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Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act

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DO GOOD AND GET RICH: FINANCIAL INCENTIVES FOR WHISTLEBLOWING AND THE FALSE CLAIMS ACT

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I. INTRODUCTION†

FEW would argue that the eradication of societally harmful conduct is an important governmental goal. There is, however, greater uncertainty as to the most effective and appropriate means of achieving that goal. One means which has become particularly widespread in the last decade and is believed by legislators, both federal and state, to reduce wrongdoing is the encouragement of whistleblowing. Two different legislative approaches have been taken to stimulate this disclosure of harmful conduct. The most common approach has been to extend legal recourse—typically reinstatement and lost compensation—to whistleblowers who suffer from employment-related retaliation for their disclosures. A few states and the federal government, however, have gone a step further by enacting statutes that create or strengthen financial incentives for whistleblowers.[1] Most notably, the federal False Claims Act (FCA)[2] was revised in 1986 to

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1. In recent years, corporations have also exhibited interest in offering such rewards. *See, e.g., GM Offers Reward In Effort To Stop Leaks*, L.A. TIMES, Nov. 22, 1989, at D2 (discussing GM's offer of up to $30,000 for information leading to persons that leak product-related information); David J. Solomon, *Hotlines and Hefty Rewards: Retailers Step Up Efforts to Curb Employee Theft*, WALL ST. J., Sept. 17, 1987, at A37 (discussing retailer hotlines and rewards for information on employee theft).

2. 31 U.S.C. §§ 3729-3733 (1988). Section 3730 of this statute provides:

> (b) ACTIONS BY PRIVATE PERSONS.—(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the

significantly increase the potential rewards for whistleblowers and to broaden the range of individuals permitted to bring suit.[3]

Presumably, the value of financial incentives for whistleblowing should be measured in terms of whether the incentives will effectively encourage individuals to disclose illegal and unethical activity. Examination of the potential efficacy of such rewards,

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Attorney General give written consent to the dismissal and their reasons for consenting.

. . . .

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—

. . . .

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

. . . .

(d) AWARD TO QUI TAM PLAINTIFF.—(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant. (2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

Id. § 3730. There is also a criminal section of the False Claims Act, 18 U.S.C. § 287 (1988), which allows fines of up to $10,000, imprisonment up to five years or both. This Article, however, focuses on the civil sections of the FCA, and especially on the rights of third parties to recover thereunder.

3. For a detailed discussion of the FCA, see *infra* notes 111-81 and accompanying text.

however, makes plain a more fundamental issue—whether the encouragement of whistleblowing is, in fact, the best way to combat wrongful activity. In addressing this issue, a number of policy questions should be considered: whether the motive of the whistleblower should be relevant to legal recognition of his or her claim; whether statutory protection of whistleblowing will spur groundless claims; whether the government should affirmatively encourage individuals to "spy" on each other; and what effect whistleblowing incentives will have on the employment environment.

This Article begins with a brief description of the ineffectiveness of legislative efforts in the last decade to encourage whistleblowing.[4] The potential effectiveness of financial incentives to foster whistleblowing is then assessed by examining the social-psychological literature on the use of money rewards by organizations.[5] The history of and revisions to the False Claims Act, as well as other federal reward statutes, are next discussed in the context of the reward efficacy literature.[6] Finally, the broader issue is addressed—whether financial incentives to encourage whistleblowing are *advisable*, rather than simply effective.[7]

II. WHISTLEBLOWING LEGISLATION IN THE 1980s

A. *Protection from Retaliation*

Three-quarters of the states currently have whistleblowing legislation, for the most part enacted in the last decade.[8] The

4. For a discussion of these legislative efforts, see *infra* notes 8-37 and accompanying text.

5. For a discussion of the social science research on financial rewards for whistleblowing, see *infra* notes 38-110 and accompanying text.

6. For a discussion of the FCA and other federal reward statutes, see *infra* notes 111-81 and accompanying text.

7. For a discussion of the advisability of financial incentives to encourage whistleblowing, see *infra* notes 182-253 and accompanying text.

8. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 38-531, -532 (Supp. 1991) (prohibiting retaliation against state employees for disclosure of information that is of public concern); COLO. REV. STAT. § 24-50.5 (1988) (encouraging state employees to disclose information on state agencies not acting in public interest; prohibiting retaliation for those disclosures; providing mechanism to file complaints alleging retaliation; providing for civil actions); DEL. CODE ANN. tit. 29, § 5115 (1991) (protecting employees who report violations or suspected violations of law; providing right of civil action for injunctive relief and/or actual damages); *see generally* STEPHEN M. KOHN & MICHAEL D. KOHN, THE LABOR LAWYER'S GUIDE TO THE RIGHTS AND RESPONSIBILITIES OF EMPLOYEE WHISTLEBLOWERS 39-59 (1988) (discussing development of state protections for private sector whistleblowers; providing state-by-state breakdown of public policy exception to common law termination-at-will doctrine). For a comprehensive chart of state whistleblowing

nearly uniform focus of these laws is to protect whistleblowers from retaliation and to give them a remedy when retaliation occurs.[9] Most commonly, the successful litigant's remedy under such a statute is a recovery of lost benefits and wages, and a return to the job lost due to the illegal retaliation.[10] The assumption underlying this legislation is that, because most whistleblowers suffer retaliation, potential whistleblowers are deterred from reporting wrongdoing.[11] Thus, it was supposed, the affordance of protection from retaliation would increase employee disclosure of wrongdoing.[12]

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provisions, see Terry M. Dworkin, *Charting the Course of Whistleblowing*, 14 SELECTED PAPERS OF TRI-STATE REGIONAL BUS. L. ASS'N 48, 61-67 (1990) (copy on file with *Villanova Law Review*).

9. *See, e.g.*, ARIZ. REV. STAT. ANN. § 38-532(A) ("[i]t is a prohibited personnel practice for an employee who has control over personnel actions to take reprisal against an employee for a disclosure of information of a matter of public concern"); *id.* § 38-532(D) ("employee or former employee against whom a prohibited personnel practice is committed may recover attorney fees, costs, back pay, general and special damages and full reinstatement"); FLA. STAT. ANN. § 112.3187(4) (West Supp. 1991) ("agency or independent contractor shall not dismiss, discipline, or take any other adverse personnel action against an employee for disclosing information pursuant to the provisions of this section"); *id.* § 112.3187(9) (relief may include reinstatement, compensation for lost wages, payment of reasonable costs).

A number of federal regulatory statutes have provisions protecting whistleblowers against retaliation as well. *See, e.g.*, Whistleblower Protection Act, 5 U.S.C. §§ 1201-1214 (Supp. II 1990) (protecting employees who disclose government illegalities, waste and corruption); Safe Drinking Water Act, 42 U.S.C. § 300j-9 (1988) (prohibiting retaliation against employees who assist in bringing action to administer or enforce drinking water regulations); Energy Reorganization Act, 42 U.S.C. § 5851 (1988) (prohibiting retaliation against employee who brings or assists proceeding for violation of Atomic Energy Act); Clean Air Act, 42 U.S.C. § 7622 (1988) (prohibiting retaliation against employee who brings or assists proceeding for violation of Clean Air Act); *see generally* KOHN & KOHN, *supra* note 8, at 151-96 (describing many of these protective federal statutes).

10. *See, e.g.*, COLO. REV. STAT. § 24-50.5-104 (providing for relief including, but not limited to, reinstatement, back pay, restoration of lost service credit and reimbursement of costs); FLA. STAT. ANN. § 112.3187(9) (providing for relief which may include reinstatement of position, fringe benefits and seniority rights, lost wages, benefits, or other lost remuneration and reasonable costs (including attorneys' fees)); IOWA CODE ANN. § 79.28 (West 1991) (providing affirmative relief for retaliation, including reinstatement with/without back pay or other equitable relief deemed appropriate by court). For a general discussion of these provisions, see Janet P. Near et al., Explaining the Whistle-blowing Process: Suggestions from Power Theory and Justice Theory, (scheduled for publication in ORGANIZATION SCI. 1992).

11. *See* Near et al., *supra* note 10 (discussing fact that retaliation is seen as primary, if not sole, deterrent to whistleblowing; it is assumed most employees are people of conscience who would report wrongdoing if they did not fear retaliation).

12. For example, the preamble to one such law states:

To help achieve . . . [whistleblowing], the general assembly declares

These assumptions, while intuitively appealing, have proved to be untrue. A study of the first state anti-retaliation statutes for private sector employees indicated that the statutes were not effective in encouraging whistleblowing.[13] In a four-year period, only three appellate cases in the three states studied concerned employees who sought protection under the statutes, and these whistleblowers met with only limited success.[14] Further, the number of suits relying on the anti-retaliation statutes was no higher than the number filed on the basis of common law principles in states without such statutes.[15] A follow-up examination of

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that state employees should be encouraged to disclose information on actions of state agencies that are not in the public interest and that legislation is needed to ensure that any employee making such disclosures shall not be subject to disciplinary measures or harassment by any public official.

COLO. REV. STAT. § 24-50.5-101.

13. *See* Terry M. Dworkin & Janet P. Near, *Whistleblowing Statutes: Are They Working?*, 25 AM. BUS. L.J. 241 (1987) (discussing study of initial impact of state whistleblowing statutes—including those of Connecticut, Maine and Michigan—which argued that statutes' failure to protect whistleblowers was primarily due to legislative drafting errors and ineffective judicial interpretation); *see also* CONN. GEN. STAT. ANN. § 31-51m (West Supp. 1991) (requiring employees to exhaust all administrative channels before bringing civil action); ME. REV. STAT. ANN. tit. 26, § 833 (West 1988) (providing for protection of private employees, but not clearly providing for compensation for whistleblowing employees; requiring employees to first bring alleged violation to attention of supervisor); MICH. COMP. LAWS ANN. § 15.362-.369 (West 1981 & Supp. 1991) (providing for protection of employees; establishing right to bring civil action and remedies).

14. *See* Melchi v. Burns Int'l Sec. Servs., Inc., 597 F. Supp. 575 (E.D. Mich. 1984) (limiting damages awarded to discharged employee who brought suit under Michigan Whistleblowers' Protection Act to back pay; rejecting employee's claim for reinstatement or actual damages); Watassek v. Michigan Dep't of Mental Health, 372 N.W.2d 617 (Mich. Ct. App. 1985) (denying motion for summary judgment against employee suing for retaliatory discharge; although case not brought under Michigan Whistleblowers' Protection Act because discharge took place prior to passage of Act, Act was cited as expression of "public policy pre-existing its actual enactment"); Covell v. Spengler, 366 N.W.2d 76 (Mich. Ct. App. 1985) (holding no cause of action existed under Michigan Whistleblowers' Protection Act where plaintiff failed to meet 90 day statute of limitations specified in Act).

Thus, at the time of this study (1985), only two appellate cases had been decided under Michigan's whistleblowing statute; no claims had been made under the statutes of either Connecticut or Maine. *See* Dworkin & Near, *supra* note 13, at 258. Two common law claims, however, were decided in Connecticut in 1985. *See id.* These cases involved firings which took place in 1982, the year the Connecticut whistleblowing statute became effective. *See id.*

15. *See* Dworkin & Near, *supra* note 13, at 254-58. The number of suits uncovered in this study was comparable to or lower than the number of suits brought by whistleblowers in states without protection statutes but recognizing a right to sue for discharges violative of public policy. *See id.* at 258-60. The three states studied for comparison purposes were Illinois, Hawaii and Arizona. *Id.* They were selected because they had similar populations in size to those of Michigan, Maine and Connecticut, respectively. *Id.*

cases through 1989 demonstrated little change from this pattern.[16] In addition, a major study of thousands of federal employees showed similar results.[17]

B. *Financial Incentives for Whistleblowing*

Providing significant monetary rewards to encourage whistleblowing is an approach quite different from that taken in most of the whistleblowing statutes passed in the 1980s. Only two states, Oregon and South Carolina, explicitly offer financial rewards for whistleblowing, and in each instance, the legislature seemed reluctant to make the rewards significant enough to have much impact. Oregon's statute allows public employee whistleblowers to collect $250 if this amount would be greater than the damages awarded in a suit based on retaliation for the whistleblowing.[18] The reward in South Carolina is twenty-five percent of the savings resulting from the whistleblowing in the first year, up to a maximum of $2000.[19] Additionally, Wisconsin

16. Terry M. Dworkin & Janet P. Near, *Whistleblower Statutes and Reality: Is There a Need for Realignment?*, 1990 PROC. PAC. SW. BUS. L. ASS'N 73, 74, 76 (1990). While the number of cases had increased slightly, no plaintiff had yet won a recovery. The primary reason for this lack of success was, according to the courts, that the statutes were being used for purposes not intended by the legislatures. *See, e.g.*, Wolcott v. Champion Int'l Corp., 691 F. Supp. 1052 (W.D. Mich. 1987) (holding that no causal connection existed between protected conduct of employee and discharge; according to court, legislature did not intend statute "to be used as an offensive weapon by disgruntled employees"); Hopkins v. City of Midland, 404 N.W.2d 744 (Mich. Ct. App. 1987) (stating that action was brought to avoid results of adverse arbitration decision, but employee's failure to raise whistleblower claim in prior arbitration did not bar its later consideration).

17. *See* Marcia P. Miceli & Janet P. Near, *The Incidence of Wrongdoing, Whistle-Blowing and Retaliation: Results of a Naturally Occurring Field Experiment*, 2 EMPLOYEE RESPS. & RTS. J. 91 (1989). The study of several thousand federal employees covered by the Civil Service Reform Act (CSRA), which contains an anti-retaliation provision, showed a slight increase in whistleblowing after the passage of the CSRA. *Id.* at 101. While the incidence of anonymous whistleblowing was higher after the passage of the protective legislation, the incidence of retaliation against non-anonymous whistleblowers remained the same. *Id.* Based on this data, the researchers concluded that other measures were needed to encourage whistleblowing. *Id.* at 107.

18. OR. REV. STAT. § 659.530 (1991). Under the Oregon statute, a public employee who suffers retaliation may file an action for injunctive relief or damages "in the circuit court of the county in which the alleged violation occurred, or the county in which the complainant resides. If damages are awarded, the court shall award actual damages or $250, whichever is greater." *Id.* It is unclear whether this amount is thought of as a reward, or merely reimbursement for the time and expense involved in filing a report. In any event, it is not significant enough to have much, if any, impact on whistleblowing.

19. S.C. CODE ANN. § 8-27-20 (Law. Co-op. Supp. 1991). The South Carolina statute provides:

allows the possibility of a reward—if the reward is offered by the government for the purpose of obtaining information to improve state administration or operations.[20] The general antipathy of the states to financial rewards is reflected in the statutes of some states which go so far as to refuse to protect whistleblowers from retaliation if the whistleblower stands to benefit by reporting the wrongdoing.[21]

Congress, perhaps in recognition of the failure of the existing anti-retaliation statutes to encourage whistleblowing, does not share the states' distrust of rewards.[22] In the last several

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> If the employee's report, exposé, or testimony results in a saving of any public money from the abuses described in this section, twenty-five percent of the estimated net savings resulting from the first year of implementation of the employee's report, exposé, or testimony, but not more than two thousand dollars, must be rewarded to the employee by the public body, as determined by the State Budget and Control Board.

Id.

20. WISC. STAT. ANN. § 230.83(2) (West 1987). The pertinent section of this statute states:

> This section [prohibiting retaliatory action] does not apply to an employe [sic] who discloses information if the employe [sic] knows or anticipates that the disclosure is likely to result in the receipt of anything of value for the employe [sic] or for the employe's [sic] immediate family, unless the employe [sic] discloses information in pursuit of any award offered by any governmental unit for information to improve government administration or operation.

Id.

21. *See, e.g.*, 43 PA. CONS. STAT. ANN. §§ 1422, 1423 (1987); W. VA. CODE § 6C-1-2(d), -1-3 (1988). Both statutes employ the same language. The statutes provide that an employer may not "discharge, threaten or otherwise discriminate or retaliate against an employee . . . because the employee . . . makes a good faith report . . . of wrongdoing or waste." 43 PA. CONS. STAT. ANN. § 1423; W. VA. CODE § 6C-1-3. A "good faith report" is defined as a "report of conduct defined in this act as wrongdoing or waste which is made without malice *or consideration of personal benefit* . . . ." 43 PA. CONS. STAT. ANN. § 1422; W. VA. CODE § 6C-1-2(d) (emphasis added). Wisconsin will not protect whistleblowing that is motivated by gaining "anything of value" unless it is the government offering an award in order to get information to improve administration or operation. WISC. STAT. ANN. § 230.83(2).

22. *See* Fred Strasser, *When the Big Whistle Blows . . .*, NAT'L L.J., May 8, 1989, at 1, 43 (discussing history and impact of *qui tam* laws and FCA). With the False Claims Act, Congress raised the possible recovery for a whistleblower to treble the amount of the fraud, and the fine for each false claim from $2,000 to $10,000, with thousands of claims possible in each case. *Id.* at 43. There are also private awards for whistleblowing. The Cavalo Prize (established by money market manager Michael Cavalo), for example, makes $10,000 awards to whistleblowers. Jeff Goldberg, *Truth & Consequences*, OMNI, Nov. 1990, at 73, 113. Another private award is the Lear Award, named after television producer Norman Lear who recently pledged $1 million to form the Business Enterprise Trust to award money to companies and whistleblowers who behave ethically. James Srodes, *Corporations Discover It's Good To Be Good*, BUS. & SOC'Y REV., Summer 1990, at 57, 57-58.

years, Congress has included financial incentives in statutes proposed or passed to curb organizational wrongdoing.[23] For example, the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA)[24] (the savings and loan "bailout" legislation) provides for rewards to whistleblowers. Under this law, an "appropriate Federal banking agency" can pay as much as twenty-five percent of the recovered fine, penalty, restitution, or forfeiture, to a maximum of $100,000, to an informant whose original information leads to the recovery.[25] In the same year, Congress authorized money awards of up to $250,000 for whistleblowers providing information for criminal cases against federal contractors.[26] Under the Insider Trading Sanctions Act, Congress, in 1988, authorized the Securities and Exchange Commission to offer rewards, of up to ten percent of the penalty imposed, for information leading to civil insider-trading penalties.[27]

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23. One House bill, H.R. 4983, 101st Cong., 2d Sess. (1990), authored by Ohio Congressman John Kasich and designed to double the reward under the Inspector General's Federal Employee Incentive Awards Program for disclosure of waste or fraud by government employees, came close to passage in Congress last year. John Kasich, *Incentives Bill Moves Forward*, REPORTS TO THE 12TH DISTRICT (Ohio Congressman John Kasich, Washington, D.C.), July 1990, at 2. The reward would have been $20,000; additional presidential awards would have been doubled to $40,000. *Id.* In the same vein, the State Department has doubled to $4 million the possible reward for providing information that would help catch terrorists. *Rewards for Aiding to Nab Terrorists Are Increased*, WALL ST. J., Oct. 17, 1990, at A4.

24. 12 U.S.C. § 1831k (Supp. II 1990) (authorizing federal banking agencies to pay reward to persons providing original information which leads to recoveries greater than $50,000). This section of the bill applies to both banking and thrift institutions.

25. *Id.* § 1831k(b). In order to be eligible for the award, a person must have provided information that led to a recovery of a criminal fine, restitution, civil penalty or forfeiture under specified statutes. *Id.* § 1831k(a). Officers or employees of the United States or a state or local government who obtained information in the performance of their official duties, however, cannot collect a reward. *Id.* § 1831k(c).

26. H.R. REP. No. 273, 101st Cong., 1st Sess. 3 (1989), *reprinted in* 1989 U.S.C.C.A.N. 593, 595 (authorizing Attorney General to give awards to whistleblowers and establishing funds to make awards under Major Fraud Act).

27. Insider Trading and Securities Fraud Enforcement Act of 1988, 15 U.S.C. § 78u-1(e) (1988). The award is taken only from the penalty assessed, not from illegal profits recovered, up to a maximum amount of 10% of such penalty. *Id.* According to the statute:

> [T]here shall be paid from amounts imposed as a penalty under this section and recovered by the Commission or the Attorney General, such sums, not to exceed 10 percent of such amounts, as the Commission deems appropriate, to the person or persons who provide information leading to the imposition of such penalty.

