

2009

## "Whistle . . . And You've Got an Audience"

Amanda C. Leiter

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### Recommended Citation

Amanda C. Leiter, "Whistle . . . And You've Got an Audience", 36 Fordham Urb. L.J. 747 (2009).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol36/iss4/6>

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# "Whistle . . . And You've Got an Audience"

## **Cover Page Footnote**

Catholic University, Columbus School of Law.

# “WHISTLE . . . AND YOU’VE GOT AN AUDIENCE.”†

*Amanda C. Leiter\**

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## INTRODUCTION

One of the questions for discussion today is whether public rights litigation is an effective means of social change. This Article does not attempt an answer but begins to explore a set of issues central to any answer: the extent, types, uses, and potential shortcomings of government whistleblowing. There is considerable sociological and legal literature on government whistleblowing, but little of it addresses the issue from the angle relevant to maximizing the efficacy of public rights litigation. This Article begins to fill that gap. Part I discusses the importance of whistleblowers in the vindication and enforcement of public rights. Part II suggests eight traits that increase a government whistleblower’s utility to public rights litigators, such as access to information, insight, willingness to disclose, and relative honesty. Part III proceeds on the assumption that the effectiveness of public rights litigation depends in part on litigators’ use of the highest utility

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† Attributed to Greek philosopher Diogenes of Sinope. See THE COLUMBIA WORLD OF QUOTATIONS (Robert Andrew et al. eds., 1996) (“Discourse on virtue and they pass by in droves, whistle and dance the shimmy, and you’ve got an audience.”).

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whistleblowers. This Part also suggests several concrete issues one could explore empirically to assess litigators' present use of such whistleblowers; the discussion concludes with a somewhat more in-depth examination of one such issue: the legal landscape confronting federal government whistleblowers. Part IV offers very preliminary empirical evidence that the predictions of Parts II and III accord with reality. The Article concludes with a summary of outstanding questions about the importance of government whistleblowing to effective public rights litigation, and an outline of a possible approach to investigating these questions.

### I. THE CENTRALITY OF WHISTLEBLOWERS

Some background is necessary to explain why I consider government whistleblowing essential to effective public rights litigation. If today's question were whether litigation seeking to vindicate a widely-shared right can effect social change, one would not need to look beyond *Brown*<sup>1</sup> and *Roe*<sup>2</sup> to reach an affirmative answer. Clearly, even in the absence of whistleblowers, public rights litigation is one means of changing social policy.

For such litigation to serve as an *effective* tool to shift policy in a concerted direction, however, numerous predicate conditions must be met. For instance, litigators hoping to achieve such a shift must identify appropriate test cases with sympathetic plaintiffs and facts,<sup>3</sup> decide whom to sue, where to file suit, what causes of action to raise,<sup>4</sup> meet the often stringent justia-

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1. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding that public schools cannot be segregated on the basis of race).

2. *Roe v. Wade*, 410 U.S. 113 (1973) (striking down Texas statutes prohibiting abortions at any stage of pregnancy except to save the life of the mother).

3. See, e.g., Emily Zackin, *Popular Constitutionalism's Hard When You're not Very Popular: Why the ACLU Turned to Courts*, 42 LAW & SOC'Y REV. 367, 375-76 (2008) (suggesting that the ACLU may have modeled its litigation strategy in part on organizations like the NAACP, which "almost from its inception in 1909 . . . used courts as one avenue to promote its political agenda[, establishing] a national legal committee to review relevant cases and recommend promising ones for the organization's involvement" (citing Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910-1920)*, 20 LAW & HIST. REV. 97 (2002)).

4. See, e.g., MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950*, at 1-33, 105-37 (1987) (describing the NAACP Legal Defense Fund's litigation strategy in the decades leading up to *Brown*, and specifically noting the importance of local support for the litigation efforts); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1447 & n.38 (2005) (arguing that the Center for Individual Rights, a conservative public interest group with an "agenda of ending—categorically—affirmative action policies benefiting racial minorities" has followed the LDF's legal blueprint, making "deliberate choices about who will serve as plaintiffs in the test cases that it chooses to bring" (citing LEE EPSTEIN, *CONSERVATIVES IN COURT* 94, 113, 120 (1994); GREG STOHR, *A BLACK AND WHITE CASE: HOW AFFIRMATIVE ACTION SURVIVED ITS GREATEST LEGAL CHALLENGE* 46-49

bility requirements of the chosen forum,<sup>5</sup> and obtain and coordinate suitable amicus filings.<sup>6</sup>

These litigation-related concerns do not become relevant, however, until public rights advocates have formulated a social change agenda and begun weighing action strategies and evaluating the utility of litigation. Prior to that point, there is a different critical concern: access to information. Litigators cannot effectively drive social change unless they have complete and accurate information about the social ills they seek to correct.

