

The Successes and Failures of Whistleblower Laws

Dedication

This book is dedicated to men and women throughout the world who over the decades have spoken out against misconduct and abuse of power and for the rule of law, public health and safety, and justice. This dedication includes all those whistleblowers whose courage, perseverance, and suffering have contributed to the common good.

The Successes and Failures of Whistleblower Laws

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Edward Elgar

Cheltenham, UK • Northampton, MA, USA

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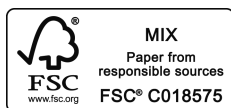
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Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Control Number: 2012938058



ISBN 978 1 84980 837 8 (cased)

Typeset by Cambrian Typesetters, Camberley, Surrey
Printed and bound by MPG Books Group, UK

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Preface

This book became more personal than I anticipated. As I wrote, I began to see how deeply whistleblowers and whistleblower laws had influenced my life, as well as my career. In retrospect, I understand how the events that I experienced and observed represented profound changes in the perceptions of, and protections for, those individuals we now call whistleblowers. In turn, I see how those changes increasingly influence law and policy.

Like others, when I was younger, I often expected that changes would occur rapidly and that efforts at reform would come to immediate fruition. My earliest involvement with whistleblower laws confirmed this belief in transformation. The magnitude of early successes regarding whistleblower laws encouraged me to define setbacks, rejections, and reconsiderations of these laws as failures. Likewise, the dramatic events surrounding the first whistleblower laws, particularly the whistleblower provision of the Civil Service Reform Act of 1978, obscured the weaknesses or failures in those laws. More than 40 years after my introduction to whistleblowing and whistleblower laws, this book enabled me to see more clearly the path of my involvement and the arc of those laws.

In designing this book, I used a temporal description of whistleblower laws over nearly half a century as one of its organizing themes. That design rested on my belief that history informs both past and current events. As I wrote, I realized that this theme also required me to consider my personal history. The book brought together the history of these events and laws with my own. It educated me regarding the difficulty of unraveling those complementary remembrances. A reader will recognize that this weaving of the two offers perspective and context that gives significance to events and to the laws generated by them. A reader will also recognize that bias is the companion of experience and expertise. This bias arises not from intent or manipulation, but from familiarity. Just as general and personal histories are bound with one another, experience and bias walk together. This book has enabled me better to recognize these ties, a recognition that I believe comes in part from careful analysis.

The personal story evoked by these recollections is a modest one. Like other persons, I have written about whistleblower laws and participated in the development of those laws. My involvement was not greater than many others

and less than some. For me, however, that personal story has animated my scholarly interests, influenced my perceptions of whistleblower laws, and stimulated my attention to this book. In turn, this book encouraged an examination of that personal story. I have come to see how my life is intertwined with whistleblowing.

In 1970, as a 26-year-old attorney, I began to work with a law firm that Ralph Nader established in Washington, DC. With me were 13 others, most of them, like me, recent graduates of law school. Nader's reputation had been established by his book, *Unsafe at Any Speed*, and by the works of Nader's Raiders, students who over summers conducted investigations of federal agencies. Our group was funded by the money that Nader received from General Motors to settle his suit for its surveillance of him following the publication of his book. That surveillance by General Motors led to hearings before the Senate Commerce Committee and established Nader as a national figure. I remember a 'brown bag' lunch in our offices at which Nader read excerpts from the reports filed by the private detectives hired to follow him. Subsequently, the attempts of governments and corporations to harass and undermine whistleblowers and citizen activists in ways similar to Nader's treatment resonated for me. Unwanted surveillance followed disclosures by many whistleblowers.

My own experiences also resonated with those of whistleblowers. One day during the first weeks our offices were open, men in suits stood across the street from the entrance to our office building and openly photographed us as we entered and left it. About a year later, I met a federal employee at a restaurant to discuss information that he had about contracting and political abuses at the General Services Administration. During that dinner, he pointed out the man who had been following him. On a separate and unrelated occasion, I became convinced that I was being followed after I confronted the person I suspected of doing so.

Nader gave each of us a project in a field on which we were to concentrate our activities. Because I arrived later than many, several areas such as tax reform, insurance regulation, consumer protection, citizen and student organizing, and environmental law were already taken. Instead, I agreed to undertake a project on civil service reform. In fulfilling that undertaking, I interviewed many federal employees, some of whom would today be called whistleblowers.

In many instances I concluded that the disciplinary authority of federal agencies was often used not to punish those responsible for misconduct, particularly among higher-ranking employees, but to discipline those who objected to misconduct or who reported it. The civil service system in important instances did not use personnel authority to impose accountability, but to support conformity and engender silence. I choose the word 'engender' advisedly because

silence is more than the failure to speak – it marks an atmosphere that discourages criticism and restricts thought. Silence substitutes the license of informal practices and expectations for the restraints of law and ethics; this silence invites misconduct. Later when considering my examination of the practices of the United States Civil Service Commission, I realized that I had received hints of the extensive efforts of the Nixon Administration to undermine the federal civil service.

My project emphasized the failures of the United States Civil Service Commission and the need to hold government officials accountable for their misconduct. This project intersected with whistleblower protection, but it was my colleague, Peter Petkas, who conceived and organized the landmark Nader conference on whistleblowing. My proposal for civil service reform included protection of whistleblowers, and the proposed law that I drafted to do so was included in the book published from that conference.

Harrison Wellford, one of Nader's Raiders, had written a draft of his book *Sowing the Wind*, a study of the Department of Agriculture that contained a discussion of the failure of the Department to support meat and poultry inspectors and to weaken inspection at processing plants. A poultry inspector sent a confidential letter to Nader regarding unsanitary conditions in the plant he inspected. After inquiry by Wellford to the Department of Agriculture regarding conditions in the plant, the Department, unaware of the source of the information, instructed the inspector to answer his own letter. Later that inspector, then identified as the source of the letter, believed he had suffered as a result of those disclosures. I volunteered to represent him in a grievance proceeding. I also represented another inspector who reported to the Associated Press unsanitary conditions in a different poultry processing plant. The day after the story appeared, the relevant regional office had 'reviewed' his personnel record and decided that he should be transferred from the plant at which he worked near his home in North Carolina to one in Puerto Rico. Alan Morrison, who had become the Director of Public Citizen Litigation, sought a preliminary injunction prohibiting the transfer, after which the Department of Agriculture withdrew the transfer order. I later testified before a committee of the House of Representatives regarding weaknesses in personnel practices in the reassignment of meat and poultry inspectors.

John Nestor, an outspoken physician at the Food and Drug Administration (FDA), had criticized the FDA leadership for pressuring reviewers to approve new drugs despite inadequate testing or the serious risks from them. The FDA ordered his transfer to a position where he would no longer review new drug applications. I represented him in a grievance proceeding, the only avenue available to challenge his transfer. My experiences confirmed a suspicion that such proceedings were unlikely to succeed. John Nestor assumed that he had little chance of winning but believed that he had to show the management of

the agency, as well as other reviewers of new drug applications, that he was willing to fight. In my enthusiasm and inexperience I was more optimistic. I also thought that the grievance process would bring to the surface information about how the transfer decision was made. He was right and I was wrong. After President Carter's election, his transition team for the FDA discovered that the agency had withheld at the time of the hearing many of the documents and memoranda for which requests had been made.

John Nestor became one of the best-known FDA whistleblowers of the time. He testified before Congress regarding reorganization of the FDA and provided insights to Congress and to the public about the influence of the pharmaceutical industry at the agency. Nestor's experience highlighted the need for independent external review of informal personnel actions used to retaliate against whistleblowers and influenced the proposed legislation that I later advocated. His story was included in Senator Patrick Leahy's report on whistleblowing that was considered by Congress during the enactment of the whistleblower provision of the Civil Service Reform Act of 1978.

In September 1972, I became an assistant professor of law at American University's Washington College of Law (WCL). I have remained a faculty member at WCL for 40 years. In my first years, my writing and research principally concerned public employment law more generally. Those years were also marked by the Watergate scandal, the constitutional crisis that accompanied it, and the resignation of President Nixon. In response to that crisis, I participated in congressional consideration of the 1974 amendments to the federal Freedom of Information Act, particularly the sanctions provision that allowed the discipline of agency officials who arbitrarily or capriciously withheld requested information. In 1975, I testified regarding the first whistleblower protection law considered for federal employees, a proposal that linked those protections to the Freedom of Information Act. In 1977, I published an article advocating statutory recognition of the right of public employees to disobey illegal orders, a right included in the Whistleblower Protection Act in 1989 and now incorporated into the law of several states.

The whistleblower provision of the Civil Service Reform Act of 1978 was a tipping point for whistleblower laws. I testified in the House of Representatives on Reorganization Plan No 2 that framed the reform legislation, and with Ralph Nader in the Senate regarding the reform legislation and the whistleblower provision. During this period I also worked with the chief lobbyist for Public Citizen, Andrew Feinstein, on the legislation regarding a number of proposed amendments and changes in the legislation. After its passage, I wrote an article discussing interpretative problems that might arise in the application of the whistleblower provision.

At the time, I did not fully appreciate the implications and effects of the law. I had worked on similar proposed legislation for a number of years and it

seemed like another step in a long process which I measured as much by my involvement as by an understanding of its import. This book has allowed me to examine more analytically and less personally the magnitude of the changes that I observed and the reasons for them. The book has enabled me to reconsider that law, including parts of it that I supported. This assessment has permitted me to understand how choices made then continue to reverberate decades later.

The Washington College of Law has provided opportunities to live and study in other countries. The international aspect to my work is a fortuity of my position at the school. In 1979 and 1980, as Scholar-in-Residence with the law faculty of King's College of the University of London, I conducted a year-long study of public service ethics in Britain. A fair part of this study considered whistleblowing in Britain. For a number of reasons, I concluded that Britain was unlikely to enact any form of whistleblower law, a prediction that proved true for more than a decade and a half.

In 1990, I looked at the role of public employment law in the transition to democracy in Chile, with some attention to the right to disobey illegal orders. In 2001, as a visiting professor with the law faculty of Ritsuemakian University in Kyoto, Japan, I was able to meet with many lawyers and activists familiar with freedom of information and whistleblower protection in that country. In 2009, while I was a visiting academic with the law faculty of Monash University in Melbourne, Australia, I benefited from discussions with leading Australian academics working on whistleblower laws and with representatives of a national association of whistleblowers. Such exposures were humbling in that they challenged assumptions with sophisticated analysis. They were also enabling because they taught me as much about whistleblower laws in my country as those in other nations. These opportunities sharpened my assessment of laws in the United States and illuminated aspects of law and practice here.

The fortuity of my position at the Washington College of Law opened possibilities to work with international and regional organizations regarding whistleblower laws. In the last decade, I served as a consultant to the Office of Legal Cooperation of the Organization of American States responsible for drafting a model whistleblower law to implement the whistleblower protections of the Inter-American Convention Against Corruption. During that decade, I also consulted with the World Bank regarding revision of its whistleblower policies.

A good part of my scholarship has addressed whistleblower laws and related issues. So has my teaching. The Washington College of Law has also given me the opportunity to teach a course on whistleblowing; and my seminars on public employment law and public information law include segments on whistleblower laws. Because those are research seminars that rest on the

preparation and defense of research papers, I have benefited from the insights and diligence of many students who have chosen topics relating to whistleblower laws for their papers.

This book has reminded me how much of my academic life has involved attention to whistleblowing. This book wove together experiences that I had often perceived only as episodes in the passing years. It enabled me to see the whole. Working on this book confirmed for me how whistleblowing was tied to ethics as well as law, how it reflected communities of persons as well as individuals, and how whistleblower laws are more than a subset of employment law.

Writing this book instructed me how whistleblowing had influenced my life, as well as my career. I have not been a whistleblower. I have had the good fortune of working in an institution that follows the principles it articulates. I have also had the good fortune of being surrounded by many colleagues of moral authority, including persons who have faced censure and rejection for defense of their principles, who with grace have survived discrimination and hardship suffered in the service of ideals of equality, who have declined economic benefits that would have required sacrifice of their academic integrity, who have striven for truth rather than recognition, and who have risked their lives for justice.

The stories of whistleblowers have instructed me in courage, in perseverance, in ethics and morality, and in sacrifice for others. These stories cause me to question whether I possess such courage and perseverance. I am not naïve enough to believe that all who claim to be whistleblowers share these attributes, but I am experienced enough to know that many do. I now see that this experience and knowledge has affected my life, as well as my work. My attitudes toward many things are no longer those of the 26-year-old attorney who stepped into an office at 15th and L streets, NW, in Washington, DC, in July of 1970. Many of those changes follow age and experience, but many of them are a consequence of my involvement with whistleblower laws. For me, this is perhaps the greatest lesson of the book that you are about to read.

Acknowledgments

I gratefully acknowledge the invaluable assistance of the following students: Sally Abrahamson, Lucas Ballet, Vicky Chien, Andy Gibbs, Katherine Gibson, Jennifer Kaufman, Adam Sabrin, Kristin Soltes, and Lucy Wiggins. In particular, Vicky Chien, Katherine Gibson, and Jennifer Kaufman worked on this book during most of their law school careers. No one has contributed more than Jennifer Kaufman. I also thank the students in my public employment law and public information law seminars who over the past two decades have contributed much to my understanding of the topics addressed here.

The faculty of the Pence Law Library and the staff of the Washington College of Law exceeded any legitimate expectations in helping in the completion of this book. Billie Jo Kaufman, Associate Dean of Library and Information Services, supported this book from its inception. Ripple Weistling, Reference and Electronic Services Librarian, had a useful response to every research challenge and graciously contributed her expertise and experience. My administrative assistant, Frankie L. Winchester, met every obstacle with good humor. Elma Gates, Manager of Faculty and Administrative Support Services, was also supportive and helpful.

Many scholars in different disciplines over many decades have contributed to this book. This book rests on their work. Others have contributed more personally to this book. Several Australian scholars deserve mention: A.J. Brown, William De Maria, Paul Latimer, Brian Martin, Moria Paterson, Tania Penovic, Kim Sawyer, and Rick Snell. My conversations with them while I was a visiting academic with the Law Faculty of Monash University in Melbourne influenced my decision to write this book, as well as its content. Professor Marilyn Pittard, the Associate Dean (Research) during my term at Monash, incorporated me into the faculty and acted as a guide and counselor. In the United States, my several discussions with Kathleen Clark and Richard Moberly have both challenged and supported my understanding of the successes and failures of whistleblower laws. Louis Clark, the President of the Government Accountability Project, graciously discussed the activities of GAP with me.

Dean Claudio Grossman and Associate Deans Christine Farley and Tony Varona have supported this book. Their enthusiastic backing was indispensable.

My wife, Nancy, has tolerated my extended work schedule and vacations accompanied by a box or two of materials, as well as other signs of absorption in this book. I owe her much.

A note on style

The endnotes in this book follow the system of citation contained in *THE BLUEBOOK: A Uniform System of Citation* (19th ed. 2010). These endnotes can be considered a list of references for each of the chapters. In some instances where a single source is used to support a paragraph or series of paragraphs, citations may be limited.

1. Successes and failures

This book gives an interested reader a variety of ways to evaluate the successes and failures of a particular whistleblower law, to appraise types of whistleblower laws, and to assess the merits of whistleblowing. All of these tasks require awareness of competing purposes of such laws and differing perceptions of whistleblowing. An extensive examination of the multitude of whistleblower laws and regulations now found throughout the world risks emphasizing details, the mastery of which does not necessarily enable the reader to judge success or failure. Even the listing of criteria deprives a reader of the ability to select criteria and to weigh them. For these reasons, this book introduces the competing and overlapping perspectives that guide any evaluation, the richness of scholarly and practical considerations of these laws, and the vagaries of persons and events that have stamped the character of whistleblower laws.

Whistleblower laws cannot be evaluated in the abstract. No single perspective nor particular discipline – not law, social science, public administration, philosophy, psychology, sociology, communications, history, or others – can provide the solitary ground for evaluation. Still, this book focuses on whistleblower laws and thus relies on the character of legal regulation but nevertheless recognizes how various disciplines influence assessment. Whistleblower laws arise from and are applied in different contexts and at different times and in different places. These contexts do not yield to easy characterization.

Instead of a destination, this book offers the reader a journey. That journey takes the reader through time and across the world, introduces presidents, world leaders, activists and scholars, criminals and scoundrels, and brave men and women from many backgrounds, all of whom acted against the uncertainties of life. That journey has four organizing themes. The first is topical and considers subjects relevant to evaluation of whistleblower laws; the second gives attention to the whistleblower provision of the Civil Service Reform Act of 1978 and the subsequent amendments to it through the Whistleblower Protection Act of 1989; the third considers the stories of individual whistleblowers as they relate to the context and content of legislation; and the fourth follows a temporal organization beginning in the 1960s and ending some half a century later.

The final two chapters link these four themes. Chapter 15, 'Perspectives', explores how whistleblower laws can be viewed as aspects of different bodies of law. That exploration draws on discussions in previous chapters and enables the reader to see that more specific disputes are connected and intertwined in a conceptual framework for evaluating whistleblower laws. The last chapter, 'Old issues – new controversies', demonstrates both change and stability in important issues that address the successes and failures of whistleblower laws. These chapters invite the reader to organize the previous material in a variety of ways.

Either consciously or not, those who enact whistleblower laws confront aspects of legal regulation. Evaluation of the successes and failures of whistleblower laws necessarily must address these aspects of the use of law. For example, law has a limited number of devices to discourage or encourage behavior. It can prohibit conduct through sanctions; it can encourage conduct by protecting it or by providing financial or other incentives for it. Protection of whistleblowers, through legal sanctions, encourages disclosures and discourages retaliation. The justification for protecting disclosures often relies on legal authorities' need for information that permits the application of sanctions for a variety of other misconduct. Chapter 8, 'Incentives', discusses the use of financial incentives to motivate whistleblowing. It investigates the advantages and disadvantages of their use in false claims and bounty laws. That chapter suggests that these financial incentives receive a different reception than the protection of whistleblowers from reprisals, even though both can be treated as incentives. The chapter ends by presenting a concept of incentives that ties them more closely to the majority of whistleblower laws.

The fall of the Soviet Union vindicated a liberal view of government that distinguishes the public and the private. This distinction has long marked both civil and common law traditions. The growth of corporate power and its globalization has accompanied the application of the legal framework relying on the distinction. Whistleblower laws deal with this distinction in different ways. Chapter 9, 'Private-sector laws', looks specifically at the issues that arise in legal regulation that accepts differences between public- and private-sector laws. That chapter also shows how increasing government regulation of private-sector activities has influenced whistleblower laws.

A limited number of institutions can use the power of the state to enforce legal standards. If the enforcement of whistleblower laws is not left exclusively to the courts, administrative bodies must play an important role in the application of those laws. Many laws rely on administrative agencies to receive and evaluate disclosures of misconduct or to address claims of retaliation by whistleblowers. These agencies share the strengths and weaknesses of administrative agencies. Chapter 10, 'Institutional failures', shows how administrative agencies charged with the enforcement of whistleblower laws

suffer from weaknesses in administrative regulation. That chapter also asks whether whistleblower laws pose distinctive challenges for administrative enforcement. These inquiries demonstrate that successful whistleblower laws need to pay attention to administrative structures and to administrative procedures. Dissatisfaction with the administration of whistleblower laws led to proposals to rely primarily upon the courts. Chapter 10 helps a reader to decide whether the abandonment or subordination of administrative regulation portends success or failure of whistleblower laws.

Regardless of the role of administrative agencies or the courts in the enforcement of whistleblower laws, either set of institutions must interpret the relevant laws. Chapter 11, 'Interpretation', suggests that many courts and administrative agencies have narrowly construed those laws to the detriment of whistleblower protection. The breadth of the phenomenon – among different courts and administrative agencies and in different countries – calls for explanation. That chapter presents several possible reasons, including approaches to interpretation, negative judicial and administrative attitudes toward whistleblowing, application of bodies of law, particularly employment law, that restrict the scope of whistleblower laws, and the practical disabilities suffered by whistleblowers in legal conflicts regarding the meaning of whistleblower laws.

National security is a primary responsibility of the state. The worldwide turmoil of the twentieth century, including two world wars, a decades-long 'cold war' between the United States and the Soviet Union and their respective allies, and the advent of global terrorism accentuated the importance of national security. Democratic states have struggled to reconcile the demands of national security with the rule of law. Nowhere has that struggle been more pronounced than in the United States. Chapter 12, 'National security', looks at that struggle through the lens of whistleblower laws. National security represents an exception to the acceptance and protection of whistleblowing. Thus, it poses a major test for the successful definition and application of whistleblower laws. That chapter, however, argues that whistleblowing is more important, not less, in this area of state power.

Law and culture are linked in many ways. This connection poses a conundrum with which generations of legal scholars have struggled. The global reach of whistleblower laws likewise emphasizes the relationship between law and culture. Chapter 13, 'Global whistleblower laws', explores how culture influences the content of whistleblower laws and affects views regarding criteria for evaluating their success or failure. That chapter, however, indicates that the global relationships represented by these laws make it more difficult to conceive of even domestic laws as purely local. The adoption of whistleblower protections by international organizations not subject to any national law, such as the United Nations, the World Bank, and other regional development banks,

highlights an international conversation about whistleblower laws. Likewise, some regional anti-corruption conventions implicate transnational standards for whistleblower protection. The connection of whistleblower laws with freedom of expression links those laws to discourse regarding international human rights.

In democratic societies civil society groups play important roles in legal reform and in legal enforcement. Chapter 14, 'Civil society', describes the influence and tactics of these groups in several countries. This description illustrates the importance of these groups to the successes or failures of whistleblower laws. In several countries, including the United States, these groups have influenced the passage and content of whistleblower laws. These groups fill several roles: legislative advocates, legal representatives, advisors and counselors and agents for change of government and corporate behavior. Their advice to whistleblowers offers insights about the successes and failures of whistleblower laws.

The second theme of the book rests on acceptance of the critical role of the whistleblower provision in the Civil Service Reform Act of 1978 and subsequent amendments to it, particularly in the Whistleblower Protection Act of 1989. That acceptance explains the attention to this law, but requires justification.

Some date whistleblower laws from the 1863 false claims law called 'Lincoln's law.'¹ After amendments in 1943, that law fell into desuetude until subsequent amendments in 1986. It was not until those later amendments that the law contained a whistleblower protection provision. In *The Whistleblower's Handbook*, Stephen Kohn of the National Whistleblower Center presents a 'whistleblower' example from 1777 involving disclosures by sailors and marines serving on the naval ship, *USS Warren*, that the Commodore of the Navy tortured British soldiers.² Congress released the relevant documents, enacted a law protecting the sailors and marines who made the disclosures, and used government funds to ensure that protection. In 1951, Senator Richard Nixon introduced legislation (without use of the term 'whistleblower') to protect federal employees who testified before Congress. Edward Weisbard and Thomas Franck, the authors of *Resignation in Protest*, describe a number of high-ranking government officials throughout American history who resigned while denouncing government policies or the conduct of government officials.³ In *Blowing the Whistle*, Charles Peters and Taylor Branch describe the role of 'a minor bureaucrat' in exposing the Teapot Dome scandal of the 1920s.⁴ Surely, other examples can be found throughout American history of conduct that today could be described as whistleblowing.

Others see whistleblower laws as an outgrowth of labor legislation of the 1930s that protected union organizers and workers from retaliation for union activities.⁵ Subsequent civil rights legislation and labor legislation adopted

anti-retaliation principles. This legislation applied to the reporting of workplace conditions or behavior prohibited by labor statutes. With one or two limited exceptions, these anti-retaliation provisions did not protect disclosures unconnected to workplace conditions. In the late 1950s a few opinions of state courts, particularly in California, created a public policy exception to the doctrine of at-will employment for employees who were removed for reporting employers' violations of the law to appropriate authorities. These anti-retaliation statutes did not apply to federal employees, and judicially created public policy exceptions were limited to private-sector workers. Furthermore, these laws did not encompass the character of disclosures now routinely conjured by the term whistleblowing. These examples of the origin of whistleblower laws understand those laws only as a form of employment law.

In 1968 in *Pickering v. Board of Education*⁶ the United States Supreme Court applied the First Amendment to protect public disclosures by public employees. The whistleblower provision of the Civil Service Reform Act of 1978 sought to vindicate these constitutional rights but it substituted statutory standards for the vague balancing test under First Amendment law. Congress sought to do more than provide a statutory remedy for existing constitutional rights. This body of law shows that whistleblower laws can be perceived more broadly than as a form of employment law. They can also be perceived as a part of human rights law, protecting freedom of expression.

These explanations for the appearance of whistleblower statutes suggest that little appears suddenly. What at the time may be perceived as revolutionary can in retrospect be found to have a number of antecedents. Still, the whistleblower provision was a dramatic and transformative law. In 1968, whistleblowing was widely rejected and officially punished. Yet within a decade, whistleblowing evoked significant public support and, in a bipartisan effort, Congress enacted a broad statute protecting millions of federal employees. The whistleblower provision challenged long-entrenched administrative and executive prerogatives. That whistleblower statute marked a transition in legal recognition of whistleblower protection. It served as a model for many subsequent whistleblower laws and its resolution of many issues came to be identified with whistleblower protection. It broke barriers that eased the adoption of other laws. Chapter 7, 'Retrospective and forecast', shows how it created expectations regarding the character of whistleblower laws. Subsequent chapters also demonstrate the influence of that law on many of the issues of legal regulation generated by whistleblower laws. Why did such a dramatic change occur?

Several chapters explore the explanations for this dramatic change in culture and in law. These explanations illuminate the content of the law and show how the tenor of these societal changes became incorporated into both legal and popular conceptions of whistleblowing. Chapter 2, 'Question authority',

describes an understanding of how the power of bureaucracy and command could lead individuals to abandon ethics and morality. That understanding altered attitudes toward obedience. The risks posed by bureaucratic organizations supported reform of them. Events also emphasized individual responsibility. The whistleblower provision incorporated skepticism of authority and a commitment to individual liberty. Whistleblower laws not only reflect culture, but also carry with them values that influence culture. Indeed, many current controversies regarding whistleblower laws reflect the contrast between this skepticism of bureaucratic power, both public and private, and an emphasis on institutional loyalty and obedience.

Chapter 3, 'Nonviolence and civil disobedience', considers the effects of nonviolent civil disobedience on the acceptance of whistleblowing. That chapter focuses on the use of nonviolent disobedience by Dr. Martin Luther King, Jr. in the civil rights movement. In one sense, whistleblower laws are but one of the details of life changed by the civil rights movement. Like the civil rights movement, whistleblower advocates conceive that nonviolent refusals to participate in injustice and wrongdoing are affirmative responses to the abuse of power. Similarly, the proponents of whistleblowing see it, like nonviolent disobedience, as supporting democratic values. Both nonviolent disobedience and whistleblowing describe the confrontation of injustice as a moral duty. Likewise, a commitment to truth binds whistleblowing with the principles of nonviolent disobedience. The influence of the civil rights movement reinforced the effects of challenges to reliance on authority and obedience to it. The legacy of nonviolent civil disobedience led to the enactment of the landmark whistleblower provision. These rejections of authority and manifestations of principled dissent explain why, decades later, some scholars would exclude disclosures that did not involve dissent.⁷

Chapter 4, 'Whistleblower stories and emerging narratives', examines the publication of the stories of whistleblowers that began in the early 1970s. These stories created narratives describing whistleblowing and whistleblowers. Although these narratives varied, they presented favorable views of whistleblowers that justified legal protection of them. A common one described a dedicated employee who risked censure for disclosing misconduct by officials within an organization. While the whistleblower suffered for telling the truth, those persons who committed the wrongdoing or who retaliated against the whistleblower often prospered. These narratives also contained some major themes: the importance of personal responsibility in the face of bureaucratic misconduct and obstruction; whistleblowers' reliance on ethics and ethical standards; a commitment to the mission and interests of the organization for which a whistleblower worked; the courage and perseverance required to pursue allegations of misconduct and to face subsequent retaliation; principles for reform generated by the actions of whistleblowers. The stories of whistle-

blowers allow us to discover part of ourselves. These narratives represent the choice between varying stories, but they may also inform us of how the organizations of which we are part alter our perceptions of ourselves.

In many ways the whistleblower provision can be viewed as a 'Watergate law' and part of a number of laws designed to address abuse of power by the Nixon Administration. Chapter 5, 'Watergate and whistleblower protection', describes the connections between whistleblowing and that abuse of the powers of government. These connections supported the enactment of the whistleblower provision and placed whistleblower laws among other open-government laws. Without Watergate, this breakthrough national law might have been long delayed.

The whistleblower provision became part of the much larger and more comprehensive Civil Service Reform Act of 1978. The inclusion of it in that law gave influence to theories of public administration. Coincidentally, many of the events described in the early chapters motivated public administration scholars to challenge long-standing principles including unity of command, hierarchical control, and limitations of the rights of public employees. Chapter 6, 'The Civil Service Reform Act and whistleblower protection', shows how the inclusion of the whistleblower provision in the reform legislation speeded the enactment of this whistleblower law, but also created obstacles to its success. That connection also introduced conceptions of whistleblower laws that contrasted with other explanations for the dramatic change in approaches to whistleblowing.

These chapters suggest that the whistleblower provision and other whistleblower laws following it continue to carry the 'conceptual DNA' incorporated into this first major law. A reader will find evidence for this proposition in chapters addressing specific topics important to the successes or failures of whistleblower laws. In this way the first and second themes work together to frame any evaluation of whistleblower laws.

A third theme involves the stories of whistleblowers. These stories played a role in constructing narratives that supported enactment of the first comprehensive whistleblower law, but these stories continue to instruct and guide. Many of these stories appear throughout this book. They connect the context for whistleblowing with an assessment of whistleblower laws. The stories of these whistleblowers are closely linked to proliferation of whistleblower laws and respond to major upheavals over the past five decades. An examination of whistleblower laws must give prominence to whistleblowers. Separated from their stories, whistleblowers recede from view to become insubstantial legal creations. Their stories provide material for the examination of existing narratives or for the construction of new ones. Their stories make the successes and failures of whistleblower laws concrete rather than abstract, personal rather than statistical, and emotional as well as analytical.

A fourth theme uses a temporal organization. The chapters in the book can be viewed as more than topical; the organization of these chapters moves the reader through time. The six chapters following this one place the reader in the 1960s and 1970s to observe the creation of whistleblower laws and the enactment of the whistleblower provision. Chapter 8, 'Incentives', of necessity considers the federal False Claims Act, much of the development of which took place after amendments in the 1980s. Chapter 13, 'Global whistleblower laws', situates the reader in the 1990s and 2000s; these laws were rare before 1990 but have expanded in the last two decades. In Chapter 9, 'Private-sector laws', a reader follows the development of these laws over several decades, but those decades also describe the history of private-sector regulation. Whistleblower provisions tend to follow health and safety failures. These failures in product safety regulation and in food safety combined with financial scandals in the 2000s led the federal government in the United States to enact more federal private-sector whistleblower laws in the first decade of the twenty-first century than in any previous decade. This history is viewed in retrospect and we can examine it to discern its effects and influence. Current controversies allow us to image this history as contemporary and to experience the uncertainty of others as they confronted these events unaware of their outcome or their significance.

Other chapters examine particular topics over time. This chronological examination provides important insights about these topics. Chapter 12, 'National security', guides the reader through more than five decades of expansion of national security powers. Whistleblower laws accompany that expansion, particularly after September 11, 2001. Similarities of the experiences of national security whistleblowers inform an assessment of the threat that the secrecy justified by national security poses to the values underlying whistleblower laws. Chapter 10, 'Institutional failure', and Chapter 11, 'Interpretation', also trace these aspects of whistleblower laws through time. This temporal examination establishes the continuity of problems – a continuity that is an important conclusion of those chapters.

Chapter 15, 'Perspectives', lets the reader apply historical insights when assessing the matrix of legal approaches presented there. The concluding chapter, 'Old issues – new controversies', reflects on continuity and change regarding fundamental issues surrounding an appraisal of whistleblower laws. Those consistencies and variations permit the reader to consider the previous chapters from a different perspective, as well as to judge the efficacy of historical frameworks for the evaluation of the successes and failures of whistleblower laws.

NOTES

1. Chapter 8 discusses the history of the federal False Claims Act.
2. STEPHEN M. KOHN, *THE WHISTLEBLOWER'S HANDBOOK 195–200* (2011) (describing the Warren episode).
3. EDWARD WEISBARD & THOMAS M. FRANCK, *RESIGNATION IN PROTEST: POLITICAL AND ETHICAL CHOICES BETWEEN LOYALTY TO TEAM AND LOYALTY TO CONSCIENCE IN AMERICAN LIFE* (1975).
4. CHARLES PETERS & TAYLOR BRANCH, *BLOWING THE WHISTLE: DISSENT IN THE PUBLIC INTEREST* 6–13 (1972) (describing the Teapot Dome scandal).
5. DANIEL P. WESTMAN & NANCY MODESITT, *WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE* (2004). This book traces whistleblower law through the development of the anti-retaliation principle contained in these earlier labor provisions.
6. 391 U.S. 563 (1968).
7. Peter B. Jubb, *Whistleblowing: A Restrictive Definition and Interpretation*, 21 J. BUS. ETHICS 77, 89 (1999) (asserting that whistleblowing must be a form of dissent).

2. Question authority

The admonition or command to question authority was more than a counter-culture badge or words embossed on a T-shirt – rather, it expressed a suspicion of authority and a challenge to its legitimacy. The phrase’s frequent appearance attested to its ubiquity and influence on American culture in the 1960s and 70s. It represented more than an affirmation of individualism. It embodied fear and distaste for authority that was a part of the fabric of American democracy. Graphic displays of this admonition did more than acknowledge historical precepts. They counseled skepticism and resistance, counsel that relied upon contemporary illustrations of the dangers of institutional and bureaucratic authority to democratic societies and to individual liberty. They suggested a need to criticize and remake those institutions.

The bitter reminders of the evil done in the name of authority by the Nazi regime in Germany grew with contemporary descriptions of those evils. The Nuremberg principle denied to those who conceived and perpetuated genocide the defense that they only abided by the directives of authorities; that they were only following orders; indeed, that they did their duty. These reminders, however, seemed more appropriate to power wielded by authoritarian and totalitarian regimes. In World War II such regimes issued commands to commit the most egregious violations of standards of decency and humanity. These bitter reminders influenced international law and organizations. One of the origins of international human rights law was the principles of conduct adopted as standards to which all nations must adhere.

Many of the communist totalitarian governments of the day, particularly the Soviet Union, its eastern European client states, and the People’s Republic of China, served as examples of similar types of abuses of authority. Those abuses of authority condemned millions of their own citizens to privation and death.

In contrast, authority in democratic governments rested on political accountability and represented reasoned policies broadly supported. In such circumstances, conformity and obedience to authority carried other messages – ones of acquiescence to legitimate commands. Dissent and resistance undermined institutions, ignored rational and democratic judgments, and often resulted from petty or malicious objections. No institutions were perfect but authority carried a weight that could handicap many forms of disagreement

and dissent, including whistleblowing. In this context, whistleblowing could be presented as illegitimate and illegal.

A number of events altered perceptions of authority as exercised by institutions within the United States. These events, including the civil rights movement and abuses of power by the Nixon Administration, emphasized the dangers of authority even within American institutions.¹ This chapter considers other events that undermined the authority of bureaucracies: psychological experiments that showed how authority could override law and conscience, and the massacre of civilians by US troops at My Lai, Vietnam. Two of the best-known psychological studies are Stanley Milgram's experiments regarding obedience to authority and Philip Zimbardo's Stanford Prison experiment. These experiments remain controversial, but for our purposes they enjoyed wide dissemination during the period that also marked the societal acceptance of whistleblowing and the legal protection of it.

These experiments added the weight of social science research to the conclusions drawn from contemporary events – that the power of authority can, in some contexts, breed misconduct and even evil. They hauntingly confirmed that any of us could become participants in misconduct and evil unless we cultivated skepticism and resistance. Both experiments, particularly the Stanford Prison experiment, identified the important role of whistleblowers in challenging misconduct created by institutional influences. Both studies resonate today, reflecting their continuing power to engage and persuade. Their current relevance also attests to the influence that they exerted in the decade before legal protection of whistleblowers applied to millions of federal employees.

The My Lai Massacre, one of the best-known and controversial events of the time, helps to explain the resonance of the Milgram and Stanford Prison experiments. The My Lai Massacre in which units of the United States Army systematically killed hundreds of Vietnamese civilians further divided citizens of the United States, a country already rent by the Vietnam War. It recalled Nazi and Soviet atrocities committed in the conduct of World War II and contrasted with descriptions of the behavior of our own troops in that conflict.

These experiments and My Lai did more than support the importance of individual action and accountability. They emphasized the role that institutional arrangements play both in misconduct and in the acquiescence and silence of those who participate. Together, atrocity and psychological analysis introduced a powerful strain of justification for whistleblower protection. Whistleblowing altered the character of institutional relationships and thus was an important part of the reform of public and private bureaucracies. Whistleblowing could be judged by its success as an institutional reform. Whistleblowing was an antidote to bureaucratic evil.

OBEDIENCE TO AUTHORITY: THE MILGRAM EXPERIMENT

Stanley Milgram completed his now famous experiments on obedience while a member of the Department of Psychology at Yale University. His doctoral dissertation that helped to secure his position at Yale studied conformity to majority judgments in different cultures, particularly Norway and France.² In 1961 the National Science Foundation approved his grant for a series of experiments on obedience.³ He completed the series of experiments on May 27, 1962.⁴

Milgram's experiments sought to determine when test subjects would refuse to cause pain to a third person despite directions to do so by an authority figure. One variation of these experiments and the one most usually described involved three persons, an 'experimenter', a 'teacher' and a 'learner.'⁵ The teacher was the test subject who was told that he⁶ was part of an experiment to examine the role of punishment in learning.

The experimenter paid the teacher for his participation but told him that he could keep the money regardless of the completion of the research sessions.⁷ The subject or teacher was told that the learner or victim was also a volunteer test subject, although that person was actually a confederate who collaborated with the experimenter in carrying out the ruse on which the experiment rested. (In the first experiments, the persons who would become the teacher and learner were introduced to one another as test subjects and asked to draw slips of paper to determine the role that each would play. Both slips of paper contained the term 'teacher' so that the subject who was asked to draw first became the teacher and the confederate then acted as the learner.) The learner was strapped into a chair in another room and connected to an electrode through which electrical shocks would supposedly be delivered. In truth, no electric shock would be received by the learner. In response to a question from the learner, the experimenter would announce: 'Although the shocks can be extremely painful, they cause no permanent tissue damage.'

In the basic experiment the teacher was in a separate room with the experimenter. The teacher could hear but not see the learner. The teacher was seated before a shock generator that contained 30 lever switches, each of which was 'clearly labeled' with a voltage designation ranging from 15 to 450 volts, in 15-volt increments from left to right. The levers were divided into groups of four switches; these groups were labeled 'Slight Shock,' 'Moderate Shock,' 'Strong Shock,' 'Very Strong Shock,' 'Intense Shock,' 'Extreme Intensity Shock,' 'Danger: Severe Shock.' Two levers 'after the last designation were simply marked XXX.' When a switch was depressed 'a corresponding light was illuminated in bright red; an electric buzzing was heard; an electric blue

light, labeled "voltage energizer," flashed; the dial on the voltage meter swung to the right and various relay clicks were sounded.' Each teacher was given a sample shock of 45 volts to increase the perception of authenticity. During the test the experimenter, dressed in a white laboratory coat, sat in a chair in the room with the teacher.

The teacher was told that the experiment tested the role of punishment in learning. The teacher read four pairs of terms to the learner and then read the first word of a pair and asked which of the four second terms matched with this word. The learner responded by pushing a button that illuminated one of four quadrants in the answer box on top of the shock generator. The 'key command' was that each time the learner gave a wrong answer the teacher was to increase the shock by one level, after announcing the voltage level.

During the experiment, test subjects would turn to the experimenter to determine whether they should continue to administer shocks or to indicate that they wanted to leave. The experimenter used 'prods' in an established sequence to compel the subject to continue: (1) 'Please continue, or, Please go on.' (2) 'The experiment requires that you continue.' (3) 'It is absolutely essential that you continue.' (4) 'You have no other choice, you *must* go on.' The experimenter would use subsequent prods only if previous ones failed. If the subject refused to obey after the fourth, the experiment ended.

The experimenter used a firm but not impolite tone of voice. 'The sequence [of prods] was begun anew on each occasion that the subject balked or showed reluctance to follow orders.' If a teacher said that the learner did not want to go on, the experimenter told the teacher that whether or not the learner liked it, the teacher was to go on until the learner had mastered all the work pairs correctly.

The learner responded vocally at particular voltage levels. Milgram cautioned that it was difficult 'to convey on the printed page the full tenor of the victim's response.' (Perhaps Milgram made his documentary composed of films of the experiments to capture the emotion of these responses.) The learner expressed no response until 75 volts were reached. At that point and at 90 and 105 volts, the learner gave 'a little grunt.' However, at 120 volts, the learner 'shouted to the experimenter' that the shocks had become painful. 'Painful groans' issued at 135 volts. At 150 volts, the victim cried out, 'experimenter, get me out of here! I won't be in the experiment any more! I refuse to go on!' 'Cries of this type continue[d] with generally rising intensity ...' At 180 volts, the learner shouted 'I can't stand the pain.' At 270 volts, there was only an 'agonized scream.' From 150 volts, the learner insisted that he be released from the experiment. 'At 300 volts the victim shouted in desperation that he would no longer provide answers to the memory test.' After a violent scream at 315 volts the learner was vehement in declaring himself no longer a participant. After 330 volts, 'he was not heard from nor did his answers reappear on the four-way signal box.'

Although Milgram completed this basic experiment in 1962, the paper about his conclusions was not published until it appeared in October 1963 in the *Journal of Social and Abnormal Psychology*. Regarding that experiment, Milgram found that 65 percent of the subjects proceeded to administer all of the shocks on the board despite the pleas and screams of pain of the learner.⁸ The experiment quickly became nationally known and the object of consternation and criticism. At the end of October 1963, the *New York Times* published a story by William Sullivan headlined '65% in Test Blindly Obey Order to Inflict Pain.'⁹

The conclusion that ordinary Americans could obey orders to inflict pain recalled, for the author of the *Times* story, people who 'slavishly doing what they were told would send millions of fellow human being into gas chambers or commit other atrocities.' Milgram saw a similar connection and defended subsequent criticism of his experiment by arguing for its importance precisely because it was linked to understanding the bureaucratic evil that formed one of the hallmarks of the twentieth century.¹⁰

Soon critics attacked both the substance and the ethics of the experiment. In 1964, Diana Baumrind questioned the ethics and soundness of Milgram's experiment. Because the experimental setting creates a dependent attitude in test subjects and because of the attendant anxiety and passivity, 'the subject is more prone to behave in an obedient, suggestible manner in the laboratory than elsewhere.'¹¹ In her view, an experimenter has particular obligations to protect the security and self-esteem of subjects. Milgram reported the agitation and discomfort felt by test subjects and the potential for changes in their self-perceptions. Baumrind quoted Milgram's description of one test subject who entered the experiment smiling and poised but within 20 minutes was reduced to 'a twitching, stuttering wreck, who was rapidly approaching the point of nervous collapse.'¹² She believed that Milgram's experiment was an example of the studies that 'manipulate, embarrass and discomfort subjects.' Milgram's experiment rested on deception of the subject.¹³ She asserted that the exit interview was insufficient to address the level of emotional disturbance described. She found 'unclear' the parallel between Milgram's experiment and authority-subordinate relationships in Nazi Germany, where superior officers could not be thought to be benign either to the subordinate or the victims. Those victims were perceived as subhuman and unworthy of consideration. In particular, an experiment such as Milgram's should not proceed unless the subjects are 'fully informed' of the 'serious after effects' on them.¹⁴

At the time of the publication of the results of the experiment in the *Journal of Social and Abnormal Psychology*, Milgram was conducting additional experiments to explore the factors that influenced obedience. These eventually addressed: physical closeness of the victim, touching of the victim, physical risk to the victim, personalities of the learner and experimenter, closeness of

authority, differences between female and male subjects, limited consent by the victim, location of the laboratory outside a university, subject's freedom to choose the shock level and a number of role changes in the participants, contradictory commands from two authorities, the effects of having peers who disobey and a peer who administers the shock. Some of these variations altered, sometimes dramatically, the rates of disobedience. In one experiment, subjects would intervene to protect a learner from a peer. However, even in the proximity experiments in which the subject had to hold down physically the learner's hand in order to administer the shock, 25 percent of the test subjects continued to apply the maximum voltage despite the screams and resistance of the learner.

In a 1974 book, Milgram described these variations on the basic experiment, responded to criticisms of the ethics of the experiment,¹⁵ and drew conclusions regarding the reasons subjects demonstrated obedience in the context of the original experimental design. Milgram's book emphasized the implications of his original experiment and the article accompanying it. At the time, its conclusions surely connected many observers with events such as the My Lai Massacre; Milgram, in fact, drew this relationship with his study. He argued that his laboratory results were of great import because they demonstrated how responsibility is cast off and individuals become thoughtless agents of evil acts.

One can find evidence of its occurrence time and again as one reads over the transcripts of the war criminals at Nuremberg, the American killers at My Lai and the acts performed by ordinary Americans in the Vietnamese conflict is too long to document here in detail ... [treatises] recount that 'our soldiers routinely burned villages, engaged in a free-fire zone policy, employed napalm extensively, ... defoliated vast areas of the land, forced the evacuation of the sick and aged for military expediency and massacred outright hundreds of unarmed civilians.'¹⁶

Milgram included a portion of a transcript from a chilling *60 Minutes* segment in which Mike Wallace interviewed a soldier involved in the My Lai Massacre.¹⁷

My Lai reinforced the implications of Milgram's study and helped to propagate his view of the role of the individual within hierarchical organizations. Regarding that role, Milgram argued that it would be a mistake to see the obedience studies as relevant only to highly publicized atrocities, '[f]or the studies are principally concerned with the ordinary and routine destruction carried out by everyday people following orders.'¹⁸

Milgram's assessment was bleak. The conclusions contained in his epilogue captured for him the implications of the obedience experiments. The My Lai episode and the transcripts of the trial of the commandant at Andersonville Prison during the Civil War involve recurring themes relevant

to the experiments. Among these are that individual values such as loyalty, duty and discipline 'derive from the technical needs of the hierarchy.' They are experienced as 'highly personal moral imperatives' but 'are simply the technical preconditions for the maintenance of the larger system.'¹⁹ Milgram added, '[i]t is ironic that the virtues of loyalty, discipline and self sacrifice that we value so highly in the individual are the very properties that create destructive organizational engines of war and bind men to malevolent systems of authority.'²⁰ Milgram feared 'the capacity' for an individual 'to abandon his humanity, indeed, the inevitability that he does so, as he merges his unique personality in to larger institutional structures.'²¹ As to the limits of obedience, Milgram was not optimistic. 'A substantial proportion of people do what they are told to do, irrespective of the content of the act without limitations of conscience, so long as they perceive that the command comes from a legitimate authority.'²²

Perhaps the bleakness of his conclusions motivated spirited dissent to his views. Daniel Bell, a professor of sociology at Harvard, noted in a comment in the *New York Times* the attention that Milgram's study had received on CBS's *60 Minutes*. Bell discussed Morley Safer's comment on that program that if concentration camps were ever created in the United States, it would not be difficult to staff them.²³ Bell condemned the experiment as cruelly deceiving and manipulating the subjects, describing it as a 'stacked situation' with no recourse to independent judgment. He interpreted Milgram as 'promoting a liberal platitude' that erased 'any grounds for moral responsibility' because 'we all can be guilty.' According to Bell, Milgram's comparison of the experiments to concentration camps repeats 'some liberal banalities' and is 'a libel on ordinary human beings.'

Likewise, a book review in the *New York Times* criticized Milgram for the ethics of the experiment and lasting damage to the participants.²⁴ The reviewer, Steven Marcus, thought Milgram's book to be full of 'intellectual calamities.' Marcus believed that Milgram muddled the internal state of the individual acting as an agent of the institution and the external influences. Milgram simply applied insights that might more ably be described by Freud's concept of the superego.

Milgram's experiments were an influential part of societal perceptions of the relationship between individuals and the institutions of which they are part. Milgram may not have been specifically referred to during debates on the whistleblower provision but his experiments formed a background of perceptions that influenced the enactment of a provision that the participants in the legislative debates saw as altering the relationship to authority that Milgram described. His experiments are one reason for the significant change in attitudes toward whistleblowing. This influence reflected the place that his experiments occupied in academic and popular perceptions of the risks of

institutional authority.²⁵ Indeed, calls in the mid-1970s for the right of public employees to disobey illegal or unconstitutional orders specifically drew on Milgram's work and preceded enactment of whistleblower protection for federal employees.²⁶

THE IMPORTANCE OF INSTITUTIONAL DESIGN: THE STANFORD PRISON EXPERIMENT

Another social science study from the period, Philip Zimbardo's Stanford Prison experiment, also influenced views of the relationship of individuals to institutions. Although different in the sense that participants in the obedience experiments responded to unjust orders by an authority when those orders were part of a face-to-face monitoring by that authority,²⁷ the experiments had much in common. Both conveyed the same message, describing how institutional settings could induce ordinary persons to engage in reprehensible behavior. Both emphasized the influence of the setting on behavior, rather than the attributes of the persons involved. Zimbardo believes that his experiment has become the model of 'the power of the situation' in 'textbooks and the public mind.'²⁸ According to one of the graduate assistants who aided Zimbardo with the experiment, Zimbardo recognized the debt owed to Milgram 'for the way in which his demonstrations dramatically reframed the issues that we subsequently studied.'²⁹

In his Stanford Prison experiment, Zimbardo created a prison in the basement of the psychology department at Stanford University in order to explore the effects of de-individualization, dehumanization, and anonymity operating within a total environment.³⁰ The 'prison' contained cells, a room for solitary confinement, and an office for the guards. 'Much of the daily chronology of behavioral actions was videotaped for later analysis, along with a variety of other observations, interviews, tests, diaries, daily reports and follow-up studies that together constituted the empirical data of the study.'³¹

Because the experiment sought to distinguish the attributes the participants brought into the situation from those the situation brought 'out in the people who are there,' the participants were carefully prescreened.³² This prescreening sought to ensure that the participants were psychologically sound and without pathologies. Zimbardo described the subjects as 'generally representative of middle-class educated youth' and as 'a homogenous group of students who are quite similar to each other in many ways.'³³ These similar participants were randomly assigned the role of the eleven guards or nine prisoners.³⁴ At the beginning of the experiment, the participants were interchangeable and none sought the power or authority of the guards.

Neither the guards nor the prisoners were given specific instructions about how they should behave in these roles.³⁵ The prisoners, however, were dressed in smocks across which was emblazoned a number, wore rubber clogs and no underwear. They also wore women's nylon stockings as a cap to represent the shaving of the head in some prisons. A locked chain was attached to the ankle of each prisoner, a chain that the prisoners wore even when sleeping. The guards wore military uniforms and mirrored sunglasses. They each carried a club that they were told should only be used symbolically.

The guards formulated 17 rules that prisoners were to follow and commit to memory.³⁶ Among these rules, both guards and prisoners were to address prisoners only by their number, while guards were to be addressed by prisoners as 'Mr. Correctional Officer.' The rules emphasized the subordinate position of prisoners and stressed the obligations of prisoners and the discretion of the guards. The guards introduced the prisoners to 'the count,' a process during which the prisoners stood at attention and called out in order. The guards also developed physical exercises, such as pushups, for violation of the rules.

A variety of other persons played a part in the experiment, lending it authenticity and suggesting that the situation influenced the perceptions and behavior of persons who were neither guards nor prisoners, including some who were only intermittently connected with the experiment. Without forewarning, local police arrested those who played the role of prisoners, booked and fingerprinted them, and then blindfolded them and delivered them to the 'prison.' Friends and family visited the inmates on a visitors' night, a former prison chaplain interviewed the inmates, and a Catholic priest and a public defender visited one of the prisoners. In addition, ten outsiders served on two 'parole boards.'³⁷ Zimbardo played the role of the prison superintendent; his assistants monitored the experiment and one played the role of the warden of the prison.

Zimbardo now describes the August 14, 1971, journey of the prisoners into the basement of Jordan Hall, the location of the psychology department, as a journey that 'would become a descent into hell.'³⁸ Although the experiment was to last two weeks, it was terminated after six days because 'too many normal young men were behaving pathologically as powerless prisoners or as sadistic, all-powerful guards.'³⁹ In fact, Zimbardo believes that the experiment should have been terminated on the second day when the first prisoner 'suffered a severe stress disorder.'⁴⁰

In his book, *The Lucifer Effect*, Zimbardo discusses in some detail the occurrences of each of the six days of the experiment. He catalogs the initial waiving of billy-clubs in a threatening manner, the crushing of a prison rebellion, and the increasingly brutal treatment of prisoners leading to creation of division among prisoners, the withholding of food, placing bags over the heads of prisoners, forcing them to stand naked, stepping on prisoners who

were ordered to do pushups, selecting some prisoners for more abuse, and using the count to awaken prisoners during the night as a technique of harassment and sleep deprivation. Even the 'good guards' who behaved less sadistically did nothing to stop these practices or to intervene to prevent abuse. One prisoner was struck on the chin with a billy-club when a guard felt threatened.

After only six days, participants, who had scored similarly on a battery of psychological tests before the experiment began, displayed disparate scores correlated to their status as guards or prisoners.⁴¹ For example, those prisoners who remained in the experiment for its full six days had much higher scores than previously recorded on rigid adherence to conventional values and uncritical attitude toward authority.⁴²

Zimbardo interpreted the data to demonstrate that the previously measured personality characteristics did not predict responses as guards.⁴³ The secretly recorded conversations of prisoners in their cells demonstrated that they did not talk about themselves in a context other than as prisoners.⁴⁴ The breadth of the character transformation created by the experiment was also inconsistent with the countercultural and anti-authoritarian atmosphere of the time.⁴⁵

The institutional situation influenced the behavior not only of the guards and prisoners, but also of others. Zimbardo describes how the priest quickly transitioned to a role as prison chaplain⁴⁶ and that the public defender meeting with one of the prisoners, his cousin, also assumed the role of a prisoner's representative rather than giving personal advice or any suggestions regarding the experiment of which the participant was part. Even visiting parents were influenced by the roles assigned to their sons rather than the conditions of the experiment. The most important person who succumbed to the created reality surrounding his role was Phillip Zimbardo who served both as the principal investigator and as the prison superintendent. In the role as the prison superintendent he engaged in false and misleading representations to visitors and to prisoners. He also believes that his acceptance of his role prevented his recognition of the dangers to which participants were exposed and caused him to delay ending it.⁴⁷

Based on his experiment, Zimbardo concluded that situations powerfully influence people, particularly in settings in which previous guidelines of behavior provide less guidance.⁴⁸ This influence rests on the ambiguity of role boundaries and the permission that the situation gives to exhibit behavior that otherwise would be disapproved. Moreover, even conscious role-playing affects the actor's view of reality. The Stanford Prison experiment demonstrated that even temporary, artificial, or situation-bound role-playing can affect an actor's perception of reality.

The Stanford Prison experiment and its conclusions were widely disseminated in the period 1972 to 1978. The amount of dissemination followed from the character of the conclusions and from Zimbardo's belief that some

experiments are so value laden that researchers must become advocates for social change.⁴⁹ Zimbardo describes how he publicized the results of the experiment, not only in a number of professional journals, but also in popular magazines, such as the *New York Times Magazine* and *Psychology Today*.⁵⁰ He appeared on *The Phil Donahue Show*, a popular television talk show of the era, and distributed a dramatic slide-tape show. Furthermore, in 1972, he testified before a subcommittee of the Judiciary Committee of the United States House of Representatives.

Zimbardo's advocacy guaranteed that the experiment and its conclusions were widely known. It reinforced the attention paid to Milgram's obedience experiment. Both gave a new significance to the admonition to 'question authority.' It reinforced the view that institutional situations and the authority that they embodied threatened those who are part of these institutions, those subject to the power of those institutions.

Zimbardo's advocacy also linked the experiment to whistleblowing and to what he called the heroism of ordinary people.⁵¹ Specifically, Zimbardo credited a whistleblower, Christina Malach, with ending the out-of-control experiment. She confronted him with the damage being inflicted on the participants after she observed the humiliation and brutalization of the prisoners during a night shift at the prison. After a heated argument, Malach convinced him that the experiment had to end.⁵²

Zimbardo reports that he spoke with Milgram⁵³ about the obedience experiment because Zimbardo was interested in whether any participant in that experiment attempted to rescue the victim.⁵⁴ According to Zimbardo, he and Milgram discussed the need to study the dissidents, the rebels, and 'the whistle-blowing heroes.'⁵⁵

The publicity of the Stanford Prison experiment and its direct connection to whistleblowing emphasized the relevance of the study to ongoing debates about whistleblowing and whistleblower protection. Zimbardo's recent work more expressly draws the connection that implicitly exists between whistleblowing and ethical dissent with the ability to resist the evil and harmful effects of institutional and situational influences.⁵⁶ In his more recent work, Zimbardo specifically recognizes the importance of whistleblowing in permitting good people to resist evil deeds.⁵⁷ He examines the abuses at Abu Graib and compares the institutional context there to the Stanford Prison experiment.

THE MY LAI MASSACRE

The My Lai Massacre tragically illustrated the concerns of Milgram and Zimbardo about the capacity of ordinary people to commit evil deeds. On September 16, 1968, Charlie Company, 11th Light Infantry Brigade, 23rd

Infantry Division, known as the American Division, killed between 175 and 500 unarmed Vietnamese civilians, including women, children, babies, and old men, in the hamlet of My Lai, part of the village of Son My.⁵⁸ According to accounts, these murders were accompanied by rapes, scalplings, and other abuses. Of the approximately 20 women raped at My Lai, 13 were under 14 years of age, the youngest was ten.⁵⁹ An observer of events that day, when speaking to cadets at West Point decades later, recalled: 'A lot of girls did not scream too much because [soldiers had] already cut their tongues out.'⁶⁰ Troops used rifle fire, bayonets, and hand grenades; some victims were lined up in ditches and shot. Some considered the events of that day as 'possibly the most extensive war crime in U.S. military history.'⁶¹

The public exposure of the killings at My Lai occurred between the spring and fall of 1969,⁶² and Seymour Hersh's Pulitzer-prize winning book on the massacre appeared in 1970⁶³ – after the first public discussions of Milgram's obedience experiment, but before his 1972 book and before Zimbardo's Stanford Prison experiment. My Lai fueled the divisions regarding the Vietnam War but gave resonance to these studies regarding the implications of obedience to authority. Both studies explicitly or implicitly evoked My Lai.⁶⁴ War crimes by American troops alerted the public to the dangers of obedience and the power of situations to permit horrendous behavior. These public warnings demonstrated that these studies were more than 'academic.' The My Lai massacre also highlighted individual resistance to authority during the massacre and the role of whistleblowers in reporting it.

The 48th Battalion of the Viet Cong, an elite Viet Cong unit, was based in the area and lived in the hamlets, including My Lai, that were part of the Son My village. Some were the fathers and husbands of people living in the village.⁶⁵ The area was part of a 'free fire zone,' a designation that assumed that all persons in the area were sympathetic to the Viet Cong and remained at their own risk.⁶⁶ Such zones were part of a pacification effort to deny the Viet Cong sanctuary and support. The 48th Battalion suffered considerable losses during the Tet Offensive that began on January 31, 1968. Operation Barker, of which Charlie Company was part, was a campaign that sought to eliminate the remainder of that Viet Cong battalion.

Charlie Company was sent to Vietnam before its training had been completed and was first assigned to the mountainous southern part of Quang Ngai province, an area already pacified.⁶⁷ One reason for the assignment was to allow Charlie Company to complete its training. In late January 1968, Charlie Company was transferred to northern Quang Ngai province and became part of Task Force Barker. 'As casualties mounted, Charlie Company demanded revenge.'⁶⁸ Even before My Lai, many in the company had come to see civilians as enemies – prisoners were used as mine detectors and rape was common.⁶⁹

At the briefing the night before the attack on My Lai, Captain Ernest Medina told the soldiers that the village was a stronghold and that they would encounter experienced Viet Cong fighters.⁷⁰ Medina said that this would be their chance to get even with fighters who had killed their friends with mines or sniper fire. The night before the briefing the men attended a memorial for Staff Sergeant George Cox, a popular soldier who had been killed by a land mine.⁷¹ At the briefing, Medina told the company that approximately 250 enemy fighters were near the village and that neutral civilians would be away at market; remaining villagers would be Viet Cong or Viet Cong sympathizers.⁷²

Different members of the platoon heard Medina say different things about what to do with those civilians. He had said to kill everything, including animals, and that there would be no prisoners, but some heard him to say not to kill women and children. Others believed that it was clear that everyone, including women and children, were to be killed.⁷³ This uncertainty reflected operation commander Lieutenant Colonel Frank Barker's pre-operational briefing in which he did not order the killing of civilians, but in which he 'intentionally or unintentionally' failed to make clear distinctions between combatants and non combatants.⁷⁴

The killing began as the company landed in helicopters to secure the landing site – a dangerous operation. One member recalled that either Lieutenant William Calley or Medina ordered the killing of an old man who waived his arms as they landed. Fleeing Vietnamese – unarmed civilians – were shot. Some civilians hid in their huts or bunkers; others ran for the highway and escape. The second platoon opened fire on one of these large groups seeking to escape, killing young and old alike. In the village, an old man with a white beard and a walking stick was knocked down and his throat cut. Villagers were ordered out of their huts and shot after they came out. Soldiers tossed grenades into huts that people refused to leave. Many Vietnamese who had surrendered were rounded up and moved to a dirt road near the village and then shot. Children and old men were killed while begging for mercy. Children were shot while holding their hands out for candy.⁷⁵ Several participants identified Calley and Medina as personally involved in murders.⁷⁶

Some soldiers simply did not fire their weapons or refused to participate despite direct orders to do so.⁷⁷ When Robert Maples refused to follow Calley's order to shoot civilians who had been collected in a ditch, Calley threatened to shoot him but lowered his gun when other members of the platoon intervened.⁷⁸ When Calley put his rifle to Harry Stanley's stomach and threatened to kill him if he did not shoot civilians in the ditch, Stanley pulled his pistol and told Calley: 'We're all going to die here anyway. I just as soon go out right here and now – but I ain't killin' no women and children.'⁷⁹ Calley backed down. None of those who refused to participate, however, intervened to stop the killings.

Another soldier who refused to participate in the murders, Michael Bernhardt, was so incensed by the killings of unarmed civilians that he resolved to hunt down and kill the officers who were involved when he returned to the United States.⁸⁰ Although he never acted on this resolve, he played a role in the subsequent investigation. Because those who refused to participate could report those who did, they suffered retaliation. Bernhardt 'was kept out in the field for long stretches of time, given the most hazardous duties and denied proper medical treatment for an intestinal disorder' and for a fungus 'that was devouring the skin on his feet calves and thighs. He was often made to walk point, in front of his squad, thus increasing his chances of being killed by a booby trap or taking the first bullet in a frontal ambush.' His weight dropped from 145 pounds to 105. When treated at a base hospital, the doctor there declared that Bernhardt should have been 'brought in for medical treatment two months earlier.'⁸¹

Hugh Thompson: Hero and Whistleblower

Some military personnel did intervene. The most important of these was Hugh Thompson, a 24-year-old warrant officer, who piloted a scout helicopter in Task Force Barker of which Charlie Company was a part. A scout helicopter was smaller, less heavily armed than the Huey gunships and was used to identify enemy ground troops and locate them for attack by the larger, better-armed Huey helicopters. One method of locating enemy units was to draw enemy fire. Accompanying Thompson on these dangerous missions were his gunner, Larry Colburn, and his crew chief, Glenn Andreotta.

During their mission on September 16, 1968, Thompson and his crew saw only one Vietnamese who was armed, but they saw many dead and wounded Vietnamese as the day progressed. Near one of the wounded Vietnamese women they dropped a smoke canister to identify her location and then asked for medical assistance from one of the gunships. The crew of that gunship relayed the message to the commander of the ground unit, Medina. Hovering their helicopter near the wounded woman, Thompson and his crew saw Medina approach her as she appeared to signal for help, nudge her with his foot, and shoot her with an automatic weapon.⁸²

During the morning, the crew encountered more and more bodies spread out in the area. They decided to return to the ditch where they had seen bodies to determine if anyone was still alive. When he landed the helicopter, Thompson could see that several individuals in the ditch were still alive. He was approached by David Mitchell, a sergeant in Charlie Company. A few minutes later, Calley approached Thompson. When Thompson asked Calley what was going on, Calley responded, 'just following orders.'⁸³ Thompson responded that the victims were human beings, unarmed civilians; Calley told

him to get in his helicopter and take off and the crew reluctantly complied. In the air, they considered how they could stop the killing when they would have to oppose an entire infantry company.

As they talked, the crew saw seven or eight soldiers chasing three Vietnamese. These Vietnamese entered a bunker as the US soldiers drew closer. The actions of Hugh Thompson and his crew from this point would make Thompson a hero – a man whose name is still remembered – but it would also cause him to be treated as a pariah and made the subject of public and official scorn.

After asking the crew of the lower flying of two Huey gunships to back him up, Thompson landed the helicopter and approached Lieutenant Stephen Brooks who headed the group of soldiers that they saw and told him to order his men to stop. Brooks complied, perhaps in part because Colburn had the helicopter's M-60 gun pointed in the direction of Brooks and his squad.⁸⁴ In the bunker, Thompson found nine civilians – two elderly men, two women, and five children. With the assistance of the pilots of the two Huey gunships, Danny Mullins and Brian Livingston, Thompson had these civilians flown out of danger.⁸⁵

Thompson, Andreotta, and Colburn then returned to the ditch. Colburn searched the ditch for any survivors. He found three or four dying people and a five- or six-year-old child buried under a corpse. Colburn had difficulty getting out of the ditch because of the 'intestines, bits of flesh, blood and other body fluids.'⁸⁶ They flew the traumatized child to a hospital in Quang Ngai.

Thompson returned to the landing zone and reported to his platoon leader that US troops were 'behaving like Nazi executioners.'⁸⁷ Thompson yelled that he did not ever want to be part of such an operation again. He also described what he had seen to his commanding officer, Major Fred Watke. It was Watke who told Barker, the commander of the operation, about the events Thompson had seen. Barker sent orders to Medina ordering a cease-fire by Charlie Company. After the events, Thompson again reported to Watke and to Colonel Oran Henderson, commander of the 11th Infantry Brigade, setting out the details of his observations. Thompson's information was forwarded to Major General Samuel Koster.

For making these reports within the chain of command, Thompson might be called an internal whistleblower. He fulfilled the obligations that he believed he had to the Army to report what he had seen. His internal report did lead to a cease-fire earlier than it might otherwise have been called. Although over a 100 civilians had been murdered, it is conceivable that some Vietnamese civilians survived who otherwise might have been hunted and killed had Thompson not made his disclosures.⁸⁸

Unfortunately, these internal reports did not lead to accountability. Official reports filed by command officers, including Henderson, denied that a

massacre had occurred. Instead, the reports of a massacre were attributed to anti-American propaganda by the Viet Cong. As a result of these internal reports, no official action was taken against any of the officers or men involved in the massacre at My Lai on September 16, 1968. One scholar has noted that the division-level investigation of the massacre 'is a prime example of bureaucratic self-protection.'⁸⁹ Such can be the fate of other internal disclosures.

As a result of his heroism, Thompson began to fear for his life.⁹⁰ He believed his missions became more and more frequent. Several months later, Thompson was assigned to Da Nang and attached to a division of marines. In his new position, Thompson flew missions to draw fire in an area where enemy units fired rockets rather than bullets at helicopters. He also attacked any positions that he identified. A few weeks into his reassignment, Thompson's helicopter was hit by rocket fire and crashed. He was seriously injured and returned to civilian life.⁹¹

Ron Ridenhour: Whistleblower

Ron Ridenhour, a US soldier in Vietnam, who did not have personal knowledge of the massacre, exposed the massacre and started a chain of events that led to official Army investigations by the Office of the Inspector General and a special investigation headed by Lieutenant General William Peers aided by civilian attorney, Robert MacCrate. These investigations would lead to charges against Lieutenant Calley, Mitchell, Medina and about 20 others, some of these for involvement in the massacre and others, including highly ranked command officers, on charges such as dereliction of duty and failure to report a war crime.

Ridenhour also served as an infantryman in the 11th Brigade, but not with Charlie Company nor with any elements of Task Force Barker. About nine months before his discharge from the Army, Ridenhour was drinking with Private Charles Gruver in a bar in Vietnam. During their conversation, Gruver described the events of September 16 at My Lai, including the execution of unarmed civilians.⁹² In the next several months, Ridenhour sought out other men in Charlie Company, including Michael Terry, William Doherty, Larry La Croix, and Bernhardt.⁹³ From these sources, he pieced together a number of details of the massacre and became convinced that 'something very black, indeed' had occurred there.⁹⁴

After returning to the United States, Ridenhour struggled with what to do with the information that he had learned about the massacre. He feared that unless he acted, the military command in Vietnam would prevent the massacre from being known in the United States. Ridenhour also knew that there would be costs of speaking up but he believed that justice required a response to these

crimes. In a letter dated March 29, 1969, he set out what he had learned about the massacre. He sent the letter to President Nixon, the Secretary of the Army, and about two-dozen members of the House and Senate.⁹⁵ That letter generated an investigation by the Inspector General of the Army, an investigation led by Colonel William Wilson.

Wilson had hoped that the story contained in Ron Ridenhour's letter was not true. His investigation determined that, without a doubt, the massacre had occurred. Regarding his assessment of Ridenhour after their meeting, Wilson said: 'Ridenhour was an extremely impressive young man, and while his allegations were still only hearsay, he was depressingly convincing. The fact that he had stuck with it, pieced the whole thing together and followed through remains extraordinary.'⁹⁶

In his March 29 letter, Ridenhour stated that he had thought about sending the letter to 'newspapers, magazines and broadcasting companies' but rather he informed members of Congress because he believed that investigation by them was the 'appropriate procedure.' He sought to reduce damage to the image of American servicemen.

Ridenhour's letter might be characterized as an act of whistleblowing by a person who had only indirect evidence of wrongdoing. Some statutes, including the whistleblower provision of the Civil Service Reform Act of 1978, do not require that the information forming reasonable belief be based on direct knowledge. The allegations contained in his letter were made to public officials who, arguably, had responsibilities to address the crimes and misconduct at issue. Ridenhour can also be considered a whistleblower even though he was neither an employee of the Army nor any longer a member of the military. Likewise, some whistleblower statutes wisely protect former employees and some do not require an affiliation with the organization that is the subject of disclosures to qualify as a whistleblower.

The attention given to the massacre and the interpretation of it depended on the character of press coverage of the investigation and the trials of those charged with war crimes or the cover-up of these crimes.⁹⁷ Although news of the massacre appeared in the press in connection with the investigation and detention of Calley, it did not become a major media interest until November 13, 1969, when Hersh published his story, based on an interview with Calley, in 35 newspapers around the country. This story was followed by publication in *Cleveland Plain Dealer* of the pictures by an army photographer with the platoon at My Lai. This publication of the pictures and subsequent ones in *Life* brought the massacre to the front pages. *CBS News* showed pictures of the massacre on the evening news. Moreover, many of the participants had returned to civilian life and were available to discuss the massacre.

Investigations and Accountability

Official investigations, spurred by Ridenhour's actions, once again called upon Thompson. Trent Angers, the author of *The Forgotten Hero of My Lai*, describes Thompson's June 10, 1969, meeting with Wilson as the 'turning point' in the investigation and as a historical event 'that gave weight and substance to the allegations of possibly the most extensive war crime in U.S. military history.'⁹⁸ Although Ridenhour's letter provided a number of details and raised the specter of massacre, he had no direct knowledge of events. Without Ridenhour's letter, the investigations were not likely to have occurred; without Thompson's cooperation they may not have proceeded.

In addition to his involvement in the investigation of the Inspector General and in the special investigation commission later established by the Army (known as the Peers investigation), Thompson testified at a number of court-martials proceedings. His most difficult testimony was before the House Armed Services Committee and before its Armed Service Investigating Subcommittee, which investigated the massacre. The full Committee was chaired by Mendel Rivers, a conservative Southern congressman and an advocate for the military. The Investigating Subcommittee was chaired by Edward Hebert, described as having a worldview 'framed by four basic tenets: defense of Southern racism and of state's rights, fierce anti-communism, super patriotism and enthusiastic support of the American military.'⁹⁹

Thompson was one of the persons questioned in four closed sessions of the Armed Services Committee, and he also testified before the Investigating Subcommittee.¹⁰⁰ During Thompson's appearance before the Armed Services Committee, Rivers focused on whether Thompson had ordered his men to point their weapons at US soldiers. According to Rivers, Thompson deserved to be punished and Calley to be praised for doing the tough work of infantrymen.¹⁰¹

Before the Subcommittee, Hebert also concentrated on whether Thompson ordered his crew to point his weapons at US troops, and Thompson believed that this questioning was 'intended to create grounds on which he could be subjected to a court martial.'¹⁰² Thompson appeared at this hearing with an attorney and his concerns may explain some of his confusion and his decision to plead the Fifth Amendment. The Subcommittee also considered whether Thompson should have received the Distinguished Flying Cross for his actions at My Lai.¹⁰³ Over one-quarter of the Subcommittee's final report focused on inconsistencies in Thompson's testimony.¹⁰⁴ One analysis of the Subcommittee's and Hebert's performance found that the Subcommittee's 'badgering of Thompson reeked of simple vindictiveness.'¹⁰⁵

The military prosecutor of Medina asserted that Hebert and Rivers had tried to sabotage the My Lai prosecutions. According to the prosecutor, William

Eckhardt, these members of Congress wanted Thompson prosecuted for threatening the lives of American soldiers and sought in many ways to undermine Thompson's credibility.¹⁰⁶ Ultimately, only Calley was found guilty of war crimes and only Koster and Brigadier General George Young received punishment for the cover-up. Koster was reduced in rank and Young had official censure included in his personnel records.¹⁰⁷ During the vitriolic public debate on the massacre, President Richard Nixon confined Calley by house arrest; Calley's sentence was gradually reduced and finally the Secretary of the Army ordered him released on parole.¹⁰⁸

Thompson found himself shunned and the object of hate mail. The controversy over the conviction of Calley exacerbated passions about the war and some identified Thompson as a snitch. When the My Lai prosecutions collapsed and Calley was paroled, one whistleblower narrative seemed to have played out. Those guilty of misconduct and crime avoid accountability while whistleblowers and resisters suffer. Of those who contributed to the story of the massacre, one author finds that Thompson and Ridenhour 'were most clearly beyond reproach.'¹⁰⁹ 'Ridenhour's immediate reward for his endeavors, however, was to be trailed by an investigator working for the White House, at the direct request of Richard Nixon to discover "who was backing him."' Thompson's reward was 'hate mail and hostile questioning when he appeared before Congress.'¹¹⁰

In 1989, a documentary, *Four Hours in My Lai*, aired on public television stations in the United States. That documentary, which described the actions of Thompson and his crew, brought Thompson to national attention. One viewer, a Clemson University professor named David Egan, began to campaign for recognition of Thompson's bravery. In 1998, Thompson and Colburn traveled to Vietnam and met with survivors they had saved. On March 6, 1998, standing before the Vietnam War Memorial in Washington, DC, Thompson received the Soldier's Medal for bravery not involving combat with the enemy. After appearing on a number of programs to discuss the award, including *60 Minutes*, military academies began to invite him to give lectures on military ethics for young soldiers. Military ethics manuals in the United States and Europe now incorporate his story. In 2004 he was elected to the Army Aviation Hall of Fame, an award that Thompson called 'the big one' because it came from his fellow aviators.¹¹¹

At the time of Thompson's death in 2006, Colonel Tom Kolditz, head of the US Military Academy's Behavioral Science and Leadership Department stated: 'There are so many people today walking around alive because of him...' These people could be found not only in Vietnam, but in other places where officers 'kept their units under control ... because they had heard his story.' 'We may never know just how many lives he saved.'¹¹²

The narrative accompanying the Soldier's Medal lauds Thompson for land-

ing 'his helicopter in the line of fire between fleeing Vietnamese civilians and pursuing American ground troops to prevent their murder. He then personally confronted the leader of the American ground troops and was prepared to open fire on those American troops should they fire upon the civilians.' The award praises him for 'his relayed radio reports of the massacre and subsequent report to his section leader and commander' reports 'that resulted in an order for a cease fire at My Lai and an end to the killings of innocent civilians.'¹¹³

My Lai became one of the most important stories of its time. In a survey conducted on April 1, 1970, 96 percent of Americans had read, heard of, or seen information about the conviction of Calley.¹¹⁴ My Lai continues to haunt us 'because it challenges long-held notions of national virtue.'¹¹⁵ As troubling is that 'few besides Hugh Thompson and his crew seem to have registered [the events surrounding My Lai] as a challenge to their conscience, as such an affront to the moral logic of a shared humanity that they compelled personal intervention and protest.'¹¹⁶ The Milgram and Zimbardo experiments gave reasons for this disquieting revelation.

The cover-ups also led to another ominous conclusion. 'If the slaughter of 500 Vietnamese civilians could be covered up for more than a year, in spite of dozens of eyewitnesses and a formal report to a full colonel who commanded an entire brigade, what other atrocities might have gone unnoticed during the Vietnam war?'¹¹⁷ This conclusion highlighted the importance of whistleblowers and their roles in preventing such cover-ups in other institutions.

Finally, at the time of Calley's parole, Lieutenant General William Peers, who headed the Army's special investigating commission of the massacre, told reporters: 'To think that out of all those men, only one, Lieutenant William Calley was brought to justice. And now, he's practically a hero. It's a tragedy.'¹¹⁸ Institutional failure not only prevented justice, but institutional structures and incentives created the ground for the massacre. The My Lai Massacre stressed the role of whistleblowers, whistleblowers who emerged as My Lai's heroes.

Neither My Lai nor the Milgram and Zimbardo experiments were mentioned in the congressional deliberations regarding the whistleblower provision of the Civil Service Reform Act 1978. Their lessons, however, applied to all institutions and to both public and private bureaucracies. Their messages of institutional failures and the importance of whistleblowers in preventing them were already firmly embodied in different views of institutions, obedience, and authority – views captured in the slogan: 'question authority.'

NOTES

1. Chapter 3 examines the influence of the civil rights movement and its connections with nonviolent civil disobedience. Chapter 5 describes how Watergate and abuses of the Nixon Administration encouraged protection of whistleblowers. These chapters are of one piece with this one, for all describe the change in attitudes toward institutional authority and whistleblowing.
2. THOMAS BLASS, *THE MAN WHO SHOCKED THE WORLD: THE LIFE AND LEGACY OF STANLEY MILGRAM* 31 (2004) [hereinafter *THE MAN WHO SHOCKED THE WORLD*].
3. *Id.* at 35.
4. *OBEEDIENCE TO AUTHORITY: CURRENT PERSPECTIVES ON THE MILGRAM PARADIGM*, at xii (Thomas Blass ed., 2000) [hereinafter *CURRENT PERSPECTIVES ON THE MILGRAM PARADIGM*].
5. STANLEY MILGRAM, *OBEEDIENCE TO AUTHORITY* 13–26 (1974) [hereinafter *OBEEDIENCE TO AUTHORITY*] (describing the experiment); *THE MAN WHO SHOCKED THE WORLD*, *supra* note 2, at 75–92 (providing another explanation of Milgram's experiment).
6. *OBEEDIENCE TO AUTHORITY*, *supra* note 5, at 62–63. The test subjects in the initial experiment were all men. Milgram describes a variation on the experiment using women as the subjects. He concludes that their 'level of obedience was virtually identical to the performance of men' but the level of personal conflict 'experienced by the women was on the whole higher than that felt by our male subjects.' *Id.* at 63 (footnotes omitted).
7. All quoted material in this description of the experiment is taken from *OBEEDIENCE TO AUTHORITY*, *supra* note 5, at 13–26. All quoted material in the above description comes from this source.
8. Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371, 376 (1963) (discussing the findings that the experiment yielded); *THE MAN WHO SHOCKED THE WORLD*, *supra* note 2, at 120 (describing the publication of *Behavioral Study of Obedience*). The 65 percent figure concerned the remote-condition experiment described in the text.
9. N.Y. TIMES, Oct. 26, 1963, at 10. A week after this article, on November 2, the *St. Louis Post-Dispatch* ran an editorial 'skewering' Milgram for the harm caused to subjects. *THE MAN WHO SHOCKED THE WORLD*, *supra* note 2, at 121. Milgram's membership application for the American Psychological Association 'was held up for a year' after a member of the Yale psychology faculty complained to the Association about Milgram's experiment. *Id.* at 112–113.
10. *OBEEDIENCE TO AUTHORITY*, *supra* note 5, at 1–2; Adolph Eichmann was executed on May 31, 1962, 'four days after Milgram concluded his obedience study.' *THE MAN WHO SHOCKED THE WORLD*, *supra* note 2, at 110.
11. Diana Baumrind, *Some Thoughts on Ethics of Research: After Reading Milgram's 'Behavioral Study of Obedience'*, 19 AM. PSYCHOLOGIST 421 (1964).
12. *Id.* at 422.
13. *Id.*
14. *Id.* at 423.
15. *OBEEDIENCE TO AUTHORITY*, *supra* note 5, at 32–45, 55–72, 89–122 (describing these variations). Particularly in Appendix 1, Milgram responded to criticisms of the ethics of the experiment, including Baumrind's. *Id.* at 193–202.
16. *Id.* at 180.
17. *Id.* at 180–83.
18. *Id.* at 178.
19. *Id.* at 186.
20. *Id.* at 188.
21. *Id.*
22. *Id.* at 189.
23. Daniel Bell, *Is Eichmann in All of Us*, N. Y. TIMES, May 26, 1974, § 2, at 1.
24. Steven Marcus, *Obedience to Authority*, N. Y. TIMES, Jan. 13, 1974, § 7, at 1 (book review).

25. THE MAN WHO SHOCKED THE WORLD, *supra* note 2, at 259–92 (describing the pervasive influence of Milgram’s experiment in a concluding chapter titled ‘Milgram’s Legacy’).
26. Robert G. Vaughn, *Public Employees and the Right to Disobey*, 29 HASTINGS L. REV. 261 (1977).
27. The Stanford Prison experiment sought to study the power of social situations over individuals ‘without relying on the type of face-to-face authority surveillance that was central in Stanley Milgram’s obedience studies.’ Philip G. Zimbardo, Christina Maslach, & Craig Haney, *Reflections on the Stanford Prison Experiment: Genesis, Transformations, and Consequences*, in CURRENT PERSPECTIVES ON THE MILGRAM PARADIGM, *supra* note 4, at 204. Chapter 11 in this 2000 book explores in detail the interrelations between the two studies.
28. *Id.* at 212.
29. *Id.* at 222.
30. *Id.* at 203. To study these effects was the ‘primary reason for conducting the experiment.’
31. *Id.* at 200.
32. PHILIP G. ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL 33 (2007) [hereinafter THE LUCIFER EFFECT].
33. *Id.*
34. Zimbardo reports that no one wanted to be a guard.
35. *Id.* at 40.
36. *Id.* at 44–45. The rules themselves are set out on page 45.
37. *Id.* at 202.
38. *Id.* at 39.
39. *Id.* at 202.
40. *Id.* at 211.
41. *Id.* at 198–205. As the experiment progressed, the ‘two most *infrequent* behaviors observed over the six days’ were treating others as individuals or helping others. Only one incident of helping was recorded. *Id.* at 203 (emphasis in original).
42. *Id.* at 198.
43. For example, the most ‘bad ass’ guard did not rank high on masculinity. *Id.* at 200.
44. *Id.* at 204.
45. *Id.* at 225. That ‘Zeitgeist of the 1960s and early 1970s’ rejected authority, rebelled against injustice and oppression, and opposed the Vietnam War.
46. *Id.* at 102.
47. CURRENT PERSPECTIVES ON THE MILGRAM PARADIGM, *supra* note 4, at 212.
48. *Id.* at 204–06.
49. *Id.* at 209 (recounting Zimbardo’s assertion that ‘[i]t is necessary for psychological researchers who are concerned about the utility of their findings and the practical application of their methods and conclusions to go beyond the role restraints of academic researcher to become advocates for social change’).
50. *Id.* at 209–10.
51. THE LUCIFER EFFECT, *supra* note 32, at 444–490. In Chapter 16, Zimbardo describes how to resist and even encourage heroism. Zimbardo describes a banality of heroism in contrast to Hannah Arendt’s banality of evil. *Id.* at 483–88 (referring to the difference between heroism of the moment and heroism over a long period of time). He calls his experiment a ‘reverse-Milgram’ one. *Id.* at 450.
52. *Id.* at 168–71. She notes that she was romantically involved with Zimbardo and they had discussed marriage. She indicated that she does not know if she would have so acted if she were still a graduate student dependent on his goodwill. Because there was no order for her to disobey she chose confrontation instead, thereby becoming a whistleblower. CURRENT PERSPECTIVES ON THE MILGRAM PARADIGM, *supra* note 4, at 218–19.
53. CURRENT PERSPECTIVES ON THE MILGRAM PARADIGM, *supra* note 4, at 195–196. Zimbardo reports that he and Milgram were high school classmates at James Monroe High School in the Bronx. *Id.* at 195. (maintaining Zimbardo’s recollection of ‘[Milgram] being considered the smartest kid and I voted the most popular’).
54. *Id.* at 196.

55. *Id.* (describing Zimbardo's recollection that 'We both discussed but did not act on the need for psychologists to study the dissidents, the rebels, the whistle-blowing heroes. Demonstrating the power of the situation to make good people do evil deeds somehow held more appeal to us than the more difficult reverse process of showing how ordinary people could be induced to heroic deeds with a Milgram-like paradigm').
56. THE LUCIFER EFFECT, *supra* note 32, at 451–56. The ten steps to resist unwarranted influences reflect many of the themes contained in Chapter 4 and the advice of whistleblower advocates in Chapter 14, and they occur throughout this book.
57. *Id.* at 474–78. In developing a taxonomy of whistleblowers, Zimbardo examines the profiles of several whistleblowers.
58. KENDRICK OLIVER, THE MY LAI MASSACRE IN AMERICAN HISTORY AND MEMORY 1–5 (2006); JAMES C. OLSEN & RANDY ROBERTS, MY LAI: A BRIEF HISTORY WITH DOCUMENTS 20–23 (1998). To the Vietnamese the settlement was known as Xom Lang, a sub-hamlet of Tu Chung, not as My Lai.
59. OLSEN & ROBERTS, *supra* note 58, at 99 (summarizing the rapes compiled in 1970 by Army investigators).
60. Rebecca Leung, An American Hero, CBS NEWS (Dec. 5, 2007). <http://www.cbsnews.com/stories/2004/05/06/60minutes/main615997.shtml?tag=currentVideoinfo.videoMetaInfo>; in reflecting on the day, Thompson said, 'I wish I was a big enough man to say that I forgive them, but I swear to God, I can't. See also *60 Minutes: American Hero* (CBS Television Broadcast, May 9, 2004) [hereinafter *American Hero*].
61. TRENT ANGERS, THE FORGOTTEN HERO OF MY LAI: THE HUGH THOMPSON STORY 157 (1999). OLIVER, *supra* note 58, at 2–3 (describing similar sentiments about the massacre, including that it 'may turn out to be one of the nation's most ignoble hours' – from a November 22, 1969 editorial in The New York Times – and 'This is the moment of truth when we realize that we are not a virtuous nation' – statement by theologian Reinhold Niebuhr).
62. Kendrick Oliver's book describes the reporting of the massacre. He explains in detail how it emerged as perhaps the definitive story of the Vietnam War. OLIVER, *supra* note 58, at 11–52.
63. SEYMOUR HERSH, MY LAI: A REPORT ON THE MASSACRE AND ITS AFTERMATH (1970).
64. In his book Milgram specifically drew the connections between his study and My Lai, and Zimbardo's book shows that he implicitly saw the same connections. OBEDIENCE TO AUTHORITY, *supra* note 5, at 180; THE LUCIFER EFFECT, *supra* note 32, at 451–56.
65. ANGERS, *supra* note 61, at 103.
66. OLSEN & ROBERTS, *supra* note 58, at 8.
67. *Id.* at 13.
68. *Id.* at 16.
69. *Id.* at 17.
70. ANGERS, *supra* note 61, at 102.
71. *Id.*
72. OLSEN & ROBERTS, *supra* note 58, at 19.
73. *Id.* at 57.
74. *Id.* at 58.
75. *Id.* at 22.
76. *Id.* at 76–81 (1970 testimony to the Peers Commission of Dennis Conti) (1969 testimony of Herbert J. Carter to the Army Criminal Investigation Division); W.R. PEERS, THE MY LAI INQUIRY (1999) (describing the investigation conducted by the commission and its conclusions).
77. ANGERS, *supra* note 61, at 11–12 (listing some of those soldiers who refused to participate); OLSEN & ROBERTS, *supra* note 58, at 83–87 (describing the 1969 testimony of Robert Maples to Army Criminal Investigation Division recounting his refusal to obey a direct order of Lieutenant William Calley to shoot civilians, as well as the 1969 testimony of Larry Polston to Army Criminal Investigation Division describing his failure to fire on civilians).
78. ANGERS, *supra* note 61, at 115.

79. *Id.* at 116.
80. *Id.* at 112.
81. *Id.* at 144.
82. *Id.* at 113–14.
83. *Id.* at 119.
84. *Id.* at 124–25.
85. *Id.* at 127–28. These heavily armed gunships also ensured the safety of the evacuation. One landed to support Thompson and the other remained aloft to provide air cover.
86. *Id.* at 129
87. *Id.* at 132. PEERS, *supra* note 76, at 74. ('In my view, Warrant Officer Thompson reacted in the way I would have expected any decent young man caught up in the midst of the My Lai tragedy to react. He had done everything he felt he could to report what he had seen, and during the operation had tried to intercede to stop the indiscriminate killing and help the civilians.')
 88. According to Trent Angers, Thompson's actions may also have had some effect on other search-and-destroy missions.
89. Mark D. Carson, *F. Edward Hebert and the Congressional Investigation of the My Lai Massacre*, 37 L. HIST.: THE J. L. HIST. ASS'N 61, 61, 77 (1996); PEERS, *supra* note 76, at 207. 'The inquiry could only conclude that by design or failure to act on the many indications they had of the most serious situation, the division command group effectively restricted knowledge of the incident from leaving the division. *Id.* at 209. 'To this day what most greatly concerns me is that so many people in command positions ... had information that something unusual had occurred during the My Lai operation and yet did nothing about it.'
90. ANGERS, *supra* note 61, at 137.
91. *Id.* at 147–149.
92. OLSEN & ROBERTS, *supra* note 58, at 1–3.
93. *Id.* at 149–50 (containing Ridenhour's March 29, 1969, letter to members of Congress and executive branch officials describing his investigation of the massacre). Ridenhour and Bernhardt agreed that they would support one another in their efforts to tell the story in the United States and help bring the guilty to justice.
94. *Id.* at 151 (reproducing a portion of his letter).
95. *Id.* at 149–50. In the letter, he stated: 'I do truly believe in the principles of justice and equality for every man, however humble, before the law, that form the backbone that this country is founded on ...'
96. William Wilson, *I Prayed to God That This Thing Was Fiction*, AM. HERITAGE (1990) reprinted in OLSEN & ROBERTS, *supra* note 58, at 152–163 (quote on page 155). PEERS, *supra* note 76, at 7. William Peers, who led the subsequent investigation, said that Ridenhour's letter 'proved the key to uncovering the tragedy and had he not sent it, it is conceivable that the My Lai incident would have remained hidden ...'
97. OLIVER, *supra* note 58, at 11–52. Chapter 1, 'Reporting Atrocity,' describes the media coverage and how the My Lai Massacre became national news. This paragraph rests on that description.
98. ANGERS, *supra* note 61, at 157.
99. Carson, *supra* note 89, at 62.
100. *Id.* at 67–68.
101. ANGERS, *supra* note 61 at 165.
102. *Id.* at 101. During the hearings, the counsel for the committee, John Reddan, confronted Thompson: 'I will ask you specifically. Did you tell your crew, your guns [sic] and your crew chief to fire on American soldiers if they fired on you?' *Investigation of the My Lai Incident: Hearings Before the Armed Serv. Investigating Comm. of the H. Comm. on the Armed Serv.*, 91st Cong. 230 (1970).
103. Carson, *supra* note 89, at 72.
104. *Id.*, citing the committee's report.
105. *Id.* at 77.
106. ANGERS, *supra* note 61, at 172–73.

107. OLSEN & ROBERTS, *supra* note 58, at 106.
108. ANGERS, *supra* note 61, at 105.
109. OLIVER, *supra* note 58, at 105.
110. *Id.*
111. *American Hero*, *supra* note 60.
112. Obituary, *My Lai Rescuer Hugh Thompson, Jr.*, WASH. POST, Jan. 7, 2006, at B5.
113. ANGERS, *supra* note 61, at 230.
114. OLIVER, *supra* note 58, at vii. Oliver reports that at the time, 'the My Lai massacre (as it came to be known) was a pivotal event not just in the history of the Vietnam war, but also in the history of the American nation as a whole.' *Id.* at 3.
115. *Id.* at vii.
116. *Id.* at 229.
117. OLSEN & ROBERTS, *supra* note 58, at 114
118. *Id.* at 179.

3. Nonviolence and civil disobedience

If you seek the monument of the civil rights movement, you need only look around. That movement altered American society. It was pervasive because the racism that it attacked was intertwined in America's laws, culture, and history. The civil rights movement represented the long march of American democracy by extending the rights of full citizenship to those who had been excluded from the founding of the Republic. The story of that movement and of its effects is a tale hard to summarize because it is written in the details of life today.

This examination of the movement captures neither the complex interplay of many historical events nor the diversity in the movement itself. Because this chapter addresses the effects of that movement's assertion of principles of nonviolence and civil disobedience, principles connected to the acceptance of whistleblowing, its scope is limited. Thus this chapter does not explore the development of nonviolence and civil disobedience or the current challenges to the civil rights movement.

The civil rights movement is often identified with the life of Dr. Martin Luther King, Jr. His leadership and death encompassed the years of the 1950s and 1960s when the magnitude of change guaranteed turmoil. That change raised questions regarding long-held and long-defended assumptions. It challenged the institutions – both public and private – that advanced or condoned the subjugation of African Americans. King's vision of change and his commitment to nonviolence offered not only a guide to techniques, but also a philosophy of conduct. Like other aspects of the civil rights movement, those techniques and that philosophy influenced other attempts at social change and bequeathed a legacy that shaped other movements and affected the success of reform.

Part of that legacy includes the philosophy of nonviolence and civil disobedience. This chapter explores this strand of the civil rights movement and considers its effects on acceptance of whistleblowing. That acceptance marked a dramatic and rapid change in perceptions of whistleblowing, changes that permitted the adoption of protection for millions of federal employees. The legacy of the civil rights movement played no small part in the approval of whistleblowing. The origins of whistleblower laws explain their enactment and illuminate their content, as well as clarify current controversies surrounding

those laws. The origins of whistleblower laws provide one perspective from which to judge their successes and failures. An examination of the whistleblower provision shows that the whistleblower laws are one of the details of life today connected with the civil rights movement.

Nonviolence and civil disobedience can differ. Nonviolence can be employed in activities that are legal, as with the rights of persons to protest and to gather to express disagreement and opposition to the conduct of government or of other institutions. Civil disobedience is the violation of laws with a willingness to accept the consequences of that violation. That violation can be done nonviolently or it can be accompanied by violence.¹ Protesters may attack police or other security personnel who seek to impede or limit the protest.

Nonviolence and civil disobedience can also be correlated concepts as they were in the civil rights movement. Unjust laws regarding segregation were violated knowingly, but without violence. The violence of state authorities and others in the face of peaceful, often lawful, protests was met with nonviolence. In cases of protests and demonstrations the line between nonviolence and civil disobedience is often obscured.

Nonviolence can be viewed as a technique, a means of accomplishing a goal. In some circumstances, nonviolence may have a number of tactical advantages. Among these are mobilizing members of the group or groups that feel harmed by the law, reducing the legitimacy of the government, disrupting the functioning of the government, and provoking violence on behalf of the government further undermining its authority.² The tactical commitment to nonviolence assumes that violence may at some point become a more effective or necessary tactic.

Nonviolence can also be seen as a philosophy toward conflict and toward one's opponents. Such a philosophy of nonviolence animated the advocacy and the conduct of civil disobedience by King. Nonviolent civil disobedience can advance democratic values. It informs others of the misconduct of government, but in a way that stresses the commitment to the government of those who object. It seeks to strengthen not weaken democratic government because it seeks redress from that government. It encourages the participation of citizens. Ironically, by breaking the law but nonviolently accepting the legal consequences of that action, it educates about the importance of the law. By forswearing violence it demonstrates a commitment to human rights and to peaceful change. Such action appeals to one's opponents and sows doubt in the minds of supporters of the practices that civil disobedience opposes.

KING AND GANDHI

King's commitment to a philosophy of nonviolence incorporated these values but drew on another strain of philosophical and spiritual support for nonviolent civil disobedience. That strain incorporated sources in American history and culture, and included important elements of Christianity that reflected King's background and vocation, as well as the importance of the church in black communities. King's commitment to the philosophy of nonviolence, however, relied heavily upon the philosophy of nonviolence articulated and deployed by Mohandas K. Gandhi in his campaigns to free India from British control.³

Like King's, Gandhi's story is well known. He lived a privileged youth, received the best education, and trained as a lawyer.⁴ After leaving England and settling in South Africa, Gandhi had a number of experiences that influenced his philosophy of nonviolence. He served in an ambulance unit during the Boer and Zulu wars and was affected by the violence that he observed. His unit served mostly Zulu casualties because white ambulance units would not. Despite his education and professional standing, he was ejected from a first-class train car for which he had bought a ticket.⁵ He had to leave the train because several white passengers objected to a 'colored' riding in the car. After his ejection, Gandhi studied the relevant laws and regulations and was able to compel the railroad to honor a ticket for the first-class car.

Gandhi's philosophy of nonviolence was influenced by Indian culture and by the Hindu religion, but he read a number of works regarding other religions including Christianity, Islam, and Buddhism.⁶ By his own account, two books were the most important in developing his philosophy of nonviolence: Leo Tolstoy's *The Kingdom of God is Within* and John Ruskin's *Unto This Last*. Gandhi was also taken with Thoreau's essay *On Civil Disobedience*.⁷ According to one scholar, Gandhi's idea of nonviolence as a positive, life-affirming concept 'came from fusing traditional Jain and Hindu concepts with ideas found in Tolstoy and also in Jesus's Sermon on the Mount.'⁸ Nonviolence, to Gandhi, was an affirmative manifestation of love, not a passive acceptance of punishment.

Throughout his life and his struggles with the British in India he adhered to this philosophy of nonviolence. He used it effectively to unite and recruit Indians to follow his campaign. The Salt March of 1930 exemplified the successful use of nonviolent civil disobedience on a large scale. The march challenged the British monopoly on salt. In the march, thousands of Indians walked 240 miles to the sea, gathering followers as they went. The march took nearly a month to reach the sea. It was designed to give people a way of defying the British and it undermined the obedience to authority and consent on which British rule rested.⁹ It also exposed the weakness of the British response

to a nonviolent mass movement. The British arrest of Gandhi and thousands of Indians involved in the march fueled resistance rather than crushed it.

Gandhi sought not simply to end British domination of India but to replace British rule with a superior society to the one the British sought to impose. That superior society would consist of a community without the artificial divisions imposed by caste or religion. It would incorporate values more consistent with the philosophy of positive and affirmative love that underpinned the campaign of nonviolent civil disobedience. That society, a pure end, could not be created by violence and hatred; it could only be created by the pure means of nonviolence.