Id. As with FIRREA, no payment may be made to "any member, officer, or employee of any appropriate regulatory agency, the Department of Justice, or a self-regulatory organization." *Id.*

These legislative efforts to spur whistleblowing are not insubstantial. Because the rewards they provide are discretionary and the amounts available are relatively small, however, the most significant recoveries by whistleblowers are likely to be made under the federal False Claims Act.[28] As its name implies, the False Claims Act is designed to allow recovery of monies falsely claimed by government contractors.[29] While the government itself can

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Since the enactment of these civil penalty provisions, the Securities and Exchange Commission has approved rules under which it will award these bounties. *See* Paul Duke Jr., *SEC Set to Award Bounties to Tipsters On Insider Trading*, WALL ST. J., June 29, 1991, at C1. Under these rules, information may be provided anonymously, and the informant can identify himself or herself when actually applying for the reward. *Id.* The informant must apply for the award within 180 days after the court orders a civil penalty in a case based on the information. *Id.* Whether the award is given is up to the SEC commissioners. *Id.*

28. 31 U.S.C. §§ 3729-3733 (1988) (liability under FCA is defined in § 3729; § 3730 describes civil actions for false claims and explains responsibilities of Attorney General and rights of private parties to bring actions; § 3731 delineates false claims procedure; § 3732 provides false claims jurisdiction; § 3733 details discovery process in false claims litigation, especially power of federal government to issue civil investigative demands to persons believed to have information pertaining to false claim). For a comparison of the discretionary awards under other federal statutes to awards given under the False Claims Act, see *infra* notes 127-33 and accompanying text.

29. *See* 31 U.S.C. § 3729(a). This section provides:

(a) LIABILITY FOR CERTAIN ACTS.—Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of

pursue remedies under the FCA,[30] third parties are also authorized to seek claims in the name of the government, and to keep up to thirty percent of any treble damages and fines recovered.[31] Rewards under the FCA can be significant given the fact that the Justice Department has estimated fraud to be as much as ten percent of the federal budget, or one hundred billion dollars a year.[32] In certain industries, such as defense contracting, where fraudulent claims often involve millions of dollars, successful whistleblowers can come away multimillionaires.[33] With the outside statute of limitations set at ten years,[34] and with the development of an aggressive False Claims bar,[35] FCA suits are pre-

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damages which the Government sustains because of the act of that person . . . .

Id.

30. *Id.* § 3730(a). This section provides: "The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person." *Id.*

31. *Id.* § 3730(b), (d). For the text of these sections, see *supra* note 2.

32. Mark Thompson, *Stealth Law*, CAL. LAW., Oct. 1988, at 33. With a federal budget of approximately $1 trillion per year, "they're talking about a range of $100 billion of fraud a year—and this is a 10-year statute so it covers fraud going back 10 years." *Id.* at 33-34 (quoting John R. Phillips, co-director of Center for Law in the Public Interest in Los Angeles and lawyer who helped to conceive and draft 1986 FCA amendments). Fraud in the military alone is estimated by the Defense Department at $1 billion annually. Strasser, *supra* note 22, at 42.

33. Many of the cases that the government has decided to join allege well over $100 million in damages each. Steve France, *The Private War on Pentagon Fraud*, A.B.A. J., Mar. 1990, at 46, 48. According to the Justice Department, as of October 1989, 13 FCA cases had been settled for $26.7 million, with $2.7 million going to the private plaintiffs. *Id.* at 46. In one case against Industrial Tectonics, the government recovered $14.3 million. Richard W. Stevenson, *Workers Who Turn in Bosses Use Law to Seek Big Rewards*, N.Y. TIMES, July 10, 1989, at A1. The former Tectonics employee who started the suit and provided evidence of overcharging was awarded $1.4 million. *Id.*

34. 31 U.S.C. § 3731(b) (1988). According to the provision:

A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

Id.

35. An aggressive, although perhaps small, FCA bar is a likely development. *See, e.g.*, Richard J. Oparil, *The Coming Impact of the Amended False Claims Act*, 22 AKRON L. REV. 525, 525-26 (1989) (stating that publicity surrounding large dollar FCA suits and resultant rewards for both private plaintiffs and attorneys (through fees) provide incentive for suits; plaintiffs' counsel are now specializing

dicted to rival suits filed under the Racketeer Influenced and Corrupt Organizations Act (RICO)[36] in number and to exceed them in awards.[37] Are these predictions likely to come true, or will they, like the presumptions about retaliation protection, prove to be little more than "whistling in the wind"?

III. FINANCIAL REWARDS FOR WHISTLEBLOWING: A SOCIAL PSYCHOLOGY PERSPECTIVE

To make any meaningful predictions about the success of rewards to spur whistleblowing, a review of the current social-psychological literature on rewards is necessary. While logical, such reviews are not systematically undertaken during the process of drafting legislation despite the fact that an abundance of material is often available. For example, coverage of reward systems is as standard to an organizational behavior or human resources management text as is coverage of the doctrine of consideration to a contract law hornbook.[38] In addition to the extensive mainstream literature pertaining to reward systems, whistleblowing as a discrete area of study has been a focus of social-psychological research for the last decade.[39] It does not appear, however, that a

in FCA suits); Goldberg, *supra* note 22, at 76, 108 (stating that Washington D.C. attorney Louis Clark, executive director of Government Accountability Project, "has counseled thousands of whistle-blowers and has organized a crack legal team to work in their behalf"); Strasser, *supra* note 22, at 42 (stating that one plaintiff's attorney believes that FCA bar will take tougher stand on settlements and do better job litigating claims because private attorneys look at bottom line).

36. 18 U.S.C. §§ 1961-1968 (1988 & Supp. II 1990). For a discussion of the popularity of actions under RICO, see *infra* notes 224-30 and accompanying text.

37. *See* France, *supra* note 33, at 49 (stating that FCA *qui tam* actions have potential for greater impact than RICO suits because whistleblowing involves "grass roots enforcement"); Goldberg, *supra* note 22, at 108 (stating that FCA, if upheld by courts, "is expected to create a ground swell of whistle-blower activity"); Strasser, *supra* note 22, at 43 (according to FCA plaintiff's attorney, if FCA can survive politically, it will make RICO litigation "look like an infant").

38. *See, e.g.*, WAYNE F. CASCIO, MANAGING HUMAN RESOURCES 426-61 (2d ed. 1989) (discussing general motivational strategies, including different types of financial rewards used to improve employee performance and to motivate certain types of behavior); GEORGE T. MILKOVICH & JOHN W. BOUDREAU, HUMAN RESOURCE MANAGEMENT 495-518 (6th ed. 1991) (examining and evaluating different pay techniques and financial incentive systems used by employers); GREGORY MOORHEAD & RICKY W. GRIFFIN, ORGANIZATIONAL BEHAVIOR 175-87 (2d ed. 1989) (describing components and management of reward systems).

39. Social psychology is "[a] discipline devoted to the systematic study of human interaction and its psychological basis." KENNETH J. GERGEN & MARY M. GERGEN, SOCIAL PSYCHOLOGY 5 (1981) (emphasis omitted). For examples of social psychological studies in the whistleblowing area in the past 10 years, see Mary Brabeck, *Ethical Characteristics of Whistle Blowers*, 18 J. RES. PERSONALITY 41 (1984) (describing study intended to measure effects of moral reasoning on

review of literature in this area was undertaken by legislators or their staffs to analyze the potential effectiveness or the human and organizational implications of financial incentive statutes. Indeed, there is no evidence that they even realized the existence of such data.

A review of social science research indicates that money rewards for whistleblowing may produce the desired result of increasing the number of individuals willing to report wrongful activity. According to the current literature, if the reward system is structured properly, financial incentives should encourage a new type of whistleblower to step forward. It is important to keep in mind, however, that the social psychologists attempting to study whistleblowing in organizations have relied heavily on case studies or questionnaires; these methods depend primarily on "the retrospective and one-sided view of the whistleblower," a perspective that may lead to some bias in the reporting of the events.[40] Accordingly, the conclusions proposed below should be considered preliminary, particularly those relying on the still-developing whistleblowing literature. Despite the dynamic aspect of these conclusions, however, the social-psychological research completed thus far does contribute to assessing the viability of financial incentives for whistleblowing.

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whistleblowing); John P. Keenan, *Communication Climate, Whistle-blowing, and the First-Level Manager: A Preliminary Study*, 40 ACAD. MGMT. BEST PAPER PROC. 247 (1988) (presenting findings on study of whistleblowing and communication climate of organization from perspective of line manager); Marcia P. Miceli & Janet P. Near, *Characteristics of Organizational Climate and Perceived Wrongdoing Associated with Whistle-Blowing Decisions*, 38 PERSONNEL PSYCHOL. 525 (1985) (discussing potential explanations of why some observers report organization wrongdoing while others do not); Marcia P. Miceli & Janet P. Near, *Individual and Situational Correlates of Whistle-Blowing*, 41 PERSONNEL PSYCHOL. 267 (1988) [hereinafter *Correlates of Whistle-Blowing*] (analyzing effects of individual characteristics, working environment and employer practices on employee whistleblowing); Marcia P. Miceli & Janet P. Near, *The Relationships Among Beliefs, Organizational Position, and Whistle-Blowing Status: A Discriminant Analysis*, 27 ACAD. MGMT. J. 687 (1984) [hereinafter *Beliefs, Organizational Position, and Whistle-Blowing Status*] (examining survey data to determine whether persons who report organizational wrongdoing differ from other employees as to their beliefs about organizational conditions and position); Janet P. Near & Tamila C. Jensen, *The Whistleblowing Process: Retaliation and Perceived Effectiveness*, 10 WORK & OCCUPATIONS 3 (1983) (examining data on factors that motivate female employees who blew whistle on employers with regard to alleged sex discrimination); Janet P. Near & Marcia P. Miceli, *Retaliation Against Whistle Blowers: Predictors and Effects*, 71 J. APPLIED PSYCHOL. 137 (1986) (examining circumstances under which whistleblower should expect retaliation by employer); Marcia A. Parmerlee et al., *Correlates of Whistle-blowers' Perceptions of Organizational Retaliation*, 27 ADMIN. SCI. Q. 17 (1982) (analyzing factors that influence organizational retaliation against public whistleblowers in cases of alleged unfair employment discrimination).

40. Dworkin & Near, *supra* note 16, at 80.

A. *The Potential Whistleblower*

In assessing the efficacy of a reward system, the first step is to identify the type of reward to be offered, the type of behavior sought to be encouraged by that reward, and the likelihood that the chosen reward will in fact encourage the desired behavior.[41] Rewards are often classified by social scientists as either "intrinsic" or "extrinsic."[42] Intrinsic rewards (such as a sense of competence, the satisfaction of meeting a challenge and the opportunity to exercise creativity) are self-administered by participation in or accomplishment of the rewarding activity.[43] Extrinsic rewards (i.e., money, benefits, promotions), on the other hand, depend upon external factors.[44] Extrinsic rewards are generally more tangible, and the satisfaction they provide is distinct from the activity rewarded. Extrinsic rewards are often used to stimulate

41. A variety of rewards may be gained in the employment setting. *See, e.g.*, CASCIO, *supra* note 38, at 429-30, 432 (noting that management has many powerful reward tools to improve employee performance, such as raises, promotions, job performance recognition).

42. *See, e.g.*, William W. Notz, *Work Motivation and the Negative Effects of Extrinsic Rewards: A Review with Implications for Theory and Practice*, 1975 AM. PSYCHOL. 884, 884 (discussing that many theorists and practitioners draw distinction between intrinsic and extrinsic motivation and assume that both kinds of motivation are independent and additive; under this view, rewards such as pay, fringe benefits and promotions are extrinsic, intrinsic awards are integral part of work activity itself). It must be kept in mind, however, that not all commentators share this classification scheme. For example, one commentator has stated that "[a] single definition separating intrinsic and extrinsic rewards is not widely shared among observers of work behaviors . . . ." Richard A. Guzzo, *Types of Rewards, Cognitions, and Work Motivation*, 4 ACAD. MGMT. REV. 75, 75 (1979). According to Guzzo, making a distinction between intrinsic and extrinsic rewards on the basis of an activity-reward relationship is unsatisfactory for two reasons: (1) it can be indefinite and illusory—behavior apparently occurring for no reward may be due to tangible awards which happen to be sporadic; and (2) it is improper to say that an activity can be engaged in for its own sake—all activities have consequences, but some may be private to the actor. *Id.* at 76.

43. *See, e.g.*, EDWARD L. DECI & RICHARD M. RYAN, INTRINSIC MOTIVATION AND SELF-DETERMINATION IN HUMAN BEHAVIOR 43 (1985) (describing intrinsic motivation as "innate, natural propensity to engage one's interests and exercise one's capacities"); LYMAN W. PORTER ET AL., BEHAVIOR IN ORGANIZATIONS 341-42 (1975) (for intrinsic awards, such as feelings of competence or self-actualization, "all the organization can do is to create conditions (e.g., particular job designs) that make it possible for the individual to experience them . . . [however, ultimately] the individual must reward himself"); Notz, *supra* note 42, at 884 (describing intrinsic awards as "those over which the employee has a high degree of self-control and that are an integral part of the work activity itself").

44. *See, e.g.*, PORTER ET AL., *supra* note 43, at 343 (stating that extrinsic awards are given to or obtained by employee, and are tangible and potentially visible to others); Notz, *supra* note 42, at 884 (stating that extrinsic rewards "provide satisfaction that is independent of the actual activity itself . . . because they are controlled by someone other than the employee").

conduct that would not otherwise be reliably exhibited.[45] In the employment context, these extrinsic rewards are commonly utilized to induce three general types of behavior: joining the organization; dependably discharging job responsibilities; and undertaking "innovative and spontaneous activity" to achieve organizational objectives extending beyond job specifications.[46]

1. *Analysis of Money as a Reward*

In looking at the type of reward offered by the FCA (payment for information provided), the social-psychological literature clearly establishes that pay, which is classified as an extrinsic reward, is a potent motivational tool.[47] Nevertheless, a great deal of research also indicates that rewards other than money are preferable motivators in some, and perhaps many, circumstances because of the relationship between extrinsic rewards and intrinsic motivation. A number of studies involving a wide array of rewards and situational variables have evaluated the relationship between rewards and motivation.[48] The results of these studies have been interpreted to establish the proposition that providing

45. *See* PORTER ET AL., *supra* note 43, at 342 (stating that, "[i]n order to function effectively, most work organizations need people to do tasks that in the absence of extrinsic rewards they often would not do").

46. Daniel Katz, *The Motivational Basis of Organizational Behavior*, 9 BEHAVIORAL SCI. 131, 131-32 (1964). These three types of behavior are considered essential to the organization. Attracting employees to join and remain with an organization is important to ensure sufficient personnel to man the functions of that organization and to avoid costly turnover. *Id.* at 132. Dependable performance is necessary so that the organization can predict and rely upon minimal levels of production and quality. *Id.* Finally, an organization gains strength through the ability of its employees to spontaneously and creatively react to unforeseen changes in operations and the environment. *Id.*; *see also* PORTER ET AL., *supra* note 43, at 342 (stating that organizations use extrinsic rewards to motivate three kinds of behavior: membership, attendance and performance).

47. *See, e.g.*, EDWARD L. DECI, INTRINSIC MOTIVATION 207 (1975) (stating that extrinsic rewards motivate behavior and often improve performance); EDWARD E. LAWLER III, PAY AND ORGANIZATIONAL EFFECTIVENESS: A PSYCHOLOGICAL VIEW 62 (1971) (stating that "pay can be and usually is important enough to motivate most kinds of job behavior"); PORTER ET AL., *supra* note 43, at 352 (stating that extrinsic rewards can be used to motivate job performance); Herbert H. Meyer, *The Pay-for-Performance Dilemma*, 4 ORGANIZATIONAL DYNAMICS 39, 39 (1975) (stating that pay is powerful motivator for most people); John A. Wagner, III et al., *Incentive Payment and Nonmanagerial Productivity: An Interrupted Time Series Analysis of Magnitude and Trend*, 42 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 47, 47 (1988) (discussing study that examined changes in productivity after introduction of non-managerial pay incentive program).

48. *See* DECI & RYAN, *supra* note 43, at 44-48 (summarizing numerous studies on effects of monetary rewards on intrinsic motivation); GUZZO, *supra* note 42, at 79-81 (synthesizing results of 30 studies on relationship between extrinsic and intrinsic rewards).

an extrinsic reward for the accomplishment of an intrinsically rewarding activity has a negative effect on the intrinsic motivation for that task.[49]

This effect has been explained in terms of "cognitive evaluation theory," a theory which focuses on the origins of motivation for behavior.[50] The hypothesis is that "intrinsically motivated behavior" has an internal source or causation—a person does the task for internal rewards such as interest in or mastery of the task.[51] In comparison, "extrinsically motivated behavior" has an external source or causation—the person does the task to obtain a reward or to comply with an external constraint.[52] Thus, an extrinsically motivated activity is pursued as "a means to an end rather than an end in itself."[53] Under cognitive evaluation the-

49. *See* DECI & RYAN, *supra* note 43, at 47-48 (discussing studies demonstrating that "when subjects received monetary rewards for working on a variety of activities, under a variety of circumstances in and out of the laboratory, their intrinsic motivation for the rewarded activity decreased"). For example, Deci found in one study that research subjects who were paid for working on an intrinsically interesting activity (in this case solving puzzles) were less intrinsically motivated after being paid for solving the puzzles in the allotted time than were the subjects who had done the same activity without pay. *Id.* at 47. Another study showed that paying male teenage subjects for working on a mechanical assembly task decreased the subjects' satisfaction. *Id.* at 48. From these studies, the researchers concluded: "Evidence that extrinsic rewards . . . can undermine intrinsic motivation is quite persuasive." *Id.* at 51. According to Deci and Ryan, this "phenomenon has appeared with ages ranging from preschoolers to adults, rewards ranging from money to marshmallows, activities ranging from solving puzzles to beating a drum, settings ranging from psychology laboratories to a newspaper office, and cultures ranging from the United States to Japan." *Id.*; *see also* Meyer, *supra* note 47, at 41 (citing Deci's conclusion that "to the extent pay is attached directly to the performance of the task, intrinsic interest in the task itself decreases").

50. According to Deci and Ryan:

> With an external reward or constraint, an instrumentality develops such that the activity becomes a means to an end rather than an end in itself. The behavior is no longer something that is done because it is interesting; it is something that is done to get an external reward or to comply with an external constraint. This statement about the change in perceived locus of causality became part of what Deci (1975) referred to as cognitive evaluation theory.

DECI & RYAN, *supra* note 43, at 49.

51. *Id.* (stating that "intrinsically motivated behavior has an internal perceived locus of causality").

52. *Id.* (stating that "extrinsically motivated behavior has an external perceived locus of causality").

53. *Id.* Other theorists agree with this conclusion. *See, e.g.*, Notz, *supra* note 42, at 884-85 (citing and expanding on similar hypothesis of deCharms).

> [D]eCharms hypothesized that when a man perceives his behavior as stemming from his own choice (i.e., sees himself as an origin), he will cherish that behavior and its results; when he perceives his behavior as stemming from external forces (i.e., sees himself as a pawn), that be-

ory, therefore, rewarding an intrinsically motivated activity extrinsically has the effect of shifting toward the external an otherwise internal source of motivation.[54] The practical consequences of this phenomenon could have a significant impact on employees. As a result of offering extrinsic rewards for performance of intrinsically motivated activities, rewarded activities could become less interesting, less enjoyable and less persistently pursued.[55]

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havior and its results, though identical in other respects to behavior of his own choosing, will be devalued.

DeCharms used the origin-pawn dimension to distinguish between intrinsically versus extrinsically motivated behavior. A person is said to be intrinsically motivated whenever he experiences himself as the locus of causality for his own behavior (i.e., when he sees himself as an origin). Conversely, he considers himself extrinsically motivated when he perceives the locus of causality for his behavior as external to himself (i.e., when he perceives himself as a pawn).

Id.

54. DECI & RYAN, *supra* note 43, at 49 (stating that "intrinsic motivation is based in the need to be self-determining[;] . . . rewards, which are widely used as instruments of control, can often co-opt people's self-determination and initiate different motivational processes"). This conclusion, that intrinsically appealing activities are generally made less so when they are extrinsically rewarded, is not, however, universally shared. *See, e.g.*, Guzzo, *supra* note 42, at 78 ("Since . . . [accompanying table summarizing results of 30 studies] reveals a substantial mix of support and refutation for the proposition that extrinsic rewards diminish the effects of intrinsic rewards, it is evident that the general proposition cannot be accepted."); W. Clay Hamner, *How to Ruin Motivation With Pay*, 7 COMPENSATION REV. 17, 24 (1975) (concluding that Deci's "results don't appear to completely support his conclusion about the effect of money as a motivator"; other research has shown that "effect of intrinsic and extrinsic monetary rewards are additive").

