

The Phenomenon of Whistleblowing: A Series of Conceptual and Legal Considerations

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**The Phenomenon of Whistleblowing:
A Series of Conceptual and Legal Considerations**

By

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A Senior Honors Thesis Submitted to
The Department of Communication,
Boston College

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Chapter One: Introduction

Overview

Historically, whistleblowers constitute a relatively new group in American society. Of course, the efforts of earlier workers should not be undermined; they exposed malpractices in the workplace as they organized strikes to improve their wages and working conditions. However, the practice of whistleblowing as we know it today is a rather different and new phenomenon. This new group is characterized by employees who do not act solely out of self-interest but concentrate on the exposure of policies that have the potential to hurt the public (Grazer & Grazer, 1989).

A combination of societal and political factors in the 1960s created an ideal atmosphere for the perpetuation of this new type of ethical resister. Glazer & Glazer (1989) note that public concern about toxic wastes, nuclear accidents, and dangerous drugs precipitated a series of new laws regulating the public and private sector, which protected workers who reported misconduct in the workplace. There also existed widespread suspicion directed at the practices of the government and private industry over their perceived inability to control technological hazards as well as practices that seemed to threaten both the health and safety of employees and consumers (Glazer & Glazer, 1989). As these elements culminated together, employees became more critical of their superiors' law-breaking ways, fostering a sense of distrust directed towards their employers.

While the decade of the 1960s and the 1970s created an environment that was seemingly ripe for whistleblowing, this climate was not enough to spur workers to engage in whistleblowing. Glazer and Glazer (1989) explain that it was not until workers were finally provided an outlet for their concerns in the form of “new laws, the creation of regulatory

agencies, the development of public-interest groups, and the growing attention by Congress and the media to the prevalence of corruption” that employees felt more comfortable to blow the whistle (p. 12). In response to the newly enforced regulatory measures over public and private industry, many government officials and corporate executives nevertheless refrained from implementing the necessary changes (Glazer & Glazer, 1989). Consequently, over the next few decades, a series of new whistleblower encouragement strategies were implemented to encourage the act of blowing the whistle. State and federal laws were enacted, and there was a spurt in the creation of industry specific regulation agencies.

More recently, in the wake of immense corporate fraud as evidenced by companies such as Enron, WorldCom, Adelphia, as well as a number of large-scale ponzi schemes, the American public has once again renewed its interest in the concept of whistleblowing (Ebersole, 2011). Today’s sense of mistrust seems to parallel, to some degree, the mistrust that was prevalent in the 1960s and 1970s. The rise of watchdog groups coupled with ever-increasing media scrutiny has lead to the proliferation of news stories that highlight misconduct in the workplace, leaving the American public skeptical of corporate practices. In this environment, whistleblowers have emerged as another force behind the uncovering of illegitimate practices.

Whistleblowers have generally been praised in the media for sacrificing company loyalty in order to expose misconduct. Though the public may praise them for their efforts, whistleblowers often face harsh criticisms from their organizations. As Elliston, Keenan, Lockhart, and van Schaik (1985a) note, whistleblower are often “labeled” or “stigmatized” through methods such as reducing their organizational status or power, as well as being called a traitor and sometimes even being fired (p. 28). Because whistleblowers can face such serious retaliation, scholars have sought to analyze why certain people chose to blow the whistle while

others remain silent. They found that a number of personal characteristics as well as certain situational factors might influence employees to engage in whistleblowing. For example, studies have shown that whistleblowers tend to be middle aged rather than younger, and they often have a strong sense of moral conviction (Elliston et al., 1985a). In terms of contextual factors, for example, whistleblowers tend to come out of hierarchical organizational structures as opposed to more democratic organizations (Near & Miceli, 1996).

This thesis will aim to outline the characteristics most conducive to whistleblowing in order to answer the question of who is a whistleblower. It will examine both the personality traits and situational factors most related to whistleblowing in order to form a more complete understanding of why someone may choose to blow the whistle. In order to contextualize these characteristics, an in-depth examination of two recent whistleblowers will follow. These two whistleblowers, Cynthia Cooper and Harry Markopolos, both wrote books that describe their experiences as whistleblowers. Their stories not only demonstrate the personal and situational characteristics common to whistleblowing, but they also highlight the series of difficult decisions whistleblowers face during the whistleblowing process. This process forces whistleblowers to confront their moral values on a continuous basis and places them in demanding situations.

Despite whistleblowers' contributions to society, history has shown that protecting whistleblowers is often a complex and arduous task. Though research has shown that whistleblowing can benefit both the public and the organization itself, whistleblower legislation has often failed to provide whistleblowers with the comprehensive protection necessary to secure them against retaliation. Nevertheless, in the past two decades, the government has implemented an increasing number of programs to encourage whistleblowing and it continues to pass legislation that minimizes retaliation against whistleblowers.

The most recent efforts in this direction include the Sarbanes-Oxley Act and the Dodd-Frank Act. Each revision to whistleblower laws, however, seems to come up short in fulfilling its stated goals. Whistleblower protection agencies are not always competent enough to process whistleblower tips, and organizations find ways to resist or ignore protections that should be afforded to whistleblowers. These consistent shortcomings beg the question whether whistleblowers can truly be protected by the law.

Purpose

The purpose of this thesis is to examine a multitude of concepts related to the phenomenon of whistleblowing. Chinn, Mufson, and Pearlman (2013) underline that we find ourselves “in the age of the whistleblower” and it is therefore imperative to understand this new phenomenon. The visibility of whistleblowers in the media is increasing but whistleblowers are not always portrayed accurately, and, as such, it may be beneficial to examine them in a more legitimate context. As whistleblowers can provide a tremendous service to the public, their organization, and the current economic situation, it is in society’s best interest to understand the whistleblowing process in order to encourage its expansion.

The first half of the thesis examines the logistics of the whistleblowing process, the characterization of a whistleblower, and the various groups that can benefit from the whistleblowing phenomenon. This in depth analysis aims to dispel any misconceptions about whistleblowing and provides readers with a comprehensive overview of the literature available on whistleblower dynamics.

The second half of the thesis reviews whistleblower laws from their foundation nearly two centuries ago all the way to current developments in whistleblower legislation. It analyzes

the strengths and deficiencies of various legal measures and seeks to demonstrate why whistleblower legislation may never fully afford whistleblowers the comprehensive protection they deserve. This section will argue that, though whistleblower legislation has certainly improved in aiming to promote whistleblowing, certain deficiencies remain a permanent part of whistleblower law.

Organization

The following is an outline for the thesis, which will be divided into seven chapters:

- I. Introduction
- II. Who is a Whistleblower?
- III. Whistleblower Examples: A Characterization of Two Recent Whistleblowers
- IV. The Role of a Whistleblower
- V. The History of Whistleblower Legislation
- VI. Recent Developments in Whistleblower Law
- VII. Conclusion

After the introductory chapter, which provides a brief overview of the history of whistleblowing, the second chapter begins by addressing a series of definitional concerns. It also outlines the whistleblowing process in a step-by-step manner. The third chapter focuses on attempting to answer the question “who is a whistleblower?” by examining the personal characteristics of a whistleblower as well as the situational factors that may encourage an employee to blow the whistle. The next chapter outlines the role of a whistleblower, underlining the various benefits of whistleblowing.

After addressing theoretical considerations, the thesis then shifts its attention to analyzing whistleblower legislation. The fifth chapter traces the development of whistleblower law from 1871 and discusses federal measures as well as industry specific whistleblower protections. The sixth chapter focuses on major whistleblower legislation reforms of the last decade and examines

their effectiveness. Finally, the conclusion will argue that despite the obstacles that whistleblowers face, whistleblowing will continue to exist and may even increase even if whistleblower legislation is not able to promise full protection.

Chapter 2: Who is a Whistleblower?

Over the past few decades, courtroom records and media accounts seem to suggest that the phenomenon of whistleblowing is on the rise (Greenberger, Miceli & Cohen, 1987). The media's sensationalizing of the whistleblower and the often large-scale wrongdoing they expose, however, would have us fooled that the whistleblowing process is as alluring as the media presents. In reality, the potential whistleblower finds themselves in an extremely difficult situation, weighing the decision of whether he or she should potentially sacrifice company "loyalty" and expose their concerns, or remain silent despite their knowledge of misconduct.

The whistleblowing process is an intricate one as it involves a number of actors, a series of tough decisions, and a plethora of uncontrollable factors. The whistleblower must therefore make a number of cost-benefit analyses as the outcome of their decision to act remains uncertain. If they do indeed decide to blow the whistle, they must further determine how and to whom they should address their concerns and make subsequent decisions based upon the response they receive.

The complicated and often stressful nature of whistleblowing begs the question: who is a whistleblower? If the whistleblowing process is an uncomfortable experience and whistleblowers nevertheless engage in it, it seems logical that there must exist some factors that differentiate whistleblowers from inactive observers. Academics have studied these factors extensively, focusing on both personal characteristics of the whistleblower as well as context-related explanations. Though some of their findings may be inconsistent, there appear to exist a number of commonalities.

Definitional Concerns and The Whistleblowing Process

The substantial amount of literature available on whistleblowing is often contradictory, and opinions on the topic are frequently inconsistent. Disagreements range from issues such as the importance of whistleblowing, to the motivations behind blowing the whistle, to the methods that should be used to encourage whistleblowing. According to Miceli, Rehg, Near, and Ryan (1999) even defining the term whistleblowing has proved to be controversial. As such, it would prove beneficial to address definitional concerns in order to clarify the approach that will be used here.

The definition of whistleblowing that will be employed is offered by Near and Miceli (1985) as, “the disclosure by organization members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action” (p. 4). Whether they choose to remain anonymous or not, this includes employees who use internal channels, external channels, or both to report the wrongdoing they have observed. Internal channels constitute reporting to someone within the organization, such as personnel and human resource managers, and external channels, by contrast, include actors outside of the organization (Miceli & Near, 1988). Since most whistleblowers who use external channels have also used internal channels (Miceli & Near, 1985), and empirical results have demonstrated that the whistleblowing process tends to be the same in both cases (Miceli & Near, 1992), it is appropriate that we include both of these methods in our definition.

In addition to addressing definitional concerns, it is worthwhile to expand upon the whistleblowing process itself. By examining the development of a whistleblowing situation, it is possible to gain insight into this phenomenon and gain a deeper understanding of the types of decisions that whistleblowers must confront. Most models of the whistleblowing process

contend that the process begins with a ‘triggering event’ (Henik, 2008a) in which the whistleblower recognizes the wrongdoing (Miceli, Near, & Schwenek, 1991). It is during this stage that the whistleblower may experience a value conflict as he or she attempts to adjust their perspective of the organization or employer based on their sense of right and wrong (Henik, 2008a).

Afterwards, the individual must assess whether the observed wrongful activity is intolerable enough to constitute being reported. If the employee does indeed decide to blow the whistle, he or she determines what actions are available at their disposal and weighs the expected costs and benefits of their decision (Miceli et al, 1991). The person may communicate their concerns to their coworkers, supervisor or sometimes the perpetrator themselves. These are considered internal channels of communication. As Richardson, Wang, and Hall (2012) note, the next stage includes a response from the organization and the employee’s analysis of this response. The whistleblower determines whether further action is warranted, and may turn to external measures if they find themselves unsatisfied with the employer’s response.

