The World of Whistleblowing: From Jiminy Cricket to the Wicked Witch of the West

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In this exploratory study, we explore the world of whistleblowers and whistleblowing. This topic has produced a great deal of “buzz,” but little clear understanding of the contexts in which whistleblowers act, the paths that whistleblowers follow, or even a critical understanding of how whistleblowing ought to be understood as a social and legal practice.

This paper seeks to articulate some of these boundaries through a mixed method analysis. We have conducted a legal analysis, a review of extant quantitative data, and a series of interviews in order to be able to sketch a plausible picture of the current state of whistleblowing, and we use these results to construct a typology of whistleblowers that attempts to provide a conceptual shorthand for the goals, motivations, and contexts that define whistleblowing.

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1. Introduction.

Whistleblowing and whistleblowers are everywhere in the news, with any number of stories about corporate or government malfeasance and the lone brave person who opposes and reports it. However, our hero is almost always portrayed as also facing any number of harrowing challenges in her fight for justice. This essay is an exploratory study of whistleblowing and whistleblowers. Our initial perspective in approaching this subject was that, in accordance with the common tale, the whistleblower is a hero. She is in fact performing a societally valuable function of speaking truth to power when the interests of the public are on the line. In addition to daily news sources, this vision is supported by any number of whistleblower portrayals in books, magazine articles, films, and other media supports this view. This view is further

1 Joan Lowy, FAA whistleblower warned of safety issues at airline involved in Buffalo air crash a year ago, Associated Press Writer (June 3, 2009), www.aviationairportdevelopmentlaw.com/.../aviation-and-airport-news/.
5 For example, in 2009, it was announced that Rachel Weisz agreed to star in a forthcoming political drama titled “The Whistleblower” in which she reveals a United Nations cover up of a sex-trafficking scandal in Bosnia; In 2009, Matt Damon’s movie “The Informant” was released in which he played the whistleblower Mark Whitacre who blew the whistle against price-fixing in Archer Daniels Midland (ADM); Newsweek’s cover story in December 2008, “The Fed Who Blew the Whistle”, discusses the moral dilemma faced by the whistleblower Thomas Tamm who revealed the 2004 wiretapping scandal during his work in the United States Department of Justice. There have been many books about whistleblowing. Some are old but very exhaustive. (See James S. Bowman, Whistleblowing: Literature and Resource Materials, 43 Public Administration Review271 (1983)). A somewhat more recent article is “Whistle-Blowing: Myth and Reality” (See Janet P. Near and Marcia P. Miceli, Whistle-Blowing: Myth and Reality, 22 Journal of Management 507 (1996)). The American Political Science Review article entitled “Whistleblowing”, though mostly about rational choice, covers a wide range of relevant and current whistleblowing literature (See Michael M. Ting, Whistleblowing, 102 American Political Science Review (2008)). There are also a number of excellent case studies on whistleblowers including Peter Katel, Protecting Whistleblowers: Do Employees Who Speak out Need Better Protection? 16 CQ Researcher Online 1 (2006)). A noteworthy review on the Whistleblower Protection Act, legislation heavily covered in this paper, has also been published by the Congressional Research Service (See L. Paige Whitaker, The Whistleblower Protection Act: An Overview, United States Congressional Research Service, 2007.)
reinforced by the recognition that the government has formally acted on behalf of whistleblowers. A variety of laws have been passed, on both state and federal levels, protecting whistleblowers from retaliation. Yet, as demonstrated by the stories headlined above, all too frequently we found stories in the media about whistleblowers whose warnings were ignored, or who suffered greatly for their display of courage, their careers, and even their lives, destroyed by the organizations whose actions they have challenged.\textsuperscript{6}

The apparent inconsistency between the treatment afforded whistleblowers and the value of their actions for society caused us to take a first, cursory look at some already existing literature. This only added to our confusion for they showed that whistleblowers rarely prevail in their claims of retaliation. Rather than resolving any inconsistencies, we discovered instead that not only were the experiences of whistleblowers counter to what we expected, but that there were significant barriers to understanding those experiences. The literature failed to provide a critical appraisal of the phenomenon as a whole. There are a number of excellent investigations into specific types of whistleblowing, such as Richard Moberly’s analysis of the success (and lack thereof) of whistleblowers under the Sarbanes-Oxley Act of 2002\textsuperscript{7} (Corporate and Criminal

\textsuperscript{6} It is important to acknowledge that there are three major whistleblowing organizations, the Government Accountability Project (GAP), the National Whistleblowing Center (NWC) and the Project on Government Oversight (POGO). These organizations provide a number of databases, reports, and legislative and media documentation related to whistleblowing. GAP, directed under the expertise of famed whistleblower defender, Tom Devine, specifically acts as a whistleblower support center, and counsels potential and current whistleblowers about the legal proceedings of their case. The NWC, under the leadership of Stephen Kohn, among the nation’s foremost experts in whistleblowing laws, provides whistleblowers with a number of legal and professional resources. POGO aims to focus on exposing government corruption and is a storehouse of knowledge and information on a variety of whistleblowing areas. Other noteworthy organizations include the Whistleblower Protection Agency (WBPA), the National Security Whistleblowers Coalition (NSWBC) and Taxpayers Against Fraud. In addition, by representing public employees working for government environmental agencies, both state and federal, Public Employees for Environmental Responsibility (PEER) is also an organization supportive of whistleblowing by such employees. For a brief but perceptive analysis of GAP, NWC and POGO, see Louis Fisher, National Security Whistleblowers, United States Congressional Research Service, December 30, 2005, at 42, available at http://www.fas.org/sgp/crs/natsec/RL33215.pdf

Fraud Accountability Act (CCFA) Public Law 107-204, July 30, 2002 [Sarbanes Oxley],\(^8\) but none that attempted to sketch the contours of the whole landscape.

This article attempts to begin that sketching. After finding this gap, there were a number of questions that we thought were crucial to really understanding what is happening in the world of whistleblowing. These are some of those questions, which make up the core thrust of this article:

- Are the data telling the whole story, or must they be examined more carefully to get a complete picture?
- Do the inconsistencies require a reevaluation of the “hero” view of whistleblowers, or at least a more nuanced view of them?
- How do their employers view whistleblowers? By the very nature of whistleblowing, there is an adversarial element in the relationship between the two groups, but what elements ameliorate or exacerbate the contentiousness of that relationship?
- Are there differences between these relationships in the public and private domains?
- Are the laws intended to protect whistleblowers working?

There are, no doubt, additional questions one can ask, but we clearly had to bound the issues to be investigated in these early efforts, and so we largely limited our investigation to the issues above. The research for this exploratory study was then designed to get a better feel for what the whistleblowing world actually looked like, to introduce nuance into the previous concepts of whistleblowing by looking at it from different viewpoints - looking at different data sets not tied together before, assessing them to achieve a more complex understanding of whistleblowing. People operate with stereotypes and use research of small cross-sections/slices of very limited viewpoints. Our contribution, admittedly in an exploratory way, is to adopt a multidimensional approach, examining whistleblowing from a number of different angles.

Our multi-pronged approach has five primary components: a legal review, a narrated definition of what makes a whistleblower, an analysis of a number of existing quantitative data sources, a series of open-ended interviews with people from a variety of backgrounds concerning whistleblowing, and a theoretical component that seeks to synthesize our knowledge and reconstruct it in a typology that is useful both for understanding whistleblowing as it is and for future research. This article also follows this structure. The methods used in each approach will be discussed at the start of each section, but we chose to use this mixed-methods approach because of our desire to capture the entire horizon of whistleblowing, and we determined that any one approach would lose some key element. Indeed, the slippery nature of researching whistleblowing will be examined in detail later in this paper as we propose our “Sieve Hypothesis.” Though none of these sections can be considered exhaustive on its own, together we have constructed, at minimum, a decent frame through which the contexts, paths, challenges, and motivations of whistleblowing can be understood. We begin with a brief overview of the legal landscape of whistleblowing, including common law, statutory and constitutional considerations, and then proceed to the heart of this paper. Specific contributions that this article makes include: (1) a new reading of quantitative data that casts the success of whistleblowers in a new light; from our interview data, (2) we are able to situate whistleblowing within a more complex socio/legal matrix than has previously been done; (3) the construction of a working definition of a whistleblower; and (4) the development of a critical typology that reflects our analysis and provides a structure for further work.

2. Legal Review: The Legal Landscape of Whistleblowing

There is already a rich discourse surrounding whistleblowing, both in the law itself and in the legal literature. Even a cursory investigation into the legal aspects of whistleblowing reveals
what appears to be a cottage industry involving the practice, with a large body of statutory law on the topic, complex procedures or structures to address legal issues arising out of whistleblowing, and even some law firms specializing in cases involving whistleblowing, all of which reflect the schizophrenic attitude of a society that both encourages and at times lauds whistleblowers, while also punishing them to the extent that the practice is considered to require legal protection in order to be fostered. The following is a brief overview of the law as a prelude to and background for the broader policy questions that are the heart of this paper. This section briefly discusses the history of whistleblowing, the current statutory climate—both at the federal and state levels – looks closely at whistleblowing as it emerges from qui tam suits and claims made under the False Claims act, and concludes with a discussion of whistleblowing in constitutional context.

The Common Law Background—At Will and the Public Policy Exception

As most whistleblowers are people with insider information into an organization, but are not those with the power to make unilateral changes (or else they wouldn’t need to blow the whistle, they could just stop whatever problematic practice is happening), the traditional whistleblower has been the employee. Therefore, the common law doctrine that generally governs whistleblowers is employment law. Whistleblowers have consistently been challenged by the predominance of at-will employment and only inconsistently supported by “public policy exceptions” to that at-will structure. At common law, workers not hired pursuant to an employment agreement setting forth the conditions under which they can be fired are, with few exceptions, “at will” employees. At-will employees can be fired, as described in a popular formulation, for any reason or no reason at all. At-will employment is, of course, a decidedly inhospitable environment for blowing the whistle. If your boss can fire you because she dislikes

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the color of your socks or the way you part your hair, ratting out senior management for some policy or practice that is either illegal or against the public interest is an unlikely avenue to job security or career advancement. It is against this background that the law began to develop ways to protect those who would risk job and career to report wrongdoing.

While the “at will” rule dominates, it is not without its exceptions or qualifications. A major exception to the “at will” doctrine holds that an employee cannot be terminated from employment for reasons that are “contrary to public policy.”

Forty-two of the fifty states have created such an exception. The definition of what constitutes “public policy” has, in the words of one court, been “notoriously resistant to precise definition,” and varies significantly. Some courts have extended the exception to include protection for whistleblowers.

In a frequently-discussed case, *Palmateer v. International Harvester*, the Illinois Supreme Court, in a 4-3 decision, allowed a former employee to proceed with his lawsuit for wrongful discharge after he was fired for advising local law enforcement about possible criminal conduct by a co-worker. The majority noted that while there was no precise definition for what constitutes public policy, in general, it covers “what is right and just and what affects the citizens of the State collectively.” Regarding advising authorities of possibly illegal behavior, the court concluded that, “No specific constitutional or statutory provision requires a citizen to take an active part in the ferreting out and prosecution of crime, but public policy nevertheless favors citizen crime-fighters.” Numerous other courts, both before and after *Palmateer* have found...
whistleblowing to fall within the public policy exception, but later courts in both Illinois and other states have either narrowed *Palmateer* or refused to extend the principle in new contexts.\footnote{For example, *Palmateer* was followed in *Petrik v. Monarch Printing Corp.*, 111 Ill.App.3d 502 (1982) (allowing retaliatory discharge lawsuit by an employee who reported a discrepancy in company financial records that he believed to be the product of criminal activity); *Johnson v. World Color Press*, 147 Ill.App.3d 746 (1986) (employee fired for reporting violations of securities laws allowed to bring retaliatory discharge action); and *Belline v. K-Mart*, 940 F.2d 184 (7th Cir. 1991). The decision was not followed in *Fisher v. Lexington Health Care, Inc.*, 188 Ill.2d 455 (1999). The reach of *Palmateer* was also limited by a later decision of the Illinois Supreme Court, *Fellhauer v. Geneva*, 142 Ill.2d 495 (1991). For cases in other states that have extended protection for whistleblowers, see, *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 280 (Ark. 1988); *Harless v. First National Bank*, 246 S.E.2d 270 (W.Va. 1978); *Sheets v. Teddy's Frosted Foods*, 179 Conn. 471 (1980).}

However, not every state or jurisdiction has granted protection to whistleblowers under the public policy exception. The Wisconsin Supreme Court declined to do so in a case decided just a few years after the *Palmateer* case, refusing to allow a lawsuit by an employee who was fired after advising his superiors that, if called upon to testify in a co-worker's sex discrimination suit, he would answer questions truthfully, saying that even though perhaps “praiseworthy”, the conduct did not fall within the protection of the public policy exception.\footnote{Brockmeyer v. Dunn & Bradstreet, 113 Wis.2d 561 (1981). The Brockmeyer case illustrates the fact that not all whistleblowers wear a white hat. Brockmeyer's co-worker whom he was eager to protect, was his secretary with whom he appeared to be carrying on an affair and who was forced to resign only after the company could not find a new assignment within the company. Later, a Wisconsin Supreme Court case allowed a former employee's case for wrongful discharge to proceed who was fired for reporting abuse in a nursing home, although by the time of that decision, Wisconsin had already passed a statute protecting persons who reported such abuse. See *Hausman v. St. Croix Care Center Hausman*, 571 NW 2d 393 (Wis.1997).} In another case, a Texas appellate court simply rejected the idea of protecting the whistleblower without any discussion.\footnote{See *Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d 723 (Tex. 1990). In that case, after noting many of the states that do offer protection for those reporting illegal activities, the court stated simply that “We decline to do so at this time on these facts.”} There has also been an array of cases in between those extremes, paying lip service to the value of whistleblowing as worthy of recognition of the public policy exception and affording some protection, but cautious in the application of the exception.\footnote{See, e.g., *Wagner v. City of Globe*, 722 P.2d 250 (1986); *Hayes v. Eateries, Inc.*, 905 P.2d 778 (1995); *Wholey v. Sears Roebuck*, 803 A.2d 482 (2002); *Adler v. American Standard*, 432 A.2d 464 (1981).}

A number of courts that rejected the efforts of whistleblowers to invoke the public policy exception were instead sympathetic to the plight of the employer confronted with a whistleblower. However, there were other cases in which courts were neutral, ruling against
whistleblowers not out of any animosity towards their position, but because they found that state law insisted that the public policy exception be found only in express constitutional or statutory provisions. 19

**The World of Statutes**

It is difficult to draw a conclusion from a relatively limited a number of opinions, expressing a wide range of views, as to whether the failure of the common law to more fully embrace protection for whistleblowers reflects some hostility to whistleblowing or simply the not-uncommon judicial caution to upset long-established norms. It is also possible that the relatively limited number of such cases stems from the fact that, as the “public policy” exception was being developed, legislatures, both Congress and in the states, were simultaneously entering into the arena by passing their own whistleblower protection statutes. If courts have been somewhat slow to offer protection for whistleblowers, legislatures – both Congress and at the state level – have responded more aggressively in the past twenty years or so. We begin by discussing the main piece of legislation passed by Congress to give some sense generally of what is involved in triggering the protections afforded. Keeping in mind that not all whistleblower protection statutes track the federal statute precisely, we will then discuss more briefly other federal and state statutes.

