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Since its inception in August 2011, the SEC's whistleblowing program has received over 18,000 tips and has distributed over thirty awards. The Commission's Enforcement Division has lauded the program, emphasizing its recoveries (over $500 million in the aggregate) as well as its generous bounties (over $100 million total). Nevertheless, an agency focused on deterrence must pay attention to the volume of credible reports it receives from insiders, particularly because deterrence has been shown to rest so strongly on the putative wrongdoer's perceived probability of detection. From that perspective, the program's success is more ambiguous: twenty-six covered actions (some involving more than one whistleblower) derived from a field of more than 18,000 tips.

This Article advances an explanation for the program's modest "hit rate," which is whistleblowing's effect on the probability of criminal sanction. If employees who possess the most concrete information of wrongdoing are also those most exposed to criminal prosecution, whistleblowing morphs into self-incrimination. This is so because the whistleblower who voluntarily discloses her participation strips herself of her most effective legal protection, the government's difficulty in establishing her guilty state of mind.

To demonstrate this dynamic, the Article introduces two types of employees: Complicits (those who have violated the law) and Innocents

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(those with no legal exposure whatsoever). Whereas Complicits possess more valuable information, they are less incentivized to seek a financial bounty. The Article then identifies the legal, psychological and organizational factors most likely to inflate the number of Complicits within the firm, thereby depressing the pool of potential whistleblowers. The Article then considers the various strategies policymakers might employ to either dampen or undo this effect.

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INTRODUCTION

Since its inception in 2011, the Securities and Exchange Commission's whistleblowing program has awarded whistleblowers over 100 million dollars.[1] While protecting its whistleblowers' anonymity, the Commission and its top officials have enthusiastically praised the various insiders who have come forward, awarding them as much as thirty million dollars in one case and referring to the program overall as a "game changer" that has had a "transformative effect."[2] Nevertheless, the actual number of awards the SEC has issued pales in comparison to the number of tips it has received.[3] Over the program's first five years of existence, over 18,000 reports have been filed with the SEC's whistleblowing office. During the same time-period, the SEC has distributed thirty-four awards relating to twenty-six SEC enforcement actions.[4] Even taking into account additional awards since announced or in the pipeline, the SEC's whistleblowing "hit rate" — that is, the percentage of tips that result in a financial recovery warranting a whistleblower reward — registers just below 0.2%.

The program, which was intended to leverage current and former employees' knowledge of wrongdoing, has received nothing but uniform support from SEC officials,[5] notwithstanding its flaws. The

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[1] *See* 2016 SEC ANNUAL REPORT TO CONGRESS ON THE DODD–FRANK WHISTLEBLOWER PROGRAM 1 (2016), https://www.sec.gov/files/owb-annual-report-2016.pdf [hereinafter SEC 2016 ANNUAL REPORT]. Congress enacted Dodd–Frank in 2010. The SEC created the Office of the Whistleblower in February 2011 and initiated training sessions for its enforcement personnel in May 2011. Its final whistleblowing rules (Section 21F or 17 C.F.R. § 240.21F) became effective on August 12, 2011, at which time its website became effective. *See generally* U.S. SEC. & EXCH. COMM'N, OFFICE OF INSPECTOR GEN., EVALUATION OF THE SEC'S WHISTLEBLOWER PROGRAM 1, 12 (2013) (describing program's early period). The Office of the Whistleblower treats the effective date of the whistleblowing rules as the commencement of the program. *See id.* at 29 (observing program, "has been only been in place since August 12, 2011").

[2] *See* SEC 2016 ANNUAL REPORT, *supra* note 1, at 1, 10 (setting forth top ten whistleblowing awards); Press Release, U.S. Sec. & Exch. Comm'n, SEC Pays More than $3 Million to Whistleblower (July 17, 2015), https://www.sec.gov/news/pressrelease/2015-150.html [hereinafter SEC Pays].

[3] *See* SEC Pays, *supra* note 2. Congress enacted Dodd–Frank in 2010. The SEC set up its first hotline for whistleblowers in May 2011 and published its final Whistleblowing Rules in August 2011.

[4] "Since the beginning of the whistleblower program, the Commission has issued awards to 34 individuals in connection with 26 covered actions, as well as in connection with several related actions." SEC 2016 ANNUAL REPORT, *supra* note 1, at 17. The 2016 Report counts all awards through September 30, 2016, which is the conclusion of the fiscal year. *Id.* at 1 n.1.

[5] As Christina Parajon Skinner notes, public officials have voiced far more

statute authorizing the program, the Dodd–Frank Wall Street Reform and Consumer Protection Act, could be clearer.[6] Some observers worry the program short-circuits the internal compliance function within corporations, while also granting the SEC too much discretion to decide how to handle tips and complaints.[7] A thicket of implementation rules restrict the number and type of individuals who can seek bounties, leaving some groups partially[8] or completely ineligible to participate.[9] Finally, the very ease of filing a tip generates some number of frivolous complaints by disgruntled employees.[10] All

enthusiasm for the program than private companies. *See* Christina Parajon Skinner, *Whistleblowers and Financial Innovation*, 94 N.C. L. REV. 861, 865 (2016) (observing that private sector has been "more reserved" than public officials in favor of SEC program) [hereinafter *Whistleblowers*].

[6] Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). For cases interpreting the term "whistleblower," compare Berman v. Neo@Olgilvy, LLC, 801 F.3d 145 (2d Cir. 2015) (affirming the SEC's view that "whistleblower" includes individuals who report securities violations internally), with Asadi v. GE Energy, 720 F.3d 620 (5th Cir. 2013) (concluding that Congress unambiguously limited the designation to those who report wrongdoing directly to the Commission). For recent commentary, see generally Andrew Walker, Note, *Why Shouldn't We Protect Internal Whistleblowers? Exploring Justifications for the* Asadi *Decision*, 90 N.Y.U. L. REV. 1761 (2015).

[7] Notably, the would-be whistleblower lacks the power to file a qui tam lawsuit on the public's behalf. *See, e.g.*, Julie Rose O'Sullivan, *"Private Justice" and FCPA Enforcement: Should the SEC Whistleblower Program Include a Qui Tam Provision?*, 53 AM. CRIM. L. REV. 67, 69 (2016); *see also* Geoffrey Christopher Rapp, *Mutiny by the Bounties?: The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd–Frank Act*, 2012 BYU L. REV. 73, 78 [hereinafter *Mutiny by the Bounties?*] (arguing that Dodd–Frank's "biggest failure" is that it "does not create true *qui tam* structures").

[8] Compliance personnel can submit "original information" if 120 days have elapsed since an internal report, or if a "reasonable basis" exists for believing disclosure is necessary to prevent a "substantial injury" on investors. 17 C.F.R. § 240.21F-4(b)(4)(iii), (v) (2016). The SEC's whistleblowing rules exclude attorney disclosures based on privileged information, *see id.* § 240.21F-4(b)(4)(i), (ii) (2016), although exceptions here also exist. *See* Kathleen Clark & Nancy J. Moore, *Financial Rewards for Whistleblowing Lawyers*, 56 B.C. L. REV. 1697, 1745 (2015) (parsing SEC's whistleblowing rules with regard to attorneys); Jennifer M. Pacella, *Advocate or Adversary? When Attorneys Act as Whistleblowers*, 28 GEO. J. LEGAL ETHICS 1027, 1032 (2015) (arguing that SEC's whistleblowing rules potentially conflict with attorney's professional responsibility and duty of confidentiality to client).

[9] Jennifer M. Pacella, *Bounties for Bad Behavior: Rewarding Culpable Whistleblowers Under the Dodd–Frank Act and Internal Revenue Code*, 17 U. PA. J. BUS. L. 345, 356 (2015) [hereinafter *Bounties for Bad Behavior*].

[10] *See* Anthony J. Casey & Anthony Niblett, *Noise Reduction: The Screening Value of Qui Tam*, 91 WASH. U. L. REV. 1169, 1175 (2014) (theorizing that whistleblowing program's ease of entry can swamp agency with low value information, thereby undermining enforcement); *see also* O'Sullivan, *supra* note 7, at 69 (warning of current

of these concerns have been duly cited and discussed, often amidst the background assumption that regulators and legislators can solve them with just a few tweaks here and there.[11]

This Article introduces a more profound problem: When a whistleblower comes forward with credible and specific information, she exposes her company, her colleagues, and herself to government enforcement activity, up to and including criminal sanctions. Even if her tip fails to produce a single indictment, it has the capacity to generate an intrusive and stressful government investigation, not to mention a serious civil enforcement action.[12] The ensuing inquiry may extend far beyond the reach of the whistleblower's original complaint, attracting the attention of prosecutors, state attorney generals, and regulatory agencies. Whistleblowing therefore poses profound risks to any employee who has violated any law that carries with it serious penalties. Moreover, whistleblowing's cost rises precipitously for crimes whose successful prosecution depends on the government's ability to prove the defendant's requisite mens rea or "state of mind." For this variety of tipster, whistleblowing is not simply a morally ambiguous act of snitching; instead, it is tantamount to self-incrimination.

To date, scholars have paid relatively little attention to this dilemma and its overall effect on whistleblowing's effectiveness as a deterrent. Instead, the whistleblowing literature has hewed closely to doctrinal and institutional design questions, asking whether the program should more closely follow the qui tam framework erected by the False Claims Act (FCA).[13] The few scholars to raise the thorny issue of

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program's tendency towards "cost-free tipping").

[11] Much of this discussion was written prior to the 2016 election of President Donald Trump. Given the whistleblowing program's general support (albeit with caveats), this Article presumes the program's continued existence.

[12] "A lengthy investigation is likely to change the target's life irrevocably, even if there is no indictment; an indictment almost certainly will change the target's life, even if there is no conviction." John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POL'Y 423, 425-26 (1997).

[13] A *qui tam* lawsuit is a cause of action filed by an individual on the public's behalf. It enables private individuals to seek civil recoveries for harms perpetrated on the public. The False Claims Act, which punishes persons and organizations that attempt to defraud the United States, is often heralded for its employment of the *qui tam* device. *See generally* David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913 (2014) [hereinafter *Private Enforcement's Pathways*] (analyzing several decades' worth of qui tam lawsuits). For Freeman Engstrom's comparison of whistleblowing regimes, see David Freeman Engstrom, *Whither Whistleblowing? Bounty Regimes, Regulatory Context and the*

"whistleblower complicity" have conceptualized it primarily as a question of eligibility, inquiring whether an individual should profit from his wrongdoing.[14] That question, however, is not this Article's subject; rather, it is whether the prospect and salience of criminal liability shuts off the very flow of information bounty programs are assumed to promote. The concern, the Article argues, is not eligibility so much as it is viability.

An extensive literature has long explored the social, psychological and economic harms visited upon whistleblowers.[15] These are the damages observers cite most when exploring the traditional "dilemma" endured by putative whistleblowers.[16] This Article reconceptualizes that dilemma. For complicit employees, the sticking point is neither the size nor certainty of a monetary bounty, much less the ability to take control of matters by filing a civil lawsuit. Rather, it is the knowledge that disclosure significantly increases the risk of criminal punishment. This is a problem of unique importance for bounty programs crafted in the United States, whose federal criminal statutes blur much of the distinction between incipient frauds and completed ones.

Challenge of Optimal Design, 15 THEORETICAL INQUIRIES L. 605, 605-06 (2014) (arguing that nature of harm and determinacy of underlying legal mandate help "structure the choice" between pure bounty regimes and *qui tam* provisions).

[14] *See* O'Sullivan, *supra* note 7, at 77 (describing the ways in which the "SEC wrestled with the question whether those complicit in the reported securities violations [should] benefit from their wrongdoing"). Jennifer Pacella has provided the most in depth treatment of the eligibility question as it relates to wrongdoers, comparing the SEC's bar on recovery with the IRS' program, which excludes payments only to those convicts who "instigated or planned" the illegal conduct. *See* Pacella, *Bounties for Bad Behavior*, *supra* note 9, at 349-50, 376-77 (registering preference for SEC's approach). Robert Howse and Ronald Daniels have also addressed "whistleblowing complicity," albeit more abstractly. *See* Robert Howse & Ronald J. Daniels, *Rewarding Whistleblowers: The Costs and Benefits of an Incentive Based Compliance Strategy*, *in* CORPORATE DECISION-MAKING IN CANADA 525, 538-39 (Ronald J. Daniels & Randall Morck eds., 1995) (arguing against a "hard-and-fast rule preventing an individual who is implicated in wrongdoing from recovering a whistleblower reward").

[15] *See, e.g.*, Richard E. Moberly, *Sarbanes–Oxley's Structural Model to Encourage Corporate Whistleblowing*, 2006 BYU L. REV. 1107, 1144 [hereinafter *Sarbanes–Oxley's Structural Model*].

[16] The Senate Committee Report supporting the creation of the SEC's bounty program describes the standard dilemma as the employee's "difficult choice between telling the truth and the risk of committing 'career suicide.'" *See* S. REP. NO. 111-176, at 111 (2010), https://www.congress.gov/111/crpt/srpt176/CRPT-111srpt176.pdf; *see also* Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213, 2240, 2245 (2010) (identifying negative consequences to whistleblowers, including "retaliation from fellow workers and friends, personal attacks on one's character during the course of a protracted dispute, and the need to change one's career").

Some readers may challenge the Article's premise, given the prosecutions in the wake of the 2008 Financial Crisis.[17] Government prosecutors have repeatedly reminded the public how difficult it is to prosecute individuals for frauds and similarly deceptive acts when evidence is lacking.[18] If white-collar prosecutions are so "rare,"[19] why should fear of criminal prosecution play such an important role in the average employee's decision to blow the whistle?

A closer examination of white-collar criminal law resolves this tension. It is indeed difficult to prosecute individuals for behavior that either originates in or resembles legitimate business activity.[20] The reason for this difficulty, however, is that prosecutors often lack proof of an individual's state of mind.[21] Whistleblowing partially alleviates this problem, particularly when it reveals the content of a private conversation or provides a recitation of elaborate efforts to conceal data. Such evidence enables jurors to infer that offenders knew what they were doing, and that their behavior was not merely risky, but in fact deceptive and wrongful.[22]

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17 For a pointed critique of the government's failure to pursue criminal prosecutions in the wake of the mortgage crisis, see Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/. On the relative scarcity of corporate prosecutions in general, see BRANDON GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 82-84 (2014) (pointing out relative paucity of prosecutions of corporate executives in conjunction with their companies' settlements with the Department of Justice).

18 "[I]n some instances, it is simply not possible to establish knowledge of a particular scheme on the part of a high-ranking executive who is far removed from a firm's day-to-day operations." Att'y Gen. Eric Holder, Remarks on Financial Fraud Prosecutions at NYU School of Law (Sept. 17, 2014), https://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law.

19 Daniel Richman, *Federal White Collar Sentencing: A Work in Progress*, 76 LAW & CONTEMP. PROBS. 53, 63 (2013) (arguing that the political economy of federal prosecutions renders white collar prosecutions "pretty rare").

20 "When the corporate actor engages in crime, she does so in a social setting in which she is embedded in activities that society has chosen, at the basic level of capitalist economic structures, to treat as not only legitimate but desirable." Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. 823, 877 (2014) [hereinafter *White Collar Offender*].

21 Although the Dodd–Frank program permits the whistleblower to file a complaint anonymously through her lawyer, the SEC's regulations prohibit the payment of any bounty until it has learned the whistleblower's identity. *See* 17 C.F.R. § 240.21F-7(b)(1)–(3) (2016).

22 "To secure a conviction for [foreign bribery cases], prosecutors generally need to prove some degree of *scienter* and they need to prove that *scienter* . . . . The most difficult element for the government to prove in FCPA cases is corrupt intent." O'Sullivan, *supra* note 7, at 82. Professor Buell has written extensively on the

In the wake of a major corporate scandal, many employees can plausibly deny complicity in any wrongdoing. The whistleblower who discloses an illicit scheme and alludes to her own state of mind, however, takes a terrible risk, particularly if she has joined in that scheme with knowledge of its underlying wrongfulness.[23] When all facts are known, the federal laws of fraud, obstruction, and bribery emerge as extremely powerful tools. Accordingly, for many employees, "whistleblowing" — now hailed as a lucrative opportunity to secure a government bounty — is intertwined with a terrible downside, the disclosure of one's state-of-mind and consequent exposure to criminal fines and imprisonment.

If employees perceive whistleblowing as a form of self-incrimination, monetary bounties are bound to fall short, as few individuals will accept a cash bounty in exchange for their increased exposure to a jail sentence.[24] At the same time, the unwinding of a whistleblowing bounty regime — particularly one ushered in with as much fanfare as the SEC's program — broadcasts its own array of undesirable messages. Accordingly, the decidedly second-best move may be to leave the program intact while quietly downplaying its minimal effect on deterrence. The Article thus serves as a warning for other regulators: be careful what you wish for.[25]

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importance of *mens rea* in regard to white-collar crimes such as fraud and bribery. *See, e.g.*, Samuel W. Buell, *Culpability and Modern Crime*, 103 GEO. L.J. 547 (2015); Buell, *White Collar Offender*, *supra* note 20; Samuel W. Buell, *What Is Securities Fraud?*, 61 DUKE L.J. 511 (2011) [hereinafter *Securities Fraud*].

[23] Although the Supreme Court rejected a private cause of action for aiding and abetting securities fraud in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 176-77 (1994), the SEC can still pursue civil actions premised on aiding and abetting, and the Department of Justice and United States Attorney's offices may seek criminal indictments under 18 U.S.C. § 2 (2012), which treats principals and accomplices as equals. Joseph A. Franco, *Of Complicity and Compliance: A Rules-Based Anti-Complicity Strategy Under Federal Securities Law*, 14 U. PA. J. BUS. L. 1, 61 n.250 (2011).

[24] Alternatively, regulators may need to inflate bounties to such a point that they attract false claims. "[W]hen the risk of a false report is sufficiently high . . . it is desirable to provide no whistleblower award." Yehonatan Givati, *A Theory of Whistleblower Rewards*, J. LEGAL STUD. 43, 56-57 (2016).

[25] *See, e.g.*, David Cooper, *Blowing the Whistle on Consumer Financial Abuse*, 163 U. PA. L. REV. 557, 580-98 (2015) (proposing bounty program administered by Consumer Financial Protection Bureau for "information that protects consumers' financial welfare"); Karie Davis-Nozemack & Sarah J. Webber, *Lost Opportunities: The Underuse of Tax Whistleblowers*, 67 ADMIN. L. REV. 321, 322-23 (2015) (arguing for revamped IRS bounty program); Skinner, *Whistleblowers*, *supra* note 5, at 882-84 (citing efforts to expand whistleblowing programs).

The remainder of this Article unfolds as follows. Part I briefly discusses Dodd–Frank's whistleblower program, its reporting mechanics, and the provisions that have occasioned the strongest calls for reform. Part II elucidates the whistleblower's self-incrimination problem by introducing two categories of employees: "Innocents," who have witnessed wrongdoing, but are legally innocent of any violation, and "Complicits," who are technically guilty of at least one federal crime. Part II also identifies the factors that are most likely to heighten or lessen the number of Complicits within a given firm. Part III analyzes the various responses a policymaker might adopt to address the problem. It also considers the applicability of the Innocent/Complicit framework in other contexts.

I. A PROMISING BOUNTY PROGRAM

Several scholars have meticulously traced the evolution of the SEC's whistleblowing bounty program.[26] In the wake of several blockbuster accounting fraud scandals that boiled over in the 1990's and early 2000's, Congress responded in Section 806 of the Sarbanes–Oxley Act of 2002 by enacting a number of provisions that purported to protect whistleblowing employees from retaliation.[27]

Following the financial crisis and mortgage meltdown of 2008, Congress again revisited the plight of whistleblowers when it enacted the Dodd–Frank Act in 2010. In addition to strengthening outstanding anti-retaliation provisions, Congress sought an additional tool to draw forth information from corporate employees, namely a financial reward. This Part briefly reviews the bounty program's origins, analyzes the "conveyor belt" that best describes the process through which a "tip" eventually becomes a "reward" and concludes by surveying the most notable reform efforts to date.

A. *Origins and Eligibility*

Although much of the Dodd–Frank Act emerged in response to the 2008 Financial Crisis, its whistleblowing provisions arose out of the

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26 *See, e.g.*, Rapp, *Mutiny by the Bounties?*, *supra* note 7; Amanda M. Rose, *Better Bounty Hunting: How the SEC's New Whistleblower Program Changes the Securities Fraud Class Action Debate*, 108 NW. U. L. REV. 1235, 1261-73 (2014) (outlining program and explaining how it works).