As Elliston et al. (1985a) underscore, “whistleblowing itself is the final stage of a process that begins in an awareness of...an unethical activity, [and] it grows and takes shape through discussions with coworkers to clarify one’s initial worries” (p.27). The actual *act* of whistleblowing is therefore extremely varied and circumstantial. Subsequently, it will not be considered here in depth; however, the reasoning behind why a whistleblower may choose one channel of dissemination over another will be examined at a later time. Though the above model serves as a general outline of the process of whistleblowing, it should be noted that various decisions and tradeoffs are made at every level of the process, which causes each whistleblowing case to be unique; as such, no whistleblowing case can be characterized as typical (Near &

Miceli, 1996). Nevertheless, this model adequately serves as a general framework for the type of internal debates a potential whistleblower experiences.

The manner in which the organization responds to the whistleblower can also vary. Greenberger et al. (1987) provide a list of possible reactions which include: “attempts to persuade the whistleblower of errors, increased communication directed to whistleblower, social rejection of whistleblower, and punishment of whistleblower” (p. 535). Scholars most often tend to focus on the retaliation towards whistleblowers as many of the employer’s responses can be understood as such, whether they are more or less severe.

Certain factors of whistleblowing have been found to be related to the likelihood that retaliation will occur. For example, Mesmer-Magnus and Viswesvaran (2005) explain that the action taken by the whistleblower, such as the use of external channels, may lead to a greater likelihood and severity of retaliation (p. 282). On the other hand, studies have found that general characteristics of the whistleblower such as education, job level, or age tend to be less predictive of retaliation than contextual factors (Miceli and Near, 2002).

Characteristics of a Whistleblower: Personal Characteristics

Amongst the available literature on whistleblowing, there exist disputes over the question of whether whistleblowers share common personality traits. Certain scholars attribute predictors of whistleblowing to be instead based on situational characteristics and consider personality to be much less of a determining factor. Nevertheless, despite the dispute over the *degree* to which personality traits play a role in blowing the whistle, most scholars agree on the existence of at least a few commonalities. Indeed, as Jos, Tompkins, & Hays (1989) suggest, there must be

something that prompts whistleblowers to jeopardize their careers, risk ostracism, and suffer potential retaliation while their coworkers remain silent.

In response to the question above, Elliston et al. (1985a) suggest that, “whistleblowers must have relatively high ideals, staunch principles. . . and feel a strong obligation to ‘take action’ rather than compromise their standards by remaining silent” (p. 26). As opposed to silent observers, whistleblowers not only have a stronger sense of commitment to their values, but they are also capable of acting on their obligations even in the face of pressures to do otherwise (Jos et al., 1989). As such, a large majority of whistleblowers are seemingly uninterested in altering their behavior in order to conform to the situation at hand (Jos et al., 1989). Because of their strong value system, whistleblowers may often feel anger towards the organization or perpetrators of the wrongdoing and subsequently seek to restore moral order (Henik, 2008b).

Ideological convictions, whether based on professional values or religious beliefs, may also constitute a shared personality trait among whistleblowers. Both of these foster a sense of obligation coupled with a sense of community that may encourage employees to blow the whistle. In the case of professional values, professional organizations in fields such as law, medicine, and engineering are largely responsible for fostering strong ideologies (Glazer & Glazer, 1989). Glazer and Glazer (1989) ascertain that among the members of these organizations, whistleblowers tend to take the ideology of their profession most seriously, and they commit themselves to upholding these professional values; they have a certain “red line” that they will not cross, and they will not compromise their judgments (p. 70). In an interview conducted by Henik (2008a) in which whistleblowers were asked about their motivations for exposing wrongdoing, one interviewee was quoted as saying:

When you come on board...in the government, you swear an oath to the Constitution and to defend it against enemies foreign and domestic. I’m not deciding you’re an

enemy. All I know is that I've got a bunch of rules. I am obliged to report various things under the circumstance. . . It's not a choice. I was actually told one time. . . that I should use a little more discretion when I pick and choose which rules to follow. . . that was the first time I'd ever heard that. You don't get to pick and choose which rules to follow (p. 61).

Like those with strong professional values, those employees who have strong belief systems also have a more difficult time compromising their values. Glazer and Glazer (1989) contend that well developed belief systems can aid people in withstanding the pressures to conform to the wrongdoing, and they argue that religious teachings can be effective in encouraging a sense of individual responsibility. Another whistleblower in the same interview with Henik (2008a) cited religious reasons for whistleblowing:

I have an extremely strong sense of faith and ethics in a Christian context. . . And I believe, at the end of the day, this is what makes me. . . different from a lot of people you find in [my organization]. I'm a Christian, and I have a higher obligation to God than to anyone, government or military agency. And my ethics in handling the matter was always of the highest importance to me because ultimately we are all going to answer to God for our impunities. And I was not afraid to answer to God for what I was doing. . . . (p. 61).

The sense of community fostered by both professional and religious communities can indeed influence a potential whistleblower to commit the action.

In addition to their strong value system, whistleblowers also possess a strong need to control their surroundings. Barton (1995) emphasizes that whistleblowers possess "a higher than average need to control their environment and believe that the absence of controls could jeopardize progress in the organization" (p. 300). This need for a "locus of control" (Rotter, 1966) can lead whistleblowers to believe that their actions have a substantial impact on what

happens to them and that their actions can make a difference in the world (Dozier & Miceli, 1985).

Demographically and professionally, there seem to be a number of traits linked to whistleblowers. For example, more whistleblowers tend to be married and middle aged as opposed to single and younger (Barton, 1995). There seems to be less consistency regarding the gender of whistleblowers; some studies found that a greater proportion of males are whistleblowers (Miceli and Near, 1988), while other studies found a positive correlation between whistleblowing and being female (Mesmer-Magnus & Viswesvaran, 2005). In a professional context, Miceli and Near (1988) note that whistleblowers have higher levels of professional status than those who observed wrongdoing but chose not to report it. Near and Miceli (1996) indicate that whistleblowers are also more likely to have high job performance, while Miceli and Near (1988) suggest that employees who feel respected or powerful will be more likely to blow the whistle.

According to Greenberger et al. (1987), high performers who are perceived as competent have a higher credibility and are therefore at a greater liberty to deviate from the status quo without fear of retaliation. As Mesmer-Magnus and Viswesvaran (2005) explain, “an individual with more experience, tenure, and better job performance is more valuable to an organization, thus giving them some leverage to report misdeeds” (as cited in Miceli and Near, 2002). By this logic, observers of wrong doing with poor job performance may believe that their opinion is less influential and their position more susceptible to retaliation; as such, low performers may be less likely to blow the whistle (Miceli et al., 1991). Indeed, a more recent study about the incidence of whistleblowing in sexual harassment cases found that “more vulnerable targets are more likely

to suffer retaliation from powerful harassers, especially if they have blown the whistle multiple times” (Lee, Heilmann, & Near, 2004, p. 316).

High performing, experienced employees are also most likely to hold higher positions within the organizational hierarchy, which may be related to a higher rate of whistleblowing. Mesmer-Magnus and Viswesvaran (2005) argue that, “individuals demonstrating higher organizational commitment are more invested in staying with the organization” and are therefore more likely to blow the whistle as opposed to exiting the organization (p. 280). These employees are more invested in the organization, and they therefore see a greater value to voicing their concerns. In contrast to younger workers, older employees may also feel more comfortable upholding their value system, and, consequently, more willing to defend it during the lengthy and sometimes retaliation-ridden whistleblowing process (Chiu, 2003). Because they have worked at the organization for a longer period of time, they are likely to have a greater appreciation of and commitment to the values of the workplace and, subsequently, a greater motivation to protect its culture (Mesmer-Magnus and Viswesvaran, 2005).

In addition to their high work performance, whistleblowers tend to have a meaningful connection to their workplace and a genuine interest in seeing it succeed. Elliston et al. (1985a) emphasize that, “they tend to be conscientious employees who identify closely with the organization” (p. 26). Mesmer-Magnus and Viswesvaran (2005) contend that whistleblowing is greater in organizations in which the “whistleblower perceives a high congruence between personal and organizational values” (p. 280). Whistleblowers may truly believe in and dedicate themselves to fulfilling the explicit goals of the company, and they take their roles within the organization very seriously (Elliston et al., 1985a).

Characteristics of a Whistleblower: Situational Factors

Among scholars, certain situational factors are more readily agreed upon as to their perceived predictability for whistleblowing. One such factor suggests that whistleblowers are in large part influenced by their workplace environment and organizational structure. Elliston et al. (1985a) highlight this point by arguing that, “since whistleblowing is an action taken by an employee against the organization, the nature of the organization is itself a factor” (p. 28). They conclude that problems and tensions are more likely to occur in large-scale organizations that employ professionals because professional requirements can often come into conflict with organizational needs (Elliston et al., 1985a).

Professionals who are employed in technical roles have a deep knowledge and understanding of highly specialized fields which are outside of the expertise of their managers. As a result of this specialization of roles, alienation between managers and professionals is more likely to occur (Elliston et al., 1985a). Bureaucratic organizations, however, require coordination, which is achieved through managerial support, but professionals often believe that they should not be subject to external control and that their authority should instead rest on their expertise (Elliston et al. 1985a). In situations where managers pressure professionals to continue their work despite potentially dangerous technical issues, an employee may be moved to blow the whistle (Elliston et al., 1985a).

The disconnect between professionals and managers in terms of their occupational associations can also lend itself to a whistleblowing phenomenon. While management tends to have a greater loyalty to the organization, professionals generally submit their loyalties to greater professional associations. As opposed to their supervisors, they may feel a greater sense of identification with those who share their professional interests. Ellisten et al. (1985a) underline

that professionals often use these “reference groups” or “significant others” “when making assessments or judgments on questions of professional concern” thereby bypassing their employer’s expectations and demands (p. 30). When a conflict emerges between the employer’s expectations and a professional code of ethics, whistleblowing may serve as one solution (Elliston et al., 1985a).

This employee-employer relationship also demonstrates how the nature of hierarchical organizational structures can influence whistleblowing. For example, decentralized organizational structures are less threatened by whistleblowing because they encourage equal participation amongst their employees. Gundlach, Martinko, and Douglas (2003) explain that this is because, “a decentralized organizational structure is conducive to encouraging ethical decision making at all levels” (p. 47). On the other hand, bureaucratic organizations are *more* likely to be threatened by whistleblowers (Near and Miceli, 1996). Because bureaucracies are predicated on the notion that managers hold authority over their superiors, any type of challenge to their decisions undermines the entire structure of the organization (Near and Miceli, 1996). As such, bureaucracies are more likely to ignore or retaliate against whistleblowers to discourage opposition. Correspondingly, because bureaucracies are generally less open to reform than other organizations, and the goal of whistleblowing is to facilitate change, bureaucracies are at a greater threat to experience whistleblowing behavior (Near and Miceli, 1996).

Whistleblowing is also more likely to occur in organizations that support whistleblowing (Near & Miceli, 1996). Elliston et al. (1985a) conclude that if top management neither values nor rewards employees who report unethical and questionable behavior, then whistleblowing is less likely to occur. On the other hand, Gundlach, Martinko and Douglas (2008) suggest that, “By understanding the causal attributions associated with employees’ perceptions, and by taking

their cognitive and emotional concerns seriously, managers can build trust within their organizations and benefit from learning how things operate in the eyes of all employees” (p. 46). By fostering an open dialogue with employees and enforcing mechanisms that allow them to voice their concerns, management can encourage a positive result to the whistleblowing process (Gundlach et al., 2008).