55. DECI & RYAN, *supra* note 43, at 57. Research shows that extrinsic rewards affect people's experience of self-determination and can induce "a decrement in intrinsic motivation for the target behavior, less persistence at the activity in the absence of external contingencies, and less interest in and enjoyment of the activity." *Id.* It also "appears that when the expression of an attitude becomes instrumental to reward attainment, one's commitment to the attitude is weakened." *Id.* at 69. This second point is illustrated by a hypothetical person who attempts to persuade a neighbor to support a referendum to prevent the construction of a highway through a game preserve. *Id.* The beliefs of an environmental conservationist in support of the referendum, according to this theory, would be weakened if he or she were hired by an association to campaign for the referendum, because the beliefs would now be asserted for financial gain as opposed to personal conviction. *Id.* Deci and Ryan further assert that "the person would become less favorable toward the espoused position, because he would not need to hold to the attitude to justify the behavior and because people are often paid as a way of getting them to do things they do not believe in." *Id.*

Deci and Ryan offer two studies in support of this proposition. In the first study by Benware and Deci in 1975, two groups were asked to argue in favor of a position they believed in (knowledge of the belief was pre-determined). *Id.* One of the group was paid; the other was not. *Id.* The study showed a significant change in attitudes away from the espoused position for the paid group compared to the unpaid group. *Id.* In the second study, done by Kiesler and Sakamura in 1966, the researchers found that being paid to espouse a belief one

Thus, because of this interplay between extrinsic rewards and intrinsic motivation, it is useful when considering motivational schemes to categorize conduct sought to be encouraged by a reward system as either a short-term, single instance activity or a long-range, continuing behavior.[56] Extrinsic rewards, such as money, may be useful with reference to the first type of conduct if a possible concomitant decrease in intrinsic motivation is not a concern. As to desired long-range behavior, the use of such incentives may be detrimental.

2. *Employee Reaction to Money Rewards for Performance*

While it appears that payment for performance under the

already held made the beliefs "more vulnerable to change during a subsequent period when [the subjects] . . . read an argument that was counter to their beliefs." *Id.*

This analysis provides a possible explanation for the apparently contradictory results of two recent long-term studies of performance-driven pay systems. The first, analyzing managerial performance, concluded that implementing a performance-driven plan had no measurable impact on performance trends. Jone L. Pearce et al., *Managerial Compensation Based on Organizational Performance: A Time Series Analysis of the Effects of Merit Pay*, 28 ACAD. MGMT. J. 261, 271 (1985) (studying effects of tying managerial pay to organizational performance in Social Security Administration). The second study, however, demonstrated "that the introduction of nonmanagerial incentive payments in a unionized iron foundry led to a significant long-term increase in productivity relative to the level observed under flat-rate wages." Wagner et al., *supra* note 47, at 64-65. The contrast in the results of the two studies can perhaps be explained by the fact that, in general, management positions are characterized by variety and flexibility, and thus may be expected to be intrinsically rewarding. *See* Pearce et al., *supra*, at 262. Production jobs, on the other hand, are likely to be monotonous and controlled. *See id.* Accordingly, Deci's theory would predict the outcome suggested by these studies, i.e., that a performance-contingent pay scheme would be more effective for production workers, who were not intrinsically rewarded by their jobs, than for managerial employees who are more likely to be intrinsically motivated. *See also* Charles N. Greene & Phillip M. Podsakoff, *Effects of Removal of a Pay Incentive: A Field Experiment*, 1978 ACAD. MGMT. PROC. 206 (discussing study of management and non-management employees that revealed performance decline among latter, but not former, group when performance-driven pay system was removed).

56. *See* DECI & RYAN, *supra* note 43, at 208-09 (stating that, because "[r]ewards affect performance and intrinsic motivation differently," it is important to distinguish whether goal is immediate performance or maintenance of intrinsic motivation; if main concern is performance, extrinsic rewards may be very effective). As Professor Deci notes:

> If one is trying to motivate a person to engage in a particular activity on a one-shot basis and is not concerned with the person's intrinsic motivation for the activity, the extrinsic-rewards route may be the best one to travel. Further, since extrinsic rewards have been shown to be effective motivators, it would seem that extrinsic control systems would be appropriate so long as the system remains operative, that is, so long as the rewards never stop, quality is rigidly controlled, etc.

Id. at 208.

right circumstances may encourage the desired behavior, another consideration must be kept in mind—employees do not necessarily react positively to performance reward schemes. Studies in this area indicate serious problems that should be addressed before such a scheme is put in place. For example, a reward system that engenders competition among participants may have negative consequences more direct than decreased intrinsic motivation. Interpersonal relationships, and thus organizational effectiveness, may suffer due to increased antagonism and decreased contact and communication among the competing employees.[57] Additionally, the use of performance-contingent rewards can have an impact on the self-esteem of eligible individuals. Studies indicate that self-appraisals of job performance are typically quite exaggerated.[58] If this is so, there will be a significant gap between the (unreasonably high) expectations of most employees and the reality of the reward in a merit-driven pay system. Such employees are likely to feel that this gap is unjustified.[59] A second, related, concern also arises from the truism that it is only possible for some persons to receive above-average rewards. The potentially amotivating signal given to the balance of the pool of eligible individuals is that they are not performing well.[60]

Further, a system of monetary rewards for behavior necessarily involves the designation of the activity or performance to be rewarded by the person providing the reward. This may explain, at least in part, studies demonstrating that employees do not view merit compensation plans as desirable.[61] Not only does research addressing performance-based pay systems raise serious ques-

57. Meyer, *supra* note 47, at 42. According to Professor Meyer, forcing employees to compete for awards can generate several types of reactions: (1) hostility between employees because competitors are seen as enemies; (2) distorted perceptions of oneself and others; and (3) decreased interaction and communication with others. *Id.* Because organizations require integration of efforts to function effectively, these types of reactions are generally detrimental to the organization. *Id.*

58. *Id.* at 42-44. Professor Meyer presented a tabular summary of the results of several such surveys. *Id.* at 44. Asked to compare their job performance with others doing similar work, 72% and 68% of different groups of blue collar workers, 86% of engineers in a research laboratory, and 77% of accountants in several companies rated themselves in the top 10% or top 25%. *Id.*

59. *Id.* (stating that most employees think they are above-average performers, however most do not receive salary increases reflecting superior performance and they therefore "feel discriminated against because it appears from pay raises that management does not recognize their true worth").

60. *See* DECI & RYAN, *supra* note 43, at 310-11.

61. *See* LAWLER, *supra* note 47, at 159-62 (stating that "studies indicate that workers are less favorably disposed toward merit pay plans than are managers"); Meyer, *supra* note 47, at 40 (noting that, despite belief that it is based on sound

tions about managers' abilities to objectively evaluate their employees, there is also evidence that few workers believe that managers are capable of identifying legitimate differences among the performances rendered by subordinates.[62] In addition, some reward systems based on performance may be perceived as demeaning in the sense that they require dependence on the rewarder.[63]

3. *Individual Characteristics and the Effectiveness of Money Rewards*

Another factor must also be kept in mind—how an employee's individual characteristics might affect his or her view of money as a reward for behavior. On an individual basis, money will affect motivation to the extent that money is valued by that person. Several studies have analyzed the relationship between the priority given to pay and sex, age, education and level of self-esteem. These studies suggest that men value pay more highly than women, that the importance of pay declines as age advances, and that no demonstrable relationship exists between education level and the significance of pay.[64] The studies also indicate, pre-

principle, merit pay system "contributes little or nothing to employee satisfaction with pay").

62. *See* LAWLER, *supra* note 47, at 168 (stating that subordinates often see subjective appraisal systems as arbitrary and unfair; objective systems can fail to reflect individual efforts); PORTER ET AL., *supra* note 43, at 321 (stating that "[s]tudy after study has shown that the typical performance evaluation ratings done by a superior tend to be suspect"); Hamner, *supra* note 54, at 19 (noting that even managers working under merit program believed to be good are dissatisfied with performance evaluation by superiors); Meyer, *supra* note 47, at 41 (noting that validity of assumption that supervisor can make objective, valid distinctions between employees' performances is often questioned; most unionized employees do not accept validity of supervisor judgments). *But see* Lee Dyer et al., *Managerial Perceptions Regarding Salary Increase Criteria*, 29 PERSONNEL PSYCHOL. 233, 240 (1976) (finding that managerial survey respondents believe performance is important factor in determining their own salary increases, but organizations do not place as much emphasis on this criterion as they should).

63. *See* Hamner, *supra* note 54, at 19 (stating that manager's role in determining pay reminds employee that he or she is dependent on manager for rewards); Meyer, *supra* note 47, at 41 (stating that merit pay can be viewed as demeaning because of implication that employee must please "big daddy boss" in order to receive rewards boss deems appropriate). This difficulty would not arise, however, where objective criteria for the reward have been established. *See* Meyer, *supra* note 47, at 42 (stating that "[a] merit pay plan based on objective criteria, such as commissions on sales, does not have this paternalistic character").

64. *See* LAWLER, *supra* note 47, at 47-49, 51. According to Lawler, "studies are quite consistent in showing that pay is more important to men than to women." *Id.* at 47. His own research showed "a tendency for women to rate pay as significantly less important, even when they are heads of households." *Id.* From this, Lawler concluded that "it is not simply a lack of economic necessity that

liminarily, that greater emphasis is placed on pay by individuals who have low self-esteem.[65]

Individual, but employment-related, characteristics such as job level and pay level have also been studied.[66] In general, the research suggests an inverse relationship between both job and pay levels and the value placed on pay.[67]

4. *Implications for Whistleblowing Rewards*

While extrinsic rewards are often utilized to stimulate performance, the question remains whether the potential benefits of using money (an extrinsic reward) as an incentive for blowing the whistle on wrongful conduct (the desired performance) outweigh the likely drawbacks. In an effort to address this query, the following discussion integrates the social-psychological research on whistleblowing with the rewards literature previously summarized.[68]

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causes women to rate pay as less important, but rather the relationship of pay to their needs and goals." *Id.*

With reference to age and pay, Lawler discussed three studies that found a negative relationship and one study which found no relationship. *Id.* at 48. At this point, however, Lawler found no definitive explanation for why pay might decrease in importance as age increases. *Id.* at 49.

Lawler also concluded that education level and pay are probably not related. *Id.* at 51. He came to this conclusion in spite of two studies which showed "that more highly educated people place more importance on pay than do less highly educated people." *Id.* For Lawler, because "it is not obvious that education substantially affects the strength of needs or the perceived instrumentalities of pay for satisfying needs," there is no "obvious reason why educational level should have any such effect." *Id.* Lawler also noted that a 1954 study reported no difference in groups with different education levels with respect to importance attached to pay. *Id.*

65. *Id.* at 49. Lawler concluded that, because "pay is probably seen as instrumental for the satisfaction of esteem and security needs," it is likely that "pay is more important to employees who, presumably, wish to bolster their self-assurance." *Id.*

66. *Id.* at 51-55.

67. *Id.* According to Lawler, there is a good deal of evidence showing that, "as one considers higher and higher levels within an organization, pay becomes less important." *Id.* at 53. For example, one study showed that skilled blue-collar workers rated pay as less important than did unskilled blue-collar workers. *Id.* Another study reported that lower-level managers rated pay as more important than middle-level managers. *Id.* A third study found the same as between middle-level and top-level managers. *Id.* at 53-54.

Lawler also concluded that "high pay satisfaction can lead to a reduction in the importance of pay." *Id.* at 52. As Lawler cautioned, however, there is not much data in this area and the evidence thus far "is only a start in showing how the amount of pay influences its importance to employees but the evidence supporting some of the relationships is impressive." *Id.*

68. For a discussion of the "rewards" literature, see *supra* notes 38-67 and accompanying text.

a. Relationship Between Extrinsic Rewards and Intrinsic Motivation

Social-psychological research on whistleblowing indicates that an individual who reports wrongful conduct is typically prompted to do so by organizational loyalty; the employee acts with the primary objective of benefitting the organization.[69] These are intrinsic motivations, similar to meeting a challenge or achieving a sense of competence.[70] If the use of extrinsic rewards does, in fact, have a detrimental effect on intrinsic motivation, offering monetary incentives for reporting wrongful conduct may reduce prospective whistleblowers' loyalty-driven impulses to take the same action.[71] Because encouraging whistleblowing is likely a long-term and continuing goal, this detrimental effect could be a significant disadvantage to offering monetary rewards for making such disclosures.

Evidence suggests, however, that most observations of wrongdoing are not reported.[72] This fact may support the use of monetary incentives for whistleblowing. Extrinsic rewards are commonly and effectively used to encourage action that would not otherwise be taken.[73] Thus, the potential decrease in whistleblowing resulting from a reduction of intrinsic motivation among individuals who would blow the whistle without a money reward may be more than offset by an increased rate of disclosure by persons who would not blow the whistle in the absence of such an incentive.[74]

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69. *See* Miceli & Near, *Correlates of Whistle-Blowing*, *supra* note 39, at 269. According to Miceli and Near, "[a]lthough it is often assumed that whistle-blowers are disloyal to or dissatisfied with their organizations, the opposite may in fact be true: they act precisely because they believe it to be in the long-term best interests of the organization . . . and of other individuals." *Id.* (citation omitted).

70. For a discussion of intrinsic motivations, see *supra* note 43 and accompanying text.

71. For a discussion of the potential impact of extrinsic rewards on intrinsic motivation, see *supra* notes 54-55 and accompanying text.

72. *See* MARCIA P. MICELI & JANET P. NEAR, WHISTLE-BLOWING IN ORGANIZATIONS, 93-135 (1992) (discussing research on and reasons for who blows whistle and who does not).

73. For a discussion of the use of extrinsic rewards to influence behavior, see *supra* notes 45-46 and accompanying text.

74. The relationship between financial rewards and whistleblowing has received little attention in the social-psychological literature to date. *See* MICELI & NEAR, *supra* note 72, at 153-54 (stating that "there is little evidence that [cash] incentives offered by organizations are effective [in encouraging internal whistleblowing] primarily because little investigation has been conducted into incentive programs"). The little research available, however, does not support this hypothesis. For instance, only one respondent in a study of first-level managers indicated that a monetary reward would be the best way to encourage such

Other considerations suggest that rewards may have little negative impact on the intrinsically-motivated whistleblower. Participation in a reward system such as that created by the False Claims Act is voluntary and must be aggressively pursued—in contrast to most extrinsic rewards in organizational compensation systems. Further, whistleblowers motivated by the desire to benefit the organization are unlikely to pursue FCA actions because of the potential of such lawsuits to subject their organization to large losses. Thus, individuals who are intrinsically motivated to blow the whistle may be only minimally affected by the availability of financial incentives.

b. Responses of Person Rewarded

Other concerns about common employee responses to monetary incentives may be less troublesome in the context of rewards for whistleblowing than in other situations for several reasons. First, the performance to be rewarded under such a scheme—that is, blowing the whistle on the wrongful activity of another individual or group—can be objectively evaluated. Either the disclosure is made or it is not. Thus, questions regarding managers' abilities to accurately assess and distinguish among employees' performances should not arise.[75] Similarly, potential feelings of discrimination, based on unrealistic perceptions of individual accomplishment in comparison to others, are not likely to occur.[76] In addition, because of the objective nature of the criteria for a whistleblowing reward, the potentially demeaning need to please a superior does not exist.[77]

Second, the ability to blow the whistle usually depends more upon an accident of access than on diligence or competence.[78]

disclosures. Keenan, *supra* note 39, at 249. Professor Keenan's study indicated that the factor most likely to encourage a report of wrongful conduct was the knowledge that corrective action would be taken. *Id.*; *see also* Miceli & Near, *Beliefs, Organizational Position, and Whistle-Blowing Status*, *supra* note 39, at 700 (discussing survey in which respondents who blew whistle within organization reported that "environmental incentives" such as cash did not influence their decisions to disclose, but "providing convincing evidence that corrective action would be taken appear[ed] to be important to nearly all potential whistleblowers").

75. For a discussion of the concerns of subjective evaluation for extrinsic rewards, see *supra* note 62 and accompanying text.

76. For a discussion of the impact of employees' perception of their job performance on employee motivation, see *supra* notes 58-59 and accompanying text.

77. For a discussion of the potential demeaning quality of a reward system, see *supra* note 63 and accompanying text.

78. Generally, the opportunity to become a whistleblower arises when an

Therefore, money awards for whistleblowing should not discourage individuals who do not receive them, in the sense that below-average merit-based compensation can.[79] This "accident of access" factor also renders unlikely the negative interpersonal consequences that can arise from performance-driven reward systems that engender competition among participants.[80]

c. Relationship Between Effectiveness of Money Rewards and Characteristics of Rewardee

As previously discussed, social-psychological research suggests that the motivational potential of financial incentives varies in relation to individual characteristics such as sex, age, education level, and personality traits.[81] Several of these variables have been examined specifically in terms of the propensity of employees to blow the whistle. An assessment of the rewards literature in combination with the whistleblowing data suggests that older persons are more likely to blow the whistle, whereas younger individuals might be more susceptible to financial incentives.[82] Similarly, it is hypothesized that higher levels of self-esteem are positively related to whistleblowing, whereas persons with low self-esteem are more likely to value pay.[83] Given that extrinsic rewards may be used successfully to engender conduct that might not be pursued without such incentives, a tentative conclusion may be drawn that whistleblowing by younger persons and individuals with low self-esteem might be effectively encouraged through the use of money rewards.[84]

individual observes, by chance, the wrongful activity of another. An employee's job performance, on the other hand, is largely determined by that individual's capabilities and industriousness.

79. For a discussion of the potentially discouraging effect of rewards, see *supra* note 60 and accompanying text.

80. For a discussion of the negative interpersonal consequences and the resulting impact on the organization, see *supra* note 57 and accompanying text; *cf. infra* notes 244-52 and accompanying text (discussing other potential negative organizational consequences).

81. For a discussion of these characteristics in relation to extrinsic reward systems, see *supra* notes 64-65 and accompanying text.

82. *See* LAWLER, *supra* note 47, at 48-49 (stating that importance of pay decreases as age increases); MICELI & NEAR, *supra* note 72, 115-17 (discussing reasons why younger employees are less likely to blow whistle).

83. *See* LAWLER, *supra* note 47, at 49 (noting that pay is more important to employees who want to boost self-esteem); MICELI & NEAR, *supra* note 72, at 109 (discussing research that proposed that self-esteem is positively related to whistle-blowing). This hypothesis, however, has not yet been tested empirically. *Id.* at 110.

84. Under this analysis, information regarding two other variables considered by scholars of reward theory and whistleblowing is of limited usefulness to

Likewise, research focusing on work-related personal characteristics indicates that rewards may spur whistleblowing among lower level employees who might not otherwise disclose wrongdoing. This conclusion is drawn from studies done on the types of employees likely to blow the whistle without that additional financial incentive and the types of employees likely to respond positively to a financial incentive. Studies on whistleblowing have revealed that certain categories of whistleblowers typically occupy supervisory positions.[85] Another finding is that those who make such disclosures, outside the organization at least, tend to be long-term employees.[86] In light of the studies revealing that the value placed by an individual on pay tends to decrease as his or her job and pay levels rise, money rewards may effectively encourage employees with certain characteristics—such as low pay and job status, and short tenure in the position—to report wrongful activity where they might have otherwise remained silent.[87]

B. *Reward Administration and Structure*

In terms of individual characteristics, the social-psychological literature supports the assumption that financial incentives will motivate new whistleblowers to come forward. Other considerations, however, also have a crucial bearing on the overall success of such a scheme. The effectiveness of extrinsic rewards in a given context, therefore, must also be evaluated in light of the

a decision on whether or not to use money rewards to encourage whistleblowing. With reference to sex, men are both more responsive to financial incentives and more likely to blow the whistle. *See* LAWLER, *supra* note 47, at 47 (noting that pay is more important to men than to women); MICELI & NEAR, *supra* note 72, at 120-23 (discussing research on and reasons why men are more likely to blow whistle than women). Thus, extrinsic rewards should not be particularly useful in encouraging whistleblowing among women. Educational level, on the other hand, has not been shown to have a relationship to the value given to pay in the rewards literature, although preliminary evidence indicates that more highly educated persons are more likely to blow the whistle. *See* LAWLER, *supra* note 47, at 51 (noting that education and importance of pay are most likely not related); MICELI & NEAR, *supra* note 72, at 119-20 (discussing research on and reasons why education level has some effect on whistleblowing).

85. *See* MICELI & NEAR, *supra* note 72, at 125 (discussing research on and reasons why supervisory status has effect on whistleblowing).

86. *See id.* at 117-19 (discussing research on and reasons why length of service has effect on whistleblowing); Dworkin & Near, *supra* note 16, at 78 (stating that "whistleblowers seemed to be long-term employees who had shown a history of loyalty to the employer through their lengthy tenure"); Miceli & Near, *Beliefs, Organizational Position, and Whistle-Blowing Status, supra* note 39, at 700-01 (describing characteristics of whistleblowers who utilize external channels).