THE POWER OF LOVE

Before King's adoption of nonviolent civil disobedience, other civil rights leaders 'observed what Gandhi had accomplished using nonviolence in India. ...'¹⁰ Among those who perceived its value for African Americans in the United States were Asa Philip Randolph and James Laws. In 1942, Randolph had 'used the threat of a mass nonviolent march on Washington' to force Franklin Roosevelt to integrate war industries.¹¹

King's autobiography¹² describes his connection with civil disobedience and with nonviolence. As a freshman at Morehouse College in 1944, King read Thoreau's essay, *On Civil Disobedience*, which King describes 'as my first contact with the theory of nonviolent resistance.' It 'so deeply moved' him that he 'reread the work several times.'¹³ He found particularly relevant 'Thoreau's insistence that evil must be resisted and no moral man can patiently adjust to injustice.' King also describes how as a seminarian he was introduced to the 'pacifist position', although he 'despaired of the power of love in solving social problems.'¹⁴

King's first contact with Gandhi's philosophy resulted from a trip to Philadelphia where Dr. Mordecai Johnson, the President of Howard University, 'spoke on the life and teachings of Mahatma Gandhi.'¹⁵ As King studied Gandhi, he was 'moved by his Salt March to the Sea, and believed that Gandhi's idea of a love or truth force was "profoundly significant."¹⁶ According to the autobiography, '[p]rior to reading Gandhi,' he 'had concluded that the ethics of Jesus were only effective in individual relationships' and thus King found 'deep satisfaction' in Gandhi's 'emphasis on love and nonviolence' as 'a potent instrument for social and collective reform.'¹⁷ At the same time, King rejected what he called 'a liberal view' of humans that expressed optimism about the essential goodness of humans guided by reason.¹⁸ He 'came to recognize the complexity of man's social involvement and the glaring reality of collective evil.'¹⁹

Based on his study of Gandhi, King also rejected Reinhold Niebuhr's critique of pacifism. Gandhi's philosophy was not 'nonresistance to evil but nonviolent resistance to evil.'²⁰ Nonviolence was the 'courageous confrontation of evil by the power of love, in the faith that it is better to be the recipient of violence than the inflicter of it.' A violent response 'multiplies the existence of violence and bitterness' while nonviolence 'may develop a sense of shame in the opponent and thereby bring about a transformation and change of heart.'²¹

NONVIOLENT CIVIL DISOBEDIENCE AND THE CIVIL RIGHTS MOVEMENT

King's ascent to the leadership of the civil rights movement in the United States began in Montgomery, AL, on December 1, 1955. On that day Rosa Parks boarded a bus and took the first seat in the unreserved section. Later, the bus driver, as the law required, ordered her to get up and stand at the back of the bus so that a white male passenger could take her seat. She refused to do so and was arrested.²² At the time of her resistance, Parks was 'one of the most respected people in the Negro community.'²³

In response to this event, community leaders called for a boycott of the buses. Thus began the Montgomery Bus Boycott that would propel a young King into a position of national leadership and that would test the tenets of nonviolent civil disobedience. In his speech to the first mass meeting of the boycott he stressed the importance of nonviolence coupled with protest and disobedience. That emphasis confirmed democracy. King stated that 'the great glory of American democracy is the right to protest for right.'²⁴ King told the assembly, 'we are not here advocating violence' but rather 'an appeal for justice to be conducted by the moral and ethical principles contained in our religious beliefs.'²⁵ The concept of nonviolence in that speech was conveyed by the term 'Christian love.' As the boycott unfolded, King came to see 'that the Christian doctrine of love operating through the Gandhian method of nonviolence was one of the most potent weapons available. ...'²⁶

The people involved in the crisis created practices of nonviolence through their conduct of the boycott. King's own commitment to nonviolence developed as the boycott continued. Some of his closest advisors, including Bayard Rustin, aided King in establishing his nonviolent philosophy. King, who kept a gun in his home, disposed of it when challenged by Rustin that its possession was inconsistent with the principles that King preached.²⁷ King stated that he felt freed by getting rid of the gun and that it increased his faith and his commitment to nonviolence. 'I came face-to-face with the question of death and I dealt with it. From that point on, I no longer needed a gun nor have I

been afraid. Had we become distracted by the question of my safety we would have lost the moral offensive and sunk to the level of our oppressors.²⁸

After initial negotiations with the city and the bus company broke down, the city pursued a 'get tough' policy in which people were arrested for minor or fabricated traffic violations. One of the victims of this 'get tough' policy was King himself, who was arrested for speeding.²⁹ During the boycott his house was bombed. King was found guilty of violating an anti-boycott law.³⁰ After the successful desegregation of the buses, leaders of the boycott urged behavior that would demonstrate that desegregation was not a victory over the white man but 'a victory for justice and democracy.'³¹

King advanced his growing commitment to nonviolence with a pilgrimage to India in February 1959. During that visit to India he extolled Gandhi and the use of nonviolence.³² King praised Gandhi for his sincerity, his dedication, his self-criticism, and his use of nonviolence. King called Gandhi's use of nonviolence to free the people of India 'one of the most significant things that ever happened in the history of the world.'³³

Others in the South who sought to end segregation also used forms of nonviolent civil disobedience. Most prominent among these were the sit-ins at lunch counters, restaurants, and other locations that refused to serve Negroes and the Freedom Riders who sought to integrate interstate buses traveling through the South. Many of these volunteers, including whites, participated in voter registration campaigns. These volunteers were harassed and some were murdered; other civil rights leaders were murdered.³⁴ In the face of these provocations, nonviolent protests and civil disobedience marked the attempts to guarantee blacks the legal rights available to other citizens.

King was arrested a number of times but his best-known incarceration was in the Birmingham jail for violating an injunction during the campaign attacking segregation in the city. King and Ralph David Abernathy submitted to arrest because in good conscience 'we cannot obey unjust laws, neither can we respect the unjust use of the courts.'³⁵ It was during this imprisonment that King wrote the famous 'Letter from Birmingham Jail', a response to the open letter to King by eight local clergymen urging him to end his campaign in Birmingham.³⁶

King's letter, one of America's best-known protest documents, contains many references to nonviolence. These references illustrate how nonviolence was woven into the fabric of the civil rights movement. King stated that 'I wish that you had commended the Negro sit-inners and demonstrators for their sublime courage, their willingness to suffer and their amazing discipline in the midst of great provocation.'³⁷ If discontent with injustice is not expressed nonviolently, it is 'a fact of history' that such discontent 'will seek expression through violence.'³⁸ If the philosophy of nonviolence had not emerged, 'by now many streets of the South would, I am convinced, be flowing with

blood.’³⁹ King evoked the universal character of nonviolence. King asserted that nonviolence could be properly applied in violation of the law, for, in Hitler’s Germany it was illegal ‘to aid and comfort a Jew.’⁴⁰

The Selma-to-Montgomery March, part of a campaign for voting rights in the South, has been compared to Gandhi’s Salt March because of its reliance on nonviolence and because of its symbolic and practical effects.⁴¹ The 54-mile march from Selma to Montgomery, AL, called on Governor George Wallace to end police brutality and remove obstacles to the right of blacks to vote. The march also responded to police violence against those involved in the civil rights campaign in Selma. Illustrative of this violence were incidents such as the killing by police in Marion, AL, of a black youth, Jimmie Lee Jackson, who was attempting to protect his mother and grandfather from being beaten by the police.⁴²

On March 7, 1965, as the marchers attempted to cross the Edmund Pettus Bridge in the first stage of the march they were met by police in riot gear. The march was declared an unlawful gathering and mounted troopers advanced on the marchers, using tear gas and clubbing and beating them.⁴³ The marchers attempted to hold their ground but retreated in the face of the attack. ‘It was a shameful and bloody attack that was captured by the national news media and spurred many otherwise complacent people to action on behalf of the marchers.’⁴⁴

Following the attacks, King called for white ‘ministers, rabbis, priests and nuns’ to join him in a ministers’ march to Montgomery. About 400 responded. One of these, James Reeb from Boston, MA, was brutally beaten in Walker’s Cafe in Selma and died of his injuries on March 11.⁴⁵ In response, President Lyndon Johnson, in a nationally televised broadcast, endorsed the effort in Selma and announced his plan to submit a new voting rights bill to Congress, and the march resumed on March 21 with the protection of the federalized state national guard.⁴⁶

The march influenced the enactment of the Voting Rights Act. It engaged people in their local communities and it brought many persons, black and white, to the South to join the movement. This involvement put the lives of participants at risk and cost some of them their lives. It established nonviolence as a philosophy and as a technique that would be used in other social movements, such as the anti-war movement and gave legitimacy to civil disobedience.

In his speech at the conclusion of the march, King repeated many of these themes of nonviolent civil disobedience. The speech was one of victory, not only for the marchers and the civil rights movement, but also for nonviolence. As King reflected on the accomplishments of the march and on the tasks ahead, he urged participants in the movement to ‘go away more than ever committed to nonviolence.’⁴⁷ ‘We must come to see that at the end we seek a society at peace with itself, a society that can live with its conscience.’⁴⁸

King's commitment to nonviolence had a practical side as well. Violence by blacks provoked greater violence by whites – violence expressed by beating and killing those who sought to vindicate their rights. Blacks could not command force equivalent to that that could be used against them. King articulated these considerations, as well as his philosophical and religious roots of nonviolent disobedience.⁴⁹ Nonviolence demonstrated that those committed to it did not tolerate the use of force, that they did not seek revenge for past harms but redress of current conditions, and that they were devoted to a spirit of love. Nonviolence also inspired large numbers of people to resist repression; it created discord that revealed fissures in society so that those divisions could be healed; it appealed to groups of whites who supported the goals of civil rights but feared and rejected violence; and by meeting violence with nonviolence, it discredited the methods of the oppression that marked white racism in the United States.⁵⁰

King's focus on nonviolence was a necessary method of challenging white oppression that denied civil rights to blacks. Persistent, strong, and determined action would reduce or eliminate oppression.⁵¹ Hatred does not cease with hatred and if the civil rights movement was to create a better society, nonviolence must redeem not only blacks, but also whites, not only the oppressed, but also the oppressors.⁵²

In a speech in Memphis the night before he was killed, King spoke again on nonviolence.⁵³ 'The nation is sick, trouble is in the land, confusion all around.'⁵⁴ He admonished the audience that a little violence, like the breaking of some windows during a demonstration, permitted the focus to be shifted from the injustice that required protest. 'We aren't engaged in any negative protest and in any negative argument.' 'Rather, we are saying that God's children don't have to live the way that we are forced to live.' He recounted in some detail how the violence of Bull Connor's police and fire departments in Birmingham was met not with violence but with nonviolent defiance.⁵⁵ 'And every now and then ... we'd see the jailer looking through the windows and being moved by our prayers. And there was power that Bull Connor could not adjust to and so we ended up transforming Bull into a steer and won our struggle in Birmingham.'⁵⁶

According to King, violence cannot solve a conflict: 'Violence may murder the murderer but it doesn't murder murder.'⁵⁷ Likewise, violence may kill the liar, the dishonest, and the hater but it doesn't end lying, dishonesty, or hate. 'It may increase hate. It is always a descending spiral leading nowhere. This is the ultimate weakness of violence: It multiplies evil and violence in the universe. It doesn't solve any problems.'⁵⁸

NONVIOLENT DISOBEDIENCE AND WHISTLEBLOWING

The commitment of the civil rights movement to the philosophy of nonviolent civil disobedience and the movement's application of that philosophy influenced the dramatic acceptance of whistleblowing. The whistleblower provision of the Civil Service Reform Act of 1978 testifies to that influence and represents a consensus regarding that acceptance. The effects of the civil rights movement on whistleblowing also illuminate some less commonly perceived aspects of whistleblowing.

Several aspects of nonviolence and civil disobedience link the civil rights movement with whistleblower laws. Both the civil rights movement and alliances arguing for whistleblower laws conceive nonviolent refusals to consent to injustice and wrongdoing as forms of action and as affirmative responses to abuses of power by those exercising authority. Both place truth at the heart of the justifications for conduct in opposition to authority. The proponents of nonviolent civil disobedience and of whistleblowing see those activities as supporting democratic values and democratic governments. In this regard, both are imbued with respect for the law. Both view confrontation of injustice as a moral duty. Thus, both recognize that large public and private bureaucracies have the potential for injustice and evil.

The religious grounds for nonviolence found in the civil rights movement are more muted in the advocacy for whistleblower protection. Yet whistleblowing draws upon some of the same inspirations for action, for risking injury, and for unmerited suffering on behalf of others that represent if not overt religious dogma, at least spiritual or psychological principles contained in the advocacy of nonviolence by both Gandhi and King.

The connections between nonviolent civil disobedience and whistleblowing show that whistleblowing, likewise, can be seen as a group activity. Narratives regarding whistleblowing often conjure images of single heroic figures standing in opposition to powerful organizations, but successful whistleblowing often involves the support and assistance of groups of people.⁵⁹ The chapters that follow allow a glimpse of this aspect of whistleblowing and whistleblower laws, examples that illustrate how whistleblowing can share the group character of the civil rights movement. Some examples include the influential arguments by Senator Patrick Leahy that whistleblower laws should be drafted to prevent isolation of whistleblowers and to include those who aid or assist a whistleblower.⁶⁰ Likewise, the experiences of civil society groups demonstrated how loyalty to fellow employees can lead to multiple whistleblowers coming forward. The tactics of whistleblower advocacy groups organize whistleblowers to address systemic problems and abuses, such as food safety or shoddy construction of nuclear plants.⁶¹ All of these examples expose the group character of whistleblowing.

The power of whistleblowing rests on the potency of non-consent. Non-consent can be demonstrated through refusal to obey, as well as through exposure of wrongdoing. The first aspect of non-consent responds to a directive to participate; the second, to an unwillingness to participate through silence and inaction. The second may encompass many persons who have not been given a specific command, like observers, witnesses, and bystanders.

Circumstances calling for non-consent can contrast with some reasons for obedience. Individuals may support those giving commands; they may agree with the decision or policy; they may be rewarded for obedience and acquiescence or punished for resistance; they may be conditioned to obedience or fail, perhaps unconsciously, to perceive the injustice; they may not care, or they may doubt their competency to judge or to resist the actions.⁶² In this way, whistleblowing rests on many of the operative principles of nonviolent civil disobedience and against many of the reasons compelling consent and acquiescence.

In this view, consent is the source of the power of institutions. Both public and private bureaucracies rely on the consent of those who work in them and those who support these bureaucracies. Whistleblowing empowers non-consent and, like nonviolent civil disobedience, rests on the assumption that violence is not central to or necessary for power. As King and Gandhi did, nonviolence seeks a different type of community where consent governs. Therefore, both the civil rights movement and whistleblowing embody a vision of the role of consent in the governance of society. An early discussion of the relationship between civil disobedience and whistleblowing recognized the connection between them but used loyalty to differentiate them.⁶³ Perhaps it is this conception of consent that has caused one scholar to say, 'An unyielding "No" may yet prove to be our sole password to the future.'⁶⁴

Because of this vision of institutions, whistleblowing, like nonviolent disobedience, imposes an affirmative duty to 'act' to resist misconduct and injustice within institutions. This affirmative duty sees resistance as an affirmative force, not a passive one. Both nonviolence and whistleblowing posit a moral duty to resist injustice because of an implicit image of a society based on consent.

This implicit image of society enabled King to bond nonviolent civil disobedience to democratic values. Likewise, whistleblower advocates similarly link whistleblowing with the rule of law and with democratic values both in regard to public- and private-sector institutions. King, unlike some other supporters of nonviolence, expressed doubt as to whether nonviolence could be effectively applied in an authoritarian or dictatorial society. An examination of global whistleblower laws tests the connections between nonviolent disobedience and political economy.⁶⁵

A commitment to truth strongly binds whistleblowing with the principles of

nonviolent disobedience. Both Gandhi and King saw nonviolence as an application of the force of love that included a commitment to truth. Gandhi called this force underlying nonviolence a truth force, as well as a love force.⁶⁶ Truth was connected with nonviolence while lies were connected to violence. For him, 'lying is the mother of violence.'⁶⁷ King repeatedly stressed that nonviolent disobedience exposed the lies on which discrimination and subjugation rested. The civil rights movement sought to force white Americans to recognize the truth of the evil contained in social and legal racism. Whistleblowing also rests on the exposure of lies that are used to hide misconduct and to confront organizations with the truth of their behavior. Making misconduct public is an antidote to the lies that make that misconduct possible. It is the truth that leads to redress and to change.

The spiritual aspects of whistleblowing are rarely considered. The connections between the civil rights movement and its principles of nonviolence and whistleblowing help identify the spiritual aspects of whistleblowing. Gandhi and King conceived the love or truth force underlying nonviolence as closely related to spiritual principles in knowing the nature of God. These principles appear infrequently in discussions of whistleblower laws that often approach them solely as exercises in policy analysis.

Whistleblowing, however, recalls other parts of the spiritual conceptions of Gandhi and King. In particular, they stressed the willingness to put one's body at risk for love and truth. Each recognized that nonviolence required a readiness to accept undeserved suffering for the benefit of others. One clear theme in most whistleblower narratives stresses the suffering of whistleblowers who speak the truth. At some point, whistleblowers voluntarily proceed in the face of personal suffering in order to disclose misconduct and to pursue their allegations. Job loss, financial loss, psychological harm, and damage to family and personal relationships accompany many disclosures of misconduct. Some are undone by this suffering. Others identify it as an empowering, spiritual experience.

The scope of the civil rights movement and the principles that it espoused could be expected to influence other and related issues. Whistleblowing is one of these. The acceptance of whistleblowing and the consensus regarding its propriety occurred historically in what now seems like a small moment in time. It is no accident that the civil rights movement and the principles of nonviolence and civil disobedience heavily influenced the same moment in history.

The influence of the civil rights movement on the acceptance of whistleblowing reinforced the effects of events challenging reliance on authority and obedience to it. Well-publicized experiments of Stanley Milgram and Philip Zimbardo, described in the previous chapter, also addressed the themes introduced by nonviolent civil disobedience, including concerns about the evil and

injustice of bureaucratic actions and the importance of resistance to those practices. Both Gandhi and King saw the conduct of others as often determined by the situations in which they found themselves rather than on personal attributes. This focus on the influence of the situation enabled both Gandhi and King to challenge injustice rather than demonize those involved in it. The perception of participants as themselves entangled in unjust and dishonest institutional arrangements and practices supported a vision of a more just society that would include the oppressors, as well as the oppressed. Thus, these two powerful strains of influence described in Chapter 2 and in this chapter can be seen as mutually reinforcing in altering perceptions of whistleblowing.

Nonviolence and civil disobedience are connected to whistleblower protection in more direct ways. For example, Lewis Clark, one of the creators and now the President of the Government Accountability Project, which is among the best-known nongovernmental organizations supporting whistleblower protection, was a Methodist minister who participated in voter registration drives in Mississippi during his involvement in the civil rights movement there.⁶⁸ That organization played a role in the passage of the whistleblower provision of the Civil Service Reform Act and in much of the whistleblower legislation in the United States and abroad during the last 30 years.

Chapter 5 describes the influence of Daniel Ellsberg and the release of the Pentagon Papers in the passage of the first comprehensive whistleblower law. That description shows how Ellsberg's disclosures related to the Watergate cover-up. The Watergate scandal led to the enactment of the whistleblower provision of the Civil Service Reform Act of 1978. Ellsberg's release of the Pentagon Papers is linked to nonviolent civil disobedience. Ellsberg recounts the influence of nonviolent disobedience on him and describes that while considering what to do with the evidence of government lies contained in the Pentagon Papers, he reflected on the experiences of conscientious objectors who spoke of their decisions to face imprisonment for resisting the draft.⁶⁹ These conscientious objectors articulated many of the principles of nonviolent civil disobedience. After having considered these persons, Ellsberg reports that he could not in good conscience fail to act. He left the meeting to commence the process that would lead to the publication of the Pentagon Papers by *The New York Times* and the *Washington Post*. Thus, the principles of nonviolent civil disobedience are linked to one of the more significant disclosures of the time, a disclosure leading to events that directly influenced the enactment of the first comprehensive whistleblower law.

NOTES

1. Nonviolent disobedience can damage or destroy property; for example, defacing objects of protest such as the building or property representing the contested government action. The pouring of blood on military buildings or installations provides one illustration. A discussion of civil disobedience from differing perspectives can be found in *CIVIL DISOBEDIENCE: THEORY AND PRACTICE* (Hugo Adam Bedau ed., 1969) [hereinafter *CIVIL DISOBEDIENCE: THEORY AND PRACTICE*]. Bedau dedicated this book to the memory of Dr. Martin Luther King Jr. and uses the beginning words of the Declaration of Independence in that dedication.

We hold these truths to be self-evident, that all Men are created equal, that they are endowed by the Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness – That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or abolish it, and to institute a new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.

2. Bruce Pech, *Radical Disobedience and Its Justifications* in *CIVIL DISOBEDIENCE: THEORY AND PRACTICE*, *supra* note 1, at 261.
3. MICHAEL J. NOJEIM, *GANDHI AND KING: THE POWER OF NONVIOLENT RESISTANCE* (2004). Professor Nojeim's book ably draws the connections between them.
4. *Id.* at 274–75.
5. *Id.* at 73.
6. *Id.* at 58.
7. *Id.* at 84. Until Gandhi had been imprisoned for a failure to pay taxes he had not read Thoreau's essay.
8. *Id.* at 99.
9. *Id.* at 141.
10. *Id.* at 211.
11. *Id.*
12. *THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR.* (Clayborne Carlson ed., 1998) [hereinafter *THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR.*]. King's autobiography was published after his death and is a collection of his writings, speeches, and other documents edited and placed together in a narrative format.
13. *Id.* at 14.
14. *Id.* at 23. King speculates that 'my faith was temporarily shaken by the philosophy of [Frederick] Nietzsche including part of the *Genealogy of Morals* and all of the *Will to Power*.'
15. *Id.* After the 'profound and electrifying message,' King bought several books on 'Gandhi's life and work.'
16. *Id.*
17. *Id.* at 23–24.
18. *Id.* at 24–25. What he hoped to retain was liberalism's 'devotion to the search for truth, its insistence on an open and analytical mind, its refusal to abandon the best light of reason.' *Id.* at 25.
19. *Id.* at 25.
20. *Id.* at 26.
21. *Id.*
22. Rosa Parks' resistance must have touched King, not only because of the history of segregation in Montgomery and abuse that bus drivers heaped on black passengers, but also because it recalled an episode that King describes as 'the angriest I have ever been.' In that instance as a high school student returning with a teacher from an oratorical contest, King and the

teacher were ordered to the back of the bus to make room for white passengers. Despite King's resistance, the teacher convinced him to move and they stood in the aisle for the 90-mile trip to Atlanta. *Id.* at 9–11.

23. *Id.* at 53.
24. A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR. 9 (Clayborne Carson & Kris Shepard eds., 2001) [hereinafter A CALL TO CONSCIENCE].
25. *Id.*
26. THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR., *supra* note 12, at 67.
27. NOJEM, *supra* note 3, at 183.
28. THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR., *supra* note 12, at 82.
29. *Id.* at 73–74.
30. *Id.* at 87–89.
31. *Id.* at 95.
32. *Id.* 121–34. One thing that King extracted from his visit was the relationship between Gandhi's rejection of caste distinctions and King's rejection of racial ones. In both societies, these distinctions bred exploitation and injustice.
33. *Id.* at 129.
34. One listing of those killed can be found in the Civil Rights Memorial Center of the Southern Poverty Law Center – *Civil Rights Martyrs*, SOUTHERN POVERTY LAW CENTER (Feb. 13, 2012), <http://www.splcenter.org/civilrights-memorial/civil-rights-martyrs>.
35. THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR., *supra* note 12, at 181.
36. *Id.* at 183–84.
37. *Id.* at 203.
38. *Id.* at 198.
39. *Id.* at 197.
40. *Id.* at 194.
41. NOJEM, *supra* note 3, at 243.
42. *Id.* at 241
43. *Id.* at 292.
44. *Id.*
45. THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR., *supra* note 12, at 282.
46. *Id.* at 282–84.
47. A CALL TO CONSCIENCE, *supra* note 24, at 130 (Address at the conclusion of the Selma-to-Montgomery March).
48. *Id.* King's speeches and autobiography capture the religious foundations of the civil rights movement and its use of nonviolence, a use that defined the movement.
49. NOJEM, *supra* note 3, at 211–12.
50. *Id.* at 211.
51. THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR., *supra* note 12, at 198.
52. A CALL TO CONSCIENCE, *supra* note 24, at 75
53. *Id.* at 207 ('I've Been to the Mountain Top' speech).
54. *Id.* at 209.
55. *Id.* at 211–12.
56. *Id.* at 212.
57. NOJEM, *supra* note 3, at 289.
58. *Id.*
59. MYRON PERETZ GLAZER & PENINA MIGLAL GLAZER, *THE WHISTLEBLOWERS* 99–132 (1989). In this classic book, the Glazers describe how religious beliefs and principles influenced the actions of several whistleblowers.
60. Chapter 5 describes Senator Leahy's study in detail.
61. Chapter 14 explores the aspects of the tactics of whistleblower advocacy groups.
62. Gene Sharp's view paraphrases the explanations as to why nonviolence works. Sharp, who wrote a book about Gandhi and went to prison as a conscientious objector, heads the International Center on Nonviolent Conflict. A recent article describes the influence of Sharp and the principles of nonviolent resistance in the revolution in Egypt. Sheryl Gay Stolberg, *Shy U.S. Intellectual Created Playbook Used in a Revolution*, N.Y. TIMES, Feb. 17, 2011, at

- A1. Brian Martin also describes the similarities and connections between nonviolence and whistleblowing. Brian Martin, *Whistleblowing and Nonviolence*, 24:1 PEACE AND CHANGE 15, 16–19 (1999) (describing similarities in conceptions, including principled stands by vulnerable individuals and the recognition of fundamental social changes).
63. Frederick A. Elliston, *Civil Disobedience and Whistleblowing: A Comparative Appraisal of Two Forms of Dissent*, 1 J. BUS. ETHICS 23 (1982). Similar issues arise with both: whether first to exhaust internal avenues of redress, whether to act anonymously, the recognition of higher loyalties to personal responsibilities and principles of morality, disobedience to commands and rejection of the obligations to remain silent, and development of the criteria for disobedience.
 64. CIVIL DISOBEDIENCE: THEORY AND PRACTICE, *supra* note 1, at 7 (discussing the risk of obedience in relation to the Nazis and the nuclear bombing of Japan).
 65. Chapter 13 explores these relations in examining global whistleblower laws.
 66. NOJEM, *supra* note 3, at 92–93.
 67. *Id.* at 91, citing Gandhi on *satyagraha* in NONVIOLENCE IN THEORY AND PRACTICE (Robert L. Holmes ed., 1990).
 68. In a sermon that he delivered on July 27, 2003, to the Wesley United Methodist Church in Washington, D.C., on the 40th anniversary of King's March on Washington, Clark described the dangers and fears that he experienced as poll monitor in Mississippi during the 1960s. For Clark, the Kingdom of God was a spiritual realm that would affect history. He referred to King and Gandhi who had used that realm to change history. He ended with a prayer, 'Give us the courage to conquer death, seek justice, and live compassionate lives.'
 69. The documentary, *Most Dangerous Man in America: Daniel Ellsberg and the Pentagon Papers* (PBS television, broadcast June 7, 2011) contains this explanation by Ellsberg. Ellsberg recounts his introduction to the philosophy of Gandhi and King from April 3–4, 1968. DANIEL ELLSBERG, *SECRECY: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS* 212–14 (2002). He describes his emotional response to meeting with war resisters in late August 1969. *Id.* at 262–73. Chapter 5 of *Success and Failures* describes the relationship between Ellsberg's disclosures and nonviolent civil disobedience.

Ellsberg's experience suggests spiritual aspects of whistleblowing. More contemporary whistleblowers make a similar point. Whistleblowing 'is a test of values and loyalties.' K.P. Sawyer, *Whistleblowing: Making It Work* (paper delivered to the National Conference of Whistleblowers Australia, September 11, 2005, in Adelaide, Australia). Such tests likely have psychological and spiritual effects.

Whistleblowing is also a test for those who receive whistleblowers' disclosures. Those who receive disclosures likewise must decide what values and loyalties they adopt. In turn, the responses of recipients influence the conduct of whistleblowers. Regarding those officials who did not speak out, the authors of *RESIGNATION IN PROTEST* indict the potential recipients of disclosures, as well as those who remain silent.

That no major figures in the Johnson or Nixon Administrations quit and spoke up in protest during the Vietnam war or Watergate is a comment, therefore not solely on the ethical state of the men who occupy high office, but also on the ethical climate of the nation. We positively do not *want* to be told. We reject those who break faith with the system, even if they do it to keep faith with us. We prefer officials to be loyal to the President even they are thereby disloyal to the Constitution and to themselves. The men and women at the breaking point in the executive branch know this, and trim accordingly. EDWARD WEISBARD & THOMAS M. FRANCK, *RESIGNATION IN PROTEST: POLITICAL AND ETHICAL CHOICES BETWEEN LOYALTY TO TEAM AND LOYALTY TO CONSCIENCE IN AMERICAN PUBLIC LIFE* 188 (1975).

4. Whistleblower stories and emerging narratives

On April 26, 1951, Senator Richard Nixon introduced S. 1390, a bill to protect federal employees who provided information in congressional investigations. The bill prohibited any officer of the government to ‘dismiss or otherwise discipline a Government employee for testifying before a committee of Congress.’ Senator Nixon argued that such protection was necessary if Senate hearings ‘on our far eastern policy, the conduct of the Korean War and the dismissal of General McArthur’ were to be established on other than ‘half truths and the suppression of testimony.’¹

In 1970, President Richard Nixon ordered the firing of Ernest Fitzgerald, who had been the Deputy for Management Systems of the US Air Force. According to the White House tapes of January 31, 1973, Nixon acknowledged to aide Charles Colson ‘that’s how it happened. I said get rid of the son of a bitch.’² It is clear that Nixon ordered the firing because of Fitzgerald’s testimony before Congress.

Fitzgerald had testified before the Joint Economic Committee of the United States Senate on March 13, 1968, regarding a two-billion-dollar cost overrun on the C-5A military transport program. After Fitzgerald testified, the Air Force demoted him and his supervisors told him that his civil service tenure was a computer error. Subsequently, they assigned Fitzgerald to more trivial duties such as studying cost overruns in the construction of bowling alleys in Thailand. Following his initial testimony, Fitzgerald testified over 50 times before congressional committees.

Fitzgerald’s story made him one of the best-known whistleblowers of the time. Members of Congress had his experiences in mind during consideration of the whistleblower provision of the Civil Service Reform Act of 1978.³ His case embodies many of the concepts underlying the recognition of whistleblowers – the importance of individual responsibility within bureaucracies, the role of ethics in the exercise of that responsibility, and the changing views of the appropriate relationship between individual employees and bureaucracy. Because of its importance, this chapter develops his story, as well as those of others.

The stories of whistleblowers connect themes of the period with the enactment of the whistleblower provision contained in the Civil Service Reform Act

of 1978 (CSRA). These stories changed perceptions of whistleblowers, often presenting them as heroes – brave, honest, and responsible – and emphasized their loyalty rather than their disloyalty. Often these whistleblowers, rather than those in charge of bureaucracies, were the guardians of the interests of the organization or the public good.

This chapter examines some of these stories. The following selected stories represent a larger number of publicly available ones that incorporate similar themes and build similar narratives for protection of whistleblowers. These stories come from three sets of sources. The first set represents stories clearly connected to the enactment of the whistleblower provision. Among these are stories contained in *The Nader Report: Whistle Blowing*,⁴ a volume widely read. Its influence rests in part on Nader's connection with Jimmy Carter and, through him, with civil service reform. As a presidential candidate Jimmy Carter's endorsement of whistleblowing and his campaign promise to introduce legislation to protect whistleblowers followed a meeting with Ralph Nader, one of the authors of the study. The legislative proposal contained in the Nader report bears a reasonable resemblance to the whistleblower provision of the CSRA.⁵

Also included in this first set is *The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Governmental Waste, Abuse and Corruption*,⁶ a report compiled by Senator Patrick Leahy and describing a number of federal employee whistleblowers, the character of their disclosures, the retaliation they faced, and the treatment of the wrongdoers identified by them. Leahy testified on the whistleblower provision and his report was part of the hearing record in the Senate. In deliberations on the whistleblower provision, witnesses and members of Congress referred to the report. This report also draws on the stories of whistleblowers during the Watergate scandal. Like the Nader report, it addressed questions regarding the character of whistleblowing and the goals and purposes of whistleblower protection.

The second set of sources includes ones reasonably assumed to have either directly influenced legislative deliberations or to have been incorporated into sources that were referenced by members of Congress and participants in congressional deliberations. In *Blowing the Whistle*,⁷ Charles Peters and Taylor Branch drew on the experiences of several government whistleblowers. Although their book was not specifically referred to in congressional deliberations, the Leahy report profiled some of the whistleblowers contained in it. Given the connection of the book to participants actively involved in the debate regarding whistleblower protection, and its publication some six years before the enactment of the whistleblower provision, it is reasonable to conclude that these stories were available to, and likely considered by, those involved in the development and enactment of the legislation.

Because of the close connection of whistleblowing to the Watergate scandal, two other examples of whistleblower stories likely influenced the adoption of the whistleblower provisions of the CSRA. One of these is *Resignation in Protest*.⁸ This highly acclaimed volume by Thomas Franck and Edward Weisbard, published after Nixon's resignation, emphasized the lack of resignations in protest against the conduct of the Vietnam War. In doing so, it traced the history of such resignations in the United States. Given its subject matter and its acclaim, it is reasonable to believe that these stories were known to the participants in congressional consideration of the whistleblower provision. The next chapter discusses this book in the context of the constitutional crisis accompanying Watergate.

The story of Daniel Ellsberg also connects with the Watergate scandal. Ellsberg was the Rand Corporation analyst who disclosed the papers prepared for the Department of Defense regarding the history of US involvement in Vietnam, papers subsequently published by newspapers including *The New York Times* and *The Washington Post*. Those papers exposed the lies and mistakes by government officials and led to one of most significant decisions of the United States Supreme Court regarding the media and the First Amendment.⁹ His case was likely known by participants in legislative consideration of the whistleblower provision. Because of the close connection to government abuses identified with the Watergate scandal, the next chapter describes his story.

A third set of stories was perhaps considered in the enactment of the whistleblower provision, but more certainly contributed to general perceptions of whistleblowing and whistleblowers. Frank Serpico's story regarding his resistance to widespread corruption in the New York City Police Department (NYPD) and Ron Ridenhour's narrative discussed in Chapter 2 illustrate the character of stories in this third set. Both of these stories became part of popular culture.

Serpico's exposure of corruption in the NYPD appeared on the front page of *The New York Times* and made him a public figure. A best-selling book by Peter Maas¹⁰ and an award-winning movie starring Al Pacino¹¹ incorporated Serpico's story into popular culture. Ridenhour's exposure of the My Lai massacre concerned an event that dominated the news. Ridenhour's name became linked to one of the most divisive issues of the time.

This chapter reviews these stories and extracts from them narratives about whistleblowers and whistleblowing, narratives that influenced congressional enactment of the whistleblower provision. These narratives continue to affect conceptions of whistleblowing because those views are embodied in the whistleblower provision of the CSRA.

THE NADER REPORT

The book *Whistle Blowing* by Ralph Nader, Peter Petkas, and Kate Blackwell was among the first to set out the stories of whistleblowers and to create a narrative emphasizing themes that led to proposals for change. The book also illustrates Ralph Nader's influence on whistleblowing reform, an influence other authors in the field called a 'kind of antidote to all-out pessimism.'¹² An observer of Nader's influence at the time of the publication of this book tied the success of whistleblower protection to Nader's future. '[H]is explicit espousals of whistle-blowing values has linked him to a new tradition and tied the practice of internal disclosure so closely to Naderism that any speculation of the future of whistle-blowing necessarily involves speculation of the future of Nader.'¹³

This observer may have overestimated the link between Nader's own future and the success of whistleblowing and legal protection of it, but more accurately assessed Nader's influence at the time. In part, Nader's influence linked whistleblower protection to health and safety concerns and identified it as support for the regulation of corporate misconduct.

The links to Nader's broader project of regulating corporate abuses is reflected in the number of public- and private-sector whistleblowers whose stories addressed the effect on consumers of corporate derelictions. For example, among the profiled whistleblowers were William Stieglitz, a government regulator of automobile safety, and Edward Gregory, a safety inspector at General Motors (Carl Thelin, a General Motors' engineer was a whistleblower contained in the group 'beyond the headlines').¹⁴ The Nader book also included Dr. A. Dale Console and Dr. Jacqueline Verrett, scientists at the Food and Drug Administration (FDA) who raised concerns about safety risks to consumers.¹⁵ Likewise, Dr. John Gofman and Dr. Arthur Tamplin, employees of the Atomic Energy Commission (AEC), sought to clarify radiation exposure from nuclear power plants and Carl Houston, a construction supervisor of a nuclear power plant, raised concerns about welding defects in pipes used to cool a nuclear reactor.¹⁶

Other private-sector whistleblowers raised objections regarding safety and health risks. An engineer reported substandard construction work on a project in Peru; employees at the Colt Firearms Company complained about testing procedures for the performance and safety of the M-16 rifle being produced for combat in Vietnam; and an employee asserted that the National Association of Broadcasters skirted compliance with the existing limitations on tobacco advertising on television.¹⁷ A safety engineer, Kermit Vandiviers, refused to rewrite a report for BF Goodrich regarding safety defects for the brakes on the A-7D aircraft and exposed defects in those brakes.¹⁸

The Nader report also discussed public employees who addressed types of government misconduct other than risks to public health and safety. The

discussions of these whistleblowers considered the performance of government. The revelations of several of these employees disclosed fraud, corruption, waste, and mismanagement. Ernest Fitzgerald exposed cost overruns on the C5-A transport and the institutional weaknesses that encouraged waste and fraud; Gordon Rule, a civilian procurement officer in the Naval Material Command publicly criticized and testified before Congress on Navy procurement practices; John McGee, a Navy fuel inspector in Thailand, reported concerns that led the General Accounting Office to confirm the loss or theft of 5.5 million gallons of fuel; Kenneth Cook, an Air Force weapons analyst and physicist, described distortions in scientific reports regarding the effectiveness of the United States' defenses against intercontinental ballistic missiles; and Oscar Hoffman refused to approve substandard work by Navy contractors.¹⁹

Other whistleblowers exposed the government's violation of the civil rights and civil liberties of US citizens. Two former intelligence officers, Christopher Pyle and Ralph Stein, described how the Army in the early 1970s had investigated and collected data on individuals regarding the exercise of First Amendment rights.²⁰ The Army developed an extensive data bank on American citizens. These surveillance activities led to congressional hearings before the Senate Subcommittee on Constitutional Rights chaired by Senator Sam Ervin. In 1976, Ervin sponsored the Federal Privacy Act, which contained a provision prohibiting the collection of information regarding a person's exercise of First Amendment rights.²¹

The Nader book briefly mentioned Ridenhour and his role in revealing the My Lai massacre.²² That story received extensive public attention and represents one of the stories of whistleblowers that influenced attitudes toward whistleblowing. The My Lai episode, described in Chapter 2, also illustrates the attention that Ridenhour's disclosure received, including an order by President Nixon that Ridenhour be followed. That chapter also illustrates the broad and ambiguous meaning of whistleblowing. For example, Ridenhour did not have personal knowledge of the massacre.

These whistleblowers' stories varied in many details. Much of this variance reflected the factual differences attending the individual circumstances of each whistleblower's case. The diversity also captured some more general aspects of the context for whistleblowing; for example, whether disclosures were made by an employee or a former employee, the extent of a whistleblower's efforts to obtain an internal response to allegations of misconduct by the organization of which the whistleblower was part, the effectiveness of the internal response, the scope of public disclosure, and the personal risks to the particular whistleblower.

Despite these variances the stories followed a similar narrative. An individual discovered, or was asked to participate in, misconduct that damaged the organization and harmed persons affected by the organization's conduct. An

individual's decision to report the misconduct or to refuse to participate in it considered the risks of retaliation. The individual's report often responded to institutional inaction or cover-up. Risks of retaliation followed from both internal and public disclosures, although these risks seemed higher with public disclosures. Whistleblowers often suffered retaliation in various forms – sometimes losing their jobs, followed by attempts to destroy their credibility or to blacklist them from other similar employment. By contrast, those persons who committed misconduct or retaliated against the whistleblower often suffered little detriment and sometimes prospered.²³

In deciding whether to speak out or to refuse to participate, whistleblowers looked to several standards. These standards included the obligations of their jobs, ethical standards, and principles of personal morality.

Often individuals underestimated the response likely to be directed at them. The stories of whistleblowers, as well as advice contained in the Nader book, educated potential whistleblowers as to the risks likely to be confronted and properly to be considered. These risks gave substance to the Nader critique of large public and private bureaucracies in which 'common candor requires uncommon courage.'²⁴

The stories of whistleblowers and the narratives emerging from them incorporated several themes. Among these were the importance of individual responsibility, whistleblowing as an ethical undertaking, whistleblowers as the most loyal employees, and the connection of constitutional rights to whistleblower protection.

The stories of whistleblowers stressed the importance of individual responsibility. Arrayed against the individual were powerful, sometimes authoritarian, institutions. Yet individual responsibility became a principle for imposing accountability on these institutions. These narratives stressed that the absence of individual responsibility perpetuated misconduct and multiplied its effects.

In addition, these stories described whistleblowing as an ethical undertaking. Whistleblowers appealed to varied ethical standards. The standard frequently cited by federal employees was the Code of Ethics for Government Service.²⁵

Code of Ethics for Government Service: Any person in Governmental service should: Put loyalty to the highest moral principles and to country above loyalty to persons, party or Government department. Uphold the Constitution, laws and legal regulations of the United States and of all governments therein and never be a party to their evasion. Give a full day's labor for a full day's pay, giving to the performance of his duties his earnest effort and best thought. Seek to find and employ more efficient and economical ways of getting tasks accomplished. Never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration of not; and never accept, for himself or his family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties. Make no private promises of

any kind binding upon the duties of office, since a Governmental employee has no private word which can be binding on public duty. Engage in no business with the Government, either directly or indirectly, which is inconsistent with the conscientious performance of his governmental duties. Never use any information coming to him confidentially in the performance of governmental duties as a means for making private profits. Expose corruption wherever discovered. Uphold these principles, ever conscious that public office is a public trust.

This ethical standard appeared not only in the Nader book, but also was cited by federal employee whistleblowers in Congressional Reports and in considerations of the whistleblower provision.

Whistleblowers also turned to professional codes of ethics when deciding how to respond to knowledge of misconduct. For example, The Nader report contains several codes of professional ethics, including the Engineers Code, the Civil Engineers Code, the Chemists Code, the Code of Professional Responsibility of the American Bar Association, and the Principles of Medical Ethics.²⁶

The stories of whistleblowers demonstrated that they were often the ones who pursued the best interests of the organization, not the managers whose misconduct provided the content of their objections. This description of whistleblowers fit comfortably with contemporaneous discussions in administrative law of the problem of regulating administrative discretion. In his classic 1969 work, *Discretionary Justice: A Preliminary Inquiry*,²⁷ Kenneth Culp Davis distinguished between the interests of the government and the interests of the individual managers who exercised the discretion available to a government agency. Davis argued that the United States government is not a single entity but represents the administrators charged with carrying out the law, the Congress that establishes those laws, and the courts that limit administrative abuses. These courts are carrying out the will of the government democratically expressed when they check the government's agents.²⁸

Although Davis did not directly discuss whistleblowers, he championed the view that the decisions and behavior of government agents do not necessarily represent the interests of a government, particularly a democratic one. Rather than a conflict between a loyalty to the organization and loyalty to individual conscience, the whistleblower's individual judgment could show a greater loyalty to the organization (and to those affected by it) than the actions of other employees whose conduct undermined the organization and abused the discretion available to it.

The stories of whistleblowers also connected constitutional rights, such as due process and the right of free speech and association, to whistleblower protection. These constitutional rights strengthened individual liberty, a requirement for the exercise of individual responsibility within large organizations. These were the rights of citizens that should be extended under differ-

ent legal theories, not only to the public, but also to private institutions. These rights supported whistleblowing, but whistleblowing in turn vindicated these rights. The implications for government agencies in particular were significant; the effects on corporations were radical.

The stories of whistleblowers set out themes that structured much of the subsequent debate about whistleblower laws. Those stories also generated a number of reform proposals. These proposals indicate the options considered at the time. The options chosen in the whistleblower provision of the CSRA have affected the successes and failures not only of that whistleblower provision, but also of a variety of other whistleblower laws.

The Nader report proposed several approaches to legal protection for whistleblowers. These proposals included a statute, The Government Employees Accountability Act.²⁹ This proposal influenced the whistleblower law enacted six years later, not simply because of the influence of the book, but also because Nader and the organization he created, Public Citizen, were important advocates during the consideration of that law. This advocacy, as well as the legislation, showed several similarities to this 1972 draft statute.

The proposals in the Nader report suggested approaches that, while not necessarily inconsistent, represented different ways of protecting whistleblowers. These proposals included an internal agency ombudsman, civil service reform, including a special administrative tribunal separate from the United States Civil Service Commission, and the protection of federal employees from a broad range of discriminatory and retaliatory action resulting from employees' whistleblowing.³⁰

The Nader report also considered treating whistleblowers under anti-discrimination provisions applicable to other types of discrimination, such as race and gender discrimination.³¹ This suggestion looked to the Civil Rights Act of 1964 and would have merged whistleblowing with laws prohibiting retaliation for asserting protected rights. The wisdom of this alternative approach continues to be debated in light of the subsequent successes and failures of the whistleblower provision.

Several of the proposals in the book, as applied to both government agencies and corporations, made whistleblowing less of an individual and more of a group enterprise. For example, the book recommended the creation of internal disclosure mechanisms, including an internal ombudsman, where an agency official, rather than the whistleblower, would make the disclosure. The book also advocated that labor unions and professional societies do more to nurture whistleblowing and to support whistleblowers.

BLOWING THE WHISTLE BY PETERS AND BRANCH

Blowing the Whistle by Peters and Branch, published the same year as the Nader book,³² contained a number of articles on specific whistleblowers that had appeared in the *Washington Monthly*. The authors of *Blowing the Whistle* frequently referred to the Nader conference on which the Nader book was based. That conference occurred in January 1971 and was a sign that whistleblowing had achieved 'a measure of public legitimacy.'³³ These articles, along with the settings for them and the authors' introductions and conclusions, addressed several whistleblowers also discussed in the Nader book, including Christopher Pyle (regarding Army surveillance of US citizens), Charles Pettis (disclosures regarding faulty planning and construction of a project in Peru), John McGee (regarding problems with control of Navy fuel in Thailand), Jacqueline Verrett (scientific reports on tests of cyclamates on chicken embryos), and Ernest Fitzgerald (cost overruns on the C-5A transport).³⁴

Peters and Branch also included several whistleblowers omitted from the Nader book. Among these were: James Boyd, Senator Thomas Dodd's aide who disclosed corruption by the senator; Terry Lenzner and Frank Jones, who were fired as officials at the Office of Economic Opportunity for objecting to 'gutting' the Office of Equal Opportunity of the Office of Legal Services; Jeffrey Record, a former Central Intelligence Agency (CIA) analyst, who discussed how the use of Cobra gunships in Vietnam increased civilian casualties; Patrick McGarvey, a former Defense Intelligence Agency analyst, who criticized the performance of the agency in acquiring information about Vietnam and the effects of command influence on intelligence; and actions by Department of Justice attorneys objecting to administration actions to delay a suit challenging segregation in Mississippi.³⁵

Although the Nader book profiled only some whistleblowers who had left or resigned their positions prior to criticizing the conduct of persons within the agency for which they had worked, a substantial number of *Washington Monthly* articles discussed such persons. Like the Nader book, *Blowing the Whistle* included several instances of group dissent or group action in both disclosures and protest.

These stories suggest a narrative somewhat different than the one contained in the Nader book. Many of the whistleblowers involved did not make new public disclosures but instead criticized policies or conduct already known to the public.³⁶ According to the authors, the risk of whistleblowing follows 'Newtonian principles' because the agency's reaction 'varies according to how intensely his actions [harm the employer or managers]. If his charges strike home, he can expect tribulations. ...'³⁷

The narrative also differs because Peters and Branch are 'generally unsympathetic' to job protection for whistleblowing employees. If, however, an

employee is charged with protecting public health and safety, they must publicly warn those at risk of injury and thus the authors advocate 'absolute protection.'³⁸

The stories in the Peters and Branch book give a good sense of the narrative likely expected from agencies or corporations or their officials and managers. This narrative suggests why some whistleblowers survive their disclosures and others do not. The 'employers' narrative' focuses on the employee rather than the disclosures by arguing that the assertions made are unsupported and should be assumed to be fallacious because the employee acts for personal, often petty, motives, such as revenge or notoriety. The employee is disgruntled, seeking an avenue for frustrations or is poorly performing or negligent and anxious to acquire protection from legitimate discipline. The employee's passion or commitment to obtain explanations of the allegations and redress from damaging actions by the employer reflect not so much personal responsibility as some type of mental imbalance or compulsion. Resources are devoted to silencing or removing the employee rather than to considering reform. The whistleblower has the obligation to establish both the alleged agency misconduct and alleged improper action against the employee.

In addition to the power of the allegations of misconduct and the position and influence of the officials implicated by them, Branch and Peters describe several factors that determine the survival of a whistleblower. Among these factors are the type of unique skills or abilities that the whistleblower brings to the workplace, the ability of the employee to work independently without assistance and cooperation from others, the publicity surrounding the case (a condition resting heavily on how newsworthy it is considered), support for the whistleblower in Congress, and the quality of the advice and assistance available.³⁹

Whistleblowers, however, usually confront several obstacles. Among these are job vulnerability, proof of the basis for their charges of alleged misconduct, the power of group loyalty, and bureaucratic organization. Given these obstacles, the authors praised whistleblowing as an act of personal commitment and courage.⁴⁰ Although not explicitly stated, this view combined with a reluctance to provide protection, particularly job security, to whistleblowers conjures a story of ethical resistance – a story with strong ties to the practices of civil disobedience in the 1960s. Civil disobedience is a persuasive act because those engaging in it accept the personal cost of doing so. The book's term, 'whistle-blowing,' differs from the scope and meaning of the almost identical term, 'whistleblowing,' in the Nader book. Serendipitously, the difference in spelling reflects both the commonality of the narrative of whistleblowing in the two books and the important differences in emphasis and meaning.

The events of the decades following these two books have not removed the complexity and subtlety of the phrase – regardless of how it is spelled. Those decades have also seen a renaming of the phenomenon, with advocates and others considering the connotations and thus the narrative invoked by the term chosen. The interpretation of whistleblower laws, particularly the whistleblower provision in the CSRA, involves not simply technical rules of statutory interpretation, but also a choice between narratives.⁴¹

ERNEST FITZGERALD'S STORY

Ernest Fitzgerald is perhaps the whistleblower most likely to have influenced the whistleblower provision. His story appeared in the Nader report, as well as in Peters and Branch's book, and was included in the Leahy report, compiled and issued after Watergate. Fitzgerald testified before congressional committees considering the whistleblower provision and he advocated positions often at odds with the proposals of the administration and of other whistleblower advocates. To some observers his opposition to reliance on administrative redress and his advocacy of rights of action in federal courts now seems prescient.

Fitzgerald's case led to several important judicial and administrative decisions, decisions issued both before and after the passage of the legislation. Likewise, his disclosures directly invoked the power of Congress, and members of Congress referred to his case during deliberations on the whistleblower provision.⁴² He pursued his interest in whistleblower protection in the decades following the legislation. He played an important role in challenging the 'gag order' regulations issued by President Ronald Reagan and then rejected by Congress in legislation prohibiting their implementations.⁴³ He advised regarding other whistleblower reforms, including subsequent amendments to the whistleblower provision.

Fitzgerald's story also follows the narrative presented for whistleblowers and incorporates the major themes discussed above:

- (1) the importance of personal responsibility in the face of bureaucratic misconduct and obstruction;
- (2) the role of ethics and ethical standards in the actions of whistleblowers;
- (3) the commitment of the whistleblower to the mission and interests of the agency or company for which the whistleblower works;
- (4) the courage and perseverance required to pursue allegations of official misconduct and to face the subsequent retaliation; and
- (5) the principles for reform generated by the acts of whistleblowers.

Fitzgerald had a distinguished career before joining the Air Force as a civilian employee in 1965 as the Deputy for Management Systems for the Air Force.⁴⁴ In the 1950s he worked as a quality control engineer at different companies, including as a senior plant engineer at Kaiser Aluminum and Chemical Corporation. By the end of the decade he became a managing associate and principal at Arthur Young and Company; and in 1962 he began to serve as the President of Performance Technology. He took a substantial cut in pay to take the civilian position with the Air Force.

In 1965, the Department of the Air Force awarded Lockheed the contract to build 120 huge transport planes – the C-5A – at a cost of two billion dollars. In his position Fitzgerald had responsibilities for cost analysis and oversight of this project.

By 1968, Air Force officials were aware that the cost would be closer to five billion dollars. Senator William Proxmire, who had heard rumors of the possible overrun, conducted hearings and called Fitzgerald to testify. On March 13, 1968, Fitzgerald appeared before Proxmire's Joint Economic Committee. Fitzgerald's supervisors pressured him not to testify or, at the least, to 'play dumb.' Fitzgerald testified nevertheless.⁴⁵

In an interview several years later, Fitzgerald's wife, Nell, reported, 'I told him that I really didn't think that I could live with a man I didn't respect and if he went over there and lied, I'd have no respect for him.'⁴⁶ In that hearing Fitzgerald was asked whether the C5-A might be two billion dollars over budget. After 'waffling,' Fitzgerald acknowledged that the figure for the overrun was 'approximately right.'⁴⁷

After his testimony, Fitzgerald was demoted and his supervisors told him that his promised civil service tenure was a computer error. He was assigned to trivial projects such as going to Thailand to study the cost overruns on bowling alleys. Fitzgerald later testified that he was socially and professionally ostracized at the Pentagon.⁴⁸

John Lang, the Administrative Secretary to the Secretary of the Air Force, prepared a January 6, 1969, memorandum outlining three ways of getting rid of Fitzgerald. 'One of the ways was the reduction-in-force method which was later put into effect.'⁴⁹ On May 7, 1969, the Secretary of the Air Force, Robert Seamans, before a closed session of the Armed Services Committee, accused Fitzgerald of leaking confidential documents, a charge which Seamans later retracted.⁵⁰ Secretary of Defense Melvin Laird, in response to Fitzgerald's reduction-in-force, told members of Congress that Fitzgerald was not a 'team player' and was 'fired' even though his C5-A cost estimates were correct. After his dismissal, Fitzgerald sought a job in private industry but found that he had been blacklisted.⁵¹ Fitzgerald always maintained that he had been dismissed for 'committing truth.'⁵²

Fitzgerald believed he was only carrying out the responsibilities of his job

and fulfilling the ethical standards for government service. He kept a framed copy of the Code of Ethics for Government Service behind his desk at the Pentagon. Fitzgerald also appealed to the ethical standards applicable to professional engineers. These ethical standards make industrial engineers responsible for uncovering waste, mismanagement, and fraud. One of the basic tasks of an engineer is to save money. Fitzgerald believed that 'the only group of engineering professionals who take a code of ethics seriously is civil engineers.'⁵³ Columbia University Industrial Engineering Professor Seymour Melman stated that Fitzgerald suffered 'for standing by the ethics and values that every engineer ought to have.' '[He is a] model, notably to young engineers who need models of ethical, professional and competent behavior that serve not only the needs of a particular employer, but is also consistent with the best interests of a wider society.'⁵⁴

Fitzgerald was removed during a reduction in force due to a reorganization in the department. Usually a reduction in force implicates many persons, and gives several employees the right to take other positions within an agency. Fitzgerald's reduction in force affected only one person – Fitzgerald – denying him the right to seek another post in the Air Force.

In his appeal to the Civil Service Commission, the agency with the power to review a reduction in force,⁵⁵ Fitzgerald demanded a hearing open to the public, a demand rejected by a hearing examiner at the commission. The United States Court of Appeals for the District of Columbia Circuit, however, required that the hearing be open to public.⁵⁶

In the subsequent hearing the hearing examiner found the reduction in force was improper, not because it was retaliation for Fitzgerald's congressional testimony, but because the reduction in force decision was taken for reasons personal to him.⁵⁷ The Air Force returned Fitzgerald to a lower graded position and he spent the next eight years contesting this assignment before the Air Force returned him to the position that he originally held. The government, however, successfully denied Fitzgerald the interest that he would have earned on the back pay he received.⁵⁸

Fitzgerald also sued Richard Nixon, seeking damages for Nixon's unconstitutional and illegal actions in ordering his removal. In a 5–4 decision, the United States Supreme Court held that the President was immune from damage suits for acts conducted in his capacity as President.⁵⁹ Strong dissents objected to this grant of immunity. Justice Byron White argued that the Court's decision allowed '[a] President acting within the outer boundaries of what Presidents normally do, may, without liability, deliberately cause serious injury to any number of citizens even though he knows his conduct violated a statute or tramples on the constitutional rights of those who are injured.'⁶⁰ He also believed that such immunity weakened individual accountability for illegal acts.⁶¹ Justice Harry Blackmun added: 'For me the Court leaves unan-

swered the unanswerable argument that no man, not even the President of the United States, is absolutely and fully above the law.’⁶²

Nixon was not the only individual responsible for retaliation against Fitzgerald who escaped punishment for his conduct. Other officials suffered no detriment for their involvement in the misconduct disclosed by Fitzgerald or for their actions against him; rather, they prospered in their careers. Harold Brown, then Secretary of the Air Force who ordered a memorandum on the three best ways to fire Fitzgerald, became the Secretary of Defense. Major General Duward Crow, who gave the ‘false cost figures on the C-5A to Congress,’ retired at the rank of Lieutenant General and became the Assistant Administrator at NASA, ‘receiving both his military pension and an Executive Level V salary.’ Colonel Hans Driessnack, ‘the secret informer who reported false charges about Fitzgerald to the Office of Special Investigation,’ became a major general. Seamans, who followed Brown as the Secretary of the Air Force, ‘went on to become Administrator of the ERDA [Energy Research and Development Administration] after being forced to publicly retract his charge that Fitzgerald had leaked confidential documents.’⁶³

The stories of other whistleblowers influenced popular culture and can be less directly linked to proposals for reform and to congressional consideration of them. Still, these stories affected perceptions of whistleblowing and of whistleblowers. One indication of their likely effect is the similarity of the narrative contained in these stories to the ones already examined. One of these, that of Ridenhour, is described in Chapter 2. The other of these is the story of Serpico, the New York City police officer whose disclosures led to a citywide investigation of police corruption.

FRANK SERPICO’S STORY

Thanks to a best-selling 1973 book by Peter Maas and a popular 1973 movie starring Al Pacino, both entitled *Serpico*, New York City police officer Frank Serpico became identified with honesty and courage. His disclosures, including his testimony before the Knapp Commission, led to responses by the police department and the city’s administration to widespread corruption in the New York City Police Department.

Serpico’s story was not of a single, although important disclosure, but rather of decades-long career committed to honesty and resistance to endemic corruption. At first, he sought not to change the system but simply to do his job. Serpico faced more than job retaliation. He also confronted personal harassment, threats, and the risk of physical injury or death. On February 3, 1971, Serpico was shot in the face by a drug suspect at an apartment door when his partners failed to come to his assistance. In some accounts they failed

to render assistance or to seek medical care for him as he lay bleeding in the hallway of the apartment building.⁶⁴ While in critical condition in the hospital he received get well cards carrying the opposite sentiment, such as one that said in its printed message – ‘With Sincere Sympathy and Regret’ – followed by the hand-written note, ‘that you didn’t get your brains blown out, you rat bastard. Happy relapse.’⁶⁵ Many precinct bulletin boards contained pleas for money to pay for a lawyer for the ‘guy who shot Serpico’ and to pay for lessons to teach him to shoot better.⁶⁶

The child of Italian immigrants, Serpico dreamed of becoming a cop throughout his childhood. He respected police officers and saw them as befriending and protecting the residents of the city. He did not, however, believe that a gun and a badge should lead to special privileges. *Gangbusters* was his favorite radio show. After service in Korea he studied police science at Brooklyn College and in September 1959 passed the examinations for the police academy. In 1960 he became a rookie police officer.

In the movie, several scenes capture Serpico’s initial naiveté and his education about how corruption large and small permeated the department. He first recognizes that a restaurant owner gives the officers free, if cheap, food in return for ignoring parking violations. He learns that rather than supporting his aggressive investigation and policing, his supervisors are annoyed by it. Finally, as he refuses to accept bribes at traffic stops or accept his portion of money from gamblers who pay for protection, Serpico becomes aware of the hold that corruption has on the New York City Police Department.

In 1966, after receiving, in a police parking garage, an envelope containing \$300, he contacted a senior police official to discuss what he should do. The officer suggested that he give it back, signaling that he is an honest cop who nevertheless is not a threat to those ‘on the take.’ The officer stated that another course of action would find Serpico ‘face down in the East River.’⁶⁷

After a transfer to plainclothes in the Bronx, he continued to refuse to take money and aggressively pursued gamblers, including ones paying for police protection. Ironically, he became mistrusted not because of dishonesty in the performance of his duties but for his honesty. In 1968 Serpico went to the Bronx District Attorney who prosecuted one case of corruption involving eight patrolmen. Serpico was upset that the prosecution was limited to lower-level officers and did not address systematic corruption in which command officials participated in or at least condoned corruption.

In early 1969 he was transferred to Manhattan North where he had the reputation of refusing to take bribes and of ‘ratting out’ other officers. His commanding officer, Paul Delise, was the only person who would work as a partner with Serpico. Often the two of them had to lose their police tail before beginning work.⁶⁸ They were followed to see whether they interfered with persons who were receiving police protection.

Serpico also found that appeals to command officials, including ones in charge of investigating corruption, to the police commissioner, and to the mayor's office were not fruitful. The movie captures Serpico's increasing frustration and alienation. It also demonstrates the courage and resourcefulness that he needed to follow his principles and to survive. At one point he says, 'I feel like a criminal because I don't take money' and, 'I just want to go someplace where I can do my job.'

Having broken the code of silence, he became a marked man. According to Maas, Serpico 'debated his future as a cop, sensing the underlying hatred of the police establishment toward him after what he had done, knowing that he would remain forever someone apart.'⁶⁹ On June 15, 1972, he resigned from the New York City Police Department. One of the final scenes in the movie shows him, partly in response to a rumored Mafia plot to kill him, forlornly sitting on the dock waiting to board a ship that will take him to Europe to live among strangers.

Serpico was portrayed in the book and movie as a compelling and attractive character. He adopted an unorthodox life style for a police officer. He lived in Greenwich Village, took college courses, loved opera and ballet, and was comfortable with many different kinds of people. In the movie, one observes Serpico go from a clean-shaven young officer to a long-haired, bearded, and mustachioed veteran. At the beginning of his book, Maas notes women's attraction to Serpico and describes his many affairs with beautiful women.⁷⁰

The movie was a commercial success perhaps because these disclosures were new and shocking and were not commonly known by the public. According to Pacino's manager, the movie made Pacino a movie star for his defining and nuanced portrayal of a complex, interesting, and important man. The combination of the story and the character presented in the movie made Serpico an iconic portrait of a whistleblower. The narrative of the story is similar to others in that it stresses the obligation of an employee's professional role and the importance of ethics and morality. It also demonstrates how the practices that guide many organizations are at odds with the public goals of the institution and the legal and other standards intended to control it.

As with Serpico, the authority of an institution, particularly its power over its members and those subservient to it, can be used not to vindicate the purposes for which it is given power but to perpetuate neglect, misconduct, and corruption. In such an institution, commitment to honesty and performance can invoke suspicion, hostility, harassment, and even death. Ironically, another star witness before the Knapp Commission was a corrupt officer who agreed to testify in return for immunity. Maas reports that the NY City Police Department increasingly began to offer immunity to dishonest officers found to have engaged in corruption.⁷¹

More than the movie, Maas's book focuses on the causes of corruption. Among these were the long history of corruption in the police department,⁷² the practices of plainclothes units, particularly the structure that made command oversight difficult, the attitudes of recruits who did not seem interested in what they could accomplish as police officers,⁷³ and alienation from the public.⁷⁴ Maas demonstrates that no machinery really dealt with corruption and that the lack of credible avenues of redress through which to report corruption left officers with only the choice to participate or not because 'anything else was unthinkable.'⁷⁵

Even in some elite units only a small percentage of officers were 'not on the take.'⁷⁶ Maas profiles several senior leaders in the department who failed to consider or aggressively to pursue allegations of corruption – investigations that were undertaken often lacked adequate manpower.⁷⁷ The preservation of the image of the department and of the reputations of senior officials made meaningful responses to endemic corruption difficult. Maas closes with an indictment of the role of the police bureaucracy and the implications for honest officers: 'All Frank Serpico ever wanted was to be a good cop. Perhaps that was the trouble: he had wanted too much.'⁷⁸

Serpico's experience identifies two hard truths often confronting whistleblowers. First, reports to officials of misconduct within an organization led not to redress but retaliation. Serpico's repeated attempts to raise issues of corruption and crime through reports within the chain of command of the police department led not to action against this misconduct but to retaliation against him. Serpico became a marked man and suffered increasing harassment. Second, when corruption and crime are identified but go uncorrected, corruption and crime become institutionalized. Serpico's disclosures did not identify things unknown within the chain of command. Both his specific disclosures and his identification of widespread corruption were known, including by most of the persons whom he contacted. He provided not new information of misconduct but new information regarding the likelihood that officials would be held to articulated standards of conduct.

Serpico's experience also clarifies the relationship between whistleblowers and investigative reporters who often present the revelations of those whistleblowers to the public.⁷⁹ David Burnham, a reporter for *The New York Times*, received information from Serpico and others who Serpico convinced to speak. How Serpico came to Burnham and the character of their relationship offers a way of examining these relationships more broadly.⁸⁰

Kristin Birks's detailed interviews with Serpico and Burnham give a picture of that relationship. After years of effort, Serpico had exhausted avenues of both internal and external reporting. He had contacted numerous officials within the police department all the way to the office of the commissioner and gone outside the department to the office of Mayor John Lindsay.

He approached Burnham because of an article that Burnham had published on December 16, 1968, regarding police officers on night duty sleeping during their shifts. The reputation and influence of Burnham's employer, *The New York Times*, also influenced his decision. Finally, Serpico told Birks that 'I think it would have been immoral *not* to blow the whistle.'⁸¹

Burnham was receptive to Serpico's disclosures for a number of reasons. Burnham had investigated the issue of police corruption for almost a year and a half. Serpico's information was new and important and described egregious conduct. Burnham was impressed by the idealism, honesty, quest for truth, outrage, and perseverance of Serpico and David Durk, a member of the department who accompanied Serpico.⁸² Durk's involvement, that of a police officer of another socioeconomic class who was part of a different division of the department, collaborated Serpico's allegations.⁸³ A discussion at *The Times* with Serpico, Durks, Eddie Mammet, a member of a special narcotics investigation unit, and Inspector Delise, as well as independent investigation by Burnham, confirmed Serpico's allegations.⁸⁴

For Serpico, the contacts with Burnham provided several benefits. Burnham gave emotional and moral support. Burnham independently validated and supported his allegations and provided a way of addressing serious wrongdoing. Burnham's involvement 'led to a sense of some safety and the support of like-minded individuals ... a curtailment of frustrations and also encouragement to believe that there is light at the end of the tunnel, however, dim.'⁸⁵ Publication of such an important story also could provide protection from further retaliation.

Burnham did not believe that the story contributed to the shooting of Serpico. Burnham recalls that Serpico thought the shooting was an accident.⁸⁶ Burnham, however, cannot say whether the story protected Serpico from retaliation. After the story ran, Burnham received several death threats. A sympathetic police official told Burnham, 'Listen kid, listen kid. You never worry about the death threats you *get*.'⁸⁷

Burnham thought the publication of the story fit the tenor of the decade, reflecting public disillusionment and a 'skeptical mood' at *The Times*.⁸⁸ Chapters 2 and 3 describe how the context of the period helped to create a skeptical mood. That context affected the content and the acceptance of these narratives. Burnham believes the story had 'an enormous impact on the quality of life' in New York City.⁸⁹

Today, Burnham is more skeptical about the influence of investigative journalism. Such journalism 'is a pretty thin stream in the river of media pap.' He opines, 'If investigative journalism is the savior of America then we are all in danger!'⁹⁰

Like all abstractions the term whistleblowing is unclear and supports inconsistent and conflicting propositions. These stories informed the debate in the

1960s and 1970s about the meaning of whistleblowing. These stories helped give definition to the term.⁹¹ That definition of whistleblowing contains the 'conceptual DNA' of the narratives of these whistleblowers. Through those narratives and the cultural changes that they reflect, that DNA is also incorporated into the character of whistleblower laws.⁹²

The whistleblower stories that emerged between 1966 and 1978 created more positive images of whistleblowers. Some of the descriptions of whistleblowers of the period illustrate the influence of these stories. Those descriptions included ethical resister, patriot, concerned professional, good citizen, honest and courageous official, and dedicated employee. These affirmative descriptions captured different aspects of the narratives emerging from their stories and illuminated principles such as individual responsibility, personal liberty, ethical behavior within large bureaucracies, broader definitions of employee loyalty, and the accountability of those exercising public and private power. These stories of whistleblowers gave new meanings to old activities, influenced reform, and affected the successes and failures of whistleblower laws.

NOTES

1. CONG. REC. 4391 (Nixon's remarks) 4635 (language of the amendment).
2. Kenneth Bredemier, *Tapes Show Nixon Role in Firing of Ernest Fitzgerald*, WASH. POST, Mar. 7, 1979, at A2. In a press conference, Nixon also conceded that he had ordered Fitzgerald fired. On the tapes, he told aide John Ehrlichman that Fitzgerald was fired for complaining in public and 'not taking orders.'
3. For example, the Report of the National Academy of Public Administration on Watergate referred to Ernest Fitzgerald in its discussion of whistleblowers. FREDERICK C. MOSHER, ET AL., WATERGATE: IMPLICATIONS FOR RESPONSIBLE GOVERNMENT 85-86 (1974).
4. RALPH NADER, PETER PETKAS & KATE BLACKWELL, WHISTLE BLOWING: THE REPORT OF THE CONFERENCE ON PROFESSIONAL RESPONSIBILITY (1972) [hereinafter WHISTLE BLOWING].
5. *Id.* at Appendix D, 275-86.
6. STAFF OF SEN. PATRICK LEAHY, 95TH CONG., THE WHISTLEBLOWERS: REP. ON FED. EMPLOYEES WHO DISCLOSE ACTS OF GOVERNMENT WASTE, ABUSE, AND CORRUPTION (Comm. Print 1978). Chapter 5 discusses this report in detail.
7. CHARLES PETERS & TAYLOR BRANCH, BLOWING THE WHISTLE: DISSENT IN THE PUBLIC INTEREST (1972).
8. EDWARD WEISBAND & THOMAS M. FRANCK, RESIGNATION IN PROTEST: POLITICAL AND ETHICAL CHOICES BETWEEN LOYALTY TO TEAM AND LOYALTY TO CONSCIENCE IN AMERICAN PUBLIC LIFE (1975).
9. *New York Times v. U.S.*, 403 U.S. 713 (1971).
10. PETER MAAS, SERPICO (1973).
11. SERPICO (Paramount Pictures 1973).
12. PETERS & BRANCH, *supra* note 7, at 277.
13. *Id.* Peters and Branch, however, suggest that future whistleblowers 'may prosper even without Nader, if they can overcome concrete, traditional obstacles to the exercise of conscience. ...' Perhaps Nader's greatest contribution is that 'he has helped to bring about a value change in which people assume greater loyalty to the general public at the expense of old loyalties to the immediate boss.' *Id.* at 280.

14. WHISTLE BLOWING, *supra* note 4, at 98–108 (William Stiglitz); 75–89 (Edward Gregory); 158–60 (Carl Thelin).
15. *Id.* at 90–97 (Dr. Jacqueline Verrett); 118–25 (A. Dale Console).
16. *Id.* at 55–74 (Dr. John W. Goffman and Dr. Arthur R. Tamplin); 148–51 (Carl Houston).
17. *Id.* at 135–39 (Charles Pettis); 140–46 (The Colt workers); 156–57 (Warren Brown).
18. *Id.* at 157–58.
19. *Id.* at 39–54 (Ernest Fitzgerald); 166–67 (Gordon Rule); 167 (John McGee); 169–70 (Kenneth Cook); 168–69 (Oscar Hoffman).
20. *Id.* at 126–34.
21. S. REP. NO. 93–1416, 5–6 (1974). The Report references information disclosed by Pyle and Stein. ‘The investigation of military surveillance over American political dissidents by the Senate Subcommittee of Constitutional Rights headed by Senator Ervin revealed yet another dimension of abuses during the late 1960s involving intelligence gathering activities that violated basic privacy rights.’ The footnote supporting this statement refers to an article by Christopher Pyle. Chapter 12 in this book describes similar practices today of the federal and state government in collecting private information through illegal electronic surveillance and by targeting the exercise of First Amendment rights.
22. WHISTLE BLOWING, *supra* note 4, at 167–68.
23. MYRON PERETZ GLAZER & PENINA MIGDAL GLAZER, *THE WHISTLEBLOWERS* (1989). The Glazers focused on an aspect of retaliation not emphasized in the narrative preceding the enactment of the 1978 whistleblower provision; that is, the role of retaliation in solidifying an individual’s resistance and calling forth supporters. The Glazers called this reaction the ‘Irony of Retaliation.’ *Id.* at 136. They also considered, more than earlier works described here, the fears for physical safety felt by many whistleblowers. *Id.* at 145–47.
24. WHISTLE BLOWING, *supra* note 4, at 3. Nader also proposed the proposition that ‘the speed of exit of a public servant is almost directly proportional to his commitment to serve the public.’ *Id.* at 8.
25. H.R. CON. RES. 175, 85th Cong. (1958).
26. WHISTLE BLOWING, *supra* note 4, at 275, Appendix B.
27. KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* (1969).
28. *Id.* at 177.
29. WHISTLE BLOWING, *supra* note 4, at 273, Appendix D.
30. *Id.* at 192–205 (suggesting these options).
31. *Id.* at 220–21 (stating applicability to corporations).
32. PETERS & BRANCH, *supra* note 7.
33. *Id.* at 8.
34. *Id.* at 40–76 (Christopher Pyle); 182–94 (Charles Pettis, John McGee, and Dr. Jacqueline Verrett); 207–22 (Fitzgerald). Fitzgerald wrote an article in 1970 for the *Washington Monthly*, ‘describing how the Defense Department conned the press into misreporting the work of the panel commissioned to study Pentagon waste in the midst of the controversy over the C-5A.’
35. *Id.* at 22–29 (James Boyd); 77–100 (Terry Lenzner and Frank Jones); 101–08 (Jeffrey Record); 109–20 (Jeffrey McGarvey); 152–66 (Gary J. Greenberg and the revolt at the Department of Justice).
36. *Id.* at 21. The following chapters in Peters and Branch’s book deal with ‘alumnus and pure’ whistleblowers.
37. *Id.* at 182.
38. *Id.* at x (this source contains both quotations in this paragraph). In concluding, Peters and Branch state ‘that there should be more protection for whistle-blowers who prove right[,] but resist whistleblowing becoming “an automatic free ride.”’ *Id.* at 298.
39. *Id.* at 193–94 (discussing why Dr. Jacqueline Verrett survived her whistleblowing at the Food and Drug Administration).
40. *Id.* at 276–98.
41. Chapter 11 of this book, *SUCCESSSES AND FAILURES OF WHISTLEBLOWER LAWS*, allows a reader to consider how narrow interpretations of whistleblower laws may reflect more than technical rules of statutory interpretation.

42. Robert G. Vaughn, *Statutory Protection of Whistleblowers in the Federal Executive Branch*, 1982 U. ILL. L. REV. 615, 620, n.21.
43. Neil Roland, *Air Force Employee Refuses to Sign Secrecy Pledge*, UPI, Aug. 17, 1987; *Whistleblower Might Lose Job*, CHI. TIMES, July 5, 1987. The history of this gag order and congressional reaction to it is described in, LOUIS FISHER, CONG. RESEARCH SERV., RL33215, NATIONAL SECURITY WHISTLEBLOWERS 41 (2005).
44. Many biographical details are taken from Biography of A. Ernest Fitzgerald, INSTITUTION OF GOVERNMENT AND PUBLIC AFFAIRS, available at <http://igpa.uillinois.edu/ethics/person/ernest-fitzgerald>, and <http://www.af.mil/bios/bio.asp?bioID=5423> (last visited Feb. 20, 2012).
45. *The Dismissal of Ernest Fitzgerald by the Department of Defense, Hearings before the Subcomm. on Economy in Gov't of the Joint Economic Comm.* 91st Cong. App. A at 57 (1969) (describing the events leading to Fitzgerald's testimony); 121 (statement of Sen. William Proxmire) [hereinafter *Joint Economic Committee Hearings*].
46. Peter Carlson, *A. Ernest Fitzgerald: His Commitment to Cutting Costs Made Him No. 1 on the Pentagon's Hate List*, PEOPLE, Dec. 1995, at 77.
47. *Id.*
48. *Joint Economic Committee Hearings*, *supra* note 45, at 11.
49. *Id.* at 121–22 (summarizing the Lang memorandum).
50. *Id.* at 124.
51. Carlson, *supra* note 46.
52. One record of this often repeated statement by Fitzgerald can be found in Alison Ross Wimsatt, *A. Ernest Fitzgerald: The Struggles of Being Ernest*, 41 INDUS. MGMT. 12, 15 (1999).
53. *Id.* at 18.
54. *Id.* In the same article, Robert Bell, Professor of Management at New York University's Brooklyn College of Economics, calls Fitzgerald 'the greatest living American patriot.' He is 'a heroic figure' who had 'enormous influence on the country.' *Id.* at 19.
55. Fitzgerald was able to appeal only because he was a veteran entitled to 'Veteran's Preference.' At the time, a non-veteran could not appeal a reduction in force to the Civil Service Commission.
56. *Fitzgerald v. Hampton*, 467 F.2d 755 (D.C. Cir 1972).
57. This decision is discussed in *Fitzgerald v. Nixon*, 457 U.S. 731, 738–739 (1982).
58. *Fitzgerald v. Stats*, 578 F.2d 435, 439–440 (D.C. Cir. 1978)(based on the doctrine of sovereign immunity).
59. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).
60. *Id.* at 764.
61. *Id.*
62. *Id.* at 797. Two scholars credit Fitzgerald's lawsuit against Nixon as an important in the passage of the whistleblower provision in the Civil Service Reform Act. The suit of course had been pending for sometime before the final decision of the United States Supreme Court. DANIEL P. WESTMAN & NANCY M. MODESITT, WHISTLEBLOWING AND THE LAW OF RETALIATORY DISCHARGE 12–14 (2d ed. 2004).
63. *Civil Service Reform, Hearings on H.R. 11280 Before the House of Representatives Comm. on Post Office and Civil Serv.* 95th Cong. 339 (1978) (testimony of Ralph Nader).
64. *Biography: Serpico: Honor Bound* (Arts and Entertainment Channel 1997) [hereinafter *Serpico: Honor Bound*]
65. MAAS, *supra* note 10, at 86.
66. *Id.* at 40.
67. *Id.* at 133.
68. *Serpico: Honor Bound*, *supra* note 64.
69. MAAS, *supra* note 10, at 309.
70. *Id.* at 6–8
71. *Id.* at 309.
72. *Id.* at 36, 137 (even Teddy Roosevelt was happy to leave the job as commissioner).
73. *Id.* at 42.

74. *Id.* at 63.
75. *Id.* at 90.
76. *Id.* at 102.
77. *Id.* at 209.
78. *Id.* at 311.
79. Kristin Birks, *Committing Truth: Identifying Factors that Drive Whistleblowers and Investigative Reporters to Join Forces* (2002) (unpublished M.A. dissertation, University of Missouri-Columbia) (on file with the University of Missouri-Columbia Library) [hereinafter Birks dissertation].
80. *Id.* at 92–93. Burnham was on his way in 1979 to meet Karen Silkwood, the nuclear whistleblower at the Kerr-McGee nuclear processing plant in Oklahoma, when she died in a one-car accident. Birks dissertation rests on extensive interviews with five sets of whistleblowers and journalists, including Frank Serpico and David Burnham. In their book, the Glazers discuss how the *Seattle Times* helped whistleblower Casey Rudd in his allegations regarding quality control in a nuclear power plant. GLAZERS, WHISTLEBLOWING, *supra* note 23, at 171–77.
81. Birks dissertation, *supra* note 79, at 161 (emphasis in original).
82. *Id.* at 154.
83. *Id.* at 132.
84. *Id.* at 131–32.
85. *Id.* at 112.
86. *Id.* at 182.
87. *Id.* at 169–70 (emphasis added).
88. *Id.* at 139.
89. *Id.* at 174.
90. *Id.* at 150 (footnote deleted).
91. The terms that are used to replace whistleblowing, such as public interest disclosures, internal witnesses, etc., are likewise abstractions. Narratives and stories act as metaphors that give meaning to these abstractions in ways in which a single definition cannot. These stories also give meaning to any single definition.
92. The importance of these narratives is consistent with the position of some scholars that such case studies have ‘serious shortcomings’ in assessing the motivations of whistleblowers or in determining the prevalence of retaliation. MARCIA P. MICELI & JANET P. NEAR, *BLOWING THE WHISTLE* 40 (1992). Atypical or not, these cases and the narratives created by them altered popular perceptions, defined whistleblowing, and influenced the character of whistleblower laws. In addition, cases with the greatest implications for the public welfare may appropriately be examined independently. The narratives provide another perspective from which to view whistleblower laws and their successes and failures.

5. Watergate and whistleblower protection

‘Watergate’ conjures a number of visions: burglars in offices of the Democratic National Committee near the Watergate apartment complex; a Presidential cover-up; a single federal judge, John Sirica, who kept the investigation alive; Senator Sam Ervin, who chaired the Senate Select Committee on Presidential Campaign Activities; the discovery of the White House tapes of conversations in President Richard Nixon’s office; the stories in the *Washington Post* by Bob Woodward and Carl Bernstein, and the movie *All the President’s Men*; the Saturday Night Massacre leading to the resignation of Elliott Richardson, the Attorney General of the United States, the firing of the Deputy Attorney General William D. Ruckelshaus and the firing of Special Prosecutor Archibald Cox by Robert Bork; the hearings of the House Judiciary Committee considering the impeachment of Nixon; and the Supreme Court’s confirmation of the judicial order to turn over the tapes. The ultimate vision is that of Nixon’s resignation as President of the United States, as he left the White House in a helicopter.

Without Watergate it is unlikely that Congress would have enacted the Civil Service Reform Act of 1978 (CSRA), and without that Act the whistleblower provision might have been delayed for years. The CSRA and the whistleblower provision were historical responses to Watergate. Whistleblowers played important roles in the Watergate scandal and one of them, Daniel Ellsberg, figured prominently in the motivation for the presidential cover-up of the Watergate break-in.

THE WATERGATE SCANDAL

Washington Post reporters Woodward and Bernstein relied on a number of anonymous sources for their stories, sources that aided them in exposing the presidential cover-up and a variety of illegal and unconstitutional acts committed by President Nixon and other government officials such as Attorney General John Mitchell and Director of the Federal Bureau of Investigation Patrick Gray. Perhaps the most famous of these anonymous sources was ‘Deep Throat,’ identified decades later as W. Mark Felt, a senior official of the FBI.

Daniel Ellsberg's Story

Ellsberg played a different and more causative role in the scandal and remains one of the best-known whistleblowers in US history. His release of the Pentagon Papers to *The New York Times* laid bare the deceptions regarding the role of the United States in Vietnam. The impact of his disclosure was telling. For example, *Time* magazine reported in its January 28, 1978, edition that the Pentagon Papers demolished any 'lingering faith the nation's weightiest decisions are made by deliberations calmly examining all the implications of the policy and carefully laying out their reasoning in depth.'¹

The 2009 documentary, *Most Dangerous Man*, a title based on Henry Kissinger's characterization of Ellsberg, recounts the story of a respected strategic analyst and an avid supporter of the war who became an opponent and released a government study describing the history of the war. That study identified the mistakes of government officials and the lies they told to precipitate the conflict and to support it.

Ellsberg worked as an analyst for the Rand Corporation, and as a consultant to the Department of Defense to consider the command and control of nuclear weapons. In 1964, Ellsberg began employment with the Department of Defense. Ellsberg transferred to the Department of State under Major General Edward Lansdale. In that position Ellsberg specialized in the pacification of South Vietnam and spent time on the front line there. As a supporter of the war and a former marine, Ellsberg travelled roads so dangerous that Lansdale warned him of ambushes.²

While in Vietnam, Ellsberg began to worry about needless killing. In 1967 he returned to the Rand Corporation to work on Robert McNamara's study of US decision-making in Vietnam, a study later known as the Pentagon Papers. After the Tet offensive in 1968, Ellsberg despaired of US victory in Vietnam and examined his involvement in the planning of the war. He repeatedly criticized the government of 'callousness toward Vietnamese deaths and a preoccupation with lowering its own casualties to acceptable level[s].'³ He began to consider release of the papers and worked to photocopy them. In 1969 he distributed them to the Senate Foreign Relations Committee.

After resigning in 1970 from the Rand Corporation, he released copies of the Pentagon Papers to *The New York Times* and to *The Washington Post*. These newspapers appealed to the United States Supreme Court an injunction obtained by the government to halt weekly publication of portions of the documents. The Court dissolved the injunction and in doing so issued one of the Court's most important First Amendment decisions.⁴

The government prosecuted Ellsberg for illegal possession of classified documents and a failure to return them to proper custody. In 1973 the case against Ellsberg was dismissed for government misconduct.⁵ The government

had conducted illegal surveillance of the defendants, including Ellsberg, as well as his attorney.

To discredit Ellsberg, White House officials had ordered a unit within the White House, 'the plumbers,' to break into the office of Ellsberg's psychologist, Lewis Fielding, to acquire his notes of the sessions with Ellsberg. Nixon justified the break-in and warrantless search on the grounds of national security. When the Watergate burglars, connected with this group of White House operatives, were later apprehended, White House officials feared that prosecution of that case would expose other illegal activities of this group, including the Fielding burglary. Presumably, this fear spurred the attempted cover-up of the burglary and encouraged other obstructions of justice by the President and his aides.

This influence on Watergate led to the whistleblower provision of the Civil Service Reform Act. Under that whistleblower provision, however, Ellsberg would have been unlikely to receive legal protection because that provision prohibited the disclosure of classified information except to certain limited officials and excluded several national security agencies from the protection of the legislation. Congress still continues to struggle with the protections that should apply to employees of national security agencies.⁶

Persons debating whistleblower protection differed on the propriety of Ellsberg's actions. One public administration scholar approached Ellsberg's actions with trepidation. 'The Daniel Ellsberg case, to cite a conspicuous example, raises a question so profound, poses alternatives so threatening, that we are inclined to leave it there with quick ideological answers.'⁷ *Time* magazine concluded a June 28, 1971, article on Ellsberg by asserting that all of his actions had served a larger purpose: 'if the Government and the public come to understand the atmosphere, the pressures, the false and strained hopes and the futile decisions that pervade the whole secret history of Vietnam, the wrong decisions may not be made again – or at least not so easily.'⁸

Ellsberg's conduct fits with a model of civil disobedience described by Mohandas K. Gandhi and Dr. Martin Luther King Jr.⁹ In the documentary, *Most Dangerous Man*, Ellsberg states that he reached the decision to release the Pentagon Papers and to risk prosecution and imprisonment after attending a meeting of conscientious objectors describing the moral principles in which they believed. After listening to them, he believed that he had to act on the principles that he held. Civil disobedience posits a valid moral position that requires action to change unjust laws but which accepts the (unmerited) punishment that will be received.

Reflections on President Nixon's Abuses of Power

The 1974 Special Report of a Panel of the National Academy of Public

Administration to the Senate Select Committee on Presidential Campaign Activities captured the misconduct identified by the Panel and problems which in the view of the panel had made Watergate 'both an aberration and an extension of earlier trends.'¹⁰ These conclusions represented an articulation of the improper practices known to Congress and summarized aspects of Watergate. Alan K. Campbell, a member of this panel, gave some indication of his approach to whistleblower laws when he later assumed leadership of civil service reform during the Carter Administration.¹¹

The panel set out the results disclosed by the government investigations. These included: '(1) use of governmental powers and resources on behalf of friends, agents, opponents (enemies); (2) politicization of the career service; (3) political espionage on American citizens; (4) excessive secrecy, use of the grounds of national security, whether or not justifiable; (5) use of governmental personnel and resources for partisan purposes, including political campaigns; (6) solicitation of political contributions from private interests with implicit or explicit assurances of support or favor or an absence of disfavor; and (7) dirty tricks.'¹²

The panel concluded that the climate of government controlled by Watergate 'constituted a critical threat to many of the values that patriotic Americans associate with democratic government.'¹³ These rights were 'the right to participate in elections, to equal treatment, to free and honest elections, to the protections of free speech and protection against unreasonable searches, to resist the usurpation of the other branches of government and the right to ethical conduct by public officials.'¹⁴

Chillingly, President Nixon combined these aspects of Watergate with broad assertions of presidential powers and prerogatives. These assertions rested upon President Nixon's claims of 'inherent power' arising from his powers as commander in chief, his role in foreign affairs and national security, and his power to ensure the coherence of executive branch policy and implementation. These inherent powers included the power to refuse to spend funds that Congress required to be spent, the ability to conduct domestic surveillance wiretaps without statutory authorization, and illegal criminal acts, such as burglary and theft.¹⁵ During his interview with David Frost, Nixon's comments captured the breadth of his view of presidential inherent power. When asked about illegal conduct against American dissidents, Nixon replied, 'when the President does it, it means it is not illegal.' Nixon asserted that spying on dissidents, creation of the 'plumbers unit,' and burglary of the office of Ellsberg's former psychiatrist 'had been logical extensions of presidential authority to maintain internal order.'¹⁶

Other scholars saw Watergate as a more extensive critique of public administration and of laws regulating the federal civil service. Authors noted the decline of confidence in government institutions¹⁷ and emphasized that good

fortune had brought the country through the crisis but sound policy required additional reforms.¹⁸ Commentators saw the centralization of power in the executive¹⁹ and feared that the crisis reflected the continuing dangers of such centralization.

Watergate also challenged the tenets of public administration, particularly its reliance on unity of command and on the distinction between administration and politics. Perhaps the best-known articulation of this view is found in Vincent Ostrom's *The Intellectual Crisis in American Public Administration*.²⁰ In a series of lectures, Ostrom argued that many of the tenets of public administration were inconsistent with the underpinnings of democratic administration. Among the propositions Ostrom asserted was the belief that '[p]erfection in the hierarchical ordering of professionally trained public service accountable to a *single* center of power will reduce the capability of a large administrative system to respond to the diverse preference among citizens for many different goods and cope with diverse environmental conditions.'²¹ Neither will such a hierarchical organization create efficiency in terms of the resources expended. Rather, Ostrom insisted that fragmentation of authority with different centers of power within a jurisdiction are 'necessary conditions for maintaining a stable political order which can advance human welfare under rapidly changing conditions.'²²

Ostrom believed that the constitutional crisis regarding executive authority flowed from efforts to strengthen the executive and 'reflect the central tenet in American scholarship in public administration: unity of command.'²³ Under this principle 'the meaning of statutory law will turn increasingly on presidential instruction.'²⁴

This reassessment of the failure of public administration also created a view of the duties of employees sometimes at odds with the hierarchy of command in public administration. According to Ostrom, a public servant had an obligation to be 'not a neutral and obedient servant to his master's command' but instead to 'refuse to obey unlawful efforts to exploit the common wealth or to use the coercive capabilities of the state to impair the rights of persons.'²⁵ In the American system of democratic administration, a public servant 'bears the burden of being a citizen in a constitutional republic; and citizenship in a constitutional republic depends upon a willingness to bear the costs of enforcing the rules of constitutional law against those who exercise the prerogatives of government.'²⁶

These Watergate-inspired critiques of public administration encompassed many of the same themes as those reflected in the narratives of whistleblowers and thus suggested the importance of whistleblowing, identifying it as a portent of even more radical reform. Whistleblower protection would succeed as part of a group of reforms that altered the dynamics of bureaucratic power. Whistleblower protection, however, was contained in the CSRA, a law that

represented established theories in public administration, theories that Ostrom and others believed had contributed to Watergate.²⁷

Another well-known, post-Watergate book, *Resignation in Protest*,²⁸ explored the relationship between loyalty to team and loyalty to conscience in American public life. In doing so, it also addressed how expressions of individual conscience informed public debate on government policy and affected the behavior of government officials. Like others writing after Watergate, the authors, Thomas Franck and Edward Weisbard, hoped that the disasters of the Johnson and Nixon Administrations would engender more than cynicism by permitting 'fundamental change' in American government and altering the rules of the game. Among the most important of these rules were those that 'govern the relationship between the President and his own advisors.'²⁹

The authors developed this theme by examining instances of resignation in protest throughout American history and contrasting that history to experience in Great Britain. The authors asserted that a person who sacrifices team loyalty for integrity is likely to face the coercive powers of society that incorporate systems of judgment and perceptions of reality. 'No wonder few men and women choose this unprofitable role except under the severest demands of their inner voice.'³⁰

The subsequent careers of Americans who resigned prominent government positions to protest government policy and to challenge the administration of which they had been part demonstrated the price paid for these exercises of conscience. The authors examined political executives who between 1900 and 1970 had resigned their posts voluntarily and had a reasonable prospect of returning to office. Among this group, only about 9 percent resigned with public protest. Of those who resigned in protest only 3 percent were reappointed to an equivalent or higher post.³¹ Of those who left quietly, nearly 21 percent were appointed subsequently to an equivalent or higher post.³² Those who resigned in protest were also less likely to receive subsequent appointments to part-time posts that conveyed prestige and influence (only about 12 percent of those who resigned in protest compared to nearly 36 percent of those who left quietly). The correctness of the protest did not seem to influence the dangers of such a protest.

In the view of the authors, more frequent resignations in protest could have avoided or tempered a number of foreign policy, national security, and domestic policy disasters. Protest would have permitted more informed public debate at a time when it might have made a difference. The authors observed that cabinet members or advisors who are 'yea sayers' pose a danger to public policy and to the executives whom they serve.³³ These observations were pertinent to the number of high government officials with serious doubts about the conduct of the Vietnam War who failed to speak out as they left the government.

Franck and Weisbard asserted: 'The failure of senior officials to resign in protest requires other whistleblowers' because in a democracy 'dissent within the government on issues of great public importance must make itself heard.'³⁴ In this sense, the authors believed that Ellsberg is the result of a system that encouraged McNamara's silent resignation. 'Lower ranking officials like Gordon Rule and A. Ernest Fitzgerald are honored not because of their rank but because they alone had the courage "to buck the President and speak up."³⁵

The authors drew on Watergate and the resignations of Richardson and Ruckelshaus as a 'dramatic instance' of how resignation in protest compelled the retreat of a President. After their resignations, Nixon abandoned claims to executive privilege and withdrew objections to the release of tape recordings of key conversations to Judge Sirica.

These resignations were part of the 'Saturday Night Massacre' of October 20 and 21, 1973. Cox, the special counsel appointed by Attorney General Richardson to investigate the Watergate cover-up, refused to defer to President Nixon's directive to cease actions to acquire the White House tapes. Nixon ordered Richardson to fire Cox; Richardson refused and resigned. Nixon then directed Ruckelshaus to do so. When he also refused and resigned in protest, Bork, previously the third-ranking official in the Department of Justice, followed Nixon's order and dismissed Cox.

Ironically, Nixon appealed to the personal ethics of those who contemplated resignation. For example, Nixon emphasized the peril that the nation faced in the Middle East and showed Richardson a secret letter from Soviet Union Premier Leonid Brezhnev, a letter that caused Nixon to declare a world-wide alert of US armed forces.³⁶ A similar appeal was made in an attempt to dissuade Ruckelshaus from resigning. A presidential assistant insisted that the President was the commander in chief and, as a subordinate, Ruckelshaus had to obey orders.³⁷

Despite these efforts to dissuade them, Richardson, Ruckelshaus and Cox all spoke publicly against the order of the President. Richardson argued that his resignation was necessary to protect the integrity of government. Ruckelshaus stated that there were lines over which a public official could not step – when you are ordered to do something 'that your conscience will not permit. ...'³⁸

In subsequent weeks, Ruckelshaus criticized the administration and the way in which presidential power had been exercised, arguing that the exercise of power provided a 'frightening glimpse of the abuse of power.'³⁹ A few months later a federal court declared that Bork's firing of Cox was illegal because it violated the regulations issued by the Department of Justice to guarantee Cox's independence.⁴⁰

WATERGATE REFORM

Following the resignation of Nixon, Congress considered several pieces of legislation seen as Watergate reform legislation. These pieces of legislation established the context for subsequent reforms, such as the whistleblower provision, contained in the Civil Service Reform Act of 1978. These predecessors include the 1974 amendments to the 1966 Freedom of Information Act, the Privacy Act of 1974, the 1976 Sunshine in Government Act, the 1978 Ethics in Government Act, and provisions regarding inspectors general.⁴¹ These earlier laws addressed some of the themes found in the stories of whistleblowers and responded to assessments regarding the causes of the Watergate crisis.

These laws sought to increase the openness of government and to restrict the power of the executive. They also sought to impose personal responsibility through individual accountability. This opposition to secrecy and to bureaucratic command reflected not only Watergate but also the other perspectives that marked the period, such as skepticism about authority and ethical resistance to bureaucratic power.⁴²

These statutes responded to assessments of the causes for the Watergate crisis – the concentration of presidential powers and government secrecy – and the implications of government surveillance of citizens, as well as the use of government power to harass opponents of the administration. The 1974 amendments to the federal Freedom of Information Act responded to weaknesses in the original 1966 law and sought to clarify agencies' obligations when responding to requests and to strengthen the ability of requesters to acquire information. For example, the amendments established deadlines for agency responses to requests for documents, provided for the recovery of attorneys fees, and permitted agencies to waive or to reduce fees. The amendments also made substantive changes in the law affirming the power of courts to review the propriety of classification of documents under the relevant presidential classification orders.

One analyst of the amendments expressly drew the connection of the amendments to the downfall of President Nixon. The Freedom of Information Act and the amendments to it 'enable the public to claim government decisions as their own.'⁴³ Access to information supported the rights of free speech and association and assured the accountability of government agencies and officials.

One provision, perhaps for the first time in federal law, authorized sanctions against federal officials for improperly withholding requested documents and records. This provision relied upon state laws that imposed sanctions for withholding information.⁴⁴ It also responded to criticism that agency disciplinary systems in the hands of agency managers were unlikely to be applied

against high-ranking officials but likely to be applied to punish dissent and to ensure conformity. This 'sanctions' provision allowed the disciplinary system to be employed by someone other than the management of an agency.

The importance of the access to public information links the goals of the freedom of information law to whistleblower protection. Indeed, one of the first whistleblower provisions considered in Congress, S.1210, introduced by Senator Ted Kennedy in 1975, connected whistleblower protection to the Freedom of Information Act. Federal employees who disclosed information available under the Freedom of Information Act, whether or not a request for such information had been made, would receive protection from retaliation by agency officials. The hearings on S.1210 referred to the abuses of the Nixon Administration and the need to protect employees who speak out, making disclosures of information that should be available to the public.⁴⁵

The Privacy Act of 1974, likewise responded in part to actions by the Nixon Administration, including the collection of information about persons on an 'enemies list.' The Act prescribed how the government could collect, maintain, use, and disseminate information regarding individuals. The Act also responded to fears, articulated by several whistleblowers, of illegal surveillance of citizens for the exercise of First Amendment rights. Similar risks to privacy were created by the large data banks of government-collected information. Ervin, the principal sponsor of the legislation, had also headed the Senate Select Committee on Presidential Campaign Activities and in that capacity became aware of the activities of government officials, including the 'plumbers.' One scholar called that group the 'precursor of a secret police.'⁴⁶

The third piece of Watergate reform legislation, the Ethics in Government Act of 1976, was inspired by ethical lapses of government officials during the Nixon Administration. The Act strengthened conflict of interest standards contained in existing criminal provisions and required public financial disclosure by higher-ranking officials of the executive and judicial branches. It created an Office of Government Ethics to provide advice and guidance, to assist agencies in the application of ethical standards, and to administer the applicable regulations. The Act also contained new post-employment restrictions on the activities of former higher-ranking government officials. It reconfirmed the fiduciary obligations owed by government officials.

The law sought to provide ethical standards, as well as agency ethics officials who could identify ethics issues and counsel agency employees. The law authorized the appointment of a Special Prosecutor who could act when the rank of charged officials raised concerns about the effectiveness of the Department of Justice. This Special Prosecutor provision reflected in part the conviction of Mitchell for obstruction of justice in the Watergate inquiry while serving as the Attorney General. The Inspector General Act of 1978 created positions for officials who enjoyed some independence from agency manage-

ment and who could investigate fraud, waste, and abuse within government agencies.

Watergate also generated renewed interest in the right of public employees to disobey illegal or unconstitutional orders. Prior to Watergate, state courts had described circumstances when an employee could disobey such orders.⁴⁷ The decisions were unclear on the standard to be applied – whether protection for such disobedience required that the order be found unlawful or whether a reasonable belief of its illegality was sufficient to allow protection.⁴⁸

In 1977 the first article appeared advocating judicial acceptance of the right to disobey under the standard of reasonable belief; the article also recommended the adoption of statutory provisions recognizing the right and creating mechanisms to preserve a public employee's right to do so.⁴⁹ The right to disobey was supported by principles regarding the right to disobey under the Nuremberg principles. Arguments for statutory recognition of the right relied on experiences in Watergate and drew on new principles in public administration and in psychology that emphasized the weaknesses in hierarchical unity of command. Although the article rejected legal protections for disobedience solely based on ethical or moral grounds, it asserted that, in democratic countries, laws often incorporate many of these grounds. Moreover, the article recommended that moral objections be considered when applying any penalty for disobedience.

Finally, the article relied upon an employee's interest in not being required to violate the law. This interest encompassed not only the risk of administrative, civil, or criminal liability, but also the individual's change in self-regard after being compelled to obey such orders in a free and democratic society. These justifications for the right to disobey fit within the larger body of literature regarding whistleblower protection following Watergate.