**Protecting Whistleblowers: Congress Acts**

The centerpiece of legislation enacted by Congress protecting whistleblowers is the aptly-named Whistleblowers Protection Act of 1989 (WPA). 20 The WPA was passed to provide protection for federal employees who act to prevent wrongdoing by the Federal government from retaliation for their actions. The WPA is a comprehensive piece of legislation that builds upon

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and significantly expands similar much weaker protections found in the Civil Service Reform Act of 1978.\textsuperscript{21} The WPA protects a “covered employee” against an adverse employment action by his or her employer for actions taken by the employee to report illegal conduct. The act, thus, only comes into play if and when the federal government retaliates against one of its employees.

As summarized by a recent Congressional Report, “In order to trigger the protections of the WPA, a case must contain the following elements: a personnel action that was taken because of a protected disclosure made by a covered employee” (discussed further at note 28). If the statutory scheme looks straightforward, each of the elements has invited a number of challenges and refinements.

For example, the definition of a “covered employee” is broad, but with some notable exceptions. Covered employees include not only current employees of the executive branch of the federal government, but also former executive branch employees and applicants for positions in the executive branch. This covers employees in the competitive service as well as in the excepted service and the Senior excepted service.\textsuperscript{22} However, not all federal executive branch employees are covered by the WPA. Specifically, employees are excluded from WPA protection if their responsibilities are best described as of a “confidential, policy-determining, policy-making, or policy-advocating character.”\textsuperscript{23} Also, the President can exempt an employee if he or she determines that the exclusion is necessary and warranted for good administration.\textsuperscript{24} And, certain agencies are excluded from the restrictions of the WPA.\textsuperscript{25} The FBI does protect those

\textsuperscript{21} Civil Service Reform Act of 1978 P.L. 95-454, 92 Stat. 111. (“Reform Act”)
\textsuperscript{22} 5 U.S.C. § 2302(a)(2)(B).
\textsuperscript{25} See 5 U.S.C. §§ 2105, 2302(a)(2)(C); National Defense Authorization Act for Fiscal Year 1997, P.L. 104-201, § 1122(b)(1) (exempting the following agencies: the Postal Service and Postal Rate Commission, the Government Accountability Office, the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Imagery and Mapping Agency, the National Security Agency, and any other agency that the President determines primarily conducts foreign intelligence or counter-intelligence activities).
who report illegal activities, but to receive that protection, the whistleblowers can only report the misconduct to the Attorney General.\textsuperscript{26}

Further, the WPA protects “any disclosure of information” that evidences a violation of law, rule or regulation or of gross mismanagement, a gross waste of funds, an abuse of authority or a substantial and specific danger to public health and safety, but even that comes with some caveats. For example, the employee must “reasonably believe” that the information is evidence of a violation of law or misconduct as just described.\textsuperscript{27} Also, disclosures that contain information that may not be made public as a matter of law or that are prohibited by an Executive Order in the interests of national security are protected if the disclosure is made to the Office of Special Counsel or to the Inspector General of the agency that is the subject of the disclosure or to any official designated by that agency to hear whistleblower complaints. Otherwise, disclosure may be made to any one. Further, one of the purposes of the WPA was to ensure that federal employees who alerted members of Congress to wrongdoing would not be punished for such disclosures.\textsuperscript{28} Finally, the motivation of the whistleblower – whether driven by personal gain or public-spirited – does not affect whether the disclosure is protected.

Of course, notwithstanding that admonition, “any disclosure” is not, in truth, \textit{any or every} disclosure: judicial interpretations have limited the scope of a protected disclosure somewhat. The Act’s protections, for example, are not triggered by a “debatable management decision regarding a policy matter” but \textit{can} include a dispute about a matter of policy where the agency’s position is so clearly erroneous that no reasonable person could entertain it.\textsuperscript{29} The matter

\begin{itemize}
\item \textsuperscript{26} 5 U.S.C. § 2303.
\item \textsuperscript{27} 5 U.S.C. § 2302(b)(8)(A); 5 U.S.C. § 2302(b)(8)(B).
\item \textsuperscript{29} White v. Air Force, 391 F.3d 1377 (Fed. Cir. 2004).
\end{itemize}
disclosed must also be of significant importance. One court ruled that the WPA was intended to “root out real wrongdoing,” not “every trivial lapse in behavior.”

One other qualification that has developed is more challenging conceptually: a disclosure does not fall within the statute if it is made pursuant to the employee’s normal duties. Thus, for an inspector whose job entailed examining farms to determine whether the farms were in compliance with agency-mandated plans, his written reports of non-compliance were not protected disclosures triggering WPA protection. But a report of illegal activities outside normal channels – made, for example, to persons other than those who would normally receive those reports out of a concern that the normal channels would not do anything to address the illegal conduct – would be protected. Also protected would be reports of illegal activity where the employee is obligated to make the report but making the report is not part of the employee’s normal duties.

Further, the test for whether an employee’s belief that a violation of law or other misconduct has occurred is “reasonable” is based on a standard described as what a “disinterested observer” would conclude. An employee’s subjective belief and good faith are not enough. Further, in assessing an employee’s assertions, there is a presumption that his fellow government employers acted in good faith and the conclusion that there was misconduct must be “irrefragable,” or in layman’s terms, indisputable. Combined with a requirement that an employee’s assertions be backed by “substantial evidence” this seems to place a difficult burden on the employee, perhaps at odds with a requirement that the employee’s belief be only “reasonable”.

30 Frederick v. Department of Justice, 73 F.3d 349 (Fed. Cir. 1996).
31 Willis v. Department of Agriculture, 141 F.3d 1139 (Fed. Cir. 1998).
33 White v. LaChance, 174 F.3d 1378 (Fed.Cir. 1999).
34 Frederick v. Department of Justice, supra.
35 Id.
Finally, a disclosure, to trigger the protections of the WPA, must be made to the right person. Specifically, disclosure “must be made to persons who may be in a position to remedy the problem.”\textsuperscript{36} Thus, as a general rule, complaints about misconduct made to those who actually are engaged in the wrongdoing will not normally be taken to be whistleblowing.\textsuperscript{37} It should be noted that the WPA in addition to protecting whistleblowing \textit{per se}, also provides protections for actions that are incidental to whistleblowing. These include pursuing a right of appeal, complaint or grievance granted by law on one’s own behalf, as well as testifying for others, helping others who are exercising any right to complain or filing an appeal, and cooperating with the Inspector General or Special Counsel in an investigation of the wrongdoing.\textsuperscript{38}

\textbf{What is an Adverse Personnel Action?} Once a covered employee shows that he or she made a protected disclosure, the third element of the statutory scheme is for that employee to show that an adverse personnel action has been taken, or a decision not to act that has an adverse effect (such as failure to promote), against him or her. The range of personnel actions is broad, ranging from reemployment or outright termination of employment, to lesser sanctions such as a failure to promote, a reassignment or transfer or changes in pay or benefits, to “any other significant changes in duties, responsibilities or working conditions.”\textsuperscript{39}

\textbf{Protection For Employees Other Than Federal Employees} The WPA is not the only statute Congress has enacted to protect those who wish to report illegal or improper behavior; far from it. The FBI has its own separate statute. And separate statutes, although far less-detailed, also protect employees of Congress, the Office of the President, and even military contractors.

\textsuperscript{36} \textit{Willis v. Department of Agriculture}, supra.
\textsuperscript{37} \textit{Id.}; \textit{Horton v. Department of Navy}, 66 F.3d 279 (Fed. Cir. 1995).
Congress has also passed statutes providing protection for employees in private industry or in regard to other areas of significant public concern. Financial crises, for one, have prompted such protections. Thus, for example, Sarbanes Oxley – the legislation enacted to address the problems associated with corporate fraud and failures such as Enron and WorldCom – contains protections for whistleblowers\(^40\), perhaps not surprising given the fame and prominence accorded Sherron Watkins as a whistleblower helping to uncover the wrongdoing at Enron.\(^41\) But legislation to deal with other financial crises – such as the Savings and Loan Crisis of the late 1980s and the 2008 economic meltdown – also includes whistleblower protections\(^42\) even though few if any noteworthy whistleblowers came forward in those crises.\(^43\) And legislation passed to stop various forms of pollution and clean up the environment – such as the Clean Air Act, the Federal Water Pollution Control Act and the Comprehensive Environmental Response, Compensation and Liability Act (more commonly known as CERCLA) – all contain whistleblower protections. Indeed, the Occupational Safety and Health Administration has an Office of Whistleblower Protection that administers and oversees protections for employee whistleblowers found not only in its own statute (Section 11(c) of the Occupational Safety and Health Act), but eighteen other statutes as well in a variety of industries and settings. Those statutes include the aforementioned financial reform statutes and environmental statutes, as well as a wide-ranging host of others.\(^44\)

\(^{40}\) Corporate and Criminal Accountability Act of 2002, Section VIII of Sarbanes Oxley Act.


\(^{42}\) Financial Institutions Reform, Recovery and Enforcement Act, 12 U.S.C. § 1831(j); Dodd-Frank Wall Street Reform and Consumer Protection Act, § 922(h).

\(^{43}\) On the lack of whistleblowers coming forward during the savings and loan crisis, see William Black, The Best Way to Rob a Bank is to Own One, (2005).

Down to Business – Whistleblowing Laws In the States

Over the past twenty-five years, states have also been active legislatively in protecting whistleblowers from retaliation.\(^{45}\) Most states have passed statutes that generally protect public employees from retaliation or adverse employment actions for reporting misconduct. Fewer than half the states, but still a substantial number, provide a general blanket protection for private employees.\(^{46}\) Many of those states also cover public employees; only Montana provides general protection for private employees without corresponding general protection for public employees. And a few states do not provide blanket protections for public or private employees generally, but do protect disclosures in connection with certain industries or activities.\(^{47,48}\)

The varied landscape of protections led Justice David Souter in a recent case to describe the federal and state statutory framework thusly: “individuals doing the same sorts of governmental jobs and saying the same sorts of things addressed to civic concerns will get different protection depending on the local, state, or federal jurisdictions that happened to employ them.”\(^{49}\)

Qui Tam Suits; The False Claims Act


\(^{46}\) Delikat, Michael & Rosenberg, Jill L., 2005. Defending Whistleblower Claims Under the Sarbanes-Oxley Act, in UNDERSTANDING DEVELOPMENTS IN WHISTLEBLOWER LAW 2 YEARS AFTER SARBANES-OXLEY. 37

\(^{47}\) Vaughn. 1999 and Delikat & Rosenberg 2005.

\(^{48}\) Obviously there is a great deal of variation in the protections afforded by the states. For example, not all state statutes that offer protection to public employees cover all public employees; some limit protection to state employees, and some cover only municipal and other local officials. Further, most state statutes protect disclosures of violations of laws and attendant regulations, but far fewer cover disclosures of waste or mismanagement, or other more unspecific wrongdoing as the WPA does. Most state statutes protect disclosures to state and local officials; rare is the statute that allows disclosure outside of the appropriate governmental channels, such as to the media, despite the popular image of whistleblowers holding press conferences. Some state statutes require disclosure to the employer before the whistleblower can seek outside avenues for redress. And while most state statutes require that the employee reasonably believe that the law has been broken and measures that by a “reasonable person” test, as does the WPA, some state statutes impose a requirement that the disclosure be made in good faith. See Vaughn, supra n. 45 at 588-602

\(^{49}\) Garcetti v. Ceballos, 547 U.S. 410 (Souter, J., dissenting)
Legislatures not only protect whistleblowers, they also encourage the practice through what are known as *qui tam* suits, in which a person brings suit against someone or some entity on the basis of a belief that that person or entity has defrauded the government. If successful, the person so commencing that action, also known as a relator, can receive a percentage of the damages awarded in that suit. The concept and practice of *qui tam* lawsuits – in which the person bringing the action sues not only on his or her own behalf, but more broadly on behalf of the government – have existed for centuries, pre-dating the Magna Carta. In this country, although there were some *qui tam* statutes in the early Republic, they were brought infrequently until the Civil War.\(^5\)

During the American Civil War, there was widespread fraud committed against the Union government. Exorbitant rates were charged for broken rifles and inedible foodstuffs. This led to the passing of the False Claims Act (FCA), which nicknamed for its champion is sometimes called “Lincoln’s Law.” The FCA imposed sanctions of double the amount of damages, as well as monetary fines for acts that defrauded the government through a false claim, such as claiming payment for services not rendered or goods that do not meet the contractual obligations. Also, because the federal government at the time was devoting large resources to the war effort itself, and had limited resources to pursue fraud cases, the FCA allowed for *qui tam* actions to pursue those committing fraud, allowing relators to receive half of any damages award. Thus, the government encouraged and relied upon private citizens to inform the

government about fraud committed against the government in the war effort, and further to pursue legal claims for the damages related to that fraud.

As the federal government grew in size and strength, claims of fraud against the government were usually pursued by the government and qui tam actions declined. That changed starting in the 1930s, as increased spending by the federal government in connection with the New Deal and in the lead up to World War II saw an increase in fraud against the government. However, with the Department of Justice better able to pursue cases of fraud, and with a recent history of having done so, Congress grew concerned about “parasitic” lawsuits, in which private parties commenced actions under the FCA based on accusations made in public court proceedings and other public arenas. In 1943, the FCA was amended with the result of greatly narrowing the reach of qui tam actions, including reducing the amount relators could recover to twenty-five percent of the amount of damages. The number of qui tam lawsuits brought by private citizens thereafter dropped dramatically.51

By the mid-1980s, however, defense contractor fraud was rampant again. One source put it that nine of the ten largest defense contractors were under indictment for fraud and public stories abounded about the Department of Defense’s paying hundreds of dollars for things like toilet seats and hammers. Congress and the administration of Ronald Reagan once again grew interested in claims brought under the FCA and in 1986 amended the statute once again to expand the reach of the statute.52 For our purposes, the important amendments to the FCA included a provision that allowed a relator to receive at least 15% and as much as 30% of the

amount of damages recovered. They also included protections for whistleblowers, including provisions providing for reinstatement and back pay.

The FCA was amended once more, in 2009, following the economic meltdown of 2008. As currently drafted, the FCA provides for both criminal penalties and civil remedies against those who defraud the government. It covers a number types of fraud against the government, including among other things, knowingly presenting a false claim for payment or approval, making a false statement or record in asserting a false or fraudulent claim, submitting a receipt for property to be used by the government without knowing the receipt to be accurate, and with possession or control of money or property to be used by the government, knowingly delivering less than all of that money or property. Among the changes made to the original FCA by the 1986 and 2009 amendments were the elimination of “presentment,” that is, as long as the claim is to be paid by the government, it is not necessary that the wrongdoer actually present the false claim to the federal government or even have dealt directly with the federal government as part of the fraudulent conduct. Also, it is not necessary to prove that the wrongdoer had an intent to defraud the government. It is enough that the wrongdoer knowingly submitted a false claim or made a false statement material to a claim. Thus, the False Claims Act, and actions by private citizens brought under it, have evolved into a broad weapon for those who successfully prosecute fraud against the government.

