

## WOMEN AND WHISTLEBLOWING: EXPLORING GENDER EFFECTS IN POLICY DESIGN

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### *Abstract*

*Laws that incentivize employees to blow the whistle when they perceive a financial risk and protect them from retaliation have sharply increased in popularity and have even become commonplace at the state level for fraud related to government money. Dodd-Frank codified a similar kind of protection for whistleblowers who report private-sector fraud. This Note suggests that states, especially New York, have an opportunity to propose new financial fraud whistleblower legislation in response to the Trump administration's efforts to reduce the federal government's active regulatory role in the financial sector. However, the prevalence and potential of such legislation should inspire a closer look at how legal mechanisms target and encourage participation across the employee population. Any program that seeks to encourage participation within an existing context, such as the financial services workplace, risks entrenching bias and inequality if it fails to consider the differential effects of its design across different demographics.*

*This Note therefore addresses whistleblower laws' implications for women employees' participation in whistleblowing when they observe financial services sector-based misconduct. It reviews existing research regarding women's participation<sup>1</sup> in*

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1 This Note addresses gender only in terms of a binary distinction between men and women. This conception of gender is unfortunately but necessarily narrow because it reflects the state of the existing research on gender effects of whistleblowing mechanisms. *See, e.g.,* Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151 (2010) [hereinafter Feldman & Lobel, *Incentives Matrix*] (comparing the responses of men as opposed to women in a survey that studied various legal mechanisms, without greater nuance regarding gender identity); Michael T. Rehg et al., *Antecedents and Outcomes of Retaliation Against Whistleblowers: Gender Differences and Power Relationships*, 19 ORG. SCI. 221, 235 (2008) (studying the frequency of whistleblowing

*whistleblowing and considers how that evidence should shape choices of policymakers who seek to encourage employee reporting while still fostering workplace environments and regulatory structures that value and benefit from women's voices.*

## INTRODUCTION

“Whistleblowing,” or an employee’s act of reporting misconduct when he or she observes it within an organization, is the result of a complicated calculation on the reporting employee’s part. The whistleblower makes the choice to “change, rather than escape from, an objectionable state of affairs,”<sup>2</sup> and that will only happen when an employee decides that the costs that come with reporting wrongdoing do not outweigh the benefits.<sup>3</sup>

This Note considers both internal reporting (such as to a company hotline or a manager) and external reporting (such as to the government or a media outlet) types of whistleblowing. The nature and effects, as well as the moral status and attendant risks, of these two kinds of reporting diverge sharply. However, to the extent that existing or potential policies attempt to encourage compliance through voluntary private action, the frequency of both these kinds of action speaks to policies’ successes.

Furthermore, the effects of a law like the federal Dodd-Frank Act (“Dodd-Frank”) reach beyond the reporting systems that it structures directly—that is, formal reporting to a government agency. Rather, an important suggestion based on the academic literature is that we should expect laws that explicitly relate only to external reporting to increase the moral salience of whistleblowing and therefore impact a broader range of reporting behaviors. Therefore, I adopt an expansive whistleblower definition: “organization members . . . who disclose illegal, immoral, or illegitimate practices . . . to [those] who may be able to effect action,”<sup>4</sup> regardless of where the “persons or organizations” who receive the reports sit.

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and of retaliation in response to whistleblowing by comparing survey responses of employees identified as “men” and “women”).

2 Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1071 n.4 (2014) (citing ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 30 (1970)).

3 *Id.* at 1176.

4 Norman D. Bishara et. al., *The Mouth of Truth*, 10 N.Y.U. J. L. & BUS., 37, 43 (2013) (citing Granville King III, *The Effects of Interpersonal Closeness and Issue Seriousness on Blowing the Whistle*, 34 J. BUS. COMM. 419, 420–21 (1997)).

Whether an individual makes an internal or an external report, regulation and law affect the calculation that leads the whistleblower to reach out and report conduct. Laws can provide protection from retaliation, assurances of confidentiality, or monetary incentives. In fact, state and federal False Claims Act (FCA) legislation,<sup>5</sup> as well as Dodd-Frank,<sup>6</sup> have used monetary incentives and inspired controversy among commentators for doing so. This Note contemplates the potential effectiveness of a mini Dodd-Frank that implements the same policies on a statewide basis, which was a model the New York State Attorney General alluded to developing in February 2015.<sup>7</sup> Financial incentives for whistleblowers therefore figure particularly prominently in the following analysis.

Policy discussions in cities throughout the country and in liberal-leaning states like New York have focused on attempts to counteract and resist Trump administration initiatives that have struck a chord and inspired anxiety among local citizens.<sup>8</sup> The administration has also signaled its willingness to embark on an “extensive effort to loosen regulation on banks and other major financial companies.”<sup>9</sup> This area presents itself as another opportunity for New York’s leaders to wield the state’s power in the opposite, progressive direction of the administration’s policies.

Research regarding the current landscape of federal and state whistleblowing legislation offers extensive implications for how a thoughtful new law would form. This Note identifies and discusses research conclusions regarding women and whistleblowing<sup>10</sup> and highlights

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5 *Id.* at 52.

6 *Id.* at 49; Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010).

7 Press Release, A.G. Schneiderman Proposes Bill To Reward And Protect Whistleblowers Who Report Financial Crimes (Feb. 26, 2015), <https://ag.ny.gov/press-release/ag-schneiderman-proposes-bill-reward-and-protect-whistleblowers-who-report-financial> [perma.cc/8XCR-75F7].

8 Heather Gerken et al., ‘All Resistance Is Local’: A Plan of Progressive Action for the Trump Years, THE NATION (Nov. 29, 2016), <https://www.thenation.com/article/all-resistance-is-local-a-plan-of-progressive-action-for-the-trump-years/> [perma.cc/AAR4-5H4H] (describing a strategy for liberal-leaning cities and states to resist Trump administration policies and specifically highlighting New York Governor Andrew Cuomo’s “insiste[nce] that New York will be a ‘refuge’ for Muslims and other minority groups”).

9 Ben Protess & Julie Hirschfeld Davis, *Trump Moves to Roll Back Obama-Era Financial Regulation*, N.Y. TIMES (Feb. 3, 2017), [https://www.nytimes.com/2017/02/03/business/dealbook/trump-congress-financial-regulations.html?\\_r=0](https://www.nytimes.com/2017/02/03/business/dealbook/trump-congress-financial-regulations.html?_r=0) [perma.cc/J9BR-ZUB6].

10 See generally Feldman & Lobel, *Incentives Matrix*, *supra* note 1 (engaging in an extensive survey study to ascertain the effects of context, employees’ characteristics, and severity of the observed misconduct on the

important takeaways for policymakers attempting to craft a whistleblowing system that encourages all employees, regardless of gender, to raise their voices and participate in the monitoring mechanisms the law creates.

This Note attempts to envision the components of a gender-effect-conscious whistleblowing policy that could be effectively implemented at the state level. Despite existing research, a central conclusion is that further, more specific research into the particular circumstances of women in the New York financial services industry would be necessary to develop a thorough policy proposal that will achieve this goal. However, given what we know, I emphasize that including a duty to report in a whistleblower law would potentially serve to enhance women's participation in workplace reporting.

Part I situates whistleblowing policy in the broader relevant historical, legal, and political context. It addresses the status of whistleblowing in terms of public perception, existing law, and the "New Governance" philosophy that has underpinned most twenty-first century compliance efforts. Evidence of a sea change in state false claims laws in particular lends strength to the idea that there is potential for a similar shift in the way states deal with damaging financial fraud. Next, Part II describes the extensive social science research that indicates that superficially gender-neutral whistleblower mechanisms affect men and women differently. Given that research, Part II also considers what gender effects we would expect from aspects of the proposed law as it was described in 2015. Finally, Part III addresses the question of what the social and legal whistleblowing context demands of policymakers concerned with drafting and implementing a whistleblower law that will encourage diverse participation. This Part emphasizes the need for a detailed inquiry into the context of the financial services industry in particular, in an effort to avoid misapplying general conclusions about female employees to the behavior of professional women who work in a specific industry and are therefore likely to have had distinct experiences. However, Part III also offers suggestions for mechanisms that policymakers should consider, given the information that is currently available.

## **I. Current Whistleblower Landscape**

### **A. Politics and Perception of Whistleblowing**

At best, the public responds to whistleblowers as heroes who stand up against powerful forces to protect the public interest. But public perception can also feed off of a natural

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likelihood of employees to blow the whistle, given various legal mechanisms).

distaste for tattletales, leading to distrust and a perception that whistleblowers report for selfish, destructive reasons.<sup>11</sup> Interviews on the subject indicate that the public is inconsistent in its evaluation of whistleblowers. Interviews led to subjects admitting that the category includes the quintessential brave reporter, but they also reflected an expectation that some whistleblowers are disgruntled employees or slightly unhinged troublemakers.<sup>12</sup> Fear of such accusatory or derogatory responses to whistleblowing weigh on employees deciding whether to report on misconduct.

