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FOUR SIGNAL MOMENTS IN WHISTLEBLOWER LAW: 1983-2013

*By Geoffrey Christopher Rapp**

Consumer activist Ralph Nader is sometimes credited with having coined the term “Whistle Blower” in the early 1970s.¹ In the decades since, much has changed. The term lost one space – becoming “whistleblower”² – but came to occupy a new space in the public’s understanding of the best ways to root out fraud and criminality in a wide range of activities and organizations. Whistleblowers helped end a war³ and bring down a United States President;⁴ changed the landscape of environmental protection;⁵ exposed fraudulent practices at tobacco companies;⁶ and, in more recent memory, highlighted patterns of fraud in publicly traded companies⁷ and helped destroy one of America’s most beloved sports icons, cyclist Lance Armstrong.⁸

The legal landscape relating to whistleblowers has changed dramatically as well. In 1983, the Supreme Court dismissively made

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1. See WHISTLE BLOWING: THE REPORT OF THE CONFERENCE ON PROFESSIONAL RESPONSIBILITY (Ralph Nader et al. eds., 1972). Other sources identify earlier uses of the term, such as in a 1958 article in an Ohio newspaper. See Dave Wilton, *Whistleblower*, WORDORIGINS.ORG (Feb. 18, 2007), <http://www.wordorigins.org/index.php/site/whistleblower/>.

2. See *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 131 S.Ct. 1885, 1896 (2011).

3. See Steven Duin, *Daniel Ellsberg – The Nation’s Pre-eminent Whistleblower – Will be in Portland with Documentary*, OREGONLIVE (Mar. 31, 2010, 5:05 PM), http://www.oregonlive.com/news/oregonian/steve_duin/index.ssf/2010/03/daniel_ellsberg_-_the_nations.html.

4. See Matt A. Vega, *Beyond Incentives: Making Corporate Whistleblowing Moral in the New Era of Dodd-Frank Act “Bounty Hunting”*, 45 CONN. L. REV. 481, 491 (2012).

5. See, e.g., RICHARD RASHKE, *THE KILLING OF KAREN SILKWOOD* 5 (1981).

6. See *Wigand: 60 Minutes’ Most Famous Whistleblower*, CBS NEWS (Aug. 21, 2011, 6:56 PM), http://www.cbsnews.com/8301-504803_162-20094836-10391709.html.

7. See Bob Ivry, *Woman Who Couldn’t be Intimidated by Citigroup Wins \$31 Million*, BLOOMBERG (May 31, 2012), <http://www.bloomberg.com/news/2012-05-31/woman-who-couldn-t-be-intimidated-by-citigroup-wins-31-million.html>.

8. Joseph Ax, *Doping Admission Could Cost Armstrong Millions – Lawyers*, REUTERS (Jan. 18, 2013), <http://www.reuters.com/article/2013/01/18/us-cycling-armstrong-legal-idUSBRE90H08020130118>.

reference to “so-called ‘whistleblowers.’”⁹ In the years since, however, the whistleblower has been elevated to a far more prominent position. A whistleblower is typically (though not exclusively) an employee of a corporation, government agency, or educational institution, who comes into possession of information on an ongoing criminal, fraudulent, unsafe or otherwise questionable practice.¹⁰ The whistleblower reports information or makes allegations, sometimes to external regulators, watchdog groups, or the media, and sometimes internally (though often outside of the chain of command).¹¹ From the beginning of the practice we now call whistleblowing such employees have faced retaliation – the threat of which, along with other incentives, favored remaining silent.¹² The law, thankfully, has evolved to provide both protection and positive incentives for whistleblowers.¹³

This Article identifies four signal legal changes in the treatment of whistleblowers that have helped propel those who speak out into their current prominent role in policy discussions. The first moment was the passage of amendments, in 1986, to the Federal False Claims Act (FCA).¹⁴ These amendments created a structure by which whistleblowers in the federal procurement context could claim a share of recovered funds connected with fraud perpetrated against the government.¹⁵ Importantly, the FCA amendments gave whistleblowers increased control over litigation involving fraud against the government.¹⁶ In addition to helping the government recover large sums of money, the 1986 FCA amendments provided financial resources to an emerging plaintiff’s whistleblower bar.¹⁷ The lawyers who got rich using the newly strengthened FCA provisions became a powerful force for policy advocacy in contexts outside of the somewhat narrow purview of the FCA.¹⁸

9. *Bush v. Lucas*, 462 U.S. 367, 385 n.25 (1983) (emphasis added).

