

THE WHISTLEBLOWER AS CORPORATE FRENEMY

PROFESSOR DAVID KWOK*

Professor David Kwok. Thank you very much to Belmont and the Criminal Law Journal here for having me here. This is a great opportunity to keynote this event and to think about some things that are actually slightly outside of my research area.¹

If only I had heard Paul Kish's talk earlier, I would have made tectonic plates crashing here on my PowerPoint slide. Instead, I have some simple circles here, and I am looking at this interplay between the corporation, the public interest—represented by the government—and then whistleblowers here. This is as opposed to the individual or other reporting that happens in companies. So, most of the casework has been focused on the overlapping of the public interest and whistleblowers.

Do whistleblowers bring forward frivolous cases, or do they focus on serious cases of wrongdoing that the government must bring action on? That is kind of one question here. Even this conference kind of pushes on another question, obviously, but what is the overlap of interest between whistleblowers and the corporate entities that are going to correlate instead?

Why, then, corporate? To the extent that whistleblowers and corporations actually are very much in-line, they're aligned with the employer's interests. A lot of the questions about whistleblower programs are actually educational in nature. A lot of companies develop their own whistleblower programs.² They believe it is in their interest, and it comes from a natural development—a need to leave off pressure from the government—so, you need to put in a really good whistleblower program. We do not need to mandate the enforcement because, if it is in a company's interest, they will do it. But, to the extent that corporations and whistleblowers have significantly divergent interests, then perhaps in these situations we should strongly consider government intervention in these cases.

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¹ See generally David Kwok, *The Public Wrong of Whistleblower Retaliation*, 69 *Hastings L.J.* 1225 (2018).

² Among major corporations to develop internal whistleblower policies are Wal-Mart and McDonald's. Harold Hassink et. al., *A Content Analysis of Whistleblowing Policies of Leading European Companies*, 75 *J. Bus. Ethics* 25, 28 (2007).

All right, so, before I jump into this, let me address some background definitional questions because these are obviously loaded concepts or ideas that we are talking about. So, first of all, I mentioned roughly the corporate interests, and the purposes discussed by many of our other speakers today. The corporation is not a model entity, and there are plenty of reasons to believe there are different interests at play. Some of those interests include short term investors, long term investors with different firms, belief of what the government interest is and management of individual employees.

So, for example, Mr. Gilchrist's idea about over-compliance: You might see different views from the executives and the board of directors about how much the Occupational Safety and Health Administration standards have been enforced at a company. Perhaps employees who are on the shop floor, who may be much more risk-averse, may have much stronger opinions about the level of appropriate enforcement. So, there is no reason to believe there is some sort of unified sense of corporate interests in the first place.

Secondly, let me mention that whistleblowers also are not a unified category either; there are lots of different conceptions about who is a whistleblower. The general idea of whistleblowers is: This is not someone who works in compliance; this is someone who is a regular employee, and is getting involved in some sort of wrongdoing or alleged wrongdoing in the course of their employment and then notifying someone else. Typically, this is a class of external whistleblower who, for example, discovers a securities fraud is going on and notifies the U.S. Securities and Exchange Commission.

Some people also refer to whistleblowing as "internal whistleblowing" or "own reporting." Perhaps it might involve general compliance—you volunteer things to your boss or someone else inside the company. Some people think of that, but I am going to focus primarily on "legal whistleblowers." Meaning, under federal law, there are certain categories of whistleblowers who receive rights and protections and the rest.

So, while there are a dozen federal statutes, there is no unified statute—except for federal employees.³ So, if you are a private sector employee, there is no unified statute protecting you as a whistleblower. You have to find relevant subject matter. If you are an SEC whistleblower, then that statute covers you. Or, if you are a whistleblower with occupational health or violations, then there is a statute that covers you. Anyway, I am going to focus on primarily federal protections. There are obviously state and common law protections, but we are focused on federal protections.

All right, so, what is the possible level of infraction? This is theoretically complicated. Let me highlight what some researchers have done on this front that are kind of tied to this question about the level of overlap between the corporation and the whistleblower's interests.

³ See United States Department of Labor, *Occupational Safety and Health Administration - Statutes*, <https://www.whistleblowers.gov/statutes> (last visited March 9, 2019) (listing OSHA-enforced federal statutes protecting whistleblowers).

One idea that is kind of floating out there is: People are interested in claiming fault – what is the fault of the quality of the claim against a whistleblower?⁴ One easy answer to this potential overlap of interest is: Corporations do not want bad faith whistleblowers. So, with a bad faith whistleblower, that is when it is not in the company's interest or obviously not in the government's interest either.