While the FCA authorizes the Government to pursue claims of fraud against it, in an effort to encourage whistleblowers, it also allows private citizens (relators) to bring civil actions to recover damages from fraud as well. A relator who brings suit under the FCA must assert the action on behalf of the government and must file the initial complaint under seal with written

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53 This was accomplished through the Fraud, Enforcement and Recovery Act of 2009.
disclosure of all material evidence and information in his possession. The complaint and the materials are kept under seal for sixty days, unless the government obtains an extension of that time frame. In that period, the government must advise the relator whether it intends to pursue the action. If it does not, or does not say one way or the other, the relator can press forward. If the government takes over the lawsuit, the government assumes primary responsibility for the lawsuit and the relator will be awarded between 15% and 25% of the ultimate damages award, depending on how important that person’s contribution to the case was. Reflecting an apparent concern for parasitic lawsuits, that amount is reduced to no more than 10% if the information serving as the basis for the suit is drawn from a criminal prosecution, civil trial or administrative hearing, or from a Congressional hearing or Government Accounting Office hearing.\(^{55}\)

If government decides not to go forward and the relator proceeds, he will be awarded a “reasonable” amount between 25% and 30% of the amount of damages recovered. A person can receive a percentage of the damages even if he engaged in the acts violating the FCA, unless his actions result in his own criminal conviction, in which case he is barred from recovery. Also, even if government decides to pursue the action, the relator can remain in the action and press forward with his original claim separately, although that is subject to numerous steps that the government can take, including dismissing or settling the underlying claim, subject to some procedural protection for the relator.\(^{56}\)

As with the WPA, the provisions of the FCA and its amendments have been the subject of voluminous litigation on many issues. The most recent expansion in 2009 has been criticized as turning the FCA into an “all-purpose fraud statute” and making its reach “almost boundless”. Also, mirroring the ambivalence directed toward whistleblowers, relators are sometimes referred


\(^{56}\) Id.
to as “private attorneys general” and at other times as “bounty hunters”. Finally, it should be noted that approximately thirty states have statutes similar in reach or purpose to the FCA.

The Constitutional Dimension

Because of the prominence of the statutory scheme, it is easy to conclude that that, essentially, is where the protections for whistleblowers start and stop. That is not necessarily true, however. Even the legislation leaves a role for judges, either, as discussed above, in interpreting the statutory language or in answering questions about whether the legislation preempts the field, that is, whether statutory schemes to protect whistleblowers provide the exclusive remedy for such actions, or instead allow courts to expand that protection by filling in gaps in coverage found in the statutory scheme.\(^{57}\) When that protection has been expanded, it has been done under claims of the protection of free speech.

For most of our history, public employees were held not to have any free speech rights as it regards their employment. The state of the law was reflected in the famous and oft-quoted statement of Justice Oliver Wendell Holmes, Jr., in a case, while he was on the Massachusetts Supreme Court, upholding the dismissal of a police officer who was fired for engaging in political activities separate from his duties as a police officer. The policeman, Holmes stated, “may have the constitutional right to talk politics, but he has no constitutional right to be a policeman.”\(^{58}\) Holmes statement came at a time when First Amendment jurisprudence was relatively undeveloped compared to the robust development of free speech rights in the twentieth century.\(^{59}\)

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\(^{57}\) Some courts have reasoned that the existence of statutes protecting the whistleblowers reveal a public policy for such protection that allows the court to extend that protection to persons who do not, as a matter of law, fall within the statute. See, e.g., McAuliffe v. Mayor of the City of New Bedford, 29 N.E. 517, 517-18 (1892).

\(^{58}\) That is not to say that the development of freedom of speech was moribund or non-existent before the twentieth century. For excellent discussions of free speech rights and controversies before the twentieth century, see: Rabban, David M. *Free Speech in Its Forgotten Years*. Cambridge: Cambridge UP (1997)
protection for free speech in other contexts, the Holmesian formulation quoted above remained the law with regard to public employees, perhaps ironically long after Holmes attained iconic status as champion of free speech rights.\(^{60}\)

But that changed. The decade of the 1960s saw a number of decisions addressing free speech claims – such as New York Times v. Sullivan and Brandenburg v. Ohio – that are considered to be landmark decisions today.\(^{61}\) It was also in that decade that the Court first recognized that public employees enjoy some First Amendment protections for statements concerning matters of public concern regarding their employment. Ultimately, in a series of cases bracketed by Pickering v. Board of Education,\(^{62}\) and Connick v. Myers,\(^{63}\) the Court expressly recognized that public employees have certain First Amendment rights of free speech related to matters of public concern.\(^{64}\) While neither Pickering nor Connick involved whistleblowing per se, the issues involved are relatable to whistleblowing jurisprudence. As the law in this area developed, some cases involved persons who might be called whistleblowers, but the Court did not directly address the subject of whistleblower protections.\(^{65}\)

A more recent case presented the plight of the whistleblower even more directly but the Court once again side-stepped an in-depth discussion of whistleblowing in a case that nonetheless has important ramifications for the question of what protections the Constitution


For cases in which the Court recognized First Amendment free speech rights, see: DeJonge v. Oregon, Herndon v. Lowry, Terminiello v. Chicago, and Near v. Minnesota. The full picture, it should be noted, is hardly one of uninterrupted progress in this regard. The first half of the twentieth century also saw Schenck v. United States, Gitlow v. New York, Dennis v. United States, and Feiner v. New York. And, in fact, Holmes reputation came as the result of dissenting opinions he authored or joined in with Justice Brandeis, not decisions in which he set out the governing legal principles.


A year before Pickering, the Court recognized that public employees enjoy some First Amendment rights when it struck down a state loyalty oath in Keyishian v. Board of Regents, 385 U.S. 589 (1967).

affords those who would report wrongdoing.\textsuperscript{66} Garcetti v. Ceballos\textsuperscript{67} involved a lawyer in the Los Angeles County District Attorneys Office who, believing that a search warrant issuing from the District Attorney’s Office was based on false information, advised defense counsel and a reviewing court of that. For those actions, Ceballos was demoted. He sued, claiming that those actions constituted retaliation against him for exercising his First Amendment rights.

In a 5-4 decision, the United States Supreme Court rejected his argument that his complaints to his superiors about the search warrant that he believed to contain false statements were protected by the First Amendment. Refusing to apply the Pickering-Connick balancing test,\textsuperscript{68} the Court instead ruled that statements by a public employee made in the course of his official duties enjoyed no First Amendment protection at all. In explaining its rationale, the Court at times used rhetoric reminiscent of some of the iconic First Amendment decisions. But clearly, the sympathies of the majority were with the public employers.

Only at the very end of its opinion did the majority even mention whistleblowing, and then favorably, but only in passing: “Exposing governmental inefficiency and misconduct is a

\textsuperscript{66} This is not the first time or issue that the Court has refused to engage directly with a matter raising constitutional concerns on a matter of great public interest and debate. The Court did so in connection with racial profiling as well. See, Heumann, Milton, and Lance Cassak. \textit{Good Cop, Bad Cop: Racial Profiling and Competing Views of Justice}. New York: P. Lang (2003).

\textsuperscript{67} 547 U.S. 410 (2006).

\textsuperscript{68} In their article, "First Amendment Protection for the Public Employee," Eddy and Carver describe the \textit{Pickering/Connick} Test thusly: “When the government is acting as an employer, as opposed to a sovereign, it is less restricted under the First Amendment. In other words, a government employer “may impose restraints on the job-related speech of public employees that would plainly be unconstitutional if applied to the public at large.” To determine whether a public employer has violated an employee’s First Amendment right to freedom of expression, the courts apply a four-part balancing test, known as the Pickering/Connick test. The first two parts of the test are questions of law for the court, while the last two steps are questions of fact for the jury.

“The first part of the Pickering/Connick test is whether the speech in question involves a matter of public concern. If so, the employee’s interest in the expression is weighed against the government employer’s interest in regulating the speech of its employees so that it can carry on an efficient and effective workplace. The employee’s interest in commenting upon matters of public concern is balanced against the interest of the government, as an employer, in the nondisrupted provision of the public services it performs through its employees. If the balance tips in favor of the employee, then the employee must show that the speech was a substantial or motivating factor in the adverse employment action. In response, the employer can show that it would have taken the same employment action against the employee even in the absence of the protected speech.

“A public employee’s speech addresses a matter of public concern when it relates “to any matter of political, social, or other concern to the community” based on the content, form and context of the speech. Usually, speech that relates to personnel disputes and working conditions do not relate to matters of public concern. A public employee’s speech that seeks to expose government corruption or waste, or questions the integrity of government officials has generally been held to constitute matters of public concern.” (OBJ 77 861 (March 11, 2006 )) Eddy, Rand C., and Sherri Carver. "First Amendment Protection for the Public Employee." Oklahoma Bar Journal, available at: http://www.okbar.org/obj/articles_06031106eddy.htm.
matter of considerable significance…. [P]ublic employers should, ‘as a matter of good judgment,’ be ‘receptive to constructive criticism offered by their employees.’ … The dictates of sound judgment are reinforced by the powerful network of legislative enactments – such as whistleblower protection laws and labor codes – available to those who seek to expose wrongdoing.” It appeared to escape notice of the majority that Ceballos was not covered by the California statute protecting whistleblowers at the time.

The majority opinion was met with a couple of dissenting opinions. The main dissent, authored by Justice Souter, was somewhat sympathetic to the interests of public employers in the efficient administration of their operations, but believed the majority went too far in adopting its blanket rule and would have used the Pickering-Connick balancing test to Ceballos’ actions. Souter discussed the protections available to whistleblowers set forth in statutes in somewhat more detail than the majority’s cursory mention and concluded, as quoted earlier, that the existing statutory schemes provide some, but haphazard protection.

_Garcetti v. Ceballos_ has elicited considerable comment, much of it critical. For our purposes, one sees in the majority and dissenting opinions in _Garcetti v. Ceballos_ something of a replay, although in much muted fashion, of the different approaches we saw in the common law decisions, between those courts that saw and expressed great admiration for those who would risk job and career to report wrongdoing and those whose sympathies lay with the employers.69 After _Garcetti v. Ceballos_, public employees can still report wrongdoing and receive some First Amendment protection, but only as citizens and not regarding matters within their official duties, which means, counter-intuitively, not for those subjects and actions they know best.

The legal history of whistleblowing in the United States is, like much in this federal system, disjointed and much has emerged as a reaction to specific historical conditions. Overall,

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69 See text at note 49 supra.
there has been a recent trend to expand whistleblowing protections legislatively, but mixed support for whistleblowers from the judicial branch.

4. Defining Whistleblowing

As discussed in the introduction, one of the discoveries that prompted this study was a lack of understanding about the boundaries of whistleblowing; at the core of this deficiency, we have found, is the lack of a clearly-articulated definition of what does and does not constitute whistleblowing. Instead there is great variability in the definition of whistleblowing, each author’s definition (explicit or not) affecting the way that data can be interpreted. Speaking broadly, there is an amusing irony in much of the literature on whistle blowing: different authors each insist that there is a generally-accepted definition of whistleblowing and then offer different and sometimes conflicting definitions.\(^7^0\) As an example, in Whistleblowing: When It Works – And Why\(^7^1\), Roberta Ann Johnson states that for whistleblowing “There is an agreed-upon definition that has four component parts: (1) An individual acts with the intention of making information public; (2) the information is conveyed to parties outside the organization who make it public and a part of the public record; (3) the information has to do with possible or actual nontrivial wrongdoing in an organization; and (4) the person exposing the agency is not a journalist or ordinary citizen, but a member or former member of the organization.”

However, C. Fred Alford in Whistleblowers: Broken Lives and Organizational Power\(^7^2\), cites previous work by Myron and Penina Glazer\(^7^3\) which “defines the whistleblower as one who (1) acts to prevent harm to others, not him or herself, (2) trying first to rectify the situation within the framework provided by the organization, (3) while possessing evidence that would convince

Alford then goes on to eliminate parts 2 and 3 of the Glazers’ definition, part 2 being considered advice rather than part of a definition, and part 3 objected to because “An unreasonable whistleblower is still a whistleblower.” This leaves little beyond altruism of the Glazers’ definition. Alford’s citation from the Glazers’ work appears to be a condensed version of a set of ideal requirements they attribute to Norman Bowie\textsuperscript{74,75} for what constitutes a justifiable act of whistleblowing. Bowie’s additional requirements include “(4) that the whistleblower perceive serious danger that can result from the violation; (5) that the whistleblower act in accordance with his or her responsibilities for ‘avoiding and/or exposing moral violations’; (6) that the whistleblower’s actions have some reasonable chance of success.” Alford then adds “In theory, anyone who speaks out in the name of the public good within the organization is a whistleblower. In practice, the whistleblower is defined by the retaliation he or she receives.” Further complexity is added by laws intended to protect whistleblowers, e.g., the Whistleblower Protection Act of 1989,\textsuperscript{76} which as noted above affords whistleblower protection not only to employees and former employees, but to applicants for employment as well.

Through review of an extensive variety of these definitions, and through critical analysis, we offer here an operational definition which identifies the key elements of what it means to be a whistleblower, while at the same time ensuring that the definition is sufficiently exclusive so as to be meaningful.

**Whistleblower Definition**

1. A whistleblower is an insider, an employee or ex-employee, someone charged with examining (e.g., auditing) the performance of an organization (e.g., business, government agency) normally engaged in legitimate activities, or an agent of or contractor to such an

\textsuperscript{74}ibid., p.4


\textsuperscript{76}See fuller discussion of the WPA in text at note 20.
organization. We understand that by limiting whistleblowers to insiders, we exclude some persons – such as the crusading citizen who comes by the relevant information in a way other than through internal channels – who others might consider whistleblowers.

2. A whistleblower challenges an organizational policy, practice or action by reporting misconduct associated with it to someone in a position to stop or change that policy, practice or action, bring pressure on the organization to do so, or penalize the organization for the misconduct.\(^{77}\)

3. A whistleblower has a reasonable belief that the organizational policy, practice or action being challenged has significant adverse public impact, wherein reasonableness is determined according to standard legal “reasonable person tests.”\(^{78}\)

4. In the act of whistleblowing, whistleblowers acts in accordance with a perceived ethical or legal mandate.\(^{79}\)

5. If only internal, whistleblowing requires persistence – possibly numerous attempts, going up the chain of command if necessary, in search of relief to the identified problem. If no internal relief is found, the whistleblower might then make an external disclosure to the public or authorities.\(^{80}\)

In the above definition, we have avoided discussion of several issues that might be attached to some definitions of whistleblowing. Among them are questions of motivation and anonymity of a whistleblower.\(^{81}\) As for motivation, if we think of whistleblowing as conduct to

\(^{77}\) At least in its early stages, whistleblowing is an exercise of “voice”, and frequently of “loyalty”, in the sense of Albert O. Hirschman’s *Exit, Voice, and Loyalty* (Hirschman, Albert O. *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States*. Cambridge, MA: Harvard UP (1970).) The challenge requires an affirmative or overt act beyond simple passive disobedience. A refusal to obey or participate in the action may well be part of the act of blowing the whistle, but simply refusing to participate without more, is not enough, for it is unlikely that such an act by one individual will change organizational policy, practice, or action. The need for the reporting being to someone who can effect change is influenced by *Horton v. Department of Navy*, cited previously, where the Court said that the purpose of the WPA is “to encourage disclosure of wrongdoing to persons who may be in a position to act to remedy it, either directly by management authority, or indirectly as in disclosure to the press.” Finally, qui tam actions are frequently after the fact – the harm has already been done, though it may be continuing. To include such actions within the whistleblower definition, we thought it necessary to include the last clause, penalizing the organization for misconduct, part of that penalty being recovery for the harm inflicted.