On one hand, employees may worry about explicit retaliation from inside their organizations, including demotion and firing. Corporations and public organizations alike at least present a pro-whistleblower attitude in many cases, encouraging employees to report wrongdoing in order to bolster performance.<sup>13</sup> However, actual employees respond not to those formal messages but to accounts of previous whistleblowers' negative experiences and to the realities of power dynamics within organizations, which discourage participation. According to one whistleblower advocate, the employees thinking about reporting assume "the fact that adverse consequences are generally not assured but their occurrence is probabilistically determined."<sup>14</sup> Employees are conditioned to understand that any product or company action comes with some kind of risk, and that is built into their work in some way. The risk of retaliation based on a whistleblowing tip that receives a hostile response, though, is actually more difficult to manage by comparison.<sup>15</sup> Research indicates that these concerns structure not just whether but also how a reporter blows the whistle. Employees who fear retaliation from superiors may turn to external reporting in an effort to find protections that they do not see within their organizations.<sup>16</sup>

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11 Bishara et al., *supra* note 4, at 7 ("[L]egislators often seem ambivalent about rewarding 'tattle-tales.' Some commentators, as well, have derisively referred to rewards paid to whistleblowers as "bounties" that may encourage whistleblowers to report wrongdoing externally, rather than within the organization, to maximize personal reward.").

12 Milton Heumann, *The World of Whistleblowing: From Jiminy Cricket to the Wicked Witch of the West* 56–67 (Feb. 16, 2012) (unpublished manuscript), [https://works.bepress.com/milton\\_heumann/1/](https://works.bepress.com/milton_heumann/1/) [perma.cc/T6HW-JRBA].

13 *Id.* at 50–52.

14 *Id.* at 51–52.

15 *Id.*

16 Janet P. Near & Marcia P. Miceli, *Whistle-Blowing: Myth and Reality*, 22 J. MGMT. 507, 509–10 (1996).

But well-known whistleblowers' experiences in the past have indicated even more far-reaching negative effects that follow from reporting. Beyond discrete incidents of job loss, retaliation against whistleblowers can include isolation in the workplace.<sup>17</sup> The cost of whistleblowing can reach to family strife and long-term financial well-being. The risk of psychological consequences and anxieties that come with reporting should not be understated: whistleblowers as a whole tend to suffer from alcoholism and depression.<sup>18</sup>

Conflicting ideas about whistleblower motivations characterize social attitudes toward whistleblowers. Public discourse can paint whistleblowers as heroes or snitches,<sup>19</sup> selfish or altruistic.<sup>20</sup> The overview of existing whistleblower laws can also be interpreted to reflect that range of ideas about whistleblower motivation.

### B. Current Law at the State Level

To understand what the addition of a law that covers and encourages reporting on financial wrongdoing would mean, it is important to appreciate the current, limited applicable whistleblowing law in New York. While N.Y. Labor Law § 740 covers public and private employees, it is written to apply only to reports that implicate public health or safety.<sup>21</sup>

The courts have interpreted the “danger” requirement narrowly, and, despite the central position of the financial services industry in the state, reports of “financial improprieties”

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17 Richard Lacayo & Amanda Ripley, *Persons of the Year 2002: The Whistleblowers*, TIME, Dec. 30, 2002. See also Heumann, *supra* note 12, at 58 for a discussion of one military whistleblower whose moral stance led to community isolation.

18 *See generally* Lacayo & Ripley, *supra* note 17. Demonstrating the public perception of whistleblowing's professional and personal risks, TIME reported that “whistle-blowers don't have an easy time,” that “[i]f they aren't fired, they're cornered: isolated and made irrelevant,” and that “[e]ventually many suffer from alcoholism or depression.” *Id.*

19 Bishara et al., *supra* note 4, at 95.

20 Heumann, *supra* note 12, at 57–64.

21 The law defines employer as “any person, firm, partnership, institution, corporation, or association that employs one or more employees.” The public health and safety factor comes through in the requirement that the activity the whistleblower reports on “presents a substantial and specific danger to the public health or safety.” N.Y. LAB. LAW § 740 (McKinney 2017); *see also* Barker v. Peconic Landing at Southold, Inc., 885 F. Supp. 2d 564, 567 (E.D.N.Y. 2012). When it applies, the law affords anti-retaliation protections to whistleblowers when reports implicate a matter of public health or safety. There are no financial incentives embedded in the law.

do not garner protection against retaliation under § 740.<sup>22</sup> The law also steers away from more controversial mechanisms, dealing only with anti-retaliation rather than including a framework for monetary incentives or a duty to report.

### 1. Monetary Incentives in Whistleblower Statutes Today

Monetary incentives inspire suspicious criticism founded on the possibility that whistleblowers will come forward “to maximize personal reward.”<sup>23</sup> However, despite those criticisms, thirty years on, commentators are comfortable calling the “effectiveness of the [Federal False Claims Act]”—which includes opportunities for whistleblowers to gain personal awards—“evident.”<sup>24</sup> The federal version of the law has inspired state legislatures in thirty-one states, including New York, to develop similar structures.<sup>25</sup>

State False Claims Acts (“FCAs”) are the only state-level examples of financial incentive mechanisms in current law. By focusing on claims for government funds, these provisions all benefit from a public-service ethos. State-level FCAs, like the Federal version of the law, provide for whistleblower awards through *qui tam* suits, using a two-plaintiff structure.<sup>26</sup> In this model, private citizens (usually employees of the defendants) file on behalf of the government claiming that a federal contractor has defrauded a government entity. Depending on the circumstances of the suit, a *qui tam* plaintiff may receive between ten percent and thirty percent of the award in a successful claim. The New York State False Claims Act tracks with the federal law’s guidelines.<sup>27</sup>

The FCA regime embeds flexibility and discretion in the recovery process, and those

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22 *Barker*, 885 F. Supp. 2d at 570.

23 Bishara et al., *supra* note 4, at 64; *See also* Geoffrey Christopher Rapp, *Beyond Incentives: Making Corporate Whistleblowing Moral In The New Era Of Dodd-Frank Act “Bounty Hunting,”* 45 CONN. L. REV. 483, 486–87 (2012) (expressing concern that the Dodd-Frank Act, as written “appeals without apology to an informant’s greed”).

24 Bishara et al., *supra* note 4, at 63.

25 Of the forty states with False Claims Acts, thirty-one of them, and Washington, D.C., provide for whistleblowers to gain personal monetary rewards. *Id.* at 61.

26 In *qui tam* actions, a statute allows for a private citizen to sue a defendant for violating a public law. In such a case, the private person and a government entity each receive a portion of the penalty if the defendant is found liable. *Qui Tam Action*, BLACK’S LAW DICTIONARY (10th ed. 2014).

27 N.Y. STATE FIN. LAW § 190(6) (McKinney 2017) (setting the range of possible awards between fifteen and thirty percent).

mechanisms provide opportunities to prevent some of most distasteful, gross stereotypes of whistleblowers from being associated with the system. The law provides meaningful mechanisms for the government to monitor and adjust whistleblowers' awards based on the conditions of the fraud they reported. For example, if an individual carries on with a claim that the government itself would have abandoned, then they will garner at least twenty-five percent of the final claim.<sup>28</sup> But the law also builds in specific discretion for the court to reduce the award in the event that the whistleblower "planned or initiated the violation . . . upon which the action was brought."<sup>29</sup> These discretion-granting provisions, coupled with the law's substantive focus on claims against the government, ensures that whistleblowers who profit from reporting their employers are likely to remain moral actors in the eyes of the public.

Currently, state legislatures across the country demark which reports constitute whistleblowing valuable enough to warrant a reward using a public service element as a heuristic for ethical value. However, a glance at the history of state FCAs demonstrates that legislatures' conception of appropriate whistleblower policy is not static and can in fact evolve rapidly, given the right conditions. There were very few state-level FCA copycats in the years immediately following the 1986 Federal False Claims Act revision that added *qui tam* claims in the federal version of the law.<sup>30</sup> However, development in this brand of whistleblower law happened quickly and recently. By 2004, nineteen states had FCA laws that provided substantial rewards to *qui tam* plaintiffs, and today, more than thirty have codified similar rules.<sup>31</sup>

A state-level whistleblower law that covers reporting on financial fraud would make New York an outlier if the proposal gains traction now. But the wave of state-level FCAs seen in the last two decades provides a realistic example of states responding to well-received federal whistleblower regulation by mimicking its provisions. The result was a sea change in whistleblower protection throughout the beginning of the twenty-first century, and regulation addressing financial fraud could be the next arena for a similar transformation.

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28 *Id.*

29 *Id.* at § 190(8).