87. For a discussion of these studies, see *supra* notes 64-67 and accompanying text.

characteristics of the organization or entity granting the award and the structure of the reward itself.[88]

1. *Characteristics of Reward Administration*

The nature of the environment within which a reward system operates is a critical factor in determining its potential efficacy.[89] Further, in contrast to the personal characteristics of the potential reward recipient, organizational factors can be changed in order to maximize the potential effectiveness of rewards. The motivational potency of a reward depends on the clarity of its link to the conduct sought to be induced.[90] Accordingly, money is unlikely

88. The significance of organizational characteristics and reward structure to the success of a pay-for-performance scheme is illustrated by a synthesis of 98 published productivity studies. *See* Richard A. Guzzo et al., *The Effects of Psychologically Based Intervention Programs on Worker Productivity: A Meta-Analysis*, 38 PERSONNEL PSYCHOL. 275, 280 (1985). The authors analyzed the effect of 11 types of "intervention programs," including financial incentive programs, to determine their relative impact on productivity. *Id.* at 277-78. The authors characterized as "surprising" their failure to identify a statistically significant effect of money incentives on productivity, but explained:

> [T]he variance in the effects of financial compensation was the greatest among all the programs. In some applications, financial incentives had very powerful effects on productivity, but there were other instances of negligible effects. Apparently the effects of incentive programs depend heavily on the circumstances and methods of applying them . . . .

Id. at 285. Accordingly, the authors "sound[] a warning that [financial] incentive schemes have traps for the unwary or unsophisticated. . . . On the other hand, when applied in the right way and in the right situations, they can have strongly positive effects on productivity, especially on output." *Id.* at 289.

89. *See* LAWLER, *supra* note 47, at 55-56 (discussing evidence that "pay is more important to people who work in profit-making business organizations than to those who work in non-profit organizations"); PORTER ET AL., *supra* note 43, at 363 (noting that reward plans which work in small, democratically-managed organizations may not work in large, autocratically-managed organizations).

90. *See, e.g.*, LAWLER, *supra* note 47, at 257-58 (stating that pay should be closely tied to performance); PORTER ET AL., *supra* note 43, at 354 (stating that for reward to be motivator it must be tied to measured performance); Katz, *supra* note 46, at 140 (stating that if rewards are to work as intended, they must follow performance and must be perceived (1) as large enough to justify additional effort required, (2) as directly related to required performance, and (3) as equitable). Recognition of high levels of performance can also have negative consequences, however, such as social ostracism. *See* PORTER ET AL., *supra* note 43, at 361-63 (evaluating pay plans on ability to minimize negative consequences including ostracism; ostracism occurs most often with individual bonus and piece-rate payment plans). This result has been demonstrated in the context of piecework pay schemes involving production workers. *See* LAWLER, *supra* note 47, at 124-26 (discussing fact that, although little evidence exists to show how employees' beliefs develop, studies show that workers placed on individual piece-rate plans often feel "negative social and economic consequences will result if they are highly productive"). These negative beliefs can be minimized, however, if the system is viewed as fair by most of the individuals who are eligible for rewards, including those who do not receive them. *See* Katz, *supra* note 46, at 140

to motivate behavior where individual performance is not susceptible to objective measurement by the organization—where it is not clear exactly what type of conduct will be rewarded.[91] Further, motivation can be affected by the timeliness of the reward.[92]

Additionally, performance-driven rewards are most useful in situations where information about their calculation and allocation can be disseminated.[93] In the absence of such disclosure, it is difficult to demonstrate to employees that significant financial rewards can, in fact, be acquired by those who perform well.[94] The amount of the reward is also relevant, in that the reward is a motivator only if it is perceived as sufficiently substantial to justify the required effort.[95] Finally, employee participation in the de-

(stating that pay incentive rewards can work if majority of employees, many of whom won't receive rewards, perceive rewards as equitable). Perceptions of a strong, objectively demonstrable link between performance and reward may be the best antidote. A high level of organizational trust and positive interpersonal relationships between managers and employees provides a helpful framework for this link. *See* DECI & RYAN, *supra* note 43, at 301-04 (discussing evidence showing that interpersonal context within which rewards and communications occur affects employees' motivation); Katz, *supra* note 46, at 144 (stating that, because we are social animals, approval and support from interacting is potent form of motivation); LAWLER, *supra* note 47, at 172 (showing graph of relationship between trust, objectivity of criteria and success of reward program; high levels of trust and objectivity create greatest likelihood for success).

91. *See* LAWLER, *supra* note 47, at 174 (discussing studies showing that "accurate feedback about quality of work is a strong stimulus to good performance"; concluding that "[p]eople work better when they know how well they are doing in relation to some meaningful standard"); PORTER ET AL., *supra* note 43, at 354, 364 (stating that, for any reward to be motivator, it must be tied to performance and performance must be measured; if performance cannot be objectively measured, it is better not to use extrinsic reward as motivator). *But see* Donald P. Schwab & Craig A. Olson, *Merit Pay Practices: Implications for Pay-Performance Relationships*, 43 INDUS. & LAB. REL. REV. 237-S, 250-S to 251-S (1990) (stating that while measurement error in evaluation of employees' performance attenuates relationship between performance and pay, it has only modest effect on that relationship).

92. *See* Hamner, *supra* note 54, at 19 (stating that, where time horizon for reward is long (i.e., deferred payments), employee can lose sight of relationship of reward to performance); Katz, *supra* note 46, at 140 (rewards, to work as intended, should follow directly on accomplishment of desired performance).

93. PORTER ET AL., *supra* note 43, at 354-56 (discussing existence of evidence that keeping basis for pay raise secret may increase employee dissatisfaction and make it more difficult to use pay as motivator); *see also* Hamner, *supra* note 54, at 19-20 (stating that, when pay increases are kept secret, employees can draw erroneous conclusions about perceived level of equality or esteem).

94. PORTER ET AL., *supra* note 43, at 356 (discussing study which showed significant increase in employees' perceptions of degree to which pay and performance were related after company became less secretive about pay).

95. *See* LAWLER, *supra* note 47, at 173 (stating that "[l]arge amounts of money must be given to the good performers if employees are to place a high value on good performance and the raises to which it leads"); Katz, *supra* note 46, at 140 (stating that pay rewards, in order to work, "must be clearly perceived

velopment of the reward structure can also have a critical impact on its success.[96]

2. *Reward Structure*

The structure of the reward system, aside from the context in which the system operates, also influences its efficacy. The problem here, however, is that no single scheme appears to be able to meet successfully all motivational objectives. For example, one study compared different types of reward systems and rated those plans in terms of their effectiveness in creating the perception that pay was tied to performance, their minimization of the perceived negative consequences of good performance, and their contribution to the perception that important rewards other than pay stem from good performance.[97] With respect to tying pay to performance, individual plans were rated the highest.[98] Group plans were rated the lowest.[99] In addition, bonus plans were rated higher than pay raise plans.[100] Further, plans which used

as large enough in amount to justify the additional effort required to obtain them").

96. Katz, *supra* note 46, at 144 (discussing finding that one way for employees to become committed to goals of organization is participation by employees in decisions about group objectives); Edward E. Lawler III & J. Richard Hackman, *Impact of Employee Participation in the Development of Pay Incentive Plans: A Field Experiment*, 53 J. APPLIED PSYCHOL. 467, 470-71 (1969) (discussing study which suggested that employee participation in plan development may have greater impact on effectiveness of plan than mechanics of plan itself).

97. LAWLER, *supra* note 47, at 164-70 (evaluating different approaches to merit-based pay and concluding that "it is vital to fit the pay plan to the organization"). The plans were evaluated using combinations of three sets of variables: (1) compensation in the form of salary versus bonuses; (2) payments given to individuals, groups, or the organization as a whole; and (3) performance, measured in terms of productivity, cost effectiveness and supervisors' evaluations. *Id.* at 164-65. According to Lawler, evaluating a plan "in terms of how effective it is in creating the perception that pay is tied to performance . . . indicates the degree to which the approach actualy [sic] ties pay closely to performance, chronologically speaking, and the degree to which employees believe that higher pay will follow good performance." *Id.* at 164. Evaluation "in terms of how well [the plan] . . . minimizes the perceived negative consequences of good performance . . . [looks to] the extent to which the approach eliminates situations where social ostracism and other negative consequences become associated with good performance." *Id.* at 164-65.

98. *Id.* at 165.

99. *Id.* According to Lawler, this trend reflects the fact that, in group and organization-wide plans, "an individual's pay is not directly a function of his *own* behavior." *Id.*

100. *Id.* at 164-65. Bonuses, unlike pay raises, can be tied to recent behavior of employees. *Id.* at 166. With a bonus, an employee's reward can differ significantly from year to year, depending on that year's performance. *Id.* With a pay raise, however, because organizations generally do not cut pay, pay raises most often reflect performance over a number of years. *Id.*

objective measures of performance were rated higher than those which used subjective measures.[101] The ratings differed significantly for the other criteria. While the ability to minimize negative outcomes related to high performance was generally rated as neutral in most plans, it was rated negatively in individual bonus plans.[102] In addition, the ratings for tying non-pay rewards to performance were also higher for the group and organizational plans.[103]

Perhaps the most important generalization to be drawn from this evidence is that no single reward scheme can successfully satisfy all objectives.[104] More specifically, the strongest tie between performance and pay seems to be achieved by the use of individual bonuses calculated on the basis of objective criteria.[105] Yet individual bonuses are not the ultimate solution. They seem to have a deleterious effect on employees' perceptions of autonomy and control and, at the same time, they can engender peer pressure to limit productivity.[106] Group and organizational plans, in-

101. *Id.* at 166. For example, employees are generally more willing to trust objective measures, such as sales or units produced, over unverifiable subjective measures, such as managers' ratings. *Id.*

102. *Id.* Lawler concluded that this rating "reflects the fact that piece rate plans often lead to situations in which social rejection, firing, and running out of work are perceived by individuals to result from good performance." *Id.* Thus, under this type of system, "the perceived negative consequences of good performance may cancel out the positive motivational force that piece rate plans typically generate by tying pay closely to performance." *Id.*

103. *Id.* Because, under these types of plans, it benefits everyone when an individual performs well, "good performance is much more likely to be seen to result in esteem, respect, and social acceptance, than it is under individual plans." *Id.*

104. *See id.* at 167 (because "no one pay plan is strong in all areas," no one type of pay plan provides the ultimate solution for employee motivation problems); PORTER ET AL., *supra* note 43, at 360-61 (evaluating any number of thousands of pay plans that have been designed "illustrates the impossibility of developing an extrinsic reward system that is strong in all respects").

105. *See* LAWLER, *supra* note 47, at 165-66; PORTER ET AL., *supra* note 43, at 362 (evaluating trends that show that individual bonuses have greatest effect on motivation because they are directly equated to employee's recent performance, and that objective measures enjoy highest levels of credibility); *see also* Lawrence M. Kahn & Peter D. Sherer, *Contingent Pay and Managerial Performance*, 43 INDUS. & LAB. REL. REV. 107-S, 117-S to 118-S (1990) (stating that study of managers in mid-sized manufacturing company demonstrated that bonuses, but not merit increases to base salary, influenced performance); Katz, *supra* note 46, at 138 (stating that system rewards, in contrast to individual rewards "will not . . . lead to higher quality of work or greater quantity than the minimum required to stay in the organization"). *But see* Schwab & Olson, *supra* note 91, at 249-S to 251-S (stating that study of entry level through middle managers, professional and technical employees suggested that merit-driven increases in base pay effectively link pay to performance over longer term).

106. *See* PORTER ET AL., *supra* note 43, at 114 (stating that "feeling of per-

volving payment in the form of either salary or bonuses, would appear to address most effectively the goal of linking high performance to non-monetary rewards such as peer acceptance and recognition.[107]

3. *Implications for Whistleblowing Rewards*

The research on reward structure and administration seems to indicate that rewarding whistleblowing should be an effective means of encouraging that behavior. Blowing the whistle is an objectively quantifiable act. A monetary reward for blowing the whistle, which clearly establishes a tie between pay and performance, could thus be characterized as an individual bonus based on objective criteria. Accordingly, because the rewarding organization can establish that connection between the reward and the desired performance, the probability that a monetary incentive will motivate whistleblowing is high.[108] This probability will be maximized where the rewards are sizeable, made in a timely manner and publicized.[109] Other reward administration considerations

sonal control and autonomy in one's work" is sometimes relinquished by employee for reward plans to work, resulting in unwillingness "to participate fully and honestly in the plans"); LAWLER, *supra* note 47, at 124-26 (discussing studies showing that workers on individual incentive plans establish quotas below maximum production capabilities and anyone who produces more could be ostracized or physically punished); *see also* Hamner, *supra* note 54, at 20-21 (noting relative advantage of group or company-wide plan to avoid decreased cooperation among employees).

107. *See* LAWLER, *supra* note 47, at 166 (noting that, under group and organizational plans, all group members benefit from strong individual performances); PORTER ET AL., *supra* note 43, at 363. This result is expected because "it is generally to the advantage of everyone for an individual to work effectively" where rewards are given group- or organization-wide, "[t]hus, good performance is much more likely to be supported by other employees." PORTER ET AL., *supra* note 43, at 363.

108. For a discussion of measurable performance and its relation to motivation, see *supra* notes 90-92 and accompanying text. Individual bonuses, however, are the method of compensation least likely to minimize negative outcomes related to performance, such as ostracism by peers. This consideration is pertinent because whistleblowers are typically treated with suspicion and often suffer severe forms of social retaliation. *See* MYRON P. GLAZER & PENINA M. GLAZER, THE WHISTLEBLOWERS (1989) (providing anecdotal evidence on personal and professional consequences of decisions to blow whistle); John C. Coffee Jr., *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099, 1146 (1977) (stating that "near unanimity exists among observers of the corporation that within its hierarchy no act is viewed more disfavorably, indeed seen virtually as 'treason,' than disclosure of adverse confidential information to outsiders"). Nonetheless, the rewards literature indicates that, overall, the motivational potential of financial rewards for whistleblowing may be great.

109. For a discussion of the relationship between motivation and reward size, timeliness and publication, see *supra* notes 92-95 and accompanying text.

that can affect the efficacy of whistleblowing rewards, such as employee participation and organizational trust, however, are necessarily situation-specific.[110]

IV. ANALYSIS OF REWARD LEGISLATION

The social-psychological literature thus strongly suggests that a properly administered system of monetary rewards will effectively encourage whistleblowing. The next logical inquiry is whether recently enacted legislation providing financial incentives for whistleblowers is structured appropriately to take advantage of this opportunity. The primary focus of this discussion is on the False Claims Act,[111] the most prominent of the reward statutes.

A. *The History and Structure of the False Claims Act*

At the urging of President Lincoln, the False Claims Act was passed in 1863 to help stem widespread procurement fraud against the Union Army.[112] With the incorporation of a provision allowing for *qui tam* actions, private citizens were encouraged to help prevent fraud by filing an action on behalf of the government as well as themselves.[113] The citizen-enforcer who filed suit under the FCA (the relator) was allowed to keep a percentage of the funds recovered as an incentive and reward for helping to enforce the law.[114]

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110. For a discussion of these considerations in relation to motivation, see *supra* notes 90 & 96 and accompanying text.

111. 31 U.S.C. §§ 3729-3733 (1988). For the text of pertinent sections of the FCA, see notes 2 & 29-30.

112. Act of Mar. 2, 1863, ch. 67, § 6, 12 Stat. 696 (current version at 31 U.S.C. §§ 3729-3733 (1988)). Because President Lincoln had not been able to limit procurement fraud by well-connected Army contractors, he included *qui tam* provisions in the original act. France, *supra* note 33, at 47. The objective of the act was to punish government contractors who were, among other things, selling sawdust for gunpowder. Strasser, *supra* note 22, at 43.

113. The term "*qui tam*" is derived from the phrase, "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," or he "who brings the action for the king as well as for himself." France, *supra* note 33, at 47; *see also* Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 341 (1989) (stating that, in *qui tam* action, private citizen brings "civil proceeding on behalf of both herself and the United States to recover damages and/or to enforce penalties available under a statute prohibiting specified conduct"; plaintiff shares monetary recovery with government).

114. The original act provided:

> The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all

Over time, however, the vitality of the FCA was eroded. Amendments to the legislation and judicial interpretations in the twentieth century significantly inhibited the ability of whistleblowers to successfully prosecute FCA claims.[115] By the mid-1980s, six or fewer claims a year were being brought under the FCA.[116] The defense procurement scandals and growing recognition of fraud in other federal contracting areas, however, spurred amendment of the FCA in 1986.[117] According to Senator

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costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States.

36 U.S.C. § 3493 (1874) (current version at 31 U.S.C. §§ 3729-3733 (1988)).

115. *See* United States *ex rel.* Wisconsin v. Dean, 729 F.2d 1100, 1103-06 (7th Cir. 1984) (discussing abuse of FCA and legislative and judicial response); France, *supra* note 33, at 47 (stating that 1943 amendment and adverse judicial interpretations "crippled qui tam plaintiffs' ability to bring actions"); Caminker, Comment, *supra* note 113, at 343 n.12 (noting that perceived abuse of reward structure by informers who copied information from government documents led to congressional imposition of jurisdictional restrictions in *qui tam* suits; these jurisdictional restrictions, FCA's failure to guarantee minimum share in recovery and judicial interpretations imposing high burdens of persuasion and proof on *qui tam* plaintiffs "contributed to the action's virtual dormancy" in last 50 years).

116. *See* France, *supra* note 33, at 48.

117. The False Claims Reform Act was proposed by Senator Charles Grassley after he conducted several investigations of defense-contracting abuses. *Id.* at 46. After concluding that neither reform of the procurement process nor reliance on the Justice Department's efforts would stem the rampant fraud, Senator Grassley turned to the idea of *qui tam* actions. *Id.* at 47. Senators Dennis DeConcini and Carl Levin co-sponsored the bill. SENATE COMM. ON THE JUDICIARY, FALSE CLAIMS ACT OF 1985, S. REP. No. 345, 99th Cong., 2d Sess. 13 (1985), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5278; *see also* The False Claims Reform Act, S. 1562, 99th Cong., 1st Sess. (1985). The Senate Report summarizes the concerns which led to this legislation:

> Evidence of fraud in Government programs and procurement is on a steady rise. In 1984, the Department of Defense conducted 2,311 fraud investigations, up 30 percent from 1982 . . . . In 1985, the Department of Defense Inspector General . . . testified that 45 of the 100 largest defense contractors, including 9 of the top 10, were under investigation for multiple fraud offenses. Additionally, the Justice Department has reported that in the last year, four of the largest defense contractors . . . have been convicted of criminal offenses while another . . . has been indicted and awaits trial.

S. REP. No. 345, at 2-3, *reprinted in* 1986 U.S.C.C.A.N. at 5267 (footnotes omitted). The Senate Report also noted that "[f]raud permeates generally all Government programs ranging from welfare and food stamps benefits, to multibillion dollar defense procurements, to crop subsidies and disaster relief programs." *Id.* at 2, *reprinted in* 1986 U.S.C.C.A.N. at 5267.

These concerns about government waste and fraud were paralleled on the state level. State legislatures, in addition, also expressed concern about safety-related incidents which might have been prevented if whistleblowing had occurred. *See, e.g.*, STATE ETHICS COMM'N, STATE OF CONNECTICUT, STATEMENT OF THE STATE ETHICS COMMISSION ON RAISED COMMITTEE BILL NO. 5542, at 1

Grassley, this amendment would encourage "private attorneys general" who would help enforce the laws and protect the treasury by prosecuting wrongdoers that the government does not have the adequate resources to pursue.[118]

Procedurally, when a relator files a *qui tam* action under the revised act, the complaint and written disclosure of all material evidence and information possessed by the relator is served on the government and placed under seal.[119] The government then has sixty days to decide whether to intervene and take over the prosecution of the claim.[120] If the government chooses to prosecute the action, the relator receives an amount ranging from fifteen to twenty-five percent of any treble damages and fines recovered from the defendant.[121] Where the government decides

(1982) (supporting House Bill 5542 which would protect state employees "from retaliation by superiors because the employee revealed instances of malfeasance which affect State interests" and public welfare). As a result, both state courts and legislatures moved toward whistleblowing as a means to control organizational wrongdoing. Courts began to erode the employment-at-will doctrine, allowing employees to sue when they suffered retaliation for whistleblowing. *See* Terry M. Dworkin & Elletta S. Callahan, *Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society*, 29 AM. BUS. L.J. 267, 285-88 (1991) (discussing approaches taken by courts towards internal whistleblowing). It was also in this time period (the 1980s) that approximately three-quarters of the states passed whistleblowing legislation. For a discussion of this legislation, see *supra* notes 8-10 and accompanying text.

118. *False Claims Act Implementation: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 1-2 (1990) [hereinafter *FCA Implementation Hearing*] (remarks of Sen. Grassley) (asking committee to consider problem areas of "people's attitude toward the law" and "the actual language of the law"); *see also* Robert L. Vogel, *Citizens' Lawsuits Based on the False Claims Act Have Multiplied*, NAT'L L.J., Nov. 26, 1990, at 20 (discussing private attorney general role envisioned by statute).

119. 31 U.S.C. § 3730(b)(2) (1988). According to this provision, "[t]he complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." *Id.*

120. *Id.* "The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information." *Id.* The government has joined in approximately 25% of the first 200 *qui tam* claims filed since October, 1986. Vogel, *supra* note 118, at 21.