\(^{78}\) The type of impact could range over a wide field, e.g., threat to public health or welfare, betrayal of a public or fiduciary trust, threat to security, etc. It is important to note that the whistleblower needn’t be right in his or her assertions, but need only have an appropriate reasonable basis for making them and launching the challenge to the organization.

\(^{79}\) The whistleblower may appeal to some higher moral standard to support his or her position on the organization’s policy, practice or action in question. The intent is to exclude simple technical or legal differences of opinion or judgment between the whistleblower and his or her management, or differences between such parties that address only the economic or financial impact of a policy, practice, or action on the organization. But it must be emphasized that there must be some broad public acceptance of the moral principle(s) to which the whistleblower is appealing, as in *Pierce v. Ortho* (“An employee does not have a right to continued employment when he or she refuses to conduct research simply because it would contravene his or her personal morals.” *Pierce v. Ortho Pharmaceutical Corp.*, N.J., 1980, Supreme Court of New Jersey. Grace PIERCE, Plaintiff Respondent, v. ORTHO PHARMACEUTICAL CORPORATION, Defendant-Appellant. Argued Nov. 13, 1979. Decided July 28, 1980.). Thus in exercising a right of personal moral conscience someone may not be afforded whistleblower protection. One might still consider such an act whistleblowing. We choose not to unless the invoked moral principle(s) have some broad acceptance within society.

\(^{80}\) If it would be reasonable for our whistleblower to believe that pursuing the matter internally would be fruitless or counterproductive, he or she might at the outset resort to public revelations.

\(^{81}\) Our exclusion of motivation from our whistleblower definition stems from the previously cited Fiorillo v. US Department of Justice Bureau of Prisons decision, and its legislative aftermath. Yet we do not dismiss the impact of motivation in whistleblowing, and discuss it at greater length in our typology section.
be encouraged for the protection of the public welfare, then it is that, and only that, as embodied in criteria 2 and 3 above, that matters. Of the many possible motivations the whistleblower may have, those embodied in criteria 2 and 3 determine whether he or she fits within our definition.

The very term “whistleblower”, presumably derived from the British bobbies’ blowing of a whistle when detecting a crime, depicted a public action. Yet we see no requirement for someone to go public to be considered a whistle-blower, though we have found that even some whistleblowers consider that to be a necessary condition. It is not a necessary condition for whistle-blower protection in legislation, nor is it required in several other definitions (e.g., Alford, the Glazers, and Bowie cited previously). Nor do we see it necessary for a whistle-blower to have been a target of retaliation.

We have taken some pains with our definition to exclude certain actions from the domain of whistleblowing, and to include others. For example, in criterion 1 of our definition we tried to exclude from whistleblowing witnesses to crimes who testify to law enforcement, and include a significant portion (those who are insiders) of those who file qui tam suits. The restriction in that item to “organizations normally engaged in legitimate activities” is intended to exclude such individuals as gang members, or those engaged in organized crime, who, to minimize their punishment, choose to provide evidence to law enforcement about the organization of which they were a part. We view this as bargaining, not whistleblowing.

To include whistleblowers protected under Sarbanes-Oxley, 82 we extended the definition of “insider” to cover someone not part of an organization, but charged with examining the performance of that organization. Such a person is certainly an insider in the sense that, by virtue of her normal activities, she is privy to inside information about the operations of the organization, even though she might not be subject to traditional forms of retaliation. We have

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82 Sarbanes-Oxley 18 USC Section 1514A
further extended the insider definition to cover contractors and agents who gained increased protection as qui tam relators under the Fraud Enforcement and Recovery Act (FERA) of 2009.\footnote{Fraud Enforcement and Recovery Act (FERA) of 2009, S.386, which became Public Law 111-21 on May 20, 2009}

We have included the element of persistence in criterion 5 to capture two primary elements. One, case law,\footnote{See Kenneth D. Huffman v. Office of Personnel Management, August 2001} balances the need for managerial control with the interest of acting in the public good by excluding complaints about minor or inadvertent mistakes, as opposed to genuine violations of law or public policy, from whistleblowing protection. We agree. The second part of persistence is the idea, common in the public view, that in order to be considered a whistleblower, the person must be taking on some risk to himself in order to qualify.

As indicated in our legal review, the courts have attempted to balance the need for managerial discipline for the efficient functioning of an organization against that for promoting the disclosure of illegal or grossly wasteful behavior in determining what constitutes a protected disclosure. This is summarized by the following statement from Huffman. “If every complaint made to a supervisor concerning an employee’s disagreement with the supervisor’s actions were considered to be a disclosure protected under the WPA, virtually every employee who was disciplined could claim the protection of the Act. Although Congress intended that the WPA’s coverage be broad, we think it unlikely that Congress intended the Act to extend that far, and we hold that it did not.” By and large, the courts have been given the edge to the former need of preserving efficient functioning of an organization. But when one looks at the decisions more carefully, that edge is generally because employees have not been persistent – have not gone beyond their immediate management or beyond their “job description” in pushing their claims. Even though it may be contrary to the initial Congressional intent of WB protection laws, the courts are insisting that the employee put a significant amount of skin in the game before they...
are willing to afford those protections. (Again from *Huffman*\(^{85}\) - “As we previously stated in Willis, “the WPA is intended to protect government employees who risk their own personal job security for the advancement of the public good by disclosing abuses by government personnel.” Willis, 141 F.3d at 1144.”) We have included the notion of persistence in item 5 to capture both this legal perspective, and the more general perception that the whistleblower must be placing his job security at risk to protect some public good.

Two final points warrant consideration. First, as a general matter, just as speaking out on behalf of a personal moral conviction is not enough (see criterion 4 above), the objection to the challenged activity must look to correct a pervasive harm to the general public, rather than a specific harm that is particular to the individual objecting. Thus, for example, one’s effort to object to broad and pervasive discrimination by a company or organization may constitute whistleblowing; filing an individual complaint seeking redress only for an alleged discriminatory action against the individual would not. Of course, a person denied employment or a promotion who suspects discrimination as the reason may believe that the employer discriminates against other prospective or actual employees as well, if only because evidence or belief that s/he alone among others in the relevant protected group\(^{86}\) has been discriminated against would almost certainly greatly weaken, if not doom, the claim of discrimination. But to be classed a whistleblower, the claimant must be concerned about the broader practices and seek a remedy for those practices, not solely his or her own situation.

Second, again as a general proposition, whistleblowing is an action that addresses policies or conduct of the company or organization as a whole or actions of those higher in the company organization than the person blowing the whistle. In other words, one can blow the


\(^{86}\) This phrase is purposely taken from Title VII, 42 U.S.C. sec. 2000e (1972), which requires membership in one of the groups protected by the statute as a starting point for any claim.
whistle “up” but not “down”. Thus, again for example, a bank teller who attempts to blow the whistle when she believes that the bank or her branch manager are engaged in illegal activity may be whistleblowing; the actions of the branch manager or others higher in the corporate structure who call out the bank teller for illegal conduct such as embezzling funds from her teller drawer, would not be. The latter conduct might be laudable behavior, but it is more akin to carrying out the responsibilities that come with one’s position of authority than engaging in whistleblowing.

4. Quantitative Data Analysis

In beginning a review of extant data, we were surprised to find that there were any number of sources for “whistleblower data.” Data are available under various laws that both protect whistleblowers and require that data be kept on those cases. In this article we review two data sets, the first obtained from the Merit Systems Protections Board (MSPB)\(^7\) via a Freedom of Information Act (FOIA) request, and the second from the False Claims Act (qui tam) data.

\(^7\) The MSPB is a government agency responsible for the collection of data from all government agencies covered under the Whistleblower Protection Act (WPA). The WPA was discussed in the Legal Review Section. It suffices to know here that it was first passed in 1989 and amended in 1994. In 2007 and 2009, attempts were made by Congress to further amend the statute. Included under the WPA are the following agencies: Administrative Office of the U.S. Courts, Agency for International Development, American Battle Monuments Commission, Armed Forces Retirement Home, Broadcasting Board of Governors, Chemical Safety Hazard Investigation Board, Committee for Purchase from People who are Blind and Severely Handicapped, Commodity Futures Trading Commission, Community Services, Department of Agriculture, Department of Commerce, Department of Defense, Department of Education, Department of Energy, Department of Health and Human Services, Department of Homeland Security, Department of Housing and Urban Development, Department of Justice, Department of Labor, Department of State, Department of the Air Force, Department of the Army, Department of the Interior, Department of the Navy, Department of the Treasury, Department of Transportation, Department of Veterans Affairs, Environmental Protection Agency, Equal Employment Opportunity Commission, Federal Communications Commission, Federal Deposit Insurance Corporation, Federal Election Commission, Federal Housing Finance Board, Federal Mediation and Conciliation Service, General Services Administration, Government Printing Office, International Boundary and Water Commission: U.S. and Mexico, Interstate Commerce Commission (now DOT), Merit Systems Protection Board, National Aeronautics and Space Administration, National Archives and Records Administration, National Council on Disability, National Credit Union Administration, National Labor Relations Board, National Mediation Board, National Science Foundation, National Transportation Safety Board, Nuclear Regulatory Commission, Occupational Safety and Health Review Commission, Office of Personnel Management, Overseas Private Investment Corporation, Peace Corps, Pension Benefit Guaranty Corporation, Presidio Trust, Securities and Exchange Commission, Selective Service System, Small Business Administration, Smithsonian Institution, Social Security Administration, Soldiers’ and Airmen’s Home, Tennessee Valley Authority, U.S. Arms Control and Disarmament Agency, U.S. Holocaust Memorial Museum, and the United States Postal Service.

Still excluded from its coverage, despite recent attempts to amend the WPA are the Central Intelligence Agency, Defense Intelligence Agency, Federal Bureau of Investigation, National Geospatial-Intelligence Agency, National Reconnaissance Office, National Security Agency, and the Transportation Security Administration.
Applying the definition to that data made it clear that many instances of whistleblowing were not captured by the data, which led to the development of the “Sieve Hypothesis,” which is discussed in detail in this section, but which argues that relying only on the quantitative data as it is generally reported gives a distorted picture of what is taking place in the whistleblowing domain.

**Merit Systems Protection Board Data.** Our data analysis was based on the same Merit Systems Protection Board (MSPB) data used by James Sandler in “The War on Whistleblowers.”\(^88\) That data contained all cases resulting from whistleblower complaints of retaliation filed under the WPA filed from the end of 1994 to 2007, amounting to approximately 3,000 cases.\(^89\) For each such case, the name of the whistleblower, the agency against which he filed the complaint, the date of filing of the whistleblower complaint, the result of the complaint, and any subsequent actions by the plaintiff are provided by the data set. Sandler’s article focused more on case studies of individual whistleblowers, but he did draw some quantitative conclusions from the data, finding that whistleblowers won their cases only 3.5% of the time during the Clinton administration (from 1994 to 2000), and 3.3% of the time during George W. Bush’s administration (from 2001 to 2007).\(^90\)

In analyzing the MSPB data, we started out by defining as a whistleblower “win” all cases in which there had been a settlement, or where corrective action had been ordered. Though different from some definitions of a win, our grouping of settlements with judgments in favor of

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\(^{88}\) Sandler, James. "The War on Whistleblowers." *Salon.com*, 1 Nov. 2007 available at: [http://www.salon.com/news/feature/2007/11/01/whistleblowers](http://www.salon.com/news/feature/2007/11/01/whistleblowers). Initially we undertook a separate examination of what are known as “NO FEAR” (Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002) data. These data report on retaliation complaints by federal employees against their employers, while close cousins to WPA data, these data are different enough that we feel comfortable not analyzing them in this paper because they track other things other than whistleblowing, though some whistleblowing cases might be scooped up in this dataset.

\(^{89}\) Ibid., Sandler reports that he analyzed nearly 3600 cases. We were told that we received the exact same data set as Sandler from the MSPB, and the total of our cases is 2980. Data we have is from 11/4/1994 - 7/10/2007. Procured by way of the Freedom of Information Act.

\(^{90}\) Ibid.
the whistleblower to define a win is easily justified in light of arguments made by other authors, and other treatments of whistleblower data.\textsuperscript{91,92,93} Even using our broader definition of a whistleblower win, the data of Figure 1\textsuperscript{94} starkly demonstrate the ability of whistleblowers to win fewer than 20\% of their cases. It is likely that Sandler defines “win” similarly to Moberly\textsuperscript{95}, yielding a much lower win rate. However, the specific win rate is not as important as how low it is regardless of how one defines “win” – whether the win rate be 3.5 or 5 or even 20 percent.\textsuperscript{96} Moberly states that “…scholars estimate that more than 60\% of cases filed in federal court settle each year.”\textsuperscript{97} Even if one considers a settlement a whistleblower win, his win rate is far below that of a plaintiff in a federal court.\textsuperscript{98}

\textsuperscript{91} Moberly, Richard E., “Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win,” 49 William and Mary Law Review, 96-97 (2007). Though Moberly does not treat settlements as wins in his analysis, he states “…Settlement of a case may provide some indication that the case had at least minimal merit and therefore arguably could be counted as an employee success. Indeed, settlements may have removed the strongest employee cases from the pool of cases, causing the employee win rate in resolved cases to appear lower than the number of “meritorious” claims actually filed.” He goes on to say “…a settlement may simply reflect an employer’s increased willingness to enter “nuisance-value” settlements rather than pay the high litigation costs of an ALJ hearing. Or employers may have settled a case involving allegations of corporate fraud to avoid bad publicity, even if the allegations were without merit.”

\textsuperscript{92} Ibid., Footnote 137, p. 97, where Moberly states that “OSHA computes its percentage of “merit” resolutions by combining settlements with employee wins.”


\textsuperscript{94} Where cases “Lost” means result of the case was Dismissed for being brought to the courts Premature or Late (“Dismissed-Timeliness (Premature or Late)”), “Dismissed-Without Prejudice”, “Dismissed-Jurisdiction or Res Judicata”, Dismissed because it was withdrawn by the complainant (“Dismissed-Withdrawn”, “Dismissed-Cancel or Failure to Prosecute”; case was “Affirmed”; case did not have Corrective Action Ordered (“Corrective Action - Not Ordered”), “Denied (Short Form)”, “DEN: Reopened/Int Decision Affirmed”, “DEN: Reopened/ID or Final Bd Order Reversed”, “DEN: Reopened/Case Forwarded to RO”, Granted: Affirm Initial Decision”, “Granted: Remand Case” but did was not have further results documented, “Denied (Not Short Form)”, “DEN: Reopened/Case Remanded”, or had “Granted: Initial Decision Vacated”,

\textsuperscript{95} Moberly, op. cit.. There is no explicit definition of a win, but judging from the discussion on p. 67, it is a finding in favor of a complainant either by the responsible agency (OSHA) or by an ALJ.