30 Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 110 (2000) ("[In 2000, only] two states, Illinois and Florida, offer[ed] significant rewards for whistleblowing through a false claims-type statute.") (footnotes omitted).

31 Geoffrey Christopher Rapp, *States of Pay: Emerging Trends in State Whistleblower Bounty Schemes*, 54 S. TEX. L. REV. 53, 61, 75 (2012).



## 2. Dodd-Frank in Application

The Dodd-Frank Act provides the only example of a financial incentive program for whistleblowers in the financial services industry. It tracks with the FCA's whistleblower incentives, providing for a "[t]en to thirty percent reward for original information that leads to monetary sanction under any securities law" and builds on pre-existing anti-retaliation protections in the Sarbanes-Oxley Act.<sup>32</sup> The law allows for whistleblower awards without a dual-plaintiff structure, and it implicitly expands the range of whistleblower activity that the federal government deems valuable enough to warrant not only protection but financial incentive.

Culturally and strategically, that expansion was a response to the 2008 financial crisis and a "reaction to the role of corporate malfeasance in sparking [the crisis]."<sup>33</sup> Dodd-Frank opened the door to redefining financial misconduct as not just immoral but dangerous to the public. We might understand the Trump administration's deregulation rhetoric as an attempt to revise that approach as a matter of attitude as well as policy. Specific acts to revise or reverse Dodd-Frank provisions have come more slowly than the administration's earlier language indicated the country could expect.<sup>34</sup> But administration-backed legislation that has earned attention from Congress takes aim at the law's current structure, specifically loosening banking regulations.<sup>35</sup>

Under Dodd-Frank, eight whistleblowers earned rewards in 2015. The awards total thirty-seven million dollars, with thirty million dollars going to just one whistleblower. Since August 2011, the Commission has received a total of 116 whistleblower tips. About half of the whistleblowers who received awards gave tips that led to the opening of a new investigation, and the other half significantly contributed to existing investigations. The SEC considers a variety of factors in determining the award the reporting employee

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32 Bishara et al., *supra* note 4, at 62.

33 *Id.* at 41.

34 *An Assessment of the White House's Progress on Deregulation*, THE ECONOMIST (Oct. 14, 2017), <https://www.economist.com/news/business/21730170-donald-trump-has-blocked-new-regulations-ease-repealing-old-ones-will-be-harder> [perma.cc/42AW-AJWA] (arguing that the administration's work on financial deregulation has, in fact, been "more thoughtful than zealous" and describing several administration reports on financial regulation published by the fall of 2017).

35 Renae Merle, *House Passes Sweeping Legislation to Roll Back Banking Rules*, WASH. POST (June 9, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/06/08/house-to-vote-on-sweeping-rollback-of-banking-rules/> [perma.cc/77F7-UDAP].

garners, which allows case-by-case flexibility.<sup>36</sup> Attempting to use internal channels before reporting to the SEC weighs in favor of the whistleblower.

### **B. Considerations for Whistleblower Design and Organizational Equality**

Lessons from past important revisions in whistleblower financial regulation law indicate that, given the state-level resistance to the current presidential administration, progressive states like New York have the opportunity to reorient standards for whistleblower provisions in their jurisdictions. Contrary to existing state whistleblower law, a “mini-Dodd-Frank” would embody a reassessment of how serious and destructive financial fraud can be. While existing New York State protections and their accompanying case law provide no avenue for expanding protected whistleblowing action by broadening the state’s definition of a “threat to public health or safety,”<sup>37</sup> the proposed Act, like Dodd-Frank, would in effect elevate some kinds of financial fraud to a position that more closely resembles public health threats. Attorney General Schneiderman’s office was contemplating this goal by 2015, when it proposed the New York State Financial Frauds Whistleblower Act. The proposal’s structure was similar to the Dodd-Frank whistleblower provisions: it covered whistleblowers who report fraud in “banking, insurance and financial services industries” and also included anti-retaliation protections.<sup>38</sup>

As New York and other states turn to options for productive and creative financial regulation, looking for new ways to challenge and alleviate the effects of policies at the federal level, a state law of this kind has potential to be a valuable tool. However, at this stage, years into a respected FCA regime at the state level, it is appropriate for state policymakers to look critically at the way the whistleblower mechanisms they choose may systematically raise or depress the voices of particular workers. The “business case”

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36 Factors to consider include: “whether the information allowed [the agency] to bring: (1) [A] successful action in significantly less time or with significantly fewer resources; (2) additional successful claims; or (3) successful claims against additional individuals or entities.” Implementation of the Whistleblower Provisions of Section 21F, Exchange Act Release No. 34-64545, 76 Fed. Reg. 34300, 34325 (May 25, 2011).

37 *McGrane v. Reader’s Digest Ass’n, Inc.*, 822 F. Supp. 1044, 1051 (S.D.N.Y. 1993).

38 Press Release, A.G. Schneiderman Proposes Bill, *supra* note 7. The design mimics the Dodd-Frank Act in that a potential award can be determined on a sliding scale from ten to thirty percent of the claim against the wrongdoer. The Act would also ensure the confidentiality of employee’s report and provide anti-retaliation protections that cover “discharging, demoting, suspending or harassing employees that report on suspicious or fraudulent activity.” Erick Naing, *New York AG Pushes Financial Whistleblower Bill*, CQ ROLL CALL, 2015 WL 826247 at 1 (Feb. 27, 2015).

for diverse participation is an increasingly common refrain in the professional world.<sup>39</sup> Thought leaders in business cite evidence that companies perform better when “gender-balanced” teams lead on projects to argue that diversity is an “economic issue” that “can benefit business and economic performance, thereby impacting all stakeholders.”<sup>40</sup> Surely, a similarly diverse cohort of engaged employees reporting on serious wrongdoing would also be vital. But beyond the instrumentalist arguments for gender diversity is a more basic question of whistleblowing legitimacy as a form regulatory policymaking.

Effective whistleblowing structures allow for employee networks to effectively fill in for government parties in their monitoring capacity. Government does not have the resources or the expertise to track and respond to the range of wrongdoing that might go on in a financial services company. At best, when internal reporting leads to immediate responses from corporate managers, a robust whistleblowing structure removes a portion of the burden of both monitoring and enforcement from government agencies. And when corporate managers support the reported wrongdoing or are unwilling to remedy it, external whistleblowing draws government resources to those areas where they are most needed.

In recognizing that government-structured whistleblower laws serve a function that was exclusive to government agencies and based almost entirely on affirmative regulation in previous generations,<sup>41</sup> the need to thoroughly consider the impact of mechanisms on

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39 Sangeeta Bharadwaj Badal, *The Business Benefits of Gender Diversity*, GALLUP BUS. J. (Jan. 20, 2014), <http://www.gallup.com/businessjournal/166220/business-benefits-gender-diversity.aspx> [perma.cc/A9LY-RWRU] (finding that “gender-diverse business units have better financial outcomes than those dominated by one gender” in study of more than 800 business units in two companies in retail and hospitality); Marcus Noland & Tyler Moran, *Study: Firms with More Women in the C-Suite Are More Profitable*, HARV. BUS. REV. (Feb. 8, 2016), <https://hbr.org/2016/02/study-firms-with-more-women-in-the-c-suite-are-more-profitable> [perma.cc/UK6A-X3YY] (finding advantage to firms with more women in leadership roles or “the C-suite” in global survey of nearly 22,000 firms and specifically finding that “going from having no women in corporate leadership (the CEO, the board, and other C-suite positions) to a 30% female share is associated with a one-percentage-point increase in net margin—which translates to a 15% increase in profitability for a typical firm.”).

40 Michel Landel, *Why Gender Balance Can't Wait*, HARV. BUS. REV. (Mar. 8, 2016), <http://hbr.org/2016/03/why-gender-balance-cant-wait> [perma.cc/V7KW-PP2M] (describing a study of the author’s own company, Sodexo, which indicated that teams with gender-balanced management perform better on a number of scales, including generating profit and client satisfaction).

41 See Yuval Feldman & Orly Lobel, *Decentralized Enforcement in Organizations: An Experimental Approach*, 2 REG. GOVERNANCE 165, 168 (2008) [hereinafter Feldman & Lobel, *Decentralized Enforcement*] and Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344 (2004) for a description of how the whistleblower role aligns with the New Governance paradigm, which shifts policy from expert-devised, “command and control” regulation to decentralized, bottom-up collaboration.

participation becomes more urgent. Where business leaders' efforts at gender-balanced participation can be defended, and championed, on the basis of their companies' bottom lines, government-devised incentives that produce inequality deserve criticism on a more fundamental basis. The private sector remains, despite efforts to rectify its shortcomings, measurably unequal.<sup>42</sup> As they currently stand, modern corporations structurally encourage women's underrepresentation. Policymakers therefore have a responsibility to ensure that the whistleblowing mechanisms they design avoid reifying the inequalities already at work in corporate structures. Policies that harness private action and encourage compliance through internal structures have the potential for success. But moving away from government regulation also risks that the quasi-enforcement compliance mechanisms that develop in private firms will replicate existing bias in the private sector instead of accurately reflecting the range of voices we expect in a democratic system.