In addition to specific structural factors, certain characteristics of the wrongdoing itself can be responsible for yielding a higher incidence of whistleblowing. Depending on how gravely the employee foresees the consequences of the wrongdoing will in large part determine their decision to blow the whistle (Henik, 2008a). Near and Miceli (1996) adroitly point out, however, that “reasonable people may differ on what constitutes wrongdoing” (p. 509). Consequently, this factor has been disputed among researchers.

Chapter 3: Whistleblower Examples: A Characterization of Two Recent Whistleblowers

In order to contextualize the whistleblowing process as well as the personal and situational characteristics associated with whistleblowing, it may prove beneficial to examine actual examples of the whistleblowing phenomenon. The following chapter will focus on Cynthia Cooper and Harry Markopolos, two of the more recently publicized whistleblowers. Cooper was the whistleblower behind the WorldCom corporate accounting scandal in the early 2000s, while Markopolos was responsible for documenting almost a decade of evidence on Bernie Madoff's ponzi scheme, which was exposed in 2008.

Each case highlights the personal characteristics of Cooper and Markopolos consistent with typical whistleblower characterizations. Both relied upon their strong value system to continue investigations of misconduct despite consistent failure to bring about real change. Their highly technical expertise aided them in their discovery of wrongdoing, but simultaneously caused tension with management. In addition to personal factors, structural characteristics are also considered. Organizational concerns at WorldCom and the institutional failure of the SEC to apprehend Madoff cannot be overstated and will be further analyzed.

Cynthia Cooper

When Cynthia Cooper became aware of the massive fraud at her workplace, she was perhaps at the pinnacle of her career: she was 37 years old and the Vice President of Internal Audit at WorldCom. WorldCom, one of the largest telecommunication companies at the time, boasted some of the greatest acquisition and debt offerings in corporate history (Cooper, 2008). As Cooper (2008) notes, it delivered some of the highest returns on Wall Street, its stock became

the fifth-most widely held, and the *Wall Street Journal* ranked it Number One in return to shareholders over a ten-year period. Despite its success, Cynthia Cooper felt that something had gone awry at WorldCom and through her efforts, she exposed \$3.8 billion in fraud, though the amount would ultimately grow to \$11 billion.

Cynthia's suspicions about the soundness of WorldCom's financial statements began to form in the summer of 2002. As the Vice President of the Internal Audit committee, it was her responsibility to inspect the company's financial records and yet, as she and her team probed deeper into the entries of the WorldCom books, they were met with increasing hostility and unforeseen roadblocks from their superiors. At first, company presidents assured Cooper that she was wasting her time auditing unnecessary areas of the company. Over time, she was asked to delay her audit work, and eventually, she was overtly humiliated and threatened for continuing to investigate questionable financial statements.

Cooper's ties to WorldCom were meaningful, and she greatly revered her position in the company as it demonstrated her profound commitment to her profession as an accountant. Like many whistleblowers, she had a deep connection to the company and a vested interest in seeing it succeed. Her involvement in WorldCom began early; she joined the team when WorldCom, then known as Long Distance Discount Services (LDDS), was still an underdog, regional company and only but a speck in the telecom industry (Cooper, 2008). In her first eight years, however, she witnessed the company grow from \$1.5 billion in revenue to \$38 billion and become an international giant in the telecom business. Cooper's division in WorldCom also went through a staggering transformation. Her career at WorldCom began by establishing a start-up Internal Audit group with a mere two inexperienced staff members and under her behest, she witnessed its transformation to a competent division, well respected by her coworkers.

For Cooper, her occupation was not simply a manner through which to acquire means, but a personal challenge and a source of pride. Her beginnings at WorldCom were not easy—she spent a significant portion of her time convincing management of the value of an internal auditing committee and persuading them to allocate more resources to her department. The highly technical and specialized nature of Cooper’s profession was often beyond the understanding of her managers, however, leading them to disregard the importance of her work (Elliston et al. 1985a). This situational characteristic of whistleblowing was at the forefront of her troubles at WorldCom, but her commitment to her profession drove her to persevere. Despite the obstacles, Cooper (2008) admits that, “at some point, perseverance wins out. I don’t just want to quit. I’ve worked too hard, and I still feel confident that if I can just get a little support, I can build a team of well-qualified auditors who can add value to this company” (p. 113).

Cooper was personally invested in building a successful auditing group at WorldCom, and she would not admit defeat. She even went so far as to call a meeting with the CEO to explain the basics of internal auditing, calling attention to how internal controls could help the company and management meet their objectives (Cooper, 2008). Aside from internal controls constituting an important facet of Cooper’s occupation, her commitment and unwavering faith in internal controls demonstrates a higher than average need to control her surroundings, a very common whistleblower personality trait. As Barton (1995) explains, whistleblowers have a heightened need to control their environment, as they believe that an absence of controls could endanger progress in the company. Cooper’s persistence in trying to establish these controls therefore serves to demonstrate the close tie between situational and personal characteristics in the whistleblowing process.

Cooper's efforts eventually proved fruitful as management began to respond positively to the auditing committee's findings and put many of its recommendations into place. This strong-willed commitment to her profession demonstrates a common situational factor in whistleblowing. Whistleblowers are often professionals employed in highly technical roles, which lie beyond the expertise of their managers, and they therefore believe that their authority should rest on their highly specialized skills. Consequently, they believe they should be exempt from the general, organizational external controls to which managers attempt to conform them (Elliston et al. 1985a). This often leads to a tense relationship between whistleblower and management because of their differing objectives. Cooper's experiences certainly followed this trend.

While Cynthia's passionate commitment to her profession demonstrates the situational factors consistent with whistleblowing, it also crosses into the realm of whistleblower personality traits. She is a determined person in all aspects of life, unwilling to settle for the status quo. In reminiscing about her childhood and teenage years, Cooper underlines that she was very resolute in her endeavors, though they were often unconventional. Cooper (2008) emphasizes that she was "a bit of a free spirit and somewhat single-minded" (p. 16).

One memory is particularly illuminating of Cooper's commitment to her obligations, which some may see as extreme. She recounts a story of working as a waitress, admitting that she was not very good at balancing plates and began to notice that her hours were significantly cut down. Unwilling to fail as a waitress, she requested that her father buy weights so that she could "bulk up" and carry more platters. Eventually, she began to work more hours and her manager confronted her admitting, "You were the worst waitress I ever hired. I did everything I could to get you to leave and you just wouldn't quit. Now you're one of the best waitresses I

have” (p. 38). This personality trait is certainly something that carried over into her career at WorldCom. Despite serious obstacles, she was never willing to surrender her position.

Another of Cooper’s personality traits that is in line with the whistleblowing phenomenon is her sense of moral conviction, fostered through both her religious community and strong familial ties. Both of these can offer whistleblowers a sense of a higher purpose and discourage them from overlooking wrongs perpetrated by their workplace. Cooper had both her religion and her family to serve as a foundation during troubling times. Cooper (2008) notes that some of the most influential people in her life were her church pastors and her youth minister, and as she began to face increasing pressures at WorldCom, she prayed saying, “God please give me strength in making the right decisions” (p. 242).

Like many whistleblowers, Cooper was unwilling to compromise her values. In a 2008 *Time* interview, she articulated that looking back, she would still take the same course of action. She expressed that, “I really found myself at a crossroads where there was only one right path to take” (Ripley, 2008). In addition to her strong belief system, Cooper’s parents as well as her husband were also particularly supportive both during and after the whistleblowing process, encouraging her to act in line with her convictions.

Cooper also fits the demographic description of a “typical” whistleblower. She received a high level of education, acquiring an undergraduate and master’s degree in accounting. She was married and middle-aged when she decided to blow the whistle, both of which are characteristic of whistleblowers. Her position professionally also fits a number of typical whistleblower traits: she had a high level of professional status, high job performance, and felt relatively respected amongst her coworkers (Miceli and Near, 1988).

Cooper became aware of the troubles at WorldCom in the summer of 2000, two years before the fraud was made public. She explains that, though the original organizational structure of the company was able to retain a “strong spirit of camaraderie” during its early years, it eventually turned unstable as the company made a number of serious acquisitions (Cooper, 2008, p. 73). Cooper (2008) explains that WorldCom became “a patchwork of companies piled one on top of another. The result [was] an environment that [was] never stable and a quagmire of duplicate systems and processes” (p. 95). The CEO continued to run the company like a mom-and-pop business, though it was now worth almost \$40 billion.

The first signs of fraud, however, were actually brought to Cooper’s attention by the CEO, who believed that sales representatives manipulated commissions payments (Cooper, 2008). While Cooper was praised for her work in exposing commissions fraud, when she mentioned that internal control weaknesses were the culprit, her supervisor became irritated. As she started to expose more serious problems and present them to management, she was asked her to alter her findings and humiliated at Audit Board meetings.

Over time, it became increasingly harder for Cooper to access the information needed to complete her job. Her supervisor began to delineate which projects she was allowed to take on, something he had never done before. When Cooper and her auditing team finally noticed that large amounts of money were nonsensically moved through different accounts, which turned out to be at the core of the fraud, senior managers contacted Cooper to inform her that she was wasting time and company resources on a negligible task (Cooper, 2008). As Cooper unearthed increasingly serious misconduct, she no longer used internal means to voice her concerns. Whistleblowers tend to first use internal means to express their findings but are often dismissed and instead move to external means to expose their findings. After being yelled at, mocked, and

berated, Cooper decided to keep the information to herself and worked after hours so as not to be distracted by management.

On June 25, 2002, WorldCom submitted their first press release acknowledging that they had misstated their financial statements (Cooper, 2008). Cooper was immediately thrown into the media blitz surrounding the scandal as the company whistleblower. Cooper (2008) emphasizes, however, that, “the last thing I want is to be in the headlines. I’m comfortable leading a private life” (p. 277). She was unable to go about her regular life as she constantly hid from reporters who even followed her onto her home’s driveway. As media scrutiny of WorldCom was at its peak, Cooper nevertheless continued to work in the tense environment, but the ordeal quickly began to take an emotional and physical toll on her life. Cooper (2008) explains that, “the control over my life that I used to feel vanished, replaced by feelings of depression and anxiety. I had done what I believed was right, but there’s an emotional and physical price. There’s rarely a moment when I don’t feel nauseous. I have trouble falling asleep...” (p. 283).

The emotional consequences she experienced, like in many cases of whistleblowing, are two fold—not only did Cooper feel a sense of personal despair and loneliness, she was also overcome with intense feelings of pity for her fellow coworkers associated with the fraud. Furthermore, it was technically as a result of her involvement that many of them were now under investigation. As the FBI searched the offices, Cooper (2008) articulates how she felt, “My team and I watch as people we’ve worked with for years lose their jobs and leave the building carrying their belongings in small cardboard boxes...People we work with may be facing prison. And they aren’t just numbers to us. They are people we have known for a long time, trusted and respected. Many of us know their children, husbands, and wives...” (p. 285).