Watergate provided many examples to support statutory recognition of the right to disobey illegal or unconstitutional orders. Misconduct attributed to the Nixon Administration, including illegal surveillance, improper awards of government contracts, provision of grants to unqualified but politically connected recipients, the lowering of government regulatory standards, and the circumvention of civil service protections to acquire control over government programs all relied on the compliance of public employees with illegal and unconstitutional orders. Similar to the justification for the protection of whistleblowers, protection of the right to disobey preserved the integrity of federal employees and supported the exercise of First Amendment rights. The right to disobey stressed the personal responsibility of those who act within government, and in doing so provided a way of holding government officials accountable for their misconduct. The right formed an important guarantee of democratic government. The interests of the government of employees and of the public all supported the right to disobey.

WATERGATE REFORM AND WHISTLEBLOWING

Watergate played an important role in generating support for whistleblower protection. First, it emphasized the themes contained in the stories of many whistleblowers regarding the relationship between individuals and large bureaucracies. Second, it sharply outlined the fears of the time regarding the risks to democratic government posed by expansive executive and administrative power. Third, it vindicated views in law and public administration challenging traditional views of government administration. Finally, it combined these challenges with a popular mandate for change.

A report by Senator Patrick Leahy, *The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Governmental Waste, Abuse and Corruption*,⁵⁰ linked whistleblowing and Watergate reform. The Senate Committee on Government Affairs issued the report in February 1977, preceding consideration of the Civil Service Reform Act. Leahy testified regarding the report during Senate deliberation of the CSRA.

The Leahy report considered the experiences of several federal government whistleblowers, but rather than focusing on the narratives emerging from their stories it used them to illustrate propositions on which the conclusions of the report rest. These propositions emphasized the importance of whistleblowers in reporting and challenging waste, malfeasance, misfeasance, corruption, and abuse. The report concluded that whistleblowers suffered retaliation through formal disciplinary and administrative procedures and through a variety of forms of informal harassment.⁵¹

The report argued that whistleblowers confront a conflict between the Code of Ethics for Government Service and agency management who emphasized 'team work and internal resolution of any concerns.'⁵² The ineffectiveness of agency procedures when addressing allegations of wrongdoing required employees to make public allegations. Whistleblowing should impose accountability on agency policymakers who would be more likely to address and resolve allegations of government waste and abuse. An employee, however, who raised issues of waste or abuse immediately became the focus of the agency's response rather than the identified abuse.⁵³ Internal grievance procedures considering complaints of retaliation were biased, weak, and frustrated rather than helped whistleblowers. For different reasons, Congress and the courts had failed to protect whistleblowers or to address their concerns. Finally, the report stated that Congress and the executive branch must cooperate to address whistleblowing and to preserve good government and to maintain a responsive and efficient federal government.

The report used the Code of Ethics for Government Service as a standard to evaluate the actions of individual whistleblowers whose experiences the report examined. For example, John Coplin, a United States Department of

Agriculture supervisory inspector, who battled corruption in the meat-grading service, was credited with following the ethical admonition to 'Seek to find and employ more efficient and economical ways of getting tasks accomplished' and to 'Expose corruption wherever discovered.'⁵⁴ The report praised other employees for using the code as guidance when raising criminal conduct at the General Services Administration, misconduct at the Social Security Administration, and safety concerns regarding a flu vaccine regulated by the Food and Drug Administration.⁵⁵

The author of the report believed that government agencies created the wrong incentives for principled employee action by emphasizing bureaucratic loyalty. In this regard the report drew on personnel abuses during the Nixon Administration, including patronage hiring, political manipulation of agency procedures, and the use of techniques described in a manual named for an advisor to President Nixon, Fred Malek. The techniques in the manual were designed to get rid of 'troublesome employees' who could be obstacles to political manipulation of government authority. The report described several techniques advocated by the Malek Manual, such as punitive details, personal attacks, refusals to assign work, and transfers and reassignments designed to isolate employees or to force out of government service any employee unwilling to assent to improper agency actions.⁵⁶

Leahy stressed the importance of internal disclosures using procedures within agencies. In the report, however, he concluded that internal procedures for reporting employee concerns were often ineffective. The report described the experiences of seven employees in divisions of the Nuclear Regulatory Agency and one employee in the Food and Drug Administration to show the ineffectiveness and the dangers of using these internal avenues. The report also considered the ineffectiveness of agency suggestion programs.⁵⁷

Given the weaknesses of mechanisms for internal disclosures, employees often had to choose whether to go outside of the agency. The report described the experiences of whistleblowers who contacted Congress, testified before Congressional committees, forwarded evidence of criminal conduct to the FBI, or contacted the press with allegations of misconduct by agency personnel. These experiences emphasized the risks and consequences of such actions.⁵⁸

After evaluating the effectiveness of agency grievance procedures and administrative review by the Civil Service Commission in redressing retaliation against whistleblowers, the report concluded that these avenues of redress were more likely to harm and frustrate the whistleblower than to provide relief to them. The report urged greater agency compliance with the Code of Ethics. Such compliance required agency officials to create an environment in which dissenting positions and minority views were fairly considered by agency policymakers. Specifically, the report recommended that agencies should create

independent ombudsmen to ensure the operation of procedures designed to audit and regulate the conduct of agency officials. The report also urged the reorganization of the United States Civil Service Commission to create institutions that would impartially review the retaliation claims of whistleblowers.⁵⁹

WATERGATE AND CIVIL SERVICE REFORM

Another report by the House Post Office and Civil Service Committee linked the actions of the Nixon Administration to broader issues of civil service reform.⁶⁰ That report examined the violations of civil service laws by the Nixon Administration. Those violations were part of an attempt to 'politicize' the federal civil service. Political control of the civil service permitted the Nixon 'team' to focus federal grants, contracts, programs, and regulation on the re-election of the President. This emphasis led in some circumstances to the violation of law by the improper use of grants, contracts, and regulatory authority to curry favor with powerful contributors and to target government actions based not on legal and regulatory standards but on the basis of their political effect on President Nixon's campaign.

The House report identified how civil service laws were violated to create patronage for political operatives and campaign contributors. In this effort, the administration counted on the cooperation, or the inaction, of the Civil Service Commission to condone or ignore violations of civil service laws, particularly those related to the merit system appointments.

The report also described how federal officials manipulated grant and contract programs, targeting them for political purposes. Included in these examples was the General Services Administration, the body that handles government buildings and related construction, supply, and maintenance contracts. Also, implicated in abuses were grants for the elderly by the Department of Health and Human Services. These actions required the complicity of civil servants who were not political operatives. Thus, the Nixon Administration focused on guaranteeing that civil servants who were not 'team players' could be intimidated, harassed or removed. The Malek Manual was only one example of the informal techniques that could be used to accomplish these goals without invoking administrative reviews.

Watergate supported or affirmed other trends leading to a different conception of whistleblowing, including the individual stories of whistleblowers, theories of ethical resistance and civil disobedience, the fears of the power of bureaucratic institutions and new views on personal responsibility, government administration and the psychology of authoritarianism. One architect of civil service reform identified one particular contribution of Watergate to the

momentum for that reform: the distrust of government.⁶¹ Another reason for the public disenchantment with government is 'caused by the merit abuse during the Watergate era. Previously the career civil service system was thought to be nonpolitical and inviolate; those abuses led to a belief that, in fact, the system could be politically manipulated.'⁶²

Watergate, along with these trends, helps to explain the focus on external and public disclosures in the whistleblower provision. Responses to Watergate identified whistleblower laws as important reforms of public bureaucracies, reforms intended to preserve democratic government.

NOTES

1. *Pentagon Papers: The Secret War*, TIME (Mon. June 28, 1971) [hereinafter *Pentagon Paper: The Secret War*].
2. *Man with the Monkey Wrench*, TIME (Mon. June 28, 1971). DANIEL ELLSBERG, SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS 117–25 (2002) (describing his travels by car with John Paul Van and the shocked reaction of military commanders who were told that Van and Ellsberg had driven to these outposts), 146–47 (describing a mortar shell that came through the roof of the hut next to the cot in which Ellsberg had been sleeping), 156 (describing ambush), 162 (describing how he traveled with military units as an armed civilian and the firing of his weapon during encounters).
3. *Id.* at 137–38 (discussing the implications of free-fire zones in light of thousands of fishermen who remained in the Plain of Reeds plying their trade as 'all over Vietnam humans were being hunted like animals from the air on the basis of where they were and what they were wearing'), 165 (denouncing 'reconnaissance by fire' where units at the risk of civilian deaths fired into huts at night to see if fire would be returned).
4. *New York Times v. United States*, 403 U.S. 713 (1971).
5. *United States v. Russ*, Crime. No. 9373 (C.D. Cal. Dismissed May 11, 1973), cited in *Ellsberg v. Mitchell*, 709 F.2d 51, 53 (D.C. Cir. 1983). The case was dismissed for illegal government electronic surveillance of Ellsberg's attorneys. ELLSBERG, *supra* note 2, at 412–43 (describing Nixon's order to 'destroy Ellsberg in the press' to deter others, the engagement of Howard Hunt to acquire derogatory information about Ellsberg, and the decision to break into the office of Ellsberg's psychiatrist).
6. Chapter 12 contains a more detailed discussion of protections for national security whistleblowers.
7. Dwight Waldo, *Education for Public Administration in the Seventies*, in AMERICAN PUBLIC ADMINISTRATION: PAST, PRESENT, FUTURE 221 (Frederick Mosher ed., 1975).
8. *Pentagon Papers: The Secret War*, *supra* note 1.
9. Chapter 3 also discusses this relationship. Ellsberg was introduced on April 3–4, 1968, to Gandhi's and King's use of nonviolent civil disobedience to force change. Ellsberg recounts, 'I found myself hearing a surprisingly coherent doctrine and a relevant body of experience supporting it, all new to me.' He remembers that 'late in the afternoon' of April 4 he and the friend who had spent two days talking about Gandhi and King turned on the 'evening news and learned that Martin Luther King, Jr., had been killed.' ELLSBERG, *supra* note 2, at 212–14.
10. FREDERICK MOSHER AND OTHERS, WATERGATE: IMPLICATIONS FOR RESPONSIBLE GOVERNMENT 6 (1974) [hereinafter WATERGATE: IMPLICATIONS FOR RESPONSIBLE GOVERNMENT].
11. Chapter 6 indicates why Campbell was an important actor regarding the whistleblower provision.
12. WATERGATE: IMPLICATIONS FOR RESPONSIBLE GOVERNMENT, *supra* note 10, at 5.

13. *Id.* at 11.
14. *Id.* Among other factors, the discovery of wrongdoing that might have been hidden during previous periods in American history depended on 'some unidentified leaks to the press.'
15. The American Society for Public Administration study stated the 'most alarming aspect of the Watergate disclosures were the attempted misuse of the law-enforcement and intelligence agencies against supposed "enemies" of the Administration, most of whom were American citizens.' *Id.* at 50
16. James M Naughton, *Nixon Says a President Can Order Illegal Actions Against Dissidents*, N.Y. TIMES (May 19, 1977). In the interview Nixon stated: 'If the President, if, if for example, the President approves something, approves the action because of national security, or, in the case, because of threats to internal peace and order of, of significant magnitude, then the President's decision in that instance is one that enables those who carry it out to carry it out without violating the law, otherwise, they're in an impossible position.' One member of the 'plumbers unit' involved in the Watergate break raised as a defense that he was following orders issued in the interest of national security. The United States Court of Appeals for the District of Columbia Circuit held that acting under orders was not a defense to criminal charges. *U.S. v. McCord*, 509 F.2d 334, 343, n.16 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 930 (1975).
17. Alan L. Dean, *Re Establishing Confidence in Government*, 37 PUB. ADMIN. REV. 306 (1977) [hereinafter *Re Establishing Confidence in Government*]; Ronald E. Pynn, *Watergate: Retrospective Policy Implications*, 4 POL'Y STUD. J. 63 (1975).
18. Hugh Heclo, Fred R. Brown & Conley Dillon, *Watergate in Retrospect: The Forgotten Agenda*, 36 PUB. ADMIN. REV. 306 (1976).
19. *Re Establishing Confidence in Government*, *supra* note 17; Samuel Hendel, *Separation of Power Revisited in Light of 'Watergate'*, 27 W. POL. Q. 575 (1974).
20. VINCENT OSTROM, *THE INTELLECTUAL CRISIS IN AMERICAN PUBLIC ADMINISTRATION* (revised ed. 1974) [hereinafter *THE INTELLECTUAL CRISIS IN AMERICAN PUBLIC ADMINISTRATION*].
21. *Id.* at 112.
22. *Id.* at 136.
23. *Id.*
24. *Id.* at 140. Such presidential directives 'can be by secret instructions protected by executive immunity.'
25. *Id.* at 131, 'but he will use reason and peaceful persuasion in taking such stands.'
26. *Id.*
27. Chapter 6 develops this theme.
28. EDWARD WEISBARD, THOMAS M FRANCK, *RESIGNATION IN PROTEST: POLITICAL AND ETHICAL CHOICES BETWEEN LOYALTY TO TEAM AND LOYALTY TO CONSCIENCE IN AMERICAN PUBLIC LIFE* (1975).
29. *Id.* at Preface.
30. *Id.* at 3.
31. *Id.* at 60.
32. *Id.*
33. The authors develop this theme in a chapter entitled 'A Cabinet of Yea-Sayers' beginning *Id.* at 121. The most prominent professional groups were business people and lawyers. Lawyers were 'less inclined' to 'leave government with public expressions of dissent over policy.' *Id.* at 151.
34. *Id.* at 169.
35. *Id.* at 170.
36. *Id.* at 15.
37. *Id.* at 16. Alexander Haig told Ruckelshaus that the 'President's the Commander-in-Chief and all of us subordinates have to go down the line.'
38. *Id.* at 14. Ruckelshaus also emphasized that 'there has to be a line over which any public official refuses to step.'
39. *Id.* at 15.
40. *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973).
41. Ethics in Government Act of 1978, P.L. 95-521 (S 555), October 26, 1978; Inspector

- General Act of 1978, P.L. 95-452 (HR 8588), October 12, 1978; The Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (current version 5 U.S.C. § 552a); The Freedom of Information Act, 5 U.S.C. § 552 (1966), amended by Pub. L. No. 110-175, 121 Stat. 2524 (Supp. 2007).
42. Chapters 2 and 3 present these other perspectives and demonstrate their influence.
 43. Elias Clark, *Holding Government Accountable: The Amended Freedom of Information Act: An Article in Honor of Fred Rodell*, 84 YALE L. REV. 741, 742 (1975).
 44. The history of the provision is described in Robert G. Vaughn, *The Sanctions Provision of the Freedom of Information Act*, 25 AM U.L. REV. 25 (1975).
 45. *Hearings on S. 1210 before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary* at 358 (1975) (comments of Senator William Proxmire).
 46. THE INTELLECTUAL CRISIS IN AMERICAN PUBLIC ADMINISTRATION, *supra* note 20, at 144. Centralized action by the President increasingly will require discipline of 'recalcitrant employees' and such control will require a 'Special Investigations Unit' to maintain 'executive secrecy' and to gain access to information required for control. 'The new information system will require secret intelligence provided by a secret police.' *Id.* at 143-44.
 47. Robert G. Vaughn, *Public Employees and the Right to Disobey*, 29 HASTINGS L. REV. 261 (1977)
 48. *Id.*
 49. *Id.*
 50. *The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Government Waste, Abuse, and Corruption for the Senate Comm. on Gov't Affairs*, 95th Cong. 2d Sess. (1978) [hereinafter the *Leahy Report*].
 51. *Id.* at 3-5
 52. *Id.* at 12, 28.
 53. *Id.* at 3.
 54. *Id.* at 14. The report describes Coplin's case in more detail at 33-34.
 55. *Id.* at 11-15. For example, one whistleblower, Robert Sullivan, at the General Services Administration cited the Code of Ethics in defense of his proposed removal. *Id.* at 13.
 56. *Id.* at 25-35 (discussion of the Malek Manual in a chapter entitled 'Management's Recourse: Ad Hominem Defined').
 57. *Id.* at 16-21.
 58. *Id.* at 21-24.
 59. *Id.* at 48-52.
 60. STAFF OF SUBCOMM. ON MANPOWER AND CIVIL SERVICE OF THE HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, 94TH CONG., FINAL REPORT ON THE VIOLATIONS AND ABUSES OF MERIT SYSTEMS PRINCIPLES IN FEDERAL EMPLOYMENT TOGETHER WITH MINORITY VIEWS (Comm. Print No. 94-28, 1976).
 61. Alan Campbell, *Revitalizing the Civil Service*, 67 NAT'L CIVIC REV. 76, 77 (1978).
 62. *Id.*

6. The Civil Service Reform Act and whistleblower protection

Perhaps the placement of the whistleblower provision in the Civil Service Reform Act of 1978 (CSRA) was as important to its successes and failures as its content. That placement was not predestined. Proposals for whistleblower reform tended to address public- and private-sector whistleblowers separately; even within the public sector many proposals did not connect whistleblower provisions to general reform of the civil service. For example, anti-discrimination statutes applicable to federal employees could include whistleblowers. Separate institutions and standards within the civil service could apply to allegations of misconduct and to allegations of retaliation made by whistleblowers. Such institutions could include ombudsman-like ones or separate boards and agencies to consider the substance of whistleblower allegations, as well as claims of retaliation. Rather than rely on administrative redress for retaliation, whistleblowers could simply be given private rights of action to sue in federal courts, actions in which whistleblowers could be entitled to a trial by jury.

Likewise, whistleblower provisions did not have to be conceived as part of a reform of the federal civil service. Whistleblower protection could be seen as an aspect of open-government reforms. These reforms, like those of the civil service, responded to Watergate and related abuses by the Nixon Administration. One of the first proposals made in 1975 connected whistleblower protection to reform of the 1966 federal Freedom of Information Act. This legislation, S. 1210, conceived whistleblower protection as a vindication of the public access to government information as part of freedom of information laws.¹ Indeed, currently established international standards for freedom of information laws include protection of whistleblowers.²

Whistleblowers laws could also rest on protection of the free speech rights of federal employees. A statute could develop and articulate these rights and provide judicial redress for them. Although Congress considered these other grounds as reasons for including the whistleblower provision as part of civil service reform, that provision did not have to be tied to the broader goals of restructuring and reforming the federal civil service.

All of these alternative foundations and varying legislative responses reflected proposals for reform that emerged between 1966 and 1978. A 'perfect storm' of events during this period, however, placed whistleblower

protection within civil service reform legislation. The momentum for reform illustrated by the positive narratives of whistleblowers, the changing perceptions of the place of the individual in large institutions, and the discontent and dissent generated by the civil rights and antiwar movements marked a crucial, if not revolutionary, change in attitudes. Watergate emphasized the importance of whistleblowers and illustrated the risk of government institutions run by 'team players' and 'yea sayers.'³

The influential book, *The Nader Report: Whistle Blowing*, connected whistleblower laws to reform of the federal civil service.⁴ Although that book suggested many of the alternatives described above, it proposed legislation to protect federal employee whistleblowers. That proposal viewed such protections as part of broader civil service reform. A subsequent book, *The Spoiled System: A Call of Civil Service Reform*,⁵ written by a Nader staff attorney described pathologies of the civil service that encouraged conformity and punished dissent.

The momentum for whistleblower protection as part of civil service reform also flowed from President Carter's commitment to civil service reform as a major domestic policy goal. This commitment may have reflected his experience with civil service reform while the Governor of Georgia,⁶ but other factors also affected the prominence given to civil service reform. The role of whistleblowers in the Watergate scandal and the extraordinary evidence of official illegality that emerged in the investigations of actions of the Nixon Administration stressed the importance of federal government whistleblowers. Investigations also connected official misconduct of the Nixon Administration with abuses of the civil service system.⁷

The choice of civil service reform as the container for whistleblower protection gave prominence to public administration. The discipline of public administration claimed many of the issues that civil service reform would have to address. Leaders in the field of public administration provided guidance for President Carter's attempts to reform the federal civil service. Thus, civil service reform came to be dominated by views of scholars in public administration. The previous chapter on Watergate suggests that many of the concepts accepted by public administration scholars were at odds with whistleblower protection.

Many whistleblower advocates did not object to this connection. The momentum for civil service reform increased the likelihood of the enactment of whistleblower laws. Many advocates had identified whistleblower protection as one among the necessary changes to assure the accountability of federal officials. Civil service reform offered the opportunity to support whistleblower protection as one of several reforms needed to ensure that accountability. Although many principles adopted by public administration were inconsistent with whistleblower protection, advocates came to rely on dissenting views within public administration represented by the 'new public administration' and by other critics of existing orthodoxy in the field.

The new public administration questioned aspects of classic public administration that stressed hierarchy of administration, expertise, and the separation of administration from politics. This emphasis contained anti-hierarchical sentiments and stressed openness, personal responsibility, and integrity. These principles, particularly efficiency and obedience to command, ensured that administrative action represented the political judgments of those who managed agencies. These unelected managers were politically accountable to the President or to Congress and these elected officials directed the unelected bureaucracy.⁸

By contrast, new public administration emphasized personal responsibility in the pursuit of social justice and equity.⁹ This emphasis contained anti-hierarchical sentiments and stressed openness, personal responsibility, and integrity. To these young scholars, classic public administration had failed to deal with these political and normative issues. Some suggestions by these new public administration scholars to create an office that could investigate allegations of agency misconduct and to protect individuals who spoke out against social inequality, abuse, fraud, and waste portended the Office of Special Counsel created in the CSRA.¹⁰

Some scholars advocated a bureaucracy representative of the groups to be served by government as a way to ensure social justice and as an effective means of administrative accountability.¹¹ Others, particularly David Rosenbloom and John Rohr, argued for an incorporation of democratic values into administrative decisions. They recognized the discretion of public employees and the need for these employees to take responsibility for their decisions. According to Rohr, an ethical administrator would seek guidance in our historical and shared values.¹² Rosenbloom argued that democratic values must be incorporated into administrative decisions.¹³

Advocates of whistleblower protection may have seen the new public administration as an indication that reforms of the federal civil service would incorporate views supportive of whistleblower protection. Existing federal employment law reflected many of the tenets of classic public administration and successful application of the whistleblower provision would require modification in that body of law.

THE CIVIL SERVICE REFORM ACT AND REORGANIZATION PLAN NO. 2

A description of the Civil Service Reform Act and of the principles underlying much of it provides a context for examining the content of the whistleblower provision. That context aids an assessment of the successes and failures of the whistleblower provision. An examination of content without

context can deceive by suggesting that decisions made in the provision will similarly succeed or fail in other contexts. In a national and international environment now ripe with a variety of approaches and models, such deception can misguide efforts to evaluate contrasting models.

The CSRA, a massive piece of legislation, represented the first comprehensive reform of the federal civil service since its creation by the Civil Service Act of 1883.¹⁴ The CSRA also completed a reorganization of the governmental institutions regulating the civil service. In this reorganization, venerable institutions were eliminated, tasks reassigned, and several new agencies created. This reorganization, contained in Reorganization Plan No. 2, also represented some of the basic policies to be implemented in the subsequent legislation.

Reorganization Plan No. 2, introduced in 1978, established the institutional framework to administer the legislative changes to follow. The plan abolished the United States Civil Service Commission (the Commission) that had been established in 1883 and had been identified with the modern civil service for nearly 100 years. It divided the functions of the Commission among one existing governmental agency and four newly created ones. The role of the Commission in administering the federal government's anti-discrimination and equal opportunity laws was transferred to the United States Equal Employment Opportunity Commission (EEOC), an existing federal agency.

Reorganization Plan No. 2 assigned other functions of the Commission to newly created agencies. A new agency, the Office of Personnel Management (OPM), received the personnel functions of the Commission, including testing, hiring, oversight of agency personnel practices, and adoption of regulations governing the civil service. This office was not a multi-headed bipartisan commission like the Civil Service Commission, but a single-headed agency responsible to the President and seen as representing the personnel policies of the administration.

Reorganization Plan No. 2 gave the adjudicatory functions and oversight responsibilities of the Commission for protecting the merit system to the United States Merit Systems Protection Board (MSPB), a type of administrative court. Along with this adjudicatory authority, the MSPB received some study and review functions. Other oversight and investigative functions rested with the Office of Special Counsel (OSC), an independent office with investigative and prosecutorial functions to protect employees from abuse through the violation of principles of the merit system. The federal labor relations duties of the Commission were passed to the newly created Federal Labor Relations Authority (FLRA).

Reformers believed that the Commission's failure to prevent the Nixon Administration's abuses of the civil service system resulted from the close identification of the Commission with the Office of the President, an identification

captured in the statement that the Commission was 'the President's personnel office.'¹⁵ This identification with the Office of the President prevented the Commission from effectively serving as a guardian of the merit system. Reformers argued that the Commission could not advise federal agencies on personnel matters and retain a variety of connections with senior personnel and management officials while at the same time fairly adjudicating the appeals of federal employees from disciplinary and other actions taken by those agencies.¹⁶

Somewhat analogous conflicts also infected the Commission's administration of equal employment opportunity laws and federal labor relations regulations. The Commission was seen to lack the expertise of the Equal Employment Opportunity Commission and unlikely to acquire the same expertise as a separate labor relations authority. In all these areas, but particularly in protection of the merit system, adjudication of employee appeals, and administration of the equal opportunity laws, these conflicts of interest were accompanied by significant failures by the Commission.¹⁷

The justifications for this reorganization introduced themes that appeared in the CSRA as well. OPM would be closely identified with the President and would regulate the civil service in the interests of the President. This connection would increase management flexibility, create efficiencies, and improve personnel administration.¹⁸ Other parts of the reorganization, however, would serve to protect the merit system from abuse and to preserve the rights of federal employees. The OSC would identify violations of merit principles and would have the power to respond to such violations. The MSPB would fairly adjudicate the appeals of federal employees and protect their legal rights binding on the agencies. Likewise, the FLRA would ensure that both agency management and employee unions obeyed the laws regulating federal labor relations.¹⁹

The CSRA developed the powers of these agencies and articulated the legal standards by which they applied these powers. The scope and complexity of the CSRA can be appreciated simply by a recitation of the major topics that the law addressed. The list that follows is at a relatively high level of generality and still consumes several lines in the following endnote. That endnote could easily encompass a page or more if the topics were presented more specifically.²⁰

In legislation this complex and involving many interests and groups, no one person was responsible for the final legislation or even for the legislative proposals of the Carter Administration. The interplay of interests and political forces is difficult, if not impossible, to trace fully. Still, the Carter Administration proposals determined the character of the legislation. Moreover, the opinions of those who helped to develop and to guide these proposals through Congress are particularly important. These persons influ-

enced the character of the legislation and their opinions on topics relevant to the legislation illuminate those topics. Perhaps more importantly, their statements and summaries of the principles of the legislation are most likely to reflect those principles because of the frequency and depth of their involvement in the legislation's development. Their own views may have colored their assessment of underlying principles, but because these principles can be tested against the content of the legislation itself, that testing provides a safeguard against either conscious or inadvertent misrepresentation of these general principles.

President Carter appointed Alan Campbell, the former dean of the Maxwell School of Public Administration at Syracuse University, to head the Commission. In that position, Campbell became the principal advocate for the administration's legislative proposals. He also played a central role in the development of those proposals. In addition to his position as Chairman of the Commission, he served as Chairman of The Federal Personnel Management Project, which President Carter charged with developing the reform proposals. Campbell testified numerous times before Congress and wrote about the reform proposals before and after their enactment.²¹

As with Reorganization Plan No. 2, the CSRA sought to balance greater management flexibility with protection for the merit system and for employee rights. In a number of ways the CSRA gave agency heads and federal managers greater discretion in personnel administration and in the management of federal employees. The CSRA created a Senior Executive Service that gave politically appointed agency leadership a greater role in assigning and managing senior civil servants; indeed a percentage of the Senior Executive Service could be political appointees. Within an agency, subjecting managers to merit pay based on the evaluation of superiors created incentives for efficient performance and provided a way to hold these managers responsible for the performance of those whom they supervised. In response to the accountability of agency managers, a provision made it easier to remove employees for poor performance and thus gave the managers the authority to manage their workforce by disciplining or firing those who could not or would not do their work. (The original administration proposal would have given employees removed for poor performance little redress even through the Merit Systems Protection Board.)

On the other hand, an employee covered by the law could appeal certain personnel actions to the MSPB. The OSC possessed authority to investigate the violations of merit system principles; such violations became prohibited personnel practices. At various times, the CSRA prohibited nine or ten personnel practices. One of these prohibited personnel practices was reprisal against whistleblowers. Although it was one of many important issues, Campbell, in his congressional testimony, listed whistleblower protection as third of the ten

most important issues to be addressed in the civil service reform.²² The draft legislation reflects the importance of whistleblower protection by creating rights for whistleblowers not applicable to employees who are the victims of other prohibited personnel practices. Given the scope of the law, however, Campbell, both in his testimony and writing, paid little attention to whistleblower protection.

Considerable tension exists between these prohibited personnel practices, including whistleblower protection, and the significant management discretion provided in the law. For example, under the administration's proposal, employees removed for poor performance would have limited rights of review by the MSPB. These limited rights of review would require a whistleblower to rely on the discretion of the OSC in order to obtain administrative review of the agency's action.

The tension between whistleblower protection and the attention to badly performing employees poses a particular problem for whistleblowers because of the concern that employees could disclose misconduct in order to avoid legitimate agency discipline based on poor performance. Early advocates of whistleblower protection, for example in the book *The Nader Report: Whistle Blowing*, likewise expressed a concern about abuse of the whistleblowing provision but suggested that the burden be shifted to the agency to explain and justify its decision to take personnel actions against whistleblowers.²³ In these circumstances, the employee must also be given an opportunity to acquire evidence to demonstrate the impropriety of the agency action.²⁴ On the other hand, the reduced protections for employees disciplined for poor performance could encourage managers to use poor performance as an excuse for disciplining whistleblowers, thereby denying them the greater protection provided for whistleblowers.

Campbell's writings and testimony more usually articulate and support larger underlying themes of the legislation rather than discussing whistleblower protection. Three themes appear frequently:

- 1) the CSRA is intended to deregulate personnel administration and management;
- 2) the CSRA will decentralize personnel authority placing more discretion in individual agencies; and
- 3) overall, the CSRA must improve the management of federal agencies.

Relying on these themes, Campbell describes whistleblower protection primarily as improving the efficiency and productivity of federal agencies. This view stresses internal remedies and sees whistleblowing primarily as an aid to administration. As Campbell puts it, whistleblower protection allows employees to '[b]ring problems to the attention of agency officials who can

solve them.²⁵ Most important is the creation of a climate in the agency favorable to such internal disclosures. These comments support whistleblower protection because effective procedures for internal disclosures create an open workplace where employees are not afraid to raise their concerns about agency inefficiencies or misconduct.

Although these comments are consistent with support for whistleblower protection, they identify the principal justifications for protection with themes of efficiency and productivity. These themes are at odds with those identified in Chapters 2, 3, 4, and 5. Those chapters describe skepticism about public and private bureaucracies, see whistleblowing as protecting the public welfare, describe the threats to civil liberties by practices of the Nixon Administration, and tell the stories of courageous men and women preserving the public interest against institutional misconduct. These justifications for whistleblower protection, resting principally on administrative efficiency and productivity, also do not incorporate the critiques of classic public administration raised by proponents of a new public administration.

Although the MSPB and OSC may have an interest in protecting whistleblowers and creating a climate that encourages internal disclosure, the division of functions makes the creation of such a climate difficult. For the MSPB to create such a climate would be a difficult task. Conceivably, it could interpret whistleblower law to give agencies an incentive to create an effective internal mechanism; its challenge would be to create such an incentive without undercutting the rights of whistleblowers under the statute.

On the other hand, the OSC can investigate patterns and practices of abuse of whistleblowers. If the OSC finds such abuse, the Special Counsel may require agencies to take 'corrective action.' Such corrective action can impose obligations on agencies to modify work place practices to create such an environment. This undertaking, while conceivable, would require considerable resources and, if agencies did not respond to the examples made of other agencies, would force the Special Counsel to proceed agency-by-agency.²⁶

OPM has authority to issue regulations regarding federal employment and seems better situated to suggest guidelines or to impose requirements on agencies to create a climate favorable to internal disclosures. The principal tasks of OPM, however, are deregulation and decentralization of personnel administration. Regulation of agencies' treatment of whistleblowers might be seen as inconsistent with the policy of the CSRA to increase management flexibility. OPM serves as the personnel office of the President and executive agencies may oppose regulations that interfere with their administrative prerogatives.

One scholar, Frederick Thayer, examining the CSRA concluded that the provisions of the law regarding merit pay and greater management flexibility in the control of the Senior Executive Service cancelled the whistleblower

protection and other employee rights in the CSRA.²⁷ In general, this scholar described two theories of public administration: First, 'Theory X' holds that employees need to be coerced, controlled, and disciplined in order to work toward an organization's goals. Second, 'Theory Y' assumes that employees will exercise self-restraint and self-control in working toward goals with which the employees agree.

Theory Y is more consistent with the ethic of self-restraint in the service of the public interest and thus seems a view that is more congenial to disclosures of conduct threatening the public interest. Theory X fits more easily with management based on command and hierarchical control and thus seems less likely to create an agency environment where employees are encouraged to advance concerns about official misconduct. Not surprisingly the title of the scholar's article was *The President's Management 'Reforms': Theory X Triumphant*.

THE WHISTLEBLOWER PROVISION

The whistleblower provision also contains a review of the topics that a whistleblower protection law should address. In part, the resolution of these issues determines the meaning of whistleblowing within the federal civil service. Thus, an examination of the whistleblower provision demonstrates how it served as a guide for other whistleblower laws. In the United States, it influenced federal whistleblower protections for private-sector employees, as well as a variety of state whistleblower laws. It also offered a model for whistleblower laws in other countries, for protections of employees in international organizations, and for laws implementing regional anti-corruption conventions.

The whistleblower provision consists of the description of a prohibited personnel act, retaliation against employees who make protected disclosures, along with several statutory sections that specifically address the enforcement of that prohibited personnel practice.²⁸ Other enforcement provisions applicable to all prohibited personnel practices, apply to and are considered part of the whistleblower provision. Decisions made about the whistleblower provision at the time of its enactment allow judgment on its successes and failures. For this reason, the interpretations below are those that, at least to the author, seem the most likely after the enactment of the law and prior to administrative and judicial interpretation of it. Many, but by no means all, of these interpretations remain valid.²⁹ Congress has amended the whistleblower provision several times. These interpretations, however, permit consideration of the topics that a whistleblower law should address and provide understanding of how this landmark statute defined whistleblowing. This description of the likely mean-

ing of the law at the time of its enactment also provides a perspective from which a reader can evaluate subsequent modifications.

The decisions regarding the content of the law continue to reverberate over three decades later and to influence more contemporary judgments regarding its successes and failures. An examination of the content of the whistleblower protection provision of the CSRA identifies the issues that the drafters of any whistleblower law must consider. The resolution of these issues isolates the controversies that accompany that resolution. In this regard, the content of the whistleblower provision is a preview of current controversies regarding the scope and character of whistleblower laws. By understanding this landmark law, a reader can evaluate all whistleblower laws.

Two of the most controversial parts of the law gave the OSC substantial and largely unprecedented authority over federal agencies. One of these permitted the OSC to commence disciplinary actions against agency officials responsible for retaliation against whistleblowers. This authority allowed an official outside the agency chain of command to seek discipline against senior agency officials. The other authorized the OSC to require the heads of federal agencies to respond to certain allegations of misconduct made by employees to the OSC.³⁰ These two controversial aspects of the law reflect the suspicions regarding bureaucratic power and the support of individual responsibility that fueled cultural and legal changes regarding whistleblowing. These two parts of the law go beyond the concerns about efficiency and productivity. Neither of these provisions was found in the proposals of the Administration; both were controversial and strongly supported by Congress.

Below are the issues arising in the drafting of a whistleblower law and a description of the resolution of these issues in the whistleblower provision. The summary provides one basis for evaluating the successes and failures of the whistleblower provision and of other subsequent laws.

Disclosure to Whom

The CSRA addresses this issue in two subparts. The first protects a disclosure without specifically identifying to whom it may be made. Disclosures, however, under this subpart must not be 'specifically prohibited by law' or specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs.

The second subpart limits disclosures to the OSC or to the inspector general of an agency or to another employee chosen by the head of the agency to receive them. These disclosures are not limited by the prohibitions on disclosure contained in the first subpart. The contrast between the two provisions suggests that the first subpart permits a disclosure to any person within or without the agency. The second subpart was added by the House of

Representatives as part of amendments that gave the OSC power in certain circumstances to respond to allegations of wrongdoing. Therefore, an employee did not have to follow this process in order to make disclosures to others that were not prohibited in the first subpart.

Prohibitions on Disclosure

The first subpart denies protections to disclosures of information that are specifically prohibited by law or specifically required to be kept secret under an Executive Order in the interest of national defense or foreign affairs. These prohibitions preserve the interests of the government and of third parties. The original proposal of the Carter Administration would have denied protection to information the disclosure of which was prohibited by law, rule, or regulation. Both the House and Senate committees rejected this language, substituting instead the phrasing 'prohibited by law.' The purpose of the protection, as well as congressional statements regarding the change, show that it was intended to deny agencies the ability to prohibit disclosures through regulation. Such a power would permit agencies to determine the content of the law and undermine its purposes. Both the House Committee report and the report of the Conference Committee between the House of Representatives and the Senate expressly affirm this most likely interpretation of the language of the provision.

Some statutes give agency officials discretion to withhold information and thus the authority to prohibit disclosure by regulation or through individual orders. The Senate Committee believed that the provision would give an agency this authority only if the statute afforded the official no discretion to control disclosure or the statute established criteria for withholding or referred to particular matters to be withheld. Such a requirement for agency authority was consistent with the standards in the 1966 federal Freedom of Information Act describing statutes that prohibit disclosure under that law. The exception for information under an Executive Order is consistent because this is the circumstance where the prohibition need not be contained in a statute, whereas that prohibition addresses information implicating national defense and foreign affairs. It seems unlikely that this exception on disclosure would be required if agencies could prohibit disclosures simply by regulations.

Agencies and Employees Covered

The whistleblower provision does not apply to several agencies, including the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and, as determined by the President, any executive agency or unit the principal function of which is the conduct of foreign intelligence or

counterintelligence activities. It also excludes government corporations. A special provision of the law applies to personnel practices within the Federal Bureau of Investigation. The provision does not apply to the employees of government contractors even though it applies to a broad range of federal government employees. It does not apply, however, to a position excluded from the competitive service because of its confidential, policy-determining, policy-making or policy-advocating character.

Information and Disclosure

Both of the subparts require the disclosure of information. Information imparts knowledge and thus can be a combination of facts, opinions, analysis, and interpretation. The structure of the provision, particularly the requirement of reasonable belief, suggests that something more than an opinion must be involved. That requirement would have little effect if some factual basis for an opinion or analysis was not contained within the information disclosed.

Disclosures can be examined either from the viewpoint of the whistleblower or from the viewpoint of the person to whom the information was made known. It seems more likely, given that these portions of the provision focus on the whistleblower and the whistleblower's conduct, that the first viewpoint is the most appropriate one. It does not matter whether the persons, including wrongdoers, to whom the disclosure is directed are already aware of the information that the disclosure contains. If we focus on the viewpoint of the person who first receives the information, it places on the whistleblower the burden of deciding what crucial officials do or do not know. Disclosure to the wrongdoer may serve the purposes of the whistleblower provision. The wrongdoer might not have been aware of the effects of the misconduct; alerting the wrongdoer might in some circumstances redress the situation with less impact on working relationships. Even if others know the information, which might often be the case with widespread or egregious wrongdoing, it is the whistleblower who has taken action and used the available information to seek redress and accountability.

Reasonable Belief

An employee must 'reasonably believe' that the information disclosed evidences certain types of wrongdoing. The reasonable belief standard is an objective one that focuses on the particular circumstances in which a whistleblower acts. The standard means that whistleblowers are protected even if their allegations prove incorrect.

Reasonable belief also contains an element of actual belief. In order to have a reasonable belief one must actually believe that the information 'evidences'

one of the types of described wrongdoing. Reasonable belief requires more than a belief; it must be one that is reasonable. There may be a difference between suspicion and reasonable belief. If so, there may be some circumstances where an employee must acquire more information before forming a reasonable belief.

Under the whistleblower provision, the standard of reasonable belief applies to all disclosures. Thus, all disclosures are protected under the same standard, including internal disclosures to agency officials, to the OSC, to an inspector general, to third parties, to members of Congress, to law enforcement officials, to persons in other agencies, to hotlines, and to the media.

Types of Agency Misconduct

A whistleblower must reasonably believe that the disclosed information evidences one of several types of misconduct, which include:

- 1) a violation of law, rule, or regulation;
- 2) mismanagement (now gross mismanagement);
- 3) a gross waste of funds;
- 4) an abuse of authority, or;
- 5) a specific and substantial danger to public health or safety.

The original proposal of the Carter Administration covered only a violation of law, rule, or regulation. Thus, it presumably had a broad meaning. Based on the legislative history, the term 'law' likely includes statutes and actions of Congress that have the effect of statutes, such as joint or continuing resolutions and judicial interpretations of statutes. Given the statutory meaning of the term 'rule', it seems regulations were included to reach violations of other established and written standards to which an agency bound itself.

Unlike a violation of law, rule, or regulation, the other types of misconduct – mismanagement, gross waste of funds, and a specific and substantial danger to public health and safety – require a judgment that cannot be made against clearly established standards. Despite this ambiguity, neither the statute nor Congressional deliberations give much guidance as to the meaning of other types of misconduct. The Senate Committee emphasized that allegations regarding dangers to public health and safety must be both substantial and specific. The committee sought to remove from protection a general criticism that an agency, such as the Environmental Protection Agency, was not doing enough to protect the environment.

Covered Personnel Actions

Unlike some private-sector laws that prohibit discrimination against whistle-

blowers who make protected disclosures, the whistleblower provision listed specific personnel actions that could not be taken in reprisal for whistleblowing. Perhaps the number of prohibited personnel practices to which this definition of covered personnel actions applied motivated this approach. This approach, however, risked omitting important terms or encouraging restrictive interpretation of the listed ones. The most notable exception to the list is reductions in force. None of the other terms cover reductions in force and the omission seems to have been intentional.

The omission is notable because a reduction in force was the technique chosen by the Air Force to remove Ernest Fitzgerald from his job. Chapter 4 describes the importance of Fitzgerald's case in the movement toward statutory protection for whistleblowers. Fitzgerald's case was well known; he testified before both the House and Senate committees; he was included in the Leahy Report regarding federal employee whistleblowers; and the Chairman of the Senate Committee considering the legislation remarked during the hearings, 'I think the committee certainly is going to want to make sure that the language that we ultimately adopt will definitely protect the situation of the Fitzgeralds.'³¹

Reprisal

The whistleblower provision protects from reprisal employees who make disclosures protected under the provision. Both the standards for defining reprisal and the procedures for enforcement of the prohibition against reprisal determine its effectiveness. Aggressive enforcement of inadequate standards and weak enforcement of adequate standards both limit the effectiveness of the prohibition and thus the protection of whistleblowers.

The standards for reprisal consider what actions constitute reprisal, an issue partly resolved by the language used in the listing of certain personnel actions, taken for the wrong reasons, as prohibited personnel practices. The list, however, leaves open the question as to whether a threat to take one of these actions constitutes reprisal.

The description of persons who can be charged with reprisal affects the standards for reprisal because of the assumption that those persons must have some knowledge of the protected activity. The whistleblower provision permitted a broad definition of these persons, including ones who take, direct, recommend, or approve the personnel action at issue. The knowledge of these individuals is relevant in determining whether a reprisal has occurred. These persons will also be subject to disciplinary action, as provided for in the Act, for their involvement. This broad view may hold senior officials responsible, while also encompassing subordinates with the power to affect a personnel action. This broad view still permits protection of the whistleblower when

senior officials with formal authority to take the action assiduously avoid knowledge in order to ensure that 'appropriate action' will be taken against 'disloyal employees' who are not 'team players.'

One or more of the relevant responsible persons must have knowledge of the protected disclosure. A logical interpretation (and one early adopted by the MSPB) is that actual knowledge is not required but that constructive knowledge is sufficient to establish this element of reprisal. Such an interpretation is consistent with the purposes of the provision and with its legislative history. This constructive knowledge also logically fits with the inference of reprisal when the personnel action follows closely the protected disclosure.

The standards for reprisal must consider what connection will be required between the protected disclosure and the action alleged to have been taken in reprisal for that disclosure. In constitutional litigation under the First Amendment, courts commonly used a 'but for' test for this connection; that is, the reprisal would not have occurred but for the disclosure. This test would require that the disclosure be the sole or the dominating reason for the reprisal. Other standards are also possible, such as the disclosure was a 'contributing cause' of the reprisal. This alternative standard reduces the burden on the employee.

If this alternative standard were adopted, it would indicate that the agency should have an opportunity to make the case that it would have taken the personnel action in the absence of the protected disclosure. This division of proof permits the whistleblower's case to proceed but allows the agency to establish that it would have taken the same action for another reason, such as poor performance. If this structure of proof is applied, it must consider the burden of proof for the employee and for the employer. The civil standard for the burden of proof, the preponderance of the evidence, could apply to both parties. The greater access of the agency to information is one of several reasons for arguing that the agency's standard of proof should be higher, perhaps requiring the agency to establish by clear and convincing evidence that it would have taken the action without consideration of the protected disclosure. That the agency 'would' have taken the action absent the protected disclosure requires more than a demonstration that the agency 'could' have taken the action. Presumably, discipline must have been planned or commenced prior to the protected disclosure.

Under the whistleblower provision a number of agencies and procedures play a part in enforcement of the prohibition of reprisals against whistleblowers. These include appeals to the MSPB or to the OSC, redress through negotiated grievance procedures established in collective bargaining, or as part of complaints for discrimination on such grounds as race, gender, color, religion, and national origin, and through actions brought to trial or appellate courts.

The most important of these agencies are the MSPB and the OSC. The

MSPB may review certain personnel actions through a *de novo* administrative adjudication. Some, but not all, of these personnel actions are among those contained in the whistleblower provision. In relation to those actions directly appealable to the MSPB, an employee may raise a claim of reprisal for whistleblowing as a defense to that action. As to the other actions, the MSPB could only adjudicate them when they are brought before it by the OSC. (In 1989, Congress amended the whistleblower provision to allow an employee subjected to such personnel actions an independent review by the MSPB if the OSC rejected the whistleblower's complaint or delayed in responding to it.) Thus, the MSPB plays a central and exclusive role in the adjudication of whistleblower claims of reprisal.

In addition to the power to bring whistleblower claims of reprisal resulting from actions not directly appealable to the MSPB before it, the OSC possesses a number of other powers to discourage or punish reprisal. In any action regarding a reprisal claim before the MSPB, the OSC may intervene, may seek stays of the challenged personnel actions, and may request interim relief prior to, or after, a prohibited personnel action has occurred. The OSC also may investigate patterns of prohibited personnel practices and seek corrective action to remedy them.

One of the most controversial sections of the whistleblower provision gives the OSC the authority to seek disciplinary actions against government officials responsible for reprisal against whistleblowers. Given the difficulties of protecting whistleblowers from retaliation, this section seeks to deter retaliation by punishing it. This section assumes that senior officials could not always be relied upon to commence disciplinary actions against other senior officials responsible for reprisal. Disciplinary actions not only deter reprisals by individual officials but also encourage agencies to establish procedures and practices that provide a fair assessment of the allegations of whistleblowers and to prevent reprisals.

Another controversial section authorizes the OSC to require agency heads to evaluate the allegations of whistleblowers if the OSC believes that those allegations likely address agency misconduct. The OSC may require an investigation and report by the head of the agency. These reporting requirements are detailed, and the OSC transmits these reports to Congress, the President, and to the whistleblower. The OSC must determine whether the findings of the head of the agency appear reasonable and whether the report contains the information required by the provision. This procedure tends to keep employees in government channels because it allows a whistleblower to seek correction of agency misconduct while reducing personal risks. Because the provision burdens agency heads, its enforcement will encourage agencies to create internal mechanisms that make disclosures to the Special Counsel less likely. In these circumstances, internal appeals are more likely to be credible and effective, thus reducing the occurrence of reprisals.

The whistleblower provision anticipates that the courts will play a less central role in the adjudication of whistleblower claims. The provisions involve the courts in appellate review, and the standards for such review are traditional ones limiting review to errors of law, the lack of substantial evidence to support adjudicatory findings, and arbitrary and capricious conduct. The whistleblower provision adopted venue provisions that could allow appellate review in any of the United States Circuit Court of Appeals but, as in other administrative law appeals, allow such appeals also to be brought in the United States Court of Appeals for the District of Columbia Circuit.

Because the whistleblower provision of the CSRA was the first broad whistleblower law its provisions suggest the issues that any whistleblower could be expected to address. Among these issues are the following: What persons are protected? Are persons who assist in a variety of ways in the disclosure included? Are persons who are not employees of the agency or organization that is the target of disclosure protected?

What disclosures will be protected? Will it protect only violations of law or of particular laws or will it protect broader categories of misconduct? Must the information come to whistleblowers' attention as part of their employment or can it come to their attention in other ways? Must the disclosures be factual or will a degree of opinion and analysis be included?

To whom may disclosures be made? Are internal disclosures protected? Are they required? May external disclosures be made only to certain named agencies or parties or to public bodies in general? Are disclosures to nongovernmental entities, including the media, protected? Are there standards regulating or mandating internal complaint systems? How do these standards protect against reprisals?

What is the standard for disclosure? Is the standard applicable to all disclosures regardless of to whom they are made or do different standards apply depending upon the identity of the person or organization receiving the disclosure?

What disclosures are prohibited? Are different types of disclosures permitted to some persons but not others? Can some persons or organizations be given information prohibited to others? How do the prohibitions address existing standards of confidentiality and privacy?

What actions can constitute reprisal? Who can be charged with reprisal? What knowledge of the protected disclosures must these persons possess? What must be the connection between the protected disclosure and the reprisal? What are the burdens of proof of the parties in establishing or disproving this connection? How does the law address the merits of allegations and act to correct the misconduct? Does the provision permit discipline against the retaliating official? If so, who may commence such discipline and

who decides whether it is imposed? Does the provision encourage, require, or regulate credible and effective internal procedures for considering allegations of misconduct and protecting members of the organization from reprisal?

The answer to these questions will do much to determine the success or failure of a whistleblower law. Likewise, the institutional setting for whistleblowing and the administrative structures for investigating disclosures and responding to retaliation influence the effectiveness of a whistleblower law. The resolution of these aspects of a whistleblower law affects the successes and failures of the whistleblower provision and of other whistleblower laws.

NOTES

1. *Federal Employee Disclosure Act of 1975: Hearings on S.1210 before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 94th Cong. (1975).
2. John M. Ackerman & Irma E. Sandavol-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN L. REV. 85, 94–95 (2006).
3. EDWARD WEISBARD & THOMAS M. FRANCK, RESIGNATION IN PROTEST: POLITICAL AND ETHICAL CHOICES BETWEEN LOYALTY TO TEAM AND LOYALTY TO CONSCIENCE IN AMERICAN PUBLIC LIFE 121 (1975).
4. RALPH NADER, PETER PETKAS & KATE BLACKWELL, WHISTLE BLOWING: THE CONFERENCE ON PROFESSIONAL RESPONSIBILITY ch. 17 (1972) [hereinafter WHISTLE BLOWING].
5. ROBERT G. VAUGHN, THE SPOILED SYSTEM: A CALL FOR CIVIL SERVICE REFORM (1976). The book was first published in manuscript form in 1972 and incorporated a study, M. Weldon Brewer, *Behind the Promises: The Government's Equal Employment Opportunity Program* (1972) (separately published under this title in 1972).
6. <http://www.GEORGIAENCYCLOPEDIA.COM/NGE/ARTICLE.JSP?H=676&HL=Y> (Feb. 9, 2012) (describing '[t]he reorganization of the state government. ... as the cornerstone of Carter's gubernatorial program. This massive reform effort, which continued throughout his four-year term, produced large-scale structural reform.'). Jimmy Carter made a campaign promise to provide whistleblower protection for federal employees. Howard Messner, who was active in the development of the Civil Service Reform Act, stated that the administration's looking 'at the total organization of the U.S. government' as 'more than a campaign plank' in Carter's platform 'and something that he took very seriously.' UNITED STATES GOVERNMENT ACCOUNTING OFFICE SEMINAR: CIVIL SERVICE REFORM: DEVELOPMENT OF THE 1978 CIVIL SERVICE REFORM PROPOSALS 51 (1988).
7. Chapter 5 connects two of these actions of the Nixon Administration to whistleblowing – illegalities that were part of official practices and abuse of the civil service system.
8. Thomas Sargentich describes this theory of legitimating actions by unelected public administrators in his article, Thomas O. Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WISC. L. REV. 386, 397–409 (stating argument that administrators follow the directives of the legislature). Woodrow Wilson presented a similar defense of administration in his 1887 work, *The Study of Administration*. Woodrow Wilson, *The Study of Administration*, in CLASSICS IN PUBLIC ADMINISTRATION 1 (Jay. M. Shafritz & Albert C. Hyde eds., 7th ed. 2011).
9. The new public administration was linked with the 1968 Minnowbrook Conference of Young Scholars in Public Administration. Those scholars began to formulate a new view of public administration. A sense of the variety of their views, as well as unifying aspects, can be found in TOWARD A NEW PUBLIC ADMINISTRATION: THE MINNOWBROOK PERSPECTIVE (Frank Marini ed., 1971) [hereinafter TOWARD A NEW PUBLIC ADMINISTRATION]. The Conference responded to the turmoil of the 1960s. Dwight Waldo, *Public Administration in a Time of Revolution*, 28 PUB. ADMIN. REV. 362 (1968).

10. Herbert Kaufman, *Administrative Decentralization and Political Power*, in CLASSICS IN PUBLIC ADMINISTRATION 268 (Jay M. Shafritz & Albert C. Hyde eds., 6th ed. 2007)
11. HARRY KRANZ, THE PARTICIPATORY BUREAUCRACY (1972).
12. JOHN A. ROHR, ETHICS FOR BUREAUCRATS: AN ESSAY ON LAW AND VALUES 55, 74 (1978). For Rohr, the 'high road' to ethics 'stresses social equality.' 'What is important is that [administrators] accept the moral obligation to put themselves in touch with the values of the American people through the values of the American regime.'
13. Rosenbloom has emphasized how due process became incorporated into federal employment law, DAVID H. ROSENBLOOM, FEDERAL SERVICE AND THE CONSTITUTION (1971); how due process and equal protection came to apply to a variety of government conduct, DAVID H. ROSENBLOOM & ROSEMARY O'LEARY, PUBLIC ADMINISTRATION LAW (2d ed. 1997); and how administrative transparency, public commentary of rules and regulations, judicial review, legislative oversight, and regulation of conflicts of interest came to be incorporated into administrative law and practice, DAVID H. ROSENBLOOM, BUILDING A LEGISLATIVE-CENTERED PUBLIC ADMINISTRATION: CONGRESS AND THE ADMINISTRATIVE STATE, 1946 (1999). In these works Rosenbloom argues that democratic values are reflected in constitutional and statutory rules and that these rules must be incorporated in the perspectives and behavior of administrative officials. David H. Rosenbloom, *Reinventing Administrative Prescriptions: The Case for Democratic-Constitutional Impact Statements and Scorecards*, 67 PUB. ADMIN. REV. 28 (2007).
14. ROBERT G. VAUGHN, PRINCIPLES OF CIVIL SERVICE LAW §§ 1.1, 1.2 (1976) (describing the background and history of the Civil Service Act of 1883).
15. *Id.* at §1.4.
16. Robert G. Vaughn, *The Opinions of the Merit Systems Protection Board: A Study in Administrative Adjudication*, 34 ADMIN. L. REV. 25, 26 (1982) (describing studies of the adjudicatory practices of the United States Civil Service Commission conducted by several scholars and the General Accounting Office)
17. Chapter 5 of this book describes the congressional investigations of abuse of the civil service system by the Nixon Administration.
18. The provision also gave the President greater control over the regulation of the civil service. The single-headed OPM was directly responsible to the President while the multi-headed Civil Service Commission was less so.
19. This description of the relationship between these agencies can also be found in Pub. L. No. 95-454, 92 Stat. 960 (1978) LEGISLATIVE HISTORY OF THE CIVIL SERVICE REFORM ACT OF 1978 (1979).
20. The CSRA described the power and structure of the new agencies (including the OPM, MSPB, OSC, and FLRA), addressed recruitment and examining, disciplinary actions, performance-based actions, veterans' preference, dual compensation, creation of a Senior Executive Service, merit pay, labor-management relations, the right to strike, downgrading and saved pay, Hatch Act reform (regarding restrictions on the political activities of federal employees), treatment of firefighters, retirement, adoption of merit principles to guide agency actions, decentralizing personnel authority, and performance appraisals.
21. GOVERNMENT ACCOUNTING OFFICE, CIVIL SERVICE REFORM, DEVELOPMENT OF THE 1978 CIVIL SERVICE REFORM ACT PROPOSALS (1988) (featuring interviews with many of the people involved in the project, including one of the co-chairmen of the working group, Howard Messner, the executive director of the project, Dwight Ink, who oversaw the operation of nine subject-matter taskforces, and Alan Campbell).
22. *Civil Service Reform, Hearings on H.R. 11280 before the H. Comm. on Post Office and Civil Serv.*, 95th Cong., 22 (1978) (statement of Alan Campbell).
23. WHISTLE BLOWING, *supra* note 4, at 204.
24. *Id.* at 205
25. *Civil Service Reform Oversight, 1980 – Whistleblower: Hearings before the Subcomm. on Civil Serv. of the H. Comm. on Post Office and Civil Serv.*, 96th Cong., 197 (1980). Although these statements were made after the passage of the CSRA, Campbell's comments give a good sense of his views.
26. Chapter 10 of this book illustrates that the OSC possessed neither the resources nor the leadership to carry out such a task. The OSC failed to accomplish even more limited goals.

27. Frederick C. Thayer, *The President's Management 'Reforms': 'Theory X Triumphant*, 38 PUB. ADMIN. REV. 309 (1978). Thayer notes that the Carter Administration's bleak view of human nature creates an 'incredible contradiction concerning the treatment of "whistleblowers".' 'It is not the only significant conceptual contradiction, but it is the most important one.'
28. The following statement of the likely interpretation of the provision, a statement made soon after the provision's enactment, rests on assertions made in Robert G. Vaughn, *Statutory Protections of Whistleblowers in the Federal Executive Branch*, 1982 UNIV. ILL. L. REV. 710.
29. Chapter 11 in this book shows how subsequent interpretations of the provision have narrowed its scope.
30. Chapter 10 in this book explores the use of these powers by the OSC.
31. Vaughn, *supra* note 28, at 635–36.

7. Retrospective and forecast

This chapter explores how a knowledgeable observer might have evaluated the whistleblower provision of the Civil Service Reform Act of 1978 (CSRA) at the time of its passage. It also suggests what an astute observer might have predicted about the successes and failures of the law. The knowledgeable observer is aware of the background and character of the law explored in the previous chapters; and the astute observer critically examines the relationship between that history and the content of the law to speculate what problems might arise. Put together as one, this knowledgeable and astute observer provides us with both a retrospective and a forecast regarding the successes and failures of this groundbreaking whistleblower provision. This chapter thus introduces several of the issues considered in subsequent chapters.

Some of the forecasts, perhaps the easiest to verify or explain, are addressed here with the advantage of hindsight. Others, perhaps the more difficult and complex, are explored in subsequent chapters. This chapter also enables one to see the landscape ahead and the development of other whistleblower laws and their similarities and differences to the whistleblower provision. Those similarities and differences advance an assessment of the successes and failures of those laws and suggest criteria for their evaluation.

THE ENACTMENT OF THE PROVISION AS A SUCCESS

A knowledgeable observer sees the passage of the provision itself as its greatest success. Congress approved and protected an activity widely condemned and officially punished a decade before. The provision incorporated and confirmed changes in attitudes toward whistleblowing. The CSRA gave statutory definition and recognition to whistleblowers but also endorsed the legitimacy of similar conduct in other circumstances and in other contexts. Thus, the provision accepted and approved of whistleblowing.

Effect on Private-Sector Laws

The statute shifted disputes from the legitimacy of whistleblowing to conflicts regarding the interpretation of legal protection. This acceptance of whistle-

blowing offered the provision as a model for other laws and increased the likelihood of the expansion of whistleblower laws. It offered a model not only for public-sector laws but also for private-sector ones.

Although the first federal statutes protecting private-sector whistleblowers had been enacted prior to the whistleblower provision applicable to federal employees, those statutes addressed reporting of violations affecting the workplace of the protected employees. The first such statute protected employees who disclosed violations of workplace safety regulations to the Occupational Health and Safety Administration (OSHA) of the Department of Labor (DOL).¹ Prior to the passage of the whistleblower provision, Congress enacted other laws that addressed employer misconduct unrelated to working conditions, principally environmental laws that contained anti-retaliation provisions related to participation in enforcement proceedings.²

The whistleblower provision influenced subsequent statutes; some copied principles articulated in it, such as the respective burdens of proof for employees and employers and the standards for protected disclosures.³ For example, the Asbestos School Hazard Detection Act of 1980 protected disclosures to the public.⁴ Other subsequent laws focused protected disclosures on state and federal regulatory agencies.⁵

Partly because the enforcement of these statutes initially concerned workplace violations, Congress gave the DOL enforcement and adjudicatory authority. Other federal private-sector laws also directed employees to seek relief through the DOL, but some, particularly those dealing with financial institutions, permitted civil actions in federal courts.⁶ Still, many of these private-sector laws, like the whistleblower provision of the CSRA, placed enforcement of prohibitions against retaliation with administrative agencies, followed by appellate judicial review of final decisions of the administrative authority, the Secretary of Labor.⁷

Subsequently, Congress placed enforcement of broadly based private-sector statutes, now covering tens of millions of corporate employees, with the DOL. Some of these statutes included a range of corporate misconduct such as securities fraud, consumer product safety, and food safety, areas in which the DOL lacked, and still lacks, experience and/or expertise.

Most states also enacted statutes protecting public- or private-sector whistleblowers or both.⁸ In some states, a single statute covered both public- and private-sector whistleblowers. Likewise, these statutes demonstrated the influence of the whistleblower provision. Many of them contained similar categories of protected disclosures, as well as standards for disclosure and burdens of proof.

The use of the whistleblower provision as a model for other laws portends success if relevant aspects of the federal provision prove successful, but the use of the whistleblower provision as a model also augurs failure when relevant

provisions of the federal law fail. The opinions of an astute and knowledgeable observer regarding the performance of the whistleblower provision foreshadow a similar assessment of many federal private-sector laws, of state laws, and/or provisions in other countries.⁹

One example considers the failure of the administrative bodies, such as the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB), selected to receive allegations of misconduct and to respond to allegations of retaliation. Chapter 10 assesses the predictions of an astute observer regarding administrative successes and failures.¹⁰

The Provision as Radical Change

A knowledgeable observer could see the provision as a success because it embodied many of the values that helped to change popular and official attitudes toward whistleblowers. Chapters 2 and 3 describe changes that contain strongly anti-bureaucratic strains and challenge bureaucratic authority. The provision can be seen as radical and portend other challenges to bureaucracy.

Two of the more important and controversial provisions of the whistleblower provision address these themes of responsibility and accountability. One provision permits the OSC to commence disciplinary actions against agency officials who are responsible for retaliation against whistleblowers.¹¹ This authority is one of only two in federal law broadly placing disciplinary authority of agency officials outside of the agency chain of command.

The disciplinary authority of the OSC demonstrates the radical character of the whistleblower provision because that authority could easily apply in other situations regarding other types of agency conduct. For example, citizens could bring to the OSC allegations regarding violations of conflict of interest regulations or of other ethical standards. This extension is easily seen because the justifications for whistleblower protection are linked to the ethics of federal employees. In addition, like the CSRA, the 1966 federal Ethics Reform Act, which created the Office of Government Ethics, can be seen as Watergate reform legislation.¹²

Depending on the nature of the allegations of wrongdoing made by whistleblowers, the other provision authorizes the OSC to direct agency heads to investigate these allegations of misconduct, to require a formal response, and to evaluate the response received. The OSC may also file a report with Congress and with the President.

This authority in the OSC likewise demonstrates the radical aspects of the provision. The power to investigate allows a single federal employee to commence a process in which the head of the agency must investigate possible agency misconduct under the scrutiny of the OSC. This power challenges bureaucratic control in new and potentially significant ways.

The second group of values is connected by their rejection of bureaucratic secrecy. The whistleblower provision allows a federal employee to disclose to the public information that an agency seeks to protect. Although the provision prohibits the disclosure of certain classified information, the permitted disclosures are broad. Whistleblowing shares much with other attempts to limit bureaucratic secrecy and is linked with the idea of open-government contained in the 1966 federal Freedom of Information Act. Whistleblowing challenges bureaucratic secrecy in ways that a freedom of information provision does not. Whistleblowers are likely to be insiders who know of the existence of information and of its value, knowledge often not available to those who might use a freedom of information law. Whistleblowing can affect when the information is disclosed, as well as whether it is disclosed.

The First Amendment rights of federal employees can also be seen to reject bureaucratic secrecy. Although the First Amendment protects opinions in ways in which the whistleblower provision does not, like the whistleblower provision, the First Amendment protects insiders with access to information and expertise who expose matters of public concern. The whistleblower provision also buttressed the First Amendment. One of the goals of Congress was to specify First Amendment-related rights of federal employees by clarifying ambiguous applications of the First Amendment.¹³

A knowledgeable observer might also see the passage of the provision as a success because it illustrates a level of support for whistleblowing that bodes well for the application of the law and improvements in it. The passage of the whistleblower provision resulted in part from action by civil society groups; passage of the law also generated the creation of similar groups. The history of the Government Accountability Project (GAP), a whistleblower advocacy group located in Washington, D.C., illustrates these points.¹⁴ That group, affiliated with the Institute for Policy Studies at the time of the congressional debate, played a prominent role in lobbying for the provision and testified before Congress in support of it. The whistleblower provision suggests an increasing role for civil society.

The passage of the whistleblower provision generated broad bipartisan support. The CSRA, including the whistleblower provision, was passed by the Senate by a vote of 90 to 9. Among those 90 were both Senator Barry Goldwater, regarded as one of the Senate's most conservative Senators, and Senator Ted Kennedy, regarded as one of the most liberal.¹⁵

Effect on Public Employment Law

A knowledgeable observer might have seen the passage of the whistleblower provision as a success because of its implications for a number of areas in need of reform. One of these areas was public employment law. The dominant view

of public employment law at the time took a narrow view of employee loyalty, emphasized efficiency and unity of command based on hierarchical control, limited employee freedom of expression, discouraged employees from participating in agency policymaking, and gave employees a peripheral role in preserving the rule of law and in imposing democratic accountability.¹⁶ Certainly, public employment law contained other strains of thought but, for a variety of reasons, by including the need to legitimate administration by unelected government officials, it reflected the tenets described above.

The passage of the whistleblower provision alone challenged these tenets of public employment law; individual provisions of the law emphasized and magnified this challenge. Under the traditional view of public employment law, an employee's loyalty was to the agency for which the employee worked. The Code of Ethics for Government Employees, to which many whistleblowers appealed, illustrates the challenge posed to this view of loyalty. The Code lacked legal effect and a judgment regarding its violation lay in the hands of the agency hierarchy. The whistleblower provision permitted employees to make their own judgments about whether agency actions constituted a violation of law, rule, or regulation, mismanagement, a gross waste of funds, or specific and substantial dangers to public health and safety. These disclosures could be made public. The standard for disclosure was a reasonable belief, meaning that an employee could be protected for making an inaccurate disclosure as long as the employee had a reasonable belief that it 'evidenced' one of the types of misconduct articulated in the provision.

The whistleblower provision described a broader view of employee loyalty more closely connected to the Code of Ethics. The provision replaced a hortatory and abstract definition of employee loyalty with one that is practical, concrete, and with legal effect. The whistleblower provision represents a view of employee loyalty that includes the government generally, the system of democratic accountability, and perhaps even those who might be affected by government derelictions. It also redefines the interests of the employee's agency to which the employee owes loyalty – separating loyalty to individual managers from loyalty to the agency. The protection of external disclosures, without requiring internal ones, emphasizes this broader characterization of employee loyalty contained in the whistleblower provision.

Effect on Disobedience to Illegal Orders

The character of the protected disclosures demonstrates that public employment law should be concerned with more than efficiency and unity of command. The rule of law and democratic accountability of an agency count for much; in fact, it is not possible to define efficient service without incorporating these democratic values. The ability of employees to disclose these

types of misconduct can also be seen to justify disobedience to illegal orders. Disobedience acts as a disclosure – an internal report of a violation of law. In 1989, Congress included in civil service law a separate provision protecting an employee who disobeys an illegal order. Still, a knowledgeable observer could conclude that the whistleblower provision challenged these central tenets of public employment law.

Effect on First Amendment Rights

Because of the connection between the whistleblower provision and the First Amendment rights of federal employees, it is possible to see that the passage of the whistleblower provision also rejected the part of public employment law that limited the rights of expression of public employees. Instead, as noted above, the provision buttressed these rights.

The history of the provision and its content demonstrates that it rested on the belief that federal employees should play an important role in preserving the rule of law and democratic accountability. Whistleblowers provide agency officials, Congress, the press, and the public with information about violations of the law and ensure that information regarding those violations are placed in the hands of persons who could call the agency personnel to account.

Effect on Public Administration

At this point the reader, as well as our knowledgeable observer, will recall how new approaches to theories of public administration influenced the favorable reception of whistleblower protection. Those new approaches to public administration by implication also challenged traditional tenets of public employment law, including an emphasis on efficiency, obedience to command, and limited rights for public employees. To the extent that these new approaches created a competing vision of public employment, they supported the challenge that the whistleblower provision posed to public employment law.

The passage of the whistleblower provision suggested some significant changes in public policy debates by giving employees a much greater role in debates about agency policy. The provision encourages employees to disclose information regarding violations of law, the gross waste of funds, mismanagement, and specific and substantial dangers to public health and safety. All of these disclosures could influence policy debates regarding agency conduct. The last three items mentioned above lack the clarity of violations of law that require appeal to specific legal or regulatory standards. Unlike specific legal standards evoked by violations of law, gross waste of funds, mismanagement, and specific and substantial dangers to public health and safety suggest more amorphous criteria. Thus, these more ambitious standards encourage

employees to exercise greater independent judgments when evaluating and reporting agency conduct. Thus, an individual employee possesses the ability to influence and challenge agency policy.

The protection of disclosures regarding specific and substantial dangers to public health and safety illustrates the introduction of employees into public policy debates. These disclosures may not address an agency's own interest in the same way as the other disclosures. The interest of a generic federal agency in the health and safety of the public does not implicate an agency's interest in legality and efficiency. Those agencies, however, that have responsibilities for protecting public health and safety have an interest in carrying out that mission and the disclosure of specific and substantial dangers to public health and safety can likewise be seen as implementing a duty of loyalty to the agency that is separate from any obligation to the current management of the agency. In these agencies, however, employees are directly involved in the administration of these programs and their disclosures are more likely to address disputes regarding policy.

Effect of Government Regulation on the Private Sector

This last example indicates why passage of the whistleblower provision might also affect government regulation. Criticism of regulatory agencies include capture of those agencies, misplaced regulatory priorities, and abrogation of regulatory responsibilities for a variety of reasons, including interest, resources, incompetency, or political pressure not to enforce important regulatory provisions. This category of protected disclosure responds to these concerns by permitting employees to challenge these regulatory failures, not in every instance, but when they create a 'specific and substantial danger to public health or safety.'

When an agency's regulatory responsibilities affect public health or safety, it is not clear that the protected disclosures must concern something that occurs within the workplace or in the federal agency. In these circumstances, it is more likely that a disclosure is about the conduct of third parties. For example, assume that a federal employee identifies a private activity involving the disposal of toxic chemicals in the course of mountain-top mining, an activity that the employee believes creates a specific and substantial danger to public health and safety. The agency may have authority to regulate this activity but it is not legally required to do so, as is the case with much regulatory authority. Although the agency may be efficient in the regulatory responsibilities it has chosen to follow, the employee's disclosure identifying regulatory omissions challenges the agency's regulatory priorities.

THE ENACTMENT OF THE PROVISION AS FAILURE

A knowledgeable observer could see many reasons to view the passage of the whistleblower provision alone as an important success, which promises to fulfill the expectations created by the themes supporting its enactment. Its enactment paves the way for other successes and the development of other whistleblower provisions.

An astute observer may share these judgments but raise a number of reservations that question whether the promise of the provision will be fulfilled. These reservations also require a more nuanced assessment of the successes attributed to the passage of the whistleblower provision. In particular, this observer can identify grounds for concluding that the enactment of the provision was more problematic. These grounds reassess the prospect of success because of the recognition of the legitimacy of whistleblowing, the challenge that the provision poses to bureaucratic power, and the rejection of important aspects of public employment law. These implications of the provision may lead to failure rather than success.

First, the passage of the law has shifted the discussion to the content of the law but this modification in the debate can also be seen as a potential risk of, as well as an advantage of, the enactment of the provision. The movement signals recognition of the legitimacy of whistleblowing but it also obscures the justifications for whistleblowing. For example, the rich ethical debate about whistleblowing generated considerable support for it. Debate regarding the statute emphasizes administrative or judicial interpretation of it; rather than focusing on the reasons for protecting whistleblowers, this emphasis leads to the often arcane criteria of statutory interpretation enabling agencies and courts to ignore the connection of that statutory language to the values that generated it.

Even though the enactment of the provision may signal the legitimacy of whistleblowing, opponents who can no longer directly challenge the validity of the activity can turn to other objections. If these substitute objections are successful, the usefulness of the provision can be substantially reduced. These substitutes may be more successful than direct challenges to the justifications for protections.

Such substitutes include challenging the breadth of the law, describing unintended consequences for administration flowing from broad judicial interpretations of the statute, and redefining whistleblowing by emphasizing the costs and risks of protection. This redefinition in the context of a statute can take place without discussion of the background and justifications for the law. The balancing of interests used either explicitly or implicitly by an administrative agency or court permits a balance that focuses on costs and not benefits of the whistleblower law. The risks are identified but the advantages are

undervalued because they are assumed to have been incorporated into the statutory language. Those advantages do not receive the articulation of, and the attention given to, the risks.

Second, the success of the provision in challenging bureaucratic authority and in opposing bureaucratic secrecy raises the specter of bureaucratic resistance. If the success of the provision rests on the reduction of bureaucratic power, then that power will be deployed to undermine or limit the effect of the provision. It may prove difficult to protect a whistleblower. The preceding stories of individual whistleblowers have catalogued the many techniques available to an organization to discourage, ridicule, or punish those who raise objections or reservations about the practices of the organization or of the behavior of persons within it.

The risk of bureaucratic resistance requires examination of the techniques to address that resistance. For example, how does the provision seek to persuade organizations to create internal mechanisms that will encourage employee disclosures within the organization by ensuring that employees can safely make them? How does it ensure that employees' allegations will be fully and fairly considered? The Leahy report concluded that prior to the enactment of the provision, on the whole, agencies had failed to do so.¹⁷ By protecting but not requiring internal disclosures the whistleblower provision encourages agencies to create effective and fair internal complaint mechanisms. If agencies create credible, effective internal mechanisms, they can encourage employees to use these procedures rather than making disclosures outside the agency as the provision permits. Beyond this encouragement, the provision does little to require effective procedures and likewise fails to establish criteria for them.

None of the agencies, neither the Office of Special Counsel nor the Merit Systems Protection Board, charged with protecting and adjudicating the interests of whistleblowers has any express authority to require that agencies develop effective internal mechanisms or to evaluate those created. The OSC can seek 'corrective action' to patterns and practices of prohibited practices by agencies. The MSPB has the authority to order corrective action in certain circumstances. This authority, however, does not seem broad enough for either agency to articulate and enforce standards for internal disclosures applicable to all federal agencies. Under the whistleblower provision, the agency that could do so, the Office of Personnel Management (OPM), is viewed as the President's personnel manager with close ties to the personnel authorities within federal departments and agencies. It seems highly unlikely that OPM would undertake or implement such a project.

Even if a whistleblower prevails in an action alleging agency retaliation for a protected disclosure, reinstatement of the whistleblower may be an empty remedy. The employee returns to a likely hostile environment. Conditions after

reinstatement may be little different from those that led to the whistleblower's action for retaliation. Subsequently, Congress moved to address this issue by enacting a section that gave whistleblowers priority of transfer to another agency.

The section of the law conceivably addressing this problem authorizes the OSC to seek disciplinary action against an agency official for retaliation against an employee who made a protected disclosure. Likewise, the MSPB may consider a petition for enforcement where an agency has not carried out its order to reinstate the employee. The employee might argue that the creation of intolerable working conditions was, in effect, the failure to carry out the order of reinstatement. Either of these devices, however, seems unlikely to create and sustain the type of government-wide commitment to effective and credible internal disclosure mechanisms. Both are at best episodic and limited in effect.

Third, the modification of central tenets of public employment law invites agency officials and the government to use those tenets to restrict those aspects of the provision that create the most conflict with them. In particular, the need for hierarchical command to ensure the effective administration of government and the loyalty of employees to those who manage them may be deployed in arguments about interpretation and application of the provision.

Inclusion in the CSRA

Apart from a more skeptical assessment of some the successes that are seen to follow from the enactment of the provision, an astute observer might also have reservations about the inclusion of the whistleblower provision in the CSRA. In addition, this observer might explore the 'opportunity costs' created by the whistleblower provision by examining those alternatives not pursued, those roads not taken.

The CSRA was a large and complex piece of legislation. The whistleblower provision was only a part of it; the protection for whistleblowers was included in a section in which the proscription of retaliation against whistleblowers was the eighth of ten such prohibited personnel practices. The structure of the CSRA regarding these prohibited personnel practices determined the enforcement and application of the whistleblower provision. The character of the treatment of prohibited practices responded to many issues unconnected to whistleblower protection.

Because of its character, the CSRA implemented values and principles conflicting or inconsistent with those supporting the whistleblower provision. The CSRA emphasized governmental efficiency and many provisions sought to increase the discretion and authority of federal managers.¹⁸ The whistleblower provision was defended by proponents of these other changes in the law as a counterbalance to increased managerial discretion.

Moreover, the CSRA confirmed the dominant view of federal employment law. As discussed above, the whistleblower provision challenged this view. This challenge, however, was placed within a larger context that generally supported and advanced the vision being questioned.

The implanting of the whistleblower provision in the CSRA may have helped to secure its enactment. The Carter Administration pursued enactment because it saw the CSRA as one of the necessary reforms responding to the Watergate crisis. Although the whistleblower provision also implemented reforms required by Watergate and other events in the 1960s and 1970s, Congress delayed or declined to enact it as separate legislation, particularly if Congress had already adopted a more comprehensive piece of legislation. Yet there were costs attached to the inclusion of the provision in the CSRA.

An astute observer might also speculate regarding other costs attached to the connection with the CSRA. The attachment of the whistleblower provision to the CSRA foreclosed other ways in which whistleblower protection could have been implemented. These other options were among the opportunities lost by the choices made.

Many of these alternative approaches were well known at the time of the enactment of the whistleblower provision. The book, *The Nader Report: Whistle Blowing*, described in Chapter 4, was the first to combine stories of whistleblowers with specific proposals for reform. These proposals mentioned many of the alternatives discussed here.¹⁹ Thus, these alternatives were appreciated at the time of the enactment of the whistleblower law. The rejection of them remains controversial.

Reliance on Administrative Regulation

The CSRA protected employee rights principally through administrative agencies, such as the MSPB and the OSC. Whistleblowers were bound by the same administrative processes. Certain types of specifically listed agency actions taken in retaliation for protected disclosures could be appealed directly to the MSPB and in these actions whistleblowing could be raised as an affirmative defense. Regarding other agency actions not so listed and thus not appealable, a whistleblower could seek redress from the OSC. The OSC could take the case to the MSPB for adjudication. The final decisions of the MSPB, but not of the OSC, could be appealed to a United States Circuit Court of Appeals. A court of appeals would decide the case on the factual record created by the MSPB and would reverse the action only if the MSPB acted arbitrarily or there was not substantial evidence to support its decision.

Witnesses, including some whistleblowers and whistleblower organizations, who testified before Congress opposed this administrative scheme. They preferred that whistleblowers be given the right to sue in a federal district court

where their claims against an agency or an individual official would be tried,²⁰ and others believed that whistleblowers should be able to take all claims of retaliation directly to the MSPB for adjudication.²¹

In contrast, the whistleblower provision placed great reliance on administrative officials at the OSC and at the MSPB. An astute observer might question whether these officials would be up to the task, and might consider how changes in the identity of a few key officials could alter the effectiveness of the whistleblower provision. The OSC was particularly vulnerable. That office requires funds and personnel to carry out many important, but resource-consuming tasks assigned to it.

Enforcement of the whistleblower provision relies principally administrative agencies. This reliance resembles a regulatory model and partakes of the weaknesses of this model. Like agencies regulating the private sector, agencies regulating government risk capture by those regulated. The CSRA could be described as a regulatory statute for the personnel management of federal agencies.

Like other regulated parties, those agencies regulated are likely to use their connections with regulators and their political influence with Congress and with the executive branch to limit the scope and character of regulation. This influence could be brought to bear on OPM through the variety of contacts between OPM and agency officials responsible for agency management. This influence could be brought to bear on the OSC and the MSPB by urging the President to appoint persons with perspectives more favorable to the agencies. Moreover, strengthening this regulatory scheme necessarily confronts the expertise and resources of those regulated. Because the Department of Justice (DOJ) represents agencies in personnel matters, the DOJ may be more inclined to adopt the position of those agencies when formulating litigation positions and evaluating congressional proposals for modifications in the whistleblower provision.

Rather than a regulatory model, the whistleblower provision could have been part of a broad anti-discrimination statute. Under this model, whistleblowers would enjoy some advantages not provided by the regulatory model of the CSRA. The discrimination model would also lack some of the disadvantages of the CSRA. Whistleblowing would become another basis on which discrimination would be prohibited. Discrimination, a broad term, is central to a significant body of law into which whistleblowing could fit. That body of law is well known, often reviewed and evaluated by the courts and by Congress. That law relies on administrative processes but also gives employees the right to seek redress in federal district courts through the conduct of trials unrestricted by previous administrative determinations. Large and powerful coalitions support these anti-discrimination provisions, and whistleblowers would benefit from this political power in disputes regarding changes in the law.

The anti-discrimination model could also permit a statutory provision that would cover both public- and private-sector employees. At the time of the enactment of the whistleblower provision the law was moving toward this position. If the same standards and procedures applied to public- and private-sector whistleblowers, many of the practical impediments for joining public- and private-sector protections in a single statute would be removed.

An astute observer, however, would also question this approach. First, a portion of the CSRA and Reorganization Plan No. 2 dealt with the treatment of discrimination claims by federal employees. The CSRA created a complex administrative scheme regarding allegations of discrimination. That scheme gives the Equal Employment Opportunity Commission (EEOC) jurisdiction over complaints of discrimination by federal employees while it confers jurisdiction over appeals from certain listed personnel actions to the MSPB. In resolving these personnel actions, the MSPB is bound by the EEOC's interpretation of anti-discrimination law. If employees raise discrimination as defenses in personnel actions appealed to it, the MSPB has authority to resolve both the personnel actions and the discrimination claims. An anti-discrimination approach to whistleblower claims would require a separate section of the CSRA to treat whistleblower claims not under civil service law but under anti-discrimination procedures. The feasibility of this approach is hard to judge in retrospect.

At least on the surface, justifications for the anti-discrimination approach differ from those supporting the whistleblower provision. Anti-discrimination provisions rest on characteristics of the person while the whistleblower provision rests on conduct. The conduct-based quality of whistleblower protection stresses the standards for the behavior of the whistleblower and the character of conduct protected in detail not found in anti-discrimination laws. The history of the whistleblower provision evokes justifications and values not embodied in anti-discrimination provisions. Anti-discrimination statutes, however, implement a broad anti-retaliation principle that permits reductions in the prerogatives of employers when employees disclose matters affecting the public interest. In this sense, allegations of discrimination are disclosures of illegality.

Omissions

An astute observer would also note important omissions in the whistleblower provision. First, the whistleblower provision relies on protections to encourage disclosures. It does not provide other incentives for doing so. Even with the protection provided by the provision, employees must weigh the effectiveness of the protections against the detriments likely to be suffered. This calculus gives considerable weight to the reasons for disclosure, including the magnitude of the misconduct identified.

Even if the whistleblower receives reinstatement, back pay, and attorney fees, the whistleblower does not receive other economic costs attendant to the retaliation, such as the loss of a home or reduction in the value of other assets. The whistleblower does not recover for emotional harm. Thus, the whistleblower still pays these uncompensated costs of the disclosure. These costs include opportunity costs, the readjustment of one's life, and a negative change in attitudes toward the whistleblower by some acquaintances or co-workers. Under the whistleblower provision, an employee could not recover the attendant economic costs for emotional harm and the recovery of attorney fees would not be guaranteed. Changes in the whistleblower's career are not fully compensated. The damage to marriages and personal relationships is not redressed. At least some of the sting of Nader's remark about whistleblowing remains: 'common candor requires uncommon courage.'²²

At the time of the enactment of the whistleblower provision the federal False Claims Act, adopted during the Civil War to deal with fraud by contractors supplying material to the Union Army, was rarely used and regarded as ineffective. Likewise, bounty provisions were limited and rarely referred to in the discussion of whistleblowing prior to the Act. Perhaps one reason for this lack of interest in these types of incentives was that they clashed with the narrative created by whistleblowers' stories. Under these narratives whistleblowers were heroes who sacrificed themselves for the public good. As it does with religious observance, avarice taints whistleblowing.²³

The whistleblower provision focuses on individuals. This concentration on the individual reflects a similar aspect of the narrative taken from the stories of whistleblowers. Yet these individual stories, such as that of Frank Serpico, illustrate that successful whistleblowing is usually a group enterprise. Other persons provide information, give support, furnish advice, offer assistance, and devote resources to the whistleblowing. Some of these persons are employees but others may not be; they are family members, advisors, members of public interest groups, reporters, and media. One of the most effective devices used by the Government Accountability Group creates substantive task forces around an area, such as meat and poultry inspection. These task forces encourage other whistleblowers and become groups dedicated to reform of identified misconduct or abuse. An astute observer would also have known that some of the conduct described in the early works on whistleblowing described it as group action.²⁴

The Leahy report recognized the importance of support for whistleblowers and that acts of whistleblowing may involve many persons who can be seen as part of the same act. The Leahy report acknowledged that the isolation of whistleblowers was one of the most effective techniques of control and of discouragement of disclosures. For this reason, the whistleblower provision could be interpreted to include aiders and abettors who assist the whistleblower

in the disclosure. Perhaps the provision should have been more specific; perhaps it should have encouraged group action.

A logical source for group action would be through unions. These organizations, however, have not been as involved in whistleblowing as many whistleblowers would like. Perhaps the CSRA should have also addressed whistleblowing more extensively in the labor relations chapter of the Act. The treatment addressed in that chapter recognizes that retaliation against whistleblowers can be addressed in negotiated grievance procedures.

THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Soon after the enactment of the whistleblower provision an unanticipated event would have altered the views of a knowledgeable and astute observer regarding the likely successes and failures of the whistleblower provision. That event altered interpretation of the provision. The creation of the federal circuit reinforced fears that challenges to bureaucratic power posed by the whistleblower provision could be undermined by an entrenched view of public employment law. The event was the creation of the United States Court of Appeals for the Federal Circuit (Federal Circuit).²⁵

Prior to the enactment of the CSRA, review of federal personnel actions took place in federal district courts on the standards normally applied to appellate review. In addition, the Court of Claims considered federal employee cases when federal employees sought damages against the United States.

The CSRA provided for direct appellate review in any one of 11 United States Circuit Courts of Appeals depending upon where the employee resided. An appeal could also be brought in the United States Court of Appeals for the District of Columbia Circuit. The Federal Court Improvement Act of 1982 placed appeals by federal employees from the MSPB, with limited exceptions, in a newly created United States Court of Appeals for the Federal Circuit. The Federal Circuit was created by merging the Court of Claims and the Court of Custom and Patent Appeals. The 1982 Act gave the Federal Circuit exclusive jurisdiction over appeals brought by federal employees. This exclusive jurisdiction meant that most federal employee claims, including claims under the whistleblower provision, could only be appealed to the Federal Circuit.

The Federal Circuit became the only court of appeals interpreting the whistleblower provision. Thus, its interpretation determined the meaning of the whistleblower provision except when reversed by the United States Supreme Court, a rare occurrence, or by legislation passed by Congress. The Federal Circuit adopted the precedent of the Court of Claims that incorporated

the dominant view of public employment law discussed above. Some of the first judges of the Federal Circuit had been members of the Court of Claims. This change of jurisdiction increased the likelihood of narrow interpretations of the law with implications for the successes and failures of the whistleblower provision.

A knowledgeable and astute observer can tell us much about the successes and failures of whistleblower laws by examining the whistleblower provision at the time of its enactment. That examination prepares the reader for subsequent chapters that explore the conclusions of our observer. It also prepares us to consider other whistleblower laws throughout the world.

NOTES

1. Occupational Health and Safety Act of 1970, 29 U.S.C. § 660.
2. Federal Water Pollution Control Act of 1972, 33 U.S.C. §1367 (retaliation prohibited for filing, instituting, or causing to be filed or testifying in enforcement proceedings); Solid Waste Disposal Act (1976), 42 U.S.C. § 6971 (retaliation prohibited for commencing proceeding or for testifying, assisting, or participating in enforcement proceedings); Toxic Substances Control Act (1976), 15 U.S.C. § 2622 (retaliation prohibited for commencing proceedings, or for testifying, assisting, or participating in enforcement proceedings); Surface Mining Control and Reclamation Act, 30 U.S.C. §1293 (1977) (retaliation prohibited for filing complaint or testifying in enforcement proceedings); Safe Drinking Water Act (1977), 42 U.S.C. §300j-9 (retaliation prohibited for commencing proceedings, or for testifying, assisting, or participating in enforcement proceedings); Clean Air Act (1977), 42 U.S.C. §7622 (retaliation prohibited for commencing proceedings or for testifying, assisting, or participating in enforcement proceedings). The only exception in this period is The International Safe Container Act (1977), 46 U.S.C. §80507 *amended by* Pub. L. No. 109-304, § 11, 120 Stat. 1697 (2006).
3. Chapter 9 in this book describes a number of federal whistleblower laws applicable to private-sector employees. As of the beginning in 2000, these statutes are more likely to share attributes of the whistleblower provision regarding proof of retaliation.
4. 20 U.S.C. §§ 3601, 3608. This statute, however, is one of the few private-sector laws that protect disclosures to the public.
5. Examples include: The Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9610; Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. § § 2641, 2651 (disclosure to any person including state or federal government); Federal Deposit Insurance Act (1989), 12 U.S.C. §1831j; Records and Reports on Monetary Transactions (Bank Secrecy Act of 1992), 31 U.S.C. §5328. Most of the private-sector statutes passed in this millennium protect disclosures to relevant federal regulatory and law enforcement agencies. Chapter 9 of this book explores a number of these statutes in more detail.
6. Examples include: Commercial Fishing Industry Vessel Act (1984), 29 U.S.C. §1855; Health Insurance for Aged and Disabled, Examination and Treatment for Emergency Medical Conditions and Women in Labor (Emergency Medical Treatment and Labor Act of 1986), 42 U.S.C. §1395dd(i); Federal Deposit Insurance Act (1989), 12 U.S.C. §1831j; Records and Reports on Monetary Instruments Transactions (Bank Secrecy Act of 1992), 31 U.S.C. § 5328.
7. Chapter 9 of this book discusses this aspect of these laws and the movement toward providing trial *de novo* in federal district courts in which whistleblowers would have a right to trial by jury.

8. Collections of state laws can be found in Chapter 9 of this book.
9. Chapter 13 of this book discusses whistleblower laws worldwide with some comparison of these provisions to the current version of the whistleblower provision of the CSRA.
10. Chapter 10 of this book explores the performance of the OSC.
11. Chapter 6 discusses this provision.
12. Chapter 5 addresses these two laws in the context of the Watergate crisis.
13. In the whistleblower provision, Congress made judgments regarding the weight to be given to the interests of public employees. In doing so, Congress sought to overcome the reluctance of courts to use the Constitution to interfere with employer rights. Interpretation, however, has emphasized the protection of those employer interests. Chapter 11 of this book presents this aspect of the interpretation of the whistleblower provision.
14. Chapter 14 evaluates the role of civil society groups in the successes of whistleblower laws.
15. Robert G. Vaughn, *Statutory Protection of Whistleblower in the Federal Executive Branch*, 1982 UNIV. OF ILL. L. REV. 615, 620 (describing bipartisan support for the legislation).
16. Chapter 6 describes this aspect of public employment law.
17. Chapter 5 examines this report in detail.
18. Chapter 6 discusses the internal conflicts and contradictions in the CSRA.
19. Chapter 4 contains a description of several of these alternatives.
20. *Civil Service Reform: Hearings on H.R. 11280 before H. Comm. on Post Office and Civil Serv.*, 95th Cong. 531 (1978) (testimony of Ernest Fitzgerald).
21. *Id.* at 331 (testimony of Ralph Nader).
22. RALPH NADER, PETER PETKAS & KATE BLACKWELL, *WHISTLE BLOWING: THE REPORT OF THE CONFERENCE ON PROFESSIONAL RESPONSIBILITY* 3 (1972).
23. Chapter 8 shows that the whistleblower narrative is not necessarily alien to a bounty or false claims provision.
24. CHARLES PETERS & TAYLOR BRANCH, *BLOWING THE WHISTLE: DISSENT IN THE PUBLIC INTEREST* 77–100 (describing group action with the Office of Equal Opportunity), 152–66 (describing concert of action by attorneys in the Civil Rights Division of the Department of Justice), 167–81 (describing group dissent with the Department of Health and Human Service) (1972). Chapter 4 of this book contains a more complete discussion of the Peters and Branch book that contains the stories of whistleblowers.
25. ROBERT G. VAUGHN, *MERIT SYSTEMS PROTECTION BOARD: RIGHTS AND REMEDIES* §17. 01 (rev. ed. 2011). The following discussion of the history of the United States Court of Appeals for the Federal Circuit rests on this section.

8. Incentives

Protection of whistleblowers from retaliation provides an incentive for their disclosures. In this sense, protection is the price paid for information whether it is provided to an employer, to a government regulatory or law enforcement agency, to members of the legislature, or to the public through the media or through private organizations. The conception of protection as an incentive invites an evaluation of the balance between the costs of the protections and the value of disclosures. For example, a finding that whistleblowers are likely to make disclosures in ignorance of protections or despite ineffective protections affects the calculus of costs and benefits.

In contrast, ethical justifications for protecting whistleblowers as those who resist misconduct, or even evil, fit comfortably with support for the earliest whistleblower laws.¹ Other aspects of those early laws, however, blur the distinction between the instrumentalist and ethical justifications for protection. For example, the early laws saw whistleblowing as an important tool for reform of bureaucracies. The societal benefits of whistleblowing justify financial incentives, such as bounties.

The effectiveness of anti-retaliation provisions affects the incentives that they provide. Many whistleblowers are unaware of whistleblower protection at the time that they act. Professor Richard Moberly has demonstrated the weaknesses of anti-retaliation provisions in regard to the Sarbanes-Oxley Act. Other scholars, whose works are discussed in subsequent chapters, also identify weaknesses in whistleblower protection laws. These weaknesses include inadequate access to legal counsel, limited resources, delay in consideration of allegations of reprisal, limited success in administrative agencies and in the courts, and insufficient remedies.²

AN OVERVIEW OF INCENTIVES

This chapter considers financial incentives designed to encourage disclosures of particular types of information. The federal False Claims Act (FCA), which allows individuals, called relators, to pursue the recovery of false claims paid by the United States, remains the best known of these laws.³ Although dating from the time of Civil War, Congress reinvigorated the FCA with amendments

in 1986. Thus, those amendments can be connected to the background leading to the enactment of the whistleblower provision of the Civil Service Reform Act (CSRA) in 1978. The 1986 amendments (and through them the whistleblower provision of the CSRA) encouraged the states to enact false claims acts with *qui tam* provisions.⁴ In 2006, Congress, in the Deficit Reduction Act of 2005, required major recipients or payees of Medicare funds to include in employee handbooks information regarding the FCA and its whistleblower protections.⁵

Despite some criticisms of the FCA, Congress further ‘clarified’ the law. The Fraud Enforcement and Recovery Act of 2009 (FERA) expanded the scope of the FCA, corrected erroneous interpretations by including fraud against government contractors and grantees, rejecting an intent requirement in some sections of the law, covering funds administered by the United States, for example in the reconstruction in Iraq, applying the conspiracy provisions of the FCA beyond approval or payment of false claims, and approving ‘reverse false claims’ where a company uses a false record to reduce, hide, or eliminate an obligation owed to the government.⁶ The Patient Protection and Affordable Care Act of 2010 reduced the limitations imposed by the requirements that the relator be an original source and by the exclusion of claims based on public disclosures.⁷

Financial incentives also take the form of bounties paid to individuals who bring violations of the law to the attention of regulatory or law enforcement officials. These laws encourage disclosures and contain anti-retaliation provisions. Bounty laws have long existed in many states and in the federal government.⁸ For example, the patent bounty law dates from 1890 (that law allows an individual to sue for a penalty of mismarking and retain half of the recovery); the Internal Revenue Service (IRS) bounty provision dates from 1954 and the US Customs Service law from 1930. In 1988, Congress created a bounty system for the Securities and Exchange Commission (SEC), but restricted to violations of restraints on insider trading. Some bounty provisions were seen as outdated or ineffective and rarely used. For example, they did not include anti-retaliation provisions. In 1998, one influential senator called for an end to the IRS bounty program on moral grounds, calling the program ‘Rewards for Rats.’⁹

Bounty provisions, however, have enjoyed a revival. This revival suggests an increasingly important role for bounties in a number of areas of federal regulation. The IRS bounty provision was significantly revised in 2006. In 2010 and 2011, Congress created enhanced bounty provisions respectively for the SEC and for the Commodity Futures Trading Commission (CFTC). In particular, the SEC bounty provision and the implementing regulations have generated controversy and debate.¹⁰

The federal FCA and bounty provisions remind us that whistleblowing and

whistleblower protection need not be limited to employees. Although employees usually possess the types of information that financial incentives attempt to dislodge, persons other than employees of a company may possess relevant information. The FCA and bounty provisions cover some persons who are not employees. In this way, these provisions reiterate that whistleblower laws are more than employment laws.

The FCA and bounty provisions also accentuate the monetary value of information. The acquisition and evaluation of information is costly. These costs create one of the weaknesses of regulatory administration. Insiders not only have access to information, but also possess special skills in evaluating its significance. Whistleblowers are thus an important source of information and financial incentives recognize the monetary value of that information. Agency investigations can overlook much important information but can also identify some activities that appear to be violations of the law that insiders evaluate as fully compliant. In a regulatory context, information held by insiders is a public good for which there is no market. False claims and bounty laws provide a market for this information.

This chapter also considers other incentives based on honor and recognition. As shame can be an effective sanction, social honor can serve as a meaningful incentive. Such honor can include formal awards by agencies, businesses, professional groups, and peers. These awards, like protection or financial incentives, are external. They reinforce varying personal motivations of individual whistleblowers. Whistleblower laws have inadequately deployed these types of incentives.

