

# BLOWING THE WHISTLE ON WHISTLEBLOWER PROTECTION: A TALE OF REFORM VERSUS POWER

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## I. INTRODUCTION

The ability of the law to curb the exercise of political and economic power is always suspect, and this is a point of agreement among voices on the Right and the Left.<sup>1</sup> The Left suggests that the law is subservient to power, and the Right suggests that powerful economic and political interests are easily able to overcome collective action challenges to pursue their special interests at the expense of the general welfare.<sup>2</sup> So it is with legal protections for whistleblowers.<sup>3</sup> Whistleblowers threaten those with power.<sup>4</sup> This Article shows that the law's protection of whistleblowers today is illusory at best but that durable reform may be

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1. See RAGHURAM G. RAJAN & LUIGI ZINGALES, *SAVING CAPITALISM FROM THE CAPITALISTS* x–xi (2004). Business Professors Rajan and Zingales focus upon the power of economic and political incumbents to distort the political system—and thus law—in ways that undercut the proper functioning of markets. *Id.*

2. Historian Gabriel Kolko demonstrated that, in the end, the Progressive Era reforms served the interests of powerful capitalists. See GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900–1916*, at 3 (1963). Law and Economics scholars argue that regulation is self-defeating, as those economic interests subject to regulation exercise their economic power to dominate the regulatory process. See Ronald A. Cass, *The Meaning of Liberty: Notes on Problems Within the Fraternity*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 777, 790 (1985) (“Take almost any government program at random, and a ‘special interest’ counter-majoritarian explanation can be found that is more plausible than the public interest justification for it.”).

3. Whistleblowing as used in this Article denotes conduct by an employee designed to reveal potential illegality or unlawful conduct undertaken by an organization. See DANIEL P. WESTMAN & NANCY M. MODESITT, *WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE* 23 (2d ed. 2004). Whistleblower protection refers to laws designed to assure that whistleblowers do not suffer specified adverse consequences as a result of their disclosures.

4. In fact, the pressures against whistleblowing have powerful cultural roots. Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 26–28 (2003). Simons identifies historical criticism (such as Benedict Arnold) and religious criticism (such as Judas' kiss leading the Roman soldiers to Jesus' capture and death, and the Jewish “Talmudic prohibition against testifying against another Jew”) as examples of our cultural bias against those who betray the trust of confederates. *Id.* at 27, 30 n.140.

possible if the law is restructured appropriately.<sup>5</sup> Thus, this Article seeks to use the law of whistleblower protections to demonstrate that law can more efficaciously curb the excessive exercise of power to serve the general welfare.<sup>6</sup> In short, legal structure matters.

An excellent example of the power dynamics underlying whistleblowing law is the Sarbanes-Oxley Act of 2002, which offers protection for those blowing the whistle on corporate and securities fraud.<sup>7</sup> The Act became law during a compelling political context; indeed, the Act passed the U.S. Senate ninety-nine to zero.<sup>8</sup> Yet, when President Bush signed the measure, he issued an executive signing statement<sup>9</sup> that, out of literally hundreds of reform provisions, narrowed only whistleblower protection.<sup>10</sup> The executive signing statement introduced confusion to a facially clear statute.<sup>11</sup> Despite the protestations of key senators, the whistleblower provision was thus diluted before the ink of the President's signature was dry.<sup>12</sup> Those contending that law is essentially a manifestation of power and interest group politics would have predicted this very outcome.<sup>13</sup>

5. Recently, the House of Representatives passed a more expansive whistleblower protection act by a vote of 331 to 94. President Bush, however, has already committed to veto the measure. Jim Abrams, *House Passes Open-Government Bills; White House Threatens Vetoes*, SEATTLE TIMES, Mar. 15, 2007, available at [http://seattletimes.nwsourc.com/html/nationworld/2003618752\\_sunshine15.html](http://seattletimes.nwsourc.com/html/nationworld/2003618752_sunshine15.html).

6. For example, President Bush objected to the Act approved by the House on the ground that it would compromise national security. *Id.* In fact, the bill failed to include provisions, like those urged herein, to address national security concerns. See H.R. 985, 110th Cong. (2007).

7. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28 and 29 U.S.C.); 18 U.S.C. § 1514A (Supp. V 2005). See *infra* Part II.

8. HENRY N. BUTLER & LARRY E. RIBSTEIN, *THE SARBANES-OXLEY DEBACLE* 18 (2006).

9. Statement by President George W. Bush upon Signing H.R. 3763 (July 30, 2002), reprinted in 2002 U.S.C.C.A.N. 543 [hereinafter Signing Statement of President Bush] (“[T]he legislative purpose of section 1514A . . . is to protect against company retaliation for lawful cooperation with investigations and not to define the scope of investigative authority,” therefore, “the executive branch shall construe section 1514A(a)(1)(B) as referring to investigations authorized by the rules of the Senate or the House of Representatives and conducted for a proper legislative purpose.”).

10. Indeed, Professors Butler and Ribstein identify many other provisions of the Sarbanes-Oxley Act that imposed costs that they estimate to total \$1.1 trillion that were not deemed worthy of targeting. BUTLER & RIBSTEIN, *supra* note 8, at 3.

11. Compare Signing Statement of President Bush, *supra* note 9, with Sarbanes-Oxley Act of 2002 § 806(a), 18 U.S.C. § 1514A(a)(1)(B) (providing protection for employees against discrimination in retaliation for providing or assisting in providing information “when the information or assistance is provided to or the investigation is conducted by . . . (B) any Member of Congress or any committee of Congress”).

12. See Kelly Wallace, *Senators: Bush Could Undercut Whistleblowers*, CNN, July 31, 2002, available at <http://foi.missouri.edu/whistleblowing/senatorsbush.html> (reporting that U.S. Senators Pat Leahy (D-Vermont) and Charles Grassley (R-Iowa) sent to President Bush on July 31, 2002, a letter raising concerns with the President's signing statement: “The statement ‘embodies a flawed interpretation of the clearly worded statute and threatens to create unnecessary confusion and to discourage whistleblowers . . . from reporting corporate fraud to Congress.’”).

13. See RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 24

The goal to better protect whistleblowers from retaliation is not new.<sup>14</sup> The issue has international interest as nations struggle to protect those employees who seek to protect the public interest.<sup>15</sup> Whistleblowing is crucial to effective law enforcement efforts and, in the business sector, serves to enhance the transparency and integrity of financial markets.<sup>16</sup> Still even weak and ineffective reforms have been legislatively stalled in the past.<sup>17</sup> The widespread extent of employer retaliation to legitimate whistleblowing by employees suggests lawmakers and reformers must identify a means to extend broader protection to employees to enhance law enforcement mechanisms.<sup>18</sup> This Article argues that power

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(2001) (“But after the celebration dies down, the great victory is quietly cut back by narrow interpretation, administrative obstruction, or delay.”). Critical race theorists have demonstrated that racial reform occurs when it coincides with the needs of those with economic and political power. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (stating that *Brown* was the “subordination of law to interest-group politics”). Bell’s assessment was vindicated when archival research revealed that when the Department of Justice intervened on the side of the NAACP, the administration “was responding to a flood of secret cables and memos outlining the United States’ interest in improving its image in the eyes of the Third World.” DELGADO & STEFANCIC, *supra*, at 19–20; Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 66, 82–84 (1988) (examining extensive materials in the U.S. Department of State and the U.S. Department of Justice files, including foreign press reports, letters from U.S. ambassadors abroad, and Department of Justice amicus briefs, confirming Bell’s thesis).

14. See, e.g., STEPHEN M. KOHN, CONCEPTS AND PROCEDURES IN WHISTLEBLOWER LAW 377–94 (2001) (discussing and proposing elements for a uniform national whistleblower protection law, including Model Whistleblower Protection Act); *Testimony of Tom Devine Before Working Group on Probity and Public Ethics Organization of American States*, (Mar. 31, 2000), available at [http://www.oas.org/juridico/english/tom\\_devine.htm](http://www.oas.org/juridico/english/tom_devine.htm) [hereinafter Devine Testimony] (testimony of Tom Devine, Legal Director, Government Accountability Project) (describing the Model International Whistleblower Protection Act (MIWPA) on behalf of the Government Accountability Project (GAP), a nonpartisan, nonprofit public interest organization that supports the rights of whistleblowers); Federal Protection of Private Sector Health and Safety Whistleblowers (Recommendation 87-2), 1 C.F.R. § 305.87-2 (1988) (recommending omnibus whistleblower legislation that would, among other things, close the gaps in current whistleblower protection legislation).

15. See Elletta Sangrey Callahan, Terry Morehead Dworkin & David Lewis, *Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest*, 44 VA. J. INT’L L. 879, 908–12 (2004) (comparing approaches of Australia, U.K., and U.S.A. to whistleblowing and making specific recommendations as to what is effective for whistleblower statutes).

16. Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757 (2007) (arguing that Congress should create rewards to encourage whistleblowing because of its important role in securing legal compliance).

17. See, e.g., KOHN, *supra* note 14, at 378 (“In 1990 the Senate Committee on Labor and Human Resources approved, by a one vote margin, the Employee Health and Safety Whistleblower Protection Act. . . . which did not even close the loopholes in existing legislation [and] was extremely complex and unworkable. . . . It was never debated [n]or voted upon by the Senate and, since 1990, has not been seriously reintroduced.”).

18. See Simons, *supra* note 4, at 29–31; KENNETH MANN, DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK 172 (1985) (observing the sanctions faced in the marketplace by informants as a result of informing on business associates). Sherron Watkins’s experience at Enron is telling. Ms. Watkins waited until CEO Jeffrey Skilling’s departure from Enron because she feared she would be fired, given that the company treasurer, Jeff McMahon, was transferred after he “complained

deliberately crafted whistleblower “protection” laws so that whistleblowing is hazardous and costly to the ordinary citizen who blows the whistle.<sup>19</sup>

By definition, whistleblowers threaten those with power—an employee rarely needs protection from blowing the whistle on an underling.<sup>20</sup> This Article seeks to light the way for durable reform, notwithstanding the power dynamics—and the cultural mores—at stake. Those seeking enhanced whistleblower protections must be prepared to exploit opportune times when a political coalition in favor of more effective law enforcement against those with power may emerge.<sup>21</sup> Such a reform moment could give rise to an omnibus whistleblower statute that can secure the policy foundations of whistleblowing.<sup>22</sup> A

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mightily” to Skilling about the “veil of secrecy” surrounding accounting deals. Michael Duffy, *By the Sign of the Crooked E*, TIME, Jan. 19, 2002, available at <http://www.time.com/time/business/article/0,8599,195268,00.html>. Moreover, after reporting her concerns to Ken Lay (Enron Chairman of the Board and Skilling’s replacement as CEO), Andrew Fastow (Enron’s Chief Financial Officer) reportedly wanted her fired and her computer seized. Dan Ackman, *Sherron Watkins Had Whistle, But Blew It*, FORBES, Feb. 14, 2002, available at <http://www.forbes.com/2002/02/14/0214watkins.html> (reporting on Watkins’s testimony before Congress investigating Enron). Although Watkins’s computer was returned to her (after her request to transfer to another department), her work assignments were radically diminished. Kathleen F. Brickey, *From Enron to Worldcom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357, 362–64 & nn.28–30 (2003). Finally, after Lay’s contact with Watkins, he instructed the law firm of Vinson & Elkins to investigate Watkins’s concerns, but he also requested an assessment of whether Watkins could be fired without repercussions to Enron. *Id.* at 362–63.

19. Among the numerous tactics of retaliation that are used against whistleblowers, employers have launched investigations of the whistleblowing employees to focus attention on the person and not the alleged misconduct of the employer, or have sought prosecution of the whistleblowers for “unauthorized” disclosures or “stealing” the evidence used to prove the employer’s wrongdoing. See TOM DEVINE, GOV’T ACCOUNTABILITY PROJECT, COURAGE WITHOUT MARTYRDOM: THE WHISTLEBLOWER’S SURVIVAL GUIDE 28–32, 35–36 (1997).

20. See THE WORLD BANK, WORLD DEVELOPMENT REPORT 2006: EQUITY AND DEVELOPMENT 10 (2005) (“Policy reforms that result in losses for a particular group will be resisted by that group. If the group is powerful, it will usually subvert the reform.”). Economists predict that high economic inequality is associated with legal outcomes that systematically favor the rich. *Id.* at 8–9; Edward Glaeser, Jose Scheinkman & Andrei Shleifer, *The Injustice of Inequality*, 50 J. MONETARY ECON. 199 (2003). One study reveals that the income share of the top decile in United States increased substantially over last twenty-five years, garnering 40–45% of overall U.S. income. Thomas Piketty & Emmanuel Saez, *The Evolution of Top Incomes: A Historical and International Perspective*, 96 AM. ECON. REV. 200, 201 (2006), available at <http://elsa.berkeley.edu/~saez/piketty-saezAEAPP06.pdf>. The increase is attributed to “the very large increases in top wages (especially top executive compensation).” *Id.* at 204. The Economic Policy Institute supports this analysis, reporting that from 1965 to 2005, the ratio of chief executive officers’ annual compensation as compared to minimum wage workers increased from \$51:\$1 to \$821:\$1. Lawrence Mishel, *CEO Pay-to-Minimum Wage Ratio Soars*, ECON. POL’Y INST., June 27, 2006, [http://www.epinet.org/content.cfm/webfeatures\\_snapshots\\_20060627](http://www.epinet.org/content.cfm/webfeatures_snapshots_20060627). Consequently, “[a]n average CEO earns more before lunchtime on the very first day of work in the year than a minimum wage worker earns all year.” *Id.*

21. Such a reform moment occurred when Congress passed the Sarbanes-Oxley Act of 2002. See *supra* notes 7, 8.

22. Whistleblowers are crucial to effective white collar crime enforcement because, unlike much

unified and integrated legal approach to whistleblower retaliation would offer certainty for employers and employees, would assist law enforcement's efforts to detect crime, and would serve society's interests in assuring legal compliance.<sup>23</sup> Such a statute could also prove remarkably durable, as reactionary forces may find unassailable political opposition in favor of whistleblowing generally.<sup>24</sup> Theories of legal reform suggest that disruptions to the status quo provide opportunities for reform; this Article attempts to articulate a vision of whistleblower protection that can be implemented in response to the next reform opportunity.<sup>25</sup>

In Part II, this Article highlights that the current framework is an inadequate net, not a secure blanket, and thus fails to catch every falling whistleblower. Federal and state legislation both intend to encourage whistleblowing and to protect whistleblowers from retaliation; instead they require whistleblowers retain legal counsel, and thus, they operate to chill whistleblowing.<sup>26</sup> The most recent federal foray, the Sarbanes-Oxley Act of 2002 (SOX), underscores this point.<sup>27</sup> Congress enacted

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street crime, white collar crimes are usually undertaken in the privacy of the executive suite with only minimal underlings present. *See, e.g.*, H.R. REP. NO. 110-42, pt. 1, at 3 (2007) ("A key component of government accountability is whistleblower protection. Federal employees are on the inside. They can see when taxpayer dollars are wasted and are often the first to see the signals of corrupt or incompetent management."). This same rationale applies to the private sector.

23. *See infra* Part IV.B.

24. For example, President George W. Bush did not resist the enhanced Sarbanes-Oxley whistleblower protections directly; instead he undercut those protections indirectly through a little-publicized executive signing statement. *See* Signing Statement of President Bush, *supra* note 9.

25. *See* Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121, 138 (2003) (book review) (observing that interest convergence is "useful both in explaining the course of history and in determining when the time may be right to strike for change"); *see also* Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1524 (2005) (stating that successful law reform often emerges from ideas advanced in policy circles by taking advantage of "policy windows" that open when shifts in the national mood, change in elected officials, and "focusing events" coincide); Dani Rodrik, *Understanding Economic Policy Reform*, 34 J. ECON. LIT. 9, 31-38 (1996) (summarizing theory of economic reform that identifies economic crises as one factor leading to reform). Although there is not a general theory of legal reform, voices on both the Left and the Right agree that elite influence is essential to all reform. *See* RAJAN & ZINGALES, *supra* note 1, at x-xi (stating that both conservative- and liberal-leaning voices agree that "the market system gets distorted by politically powerful elites"). Power held by elected officials also accounts for legal system distortion. Edward J. McCaffery & Linda R. Cohen, *Shakedown at Gucci Gulch: The New Logic of Collective Action*, 84 N.C. L. REV. 1159, 1233 (2006) (finding that Congress often engages in ex ante rent extraction as much as legislative activity is a function of collective action theory).