Cooper eventually quit her job at WorldCom. The experience of being a whistleblower was certainly draining, and she now spends a lot of her time sharing lessons of her experience with both professional groups and students (Cooper, 2008). It should be noted that Cynthia's experiences as a whistleblower followed a somewhat common trajectory of the whistleblowing process and therefore provide us with an illuminating glimpse into the whistleblowing phenomenon.

Harry Markopolos

The name Bernie Madoff is now almost synonymous with ponzi scheme. In 2008, it was finally exposed that Madoff defrauded his investors of \$65 billion by employing a relatively simple ponzi scheme structure. Perhaps the logistics are not simple to the untrained eye, but a number of financiers were attune to the suspicious activities. One of them, Harry Markopolos, tracked Madoff's scheme for an entire nine years before it was finally exposed. Despite his continuous efforts, Markopolos was not able to stop Madoff, but when the fraud finally came to the limelight, Markopolos offered the public a meticulously documented record of Madoff's actions. He may not have been able to stop the greatest financial crime in history, but thanks to his efforts, not only was the extent of Madoff's crime thoroughly documented, the inefficiency of the Securities and Exchange Commission and whistleblower legislation was also publically exposed.

When Markopolos began his investigation of Bernie Madoff, he was working as an assistant portfolio manager. Markopolos (2010) was a quant and a self-proclaimed "nerd" who enjoyed "watching the choreography of numbers" (p. 9). Like many whistleblowers before him, he had a highly technical expertise that strayed beyond the understanding of his managers.

Markopolos' expertise lied in the field of finance; he was capable of conceptualizing associations between numbers that most people were not even aware existed (Markopolos, 2010).

Throughout the nine year ordeal, Markopolos remained working in the finance sector but despite his passion for numbers, he was disillusioned by the overwhelming ethical breaches in the industry. As Elliston et al. (1985a) note, whistleblowers tend to have firm ideals and “feel a strong obligation to ‘take action’ rather than compromise their standards” (p. 26). Markopolos had an extremely firm ethical backing and could not compromise his values with the corruption he witnessed on a daily basis. Harry (2010) expressed that:

What surprised me from the very beginning of my career was the level of corruption that was simply an accepted way of doing business. . . I became disillusioned very quickly. . . I don't know where my education went wrong but my brother and I had been taught that there was no such thing as a minor lapse of ethics. Either you were honest or you were not. It was not possible to be partly honest. (p. 12)

Furthermore, Markopolos (2010) was of the opinion that “good ethics demands action” (p. 3).

Though Markopolos realized that stock-trading violations occurred on a daily basis, he refused to accept them as normal, and reported them regularly despite the SEC's inaction (Markopolos, 2010). He understood that it was an accepted way of conducting business, but he refused to compromise his judgments and partake in the corrupt “business as usual” structure.

Harry's initial interest in Madoff's impressive returns was a matter of curiosity. Madoff was highly praised in the finance community and as Markopolos (2010) explains, he and his team “simply wanted to know how he made his numbers dance” (p. 20). He quickly realized that Madoff's successful returns were numerically impossible and could not be explained without some type of fraudulent basis. Despite alerting management of his suspicions, Harry's superiors nevertheless incessantly pushed him to produce the same types of profits as Madoff. As with the

case of Cynthia Cooper, Markopolos' managers did not possess the technical expertise to fully comprehend the importance of his work. He was finally aggravated enough by their insistence to replicate Madoff's returns that his anger served as the triggering event to report Madoff to the SEC (Markopolos, 2010).

What followed was not the exposure of Madoff's scheme, but the exposure of the extreme inadequacy of the SEC to accomplish the job appointed to them. Over 9 years, Markopolos submitted three separate reports on the Madoff ponzi scheme and met with several members of the commission; all of his efforts ultimately proved fruitless. Despite an overwhelming amount of evidence to convict Madoff, his appeals were consistently dismissed. After Madoff's fraud was unearthed, it became exposed that none of the SEC agents had ever even investigated a Ponzi scheme and would therefore be oblivious to its warning signs. Markopolos (2010) hypothesized that, "as part of the bureaucracy they didn't want to look unqualified or unprepared by asking someone like me for assistance" (p. 140).

After growing disillusioned with the SEC's inability to handle a case of this magnitude, Harry Markopoulou embarked on a new career path. With the hopes of receiving payments from the SEC under their bounty program (a program that pays whistleblower a portion of the fraud they expose), Markopolos formed an investigating organization that examined smaller scale fraud. Ultimately, the SEC dropped all 20 cases the day he filed them. He had wasted his time, money, and professional expertise only to emerge empty-handed. Not only did whistleblowing take a professional toll on Markopolos, it was also a psychologically draining experience. Markopolos (2010) explains:

Being a whistleblower is an extraordinarily lonely existence. You're putting your livelihood at risk, maybe your life, and you can't tell anyone about it. You have to go through every workday as if everything is normal, when in fact you've made a conscious

decision to expose illegal actions your company is taking, and you're doing it with the knowledge that the people you work with are going to suffer because of that, and some of them may even go to jail (p. 120).

This experience was accompanied by a sense of paranoia. The greater the fraud Markopolos uncovered, the more worried he became for his personal safety and the safety of his family. He regularly looked over his shoulder when walking down the street and checked his car for possible explosives, feeling that retaliation was imminent (Markopolos, 2010). His fears were not unfounded; if someone took enough interest to listen to Markopolos' claims, the information he possessed would have been severely damaging.

Unfortunately, Markopolos was unable to expose Bernie Madoff's scheme in time to protect thousands of investors. Instead, he exposed the widespread ineptitude of the SEC and their failure to protect whistleblowers and promote their cause. As Markopolos (2010) argues, "The magnitude of this Ponzi scheme [was] matched only by the willful blindness of the SEC to investigate Madoff" (p. 8). His whistleblowing, however, did not go unnoticed or unappreciated, and led to serious revision in whistleblowing laws. Markopolos' concerns about the shortcomings of the SEC as well as their failure to accommodate whistleblowers will be further discussed in Chapter 4.

Chapter 4: The Role of a Whistleblower

The manner in which whistleblowers are portrayed varies depending on who is describing them. Concerned consumers see them as heroes while bruised companies may view them as disloyal traitors. Despite their reputation, it can hardly be argued that whistleblowers do not provide a service that various sectors of society can enjoy. In terms of benefitting the public, whistleblowers have been instrumental in exposing malpractices that could harm health and overall well-being. Thanks to their efforts, appropriate safety measures have been put in place to protect the public from harm.

Whistleblowers can also benefit their companies by saving them money, especially in current economic situation. As the Association of Certified Fraud Examiners (2009) notes, “fraud levels are expected to continue rising as fraud thrives in times of economic turmoil (p. 8-10). In times of economic difficulty, layoffs become increasingly more common and consequently leave holes in internal control systems (Association of Certified Fraud Examiners, 2009). A 2008 study by the Association of Certified Fraud Examiners, found that, based on a sample of nearly 1000 cases of occupational fraud, “a lack of adequate internal controls was most commonly cited as the factor that allowed fraud to occur” (p. 5). Whistleblowers are instrumental in exposing this fraud. Cynthia Cooper (2008) underlines that, on average, financial statement frauds continue for 25 months before being detected, and tips by whistleblowers serve as the primary means for fraud detection.

Given its wide range of benefits, whistleblowing should be promoted. Though the short term results of whistleblowing may be daunting, especially for companies engaged in wrongdoing, the long term benefits are substantial. As Miceli et al. (1999) emphasize,

“wrongdoing has negative consequences for the organization, its members, and society as a whole,” but whistleblowers have the potential to ameliorate some of these injuries (p.129).

Benefits to the Public

As Earle and Madek (2007) suggest, “whistleblowers have a special place in American culture.” They provide the example of Deep Throat, the whistleblower in the Watergate scandal, in order to demonstrate society’s fixation on whistleblowing (Earle and Madek, 2007). Perhaps one of the most notorious American whistleblowers, Deep Throat became the center of intense speculation both during and even after the Watergate scandal. It therefore comes as almost no surprise that the American public is intrigued by whistleblowers because of their willingness to contribute to the societal good, despite the potential consequences they may suffer as a result it. As Harry Markopolos (2010) emphasizes, “whistleblowers in this country generally have a very difficult time, but they provide a tremendous service. . .” (p. 230).

As actors working to implement change, early scholars tended to take the position that whistleblowers were purely motivated by altruism, disregarding potential retaliation or repercussions (Dozier & Miceli, 1985). More recently, however, experts tend to view the act of whistleblowing as a prosocial behavior, a social behavior that Staub explains as an action that is meant to benefit others while at the same time gaining rewards for oneself (as cited in Dozier & Miceli, 1985). Despite specific motivations, there exists a general consensus that most whistleblowing activity is well-intentioned, and it serves as an impetus for raised public consciousness of potential hazards.

One of the primary benefits of whistleblowing is the power to inform others (Elliston et al., 1985a). Employees have a direct connection to the inner-workings of an organization and are

sometimes the only people with access to crucial information about the type of practices observed within that group. As such, the exposure of dangerous policies and public risks is often reliant on their willingness to blow the whistle. As Glazer and Glazer (1989) explain, whistleblowers “serve as the bellwethers of emerging social problems” (p. 250). It is thanks to their efforts that public attention has been drawn to issues such as the contamination of meat and the warnings of salmonella poisoning, the dangers of nuclear energy, and the serious side effects of certain medications (Glazer & Glazer, 1989). The public continues to rely on ethical resisters to expose future problems related to consumer safety, environmental degradation, and public health (Glazer & Glazer, 1989).

In essence, whistleblowers sacrifice loyalty to the organization in favor of the common good (Glazer & Glazer, 1989). To demonstrate this behavior, Laurence Barton (1995) provides examples of two whistleblowers—Daniel Ellsberg, who released the secret government documents known as *The Pentagon Papers*, and Karen Silkwood, a technician at Kerr-McGee Company in Oklahoma, who blew the whistle on worker contamination at a nuclear power plant. Barton highlights that, “these are two of several hundred whistleblowers whose acts of courage helped to change the way society thought and acted upon questionable public and corporate policies” (p. 160). By forgoing fidelity to their organization and pledging allegiance to the public good, whistleblowers like Ellsberg and Silkwood have the potential to make important changes. In fact, as Barton (1995) underlines, in most cases courts have actually dismissed the notion that whistleblowers are disloyal, and suggest instead that the whistleblower “can often serve as the progenitor for change in public policy” (p. 305).

Benefits to the Organization

Though the public may perceive a whistleblower as a hero, he or she is not always framed in such a positive light within their organization. Unfortunately, whistleblowing within an organization is often unwelcome, and whistleblower concerns are often buried and ignored (Miceli et al., 1991). Barton suggests that coworkers feel that the whistleblower undermines the spirit of the team, and whistleblowers are therefore often perceived by the organization as being disloyal, or “another kind of enemy within” (p. 305). While this may be a common sentiment among co-workers, it is the case that, if dealt with properly, whistleblowers can actually benefit the organization at which they work.

For an organization, perhaps one of the most advantageous consequences of blowing the whistle is the opportunity to locate and change corporate practices that lead to the wrongdoing (Elliston et al., 1985a). Since most whistleblowers that used external measures to blow the whistle used internal measures first (Miceli & Near, 1985), organizations have the opportunity to consider the whistleblower’s concerns and make appropriate adjustments to current practice before the whistleblower “goes public”. As Mesmer-Magnus and Viswesvaran (2005) contend, internal channels are usually less threatening than external reporting which can invite legal consequences and public scrutiny (p. 278). As such, Miceli and Near (1988) convey that organizations can “avoid the negative consequences that may result from external reporting” (p. 268).