A HISTORY OF *QUI TAM* LAWS

Qui tam provisions allowing individuals to bring actions on behalf of the government or sovereign have existed for centuries in English and American law. The original Congress passed a number of such provisions. John Boese notes that '[a]t least 10 of the first 14 statutes enacted by the first United States Congress relied on some form of *qui tam* action to supplement the enforcement role of government agents.'¹¹ Such provisions provided a financial incentive for individuals with information of wrongdoing to bring actions to recover damages to which the government was entitled. The current federal False Claims Act, often referred to as the Lincoln Law, is linked with a statute intended to deal with fraudulent contract claims during the Civil War in which contractors provided substandard equipment, or sometimes nothing, to the Union Army. As one article put it, 'Diseased mules and defective muskets led to the passage of the federal False Claims Act.'¹² 'By the twentieth century, the 1863 False Claims Act contained virtually the last remaining *qui tam*

provision of any consequence in federal law.’¹³ Before 1943 there ‘were few reported civil False Claims Act decisions.’¹⁴

In 1943, due in good part to the efforts of Attorney General Francis Biddle, Congress revised the FCA reducing its effectiveness and limiting its use.¹⁵ Particularly debilitating was the requirement that a relator could not bring suit if the evidence provided by the relator had been known to any federal agency because some agency often possessed some information relevant to the relator’s suit.¹⁶ Another commentator emphasizes the range of government enforcement mechanism that became available to the government and states that although the use of *qui tam* ‘decreased[,] [t]he Act itself, however, remained important.’¹⁷

The legislation also considerably lowered the maximum percentage that could be recovered by the relator and made the award of any recovery discretionary on the part of the courts. The Attorney General argued that actions by ‘informers’ were always disfavored and that changed circumstances reduced the need for such actions. These changed circumstances included expanded federal law enforcement and increased resources of the Department of Justice (DOJ).¹⁸ Biddle drew attention to a case in which a relator took a complaint filed by the government in a criminal action, slightly altered it, and filed a FCA suit. A minority view in the Senate emphasized the importance of holding defrauders accountable. Senator Langer, the author of these minority views, also emphasized the accountability of government. ‘The proposed bills seek to emasculate the inalienable rights of the citizen to check upon his appointed administrative officer – to see that his own Government is protected.’¹⁹

Decades of inactivity followed the 1943 revision (one indicator is comparing the number of FCA suits before and after the 1986 reforms). A series of reports in 1979 and 1981 began the revision of the law. These reports by the United States General Accounting Office (now the United States Government Accountability Office) (GAO)) described the extent of fraud against the government, as well as weaknesses in the government’s responses. In its 1979 report the GAO criticized the DOJ for not making full use of civil remedies to combat fraud.²⁰ In May 1981, in the first volume of a massive report, the GAO concluded that fraud was widespread but that much of it went undetected and those who were caught faced little chance of being prosecuted or jailed.²¹ The GAO included in the cost of these frauds not only the financial losses to the United States, but also an erosion of public confidence in the ability of government to manage its programs. According to the GAO, the DOJ took civil action in only 28 of 393 fraud cases referred by federal agencies.²²

In its second volume, the GAO reviewed the nature, extent, and cost of fraud identified at 21 federal agencies. Its analysis examined an estimated 77,211 fraud cases.²³ Its third volume comprehensively reviewed the cost of

fraud at these agencies and provided fraud profiles for each agency.²⁴ These reports constructed part of the foundation on which the 1986 amendment of the FCA rested. In the years following the GAO reports, the press carried stories of \$400 hammers, \$7,000 coffee pots, \$660 ashtrays, \$400 socket wrenches, \$16,571 refrigerators to hold the lunches of air crews, and \$640 toilet seats.²⁵ This steady refrain of contractor abuse also supported reform of the FCA.

Whistleblowers laid another part of that foundation for the amendment. Two whistleblowers, John Gravitt and Robert Wityczak, testified before a subcommittee of the Senate Judiciary Committee regarding contractor abuses that involved charging the government for work performed by private contractors on nongovernment jobs and that included costs for eight-hour days even though part of that time had been spent waiting for advice or parts or waiting to be assigned work.²⁶ Gravitt testified that each week he was given a 'hot sheet' of commercial jobs that were in 'cost overrun' to ensure that work on those projects were charged to government jobs. Gravitt reported the fraud to his foremen and his supervisor and refused to falsify vouchers. He was later told that he would be laid off. Despite an investigation by a company auditor that confirmed the allegations, no action was taken to change practices or to discipline any of those responsible.

Gravitt described his experiences as a relator under the FCA. His attorney, James Helmer, also described those experiences in his congressional testimony²⁷ and in more detail in a book regarding the FCA. In his book, Helmer identified serious deficiencies in the FCA, highlighted the failure of DOJ to proceed aggressively with the case, and discussed its acceptance of an inadequate settlement, as well as its harassment of Mr. Gravitt.²⁸

The other whistleblower, Robert Wityczak, also described schemes to mischarge work on other projects to the space shuttle program. Wityczak complained to his supervisors and refused to participate in the fraud. Because he reported the fraud to the NASA Inspector General, he could not bring an FCA action because the government had prior knowledge of the fraud, albeit from Wityczak's own report.²⁹ NASA did not use that information to seek recovery under the FCA, and Wityczak was barred from doing so. He describes the response to his complaints and his refusal to participate in fraud: 'I was squeezed out of work' ... 'excluded from meetings,' '[denied] access to documents,' and 'put to work doing menial tasks.'³⁰ Wityczak, who was a triple amputee because of combat injuries suffered as a marine in Vietnam, discusses the effects of those tasks. 'The tasks were often difficult physically, and my back condition was aggravated, and I had to take medical leave.'³¹

The 1986 amendments reflect the influence of the testimony of these whistleblowers. The House Report noted the lack of federal whistleblower protection in the FCA and the significance of the inclusion of such protection in the amendment.³² Courts, however, continue to disagree regarding the

circumstances in which internal disclosures will be protected and whether employees whose positions require them to advise superiors of wrongdoing are entitled to whistleblower protection under the 1986 amendment.³³

The House Report specifically referred to Gravitt's testimony as the basis for changes that would permit the relator to remain in the litigation if the government takes charge of it and for a provision that the government may settle a case over the objection of the relator only if the relevant court concludes, after a hearing, that the settlement is fair.³⁴ Likewise, the Senate Report drew on Gravitt's and Wityczak's testimony to support its conclusion that whistleblowers are effective in detecting fraud. The report relied on Wityczak's conclusion that there is 'absolutely no encouragement or incentive' for defense industry employees to report fraud but instead a great disincentive due to employer harassment and retaliation.³⁵ The report also cited Gravitt's view that auditors would rarely detect the types of abuses that he identified.³⁶

In several ways the 1986 amendments and the whistleblower provisions included in it are extensions of the whistleblower protection provision included in the Civil Service Reform Act in 1978. Several of the stories of whistleblowers told in the early 1970s, stories that helped to create a narrative supporting whistleblower protection, related to waste and fraud in government. One iconic whistleblower of the period, Ernest Fitzgerald, addressed abuse by contractors.³⁷ His story pervaded the discussion of whistleblower protection during the period and connected that discussion to contractor fraud and abuse. The importance of uncovering waste, fraud and abuse became justifications for whistleblower protection in both laws.

Watergate and concerns about government integrity and performance also generated support for whistleblower protection for federal employees. Similar concerns about bureaucratic inefficiency and misconduct affected government and the private sectors equally.³⁸ The Senate Committee report explicitly draws this connection between civil service whistleblower protection and protection under the FCA. That report describes the similarities between civil service employees reporting fraud, waste and abuse and contractor employees who 'blew the whistle' on fraud by government contractors.³⁹

The 1986 amendments⁴⁰ included whistleblower protections that provided for reinstatement, double damages, and attorney fees. The amendments abandoned the rule prohibiting suits in cases of 'prior government knowledge' and substituted a requirement that the 'relator' be an original source with direct and independent knowledge of the 'information on which the allegations are based and who voluntarily provided the information to the Government before filing a *qui tam* action.'⁴¹

The amendments also increased the relator's share of an award: the relator receives between 15 and 20 percent of an award if the government takes control of the action and between 25 to 30 percent if the relator proceeded

alone. In both instances, relators would be responsible for their own attorney fees. If the relator brought the actions 'based primarily on disclosures of specific information' relating to allegations or transactions in criminal, civil or administrative hearing, and congressional hearings a 'relator may receive an award of not more than ten percent.' The amendments allowed the relator to remain in the litigation even if the DOJ took charge of it. The amendments also permitted limitations on discovery by the relator and authorized, with court approval, a settlement by the DOJ to which the relator objects.

Relators also benefitted from changes that increased the likelihood of success under the FCA. The amendments excluded a requirement of specific intent by the defendant, clarified that the burden of persuasion is by a preponderance of the evidence, allowed treble damages, and increased civil penalties. According to the legislative history of the amendments, they also permitted recovery for 'reverse' false claims that included misrepresentations to 'avoid paying money owed the Government.'⁴²

The amendments increased the number of false claim actions and the amount of funds recovered by, or on behalf of, the government. For example, in fiscal year 1987, 33 *qui tam* actions were filed; fiscal year 1997 saw 534 such filings. Since then the number of these actions has ranged roughly between 300 and 400. From 1997 to the end of September 2005, these actions recovered 'over \$9.6 billion owed to the United States.'⁴³ By 2009, the recoveries had exceeded \$15 billion.⁴⁴ By September 30, 2010, total recoveries exceeded \$18 billion.⁴⁵

The Fraud Enforcement and Recovery Act amended the False Claims Act to reject a number of judicial decisions and thus to increase the scope of the law. The Senate Report regarding these changes stated: 'One of the most successful tools for combating waste and abuse in Government spending has been the False Claims Act (FCA), which is an extraordinary civil enforcement tool used to recover funds lost to fraud and abuse.'⁴⁶ The amendments authorized actions for fraud against government contractors and grantees, and for fraud against funds administered by the United States, such as with the reconstruction funds in Iraq. They also broadened the definition of conspiracy, redrafted the liability for conversion of government property, and clarified the definition of a government 'obligation' for reverse false claims.

EVALUATION OF THESE INCENTIVES

Scholars and others offer criteria for the evaluation of the incentive scheme provided by the FCA. These commentaries represent a variety of perspectives and judgments regarding the law. Assessments of state false claims laws suggest additional standards.

Given the number of false claims actions and the controversy surrounding them, disagreement could be expected on the propriety of *qui tam* actions and on the criteria appropriate to that determination. Likewise, assessments under selected criteria may focus on outcomes, on process, or on the relationships between participants in the process. Scholars employ different intellectual disciplines and perspectives in their analyses. Given the project of this book, it is also appropriate to consider the FCA through the perspective of whistleblowing.

Several scholars have written about FCA suits from subject matter areas such as defense contracts or health care. Most of these articles address issues arising in a specific field and the propriety of the application of the FCA to a particular area like health care. Apart from commentary specifically addressed to these fields, articles consider a more general analysis.

Some scholars describe the FCA as another bounty provision. The crucial distinction between the FCA and the bounty provisions lies with the role of the relator in bringing an action. With bounty provisions, enforcement discretion solely rests with the government regulatory or law enforcement agency; with false claims laws, it does not. This difference supports this chapter's separate evaluation of the FCA.

Some disagreement surrounds the influence of monetary incentives. On the one hand, Professor Pamela Bucy asserts that 'research consistently shows that whistleblowers rarely are motivated by the potential for monetary gain.'⁴⁷ Elleta Callahan and Terry Dworkin assert that '[i]t is clear that the call to conscience has had limited appeal for potential whistleblowers. Virtue may be its own reward, but for many, money is more gratifying.'⁴⁸ A recent online survey of attitudes toward disclosure of misconduct found that small monetary rewards were not the most effective incentives and that in some cases monetary awards can lead to less reporting of illegality.⁴⁹ 'Duty-based reporting provides the highest status to a whistle-blower while rewards carry the highest level of social stigma.'⁵⁰

The literature suggests misgivings about the use of monetary incentives. Even scholars who believe money will motivate disclosures still believe that the propriety of such rewards remains in question.⁵¹ First, the belief that whistleblowers act for financial gain influences perceptions of their reliability. Second, the tone and character of the discussion as reflected in the names given to whistleblowers sets this literature and debate apart from other discussions of whistleblowing. For example, an article is entitled *Snitching for Dollars* and other articles contain descriptions of whistleblowers as 'snitches,' 'informers,' 'mercenaries,' 'rats,' and 'paid stool pigeons.' Words and phrases like 'extortion,' 'abuse,' 'shades of Nazism for informing on friends and neighbors,' 'lottery players,' and 'sacrifice of the public good' also appear. Some of these terms are the argot of criminal organizations seeking to prevent

investigation and prosecution. In no other body of literature regarding aspects of whistleblower laws is there found frequent incorporation of the dialect of criminal associations.

Thus, Bucy looks to the 'expressive function' of the law. In private enforcement of the law, the perceived quality of the messenger has much to do with the message conveyed.⁵² If the *qui tam* plaintiff is credible and able to convey the regulatory message of the government, then some of the problems of private enforcement are ameliorated. The FCA enables DOJ attorneys to judge the credibility of a whistleblower. These enabling provisions include the obligation to provide the DOJ with extensive information about the suspected fraud before the suit is filed, the requirement that the FCA suit be filed *in camera*, and the authority of the DOJ to monitor the case.⁵³ The greatest changes, however, are ones in attitude, including 'a stronger societal consensus that economic wrongdoing is bad' and 'a shift in loyalty' putting 'the welfare of the larger community ahead of loyalty to those near at hand.'⁵⁴

Many see the evaluation of the FCA in economic terms. For example, public choice theory 'assumes' that 'private initiatives are needed to supplement enforcement efforts by government agencies that do not have the ability or resources to conduct their duties; government agencies have been "captured" by the industries that they are to monitor and they do not vigilantly pursue their given regulatory mission.'⁵⁵ The FCA private action 'contains two features unique to private justice actions' that make it 'extraordinarily successful as a regulatory tool.' The financial incentives – the damages and penalties combined with the mandatory percentage of the recovery – attract 'knowledgeable insiders.'⁵⁶ Inside information empowers regulatory action that otherwise might not be available to an agency. In addition, that the DOJ and the FCA plaintiffs serve as 'dual plaintiffs' provides quality control and allows the plaintiff to work with regulators in a way that encourages the exchange of information about regulatory policy. The FCA is also 'highly effective in recruiting legal talent.'⁵⁷

Others believe that the design of the FCA creates inefficiencies. For example, the DOJ's 'insurance' against the payment of any attorney fees when a FCA plaintiff loses an action creates a moral hazard that discourages the DOJ from seeking the dismissal of marginal cases. Actions by FCA plaintiffs can generate excessive litigation not consistent with an agency's regulatory goals.⁵⁸ Actions by employees challenge employers, and actions by government employees challenge behavior that their agencies could regulate. These challenges disrupt the workplace and can reduce efficiency by encouraging costly safeguards, including screening and monitoring employees to encourage passivity and loyalty, and by changing the decision-making process within a company.

Professor William Kovacic argues that these suits can also discourage

information-sharing with employees and other suppliers. The possibility of large recoveries can delay commencement of litigation in order to increase damages and recoveries and encourage public employees involved in compliance to focus on companies based on their ability to pay large damages. The pursuit of large recoveries can erode internal compliance because employees will first seek litigation or delay reporting. The FCA also imposes costs on the DOJ. According to Kovacic, these costs include the evaluation of *qui tam* suits, the billing of legal fees by successful defendants, and the reduction in government recoveries in actions that the government would have brought anyway.

Even if financial incentives are effective in bringing forth inside information, some scholars worry about the social costs of these procedures. These actions disrupt institutional relationships and alter the loyalty and collaboration on which institutions rely. Although the financial incentives can be seen as serving democratic values, they can also be viewed as the payment of government spies and the creation of a 'mind police.'⁵⁹

Many authors considered the relationship between the relator and the DOJ. One author describes how game theory analyzes this relationship.⁶⁰ Litigation under the FCA involves the same parties in similar games over time. The game is not a zero-sum game but a win-win one in which all parties will benefit from cooperation. Although cooperation is the best strategy for the parties, individual parties will be tempted to not to cooperate. A tit-for-tat strategy can be employed punishing a failure to cooperate and such a strategy benefits all the parties.

Bucy examines the powers held by the DOJ, counsel for the relator, and counsel for the defendant to punish a lack of cooperation. She also describes the FCA bar as a closely-knit group who share many characteristics and informal norms. In such a group a tit-for-tat strategy can be easily conveyed and informal sanctions will contribute to the enforcement of it.

While few articles recommend repeal of the FCA, more articles focus on amendments or other reforms. The character of these reforms reflects, in part, varying degrees of skepticism regarding the accomplishments and effects of the law. Because of complexity of the law, small changes may have significant consequences. For example, the 1943 amendments retained the FCA but rendered it ineffective. Thus, changes must be examined not only in how they address the problem identified, but also in how they affect the use of the law.

As the courts have narrowly constructed the whistleblower provisions of the FCA,⁶¹ Gregory Booker believes that they have also limited the scope of the FCA.⁶² After examining judicial decisions interpreting several important terms of the law, he concludes: 'Since 1986, however, the broad remedial nature has been thwarted by restrictive court interpretations.'⁶³ For example, the courts 'have created elements of proof not present in the plain language of the statute.'⁶⁴

Opponents have raised several constitutional objections to the FCA. Objections include the lack of standing of relators, who have no direct concrete injury, to bring a claim on behalf of the government and the violation of the separation of powers by removing from the executive authority to prosecute, to control the litigation, and to settle litigation. Opponents also asserted that the Act violates the appointments clause because it allows persons not appointed by the President to conduct litigation on behalf of the United States. Some defendants have argued that permitting a financially interested party to pursue a civil fraud deprives a defendant of due process because it deprives defendants of ‘a neutral and detached “prosecutor.”’⁶⁵ On the basis of various theories, courts have rejected these constitutional objections. For example, the United States Supreme Court concluded that the relator had constitutional standing to pursue a claim.⁶⁶ James Helmer summarizes the constitutional challenges thus: ‘the False Claims Act has withstood every constitutional challenge.’⁶⁷

THE FALSE CLAIMS ACT AND WHISTLEBLOWING

Viewing false claims provisions from the perspective of whistleblowing laws places false claims laws more clearly with other whistleblower provisions with a concomitant reduction in the importance of financial incentives. From this perspective, the financial recoveries provided by these laws are the compensation, often inadequate, for the costs of whistleblowing. James Helmer, a prominent member of the relators’ FCA bar, captures part of this view. He describes a false claims action as really about whistleblowing and urges employees to examine popular culture and books on whistleblowing to prepare for the experience.⁶⁸ In his experience ‘many individuals first pursue other causes of action, such as anti-retaliatory administrative remedies found in dozens of federal statutes.’⁶⁹ After pursuing other avenues ‘a *qui tam* suit is the only real solution a whistleblower has in order both to obtain some personal relief and compensation, as well as to force the Government and the public to take notice of wrongdoing.’⁷⁰

A research study published in the *New England Journal of Medicine* also links false claims litigation more closely to traditional concepts of whistleblowing and the narratives surrounding it.⁷¹ The study examined a sample of pharmaceutical industry whistleblowers involved in *qui tam* litigation.⁷² The study rested on interviews with whistleblowers involved in settled actions.⁷³ Of those interviewed, 85 percent were employees of the defendant company. Most of the whistleblowers who used the *qui tam* provision did not specifically intend to do so. ‘Every relator we interviewed stated that the financial bounty offered under the federal statute had not motivated their participation

in the *qui tam* lawsuit.⁷⁴ Instead the reasons given played several interrelated themes (referred to in descending order): integrity, risks to public health posed by the fraudulent conduct, and fear that discovery of the behavior would have legal consequences for them.⁷⁵

The whistleblowers reported varying degrees of retaliation often resulting in the loss of their jobs. The investigative process was long and 'there was widespread criticism of the Justice Department's collaborative posture or lack thereof.'⁷⁶ The settlement of the cases took, on the average, nearly five years.⁷⁷

'The experience of being involved in troubling corporate behavior and a *qui tam* case had substantial and long-lasting effects for nearly all of the insiders.'⁷⁸ Blowing the whistle put their careers on the line and created financial hardship. One reported: 'I lost everything. Absolutely everything.' Relators also reported 'divorces, severe marital strain or other family conflicts during this time. Thirteen reported having stress-related health problems.'⁷⁹ The report concluded 'that [whistleblower protections] are not fully effective, particularly for insiders.'⁸⁰

The median settlement was three million dollars (in 2009 dollars) and ranged from one hundred thousand to forty-two million.⁸¹ 'The settlement helped to alleviate some of the financial and non-financial costs of the litigation.' Although one whistleblower compared his settlement to hitting the lottery, 'a majority perceived their net recovery to be small relative to the time they spent on the case and the disruption and damage to their careers.' One relator calculated that if she had stayed in her job with the stock options attached to it, she 'would've been worth a lot more ... The prevailing sentiment was that the payoff had not been worth the personal cost.'

'Nearly all' of the insider whistleblowers first took their allegations to officials within the company; one whistleblower proceeded up the chain of command to the chief executive officer of the company.⁸² Ironically, the anonymity of the sealing of the complaint 'was undercut by the fact that internal complaints filed beforehand fingered them as obvious suspects.'⁸³

The stories of these relators fit easily with the whistleblowing narrative first created nearly four decades ago.⁸⁴ That narrative helped to change public perceptions of whistleblowing and led to the whistleblower provision of the Civil Service Reform Act of 1978.

STATE FALSE CLAIMS LAWS

State false claims laws attest to the success of the federal False Claims Act's *qui tam* provision. Congress cited the success of the federal FCA in the enactment of a provision in the 2006 Deficit Reduction and Balanced Budget Act

of 2005 to encourage states to enact false claims laws. If a state's law is 'at least as effective in rewarding and facilitating *qui tam* actions' as the federal FCA, the state is able to reduce by ten percent the federal share of Medicaid fraud that the state recovers. In response to this incentive, ten states either amended an existing false claims act or enacted a new one that 'mirrors the federal FCA.'⁸⁵

The Office of Inspector General of the Department of Health and Human Services issued guidelines for evaluating state false claim acts under the enumerated requirements set out in the Deficit Reduction Act.⁸⁶ Accordingly, those guidelines describe the character of *qui tam* provisions. The Inspector General will also examine other 'procedural rights, reductions in relator awards, jurisdictional bars, and other *qui tam* provisions similar to those found in the FCA' to determine whether these provisions meet the relevant requirements.

As of 2009, 23 states and the District of Columbia had false claims acts with *qui tam* provisions.⁸⁷ In a survey, 'a substantial majority of the states with *qui tam* provisions [74 percent] described their statutes as effective. Most states that did not view their statutes as effective had recently passed statutes and indicated that it was too early to assess their effectiveness.'⁸⁸

BOUNTY SCHEMES

The resurgence in the bounty schemes at federal agencies promotes disclosures of information relating to regulatory violations and to criminal conduct. These bounty schemes endorse financial incentives as an important motivation for whistleblowing. With the exception of the patent bounty law,⁸⁹ current bounty provisions rely upon administrative enforcement of the law to which the disclosure relates.

Debate regarding recent bounty provisions applicable to the SEC, the IRS, and the CFTC focuses on the particular details of each bounty scheme. The proposed regulations of the SEC implementing the 2010 Dodd-Frank and Wall Street Reform and Consumer Protection Act (Dodd-Frank) have generated considerable debate and controversy, much of it surrounding the place of internal disclosures in the scheme. The Dodd-Frank Act, applicable to the SEC, the CFTC, and the Foreign Corrupt Practices Act of 1977, contains an anti-retaliation, whistleblower protection provision. Thus, these bounty provisions contain whistleblower protection not included in the bounty programs of the IRS and the Customs Service.

Despite reservations about bounty programs, Marsha Ferziger and Daniel Currell note that they survive 'for one reason: they work.'⁹⁰ Conceptually, 'agencies can greatly increase the efficiency of enforcement at fairly low cost

by creating systems that encourage the appropriate level of private informing.⁹¹

In a 1999 article, *Snitching for Dollars*, the authors suggest frameworks for considering these federal bounty provisions⁹² by raising a number of questions relevant to the effectiveness of a bounty provision. One question addresses whether a successful enforcement or other action by the agency is necessary for recovery of the bounty. Other questions concern the amount of the bounty, whether the bounty is guaranteed, the extent of agency discretion, and the availability of judicial review of the agency decisions regarding the granting of and amount of the bounty.

The article explains that a bounty scheme must also consider out of what funds the bounty will be paid and whether whistleblowers may remain anonymous.⁹³ With the exception of the Customs Service, the bounties are paid out of the proceeds of a successful regulatory action based on the information qualifying for a bounty. The IRS provides greater protection of anonymity than the SEC, which identifies the whistleblower after the bounty is rewarded.⁹⁴ Other relevant aspects of a bounty program address publicity of the program.

According to the article, a bounty program must be profitable to the agency and to the whistleblower. The agency seeks to reduce the amount of low-quality information that it receives because administrative resources will be expended in sorting out good information and in pursuing investigations regarding information that does not lead to a violation. Relying on the proposition that a whistleblower will compare the discounted gains from making the disclosure with the discounted losses from doing so, the article advises how an agency can create a bounty program that encourages the right number of high-quality disclosures. The agency controls some factors important to the whistleblower's disclosure decision – the amount of the bounty, certainty of the bounty, and anonymity of the whistleblower. The authors of the analysis propose a model bounty system against which they compare the then existing federal bounty provisions.⁹⁵

The authors suggest a model bounty system as one with 'low fixed-percentage bounties with no nominal caps' (such a low bounty would be 'in the range of one to three percent'). This system should guarantee that 'the maximum allowable bounty will always be paid where an agency recovers a penalty' based on the information provided and that 'the agency will make all possible efforts to maintain an informant's anonymity within the constraints of the litigation process.'⁹⁶

According to the authors, this system would 'encourage potential informants to come forward with information' only when '(1) the violation is factually and legally clear, and (2) it involves a substantial quantity of money.' It would do so by 'reducing the available bounty while making its payment more

certain.’ The authors argue that certainty is important because it increases the discounted gain of smaller bounties and because it encourages disclosures from risk-averse whistleblowers. Risk-averse whistleblowers are also more likely to fear embarrassment from making a disclosure or providing false or misleading information.

RECOGNITION OF WHISTLEBLOWING AS ACTS OF MORAL AND CIVIC COURAGE

Incentives may also include honors and recognition of the contributions and sacrifices of whistleblowers. Whistleblowers, including those who do not face physical injury or death, demonstrate moral and civic courage. Like others who sacrifice for the common good, whistleblowers should receive honor and recognition for doing so. Such honors are effective even though they are awarded after the actions taken and whistleblowers have endured much of the suffering. First, such recognition supports the whistleblower and aids emotional recovery; it restores the reputation and standing of the whistleblower and vindicates his or her conduct for friends, family, and supporters. Second, such honors symbolize the value of the conduct and signal to others the honor and glory that attach to whistleblowing. They confirm the merit of the activity, as well as the person who engaged in it. Perhaps for these reasons, a number of whistleblower advocacy groups provide awards and recognition to whistleblowers.⁹⁷

Awards and honors by peers and indeed by the organizations that were the object of disclosures are perhaps most important. For Hugh Thompson, the hero of My Lai, the greatest honor was that accorded by an association of military pilots.⁹⁸ Also important to him was the Soldiers Medal, the highest honor given for courage not connected with conflict with the enemy. Being honored by peers confirms a whistleblower’s actions by those most familiar with the challenges and therefore those most aware of the integrity and courage required in meeting them. Honor by the organization whose conduct was exposed testifies to the possibility of change, perhaps the greatest reward for many whistleblowers.

In 2001 the Office of Special Counsel (OSC), under Elaine Kaplan, began its own nonmonetary awards for whistleblowers who filed either protected disclosures or claims of retaliation with the OSC.⁹⁹ The first winner was Dr. Donald Sweeney, an economist with the St. Louis District of the Corps of Engineers. His allegations, later confirmed by an agency investigation, were improper influence and manipulation of a one billion dollar public works project. Similar awards were given in 2002, 2003, 2005, and 2006, 2008, and 2009. Unfortunately, Special Counsel Scott Bloch cancelled the ceremony for

the 2006 award when he learned that the recipient planned to criticize the OSC for unresponsiveness.¹⁰⁰

Monuments, plaques, and other permanent indicia of the contributions of whistleblowers also honor them. These symbols of honor teach each generation the importance of whistleblowing. These honors also testify to the willingness of organizations to absorb the lessons taught by whistleblowers. Corporate and government bureaucracies who include these indicia in the physical environment of employees make a statement at least as powerful as those contained in codes of ethics. These symbols give content and meaning and make these codes more than simply perfunctory gestures.¹⁰¹

More extensive and routine awards and honors should be provided by government and by corporations. Awards will often be made in hindsight after the events giving rise to conflict have faded, but that delay makes the awards no less important. One test ahead for governmental and private institutions and for civil society is to redress past omissions in such awards and to create new ones. Perhaps these institutional responses will be among the most important incentives for whistleblowing.

NOTES

1. The first four chapters in this book set out the ethical underpinnings of whistleblowing.
2. Chapters 9–14 examine these weaknesses in whistleblower laws.
3. Two books canvass the federal False Claims Act. One, JAMES B. HELMER, *FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION* (5th ed. 2007) [hereinafter HELMER], looks from the perspective of the relator; a second, JOHN T. BOESE, *CIVIL FALSE CLAIMS AND QUI TAM ACTIONS* (4th ed. 2011) [hereinafter BOESE], from the perspective of defendants.
4. *Qui tam* is the Latin phrase, *qui tam pro domino rege quam pro se ipso in hac parte sequitur* which means ‘who pursues this action on our Lord the King’s behalf as well as his own.’ Vermont Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768, n. 1 (2000). One article describes the decline of the *qui tam* action in England. J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C.L. REV. 539 (2000).
5. BOESE, *supra* note 3, at § 1.04[H][4].
6. The Senate Committee report describes important changes in the law. S. REP. NO. 111–10 (2009). Justin P. Tschoepe, *A Fraud Against One Is Apparently A Fraud Against All: The Fraud Enforcement and Recovery Act’s Unprecedented Expansion of Liability Under the False Claims Act*, 47 HOUSTON L. REV. 741 (2010).
7. BOESE, *supra* note 3, at §1, 10[B].
8. The article, Marsha J. Ferziger & Daniel C. Currell, *Snitching for Dollars: The Economic and Public Policy of Federal Civil Bounty Provisions*, 99 UNIV. ILL. L. REV. 1141 (1999) [hereinafter *Snitching for Dollars*], describes these bounty provisions.
9. *Id.* at 1141 (comments of Senator Majority Leader, Harry Reid).
10. Chapter 16 in this book considers the controversy surrounding the SEC regulations implementing its bounty program. In particular, the regulations raise issues regarding the role of internal disclosures and corporate compliance systems.
11. BOESE, *supra* note 3, at §1.01[A], at 1–11.
12. Pamela H. Bucy et al., *States, Statutes and Fraud: A Study of Emerging State Efforts to Combat White Collar Crime*, 31 CARDOZO L. REV. 1523, 1526 (2010) [hereinafter *States, Statutes and Fraud*].

13. BOESE, *supra* note 3, at §1.01[B] at 1–12.
14. *Id.*
15. A relator, Morris L. Marcus, copied a criminal indictment and incorporated its assertions in a civil action under the False Claims Act, and the Supreme Court, over objections by the Department of Justice, concluded that the FCA permitted recovery by the relator. *Id.* at §1.02, at 1–14.
16. HELMER, *supra* note 3, at 53. Helmer notes that ‘any knowledge of the fraud was sufficient to invoke the jurisdictional bar,’ even information provided by the relator could provide the barring information if it was provided prior to the filing of the suit.
17. BOESE, *supra* note 3, at §1.02 at 1–15.
18. H.R. REP. NO. 78–263, 2 (1943).
19. S. REP. 78–291, pt. 2, at 2–3 (1943).
20. COMPTROLLER GENERAL OF THE U.S., U.S. GEN. ACCOUNTING OFFICE, GGD–80–7, DEPARTMENT OF JUSTICE SHOULD COORDINATE CRIMINAL AND CIVIL REMEDIES TO EFFECTIVELY PURSUE FRAUD IN FEDERAL PROGRAMS i–v (1979).
21. COMPTROLLER GENERAL OF THE U.S., U.S. GEN. ACCOUNTING OFFICE, AFMD 81–57, FRAUD IN GOVERNMENT PROGRAMS: HOW EXTENSIVE IS IT? HOW CAN IT BE CONTROLLED? Vol. I at iv, v (1981).
22. *Id.* at 32.
23. COMPTROLLER GENERAL OF THE U.S., U.S. GEN. ACCOUNTING OFFICE AFMD 81–73, FRAUD IN GOVERNMENT PROGRAMS: HOW EXTENSIVE IS IT? HOW CAN IT BE CONTROLLED? Vol. II at 5 (1981).
24. COMPTROLLER GENERAL OF THE U.S., U.S. GEN. ACCOUNTING OFFICE AFMD 82–3, FRAUD IN GOVERNMENT PROGRAMS: HOW EXTENSIVE IS IT? HOW CAN IT BE CONTROLLED? Vol. III at 1–42 (1981).
25. HELMER, *supra* note 3, at 54.
26. *False Claims Reform Act, Hearings on S. 1562 Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 99th Cong. 49–53 (testimony of John Gravitt), 80–86 (testimony of John Gravitt and Robert Wityczak) (1985) [hereinafter 1985 Hearings].
27. *Id.* at 58–79 (prepared statement of James Helmer).
28. HELMER, *supra* note 3, at 57–58.
29. *Id.*
30. 1985 Hearings, *supra* note 26, at 81.
31. *Id.*
32. H.R. REP. NO. 99–660 at 23 (1986) [hereinafter House Report 99–660].
33. BOESE, *supra* note 3, at §4. 11[B]. Chapter 11 of this book discusses restrictive judicial interpretations of the whistleblower provision of the FCA.
34. House Report 99–660, *supra* note 32, at 23–24.
35. S. REP. 99–345 at 5–16 (1986) [hereinafter Senate Report 99–345].
36. *Id.* at 6.
37. Chapter 4 of this book discusses the experiences of Ernest Fitzgerald.
38. Chapter 2 and Chapter 9 of this book develop these themes in the public and private sectors.
39. Senate Report 99–345, *supra* note 35, at 4–5.
40. HELMER, *supra* note 3, at 58–65 and BOESE, *supra* note 3, at §1.04 contain summaries of the amendments on which the following discussion relies.
41. HELMER, *supra* note 3, at 60 (footnote omitted).
42. S. REP. 99–345, *supra* note 35, at 16–17. BOESE, *supra* note 3, at §1.04.
43. The statistics above are found in HELMER, *supra* note 3, at 65.
44. These statistics are found in BOESE, *supra* note 3, at §1.04, at 1–26.
45. CIV. DIV. U.S. DEP’T OF JUSTICE, *Fraud Statistics-Overview October 1, 1989–September 30, 2010*. TAXPAYERS AGAINST FRAUD (Nov. 23, 2010, 10:18 AM), <http://taf.org/FCA-stats-2010.pdf>. *FY 2010 False Claims Act Settlements*, TAXPAYERS AGAINST FRAUD (Oct. 10, 2010), taf.org/total2010.htm (describing the major false claims cases).
46. S. REP. NO. 111–10 at 10 (2009).

47. Pamela H. Bucy, *Moral Messengers: Delegating Prosecutorial Power*, 59 SMU L. REV. 321, 338 (2006) (footnote omitted) [hereinafter *Moral Messengers*].
48. Elleta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273, 335–36 (1992) [hereinafter *Do Good and Get Rich*].
49. Yuval Feldman & Orly Lobel, *The Incentive Matrix: The Comparative Effectiveness of Reward, Liabilities, Duties and Protection for Reporting Illegality*, 88 TEX. L. REV. 1151 (2010).
50. *Id.* at 1205.
51. *Do Good and Get Rich*, *supra* note 48, at 336.
52. *Moral Messenger*, *supra* note 47, at 339.
53. *Id.* at 348.
54. *Id.* at 340–41.
55. Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 32–33 (2002).
56. *Id.* at 53.
57. *Id.* at 54.
58. William F. Kovacic, *Whistleblowing Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 LOY. L. A. L. REV. 1799, 1807–808 (1996). The discussion in the following three paragraphs rests on this article.
59. *Do Good and Get Rich*, *supra* note 48, at 327–28.
60. Pamela H. Bucy, *Game Theory and the Civil False Claims Act: Iterated Games and Close-Knit Groups*, 35 LOY. U. CHI L. J. 1021 (2004).
61. Chapter 11 of this book describes these interpretations.
62. Gregory G. Brooker, *The False Claims Act: Congress Giveth and the Courts Taketh Away*, 25 HAMLINE L. REV. 373 (2002).
63. *Id.* at 400.
64. *Id.*
65. HELMER, *supra* note 3, at 239.
66. *Vt. Agency of Natural Res. v. United States, ex rel. Stevens*, 529 U.S. 765 (2001).
67. HELMER, *supra* note 3, at 238 (footnote omitted).
68. *Id.* at 8. He includes the book *Profiles in Courage* and the films, *Silkwood* and *The Insider*.
69. *Id.* at 9
70. *Id.* The National Whistleblower Center advises whistleblowers to consider false claims and bounty provisions for similar reasons. Chapter 14 of this book reviews the advice of whistleblower advocacy groups.
71. Aaron S. Kesselheim, David M. Studdert & Michelle M. Milla, *Whistleblowers' Experiences in Fraud Litigation against Pharmaceutical Companies*, 362 NEW ENG. J. OF MED. 1832 (2010).
72. According to the study, approximately 90 percent of health care fraud cases are *qui tam* actions.
73. The study draws no conclusions for other areas of *qui tam* litigation and recognizes that the study can be affected by socially desirable response bias and recall bias. The responses in the study of whistleblowers whose cases were successful may have been more positive than the responses of other whistleblowers whose cases were not successful.
74. *Id.* at 1834.
75. *Id.* at 1834–835.
76. *Id.* at 1836.
77. *Id.* at 1834. After settlement of their claims only two of the 22 insiders remained in the pharmaceutical industry. *Id.* at 1836.
78. *Id.* at 1836.
79. *Id.*
80. *Id.* at 1838. Retaliation was often subtle, including changes in job duties that invited poor performance. Among the responses to allegations of misconduct, whistleblowers reported isolation, attempts to bribe them or buy their silence, intimidation, loss of employment, and blackballing.
81. *Id.*

82. *Id.* at 1834.
83. *Id.* at 1839.
84. Chapter 4 of this book describes the whistleblower stories and the narrative created by them that led to changes in attitudes toward whistleblowers and to the enactment of whistleblower laws.
85. *States, Statutes and Fraud*, *supra* note 12, at 1535.
86. *Publication of the OIG's Guidelines for Evaluations of State False Claims Acts*, 71 Fed. Reg. 48552, 48552–48554 (August 21, 2006) (listing these four standards). These guidelines often include more specific requirements, but generally they mandate that state laws: (1) provide liability for false or fraudulent claims, (2) contain *qui tam* provisions, (3) require filing of actions under seal, and (4) allow for civil penalties.
87. *States, Statutes, and Frauds*, *supra* note 12, contains a detailed summary of state statutes.
88. *Id.* at 1359. Appendix A in the article describes key differences between the laws of each of the states and the FCA.
89. False Marketing, 35 U.S.C. § 292 (amended by Uruguay Round Agreements Act, Pub. L. No. 103–465 title V, sec. 553(b)(6), 108 Stat. 409 (1994)).
90. *Snitching for Dollars*, *supra* note 8, at 1143. Another commentator on the application of *qui tam* to tax asserts that *qui tam* would close a ‘competency gap’ between tax regulators and members of the private tax bar. Dennis J. Ventry Jr., *Whistleblowers and Qui Tam for Tax*, 61 THE TAX LAW. 357 (2008).
91. *Snitching for Dollars*, *supra* note 8, at 1200.
92. *Id.* The following discussion rests on this analysis of the article except for changes that have occurred since its publication.
93. The article sets out these variables as questions to be answered and contains a useful summary in Table I of the characteristics of the four bounty programs examined – the programs of the SEC, the IRS, the Customs Service, and the FCA.
94. *Id.* at 1203–204.
95. *Id.* at 1197–200.
96. *Id.* at 1197.
97. Some examples include: The Sam Adams Award (given by the Sam Adam Associates for Integrity in Intelligence), The Good Government Award (given by the Project on Government Oversight), The Paul H. Douglas Award for Ethics in Government (given by the Institute of Government and Public Affairs of the University of Illinois), and the Ridenhour Prizes (given by the Nation Institute and the Fertel Foundation) (the four Ridenhour prizes are The Ridenhour Courage Prize, the Ridenhour Book Prize, The Ridenhour Prize for Truth-Telling and the Ridenhour Documentary Film Prize).
98. Chapter 2 in this book presents Hugh Thompson’s story and these particular awards.
99. Chapter 10 in this book describes these awards. In 1981, Congress authorized the payment of cash awards to employees whose disclosures of waste, fraud, or mismanagement to the inspector general of an agency resulted in cost savings. H.R. REP NO 81–158 at 48 (1981). The Special Counsel’s award better recognizes civil courage than the limited Congressional enactment. It is unlikely that most federal employees are aware of the Congressional initiative.
100. Chapter 10 in this book sets out the circumstances of the cancellation as part of a discussion of Scott Bloch’s tenure as the Special Counsel.
101. Chapter 16 of this book suggests that such awards might be an important criterion for evaluating internal disclosure and compliance schemes.

9. Private-sector laws

PRIVATE-SECTOR EMPLOYMENT LAWS

The doctrine of at-will employment applicable to most employees of companies and corporations in the United States has influenced the character of whistleblower laws pertinent to the private sector. Under that doctrine, absent a specific contract, both the employee and the employer can end the employment relationship at any time. In practice, the doctrine permits an employer to fire an employee for no reason. Contracts limiting this discretion arise from individual negotiations, usually by the highest levels of corporate management or through collective bargaining agreements between the employer and a union representing some or all of its employees. In this context, whistleblower laws restrict that authority by prohibiting retaliation for disclosures protected by those laws.

In many countries, including some members of the European Union, employees in the private sector can be removed only for cause. In those countries protection against removals for disclosures regarding activities of the employer rest on whether those disclosures constitute good cause. The determinations of courts or specialized labor tribunals or administrative bodies regarding good cause define protected disclosures; in the United States such definitions are found in state or federal whistleblower laws. The differing labor regimes, however, are complex. For example, whistleblower laws in some countries draw on private law regarding the scope of employee loyalty and confidentiality. The British Public Interest Disclosure Act 1998 incorporates traditional legal conceptions regarding permitted violations of loyalty and confidentiality. Those bodies of precedent continue to influence the interpretation of the statutory protection.

In some states within the United States, protection of private-sector whistleblowers rests on judicial application of ‘public policy’ exceptions to the doctrine of at-will employment.¹ One of the most important of these exceptions prohibits an employer from firing an employee for the disclosure of the employer’s violations of law. State whistleblower laws may supplant this body of law but issues regarding the relationship between these laws and the relevant public policy exceptions may still generate litigation.²

The earliest private-sector whistleblower laws followed government regu-

lation of the employment relationship. In these anti-retaliation provisions, disclosures concerned the effectuation and enforcement of statutory and administrative regulation. Examples include prohibitions against retaliation for union organizing, for reporting workplace health and safety violations, or for employer misconduct regarding pension and benefit plans. The Federal Mine Safety and Health Act of 1977 exemplifies later protections for disclosures regarding workplace safety. Similar prohibitions apply to reporting or seeking redress under anti-discrimination laws such as the Age Discrimination in Employment Act of 1967 and Title VII of the Civil Rights Act of 1964. Anti-retaliation provisions in federal laws enacted in the 1980s protecting immigrant labor, workplace safety on commercial vessels, and regulating family and medical leave likewise emphasize government regulation of working conditions.³

Subsequent federal and state provisions protected disclosures regarding regulatory statutes not directly implicating the employment relationship. These whistleblower laws provided protections to employees who came forth with information, often otherwise unavailable to government officials, regarding violations of regulatory laws such as ones addressing water pollution, solid waste disposal, control of toxic substances, surface mining and land reclamation, air pollution, asbestos in schools, hazardous substances, toxic waste cleanups, safe drinking water, other environment statutes, and misconduct by officials at depository institutions.⁴ These federal whistleblower provisions in the 1970s and 1980s emphasized whistleblower protection as adjunct to broader federal regulation.⁵

These statutes shared a pedigree with judicially created 'public policy' exceptions for disclosures of violations of law. Under those exceptions the public interest in such disclosures justified the interference with employment relationships based on at-will employment. That such statutes begin to appear in the 1970s along with the judicially created exceptions attests to a belief that employees play an important role in the enforcement of regulation aimed at their employers.

These private-sector whistleblower laws are also intertwined with the whistleblower provision of the Civil Service Reform Act of 1978 (CSRA),⁶ despite the CSRA's application to public employment. Although federal employees and other public employees do not serve at the will of their employers, but enjoy tenure, the CSRA remains pertinent to private-sector whistleblower laws. First, the background of events leading to landmark whistleblower protection for federal employees also enabled the enactment of the broader private-sector whistleblower laws.⁷ Second, language from the whistleblower provision of the CSRA appears in subsequent private-sector laws. This appearance reflects a similarity in structure and approach. Remedies and burdens of proof first developed in the whistleblower provision

emerge in these private-sector provisions. Finally, the distinctions between public- and private-sector laws are less sharply drawn than the terms, public and private, suggest.

The whistleblower stories that helped to change public and congressional perceptions of whistleblowers concerned private-sector as well as public-sector employees. Many of the stories described in Chapter 4, Whistleblower stories and emerging narratives, concern private-sector employees. This chapter demonstrates how the developing whistleblower narrative intertwined public- and private-sector whistleblowers. These narratives outline the dangers of bureaucratic dominance shared by public and private sectors. An assessment of the risks of bureaucratic evil included both public and private bureaucracies. Unrestrained public and private bureaucracies threatened the rule of law, public welfare, individual rights, and institutional and personal accountability. It is no accident that one of the first comprehensive examination of these stories can be found in a conference organized by consumer advocate Ralph Nader.

At the time of that conference, consumer groups recognized the importance of whistleblowers in regulation of public health and safety. Regulatory reform became a prominent topic for Congress, as well as for consumer, environmental, and other public interest groups. 'Nader's Raiders,' young lawyers and students who examined the operations of federal agencies, such as the Federal Trade Commission, issued scathing reports on the failure of federal regulation. Congress considered a variety of reform proposals that addressed the capture of agencies by regulated parties, the inefficiencies of agencies, and regulatory inaction.

Among these proposals, the most dramatic sought the creation of a consumer protection agency that could intervene in other federal agencies on behalf of consumers and independently represent consumer interests through new legal authority. Although proposals for a consumer protection agency failed, the Consumer Product Safety Act of 1972 included a number of provisions designed to prevent industry capture of the regulatory process. Among these were provisions that sought to end 'the revolving door' by which agency officials left to join the regulated industry and prominent members of the industry became officials in an agency.⁸

Thus, the whistleblower narratives that played an important role in the acceptance of whistleblowing also challenged the weaknesses of federal regulation of the private sector. Many of the stories of federal employees described in Senator Patrick Leahy's influential report considered federal whistleblowers who disclosed weaknesses and abuse in federal regulation.⁹ Private-sector whistleblowers were connected to regulation in similar ways.

Federal private-sector laws enacted subsequent to the whistleblower provision of the CSRA incorporated language contained in that provision. For

example, the 1989 whistleblower provision of the Federal Deposit Insurance Act uses the language of the CSRA to describe protected disclosures: 'violation of law or regulation, gross waste funds, abuse of authority, substantial and specific danger to public health and safety.'¹⁰ Most of these laws also adopted the enforcement structure of the CSRA – reliance on administrative adjudication with appellate review.¹¹ These laws addressed the proof of causation in language similar to the CSRA.¹²

Also telling of the influence of the whistleblower provision is how changes in the burden of proof in that law were incorporated into subsequently enacted private-sector laws. Indeed, often previously enacted laws were modified to include the new standard. For example, the 1989 Whistleblower Protection Act required that a federal employee need only prove that a protected disclosure was a contributing factor to the alleged retaliatory act. In order for the government to overcome this *prima facie* case, it must establish by 'clear and convincing' evidence that the government *would* have taken the same action absent the protected disclosure. This change soon found its way into private-sector laws.¹³ Indeed, proposed changes for the CSRA whistleblower provision, though never enacted, were inserted into a number of private-sector provisions. For example, the Whistleblower Protection Enhancement Act applicable to federal employees failed enactment in several Congresses. That Act contained a provision providing a right to trial *de novo* in a federal district court for a whistleblower who lost in the administrative process. In a trial in a federal district court, employees are entitled to a trial by jury. This method of review, however, has been included in a number of twenty-first century private-sector laws.

PRIVATE-SECTOR WHISTLEBLOWER LAWS AND PUBLIC-SECTOR REGULATION

The United States draws the line between public and private sectors more sharply than many countries. The rule of law limits the scope of government discretion and thus protects the individual decisions made in the private sector from government interference. This philosophy supports individual liberty against the role of government but less effectively guards individuals against concentrations of private power that similarly limit the choices and opportunities of individuals. Moreover, it fails adequately to animate the government's ability to protect the public interest. Since Franklin Roosevelt's New Deal, the government has assumed a prominent and accepted role in the regulation of private activities, particularly those represented by concentrated economic power.

Acceptance of the propriety of government regulation of business supports private-sector whistleblowing. Regulation blurs the distinction between public- and private-sector whistleblowers. Private-sector whistleblowers disclose information about the misconduct and regulatory violations of corporations. These same disclosures may also indict the conduct of government regulators or expose the weaknesses of government regulation and identify necessary improvements. Likewise public-sector whistleblowers disclose information about the misconduct and regulatory failures of government. These disclosures also detect regulatory violations by corporations, describe the derelictions of corporate officials, and suggest how agencies should address those violations. Regulation connects public- and private-sector whistleblowers and explains the interconnections of public- and private-sector whistleblower laws.

Regulation creates a nexus between government officials and private interests and thus invites corruption. This nexus explains why anti-corruption regulations protect both public and private employees. Both groups of employees possess information regarding the same misconduct from different vantage points. For example, the whistleblower provision of the Inter-American Convention Against Corruption, adopted in 1996, protects 'public servants and private citizens' who expose corruption.¹⁴

In the United States, federal whistleblower laws routinely divide between ones related only to federal public employment and those applicable to private-sector employment.¹⁵ Usually, state laws follow the same pattern with separate statutes covering public employees and private-sector employees. More state statutes cover the public sector than the private one. This separate treatment of employees in each of the two sectors reflects several factors, including more developed administrative grievance and review mechanisms for public employees, greater diversity in the character of private-sector employees, theoretical distinctions between public and private sectors, and the differing political influence of agency officials and corporate managers.¹⁶

Some state laws, however, cover public- and private-sector whistleblowers under the same statute. This common treatment reflects how disclosures relating to regulation of the private sector can encourage similar disclosures and protections in the public section. Likewise, in some countries, whistleblower laws cover both public- and private-sector employees. The Public Interest Disclosure Act in Britain, the South African Public Interest Disclosure Act, and Japan's Whistleblower Protection Act illustrate this approach. Interpretation of the British law suggests that the majority of decisions under the law have addressed private-sector employees rather than public-sector ones.¹⁷

Still, differences remain in these laws. Perhaps the most salient of these in the United States is the role of internal disclosures. In federal statutes, the

public disclosures of federal employees are normally protected; some, but far from all, internal disclosures are protected but not required prior to external disclosures. Under federal private-sector whistleblower laws public disclosures are not specifically protected and disclosures are limited to federal regulatory and administrative agencies, to the private-sector employer, and in some instances to members of Congress.¹⁸ These distinctions regarding internal disclosures suggest that private-sector whistleblower laws are seen as adjunct to government regulation. Despite these limitations on the scope of private-sector laws, experience demonstrates that many of the disclosures of private-sector employees are public ones.¹⁹ Indeed, the influence of many civil society organizations rests on the public dissemination of information acquired from the employees of private companies, companies that have violated federal regulatory provisions or agency directions under them.

State laws are also more likely to cover or require internal disclosures and to limit public disclosures. One assessment of these state laws, however, concludes ‘the differences [regarding internal disclosures] are not dramatic.’²⁰ Overall, ‘[o]ne could expect, however, that these differences between public and private-sector employment would create more dramatic distinctions between the public and private sector whistleblower laws.’²¹ Thus, state laws do not suggest that public- and private-sector laws vary strikingly.

TWENTY-FIRST CENTURY PRIVATE-SECTOR WHISTLEBLOWER LAWS

Since 2000, Congress has enacted or significantly amended 14 private-sector whistleblower laws.²² These laws go beyond reporting improper job conditions and all permit the disclosure of information regarding particular areas of regulation, including aviation, surface transportation, corporate fraud and other misconduct, pipeline safety, energy regulation, transit security, defense contracts, railway safety, consumer product safety, patient safety, food safety, and misconduct related to the financial crisis of 2008. These 14 laws are twice the number of similar laws enacted in any of the three preceding decades. Seven laws were enacted in the 1970s, seven in the 1980s, and six in the 1990s. Moreover the twenty-first century laws cover many more employees than earlier laws. These laws alone provide protection to tens of millions of private-sector employees.²³ The number of employees reflects the scope of the industries covered by these laws, including the financial industry, the consumer products industry, and the food products industry.

The flurry of such laws in the first decade of the twenty-first century responds to several influences. In particular, corporate fraud that led to the collapse of some of America’s largest corporations in 2001 and the financial

crisis of 2008 that created the greatest economic contraction since the Great Depression of 1929 reduced national wealth by trillions of dollars and mired governments in massive debts. In the same decade, a number of public health and safety disasters led to a loss of life greater than the number of American deaths in the Vietnam War. Regulatory failures also contributed to these deaths and economic losses. The whistleblower laws reacted not only to particular disasters, but also to a lack of confidence in both private and public bureaucracies. On the other hand, whistleblowers played crucial roles in publicizing abuses and regulatory violations. Many whistleblowers from this period, such as Sherron Watkins and Cynthia Cooper, became well known.

Beyond the sheer number of these statutes, their content reflects dissatisfaction with the administration and interpretation of current laws. These recent laws expand the remedies available to whistleblowers and address the administrative and judicial treatment of their claims. Many of these statutes incorporate a right to *de novo* review in federal district courts and often the right to trial by jury accompanies this review.²⁴ Many of these changes encourage private enforcement of whistleblower claims. These statutes spurred the growth of a new 'compliance industry' for large corporations as they considered the implications of these laws. In a politically conservative decade, these statutes represented an expansion of whistleblower rights and a commitment to whistleblower protection in the private sector.

Beginning in 2001, companies such as Enron, WorldCom, Global Crossing, and Tyco became familiar names as accounting fraud and other business abuses became public. Large, presumably successful, companies sank into bankruptcy. The corporate practices of these companies cost shareholders and employees billions of dollars and seriously damaged public confidence in the securities markets and in corporate governance and ethics.

Publicized abuses extended beyond accounting fraud, as reflected by Enron's manipulation of the energy markets in California, manipulations that stole millions of dollars from ratepayers and precipitated a crisis in that state. Enron officials were also implicated in the bribery of high-ranking officials in the governments of India and Guatemala. Other American companies were implicated in environmental catastrophes and in violations of human rights.

Employees of these companies were aware of fraud and other abuses, but failed to come forward from fear of retaliation or found their warnings ignored. Some who came forward faced harassment. In response to the public outcry and the disclosed weaknesses in laws regulating corporate conduct, Congress enacted and President George W. Bush signed the Sarbanes-Oxley Act of 2002. The whistleblower provision of this massive statute protects millions of employees of publicly traded companies and entities connected with these companies from retaliation for disclosing corporate fraud.

Whistleblowers received a prominent place among the few heroes of the

financial debacles. Their courage and dedication to the best interests of the companies for which they worked contrasted with the self-serving, often criminal, conduct of the companies' highest officers and with the ineffectiveness, or complicity, of federal regulators. Two of the best known of these whistleblowers were Watkins, a vice-president of Enron, and Cooper, an accounting supervisor at WorldCom. Watkins and Cooper were two of the three *Time* magazine's 'Persons of the Year' recognized for their courage and dedication in reporting corporate fraud within their organizations.²⁵

In the summer of 2001, Watkins took her concerns about fraudulent practices within Enron to its Chief Executive Officer and Chairman of the Board, Ken Lay. As Watkins described it, 'I naively thought that I would be handing Ken Lay his leadership moment.'²⁶ Shortly after Watkins left Lay's office, he called the law firm representing Enron, Vincent and Elkins, to discuss whether he could fire Watkins without violating the Texas whistleblower law. Watkins admitted: 'I was really shocked when I saw a detailed memo about the pluses and minuses of discharging me. I thought that because I have the best interests [of the company] in mind ... the company should be on my side.'²⁷

Similarly, Cooper found troubling indications that WorldCom officials had used improper accounting techniques to cover up massive losses. She decided to take action when she failed to receive satisfactory answers to her questions and was confronted with hostility for her inquiries. 'I certainly knew that it was possible that I would lose my job.'²⁸ 'I even cleared some things out of my office. But the fear of losing my job was very secondary to the obligation I felt.' She took the step of copying documents demonstrating the fraud; she and her staff worked at night to ensure that these documents would be retained. She then reported to the audit committee of the Board of Directors that company officials had covered up \$3.8 billion in losses.

The scandal also touched financial institutions and banks. For example, it was alleged that financial institutions like Citigroup and J.P. Morgan helped Enron to deceive investors by disguising billions of dollars raised in off-shore transactions as bank loans.²⁹ A Canadian bank, the Canadian Imperial Bank of Commerce, reportedly advanced billions to hidden funds created by Enron. The Enron scandal involved arrangements with banks that violated banking laws and were inconsistent with the interests of the institutions involved.

The failure of these companies and the accompanying fraud and misconduct damaged public perceptions of corporations and public officials. A 2003 study by the Conference Board, a well-known business network, documented widespread public skepticism about corporate executives' trustworthiness and chronicled the perception that corporate wrongdoing was prevalent. For example, only 16 percent of those surveyed believed that the known examples of wrongdoing were probably isolated instances of misconduct.³⁰

Congress responded to these failures with the Sarbanes-Oxley Act of 2002

(SOX), which reformed corporate governance. In addition to the whistleblower provision, SOX required that there be mechanisms by which employees could report anonymously and directly to the audit committee of the board of directors, and that corporate officers, including chief executive officers, sign off on financial statements. It also imposed new obligations on corporate officials, boards of directors, and on attorneys and accountants working for or hired by corporations. Congress believed that protecting corporate whistleblowers encouraged disclosures crucial to the preservation of the interests of shareholders, employees, and consumers.

The whistleblower provision of the law, which was added by the Senate, relied on the experience of corporate whistleblowers. Regarding the Report of the Conference Committee, Senator Leahy stated:

[W]e included meaningful protection for whistleblowers as passed by the Senate. We learned from Sherron Watkins of Enron that these corporate insiders are the key witnesses that need to be encouraged to report fraud and help prove it in court. ... There is no way that we could have known about [the misconduct of corporate officers] without that kind of whistleblower.³¹

The whistleblower provision of SOX was the most comprehensive private-sector whistleblower law ever enacted in the United States. It contained a number of provisions found in subsequent federal statutes. These innovations included an abandonment of administrative adjudication and appellate review as the sole structure for whistleblower redress and instead provided for the right to trial by jury for whistleblower claims.

A 2000 law amending whistleblower protections for airline industry employees modified the standards of proof for the whistleblower and the private employer to correspond with the significant changes made in the Whistleblower Protection Act of 1989, an act applicable to federal employees. Congress included these modifications in SOX and in subsequent laws.

The whistleblower provision of SOX heralded a decade of congressional enactment of private-sector whistleblower laws. A number of these laws were also extensive in their scope. The SOX provisions renewed interest in such laws and provided the framework for similar provisions. The financial crisis of 2008 also generated legislative responses. Two of these, the American Recovery and Investment Act of 2009 (AIRA) and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), contain whistleblower provisions of wide scope that also cover millions of private-sector employees. Laws from this period also amended the False Claims Act in ways that expanded its scope.³²

Other private-sector laws enacted since 2000 respond to failures in public health and safety regulation. Unlike SOX, which applies broadly to many different types of corporations, these private-sector laws relate to specific

areas of regulation – food health and safety, the safety of consumer products, pipeline safety, surface transportation, and railway safety. SOX and other statutes can be seen to apply to large and diverse industries. Particularly the whistleblower provision of the Food Safety Modernization Act of 2010 (FSMA) and the Consumer Product Safety Improvement Act of 2010 (CPSIA) cover millions of private-sector employees. These two laws apply to large industries and protect a substantial number of employees.

These laws regarding public health and safety also relate to statutes regarding corporate misconduct causing economic harm. For example, approaches taken in whistleblower provisions in health and safety laws were applied to subsequent financial whistleblower laws. The modifications of the burden of proof in the whistleblower provision relating to airline safety appeared in the other statutes of the new millennium. Likewise, Congress expressly incorporated into subsequent health and safety laws the right to trial by jury attached to whistleblower claims in the Sarbanes-Oxley Act. The discrediting of corporate ethics and the chronicling of illegalities leading to these regulatory provisions supported whistleblower protections in all the private-sector whistleblower laws of the new millennium. Finally, financial misconduct and crime can injure health and safety. The Office of Management and Budget, in evaluating the costs and benefits of federal regulations, has long considered that reductions in income and wealth have health consequences. The emotional harms of foreclosures, and of the loss of assets, jobs, and retirement security, can cause physical harm and lead to depression, violence, and suicide.

Regulatory failures contributed to the financial crisis of 2008. That crisis nearly destroyed the financial system of the United States and the financial systems of much of the world, a destruction compared with the Great Depression of 1929.³³ After the expenditure of trillions of dollars of public funds, that crisis became ‘merely’ the worst contraction since 1929.³⁴

Several developments set the stage for the financial crisis.³⁵ Credit default swaps, an unregulated form of insurance, rose ‘astronomically’ between 2000 and 2008.³⁶ For a variety of reasons these instruments undervalued risk, particularly in mortgages for home loans. This undervaluing of risk rested on the nearly sole reliance on mathematical models that did not consider years in which losses would be above average or incorporate other information regarding the systematic risk of these instruments, such as the ability of borrowers to repay, and on the underestimating of the likelihood of certain large events.

Rating agencies similarly inadequately assessed the risks of these investments. This mispricing of risk resulted in a credit bubble as investors were able to ‘hedge their investments in bonds and loans at abnormally low prices.’³⁷ The insurers of these instruments, including banks, federal mortgage agencies, and insurance companies, such as American International Group

(AIG), were highly rated but the absence of regulation of credit default swaps resulted in inadequate disclosure of the risks associated with the insured instruments. The highest ratings given to these instruments 'implied government backing.'³⁸ As a result, risky loans carried interest rates similar to those on US Treasury instruments. Investors could buy higher yielding debt, suggesting higher risk, insure these debts through cheap credit default swaps and pocket the difference between the high spread and the insurance premium.³⁹ Mortgage lenders made money because the defaults on home loans were lower when they were first issued, in part because of low 'teaser rates' that would increase later in the loan period. Presumably, increases in home prices would permit refinancing at that point to accommodate the rise in rates. Mortgage lenders also made money through origination fees. Insurers of securities backed by these mortgages did not consider information indicating more substantive risks. For example, insurers did not discover the extent to which mortgages were 'liar loans – loans where the financial information was accepted without verification.'⁴⁰ These insurers also failed to consider that mortgage bankers, who profited from the issuance of mortgages, but were not subject to the risks attached to the issued mortgages, had incentives to disregard information suggesting considerable risks of default.

Increased defaults placed foreclosed homes on the housing market, which in turn reduced the price of housing, a reduction that led to additional defaults. These additional defaults continued the cycle of price declines. Large financial institutions, such as Lehman Brothers and AIG, which had invested in debt contracts that now fell in value along with the increase in defaults, found that their liabilities exceeded their assets. AIG, for example, suffered from the failure to value adequately the risk of default on these mortgages. The failure of these institutions spurred demands for more collateral from firms that were receiving payments on credit default swaps. This credit crisis led to a severe stock market decline and a fall in consumer confidence. The combination of these factors drove the US economy into recession thereby reducing the availability of credit and nearly sending the economy into a depression.

Despite warnings from some regulators, neither regulators nor the institutions involved in these practices took steps to prevent the catastrophe that now appears obvious. In retrospect, the failure by thousands of sophisticated and experienced financial experts to consider evidence of these risks may seem inexplicable. This evidence included the regulatory forecasts of serious problems, the reliance on purely mathematical models to assess risk, the lack of assessment of many factors suggesting a higher risk of default, the dependence on doubtful assumptions, such as continuously rising housing prices, and the implications of US government backing for commercial and investment banks 'too big to fail.'

Most of the participants, however, had financial incentives to ignore the

risks. Those modeling the risks of the credit default swaps 'generated large income for the firm' in the short-term that later became 'decimating losses.'⁴¹ Insurers also received significant fees for insuring the risk; rating agencies collected fees; and mortgage companies received large payments for initiating mortgages for which they did not bear the risks. Banks and investment companies received substantial profits from the securitization and sale of mortgages. In these circumstances, institutional profits were directed to the executives in charge of these organizations. Although this income might have reflected the short-term profits of the institution, it did not reflect the long-term risks to those institutions, much less to the financial system and to the American economy.

The financial crisis also drew attention to the collapse of the largest 'Ponzi scheme' in United States history.⁴² Bernie Madoff managed investments that consistently paid higher than market returns on investments. Madoff accomplished this economic miracle by using the money of new investors to pay these returns to current investors. Such a scheme requires a never-ending number of new investors and, thus, such schemes are destined to collapse. Before this scheme collapsed, Madoff had siphoned off hundreds of millions of dollars to fund an extravagant lifestyle. The scheme collapsed when his sons reported to authorities Madoff's confession about the already failing undertaking. A whistleblower, Harry Markopolos, reported his suspicions multiple times over several years to the United States Securities and Exchange Commission (SEC). The SEC failed to investigate adequately the allegations, thus drawing the ire of members of Congress who believed that the agency's conduct demonstrated regulatory failure and the unwillingness of the SEC to challenge powerful financial interests.

The long-term costs of the crisis include loss of confidence in the American economy. The financial crisis and the near collapse of the economy undermined public confidence in financial institutions, in government regulation of business, in the housing and financial markets, in the rating agencies, and in the leadership of the country's largest investment banks. An international survey regarding the strength of belief in the free market as the best way to regulate an economy found that such a belief fell significantly in the United States.⁴³ Among lower- and middle-income Americans the decline was so dramatic that the authors of the study concluded: 'American business is close to losing its social contract with average American families that has enabled it to prosper in the world. Inspired leadership will be needed to reverse this trend.'⁴⁴

In response to the financial crisis and the decline in public confidence, Congress enacted the American Recovery and Reinvestment Act (ARIA) and the Dodd-Frank Act both of which contain whistleblower provisions of broad scope.⁴⁵ The ARIA provided funds to state and local governments and through

them to private contractors on public projects. This spending was intended to stimulate the economy. The ARIA protects employees of private contractors that receive stimulus funds under the Act. Employees may disclose gross management, waste, fraud, and abuse of stimulus funds. It protects employees of companies that receive stimulus funds, companies that receive any payment from those funds, as well as state and local governments. Protected disclosures include those by an employee to a supervisor, to a state or federal regulatory or law enforcement agency, to a court or grand jury, to the head of a federal agency or an inspector general of an agency, or to a member of Congress. The employee must reasonably believe that the information evidences gross mismanagement of an agency contract or a grant relating to stimulus funds, a gross waste of stimulus funds, a substantial and specific danger to public health and safety, an abuse of authority related to the implementation or use of stimulus funds, or a violation of a law, rule, or regulation that governs an agency contract or grant related to stimulus funds. The law specifically protects disclosures made by an employee in the ordinary course of performing job duties.

The Dodd-Frank Act protects employees in the financial services industry, including organizations that extend credit or service or broker loans, that provide real estate settlement services or perform property appraisals, that give financial advisory services to consumers relating to proprietary financial products, including credit counseling, or that collect, analyze, maintain, or offer consumer report information or other account information in connection with any decision concerning the offering or provision of a consumer financial product or service. Protected conduct includes disclosures to the Bureau of Consumer Financial Protection or any other government or law enforcement agency. A disclosure must rest upon a reasonable belief that the information relates to the violation of any consumer financial protection contained in the Dodd-Frank Act or any rule, order, standard, or prohibition prescribed or enforced by the Bureau.

Under ARIA, the employee must initially file a claim of retaliation with the inspector general of the appropriate agency, but has an option, if the inspector fails to issue investigative findings with 180 days or within 30 days of receiving the findings, to bring the action to a federal district court, an action in which the employee is entitled by right to trial by jury. An agency may also enforce an order for relief to a whistleblower in a federal court; in those instances the court can award punitive damages. The consumer financial protection provision of the Dodd-Frank Act follows a similar pattern except that the complaint must originally be filed with the Department of Labor, but the employee may seek a trial *de novo*, to which the right to trial by jury attaches, if no decision is reached within 210 days or within 90 days of a written determination.

The financial crisis also perversely creates a greater reliance on whistleblowers and whistleblowing laws. The budget deficits generated by the crisis compounded the effects of two wars in Iraq and Afghanistan and losses of revenue from extensive tax cuts in the first decade of this century. These deficits have led to proposals that would drastically reduce the resources of regulatory agencies at the same time that new authority imposes greater obligations on them. Given budget deficits and sentiments to reduce government spending, appropriations to enforce the Food Safety Modernization Act are likely to be limited. Thus, the crisis now suggests that whistleblowers are a significant source of regulatory information, information that should be reported not only to regulatory agencies, but also to Congress and the public. In the same way, the effects of the financial crisis portend greater importance for false claims laws and bounty provisions.

In each of the areas of food safety and consumer product safety, reform followed troubling episodes that suggested regulatory failures. In these two areas, both public- and private-sector whistleblowers identified instances of health and safety violations. In other areas in which Congress passed new or revised statutes, both serious accidents and activities of whistleblowers preceded reforms.

The Consumer Product Safety Improvement Act of 2008 (CPSIA) was in response to a number of product recalls in 2007.⁴⁶ These recalls included dangerous pet foods, toothpaste containing poisonous chemicals, contaminated blood thinners that caused at least 81 deaths, contaminated infant formula, defective tires, toys containing excessive levels of lead or loose magnets that could be swallowed, toy beads that were toxic if swallowed, and toy ovens posing burn hazards.

The Consumer Product Safety Commission's (CPSC) performance in regulating products dangerous to children characterizes its regulatory failures. Following the 2005 death of a child caused by the drop rail on a Simplicity crib 'two more infant deaths, seven nonfatal injuries and fifty other incidents' regarding the same crib manufacturer, the CPSC did nothing for more than two years.⁴⁷ The recall in 2007 of 'nearly one million cribs' followed intense criticism of the Commission. The CPSC mishandled the recall in several ways.⁴⁸ The recall of dangerous toy magnets did not occur until many months after the dangers had been identified.⁴⁹

Because President Bush had not appointed a third member of the agency, the CPSC had been unable to issue new rules or to sanction companies that violated product safety standards.⁵⁰ Only 15 CPSC inspectors examined imports of consumer products valued at \$614 billion.⁵¹ The acting chairwoman of the CPSC, Nancy Nord, had served as executive director of the American Corporate Counsel Association and Director of Consumer Affairs for the US Chamber of Commerce.⁵² Nord opposed legislation to increase the

CPSC's budget after numerous product recalls in 2007. The CPSC, however, had been hampered for years. Its budget and staff were reduced by President Ronald Reagan.⁵³ In 2008 the CPSIA increased the powers of the Commission and its budget and staff.

The CPSIA included a whistleblower provision for employees of companies regulated by the Commission.⁵⁴ That legislation incorporated many of the procedural changes that were part of the Sarbanes-Oxley Act, such as a right to go to a federal court for a trial *de novo*. Opponents of the legislation criticized the whistleblower provision. The acting chairwoman of the CPSC, Nancy Nord, objected to its coverage of private-sector employees.⁵⁵ President Bush referred specifically to the whistleblower provision in his objections to the legislation.⁵⁶ Senator Jim DeMint of South Carolina argued that the whistleblower provision 'makes it legally impossible to fire disruptive employees.'⁵⁷

The CPSIA illustrates how whistleblower laws have become an important part of regulatory reform. The failures of regulatory agencies and the deaths and injuries following those failures led to legislative responses, including the encouragement of private-sector whistleblowers to identify and disclose risks to public health and safety.

These recent federal private-sector whistleblower laws allow a complaining employee to leave the administrative process if the appropriate agency, usually the Department of Labor, does not reach a timely decision or in any event after a final decision is issued. The employee may seek *de novo* review in a federal district court, an action in which the employee is entitled to a trial by jury. By expressly establishing a right to trial by jury, the Dodd-Frank Act also amended the SOX to clarify conflicting judicial opinions. These provisions often prohibit the pre-dispute waiver of a private right of action and of trial by jury as a condition of employment. Thus employers cannot require employees to substitute arbitration for the right to a trial by jury. The trial by jury connects citizen democracy with whistleblower protection.

Juries appropriately deal with politically sensitive cases often posed by private-sector whistleblowers whose disclosures have indicted America's most powerful corporations and industries. Whistleblower protection, like the trial by jury, vindicates accountability of the powerful to the rule of law. By exposing regulatory failures, whistleblowing also supports democratic accountability of unelected administrative officials.

The right to trial by jury reassures whistleblowers that citizens will participate in the adjudication of claims of retaliation. It alerts whistleblowers and others to the importance of fair adjudication and it allows citizens as representatives of communities throughout the country to participate in these adjudications that help secure legal control of bureaucracy. These reassurances and alternatives are significant in whistleblower retaliation claims when an indi-

vidual employee is often pitted against a large and powerful corporation regarding the conduct of the leaders of the corporation who seek to justify or hide their own misconduct – misconduct that may violate their obligations to the law, their duties to their corporations, and their responsibilities for the health and safety of workers and consumers.

In particular, bias against corporations is relevant to concerns regarding the right to trial by jury. Professor Valarie Hans, a leading scholar regarding the jury, examined such bias against corporations. In so doing, she contrasted myths regarding the jury with social science research.⁵⁸ She concluded: 'Reflecting the citizenry from which they are drawn, civil jurors are largely supportive of the aims of American business and extremely concerned about the potential negative effects on business corporations of excessive litigation.'⁵⁹ Still, jurors 'hold corporate defendants to more exacting standards compared to individual litigants, and expect businesses to exhibit a high degree of care for workers and consumers.'⁶⁰ This distinctive standard 'appears to be consistent with the political function of the American jury.'⁶¹ Hans also found, based on social science studies, that 'there is little evidence that jurors take a deep pockets approach in deciding liability or reaching awards.'⁶²

Relief under recent whistleblowers laws is extensive, including reinstatement, back pay, compensatory damages, attorney fees and litigation costs, and specifically includes expert witness fees. The similarity between recent laws illustrates the application of a common model for their content. This similarity offers some advantages by tying them together and creating a body of federal private-sector whistleblower laws. For example, this similarity could empower some future reform such as a uniform federal law applying blanket protection to all private-sector whistleblowers. The similarity, however, has some disadvantages. Because the pedigree of these common elements rests on aspects of the Whistleblower Protection Act of 1989, applicable to federal employees, and of the Sarbanes-Oxley Act, these laws may be limited by restrictive interpretations of relevant statutory terms by the Federal Circuit in relation to the Whistleblower Protection Act and by the Department of Labor in relation to the Sarbanes-Oxley Act.⁶³ Indeed, the Dodd-Frank Act overturns several Department of Labor interpretations of SOX, interpretations deemed erroneous by Congress. These changes include the coverage of the employees of corporate subsidiaries and a clarification that employees who seek *de novo* review in a federal district court have a right to trial by jury. It also expands the statute of limitations to 180 days and prohibits pre-dispute waiver of remedies and rights, including through pre-dispute arbitration agreements.

Other health and safety whistleblowers in the last decade have exposed health, safety, and environmental risks. Their disclosures also attest to the relationship between protection of whistleblowers and regulation. Prominent

among these is Dr. David Graham an employee of the Food and Drug Administration (FDA). His work alone saved thousands of lives. In testimony before the Senate Finance Committee, Graham stated that a popular arthritis drug, Vioxx, dramatically increased the risk of heart attacks in its users.⁶⁴ Graham estimated that the use of the drug led to 60,000 to 100,000 excess deaths.⁶⁵ According to him, this number represented 1 percent of the population of Florida or Pennsylvania, 5 percent of the population of Maine, and 27 percent of the population of Wyoming. Graham also described how officials at the FDA attempted to suppress his study, to attack his credibility, and to shunt him aside within the organization. Despite his and other studies, in September 2000 the FDA approved the drug for use on children with rheumatoid arthritis. 'Vioxx is a terrible tragedy and a profound regulatory failure' and 'may be the single greatest drug safety catastrophe in the history of this country.'⁶⁶ After his testimony, an FDA advisory committee in 2005 both required Vioxx to carry large warning labels and banned product advertisements for it. These and other instances demonstrate that both the public- and private-sector whistleblower possesses information regarding regulatory failure.

Recent disasters underscore the potential for whistleblowers to avert such disasters, as well as regulatory failures that enabled those disasters. Specifically, the Gulf Oil Disaster following the explosion of British Petroleum's *Deep Water Horizon* drilling platform on April 22, 2010,⁶⁷ and the April 5, 2010, explosion of the Upper Big Branch mine in West Virginia⁶⁸ document both the role of whistleblowers and regulatory failure.

The explosion of the *Deep Water Horizon* rig killed 11 rig workers and created the largest oil discharge in history as a gusher under the Gulf of Mexico released oil for many days. That discharge contaminated the Gulf of Mexico, caused extensive economic harm along the Gulf coast of the United States, and required billions of dollars for compensation and cleanup.⁶⁹ The full cost of the explosion is yet to be determined. It may take decades to measure accurately the environmental and economic harm of the spill. According to a national commission created by President Barack Obama, the disaster signals 'severe shortcomings – of federal regulation of offshore drilling in the United States, particularly of [Minerals Management Service] oversight of deep water drilling in the Gulf of Mexico.'⁷⁰ The commission also concluded that 'despite assurances to the contrary,' the oil and gas industry did not 'take the initiative to match its massive investments in oil and gas development and production with comparable investments in drilling safety and oil-spill containment technology and contingency response planning in case of an accident.'⁷¹ Cost-cutting and negligence on the part of several participants contributed to both the event and its aftermath.

A veteran oil-field worker reported that BP had been aware for years that 'tests of blowout prevention devices were being falsified in Alaska.' He

described a culture where corporate personnel looked the other way regarding violations of safety procedure. The whistleblower, Mike Mason, described personal experiences in which he had been ordered not to report chemical spills. Mason provided a sworn statement in 2003 that rig supervisors 'routinely falsified reports to show equipment designed to prevent blowouts was passing state-mandated performance tests.'⁷²

An explosion in the Upper Big Branch Mine owned by Massey Energy killed 29 miners. This disaster had 'grave consequences for a mining company, for a community and, most importantly, for the family members of those who were killed.'⁷³ The investigative panel established by the Governor of West Virginia concluded that the explosion could have been prevented, that it resulted from the failure of basic safety systems designed to protect the lives of miners, and that safety hazards were not reported nor corrected. A report by the federal Mine Health and Safety Administration reached similar conclusions that the accident was a preventable one caused by poor coal dust control, inadequate ventilation, and shoddy maintenance of a coal-cutting tool.⁷⁴ Both federal regulators and Massey shared responsibility for allowing the dangerous conditions that led to the deaths of the 29 miners.

Massey had a pattern of violations of safety rules and standards and a record of repeated violations of the same safety standards. The West Virginia investigation described Massey's history of 'inadequate commitment to safety,' 'a window dressing safety program,' and a 'spinning of information.' Massey 'relish[ed] the opportunity to challenge inspectors' enforcement actions.'⁷⁵

The investigation of the mine disaster relied upon employees who spoke with the Investigation Panel. Such information supports reform and prevention, and accountability. The Chairman of the Panel stated, we 'thank the many Upper Big Branch miners and supervisors who gave candid and honest testimony.' They sought 'to prevent similar disasters' and their cooperation 'is in sharp contrast to others who declined to testify.'⁷⁶

Others spoke out earlier. Before the blast, one former miner at Upper Big Branch, Michael Ferrell, met friends who still worked at the mine and who feared the conditions there. Ferrell, who maintains that he was fired for reporting safety concerns to a state mining inspector, shared their anxiety about the mine.⁷⁷ Employees also spoke of the 'Massey Code of Silence.' Employees were given pay increases and layoff guarantees for three years if they became at-will employees. If employees left or were dismissed, they had to return all of the 'enhanced pay' that had been received. 'Those who violated the membership agreement, who are disloyal to the company by complaining about work conditions or calling hotlines to report safety issues, place themselves outside the club.'⁷⁸ Massey failed to address repeated safety problems and resisted information that would require preventive action in the mine.

Massey also fired another whistleblower, Ricky Lee Campbell, after he complained about safety at the mine. One of the incidents to which he testified before a federal grand jury regarded the orders of a mine supervisor that an electrician disable a methane monitor on a continuous mining machine. Campbell initially worked at the Big Branch Mine but was transferred to a job at another mine the day of the blast and fired three weeks later when he told reporters about general safety problems that existed at the mine. The Department of Labor sustained his claim of retaliation.⁷⁹

The McAteer Report also faulted federal regulators. Inexperienced inspectors, the intimidation of inspectors, a lack of enforcement, insufficient transparency of the practices of regulators, and insufficient management oversight of inspection in field offices contributed to failures in regulation. Specifically, federal regulators overlooked the documented risks of a methane outburst at the mine, the deadly potential of an inadequate ventilation system, the neglect of regulatory authority in forcing technological improvements in safety, and the inattention to the degradation of the regulatory system.⁸⁰

A former director of the federal Mine Safety and Health Administration, Jack Spadaro, was fired when he criticized Massey's failure to implement safeguards in an earlier incident.⁸¹ That 2000 incident involved the discharge of toxic coal slurry much larger than the Exxon Valdez oil spill. (Spadaro claimed that President Bush had pushed him out of office for Spadaro's investigation of the Martin County coal slurry discharge.) Spadaro had an earlier experience as a whistleblower in the 1980s. Alex Kozinski, then the Special Counsel, overruled his staff's recommendation to stay Spadaro's termination and advised attorneys in the Department of Interior as to the procedures for lawfully removing him.⁸²

Ironically, the federal private-sector laws that have marked the last decade attest to the importance of whistleblower provision of the Civil Service Reform Act enacted over three decades before the most recent of these private-sector laws. The influence of the whistleblower provision of the Civil Service Reform Act of 1978 (CRSA) demonstrates the many interrelationships between public- and private-sector whistleblower laws.

These private-sector laws respond to a number of health and safety disasters that have led to the deaths of tens of thousands of persons. Thus, it is not hyperbole to say that these whistleblower laws 'are written in blood.' These private-sector laws have also included a number of changes that reject administrative adjudication and judicial appellate review as the only avenue for redress. These laws provide a right to trial *de novo* in which whistleblowers enjoy a right to trial by jury. Ironically, these private-sector laws now come closer to the approach rejected three decades ago by Congress in the whistleblower provision of the Civil Service Reform Act of 1978 – a private right of action by whistleblowers in a federal district court. The most recent of these,

such as Dodd-Frank's amendment of SOX, prohibits waiver by pre-dispute contracts, including pre-dispute arbitration agreements.

If the success or failure of whistleblower laws rests on the number and scope of statutes, the first decade of the new millennium has witnessed the success of federal laws protecting private-sector whistleblowers. If success or failure depends upon greater reliance on federal courts and on citizen fact-finders, that decade offers many success stories. If success involves the coordination of whistleblowing and regulatory authority, the judgment of success is less clear. If success requires an assurance that most, if not all, persons entitled to protection will receive it, success remains an objective not an accomplishment.

NOTES

1. DANIEL P. WESTMAN AND NANCY MODESITT, *WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE* 16–18 (2004).
2. *Id.*
3. Richard Moberly, *The Supreme Court's AntiRetaliation Principle*, 61 CASE WESTERN L. REV. 375 (2010). In this article Professor Moberly analyzes the Supreme Court's anti-retaliation cases and traces the history of these provisions.
4. Eugene Fidel, *Federal Protection for Private Health and Safety Whistleblowers*, 2 AD. L. J. 1 (1988). This article describes the development of federal private-sector whistleblower laws and the variances among them.
5. This relationship between them is reflected in the specific topic areas covered by these provisions
6. Chapters 6 and 7 describe the characteristics of this landmark whistleblower law.
7. Robert G. Vaughn, *State Whistleblower Laws and the Future of Whistleblower Protection*, 51 ADMIN. L. REV. 581, 588–95 (1999) (discussing the similarities between the whistleblower provision of the CSRA – and the 1989 amendments to it – with subsequent state whistleblower laws) [hereinafter *State Whistleblower Laws*].
8. One provision restricted the appointment of persons working for regulated parties as commissioners; another limited employees GS–14 and above from accepting compensation from regulated parties for a period of two years after leaving employment with the agency. MICHAEL R. LEMOV, CONSUMER PRODUCT SAFETY COMMISSION §2.12 (1981) (describing limitations on the employment of persons as commissioners); ROBERT G. VAUGHN, CONFLICT OF INTEREST REGULATION IN THE FEDERAL EXECUTIVE BRANCH 90–93 (1979) (describing post-employment limitations).
9. Chapter 5 discusses the Leahy Report in detail.
10. 12 U.S.C. § 1831j.
11. The federal private-sector laws place enforcement of retaliation claims in the Department of Labor (DOL). The Occupational Health and Safety Administration investigates complaints and makes initial recommendations. Adjudication of claims is before an administrative law judge with administrative review by an Appeals Review Board. Appellate review is before a United States Court of Appeals. Chapter 11 evaluates the DOL's interpretation of one of the whistleblower laws, the one that is included in the Sarbanes-Oxley Act. Some exceptions provide for civil actions in federal district courts. For example, Commercial Fishing Industry Vessel Act, 29 U.S.C. § 1855 (enacted in 1984), The Federal Deposit Insurance Act, 12 U.S.C. § 1831j (enacted in 1989), the Records and Reports on Monetary Instruments Transactions, 31 U.S.C. § 4212 (enacted in 1992), and the Health Insurance for Aged and Disabled, Examination and Treatment for Emergency Medical Conditions and Women in Labor, 42 U.S.C. § 1395dd(i) (enacted in 1986).

12. Robert G. Vaughn, *America's First Comprehensive Statute Protecting Corporate Whistleblowers*, 57 ADMIN. L. REV. 1, 76–78 (2005) (describing the similarities in the standard of proof of causation between protected disclosures and subsequent actions against an employee) [hereinafter *America's First Comprehensive Statute Protecting Corporate Whistleblowers*].
13. This change appeared in the 2000 Wendell H. Ford Aviation Investment and Reform Act, 49 U.S.C. § 42121. Subsequent private-sector laws include similar language.
14. Chapter 13 describes the Inter-American Convention Against Corruption and other regional anti-corruption conventions.
15. Collections of state whistleblower laws can be found in note 4 of the notes for Chapter 11.
16. *State Whistleblower Laws*, *supra* note 7, at 623–24.
17. Chapter 13 discusses these laws.
18. These laws are listed in note 22, *infra*.
19. As illustrated in Chapter 14, civil society groups make public the disclosures of private-sector whistleblowers to those groups even though such disclosures are not protected under applicable laws.
20. *State Whistleblower Laws*, *supra* note 7, at 624.
21. *Id.*
22. 2000: Wendell H. Ford Aviation Investment and Reform Act, 49 U.S.C. § 42121. 2002: Sarbanes-Oxley Act, 18 U.S.C. § 1514A; Pipeline Safety Improvement Act, 49 U.S.C. § 60129. 2005: Energy Reorganization Act, 42 U.S.C. § 5851 *amended by* Pub. L. No. 109–56, Title VI, § 629, 119 Stat. 785 (2005). 2007: National Transit Systems Security Act, 6 U.S.C. § 1142. 2008: Surface Transportation Assistance Act of 1994, 49 U.S.C. § 31105 *amended by* Pub. L. No. 110–53, § 1536, 121 Stat. 464 (2007); Department of Defense Act of 1987, 10 U.S.C. § 2409 *amended by* Pub. L. No. 110–181, Div. A, Title VIII, § 846, 122 Stat. 241 (2008); Federal Railroad Safety Act of 1994, 49 U.S.C. § 20109 *amended by* Pub. L. No. 110–432, Div. A, Title IV, § 419, 122 Stat. 4892 (2008), Consumer Product Safety Improvement Act, 15 U.S.C. § 2087 *et seq.* 2009: American Recovery & Investment Act, Pub. L. No. 111–5, § 1553, 123 Stat. 297–302. 2010: Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010, 12 U.S.C. § 5567 *et seq.*; Seaman's Protection Act, 46 U.S.C. § 2114, *amended by* Pub. L. No. 111–281; The Patient Protection and Affordable Care Act of 2009, Pub. L. No. 111–148, § 1558, 124 Stat. 119. 2011: FDA Food Modernization Act, Pub. L. No. 111–353 § 1012 *et seq.*
23. The number of employees reflects the scope of the industries covered in these more recent laws. The Sarbanes-Oxley Act and amendments to it cover all the employees of companies and their subsidiaries registered on any US stock exchange; the Consumer Product Safety Improvement Act covers manufacturers, importers, and others involved in the sale of consumer products in the United States. The Food Safety Modernization Act likewise covers a significant number of entities subject to FDA regulation, entities that employ large numbers of employees. One article asserts that the Sarbanes-Oxley Act alone covers 'millions' of private-sector employees. *America's First Comprehensive Statute Protecting Corporate Whistleblowers*, *supra* note 12, at 11–12. This estimate is based on 8,200 companies listed on the New York Stock Exchange, the Nasdaq, and the American Stock Exchange, a figure that does not include all of the subsidiaries of these companies nor does it include companies who must register securities with the Securities and Exchange Commission or that must file reports with the SEC. A total of in excess of two-and-one-half million employees are employed by only 19 members of the 30 members of the Dow Jones Industrial Average.
24. The amendment to existing laws often allowed a trial *de novo* and/or provided for a right to trial by jury in such actions.
25. Jodie Morse & Amanda Bower, *The Party Crasher*, TIME, Dec. 30, 2002/Jan. 6, 2003, at 53 (naming Enron employee Sherron Watkins, one of the 'Persons of the Year') [hereinafter *The Party Crasher*]. ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS (Nancy B. Rapoport & Bala G. Dharan eds., 2004) (describing the dissolution of Enron and exploring changes in the roles of accountants and attorneys resulting from that demise).
26. *The Party Crasher*, *supra* note 25.

27. *Id.* A securities law scholar, however, doubts that Watkins can ‘properly be characterized as a whistleblower’ because her communications to Ken Lay show that she did not seek to expose the fraud but urged secretly unwinding it. This scholar found it ‘impossible to describe her motives as being more altruistic than inside traders.’ Jonathan Macey, *Getting the Word Out About Fraud: A Theoretical Analysis of Whistleblowing and Insider Trading*, 105 MICH. L. REV. 1899, 1909–1910 (2007). Professor Macey’s conclusions rest in part on searching the motive of Sherron Watkins and particularly her expressed interest in protecting her job and securing the financial health of the company without reporting beyond the highest levels of the company.
28. Amanda Ripley, *The Night Detective*, TIME, Dec. 30, 2002/Jan. 6, 2003, at 45 (naming WorldCom employee, Cynthia Cooper, one of the ‘Persons of the Year’).
29. *America’s First Comprehensive Statute Protecting Corporate Whistleblowers*, *supra* note 12, at 130.
30. *Id.* at 3, n. 5.
31. 148 CONG. REC. S7358 (daily ed. July 25, 2002).
32. Chapter 8 describes the changes in the False Claims Act. JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS App. 6 (4th ed. 2011) (containing the relevant changes).
33. The *New York Times* archive regarding the Great Depression contains reference to articles comparing that depression to the 2008 financial crisis, http://topics.nytimes.com/top/reference/newyorktimessubjects/g/great_depression_1930s/index.html.
34. According to one 2008 projection, 250 billion dollars in subprime losses in the United States led to 4.7 trillion dollars of losses in GDP and 26.4 trillion in losses in stock market values. Olivier Blanchard (Massachusetts Institute of Technology, Department of Economics, Working Papers – Working Paper 09–01, December 29, 2008), <http://ssrn.com/abstract=1324289> [hereinafter Blanchard]; Austin Murphy, ‘An Analysis of the Financial Crisis of 2008: Causes and Solutions’ 2, <http://ssrn.com/abstract=1295344> [hereinafter Murphy]. In 2008, the total cost of the crisis was estimated to exceed ten trillion dollars. Given the slow recovery in the United States and Europe and continued weaknesses in housing markets, this estimate may seem conservative.
35. The discussion below is based on the Blanchard and Murphy papers.
36. Murphy, *supra* note 34, at 2–3. The swaps were labeled in this way to avoid regulation and they grew from 900 billion dollars in 2000 to 50 trillion in 2008 ‘after Congress exempted them from state gaming laws in 2000.’ *Id.* at 3.
37. Murphy, *supra* note 34, at 8.
38. *Id.* at 8.
39. *Id.* at 9.
40. *Id.* at 11. With these loans, financial information supporting the ability to repay was accepted without verification.
41. *Id.* at 4, citing Gretchen Morgenson, *Behind Biggest Insurer’s Crisis: Blind Eye to a Web of Risk, How a Small Freewheeling Unit Brought AIG to its Knees*, N.Y. TIMES, Sept. 28, 2008, at 1.
42. A contemporaneous description of the scheme: *The Madoff Affair: Con of the Century*, THE ECONOMIST, Dec. 18, 2008, <http://www.economist/node/12818310>. A more recent update and collection of articles: http://topics.nytimes.com/reference/timestopics/people/m/bernard_i_madoff/index.html (overview updated Nov. 2, 2011).
43. The percentage of ‘Americans who believe that the free market is the best economic system in the future’ fell 15 points to fewer than three in five Americans viewing free market capitalism as the best system for the future. Globescan, Sharp Drop in American Enthusiasm for Free Markets Poll Shows, April 6, 2011, http://www.globescan.com/news_archives/radar10w2_free_market. When Globescan began tracking views in 2002, 80 percent of Americans saw the free market as the best economic system, the highest among any country tracked. Chinese and Brazilians now exceed, and Indians match, Americans’ belief in the free market.
44. *Id.* Among Americans with incomes below \$20,000, support for the free market dropped from 76 percent in 2009 to 44 percent in 2010. American women have also become less positive with the percentage supporting the free market dropping from 73 percent in 2008 to 52 percent in 2010.

45. American Recovery and Investment Act Pub. L. No. 11–5, § 1553, 123 Stat. 115, 297–302 (2009); Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010, 12 U.S.C. § 5567 et seq.
46. CRS REPORT FOR CONGRESS, CONSUMER PRODUCT SAFETY IMPROVEMENT ACT OF 2008: P. L. 110–311 SEPT. 22, 2008) 1, (describing whistleblower provision) [hereinafter CONSUMER PRODUCT SAFETY IMPROVEMENT ACT OF 2008]; BRUCE MULOCK, CRS REPORT FOR CONGRESS, CONSUMER PRODUCT SAFETY COMMISSION: CURRENT ISSUES 2–3 (June 17, 2008) [hereinafter CURRENT ISSUES CPSC]; WAYNE MORRISON, CRS REPORT: HEALTH AND SAFETY CONCERNS OVER U.S. IMPORTS OF CHINESE PRODUCTS: AN OVERVIEW 1 (June 4, 2009) [hereinafter IMPORTS OF CHINESE PRODUCTS]; Russell T. Gips, *From China with Lead: The Hasty Reform of the Consumer Product Safety Commission*, 46 HOUSTON L. REV. 545, 567–69 (2009) (containing data on product recalls).
47. Amy Widman, *Advancing Federalism Concerns in Administrative Law Through a Revitalization of State Enforcement Powers – A Case Study of the Consumer Product Safety and Improvement Act of 2008*, 29 YALE L. & POL'Y REV. 165, 181–82 (2010) [hereinafter *Revitalization of State Enforcement Powers*]. The whistleblower provision may respond to agency inaction that Amy Widman calls the 'understudied problem' of administrative law. Her statement occurs in the context of creating concurrent authority in the states to regulate product safety but its conclusions also suggest a role for whistleblowers.
48. *Id.* at 181–83 (describing the immediate unavailability of repair kits, the inclusion in ultimately available kits of parts not approved by the CPSC, and the refusal of the CPSC to provide information about the recall).
49. *Id.* at 183.
50. *Id.* at 180–81. Bush had nominated Michael Baroody as the chairman of the CPSC. Baroody had been the chief lobbyist for the National Association of Manufacturers. He withdrew his name after controversy regarding his \$150,000 severance payment from the Association; Bush never nominated another chairperson, who would have made the third member of the CPSC.
51. Stephen Labaton, *Senate Votes to Strengthen Product Safety Commission*, N.Y. TIMES, Mar. 7, 2008, at C–1 [hereinafter *Senate Votes to Strengthen Act*].
52. *Revitalization of State Enforcement Powers*, *supra* note 47, at 181.
53. Matthew Blake, *The Turbulent History of the U.S. Consumer Product Safety Commission – The Consumer Watchdog That Politicians Nearly Destroyed and Now Want to Save* 6–13 (Understanding Government 2008) (describing Reagan's budget reductions and attacks on the agency).
54. CONSUMER PRODUCT SAFETY IMPROVEMENT ACT OF 2008, *supra* note 46, at 22–24 (describing the whistleblower provision of the proposed legislation).
55. *Id.* at 22.
56. *Senate Votes to Strengthen Act*, *supra* note 51.
57. *Id.*
58. Professor Hans is the co-author of a text evaluating juries based on social science research. NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT (2009).
59. Valerie Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327, 327–28 (1998) (footnote deleted).
60. *Id.* at 328.
61. *Id.*
62. *Id.* at 349.
63. Chapter 11 discusses the Department of Labor's restrictive interpretations of the whistleblower provision of the Sarbanes-Oxley Act.
64. F.D.A., *Merck and Vioxx: Putting Patient Safety First? Hearing before the S. Comm. on Finance*, 108th Cong. 13–17 (2004).
65. *Id.* at 14. Graham states that assuming jet airliners hold 150 to 200 passengers, 'this range of 88,000 to 190,000 [deaths from Vioxx] would be the rough equivalent of 500 to 900 aircraft dropping from the sky. This translates to two to four aircraft every week, week after week, for the past 5 years.'
66. *Id.* at 125 (these are the states represented by Senators on the committee).

67. *Id.* at 14.
68. NATIONAL COMMISSION ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING (January 2011) [hereinafter NATIONAL COMMISSION ON THE DEEPWATER HORIZON OIL SPILL]. According to the report, 'The root problem has instead been that political leaders within both the Executive Branch and Congress have failed to ensure that agency regulators have had the resources necessary to exercise that authority, including personnel and technical expertise, and no less important, the political autonomy needed to overcome the powerful commercial interests that have opposed more stringent safety regulations.' *Id.* at 67.
69. GOVERNOR'S INDEPENDENT INVESTIGATION PANEL, UPPER BIG BRANCH: THE APRIL 5, 2010 EXPLOSION: A FAILURE OF BASIC COAL MINE SAFETY PRACTICES (May 2011) [hereinafter GOVERNOR'S INDEPENDENT INVESTIGATION PANEL]. State and federal citations 'offer dramatic evidence of inadequate coal dusting,' as a cause of the explosion. *Id.* at 54. The report is highly critical of both the management of the mine and of the federal regulators. *Id.* at 92–102; 76–79.
70. Even the risks to clean-up workers may take decades to assess. Almost all workers involved in cleaning up the 1989 Exxon Valdez oil spill are now dead. According to a CNN report, the average life expectancy of an Exxon Valdez oil spill worker is 51 years. Tim King, *Almost All of the Exxon Valdez Oil Spill Workers Are Dead*, SALEM-NEWS (Mon., Nov. 1, 2010) (reporting on the CNN story and other concerns about the health of Gulf oil spill volunteer workers.) This information suggests the difficulty of determining the complete cost of such disasters.
71. NATIONAL COMMISSION ON THE BP DEEPWATER HORIZON OIL SPILL, *supra* note 68, at 67.
72. *Id.* at 56.
73. Marcus Baram, *Whistleblower Claims That BP Was Aware of Cheating on Blowout Preventer Tests*, May 5, 2010, http://www.huffingtonpost.com/2010/05/12/bp-whistleblower-claimed_n_573839.html?vie.
74. GOVERNOR'S INDEPENDENT INVESTIGATION PANEL, *supra* note 69, at 4. J. Davit McAteer who headed the Panel was a former Assistant Secretary of Labor in charge of the Federal Mine Health and Safety Administration from 1994–2000.
75. John B. Broder, *Despite U.S. Findings, West Virginia Company Say Blast Wasn't Its Fault*, N.Y. TIMES, Jan. 29, 2011, at A17. The Mine Health and Safety Administration noted that 'Massey had received hundreds of citations for violations of federal mine safety rules at Upper Big Branch.'
76. GOVERNOR'S INDEPENDENT INVESTIGATION PANEL, *supra* note 69, at 76–78.
77. *Id.* at 2 (letter of transmittal). A list of those who declined to testify is in Appendix I at 114.
78. *Id.* at 95.
79. *Id.* at 99–100.
80. Howard Berkes, *Second Whistleblower Complains for Massey Miners*, NATIONAL PUBLIC RADIO, August 11, 2010, <http://www.npr.org/templates/story/story.php?storyId=12914259>.
81. GOVERNOR'S INDEPENDENT INVESTIGATION PANEL, *supra* note 69, at 80–83.
82. Daphne Wysham, *Mining Whistleblower Speaks Out Against Massey*, INSTITUTE FOR POLICY STUDIES, July 23, 2010, http://www.ips.org/blog/mining_whistleblower_speak_out_against-Massey. Jack Spadaro believes that if his earlier investigation 'and recommendations had not been thwarted,' the miners in the Upper Big Branch mine 'might not have died.'
83. Chapter 10 considers the tenure of several Special Counsel including Alex Kozinski.

10. Institutional failure

Many whistleblower provisions, addressing public- and private-sectors or both, rely on administrative agencies. Some agencies have responsibilities for the receipt and investigation of complaints of misconduct or corruption. The responses of law enforcement and regulatory agencies often determine the efficacy of whistleblowers' disclosures. Administrative agencies charged with implementation of whistleblower laws also have responsibilities to protect those who make disclosures. The performance of these agencies affects the success or failure of a whistleblower law to identify misconduct and protect those who report it.

