, and eclipses the next highest award of \$50 million made to an individual in June 2020. ‘Today’s milestone award is a testament to the Commission’s commitment to award whistleblowers who provide the agency with high-quality information’” (quoting SEC Chairman Jay Clayton)); *see also* Press Release, SEC No. 2018-44, SEC Announces Its Largest-Ever Whistleblower Awards (Mar. 19, 2018), <http://www.sec.gov/news/press-release/2018-44> [<http://perma.cc/6T27-7FA8>]; Press Release, SEC No. 2018-179, SEC Awards More Than \$54 Million to Two Whistleblowers (Sept. 6, 2018), <http://www.sec.gov/news/press-release/2018-179> [<http://perma.cc/XPC7-ZZRC>]; Press Release, SEC No. 2016-237, SEC Issues \$20 Million Whistleblower Award (Nov. 14, 2016), <http://www.sec.gov/news/pressrelease/2016-237.html> [<http://perma.cc/R4Y4-MZR5>]; SEC, 2018 ANNUAL REPORT TO CONGRESS: WHISTLEBLOWER PROGRAM 9 (2018) [hereinafter SEC, 2018 ANNUAL REPORT], <http://www.sec.gov/sec-2018-annual-report-whistleblower-program.pdf> [<http://perma.cc/A7UT-CD3H>] (“The Commission’s \$83 million award in March 2018 included an almost \$50 million joint award to two individuals, which is also the Commission’s highest award to date, as well as an award of \$33 million to a third individual.

The numbers tell a different story. To take one year as an example, in 2018, the SEC received over 5,200 tips.²²¹ It paid out awards to 13 individuals.²²² This mismatch between number of tips received and payouts authorized in 2018 is no anomaly. The difference between tips received and awards made for earlier years is equally stark. Over 4,400 tips were received in 2017 and only 12 individuals received awards.²²³ Similarly, over 4,200 tips were received in 2016 and only 13 individuals received awards.²²⁴ The payouts in each year were substantial—\$168 million in 2018, \$50 million in 2017, and \$57 million in 2016—especially considering the relatively low number of individuals who shared those totals.²²⁵

The percentage of successful tips has thus been remarkably low. Excluding the first year of reporting (when there was only one award), it has moved from a low of 0.12% in 2013 to a high of 0.81% in 2016.²²⁶ The average success rate in years 2013–2020 is 0.33%. It is fair to say that, while the SEC ballyhoos its Office of the Whistleblower, actual awards—though sometimes substantial—appear to be few and far between.²²⁷ Among such tips is surely a lot of noise.

One potential objection to looking at awards and tips in this fashion is that one cannot draw a linear connection between tips and resulting awards in any given year. A tip made to the SEC in 2018 might not lead to a government recovery and a subsequent agency determination of a whistleblower award until years later. Indeed, one accomplished and highly reputed whistleblower attorney argued this very point in an interview.²²⁸

Another potential issue is that the number of awards underestimates the value of the program to the government. The SEC's 2020 annual report states that it is tracking "over 1,100 matters" where a tip has caused an investigation to be opened or been relevant to an ongoing investigation.²²⁹ Furthermore, given the labyrinth an award-claiming whistleblower must navigate (described in Part III.D) there may be eligible claimants who fail to receive an award.

Still, the chances of a single tip leading to an award are infinitesimally low. Perhaps in acknowledgement of this state of affairs, in 2018, the SEC began to deemphasize the

The Commission also made a \$54 million award in September 2018, with a \$39 million award to one individual, and a \$15 million award to a second individual.").

221. SEC, 2018 ANNUAL REPORT, *supra* note 220, at 2, 20.

222. *Id.* at 1, 9.

223. SEC, 2017 WHISTLEBLOWER PROGRAM ANNUAL REPORT TO CONGRESS 1 (2017) [hereinafter 2017 WHISTLEBLOWER ANNUAL REPORT], <http://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf> [<http://perma.cc/JUX4-HC5P>].

224. SEC, 2016 DODD-FRANK WHISTLEBLOWER PROGRAM ANNUAL REPORT TO CONGRESS 1 (2016) [hereinafter 2016 WHISTLEBLOWER ANNUAL REPORT], <http://www.sec.gov/files/owb-annual-report-2016.pdf> [<http://perma.cc/DU6Y-AHQK>].

225. SEC, 2018 ANNUAL REPORT, *supra* note 220, at 1; 2017 WHISTLEBLOWER ANNUAL REPORT, *supra* note 223, at 1; 2016 WHISTLEBLOWER ANNUAL REPORT, *supra* note 224, at 1.

226. Miriam Baer found a "hit rate" of just under 0.2% for the first five years of the program. Baer, *supra* note 49, at 2217.

227. See, e.g., SEC, 2020 ANNUAL REPORT, *supra* note 23, at 2 (noting that over 6,900 tips were received in 2020, but awards were only issued to thirty-nine individuals).

228. Telephone Interview with Attorney I (Jan. 23, 2020).

229. SEC, 2020 ANNUAL REPORT, *supra* note 23, at 31.

whistleblower bounty program. The agency proposed scaling back on whistleblower awards above \$100 million.²³⁰ In a move some attributed to the proposed reform, 2019 saw a drop in whistleblower tips, down 1% from 2018, the largest drop being in tips about potential fraud in securities offerings.²³¹ The proposed rules also gave the Commission discretion to make awards to people who would not qualify under the current one million dollar minimum, as well as discretion to adjust rewards upwards.²³²

Section V will return to these proposed rules, some of which the SEC ultimately adopted in September 2020, which present a case study on the problem of reforming whistleblower protection without examining the basic questions set forth at the outset of this Article. For now, this Part moves to the next two datasets, and in doing so pivots from the bounty mechanism to two methods of protecting whistleblowers from retaliation.

TABLE 2: TIPS AND AWARDS IN THE SEC 2012–2020

Year	Number of Tips	Number of Awards	Percentage of Awards to Tips (%)	Total Dollar Amount (\$)
2012	3,001	1	0.03	50,000
2013	3,238	4	0.12	14,000,000
2014	3,620	9	0.25	30,000,000
2015	3,923	8	0.20	37,000,000
2016	4,218	13	0.31	57,000,000
2017	4,484	12	0.27	50,000,000
2018	5,282	13	0.25	168,000,000
2019	5,212	8	0.15	60,000,000
2020	6,911	39	0.56	175,000,000
Average (excluding 2012)	4,611	13	0.28	74,000,000

B. Antiretaliation Data (SOX and Dodd-Frank)

The first antiretaliation mechanism focuses on OSHA’s initial investigatory decisions; the second focuses on lawsuits filed in court alleging claims under Dodd-Frank. The datasets do not pull from the same universe of potential claims; as described above, Dodd-Frank and SOX protect whistleblowers, but in different ways and in different, but overlapping, fields. Indeed, whistleblowers can have both SOX and

230. See Whistleblower Program Rules, *supra* note 29; see also Henry Cutter, *SEC Seeks Right To Cut Whistleblower Bounties*, WALL ST. J. (June 29, 2018, 9:00 AM), [http://www.wsj.com/articles/sec-proposes-whistleblower-awards-for-smaller-cases-1530212390?mod=article_](http://www.wsj.com/articles/sec-proposes-whistleblower-awards-for-smaller-cases-1530212390?mod=article_inline)
[inline \[http://perma.cc/UZ98-ER2J\]](http://perma.cc/UZ98-ER2J).

231. See Kristin Broughton & Dylan Tokar, *SEC Whistleblower Tips Decline as Agency Looks To Limit Big Awards*, WALL ST. J. (Nov. 15, 2019, 7:35 PM), <http://www.wsj.com/articles/sec-whistleblower-tips-decline-as-agency-looks-to-limit-big-awards-11573864500> [<http://perma.cc/Q73B-VKZY>].

232. Cutter, *supra* note 230.

Dodd-Frank claims arising from the same protected conduct—in fact, many of them do.²³³

These data do not permit direct comparison. Yet these data constitute the *only* concrete findings we have on how whistleblowing works in financial-fraud cases in the United States. They reveal a notable difference in success rate. This Part thus casts light on how different sifting mechanisms work in real life.

1. SOX (OSHA)

The Department of Labor publishes aggregate OSHA whistleblower complaint data on its Office of the Whistleblower website.²³⁴ Data are available from 2008 to 2020,²³⁵ but this Article's sample period spans 2012 to 2020, overlapping with the time span of the OWP award dataset.²³⁶

In terms of process, OSHA investigators are assigned complaints to be investigated.²³⁷ The investigator works with the complainant during the intake and evaluation phase of the investigation,²³⁸ conducts on-site interviews, and collects documentary evidence whenever practicable.²³⁹ The investigator also contacts the employer for interviews, records, and other matters.²⁴⁰ After investigators have gathered the available relevant evidence, they make a determination and consult with their supervisor.²⁴¹ The supervisor reviews the file and either approves it or, if the supervisor does not agree with the investigator's analysis, returns the file for follow up work.²⁴² Regional administrators have overall responsibility for all whistleblower investigations in their regions.²⁴³

233. See Daniel J. Hurson, *Sarbanes-Oxley, Dodd-Frank, Retaliation, and Reward: Representing Clients in the Age of the Whistleblower*, 32 ABA J. LAB. & EMP. L. 381, 406 (2017); Jay Fishman, *Whistleblowers 2d Cir.: Discharged Employee Survives Prima Facie Inquiry To Defeat Summary Judgment*, WOLTERS KLUWER EMP. L. DAILY, 2016 WL 7403928 (2016); Joanne Cursinella, *No Second Shot for Bio-Rad at Whistleblower Claim As Motion To Relitigate Is Denied*, CORP. GOVERNANCE GUIDE 2255235 (C.C.H.), 2017 WL 2255235 (2017); Nicolas Morgan & Grant Alexander, *Does Your Babysitter Qualify for Whistleblower Protection Without Reporting Directly to the SEC?*, 22 CORP. GOVERNANCE ADVISOR 1, 27 (2014).