As such, whistleblowing can serve as a type of precautionary measure. Barton (1995) explains that whistleblowing can “identify workers and managers who act illegally or immorally, send a message throughout the organization that unethical behavior will not be tolerated, and alert coworkers that their valid complaints about other abuses will also be heard and adjudicated”

(p. 305). By encouraging and engaging in dialogue with disconcerted employees, management can actively seek to find solutions for the wrongdoings whistleblowers expose.

Miceli et al. (1991) express that though there is a possibility that whistleblowing may threaten organizational authority structures (Weinstein, 1979), in the long run, organizational effectiveness can be improved because whistleblowers may suggest solutions to organizational problems (Brief & Motowidlo, 1986). Because employees are immersed in the day-to-day functions of their organization, they can help locate organizational inefficiencies and suggest possible adjustments. Ellston et al. (2005) explain that, “the direction of change in any organizational system is only partially determined by management” while “the other sources are found within internal and external processes” (p. 38). Ellston et al. (2005) contend that whistleblowers can fill this external vacuum and serve as an “organizational guidance through nonformal channels of influence” (p. 38). Whistleblowers can help organizations to adapt to a changing environment and highlight matters of concern.

Organizations can also benefit from whistleblowing from a material perspective. Organizations can protect themselves from financial losses by implementing anti-fraud controls such as whistleblowing encouragement programs. The Association of Certified Fraud Examiners (2008) found that the use anti-fraud controls seemed to have a significant impact on an organization’s exposure to fraud citing that, “organizations that [had fraud controls and] conducted surprise audits suffered a median loss of \$70,000, while those that did not had a median loss of \$207,000” (p. 5). Therefore, by implementing measures such as anonymous hotlines and employee support programs, organizations can minimize material losses (Association of Certified Fraud Examiners, 2008).

With American organizations losing as much as 7% of their annual revenue to fraud, a median loss amounting to \$175,000, it becomes clear why whistleblowers serve such an indispensable purpose. On a national scale, fraud was responsible for approximately \$994 billion in losses in 2008, with small businesses being particularly vulnerable to fraud (Association of Certified Fraud Examiners, 2008). Whistleblowers are instrumental in exposing these potential losses and can therefore be a great asset to their organizations. They can also alert the public to the misallocation of funds as well as other harmful company practices.

Benefits to the Current Economic Situation

Whistleblowers play a prominent role in revealing wide-scale corporate fraud, and the increase in exposure of fraudulent activity during the past decade can in large part be attributed to the work of whistleblowers. In fact, a recent study seeking to measure the effectiveness of various methods of identifying corporate fraud concluded that whistleblowers proved to be the most effective monitors in detecting fraud (Kim, 2009). Markopolos (2010) underlines this notion by articulating that, “whistleblower tips are 13 times more effective than external auditing” (p. 230).

By exposing fraud, the Office of the Whistleblower of the U.S. Securities and Exchange Commission asserts that whistleblowers can aid in: “minimizing the harm to investors, better preserving the integrity of the United States’ capital markets, and more swiftly holding accountable those responsible for unlawful conduct” (Office of the Whistleblower, 2011). In addition to minimizing the harm to investors, whistleblowers are also capable of restoring investor confidence (Kim, 2009).

Chapter 5: The History of Whistleblower Legislation

Given the wide range of benefits provided by whistleblowing, it is easy to see why society would wish encourage this type of behavior. However, because the consequences associated with whistleblowing can be extremely high, drafting laws aimed at encouraging whistleblowing and protecting whistleblowers have faced significant difficulties.

It is not uncommon for organizations to retaliate against whistleblowers by invoking such measures as dismissal, transfer, blacklisting, and personal harassment (Glazer & Glazer, 1989). Glazer and Glazer (1989) also note that whistleblowers face “the harsh reality of disrupted careers and family stress (p. 133),” and Alford (2001) suggests that, “most are in some way broken. . . and unable to come to terms with what they have learned about the world” (p. 1). The often grave aftermath of whistleblowing begs the question whether laws protecting whistleblowing are at all feasible.

Federal Whistleblower Protections

The first mention of whistleblower protection in a legal context appeared almost a century and a half ago. The First Amendment in conjunction with the Civil Rights Act of 1871 established that employees of state and local governments had the right to obtain both monetary and injunctive relief if they were discriminated against on the basis of First-Amendment-protected whistleblowing (Kohn, 2001). However, the types of activities protected under these measures were relatively restricted, and it was not until nearly a century later that more encompassing whistleblower laws were enacted.

The first of these, the Civil Service Reform Act, was enacted in 1978 and established the first statutory cause of action which protected whistleblowers from employer retaliation

(Ebersole, 2011). Though the Civil Service Reform Act provided a foundation for future whistleblower laws, it had relatively little impact because its provisions were limited to protecting federal employees (Ebersole, 2011). As a result, Congress enacted the Whistleblower Protection Act of 1989 which had a three-fold objective: (1) it established a separate agency to litigate claims; (2) allowed individuals to file whistleblower claims without government support; and (3) permitted attorneys' fees to be shifted from whistleblowers to plaintiffs (Ebersole, 2011). All of these measures greatly expanded whistleblower protection.

In the meantime, the federal government made important amendments to the False Claims Act, which was originally enacted in 1863 during the Civil War to control fraud in defense contracts (Kohn, 2001). In its enactment, lawmakers revived the tradition of *qui tam* which allowed private citizens, also known as relators, to bring lawsuits on the government's behalf in exchange for monetary compensation (Constantine Cannon, 2005). The False Claims Act was not used again extensively until World War II, which precipitated the reform of the Act in 1943. As Thomas L. Harris (2009) notes, the revision of the Act was prompted by "the exploitation of the Act by opportunistic informers," and almost lead to a repeal of the *quit tam* provisions (p. 1299). The reform stopped short of an outright appeal but severely restricted relator's ability to recover compensation under the False Claims Act, insisting that he or she provide information and evidence that the government did not already possess (Harris, 2009). Additionally, the revisions restricted the amount of compensation available to a whistleblower.

In 1986, Congress reversed their prior reforms and significantly amended the FCA (Harris, 2009) amid widespread reports of outlandish abuses by government contractors (Constantine Cannon, 2005). Some contracting agencies were found to charge \$400 for hammers, \$1,000 for bolts, and \$7,000 for coffee pots (Constantine Cannon, 2005). The

amendments sought to incentivize relators to come forward, most notably by increasing the whistleblower's share of compensation in a successful suit (Harris, 2009). The new amendments also made it possible for relators to be reimbursed for attorney's fees, and other reasonable costs (Harris, 2009). Harris (2009) also notes that, overall, the reforms made it easier to bring *qui tam* suits because the Act no longer required "proof of specific intent to defraud," but imposed liability on the defendants even if they acted simply with "deliberate ignorance" or "reckless disregard of the truth of falsity" of the information provided to the government (p. 1300).

The amendments were relatively successful in increasing FCA suits, at least until the late 1990s (Harris, 2009). As Constantine Cannon (2005) cites, "by the mid-1990s, hundreds of millions of dollars were being returned to the government through the False Claims Act every year, with tens of millions of dollars going to whistleblowers" and by 2000, "these annual recoveries crossed into the billions." It is important to note that the False Claims Act only applies to federal money, but a number of states have passed their own version of the FCA, almost identical to the original (Kohn, 2001).

More recently, President Obama's signing of the Patient Protection and Affordable Care Act (PPACA) further extended the ramifications of the False Claims Act. Previously, the FCA's public disclosure bar prevented potential whistleblowers from profiting from the exposure of fraud that had already been exposed or that had reached the public domain (Berger and Montague, 2013). The PPACA, however, expands the FCA's reach and weakens the public disclosure bar by using a more flexible standard (Santo, 2010). For example, the new public disclosure bar does not consider information disclosed in private and state proceedings to be "privately disclosed," (Berger and Montague, 2013) thereby decreasing the amount of instances in which a whistleblower's suit can be dismissed (Santo, 2010). Furthermore, as Santo (2010)

underlines, “the PPACA extends the scope of the original source exception.” This means that the whistleblower’s allegations can now be grounded in secondhand information as long as they add to the information already present in the public domain (Santo, 2010). Previously, the FCA only allowed relators to bring forth a suit if they had “direct and independent knowledge” of the information provided (Santo, 2010).

The most recent revision to the False Claims Act was initiated in July of 2010 in what is known as the Dodd-Frank Act. Passed in response to the financial meltdown of the late 2000s, the Dodd-Frank Act sought to ameliorate some of the shortcomings of the FCA by including financial incentives as well as retaliation protection for whistleblowers (Constantine Cannon, 2013). The provisions of the Dodd-Frank Act as well as its strengths and weakness will be examined in detail in a later chapter.

Industry Specific Whistleblower Protections

Additional whistleblower protection statutes that are particular to certain industries have also been passed in recent decades. A nuclear law as well as a number of environmental laws such as the Clean Air Act, the Water Pollution Act, and the Toxic Substances Act (Elliston, Keenan, Lockhart, & van Schaick, 1985b) protect employees who report violations of environmental or nuclear safety regulations to public authorities (Kohn, 2001). Laws protecting whistleblowers in workplace safety cases have also been implemented and enforced through regulatory committees such as the Occupational Safety and Health Administration (OSHA) and the Nuclear Regulatory Commission (NRC) (Kohn, 2001). Furthermore, federal statutory protections for whistleblowers have been put into effect in very specific cases that range from

airline safety to mine health safety to protections for migrant and seasonal agricultural workers, just to name a few (Kohn, 2001).

In 1970, The Occupational Safety and Health Act (OSH Act) was passed in order to ensure that employers provide employees with a safe and healthy workplace, and the act contained a number of whistleblower protections in order to ensure that this goal was met. An OSHA factsheet (2013) underscores that the Act protects employees who report unsafe conditions and guarantees that the employee “cannot be transferred, denied a raise, have hours reduced, be fired, or punished in any other way” as a result of voicing their concerns. The United States Department of Labor (2009) explains that the Act covers employees in an array of different fields by articulating a broad understanding of “employer,” defining him or her to be any “person engaged in a business affecting commerce who has employees.” If the employer is found guilty, OSHA will “require the employer to reinstate the employee, pay back wages, restore benefits and [make available] other possible remedies to make the employee whole.”

As Richard Alaniz (2013) explains, in recent years, OSHA has been working on restructuring their whistleblower program by making changes to their program policy and internal systems in order to strengthen the enforcement of its whistleblower protections. In 2012 budget, OSHA sought to create more visibility for whistleblowing activity and added 25 new investigators to investigate whistleblowers’ claims (Alaniz, 2013). It has also changed its training methods such as including a national whistleblower training conference for whistleblower investigators (Alaniz, 2013). As expected, the restructuring lead to an increase of whistleblower claims as well as an increase in the number of OSHA determinations. As Chinn et al. (2013) cite, “the number of whistleblower cases submitted to OSHA in fiscal year 2012 was

2,787, up 5% from 2011, and the number of complaint determinations made by OSHA increased by 42%.”