This chapter examines the weaknesses of agencies assigned special responsibilities either for investigating and resolving allegations or for protecting whistleblowers. This chapter also reviews criticisms of the performance of administrative agencies charged with implementation of whistleblower laws. That examination considers in detail the Office of Special Counsel (OSC) created by the whistleblower provision of the Civil Service Reform Act of 1978 (CSRA). The whistleblower provision directs the OSC to evaluate the merits of allegations of misconduct and also to protect whistleblowers who suffer retaliation for presenting allegations to agencies, law enforcement officials, the public, the media, or the Special Counsel. Thus, the performance of the OSC reflects the likely failures of administrative bodies charged with either the tasks of investigation of allegations or the protection of whistleblowers.

OFFICE OF SPECIAL COUNSEL

The OSC possesses authority unique in federal administrative law.¹ The Special Counsel may require the heads of federal agencies to investigate and respond in writing to allegations of misconduct that the Special Counsel determines have merit. This power mirrors similar authority held by certain anti-corruption agencies and ombudsman-like officials in other countries. In addition, the Special Counsel may commence disciplinary actions against agency officials responsible for retaliation against whistleblowers. This power, contained in the CSRA, is only one of two such provisions in federal law allowing someone other than the leadership of an agency to commence disciplinary action against agency employees.²

Regulatory agencies confront several challenges that help to explain regulatory failures. These failures can support deregulation or the use of economic incentives to encourage and discourage behaviors by regulated entities.³ A brief history of the OSC illustrates these challenges. Those challenges have led members of Congress and whistleblower advocates to condemn the Office and to denigrate several Special Counsels.

The challenges of regulatory administration have damaged OSC's reputation and created a narrative of failure that is intertwined in its history. These challenges are well known but difficult to address. Administrative agencies may suffer from unclear or conflicting conceptions of their missions. Regulatory agencies lack information about the character and extent of the problems to be regulated; part of the insufficiency relates to the lack of expertise and part to the lack of resources. Inadequate resources for the breadth of the tasks assigned bedevil regulation and force adjustments and compromises that undermine regulatory goals and performance. Lack of resources affects the quality and number of staff. Insufficient resources encourage cursory investigations, the dismissal of complaints to control backlog, the reduction in the number of regulatory actions, and the allocation of resources as an important factor in deciding what regulatory actions to pursue. Regulatory bodies lack penetration into the everyday behaviors of regulated entities. Because of failures in regulatory administration, regulatory standards do not guide behavior, even if regulated entities adopt guidelines or procedures at the behest of regulatory agencies. Regulatory sanctions can be insufficient to redress identified problems or ineffective because of the cost or difficulty of application.

Regulatory agencies face capture of the regulatory process by those persons who are subject to regulation. The mission of the OSC invites capture. The Office regulates government agencies and the practices that can affect many aspects of executive administration. The President appoints the Special Counsel, the Department of Justice (DOJ) litigates for the OSC, the Office of Management and Budget (OMB) controls the budget of the OSC, and the Office relies on the cooperation and respect of executive agencies. Aggressive actions of the OSC bring it into conflict with powerful and well-connected political figures within an administration. Executive control not only may reduce the likelihood of regulatory enforcement but can also encourage the use of the powers of the OSC for partisan political purposes. Alienation of civil society groups and members of Congress supporting whistleblower protection reduces the standing of the Office and invites additional resistance from executive branch officials.

Although outstanding leadership does not guarantee success, poor leadership ordains failure. Poor leadership can disable an agency, making future success difficult or unlikely. Few Special Counsel have escaped without criticism and disparagement; Alex Kozinski lost the votes of nearly a third of the

members of the United States Senate in a confirmation vote for a judgeship on the United States Court of Appeals for the Ninth Circuit in good part because of his performance as Special Counsel; Scott Bloch pled guilty to criminal contempt of Congress for withholding information by ordering private computer technicians to 'scrub' computer files at his office.

The history that follows provides a litany of the challenges to administrative regulatory bodies – challenges that often lead to failure. The stories of the individuals who have held the title Special Counsel repeat the same themes appointment after appointment, year after year, and decade following decade. That history forms both an institutional and personal narrative. Parallel to this narrative is one describing the activities of federal employee whistleblowers during the same period. That these narratives only occasionally intersect is perhaps the strongest evidence of the failure of the OSC.

The CSRA gave the OSC significant and wide ranging authority.⁴ The Office was responsible for protecting the merit systems from prohibited personnel practices – practices defined by abuses committed by the Nixon Administration.⁵ These practices extended well beyond retaliation against whistleblowers and applied to other types of prohibited personnel practices including improper hiring of federal employees. The Special Counsel has responsibilities beyond these prohibited personnel practices. For example, Congress also gave the Special Counsel responsibility for enforcing the 1939 Hatch Act, a federal law that prohibits federal employees from active involvement in political campaigns. The powers of the Special Counsel were intended to balance the increased management authority that the CSRA gave to federal agencies and to the President. The performance of the OSC, apart from enforcement of the whistleblower provision of the CSRA, determined in part whether the CSRA would restrict executive power or augment it.

Congress intended the OSC to become a safe avenue through which employees could raise allegations of official misconduct. Congress also gave the OSC a number of powers to protect employees who suffered reprisal for their protected disclosures. The OSC could commence investigations of patterns and practices of abuse by agencies and could order broad corrective action that extended beyond redress for an individual whistleblower and included changing agency procedures and standards that encouraged or permitted retaliation. Overall, the Special Counsel was to secure the whistleblower rights of millions of federal employees.

History

The initial performance of the Office was not auspicious. From the beginning, the Office was understaffed and lacked adequate resources. President Carter appointed H. Patrick Swygert as the Special Counsel.⁶ Swygert's budget was

about two million dollars in inflation-adjusted dollars. He began with a staff of 19 out of 120 positions authorized for the agency and ended his term with a staff of 48.⁷ Along with the creation of the office came an influx of complaints, magnifying the lack of staff and resources. The office handled some early cases of note⁸ and under Swygert's leadership the office made progress. Swygert, however, only served as the Special Counsel for one year leaving the position to return to academia.⁹ The Senate never confirmed President Carter's next appointee and the Acting Special Counsel, Mary Eastwood, headed the agency for the remainder of President Carter's term. Eastwood faced further reduced resources when funding was cut during the 1980 recession.¹⁰

Turnover in the Special Counsel position further disabled the office. The first Special Counsel to complete a full term was William O'Connor, who was appointed in 1982 to complete Kozinski's unfinished term. Thus, in the first formative years, four different individuals held the office. The changes in leadership aggravated the other difficulties confronting the office.

The formative years of the office illustrated the problem of limited resources that have since plagued it. Over the period 1982 until 1990, the budgets of the OSC, in inflation adjusted dollars, ranged from \$8 million to \$9 million.¹¹ The budget of the Office in 1990 was lower than it had been in any previous year in the preceding decade. Since 1991, the budget of the office has risen from about \$10.5 million to about \$18 million. The Office's budget supports an agency with broad duties and one that Congress deemed essential to preserve the merit system and address the allegations of, and retaliation against, whistleblowers. To put these resources in some context, at the time that the budget of the OSC is approximately \$18 million, the budget for military bands for fiscal year 2012 is \$320 million.¹² A 1977 proposal that a check-off system be used to allow federal employees to fund a whistleblower protection office¹³ was not incorporated into the Civil Service Reform Act, but user fees that fund some activities of the Food and Drug Administration is an analogous funding mechanism.

The allocated budget proved inadequate for the magnitude of the tasks that confronted the office, including its responsibilities regarding whistleblowers. Thus, only a portion of the budget of the Office in any year can be devoted to responsibilities under the whistleblower law. Insufficient resources led to the creation of backlogs of allegations of misconduct and of reprisal. Inadequate budgets altered how the Office evaluated and screened cases. Inadequate support limited its influence and reach. Inadequate funding has reduced the ability of the office to inform federal employees of their rights and limited its ability to encourage them to use the reporting and redress procedures available through the OSC.

The promotion of complaints would add to the burdens facing the agency and contribute to its backlog. For example, one Special Counsel, Kozinski,

testified that he discouraged advertising the office to federal employees because the OSC was overextended.¹⁴ Fifteen years after the passage of the whistleblower provision and four years after major reform in the Whistleblower Protection Act of 1989, a General Accounting Office study reported that 76 percent of federal employees were unaware of their whistleblowing rights.¹⁵

The backlogs and failures to provide relief created by inadequate funding encouraged the Special Counsel to reassess the merits of whistleblowers' claims of reprisal. Swygert stated: 'In terms of the percentage of whistleblower complaints that may be well founded, somewhat surprisingly most of the allegations we have found are substantial enough to forward to agencies for investigation. This is somewhat surprising, to the extent that one would have thought that a number of employees would have looked upon whistleblower protection as a way to avoid legitimate management action. That does not appear to be developing.'¹⁶ Other Special Counsel have been less positive in their appraisal of the claims coming before the office. Kozinski argued that claims he did not investigate did not involve worthy whistleblowers. In responding to studies that the OSC did in-depth investigations on 'only 8 of every 100 allegations and that 99 percent of whistleblower reprisal cases were closed without corrective action or disciplinary action,'¹⁷ O'Connor argued that the closing of the overwhelming majority of cases was justified because they did not meet legal standards.¹⁸ He also noted during other testimony, 'we are getting a great deal of frivolous complaints.'¹⁹

Leadership

Against this background, some Special Counsel stand out for both good and ill reasons. Elaine Kaplan is perhaps the most highly regarded Special Counsel to date. She took the position on May 8, 1998. At her nomination hearing she acknowledged dissatisfaction with the performance of the OSC and pledged to identify and address problems.²⁰ She sought to increase the number of corrective actions secured by the Special Counsel and, after approximately a year in office, she described how the office had addressed problems for which it had been criticized, through the reduction of backlogs, the efficient use of limited staff, the creation of the perception of OSC's neutrality, and the encouragement of agencies to cooperate with the office.²¹ In 2001, Senator Carl Levin asserted that the Special Counsel had gained the respect 'of even the most disillusioned of critics.'²² Unlike some previous Special Counsel, she supported amendment of the whistleblower provision by the Whistleblower Protection Act. After leaving the position of Special Counsel, she described weaknesses with the OSC, including its failure to follow up on claims and the slowness with which it responded to whistleblower complaints.²³

Three Special Counsel, Kozinski, O'Connor, and Bloch, served terms that are identified with controversy and criticism. When Kozinski became the Special Counsel in 1981, the office was already in poor shape. Some members of the House of Representatives suggested that the office be deemed a failure and closed.²⁴ Kozinski argued that the OSC's failures resulted from the absence of a confirmed Special Counsel for two and a half years, inadequate funding, and conflicts with the Merit Systems Protection Board (MSPB) about their respective roles. Kozinski discussed what he could do with sufficient staff and resources.²⁵ At the same time, an increasingly contentious relationship developed between Kozinski and the staff of the OSC.

Others saw his stated goals as an indictment of his own performance. Whistleblower advocacy groups harshly criticized his performance, arguing that he acted willfully to undermine whistleblower protection for federal employees.²⁶ Kozinski left before his term was completed to become the Chief Judge on the United States Court of Claims. In 1985, during his confirmation hearings to become a judge of the United States Court of Appeals for the Ninth Circuit, opponents raised his performance as Special Counsel as a ground for rejecting his nomination.²⁷ Kozinski was narrowly confirmed for that position.

In 1982, O'Connor replaced Kozinski as the Special Counsel. O'Connor blamed the problems of the OSC on the frequent changes in the leadership of the office.²⁸ He sought to remedy the problem by creating more field offices and reducing the backlog. On the other hand, he was not a proponent of change. He did not ask for more money in the funding request for fiscal year 1984.²⁹ He did not support the Whistleblower Protection Act of 1986 on the grounds that he believed it would make OSC expensive and ineffective. He did not support any changes to the whistleblower provision that would alter the role of the Special Counsel.³⁰ He also objected to easing the burden of proving a connection between a protected disclosure and alleged retaliatory action by an agency. He believed that the change could throw 'a magic circle' around any person who claimed to be mistreated.

O'Connor had supporters who approved of what he had accomplished with limited resources,³¹ credited him with making the office more competent, and praised his effectiveness in a thankless job.³² O'Connor seemed to hold an equivocal view of whistleblowing and whistleblowers, a view perhaps at odds with his role as Special Counsel. In one interview, giving his opinion, as would a private attorney, regarding whether to blow the whistle, he stated, 'I'd say that unless you're in a position to retire or are independently wealthy, don't do it. Don't put your head up, because it will get blown off.'³³ Before Congress, O'Connor was equally critical of the protections available to whistleblowers and again he advised against blowing the whistle.³⁴

O'Connor held the 'firm belief' that most federal managers follow the law and that 'most whistleblowers are malcontents.' He stated that it was 'not in

the public interest to employ, retain or cosset drones, incompetents, disruptors of the workplace, malefactors, or those whose conduct is unlawful in ways inappropriate to the execution of the mission of the organization' even if these persons engaged in specifically protected conduct 'like whistleblowing.' O'Connor seemed to assert that his view of the public interest counseled against protection of persons entitled to whistleblower protection. That view of the public interest seemed more concerned with conduct that suggested dissent against agency policies or practices. He asserted that it was not 'in the public interest to foster internal dissidence, vituperation, backbiting and disaffection.'³⁵

During his tenure, O'Connor faced constant criticism for his performance as Special Counsel. One critic said that he was 'more like a lap dog than a watch dog.'³⁶ One high-ranking member of the House Post Office and Civil Service Committee charged that a single chairman of a House Committee 'has protected more whistleblowers than the Office of Special Counsel.'³⁷

A third Special Counsel, Bloch, became mired in controversy at the beginning of his term. Bloch followed the well-respected Kaplan and soon after his confirmation on December 9, 2003, began to undo changes that she had made. For example, Bloch removed sexual orientation from a list of characteristics giving rise to protected status, an item that Kaplan had included. Bloch based his actions on a legal analysis of the scope of statutory protections,³⁸ an analysis with which the Office of Personnel Management (OPM), the agency responsible for providing guidance to federal personnel officials, disagreed.³⁹ President Bush eventually rejected Bloch's position by reaffirming that the federal government 'prohibits sexual-orientation discrimination and federal agencies are expected to enforce this policy.'⁴⁰

In early 2005, members of Congress accused Bloch of mishandling pending whistleblower cases as part of the process of reducing the ever-present backlog at the OSC. Responses to questionnaires by persons who brought complaints of retaliation to the OSC showed that the office was not doing a good job.⁴¹ Bloch explained these responses by positing that the small percentage of employees who completed the questionnaires were disgruntled because they did not have meritorious cases or because the office lacked jurisdiction over their claims. Other reports concluded that the quality of the presentation of cases by the office had declined during his tenure.⁴²

Bloch attracted attention in 2006 for cancelling a ceremony honoring the recipient of OSC's whistleblower award, Leroy Smith, after Smith advised that he would criticize the office for nonresponsiveness.⁴³ Thus, the ceremony to praise an exemplar of those employees willing to address administrative failures was called off because of the temerity of the award winner to criticize administrative failure.

Several of Bloch's employees claimed that he had retaliated against staff

critical of him or who may have leaked information about his alleged misconduct – persons sometimes referred to as whistleblowers.⁴⁴ Without warning, Bloch reassigned about 10 percent of his staff to field offices, thereby forcing most of them to resign. Some of these staff members filed reprisal complaints with the office. Because the protector of whistleblowers could not investigate himself for retaliation against whistleblowers, the complaints were assigned to the Office of Personnel Management Inspector General. Bloch's response rested on characterization of the allegations as reckless, false, slanderous, and self-serving.⁴⁵ Bloch was also questioned regarding his use of personal e-mail accounts for public business.⁴⁶

During the investigation of these retaliation complaints in 2007, Bloch hired private computer specialists, Geeks on Call, to wipe his office computer clean of all data.⁴⁷ In May 2008, the Federal Bureau of Investigation shut down the OSC's e-mail system and raided Bloch's office and home looking for evidence that he had obstructed justice.⁴⁸ In October he refused to resign but wrote President George Bush stating that he would resign at the end of his five-year term. After a meeting with White House officials on October 23, Bloch resigned as Special Counsel and was not permitted to re-enter his office at the OSC.

In April 2010, he pled guilty to 'criminal contempt of Congress.' Despite a plea agreement, Magistrate Judge Deborah A. Robinson, on February 2, 2011, sentenced him to a mandatory one-month incarceration. In August 2011, Bloch was permitted to withdraw his guilty plea because neither he nor the prosecution realized that the law required mandatory incarceration.⁴⁹ From October 2008 through April 2011, the Senate did not confirm a Special Counsel because President Obama had not nominated one. President Barack Obama's failure to nominate a person to fill the vacancy for over two years of his term offers a telling commentary on the perceived importance and power of the office.⁵⁰

The Senate confirmed President Obama's appointee, Carolyn Lerner, on April 14, 2011. In her statement at her nomination hearing, she confirmed the importance of whistleblowers in combating fraud, waste, and abuse. She emphasized her commitment 'to building collaborative and constructive relationships with the Congress, federal employee and agency management groups, and good government advocates.'⁵¹ Early in her tenure she added Jason Zuckerman, a well-known attorney for whistleblowers, and Mark Cohen, the Executive Director of the Government Accountability Project, to the office. These additions suggested a commitment to aggressive representation of the interests of whistleblowers.

Failures of the Office of Special Counsel

Even the briefest summary of its performance supports a perception that the OSC has failed not only to fulfill the loftiest of expectations, but also to meet

more modest ones. The lofty expectations include the promise that the office could influence the character of the federal bureaucracy.⁵² The most controversial provisions of the whistleblower provision gave the office the power to do so. The Special Counsel could seek to discipline agency officials involved in reprisals for protected disclosures. Congress created the OSC as a safe avenue for allegations of misconduct, including disclosures that the whistleblower provision prohibited to others. More dramatically, the Special Counsel could take allegations with a substantial likelihood of merit to the heads of agencies and require those officials to investigate the allegations and to provide a detailed report to the Special Counsel. The agency head would then in turn submit the report to Congress, to the President, and to the office of Special Counsel for transmittal to the whistleblower. If the allegations did not merit referral for a detailed report, the Special Counsel would refer the allegations to the head of the agency for a less formal report that would state what action were taken regarding the allegations. The Special Counsel also initiated the practice of informally referring some allegations to agency Inspectors General for action.

In its first years, 1978–1982, the OSC commenced some well-publicized disciplinary actions against agency officials for reprisal against whistleblowers.⁵³ In one of these actions regarding officials at the United States Marshalls Service, the United States Court of Appeals for the District of Columbia Circuit broadly interpreted the scope of the disciplinary provision.⁵⁴ An examination of the annual reports of the OSC show that the office has taken a limited number of these actions for reprisal against whistleblowers. The greatest number of disciplinary actions commenced by the Special Counsel address violations of the Hatch Act. In most reports, particularly in this century, few such actions concern reprisals against whistleblowers. In many years, the reports do not mention any disciplinary actions commenced against agency officials for reprisals against whistleblowers. Practically, these actions seem to be ‘a dead letter.’

However, recent action by Lerner suggests reliance on the provision. After finding that supervisors at the Dover Air Force Base mortuary had retaliated against whistleblowers who reported missing body parts from the remains of service members, as well as other failures at the mortuary, the Special Counsel directed the Air Force to take disciplinary actions against the retaliating supervisors. The Special Counsel gave the Air Force one month to take the actions. ‘[I]f the Air Force does not, the Office of Special Counsel said it was prepared to pursue disciplinary action against the two civilian supervisors before the federal Merit Systems Protection Board.’⁵⁵

In defense of the Office of Special Counsel, restrictive interpretations of the disciplinary provision by the United States Court of Appeals for the Federal Circuit (Federal Circuit) and by the MSPB complicate these actions and make

more difficult successful prosecution by the office. For example, the MSPB, the administrative court responsible for adjudicating these cases, concluded that sanctions could not be applied against former employees and that only one of the sanctions listed in the provision could be applied in a case.⁵⁶ The MSPB also increased the risk to the OSC of commencing these disciplinary actions. The MSPB held that an employee who successfully defended a disciplinary action could seek attorney fees from the office.⁵⁷

Likewise, the Federal Circuit restricted the application of the disciplinary provision. Despite changes in the standard of proof for causation to require that whistleblowing be only a contributing rather than a substantial factor in the challenged reprisal against the whistleblower, the Federal Circuit applied the more demanding substantial factor test in disciplinary actions brought by the Office of Special Counsel.⁵⁸ The Federal Circuit also distinguished between those officials who took disciplinary actions and those who recommended or proposed them. The disciplinary provision applied to the former but not the latter.⁵⁹

The number of formal reports requiring agency heads to respond to 'substantial' allegations of misconduct varies considerably throughout the history of the OSC. In 23 of the 33 annual reports of the Special Counsel (from 1979 through 2009) fewer than 20 referrals requiring a formal report were made to agency heads. Many OSC annual reports do not describe the character of the allegations. A perusal of the reports that do, however, indicates the character of the matters referred. For example, the Report of the Special Counsel in 1979 described matters such as the misuse of government property, dangerous working conditions at a particular site, and conflicts of interest. Perhaps the most notable matter was fire risks at one of the buildings used by the National Archive, a risk that required the closing of the building pending remediation. The annual reports since 2007 contain the largest numbers of referrals and include matters such as failure of administrative practices of the National Cemetery Administration regarding rights to burial at the National Cemetery, the e-mailing of pornographic material on government computers and on government time, gambling on federal property, unsafe modifications of emergency helicopters, use of explosives without proper training, failure to investigate death threats to a federal agent, and misuse or destruction of government property or equipment.

Although many of these referrals concern significant matters, the number of these required reports and the conduct to be investigated show that the OSC has not become what many envisioned at the time of the passage of the CSRA. It has become neither a safe channel that attracts a large number of agency whistleblowers nor a responder to systemic abuse implicating high-level management officials at federal agencies, nor has it become an established avenue for disclosures regarding classified information from employees of

agencies other than those national security agencies excluded from the whistleblower provision.⁶⁰ The possibility of the OSC being any of these things explained the powerful resistance to the inclusion in the original legislation of this authority for the Special Counsel.

The changes that enabled the recognition of whistleblowing and the passage of the whistleblower provision also evoke an image of a much different Office of Special Counsel. Those changes included the need to reform bureaucracies, to reduce the risks of compliance with authority, and to restrict and control misconduct within the executive branch; they also demonstrated the importance of whistleblowers as part of nonviolent resistance. These changes relied on the stories of whistleblowers that created narratives of heroism and individual responsibility, of ethical decision-making and of commitment to the welfare of institutions for which whistleblowers worked and those affected by those instances, and on the record of the abuse of government power and the illegality conducted in its exercise.

Other expectations for the OSC were more modest, including support of whistleblowers who bring complaints of reprisal before the office. The personal narratives of Special Counsels illustrate the weaknesses of the office and its failures in regulation. Those individual stories illustrate that the President and executive officials may have little incentive or desire to create the more robust OSC envisioned by many advocates of whistleblowing. The performance of the office in corrective actions, in the representation of whistleblowers, and in timely and effective consideration of whistleblower complaints also suggests that the OSC has often failed to meet more modest and perhaps jaded expectations for it.

The personal narratives of Special Counsels describe the serious backlogs of whistleblower complaints that have plagued the office. From 1995 to 2003 the OSC annual reports do not contain references to any corrective action complaints regarding whistleblowers. The Special Counsel refers whistleblower allegations of retaliation to agencies for action by them. The annual reports also describe informal resolution of the allegations obtained by negotiation and agreement between the agency and the Special Counsel. The office mentions these informal referrals of reprisal allegations in several reports; sometimes examples are given but the number of referrals or resolutions is not provided. When numbers are given, those numbers do not strike an observer as large. Moreover, the annual reports do not discuss whether the resolution was acceptable to the whistleblower who made the reprisal allegation.

Prior to the enactment of the Whistleblower Protection Act of 1989, these shortcomings by the office affected the ability of many whistleblowers to obtain redress for retaliation. If the personnel action taken in reprisal was not one directly appealable by the whistleblower to the MSPB, the OSC was the sole remedy available. If the office decided not to take the allegation of

reprisal to the Board or did not act on it, the whistleblower was without remedy. The Whistleblower Protection Act permitted a whistleblower to bring an independent right of action to the MSPB when that whistleblower's allegations of reprisal were rejected by the Special Counsel or when the Special Counsel long delayed in acting on them.⁶¹ Even in these circumstances, the whistleblower lost the experience of the Special Counsel and incurred the individual expense of pursuing the reprisal claim.⁶²

The Special Counsel has been unable to meet either the lofty or modest expectations for the Office. The first expectation may evidence conflicting missions for the Special Counsel. Fulfillment of the lofty expectations required influence, power, and respect that the Office never acquired. Fulfillment of the modest expectations required consistency in viewpoint and leadership that the Office lacked. The office never possessed the resources to accomplish either set of expectations.

Conflicts in mission also challenged the OSC. One of these conflicts pitted the Special Counsel against the MSPB as they disagreed about the degree of independence that the OSC enjoyed from MSPB direction. That dispute drained the resources of both bodies until they accommodated their conflicting demands and Congress resolved the dispute by securing the independence of the OSC.

A different conflict haunted the Office. This conflict did much to undermine the reputation of the OSC and to evoke the opposition of whistleblower advocates. Several Special Counsels, but particularly Kozinski and O'Connor, asserted that they did not represent whistleblowers but were advocates for the merit system. Kozinski told a subcommittee of the House Appropriations Committee, 'I should make clear that when we bring a case, we are not representing an employee. We are charged with cleaning up the system, so to speak. We are charged with making sure that if there is some impropriety, the impropriety is corrected. We may not always ask for the corrective relief that the employee would want. We ask for the type of relief that is best for the system.'⁶³ O'Connor often expressed a similar view that the purpose of the OSC was to protect the merit system and not individual whistleblowers.⁶⁴

The manner in which the OSC resolved this conflict played a role in a number of criticisms of whistleblower advocates. The Office's resolution of the conflict perhaps too conveniently explained the OSC's thin record of success in protecting whistleblowers.

Some critics argued that the Office failed not only in what was left undone, but also in what was done. Thomas Devine and Donald Alpin castigated the OSC for undermining whistleblowers.⁶⁵ The Office shared information without the whistleblower's permission, thus giving agencies insight regarding the whistleblower's evidence. The Office could compromise the interests of whistleblowers to cultivate agency cooperation. The Office also refused to

permit whistleblowers to respond to agency arguments and factual assertions, and rejected the expertise of the whistleblower that could help the OSC to construct a case for reprisal. Perhaps more sinister, the office could intervene in an action that the whistleblower brought before the Board and take positions that undermined that action. Thomas Devine charged that the Special Counsel was training agency officials in how to retaliate without violating the regulations of the OSC. To this critic, the Office became a Trojan horse by inviting whistleblowers to contact the Office while at the same time enabling reprisals.

The Whistleblower Protection Act of 1989 resolved this conflict by stating that the office represented the whistleblower who brought claims of reprisal to it. The Act reflects this resolution in a number of ways. It specifically described the duty of the Special Counsel to whistleblowers. The office cannot routinely disclose information provided by the whistleblower without permission. The OSC must keep the whistleblower informed of the progress of an investigation and give the whistleblower reasons for closing a case. The Special Counsel cannot intervene in a proceeding before the Board without the permission of the whistleblower.

Capture of the Office of Special Counsel

Capture of regulatory processes by those who are regulated leads not only to inaction, but also to destruction of the substance of regulation. The performance of the OSC in cases other than whistleblower ones illustrates the risks when the power of the office is used by the executive branch for partisan and political purposes. Most of the disciplinary actions brought by the Special Counsel prosecute violations of restrictions on the active participation of federal and state employees in political campaigns. These prosecutions require independence and political neutrality; otherwise, the office's power can be used to ignore the violations of political allies and to punish conduct by political adversaries. Prosecutions politically expedient for the administration in power for arguably innocent conduct illustrate the use of the power of OSC to punish political adversaries.

The Special Counsel brought disciplinary actions against the officers of federal employee unions for activities during the 1984 presidential election. The presidents of two unions, the American Federation of Government Employees (AFGE) and the Postal Workers Union (PWU) 'expressed support for presidential candidate Walter Mondale and expressed opposition to incumbent President Ronald Reagan' in columns in union magazines and 'encouraged union members to vote for Mondale and to contribute to the union's political action funds.'⁶⁶ One AFGE president also published, in a union magazine, eight articles 'highly critical of President Reagan.' In one article, the union president urged workers to vote and stated that the polling booth was

'our only hope and only uncorrupt place left in the Reagan Administration.'⁶⁷ Both of these union officials were federal employees but had been detailed to these positions, and had not worked as employees for many years.

The Special Counsel began disciplinary actions against them and prevailed before the MSPB. The United States Court of Appeals for the Second Circuit and the United States Court of Appeals for the Eleventh Circuit repudiated the imposition of disciplinary action.⁶⁸ Both courts relied on the legislative history of the Hatch Act and stressed the right of federal employees freely to express their political views. Both courts required these expressions to be connected with or on behalf of organized efforts by political parties or partisan committees, clubs, or candidates. These courts must interpret the Hatch Act and disciplinary actions under it in light of the First Amendment right of free expression.

The described failures of the OSC illustrates general weaknesses in administrative regulation. That performance also demonstrates how the experience of a specific agency ameliorates or exacerbates those weaknesses. The experience of the office offers insights into the possibilities of institutional failure regarding administrative responses to allegations of misconduct and to allegations of reprisal.

In the federal government, individual agencies have responsibility for evaluating allegations brought to them by their employees or by others. These agencies, such as the Food and Drug Administration, the Federal Aviation Administration, and the Environmental Protection Agency, are those that receive allegations from private-sector employees regarding regulatory violations by private-sector employers. These regulatory agencies can be evaluated on the criteria applied to the Office of Special Counsel. Some agencies will be more successful than others. Some agencies might succeed or fail for reasons unique to each agency, but all agencies will confront challenges similar to those described regarding the OSC.

INSPECTORS GENERAL

In the federal government, one group of officials has special responsibility for the receipt and evaluation of allegations of misconduct in the organizations of which they are part. That group consists of agency inspectors general. The Inspector General Act of 1976, a post-Watergate reform, created these official positions.⁶⁹ The law charged them with the investigation of misconduct and attempted to give them some independence from agency management. Similar offices, but with different titles, perform a similar function in state governments, in other countries, and in international organizations. In corporations, compliance officials, auditors, and others perform an analogous role.

The abuses exposed during the Watergate crisis encouraged enactment of both the whistleblower provision of the CSRA and the law addressing inspectors general. The whistleblower provision designated inspectors general as protected avenues for disclosure of information, including information otherwise prohibited from disclosure.

Most inspectors general actively seek to identify misconduct. Whistleblowers permit inspectors general to direct investigations beyond those likely to be identified by the investigative efforts of these offices. In particular, inspectors general employ hotlines to receive both anonymous and confidential allegations that initiate investigations or provide information in ongoing inquiries.

A recent report of the United States Government Accountability Office concluded that inspectors general had taken steps to enhance their independence and to possess relevant expertise and qualifications. Inspectors general reported billions of dollars in savings and the initiation of criminal and administrative actions to address misconduct.⁷⁰

Inspectors general serve as channels for reporting allegations of misconduct. They offer less assistance to whistleblowers facing reprisal. Although a particular inspector general might use the power of the position to advocate for a whistleblower, inspectors general are similar to administrative or law enforcement agencies with regulatory authority over particular entities. The task of whistleblower protection is left to others.

Despite the independence granted to inspectors general, the structure of the Inspector General Act assures that inspectors general will work closely with the head of an agency. That relationship creates conflicts when the head of the agency is the target of an investigation. Even investigations of others within the agency can impugn the management and honesty of the agency head. Inspectors general are political appointees and thus partisan political interests may play a role in politically sensitive investigations.⁷¹

EXAMPLES OF SIMILAR AGENCIES IN OTHER COUNTRIES

Many anti-corruption efforts in other countries rely on administrative bodies. These bodies either enforce anti-corruption standards that rely on the disclosures of whistleblowers or protect whistleblowers from retaliation. These anti-corruption commissions vary in success and reputation; none are without critics. A brief examination identifies similar challenges to administrative enforcement and significantly similar aspects in their histories. This examination repeats themes addressed in evaluation of the performance of the OSC. These themes include: the risk of capture by those to be regulated; the vulner-

abilities created by limited resources; the significance of the first years of performance; the accountability of administrative agencies; the insufficient enforcement powers or the failure to use them; the importance of leadership, and the conflicting roles that discourage an unambiguous commitment to mission.

The Central Vigilance Commission (Commission) in India enforces anti-corruption provisions, including the Public Interest Disclosure and Protection of Informers Resolution. Protection of those who disclose misconduct supports the fight against corruption and is necessary to protect whistleblowers who, according to the press, face constant retaliation. Retaliation is not limited to dismissal, but can lead to whistleblowers being killed.

Critics find the Commission ineffective in its response to complaints of retaliation. According to critics, the Commission has itself become corrupt, captured by the system of corruption that it is to eliminate. Its senior officials are 'dysfunctional' with attitudes inconsistent with the charge to protect whistleblowers.⁷² Rather than protecting whistleblowers, the Commission endangers them. One story describes how the Commission exposed the identity of the whistleblower to those whom he charged with retaliation.⁷³ This exposure violated the Commission's guidelines on the very point. In addition, the Central Vigilance Commission has limited powers. It lacks enforcement powers and it cannot punish those responsible for retaliation.⁷⁴

The Independent Commission Against Corruption (ICAC) in Hong Kong enjoys a much different reputation.⁷⁵ Studies showcase it to illustrate how such a commission should work. Its accomplishments contrast starkly with the culture of corruption that it confronted at its creation. Its task then was seen as a 'mission impossible.' Moreover, its mandate extends to both the public- and private-sector participants in governmental corruption.

It benefited from strong leadership and early successes. The ICAC lucidly articulated its corruption code of conduct to its staff, and published a performance pledge. An independent ICAC Complaints Commission also helps to ensure the accountability of the Commission. Within its first three years, the ICAC had eliminated 'the corruption syndicates entrenched within the government.'⁷⁶ This early success established its reputation and changed the attitudes of the public, thus ending the toleration of corruption.⁷⁷ It continues to actively prosecute persons for misconduct.

The ICAC seeks to change public perceptions and the conduct of those within government. It emphasizes prevention through codes of conduct that the Commission monitors.⁷⁸ It stresses education through the codes of conduct, and through a separate education program it meets with workers and trainee workers and discusses the temptation of corruption in the workplace.

The ICAC also recognizes the power of narratives.⁷⁹ It publicizes and repeats the stories of whistleblowers and of those guilty of corruption, and

thereby reinforces its missions through the stories of heroes and villains – heroes and villains that each receive their just desserts. These stories, unlike many of the narratives regarding whistleblowers in the United States, present lessons of justice done rather than justice denied.

Two states in Australia, New South Wales and Queensland, have respected administrative bodies – in New South Wales, the Independent Commission Against Corruption (ICAC-NSW), and in Queensland, the Crime and Misconduct Commission (CMC).⁸⁰ Regarding the ICAC-NSW, Christopher Elmendorf suggests that its success and reputation are reflected in the actions of ‘hostile politicians’ who ‘[curtail] its budget and its jurisdiction.’⁸¹ Public regard for similar commissions in Australia prevents their elimination but ‘has not kept legislators from undermining their independence.’⁸²

The ICAC in New South Wales has broad powers to investigate officials in the public sector.⁸³ For example, it can ‘tap telephones, instigate investigations, execute search warrants, summon witnesses or documents, force witnesses to answer incriminating questions, search public offices, hold public and private hearings and obtain arrest warrants for witnesses failing to appear.’⁸⁴ Brian Carr argues that the ICAC has too much unchecked power. In his view, thousands of innocent parties were investigated for the conviction of less than a dozen corrupt officials.⁸⁵ ‘For those falsely accused, the psychological, financial and professional damage is often irreparable.’⁸⁶

Like the ICAC in New South Wales, the success of the CMC in Queensland can be measured by the reaction to it. According to Elmendorf, the investigations of the CMC embarrassed members of both major parties leading to a ‘trumped-up’ parliamentary inquiry.⁸⁷ The Supreme Court intervened to close the inquiry. In response, the state parliament denied the Commission access to the Supreme Court and created a special joint committee to oversee the CMC. Regulated parties often seek legislative redress from unpleasant or embarrassing regulatory action.

The CMC investigated child protective services and identified serious flaws in those services. Bob Lonne and Jane Thompson, in their article responding to the report of the Commission, agreed with the identification of serious flaws but criticized the report for a number of shortcomings.⁸⁸

Other criticism addresses conflicts of interest in the Commission. Police hold many of the positions in the Commission and yet the Commission oversees the police.⁸⁹ If the CMC finds wrongdoing by the police, the CMC as the oversight body shares some responsibility. A case in which a suspect died in police custody highlighted these conflicts.

The successes and failures of whistleblower laws depend on the performance of the administrative agency charged with investigating allegations of misconduct and retaliation. Evaluation of the performance of these agencies relies on criteria more broadly used to evaluate administrative regulation. This

chapter also suggests that whistleblower laws pose distinctive challenges for administrative regulation.

NOTES

1. Chapters 5, 6, and 7 trace the creation of the Office of Special Counsel and discuss the powers of the Office. Those chapters confirm the importance of the OSC in relation to the success of the whistleblower provisions.
2. The other provision also applies to the OSC. The sanctions provision, part of the 1974 Amendments of the federal Freedom of Information Act requires the Special Counsel to investigate instances of arbitrary and capricious withholding of government documents by government officials referred to it by the courts.
3. Richard A. Posner, *The Sociology of Law: A View from Economics*, 2 EUR. J. L. & ECON. 263 (1995).
4. Chapters 6 and 7 describe this authority.
5. Chapter 5 shows how abuses by the Nixon Administration led to the creation of the Office of Special Counsel, and Chapter 6 describes how it became part of the Civil Service Reform Act of 1978.
6. U.S. Office of Spec. Counsel, Rep 1 (1978).
7. *Oversight of the Civil Service Reform Act of 1978: Hearings Before the S. Comm. on Gov't. Affairs*, 96th Cong. 15–25 (1979) [hereinafter 1978 *Oversight Hearings*].
8. See, e.g., *Frazier v. MSPB*, 672 F. 2d 150 (D.C. Cir. 1982) (establishing standards under the whistleblower provision regarding protected conduct, corrective action, and disciplinary action against retaliating officials); In the Matter of Robert J. Frazier, Jr., 1 M.S.P.B. 159, 1 M.S.P.R. 198 (1979); In the Matter of Robert S. Tariela, 1 M.S.P.B. 116, 1 M.S.P.R. 119 (1979) (considering the character of protected disclosures).
9. Swygert served as the President of Howard University from August 1995 to June 2008.
10. The budget at the beginning of 1980 was roughly twelve million dollars (inflation adjusted) and around six and one-half million at the end of the year. A biographical sketch of Eastwood can be found in *Treasury, Postal Serv. And Gen. Gov't. Appropriations for Fiscal Year 1982: Hearings on H. R. 4121 Before a Subcomm. of the H. Comm. on Appropriations*, 97th Cong. 90 (biographical information); 137–42, 152–57 (appropriations for OSC) (1981).
11. The budget information comes from the annual reports of the Office of Special Counsel for the years 1982–2009. These annual reports are found in the Reading Room of the Office of Special Counsel, available at http://osc.gov/RR_OSCReportsAndInformation.htm.
12. Walter Pincus, *House Planning to Name (the price of) That Tune*, WASH. POST, July 7, 2011, at B4. The House of Representatives rejected a spending limit of 200 million dollars for military bands proposed by the Senate in response to deep cuts in programs such as those for supplementing the nutrition of women with children.
13. *Whistleblower Forum*, 6 THE BUREAUCRAT 3 (1977).
14. *Treasury, Postal Serv. & Gen. Gov't. Appropriations for Fiscal Year 1983: Hearings Before Subcomm. on the H. Comm. on Appropriations*, 97th Cong. 205–15 (1982) [hereinafter *Appropriations for Fiscal Year 1983*].
15. *Treasury, Postal Serv. & Gen. gov't. Appropriations for Fiscal Year 1995: Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 103rd Cong. 672–73 (1994) (in answers submitted for the record on a 1993 General Accounting Office Report regarding the percentage of federal employees who did not know their whistleblowing rights, Special Counsel Kathleen Day stated, 'I was disturbed by this figure, as are all people who are concerned about whistleblower protection').
16. 1978 *Oversight Hearings*, *supra* note 6, at 25.
17. *Whistleblower Protection Act of 1986: Hearings on H.R. 4033, Before the Subcomm. on Civil Serv. Of the H. Comm. on Post Office and Civil Serv.*, 99th Cong. 5–6 (1986) [hereinafter *Hearings on Whistleblower Protection Act of 1986*]. 'That means we are dealing with a very small number of closed complaints as to which anyone could raise any question at all.'

18. *Id.*
19. *Treasury, Postal Serv. And Gen. Gov't. Appropriations for Fiscal Year 1986: Hearings Before a Subcomm. of the S. Comm. on Appropriations*, 99th Cong. 215 (1985) [hereinafter *Appropriations Committee Hearings for Fiscal Year 1986*].
20. NOMINATIONS OF ELAINE D. KAPLAN & RUTH Y. GOLDWAY: *Hearing Before the S. Comm. on Governmental Affairs*, 105th Cong. 5 (1998).
21. *Whistleblowing & Retaliation in the Department of Veterans Affairs: Hearings Before the Subcomm. on Oversight and Investigations of the H. Comm. on Veterans Affairs*, 106th Cong. 4 (1999).
22. *S. 995 – Whistleblower Prot. Act Amendments: Hearing Before the Int'l. Sec. Proliferations & Fed. Serv. Subcomm. of the S. Comm. on Governmental Affairs*, 107th Cong. 22 (2001).
23. Barbara A. Atkin, Elaine Kaplan & Gregory O'Duden, *Wedging Open Courthouse Doors: Federal Employee Access to Judicial Review of Constitutional Claims*, 12 EMP. RTS. & EMP. POL'Y J. 233, 285 (2008).
24. *Gen Oversight of Civil Serv. Agencies: Hearing Before the Subcomm. on Civil Serv. of the H. Comm. on Post Office & Civil Serv.*, 97th Cong. 201–03 (1981).
25. *Id.*
26. Thomas Devine & Donald G. Aplin, *Abuse of Authority: The Office of the Special Counsel and Whistleblower Protection*, 4 ANTIOCH L. J. 5 (1986) [hereinafter *Abuse of Authority*]. A subsequent article by these authors was also critical of the Special Counsel. Thomas Devine & Donald G. Aplin, *Whistleblower Protection: The Gap between Law and Reality*, 31 HOW. L. J. 223 (1988).
27. Robert L. Jenkins & Philip Hager, *Senate Narrowly Confirms Kozinski as Appeals Judge*, L.A. TIMES, Nov. 8, 1985, at A3. Democrats who opposed his nomination in the Senate argued that his service as Special Counsel 'showed that he lacked the temperament and compassion a judge should have.' *Confirmation Hearings on Federal Appointments: Hearings before the S. Comm. on the Judiciary*, 99th Cong. 127–43 (1985).
28. *Nomination of K. William O'Connor: Hearings Before the S. Comm. on Governmental Affairs*, 97th Cong. 11 (September 23, 1983) [hereinafter *Nomination of K. William O'Connor*].
29. *Treasury, Postal Serv. & Gen. Gov't. Appropriations for Fiscal Year 1984: Hearings Before a Subcomm. of the S. Comm. on Appropriations*, 98th Cong. 215–17 (1983).
30. *Hearings on the Whistleblower Protection Act of 1986*, *supra* note 17, at 3, 5–6.
31. *Appropriations Committee Hearings for Fiscal Year 1986*, *supra* note 19, at 215–16. Congressman Abnorn stated: '[L]et me tell you that I think you are certainly to be commended for your ... reduced personnel [while you have] increased your productivity.'
32. *Role of Whistleblowers in Admin. Proceedings: Hearing Before the Subcomm. on Admin. Practice of the S. Comm. on the Judiciary*, 98th Cong. 156 (1983) [hereinafter *Hearings on the Role of Whistleblowers in Administrative Proceedings*].
33. Howard Kurtz, *Friendly Advice: 'Don't Put Your Head Up'*, WASH. POST, July 17, 1984, at A17.
34. *Hearings on the Role of Whistleblowers in Administrative Proceedings*, *supra* note 32, at 151.
35. The quotations in this paragraph are contained in LOUIS FISHER, CONG. RESEARCH SERV., RL33215: NATIONAL SECURITY WHISTLEBLOWERS (2005).
36. This remark is usually attributed to Congresswoman Patricia Schroeder.
37. *Whistleblower Prot. Hearings Before the Subcomm. on Civil Serv. Of the H. Comm. on Post Office and Civil Serv.*, 99th Cong. 34 (1985).
38. *Safeguarding the Merit Sys.: A Review of the U.S. Office of Special Counsel: Hearings Before the Oversight of Gov't Mgt., The Fed. Workforce & Dist. Of Columbia Subcomm. of the S. Comm. on Homeland Sec. and Governmental Affairs*, 109th Cong. 16–18 (2005). The hearing transcript records a long and tense question-and-answer period between Mr. Bloch and Senator Levin.
39. *Addressing Sexual Orientation Discrimination in Federal Civilian Employment*, U.S. OFFICE OF PERSONNEL MANAGEMENT, www.opm.gov/er/address2?Guide04.asp (last visited Feb. 11, 2011).

40. Daniel Schulman, *Office of Special Counsel's War on Whistleblowers*, MOTHER JONES, Apr. 23, 2007, FAIR (Protecting Whistleblowers Who Protect the Public Interest), Apr. 23, 2007, <http://www.fairwhistleblowers.com/content/office-special-counsels-war-whistleblower> (last visited June 11, 2012).
41. *Safeguarding the Merit Sys. Principles: A Review of the Merit Sys. Prot. Bd. And the Office of Special Counsel: Hearings Before the Oversight of Gov't Mgmt, the Fed. Workforce & the Dist. Of Columbia Subcomm. of the S. Comm. on Homeland Sec. and Governmental Affairs*, 110th Cong. 24 (2007).
42. *Id.* at 10–11.
43. Elizabeth Williams, *Special Counsel Cancels Award Ceremony for Whistleblower*, WASH. POST, Sept. 11, 2009, at A15.
44. Schulman, *supra* note 40.
45. *Ensuring a Merit-Based Emp't Sys.: An Examination of the Merit Sys. Prot. Bd. & Office of Special Counsel: Hearings Before the Subcomm. on Fed. Workforce, Postal Serv. & Dist. of Columbia of the H. Comm. on Oversight & Gov't Reform*, 110th Cong. 405 (2007).
46. *Id.* at 36–44. In this exchange, Bloch asserted that the committee sought to intimidate him and interfere with his investigations of violations of the Hatch Act by the head of the General Services Administration.
47. Kim Zetter, *Did Fed. Lawyer Use Geeks-on-Call to Erase Gov't Computer Evidence?*, WIRED, Nov. 28, 2007, available at <http://www.wired.com/threatlevel/2007/11/did-fed-official>.
48. Ari Shapiro, *FBI Raids Special Counsel Office, Seizes Records*, NPR, May 6, 2008, available at <http://www.npr.org/templates/story/story.php?StoryID=90223448>.
49. Del Quentin Wilber, *Bush-era Official Allowed to Withdraw Guilty Plea*, WASH. POST, Aug. 4, 2011, at A2.
50. On April 23, 2010, a year before a new Special Counsel was appointed, the National Whistleblower Center called on President Obama to appoint a new Special Counsel. NATIONAL WHISTLEBLOWER CENTER, *Press Release: NWC Calls for Immediate Appointment of a New Special Counsel* (Apr. 23, 2010), available at http://www.whistleblowers.org/index.php?option=com_content&task=view&id=1088&Itemid=189.
51. *Nomination of Carolyn Lerner: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 111th Cong. (2011).
52. Chapters 6 and 7 describe these provisions and the controversy surrounding them.
53. The cases are discussed in ROBERT G. VAUGHN, MERIT SYSTEMS PROTECTION BOARD: RIGHTS AND REMEDIES §9. 04(1) (rev. ed. 2011).
54. *Frazier v. MSPB*, 672 F. 2d 150 (D.C. Cir. 1982).
55. Craig Whitlock, *Whistleblowers Faced Reprisal at Dover; Probe Finds*, WASH. POST, Feb. 1, 2012, at A15.
56. *Special Counsel v. Owens*, 11 M.S.P.R. 128 (1982) (disciplinary action not available against former employees); *Special Counsel v. McDonald*, 42 M.S.P.R. 624 (1989) (only one of the statutory penalties could be applied); *Special Counsel v. Doyle*, 45 M.S.P.R. 43 (1990) (limitation of sanctions applied to settlements between OSC and charged agency officials).
57. *Santella v. Special Counsel*, 86 M.S.P.R. 48, 61 (2000).
58. *Eidmann v. MSPB*, 976 F. 2d 1400, 1403–404 (Fed. Cir. 1992).
59. *Frederick v. Dep't of Justice*, 73 F.3d 349, 353–54 (Fed. Cir. 1996). This distinction seems inconsistent with long-standing interpretations of the whistleblower provision – interpretations that permitted discipline of those who recommended prohibited personnel actions. It seems unlikely that the Whistleblower Protection Act (WPA) intended to incorporate such a distinction because the WPA proscribes threats of reprisal.
60. Under the WPA, the Special Counsel may only pass this information to the President's National Security Advisor or to the Select Intelligence Committees of the House and Senate. Stephen Vladeck, *The Espionage Act and National Security Whistleblowing After Garcetti*, 57 AM U. L. REV. 1531, 1595 (2007).
61. This change is incorporated into 5 U.S.C. § 1221.
62. This alternative route for the whistleblower to MSPB adjudication, however, may explain reductions in the number of formal corrective actions by the OSC because whistleblowers now pursue their own actions before the MSPB if the OSC has not responded in a timely fashion or rejected whistleblowers' complaints.

63. *Appropriations for Fiscal Year 1983*, *supra* note 14, at 210.
64. *Nomination of K. William O'Connor*, *supra* note 28, at 8, 13–14.
65. *Abuse of Authority*, *supra* note 26.
66. These statements are described in *Billar v. MSPB*, 863 F. 2d 1079, 1081 (2d Cir. 1988).
67. These statements are described in *Blaylock v. MSPB*, 851 F. 2d 1348 (11th Cir. 1988).
68. *Id.*; *Billar*, 863 F.2d at 1081.
59. Pub. L. No. 95–452, 92 Stat. 1101 (Oct. 13, 1978) (codified as amended at 5 U.S.C. App.); Diane M. Hartmus, *Inspection and Oversight in the Federal Courts: Creating an Inspector General*, 35 CAL. W. L. REV. 243 (1999) (describing the history of the Inspector General Act of 1978); Kathleen Clark, *Toward More Ethical Government: An Inspector General for the White House*, 49 MERCER L. REV. 553 (1998) (outlining the roles of inspectors general).
70. UNITED STATES GENERAL ACCOUNTABILITY OFFICE, GAO 11–770, INSPECTORS GENERAL: REPORTING ON INDEPENDENCE, EFFECTIVENESS, AND EXPERTISE (2011).
71. Dan W. Reicher, *Conflicts of Interest in Inspector General, Justice Department, and Special Prosecutor Investigation of Agency Heads*, 35 STAN. L. REV. 975 (1983).
72. *CVC Seeks Powers to Stop Victimisation of Whistleblowers*, HINDUSTAN TIMES, July 25, 2010, available at <http://www.hindustantimes.com/India-news/NewDelhi/CVC-seeks-powers-to-stop-victimisation-of-whistleblowers/Article1-577334>, asox [hereinafter *Victimisation of Whistleblowers*].
73. Kiran Yadav, *The Road to Perdition*, FIN. EXPRESS (Sept. 12, 2010), <http://www.financialexpress.com/news/the-road-to-perdition/680453/>.
74. *Victimisation of Whistleblowers*, *supra* note 72.
75. *Case Study: The Independent Commission Against Corruption (ICAC) in Hong Kong*, Communication for Governance & Accountability Program, available at <http://www.scribd.com/doc/28259827/Case-Study-The-Independent-Commission-Against-Corruption-ICAC-in-Hong-Kong>.
76. C. Raj Kumar, *Human Rights Approaches of Corruption Control Mechanisms – Enhancing the Hong Kong Experience of Corruption Prevention Strategies*, 5 SAN DIEGO INT'L L. J. 323, 325–26 (2004).
77. *Id.*
78. Max J. Skidmore, *Promise and Peril in Combating Corruption: Hong Kong's ICAC*, 547 ANNALS AM. ACAD. POL. & SOC. SCI 118 (1996).
79. *Id.* Both the Central Vigilance Commission and the ICAC are discussed in Herbert Smith, *Guide to Anti-Corruption Regulation in Asia*, 2008/2009, available at <http://www.herbertsmith.com/NR/rdonlyres/446AF69B-1358-4492-A5205F3AAA94AD1/12046/GuidetoanticorruptionregulationinAsia0809final.PDF>.
80. Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U.L. REV. 1366, 1390 (2005) (giving general information about Australia's anti-corruption commissions).
81. *Id.* at 1392.
82. *Id.*
83. Amanda O'Brien & Gary Hughes, *Some Like It Rotten*, THE AUSTRALIAN, Mar. 29, 2007, at 12.
84. *Id.*
85. Brian Carr, *Don't Follow NSW in War on Corruption*, ADVERTISER (AUSTRALIA), Oct. 5, 2001, at 20.
86. *Id.*
87. Elmendorf, *supra* note 80, at 1392.
88. Bob Lonnie & Jane Thompson, *Critical Review of Queensland's Crime and Misconduct Commission Inquiry into Abuse of Children in Foster Care: Social Work's Contribution to Reform*, 58 AUSTRALIAN SOCIAL WORK 86, 97 (2005) (criticizing a lack of political and management accountability and the failure to identify ideologies of management that reduced child protection).
89. Robyn Ironside, *CMC Under Fire Over Custody Death Care*, COURIER MAIL (AUSTRALIA), June 17, 2010, at 5.

11. Interpretation

Many persons interpret whistleblower laws. Attorneys, employees, citizens, law enforcement and regulatory agencies, businesses, scholars, courts, whistleblower advocates, and whistleblowers all consider the application of the language of whistleblower laws. Of all of these persons, whistleblowers are among the least likely to guide their conduct by the content of the law. Studies consistently show that employees covered by whistleblower laws are unlikely to know of the relevant law. Even if aware of the relevant statutes, whistleblowers are least likely to recognize or examine how the interpretation of the language of a statute affects their rights. For example, one study of federal employees in the United States concluded that 15 years after the passage of the whistleblower provision in the Civil Service Reform Act of 1978 (and four years after the amending legislation in the Whistleblower Protection Act of 1989), 76 percent of federal employees were unaware of their whistleblower rights.¹

Courts and administrative bodies adjudicating whistleblower claims play the most important roles in determining the meaning of these laws. Their interpretations guide and limit the authority of agencies charged with enforcing specific whistleblower laws. These interpretations can encourage or discourage disclosures by employees and also influence the willingness of attorneys to pursue employee claims of retaliation. The ambiguity of words and the application of language to unanticipated circumstances or to specific facts all demand interpretation. The performance of the courts and adjudicatory agencies does much to determine the successes and failures of whistleblower laws.

This chapter examines interpretation of whistleblower laws by many different courts and adjudicatory bodies and concludes that adjudicators narrowly construe whistleblower laws despite their remedial character. This examination seeks trends that link together diverse adjudicators of various statutes. In doing so it sacrifices detailed analysis of the interpretation of the statutes by different adjudicators and it risks comparing and contrasting dissimilar circumstances. It also discounts local and specific conditions that may explain the interpretation of particular laws. This approach, however, does identify some particular aspects of both the adjudicators and of the context in which they operate. The more general import of interpretation justifies the loss of detail and context.

The evaluation considers the interpretation of federal and state courts in the United States. This consideration looks at the performance of the United States Court of Appeals for the Federal Circuit (Federal Circuit) that exercises nearly exclusive jurisdiction² over interpretation of the whistleblower provision of the Civil Service Reform Act of 1978 (CSRA) and subsequent amendments including the Whistleblower Protection Act of 1989 (WPA). It also considers the interpretations of federal district courts and courts of appeal in interpretation of the whistleblower provision added to the False Claims Act (FCA) in 1986 and the Sarbanes-Oxley Act of 2002 (SOX). The WPA applies to federal employees while the FCA and the SOX apply more to private-sector ones.³

Appraisal of these decisions relies principally on the assessment of them by scholars and attorneys. This evaluation shows that, with some important exceptions, courts narrowly, rather than broadly, construe whistleblower laws. Some interpretations seem inconsistent with the most likely meaning of the relevant statutory language and ignore legislative history supporting a broader interpretation. From these decisions emerge conflicting approaches to interpretation by courts, sometimes even in the same opinion. These conflicts in approaches to interpretation permit more than one explanation, but one of these explanations suggests that some interpretations of whistleblower laws are likely result driven.

Because of the number of state laws, the evaluation of them relies upon articles focusing on some states, including California, Maryland, Minnesota, New York, and Texas. Here, the number of states and laws render conclusions more tentative and subject to modification. In addition, some of the whistleblower laws of these states are more narrow and restrictive by their terms than the federal laws. State laws cover both public- and private-sector employees, while most of the statutes evaluated address the private sector. Still, a similar tendency of these courts to construe narrowly the language of the statutes by adopting the more restrictive meaning emerges from these decisions.⁴

Two federal adjudicatory bodies, the United States Merit Systems Protection Board (MSPB) and the Department of Labor (DOL) respectively interpret the WPA and SOX. Adjudication before the DOL involves the Office of Administrative Law Judges, similar to trial judges, and the Appeals Review Board of the Department of Labor (ARB), similar to an appellate court. Whistleblower advocates and scholars have criticized the MSPB for its interpretation of the whistleblower provision, although some of its decisions have taken a broader view of the law than the Federal Circuit. Critics have raised questions about the propriety of many of its decisions, including ones in the latter part of the last decade. Overall, the MSPB began with a broader view of the statute and while vacillating in approach has over time become more restrictive in its interpretations of the law.

A thorough and thoughtful study of the Department of Labor's administra-

tion of the SOX concludes that the Department, including its administrative law judges, has taken a narrow and restrictive view of the law and has applied clear provisions of it in ways that are inconsistent with its language and likely meaning. An evaluation of these two adjudicatory agencies, the MSPB and the DOL, also permits the conclusion that they have chosen interpretations that limit the scope of the statute allowed by its language. Some of these narrow interpretations appear to be the less likely meanings of the language chosen by Congress.

Less clear implications arise from the interpretative practices of bodies interpreting whistleblower laws in other countries. Particularly in civil law countries, approaches to interpretation vary. The context for interpretation in common law countries may also vary in important ways from that in the United States. An examination of whistleblower laws in Australia, Britain, France, Germany, and South Africa, however, raises at least some of the same issues identified in the interpretation of adjudicatory bodies in the United States.

JUDICIAL INTERPRETATION: FEDERAL

The Federal Circuit's interpretation of whistleblower protection for federal employees drew criticism from the time of the formation of the court. Congress created the Federal Circuit as a court of exclusive jurisdiction over veterans' claims, patent and trademark claims, and appeals of federal employees from the MSPB. The addition of this last jurisdiction encompassed almost all claims by whistleblowers. Members of the Court of Claims, an article I court, not part of the article III judiciary, became federal appellate court judges. The Federal Circuit incorporated not only members of the Court of Claims, but also the precedent of that court regarding federal employment law. In some aspects that precedent was less protective of federal employees than the precedent of other courts of appeal.⁵

A 1999 article by Thomas Devine, the legal director of a whistleblower advocacy group, captured the character of the criticisms of the interpretative approach of the Federal Circuit in its first decade.⁶ In both the WPA and the 1994 amendments to that law, Congress rejected a number of the decisions of the court because they failed to implement the law as Congress intended.⁷ Among these interpretations were ones that equated statutory protection with the First Amendment and applied the burden on the government to justify its action in a way that effectively only required proof that an agency 'could have' taken the action against the whistleblower.

In hearings held in 2009 on a proposed Whistleblower Protection Enhancement Act (WPEA), Devine described a number of other decisions in

which the Federal Circuit misinterpreted that law and ignored congressional directives regarding interpretation of the law.⁸ According to critics, the Federal Circuit's interpretations undermined the law. These critics assert that the miniscule percentage of whistleblowers prevailing before the Federal Circuit demonstrate the effect of these interpretations.⁹ Other explanations for the low percentage of prevailing whistleblowers argue that the Federal Circuit's limited review of factual findings by the MSPB explains why many whistleblowers who lose before the MSPB also lose before the court. The Federal Circuit, however, exercises *de novo* review of the law.

A few of the most controversial decisions of the court give a sense of the character of the criticisms. This review illustrates the mixture of interpretative approaches used by the court and the restrictive character of its interpretations. In one of its first decisions interpreting the whistleblower provision, the court held that the statutory provision was 'co-extensive' with the First Amendment.¹⁰ Thus, the whistleblower law would not protect reports of misconduct not protected by the First Amendment. In a single sentence, the court announced a rule that erased the provision from the law¹¹ – a brevity that suggests a well-established principle of law. The citation for the proposition did not contain binding precedent and, at best, was barely relevant to the proposition.¹² The majority cited no legislative history for its startling conclusion; only the dissent relied on any legislative history. Even the dissent did not capture how the legislative history supports a proposition opposite to the one endorsed by the court. The court also applied a muddled analysis of existing First Amendment law by confusing the *content* of a protected disclosure regarding a matter of public interest and concern with the *motive* of the speaker. The brevity and fragility of the analysis portended future confusion and error.

Another controversial decision renewed calls for the removal of exclusive appellate jurisdiction over whistleblower claims from the Federal Circuit. In *Huffman v. OPM*, the court defined disclosure in a way that limits protection to a report of information of previously unknown misconduct.¹³ The court did not address any legislative history but reached this result by relying on a dictionary definition of disclosure and contrasting that definition with other words that Congress *could* have chosen, such as 'report.'¹⁴ In this exercise the court relied on a comparison not made by Congress and conveniently ignored a rich legislative history. The technique of selecting the alternative term that Congress might have chosen offers multiple choices to the court – choices for comparison that ordain the result. For example, disclosure could be compared with 'revelation' and such a comparison would more easily permit the conclusion that Congress did not intend to protect only recent, newsworthy, previously unreported information. Moreover, the legislative history of the whistleblower provision contains numerous examples of whistleblowers who reported instances of widespread misconduct of which many officials of an

agency were aware. For example, the Leahy report contains several examples of employees who told their superiors information that those superiors already knew. The disclosures invited retaliation because they evidenced unwillingness to acquiesce in wrongdoing and encouraged others to do the same.¹⁵

Additionally, the court concluded that it could not look at the legislative history of the 1994 amendments to the law. Because those amendments did not change the wording of the statute, the court treated the legislative history as post-enactment legislative history in which a subsequent Congress sought to determine the meaning of previous legislation.¹⁶ Therefore, the court was bound by the plain meaning of the legislative language. The court did not consider how the WPA might have changed the purpose of the law and the context in which the statute is interpreted. Likewise, a conservative court sensitive to limits on its authority to make law could easily consider these statements as congressional admonitions about an approach to interpretation. In any event, the legislative history of the WPA prior to the amendments suggested a broad reading of the term 'disclosure.'¹⁷

In another part of the opinion, the court constructed the 'purpose' (or rather the 'purposes') of the statute using snippets of legislative history. The court used these purposes to limit the persons to whom disclosures could be made. When the court relied on the broad purpose of the statute, it was not bound by a single word or sentence but looks to the whole statute, including its object and policy. Juxtaposed on the same page of the opinion was the declaration regarding the broad purposes of the law and a cramped and formalistic interpretation of two words, 'any' and 'disclosure,' rejecting any relevance of the legislative history of either the WPA or 1994 amendments to it. Examination of the broad purpose of the statute permitted the court to consider all the language of the statute and its legislative history while the formalistic interpretation of a few words rejected any relevance of that legislative history. The court deployed these inconsistent methods to arrive at consistently narrow protections for whistleblowers.

The opinion leaves one with the suspicion that the interpretations rest on deep disagreement with the policies of the statute. In the view of the court, what Congress may have intended leads to absurd results.¹⁸ The court gives a different weight to the risk of disruption in the executive than does the statute and its legislative purpose. This suspicion connects the decision in *Huffman* with *Fiorillo* where the legislative history would have shown that Congress knew of the appropriate reluctance of courts to use the First Amendment to interfere with executive personnel matters. Thus, Congress offered a statute in which it made different decisions about the importance of whistleblowing and the risks of disruption. Seen in this way, these Federal Circuit decisions reject such a judgment about the weight to be given to executive interests, a judgment made at the expense of Congress.

Not until the court's opinion in *Marano v. Department of Justice*¹⁹ in 1993 did a majority decision of the court consider legislative history. In *Marano*, the court conducted a searching analysis of that history and correctly identified the whistleblower provision as a 'good government' statute entitled to broad and liberal interpretation.²⁰ It then construed the law to accomplish this purpose. In contrast, many decisions of the Federal Circuit narrowly construing the law rely on a variety of purposes often supported by small portions of legislative history or are asserted without significant support. These purposes are often connected with the importance of protecting government efficiency and hierarchy of command. They often appear constructed to justify the particular result in a specific case. The court in *Huffman* dispatches *Marano* in a brief footnote, with only the statement that opinions of the court have disagreed on the issue of disclosure to superiors, without addressing the fundamental inconsistency of the interpretative approaches of the two decisions.²¹

Other articles and public criticisms address other federal circuit decisions. Most assessments address specific opinions. Often the disagreement rests on the policy implemented by the interpretation, but most assessments contain explicit or implicit criticisms of the interpretation of the court. For example, in congressional testimony in 2009, one whistleblower advocate listed over a dozen Federal Circuit decisions illustrative of interpretative approaches that weakened the law and rejected congressional reforms.²²

Another important law, the False Claims Act contains a whistleblower provision. The FCA, dating from the Civil War (and with long origins in the British common law), allows private parties to begin and, in some instances, to pursue litigation against those who have received funds from the United States government based on false claims.²³ These individuals may recover a portion of the funds regained by the United States, the amount depending in good part on the involvement of this individual 'relator' in the litigation. The FCA provides an economic incentive for whistleblowers to report fraud against the government.

Unlike the WPA, where exclusive appellate jurisdiction rests with the Federal Circuit, many appellate courts interpret the FCA whistleblower provision when reviewing the decisions of federal district courts. This difference has highlighted issues of interpretation. The variety of interpretation, unlike that of a single appellate court, illuminates the interpretative choices at issue. Still, several appellate decisions limit the scope of the specific language of the whistleblower provision of the FCA.

The FCA provides broad protection to whistleblowers. The statute protects 'any employee' from specific actions and from threats and harassment, or if the employee is 'in any other manner discriminated against in the terms and conditions of employment' by the whistleblower's 'employer.' The statute broadly defines protected conduct to include lawful conduct in an action under

the FCA, such as ‘investigation for, initiation of, testimony for, or assistance in the action filed or to be filed’ under the FCA.²⁴ James Helmer, the author of one of the leading texts on the False Claims Act describes ‘the broad whistleblower protections’ based on the language and structure of the statute and asserts that the legislative history ‘reveals that Congress intended the provision to be broadly construed.’²⁵ John Boese, the author of a leading text on the False Claims Act, concludes that many restrictive interpretations are consistent with the language of the provision.²⁶ These statements are not necessarily inconsistent because the language may support more than one possible meaning – the approach to interpretation will guide the selection from among the possible meanings. The character of the statute and congressional expectations regarding interpretation influence the selection from among possible meanings of the FCA whistleblower provision.²⁷

When defining an ‘employee,’ courts have included former employees who have been blacklisted.²⁸ The term employee could also include the employee of a government contractor who faced retaliation as the result of the government’s influence on the contractor.²⁹ The United States Court of Appeals for the Federal Circuit is an exception to this broad interpretation of ‘employee’ under the FCA. The Federal Circuit concluded that the whistleblower provision did not cover federal employee relators,³⁰ instead believing that the CSRA excluded application of the FCA whistleblower provision. Helmer states: ‘The Federal Circuit’s opinion seems irreconcilably inconsistent with [the whistleblower provision’s] blanket protection to “any employee.”’³¹

Some decisions of appellate courts have broadly interpreted the FCA, even going so far as to protect whistleblowers who do not precisely fall within the language of the statute in order to avoid evisceration of the protection ‘in any manner through narrow interpretations.’³² A number of appellate court decisions, however, have narrowly construed the language of the provisions.³³

Several decisions of US courts of appeal illustrate this narrow construction. One appellate court decision does not protect internal disclosures by any employee and thus requires an employee to make an external disclosure.³⁴ Another appellate court has denied recovery to independent contractors.³⁵ If internal disclosures are protected, courts of appeal differ on what employees must assert in order to establish knowledge on the part of the employer of the potential for an action under the FCA. Courts require that the internal report must allege that the employer is defrauding the government.³⁶ One appellate court determined that an employee could not establish the required employer knowledge unless the employee expressly included an assertion of the violation of the FCA.³⁷ In this view, allegations of ‘illegal,’ ‘improper,’ or even ‘fraudulent’ conduct by the employer is insufficient to establish the requisite knowledge.

Some appellate courts distinguish between employees generally and those who have compliance, auditing, or other oversight functions.³⁸ These courts

believe that such compliance employees should not be protected for disclosures made as part of their duties because disclosures of misconduct to superiors do not sufficiently establish employer knowledge because the employer does not know that employees are going beyond their job requirements.³⁹

Some of these courts impose restrictions beyond this justification. For example, one appellate court concluded that the employee could not establish employer knowledge because the employee had never used the words 'unlawful,' 'illegal,' or '*qui tam*.'⁴⁰ This 'bright-line' rule ignores the justifications for acquiring knowledge by the employer. In this case, the employee who investigated contract charges to the government repeatedly raised concerns about these charges. In such a circumstance, a fact-finder could conclude that the employer did possess the requisite knowledge, despite the failure of the employee to utter the magical incantation. The decision of another appellate court emphasizes the restrictive character of the requirement. In that case a supervisor of laboratory testing did refer to the company's submissions as illegal and stated that similar conduct by other companies had violated the FCA. Yet the court concluded that such disclosures were insufficient to invoke protection.⁴¹ In order to alert the employer, the laboratory supervisor had to tell the employer that the employee was going to commence an action under the FCA or assist in an investigation of such an action.⁴²

Because these decisions seem inconsistent with a broad reading of the whistleblower protection contained in the FCA, Helmer believes that no 'magic words' should be required. Instead an employee need only submit evidence that allows the conclusion that the employee's activities leading to discharge were sufficient to give the employer grounds to believe that the employee was considering a *qui tam* action.⁴³ To establish employer knowledge, compliance employees, unlike other employees, may have to do more than simply report the wrongdoing.⁴⁴

Helmer believes that appellate court decisions point to the following conclusion: protected disclosures do not require an employee to even be aware of an FCA case to be protected; allegations of serious fraud made by a person who does not normally have responsibility for investigating misconduct are likely to be covered; complaints of less serious fraud, overbilling without expression of an intent to file FCA are less likely to be covered if reported by an employee whose job responsibilities include such reporting; reports of 'mere' regulatory noncompliance or generic fraud without a link to federal government and without an express connection with the federal government are not protected.⁴⁵ To an extent, these conclusions reflect the outcomes of case-by-case analysis, an approach inconsistent with restrictive interpretations that exclude classes of employees from protection.

Judicial interpretation has limited the scope of protection by adding words that could bear a broader meaning to the statutory language. This broader

meaning may not only be a permissible interpretation, but also the more likely one. Legislative history directs protection of an employee 'involved with' an action under FCA; this broad admonition is inconsistent with the notification requirement the courts have imposed on employees. If there is doubt regarding the approach to interpretation of the statute, the courts should look to Congress for the appropriate approach to interpretation. The notification requirement is not required by the language of the statute and is inconsistent with its broad remedial purpose, a purpose that would counsel against evisceration of the statutory provision through narrow construction.

The Dodd-Frank Wall Street Reform and Investment Protection Act of 2010 alters previous interpretations of the Sarbanes-Oxley Act,⁴⁶ such as the determination by some courts that whistleblowers are not entitled to a jury trial under SOX. Although such changes may only reflect altered congressional expectations, such changes, particularly when they reference judicial interpretations, also reflect on and judge the interpretation of the law by the courts.

JUDICIAL INTERPRETATION: STATES

Most state whistleblower statutes followed the enactment of the whistleblower provision of the Civil Service Reform Act of 1978.⁴⁷ Several of these laws were patterned after the federal provision protecting federal employees; some later state laws incorporated the amendments included in the Whistleblower Protection Act of 1989.⁴⁸ State laws vary considerably. For example, some states have separate laws for the public and private sectors; others include the public and private sectors in the same statute. The laws resolve differently a number of issues that any whistleblower statute must consider. Some are generous in their protections; others are more parsimonious. Some of these statutes limit the scope of common law public-policy exceptions to the doctrine of at-will employment.

An examination of critiques of the statutes of some states identifies instances of narrow judicial interpretation of these laws. These instances are frequent and significant enough to raise issues similar to those encountered in relation to judicial interpretation of some key federal whistleblower provisions.

The California courts have interpreted its law permitting disclosures to a 'public agency' so as to deny protection for internal disclosures.⁴⁹ This interpretation is not the only permissible one. The silence of the statute regarding protection of internal disclosures can be interpreted in more than one way; it could indicate a rejection of protection for internal disclosure or it could assume such protection and identify when protection would extend beyond the organization itself.

Minnesota's whistleblower statute, since amendments in 1988, provides broader remedies than the common law public-policy exception.⁵⁰ Legislative history of the law shows that the statute was to be construed broadly.⁵¹ Jonathan Armour, the author of an assessment of judicial interpretations of the statute, states that the Minnesota courts 'have incorrectly applied the whistleblower statute.'⁵² The courts erred by applying limitations on the common law claims to the whistleblower statute. Although the statute was to provide 'expansive protections,' the courts have failed to follow unambiguous language of the statute.⁵³ For example, Minnesota courts have used the good faith standard not to evaluate the content of reported misconduct or whether an employee actually believed the allegations but instead to probe the motive of the employee.

In contrast, Lois Lofgren stated that 'Texas courts are unwilling to follow other jurisdictions which have given narrow, restrictive interpretations of whistleblower statutes.'⁵⁴ This broad interpretation of the law rests on the Texas courts' characterization of it as a good-government statute with a broad purpose to protect whistleblowers.⁵⁵ A more recent study, however, focuses on the internal reporting requirement contained in the Texas statute. The court's 'narrow interpretation' of the term, appropriate law enforcement agency, has limited protection under the law.⁵⁶

Commentators Elleta Callahan and Terry Dworkin describe an important interpretation that limits the scope of the New York private-sector whistleblower statute.⁵⁷ The court interpreted 'in violation of law' to mean that the actual wrongdoing was required and contrasted the lack of 'any reasonable belief' wording in the private-sector law with the inclusion of it in the public-sector statute.⁵⁸ The courts also took a narrow approach to interpretation by calling the statute 'a narrow and specific exception' to the doctrine of at-will employment.⁵⁹ Silvia X. Liu argued that this approach to interpretation encouraged narrow interpretation of ambiguity, such as the statute's coverage of illegal financial manipulations.⁶⁰

Commentators have noted that the New York courts have narrowly limited the language, 'substantial and specific danger to public health and safety.' For example, an appellate court concluded that the report of the rape of a mental patient did not constitute a danger to public safety because it addressed only an individual case.⁶¹

In Maryland, the Court of Appeals 'narrowed the protections of the Maryland whistleblower law in the Executive Branch of State Government' by requiring that an employee report alleged wrongdoing 'to someone with actual authority to fix the problem.'⁶² In doing so, the court 'undercut the legislative intent,' unnecessarily decided the case by 'narrowing' the law, and 'misinterpreted the cases on which it purported to rely.'⁶³

Examination of whistleblower laws in these few states supports only tenta-

tive conclusions about the interpretation of state whistleblower laws. The number of decisions and variance in the criteria used in the assessments of the laws suggest caution when drawing conclusions. In addition, an assessment of the approach of courts in a particular state may be affected by a number of circumstances. Judicial interpretation may occur in circumstances where the language clearly supports protection or the language is ambiguous and the legislative history supports a liberal interpretation of the statute. Still, the examples described above suggest that most courts narrowly construe specific statutory language, and fewer courts liberally interpret a statute because it is either remedial or because the content and structure of the statute imply a purpose broadly to protect whistleblowers.

ADMINISTRATIVE INTERPRETATION

Two federal administrative agencies adjudicate numerous and important claims. In doing so the MSPB interprets the WPA applicable to millions of federal employees, and the Administrative Law Judges and Appeals Review Board within the Department of Labor determine the meaning of whistleblower provisions in dozens of federal statutes covering tens of millions of private-sector employees. These administrative adjudicatory agencies decide an exponentially larger number of whistleblower cases under these whistleblower laws than federal trial or appellate courts.

Merit Systems Protection Board

Whistleblower advocates have long criticized the MSPB for the small percentage of whistleblowers who prevail before it and the Federal Circuit. For example, according to Devine, Legal Director of the Government Accountability Project, out of 2,000 whistleblower cases from 1978 to 1988, the MSPB only decided four times on the merits in favor of whistleblowers.⁶⁴ From 2000–2009, the MSPB decided three out of 53 whistleblower cases for whistleblowers on the merits.⁶⁵ Devine asserted that the MSPB had *never* found for a whistleblower in a ‘high stakes case with national consequences.’ Devine identified over a dozen decisions that chose a restrictive interpretation or application of the law.⁶⁶

Not all assessments of the MSPB have been critical. J. Nelson Wilkinson praised the MSPB for its rejection of a *de minimis* limitation on the protected grounds for disclosure.⁶⁷ This article contrasted the Federal Circuit’s justifications for the imposition of such a requirement with the reasoning supporting the MSPB’s conclusions. The MSPB’s interpretation of the law more accurately reflected the meaning of the WPA. The MSPB has been congratulated

for its interpretation of the law to cover employees who were disciplined because an agency mistakenly believed them to be whistleblowers.⁶⁸ The MSPB found in favor of a former head of the Park Service Police in a case that can be described as one garnering considerable press attention.⁶⁹

Prior to 2000, the MSPB issued some decisions broadly interpreting the WPA. Among these it liberally construed the personnel actions covered by the law.⁷⁰ The MSPB also adhered to a position that a disclosure within an agency to a person in a position to correct the alleged misconduct is covered even if such reports are within the duties of that employee.⁷¹ The MSPB also found that the WPA prevented an agency from retaliating against an employee for comments made as a private citizen.⁷² In that decision, an Environmental Protection Agency engineer spoke in a private capacity at a public meeting considering the settlement of environmental litigation against the Department of the Interior.

Congressional testimony about the Whistleblower Protection Enhancement Act of 2009 discussed a number of decisions of the MSPB in which it misinterpreted or narrowly construed the whistleblower law.⁷³ Among these were several decisions of the MSPB issued after 2000. The MSPB concluded unnecessarily that testimony in court was not a protected disclosure.⁷⁴ The MSPB limited 'abuse of authority' to arbitrary actions that result in favoritism or discrimination, not ones having broader consequences.⁷⁵ The MSPB also limited disclosures regarding 'specific and substantial dangers to public health and safety' when the disclosures involve policy disputes, an interpretation subsequently rejected by the Federal Circuit.⁷⁶

Jon Knight found that administrative and judicial interpretation of the whistleblower provision 'dampened ... trust in the whistleblower process.'⁷⁷ Devine condemned a 2009 decision of the MSPB as potentially its 'most destructive precedent.'⁷⁸ This decision permitted the Transportation Security Authority (TSA) to define, retroactively, the information regarding the canceling of patrols on the most vulnerable flights as sensitive security information. The TSA's retroactive treatment of information through informal procedures that failed to rise even to status of agency rulemaking was treated by the MSPB as if it were information barred from disclosure by statute. In the whistleblower provision of the CSRA, Congress rejected an attempt to allow agencies to prohibit disclosures by regulation.⁷⁹ To allow agencies to do so would permit them to determine the scope of protected disclosures and to undermine the law. The MSPB's interpretation fails to consider the rejection by Congress of the most formal agency actions – such as rulemaking – as law prohibiting disclosure. In 2011, the MSPB declined to reopen the and review the decision.⁸⁰

Department of Labor

In a detailed analysis of the performance of the Department of Labor in addressing whistleblower claims under the Sarbanes-Oxley Act, Professor Richard Moberly documents the ineffectiveness of the Department in protecting whistleblowers and attributes that ineffectiveness in good part to its interpretation of the whistleblower provision.⁸¹ His thorough analysis relies on an empirical evaluation of the outcomes before the DOL, as well as on an assessment of the decisions by DOL-ALJs and the Administrative Review Board. His is a compelling critique of the restrictive interpretations by the DOL of this major private-sector law.

Despite 'strong substantive and procedural protections for whistleblowers,' the ease of filing claims, a 'favorable burden of proof,' and provision for immediate reinstatement,⁸² few whistleblowers prevailed during the first three years of the SOX. According to Moberly's analysis, SOX whistleblowers won in only 3.6 percent of the cases before the Occupational Health and Safety Administration (OSHA), the office that investigates allegations of retaliation.⁸³ On appeal of OSHA decisions to the DOL's administrative law judges, whistleblowers prevailed in only 6.5 percent of the cases.

The study 'demonstrate[s] that administrative decision makers strictly construed, and in some cases misapplied, Sarbanes-Oxley's substantive protections to the significant disadvantage of employees.'⁸⁴ Moberly attributes this low rate of success to two factors. First, adjudicators 'generally decided cases as a matter of law and rigidly construed Sarbanes-Oxley's legal requirements.'⁸⁵ Second, the administrative officials 'misapplied Sarbanes-Oxley's burden of proof regarding causation' at the expense of whistleblowers.⁸⁶

The DOL and its Administrative Law Judges (ALJs) dismissed many claims because whistleblowers failed to satisfy procedural requirements imposed by the DOL or because they concluded that whistleblowers 'did not meet Sarbanes-Oxley's statutory requirements as a matter of law.'⁸⁷ Those few cases that survived the DOL's 'strict legal scrutiny' were lost because of the DOL's misapplication of the burden of proof.⁸⁸

Moberly describes strict, rigid, or even incorrect interpretations of the statute by ALJs and by the ARB. For example, adjudicators 'strictly enforced the statute of limitations in cases in which discretion could be utilized to excuse an employee's late filing.'⁸⁹ ALJs limited coverage of subsidiaries of privately held companies by narrowly interpreting the statutory language.⁹⁰ OSHA and the ALJs were reluctant 'to define broadly the categories of whistleblower disclosures that Sarbanes-Oxley will protect.'⁹¹ Adjudicators required that errors and omissions 'related to a broader scheme of intentional corporate fraud.'⁹² Employees were required to have sufficient knowledge to link disclosures 'to a specifically identified violation covered by the Act.'⁹³

‘OSHA and the ALJs particularly focused on two new legal boundaries to whistleblower law implemented by Sarbanes-Oxley: a new definition of a ‘covered employer’ and new type of ‘protected activity.’⁹⁴

‘ALJs and the ARB strictly construed the definition of “covered employer.”’⁹⁵ Administrative judges rejected ‘a reasonable interpretation’ of the language of the Act that favored covering employees of ‘contractors, subcontractors and agents.’ Thus, rather than adopting a reasonable interpretation that liberally interpreted the law, administrative judges adopted a more restrictive interpretation. Similarly, ARB decisions rejected a broad construction of protected activities permitted by the language and purpose of the statute.⁹⁶ For example, the ARB imposed a requirement regarding mail and wire fraud not contained the language of the Act.⁹⁷ In this sense, administrative adjudicators interpreted the Act by rejecting the plain meaning of the language, as well as rejecting a canon of liberal interpretation of it. Also, the ARB required that a whistleblower ‘specifically identify the statute violated by the activities the whistleblower reports and connect the statute to Sarbanes-Oxley’s provisions.’⁹⁸ ‘Yet, the assumption that rank-and-file employees would have such specific and detailed legal knowledge is unwarranted.’ In addition, the ARB interpreted ‘reasonable belief’ to mean ‘a high certainty that the law has been broken.’⁹⁹ In contrast to early interpretations of SOX, the ARB determined that a refusal to break the law was not protected; and an employee must make an affirmative disclosure protected by the statute.¹⁰⁰ ‘This decision undermines a long tradition of interpreting both statutory whistleblower protections and the common law of wrongful discharge to protect an employee who refuses to engage in illegal activity.’¹⁰¹

Moberly’s study, the most comprehensive examination of interpretation of SOX by the Department of Labor, demonstrates narrow, rigid, and wooden interpretations of the law. This examination identifies interpretive approaches that not only fail to adopt the more expansive or reasonable interpretations of the law, but also reject the plain meaning of statutory language. Such interpretation has limited protections for whistleblowers and undermined the goals of those protections. Moberly’s study is a devastating critique of the DOL’s performance. Its conclusions also raise misgivings regarding the interpretation of the many other private-sector whistleblower laws over which the DOL has jurisdiction.

EXPLANATIONS FOR RESTRICTIVE INTERPRETATIONS

In the United States, many courts and administrative agencies narrowly interpret a variety of whistleblower laws. Although examples of opposing approaches to interpretation exist, these widespread interpretative practices

limiting the scope of whistleblower laws encourage consideration of the reasons for them. Reasons may address aspects of judicial or administrative interpretation or the practices of particular agencies. Often these reasons merge as general aspects of interpretation appear in the context of specific agencies.

One of the most enduring legal articles, the title of which says it all, is *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*.¹⁰² That article analyzes how the litigation process favors those who repeatedly appear in adjudication, such as employers, as compared to those who only appear once, such as individual employees. Although describing litigation, many of its conclusions apply to administrative adjudication. Professor Marc Galanter contends that repeat players enjoy many advantages that enable them to influence adjudication. They have advance intelligence about the applicable legal standards and can structure their affairs to take advantage of those standards. They likely have greater legal expertise. Such repeat players are more likely to have contacts and influence with judicial and administrative personnel. They have greater credibility as combatants because they have greater resources – because they risk less in each individual case, they can devote resources to any case beyond the potential losses in that case. Repeat players play for rule development and particularly for those rules that are most likely to affect the ongoing relationship of the parties.

On the other hand, persons who rarely participate or who have never before participated may lack access to legal resources. The ability to recover attorney fees may attract legal talent to these cases, but Professor Galanter argues that as a general rule the representatives of these players are less likely to be in the upper echelons of the profession, have difficulty in mobilizing clients, and cannot trade off the interests of clients to reflect the advantages of repeat players.

Repeat players benefit when courts or agencies are overloaded. This overload increases delay that raises costs and encourages courts and agencies to emphasize the clearing of dockets. This emphasis leads to routine processing and could encourage adjudicators to interpret statutes to increase summary resolution of claims.

In whistleblower adjudications, the advantages that repeat players enjoy normally attach to employers, both public and private. These advantages are linked to the interpretation of relevant statutes and lead to interpretations in favor of employers and to the disadvantage of whistleblowers.

With administrative adjudication, the political aspects of interpretation can be pronounced. For example, administrative judges at the MSPB lack the protections and independence afforded to ALJs at the DOL. The members of the ARB are appointed by the sitting Secretary of Labor who pursues a broad political agenda on behalf of the President. The members of the MSPB enjoy

protected tenure but the changes in personnel can lead to dramatic differences in the interpretations of whistleblower laws.

Techniques of statutory interpretation are not neutral but can influence the success of statutes seeking social change or alterations in the relationships between individuals and the large bureaucracies of which they are part. A study examining how the failure to use legislative history affected the interpretation in British courts of the race and sex discrimination provisions argued that interpretation without legislative history restricted the scope of these laws.¹⁰³ The refusal to examine legislative history empowered courts to disregard legislative purpose and enfeebled the legislature; plain meaning interpretation also reduced the effectiveness of social legislation that sought to alter existing practices and perceptions often incorporated into language.¹⁰⁴ The Federal Circuit interpreted the whistleblower provision for five years before first referring to legislative history; in that decision the Federal Circuit concluded that the whistleblower provision was a good government statute. Subsequent decisions used parts of the legislative history but rarely did those decisions examine that history in detail.

Many of the decisions of the Federal Circuit and other adjudicators often seem to 'mix and match' interpretative techniques to reach a particular result. Decisions of other courts and of the DOL also suffer from similar techniques. Perhaps, as some whistleblower advocates suggest, courts and specialized agencies are simply conservative in the interpretation of whistleblower laws. Perhaps the narrow and limited interpretation of these statutes reflects adjudicatory history, overloaded dockets, adoption of specific interpretative devices, or a deep disquiet about the implications of whistleblower laws for bureaucratic stability.

INTERNATIONAL INTERPRETATION

Evaluation of the interpretative practices in other countries poses problems. The character of courts and agencies, as well as differing national approaches to interpretation, can influence judgments regarding them. For example, whistleblower cases in Britain are initially heard by Employment Appeal Tribunals (EATs) that are treated as judicial bodies and chaired by a judge, but which also contain a representative of management and of labor.

A comprehensive volume describes the interpretation of the UK Public Interest Disclosure Act 1998 (PIDA). The authors of the volume state that the number of applications to EATs has risen, a rise indicating a public awareness of the law.¹⁰⁵ The authors also believe that EATs have become more relaxed in their interpretation of the types of disclosure protected by the Act. The authors assert that decisions that limit protection when the provider under-

stands that the recipient already knows of the information are inconsistent with the policy of the law. For example, such decisions deny protection to a second disclosure 'because of a concern that the matter is not being adequately investigated.'¹⁰⁶ Other decisions also limit the scope of the PIDA. For example, at least one EAT has held that truth is material to the determination of reasonable belief.¹⁰⁷ The authors also question decisions that deny protection to a whistleblower whose predominant ulterior motive is unrelated to the purposes of the Act because in such circumstances the whistleblower has not acted in good faith.¹⁰⁸ Critics of these decisions reject this interpretation of good faith to 'avoid the possibility that concerns will not come to light because... individual[s] might lose protection' if their 'motives can be impugned.'¹⁰⁹

An example of narrow judicial interpretation allows a tribunal to deny protection to an otherwise qualified disclosure if the employee fails to identify a breach of a specific law. Two recent decisions restrict the scope of the law by narrowing the information covered by the PIDA. In these decisions, the disclosure failed to identify the breach of law.¹¹⁰ These judgments suggest that an allegation of wrongdoing must be linked to particular statutory violations in order to fall with the PIDA. An earlier decision suggested otherwise.¹¹¹

A 2010 report, 'The Status of Whistleblowing in South Africa,' concludes that the courts 'in their repeated interpretations' of South Africa's whistleblower law have confirmed 'the constitutional principles of transparent and accountable governance of organizations.'¹¹² The report gives several examples of other favorable interpretations, including broad definitions of 'information' to encompass opinions,¹¹³ and the scope of harms for which whistleblowers may seek redress.¹¹⁴

One scholar disapproves of reliance on the common law as a basis for whistleblower statutes. Such reliance produces shifting meanings, each one based on the facts of a particular case, while civil law adjudication would turn on the application of first principles.¹¹⁵ The choice of applicable first principles, however, also permits the narrowing of the scope of a whistleblower law.

A German example illustrates an application of first principles. Guido Strack, a commentator on the German whistleblowing law, asserts that judicial interpretation has narrowed the legal protections provided by that law.¹¹⁶ Two decisions of the highest non-constitutional court, the Federal Labour Court, 'virtually turned the positive case law of the Federal Constitutional Court upside down.' The Labour Court imposed on whistleblowers 'the principle of proportionality which normally only comes into play if the government interferes with the fundamental rights of citizens.' The effect of the decisions obligates a whistleblower first to make the disclosure internally. In making any external disclosure, a whistleblower must weigh the interests of society in the disclosure against the duty of loyalty. This commentator believes that this latter requirement encourages courts to substitute their own views of the

proper balance rather than considering the 'situation as it presented itself to the whistleblower.' Looking at the case law interpreting the rights of whistleblowers, this analyst believes that the case law 'leads to one [piece of] advice for potential whistleblowers who do not want to risk their jobs: Don't become a whistleblower!'

The meaning of every law is determined through interpretation. State and federal court interpretations regarding many different whistleblower laws, as well as interpretations by administrative agencies adjudicating claims of reprisal, however, restrict the scope and application of these laws. To some extent, interpretations of the whistleblower laws of other countries by the courts and agencies of those countries appear to have similar effects. Some explanations of these narrow interpretations apply specifically to individual adjudicatory bodies, but many explanations suggest more general obstacles to the implementation of whistleblower laws. Narrow interpretations force the continued attention of legislative bodies over time as they seek to vindicate the goals of whistleblower laws.

Interpretations of whistleblower laws determine the successes and failures of whistleblower laws. To the extent that those interpretations impose additional burdens on whistleblowers, they promote failure rather than success.

NOTES

1. *Treasury, Postal Serv. & Gen. Gov't Subcomm. of the H. Comm. on Appropriations*, 103rd Cong. 672–73 (commenting on a 1993 General Accounting Office Report).
2. Officials whom the Office of Special Counsel disciplines may appeal to courts of appeals other than the Federal Circuit.
3. As described in Chapter 8, the whistleblower provision of the False Claims Act does apply to some public employees. On the other hand, the whistleblower provision of the Sarbanes-Oxley Act, discussed in Chapter 9, applies only to private-sector employees.
4. Collections of state whistleblower laws can be found in several sources: THE NATIONAL CONFERENCE OF STATE LEGISLATURES, *A Compilation of State Whistleblower Law* (2004) (updated 2009), available at <http://www.ncsl.org/default.aspx?tabid=13390>; DANIEL P. WESTMAN & NANCY MODESITT, *WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE* 281–308, App. A (2004); Elleta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L. J. 99, 132 (App.) (2000) (collecting state whistleblower laws) [hereinafter *The State of State Whistleblower Protection*]; Robert G. Vaughn, *State Whistleblower Statutes and the Future of Whistleblower Protection*, 51 ADMIN. L. REV. 581 (1999) (examining state whistleblower laws).
5. ROBERT G. VAUGHN, *MERIT SYSTEMS PROTECTION BOARD: RIGHTS AND REMEDIES* §17.01 (rev. ed. 2011) [hereinafter *MERIT SYSTEMS PROTECTION BOARD*].
6. Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L. REV. 531 (1999) [hereinafter *Foundation for the Modern Law of Employment Dissent*]. In 2009 testimony before a Senate Committee, Devine discussed more than a dozen decisions of the Federal Circuit misinterpreting the law after congressional amendments in 1994. S. 372 – *The Whistleblower Prot. Enhancement Act of 2009: Hearings Before the Gov't Mgmt., Fed. Workforce and the Dist. of Columbia Subcomm. of the S. Comm. on Homeland Sec., and Gov't Affairs*, 111th Cong. 72–91 (2009) [hereinafter *Hearings on the Whistleblower Protection Enhancement Act*].

7. *Foundation for the Modern Law of Employment Dissent*, *supra* note 6, at 568–72.
8. *Hearings on the Whistleblower Protection Enhancement Act*, *supra* note 6, at 72–77.
9. *Id.* at 67–68 (MSPB: from 1979–1988 only four decisions on the merits for whistleblowers out of 2,000 cases; from 2000, only three decisions on the merits out of 53 cases), 72 (Federal Circuit: since 1994, only three decisions on the merits out of 200 cases) (Tom Devine, testifying with support of the ‘Make It Safe’ Coalition).
10. *Fiorillo v. U.S. Dept. of Justice*, 795 F.2d 1544, 1549 (1986) [hereinafter *Fiorillo*].
11. This conclusion was an extraordinary deviation from the canon of interpretation directing that a statute be interpreted to give effect to all its language. Here, no effect was given to the language of the statute.
12. Robert G. Vaughn, *Federal Employment Decisions of the Federal Circuit*, 36 AM. U. L. REV. 825 (1987).
13. *Huffman v. OPM*, 263 F.3d 1341 (Fed. Cir. 2001) [hereinafter *Huffman*].
14. In other parts of the decision the court in its analysis mixes references to disclosure using both the terms, to disclose and to report.
15. Internal disclosures by employees also implied a potential public disclosure; calculating superiors would be advised to act immediately before protection would attach to subsequent disclosures. Chapter 4 of this book contains a discussion of the Leahy Report.
16. *Huffman*, *supra* note 13, at 1354.
17. *Id.* at 1347–48.
18. *Id.* at 1353, n. 2.
19. 2 F.3d 1137 (Fed. Cir. 1993).
20. *Id.* at 1142. ‘We thus view the WPA as a good-government statute.’
21. *Huffman*, *supra* note 13, at 1351–52, n. 3.
22. *Hearings on the Whistleblower Protection Enhancement Act*, *supra* note 6, at 72–77 and Appendix.
23. Chapter 8 traces the history of the current version of the False Claims Act.
24. 31 U.S.C. §3729(h).
25. JAMES B. HELMER, *FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION* 732–33 (5th ed. 2007) [hereinafter *FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION*].
26. JOHN T. BOESE, *CIVIL FALSE CLAIMS AND QUI TAM ACTIONS* § 4.11 (4th ed, 2011 supplement) (discussing these decisions) [hereinafter *CIVIL FALSE CLAIMS*].
27. These two books illustrate how well-regarded experts can take different perspectives on interpretation of the False Claims Act.
28. *FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION*, *supra* note 25, at 735.
29. *Id.* at 737.
30. *Id.*
31. *Id.*
32. *Id.* at 734.
33. In particular, limitations are imposed on employees whose job descriptions include matters such as compliance and overseeing billing and payments.
34. *FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION*, *supra* note 25, at 744.
35. *Id.* at 732.
36. *Id.* at 742–48 (citing relevant cases).
37. *Id.* at 744–45 (citing relevant cases).
38. *Id.* at 748. Opinions not applicable to compliance employees apply the language of the statute that protects an employee who faces retaliation ‘because of’ protected disclosures.
39. *CIVIL FALSE CLAIMS*, *supra* note 26, at § 4.11[B][1], 4–355 (describing the different treatment of compliance personnel as ‘quite practical’ as a general proposition).
40. *FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION*, *supra* note 25, at 746 (citing relevant case).
41. *Id.* at 745.
42. *Id.* at 746, n. 80.
43. *Id.*
44. *Id.* at 746. Even here no ‘magic words’ such as ‘*qui tam* suit’ are necessary if the employee

describes the conduct as illegal and fraudulent. *Id.* at 748. CIVIL FALSE CLAIMS, *supra* note 26, at 4–362 through 4–363.

45. FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION, *supra* note 25, at 748.
46. Chapter 9 describes some of these modifications.
47. *State of State Whistleblower Protection*, *supra* note 4.
48. *Id.*
49. Gerard Sinzduk, Comment, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements*, 96 CALIF. L. REV. 1633, 1647–48 (2008) [hereinafter *Current Whistleblower Laws: A More Flexible Approach*]. The author notes that such exclusion can encourage termination to prevent a more extensive or effective external disclosure.
50. Jonathan W. J. Armour, Comment, *Who's Afraid of the Big Bad Whistle?: Minnesota's Recent Trend Toward Limiting Employer Liability Under the Whistleblower Statute*, 19 HAMLINE L. REV. 107 (1995).
51. *Id.* at 120–22 (relying on hearings and floor statements).
52. *Id.* at 128.
53. *Id.* at 131.
54. Lois A. Lofgren, Comment: *Whistleblower Protection: Should Legislatures and the Courts Provide a Shelter to Public and Private Sector Employees Who Disclose the Wrongdoing of Employers?*, 38 S.D. L. REV. 316, 333 (1993).
55. Valerie P. Kirk & Ann Clarke Snell, *The Texas Whistleblower Act: Time for A Change*, 26 TEX. TECH. L. REV. 75, 79–80 (1995). The authors, however, criticize the courts for this broad interpretation.
56. *Current Whistleblower Laws: A More Flexible Approach*, *supra* note 49, at 1633–34.
57. *The State of State Whistleblower Protection*, *supra* note 4, at 121–22.
58. *Id.* This article also reports that the courts relied upon failed attempts to add reasonable belief to the private-sector law.
59. Silvia X. Liu, *When Doing the Right Thing Means Losing Your Job: Reforming the New York Whistleblower Statute*, 7 N.Y. CITY L. REV. 61, 68 (2004).
60. *Id.* at 78–79. This discussion illustrates a how narrow construction can foreclose a permissibly broad interpretation of a statutory term, ‘substantial and specific danger to public health and safety.’
61. Joan Corbo, Note, *Krus v. New Rochelle Hosp. Medical Ctr.: Are Whistleblowers Finally Getting the Protection They Need*, 12 HOFSTRA LAB & EMP. L.J. 141 (1994).
62. Nina H. Schichor, *Department of Natural Resources v. Heller: Whittling Away at Maryland's Whistleblower Protections*, 66 MD. L. REV. 1139 (2007).
63. *Id.*
64. *Hearings on the Whistleblower Protection Enhancement Act*, *supra* note 6, at 67.
65. *Id.*
66. An exhibit to the testimony describes every MSPB decision on the merits under the Whistleblower Protection Act from 2000–2007 to demonstrate how the MSPB has misapplied the law.
67. J. Nelson Wilkinson, Note, *No Shelter: How the Federal Circuit Misinterpreted the Whistleblower Protection Act by Excluding De Minimis Disclosures*, 16 FED. CIR. BAR J. 505–07 (2007).
68. *Id.*
69. MERIT SYSTEMS PROTECTION BOARD, *supra* note 5, at §15.03.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Hearings on the Whistleblower Protection Enhancement Act*, *supra* note 6, at 104 (exhibit 4).
74. *Id.* at 197, citing *Flores v. Department of the Army*, 98 M.S.P.R. 467 (2004).
75. *Id.* at 110, citing *Downing v. Dep't. of Labor*, 98 M.S.P.R. 64 (2004).
76. *Id.*, citing *Chambers v. Dep't. of the Interior*, 103 M.S.P.R. 375 (2004).
77. *Id.* at 62. Jon Knight, *Patrolling the Unfriendly Skies: Protecting Whistleblowers Through*

- Expanded Jurisdiction*, 20 FED. CIR. B.J. 281, 282 (2010) (the story of administrative and judicial interpretation ‘dampens one’s enthusiasm and trust in whistleblower protection’).
78. *MacLean v. Dep’t. of Homeland Sec.*, 112 M.S.P.R. 4, 5 (2009).
 79. Chapters 5, 6, and 7 discuss the development of the whistleblower provision. Robert G. Vaughn, *Statutory Protection of Whistleblowers in the Federal Executive Branch*, 1982 U. OF ILL. L. REV. 625 (tracing the legislative deliberations in interpreting the whistleblower provision).
 80. Letter from the Clerk of the Merit Systems Protection Board to Carolyn Lerner, Special Counsel, September 19, 2011, <http://www.scribd.com/doc/66006447/MSPB-Denial-of-U-S-Office-of-Special-Counsel-Motion-MacLean-v-DHS-September-19-2011>.
 81. Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65 (2007).
 82. *Id.* at 83.
 83. *Id.* at 67.
 84. *Id.* at 65.
 85. *Id.* at 67.
 86. *Id.* at 67–68.
 87. *Id.* at 71.
 88. *Id.* at 72. Here Moberly focuses on the Occupational Health and Safety Administration’s initial investigation and review of claims.
 89. *Id.* at 107. Moberly describes several instances of such strictness. *Id.* at 108.
 90. *Id.* at 110–11.
 91. *Id.* at 117.
 92. *Id.* at 118–19. Moberly notes that some ALJs adopted broader interpretations, but that such approaches were not representative of the approach taken by the majority of ALJs.
 93. *Id.* at 118.
 94. *Id.* at 129.
 95. *Id.* at 134.
 96. *Id.* at 138.
 97. *Id.* at 139.
 98. *Id.*
 99. *Id.*
 100. *Id.* at 140
 101. *Id.* at 140–41.
 102. Marc Galanter, *Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y. REV. 95 (1974).
 103. Robert G. Vaughn, *A Comparative Analysis of the Influence of Legislative History on Judicial Decision-Making and Legislation*, 7 IND. INT’L. & COMP. L. REV. 1 (1996).
 104. *Id.* at 61–62 (asserting that plain meaning interpretation ‘increases rather than limits judicial discretion, enfeebls rather than empowers the legislature, supports the status quo, and restricts legislative efforts at comprehensive social reform’).
 105. JOHN BOWERS QC, MARTIN FODDER, JEREMY LEWIS & JACK MITCHELL, *WHISTLEBLOWING: LAW AND PRACTICE* 13 (2007).
 106. *Id.* at 42.
 107. *Id.* at 34–35.
 108. *Id.* at 62–72 (discussing the requirements of good faith).
 109. PUBLIC CONCERN AT WORK, *WHERE’S WHISTLEBLOWING NOW? 10 YEARS OF LEGAL PROTECTIONS FOR WHISTLEBLOWERS* 5 (2010), http://www.pcaw.org.uk/files/PIDA_10year_Final_PDF.pdf (quoting Dame Janet Smith).
 110. *Goode v. Marks and Spencer* [2010] UKEAT/0442/09/DM (UK), http://www.bailii.org/uk/cases/UKEAT/2010/0442_09_1504.htm; *Cavendish Munro v. Geduld* [2009] UKEAT/0195/DM, http://www.bailii.org/uk/cases/UKEAT/2009/0195_09_0608.html.
 111. E.g., *Babula v. Waltham Forest College* [2007] EWCA Civ 174 [20] (UK), <http://www.bailii.org/ew/EWCA/Civ/2007/174.html> (concluding that requiring ‘employees on the factory floor or in shops and offices to have detailed knowledge of the criminal law’ sufficient to allow them to determine whether facts which they reasonably believe to be true

would constitute an offence is 'both unrealistic and [works] against the policy of the statute').

112. Patricia Martin, THE STATUS OF WHISTLEBLOWING IN SOUTH AFRICA: TAKING STOCK 74 (2010), www.opendemocracy.org.za/wp-content/uploads/2010/10/ODAC_Whistleblowing_Report_web.pdf
113. *Id.* at 44.
114. *Id.* at 51–52.
115. William De Maria, *Common Law-Common Mistakes?: Protecting Whistleblowers in Australia, New Zealand, South Africa and the United Kingdom*, 19 INT'L J. OF PUB. SECTOR MGMT. 643, 647 (2006).
116. Guido Strack, *Whistleblowing in Germany*, http://whistleblower-netz.de/pdf/WB_in_Germany.pdf or [http://www.drasuzodis.It/userfiles/WB_in_Germany\(1\).pdf](http://www.drasuzodis.It/userfiles/WB_in_Germany(1).pdf).

12. National security

Foreign affairs, national defense and whistleblowing have long been intertwined. National security and whistleblowing are part of a dance between secrecy and disclosure in American politics and culture. Whistleblower laws in the United States have been part of this minuet. National security demands for secrecy and agitation for whistleblower laws increase together. Several factors explain this synchronization. First, the circumstances – war, terrorism, or strained military and diplomatic relations with other countries – that fuel executive claims for control of information regarding national security also generate congressional need for that information. Employees of the Federal Bureau of Investigation (FBI), civilian employees of the Department of Defense (DOD), members of the uniformed services, members of the intelligence community, and, more recently, the Department of Homeland Security (DHS) hold much of this information. They have access to information and the experience and skill to analyze its importance.

Second, our experiences with claims of national security arouse suspicion regarding them. The hidden information protected by these claims can shield incompetence, corruption, and misjudgment. That information also exposes abuses of power, the violation of civil liberties, and criminal conduct. Technology, government contracting, and increasingly close ties between national security agencies and private business ensures that employees of private companies, as well as government employees, will hold information about these abuses, abuses that can threaten – either by their character or by their frequency – democratic institutions and the rule of law. When installations owned by private companies become the targets of terrorists, employees of those companies become linked to the preservation of national security. They possess information, inconvenient to their employers, but critical to national security.

Third, the perspectives of those connected with national security organizations naturally and properly accentuate the risks of disclosure. Because national security techniques often use a ‘mosaic’ of information to assess and to evaluate threats and to plan and execute responses, national security officials tend to see each bit of information as important. Those perceptions clash with expectations of citizens and of Congress regarding access to information allowing knowledge and understanding of the operations of government and

judgment of the performance of those unelected persons who exercise the power of government.

Finally, the perspective of secrecy not only limits public disclosures, but also restricts the exchange of information within the government. These restrictions impede the sharing of information and thus weaken performance and create inefficiencies and errors. These inefficiencies and errors encourage calls not only for increased exchanges of information within government, but also for external oversight. National security employees and others who are aware of these inefficiencies are likely to seek to change them, often from their commitment to national security. Disclosure of these inefficiencies often dictates release of some of the pieces of otherwise protected information.

Classified information and national security information differ from one another. Their similarities can obscure important differences. Complex legal, policy, and operational rules define and regulate classification. On the other hand, national security information may not be immune from disclosure. The treatment of classified information, however, can easily be expanded beyond classified information by attempting to link it with undefined presidential powers over national defense and foreign affairs. The executive could claim that national security information encompasses law enforcement information, as well as information provided to the government by private businesses. It is a convenient rubric to encompass significant amounts of unclassified information. Arguments against disclosure and whistleblower protection regarding classified information can be conflated with arguments against whistleblower laws for national security information.

National security challenges the success of whistleblower laws. Secrecy based on national security can prevent the adoption of whistleblower laws and limit the scope of those enacted. Treating national security information as a separate category encourages expansion of the concept as a buttress for secrecy. The number of separate and specialized national security whistleblower provisions illustrates the influence of national security on the successes and failures of whistleblower laws.

The willingness of high government officials to release highly protected information for political or policy advantage undermines the credibility of many arguments against unauthorized release of information. This release often involves conduct that would be called 'leaking.' The release by government officials can be at least technically legal if it takes place after secret information is declassified or release can occur illegally through leaking to the press or to political allies. 'Backgrounders' that often rest on classified information remain unattributed.¹ 'The rule against direct attribution tends to make a policy explanation at a background session look less partisan, more truly objective, than it is.' An authorized leak by higher ranking government officials can be called a plant.² 'Civil servants, particularly at the low or middle

range, seldom resort to leaking.³ 'Whistleblowing is by no means synonymous with leaking. Whistle-blowers are willing to state their case in public and risk the loss of their jobs.'⁴

Leaking implicates national security because it often involves the disclosure of classified information. Leaking is connected to national security in another way. 'The government's problem with leaks and leakers tends to center on three related areas: foreign policy, defense and to a lesser extent, two intelligence organizations, the Central Intelligence Agency and the National Security Agency.'⁵ Leaks can be more powerful if not attributed to government policymakers; for example, leaks may be more believable if not 'approved' by government officials. Higher-level government officials are the most likely leakers. Louis Fisher suggests that the Executive Branch of the federal government is the most frequent and serial leaker.⁶ Fisher estimates that 98 to 99 percent of leaks of classified information come from the Executive Branch and are motivated by political or partisan advantage. High executive officials declassify information for such release, a power not used by Congress. Fisher cites other examples of improper executive release of classified information. 'Backgrounders' with the press allow Executive Branch officials to release information otherwise prohibited from disclosure. Presidents Bush and Obama, in hopes of burnishing their images, have provided extensive access to classified information to reporters, such as Bob Woodward, writing books about them. Such disclosure undermines the justifications for executive privilege because it exposes any advisors, even at classified meetings, to criticism for their comments. Fisher sees whistleblowers as an important check on executive misconduct. Because Congress and the courts have deferred to executive power, executive officials are immune, paying little price for the violation of laws and the Constitution. Because of these failures by Congress and the courts, the last checks and balances on executive abuse come from outside sources, such as leakers or whistleblowers. These persons potentially pay a high cost for providing this check

Ellie Abel's book on leaking also states that 'the government has been anything but consistent about honoring its own classification system.'⁷ A survey of several former federal officials conducted by the Institution of Politics at Harvard's Kennedy School of Government 'found that no fewer than 42 percent of those questioned acknowledged that they had leaked while in office.'⁸ The most common reasons for leaking given by these officials were to correct false information and to gain attention for an issue. In descending order the other reasons for such disclosure were: to consolidate support from the public or from another constituency, to force action on an issue, to send a message to other Executive Branch agencies, to stop action on an issue, to test reactions to a proposal, to protect the positions of federal officials, or in response to the skilled and persistent inquiries by reporters.

Selective leaking to favored reporters may violate a principle of the First Amendment that prevents the government, when disclosing information, from preferring some news organizations over others. To prefer any organization over another would allow the government to manipulate the content and tenor of the news. Favorable treatment to certain members of the media regarding protective orders in litigation is 'unquestionably at odds with the first amendment.'⁹

Electronic technology facilitating the leaking and dissemination of secret information implicates not only whistleblowers, but also 'official' leaking. The disclosure of national security information encourages an ethical and policy assessment of unauthorized releases of specific types of information. This ethical discourse results in part from the assumption that some types of information require an analysis that differs from general debate regarding secrecy and openness. The limited protections for national security whistleblowers and the patchwork of whistleblower laws invite this distinction.

The characterization of a disclosure as one regarding national security reinforces secrecy during periods of threat and uncertainty. The description alone gives extraordinary weight to the value of secrecy. Ironically, in these periods, disclosure becomes more, not less, important. Even in the best of times, the appellation of national security demands secrecy. This demand rests on experience, sometimes dangerous and deadly experience, with the risks of disclosure. This demand also rests on the martial imagery of national security, an imagery that evokes the most deep-seated and perhaps genetically based sense of allegiance and loyalty. Many examples also demonstrate that disclosures represent not a failure of national security but a success. National security can become a label for secrecy or for the acquisition of executive power.¹⁰

Senator Richard Nixon's proposed whistleblower statute reflected his attempts to require testimony regarding the conduct of the Korean War.¹¹ Nixon argued that without protection for federal employees who presented information and opinions opposed to the executive, Congress would be left with only the unchallenged views of an administration committed to protecting evidence of its incompetence or misconduct. Those fears regarding executive secrecy would portend Nixon's own behavior in Watergate, as well as his order to fire Ernest Fitzgerald for disclosures of large cost overruns on an important Air Force procurement project.

Those words, however, also reflect contemporary justifications for the protection of national security whistleblowers. In the words of Louis Fisher, as a constitutional law expert at the Congressional Research Service: 'To perform its legislative and constitutional functions, Congress depends on information (domestic and national security) available from the executive branch. ... Congress needs information to pass legislation, oversee the administration of programs, inform the public, and carry out its constitutional duties.'¹² In addi-

tion, Congress 'recognizes the need to protect national security information, especially that related to sources and methods, from disclosure. This awareness is reflected in legislation that allows and encourages intelligence community employees to report issues of waste, fraud, or mismanagement to the intelligence committees of Congress.'¹³

Congressional receipt of information from national security whistleblowers and public disclosures of classified information can advance the interests of both liberals and conservatives. Although disclosures to Congress and public disclosures stand on different statutory and constitutional footings, these disclosures generate similar arguments for both liberal and conservative supporters and opponents of national security whistleblowers.

NATIONAL SECURITY WHISTLEBLOWER NARRATIVES

In one of the first books to describe the experiences of whistleblowers, *Blowing the Whistle*, Charles Peters and Taylor Branch contrasted Otto Otepka's release of personnel information regarding suspected security risks at the United States Department of State, where Otepka served as the chief of the Department's security-evaluation division, with Daniel Ellsberg's release of the Pentagon Papers.¹⁴ With this contrast, Peters and Branch conclude: 'Anyone who wants to fight institutional *rigor mortis* by encouraging people to speak out within government is obligated by honesty and consistency to take his Otepkas with his Ellsbergs and vice versa.' Otepka released classified documents not to the public but to staff of the Senate Internal Security Subcommittee.¹⁵ The Subcommittee had mounted a campaign against the State Department regarding perceived security risks.

Controversy followed Otepka's removal from his position by the State Department.¹⁶ For example, the investigative techniques used against Otepka have been described as 'the tactics of a police state.'¹⁷ In opposition to their responses to Ellsberg, supporters of Otepka did not focus on the release of classified documents except 'to note in passing that classification was nonsense in general and that Otepka's leakage of secret material did not hurt the national interest anyway, but rather struck another blow against the pinkos in the State Department.'¹⁸ Some newspapers that later played prominent roles in the release of the Pentagon Papers highlighted the unlawfulness of Otepka's disclosures and rejected any general proposition that every government employee is entitled to provide information to Congress (much less to the public).¹⁹ Liberal opponents of Otepka attacked his motives for the release when, in 1969, President Richard Nixon appointed him to the Subversive Activities Control Board.²⁰ These attacks on motive and character reflected ones directed against Ellsberg by more conservative critics.

Several of the whistleblowers profiled at conferences and in books in the early 1970s included those who could properly be called national security whistleblowers.²¹ For example, these whistleblowers included military officers, former military officers, and personnel of national security agencies and the FBI. Their disclosures addressed inefficiencies that threatened the effectiveness of national security agencies, abuses of power including the violation of civil liberties, and concerns about projects that threatened the privacy of citizens. One example is Christopher Pyle (and his colleague, Ralph Stein), a former Army intelligence officer, profiled in both of the 1972 books on whistleblowing, *Whistle Blowing* and *Blowing the Whistle*. Pyle disclosed Army surveillance of civilians engaged in political activities and the creation of a large database recording the involvement of citizens in First Amendment-protected activity. His disclosures led to congressional hearings and proposed changes in the Army practices. Pyle's subsequent disclosures challenged whether practices and policy had changed.

Pyle's disclosures and the confirmation of these practices by the Army caused Senator Sam Ervin, chairman of the Senate Subcommittee on Constitutional Rights, to chastise the Army in a Senate speech for maintaining data banks for the surveillance of citizens involved in domestic politics.²² Ervin later sponsored the 1974 Privacy Act; one provision of that law limits the ability of the government to collect records regarding the exercise of First Amendment Rights. In this legislation, Congress also reacted to Nixon's use of the Central Intelligence Agency (CIA) and the National Security Agency (NSA) to spy on Americans that Nixon deemed 'enemies.'²³

Perhaps two of the most influential national security whistleblowers of the period were Ellsberg, an employee of the Rand Corporation, who conducted a study of US involvement in Vietnam commissioned by the Secretary of Defense and Deep Throat, now identified as W. Mark Felt, a high-ranking official in the FBI who provided information to *Washington Post* reporters regarding Nixon's abuses involving the FBI and the CIA. The influence of these two disparate whistleblowers rested in part on the role that their disclosures played in the Watergate scandal and the resignation of President Richard Nixon. Nixon's use of a White House-controlled team of operatives who broke into the office of Ellsberg's psychiatrist partially motivated the cover up of the burglary of the Democratic National Headquarters. Nixon feared that an investigation would uncover his abuse of national security justifications for illegal activities, including misuse of the FBI and the CIA.

Felt, the number two official at the FBI, possessed information about similar abuses that rested on claims of national security. As an FBI official he resisted Nixon's efforts to obstruct the FBI investigation of the Watergate burglary and he was the secret source, Deep Throat, who gave information to Woodward and Carl Bernstein, the *Washington Post* reporters who pursued

stories about Nixon's abuses of power. Felt had ample experience of these abuses. Nixon had ordered the CIA to direct the FBI to end its investigations of the Watergate burglary on national security grounds.

Nixon passed over Felt to head the FBI in favor of L. Patrick Gray III, who subsequently obeyed orders to destroy documents in the case. Because former FBI Director J. Edgar Hoover had ended his practice of break-ins without warrants, Nixon created his own group to conduct such illegal searches. (Felt himself was convicted in 1980 of ordering, on national security grounds, similar warrantless break-ins at the homes of friends and relatives of the Weather Underground, a violent leftist group.²⁴) Felt, as Deep Throat, 'helped establish the principle that the highest government officials are subject to the Constitution and the laws of the land.'²⁵ Felt informed the *Post* reporters that the Watergate break-in was part of 'a massive campaign of political spying and espionage.'²⁶ Thus, his disclosure led to Senate hearings investigating abuse and ultimately to the approval of impeachment charges by the Judiciary Committee of the House of Representatives and to Nixon's resignation.

CONGRESSIONAL REFORM AND NATIONAL SECURITY INFORMATION

Both the Civil Service Reform Act of 1978 (CSRA) and the law creating inspectors general (The Inspector General Act of 1978) can be considered part of Watergate-reform legislation. Both of those laws responded to the illegalities and abuses of the Nixon Administration. Both also fit together in addressing protection of classified information. The whistleblower provision of the CSRA did not protect persons who disclosed information classified in the interests of national defense or foreign affairs. It also did not protect disclosures prohibited by statute, such as disclosure of national security sources and information. On the other hand, the Office of Special Counsel (OSC) and inspectors general could receive classified information from whistleblowers who were not employees of national security agencies excluded from the provision. The statute did not permit the OSC or inspectors general to disclose this information to the public or to the press.²⁷ The OSC may give the information to the National Security Advisor and the select intelligence committees of the House and Senate.

The absence of legal protection for many important disclosures by national security whistleblowers, however, extended beyond classified information. This extension depended on the exclusion from the CSRA of the FBI, the CIA, the Defense Intelligence Agency (DIA), the NSA, and other national security agencies. The CSRA also permitted the President to exclude from the whistleblower provision any agency or unit of an agency if the principal function of

the agency was 'the conduct of foreign intelligence or counter intelligence activities.'²⁸ The CSRA created separate protections for employees of the FBI. These separate protections permitted the FBI to create procedures protecting its employees from retaliation for making protected disclosures.

In 1982, Congress created the position of Inspector General (IG) for the Department of Defense. That official had access to intelligence and operational plans likely classified and otherwise prohibited from disclosure. Other information available to the Department of Defense IG can be characterized as national security information. At the time, the CIA had an IG authorized by regulation but not by statute.

Security Clearances

The regulation and control of security clearances, particularly the revocation of them, can be used to punish whistleblowers who have not disclosed classified information but who have made disclosures embarrassing to government officials. The best illustration of this technique for discouraging all whistleblowing, including that relating to national security but not involving the release of classified information, regards the limitation placed on administrative and judicial review of the revocation of security clearances. That limitation rests on a 1988 decision of the United States Supreme Court, *Department of the Navy v. Egan*.²⁹

In *Egan* the Navy denied a security clearance to a laborer working at refitting center for nuclear submarines and removed him from his position. Although a statute allowed the Navy to use internal review procedures, it invoked the provision generally applicable to federal employees, a provision that required the United States Merit Systems Protection Board (MSPB) to hold a trial-type hearing to review the Navy's action. The character and scope of the MSPB's review generated differing responses from the MSPB, the Federal Circuit, and the United States Supreme Court.

The MSPB believed that it could not review the merits of the Navy's action.³⁰ The Federal Circuit, however, concluded that the MSPB must provide the same review, including examination of the merits of the action, as in other appeals of federal employees from agency personnel actions.³¹ Reversing the Federal Circuit, the Supreme Court limited the MSPB's review in a disciplinary action based on denial of a security clearance.³²

The Supreme Court elevated national security concerns over the protection of federal employees. The Supreme Court agreed to review the Federal Circuit's decision 'because of the importance of the issue in its relation to national security information.'³³ The Court emphasized the importance of security clearance determinations. These determinations rested on the discretion of executive agencies when making predictions regarding the risks posed

by a particular individual. The Court saw security clearance determinations as connected closely to national security and the constitutional powers of the President. Thus, the Court would defer to the agency in military and national security affairs absent specific provision to do otherwise by Congress.

Moreover, because an employee had no right to a security clearance that represented an executive decision as to whether to share classified information with an employee, an employee had no property right in a security clearance. The MSPB was a 'nonexpert' body that lacked the ability 'to determine what constitutes an acceptable margin of error in assessing the potential risk' to national security.

According to the Court, the failure of Congress to address security clearance denials (and revocations) in the CSRA must be treated as a congressional judgment to deny the MSPB authority to review the merits of such agency actions. The MSPB's predecessor, the Civil Service Commission, had never exercised jurisdiction in a security clearance case. Thus, the Court's relied upon interpretation of statutory schemes for review.³⁴ A dissenting opinion argued that nothing in the CSRA or its legislative history foreclosed review by the MSPB. The alternative statutory option denied jurisdiction to the MSPB, an option that the agency did not follow; this alternative option provided for a hearing within the agency. The two provisions each required a hearing but before a different body. Limiting the Board's authority to review the agency's decision denied an employee a meaningful hearing before the Board.

Based on *Egan*, the Federal Circuit has limited the review of the MSPB in the denial or revocation of security clearances. The MSPB may only decide if the position was classified and if the agency dismissed an employee for failure to obtain or maintain a clearance. The MSPB may also determine whether the employee was given notice of the revocation and the reasons for it, along with an opportunity to respond. When the employee is charged with disclosing classified information as a basis for the denial, the MSPB may not decide if the information was properly classified. The MSPB may not determine the propriety of requiring the clearance or the criteria for revocation.

In a *per curiam* opinion, the Federal Circuit rejected the MSPB's authority to review the procedures for revoking a security clearance under standards of minimum due process. One concurring opinion found that the MSPB lacked any jurisdiction 'to review security clearance processes at all.' Another decision of the Federal Circuit, however, affirmed the court's ability to ensure that an agency followed its own regulations.

Egan's focus on classified information has prohibited the review of whistleblower claims asserted as a defense to the revocation of a security clearance. If the MSPB cannot review the merits of an agency's decision to revoke a security clearance, it cannot review the revocation as part of an affirmative defense. Moreover, these defenses are so intertwined with the merits of

the action that the MSPB's consideration of them would lead to the type of review precluded by *Egan*. Subsequently, in an amendment to the Whistleblower Protection Act, Congress added to the covered personnel actions a catch-all phrase that included any other action that subjects an employee to 'any other significant change in duties, responsibilities, or working conditions.' The Federal Circuit concluded that this language was not a 'clear' congressional directive for review of a security clearance determination either in the whistleblower provision or in the CSRA.

A Congressional Research Service Report on National Security Whistleblowers describes how *Egan* has been used by the executive to assert broad constitutional authority to limit congressional access to national security information, including classified information. The report argues that such reliance is misplaced because *Egan* 'had been decided on statutory, not constitutional, grounds.'³⁵

In light of *Egan*, the MSPB has resisted the attempt to expand limitations on review regarding classified information to more broadly conceived national security information.³⁶ The MSPB affirmed its jurisdiction over employee appeals of disciplinary actions if those actions did not involve the denial, revocation, or suspension of a security clearance concerning access to *classified* information. The Department of Defense had argued that *Egan* applied to limit review of actions based on a denial of employees' service in non-critical sensitive positions. The DOD defined positions as non-critical sensitive ones even if the occupants of those positions did not have access to *classified* information but had access to non-classified information that could affect *national security*.

The MSPB held that the limitations on review imposed by *Egan* applied only to classified information. The limitations on review described in *Egan* 'must be viewed narrowly.' 'Security clearance' was historically a term of art referring to access to classified information rather than the right to occupy a sensitive position. The MSPB's precedent applying *Egan* 'refused to extend the restrictions to appeals not involving security clearances to classified information even when the agency actions arguably implicated national security.' It likewise described decisions of the United States Supreme Court as 'consistent with its position.' 'Acceptance of the [Department's] view could, without any Congressional mandate or imprimatur, preclude the Board and judicial review of alleged unlawful discrimination, whistleblower retaliation and a whole host of other constitutional and statutory violations for multitudes of federal employees subject to otherwise appealable removals and other adverse actions.' For example, the DOD could describe all positions as non-critical sensitive ones, thus denying all DOD employees statutory whistleblower protection for the disclosure of non-classified information.

President Ronald Reagan's 1983 national security directive illustrates

another way in which control of security clearances can enable restrictions on disclosure beyond classified information. In that directive, President Reagan required that every employee with a security clearance sign a nondisclosure agreement or risk the loss of their clearances, losses that would require termination from positions requiring one. The nondisclosure agreement applied to information beyond classified information. It could effectively bar these federal employees from disclosures protected by the federal whistleblower provision.³⁷ In 1987, Congress prohibited the use of appropriated funds to enforce the directive, a prohibition that has been renewed annually since that time.

That directive and congressional response to it fired an exchange between Congress and the executive regarding the extent of presidential and congressional control of such information. The exchange carried through several administrations and several congresses. Likewise, that exchange exposed differing interpretations of the presidential power and the ambiguity of judicial considerations of that power.

Protection of whistleblowers and preservation of the right of employees to contact members of Congress formed much of the battleground regarding the powers of the President and Congress.³⁸ Funding restrictions, such as the one described regarding nondisclosure and one regarding payment of salaries of persons who prevent agency employees from communicating with a member of Congress, played an important role in this conflict between Congress and the Presidency.

Two important provisions are connected with this debate about the prerogatives of Congress.³⁹ The Military Whistleblower Protection Act (MWPA) and the Intelligence Community Whistleblower Protection Act of 1999 (ICWPA) preserved the ability of military and intelligence community personnel to provide information to relevant agency inspectors general and to Congress. In the case of the MWPA, disclosures could be made to any member of Congress; in the case of the ICWPA, to members or staff of the intelligence committees of the House and Senate. The Whistleblower Protection Act of 1989 (WPA) was also referenced in this debate.

In these whistleblower laws, Congress, while making accommodations for national security determinations of the President, rejected arguments that agency processes, including IGs, were the sole source to receive allegations or that an agency head could determine whether information submitted through those processes could be conveyed by an employee to the intelligence committees of the House and Senate if certain conditions in the statute were satisfied.⁴⁰ In the words of Fisher: 'Congress has never accepted the theory that the President has exclusive, ultimate and unimpeded authority over the collection, retention and dissemination of national security information.' The report, *National Security Whistleblowers*, also stressed Congress's need to receive

information from employees within an agency. 'Whistleblowers have helped to uncover agency wrongdoing, illegalities, waste and corruption. The interest of Congress in maintaining an open channel with agency employees is demonstrated through such statutes as Lloyd-LaFollette, the appropriations riders on the nondisclosure policy, the Military Whistleblower Protection Act, and the Intelligence Community Whistleblower Act.'⁴¹

THE TERRORIST ATTACKS OF SEPTEMBER 11, 2001

By 8:00 a.m. of a clear bright morning of September 11, 2001, 19 al-Qaeda terrorists on four hijacked planes had 'defeated all the security layers that America's civil aviation security system then had in place to prevent a hijacking.'⁴² At 8:46 a.m., those terrorists who had hijacked American Airlines Flight 11 crashed it into the north tower of the World Trade Center in Manhattan.⁴³ At 9:03 a.m., other hijackers flew United Airlines Flight 175 into the side of the south tower.⁴⁴ These acts led to the collapse of both towers and resulted in the deaths of more than 3,000 persons, including New York City firefighters and police.

At 9:29 a.m., other terrorists dove hijacked American Flight 77 into the Pentagon killing all on board and civilian and military personnel in the building. Another hijacked plane, United Flight 93 plowed into an empty field near Shanksville, PA. After the hijackers had taken control of the plane, passengers discovered that an aircraft had hit the World Trade Center in New York. At 9:57 a.m., passengers began an assault to retake the plane. When the passengers were only seconds from overcoming the hijackers, at 10:02 a.m. the piloting hijacker rolled the plane on its back and directed it into the ground at 580 miles per hour.⁴⁵ That plane was about 20 minutes of flying time from Washington, DC. The hijackers planned to crash the 'airliner into symbols of the American Republic, the Capitol or the White House.' That plan was defeated 'by the alerted and unarmed passengers of United 93.'

By the end of the day, all commercial aircraft in the United States had been grounded, international flights were barred from US airports and American skies were nearly empty. Also by the end of the day over 3,000 people had died and much of lower Manhattan was shrouded in dust and debris. By the end of September 11, 2001, public perceptions of national security had changed.

The headline in *The New York Times* on September 12 read 'WAR.' The 9/11 attacks also nurtured a concern with security and secrecy that elevated the protection of national security information. New terms, such as 'critical infrastructure information,' new government entities, such as the Department of Homeland Security, and new commitments to security challenged existing laws and practices.

Calls for unity, loyalty, and support made whistleblowing more difficult. At the same time, the 9/11 attacks confirmed the importance of whistleblowers to the preservation of national security. The disclosures of whistleblowers showed laxness and incompetence that eased the obstacles confronted by the terrorists.

FBI Whistleblower Colleen Rowley

Perhaps the best known of the whistleblowers describing the failures that an increase in security must address was FBI agent Colleen Rowley. In May 2002, Rowley revealed that in the weeks before the 9/11 attacks, officials at FBI headquarters had dismissed a request from the Minneapolis field office for a warrant to wiretap and search the computer and other belongings of Zacarias Moussaoui who had been identified as taking flight lessons. The FBI also failed to match this report with one from a field agent in Phoenix expressing suspicions about Middle Eastern men enrolled in a flight school. Agents in the Minneapolis field office sought permission to seek a warrant to inspect his computer when, after Moussaoui's arrest for an immigration violation, the agents received a French intelligence report suggesting that Moussaoui was an operative in militant Islamist groups and enjoyed autonomy and authority in them. Rowley did not assert that an authorized search would have prevented the attacks but suggested that it might have led to other inquiries that would have painted the larger picture that the FBI lacked.

In 2002, Rowley was one of three whistleblowers named 'Persons of the Year' by *Time* magazine.⁴⁶ *Time* referred to those whistleblowers as 'fail-safe systems' to ensure public confidence in our public and private institutions. In that article Rowley recalls another agent telling her on September 11, after the attack but before the towers fell, 'This is going to be just like the inquiry at Pearl Harbor. We are going to have to tell the truth.' Rowley's outspoken criticism of the leadership of the FBI for its conduct both before and after the 9/11 attacks probably played a substantial part in her departure from the FBI.

In a March 7, 2003, letter to FBI Director Robert Mueller, Rowley again criticized the handling of domestic counter terrorism investigations.⁴⁷ According to the National Whistleblower Center: 'In April 2003, following an unsuccessful and highly criticized attempt to warn the Director and other administration officials of the dangers of launching the invasion of Iraq, Ms. Rowley stepped down from her (GS-14) legal position to resume her position as a (GS-13) FBI Special Agent. She retired from the FBI at the end of 2004.'⁴⁸

In 2006, a report by the Inspector General at the Department of Justice asserted that Rowley's criticisms of the handling of the inquiry regarding Moussaoui, who was convicted as a conspirator in the 9/11 attacks, 'resulted

in an important reassessment of how the F.B.I. handled this matter.’⁴⁹ The report, however, argued that when Rowley was denied the ability to seek a warrant from the Foreign Intelligence Surveillance Act Court, she should have sought an ordinary criminal warrant.⁵⁰ Rowley responded that because of the difference between the Foreign Intelligence Surveillance Act (FISA) court (a special court created to review requests for investigative techniques regarding intelligence targets) and federal district courts, the criminal warrant in a federal district court would not have been obtained.

Federal Aviation Authority Whistleblower Bogdan Dzakovic

Another post-9/11 whistleblower identified security failures in airline security – failures that preceded the terrorist attacks. That whistleblower, Bogdan Dzakovic, headed a special ‘Red Team’ created to test airport security procedures. After the 1988 bombing of Pan American Flight 103 over Scotland, the Federal Aviation Administration (FAA) established small, secretive teams to attempt to breach security procedures, including smuggling weapons and fake bombs into secure areas. In 2002, after the 9/11 attacks, Dzakovic reported the earlier activities of his team, including that it had ‘easily’ breached security 90 percent of the time. The response of the FAA was not to improve security but to announce to airports in advance when tests were planned. He asserted that the FAA instructed his team not to return to airports that had tested poorly and tried to prevent the dissemination of the information. According to Dzakovic, ‘There is not a single instance that I am aware of in which action was taken to correct these security loopholes.’⁵¹ Dzakovic attributed these failures to a number of causes, one of which was the influence of the airline industry on the regulatory functions of the FAA. He argued that 9/11 was predictable because of the failures identified by the Red Team combined with knowledge that aviation was a favorite target of terrorists and intelligence suggesting something would happen. After his disclosures, he was assigned what he called ‘entry-level idiot work’ at the Transportation Security Administration, the agency that had assumed the FAA’s airport and airline security duties.

A report by Special Counsel Elaine Kaplan concluded that the ‘Red Team was grossly mismanaged’ and that this mismanagement created ‘a substantial danger to public safety.’ The Special Counsel also reported that an investigation in response to statutory requirements following the Special Counsel’s referral to the Department of Transportation ‘substantiates the crux of Mr. Dzakovic’s disclosure.’⁵² The FAA’s report and Dzakovic’s allegations varied on some points, such as whether FAA personnel deliberately suppressed negative Red Team findings. On this point, Kaplan stated ‘whether the FAA deliberately suppressed negative Red Team findings (as Mr. Dzakovic believes) or grossly neglected to respond effectively to those findings (as the OIG’s [Office

of Inspector General] report demonstrates), the result was the same – aviation security was seriously compromised.’ The Special Counsel criticized the FAA for the failure to identify ‘the individuals responsible for the management failures.’ Finally, the Special Counsel praised Dzakovic’s ‘courage’ for how ‘he had brought public attention to issues of great national importance.’

Soon after the Special Counsel’s letter to the President, both Kenneth Mead, the Inspector General who submitted the FAA report to the Special Counsel, and Dzakovic testified before The National Commission on Terrorist Attacks Upon the United States.⁵³ Both outlined failures in airport security. Much of Mead’s information must have come from the investigation spurred by Dzakovic’s disclosures. The 9/11 Commission Report concluded that each relevant layer of airport security ‘was seriously flawed prior to 9/11. Taken together, they did not stop any of the 9/11 hijackers from getting on board four different aircraft at three different airports.’⁵⁴

Warrantless Surveillance and Whistleblowers

Following the 9/11 attacks, the Bush Administration commenced a secret warrantless electronic surveillance program. In 2005, *The New York Times* reported that President George W. Bush had authorized the National Security Agency to ‘intercept international communications into and out of the United States,’ by ‘persons linked to al Qaeda or related terrorist organizations’ based upon ‘his constitutional authority to conduct warrantless wartime electronic surveillance of the enemy.’⁵⁵ This electronic surveillance ‘aroused controversy because it appeared to run afoul of the general rule that electronic surveillance by the federal government is unlawful unless it [is] conducted [according to two specific statutory provisions].’⁵⁶ This controversy addressed extensive invasions of privacy without statutory authorization and risks posed to civil liberties. The use of ‘warrantless wiretaps’ pointed toward the techniques of authoritarian regimes. Fisher, addressing the Bush Administration’s domestic surveillance program, asserted that the preservation of free government requires that the Executive be under the law: ‘Simple words but so profound. The Executive is under the law, not above it. The law is made by Congress.’⁵⁷

Several whistleblowers played roles in public disclosures of the program. The *Times* story by Jim Risen and Eric Lichtblau was triggered by a call from a career Justice Department lawyer, Thomas Tam, who learned of the warrantless surveillance program and concerns by him and others about its legality.⁵⁸ The story stated that almost a dozen former officials expressed ‘concerns about the operation’s legality and oversight.’⁵⁹ ‘In response, the Justice Department began a criminal investigation to find out the identity of those who leaked the information.’⁶⁰

Professor Kathleen Clark used the Bush Administration's warrantless electronic surveillance program to demonstrate how the executive can avoid, blunt, or defeat the mechanisms that secure its accountability to the law.⁶¹ National security defeated internal executive branch mechanisms, such as the requirement for opinions regarding legality from the Office of Legal Counsel of the Department of Justice. Jay Bybee and John Yoo produced an opinion that had been kept secret and 'inadequately reviewed' within the Department and which contained dubious legal reasoning and extreme assertions of the presidential powers and 'was factually inadequate in its factual description of intelligence activities.'⁶² Subsequent attempts of the Office of Professional Responsibility (OPR) to review these opinions, after the disclosure of illegal electronic surveillance, were stymied because President Bush refused to give needed security clearances to the lawyers in the division. Clearances had been given to attorneys in the Civil Division defending the program and to 'Criminal Division lawyers investigating the leak to the *New York Times*. This was the first time in its history that OPR shut down an investigation because it was denied security clearances.'⁶³

After the disclosure of the program, private plaintiffs filed suits against the government and the telecommunications companies supposedly involved in the program. In these cases the government invoked the state secrets privilege to deny access to litigants who sought evidence that the Department of Justice asserted must be kept secret for national security or foreign policy reasons.⁶⁴ The government invoked the privilege not only to limit evidence that could be presented at trial but also to prevent the case from proceeding at all. The program violated the Foreign Intelligence Surveillance Act of 1978 and those who authorized it may have committed a felony. These prosecutorial decisions, however, rested within the executive branch whose highest officials may have been complicit in illegal conduct.

While the Government Accountability Office (GAO) can investigate government programs, it cannot require agencies to provide records related to intelligence activities. The executive argues that the Senate and House Intelligence Committees are 'exclusive vehicles for congressional oversight.'⁶⁵ The executive also claims that the GAO lacks authority to investigate executive actions that take place under the President's constitutional authority.⁶⁶

One of the most powerful exemptions under the 1966 Freedom of Information Act (FOIA) requires the government to withhold documents in fact properly classified under an Executive Order in the interests of national security or foreign affairs.⁶⁷ An analogous provision in the Whistleblower Protection Act limits disclosures of classified information; another provision excludes members of the intelligence community from the whistleblower provision.⁶⁸

Professor Clark asserts that all of the mechanisms of accountability depend upon information. 'If the mechanism does not or cannot obtain information about a particular program, it cannot ensure legal accountability of that program.'⁶⁹ The absence of that information defeats the accountability imposed by a complex structure of institutions both internal and external. 'The Bush administration systematically used national security secrecy to prevent multiple accountability mechanisms from scrutinizing its warrantless surveillance program.' The major flaw in the system designed to guarantee executive compliance with the law is 'the executive branch's ability to avoid accountability through claims of national security secrecy.'⁷⁰

Not all national security whistleblowers are employees of the intelligence and law enforcement agencies. Some are private citizens and employees of contractors or companies and corporations. One of the most important of these was Babak Pasdar, the chief executive officer of a computer security company hired by Verizon in 2003 to address security procedures for the introduction of new picture technology and in the administration of George Bush's electronic surveillance system.

As part of its consideration of statutory authorizations for electronic surveillance beyond existing statutes, Congress debated whether to grant telecommunication companies, such as Verizon, immunity from suit for their involvement in previous illegal electronic surveillance of the industry's customers. Into this debate stepped Pasdar. His revelations illuminated the complicity of a large telecommunications company and exposed the breadth of the information that the government might have acquired. A patently inadequate system to record what data the government accessed accompanied the scope of potential data that could be retrieved. In a detailed affidavit submitted to Congress, Pasdar identified a 'Quantico line' which was not subject to firewalls or other protections and through which government security personnel could access most of the client information held by Verizon.⁷¹

NATIONAL SECURITY AND LAW ENFORCEMENT

After 9/11, state and federal agencies cooperated much more in security investigations, often combining law enforcement and national security operations. The terrorist attacks brought together law enforcement and national security information in ways that expanded the scope of national security claims for secrecy. The ties between state law enforcement agencies and federal national security operations encouraged conceptions of state and even local law enforcement authorities as possessors of national security information. The New York City Police Department became known for its anti-terrorist work and even deployed officers outside the United States to acquire intelligence for security precautions in New York City.

The blurring of national security and law enforcement information exemplifies the expansion of the scope of national security information. The courts have begun to transfer the deference given to classified information to law enforcement information that can be described as having national security implications. Cases under the federal FOIA evidence such a transfer.⁷²

Abuses by state and local investigative authorities as they consider risks to national security describe another extension of the scope of secrecy and surveillance. The Maryland State Police investigated as possible terrorists a number of persons, including death penalty opponents, Quaker peace activists, and other citizens groups advocating immigrant rights, human rights, ethical treatment of animals, the establishment of bike lanes, abortion opponents, and gay rights groups.⁷³

The Maryland State Police targeted citizens involved in the exercise of First Amendment rights and shared that intelligence with the federal authorities, registering on national terrorist watch lists some of those involved in the peaceful exercise of their rights.⁷⁴ One peace advocate, Max Oburzcwski, was listed on the database under the heading, Primary Crime: Terrorism-anti-government; Secondary Crimes: Terrorism-anti-war-protester. The DHS worked with the Maryland State Police to monitor advocacy groups; the DHS tracked the protest plans 'of a peaceful Washington area antiwar group' and gave the information to the Maryland State Police 'which had previously labeled the activists as terrorists in an intelligence file.'⁷⁵

In a report commissioned by Maryland Governor Martin O'Malley, former Maryland Attorney General Stephen H. Sachs concluded that the Maryland State Police 'intruded upon the ability of law-abiding Marylanders to associate and freely express themselves.' Sachs also stated that '9/11 created an atmosphere where cutting corners was easier.'⁷⁶ The current Maryland Attorney General, Douglas F. Gansler, questioned the activities of the state police: 'It raises the specter of, was this almost a police state?'⁷⁷ *The Washington Post* called that domestic spying 'pernicious and symptomatic of a post-Sept. 11 erosion of respect for fundamental civil liberties.'⁷⁸ It appears that surveillance of citizens involved in the peaceful exercise of the First Amendment was not limited to Maryland.⁷⁹

The FOIA illustrates the potency of the national security rubric and demonstrates how legitimate limitations on the disclosure of classified information can be applied to other areas. In this way the term 'national security' can be used to swallow disclosure. In 2001 the Center for National Securities Studies requested the names of persons who the government had taken into custody in a round-up of potential terrorists after 9/11. The government had refused even to disclose the names of those arrested.

The FOIA contains an exemption for documents and records properly classified in the interests of national defense or foreign affairs. Under this exemp-

tion the courts give considerable deference to the decision of proper authorities to classify the requested documents or record. In the suit by the Center for National Security Studies, the government did not claim that the records requested were classified as required under this exemption. The government, however, did claim that the documents could be withheld under an exemption protecting records compiled for purposes of law enforcement. The federal district court held that the exemption did not apply and stated that secret arrests are ‘a concept odious to a democratic society.’⁸⁰ A divided panel before the United States Court of Appeals for the District of Columbia Circuit applied the law enforcement exemption, arguing that the deference to executive judgments regarding classified information also applied in these circumstances to the law enforcement information.⁸¹ A dissenting opinion asserted that the majority’s decision ‘disregard[ed] settled principles’ regarding the Freedom of Information Act, ‘uncritical[ly] defer[red]’ to the government’s ‘vague and poorly explained arguments for withholding,’ and was ‘profoundly antithetical’ to the values of ‘a free and open [society] such as ours.’⁸²

‘Citizens have a compelling interest in insuring that their government does not, in discharging its duties, abuse one of its most awesome powers, the power to arrest and jail.’⁸³ The dissent believed that the majority ‘drastically diminishes, if not eliminates, the judiciary’s role in FOIA cases that implicate national security.’⁸⁴

This example illustrates that, by applying the rubric of national security, a government could shield from disclosure information regarding law enforcement, regulatory activities, and pertinent information from businesses and corporations. The creation of a post-9/11 category of ‘homeland security information’ expands secrecy beyond classified information and adds another rubric within the frame of national security information.

WHISTLEBLOWING AND LEAKING

Leaking can be defined in terms of disclosures; leaking can also be connected with anonymous disclosures. In both instances, the disclosures might be protected under a whistleblower statute but need not be. When not authorized under an appropriate statute, leaking exists outside of legal protection. If such disclosures are also referred to as whistleblowing, the term whistleblowing must have a meaning beyond the statutory definition of protected conduct. Thus, leaking can invoke legal definitions of whistleblowing but it can also appeal to ethical or other justifications for conduct not falling under a legal definition.

The Wikileaks controversy surrounding the online posting of thousands of pages of classified documents of the United States Department of State falls

outside of the scope of whistleblowing laws. Wikipedia sought to justify disclosures under ethical and pragmatic arguments used to support whistleblowing. For this reason, leaks open an ethical debate often submerged in the legal standards of a whistleblowing law.

Apart from Wikileaks, one of the most dramatic leaks of information regarding national security information included pictures of abuse by United States soldiers and other national security employees of persons being held in Abu Graib prison in Iraq. Those pictures stirred a worldwide condemnation of US practices, stained the international reputation of the US, and undermined support for the war in Iraq. One of the iconic pictures of that war will be the hooded prisoner standing on a box with electrodes attached to his body.⁸⁵ Other pictures showed naked prisoners being stacked in pyramids or forced to simulate sexual acts; in some photographs US military personnel against the backdrop of these scenes smile and give 'thumbs up' to the camera. The investigation also reported that guards poured phosphoric liquid on detainees, threatened male detainees with rape, sodomized a detainee with objects like a broomstick, and used dogs to threaten detainees.

The stories and images accompanying these leaks may have influenced the law, as well as public opinion and policy. On Wednesday April 28, 2004, Deputy Solicitor General Paul D. Clement appeared before the Supreme Court of the United States to argue *Hamdi v. Rumsfeld*, the case that would determine the role of the federal courts in reviewing the detention of enemy combatants. During that argument,⁸⁶ Justice Stevens asked: '[D]o you think there is anything in law that curtails the method of interrogation that can be employed?' Clement responded: 'I think the United States is signatory to conventions that prohibit torture and that sort of thing. And the United States is going to honor its treaty obligations.' When questioned about whether torture was an effective way of acquiring information, Clement alluded to the 'judgment of people who do this' (that is, interrogations) and that a 'relationship of trust is most effective in acquiring accurate information.' He also assured Justice Ruth Ginsburg that even if the torture prohibition of the Geneva Convention cannot be enforced by a private action and is 'not a binding treaty [that] doesn't mean that it's not going to constrain the actions of the executive branch.'

On that same day, *CBS News* released photographs from Abu Ghraib, the former Iraqi prison refurbished and operated by the United States. A few days later, on May 10, the *New Yorker* magazine published an article by Seymour Hersh on the brutality employed by US personnel at the prison. An Army report called the illegal and systematic abuse of prisoners by US military personnel as comprising 'sadistic, blatant, and wanton criminal abuses.'⁸⁷ According to Hersh, the army investigation began when a member of the military police, Specialist Joseph M. Darby, received pictures of naked detainees

and then gave a sworn statement to Army criminal investigators.⁸⁸ Soldiers who were charged claimed that military, civilian, and CIA interrogators were the dominant force in the prison and encouraged, if not directed, the misconduct.

On June 28, 2004, the Supreme Court handed down its decision in *Hamdi v. Rumsfeld*.⁸⁹ In the decision the court extended the due process rights of citizens held in the US to those labeled as enemy combatants, thereby requiring that they be given a meaningful opportunity to contest the factual basis for their detention before a neutral decision-maker. The opinion also stressed that detention should not be used as punishment or vengeance but instead to prevent the captured person from serving the enemy. Once the individual was disarmed, he must be treated humanely and in time exchanged, repatriated, or otherwise released.⁹⁰

It was unclear as to whether the MWPA applied to Darby's disclosure of the evidence of abuse to the Army's Criminal Investigation Division. That uncertainty led Congress in 2005 to clarify those persons to whom protected disclosures could be made.⁹¹ The disclosures affected Darby. He received numerous threats and he and his family received protection. Darby also was honored in 2004 by a citation from the American Psychological Association and by the John F. Kennedy Profile in Courage Award.⁹²

The disclosures regarding Abu Ghraib had other effects. 'Abu Ghraib put the spotlight on the CIA.'⁹³ That spotlight and the leaking of other information disclosed the 'extraordinary rendition program' by which the CIA kidnapped persons in other countries and transferred them to secret CIA interrogation centers or sent them to countries where they faced torture. In reviewing the history of this program and the attempts of the Bush Administration to justify it, one scholar, Fisher, concluded that the administration 'deceive[d] the American public and the international community' and admitted the truth only when confronted by independent studies and analysis.⁹⁴ Fisher concludes that both the Bush administration and the US 'paid a price legally and politically' for transferring suspected terrorist to other countries for 'interrogation and torture.' Most importantly, Fisher finds that an 'effective national security policy requires an administration to build trust with the public and to work jointly with Congress.'⁹⁵ In another context, Fisher describes how 'unchecked presidential power has regularly weakened, not strengthened, national security.'⁹⁶ To the extent that whistleblowers provide information to the administration, to Congress, and to the public about abuses in the name of national security, these whistleblowers are an important assurance of an effective national security policy.

Leaking also encompasses 'official' leaks where highly sensitive information is unclassified for personal or political considerations or where the disclosures of classified information goes unchallenged and condoned because the

leaker is pursuing or serving the interests of at least some government officials. Such official leaks have a long pedigree. Perhaps the best-known example of such official leaking was the release of information to identify Valerie Plame as a CIA operational officer. This official leaked unusually sensitive information because of the risks it created for individuals and to operations under the direction of the identified officer. In the case of Plame, she asserted that she had been identified in response to allegations made by her husband, Joseph Wilson, a former American diplomat, against the Bush Administration. Wilson had alleged that the Bush Administration lacked support for its assessment that Saddam Hussein's government in Iraq was buying elements (Niger yellow cake uranium ore) for the development of an atomic bomb.⁹⁷ These allegations regarding Iraq's development of an atomic bomb formed an important part of the case that President George W. Bush made for the invasion of and subsequent war in Iraq.⁹⁸

The exposure of Plame's identity was intended to discredit her husband. The identification of such an agent ends their usefulness and conceivably violated the Intelligence Protection Act of 1982. Wilson was the first recipient of the Ron Ridenhour Award for Truth Telling.⁹⁹

NATIONAL SECURITY AND THE PRIVATE SECTOR

The scope of responses to the 9/11 terrorist attacks on the United States implicated private-sector activities. For example, a concern with critical infrastructure made disclosures by companies and employees of vulnerabilities in that infrastructure necessary to ensure national security. One such activity is transportation; the terrorist attacks illuminated the importance of aviation. Vulnerabilities in aviation dominated discussion following 9/11. The importance of transportation drafted the private sector into the war on terror and led Congress to enact legislation addressed to rail and surface transportation as well. Whistleblower protection, included in the Homeland Security Act in 2007, applied to employees of railway carriers engaged in interstate or foreign commerce and to commercial motor carriers. This law protects employees who disclose, among other topics, information regarding safety and security to federal, state, and local law enforcement or regulatory officials, to an agency inspector general, to certain officials within a company, and to members of Congress.¹⁰⁰ This provision responded in part to recommendations of the 9/11 commission and reflects how whistleblower protection came to be included in legislation regarding homeland security.

The Whistleblower Protection Enhancement Act of 2010 failed only because a single United States senator anonymously refused to permit unanimous consent of the law in the last days of the 111th Congress. That law

included new protections for whistleblowers who were members of the intelligence community; those protections generated much of the debate surrounding the proposed law. Although congressional deliberations altered the content of the protections for intelligence community whistleblowers, the legislation would have permitted the disclosure of classified information to members of Congress on relevant oversight committees or to their staff. The legislation also provided more extensive avenues for redress of claims of retaliation, including review by an agency's inspector general and the head of the agency. Various versions of the bill provided for further review in different ways. Some versions included a right to appeal to a federal district court for *de novo* review or for appellate review before the United States Court of Appeals for the Federal Circuit. Any change in the rights of these whistleblowers was removed from the bill in the House of Representatives before the legislation died in the Senate.

The Senate version of the legislation also allowed employees of intelligence agencies, as well as other federal employees holding security clearances, to appeal the revocation of these clearances. An Intelligence Community Whistleblower Protection Board, however, rather than the MSPB would adjudicate these appeals from both groups of employees.¹⁰¹ The Senate Committee supported this complex scheme for the review of suspension or revocation of security clearances because of 'the heightened need to ensure that federal employees come forward with information vital to preserving our national security.'¹⁰²

NATIONAL SECURITY AND WHISTLEBLOWING IN GREAT BRITAIN AND AUSTRALIA

In some countries, official secrecy laws limit the scope of whistleblowing. Great Britain's Public Interest Disclosure Act 1998 (PIDA) applies to both public- and private-sector employees. The Official Secrets Act 1989, however, continues to apply to disclosures that are subject to it. That Act makes criminal the release of government information and thus deters some disclosures that would otherwise fall under the PIDA. In the United States, opponents objected to a 2000 legislative proposal that would have imposed criminal penalties for leaking classified information calling it an 'official secrets' law.¹⁰³

Consideration of the treatment of an Australian whistleblower in circumstances similar to those applicable to the FAA Red Team leader, Dzakovic, illustrates the effects of official secrets laws. In June 2005, a confidential report regarding security breaches at the Sydney Airport was leaked to *The Australian*, a national newspaper.¹⁰⁴ As a result of that disclosure the government

commissioned a report that found airport security was 'inadequate and dysfunctional.' Following that report, the government undertook an A\$212 million improvement of security at national airports and seaports. Improvements included extra police at these facilities, more surveillance cameras, and tougher background checks.

In December of that year, the government charged Allan Robert Kessing, a former Customs Department security expert, with violation of Australian law similar in effect to the British Official Secrets Act.¹⁰⁵ In 2007 he was found guilty of the violation. The Australian official secrets law also prohibits disclosures to members of parliament and no protections existed at the time for internal disclosures by federal employees or contractors. The Australian law also applies to former employees and contractors. Both the scope of the law and its criminal sanctions could discourage whistleblowers who might consider imprisonment differently than job harassment. One Australian commentator, Paul Latimer, observed that Kessing 'should have been rewarded – not prosecuted' for his disclosures.¹⁰⁶

An observer examining the confluence of national security and whistleblower laws could see this history of interaction as the failure of whistleblower laws to extend legal protections to the disclosure of information that can be conceivably defended on the grounds of national security. That same observer, however, could conclude that whistleblowing laws have challenged secrecy based on claims of national security, have taught that disclosures can improve security, have illustrated how disclosures play an important role in avoiding abuse and in shielding civil liberties, have strengthened democratic decision-making, and have redefined loyalty. In no other area does the success or failure of whistleblower protection require assessment of a body of law like that devoted to national security.

NOTES

1. ELLIE ABEL, *LEAKING: WHO DOES IT? WHAT COSTS?* 56 (1987) [hereinafter *LEAKING*].
2. *Id.* at 2.
3. *Id.* at 17.
4. *Id.* at 21.
5. *Id.* at 4.
6. Louis Fisher, Scholar in Residence of the Constitution Project, on the Panel, *The Legal Effects of Leaks*, at Collaboration on Government Secrecy: Academic Conference on The Protection of National Security Information, April 27, 2011, *available at* <http://media.wcl.american.edu/Mediasite/SilverlightPlayer/Default.aspx?peid=fa124943-348e-4f5f-bec8-a9823287c959>.
7. *LEAKING*, *supra*, note 1, at 33.
8. *Id.* at 62.
9. *Anderson v. Cryovac*, 805 F.2d 1 (1st Cir. 1986).
10. LOUIS FISHER, CONG. RESEARCH SERV., RL33215, NATIONAL SECURITY WHISTLEBLOWERS

- 25–26 (2005) [hereinafter CRS REPORT: NATIONAL SECURITY WHISTLEBLOWERS]. ‘The process of allowing claims of national security to envelop statutory standards demanding openness is described by the comments in 1986 of William J. Nold before the United States Supreme Court in a case regarding security clearances. ‘What the Department of Justice seems to do in my view is to start building a cloud around the statute. They start building this cloud and they call it national security, and as their argument progresses ... the cloud gets darker and darker, so that by the time we get to the end we can’t see the statute anymore. What we see is a cloud called national security.’
11. Chapter 4 describes Nixon’s advocacy for protection for federal employees who provided information to Congress and the nature of his proposed statute.
 12. CRS REPORT: NATIONAL SECURITY WHISTLEBLOWERS, *supra* note 10, at 41. In the CSRA Congress carefully preserved its rights to obtain national security information regardless of the whistleblower provision.
 13. *Id.*
 14. CHARLES PETERS & TAYLOR BRANCH, *BLOWING THE WHISTLE: DISSENT IN THE PUBLIC INTEREST* 223 (1972).
 15. *Id.* at 222.
 16. Peters and Branch consider Otepska to be the anti-Ellsberg.
 17. *Id.* at 222, citing *Readers Digest*.
 18. *Id.* at 228.
 19. *Id.* at 229–31. These papers included *The Washington Post* and the *St. Louis Post Dispatch*.
 20. PETERS & BRANCH, *supra* note 14, at 231.
 21. Chapter 4 examines the stories of whistleblowers presented in Ralph Nader’s 1971 conference and in the 1972 books, *Whistleblowing* and *Blowing the Whistle*.
 22. RALPH NADER, PETER PETKAS & KATE BLACKWELL, *THE NADER REPORT: WHISTLE BLOWING: THE REPORT OF THE CONFERENCE ON PROFESSIONAL RESPONSIBILITY* 129 (1972) [hereinafter WHISTLE BLOWING].
 23. Chapter 5 describes how these activities by the Nixon Administration defined the Watergate constitutional crisis, while Chapter 16 discusses the wider Senate investigation of FBI and CIA violations of civil liberties.
 24. Tim Weiner, *W. Mark Felt, Watergate Source Known as ‘Deep Throat,’ Dies at 95*, N.Y. TIMES, Dec. 20, 2008, at A19.
 25. *Id.*
 26. *Id.*
 27. Stephen Vladek, *The Espionage Act and National Security Whistleblowing After Garcetti*, 57 AM. U. L. REV. 1531, 1593–95 (2007).
 28. 5 U.S.C. § 2302(b)(8).
 29. 484 U.S. 518 (1988).
 30. *Egan v. Department of the Navy*, 28 M.S.P.R. 509 (1985).
 31. *Egan v. Department of the Navy*, 802 F.2d 1563 (Fed. Cir. 1986).
 32. *Egan v. Department of the Navy*, 484 U.S. 518 (1988).
 33. *Id.* at 520.
 34. The following discussion of the application of *Egan* rests on analysis contained in ROBERT G. VAUGHN, MERIT SYSTEMS PROTECTION BOARD: RIGHTS AND REMEDIES § 12.02[5] (rev. ed. 2011) [hereinafter MERIT SYSTEMS PROTECTION BOARD: RIGHTS AND REMEDIES].
 35. CRS REPORT: NATIONAL SECURITY WHISTLEBLOWERS, *supra* note 10, at 24. In a November 13, 2009, paper, Louis Fisher examines judicial interpretations of *Egan*, including conclusions that the revocation of security clearances are not subject to judicial review and the failure of courts to understand that *Egan* relies on statutory interpretation. Congressional Research Service, *Paper: Judicial Interpretations of Egan*, file no. 2010–003499. (2010).
 36. The following discussion of the MSPB decision is taken from MERIT SYSTEMS PROTECTION BOARD: RIGHTS AND REMEDIES, *supra* note 34, at § 12.02[5].
 37. Chapters 4 and 5 describe Ernest Fitzgerald’s opposition to the gag order and his refusal to sign it.
 38. CRS REPORT: NATIONAL SECURITY WHISTLEBLOWERS, *supra* note 10, at 41. The subsequent quotations in this paragraph are contained in this report.

39. *Id.* at 22–23 (military whistleblower laws), 29–35 (avenues for intelligence community whistleblowers).
40. *Id.* at 41.
41. *Id.*
42. THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 1–14 (authorized ed. 2004) [hereinafter THE 9/11 COMMISSION REPORT] is the source for the narrative that follows in this portion of the chapter. This narrative also recalls the deaths of two American University Washington College of Law alumnae/alumni who died in the attacks on the World Trade Center and the Pentagon. Their names are listed here as a reminder of the loss of individual lives, losses that cannot be captured by statistics alone. *In Memoriam*: Linda Grolund '83 and Ernest Willcher '68.
43. All 92 persons on that flight died: two pilots, nine flight attendants, seventy-six other passengers, and the five hijackers.
44. All 65 persons on that flight died: two pilots, seven flight attendants, fifty-one other passengers, and five hijackers.
45. All 44 persons on that flight died: two pilots, five flight attendants, thirty-three passengers, and four hijackers.
46. Richard Lacayo and Amanda Ripley, *Persons of the Year 2002: The Whistleblower*. TIME, Dec. 30, 2002. The issue also contains an interview with Cynthia Cooper, Sherron Watkins and Coleen Rowley, available at www.time.com/time/magazine/article/0,9171,1003994,00.html. Chapter 9 describes the activities of Cynthia Cooper and Sherron Watkins in more detail.
47. Philip Shenon, *Threats and Responses: A Whistleblower; Agent Who Saw 9/11 Lapses Still Faults FBI on Terror*, N.Y. TIMES, Mar. 6, 2003, at A1. This article describes Agent Rowley's criticism of the FBI's performance following 9/11. She faults the FBI for its conduct of the investigation regarding Zararias Moussaoui, a conspirator in the 9/11 attacks. She also expressed fear that the attack on Iraq would increase the risk of terrorism in the United States.
48. Website of the National Whistleblower Center, <http://www.whistleblowers.org>.
49. *F.B.I. Whistle-Blower is Criticized in Report*, N.Y. TIMES, June 20, 2006 (AP), available at <http://www.nytimes.com/2006/06/20/washington/20rowley.html?ref=coleenrowley>.
50. *Id.*
51. HEARINGS OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, Room 216, Hart Senate Office Building, Washington, D.C., Thursday, May 22, 2003 at 130–46 [hereinafter May 22 Hearings of the 9/11 Commission].
52. March 13, 2003, letter of the Special Counsel to the President, regarding the FAA's response to Dzakovic's allegations. The material in this paragraph comes from that letter.
53. May 22 Hearings of the 9/11 Commission, *supra* note 51, at 130.
54. THE 9/11 COMMISSION REPORT, *supra* note 42, at section 3.3, p. 83 (footnote omitted).
55. EDWARD C. LIU, CONGRESSIONAL RESEARCH SERVICE REPORT: RETROACTIVE IMMUNITY PROVIDED BY THE FISA AMENDMENTS ACT OF 2008 at 1 (2008), citing THE NEW YORK TIMES.
56. *Id.* at 2–3.
57. *Hearings on Constitutional Limits on Domestic Surveillance Before the H. Comm. on the Judiciary*, 110th Cong. 10 (2007) (statement of Louis Fisher). Fisher also warned of the dangers to our democracy of ceding powers to the executive under a rubric of 'inherent powers.' 'Under the guise of "inherent power" the executive branch claims the right to ignore statutory law in order to give preference to executive-made laws all done in secret. Other countries have adopted this approach at great cost to democratic institutions and individual rights.' *Id.* Fisher concludes: 'It has been our foreign policy to support and encourage the rule of law abroad. Shall we also have it here at home?'
58. Kathleen Clark, *The Architecture of Accountability: A Case Study of the Warrantless Surveillance Program*, 2010 B.Y.U.L. REV. 357, 396 (Tam provided limited information but spurred the acquisition of information from other sources) [hereinafter cited as the *Architecture of Accountability*]. This article describes the events surrounding the unauthorized surveillance program and its significance. The following paragraphs rely on this work.

59. *Id.* at 397–98, quoting story.
60. *Id.* at 398 (footnote omitted).
61. *Id.*
62. *Id.* at 393 (footnote omitted).
63. *Id.* at 402–03 (footnote omitted).
64. *Id.* at 400.
65. *Id.* at 395 (footnote omitted).
66. *Id.* (footnote omitted).
67. 5 U.S.C. § 552(b)(1).
68. Chapter 6 describes the whistleblower provision applicable to federal employees while Chapter 7 explores its strengths and weaknesses.
69. *The Architecture of Accountability*, *supra* note 58, at 404.
70. *Id.*
71. Affidavit of Babak Pasdar, Feb., 28, 2008. Pasdar gave his affidavit to Thomas Devine, the Legal Director of the Government Accountability Project, a whistleblower advocacy group. A copy of the affidavit is in the author's files.
72. This chapter subsequently addresses the expansion of deference to executive decisions to withhold information on national security grounds beyond classified information.
73. Lisa Rein & Josh White, *More Groups Than Thought Monitored in Police Spying: New Documents Reveal Md. Program's Reach*, WASH. POST, Jan. 4, 2009, at A1. [hereinafter *More Groups Monitored*]. For example, a file was entered on Amnesty International for possible 'crimes.' The program also involved police surveillance and infiltration of peaceful protest groups.
74. Tom LoBianco, *Police Aware of State's Spying; ACLU Widens Trooper Probe*, WASH. TIMES, July 31, 2008, at A1. Local Baltimore police kept files on advocacy groups including the leadership of those groups. The police kept files on the director of Children First, who drew the attention of Baltimore police after he refused to call off a peaceful protest about lead in the city's drinking water.
75. Lisa Rein, *Federal Agency Aided Md. Spying; Homeland Security Department Gave Information to State Police*, WASH. POST, Feb. 17, 2009, at B1.
76. *More Groups Monitored*, *supra* note 73.
77. Lisa Rein, *Former Md. Attorney General to Review State Police Surveillance*, THE WASH. POST, Aug. 1, 2008, at B1.
78. Editorial: *The Petty and Pernicious Spying Operation of Maryland's State Police*, WASH. POST, July 19, 2008, at A14. These events led to strong anti-spying legislation applicable to the state police and to other Maryland law enforcement agencies, including local police and sheriffs' departments. MD. CODE, PUBLIC SAFETY § 3.701. That legislation limits covert investigations, interference with the exercise of First Amendment rights, the collection of information about political beliefs and the dissemination of this information. It imposes a duty on law enforcement agencies to conduct all investigations involving First Amendment activities only 'for a legitimate law enforcement objective'; and to 'safeguard the constitutional rights and liberties of all persons.'
79. Similar incidents may have occurred in New York and in Colorado. N.Y. TIMES, Jan. 4, 2009, at A14.
80. Center for National Security Studies v. U.S. Dep't. of Justice, 215 F.Supp. 2d 94, 96 (D.D.C. 2002).
81. Center for National Security Studies v. U.S. Dep't. of Justice, 331 F.3d 918–926–929 (D.C. Cir. 2003).
82. *Id.* at 937 (Tatel, dissenting).
83. *Id.* at 938.
84. *Id.* at 951.
85. The assumption has been that the electrodes were not connected to an electrical source although the prisoner believed that they were.
86. The quotations below are taken from the transcript of that oral argument. U.S. Oral Arg. 2004 Supreme Court of the United States, Hamdi v. Rumsfeld, no. 03–6696, Wednesday, April 28, 2004, wc. 10608 (US) westlaw.

87. Seymour Hersh, *Torture at ABU GRAIB: American Soldiers Brutalized Iraqis: How Far Up Does the Responsibility Go?*, THE NEW YORKER, May 10, 2004, at 42.
88. *Id.*
89. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
90. *Id.* at 518–19.
91. Ronald Reagan National Defense Authorization Act of Fiscal Year 2005. Changes found in 10 U.S.C. § 1034.
92. PHILIP ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL (2007) 330–31, 746–47 (describing Darby’s role in the disclosures, describing Darby’s awards, and using Darby as one of his ‘hero profiles’). In Chapter 14 of his book, Zimbardo compares Abu Graib to the Stanford Prison Experiment (described in detail in Chapter 2 of this book) and emphasizes the role of whistleblowers in resisting institutional contexts that encourage evil.
93. Louis Fisher, *Extraordinary Rendition: The Price of Secrecy*, 75 AM. U. L. REV. 1405, 1420 (2008).
94. *Id.* at 1422–36.
95. *Id.* at 1451.
96. LEGAL TIMES, November 24, 2008, Vol XXXI, no. 47.
97. Wilson’s trip to Niger, his findings, his conclusions, his appearance on *Meet the Press*, and his commentary in *The New York Times* are described in Vicky Ward, *Double Exposure*, VANITY FAIR, January 2004.
98. In his 2003 State of Union Address, George W. Bush stated: ‘The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa.’ A Special Prosecutor, Patrick Fitzgerald, concluded that Plame was a covert agent at the time her identity was disclosed and that disclosure was thus a violation of the 1982 Intelligence Identities Protection Act.
99. The Ridenhour Awards are sponsored by the Fertel Foundation in honor of Ron Ridenhour, a whistleblower who played a significant role in bringing the My Lai Massacre to public attention. Chapter 2 describes that massacre and Ridenhour’s role in its exposure.
100. *Transit and Rail Security: Joint Hearings Before the Subcomm. on Highways and Transit and of the Subcomm. on Railroads, Pipelines, and Hazardous Materials of the H. Comm. on Transportation and Infrastructure*, 110th Cong. (2007) (describing the need for whistleblower protections contained in various sections of legislation applicable to railroad employees and motor carrier employees).
101. S. REP. NO. 111–101 at 35 (2009).
102. *Id.* at 34.
103. CRS REPORT: NATIONAL SECURITY WHISTLEBLOWERS, *supra* note 10, at 38. Congress passed the proposed legislation but President Clinton vetoed it.
104. A series of articles that appeared in *The Australian* provide the outline of the events described below. These stories can be found in the following editions of the newspaper: June 1, 2005, local p. 1; August 19, 2005, local p. 6; September 22, 2005, local p. 1; December 14, 2005, local p. 6; March 28, 2007, local p. 3; April 12, 2007, all country p. 11; September 9, 2009, local p. 4; October 30, 2009, local p. 7; March 4, 2011, features p. 30; March 25, 2011, features p. 29.
105. Kessing admitted that he gave information to a Member of Parliament, which also would have been a violation of the law, but not to the press.
106. Paul Latimer and A. J. Brown, *Whistleblower Laws: International Best Practices*, 31 U.N.S.W. L. J. 766, 783 (2008).

13. Global whistleblower laws

The last two decades have witnessed a new generation of global whistleblower laws. These laws respond to conditions in each of the countries in which they have been enacted, but also represent broader global movements. They can be found in several nations in Europe, including states formerly parts of the Soviet Union and Eastern European states that were within the sphere of influence of the Soviet Union. Whistleblower laws can now be found in Asia, Africa, and the Americas and their number continues to grow. Similarities and differences between these laws cast light on both their local and global aspects. A number of international treaties and conventions mandate whistleblower laws, and powerful international organizations have adopted whistleblower protections.

Apart from the United States whistleblower laws, almost no other national laws, or those of states or provinces of other nations were enacted before 1990.¹ Nearly four times the number of these statutes were passed in the 2000s than in the 1990s. The expansion of these laws has been rapid, and has accelerated over the last two decades.

By far the largest number of whistleblower laws can be found in the United States. However, this statement can be deceptive because the United States is a federal system with a variety of laws in individual states; there are separate federal public- and private-sector laws and many of those private-sector laws concern specific industries. In contrast, Great Britain has a single statute that applies to both public- and private-sector employees throughout the country. Outside of North American countries, the largest number of whistleblower provisions can be found in Europe, followed by Asia, Australia and New Zealand, Africa, the Middle East, and South America.²

The global development of whistleblower laws has introduced competing approaches and models. In particular, the British Public Interest Disclosure Act 1998 (PIDA) contrasts with the US approach to whistleblower laws represented by the whistleblower provision of the Civil Service Reform Act of 1978 (CSRA) and its amended version, the Whistleblower Protection Act of 1989 (WPA). Global responses counsel the importance of comparative analysis and illustrate the roles of culture, including legal traditions, in these laws. Global whistleblower laws offer not only a different set of laws, but also other ways of considering the successes and failures of whistleblower laws.

Less than a handful of national whistleblower laws predate 1990. The dozens of whistleblower laws from other nations are of more recent vintage. The whistleblower provision of the CSRA in the United States represents the equivalent of a senior citizen among adolescents. Using this analogy, even many of the state whistleblower laws in the US would be eligible for a least partial social security benefits. The starkness of the contrast emphasizes again the historical importance of the 1978 whistleblower provision and accentuates the generational distinction between these laws in the United States and more recently enacted laws in other countries. A subsequent generation may or may not be respectful of a previous one and may or may not seek to emulate it. National whistleblower laws enacted since 1990 may emulate older provisions but, like any new generation, they reflect dissimilar influences. These laws may reflect differences based on evaluation of the successes and failures of those laws preceding them.

The first or most extensive whistleblower protections for employees of powerful international organizations, such as the World Bank and the United Nations, are of even more recent vintage. For example, the World Bank significantly revised its policy in 2005 and the United Nations adopted a whistleblower provision in that same year. There is now question as to how broadly the provision applies among UN agencies and administrative bodies. The whistleblower standards of international organizations are less than a decade old.

This chapter examines the character of this new generation of global laws and considers the circumstances leading to their enactment. This chapter also explores the interconnections between them, describes their development, and speculates regarding the role of culture in their enactment and in their application.

Despite the number of laws, commentators are skeptical of their scope and their effect. For example, David Lewis's examination of whistleblower laws in Europe concludes that 'there is not much whistleblower protection in Europe and the legislation that exists is extremely diverse.'³ This assessment assumes that internal disclosures, disclosures to regulatory and other oversight bodies and to the public should all be protected under some criteria.

International organizations limit disclosures. These limitations in part reflect the character of these organizations that enjoy autonomy because of immunity from the law of any state. The nature of these organizations challenges structures of protection and accountability.

The many connections between whistleblower laws suggest common influences. The relationships among these laws demonstrate the similarities of the laws, as well as their differences. Those differences often reflect culture and turn attention from the content to the context of these laws. This shift to the context of these laws offers new ways of considering their successes and failures.

THE RISE OF GLOBAL WHISTLEBLOWER LAWS

The Fall of the Soviet Union

What explains the burst of activity in the last two decades that has created these global legal responses to whistleblowing? Several explanations appear. The first of these connects these laws with the fall of the Soviet Union in 1990. The simultaneous occurrence of this world historical event with the advent of national whistleblower laws suggests some relationship. The fall of the Soviet Union discredited both economic and political philosophies underlying the Soviet state. Among the remaining philosophies of political economy, that of political democracy and market capitalism emerged as dominant. The principal adversaries of the Soviet Union, the United States and its Western allies, represented this view of political economy.

Liberal democracy carried with it certain assumptions about access to information about the operations of government. Both whistleblower protection and freedom of information laws acted on these assumptions by providing access to information about government that was necessary to democratic accountability. John Ackerman, Irma Sandoval Ballesteros, and Robert Vaughn, examining the similar global explosion of freedom of information laws after the fall of the Soviet Union, described their connection.⁴ Ackerman and Sandoval Ballesteros noted that states formerly part of the Soviet Union or among its client states adopted many of the new freedom of information laws.⁵ These scholars posited that this adoption in part reflected how the information policies included in these laws were 'symbols' of a commitment to democracy. Whistleblower laws play an information role similar to freedom of information laws and reflect a similar connection to liberal democracy.⁶

At the time of the fall of the Soviet Union, free-market capitalism emerged as the dominant economic theory. In the West, including the United States and particularly in Europe, economies relied upon extensive regulation of those markets. Such regulation rested on responses to market failures, but also rejected assumptions regarding the definition of markets contained in classic microeconomic theory. Regulation of markets and thus of corporations implicated information policies as well. Markets, including investment markets and markets in consumer goods, required information to operate efficiently. Much economic regulation rests on requirements for information and disclosure by market participants. Whistleblowing provides such relevant market information. Private-sector whistleblower laws reflect this connection to free-market economies.⁷

Regulation defines the market and thus the two are inextricably connected. Different types of regulation create different types of markets. Without a consideration of regulation the market is like any other abstraction often

devoid of meaning. Effective regulation requires information that whistleblowers are able to provide. Whistleblower laws are part of attempts to define the market. Such laws would be expected to accompany market capitalism.⁸

The more specific reasons given for the number of new global whistleblower provisions include the similarity of problems and crises confronted by 'modern' societies, more specifically health and safety violations, economic misconduct, and efforts to control international corruption. Other reasons emphasize not the nature of problems but the civil society actors involved in global reform.⁹ These actors include international transparency groups, human rights groups, and whistleblower advocacy groups. These groups appropriately contain not only civil society organizations, but academics, think tanks, and others affiliated with the topics. These groups essentially 'advertised' whistleblower laws and 'marketed' particular models of these laws.

Complex modern societies must address common problems. The well-being of individuals in these societies depends on the behavior of many persons and organizations over which individuals have little direct control or influence. Although many societies employ sophisticated techniques of legal and social control over large organizations, the performance of those organizations relies on faithful conduct of persons within them, particularly their leaders. All organizations are beset by the problem of agency, that is those within the organizations may be tempted to prefer their own interests rather than those of the organization or those groups the organization is to serve.

Health and Safety Regulation

Organizational failure can occur for other reasons as well. These reasons include mistakes, incompetence, negligence, inattention, ignorance, and insufficient resources. The better-designed organizations can reduce but not eliminate these problems. All types of organizational failures can have catastrophic effects. Both oversight and organizational design contain information components that rely on internal and external reporting of information regarding organizational failures. Whistleblowing is one technique for such information reporting and whistleblower laws support and encourage it.

Some of the most catastrophic organizational failures damage health and safety. The enactment of three whistleblower laws, the Whistleblower Protection Act in the United States, the Public Interest Disclosure Act in Great Britain, and the whistleblower law in Japan illustrate how global whistleblower laws respond to health and safety disasters.

'By the early 1990s, a series of disasters and tragedies had shaken the public's confidence in many of the institutions and companies traditionally trusted in Britain.'¹⁰ In 1987, a British ferry sank off the coast of Zeebrugge, 'killing 193, including many children.' In 1988, the Piper Alpha oil platform

‘exploded 110 miles off the north coast of Scotland killing 167 people.’ In the same year, a commuter train struck a train stopped in the Clapham Junction station in London killing 35 and injuring 500. ‘In 1991, three social service employees working in residential care facilities for children were convicted of the assault and sexual abuse of children over a 13-year period.’ According to Public Concern at Work (PCW), those led to the enactment of Britain’s Public Interest Disclosure Act in 1998, and, in the decade preceding the enactment of the law, ‘employees had been aware of the dangers and either remained silent from fear or found their warnings unheeded or were subjected to reprisal or compelled to leave their jobs.’¹¹ The PIDA covered most public- and private-sector employees in Britain.

In Japan, many persons developed acquired immunodeficiency syndrome (AIDS) from the exposure to the human immunodeficiency virus (HIV) in blood transfusions when government and corporate officials were aware of the contamination.¹² In the same period Mitsubishi Motors ‘hushed up’ some 64,000 customer complaints by repairing individual vehicles rather than ‘issuing costly model-wide recalls’¹³ In 2003, the Tokyo Electric Power Company covered up damage to some of its nuclear power plants.¹⁴ All of these disasters influenced the enactment of Japan’s 2004 whistleblower law.

The United States space shuttle *Challenger* exploded 73 seconds after its launch on January 28, 1986, destroying the shuttle and killing the crew. Subsequently, during the investigation of a Presidential Commission into the disaster, an engineer for a contractor testified that engineers had pleaded with National Aeronautics and Space Administration (NASA) not to launch the shuttle, predicting the failure that caused the explosion, but were overruled by management of the contractor, a decision accepted by NASA officials anxious to launch the shuttle.¹⁵ That engineer suffered reprisal after his testimony.¹⁶ The disaster had such an effect on congressional passage of the 1989 Whistleblower Protection Act that some referred to that Act as the *Challenger* law.

Anti-Corruption Measures

A good number of the global whistleblowing laws enacted since 1990 respond to a powerful international anti-corruption movement. Several international conventions against corruption require signatories to provide protection to persons that expose corruption, are victims of it, or who serve as witnesses or experts in actions related to these disclosures. In Article 32, The United Nations Convention Against Corruption requires party states to provide ‘effective protection’ from retaliation or intimidation of witnesses and experts who give testimony. This provision is narrow in that it applies to witnesses or experts (and victims) who give testimony. Article 33, which is not mandatory,

applies to protection against 'unjustified treatment' of persons who 'in good faith and on reasonable grounds' report facts concerning corruption to 'competent authorities.'

The European Civil Convention on Corruption, in Article 9, paragraph 66, requires parties to the Convention 'to take necessary measures to protect employees' who 'in good faith on the basis of reasonable grounds' report suspicions of corrupt practices 'from being victimised in any way.'¹⁷ The European Convention extends protection more broadly than the UN Convention by covering all employees who 'report.'¹⁸

Other regional pacts regarding corruption also protect whistleblowers. The Protocol Against Corruption of the 13 African states that are members of the Southern Africa Development Community commits these countries to developing systems for 'protecting individuals who, in good faith, report acts of corruption.'¹⁹ Thirty-one nations that ratified the 2003 African Union Convention on Preventing and Combating Corruption undertake in Articles 5.5, 5.6, and 5.8 respectively to protect 'informants and witnesses' in corruption or related offenses, to adopt measures to 'ensure citizens report instances of corruption without fear of consequent reprisals,' and to strengthen education regarding the fight against corruption.

Twenty-eight Asian and Pacific Countries, including Australia, China, Hong Kong, Korea, India, Indonesia, and Japan, formally adopted the Organisation for Economic Co-operation and Development's (OECD) Anti-Corruption Action Plan for Asia and the Pacific.²⁰ That Plan requires measures to 'ensure that officials report acts of corruption and which protect the safety and professional status of those that do.'²¹ The Plan specifically requires the encouragement of participation through 'protection of whistleblowers'.²² The Inter-American Convention Against Corruption, proposed in 1996, commits the 29 ratifying states, including the United States, to develop ways of 'protecting public servants and private citizens who, in good faith, report acts of corruption.'²³

The international conventions and agreements bind dozens of countries to protection of whistleblowers who report covered acts of corruption, as do many whistleblower laws. In some countries, whistleblower laws focus on disclosure of corruption, excluding from protection those disclosures that do not fit into the category of corruption. Many of the anti-corruption conventions described above only protect disclosures to designated public bodies. The Inter-American Convention Against Corruption deviates from this trend by not limiting the recipients of these disclosures. The model whistleblower law to implement the Inter-American Convention interprets the Convention to permit public disclosures.²⁴

Some of these anti-corruption conventions, such as the Inter-American Convention Against Corruption, protect 'citizens' and thus persons who are

not employees of the institutions whose officials are involved in corrupt practices. There are many reasons for addressing corruption and these reasons draw on differing perspectives supporting whistleblower laws, perspectives that are described in Chapter 15. For example, corruption may be seen as another type of hidden misconduct known to employees of large organizations and therefore closely connected to employment law. To preserve democratic accountability it is necessary to reduce corruption. This reason for controlling corruption links it to whistleblower statutes as open-government laws. A view of corruption as enabling violations of human rights supports whistleblower laws as a preserver of human rights, particularly the right of free expression. As a means of ensuring the efficient operation of economic markets, the control of corruption associates whistleblower laws with market regulation through information disclosure.

Corruption challenges all governments and all societies, but authoritarian societies are especially bedeviled by it. The secrecy surrounding institutions of authority, the power of government officials, and the opportunities for self-serving behavior combine with characteristics of human nature to encourage and protect corruption. Political patronage and protection may yield in the short term to changes in enforcement philosophy but do not change the underlying lawless behavior.²⁵ Such states have an interest in appearing to control corruption because allegiance to the state rests on popular acceptance of its ideology of control. Enrichment of a few individuals is unlikely to be an ideology widely adopted. Although authoritarian states might be viewed as having an advantage in social control of 'deviant' behavior, experiences suggest otherwise.

Social control requires detailed regulation of the behavior of each member of the state. Illegal activity by state officials or managers challenges centralized control and administration and thus poses a particular challenge to an authoritarian state that seeks to exercise such detailed oversight of society.²⁶ Such centralized management of society 'can only work well if there are well-understood and more or less stable rules which are taken seriously by citizens.'²⁷ The weaknesses of centralized economic management require officials to break some rules and regulations in order to fulfill their obligations.²⁸ Such illegality supports other activities motivated by private gain and encourages corruption.

Whistleblowing in such a society can be defined as complaints by members of society about abuses of office, as well as by employees of organizations in which managers and officials are engaged in misconduct.²⁹ Soviet law protected whistleblowers from retaliation for reporting misconduct to administrative superiors, to state organs, to legislative officials, to prosecutors, and the courts.³⁰ Whistleblowers could also report to party officials, trade unions, and the press. One way of keeping abuse in check is to encourage 'individual

citizens to uncover illegal practices, to blow the whistle on wayward managers and officials.³¹ Despite the Soviet whistleblower laws, many things discourage employees from taking accusations out of their organization. A complaint procedure for reporting criminal conduct is 'fraught with difficulty and uncertainty'. Persons who do so 'are likely to pay much more heavily for their efforts than those they seek to criticize.'³²

A 1985 study of Soviet whistleblowers described the heavy price paid by these whistleblowers. Most whistleblowers studied were employees of state enterprises; few were clients of state agencies or employees of those agencies. Whistleblower complaints were rarely favorably received when the allegations affected the management of the organization for which an employee worked.³³ Rarely did even confirmed wrongdoers suffer from the allegations.

Soviet whistleblowers were subjected to *post hoc* attacks on their performance or qualifications, targeted for staff cuts, dismissed, demoted, transferred to undesirable jobs, and exposed to harsh working conditions.³⁴ Whistleblowers' records were searched for anything that 'might in the slightest compromise' them.³⁵ Whistleblowers were characterized as 'idlers, troublemakers, scribblers, nitpickers, and as quarrelsome, unsociable, and unsophisticated.' Labor law provided limited protection; managers and appeals bodies manipulated the legal standards; and remedies were ineffective even when higher authorities held for the whistleblowing employees.³⁶

The experience of whistleblowers in the Soviet Union illustrates the problems of corruption in authoritarian states. It also invites another look at the connection of whistleblowing to a liberal political economy combining democracy and markets. It cautions that whistleblowing can be part of a system of bureaucratic hegemony. It is possible to see that, in the Soviet Union, whistleblowing was centralized information-gathering, a technique of institutional control, a means of alerting authorities to discontent, a release for frustrations, and a method of surveillance. It is a reminder of the role of a free press, the importance of free speech and, the importance of the protection of public disclosures. The experience of Soviet whistleblowers demonstrates that the successes of whistleblower laws do not rest on the content of law as much as on its implementation.

The Soviet experience with whistleblowers also emphasized how whistleblowing was an important part of a series of democratic reforms. It demonstrated that even well-defined bodies of law that preserve individual rights did not guarantee the rule of law. The whistleblowing cases that appeared in the state-controlled Soviet press focused on labor violations and other misconduct at a plant or local level. These evaluations of individual reports were presented by Soviet officials without a 'social or political' context.³⁷ The experience of Soviet whistleblowers demonstrated that those who raised matters of national concern and directly challenged high-level communist party officials received

harsher responses from the Soviet state. Perhaps one test for the effectiveness of whistleblowing in the prevention of corruption is its effectiveness in the 'highest profile cases' involving high government officials.

The Influence of Civil Society

Civil society and nongovernmental organizations also connect global whistleblower laws. The following chapter, Chapter 14, on civil society demonstrates how these organizations, particularly those in the United States and Great Britain, have advised whistleblower advocates in other countries.³⁸ Whistleblower organizations in different countries share information and strategies. The similarity of whistleblowing laws in several countries evidences the effects of this cooperation on these laws. Some scholars, such as William De Maria, decry the copying of laws that may not consider the culture of a country that adopts them. Ignorance of the culture and legal traditions of enacting countries may contribute to the failure of those laws that do not conform to cultural norms and legal traditions.

Civil society groups also play a role in international organizations whose actions can affect many countries. For example, the approach of the World Bank or the United Nations to whistleblowers can influence these laws globally. By way of illustration, the Government Accountability Project criticized the internal hearing procedures of the World Bank and recommended procedures more analogous to those adopted by the United Nations.³⁹ The development of model and sample laws by the UN and the World Bank can encourage countries to adopt these laws or the principles contained within these models. For example, whistleblower provisions adopted to satisfy the obligations of countries under one of the anti-corruption conventions were likely to draw on similar templates, including those provided by civil society groups.

Studies of whistleblowing laws in one country have implications for the laws in others. In particular, empirical studies on whistleblower behavior, on the effectiveness of different approaches taken in these laws, and experience with different types of law may influence the characteristics of many other laws. For example, empirical studies by scholars of the characteristics of effective procedures can have international influence.⁴⁰ Civil society groups are part of an international community of advocates, scholars, and researchers that now operate globally. The role of civil society groups demonstrates the proposition that today even domestic laws are not local.

CONTRASTING MODELS FOR WHISTLEBLOWER LAWS

Other national laws, particularly Great Britain's Public Interest Disclosure

Act, present models competing with the world's first major whistleblower law now incorporated into the Whistleblower Protection Act applicable to federal employees in the United States. The Whistleblower Protection Act is a 'single standard' statute. Under the WPA a single standard applies to internal disclosures, to disclosures to regulatory and law enforcement agencies, and to disclosures to others including the media, private organizations, and members of Congress. In the United States, federal employees making disclosures to Congress are protected by constitutional prerogatives of Congress, as well as by whistleblower laws.⁴¹

On the other hand, the PIDA applies multiple standards depending to whom the disclosure is made. One British scholar, David Lewis, refers to this as a three-tier system of disclosure and protection.⁴² The first-tier protections apply to disclosures within the organization for which a whistleblower works. The most lenient standard for protection applies to this first tier. For example, employees need only show that they reasonably believe in good faith that one of the types of misconduct covered by the law has occurred or is threatened. The second tier of protections are applied to disclosures to governmental organizations and law enforcement and regulatory bodies that oversee the institutions contained within the first tier. For example, employees must reasonably believe that the allegations are substantially true. A more strenuous standard applies to these disclosures. All other disclosures, including disclosures to the media, fall within the third tier. These disclosures must satisfy the most demanding standard. For example, employees must meet the standards for tier two disclosures and their disclosures must not be made for personal gain, must be reasonable under the circumstances. In addition, employees must satisfy one of three conditions: (1) reasonable fear of reprisal if disclosure is made internally or to recipients falling under tier two; (2) reasonable belief of the concealment or destruction of evidence relating to the misconduct; or (3) previous disclosure of the misconduct was made to employers or another prescribed recipient and no response has been received or action taken.

Unlike the Whistleblower Protection Act, the Public Interest Disclosure Act applies to both public- and private-sector employees. In the United States, some state private-sector laws allow employees to make disclosures regarding all three tiers under the same standard. Federal private-sector whistleblower laws, however, do not permit disclosures beyond the first and second tiers, although these protected disclosures can be made under the same standard.⁴³ Thus, federal whistleblower law in the United States is more expansive than the British law regarding public employees, but federal private-sector laws may be more restrictive than the British law regarding public disclosures and more expansive regarding regulatory disclosures. The British model has been followed in several countries, including South Africa and Japan.

WHISTLEBLOWER PROVISIONS OF INTERNATIONAL AND TRANSNATIONAL ORGANIZATIONS

Beginning with the United Nations in 2005, important international organizations have adopted new whistleblower protections or substantially modified previous ones. In addition to the UN, the organizations approving such protections include the World Bank and several of the regional development banks, including the African Development Bank, the Asian Development Bank, and the Inter-American Development Bank.⁴⁴

These international organizations confront special problems because of their immunity from actions commenced in national legal systems. Because of this immunity, the creation of internal systems regulating whistleblowing poses challenges not confronted by government agencies or by corporations subject to external legal authority. No external authority routinely receives and evaluates allegations of corruption or misconduct within these international organizations. No external authority reviews or adjudicates decisions of these organizations regarding claims of retaliation. Many whistleblower provisions use the possibility of external disclosure to foster the development of internal schemes to encourage employees to bring forward information to the employer. Likewise, many whistleblower provisions use the possibility of external adjudication to police institutional decisions regarding retaliation. In the development of an internal system of whistleblower protection, these international organizations cannot draw on the standards and experience incorporated into national laws and practices. Thus, procedures that might be acceptable in internal grievance provisions within most organizations can be viewed as inadequate in these organizations. These international organizations must also protect some types of external disclosures or create functional substitutes for them.

The whistleblower regulations of the World Bank, the United Nations, and the African Development Bank are extensive and detailed. The treatment of three issues explains the dilemma posed by independence of these organizations from national law. These three issues are the protection of external disclosures, the external evaluation of allegations of retaliation, and a duty to report.

Two of these international organizations, the United Nations and the African Development Bank, permit external disclosures in some circumstances. The circumstances described in their regulations are similar. Both permit external disclosures 'necessary' to avoid significant threats to public health and safety and 'substantial damage' to their 'operations.' In addition, the United Nations protects disclosures 'necessary' to avoid 'violations of national or international law.' These permitted topics are broad and include a variety of misconduct. The applicable regulations, however, require a whistle-

blower to demonstrate that use of internal mechanisms of disclosure 'are not possible' because there are 'grounds' to believe that such use would result in retaliation or in the concealment or destruction of evidence regarding the alleged misconduct or because the whistleblower previously reported it internally and was not notified in writing within six months of the status of 'the matter.' On the other hand, the World Bank does not protect external disclosures. Employees of the World Bank may only report to a 'direct manager' of the employee or the Department of Institutional Integrity.

The World Bank and United Nations require the use of internal mechanisms for the investigation and resolution of claims of retaliation. The World Bank permits whistleblowers to invoke procedures that are more adjudicatory in their character. In many ways these procedures seem like an internal grievance system where the management of the institution plays important roles in the resolution of complaints. The United Nation's procedures for assessment of allegations of retaliation seem more administrative without the safeguards attached to adjudicatory procedures. The African Development Bank anticipates the use of 'an independent alternative dispute mechanism.' Although the example contained in the regulation refers only to 'conciliation,' independent alternative dispute resolution includes the adjudicatory option of arbitration. The World Bank specifically rejected arbitration because it is an adjudicatory procedure outside the control of the Bank.

All three organizations impose a duty on staff to report suspected fraud or corruption. The United Nations and the African Development Bank do so because they require the reporting of all misconduct. The World Bank's duty applies only to managers. Staff members at the World Bank are 'encouraged' to report to all forms of misconduct but are not required to do so. It is not clear how the obligation to report fits with the Bank's use of anonymous hotlines. If the duty to report is an admonition not an obligation of employees to report misconduct, the anonymous hotline is somewhat anomalous, but not inconsistent, with the duty. If the duty is enforced by sanctions, the anonymous hotline can be viewed as an invitation to commit an act for which discipline can be imposed.

Some research by Yuval Feldman and Orly Lobel demonstrates that the recognition of a duty, when combined with other factors, encourages disclosures.⁴⁵ The imposition of sanctions, however, creates additional difficulties. Such a duty to report certain misconduct entangles whistleblowers with another set of potential risks. In an organization where employees doubt the effectiveness and fairness of investigation regarding allegations and the response to complaints of reprisal, such a duty can, ironically, limit disclosures. Employees who doubt these internal procedures and who are aware of the significant risks of reporting may remain silent. Once they have done so, the risk of sanctions for nondisclosure adds to the reluctance to report in the

future. An employee may learn not to acquire or acknowledge information that would give rise to such an obligation. A duty to report could be part of a larger scheme of bureaucratic surveillance and control.

Particularly questionable are obligations to report within a specific time. The African Development Bank requires that any fraud or corruption be reported within seven days of the time that it 'come[s] to the attention' of bank personnel. In similar contexts, agencies have used these obligations to punish whistleblowers who delayed reporting because of fear of injury and death.⁴⁶ All employees labor under the threat of action based on managerial assessment of their knowledge of the misconduct.

The whistleblower practices of these international organizations have created an international conversation regarding whistleblower laws. This conversation is an important one because these organizations can draw on the whistleblower laws of a number of countries. For example, the policies of these organizations draw on whistleblower laws in the United States, but also incorporate approaches from whistleblower laws in other countries. For instance, the United Nations and the African Development Bank use a 'tiered disclosure' standard reminiscent of Britain's Public Interest Disclosure Act. The similarity of regulations at these international organizations reflects the advocacy of civil society groups, advocacy that emphasized the interests of stakeholders in good governance in these institutions.⁴⁷ These similarities also reflect judgments by these organizations of the characteristics of whistleblower laws that are likely to lead to success or failure.

Whistleblowers played important roles in the development of these policies. For example, scandals involving World Bank President Paul Wolfowitz supported efforts to revise the bank's whistleblower policy.⁴⁸ Disclosures regarding corruption and other misconduct by officials of the United Nations also helped to create the UN's 2005 whistleblower policy. Scandals included illegal charges and kickbacks by participants in the UN's oil-for-food program with Iraq.⁴⁹ Several whistleblowers exposed sexual abuse by UN forces in conflicts in Bosnia and the Congo.⁵⁰

The model whistleblower law drafted for the Office of Legal Cooperation of the Organization of American States (OAS) offers another example.⁵¹ The statute implements the Inter-American Convention Against Corruption. In some ways the OAS statute is patterned after the Whistleblower Protection Act. For example, it is a single-standard law, it describes wrongdoing properly disclosed in a way consistent with the same articulation of types of misconduct contained in the WPA, and it protects but does not require internal disclosures.

The model law, however, contains many approaches not contained in the WPA. Recognizing the importance of incentives for disclosure, as well as the prohibition of retaliation, it incorporates a 'false claims' provision similar to

the United States False Claims Act. It approaches whistleblowing not simply as an employment provision, but also as 'an embodiment of the human right of freedom of expression.' The law eschews a heroic conception of whistleblowers by emphasizing the nature of the information disclosed rather than the motives of whistleblowers. The model law provides many avenues for disclosure and for redress against retaliation. It protects disclosures to employers of whistleblowers, to regulatory and law enforcement agencies, to ombudspersons, and to others, including the media. Avenues for redress of retaliation include employers, ombudspersons, human rights commissions, alternative dispute resolution, other national and international bodies, and the courts. Reliance is not placed on a single office or agency because such reliance invites cooption of the agency and jeopardizes protection in individual cases. This approach, however, may sacrifice the expertise of administrative bodies that would otherwise develop greater experience in addressing the disclosures of whistleblowers and their claims of retaliation.

The drafters of the OAS model law consciously considered the social and legal context in which the law would operate. This context can be described in part by the Central American folk saying, 'the law is a serpent that bites those without shoes.' 'The aphorism manifests a distrust of the law, reflecting suspicion of the rule of law as well as the acceptance of corruption of administrative and judicial processes.'⁵² The model law considered indices of corruption, respect for the courts and lack of trust in democratic government in Latin America. The drafters of the law examined how whistleblowing would be influenced by the independence of the media and the judiciary in the region. In particular, the law considered the treatment of investigative journalists and the harsh libel, slander, and defamation law criminalizing slander of government officials. A whistleblower law is also closely tied to other provisions addressing access to information, including public information laws and ethics laws requiring the public disclosure of financial interests by higher-ranking government officials. This context suggests that in many countries whistleblower laws must be part of a larger strategy of reform.