27 *See* 18 U.S.C. § 1513(e) (2012) (criminalizing retaliation when it is undertaken with retaliatory intent); *id.* § 1514A (2012) (creating administrative relief with the Department of Labor and cause of action for reinstatement and back pay). For implementing regulations, see 29 C.F.R. § 1980.100 (2016).

SEC's poor handling of information regarding Bernard Madoff's billion-dollar Ponzi scheme.[28] Harry Markopolos, an analyst and would-be hero, attempted on numerous occasions to contact the SEC and demonstrate the fraudulent nature of Madoff's investment business.[29] Markopolos' claims fell on deaf ears, however, as the SEC's agents who interviewed him either discounted or misunderstood his analysis.[30] As a result, Madoff's scheme continued unabated for years until he admitted his behavior to his sons, whose attorney promptly contacted federal prosecutors.[31]

Congress responded by including in Dodd–Frank a provision that required the SEC to pay a bounty of between ten and thirty percent of any recovery in a "covered" or "related" action exceeding one million dollars to whistleblowers who provided "original information" pertaining to violations of securities laws.[32] Combined with other improvements, the bounty would empower the Commission in preventing and promptly detecting schemes before they embarrassed the government and rattled potential investors.

To implement the new program, the SEC created a new Office of the Whistleblower, which would educate the public and task a group of SEC agents with reviewing and monitoring tips.[33] The Office and its user-friendly website represented a marked turn from the bounty

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[28] "[W]e have defined a Ponzi scheme as one 'in which early investors are paid off with money received from later investors in order to prevent discovery and to encourage additional and larger investments.'" United States v. Simmons, 737 F.3d 319, 326 (4th Cir. 2013) (quoting United States v. Loayza, 107 F.3d 257, 259 n.1 (4th Cir. 1997)).

[29] "[T]he tragedy is that the SEC, on multiple occasions, involving multiple credible complainants, and spanning sixteen years, had opportunities to investigate and uncover Madoff's fraud." Robert J. Rhee, *The Madoff Scandal, Market Regulatory Failure and the Business Education of Lawyers*, 35 J. CORP. L. 363, 365-67 (2009) [hereinafter *Madoff Scandal*]. For a highly nuanced account of the Madoff debacle and the criticism that followed, see Donald C. Langevoort, *The SEC and the Madoff Scandal: Three Narratives in Search of a Story*, 2009 MICH. ST. L. REV. 899, 899-914 [hereinafter *SEC and the Madoff Scandal*].

[30] Rhee, *Madoff Scandal*, supra note 29, at 366-67 (concluding that the SEC investigators who read Harry Markopolos' memo "were too ignorant to understand its import"). Langevoort's more charitable reading is that Markopolos came off "obnoxious and self-absorbed, deep into his own personal crusade against Bernie Madoff, which caused [the SEC's investigator] not to pay as much attention to the underlying argument as she should have." Langevoort, *SEC and the Madoff Scandal*, supra note 29, at 909.

[31] Amir Efrati et al., *Top Broker Accused of $50 Billion Fraud*, WALL STREET J. (Dec. 12, 2008), http://www.wsj.com/articles/SB122903010173099377.

[32] 15 U.S.C. § 78u-6(b)(1) (2012).

[33] Rose, *supra* note 26, at 1269-71 (describing the Office and its personnel).

program the SEC had employed for insider trading.[34] According to critics, the precursor program was, among other things, insufficiently generous, difficult to use, and not well known to the public.[35] Dodd–Frank's bounty program, in contrast, ushered in an enthusiastic whistleblowing-friendly era at the SEC, assuring ease of communication and prompt replies from government investigators.[36]

Dodd–Frank also strengthened anti-retaliation protections for whistleblowers. The anti-retaliation provisions set forth in the Sarbanes–Oxley Act (SOX)[37] enabled employees to lodge administrative complaints with the Occupational Health and Safety Administration (OSHA) and seek back pay and reinstatement.[38] Dodd–Frank improved upon SOX by permitting covered individuals to file actions in federal court immediately,[39] where they could receive double their owed compensation and other costs,[40] all within a much more generous statute of limitations.[41]

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[34] The SEC's Office of the Whistleblower website is quite user-friendly; it includes fairly easy-to-follow instructions and tabs for filing claims, and offers viewers an explanatory overview of the program. *See* U.S. SEC. & EXCHANGE COMMISSION OFF. WHISTLEBLOWER, https://www.sec.gov/whistleblower (last visited Jan. 23, 2017).

[35] For an overview of the reward program's deficiencies, see generally U.S. SEC. & EXCH. COMM'N, OFFICE OF AUDITS, REP. NO. 474, ASSESSMENT OF THE SEC'S BOUNTY PROGRAMS (2010). Within this report, the Inspector General set forth a series of suggestions that Congress and the SEC eventually incorporated in the revamped program. *See generally id.*

[36] *See, e.g.*, Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, The SEC as the Whistleblower's Advocate, Address Before the Corporate Securities Law Institute at Northwestern University (Apr. 30, 2015), https://www.sec.gov/news/speech/chair-white-remarks-at-garrett-institute.html.

[37] Sarbanes–Oxley Act of 2002 (Public Company Accounting Reform and Investor Protection Act), Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of U.S.C. titles 11, 15, 18, 28, and 29).

[38] 18 U.S.C. § 1514A(c)(2)(A)–(B) (2012). For a summary of SOX's anti-retaliation protections and their various drawbacks, see Richard Moberly, *Sarbanes–Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 5-11 (2012) [hereinafter *Whistleblower Provisions*]; Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes–Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 92 (2007).

[39] For helpful comparisons, see Khazin v. TD Ameritrade Holding Corp., 773 F.3d 488, 491 (3d Cir. 2014) (describing differences in procedures and remedies); Ahmad v. Morgan Stanley & Co., 2 F. Supp. 3d 491, 497 (S.D.N.Y. 2014).

[40] 15 U.S.C. § 78u-6(h)(1)(c) (2012); Rose, *supra* note 26, at 1271-72 (describing changes in anti-retaliation provisions). In addition, the SEC itself can bring an enforcement action to punish anti-retaliatory conduct. *See* SEC 2016 ANNUAL REPORT, *supra* note 1, at 2 (describing its "first-of-its kind enforcement action" in September 2016 against a gaming company that fired an employee "because the employee had reported to senior management and the SEC that the company's financial statements

Notwithstanding its improvements in anti-retaliation law, Dodd–Frank's most notable innovation lay in its enactment of a bounty program. Congress' willingness to pay money for information reflected its implicit recognition that anti-retaliation law could only go so far; back pay and the threat of lawsuits could not protect employees from stigma and discrimination too subtle to prove.[42] Financial bounties would therefore close these gaps.

Congress set up a fund to pay bounties and directed the SEC to develop an appropriate Office and implementing regulations.[43] The SEC subsequently promulgated its whistleblowing rules, which are set forth at 17 CFR 240.21F ("Section 21F"). Under Dodd Frank and Section 21F, a whistleblower who voluntarily provides "original information" to the SEC is eligible for a reward when the information enables the SEC to recover monetary sanctions in civil and "related" cases in excess of one million dollars.[44] Information "leads to" a successful enforcement action when it is "specific, credible and timely" enough to cause the SEC to open a new case, reopen a closed one, or contributes significantly to an ongoing examination's success.[45]

Dodd–Frank and Section 21F bar several groups from receiving rewards: those who have a "pre-existing legal or contractual duty" to report to the Commission; attorneys, unless their disclosure is permitted by SEC or their applicable state bar; compliance and audit personnel, unless they first disclose their findings internally and wait

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might be distorted").

41 Rose, *supra* note 26. Dodd–Frank amended SOX while also creating a separate cause of action for whistleblowers. *See* Meghan Elizabeth King, *Blowing the Whistle on the Dodd–Frank Amendments: The Case Against the New Amendments to Whistleblower Protection in Section 806 of Sarbanes–Oxley*, 48 AM. CRIM. L. REV. 1457, 1480 (2011) (discussing interplay).

42 On Sarbanes–Oxley's weaknesses, see Dyck et al., *supra* note 16, at 2250 (finding that Sarbanes–Oxley's protections "ha[d] not increased employees' incentives to come forward with cases of fraud"); Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1022-23 (2005) (citing studies indicating whistleblowers are often perceived as "deviants" or "traitors"); Moberly, *Whistleblower Provisions*, *supra* note 38, at 21-38.

43 15 U.S.C. § 78u-6 (2012); *see also* 17 C.F.R. § 240.21F (2016) (whistleblower rules implemented by SEC to run program).

44 17 C.F.R. § 240.21F (2016).

45 *Id.* § 240.21F-4(c) (setting forth circumstances in which SEC deems information as leading to successful enforcement outcome). Approximately 60% of the whistleblower awards generated through the end of September 2016 involved tips that caused the SEC to open an investigation, while 40% involved significant contributions to ongoing investigations. *See* SEC 2016 ANNUAL REPORT, *supra* note 1, at 17.

120 days or seek to prevent substantial harm to investors; and those criminally convicted in connection with the reported conduct.[46]

Whistleblowers must provide complete and accurate information to the SEC and affirm under penalty of perjury that they have done so.[47] They may also be required to answer follow up questions and requests for further information.[48] Although the whistleblowing rules shield the whistleblower's identity from the public, they do not completely anonymize her from the government. To assert anonymity at the filing stage, the whistleblower must act through an attorney; before she collects any reward, she must reveal her identity to the Commission.[49]

That the SEC requires the whistleblower to disclose herself prior to collecting a reward underscores another section of the whistleblower rules, which warns:

> The fact that you may become a whistleblower and assist in Commission investigations and enforcement actions does not preclude the Commission from bringing an action against you based upon your own conduct in connection with violations of the federal securities laws.[50]

As Professor O'Sullivan succinctly observes, "[w]histleblowing . . . does not confer amnesty."[51]

B. *The Whistleblowing Conveyor Belt: Tips, Referrals, Covered Actions and Rewards*

To understand why the SEC's whistleblowing hit rate is so low, one must learn the SEC's framework for handling and referring tips.[52] The SEC begins with thousands of tips, refers a far smaller number of those tips to its enforcement agents for review, tracks those tips and advises

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[46] 17 C.F.R. § 240.21F-4(b)(4) (2016) (treating as "unoriginal" information protected under the attorney-client privilege or learned through audits or compliance reviews); *id.* § 240.21F-4(b)(4)(v) (setting forth exceptions to the above, including 120 days after compliance personnel have reported information); *id.* § 240.21F-8(c)(3) (excluding from eligibility those convicted of a "criminal violation that is related to the Commission's action or the related action . . . for which you otherwise could receive an award").

[47] *Id.* § 240.21F-9(b) (whistleblower must declare under penalty of perjury that his report is, to the best of his knowledge, "true and correct").

[48] *Id.* § 240.21F-8(b)(1)–(3).

[49] *Id.* § 240.21F-7(b).

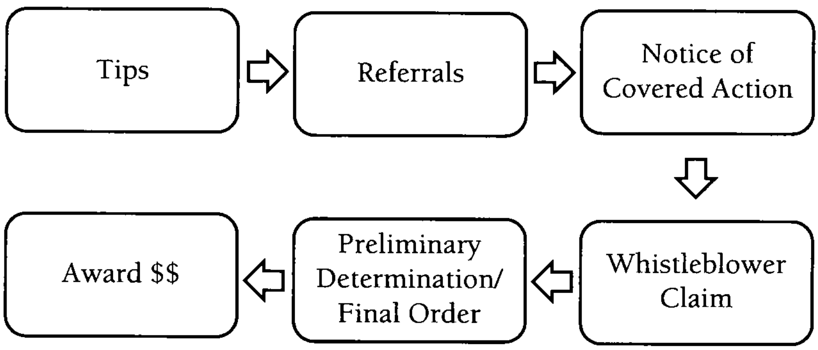
[50] *Id.* § 240.21F-15.

[51] O'Sullivan, *supra* note 7, at 78.

[52] *See* Rose, *supra* note 26, at 1270-71 (describing processing system).

whistleblowers of any "covered actions" that have emerged from those investigations, and then issues a preliminary determination and then final order on any whistleblower's specific claim for relief. Were one to draw a flowchart depicting the SEC's process, it might look something like Figure 1:

Figure 1: How a Tip Becomes an Award[53]



The number of individuals who have contacted the SEC with information has increased steadily since the SEC first implemented its whistleblowing program in August 2011.[54] According to the Commission's 2015 and 2016 Annual Reports to Congress on the Dodd–Frank Whistleblower Program ("2015 Report" and "2016 Report"), the Commission received nearly 4,000 tips in each of fiscal years 2015 and 2016.[55] From its inception in 2011 through the end of fiscal year 2016, the program received over 18,000 whistleblower tips.[56]

To process the public's complaints, the SEC has developed its Tips, Complaints and Referrals Intake and Resolution System (TCR). The TCR System enables whistleblowers to file their complaints online

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[53] A longer and more visually interesting version of this chart can be found in the SEC 2016 ANNUAL REPORT, *supra* note 1, at 13.

[54] This Article treats August 2011, the date the SEC's whistleblower's rules became effective, as the program's "birth" date.

[55] U.S. SEC. & EXCH. COMM'N, 2015 ANNUAL REPORT TO CONGRESS ON THE DODD–FRANK WHISTLEBLOWER PROGRAM 21 (2015), at 21 https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2015.pdf [hereinafter SEC 2015 ANNUAL REPORT]; SEC 2016 ANNUAL REPORT, *supra* note 1, at 23. The "fiscal years" referred to in this report run from October 1st of the prior year to September 30th. Accordingly, Fiscal Year 2015 began on October 1, 2014 and ran through September 30, 2015. U.S. GOV'T ACCOUNTABILITY OFF., A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 55 (2005), http://www.gao.gov/new.items/d05734sp.pdf.

[56] SEC 2016 ANNUAL REPORT, *supra* note 1, at 23.

(although they can also fax or mail them in hard copy form) and serves as the primary medium through which the SEC processes each claim and keeps in touch with reporting individuals.[57]

Each tip is evaluated by the SEC's Office of Market Intelligence ("OMI"). If the OMI believes it "warrants deeper investigation," OMI assigns it to Enforcement staff in the regional offices, specialty units or home office for further investigation and follow-up.[58] The SEC's Office of the Whistleblower ("OWB") then tracks each of these referred tips so that it can notify whistleblowers if their tips have in fact resulted in an enforcement proceeding or related action whose monetary sanctions exceed the $1 million threshold.[59] Although neither of the SEC's Reports to Congress disclose how often the OMI refers a tip for follow-up, the 2015 Report hints at OMI's relatively low referral rate when it advises that the OWB "currently is tracking over 700 matters" relating to a whistleblower tip.[60]

After the SEC recovers monetary sanctions exceeding the one million dollar threshold, it posts a "Notice of Covered Action" ("NoCA") on its website.[61] A tipper believing herself eligible for a whistleblower award then has ninety days to file her claim. The OWB considers the whistleblower's claim and prepares a preliminary recommendation, which is reviewed by the Claims Review Staff, a small five-member group comprised of "senior officers in Enforcement, including the Director of Enforcement."[62]

Pursuant to criteria set forth in both the statute and the SEC's Whistleblower Rules, the Claims Review Staff issues its Preliminary Determination on whether the applicant should receive an award and, if so, for how much. If the Claims Staff decides in the whistleblower's

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[57] SEC 2015 ANNUAL REPORT, *supra* note 55, at 7 ("Exchange Act Rule 21F-9 provides whistleblowers the option of either submitting their tips directly into the TCR System . . . or by mailing or faxing a hard copy").

[58] *Id.* at 25. In certain instances, the SEC might refer the tip to another agency. *Id.*

[59] *Id.*

[60] *Id.* The SEC 2016 Report references 800 open matters. SEC 2016 ANNUAL REPORT, *supra* note 1, at 27. Amanda Rose's earlier assessment of the program cited the SEC's Office of Inspector General (OIG) report, which was released in January 2013. *See* Rose, *supra* note 26, at 1274. That Report, which sampled claims filed between April 2011 and September 2012, estimated that the OMI declined further action on 69% of the TCR's received during that time period. *See id.* Although the OIG has yet to repeat this sampling exercise, one can assume that the referral rate has fallen since 2012, given the increase in tips.

[61] SEC 2015 ANNUAL REPORT, *supra* note 55, at 6. The OWB also announces the NoCA posting on Twitter and sends an email to an update list that whistleblowers can join. *Id.* at 12.

[62] *Id.* at 13.

favor, its Preliminary Determination is automatically forwarded to the Commission for consideration. If none of the Commissioners objects during a thirty-day review period, the Preliminary Determination becomes a Final Order and the whistleblower receives her bounty.[63]

From the program's inception through the end of fiscal year 2015, the SEC posted 709 NoCAs to its website.[64] During Fiscal Year 2016, the OWB posted an additional 178 NoCAs, suggesting the Commission has successfully accelerated the pace with which it processes whistleblowing claims.[65] Whistleblowers wishing to claim a reward must base their claim on the NoCAs posted on the SEC's website. Although the SEC's reports to Congress do not reveal how many claims the SEC has received over the life of the program[66] the 2015 Report advises that the SEC has issued final or preliminary decisions addressing "more than 390 award claims since the beginning of the program."[67] Thus, the SEC has received in excess of 390 claims from would-be whistleblowers. One can infer that a non-insignificant portion of these claim requests have been frivolous, primarily for two reasons. First, very few rewards have been granted. As of the SEC's 2015 Report to Congress, only twenty-two whistleblowers had received awards;[68] as of its 2016 Report to Congress, that number had jumped to thirty-four (and, logically, so too had the number of whistleblowing claims).[69] Second, the 2015 Report references at least two individuals who have been barred from ever receiving an award due to their filing of repeatedly frivolous claims.[70]

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[63] *Id.* If the Claims Staff *denies* the whistleblower an award, its determination becomes a Final Order if the whistleblower does not object; otherwise, whistleblowers can seek reconsideration by submitting a written response. *Id.*

[64] *Id.* at 12.

[65] SEC 2016 ANNUAL REPORT, *supra* note 1, at 14. As the OWB pointedly noted, the SEC awarded more money during Fiscal Year 2016 than all previous years combined. *Id.* at 11 (bragging that "the SEC's whistleblower awards in FY 2016 totaled more than $57 million — exceeding the amount of all awards made in prior fiscal years combined").

[66] The SEC did receive "more than 120" award claims in fiscal year 2015, "representing a significant increase" over prior years. SEC 2015 ANNUAL REPORT, *supra* note 55, at 1.

[67] *Id.* at 10.

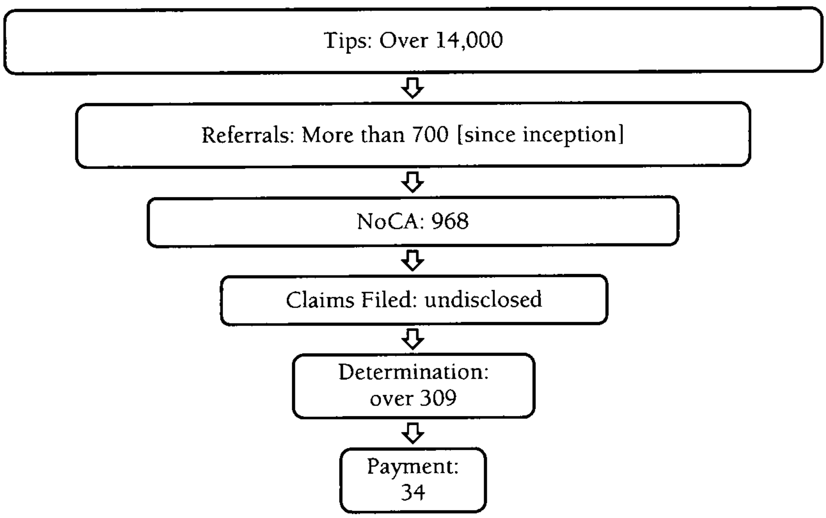
[68] *Id.* at 10 n.16.

[69] SEC 2016 ANNUAL REPORT, *supra* note 1, at 1 (listing solely the number of whistleblowers receiving awards, but not the total number of claims received seeking an award).