Take, for example, the problems facing state public defenders' offices, many of which find themselves "pushed . . . to the breaking point" by "budget cuts and rising caseloads."<sup>7</sup> A recent study suggests that lawsuits filed over the last fifteen years have been fairly successful at "creat[ing] substantive, lasting reform" of indigent defense systems.<sup>8</sup> These so-called

(2004)); see also Ass'n of Trial Lawyers of Am., *Perspective from the Bench: How Civil Rights Issues Are Viewed by the Court—What Works and What Doesn't*, 1 ANN.2004 ATLA-CLE 211, 214 (2004) (providing informal advice on "what needs to be done to improve the chances for successfully litigating a civil rights case," including considerations relevant to forum and claim selection).

5. See Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384 (2000). Gilles argues that under recent, restrictive Supreme Court standing holdings, notably *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983):

[w]e have lost . . . the powerful force of the citizenry as a direct agent in effecting meaningful social change through America's courts. *Brown v. Board of Education*, . . . *Roe v. Wade*, . . . and scores of other landmark constitutional cases were driven by private plaintiffs who sought not only redress for themselves, but protection for society at large against the harms that they had personally suffered. . . . None of the plaintiffs in these cases would have been able to scale the equitable standing bar erected in *Lyons*.

*Id.* at 1386; see also, Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 473, 475-76 (2007) (discussing the standing hurdles that private attorneys general face in suits alleging violations of the Americans with Disabilities Act).

6. See, e.g., Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women's Rights Project*, 11 TEX. J. WOMEN & L. 157, 224 (2002) (detailing the careful strategy formulated by Justice Ginsburg—then Director of the ACLU Women's Rights Project—for pursuing women's rights through the courts, and noting that "a critical component . . . was the coordination of amicus briefs for the cases on which she was the primary attorney"). See generally Nicole J. De Sario, *The Quality of Indigent Defense of the 40th Anniversary of Gideon: The Hamilton County Experience*, 32 CAP. U. L. REV. 43, 61-62 (2003) (noting the difficult questions of (1) whom to include as plaintiffs; (2) where to sue; and (3) whom to sue); Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1295003](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1295003) (discussing the strategic choices necessary for "successful systemic litigation" to reform inadequate indigent defense systems).

7. Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 8, 2008, at A1.

8. Drinan, *supra* note 6 (manuscript at 19).

“second-generation” suits differ in kind from the ineffective assistance of counsel claims that public rights litigators filed in previous decades.<sup>9</sup> Many of the recent suits are “state-court class-actions, challenging objective criteria, such as excessive attorney caseloads [and] meager rates of attorney compensation.”<sup>10</sup> In other words, these second-generation suits depend on data that quantitatively demonstrate the inadequacy of the relevant state’s public defense system. Without specific and reliable programmatic information about “excessive” caseloads and “meager” compensation rates, the litigators pushing these suits could not have articulated—let alone realized—their reform goals.

Over the last half century, Congress and state legislatures have adopted “right-to-know” laws that improve public access to this sort of information. For example, subject to certain exemptions,<sup>11</sup> the Freedom of Information Act<sup>12</sup> (“FOIA”) grants “‘any person’” the right to request and receive “‘any record’ in the possession and control of a federal agency, government corporation, or other federal entity.”<sup>13</sup> Additionally, the Federal Advisory Committee Act<sup>14</sup> (“FACA”) and Government in the Sunshine Act<sup>15</sup> direct certain committees and agencies, respectively, to open their meetings to the public.<sup>16</sup> Comparable state open-records and open-meeting laws govern disclosure of information about state and local government activities.<sup>17</sup> Additionally, various subject-specific statutes also mandate disclosure of particular categories of government information. To meet the requirements of the Federal Funding Accountability and Transparency Act of 2006,<sup>18</sup> for instance, the George W. Bush (“Bush”) Administration created a public searchable database of *all* “government contract, grant and other award data.”<sup>19</sup>

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9. *Id.*

10. *Id.*

11. See 5 U.S.C. § 552(b) (2006) (listing exemptions).

12. § 552.