26. A recent study shows that even when whistleblowers settle retaliation claims they usually are permanently barred from continued employment. Peter Eisler, *U.S. Lets Whistle-blowers Lose Jobs*, USA TODAY, Mar. 13, 2007, available at [http://www.usatoday.com/news/washington/2007-03-13-whistle-blowers-lose-jobs\\_N.htm](http://www.usatoday.com/news/washington/2007-03-13-whistle-blowers-lose-jobs_N.htm).

27. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at in scattered sections of 11, 15, 18, 28 and 29 U.S.C.).

SOX to address a crisis in confidence in our financial markets<sup>28</sup> brought on by multilayered accounting and securities frauds perpetrated by some of the largest corporations in the United States.<sup>29</sup> Yet, SOX does little to change the hazardous path whistleblowers must tread.<sup>30</sup>

Part III identifies current issues of concern in whistleblower protection while examining SOX's approach to these issues, and it proposes the means to address the issues through omnibus legislation. Part III argues that more certainty and clarity could operate to broaden protections and to encourage more whistleblowing. Sarbanes-Oxley's whistleblowing provision accomplishes neither of these goals. Thus, this Part suggests that SOX, like other efforts to secure whistleblowers from retaliation, misses the mark.

Finally, Part IV considers the competing interests at stake and suggests that interests can align to provide blanket protection for whistleblowers that respect employers' rights to manage employees, investors' rights to honest businesses, society's right to safety, and government's responsibility to protect its citizens through legal compliance. Central to this analysis are the benefits of an omnibus statute, in terms of protecting whistleblowers in whatever capacity or industry we may find them, as well as in political terms.<sup>31</sup>

This Article concludes that omnibus legislation can be enacted in response to an appropriate reform moment and during a time of a favorable governing coalition that provide the opportunity to replace the net of unpredictable and unreliable protections with a blanket of protection that is politically unassailable.

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28. Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002*, 34 LOY. U. CHI. L.J. 359, 386, 407 nn.245-48 (2003).

29. See STEPHEN M. ROSOFF, HENRY N. PONTELL & ROBERT H. TILLMAN, *PROFIT WITHOUT HONOR: WHITE-COLLAR CRIME AND THE LOOTING OF AMERICA* 279-311 (2004) (describing the discovery of various corporate crimes and fraudulent schemes at Enron, Arthur Andersen, WorldCom, Global Crossing, Qwest Communications, Xerox, Adelpia, Tyco, Rite Aid, Halliburton, and Coca-Cola from 2001 to 2004); see also PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE COMM. ON GOVERNMENTAL AFFAIRS, *THE ROLE OF THE BOARD OF DIRECTORS IN ENRON'S COLLAPSE*, S. Rep. No. 107-70 (2002).

30. Leonard M. Baynes, *Just Pucker and Blow?: An Analysis of Corporate Whistleblowers, the Duty of Care, the Duty of Loyalty, and the Sarbanes-Oxley Act*, 76 ST. JOHN'S L. REV. 875, 883-88, 896 (2002) (examining the fiduciary obligations of corporate insiders who want to blow the whistle and the conflict presented by the duties of care and loyalty in the whistleblowing context, and concluding that SOX does not eliminate the challenges facing whistleblowers).

31. See Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (and It Just Might Work)*, 35 CONN. L. REV. 915, 987 (2003) (comparing the reactive reforms in SOX to military planning based upon the last war rather than anticipating the next war).

## II. THE NET OF WHISTLEBLOWER PROTECTION

Whistleblower protection has evolved in response to specific breakdowns in law enforcement over time. Instead of a tightly woven blanket, the evolution has yielded a porous net of protections that is complex and non-intuitive; under current protections, being a whistleblower requires bearing costs and risks.<sup>32</sup> Two key considerations tend to arise for employees faced with this decision of stepping forward:<sup>33</sup> First, will coming forward with the information change the status quo and fix the problem; and second, will they be protected from a destroyed career,<sup>34</sup> financial ruin,<sup>35</sup> and, perhaps, physical threat.<sup>36</sup> Given the stakes, the only sound course of action for a putative whistleblower is to get a lawyer.<sup>37</sup> As Justice Souter has noted, the protections available to whistleblowers amount to a legal “patchwork.”<sup>38</sup> The questions of whether or which law covers specific

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32. Cora Daniels, *It's a Living Hell*, FORTUNE, Apr. 2002, at 367, 368 (“About half of all whistleblowers get fired, half of those fired will lose their homes, and most of those will then lose their families too.”).

33. U.S. MERIT SYS. PROT. BD., WHISTLEBLOWING IN THE FEDERAL GOVERNMENT: AN UPDATE ii (1993) [hereinafter MSPB 1993 Report] (finding that 59% of the respondents failed to report observations of illegal or wasteful activities “because they felt nothing would be done to correct the activities,” and 33% did not report such observations because they feared reprisal). Earlier surveys by the U.S. Merit Systems Protection Board yielded similar results. See U.S. MERIT SYS. PROT. BD., BLOWING THE WHISTLE IN THE FEDERAL GOVERNMENT: A COMPARATIVE ANALYSIS OF 1980 AND 1983 SURVEY FINDINGS 5–6 (1984).

34. Sandra Blakeslee, *For Los Alamos, a New Puzzle: The Case of the Battered Whistle-Blower*, N.Y. TIMES, June 9, 2005, at A24 (reporting that an auditor who accused Los Alamos nuclear laboratory’s management of accounting irregularities—and was subsequently removed from his auditing duties—was severely beaten and warned by his attackers to “keep his mouth shut,” having been lured to a topless bar to meet a laboratory auditor with “important new information about fraud”); Eisler, *supra* note 26.

35. See C. FRED ALFORD, WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER 109–10 (2001) (observing that even in the rare instances when a whistleblower wins a claim, the victory may take years to materialize because of administrative and appeals processes, and the victory may be hollow because the legal cost of pursuing the claim and the time out of work is borne by the individual, whereas lengthy processes favor the organization).

36. RICHARD RASHKE, THE KILLING OF KAREN SILKWOOD (2d. ed. 2000) (recalling the death of Karen Silkwood, an employee of Kerr McGee’s Oklahoma plutonium facility, who was killed when her car was forced off the road while she was on her way to meet with a reporter about misconduct at the facility).

37. DEVINE, *supra* note 19, at 105. Devine advises that not only is it wise to consult a lawyer before blowing the whistle, but he advocates choosing the attorney carefully and provides a list of twenty tips on choosing the lawyer, including confirming the lawyer does not have a conflict of interest. *Id.* at 107–12.

38. Justice Souter has observed that “the combined variants of statutory whistle-blower definitions and protections add up to a patchwork, not a showing that worries may be remitted to legislatures for relief”:

Some state statutes protect all government workers, including the employees of

retaliatory conduct, and where and when to file such a claim, demands the services of a lawyer.<sup>39</sup> Thus, the whistleblower faces financial, legal, and physical risks, with no assurance that blowing the whistle will effectively stem the misconduct at issue.

In addition to these formidable risks is social and cultural risk. The celebrated “heroism” of whistleblowers Sherron Watkins of Enron fame, Cynthia Cooper at WorldCom, and Colleen Rowley from the FBI, *Time Magazine’s* 2002 Persons of the Year,<sup>40</sup> ignores that a different social value is communicated to our children on playgrounds across America: Nobody likes a tattletale.<sup>41</sup> Society values “team players” and scorns “rats,” “snitches,” and “turncoats.”<sup>42</sup> These cultural mores help explain why the number and scope of laws protecting whistleblowers from retaliation continues to grow, but why real protection remains elusive.<sup>43</sup>

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municipalities and other subdivisions; others stop at state employees. Some limit protection to employees who tell their bosses before they speak out; others forbid bosses from imposing any requirement to warn. As for the federal Whistleblower Protection Act of 1989, current case law requires an employee complaining of retaliation to show “irrefragable proof” that the person criticized was not acting in good faith and in compliance with the law. And federal employees have been held to have no protection for disclosures made to immediate supervisors, or for statements of facts publicly known already.

*Garcetti v. Ceballos*, 126 S. Ct. 1951, 1970–71 (2006) (five to four decision) (Souter, J., dissenting) (refuting majority opinion statement that public employees are protected from vindictive bosses by “a comprehensive complement of state and national statutes”).

39. In fact, the state where the whistleblowing occurs could well determine whether protection is available. See Michael Delikat & Jill L. Rosenberg, *Defending Whistleblower Claims Under the Sarbanes-Oxley Act*, in UNDERSTANDING DEVELOPMENTS IN WHISTLEBLOWER LAW 2 YEARS AFTER SARBANES-OXLEY 9, 37 (2005).

40. Richard Lacayo & Amanda Ripley, *Persons of the Year*, TIME, Dec. 30, 2002, at 30.

41. Simons, *supra* note 4.

42. One author aptly describes the “intensely personal” decision about whether to blow the whistle as a “choice between conflicting social values”:

Our society honors “team players” and doesn’t like cynical troublemakers and naysayers. But we also admire rugged individualists and have contempt for bureaucratic “sheep.” We look down on busybodies, squealers and tattletales. But we condemn just as strongly those who “don’t want to get involved,” claim to “see nothing” or look the other way. And while we believe in the right to privacy, we simultaneously fight for the public’s right to know.

DEVINE, *supra* note 19, at 4.

43. See Delikat & Rosenberg, *supra* note 39, at 61–64, 67–86, apps. A–B (charting federal and state whistleblower protection provisions, respectively, and summarizing the prohibited employer action and the employee protected conduct under each provision listed). The difficulty in tracking the various laws is evident from websites such as Whistleblowerlaws.com, which lists about 58 federal laws providing whistleblower protection but notes that the list remains incomplete. See Ann Lugbill: WhistleblowerLaws.com, List of Federal Whistleblower Statutes, <http://www.whistleblowerlaws.com/statutes.htm> (last visited Mar. 13, 2007). In addition to whistleblower protection, a private individual may bring a qui tam action under the False Claims Act on behalf of the government to pursue fraudulent conduct against the government. 31 U.S.C. §§ 3729–3733 (2000). Other statutes also encourage the

*A. The Evolution of Whistleblower Protection*

The sheer number of anti-retaliation laws illustrate that whistleblowers are a critical component to effective law enforcement in a complex society as insiders often furnish invaluable assistance in the investigation and prosecution of public corruption and corporate fraud.<sup>44</sup> Well over fifty federal statutes exist to protect whistleblowers.<sup>45</sup> Nearly all states have some whistleblower protection, be it statutory or common law, but the contours of protection vary considerably from state to state.<sup>46</sup> Yet, legal protection remains illusory, largely because of the piecemeal evolution of whistleblower protection.<sup>47</sup>

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disclosure of information within the corporation. *See, e.g.*, Sarbanes-Oxley Act of 2002 § 307, 15 U.S.C. § 7245 (Supp. V 2005) (requiring the Securities and Exchange Commission (SEC) to issue regulations “requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty . . . to the chief legal counsel or the chief executive officer of the company” and, if remedial measures are not forthcoming, “to report the evidence to the audit committee of the board of directors of the issuer or . . . to the board of directors.”); 17 C.F.R. §§ 205.1–205.7 (2006) (regulations in response to the § 307 mandate); 15 U.S.C. § 78j-1(m)(4)(B) (Supp. V 2005) (publicly traded corporations must establish audit committees that administer procedures for internal receipt and investigation of employee complaints concerning “questionable accounting or auditing matters”).

44. In the United States, whistleblowers have disclosed or assisted in exposing acts that threatened the environment with radioactive leaks from nuclear waste disposal sites, that threatened national security and armed forces with the use of faulty parts for military equipment that failed during tests but were still sold to the government, and that resulted in billions of dollars in government contract fraud. Devine Testimony, *supra* note 14. *See* HENRY SCAMMELL, *GIANTKILLERS: THE TEAM AND THE LAW THAT HELP WHISTLE-BLOWERS RECOVER AMERICA’S STOLEN BILLIONS* 7–11, 14–17 (2004) (describing the experiences of a whistleblower at Teledyne who refused to falsify reports regarding failed quality assurance tests of electronic relays, an automatic electronic current switching device sold to the government for military projects).

45. *See* Delikat & Rosenberg, *supra* note 39.

46. *See* Delikat & Rosenberg, *supra* note 39, at 67–86, app. B (charting the whistleblower provisions available in each state summarizing the prohibited employer action and the employee protected conduct under each provision listed); Frank J. Cavico, *Private Sector Whistleblowing and the Employment-At-Will Doctrine: A Comparative Legal, Ethical, and Pragmatic Analysis*, 45 S. TEX. L. REV. 543 (2004).

47. One example of the legal risk facing whistleblowers is a False Claims Act (FCA) claim against Custer Battles LLC, alleging the company had submitted tens of millions of dollars in false claims to the Coalition Provisional Authority (CPA); the CPA is the organization formed in 2003 to administer the transition to a democratic society and rebuild Iraq. *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617, 618 (E.D. Va. 2005). One whistleblower, Robert Isakson, alleged that when he objected to Custer Battles practices, “he was held at gunpoint by company employees along with his 14-year-old son. . . . [and then he and his son were kicked] off the [Baghdad] airport base” and left to find their own way home. T. Christian Miller, *Contractor Accused of Fraud in Iraq*, SEATTLE TIMES, Oct. 9, 2004, available at [http://seattletimes.nwsourc.com/html/nationworld/2002058470\\_contract09.html](http://seattletimes.nwsourc.com/html/nationworld/2002058470_contract09.html). After a jury trial finding in favor of the relators (the whistleblowers), the district granted in part defendants motion seeking judgment as a matter of law, finding that the FCA did not apply because the CPA is not an officer or employee of the United States government under the FCA despite jury findings that Custer Battles had knowingly presented false claims valued at \$3 million dollars. *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 444 F. Supp. 2d 678, at 680 (E.D. Va. 2006). The district court found that the CPA was “created by the United States, United Kingdom, and

Most of the development in whistleblower protection has occurred over the last thirty years, but the legal cornerstone was set during the U.S. Civil War.<sup>48</sup> Congress enacted the 1863 False Claims Act<sup>49</sup> to encourage private citizens to sue on behalf of the United States to address fraudulent practices of companies supplying the federal government with deficient goods during the Civil War.<sup>50</sup> The formation of labor unions and the civil unrest that accompanied the labor movement spurred anti-retaliation legislation.<sup>51</sup> Both the Railway Labor Act<sup>52</sup> and the Wagner Act (also known as the NLRA)<sup>53</sup> included provisions barring retaliation against union organizers. The disruptive labor strikes and civil unrest associated with the labor movement had led to “burdening [and] obstructing commerce.”<sup>54</sup> Workers’ had an interest in “freedom of association, self-organization, and designation of

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its Coalition partners ‘acting under existing command and control arrangements through the Commander of Coalition Forces,’” and thus could not be considered an instrumentality of the United States even though it was “staffed, in large part, by employees of the United States government, [it was] led by a CPA Administrator appointed by and subject to the President, [and it] received a substantial part of its operating budget (approximately \$1 billion) from Congress.” *Id.* at 687–688.

48. WESTMAN & MODESITT, *supra* note 3, at 4–12 (recounting the historical development leading to whistleblower protection laws).

49. False Claims Act, 31 U.S.C. §§ 3729–3733 (2000).

50. See WESTMAN & MODESITT, *supra* note 3, at 3–4; SCAMMELL, *supra* note 44, at 36 (“[C]orrupt profiteering was epidemic. Gunpowder was frequently adulterated with sawdust. Rifles didn’t fire. At the start of the Civil War, Union uniforms exposed to rain would often dissolve and fall from the wearer in clots of sodden fiber.”). The False Claims Act (FCA) was amended in 1986 to protect employees of federal contractors who proceed under the FCA. WESTMAN & MODESITT, *supra* note 3, at 4.