By in large, claim quality, while of interest to researchers like myself, is probably not the best one because there are a lot of good faith claims out there and those good faith claims vary greatly in terms of quality of the information that they're providing

Another alternative method of possibly a rough proxy for overlap of corporation and whistleblower interest is retaliation.⁵ This is something that this is relied upon in my own work,⁶ and that is to say, perhaps the company against the whistleblower is a pretty strong signal that the whistleblowing behavior was not in the company's interest.

This is problematic for several reasons, right? Again, corporations are not monolithic and the individuals who are present for the retaliation when even though it was the greater interest of the corporation.

There are a lot of troubling statistics also on retaliation. Richard Moberly in Nebraska has done a few studies of this where he looked at the aggregates of statistics in certain categories of whistleblowers.⁷ The success of retaliation claims is perhaps less than 10%, single digits. What that signals is a little trickier. Does that mean that the whistleblower was not acting in good faith because they claimed retaliation but there was none? This is a difficult area.

The third category that a lot of researchers have focused on is the question of internal reporting.⁸ There is a number of researchers who have done interesting work on this front.

⁴ See generally Shoshana Gavish, *Requirement of Good Faith from Whistleblowers*, International Law Office (Aug. 20, 2014), <https://www.internationallawoffice.com/Newsletters/Employment-Benefits/Israel/S-Horowitz-Co/Requirement-of-good-faith-from-whistleblowers#> (addressing the role of good faith and fault in whistleblowing).

⁵ See Kwok, *supra* note 1.

⁶ *Id.*

⁷ See Richard Moberly, *Confidentiality and Whistleblowing*, 96 N.C. L. Rev. 751 (2018). See also Richard Moberly, *Whistleblowers and the Obama Presidency: The National Security Dilemma*, 16 Emp. Rts. & Emp. Pol'y J. 51 (2012); Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S. C. L. Rev. 1 (2012); Richard Moberly, *Protecting Whistleblowers by Contract*, 79 U. Colo. L. Rev. 975 (2008); Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 Wm. & Mary L. Rev. 65 (2007); Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. Rev. 1107 (2006).

⁸ See generally Stephen Stubben & Kyle Welch, *Research: Whistleblowers Are a Sign of Healthy Companies*, Harvard Bus. Rev. (Nov. 14, 2018) <https://hbr.org/2018/11/research-whistleblowers-are-a-sign-of-healthy-companies>.

Let me highlight Orly Lobel at the University of San Diego and Yuval Feldman.⁹ They have done interesting work here that suggests different categories of whistleblowers, for example in the environmental category, are less likely to internally report an environmental violation and more likely, of course, to report externally.¹⁰ As opposed to, perhaps, financial fraud inside the company, where they may be more likely to report internally.¹¹

And so you might read from this that internal reporting suggests greater conversions of an employer, corporate, and whistleblower interests. So, this categorical approach is one possible approach also relied similarly in different types of work.

This area is problematic, though, for different reasons. Empirically, because the category of internal reporting is very broad. For example, Feldman and Lobel include the idea of just telling your supervisor as internal reporting.¹²

You can imagine that telling your supervisor about something you saw that went wrong would probably involve lots of different factors, depending on your relationship to your boss and how much you trust your boss.

Your willingness to report internally may also be not a question of your company's interest, but perhaps your view of the company's ability to deal with that information. If you think your company is incapable of—or extremely unlikely to—successfully resolve this problem, even though it is in their interest to resolve the problem, you may defer to external reporting.

There are a lot of interesting ideas, there is a lot of interesting internal work. Perhaps there will be future work clarifying this kind of internal reporting, and maybe it will lead to a greater focus on anonymous reporting. That is typically a solution that may be helpful on this front.

Where does this leave us right now? My claim to you is that perhaps the best we can determine right now is within categories. We have good ideas that there are certain categories of offenses, such as environmental violations, and that possibly there is a greater divergence of interests between whistleblowers and corporations. But, within these categories, that is to say, different types of environmental violations or different types of securities fraud, how do we rank what will happen? What do we do with this?

My suggestion here is the strongest level of overlap between the whistleblower and corporation's interest is going to be in the provision of information. That is to say, the company has an interest in learning the information, and the whistleblower wants to

⁹ 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).

¹⁰ *Id.* at 1187-1200.

¹¹ *Id.*

¹² *Id.*

provide the information, so those interests converge there in the short term, but post provision of information, the interests are diverging.