[70] SEC 2015 ANNUAL REPORT, *supra* note 55, at 14. One of the claims "failed to include even a remote factual nexus to the covered actions for which the individual applied." *Id.*

Based on the figures provided by the SEC, the graphic representation of the flowchart described in Figure 1 might be best expressed as a funnel, as set forth in Figure 2:

Figure 2: SEC Whistleblowing Program, August 2011 through September 30, 2016.



As Figure 2 demonstrates, the SEC receives a large number of tips and then winnows that number down substantially through its referral process.[71] It cuts the field a second time when posts its NoCA and reviews and decides the merits of a whistleblower claim, all of which takes some time.[72] A few whistleblowers possibly take themselves out of the award pool by failing to file timely whistleblower claims.[73] Given the presence of whistleblowing attorneys who assist in the

[71] As of the publication of the 2015 Report, the SEC "currently" had 700 referred cases under review. Since some number of referred cases would have already concluded before the filing of the 2015 Report, one can assume the Office of Market Intelligence has, over the course of the program, referred more than 700 cases to enforcement units. *Id.* at 25.

[72] As the 2016 Report points out, the "time between the submission of a whistleblower tip and when an individual may receive an award payment can be several years, particularly where the underlying investigation is especially complex, where there are multiple, competing award claims, or where there are claims for related actions." SEC 2016 ANNUAL REPORT, *supra* note 1, at 13.

[73] To calculate this "valuable claims rate," one would have to know the percentage of whistleblowers who filed claims for tips that were referred to enforcement units and eventually resulted in the posting of NoCA's.

drafting of such tips, however, it seems highly unlikely that most whistleblowers simply "forget" about their tip, regardless of how long the SEC takes to complete its investigation.[74]

C. *Notable Reform Efforts*

In the lead-up to the SEC whistleblowing program's implementation, critics were most concerned that it would divert valuable information from internal corporate compliance departments and incentivize knowledgeable insiders to delay disclosure until the information became valuable enough to warrant an award.[75] The SEC addressed these concerns by promulgating a number of provisions that encourage employees to first seek relief from the firm's internal compliance department before filing a complaint externally.[76] Through these provisions, the SEC appears to have resolved the concern that external bounties might unintentionally compete with internal compliance efforts.[77] According to its most recent Report to Congress, approximately eighty percent of those who have received whistleblower awards "raised their concerns internally to their supervisors or compliance personnel."[78]

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[74] According to the 2016 Report, "[a]pproximately half of the award recipients were represented by counsel when they initially submitted their tips to the agency." Additional tippers, "subsequently retained counsel during the course of the investigation or during the whistleblower award application process." SEC 2016 ANNUAL REPORT, *supra* note 1, at 18.

[75] "Perhaps the most vigorously-debated issue was the effect of the whistleblower program on internal corporate compliance processes." Robert S. Khuzami, Director, Enforcement Division, Remarks at SEC Open Meeting-Whistleblower Program, May 25, 2011, https://www.sec.gov/news/speech/2011/spch052511rk.htm (announcing final rules for SEC Whistleblower Program); *see also* Kathryn Hastings, Comment, *Keeping Whistleblowers Quiet: Addressing Employer Agreements to Discourage Whistleblowing*, 90 TUL. L. REV. 495, 511 (2015) (cataloging objections); Ted Uliassi, Comments, *Addressing the Unintended Consequences of an Enhanced SEC Whistleblower Bounty Program*, 63 ADMIN. L. REV. 351, 363-64 (2011) (raising delayed reporting issue).

[76] *See, e.g.*, 17 C.F.R. § 240.21F-4(b)(7) (2016) (relation-back provision); § 240.21F-4(c)(3) (treating information as original and successful when it is reported internally and leads to an internal audit, or company's report to SEC); § 240.21F-6(a)(4) (providing for greater reward when whistleblower first seeks out internal compliance channels); Rose, *supra* note 26, at 1264-65 (summarizing incentives to encourage internal reporting).

[77] "The evidence to date indicates these regulations should be sufficient to induce internal reporting." O'Sullivan, *supra* note 7, at 79; *see also* Rose, *supra* note 26, at 1278 (observing that several whistleblowing awards involved instances in which the whistleblower first reported wrongdoing internally but was ignored).

[78] SEC 2016 ANNUAL REPORT, *supra* note 1, at 18.

Although the program elicits praise from politicians and the SEC's Enforcement Division, it nevertheless has encountered several legal and practical challenges. For example, federal courts disagree on the meaning of the term, "whistleblower," which arguably clothes the program with some undesirable uncertainty.[79] Moreover, several corporations have employed a variety of contractual agreements that appear to have the design or effect of discouraging whistleblowing.[80] The SEC has taken several steps to halt the latter development, including several enforcement actions filed against offending companies.[81]

Critics also cite the SEC's procedures for rewarding tippers. Although the agency has gone to great lengths to make its system user-friendly, those who provide the SEC with information maintain little control over their information once they submit their report.[82] Individuals are welcome to file a tip pro se, but the private securities plaintiff's bar has increasingly begun to occupy this space.[83] As Professor Julie O'Sullivan observes, the delay and uncertainty that arise from the SEC's TCR procedure may unnecessarily repel the attorney-intermediaries who play an important role in screening tips,

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[79] *Compare* Berman v. Neo@Olgilvy LLC, 801 F.3d 145, 146 (2d Cir. 2015) (defining whistleblower broadly as someone who reports wrongdoing internally or to the SEC), *with* Asadi v. G.E. Energy, LLC 720 F.3d 620, 623 (5th Cir. 2013) (limiting term to those who report directly to the Commission).

[80] *See generally* Richard Moberly, Jordan A. Thomas & Jason Zuckerman, *De Facto Gag Clauses: The Legality of Employment Agreements that Undermine Dodd–Frank's Whistleblower Provisions*, 30 ABA J. EMP. L. 87, 98-116 (2014) (analyzing several types of employment agreements and their potential effects on whistleblowing); Hastings, *supra* note 75 (using a case study to explore policy consideration of the whistleblower program).

[81] In 2015, the SEC sanctioned defense contractor Kellogg Brown & Root for employing such agreements and promised to pursue additional companies for engaging in similar activity. *See* U.S. SEC. & EXCH. COMM'N, COMPANIES CANNOT STIFLE WHISTLEBLOWERS IN CONFIDENTIALITY AGREEMENTS 2015-54 (2015), https://www.sec.gov/news/pressrelease/2015-54.html; *see also* SEC 2016 ANNUAL REPORT, *supra* note 1, at 2 (describing additional proceedings against companies for using severance agreements whose terms impeded whistleblowing).

[82] *See* O'Sullivan, *supra* note 7, at 74. In addition, the SEC employs no specific mathematical formula for determining the whistleblower's eventual award. SEC 2016 ANNUAL REPORT, *supra* note 1, at 15 (advising that "[a]ward percentages are based on the particular facts and circumstances of each case").

[83] Not everyone views this as a positive development. *See, e.g.*, Joe Palazzolo, *First Comes the Whistleblower, then Comes the Securities Class Action?*, WALL STREET J., Nov. 17, 2010 (voicing concerns regarding private bar's involvement in SEC's whistleblower program).

preparing complaints, and presenting them in a manner the Enforcement Division finds most useful.[84]

Finally, at the other end of the spectrum, some have cited the program's propensity to attract false and frivolous complaints from disgruntled employees.[85] The SEC's 2015 report to Congress reflects this problem when it alludes to two individuals who have filed hundreds of apparently frivolous claims for relief,[86] and the SEC's 2016 report suggests a similar dynamic with regard to an additional individual whose tips have been so numerous (and presumably frivolous), that the Commission has decided to exclude it from its calculation of tips received.[87] Here again, the qui tam action appears to be the favored method for screening out noisy and unhelpful tips while effectively attracting more polished, attorney-constructed narratives of corporate misconduct.[88]

II. HOW WHISTLEBLOWING BECOMES SELF-INCRIMINATION

Congress created a bounty program to encourage employee reports, induce more effective corporate self-monitoring, and deter violations of the securities laws.[89] As it turns out, the bounty program wrought an additional benefit, which was the improved flow of information between and among the SEC's enforcement agents.

Law and economics scholars have hypothesized whistleblowing's deterrent effect from a number of angles.[90] These discussions,

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[84] *See* O'Sullivan, *supra* note 7, at 104-08.

[85] *See* Casey & Niblett, *supra* note 10, at 1198 (theorizing problem of government receiving too many tips and therefore drowning in information); Rapp, *Mutiny by the Bounties?*, *supra* note 7, at 112 (citing concerns regarding disgruntled or ineffective employees falsely seeking whistleblower status to protect themselves).

[86] *See* SEC 2015 ANNUAL REPORT, *supra* note 55, at 14 (describing two individuals who collectively have filed hundreds of claims and have been permanently barred from ever receiving an award).

[87] SEC 2016 ANNUAL REPORT, *supra* note 1, at 23 n. 51 (explaining that FY 2016 tip number excludes tips by a particular individual who provided an "unusually high number" of whistleblowing tips). The SEC's decision to exclude a single person's tips, without specifying what it means by "unusually high number" or any additional basis for exclusion, is problematic insofar as it arbitrarily excludes some tips, but not others, from its total.

[88] *See e.g.*, Casey & Niblett, *supra* note 10, at 1203-07 (praising the qui tam action's "screening benefits").

[89] "It is the [Office of the Whistleblower's] mission to administer a vigorous whistleblower program that will help the Commission identify and halt frauds early and quickly to minimize investor losses." SEC 2015 ANNUAL REPORT, *supra* note 55, at 4.

[90] *See, e.g.*, Casey & Niblett, *supra* note 10 (modeling whistleblowing's "noise" problem and its effect on deterrence); Givati, *supra* note 24 (creating formal economic

however, tend to underestimate the bounty program's interaction with criminal law. To fill this gap, this Part introduces two categories of employee, Innocents and Complicits, and analyzes their distinctly different incentives in regard to monetary bounties.

A. *The Bounty Program's Advantages*

Whistleblowing bounties are often hailed for their beneficial effect on deterrence and corporate enforcement. They deter criminals by increasing the likelihood that fraudulent schemes will be detected.[91] Increased detection, in turn, comes about for several reasons. First, the prospect of a bounty improves *external* enforcement efforts because it elicits valuable information from insiders[92] and consumes fewer resources than the hiring of additional enforcement agents.[93] It also motivates and improves *internal* enforcement, since a whistleblower might embarrass the company's compliance program by taking his information directly to external authorities and demonstrating deficiencies in the corporation's compliance apparatus.[94] This one-two punch produces three benefits: (i) it convinces some would-be wrongdoers to avoid the proscribed conduct altogether; (ii) it introduces a costly element of distrust within extant conspiracies, thereby undermining their effectiveness and longevity; and (iii) it enables the federal government to punish, incapacitate, and seek disgorgement from those who remain undeterred.[95]

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model analyzing optimal reward structure); Howse & Daniels, *supra* note 14 (providing overview of benefits and drawbacks of bounties).

91 "The [program] will have the laudable effect of deterring securities fraud if it makes it more likely that fraudsters will be caught." *See* Rose, *supra* note 26, at 1275.

92 *See* O'Sullivan, *supra* note 7, at 67 (arguing that resource-strapped agencies such as the SEC require "the help of whistleblowers and the private bar"); *see also* Skinner, *Whistleblowers*, *supra* note 5, at 890 (praising whistleblowers' "early warning role" in uncovering wrongdoing).

93 *See* Givati, *supra* note 24, at 2 (explaining that whistleblowing rewards represent "wealth transfers" whereas "police officers and investigators" require expenditures of resources). Then again, a regulatory agency might use its whistleblower program to justify the hiring of additional agents to investigate and prosecute credible whistleblower complaints. *See* U.S. SEC. & EXCH. COMM'N, FY 2016 BUDGET REQUEST BY PROGRAM 95 (2016), https://www.sec.gov/about/reports/sec-fy2016-budget-request-by-program.pdf (arguing for additional Enforcement Division resources in light of its whistleblowing program). In any event, whistleblowers may conserve the agency's resources by collecting and processing the documentary and digital evidence that supports their claims. *See* O'Sullivan, *supra* note 7, at 95-96.

94 *See* O'Sullivan, *supra* note 7, at 80.

95 On the difference between deterrence and detection of completed crimes (and whistleblowing's effect on both), see Giancarlo Spagnolo, *Leniency and Whistleblowers*, in

Scholars have long argued that bounties work because they compensate insider employees for the social, economic and psychological harms that whistleblowers experience.[96] A toxic mix of norms and biases induce silence and self-rationalization among employees, who would rather hope for the best than bring about the worst by snitching on their friends and supervisors.[97] Bounty programs seek to alter this state of affairs by encouraging more individuals to come forward. Increased reporting, in turn, improves society's view of whistleblowers and reduces the stigma associated with whistleblowing.[98] Viewed in their best light, whistleblowing programs not only alter the individual employee's cost–benefit analysis, but also change the social meaning of whistleblowing itself.[99]

To understand whistleblowing's effect on the corporation's internal compliance function, it is helpful to review the economic theory of compliance. The rule of corporate criminal liability most favored by scholars is what some refer to as a modified respondeat superior rule of liability (sometimes referred to as "composite liability"), which is thought to produce optimal monitoring and reporting.[100]

HANDBOOK OF ANTITRUST ECONOMICS 259, 263 (Paolo Buccirossi ed., MIT Press 2008).

[96] See, e.g., Dyck et al., supra note 16, at 2251 (arguing, in light of findings, that "the use of monetary rewards provides positive incentives for whistleblowing").

[97] For explanations why managers may be reluctant to recognize or confront organizational wrongdoing, see James Fanto, *Whistleblowing and the Public Director: Countering Corporate Inner Circles*, 83 OR. L. REV. 435, 441 (2004) (hypothesizing group dynamics that "bind[s] group members together and blinds them to their failings and abuses"), and Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (And Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 105-06 (1997) (seminal account applying behavioral literature to explain incidence of fraud within publicly held companies).

[98] Readers should note, however, that a financial reward may crowd out intrinsic reasons for reporting wrongdoing. On crowding-out effects, see Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1178-80 (2010) (reviewing literature).

[99] Concededly, a financial reward may render the disclosing employee's act *less* morally acceptable to his peers than when driven solely by a sense of legal or moral obligation. *See id.* at 1200 (reporting that survey respondents held in higher regard those peers who reported wrongdoing "without the promise of a reward").

[100] Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 694 (1997) (advocating mitigation for monitoring and disclosure of wrongdoing within corporate firms); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 836 (1994) [hereinafter *Potentially Perverse Effects*] (demonstrating ways in which strict vicarious liability regime perversely increases the probability of punishment for crimes that corporate entities detect but fail to deter).

The argument for a modified vicarious liability regime proceeds from the foundational premise that corporate managers who benefit from their employees' wrongdoing maintain little incentive to investigate or punish them.[101] Strict vicarious liability confronts this issue by holding the organization legally responsible for its employees' misconduct.[102] A liability regime that fails to credit the corporation's efforts to prevent or police misconduct, however, discourages policing and disclosure of misconduct.[103] At the same time, a regime that imposes liability solely in regard to the corporation's negligence in meeting some predefined standard (a so-called "duty based regime") is prone to error and fails to fully internalize the firm's activity-driven costs.[104] Accordingly, Arlen and Kraakman promote a composite liability regime that holds the firm liable for all of its employees' wrongdoing but reduces the sanction when the firm has monitored and voluntarily disclosed its employees' bad behavior.[105]

Arlen and Kraakman's idealized composite regime optimally incentivizes the firm to monitor and report misconduct. Under these ideal circumstances, the government presumably has little need for external whistleblowers; the firm's compliance personnel do most, if not all, of the important work.[106]

How well does the federal government's current enforcement approach approximate Arlen and Kraakman's prescription? For many, the answer is "not very." The Department of Justice offers corporate

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[101] Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Non-Prosecution*, 84 U. CHI. L. REV. 323, 353 (2017) (conceptualizing "policing agency costs" that arise when "top managers . . . benefit personally from either tolerating wrongdoing or from deficient policing" of employees); *see also* Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691, 701-03 (conceptualizing securities fraud as an agency cost).

[102] Arlen & Kraakman, supra note 100, at 690 (identifying strict vicarious liability as a "benchmark norm in the common law"). For more on the respondeat superior rule's doctrinal underpinnings, see Miriam H. Baer, *Too Vast to Succeed*, 114 MICH. L. REV. 1109, 1124 & nn.71-79 (2016).

[103] *See* Arlen & Kraakman, *supra* note 100, at 706-07 (describing strict liability's failure to induce optimal policing after wrongs have been committed); Arlen, *Potentially Perverse Effects*, *supra* note 100, at 836.

[104] *See* Arlen & Kraakman, *supra* note 100, at 692 (explaining duty-based liability's failure to achieve optimal activity levels); *id.* at 711 (identifying duty-based liability's weaknesses when courts fail to set optimal or clear standards).

[105] *See* Arlen & Kraakman, *supra* note 100, at 726-29 (explaining composite liability and analyzing its benefits in comparison to other regimes).

[106] To put it another way: the more the government finds itself in need of whistleblowers, the greater evidence its corporate liability regime may be faltering.

offenders leniency in the form of deferred or non-prosecution agreements, commonly referred to as DPAs or NPAs.[107] For indicted firms, the Organizational Sentencing Guidelines promote their own form of sentencing largesse. Despite the government's lip service to compliance and self-policing, however, most observers — on the left, as well as the right — complain bitterly that the federal government enforces corporate crime in an ad hoc and insufficiently transparent manner.[108]

In an ideal world, properly motivated firms would promote employee reporting; employees would report their concerns to supervisors and internal compliance officers; and compliance personnel would promptly elevate and disclose violations to regulators and prosecutors.[109] As a result, the need for a robust whistleblowing bounty presumably would disappear.[110]

Alas, the perfect world does not exist. Some corporations ignore or explicitly discourage internal reporting.[111] Some prosecutors, meanwhile, fail to judge compliance efforts with sufficient consistency or transparency.[112] Thus, depending on one's point of view, the

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[107] For an overview of DPAs and a thorough assessment and criticism of the process, see generally GARRETT, *supra* note 17.

[108] *See id.* at 48 (criticizing *ad hoc* and inconsistent nature of DPA's); Jennifer Arlen, *The Failure of the Organizational Sentencing Guidelines*, 66 U. MIAMI L. REV. 321, 353-54 (2012) (rejecting portions of the Sentencing Guidelines' rubric as it applies to organizations). Then again, these tools are still evolving: "It's worth noting from the start that the current approach is very much a work in progress, and that the world of Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs) is only a few decades old." Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL'Y REV. 265, 277 (2014).

[109] This assumption would not hold if either the corporation's board or its most responsible executives (CEO, General Counsel) were personally responsible for the wrongdoing. Regardless of the firm's incentives, these individuals personally would not benefit from disclosing wrongdoing if they themselves were guilty of the underlying misconduct.

[110] *Cf.* Feldman & Lobel, *supra* note 98, at 1193 (finding that financial rewards were unnecessary to spur reporting when survey respondents found the misconduct sufficiently "severe"). *See generally* Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2095 (2016) (contending that compliance programs enable lower-level employees to "safely report" concerns to the appropriate actors within the firm).

[111] *See* Rachel Louise Ensign, *Survey: Companies Finding More Whistleblower Retaliation*, WALL STREET J. (Mar. 9, 2015, 6:20 PM), http://blogs.wsj.com/riskandcompliance/2015/03/09/survey-companies-finding-more-whistleblower-retaliation/; *see also* ETHICS RES. CTR., NATIONAL BUSINESS ETHICS SURVEY 13, 34 (2014) http://www.ethics.org/research/eci-research/nbes/nbes-reports/nbes-2013 (indicating fear and relatively high levels of retaliation among those who report misconduct through internal channels).

[112] *See generally* Lawrence A. Cunningham, *Deferred Prosecutions and Corporate*

government either credits facile compliance too often, or unfairly discounts genuine efforts at monitoring and disclosure.[113] On top of all that, the government either relies on the wrong factors,[114] or demands reforms that are only tenuously supportive of self-policing.[115]

This breakdown in credibility is, to some degree, inevitable. Corporations are, by nature, structurally complex and opaque.[116] Compliance is difficult to assess, both before and even after the fact,[117] and the source of illegal behavior can be difficult to pinpoint.[118] The firm's compliance officers may understand the organization better than outside authorities, but compliance officers themselves are often kept in the dark.[119] Accordingly, regulators and prosecutors experience greater difficulty distinguishing good programs from bad ones,[120] and firms just as surely discount the government's promise that it will look

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Governance: An Integrated Approach to Investigation and Reform, 66 FLA. L. REV. 1 (2014) (criticizing "ad hoc" nature of governance reforms sought by prosecutors as part of their DPA process).