121. 31 U.S.C. § 3730(d)(1). The award will depend "upon the extent to which the person substantially contributed to the prosecution of the action." *Id.* The exact amount the relator receives is determined by the court. *Id.* If the relator's suit is based on publicly disclosed information, however, the award can be less than 10%. *Id.* Penalties for false claims can range up to $10,000 per false claim, plus three times the amount of damages suffered by the government. *Id.* § 3729(a).

The Justice Department, if it takes over the prosecution, controls the litigation. *Id.* § 3730(c)(1). The relator remains a party to the action, but has little role in decisionmaking. *Id.* He or she is entitled to notice and a hearing, however, if the Justice Department decides to dismiss or settle the case. *Id.* § 3730(c)(2).

against intervention, the individual plaintiff may proceed with the suit and, if successful, can recover up to thirty percent of the judgment or settlement, plus costs and attorneys' fees.[122]

B. *False Claim Revisions*

As demonstrated by the rewards literature, the clarity of the link between the conduct desired and the reward given can determine the efficacy of a financial incentive. The 1986 amendments to the FCA, by ensuring that relators will receive payment for useful information they provide, offer just such a clear link. These amendments, thus, could prove to be the most important and effective changes made to this legislation. These amendments, and their suggested impact, are discussed in the following sections.

1. *Amendments Increasing the Likelihood of Recovery*

The 1986 amendments to the FCA increase the likelihood of recovery by a *qui tam* plaintiff in several ways: (a) by guaranteeing minimum amounts to be awarded in successful cases; (b) by making it easier for a plaintiff to make a successful claim; and (c) by potentially expanding the class of persons who may bring claims.

a. Amendments Guaranteeing Minimum Recovery

Previously, there was no guaranteed minimum recovery for a successful *qui tam* plaintiff. A relator could be awarded an insignificant amount, or nothing at all, for providing information and pursuing a claim.[123] Because coming forward with the information could cost the relator his or her job or career, or have other significant consequences, this lack of a clear connection between providing information and being rewarded likely contributed to

122. *Id.* §§ 3730(c)(3), (d)(2). If the government decides not to proceed in the action, the amount received by the *qui tam* plaintiff will not be less than 25% of the proceeds and, in addition, the plaintiff will "receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs," all of which is awarded against the defendant. *Id.* § 3730(d)(2). The Justice Department, however, still can monitor the progress and prosecution of the suit, and must consent to any dismissal. *Id.* §§ 3730(b)(1), (c)(3)-(5).

123. If the government did not pursue an action, the court could award the successful relator a "reasonable" amount, not to exceed 25% of the judgment or settlement. 31 U.S.C. § 3730(c)(2) (1982) (amended 1986). If the government joined in the prosecution, the relator could receive up to 10% of the recovery for the value of the information the government did not have before the action was brought, again depending upon what the court believed to be a reasonable amount. *Id.* § 3730(c)(1) (amended 1986).

the small number of claimants willing to take such risks.[124] The 1986 amendments guarantee that relators will receive "not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement" in cases that they pursue themselves; the amendments also clarify that reasonable expenses of pursuing the claim, including attorneys' fees, should be awarded against the defendant.[125] In cases that the Justice Department decides to join, the minimum recovery for the relator is fifteen percent of the proceeds of the action.[126]

The minimum recoveries guaranteed by the FCA amendments distinguish the FCA from the other major reward provisions recently authorized by Congress. The financial incentives authorized by the other statutes are awarded at the discretion of the administering federal agency. For example, under FIRREA, an appropriate federal banking agency, with the concurrence of the Attorney General, may pay a reward.[127] The agency's decision concerning the award "is final and not reviewable by any court."[128] Similarly, any determination about the awarding of bounties under the Insider Trading Sanctions Act, "including whether, to whom, or in what amount to make payments, is in the sole discretion of the [Securities and Exchange] Commission."[129] Because there is no guarantee of any recovery, and indeed, no track record of payments, neither of these reward provisions are likely to spur much whistleblowing activity.

Nor have other federal agency reward decisions under earlier authorizations been particularly generous to whistleblowers. For example, the Secretary of the Treasury or the Secretary's delegate is authorized to pay rewards for information leading to the detection and prosecution of violators of the Internal Revenue laws.[130]

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124. For a discussion of the link between performance and reward, see *supra* note 90 and accompanying text.

125. 31 U.S.C. § 3730(d)(2) (1988). For the text of this provision, see *supra* note 2.

126. 31 U.S.C. § 3730(d)(1). The maximum award is 25% of the proceeds. *Id.* Reasonable expenses, including attorneys' fees, are also available. *Id.* In cases in which the government joins, and the information provided by the relator had been publicly disclosed, the relator can receive up to 10% of the amount recovered, depending on the role of the relator in advancing the case and the value of the information provided. *Id.*

127. 12 U.S.C. § 1831k(a), (d) (Supp. II 1990). For a further discussion of these provisions, see *supra* notes 24-25 and accompanying text.

128. *Id.* § 1831k(d).

129. 17 C.F.R. § 201.61 (1991) (setting forth procedures for bounty awards under Securities Exchange Act of 1934).

130. 26 U.S.C. §§ 7623, 7701(a)(11)(B) (1988) (authorizing Secretary of

These discretionary rewards, however, have often been difficult for informants to collect.[131] Although a record number of award requests were filed in the 1989-1990 claims year, it is estimated that only nine percent will be granted.[132] One reason for this low award percentage could be that typically, in discretionary rewards, the amount to be awarded by the agency comes out of the agency's recovery.[133] Thus, there is a strong incentive for the agency to keep recoveries to a minimum. The facts that the court, rather than an interested agency, makes the determination in an FCA action, and that a minimum recovery amount is guaranteed, make the FCA a much stronger spur to whistleblowing.

Further facilitating adequate rewards is the FCA amendment that allows the relator a role in the litigation of cases taken over by the government. The relator, even though the government has taken over the case, now has the right to file motions, object to settlements, and take part in arguments.[134] There were no intervention rights in the statute prior to the 1986 amendments, and a case could be dismissed, diverted or settled without input from the whistleblower.[135]

Treasury to pay sums deemed necessary for detecting and bringing to trial persons guilty of violating tax laws).

131. *See, e.g.*, Silverstein v. United States, 38 A.F.T.R.2d (P-H) ¶ 76-5038 (S.D.N.Y. 1976) (holding that district court lacked subject matter jurisdiction to hear informer suit for 10% of amount collected by IRS; IRC provision authorizing payment of reward to informant did not give rise to implied contract; regulations authorizing director to award sums "as he deems suitable" do not constitute offer of definite amount); Schein v. United States, 352 F. Supp. 182 (E.D.N.Y. 1972) (holding that district court was without jurisdiction to hear action to recover reward for IRS tax recovery allegedly attributable to information furnished by plaintiff).

132. *Rewards for Information Tempt More Tattletales to Tell the IRS*, WALL ST. J., Aug. 22, 1990, at A1 (according to IRS, "few tips are good enough to merit rewards").

133. *See, e.g.*, Duke, *supra* note 27, at C1 (discussing SEC endorsement of paying tipsters to disclose insider trading).

134. 31 U.S.C. § 3730(c)(1)-(2) (1988). According to these provisions, the relator has the right to be notified of a motion for dismissal or settlement, and has the right for a hearing on these matters. *Id.* § 3730(c)(2)(A)-(B). If this opportunity has been provided, however, the government may then proceed with the dismissal or settlement "notwithstanding the objections of the person initiating the action." *Id.* In addition, the participation of the relator can be limited if the government shows that such participation would interfere with or unduly delay the prosecution of the case, or that it would be repetitious, irrelevant, or result in harassment. *Id.* § 3730(c)(2)(C).

135. An example of this increased control is shown in the case of a General Electric (G.E.) employee who blew the whistle on his employer's overcharges on military contracts. *See* Gravitt v. General Elec. Co., 680 F. Supp. 1162 (S.D. Ohio 1988). Mr. Gravitt, a machinist supervisor for G.E., alleged that G.E. had been substantially overcharging the government. *Id.* at 1162-63. He brought

b. Amendments Facilitating Recovery

Several of the amendments to the FCA make it easier for a relator to bring a successful claim. To the extent that this makes recovery more certain, the connection between providing the information and collecting the reward is clearer.

For example, the relator in a FCA suit must prove that the defendant "knowingly" submitted a false claim for payment.[136] Prior to the 1986 amendments, courts were split as to whether intent to defraud had to be shown.[137] The amendments cleared up this ambiguity and eased the relator's burden by defining "knowingly" to include deliberate ignorance and reckless disregard as well as actual knowledge.[138] A second procedural split of authority was resolved by the amendments with the provision that the relator must establish his or her proof by a preponderance of the evidence, rather than the clear and convincing standard that

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suit under the False Claims Act, and the government joined the suit. *Id.* at 1163; *see also* Strasser, *supra* note 22, at 42. Gravitt's attorney successfully objected when the government tried to settle the claim for $234,000, and persuaded the judge to allow Gravitt to prosecute the claim. Strasser, *supra* note 22, at 42. On the day set for trial, G.E. settled that suit and three others for $3.5 million. *Id.* The whistleblowers, including Gravitt, reportedly received 22% of the recovery, or $770,000. *Id.*

136. *See* 31 U.S.C. § 3729(a) (1988) (liability is incurred for knowingly presenting a false claim, knowingly making or using a false record to get a false claim paid, knowingly buying government property which may not lawfully be sold by seller, knowingly making or using a false record to conceal or avoid government debt).

137. *See* United States v. Aerodex, Inc., 469 F.2d 1003, 1007 (5th Cir. 1972) (recognizing split among circuit courts regarding requirement of specific intent and whether, to prove violation of FCA, evidence must demonstrate guilty knowledge of purpose on part of defendant to cheat government). *Compare* United States v. Cooperative Grain & Supply Co., 476 F.2d 47, 60 (8th Cir. 1973) (holding that negligent misrepresentation by claimant constitutes necessary knowledge within meaning of FCA) *and* United States v. Fox Lake State Bank, 225 F. Supp. 723, 725 (N.D. Ill. 1963) (holding that intent to defraud is not required for "knowing" violation of FCA and knowing submission of false claims is sufficient) *with* United States v. Mead, 426 F.2d 118, 123 (9th Cir. 1970) (requiring specific intent to defraud for liability under FCA) *and* United States v. Priola, 272 F.2d 589, 594 (5th Cir. 1959) (requiring "guilty knowledge" for liability under FCA).

138. *See* 31 U.S.C. § 3729(b). This section provides:

> [T]he terms "knowing" and "knowingly" mean that a person, with respect to information—
>
> (1) has actual knowledge of the information;
>
> (2) acts in deliberate ignorance of the truth or falsity of the information; or
>
> (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

Id.

some courts had required previously.[139]

Another important change was the broadening of the definition of a "false claim." Although the Supreme Court, in the 1968 case of *United States v. Neifert-White Co.*,[140] called for a broad reading of the definition of "claims" under the FCA—including all fraudulent attempts to cause the government to pay out sums of money—subsequent lower court decisions narrowed this interpretation.[141] In response to these decisions, Congress made clear in the 1986 amendments that the FCA was to be read as broadly as possible.[142] A broad reading of the claim definition has elicited information about a variety of activities including Medicare fraud,[143] acquiring and redeeming stolen food stamps,[144] and

139. *See id.* § 3731(c) (stating that "United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence"). For a comparison of the standards previously used by courts, see Federal Crop Ins. Corp. v. Hester, 765 F.2d 723, 727 (8th Cir. 1985) (holding that preponderance of evidence is appropriate standard of proof under FCA); United States v. Thomas, 709 F.2d 968, 972 (5th Cir. 1983) (holding that government must establish violation of FCA by preponderance of evidence); United States v. Foster Wheeler Corp., 447 F.2d 100, 101 (2d Cir. 1971) (holding that there must be clear and convincing evidence of FCA violation).

140. 390 U.S. 228 (1968) (holding that FCA applied to supplying false information in support of federal agency loan application). In *Neifert-White Co.*, the Court stated that "the objective of Congress in enacting the False Claims Act 'was broadly to protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims were made' . . . ." *Id.* at 233 (quoting Rainwater v. United States, 356 U.S. 590, 592 (1958)). Thus, according to the Court, "[t]his remedial statute reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." *Id.*

141. *See, e.g.*, Hansen v. National Comm'n on the Observance of Int'l Women's Year, 628 F.2d 533, 534 (9th Cir. 1980) (holding that FCA is limited to actions involving false demands for payment of money, transfer of property; absent allegation that commission fraudulently took money from government, no cause of action under FCA).

142. *See* 31 U.S.C. § 3729(c) (1988). A false claim is defined as follows:

> For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

Id.

143. *See, e.g., FCA Implementation Hearing, supra* note 118, at 2 (discussing $200 million Medicare fraud case from Florida where Department of Justice received all information needed for case from *qui tam* plaintiff); France, *supra* note 33, at 48 (discussing fact that Medicare fraud "already has spawned a number of qui tam lawsuits," including case partially settled in 1989 for $355,000).

144. *See, e.g.*, Blusal Meats, Inc. v. United States, 638 F. Supp. 824, 827

paying kickbacks.[145]

c. Amendments Clarifying Jurisdiction

Attempts to clarify and expand jurisdiction under the FCA have so far proved to be the least successful amendments in terms of forging a clear link between the desired behavior and the reward. Jurisdictional challenges have been the biggest source of FCA litigation to this point, and have allowed defendants—and the government—to put a substantial barrier in the way of many a potential relator's pursuit of recovery.[146] Such obstacles provide a general disincentive to blowing the whistle, and are particularly discouraging to an especially important group of potential whistleblowers—government workers.

The basic premise of the FCA is to promote whistleblowing without concurrently rewarding useless information.[147] Accordingly, the 1986 amendments prohibit recovery by a relator for information that was already in the hands of the government or revealed in some public way before the claim was filed, unless the claimant was the original source of the information.[148] The government has successfully challenged several post-amendment

(S.D.N.Y. 1986) (alleging corporation violated FCA by knowingly accepting and presenting stolen food stamps), *aff'd*, 817 F.2d 1007 (2d Cir. 1987).

145. *See, e.g.*, United States v. Killough, 625 F. Supp. 1399, 1401 (M.D. Ala. 1986) (alleging violation of FCA by participation in kickback scheme whereby bids to provide disaster relief services to state were inflated to assure that defendants would receive kickback). Coverage also encompasses false claims involving the use of federal funds by state or local entities. *See, e.g.*, United States v. Board of Educ., 697 F. Supp. 167, 169 (D.N.J. 1988) (alleging violation of FCA by plan to pocket federal funds earmarked for purpose of improving city schools). The amendment to § 3729(c) overruled United States *ex rel.* Salzman v. Salant & Salant, Inc., 41 F. Supp. 196, 197 (S.D.N.Y. 1938) (holding that once federal funds given to grantees, FCA claim could not be made against them unless grantee is agent of government).

146. The authors of this Article have been collecting case reports since the 1986 amendment to the FCA. So far, the majority of the cases have been about the right to sue.

147. For a discussion of the relationship between the reward and the value of the information provided, see *infra* notes 185-203 and accompanying text.

148. *See* 31 U.S.C. § 3730(e)(4)(A) (1988). According to the provision, courts do not have jurisdiction over an action that is brought on the basis of publicly disclosed information unless brought by the Attorney General or unless the relator bringing the suit was the "original source" of information brought to light in "a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media." *Id.* "Original source" is defined as someone who has "direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action . . . ." *Id.* § 3730(e)(4)(B).

cases on the ground that the relator was not the original source.[149] This result, of course, allows the government to keep the entire award, but it also elicits a conflict between the policies of encouraging the liberal disclosure of information, as envisioned by Congress, and of supplementing the public treasury.

A related issue, and one that has engendered much litigation, is whether government employees can bring *qui tam* actions under the FCA. In terms of simple access, government employees are among the individuals most likely to be aware of relevant information regarding federal contractor fraud. In addition, part of Congress' motivation for strengthening the FCA in 1986 was that the government, for a variety of reasons, was underenforcing the laws.[150] Allowing lower-level employees to sue on behalf of the government when their superiors have failed to take appropriate action could substantially increase enforcement and recovery.[151] Thus, challenges by the Justice Department to government employee suits put a damper on an important resource.

The courts have recognized the important potential role of government whistleblowers, and thus have been reluctant to rule that these employees can never bring *qui tam* actions.[152] There is a split of opinion, however, as to whether and when to allow suit

149. *See, e.g.*, United States *ex rel.* LeBlanc v. Raytheon Co., 913 F.2d 17, 20 (1st Cir. 1990) (holding that government employee could not bring *qui tam* action under FCA because employee was not "original source"); United States *ex rel.* Dick v. Long Island Lighting Co., 912 F.2d 13, 16-18 (2d Cir. 1990) (barring suit under FCA where plaintiff was not "original source" of publicly disclosed information); United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co. of Am., 736 F. Supp. 614, 622-23 (D.N.J. 1990) (holding information obtained by law firm in discovery during suit alleging Medicare fraud did not qualify as "original source" under FCA); United States v. Rockwell Int'l Corp., 730 F. Supp. 1031, 1035-36 (D. Colo. 1990) (holding nonprofit corporation which learned of alleged wrongful activities at nuclear weapons plant from government employee was not proper party to bring action under FCA).

150. *See* Caminker, Comment, *supra* note 113, at 350-51, 361 (stating that dependence by government agencies on individuals in military-industrial complex may compromise desire to prosecute wrongdoers diligently; "central premise underlying *qui tam* authorization is that, when viewed from a more global perspective, the set of targeted misconduct is underenforced in a regime of exclusive executive discretion").

151. *See, e.g.*, United States *ex rel.* Hagood v. Sonoma County Water Agency, 929 F.2d 1416 (9th Cir. 1991) (holding valid cause of action existed in FCA suit brought by government attorney alleging superiors facilitated fraudulent contract with agency to be regulated).

152. *See, e.g., LeBlanc*, 913 F.2d at 20 (holding FCA does not absolutely bar *qui tam* actions by government employees); United States *ex rel.* McDowell v. McDonnell Douglas Corp., 755 F. Supp. 1038, 1039 (M.D. Ga. 1991) (holding that under certain circumstances government employee's *qui tam* action may fall within subject matter jurisdiction of federal district court); Erickson *ex rel.* United States v. American Inst. of Biological Sciences, 716 F. Supp. 908, 912-13 (E.D.

by government employees on the basis of information gained through their jobs. The original version of the FCA did not allow such actions.[153] The revisions, on the other hand, permit any "person" to bring suit unless he or she falls into one of five exceptions.[154]

One of the jurisdictional exceptions prohibits suits based on information made public in a governmental action unless the potential relator was the original, voluntary source of the information to the government.[155] Thus, a question raised after the 1986 amendments, in *United States ex rel. LeBlanc v. Raytheon Co.*,[156] was whether government workers who acquire actionable information in the course of their employment were excluded as potential relators by this exception. Because gaining such information was done in the scope of the employee's job responsibilities, it was argued (successfully in this case) that the information therefore

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Va. 1989) (permitting government employees to sue as relators in *qui tam* action on ground that FCA does not make "blanket exclusion").

153. *See* 31 U.S.C. § 3730(b)(4) (1982), *amended by* 31 U.S.C. § 3730(e) (1988). The 1982 version stated: "Unless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought." *Id.* Thus, before the amendments, government employees were effectively prohibited from bringing *qui tam* actions because § 3730(d) denied jurisdiction to actions based on information already possessed by the government. *See, e.g.*, United States *ex rel.* McCans v. Armour & Co., 146 F. Supp. 546, 549-50 (D.D.C. 1956) (per curiam) (excluding "parasitical" claims under FCA based on information acquired in government service), *aff'd*, 254 F.2d 90 (D.C. Cir.), *cert. denied*, 358 U.S. 834 (1958).

154. *See* 31 U.S.C. § 3730(b)(5), (e) (1988). Under § 3730(e), certain actions are barred; no court has jurisdiction over the following: (1) action arising out of service in the armed forces by a former or current member of the armed forces against a member of the armed forces; (2) action "against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought"; (3) action based on "allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party"; (4) action based on publicly disclosed information unless "the person bringing the action is an original source of the information." *Id.* § 3730(e). In addition, when a relator has filed an action, "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." *Id.* § 3730(b)(5).

155. *Id.* § 3730(e)(4)(A).