234. *Data and Statistics*, U.S. DEP'T OF LAB., http://www.whistleblowers.gov/factsheets_page/statistics [<http://perma.cc/2NGX-399G>] (last visited Feb. 1, 2022).

235. Internet archives provided the data from 2008–2018. OSHA, U.S. DEP'T OF LAB., WHISTLEBLOWER DOCKETED CASES RECEIVED: FY2008 – FY2018, <http://www.whistleblowers.gov/sites/default/files/3DCharts-FY2008-FY2018.pdf> [<http://perma.cc/9GAJ-JTJX>].

236. The Department of Labor's Office of the Whistleblower website provides aggregate data from 2015–2020. OSHA, U.S. DEP'T OF LAB., WHISTLEBLOWER DOCKETED CASES RECEIVED: FY2015 – FY2020, http://www.osha.gov/sites/default/files/3D_Charts-Received_Closed.pdf [<http://perma.cc/L6JW-YDYF>].

237. OSHA, U.S. DEP'T OF LAB., WHISTLEBLOWER INVESTIGATIONS MANUAL 3-2, 3-9 (2016) [hereinafter WHISTLEBLOWER INVESTIGATIONS MANUAL], http://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-03-007.pdf [<http://perma.cc/LEE2-QPZN>].

238. *Id.* at 3-2, 3-13.

239. *Id.* at 3-15.

240. *Id.* at 3-21.

241. See *id.* at 3-22.

242. See *id.* at 4-2, 4-6.

243. *Id.* at 1-8, 1-9.

TABLE 3: SOX DOCKETED AND COMPLETED CASES 2012–2020²⁴⁴

Year	SOX Docketed Cases	SOX Cases Completed
2012	170	157
2013	179	200
2014	146	171
2015	156	149
2016	174	170
2017	186	200
2018	155	163
2019	125	144
2020	143	144

OSHA classifies the data on the cases that it investigates into six categories: merit, settled, settled other, dismissed, kickout, and withdrawn.²⁴⁵ The Whistleblowers Investigations Manual provides the following explanations²⁴⁶:

Merit. Cases found to have merit must have been approved by a supervisor and by the regional solicitor of labor, an attorney, who will litigate the case if it does not settle.²⁴⁷

Settled. OSHA views voluntary resolution of cases to be “desirable” and encourages investigators to “actively assist” the parties in resolving their case.²⁴⁸ OSHA has its own standard settlement agreement and procedures in place for settlement.²⁴⁹ Parties can also

244. The Department of Labor’s Office of the Whistleblower website provides aggregate data from 2015–2020. OSHA, U.S. DEP’T OF LAB., WHISTLEBLOWER DOCKETED CASES RECEIVED: FY2015 – FY2020, *supra* note 236.

245. See WHISTLEBLOWER INVESTIGATIONS MANUAL, *supra* note 237, at 4-1–4-6.

246. See *id.* at 1-13, 4-1–4-6 (describing categorizations of whistleblower complaint data). OSHA screens out whistleblower complaints under some statutes and reports those data separately. *Id.* at 2-3, 2-4. Screened out cases are administratively closed. *Id.* Per OSHA policy, no SOX cases may be screened out for untimeliness or lack of a *prima facie* allegation; they must be docketed and dismissed after a determination is made. *Id.* at 2-4, 2-5 (“Complaints filed under STAA, CAA, CERCLA, FWPCA, SDWA, SWDA, TSCA, ERA, AIR21, SOX, PSIA, NTSSA, FRSA, CPSIA, ACA, CFPA, or FSMA that are either untimely or do not present a *prima facie* allegation, may not be ‘screened out’ or closed administratively. Complaints filed under these statutes must be docketed and a written determination issued, unless the complainant, having received an explanation of the situation, withdraws the complaint.”).

247. *Id.* at 1-8, 3-5 (“Under the reasonable cause standard, OSHA must believe, after evaluating all of the evidence gathered in the investigation from the respondent, the complainant, and other witnesses or sources, that a reasonable judge *could* rule in favor of the complainant. The threshold OSHA must meet to find reasonable cause that a complaint has merit requires evidence in support of each element of a violation and consideration of the evidence provided by both sides or otherwise gathered during the investigation, but does not generally require as much evidence as would be required at trial. Because OSHA makes its reasonable cause determination prior to a hearing, the reasonable cause standard is somewhat lower than the preponderance of the evidence standard that applies following a hearing.”).

248. *Id.* at 4-3.

249. *Id.*

negotiate settlements on their own.²⁵⁰ While these must be reviewed and approved by the supervisor, OSHA's policy is to "defer to adequate privately-negotiated settlements."²⁵¹

Settled Other. Cases that fall within the "settled other" category are cases that were deferred from OSHA to another agency, grievance proceeding, or arbitration, and subsequently settled.²⁵²

Dismissed. A recommendation to dismiss the case requires that OSHA issues findings to the complainant and respondent. The recommendation "must include the rationale for the decision" as well as information regarding the parties' rights to object or appeal after 180 days.²⁵³

Kicked-Out. "Kicked-out" cases are cases in which the complainant exercises his or her right to remove their case to the federal district court.²⁵⁴

Withdrawn. Complainants can withdraw at any time during the process.²⁵⁵ A complainant who withdraws forfeits all rights to appeal or object.²⁵⁶

Positive Outcome for Complainant. OSHA classifies *merit*, *settled*, and *settled other* as positive outcomes for complainant.²⁵⁷ I adhere to the agency classification of positive outcomes, as further explained later in this Part.

250. *Id.* at 6-18.

251. *Id.*

252. *See id.* at 4-5. In cases where the investigator recommends a deferral to another agency's decision, grievance proceeding, arbitration, or other appropriate action, the supervisor will issue letters of deferral to the complainant and respondent. The case will be considered closed at the time of the deferral and will be recorded in Integrated Management Information System as "Dismissed." *Id.* If the other proceeding results in a settlement, it will be recorded as "Settled Other." *Id.*

253. *See id.* at 4-3.

254. *See* Memorandum from Francis Yebesi, Acting Dir. of Whistleblower Prot. Programs, to Regional Adm'rs and Whistleblower Program Managers on the Clarification of Procedures for Closing Investigations Based on a "Kick-Out" to Federal District Court (Jan. 26, 2018), <http://www.whistleblowers.gov/memo/2018-01-26> [<http://perma.cc/5AWT-M5Z9>].

255. WHISTLEBLOWER INVESTIGATIONS MANUAL, *supra* note 237, at 4-2.

256. *Id.*

257. *See id.* at 1-13, 4-1-4-6.

TABLE 4: COUNTS OF SOX WHISTLEBLOWER COMPLAINT DETERMINATIONS 2012–2020

SOX Whistleblower Complaint Determinations FY 2012–2020 (#)								
Year	Positive Outcomes				Dis-missed	Kick-Out	With-drawn	Total
	Merit	Settled	Settled Other	Total Positive				
2012	2	11	29	42	90	10	18	160
2013	2	9	29	40	141	25	44	250
2014	2	3	29	34	77	30	33	174
2015	1	2	20	23	82	20	30	155
2016	1	7	27	35	77	31	30	173
2017	7	5	35	47	102	16	37	202
2018	3	5	27	35	92	16	20	163
2019	1	6	15	22	92	15	19	148
2020	0	8	27	35	75	22	12	144
Total	19	56	238	313	828	185	243	1569

TABLE 5: PERCENTAGE OF SOX WHISTLEBLOWER COMPLAINT DETERMINATIONS 2012–2020

SOX Whistleblower Complaint Determinations FY 2012–2020 (%)								
Year	Positive Outcomes				Dis-missed	Kick-Out	With-drawn	Total
	Merit	Settled	Settled Other	Total Positive				
2012	1.3	6.9	18.1	26.3	56.3	6.3	11.3	100.0
2013	0.8	3.6	11.6	16.0	56.4	10.0	17.6	100.0
2014	1.1	1.7	16.7	19.5	44.3	17.2	19.0	100.0
2015	0.6	1.3	12.9	14.8	52.9	12.9	19.4	100.0
2016	0.6	4.0	15.6	20.2	44.5	17.9	17.3	100.0
2017	3.5	2.5	17.3	23.3	50.5	7.9	18.3	100.0
2018	1.8	3.1	16.6	21.5	56.4	9.8	12.3	100.0
2019	0.7	4.1	10.1	14.9	62.2	10.1	12.8	100.0
2020	0.0	5.6	18.8	24.3	52.1	15.3	8.3	100.0
Average	1.2	3.6	15.2	19.9	52.8	11.8	15.5	100.0

TABLE 6: SOX WHISTLEBLOWER COMPLAINT DETERMINATIONS SUMMARY STATISTICS 2012–2020

SOX Whistleblower Complaint Determinations Summary Statistics FY 2012–2020								
	Positive Outcomes							
Stat	Merit	Settled	Settled Other	Total Positive	Dis-missed	Kick-Out	With-drawn	Total
Average (#)	2.1	6.2	26.4	34.8	92.0	20.6	27.0	174.3
Average (%)	1.2	3.6	15.2	19.9	52.8	11.8	15.5	100.0
Range (#)	0–7	2–11	15–35	22–47	82–141	10–31	12–44	144–250
Range (%)	0–3.5	1.3–6.9	10.1–18.8	14.9–26.3	44.3–62.2	6.3–17.2	8.3–19.4	N/A

Recall Richard Moberly found a 3.6% win rate at the initial OSHA investigation level and a 6.5% win rate at the ALJ level, excluding settlements in each case.²⁵⁸ I include Moberly’s early data for comparison. Investigators find for SOX complainants 1.2% of the time. This is an extremely small percentage, even as compared to what Moberly finds in his initial study of investigations from 2003 to 2005.