10. *See Legislative Proposals to Address the Negative Consequences of the Dodd-Frank Whistleblower Provisions: Hearing Before the Subcomm. on Capital Mkts. and Gov’t Sponsored Enters. of the H. Comm. on Fin. Servs.*, 112th Cong. 58 (2011) [hereinafter *Legislative Proposals*] (statement of Geoffrey Christopher Rapp, Professor of Law, Univ. of Toledo College of Law).

11. *See id.*

12. *See id.* at 58-59.

13. *See, e.g.*, 18 U.S.C. § 1514A (2006) (providing increased protections to whistleblowers under the Sarbanes-Oxley Act of 2002).

14. *See infra* Part I.

15. *See infra* note 33 and accompanying text.

16. *See* Joseph M. Makalusk, *Blowing the Whistle on the Need to Clarify and Correct the Massachusetts False Claims Act*, 94 MASS. L. REV. 41, 45-46 (2012).

17. *See infra* notes 48-51 and accompanying text.

18. *See infra* notes 49-51 and accompanying text.

The second signal moment for whistleblower law was the passage of the Sarbanes-Oxley Act of 2002¹⁹ (SOX), which, for the first time, provided seemingly uniform protections for whistleblowers who raised concerns about accounting fraud in publicly held companies.²⁰ Although many scholars have deemed SOX's whistleblowing provisions ineffective, the statute itself represented an important shift in national thinking about the best ways to uncover financial fraud.²¹ Whistleblowers, long second fiddle to private securities lawsuits, came to be recognized as an important avenue for detecting fraud.

The third signal moment was perhaps the least noticed. In a section of the Deficit Recovery Act of 2005 (DRA),²² the federal government deployed a rather novel carrot for stimulating state law change. The DRA gave states that enacted their own false claims acts a significant windfall in terms of their split of recoveries in federal False Claims Act cases involving joint state-federal Medicaid expenditures.²³ As a result, in just a few short years, the number of states with such statutes rapidly increased, and state false claims acts have been a hot area of litigation in the ensuing time.²⁴

Finally, in reaction to the financial market meltdown of 2008-2009, Congress imported the FCA's bounty model for stimulating whistleblowers to the SOX context,²⁵ as a number of scholars, including myself, had argued was needed.²⁶ Although Dodd-Frank's whistleblower provision, like SOX's before it, suffers from important limitations, it represents a major shift in direction toward empowering and incentivizing whistleblowers in the financial arena.

After discussing each of these signal moments, I speculate about the future of whistleblower law. Important questions remain to be

19. Pub. L. No. 107-204, 116 Stat. 745 (2002).

20. See Vega, *supra* note 4, at 493.

21. See Paul Sweeney, *Sarbanes-Oxley – A Decade Later*, FIN. EXECUTIVES INT'L (2012), http://www.financialexecutives.org/KenticoCMS/Financial-Executive-Magazine/2012_07/Sarbanes-Oxley—A-Decade-Later.aspx#axzz2QZ5BaI6A.

22. Pub. L. No. 109-171, 120 Stat. 4 (2006).

23. See Kirsten V. Mayer et al., American Bar Association's Eighth Annual National Institute on the Civil False Claims Act and Qui Tam Enforcement, State False Claims Laws and Compliance with the DRA: What is Required After FERA and PPACA?, I-45 (2010), available at <http://www.ropesgray.com/files/Publication/95a2a983-d350-42ee-9fc1-7cc28709f938/Presentation/PublicationAttachment/53217857-8554-497f-87e7-7e9ea8e0ba0e/statefalseclaims.pdf>.

24. See *id.*

25. See *infra* notes 82-87 and accompanying text.

26. See Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 116-18 (2007) [hereinafter Rapp, *Beyond Protection*].

answered. Will Congress respond to Dodd-Frank's invitation to consider allowing securities whistleblowers, like FCA plaintiffs, to pursue an action on their own? Will companies adjust their historical reluctance to whistleblowing and begin to implement their own internal whistleblower reward systems? Will protection for whistleblowers on the federal and state level help stimulate changes in the common law's treatment of whistleblowers, which may have lagged behind? Only time will tell, but one thing is certain: the prominence of whistleblowers, for better or for worse, is here to stay.

I. THE 1986 FCA AMENDMENTS

The federal FCA dates back to the Civil War,²⁷ but it remained a largely ineffectual tool for much of its history thanks to restrictive court decisions.²⁸ During the height of the Cold War, chicanery on the part of defense contractors captured congressional attention.²⁹ The result was a statutory reform that transformed the role of whistleblowers as deputies for enforcing federal claims.³⁰

Prior to the adoption of the 1986 amendments, an employee of a defense contractor with information about ongoing fraud faced significant threats to her career were she to choose to bring such information to the attention of federal procurement or law enforcement authorities.³¹ There was little effective incentive, moreover, for an employee to step forward.³²

The 1986 amendments began the revolution in whistleblower reward and incentive laws. First, through its 1986 amendments, Congress made whistleblower bounties mandatory, whereas previously they had been discretionary.³³ Anti-retaliation provisions were adopted, which provided a "much needed" change giving employees the right to bring suit against employers who retaliate, demote, or otherwise

27. David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1270 (2012).

28. *See id.* at 1270-71, 1274.