Despite these efforts, there seems to exist a general consensus that whistleblowers are still not adequately protected nor can they come forward with incriminating evidence without fear of retaliation. Kohn (2001) suggests that, “the failure of Congress to pass comprehensive legislation adequately covering employees who “blow the whistle” on illegal governmental or corporate conduct is the single most remarkable deficiency in the protection of legitimate whistleblower activity” (p. 79). Alford (2001) recounts his experience at a conference put on by the Governmental Accountability Project and mentions that all attorneys in attendance advised their clients not to blow the whistle because “it costs too much and it hurts too much”(p. 33). Even with efforts in place that prohibit retaliation against whistleblowers, most will nevertheless get fired and never work in the field again (Alford, 2001).

Chapter 6: Recent Developments in Whistleblower Law

The Sarbanes-Oxley Act

Recent developments in whistleblower legislation have sought to ameliorate some of the deficiencies exposed by past whistleblower laws. According to Steinberg and Kaufman (2005), in 2002, Congress enacted the Sarbanes-Oxley Act (SOX) “in part to eliminate the patchwork and vagrancies of current state whistleblower laws” (p. 446). Though the patchwork of state laws contributed to its enactment, the overriding reason for SOX’s implementation stemmed from the plethora of corporate fraud unearthed by corporations such as WorldCom, Enron, and Adelphia (Earle & Madek, 2007). However, the swift enactment of SOX, passed by a vote of 99-0 in Congress (Earle & Madek, 2007), may suggest that the government was more so motivated by a desire to rebuild investor confidence in the U.S. securities market (Kim, 2009), than in providing extended whistleblower protection.

Despite its intentions, SOX *does* provide extended protection for whistleblowers in comparison to the laws the preceding it. Section 806 of the Sarbanes-Oxley Act, known as the Whistleblower Provision, protects employees of public corporations from discrimination and retaliation for reporting fraudulent activities (Kim, 2009). In order to be protected by the Whistleblower Provision, the whistleblower must have a reasonable belief that the employer committed fraud, violated the Security and Exchange Commission regulations, or violated another federal provision related to fraud (Kim, 2009). Regardless of whether the claim proves to be true, the whistleblower remains protected as long as he or she genuinely believed that the employer was engaged in fraudulent activities (Kim, 2009). On the other hand, in order to report a retaliation claim, the whistleblower must provide three pieces of evidence: (1) the worker must be a part of a protected activity; (2) suffer negative employment action; (3) provide reasonable

cause that his or her exposure was a contributing factor to the employer's negative employment action (Steinberg & Kaufman, 2005).

A series of remedies are made available to the whistleblower under SOX. The act entitles relief that is necessary "to make the employee whole" and Steinberg and Kaufman (2005) explain that this type of relief includes "compensatory damages in the form of reinstatement with the same seniority, back pay with interest, and special damages including litigation costs, expert witness fees, and reasonable attorney fees" (p. 455). The act, however, does not allow for punitive damages, and it does not mention damages associated with loss of reputation or pain and suffering (Kim, 2009).

In addition to the components of the statute that confront whistleblowers, there exist a series of provisions directed at public companies as well. For example, SOX mandates that the audit committees of public companies must develop and enforce procedures aimed at hearing whistleblower complaints (Steinberg & Kaufman, 2005). Furthermore, if a person within the company discriminates or retaliates against the whistleblower, they can be held civilly liable for their unlawful action (Steinberg & Kaufman, 2005) and serve up to ten years in prison (Kerschberg, 2011).

Keeping in mind the billions of dollars spent collectively by public corporations to comply with SOX provisions as well as Congress' intentions in the development of the Sarbanes-Oxley Act, the question remains whether SOX lived up to its expectations (Sweeney, 2005). Paul Sweeney (2005) notes that Sarbanes-Oxley is not the deal-closing statute that many lawmakers may have hoped for, and Kim (2009) underscores that the legislative branch has been incapable of protecting whistleblowers as it had intended. One of the fundamental flaws in the Whistleblower Provision rests upon the decision to install the Occupational Safety and Health

Administration (OSHA) as the agency to administer whistleblower claims under SOX. Though OSHA already administers some whistleblower statutes, it is mainly concerned with matters of labor and employment (Kim 2009). Sarbanes-Oxley requires OSHA to investigate matters outside of their usual arena (Earle & Madek, 2007), and they do not have the proper training or experience to deal with the intricacies of fraud (Kim, 2009). Earle and Madek (2007) assume that because OSHA already managed a series of other whistleblower statutes, Congress simply decided to extend OSHA's oversight; they advance the belief that cost was clearly a factor in this decision.

Yet another flaw of SOX can be located in its procedural difficulties (Kim, 2009). The procedure of filing a grievance under SOX, for example, has been particularly confusing due to its strict time restrictions. In its original form, the statute of limitations to file a retaliation claim was only 90 days, and the statute of limitations period began when the whistleblower became aware of the employer's intention of implementing adverse employment actions, and not when the action was actually implemented (Kim, 2009). (This time restraint was changed to 180 days in the Dodd-Frank Act, which will be explained in the upcoming section.)

Additionally, though SOX outlined a series of mandates for public companies, they have not always abided by these rules which exposes yet another weakness in Sarbanes-Oxley (Sweeney, 2005). Toby Bishop, the past president of The Association of Certified Fraud Examiners, asserts that companies that are determined to engage in fraudulent activities can "override" the controls put in place by SOX, and that despite the resources spent to comply with provisions of Sarbanes-Oxley, whistleblower programs have not been a high priority (Sweeney, 2005).

There is also a question as to whether the whistleblower in a retaliation case actually holds the advantage over their employer when filing a case. It arises from a component of the provision stating that the whistleblower's employer must only provide evidence that he or she would have undertaken the same measures (i.e. demotion, transfer, discharge, etc.) against the whistleblower regardless of the whistleblower's conduct (Earle & Madek, 2007). Disputes as to who carries the heavier burden of proof, the whistleblower or the employer, are common among scholars. Some argue that the whistleblower is at a disadvantage because he or she must provide proof of three factors in the retaliation claim (as explained above) while the employer must only fulfill one (Kim, 2009). On the other hand, some argue that the employer is at a disadvantage because he or she may genuinely want to demote, transfer, or discharge an unsatisfactory employee but when this employee also happens to be a whistleblower, the employer may incur unjustified liabilities (Steinberg & Kaufman, 2005).

Though Sarbanes-Oxley did not improve whistleblower protection as much as many had hoped, proponents of SOX argue that it was successful in a different manner—it changed the business environment in the United States (Sweeney, 2005). Following the widely-publicized cases of corporate fraud, investors may have been hesitant to put faith in the market. However, by providing an additional level of government oversight, Sweeney (2005) suggests that SOX “helped scrub a tarnished image of corporate America” (p. 23).

In line with this argument, Earle and Madek (2007) execute a more disparaging analysis of the Sarbanes-Oxley Act by suggesting that its enactment served only as window-dressing for the concern of whistleblowers. In their opinion, the “unusual rapidity” of Congress to pass this statute “signals that perhaps Congress had not carefully considered all the provisions. . .and perhaps the Senate simply wanted a quick fix that allowed it to appear decisive, rather than

choosing inaction or filibuster” (Earle & Madek, 2007, p. 4). Earle and Madek (2005) question whether SOX merely promised a “mirage of safety,” and they suspect that Congress simply wanted to appear proactive, but it essentially allowed companies to continue business as usual (p. 3).

The Dodd-Frank Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act, more commonly known as the Dodd-Frank Act, was enacted in 2010 in an attempt to prevent the recurrence of the financial crisis of 2007-2009 (King, 2011) by creating an improved financial regulatory system that enforces accountability and transparency (Rouse, 2011). As cited by Kerschberg (2011), the Dodd-Frank Act seeks to reward whistleblowers “who bring violations of securities law, commodities law, or the Foreign Corrupt Practices Act to the attention of the proper government authorities—the Securities Exchange Commission, the Department of Justice, or the Commodities Futures Trading Commission.”

Partially in response to the Madoff and Stanford ponzi scheme, the Dodd-Frank Act greatly expanded upon the whistleblower protection offered by Sarbanes-Oxley (Ebersole, 2011). Section 922 of the Dodd-Frank Act amends the whistleblower provisions set forth in SOX in the following ways: (1) expands whistleblower protection to employees of all subsidiaries and affiliates of the public company, not exclusively the employees of the public company (Ebersole, 2011); (2) extends Sarbanes-Oxley’s statute of limitations from 90 to 180 days (King, 2011); (3) prohibits retaliation against an employee, regardless of whether the employee reasonably believed that the conduct exposed was unlawful (SOX only protected internal whistleblowers if the individual reasonably believed the conduct was unlawful) (The Network, 2011); and (4)

allows a whistleblower to file a retaliation complaint directly in federal court (The Network, 2011).

The major difference between Sarbanes-Oxley and the Dodd-Frank Act is that the Dodd-Frank Act offers a financial reward for whistleblowing (Kerschberg, 2011). In order to provide monetary incentives for potential whistleblowers, Congress created the Whistleblower Program, and, subsequently, The Office of the Whistleblower was established to monitor the program (Office of The Whistleblower, 2011). According to the Securities and Exchange Commission, the Whistleblower Program allows the Commission to provide the whistleblower with 10-30% bounty of the total monetary sanctions that the Commission collects in response to the whistleblower's claim, as long as the sanctions yield more than \$1 million (Office of the Whistleblower, 2011). By providing both monetary incentives and anti-retaliation protection, the hope is that the Dodd-Frank Act is more comprehensive in its coverage and more enticing for potential whistle-blowers than Sarbanes-Oxley.

Because the Dodd-Frank Act did not go into effect until 2010, and the final rules regarding the implementation of the Whistleblower Program did not take effect until August 12, 2011, we are still in the beginning stages of accessing its success. Ebersole (2011), however, notes that early reports suggest that whistleblower tips have increased significantly since Dodd Frank's enactment, but more time is needed to evaluate their quality. Nevertheless, criticisms of the act have already emerged, specifically in the installment of the bounty. As Ebersole (2011) logically suggests, individuals are more likely to report misconduct if they find it to be morally reprehensible, and, as such, monetary incentives would be most effective in situations where the conduct is *not* viewed as morally reprehensible. Because whistleblowing entails the reporting of behavior that is deemed morally reprehensible, the Whistleblower Program can be seen as both

frivolous and ineffective. Ebersole (2011) even suggests that the monetary incentives can prove detrimental because they may propel a flood of low quality tips and result in unnecessary and excessive litigation.

Nevertheless, there have been some breakthroughs made with the help of the Dodd Frank Act. Protes and Popper (2013) cite lawyers who have commented that, with the help of whistleblowers, they were able to discover large scale ponzi schemes and fraudulent activities at some of the largest stock trading firms on Wall Street. Despite these successes, however, the Dodd Frank Act still faces a number of challenges. Some lawyers contend that The Office of the Whistleblower takes weeks or sometimes months before responding to whistleblower tips while others think that the SEC may be overstating the power of the whistleblower program (Protes & Proper, 2013).