51. The passage of the Clayton Act restricted management from resorting to federal antitrust laws or civil remedies to restrain peaceful union activity, but it did not prevent employers from firing or failing to hire persons who engaged in organizing activities; section 6 of the Clayton Act exempts labor unions from the federal antitrust laws, and thereby “prohibited federal courts from issuing injunctions restraining labor unions from peaceful picketing, or from ‘peacefully persuading any person to work or to abstain from working.’” WESTMAN & MODESITT, *supra* note 3, at 5. See 15 U.S.C. § 17 (2000). The Norris-LaGuardia Act in 1932 reaffirmed the prohibition of injunctions to resolve labor disputes. See 29 U.S.C. §§ 101–115 (2000); WESTMAN & MODESITT, *supra* note 3, at 6.

52. The 1926 Railway Labor Act is now codified at 45 U.S.C. §§ 151–188 (2000). The law was enforceable by any district attorney of the United States and made it a misdemeanor for any common carrier “to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization.” See 45 U.S.C. § 152; WESTMAN & MODESITT, *supra* note 3, at 6 & n.13.

53. 29 U.S.C. §§ 151–169 (2000); WESTMAN & MODESITT, *supra* note 3, at 6. The NLRA demonstrated that the national policy in favor of collective bargaining of employees may limit employers’ right to discharge employees, prohibiting “discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization,” and deeming it an unfair labor practice for an employer “to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter.” 29 U.S.C. § 158(a)(3)–(4), WESTMAN & MODESITT, *supra* note 3, at 7.

54. 29 U.S.C. § 151.

[employment] representatives of their own choosing,”<sup>55</sup> and retaliation against union organizers impeded this interest. The preamble of the NLRA recognized the importance of union organizing by favoring collective bargaining as a means of “safeguard[ing] commerce from injury, impairment, or interruption, and promot[ing] the flow of commerce by removing certain recognized sources of industrial strife and unrest.”<sup>56</sup> Thus by 1940, the federal labor laws established that Congress could restrict the right of employers to discharge at-will employees in order to facilitate industrial peace, and could protect employees who participated in labor union activity.<sup>57</sup>

In the 1960s and 1970s, national attention shifted from economic concerns to concern for civil rights,<sup>58</sup> and public health and safety.<sup>59</sup> Consequently, expansive federal regulation of businesses to promote these “national interests” solidified government involvement in the private sector workplace. Moreover, it offered protection to those employees aiding the enforcement of these laws by restricting employers’ ability to discharge such employees at will and by shifting retaliation issues from government enforced administrative actions to the civil courts.<sup>60</sup> The proliferation of whistleblower protections did not end there.

Protecting the public fisc provided the catalyst for the Civil Service Reform Act of 1978 (CSRA),<sup>61</sup> encouraging federal employees to report waste, fraud, or corruption within the federal government by establishing statutory protection for them from retaliation.<sup>62</sup> The

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55. *Id.*

56. *Id.*

57. WESTMAN & MODESITT, *supra* note 3, at 7.

58. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (2000).

59. *See, e.g.*, Consumer Credit Protection Act, 15 U.S.C. §§ 1601–1693 (2000) (originally enacted in 1968, but has since been amended); Occupational Safety and Health Act, 29 U.S.C. §§ 651–678 (2000) (workplace safety); Federal Water Pollution Control Act, 33 U.S.C. § 1251–1387 (2000); *see also* WESTMAN & MODESITT, *supra* note 3, at 8.

60. WESTMAN & MODESITT, *supra* note 3, at 8–9. The protection within the statutes vary from narrow provisions that only protect employees who participate in hearings regarding employer misconduct to prohibiting retaliation by employers against employees who oppose improper conduct. *Id.*; *see also* Cavico, *supra* note 46, at 553–83 (comparing the variety of protections offered in whistleblower protection provisions).

61. Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended in scattered sections of 5 U.S.C.). A principle purpose of the CSRA was to “[p]rovide[] new protections for employees who disclose illegal or improper Government conduct.” S. REP. NO. 95-969, at 2 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 2723, 2724; WESTMAN & MODESITT, *supra* note 3, at 14–15.

62. WESTMAN & MODESITT, *supra* note 3, at 12. The legislative history provides this rationale for the statute: “Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. . . . What is needed

Whistleblower Protection Act of 1989 (WPA)<sup>63</sup> addressed criticisms of the CSRA by procedurally enhancing protections for whistleblowers<sup>64</sup> on the “front line . . . in the battle to save the taxpayers’ money.”<sup>65</sup>

Deregulation in the 1980s and 1990s led to a whistleblower protection movement;<sup>66</sup> state statutory protections for private sector whistleblowers and state judicial exceptions to the common law at-will rule followed federal expansion of employee protections.<sup>67</sup> By 2004, forty-five state jurisdictions in the United States had recognized causes of action for

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is a means to assure [employees] that they will not suffer if they help uncover and correct administrative abuses.” S. REP. NO. 95-969, at 8 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 2723, 2730. The CSRA provides that employees should proceed first through internal procedures to report wrongdoing. S. REP. NO. 95-969 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 2723, 2757. “[O]nly disclosures of public health or safety dangers which are both *substantial* and *specific*” are protected. S. REP. NO. 95-969, at 21 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 2723, 2743.

63. Whistleblower Protection Act of 1989 (WPA), Pub. L. No. 101-12, 103 Stat. 16 (codified as amended in scattered sections of 5 U.S.C.).

64. Procedural modifications included protecting the identity of whistleblowers, permitting whistleblowers to obtain orders of protection, granting prevailing whistleblowers all relief awarded to them during the pendency of any appellate review, requiring losing agencies to pay attorney’s fees and costs of prevailing whistleblowers, and substantively adding a provision allowing preferential transfers of whistleblowers seeking to leave the agency because of fear of retaliation. WESTMAN & MODESITT, *supra* note 3, at 62–63. An amendment to the WPA in 1994 added two ways to appeal retaliatory actions: by filing directly with the Merit Systems Protection Board (MSPB) or by filing an Independent Right of Action (IRA) with the Office of Special Counsel (OSC). 5 U.S.C. § 1214(a)(3)(B) (2000); WESTMAN & MODESITT, *supra* note 3, at 63. In 2002, Congress enacted the Notification and Federal Employee Anti-discrimination and Retaliation Act of 2002 (NO FEAR), making federal agencies responsible for paying judgments and settlements out of the agency budget in whistleblower retaliation cases. Pub. L. No. 107-174, 116 Stat. 566 (2002). Among other things, NO FEAR requires agencies to report to Congress on the number of whistleblower retaliation cases, the disposition of such cases, and the total amount of monetary awards and settlements. Pub. L. No. 107-174, § 203(a)(1)–(4), 116 Stat. at 569-70.

65. 135 CONG. REC. S2779 (daily ed. Mar. 16, 1989) (statement of Sen. Levin). The legislative history concerning adopting the “contributing factor test” presents this view: “Government employees who ‘blow the whistle’ on waste, fraud and abuse are front line soldiers in the battle to save the taxpayers’ money. Giving real protection to these whistleblowers is a simple and effective way to cut cost overruns, wasteful spending, and the bottom line save taxpayers’ dollars.” *Id.*

66. *See* MYRON PERETZ GLAZER & PENINA MIGDAL GLAZER, THE WHISTLEBLOWERS: EXPOSING CORRUPTION IN GOVERNMENT AND INDUSTRY 12–20 (1989). During this period, whistleblower support organizations such as the Government Accountability Project (GAP) were formed. *Id.* at 61–63. *See also* WESTMAN & MODESITT, *supra* note 3, at 11 (suggesting that a need for private assistance in the form of whistleblower protection arose in response to perceived government inability to solve social ills).

67. WESTMAN & MODESITT, *supra* note 3, at 11. *See also* Delikat & Rosenberg, *supra* note 39, at 67–86, app. B (charting the whistleblower provisions available in each state summarizing the prohibited employer action and the employee protected conduct under each provision listed); WESTMAN & MODESITT, *supra* note 3, at 77 & app. B (stating that since the 1980s, Arizona, California, Connecticut, Florida, Hawaii, Louisiana, Maine, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, North Dakota, Ohio, Rhode Island, and Tennessee have enacted statutes that protect private sector employees from whistleblower retaliation).

wrongful termination in violation of public policy,<sup>68</sup> and many states have statutory protection for whistleblowers in at least limited circumstances.<sup>69</sup> Common to each step toward more expansive whistleblower protection was the alignment of interests between those with power and those seeking broader protection; business and social movements found common ground leading to limited protection—enough to keep the economy moving and pacify the populace.

*B. The Political and Economic Context to Enacting Whistleblower Protection*

Whistleblower protection advanced in response to a political and economic context favoring reform and supported by key political and economic interests. This is a common element to many shifts of power pursuant to law.<sup>70</sup> Public choice theory, interest convergence theory, and economic theories of reform all are based upon the need for those with power to bargain for reform.<sup>71</sup> Applying that approach, labor laws came about as employees bartered with employers and politicians representing the moneyed interests: Employees offered peace and the

68. WESTMAN & MODESITT, *supra* note 3, at 335–72. The five “holdouts” are Alabama, *id.* at 335; Georgia, *id.* at 343; Maine, *id.* at 349; New York has consistently declined to accept a cause of action, *id.* at 357–58; and Rhode Island has indicated a willingness to extend, although it has not clearly done so, *id.* at 364.

69. See WESTMAN & MODESITT, *supra* note 3, at 335–72. Connecticut now has statutory protection as its exclusive remedy, *id.* at 340; Florida statutes broadly protect both public and private employees, *id.* at 342; and Montana has statutory protection, *id.* at 353–54. Even in states such as Alabama where no public policy exception to the at-will doctrine has been recognized, the legislature has enacted a statute making it illegal to fire an employee for seeking workers’ compensation benefits. See ALA. CODE § 25-5-11.1 (2003); WESTMAN & MODESITT, *supra* note 3, at 335–36.

70. See generally Steven A. Ramirez, *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America’s Boardrooms and What To Do About It*, 61 WASH. & LEE L. REV. 1583, 1604–06 (2004) (considering interest convergence theory in a variety of contexts, including the passage of the Sarbanes-Oxley Act of 2002). For instance, the New Deal legislation evolving from the stock market crash in 1929 and the Great Depression provided security to the U.S. financial markets and to its citizens. The legislation gained support as the financial interests in the United States realized that government needed to take action, and business interests were key in formulating the resulting legislation. See COLIN GORDON, *NEW DEALS: BUSINESS, LABOR, AND POLITICS IN AMERICA, 1920–1935*, at 4 (1994) (supporting view stressing “the primacy of business interests in the formulation of U.S. public policy and the essential conservatism of the New Deal”).

71. See *supra* notes 1, 2, 13, 20. As such, these theories of reform arguably go back to Adam Smith’s observation regarding the appeal to self-interest over 230 years ago:

It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.

ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 18 (Edwin Cannan ed., Univ. of Chi. Press 1976) (1776).

flow of commerce in exchange for the right to form trade unions and bargain collectively, and thereby improve working conditions for the masses.

In late 2001, an extraordinary event occurred in the United States: Enron, one of the fastest growing US corporations of the 1990s, collapsed.<sup>72</sup> This was followed by a series of corporate corruption revelations, culminating in the bankruptcy of WorldCom in mid-2002.<sup>73</sup> A cavalcade of civil and criminal fraud cases followed these massive corporate corruption scandals,<sup>74</sup> and the crush of corporate fraud cases led investors to conclude that U.S. corporations were not safe from corporate plunderers.<sup>75</sup> Foreign capital fled the nation.<sup>76</sup> Publicized congressional hearings and stern rebukes from the President of the United States did not salve the situation.<sup>77</sup> By summer of 2002, the political and economic context as well as political and economic

72. REBECCA SMITH & JOHN R. EMSWILLER, *24 DAYS: HOW TWO WALL STREET JOURNAL REPORTERS UNCOVERED THE LIES THAT DESTROYED FAITH IN CORPORATE AMERICA* 4 (2004).

73. See ROSOFF, PONTELL & TILLMAN, *supra* note 29, at 279–311 (describing the discovery of various corporate crimes and fraudulent schemes at Enron, Arthur Andersen, WorldCom, Global Crossing, Qwest Communications, Xerox, Adelphia, Tyco, Rite Aid, Halliburton, and Coca-Cola from 2001 to 2004).

74. Numerous criminal and civil lawsuits resulted from Enron's collapse alone. See, e.g., John E. Black, Jr., & David T. Burrowes, *D&O Litigation Trends in 2006*, 139 INT'L RISK MGMT. INST., June 21, 2006, <http://www.irmi.com/Expert/Articles/2006/Black06.aspx> (reporting that Enron paid \$7.165 billion to resolve shareholder and bond claims, the largest securities claim settlement in history); *Merrill Settles Suit with Enron*, L.A. TIMES, July 7, 2006, at C3 (reporting on the multi-million dollar settlements of various banks and securities firms in the so-called "MegaClaims" lawsuit filed against banks accused of failing to prevent Enron's collapse, multi-billion dollar settlements in a class-action lawsuit filed by Enron investors, and referring to several criminal convictions related to the Enron debacle). The *Houston Chronicle* maintains "The Fall of Enron" webpage with a prosecution scorecard on its website, reporting sixteen guilty pleas, five jury convictions, two acquittals, two convictions overturned, one case dropped, and eight others charged; the website also provides links to stories on each individual listed on the scorecard. *The Fall of Enron*, HOUSTON CHRONICLE, <http://www.chron.com/news/specials/enron/> (last visited Mar. 15, 2007) (on file with author).

75. Two weeks before passage of the Sarbanes-Oxley Act, Federal Reserve Chairman Alan Greenspan testified that, in response to the recent reports of corporate malfeasance and the potential for further bad news, "investor skepticism about earnings reports has not only depressed the valuation of equity shares, but it also has been reportedly a factor in . . . elevating the cost of capital." *Federal Reserve Board's Semiannual Monetary Policy Report to the Congress: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 107th Cong. 10 (2002) (statement of Alan Greenspan, Chairman, Fed. Reserve Bd. of Governors), available at <http://www.federalreserve.gov/boarddocs/hh/2002/July/testimony.htm>.

76. Edmund L. Andrews, *Turmoil at WorldCom: The Overseas Reaction*, N.Y. TIMES, June 27, 2002, at A1 (reporting that foreign investors were withdrawing from U.S. markets after the news of WorldCom's admission of losses and falsely reported profits).

77. See Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 956 & nn.128–130, 960 n.146 (2005) (recounting the political maneuvers leading to passage of SOX).

interests demanded action.<sup>78</sup> The Sarbanes-Oxley Act of 2002<sup>79</sup> reflected the intense political and economic pressure for reform generated by the corporate scandals and eroding financial markets.<sup>80</sup>

Among other reforms, the Act led to many changes in corporate accountability,<sup>81</sup> expanded criminal jurisdiction and penalties,<sup>82</sup> and directed the Securities and Exchange Commission (SEC) to establish minimum standards of professional conduct for attorneys appearing and practicing before the Commission.<sup>83</sup>

Central to SOX was the Senate Judiciary Committee's view that existing corporate culture failed to promote honest business practices and discouraged employees from reporting dishonest practices.<sup>84</sup> To address these concerns, SOX provides a civil cause of action for whistleblowers employed by publicly traded companies. The law protects employees of publicly traded companies from employer retaliation through discharge, disciplinary action, or harassment in response to employee-supplied information or cooperation with a federal agent or employee-instigated internal company investigation regarding specified violations of federal law. The identified laws are mail fraud,<sup>85</sup>

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78. The Sarbanes-Oxley Act passed in the House with a 423 to 3 vote, and the Senate approved it 99 to 0. Mike Allen, *Bush Signs Corporate Reforms into Law; President Says Era of "False Profits" is Over*, WASH. POST, July 31, 2002, at A4.

79. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at in scattered sections of 11, 15, 18, 28 and 29 U.S.C.). President Bush recounted the variety of interests that went into uniting Congress behind the Act in his speech preceding the signing of SOX. See President George W. Bush, Remarks Before Signing the Sarbanes Oxley Act of 2002 (July 30, 2002) (transcript available at *President Bush Signs Corporate Corruption Bill*, The White House, Office of the Press Secretary, <http://www.whitehouse.gov/news/releases/2002/07/print/20020730.html>).

80. S. REP. NO. 107-205 (2002).

81. *E.g.*, Sarbanes Oxley Act of 2002 § 302, 15 U.S.C. § 7241 (Supp. V 2005) (providing that the CEO and CFO of every public company required to file financial statements with the SEC must certify that the statements "fairly present in all material respects the financial condition and results of operations of the issuer"); 17 C.F.R. §§ 228, 229, 249 (2006) (requiring publicly traded companies to either adopt a code of ethics or to report and explain the decision not to adopt such a code).

82. Sarbanes Oxley Act of 2002, § 905, 116 Stat. at 805-06. In response to this directive, the guidelines were amended to increase the guideline's ranges for obstruction of justice and for fraud offenses, and additional enhancement factors were included in the organizational sentencing guidelines. See U.S. SENTENCING GUIDELINES MANUAL § 2J1.2(b) (2006). See generally Pamela H. Bucy, "Carrots and Sticks": *Post-Enron Regulatory Initiatives*, 8 BUFF. CRIM. L. REV. 277, 281-90 (2004) (reviewing SOX's new crimes and tougher sentences).

83. Sarbanes-Oxley Act of 2002 § 307, 15 U.S.C. § 7245 (Supp. V 2005). The SEC issued rule 205, effective August 5, 2003, requiring attorneys to report evidence of a possible securities fraud or a similar violation to an issuer's senior management. 17 C.F.R. § 205.3(b)(1), (b)(3) (2006) (requiring counsel to report to the audit committee or to the board if it does not have a separate audit committee).

84. See S. REP. NO. 107-146 (2002). See also STEPHEN M. KOHN ET AL., WHISTLEBLOWER LAW: A GUIDE TO LEGAL PROTECTIONS FOR CORPORATE EMPLOYEES 2-3 (2004).

85. 18 U.S.C. § 1341 (Supp. V 2005) (mail fraud).

wire fraud,<sup>86</sup> bank fraud,<sup>87</sup> securities fraud,<sup>88</sup> federal securities regulations, or other federal laws relating to shareholder fraud.<sup>89</sup> Remedies include compensatory damages and reinstatement, and the cause of action is commenced by filing a complaint with the Department of Labor (DOL).<sup>90</sup> The provision's purpose is to provide uniform protection of corporate whistleblowers, previously subject to varying state laws only, so as "to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies."<sup>91</sup> Thus, by any measure, the reform effort was a significant reconfiguration of federal regulation of corporate governance generally, and of criminal law and whistleblower protections in particular.<sup>92</sup>

SOX illustrates again a common theme to the evolution of whistleblower protection law: Nearly all protective statutes are the result of an accommodation between the holders of power and those in favor of reform, and the accommodation is usually precipitated by some crisis or new political movement that disrupts the preexisting status quo.

86. 18 U.S.C. § 1343 (Supp. V 2005) (wire fraud).

87. 18 U.S.C. § 1344 (2000) (bank fraud).

88. 18 U.S.C. § 1348 (Supp. V 2005) (securities fraud).

89. Sarbanes-Oxley Act of 2002 § 806, 18 U.S.C. § 1514A (Supp. V 2005).

90. 18 U.S.C. § 1514A(b). If the DOL fails to issue a final order within 180 days of an administrative complaint then the complaint may be pursued in federal court. *Id.* § 1514A(b)(1).

91. S. REP. NO. 107-146, at 19 (2002) (Senate Judiciary Committee Report). The Senate Report describes the lack of whistleblower protection as "a significant deficiency because often, in complex fraud prosecutions, these insiders are the only firsthand witnesses to the fraud. They are the only people who can testify as to 'who knew what, and when,' crucial questions not only in the Enron matter but in all complex securities fraud investigations." *Id.* at 10. In addition to civil remedies, the amended obstruction of justice statute prohibits retaliation against employee whistleblowers pursuant to SOX § 1107. 18 U.S.C. § 1513(e) (Supp. V 2005). Section 1513(e) provides the following:

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

*Id.* Notably, unlike the civil provision in SOX, this provision is not limited to reports of corporate fraud. The provision is limited, however, in that it requires that information be provided to a *law enforcement officer*, and must be related to a "Federal offense." Because this is a criminal statute, a prosecutor holds the discretion to assess whether an individual should be charged, and in making that assessment, she must recognize that a much higher burden of proof is required; the prosecution must prove all elements of the crime beyond a reasonable doubt, including that the actor's conduct was done knowingly, with a specific intent to *retaliate*.

92. See Romano, *supra* note 25, at 1527–28 (the substantive mandates imposed on corporations in the Sarbanes-Oxley Act are unique and distinct from "conventional regulatory apparatus" that has typically limited federal oversight of corporations to mandatory disclosures); KOHN, *supra* note 84, at xi ("The [Sarbanes-Oxley] Act was one of the most comprehensive reforms of Wall Street investment practices ever passed by Congress.").

### III. THE INTERPRETATION AND ADMINISTRATION OF SOX'S CIVIL WHISTLEBLOWER PROTECTION

This Part of the Article reviews how SOX's whistleblower regime functions. Specifically, it shows that claims for whistleblower protection under SOX seem unlikely to succeed. Thus, SOX in the end fails to encourage whistleblowing.

Many of SOX's procedural regulations are modeled on other federal whistleblower laws.<sup>93</sup> Like other regimes, the regulations governing SOX's whistleblower protective regime seek to balance the Due Process rights of the persons named by the whistleblower and Congress's desire for an expedited administrative complaint process, prior to filing any civil claim for whistleblower protection.<sup>94</sup> Despite its purpose to encourage and protect corporate whistleblowers, SOX administrative claims have had limited success.<sup>95</sup> The number of SOX complaints before the DOL that are dismissed dwarfs the number that are settled by

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93. See, e.g., 18 U.S.C. § 1514A(b)(2) (incorporating the airline whistleblower protections in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. § 42121(b) (2000)).

94. The administrative procedure for filing a claim, its investigation, findings, review, and administrative appeal are set forth at 29 C.F.R. § 1980 (2006). Under the regulations, the Occupational Safety and Health Administration (OSHA) has sixty days to complete the investigation and issue written findings as to whether there is "reasonable cause to believe that the named person has discriminated against the complainant in violation of the Act." 29 C.F.R. § 1980.105. If OSHA determines the employee was subjected to retaliation, the Assistant Secretary may order *immediate reinstatement*, which is generally effective immediately upon receipt of findings. 29 C.F.R. § 1980.105. Parties are notified of the Preliminary Order and have thirty days from receipt of the notice to file objections to the findings and preliminary order before the findings and preliminary order are deemed effective for all remedies awarded by the order. 29 C.F.R. § 1980.105(b), (c). If a party files timely objections seeking review, all provisions of the preliminary order are stayed except for reinstatement. 29 C.F.R. § 1980.106(b)(1). If no timely objections are filed, the findings or preliminary order become the final decision of the Secretary, not subject to judicial review. *Id.* A timely objection is considered a request for a hearing. *Id.* Hearings are conducted de novo by an Administrative Law Judge (A.L.J.). 29 C.F.R. § 1980.107. The A.L.J. decision is the final decision of the Secretary unless a timely petition for review is filed with the Administrative Review Board (ARB). 29 C.F.R. § 1980.110(a) (2004). The ARB has thirty days to decide whether to accept review; if not accepted, the decision of the A.L.J. will become the final order for purposes of appeal. *Id.* § 1980.110(b). If accepted, the ARB must issue a decision within 120 days of the conclusion of the hearing. *Id.* § 1980.110(c). By November 2, 2004, 333 complaints had been filed with the DOL. Delikat & Rosenberg, *supra* note 39, at 87–90, app. C.

95. Early results of the success of SOX were mixed. The DOL released statistics on the use of SOX's civil whistleblowing provision twenty-seven months after it became law. See Delikat & Rosenberg, *supra* note 39, at 87–90, app. C (graphing statistics from July 30, 2002 to November 2, 2004, obtained from the DOL). Over 95% of the DOL determinations during that period, 186 cases were dismissed by the agency, determined to lack merit; whereas only nine cases were determined by DOL to have merit. *Id.* Of course, the statistics alone cannot identify the basis for distinguishing a meritorious claim from a failed claim because many claims settle and others may be pursued in federal court if there is no final order from the DOL within 180 days.

the agency on the merits.<sup>96</sup> This limited success for complainants suggests that many employees expecting protection by SOX are not actually enjoying such protection.

As with any whistleblower protection and anti-retaliation provisions within its purview, the DOL interprets the statutory and regulatory provisions to determine each law's scope of protection, forum availability, application of the rules, relief afforded, and timing.<sup>97</sup> The following subparts' focus is on the interpretations of SOX that narrow coverage and on the potential to broaden coverage under an omnibus provision that would extend protection beyond financial frauds to better effect the purposes of encouraging and protecting whistleblowers. Omnibus legislation referred to below would offer a blanket of protection to the whistleblowing employee to replace the net that our federal and state laws presently offer.<sup>98</sup> Such legislation could cover public and private employers, and it could protect employees who hold a reasonable belief that the conduct reported is wrongful in that it is illegal, intentionally tortious, or unethical, and who exhibit the courage to step forward with such information.<sup>99</sup>

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96. See E-mail from Nilgun Tolek, Director, Office of Investigative Assistance, Department of Labor, to Thomas Hitchcock (June 12 2006, 3:24 p.m. CST) (on file with author). As of May 31, 2006, the total number of SOX complaint determinations was 702; of that number, 499 complaints had been dismissed, 93 were settled, 15 more were decided on the merits, and 95 complaints were withdrawn. *Id.* Thus, only 3% of cases decided by DOL were decided on the merits; if settled cases are added to those addressed on the merits (assuming that settled cases have some merit), then less than 1 out of 5 complaints (18%) avoid dismissal. *Id.*

97. See 18 U.S.C. § 1514A; 29 C.F.R. § 1980 (2006).

98. See, e.g., WESTMAN & MODESITT, *supra* note 3, at 24; KOHN, *supra* note 14, at 377-78; see also *supra* note 5.

99. Extending the scope of protection to public and private employers would be limited only insofar as it would fall outside Congress's plenary authority to regulate interstate commerce under the Commerce Clause of the U.S. Constitution. U.S. CONST. art. 1, § 8.

The commerce power has served as the basis for Federal action on such national policies as the regulation of agricultural production; requirement of collective bargaining; prohibition of industrial monopolies and unfair trade practices; regulation of the sale of stocks, bonds, and other securities; establishment of hydroelectric, flood control and navigation projects; and an attack upon such crimes as white slavery, kidnapping, trade in narcotics, theft of automobiles, and shipments of gambling devices and lottery tickets.

S. REP. NO. 88-872 (1964), as reprinted in 1964 U.S.C.C.A.N. 2355, 2368 (Senate Judiciary Committee report assessing Congressional authority to end discrimination in places of private accommodation under the Civil Rights Act of 1964). To aid in assessing whether interstate commerce is affected, the term "employer" could borrow language, in part, from Title VII's definition of "employer": "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U.S.C. § 2000e(b) (2000).

*A. Scope of Coverage*

SOX prohibits employer retaliation to an employee's providing information or cooperation externally to a federal agent, a Member of Congress, a congressional committee, or in a criminal fraud or securities regulatory proceeding.<sup>100</sup> SOX also prohibits employer retaliation to an employee's providing information or cooperation internally to a supervisor or another with "authority to investigate, discover, or terminate misconduct."<sup>101</sup> Thus, SOX protects whistleblowers only in some specified instances.

SOX limits whistleblower protection to instances when whistleblowers provide information to statutorily identified categories of persons. Thus, the Act does not protect whistleblowers providing information to state or local authorities, co-workers who are not supervisors nor charged with authority to investigate the misconduct,<sup>102</sup> or the press.<sup>103</sup> Unless an employee has taken the unusual precaution of reviewing the statutory language, the employee is unlikely to realize the limits of its protection.

Providing protection for both internal and external whistleblowing is a response to the tension between affording employers an opportunity to address wrongdoing and protecting the institution.<sup>104</sup> Presumably, most employees would prefer an opportunity to address wrongdoing in-house rather than go to regulators or law enforcement, given that the foremost reason given for failure to report wrongdoing is the belief that nothing will be done.<sup>105</sup> Nonetheless, limiting reporting to internal sources likely would expose whistleblowing employees to great risk of

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100. 18 U.S.C. § 1514A(a)(1)(A)–(B), (a)(2).

101. 18 U.S.C. § 1514A(a)(1)(C).

102. *See Trodden v. Overnite Transp. Co.*, 2004-SOX-64 (A.L.J. Mar. 29, 2005) (noting that an employee's refusal to follow what he believes is an illegal company practice is not protected under SOX).

103. SOX concerns private employers that are publicly held. The issue of whether a *public* employee enjoys First Amendment protection for matters expressed as a result of employment that raise a public concern was recently addressed in *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960–61 (2006). *See infra* notes 199–205 and accompanying text.

104. *See Cavico, supra* note 46, at 570–71 (recognizing that for the employee to be protected, most state statutes require whistleblowing employees provide notice to the employer of wrongdoing, and some states require notice in writing so that the employer has the opportunity to correct the wrongdoing and preserve its reputation). Some state statutes further require that the employer must have an opportunity to remedy the wrong and may even require an "oath or affirmation" if external notice is permitted. *Id.* at 572, 574. Other federal statutory whistleblower protections vary with respect to whom the employee notifies so that some statutes limit protection to complaints made to government agencies. WESTMAN & MODESITT, *supra* note 3, at 92 (assessing the limits on the substantive coverage afforded whistleblower complainants in provisions enforced by the Department of Labor).

105. *See MSPB 1993 REPORT, supra* note 33.

retaliation.<sup>106</sup> In an omnibus statute addressing broader forms of whistleblowing rather than merely financial fraud by publicly traded companies, the protected activity should cover disclosures made to a “public body” that included federal, state, and local authorities in the executive, legislative and judicial branches of the government, as well as its agencies, boards, committees, and other government offices.<sup>107</sup>

Although many employees may be affected by the misconduct of a corporation, SOX limits civil protection against employment discrimination for lawful whistleblower actions to *employees of publicly traded companies*, and “employee” is defined by the statute as “any officer, employee, contractor, subcontractor, or agent of such company.”<sup>108</sup> Litigation over the SOX’s anti-retaliation provision is sufficiently recent that there are few reported federal cases; nonetheless, the administrative cases involving disputes over the term “employee” are illustrative. For instance, the question of whether the statute applies to subsidiaries has resulted in conflicting decisions.<sup>109</sup> Likewise, a federal circuit court, applying statutory canons of construction, has

106. Sherron Watkins, the Enron employee who blew the whistle internally, contacted CEO Ken Lay and identified accounting problems she had discovered. MIMI SWARTZ & SHERRON WATKINS, *POWER FAILURE* 275–76, 361–62 (2003). Watkins suggested Enron might be able to fix them quietly, if the probability of getting caught was low, or alternatively, they could disclose after putting a public relations team in place, if the probability of getting caught was high. *Id.* at 368. Employees may have a practical reason for wishing to report internally. Watkins also mentioned in her memo to Lay that, if Enron tanks, her “eight years of Enron work history will be worth nothing on my resume.” *Id.* at 275, 362. However, Watkins did not report the wrongdoing sooner (she waited for weeks to work up the nerve to write her first letter to Lay) because she thought she would be fired by then CEO Jeffrey Skilling because one of her friends, then company treasurer Jeff McMahon, had been transferred when he “complained mightily” to Skilling about the “veil of secrecy” surrounding the outside deals. Duffy, *supra* note 18. Watkins’s concerns were well-founded. She testified before Congress that after she talked to Ken Lay, CFO Andrew Fastow wanted her fired and her computer seized. Ackman, *supra* note 18.