156. 729 F. Supp. 170, 175-77 (D. Mass.) (addressing issue of whether FCA barred *qui tam* action by government employee; holding that information gained by government employee as condition of employment belonged to government and FCA suit was barred), *aff'd*, 913 F.2d 17, 20 (1st Cir. 1990) (affirming decision that government employee in this case could not bring *qui tam* action, but clarifying district court's analysis in that FCA does not absolutely bar *qui tam* actions by government employees).

belonged to the employer, the government.[157] Allowing government employees to bring suit in these circumstances was characterized as permitting opportunism and personal benefit from information acquired at taxpayer expense.[158] Further, because the government already possessed the information, it was asserted that there could be no voluntary disclosure, as required by the statute.[159] The appellate courts, however, have uniformly rejected this interpretation, reasoning that Congress, by spelling out the classes of people ineligible to bring *qui tam* actions—and not including government employees on this list—must have intended to permit such suits.[160] Although such suits have been allowed, it is still very difficult for government employees to prove they are the original source of the information, or that they

157. *Id.* at 175-77.

158. *Id.* at 176. The court stated:

> A lawsuit by a former government employee based on information he obtained solely through his employment can fairly be construed as "opportunistic." The relator in such a context would profit from information already obtained at the taxpayers' expense . . ., permitting former government employees to bring *qui tam* actions based upon information they discovered on the job would allow them to be paid twice for the same work. That is not what Congress had in mind.

Id.

159. *Id.* at 177 n.18; *see* 31 U.S.C. § 3730(e)(4)(B) (1988) (defining "original source" as "individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information"). In a novel jurisdictional exclusion argument, the government in United States *ex rel.* Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1419 (9th Cir. 1991), asserted that Hagood, a government attorney who was preparing a contract, was engaged in an "administrative investigation." Thus, according to the government, the statutory exclusion of § 3730(e)(4)(A) was met. *Id.* The government then further alleged that the "public disclosure" requirement of this section was met when the attorney, as a government employee, disclosed the information on which the suit was based to himself, a member of the public. *Id.* The court, however, dismissed this argument as "tortured," stating that Hagood had based his suit on "information that he acquired in preparing the contract"—non-publicly disclosed information. *Id.*

160. *See, e.g.*, *Hagood*, 929 F.2d at 1419-20 (rejecting absolute jurisdictional bar to *qui tam* actions by government employees); United States *ex rel.* LeBlanc v. Raytheon Co., 913 F.2d 17, 20 (1st Cir. 1990) (holding that government employees are not barred from bringing *qui tam* actions); United States v. CAC-Ramsey, Inc., 744 F. Supp. 1158, 1160 (S.D. Fla. 1990) (holding that *qui tam* suit by former government employee not barred after government failed to take action); Erickson *ex rel.* United States v. American Inst. of Biological Sciences, 716 F. Supp. 908 (E.D. Va. 1989) (holding neither FCA structure, history or purpose excludes government employees from bringing *qui tam* actions). For an example where Congress did spell out those prohibited from bringing suit, see 12 U.S.C. § 1831k(c)(1) (Supp. II 1990) (under FIRREA, government employees and officers specifically prohibited from collecting reward).

are presenting the information in a new way.[161]

2. *Amendments Increasing the Amount of Recovery*

Another hurdle to increased whistleblowing was also overcome with the 1986 amendments—making the award large enough for employees to want to take the risks involved with disclosure. In order for a reward to be effective, it must be perceived as sufficiently substantial to justify the required effort.[162] Whistleblowers can incur substantial personal and professional penalties for providing information of organizational wrongdoing. They may suffer job-related consequences including discharge, failure to achieve promotion, blackballing, and social ostracism, as well as health and family problems caused by stress from these various forms of retaliation.[163] In addition, in order to collect the reward, they must suffer the hassles and emotional trauma of a lawsuit. The substantial nature of these potential penalties requires a commensurate reward in order to encourage the desired behavior. The increased amounts recoverable under the amendments, when combined with the increased certainty of recovery, are likely to be perceived as sufficient to justify taking the risk.[164]

Measured by these standards, the rewards for whistleblowing such as those offered by the states of Oregon and South Carolina

161. *See, e.g., LeBlanc*, 913 F.2d 17 (stating that even though FCA does not bar *qui tam* actions by government employees, employee whose responsibilities included uncovering fraud was barred from bringing suit on grounds that he had no independent knowledge or information).

162. For a discussion of the relationship between reward size and motivation, see *supra* note 95 and accompanying text.

163. *See* Dworkin & Near, *supra* note 13, at 262 (noting that back pay and reinstatement do not compensate for emotional and physical upheaval of being unemployed); Goldberg, *supra* note 22, at 75 (stating that consequences of whistleblowing go beyond workplace and include financial upheaval, divorce and deterioration of physical and mental health); Nancy R. Hauserman, *Whistle-Blowing: Individual Morality in a Corporate Society*, 29 BUS. HORIZONS 4, 9 (1986) (noting that whistleblowers are not considered part of corporate "team" and have little luck in finding new employment).

164. Before the 1986 amendments, the FCA provided for double damages and fines of $2,000 per false claim. *See* 31 U.S.C. § 3729 (1982) (amended 1986). The statute had provided:

> A person not a member of an armed force of the United States is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action.

Id. Damages are now trebled, and fines range from $5,000 to $10,000 per false claim. *See* 31 U.S.C. § 3729(a) (1988). For a discussion of the range of award amounts, see *supra* notes 121-22 and accompanying text.

are woefully inadequate, and are unlikely to have any impact on reporting activity.[165] While awards authorized by federal legislation other than the FCA are potentially large enough to have some impact if the upper recovery levels are reached, none of these other legislatively-created awards can reach the level of an FCA award.[166] Thus, to the extent that the size of the recovery is determinative of the motivational effect of financial incentives for whistleblowing, the FCA is likely to be the most effective of these laws because it involves the greatest potential rewards.

3. *Timeliness*

Perhaps the biggest drawback of the structure of the FCA in spurring whistleblowing is that it can take many years between the reporting of the information through filing a claim and the receipt of the reward. Since timeliness has an important impact on the motivational potency of rewards, this wait can have a negative influence on whistleblowing.[167] Delays in recovery were especially prevalent in the early cases, where issues such as constitutionality and jurisdiction had to be decided before the claim could be pursued.[168] As these issues are settled, some delay, at least, should be minimized.[169]

Another source of delay, however, is built into the structure of the FCA. The relator must wait at least sixty days while the government studies the claim before the defendant in the action is even served.[170] This period can be extended with court consent for "good cause," and the Justice Department usually requests one or more extensions.[171] This delay, when combined

165. For a discussion of these statutes, see *supra* notes 18-19 and accompanying text.

166. For a discussion of these statutes, see *supra* notes 23-27, 127-33 and accompanying text.

167. For a discussion of the relationship between the timeliness of a reward and motivation, see *supra* note 92 and accompanying text.

168. For a discussion of one such constitutional claim raised in connection with FCA litigation, see *infra* note 206 and accompanying text. For a discussion of the jurisdictional issues raised in connection with FCA litigation, see *supra* notes 150-61 and accompanying text.

169. All suits challenging the constitutionality of the FCA have been lost. Thus, this issue is unlikely to again be seriously litigated.

170. *See* 31 U.S.C. § 3730(b)(2) (1988) (stating that "complaint shall . . . remain under seal for at least 60 days").

171. *See id.* § 3730(b)(3) (stating that "Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal"); Vogel, *supra* note 118, at 20 (noting that "[i]n some complex cases, courts have granted the Justice Department a series of extensions covering several years"). This period is designed to give the government a

with what is usually complicated discovery and extremely crowded court dockets, can mean that it will take a year or more before a reward is recovered in a successful claim. Appeals, of course, can slow payment further.

The time factor could have the positive result of driving a settlement, but in settling, relators almost always receive less than the anticipated reward in exchange for a prompt payment.[172] This, in turn, increases the importance of the size of the potential recovery. If the potential recovery is large enough, a settlement for prompt payment of an amount sufficient to justify the risks of disclosure can be negotiated. It is also possible, however, that people could be more likely to wait a few years, even without a job or meaningful career, if there is a high likelihood that they will be paid several hundred thousands, or millions, of dollars at the end of that period. Thus, considering either alternative—settlement or waiting out litigation—reward structures that involve the possibility of litigation and its resultant delays must allow for large potential recoveries in order to be effective.[173] The False Claims Act does this.

4. *Information*

A final factor relevant to the motivational effectiveness of rewards is adequate information. Information regarding the availability, calculation and allocation of rewards, as well as the likelihood of success, is important.[174] While most federal awards

chance to evaluate whether joining the suit and taking over the prosecution would be in its best interest, as well as to prevent premature disclosure of an ongoing criminal investigation. S. REP. No. 345, *supra* note 117, at 24, *reprinted in* 1986 U.S.C.C.A.N. at 5289.

172. Settlement pressures on the government can also put the government at odds with the relator/co-plaintiff. *See, e.g.*, Rick Wartzman & Paul M. Barrett, *For Whistle-Blowers, Tune May Change*, WALL ST. J., Sept. 27, 1989, at B1 (discussing defense industry's hope that Justice Department will thwart whistleblower cases).

173. A possible alternative to litigation is the establishment of an administrative procedure to handle the claims. While this procedure has the potential of being faster than litigation, the track record of federal administrative handling of whistleblower complaints has been notoriously bad. The information has typically been ignored and the whistleblower punished. *See* Thomas M. Devine & Donald G. Aplin, *Abuse of Authority: The Office of The Special Counsel and Whistleblower Protection*, 4 ANTIOCH L.J. 5 (1986) (discussing whistleblower rights being vulnerable to administrative abuse by Office of Special Counsel); Rhonda McMillion, *Aiding Whistle-Blowers*, A.B.A. J., Mar. 1989, at 121 (stating that Office of Special Counsel, by frequently working with agencies to harm employees, is losing sight of objective).

174. For a discussion of the relationship between information and motivation, see *supra* notes 93-94 and accompanying text.

provisions, such as those in FIRREA and the Insider Trading Sanctions Act, have not been well publicized, the False Claims Act has received a great deal of attention. Information concerning the FCA has been broadly disseminated, in a variety of ways, in the past few years.

The False Claims Act has been widely discussed in business, professional and trade journals, as well as in more generally read magazines.[175] These articles outline the basic requirements of the FCA and stress the potential for (or danger of) huge recoveries. Thus, basic information is being delivered to important groups of potential whistleblowers. Successful cases against government contractors have also been followed and widely reported. The Wall Street Journal, for example, often reports when such a case is filed, when major pre-trial developments take place, and when a case has been settled or gone to trial.[176] Finally, the development of a *qui tam* bar[177] and whistleblower advocacy groups[178] have been important in the dissemination of adequate information.

5. *Post-Amendment Developments*

While we cannot make an unequivocal prediction as to

175. *See, e.g.*, David F. Bond, *Military Authorization Compromise Keeps Business Integrity Rules' Schedule Intact*, AVIATION WK. & SPACE TECH., Nov. 12, 1990, at 74 (discussing impact of FCA on defense contractors); Michael Brody, *Listen To Your Whistleblower*, FORTUNE, Nov. 24, 1986, at 77 (warning managers to find problems and encourage employees to blow whistle); Rosemary Chalk, *Making the World Safe for Whistleblowers*, TECH. REV., Jan. 1988, at 48 (advocating support for scientists and engineers who blow whistle); Amy Dunkin, *Blowing the Whistle Without Paying the Piper*, BUS. WK., June 3, 1991, at 138 (advising whistleblowers on how to protect themselves); France, *supra* note 33, at 46 (discussing FCA procedures and awards); Ted Gest, *Why Whistle-Blowing Is Getting Louder*, U.S. NEWS & WORLD REP., Nov. 20, 1989, at 64 (discussing recent increase in FCA claims and large monetary awards to whistleblowers); Goldberg, *supra* note 22 (discussing dilemmas faced by and public support offered to whistleblowers); Joseph Palca, *Justice Department Joins Whistleblower Suit*, 249 SCIENCE 734 (1990) (marking first time for government intervention in *qui tam* suit involving scientific misconduct).

176. *See, e.g.*, Eileen White Read, *Stealth Eludes Radar, But Not the Scrutiny of Litigious Mr. Hafif: He & Clients Stand to Share Millions if They Show Northrop Bilked the U.S.*, WALL ST. J., May 12, 1988, at A11; Amy Stevens & Milo Geyelin, *Defendants in Fraud Cases are Dealt Blow*, WALL ST. J., May 20, 1991, at B6; Rick Wartzman, *Northrop Agrees to Pay About $9 Million to Settle Suit by Two Whistleblowers*, WALL ST. J., June 24, 1991, at A3; Rick Wartzman, *Northrop, US May be Close to Settlement*, WALL ST. J., Mar. 18, 1991, at A3; Rick Wartzman, *US May Join Suit by Northrop Whistleblower*, WALL ST. J., Sept. 5, 1989, at A4.

177. For a discussion of this plaintiffs' bar, see *supra* note 35 and accompanying text.

178. These groups include the Government Accountability Project and the Center for Law in the Public Interest. For a discussion of the public interest groups, see Goldberg, *supra* note 22, at 108.

whether monetary rewards offered under the revised FCA will effectively encourage more whistleblowing, the research to date clearly suggests that financial incentives, when properly structured, are likely to encourage acts of whistleblowing by individuals who might not otherwise make such disclosures. In factual (as opposed to theoretical) terms, congressional faith in financial rewards to spur whistleblowing—at least under the FCA structure—appears to be justified. Before the FCA was revised, relator suits under the statute averaged six per year.[179] By late 1989, the number of suits filed since the revisions became effective was 198.[180] That figure had grown to 280 by the end of 1990.[181]

V. A NATION OF SNITCHES?

These early indications that financial incentives can be an *effective* method of encouraging the disclosure of wrongful conduct do not, however, overcome concerns about whether the government's use of such rewards is *appropriate*. The concerns regarding appropriateness center on whether whistleblowing out of greed rather than conscience should be encouraged and/or rewarded; whether large rewards will engender false claims; whether encouraging "snitching" is somehow anti-American or anti-democratic; and whether the detrimental effect on organizational efficiency and values will more than offset the benefits of increased whistleblowing.

A. *The Question of Motive*

The debate over the motives for and the legitimacy of whistleblowing has existed since the early 1970s when Ralph Nader first suggested that whistleblowing be employed as a way to help control corporate and governmental wrongdoing.[182] That

179. *See* France, *supra* note 33, at 48.

180. *See* Wartzman & Barrett, *supra* note 172, at B1 (discussing wave of fraud cases filed under FCA by whistleblowers in defense industry).

181. *See* Michael Waldman, *Time to Blow the Whistle?*, NAT'L L.J., Mar. 25, 1991, at 13. This "exponential rise" is expected to continue. *Id.* Similarly, in the first few months after rewards were authorized for tips under the Insider Trading and Securities Enforcement Act of 1988, 15 U.S.C. § 78u-1 (1988), 25 qualified tips had been filed. *See* Duke, *supra* note 27, at C1, C12.

182. *See* Ralph Nader, *A Code for Professional Integrity*, N.Y. TIMES, Jan. 15, 1971, at 43. In this 1971 article, Nader called for whistleblowing by professional employees and for the establishment of a Clearing House for Professional Responsibility. *Id.* Nader later broadened the class of whistleblowers to include all employees. RALPH NADER ET AL., WHISTLEBLOWING 1 (1972). For varying points of view on the motive and legitimacy of whistleblowing, see Phillip I. Blumberg, *Corporate Responsibility and the Employee's Duty of Loyalty and Obedience: A Preliminary*

this debate is still active is demonstrated by the split in opinion between state legislatures and Congress over governmental rewards for whistleblowing.[183] The approach taken by those states hostile to rewarding whistleblowing reflects the view, expressed in early whistleblowing articles by a few social scientists and ethicists, that disclosures motivated by gain, as opposed to those motivated by desire to correct the wrongdoing, are not "true" whistleblowing, and thus are not to be encouraged.[184]

Over time, however, legal writers have concluded that motive is secondary to the public good. Under this view, to the extent that whistleblowing provides information beneficial to societal interests, it is irrelevant whether the information was provided out of greed or conscience.[185] Social scientists, approaching the debate from a different perspective, have generally arrived at the same conclusion. From both perspectives, so long as the whistleblowing will halt or prevent organizational wrongdoing, it should be legitimized.[186] In the current literature of both disciplines, motive is only important as a reflection of the

Inquiry, 24 OKLA. L. REV. 279 (1971) (discussing corporate social responsibility and disclosure in public interest); James M. Roche, *The Competitive System: To Work, to Preserve, and to Protect*, 1971 VITAL SPEECHES 445, 447 (viewing many consumer laws as unnecessary and as harassment to business); Kenneth D. Walters, *Thinking Ahead: Your Employees' Right to Blow the Whistle*, HARV. BUS. REV., July-Aug. 1975, at 26 (suggesting that employees express views without compromising employer integrity).

183. While Congress clearly endorses rewards, some states have gone so far as to refuse to protect whistleblowers who profit from their disclosures. For a discussion of this split in opinion, see *supra* notes 18-27 and accompanying text.

184. *See* Dworkin & Callahan, *supra* note 117, at 299-304 (discussing position advanced by several social scientists on whistleblowing motivation); J. Vernon Jensen, *Ethical Tension Points in Whistleblowing*, 6 J. BUS. ETHICS 321 (1987) (hypothesizing that conscientious decision to blow whistle can be complex ethical struggle).

185. *See, e.g.*, Terry Ann Halbert, *The Cost of Scruples: A Call for Common Law Protection for the Professional Whistleblower*, 10 NOVA L.J. 1 (1985) (discussing legal protection for whistleblowers, public policy and private power); Margaret Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 MICH. J.L. REFORM 277, 277-78 (1983) (discussing utility of whistleblowing to society); Nicholas M. Rogine, *Toward a Coherent Legal Response to the Public Policy Dilemma Posed by Whistleblowing*, 23 AM. BUS. L.J. 281, 282-87 (1985) (justifying employees' right to blow whistle under duty of loyalty to society).

186. *See* Janet P. Near & Marcia P. Miceli, *Organizational Dissidence: The Case of Whistle-Blowing*, 4 J. BUS. ETHICS 1, 1-3 (1985) (using motivational theories to discuss variables which affect decision to blow whistle); Near et al., *supra* note 10 (stating that whistleblowing is "influence process in which the whistle-blower attempts to exert power over the organization or some of its members, in order to persuade the dominant coalition to terminate the wrongdoing"). The False Claims Act pursues whistleblowing from a somewhat different perspective, for it encourages after-the-fact reporting to the government to enable the government

whistleblower's good faith belief in the legitimacy of the information about the wrongdoing.[187] If the whistleblower is not fabricating the information, or reckless in regard to the accuracy of the information, then motive becomes secondary; the information provided is the focal point.

Congress' approach in the FCA reflects this view: if the relator brings forth new information that results in a successful claim, that information is valued and thus viewed as worth paying for. Motive becomes important only if the information proves meritless. For example, the judge can assess costs against a relator who acted out of a desire to harass or be vexatious.[188]

In arriving at these current standards for motive and "newness" of information, Congress had over forty years of FCA interpretation on which to draw. In those years, both standards have shifted back and forth because of judicial interpretation and legislative amendment. For example, in 1943, in *United States ex rel. Marcus v. Hess*,[189] the Supreme Court adopted an expansive approach toward information, finding that private claimants could bring claims under the FCA although they were relying on public information provided by someone else.[190] The dissenting Justice, Justice Jackson, had a slightly different point of view.[191] While he felt that *motive* was irrelevant, he did not believe that a relator should be rewarded for information already in the possession of the government.[192]

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to reclaim funds falsely obtained by the wrongdoer. In both instances, however, correction of the wrongdoing is the goal.

187. *See, e.g.*, Halbert, *supra* note 185, at 20-24 (discussing case of ethical employee who feels compelled to blow whistle); Near & Miceli, *supra* note 186, at 3 (stating that, "[i]f organization members report 'wrongdoing' which they believe to be illegitimate acts outside the organization's purview to authority, then this is truly whistleblowing"); Rogine, *supra* note 185, at 284 (stating that question of motive is distinct from question of truth of charge).

188. *See* 31 U.S.C. § 3730(d)(4) (1988) (providing that, if government does not proceed with action and *qui tam* plaintiff conducts action, court may award defendant reasonable attorneys' fees and costs if defendant prevails and court finds that claim of plaintiff was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment").

189. 317 U.S. 537 (1943).

190. *Id.* at 545-46. According to the Court: "Even if . . . the petitioner has contributed nothing to the discovery of this crime, he has contributed much to accomplishing one of the purposes for which the Act was passed." *Id.* at 545. As the Court recognized, "[t]here is of course no reason why Congress could not, if it had chosen to do so, have provided specifically for the amount of new information which the informer must produce to be entitled to reward." *Id.* at 546 n.9.

191. *See id.* at 556 (Jackson, J., dissenting).