\textsuperscript{96} There is also whistleblower protection for employees working in a number of specific policy areas (i.e. nuclear power, transportation, securities, pipeline infrastructure, consumer product safety and some environmental areas. ) There are 17 different federal acts protecting these workers. See discussion, infra at note 43. Interestingly, the GAO found in January 2009 that approximately 21\% of the whistleblowers protected by these acts (a number comparable to our finding under the MSPB) prevail, where by prevailing they too include settlements and judgments in favor of the employee. “GAO Whistleblower Protection Program, Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency” Government Accountability Office (2009). For the specific list of the statutes protecting these whistleblowers, see page 8 of that document.

\textsuperscript{97} Moberly, op.cit., p. 97.

\textsuperscript{98} Ibid.
Who Files Whistleblower Complaints? Multiple and Repeat Complainants.

In theorizing who exactly whistleblowers are, one can formulate two competing hypotheses about such whistleblowers. One is that the typical whistleblower is a “one-shot” player, someone whose involvement in the whistleblowing processes is for him or her, a unique event. (Conversely, many of the agencies involved can be considered “repeat players.”) Given the pain associated with the process – how long it may take, the strains placed upon the whistleblower and his family, the likelihood of winning, and winning any adequate compensation – doing it just once would be understandable. The second, competing hypothesis is that many of these whistleblowers are frequent complainers, nettlesome individuals with the fortitude to formally pursue their objections as frequently as necessary through the

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100 Though Jos, et. al., in their study report that an overwhelming majority of the whistleblowers they interviewed (81%), most of whom experienced retaliation and “protracted legal battles,” reported that they would do what they had done again, even knowing the results of their whistleblowing. Philip H. Jos, Mark E Tompkins, and Steven W. Hays, “In Praise of Difficult People: A Portrait of the Committed Whistleblower,” Public Administration Review, Vol. 49 (6), November/December 1989, pp. 552-561.
whole panoply of whistleblower procedures. In this latter case, one might find such whistleblowers filing multiple complaints. How many such individuals are there, how many complaints do they lodge, and is there a “squeaky wheel” phenomenon which leads these individuals to win their cases more often than others?

Figure 2 clearly demonstrates that three-quarters of the whistleblowers in the MSPB data are one-time complainants; that is, in the 1994 through 2007 times span, 1645 of the 2149 unique complainants, over 75%, filed only one case, and were not bombarding the court system, MSPB and OSC etc., with whistleblower complaints. Moreover, of the 504 repeat complainants, the vast majority filed only two cases. These data, however, need to be sensitively examined since the repeat complainants did in fact generate almost 45% of all cases filed. Though there is a slight increase in the percentage of cases where corrective action is ordered for repeat complainants (1.65% compared to 1.27%), Figure 3 shows that one-time complainants are considerably more
likely to obtain settlements than repeat complainants, and indeed using our definition of a “win” (settlements plus favorable judgments), are therefore more than a third more likely to achieve a win than repeat complainants.¹⁰¹

The Sieve Hypothesis

Any way one looks at the data, for a variety of reasons it seems exceedingly difficult for a whistleblower to win a case where he claims retaliation. In fact, the MSPB data examined are based on whistleblower complaints filed because of perceived retaliation. Yet we have resisted including retaliation as a component of our definition of a whistleblower, feeling that he should be defined by his actions, and not the reactions of another. Thus, our contention – the Sieve

¹⁰¹ Some other interesting information can be gleaned from the MSPB data. For example, seventy-five percent of the cases fall within the top ten agencies, and the success rates vary significantly by agency, from a low of 10% in the Department of Homeland Security to a high of nearly 25% in the Department of the Interior.
Hypothesis – is that these data describe only the residue in a sieve through which pass many other “cases” or situations in which whistleblowers find themselves, and so these data do not adequately describe what happens to whistleblowers.

Even within that residue, where retaliation has been claimed, there are confounding circumstances, some of which would apparently increase the whistleblower win rate, and others which would apparently reduce it. For example, if there were claimants who would not otherwise qualify as whistleblowers, according to our definition, but who lost cases on procedural grounds or withdrew their claims at an inordinate rate for reasons unrelated to the merits, removing those claimants would increase the win rate of true whistleblowers. On the other hand, if the cost or inconvenience of pursuing a case was so great as to induce the allegedly retaliating agencies to settle even with some claimants who would not qualify as whistleblowers, the whistleblower win rate would be artificially increased. Data to enable us to exclude such cases are unavailable.\(^{102}\)

But apart from the residue in the sieve, there are many whistleblower “cases” which never appear at all in data based on complaints due to perceived retaliation. One might argue that our more expansive definition of whistleblowing, in which retaliation is not a component, naturally includes cases of whistleblowing excluded by data based on retaliation, and subsequent complaint, so that the sieve hypothesis is “proven by definition.” But that argument understates the issue and is under-inclusive; even with the very small sample size provided by our interviews, and without any attempt to seek him out, we encountered an individual who was clearly a whistleblower, had arguably experienced retaliation, and yet filed no complaint. As we have seen from the data, a whistleblower who files a complaint of retaliation has a very hard time

\(^{102}\) Moberly, op. cit., in his examination of Sarbanes-Oxley whistleblowers, is well aware of such confounding factors. See, in particular, his Section III A. The Big Picture: Outcomes from the Administrative Process, 91-99.
having that claim upheld. This, in itself, must dissuade whistleblowers from filing complaints, so there are surely others just like the individual we found, and our assertion of the sieve hypothesis is not one proven by definition.\(^{103}\) In such situations, having fallen through the sieve, the whistleblower has experienced retaliation for which he has not been compensated, and has, therefore, lost but has not been counted.

Other situations falling through the sieve would tend to skew statistics in exactly the opposite direction, being an uncounted whistleblower win. One such example (there are clearly others as well) derives from “the whistleblower is our friend” statement that several of our subjects made (see our section on our interviews). Whether self-serving or not, such statements reflect the real costs facing an organization that are associated with ignoring the warnings made by whistleblowers, and worse, retaliating against them for issuing such warnings. Recognizing those real costs, there must certainly be situations where whistleblowers, through their persistence in fighting for what they perceive as right, ultimately carry the day and change organizational policy without themselves suffering adverse consequences. Furthermore, the costs of retaliating against the whistleblower and then defending against a whistleblower complaint might preclude the organizations’ retaliating in the first place. If the objective of the whistleblower is to change that policy and right a wrong, this should surely count as a whistleblower win, perhaps on two counts since he has forestalled retaliation as well, yet such a situation would not appear in our data.

\(^{103}\) For a whistleblower to be dissuaded from filing a complaint against retaliation by the hurdles he would face does not contradict the findings of Jos, et.al., op. cit., and earlier findings they cite “which found little evidence of the kinds of cost/benefit calculations implied as a step in the decision-making process by “prosocial” accounts of whistleblowing.” These findings deal with cost/benefit calculations about whether to blow the whistle, and whistleblowers seem far more driven by internalized ethical principles than a weighing of cost versus benefit. In our case, having already made the choice to blow the whistle, and having experienced retaliation, the whistleblower is trying to make a decision on how best to protect his interests, a decision far more given to weighing one’s options in the light of their consequences, and not one so driven by ethical principles.
Building on this latter observation, it is easy and perhaps tempting to conclude from the data that the dismal success rate for those seeking redress from retaliation under the whistleblower protections statutes demonstrates that those statutes fail in their ultimate purpose and need to be reconceived and redrafted. That would be consistent with the frequent media narrative of whistleblower-as-hero-who-suffers-for-his-act. But in fact that is only one of at least two, competing, hypotheses offered by the data. A second possibility is that the whistleblower protection laws have in fact worked, and worked very well. This hypothesis would have it that the laws have changed the broader culture to make whistleblowing accepted as a valuable activity or at least one to which organizations have become exceedingly sensitive. Under this second hypothesis, the lack of success rate reflects a situation in which whistleblowers are not usually retaliated against, and those who sought the protections of the laws were in most cases the outliers, those who sought protection for unreasonable accusations unworthy of, and hence not covered by, whistleblower protection laws, or as a baseless way to attack otherwise legitimate personnel actions taken against them unrelated to their efforts to report alleged misconduct. No data we have examined supports strongly either hypothesis, or even points in one direction or the other. Nor do we know a way to devise the methodology to test which of the two hypotheses – or any other – more accurately reflects reality. But the importance of this should not be overlooked, for it is the difference between knowing whether the whistleblower protection laws are working well (maybe even beyond expectations) or are failing spectacularly.

False Claims Act Data. Examining another data set provided by fraud statistics, yields a conclusion which, though different from the Sieve Hypothesis, shares with it the finding that a

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104 See, for example, Ashby Jones and Joann S. Lublin, “Firms Revisit Whistleblowing,” The Wall Street Journal (March 14, 2011).
straightforward reliance on the numbers to depict what is actually happening in whistleblower cases distorts and simplifies reality.

Looking specifically at the qui tam data within those statistics, shown in Appendix A, we find that qui tam relators are on the winning side in approximately 26% of the cases, excluding those still active or under investigation. However, the overwhelming number of these wins are in cases where the U.S. has intervened (1,000 of the 1,219, or 82% of the cases in which there were settlements or judgments). In fact, excluding those cases that were still active, when the U.S. does intervene it wins settlements or judgments in 95% of the cases (1,000 of 1052 cases). Of those cases where the U.S. has declined to intervene (3,567 cases, where 566 cases still active had been excluded), the relator won only 219, or a mere 6% of these cases. Furthermore, the average relator share of the award in these latter cases was about $321,500 compared to more than 2 million dollars when the U.S. did intervene.

Considering that the relator would have to bear the full burden of attorney and court costs if the U.S. did not intervene, a cost-benefit analysis might easily dissuade a relator from proceeding with a qui tam suit not joined by the government, regardless of the merits of the case. But we have no data to indicate why the government chooses not to intervene in a case, and so cannot determine the number of meritorious cases abandoned by a relator. Admittedly, the prescreening done by the DOJ in deciding whether to intervene in a qui tam suit provides a good deal of assurance that when government does do so the relator’s case has merit. But there is a strong likelihood that among the large number of cases (4,133 cases between October 1, 1986 and September 30, 2008) in which the U.S. has declined to intervene, there is a significant number of cases which are meritorious, but not worth pursuing by the relator alone. What that number is, we cannot determine.
On the other side of the ledger, when the government does choose to intervene, or even appears to be leaning in that direction, its win rate is so high that a potential defendant has a strong incentive to settle, particularly if the case can remain sealed, even if he has a rather meritorious defense. Here the government’s and relator’s win rate may be artificially inflated, beyond the merits of their case – quite the opposite from the previous situation. Again, we cannot tell how often this might happen, though given the statistics, it appears quite plausible that it sometimes does.

Observations on the Quantitative Data.

The low win rate experienced by whistleblowers confirms that they have a tough row to hoe in supporting their claims. But, the previous discussion in our data analysis indicates that there are significant perturbations, of unknown magnitude, about those win rates. Furthermore, data that would allow one to assess the magnitude of those perturbations is generally unavailable. Thus, though we would agree that the whistleblower’s lot is a hard one, the data we have examined do not give a clear indication of exactly how hard, and possibly more importantly, how often they are able to achieve their goal of protecting the public good and, on the other side of the coin, how often they make frivolous claims of organizational malfeasance or retaliation.

The quantitative data simply does not allow the nuances of whistleblowing to shine through.

6. Qualitative Data: Small-n interviews.

An odd, but striking, coincidence one observes from examining these data sets, is that regardless of whether the whistleblower is claiming retaliation, as in the MSPB data we examined, Moberly’s Sarbanes-Oxley data, the OSHA data cited, or the GAO data cited, or has filed a qui tam suit, his documented win rate, including both settlements and judgments, falls in the very narrow range of about 16.5% - 26%.

For a different slant on the merits of qui tam relator’s cases see the discussion in “Qui Tam and the Public Interest,” by Christina Orsini Broderick, Columbia Law Review, Vol. 107, No. 4, pp. 949 – 1001. In particular, note the discussion on pp. 963 – 975, and note carefully the author’s definition of the merit of a qui tam claim in Footnote 113, used for most of that discussion. Note also, that the data used in that paper is from an earlier version of the same source we used, extending only through September 30, 1984, though the statistical outcomes (frequency of government intervention, percentage of cases in which there were settlements or judgments when the government intervened and when it did not, etc.) are almost identical to those in our later data set.

Note that if the claims against the organization were truly frivolous, the claimants would likely not be considered whistleblowers at all.
In our search for nuance, we turned to a variety of people who had diverse whistleblowing experiences. We conducted nine in depth interviews with respondents on several sides of the whistleblower issues (whistleblowers, corporate executives, legal officials, and Human Relations officers………). The average interview lasted over two hours, and was primarily open-ended, though there were several standard questions that we asked in order to obtain a more concrete comparable sense. The interviews were group interviews, conducted with one subject and four members of the research team. Though this style of interview is not possible for many reasons in many studies, it proved to provide a number of advantages in this case. The team members brought their specific individual areas of expertise to the interview process, and collectively the “team” managed to go down a substantial number of roads with the respondents. The success of our collective “discussion” with the respondents is reflected in the richness of the interviews and the fact that a number of respondents actually wanted to join our project—at least insofar as attending our frequent reviews of what we had learned. We used a standard snowball approach in identifying subjects, though in one case, a subject overheard the team discussing the project in a local cafe and volunteered to be interviewed! Our observations from these interviews were supplemented by those from two webcasts.109

To describe our nine subjects: two whistleblowers (Subjects 1 and 9) themselves, one was a whistleblower advocate (Subject 4), five people were from the corporate world who had whistleblowing related experiences--two from the legal side (Subjects 5 and 7), one from the human resources side (Subject 2), one from the technical and marketing side (Subject 8), and one from the business/financial side (Subject 6), and one was from industry press (Subject 3). Clearly the sample size is small, even if interview results were instructive. However, given the

109 “Anyone can Whistle”, hosted by Juan Williams, webcast from the Paley Center for Media in New York City on Feb. 17, 2010; and “Whistleblowers and the Media”, hosted by Stephen M. Kohn, broadcast on C-Span on April 1, 2010.
scope of this study, this method adds a bit of “glue” to the structure. We do not claim exhaustive knowledge, but rather argue that the themes uncovered in these interviews provide significant grounds for hypothesis formation. This section is organized by theme, and analysis of each theme is conducted in the relevant subsection.

**Historical Changes in Whistleblowing** – Two of our subjects (Subjects 2 and 5) who had worked for major corporations from the 1960’s onwards noted enormous changes in corporate attitudes towards whistleblowers between then and now. As Subject 5 noted, when he first started working with the company with which he was to remain for thirty years, there was “not even a vocabulary for these [whistleblowing] acts.” He further referred to that earlier, idyllic time when there were “…no adversarial relationships between government and business, and even between management and employees. But things have changed.”