107. See KOHN, *supra* note 14, at 379–80, 392–93 (discussing and proposing elements for a uniform national whistleblower protection law, including Model Whistleblower Protection Act).

108. 18 U.S.C. § 1514A(a) (Supp. V 2005).

109. See *Morefield v. Exelon Servs., Inc.*, 2004-SOX-2 (A.L.J. Jan. 28, 2004) (ruling that publicly-traded holding company of non-publicly traded subsidiary is an employer subject to SOX provision); see also *Platone v. Atl. Coast Airlines*, 2003-SOX-27 (A.L.J. Apr. 30, 2004) (same). But see *Bothwell v. Am. Income Life*, 2005-SOX-57 (A.L.J. Sept. 19, 2005) (rejecting complaint against non-publicly traded subsidiary of publicly traded company, finding no support in the statutory language to include the subsidiary). The *Bothwell* judge also rejected attempts to add the publicly traded parent company as a named respondent as untimely and unable to meet the “relation back” standard of the Federal Rules of Civil Procedure 15(c). *Bothwell*, 2005-SOX-57; see also *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, 2004-SOX-11 (A.L.J. July 6, 2004) (ruling that the statute does not apply to a subsidiary of a publicly traded company when the subsidiary is *not* a publicly traded company *and* the publicly traded company parent is not named in the complaint); *Powers v. Pinnacle Airlines, Inc.*, 2003-AIR-12 (A.L.J. March 5, 2003) (ruling SOX does not cover non-publicly traded subsidiary when publicly traded parent not named in complaint, and also suggesting that there must be allegation that publicly traded parent company had some relationship to the retaliatory conduct).

found that § 1514A does not apply to employees outside of the United States absent specific language in statute or clear legislative intent to the contrary.<sup>110</sup> Thus, despite the intent of Congress that SOX “protect[s] those who report fraudulent activity that can damage innocent investors in publicly traded companies,” SOX has been interpreted to permit the complexity of corporate organizational structures (such as those with international manufacturing and assembly plants) to shield corporations from the statutory provisions.<sup>111</sup> An omnibus provision should provide specific language providing a forum in the United States to protect those would-be whistleblowers employed by employers with operations in the United States, whether the employee is stationed in the United States or outside of its borders, whether the employee is working for a subsidiary or for the parent company, and whether the employer is a private or a government entity.<sup>112</sup>

Public confidence in corporations depends in large part upon the oversight of the corporation by others with professional duties and responsibilities, yet these professionals may not be protected by SOX.<sup>113</sup>

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110. See *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 7–8, 18 (1st Cir. 2006), *cert. denied*, 126 S. Ct. 2973 (2006) (finding no express language or clear legislative intent for the whistleblower protections to extend extraterritorially). The DOL has likewise determined that 18 U.S.C. § 1514A does not extend extraterritorially. See *Ede v. Swatch Group*, 2004-SOX-68, 2004-SOX-69 (A.L.J. Jan. 14, 2005); *Concone v. Capital One Fin. Corp.*, 2005-SOX-6 (A.L.J. Dec. 3, 2004); *Carnero v. Boston Scientific Corp.*, 2004-SOX-22 (OSHA Reg’l Adm’r) (Dec. 19, 2003). *But see Penesso v. LLC International, Inc.*, 2005-SOX-16 (A.L.J. Mar. 4, 2005) (distinguishing *Concone* and *Carnero* despite the fact that complainant was employed in Italy by Italian subsidiary of corporation headquartered in Virginia, because substantial nexus since at least one alleged retaliatory action occurred in the United States and the complainant was a U.S. citizen).

111. S. REP. NO. 107-146 at 19 (2002) (Senate Judiciary Committee Report).

112. Certainly, issues of international comity must be attended; for example, in 2005 the French Commission Nationale de l’Informatique et des Libertés (CNIL) issued guidelines summarizing its position on whistleblower protections that clarified the distinctions between protections under U.S. laws and French laws, and confirmed that target employees retained the benefit of rights provided by the French personal data protection law. See Nicolas Grabar, *Cleary Gottlieb Memorandum: French Regulator’s Guidelines on the Implementation of Whistleblower Procedures*, Paris, 1544 PLI/Corp 353, 355 (2006); *id.* at 363 (providing an unofficial English translation of the French guidelines). The CNIL guidelines were created in response to CNIL’s May 2005 rulings prohibiting French affiliates of McDonald’s Corporation and Exide Technologies from implementing SOX whistleblower procedures, in particular, establishing an employee hotline. *Id.* at 355, 364. The French guidelines recognize the risk for malicious reporting and express concern that reporting requirements not be mandatory. *Id.* at 366–67. It is beyond the scope of this Article to articulate a comprehensive framework for transnational whistleblowing law.

113. Lawyers, securities analysts, public accountants, securities brokers, and bankers are some of the professionals who provide services to public corporations and also serve the public. These “gatekeepers” have been criticized for their failure to alert those dependent upon the professionals’ assessments in the corporate frauds that spawned the SOX. S. REP. NO. 107-146 (2002) (Senate Judiciary Committee Report); see, e.g., John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301, 318–31 (2004) (hypothesizing about the reasons for gatekeeper failure in detecting the accounting irregularities of Enron and others in 2001–

Some categories of “gatekeepers” may not fall within SOX’s civil whistleblower protections because independent professionals arguably are not “officer[s], employee[s], contractor[s], subcontractor[s], or agent[s] of such companies.”<sup>114</sup> Thus, whistleblowing by the independent professional risks harming the relationship with the client—or even loss of the client—without any avenue of civil protection. For young professionals working on a senior partner’s account, interfering with the partner’s client relationship can have detrimental consequences to their careers.<sup>115</sup> With uncertain legal protection, the choice to whistleblow becomes less likely.

Even within the public corporation, a question arises as to whether in-house corporate counsel, who is required by SOX to report wrongdoing to the directors’ audit committee, is protected.<sup>116</sup> Although in-house counsel should fit within the definition of “employee” under SOX, some courts have shown a reluctance to invade the attorney-client privilege or permit the introduction of confidential information by the complainant as support for a claim of retaliation.<sup>117</sup> Thus, SOX whistleblower protection for in-house counsel is uncertain.

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2002).

114. See *Roulett v. Am. Capital Access*, 2004-SOX-78 (A.L.J. Dec. 22, 2004) (finding that financial insurance employer’s providing debt securities for publicly traded companies did not make it a contractor, subcontractor, or agent).

115. Had SOX been in effect in the 1990s, it would not have protected the accountants at Arthur Andersen who observed questionable accounting practices at Enron. Although many Andersen employees have since admitted they were uneasy with the financial structuring, none came forward until the collapse of Enron was inevitable. See SMITH & ESMHWILLER, *supra* note 72, at 288–90 (describing the close relationship between Enron and Arthur Andersen: “Carl Bass, an Andersen accountant . . . had witnessed how the rules were often bent and didn’t like what he saw. These concerns became especially sharp once he began working on Enron accounting issues. . . . [Enron] officials wouldn’t let up until they had found a way to get the accountants to sign off, recalled Andersen partner Mike Jones, who described the Enron assignment as a ‘very stressful’ environment.”); S. REP. NO. 107-146 at 5 (2002) (recounting the experiences of a financial advisor who was fired and an Andersen accountant who was removed from the account when they expressed reservations about Enron’s stability and accounting practices).

116. The SEC promulgated regulations, as directed by SOX, “requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty . . . to the chief legal counsel or the chief executive officer of the company” and if remedial measures are not forthcoming, “to report the evidence to the audit committee of the board of directors of the issuer or . . . to the board of directors.” Sarbanes Oxley Act of 2002 § 307, 15 U.S.C. § 7245 (Supp. V 2005); see 17 C.F.R. §§ 205.1–205.7 (2006).

117. Traditionally, state and federal courts have been reluctant to allow retaliation claims by in-house corporate counsel against employers, but some courts have rejected the traditional approach and allowed retaliatory discharge public policy claims in limited circumstances. WESTMAN & MODESITT, *supra* note 3, at 146–50; see also *Willy v. Admin. Review Bd.*, 423 F.3d 483, 500–01 (5th Cir. 2005) (applying breach of duty exception to the employer’s claim of attorney-client privilege and finding no “per se ban on the offensive use of documents subject to the attorney-client privilege in an in-house counsel’s retaliatory discharge claim against his former employer under the federal whistleblower statutes when the action is before an ALJ”).

Additionally, the release of sensitive information by any employee in the name of whistleblowing could be viewed as breaching the employee's duty to the employer;<sup>118</sup> the breach then undermines the employee's retaliation claim and meets the employer's burden of proof by further supporting employment termination or, alternatively, by providing an independent reason for termination.<sup>119</sup> Unquestionably, precluding the employee from raising significant concerns because of related confidential or sensitive information ignores critical opportunities to gain information to protect against serious criminal acts or threats to public health or safety. An omnibus statute should provide for an *in camera* review to assess whether the employee took measures to limit or protect disclosure; such a review would evaluate any attempts to act internally to alert appropriate supervisors regarding the related misconduct, any reasons why alternative routes were accessed, and whether the extent of the disclosure was necessary.

Under SOX, an employer may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment" in response to the lawful act of an employee covered by the statute.<sup>120</sup> Issues also arise in whistleblower claims of retaliation as to failure to promote or in decisions to transfer.<sup>121</sup> The language in SOX, "in any other manner discriminate," should provide broad coverage as to what conduct is

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118. See Baynes, *supra* note 30, at 884–86 (observing that a corporate whistleblower might convert corporate proprietary information by providing corporate records to law enforcement and exposing the corporation to civil or criminal liability, or possibly, bad publicity).

119. One example of this is the case of Sibel Edmonds, a contract linguist hired by the FBI. See OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S ACTIONS IN CONNECTION WITH ALLEGATIONS RAISED BY CONTRACT LINGUIST SIBEL EDMONDS: UNCLASSIFIED SUMMARY (2005) (OIG Edmonds Review). When Ms. Edmonds complained about potential espionage and security breaches by a co-worker, Edmonds's supervisor instructed her to prepare a memo outlining her allegations. *Id.* at 12–13. Concerned about documents that had been removed from her work computer, Edmonds obtained permission from her supervisor to prepare the memo at home. *Id.* Two days after providing her supervisor with the memo, the supervisor gave the memo to the Office of Inspector General to review both the concerns in the memo that Edmonds had been threatened by the co-worker and Edmonds's security violation of using her home computer to prepare memoranda that included classified information. *Id.* at 13–14. Edmonds's home computer was seized and a second document, a draft memorandum of the memo given to the supervisor, was also discovered on the computer. *Id.* at 14. Edmonds's security classification was revoked five weeks later primarily for her "disruptive effect" on operational matters and her "documented" mishandling of classified information at her residence." *Id.* at 30, app. C. As discussed *infra* in Part IV.A., note 192 and accompanying text, any legislation must balance the employer's concern to protect confidential information against the need to protect the whistleblower.

120. 18 U.S.C. § 1514A(a) (Supp. V 2005).

121. See *Burlington N. & Sante Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006) (finding that an employer could be held liable for retaliatory discrimination under Title VII for any "materially adverse change in the terms of employment," including an inconvenient reassignment, or for any adverse treatment that was "reasonably likely to deter" the plaintiff from engaging in protected activity).

prohibited in light of the Supreme Court's most recent interpretation in *Burlington Northern v. Santa Fe* regarding adverse actions held to be retaliatory discrimination.<sup>122</sup> Yet, in the hands of an administrative law judge, limits may be imposed.<sup>123</sup> Any omnibus provision should be at least as broad as the formulation used in *Burlington Northern*.

Finally, a whistleblowing employee under SOX must "reasonably believe[]"<sup>124</sup> the reported conduct constitutes a violation of specific federal fraud statutes, or any rule or regulation of the SEC.<sup>125</sup> The "reasonably believe" language has also been the subject of litigation, including whether the employee must allege the specific regulation or law that was reasonably believed to be violated.<sup>126</sup> Another closely

122. *See id.*

123. *See* *Bechtel v. Competitive Techs., Inc.*, 2005-SOX-33 (A.L.J. Oct. 5, 2005) (finding whistleblowers must prove tangible job consequence to establish adverse action, and that neither removing complainant's status as an officer of the company nor providing a performance review were adverse because no showing of actions resulting in loss of pay, raises, bonus, benefits, or negative impact on employment conditions); *Dolan v. EMC Corp.*, 2004-SOX-1 (A.L.J. Mar. 24, 2004) (dismissing SOX whistleblower complaint alleging retaliation due to negative job performance evaluation received after employee reported to EMC that his former supervisor was engaged in improper billing schemes designed to inflate the company's revenue, and finding that neither the negative job performance appraisal nor the company's refusal to remove the appraisal were adverse employment actions). The A.L.J. relied upon a unanimous 2002 Supreme Court decision finding that the "continuing violation doctrine" does not apply to employees raising discrete acts of employment discrimination or retaliation as similar to Dolan's discrete claim of a negative performance appraisal where he did not show any tangible job detriment. *Id.* (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002)). *But see* *Halloum v. Intel Corp.*, 2003-SOX-7, at 15-16 (A.L.J. Mar. 4, 2004) ("An employment action is unfavorable if it is reasonably likely to deter employees from making protected disclosures."); *Hendrix v. Am. Airlines, Inc.*, 2004-SOX-23 (A.L.J. Dec. 9, 2004) (contrary to other whistleblower protection provisions, under SOX, adverse action need not be tangible; harassment is protected under SOX). Inevitably, the determination of whether an adverse action occurred is fact specific. KOHN, *supra* note 14, at 243-47 (listing some of the various issues that can arise including a reduction in force, a hostile work environment, and treating employees differently).

124. 18 U.S.C. § 1514A(a)(1). Legislative history suggests that the "reasonably believes" language "is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts." *See* 148 CONG. REC. S7420 (daily ed. July 26, 2002) (statement of Sen. Leahy). "The threshold is intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence." *Id.*

125. Some state statutes will not protect a whistleblower if the information provided by the whistleblower is erroneous. Cavico, *supra* note 46, at 569. Most state statutes also apply a reasonable belief standard. *Id.* at 567.

126. *See* *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1376-77 (N.D. Ga. 2004) (finding plaintiff's disclosures raised genuine issue of material fact as to whether she engaged in protected activity based upon a reasonable belief, and observing that plaintiff need not allege the specific regulation or law that was violated when disclosures to supervisors clearly raised concerns internally that criminal violations, or violation of the company's standards of corporate conduct, even if those allegations prove to be incorrect: "[T]he mere fact that the severity or specificity of her complaints does not rise to the level of action that would spur Congress to draft legislation does not mean that the legislation it did draft was not meant to protect her."); *Halloum v. Intel Corp.*, 2003-SOX-7, at 15 (A.L.J. Mar. 4, 2004) (finding that an employee who reasonably believed shareholders were being defrauded is protected under SOX even if it is later established that no fraud occurred). *But see*

related issue is whether the complained acts actually violate the law or are simply a private, internal, management or policy dispute.<sup>127</sup> Because SOX is limited to violations of particular statutes, employees of publicly traded companies are not covered if they report on violations of law that fall outside the specified financial fraud provisions.<sup>128</sup> Thus, the statute is narrowly drawn and interpreted to limit protection to whistleblowers.

Requiring that an employee identify the specific statute believed to be violated presumes employees enjoy facility with all relevant statutes and possess the ability to predict whether a court would find a violation. An omnibus provision should clarify that the employee must reasonably believe, based upon the employee's experience, that the reported action violates the law or threatens the public health, safety, or fisc; it should not require more than can be reasonably expected of such employee. Clearly, the reasonable belief standard affords the employer the opportunity to investigate the concern and either determine no misconduct exists or rectify the action. Providing protection to employees who report such concerns does no disservice to the employer and encourages interaction between employees and employers to detect and defuse misconduct at an early stage.