29. This was the era of the "\$600 toilet seats" and the "\$7000 coffeepots." Sean Elameto, *Guarding the Guardians: Accountability in Qui Tam Litigation Under the Civil False Claims Act*, 41 PUB. CONT. L.J. 813, 818 (2012) (quoting Barry M. Landy, Note, *Deterring Fraud to Increase Public Confidence: Why Congress Should Allow Government Employees to File Qui Tam Lawsuits*, 94 MINN. L. REV. 1239, 1239 (2010)).

30. *See* False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986).

31. *See False Claims Act History*, PHILLIPS & COHEN LLP, <http://www.phillipsandcohen.com/False-Claims-Act-History/> (last visited May 12, 2013).

32. Elameto, *supra* note 29, at 818.

33. *See* Makalusky, *supra* note 16, at 45-46.

discriminate against an employee for bringing fraud to light.³⁴ The damages provision was modified from double to treble damages.³⁵ Furthermore, the statutory fine was doubled, and an attorneys' fees and costs provision was added.³⁶ Perhaps most importantly, the statute's jurisdictional "public disclosure" bar was modified.³⁷ Prior to the 1986 amendments, courts could not consider any FCA lawsuits based on information already in the government's possession,³⁸ under the amendments, only a lawsuit "based upon the public disclosure" would be subject to a jurisdictional bar,³⁹ and then only if the plaintiff were not the "original source" of the information.⁴⁰

Collectively, these were "sweeping changes."⁴¹ The result of the 1986 amendments was a rapid expansion of the use of qui tam suits to enforce the federal FCA.⁴² Qui tam recoveries have come to eclipse recoveries in other areas of law, including securities and antitrust.⁴³

The 1986 amendments did include some checks, such as the modified public disclosure bar⁴⁴ and a restriction on lawsuits by members of the military and veterans,⁴⁵ but those limitations did not prevent the statute from proving to be an adaptable and broad sword in the battle against fraud perpetrated on taxpayers. The most common use of qui tam suits includes both the defense fraud context that prompted the 1986 amendments and fraud in connection with federally funded healthcare programs – Medicaid and Medicare.⁴⁶ However, qui tam litigation has been brought in a wide variety of other areas.⁴⁷

Perhaps the most important consequence of the 1986 amendments is that they helped to create an "increasingly sophisticated and specialize qui tam relators' bar" – with dozens of law firms and hundreds of

34. *Id.* at 46.

35. Elameto, *supra* note 29, at 819.

36. See Makalusky, *supra* note 16, at 46.

37. See *id.* at 45.

38. *Id.*

39. 31 U.S.C. § 3730(e)(4)(A) (1986).

40. § 3730(3)(4)(B).

41. Makalusky, *supra* note 16, at 45.

42. Engstrom, *supra* note 27, at 1270 ("qui tam filings have exploded from a few dozen lawsuits in 1987 to more than 600 in 2011").

43. *Id.* at 1270-71.

44. See Beverly Cohen, *KABOOM! The Explosion of Qui Tam False Claims Acts Under the Health Reform Law*, 116 PENN ST. L. REV. 77, 86-87 (2011).

45. See Makalusky, *supra* note 16, at 45.

46. Engstrom, *supra* note 27, at 1271.

47. *Id.* (listing other common claims such as frauds in connection with federal research grants and Hurricane Katrina relief).

lawyers focusing on whistleblower litigation.⁴⁸ Victories by these lawyers helped to fund⁴⁹ a collection of whistleblower advocacy groups that have successfully lobbied not just for plaintiff-friendly changes in the FCA, but also for the adoption of whistleblower bounty and reward programs in other contexts.⁵⁰ For instance, Taxpayers Against Fraud (TAF) serves as an educational, policy, and lobbying organization funded and supported by successful whistleblower lawyers.⁵¹

The role of attorneys in shaping policy is just one of the ways in which lawyers have helped to change the perception of whistleblowers and their role in public debates. Lawyers have also proven to be important translators of whistleblower experiences. Whistleblowers, whether due to preexisting tendencies⁵² or the traumatic experiences they have undergone since bringing fraud to light, can often make their audiences uncomfortable – they worry about crying in public, and talking like their “hair is on fire.”⁵³ Lawyers, removed from the emotional trauma and pain of a whistleblower’s experience, are perhaps more likely to be taken seriously. The FCA amendments helped cultivate and groom a generation of whistleblower lawyers who today stand beside those who bring fraud to light and help communicate whistleblowers’ experiences.