TABLE 7: PERCENTAGE OF SOX FINDINGS FOR PLAINTIFFS ON THE MERITS

	Percentage of whole merits determinations only	Moberly 2003–2005
SOX	1.2%	6.5%

As already observed, any discussion of sorting meritorious from meritless claims requires defining merit. So far I have used a plaintiff’s outright win as a signal of merit. This test certainly has intuitive appeal. Perhaps if OSHA investigators made a finding in each and every case a complainant filed, plaintiff success or failure in these cases might fairly be thought to capture merit. But many cases do not reach that point—many cases settle.²⁵⁹ In the OSHA sample, 294 out of 1,569—or 18.7% of the total—settled.²⁶⁰

Scholars have grappled with how to characterize settlements in empirical studies before. As Wendy Parker points out, “[s]ettlements do not fit neatly into the categories of win or loss.”²⁶¹ As Theodore Eisenberg and others have explored, cases that are

258. Moberly, *Unfulfilled Expectations*, *supra* note 137, at 91. In the six years following Moberly’s initial study, only ten whistleblowers won a case in front of OSHA, making the cumulative percentage of successful claimants from the Act’s enactment through 2012 1.8% (of 1,260 cases OSHA decided). Moberly, *Ten Years Later*, *supra* note 51, at 28–29.

259. See *supra* Part IV.B.1 Table 4.

260. See *supra* Part IV.B.1 Table 4.

261. Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 909 (2006). Because plaintiffs rarely win in employment discrimination cases, Parker “defined plaintiffs’

litigated to conclusion constitute a biased sample.²⁶² Disputes that heavily favor one side or the other “tend to settle readily, because both sides can save costs by settling in light of their knowledge of the applicable law and all other aspects of the case.”²⁶³ Litigants only resort to trial when they have differing expectations of a trial outcome.²⁶⁴

Settlements are the product of compromise, but if that compromise tilts a certain way, the direction is hard to determine.²⁶⁵ Risk-averse defendants, particularly those eyeing a jury award and the risk of a double pay award, are much more likely to settle for a relatively high dollar value.²⁶⁶ These latter cases are not meritless claims²⁶⁷—far from it. Rather, the fact of a settlement is an indicium of a claim’s merit.

But a settlement is not an unambiguous marker of merit. If both parties recognize the case is weak, the plaintiffs may be willing to abandon the case early on rather than shoulder the burden of paying litigation costs on a losing case.²⁶⁸ The result here can also be a settlement, although a relatively small-dollar one, reflecting the weakness of the case. It could be that plaintiffs receive a nominal token amount and compromise their claims considerably.²⁶⁹

With these caveats and complications in mind, this Part counts settlements as favorable outcomes for plaintiffs. Supporting this position is the fact that OSHA itself groups cases that are “settled” and “settled other” as positive outcomes for whistleblowers.²⁷⁰ Recall that “settled other” cases settle after being arbitrated or investigated in another forum or agency.²⁷¹

In the total Department of Labor dataset, 18.7% of the cases settle.²⁷² If we combine cases that settle with those where the plaintiff is successful, we find that plaintiffs win or settle a total of 313 out of 1,569 times, or 19.95% of the time.²⁷³ With this overview of the SOX data, we can turn to the final mechanism for whistleblower protection: litigation under Dodd-Frank.

wins broadly to capture as many cases as possible. For tried cases, whether by jury or bench, plaintiffs’ victories are the awarding of any relief, whether it be injunctive or monetary.” *Id.*

262. See Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 588 (1998); Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1568 (1989).

263. Clermont & Eisenberg, *supra* note 262, at 588.

264. See Eisenberg, *supra* note 262, at 1571.

265. See Parker, *supra* note 261, at 909–10.

266. See Eisenberg, *supra* note 262, at 1571.

267. See Parker, *supra* note 261, at 909–10 (explaining that plaintiffs almost always receive something for giving up their claims).

268. See Eisenberg, *supra* note 262, at 1571.

269. Parker, *supra* note 261, at 909–10.

270. See WHISTLEBLOWER INVESTIGATIONS MANUAL, *supra* note 237, at 1-13, 4-1-4-6.

271. See *id.* at 4-5; see also *supra* note 252 and accompanying text.

272. See *infra* Part IV.C Table 10.

273. See *infra* Part IV.C Table 10.

2. Dodd-Frank (Court Cases)

The third dataset, comprised of Dodd-Frank antiretaliation claims, was compiled by Shepardizing the Dodd-Frank statute referring to antiretaliation protections.²⁷⁴ Coders first assessed whether the case was applicable to the research question. Reasons for it being inapplicable included that no Dodd-Frank claim was alleged, that there was no employment relationship between the plaintiff and defendant, that the court lacked subject matter jurisdiction, or that the Dodd-Frank claim was not discussed because the preliminary motions dealt with other issues.²⁷⁵ The time period analyzed was from January 1, 2012, to December 31, 2020,²⁷⁶ and contained 187 observations in all. Sixty-four were not applicable to the research question.²⁷⁷

Of the 123 Dodd-Frank cases in the sample, 83 had the Dodd-Frank claims dismissed and 39 had Dodd-Frank claims proceed. One was deferred. Sixty-five cases had Dodd-Frank claims dismissed in favor of the defendant. Of these, five were for retroactivity or statute of limitations reasons. Eleven of them were dismissed in favor of arbitration. In three, the court affirmatively determined that the employee was terminated for substandard performance. Thus, the success rate for plaintiffs was 39 in 122 (omitting the deferred case), or 32%.

TABLE 8: SUMMARY OF DODD-FRANK CASES

Dodd-Frank Cases		
Outcome	(#)	(%)
Proceeded	39	32
Dismissed in favor of defendant	67	55
Dismissed for arbitration	11	9
Retroactivity/SOL	5	4
Total	122	100

C. Comparisons

The question of the relative efficacy of the sifting mechanisms is one these data cannot definitely answer given the differences in causes of action. With that caveat firmly in mind, it remains instructive to see the relative number of meritorious claims each system produces. These data, despite their drawbacks, do offer empirical evidence that offers a richer picture of the whistleblowing landscape.

274. 15 U.S.C. § 78u-6.
275. See *infra* Appendix A for the full codebook.
276. Dodd-Frank’s effective date was July 21, 2010. I exclude 2010 as a partial year and 2011 because only three cases meeting our criteria were filed that year, presumably because the cause of action was so new.
277. Either they did not contain a Dodd-Frank claim, the parties agreed to dismiss the Dodd-Frank claim, the court lacked subject matter jurisdiction, or the Dodd-Frank claim was not discussed because other preliminary motions were at issue.

TABLE 9: PERCENTAGE OF SOX AND DODD-FRANK SUCCESSFUL CLAIMS FROM ADJUDICATED CLAIMS

	Percentage of whole (%)
SOX	1.2
Dodd-Frank	32.0

On their own, these numbers suggest that empowering plaintiffs to pursue their own claims (as Dodd-Frank does) generates a relatively higher proportion of meritorious whistleblower claims (32%) than does giving an agency sole and complete jurisdiction (1.2%). That is, it would seem that the agency model produces substantial “noise” or “nuisance value” claims, even though potential damages are lower than under Dodd-Frank.²⁷⁸ Whether either regime is “better” is an open question, one that depends on a prior expectation of what an optimal rate would be and, importantly, on how many meritorious suits each side has weeded out. Part V.C will explore these questions further.

As Section II made clear, however, there are strong arguments for including settlements in any evaluation of a sifting mechanism.²⁷⁹ Table 10 includes settlement data for the agency cases. Note our focus here is with how each sorting mechanism performs at a decision point, i.e., after an opinion has issued (in the case of SOX, when it has entered the agency’s system; in the case of Dodd-Frank, after there has been an adjudication). Pretrial settlements are thus not a part of the Dodd-Frank dataset.

TABLE 10: SUMMARY OF SOX AND DODD-FRANK REGIMES

Category	SOX	Dodd-Frank	Dodd-Frank Bounty Program
P wins (%)	1.2	32.0	0.33
D wins (%)	56.2	66.36	N/A
Settlement (%)	18.7	N/A	N/A
P wins (including settlement for SOX) (%)	19.95	32.00	0.28

Recall that one argument is that pretrial litigation costs imposed on litigants means that only those securely convinced of their merit will risk a lawsuit under a direct cause of action.²⁸⁰ Under this view, there would be a higher percentage of meritorious claims under Dodd-Frank. Indeed, the data reveal a roughly 60% higher success rate for Dodd-Frank claims litigated in court as opposed to SOX claims filed with an

278. See Moberly, *Unfulfilled Expectations*, *supra* note 137, at 97.

279. While the Dodd-Frank court case data do not include cases that settle before the issuance of an opinion, subsequent case history allowed us to determine settlements in some of the cases. The data show that twelve out of thirty-nine of successful plaintiffs, or 30.8%, settle after the issuance of the opinion. Two cases with unsuccessful plaintiffs also settled.