113 *Compare* GARRETT, *supra* note 17, at 278-79 (stating that "[p]rosecutors do not seem to have a concrete idea how to measure effective compliance"), *and* David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1332-33 (2013) (noting that compliance programs often "exist only on paper"), *with* Bruce Hinchey, *Punishing the Penitent: Disproportionate Fines in Recent FCPA Enforcements and Suggested Improvements*, 40 PUB. CONT. L.J. 393 (2011) (arguing that corporations that voluntarily disclose FCPA violations are treated unequally despite implementing compliance changes), *and* Larry E. Ribstein, *Agents Prosecuting Agents*, 7 J.L. ECON. & POL'Y 617 (2011) (suggesting that prosecutors do not have the same monitoring requirements as the corporate agents they are investigating).

114 *See* Arlen & Kahan, *supra* note 101, at 3.

115 *See id.* at 4.

116 "Private organizations are relatively opaque, the more so the larger and more sophisticated they are. . . . Division of labor makes ascription of responsibility for conduct and results challenging." Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613, 1625 (2007) [hereinafter *Criminal Procedure*].

117 Even when fraud has not been detected, "it remains difficult to demonstrate the effectiveness of the compliance function." Sean J. Griffith, *supra* note 110, at 2105 (describing difficulties in measuring compliance "efficacy").

118 Buell, *Criminal Procedure*, *supra* note 116, at 1625. This is particularly true of financial and technologically sophisticated firms. *See* Skinner, *Whistleblowers*, *supra* note 5, at 873-74, 893-94.

119 "[D]epending upon company size, average compliance budgets are in the millions of dollars for multinational companies and for companies in regulated industries." Griffith, *supra* note 117, at 2102-03 (2016).

120 Concededly, the government could hire a neutral third-party to investigate the "root cause" of the misconduct and enforce compliance standards going forward. *See generally* Veronica Root, *Modern-Day Monitorships*, 33 YALE J. ON REG. 109, 123-31 (2016) (describing "enforcement" and "compliance" oriented monitorships).

positively upon vigorous compliance efforts.[121] Under these circumstances, we should not be surprised when voluntary disclosure wanes and valuable information encounters a corporation-created bottleneck, effectively preventing employee information from reaching government investigators.[122]

Happily, the external whistleblowing program relieves this bottleneck by establishing a direct line of communication between the employee and the government. If the employee fears that his employer's compliance department has buried his claim, he can report the same information to the SEC with the click of a computer button. Since the corporation's compliance officer knows this, she is more inclined to take the employee's claim more seriously and investigate it promptly. Thus, the bounty program induces a quasi-competition for information, forcing the corporation's compliance department to compete with its own employees.[123] As a result, it expands the amount of information the SEC receives while simultaneously improving the quality of self-reporting by corporate compliance departments.[124]

Even better, whistleblowers serve as an independent check on the corporation's compliance efforts. If a corporation voluntarily discloses information to the government and the government is aware of no

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[121] I have analogized this dynamic to George Akerlof's seminal work on "lemons" markets, whereby the buyer so distrusts the seller's claims that he discounts the seller's product, thereby driving legitimate sellers out of the market. Miriam H. Baer, *When the Corporation Investigates Itself*, *in* HANDBOOK OF FINANCIAL FRAUD AND MISDEALING (Arlen ed., forthcoming 2017) (manuscript on file with author) (citing George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970)).

[122] *See id.*; Moberly, *Sarbanes–Oxley's Structural Model*, *supra* note 15, at 1121-25 (describing "executive blocking and filtering" of internal employee reports); O'Sullivan, *supra* note 7, at 86 (noting that companies may try to remedy FCPA violations without disclosing them to external authorities) (citing Robert W. Tarun & Peter P. Tomczak, *A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 155 (2010) (citing those "situations . . . in which corporations rationally and responsibly choose to remedy bribery conduct internally and not self-report misconduct")).

[123] The program still encourages employees to raise their concerns internally before seeking out the SEC. *See* 17 C.F.R. § 240.21F-6(a)(4) (2016). Nevertheless, the bounty program induces a temporal competition between the compliance officer, who would rather be the first to report wrongdoing to the SEC, and the employee.

[124] Richard Craswell's discussion of "static" and "dynamic" disclosures within consumer markets further illuminates this point. According to Craswell, the "static" disclosure increases the amount of information available to a consumer regarding a set of products, while the "dynamic" disclosure incentivizes "sellers to improve the quality of their offerings." Richard Craswell, *Static Versus Dynamic Disclosures, and How Not to Judge Their Success or Failure*, 88 WASH. L. REV. 333, 334 (2013). The same can be said of whistleblowing, at least in its ideal form.

credible whistleblowing tip lodged already against that company, it may find the company's claims of self-policing more credible and as a result, reward the company with greater leniency.

To be sure, the foregoing presents a decidedly rosy portrayal of whistleblowing. It downplays drawbacks such as false reports and noise, and it presumes the government's bounty program will elicit a sufficient quantum of valuable information. In the following sections, I investigate more carefully this question.

B. *A New Framework: Innocents and Complicits*

The deterrence-based justification for paying whistleblowers bounties rests upon three basic premises: (i) that valuable information can be coaxed out of employees through monetary bounties; (ii) that information extraction enhances both external and internal corporate enforcement; and (iii) the specter of enhanced enforcement improves deterrence.

This Article does not take issue with the premise that enhanced information flow improves enforcement, or with the related premise that improved enforcement deters wrongdoing. It contends, however, that the first premise — the extraction of information from knowledgeable insiders — is more complicated than scholars often acknowledge, in part because the location of information within the employee workplace is not distributed randomly. To the contrary, where fraud and bribery are the target violations, the people who know the most about wrongdoing are likely to be wrongdoers themselves. As soon as a bounty program becomes public, wrongdoers will only intensify their efforts to quarantine information among other wrongdoers. Accordingly, the pool of potential whistleblowers will be comprised of individuals whose "costs" of coming forward differ in kind and degree from the costs ordinarily associated with whistleblowing.

To see how this might affect the SEC's program, consider two categories of employees. The first, which figures prominently in most popular accounts of whistleblowing, comprises innocent bystanders[125] ("Innocents"). Most Innocents are unaware of their coworkers' wrongdoing. Some possess partial or hazy knowledge of misconduct; they know that certain supervisors fail to follow certain internal rules, that their coworkers conduct business surreptitiously, or behave in a manner that many of us would dub suspicious or "shady." However

125 *See, e.g.*, ROBERT G. VAUGHN, THE SUCCESSES AND FAILURES OF WHISTLEBLOWER LAWS (2012) (touting whistleblowers' heroic qualities).

valuable these incomplete notions of wrongdoing may be in the aggregate, standing on their own, they are by definition insufficient to trigger or significantly advance a government enforcer's investigation.[126]

The explanation for this dearth of quality information is simple: rational criminals limit their exposure by limiting the number of bystanders aware of their scheme.[127] This is true even absent a whistleblowing regime; the fewer people who witness a violation, the better.[128]

Notwithstanding the foregoing, a few Innocents, despite their bystander status, possess sufficient knowledge of a given securities-related violation to either trigger or assist substantially in a government investigation. For the purpose of this discussion, one might call this "valuable information."[129] Some Innocents have personally observed their bosses bribing foreign officials; been inadvertently copied on emails describing fraudulent billing or accounting practices; or are aware of fraudulent practices relating to their employer's SEC filings.[130] These are the vaunted tips the government highlights, and which trigger successful investigations and notably large recoveries. They are the kinds of tips that caused researchers to conclude, in one of the more notable studies published

[126] Casey and Niblett label these "weak signals" of misconduct. Casey & Niblett, *supra* note 10, at 1192.

[127] Scholars who study and write about cartels are particularly aware of this phenomenon. "[C]ooperating wrongdoers, by acting together, inevitably end up having — as a by-product — information on each others' misbehavior that could then in principle be reported to third parties, including law enforcers." Spagnolo, *supra* note 95, at 261.

[128] One might think of this quarantining of information as a type of "detection avoidance," whereby wrongdoers respond to the threat of sanctions by engaging in conduct designed to evade or reduce the risk of detection. *See generally* Chris William Sanchirico, *Detection Avoidance*, 81 N.Y.U. L. REV. 1331 (2006). For empirical studies demonstrating the importance of detection probability in the white-collar context, see, for example, Daniel S. Nagin & Greg Pogarsky, *An Experimental Investigation of Deterrence: Cheating, Self-Serving Bias, and Impulsivity*, 41 CRIMINOLOGY 167, 175-82 (2003) (reporting results of cheating experiment, wherein probability of detection was one of the most important variables).

[129] In Casey and Niblett's model, "strong signals" of misconduct are largely consistent with this term. Casey & Niblett, *supra* note 10, at 1192.

[130] These are just illustrative examples. Innocents may be more apt to discover some types of violations over others. For an interesting analysis of how the SEC's whistleblower program has correlated with the types of enforcement actions the SEC has brought, see Caroline E. Dayton, Note, *An Empirical Analysis of SEC Enforcement Actions in Light of the Dodd–Frank Whistleblower Program*, 12 N.Y.U. J.L. & BUS. 215, 235 (2015) (finding lower average recoveries for whistleblowing-friendly claims, suggesting that bounty programs enable the SEC to uncover lesser violations).

within the past decade, that employees were responsible for uncovering seventeen percent of 216 serious corporate fraud cases, from 1996 to 2004.[131]

Unlike Innocents, some employees have knowingly participated, even minimally, in creating, perpetuating or covering up some type of misconduct. These employees are "Complicits." A "Complicit" is a person who would be guilty of violating one or more federal criminal statutes if all facts were known.[132] For purposes of this model, Complicits comprise all individuals who have, in some way or another, engaged in wrongdoing. Thus, the ringleader of a given scheme is as much a Complicit as the unwilling lackey who reluctantly, but knowingly, plays a bit part in covering up the scheme. The definition itself is important because it tracks federal criminal law's broad definition of complicity, as opposed to popularly held notions of who may be deemed an accomplice.[133]

At this point, one can advance several uncontroversial propositions. First, assuming relatively strong norms and enforcement, Innocents ought to outnumber Complicits. This is particularly the case when the threat of government enforcement is moderately credible or when community norms coincide with legally stated obligations. In a world where most people behave well, Innocents ought to constitute the vast majority.

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[131] Dyck et al., *supra* note 16, at 2213-14 (2010) (widely cited empirical study demonstrating corporate employees' contribution to fraud detection); *see also* Robert M. Bowen, Andrew C. Call & Shiva Rajgopal, *Whistle-Blowing: Target Firm Characteristics and Economic Consequences*, 85 ACCT. REV. 1239, 1242 (2010) (tracking governance benefits of "whistle-blowing," broadly defined). Seventeen percent may sound impressive, but it translates into a grand total of just thirty-six fraud cases over an eight-year period. Many of the cases studied by Dyck et al. were purely civil cases, and disclosed during a time period when the government would have been less likely to seek criminal sanction for securities violations. On the difference between reporting civil violations and violations likely to trigger criminal sanction, see discussion *infra* notes 157–61 and accompanying text.

[132] Although the SEC's whistleblower program awards bounties for information concerning violations of the securities laws, the employee who reports wrongdoing bears exposure for *any* federal crime.

[133] This narrower understanding of who an accomplice is explains the academy's failure to adequately investigate criminal liability's impact on whistleblowing. For example, Dyck et al. say in passing that some employees "might be accomplices, enjoying some of the benefits of the fraud, but most are not." Dyck et al., *supra* note 16, at 2240. True enough, "most" employees may not directly share in the proceeds of a ringleader's fraud. To be found guilty of wrongdoing, however, these employees need not benefit *at all*. I discuss this at greater length in Part II.D, *infra*.

Second, Complicits will more frequently possess valuable information and a greater degree of information than Innocents.[134] Valuable information does not distribute itself randomly.[135] Complicits know a lot more about the firm's wrongdoing because complicity invites silence among innocent bystanders.[136] Once a ringleader has identified the two or three employees in whom she can repose her trust, she will continue to rely on those employees to carry out and cover up her bad deeds.[137]

Another assumption is in order, which is that Innocents and Complicits possess roughly the same amount of information regarding the company's internal compliance program, as well as government-sponsored enforcement initiatives and penalties. That is, Innocents are no less likely than Complicits to be acutely aware or blissfully ignorant of government's enforcement apparatus.[138]

A final point: the dividing line between the Innocent and Complicit is, at least to some degree, a matter of perception. The person who

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[134] In their discussion of whistleblowing, Dyck et al. praise employees as having "the best access to information." Dyck et al., *supra* note 16, at 2240. This is of course true as compared with journalists, external auditors and government enforcement agencies, but *among* employees, access to information is sure to differ, and as I argue here, complicity itself plays a role in filtering the employees most willing to come forward.

[135] Thus, this model differs from that of Casey and Niblett. Casey & Niblett, *supra* note 10, at 1192 (assuming "weak signals are evenly distributed across all firms").

[136] The exception to this rule arises when the authorities are already aware of and investigating wrongdoing. In that case, those guilty of wrongdoing may have incentives to come forward with information if they believe themselves to be sufficiently exposed to prosecution and punishment. On the incentives of criminally prosecuted defendants to cooperate with prosecutors, see generally Miriam Hechler Baer, *Cooperation's Cost*, 88 WASH. U. L. REV. 903 (2011) (analyzing incentives to cooperate at all), and Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737 (2016) (describing incentives to provide false or inaccurate information).

[137] A rational actor will disclose information regarding her wrongdoing to another individual only insofar as that disclosure's marginal benefit outweighs its marginal cost. Conspiracies might also, as Neal Katyal points out, compartmentalize information across certain actors, so that only a few actors are aware of the conspiracy's scope, which in turn reduces the criminal organization's effectiveness in achieving its nefarious goals. Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1353-54 (2003). Compartmentalization, it should be noted, is slightly different from the quarantining of information. The former results in some Complicits knowing more than others (or no one person knowing everything). The latter effect simply reduces the number of people with knowledge of the criminal scheme.

[138] One can relax this presumption and assume that Innocents and Complicits both possess sufficient knowledge of the company's internal compliance programs and the government's securities laws.

genuinely fears criminal prosecution for participation in an illegal scheme may behave (at least for the purposes of whistleblowing theory) like a Complicit, even though she is completely innocent of any crime. One might call this person a False Complicit.[139] False Complicits behave like real ones until someone credibly advises them of their innocence.

By the same token, some individuals are guilty of various crimes but sincerely believe they have committed no violations of law. These False Innocents are therefore more inclined to seek a bounty, at least until someone disabuses them of the notion that they are themselves innocent of wrongdoing.

It is difficult to know how many False Complicits or False Innocents populate a given firm. If the misperceptions occur at the same rate, they cancel each other out. There is reason to suspect, however, that more Innocents wrongfully assume themselves complicit than the other way around. As white-collar crime grows more salient and compliance programs more aggressively communicate the content of federal criminal law, more employees — particularly, lower- and mid-level ones — will mistakenly conclude that they have done something wrong.[140] Thus, when a firm aggressively promotes its compliance efforts, more employees will assume they fall under the Complicit label, even if they are actually innocent. Indeed, an inflated sense of what the law prohibits is arguably in the compliance officer's interest insofar as it effectively reduces risky behavior among corporate employees. Accordingly, to the extent employees err in perceiving their criminal exposure, we should expect those mistakes to skew, more often than not, in the direction of guilt.[141]

More importantly, the consequences of mistakenly perceiving oneself a Complicit or Innocent differ quite a bit. If I mistakenly adjudge myself Complicit, then my likelihood of filing a whistleblower claim drops to zero. On the other hand, if I mistakenly believe myself Innocent, I still may decide to forego seeking a whistleblowing bounty for a host of other reasons.[142] Complicits almost never blow the whistle, but Innocents only sometimes blow the whistle. Accordingly, False Complicits depress whistleblowing more than False Innocents inflate it.

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139 I thank Sean Griffith for suggesting this very helpful label.

140 *See* discussion *infra* Section II.E.b.

141 Readers should note that this is not the same thing as one's perception of *detection* or *apprehension*.

142 *See* discussion *infra* Section II.E.a.

In the sections that follow, I explain the divergent interests of Complicits and Innocents, and then identify several dynamics that increase the number of (real) Complicits within the firm.

C. *The Divergent Desires of Complicits and Innocents*

The predominant narrative underlying American whistleblowing programs is one that idealizes the Innocent. Those who praise or criticize the SEC's bounty program tend to emphasize the plight of the Innocent above everyone else.[143] The problem with this assumption is that it ignores the Complicit's complicated and unique incentive structure.

The strongest reason for concern is that Complicits, unlike their Innocent counterparts, are not likely to be moved by a monetary bounty. If a Complicit is an upstanding citizen with a family and career, the Complicit's strongest wish will be to limit his or her exposure to criminal liability. The best way to limit that exposure is by suppressing a crime's probability of detection and punishment.[144] With regard to white-collar crimes such as fraud, detection requires not only the observation of an actus reus (e.g., John entered figures in several ledgers), but also the requisite demonstration of mens rea (John knew the figures were materially false).

As Professor Buell has powerfully argued, recognition of wrongdoing plays a key role in signaling whether behavior is legally blameworthy (i.e., "willful" or "corrupt") or merely an aggressive or reckless business practice.[145] Evidence the defendant knew he stood on the wrong side of

[143] "[C]orporate whistleblowing is first and foremost a moral enterprise." Matt A. Vega, *Beyond Incentives: Making Corporate Whistleblowing Moral in the New Era of Dodd–Frank Act "Bounty Hunting"*, 45 CONN. L. REV. 483, 524-25 (2012) (arguing that whistleblowing programs should encourage employees to come forward not for money, but rather, because it is "the right thing to do"); *see also* VAUGHAN, *supra* note 125, at 151 (contrasting the corporate whistleblower's "courage and dedication to the best interests of the companies for which they worked" with "the self-serving, often criminal conduct of the companies' highest officers").

[144] "[M]ost defendants will never regard an outcome of confessing and avoiding criminal sanctions as being as good as not confessing and avoiding criminal sanctions. First, confessing may force the confessor to stop engaging in profitable illegal activities . . . . Second, there is a reputational cost to being a snitch. Third, the defendant may have some small altruism toward her criminal confederates." Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 221 n.44 (2009) [hereinafter *Beyond the Prisoners' Dilemma*].

[145] *See, e.g.*, Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. REV. 1971, 2007-08 (2006) [hereinafter *Criminal Fraud*] (describing Supreme Court's emphasis on "prevailing mores" and defendants' knowledge and divergence from those mores in novel instances of fraud).

that line is thus an essential component of any criminal case.[146] Without it, the government is unlikely to succeed at trial.

Were the Complicit's overriding goal to avoid the life-changing "stick" of a criminal investigation and prosecution, then the optimal strategy for avoiding that stick would be to keep his mouth firmly shut.[147] This is not to say there exists no method for inducing the Complicit's disclosure or cooperation with authorities. To the contrary, the Complicit might well disclose information if she believes her disclosures will significantly reduce an almost certain sentence of imprisonment. But, the government has long had in place the perfect carrot for inducing this kind of trade, which is criminal cooperation, the process by which the government awards an individual defendant with leniency at sentencing when she provides evidence or assistance in the prosecution of a confederate.[148] Notice, however, that in order to compel this exchange, the government first needs leverage, which arises in the form of imminent prosecution.[149] That is, the government must first obtain evidence of one type (or level) of wrongdoing to secure the Complicit's admission of another type (or level) of wrongdoing.[150]

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146 "It turns out that the most important part of the mechanism by which the concept of fraud evolves to encompass new commercial behaviors is a startling principle . . . that an actor's belief about the wrongfulness of her own behavior — what courts have called 'consciousness of wrongdoing' — justifies punishment." *Id.* at 1976.

147 *See* McAdams, *Beyond the Prisoners' Dilemma*, *supra* note 144, at 221 n.44 (identifying silence and freedom from punishment as offender's preferred outcome). Indeed, one would expect any decent attorney to explore with her putative whistleblower whether she was involved in the reported misconduct and whether she has considered the ramifications of coming forward with such information.

