

# WHISTLEBLOWERS: IMPLICATIONS FOR CORPORATE GOVERNANCE

DEBORAH A. DEMOTT\*

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## INTRODUCTION

Whistleblowers are not among the actors who populate academic accounts of corporate governance. Nor are whistleblowers visible in formal governance frameworks consisting of legal and non-legal elements that enable a firm to operate, all traceable to a corporation’s charter and bylaws adopted in compliance with the law of the state of incorporation.<sup>1</sup> Within a corporation, whistleblowers may be lower-rank employees, not directors or officers; they may report their perceptions of wrongdoing to others within the corporation or inform governmental or other actors who are externally

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\* David F. Cavers Professor of Law, Duke University School of Law. Many thanks to Laurel Salisbury (Duke Law J.D. 2021) for excellent research assistance, and to Veronica Root Martinez, Andrew Tuch, and participants at the conference for their helpful comments.

1. For this definition, see Ronald J. Gilson, *From Corporate Law to Corporate Governance*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 3, 5–6 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018). For a rare exception of scholarship tying whistleblowing explicitly to corporate governance, see Uboho Inyang, *Whistleblowing as a Corporate Governance Mechanism: A Comparative Analysis of Employee-Whistleblower Protection in the United Kingdom and Nigeria* (Jan. 25, 2020) (unpublished manuscript), <https://ssrn.com/abstract=3547899>. Some scholars engage with the distinct roles and responsibilities of lawyers as gatekeepers, including duties to report-upward evidence of material violations of law. See, e.g., Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411, 422 (2008). These inquiries run alongside scholarship on corporate governance, which does not appear to incorporate them.

situated. Nonetheless, it is striking how often retrospective accounts of corporate scandals involve episodes of whistleblowing associated with governance and compliance failures in one form or another.<sup>2</sup> An influential quantitative study of major financial frauds found that, in the aggregate, actors outside the traditional governance cast of characters and formally-appointed gatekeepers accounted for a substantial share of fraud detection, prompting the authors' observation that it "takes a village" to discern the presence of much fraudulent activity.<sup>3</sup>

Focusing primarily on internal whistleblowing, this article argues that incorporating whistleblowers into formal governance structures could spur more proactive involvement by directors in monitoring compliance with law and regulation. Whistleblowing is significant to internal compliance functions because it reveals private information suggestive of wrongdoing,<sup>4</sup> often furnished by actors within an organization who are not subject to duties to blow the whistle. Credible whistleblowers create friction that abrades the plausibility of officially sanctioned narratives. Their reports (especially when ignored) can furnish valuable documentation in after-the-fact investigations of corporate fraud and other major compliance failures, as can retaliation against whistleblowers.<sup>5</sup> By charging the board with responsibility for adopting and overseeing the implementation of compliance policies with whistleblower components—as one state has done<sup>6</sup>—formal organizational statutes would underscore the importance of proactive engagement by directors and increase the likelihood that whistleblower reports would be used more effectively. To be sure, whistleblowers can be mistaken and may act from a mixture of motives, with the consequence that whistleblowing comes with costs as well as benefits.<sup>7</sup> Thus, how best to structure a whistleblowing policy and handle reports should fall within the board's exercise of good faith business judgment.

The principal value of internal whistleblowing stems from its creation of friction, whether to gain the attention of higher-level executives or internal compliance functions and personnel; internal reports may also be tied to

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2. For examples, see Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249 (2020).

3. Alexander Dyck, Adair Morse & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213, 2213 (2010). In particular, employees, the media, and industry regulators, not present in traditional accounts of corporate governance, accounted for forty-three percent of the cases in which major frauds were detected. *Id.* at 2226.

4. Geoffrey Parsons Miller, *The Compliance Function: An Overview*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE, *supra* note 1, at 981, 995.

5. See *infra* text accompanying note 18.

6. N.Y. NOT-FOR-PROFIT CORP. LAW § 715-b (LexisNexis 2021).

7. On the range of whistleblowers' potential motivations, see *infra* text accompanying notes 51–74.

revelations to investigative news media and law-enforcement authorities, which complicates the analysis. To illustrate more concretely, consider one of recent history's best-known whistleblowers, Tyler Schultz, who found his first job after graduating from Stanford at Theranos, Inc., working on the immunoassay team.<sup>8</sup> Commenting later—in the wake of his anonymously-made report to a state regulator, revelations to a board member and the CEO, and extensive conversations with an investigative reporter, culminating in the collapse of Theranos with legal repercussions for its principals—Mr. Schultz divided the company into two realms.<sup>9</sup> These were “the carpeted world,” inhabited by senior management, the board, and marketing officials, distinct from “the tiled world,” a separate domain of testing laboratories in which lab personnel struggled with malfunctioning equipment manufactured by Theranos.<sup>10</sup> By whistleblowing, denizens of the tiled world can create friction for their colleagues and superiors in the carpeted world. Whistleblowers' reports call into question assumed factual premises or disrupt a preferred narrative, whether of business success, legal compliance, or both. And information revealed by externally-oriented whistleblowing can arc over the hushed environs of the carpeted world to reach audiences explicitly charged with publicly-oriented missions. The friction that whistleblowers create can also help overcome the blind spots of compliance chiefs themselves who, increasingly drawn from the ranks of elite lawyers, may overlook risks inherent in the propensities of others to cheat to meet organizational metrics for performance, having themselves always succeeded (without cheating) when confronted by challenges.<sup>11</sup> To be sure, in more neutral terms whistleblowers furnish private information suggestive of wrongdoing<sup>12</sup> and serve as a mechanism to furnish information that alerts others to suspicions of wrongdoing.<sup>13</sup> But the act of whistleblowing—potentially risky and almost always contrarian in one sense or another, even when required to fulfill a duty—is charged in a fashion that is understated by more neutral terminology, underscoring its propensity to generate friction.

The article opens by examining questions of definition, contingency, duty, and motivation that are associated with whistleblowing.<sup>14</sup> Definition

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8. Markkula Center for Applied Ethics, *In His Own Words: The Theranos Whistleblower*, YOUTUBE (May 22, 2019), [https://www.youtube.com/watch?v=9wf\\_2KYRPWQ](https://www.youtube.com/watch?v=9wf_2KYRPWQ) [<https://perma.cc/ME/E2-7D6D>].

9. *Id.*

10. *Id.*

11. Miriam H. Baer, *Compliance Elites*, 88 *FORDHAM L. REV.* 1599, 1599 (2020) (identifying blind spots of high-performing lawyers in connection with performance metrics that can lead others to cheat).

12. Miller, *supra* note 4, at 995.

13. Donald C. Langevoort, *Cultures of Compliance*, 54 *AM. CRIM. L. REV.* 933, 939 (2017).

14. *See infra* Part I.A.

is important within statutory structures and common law doctrines that protect and sometimes reward the revelation of information when requisites of the definition are satisfied. But not all actors referred to as “whistleblowers” fit within these formal definitions. Moreover, the causal connection between a revelation and an outcome—the detection of wrongdoing—can be highly contingent, as the Theranos example illustrates.<sup>15</sup> Many whistleblowers are not subject to duties to report, which situates them outside analytic frameworks in which duty serves as the central structuring point.<sup>16</sup> And what motivates an individual’s decision to blow the whistle is often unknowable, in particular the extent to which the decision stems from a calculated weighing of externally-imposed potential costs and benefits, as opposed to an intrinsic motivation to do the right thing.<sup>17</sup> Reward and protection systems for whistleblowing implicitly reflect judgments about motivation but may not optimally account for the likelihood of adverse consequences feared or suffered by many whistleblowers. The next portion of the article briefly surveys the patchwork that comprises whistleblowing law in the United States, stressing that highly salient scandals generally precede the adoption of whistleblowing regimes.