WHISTLEBLOWER LAWS AND CULTURE

To the extent that whistleblower laws reflect the culture of the countries in which they are enacted, a national law permits inferences regarding aspects of the culture in which it applies. For example, an examination of the Public Interest Disclosure Act tells us something about the views of British society regarding loyalty, privacy, and confidentiality. Those views suggest a greater emphasis on these values in British society than is the case in the United States. The reliance of the statute on English common law regulation of public

interest disclosure supports the proposition that the provisions of the law alone inform us regarding long-standing cultural values.

Likewise, the French and German responses to the anonymous hotlines required under the 2002 US Sarbanes-Oxley Act also teach us about the protection of privacy in those countries. An examination of European privacy law again reinforces the difference between European and American culture.⁵³ Comparisons of US and European cultural landscapes would confirm our judgments based on an examination of legal content alone.⁵⁴

History and Culture

History can also teach us much about the culture in which specific whistleblower laws apply. For example, scholars have explained French skepticism of whistleblowing and particularly anonymous whistleblowing in terms of the Dreyfus Affair, where anti-Semitism led to the conviction of a Jewish French army officer and his imprisonment under the harshest conditions of Devil's Island.⁵⁵ That experience increased distrust of authorities and accentuated the risks of false accusations.

Scholars also point to the collaboration of many French citizens with the Germans during the occupation of France as infecting attitudes about whistleblowing, and general and anonymous whistleblowing in particular. The collaboration by the Vichy government with German occupiers and its actions against the resistance movement 'had been, in effect a civil war' that will take generations to address.⁵⁶ In this historical context, anonymous disclosures became a way of informing on friends and neighbors to an occupying force or to a French authoritarian regime. Gregory Katz-Benichou and Marc Lenglet refer to the divisions of the Dreyfus affair and the Vichy collaborations 'as embedded like a deep splinter in French national memory.'⁵⁷ The permanence of that memory explains the reaction when an American company in France sought to introduce an anonymous hotline. An employee e-mailed everyone in the company denouncing the action as 'Vichy tactics.'⁵⁸

In Germany, experiences with the Nazis, when friends and families became informers, influenced attitudes toward whistleblowing, particularly anonymous reporting.⁵⁹ In East Germany, the widespread use of informers by the secret police, the Stasi, during the Cold War contaminated views about disclosures to authorities concerning the activities of others. Similar attitudes in Eastern Europe arise from experiences with Soviet-supported totalitarian communist regimes there. In these countries as well, disclosures to the government regarding the conduct of others evoke memories of the techniques of a police state.

In Europe, resistance to anonymous hotlines also rests on history. 'In

Continental Europe, especially Belgium, Germany, France and the Netherlands, anonymous mandatory denunciations smack of World War II and communist-era authoritarianism-neighbor spying on, and the denouncing neighbor.⁶⁰ This historical specificity explains the reluctance of privacy regulators to approve anonymous hotlines.⁶¹ However, in some countries that for a period were ruled by an authoritarian regime, cultural practices seem to have incorporated exposure of the misconduct of neighbors into a new cultural standard. For example, Spain 'suffered longer under fascism than anywhere in Europe' and Slovakia had a history of communist repression; in both countries neighbor-on-neighbor reporting 'thrives today.'⁶²

History also affects attitudes toward whistleblowing in other countries. For example, in South Africa, apartheid and the use of security forces to repress the black population of the country created a dislike for those who disclose the activities of their acquaintances or co-workers to authorities. 'Like Germany, South Africa suffers from a history of an authoritarian regime that made use of state informers.'⁶³ Few whistleblower cases have been adjudicated in South Africa,⁶⁴ unlike in Britain where a review of whistleblower decisions fills a large volume.⁶⁵ These differing attitudes do not reflect differences in the respective laws because the British and South African whistleblower laws are similar.⁶⁶ This suggests that the comparison of laws of the two countries does not capture the differences in their application and thus their successes and failures. Those differences in application reflect culture, as well as the content of the laws. William De Maria discusses how informal social networks and group solidarity fostered during the resistance to apartheid likely undermine Western-style whistleblower laws.⁶⁷

In Australia, a different history involving penal servitude and repression by English authorities created a similar distaste for informers. Australians are not respected for dobbing (or informing) on their mates.⁶⁸ Both South Africa and Australia emphasize social solidarity, a solidarity threatened by disclosures. Kim Sawyer describes the dark side of the concept of mateship and the effects on whistleblowers.⁶⁹

Some scholars also believe that whistleblower protections in China will be 'mere lip service' and describe existing laws 'as impractical.'⁷⁰ This assessment does not rest on an examination of the application of whistleblower provisions in China, but relies on aspects of Chinese society seen to limit any state protections. 'People lack the ability to voice concerns in many areas of their lives in China; the workplace is no exception.'⁷¹ Authoritarian regimes may encourage informers but are unlikely to accept reporting that challenges the conduct or power of the state or that implicates state officials in misconduct. The experience of whistleblowers in the Soviet Union buttresses these assessments of authoritarian regimes.

Whistleblowers can be identified in both of Alan Westin's informational-

based definitions of democratic regimes and authoritarian regimes.⁷² Westin argued that democratic regimes can be identified by information policies that give citizens extensive knowledge about the activities of the state but restrict the information that the state has about the activities of citizens, while authoritarian states are marked by limited citizen information about the actions of the state but extensive information that the state possesses about the activities of individual citizens. Whistleblowers can support open-government or they can accompany state surveillance. The political character of a government and the social structure of a society can influence the effects of whistleblower laws and provide different criteria for evaluating their successes and failures.

Cultural Aspects of the Naming of Whistleblowers

History's influence should not be underestimated, but neither should it be overestimated. Changes in a society's attitudes toward whistleblowing can be dramatic. The first chapters of this book demonstrate how in a relatively short period of time attitudes toward whistleblowing in the United States changed.⁷³ In the same vein, one observer identified a 'sea change' in attitudes toward whistleblowers in Britain.⁷⁴ A study of attitudes toward whistleblowing in South Africa found that younger employees who had grown up with a greater emphasis on transparency, equal rights, and ethical values were more favorably disposed to whistleblowing than older employers.⁷⁵

The names given to those who report misconduct also hints at societal perceptions of them. Whether we believe that language influences our perceptions or merely incorporates them, the naming of things gives great power. In many parts of the world there seem to be few laudatory names for whistleblowers. At a 2005 academic conference in Mexico City held to discuss whistleblower protection, the title of the conference used the Spanish word, *informantes* – informers in English. The organizers of the conference believed that this word was the most neutral Spanish term available.

The negative vocabulary for whistleblowers often exceeds the positive one. Some languages seem to have no positive terms for those who make disclosures. The whistleblower law of Taiwan is called Anti Corruption Informant Rewards and Protection Program. In Thailand, Malaysia, and Kenya, the applicable laws are entitled respectively, Witness Protection Act of 2003, Witness Protection Bill (enacted 2007), and Witness Protection Act (enacted 2003). In Indonesia, protection is included in a provision called Law on Witness and Victim's Protection (enacted 2006).

In the United States, the negative epithets for those who disclose wrongdoing are numerous with informer among the milder. These words include snitch, grass, rat, rat fink, stoolie, stool pigeon, squealer, tattletale, backstabber, skunk, spy, mole, and traitor. The majority of these terms represent the argot

of criminal associations whose success depends on secrecy, but some of them have been applied more generally. 'Disgruntled or disruptive employees' has become almost a default term for whistleblowers in discourse among those opposed to new whistleblower laws.

The term whistleblower was coined as an alternative to these negative epithets. The common assumption is that the term refers to the practice of English constables to blow a whistle when they observed a crime, an act signaling both knowledge of wrongdoing and a response to it; others credit Ralph Nader with creation of the term. The connection of the term to law enforcement is buttressed by the earlier invocation of the term in the United States. For example, whistleblower was used to describe a citizen who provided information to authorities in a 1959 radio broadcast of the then popular police drama, *Dragnet*.

In the United States, whistleblowers have also been referred to as 'courageous citizens,' 'courageous employees,' 'ethical resisters,' 'loyal employees,' 'heroes,' 'persons of conscience,' and 'protectors of the public interest.' One observer ironically referred to Thomas Drake, an employee of a national security agency who faced espionage charges for the release of information regarding waste and potential privacy risks in a program collecting and organizing data,⁷⁶ as a 'spy for democracy.'

Other countries have also struggled with the absence of positive terms to describe whistleblowing. A variety of terms have emerged to address the lack of supportive descriptions, including 'secret patriot' in Japan, and 'bell-ringer' and 'watchman' in Europe. The European Civil Law Convention on Corruption and Criminal Convention on Corruption use the term 'collaborators for justice.' Many of these terms are describing persons for whom few positive descriptions exist. As such, these terms may reflect the attitudes of the culture to whistleblowing. Such terms are important, but the terms used in legislation have special significance.

The connotations of words depend upon cultural meanings attached to them and those connotations can change over time. The term whistleblower is an example. When a country uses the term whistleblower to describe legal protections, as in the United States, the variety of negative and positive terms connected to whistleblowing compete for the meaning of whistleblower. One way to judge the success or failure of a whistleblower law in a particular country is to examine the connotations most closely connected with the term for whistleblowers used in the applicable law. In this regard, statutory descriptions relying on the character of the disclosure, as in the British Public Interest Disclosure Act, may have some advantages by reducing the likelihood of the attachment of negative connotations to a term used to describe those who make protected disclosures.

Although whistleblower has been adopted as descriptive of laws in other

countries, some national and international provisions avoid the term. The United Nations Convention Against Corruption states that it uses the term 'reporting persons'⁷⁷ because the term is clear and distinguishes such persons from witnesses. 'It was also deemed preferable to the term, whistle-blowers, which is a colloquialism that cannot be accurately and precisely translated into many languages.'⁷⁸ Ironically, despite its English origins, the British law does not use the term whistleblower. Public interest disclosure was chosen instead. The British advocacy group, Public Concern at Work, believed that the term whistleblowing carried too much baggage, particularly because of the way the major US whistleblower laws, such as the WPA, emphasized public disclosures. Ironically, because the Public Interest Disclosure Act was included in the Employment Rights Act 1996, decisions interpreting the law refer to it as the 'whistle-blower provisions.'

Other countries see both the British and American laws as 'exports' that may not satisfy local needs.⁷⁹ To an extent, British rejection of the term may also reflect the foundation of the Public Interest Disclosure Act on the common law regarding such disclosures. Laws that limit disclosures regarding corruption to a small number of specified public bodies may also find whistleblower an overly inclusive term.

Methods of Analysis of Cultural Influences on Whistleblower Laws

Those considering the global reach of whistleblower laws recognize the role of culture in the acceptance of such laws, in their content, and in their effectiveness. For example, John Bowers, Martin Fodder, Jeremy Lewis, and Jack Mitchell have recognized how domestic culture affects local laws.⁸⁰ Marcia Micelli, Janet Near, and Terry Dworkin have described whistleblower laws as 'part of a cultural landscape.'⁸¹ In the United States that cultural landscape includes the 'strong belief in individualism' that is 'part of the American personality.' 'The public's receptivity to whistleblowing is supported by this long-held belief.'⁸² As a result, US whistleblowing laws confront cultural barriers when advocates seek to introduce them to states formerly part of the Soviet Union.

Cultures with a less strong commitment to individualism may have a different attitude toward whistleblowers. For example, according to Japanese expert Yukiko Miki, Japanese culture tends to 'exclude those with different opinions', to avoid those who speak of 'conflicts of interest' between parties, but stresses a 'sense of togetherness.'⁸³

Two additional structures of analysis offer systematic ways of examining the global spread of whistleblower laws. One of these ways considers how culture influences whistleblowing and thus whistleblower laws. A good deal of literature uses the work of Dutch organizational sociologist Geert Hofstede

regarding the behavior of those working in corporations. Researchers, particularly in the field of business ethics, have used this management theory regarding employee behavior to consider the role of culture in the acceptance of whistleblowing and in the adoption of whistleblower laws.

Another way to examine the global spread of whistleblower laws looks to the effect of legal traditions. This second approach uses the work of Professor H. Patrick Glenn that examines legal traditions of the world. Unlike Hofstede's theory, Glenn's has not been directly applied to whistleblower laws, although some writings regarding global whistleblower laws hint at Glenn's themes regarding common and civil law traditions. Glenn's work, however, permits an examination of the limitations on the globalization of these laws through a reliance on Western models. This section of this chapter discusses Glenn's description of the Islamic legal tradition and speculates how that tradition might respond to whistleblower laws.

Hofstede describes culture as the 'collective programming of the mind that distinguished one category of people from another.'⁸⁴ Hofstede explains differences between national cultures in several ways: individualism, power distance, masculinity, uncertainty avoidance, and Confucian dynamism (or long-term orientation). These aspects of culture introduce sets of dichotomies intended to provide an analytical framework. Individualism describes the relationship between the individual and the community by examining the importance attached to individual freedom, achievement, and personal fulfillment compared with collective effort, achievement, and loyalty to organizations and groups. Some descriptions of this dichotomy divide the categories of individualism and collectivism into vertical and horizontal. Vertical individualism expresses the desire for personal advancement through accession in a hierarchy. Horizontal individualism stresses uniqueness and self-reliance apart from any group and incorporates a perception of greater equality.⁸⁵ Vertical collectivism emphasizes loyalty to one's group and assumes hierarchical relationships between groups and with others. Horizontal collectivism also assumes a greater equality with others and highlights common goals, interdependence, and more comprehensive social connections.⁸⁶

Power distance traces values regarding inequality of power in the workplace. High power-distance accepts unequal distribution of power in institutions as legitimate and thus encourages loyalty and obedience. Low power-distance grants less legitimacy with subsequent alteration in the attitudes of subordinates. Masculinity is a dated label for the contrast between the values of heroism, assertiveness, material success, and resolution of disputes through conflict on the one hand, with those of social harmony, modesty, caring for the poor and the weak, and resolution of conflicts through conciliation and consensus on the other hand. Uncertainty avoidance divides cultures based on how comfortable the culture is with uncertainty. Aversion to uncer-

tainty places greater reliance on stability, on highly structured bureaucracies, on rules and on employment security. A final distinction considers whether a society favors the accomplishment of long-term goals or of short-term ones, whether the society focuses on the future or on the preservation of present traditions.

Each of these dichotomies, however, creates a continuum along which countries may lie.⁸⁷ One experienced observer, Dworkin, states that power distance, individualism, and Confucian dynamism 'are most relevant to examining whistleblowing among cultures.'⁸⁸ She suggests how these classifications could explain why the United States, Australia, and England enacted whistleblower laws prior to Japan. She, however, quite properly cautions that these 'classifications are, of course, only tools of analysis'.⁸⁹

Despite insights contained within the analytical framework created by these dichotomies there remain a number of reasons for caution. One premise of Hofstede's analysis uses national attitudes as the surrogate for cultural ones. At least one empirical study finds that nationality was a better predictor of attitudes than these cultural classifications. 'Crucially, the influence of cultural orientation varied by nationality and also across the various dimensions of whistle-blowing, meaning that the same cultural orientation could have different effects in different countries.'⁹⁰ This finding supports the more general objection to this premise based in part on the difficulties of its application in large ethnically diverse, multicultural societies.⁹¹ A study about whistleblowing in South Africa indicated that ethnicity played an important role separate from these cultural classifications.⁹² Another study questioned these classifications when it noted that contextual variables in individual organizations may be more important.⁹³ Other researchers noted the failure of these classifications to consider the effects of education, religion, and ethics.⁹⁴

Moreover, several empirical studies disqualify hypotheses that researchers formed using Hofstede's analytical framework.⁹⁵ Effective studies often reject hypotheses that had been based only on logical application of accepted criteria. These rejections, however, illuminate limitations on the analytical capacity of these classifications. Unfortunately, the results of these studies may not substitute for these classifications as tools of analysis. There are a limited number of empirical studies; they vary in the definitions of the classifications and the ways in which the classifications are measured. Many of them rely on very small samples, and the construction of those samples differs. There are no significant longitudinal studies, no comprehensive comparisons, and none between more than a handful of countries. Longitudinal studies are important because researchers recognize that culture is not static and current studies capture only moments in time.

Despite criticism, these classifications have generated useful research and analysis. This discussion invites interested readers to consider how each of the

dichotomies applies in their countries and where their cultures fall along the continuum contained within each dichotomy. At first, dichotomies can be applied separately, but gradually combined to explain attitudes toward whistleblowing. This exercise enables speculation regarding the effects of their cultures on whistleblower laws – and on their successes and failures.

Differing legal traditions also provide a perspective from which to consider the recent expansion of global whistleblower laws. Glenn's examination of the Islamic legal tradition⁹⁶ permits speculation on how a non-Western legal tradition may influence the acceptance of whistleblower laws. Islamic law represents many schools of thought about the character of the law, its susceptibility to change, and the appropriate methods of argument to support interpretation. Islamic law rests heavily upon revelation,⁹⁷ and privileges analogical reasoning over philosophical speculation. Several schools of thought support traditional interpretations and make modifications more difficult. Islamic law perceives of dispute resolution much differently than the common or civil law.⁹⁸ Glenn describes each case as particular and the parties and the *qadi* are seen as appropriate participants with the *qadi* in the resolution of the case. The movement for legislating Islamic law failed and that failure created 'conceptual problems with the idea of an Islamic state forever after.'⁹⁹ These aspects of Islamic law make it less receptive to proposals for a variety of Western legal reforms, including whistleblower laws.

Although diverse in its character, Islamic law values community over liberty. In the West, the conversation about Islamic law has focused on constitutionalism, human rights, and equality. In Islam, that conversation has concerned God's word, international social justice, and the community of believers. Thus, some of the bodies of law from which whistleblower laws have arisen seem less congenial than others with these traits of Islamic law. For example, the roots of whistleblower protection in human rights laws may seem less consistent with Islamic law than other legal perspectives.

Those justifications for whistleblower laws that arise from theories of open-government and accountability encounter the limitations of Islamic law in its application to the structure of the state. Whistleblower laws as a form of market regulation confront the character of Islamic contract and commercial law that relies much more on the context of society and that rejects Western forms of corporate ownership and financial arrangements, in part because they are viewed as unjust enrichment. Islamic law also discards Western concepts that are viewed to empower speculation and unfair distribution of risk.¹⁰⁰

Justifications for whistleblower laws as a modification in the employment relationship may not encounter some specific objections to justifications based on human rights, open-government, or market regulation. Justifications based on reform of employment law, however, may still face the reservations created by more general distinctions between Western and Islamic legal principles and

practices and the greater reluctance of Islamic law to incorporate Western concepts, particularly through legislation.

Other aspects of Islamic law seem more congenial to recognition of whistleblowing. Islamic law stresses the role of witnesses¹⁰¹ and shares an oral view of conflict resolution that is at least reminiscent of the common law.¹⁰² The importance of witnesses permits whistleblowers to be perceived as witnesses to the truth. The significance of witnesses and the resultant requirement to protect them offers some basis for approaches analogous to whistleblower laws.

The community aspects of Islamic law represent that 'law' as a religious ideal. That conception invites the application of the ideal to the reality of the lives of the communities that it serves to guide. These aspirations offer flexibility and forgiveness and recommend standards rather than rules. Combined with more general principles of those ideals, Islamic law could be receptive to aspects of whistleblower laws.

Our own concepts of equality, justice, human rights, and democratic participation can be viewed as 'quasi-religious' ideals mandated by 'natural' – even divine – law. These ideals guide as well as direct. The first chapters of this book demonstrate how events drawing on those ideals can dramatically change attitudes toward whistleblowing. Chapter 15 describes how different perceptions of whistleblowing draw on the religiously inspired ideals of our own legal tradition.

Like other legal traditions, the legal traditions of Islam are determined by its history. Glenn describes how that history gives Islamic law a dynamism driven by conflicts and tensions. Such a legal tradition can sometimes surprise rather than affirm the expectations of outside observers.

Some countries with overwhelmingly Islamic populations, however, have adopted some form of whistleblower laws. These countries include Indonesia, Malaysia, Pakistan, and Jordan. These laws, however, are anti-corruption and witness protection laws. Because of this, they can be linked to international anti-corruption efforts and for this reason could be perceived more as a form of the government's regulation of its own administration than a more broadly applicable provision.

The explosion of whistleblower laws in the last two decades invites speculation as to the reasons for the expansion of these laws in many countries, in international organizations, and in regional treaties and conventions. These laws offer new models for whistleblower laws. By introducing the effects of culture and legal traditions, they provide another way of evaluating the successes and failures of whistleblower laws.

NOTES

1. There are several compilations of national whistleblower provisions. One is that of the National Whistleblower Center, www.whistleblower.org/index.php?options=com_content&task=view&id=7741 items. David Banisar, *International Standards and Developments, in Contemporary DEBATES ON CORRUPTION & TRANSPARENCY: RETHINKING STATE, MARKET AND SOCIETY* 181, 190 (Irma Sandoval ed., 2011).
2. Though the order is approximate because of the ways the surveys characterize these laws.
3. David Lewis, *Introduction*, in *A GLOBAL APPROACH TO PUBLIC INTEREST DISCLOSURE: WHAT CAN WE LEARN FROM EXISTING WHISTLEBLOWING LEGISLATION AND RESEARCH?* 2 (David Lewis ed., 2010) [hereinafter *A GLOBAL APPROACH TO PUBLIC INTEREST DISCLOSURE*]. Lewis's comment considers Wim Vandekerckhove, *European Whistleblower Protection*, in *A GLOBAL APPROACH TO PUBLIC INTEREST DISCLOSURE* 15–35.
4. Robert G. Vaughn, *Introduction*, in *FREEDOM OF INFORMATION xxvii–xxvix* (Robert G. Vaughn ed., 2000), *INTERNATIONAL LIBRARY OF ESSAYS IN LAW AND LEGAL THEORY* (Tom Campbell series ed., 2d series) (describing the implications for global freedom of information laws of the dissolution of the Soviet Union); John M. Ackerman and Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85 (2006) [hereinafter *The Global Explosion of Freedom of Information Laws*].
5. *The Global Explosion of Freedom of Information Laws*, *supra* note 4, at 86–87 (looking at Eastern Europe), 111–12 (open-government laws as symbols of democracy).
6. Chapter 15 examines an 'open-government' perspective from which to evaluate whistleblower laws, a perspective that incorporates both whistleblower and freedom of information laws.
7. Chapter 15 examines a 'market-regulation' perspective from which to evaluate whistleblower laws.
8. Chapter 9 describes how private-sector whistleblower laws address this aspect of market regulation.
9. Chapter 14 explores the relationship between civil society groups and whistleblower laws.
10. Anna Myers, *Whistleblowing – The UK Experience*, in *WHISTLEBLOWING AROUND THE WORLD* 102–03 (Richard Call and an Guy Dehn eds., 2004) [hereinafter *WHISTLEBLOWING AROUND THE WORLD*].
11. PUBLIC CONCERN AT WORK, PUBLIC INTEREST DISCLOSURE ACT OF 1998: AN INTRODUCTION TO THE LEGISLATION WITH AUTHORITATIVE NOTES ON ITS PROVISIONS, SECTION BY SECTION, available at <http://www.pcaw.co.uk/pdfs/pida/pdf>.
12. Eric Feldman, *Blood Justice: Courts, Conflict and Compensation in Japan, France and the United States*, 34 LAW & SOC'Y REV. 651, 677–82 (2000).
13. Leon Wolff, *New Whistleblower Protection Law for Japan*, 9 JAPANESE LAW 209–10 (2004) (hushing up auto recalls); Takashi Araki, 28 COMP. LAB L. & POL'Y 251, 273, 279 (2007) (law passed to 'protect people's lives and property').
14. Hideo Mizutani, *Whistleblower Protection Act*, 4 JAPAN LAB. REV. 95, 95, 102 (2007) (safety faults in nuclear power plant).
15. REPORT OF THE PRESIDENTIAL COMMISSION ON THE SPACE SHUTTLE CHALLENGER ACCIDENT, Vol. I, ch. V, at 82, 104, 117–18 (June 6, 1986).
16. Rudy Abramson, *Thiokol Aide Denies Pair Was Punished*, L.A. TIMES, May 21, 1986, at A9; Mark Hayhurst, *I Knew What Was About to Happen*, GUARDIAN, Jan. 23, 2001, at Feature, p. 6.
17. United Nations Convention Against Corruption, Article 32: Protection of witnesses, experts and victims.
18. Paragraph 69 of the Civil Convention on Corruption requires an 'unjustified sanction.' Thus a sanction is not unjustified if the report breached 'a duty of confidentiality.'
19. African Southern Development Community, Art. 4(e). The convention calls on member nations 'to encourage participation by media, civil society, and non-governmental organizations in efforts to prevent corruption' (Art. 4(i)).
20. ADB/OECD ANTI-CORRUPTION INITIATIVE FOR ASIA AND THE PACIFIC: COMBATING

CORRUPTION IN THE NEW MILLENNIUM, *Anti-Corruption Action Plan for Asia and the Pacific* 1, n. 1 (Tokyo, 30 November 2001) (listing the countries), available at <http://www.oecd.org/anti-corruptioninitiative/policydialoguemeasuringprogress/site/35021642.pdf> (last visited Aug. 13, 2012).

21. *Id.* at 3. Pillar 1 – Developing Effective and Transparent Systems for Public Service (including in Integrity in the Public Service, ‘Measures which ensure that officials report acts of corruption and which protect the safety and professional status of those who do’).
22. It is not clear that this protection is mandatory. This protection is only one way to ‘encourage’ public participation.
23. Inter-American Convention Against Corruption, March 29, 1996, Organization of American States, OEA/ser. k/xxiv. 1, CICOR/doc. 14/96 rev. 2, 35I. L.M. 742 (entered into force March 6, 1994). Art. III, para. 8 (paragraph 9 requires mechanisms ‘to encourage participation by civil society and nongovernmental organizations in efforts to prevent corruption’).
24. Robert G. Vaughn, Thomas Devine & Keith Henderson, *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers*, 35 GEO. WASH. INT’L L. REV. 857, 868 (2003) [hereinafter *The Whistleblower Statute Prepared for the Organization of American States*].
25. NICHOLAS LAMPERT, WHISTLEBLOWING IN THE SOVIET UNION 7 (1985).
26. Lampert’s book usefully explores in detail the role of whistleblowers in the Soviet Union.
27. WHISTLEBLOWING IN THE SOVIET UNION, *supra* note 25, at 2.
28. Lampert’s work did not say that the problems of official and managerial irregularity were worse in the Soviet Union than in other societies or that the Soviet Union was threatened by contradiction between legal and actual norms.
29. WHISTLEBLOWING IN THE SOVIET UNION, *supra* note 25, at 2.
30. *Id.* at 61.
31. *Id.* at 8.
32. *Id.* at 9. According to Lampert, whistleblowers are ‘very often much more likely to penalized for their efforts than the offenders they are complaining about.’
33. The ‘most unpromising’ path is to appeal to one’s supervisor within an administrative hierarchy. In such circumstances, responses to allegations were often ‘only formal gestures.’ Rarely did even confirmed wrongdoers suffer from the allegations. *Id.* at 122.
34. *Id.* at Ch. 3 and page 121.
35. *Id.*
36. *Id.* at 154.
37. *Id.* at 143.
38. Chapter 14 considers how civil society groups create an international network of organizations supporting whistleblowers and advancing whistleblower laws.
39. GOVERNMENT ACCOUNTABILITY PROJECT, HOW THE WORLD BANK’S PEER REVIEW SERVICES DENY STAFF THE RIGHT TO A FAIR HEARING (2011).
40. Among such works are: A. J. BROWN, WHISTLEBLOWING IN THE AUSTRALIAN PUBLIC SECTOR (Australian National University epress 2008), http://epress.anu.edu.au/whistleblowing_citation.htm; MARCIA P. MICELI, JANET P. NEAR & TERRY MOREHEAD DWORKIN, BLOWING THE WHISTLE: THE ORGANIZATION AND LEGAL IMPLICATIONS FOR COMPANIES AND EMPLOYEES (1992); ROBERTA ANN JOHNSON, WHISTLEBLOWING: WHEN IT WORKS – AND WHY (2003) [hereinafter WHISTLEBLOWING: WHEN IT WORKS]; FEDERICK ELLISTON, JOHN KEENAN, PAULA LOCKHART & JANET VAN SCHAICK, WHISTLEBLOWING: MANAGING DISSENT IN THE WORKPLACE (1985).
41. Chapter 12 examines the constitutional authority of Congress to acquire information from the executive.
42. A GLOBAL APPROACH TO PUBLIC INTEREST DISCLOSURE, *supra* note 3, at 2; Elletta Sangrey Callahan, Terry Morehead Dworkin & David Lewis, *Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest*, 44 VA. J. OF INT’L L. 879 (2004) (exploring whistleblower laws, assessing their effectiveness, and proposing modifications).
43. Chapter 9 describes these private-sector laws in the United States.
44. According to the European Bank for Reconstruction and Development’s 2010 Anti-

Corruption Report, 'It is expected that the Bank's whistleblower policy will be adopted during 2011.' WorldBank: http://siteresources.worldbank.org/INTSSTAFFMANUAL/resources/StaffManual_WB_web.pdf. United Nations: <http://www.whistleblower.org/storage/documents/UNPolicy.pdf> (original 2005 document), <http://www.wfp.org/sites/default/files/Whistleblower%20protection,%20circular%20EO2008-03.pdf> (2008 policy), www.whistleblowing.org/storage/document/GAP_Final-UN_vsUNDP_vs_UNICEF_vs_UNFPA_comparison_chart.pdf (GAP chart comparing whistleblower regulations at different UN organizations). African Development Bank: <http://www.afdb.fileadmin/uploads/afdb/Documents/Policy-Documents/18136242-EN-WHISTLE-BLOWING-POLICY-FINAL-WKF.PDF>.

45. Yuval Feldman & Orly Lobel, *The Incentive Matrix: The Comparative Effectiveness of Reward, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1190 (2010) (highest rate of self-reporting when faced with a combination of duty and high reward).
46. *Watson v. Dep't. of Justice*, 64 F. 3d 1524, 1530 (Fed. Cir. 1995) (permitting an agency to discipline a whistleblower who correctly reported criminal conduct by another border patrol officer after delay in reporting beyond that required in the regulations).
47. Enrique R. Carrasco, Wesley Carrington & Hee Jin Lee, *Governance and Accountability: The Regional Development Banks*, 27 BOSTON U. INT'L L.J. 1, 12–15 (2009) (African Development Bank), 25–26 (Asian Development Bank).
48. These scandals, described on the website of the Government Accountability Project, included the killing of a World Bank consultant in Iraq, attacks on family planning, and abuse of authority by Wolfowitz in aiding his romantic partner at the Bank.
49. Warren Hoge, *U.N. to Detail Kickbacks Paid for Iraq's Oil*, N.Y. TIMES, Oct. 27, 2005, at A5, col. 1.
50. Among these whistleblowers was Andres Thompson whose book, *EMERGENCY SEX AND OTHER DESPERATE MEASURES* (2004), described these abuse and also catalogued the failure of UN officials to address these issues and rampant corruption.
51. *The Whistleblower Statute Prepared for the Organization of American States*, *supra* note 24. The following discussion of that statute is drawn from this article.
52. *Id.* at 897.
53. Donald C. Dowling Jr., *Sarbanes-Oxley Whistleblower Hotlines Across Europe: Directions Through the Maze*, 42 INT'L LAWYER 1 (2008) (describing resistance to anonymous hotlines in Europe) [hereinafter *Whistleblower Hotlines Across Europe*].
54. WHISTLEBLOWING: WHEN IT WORKS, *supra* note 40, at 14–23 (describing whistleblowing in the United States as 'part of the cultural landscape') (asserting that the 'strong belief in individualism' is 'part of the American personality' and 'the public's reception to whistleblowing is supported by this long-held belief').
55. Gregory Katz-Benichou & Marc Lenglet, *Transparency & Whistleblowing in France: Anatomy of a National Taboo*, paper presented to Workshop: Moral Foundations of Management Knowledge, Oct. 13–14, 2005, Essac Business School, Cergy-N Pontoise, France, at 52, available at <http://citesecrix.ist.psu.edu/viewdoc/download?doi=10.1.1.130.9100&rep=rep1&type=pdf#page=51> [hereinafter *Anatomy of a National Taboo*].
56. Robert O. Paxton, *Tricks of Memory* (book review of *THE VICHY SYNDROME: HISTORY AND MEMORY IN FRANCE SINCE 1944*) THE NEW YORK REVIEW OF BOOKS, Nov. 7, 1991.
57. *Anatomy of a National Taboo*, *supra* note 55, at 51.
58. *Whistleblower Hotlines Across Europe*, *supra* note 53, at 13. Dowling notes that many other European countries, including the Netherlands, Portugal, Slovakia, Spain, and Norway, 'have laws that actively promote workplace whistleblower laws,' that 'affirmatively promote' anonymous whistleblowing. *Id.* at 14.
59. Laura P. Hartman, Dawn R. Elm, Tara J. Radin & Kelly Richmond Pope, *Translating Corporate Culture Around the World: A Cross-Cultural Analysis of Whistleblowing as an Example of How to Say and Do the Right Thing*, *notizie di POLITEIA*, XXV, 93, 2009 ISSN 1128–244 at 263 [hereinafter *Translating Corporate Culture*].
60. *Whistleblower Hotlines Across Europe*, *supra* note 53, at 12.
61. *Id.*

62. *Id.* at 13. In Slovakia failure to report wrongdoing to the police is a crime.
63. Mukelani Dimba, Lorraine Stober & Bill Thompson, *The South African Perspective*, in *Whistleblowing Around the World*, *supra* note 10, at 143–44, 152.
64. William DeMaria, *Common Law-Common Mistakes?: Protecting Whistleblowers in Australia, New Zealand, South Africa and the United Kingdom*, 19 INT'L J. OF PUBL. SECTOR MGMT 643 (2006) [hereinafter *Common Law-Common Mistakes*].
65. JOHN BOWERS QC, MARTIN FODDER, JEREMY LEWIS & JACK MITCHELL, *WHISTLEBLOWING: LAW AND PRACTICE* (2007) [hereinafter *WHISTLEBLOWING: LAW AND PRACTICE*].
66. Although some differences exist between the provisions, they are connected by common features. David Lewis & Tina Uys, *Protecting Whistleblowers at Work: A Comparison of the Impact of the British and South African Legislation*, 49 MGMT. LAW 79–96 (2007).
67. *Common Law-Common Mistakes*, *supra* note 64; Amelia Naidoo, *Whistleblowing Seen as Breaking Ranks*, IOL (Sept. 28, 2007), available at <http://www.iol.co.za/news/south-africa/whistleblowing-seen-as-breaking-ranks-1.372649>.
68. Kristin Trott, *The Australian Perspective*, in *WHISTLEBLOWING AROUND THE WORLD*, *supra* note 10, at 119–20. William DeMaria describes the ferocity of institutional retaliation against whistleblowers in Australia. WILLIAM DEMARIA, *DEADLY DISCLOSURES: THE ETHICAL MELTDOWN OF AUSTRALIA* (1999).
69. Kim Sawyer, *Courage Without Mateship*, paper presented at the National Conference of Whistleblower Australia, November 2004, at 4. Sawyer argues that mateship makes whistleblowing in Australia different. Mateship has come to imply 'a joint monetary interest. Mates form companies, award contracts to each other, protect each other and honour each other. The corporatization of mateship is one of the most profound principles of Australia.'
70. *Translating Corporate Culture*, *supra* note 59, at 262.
71. *Id.*
72. Robert G. Vaughn, *Transparency – The Mechanisms: Open Government and Accountability in the United States*, ISSUES IN DEMOCRACY vol. 5, no. 2 (2000) at 13, 19 (citing ALAN F. WESTIN, *PRIVACY AND FREEDOM* (1st ed., 1967)).
73. Chapters 2 through 6 describe the changes in perceptions toward whistleblowers.
74. *WHISTLEBLOWING: LAW AND PRACTICE*, *supra* note 65, at 11–12 (describing the effects of the Nolan Report and a series of public disasters in Britain).
75. Sandra Perks & Elroy E. Smith, *Employee Perceptions Regarding Whistle-Blowing in the Workplace: A South African Perspective*, 6 J. OF HUMAN RESOURCES MGMT. 15–22 [hereinafter *Whistleblowing in the Workplace: A South African Perspective*].
76. Chapter 16 describes Drake's case in more detail.
77. United Nations Convention Against Corruption, Art. 33 is entitled Protection of Reporting Persons [hereinafter UNCAC].
78. UNCAC, Art. 3 I. Overview. In 1986 I was introduced to an audience in Buenos Aires, Argentina, as an expert on 'whistleblowing.' After the audience began to laugh I learned that term was used colloquially to refer to some specific sexual practices.
79. *Translating Corporate Culture*, *supra* note 59, at 259.
80. *WHISTLEBLOWING: LAW AND PRACTICE*, *supra* note 65, at 11–12.
81. *WHISTLEBLOWING: WHEN IT WORKS*, *supra* note 40, at 14–23.
82. *Id.* at 16.
83. Yukiko Miki, *THE POSITION IN JAPAN*, in *WHISTLEBLOWING AROUND THE WORLD*, *supra* note 10, at 154.
84. David A. Ralston, David H. Holt, Robert H. Terpstra & Yu Kai-Cheng, *The Impact of National Culture and Economic Ideology in Managerial Work Values: A Study of the United States, Russia, Japan, and China*, 39 J. OF INT'L BUSINESS STUDIES 8 (2008). The following description of Hofstede's analytical scheme relies in part on this article and on the Park et al. article cited in the next footnote.
85. Heungsik Park, Jolm Blenkinsopp, M. Kemal Oktan & Ugui Omurgandison, *Cultural Orientation Toward Whistleblowing: A Comparison of South Korea, Turkey, and U.K.*, 82 J. OF BUS. ETHICS 929 (2008) [hereinafter *A Comparison of South Korea, Turkey and the U.K.*].

86. *Id.* at 931.
87. Terry Morehead Dworkin, *Whistleblowing, MNCs, and Peace*, 35 V AND J. TRANSNAT'L L. 457, 472 (2002).
88. *Id.*
89. *Id.*
90. *A Comparison of South Korea, Turkey and the U.K.*, *supra* note 85, at 937. '[T]he relation between cultural orientation and attitudes toward whistleblowing cannot be generalized across countries.'
91. John P. Keenan, *Comparing Indian and American Managers on Whistleblowing*, 14 EMPLOYEE RESPONSIBILITIES AND RIGHTS J. 79, 87 (2002).
92. *Whistleblowing in the Workplace: A South African Perspective*, *supra* note 75, at 22 (a highly significant relationship was found between ethnic groups and personal perceptions of whistleblowing); Brent MacNab et al., *Culture and Ethics Management: Whistleblowing and Internal Reporting within a NAFTA Country Context*, 7 INT'L J. OF CROSS CULTURAL MGMT. 5, 22 (2007). Although collectivism 'is often assumed to be a cultural dimension that is significantly related to internal reporting and whistleblowing . . . our research finds no support for this position.'
93. Randy K. Chiu, *Ethical Judgment and Whistleblower Intention: Examining the Moderating Role of Locus of Control*, 43 J. OF BUS. ETHICS 72 (2003).
94. Richard C. Brody, John M. Coulter & Summing Lin, *The Effect of National Culture in Whistleblowing Perceptions*, 3 TEACHING BUS. ETHICS 65, 72 (1999) [hereinafter *The Effect of National Culture in Whistleblowing Perceptions*]. 'The Hofstede dimensions themselves are incomplete in so far as they omit other central components to ethical reasoning, such as training and religion.'
95. *A Comparison of South Korea, Turkey and the U.K.*, *supra* note 90, at 937 (the influence of cultural orientation varied by nationality); Heungsik Park, Michael T. Rehg & Donggi Lee, *The Influence of Confucian Ethics and Collectivism on Whistleblower Intentions: A Study of South Korea Public Employees*, 54 J. BUS. ETHICS 387, 399 (2005) ('Overall these results show that Confucian Ethics has varying effects on whistleblowing intentions. Therefore, it is unwise to assume that Confucian ethics system has a blanket effect either way on whistleblowing.'). *The Effect of National Culture in Whistleblower Perceptions*, *supra* note 94, at 6 ('differences related to individualism were observed between U. S. and Japan but were not as strong or pervasive as expected'), citing another study which found there were 'no significant differences in perceptions of power distance between bosses and subordinates' between US and Taiwanese students); Judy Tsui & Carolyn Windsof, *Some Cross-Cultural Evidence on Ethical Reasoning*, 31 J. BUS. ETHICS 143, 148 ('collectivism is thus not consistent with the highest score of ethical reasoning which focuses on personally held principles').
96. H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 171–223 (3d ed. 2007). The following paragraphs draw on this chapter of Glenn's book.
97. *Id.* at 172–76. These sources include the Koran, the Sunna, the ijma, and analogical reasoning. Glenn describes the nature of these sources.
98. *Id.* at 178. 'The process is not adversarial, in common law language, but neither is it investigative in the formal manner of civil law procedure.'
99. *Id.* at 180
100. *Id.* at 184.
101. JOSEPH SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW* 18 (primacy of witnesses in early Islam), 193 (role of witnesses more generally) (1964).
102. Glenn, *supra* note 96, at 178–80.

14. Civil society

The role of nongovernmental organizations, both in the United States and in other countries, represents one of the successes of whistleblower laws. These groups support whistleblowers, represent them, address identified misconduct, and seek enactment or reform of whistleblower laws. Other groups view advocacy regarding whistleblowing as adjunct to reforms regarding specific issues, such as environmental protection, public health and safety, financial services, racial justice, labor protections, and human rights. Still other groups see whistleblowing connected with the interests of specific professions, such as nursing, science, engineering, or law. Some organizations are identified by particular characteristics, such as race, citizenship, age, religion, or gender. All of these organizations, however, play important roles in the advancement of whistleblower laws. Their guidance and advice to whistleblowers necessarily contain judgments about the strengths and weaknesses of whistleblower laws. In this regard, whistleblower advocacy organizations offer a particular perspective from which to examine the successes and failures of whistleblower laws.

In the United States, organizations such as the American Civil Liberties Union (ACLU), the American Federation of Government Employees (AFGE), and the National Treasury Employees Union (NTEU) predate World War II. Their advocacy supporting the rights of free speech of public employees advanced justifications that would subsequently support whistleblower laws. For example, the ACLU resisted restrictions placed on the rights of free speech of public employees through loyalty oaths, the prohibition or punishment of free association, and tests of political or social orthodoxy. The ACLU's representation of Ernest Fitzgerald, perhaps the iconic whistleblower of the late 1960s, linked it to a struggle that influenced the passage of the whistleblower provision of the Civil Service Reform Act of 1978 (CSRA).¹ The organization also filed an *amicus* brief in *New York Times v. United States*,² the case in which the United States Supreme Court rejected the attempt of the government to prevent the publication of the Pentagon Papers provided to the *Times* and the *Washington Post* by Daniel Ellsberg. In its congressional testimony the ACLU stressed the importance of protecting whistleblowers.³ The ACLU's advocacy identified control over information as critical to liberty and government accountability. Whistleblower laws built on this advocacy for the provision of public access to hidden information.

Federal employee unions, such as the AFGE and the NTEU, campaigned for the interests of federal employees. These unions lobbied extensively regarding the CSRA. Federal unions saw the labor-management portions of the law and the disciplinary standards and appeals rights of federal employees as crucial. They also supported a number of proposals that strengthened the protections of federal employees. Both unions testified in favor of the whistleblower provision of the Act.⁴ Both the AFGE and NTEU, along with the National Federation of Federal Employees (NFFE), appeared at a 1977 conference on whistleblower protection, a conference that marked the birth of the Government Accountability Project (GAP).⁵ At the conference these unions described litigation on behalf of whistleblowers, inclusion of contract provisions allowing employees to grieve any violations of their rights, including retaliation for speaking out against misconduct, and support of legislation to protect whistleblowers. The NFFE described its 'blow the whistle campaign' while the AFGE recommended that whistleblowers make disclosures through the union.

This support for whistleblower protection portended alliances between whistleblower advocacy groups and labor organizations. Unions continued this cooperation in relation to subsequent legislation regarding public- and private-sector whistleblowers, as well as in other efforts to redress misconduct and to reduce dangers identified by both public- and private-sector employees. Recent reforms of whistleblower laws illustrate the longevity of this alliance.

Likewise, public interest organizations created by consumer advocate Ralph Nader promoted whistleblower protection as part of consumer protection and as central to civil service reform and official accountability.⁶ In the early 1970s, observers, such as Taylor Branch and Charles Peters, linked Nader to whistleblowing and identified him as the principal activist for whistleblower protection.⁷ Nader's whistleblower conference in 1971 presented the stories of many whistleblowers who disclosed risks to public health and safety created by the conduct of government officials or corporate officers.⁸ Nader's whistleblower protections emphasized legal protections for federal employees. Nader's involvement with the protection of whistleblowers also included representation of them. These whistleblower clients included poultry inspectors who were members of the AFGE. Public interest groups committed to reform in a variety of areas have remained important allies of whistleblower advocacy groups. Again, recent reforms of public- and private-sector laws illustrate the continuing connection.

The interconnected activities of these organizations demonstrate the importance of civil society. The ability of whistleblower advocacy groups to marshal civil society in support of whistleblowers speaks to the influence of these advocacy groups. This successful mobilization also demonstrates the importance of whistleblowing to civil society. Most, perhaps all, perspectives justi-

fying whistleblowing and whistleblower laws assume or accept the premises supporting citizen activism and civil society.⁹

These public interest organizations, unions, the ACLU, and consumer groups, both represented and shaped the cultural perceptions of whistleblowing and whistleblowers occurring in the 1960s and 1970s. This chapter focuses not on these public interest organizations but on whistleblower advocacy groups that arose as part of the cultural acceptance of whistleblowing and the legal protection of it. This chapter examines their role in whistleblower laws and their successes in making whistleblowing an important part of contemporary culture. These organizations represent different perspectives and they do sometimes disagree over the content of successful whistleblower laws. Despite these disagreements, these groups often employ similar strategies and tactics. They have been successful in building coalitions around whistleblower laws, coalitions involving many other civil society groups. They have created or inspired new organizations both within their home countries and internationally.

This chapter examines two organizations that represent the successes of civil society – the GAP in the United States and Public Concern at Work (PCW) in Great Britain. Both played a role in the enactment of whistleblower laws in their respective countries. Both help to solidify public acceptance for those laws and seek improvement in them. Both support and assist whistleblowers. Both stress response to the wrong doing reported rather than to the whistleblower – they emphasize the message and not the messenger.

THE GOVERNMENT ACCOUNTABILITY PROJECT

Thomas Devine, the Legal Director of GAP, referred to the second day of a 1977 conference on whistleblowing hosted by the Institute for Policy Studies (IPS) ‘as the actual birthday of GAP.’¹⁰ The conference featured speakers such as Nader, Ernest Fitzgerald, and several whistleblowers, including J. Anthony Morris, a virologist with the Food and Drug Administration who challenged the government’s swine flu immunization program. Morris received a standing ovation after GAP showed a film depicting Morris’s life.¹¹ Other whistleblowers included John Coplin, a federal meat-grading inspector at the United States Department of Agriculture (USDA), and Robert Sullivan, a General Services Administration employee who disclosed corruption in the agency’s Boston office.¹² Coplin’s and Morris’s stories appeared in descriptions of whistleblowers of the period – descriptions contained in books by Nader and by Peters and Branch, and reports such as the Leahy report, prepared by the staff of Senator Patrick Leahy. These descriptions were available to Congress during consideration of the whistleblower provision of the CSRA.

In 1984, GAP left the IPS to become a separate organization. The 1977 conference, however, foreshadowed the goals and strategies of the organization by emphasizing through films and discussions the personal narratives of important whistleblowers. The conference sought legislative changes to address whistleblowing. It stressed individual responsibility and the use of information provided by whistleblowers to address misconduct, to impose accountability and alter government practices and policies, and to create a nongovernmental organization to accomplish these goals.

A contemporary description of GAP's view of its mission fits easily with views from the 1977 conference. GAP defends whistleblowers against retaliation, publicizes and solves problems identified by whistleblowers, pursues legislation to secure whistleblower rights, and provides expertise on whistleblowing.¹³ This mission involves action for change and incorporation of whistleblowers into networks of groups empowering change. This network includes both public- and private-sector unions and nongovernmental organizations that address relevant areas of reform, such as the Federation of American Scientists, the Union of Concerned Scientists, the Consumer Federation of America, National Consumers League, the Center for Science in the Public Interest, and Public Citizen. Support for whistleblower laws draws specifically on 'good-government' groups, such as the Project on Government Oversight, Common Cause and the National Taxpayers' Union, 'as well as broad grassroots networks of hundreds of civil rights, environmental, labour, and civic' organizations.¹⁴

GAP's actions following the conference heralded its subsequent use of the media to address misconduct identified by whistleblowers. For example, GAP arranged a national tour for Coplin in which he examined meat in grocery stores and other commercial outlets to determine whether the meat had been properly graded.

Two areas highlight the strategies accompanying GAP's mission and illustrate how those strategies involve other civil society groups. One of these areas addresses nuclear safety, including faulty construction and quality control of nuclear power plants and the risks posed by the disposal of nuclear materials generated in the production of nuclear weapons. The other area concerns food safety, including the oversight of food production and imports by the Food and Drug Administration (FDA) and meat and poultry inspection administered by the USDA.

Recent attempts to enact the Whistleblower Protection Enhancement Act of 2010 (WPEA) to address weaknesses in the Whistleblower Protection Act of 1989 (WPA) exemplify how a whistleblower advocacy group like GAP participates in a large coalition of nongovernmental organizations. The lobbying efforts surrounding the WPEA demonstrate how civil society can be organized to support whistleblower laws.

Nuclear Safety

For a decade, 1980 through 1991, GAP pursued nuclear safety. Prior to 1980, GAP focused on whistleblowing by government employees rather than corporate employees. In 1980, a whistleblower involved with the Zimmer Nuclear Power Plant (Zimmer plant) owned by Cincinnati Gas and Electric Company (CG&E) came to GAP with allegations regarding significant failures in quality assurance programs related to the construction of the plant. GAP's representation of whistleblowers at the plant marked the beginning of GAP's involvement with nuclear power and with corporate misconduct. By the end of the decade, GAP had assisted about 600 nuclear whistleblowers in 17 nuclear power plants. The controversy surrounding the Zimmer plant raised concerns regarding the performance of CG&E and the efficacy of the Nuclear Regulatory Commission (NRC). This controversy highlights the creation of GAP's strategies and tactics.

Whistleblowers identified failures in quality assurance in the construction of the plant. These failures created conditions that had potential disastrous consequences if the plant were to receive an operating license from the NRC. Whistleblowers also described actions by CG&E to conceal these defects, including harassment of quality control engineers and other employees who raised safety concerns.

GAP approached nuclear safety by incorporating whistleblowers into the effort to resolve the significant public safety risks created by faulty construction, ineffective quality control, and improper management of nuclear facilities. One of GAP's first employees, Billie Garde, had been a nuclear whistleblower. Whistleblowers who reported problems regarding the Zimmer plant became important actors in legislative activities, in citizen outreach, and in media stories regarding the dangers of opening the facility.

These whistleblowers also provided expertise and experience in subsequent investigations and in the evaluation of responses by CG&E and contractors working for it. For example, whistleblowers with knowledge of or access to documents likely possessed by the NRC advised GAP regarding the scope of Freedom of Information Act requests. When the NRC denied possession of requested documents, GAP was able to respond effectively to NRC's assertions that the documents did not exist.

The failure of quality assurance at the Zimmer facility also highlighted the importance of whistleblowing as a group activity. When employees and inspectors saw respected colleagues punished for doing their jobs or for raising significant safety concerns many others came forward. At Zimmer, perhaps as many as 50 employees joined the original whistleblower. It became difficult for CG&E to discredit five or ten whistleblowers and virtually impossible to discredit 50 who confirmed salient details of the allegations against the utility company.

The credible allegations of serious risks to public safety attracted media coverage. Confirmations of allegations or doubts regarding the veracity of previous positions of the utility company led to additional stories, particularly in local papers and on local news. Each repetition of allegations that were accompanied by refutations of previous responses increased media interest until the utility became a source of almost routine coverage.

Hearings held by the Subcommittee of Energy and the Environment of the House of Representatives provided a forum for whistleblowers and served to vindicate their concerns.¹⁵ Whistleblowers played a central role in calling CG&E and the NRC to account. The testimony of whistleblowers contradicted positions taken by the management of CG&E, often to telling effect.

One aspect of GAP's strategy to prevent the opening of the Zimmer plant was based on convincing others of the truth of whistleblowers' allegations. It seemed that the senior management of CG&E and construction contractors were already aware of the problems. Likewise, regulatory officials at the NRC were another audience to convince of the dangers. In some instances, those officials may also have been aware of the problems but already had committed to positions that they might be reluctant to change. NRC officials might also have confronted political pressures and influences that prevented them from modifying previous positions.

The self-interest of other audiences, however, could affect the success of GAP's strategy. The credibility of the whistleblowers' allegations influenced the reactions of these other audiences. If local political and community leaders became convinced of the dangers they were more likely to resist attempts to open the plant. For example, at September 14, 1982, hearings before the Subcommittee on Energy and the Environment, the Chairman of the Cincinnati Environmental Advisory Council asked for congressional investigation and action. He asserted that the utility had refused to appear before the Advisory Council and that the city council of Cincinnati had approved an agreement with the utility in which the city council pledged to take no action to affect adversely the issuance of an operating license.¹⁶ State regulatory officials may have had different interests than regulators, such as the NRC. The media was more likely to follow stories that appeared not only credible but also likely true. As the hearings demonstrated, members of Congress likewise assessed their self-interest differently depending on the merits of the allegations brought before them. Finally, investors may simply have concluded that the credibility of the allegations, the incompetency of management, and the costs of proceeding with the plant outweighed the benefits of doing so.

Despite being 97 percent complete, the Zimmer plant never received an operating license. The NRC did not refuse to issue an operating license. Rather, investors in the project 'pulled the plug' because of the costs of obtaining that license.

GAP's attention to nuclear safety threatened the organization's survival. This attention provoked reactions from large, powerful and well-funded companies and from the NRC. In 1984, in response to attacks against it, GAP left the IPS. Owners of a nuclear power plant that GAP sought to close threatened litigation against the Institute. When it left IPS, GAP had limited resources and a small staff.

In 1987, during GAP's investigation of the South Texas Project, a nuclear power plant under construction southwest of Houston, the GAP official in charge of the investigation, Garde, notified the NRC that GAP would advise its clients not to provide information to the relevant regional NRC office. The ensuing conflict led the NRC to issue a subpoena that required the disclosure of the identities of GAP's clients and other informants. When GAP refused to identify these individuals, the NRC sought to enforce the subpoena in federal district court. If the court approved enforcement, the failure of GAP to comply with the subpoena could lead to monetary sanctions against GAP and the imprisonment of GAP employees. Thus, in opposing the subpoena, GAP risked its survival.

The district court concluded that absent a 'compelling government interest' an organization was not required to disclose the identity of its members if such identification would subject those members to retaliation for their association.¹⁷ Likewise, litigation served as political expression and association.¹⁸ The court concluded that whistleblowers who contacted GAP could be assumed to desire confidentiality and would want their names divulged to the government only with pledges of confidentiality 'acceptable to them.'¹⁹ '[I]f the government is successful in compelling Garde to reveal the information given to her, especially the identity of those she represents, GAP would lose the confidence of some of its whistleblower informants and its efforts to gather and present safety allegations will suffer. This is the harm that GAP claims, and it is cognisable under the right to association.'²⁰ The court also suggested, in a footnote, that the attorney-client privilege might protect the identity of the client when enough of the communication with the client has been disclosed so that the identification of the client is effectively the disclosure of the confidential communication.²¹ The United States Court of Appeals for the District of Columbia Circuit refused to vacate the order denying enforcement of the subpoena. The appeals court's refusal came even though the appeal was moot because GAP had given, and the NRC had accepted, information from which the names and identifying information regarding its clients and witnesses had been redacted to the satisfaction of the NRC.²²

Food Safety

Uptown Sinclair's 1906 novel, *The Jungle*,²³ described conditions in Chicago

slaughterhouses. Public perceptions of the risks posed by unsanitary and contaminated meat fueled legal regulation of the meat packing industry. Likewise, Harrison Wellford's book, *Sowing the Wind*,²⁴ documented similar risks to food safety from a then regulated meat and poultry industry. Some of Wellford's information came from USDA whistleblowers, particularly veterinarians and other meat and poultry inspectors. These whistleblowers were among the first represented by Nader's Public Interest Research Group and Public Citizen Litigation.

In the United States more than one federal agency protects food safety. Two of the principal agencies are the USDA that is responsible for inspection of meat and poultry processing plants and the FDA that oversees the processing and importation of food products. Other agencies whose activities implicate food safety include the Environmental Protection Agency, the Department of Labor, the Department of Transportation, and the National Oceanic and Atmospheric Administration.

GAP's involvement with food safety dates from 1980 when it supported the USDA meat-grader Coplin. GAP's activities related to food safety illustrate the integration of whistleblowers into actions directed at those responsible for creating the risks identified by them. These activities also show how GAP has built coalitions of nongovernmental organizations focused on one or more of the issues raised by the disclosures of whistleblowers.

Its current Food Integrity Campaign addresses many aspects of food safety from production to processing and transportation to retail distribution, to consumption and disposal of food. This 'lifecycle of food' considers conditions on farms, contamination of food and the environmental consequences of farming practices, inhumane treatment of animals, worker rights, food additives, contamination, and government regulation of this lifecycle.

This systemic approach generates synergies between whistleblowing advocacy and the substantive concerns of other groups. These synergies permit whistleblowers to become part of an offensive to change the identified conditions and to hold wrongdoers accountable. Whistleblowers provide expertise, speak to the media, address other audiences, including those persons pursuing change, participate in conferences, inform investigators, and often testify before congressional committees. The use of whistleblowers not only engages them, but also encourages others to come forward. GAP believes that these activities give whistleblowers a prominence that protects many of them from additional reprisals.

A few episodes in the period from 1980 through 2010 demonstrate the connection of whistleblowers with reform. Hobart Bartley, a USDA inspector, reported unsanitary conditions at a chicken processing plant that he monitored. When he continued to make such reports, USDA managers in 1985 transferred him to the night shift in another plant. Through GAP, he told his story to *Sixty*

Minutes, in a program that became famous. According to GAP, 'the program was credited for dropping poultry prices \$1 a pound for a year after the first broadcast.'²⁵ The publicity helped GAP to resist an attempt by the USDA to suspend Bartley.

In 2001, Kit Foshee, a quality assurance manager for a leading producer of lean boneless beef, was terminated by the company for which he worked. He described his refusal to participate in misrepresentation of microbial data to the USDA as the reason for his dismissal. Following GAP's publication of an opinion editorial about the company's claims regarding the effects of amoninating beef, *The New York Times* published two front-page stories drawing on interviews with Foshee. Foshee has appeared on a nationally webcast event sponsored by GAP and spoken at a conference on the Food Safety Modernization Act of 2010 (FSMA).²⁶

In 2002, a small meat processor, Montana Quality Foods (MQF), asserted that the USDA had harassed the business for inquiring about failures in the USDA's Hazard Analysis Critical Control Point quality assurance system.²⁷ The failures caused MQF to receive ground beef from ConAgra Food Corporation (ConAgra) that had been contaminated with *E. coli* bacteria. Subsequently, ConAgra recalled 19 million pounds of contaminated ground beef, one of the largest recalls in US history. In its report of failures in the USDA's quality assurance program and in its call for investigation of that program, GAP used the experiences of MQF's owner, John Munsell.

In 2010, Dean Wyatt, a public health investigator for the USDA, reported inhumane practices in the handling of animals at two slaughterhouses.²⁸ He approached GAP because the USDA ignored his reports. In his testimony before the Domestic Policy Subcommittee of the House of Representatives in March 2010, Wyatt described the inhuman killing of animals, the stabbing of animals shackled on a slaughter line, the herding of animals so that some were trampled, and the beating and dragging of animals that had fallen down. (Wyatt died in 2010 after his congressional testimony.)

Because of its scope, the Food Integrity Campaign attracted support from a number of civil society groups. These included Food and Water Watch, The Humane Society of the United States, the International Brotherhood of Teamsters, National Family Farm Coalition, Safe Tables – Our Priority, Union of Concerned Scientists, and United Food and Commercial Workers.

GAP's access to whistleblowers and its experience in food safety created alliances with other groups on a number of projects. Several congressional hearings illustrated this cooperation. Among these hearings are ones in 1987 (on USDA inspection activities), in 1989 (on USDA's 'Discretionary Inspection' plan for meat and poultry processing plants), in 1991 (on poultry safety), in 1994 (on US meat and poultry inspection issues, and on a review of USDA's meat inspection program), and in 2008 (on the federal meat inspection

program).²⁹ GAP testified at most of these hearings but other civil society groups also played important roles, particularly the Safe Food Coalition, the Consumer Federation of America, and the AFGF that represents meat and poultry inspectors in the USDA. In many instances, the information provided by GAP supported the reform agendas of these groups. The Safe Food Coalition represented 'an alliance of consumer advocacy, senior citizens, whistleblower protection and labor organizations formed in 1987 to work for improvements in the nation's food inspection programs.'³⁰ Among these groups were the American Public Health Association, Food and Allied Trades Department (AFL-CIO), National Consumers League, Public Voice for Food and Health Policy, United Food and Commercial Workers International Union, Safe Tables – Our Priority, and GAP. A similar alliance successfully advocated for the passage of the Food Safety Modernization Act of 2010.

The largest coalition of civil society groups was the one focused on passage of the WPEA to amend the WPA during several sessions of Congress.³¹ Because of its size, the coalition formed a steering committee to coordinate lobbying and testimony, and to adopt positions regarding issues in the proposed legislation. In addition to GAP, the steering committee contained the prominent open-government organization, the Project on Government Oversight, a federal employee union, the NTEU, an anti-waste and fraud advocacy group, National Taxpayers Union, and an important scientific association, the Union of Concerned Scientists. The last group played an important role because the coalition sought the addition of a provision in the law to protect scientific freedom and to prohibit the suppression of scientific data collected by the government.

On many issues, over a hundred civil society groups supported or opposed the positions taken by congressional committees. For example, the Make It Safe Coalition supported a provision that would guarantee jury trials for whistleblowers who left the process of administrative review and instead opted for *de novo* review in a federal district court. The members of the steering committee testified in many of the hearings regarding the proposed law. In addition to those members of the steering committee of the Make It Safe Coalition, and other prominent whistleblower protection advocacy organization, The National Whistleblower Center, played an important role in congressional consideration of the bill.³²

Lessons from GAP's Experiences

The experiences of GAP permit several propositions regarding the successes of civil society groups in supporting whistleblowing. First, lobbying and litigation play important roles in sustaining whistleblowing. Part of GAP's

support comes from attorneys' fees collected under statutes that allow their recovery from the government or from corporations.

Second, activities other than lobbying and litigation may be more effective in encouraging and protecting whistleblowers. Control of the information provided by whistleblowers has its tactical use and advances other goals. Whistleblowers should become part of an offensive that seeks to change the behavior of an agency or a company and to impose accountability for misconduct. Such offensives use information disclosures to the media and to Congress. These goals do not isolate but empower whistleblowers and create incentives for others to come forward. The prominence of a whistleblower may be a more significant protection than the formal legal ones. For this reason, GAP often does not rely on litigation or on formal procedures to protect whistleblowers.

Third, GAP's strategy leads to alliances with other nongovernmental organizations interested in reform in particular subject areas. These alliances make allies of organizations not otherwise focused on whistleblower laws. A strategy to create such alliances uses the systemic character of the conduct identified and thus recognizes that disclosures address the failures of institutions as well as the failures of individuals.

Fourth, the activities of GAP and other civil society groups change negative images of whistleblowing and of whistleblowers. The identification of whistleblowing with important interests in safety, honesty, and legality follows naturally from the strategy adopted by GAP. Civil society has built on the changes in perception that led to the whistleblower provision in the Civil Service Reform Act of 1978. Creation of a positive image for whistleblowing remains one of the greatest successes of civil society.

Fifth, GAP's activities depend upon public disclosures and thus rely on the media. The importance of nongovernmental organizations confirms the decision of Congress to include in the Whistleblower Protection Act disclosures to the press and to civil society organizations. Although several private-sector laws do not authorize such disclosures, GAP's activities demonstrate that public responses to retaliation against whistleblowers lead to public airing of allegations. In other cases, GAP's strategy can protect from retaliation a whistleblower who discloses beyond the scope of the applicable law.

Finally, GAP is a support organization for whistleblowers. As such, it operates under the admonition of the medical profession – first, do no harm. Counseling of whistleblowers requires an honest, if not brutal, description of the risks entailed. When GAP lawyers represent clients, the interests of those clients must prevail over reform.

PUBLIC CONCERN AT WORK

The first success of Public Concern at Work (PCW), the British charity, was its creation in 1993. Its founders examined what such an organization could do to help whistleblowers. Despite the availability of startup funding, the British Charity Commission refused to give the organization charitable status because it 'refused to accept that a whistleblowing helpline could be or do any public good.'³³ Attaining charitable status in 1993 required the *pro bono* assistance of a lawyer and the involvement of persons in business, labor, and consumer groups.

The difficulties of establishing the organization illustrate the hostility to whistleblowing in Britain. A 1981 study of whistleblowing in the British public service describes that hostility.³⁴ According to the study, most government officials, scholars, and perhaps even employees saw whistleblowing as illegitimate and properly sanctioned. Some of this hostility rested on the conventions of the British public service, particularly the principles of ministerial responsibility and civil servant anonymity. Those principles held ministers responsible for the conduct of civil servants under their control while protecting the identity of those involved in challenged or improper decisions. A ministry's disciplinary powers provided the appropriate response to the misconduct of individual civil servants. At the same time, accountability of the government to Parliament for the conduct of the minister responsible preserved democratic accountability.

A civil servant who disagreed with actions within a ministry or who was dissatisfied with official responses to allegations of misconduct by or within the ministry had a duty under these conventions to remain silent. If civil servants sought to speak out, they were required to resign before doing so. Even resignation did not always authorize disclosures because the Official Secrets Act 1989, with the threat of criminal sanction, barred civil servants from divulging official information. A British public administration scholar, Michael Wilding, captured this prevailing sentiment.³⁵

Although a few whistleblower inquiries and some aspects of public service regulations permitted an argument for the legitimacy of whistleblowing, legal regulation of it seemed unlikely. Moreover, the conventions of British culture supported these legal conventions regarding whistleblowing. Based on the author's experience in Britain, the most polite term used to describe a whistleblower was 'informer.' In an atmosphere where employee codes of conduct for major ministries were not available to the public, the author received an education in the impropriety and risks not only of disclosure, but also of merely raising questions.

The hostility toward whistleblowing in Britain in 1980 contrasted with the acceptance of whistleblowing in the United States. In 1978 the United States

Congress adopted extensive whistleblower protection for federal employees. The first chapters of this book recount the events, both large and small, that together shifted public and legislative opinion about whistleblowing. Similar changes occurred in the recognition of whistleblowing in the private sector. This contrast affirms the significance of the whistleblower provision of the CSRA.

Shortly after PCW's founding, its activities resulted in administrative and legislative changes regarding whistleblowing. In 1994, the Audit Commission and the Committee on Standards in Public Life in guiding their activities approved PCW's standards regarding employees who make public interest disclosures. In 1998, Parliament passed the Public Interest Disclosure Act (PIDA).

PCW attributes these successes to the incorporation into its proposals of the lessons learned from experience with its helpline. Also, the organization based its proposals for the Public Interest Disclosure Act on case law regarding confidentiality and the public interest. The greatest assistance, however, came from changes in public attitudes toward whistleblowing. These changes followed public health and safety disasters in Britain, including the sinking of the *Herald of Free Enterprise*, the explosion of the Piper Alpha oil platform, the crash of a commuter train at Clapham Junction station, and the discovery of assaults and sexual abuse of children in care in a residential facility in the London Borough of Islington over a period of in excess of 12 years.³⁶

Official inquiries into each of these events reached the same conclusion regarding the silence of employees. The inquiries supported the conclusion that in the decade preceding enactment of the law, employees had been aware of the dangers and either remained silent out of fear or found their warnings unheeded or were subjected to reprisal or compelled to leave their positions.³⁷ Public Concern at Work relied on these examples to support the need for the Public Interest Disclosure Act.

Public Concern at Work continues to improve the image of whistleblowers through education campaigns, including ones targeted at school children, and through its website. It also provides guidance for organizations and companies regarding implementation of the law and the creation of work places safe for whistleblowers. PCW's helpline provides assistance and advice. It does not, however, litigate cases.

OTHER CIVIL SOCIETY GROUPS

Both GAP and PCW have created other organizations that support whistleblowing. For example, GAP mounted a project organizing public employees to support environmental responsibility – a project that attracted and organized

federal employees in land management and other fields concerned with environmental damage. As a result of that project, whistleblowers formed a new group, Public Employees of Environmental Responsibility (PEER). That group often allies itself with GAP on issues relevant to both organizations. In 2010, Guy Dehn left the position of Executive Director of PCW to form a new organization, Witnesses Unafraid.

These two examples demonstrate the importance of nongovernmental organizations and exemplify the successes of these groups. They often provide support, assistance, and protection. They also address the concerns that motivate whistleblowers. They offer successes that sometimes evade government and corporate attacks on whistleblower laws.

Other national and international nongovernment organizations address whistleblowing. Such groups can be found in Canada, including the International Freedom of Expression Exchange, Federal Accountability Initiative for Reform, and Canadians for Accountability. In Australia, Whistleblowers Australia works to advance whistleblower laws and to support whistleblowers. Internationally, Transparency International and Article 19 pursue broader mandates but include whistleblowing as a topic of interest. Many open-government and good-government groups around the world perceive whistleblowing as an element of reform.

Both GAP and PCW illustrate how national civil society groups can foster whistleblowing laws internationally. Both groups work with civil society groups in other countries; both have sought whistleblower provisions in the regulations and standards of international organizations.

Indeed, GAP has worked closely with PCW testifying in Great Britain in 1998 in support of the Public Interest Disclosure Act. GAP also advised PCW regarding the campaign for enactment of the British whistleblower law.³⁸ 'Many GAP trips to Great Britain followed.'³⁹

GAP has also offered 'technical assistance' and 'shared whistleblowing techniques with other developed countries, including Canada, England, Israel, and Australia.'⁴⁰ In the 1990s, the United States Department of State chose GAP for an outreach program about whistleblower laws. Between 1998 and 2001 alone, GAP advised nongovernmental organizations from 'nearly fifty countries' during visits to Washington, DC.⁴¹ GAP also supported Russian nuclear whistleblowers and visited South Korea, Australia, and Canada to work with whistleblower advocacy groups in those countries.⁴² Tom Devine, the Legal Director of GAP, was one of the contractors with the Office of Legal Cooperation of the Organization of American States who was responsible in 2000 for preparing a model law to enforce the Inter-American Convention Against Corruption.⁴³

PCW also has worked with civil society groups in other countries.⁴⁴ In particular, South Africa and Japan have adopted laws patterned after the Public

Interest Disclosure Act. PCW met with nongovernmental organizations in those countries to advise as to the implementation of these laws.⁴⁵

Both GAP and PCW have influenced the development of whistleblowing regulations for employees of the World Bank. GAP conducted a special project on whistleblowing provisions at the international development banks. As part of this campaign, GAP published evaluations of the whistleblower systems at the World Bank and at each of the regional development banks. GAP also worked with Congress to require the World Bank to improve its policy. GAP played a prominent role in the whistleblower policy of the African Development Bank whose whistleblower regulations reflected ones recommended by GAP. GAP's success with the African Development Bank likely influenced the whistleblower regulations of the World Bank. GAP also fought and then joined with the United Nations to create whistleblower policies for its employees.

PCW also became involved in the development of the World Bank's whistleblower policies. Guy Dehn, the organization's Executive Director, served as a consultant to the World Bank on the development of its whistleblower policies. PCW also addressed whistleblower standards for employees of the World Bank and the regional development banks.

Not all scholars applaud the influence of these organizations on the whistleblower laws of other countries. William De Maria criticizes cross-country standardization that 'mocks cultural relativism.'⁴⁶ In particular, the adoption by South Africa and Japan of laws that rely on the model of Britain's Public Interest Disclosure Act fails to consider how these statutes make disclosures part of state power.⁴⁷ The failure to protect disclosures to the media and to nongovernmental organizations allows use of these laws to consolidate state power. Failure to protect broader disclosures may also limit the role of civil society in responding to the information provided by whistleblowers. De Maria believes that laws in Great Britain and South Africa adopt a common law approach that is at odds with structures and assumptions of civil law countries. The questionable aspects of these laws include 'a case centered approach to justice' rather than an emphasis on 'first principles'; 'an adversarial' rather than an 'investigatory system for arriving at the truth'; and an emphasis on individual wrong doing rather than systematic failures.⁴⁸

These cautions, however, accept the influence of these nongovernmental organizations. The examples of these two organizations, GAP and PCW, demonstrate the power of civil society. Descriptions of the activities of GAP and PCW suggest the existence of an international web of civil society organizations. The globalization of these efforts signals another success regarding whistleblower laws.

THE ASSESSMENTS BY CIVIL SOCIETY OF THE SUCCESSES AND FAILURES OF WHISTLEBLOWER LAWS

The views of whistleblower advocacy groups provide one perspective from which to evaluate the successes and failures of whistleblower laws. The guidance and advice of these organizations to whistleblowers contain their evaluations of whistleblower laws.

Publications of civil society groups counsel and advise whistleblowers.⁴⁹ This advice and counsel reflects judgments of each organization regarding the strengths and weaknesses and the successes and failures of the whistleblower laws examined by them. Guides produced by civil society groups are also likely to focus on the risks and dangers of whistleblowing and may emphasize those risks. If so, this emphasis might skew an assessment of successes and failures. These guides do not privilege protection over other aspects of whistleblower laws; they consider internal disclosures as an alternative, and guides of groups in the United States also discuss the availability of financial incentives. Still, these guides reflect extensive experience by some of the most important civil society groups in the world.⁵⁰

Guidance from civil society groups emphasizes whistleblower laws by encouraging potential whistleblowers to examine relevant laws before they act. These guides describe a number of laws and outline issues that any examiner of the successes and failures of whistleblower laws should consider. In the United States, the National Whistleblower Center (NWC) focuses on false claim and bounty provisions more than does GAP. All the guides suggest obtaining outside advice regarding legal and practical questions prior to disclosures.

The guides also recommend that whistleblowers consider whether it is possible to act within the system and to seek internal redress before deciding to make other disclosures. The guides stress the gravity of whistleblowing and describe the dangers and risks that attend it. Those risks must be evaluated in light of the possible outcomes of the disclosures. The US organizations express skepticism about the use of anonymous hotlines. This skepticism includes doubt about confidentiality, the lack of legal protection for some disclosures to hotlines, their effectiveness, and the implications for false claims actions. The NWC doubts the efficacy of some internal compliance systems and advises whistleblowers not to assume that the system will work, not to take legal advice from a compliance officer, and to avoid programs managed by corporate attorneys. One Australian whistleblowers' guide contains a chapter entitled, 'Proper Channels Just Don't Work.'⁵¹

GAP urges whistleblowers to examine their motives and to decide what

action an employee is willing to take if anonymous or internal disclosures are ineffective. All the guides suggest that whistleblowing should not be undertaken lightly and describe the financial and emotional costs of whistleblowing. Because of the risks of whistleblowing, whistleblowers need to obtain the support of family and friends and to explain the implications of the disclosures to members of their families. GAP advises whistleblowers to avoid isolation and to build solidarity with others within the organizations for which they work.

Whistleblower advocacy groups recommend that whistleblowers keep careful records and document every aspect of their experience but caution against acting as private detectives or engaging in investigations without understanding the legal and practical constraints. The GAP advice states explicitly what others do implicitly – stay on the offensive, develop a plan of action that focuses attention on the wrongdoer, and seek to change the unlawful or dangerous conduct.

These guides of these civil society groups recognize the importance of whistleblower laws, articulate weaknesses in them, question the effectiveness of administrative structures protecting whistleblowers, and portray whistleblowing as a risky act not to be lightly taken without information and preparation. These guides give a nuanced view of the successes and failures of whistleblower laws.

NOTES

1. SAMUEL WALKER, IN *DEFENSE OF CIVIL LIBERTIES: A HISTORY OF THE ACLU* 291 (2d ed. 1999).
2. *New York Times v. U.S.*, 403 U.S. 713 (1971).
3. *Civil Service Reform, Hearings on H.R. 11280 Before the H. Comm. on Post Office and Civil Serv.*, 95th Cong. 576 (1978) (testimony of Pamela S. Horowitz emphasizing the ACLU's long-standing commitment to employee rights and to the protection of those who 'disclose illegal or improper Government activity') [hereinafter *Civil Service Reform Act Hearings*].
4. *Id.* at 714 (testimony of the President of the American Federation of Government Employees), 159 (testimony of officials of the National Treasury Employees Union), 657 (testimony of the executive vice-president of the National Association of Government Employees).
5. *Whistleblower Forum*, 6 *THE BUREAUCRAT* 82–85 (1977) [hereinafter *THE BUREAUCRAT*].
6. *Civil Service Reform Act Hearings*, *supra* note 3, at 331 (testimony of Ralph Nader emphasizing the importance of the reform to American consumers).
7. CHARLES PETERS & TAYLOR BRANCH, *BLOWING THE WHISTLE: DISSENT IN THE PUBLIC INTEREST* 277–80 (1972).
8. This identification led to a whistleblower conference and subsequent publication of it. RALPH NADER, PETER PETKAS & KATE BLACKWELL, *THE NADER REPORT: WHISTLE BLOWING* ch. 7 (1972).
9. Chapter 15 presents four perspectives in whistleblower laws: an employment one, an open-government one, a market-regulation one, and a human rights one. Each of these perspectives draws on a different body of law.

10. Tom Devine, *The USA: Government Accountability Project*, in WHISTLEBLOWING AROUND THE WORLD: LAW, CULTURE AND PRACTICE 159 (Richard Call & Guy Dehn eds., 2004) [hereinafter *Government Accountability Project* in WHISTLEBLOWING AROUND THE WORLD].
11. THE BUREAUCRAT, *supra* note 5, at 3. Thomas Devine, the Legal Director of GAP reports that this film of Morris's life convinced him that he wanted to work for GAP and in the field of whistleblower law.
12. *Id.* at 61 (John Coplin), 64 (Robert Sullivan).
13. *Government Accountability Project* in WHISTLEBLOWING AROUND THE WORLD, *supra* note 10, at 160–61.
14. *Id.*
15. *Quality Assurance at the Zimmer Nuclear Station: Oversight Hearings Before the Subcomm. on Energy and the Env't of the H. Comm. On Interior and Insular Affairs*, 97th Cong. (1982) [hereinafter 1982 *Zimmer Hearings*].
16. *Id.* at 142–45.
17. *United States v. Garde*, 673 F. Supp. 604, 606, citing *NAACP v. Alabama*, 357 U.S. 449 (1958).
18. *Id.*, 673 F. 2d at 606, citing *NAACP v. Button*, 371 U.S. 415 (1963) and *In re Primus*, 438 U.S. 412 (1978).
19. *Id.* at 673 F. Supp. at 607.
20. *Id.*
21. *Id.* at 606, n. 1.
22. *United States v. Garde*, 848 F. 2d 1307, 1309 (D.D.C. 1988).
23. UPTOWN SINCLAIR, *THE JUNGLE* (1906).
24. HARRISON WELLFORD, *SOWING THE WIND* (1972).
25. Interview with Louis Clark in Washington, D.C. (February 22, 2011).
26. *Episode 32 – Highlights from GAP's Food Whistleblowing Conference*, GOVERNMENT ACCOUNTABILITY PROJECT, <http://www.whistleblower.org/multimedia/whistle-where-you-work/archive/1053-episode-32-highlights-from-gaps-food-whistleblower-conference> (last visited Aug. 14, 2012).
27. The material in this paragraph comes from the Food Integrity Campaign. *History of FIC*, FOOD INTEGRITY CAMPAIGN, <http://foodwhistleblower.org/about/history-of-FIC> (last visited Aug. 14, 2012). The whistleblower's allegation led to a report, *Shield the Giant: USDA's 'Don't Leak, Don't Know' Policy for Beef Inspection*.
28. *Id.* (under Dean Wyatt).
29. *Investigation into Food Safety and Inspection Serv. (FSIS) Inspection Activities: Hearing Before the Comm. on Oversight of Gov't Mgmt of the S. Comm. on Gov't Affairs*, 100th Cong. 53 (1987) (testimony of national president of AFGE), 59 (Vernie Ace, Inspector and GAP whistleblower); *USDA's 'Discretionary Inspection' Plan for Meat and Poultry Processing Plants, Hearings Before the Human Resources and Intergovernmental Relations Subcomm. of the H. Comm. on Gov't Operations*, 101st Cong. 3 (1989) (testimony of President National Joint Counsel of Food Inspection Locals), 44 (former Assistant Secretary for Food and Consumer Services), 63 (General Accounting Office testimony); *Poultry Safety: Consumers at Risk: Hearings Before S. Comm. on Labor*, 102th Cong. 122 (1991) (former Assistant Secretary of Labor testifying for the Consumer Federation of American with scientific experts); *U.S. Meat and Poultry Inspection Issues Joint Hearing Before the Subcomm. on Dep't Operations and Nutrition & Subcomm. on Livestock of the H. Comm. on Agric.*, 103rd Cong. 154 (1994) (testimony of Coordinator Joint Council of Food Inspection Locals), 191 (Safe Food Coalition); *The Fed. Meat Inspection Program: Hearings Before the Subcomm. on Agric. Research Conservation, Forestry and Gen. Legis. Of the S. Comm. on Agric. Nutrition & Forestry*, 103rd Cong. 8 (1994) (testimony of Safe Food Coalition), 197 (GAP testimony); *After the Beef Recall: Exploring Greater Transparency in the Meat Industry: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 37 (2008) (testimony of union officials), 166 (testimony of the Humane Society).
30. *U.S. Meat and Poultry Inspection Issues: Joint Hearing before. H. Subcomm. on Dep't Operations & Nutrition & H. Subcomm. on Livestock of the Comm. on Agric.*, 103rd Cong. 191 n. 2. (1994).

31. The Make It Safe Coalition includes 50 organizations. A letter submitted by GAP supporting the WEPA was signed by 253 nongovernmental organizations. S. 372 – *The Whistleblower Prot. Enhancement Act of 2009: Hearings Before the Oversight of Gov't Mgmt., the Fed. Workforce and the Dist. of Columbia Subcomm. of the S. Comm. on Homeland Sec. and Governmental Affairs*, 111th Cong. 59 (2009) (describing the number of organizations), 89–97 (listing nongovernmental organizations that signed the letter of support).
32. The National Whistleblower Center and the Project on Government Oversight could have been included in a more lengthy examination of whistleblower advocacy groups that have had a significant influence on whistleblower protection.
33. PUBLIC CONCERN AT WORK, A SWIFT GLANCE OVER THE SHOULDER (2003).
34. Robert G. Vaughn, *The Role of Statutory Regulation of Public Service Ethics in Great Britain and the United States*, 4 HASTING INT'L. AND COMP. L. REV. 341 (1981).
35. *Id.* at 375.
36. Chapters 9 and 13 address the events in more detail.
37. Anna Myers, *Whistleblowing: The UK Experience*, in WHISTLEBLOWING AROUND THE WORLD: LAW, CULTURE & PRACTICE 102–03 (Richard Call and Guy Dehn eds, 2005).
38. ROBERTA ANN JOHNSON, WHISTLE-BLOWING: WHEN IT WORKS – AND WHY 118 (2003).
39. *Id.*
40. *Id.* at 115.
41. *Id.* at 117.
42. *Id.* at 118–19.
43. Robert G. Vaughn, Thomas Devine & Keith Henderson, *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers*, 35 GEO. WASH. INT'L. L. REV. 857 (2003).
44. JOHNSON, *supra* note 38, at 19.
45. *Id.*
46. William DeMaria, *Common Law-Common Mistakes?: Protecting Whistleblowers in Australia, New Zealand, South Africa and the United Kingdom*, 19 INT'L. J. OF PUB. SECTOR MGMT. 643, 647 (2006).
47. *Id.*
48. *Id.* at 646.
49. These include STEPHEN KOHN, THE WHISTLEBLOWER'S HANDBOOK: A STEP BY STEP GUIDE TO DOING WHAT'S RIGHT AND PROTECTING YOURSELF (2011); THOMAS DEVINE ET AL., COURAGE WITHOUT MARTYRDOM: A SURVIVAL GUIDE FOR WHISTLEBLOWERS (1989); THOMAS DEVINE & TAREK MAASSARANI, THE CORPORATE WHISTLEBLOWERS SURVIVAL GUIDE (2011); BRIAN MARTIN, THE WHISTLEBLOWER HANDBOOK: HOW TO BE AN EFFECTIVE RESISTER (1999); and the Public Concern at Work's guidance is found on its website, <http://www.pcaw.org.uk/advice> (last visited Aug. 13, 2012).
50. The following summary captures only a part of the detail contained in these publications and each is worth a more detailed examination by those interested in the evaluations of whistleblower laws by these advocacy groups.
51. BRIAN MARTIN, SUPPRESSION STORIES (1997). In Chapter 6, 'Proper Channels Just Don't Work,' Professor Martin explains why proper channels are appealed to even though they fail 'time after time.' 'Most people seem to have an intense desire to believe that the formal structures of society can provide justice.' In fact, dissidents who speak out because they expect redress 'are shocked when the response is to attack them' rather than to remedy the injustices identified. *Id.* at 84.

15. Perspectives

Debates regarding the successes and failures of whistleblower laws are based upon the perceptions of whistleblowing used as the standards for evaluation. This chapter presents a conceptual framework for those debates. Preceding chapters provide the elements from which this framework is constructed.¹

FOUR PERSPECTIVES OF WHISTLEBLOWER LAWS

This conceptual framework identifies different perspectives of whistleblower protection and examines how those perspectives influence the character of legal standards and the scope of protections. Four perspectives – an employment one, an open-government one, a market-regulation one, and a human rights one – provide this framework. These perspectives do not simply label aspects of whistleblower laws; instead they emphasize differing justifications for whistleblower laws. Each perspective draws upon its own rhetoric and may engage contrasting groups of political actors and civil society groups. Each perspective presents different criteria for success and failure.

The coherency of these perspectives comes from the connection of each with a body of law containing its own theories and assumptions. These varying theories and assumptions can be more or less congenial to certain justifications for whistleblower laws. The body of law on which each draws also influences the character of legal protections. These perspectives share much in common and are not hermetically sealed categories – each influences the content of whistleblower laws.

Each of these perspectives is connected in different ways to whistleblower laws as an anti-corruption measure. Although each permits such protection, some are more likely to focus on the prevention of corruption as a justification for protection. Also, each presents differing reasons for the control of corruption. These perspectives offer a similar way of looking at the connections between whistleblower laws and regulation, particularly health and safety regulation.

These four perspectives, however, relate to one another in a variety of ways. For example, two perspectives, the employment and human rights ones, embody a greater concern with individual rights than the open-government

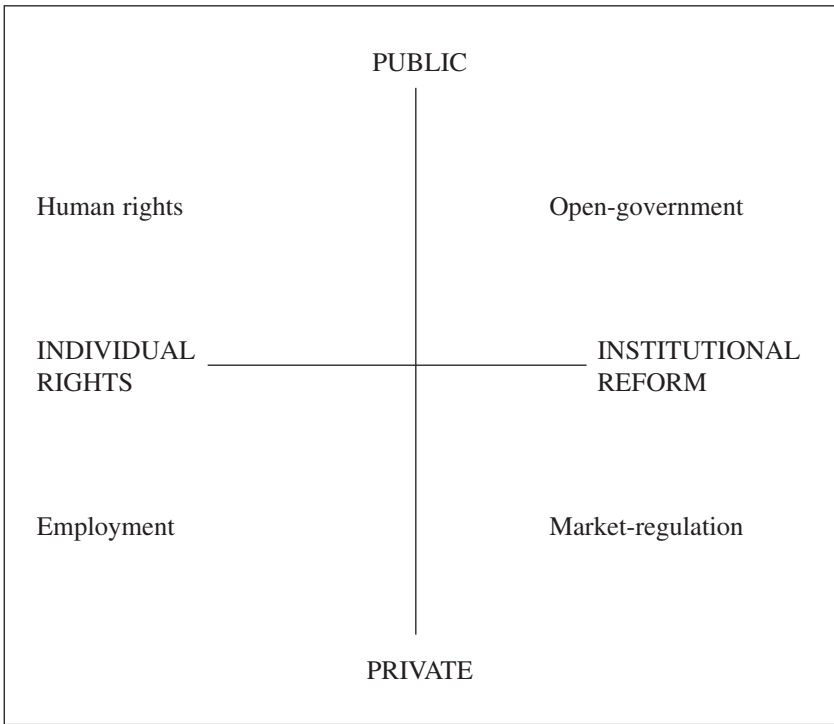


Figure 15.1 Four Perspectives on Whistleblower Laws

and market-regulation perspectives that express a different goal, that of institutional reform. In addition, two of the perspectives, the human rights and open-government ones, more likely address the public sector while the employment and market perspectives more likely address the private sector. These relationships are mapped in Figure 15.1 above.

Although these comparisons and contrasts are not the only way in which these perspectives relate to one another, these comparisons and contrasts challenge the separation of the perspectives and explain similarities in arguments regarding the successes or failures of whistleblower laws. These relationships depend in part on the body of law on which each of the perspectives draws.

Each of the four perspectives contains justifications and arguments that, though not necessarily inconsistent with those of the others, represent a distinct view of whistleblower laws. Each of these perspectives is tied to a body of law that both enables and limits whistleblower laws.

The Employment Perspective

The employment-based perspective sees whistleblower laws as a form of employment legislation. Whistleblower laws secure employee rights. These employee rights can be narrowly conceived as limited to workplace issues such as a safe working environment or one free from discrimination. These rights may be conceived broadly as related to individual autonomy or the protection of employees from potential liability for workplace misconduct. This emphasis on the protection of employee rights as a justification of protections can support a narrow scope of protected disclosures limited to a set of workplace laws or a broader scope of disclosures responding to employee autonomy and to potential liability for workplace misconduct.

Employment-based justifications, however, also address the needs of third parties for information available to employees. Such information includes various types of employer conduct that affect members of the public or regulatory and law enforcement agencies. Much of this conduct may not have the same direct effect on employees that would follow violations of workplace standards by employers.

Whistleblower laws secure these rights by encouraging employees to disclose particular types of employer misconduct. For example, most whistleblower legislation applies to disclosures and protections connected to the employment relationship.² Whistleblower protections resting on the employment relationship can also be supported as vindication of the interests of society rather than the interests of employees, however broadly or narrowly defined. Persons other than the employer need a variety of types of information, information that employees can provide.

The organization of modern societies encourages the treatment of whistleblower protection from an employment perspective. The activities of contemporary societies rely heavily upon government, including government agencies, and upon private entities, including corporations. Both private- and public-sector organizations can vary in size, but, except for the smallest groups, these organizations rely upon employees to carry out their activities. These employees may work in small organizations or they may be part of large bureaucracies. In either instance, they possess information that is often not otherwise available regarding misconduct, incompetence, corruption, and dangers and risks connected with the organizations that employ them.

A perspective that sees whistleblower law as an employment law provision permits considerable variety in those protections. For example, whistleblower laws can apply to all employers when that coverage logically permits disclosures of categories of misconduct and of safety risks that could affect a broad range of employers. Alternatively, whistleblower laws could be applied only to certain employers. For example, many whistleblower provisions in the

United States apply to different industries, such as the airline industry, the health care industry, including nursing homes and hospitals, and industries devoted to environmental protection, including waste disposal.³

Employment-based whistleblower laws can be based on the vindication of employee rights or on society's need for information regarding employer conduct. The distinction between these justifications is less stark than it may appear. Whistleblower laws also rest on the assumption that legal protections of employee disclosures will encourage employers to develop internal mechanisms to discourage external disclosures.⁴ The success of whistleblower laws depends on how well they encourage employers to develop trustworthy avenues of disclosure and to create an environment that assures employees they will not suffer retaliation for such disclosures. Whistleblower laws may more specifically regulate the character of these mechanisms for internal disclosure. For example, whistleblower laws in Australia include such specific regulation more frequently than whistleblower laws in the United States.⁵ Regardless of its intention, an employment-based whistleblower law seeks to change the workplace.

If whistleblower laws depend on the employment relationship, the definition of that relationship becomes crucial. The requirement of an employment relationship excludes from protection persons who are not treated as employees. An employment-based protection must address the status of independent contractors, of the employees of other companies who are working with a particular employer, of temporary employees, of applicants for employment, and of former employees.⁶

An employment-based protection requires that retaliation be connected to actions taken as part of the employment relationship. This requirement raises questions, such as: What types of employment actions will be considered retaliation? Is an employee protected from retaliation that is not job related, including off-the-job harassment through lawsuits, smear campaigns, blacklisting, or even physical violence? Such conduct does not necessarily constitute retaliation in statutes built on the employment perspective and specific provisions often are required to include these types of conduct as retaliation. Without these special provisions, allegations of retaliation require the interpretation of some broad term in the relevant statute or the definition of the retaliatory acts as employment-based.

Differing perceptions of public- and private-sector employment influence an employment perspective of whistleblower laws. Some legal systems draw sharp distinctions between public- and private-sector employment law.⁷ These distinctions indicate different content for public- and private-sector whistleblower laws. Differences between public- and private-sector laws may reflect theoretical or practical disparities. Practical disparities may include the size of public- and private-sectors, available remedies, and the political power of employers in the two sectors.

Employee organizations may see whistleblower laws as changing the relationship between employers and employees. In response, employers may resist whistleblower laws on this ground alone. If the employment perspective uses whistleblower laws to restructure the workplace, that use will face opposition from employers who resist interference with management prerogatives.

The current weakness of labor in relation to management cautions that whistleblower laws based on an employment perspective may be difficult to secure and existing protections difficult to enforce. In particular, the weaknesses of international protections of labor deny to this perspective the rich supranational sources of justifications and argument open to the other perspectives. The 1982 Convention No. 158: The Termination of Employment Convention of the International Labor Organization protects whistleblowing without using the term. Article 4 requires a valid reason for termination; Article 5 protects an employee who files a complaint against an employer or alleges violation of laws or regulations. Although the language of Article 5 might be broadly interpreted, the context of the Article suggests that such laws and regulations must be ones concerning the employment relationship itself. The International Labour Organization (ILO) lacks direct enforcement authority. Article 22 only requires reporting; for example, annual reports by signatories to the labor convention. The ILO whistleblower standards have not played a significant role in adoption of whistleblower laws internationally.⁸

The employment perspective does not ignore the interests of the public. Consideration of public interests often justifies the protections provided. Whistleblower laws rely heavily upon these instrumentalist values as a basis for protecting employees. This perspective, however, does make the adoption and enforcement of legal protections more difficult in the following way: the employment perspective invites a consideration of the interests of employers, as well as employees, and encourages the articulation of protection as a balance of these competing sets of interests. Employers can ably argue that the public interest, not the interest of employees, is properly balanced against those of the employer. The employer's interests thus require proof of the whistleblower's entitlement to protection.

The employee bears the burden of seeking and proving an entitlement to protection. When an employee seeks to meet this burden, the interests of the employer receive considerable weight and the public interests that animated protection often recede in importance. The employee often confronts alone the resources of an employer and is severely disadvantaged. Over time, the dynamics of statutory interpretation and enforcement created by the balancing of employer and employee interests and the public interest may narrow the scope and the effectiveness of protections.⁹ This dynamic portends failures in many whistleblower laws.

In contrast to the other perspectives that are information-based (open-

government laws, laws regulating markets, and human rights laws protecting free expression), the disclosure of information is not an integral part of employment law. The dominance of public- and private-sector bureaucracies requires the use of employment law. For this reason, the employment perspective encourages incorporation of the procedural and administrative mechanisms of employment law into whistleblower laws. The connections of the employment perspective to international law and international organizations are weaker and less well developed than those of the other perspectives.

Because employment law considers the interests of employers, it necessarily incorporates bureaucratic interests in secrecy. Both public- and private-sector employers see secrecy as crucial to the protection of institutional interests, to rational decision-making, and to the preservation of management authority against what are seen as self-interested and disruptive demands of individual employees.

The essential characteristics of the employment perspective make it seem more fundamental than other perspectives. So common is the reference to employment law that whistleblower laws may be perceived only as a form of regulation of employment. Its ubiquity and its connection to a body of law without an integral commitment to information disclosure make the employment perspective a powerful alternative to the other perspectives.

The Open-Government Perspective

The open-government perspective views whistleblower laws as ensuring the public's right to know about the activities of government and preserving democratic accountability. Although it focuses on the activities of government, its justifications for whistleblower protection can extend those protections to nongovernmental employees. Its justifications also permit protections not connected to one's status as either a public- or private-sector employee.

Since 1990 a number of countries have enacted freedom of information laws designed to ensure 'open government.' During this same period, several countries enacted whistleblower laws protecting public- or private-sector employees who disclose misconduct, wrongdoing, and other risks to the public. The coincidence of these developments suggests a connection that identifies whistleblower laws as open-government provisions ¹⁰

Whistleblower laws are thus related to open-government. This perspective of whistleblower laws emphasizes the similarity of principles supporting freedom of information and whistleblower protection. These common principles address democratic accountability.

Democratic accountability rests on the public's right to know. Without information, criticism is less powerful. Likewise, ignorance dulls outrage and reduces the incentives for individuals to organize and to use democratic procedures for

change. Political accountability requires knowledge of government conduct and policies and rests on political action to ensure both the enforcement of existing laws and the creation of new laws in response to demonstrated weaknesses in current ones. Access to information supports legal accountability that is necessary to bring government and its officials to account in the courts. Legal accountability, like political accountability, requires knowledge of the standards applied by government officials and information about misconduct or abuse of authority.

The connections between open government and democratic accountability are easier to see in the laws protecting public-sector whistleblowers. Public employees possess information about government misconduct, incompetence, and wrongdoing. They can disclose illegality, corruption, mismanagement, abuses of authority, and risks to public welfare. As insiders, employees are more likely than the general public to possess relevant information and the expertise necessary to understand the effects of government actions.¹¹

Private-sector employees, as well as public-sector ones, also know of government misconduct. Often private-sector employees have information regarding corruption of government officials or fraud regarding public funds. For example, the federal False Claims Act in the United States has encouraged disclosures by private-sector employees that have led to the recovery of billions of dollars fraudulently obtained under government contracts. These disclosures have exposed corruption in public- and private-sector institutions.¹²

Whether in the public or private sector, nothing in the justifications for whistleblower laws under this perspective limits their application to employees. Persons who are not employees may know of information about government misconduct and incompetence. Inclusion of such persons in whistleblower laws requires more careful and varied consideration of remedies because whistleblowers may not be employees of the public agencies or private companies that engage in retaliation. Thus that retaliation may involve conduct against whistleblowers other than through employment action.¹³

The open-government perspective focuses on the power of the state. This perspective contains two views of the democratic state. One view of the democratic state is that law limits the power of the government and preserves a realm for private activity and choice. The other is an activist view of the democratic state that sees the state as addressing societal maladies that individuals are unable to resolve. This activist view sees the individual at risk not only from government, but also from the concentrations of private power from which the government must protect the individual.

Both broad and narrow views of the role of the democratic state identify corruption as a threat to the mission of government. Corruption allows state officials to abuse the power granted to them. It likewise hobbles the govern-

ment, making it less effective and credible as a force of social and economic change. The capture of governmental power by private groups undermines both of these views. Such capture frustrates reform and invites the use of state power by private groups. Control of corruption is linked to the values supporting the open-government perspective of whistleblower laws. This perspective considers corruption in a way that is different than the employment perspective.

This focus on the power of the state also explains how whistleblower laws are seen as part of government regulation of private activities.¹⁴ Disclosures by private-sector employees identify weaknesses in government administration and encourage changes in laws regulating private entities. Thus, they encourage democratic accountability.

The open-government perspective affiliates whistleblower protection with powerful international movements that advocate democratic accountability and anti-corruption initiatives. The explosion of freedom of information laws, whistleblower laws, and other forms of open-government laws coincide with the fall of the Soviet Union.¹⁵ This coincidence illustrates how countries in transition to democracy, particularly in Eastern Europe, draw on views of democratic accountability. The international influence of open-government laws, including whistleblower protection, rests on the acceptance of democratic accountability. Those who seek to strengthen democratic government are drawn to open-government laws that support the legal and political accountability on which a democratic government must be based.

The international anti-corruption movement recognizes the implications of corruption for democratic accountability. That movement relies on the deterrent effect of access to information supported by open-government laws.¹⁶

In contrast to the employment perspective, the open-government one shows less concern with injury to the employment relationship. Although the employment relationship generates necessary information and employment actions may be the principal forms of retaliation, the open-government perspective is information-based rather than employment-based. This external focus generates justifications for protection in the open-government perspective that are at odds with some of the justifications supporting whistleblower protection in the employment one.