13. David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1787 (2008) (quoting 5 U.S.C. § 552(a)(3), (b)(1)-(9)).

14. 5 U.S.C. app. §§1-16 (2006).

15. § 552(b).

16. See *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 446-47 (1989) (detailing the basic requirements of and exceptions to FACA); *FCC v. ITT World Commc’ns, Inc.*, 466 U.S. 463, 469-74 (1984) (same for the Government in the Sunshine Act).

17. See The Reporters Comm. for Freedom of the Press, *Open Government Guide*, <http://www.rcfp.org/ogg/> (last visited Apr. 23, 2009) (providing an excellent, full-text searchable guide to every state’s open records and open meetings laws).

18. Pub. L. No. 109-282, 120 Stat. 1186 (2006).

19. *USAspending*, <http://www.usaspending.gov/> (last visited Apr. 16, 2009).

These laws are far from perfect, of course. A few recently-identified weaknesses of particular relevance to public rights advocates include the laws' vulnerability to selective and highly politicized enforcement,<sup>20</sup> and their susceptibility to narrowing by the courts.<sup>21</sup> In addition, critics note that the laws are "reactive," requiring interested parties to request and then wait to receive relevant government records rather than simply making all non-classified records available in searchable databases.<sup>22</sup> State information laws suffer from similar flaws. For example, like FOIA, most are reactive.<sup>23</sup> Numerous authors have suggested practical reforms to correct these and other problems with the right-to-know laws, including amending open-records laws to mandate that agencies post some categories of records on the internet without waiting for a formal request.<sup>24</sup> Overall, whether public rights advocates tell a glass-half-full or half-empty story about our current network of right-to-know laws is a question of perspective. While the existing laws do provide access to some information essential to effective litigation, their many shortcomings may delay or even derail litigation efforts in particular situations.<sup>25</sup>

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20. Vladeck, *supra* note 13, at 1790; *see also* Minjeong Kim, *Numbers Tell Part of the Story: A Comparison of FOIA Implementation under the Clinton and Bush Administrations*, 12 COMM. L. & POL'Y 313, 337 (2007) (describing results of quantitative study that "supports the prevailing perception among scholars and public access advocacy groups that the Bush administration has sought to limit the scope of the FOIA and has impaired the effectiveness of the FOIA as an instrument of access").

21. Michael J. Mongan, *Fixing FACA: The Case for Exempting Presidential Advisory Committees from Judicial Review Under the Federal Advisory Committee Act*, 58 STAN. L. REV. 895, 905 (2005) (making that case with respect to FACA).

22. Vladeck, *supra* note 13, at 1789. *But see* Memorandum from the White House to the Heads of Executive Dep'ts and Agencies re: Freedom of Information Act (Jan. 21, 2009), *available at* [http://voices.washingtonpost.com/federal-eye/2009/01/\\_in\\_a\\_move\\_that.html?hpid=topnews](http://voices.washingtonpost.com/federal-eye/2009/01/_in_a_move_that.html?hpid=topnews) (directing all agencies to "adopt a presumption in favor of disclosures"; noting that this presumption "means agencies should take affirmative steps to make information public" in a timely way; and directing the attorney general to issue and publish new FOIA guidelines "reaffirming the commitment to accountability and transparency"); Memorandum from the White House to the Heads of Executive Dep'ts and Agencies re: Transparency and Open Government (Jan. 21, 2009), *available at* [http://voices.washingtonpost.com/federal-eye/2009/01/\\_in\\_a\\_move\\_that.html?hpid=topnews](http://voices.washingtonpost.com/federal-eye/2009/01/_in_a_move_that.html?hpid=topnews) (directing the Director of the Office of Management and Budget to issue, within 120 days, recommendations on establishing "a system of transparency, public participation, and collaboration" in government).

23. *See Open Government Guide*, *supra* note 17 (comparison of all fifty states' provisions regarding "On-line dissemination" of information).

24. *See, e.g.,* Vladeck, *supra* note 13, at 1828-36 (noting "Three Proposals for Reform").