Against this background, the article turns to corporate law and governance in the United States, arguing that both are more dynamic and less static than some academic accounts assume. Nothing inherent to either corporate law or governance bars the formal incorporation of mandated whistleblower protection into organic organizational law. Directors’ duties of loyalty under contemporary Delaware law encompass invigorated oversight of legal and regulatory compliance. And although the posture of the compliance function itself—motivated by internal concerns to assure the appropriate use of assets but also by externally imposed governmental pressures—is contested within corporate governance practice and scholarship, its presence and impact are undeniable elements of how contemporary organizations function. Situated within organizational law, the legal regime applicable to whistleblowing would have greater coherence and uniformity across firms incorporated in a particular jurisdiction, complementing the operation of any whistleblowing laws specific to the firm’s industry or other circumstances. Embedded in organizational law, whistleblowing would also become freshly visible to lawyers who advise organizations and furnish an additional formal basis on which lawyers could

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15. See *infra* text accompanying notes 24–30.

16. See *infra* text accompanying notes 50–53.

17. See *infra* text accompanying notes 54–78.

encourage directors to engage with compliance matters more broadly.<sup>18</sup> When handled by in-house legal experts, whistleblower reports can function as red flag indicia of obvious flaws in the company's public disclosures, undergirding allegations of awareness on the part of senior managers.<sup>19</sup> The link between the information revealed by internal whistleblowing and directors' duties of loyalty strengthens the argument for treating whistleblowing as a component of corporate governance that should be formalized via organizational law.

### I. DEFINITIONS, CONTINGENCY, DUTY, AND MOTIVATION

Dimensions of whistleblowing as a phenomenon range beyond the law but nonetheless implicate corporate governance. These include how whistleblowing is defined and how a whistleblower's report may interact with other factors in revealing misconduct. Whistleblowers' motivations, which may be mixed and are often imponderable, also raise fundamental questions.

#### A. Definitions, General Usage, and Contingency

How "whistleblower" is defined matters for legal purposes because the definition is the initial element that triggers the consequences specified by whistleblowing statutes or common law doctrine. For example, under the provision added to federal law in 2010 by the Dodd-Frank Wall Street Reform and Consumer Protection Act, triggering the statute's anti-retaliation protection requires that an individual provide "information relating to a violation of the securities laws" to the SEC.<sup>20</sup> Under the

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18. Miller, *supra* note 4, at 986 (addressing the role of legal counsel in the relationship between directors' duties of loyalty and compliance matters).

19. See Stavros Gadinis & Amelia Miazad, *The Hidden Power of Compliance*, 103 MINN. L. REV. 2135, 2184 (2019) (identifying whistleblower reports as "[c]haracteristic red flags"). For a related example, see Miller, *supra* note 4, at 989 (discussing *UBS AG v. Kommunale Wasserwerke Leipzig GmbH* [2014] EWHC (Comm) 3615 (Eng.)). Senior bank officials overruled the internal compliance function to proceed with a risky and potentially lucrative transaction. Although officials did not bear direct culpability for the conduct of the intermediary, who procured the transaction by bribing the bank's counterparty, the decision to proceed notwithstanding objections from compliance was likely relevant to the court's determination that the bank was responsible for contracts procured through bribery.

20. 15 U.S.C. § 78u-6(a)(6), *interpreted in* *Digit. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018). In *Digital Realty Trust*, the Court acknowledged that a separate provision in Dodd-Frank does not require that information be conveyed to a governmental authority. *Digit. Realty Tr.*, 138 S. Ct. at 777; see 12 U.S.C. § 5567(a)(1) (defining a "covered employee" as one who "provide[s] . . . information to the employer, the [Consumer Financial Protection] Bureau, or any other State, local, or Federal, government authority or law enforcement agency relating to" a violation of law within the CFPB's jurisdiction). A draft model act released in 2020 by the North American Securities Administrators Association (NASAA) extends anti-retaliation protection to whistleblowers who report only internally.

provision earlier enacted via the Sarbanes-Oxley Act of 2002 (SOX), protection against retaliation by an employer is afforded to an individual who provides information or otherwise assists in an investigation of conduct the individual “reasonably believes constitutes a violation” of criminal fraud statutes, any SEC rule or regulation, or “any provision of Federal law relating to fraud against shareholders.”<sup>21</sup> The trigger encompasses individuals who provide assistance to a federal regulatory or law-enforcement agency or to Congress, or internally to any “person with supervisory authority over the employee.”<sup>22</sup> Other statutes, plus whistleblower-protective common law doctrines, have distinct triggers as well.<sup>23</sup> Also evident is a disconnect between the general usage of “whistleblower” and formal definitions that trigger specific consequences.

Consider as an initial prototype, Tyler Shultz. Using a pseudonym, Mr. Shultz reported concerns about Theranos to the New York Department of Health because it ran a testing program in which Theranos participated, and he suspected the company’s methodology was improper.<sup>24</sup> He also notified his grandfather (a Theranos director) about his concerns and later sent lengthy written statements of testing discrepancies to the company’s founder (also its CEO), to which the Chief Operating Officer (COO) replied.<sup>25</sup> The COO’s dismissive and hostile tone prompted Mr. Shultz to resign.<sup>26</sup> Later Mr. Shultz had extensive conversations with a reporter from the *Wall Street Journal* that confirmed the gist of the reporter’s working thesis about Theranos and, from an insider’s perspective, elaborated on facts the reporter already knew from other sources.<sup>27</sup> The reporter credited his conversations with Mr. Schultz and other Theranos insiders with enabling him to persuade his editors to publish his first article about Theranos.<sup>28</sup> Holding for a moment questions about the relative causal importance of each of these three communications and their recipients to ultimate outcomes, which revealed Theranos as a sham and carried potentially

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See MODEL WHISTLEBLOWER AWARD & PROT. ACT § 10(1)(d) (N. AM. SEC. ADM’RS ASSOC. 2020), <https://www.nasaa.org/wp-content/uploads/2020/08/Model-Whistleblower-Award-and-Protection-Act-A-s-Adopted-by-the-NASAA-Membership.pdf> (protecting against retaliation “an individual” who does any lawful act “in making disclosures to a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct) regarding matters subject to the jurisdiction of” the SEC or the state securities regulator).

21. 15 U.S.C. § 1514A(a)(1).

22. *Id.*

23. See *infra* text accompanying notes 83–102.

24. JOHN CARREYROU, *BAD BLOOD: SECRETS AND LIES IN A SILICON VALLEY STARTUP* 195 (2018).

25. *Id.* at 195–96.

26. *Id.* at 197.

27. *Id.* at 287, 301. The reporter’s initial lead came from a practicing pathologist and amateur blogger, who thought Theranos’s claims “sounded too good to be true.” *Id.* at 219, 223.

28. *Id.* at 287.

adverse legal consequences for its principals, Mr. Shultz is a prototypical whistleblower. As a lower-level employee, he reported his concerns both internally and to an external regulator.<sup>29</sup> Moreover, the content concerned misrepresentations about testing accuracy that Theranos made to users of its blood-testing services and investors.<sup>30</sup> But in this concatenated sequence, what most likely spelled doom for Theranos was publication of the results in the *Wall Street Journal*.<sup>31</sup>

Some individuals termed “whistleblowers” do not match this prototype and may not be within the set of actors specifically protected by whistleblowing law. In *Akorn, Inc. v. Fresenius Kabi AG*,<sup>32</sup> revelations that a manufacturer of generic pharmaceuticals had major lapses in regulatory compliance enabled its acquisition partner to exit its obligation to close their merger deal.<sup>33</sup> The lapses contravened representations and warranties given in the merger agreement and constituted a Material Adverse Event (MAE) as defined in the agreement.<sup>34</sup> Much noted by commentators as the first case in which a Delaware court permitted a merger partner to walk away on the basis of an MAE,<sup>35</sup> the source of the revelations to the merger partner goes unmentioned. As characterized by the court, an anonymous “whistleblower” sent a letter to the prospective acquiror detailing regulatory non-compliance in connection with the merger target’s sole promising drug in development, then followed up in another letter with more details including specifics about deficiencies in quality assurance that contravened FDA regulations.<sup>36</sup>

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29. A formal explanation for why whistleblowers are often employees is that they can acquire information at relatively low cost, given that they gather much of it as a byproduct of their work. Dyck, Morse & Zingales, *supra* note 3, at 2214. Other actors whose conduct may reveal the presence of fraud can confront much higher costs. Thus, although short-sellers may gain by trading on a belief that the market overvalues a security on the basis of non-public information pointing to fraud, short-sellers—as outsiders to the corporation—acquire salient information at higher cost than employees, plus incur the cost of investing capital in the short. *Id.*

30. CARREYROU, *supra* note 24, at 273.

31. For a narrative of events in the aftermath of publication, see *id.* at 282-83 (noting that publication “ratcheted up pressure” on the federal regulator to take action, which occurred when it “confirmed that there were serious problems with Theranos’s blood tests” and “deemed the problems grave enough to put patients in immediate danger”).