The notion that the concept and language of whistleblowing was non-existent until the last quarter of the twentieth century is an intriguing one and warrants a moment's further consideration. Why would that be, especially since qui tam suits have been around for centuries and the False Claims Act specifically for nearly 100 years? A brief look at American culture in the post-World War II era may shed some light. The culture of the fifties was a decidedly poor soil for the nurturing of what has come to be the concept and language of whistleblowing for the following reasons: The decade after the end of WWII was a time of significant prosperity, although not shared in by all. There was a tremendous rise in consumer consumption and wages as well as the rise of the suburbs. After more than a decade of the Great Depression and four years of war, Americans reacted to the prosperity with a great deal of optimism, even among those segments of society that did not share fully in the prosperity.110

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One beneficiary of this was corporate America, even though most Americans did not work in large corporations. Corporations and their executives had been portrayed as the "bad guys" for much of the Great Depression. But in the 1950s, that changed. Eisenhower may have had no plans to dismantle the New Deal, but business would once again have a prominent seat at the table. Eisenhower claimed to admire business executives more than politicians or military men and insisted he wanted his administration to be run as a business administration. 111 His initial cabinet was described by The New Republic as "eight millionaires and a plumber," describing a cabinet that looked more like a Board of Directors meeting. 112 When Charles Wilson, the head of General Motors, testified before the Senate before becoming Secretary of Defense, he was widely quoted as saying that "What is good for General Motors is good for America." He did not actually say exactly that; what he said was "What is good for our country is good for General Motors and vice versa." 113 But what is significant is that for many, there was much truth in the reported sentiment. Those who did criticize Wilson, criticized him more for his arrogance than for error. 114

Not everyone worked in large corporations, but large corporations had a disproportionate influence on how Americans viewed business in the decade or two after WWII. Workers entering these corporations were encouraged to think of their employment in terms of careers over their entire working life, not simply as jobs. The corporations funded extensive benefits, e.g., pensions, health care, stock plans, access to various forms of insurance and mortgages at reduced rates, space and money for club activities, etc., and tried to foster on the part of the employee a sincere belief in the goals and goodness of the organization. As summarized by one

112 Id (Goldman), at 238.
113 Manchester, supra note 111 at 648.
114 Id.
economist who spent time in both academe and the corporate world, "The capacity of the large American corporation to succeed competitively, to turn out a continuously improving stream of products, to earn steady and reliable profits, and to share [with its employees] the fruits of its success helped to make such firms socially and politically acceptable. Academics and journalists might criticize, and periodic antitrust action might threaten them as institutions, but for most Americans, they and their leaders were admired icons."115

In this milieu, corporate America was viewed in a light unfamiliar to more current sensibilities. According to Robert Samuelson, during the 1950s and 1960s, Americans viewed large corporations as imbued with a public purpose as well as desire for private profit, as "financially and successful and economically efficient compan[ies] that would marry profit-making with social responsibility; provide stable, well-paid jobs with generous benefits; support culture and the arts; encourage employees to become involved in their communities; and be a good corporate citizen."116. This attitude bred a mindset that stressed conformity and loyalty, and that militated against attacking or challenging the corporation. Stable jobs and ample fringe benefits would make workers loyal, and loyal workers would make companies prosper."117

Looking back two decades later, Todd Gitlin described this as follows: "For the multitude who could afford the ticket,... the payoff for hard work and a willingness to accept authority promised to be a generous share in the national plenitude."118

William Whyte captured this conforming mindset in The Organization Man,119 a very influential book written in 1956, in which he described corporate life (and government bureaucracies) as instilling in its mid-level professionals and managers loyalty and a desire for

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117 Id.
security above all else. Although he claimed otherwise, Whyte's was a devastating indictment of the mindset that corporate America encouraged. Whyte believed that the rugged individualism of the Protestant Work Ethic had been replaced by a new "social ethic", a "belief in the group as the source of creativity." As described by one commentator, Whyte argued that workers came to believe that "each person could feel worthwhile only when he restrained his ego and collaborated with his peers in some common enterprise.... The new functionaries ... cared less about their own creativity than about supervising the work of their subordinates...[T]hey preferred cooperation to open rivalry, managerial efficiency to disruptive debate, the 'practical team-player' to the eccentric genius, getting along with others to getting ahead. On all occasions, company loyalty mattered more than displays of imagination, curiosity or independence." At the end of the day, the Organization Man returned to his home in the suburbs dreaming not of wealth but of job security and "the good life" and saw in his company or office his roots in the nation. This was not intended to describe all workers, and indeed, throughout the period unions, for one, continued to battle management (unsuccessfully) for more worker participation in the daily operations of the workplace. But Whyte was describing exactly the mid-level professionals who would turn out to be a source of many whistleblowers in later years. Perhaps because of this, a whistleblower in that environment might be viewed as disloyal: “We’re doing all this for you and you’re ratting on us?” In the 1960s and 1970s, however, this began to change, at least for those who came of age after the Great Depression. For one thing, corporate America failed to live up to the picture

120 Id.
122 Id.
painted by Samuelson as inherently benevolent, able to be both profitable and good, or so many came to believe. The thalidomide scare of 1960-1961 led to the 1962 Kefauver-Harris Amendment, which changed the procedures for the testing and approval of new drugs. The 1964 Surgeon General’s Report on Smoking established a causal link between smoking and a wide range of chronic and life threatening diseases.

But more important, social attitudes changed. If the 1950s were, on the surface, mostly calm and complacent, the 1960s roiled. Titles of some of the standard histories of the decade give a sense of the change: “Coming Apart,” The Unraveling of America, America Divided; The Civil War of the 1960s, and perhaps more optimistically, The Sixties; Years of Hope, Days of Rage. Most benignly, the Kennedy administration called a new generation to public service to concerns beyond the four corners of their suburban home. Causes for public concern proliferated. A number of influential books including Betty Friedan's The Feminine Mystique, Michael Harrington's The Other America, Jane Jacobs' Death and Life of Great American Cities, Rachel Carson's Silent Spring, James Baldwin's The Fire Next Time and Joseph Heller's Catch-22 brought attention to social and political problems. Some were new or previous causes that had had fallen by the historical wayside for a couple of decades: the anti-war, second wave feminist, and LGBT rights movements, and vigorous environmental and ecological groups, all sought (with varying success) to empower and protect individuals against authoritarian forces in

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129 Gitlin, supra note 118.
130 See Patterson, (1996). This overview of the Sixties is drawn from Patterson, Chapter 15 and the works cited in notes 14-17 supra.
American society.\textsuperscript{131} Other already-existing and active causes, such as the push for racial equality, took on a new tone or urgency.\textsuperscript{132} If the iconic images of the battles for racial equality in the 1950s are the famous photo of a woman sitting on the steps of the Supreme Court reading a newspaper account of the decision in \textit{Brown v. Board of Education}, or of Rosa Parks sitting quietly but resolutely in the front of the bus, the familiar images of the Sixties prominently include Bull Connor's police dogs and fire hoses, and the three murdered civil rights workers. The new generation was told to "Question Authority" and many did—but not everyone. Nixon's Silent Majority stayed on the sidelines but through television and elsewhere, the images of protest were ubiquitous.\textsuperscript{133}

This piquant social stew changed the relationships between employee and big business on the one hand, and between big business and government on the other. The honeymoon with corporate America was slowly ending. Ralph Nader took on automobile makers, as symbolic an industry of American greatness as existed. And corporations such as Dow Chemical, Honeywell and other corporations with large defense contracts came to be seen as central players in an unpopular war effort. A new generation of activists targeted corporate America on a wide range of issues from product safety to equal hiring practices to environmental issues. A poll in 1971 showed that the percentage of respondents who agreed with the statement that “business tried to strike a fair balance between profits and the interests of the public” had dropped by 50% over the decade. And by the end of the decade, prominent business publications such as \textit{Forbes} and \textit{Business Week} urged business leaders to listen to the concerns expressed or assumed they were

\textsuperscript{131} Isserman and Kazin, supra note 128, pp. 56-7.
\textsuperscript{132} Patterson, supra note 130, pp 443.
\textsuperscript{133} Id. Pp. 450.
Moreover, not only corporate America, but government -- after the Vietnam War and Watergate -- lost any claim to infallibility it may have had in the preceding decades.

It was this environment that proved much more hospitable to and encouraging of whistleblowing and out of which the language and law developed. Some of the challenges of the Sixties took radical and extreme measures, but many, perhaps most, who sought change were willing to work within existing institutions when speaking out and challenging practices. This was particularly so as the more radical fevers of the decade subsided and some of the former revolutionaries sought more modest and practical reforms in the factories and fields.  

By the late 1970’s, faced with increased competition from abroad and at home, now with an increasingly deregulatory environment more to their liking, major corporations became less paternalistic towards their employees. As layoffs and reduced benefits were imposed at heretofore iconic corporations such as IBM in the 1970s, the old notion that loyalty would always or necessarily be rewarded with stable jobs and generous benefits came into serious question. Employees, in turn, may have felt less constrained by loyalty to their employers, with increased whistleblowing being a result. For example, after the 1986 amendment to the False Claims Act made it easier to institute a qui tam suit, the number of these cases filed annually soared from 66 in 1987 to a peak of 533 in 1997, remaining at an average of 385 thereafter through 2005. Relatedly, the civil rights and equal opportunity legislation of the 1960 provided protections against discrimination, violations of which became enmeshed in

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135 Isserman and Kazin, supra note 128 at 165-68; Gitlin, supra note 118 at 421-22.

136 Samuelson, supra note 116.


138 Note that one need not be an employee to file a qui tam suit against a company.

139 FRAUD STATISTICS – OVERVIEW, October 1, 1986 – September 31, 2005, Civil Division, U.S. Department of Justice (taf.org/feastatistics2006.pdf)
whistleblower complaints. Major corporations began implementing procedures for employees to follow to voice complaints internally, both to deal with such complaints before they became whistleblowing, and to deal with claims of retaliation for whistleblowing. Thus the missing vocabulary was being developed. In the public arena, the first statutory whistleblower protection for federal employees was introduced by the Civil Service Reform Act of 1978, and in the private sphere, caselaw regarding protections for whistleblowers was starting to develop around this same time, as reflected in the Palmateer case described earlier.

Protecting the Whistleblower is “Good Business” - Several of our subjects contended that, rather than viewing the whistleblower as disloyal, corporations now view the whistleblower “as our friend” and protecting her is “good business.” In elaborating on this view, Subject 5 stated that “a whistleblower is a management failure.”

There are several ways to view these statements and this expressed corporate attitude may have to be taken with a grain of salt (or two). As for the latter statement, what they seem to be getting at, which is consistent with other statements these subjects made, is that, particularly in certain industries, the corporate stakes resulting from adverse public disclosures, or harm to the public from product defects, false advertising or fraud, are so large that internal complaints, if listened to and acted upon, can keep the companies out of great trouble. When they don’t listen, and the employee goes public, the management has missed an opportunity to deal with the problem at a lower, and less economically painful, level. In addition, in some cases (e.g., the

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140 An example of this can be found under the NOFEAR Act, which protects against reprisals for discrimination and for whistleblowing.

141 See text at note 20 infra.

142 The quotes here are from Subject 2. Subject 5 confirmed this view, but did not use the specific phrases cited to characterize it. That protecting the whistleblower is “good business” was echoed exactly by Dr. David B. Amerine, from the nuclear energy industry, in the webcast “Anyone can Whistle” cited previously at note 109.

143 That subject felt that, to be considered a whistleblower, an employee had to go public with her complaint. Subject 7 confirmed the idea expressed in the phrase cited, but did not use it.
space shuttle Challenger disaster\textsuperscript{144}) the consequences of corporate/agency error or negligence are so large as to be manifest without explicit public disclosure by a whistleblower.\textsuperscript{145} Thus even without the threat of going public, a whistleblower’s warnings afford management an opportunity to head off damage to employees or the public with consequent damage to the organization. So in this sense too, ignoring a whistleblower is a “management failure.”

The first two statements (protecting the whistleblower is “good business” and “the whistleblower is our friend”) are not necessarily ringing categorical endorsements of whistleblowing. Rather, they may simply represent a utilitarian calculation which concludes that there is more to be lost by discouraging whistleblowing than by promoting it. This hardly means that in every instance the corporation looks favorably on serious employee complaints about its behavior, and even when they act on those complaints, that they don’t punish the employees who raise them because they may have made life more difficult for the corporation in the short run.

In the context of that utilitarian calculation, it is interesting to examine in concert the observations of two of our subjects (4 and 5). Subject 5 correctly observes that in his experience “risk is inherent in every product,” and that, with respect to whistleblowing, “it’s often a matter of judgment, and differences in it between the employee and management.” Subject 4, in discussing why engineering disasters occur (e.g., the DC-10 Turkish Airline Flight 981 crash,\textsuperscript{146} the Space Shuttle \textit{Challenger} disaster,\textsuperscript{147} or, more recently, the BP oil rig Deepwater Horizon explosion\textsuperscript{148}), cited the fact that adverse consequences are generally not assured but their


\textsuperscript{145}Note that the public statements by whistleblower Roger Boisjoly on the Challenger disaster occurred after the fact, though his internal warnings to Morton Thiokol and NASA preceded the disaster.


\textsuperscript{148}National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling. Available at: http://www.oilspillcommission.gov/
occurrence is probabilistically determined. Thus the utilitarian risk-versus-reward calculation is frequently an asymmetric one, pitting a calculable cost (e.g., that of a lost contract or market share, or of a schedule delay) against the probabilistic event, e.g., the failure of a component, one that may never happen. This was most vividly displayed in the Challenger disaster, where to cancel the launch Morton Thiokol engineers were forced to prove, to the satisfaction of their management and NASA’s, and in less than an hour, not that the mission might fail because of a faulty O-ring design, but that it would fail on that particular launch. The whistleblower bears the heavier burden of proof and therefore is normally on the short end of such asymmetry.\textsuperscript{149, 150}

**Variability of whistleblower personalities, motivations and claims** – The views expressed by our subjects on whistleblower personalities and motivations, and on the nature of their claims showed a wide variation in these characteristics. Their statements ranged from whistleblower’s are “brave people who take a moral stance” (Subject 6) to “the majority (of whistleblower’s) are decent, well-meaning people” (Subject 5) to “many are disgruntled employees” (Subject 9). Whistleblower motivations were seen to range across the board, some being “kookie” and some heroic. A few subjects ventured a distribution of whistleblower’s, a representative example being “20% are heroes, 20% are nuts, and I’m not sure of the other 60%” (Subject 1). The variability noticed was shared across whistleblower’s and management types whom we interviewed; whistleblowers did not necessarily have a more positive view of whistleblowers or specific acts of whistleblowing, and management representatives did not more readily default to more hostile or skeptical views. Perhaps because of their contacts with


\textsuperscript{150} ibid., Volume II, Appendix F – Personal Observations on the reliability of the Shuttle, by R.P.Feynman,
whistleblowing, their views may be more nuanced and sophisticated than what you might encounter in the media, which may tend to depict a disproportionate number of suffering heroes.