25. *Id.*, at 1799-1809 (detailing the legal hoops through which the Natural Resources Defense Council had to jump just to procure basic data on government use and disposal of the groundwater contaminant perchlorate—data obviously essential to any subsequent effort

Even if the laws were perfect, though, they could not solve two other access-to-information dilemmas for public rights litigators: (1) how to sift the vast quantities of public information for material that is useful, either because it evinces a violation of a widely-shared right, or because it could support legal action to vindicate such a right, and (2) how to obtain similarly useful information that is *not* publicly available (because, for example, it is classified<sup>26</sup> or qualifies for the deliberative process privilege<sup>27</sup>). The second dilemma speaks for itself, but the first requires some elaboration. The problem arises because federal and state governments generate enormous quantities of information. To cite just a few statistics on the federal side, the Federal Register, in which U.S. agencies publish all manner of actions, “weigh[ed] in” at 72,090 pages in 2007,<sup>28</sup> for a generation rate of about 200 pages per day. More overwhelming still, agencies must maintain a rulemaking record for many of the regulatory actions described in the Federal Register, and those records are often massive, comprising thousands or tens of thousands of pages of exhibits, hearing transcripts, agency reports, and comments by outside parties.<sup>29</sup> Searchable online databases of that information would do little to help public rights advocates sort the wheat from the chaff: the legally actionable conduct from the simply irresponsible from the utterly routine and reasonable. Diligent and fortuitous litigators might occasionally chance on a “smoking gun” in such a database, but thorough and effective culling of all or even most of the inculpatory or otherwise useful records requires a different kind of information:

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to request court assistance in forcing the responsible government agencies to clean up perchlorate-contaminated sites).

26. See 5 U.S.C. § 552(b)(1) (2006). Lest there be any doubt, such disclosures are extremely common. See, e.g., Michael Charlson, *The Constitutionality of Expanding Prepublication Review of Government Employees’ Speech*, 72 CAL. L. REV. 962, 966 (1984) (indicating that in some administrations, unauthorized disclosure of classified information is “a routine daily occurrence” (citing REP. OF THE INTERDEPARTMENTAL GROUP ON UNAUTHORIZED DISCLOSURES OF CLASSIFIED INFORMATION, at B1 (1982))).

27. See generally *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006) (recognizing that FOIA § 552(b)(5) incorporates the deliberative process privilege, which generally exempts from disclosure “agency documents that are both predecisional and deliberative”).

28. JAMES GATTUSO, RED TAPE RISING: REGULATORY TRENDS IN THE BUSH YEARS; BACKGROUND #2116 (2008), available at [http://www.heritage.org/research/regulation/bg2116.cfm#\\_ftn14](http://www.heritage.org/research/regulation/bg2116.cfm#_ftn14).

29. See, e.g., *Action on Smoking and Health (ASH) v. Dep’t of Labor*, 100 F.3d 991, 992 (D.C. Cir. 1996) (describing the “largest record in [the Occupational Safety and Health Administration’s] rulemaking history—more than 335,000 pages”); *Nader v. Nuclear Regulatory Comm’n*, 513 F.2d 1045, 1050 n.42 (D.C. Cir. 1975) (discussing a record that “involved months of hearings, over 22,000 pages of transcript, and thousands of pages of exhibits”).

guidance from someone intimately familiar with the government activities under scrutiny.

To give a concrete example of both information dilemmas in action, suppose a public rights group concerned about agency “capture”<sup>30</sup> by a regulated industry wishes to challenge as arbitrary and capricious<sup>31</sup> all environmental and public health and safety regulations in which a particular agency gave insufficient credence to the findings of staff scientists and placed excessive weight on the comments of industry lobbyists. With respect to the information published in the Federal Register or available in corresponding record pages, an inside source may be necessary to help the group locate and identify every example—or even just the most egregious examples—of arguable procedural misconduct (dilemma 1). Moreover, the group has no access to internal agency deliberations,<sup>32</sup> so even if the agency’s private files contain smoking-gun evidence of information-processing irregularities—for instance, a redlined document clearly indicating that the agency edited an internal scientific report to redact all references to a certain scientist’s findings and recommendations—the group cannot obtain that evidence without assistance from an informant (dilemma 2). At least in the regulatory context, then, efficient and effective use of public rights litigation to drive coherent, coordinated change in government policy depends crucially on access to inside information from public officials “in the know”—that is, on some form of whistleblowing.<sup>33</sup>

What of public rights advocates who seek to vindicate aggregated *individual* rights, though, such as the litigators who have worked over the last

30. See generally Mark Green & Ralph Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 YALE L.J. 871, 876 (1973) (warning of agency capture); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1684-88 (1975) (critiquing the “‘capture’ scenario, in which administrations are systematically controlled, sometimes corruptly, by the business firms within their orbit of responsibility, whether regulatory or promotional”).

31. 5 U.S.C. § 706(2)(a) (2006).