32. No. 2018-0300-JTL, 2018 WL 4719347 (Del. Ch. Oct. 1, 2018), *aff’d*, 198 A.3d 724 (Del. 2018).

33. *Id.* at \*3.

34. *Id.* at \*47-62.

35. For a selection of law-firm commentary, see Edward B. Micheletti & Arthur R. Bookout, *Analyzing Akorn: Delaware’s First M&A Termination Under Material Adverse Effect*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP & AFFILIATES (Oct. 19, 2018), <https://www.skadden.com/insights/publications/2018/10/analyzing-akorn> [<https://perma.cc/TRC6-KRW4>]; *Delaware Chancery Court Finally Finds an MAE*, JONES DAY (Oct. 2018), <https://www.jonesday.com/en/insights/2018/10/delaware-chancery-court-finally-finds-an-mae> [<https://perma.cc/R56Z-KHD3>]; RICHARD SLACK & JOSHUA M. GLASSER, WEIL, GOTSHAL & MANGES LLP, *THE MATERIAL ADVERSE EFFECT LANDSCAPE AFTER AKORN V. FRESENIUS*, [https://www.weil.com/~media/mailings/2018/q3/securities\\_litigation\\_alert\\_18\\_10\\_30\\_02.pdf](https://www.weil.com/~media/mailings/2018/q3/securities_litigation_alert_18_10_30_02.pdf) [<https://perma.cc/C5A4-BPMK>].

36. *Akorn*, 2018 WL 4719347, at \*27.

The merger partner presented the letters to the target and conducted its own investigation into the allegations.<sup>37</sup> Clearly the revelations were consequential to the aftermath,<sup>38</sup> but anonymous reports to a transaction partner fall outside prototypes of whistleblowing that require reporting to a regulator or law-enforcement authority.<sup>39</sup>

Separately, some individuals use indirect means to draw attention to revelations of suspected wrongdoing, as did the *Akorn* whistleblower (assuming she or he was or had been an employee of the merger target).<sup>40</sup> More famously, in *Dirks v. SEC*, former officers of an insurance company that engaged in fraudulent practices were unsuccessful in activating state insurance regulators.<sup>41</sup> Seeking to reveal the fraud, they shared their information with a securities analyst, who investigated and discussed his findings with clients and investors, who sold the company's stock.<sup>42</sup> The drastic price drop that followed led the state insurance authority to impound the company's records.<sup>43</sup> This was followed by a complaint from the SEC, which also investigated whether by sharing his findings and the insiders' revelations, the analyst illegally tipped inside information to his clients and investors.<sup>44</sup> The Court held that the analyst did not act illegally because the former officers did not act fraudulently when they tipped the analyst.<sup>45</sup> They were motivated to reveal the fraud, not by the expectation of receiving a quid pro quo or personal gain in another form.<sup>46</sup> In a more recent example of indirection, an Uber employee's blog post—which detailed experiences of sexual harassment by a manager and dismissiveness from Uber's human resources department—triggered board investigation, through a special committee, into Uber's workplace environment and employment practices.<sup>47</sup> The committee's investigation led to structural changes at the board level, plus a directive that the company's ongoing search for a new

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37. *Id.*

38. Akorn filed a Chapter 11 petition in May 2020 to facilitate the sale of its business and resolve a "litigation-related overhang[]." See *Akorn to Use Voluntary Chapter 11 Process to Position Business for Long-Term Success*, CISION: PR NEWSWIRE (May 20, 2020, 11:52 PM), <https://www.prnewswire.com/news-releases/akorn-to-use-voluntary-chapter-11-process-to-position-business-for-long-term-success-3010633336.html> [<https://perma.cc/3R7C-6JAL>].

39. Along the same lines, an individual identified in the media as the "whistleblower" concerning a particular episode of corporate wrongdoing is not necessarily the actor who brought the wrongdoing to light. Another actor may have already initiated a chain of events that uncovered the wrongdoing. See Dyck, Morse & Zingales, *supra* note 3, at 2218.

40. *Akorn*, 2018 WL 4719347, at \*2.

41. *Dirks v. SEC*, 463 U.S. 646, 649 (1983).

42. *Id.*

43. *Id.* at 650.

44. *Id.* at 650–51.

45. *Id.* at 665–66.

46. *Id.* at 667. Thus the Court did not need to resolve whether the tipping constituted a breach of fiduciary duty. See *infra* text accompanying notes 54–56.

47. Martinez, *supra* note 2, at 293–94.



COO focus on candidates able to improve institutional culture.<sup>48</sup> Although effective in this incident, communicating information through a blog post may be less targeted than the trigger defined by SOX for internal reporting to a person with supervisory authority.<sup>49</sup> Moreover, the content of the blog post may not have implicated SOX's focus on fraud and securities law violations.

In short, not all communications referred to as instances of whistleblowing fit within the defined components of statutory provisions. Likewise, the causal links between a whistleblower report and any particular outcome can be complex even when—but for the information provided by the whistleblower—the outcome most likely would not have occurred, at least not as soon as it did.

### B. Duty and Motivation

Duty and motivation, potentially linked in this context, are separately important to understanding legal responses to whistleblowing. In Reinier Kraakman's influential account of *ex ante* strategies for legal enforcement, an enforceable duty is essential as the mechanism that enables "private parties to avert misconduct when they detect it."<sup>50</sup> Kraakman argues that gatekeeper strategies—utilizing private actors who can disrupt misconduct by withholding co-operation from wrongdoers, as epitomized by financial auditors—are superior to whistleblowers who are subject to a duty to report misconduct.<sup>51</sup> This is because gatekeeping threatens only a withheld reward while mandatory whistleblowing additionally imposes on its targets costs of "legal defense, reputational loss, and possible penalties or civil damages."<sup>52</sup> Given the risk of erroneous whistleblowing (however motivated), its targets have incentives to withhold information and avoid actors who may betray them, while potential whistleblowers, fearing the personal consequences, may avoid reporting wrongdoing.<sup>53</sup> Proceeding within a duty-centric framework, Kraakman's analysis does not address implications that follow when whistleblowers (like the prototype, Tyler Shultz) are not subject to a duty to report suspected misconduct. To be sure, by blowing the whistle an actor *may* breach duties owed to others, as examined below.

Whistleblowers' motivations raise two distinct issues: (1) the relevance of motivation to how the law characterizes a communication, and (2) the

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48. *Id.* at 294.

49. 15 U.S.C. § 1514A(a)(1).

50. Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 57 (1986).

51. *Id.* at 58–90.

52. *Id.* at 59.

53. *Id.* at 60.

significance of motivation in structuring protections and rewards for whistleblowers. Although the motivation with which a whistleblower acts can have direct legal consequences for that individual, as in *Dirks v. SEC*,<sup>54</sup> sometimes motivation is irrelevant. Acting with a public-regarding motivation—to reveal fraud—obviated the *Dirks* officers' liability for illegal tipping under section 10(b) of the Securities Exchange Act.<sup>55</sup> Given that statutory premise for liability, it was unnecessary for the Court to examine whether, by making disclosure with the public-regarding objective of halting an ongoing fraud, the officers breached their fiduciary duties to the corporation. Most likely, revealing the information breached their duties.<sup>56</sup> Whether they might be shielded from liability by a common law privilege is an underexplored question. In tort law, conduct otherwise tortious can be privileged in particular circumstances, as when an actor's conduct serves some interest of the public and the harm caused by the conduct is offset by the importance of that interest.<sup>57</sup> The complex of statutes and common law doctrines that protect whistleblowers from retaliation by employers reflects a widely-held public commitment that should constitute a basis for privilege against breach of fiduciary duty.