Why would this be? Let me give you a hypothetical that I may or may not have experienced in my life. Perhaps you are talking to a close colleague and you find out they are expensing, or they are taking as a tax deduction, a \$1,000 plane flight. They are headed off to the Virgin Islands and they tell you, "I am going there for vacation, but I will write it off a business expense." So, depending on the marginal tax rate, perhaps they will save themselves a few hundred dollars on their taxes.

Assuming there is no reward program, how many of you at this point would call the IRS on your colleague and tell them, "I have a good case of tax fraud to report!" Any takers? No takers.

What if there is a reward program the Treasury offers, and they offer you \$1,000 for revealing this information? Any takers? Still no takers. All right, so, no question about good-character whistleblowing here.

That being said, as an FYI, the Treasury does have a program, but there is a million-dollar threshold, so they are not offering it on \$1,000.¹³

But your intuitions are right. You are not ratting out your friend for \$1,000 because of tax fraud. That violates a lot of our social norms in terms of what is appropriate behavior, and this is the major complaint from companies.

This violates a lot of our social norms, in terms of what is appropriate behavior. This is the major complaint from companies, that whistleblowers, particularly when they go out and start whistleblowing, are violating—if not a legal duty of loyalty—the social norms of loyalty. These are not the same type of trustworthy employees and colleagues that you want to work with. The problem here is that their intuition on this relates or corresponds roughly to the severity of the effects. That is to say that they are more willing to permit breaches of loyalty when the offense is really severe.

For example, if your colleague was planning some sort of mass murder, or bombing, maybe you start thinking "Okay, he is a good friend, but I am thinking something else now." However, for mild offenses, that is where the problems are in terms of our social norms. This is precisely contrary, I would suggest, to the company's interests in whistleblowers; the corporation's strongest interest is going to be in deterring wrongdoing. When talking about a lot of these offenses, we are not talking about a completely corrupt organization; but we are seeing increasing or growing offenses. What we want to see instead—what the corporation wants—is early information.

¹³ See Whistleblower - Informant Award, International Revenue Service, (Feb. 6, 2019), <https://www.irs.gov/compliance/whistleblower-informant-award>.

By the time there is some sort of catastrophic events, like some sort of Enron-style “bringing down” of the company, it is too late. Yeah, you want to learn about it, but really they wanted to learn about it much sooner. They want to deter the significant things—that is where the corporation’s interests are strongest in whistleblowing. The social pressure and deterrent value of these claims are in direct, right, opposition. The less severe the reported offense, the greater the corporation’s interest, but the worse the social stigma is for the whistleblower and, the converse is true as we increase in claim severity.

So, if you buy the claim that this breaks down that both sides want the information, but once you provide the information things are divergent at that point, what do we make of this in an applied sense? What area do you recommend this be applied? Mr. Moberly has written in the past that, while we rely on corporations to develop methods for obtaining information from whistleblowers, we should be very suspicious of corporate contracts that somehow try to restrict what employees do with that information after the fact—to perhaps external reporting, and the like.¹⁴

Now let us touch on one area that supports these divergent, or partially divergent, interests. Perhaps a more provocative application like whistleblowing and retaliation is something more analogous to what a lot of economists would describe as so-called “efficient breach of contract.”¹⁵ I heard this idea that economists say some contracts should be breached if it is efficient for society, or for someone, to breach the contract.¹⁶

This is kind of how economists get a bad name for themselves because it seems like they are trying to legitimize something that people have a moral intuition that this thing is bad. You gave your word that you would do “X,” and now you are telling me society benefits when you breach this area. If you can buy an efficient breach, I can suggest that perhaps retaliation for whistleblowing is something along those lines also. That is to say that if the social stigma, or the lack of trust, in a corporation is so strong after a whistleblower, perhaps retaliation is in the aggregate interests of society—it is something analogous to an efficient breach. Essentially, maybe it is better for society, in the aggregate, that an employee no longer work for the company after whistleblowing occurs. The interests that are satisfied with the information that has been conveyed, perhaps you can take action based on that information; but there is no long-term relationship after this point.

If this is true, again, this is like efficient breach—we have strong retaliation and that’s wrong—it might be morally troubling in what is society’s general interest. Perhaps we shift the analysis to a question of pure compensation, exchange, information, the services provided, before information about a potential offense has been transferred. Then, if

¹⁴ See Moberly, *supra* note 7.