148 "In the language of the marketplace, leniency is the price that a prosecutor must pay to purchase the cooperator's information and services." Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 3 (2003). For insight on criminal cooperation in the federal system, see Baer, *Cooperation's Cost*, *supra* note 136, at 921-24, and Katyal, *supra* note 137, at 1328-29.

149 Leverage accrues through substantive theories of criminal liability combined with the credible threat of severe sanctions for violating substantive laws. "[I]f federal prosecutors had been asked to create the sentencing regime that would place the maximum permissible pressure on criminal defendants to cooperate with the government, they could hardly have done better than the Sentencing Commission." John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1119 (1995) (explaining why federal prosecutors are uniquely situated to combat organized crime).

150 Christopher Leslie demonstrates this with regard to the classic game theory example, the prisoner's dilemma. *See* Christopher R. Leslie, *Antitrust Amnesty, Game Theory, and Cartel Stability*, 31 J. CORP. L. 453, 457 (2006) (observing that absence of provable minor crime decimates prosecutor's leverage and effectively eliminates prisoner's dilemma when prosecutor confronts two defendants).

Outside the white-collar context, this quandary is well understood. Indeed, it is the bread and butter of narcotics trafficking and organized crime investigations.[151] Compare the white-collar employee with a drug courier. The courier bears far more risk than his white-collar counterpart because his crime is more noticeable (i.e., the actus reus, which figures far more prominently in street crime, is more easily observed). The drug ring's division of labor purposely leaves couriers and street-level dealers more vulnerable to criminal prosecution than the kingpins who sit atop such organizations. Traffic laws and search and seizure doctrines all but ensure the detection of some percentage of drug couriers as they traverse airports, buses, and highways.[152]

Upon detection, the police have a nearly air-tight case against the courier caught with a particularly large haul of drugs; only the rare individual will be able to mount a credible claim that she truly had no idea she was carrying two kilograms of cocaine in her car.[153] Thus, for a substantial number of drug cases, the government's proof of mens rea will, as a practical matter, run in tandem with the actus reus. And despite her relatively minor role in the narcotics scheme, the low-level courier will face a significant sentence of imprisonment.[154] Not

[151] Federal prosecutors concededly rely on cooperating defendants in complex white-collar crimes such as fraud and bribery. Nevertheless, in absolute numbers, the government's use of cooperating defendants in high-level corporate fraud cases pales in comparison to its use of cooperating defendants in drug trafficking crimes. *See generally* Roth, *supra* note 136, at 748-50 (citing Sentencing Commission statistics indicating high percentage of criminal cooperators among those prosecuted for antitrust, bribery and fraud related offenses).

[152] *See generally* David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 558-59 (1997) (arguing that traffic laws provide police "limitless opportunities" to stop motorists); Sarah A. Seo, *The New Public*, 125 YALE L.J. 1616 (2016) (charting growth of criminal enforcement through use of traffic laws and car stops); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 298-99 (1997) (observing that the Supreme Court's expansive search and seizure doctrines relating to automobile searches has focused policing practices on traffic enforcement).

[153] Even when a courier contends she was unaware of the contents of her bag or car, the government may employ a "willful blindness" theory, which equates actual knowledge with a defendant's purposeful effort to ignore the obvious. *See, e.g.*, United States v. Heredia, 483 F.3d 913 (9th Cir. 2007) (government not obligated to show that defendant's blindness was manufactured in order to avoid liability; deliberate ignorance is sufficient). For an earlier exploration of the doctrine's development in American courts, see Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 196-210 (1990).

[154] "[T]he Court's sentence increases the cost of 'business' for drug-smuggling enterprises by making it more difficult to find drug couriers." United States v. Joseph, No. 15-CR-362, 2016 WL 3212083, at *2 (E.D.N.Y. June 7, 2016) (discussing a recent

surprisingly then, she will (often, with the encouragement of her attorney) decide to trade information in exchange for sentencing leniency.

In contrast, consider the mid-level Complicit who assists her in concealing a serious FCPA violation. To cover up the company's bribe of a foreign official, a supervisor routs illicit payments to an intermediary who is also a third-party contractor. Assume the Complicit aids in the scheme by preparing fake invoices that effectively conceal the purpose of the illegal payments.

There is nothing obviously illegal about working with contractors or preparing documentation reflecting a company's payments to those contractors. Accordingly, even if the government eventually becomes aware of the company's bribe, prosecutors may well lack requisite evidence of the Complicit's state of mind.[155] If the Complicit speaks up, and speaks up truthfully, however, the government learns not only of the scheme, but also of her knowing participation in that scheme.

In sum, whistleblowing functions as a form of self-incrimination. Volunteering information increases the probability that external authorities will learn more about the target wrongdoing, about the Complicit's role in that wrongdoing, and her specific mental state as she was engaging in said wrongdoing. Finally, should the whistleblower's claim lead to a full-blown investigation, it may further disclose additional instances of wrongdoing in which the Complicit has participated.

Bounty programs — which deal solely in pecuniary awards and little else — provide little comfort for the Complicit. However steadfastly the SEC may conceal the whistleblower's identity from the general public, this vaunted promise of confidentiality does nothing to assuage the Complicit's fears of exposing himself to government authorities.[156] As for filing an incomplete complaint or shading it in the whistleblower's favor, the conduct is not only supremely risky, but also illegal in its own right.[157] Thus, the sticking point for Complicits is not one of certainty or price. Nor is it even eligibility. So far as Complicits are concerned, the whistleblowing reforms scholars most commonly propose are orthogonal. Congress can revise its definition

courier's sentencing and the court's reasoning that prison sentences reduce the supply of willing couriers).

155 *See* Buell, *Criminal Fraud*, *supra* note 145, at 1998-2000.

156 The SEC's own whistleblowing rules reserve the right to disclose the whistleblower's information to the Department of Justice and other law enforcement agencies. 17 C.F.R. § 240.21F-7 (2016).

157 *See* 17 C.F.R. § 240.21F-8.

of "whistleblower" however it pleases and the SEC can streamline its whistleblowing process to a single computer screen. The undetected Complicit will remain silent.

D. A Caveat: Criminal Law's Salience

Before considering this model further, an important caveat is in order. Much of the foregoing discussion assumes a criminal law backdrop, replete with stories of imprisonment and corresponding social ostracism and financial ruin. This certainly can become the case for violations of the foreign bribery, insider trading and securities fraud statutes.[158] For each of these offenses, the Department of Justice has indicated both a willingness and ability to follow through on threats of criminal prosecution.[159] The credible threat of criminal sanction, made salient by blockbuster prosecutions and their attendant publicity, induces employees to view themselves through criminal law's lens.[160] As the salience literature establishes, the government need not criminally prosecute every securities fraud to cause

[158] *See, e.g.*, Jay Holtmeier, *Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities*, 84 FORDHAM L. REV. 493, 520-21 (2015) (observing that DOJ and SEC "routinely exercise" concurrent jurisdiction over cases involving "virtually identical facts"). Securities fraud cases trigger civil and criminal proceedings, often at the same time. *See* United States v. Gupta, 925 F. Supp. 2d 581, 586 (S.D.N.Y. 2013) (pointing out that "cases are legion" in the Southern District of New York "where parallel civil investigations and criminal prosecutions . . . target the same wrongdoers" (citation omitted)), *aff'd*, 747 F.3d 111 (2d Cir. 2014); *see also* J. Kelly Strader, *(Re)conceptualizing Insider Trading:* United States v. Newman *and the Intent to Defraud*, 80 BROOK. L. REV. 1419, 1445 (2015) (citing overlap in insider trading cases).

[159] Where evidence is lacking, however, the DOJ can still cede responsibility to regulatory agencies such as the SEC. Many have noted the porous boundary between civil and criminal securities cases. *See generally* Buell, *Securities Fraud*, *supra* note 22, at 566 (criticizing dearth of "conceptual distinctions" between civil and criminal fraud). For a recitation of the distinctions between civil and criminal cases and penalties, see Joan MacLeod Heminway, *Hell Hath No Fury Like an Investor Scorned: Retribution, Deterrence, Restoration, and the Criminalization of Securities Fraud Under Rule 10b-5*, 2 J. BUS. & TECH. L. 3, 4-5 (2007).

[160] Salience is further enhanced by the availability heuristic, which causes individuals to overstate the likelihood of events they can easily recall due to recent publicity. "When particular information is available or accessible in memory, it has a greater influence on judgments and decisions." Jennifer K. Robbenholt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1122 n.82 (2013) (citing Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 4 COGNITIVE PSYCHOL. 207 (1973)).

employees to sort themselves into Complicits and Innocents; to the contrary, prosecutors need only pursue some violations.[161]

Salience manifests itself in two important ways. First, the specter of criminal liability encourages wrongdoers to behave more carefully around others, thereby amplifying the differences between Complicits and Innocents.[162] Second, as criminal prosecution's plausibility increases, ex post reporting suffers, even among bit players and lower-level employees. Here again, the shift from civil to criminal liability matters quite a bit. The plaintiff-oriented law firm that files a civil securities fraud suit focuses primarily on deep pockets; it reaps little benefit from filing a civil claim against a mid- or lower-level employee. The prosecutor, by contrast, is more than happy to file a criminal case against mid- and lower-level employees. Their conviction boosts the government's statistics and demonstrates the prosecutor's commitment to vindicating the public interest.[163] More importantly, once under the prosecutor's thumb, the lower- or mid-level employee will almost certainly consider a criminal cooperation agreement that delivers higher-ranking prey. In sum, whereas civil law firms might steer clear of mid-level employees, prosecutors will share no such compunctions.[164] Thus, criminal prosecution poses a far greater threat to the lower-level employee than even the most aggressive civil litigator.

Salience further explains the distinctions between the SEC's bounty program and other whistleblowing contexts. For example, many large or publicly held companies routinely employ internal hotlines to receive reports of misconduct, which can include anything from petty theft to serious accounting fraud.[165] For petty violations unrelated to

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161 The "intended effect" I speak of in the text is general deterrence. I assume the government ordinarily views salience as a positive outcome, since the threat of criminal liability deters wrongdoing. The problem, however, is that the threat of criminal liability also depresses whistleblowing.

162 "Detection avoidance" can include anything from deleting documents to intimidating or killing witnesses (with the latter being an admittedly rare occurrence in white collar crime cases). "If you commit a crime, you will often escape punishment if no one testifies against you. So you have an interest in keeping witnesses from testifying." Brendan O'Flaherty & Rajiv Sethi, *Witness Intimidation*, 39 J. LEGAL STUD. 399, 399 (2010).

163 On what prosecutors "maximize" generally, see Russell D. Covey, *Plea Bargaining and Price Theory*, 84 GEO. WASH. L. REV. 920, 958-60 (2016) (arguing that prosecutors maximize a number of interests).

164 For trenchant criticism of the federal government's prosecution efforts, see Todd Haugh, *The Most Senior Wall Street Official: Evaluating the State of Financial Crisis Prosecutions*, 9 VA. L. & BUS. REV. 153, 181-87 (2015).

165 *See, e.g.*, ASSOC. OF CERTIFIED FRAUD EXAMINERS, REPORT TO THE NATIONS ON OCCUPATIONAL FRAUD AND ABUSE 32 fig.27 (2014) [hereinafter ACFE 2014 Global

serious fraud or bribery, criminal law poses little problem; the supervisor is not about to go to jail for misusing the company car (although she may well lose her job). Offenders are not likely to adopt drastic measures to hide such behavior, and reporting employees need not fear anything resembling criminal prosecution.[166]

A similar dynamic further separates civil filings under the False Claims Act, which permits individuals to file qui tam suits on behalf of the federal government.[167] Whistleblowers have filed thousands of civil complaints alleging a broad variety of fraud schemes, particularly in regard to the health care and defense industries.[168] If current and former employees feel comfortable disclosing wrongdoing in civil lawsuits, why would they avoid the SEC's whistleblowing platform, particularly when it promises them anonymity?

At least two distinctions deserve mention. First, although the FCA includes a criminal component, most FCA cases arise out of privately

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Fraud Study] (noting that of those surveyed, about 68% of all companies employing more than 100 employees used internal hotlines); J. Paul McNulty, Jeff Knox & Patricia Harned, *What an Effective Corporate Compliance Program Should Look Like*, 9 J.L. ECON. & POL'Y 375 (2013) (noting prevalence of "codes and training and hotlines"). Among larger employers, a number now employ separate hotlines for particular types of misconduct. *See* Thomas O. Gorman, *Emerging Trends in FCPA Enforcement*, 37 FORDHAM INT'L L.J. 1193, 1210 (2014) (noting that "nearly all" companies surveyed employed a hotline for anonymous compliance concerns).

[166] Whistleblowing's advocates sometimes blur the distinction between serious frauds and occupational misconduct. For example, Professor Skinner repeats the claim that: "in the past four years whistleblowers have uncovered 54.1% of frauds in public companies, versus the 4.1% detected by the SEC and external auditors." Skinner, *Whistleblowers*, *supra* note 5, at 892. This extremely high number comes from the Senate's 2010 Report, which is based on Harry Markopolous's testimony; Markopolous was citing the American Certified Fraud Examiners' 2008 Report on Occupational Fraud ("ACFE Report"). *See* S. REP. NO. 111-176, at 110-11 (2010), https://www.congress.gov/111/crpt/srpt176/CRPT-111srpt176.pdf. This figure has not changed since 2008; roughly half of all discoveries of occupational fraud continue to arise out of employee tips. *See* ACFE 2014 Global Fraud Study, *supra* note 165, at 21.

But that is not the whole story. The ACFE reports define "occupational fraud" in an extremely broad manner, ranging from an employee's "simple . . . pilferage of company supplies" to sophisticated accounting fraud schemes. ASS'N OF CERTIFIED FRAUD EXAMINERS, 2008 REPORT TO THE NATION ON OCCUPATIONAL FRAUD & ABUSE 6 (2008), http://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/2008-rttn.pdf. Only approximately 25% of the frauds evaluated by the ACFE 2008 Report involved losses greater than $1,000,000, and a significant portion of the victims were small businesses. *Id.* at 9. Thus, the fact that "tips" (the term used by ACFE) play such a great role in uncovering occupational misconduct is not easily generalizable to a bounty program targeted at serious securities violations.

[167] *See* authorities cited *supra* note 13.

[168] Engstrom, *Private Enforcement's Pathways*, *supra* note 13, at 1944-45 (analyzing data); O'Sullivan, *supra* note 7, at 72.

filed lawsuits and remain civil in nature.[169] Whereas private attorneys can employ the civil False Claims Act to promote aggressive theories of fraud, federal prosecutors are less able and less inclined to stretch the FCA's criminal statute.[170] Thus, the bit player in a False Claims Act case need not fret that her civil claim will morph into a criminal investigation and prosecution.

More importantly, the False Claims Act is — to borrow Professors Casey and Niblett's terminology — "court-centric" whereas the SEC's whistleblowing program is "agency-centric."[171] The interposition of a civil procedural mechanism between the FCA relator and the federal government substantially reduces, if not outright eliminates, the specter of criminal prosecution. Attorneys and their clients do not ordinarily associate private lawsuits with federal criminal prosecutions. If anything, the civil plaintiff harbors the opposite fear — that the government will simply ignore her claim.

By contrast, the SEC's Enforcement Division has notably aspired to be seen as the preeminent policeman of corporate misconduct.[172] In addition, United States Attorneys have promoted their insider trading and corporate fraud prosecutions with an eye towards assuring the general public that the DOJ does in fact care about white-collar and corporate crime. Accordingly, criminal prosecution is salient in the securities context precisely because the officials running those agencies desire it that way. Accordingly, the "agency centric" whistleblowing model must contend with an enhanced fear that the

169 "While the DOJ can initiate either criminal or civil actions against fraudsters, in practice most FCA enforcement efforts are initiated as private lawsuits brought pursuant to the FCA's *qui tam* provisions." Engstrom, *Private Enforcement's Pathways*, *supra* note 13, at 1944. The criminal statute can be found at 18 U.S.C. § 287 (2012). For an argument that Section 287 has been underutilized, see Bradley J. Sauer, Note, *Deterring False Claims in Government Contracting: Making Consistent Use of 18 U.S.C. § 287*, 39 PUB. CONT. L.J. 897, 904-08 (2010).

170 For example, the United States Attorney's Manual warns federal prosecutors of circuit splits regarding requirements such as materiality and willfulness under 18 § U.S.C. 287. *See* OFFICE OF THE UNITED STATES ATTORNEYS, CRIMINAL RESOURCE MANUAL 922 (1997), https://www.justice.gov/usam/criminal-resource-manual-922-elements-18-usc-287. For more on how the DOJ has used the FCA's *civil* provisions to enlarge the concept of a false claim, see Joan H. Krause, *Truth, Falsity, and Fraud: Off Label Drug Settlements and the Future of the Civil False Claims Act*, 71 FOOD & DRUG L.J. 401, 421 (2016). (describing "implied certification" concept in civil FCA cases, whereby the submission of a truthful invoice for services performed out of compliance with the government's program conditions qualifies as a false claim).

171 Casey & Niblett, *supra* note 10, at 1174.

172 Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 610-11 (2012) [hereinafter *Choosing Punishment*].

whistleblowing will lead not only to an investigation of others but also to an investigation of the person who comes forward with information.[173]

E. *Three Factors that Inflate the Number of Complicits*

The preceding sections introduced the reader to two types of employees, Innocents and Complicits, and explained why whistleblowing programs are unlikely to elicit information voluntarily from Complicits, particularly when criminal punishment is salient.

The Innocent/Complicit framework's effect on whistleblowing depends on two factors: the number of Innocents in relation to Complicits, and the number of Innocents who possess valuable information. If a sizable number of Innocents populate the corporate workplace and possess valuable information, a bounty program may still be viable insofar as it induces reporting from Innocents.[174] If, on the other hand, most of the individuals with valuable information are also Complicits, the bounty program's effectiveness as a deterrent quickly recedes.

This Section identifies three factors — federal criminal law, behavioral psychology, and organizational compliance — that inflate the number of Complicits compared to Innocents and inadvertently undermine whistleblowing programs. I discuss each of these in turn.

1. Law

Federal white-collar crime's breadth is a commonplace and even somewhat clichéd observation.[175] A variety of open-textured federal statutes criminalize behavior within corporate settings. Much of that

[173] *See, e.g.*, Daniel Hurson, *Ten "Rules" for Becoming a Successful SEC Whistleblower*, MONDAQ (Sept. 11, 2013), http://www.mondaq.com/unitedstates/x/261844/Corporate+Commercial+Law/The+New+Rules+For+Becoming+A+Successful+SEC+Whistleblower (warning in Rule 8 that individuals who had "any involvement" in the illegal activity should first consult an experienced securities attorney because the SEC might otherwise pursue the would be whistleblower or refer the matter to the DOJ for criminal investigation and prosecution).

[174] *See generally* authorities cited *supra* note 131.

[175] "The proliferation and breadth of penal laws — the core of the modern 'overcriminalization' phenomenon — suggests that legislatures regularly pass punitive codes they do not actually wish prosecutors or police to enforce fully." Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 680 (2015); *see also* Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 VAND. L. REV. 1191, 1197-201 (2015) [hereinafter *New Paradigm*]. For a refutation of the "federalization" aspect of the overcriminalization critique, see Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L. J. 1 (2012).

behavior falls within three broad categories: fraud, bribery and obstruction of justice. The Dodd–Frank Act protects and pays whistleblowers who report a "possible violation of the Federal securities laws" which includes accounting fraud by an issuer, insider trading and violations of the anti-bribery and record-keeping provisions of the Foreign Corrupt Practices Act.[176]

Criminal fraud differs from civil fraud in that it requires no evidence of loss or injury. The federal fraud statutes are famously inchoate; they criminalize the scheme to deprive others of tangible property under fraudulent or false pretenses, and not the scheme's actual success.[177]

The federal code covers far more activity than the crimes that are most readily perceived as securities violations. Thus, the employee who reports wrongdoing to the SEC must recognize that a subsequent investigation could reveal any serious federal crime, such as mail or wire fraud,[178] a willful violation of regulations promulgated by another agency (e.g., the FDA or EPA), or the making of false statements in a federal inquiry or otherwise obstructing justice.[179] Accordingly, the putative Innocent who contemplates reporting wrongdoing to the SEC must keep in mind not only her exposure for the crime she is reporting, but also for any other crimes in which she may have been complicit.