The limited scope of protection that SOX affords is not unusual in that it targets specific misconduct reported by specific workers to specific recipients.<sup>129</sup> Indeed, like most whistleblower protection

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Marshall v. Northrup Gruman Synoptics, 2005-SOX-8 (A.L.J. June 22, 2005) (finding whistleblower's complaints about a violation of a company ethics policy and about internal accounting practices that could not be explained by generally accepted accounting principles was not protected activity under SOX where the complainant could not identify a specific law or regulation that was violated); Lerbs v. Buca di Beppo, Inc., 2004-SOX-8 (A.L.J. June 15, 2004) (rejecting employee claim of retaliation because employee later learned that accounting practice was within generally accepted accounting principles even though he actually and reasonably believed otherwise at the time he questions the accounting practice, and because his inquiries were too "general").

127. See Grant v. Dominion East Ohio Gas, 2004-SOX-63 (A.L.J. Mar. 10, 2005) ("raising questions and lodging complaints [about an accounting error] without any reference to or suspicion about fraud against shareholders is not protected activity"). See also Cavico, *supra* note 46, at 564 (observing that state laws and judicial decisions typically cover reported acts that violate public policy, such as threatening the public safety or health of its citizens).

128. See Allen v. Stewart Enters., Inc., 2004-SOX-60 to 62, at 86 (A.L.J. Feb. 15, 2005) (finding that employees reporting violations of state statutes or laws are not protected under SOX); Harvey v. Safeway, Inc., 2004-SOX-21 (A.L.J. Feb. 11, 2005) (noting that FLSA violations unrelated to shareholder fraud are not protected under SOX); Hopkins v. ATK Tactical Sys., 2004-SOX-19 (A.L.J. May 27, 2004) (reporting that illegal dumping by employer of sludge water is not protected by SOX). But see Heaney v. GBS Props. LLC, 2004-SOX-72 (A.L.J. Dec. 2, 2004) (observing that an employee's reporting that condominium builder's violation of building codes could be bank fraud is a protected activity under SOX).

129. See Delikat & Rosenberg, *supra* note 39, at 61–64, app. A (charting federal whistleblower protection provisions and summarizing the prohibited employer action and the employ protected conduct under each provision listed).

statutes, the advice of counsel is crucial to assure protection before the whistle is blown.<sup>130</sup> Still, limiting the scope of protection makes the job of the whistleblower unnecessarily risky and costly.<sup>131</sup>

### B. Forum

Another area that prompts criticism in SOX's whistleblower protection provisions is the identified forum in which a claim may be raised.<sup>132</sup> Congress delegated the administration of SOX civil whistleblower claims to the DOL.<sup>133</sup> In addition to administering SOX administrative claims, the DOL is also responsible for administering twenty-five other whistleblower or anti-retaliation provisions, and the DOL has further delegated to the Assistant Secretary for the Occupational Safety and Health Administration (OSHA) responsibility for receiving and investigating claims for fourteen of those provisions, including SOX.<sup>134</sup> The speed with which a claim moves through the administrative or legal process impacts the protection afforded a litigant.

130. *Supra* notes 19, 37–38.

131. *See supra* notes 26, 32, 34, 36.

132. *See* Devine Testimony, *supra* note 14, at 4–7 (providing Checklist for Effective Whistleblower Protection Laws with twenty-one points; number eleven is a right to a jury trial); Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1075–83 (2004) (asserting that enforcing arbitration provisions undermines the procedures provided for in SOX).

133. 18 U.S.C. § 1514A(b)(2)(A) (Supp. V 2005).

134. *See* Sarbanes-Oxley Act of 2002 § 806, 18 U.S.C. § 1514A; Order Delegating Authority and Assigning Responsibility of 18 U.S.C. § 1514A to OSHA, 67 Fed. Reg. 65,008 (Oct. 22, 2002); *see also* Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, 29 C.F.R. § 1980.101–115 (2006). Of the twenty-six federal anti-retaliation schemes delegated to DOL, fourteen of those are further delegated to OSHA for initial evaluation. *See* Toxic Substances Control Act, 15 U.S.C. § 2622 (2000); Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. § 2651 (2000); Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c) (2000); Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1367(a), (b) (2000); Safe Drinking Water Act of 1974, 42 U.S.C. § 300j-9(i) (2000); International Safe Container Act, 46 U.S.C. app. § 1506 (2000); Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (2000); Solid Waste Disposal Act, 42 U.S.C. § 6971 (2000); Clean Air Act, 42 U.S.C. § 7622 (2000); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9610 (2000); Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105 (2000); Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121 (2000); 29 C.F.R. § 24 (2006); 29 C.F.R. § 1977.11 (2006). Others claims administered by DOL include the following: Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3) (2000); Rehabilitation Act of 1973, 29 U.S.C. § 794 (2000); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1855 (2000); Employee Polygraph Protection Act, 29 U.S.C. § 2002(4) (2000); Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2615 (2000); Workforce Investment Act of 1998 (Welfare to Work), 29 U.S.C. § 2934(f) (2000); Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (2000); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1293 (2000); Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 948a (2000); 29 C.F.R. § 783 (2006); 29 C.F.R. § 801 (2006); 29 C.F.R. §§ 1614, 1641 (2006).

If language is interpreted narrowly, and if cases languish in the administrative process whether intentionally or through bureaucratic delay, the purpose of legislation may be undermined.<sup>135</sup> SOX is an improvement upon complaints as to forum, but for several reasons discussed below, it does not go far enough.

SOX provides that administrative review and a final decision must be completed within 180 days of filing the claim, or after that time, the complainant may file the claim in U.S. federal district court for de novo review.<sup>136</sup> The 180-day deadline is unique to SOX whistleblower protection.<sup>137</sup> Because the ability to escape the administrative process and move to a federal court after 180 days guarantees either a relatively quick resolution of the administrative claim or an alternative in federal court, whistleblower protection groups have sought to have a similar provision available to federal employees.<sup>138</sup> The move to extend the 180-day limit on the administrative process to other whistleblower protection provisions has some congressional support.<sup>139</sup> Because the provision is unique to SOX, OSHA is unaccustomed to moving cases through the system within 180 days; consequently, complainants are seeking relief in federal district court.<sup>140</sup> An omnibus statute should

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135. The DOL is an agency that falls within the Executive Branch of the federal government, and consequently, that branch exercises oversight of the administrative process. *See* Signing Statement of President Bush, *supra* note 9, (“Several provisions of the Act require careful construction by the executive branch as it faithfully executes the [Sarbanes-Oxley] Act.”).

136. A person alleging retaliatory discrimination or discharge for whistleblowing must file a complaint with the Secretary of Labor, 18 U.S.C. § 1514A(b)(1)(A), within ninety days after the date on which the violation occurs 18 U.S.C. § 1514A(b)(2)(D) (statute of limitations). If a final decision is not issued within 180 days of the filing of the complaint, the complainant may bring a civil action at law or in equity for de novo review in federal district court without waiting for claim to be resolved by the DOL. 18 U.S.C. § 1514A(b)(1)(B). This provision is unique to SOX as compared to relief under other federal whistleblower statutes administered by the DOL. *See* KOHN, *supra* note 84, at 53; *see generally* Delikat & Rosenberg, *supra* note 39, at 61–64, 67–86, app. A (identifying those federal whistleblowers statutes that are administered by the DOL). Twenty-six statutes are administered by the DOL, with fourteen of those statutes administered by the DOL through the delegated authority from OSHA. *Id.*

137. KOHN, *supra* note 84, at 53.

138. *See, e.g.*, Stephen Barr, *Whistle-Blowers Urge Congress to Get Tougher on Retaliation*, WASH. POST, Apr. 29, 2005, at B2 (reporting that the National Security Whistleblowers Coalition (NSWC), a group of whistleblowers formed by former federal employees, seeks tougher federal employee whistleblower protections similar to those provided in SOX and, in particular, the right to take their cases to federal court if the DOL fails to act within 180 days); National Security Whistleblowers Coalition, NSWBC Action Alert Re: HR 1713 (HR 3097), (Sept. 26, 2005), [www.nswbc.org/action\\_alert.htm](http://www.nswbc.org/action_alert.htm).

139. *See* Stephen Barr, *Senate Committee Acts to Restore Protection for Whistle-Blowers*, WASH. POST, June 26, 2006, at D4 (reporting that the U.S. Senate has passed an amendment to the 2007 defense authorization bill that would enhance the protection to federal employee whistleblowers including the ability to take a claim to federal court after 180 days).

140. *See* *Tight Time Limits, New Subject Area Pose Challenges for Labor Department*, 3 Corp. Accountability Rep. (BNA) No. 9, at 278 (Mar. 21, 2003); *Two Sarbanes-Oxley Whistleblower Claims*

include the option to move to a federal district court after 180 days to encourage speedy resolutions or afford jury trials.

For cases proceeding on to federal courts, several issues arise. First, hope of a timely resolution may evaporate with the move to federal court because the federal courts exercise de novo review; in 2006, the median time to move a civil case through a federal district court was 8.3 months.<sup>141</sup> Second, resources spent on the administrative process are effectively “wasted” because court review is de novo.<sup>142</sup> Third, no single court is likely to develop expertise on the subject because cases have the potential to be scattered throughout the United States. Consequently, the potential for disparate results is great.

With its fourteen statutes to administer, even at the administrative level, OSHA may not be an adequate forum for the variety and multitude of claims that come before it. Each anti-retaliation provision is linked to a particular statute<sup>143</sup> thereby requiring OSHA investigators

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*Sent to Federal Court on Procedural Grounds*, 1 Corp. Accountability Rep. (BNA) No. 28, at 761 (Aug. 1, 2003) (reporting that the Labor Department’s administrative review board failed to issue a decision within the 180 day time limit under SOX in *Stone v. Duke Energy Corp.*, No. 3:03-CV-256, 2003 U.S. Dist. LEXIS 26183 (W.D.N.C. June 10, 2003), and *Willy v. Ameritron Properties, Inc.*, 2003-SOX-0009 (A.L.J. June 27, 2003)).

141. See U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS 2006, U.S. DISTRICT COURT—JUDICIAL CASELOAD PROFILE (2006), available at <http://www.uscourts.gov/> (select “Library” tab; then follow “Statistical Reports” hyperlink; then follow “Federal Court Management Statistics” hyperlink; then follow “District Courts” hyperlink). From filing to trial, the median time was 23.2 months. *Id.*

142. Irvin B. Nathan & Yue-Han Chow, *Interpretations and Implementation of the Whistleblower Provisions of the Sarbanes-Oxley Law*, ALI-ABA SARBANES-OXLEY INSTITUTE: CORPORATE GOVERNANCE, FINANCIAL DISCLOSURE, AUDITING, AND OTHER ISSUES (Oct. 6–7, 2005), SL027 ALI-ABA 527 (Westlaw) (taking the position that the 180-day administrative process is “a very short and improbable amount of time” to reach a final order and that the provision is “in urgent need of revision by Congress”); *More Legal Confusion on Whistleblowers Than When Sarbanes-Oxley Enacted in 2002*, 3 Corp. Accountability Rep. (BNA) No. 4, at 80 (Jan. 28, 2005) (acknowledging that the parameters of SOX may be shaped by federal courts rather than administrative law judges as is usually the case in administrative law areas because the cases are moving too slowly through the administrative process so that cases are being refiled in federal courts, and suggesting that such federal court cases may undermine the deference usually afforded A.L.J.s, especially if circuit splits develop).

143. OSHA is charged with the broad protection of civil servants disclosing information regarding a violation of a law, rule or regulation, or gross mismanagement, waste, abuse of authority, or substantial and specific danger to public health or safety under the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (codified in scattered sections of 5 U.S.C.), and the Whistleblower Protection Act of 1989, 5 U.S.C. § 1201–1222 (2000), and the protection of any employee relating to violations of the Age Discrimination in Employment Act, 29 U.S.C. § 623 (2000); at the same time OSHA must protect employees in the public sector, the private sector, or both in discreet areas of law such as disclosing information relating to a substantial violation of the law related to a government defense contract, Department of Defense Authorization Act, 10 U.S.C. § 2409 (2000), commencing or participating in proceedings regarding the Toxic Substances Control Act, 15 U.S.C. § 2622 (2000), the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1293 (2000), the Federal Water Pollution Control Act, 33 U.S.C. § 1367 (2000), the Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd (2000), the Energy Reorganization Act, 42 U.S.C. §§ 5801–5891 (2000), the

to become familiar with the strictures of each statute, its procedural requirements, and the relative burdens of proof.<sup>144</sup> Practitioners observe that both the investigators and supervisors lack disposition, training, and experience to adequately assess SOX claims because they are outside their area of competence.<sup>145</sup> Of course, if one defines the area of required competence as employment law, then OSHA possesses the appropriate training and experience.<sup>146</sup> Creating an omnibus statute would eliminate requiring expertise in discreet areas of law, and would permit OSHA (or some other agency) to concentrate its investigation and analysis on the issue of retaliation. Likewise, even if the administrative process is retained, when claims moved to federal courts, those courts would be more likely to develop a unified approach over time to retaliation claims based upon whistleblower actions.

Affording the right to a jury trial would promise the whistleblower an opportunity to be judged by the citizens the whistleblower sought to protect.<sup>147</sup> SOX offers the promise of a district court adjudication and, potentially, a jury trial only if the matter is not resolved 180 days from the date of filing the claim with OSHA.<sup>148</sup> Yet, where a mandatory

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Solid Waste Disposal Act, 42 U.S.C. § 6971 (2000), the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121 (2000), to name a few of the many federal statutes affording some measure of whistleblower protection against retaliation. Delikat & Rosenberg, *supra* note 39, at 61–65, app. A.

144. See *supra* note 143 (listing the federal statutes with anti-retaliation provisions administered by OSHA).

145. See Nathan & Chow, *supra* note 142 (highlighting that “OSHA investigators have been trained in health and safety issues” and that OSHA “has not increased its staff of investigators to include those with a finance background”); see also D. Bruce Shine, *A View from the Whistleblower’s Attorney*, in UNDERSTANDING DEVELOPMENTS IN WHISTLEBLOWER LAW 2 YEARS AFTER SARBANES-OXLEY, *supra* note 39, at 347, 353 (reminding practitioners that the “Proof Goal” for SOX complaints is to show the employee “reasonably believed” laws were violated).

146. If expertise was the only concern, then use of OSHA might be favored as an approach for an omnibus statute; however, presently OSHA’s responsibilities create a conflict of interest. OSHA itself has been subject to whistleblower claims. See Cindy Skrzycki, *OSHA Slow to Act on Beryllium Exposure, Critic Says*, WASH. POST, Feb. 1, 2005, at E1 (reporting that Adam M. Finkel, a top administrator at DOL’s OSHA became a whistleblower in 2002 when he realized the agency was not going to protect its inspectors from Beryllium exposure despite known risks). Perhaps too much is expected to believe OSHA can protect, police, and adjudicate whistleblower and retaliation claims. Nevertheless, it is beyond the scope of this Article to address the particular administrative structure best suited to administering whistleblower protections; instead, this Article focuses on explaining the shortcomings in present whistleblower protections, demonstrating how appropriate protection could be legislated, and explaining how present power dynamics do not favor an optimized whistleblower protection.

147. See Devine Testimony, *supra* note 14 (providing checklist for whistleblower protection laws).

148. The question of whether SOX provides for a jury trial remains uncertain. See Murray v. TXU Corp, No. Civ.A.3:03-CV-0888-P, 2005 WL 1356444 (N.D. Tex. June 7, 2005) (finding SOX provides for equitable relief only and rejecting plaintiff’s contention that the statute’s reference to “action at law” implied a right to a jury trial). *But cf.* McClendon v. Hewlett-Packard Co., No. CV-05-

arbitration agreement exists, its mandate will likely prevail over the right to a jury trial<sup>149</sup> Although considered, SOX did not affirmatively exempt itself from the presumption of arbitration.<sup>150</sup> In the first district court case to address the question of mandatory arbitration agreements in the SOX context, the court held that mandatory arbitration agreements are binding.<sup>151</sup> SOX's failure to specifically preclude mandatory arbitration is a "serious weakness in the Act" because employers can avoid the civil whistleblower provisions of SOX prospectively simply by including a provision for mandatory arbitration within employment agreements.<sup>152</sup> Permitting the presumptive effect of mandatory

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087-S-BLW, 2005 WL 1421395 (D. Idaho June 9, 2005) (denying defendant's motion for summary adjudication of SOX claim, and thus implicitly permitting jury trial).