Existing research shows that gender and culture affect potential whistleblowers' responses to whistleblower policy options, such as financial incentives, confidentiality assurances, and establishing a duty to report.<sup>43</sup> Applying these findings, any state law on this topic will interact with individual-level employee characteristics to affect the nature and quality of whistleblower reports.

## **II. Whistleblower Design: Divergent Effects of Legal Mechanisms and Observed Misconduct Based on Demographic Differences**

Academic research and experience with existing law indicate that whistleblower mechanisms create divergent effects, and results differ based on the type of misconduct potential whistleblowers observe and on demographic differences among whistleblowers. The workplace, its rules, and its dynamics are unavoidably linked to relationships and context inside and outside corporate offices. As states and the federal government seek to push regulatory efforts into the private sector with whistleblower policies, policy designers should be cognizant of the gender dynamics onto which whistleblower rules and incentives are grafted. Whistleblowing in any workplace is, at its heart, an exercise of the employee's

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42 Research shows, for example, that in 2006 women held 14.6% of all Fortune 500 board seats. Kevin Campbell & Antonio Minguez-Vera, *Gender Diversity in the Boardroom and Firm Financial Performance*, 83 J. BUS. ETHICS 435, 438 (2008); see also Cindy A. Schipani et. al., *Women and the New Corporate Governance: Pathways for Obtaining Positions of Corporate Leadership*, 65 MD. L. REV. 504, 511 (2006).

43 See generally Feldman & Lobel, *Incentives Matrix*, *supra* note 1 (engaging in an extensive survey study to ascertain the effects of context, employees' characteristics, and severity of the observed misconduct on the likelihood of employees to blow the whistle, given various legal mechanisms).

“voice” in the face of company misconduct.<sup>44</sup>

Yuval Feldman and Orly Lobel provide one of the most comprehensive examinations of the interaction between gender and the design of whistleblower laws. Their work appears throughout this Note’s discussion of how to incorporate relevant research into policy design, and their insight that “important interactions between different types of legal incentives and the demographics of individuals for which they are designed, including gender, levels of income, job status, and professional roles,”<sup>45</sup> shape the potential whistleblowers’ decision-making guides this Note’s arguments.

The following analysis limits itself to questions about the way that women as opposed to men respond to whistleblower legal mechanisms. It is therefore extremely narrow, as the foundational idea that multiple demographic realities affect individuals’ responses to the law demands that policymakers pay attention to characteristics *beyond* gender as well. Nevertheless, isolating the gender effects of whistleblower design can serve as a first step in understanding the interaction between individual-level characteristics and whistleblower policies. At the same time, it is evident that a more comprehensive inquiry that includes, for example, an analysis of race, class, and sexual orientation effects, would be necessary for a more complete picture.

The nature of whistleblowing makes field studies about the choice to report misconduct unworkable. However, researchers aiming to evaluate whistleblower behavior have turned to experimental studies in which they present a sample of workers with a series of conditions related to misconduct and/or other aspects of a workplace situation.<sup>46</sup> Researchers then ask about what the interviewee’s response would be to the observed misconduct and make their conclusions based on the responses of large samples.

### A. Increasing the Ethical Salience of Financial Fraud

The nature of the observed misconduct is one important dimension of whistleblowing. For example, research has compared financial fraud to other kinds of misconduct, such as sexual harassment, and found that the internal ethical motivation that financial wrongdoing

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44 Alexander & Prasad, *supra* note 2, at 1071.

45 Feldman & Lobel, *Incentives Matrix*, *supra* note 1, at 1187–89.

46 Granville King III, *The Effects of Interpersonal Closeness and Issue Seriousness on Blowing the Whistle*, 34 J. BUS. COMM. 419 (1997) (measuring nurses’ likelihood of reporting misconduct, studying the effects of misconduct’s severity and interpersonal closeness); Feldman & Lobel, *Incentives Matrix*, *supra* note 1.

inspires is much less intense than the motivation more morally reprehensible conduct spurs.<sup>47</sup> Where a moral reaction will lead to whistleblowing on its own, financial incentives become more relevant when the internal or ethical motivation associated with misconduct is lower.<sup>48</sup> Even within categories of misconduct that are inherently higher-stakes, research has indicated that severity matters to a would-be whistleblower's likelihood to report.<sup>49</sup> One study that focused on nurses' likelihood of reporting errors in their workplace—where mistakes and wrongdoing are always related to a patient's health—showed that “issue seriousness” had a statistically significant effect on whether employees tended to report to their supervisors.<sup>50</sup>

Financial fraud inspires a weaker ethical reaction, as demonstrated in Feldman and Lobel's 2010 experimental survey. That survey of 2,000 people further indicated that monetary incentives could be useful as an instrument to encourage reporting where inherent ethical motivation was low.<sup>51</sup> Even as compared to creating a duty to report (another mechanism for encouraging whistleblowing that the study evaluates),<sup>52</sup> they found that “when internal motivation is missing, for example when the misconduct is perceived as low in severity, external incentives mattered much more.”<sup>53</sup>

Experience with federal precursors to the Dodd-Frank Act aligns with that evidence. The Insider Trading and Securities Fraud Enforcement Act of 1988, which applied to insider trading only (as opposed to the broader range of finance-related conduct that the

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47 Feldman & Lobel, *Incentives Matrix*, *supra* note 1, at 1202–04.

48 *Id.*

49 King, *supra* note 46, at 424.

50 The two types of nurse misconduct that participants considered were failing to wash hands between patient visits (the less serious conduct) and administering the incorrect medicine to patients (the more serious conduct). Also, note that while seriousness mattered to employees' tendency to report to their direct supervisors, King did not find that seriousness was significant to reporting to peers (other staff nurses) or to administrators. Seriousness also did not prove significant to the likelihood of retaliation. *Id.* at 429 (“Results were not significant for reporting the wrongdoing to other staff nurses, to administrators, and the likelihood of retaliation.”).

51 Feldman & Lobel, *Incentives Matrix*, *supra* note 1, at 1202–04.

52 *Id.* (The study compared four types of whistleblower policy: (1) Anti-retaliation Protection; (2) Duty to Report; (3) Liability Fines; and (4) Monetary Incentives.)

53 Orly Lobel, *Linking Prevention, Detection, and Whistleblowing: Principles for Designing Effective Reporting Systems*, 54 S. TEX. L. REV. 37, 46 (2012) [hereinafter Lobel, *Linking*].

federal Dodd-Frank Act covers), had a ten percent award cap for whistleblowers.<sup>54</sup> The law resulted in only seven payments to five claimants over two decades.<sup>55</sup> The Dodd-Frank Act, the provisions of which allow for a greater recovery relative to the penalty that comes out of the whistleblowing, has seen much stronger activity under its whistleblower provisions. Eight whistleblowers received awards totaling millions of dollars in 2011 alone under Dodd-Frank.<sup>56</sup> The law's structure, which allows for between ten and thirty percent recovery, has been able to capitalize on the experience and knowledge of employees in a way that the 1988 Act did not. Something about the structure of Dodd-Frank re-shapes potential whistleblowers' calculi of cost versus benefit more effectively than the more conservative, less flexible earlier program.

The general agreement that monetary awards are the "most effective legislative incentive" available to lawmakers reflects the higher-level research findings that Feldman and Lobel, as well as others, report.<sup>57</sup> We should note, however, that the potential effects of a whistleblower protection law go beyond a mechanism's mere presence or absence. As Bishara et al. point out, we should attribute the success of the FCA to the structure that the law provides for reporting and recovery. The FCA's incentive structure cannot be isolated from its other features, including: (1) the certainty of the award, (2) the clarity of the whistleblower procedures, and (3) the degree of control that the whistleblower has over the case.<sup>58</sup>

Furthermore, introducing and passing a new piece of legislation has an expressive value.<sup>59</sup> A law that directs government attention and resources, not only at controlling financial fraud but specifically at encouraging and rewarding individuals to blow the whistle when they observe that conduct, both emphasizes the severity of corporate wrongdoing and

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54 Howard M. Friedman, *The Insider Trading and Securities Fraud Enforcement Act of 1988*, 68 N.C. L. REV. 465, 479 (1990).

55 Office of Inspector Gen., U.S. Sec. & Exch. Comm'n, Report No. 474, Assessment of the SEC's Bounty Program 5 (2010).

56 SEC, 2015 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM at 10, <https://www.sec.gov/files/owb-annual-report-2015.pdf> [perma.cc/ZC2B-S85J] [hereinafter SEC, 2015 ANNUAL REPORT].