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176 17 C.F.R. § 240.21F–2 (2016).

177 "[We have] described wire fraud as a 'crime of attempting rather than attaining.' The fraud is therefore complete once a defendant with the requisite intent has used the wires in furtherance of a scheme to defraud, whether or not the defendant actually collects any money or property from the victim of the scheme." United States v. Aslan, 644 F.3d 526, 545 (7th Cir. 2011) (citation omitted).

Indeed, some courts stress that "[t]he wire fraud statute does not require intent to cause pecuniary loss." United States v. Rodriguez, No. 2:11-0296, 2016 WL 5847008, at *1 (E.D. Cal. Oct. 5, 2016) (noting defendant's intention to eventually pay back person defrauded does not defeat prosecution for wire or mail fraud). Nor does it require actual reliance or loss. United States v. Goldberg, 455 F.2d 479, 480-81 (9th Cir. 1972).

178 *See* 18 U.S.C. § 1341 (2012) (mail fraud); *id.* § 1343 (2012) (wire fraud).

179 *See, e.g.*, *id.* § 1001 (2012) (false statements); *id.* § 1503 (2012) (obstruction of justice). The residual language of the obstruction of justice statute is particularly broad, as it "applies to all stages of the criminal and civil justice process . . . . *Indeed, it arguably covers conduct taken in anticipation that a civil or criminal case might be filed, such as tax planning, hiding assets or talking to police.*" United States v. Bonds, 784 F.3d 582, 583 (9th Cir. 2015) (Kozinski, J., concurring) (emphasis added). Other statutes, such as 18 U.S.C. § 1512(c) (2012), criminalize the destruction of documents in connection with any "official proceeding," or forbid the destruction or falsification of any document or "object" in connection with a federal investigation. 18 U.S.C. § 1519 (2012).

For example, an individual who played no role in an initial foreign bribery scheme, but then willfully destroyed documents or lied to a federal agent during a subsequent investigation is still guilty of one more obstruction crimes.[180] The executive who steered clear of his supervisor's accounting fraud scheme, only to travel or use a facility in interstate commerce to negotiate some side payment with a procurement-officer at a private company is almost certainly guilty of violating the Travel Act.[181] Finally, the employee who falsified or transmitted results for her pharmaceutical company's drug trial is also quite clearly a Complicit, even if she avoided the insider trading scheme her supervisor carried out in conjunction with the announcement of those results.[182]

In addition to federal criminal law's substantive breadth, two general rules of criminal liability — conspiracy and accomplice liability — dramatically increase criminal exposure. The federal criminal accomplice liability statute treats accomplices and principals as equivalents for purposes of guilt.[183] Thus, the employee who aids and abets his supervisor's scheme is as guilty as his supervisor, even if the supervisor is the ringleader or would have succeeded with or without the accomplice's help.[184]

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[180] On willful destruction or alteration of documents, see 18 U.S.C. § 1519 (2012).

[181] *See id.* § 1952 (2012); Jeffrey Boles, *Examining the Lax Treatment of Commercial Bribery in the United States: A Prescription for Reform*, 51 AM. BUS. L.J. 119, 135-42 (2014) (describing emergence of commercial bribery statutes and implications under federal Travel Act and other statutes).

[182] *See generally*, Vandya Swaminathan & Matthew Avery, *FDA Enforcement of Criminal Liability for Clinical Investigator Fraud*, 4 HASTINGS SCI. & TECH. L.J. 325 (2012).

[183] "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a) (2012). Section 2's general accomplice liability statute is distinct from the statute that enables the SEC to pursue civil penalties against "any person that knowingly or recklessly provides substantial assistance to another person." 15 U.S.C. § 78t(e) (2012). Notwithstanding this distinction, the Second Circuit has drawn on criminal law's aiding and abetting doctrine to guide its interpretation of Section 78t(e). *See* SEC v. Apuzzo, 689 F.3d 204, 211-13 (2d Cir. 2012).

[184] *See* Rosemond v. United States, 134 S. Ct. 1240, 1245 (2014) (explaining that an accomplice "is punishable as a principal" when he commits affirmative act with the intent of facilitating the crime). "One need not participate in an important aspect of a crime to be liable as an aider and abett[o]r; participation of relatively slight moment is sufficient. Even mere words or gestures of encouragement constitute affirmative acts capable of rendering one liable under this theory." United States v. Rufai, 732 F.3d 1175, 1190 (10th Cir. 2013) (alteration in original) (citations omitted).

The accomplice need not "cause" the crime. His assistance triggers his guilt so long as he intends his assistance to facilitate the underlying offense. *See* State *ex rel.* Martin

Students of criminal law know quite well the black-letter rule that an accomplice must purposely "associate himself with the [criminal] venture" and that he "seek by his action to make it succeed."[185] However substantial this requirement may sound in theory, it is not particularly onerous in fact. The accomplice's mens rea may be proven by circumstantial evidence and her affirmative act need not consist of anything more than the most modest of assistance.[186] And finally, the accomplice's motive is ordinarily irrelevant to the finding of her guilt. As Justice Kagan recently explained, "The law does not . . . care whether [the accomplice] participates with a happy heart or a sense of foreboding."[187]

Thus, the employee who knowingly and purposefully assists in her supervisor's scheme (because, for example, she wishes to keep her job), is a guilty accomplice, regardless of whether she receives any tangible benefit, or does so only reluctantly.[188]

The federal conspiracy statute is even less forgiving. If two or more defendants agree to commit a federal crime and just one defendant engages in an overt act in furtherance of that crime, all of the defendants are guilty under Section 371 of the federal code.[189] If a co-

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v. Tally, 15 So. 722, 738 (Ala. 1894) (noting that assistance "need not contribute to the criminal result"). For criticism of accomplice liability's expansiveness in this regard, see Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 92 (1985) (querying why the law "treat[s] all secondary parties alike" regardless of their actual contribution). For a refutation of Dressler's criticism and a philosophical discussion of accomplice liability and causation generally, see Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395, 402-07 (2007).

185 Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) (quoting Judge Hand's formulation in United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938)).

186 "After all . . . every little bit helps — and a contribution to some part of the crime aids the whole." *Rosemond*, 134 S. Ct. at 1246 (citing treatise for the proposition that the defendant need only do "something" to aid the crime).

187 *Id.* at 1250.

188 The "reluctant accomplice" problem underscores criminal law's distinction between motive and intent. "Motive describes the reason a person chooses to commit a crime. The reason, however, is different than a required mental state such as intent or malice." People v. Hillhouse, 40 P.3d 754, 777 (2002). "Motive, intent, and plan are distinct concepts that are often blurred because they all concern the mental aspects of the crime." United States v. Jenkins, 48 M.J. 594, 598 (A. Ct. Crim. App. 1998) (explaining distinctions).

189 Title 18, United States Code, Section 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to

conspirator wishes to withdraw from that conspiracy, he either must explicitly communicate his withdrawal to his co-conspirators or report the conspiracy to authorities.[190] A conspiracy is thus easy to commence and difficult to exit.[191] Moreover, it poses particular peril for any employee who happens to suffer weaknesses in impulse control.[192]

Finally, under federal law's controversial *Pinkerton* doctrine, the employee who joins a criminal conspiracy is liable for not only the conspiracy itself, but also for all foreseeable substantive crimes her co-conspirators commit in furtherance of the conspiracy.[193]

Taken together, federal criminal law's combination of inchoate and vicarious liability doctrines expose the ordinary employee to an alarming degree of criminal liability once she crosses some initial threshold and once her state of mind is known.[194] This exposure, in

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> effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 371 (2012). "[The statute] is broad and reaches conspiracies to commit any offense specifically prohibited by other federal statutes." William C. Tucker, *Deceitful Tongues: Is Climate Change Denial A Crime?*, 39 ECOLOGY L.Q. 831, 878 (2012) (describing Section 371's breadth).

[190] United States v. George, 761 F.3d 42, 55 (1st Cir. 2014) ("Withdrawal is a difficult defense, typically requiring evidence that the accused confessed his involvement in the conspiracy to the government or announced his withdrawal to his coconspirators."); *see also* United States v. Randall, 661 F.3d 1291, 1294-95 (10th Cir. 2011) (requiring explicit communication with co-conspirators or authorities that offender will no longer be associated with the conspiracy "in any way").

[191] *Randall*, 661 F.3d at 1294 (observing that "[g]etting involved in a conspiracy . . . is a risky endeavor because of the difficulty of getting out"); *see also* United States v. Luttrell, 889 F.2d 806, 809 (9th Cir. 1989) ("A conspiracy is complete as soon as some overt act is taken to achieve the objective of the agreement.").

[192] By the time an employee "thinks twice" about his decision to join in an illicit scheme, it may be too late. "Withdrawal after entering into the agreement and the commission of one or more overt acts pursuant thereto does not prevent a conspiracy conviction of the withdrawing party." United States v. Brown, No. 97-20591, 1998 U.S. App. LEXIS 39116, at *18 (5th Cir. Dec. 28, 1998). "[I]n order to avoid complicity in a conspiracy, one must withdraw before any overt act is taken in furtherance of the agreement." United States v. Cervantes, No. 91-50011, 1992 U.S. App. LEXIS 2503, at *2 (9th Cir. Feb. 14, 1992).

[193] *See* Pinkerton v. United States, 328 U.S. 640, 647 (1946). For applications of *Pinkerton* in the securities context, see *United States v. Blitz*, 533 F.2d 1329, 1341 n.40 (2d Cir. 1976), and *United States v. Samueli*, 575 F. Supp. 2d 1154, 1161 (C.D. Cal. 2008) (upholding aiding and abetting charge in securities fraud case and observing that liability also would have been proper under *Pinkerton* theory).

[194] "[I]t is often difficult for a defendant to understand . . . the 'in for a dime, in for a dollar' theory of conspiracy." United States v. Holcomb, No. 07-11210, 2008 WL 2245365, at *3 (E.D. Mich. May 30, 2008) (rejecting defendant's ineffective assistance

turn, omits any front-end distinction between the weakest and strongest players in a criminal scheme. Although a defendant might successfully persuade a sentencing court of her minimal participation, that possibility — and the hoped for lesser sentence accompanying it — is cold comfort for the Complicit contemplating the SEC's whistleblowing program.

2. Psychology

If white collar criminal law is fairly well-known and understood in even general terms ("the federal authorities can prosecute me and throw me in jail if I fill out this form falsely"), then a series of related questions arise: Why do mid- and lower-level employees join in their supervisor's schemes? Why do mid- and lower-level employees engage in misconduct that redounds, primarily if not exclusively, to the benefit of their employer? Why do otherwise honest employees fail to report the first whiff of wrongdoing immediately, to either internal or external enforcers? After all, a user-friendly computer screen and potentially large bounty now awaits them. And for more highly educated sought-after employees, why not leave the firm altogether and find a job elsewhere?

The discipline of behavioral finance has devoted itself to explaining the biases and heuristics that cause corporate employees to acquiesce and engage in illicit schemes.[195] I will not attempt to repeat this now-voluminous scholarship.[196] Two biases in particular, however, bear exploration as they relate to Complicits and Innocents: fundamental attribution error and temporal inconsistency.

Fundamental Attribution Error. The fundamental attribution error posits that individuals understate the situational factors that induce others to engage in wrongdoing.[197] Thus, supervisors and employees

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of counsel claim).

195 For an introduction to behavioral economics and an exploration of the interaction between bounded rationality, bounded willpower, and what the authors refer to as "bounded self-interest," see Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476-79 (1998).

196 For excellent articles applying behavioral finance to corporate compliance, see Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 83-91 [hereinafter *Monitoring*] (introducing behavioral concepts likely to arise in supervision and monitoring of employees), and Robert A. Prentice, *Beyond Temporal Explanations of Corporate Crime*, 1 VA. J. CRIM. L. 397, 409-14 (2013) (describing loss aversion and framing effects).

197 *See generally* Kim, *supra* note 42, at 993-97 (describing Milgram's famous experiment testing obedience to authority figures).

incorrectly assume wrongdoing can be explained or predicted by personality or personal characteristics ("John's not the type of guy who would bribe someone") and then are subsequently surprised when situational factors prove them wrong.[198] ("I can't believe John bribed that official. He must have been a bad guy all along!"). "The implicit assumption here," Donald Langevoort aptly summarizes, "is that cheaters involuntarily emit behavioral signals indicating a lack of trustworthiness that can be spotted by savvy observers."[199] This assumption — that we can sniff out the difference between good and bad guys — unfortunately is as pervasive as it is wrong.[200]

The fundamental attribution error yields a number of implications. A corporation's top executives might believe, quite genuinely, that their company can do business in China and India without violating the Foreign Corrupt Practices Act because the corporation hosts an extensive foreign compliance program and has articulated a strong policy against hiring employees whose backgrounds would suggest a reckless personality. The same corporation's board might place excessive trust in a chief compliance officer who appears conscientious and reliable. His disposition is that of a competent straight-shooter. Finally, regional and mid-level managers who supervise work in these geographic areas become overly confident in the employees who report directly to them because the managers just know their hires are the ones talented enough to produce higher-than-average revenues and not resort to cheating or shortcuts. Their dispositions imply nothing, but hard work and adherence to rules.

The dynamic is not limited to decisions to authorize business in foreign countries. Disposition will cause mid- and lower-level employees to join organizations with a less than perfect understanding of the situational factors they are likely to encounter. If, as described above, individuals consistently use dispositional character traits as heuristics for predicting illegal conduct, they will unwittingly join organizations and groups whose rules and structures either encourage or fail to detect such wrongdoing.[201] And so long as their

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198 "We generally believe, in other words, that bad results arise from bad people and we ignore or are oblivious to mitigating situational factors." Eric A. Zacks, *Contracting Blame*, 15 U. PA. J. BUS. L. 169, 173 (2012).

199 Langevoort, *Monitoring*, *supra* note 196, at 88.

200 "[O]bservers underestimate in others the influence of situational factors, and overestimate character." *Id.* at 89.

201 Thus, as Donald Langevoort argues, internal compliance efforts that underestimate the effects of "tournament style" promotion practices within corporate firms may fall short of their goals. "[A]n internal controls system may be deficient if it does not anticipate the risks generated by these tournament survival traits and the

determinations of character hold steady, the fundamental attribution error, combined with other well-known cognitive biases, will cause these same individuals will deny the presence of wrongdoing until it has become so pronounced they can no longer ignore it.[202] At that point, they will be faced with a highly unpleasant decision: speak up or reluctantly join in someone else's illicit scheme. For reasons laid out below, they may well choose the latter.

Temporal Inconsistency. Everyone discounts costs and benefits slated to occur in the future. "Money today is worth more than money tomorrow" is more than a maxim; it is a reflection of exponential discounting. The money I receive today I can deploy immediately or loan to someone else with interest. The money I believe I will receive next month is both unavailable for use and unable to earn interest.[203] By the same token, the pain I can put off until tomorrow or the following day is slighter than the pain I experience today.[204]

Exponential discounting can be modeled fairly easily. The farther out in time a cost or benefit is slated to occur, the lesser its value.[205] Unfortunately, many of us do not apply a stable discount rate.[206] Instead, we apply an extremely high rate for near-term periods and then a decreasing rate for later ones. Behavioral economists call this "hyperbolic" or "quasi-hyperbolic" discounting.[207] Hyperbolic

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predictably pernicious way they can occasionally play out in the game of corporate governance." Donald C. Langevoort, *Resetting the Corporate Thermostat: Lessons from the Recent Financial Scandals About Self-Deception, Deceiving Others and the Design of Internal Controls*, 93 GEO. L.J. 285, 289 (2004).

202 "Once an impression is gained, it is insufficiently revised to reflect new information. There is a bias to the status quo." Langevoort, *Monitoring*, *supra* note 196, at 87-88 (explaining individuals' failure to update favorable first impressions).

203 "[M]oney received today is worth more than the same amount of money received tomorrow. This truism reflects both the effects of inflation, as well as the fact that individuals are risk averse and prefer definite cash flows today to possible ones in the future." Miriam H. Baer, *Timing Brady*, 115 COLUM. L. REV. 1, 40 (2015) [hereinafter *Timing Brady*] (citation omitted).

204 Yair Listokin, *Crime and (with a Lag) Punishment: The Implications of Discounting for Equitable Sentencing*, 44 AM. CRIM. L. REV. 115, 116 (2007) (explaining how punishment slated to occur in the future impose less deterrent effect than punishments slated to occur imminently).

205 Robert J. Rhee, *The Application of Finance Theory to Increased Risk Harms in Toxic Tort Litigation*, 23 VA. ENVTL. L.J. 111, 130-31 (2004).

206 *See* Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U. L. REV. 1033, 1043 (2012) ("Stable, time-consistent preferences require a constant exponential discount factor.").

207 *See generally* Jon Elster, Intertemporal Choice and Political Thought, *in* CHOICE OVER TIME 35, 35-53 (George Loewenstein & Jon Elster eds., 1992) (discussing "how

discounting causes an individual to perceive the difference between a piece of pizza now and a piece of pizza an hour from now differently from the same pair of events forecasted two months in the future. The hour long wait feels different if it is slated to begin now than if it is to occur two months from now.[208]

Hyperbolic discounting explains preference switching in individuals.[209] We say we want to exercise, avoid sugary foods and quit unhealthy addictions. But when we confront the choice between engaging in these behaviors and adhering to our original plan of "delaying" gratification, we suddenly cave to our desires and "switch" preferences.[210] More importantly, after we engage in such behavior, we register regret, suggesting that we really would have preferred to stick to our original plan. Psychologists refer to this phenomenon as a "willpower" failure.[211] Philosophers conceptualize it as a duel of long-term and short-term selves wherein the long-term self wishes to behave in a socially desirable way, but the short-term self somehow gets the upper hand and undermines the long-term self's admirable goals.[212]

If "low willpower" is nothing more than a layperson's term for hyperbolic discounting, one can see why temporal inconsistency increases the number of Complicits.[213] An employee might genuinely

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issues of myopia, deferred gratification, and self-control have been discussed within political theory"). For more formal, technical models, see generally David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q.J. ECON. 443 (1997), and R.H. Strotz, *Myopia and Inconsistency in Dynamic Utility Maximization*, 23 REV. ECON. STUD. 165 (1956).

208 Some conceptualize the problem as one that relates primarily or exclusively to costs and benefits slated to occur immediately. *See, e.g.*, Richard H. McAdams, *Present Bias and Criminal Law*, 2011 U. ILL. L. REV. 1607 (2011) (analyzing temporal inconsistency's implications for criminal law).

209 This is particularly the case with procrastination and excessive or premature consumption. *See* Ted O'Donoghue & Matthew Rabin, *Doing It Now or Later*, 89 AM. ECON. REV. 103, 104 (1999) (employing temporal inconsistency theory to explain procrastination and premature consumption).

210 "Over the long term, you want to lose weight, but in the short term, you become tempted by a piece of chocolate cake and eat it (and later feel remorse)." Baer, *Timing Brady*, *supra* note 203, at 41. Preference switching is more likely, and more problematic, when an activity's costs and benefits fall in different time periods. Intertemporal decisions are ones "in which the timing of costs and benefits are spread out over time." George Loewenstein & Richard H. Thaler, *Anomalies: Intertemporal Choice*, 3 J. ECON. PERSP. 181, 181 (1989).

211 *See* Lee Anne Fennell, *Willpower Taxes*, 99 GEO. L.J. 1371, 1378-79 (2011).

212 *See* Drew Fudenberg & David K. Levine, *A Dual-Self Model of Impulse Control*, 96 AM. ECON. REV. 1449, 1449-52 (2006) (explaining "dual self" model).

213 Professor Manuel Utset's seminal work in this area demonstrates the ways in

believe that she will "do the right thing" when faced with a difficult situation sometime in the future. The costs of foregoing a promotion, exposing a fraud, or refusing to conceal a bribe will all look far less daunting when perceived as something that might occur in the distant future. By the same token, the benefits of rising within the company, attaining greater responsibility, and making more money will also appear less pressing when forecasted abstractly in future time periods.

Now consider the same cost–benefit analysis for a decision that arises imminently. A supervisor asks her employee to lie for her and the employee must decide, in the moment, whether to lie and go along with the supervisor, confront the supervisor directly, or instead report the supervisor's behavior to the company's compliance department. Each decision carries with it a mix of intertemporal costs and benefits. The decision to confront the supervisor may be particularly painful, and the benefits of reporting the supervisor will almost certainly take time to materialize.