II. SOX’S WHISTLEBLOWER PROTECTIONS – A SYMBOLIC VICTORY

SOX was enacted in 2002 as a response to financial scandals at Enron and WorldCom.⁵⁴ SOX included a laundry list of corporate governance and financial regulation reforms.⁵⁵ Among them was a provision protecting employees from retaliation for reporting violations of the federal securities laws.⁵⁶ Prior to SOX, an employee of a company subject to the federal laws who brought a violation of those

48. *Id.* at 1281; *see also* Elameto, *supra* note 29, at 815.

49. Qui tam relators reaped nearly three billion in relator awards between 1986 and 2010. Elameto, *supra* note 29, at 844.

50. *See Who We Are*, TAXPAYERS AGAINST FRAUD EDUC. FUND, <http://www.taf.org/who-we-are> (last visited Apr. 17, 2013).

51. *See id.*

52. Fred Alford describes the motivation for whistleblowers as “narcissism moralized,” recognizing though intending potential insult. C. FRED ALFORD, WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER 63 (2001).

53. *Id.* at ix.

54. *See* Sarah L. Reid & Serena B. David, *The Evolution of the SEC Whistleblower: From Sarbanes-Oxley to Dodd-Frank*, 129 BANKING L.J. 907, 908 (2012).

55. For example, section 301 establishes complaint procedures at covered companies. *See id.*

56. 18 U.S.C. § 1514A (2006).

laws to the attention of internal superiors or external regulators would likely have been terminated with little legal protection.⁵⁷

Section 806 of the statute prohibits covered employers from retaliating against whistleblowers who report violation of any federal law relating to shareholders, including rules and regulations promulgated by the Securities and Exchange Commission (SEC).⁵⁸ Section 301 of SOX required all companies to establish procedures to receive and process complaints.⁵⁹ These two sections create SOX's dual mechanisms for fostering whistleblowing – a traditional anti-retaliation provision and what Richard Moberly calls a “structural” whistleblower policy designed to promote the revelation of fraud by improving the procedures by which tips and complaints would be processed.⁶⁰

Industry was concerned that SOX would produce “a floodgate of complaints,” though this concern proved not to be legitimate.⁶¹ The Act may have failed to produce an unwieldy volume of complaints due to its limitations and the restrictive way it has been interpreted. The federal administrative agency responsible for evaluating SOX claims – OSHA – was reluctant to find for complainants, overburdened by the scope of its new mandate, and bereft of the new resources needed to do its job.⁶² Narrow interpretations of key statutory provisions further limited the statute's reach.⁶³

In addition, a disconnect persisted between the agency enforcing SOX – OSHA – and the anti-financial fraud policy objective behind the statute. Amazingly, there apparently was not even a single instance in which an OSHA complaint prompted an SEC investigation.⁶⁴ Whether that is due to the low quality or stale nature of tips, or to bureaucratic wrangling, is unclear. The SEC indicated that, during the time between SOX and Dodd-Frank, it expected to leave responsibility for whistleblower tips to OSHA,⁶⁵ even though that agency had no authority to enforce violations of the securities laws. The bottom line is, whether

57. Sarbanes-Oxley provides whistleblowers receive “all relief necessary to make the employee whole,” including reinstatement and back pay. § 1514A(c).

58. § 1514A.

59. 15 U.S.C. § 78(j)-(l).

60. See Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 10 (2012).

61. Reid & David, *supra* note 54, at 908-09.

62. See Moberly, *supra* note 60, at 32.

63. See *id.*

64. Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 BYU L. REV. 73, 126 (2012) [hereinafter Rapp, *Mutiny by the Bounties?*].

65. See *id.*

or not SOX provided meaningful protection for workers, it utterly failed to promote financial fraud whistleblowing in ways that facilitated timely and meaningful governmental intervention.