57 Bishara et al., *supra* note 4, at 93.

58 *Id.*

59 Feldman & Lobel, *Incentives Matrix*, *supra* note 1, at 1183 n.203 (observing that individuals respond to signals in the existing legal system to determine what their duties are as citizens and to anticipate what level of social support they can expect for steps they choose to take). For the purposes of this Note, this bears on the choice to report corporate wrongdoing and receive a monetary reward for that contribution.

bolsters the legitimacy of whistleblowers who make the choice to report and gain a reward from it. The potential norm-shaping influence of attaching a whistleblower provision to financial fraud is illustrated by the aforementioned research and experience with money incentive structures. On one hand, a whistleblower provision would emphasize the importance of financial misconduct in a way that has the potential to increase the internal ethical motivation that Feldman and Lobel observed as “low” for financial fraud reporting.<sup>60</sup> Additionally, passing and enforcing such a provision would support whistleblowing in the face of popular ambivalence about the role of whistleblowers in supporting compliance. As discussed in Part I, public responses to whistleblowing vary widely, and whistleblowers may be praised or vilified. The existence of a state-level Dodd-Frank statute has the potential to guide reactions to the whistleblowers who report financial frauds, increasing the likelihood that their activity will be received as morally valuable and not merely as a bid for attention or monetary gain. This second piece—related to the expressive effect of the law on reactions from peers, based on research related to women in the workplace described below—has particular potential to affect women who consider whistleblowing.

## **B. Gender and Whistleblowing in Academic Research and in Public Discussion**

The question of whether and how women and men respond differently when they observe misconduct in the workplace has been of interest to social science researchers and popular commentators alike. Given the strong, often conflicting, emotional reactions that the public has to whistleblowing and the visible nature of a few high-profile instances of whistleblowing, the topic can be particularly vulnerable to stereotype and assumption. But, given the highly social nature of the choice to blow the whistle, the interaction between formal academic inquiry and armchair commentary on this topic is particularly interesting and potentially revealing.

### **1. Conclusions from Academic Research**

As a starting point, it is worth looking at research that deals with whistleblowing patterns and gender overall, without inquiring into the effects of particular legal mechanisms. The work is mixed, indicating multiple possible narratives, which sometimes conflict.<sup>61</sup> A satisfying answer to the question of whether men or women are, on the whole, more likely to blow the whistle does not emerge from retrospective work on actual whistleblowing that has taken place, or from survey results that ask employees about how they would react in a

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60 *Id.* at 1207.

61 *See id.* at 1177 for the authors’ overview of some of the existing research and possible explanations.



theoretical situation where they observe misconduct. Some work has indicated that internal whistleblowers are more likely to be women than men or, along the same lines, that when external whistleblowing occurs, men are more likely to carry it out.<sup>62</sup> But other research disagrees with, or at least complicates, that observed trend. Some research indicates women are more likely to report to a specific and important type of external contact than men are: law-enforcement.<sup>63</sup> The inconclusive results of existing work underscore the complicated nature of explaining whistleblowing choices.

Furthermore, social science's methods for studying behavior suffer from particularly acute limitations when dealing with whistleblowing. Surveys and case studies that address individuals who did blow the whistle on misconduct encounter "recall difficulties" when attempting to measure differences in whistleblowers' experiences with reporting.<sup>64</sup> Experimental surveys with carefully developed, extensive, and representative response populations<sup>65</sup> provide a valuable tool for studying employee responses to legal mechanisms. However, when the surveys are specifically geared toward culling a representative and varied sample, the study responses may not align with behaviors that are most relevant in the workplace. From a social science perspective, this mismatch is not problematic, but policymakers could find themselves concerned that research indications may not counsel the legislative action that would have the greatest impact in terms of encouraging reliable and fair whistleblowing.

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62 Research about women's reporting is mixed overall. *See, e.g.*, Joyce Rothschild & Terance D. Miethe, *Whistle-Blower Disclosures and Management Retaliation*, 26 *WORK & OCCUPATIONS* 107, 113 (1999), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.472.203&rep=rep1&type=pdf> [perma.cc/724Y-VL7Y] (indicating that internal whistleblowers were more likely to be women). Other studies showed men were more likely to blow the whistle on the whole. *See, e.g.*, Marcia P. Miceli et al., *Blowing the Whistle on Data Fudging: A Controlled Field Experiment*, 21 *J. APPLIED SOC. PSYCHOL.* 271, 288–89 (1991); Randi L. Sims & John P. Keenan, *Predictors of External Whistleblowing: Organizational and Intrapersonal Variables*, 17 *J. BUS. ETHICS* 411, 418 (1998).

63 Feldman & Lobel, *Incentives Matrix*, *supra* note 1, at 1177 (citing Feldman & Lobel, *Decentralized Enforcement*, *supra* note 41).

64 Janet P. Near & Marcia P. Miceli, *Whistle-Blowing: Myth and Reality*, 22 *J. MGMT.* 507, 518 (1996) (discussing the limitations that come with reliance on case studies and noting "obvious recall difficulties associated with this method").

65 *See, e.g.*, Feldman & Lobel, *Incentives Matrix*, *supra* note 1, at 1189 for a description of a sample survey created by the firm Zoomerang.

One narrative that clearly emerges from the research, however, is that women and men respond to whistleblower legal mechanisms in systematically different ways.<sup>66</sup> Across the board, women “were motivated to report by different factors than men,”<sup>67</sup> and they engaged in particular types of reporting with more frequency. One study that Lobel describes included a finding that women are more likely to act based on observing the misconduct themselves, rather than collecting evidence that wrongdoing occurred. But women were less likely to confront the person committing the wrongdoing directly. Rather, they were more comfortable reporting to a third party (either internally or externally).<sup>68</sup> Particularly relevant to this inquiry, women proved more likely than men to report on “corporate misconduct,” and that pattern persisted across the range of legal mechanisms the survey studied.<sup>69</sup>

In terms of legal mechanisms at play, women valued anti-retaliation provisions and confidentiality assurances more than men did. Women also responded more strongly to establishing a duty to report. In whistleblower and compliance law, duties to report have largely been limited to individuals in certain professions. When the Sarbanes-Oxley Act imposed a duty to report in cases of financial fraud, for example, that duty was limited to lawyers.<sup>70</sup> The survey, however, did not frame the duty requirement as an imposition connected with a certain status or profession. Still, women proved significantly more likely to report wrongdoing when a duty was present. Men, on the other hand, reported that they cared more about financial incentives as opposed to women.<sup>71</sup>

A law that focuses primarily on monetary incentives, which likely motivates mostly men to report financial wrongdoing, is not inherently unjust to women in the workplace. However, taking a finer-grained look at the role that women tend to play in whistleblowing, as well as understanding what factors and circumstances explain the observed divergences in the way women and men respond to policies, would allow drafters to better appreciate how a potential law would fit into the existing social and legal dynamics of the workplace.

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66 *Id.* at 1196.

67 Lobel, *Linking*, *supra* note 53, at 49.

68 *Id.*

69 *Id.*

70 *Id.* at 45 n.36.

71 Feldman & Lobel, *Incentives Matrix*, *supra* note 1, at 1196–97 (“Whereas men care significantly more than women about the size of the monetary reward, women are more incentivized by antiretaliation protections and legal duties.”).

In pursuing that goal, it is useful to be aware of the murkiness in these academic works' conclusions about actual patterns in whistleblowing, particularly as juxtaposed with popular reports about internal and external reporting of organizational misconduct. In translating whistleblower experiences into news media, accounts of female whistleblowers and discussions of gender and whistleblowing have tended to fall into the trap of understanding behavior through the lens of either simplified stereotype or idealized, self-sacrificing morality.

## 2. Women Whistleblowers in the News

Some of the most notable and newsworthy examples of whistleblowing in recent history deal specifically with female whistleblowers. In 2002, Coleen Rowley (an FBI attorney), Cynthia Cooper (a former employee at WorldCom), and Sherron Watkins (a vice president at Enron) each gained notoriety for reporting misconduct at their high-profile organizations, and TIME magazine also highlighted the three as their "Persons of the Year."<sup>72</sup>

The nature of TIME's yearly report lends itself to simplification and storytelling over nuance. The article gushes about the women's choices to blow the whistle, giving an idealized account of the "good" kind of whistleblowing: "What we saw in these three women was ordinary people from the heartland doing an extraordinary thing, which is telling the truth and telling the truth because they believed that telling the truth would improve, change, and redeem the institutions they loved so much."<sup>73</sup> But the article also exploited popular ideas and stereotypes about women in developing a narrative for understanding the action all three whistleblowers took. It's important to the TIME article's account that the 2002 whistleblowers were "reluctant" to take on public roles.<sup>74</sup> The article specifically discusses the term "whistleblower" itself. Calling to mind the discussion in Part I above, TIME paints the women as concerned about presenting themselves as whistleblowers.<sup>75</sup> The TIME account actively pushes readers away from interpreting its subjects as self-absorbed or selfish, consistently mixing its praise of the whistleblowers' reporting with reminders that the women have an aversion to the "limelight."