280. See, e.g., *supra* note 268 and accompanying text.

administrative agency over the same period (19.95% vs. 32.00%). And both of these success rates dwarf the average success rate for whistleblower tips of 0.28%.

These comparisons are not perfect. For one, the decisionmaker in Dodd-Frank cases is an Article III judge, a far more vetted and credentialed individual than an OSHA investigator. On the other hand, an agency investigator will have the benefit of specialization. The SEC's team of investigators and lawyers likewise have this advantage of specialization. A limitation of this cross-regime comparison is that it must, by its nature, take these different sorting mechanisms at face value, presuming that they are sorting accurately—or at least with consistent levels of inaccuracy. Relaxing this assumption perforce lessens the utility of the comparison.

With this caveat in mind, an efficiency-minded reformer might purport to know exactly what to do with these data. It appears that Dodd-Frank's court-based sorting mechanism results in the highest percentage of successful claims, higher than SOX's agency-based method, and much higher than Dodd-Frank's bounty mechanism, which generates thousands of tips and only a handful of awards for its pains.²⁸¹

What this purportedly efficiency-minded reformer is forgetting are this Article's central questions: How much whistleblowing is optimal? And how many meritless claims are we willing to tolerate in order to reach that optimal level? This Section gave us concrete data to think about when answering these questions in three different regime-design contexts. Section V will examine past whistleblowing reforms, which failed to consider our central questions, in light of what we have learned in this Section. It concludes with a framework for future decisionmakers.

V. PAST MISTAKES AND FUTURE PRESCRIPTIONS

Congress legislated in emotion-laden settings to create its two financial whistleblower regimes—SOX in response to the scandals of Enron and WorldCom,²⁸² and Dodd-Frank in response to the 2008 financial crisis.²⁸³ It has never carefully considered the tradeoffs involved in whistleblower protection. Similarly, the recent SEC reforms duck these basic questions as to what kinds of whistleblowing we want to incentivize and how best we can do so.²⁸⁴ This Section offers two examples, one from Congress and one from the SEC, that show how little attention these questions have received. It then moves to normative prescriptions.

281. See *supra* Part IV.C Table 10.

282. SOX responded to internal whistleblowers Sherron Watkins (Enron) and Cynthia Cooper (WorldCom). See Greg Farrell, *WorldCom's Whistleblower Tells Her Story*, ABC NEWS (Feb. 15, 2008, 8:38 PM), <http://abcnews.go.com/Business/story?id=4295223&page=1> [<http://perma.cc/NZ7K-RRNP>]; Associated Press, *Enron Whistleblower Tells of 'Crooked Company'*, NBC NEWS (Mar. 15, 2006, 12:02 PM), http://www.nbcnews.com/id/11839694/ns/business-corporate_scandals/t/enron-whistleblower-tells-crooked-company/#.XjmaiC2ZNQI [<http://perma.cc/4S48-EVAT>].

283. See Barack Obama, U.S. President, Remarks of the President on Regulatory Reform (June 17, 2009), <http://obamawhitehouse.archives.gov/the-press-office/remarks-president-regulatory-reform> [<http://perma.cc/9QZG-VMRY>] (“[T]oday, my administration is proposing a sweeping overhaul of the financial regulatory system, a transformation on a scale not seen since the reforms that followed the Great Depression.”).

284. See analysis *infra* Part V.B.

A. *Congress's Lack of Attention to Key Whistleblower Considerations*

After all of this examination of the theory and practice of whistleblowing, the reader may be troubled by a lingering question: Why does OSHA, a governmental agency focused on occupational safety, administer these financial whistleblower claims rather than the SEC? The answer is one of historical accident rather than purposeful congressional design.²⁸⁵ And this fact underlines the lack of consideration that has plagued legislative action regarding whistleblowing.²⁸⁶

OSHA, as its name suggests, is an agency focused on workplace health and safety. Congress foisted SOX whistleblower claims onto it without ceremony and without apparent consideration as to whether the agency had any expertise in the area.²⁸⁷ Its only justification was that, at the time, OSHA was already administering the Wendell H. Ford Aviation Investment and Reform Act of the 21st Century²⁸⁸ (AIR-21), an early federal whistleblower-protection measure aimed at the aviation industry.²⁸⁹

The original SOX bill provided full reinstatement of position, double the amount of back pay with interest, and compensation for any "special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees"—in addition to the possibility of punitive damages based on the weighing of three factors listed in the statute.²⁹⁰ Senator Chuck Grassley thought this private cause of action was too dangerous and introduced an amendment that forced whistleblowers to seek relief with an agency.²⁹¹ He feared that empowering plaintiffs would "encourage[] frivolous claims that abuse the protections we seek to bestow."²⁹² Note that Section IV's data suggest that Senator Grassley's concern was misplaced—and that, indeed, the agency mechanism may permit *more* frivolous claims because the government bears the costs of the case.

Senator Grassley urged that the protections trace the same ones afforded in the only prior federal whistleblower statute—AIR-21.²⁹³ So Congress "struck the excessive damages included in the original bill and . . . removed a provision that allowed immediate access to federal district courts."²⁹⁴ Thus, AIR-21 served as the procedural model for

285. See *supra* notes 146–158.

286. See *supra* notes 57–58.

287. SOX claims have been described as a "bureaucratic stepchild" at OSHA. Kwok, *supra* note 94, at 1249.

288. 49 U.S.C. § 42121.

289. See S. REP. 107-146, at 13 (2002).

290. See S. 2010 107th Cong. § 7 (2002). Fact finders would need to take the following into account: "the significance of the information or assistance provided by the employee . . . and the role of the employee in advancing [the process], or in protecting the health, safety, or welfare of the employer or of the public," "the nature and extent of both the actual and potential discrimination to which the employee was subjected," and "the nature and extent of the risk to the health, safety, or welfare of shareholders or the public." *Id.*

291. See S. REP. NO. 107-146, pt. VIII-A, at 26.

292. *Id.*

293. See *id.* This SOX forbearer, incidentally, housed whistleblowing protection in OSHA—a fact that explains why financial-fraud whistleblower protection wound up in that agency rather than the SEC. See *id.*

294. *Id.* pt. VIII-B, at 30; see also *Accounting Reform and Investor Protection: Hearing on H.R. 1088, S. 1895, S. 2010, S. 2673, H.R. 3763, and H.R. 5118 Before the S. Comm. on Banking, Hous. and Urb. Affs., 107th Cong.* 458 (2002) [hereinafter *Hearing on Accounting Reform*],

SOX whistleblower protection.²⁹⁵ Indeed, revisions to the original SOX bill specifically sought to make protections “track” those of the aviation bill.²⁹⁶ Congress reasoned, “[b]ecause we had already extended whistleblower protections to non civil service employees, we thought it best to track those protections as closely as possible.”²⁹⁷ Ultimately, the reason SOX whistleblowers did not have direct access to federal courts was for the sake of consistency with a prior whistleblowing regime concerning *aviation safety*.²⁹⁸ Note the lack of consideration that aviation safety and financial misconduct might be different subject matter areas, with different kinds of whistleblowers, different kinds of claims, and therefore needful of different protections.

This almost instinctual move on the part of Congress to harmonize whistleblowing statutes reveals its lack of thought with respect to one of the central questions of this Article: How many meritless claims are we willing to tolerate in order to reach an optimal level of whistleblowing? Some citizens might argue that a high error rate is tolerable in the context of airline safety, that handling ninety-nine false claims is a small price to pay for encouraging one report of misconduct when human lives are on the line. Others might argue that financial fraud, which impacts people’s ability to survive and make a living—and can at its worst have implications for the economy of the nation as a whole—is more serious in nature. Under such a view, a high rate of false positives (i.e., meritless claims) for SOX whistleblowers would be acceptable.

These are hard questions, to be sure. But Congress in SOX did not even *try* to address them or, indeed, appear to consider them.²⁹⁹ Instead, it simply conformed SOX whistleblower protections to existing ones.³⁰⁰ Equally unthinkingly, on the logic of “whistleblowing is whistleblowing,” it assigned complex financial investigations to an agency focused traditionally on the physical health and well-being of workers,³⁰¹ even though the SEC would have been a far more logical choice. This decision had real costs—it took years for OSHA to develop the necessary expertise to handle the technical and complex SOX claims.³⁰²

This mismatch leads to this Article’s most concrete policy prescription. Although OSHA has developed expertise in the area of financial fraud, it is time to move SOX whistleblowing out of OSHA and to the SEC. It was always an awkward housing; OSHA’s whistleblower protection office administers twenty-three statutes, and

<http://www.govinfo.gov/app/details/CHRG-107shrg87708/CHRG-107shrg87708>
[<http://perma.cc/A433-W5DR>].

295. Vaughn, *supra* note 46, at 8.

296. S. REP. NO. 107-146, pt. VIII-A, at 26; *Hearing on Accounting Reform*, *supra* note 294, at 2096.

297. S. REP. NO. 107-146, pt. VIII-B, at 30.

298. “However, this compromise does provide whistleblowers with access to federal court in the event the Secretary of Labor fails to issue a final decision within 6 months.” *Id.*

299. See, e.g., *Hearing on Accounting Reform*, *supra* note 294, at 454.

300. See *id.*; see also Vaughn, *supra* note 46, at 78–79.

301. See Occupational Safety and Health Act of 1970 § 2, 29 U.S.C. § 651(b) (“The Congress declares it to be its purpose and policy . . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . .”).