Some employees might very well reply, if asked (and if prompted during a compliance training program) that, despite the upfront cost, the long term benefits of reporting wrongdoing far outweigh the momentary discomfort of confronting or "snitching on" a fellow employee. They may come by this belief quite genuinely, particularly when viewing costs and benefits in the abstract.[214] The delayed gratification and immediate pain that accompanies most varieties of confrontation, however, will appear quite different when the choice becomes an immediate and concrete one as opposed to an abstract decision to occur in the distant future. Accordingly, some percentage of employees will choose the "easier" route, which in many cases will entail the provision of affirmative help (however minor) to certain colleagues and not mere silence.[215] Within this group, some will

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which temporal inconsistency fuels criminal behavior generally and corporate crime more specifically. *See, e.g.*, Manuel A. Utset, *Corporate Actors, Corporate Crimes and Time-Inconsistent Preferences*, 1 VA. J. CRIM. L. 265, 320-24 (2013) [hereinafter *Corporate Actors*] (conceptualizing internal control provisions of Sarbanes–Oxley and provisions of Dodd–Frank Act as modifications of temporal inconsistency within corporations); Manuel A. Utset, *Hyperbolic Criminals and Repeated Time-Inconsistent Misconduct*, 44 HOUS. L. REV. 609, 622-25, 659-60 (2007) (explaining hyperbolic discounting's effect on incidence of crime and recidivism).

214 "Construal theory" contrasts the individual's perception of abstract and more concrete costs and benefits. Unsurprisingly, concrete costs and benefits are experienced more intensely. *See* Rebecca Hollander-Blumoff, *Crime, Punishment, and the Psychology of Self-Control*, 61 EMORY L.J. 501, 545-52 (2012) (explaining construal theory and its implications for criminal law).

215 For a discussion of this dynamic and the challenges it presents for corporate compliance officers, see Miriam H. Baer, *Confronting the Two Faces of Corporate Fraud*,

employ a combination of rationalizations or motivated reasoning to ease their conscience.[216] Others will suffer regret and misgivings. Under the criminal code's definition of conspiracy and accomplice liability, they will be guilty regardless.

Temporal inconsistency inflates the number of Complicits in two ways. First, it causes employees to underestimate their own likelihood of joining in or concealing an illicit scheme. As a result, employees are more willing to work for firms or divisions whose moral reputation is at least questionable or whose activities brush up against well-known legal boundaries.[217] Like many humans, employees underestimate the power of temptation and expose themselves to future misconduct risk.[218] Second, once temptation hits, the costs of speaking up appear incredibly high and the benefits of "going along" appear comparatively modest. Accordingly, the employee who confidently believed she would never commit a crime, even if tempted by her supervisors, eventually finds herself a Complicit.

3. Compliance

The final inflationary factor is, quite surprisingly, the company's internal compliance function. Compliance, quite surprisingly, begets Complicits.

Over the past two decades, corporate compliance has morphed into a billion dollar industry, comprising an eclectic mix of experts and vendors steeped in business ethics and educational tools, high-tech surveillance, and legal advice.[219] Numerous legal institutions either

66 FLA. L. REV. 87, 108-15 (2014) [hereinafter *Confronting the Two Faces*] (describing temporal inconsistency and its effect on corporate compliance).

[216] For a discussion on rationalizations, see generally Haugh, *supra* note 175 at 1213-41. For more on motivated reasoning, see Langevoort, *Monitoring*, *supra* note 196 at 87.

[217] By contrast, individuals aware of their willpower weaknesses will remove themselves from temptation or otherwise "precommit" themselves. For more on precommitment and its utility in reducing wrongdoing throughout the corporate firm, see Baer, *Confronting the Two Faces*, *supra* note 215, at 109-10, and Utset, *Corporate Actors*, *supra* note 213, at 324.

[218] For an organizational perspective on "misconduct risk," see Christina Parajon Skinner, *Misconduct Risk*, 84 FORDHAM L. REV. 1559, 1562-63 (2016) (defining term).

[219] "The accumulation of . . . legal and regulatory obligations has been branded as a new 'era of compliance' for corporations." Robert C. Bird & Stephen Kim Park, *The Domains of Corporate Counsel in an Era of Compliance*, 53 AM. BUS. L.J. 203, 204 (2016) (describing rise to power of the corporate legal and compliance departments); *see also* GEOFFREY PARSONS MILLER, THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE 168-69 (2014); Charles D. Weisselberg & Su Li, *Big Law's Sixth Amendment: The Rise of Corporate White-Collar Practices in Large U.S. Law Firms*, 53

directly require or strongly encourage the firm to maintain a robust compliance department, replete with investigators and internal disciplinary processes.[220] Indeed, the compliance function's entire raison d'etre is the reduction of wrongdoing within corporate settings.

Until now, observers have spilled significant amounts of ink analyzing whistleblowing's effect on compliance, debating how well (or poorly) bounty programs complement internal compliance programs.[221] No scholars to date have considered the opposite question, namely the internal compliance function's effect on whistleblowing. As I explain here, a sincere compliance program can actually increase the number of Complicits relative to Innocents, thereby reducing the flow of information inside and outside of the firm. In other words, the corporate compliance function may undermine whistleblowing's efficacy, and in turn, further impair compliance throughout the firm.

Begin with the typical compliance program. Assume it promotes events and activities typical of well-regarded programs. That is, it educates its employees regularly on developments in applicable laws, alerts them of red flags and other signs of wrongdoing. Assume further that it promptly and effectively investigates internal reports of misconduct, leading to the firm's discipline and termination not only of those who violate the law, but also of those who transgress or bend the company's internal ethics rules.[222] For the sake of brevity, I refer to this type of program as the credible compliance program or "CCP". The CCP is well funded, highly regarded within and outside the firm, and employs and recruits well-credentialed compliance personnel. It is, in sum, the compliance ideal.

With regard to potential employees, the CCP is, overall, a benefit to the firm. It attracts some candidates, for example, because they prefer to work for a firm whose internal norms and systems protect it from corruption and entity-level prosecutions. Nevertheless, even for this

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ARIZ. L. REV. 1221, 1263-73 (2011).

[220] "[T]he contemporary compliance department is the product of a *de facto* government mandate that . . . has become a market wide concern." Griffith, *supra* note 110, at 2081 (tracking compliance's "maturation into a corporate governance function"). On the growth of internal corporate compliance and extensive advisory practices within white-shoe law firms, see Bird & Park, *supra* note 219, at 213-18; Weisselberg & Li, *supra* note 219, at 1237 (tracking the corporate compliance industry's evolving influence in corporate decision-making).

[221] *See, e.g.*, Skinner, *Whistleblowers*, *supra* note 5, at 901-02 (describing ways in which whistleblowing can improve cultural norms within businesses).

[222] *See* Griffith, *supra* note 110, at 2096 (citing general expectation that compliance function will "train employees on the organization's policies and procedures").

population, the CCP poses some drawbacks. Some potential employees may decline employment either because they fear that an overly aggressive CCP interferes too often in business decisions or otherwise stifles creativity.[223]

With regard to existing employees, however, the effect is unambiguous: the CCP reduces the number of Innocents who possess valuable information. When the firm visibly amplifies its compliance effort and moves from a non-credible to a credible compliance program, wrongdoers respond by redoubling their efforts to evade detection and substitute less detectable crimes for more visible ones.[224] Consistent with these avoidance efforts, Complicits do everything possible to limit the proliferation of information. They hide information from Innocents, or otherwise convert Innocents into Complicits by threatening subordinates or bribing employees in exchange for their assistance and silence. As a result, following the corporation's installation of its CCP, two ratios fall. First, the number of Innocents possessing valuable information, as compared with all other Innocents, decreases, as Complicits do everything to hide their information from innocent bystanders. Second, the number of Innocents relative to Complicits also decreases, as Complicits lure bystanders (through threats and promises) into their illicit schemes.

The creation of a CCP further eliminates Innocents when it aggressively disciplines employees for violating the company's internal ethics code. For example, consider the employee who suspects his colleague is selling information to a hedge fund (whose traders then trade on the information), but reports nothing to his superiors or anyone else at the company. Eventually, the employee observes irrefutable evidence of his colleague's criminal misconduct. Now, however, the employee realizes his own failure to speak up earlier may be called into question by the CCP because the company's code of conduct required his "prompt and immediate reporting" of suspected wrongdoing. Fearing termination, the employee elects to actively conceal his coworker's scheme. The CCP's aggressive reporting requirement effectively induces the Innocent to become a Complicit.

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[223] For more on the inverse relationship between creativity and compliance, see generally Donald Langevoort, *Cultures of Compliance*, AM. CRIM. L. REV. (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2840762.

[224] On substitution effects in criminal behavior, see Miriam H. Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 VA. L. REV. 1295, 1308 & n.46 (2008) (citing Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2391-402 (1997)). On detection avoidance, see Sanchirico, *supra* note 128, at 1337 & n.24 (defining concept) (citing Arun S. Malik, *Avoidance, Screening and Optimum Enforcement*, 21 RAND J. ECON. 341 (1990)).

Finally, through its educative programs, the CCP may cause some number of employees to inaccurately *perceive* themselves guilty of a crime.[225] The CCP harbors little incentive to correct such mistakes if it intends to demonstrate to the government the "hard line" it is taking on firm-wide behavior. By its very nature, the CCP is the champion of risk aversion, advising the company's employees to stay as far away as they can from the fuzzy line that separates aggressive behavior from illegal acts of fraud. But risk aversion generates costs: once an employee believes herself guilty of a serious crime, she becomes a False Complicit, and False Complicits, like their "real" counterparts, have no interest in blowing the whistle.

III. A REGULATOR'S DILEMMA

Part II introduced the reader to two types of employees, Complicits and Innocents, and argued that Complicits are, as a general rule, immune to promises of financial rewards.

Readers who generally agree with Part II's argument may nevertheless resist its application to the SEC's whistleblowing program. For example, some might assume that securities violations, as compared with other crimes, take place in the open and are therefore more easily observed by Innocents. If so, this is quite the departure from conventional wisdom. Others might reason that a popular program that induces the occasional high-value tip more than justifies its existence.[226] This too amounts to a departure from the consensus on deterrence, which establishes the primacy of probability of detection over all variables.[227] Particularly if whistleblowing eventually causes Congress to shortchange either the SEC or FBI on additional enforcement expenditures, the program's opportunity costs increase proportionally.

Still others might contend that the program indirectly strengthens the SEC by improving morale and legitimating the SEC as a protector of the public.[228] In addition, some might explain the program's low hit

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[225] *See* discussion *supra* notes 139–41 and accompanying text (introducing concept of "False Complicit").

[226] *See, e.g.*, Skinner, *Whistleblowers*, *supra* note 5, at 891-92 (recounting instance in which whistleblower improved regulators' understanding of trading crash, five years after it occurred).

[227] *See generally* Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199 (2013) (citing studies demonstrating that the probability of detection is the variable that exerts the strongest effect on deterrence).

[228] Similar arguments have been made regarding insider trading. *See, e.g.*, Thomas W. Joo, *Legislation and Legitimation: Congress and Insider Trading in the 1980s*, 82 IND.

rate as a temporary phenomenon, one that is sure to change as the program gets under way and the SEC grows more adept at processing tips.[229] One hopes this is the case. If it is not, the SEC eventually may find less support for its not-so-new bounty program. Wrongdoers are most deterred when they sense a credible increase in the likelihood they will be identified and caught.[230] If the SEC bounty program attracts even billions of dollars in recoveries, but fails to deter complex frauds and foreign bribery schemes, it will have achieved something quite different from the result Congress sought.

If deterrence remains Congress' core objective, then it may wish to consider several avenues of reform. This Part sketches three possibilities: (i) narrowing federal criminal law's scope; (ii) providing amnesty for securities whistleblowers, or (iii) "doing nothing" and building a separate enforcement regime.

A. *Narrow Criminal Law*

The first option, narrowing federal criminal law's substantive and complicity statutes, is one that already coincides with extant reform efforts. Toward the end of 2015, Republicans in Congress introduced a bill that would have created a default mens rea of knowledge for any crime whose mental state had not already been defined by "law."[231] The proposed bill further provided:

L.J. 575, 578 (2007) (contending that Congress conducted insider trading hearings to capture the public's support).

229 *See* O'Sullivan, *supra* note 6, at 90 (citing authority's claim that "floodgates" are soon to open).

230 Deterrence approaches that emphasize increases in sanctions fail, in part, because individuals "discount" the additional disutility of additional years in jail. A ten-year prison sentence is not perceived as twice as bad as a five-year sentence. *See* A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and Theory of Deterrence*, 28 J. LEGAL STUD. 1, 2 (1999) (demonstrating that when "disutility [from imprisonment] rises less than in proportion to the sentence, raising the magnitude of sanctions has a smaller effect than increasing their probability"). For an interesting application of these theories in a white-collar crime case, see *United States v. Yeaman*, 248 F.3d 223, 238 (3d Cir. 2001) ("It is widely recognized that the duration of incarceration provides little or no general deterrence for white collar crimes.").

231 Orin Kerr, *A Confusing Proposal to Reform the Mens Rea of Federal Criminal Law*, WASH. POST (Nov. 25, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/11/25/a-confusing-proposal-to-reform-the-mens-rea-of-federal-criminal-law/?utm_term=.e03b26ea4a00. For additional materials and commentary, see *The Adequacy of Criminal Intent Standards in Federal Prosecutions: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2016) (statement of Sen. Grassley, Chairman, S. Comm. on the Judiciary and Sen. Leahy, Member, S. Comm. on the

> if the offense consists of conduct that a reasonable person in the same or similar circumstances would not know, or would not have reason to believe, was unlawful, the Government must prove that the defendant knew, or had reason to believe, the conduct was unlawful.[232]

The statute elicited a number of negative responses, both from those who believed it was unnecessarily confusing, as well as those who worried that it would unduly impair prosecutions of white collar offenders.[233]

Rather than enact a one-size-fits-all mens rea statute, Congress might instead turn its attention to specific statutes, such as mail or securities fraud.[234] For example, one could imagine the creation of a more nuanced scheme of graded liability that included a lesser "attempt" offense alongside more serious inchoate schemes; permitted misdemeanor charges for employees who rendered minimal assistance; and eliminated the pernicious *Pinkerton* doctrine that holds a co-conspirator liable for his confederate's foreseeable crimes in furtherance of the conspiracy.

Legislative reforms such as these would vastly transform federal criminal law and with it, the whistleblowing landscape, significantly altering the ratio of Complicits to Innocents. Unfortunately, these reforms also would reduce the likelihood that wrongdoers will be punished. Newly enacted laws, if poorly written, could decriminalize not only the low-level and reluctant participants, but also sophisticated and venal wrongdoers. Even if one attempted to cure this problem linguistically (for example, by making it clear that only the most tenuous participants should escape liability), evidentiary

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Judiciary).

232 Criminal Improvement Act of 2015, H.R. 4002, 114th Cong. § 11 (2015) ("Default state of mind proof requirement in Federal criminal cases."). For a defense of this proposed bill, see Gideon Yaffe, *A Republican Crime Proposal that Democrats Should Back*, N.Y. TIMES (Feb. 12, 2016), https://www.nytimes.com/2016/02/12/opinion/a-republican-crime-proposal-that-democrats-should-back.html.

233 *The Adequacy of Criminal Intent Standards in Federal Prosecutions: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. 1, 3 (2016) (statement of Leslie R. Caldwell, Assistant Att'y Gen., Criminal Division); Mike DeBonis, *The Issue that Could Keep Congress from Passing Criminal Justice Reform*, WASH. POST (Jan. 20, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/01/20/the-issue-that-could-keep-congress-from-passing-criminal-justice-reform/; Jennifer Taub, *Going Soft on White Collar Crime*, N.Y. TIMES (Nov. 20, 2015), http://www.nytimes.com/2015/11/21/business/dealbook/going-soft-on-white-collar-crime.html.

234 For an overview of the *mens rea* requirement in federal criminal securities fraud cases, see Buell, *Securities Fraud*, *supra* note 22, at 573.

problems would invariably arise when sophisticated actors attempted to pass themselves off as lesser participants at either the trial or sentencing stages of prosecution.

In lieu of statutory reform, one might instead prefer prosecutors to employ their considerable discretion to decline cases that are technically legitimate, but otherwise diverge from the public's notion of wrongfulness.[235] As Judge Gerard Lynch observed in his seminal piece on federal white-collar crime, the delineation of what is and is not a crime occurs in conference rooms behind closed doors, wherein defense attorneys attempt to persuade prosecutors that the set of events surrounding a particular client's case does not merit a criminal prosecution.[236]

Discretion of this sort has long had its detractors, and for good reason.[237] Particularly in the federal system, discretion transfers enormous amounts of unchecked power to unelected officials. It lacks transparency, undermines legitimacy, and is thought to favor the wealthiest and most well-connected defendants. Most importantly for our purposes, its effect on whistleblowing is negligible. Low-level and reluctant Complicits who have no idea, ex ante, whether a prosecutor will exercise his discretion in their favor are not very likely to come forward.

If any narrowing strategy is to improve whistleblowing rates by reducing the number of Complicits, it will almost certainly lie in legislative reform. Reform efforts focused exclusively on fraud or bribery statutes, however, would almost immediately draw criticisms from the political left, and rightfully so. By the same token, conspiracy and aiding and abetting laws have long been "transsubstantive."[238] Any

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[235] *See* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2125-26 (1998) (describing common interactions between criminal defense attorneys and prosecutors regarding disposition of white collar criminal investigations). Josh Bowers has undertaken a deeper and more theoretical analysis of the prosecutor's obligation and power to incorporate equitable considerations when deciding how and whether to charge a defendant with a particular crime. *See* Josh Bowers, *Legal Guilt, Normative Innocence and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1658-59 (2010) (introducing concept of "equitable" prosecutorial discretion).

[236] Lynch, *supra* note 235, at 2126.

[237] "A central campaign of the modern age — extending far beyond sentencing and the criminal justice system — has been to reduce the discretion of government officials." Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1422 (2008) (analyzing modern-day efforts to reign in judicial and prosecutorial discretion).

[238] For examples of transsubstantive rules in other contexts, see Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, 90 N.Y.U. L.

attempt to overhaul these laws solely for white-collar offenders would also surely fail. Whatever federal criminal law's future, its reform will not arise out of whistleblowing. Nor should it.

B. *Amnesty*

The much easier and neater fix would be to create amnesty for individuals who report crime through the SEC's whistleblowing channel. Currently, Section 21F explicitly warns the whistleblower that amnesty does not exist, but Congress could remove this impediment if it so desired. To do so, Congress would have to bind not only the SEC, but also the Department of Justice, which retains exclusive authority over federal criminal cases.[239]

It is important to note the difference between an amnesty program, which shields an individual from prosecution altogether, and a criminal cooperation regime, which requires assistance and an admission of wrongdoing in exchange for a reduction in sentence.[240] Under certain circumstances, the criminal cooperation program can be quite generous. Federal prosecutors may go so far as to extend certain individuals "non-prosecution" agreements or otherwise immunize testimony from prosecution.[241] The United States Attorneys Manual discourages such largess, however, and instead prefers the extraction of a guilty plea paired with the promise of leniency at sentencing.[242] As for the SEC, it cannot do much more than offer its own version of cooperation-based leniency to witnesses in civil actions.[243] On its own,

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REV. 397, 413 (2015) (contending that evidence rules purport to reflect "transsubstantive values"), and William Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 856-69 (2001) (describing Fourth Amendment doctrines as transsubstantive).

239 For more on the SEC's inability to unilaterally initiate or decline criminal cases, see Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 623 & nn.218–19 (2012) (citing authorities).

240 UNITED STATES ATTORNEY'S MANUAL § 9-27.430(B)(1) (1997), https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.600 (urging caution in diverging from general rule requiring defendant to plead to charges "consistent with the nature and extent of his/her criminal conduct"); *id.* § 9-27.600 (permitting non-prosecution agreements when "other means of obtaining the desired cooperation are unavailable and would not be effective").

241 The Department of Justice retains sole authority to seek immunity for a witness under the federal immunity statute, see 18 U.S.C. § 6003 (2012). Although the SEC can recommend immunity, it has no power to actually seek or confer it.

242 *See generally* authorities cited *supra* note 240.