149. See Cherry, *supra* note 132, at 1075–83 (criticizing the use of mandatory arbitration in employment litigation and analyzing the likelihood that SOX cases will go to mandatory arbitration); Alliance Bernstein Inv. Research and Mgmt., Inc. v. Schaffran, 445 F.3d 121 (2d Cir. 2006) (dismissing declaratory judgment action brought by employer seeking to avoid arbitration, and finding the issue of arbitrability of employee's claim was subject to arbitration); Boss v. Salomon Smith Barney, Inc., 263 F. Supp. 2d 684 (S.D.N.Y. 2003) (ruling in favor of mandatory arbitration because SOX does not preclude arbitration and because arbitration does not inherently conflict with the statute's purposes). See also 9 U.S.C. § 9 (2000); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (establishing a general presumption in favor of mandatory arbitration); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001) (applying a presumption in favor of arbitration where Congress does not specifically address arbitration in the statute).

150. An earlier draft of SOX exempted SOX whistleblowers from mandatory arbitration agreements: "No employee may be compelled to adjudicate his or her rights under this section pursuant to an arbitration agreement." S. 2010, 107th Cong. § 7 (2002); H.R. 4098, 107th Cong. § 8 (2002). The language did not appear in the final version of the bill. See Sarbanes-Oxley Act of 2002 § 806, 18 U.S.C. 1514A(Supp. V 2005); S. REP. NO. 107-146, at 22 (2002) (the report of the Senate Judiciary Committee accompanying the revised version of the Senate bill references the removal of the provision dealing with arbitration agreements); see also Cherry, *supra* note 132, at 1080 (observing that the provision that banned mandatory arbitration was excised in committee without explanation); WESTMAN & MODESITT, *supra* note 3, at 177.

151. In *Boss v. Salomon Smith Barney, Inc.*, 263 F. Supp. at 684, Boss's agreement with Salomon Smith Barney, titled "Terms of Employment" and "Principles of Employment," incorporated the terms of Salomon's Employee Handbook, providing for mandatory arbitration and "resolution of all employment disputes based on legally protected rights . . . including without limitation claims demands or actions under . . . any . . . federal, state or local statute, regulation or common law doctrine, regarding . . . termination of employment." *Id.* at 684–85. The district court rejected the argument that because a statute confers jurisdiction on the federal courts to hear claims arising under the statute, such claims are not to be arbitrated. *Id.* The *Boss* holding followed similar rulings regarding other statutes. See *Oldroyd v. Elmira Sav. Bank*, 134 F.3d 72 (2d Cir. 1998) (affirming mandatory arbitration was available in connection with Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA)); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. at 26 (finding that Congress may override the presumption in favor of arbitration if it manifests its intent to do so "in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes," allowing for mandatory arbitration in Age Discrimination in Employment Act); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (finding same regarding Sherman Antitrust Act); *Bird v. Shearson Lehman/Am. Express, Inc.*, 926 F.2d 116 (2d Cir. 1991) (allowing mandatory arbitration in ERISA cases).

152. Cherry, *supra* note 132, at 1075–83 (analyzing the likelihood that SOX cases will go to

arbitration clauses would appear to undermine the stated intent of SOX whistleblower provisions “to prevent recurrences of the Enron debacle and similar threats to the nation’s financial markets.”<sup>153</sup> Given that many arbitration agreements are a condition of employment, those individuals most likely involved in the corporate fraud would be the same corporate leaders who possess power in choosing the arbitrator.<sup>154</sup>

Providing the option for alternative dispute resolution before an arbitrator, however, may operate as an efficient means to avoid the potential duplicity, discussed above, of an administrative investigation followed by a federal district court *de novo* review. Recognizing this potential benefit, an omnibus statute should include an arbitration alternative to a jury trial, but only if it is specifically limited by, for example, providing that the arbitrator be selected by mutual consent to avoid placing the choice solely with the employer.<sup>155</sup>

In creating an omnibus statute, multiple opportunities exist to improve upon existing forum options: any administrative option must consider issues of expertise; if arbitration is not precluded, it must be limited; and ideally, a right to relief from retaliation should be expeditiously adjudicated.

### C. Burden of Proof

The burden of proof to prevail in a whistleblower retaliation claim under an omnibus statute should track the language adopted in SOX regulations, providing that the whistleblower must prove by a preponderance of evidence that protected conduct was a “contributing factor” to the retaliatory action.<sup>156</sup> The same burden of proof applies at

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mandatory arbitration—based upon US Supreme Court cases recognizing a presumption in favor of arbitration and the legislative history of SOX—thereby avoiding the administrative and judicial forums available under the Act).

153. 148 CONG. REC. S7419, S7420 (daily ed. July 26, 2002).

154. See *supra* note 18 (discussing Sherron Watkins’s experience at Enron).

155. See Devine Testimony, *supra* note 14 (providing checklist for whistleblower protection laws).

156. See 18 U.S.C. § 1514A(b)(2)(C) (Supp. V 2005); 29 C.F.R. § 1980.104(b)(2) (2006). Since the enactment of the Whistleblower Protection Act of 1989, 5 U.S.C. § 1221(e)(1) (2000), the same burden of proof to prevail has been adopted consistently in federal laws. Enacted to protect most federal employee whistleblowers, the evidentiary framework is different from that of the general body of employment discrimination law. *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1374 n.11 (N.D. Ga. 2004). Plaintiff/employee must prove by a preponderance of evidence that:

- (a) Plaintiff engaged in a protected activity under the statute;
- (b) The employer knew of the protected activity;
- (c) The employee suffered an unfavorable personnel action; and

(d) The discriminatory act was a “contributing factor” in the adverse action taken by the employer against the employee. *Id.* at 1375–76.

the administrative review and before the district court.<sup>157</sup> The “contributing factor” language contrasts favorably with earlier anti-retaliation provisions that required the claimant prove the protected conduct was “a substantial, motivating or predominant factor in the personnel action,”<sup>158</sup> and has proven to be a watershed for whistleblower claims; the annual rate of whistleblower claims prevailing on the merits increased from less than 10% prior to the adoption of the language up to 25–33% by the late 1990s.<sup>159</sup> This shift in the level of proof recognizes that an employer can often identify other reasons for unfavorable employment actions against an employee. If the employee meets her burden, then the burden shifts to the employer to prove by clear and convincing evidence that it would have taken same action for independent, legitimate reasons in absence of the protected activity.<sup>160</sup> The ultimate burden of proof rests with the complainant to prove by a preponderance of the evidence that the unfavorable employment action was taken in retaliation for whistleblowing.<sup>161</sup> Any omnibus provision would benefit from this balanced approach.

#### *D. Relief for the Whistleblower*

An omnibus statute should adopt the relief provided in SOX, but it should extend it further. SOX established both a legal and equitable remedy providing for “make-whole” relief.<sup>162</sup> The remedies available

157. 29 C.F.R. § 1980.109(a) (2006).

158. 135 CONG. REC. S2779, S2784 (daily ed. Mar. 16, 1989) (Whistleblower Protection Act of 1989, Joint Explanatory Statement).

159. DEVINE, *supra* note 19, at 116.

160. Once proved, the burden shifts to the employer to prove by “clear and convincing evidence” that it would have taken the same adverse action even if the employee did not blow the whistle. *Collins*, 334 F. Supp. 2d at 1376 (applying the standard articulated in 49 U.S.C. § 42121 (2000)); 29 C.F.R. § 1980.104(c).

161. See WESTMAN & MODESITT, *supra* note 3, at 232 n.28.

162. 18 U.S.C. § 1514A(c) (Supp. V 2005); 29 C.F.R. § 1980.103(a)(1). The interim relief under SOX belies the notion of “make-whole relief” because it is limited to reinstatement and excludes back-pay. Because the administrative process may continue up to 180 days, possibly years if the case is filed in federal district court, the employee will have suffered, in a case of retaliatory termination, from the loss of pay during the period from termination to reinstatement. Even with interim reinstatement, the employee will have lost several months wages. Although final relief includes back-pay with interest, for many employees, the delay of months or even years would mean financial hardship. Under omnibus whistleblower relief, interim back-pay should be ordered concurrent with reinstatement, with conditional repayment to the employer should the decision be overturned. With reinstatement, the employer gets the benefit of the employee’s labor even if the decision is overturned. The problem with an interim back-pay provision is that, once interim back-pay has been paid, recovery of those funds may be near to impossible if the reinstatement decision is overturned, given that the employee would presumably now be unemployed and short on funds. On the other hand, employers may be less likely to terminate employment if interim back-pay is available to employees. Finally, hearing officers may be hesitant to

include “reinstatement with the same seniority status that the employee would have had but for the discrimination; back pay with interest; and compensation for any special damages sustained . . . including litigation costs, expert witness fees, and reasonable attorney’s fees.”<sup>163</sup> Additionally, SOX provides for immediate reinstatement of the employee in cases where OSHA determines in its initial sixty-day review that the employee was subjected to retaliation.<sup>164</sup> The employer may obtain a stay of reinstatement only in exceptional cases by meeting criteria for equitable injunctive relief.<sup>165</sup> Two additional remedies should be offered in appropriate circumstances under an omnibus provision. First, where the employer organizational structure is large enough, it should afford the prevailing employee transfer preference upon reinstatement, minimizing the employee’s exposure to lingering hostility by managers or co-workers who may feel defeated or betrayed.<sup>166</sup> Second, individuals who engaged in the retaliatory actions should be held personally accountable.<sup>167</sup> Several options are available: at a minimum, the actor would be disciplined for the wrongful conduct; the actor could be fined; or the actor could be held jointly liable for punitive damages to deter employees from merely acting at the behest of superiors without risking repercussion.<sup>168</sup> The omnibus statute should explicitly state that any remedy available for retaliation should be in

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order interim relief if the case is a close one and the employer may forever lose the funds paid out through interim back-pay.

163. Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 29 C.F.R. § 1980.105(a)(1) (2006); *see* 18 U.S.C. § 1514A(c)(2). At least one court has found that the relief provided does not include punitive damages. *Murray v. TXU Corp.*, No. Civ.A.3:03-CV-0888-P, 2005 WL 1356444 (N.D. Tex. June 7, 2005) (finding the omission of punitive damages in the statutory language “clear and unequivocal”). However, a Florida court held that “a successful Sarbanes-Oxley Act plaintiff cannot be made whole without being compensated for damages for reputational injury that diminished plaintiff’s future earning capacity.” *Hanna v. WCI Cmtys.*, 348 F. Supp. 2d 1332, 1334 (S.D. Fla. 2004).

164. Once a complaint is filed, OSHA has sixty days to complete the investigation and issue written findings as to whether there is “reasonable cause to believe that the named person has discriminated against the complainant in violation of the Act.” 29 C.F.R. § 1980.105(a). If the complainant demonstrates a prima facie case, the named person has twenty days to meet with representatives of OSHA and present clear and convincing evidence that it would have taken the same personnel action in the absence of the employee’s protected activity. 29 C.F.R. § 1980.104(c). If OSHA determines the employee was subjected to retaliation, it may order immediate reinstatement, which is generally effective immediately upon receipt of findings. 29 C.F.R. § 1980.106.

165. The employer must demonstrate irreparable injury, likelihood of success on the merits, and the balancing of possible harms to the parties and the public. 29 C.F.R. § 1980.106(b)(1).

166. *See* Devine Testimony, *supra* note 14 (Checklist for Effective Whistleblower Protection Laws, Part IV, ¶¶ 18–19).

167. *Id.*

168. *Id.*

addition to claims and remedies for constitutional or common law rights, and therefore does not preempt existing rights or remedies.<sup>169</sup> This provision would most likely conflict with some state common law approaches, where claims are only available if there is no adequate alternative remedy.<sup>170</sup>

### *E. Timing Issues*

An omnibus provision should standardize the time in which a claim may be filed. The variance in limitations periods for filing anti-retaliation provisions and the time frames for investigating claims administered by OSHA are evident in the OSHA-issued Whistleblower Investigation Manual that provides guidance to investigators and claimants for those fourteen provisions.<sup>171</sup> OSHA must contend with differing statutes providing filing limitations of thirty days up to 180 days.<sup>172</sup> Further, investigational time frames vary from thirty days, to sixty days, to ninety days depending upon the statute.<sup>173</sup> Consistent time frames for filing and investigating claims would aid investigators in tracking cases as they move through the administrative system and would aid informing whistleblowers about exercising legal rights.

169. *See, e.g.*, 18 U.S.C. § 1514A(d) (Supp. V 2005) (“Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.”). An omnibus statute should clarify that constitutional claims and common law claims are not preempted.

170. Some states may preclude recovery under state law when the federal statute can provide an adequate alternative remedy. *See, e.g.*, *Flenker v. Willamette Indus., Inc.*, 967 P.2d 295, 299–300 (1998) (finding remedy under OSHA is inadequate alternative remedy to Kansas common law tort action for whistleblowing because Secretary of Labor has sole discretion to investigate and file suit).

171. *See* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, WHISTLEBLOWER INVESTIGATION MANUAL 2-4 to 2-5 (2003); *Compliance Directive from OSHA Amends Whistleblower Investigation Manual*, 1 Corp. Accountability Rep. (BNA) No. 32, at 859 (Sept. 5, 2003).

172. The statute of limitations for filing claims under those fourteen provisions ranges from thirty to 180 days. *See, e.g.*, Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. § 2651 (2000) (ninety days); Clean Air Act, 42 U.S.C. § 7622 (2000); 29 C.F.R. § 24 (180 days); Comprehensive Environmental Response, Compensation and Liability Act (Superfund), 42 U.S.C. § 9610 (2000) (thirty days); Energy Reorganization Act, 42 U.S.C. § 5851 (2000) (180 days); Occupational Safety and Health Act, 29 U.S.C. § 660(c) (2000), (thirty days); International Safe Container Act, 46 U.S.C. § app. 1506 (sixty days); Safe Drinking Water Act, 42 U.S.C. § 300j-9 (thirty days); Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (ninety days); Solid Waste Disposal Act, 42 U.S.C. § 6971 (2000) (thirty days); Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105 (2000) (180 days); Toxic Substances Control Act, 15 U.S.C. § 2622 (2000) (thirty days); Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1311, 1367(a), (b) (2000) (thirty days); Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121 (2000) (ninety days).

173. *See, e.g.*, Energy Reorganization Act, 42 U.S.C. § 5851 (30 days); International Safe Container Act, 46 U.S.C. § app. 1506 (thirty days); Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (sixty days); Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105, 29 C.F.R. § 24 (sixty days); Occupational Safety and Health Act, 29 U.S.C. § 660(c) (ninety days).

Indeed, providing consistency across the current statutory schemes (in the event omnibus legislation is not pursued) would benefit the investigator and whistleblower alike.<sup>174</sup>

In selecting an appropriate statute of limitations for an omnibus statute, tension exists between the interests of the employee and the employer. An employer may prefer a shorter time period, such as the ninety-day period, because it protects the general “at-will” nature of the employer-employee relationship and permits a claim to be investigated while the actions prompting the claims are still fresh in the minds of the witnesses. Yet, for the employee, ninety days may not be enough time to realize that an adverse employment action is based upon the whistleblowing activity of the employee.<sup>175</sup> The employer and employee may also share common interests in the limitations period: because coworkers and supervisors often react negatively to the whistleblower due to a loss of trust in the perceived breach of loyalty, the whistleblower activity disrupts the working environment and may take some time to settle down.<sup>176</sup> An employee may prefer to wait to file a claim, recognizing that filing will likely further disruption and loss of trust and that time may resolve the tension in the workplace. If faced with the prospect of losing the right to file the claim for retaliation, however, the employee may file precipitously. Thus, in addition to providing for consistent limitations periods in whistleblower claims,<sup>177</sup> an omnibus statute should provide for a realistic limitations periods.