302. See Moberly, *Ten Years Later*, *supra* note 51, at 29–30; Meera Khan, *Whistling in the Wind: Why Federal Whistleblower Protections Fall Short of their Corporate Governance Goals*, 26 UNIV. MIAMI BUS. REV. 57, 75 (2018).

twenty-two of them have nothing to do with financial fraud.³⁰³ Instead, they concern areas one would expect from OSHA: the Asbestos Hazard Emergency Response Act,³⁰⁴ the Federal Railroad Safety Act,³⁰⁵ the Safe Drinking Water Act,³⁰⁶ and the Toxic Substances Control Act,³⁰⁷ among others. SOX claims certainly represent the odd man out in this group.

SOX claims have historically imposed a disproportionate burden on OSHA,³⁰⁸ and increasing demands are being placed on the agency. A recent report described how the COVID-19 pandemic has caused a “significant increase” in the number of complaints, an increase of thirty percent.³⁰⁹ OSHA investigators are overtaxed, and this increase will cause delays in processing workplace whistleblower claims.³¹⁰ SOX investigations take significantly more resources and sophistication than other OSHA investigations.³¹¹ It is time to ease the burden and move these claims to a more amenable home: the SEC.

Making the transition all the smoother, the SEC already has an Office of Whistleblower Protection, which houses the Dodd-Frank’s tips.³¹² That expertise could easily expand to encompass SOX claims. By statute, ALJs hear whistleblower appeals.³¹³ Happily, the SEC has this apparatus already in place by virtue of its own in-house ALJs.

Another benefit of this move would be to foster a kind of information sharing that does not seem to be happening consistently right now. The SEC is supposed to receive copies of every SOX whistleblower complaint filed with OSHA.³¹⁴ Yet the Department of Labor’s Office of Inspector General 2015 Report found that twenty-three percent of

303. See DIRECTORATE OF WHISTLEBLOWER PROT. PROGRAMS (DWPP), OCCUPATIONAL SAFETY & HEALTH ADMIN., WHISTLEBLOWER STATUTES SUMMARY CHART 1–11 (2021), http://www.whistleblowers.gov/sites/wb/files/2021-06/Whistleblower_Statutes_Summary_Chart_FINAL_6-7-21.pdf [<http://perma.cc/XGF4-Y3B6>].

304. 15 U.S.C. § 2651.

305. 49 U.S.C. § 20109.

306. 42 U.S.C. § 300j-9(i).

307. 15 U.S.C. § 2622.

308. See WHISTLEBLOWER PROTECTION: BETTER DATA AND IMPROVED OVERSIGHT, *supra* note 148, at 19–20 (“In our interviews, officials and investigators cited Sarbanes-Oxley cases as particularly complex and time-consuming, with different officials equating the work required for one Sarbanes-Oxley case to the work required for two to six cases under the Occupational Safety and Health Act. One official explained that Sarbanes-Oxley cases take the longest to investigate for several reasons: investigators must learn financial terminology; the cases tend to require more detailed, often legal, research with little case precedent; and the employers are often large corporations that engage a larger contingent of attorneys than do employers in other types of whistleblower cases.”).

309. U.S. DEP’T OF LAB., OFF. OF INSPECTOR GEN., NO. 19-20-010-10-105, COVID 19: OSHA NEEDS TO IMPROVE ITS HANDLING OF WHISTLEBLOWER COMPLAINTS DURING THE PANDEMIC 3 (2020).

310. See *id.*

311. See WHISTLEBLOWER PROTECTION: BETTER DATA AND IMPROVED OVERSIGHT, *supra* note 148, at 40, 44 (“Officials and supervisors told us that the Sarbanes-Oxley Act is the statute on which specialized legal assistance is most often needed . . .”).

312. See 17 C.F.R. § 240.21F-9(a) (2021).

313. See 29 C.F.R. § 1980.107 (2021).

314. See *Id.* § 1980.104 (2021) (“OSHA will provide an unredacted copy of [the complaint, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint] to the complainant (or complainant’s legal counsel, if complainant is represented by counsel) and to the Securities and Exchange Commission.”).

alleged violations were not reported to the agency empowered to investigate them.³¹⁵ Consolidating financial fraud reporting in a single agency would hopefully lead to sharing of information in a manner that, as we have seen, currently is not always occurring.

Unfortunately, moving the SOX claims out of OSHA cannot be done by administrative action alone. Given the mandate in SOX, it would take congressional action to make this move. Thus, this Article recommends that Congress amend SOX to assign whistleblower complaints to the SEC rather than OSHA.

This Part detailed the lack of careful thought Congress has applied to whistleblower protection. It explained the historical accident that housed SOX whistleblowers in OSHA and made the case for moving them to the SEC. Having described what the SEC's Office of the Whistleblower *should* be doing, it is time to turn to what that office currently *is* doing—and recent reforms to its workings.

B. Recent Reforms to the SEC's Bounty Program

In 2018, the SEC proposed changes to its administration of Dodd-Frank's whistleblower bounty system, including to the way it calculates awards.³¹⁶ These proposals had the net effect of *increasing* the odds of success for a relatively small-dollar payout, while at the same time *decreasing* the chance of a large payout.³¹⁷ This Part will use a description of the proposed and final rules, and the reaction of the whistleblower and corporate community, as another illustration of the importance of the key questions this Article has raised.

As originally enacted, Dodd-Frank provided that if the SEC collected monetary sanctions of over one million dollars based on the whistleblowers' information, they were entitled to awards between 10% and 30% of the award amount.³¹⁸ The award percentages could increase or decrease based on several positive or negative factors.³¹⁹ The SEC's 2018 proposed reforms provided that, for awards of five million dollars or less, the whistleblower *automatically* would receive the statutory maximum—30%—absent the existence of any negative factors.³²⁰ The SEC justified the presumption of an award in these cases because 75% of awards have historically been five million dollars or less.³²¹

315. OFF. OF INSPECTOR GEN., U.S. DEP'T OF LAB., REPORT TO THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION: OSHA NEEDS TO CONTINUE TO STRENGTHEN ITS WHISTLEBLOWER PROTECTION PROGRAMS 10 (2015), <http://www.oig.dol.gov/public/reports/oa/2015/02-15-202-10-105.pdf> [<http://perma.cc/XF7R-EGU3>]. Indeed, out of a sample of thirty-one OSH Act-related regional complaints the Office of the Inspector General reviewed, the enforcement arm of OSHA did not receive notification in ten of them. *Id.* That is, in over a third of these cases, the agency did not notify its *own enforcement group*. OSHA responded to the 2015 report by alleging that the Office of the Inspector General relied on inaccurate data and ignored inter-agency correspondence to assess communication among agencies. *Id.* at 22.

316. Whistleblower Program Rules, *supra* note 29.

317. See Amanda M. Rose, *Calculating SEC Whistleblower Awards: A Theoretical Approach*, 72 VAND. L. REV. 2047, 2059–60 (2019).

318. 15 U.S.C. § 78u-6.

319. *Id.*

320. Whistleblower Program Rules, *supra* note 29.

321. SEC, 2020 ANNUAL REPORT, *supra* note 23, at 33.

Thus, whistleblowers whose reports led the government to collect around \$17 million or less would be assured of receiving 30% of that recovery.

What the SEC gave with one hand to small-dollar whistleblowers it threatened to take away with the other, from recipients of large awards. The SEC's proposed rules included a provision that would have given the SEC discretion to reduce an award that netted the government monetary sanctions of at least one hundred million dollars if the SEC found that the potential award exceeded what is "reasonably necessary to reward the whistleblower and to incentivize other similarly situated whistleblowers."³²²

Predictably, this proposed amendment stirred controversy. Recall the qualitative data in Part III.E about the role attorneys play in these cases. Plaintiffs' attorneys generally work on a contingency fee basis and thus favor claims that result in large dollar verdicts—either retaliation claims involving highly compensated employees or bounty claims that have the potential to result in large collections for the government.³²³ Because attorneys claim roughly a third of any amount collected, larger awards result in higher pay for them.

To justify large awards, attorneys are quick to point out the tremendous amount these whistleblowers risk, not only personally but also professionally.³²⁴ They also stress the uniquely valuable information high earners can provide. If it is only those employees in the C-suite who have the requisite access to high-level financial information, and such information is precisely what is necessary to implicate financial-fraud claims, then the government needs to incentivize and protect these executives. They are sophisticated individuals all too aware that they risk becoming unemployable pariahs after blowing the whistle. Considering all this, multimillion-dollar paydays do not seem so disproportionate. After all, the annual compensation of such executives numbers in the millions, and to blow the whistle is to risk years of unemployment.