Privilege aside and distinct from any contractual obligations of confidentiality, the officers in *Dirks*—even as former officers—were agents who owed the corporation—their principal—a fiduciary duty of loyalty that encompassed a specific duty not to use the principal's confidential information for their own purposes or those of a third party.<sup>58</sup> Not absolute, the duty is not breached when an agent reveals to law enforcement that the principal is committing or is about to commit a crime or informs a third party who will be harmed by the principal's illegal conduct.<sup>59</sup> And, as noted above, whistleblowing-protective statutes and common law doctrine would also be a basis for privilege. But in general, within the framework of common law agency, an agent's well-motivated departures from the principal's known preferences breach the agent's fiduciary duties to the principal.<sup>60</sup> Likewise, the *Akorn* insider's revelations may have been well

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54. 463 U.S. 646 (1983).

55. *Id.* at 653–54, 667.

56. See RESTATEMENT (THIRD) OF AGENCY § 8.05 (2)(agent's duty “not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party”).

57. RESTATEMENT (SECOND) OF TORTS § 10 (AM. L. INST. 1965) (defining “privilege”). Breach of fiduciary duty can sound in tort, resulting in liability to the person to whom the duty was owed. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 16 (AM. L. INST. 2020).

58. RESTATEMENT (THIRD) OF AGENCY § 8.05(2) (AM. L. INST. 2006).

59. *Id.* at § 8.05 cmt. c.

60. Deborah A. DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 321, 329–30 (Andrew S. Gold & Paul B. Miller eds., 2014). Arguments for a less adamant framing of an agent's duty extend only to situations in which an agent's conduct furthers a principal's known objectives and does not sacrifice economic benefit for the principal. See *id.* at 329.

motivated, but sharing the information with a merger partner surely contravened preferences shared by the target's shareholders and directors to proceed with the merger, sharpened by severe business reverses the company suffered following the date of the merger agreement.

In contrast, a whistleblower's motivation is irrelevant to analysis under SOX and Dodd-Frank. What matters under SOX is whether the individual "reasonably believes" the information concerns a violation of federal prohibitions on fraud or SEC rules and regulations. Under Dodd-Frank, the dispositive question is whether the individual provided "information relating to" securities law violations to the SEC. It is beside the point *why* the individual determined to provide the information. A public-minded motivation to reveal wrongdoing may co-exist with resentment against co-employees or superiors, the desire to exact revenge or achieve fame, or a combination of many motives, including these.<sup>61</sup> Seeking to mitigate the risk of liability when the information may implicate the whistleblower can motivate disclosures,<sup>62</sup> although whistleblowing by itself does not confer amnesty when it pertains to an individual's prior criminal conduct.<sup>63</sup> This fact may help explain why employee-whistleblowers tend to inhabit the tiled world, situated lower in an organization's hierarchy. On the one hand, higher-ups, including denizens of the carpeted world, could be sources of better information about wrongdoing; on the other hand, that information may well inculcate them as direct and knowledgeable participants in criminal conduct.<sup>64</sup> Motivation is also irrelevant to the legal consequences of whistleblowing when an individual has a duty to reveal information, as would a gatekeeper with an obligation to make disclosure, such as an auditor who fulfills a duty imposed by federal securities law.<sup>65</sup> Nor does a whistleblower's motivation necessarily bear on the *quality* of the whistleblower's report, something of a theoretical issue in any event given the imponderable nature of subjective motivation in this context.

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61. See Dyck, Morse & Zingales, *supra* note 3, at 2215 (noting the mix of considerations that motivate whistleblowing); see also Claire Hill, Brett McDonnell & Aaron Stenz, *Bad Agent, Good Citizen?*, 88 FORDHAM L. REV. 1631, 1644–45 (2020) (stressing variety of motivations for lawyer whistleblowers).

62. Dyck, Morse & Zingales, *supra* note 3, at 2245 (reporting that in around 35% of cases in study, avoiding liability appeared relevant to whistleblower).

63. Miriam H. Baer, *Reconceptualizing the Whistleblower's Dilemma*, 50 U.C. DAVIS L. REV. 2215, 2227 (2017) ("[W]histleblowing . . . does not confer amnesty." (quoting Julie Rose O'Sullivan, "Private Justice" and FCPA Enforcement: Should the SEC Whistleblower Program Include a *Qui Tam* Provision?, 53 AM. CRIM. L. REV. 67, 78 (2016))).

64. *Id.* at 2219.

65. 15 U.S.C. § 78u-6(h)(1)(A)(iii); see Lawrence A. Cunningham, *Beyond Liability: Rewarding Effective Gatekeepers*, 92 MINN. L. REV. 323, 330–31 (2007) (differentiating between gatekeepers, who generally report within organizations, and whistleblowers, who may report to the public or to authorities, and terming auditors, subject to statutory whistleblowing obligations, an instance of "nonvolunteer" whistleblowers).

Assumptions or theories about whistleblowers' motivations are crucial to the operation and effectiveness of legal doctrines and other structures that afford protection against retaliation or offer financial incentives for whistleblowing, such as Dodd-Frank. All operate against a backdrop in which the practical consequences for known whistleblowers can be severe. One quantitative study found that monetary incentives are associated with more cases in which whistleblowing leads to the revelation of major financial fraud, contrasting fraud cases in the health care sector with all others.<sup>66</sup> The study—focused on cases prior to Dodd-Frank—attributes this difference to the fact that successful fraud claims originating in the health-care sector are more likely to be eligible for monetary rewards under the federal False Claims Act due to the significant governmental presence in procurement.<sup>67</sup> But overall the study finds it “surprising” that employees decide to blow the whistle given its association with wrongful discharge claims.<sup>68</sup>

Less formally, identified whistleblowers often find themselves ostracized and shunned in many ways.<sup>69</sup> For Tyler Shultz, the prototypical whistleblower introduced earlier, a highly atypical aftermath followed his revelations about Theranos. To be sure, he reports that his parents incurred \$400,000 in legal fees when Theranos responded aggressively through its lawyers, threatening and demanding the execution of non-disclosure agreements.<sup>70</sup> But post-Theranos Mr. Shultz stayed in Silicon Valley in the medical-testing business, co-founding a startup to develop a line of research from his time at Stanford and raising \$37 million in early-stage venture capital funding secured in 2018.<sup>71</sup> That his experience is widely viewed as exceptional underscores the overhang of well-known adverse consequences in shaping whistleblowers' motivations. Additionally, many insiders who are aware of indicia of illegal conduct lack resources of the nature and magnitude available to Mr. Shultz through his family and other relationships.

Reframing whistleblowing as an acknowledged component of corporate governance—in particular, as a source of private information that materially facilitates the effectiveness of internal control systems—can help overcome powerful norms against being seen as a “rat” or a “snitch,” and thus vulnerable to retaliation by wrongdoers as well as by other actors “who

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66. Dyck, Morse & Zingales, *supra* note 3, at 2215.

67. *Id.* at 2245.

68. *Id.*

69. *Id.* at 2251.

70. CARREYROU, *supra* note 24, at 287.

71. For details, see *Flux Biosciences*, PITCHBOOK, <https://pitchbook.com/profiles/company/267820-66#overview> [<https://perma.cc/3TJP-V9VQ>].

enforce the social code.”<sup>72</sup> Situating the response to whistleblower reports within the board’s suite of responsibilities should add credibility to assurances a corporation provides employees by garnering the attention of high-level governance actors and the cohort of lawyers who advise them. Along these lines, some corporations now define whistleblowing as an obligation, not just a right.<sup>73</sup> In experimental research, when whistleblowing is cast as a duty, more of it occurs, arguably due to the increased social status ascribed to whistleblowers subject to duties to report.<sup>74</sup> Additionally, credible assurances that internally-made disclosures will remain confidential and will be investigated by personnel who are organizationally distant from those accused of wrongdoing should reduce perceived risks of retaliation and signal that the value of whistleblowing is acknowledged.<sup>75</sup> Otherwise, it is open to debate how powerfully financial incentives can operate, especially for higher-placed (often older) insiders who have much to lose if excluded from the corporation that employs them or the industry, or demeaned and demoted in rank and status within them.