Other obstacles to the enforcement of the whistleblower provisions stem from organizations themselves, some of which implement policies that violate the spirit of the program (Protes & Proper, 2013). David Marshall, a founder of a whistle-blower law firm, explains that some companies discretely insert language in its contracts that essentially stop the whistleblower from going to the SEC (As cited by Protes and Proper, 2013). Employees are often not aware of these provisions of their contracts, and if they chose to use external measures of whistleblowing, they are barred from doing so under contract. Of course, the successes of the Dodd-Frank Act should not be overlooked, but only time will tell whether its failures can be ameliorated.

Whistleblower Protection Enhancement Act

In November of 2012, President Obama signed into law the most recent piece of whistleblower legislation—the Whistleblower Protection Enhancement Act (WPEA). The WPEA made whistleblower protections stronger as it updated some of the weak and outdated provisions of the Whistleblower Protection Act of 1989 (Government Accountability Project, 2013). Overall, as Samuel Rubenfield (2012) of the Wall Street Journal notes, “the law expands protections for federal workers who blow the whistle on misconduct, fraud and illegality.”

According to a statement released by the White House (2012), “the WPEA amends whistleblower protections for Federal employees by: clarifying the scope of protected disclosures; tightening requirements for non-disclosure agreements; expanding the penalties imposed for violating whistleblower protections; and establishing a Whistleblower Protection Ombudsmen in certain agencies.” The Whistleblower Protection Enhancement Act also made significant strides in terms of protecting whistleblowers from reprisal. Dylan Blaylock (2012) emphasizes that federal employees are protected from retaliation if they, “are not the first person to disclose misconduct; disclose misconduct to coworkers or supervisors; disclose the consequences of a policy decision; or blow the whistle while carrying out their job duties.”

President Obama has been widely praised for championing this historical whistleblower protection law. As Tom Devine (2013), the Legal Director of the Government Accountability Project, has noted, “no other president has come close to President Obama on strengthening whistleblower job rights.” It is therefore particularly ironic that, in recent months, Obama’s administration has been harshly criticized for both its failure to protect whistleblowers as well as its increasingly severe treatment of them. In the recent film *War on Whistleblowers*, David Carr (2013) of the New York Times laments that, “the Obama administration came to power

promising the most transparent administration in history...and began prosecuting [whistleblowers] every which way” (as cited by Tom Devine, 2013).

Some believe that the administration has cracked down on federal whistleblowing under the pretext of national security. Devine (2013) cites that, “the Obama administration has attacked more national security whistleblowers as Espionage Act criminals than all previous administrations combined, lumping them with spies.” Calderone and Sledge (2013) observe that whistleblowers have been “fired, prosecuted or shunned” for exposing the inefficiencies in military projects. Devine (2013) argues that the dangers of this approach are particularly severe. He articulates that national security whistleblowers are the ones society needs the most because they expose threats from our own government (Devine, 2013). Jonathan Landay, a veteran national security reporter attests that the environment for exposing this type of wrongdoing has shrunk because “the crackdown on leaks seems deliberately intended to have a chilling affect” (as cited by Calderone and Sledge, 2013).

Currently, the Justice Department and the Defense Department are arguing in favor of further restrictions on federal employees. Josh Gernstein (2013) explains that the Departments take the position that, “federal employees...who don’t have access to classified information, can be demoted or effectively fired without recourse to the usual avenues of appeal if their jobs are designated as “sensitive.” Critics argue that if ordinary, federal jobs are deemed “sensitive,” then “almost any job at any agency could be designated as such” (Gernstein, 2013). This could remove federal workers’ whistleblower protections and grant agencies greater leniency in punishing employees who report wrongdoing (Gernstein, 2013).

Proponents of the measure, on the other hand, argue that this is a necessary precaution due to the nature of technology. Federal employees like accountants or stockroom workers have

greater access to secretive computer databases which can pose a cyber-security, insider threat.

The administration therefore finds itself in a difficult bind; it must strike the appropriate balance between national security concerns and whistleblower protection.

Chapter 7: Conclusion

Current corporate practices elicit a sense of mistrust from the public, heightened by the exposure of corruption in various industries. Instances of wasteful spending, fraudulent activities, and risky decision-making have surfaced into the public sphere, becoming almost a standard narrative of current business practices. Though this is not a positive reflection of business proceedings, transparency is necessary to alert us into making appropriate changes. To a certain extent, it is through the tribulations of whistleblowers that these wrongdoings have come to the public's attention. With firsthand knowledge of the misconduct, whistleblowers have been able to shed light on the misconduct they observe.

As analysts have articulated, we currently find ourselves in the age of the whistleblower (Chin et al., 2013). Whistleblowing is on the rise (Greenberger et al., 1987) and more of it is being brought to the attention of external actors (Chin et al., 2013). As the thesis has articulated, the rise in whistleblowing should be welcomed as a positive phenomenon as whistleblowing can come to benefit to various sectors of society. Not only the public but the organization itself can take advantage of the concerns whistleblowers expose. Whistleblowers can bring attention to industries and practices in need of revision thereby jumpstarting the process of change.

Whistleblowers such as Cynthia Cooper and Harry Markopolos have served precisely as these initiators of change. Thanks to their efforts and the grand scale misconduct they exposed, the government made appropriate revisions to legal statutes aimed at impeding similar types of wrongdoing. The wrongdoing unearthed by whistleblowers need not be of the same magnitude that Cooper and Markopolos exposed, however. Smaller scale whistleblowing is also beneficial as it can prompt organizations to restructure ineffective or unfair arrangements. Because

whistleblowers are immersed in the work environment, they are better able to identify problems than, for instance, external monitoring agencies (Cooper, 2008).

The road to initiating change, however, is a difficult. This thesis has presented the whistleblowing process as an arduous one as the whistleblower finds themselves in a morally complex situation. The series of considerations a potential whistleblower must undergo is extensive and tiring. He or she must consider the possible consequences of their actions and question the extent of retaliation they will receive. With this in mind, it is impressive that individuals nevertheless decide to blow the whistle in pursuit of the greater good. Whether the whistleblower is only seeking to change organizational practices or whether they are concerned about the greater good of the public, whistleblowing can hardly be seen as a selfish act (Dozier & Miceli, 1985).

In fact, whistleblowers sacrifice organizational loyalty with the hopes that their temporary “discretion” brings about positive change. Because of this, their coworkers and superiors may see the whistleblower as a type of traitor. It is important to understand, however, that the decision to blow the whistle is not an easy one and it is usually made with the belief that the exposure of misconduct will not only be welcomed, but that the wrongdoing will be eradicated (Mesmer-Magnus and Viswesvaran, 2005). Managers, however, do not always make the appropriate adjustments, and the whistleblower must decide whether to continue pushing their claim or abstain from further action.

Whistleblower’s value systems are continuously put to the test as they weight the cost and benefits of whether to blow the whistle. They consider possible retaliation and make a decision of whether or not the exposure of the misconduct is worth the potential personal sacrifices. Because the whistleblowing process is so demanding, whistleblowers tend to be

people of strong moral conviction with an unwavering commitment to their value system (Glazer & Glazer, 1989). As the thesis has explained, a series of other personal factors also contribute to a person's decision to blow the whistle. It seems almost intuitive that this category of people would share certain common characteristics. Situational factors are also partially responsible for prompting whistleblowing. As social beings, we are influenced by our surroundings and whistleblowers are equally influenced by the context in which they find themselves.

Based on the above considerations, it is clear that the phenomenon of whistleblowing is multifaceted and complex. In order to make the process less difficult, legislators have attempted to construct laws that will both protect whistleblowers and encourage other potential whistleblowers to come forward. It has become evident, however, that this is not an easily attainable feat. The drafting of effective whistleblower legislation has proved to be very challenging and despite numerous efforts, it is still far from ideal.

Though whistleblower laws are not perfect, it should not be overlooked that the government nevertheless understands the whistleblowing process to be beneficial. Since the 19th century, the government has sought to develop ways to encourage whistleblowing, acknowledging that the services whistleblower provide are unique and in their best interest. Originally, whistleblowers helped the government detect instances of fraud in government contracts, and since then, whistleblower legislation has expanded to encompass much more (Kohn, 2001).

A number of laws have been enacted and consistently revised to meet whistleblower concern. Legislation such as the False Claims Act, for example, has been revised a number of times to accommodate developing factors in the whistleblowing process. Provisions of the widely discussed Sarbanes-Oxley Act and the Dodd-Frank Act include explicit measures meant

to protect and encourage whistleblowers. Most recently, President Obama signed a revised version of the Whistleblower Protection Act of 1989, now named the Whistleblower Protection Enhancement Act, which is meant to broaden the scope of action protected against retaliation (Blaylock, 2012). Clearly, whistleblower legislation has moved with the times as it attempts to ameliorate deficiencies of past laws.

Even though legislation aims to accommodate whistleblowing, it seems as if there exists an inherent flaw in this approach. Whistleblower legislation often comes short of meeting its stated goals and constant revisions are necessary to meet these shortcomings. This pattern of constant revision leads one to wonder when the revision will stop and no longer be necessary. Perhaps, however, whistleblower legislation will never be able to guarantee whistleblowers total protection from retaliation. Even with more stringent punishments for retaliation, employers have found ways to circumvent the rules. Whistleblowers today may have a better chance of seeking redress from the government, but this does not change the fact that they are not immune from retaliation.

Whistleblowers and researchers alike have proposed different means of encouraging whistleblowing. Cynthia Cooper (2008) noted, for example, that the use of internal controls might be the best way to expose wrongdoing in the workplace. Cooper (2008) underlined that “tips by employees tend to be the primary means of fraud detection” and emphasized the importance of using an “anonymous fraud hotline” (p. 297). Researchers have also praised efforts such as encouraging open communication within the workplace. Gundlach et al. (2008) emphasize that, “organizations must have open channels of communication in place that enable employees to report workplace acts they perceive as questionable and that assist them in understanding how

these acts were cause” (p. 46). These types of measures can allow for managers and potential whistleblowers to discuss concerns in a safe setting.

Moving Forward

With the state of whistleblowing as we find it in today, it is worthwhile to consider what we can expect from this phenomenon in the future. The obstacles that whistleblowers face and the retaliation they often experience may prompt some to believe that whistleblowing will remain in its current state or potentially decline. Though this is a valid opinion, the type of society we find ourselves in may suggest that the opposite is true. With increased media scrutiny and the proliferation of watchdog groups, it has become the norm to expose scandals almost on a daily basis. Watchdog groups such as WikiLeaks, for example, thrive on anonymous tips and the amount of information they have exposed shows employees want the public to be aware of misconduct.

This type of environment will continue to make the exposure of scandals of more acceptable and, subsequently, encourage more whistleblowing. In general, whistleblowers are praised by the public and hopefully the positive sympathies the media espouses towards whistleblowers will encourage potential whistleblowers to take action. Furthermore, the fact that we live in a time of corporate suspicion may prompt potential whistleblowers to act on this distrustful view of corporate practices and lead them to expose misconduct.

Moreover, the quick paced nature of technological advances will make whistleblowing even easier. With more sophisticated systems and enhanced electronics at our disposal, it will become easier to document employer malpractices. For example, cellphones with video or voice recording capabilities can capture misconduct without raising any suspicions. The

interconnectedness of computer systems can also facilitate whistleblowing. Employees have access to extensive databases that might contain “sensitive” information, or evidence of the organization’s wrongdoing. With the above considerations in mind, it follows that the phenomenon of whistleblowing is hardly going to decline or remain stagnant. In fact, it will only continue to gain speed.