In spite of its limited actual benefit to terminated employees, SOX stands as a moment of great symbolic importance. Without SOX – and persistent evidence of its ineffectiveness, at least relative to the successful FCA⁶⁶ – there would not have been Dodd-Frank. SOX symbolized an expansion of federal whistleblower policy outside of the narrow areas – procurement fraud, nuclear safety, insider trading, and the like – to which it had previously been confined.⁶⁷ Because of its symbolic force, SOX provided a roadmap and “model for subsequent legal measures that encourage and protect whistleblowers.”⁶⁸ Richard Moberly identifies *nine* new whistleblower anti-retaliation provisions adopted in the ten years following SOX.⁶⁹

III. THE DRA’S SILENT STIMULUS FOR STATE-LAW CHANGE

The third signal moment in whistleblower law is the one that has received the least attention from scholars and at the national policymaking level. The Deficit Recovery Act of 2005 (DRA)—actually enacted in 2006—established that any state with its own false claims law as strong as the general version would enjoy a larger share of any recovery in a Medicaid fraud lawsuit.⁷⁰ This “dangl[ed] carrots”⁷¹ in front of the states, creating a strong incentive for them to adopt significant changes to bring their statutes in line with the federal approach.⁷² The passage of the DRA meant that any states without false claims laws would enact them.⁷³

The results have been striking. Prior to the enactment of the DRA, only nineteen states had false claims laws, and only thirteen of those included a *qui tam* provision, giving a whistleblower the right to sue in

66. See Ben Kerschberg, *The Dodd-Frank Act’s Robust Whistleblowing Incentives*, FORBES (Apr. 14, 2011, 9:20 AM), <http://www.forbes.com/sites/benkerschberg/2011/04/14/the-dodd-frank-acts-robust-whistleblowing-incentives/>.

67. See Moberly, *supra* note 60, at 7.

68. See *id.* at 4.

69. See *id.* at 12 & n.65.

70. 42 U.S.C. § 1396(h) (2006).

71. Makalusk, *supra* note 16, at 57.

72. See *id.*

73. See Michael J. Davidson, *VFATA: Virginia’s False Claims Act*, 3 LIBERTY U. L. REV. 1, 4 (2009).

the name of the government.⁷⁴ By three years after the DRA's passage, the number of states with false claims acts was up to twenty-four⁷⁵ and just three years after that it was up to a whopping forty.⁷⁶ While some of these state laws are limited to the health care or Medicaid context, a number of them have a broader reach.⁷⁷

These changes create a whole new area of whistleblower bounty law for courts to develop and for legislatures to continue to tweak. It also represents an interesting form of competitive federalism. Instead of letting the "laboratory" of states decide whether to have a law and what form the law would take, the federal authorities have created a strong incentive for the adoption of a baseline law meeting the federal standards.⁷⁸ Beyond that, however, states will be free to experiment; having laws on the books for the first time in most cases, they are in a position to help answer important questions about the effectiveness of whistleblower rewards, particularly in the health care sector.⁷⁹

IV. DODD-FRANK'S CAUTIOUS EMBRACE OF BOUNTY AWARDS

Prior to Dodd-Frank, federal financial regulators had a dismissive approach toward whistleblowers—even where limited statutory avenues existed (as in the case of insider trading)—for providing bounties to tipsters.⁸⁰ This was unfortunate, for whistleblower revelations had the potential to do a much better job than private securities litigation in bringing ongoing, serious fraud to light at a time when it could be addressed and corrected at a reduced social cost.⁸¹ Financial industry employee-whistleblowers are likely to be sophisticated, particularly receptive to financial incentives, and were thus an ideal candidates for the adoption of whistleblower bounty schemes.⁸²

Dodd-Frank expanded bounties beyond the world of fraud against the government; "fraud against private investors or the financial

74. Geoffrey Christopher Rapp, *States of Pay – Emerging Trends in State Whistleblower Bounty Schemes*, 54 S. TEX. L. REV. 53, 61 (2012).

75. *Id.*

76. *Id.*

77. *See id.* at 75-79.

78. *See supra* notes 70-72 and accompanying text.

79. *See Rapp, Beyond Protection, supra* note 26, at 139-40.

80. *See Reid & David, supra* note 54, at 910.

81. Geoffrey Christopher Rapp, *False Claims, Not Securities Fraud: Towards Corporate Governance by Whistleblowers*, 15 NEXUS 55, 61 (2009-2010).

82. *See id.*

markets” could now trigger a bounty reward.⁸³ In addition, Dodd-Frank extended the protection provided by SOX to a broader range of potential tipsters.⁸⁴ In general, Dodd-Frank took a broad approach to defining eligible whistleblowers.⁸⁵

Under Dodd-Frank, a whistleblower who reports violations of the federal securities laws to the SEC could earn a bounty in any case where the SEC obtains a \$1 million fine or sanction against a wrongdoer.⁸⁶ However, unlike under the FCA, whistleblowers under Dodd-Frank lacked standing to pursue fraud allegations in the absence of government intervention⁸⁷ – an omission which may prove significant.⁸⁸

The most controversial aspect of the Dodd-Frank whistleblower provisions is likely its failure to mandate, as a condition for bounty eligibility, internal reporting prior to bringing fraud to the government’s attention.⁸⁹ Scholars have questioned whether this undermines the whistleblower program in a moral sense,⁹⁰ and businesses have objected to the effect that they perceive Dodd-Frank will have on their internal corporate compliance regimes, built at great cost in the aftermath of SOX.⁹¹