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72 See generally Lacayo & Ripley, *supra* note 17.

73 *Time Names Whistleblowers as Persons of the Year*, CNN (Dec. 23, 2002), <http://edition.cnn.com/2002/US/12/23/time.persons.of.year/> [perma.cc/KF32-9CZN].

74 Lacayo & Ripley, *supra* note 17.

75 *Id.* ("[T]wo out of the three hate the term whistle-blower.").

This framing is relevant to our understanding of which kinds of organizational participation women feel justified in performing. Specifically, it implicates women's calculations regarding which kinds of participation will have a likely payoff high enough to make assuming the risks that come with the behavior worth it—especially in light of the widely varying responses a whistleblower's conduct can inspire. In the article's closing lines, the TIME authors explicitly praise the 2002 whistleblowers for taking on the responsibilities and challenges of citizenship with their choice to report. However, when the entire piece is infused with the theme that they were quiet, reluctant actors who risked more than they gained, the article gives the ultimate impression that the women earn its praise only after sufficiently justifying and proving the humility of their motives.

Magazine and newspaper articles tend to report common tropes in describing women's involvement in whistleblowing. There are a variety of facially satisfying explanations that writers posit for understanding women's involvement in reporting wrongdoing. One representative article published in *Fortune* in 2014 demonstrates that even a focused discussion about women whistleblowers can serve to reify stereotypes.<sup>76</sup> To its credit, the *Fortune* article avoids making assumptions about women's absolute rate of participation in whistleblowing, calling the activity an "equal opportunity vocation."<sup>77</sup> But, even as it notes that "for every Sherron Watkins . . . there's an Edward Snowden," at the base of the discussion is an assertion that women blow the whistle *differently* from men, and that the divergence is in large part about women's aversion to notoriety. In terms similar to the TIME piece, the article emphasizes that women seek out ways to "operate below the radar"<sup>78</sup> rather than asserting themselves as active, visible participants in enforcing the law.

It is unclear if Sellers (describing arguments that Sherron Watkins herself has expressed regarding whistleblowing) is making the point that women tend to report *internally* versus externally, or if the comment is more qualitative regarding the level of attention women reporters seek. Furthermore, if the comment refers to internal as opposed to external whistleblowing, that conclusion would be contrary to the Feldman and Lobel study's

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76 Patricia Sellers, *Are Women More Likely Than Men to Be Whistleblowers?*, FORTUNE (Sept. 30, 2014), <http://fortune.com/2014/09/30/women-whistleblowers/> [perma.cc/3ZS4-7GD3] (describing three reasons for women's whistleblowing choices as women-specific ways of "tolerat[ing] risk," a "motherhood gene," and women's roles as institutional outsiders).

77 *Id.*; see also Lacayo & Ripley, *supra* note 17 (recognizing that, despite assumptions about women's roles as organizational outsiders making them more likely to blow the whistle, whistleblowers are, in reality, slightly more likely to be men than women).

78 Sellers, *supra* note 76.

indications that, overall, women were more likely to report to a third party or externally, where male respondents were more likely to directly confront the wrongdoer.<sup>79</sup>

### **C. The Value of Nuanced Explanations for Women’s Whistleblower Participation**

Regardless, even if the logic that Sellers and others provide for women whistleblowing gives insight, a more complete understanding of how and when the factors that shape women’s role in the workplace interact is necessary. These factors range from women’s lower tolerance for risk to a “motherhood gene” that inspires women employees to care about the weak with greater frequency than their male counterparts.<sup>80</sup> When considering specific policies, the inadequacy of broadly-sweeping generalizations about women and whistleblowing is evident. To understand whether policy design will act on women’s whistleblowing motivation, it is essential to have a more detailed understanding of how gender differences affect reactions to policy. Existing research leaves many questions open, but work so far does give us an opportunity to start thinking about how a law’s mechanisms would act on women employees in the financial services industry.

#### **1. Explaining the Variation in Whistleblowing Between Women and Men**

One factor that writers emphasize is that women often remain, even today, “institutional outsiders” in corporate workplaces. The statistics that describe the modern corporate workforce indicate an ongoing disparity. The less-connected status of women in corporate workplaces has to do with leadership at the highest levels. Only 9.9% of corporate offices with directly responsibility for budgeting and client relationships are held by women, and those are the roles “from which promotions are made to the highest positions.”<sup>81</sup>

Features of women’s tenure and relationship to their workplaces are especially important to whistleblowing. Women’s patterns of employment tend to include breaks in their time in the workforce, often because of family responsibilities. But it is not entirely clear which way that idiosyncrasy in employment patterns cuts. On the one hand, Seller’s argument indicates that less loyalty to an organization, by reason of a shorter tenure, encourages reporting. But Bishara et al. highlight research that tells a different story, explaining that “[w]histleblowers are . . . motivated by the desire to put ‘their’ organization back on the

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79 Lobel, *Linking*, *supra* note 53, at 49.

80 Sellers, *supra* note 76.

81 Schipani et al., *supra* note 42, at 504–05.

right track. The literature . . . suggests that longer organizational tenure and higher job satisfaction are associated with whistleblowing.”<sup>82</sup>

The hierarchies that these general trends create have implications for whistleblowing. Regardless of the whistleblower’s gender, reporting (internal or external) happens more often when the observed offender is not higher-ranked than the whistleblower (i.e. the offender is a peer or subordinate). Apart from the ownership and membership that women may feel in a corporation, the numbers come out to make it more likely that an observed offense will be by someone higher-ranked than a female observer. It is therefore worth noting that the forces that create differences between men’s and women’s responses when they observe misconduct might in part be an issue of power dynamics that would factor into any relationship with a power differential. When we observe women responding to particular legal mechanisms, such as a duty to report, perhaps that pattern would be true of lower-ranked individuals across the board. Correcting policies to encourage gender equity in participation, therefore, has the potential to equalize participation in other ways—such as participation by rank in an organization.

Norms also play a particularly meaningful role in women’s thinking about whether or not to blow the whistle. When women talked about their choices in the Feldman and Lobel survey, female survey respondents, as opposed to males, were more concerned about social norms and more affected by responses from friends and family in determining whether to blow the whistle. The question of where they would fit into the whistleblowing typology—a hero or a snitch—factors into women’s choices to act at the outset of the experience.

Feldman and Lobel situate this concern about norms in the context of broader costs of whistleblowing: “In general, reporting is costly. Whistleblowers fear not only retaliation by their employers but the psychological and social consequences of being shunned by their coworkers and the community.”<sup>83</sup> An explanation that rests on women’s desire to “fly under the radar,” such as the one that the Sellers piece suggests, may come from the same source that led to Feldman and Lobel’s conclusion. But praising that proclivity as a sign of humility forecloses the opportunity to understand how to reckon with women’s relatively greater norms-consciousness in efforts to create whistleblower systems that encourage equity.

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82 Bishara et al., *supra* note 4, at 60.

83 Lobel, *Linking*, *supra* note 53, at 48.

## 2. Connecting the Proposed Law to Research

A state level law, like the Dodd-Frank Act, could impact this norms-consciousness. As discussed above, law has the potential to “mak[e] a particular behavior salient.”<sup>84</sup> American culture, while it sometimes praises whistleblowing activity (such as in the cases of the TIME 2002 whistleblowers), is often inclined to see reporting as snitching.

The law draws implicit lines about what kind of reporting is protected, responsible citizenship and what kind of reporting is either annoying overreaction or self-interested bounty hunting.<sup>85</sup> Especially in New York State, the financial services industry has a general welfare dimension. The 2008 crisis clarified the dangerousness of questionable conduct at the nation’s most prominent and powerful financial institutions. Perhaps it is particularly important to seize on this opportunity (while the financial crisis is still in relatively recent memory) to bolster the salience of the employee’s role in participating in watchdog activities. Indeed, empirical evidence indicates the objective importance corporate wrongdoing, which has been estimated to be more costly than common crime.<sup>86</sup> But as the financial crisis of 2008 becomes a more distant memory, the Trump administration’s hostility to Dodd-Frank and other corporate regulation<sup>87</sup> can substitute as the “threat” to which the legislation is responding. That reframing can elevate whistleblowing to a more valuable activity and attenuate the risk among peers and family that women perceive when they consider social norms in reporting.

But a similar result could also come from incorporating a duty to report. When women respond to a duty to report in the research, they may be looking for the same kind of social support that ethical salience affords. Being able to fall back on a legal duty allows for women whistleblowers to play the role of reluctant reporter, bound by a legal requirement, not driven by pride or greed. Failing to include a duty to report means that women and men alike cannot derive that benefit from the law.