192. *Id.* at 558 (Jackson, J., dissenting). Justice Jackson stated:

Congress agreed, at least in part, with Justice Jackson.[193] In Congress' view, "mere busybodies" (in the words of Justice Jackson) who did not contribute new information, but were only lining their pockets, should not be permitted to obtain windfalls.[194] Congress therefore promptly revised the FCA in 1943 to overrule *Marcus*, and refocused the statute to reward the relator for the usefulness of the information.[195] The 1943 amendment required a court to dismiss an FCA action brought by an individual on the basis of evidence in possession of the government when the action was brought.[196] Many courts read the 1943 amendment literally and narrowly and, on the basis of the amendment, excluded claims by potential relators who otherwise supplied useful information. In one line of cases, for example, whistleblowers who first supplied information to the government and cooperated in government investigations, and who later sought to recover under the FCA, were barred because the government had the information when their suit was filed.[197]

> Informers who disclose law violations even for the worst of motives play an important part in making laws effective. But there is nothing in the text or history of this statute which indicates to me that Congress intended to enrich a mere busybody who copies a Government's indictment as his own complaint and who brings to light no frauds not already disclosed and no injury to the Treasury not already in process of vindication.

Id. (Jackson, J., dissenting).

193. *See* H.R. REP. No. 660, 99th Cong., 2d Sess. 22 (1986) (recognizing that, because of *Marcus* ruling, FCA *qui tam* provisions "were amended in 1943 to preclude *qui tam* suits that are based on information in the Government's possession, even though the Government may have had the information for a long time but had taken no action on this information").

194. In Representative Walter's opinion, "the latest count [of FCA cases as of December 17, 1943] showed 250 cases, in none of which had any service been rendered to the United States." 89 CONG. REC. 10,846 (1943) (statement of Rep. Walter). Thus, according to Representative Kefauver, the 1943 amendments were designed to protect the government, and protect corporations "from being defrauded and harassed by shysters or people who might bring suit without any information or with little information." *Id.* at 10,849 (statement of Rep. Kefauver). Members of Congress did distinguish, however, between the "dishonest and unscrupulous" who took advantage of information already known to the government and those who came forward with new information and should therefore have been rewarded. *Id.* at 10,846 (statement of Rep. Walter on why Congress had not abolished *qui tam* actions nor followed the *Marcus* approach of allowing everyone to sue).

195. *See* H.R. REP. No. 660, *supra* note 193, at 22.

196. 31 U.S.C. § 232 (1976), *recodified at* 31 U.S.C. §§ 3729-31 (1982), *amended by* 31 U.S.C. § 3730(e) (1988). The old section provided: "Unless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought." *Id.*

197. *See, e.g.*, Safir v. Blackwell, 579 F.2d 742, 747 (2d Cir. 1978) (holding

Drawing on this history, Congress, in the 1986 amendments, rejected the extreme positions on freshness of the information of both *Marcus* and the restrictive post-1943 amendment interpretations. With the objective of promoting whistleblowing without rewarding useless information, Congress came down on the side of encouraging the disclosure of information, even if that information has limited value.[198] Under the 1986 amendments, a finding by the court that a successful action was based primarily on disclosures through government sources, rather than information provided by the relator, does not prevent the relator from benefitting under the FCA; the reward in such instances, however, may not exceed ten percent of the amount recovered.[199] In addition, a suit can be filed on the basis of previously reported information if the relator was the "original source" of information brought to light in "a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media" before the relator's suit was brought.[200] The FCA, however, still focuses somewhat on the value of the information provided; this focus is evidenced by the FCA reward scheme which allows the relator different recovery amounts, depending on the novelty and usefulness of the information.[201]

This emphasis on information over motive is reflected in the FCA in other, more subtle ways. For example, if the relator's action would interfere with a government investigation arising out

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that plaintiff was not entitled to bring *qui tam* action under FCA on basis of information already furnished to government); United States v. Aster, 275 F.2d 281, 283 (3d Cir.) (holding that court did not have jurisdiction over *qui tam* suit where essential information held by plaintiff was already in government possession), *cert. denied*, 364 U.S. 894 (1960).

198. *See* S. REP. NO. 345, *supra* note 117, at 27-29, *reprinted in* 1986 U.S.C.C.A.N. at 5292-94. The Senate Committee "recognize[d] that guaranteeing compensation for individuals . . . could result in inappropriate windfalls where the relator's involvement with the evidence is indirect at best." *Id.* at 28, *reprinted in* 1986 U.S.C.C.A.N. at 5293. The Committee believed, however, that some financial award was still justified, depending on "the significance of the information and the role of the person in advancing the case to litigation," if the government might not have recovered but for the relator's suit. *Id.*

199. *See* 31 U.S.C. § 3730(d)(1) (1988). The full 10% recovery is allowed in actions which the government has successfully prosecuted. *See id.* Of course, 10% of a multimillion dollar case can be substantial.

200. *See id.* § 3730(e)(4)(A). The relator must have voluntarily provided the information to the government before the information was disclosed in a public proceeding or the news media. *See id.* § 3730(e)(4)(B).

201. *See id.* § 3730(d)(1). If the relator was the primary source of the information, he or she can get between 15-25% of the award. *See id.* For the text of the relevant provision of the FCA, see *supra* note 2.

of the same facts, the court can order a stay in the relator's case, thus insuring non-interference with the government's gaining of information.[202] Similarly, if a relator has filed suit, other parties cannot intervene or bring related actions based on the underlying facts of the relator's case.[203] In such instances, there is no reason to allow others to profit from the information which has already been provided by the first relator.

The most explicit treatment of motive in the FCA is a section which prevents a person from profiting from his or her own wrongdoing.[204] Even in these cases, however, the limitation is tempered by the desire for information. A party who planned and initiated a false claim can still recover in a *qui tam* suit as long as he or she is not convicted of criminal conduct arising from his or her role in the false claim.[205]

The courts have also implicitly rejected the argument that large gains somehow illegitimize whistleblowing.[206] This rejec-

202. *See* 31 U.S.C. § 3730(c)(4) (providing that even if government decides not to proceed with action, government may ask court to stay discovery by *qui tam* plaintiff for up to 60 days upon showing that "certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts"). The section thus gives preference to governmental priorities over individual claims.

203. *See id.* § 3730(b)(5) (stating that "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action").

204. *See id.* § 3730(d)(3). The section provides:

> Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

Id.

205. *See id.* A nonconvicted wrongdoer could still receive an award, depending on his or her conduct and the "relevant circumstances." *Id.* In contrast, under FIRREA, Congress chose not to allow wrongdoers to claim awards under the Federal Deposit Insurance Act. A person who "deliberately causes or participates in the alleged violation of law or regulation" is ineligible to get a reward regardless of the information provided. 12 U.S.C. § 1831k(c) (Supp. II 1990).

206. This does not mean, however, that the courts are unaware that some-

tion makes intuitive sense. If the disclosure of information protective of the public good is indeed spurred by large rewards, this appeal to self-interest as opposed to altruism does not seem so inherently wrong that the government should shun its use. In addition, it is too simplistic to attribute whistleblowing under the False Claims Act simply to greed. It is equally likely that rational decision-making based on a cost-benefit analysis is being undertaken by the new whistleblowers. Proponents of the False Claims Act make this argument and there is some evidence that Congress agrees, seeing large rewards as a way to offset the significant personal and financial risks that whistleblowers may face.[207] If this is

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times the awards may be excessive in regard to the fraud committed and that the punishment may exceed the crime. In United States v. Halper, 664 F. Supp. 852 (S.D.N.Y. 1987), the FCA penalties were found to be so much greater than the actual loss to the government that they amounted to double jeopardy. *Id.* at 854. In *Halper*, the defendant was charged with 65 counts of Medicare fraud. *Id.* at 853. The loss to the government on these claims was $585, but the amount of the penalties was $130,000. *Id.* at 855. Halper had already been sentenced to two years in prison and fined $5,000 for the same acts. According to the court, if the additional $130,000 penalties had been found to be remedial rather than punitive, they would not have violated the constitutional proscription against multiple punishments for the same crime. The court, however, found the additional penalties to be punitive, and thus violative of the double jeopardy clause. *Id.* According to the court, these penalties constituted "punishment" because a civil penalty designed to make the government whole cannot be totally unrelated to the actual damages suffered. *Id.* The $130,000 penalty assessed was 220 times greater than the actual loss. *Id.* The court instead assessed a penalty of $1,170 (twice the loss) and costs. *Id.*

207. *See* Strasser, *supra* note 22, at 42. Some proponents, such as John Phillips, who helped to develop the *qui tam* amendments, believe that the reforms were designed to put the risks of whistleblowing on the plane of an investment decision. *Id.* As Phillips noted: "Now we are getting people who look coldly at 'What's in it for me?' There is no value to a weak case, after all. You are getting more credible, solid people who feel good about doing the right thing." *Id.*; (quoting John Phillips); *see also False Claims Reform Act: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 86-88 (1985) (statement of John R. Phillips, Co-Director, Center for Law in the Public Interest) (supporting FCA amendments which would provide financial incentives for private action); S. REP. No. 345, *supra* note 117, at 27-28, *reprinted in* 1986 U.S.C.C.A.N. at 5292-93 (acknowledging risks and sacrifices of private relators).

One of the main arguments used to challenge the constitutionality of the FCA amendments was that self-interested private citizens, motivated at least in part by personal gain, did not have standing to represent the interests of the people. *See* Caminker, Comment, *supra* note 113. This argument has been uniformly rejected. *See, e.g.*, United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 614-15 (N.D. Cal. 1989) (holding that *qui tam* plaintiffs have standing under case and controversy requirement of Constitution); United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1096-99 (C.D. Cal. 1989) (holding that congressional grant of standing under FCA does not abrogate case or controversy limitation). Instead, *qui tam* relators are considered "representatives of the public for the purpose of enforcing a policy explicitly formulated by legislation" and thus worthy of rewards for fulfilling

the case, rational decision-making which furthers the public interest is certainly a goal worthy of support.

B. *Fears of Groundless Claims*

Voices raised against the FCA consistently cite the danger of meritless claims motivated by greed.[208] Some assert that this has already happened, citing the statistic that the Justice Department has chosen to take over only forty-two of the nearly three hundred claims brought since the 1986 amendments were enacted.[209] There is not, however, necessarily a correlation between the Justice Department opting to take over a claim and the merits of that claim. On the one hand, the Department may believe that federal interests will be adequately represented by the relator, or that the amount to be recovered is not worth the expenditure of the Department's limited resources, and thus will choose not to intercede.[210] Alternatively, the decision not to intervene may be due to the other types of cases the Justice Department is pursuing or wishes to pursue and the implications of a successful prosecution in those cases.[211] Thus, the significance of the Justice Department's decision whether to join a suit could be compared to a decision by the Supreme Court whether to grant certiorari. Neither the Supreme Court's denial of certiorari nor the Justice Department's decision not to become involved in an FCA claim may properly be interpreted as a decision on the merits of the controversy.

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this role. Priche & Sons v. United States, 332 U.S. 407, 418 (1947) (Frankfurter, J., dissenting). Indeed, in the legislative history of the FCA, the awards are referred to as "finders fees" which relators should receive as of right. S. REP. NO. 345, *supra* note 117, at 2-3, *reprinted in* 1986 U.S.C.C.A.N. at 5266.

208. *See, e.g.*, Elkan Abramowitz, *Mutiny for the Bounty—Qui Tam: Bonanza or Fair Reward*, N.Y.L.J., May 1, 1990, at 3 (stating that minimum 15% recovery for *qui tam* plaintiffs has resulted in increase of cases, but is mixed blessing due to some clearly frivolous claims); Gest, *supra* note 175, at 64 (stating that workers see chance for huge financial gain by blowing whistle on employer); Waldman, *supra* note 181, at 14 (stating that FCA, because of sizeable monetary recoveries, encourages defense contractor employees to sue).

209. *See* Abramowitz, *supra* note 208, at 3; Waldman, *supra* note 181, at 14.

210. *See, e.g.*, United States *ex rel.* Wisconsin v. Dean, 729 F.2d 1100, 1102 n.2 (7th Cir. 1984) (recognizing situation where United States declined to intervene in *qui tam* action because government interests were served by relator's control of case).

211. *FCA Implementation Hearing, supra* note 118, at 11 (testimony of Stuart M. Gerson, Assistant Attorney General, Department of Justice). According to Mr. Gerson: "[D]eclination of intervention [by the Justice Department] is not the seal of approval of the conduct. It may be no more than an indication that we find the standards for a fraud case have not been met, even though there may be some other form of activity that can be otherwise pursued." *Id.*

Moreover, there are many reasons why this fear of groundless claims is not soundly based. Prosecuting a successful *qui tam* action without government intervention is generally very time-consuming and expensive.[212] The cases often involve highly technical issues and thousands of documents. Investigative costs are burdensome. Moreover, the relator may well be facing defendants with top legal counsel and considerable resources. These are not odds that rational people—or their attorneys—would accept without a good chance of success. Further, settlement leverage to be gained from a meritless claim is minimal.[213]

In addition to these practical impediments, the FCA provides strong disincentives to bringing meritless claims. If a relator is unsuccessful in his or her *qui tam* claim, the court can order the relator to pay the defendant's costs and attorneys' fees if it finds that the relator's claim "was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."[214] The possibility of incurring the defendant's costs and fees, combined with the deterrents discussed above, make genuinely groundless claims highly unlikely.

The likelihood of a second type of specious claim—one based on information previously revealed to the government—has for the most part been eliminated.[215] Because of the structure of the FCA and the willingness of the government to challenge any claim believed not to be based on original information, such "false whistleblowers" generally will not be successful today.

C. *Citizen Intelligence Gathering or Spying?*

Despite the states' apparent mistrust of reward statutes, there is a long tradition in this country of rewarding people for information that the government can use for prosecution.[216] One

212. *See* Vogel, *supra* note 118, at 21 (recognizing that costs of litigating *qui tam* action by private individual is prohibitive without Justice Department intervention). Typical litigation costs for whistleblowers were estimated in 1986 to range from $20,000 to $700,000, depending on the practice challenged and the identity of the defendant. Barbara Bradley, *High Cost of Conscience: Guidelines on Prudence*, CHRISTIAN SCI. MONITOR, Dec. 8, 1986, at 25 (pointing out that whistleblowing can often be too costly to pursue, especially if challenging government agency).

213. *See* Strasser, *supra* note 22, at 43.

214. *See* 31 U.S.C. § 3730(d)(4) (1988). For a discussion of this provision, see *supra* note 188.

215. For a discussion of this issue, see *supra* notes 155-61 and accompanying text.

216. Anyone familiar with TV or movie Westerns knows about reward posters (and "bounty hunters"). Postal patrons are also familiar with the updated

method of reward, *qui tam*, represents a law enforcement concept that existed in England for hundreds of years and was passed on to our legal system.[217] Indeed, the First Congress, as well as subsequent Congresses, authorized payments to informers in the form of *qui tam* actions.[218] While most of these early actions have since been repealed or become dormant as the government moved on to different enforcement tactics, they demonstrate the entrenched custom of rewards in law enforcement.[219]

The FCA is perhaps different from previous *qui tam* statutes in degree, but not in spirit. The size of the reward—even the chance to become very wealthy—does not change the basic idea of giving financial incentives to citizen enforcers; it merely encourages more vigorous enforcement to the extent that large rewards act as a spur.[220] Further, with FCA rewards, the size of the reward is directly related to the magnitude of the fraud; hence, the reward is proportional to the wrongdoer's action, as well as to the benefit to the government.[221]

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versions that hang in post offices. The FCA is more benign than the "dead or alive" attitude of those earlier times.

217. *See* Caminker, Comment, *supra* note 113, at 341-42 (discussing origin of *qui tam* actions).

218. The First Congress authorized at least 11 *qui tam* actions of various kinds. In three of these authorized actions, informers were allowed to keep the entire recovery. *See* Act of Aug. 4, 1790, ch. 35, § 55, 1 Stat. 145, 173 (setting up table of fees for collectors, naval officers, surveyors); Act of Sept. 1, 1789, ch. 11, § 21, 1 Stat. 55, 60 (providing for recovery of penalties and forfeitures in coastal trade); Act of July 31, 1789, ch. 5, § 29, 1 Stat. 29, 44-45 (itemizing fees of collectors, naval officers, surveyors); *see also* Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?* 78 YALE L.J. 816, 825-27 (1969) (discussing century-old "informer" statutes which offered inducements to prosecute actions); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1406-09 (1988) (discussing statutes providing for collection of portion of judgment by informers); Caminker, Comment, *supra* note 113, at 341-43.

219. For examples of existing but generally dormant statutes, see 18 U.S.C. § 962 (1982) (providing one half of forfeit for informer who gives information about someone in U.S. arming foreign vessel); 25 U.S.C. § 201 (1982) (providing one half of penalty recovered for informer who gives information about offenses under Protection of Indians statutes); 35 U.S.C. § 292(b) (1982) (providing one half of penalty recovered for person suing for false marking under patent laws).

220. For a discussion of social-psychological literature suggesting that rewards must be sufficiently large to motivate desired behavior effectively, see *supra* notes 108-09 and accompanying text.

221. The benefits of whistleblowing often are not just monetary. In the defense arena, for example, weapons safety and accuracy and ultimately national security can be implicated. *See* S. REP. No. 345, *supra* note 117, at 3, *reprinted in* 1986 U.S.C.C.A.N. at 5266. According to the Senate Report:

> The cost of fraud cannot always be measured in dollars and cents, however. . . . Even in the cases where there is no dollar loss—for example

One potential problem with *qui tam* actions is that they can be viewed as government-promoted spying. Another perspective of the action is possible, however. A *qui tam* action can be viewed as a democratic mechanism which gives an individual a measure of control over the large organizations with which he or she is forced to deal. An additional governmental benefit of a recognized citizen role in this context is that it allows greater law enforcement than is available to prosecuting agencies, agencies which face "the harsh reality of today's funding limitations."[222] The citizen role also makes enforcement possible when the government, for proper or improper reasons, declines to act.[223]

Other well-established statutes also follow the reward tradition. For example, statutes which allow civil suits for treble damages authorize a citizen enforcement role analogous to the role provided for in *qui tam* actions. One such statute is RICO.[224] In

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where a defense contractor certifies an untested part for quality yet there are no apparent defects—the integrity of quality requirements in procurement programs is seriously undermined. A more dangerous scenario exists where in the above example the part *is* defective and causes not only a serious threat to human life, but also to national security.

Id.

222. 132 CONG. REC. 29,321-22 (1986) (statement of Rep. Berman including legislative history for record) (recognizing financial limitations of government as one reason for *qui tam* plaintiff role).

223. *See* Caminker, Comment, *supra* note 113, at 351 (endorsing private enforcement of *qui tam* actions). In some instances, the whistleblower may be the only one who is willing or free to act to protect the public good. In other cases, the impact of the revolving door or the dependence of certain agencies on contractors could lead to less than diligent enforcement. Certainly, incidents of refusal to prosecute and retaliation against federal employee whistleblowers by those given enforcement powers under the Civil Service Reform Act, 5 U.S.C. § 2302 (1982), have been well documented. For example, up to 90% of employees appealing administrative decisions regarding retaliation for whistleblowing under the Civil Service Reform Act during the Reagan administration lost those appeals. 3 INDIVIDUAL EMPLOYEE RTS. (BNA) 4 (1988).

224. 18 U.S.C. §§ 1961-1968 (1988 & Supp. II 1990). The civil RICO provisions are modeled on the antitrust laws and both have been effective in promoting citizen enforcement. *See* G. Robert Blakey, *Forward: Debunking RICO's Myriad Myths*, 64 ST. JOHN'S L. REV. 701, 707 (1990) (describing criminal enforcement mechanisms for RICO); *see also* 15 U.S.C. § 15(a) (1988) (providing for recovery of treble damages and costs by person injured as result of antitrust violation).

The treble damages private enforcement mechanism of the antitrust laws has as its objective the encouragement of "private challenges to antitrust violations." Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) (discussing private antitrust suits as supplement to Department of Justice enforcement). Historically, the great preponderance of antitrust claims have been instituted by private plaintiffs. *See* Blakey, *supra*, at 708 n.51 (stating that, between 1960 and 1980, 84% of antitrust claims were instituted by private plaintiffs); Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J.

fact, when discussing the potential impact of the FCA, commentators often compare it with RICO.[225] One of RICO's main methods of reaching its primary goal—combatting organized crime—was to strengthen "the evidence gathering process, an objective partially addressed by allowing civil suits for treble damages."[226] According to the Supreme Court, this opportunity for treble damages gives potential plaintiffs vigorous incentives to pursue claims and to help correct "a serious national problem for which public prosecutorial resources are deemed inadequate."[227] Since its passage in 1970, lawsuits involving RICO have grown both in number and variety as claimants, building on expansive judicial interpretations of the statute, found treble damages an inducement for initiating or broadening civil lawsuits based on criminal acts.[228]

1001, 1002 (1986) (providing table which exhibits relative numbers of government and private antitrust cases commenced for the period 1941-1984).

225. *See* France, *supra* note 33, at 49; Strasser, *supra* note 22, at 43.