Professor Matt Vega argues that Dodd-Frank’s preference for external reporting renders the provision morally suspect—that it forces whistleblowers to choose between doing the “right thing” by blowing the whistle internally, and doing the “profit-maximizing thing” by going straight to the government.⁹²

While I am sympathetic to the general feeling that undercutting internal compliance structures should not be a policy goal, I find some of these objections overblown.⁹³ First, there is no indication that, even after Dodd-Frank, employees will utterly abandon internal whistleblowing programs. Most employees report fraud as part of a desire to protect their employer and they will likely choose internal

83. Reid & David, *supra* note 54, at 910.

84. *See id.* at 911.

85. *See id.* (stating that individuals engaged in compliance, internal audit, human resource or public accounting could all qualify as whistleblowers).

86. Moberly, *supra* note 60, at 47.

87. *Id.*

88. *See Rapp, Mutiny by the Bounties?*, *supra* note 64, at 133-42.

89. *See Vega, supra* note 4, at 485.

90. *See id.* at 485-86.

91. *See id.* at 499-500.

92. *See id.* at 484 (describing this “Hobson’s choice”).

93. I have also argued that SOX’s anti-retaliation and structural approach may have favored *internal* as opposed to external whistleblowing to an unwarranted degree. *See Rapp, Beyond Protection*, *supra* note 26, at 126.

routes for that reason,⁹⁴ even if it runs against their financial self-interest.⁹⁵

Second, Dodd-Frank may counterintuitively have a positive effect on internal corporate compliance by introducing competitive pressure. Internal programs will need to adjust to appear to potential employees to be a *better* way to report concerns. Companies may go beyond adopting a “we won’t punish you” approach to whistleblowers and instead embrace an approach of *rewarding* those who bring fraud or other abuse to light via internal channels.

Third, any mandate of internal reporting would be problematic in those instances where a dedicated fraudster has both perpetrated a financial scheme *and* has the power or leverage to control the outcome of a whistleblower’s internal complaints. The typical solution is to craft an escape clause from an internal reporting mandate for circumstances in which the person who would receive the report is the wrongdoer, or the whistleblower believes the person receiving the report would be conflicted.⁹⁶ The problem is that there is simply too great a danger that whistleblowing will be chilled due to uncertainty surrounding whether such an exemption applies.⁹⁷

As to Professor Vega’s objections based on natural law theory and perfectionism, I am afraid we may just be approaching the topic from fundamentally divergent starting points. The proposal I advanced in *Beyond Protection* in 2007 was squarely instrumental and pragmatic.⁹⁸ Whistleblowers were embraced as leverage to achieve securities fraud deterrence in a more effective way and at a lower social cost than private securities litigation.⁹⁹ To me, the proposal to reward tipsters has always been more about investor protection through deterrence than it has been about the moral dimension of the act of whistleblowing.¹⁰⁰ If forced to argue the issue along moral lines, I would offer the following defense of bounty rewards: one must, in the financial fraud context, consider their moral effects *relative* to other methods of fraud detection (such as

94. *Legislative Proposals*, *supra* note 10, at 60.

95. *See id.* Given the holes in the Dodd-Frank program, in particular its one million dollar fine limitation, it may be that the SEC only rarely pays out whistleblower rewards and, for the vast majority of potential tipsters discovering fraud at its early stages, it is financially better to keep things within the confines of one’s firm.

96. *See id.* (discussing the high-level management and bad-faith exceptions).

97. *Id.*

98. *See generally* Rapp, *Beyond Protection*, *supra* note 26 (arguing that significant bounties would outweigh drawbacks of whistleblowing).

99. *See id.* at 97.

100. *See* Rapp, *Mutiny by the Bounties?*, *supra* note 64, at 123.

parasitic securities fraud claims).

Dodd-Frank's most immediate meaningful impact may not have been in changing the calculus for whistleblowers, but instead in spurring the SEC to respond to whistleblower information. In response to Dodd-Frank the SEC created new offices to respond to the predicted influx of whistleblower tips.¹⁰¹

Previous experience gives reason to be suspicious of the SEC's enthusiasm for embracing whistleblower reports.¹⁰² The SEC long had authority to pay bounties in insider trading cases, yet it only rarely exercised that authority.¹⁰³ More strikingly, in one recent case that produced an SEC Office of Inspector General report, an SEC enforcement attorney revealed a whistleblower's identity to the tipster's employer.¹⁰⁴