Separately, by rewarding whistleblowers, might the law interfere with an individual’s intrinsic motivation to blow the whistle because it is the right thing to do? Raising this possibility, Emad Atiq questions the impact on financially-incentivized whistleblowers themselves, who might regret having become even more “ beholden to financial interests.”<sup>76</sup> On the other hand, recasting whistleblowing as a duty owed to a corporation or encompassing it as an acknowledged component of corporate governance structures might strengthen—or “crowd in”—intrinsic motivation through a strong signal of encouragement. Either (or both) could also trigger the ethical value of fulfilling one’s obligations, whether imposed directly by positive law or via a corporation’s internal rules and policies.<sup>77</sup>

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72. Miller, *supra* note 4, at 996 n.50.

73. *Id.* at 996.

74. Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1206 (2010).

75. See David Freeman Engstrom, *Whither Whistleblowing? Bounty Regimes, Regulatory Context, and the Challenge of Optimal Design*, 15 THEORETICAL INQUIRIES L. 605, 615 (2014) (observing that higher-quality tips from higher-placed sources may require strengthening protections against retaliation, not increased bounties).

76. Emad H. Atiq, Note, *Why Motives Matter: Reframing the Crowding Out Effect of Legal Incentives*, 123 YALE L.J. 1070, 1097 (2014).

77. See Cary Coglianese & Jennifer Nash, *Compliance Management Systems: Do They Make a Difference?*, in THE CAMBRIDGE HANDBOOK OF COMPLIANCE (Benjamin van Rooij & D. Daniel Sokol eds., forthcoming Apr. 2021) (manuscript at 21–22) (on file with author) (acknowledging that heavy emphasis on compliance may potentially interfere with intrinsic motivation while also acknowledging that compliance and respect for the rule of law are themselves important ethical values). For an overview of arguments and social-science evidence concerning crowding-out and crowding-in effects, see Deborah A. DeMott, *The Domains of Loyalty: Relationships Between Fiduciary Obligations and Intrinsic Motivation*, 62 WM. & MARY L. REV. 1337 (2021).

Additionally, and distinct from the power of social sanctions against whistleblowing, the overall efficacy of reward programs in generating information useful to law-enforcement agencies (including the SEC)<sup>78</sup> is tied to the robustness of anti-retaliation assurances through a complex and highly individualized motivational mix of loss-aversion and gain-seeking that's hard to unscramble.

## II. THE TEXTURE AND CONTENT OF WHISTLEBLOWING LAW

The evolution of whistleblowing law in the United States fits within a larger pattern that typifies the ongoing development of corporate law and corporate governance as articulated in two recent accounts. In its 2017 edition the foundational book *The Anatomy of Corporate Law* concludes with a chapter, *Beyond the Anatomy*.<sup>79</sup> Its authors, acknowledging the book's ahistorical and functional methodology, in one section venture "Beyond the Present" of corporate law and see a "fundamental rethink of corporate laws . . . under way in many countries, partly as a reaction to corporate scandals and the alleged failure of corporate governance at financial institutions" that preceded the world-wide financial crisis of 2008–2010.<sup>80</sup> Likewise on the table as current issues are "the goals of corporate law," which for these authors implicate the design of regulatory measures to assure that the social costs of corporate activity are reflected in corporations' financial results.<sup>81</sup> Writing in the same era about the evolution of corporate governance as a path-dependent process not isolated from shifts in broader social and economic concerns, Ronald Gilson observes that although much of corporate governance is not dictated or specified by law, governance matters may become legally specified "when legislatures conclude that self-generated governance is less effective than social welfare demands."<sup>82</sup> Whistleblowing law develops responsively and to a considerable extent episodically, whether through legislative enactment or common law adjudication, generally following in the wake of outrage at wrongdoing known to insiders within organizations. A sketch of that evolution follows.

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78. See Amanda M. Rose, *Calculating SEC Whistleblower Awards: A Theoretical Approach*, 72 VAND. L. REV. 2047, 2050 (2019) (arguing the initial premise in SEC's calculation of awards should be "help[ing] the SEC in its deterrence mission," with the implication that awards should be structured to reward tips that create more benefits than costs for SEC).

79. John Armour, Luca Enriques, Mariana Pargendler & Wolf-Georg Ringe, *Beyond the Anatomy*, in *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 267 (3d ed. 2017).

80. *Id.* at 269.

81. *Id.* at 271.

82. Gilson, *supra* note 1, at 8.

Historical accounts of whistleblowing law trace it to 1863. Congress adopted (and President Lincoln signed) the False Claims Act (FCA)<sup>83</sup> when it became clear that many suppliers had provided substandard services and goods to Union troops in the midst of the Civil War.<sup>84</sup> From its beginning, the FCA has included a provision authorizing *qui tam* suits brought by whistleblowers on behalf of the United States. Under the FCA as revised in 1986, a whistleblower may receive up to thirty percent of the proceeds of a lawsuit, recovered from the defendant in a judgment on a claim stemming from fraud in federal spending, procurement, or contracting.<sup>85</sup> Thus, bounty or reward systems to incentivize whistleblowing have a long lineage in the United States that predate statutory anti-retaliation protections. For employees of the federal government, anti-retaliation measures date to 1912 and the Lloyd-LaFollette Act<sup>86</sup> (later amended by the Civil Service Reform Act of 1978), enacted in response to Presidential “gag orders” that Congress understood to stymie its ability to obtain relevant information from federal civil-service employees.<sup>87</sup> Further strengthening the position of whistleblowers, the Whistleblower Protection Act (WPA) of 1989 created the Office of Special Counsel to investigate allegations of illegal personnel practices, among other measures.<sup>88</sup> In 2012, the Whistleblower Protection Enhancement Act addressed the WPA’s lack of specified remedies and clarified the breadth of disclosures protected by the statutory regime, which now applies to disclosures of violations of law, rule, or regulation, or “gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”<sup>89</sup>

Notwithstanding their present breadth, these statutes apply only to employees of the federal government, with non-identical counterparts in

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83. Presently codified at 31 U.S.C. §§ 3729–3733.

84. *The False Claims Act*, NAT’L WHISTLEBLOWER CTR., <https://www.whistleblowers.org/prote-ct-the-false-claims-act> [<https://perma.cc/B83X-7UH4>].

85. 31 U.S.C. § 3730(d)(2).

86. The Lloyd-LaFollette Act was added as section six to the Postal Service Appropriations Act of 1912, ch. 389, § 6, 37 Stat. 539, 555, in response to “gag orders” from Presidents Taft and (Teddy) Roosevelt that prohibited employees of executive branch departments from seeking to influence legislation except through departmental heads. The Senate perceived the orders as enabling the Executive Branch to bar Congress from access to sources of information that should be open to it. The Act applied to civil-service employees and assured their rights to petition Congress or furnish information to it. It provided safeguards against the arbitrary dismissal of civil servants who attempted to communicate with Congress. For background, see <https://whistleblowersblog.org/2012/08/articles/government-whistleblowers/happy-birthday-lloyd-la-follette-act/>.

87. See 5 U.S.C. § 7211.

88. Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified as amended in scattered sections of 5 U.S.C.).

89. Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, sec. 103, § 2302(a)(2), 126 Stat. 1465, 1466.

state statutes that are mostly focused on protecting against retaliation.<sup>90</sup> For private-sector employees, statutory protection for whistleblowers at the federal level has a much shorter history that begins with SOX in 2002. As elaborated above, like Dodd-Frank, SOX applies only when a whistleblower's report pertains to specified types of misconduct. Additionally, statutes applicable to specific industries may address whistleblowing but also contain significant limitations on coverage. For example, although the health and pharmaceutical industries are heavily regulated by the Food and Drug Administration (FDA) through authority under the Federal Food, Drug, and Cosmetic Act (FFDCA), the FFDCA does not create whistleblower protections applicable to the pharmaceutical and cosmetic industries.<sup>91</sup> In 2011, the Food Safety Modernization Act authorized whistleblower-protective rules for the food industry.<sup>92</sup> Thus, the extent of legally-mandated protection for employee whistleblowers in the pharmaceutical industry and in health care turns on applicable state law. On the other hand, the oldest of the federal statutes—the FCA—may create a viable whistleblower claim when misconduct implicates false claims for payment by the federal government and the employee-whistleblower proceeds with a *qui tam* action.<sup>93</sup>

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90. In the United Kingdom, as in the United States, whistleblower legislation was preceded by scandals and a series of public inquiries. These focused on the collapse of the BCCI bank and a catastrophic incident at a recreational facility in which an employee who identified safety lapses was dismissed after reporting them to management. See Elletta Sangrey Callahan, Terry Morehead Dworkin & David Lewis, *Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest*, 44 VA. J. INT'L L. 879, 883 (2004). The Public Interest Disclosure Act (PIDA), enacted in 1998, creates an express exception to the duty of confidentiality that an employee owes to an employer. See Public Interest Disclosure Act 1998, c. 23 (UK), <https://www.legislation.gov.uk/ukpga/1998/23/content> s [https://perma.cc/K3Y8-9T5V], incorporated into the Employment Rights Act 1996, c. 18 (UK), <https://www.legislation.gov.uk/ukpga/1996/18/contents> [https://perma.cc/XLQ7-93JZ], subsequently modified by the Enterprise and Regulatory Reform Act 2013, c. 24 (UK), <https://www.legislation.gov.uk/ukpga/2013/24/contents> [https://perma.cc/KZ6C-SQ25]. PIDA, which offers no financial incentives for whistleblowing, in most instances requires that internal reporting precede reporting to external audiences. PIDA's structure requires litigation before expert employee tribunals with costs beyond the reach of most employees; the statute recommends but does not require that employers adopt internal-reporting procedures. For these criticisms, among others, see ALL PARTY PARLIAMENTARY GRP. FOR WHISTLEBLOWING, WHISTLEBLOWING: THE PERSONAL COST OF DOING THE RIGHT THING AND THE COST TO SOCIETY OF IGNORING IT (2019), [https://docs.wixstatic.com/ugd/88d04c\\_9754e54bc641443db902cd963687cb55.pdf](https://docs.wixstatic.com/ugd/88d04c_9754e54bc641443db902cd963687cb55.pdf) [https://perma.cc/HR68-DS53].

91. 21 U.S.C. §§ 301–399i.

92. See *id.* § 399d.

93. For a prominent example, see *United States ex rel. Eckard v. GlaxoSmithKline*, No. 04-CV-10375-JLT (D. Mass. Mar. 2, 2011) (Bloomberg Law). *Eckard* involved false claims arising from chronic and serious deficiencies in quality control at a manufacturing plant. This led to the public release of adulterated and defective pharmaceutical drugs that harmed those who bought them as well as false claims for payment by federal and state purchasers, as well as payment under Medicare and state Medicaid programs. The whistleblower—the corporation's manager for quality control—internally reported code violations that were not adequately investigated, then was downsized out of a job. The *qui tam* case settled for \$600 million plus interest. See *Blue Cross Blue Shield Ass'n v. GlaxoSmithKline LLC*, 417 F. Supp. 3d 531, 548 (E.D. Pa. 2019).



On the state level, the District of Columbia and all fifty states have some form of whistleblower-protective statute. These vary widely in content and scope<sup>94</sup> but are important protections for at-will employees.<sup>95</sup> Many statutes were enacted in the wake of specific incidents when lawmakers believed that employee reporting could have prevented or ameliorated harm.<sup>96</sup> Seven states require a whistleblower to report internally before turning to an external channel.<sup>97</sup> Common law doctrines may also afford protection; in most but not all states<sup>98</sup> wrongful discharge in violation of public policy is tortious.<sup>99</sup> As applied to whistleblowers, the tort protects employees who report or inquire about conduct believed to be illegal or to violate an established professional or occupational code of conduct,<sup>100</sup> in particular one that threatens injury to a public interest as opposed to harm internalized to the corporation itself.<sup>101</sup> The wrongful-discharge tort, plus state whistleblower-protective statutes, undergird the argument advanced above that although employee-whistleblowing may theoretically breach fiduciary duties of loyalty and confidentiality, it should be protected by privilege under common law principles of tort law.<sup>102</sup>

In general, the fragmentary and episode-driven quality of whistleblowing law in the United States undercuts its capacity to facilitate effective systems of internal control and to overcome deeply entrenched opposition to organizational actors who reveal evidence suggestive of others' misconduct, whether externally or through internal channels. Acknowledging whistleblowing within formal organizational law would contribute an overlay of uniformity, at least as across business entities formed and governed under any particular state's law.

### III. REFRAMING WHISTLEBLOWING WITHIN CORPORATE GOVERNANCE

Recast as actors within a corporate governance framework, whistleblowers, the private information they reveal, and the frictions they create could facilitate the ability of directors and senior officers to better assure that the organization complies with positive law. Their ability to do so is all the more pressing in an era when, as Donald Langevoort writes, a

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94. For many specifics, see Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99 (2000).

95. Leonard M. Baynes, *Just Pucker and Blow?: An Analysis of Corporate Whistleblowers, the Duty of Care, the Duty of Loyalty, and the Sarbanes-Oxley Act*, 76 ST. JOHN'S L. REV. 875, 888 (2002).

96. Callahan et al., *supra* note 90, at 882.

97. *Id.* at 891.

98. New York is a significant exception. See *Sullivan v. Harnisch*, 969 N.E.2d 758 (N.Y. 2012).

99. RESTATEMENT OF EMPLOYMENT LAW § 5.01 (AM. L. INST. 2010).

100. *Id.* § 5.02(e).

101. For the leading precedent, see *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988).

102. See *supra* text accompanying notes 57–60.

parade of “all the more garish” corporate wrongdoing seems to co-exist with widespread adoption of internal compliance systems.<sup>103</sup> This section opens by sketching two recent developments in corporate law. In their articulations of directors’ duties, Delaware courts have reinvigorated the component of directors’ duty of loyalty that focuses on legal and regulatory compliance, assigning a proactive role to the board.<sup>104</sup> Separately, in one jurisdiction, organizational law explicitly addresses whistleblowing and subjects directors to specific responsibilities.<sup>105</sup> The section then elaborates on why whistleblowers should be formally embraced as components of corporate governance. While not a panacea for corporate misconduct, a broader understanding of governance mechanisms and actors expands the potential range of responses to the risk of wrongdoing.

#### A. *Evolution in Corporate Law*

Like corporate governance, corporate law itself is less static than some academic accounts suggest and is at least potentially responsive to external circumstances. To be sure, it is always difficult—writing in the present—to discern blips versus developments with staying power. With that caveat, consider recent shifts in the Delaware jurisprudence of directors’ duties as they bear on compliance with positive law. In 1996, the Court of Chancery famously articulated a fiduciary duty of oversight regarding legal and regulatory compliance in the *Caremark* case.<sup>106</sup> A decade later, the Delaware Supreme Court situated the duty as a component of directors’ duty of loyalty, with the important consequence that a director could not be shielded against liability for monetary damages on a *Caremark* claim through exculpatory language in the corporation’s charter, in contrast with a claim grounded in a breach of the duty of care.<sup>107</sup> Assessing developments over the next decade, scholarly commentators find grounds for pessimism about the potential of *Caremark* claims and their potential impact on directors’ engagement with compliance.<sup>108</sup> Cases from that era, few

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103. Langevoort, *supra* note 13, at 942. To be sure, it is likely impossible to know the full extent to which internal compliance measures discovered wrongdoing. An earlier study (using large reported financial frauds from 1996–2004) estimated that 34% of frauds were detected internally but also cautioned this proportion may be an underestimate. Dyck, Morse & Zingales, *supra* note 3, at 2225.