243 *See* U.S. SEC. & EXCH. COMM'N, NO. 34-61340, POLICY STATEMENT CONCERNING COOPERATION BY INDIVIDUALS IN ITS INVESTIGATIONS AND RELATED ENFORCEMENT ACTIONS (2010), https://www.sec.gov/rules/policy/2010/34-61340.pdf. By its terms, the Policy

the SEC is powerless to promise the whistleblower protection from criminal prosecution.[244]

Given the foregoing, one might wonder why Complicits need any inducement to speak at all, since the SEC and DOJ have long had in place separate cooperation policies.[245] Criminal cooperation works, however, only when the government's successful prosecution is itself imminent. Those familiar with the prosecution of Raj Rajaratnam and his insider trading ring may recall that one of the government's strongest witnesses was Anil Kumar, a cooperating defendant whose testimony played crucial role in Rajaratnam's conviction and the conviction of one of Rajaratnam's co-conspirators, Rajat Gupta, who was also a Goldman Sachs director.[246] Kumar's information was both extensive and valuable, and he was rewarded with a glowing prosecutor's letter on his behalf at his sentencing.[247] Then again, Kumar had very good reason to cooperate: a wiretap captured his conversations on several occasions in 2008, thereby documenting his participation in insider trading schemes.[248] By the time the government approached Kumar, his complicity and reason to cooperate were already well established.

Cases like these remain the exceptions in white-collar criminal practice. In many cases, the complicit employee flies under the radar. Absent an unusual situation, the government will lack credible evidence of an employee's mens rea unless, of course, he happens to find himself caught on a wiretap or engaging in some unrelated crime that places him in contact with an undercover agent or snitch. Accordingly, for many investigations, the criminal cooperation regime will yield as much information as a monetary bounty: little to none.

Statement creates no "legally enforceable rights" and extends solely to civil enforcement actions within the SEC's jurisdiction.

[244] 17 C.F.R. § 202.5 (2016) ("[N]either the Commission nor its staff has the authority or responsibility for instituting, conducting, settling, or otherwise disposing of criminal proceedings.").

[245] Pacella suggests as much when she hypothesizes, "the availability of leniency or immunity to potential whistleblowers likely facing criminal prosecution may be enough to incentivize such persons to disclose wrongdoing." Pacella, *Bounties for Bad Behavior*, *supra* note 9, at 375; *see also id.* at 376 nn.174–76 (citing similar comments in lead up to SEC whistleblowing program's adoption).

[246] *See* Memorandum from the U.S. Dep't of Justice to the Hon. Denny Chin 19 (July 16, 2012), http://online.wsj.com/public/resources/documents/071612kumar.pdf.

[247] *Id.* at 15-19.

[248] *Id.* at 6 (describing wiretap recordings of conversations between Kumar and others).

We now reach the solution most commonly touted by students of antitrust and tax enforcement: if criminal cooperation is unlikely and a pure monetary bounty undesirable, why not pair a modest financial reward with the promise of true forgiveness (i.e., amnesty) for the admitted crime? Surely, some employees will come forward if: (a) punishment is off the table, and (b) a modest reward accompanies their information. To put it another way, if criminal law's salience is responsible for engineering the distinction between the Innocent and the Complicit, then why not take eliminate criminal liability for those who voluntarily disclose wrongdoing?

Amnesty certainly is not unheard of. State and federal tax authorities have periodically extended it to taxpayers who voluntarily disclose violations and pay penalties.[249] More pertinently, the DOJ's Antitrust Division employs a Corporate Leniency program for corporate cartel members and their executives.[250] Under its Leniency Program, the first cartel organization to voluntarily disclose wrongdoing receives a grant of full amnesty for antitrust violations, for both the company and its employees, provided they cooperate in the ensuing investigation.[251] Each additional cartel member who comes forward is then eligible for a rapidly decreasing discount in liability.[252] Thus, the Antitrust Division's program places a great premium on being first to defect.[253]

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[249] *See, e.g.*, Allen D. Madison, *An Analysis of the IRS's Voluntary Disclosure Policy*, 54 TAX LAW. 729, 729 (2001); Leo Martinez, *Federal Tax Amnesty: Crime and Punishment Revisited*, 10 VA. TAX REV. 535, 542-49 (1991). *See generally* Bonnie Ross, *Federal Tax Amnesty: Reflecting on the States' Experiences*, 40 TAX LAW. 145 (1986) (discussing the history of tax amnesty programs).

[250] The Antitrust Division employs both a Corporate Leniency Policy (1993) for firms, and an Individual Leniency Policy (1994) for the individuals employed by those firms. U.S. DEP'T OF JUSTICE, CORPORATE LENIENCY POLICY (1993), https://www.justice.gov/atr/file/810281/download (Corporate Policy); U.S. DEP'T OF JUSTICE, INDIVIDUAL LENIENCY POLICY (1994), https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/0092.pdf (Individual Policy). Unlike the SEC's Leniency Policy, the Antitrust Division's individual policy function as an amnesty program, as it promises qualifying individuals that they will not be charged criminally for the activity being reported.

[251] Brent Snyder, Deputy Assistant Att'y Gen., U.S. Dep't of Just., Remarks at the Yale Global Antitrust Enforcement Conference (Feb 19. 2016), 2016 WL 676020, at *4 (explaining that because only the first whistleblower receives full amnesty, the program creates "a race to the prosecutor's door"). For criticisms of this mentality, see Bruce H. Kobayashi, *Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations*, 69 GEO. WASH. L. REV. 715, 716 (2001) (contending that the "potential for excessive expenditures is exaggerated by the 'first to cooperate' nature of the Division's Corporate Leniency Policy").

[252] For a helpful overview of the Antitrust Division's program and its breadth in

Most observers proclaim the Antitrust Division's program an unqualified success.[254] By spurring defections, it has increased the coordination and monitoring costs of running a cartel.[255] Could Congress amend Dodd–Frank to mimic the Antitrust Division's program? Yes, but there are a number of reasons it would not want to.[256] First, unless very carefully monitored, a broad amnesty program could easily undermine deterrence.[257] It is one thing to use government bounties to alleviate the social and psychological costs of tattling on one's peers. It is quite another matter to eliminate entirely the very penalties the government puts in place to deter wrongdoing.

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terms of amnesty, see *Morning Star Packing Co. v. S.K. Foods, L.P.*, No. 2:09–cv–00208–KJM–KJN, 2015 WL 3797774, at *5-7 (E.D. Cal. June 18, 2015).

[253] By contrast, the DOJ's cooperation practices emphasize the would-be cooperator's willingness and ability to assist the government. For more on the process of assessing and signing up a criminal defendant as a cooperator, see Gleeson, *Supervising Criminal Investigations*, *supra* note 12, at 447-50 (describing prosecutor's process of meeting with and "proffering" potential cooperators).

[254] Gary R Spratling, Deputy Assistant Att'y Gen., U.S. Dep't of Just., Making Companies an Offer They Shouldn't Refuse: The Antitrust Division's Corporate Leniency Policy — An Update, Presentation to Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust 3 (Feb. 16, 1999), http://www.usdoj.gov/atr/public/speeches/2247.htm.

[255] *See* Renata B. Hesse, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Can There be a "One-World Approach" to Competition Law?, Remarks at the Chatham House Conference on Globalization of Competition Policy (June 23, 2016), 2016 WL 3439992 (declaring policy as having "revolutionized our cartel enforcement, and served as a model for jurisdictions around the world").

[256] Pacella nods in this direction when she discusses the SEC's Cooperation Policy, which was adopted in 2010. Pacella, *Bounties for Bad Behavior*, *supra* note 9, at 376-77. The Policy, which was purposely modeled after its DOJ analog, purports to promise firms and individuals who voluntarily disclose wrongdoing leniency in terms of sanctions. *See generally* U.S. SEC. & EXCH. COMM'N, POLICY STATEMENT CONCERNING COOPERATION BY INDIVIDUALS IN ITS INVESTIGATIONS AND RELATED ENFORCEMENT ACTIONS (2010), https://www.sec.gov/rules/policy/2010/34-61340.pdf (laying out the Enforcement Division's analytical framework); *SEC Enforcement Cooperation Program*, U.S. SEC. & EXCHANGE COMMISSION, https://www.sec.gov/spotlight/enfcoopinitiative.shtml (last modified Sept. 20, 2016) (describing considerations for leniency). These policy statements indicate the framework the SEC employs when meting out *civil* sanctions; they do not promise civil amnesty for any reporting whistleblower. Nor do they make any claims with regard to *criminal* punishment.

[257] Pacella raises a variant of this concern, criticizing the IRS's program because it effectively "pays" individuals to break the law. Pacella, *Bounties for Bad Behavior*, *supra* note 9, at 354. Since the IRS program leaves the taxpayer exposed to criminal prosecution, however, it is questionable how much its reward program (available only to those convicted offenders who were neither instigators nor leaders in criminal schemes) affects criminal behavior. It may not *deter* criminal behavior, but it is doubtful that it *encourages* it either.

Criminal liability is not simply another "cost" the whistleblower suffers. It is the cost presumed to best deter wrongdoing, assuming a credible probability of detection. If overused or improperly used, an amnesty program could convey the message that it is fine to join criminal conspiracies, so long as one admits the wrongdoing first to authorities.[258]

In a related vein, amnesty could easily erode public support for whistleblowing generally. If the government retains its confidentiality pledge, but otherwise publicizes generally its grant of amnesty to some Complicits and its payment of monetary bounties to others, the general public will infer that some undisclosed number of whistleblowers are themselves guilty of wrongdoing. This, in turn may cause the public to look upon whistleblowers with increased cynicism. If the public reverts to viewing whistleblowers as snitches and rats, the psychological and social costs of disclosure will increase for all whistleblowers.[259]

Third, a first-in-the-door amnesty program would almost certainly compete with the program the government already has in place for combatting crime: criminal cooperation. The Department of Justice already trades leniency for information, and this program very carefully avoids, in most instances, pure amnesty.[260] It also avoids mechanical reliance on the order of disclosure; if the second person to confess provides better information than the first or appears to be a more sincere or better witness than the first, federal prosecutors remain free to choose their best cooperator.[261] Indeed, federal prosecutors remain free to choose more than one cooperator, if their case warrants the additional assistance.

A first-in-the-door amnesty program operates well when all participants in a given scheme are assumed to have more or less the same quality of information. That may be a safe assumption for members of a cartel, but for a fraud or bribery scheme, it is more contestable. Some

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[258] I have argued elsewhere that an improperly structured criminal cooperation program may in fact reduce the overall expected sanction for crimes, thereby undermining deterrence. *See* Baer, *Cooperation's Cost*, *supra* note 136, at 904.

[259] If whistleblowing's social and psychological costs increase, then the government must increase its bounty, which *also* increases the risk of false reports. *Cf.* Givati, *supra* note 24, at 45 (observing a high risk of "false report" when "the reward that is required to deter the employer is so high" that it induces false tips).

[260] *See* discussion *supra* notes 240–42 and accompanying text.

[261] As a result, the DOJ can collect multiple proffers from several witnesses but is under no obligation to "pay" for that information with a cooperation agreement. *See* Baer, *Cooperation's Cost*, *supra* note 136, at 920-23 (describing beneficial "detection effect" of cooperation).

individuals will have far more information than others, or be better witnesses because of their position or previous history.

Even if one can move past these problems, there exists an additional wrinkle. The DOJ's antitrust leniency program works because it is narrowly applied and highly administrable. In a cartel of five or six producers, it should not be terribly difficult to discern which participant first disclosed wrongdoing to the Department of Justice's relatively small investigatory division.[262] Among a corporation of ten thousand employees, however, it may well be far more difficult to identify the "first" employee to disclose wrongdoing, particularly when the recipients of such information include multiple federal agencies, the state attorney general, the local district attorney's office, and the company's internal compliance program. Concededly, this problem already arises when the SEC is tasked with allocating a bounty among more than one whistleblower.[263] The stakes increase dramatically, however, when the benefit conferred by the government is no longer just a contingent bounty, but in fact amnesty, available for the first — and only the first — person who discloses.

C. *Developing Alternatives*

There are no easy solutions to the whistleblower's dilemma. Narrowing criminal law's scope of liability is itself a difficult task and ultimately, is best guided by considerations other than whistleblowing. Amnesty is difficult to administer and can undermine other enforcement tools. Concededly, the SEC and DOJ could promise a sort of informal amnesty, with a nod and wink, but it is doubtful that any defense attorney worth his salt would advise his client to file a whistleblowing claim on assurances so flimsy.

So that just brings us back to square one. If it is impossible to remove criminal liability, either broadly or narrowly, for the individuals who engage in wrongdoing within firms, then the government should seek out alternative methods for investigating, prosecuting and deterring corporate wrongdoing. It should rely more often on wiretaps and undercover agents, and ramp up its capacity to review emails, documents, and the massive amounts of data that suggest criminal conduct. In some notable cases, the government has

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[262] Even here, one expects the occasional controversy to ensue.

[263] *See* Rose, *supra* note 27, at 1263 (analyzing hypothetical scenario wherein two co-workers might separately report wrongdoing to the SEC).

already done this, but the "white collar sting" has yet to evolve into the powerhouse that undercover drug operations have become.[264]

In its first five years of existence, the SEC's whistleblower program has issued awards to approximately thirty-four whistleblowers in connection with twenty-six "covered actions."[265] Roughly sixty-five percent of those whistleblowers were current or former employees of the target company.[266] Thus, over a five year period, the SEC's program — no doubt implemented with a high level of professionalism and diligence — has elicited valuable information from approximately twenty additional insiders. No doubt, the aggregate dollar value of this information has been substantial, but the program's deterrent value, to the extent deterrence depends in great measure on probability of detection, is more ambiguous.

Moreover, the policy question is not simply whether a whistleblowing program deters, but how well it deters in comparison to some other alternative. If the perpetrators of securities fraud and foreign bribery schemes are even boundedly rational, it seems far more likely that wiretaps and dragnet-style investigations would impact the white-collar criminal landscape more effectively than even the most well-administered whistleblowing program.

And there's the rub. Compared to the enforcement tools described above, whistleblowing is cheap, and in more than one way. Wiretaps and undercover stings are easily more expensive than even the more generous bounty program, in part because these methods often require an increase in manpower.[267] Moreover, as Professor Samuel Buell has observed, a true crackdown on crimes such as fraud and bribery would likely mean a sea change in how the government treats white-collar offenders.[268] More frequent use of undercover stings, wiretaps and covert surveillance, would likely result in the prosecution of far more

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264 For a thoughtful discussion of the government's use of undercover tactics in investigating penny stock frauds, see Elizabeth E. Joh & Thomas W. Joo, *Sting Victims: Third-Party Harms in Undercover Police Operations*, 88 S. CAL. L. REV. 1309, 1340 (2015) (observing that undercover stings "produce clear evidence of criminal conduct" against defendants and defense lawyers who "are likely to be less sophisticated than Wall Street executives").

265 SEC 2016 ANNUAL REPORT, *supra* note 1, at 17. Thus, several of the covered actions resulted in payments to more than one whistleblower.

266 *Id.* at 18 (noting that "65 percent of award recipients were insiders of the entity on which they reported information of wrongdoing to the SEC").

267 *See* Givati, *supra* note 24, at 51-52 (demonstrating whistleblowing's superiority over external policing because policing requires additional expenditures).

268 Buell, *White Collar Offender*, *supra* note 20, at 876-77.

mid- and lower-level corporate employees.[269] A ramped up "street crimes" approach to corporate crime would require society to commit to a variety of expenditures, not only in terms of money, but also in terms of reduced privacy. No wonder, then, that the SEC prefers instead to embrace its public-friendly role as the whistleblower's "advocate."[270]

Path dependence likely predicts the whistleblowing program's continued existence, regardless of how well it actually deters serious misconduct. Neither Congress nor the SEC derives any political capital from shutting it down. The program has boosted agency morale and reinforces the Commission's long-held self-image as protector of the investing public. It has encouraged the Commission to revamp internal processes for channeling information from potential witnesses to investigators. Its annual report to Congress provides a window on the agency's enforcement activity. And, as the program itself demonstrates, some Innocents do witness misconduct, and their assistance in reporting such misconduct can be quite helpful. Cancelling the bounty program forecloses these benefits.

Thus, the optimal move might be to emphasize the program's notably large recoveries, which is exactly what the SEC has chosen to do. This too has its drawbacks. Chief among them are the opportunity costs of foregoing or minimizing alternative enforcement tactics. Moreover, a low ratio of credible whistleblowers to tips will eventually draw attention. If wrongdoers conclude that whistleblowing bounties carry more bark than bite, whatever modest effect the bounty program currently has will then decrease.[271]

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269 Concededly, the DOJ may already be moving in that direction. *See* Joh & Joo, *supra* note 264, at 1339-40 (describing emergence of sting tactics against perpetrators of penny stock fraud schemes); *see also* Rachel E. Barkow, *The New Policing of Business Crime*, 37 SEATTLE U. L. REV. 435, 460-64 (2014) (citing use of wiretaps and similar tactics in insider trading investigations); Ellen Brotman & Erin Dougherty, *Blue Collar Tactics in White Collar Cases*, 35 CHAMPION 16, 16 (2011). *But see* Buell, *White Collar Offender*, *supra* note 20, at 876-77 (warning that undercover stings and wiretaps are likely to remain infrequent in most fraud cases).

270 This is the term SEC Commissioner Mary Jo White used in a speech last year. *See* Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, The SEC as Whistleblower's Advocate, Remarks Delivered at Corporate and Securities Law Institute, Northwestern University School of Law (Apr. 30, 2015), https://www.sec.gov/news/speech/chair-white-remarks-at-garrett-institute.html.

271 *Cf.* Richard W. Painter, *Toward a Market for Lawyer Disclosure Services: In Search of Optimal Whistleblowing Rules*, 63 GEO. WASH. L. REV. 221, 241 (1995) (reflecting that whistleblower rules deter misconduct only when wrongdoers believe they are effective in eliciting information).

CONCLUSION

Since its implementation in 2011, the SEC's whistleblowing program has attracted a significant amount of attention from practitioners and scholars. This positive attention is unlikely to abate. The program is expected to survive the administration of President Donald Trump and the SEC will no doubt continue to highlight its notable awards. Nevertheless, the program has yet to generate the ratio of useful information to noise that one might desire from an enforcement tool geared towards deterrence. The SEC's bounty program may eventually recover billions of dollars, but it is far from clear how well it will deter the serious criminal activity it was designed to confront.

Assuming the program remains intact, the reforms that scholars have already advanced may well improve the program by clarifying its reach and filling some gaps. Nevertheless, most accounts of whistleblowing fail to address at length its interaction with federal criminal law. When criminal punishment is salient, the workplace splinters into Innocents and Complicits. The Complicit employee who has provided even a relatively minor amount of assistance in implementing or concealing an illicit scheme takes a massive risk by filing a whistleblowing complaint.

Policymakers can draw two lessons from this parable. First, the whistleblower's dilemma underscores the ways in which a tool intended to secure deterrence also reduces the flow of information to enforcement authorities. Policymakers who tout corporate compliance programs must recognize the extent to which compliance may negatively affect the flow of information, both within the firm and to outside enforcement agencies. At their best, organizational compliance programs provide a safe space for employees to report concerns, and deter wrongdoing by increasing the likelihood of detection and punishment. Among undeterred individuals, however, these same mechanisms reduce the number of individuals likely to come forward with information.

The second lesson is one of caution. Whistleblowing bounties attract public support precisely because they hew to an innocence narrative. Bounties are intuitively pleasing because they redress the financial harms that anti-retaliation laws fail to prevent. The bounty system's efficacy breaks down, however, when it operates in conjunction with a criminal justice system intent on obliterating distinctions between ringleaders and bit players, and between those who methodically plan wrongdoing and those who impulsively fall into it. Substantive crimes such as fraud and bribery require fairly little in terms of actus reus; crimes such as conspiracy require even less.

When mens rea can actually be established and proven, the federal criminal justice system becomes a rather frightening and potent weapon.

If guilt rises and falls on state-of-mind evidence, then whistleblowing quickly becomes a form of self-incrimination. When mens rea becomes the statutory element that divides bad judgment from outright fraud, even boundedly rational individuals will shy away from self-incriminatory tools that all but strip them of their most effective armor. Accordingly, if the government wishes to elicit information from Complicits — and to deter difficult to detect crimes like fraud and bribery — it needs to offer something far different from money. And to do that, it needs to commit the requisite time and resources to developing enforcement strategies more effective and long-lasting than even the most user friendly bounty program.