After the enactment of Dodd-Frank, the SEC, which had previously processed tips through its Enforcement Division and regional offices, created a dedicated central Office of the Whistleblower to handle and investigate tips.¹⁰⁵ For the first time, there would be attorneys in the Enforcement Division evaluated not for the number of cases filed or the number of cease-and-desist settlements obtained, but instead for how they treated and responded to whistleblower claims. In addition, the SEC created an Office of Market Intelligence to develop technologies and systems for processing tips and complaints.¹⁰⁶

While the long-term impact of the statute remains to be determined, it is fair to say that even now, as a result of Dodd-Frank, "whistleblower regimes [have become] central to the regulation of the financial services industry, and . . . will be increasingly utilized."¹⁰⁷ As was the case with the FCA, one of the mechanisms by which Dodd-Frank will matter likely has to do with attorneys, who, surprisingly, like to get paid. Dodd-Frank creates "powerful incentives for whistleblowers, and more importantly, their counsel, to report wrongdoing."¹⁰⁸

101. Moberly, *supra* note 60, at 52.

102. *See id.* at 51.

103. *See* Rapp, *Beyond Protection*, *supra* note 26, at 117.

104. Rapp, *Mutiny by the Bounties?*, *supra* note 64, at 127.

105. Moberly, *supra* note 60, at 52.

106. *See* Bruce Carton, *Details Emerge on SEC Office of Market Intelligence*, SEC. DOCKET (Feb. 9, 2010, 7:24 PM), <http://www.securitiesdocket.com/2010/02/09/details-emerge-on-sec-office-of-market-intelligence/>.

107. Reid & David, *supra* note 54, at 907.

108. David M. Becker, *What More Can be Done to Deter Violations of the Federal Securities Laws?*, 90 TEX. L. REV. 1849, 1887 (2012). In a somewhat curious argument for a law student to make, one recent author suggested that the *problem* associated with Dodd-Frank's incentive system is that it is more likely that whistleblowers will be represented by counsel. *See* Jessica Luhrs, Note,

V. CONCLUSION

What do the next three decades hold for whistleblower litigation? Only time will tell.

Doubtless, the defense bar and its corporate clients will continue to argue for restrictions to curb perceived excesses in existing whistleblower reward and incentive schemes.¹⁰⁹ Even before the Dodd-Frank rulemaking process was complete, legislators were proposing rollbacks to the whistleblower provisions of the statute.¹¹⁰

There remain a number of doctrinal issues surrounding *qui tam* litigation that courts will likely resolve. For instance, do employees violate their fiduciary duties to an employer when they bring *qui tam* actions rather than inform an employer that they have discovered fraud?¹¹¹ Should some sort of affirmative defense be crafted based on the effectiveness of corporate compliance programs?¹¹²

One thing that *may* happen as Dodd-Frank incentivizes blowing the whistle and being persistent in reporting corporate fraud is that corporations may slowly come to see the value of whistleblowers. The business lobby has displayed a seemingly instinctive antipathy for bounty programs.¹¹³ However, as more whistleblowers reveal information in time for companies to avert the sometimes devastating consequences of financial fraud, we might come to see the business community adopt a different attitude towards whistleblowing.

Corporate actors expressed deep concern that Dodd-Frank's financial incentives would encourage employees to go first to external regulators with information about fraud rather than report internally, in ways that would decimate the "structural" programs companies had adopted at great expense in the wake of SOX.¹¹⁴ I am skeptical of whether that will really be the case in regard to meritorious whistleblowers, in that they tend to blow the whistle not for financial

Encouraging Litigation: Why Dodd-Frank Goes too Far in Eliminating the Procedural Difficulties in Sarbanes-Oxley, 8 HASTINGS BUS. L.J. 175, 182 (2012) (lamenting that whistleblowers unable to afford counsel will, thanks to Dodd-Frank, be more likely to have a lawyer, leading to the filing of many more claims, some of which are meritless).

109. See Becker, *supra* note 108, at 1860, 1864, 1885.

110. Rapp, *Mutiny by the Bounties?*, *supra* note 64, at 101-02.

111. See, e.g., *Enter. Recovery Sys. v. Salmeron*, 927 N.E.2d 852, 860 (Ill. App. Ct. 2010); see also Rapp, *Beyond Protection*, *supra* note 26, at 125-26.

112. See Marcia Narine, *Whistleblowers and Rogues: An Urgent Call for an Affirmative Defense to Corporate Criminal Liability*, 62 CATH. U. L. REV. 41, 43 (2012).

113. See Ashby Jones, *For Whistleblower Fans, A Grimm Proposal*, WALL ST. J. (May 5, 2011, 4:52 PM), <http://blogs.wsj.com/law/2011/05/05/for-whistleblower-fans-a-grimm-proposal/>.