Implicit, then, in the SEC's proposed rules was a favoring of small-dollar awards and a disfavoring of large-dollar awards—and the attorneys who make their livelihood from them. The Securities Industry and Financial Markets Association, supporting the proposed rule, questioned whether awarding a whistleblower forty-five million dollars, rather than thirty million dollars, would create any more of an incentive to come

322. Whistleblower Program Rules, *supra* note 29, at 11. The SEC would not, however, have the discretion to award less than ten percent of the collected sanctions (the minimum award percentage set forth in the statute). *Id.*

323. See *supra* Part III.E.

324. See Loren Berlin, *JPMorgan Chase Whistleblower: 'Essentially Suicide' To Stand Up to Bank*, HUFFPOST (May 7, 2012, 6:41 PM), http://www.huffpost.com/entry/linda-almonte-jpmorgan-chase-whistleblower_n_1478268 [<http://perma.cc/5XHV-CUAD>]; S. REP. NO. 111-176, at 111 (2010) ("Recognizing that whistleblowers often face the difficult choice between telling the truth and the risk of committing 'career suicide', the program provides for amply rewarding whistleblower(s), with between 10% and 30% of any monetary sanctions that are collected based on the 'original information' offered by the whistleblower."); Telephone Interview with Attorney I (Jan. 23, 2020).

forward.³²⁵ Instead, it warned that large awards create a harmful perception of “jackpot justice.”³²⁶

But Congress did not make these kinds of value judgments in favor of small awards at the expense of large ones when enacting SOX. Indeed, Senator Chuck Grassley opposed the SEC’s proposed amendments as running counter to the language and intent of Dodd-Frank’s whistleblowing provisions.³²⁷ He emphasized the importance of high-dollar-value awards in motivating whistleblowers to come forward.³²⁸ Other commenters expressed concerns that the proposed reforms could disincentivize whistleblowers with information about massive frauds, especially those that disclose industry-wide fraud and might be unable to work in the field after blowing the whistle.³²⁹

Whistleblower advocates’ fears may have been justified. The volume of tips coming to the SEC declined for the first time in the history of the program in 2019, following the announcement of the proposed rules.³³⁰ While we cannot make causal inferences, it at least appears that the prospect of a higher likelihood of low awards did not encourage more whistleblowers than the lower likelihood of high awards discouraged.

The SEC’s final rules were adopted in September 2020.³³¹ They did not include the controversial language regarding awards over one hundred million dollars³³² so, at least nominally, those resisting this reform won. But this was a Pyrrhic victory for whistleblower advocates because the Commission concluded that it already *had* the power to adjust large awards downwards and thus needed no change to the rules.³³³

This pronouncement was met with dismay.³³⁴ Jordan Thomas, a prominent attorney representing whistleblowers (and former SEC attorney), even sued the Commission over

325. See Letter from Ira D. Hammerman, Exec. Vice President & Gen. Couns., Sec. Indus. and Fin. Mkts. Assoc., to Brent Fields, Sec’y, U.S. Sec. Exch. Comm’n, Comment Letter on Proposed Amendments to the Whistleblower Program Rules (Sept. 18, 2018), <http://www.sec.gov/comments/s7-16-18/s71618-4373269-175549.pdf> [<http://perma.cc/L6AJ-D8CG>].

326. *Id.* at n.10.

327. See Letter from Charles E. Grassley, U.S. Senator and Chairman of the Senate Comm. on the Judiciary, to the Honorable Jay Clayton, Chairman of the SEC (Sept. 18, 2019), <http://www.sec.gov/comments/s7-16-18/s71618-4373264-175545.pdf> [<http://perma.cc/9L55-87WB>].

328. *Id.* at 2 (“Both studies concluded that ‘high rewards can motivate potential whistleblowers to come forward because the monetary amount may mitigate the cost of professional and social sanctions that can result.’” (citing U.S. Sec. & Exchange Comm’n, Office of Inspector General, Office of Audits, Evaluation of the SEC’s Whistleblower Program, Rep. No. 511 at v–vi (Jan. 18, 2013), <http://www.sec.gov/about/offices/oig/reports/audits/2013/511.pdf> [<http://perma.cc/7PY4-FPBQ>])).

329. See, e.g., Stephen M. Kohn, Michael D. Kohn, David K. Colapinto & Siri E. Nelson, Comment Letter on Proposed Rule To Amend to the Commission’s Whistleblower Program Rules (Sept. 21, 2020), <http://www.sec.gov/comments/s7-16-18/s71618-7797952-223596.pdf> [<http://perma.cc/A35Z-4KCC>]; see also Complaint, Thomas v. SEC, No. 1:21-cv-108 (Jan. 13, 2021).

330. Broughton & Tokar, *supra* note 231.

331. Whistleblower Program Rules, 85 Fed. Reg. 70,898 (Nov. 5, 2020), <http://www.govinfo.gov/content/pkg/FR-2020-11-05/pdf/2020-21444.pdf> [<http://perma.cc/6DUE-3KN2>].

332. *Id.*

333. *Id.* at 70,914 (“[I]t is not necessary to adopt the formalized mechanism for the Commission to exercise its discretion . . .”).

334. See, e.g., Press Release, Comm’r Allison Herring Lee, June Bug vs. Hurricane: Whistleblowers Fight Tremendous Odds and Deserve Better (Sept. 23, 2020), <http://www.sec.gov/news/public-statement/lee-whistleblower-2020-09-23> [<http://perma.cc/YSA2-XQES>].

its final rule.³³⁵ Thomas's clients include senior executives, and his practice is "ultra-selective."³³⁶ Thomas argued that "[i]n reliance on the prior rules, courageous whistleblowers have put their careers and lives on the line to assist the Commission—including wearing FBI wires, testifying in high-profile trials, and smuggling key documents out of foreign countries."³³⁷ His clients have recovered over two billion dollars in monetary sanctions for the federal government, "with violators going to jail and countless investors being protected from wrongdoing."³³⁸ To date, his clients have received more than \$125 million, and his current clients are collectively eligible for awards totaling over \$300 million.³³⁹ Thus, Thomas argued, large awards are crucial to the government's mission of protecting investors.³⁴⁰

The SEC's reforms were taken in the name of efficiency. In its reports to Congress, the OWP emphasized that the presumption for awards of five million dollars or less "should result in gains in efficiency from streamlining the award determination process."³⁴¹ It highlighted two other reforms "designed to help increase the Commission's efficiency in processing whistleblower award applications."³⁴²

But Thomas's points make plain that if efficiency is a virtue, the question of the ultimate goal of rewarding whistleblowers is paramount in any assessment of the efficiency of the reward mechanism. The pattern of a large number of tips leading to a handful of awards described in Part IV.A—and an average success rate of 0.28%—is quite arresting. Indeed, it may be the sign of a real problem and serve as evidence that "[p]roviding too many incentives or protections . . . risks overloading the system."³⁴³ Overwhelming the system does not just create increased administration costs. More troublingly, it also requires an overburdened agency "to focus efforts on a subset of tips, or else allocate fewer investigative resources to each, thus degrading the accuracy of its screening efforts."³⁴⁴ Thus, swamping the system with a surfeit of tips may cause a "perverse result" where it is less likely that misconduct is reduced, and therefore "more whistleblowing may actually yield less overall deterrence."³⁴⁵

("The principal reason that I find myself unable to support this rule is because of the treatment given to the central issue of the Commission's discretion to consider the dollar amount of an award in making award determinations.").

335. Complaint ¶ 12, *Thomas v. SEC*, No. 1:21-cv-108 (D.D.C. Jan. 13, 2021), <http://www.secwhistlebloweradvocate.com/wp-content/uploads/2021/01/Thomas-Complaint-Jan-13-final.pdf> [<http://perma.cc/D2DE-RL4X>].

336. *Id.* ¶ 23. "Every year [Thomas'] team screens more than 300 potential cases, but he typically accepts fewer than 12 as clients." *Id.*

337. *Id.* ¶ 10.

338. *Id.* ¶ 35.

339. *Id.* ¶¶ 33–34.

340. *Id.* ¶¶ 102, 109.

341. SEC, 2020 ANNUAL REPORT, *supra* note 23, at 35.

342. *Id.* The first barred applicants from seeking awards if they had submitted three frivolous award applications previously. *See id.* The second provides a simplified procedure for dealing with certain common types of denials, "to help facilitate a more timely resolution . . . while freeing up staff resources to focus on processing potentially meritorious award claims." *Id.*

343. Engstrom, *Whither Whistleblowing*, *supra* note 64, at 613.

344. *Id.*

345. *Id.*

But it is hard to say from the outside whether the SEC's Office of the Whistleblower is in fact swamped by the thousands of tips it receives each year. For all the thousands of tips the SEC receives, it refers relatively few of them for investigation.³⁴⁶ Perhaps the information the SEC receives is *worth* the costs of some claims that lack merit. Perhaps many of the tips result in government recoveries under one million dollars, and thus result in no awards. Perhaps the government is exercising its discretion aggressively and not awarding awards even when tips aid in recovery. Indeed, perhaps the unspoken truth of the bounty program is that it amounts to little more than a lottery: the government gains a high volume of valuable information from tippers seeking a large payout and must pay an award for only a fraction of those tips. In some sense, such a result might be an inefficiency—but an inefficiency that works decidedly in the government's favor.

More data from the SEC would be helpful—data about how useful the tips they receive are, even those that do not lead to a monetary recovery of over one million dollars. Information about how many tips are screened out quickly, and if there are ways to decrease the number of frivolous tips, would also be helpful.³⁴⁷ How many tips lack merit? How many lead to the revelation of small dollar fraud? How many help with the government's investigation, but not enough to merit award? These are just a few questions that could shed light on the important policy questions regarding the value of small- versus large-dollar awards.