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84 Feldman and Lobel, *Incentives Matrix*, *supra* note 1, at 1185 n.215 (citing Richard H. McAdams & Janice Nadler, *Testing the Focal Point Theory of Legal Compliance: Expressive Influence in an Experimental Hawk/Dove Game*, 2 J. EMPIRICAL LEGAL STUD. 87 (2005)).

85 See Heumann, *supra* note 12, at 56–69 (discussing a proposed typology of whistleblowers).

86 Bishara et al., *supra* note 4, at 42–43 (citing *The Cost of Crime: Understanding the Financial and Human Impact of Criminal Activity: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 69 (2006) (statement of Jens Ludwig, Professor, Georgetown Public Policy Institute, Georgetown University), <https://www.gpo.gov/fdsys/pkg/CHRG-109shrg42938/html/CHRG-109shrg42938.htm> [perma.cc/VLY8-H7W3]).

87 Protess & Hirschfeld Davis, *supra* note 9.

### III. Designing a Whistleblower Law: Potential for Success and Risks for Women's Participation

The ultimate goal of whistleblower policy has three elements: deterring, exposing, and halting wrongdoing.<sup>88</sup> Any effective whistleblower law for New York State needs to emphasize the structures that are best positioned to achieve those elements through incentives, rather than the traditional regulatory model. However, as the state considers ways to move away from regulation toward a system that relies on cooperation from private actors in the New Governance mode, it has a responsibility to consider the way those structures tend to discriminate against or encourage citizen engagement from female and male employees who would be subject to the proposed rules.

The financial incentives included in the New York State proposal from 2015 have the potential to spur reporting, but the incentives the law builds in also have the potential to bolster the voices of male potential whistleblowers at the expense of women's organizational participation. The takeaway that should matter most to policymakers from Feldman and Lobel's survey is the conclusion that, "there is no one-size-fits-all solution for policy design. Rather, policy makers must consider the characteristics of the target population of social enforcers and incentivize them accordingly."<sup>89</sup> The question for policy designers should be, then, which "characteristics of the target population" matter. Given the gender effects of policy design, they also need to consider how a policy that addresses and seizes on characteristics of one segment can de-emphasize the contributions of other populations.

But a realistic evaluation of gender effects and whistleblowing also needs to recognize that there is not a "one-size-fits-all solution" for all women employees either. In any workplace, competing identities and pressures shape individuals' choices. The Feldman and Lobel study considered a wide range of survey participants,<sup>90</sup> and that range makes it valuable for its identified task. However, a policy that is particularly focused at industries—and industries in a particular state, at that—is concerned with a more narrow set of actors who are likely to share cultural characteristics regardless of gender that might affect their responses to legal mechanisms.<sup>91</sup>

88 Bishara et al., *supra* note 4, at 43.

89 Feldman & Lobel, *Incentives Matrix*, *supra* note 1, at 1156.

90 *Id.* at 1189 describes the sample.

91 Feldman & Lobel, *Decentralized Enforcement*, *supra* note 41, at 172–78 (2008) (describing sizable differences between the attitudes of employees in the United States and in Israel on topics such as happiness in the workplace and social norms to whistleblowing behavior). On a smaller scale, it is reasonable to expect that



### A. Monetary Incentives: A Realistic Choice with Drawbacks

On the whole, the monetary incentive structure in the proposed law is a realistic response to the current state of the industry and a reasonable strategy in light of existing research. But declining to include a duty to report amounts to a choice not to emphasize types of reporting that research indicates women respond to strongly.

#### 1. Benefits and Concerns, Given Current Research

As discussed above, research indicates that financial misconduct is an area where financial incentives have room to function as intended, given the lack of moral response to this kind of misconduct. Given that the “large majority of those who reported misconduct did it because of their ethical belief that they were doing ‘the right thing,’”<sup>92</sup> this speaks powerfully in favor of including such provisions in the law. The law’s ability to focus and re-shape salience is relevant. But a duty to report incentivizes women to blow the whistle. In fact, when the Feldman and Lobel study presented women participants with misconduct and a duty to report but no reward, women said they would blow the whistle at a higher rate than when they were presented with a low reward.<sup>93</sup> The results were directly inverse for the men. Men were less likely to report when presented with a duty than with a low reward.

Information about the proposed New York Financial Frauds Whistleblower Act indicates that its design revolved around a sliding scale for potential whistleblower recoveries. As in Dodd-Frank, a whistleblower recovering under the proposed law could have recovered between ten to thirty percent of the award New York State would win in a successful suit. There was an additional requirement that a case lead to at least one million dollars in penalties for a whistleblower to recover any money at all—an aspect that demonstrated a focus on high-value cases.<sup>94</sup> The Attorney General’s office identified high-value cases as a goal, in keeping with rhetoric about Dodd-Frank and the IRS’s whistleblower program.<sup>95</sup> This approach is not novel. The IRS whistleblower program, established in 2006, has the explicit goal of focusing on “high-value targets,” and that commitment is conscious and

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differences in culture might show themselves within the U.S. as well.

92 Lobel, *Linking*, *supra* note 53, at 47.

93 Both these groups were given circumstances where the misconduct inspired low ethical motivation. Feldman & Lobel, *Incentives Matrix*, *supra* note 1, at 1197.

94 Press Release, A.G. Schneiderman Proposes Bill, *supra* note 7.

95 *Id.*

ongoing; Congress rejected an amendment that would have reduced threshold claim of potential indebtedness to \$20,000 from \$200,000.<sup>96</sup> Accounts of the IRS design reflect skepticism of whistleblower motives generally, and the ambivalence that government officials themselves feel about these actors.<sup>97</sup>

To the extent that such an approach recognizes public mistrust of whistleblowing, designing a policy to ensure that rewards can go only to people with claims that look like they are worth government time and energy seems rational. However, the research has indicated that women are more willing to report whistleblowing when the harm cost is lower in terms of dollars and cents than men are when they consider the same violation. A law that intentionally incentivizes only higher-value claims therefore risks discouraging participation that has proven relatively more prevalent among women. The monetary incentives in the law explain just one aspect of a potential whistleblower scheme, and internal avenues of reporting would still be available and encouraged. However, especially in light of the possible explanations for a divergence in women's whistleblowing behavior as opposed to their male counterparts, the suggestion that the law's implicit legitimization of whistleblowing behavior does not reach lower-value reporting could serve to depress this type of whistleblowing.

## 2. Recommendations for a Design that Considers Current Research

Writing a duty to report into the law would incorporate a legal mechanism that women respond to particularly well, and the political landscape provides an opportunity to introduce the mechanism into the Financial Frauds Whistleblower Act. It is true that no such requirement appears in Dodd-Frank or in state FCAs, and duties to report financial fraud have been limited to certain professions.<sup>98</sup> However, while policymakers may believe that political support for a duty to report in this sector seems difficult to rally, a considered evaluation of the option reveals potential avenues for maximizing the incentive calculations that research indicates lead women employees to respond to a duty.

In the current political climate, a potential New York state law serves a distinct role from the one Dodd-Frank was designed to fill. Especially now that reports suggest the

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96 Feldman & Lobel, *Incentives Matrix*, *supra* note 1, at 1170 (citing Dennis J. Ventry, *Whistleblowers and Qui Tam for Tax*, 61 *TAX LAW.* 357, 383 (2008)). Statements about IRS program point to ensuring legitimacy of claims, and discouraging "weak claims and vindictive cases among neighbors." *Id.*

97 *Id.* at 1154.

98 Bishara et al., *supra* note 4, at 67.

federal law will be rolled back in the coming years,<sup>99</sup> a New York law focused on financial fraud reporting would no longer be state-level implementation of national policy. Rather, the law would more closely fit a pattern of “blue-state federalism,” which gives it greater license to be creative or bold than it might have had as a mini-Dodd Frank. A duty to report, in addition to codifying a more equitable set of mechanisms, affirms the seriousness of financial misconduct and the active role the state is committed to playing in monitoring and enforcing its standards.

Even if lawmakers decline to include a duty in the law, officials will have the opportunity to include language related to responsibility or informal duty (to fellow New Yorkers or to the financial services system more generally) in its communications to the public and to employees about the law.

The inclusion of monetary incentives ultimately appears to be the right option for a state whistleblower law. In addition to the ethical salience points addressed above, it also bolsters the deterrence goals of a whistleblowing policy. Evidence indicates that while people under-estimate the centrality of financial incentives in their own decision-making, they expect it to play a larger role in the choices that those around them make.<sup>100</sup> Financial incentives therefore serve a deterring function beyond the actual reports that occur. Insofar as would-be wrongdoers perceive that monetary incentives have greater importance in would-be whistleblowers’ decision-making than they actually do, they have the potential to limit misconduct *ex ante*.