**Whistleblower Naiveté** - This was recognized, and noted in several different ways by both whistleblowers we interviewed, Subjects 1 and 9, and by several panelists in webcasts cited earlier (see Supra at 109). Subject 1 mentioned that management tries to depict the whistleblower as being “politically naïve” as part of the effort to discredit him, but that whistleblower also felt that he had been “immune to reprisal” because of his managerial position – which clearly proved not to be the case. Interestingly, none of the management representatives we interviewed described whistleblowers as naïve. Perhaps they recognize how much, in fact, the deck is actually stacked in management’s favor while the whistleblowers do not. In retrospect, much of the whistleblowers feeling of naïveté stemmed from their overestimation of the protection and support afforded them by the government and by whistleblower protection statutes. Yet another manifestation of whistleblower naïveté, to be discussed in more detail shortly, is their sometimes narrow view of their job, and their rigid view of organizational rules and procedures.

**Whistleblower Persistence/Doggedness** – We have stated earlier that persistence is one of the requisites of a whistleblower, and surely it is. But this is not a personal characteristic that necessarily endears one to management. As stated by Subject 5 (and echoed by several panelists in “Whistleblowers and the Media”– see Supra at 109), “Whistleblowers are difficult people. They won’t stop or go away.” Subject 9 noted that he could be very combative. The other, Subject 1, commenting on how he was perceived by management, noted that they felt “He’s right on the facts but he just keeps pushing.” This can sometimes be a very positive organizational attribute, e.g., when the whistleblower not only has the facts right but is cognizant of broader
implications of those facts and others are not, but can at other times be organizationally debilitating, as when policies advocated by the whistleblower based on the facts as he sees them are contraindicated by a broader set of perfectly valid management considerations or interpretations of law. As Subject 8 stated in describing one particular situation, “Reasonable people could disagree on this issue.” In a situation where that is the case, and a whistleblower digs in his heels on one side of the issue, problems can easily occur.

“Just Doing the Job Right” – This phrase was used both by several whistleblowers and whistleblower advocates we spoke to and those appearing on the webcasts previously cited to describe whistleblower motivations and how they functioned. Perhaps tellingly, none of the management representatives we spoke to used such terms to describe whistleblowers, and though not at all uniformly critical of whistleblowers, several cited cases where whistleblowers had launched complaints outside their range of expertise. The unqualified nature of the whistleblower endorsement inherent in the descriptive phrase used was striking to us, seeming to allow for no gray area in the determination of what was technically or ethically “right”. Even with the best of intentions, there must be situations where the whistleblower perception of what is “right” is wrong, arguably or in fact. The phrase bespeaks a strong, even rigid, sense of moral rectitude which can serve the whistleblower well when she is correct, giving her the spine to oppose her organization and bring it back on course, and poorly when she is wrong, providing an impediment to the efficient functioning of her organization.

Divergences and Conflicts Between Management and Employees - Perhaps colored by their personal experiences, the whistleblowers we interviewed felt management and employees possessed and valued distinctly different skills and motivations. Both whistleblowers we interviewed, Subjects 1 and 9, had been public sector employees, and noted the divided
loyalties of employees and management. In that sector, upper level managers are often appointees of a particular political administration to whom those managers are loyal, and whose political and regulatory philosophies they share. Career employees of an agency tend to be loyal to the agency and its core mission, to which they bring experience and expertise, which can devolve into elitism, making them critical of the skills and insights of their johnny-come-lately managers. Career employees can represent – or see themselves as representing – the historical and mission-based ethical conscience of the organization, but to a politically-appointed manager, they can rather represent or be seen as representing hide-bound organizational rigidity. Thus the political appointee may question the employee’s loyalty to the administration, and, indeed, the very mission of the agency to which the employee is loyal. (Note that, in addition to the whistleblowers we interviewed who expressed this view, Subject 7, who had at one time spent several years at a federal regulatory agency, mentioned the same type of conflict of loyalties in the public sphere.) The employee, on the other hand, questions the expertise and judgment the appointee brings to the organization’s mission. In addition, the employee recognizes that the appointee is temporary – when the administration leaves office, if not sooner, she will be gone. And to make matters worse, not infrequently that appointee came from (and is likely to return to) an industry regulated by the very agency she now manages, which is not a situation likely to endear that manager to an agency careerist. This, in fact, was the case for one of our whistleblowers (Subject 1). These considerations hardly facilitate the building of loyalty and respect between upper management and careerists in the public sector.

The whistleblower advocate to whom we spoke, Subject 4, came from the private sector. He, too, pointed to the transience of management, or as he put it, “the lack of continuity of responsibility”, as a contributing factor to the making of decisions which lead to the occurrence
of disastrous, though improbable, events. If the tenure of management is significantly shorter
than that of lower level employees, the latter are left to deal with the consequences of previous
management decisions, a situation which undermines responsibility in management and breeds
resentment on the part of employees.

7. Typology: From Jiminy Cricket to the Wicked Witch of the West

Through our examinations of the whistleblowing literature, quantitative data and
interviews, we noted the variability of whistleblower personalities, motivations, claims, and
success rates. To us, these whistleblower characteristics, as perceived by their management, their
peers, their families, the general public, and by the whistleblowers themselves, all stakeholders
in the whistleblowing, have a great bearing on what happens to whistleblowers. If one
aggregates these perceptions, and forms an amalgam of them, capturing the different points of
view, we believe one can distill out a whistleblower typology which captures the noted
variability. But a note of caution – the typology presented is an after-the-fact view of the
whistleblower, and should never be used, particularly by management, to evaluate the
whistleblower or the validity of her claims. It is a retrospective view of the entirety of her case.

Our proposed typology consists of five types of whistleblowers which, for want of better
descriptive terms, we call The Wicked Witch of the West (WWotW), Jiminy Cricket, The
Good Soldier, Chicken Little, and The Bounty Hunter. Note that, though we can define each
of these types, for any individual whistleblower the stakeholders may see the whistleblower as
representative of different types, i.e., a manager might see a whistleblower as a Chicken Little
while the whistleblower sees himself as a Jiminy Cricket. Furthermore, we do not claim that the
types are mutually exclusive in the sense that all views of the whistleblower fit neatly into one or
another of the types, nor do the data allow us to assign frequencies to each of the whistleblower
types. However, we do believe that any view of the whistleblower will consist of some mixture of the five types defined. We start by describing Jiminy Cricket and The Wicked Witch of the West (WWotW) because these are the bookends, at opposing ends of the spectrum of whistleblower motivation and behavior.

**Jiminy Cricket** – This whistleblower comes closest to the “White Knight” with which we collectively began this project. She is the whistleblower who sees an evil, is fearless in her objections, and fights valiantly within, and even beyond, her corporate or government organization for the sake of justice and righting a wrong. Jiminy Cricket is the conscience of the organization. She stands, personally and directly, to gain nothing from the proven truth of her claims which are ethical in nature. If they are true, and the organization acts to rectify the situations identified, society, or some significant part of it, reaps the benefit. It may be true that, because of the accrued benefits, Jiminy Cricket achieves an honored status, and even elevation within the organization – but that is not what she seeks. She seeks only to share in the larger public good that her whistleblowing hopefully accomplishes. For Jiminy Cricket, only the cynic would question her motives and begrudge her rewards. Of the two whistleblowers we interviewed, Subject 9 certainly fell into this category, and to a great extent, so did Subject 1.

The Jiminy Cricket characterization of whistleblowers fits much of their depiction in the whistleblower literature, and in their portrayal by the various types of media.¹⁵¹ But coupled with these laudatory views of whistleblowers are often painful accounts of the price that they pay for their determination to right a wrong. Many times, the accused organizations dispute a Jiminy

¹⁵¹ For the whistleblower literature, see for example, the case studies in Myron Glazer and Penina Migdal Glazer, *The Whistleblowers: Exposing Corruption in Government & Industry*, op.cit., and Roberta Ann Johnson, *Whistleblowers: When it Works – and Why*, op.cit. For print media, see the TIME magazine issue of December 22, 2002 with articles on Cynthia Cooper, Coleen Rowley, and Sherron Watkins, TIME’s Persons of the Year for 2002, all available at [www.time.com/time/subscriber/personoftheyear/2002/povyqa.html](http://www.time.com/time/subscriber/personoftheyear/2002/povyqa.html). Examples of media depiction of whistleblowers can be seen in the webcasts “Anyone Can Whistle”, and “Whistleblowers and the Media” previously cited at note 109. Finally, the movie *The Insider*, a portrayal of the tobacco industry whistleblower Jeffrey Wigand, is a good example of that media’s depiction of whistleblowers.
Cricket’s claims, and threaten, or actually take, retaliatory action against her.\textsuperscript{152} Often we read about their suffering lost jobs, familial difficulties, or financial sacrifices. In fact, both whistleblowers we interviewed did experience such problems.

And it is not only the accused organization that may retaliate against the whistleblower. Because a Jiminy Cricket’s stand is a moral one, and because different moral issues can sometimes overlap and conflict with one another, she may, at the same time, be lauded by one segment of society and villified by another. This is precisely what happened to Spc. Joseph Darby, the whistleblower who (originally anonymously) turned in the CD’s containing the pictures of the torture of Iraqi prisoners at Abu Ghraib to the Criminal Investigations Division (CID), leading to the prosecution and conviction of several of his fellow MP’s.\textsuperscript{153} The loyalty Spc. Darby felt he owed to his own ethical principles and to the ideals of the country clashed with a conflicting loyalty that his hometown residents and some of his fellow soldiers felt he owed to his comrades at arms. As a result, he was ostracized by his own community, and even by some of his own family members, ultimately having to leave the community. At the same time, he was lauded as a hero in the press and the media.

\textbf{The Wicked Witch of the West} – This whistleblower is at the other end of our whistleblower typology from Jiminy Cricket. Of all the types, the Wicked Witch of the West’s (WWotW) motivation and behavior is viewed as more selfish or dishonorable. The WWotW is the whistleblower who calls attention to the misconduct of another – however likely to effect a larger public good or prevent a violation of law – to embarrass that person or ruin his career and

further a personal agenda of revenge or retribution against the person being reported, or the organization of which that person is a part. Rather than being driven by altruism, the WWotW’s motivations have at least a major, if not exclusive, component of revenge or retribution for a perceived slight or injustice inflicted on her. Thus, the WWotW wants to get back at someone or some organization, and the reporting of fraud, gross mismanagement, illegal activities, etc., may be secondary to the WWotW’s motivation for revenge. Our interviews and the literature suggest innumerable ways Wicked Witch scenarios arise. For example, we discussed at length the scenario in which a whistleblower, who is angry at being excluded from a potential profitable internal deal, blows the whistle motivated by his anger and not by his sincere sense of righting a wrong. What defines these Wicked Witch types then is the predominance of individual anger or “disgruntled-ness,” instead of genuine concern for the damage caused by the damaging actions of the organization. Moreover, Subject 6 raised the interesting case of an individual who threatens to use information about illicit or unethical dealings of an organization to her personal advantage, e.g., to retain a job, increase salary, or advance within the organization. (however, unless the information is used, such a person would not be a whistleblower).

It is imperative to note that the motivation of the WWotW should not deny her the protections provided by the various laws protecting whistleblowers as long as there is reason to believe that her claims are valid. And of course, as long as there is such a reason, the claims should be pursued by appropriate agencies. But suspicions of the WWotW’s motivations certainly taint the public’s view of her, and the accused person’s or organization’s view of her as well, should they know of her motivation, which may lead to an unwarranted discounting of her claims. This might be used to justify actions against the whistleblower to preserve morale or
smooth functioning of the organization in question. And those justifications become independent of the whistleblower’s claims, and dependent on her motivations.

**The Good Soldier**

The Good Soldier is the employee who attempts to report what he perceives as illegal or improper conduct out of a primary concern for the organization or company itself. He is likely to be – but does not have to be – a long-tenured employee who has really embraced the corporate or organizational culture and its mission. As such, he trusts his own judgment about what the company or organization should be doing above that of others, even those higher up in the chain of command. As such, it is likely to run squarely into corporate or organizational initiatives that senior management believes is its - not the Good Soldier’s – prerogative. He may perceived as a Mr.-Know-It-All, and not in a positive way.

Of all the elements of our typology, none provoked as much and as intense discussion within our group as the Good Soldier type. Was it essential that there be such a type or were we first defining the type and then trying to shoehorn the whistleblower into it, or was this a valid characterization of some whistleblowers? If the latter, what were we trying to capture by this type, and from whose perspective does that characterization exist? Ultimately, we felt that to capture the complexity of the world of whistleblowing it was essential that there be this type to reflect the managerial perspective, for barring perceived enmity (the WWotW) and greed (the Bounty Hunter), most managerial objections, valid or feigned, are likely to fall within the Good Soldier type. Thus, if anyone views a whistleblower as a Good Soldier, it would be management and never the whistleblower himself, for as we shall see, the Good Soldier is depicted as defective in one or more ways.

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Though there is no reason to believe that our typology rests on a linear axis, simply for conceptual reasons, just as we located the Wicked Witch and the Jiminy Cricket on polar ends of a continuum, the remaining three types we place between our polar opposites.
To management, the Good Soldier is viewed as a goad or a roadblock against achieving their goals or adhering to their policies. His is an unwelcome voice at odds with managerial goals or procedures. The Good Soldier insists that the consequences of not acting as he says will be harmful, if not catastrophic. From the whistleblower’s perspective, his motivations are generally pure, and protective of the organization, and perhaps this is one way he differs from Jiminy Cricket – his interests are more in line with what he perceives as the organization’s mission, its technical issues, and its legal and procedural confines, while Jiminy Cricket’s are primarily ethical and primarily motivated by the larger public interest. Of course, the organizational issues concerning the Good Soldier may abut the public interest (and in fact would have to to fall within our definition of whistleblowing), and it then becomes difficult to determine where one ends and the other begins. For example, a whistleblower who fights within the organization, and even goes public, to prevent advertising off-label use of a drug not approved for such use by the FDA may be initially doing so to keep his company out of legal trouble. But the unapproved off-label use of the drug could prove to be harmful to the public as well.

The Good Soldier is issuing a warning, and if it is ignored and nothing ever happens, the public would never hear of him – and, in this case, if he had gone public he would probably be viewed as a crank rather than a whistleblower. On the other hand, if the Good Soldier’s warning is ignored and the predicted catastrophe happens, he becomes a whistleblower who is a threat to his management, having exposed their faulty judgment or even dishonesty, and often becomes a target for retaliation to silence or discredit him.

But why might a the Good Soldier’s warnings be dismissed? There are many possible reasons, among which are:
o He has complained frequently in the past – note that at least some of the complaints he voiced must have been serious ones or he wouldn’t be considered a whistleblower at all. He’s not just always griping about chewing gum in the water fountain.

o He has a poor “track record” – warnings he has issued in the past have, at least most of the time, been wrong, at least in the eyes of senior management, and organizational actions have not proven harmful or catastrophic. Contributing to the poor track record may have been what senior management deems incorrect or incomplete technical or legal assessments.

o He doesn’t get the “big picture” – he has shown poor understanding of corporate or agency goals or missions, or within that context has shown poor judgment of organizational risk vs. benefit.

o He jumps to conclusions.

o He is impolitic, and has made too many enemies who discount his warnings.

Clearly, all such reasons mark the Good Soldier as defective in the eyes of management.

Certainly in some cases their assessment is correct. But certainly in others, it is defensive and self-serving, meant to protect management against claims of responsibility for harm resulting from ignoring the Good Soldier’s warning.