References

- Alaniz, R.D. (2013, March 13). Employers should prepare for more OSHA whistleblower investigations. *EHS Today*. Retrieved from <http://ehstoday.com/safety/employers-should-prepare-more-osha-whistleblower-investigations>
- Alford, C.F. (2001). *Whistleblowers: Broken lives and organizational power*. Ithica and London: Cornell University Press.
- Association of Certified Fraud Examiners. (2008). *2008 Report to the nation on occupational fraud and abuse*. Retrieved from http://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/2008-rtn.pdf
- Association of Certified Fraud Examiners. (2009). *Occupational fraud: A study of the impact of an economic recession*. Retrieved from http://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/occupational-fraud.pdf
- Barton, L. (1995). *Ethics: The enemy in the workplace*. Cincinnati: South-Western Publishing and International Thomson Publishing Company.
- Berger & Montague, P.C. (2013). *Patient protection and Affordable Care Act: False Claims Act broadens for qui tam relators*. Retrieved April 20, 2013 from <http://www.bergermontague.com/practice-areas/whistleblowers,-qui-tam-false-claims-act/whistleblowers,-qui-tam-false-claims-act-legal-blog/patient-protection-and-affordable-care-act>
- Blaylock, D. (2012). *President signs Whistleblower Protection Enhancement Act*. Retrieved April 19, 2013 from <http://www.whistleblower.org/blog/42-2012/2380-president-signs-whistleblower-protection-enhancement-act-wpea->

- Brief, A.P., & Motowidlo, S. (1986). Prosocial organizational behaviors. *Academy of Management Review*, *11*, 710-725.
- Calderone, M. & Sledge, M. (2013, April 16). Obama whistleblower prosecutions lead to chilling effect on press. *The Huffington Post*. Retrieved from http://www.huffingtonpost.com/2013/04/16/obama-whistleblower-prosecutions-press_n_3091137.html
- Chinn, L.B., Mufson, H.M., & Pearlman, S.J. (2013, January 28). OSHA whistleblower program: Record number of cases filed & resolved in 2012. *JD Supra Law News*. Retrieved from <http://www.jdsupra.com/legalnews/osha-whistleblower-program-record-numbe-85642/>
- Chiu, R. K. (2003). Ethical judgment and whistleblowing intention: Examining the moderating role of the locus of control. *Journal of Business Ethics* *43*, 65-74.
- Constantine Canon. (2013). *The False Claims Act*. Retrieved April 20, 2013, from <http://www.constantinecannon.com/whistleblower-false-claims-act.php>
- Cooper, C. (2008). *Extraordinary Circumstances*. Hoboken, NJ: John Wiley & Sons, Inc.
- Devine, T. (2013, April 16). Obama's dangerously contradictory stance on whistleblowing. *The Guardian*. Retrieved from <http://www.guardian.co.uk/commentisfree/2013/apr/16/obama-contradictory-stance-whistleblowing>
- Dozier, J.B., & Miceli M.P. (1985). Potential predictors of whistleblowing: A prosocial behavior perspective. *Academy of Management Review*, *10*, 823-836.
- Earle, B.H., & Madek, G.A. (2007). The mirage of whistleblower protection under Sarbanes-Oxley: A proposal for change. *American Business Law Journal*, *44*, 1-54.
- Ebersole, E. (2011). Blowing the whistle on the Dodd-Frank whistleblower provisions. *Ohio*

State Entrepreneurial Business Law Journal, 6, 123-174.

Elliston, F., Keenan, J., Lockhart, P., & van Schaick, J. (1985a). *Whistleblowing research: Methodological and moral issues*. New York: Praeger.

Elliston, F., Keenan, J., Lockhart, P., & van Schaick, J. (1985b). *Whistleblowing: Managing dissent in the workplace*. New York: Praeger.

Gernstein, J. (2013, April 13). Obama administration divides over whistleblowers. *Politico*. Retrieved from <http://www.politico.com/story/2013/04/obama-administration-whistleblowers-transparency-90025.html>

Glazer, M.P., & Glazer P.M. (1989). *The whistleblowers: Exposing corruption in government and industry*. New York: Basic Books.

Government Accountability Project. (2013). *Whistleblower Protection Enhancement Act*. Retrieved April 20, 2013 from <http://www.whistleblower.org/program-areas/legislation/wpea>

Greenberger, D.B., Miceli, M.P., & Cohen, D.J. (1987). Oppositionists and group norms: The reciprocal influence of whistle-blowers and co-workers. *Journal of Business Ethics*, 6(7), 527-42.

Gundlach, M.J., Douglas, S.C., & Martinko M.J. (2003). The decisions to blow the whistle: A social information processing framework. *Academy of Management Review*, 28, 107-123.

Gundlach, M.J., Martinko, M.J., & Douglas, S.C. (2008). A new approach to examining whistleblowing: The influence if cognitions and anger. *SAM Advanced Management Journal*, 78(4), 40-50.

- Harris, T.L. (2008). Alternate remedies & the False Claims Act: Protecting qui tam relators in light of government intervention and criminal prosecution decisions. *Cornell Law Review*, 94, 1293-1320.
- Henik, E.G. (2008a). *Mad as hell or scared stiff? The effects of value conflict and emotions on potential whistleblowers*. (Unpublished doctoral dissertation). University of California, Berkeley.
- Henik, E.G. (2008b). Mad as hell or scared stiff? The effects of value conflict and emotions on potential whistleblowers. *Journal of Business Ethics*, 80, 111-119.
- Jos, P.H., Tompkins, M.E., & Hays, S. W. (1989). In praise of difficult people: A portrait of the committed whistleblower. *Public Administration Review*, 49, 552-561.
- Kerschberg, B. (2011). The Dodd-Frank Act's robust whistleblowing incentives. *Forbes* (online). Retrieved April 24, 2011 from <http://www.forbes.com/sites/benkerschberg/2011/04/14/the-dodd-frank-acts-robust-whistleblowing-incentives/>
- Kim, J. (2009). Confessions of a whistleblower: The need to reform the whistleblower provision of the Sarbanes-Oxley act. *The John Marshall Law Review*, 43, 241-264.
- King, M.E. (2011). Blowing the whistle on the Dodd-Frank amendments: The case against the new amendments to the whistleblower protection in section 806 of Sarbanes-Oxley. *American Criminal Law Review*, 48, 1457-1483.
- Kohn, S.M. (2001). *Concepts and procedures in whistleblower law*. Westport, CT: Quorum.
- Lee, J., Heilmann, S.G., & Near, J.P. (2004). Blowing the whistle on sexual harassment: Test of a model of predictors and outcomes. *Human Relations*, 57, 297-322.
- Markopolos, H. (2010). *No one would listen*. Hoboken, NJ: John Wiley & Sons, Inc.

- Mesmer-Magnus, J.R., & Viswesvaran, E. (2005). Whistleblowing in organizations: An examination of correlates of whistleblowing intentions, actions, and retaliation. *Journal of Business Ethics*, 62, 277-297.
- Miceli, M.P., & Near, J.P. (1985). Characteristics of organizational climate and perceived wrongdoing associated with whistleblowing decisions. *Personnel Psychology*, 38, 525-544.
- Miceli, M.P., & Near J.P (1988). Individual and situational correlates of whistleblowing. *Personnel Psychology*, 41, 267-281.
- Miceli, M.P., & Near J.P (1992). *Blowing the whistle: The organizational and legal implications for companies and their employees*. New York: Lexington.
- Miceli, M.P., Near, J.P., & Schwenek C.R. (1991). Who blows the whistle and why? *Industrial and Labor Relations Review*, 45, 113-130.
- Miceli, M.P., Rehg M., Near J.P., & Ryan K.C. (1999). Can laws protect whistleblowers? Results of a naturally occurring field experiment. *Work and Occupations*, 26, 129-151.
- Miceli, M. P. & J. P. Near: 2002, What makes whistle-blowers effective?: Three field studies. *Human Relations*, 55(4), 455-479.
- Near, J.P., & Miceli, M.P. (1985). Organizational dissidence: The case of whistleblowing. *Journal of Business Ethics*, 4, 1-16.
- Near, J.P., & Miceli M.P. (1996). Whistleblowing: Myth and reality. *Journal of Management*, 22, 507-526.
- Occupational Health and Safety Administration. (2013). *OSHA fact sheet: Your rights as a whistleblower*. Retrieved from http://www.osha.gov/OshDoc/data_General_Facts/whistleblower_rights.pdf

- Office of The Whistleblower. (2011). *Welcome to the office of the whistleblower*. Retrieved April 24, 2013 from <http://www.sec.gov/whistleblower>.
- Proress, B. & Popper N. (2013, April 23). Hazy future for thriving S.E.C. whistle-blower effort. *New York Times*. Retrieved from <http://dealbook.nytimes.com/2013/04/23/hazy-future-for-s-e-c-s-whistle-blower-office/?ref=business>
- Richardson, B.K., Wang, Z., & Hall, C.A. (2012). Blowing the whistle against greek hazing: The theory of reasoned action as a framework for reporting intentions. *Communication Studies*, 63(2), 172-193.
- Ripley, A. (2008, February 4). Q&A: Whistle-blower Cynthia Cooper. *Time*. Retrieved from <http://www.time.com/time/arts/article/0,8599,1709695,00.html>.
- Rotter, J.B. (1966). Generalized expectancies for internal vs. external control of reinforcement. *Psychological Monographs*, 80, 1-28.
- Rouse, M. (2011). Dodd-Frank Act. Retrieved April 24, 2011 from <http://searchfinancialsecurity.techtarget.com/definition/Dodd-Frank-Act>.
- Rubinfeld, S. (2012, November 27). Obama signs whistleblower protection bill into law. *The Wall Street Journal*. Retrieved from <http://blogs.wsj.com/corruption-currents/2012/11/27/obama-signs-whistleblower-protection-bill-into-law/>
- Santo, B.G. (2010, July). The False Claims Act: Analysis of the recently expanded legislation on qui tam actions and related impact on whistleblowers. *ABA Health eSource*.
- Standard, J.H. (2004). Curing the ethical malaise in corporate America: Organizational structures as the anecdote. *SAM Advancement Management Journal*, 69(3), 14-21.

- Steinberg, M.I., & Kaufman, S.A. (2005). Minimizing corporate liability exposure when the whistle blows in the post Sarbanes-Oxley era. *The Journal of Corporation Law*, 30, 445-463.
- Sweeney, P. (2005). Report card is mixed. *Financial Executive*, 21, 22-25.
- The Network. (2011). *Global legislation*. Retrieved May 3, 2013 from http://www.tnwinc.com/index.php/resources/doddfrank_whistleblower.aspx
- The White House, Office of the Press Secretary. (2012, November 27). *Statement by the Press Secretary on H.R. 2606, H.R. 4114, S. 743 and S. 1956*. Retrieved from <http://www.whitehouse.gov/the-press-office/2012/11/27/statement-press-secretary-hr-2606-hr-4114-s-743-and-s-1956>
- United States Department of Labor. (2009). *Safety and health standards: Occupational safety and health*. Retrieved from <http://www.dol.gov/compliance/guide/osha.htm>
- Weinstein, D. (1979). *Bureaucratic opposition*. New York: Praeger.