104. See *infra* text accompanying notes 103–118.

105. N.Y. NOT-FOR-PROFIT CORP. LAW § 715-b (LexisNexis 2021).

106. *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

107. *Stone v. Ritter*, 911 A.2d 362 (Del. 2006). Exculpatory clauses are permitted to the extent consistent with the relevant provision in Delaware’s corporation statute, DEL. CODE ANN. tit. 8, § 102(b)(7) (2021).

108. See Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2113–14 (2016) (noting “episodic” judicial intervention, evisceration of directors’ duty of

resulting in liability,<sup>109</sup> imposed a pleading threshold that required the allegation of facts supporting an inference that a majority of the board intentionally caused a violation of the law or consciously disregarded it.<sup>110</sup> Other events in the course of a lawsuit might also defeat liability on an otherwise meritorious claim.<sup>111</sup> For conduct occurring deeper within the organization, liability risks for directors were few unless the facts were egregious and the corporation had no board-installed compliance system at all.

Both the tone and content of the Supreme Court's analysis of *Caremark* claims shifted in 2019's *Marchand v. Barnhill*, in which an ice-cream manufacturer's allegedly shoddy manufacturing practices led to a listeria outbreak that contaminated its product, causing three deaths plus an operational shutdown and liquidity crisis for the company.<sup>112</sup> Quality-control issues were reported to members of management, who did not report them to the board until the company issued its first product recalls; the board thereafter engaged in no in-depth discussion.<sup>113</sup> The court held that the company's nominal compliance with food-safety regulations did not suffice to establish that the board had implemented a system to monitor safety issues at the board level; the complaint alleged an absence of board-level committees or practices to inform the board about safety concerns.<sup>114</sup> And ice cream was the company's sole product, for which food-safety risks carried grave consequences for human health.<sup>115</sup> Professional commentary on *Marchand* treats it as a significant development, one law-firm memo

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care by business judgment rule, and "retreat" of corporate law from turf now occupied by internal compliance functions); Langevoort, *supra* note 12, at 941 (characterizing *Caremark* as an impetus to "just do something" that invited a check-the-box approach to compliance); Miller, *supra* note 4, at 986 (noting "curiously ambivalent quality" in Delaware's approach to compliance, imposing significant obligations on directors but following through with liability only when directors do not "manifest even minimal efforts").

109. Miller, *supra* note 4, at 986 n.14 (generalizing that cases generating liability typically involve "egregious facts" plus "companies operated out of countries with poor reputations for corporate governance").

110. *City of Birmingham Ret. & Relief Sys. v. Good*, 177 A.3d 47, 60 n.75 (Del. 2017).

111. See *In re Massey Energy Co. Derivative & Class Action Litig.*, No. 5430-VCS, 2011 WL 2176479, at \*20–21 (Del. Ch. May 26, 2011) (directors who knew that corporation had already pled guilty to criminal charges stemming from unsafe operating conditions and had suffered other adverse consequences acted inconsistently with duty of loyalty by permitting senior management to continue adversarial relationship with regulators and by failing to assure that corporation adopted policies to comply with safety regulations); *In re Massey Energy Co. Derivative & Class Action Litig.*, 160 A.3d 484, 497 (Del. Ch. 2017) (dismissing derivative claims because plaintiffs lost standing due to corporation's merger, noting that *Caremark* claim would otherwise have been viable).

112. *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019).

113. *Id.* at 812–14.

114. *Id.* at 813, 822–23.

115. *Id.* at 809.

concluding that it “[b]reathes [n]ew [l]ife” into *Caremark* claims.<sup>116</sup> Given the case’s unquestionably bad facts, *Marchand*’s potential resuscitation of directors’ liability should not be overstated, but the court’s opinion seems almost nonplussed at times by the obliviousness to risk displayed by the corporation’s senior management and its directors.<sup>117</sup> But the facts alleged sufficed to raise an inference that the directors failed even to attempt to assure the presence of “reasonable information and reporting systems” as *Caremark* requires, perhaps scaling back a bit on standards for establishing conscious disregard and instead emphasizing the nature and magnitude of the risks involved.<sup>118</sup>

*Marchand* is too recent as a precedent to assess its full force, let alone its staying power over time, but the Court of Chancery treats it as refocusing attention on the gravity of a particular compliance risk in the environment in which a corporation operates. In *In re Clovis Oncology, Inc. Derivative Litigation*, the directors of a biopharma start-up allegedly ignored multiple warning signs concerning the efficacy in fighting cancer of the company’s most promising drug in development, which violated internal clinical trial protocols and FDA regulations.<sup>119</sup> Under *Marchand*, these allegations supported a *Caremark* claim because they concerned a “mission critical” regulatory compliance risk for which *Marchand* requires that the directors exercise their oversight function “more rigorously.”<sup>120</sup> To be sure, whistleblower reports do not figure in either case, but both cases may be indicia of a turn in corporate-law jurisprudence toward more vigorous engagement with the importance of legal and regulatory compliance. In both cases this turn was framed as “mission critical” to the corporation’s ongoing viability as a business. And in both, the risks implicated human life and health, not just business risks for the corporation.<sup>121</sup>

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116. FREDERICK B. THOMAS, JODI A. SIMALA, ANDREW J. NOREUIL, RYAM H. FERRIS & THOMAS C. SANTORA., MAYER BROWN, LEGAL UPDATE: DELAWARE DECISION BREATHES NEW LIFE INTO BAD FAITH CLAIMS AGAINST DIRECTORS (2019), <https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2019/07/delaware-decisionnew.pdf> [<https://perma.cc/ET3E-JFJB>].

117. For example, senior management allegedly “turned a blind eye to red and yellow flags” waved before it, not just by internal tests but by food-safety regulators “until it was too late.” *Marchand*, 212 A.3d at 811. For its part, the board allegedly made no effort to establish “reasonable compliance system[s] and protocols” concerning “the obviously most central consumer safety and legal compliance issue facing the company.” *Id.* at 824.

118. *Id.* at 822 n.106 (quoting *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch.1996)).

119. *In re Clovis Oncology, Inc. Derivative Litig.*, No. 2017-0222-JRS, 2019 WL 4850188, at \*1 (Del. Ch. Oct. 1, 2019); see also *Hughes v. Hu*, No. 2019-0112-JTL, 2020 WL 1987029, at \*16 (Del. Ch. Apr. 27, 2020) (finding facts alleged in complaint created pleading-stage inference of bad-faith conduct by members of audit committee in failing to provide oversight in light of company’s history of flawed financial reporting (citing *Marchand*, 212 A.3d at 821)).

120. *In re Clovis*, 2019 WL 4850188, at \*13.

121. For further discussion of the resurgence of *Caremark* claims and the causes, see Roy Shapira, *A New Caremark Era: Causes and Consequences*, 98 WASH. U. L. REV. 1855, 1865–79 (2021).