But the SEC's data can only tell us so much. Ultimately, these are judgment calls. We need to decide how important information about financial fraud is to our society. And how many nonmeritorious tips—how much inefficiency—we are willing to stomach in order to ferret out financial wrongdoing. Further, we have to decide whether we are concerned enough about large dollar financial fraud to award already wealthy individuals—and their lawyers—over thirty or even fifty million dollars if they aid in a large government recovery. In the debate about reforming the system, the Commission and whistleblower advocates are largely talking past each other. The SEC's reforms, and the reaction to them, thus highlight the contribution of this Article.

C. *Proposed Analytic Framework*

Now it is time to pull back and apply what we have learned. The Article's first contribution was to move analysis beyond reflexive characterization of whistleblowing as an unalloyed good. The theory and background Sections made clear the multiplicity of design paths that legislators can take. Section IV offered a deep dive into the only evidence we have, at least in the context of U.S. financial fraud. The prior Parts in this Section illustrated the paucity of current legislative and agency thinking about the inevitable tradeoffs that whistleblowing policy presents, and made one policy prescription: to turn protection for financial-fraud whistleblowers wholly over to the SEC.

As we have seen, with respect to whistleblowing in the financial fraud context, Congress has been largely reactive.³⁴⁸ SOX, driven by the experience of internal

346. See Baer, *supra* note 49, at 2227.

347. Indeed, one of the SEC's reforms formalized a ban on tippers who have filed three or more frivolous tips. See 17 C.F.R. § 240.21F-8(e)(1) (2021).

348. See *supra* notes 282–283.

whistleblowers Watkins (Enron) and Cooper (WorldCom), focused on creating an agency response that was modeled after whistleblowing in the aviation industry—apples and oranges if ever there were any.³⁴⁹ Dodd-Frank focused on the failure of the SEC to heed the tip of external whistleblower Markopolos in the Bernie Madoff fraud.³⁵⁰ It therefore created a direct cause of action and a separate bounty system to incentivize reporting misconduct. In neither case did Congress consider the central questions of this Article.

Congress thus still has hard questions to answer, should it have the political will to do so, about what kinds of reporting the law should incentivize, and what rate of false positives (i.e., meritless claims) and false negatives (i.e., unblown whistles) society is willing to tolerate to generate that reporting.

There is also the undeniable fact that parties blow the whistle, just as they bargain, in the shadow of the law. Employees will report fraud, or stay silent, based on the protection afforded to them, and employers will negotiate prelitigation against the backdrop of the law. So the reach of these whistleblower protections extends beyond—perhaps far beyond—the actual cases and complaints filed to these prelitigation settings where the law on the books casts a considerable shadow indeed.

Faced with these competing considerations, Congress has to determine the optimal amount of whistleblowing protection—a complicated question. In the specific context of financial fraud, the question is how much of an incentive there should be for reporting fraud that could result in government recovery amounting to hundreds of millions or even billions of dollars. It might be that society has an interest in maximizing *all* reporting of misconduct, at whatever cost in false reporting. I reject this view; any sensible regime must incentivize true reporting while at least acknowledging the risk of false claims and trying to mitigate it. But then the question becomes *how* to mitigate, and what factors to consider in crafting whistleblower protection.

This Part creates a framework for thinking about the broader questions. That framework consists of a two-stage analysis. This framework is perforce general, but it creates a formal structure for applying the insights of the Article. The first stage considers the nature of the underlying harm. The second stage weighs the merits of various mechanisms of incentive, deterrence, and remedy.

1. Stage One

The first step is to evaluate the immediate harm the misconduct poses. Is it a matter of life and death, as in the aviation or health care context? Do economic losses amount to millions of dollars? This step is concerned with evaluating the *severity* of the harm. While these questions can be difficult (How does financial well-being compare in importance to physical health? What makes one harm worse than another?) they are crucial to a principled analysis of how to address misconduct.

Second, but relatedly, Congress should consider whether the misconduct has *systemic implications*. For example, to circle back to the aviation industry, there would have been systemic implications to a whistleblowing that revealed the problems with

349. *Id.*

350. See Senate Hearing Statement of Harry Markopolos, *supra* note 31.

Boeing's MAX 737 airplane. Problems with the software resulted in hundreds of planes globally being grounded.³⁵¹ Similarly, fraud in financial institutions or in data privacy might have far-reaching implications and be worthy of enhanced whistleblower protection or encouragement. This question addresses the number of individuals affected, not the severity of the harm.

Third, Congress should consider what kinds of whistleblowers would be likely to report misconduct—senior-level or more frontline employees. If high-level accounting fraud is the concern, then senior-level employees might be more likely whistleblowers. If, on the other hand, low-level employees are likely to be eyewitnesses to misconduct, a different remedy may be in order. The next stage will discuss the remedy question, but to preview in brief, reliance on back pay is a limitation of any antiretaliation model.

Fourth, Congress must reflect on the likelihood of false claims and the burden that such claims will impose on defendants. Some misconduct may be more straightforward and thus harder to falsify. Other misconduct, or other industries, might involve more gray areas that render it more difficult to ascribe fault. Indeed, some of these claims may not be nuisance suits, but rather be brought by plaintiffs who lack a good understanding of what their rights and protections are under the law. Education as to exactly what the law requires is crucial in such cases. But education is no cure-all. Ex-employees are often angry with their former employers after having been let go, and revenge is a problematic nonpecuniary motive for whistleblowing.³⁵²

2. Stage Two

From a consideration of the underlying misconduct, Congress should then move to the question of remedies and deterrence. This Article has provided data, both quantitative and qualitative, on several of the various levers available to address these questions. This Part offers only brief reflections.

The first choice is whether to provide a bounty or antiretaliation protection. Bounties are affirmative incentives to blow the whistle. This incentive works regardless of a worker's salary or whether they were punished for blowing the whistle. The goal is to incentivize the reporting itself. Part IV.A described the OWP bounty program at the SEC, showing that such incentives can be powerful, generating hundreds of tips for every actual payout. These positive incentives, however, naturally drive up the risk of spurious tips.³⁵³ On the other hand, the salience of even relatively few high-profile awards may

351. Lea Desrayaud, Basile Simon & Michael Ovaska, *The Grounded 737 MAX Fleet*, REUTERS GRAPHICS (Mar. 14, 2019), <http://graphics.reuters.com/ETHIOPIA-AIRPLANE/010091341G7/index.html> [<http://perma.cc/GX9E-9PCF>].

352. See Casey & Niblett, *supra* note 92, at 1209 ("A terminated employee may be happy to see her employer punished regardless of whether the employer committed any fraud.").

353. See Justin Blount & Spencer Markel, *The End of the Internal Compliance World As We Know It, or an Enhancement of the Effectiveness of Securities Law Enforcement? Bounty Hunting Under the Dodd-Frank Act's Whistleblower Provision*, 17 FORDHAM J. CORP. & FIN L. 1023, 1041 (2012) ("[T]he race to report may encourage employees to rush to the SEC with unreliable and frivolous claims."); see also Jenny Lee, *Corporate Corruption & the New Gold Mine: How the Dodd-Frank Act Overincentivizes Whistleblowing*, 77 BROOK. L. REV. 303, 314 (2011) ("Despite legislators' good intentions, the Dodd-Frank Act's bounty program overincentivizes whistleblowing and will waste administrative resources because it provides what studies show are unnecessarily excessive awards. Although the bounty program was enacted to encourage whistleblowing, the monetary rewards are likely unnecessary in advancing the provision's purported goals. Further, the bounty

not only encourage whistleblowers but also improve morale and motivation for investigators themselves.³⁵⁴

The other choice is to provide antiretaliation protection. This approach is less direct than a bounty system. It does not directly *encourage* whistleblowing, but instead makes whistleblowing *easier* for employees by deterring an impediment to reporting misconduct. This choice thus hinges on whether policymakers believe people will naturally want to report misconduct and need only be protected from retaliation, or need to be spurred to do the right thing. Feldman and Lobel's experimental research, discussed in Part II.D, suggests antiretaliation protection is a better motivator for whistleblowers, but the question remains an open one.

Beyond the motivational question, there are two potential problems with implementing an antiretaliation approach. First, this measure disproportionately rewards plaintiffs with high salaries. That is, a whistleblower's antiretaliation claim, because of its compensatory model, will by definition give higher rewards to relatively well-heeled employees. Attorneys who largely work on contingency fees and drive these claims will be more attracted to C-suite or other high-level employees.³⁵⁵ Lower-level whistleblowers who are punished for reporting misconduct will not find an attorney champion—that is, unless they have a colorable claim to a Dodd-Frank whistleblower bounty and can convince an attorney to join the thousands of tipsters vying for a chance at a payout.³⁵⁶ This base inequity is troubling, especially when one considers that high-income employees likely have a greater financial cushion than their low-earning whistleblowing counterparts.

Second, a back pay award is calculated from the time that an employee suffered adverse employment action through date of judgment. As every first-year law student learns, however, the employee has the duty to mitigate by finding other employment. In a tight labor market, an employee might find work very quickly after being terminated. Thus, an employee could have a strong case on the merits, but obtain a mitigating job two weeks after termination and wind up with an amount of damages so low that there is no incentive to pursue the case even if the employee is highly compensated.

Third, Congress should consider the remedy it provides to whistleblowers. Dodd-Frank offers double back pay, whereas SOX does not. One interviewee described SOX's damages as "weak and tepid" and "a joke."³⁵⁷ If Congress is concerned about retaliation against low earners—either for reasons of equity or because it believes them to be more likely to be on the front lines of witnessing violations—it could increase the damages to a multiple of the whistleblower's salary. Minimum antiretaliation awards, or multiple damages awards up to a certain amount (\$100,000? \$150,000?), might also do the trick. Yet, such awards could also encourage more frivolous claims.