226. *See* Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (stating that purpose of RICO was to eradicate organized crime with enhanced sanctions and new remedies).

227. Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 151 (1987) (comparing remedy provisions of RICO and Clayton Act); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 241 (1987) (stating that Clayton Act was model for RICO treble damages provision).

228. For examples of cases in which there has been an expansive interpretation of RICO, see Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 481 (1985) (holding that there is no requirement for prior violation or "racketeering injury" to bring private action under RICO); Alcorn County v. United States Interstate Supplies, 731 F.2d 1160, 1169 (5th Cir. 1984) (stating that alleged injury involving bribery, threats, payment for goods never received fell within scope of RICO); Bankers Trust Co. v. Feldesman, 648 F. Supp. 17, 26 (S.D.N.Y. 1986) (stating that bankruptcy fraud and bribery sufficient to meet RICO "two act" pattern requirement).

This broad interpretation has prompted vigorous calls for reform. *See, e.g.*, Rene Augustine, Introduction, *Reforming RICO: If, Why and How?*, 43 VAND. L. REV. 621, 621 (1990); Mark P. Cohen, *Civil RICO Under Fire: Will White Collar Criminals Be Exempted?*, 4 ANTIOCH L.J. 153, 154 (1986); Francis J. Flaherty, *A RICO Crisis*, NAT'L L.J., Aug. 13, 1984, at 1. Nonetheless, the Supreme Court and Congress have so far declined to limit RICO's scope. The opinions of the Supreme Court to date have not reflected an urgent need for reform of the statute. *See* H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 237-43, 249-50 (1989) (interpreting and applying relationship and continuity requirements of RICO as written); *Sedima*, 473 U.S. at 499-500 (discussing standing requirements for private civil action and deciding that any corrections lie with Congress). The Court's decisions, however, have contained an invitation for Congress to rewrite the statute if it disagrees with the adopted interpretation. *See, e.g., Sedima*, 473 U.S. at 499-500 (stating that any defect in RICO must be corrected by Congress). Congress in turn has declined to pass any of the RICO reform measures proposed thus far. *See* John M. Nonna & Melissa P. Corrado, *RICO Reform: "Weeding Out" Garden Variety Disputes Under the Racketeer Influenced and Corrupt Organizations Act*, 64 ST. JOHN'S L. REV. 825, 825 (1990) (noting that Congress has not

Use of the civil RICO provisions was slower to ignite than has been the case with the FCA.[229] The recent use of RICO has been explosive, however; there were 950 civil RICO cases filed in federal district courts in 1988, and that number increased to 1,225 by 1989.[230] If the FCA follows the RICO pattern, but at its continued accelerated pace, its use—and consequent deterrent effect—will easily satisfy the hopes of the sponsors of the 1986 amendments.[231]

While there are other means to achieve this objective of disclosure of wrongdoing that do not involve rewards—most notably citizen enforcement actions such as those allowed in the environmental area[232]—most of the information that is brought forth in *qui tam* actions comes from employees.[233] This makes a difference. The risks to these individuals of losing their jobs or any

passed any amendments to the civil RICO provisions since 1984). In addition, proponents of the status quo argue that a broad application of the law is justified by stating that business fraud "has become a national blight." *See* Cohen, *supra*, at 154 (discussing RICO controversy and sentiments of those for and against statute).

229. For instance, although the statute had been passed a decade earlier, only nine civil RICO cases were filed in 1980. ABA SECTION ON CORPORATE BANKING AND BUSINESS LAW, REPORT OF THE AD HOC CIVIL RICO TASK FORCE 55 (1985); *see also* Petra J. Rodriguez, Note, *The Civil RICO Racket: Fighting Back with Federal Rule of Civil Procedure 11*, 64 ST. JOHN'S L. REV. 931, 936 n.20 (1990) (noting that civil RICO, enacted in 1970, was slow to catch attention of legal community).

230. *See* Rodriguez, Note, *supra* note 229, at 936 n.20 (citing statistics supplied in telephone interview by the Administrative Office of the United States Courts, Statistical Analysis and Reports Division).

231. One difference between FCA *qui tam* plaintiffs and plaintiffs bringing RICO or antitrust claims must be kept in mind. While the possibility of recovering treble damages may play an important role in encouraging citizen enforcers to pursue antitrust and RICO defendants, these claimants differ in an important way from FCA relators: they have been, in some way, directly harmed by the violations. Thus, RICO and antitrust claimants are not simply reward seekers.

In contrast, FCA claimants in most instances can make only the broadest allegation of injury, i.e., that their interests as taxpayers were harmed. It is unlikely, however, that this difference will have an effect on the validity of FCA rewards as a method to encourage citizen enforcement. If greed, in combination with revenge, is not an inappropriate source of motivation for initiating RICO and antitrust claims, greed alone should not call into question the propriety of an FCA relator's suit.

232. *See, e.g.*, Federal Water Pollution Control Act, 33 U.S.C. § 1365 (1988) (providing for civil action); Clean Air Act, 42 U.S.C. § 7604 (1988) (providing for civil action against any person who violates Act's emission control standards).

233. *Qui tam* and other reward actions recognize that much information needed for enforcement is extremely difficult to obtain without the help of insider informers. *See* S. REP. No. 345, *supra* note 117, at 2-3, *reprinted in* 1986 U.S.C.C.A.N. at 5266-68.

meaningful chance for career advancement is substantial.[234] Thus, it is arguably not inappropriate to allow significant awards to offset these risks.[235]

Another alternative to the "carrot" of financial incentives for blowing the whistle is the "stick" of sanctions against people who do not come forward with important information or who do not take action to prevent wrongdoing. Like *qui tam* actions, citizen enforcement through sanctions has a long history of use. The old common law crime of misprision of felony was used to punish citizens who failed to disclose to the government useful information about the commission of a felony.[236] Misprision of felony was enacted into the codes of several states and the United States.[237] It has, however, seldom been used.[238]

More recently, the idea of punishment for failure to provide information is being employed with regard to certain social ills such as child abuse and breaches of professional ethics.[239] So far

234. For a discussion of the relationship between risk and reward, see *supra* note 90 and accompanying text.

235. Indeed, the developer of the modern *qui tam* provision, John Phillips of the Center for Law in the Public Interest, asserts that the rewards are appropriate because the whistleblower must often risk a job or a career. "The *qui tam* reforms were designed to put those risks on the plane of an investment decision . . . . Joining patriotism and money is a very powerful force." Strasser, *supra* note 22, at 42 (quoting John Phillips).

Groups advocating whistleblowing have published tips on how to minimize the risks. These include verifying the information, keeping a log of conduct observed and steps taken to get the problem rectified, determining what laws might protect the whistleblower, and how the whistleblowing must be done to receive protection. *See, e.g.*, Dunkin, *supra* note 175, at 139 (providing Government Accountability Project's recommendations for minimizing risks; recommendations to whistleblowers also included not running to media, not assuming that law covers them, not expecting windfall if fired).

236. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 526 (1972) (defining misprision of felony as "failure to report or prosecute known felon").

237. *See id.*; *see also* 18 U.S.C. § 4 (1988) (defining offense of misprision as imposing liability on person having knowledge of actual commission of felony and not just failure to provide information as soon as possible); CAL. PENAL CODE ANN. § 38 (West 1988) (providing now only for misprision of treason).

238. *See* Bratton v. United States, 73 F.2d 795, 797 (10th Cir. 1934) (declining to invoke misprision of felony statute for "mere failure to disclose"); Holland v. State, 302 So. 2d 806 (Fla. Dist. Ct. App. 1974) (declining to adopt misprision of felony into Florida substantive law); *see also* LAFAVE & SCOTT, *supra* note 236, at 526 (expressing doubt as to whether misprision offense "ever had a meaningful existence beyond the textbook writers"). *But see* Blumberg, *supra* note 182, at 293-94 ("In recent years . . . the doctrine [of misprision] has demonstrated considerable vitality.")

239. *See* Deborah Graham, *The Whistle-Blowers*, A.B.A. J., Oct. 1986, at 72 (discussing lawyers who have disclosed wrongdoing in legal profession); Reiner H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORGANIZATION 53 (1986) (discussing employment of "gatekeeper"

the results have been mixed.[240] It appears that, while professionals often resent having the law enforcement role forced upon them when put in a position of being required to breach the confidentiality of their patients, clients or colleagues, they may be more susceptible to threats than enticements.[241] In contrast, rewards are more likely to motivate whistleblowing in other employment situations.[242] Bearing in mind the type of whistleblower sought to be encouraged, it seems preferable in these days of proliferating offenses and sanctions to reward whistleblowing rather than to impose sanctions.[243]

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strategy for enforcement of securities regulations). In 1990, the American Institute of Certified Public Accountants, the major professional group of the accounting profession, came out in favor of requiring auditors to notify regulators of possible illegal acts by companies. Rosin Goldwyn Blumenthal, *Accounting Group Reverses Its Position, Backs Bill on Creditors Blowing Whistle*, WALL ST. J., Sept. 14, 1990, at A2.

240. *See, e.g.*, Graham, *supra* note 239, at 72 (stating that, with widespread failure to blow whistle, lawyers do not consider it their responsibility to monitor ethics of others in profession); Jane C. Norman, *So-Called Physician "Whistle-blowers" Protected*, 11 LEGAL ASPECTS OF MED. PRAC. 3 (1983) (recognizing that physician participation on committees to blow whistle on peers is exchanged for immunity from lawsuit); Ronald D. Rotunda, *Client Fraud: Blowing the Whistle, Other Options*, TRIAL, Nov. 1988, at 92 (stating that ethical rules encourage attorney whistleblowing for client fraud except where information is privileged); Martha Brannigan, *Arrests Spark Furor Over the Reporting of Suspected Child Abuse*, WALL ST. J., June 7, 1989, at 8 (stating that arrests of teachers for failing to report child abuse was feared to spark avalanche of unwarranted reports); Andrew Blum, *Associate Sues Firm in Flap Over Discharge*, NAT'L L.J., June 18, 1990, at 14 (discussing attorney allegedly fired for prodding law firm to report ethics violation by fellow associate); Sherry R. Sontag, *The Duty of Lawyers To Blow the Whistle on Clients Is Unclear*, NAT'L L.J., Sept. 17, 1990, at 3 (stating that lawyers and accountants may be liable for failing to blow whistle on savings and loan institutions).

241. *See, e.g.*, David Gwilliam, *Whistleblowing: They're Playing Our Tune*, 97 ACCOUNTANCY 13, 13 (1986) (discussing pressure by regulatory agencies on auditors to blow whistle on financial fraud); Rorie Sherman, *Bioethics Debate*, NAT'L L.J., May 13, 1991, at 1 (quoting Janet Benshoof, Director of ACLU Reproductive Rights Project, as expressing surprise that public would be willing to make doctors policemen of pregnant women).

The results of a recent National Law Journal/LEXIS national poll indicate that the public may not be uncomfortable with an active enforcement role for at least some professionals. For example, 57% of the respondents would require physicians who suspect that their pregnant patients are abusing drugs or alcohol to make a report to the government. *See* Sherman, *supra*, at 30. Rewards, however, are unlikely to motivate a doctor to blow the whistle on a patient or the parent of a patient-child if the doctor has any questions as to the validity of his or her report.

242. For a discussion of the relationship between rewards, motivation and employee situations, see *supra* notes 66-67 and accompanying text.

243. *See, e.g.*, Marbury v. Brooks, 20 U.S. 556 (1822). "It may be the duty of a citizen to accuse every offender, and to proclaim every offense which comes to his knowledge; but the law which would punish him in every case, for not performing this duty, is too harsh for man." *Id.*; *see also* Holland v. State, 302 So. 2d

D. *Organizational Consequences*

The calls for whistleblowers to police organizations have elicited strong responses. For example:

> Some of the enemies of business now encourage an employee to be disloyal to the enterprise. They want to create suspicion and disharmony and pry into the proprietary interests of the business. However this is labelled—industrial espionage, whistle blowing or professional responsibility—it is another tactic for spreading disunity and creating conflict.[244]

While these remarks were made at a time when employment at will was still in full force and employers were unaccustomed to being challenged, the concerns raised retain a measure of legitimacy. In the organizational context, rewarding whistleblowing may nourish a climate of suspicion, hostility and defensiveness.[245] This may result in a loss of group identity, loyalty, and morale, and a consequent loss of efficiency.[246] These dangers are not as great as they once were, however, for two reasons: (1) there has been a fundamental change in the nature of the employment relationship; and (2) whistleblowing is emerging as a tool for corporate as well as government use.

With the erosion of the employment-at-will doctrine and the rise of employee rights, the time has passed when an employer could demand—and indeed, had the right to expect—loyalty at all costs.[247] The right of employees to act out of conscience is recognized by most courts, legislatures and commentators as para-

806, 809 (Fla. Dist. Ct. App. 1974) (eschewing as harsh and oppressive enforcement of misprision of felony); Pope v. State, 396 A.2d 1054, 1078 (Md. 1979) (holding misprision of felony not chargeable offense in child abuse case, although failure to prevent child abuse fell within child abuse statute).

244. Jerry M. Flint, *G.M.'s Chief Scores Critics of Business*, N.Y. TIMES, Mar. 26, 1971, at 53 (quoting James M. Roche, then Chairman of General Motors).

245. *See* Blumberg, *supra* note 182, at 297 (stating that suspicion leads to loss of human values within organization); Coffee, *supra* note 108, at 1147 (viewing whistleblowing as "treason" and dependence on whistleblowers as counterproductive).

246. *See* Near & Miceli, *supra* note 186, at 1-2 (stating that whistleblowing is documented as leading to decline in organizations' authority and to "reduced loyalty, commitment, and task performance"); Walters, *supra* note 182, at 30-31 (discussing organizational friction resulting from whistleblowing).

247. *See* Alan F. Westin, *Why Whistleblowing is on the Rise*, *in* WHISTLE BLOWING: LOYALTY AND DISSENT IN THE CORPORATION 4-10 (Alan F. Westin ed., 1981); Halbert, *supra* note 185, at 5-10 (discussing evolution of at-will employment); Dworkin & Callahan, *supra* note 117, at 267, 285-86 (discussing protection and encouragement of whistleblowers as exception to employment-at-will).

mount to the duty of loyalty to the organization.[248] Protected whistleblowing is just one manifestation of the equalization of rights in the employment relationship.

In recognition of this equalization, the increased litigiousness of the employment relationship and the hostility with which business and government are viewed, a new ethos is emerging. There is increased emphasis on ethics and awareness of employee concerns.[249] Whistleblowers are beginning to be viewed as a resource that can help correct wrongdoing before it "irrevocably harms the organization or others."[250] For example, a recent study showed that a majority of companies had clearly defined policies to deal with employee concerns about legal, moral and/or ethical issues.[251] In order to maximize the utility of whistleblowing to the organization, however, the whistle must be blown to the organization and not to some outside entity. It is in this regard that the False Claims Act and similar reward structures may be the most harmful.

The FCA demands that, in order to collect the reward, the

248. *See, e.g.*, Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1336-37 (Cal. 1980) (holding that employer's authority over employee does not include right to demand that employee commit criminal act); Palmeteer v. International Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981) (holding that discharge of employee contravenes public policy if employer had committed legal wrong); Harless v. First Nat'l Bank, 246 S.E.2d 270, 275 (W. Va. 1978) (holding that employer's absolute right to discharge at-will employee does not apply when discharge contravenes public policy); *see also* Blumberg, *supra* note 182, at 300-15 (discussing balancing of private employee's duty as citizen with duty of loyalty to employer); Halbert, *supra* note 185, at 20-27 (discussing professional employee's duty to public-at-large); Malin, *supra* note 185, at 318 (discussing conflict between whistleblowing and loyalty to employer); Rogine, *supra* note 185, at 284-89 (stating that employee's duty of loyalty is not absolute); Walters, *supra* note 182, at 32-34 (discussing fact that courts sanction idea of whistleblowing as desire to improve performance and quality of public service). For a discussion of legislative protection from retaliation for employees, see *supra* notes 8-17 and accompanying text.

249. *See* Timothy R. Barnett & Daniel S. Cochran, *Making Room for the Whistleblower*, HUM. RESOURCES MAG., Jan. 1991, at 58 (describing whistleblowing policy whereby employee can communicate without fear of reprisal); Brody, *supra* note 175, at 77 (encouraging managers to set up whistleblowing "hotline"); Benson Rosen & Catherine Schwoerer, *Balanced Protection Policies*, HUM. RESOURCES MAG., Feb. 1990, at 61 (focusing on balance between employer and employee rights); Srodes, *supra* note 22, at 57-60 (discussing evolution of current emphasis on ethics in business).

250. Barnett & Cochran, *supra* note 249, at 58; *see also* Brody, *supra* note 175, at 77 (advocating use of employee grievance procedures to discover problems); Jeffrey L. Sheler, *When Employes* [sic] *Squeal on Fellow Workers—*, U.S. NEWS & WORLD REP., Nov. 16, 1981, at 81-82 (pointing out that many companies recognize value of employee complaints).

251. *See* Barnett & Cochran, *supra* note 249, at 60.

wrongdoing must be brought to the attention of the government through the filing of a lawsuit. Employees who work for a company with an internal whistleblowing procedure and decide to blow the whistle thus are faced with a conflict of interest. They can maximize their economic interests by going outside the organization, or help protect the organization's interests by making an internal disclosure.[252] To the extent that large money rewards encourage the former route, financial incentives are detrimental to an organization that is willing to be responsive to the information.

To avoid these consequences, procedures to encourage reporting within the organization can be established. Perhaps the most potent alternative would be an internal system of financial or other rewards. Although it would be unrealistic for an organization to offer monetary rewards in amounts equivalent to those which could be gained through an FCA action, relative advantages in terms of speed and ease of recovery might encourage utilization of the in-house procedure as opposed to FCA litigation. In addition, such a system would permit the reporting employee to maintain his or her loyalty to the organization and coworkers. Several firms have already implemented such reward programs and this is an idea that deserves closer examination.[253]

There is also another side to this inherent conflict between internal and external rewards. Internal whistleblowing protects organizational interests at the expense of the public treasury. It is impossible to tell at this time whether increased organizational loyalty, morale and efficiency compensates for the loss of these monies. It is clear, however, that whether the disclosure is internal or external, society will only be benefitted if the organization uses the information to stop the wrongful behavior.

VI. CONCLUSION

It is clear that the call to conscience has had limited appeal

252. *See* Dworkin & Callahan, *supra* note 117, at 267 (discussing government protection for internal whistleblowing). Organizational advantages include giving the organization the opportunity to take corrective action, thereby reducing the likelihood of lost business, adverse publicity, litigation, fines or other criminal sanctions. The organization can build loyalty and ethical behavior by listening to, and/or rewarding the whistleblower. Finally, misperceptions on the part of the whistleblower can be more easily corrected. *See also* Jensen, *supra* note 184, at 324-25 (noting that employee loyalty often involves confidentiality and understanding of importance of inside information).

253. For a discussion of corporations offering such rewards, see *supra* note 1.

for potential whistleblowers. Virtue may be its own reward, but for many, money is more gratifying. Thus, widespread legislative attention, on both federal and state levels, has been given to the idea of support for whistleblowers. Although few would disagree that the extension of legal protection to persons who suffer retaliation as a result of blowing the whistle is appropriate, the advisability of affirmatively encouraging whistleblowing through financial incentives remains in question.

The 1986 amendments to the FCA, strengthening that financial incentive, have spurred reporting and enriched both the federal treasury and relators, presumably by encouraging persons who would not otherwise blow the whistle to make disclosures of wrongful conduct.[254] There are, however, practical costs associated with this privatization of the law enforcement function, in addition to the policy concerns.[255]

Are the gains worth the price? A few more millionaires, and a few million dollars for the federal treasury are probably not worth the loss of trust and atmosphere of cooperation. Other significant gains must occur if this system of encouraging whistleblowing is to be deemed desirable. If financial incentives significantly increase the number of individuals willing to speak out against harmful activity, deter potential wrongdoers by the threat of whistleblowing, facilitate the redress of wrongdoing that has occurred, and encourage organizations to police themselves, then self-interested law enforcement may be worth its costs. A reduction in wrongdoing, not the individual benefit to snitches, is the final, societal reward.

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254. The government has recovered almost $70 million, and relators, $9 million. Waldman, *supra* note 181, at 13.

255. For a discussion of some of these concerns, see *supra* notes 244-52 and accompanying text. In governmental terms, the Justice Department has been forced to reorder priorities in some instances, taking law enforcement resources away from areas that the Department may deem to be more in the national interest. *FCA Implementation Hearing, supra* note 118, at 9-14 (testimony of Stuart Gerson). In 1989, the Justice Department estimated that one-quarter of attorney time in the Civil Fraud Section was spent on FCA claims, but the amount recovered was only a small portion of the amount recovered in other types of claims. Strasser, *supra* note 22, at 42. The government had joined in few cases at that time, however, and even fewer had been resolved to the point of recovery.