The proposed law includes confidentiality and anti-retaliation provisions, mechanisms which, research indicates, women privilege in their choices to report observed misconduct.<sup>101</sup> These aspects are valuable and should be central to the design. However, anti-retaliation in letter only will not be enough to effectively change behavior. Experience under Dodd-Frank shows that ongoing enforcement of employee-protective provisions is necessary. Rule 21F-17(a) enforcement was a public focus of the SEC’s Office of the Whistle Blower (OWB) in 2015.<sup>102</sup> Just recently, the OWB achieved a thirty-percent award in the *first*

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99 Protess & Hirschfeld Davis, *supra* note 9.

100 Feldman & Lobel, *supra* note 1, at 1156.

101 *Id.* at 1197 (showing that women in the study spoke about protection and confidentiality more frequently than men).

102 SEC, 2015 ANNUAL REPORT, *supra* note 56, at 2 (“Assessing confidentiality agreements for compliance with Rule 21F-17(a) will continue to be a top priority for OWB into Fiscal Year 2016.”).

anti-retaliation enforcement action that it has taken, *Capital Management, Inc.*<sup>103</sup> The employer's retaliation did not include discharge, but the retaliation was obvious, including changing the whistleblower's job function and "withdrawing supervisory responsibilities," as well as "otherwise marginalizing" her.<sup>104</sup> Because encouraging whistleblowing revolves around individuals' calculations, anti-retaliation provisions will need to be well-publicized and aggressively enforced.

### **B. The Importance of Social and Cultural Context in the Regulated Industry**

Women's concerns and different responses to policy do not come out of essential differences in workplace attitudes. Rather, thoughtful whistleblower policy that takes into account gender differences turns on the "tripartite interaction between the reporting individual, the detected misconduct in an institutional setting, and the regulatory regime that defines the contours of legality."<sup>105</sup> The law deals specifically with financial services and insurance industries in New York. To the extent that this law interacts with existing culture in New York finance to make whistleblowing more accepted and encouraged, it could ease the risks that women consider when determining whether to blow the whistle. It requires a consideration of those industries and factors specifically. The role of the financial crisis in local awareness and the pre-existing social norms in the industry are two central aspects of that inquiry.

The Feldman and Lobel study found that women tended to care more about the reaction from family and friends when they considered reporting.<sup>106</sup> The potential power of a New York state law to create more salience around the issue, as discussed earlier, bodes well for transforming peers' reactions. Furthermore, following the 2008 crisis, the health of the financial system seems to resemble health and safety policy areas in terms of their importance to citizens' well-being, particularly for New York state workers.<sup>107</sup> Passing a law that targets whistleblowing in financial fraud could serve as public validation of the dangers that go with financial frauds, codifying an approach that equates the value

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103 *Capital Management, Inc. and Candace King Weir*, Exchange Act Release No. 74826, 111 SEC Docket 1808, 2015 WL 1907622 (Apr. 28, 2015).

104 SEC, 2015 ANNUAL REPORT, *supra* note 102, at 11.

105 Lobel, *Linking*, *supra* note 53, at 48.

106 Feldman & Lobel, *Incentives Matrix*, *supra* note 1, at 1196.

107 *Id.* at 1185 ("[L]aw can induce compliance by making a particular behavior salient.") (citing McAdams & Nadler, *supra* note 84, at 108–18).

of reporting those frauds to reporting the violations that the state already protects with anti-retaliation provisions. This transformation in social norms could conceivably make whistleblowers, particularly women, more confident that they will have the support of friends and family.

But policymakers also need to examine the circumstances and mechanisms that result in women's tendency to weigh friends' and families' reactions more heavily than men do. An effective inquiry into those effects raises questions about the specific habits, inclinations, and incentives of women working in the New York financial services industry. To extrapolate from research on other industries would not only essentialize women workers but also risk misguided conclusions that fail to consider how the finance workforce may behave differently.

Stanford University's Clayman Institute has offered interesting suggestions about *how* women's priorities in the workplace develop. An ongoing project has found that women's feedback and evaluations from managers focus on personality traits rather than on technical skills more often than men's reviews do.<sup>108</sup> The findings indicate that "women are systematically less likely to receive specific feedback tied to outcomes, both when they receive praise and when the feedback is developmental," and that their feedback is less often tied to tangible business outcomes.<sup>109</sup> If women believe that their successes, contributions, and job security primarily depend on their ability to get along with coworkers and not on their substantive, technical contributions, then they may hesitate to challenge others in the workplace. When women come away from reviews with the sense that their strengths have to do with "communication" and teamwork, the good faith they risk by challenging their coworkers and superiors is a more central aspect of their job success.

Are those observed patterns present in the New York financial services industry? If not, were they central to the experiences of women in the Feldman and Lobel study? Is it reasonable to think that the industries in question here are so geared toward business outcomes that these patterns do not occur in banking? Or perhaps large corporations, as opposed to information technology companies, have more standardized review processes that protect against the kind of gendered feedback the Clayman Institute describes? In effect, the industry in question can reasonably have its own culture, which would lead

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108 Shelley Correll & Caroline Simard, *Research: Vague Feedback is Holding Women Back*, HARV. BUS. REV. (Apr. 29, 2016), <https://hbr.org/2016/04/research-vague-feedback-is-holding-women-back> [perma.cc/EWE8-P36K].

109 *Id.*

women to act either less differently from their male counterparts or to act according to different patterns altogether.

Other explanations for understanding women's involvement in whistleblowing, such as the factors that push them toward blowing the whistle and the ones that make them less likely to report in certain circumstances, also need to be considered in light of the specific circumstances of the financial services industry. Hypotheses range from the structural, such as women's shorter work histories which result in less attachment to firms and being organizational "outsiders," to the moral, such as a greater sensitivity to unfairness and higher internal levels of moral judgment.<sup>110</sup> For each possible explanation, there are both anecdotal challenges and compelling logical counterarguments. The TIME 2002 article on whistleblowers, for example, reports that its subjects disagree with the theory that women blow the whistle because they are more likely to be outsiders. In fact, the piece described them each as "[t]he truest of true believers . . . ever faithful to the idea that where they worked was a place that served the wider world in some way."<sup>111</sup> It suggests that women's loyalty—rather than a lack of connection to their institutions—in fact led them to report wrongdoing.

But more systematic criticisms are also evident. Does the outsider hypothesis, for example, apply to those who have worked in the same industry for an extended period of time but in multiple firms? Additionally, if we take seriously the suggestion that women's experiences make them more sensitive to injustice, experiences with the norms and standards of an industry will surely affect any professional's conception of what is and is not "justice." The choice to blow the whistle is an individual one, and women's relationships to norms, power, and value judgments are linked to the careers paths they have already taken.

Given that the proposed law would address specific industries, policymakers should consider that the factors leading women and men alike into these workplaces could affect their company loyalty and moral judgment. Furthermore, as workplaces change, both in gender dynamics and reporting culture, those shifts have the potential to affect earlier research conclusions.

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110 Schipani et al., *supra* note 42, at 508.

111 Lacayo & Ripley, *supra* note 17.

## CONCLUSION

From the available information on the proposed New York law, evidence indicates that it is well-crafted to encourage employees who observe misconduct to bring their reports to external enforcement officials. However, the law's design capitalizes on male employees' patterns of reaction to misconduct (i.e. privileging financial incentives in responding to misconduct) and does not emphasize incentives and approaches that have been shown to inspire women employees specifically to blow the whistle.<sup>112</sup> At the same time, the law's potential to affect social norms in the financial services industry in New York means that it could ease concerns about social risks, which research shows are particularly concerning to women would-be whistleblowers.

Despite important open questions about the New York financial services industry as its own culture, the existing research about women's participation in whistleblowing provides enough insight for dedicated policymakers to craft a law with gender equity in mind. While New York's current proposed design reflects valid policy choices, the historical underrepresentation of women in business should encourage policy makers to evaluate the effects of the monetary incentives plan it has proposed and include a duty to report in the legislation. Many of the structural explanations that researchers point to in explaining women whistleblowers' choices, such as a lack of women in leadership roles and an intensified risk of retaliation because of acting against gender norms,<sup>113</sup> are at least potentially present in the industries the proposed law would touch.

As New York looks at the political and policy landscape of the Trump administration, it has an opportunity to stake out a position that not only reasserts the importance of regulating corporate misconduct but also meaningfully considers the value of diverse voices in regulation and compliance. Summoning the political will to pass a state-level law that protects and rewards financial fraud whistleblowing while intentionally encouraging participation across demographic groups is essential to codifying a more progressive regulatory framework.

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112 See Lobel, *Linking*, *supra* note 53, at 49 (“[W]ith regard to the effectiveness of different legal mechanisms or incentives, while men care significantly more than women about the size of the monetary reward, women care more about protection against retaliation, as well as the imposition of a legal duty.”).

113 Rehg, *supra* note 1, at 235 (describing a significant increase in the likelihood that a whistleblower will experience retaliation when she is a woman and positing that whistleblowers acting in an assertive manner, against female stereotypes, explains that differential finding).