The data make clear that both regimes generate a substantial percentage of unsuccessful claims. The proportion of these that are sincere but mistaken, as opposed to

provisions lack significant threshold considerations and fail to discourage the submission of frivolous claims. As a result, whistleblowers are overincentivized.").

354. I am indebted to Miram Baer for this point.

355. See *supra* notes 211–212 and accompanying text.

356. *Id.*

357. Telephone Interview with Attorney II (Jan. 24, 2020).

malicious, is unclear. The prospect of a higher damages award will undoubtedly spur more of the latter kind of claimants. Whether such a risk is worth running depends on the calculus outlined in the first stage of the framework.

Fourth, Congress should consider the merits of confidentiality versus public exposure of wrongdoing. Corporate defendants generally will want to keep their names from being associated either with misconduct and/or with retaliating against whistleblowers. Similarly, whistleblowers may be reluctant to go public for economically rational reasons. They risk becoming “pariahs” who will not be able to find work in the industry again if they are known as whistleblowers.³⁵⁸

The risk of revenge-motivated whistleblowing is relatively smaller in the administrative-agency context, where the interpolation of an in-house investigator means that the innocent employer will face relatively little publicity and disruption, at least until appeal. We know the details of Ms. Petitt, the Delta whistleblower described in the Introduction, because her case had moved past the confidential-investigation stage and the ALJ issued an opinion on appeal. In the Dodd-Frank antiretaliation context, however, a suit will be public as soon as it is filed. The costs of such revenge litigation are thus far higher. Employers are forced to defend a lawsuit, entailing attorneys’ costs, distraction, and a diversion of resources. Thus, agency-based actions may be more appealing if we wish to safeguard against employers being harmed by revenge-motivated claims.

At the same time, public naming and shaming of corporate bad actors plays an important role in future deterrence.³⁵⁹ The public does, after all, have an interest in knowing that retaliation against whistleblowers will be punished.³⁶⁰ Knowledge of the existence of protection will embolden future whistleblowers to speak out.

Relatedly, Congress should consider whether it wants to incentivize internal versus external reporting. SOX protects whistleblowers from retaliation whether they report misconduct within the organization or to an outside agency.³⁶¹ Dodd-Frank, after *Digital Realty Trust*, only protects whistleblowers who have reported to the SEC.³⁶² This means a well-advised whistleblower will bypass any corporate mechanisms set up to address misconduct internally in favor of going straight to the SEC. It also means that sincere and meritorious whistleblowers who report internally and are fired for their scruples face a “gotcha” situation: they must report to the SEC after being fired or have no redress for the retaliation they have suffered because they went through their organization’s internal channels. Creating this incentive to report externally may be sound policy, depending on the nature of the concerns regarding the underlying harm, but there are countervailing reasons for giving corporations a chance to resolve matters first.

Fifth, Congress should consider which institution should provide plaintiffs recourse. A claimant can file with an agency relatively easily. After a claimant files with OSHA, they then face an interview, but few real upfront costs as the investigation plays

358. Telephone Interview with Attorney III (Jan. 28, 2020); Rapp, *supra* note 56, at 113.

359. See Jayne W. Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959, 964 (1999) (arguing that public shaming for corporate wrongdoing will “enhance the deterrent impact of the corporation’s sentence”).

360. See Kwok, *supra* note 94, at 1245.

361. See 18 U.S.C. § 1514A(a)(1).

362. See *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 778 (2018).

out.³⁶³ Conversely, the court model creates higher barriers to entry. Imposing costs on litigants and their lawyers lessens the burden on the public in terms of costs, but correspondingly imposes more of a burden on would-be whistleblowers themselves.

One additional justification for using an agency mechanism is that agencies can employ their specialized expertise in handling whistleblower cases. Of course, choice of agency matters. Locating whistleblowing reporting in an agency with subject-matter expertise is essential. If whistleblowing is housed in the appropriate agency, that shared location gives the agency notification of potential violations in enforcement proceedings. This informational benefit—plausible in theory—in practice is now going somewhat unfulfilled, as we saw in Part V.B.³⁶⁴ Nevertheless, government notification of wrongdoing remains a theoretical consideration when choosing between an agency and the court system.

In sum, this Part has sketched out a framework for legislators interested in answering the fundamental questions regarding whistleblower policy. There is more work to be done in analyzing the important considerations in the framework. This Article has merely attempted to open that conversation.

CONCLUSION

How much whistleblowing is optimal? And how many meritless claims are we willing to tolerate in order to reach that optimal level? So far, we have no equivalent of Blackstone's ratio in whistleblowing. We may well reckon as a society that protecting one true whistleblower is worth the cost of assessing nine, or ninety-nine, mistaken or false claims.

Whistleblowers play an important role in society, but current whistleblower protection policy is haphazard at best and miscalibrated at worst. The main contributions of this Article are its articulation of the crucial questions at the heart of the current system's failings, its showing in granular detail with empirical data how three real-world whistleblowing regimes work, and its presentation of a framework for thinking through them. The Article describes the shortcomings of housing SOX whistleblowers at OSHA, and advocates for moving that whistleblowing apparatus into its rightful home in the SEC. Finally, it provides a framework for asking hard questions about how we should structure whistleblower law to maximize the benefits it provides while minimizing its costs.

363. See 29 C.F.R. § 1980.104(e) (2021).

364. See *supra* note 310 and accompanying text.

APPENDIX A:

DODD-FRANK WHISTLEBLOWER STATUTE 15 U.S.C. § 78U-6 CODEBOOK

LexisNexis Research Path

1. In LexisNexis, search “15 U.S.C. sec. 78u-6”
2. Select “Shepardize this document” (as of 11/9/16, 138 cases cite to the statute)
3. Adjust the “Sort by” filter to “Date (newest-oldest)”
4. Open each case and read in order to gather the following information to input into Excel Spreadsheet:

Information Inputted Into Excel Spreadsheet

Case Name: Copy and paste from case

Case Citation: Copy and paste from case (either LN or National Reporter)

Is case applicable to research question?

Y = Yes

N = No

If inapplicable, why?

NDF = Not a Dodd-Frank claim

NER = No employment relationship

PAD = Parties agreed to dismiss Dodd-Frank claim

NSMJ = Court lacks subject matter jurisdiction

CND = Dodd-Frank claim not discussed (because other preliminary motions at issue)

Decision Date (provided under case name): Copy and paste from case

Court:

ST = State Court

D = District Court

1C = First Circuit

2C = Second Circuit

3C = Third Circuit

4C = Fourth Circuit

5C = Fifth Circuit

6C = Sixth Circuit

7C = Seventh Circuit

8C = Eighth Circuit

9C = Ninth Circuit

10C = Tenth Circuit

11C = Eleventh Circuit

DCC = District of Columbia Circuit

SCOTUS = Supreme Court of the United States

Judge's Name: Copy and paste from case

Employer: Copy and paste from case

Claimant's Last Name: Copy and paste from case

Claimant's First Name: Copy and paste from case

Claimant's Gender:

M = Male

F = Female

Method of Proof of Gender:

OP = Evidence given in the opinion

CONV = Conventional names

OR = Outside research, such as Googling the person's name

Claimant Represented by Attorney? (provided in case on LexisNexis or look to original complaint)

Y = Yes

N = No

U = Unknown

Amicus curiae? (provided in case on LexisNexis)

Y = Yes

N = No

If Yes, what agency?

SEC = Securities & Exchange Commission

DOL = United States Department of Labor

U = Unknown

Disposition of lawsuit as a whole:

D = Dismissed

P = Case proceeds

Disposition of Claimant's Dodd-Frank claim:

D = Dismissed

P = Case proceeds

If dismissed/withdrawn in favor of Defendant, why?

IE = Insufficient evidence

SOL = Statute of limitations

IP = Issue preclusion

RET = Claim dismissed because Dodd-Frank does not apply retroactively

NWB = Claimant did not qualify as a "whistleblower" under the statute because failed to report to SEC

ARB = Parties must arbitrate instead

EEP = Employee terminated because of his/her substandard performance

RNA = The type of relief claimant seeks is not available under Dodd-Frank language

EXT = The antiretaliation provision of Dodd-Frank does not apply extraterritorially

FSC = Failure to state a claim under Dodd-Frank

NSMJ = Court lacks subject matter jurisdiction

Other claims brought in suit?

Y = Yes

N = No

U = Unknown

If Yes, what are other claims brought?

SLC = State statutory law claims and/or common law claims

ERA = Energy Reorganization Act

SOX = Sarbanes-Oxley Act

SEA = Securities Exchange Act of 1934

FMLA = Family Medical Leave Act

FCPA = Foreign Corrupt Practices Act

ADA = Americans with Disabilities Act

ADEA = Age Discrimination in Employment Act

SCA = Stored Communications Act

CR = Civil rights violations

SAA = Sherman Antitrust Act

FCA = False Claims Act

FLSA = Fair Labor Standards Act

ERISA = The Employee Retirement Income Security Act of 1974

RICO = Racketeer Influenced and Corrupt Organizations Act

Did Claimant receive award?

Y = Yes

N = No

U = Unknown

If award, dollar amount: Copy and paste from case**If award, from what cause of action is the award amount?****Did SEC find fraud? (Other reference to underlying merit?)**

Y = Yes

N = No

U = Unknown

If yes, case citation: Copy and paste from case**Notes:**