¹⁵ See generally Maria Bigoni, Stefania Bortolotti, Francesco Parisi, & Ariel Porat, “Unbundling Efficient Breach” (Coase-Sandor Institute for Law & Economics Working Paper No. 695, 2014) available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2384&context=law_and_economics.

¹⁶ *Id.*

retaliation is the socially acceptable solution, we need to find out the probability of compensation.

Perhaps that can move us away from a lot of this messy retaliation, mixed-motive of analysis when trying to determine whether an employer was liable when they fire a whistleblower. In some cases, firms will argue that “Well, we did not fire them because they blew the whistle, we fired them because they would not reveal how they got access to the information that they provided that was evidence of the wrongdoing. So, therefore they are not cooperating with our internal investigation to explain the source of the information, and that is why we fired them.” Essentially arguing that these they are a bad, noncompliant employee, not that they are a whistleblower. What these fights are actually about are what the actual motivation for firing was, and I suggest that this is often unnecessary.

If separation is the correct final solution, we should be focused on compensation. How do we make sure there is a fair deal involved for the corporation—and for the whistleblower—after the fact is done, and after the conclusion of the issue?

Do we have any comments or questions on the current state of whistleblower law?

Audience. That was fascinating, thank you. Would the compensation for the sufficient retaliation, would you anticipate that it would mirror the compensation we see for wrongful retaliation? Would it be any different in terms of numbers? Right now what we have is litigation over whether retaliation was a violation of the law, and if it was found to be in violation of the law, there is a damages amount. So do you think there would be any savings, to doing this? I guess the savings would be in the litigation.

Professor David Kwok. So, there is savings on the litigation side and if you are a content newspaper and you are focused on sort of an optimal level of compensation, you make sure the level of compensation ties with how you value the information that’s provided. Sometimes we have good proxies for that. If there’s an actual offense and there is a subsequent fine, then we have good, easy “proxies” for how valuable this information is. Sometimes, when there is good faith belief that their action is not a violation, then our problem becomes more difficult.¹⁷ If it is not clear in those scenarios, it is not clear if we have a savings or even approach, but at least we avoid the litigation of this *mens rea* problem: why is it exactly that they were fired?

Audience. Do you think the analysis changes to whom the whistle-blowing is done? A whistleblower who blows the whistle internally, versus a whistleblower taking the internal option and going to some sort of regulatory board?

Professor David Kwok. So, that is a critical question here: who they blew the whistle to. The corporation’s interests in external reporting is because it may receive possible sanction depending on what sort of compliance they are doing internally with regards to the offense

¹⁷ See Gavish, *supra* note 4.

and the like. So, yes, that's absolutely right. Intuitively, internal reporting is what the corporation likely wants. It is possible that there is some shared interest in external reporting, but there is also a chance to do something first. Now the question should be receiving that. I think that is where the current empirical research is not great. We do not do a good job of separating out proper reporting channels, and the like, with sort of more casual, informal notification. But yes, thank you.

Audience. I am assuming that if a corporation developed this sort of approach, they would inform potential employees on the front end and the employees might be developing a culture of hiring on to just become a whistleblower and get what are essentially liquidated damages; I think that would be a real interesting culture that would resolve.

Professor David Kwok. So, these types of individuals exist already. I do not know how intentional it is, but there are definitely cases that we have seen that the number of repeat whistleblowers where they get hired by a number of different health care companies, organizations, and they find the same violation.¹⁸ In the new cord, they find the old cord. So this exists, now whether there must be some sort of bar, selection, perhaps, regarding who may blow the whistle, but that is a little more difficult. A lot of people are focused upon what's called "determinative whistleblowing"—what causes someone to blow the whistle.¹⁹ It is a kind of research and it is mixed; some people believe it is very internally driven.²⁰ They believe that regardless of what your contract says, whistleblowers have this high morality idea so they are uncomfortable. Retaliation or not, I am going to bring it. But it is a possible idea, that we would have a different culture. This type of culture that might say well-reporting means internally reporting, do not tell the outside, we need to focus on protecting the company.

¹⁸ See generally Debra Cassens Weiss, *Repeat Whistleblowers Reap Millions of Dollars in False-Claims Suits*, American Bar Association Journal (Jul. 24, 2014), http://www.abajournal.com/news/article/repeat_whistleblowers_reap_millions_of_dollars_in_false_claims_suits/.

¹⁹ See generally Nancy M. Modesitt, *Causation in Whistleblowing Claims*, 50 U. Rich. L. Rev. 1193 (May 3, 2016), <https://lawreview.richmond.edu/files/2016/06/Modesitt-504.pdf>.

²⁰ *Id.*