The Market-Regulation Perspective

The market-regulation perspective relates more to concerns about open markets, particularly decisions about the international movement of capital, than does the open-government perspective that focuses on democratic accountability. The market-regulation perspective is also linked to concerns about governmental corruption, but unlike the open-government perspective

extends those concerns beyond the conduct of government officials by addressing potential market failures.

Transparency indexes are used to evaluate the political risks of investment because transparency discourages corruption. Greater government transparency improves assessments of the extent of corruption and serves as one surrogate for the effectiveness of a country's response to corruption. Whistleblower laws can reassure investors about a government's efforts to reduce corruption.

Governmental corruption distorts the operation of markets. Whistleblower laws are information provisions that support efficient economic markets. For example, government corruption in the grant and administration of government contracts creates inefficiency among government contractors and these inefficiencies have implications for competition within both domestic and international markets.

The market-regulation perspective helps to explain why some whistleblower laws are directly linked to the control of corruption. Whistleblower laws that target corruption often limit disclosures to national anti-corruption agencies and influence other characteristics of these laws, such as the standards for disclosure and the definition of misconduct and administrative procedures and remedies.

From this perspective, protection need not be limited to any particular employment status. Because protections are not employment based, they are not limited to employees. Such laws must protect individuals not only from employment-related retaliation, but also from other forms of retaliation by corrupt government officials or private actors involved in corruption.

The behavior of corporate officers may also lead to market failures. Just as the breach of fiduciary duties owed by government officials violates the accountability of those officials to the public, the breach of fiduciary duties owed by corporate officials violates the accountability of those officials to the corporation and to its shareholders. Lack of information or the concealment of information can distort the operation of markets and cause market failures. Corruption by corporate officers, like derelictions by government officials, violates the obligations of persons to represent the interests of others, either shareholders or citizens.

If the open-government perspective can be seen as an information-based approach to the accountability of government, the market-regulation perspective can be viewed as an information-based approach to the accountability of markets. For this reason, the market-regulation perspective permits the expansion of whistleblower protection into the private sector more than does the open-government one.

The whistleblower provision of the Sarbanes-Oxley Act of 2002 and other private-sector federal laws enacted since 2000 exemplify how the market-

regulation perspective can expand protections into the private sector.¹⁷ A common aspect of these laws is the protection of disclosures to federal law enforcement and regulatory agencies and to any member or committee of Congress. These provisions also protect internal disclosures in ways that allow corporations to create credible complaint systems on which employees can rely. The number of private-sector laws enacted in the last decade attest to the scope of the market-regulation perspective.¹⁸

The justifications for the whistleblower provision in the Sarbanes-Oxley Act drew on the market-regulation perspective. The markets in securities require accurate information on which investors can rely. Without an assurance that companies are providing such information, investor confidence on which the securities markets depend would be lost. Whistleblower laws promote the disclosures of information material to the decisions of stockholders and investors.

The application of the market-regulation perspective encourages an economic analysis of whistleblower protection. According to free market principles articulated by economic theory, access to information responds to failures in markets for information.¹⁹ Because information held by whistleblowers can be seen as a public good for which no market exists, false claims and bounty laws establish incentives for the disclosure of this information. One argument for *qui tam* provisions, like the federal False Claims Act, is that such provisions provide a financial incentive for whistleblowers to serve the public good.

The Human Rights Perspective

A human rights perspective relies most strongly on freedom of expression. One of the best developed of these articulations of freedom of expression is Article 19 of the Universal Declaration of Human Rights: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'.²⁰ Article 19 illustrates how freedom of expression buttresses many political rights. For example, advocates have used Article 19 to support freedom of the press as an important part of freedom of expression.²¹

The American Convention of Human Rights addresses freedom of thought and expression. Article 13 of the Convention reads: 'Everyone has the right of freedom of thought and expression. This right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally or in writing, in print, in the form of art, or through the medium of one's choice.'²² The reports of the Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights stress the right and provide content to it.²³

The Inter-American Court of Human Rights concluded that the right to access to information held by the government independently rests on Article 13.²⁴ According to the Court, the right to seek and receive information 'protects the right of the individual to receive such information and positive obligation of the State to provide it.'²⁵ Thus, Article 13 obligates a government, subject to the need for restrictions, to provide information held by it. In particular, a government must have a law that guarantees the right of persons to request and receive public information.²⁶ This interpretation of the right of free expression imposes an affirmative obligation on governments to provide a legal structure to fulfill that responsibility. The human rights perspective permits similar justifications for the enactment of a whistleblower law. Such a law not only protects free expression, but also access to the information that supports that expression.

In the landmark 1978 whistleblower law, Congress sought to buttress the First Amendment and the rights of freedom of speech.²⁷ That landmark law and subsequent amendments to it have provided a model for state whistleblower laws in the United States. Thomas Devine described a 1989 amendment as 'the foundation of the modern law of employment dissent.'²⁸ Thus, laws patterned on the Civil Service Reform Act of 1978 incorporate support for the right of freedom of expression.

Sweden illustrates how freedom of expression supported by the public's right to know can protect disclosures that, in other countries, are protected by specific whistleblower statutes. Sweden has one of the world's most extensive freedom of information laws.²⁹ That law, combined with statutory embodiments of freedom of expression, including Sweden's Freedom of the Press Act and its Fundamental Law on Freedom of Expression, indicate how Swedish law is likely to encompass many disclosures that elsewhere in the world would be protected by specific whistleblower statutes.³⁰

The model whistleblower law of the Organization of American States provides the best example of the connection between this perspective and anti-corruption efforts.³¹ That model law implements the 'whistleblower' section of the Inter-American Convention Against Corruption, the relevant section of which protects 'public servants and private citizens who, in good faith, report acts of corruption.'

The model law explicitly recognizes the connection of whistleblower protection to human rights and freedom of expression. This recognition is also reflected 'in the scope of its coverage, its prohibitions against prior restraint, its protection for both individuals and organizations, its rejection of the expansive defamation laws protecting government officials from criticism and its acceptance of the right to disobey illegal orders.'³²

In linking whistleblower protection to human rights, the model statute broadly defines whistleblower protections and connects that definition with a

similarly expansive one of corruption.³³ Corruption often leads to human rights violations because government officials use the power of the state to silence critics and enable corruption. For this reason the model law covers exposure of violations of human rights other than freedom of expression.

The model law rejects employment as the basis for protection. The whistleblower provision of the Convention includes 'public servants and private citizens.' Individuals, organizations, such as newspapers or other media, or non-governmental organizations may have information about government corruption or other misconduct and human rights abuses that follow from and sustain corruption. Like the other perspectives on whistleblower protection, the human rights one influences the way in which whistleblower laws approach corruption.

Under this perspective, whistleblower laws can draw on well-established organizations and procedures to protect human rights. The human rights perspective provides access to a large reservoir of ideas, laws, principles, and arguments. It also involves established and powerful international bodies and nongovernmental organizations. Such powerful international bodies include the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights and the European Court of Human Rights.

A human rights perspective is limited in one way. Because the human rights perspective stresses the conduct of government officials, it may discourage the application of whistleblower protection to many types of misconduct by private individuals and organizations. This limitation is stark in countries that view constitutional or human rights protections as limiting government rather than requiring it to protect its citizens. For example, constitutional law in the United States imposes few affirmative obligations on government and this lack of affirmative duties applies to freedom of expression.³⁴

The limiting aspects of this perspective are less stark when human rights are interpreted as requiring action by the government, including the obligation to prevent human rights abuses by other groups in a society. For example, the affirmative obligations on governments to provide access to government information exemplify how human rights can require action by governments. Likewise, a state can be found to have violated the human rights of the disappeared even if the disappearances could not be proven to have been carried out by state agents if it was clear that the government failed to act to prevent the disappearances or to punish those responsible.³⁵

Human rights also support access to information held by private parties and thus could address the rights of private-sector whistleblowers. For example, the Constitution of South Africa guarantees 'the right of access to any information held by the states; and ... held by another person and that is required for the exercise or protection of any rights.'³⁶ In this manner, human rights offer an avenue for extending protections into the private sector.

The human rights perspective sees human rights law as attaching to individuals because of their humanity. These rights are universal in the sense that basic aspects of human dignity and flourishing require protection; they are parochial in the sense that these universal principles may be implemented differently in various societies and cultures. Freedom of expression is a universal right but societies may apply it differently considering their own heritages and needs. The universal character of human rights makes analysis of them less instrumentalist than the analysis under other perspectives; that is, a human rights analysis argues less for human rights as way to implement other values or to accomplish worthwhile goals, but asserts that human rights represent basic values worthy of adoption.

The indivisibility of human rights may establish human rights law as the basis for the protection of whistleblowers who disclose violations of rights, such as the right to life, to health, and to bodily integrity. In the Vienna Declaration and Programme of Action made at the World Conference on Human Rights held in 1993, 172 states adopted the following declaration: 'All human rights are universal, indivisible, and independent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.'³⁷ The matters disclosed by whistleblowers often address fundamental issues of human rights; in these circumstances, the indivisibility of human rights law establishes human rights law as an alternative basis for protection.

The human rights perspective allows powerful values to be deployed in support of whistleblower laws. In the other perspectives, whistleblower laws seek to accomplish other goals, such as the disclosure of misconduct, the assurance of government accountability, or the efficient operation of markets. In contrast, a human rights perspective ties whistleblower protection to fundamental inalienable rights, such the right of free expression.

This perspective is likely to expand the character of protected disclosures. If the law protects disclosures to secure information about various types of misconduct, the law need only focus on the factual grounds for establishing such misconduct. A human rights perspective relying on freedom of expression is more likely to encompass opinion. Thus, the human rights perspective supports a broader character of protected disclosures and a standard for disclosure more lenient than reasonable belief. The freedom of expression applies to public disclosures and the human rights perspective is more likely than other perspectives to lead to the protection of these external disclosures.

THE RELATIONSHIPS AMONG PERSPECTIVES

Because each perspective is tied to a body of law, evaluations of the successes

and failures of whistleblower laws must consider the broader themes to which those laws are linked. Each perspective is more congenial to certain arguments; each is less receptive to others. Justifications disconnected from their legal moorings may be inconsistent; failure to see how justifications connect with specific bodies of law may unknowingly influence the character of legal standards.

The relationships among the four perspectives can be illustrated by an examination of the organization of the perspectives around the public and private and around individual rights and institutional reform (the reader may wish to look again at Figure 15.1). Two pairs of perspectives, the human rights and employment perspectives and the open-government and market-regulation perspectives respectively share a similar orientation regarding individual rights or institutional reform, but are divided by the distinction between the public and the private. An examination of one of the pairs, open-government and the market-regulation, develops the significance of the division between the public and private.

Two pairs of perspectives, the human rights and open-government perspectives and the employment and market-regulation perspectives respectively, share a similar orientation regarding the public and the private, but are divided by the distinction between individual rights and institutional reform. An examination of one of these pairs, the employment and the market-regulation perspectives, develops the significance of the division between individual rights and institutional reform.

Two pairs of perspectives, the human rights and market-regulation perspectives and the open-government and employment perspectives, are divided by both the distinction between the public and the private and by the distinction between individual rights and institutional reform. Because of the clarity of the conflicts, an examination of one pair, the open-government and employment perspectives, illustrates how the choice of a perspective influences the character and scope of whistleblower laws.

These relationships show how the perspectives generate compatible and incompatible arguments regarding the character of whistleblower laws that suggest tactics for both advocates and opponents of whistleblower laws and expose a pattern to the variance between whistleblower laws. In this way, these perspectives offer firmer ground for the evaluation of the successes and failures of whistleblower laws than often-stated goals for such laws, such as the control of corruption or health and safety regulation.

The Open-Government and Market Perspectives: Examining the Public/Private Distinction

The conflict between the public and the private will influence what groups will

be covered by a statute. This conflict is particularly valuable in limiting the scope of statutes covering the private sector. Such statutes will limit the organizations subject to these laws and frame the requirements for a successful claim with the goal of preserving the autonomy of the private sector from government interference. This relationship between the employment and the market-regulation perspectives permit opponents of protection to use that relationship to resist regulation of the private sector. This vulnerability of private-sector regulation helps to explain why in the United States public-sector laws were likely the first enacted and to be more extensive in scope.³⁸

The distinction between individual rights and institutional reform can also influence the character of protection. In the public sector, the distinction can support arguments for protection; in the private sector, the distinction strengthens arguments against protection. In part this difference reflects the power of human rights justifications for individual rights. Thus, in the private sector, institutional reform carries more weight because of the weak vindication of individual rights in the employment law perspective.

The conflict between individual rights and institutional reform affects the way in which whistleblower laws protect internal disclosures and the standards imposed for public disclosures by whistleblowers. Despite arguments that public disclosures are necessary to institutional reform, institutional reform arguments more easily accommodate limitations on disclosures outside of the institutions of which whistleblowers are a part. Moreover, the employment law perspective supports protection for employees not for third parties. Because the individual rights arguments under employment law attach only to employees, institutional reform arguments permit the exclusion from protection of persons who are not employees. Because institutional reform perspectives are more likely to restrict external disclosures, the restrictions are more likely to be found in the private sector. One review of state statutes in the United States shows that private-sector statutes are more likely to require internal disclosures as a condition for protection than public-sector ones.³⁹

The conflict between individual rights and institutional reform influences which employees will receive protection. In the public sector, for example, in the military or in national security agencies, where the individual rights of employees are less powerfully invoked, the need for institutional reform must be perceived as greater or more urgent in order to justify protections similar to those provided to other government whistleblowers.

The body of law underlying each divided pair is itself beset by the same division that separates each pair. For example, the open-government perspective can be viewed as a private-sector reform, as well as a public-sector one; the market-regulation perspective can be seen as a public-sector perspective, as well as private-sector one. The conflict within each of the perspectives in this pair suggests the artificiality of the divisions chosen and counsels caution

in treating these divisions as more than a method for exploring the relationship between the perspectives. Nonetheless, this exercise offers insights into the relationships between these perspectives and the bodies of law to which they are connected.

The artificiality of these divisions is an attribute of the bodies of law on which they rely and thus cannot be avoided. This inescapable aspect of these perspectives provokes strategies for argument by both proponents and opponents of protection. For example, proponents relying on institutional reform arguments that join open-government and market perspectives will attack the artificiality of the division between the public and the private. Opponents of whistleblower provisions confronted with these arguments will defend the public and private division using the very bodies of law on which proponents have relied.

The open-government and market-regulation perspectives emphasize institutional reform. Both perspectives rely on bodies of law that use access to information to impose accountability on relevant institutions. Thus, whistleblower protection is seen as a method of acquiring information necessary to institutional reform. This connection of the market perspective with the open-government one illustrates the similarities of the justifications for disclosures. These similar justifications include the individual accountability of officials as form of institutional reform and the need for information to correct institutional failings.

These arguments apply to public- and private-sector whistleblowers. Institutional control relies upon enforcing the fiduciary duties owed to third parties by government and corporate officials. That enforcement requires information regarding the misconduct of public and private officials that undermines their institutional commitments. This theme runs through arguments supporting both public-sector whistleblower statutes such as the Whistleblower Protection Act 1989 (WPA) and private-sector ones such as the Sarbanes-Oxley Act (SOX). The WPA focuses on the fiduciary duties of government officials to the government and to its citizens while SOX emphasizes the fiduciary duties of corporate officials to the corporation and to its shareholders.

The reception that each perspective gives to arguments relied upon by the other can hide the differences between the two perspectives that rest upon the division between the public and the private. Proponents of whistleblower laws can use the congeniality of these two perspectives to argue for broader regulation of the private sector. In congressional consideration of the whistleblower provision of the Sarbanes-Oxley Act the need to respond to government regulatory failure by increasing access to information lurked behind the market arguments for corporate accountability. The whistleblower provision protected disclosures of misconduct to the Securities and Exchange

Commission (SEC) that would not necessarily have to be disclosed by corporations themselves. In this sense, the provision is an empowerment of the public regulatory process, one that in this case is built around public access to information held by corporations and by the SEC.⁴⁰

This pair of perspectives, however, more openly divide when seen respectively as public- and private-sector reforms. The open-government perspective stresses reform of government; any whistleblower law must be tied to a change of government policies or practices. On the other hand, the market perspective requires that disclosures relate to the correction of market failures and any protection must be connected to those corrections. To capture this argument, opponents used the shorthand of government interference with the private sector.

Each perspective contains within it a similar conflict between the public and the private. For example, the open-government perspective permits protection of private-sector whistleblowers who may possess information regarding government misconduct, information that will often also incriminate institutions in the private sector. In this way, the protection of private-sector whistleblowers improves the performance of government regulators. The federal provisions administrated by Department of Labor illustrate how many, perhaps most, private-sector employees can be protected under provisions related to public regulatory authority.

Moreover, the vision of the role of government either expands or limits the scope of the public and private sectors. A view of a limited state narrows the public sector and expands the private; the view of the activist democratic state expands the public sector and narrows the private sector. Despite attempts to dismantle them, the structure and powers of expansive regulation of the private sector remain.

Likewise, the market-regulation perspective links private-sector reform to the operations of government. Information-based responses to market failure may encompass a range of activities that justify whistleblower protection. The accepted insight that the scope and character of government regulation, of which whistleblower laws are a part, defines the market demonstrates that the market-regulation perspective is intimately connected to descriptions of the public sector.

The Employment and Market-Regulation Perspectives: Examining the Individual Rights/Institutional Reform Distinction

The employment and market-regulation perspectives share an orientation toward the private sector. Employment law principally addresses the private sector and the market-regulation perspective is an information-based response to market failures. This connection between the two perspectives permits simi-

lar arguments focusing on conditions in the private sector. When the private sector is described as separate from and protected against government, both perspectives entertain similar arguments for limiting government intrusion into the private sector. Thus, persons advocating whistleblower protection bear the burden of justifying an alternation in either private employment or the market. The two perspectives can be used to resist the scope of whistleblower laws in the private sector.

This pair of perspectives, however, more openly divide when seen respectively as the vindication of individual rights and as institutional reform. This conflict between individual rights and institutional reform is more muted than a similar conflict between open-government and human rights perspectives. This muted conflict rests on the anemic vindication that employment law provides for individual rights. Although whistleblower protection can be provided to secure employee rights already granted or to foster workplace democracy, whistleblower laws, from the employment perspective, have rested heavily on the value of the information held by employees to the regulation of markets, an approach represented by the number of federal private-sector whistleblower laws. Most of these statutes cover particular industries and the health and safety risks posed by them. Even the whistleblower provision of the Sarbanes-Oxley Act that covers millions of corporate employees exemplifies market regulation.

Each perspective contains within it a conflict between individual rights and institutional reform. The employment perspective often uses whistleblower laws to vindicate other goals that require the protection of whistleblowers. These goals may represent a form of institutional reform that can be seen to overwhelm individual rights. When the employment perspective seeks to change the workplace and to alter employment law, those changes appeal to institutional reform.

The market-regulation perspective can be viewed as connected with individual rights. Alteration of the employment relationship to encourage disclosures is an important part of institutional reform. Moreover, private-sector laws, such as SOX, protect the disclosure of misconduct affecting individual rights of corporate employees and third parties. Among these the whistleblower provision of the Sarbanes-Oxley Act permits the disclosure regarding types of corporate misconduct that would be material to shareholders and investors. Among these types of misconduct are several that focus on the individual rights of corporate employees and of citizens. These types of misconduct include: health and safety violations, violation of anti-discrimination laws, violation of rules and statutes protective of labor, and human rights abuse.

The Open-Government and Employment Perspectives: Examining the Effects of Both Distinctions

The open-government and employment perspectives occupy different sides of the divisions between the public and the private and between individual rights and institutional reform. The attempt to apply the open-government reforms to the private sector confronts the same objections described in the relationship between the open-government perspective and the market-regulation perspective. However, the employment perspective of individual rights is more limited than the human rights one. The employment perspective defines the rights of employees by balancing interests, a balancing that gives considerable weight to the interests of employers and includes the need to limit disruption of the workplace. The weakness of the articulation of individual rights in employment law can conflict with the goals of institutional reform.

Public employment law, at least in the United States, has struggled for separation from the tenets of private employment law⁴¹ and rests on narrow views that emphasize loyalty to management, on the assumption that employees must be coerced or disciplined to work effectively, on government efficiency supported by unity of command, and on restrictions of the rights of expression of public employees.⁴² Whistleblower protection as an open-government provision can challenge these tenets of public employment law and support a broader scope of protection than the employment perspective.

The importing of the employment perspective into institutional reform has weakened whistleblower protection by ignoring the justifications based on the open-government perspective. For example, in interpreting the Whistleblower Protection Act's application to federal employees, the Federal Circuit has neglected the justifications based on institutional reform and turned to the employment perspective to interpret a government reform statute.

The clashes between Congress and the United States Court of Appeals for the Federal Circuit (Federal Circuit) illustrate the conflict between these two perspectives and the implications of reliance on one rather than the other.⁴³ Since 1978, Congress has several times rejected what it viewed as inappropriate, restrictive interpretations of the whistleblower law applying to federal employees. In turn, the Federal Circuit has continued to interpret the provision to narrow its scope and, in the view of some critics, to ignore the often-stated concerns of Congress and to limit the effects of legislative changes.⁴⁴

The conflict between the employment and open-government perspectives explains this clash. Congress has emphasized an open-government perspective of whistleblower protection while the Federal Circuit has stressed an employment perspective. Congress expands protection by asserting the importance of disclosures of information about government misconduct; the Federal Circuit

narrows protection by relying on the disruptive effects of protection on employment relationships in federal agencies.

Statutes that cover both public- and private-sector employees hint at the incommensurable character of the conflict between the open-government and employment perspectives. The British and South African statutes cover both public- and private-sector employees. The coverage of private-sector employees complicates application of the open-government perspective and invites use of the employment perspective. These statutes also introduce multiple standards for disclosure: the easiest standard for internal disclosures, a more demanding standard for disclosures to relevant government and regulatory officials, and the most difficult standard for other disclosures.⁴⁵ Likewise, the state statutes in the United States that apply to public- and private-sector employees are more likely to require internal disclosures or limit those to whom a protected disclosure may be made than are statutes that only address the public sector. The conflict between these perspectives makes accommodation of them more difficult and encourages the adoption of restrictions that could be expected from the employment perspective. This conflict also suggests the dominance of the employment perspective in whistleblower laws.

Evaluation of whistleblower laws benefits from an understanding of these perspectives and the bodies of law connected with them. Because these perspectives matter, examination of them helps to organize justifications and arguments for protection, to clarify choices in the drafting of these laws, and to understand specific laws. Examination of these perspectives enables an appreciation of their influence. Finally, these perspectives aid assessments of the successes and failures of whistleblower laws. Those assessments depend on the perspectives from which these laws are viewed.

NOTES

1. This chapter develops ideas first presented at the *Primera Conferencia sobre Corrupcion y Transparencia: Debatiendo las Fronteras entre Estado, Mecado y Sociedad*, Mexico City (Mar. 23–25, 2006). An English version of the conference proceedings was published in *CONTEMPORARY DEBATES ON CORRUPTION AND TRANSPARENCY: RETHINKING STATE, MARKET AND SOCIETY* (Irma Erendira ed., 2011).
2. Chapters 7 and 9 illustrate this characteristic of most whistleblower laws.
3. Chapter 9 examines private-sector laws that apply to specific industries, as well as those that apply more generally to employees in many industries.
4. The appropriate role and scope of internal disclosures is both a long-standing issue and a matter of current controversy. Chapter 16 illustrates both aspects of this conflict.
5. Chapter 13, in addressing global whistleblower laws, presents different models for such laws.
6. Chapter 11 shows that some questions of interpretation focus on what persons are covered under whistleblower laws.
7. Chapter 9 considers how conceptions of the public and private influence the scope of whistleblower laws.

8. The discussion in Chapter 13 supports this last contention.
9. Chapter 11 explores how interpretation has narrowed the scope of many whistleblower laws, and Chapter 10 evaluates the effectiveness of administrative enforcement of these laws.
10. Chapter 13 discusses this connection as one reason for the international growth of whistleblower laws.
11. Chapters 5 and 6 describe the justifications for public-sector whistleblower laws.
12. Chapter 8 addresses the federal False Claims Act and its coverage of both public- and private-sector employees.
13. Chapter 13 discusses the model whistleblower law prepared for the Office of Legal Cooperation of the Organization of American States to implement the Inter-American Convention Against Corruption. Both the Anti-Corruption Convention and the model law apply to persons who are not employees in the public or private sectors. For example, it includes nongovernmental organizations as whistleblowers protected by the law.
14. Chapter 9 demonstrates how private-sector whistleblower laws are an instrument of government regulation of the private sector.
15. Chapter 13 evaluates the connection between the fall of the Soviet Union and the explosion of open-government law, including whistleblower laws.
16. Chapter 13 shows that many global whistleblower laws are part of international efforts to control corruption.
17. Chapter 9 supports this conclusion.
18. For example, Chapter 9 notes that in the United States more federal private-sector laws have been enacted since 2000 than in any previous decade; these 'twenty-first century laws' cover tens of millions of private-sector employees.
19. The literature reviewed in Chapter 8 demonstrates that false claims laws can be conceived as responses to failures in markets for information.
20. Universal Declaration of Human Rights Art. 19, General Assembly Resolution 217A (III) of 10 Dec. 1948.
21. Article 19: Global Campaign for Freedom of Expression Home Page, <http://www.article19.org/> (last viewed Aug. 16, 2012). Article 19 is an international human rights organization that promotes freedom of expression. The organization views freedom of expression as crucial to strengthening democracy and preventing repressive regimes from gaining power.
22. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.
23. The position of the Special Rapporteur for Freedom of Expression was created in 1997 by the Inter-American Commission on Human Rights. As part of the position's functions, the Rapporteur presents reports on freedom of expression in the Americas as a special chapter in the Annual Report of the Commission. CENTER OF JUSTICE AND INTERNATIONAL LAW, THE PROTECTION OF THE RIGHT OF FREEDOM OF EXPRESSION IN THE INTER-AMERICAN SYSTEM 70–71 (rev. ed. 2004) (describing the creation and function of the Special Rapporteur for Freedom of Expression). The first report is The Special Rapporteur for Freedom of Expression, *Report of the Special Rapporteur for Freedom of Expression 1998*, OAS Doc. (1998). Annual reports are available by year of the report, available at <http://www.cidh.org/relatoria/docListCat.asp?catID=24&IID=1>.
24. Reyes v. Chile, Inter-American Court of Human Rights, Judgment of September 19, 2006. Reyes was an economist working for a nongovernmental organization interested in sustainable development who sought information from organs of the Chilean government regarding a forestry project approved by Chile's Foreign Investment Committee.
25. Reyes v. Chile ¶ 77.
26. Reyes v. Chile ¶ 101.
27. Chapter 6 describes why Congress sought to do so. The influence of the First Amendment offers one explanation for the focus of the landmark whistleblower law on public employees.
28. Thomas Devine, *The Whistleblower Protection Act of 1989: Foundation of the Modern Law of Employment Dissent*, 51 ADMIN. L. REV. 531 (1999).
29. Robert G. Vaughn, Thomas Devine & Keith Henderson, *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting*

- Whistleblower*, 35 GEO. WASH. L. INT'L. REV. 857, 895, n. 269 (2003) [hereinafter *The Whistleblower Statute Prepared for the Organization of American States*].
30. *Id.* at 895–96 (discussing how the Swedish law provides protections analogous to whistleblower laws).
 31. Chapter 13 describes the model law in more detail.
 32. *The Whistleblower Statute Prepared for the Organization of American States*, *supra* note 29, at 863.
 33. The Inter-American Convention Against Corruption expansively describes corruption as an active or passive government action in exchange for a benefit, including non-monetary advantage. Inter-American Convention Against Corruption, Mar. 29, 1996, Organization of American States, OEA/Ser. K/XXXIV. 1, CICOR/doc. 14/96 rev. 2, 35 I.L.M. 724 at 728, Art. 3 §8 (entered into force Mar. 6, 1997).
 34. The character of this distinction is explained in an opinion by the United States Court of Appeals for the Seventh Circuit. *Jackson v. City of Joliet*, 715 F. 2d 1200, 1203 (7th Cir. 1983) (stating '[that the] Constitution is charter of negative rather than positive remedies ... The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them.'). In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 196–97 (1980), the United States Supreme Court held that the due process clause confers 'no affirmative right to government aid, even where such aid may be necessary to secure a life, liberty or property interest which the government itself may not deprive the individual.'
 35. *Valasquez v. Rodrigues*, 1988 Inter-Am Ct. H.R. (ser. C) No. 4 ¶ 172, 'An illegal act which violates human rights which initially was not directly imputable to the State (for example because it is the act of private person or because the person responsible has not been identified) can lead to international responsibilities of the State not because of the act itself but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.' Fernando Felipe Basch asserts that the jurisprudence of the Inter-American Court 'has enshrined the obligation to punish not only crimes committed by the state apparatus but also in cases of crimes committed by private individuals.' Fernando Felipe Basch, *The Doctrine of the Inter-American Court of Human Rights Regarding States' Duties to Punish Human Rights Violations and Its Dangers*, 23 AM. U. INT'L L. REV. 195, 201 (2007).
 36. Section 32(1) of South Africa's 1996 Constitution. This provision as well as the similar ones of Uganda and Congo are discussed by Carl Bruch, Wole Coker & Chris VanArsdale, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 COLUM. J. ENVTL. L. 131, 189 (2005). A 2000 law implementing this provision of the South African Constitution requires a requester of information from a private party to identify the human right that would be jeopardized without the information. Alasdair Roberts, *Structural Pluralism and the Right to Information*, 51 U. TORONTO L.J. 243, 253 (2001).
 37. U.N. General Assembly, Vienna Declaration and Programme of Action, no. 5, June 25, 1993.
 38. Chapter 9 shows that federal private-sector laws in the United States are most likely to limit public disclosures of information.
 39. Robert G. Vaughn, *State Whistleblower Laws and the Future of Whistleblower Protection*, 51 ADMIN. L. REV. 581 (1999).
 40. Under the Sarbanes-Oxley Act an employee need only have a reasonable belief of corporate misconduct. The 'reasonable belief' standard allows a whistleblower to disclose information to the SEC that a company would not have to disclose to the SEC under regulatory standards. The whistleblower provision enables the SEC to evaluate disclosures to determine whether they in fact address information covered by SEC regulations.
 41. DAVID H. ROSENBLUM, FEDERAL SERVICE AND THE CONSTITUTION: THE DEVELOPMENT OF THE PUBLIC EMPLOYMENT RELATIONSHIP (1971); *Developments in Law: Public Employment Law*, 97 HARV. L. REV. 1611, 1619–32 (1984).
 42. Robert G. Vaughn, *Whistleblower Protection and the Challenge to Public Employment Law*, in PUBLIC SECTOR EMPLOYMENT IN THE TWENTY-FIRST CENTURY 155–88 (M. Pittard & P. Weeks eds., 2007) (describing these aspects of public employment law and exploring a minority 'public service' vision of public employment law).

43. Chapter 11 contains criticisms of the Federal Circuit's interpretation of the Whistleblower Protection Act and describes interactions between Congress and the Federal Circuit.
44. Chapter 11 also describes how Congress, through amendments to the whistleblower provision of the CSRA and to the WPA, rejected several interpretations of the whistleblower provision by the Federal Circuit. That chapter also describes what some commentators see as the court's resistance to the congressional modifications.
45. Chapter 13 describes the tiered disclosures to different recipients by imposing increasingly rigorous standards for protected disclosures.

16. Old issues – new controversies

For nearly five decades, debates about whistleblower laws have addressed several often hotly contested issues. These issues included whether anonymous whistleblowing should be permitted or prohibited, should be fostered or discouraged; whether national security information enjoys priority and lies outside the general scope of whistleblower laws; whether whistleblowing should be described principally from legal or ethical perspectives; and whether internal disclosures should be permitted, protected or required, should be central or peripheral. All of these issues arouse current controversy that dominates our contemporary discussion. The longevity of these disputes signals their importance and attests to their role in defining the successes and failures of whistleblower laws.

Current controversies demonstrate that judgments about the successes and failures of whistleblower laws require the resolution of long-standing disagreements regarding the appropriate reach and character of these laws. These controversies reflect the history of whistleblower laws in the United States and internationally. Long-standing conflicts also identify issues the resolution of which necessarily lead to different conceptions of whistleblower laws. They provide a perspective from which to appraise the criteria for the successes and failures of these laws described in the preceding chapters of this book.

ANONYMOUS WHISTLEBLOWING

Whistleblower laws vary regarding their treatment of anonymous reporting. While some allow or encourage such reporting, others do not. For example, some provisions permit confidential reporting but they do not apply to anonymous reports. Practical considerations reduce the value of anonymity. Anonymous reporting may fail to provide the recipients of these reports with sufficient information to investigate them effectively. Investigators are not able to confirm information, to seek other investigative leads, or to draw on the expertise or experience of the whistleblower.¹ Anonymity likely increases the costs of investigation because it requires recipients to sort out false or insubstantial allegations. The lack of reliability of anonymous reports also

reduces their usefulness; for example, anonymity may encourage unreliable disclosures that would not otherwise be received.²

Anonymity also has practical consequences for the whistleblower. The whistleblower's concerns may be lost in the noise of a large number of anonymous complaints. Depending on the character of the allegations contained in the report and the deftness of an investigation, an anonymous complaint may insufficiently protect the identity of the whistleblower. Anonymity can deny a whistleblower the protection otherwise provided by anti-retaliation provisions that require at least constructive knowledge of the protected disclosures.

Anonymity may also reduce the credibility of a whistleblower because of moral or ethical objections to anonymous disclosures. Frederick Elliston outlines the moral objections to anonymous whistleblowing, suggesting that although anonymity can be treated as simply bad manners, it engenders strong disapproval.³ Elliston contends that 'it is wrong to insist' that anonymity itself creates a moral barrier; neither do requirements of fair play nor the fear of widespread anonymous disclosures nor concerns with institutional impact justify limitations on anonymous disclosures.⁴ According to Elliston, because anonymous whistleblowing is an exercise of free speech, and corporations' interests in their reputations do not equate with the public interest, the burden should lie with those who seek to restrict anonymous disclosures.

Practical objections to anonymous disclosures are linked to moral and ethical objections. One study contrasted anonymous and attributed disclosures regarding financial misconduct to experienced members of corporate audit committees. The study concluded that 'audit committee members attributed lower credibility and allocated fewer investigative resources when [the same reports] were received through an anonymous rather than non-anonymous channel.'⁵ The level of threat to the reputation of those alleged to be involved in wrongdoing also influences the treatment of anonymous reporting.⁶ Anonymity prevents an assessment of the characteristics of the whistleblower, characteristics that in many cases may add to the credibility of the allegations and may encourage the recipient to acquire additional information and to use the expertise of the whistleblower.⁷

Anonymity protects the weak who are unable to protect themselves from powerful institutions and encourages the exposure of wrongdoing. The acceptance of anonymous disclosures rejects a 'heroic vision' of whistleblowing.⁸ Anonymity thus encourages disclosures of wrongdoing and the protection of whistleblowers. The advice given by most whistleblower organizations counsels for anonymity for precisely these reasons.⁹ Important whistleblower advocacy groups, however, disagree regarding anonymity. For example, Public Concern at Work in Great Britain clearly states that it does not support anonymous whistleblowing.¹⁰ In part, this rejection of anonymous whistleblowing rests on the common law foundations of the British law. That common law

stresses employee duties of loyalty and confidentiality. In contrast, the Government Accountability Project in the United States recommends anonymity as a significant protection and counsels employees in techniques of anonymous whistleblowing.¹¹

In the United States, before the enactment of the first whistleblower laws advocates of whistleblowing were equivocal regarding anonymity. In one of the first books describing whistleblowers, Charles Peters and Taylor Branch expressed concerns about anonymous whistleblowing.¹² The first proposed whistleblower laws presented in the early 1970s failed to consider anonymity and seemed to have assumed that disclosures would be acknowledged by those persons making them.¹³

Chapter 12, 'National security', describes leaking as a type of anonymous whistleblowing. Leakers, however, are often government officials whose disclosures are part of government attempts to manipulate and control public opinion. Although leakers may be anonymous in that their identities are screened from public knowledge, many reporters know the identity of leakers who make disclosures. Thus, a number of the practical difficulties normally attached to the anonymity, such as limitations on the ability to investigate and on the use of the expertise of whistleblowers in those investigations, do not apply regarding anonymous disclosures to members of the media. Disclosures to public interest or civil society groups occur in similar circumstances.¹⁴

Despite the debate regarding anonymity in the United States, anonymity has become an accepted part of the architecture of investigations of wrongdoing in both government and corporations. For example, inspectors general in the federal government use hotlines to receive anonymous complaints of wrongdoing within agencies. The Sarbanes-Oxley Act of 2002 (SOX) directs that audit committees of publicly held and traded corporations provide a procedure to receive anonymous reports from employees. Moreover, anonymous reporting 'is an important way to encourage internal reporting without fear of retribution.'¹⁵ The views of civil society advocacy groups similarly emphasize the importance of anonymity.

A promise of anonymity requires some assurance of fulfillment of that pledge. Otherwise, whistleblowers are unlikely to use a channel for anonymous disclosures in which they lack confidence. Acceptance of anonymity carries an obligation to consider how to preserve it. For example, the hotlines of inspectors general are often administrated by independent contractors who report the allegations only to those inspectors general. The separation of the receipt of disclosures from the government officials who act upon them assures whistleblowers that the agency is not surreptitiously tracking the sources of these disclosures nor seeking to identify the whistleblower. In the private sector, SOX directs audit committees to ensure anonymity.¹⁶

Anonymity, however, remains controversial. Chapter 13, 'Global whistleblower laws', describes the responses in many European countries to the requirements for anonymous disclosures contained in SOX. Whistleblower scholars and civil society groups in other countries also oppose anonymity. As noted, Public Concern at Work discourages organizations from adopting internal procedures that guarantee anonymity rather than ensuring confidentiality, except where extraordinary circumstances require otherwise. A well-known Australian scholar who favorably views whistleblowing would exclude anonymous disclosures from whistleblower laws.¹⁷ That scholar, William De Maria asserts 'whistleblowing is not an anonymous act ... Whistleblowing is open disclosure.'¹⁸

The current controversy in Europe regarding anonymity shows how anonymity and internal disclosures are linked. It also demonstrates how this linkage reflects differing views of whistleblower laws. The European response weighs privacy highly and sees whistleblowing as posing risks to societal solidarity. Chapter 13 describes how history has affected these perceptions of anonymity. Likewise, the concerns regarding privacy and loyalty influence how whistleblower laws in Britain and in continental Europe treat internal and external disclosures.

NATIONAL SECURITY

Whistleblower protection and national security have long been linked. The first collections of whistleblower stories addressed allegations of national security whistleblowers, particularly assertions of invasions of the privacy of citizens and infringements of free speech.¹⁹ These allegations supported provisions of the federal Privacy Act that limited the government's collection of information regarding citizens' exercise of the First Amendment.²⁰

Daniel Ellsberg, who disclosed the classified Pentagon Papers, was perhaps the best-known national security whistleblower of the era. His disclosures played an important role in the subsequent cover-up that was an essential part of the Watergate scandal that led to the resignation of President Richard Nixon.²¹

Nixon justified on national security grounds many of his abuses of presidential power, including illegal surveillance of citizens and unconstitutional burglaries at the Democratic Party Headquarters and at the office of Ellsberg's psychiatrist. A Senate inquiry found that these abuses were only part of extensive illegalities that Nixon and other government officials justified on grounds of national security. The 1976 Final Report of the Select Committee to Study Government Operations with Respect to Intelligence Activities of the United States Senate²² more broadly documented 'abuses in intelligence activities

and weaknesses in the system of accountability and control.’²³ The report confirmed ‘substantial wrongdoing.’²⁴ The contents of the report described the breadth of the wrongdoing committed. This conduct included covert actions aimed at disrupting and neutralizing dissident groups and a similar Federal Bureau of Investigation (FBI) campaign against Dr. Martin Luther King Jr. According to the report, the FBI’s rationale for the attack on King was ‘a non-violent man was to be secretly attacked and destroyed as insurance against his abandoning non-violence.’²⁵ ‘For approximately 20 years the Central Intelligence Agency (CIA) carried out a program, which it knew was illegal, of indiscriminately opening citizens’ first-class mail.’²⁶ For over 28 years the National Security Agency (NSA) received from international cable companies ‘millions of cables which had been sent by American citizens in the reasonable expectation that they would be kept private.’²⁷ For 40 years intelligence agencies had ‘frequently wiretapped and bugged American citizens without benefit of judicial warrant.’ ‘Purely political information’ and ‘purely personal information’ was collected and passed on to high-ranking government officials. ‘During the 1960s alone, the FBI and CIA conducted hundreds of break-ins, many against American citizens and domestic organizations.’²⁸

Even when intelligence agencies recognized the illegality of their conduct, ‘the law, and the Constitution, were simply ignored.’²⁹ Many activities had the purpose or effect of ‘preventing the free exchange of ideas.’³⁰ Officials responsible for federal intelligence programs repeated this abuse for over 40 years – 40 years during which the scope of the abuse broadened.³¹ The development and use of increasingly ‘intrusive technologies’ threatened the rights of citizens.³²

The response of the government to domestic dissent and to the violent acts of a small minority of protesters ‘could have set an example for the nation’s citizens and prevented spiraling lawlessness by respecting the law as it took steps to predict and prevent violence. But agencies of the United States, sometimes abetted by public opinion and government officials, all too often disregarded the Constitutional rights of American[s] in their conduct of domestic intelligence operations.’³³ The ‘central problem posed by domestic intelligence activity has been its departure from the standards of the law.’³⁴ In particular, the report describes how intelligence officials concealed wrongdoing from Executive Branch officials and from Congress.³⁵ Recognition of illegality led not to disclosure or reform but to increased security to prevent discovery.³⁶ Moreover, federal agencies encouraged local police surveillance of lawful First Amendment activities.³⁷

Despite the abuses and the importance of whistleblowers in disclosures of those abuses conducted in the name of national security, the whistleblower provision of the Civil Service Reform Act of 1978 (CSRA) excluded the employees of national security agencies from any protections otherwise

provided to whistleblowers. (A separate provision applied to the Federal Bureau of Investigation.) Thus, these employees enjoyed no protection even if the information they disclosed was not classified. Other federal employees could disclose wrongdoing involving classified information only to agency inspectors general or to the Office of Special Counsel.³⁸

Perhaps one reason for the exclusion were the steps that Congress had taken to increase oversight of executive branch national security operations.³⁹ More likely though, Congress continued to see national security as both separate and immune from the legal protections of whistleblowers applicable elsewhere in the federal government. Rather, whistleblowers in these agencies had to rely on internal procedures provided by the executive. Whistleblower laws in the United States have not dealt effectively with the arguments for secrecy based on national security or with the protection of national security whistleblowers.

Official secrets laws in other countries limit whistleblowing beyond the restriction in the United States.⁴⁰ In particular, official secrets laws criminalize whistleblowing.

In its several versions the Whistleblower Protection Enhancement Act of 2010 (WPEA) applied the Whistleblower Protection Act of 1989 to the employees of national security agencies. These versions permitted more than just internal disclosures to officials within national security agencies. For example, one version would have permitted disclosures to any member of the House and Senate Intelligence Committees and to staff of those committees. These versions also sought some type of external review of allegations of reprisal. For example, one proposal would have permitted adjudication by the United States Merit Systems Protection Board (MSPB); another who have established a review board consisting of representatives of national security agencies to consider and review such claims of retaliation.⁴¹

Provisions of the law relating to national security whistleblowers were one of the reasons for the failure of the WPEA to obtain congressional approval. Objections in the House of Representatives to the national security provisions led to the removal of most of the reforms relating to national security. The subsequent delay required unanimous consent of the Senate to consider the law prior to the dissolution of the 111th Congress. One senator anonymously objected and the WPEA failed.

Current controversies regarding national security whistleblowers raise the same issues regarding the application of whistleblower laws to national security agencies or to national security information. The failure of Congress to enact the WPEA demonstrates the difficulties of expanding whistleblower laws to national security whistleblowers. The attempts to apply the draconian penalties of the 1918 Espionage Act to an employee of the National Security Agency who disclosed waste and threats to the privacy of US citizens in

surveillance technology developed for the NSA demonstrates the power of the national security rubric even in an administration pledged to openness.⁴²

The prosecution, under the Espionage Act, of Thomas Drake, an employee of the NSA, also highlights the tension between national security and whistleblowing. Drake's conviction could have resulted in a sentence of 35 years in prison. The term 'espionage' usually conjures the image of the sale of the most sensitive classified information to foreign enemies of the United States and evokes the names of spies such as Aldrich Ames and John Hanson, men whose spying led to the deaths of persons working for US intelligence agencies.⁴³

On the other hand, Drake's crime was to retain 'top-secret defense documents' and to take them home in order to make 'unauthorized disclosures.'⁴⁴ Drake contends that the prosecution was a reprisal not for disclosing secrets but for alerting a reporter to waste, fraud, and abuse in the development of a new software program, for decrying the failure of that program to incorporate safeguards for the privacy of those whose communications were monitored, and for raising at the highest levels concerns about the legality of the warrantless surveillance program ordered by George W. Bush. Privacy was a significant problem because programs could capture most e-mail communications in the United States. Other NSA whistleblowers raised concerns as early as late 2001 about the scope and legality of new surveillance protocols implemented after 9/11.⁴⁵

Drake feared that extensive government monitoring of citizens' communications would alter the character of the government itself. He saw the approach of the NSA as undermining the limitations on surveillance imposed to prevent past abuses, such as Nixon's use of the NSA to spy on his political enemies. As Drake put it (with regard to the warrantless surveillance program), 'a huge Pandora's box had been opened.' It was 'no longer necessary to follow the law' and he began 'to have grave concerns about the decisions that were made to bypass the Constitution willfully and openly as a result of 9/11.'⁴⁶ The scope of the collection of information described by Drake and other whistleblowers indicated that the NSA may possess a database of all e-mails transmitted in America that can be searched at anytime.⁴⁷ Drake was also providing information to Congress.

Drake approached a reporter for the *Baltimore Sun* after *The New York Times* printed an article reporting that the NSA was conducting a warrantless wiretapping program. According to Drake, he spoke to the reporter about unclassified matters, particularly about the waste and mismanagement involved in the billion-dollar contracts to develop a new computer system for the NSA, a project subsequently cancelled despite an investment of \$1.2 billion.⁴⁸ Drake believes that he and others were caught up in an attempt by the government to identify the persons who gave *The New York Times* information about the warrantless surveillance program. Subsequently, one of the

sources of the information to the *Times*, Thomas Tam, a Department of Justice lawyer, identified himself but was not prosecuted.

Although many of these abuses occurred in the Bush Administration, Obama's administration has used the 'Espionage Act to press criminal charges' in five alleged national security leaks – 'more such prosecutions than have occurred in all previous administrations combined.' Drake's case 'is one of two that Obama's Justice Department has carried over from the Bush years.'⁴⁹ Stephen Vladek, a constitutional law expert, describes the vagueness of the Espionage Act passed in 1918.⁵⁰ Abbe Lowell, another expert on the Espionage Act, refers to it as a 'very, very harsh statute with very harsh penalties.'⁵¹ The government's prosecution of Drake informs other employees of national security agencies that if they make unwarranted disclosures they can face draconian criminal penalties under a vague statute.⁵²

In June 2011, the Department of Justice (DOJ) ended the prosecution when Drake pled guilty to a misdemeanor – the improper retention of government documents. The plea agreement protected Drake from imprisonment and specified no more than one year of probation; the government, however, asked Federal District Judge Richard D. Bennett to fine Drake \$50,000. On Friday, July 15, 2011, Bennett sentenced Drake to 240 hours of community service and one year's probation. He refused to impose a fine, calling it 'unconscionable' that Drake and his family were dragged through 'four years of hell' only to have prosecutors 'ultimately back down on all felony charges.'⁵³

The judge lectured DOJ attorneys, asking 'What kind of message is sent by the government when the government dismisses a 10-count indictment? If the executive branch of the government doesn't provide an explanation, it's up to the judicial branch to note the impropriety of it.'⁵⁴ He explained, 'I don't think that deterrence should include an American citizen waiting two and a half years after their home is searched to find out if they're going to be indicted or not. I find that unconscionable. Unconscionable. It is at the very root of what this country was founded on – against general warrants of the British.'⁵⁵

Drake told the court that the prosecution had been 'an extraordinarily difficult ordeal for me, and [it caused] tremendous pain [for] me and my family and friends and colleagues.'⁵⁶ After sentencing, he commented, 'I paid a very high price as a public servant for choosing my conscience over my career and blowing the whistle on government wrongdoing.' He added, 'I look forward to getting my life back, so I can live free again knowing that freedom is never free. It requires eternal vigilance.'⁵⁷

The rubric of national security increasingly challenges the character of whistleblower laws. In particular, the use of a vague criminal statute against whistleblowers reduces the likelihood that Congress or the public will receive the information that identifies threats to constitutional rights or that exposes misconduct, incompetence, or waste. The criminalization of this type of

whistleblowing threatens meaningful accountability for an increasingly large and sophisticated national security apparatus. Thus, current controversies develop old issues regarding regulation of national security bureaucracies.

National security considerations limit many whistleblowers to procedures that rely on internal disclosures and depend on organizations whose practices have been challenged to evaluate allegations of retaliation for the use of internal procedures. This aspect of the relationship between national security and whistleblower laws recalls the dilemmas of international organizations, such as the United Nations and the World Bank, who must develop whistleblower procedures that are insulated from the application of external whistleblower laws. Like anonymity, national security invites a consideration of the role and function of internal disclosures.

ETHICAL AND MORAL JUSTIFICATIONS FOR WHISTLEBLOWING

National security represents an area in which whistleblowers employed by the federal government do not receive legal protection. Likewise, many private-sector laws do not protect public disclosures even though many of these laws address significant dangers to public health and safety, and national security provisions also limit disclosures.⁵⁸ Because legal justifications are not available to public- and private-sector whistleblowers in these circumstances, whistleblowers turn to ethical or moral vindications of their acts. Intent and motive, often disregarded in whistleblower laws, become relevant to ethical justifications. This contemporary reliance on ethical and moral defenses recalls the responses of early whistleblowers. This reliance forces consideration of the ethical or moral criteria for whistleblowing and reminds us of the ethical supports for whistleblower laws.

Professional Codes of Conduct

Prior to the 1978 whistleblower provision, whistleblowers and their advocates relied on ethical codes to justify disclosures regarding misconduct. Federal employees most commonly appealed to the Code of Ethics for Government Service and to various applicable codes of professional conduct.⁵⁹ In particular, the Ralph Nader book on whistleblowing relied on a number of these codes of professional conduct and urged greater involvement of professional societies in supporting their members who made disclosures based on those codes.⁶⁰

The reliance on these codes of conduct contrasted with a more general ethical discussion of whistleblowing. This general discussion drew on literature in

a number of fields, including public administration, business management and ethics, sociology, political science, journalism, and philosophy. Several reasons explain why the ethics discourse stressed specific codes of conduct. First, whistleblowers benefited from changing attitudes and perceptions regarding whistleblowing, but still confronted hostile opinions and a lack of legal protection for their actions. In this milieu, whistleblowers appealed to established and (relatively) clear standards of behavior. Second, at the time appeals to institutional loyalty and confidentiality carried inordinate weight and adopted codes of conduct illustrated competing loyalties supporting disclosures. Bureaucratic authorities deployed a unitary concept of institutional loyalty against whistleblowing. The codes of conduct clarified other loyalties and obligations of employees. Third, many whistleblowers were bound by these codes and saw them as appropriate guides to their conduct. Many resisted interference with a professional identity. These codes of conduct could also be treated as a type of customary law.

Fourth, subtle differences in focus attached to these codes of conduct and the more general ethical discourse. The codes of conduct, because they concentrated on the obligations of individual members of professions, were easier to see as 'whistleblower focused.' The general ethical discourse was more likely to consider the effects on the organizations of which whistleblowers were a part and were thus more 'institution focused.' Too much can be made of this distinction but consideration of how the acceptance of whistleblowing affects the institutions invites different analysis. Moreover, many of the disciplines, particularly business ethics and public administration, developed around an examination of the institutional behavior of corporations and government agencies and the role of individuals in those institutional settings.⁶¹

Current controversies raise the ethical issues that have always surrounded whistleblower laws. The controversy regarding the disclosures of a Department of Justice attorney about the interrogation of John Walker Lindh, the 'American Taliban,' addresses the role of professional codes of conduct. It also illustrates the complexity of appeals to these codes.

Despite the number of whistleblower laws, rich veins of ethical discourse, particularly in the field of business ethics, continue to influence assessment of whistleblower laws. One of the contributions of this field has been the examination of whistleblowing from the perspective of conflicting loyalties. The section Internal Disclosures illuminates the application of this ethical analysis.

Legal Ethics

Jesselyn Radack served in the Professional Responsibility Advisory Office of the Department of Justice. The Office provided legal and ethical advice to

other parts of the DOJ. On December 7, 2001, while on duty in the Office, Radack received a call from an attorney in the Terrorism and Violent Crimes section of the DOJ. The FBI had notified the DOJ that it planned to question, without the presence of an attorney, Lindh, who had been captured by US troops in Afghanistan. After research, Radack e-mailed the lawyer that the interrogation ‘would be a pre-indictment, custodial overt interview, which is not authorized by law.’⁶² She also pointed out that Lindh’s father had already retained a lawyer for him and that interrogation required approaching that counsel rather than Lindh. Three days later, Radack learned that the interview had been conducted despite the initial advice of the Office. She also learned that the prosecution intended to use the confession obtained during this interview.⁶³

Her interpretation of the content of the ethical rules and their importance in the profession fueled her concern with the decision. ‘It was like ethics were out the window.’ After 9/11 ‘anything goes’ in the name of terrorism. ‘It felt like they had made up their minds to get him regardless of the process.’⁶⁴ She also identified with the responsibilities of the office of which she was part. ‘[T]he role of the ethics office was to “rein in the cowboys.”’

In January 2002, US Attorney General John Ashcroft announced the prosecution and asserted the position of the DOJ that the interrogation was legal because Lindh had not chosen an attorney and had waived his right to counsel. Two weeks later, Radack received an unfavorable performance rating which questioned her professional judgment. She was advised to resign before the review became part of her personnel record (the previous year she had received a merit bonus for her performance).

In March, before she was to leave the DOJ to join a private law firm, she learned that the federal judge hearing the Lindh case had requested copies of all internal correspondence about the Lindh interrogation. She also discovered that only two of more than a dozen e-mails she had written regarding the matter had been submitted. She found that copies of all but three of the e-mails were missing from the case file. Through the help of the DOJ’s technology office she was able to recover most of them and submitted them along with an e-mail to her supervisor.⁶⁵

After she left the DOJ, she gave the e-mails to *Newsweek*. After the story appeared, she became a target of an investigation to determine the source of the leaked documents. After her refusal to cooperate fully, officials of the DOJ contacted the law firm for which she worked. That firm placed her on administrative leave because the DOJ had identified her as the target of a criminal investigation. The defense of her disclosures rested on whistleblower protections that she asserted applied because she had a reasonable belief that the DOJ would violate law and ethics by withholding relevant e-mails from the court.

After her confrontation with her supervisor in March 2002, the DOJ submitted to the court the critical e-mails that questioned the legality of Lindh's confession. The court subsequently concluded that these e-mails were privileged and confirmed the position of the DOJ that Lindh had waived his right to speak with an attorney.⁶⁶

In 2003, the DOJ closed the criminal investigation against Radack but reported her actions to bar associations in the District of Columbia and Maryland – jurisdictions in which she was licensed to practice. The DOJ contended that she violated attorney–client privilege by her disclosure of the e-mails and her memorandum. The action before the District of Columbia Bar has been pending for eight years.

Radack's conduct continues to stir controversy. Her situation illustrates an appeal to ethical standards by the whistleblower and by the government. Commitment to professional ethics motivated Radack and those ethical standards also guided her conduct. Likewise, the government appeals to the ethical obligations of government attorneys as the basis for its charges against her. Her case permits examination of the relationship between ethical codes, particularly those that impose obligations of confidentiality and loyalty and whistleblower laws.

In a 2003 law review article, Radack considered the relationship between whistleblower laws and the ethical obligations of attorney confidentiality.⁶⁷ Radack argued that changes in the Model Rules of Professional Conduct permitted attorneys to disclose client information in order 'to comply with other law.' She asserts that this language allows government attorneys to disclose confidential information if the disclosure is one protected under the Whistleblower Protection Act.⁶⁸ This assertion rests on a reading of the language to include laws like the WPA that do not require, but rather protect, disclosures. She contrasts this 'plain meaning' of the words with the commentary to the Rule 1.6 that suggests that the 'other law' referred to must be one that 'requires' the disclosure. The inclusion in the Rule of the standard to comply with other law 'or a court order' at least suggests the argument that 'other law' referred to in the language of the Rule shares the attribute of a 'court order'; that is, that disclosure is required. She also presents an argument that the code of professional responsibility of the District of Columbia allows disclosures under laws that only permit rather than require those disclosures.

In a broader project, Professor Kathleen Clark explored the application of confidentiality norms to government attorneys.⁶⁹ In doing so, she describes a number of relationships between ethical rules applying to government attorneys and whistleblower laws. Her work also highlights conflicts within professional ethics that can affect appeals to ethics rather than to the law. Her discussion rests on the requirements of lawyer confidentiality, a requirement to keep a client's secrets that is more extensive than the attorney–client privilege.

Determining who government attorneys represent demands consideration of the context and structure of government power. This context allows an attorney to consider the relationship between potential clients, including specific agencies, and the executive or the government. Because a government attorney normally represents a governmental entity, the entity exception permits the disclosure of improper conduct of employees whose conduct can harm that entity. In these circumstances, the entity, not individual employees or officials, is the client of the attorney.

Clark observes that government lawyers also act as trustees when they exercise decisions that would normally lie with a client, such as the ability to bring or settle cases. In both criminal and civil settings, the attorney represents a sovereign who is expected to act fairly and impartially. Courts 'have found that a government's very legitimacy depends on it abiding by its own laws.'⁷⁰ These aspects of a democratic government direct attorneys to consider carefully the public interest in their decisions, including decisions 'about whether to disclose information.' At the least, government attorneys promote the public interest by ensuring compliance with law. Clark argues that 'those statutes and regulations that constitute the government's information-control regime are the substantive standards that define a government attorney's confidentiality obligation.'⁷¹ These information-control statutes include freedom of information and whistleblower laws.

The government's control of its information operates against a general principle that democratic information-control regimes include freedom of information provisions that presume that information held by the government is public unless special reasons exist for keeping it secret. Also included in this legal regime are whistleblower laws, such as the Whistleblower Protection Act of 1989, that encourage employees 'to come forward with information about misconduct' and protect those who do.⁷² The Code of Ethics for Government Service also encourages government employees to expose wrongdoing. In particular, whistleblower protection laws can be treated as 'the government's consent to lawyers' for the 'disclosure of wrongdoing.'⁷³ Clark applied these principles to Radack's disclosures and concluded that those disclosures did not violate the substance of the ethical requirement of confidentiality because 'she may have believed that the government made an incomplete disclosure to the federal court hearing John Walker Lindh's criminal case.'⁷⁴

The current controversies regarding disclosures of misconduct by government officials recall the role of ethical justifications for whistleblower protection. They also suggest the relationship between professional ethics and whistleblower laws. Thus, in more than one way, ethics remain connected with whistleblower laws.

Clark contends that the entity exemption to the obligation of attorney confidentiality requires that the attorney report the wrongdoing to higher authority.⁷⁵ She employs this principle to argue that Mark Felt, the Deep Throat of the

Watergate scandal, had an obligation to report to higher authority – the head of the FBI, the Attorney General or the President. Each of these persons, however, was involved in a criminal conspiracy to hide criminal conduct.⁷⁶ She fails to discuss circumstances in which this disclosure within the entity would not be required.

Clark also argues that Radack ‘should have pursued her concerns within the Justice Department prior to breaching confidentiality.’⁷⁷ She would impose on government attorneys ‘an orderly procedure for disclosures.’ These orderly procedures would require ‘the lawyer to give the government advance notice of her plan to disclose, similar to the current procedure for entity lawyers disclosing misconduct.’⁷⁸ Her procedures draw on new ethical rules for private attorneys after the passage of the Sarbanes-Oxley Act,⁷⁹ but would vary in important ways. After ‘a reasonable time’ a government attorney could publicly disclose the misconduct ‘even if the government has taken remedial action.’⁸⁰ For information that must be released under a freedom of information law, the government should establish procedures for reviewing requests for disclosure by government attorneys. The government enjoys no special exemption from disclosure of information regarding past wrongdoing.

INTERNAL DISCLOSURES

The old issues and current controversies surrounding anonymity, national security, and ethical justifications for whistleblowing implicate the role of internal disclosures. This ubiquity of the role of internal disclosures attests to its contemporary importance. The place of internal disclosures in whistleblower laws appear from the beginning of these laws, distinguish the competing international models for whistleblower protection, mark much contemporary scholarship about whistleblower laws, and define the character of whistleblowing. The recent controversy regarding the treatment of internal disclosures in proposed regulations of the United States Securities and Exchange Commission (SEC) implementing the bounty provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) illustrate the continuing debate.⁸¹

Whistleblower laws treat internal disclosures in a number of different ways. First, some laws exclude from protection all internal disclosures or identify categories of them for exclusion. This approach limits whistleblower protections to disclosures outside of the institution of which a whistleblower is part. Second, some whistleblower laws protect internal disclosures. Third, some of these laws require internal disclosures prior to other disclosures. A variation on this approach requires internal disclosures before others unless some limited conditions are satisfied. Fourth, some apply more lenient standards for

internal disclosures than for others or only protect internal disclosures. Whistleblower laws thus represent all of these approaches.

Powerful arguments support the protection of internal disclosures. These arguments rely on descriptions of the benefits of these disclosures, both to institutions and to whistleblowers. Whistleblowers benefit because internal systems of disclosure support the loyalty of employees to the institutions of which they are part and permit the expression of concerns within those institutions. By making such disclosures, employees may believe that they have reduced the likelihood of retaliation by the organization's management. The practice of most whistleblowers to first raise concerns about misconduct within the organization demonstrates the power of these perceptions. If an organization fails to consider allegations or mistreats those employees who do speak up, others are discouraged from raising these concerns internally. The realization that whistleblowers making such disclosures enjoy no legal protection further dissuades employees.

Organizations may benefit from these internal disclosures because such disclosures alert institutions to problems and misconduct at a time when additional damage to the reputation or performance of the institution can still be avoided. Institutional responses may be more effective than subsequent regulatory or public action. The institution has an opportunity to redress misconduct, to limit damage to others, and to preserve legal and ethical standards. It allows a company to resolve misconduct prior to regulatory or public disclosure. Organizations have much to gain from an 'early warning' system.

Professor Orly Lobel argues for sequencing of disclosures along the lines of the British Public Interest Disclosure Act 1998 and criticizes the failure of courts to 'extend protection to employees who report illegality to outside authorities but leave the internal whistleblower unprotected.'⁸² The Federal Circuit's interpretation of the WPA to exclude many internal reports illustrates the 'perverse' effects of similar judicial interpretations.⁸³ The Supreme Court has also restricted the scope of First Amendment protections for public employees by denying protection to speech relating to their job duties.⁸⁴ Likewise, 'organizations that encourage employees to voice objections and difficulties' have the upper hand 'in managing uncertainty and exercising judgment.'⁸⁵ According to Lobel, internal disclosures lead to the identification of potential wrongdoing by groups of employees who are likely to be most knowledgeable on corporate practices and behavior. Giving priority to internal disclosures accepts the competing loyalties of employees but provides a forum for the expression of individual and group judgments. A legal regime accepting internal disclosures and creating incentives that make them the initial and primary forum for whistleblowing reconciles competing loyalties 'by allowing private corporations and public organizations to investigate and correct any alleged wrongdoing from within.'⁸⁶

Character of Internal Disclosures

The characteristics of schemes of internal disclosure are important whether some or all disclosures are protected or whether such disclosures are required. Whistleblower provisions can leave the development of structures of internal disclosure to institutions involved or these laws can address the character of these structures. These laws can suggest 'best practices' for these structures, impose more specific requirements, or permit administrative regulation of them.

The place of internal disclosures and their character does much to define whistleblowing and to determine the successes and failures of whistleblower laws. Internal disclosures also highlight the influence of different perspectives toward whistleblower laws, perspectives that are described in Chapter 15. Although internal disclosures emphasize the employment perspective, they also suggest the application of other perspectives.

Despite the arguments for internal disclosures, some early descriptions of whistleblowing assumed that whistleblowing required some type of disclosure outside of the institution.⁸⁷ Professors Marcia Miceli, Janet Near and Terry Dworkin addressed and rejected the views of other commentators who would have required that a person use at least one external channel in order to be classified as a whistleblower.⁸⁸ They also describe the justifications for treating internal disclosures as whistleblowing and providing legal protection to them. For them, internal and external disclosures are 'two types of one broad class of behavior' and 'not two essentially unrelated behaviors.'⁸⁹ In particular, many studies show 'that nearly all whistle-blowers who use an external channel do so after first using internal channels.'⁹⁰

Many of the early advocates of whistleblower protection were skeptical of internal disclosures because the whistleblower stories of the time stressed the inadequacy of the structures for such disclosures. Institutions failed to establish credible mechanisms to protect employees from retaliation for internal disclosures. Whistleblower advocates often saw internal disclosures as invitations to retaliation and opportunities for cover-ups. For example, the report, *The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Government Waste, Abuse and Corruption*, by Senator Patrick Leahy described agencies' disregard of the disclosures and the ineffectiveness of internal agency grievance systems in protecting whistleblowers from retaliation.⁹¹

In the whistleblower provision of the CSRA, Congress rejected any requirement for internal disclosures. This rejection shows that Congress was convinced that requiring such disclosures increased risks to the public, invited cover-ups and destruction of evidence, and permitted retaliation. The language and history of the provision, however, demonstrate that the law sought to

protect rather than require internal disclosures. The provision applied one standard to all disclosures and allowed a whistleblower to select the avenue through which allegations of misconduct would be raised (the separate treatment of information prohibited by law and classified information support this point). Congress assumed that protection of all disclosures would encourage agencies to develop and improve internal procedures for disclosure. The interpretations of the Federal Circuit are at odds with these understandings of the protection of internal disclosures.⁹²

Subsequent state laws took several approaches. Many were silent regarding internal disclosures; others protected internal disclosures; some required such disclosures. Of this last group, a few statutes provided exceptions regarding the futility or risk of such disclosures. Lobel asserts that most state-level whistleblower legislation regarding public employees ‘protects only external whistleblowing’ while those statutes that do protect internal disclosures are more likely to apply to the private sector.⁹³ Several federal private-sector laws specifically protect internal disclosures. SOX requires an avenue for anonymous disclosures to the audit committees of publicly held corporations. These private-sector laws are less likely to protect disclosures to the public or to the media.⁹⁴

The British Public Interest Disclosure Act privileges internal disclosures by imposing additional requirements for disclosures to the regulatory or law enforcement bodies and for those beyond those oversight agencies. International organizations may not protect disclosures outside of the organization itself. For example, the United Nations protects certain disclosures outside the organization while the World Bank does not.⁹⁵

The encouragement of internal mechanisms reflects trends in employment law, particularly the part of that body of law that addresses anti-discrimination provisions. The premise of ‘second-generation’ discrimination law rested on the use of judicial review of discrimination claims to encourage the development of internal complaint systems. For example, the Supreme Court created exceptions to corporate vicarious liability for hostile-environment sexual harassment claims based on the conduct of supervisors.⁹⁶ An employer can avoid liability by exercising reasonable care to stop and promptly address sexual harassment. An employer also could avoid liability if an employee unreasonably ‘failed to take advantage of any preventive or corrective opportunity provided by the employer to avoid harm.’ The Court was seen as using the law to encourage ‘the development of a dynamic regulatory regime through ongoing interaction between general legal norms and workplace problem solving.’⁹⁷

The Supreme Court’s reliance on internal mechanisms for receipt of allegations of harassment requires an effective system and a detailed analysis by the courts of the context in which the employee failed to use the system.

Professor Susan Carle describes a number of decisions in which courts of appeal have failed to analyze either the effectiveness of the avenues for redress or the circumstances that caused an employee to forego reporting.⁹⁸ She argues that courts fail to consider how workplace power dynamics influence the application of an employer's affirmative defenses. By equating 'reasonableness' with the use of existing procedures, the courts risk the substitution of perfunctory paper procedures for effective ones. Carle's analysis suggests that meaningful internal systems may require a degree of oversight for which federal courts have shown little enthusiasm.

Several studies raise similar concerns about corporate compliance programs created by corporations after the Sarbanes-Oxley Act. These studies question the effectiveness of these mechanisms and indicate that they may exist only on paper or are rife with conflicts and inadequacies. The financial collapse of 2008 raised doubts about the effectiveness of several corporate compliance programs and the ability of the SEC to ensure the effectiveness of these programs. The SEC and regulated parties often do not share the same values and aims.

The effectiveness of these programs is hard to evaluate but some question their effectiveness because of the difficulty of establishing or measuring criteria for success.⁹⁹ Studies show that many senior executives did not fully understand their companies' compliance programs.¹⁰⁰ Most compliance officers report directly to the chief executive officer, some to the general counsel, and a few to the board of directors.¹⁰¹ Only 61 percent of compliance officers in one study reported that they received training before undertaking the position and only half of these received formal instruction from the company.¹⁰² Training often did not advise how allegations of misconduct against senior management should be treated. A substantial percentage of compliance officers responding in the study reported direct pressure from corporate officials not to investigate certain allegations; more than half received similar pressure from other managers and supervisors, and 10 percent of respondents describes such pressure as 'frequent.'¹⁰³ Not surprisingly some scholars and a former SEC official describe these programs as 'window dressing' or existing 'only on paper.'¹⁰⁴

Although these studies are limited, they may explain the skepticism of employees regarding these programs and why one well-regarded whistleblower book advises whistleblowers to avoid any corporate program headed by a corporate attorney.¹⁰⁵ One study found that 53 percent of employees do not believe that they will be protected from reprisal for use of a compliance system;¹⁰⁶ another study reported that 15 percent of employees thought that they had been subjected to retaliation for past disclosures within a compliance system.¹⁰⁷ Most employees doubted a satisfying outcome to a report of wrongdoing and nearly half either questioned the commitment of top management to ethics and integrity or lacked a basis for accepting such a commitment.¹⁰⁸

Professor Richard Moberly, who advocates the use of internal reporting, identifies some of the difficulties of the design of such programs under SOX. He stresses that judicial oversight of compliance systems requires evaluation of those systems and the creation of incentives and penalties to encourage effective not sham programs.¹⁰⁹

Scholars have proposed a number of criteria for evaluating internal disclosure mechanisms. Professor Terrance Miethe proposes general requirements for a successful program: a strong organizational commitment to ethics, clear channels through which wrongdoing is to be reported, a likelihood that concerns will be addressed, and a belief that retaliation is unlikely.¹¹⁰ Some limited empirical evidence supports the proposition that imposing a duty to report wrongdoing will encourage the internal reporting of misconduct.¹¹¹

The effectiveness of an internal reporting mechanism may also be judged by criteria of procedural justice. These criteria include:

- (1) quality of decision-making, such as neutrality, objectivity, consistency, and a factual basis for decisions
- (2) concern for the rights and dignity of employees
- (3) formal rules and structures of decision-making
- (4) statement and communication of institutional values and procedures, and
- (5) interactions between decision-making, supervisors, and employees.¹¹²

Empirical research by Miceli, Near and Dworkin explores the characteristics of successful systems of internal disclosure.¹¹³ Perhaps the most extensive empirical study, *Whistleblowing in the Australian Public Sector*, examined internal disclosures by employees in public agencies in Australia; it provides a wealth of data regarding the incidence of internal disclosures and suggestions regarding the design of internal systems.¹¹⁴ The study found that many employees reported wrongdoing including corruption, defective administration, or waste. Little evidence supported 'a view of whistleblowers as disgruntled and embittered employees, driven to report by perverse personal characteristics.'¹¹⁵ The overwhelming percentage of employees, over 97 percent, who reported agency misconduct affecting the public first reported that misconduct within their agencies.¹¹⁶ The majority of these reporting employees whose reports were investigated suggested that the investigation resulted 'in improved organizational outcomes.'¹¹⁷ About a quarter of these employees believed that they were treated badly by co-workers or by managers as a result of their internal disclosures.¹¹⁸ Even whistleblowers who were not treated badly reported 'adverse psychological experiences.' The risks of reprisal depended on the 'nature and seriousness of the wrongdoing, the number and positions of wrongdoers relative to the whistleblower and the level of confidentiality.'¹¹⁹

A book edited by A.J. Brown identified several aspects of the handling of internal disclosures relevant to the effectiveness of responses to allegations and the treatment of whistleblowers. Important was the articulation of procedures and policies for reporting misconduct, investigating and assessing disclosures, supporting and managing whistleblowers, and addressing reprisal against them. Other aspects considered managers' and staff awareness of whistleblower legislation, the support and protection of whistleblowers, the assessment of the risk of reprisal to whistleblowers, the engagement with external agencies with an interest in effective systems, and greater management responsibility in receiving allegations and managing whistleblowing.¹²⁰ The book recommends that legislation provide for more central coordination of internal whistleblowing, including support for whistleblowing, greater articulation of requirements for agency internal procedures, and effective compensation of whistleblowers. The book also argues that effective internal disclosures require the recognition of 'public whistleblowing.'¹²¹

Managers who are positively inclined toward internal disclosures relay three themes.¹²² One is ethical and relies on the role of these disclosures in preserving the integrity of the organization. The second rests on the assumption that for pragmatic reasons wrongdoing must be exposed and addressed. Part of the pragmatic considerations includes the costs of responding to allegations and the results of reprisals. A third focuses on compliance with whistleblower legislation that applies to an agency.

Some 24 criteria were used to grade the content of the internal whistleblower procedures of agencies (the grading of agency performance was based on surveys and other analyses of the agency performance under these criteria).¹²³ Several of these criteria came from established standards for whistleblower protection programs with additional criteria responding to the study's focus on public agencies. The criteria themselves are important and not without controversy; for example, the criteria require that anonymous disclosures will be acted upon. In addition, in the eyes of some whistleblower advocacy groups the criteria permit widely varying approaches, some which might be patently inadequate; for example, a definition of reprisal could be so limited to exclude many cases of whistleblowing that would satisfy other criteria. For our purposes, however, these criteria demonstrate a concerted effort to establish guidance for the evaluation of the content and the operation of internal disclosure systems equipped with sufficient resources. The book suggests that the articulation and consideration by agencies of these criteria is correlated with better outcomes. Perhaps careful consideration of the elements of an effective internal disclosure system reflects a commitment to whistleblowing or perhaps the process of doing so improves agency perceptions and practices.

Some civil society groups that have evaluated internal disclosure schemes focus on fewer criteria, ones that understandably address the effectiveness of

the protection of whistleblowers. The Australian study showed that the ‘weakest areas were those associated with whistleblower protection and support.’¹²⁴ This emphasis on protection can be attributed to the missions of these organizations. This distinction may also reflect the legal realist view that the law is not what is written but what is enforced. For example, the criteria for evaluating internal reporting in international financial institutions reflect these differences.

Regulation of Structures for Internal Disclosures

Richard Moberly argues that contract remedies should be available to whistleblowers who use corporate codes of conduct and suffer retaliation as a result.¹²⁵ He notes that the listing rules of the major stock exchanges require companies to publish codes that promise broad protections to employees who disclose wrongdoing to company officials. Other codes follow from the response of companies to the Sarbanes-Oxley Act and to government incentives for codes that include reduction in sentences when effective internal compliance provisions are available. In addition, a number of companies voluntarily adopt such codes as good business practice. Contract remedies respond to weaknesses in both internal and external enforcement of these codes.¹²⁶

Contract remedies would make internal mechanisms more effective and inform shareholders of weaknesses in internal and external oversight. Contract remedies permit public enforcement of internal rules and enable public monitoring of private enforcement.¹²⁷ To be effective the anti-retaliation promises of these codes must be enforceable. This enforcement requires exclusion of these promises from the ‘handbook rule’ that makes contract remedies difficult and also requires rejection of disclaimers that prohibit claims for violation of them. Moberly argues that because these codes address compliance with law and practices directly relevant to assessment of risks of investing in particular companies, because they implicate corporate structure, and because they are part of a regulatory scheme, these codes should be treated differently than other promises made to employees.

The use of contracts avoids administrative investigation and gives employees direct access to the courts. Codes cover a range of disclosures, identify appropriate recipients, apply a more lenient ‘good faith’ standard for disclosure, and provide a longer statute of limitations. Because contract damages may be limited, the promises of protection against retaliation may vary among companies and external enforcement will likely be required. Moberly sees this approach to internal disclosure and protection of whistleblowers as a ‘valuable supplemental remedy’ that does not eliminate the need for improvements in whistleblower laws.¹²⁸

The Department of Energy’s (DOE) ‘safety-friendly’ workplace regulations offer an example of more extensive regulation of internal systems of disclo-

sure.¹²⁹ These regulations apply to contractors operating nuclear power plants. The regulations impose a number of obligations on contractors to ensure that employees are not discouraged from raising internally safety concerns about the power plants. The regulations require the engagement of 'employee concern officers' who have the responsibility to ensure that the regulations are applied in each nuclear power plant.¹³⁰ In particular, these employee concern officers act to prevent retaliation or the threat of retaliation from interfering with reporting of safety concerns. The regulations direct that these employee concern officers have sufficient authority and status to carry out these responsibilities. Moreover, the DOE inspects and evaluates compliance with these regulations through on-site visits, examinations of paperwork, and interviews with employees and employee concern officers.

The magnitude of the risks posed by nuclear power plants and the limited number of plants allow such oversight, oversight that otherwise could be prohibitively expensive if applied in other areas, such as food safety or financial misconduct. The experience of the DOE, however, suggests that other regulatory agencies could articulate criteria for internal compliance systems and mandate some of their structures. The DOE program may allow other agencies to extract principles of oversight that could be adopted for other, more extensive regulatory schemes.

Some scholars have urged the use of agreements between the parties to support whistleblower protection. The Hanford Joint Council illustrates one structure for dealing with whistleblower's allegations and fears of retaliation. This structure combines Moberly's approach, which relies on the agreement of the parties, with a novel scheme of alternative dispute resolution. The Hanford Joint Council arose from whistleblower allegations and litigation regarding the safety of the Hanford site for the disposal of radioactive waste from the United States nuclear weapons program. Whistleblowers, the DOE, and the contractor operating the site agreed that allegations regarding safety and health violations would be taken to a joint council consisting of eight members: a neutral chair, two representatives from public interest groups, two from contractors, a former whistleblower, and two neutrals from business, academia, or labor.¹³¹ The Council also addresses claims of retaliation.

The scheme contained a number of basic requirements addressing the authority and independence of the Council¹³² and articulated necessary features of a third-party review procedure.¹³³ The goal of the Council was to obtain a rapid technical assessment of the merits of allegations. One participant in the program found that it offered the opportunity to focus on the allegations of the whistleblower and to resolve the merits of allegations quickly in a forum in which employees, the employer, and the public had confidence. The chairman of the Hartford Joint Council concluded that it assessed and managed cases successfully, prevented escalation of disputes and restored a

stable employment relationship.¹³⁴ He also described factors important to the success of the council.¹³⁵

SEC regulations implementing the bounty provision of the Dodd-Frank Act are part of a current controversy regarding the role of internal disclosures. Financial organizations opposed the regulations on a number of grounds. They argued that the regulations should require internal disclosures in order for employees to be entitled to the bounty. More generally, financial institutions believed that regulations should require internal disclosure prior to any report to the SEC. Final SEC regulations do not require internal reporting of violations. Rather, the regulations provide incentives for use of internal compliance procedures. These incentives include dating an employee's disclosure from the time of an internal report, thus preserving an employee's eligibility for a bounty if the company itself subsequently reports to the SEC. Another incentive allows the SEC to consider an internal report as a factor that may increase an award.¹³⁶ A spirited debate preceded these final regulations.

Representatives of companies argued that the use of internal compliance systems may be affected by financial rewards. Even if employees overwhelmingly choose first to make disclosures internally, particularly if a corporation has an effective and safe whistleblower channel, the possibility of financial award may encourage employees to report first to the SEC. Because the regulations require that a whistleblower's information be 'original,' that is not already acquired by the SEC, an employee who reports internally risks that disclosure of the misconduct by the corporation to the SEC would foreclose any recovery by the whistleblower. Corporations could neither ethically nor legally offset these incentives for external disclosure by providing financial incentives for internal disclosure rather than reporting to the SEC. Any such actions by a corporation would suggest bribery to prevent the disclosure of misconduct and undermine the ethical and fiduciary obligations to report misconduct within the organization.

According to regulated parties, the SEC regulations would undermine internal compliance mechanisms on which companies rely to identify and respond to allegations of misconduct. The demise of effective internal compliance will harm companies and the public and will impose significant regulatory costs on the SEC.

Financial organizations also objected to the eligibility of compliance employees for bounties. Giving such employees a bounty would encourage them to defer notifying company officials of fraud or taking other action to reduce the company's legal liability. Such delay or action could increase the bounty because the bounty is based on a percentage of the fine recovered by the SEC. Thus, a larger fine will lead to a larger bounty. In this way the availability of a bounty to compliance officials created a conflict with their fiduciary duties to the corporation.

The proposed regulations of the SEC barred employees from obtaining a bounty for reporting to the SEC information acquired by employees through legal, compliance or audit functions or processes for identifying, reporting and addressing such violations. The SEC, however, created an exception in the final regulations: If the corporation fails to disclose the information obtained from these employees with a 'reasonable' time or acts in 'bad faith,' the internally reporting employees may recover a bounty.

Whistleblower advocacy groups challenged the assumptions underlying the arguments presented against the regulations. Those arguments mirror similar ones deployed against requirements of internal disclosure. These groups challenged the regulations as inconsistent with the Dodd-Frank Act because they limited the likelihood that the SEC would receive information regarding corporate wrongdoing. The regulations thus deprive the SEC of information and expertise provided by whistleblowers. The SEC regulations demonstrate a distrust of whistleblowers and fail to appreciate the importance of whistleblowers to internal compliance and to SEC regulation. The regulations create too many obstacles for whistleblowers seeking to alert the SEC to misconduct.

Instead, the regulations need to address the incentives against reporting to regulatory agencies. These factors include obedience to authority, adoption of informal standards of conduct at odds with legal ones, group loyalty, retaliation, ineffective legal protections, and cynicism about the effects of disclosure. Previous discussions recognize the influence of these factors.

The current controversy regarding the SEC regulations reflects long-standing debates regarding internal disclosures. The issues raised in these debates do much to define the character of whistleblower laws and to determine their successes and failures. Effective mechanisms for internal disclosures may alter the narrative regarding whistleblowers. That altered narrative will more likely emphasize success and signal an institutional commitment to whistleblowing and self-examination.

Current controversies regarding anonymous whistleblowing, national security, ethical justifications for whistleblowing, and internal disclosures reflect long-standing issues surrounding whistleblower laws. The connection of current controversies to old issues emphasizes the importance of these issues and demonstrates how they define the character of whistleblower laws and do much to determine their successes and failures.

NOTES

1. Janet P. Near & Marcia P. Miceli, *Effective Whistle-Blowing*, 20 ACAD. OF MGMT. REV. 679, 692 (1995) [hereinafter *Effective Whistleblowing*].

2. *Id.* at 692–93. Anonymity also conceals attributes of the whistleblower that would reduce his or her credibility. This concern also raises moral or ethical objections to anonymity.
3. Frederick A. Elliston, *Anonymity and Whistleblowing*, 1 J. OF BUS. ETHICS 167–74 (1982) [hereinafter *Anonymity and Whistleblowing*]; FREDERICK ELLISTON, JOHN KENNAN, PAULA LOCKHARD & JANE VON SCHAICK, *WHISTLEBLOWING RESEARCH: METHODOLOGY AND MORAL ISSUES* 145–61 (1985) (addressing and refuting moral objections to anonymity, including fair play, the encouragement of widespread anonymous disclosure, and independently valuing the redress of injustice). In his revised views of his earlier article, Elliston concludes: ‘from my own research it is clear that the numbers of those unfairly treated are much greater among the ranks of whistleblowers than those they accuse.’ *Id.* at 159.
4. *Anonymity and Whistleblowing*, *supra* note 3, at 174.
5. James E. Hunton & Jacob M. Rose, *Effects of Anonymous Whistle-Blowing and Perceived Reputation Threats of Investigations on Whistle-Blowing Allegations by Audit Committee Members*, 48 J. OF MGMT. STUD. 75, 77 (2010).
6. *Id.*
7. *Effective Whistleblowing*, *supra* note 1, at 692; MARCIA P. MICELI & JANET P. NEAR, *BLOWING THE WHISTLE: THE ORGANIZATIONAL AND LEGAL IMPLICATIONS FOR COMPANIES AND EMPLOYEES* 74–75 (1992) [hereinafter *BLOWING THE WHISTLE: ORGANIZATIONAL AND LEGAL IMPLICATIONS*].
8. Robert G. Vaughn, *State Whistleblower Statutes and the Future of Whistleblower Protection*, 51 ADMIN. L. REV. 581 (1999) (describing how such a heroic view can limit appropriate statutory protections).
9. Chapter 14 examines the advice given by whistleblower advocacy groups, including counseling anonymity and suspicion of the fairness of many internal reporting mechanisms that promise anonymity.
10. Chapter 14 describes this policy of Public Concern at Work.
11. THE PROJECT ON GOVERNMENT OVERSIGHT, GOVERNMENT ACCOUNTABILITY PROJECT & PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, *THE ART OF ANONYMOUS ACTIVISM: SERVING THE PUBLIC WHILE SURVIVING PUBLIC SERVICE* (2002). The book outlines the risks associated with whistleblowing, describes effective techniques for anonymous whistleblowing, cautions against the use of internal mechanisms that have proven unreliable, assesses possible recipients, and evaluates anonymous whistleblowing under applicable law. The Guide begins, ‘Throwing away your entire career, particularly if there are other ways to ventilate the problems, is imprudent and counterproductive.’ *Id.* at 7.
12. CHARLES PETERS & TAYLOR BRANCH, *BLOWING THE WHISTLE*, 291 (1972).
13. The Federal Employees Disclosure Act of 1975, S. 1210, 94th Cong. (1975). Chapter 5 discusses this legislation considered by the Senate after the Watergate crisis.
14. As discussed above, whistleblower advocates caution that anonymity may be difficult to preserve. Another observer reaches similar conclusions. TERRANCE MIETHE, *WHISTLEBLOWING AT WORK: TOUGH CHOICES IN EXPOSING FRAUD, WASTE, AND ABUSE ON THE JOB* 82 (1999) (maintaining that there is no guarantee of anonymity), 215 (whistleblowers making anonymous disclosure may still be known) [hereinafter *WHISTLEBLOWING AT WORK*].
15. Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CAL. L. REV. 433, 497 (2009).
16. *WHISTLEBLOWING AT WORK*, *supra* note 14, at 82 (1999) (no guarantee that a whistleblower will not be identified), 215 (despite attempts at anonymity, a whistleblower may still be identified); STEPHEN M. KOHN, *THE WHISTLEBLOWER’S HANDBOOK: A STEP-BY-STEP GUIDE TO DOING WHAT’S RIGHT AND PROTECTING YOURSELF* 123–25 (2011) (expressing skepticism about anonymous hotlines); Richard Moberly, *Sarbanes-Oxley’s Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107 (asserting belief that anonymous reporting channels are important ones).
17. WILLIAM DEMARIA, *DEADLY DISCLOSURES: WHISTLEBLOWING AND THE ETHICAL MELTDOWN OF AUSTRALIA* 28 (1999).
18. *Id.* (stating that ‘[a]nonymous reporting does not need protection’).
19. For example, several of the early whistleblowers were intelligence officers, including

Christopher Pyle and Ralph Stein who described Army investigations for the exercise of First Amendment rights and the creation of extensive data banks on US citizens. Chapter 4 identifies their place in these early compilations.

20. Chapter 4 describes how disclosure of the surveillance activities by Pyle and Stein led to the passage of the Federal Privacy Act.
21. Chapter 5 explores how Nixon's responses to Ellsberg's disclosures played a role in the Watergate cover-up and in Nixon's resignation as president.
22. S. REP. NO. 94-755 (1976) [hereinafter Church Committee Report]. This committee is commonly referred to as the Church Committee after its chairman Senator Frank Church.
23. *Id.* at iii.
24. *Id.* at v.
25. *Id.* at 12.
26. *Id.* The report described intelligence activities as 'A New Form of Government Power to Impair Citizens' Rights.' *Id.* at 4.
27. *Id.* at 12.
28. *Id.* at 13.
29. *Id.*
30. *Id.* at 17. After quoting the 1924 warning of Attorney General Harlan Fiske Stone, 'there is always a possibility that a secret police may become a menace to a free government and free institutions because it carries the possibilities of abuse of power which are not always quickly apprehended or understood,' the committee concluded: 'Our investigation has confirmed this warning.' *Id.* at 3 (footnote omitted). The committee added: 'We have some segments of our Government, in their attitudes and actions, adopt tactics that are unworthy of a democracy, and occasionally reminiscent of the tactics of totalitarian regimes.' *Id.*
31. *Id.* at 21.
32. *Id.* at 40.
33. *Id.* at 68.
34. *Id.* at 165.
35. *Id.* at 137-63.
36. *Id.* at 146 (describing activities of the Central Intelligence Agency, the Federal Bureau of Investigation, and the National Security Agency).
37. *Id.* at 77.
38. If the disclosed information related to foreign intelligence or counterintelligence, the Special Counsel may only give the information to the President's national security advisor or to certain members of Congress. 5 U.S.C. §1213(j). Stephen I. Vladeck, *The Espionage Act and National Security Whistleblowers after Garcetti*, 57 AM. U.L. REV. 1531, 1544 (2007).
39. Many of the changes are described in LOUIS FISHER, CONG. RESEARCH SERV.: NATIONAL SECURITY WHISTLEBLOWERS (2005). Chapter 12 of this book also discusses the expanded scope of national security information.
40. Chapter 12 contains examples from Britain and Australia.
41. S. 372 - *The Whistleblower Prot. Enhancement Act of 2009: Hearings Before the Oversight of Gov't Mgmt., the Fed. Workforce and the Dist. of Columbia Subcomm. of the S. Comm. on Homeland Sec. and Governmental Affairs*, 111th Cong. 243 (2009).
42. The website of the Collaboration on Government Secrecy (CGS) contains copies of President Obama's statements, memoranda, and policies relating to an open and transparent government. Also on the site are audio or video records of CGS conferences evaluating the transparency commitments of the Obama Administration in January 2009, 2010, 2011, and 2012. AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW COLLABORATION ON GOVERNMENT SECRECY, <http://www.wcl.american.edu/programs/collaborationon-governmentsecrecy> (last viewed Aug. 15, 2012).
43. Aldrich Ames was a CIA employee who sold vital information to the Soviet Union that imperiled many US agents; John Hanson was an FBI security official who also sold classified information to the Soviet Union and the Russian Federation.
44. Yane Mayer, *The Secret Sharer: Is Thomas Drake An Enemy of the State?* THE NEW YORKER, May 23, 2011, available at http://www.newyorker.com/reporting/2011/05/23/110523fa_fact_mayer [hereinafter *The Secret Sharer*].

45. Others who had complained about the NSA's use of the program were also swept into the investigation. Bill Binney and J. Kirk Weibe were confronted in their homes by armed agents who searched for classified documents. *Id.*
46. *60 Minutes: U.S. v. Drake* (CBS television broadcast May 22, 2011) [hereinafter *60 Minutes*].
47. One of these whistleblowers, Bill Binney, after retirement from the NSA, took his concerns to a staff member of the House Permanent Select Committee on Intelligence.
48. *60 Minutes: U.S. v. Drake*, *supra* note 47.
49. *The Secret Sharer*, *supra* note 44.
50. Vladeck, *supra* note 38, at 1543.
51. *60 Minutes*, *supra* note 46 (comments of Abbe Lowell).
52. *Id.* (asserting that the prosecution was intended to send a chilling message 'to other whistleblowers and others in the government not to speak up or speak out. Do not tell truth to power. We will hammer you.').
53. Tricia Bishop, *No Jail Time for Ex-NSA Official: Thomas Drake Accused of Espionage, Gets Probation After Case Collapses*, BALT. SUN, July 19, 2011, at 1A.
54. *Id.*
55. Ellen Nakashima, *As NSA Official Gets Mild Penalty, Delays in the Case called 'Unconscionable,'* WASH. POST, July 30, 2011, at A2, col. 3.
56. Bishop, *supra* note 53.
57. *Id.*
58. Chapter 9 considers several types of private-sector laws. Chapter 12 demonstrates how national security can involve private-sector whistleblowers.
59. Chapter 4 contains the Code of Ethics for Government Service.
60. RALPH NADER, PETER PETKAS & KATE BLACKWELL, *WHISTLEBLOWING: THE REPORT OF THE CONFERENCE ON PROFESSIONAL RESPONSIBILITY* 252, Appendix B (1972) (presenting a number of professional codes of ethics).
61. *BLOWING THE WHISTLE: ORGANIZATIONAL AND LEGAL IMPLICATIONS*, *supra* note 7, at 47 (1992) (identifying the need for 'a clear picture of the whistle-blowing process because of the obvious contribution this will make to our understanding of behavior overall in organizations').
62. Jane Mayer, *Lost in Jihad*, THE NEW YORKER, Mar. 10, 2003, at 58. JESSELYN RADACK, *THE CANARY IN THE COALMINE: BLOWING THE WHISTLE IN THE CASE OF 'AMERICAN TALIBAN'* JOHN WALKER LINDH (2006) (describing her experiences in detail).
63. Mayer, *supra* note 62.
64. *Id.*
65. *Id.*; RADACK, *supra* note 62, at 58 (reporting that when she checked the hard file of her e-mails she found it had shrunk from 'an inch thick stack of paper bound by a heavy-duty, long-reach paper clip' to three 'very innocuous' e-mails).
66. Barbara Ehrenreich, *All Together Now*, N.Y. TIMES, July 15, 2004, at A23.
67. Jesselyn Radack, *The Government Attorney Whistleblower and the Rule of Confidentiality: Compatible at Last*, 17 GEO. J. LEGAL ETHICS 125 (2003).
68. *Id.* at 134–35.
69. Kathleen Clark, *Confidentiality Norms and Government Lawyers*, 85 WASH. U.L. REV. 1033 (2007).
70. *Id.* at 1081 (footnote omitted).
71. *Id.* at 1072 (footnote omitted).
72. *Id.* at 1074.
73. *Id.* at 1079 (footnote omitted). She also relies on common law doctrines that construe the government's evidentiary privilege to include exceptions for wrongdoing and the ability of lawyers for fiduciaries to disclose wrongdoing to beneficiaries.
74. *Id.* at 1085.
75. *Id.* at 1048.
76. Chapter 5 discusses the role of whistleblowers in the constitutional crisis that was Watergate.
77. Clark, *supra* note 69 at 1085.

78. *Id.* at 1091 (footnote omitted).
79. *Id.* at 1094.
80. *Id.* at 1095.
81. Chapter 9 discusses a number of the federal private-sector laws enacted in the twenty-first century, a number exceeding the number enacted in any previous decade. These twenty-first-century laws cover tens of millions of private-sector employees.
82. Lobel, *supra* note 15, at 444 (2009).
83. Chapter 11 criticizes the Federal Circuit's decisions excluding many internal reports from protection.
84. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).
85. Lobel, *supra* note 15, at 444.
86. *Id.* at 499.
87. PETERS & BRANCH, *supra* note 12, at 280–87 (1972).
88. MARCIA P. MICELI, JANET P. NEAR & TERRY MOREHEAD DWORKIN, *WHISTLE-BLOWING IN ORGANIZATIONS* 7–10 (2008) [hereinafter *WHISTLE-BLOWING IN ORGANIZATIONS*].
89. *Id.* at 8.
90. *Id.* at 9.
91. Chapter 5 discusses The Leahy Report in some detail.
92. Chapter 11 considers these interpretations.
93. Lobel, *supra* note 15, at 447.
94. Chapter 9 discusses this aspect of these laws.
95. Chapter 13 examines the Public Interest Disclosure Act and the whistleblower regulations at the United Nations and the World Bank.
96. Susan D. Carle, *Acknowledging Informal Power Dynamics in the Workplace: A Proposal for Further Development of the Vicarious Liability Doctrine in Hostile Environment Sexual Harassment Cases*, 13 DUKE J. GENDER L. & POL'Y, 85, 87–94 (2006) (discussing the Supreme Court's vicarious liability cases regarding sexual discrimination).
97. *Id.* at 85, n. 1, quoting Susan Strum, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 489 (2001).
98. *Id.*
99. Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U.L.Q. 487, 488 (2003); Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B CL. REV. 949 (2009).
100. T. McCollum, *Compliance Costs, Spending Increasing*, INTERNAL AUDITOR 21 (2005) (reporting that 44 percent of senior executives polled didn't have a clear view of the value that their company's compliance program delivers).
101. Gary Edward & Robert Reid, *Challenges Facing Corporate Ethics and Compliance Programs: A Research Report from Ethos International, Inc.*, ETHOS INTERNATIONAL, INC. 4 (2007), available at http://ethosinternational.net/files/689_file_PDF_EthosResearchReport2007.pdf (stating that of compliance officers surveyed, 51 percent report directly to the CEO, one-third report to the General Counsel, and only 8 percent report to the Board of Directors).
102. *Id.* at 12–14.
103. *Id.* at 9.
104. David Becker, who served as the General Counsel of the SEC, conceded that some of the most carefully conceived and documented compliance programs 'exist only on paper.' David Becker, General Counsel, U.S. Securities and Exchange Commission, Remarks at the Practising Law Institute's Ninth Annual Institute on Securities Regulation in Europe (Jan. 25, 2011), <http://www.sec.gov/news/speech/2011/spch012511dmb.htm>.
105. KOHN, *supra* note 16, at 124.
106. KPMG Forensic Integrity Study 2008–2009 1, iii, available at http://kpmg.com/SecureData/aci/Files?integritySurvey08_09.pdf [hereinafter KPMG Study].
107. Ethics Resource Center, *Blowing the Whistle on Workplace Misconduct* 4 (2010) (indicating the most common type of perceived retaliation was a 'cold shoulder' or verbal abuse from colleagues or a supervisor).
108. KPMG Study, *supra* note 106, at 8.

109. Moberly, *supra* note 16.
110. Miethe, *supra* note 14, at 55.
111. Yuval Feldman & Orly Lobel, *The Incentive Matrix: The Comparative Effects of Rewards, Liabilities, Duties and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151 (2010).
112. Lobel, *supra* note 15, at 496.
113. WHISTLEBLOWING IN ORGANIZATIONS, *supra* note 88, at 131–52.
114. WHISTLEBLOWING IN THE AUSTRALIAN PUBLIC SECTOR: ENHANCING THE THEORY AND PRACTICE OF INTERNAL WITNESS MANAGEMENT IN PUBLIC SECTOR ORGANIZATIONS (A. J. Brown ed., 2008).
115. *Id.* at xxiv.
116. *Id.* at xxv.
117. *Id.* at xxvi (56 percent of the 63 percent whose disclosures were investigated reached this conclusion).
118. *Id.* at xxvii (stating that ‘78 percent of public interest whistleblowers said they were treated either well or the same by management and co-workers in their organization as a result of reporting.’ The most common acts of retaliation were intimidation, harassment, heavy scrutiny of work, ostracism, unsafe or humiliating work).
119. *Id.* at xxviii. This endnote contains the quotations in the previous two sentences.
120. *Id.* at xxxvi.
121. *Id.* at xxxvii (recognizing that the legitimacy of public whistleblowing ‘is of continuing importance to the successful management of whistleblowing as a process including to the confidence of employees and the understanding of agencies that if authorities fail to act, a further disclosure may well be justified’).
122. *Id.* at 233–60.
123. *Id.* at 246.
124. *Id.* at xxxiii.
125. Richard Moberly, *Protecting Whistleblowers by Contract*, 79 COLO. L. REV. 975 (2008).
126. *Id.* at 1009.
127. *Id.* at 1011.
128. *Id.* at 1042.
129. 10 C.F.R. 708 (2009).
130. There is a national organization of employee concern officers and that organization, the Employee Concerns Forum, brings together these officers, plant officials, and Department of Energy personnel to discuss and respond to issues of importance in the implementation of the regulations.
131. Jonathan Beck, *Full and Fair Resolution of Whistleblower Issues: The Hanford Joint Council for Resolving Employee Concerns, A Pilot ADR Approach*, 51 ADMIN L. REV. 497, 505–09 (1999) (describing the origins of the Council).
132. *Id.* at 508.
133. *Id.* at 510, Table 2.
134. *Id.* at 512–15. The Hanford Council was disbanded when a new contractor took over the facility, but was subsequently reconstituted.
135. *Id.* at 517–24. These factors are membership composition, membership characteristics, sufficient authority, judgment and resources, independence and neutrality, creation by agreement of the participants, use of consensus, joint practices and problem-solving, certainty of implementation, availability of rapid action, and trust.
136. 17 C.F.R. §§ 240 & 249, Release No. 34–64545, File No. 57–33–10, August 12, 2011.

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