We have identified two varieties of the Good Soldier, one an impeding voice and the other an activating voice. Under our category of the “impeding voice,” the Good Soldier tries to impede actions taken by or proposed by the organization because of what he perceives as their adverse consequences – “You can’t do that because...”. From the Good Soldier’s perspective, those consequences might include breaking laws, or results that would be detrimental to the organization or to some significantly larger group. He may be right in some, or even all respects. But from the organization’s perspective, it may have instituted or planned policies or actions in accordance with goals unknown to the Good Soldier, or deemed more important to the organization than his. Or there might simply be honest differences of opinion between him and the organization; e.g., what is prohibited by law may be unclear and disputed, or there may be disagreement on technical issues. And so his impeding voice is unwelcome, particularly as it becomes more insistent. Our view of this Good Soldier variety, is that his is a conventional,
conservative, or cautious view of organizational goals and prerogatives confronted by unconventional, expansive, or risky views of them held by those determining organizational policy.

In the case of the “activating voice,’ the Good Soldier is warning the organization of the dire consequences that would result from inaction – “You must do this, or else ....” He is trying to goad the organization into action. In some such cases the organization is not doing something wrong, they’re simply not doing anything at all, or at least not enough to satisfy the Good Soldier. For example, the Good Soldier might contend that organizational inaction will result in an existing law not being enforced, or a potential threat to national security being ignored. It is possible that an organization, initially at odds with a Good Soldier, comes around and eventually heeds his warning. And the Good Soldier may ultimately prove heroic. Nevertheless, from management’s perspective, he is often simply an organizational irritant.

In our previous section on our qualitative data we noted the divergences and conflicts between management and employees. Simply as an example, the Good Soldier type fits rather closely within the context of those conflicts and divergences, particularly those described in the public sector between career public employees and politically appointed managers. In fact, given the attitudes and situations depicted by our two whistleblower subjects, one can readily see them both fitting into this type (specifically the activating voice) in the eyes of their management. But this example in no way implies that the Good Soldier type resides exclusively in the public sector.

**Chicken Little** – Just as the Good Soldier is a departure from the more saintly Jiminy Cricket, the next type – Chicken Little – represents another variation on the theme or type. A Chicken Little is an employee who presses and presses insistently about the dire consequences of
the organizational or company policy of which he is complaining or reporting but without much to back up his concerns, and is almost always wrong. A Chicken Little may eventually get it right but, after a history of complaining about conduct that was not illegal, improper or harmful to the public interest – i.e., repeatedly insisting that “the sky is falling” – he has lost all credibility and no one takes action to address his concerns. Why would they, given his track record? Most likely, Chicken Little has often issued complaints or reports of misconduct that have proven to be unfounded, although one sustained, persistent effort might qualify him as a Chicken Little as well.

The Chicken Little type may be a rare bird, so to speak, among whistleblower types, and hopefully so. As discussed elsewhere in this article, there are enough barriers – emotional, psychological and financial – to any decision to engage in whistleblowing to discourage such repeatedly wrong efforts. But there are some competing considerations to believe that there may be more Chicken Littles out there than our hypotheses might predict. For one thing, although he may ultimately be wrong in his concerns, it isn’t clear that he will always or often realize this, particularly where the concern is with improper practices or violations of law that he believes will have baleful consequences far down the road but that have no immediate discernable impact. Indeed, the same costs that discourage whistleblowing in some, in others – like Chicken Little – build in a determination and persistence such that once one has decided to “go over the wall,” the incentives and temptation to believe that one’s own assessment of the situation is correct become almost irresistible. (If a simple pushback by management is enough to persuade him of the errors of his ways, he is not likely to be a whistleblower in the first place.)
Second, Chicken Little sees dire consequences resulting from the conduct he is reporting. This further enforces the decision to press on with his efforts to stop the conduct, even if his assessment is ultimately incorrect.

In the course of our research on this article, we came upon the story of a self-described whistleblower who fits this type. She was an employee of a large organization whose job responsibilities required her to work with other employees in team efforts to identify problems in connection with projects affecting the broader public interest. Repeatedly, she thought she saw problems that others missed and when she was unable to convince her immediate supervisors, she complained to more senior supervisors not only of what she thought she was finding but that her concerns were being given short shrift. Senior management tolerated her flights of fancy for a while, but ultimately, her efforts to ferret out wrongdoing where none existed were wasting resources needed for work on the projects. She was first transferred to another division within the company with different responsibilities, and eventually fired.

As noted above, the Chicken Little type may be the rarest of our five types. And the MSPB data discussed above may support that, as it shows the overwhelming majority of MSPB claimants are one-shot players. But this is another instance in which the data might not correlate precisely and capture what it appears to. The employee just described, for example, went through repeated instances of whistleblowing – all to no avail – but did not complain until she was fired. Remember that the MSPB data is based on retaliation. Even the example above, the Chicken Little may have needlessly blown the whistle many times, but only been retaliated against once. Thus she, too, might be a one-shot player in terms of the MSPB retaliation-based data, but nevertheless, a repeat whistleblowing complainant.
The Chicken Littles may in fact comprise a significant part of the claimants that we hypothesized earlier: those whose cases were rejected as unmeritorious either because they were the outliers whose whistleblowing did not satisfy the statutory requirement of a “reasonable” assessment of misconduct, or because they were actually fired for reasons totally unrelated to his efforts to report misconduct. In fact, as inveterate grousers, many of their claims may not have even risen to the level of whistleblowing, as we have defined it, in the first place.

The Bounty Hunter - We call the last of our whistleblower types “the Bounty Hunter”. On the surface, Bounty Hunters are individuals whose primary motivation is simply to make money, therefore engaging in qui tam suits. Qui tam litigants seek to gain from suing in place of the government, and Subject 6 stressed that “qui tam provided a life-changing financial interest.” As such, the Bounty Hunter term or label may conjure up a negative view of a qui tam inspired grievant. But this is far from the case for some who have studied the whistleblower process. For example, Boumil et. al. applaud qui tam suits as a means “to expose evidence of fraud” and trumpet our False Claims Act, which formalizes the place of qui tam suits, comparing this act favorably to the failures in Canada, England, and Australia to similarly incentivize employees to report organization malfeasance.\textsuperscript{155} Moreover, even in the United States, Boumil et. al. believe that the qui tam suit is a far more effective incentive for employees who otherwise, they argue, have little “incentive to risk their jobs and reputation.” They go on to note that qui tam laws provide a police force of thousands in the effort to reduce rampant fraud, waste, and abuse, and would be an asset in any health-care system where public health policy requires conservation of resources.”\textsuperscript{156}

\textsuperscript{156} Ibid. Pp. 17.
Further, it is indeed possible that the Bounty Hunter may simply have become so frustrated and disillusioned with trying to work within an unresponsive system that he becomes a Lone Ranger. His initial motivation may not have been monetary, but at the end of the day, he sees the qui tam suit as the best recourse to the goal he is trying to accomplish and is happy to take the monetary rewards for his efforts. An example of this latter type of whistleblower is Bobby Maxwell, a former Interior Department employee at the Minerals Management Service (MMS) who instituted a suit against Kerr-McGee for bilking the government out of royalty payments in which he also contended that the Interior Department had ignored audits indicating that Kerr-McGee had cheated on those payments.\textsuperscript{157,158} As an employee of MMS, Maxwell had repeatedly tried to get the agency to act against Kerr-McGee to recover royalties he felt were owed to the government.

Is Bobby Maxwell a Bounty Hunter or is he a Jiminy Cricket? It depends on one’s perspective. For someone knowing only that Bobby Maxwell initiated a qui tam suit against Kerr-McGee and was entitled to $5.7 million as his percentage of the judgment, it is easy to see Maxwell as a Bounty Hunter. Even someone knowing more of the history of Bobby Maxwell and his case could judge him by the perceived pot of gold Maxwell found at the end of the rainbow (though Maxwell says most of his award will go to his attorneys),\textsuperscript{159} while someone else with the same knowledge of the case might view Maxwell as a Jiminy Cricket. This is precisely the kaleidoscopic view depicted by the typology. For a case like Bobby Maxwell’s a lot depends on one’s perspective.


\textsuperscript{158} United States of America, ex rel. Bobby Maxwell v. Kerr-McGee Oil & Gas Corporation, 540 F.3d 1180, 1186 (10th Cir. 2008).


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Reviewing the Typology. We readily acknowledge that a strong typology would meet two conditions: its composition would be exhaustive, capturing the complete range of behaviors that are being classified; and the categories within the typology would be mutually exclusive. In our very exploratory typology we do not maintain that it is an ideal typology, i.e. one that includes all whistleblower types and whose identified types are close to pure examples of the characteristics we attribute to them. But as a first cut, we reiterate that our five types explain many of the perceptions of whistleblowers as viewed from the varied perspectives of whistleblower stakeholders. Furthermore, we contend that the lack of purity of the typology itself is indicative of an inescapable “zone of ambiguity” in the legitimacy of whistleblower grievances and motivations, something of which we were not cognizant at the outset of our investigation, and which is not adequately dealt with in the literature.

Considering the typology further reveals the kaleidoscopic nature of a more complete concept of whistleblowers. Though motivation is not part of the definition of whistleblowing proposed in this paper, it is a parameter whose value affects stakeholder perception of the whistleblower and his claims. This was first pointed out in our discussion of the WWotW. But that is not the only such parameter. Another one is judgment. This parameter is implicit in several elements of our whistleblower definition, for what is a “reasonable belief,” or the assessment of “significant public impact” without the exercise of judgment? How, without judgment, would one distinguish between a personal scruple and a broadly accepted moral principle? But it is the claim itself that makes the whistleblower. Motivation and judgment impart credence or disbelief to the claim.

As we have noted, motivation can play a key role in how major stakeholders react to certain whistleblowers. This is certainly true for the WWotW and the Bounty Hunter. But for
the other types, the more important parameter becomes judgment, and all too often it is used by stakeholders to diminish the importance of whistleblower claims. Our discussion of the Good Soldier shows how this is true for that type. But Jiminy Cricket’s judgment is also subject to attack – he can be accused of being impractical, his head in the clouds, unaware of the interplay between multiple considerations. The major point is that assessment of whistleblower claims is multidimensional, and different parameters become dominant for the different whistleblower types.¹⁶⁰

8. Conclusion & Suggestions for Further Research

Having been triggered by the apparent inconsistency between our initial, naïve picture of whistleblowers as heroes and the treatment they receive, we began our exploratory study of whistleblowing by examining the literature, media representations, and finally available data on the subject. We found the literature and the media largely anecdotal and supportive of our initial picture and the inconsistency we had perceived. So on to the data! But in looking at the data we realized that, to make any sense of it, we needed a more careful definition than any we had seen. Thus, our first contribution is a careful yet broad definition of whistleblowing which captures key elements of previous definitions, discards other elements as inessential to that careful definition, and explicitly adds new elements to better encompass all varieties of whistleblowing.

Applying that definition to the data, it became clear that many instances of what we now considered whistleblowing were not captured in the data. This, then, is our second contribution, “the Sieve Hypothesis.” Because the first data set we examined is based on filed claims of retaliation, and there may be many cases of whistleblowing, whether justified or not (remember

¹⁶⁰ Further, these parameters are in themselves complex. For example, while the WwotW might be motivated by a desire for retaliation, she has an interest in judging the situation accurately enough to achieve her ends. We can also easily imagine that a financial incentive might further complement initial motivations. This is merely to emphasize the complexity of these frameworks.
that a whistleblower need only have a reasonable belief that his challenge is valid), where there was no retaliation or no complaint filed, the data potentially excludes many cases of whistleblowing. These cases fall out of the “sieve.” This hypothesis does not lead us to conclude that life is any easier for the whistleblower than contended in earlier publications. It simply says that the available data provide an incomplete picture of the complex world of whistleblowing. This view was further supported by examining a second data set, that of qui tam cases. These no longer depend on claims of retaliation, but here too, the whistleblower finds it exceedingly difficult to win his cases.

Often in our discussion of the data we have used the broad, and usually imprecise term “situation” to point to instances where whistleblowing comes into play. This is purposeful, because many of those instances do not result in legal or administrative proceedings or cases. Thus relying on the data alone to describe what whistleblowers do and what happens to them is akin to the tale of the six blind men trying to determine what an elephant is by touching different parts of his anatomy.\(^\text{161}\) And we contend that adding to the data the anecdotal references to whistleblowing in the literature and the media would simply be like adding one more blind man with yet another anatomical reference point to the elephant’s description. To approach the gestalt of whistleblowing we undertook a small set of interviews with subjects who had experienced whistleblowing from a variety of directions. These led to the more intimate understanding of whistleblowing depicted in our section on our interviews, and ultimately led to our third contribution, the whistleblower typology, which tries to capture a more kaleidoscopic view of the subject.

At the very outset of this paper, we described this work as an exploratory study, and the sample size in our interviews was clearly small. In the future, our aim is to expand our study in several directions. First, we are in the process of developing a coding scheme for media reports on whistleblowing - what kinds of disputes are reported, what characterization of the whistleblower is presented, etc.? Second, through polling, we hope to examine public views on whistleblowing across a fairly wide sample. And finally, we are designing, and will administer, a systematic experiment to measure public understanding and acceptance of whistleblowing.

The idea that corporate America welcomes whistleblowers flies in the face of the narrative often found in the press and popular media, in which corporate America loses no opportunity to discourage whistleblowing, even if it means destroying the careers and lives of the whistleblowers. What is intriguing about this attitude expressed by our subjects are the larger questions of exactly what this sentiment reveals and, more importantly, how far and deep the sentiment spreads. Further research is needed to see how broadly this attitude stretches across industries, and just as importantly, in what kind of corporate structures. Has this sentiment taken hold generally, from small business entities up through the largest corporations, or is it more limited? Do national and multi-national corporations embrace whistleblowers when the accusations are aimed at the corporate suite, or only at mid-level managers, or at managers of remote business units?

Just as important is what this sentiment actually reveals about corporate attitudes. It is easy to dismiss this as nothing more than a cost-benefits analysis, focused on the bottom-line and not reflecting a real acceptance of whistleblowing \textit{per se}, regardless of the economic consequences of the whistleblower's actions. If, as Upton Sinclair observed, it is difficult to convince someone of something when his compensation depends on his not understanding it, an
opposite corollary may also be true: it is easy to believe something when it keeps the stock price up. And that may be all that is at work here. But that is not what the subjects told us and it could be that there is or has developed a broader acceptance of whistleblowing as an inherent good.\textsuperscript{162}

It is worth exploring whether the sentiment expressed reveals a broader acceptance of whistleblowing.

\textsuperscript{162} Recent literature on the civil rights revolution of the 1960s suggests that the key to changing attitudes in the South was not civil rights activists themselves or the courts, but southern businessmen who came to believe that the picture being presented of a segregated South worked to slow the economic development of the region, without a sincere embrace of equal rights for its own sake. But certainly there has been a greater, if not universal, acceptance of equal rights in the region over the last century. The same could be true with regard to whistleblowers. While initial acceptance, if true, may reflect simply an economic calculation, attitudes over time may have come to embrace an acceptance that not purely economically driven.
## Appendix A

### FRAUD STATISTICS - OVERVIEW

October 1, 1986 - September 30, 2008

Civil Division, U.S. Department of Justice

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