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174. For example, a person alleging retaliatory discrimination or discharge for whistleblowing under SOX must file a complaint with the Secretary of Labor, 18 U.S.C. § 1514A(b)(1)(A), within ninety days after the date on which the violation occurs. § 1514A(b)(2)(D). Failure to file within ninety days may result in dismissal. *See Walker v. Aramark Corp.*, 2003-SOX-22 (A.L.J. Aug. 26, 2003) (ordering dismissal based upon filing 105 days after alleged discriminatory action). Commencement of ninety days begins when an employee has final and unequivocal notice that a decision has been made to take adverse action, and *not* on the date the decision is implemented. *See Del. State Coll. v. Ricks*, 449 U.S. 250, 258–59 (1980); *EEOC v. United Parcel Serv., Inc.*, 249 F.3d 557, 561–62 (6th Cir. 2001) (cited in 69 Fed. Reg. 52106) (finding that limitations period commences once the employee is aware or reasonably should be aware of the employer’s decision); *Belt v. U.S. Enrichment Corp.*, ARB No. 02-117, A.L.J. No. 01-ERA-00019, at 5 (Dep’t of Labor Feb. 26, 2004); KOHN, *supra* note 84, at 15.

175. Unambiguous termination commences the ninety day filing period even if the employee does not recognize the relationship between his protected activity and employer’s decision to terminate him. *Roulett v. Am. Capital Access*, 2004-SOX-00078, (A.L.J. Dec. 22, 2004) (rejecting argument that employee did not realize termination was in response to protected activity until other employees were later terminated, and finding “statute of limitations begins to run when the employee is made aware of the employer’s decision to terminate him”). Moreover, the time period is not tolled for settlement or arbitration. KOHN, *supra* note 84, at 15–17; *cf. Collier v. Farmers Ins. Co., Inc.*, Civ. A. No. 91-2225-O, 1992 WL 221604 (D. Kan. Aug. 5, 1992) (finding that administrative charges of discrimination for filing workers compensation claim does not toll the statute of limitations period for state retaliatory discharge claim).

176. *See, e.g., SCAMMELL, supra* note 44, at 35, 135, 146–47.

177. *See supra* text accompanying notes 171–74.

Presently, claims delegated to the DOL and investigated by OSHA have statute of limitations ranging 30–180 days.<sup>178</sup> Other provisions administered by DOL but not further delegated to OSHA may contain similar administrative limitations periods, but enjoy limitations periods of up to three years for cases permitted to be filed directly in court.<sup>179</sup>

A compromised time frame for an omnibus statute should be a limitations period of one year for all retaliation claims, with equitable tolling up to three years in cases where the employee could not discover through reasonable investigation that the retaliatory act was based upon protected activity of the employee.<sup>180</sup> One year would provide sufficient time for the employee to recognize the retaliation and sufficient time so that the employee should not be fooled into believing things will work out. Likewise, one year assures the employer that witnesses will likely still be available and limit the extended threat of potential retaliation claims.<sup>181</sup> Tolling up to three years discourages willful conduct that would prevent the employee from discovering the true nature for the adverse employment action. Uniformity of forum and statute of limitations period provided by a single omnibus whistleblower statute would streamline the litigation process and afford a fair hearing for all parties.

Although SOX is a step forward in whistleblower protection, it feeds into the chaos of whistleblower protection developed in response to crisis. Moreover, through careful drafting of statutory language and narrow interpretation, the statute retains limitations similar to other recent whistleblower protections that hobble its effectiveness. The omnibus provisions proposed would improve the protections in that such legislation would eliminate the narrow application of protection and clarify the law. Unifying the forces that seek greater protection would promote its effectiveness.

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178. *See supra* note 172.

179. *See, e.g.*, Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 (2000) (180 days); Employee Polygraph Protection Act, 29 U.S.C. § 2002 (2000), 29 C.F.R. § 801.40 (2006) (three years); Equal Pay Act, 29 U.S.C. § 206(d) (2000) (two years, three years if willful violation); Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (2000), 29 C.F.R. § 783 (2006) (two years, three years if willful); Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2615, 2617 (2000) (two years, three years if willful); Federal Mine Safety and Health Act, 30 U.S.C. § 815(c) (2000) (sixty days); Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 948a (2000); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1854–1855 (2000) (180 days).

180. *See supra* note 179.

181. The ninety day limitation period in SOX claims was adopted to balance the Due Process rights of the named persons and Congress's desire for an expedited administrative complaint process. Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 69 Fed. Reg. at 52,105 (Aug. 24, 2004).

## IV. REPLACING THE NET WITH A BLANKET OF PROTECTION

SOX is but the most recent formulation of whistleblower protection, reflecting years of legal development. As Part III demonstrates, its protections are uneven and difficult to predict, to say the least. As such, SOX is unlikely to encourage employees of public companies to blow the whistle on wrongful conduct. In fact, it has failed to encourage anyone to blow the whistle on even wide scale fraud.<sup>182</sup> Specifically, during the summer of 2006, a new scandal erupted in corporate America.<sup>183</sup> Many CEOs boosted their compensation pursuant to incentive compensation plans by backdating option grants to take advantage of lower historical prices.<sup>184</sup> Although such backdating conduct has triggered criminal charges at two public companies and although over one hundred companies are under DOJ, SEC, or IRS investigation,<sup>185</sup> not a single internal whistleblower emerged.<sup>186</sup> Federal legislators continue to debate improvements to the Whistleblower Protection Act for federal employees and contractors.<sup>187</sup> Yet, it appears

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182. See Stephanie Saul, *Study Finds Backdating of Options Widespread*, N.Y. TIMES, July 17, 2006, at C1 (“More than 2,000 companies appear to have used backdated stock options to sweeten their top executives’ pay packages, according to a new study that suggests the practice is far more widespread than previously disclosed.”).

183. Much of the manipulation of options grants took place *after* the enactment of SOX. *Id.*

184. “[W]e . . . estimate that 29.2% of firms at some point engaged in manipulation of grants to top executives between 1996 and 2005.” Randall A Heron & Erik Lie, *What Fraction of Stock Option Grants to Top Executives have been Backdated or Manipulated?* 24 (Nov. 11, 2006) (unpublished manuscript), available at <http://www.biz.uiowa.edu/faculty/erie/Grants-11-01-2006.pdf>.

185. See The Wall Street Journal Online, *Perfect Payday: Options Scorecard*, <http://online.wsj.com/public/resources/documents/info-optionsscore06-full.html> (last visited Oct. 26, 2007) (online scorecard listing corporations investigated by the SEC, the DOJ, or conducting internal investigations into options backdating); Marcy Gordon, *IRS Plans Its Own Stock Options Inquiry*, WASH. POST, July 29, 2006, at D2.

186. Instead the SEC’s attention “apparently was piqued by academic research that found unusual patterns of stock activity around the time of options grants.” Charles Forelle & James Bandler, *Backdating Probe Widens as 2 Quit Silicon Valley Firm*, WALL ST. J., May 6, 2006, at A1. Another external source was a senior auditor for the IRS who discovered the agency had agreed to forgive the outstanding tax liability on the backdated options; she was pressured to sign off on the file to close the audit without having viewed the tax returns—an act that would be contrary to a directive from the IRS commissioner for large- and medium-size businesses. David Cay Johnston, *Tech Company Settled Tax Case Without an Audit*, N.Y. TIMES, Aug. 10, 2004, at C1. The auditor took her concerns up the chain of command without relief before contacting the FBI and Sen. Charles E. Grassley’s staff. *Id.* After obtaining the tax returns through a routine request to the recordkeeping department, she concluded that, for the three years she reviewed, the company owed \$51 million. *Id.* The auditor’s decision to go public with her experience placed her position with the IRS in jeopardy because IRS audits are confidential. *Id.*

187. See Barr, *supra* note 139, at D4 (reporting that the U.S. Senate passed an amendment to the defense authorization bill that would enhance the protection to federal employee whistleblowers, but recognized that the House of Representatives version did not include the protection, and therefore the amendment would be addressed in the House-Senate conference committee); S. 2285, 109th Cong. (2d

uncontestable that SOX has failed to enlist public company employees to blow the whistle.

While agreement on the need to protect whistleblowers may be widespread, the desire to provide true protection clashes with the reality of business interests and their influence on legislation. A variety of business interests are raised: agency duties of employees to their employers, the risk of false or bad faith disclosures, added tension in the work environment, and bureaucratic intrusion on employment decision making. Competing with these interests are also many societal interests: the direct and indirect financial costs of crime, psychological costs, free speech concerns, and privacy concerns. Finally, an overarching governmental interest in legislating against retaliatory conduct is the efficiency in the administration of justice.

#### A. *The Case for Limited Legislation: Business Interests*

Creating omnibus protection for whistleblowers as a substitute for the existing legal structure of narrowly drawn industry tailored protection undercuts long-valued expectations of the employee's duties of obedience, loyalty, and confidentiality to the employer.<sup>188</sup> Thus, as an agent of an employer, an employee has an implicit duty to obey an employer's reasonable instructions.<sup>189</sup> Moreover, "[u]nless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency" and, in so doing, to not take unfair advantage of position, to not act or speak disloyally in connection with employment, to not compete with the employer, and to not sabotage the employer.<sup>190</sup> Finally, the duty of loyalty implies a duty of confidentiality<sup>191</sup> because the employer must

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Sess. 2006) (introducing the Whistleblower Empowerment, Security, and Taxpayer Protection Act of 2006 ("WESTPac")); Paul Revere Freedom to Warn Act, H.R. 4925, 109th Cong. (2d Sess. 2006) (introduced by Rep. Edward J. Markey (D-MA), a senior member of the Energy and Commerce and Homeland Security Committees, and Carolyn B. Maloney (D-NY), a member of the Government Reform Committee) (proposing a comprehensive bill to provide protections to government and private sector employees who face retaliation for reporting flaws in national or homeland security, public health and safety, or waste, fraud and mismanagement of public funds); Barr, *supra* note 138, at B2. Rep. Edward J. Markey had proposed a similar provision to extend SOX-type protections to federal employees and contractors as an amendment to the fiscal 2006 authorization bill for the Department of Homeland Security, but it was rejected in committee on a party-line vote. *Id.* See also *supra* note 5.

188. See WESTMAN & MODESITT, *supra* note 3, at 2 (citing RESTATEMENT (SECOND) OF AGENCY §§ 385, 387, 395 (1958) (defining Duty to Obey, Duty of Loyalty, and Duty of Confidentiality)).

189. RESTATEMENT (SECOND) OF AGENCY § 385(1) cmt. a (1958) (amended 2006); WESTMAN & MODESITT, *supra* note 3, at 28.

190. RESTATEMENT (SECOND) OF AGENCY § 387 & cmt. b; WESTMAN & MODESITT, *supra* note 3, at 29.

191. RESTATEMENT (SECOND) OF AGENCY § 395; WESTMAN & MODESITT, *supra* note 3, at 29.

often reveal confidential business information related to the employee's responsibilities.<sup>192</sup>

Of course, even where the employee owes a duty, that duty is qualified. The duty of obedience does not require the employee follow instructions when doing so would be a crime, would be unethical, or would endanger the employee or another.<sup>193</sup> And, the employee is not held to the duty of confidentiality if the employer has committed or is about to commit a crime.<sup>194</sup> Under agency principles, however, the employee is not necessarily permitted to report unethical conduct.<sup>195</sup> There is a fine line between criminal acts and unethical conduct, a line that may not be recognizable by the employee who does not possess expert knowledge of the law. Providing a blanket of protection to employees who whistleblow would thus be largely consistent with agency principles, but risks confronting employees with difficult assessments of whether an employer's act is criminal or will endanger others.

To the degree an omnibus statute threatens intrusion on long-held agency principles, the statute should protect confidential information by providing for internal reporting procedures or oversight boards.<sup>196</sup> Employers could thereby be pivotal in keeping information confidential by acting responsively to employee-raised concerns and keeping employees informed of the employer's actions that address the concerns.

Financially, honest employers should welcome information regarding criminal or dangerous conduct in the organization so that such conduct can be remedied or deterred. Consequently, if the employer chooses

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192. The confidential information may include "unique business methods, trade secrets, customer lists, or other strategic information." WESTMAN & MODESITT, *supra* note 3, at 29. The government has opposed whistleblower claims on the basis that disclosing the information relevant to the whistleblowing incident would threaten national security. Federal whistleblower protection legislation proposed in the Senate and in the House of Representatives addresses the "State Secrets" privilege. The Senate version creates procedures to limit the government's frivolous assertion of the privilege and also to protect disclosure of classified information. S. 2285, §§ 2(c), 3. The House version provides for automatic judgment in favor of the whistleblower if the government prevents the case from being heard by asserting its State Secrets privilege. H.R. 4925, § 5. Sibel Edmonds failed to claim anti-retaliation protection because the government was able to show that the information necessary to prove her case was classified. *Edmonds v. U.S. Dep't of Justice*, 323 F. Supp. 2d 65, 69 (D.D.C. 2004).

193. RESTATEMENT (SECOND) OF AGENCY § 385(1) cmt. a; WESTMAN & MODESITT, *supra* note 3, at 28, 29.

194. RESTATEMENT (SECOND) OF AGENCY § 395 cmt. f; WESTMAN & MODESITT, *supra* note 3, at 29.

195. WESTMAN & MODESITT, *supra* note 3, at 29.

196. The audit committees established under SOX are a start, although they fail to provide for adequate feedback to the complaining employee. *See* 15 U.S.C. § 78j-1(m)(4) (Supp. V 2005); Cherry, *supra* note 132, at 1070-75 (observing that SOX does not require companies to *do* anything with the complaints it receives).

instead to punish whistleblowers through retaliatory acts or ignore the warnings of its employees, then perhaps that employer assumes the risk of release of confidential information.<sup>197</sup> Employers should not be shielded by piecemeal and limited whistleblower statutes while the employees who are dedicated to the employers or responsible to the public are punished for their courage in stepping forward; indeed, many employees who speak up believe they *are* being loyal to their employers.<sup>198</sup> Thus, concerns of confidentiality, while sometimes legitimate, should be viewed with skepticism.

For the public sector employee, issues of First Amendment free speech, the supervisory authority of managers, and potential negative publicity must be reconciled. The courts have played a key role in balancing the public employee's right to free expression against the public employer's interest in managing the workplace.<sup>199</sup> In applying this balancing test, the Supreme Court recognized the need to assess whether the statement at issue addressed matters of public concern.<sup>200</sup> In *Garcetti v. Cabellos*,<sup>201</sup> the Court recently narrowed First Amendment protection to employee statements made as a public citizen.<sup>202</sup> This may be a hardship for a public employee choosing to first express a matter of public concern internally with the expectation that the matter can be resolved.<sup>203</sup> After *Garcetti*, internal statements delivered during employment may be characterized as a part of the employee's official duties, even though the same observation could have been made as a public citizen due in part to information obtained as a citizen.<sup>204</sup> Thus,

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197. See *supra* note 18 (discussing Sherron Watkins's experience at Enron). Much retaliation, no doubt, is part of an effort to conceal wrongdoing.

198. In one survey of federal employees, of employees who reported wrongdoing at their agency, 36% reported wrongdoing to their immediate supervisors whereas less than 10% went outside of the agency when reporting wrongdoing. See MSPB 1993 REPORT, *supra* note 33, at 16.

199. See, e.g., *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 142 (1983).

200. *Pickering*, 391 U.S. at 574; *Connick*, 461 U.S. at 147.

201. *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

202. See *Garcetti*, 126 S. Ct. at 1960 (holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline"). The Court's concern for the public employer's interests is manifest: "[E]mployees retain the prospect of constitutional protection for their contributions to the civic discourse. This prospect of protection, however, does not invest them with a right to perform their jobs however they see fit." *Id.*

203. See, e.g., *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979) (holding that a public employee who arranged to communicate her concerns privately with her employer about allegedly racially discriminatory policies would be afforded First Amendment protection).

204. See, e.g., *Pickering*, 391 U.S. at 571-72; see also *Garcetti*, 126 S. Ct. at 1965 n.2 (Souter, J., dissenting) (suggesting that the government employer might in response to the Court's decision define job responsibilities expansively to shield the administration from the critical remarks of its employees). But see *Garcetti*, 126 S. Ct. at 1961 (rejecting Justice Souter's suggestion and observing that





