114. See Narine, *supra* note 112, at 68-69.

reasons but out of concern for their organization (which would favor internal, rather than external, reporting).

But even if it turns out that employees skip internal options to go to the federal authorities, there is an easy fix for concerned businesses—adopt an internal whistleblowing reward system. Companies pay bonuses for all sorts of things, including fresh ideas, long hours, lengthy careers. Providing bonuses is a way of communicating what a firm values. If a firm values internal whistleblowing, it should create a reward system. Report a fraud? Get a bonus. There is no reason in law why a firm could not adopt such a system.

There are two other trends to watch. The first is on-line whistleblowing. The web site *WikiLeaks* is now well known, thanks to its disclosure of countless classified documents from the Iraq and Afghanistan wars.¹¹⁵ The site has been bogged down in internal disputes and legal wrangling concerning its founder's various legal troubles, and a number of copycat sites have now foundered.¹¹⁶ Web portals for the revelation of confidential information offer a way for whistleblowers to raise concerns publicly yet—at least in theory—remain anonymous. As programming continues to evolve, automated systems may be able to aggregate, synthesize, and discriminate among tips forwarded through online systems. What this raises is the possibility that a whistleblower's tips (if credible and confirmed) could garner significant attention without the whistleblower having to ever identify themselves—something impossible in a “brick and mortar” whistleblowing world.

Secure online document uploading systems (in which a person providing the document cannot be traced) are likely to soon go mainstream, raising the profile of online whistleblowing. Al Jazeera, for instance, now offers a “Transparency Unit” which allows tipsters to upload such information.¹¹⁷ There are reports that the *Washington Post* and the *New York Times* are considering developing such systems as well.¹¹⁸

115. See, e.g., Scott Shane, *Cables Depict Afghan Graft, Starting at Top*, N.Y. TIMES (Dec. 2, 2010), http://www.nytimes.com/2010/12/03/world/asia/03wikileaks-corruption.html?pagewanted=1&ref=global-home&_r=0.

116. Micah L. Sifry, *As WikiLeaks Struggles, Copycats Die but Online Whistle-Blowing Thrives*, TECH PRESIDENT (May 29, 2012), <http://techpresident.com/news/22253/wikileaks-struggles-copycats-die-online-whistle-blowing-thrives>.

117. *About the Transparency Unit*, AL JAZEERA, <http://thepalestinepapers.com/en/aboutus/> (last visited May 13, 2013).

118. Rainey Reitman, *Will the Rise of Wikileaks Competitors Make Whistleblowing Resistant to Censorship?*, ELECTRONIC FRONTIER FOUND. (Feb. 16, 2011), <https://www.eff.org/deeplinks/2011/02/will-rise-wikileaks-competitors-make>.

At the same time, the existence of such sites exposes a whistleblower's targets to allegations from unidentified sources that he may never be able to disprove. We can expect numerous legal battles between targets of reports and these sites concerning access to the identity of tipsters.

Another trend to watch is the relationship between national security and whistleblowing.¹¹⁹ In the immediate aftermath of the September 11th attacks and the intelligence and political failures associated with WMDs in the Iraq war, it appeared as if the American national security apparatus would embrace a "bottom up" approach to analysis that encouraged internal dissension—in essence, allowing analysts to "blow the whistle" on misleading or inaccurate portrayals of intelligence at the higher levels of decision-making.¹²⁰ The fallout from the WikiLeaks scandal, however, appears to have swung the pendulum in the other direction.¹²¹ The Obama administration—perceived to be a friend to whistleblowers in most contexts—"has been decidedly less emphatic and more nuanced" in the national security area.¹²² In the coming years, we will likely witness a continued battle to find the "sweet spot" between disclosing enough information to allow national security decision makers to do their jobs and protecting against unauthorized disclosure.¹²³

119. See Daniel Ellsberg, *Secrecy and National Security Whistleblowing*, HUFFINGTON POST, (Jan. 13, 2011, 11:00 PM), http://www.huffingtonpost.com/daniel-ellsberg/secrecy-and-national-secu_b_2469058.html.

120. It was suggested that the intelligence community would move from a "need to know" to a "need to share" policy. RICHARD A. BEST JR., CONG. RESEARCH SERV., R41848, INTELLIGENCE INFORMATION: NEED-TO-KNOW VS. NEED-TO-SHARE 13 (2011), *available at* <http://www.fas.org/sgp/crs/intel/R41848.pdf>.

121. See *id.* at 10.

122. Richard Moberly, *Whistleblowers and the Obama Presidency: The National Security Dilemma*, 16 EMP. RTS. & EMP. POL'Y J. 51, 52-53 (2012).

123. BEST, *supra* note 120, at 1.