Corporate law also evolves at the level of change in organizational statutes that enable corporate formation and furnish both mandatory and enabling rules on an ongoing basis. As amended in 2013, the New York Not-for-Profit Corporation Act mandates that directors of corporations with twenty or more employees and revenues in excess of \$1 million in the prior fiscal year adopt and oversee the implementation of compliance policies with whistleblower components.<sup>122</sup> As amended, the Act mandates the contents of whistleblower policies: policies must (1) protect against retaliation, persons “who report suspected improper conduct”; (2) provide for a designated administrator who shall be a director, officer, or employee; and (3) assure that the subject of a whistleblower complaint is not present for deliberations concerning it.<sup>123</sup> Still open to dispute is whether the statutory provision supports an implied private cause of action for whistleblowing employees who suffer retaliation.<sup>124</sup>

Reconsidering the governance role of whistleblowers is consistent with these recent indicia of evolution in corporate law and governance. Consistent with Ronald Gilson’s observation, legislatures as well as courts specify the law further when “self-generated governance is less than social welfare demands.”<sup>125</sup> In this light, scholarship that premises corporate governance as singly focused on agency costs stemming from misaligned incentives as between shareholders and managers can seem dated or incomplete.<sup>126</sup> Likewise, understanding governance as a purely internal arrangement that does not generate substantial effects on third parties that

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122. N.Y. NOT-FOR-PROFIT CORP. LAW § 715-b (LexisNexis 2021). The amendment, part of the Non-Profit Revitalization Act of 2013, also applies to the Estates, Powers and Trusts Law. Non-Profit Revitalization Act of 2013, ch. 549, 2013 N.Y. Laws 1400. A further amendment in 2016 eliminated a requirement that whistleblower policies be overseen and adopted only by independent directors. Act of Nov. 28, 2016, ch. 466, sec. 11, § 715-b(b)(2), 2016 N.Y. Laws 947, 951. By mandating the adoption of whistleblower policies, the amendment goes further than IRS Form 990 for charitable non-profits, which asks whether the organization has a whistleblower policy. See Jean Gordon Carter, *Best Practices for Exempt Organizations and Form 990*, J. OF ACCT. (Sept. 1, 2020), <https://www.journalofaccountancy.com/issues/2010/sep/20102725.html> [<https://perma.cc/G4D5-V7KA>]. These provisions (and the Form 990 question) complement a portion of SOX, which imposes criminal liability in the event of retaliation against whistleblowers who report federal offences and in the event of destruction of records with intent to obstruct a federal investigation. 18 U.S.C. §§ 1513(e), 1519.

123. N.Y. NOT-FOR-PROFIT CORP. LAW § 715-b (LexisNexis 2021).

124. See *Joshi v. Trs. of Columbia Univ.* in N.Y., No. 17-CV-4112, 2018 WL 2417846, at \*11 (S.D.N.Y. May 29, 2018) (implying private cause of action given statute’s express concern with employees of non-profits and noting split between state-court cases). Compare *Pietra v. Poly Prep Country Day Sch.*, No. 506586/2015 (N.Y. Sup. Ct. Oct. 7, 2016) (implying cause of action), with *Ferris v. Lustgarten Found.*, No. 606353/16 (N.Y. Sup. Ct. Jan. 17, 2017) (declining to imply cause of action).

125. Gilson, *supra* note 1, at 8.

126. See Christopher M. Bruner, *Methods of Comparative Corporate Governance*, in RESEARCH HANDBOOK ON COMPARATIVE CORPORATE GOVERNANCE (Afra Afsharipour & Martin Gelter eds., forthcoming June 2021) (manuscript at 9) (on file with author).

cannot be addressed by other bodies of law or regulation can slight the contemporary significance of internal compliance systems and processes.<sup>127</sup>

### B. Whistleblowers as Governance Actors

Repositioned as governance actors, whistleblowers could better facilitate corporate compliance with positive law. This objective entails focusing on internal reporting because it serves as a more immediate source of information to inform managerial decisions and the board.<sup>128</sup> Whistleblowers might formally be designated governance actors through two routes: one specific to particular firms, the other more general. As some corporations have done,<sup>129</sup> whistleblowing could be made a duty imposed by individual firms on employees and other agents. What the duty would specifically require, and how the corporation handles whistleblower reports, would fall within the decision-making province of individual firms. Alternatively (or additionally), state-level organizational law could address whistleblowing, imposing requirements comparable to those in the New York statute discussed above.<sup>130</sup> Changes at the level of organizational law would assure greater uniformity, at least for internal whistleblowing, and may more effectively engage the attention of boards of directors and senior management. What both routes share is their potential to signal—to potential whistleblowers, their colleagues, and audiences external to the corporation—that reporting potential wrongdoing is compatible with the corporation’s own norms, thereby helping to offset reluctance to report and reduce the adverse extra-legal consequences anticipated and borne by many whistleblowers. Both routes, like formal measures more generally, “signalize” (in Lon Fuller’s term) the appropriateness of certain conduct.<sup>131</sup> Both have potential to defuse the effect of cultural inhibitions against reporting potential wrongdoing and to offset if not rewrite extra-legal (or cultural) understandings of “what is ‘not done.’”<sup>132</sup>

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127. See, e.g., Griffith, *supra* note 108, at 2079 (stating that “corporate governance arrangements both are and ought to be the product of a bargain between shareholders and managers,” in contrast to compliance, externally imposed pursuant to “the directive of a government enforcer”).

128. The independent value of external reporting is beyond the scope of this article, as are the complex causal links between it and internal reporting.

129. See Miller, *supra* note 4, at 996.

130. See *supra* text accompanying notes 122–124.

131. For the “signalize” term, see Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801 (1941). Fuller’s specific focus is the functions served by the formal consideration requirement for contract formation, but his point reaches more broadly.

132. On culture in the context of corporate governance as a widely known and often unspoken understanding of “what goes with what” and “[w]hat is ‘not done,’” see Amir N. Licht, *Culture and Law in Corporate Governance*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE, *supra* note 1, at 129, 131.

Addressing whistleblowing through state-level organizational law has the stronger prospect for enlisting the attention of directors and senior management because amendments to foundational organizational statutes can impose mandates on the board itself. This route may additionally hold more promise in circumstances in which some directors and CEOs could be tempted to suppress whistleblowers' reports or avoid their implications because it underscores the linkage between whistleblowing policies and legal compliance, as well as their institutional gravity. To be sure, aspects of implementation would be delegated, whether to board committees, officers, or deeper within the organization, but the initial and non-delegable responsibility concerning system design should be the board's. Further gravitas could be associated with a whistleblowing system if a committee of the board—perhaps the audit committee or a committee charged with risk management—bore explicit responsibility for ongoing monitoring and reporting to the entire board.

Additionally, enlisting organs of governance at this level could increase the likelihood that whistleblower reports are used more effectively, regardless of which personnel bear front-line responsibility for initial investigations. Failure to make good use of such reports is an ongoing refrain in retrospective studies of corporate scandals. Veronica Root Martinez identifies the significance of informational silos in large organizations, aggravated by one-by-one investigations of whistleblower reports unaccompanied by aggregation.<sup>133</sup> Thus, although Wells Fargo had robust compliance programs based on the Organizational Sentencing Guidelines, the bank became known as an exemplar of persistent and avoidable misconduct, evidenced in retrospect by whistleblower reports of retaliation against employees who attempted to alert their superiors to fraudulent activity.<sup>134</sup> And cross-silo patterns suggestive of failed incentive structures and weak internal controls went unidentified.<sup>135</sup> Reducing the height of information silos and imposing the broader analytic perspective requisite to aggregation require direction and support from senior levels, which a mandatory role for the board and a board committee should facilitate.

Finally, state-level organizational law is the source of directors' duties, including the *Caremark* and *Marchand* duties to monitor detailed above. Ongoing concern at the board level with a corporation's compliance with positive law and regulation would be facilitated by more effective structures and practices concerning whistleblowing, which through its propensity to create friction can supplement and correct information the board otherwise

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133. Martinez, *supra* note 2, at 294.

134. *Id.* at 252 n.6.

135. *Id.* at 257, 291.

receives, including that traceable to more routinized compliance functions. Additionally, developments in jurisprudence like *Marchand*, along with changes in organizational statutes, generally require advice from counsel to the board, as would compliance with a mandate to adopt and administer a system to engage with reports from whistleblowers. All should strengthen the ability of counsel to give advice underlining the importance of engaging with the efficacy of compliance.

#### CONCLUSION

Corporate law and corporate governance are mutable and porous, not static and closed. These properties enable them to respond to changed circumstances, which at present include assessments that many internal compliance systems have not proven adequate to meet the challenge of deterring and detecting corporate misconduct. Whistleblowers—prototypically denizens of the tiled world who reveal information that confounds accounts endorsed by higher-ups in the carpeted world—hold promise as resources. Academic accounts of corporate governance and the actors who populate governance structures should no longer exclude them. Nor should formal organizational law.