32. See *supra* note 27 (discussing the deliberative process privilege).

33. To be sure, government whistleblowing may also have adverse consequences, including breaches of national security. See, e.g., Michael Isikoff, *The Fed Who Blew the Whistle*, NEWSWEEK, Dec. 22, 2008, at 3 (“‘You can’t have runoffs deciding they’re going to be the white knight and running to the press,’ says Frances Fragos Townsend, who . . . served as President Bush’s chief counterterrorism adviser. . . . ‘There are legal processes in place [for whistleblowers’ complaints. Ignoring those processes is] incredibly dangerous.’”). Any effort to design legal, ethical, or practical reforms to encourage or redirect whistleblowing must of course consider these adverse consequences as well as the legitimate uses of inside information to vindicate public rights. This Article, though, focuses narrowly on the latter issue, in an effort to develop an analytical model that could eventually be of use in such a reform effort.

several decades to reform prison conditions?<sup>34</sup> When a public rights violation directly harms individuals, one might at first assume that whistleblowing is less essential, because the affected individuals can provide advocates with information about their alleged mistreatment. Here too, though, whistleblowers may prove invaluable, because any attempt to achieve systematic change depends for its success on information about the scope and persistence of the identified rights violation. Continuing the prison conditions example, suppose several inmates of a particular prison approach a public rights advocate to complain about denial of medical treatment. The advocate could content himself with filing a series of lawsuits on behalf of those inmates, or he could instead seek to build a broader case alleging institution-wide misconduct.<sup>35</sup> Information from the individual inmate-plaintiffs might be sufficient to support the former lawsuits, but the success of the latter case would turn on obtaining comprehensive information about conditions behind the closed doors of the prison—information unavailable (dilemma 2), or at least far more difficult to locate and obtain (dilemma 1), without the assistance of a guard or other insider.

These examples suggest that one cannot assess the effectiveness of systemic public rights litigation without asking a series of seemingly digressive questions about government whistleblowers and the information they provide. For example:

- Can one categorize government whistleblowers in a way that sheds light on their role in fostering (or hindering) public rights litigation?
- If such categorization is possible, what types of whistleblowers are most useful to public rights litigators?
- Is the information that government whistleblowers provide usually complete? If not, what kinds of information are whistleblowers most likely to overlook, ignore, or decline to disclose?
- Relatedly, to what degree do government whistleblowers' personal or political agendas or biases distort the information they disclose?

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34. See, e.g., MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 39-42 (1998) (noting that cases in almost all U.S. jurisdictions have contributed to reform on issues ranging from prison food service to medical care to inmate education); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1034-43 (2004) (surveying public law litigation in the area of prison reform).

35. See, e.g., Sabel & Simon, *supra* note 34, at 1039-40 (discussing the settlement agreement in *Plata v. Davis*, No. C-01-1351 TEH (N.D. Cal. Jan. 29, 2002), in which the California Department of Corrections "agreed to structural relief centered on a quality assurance system with significant accountability to outside professionals and the plaintiff class").

- How do advocates who receive whistleblower disclosures sort useful, accurate, and complete information from information that is untrue, biased, incomplete, or otherwise misleading?
- To what extent do federal and state legal and ethical regimes—including whistleblower statutes, constitutional privileges, and professional ethics rules—create “signal distortions” between whistleblowers and public rights advocates?
- In particular, do current legal and ethical regimes encourage complete and accurate whistleblowing by the most important type(s) of whistleblower? If not, should the incentive structure be modified?
- On the flip side, is there reason to be concerned that such incentives regularly promote disclosure of inaccurate or otherwise misleading information? If so, should the incentive structure be modified?
- Relatedly, can public rights advocates do anything to encourage useful, accurate, and complete disclosures, and discourage untrue, biased, incomplete, or otherwise misleading disclosures?

## II. FACTORS AFFECTING WHISTLEBLOWER UTILITY

This Article uses the term “government whistleblower” quite expansively, to include anyone who assists a public rights advocate with one of the information dilemmas identified above—that is, anyone who publicly discloses government information that would otherwise be difficult or impossible for the public to discover or obtain, from a short memorandum that had been buried in a lengthy rulemaking docket, to a classified document, to a personal insight about the way that an issue is playing out in the halls of an agency.<sup>36</sup> Importantly, it is irrelevant whether the whistleblower’s information directly evidences substantive wrongdoing. A hint at possible procedural irregularities in a rulemaking record, or even just a suggestion of a fruitful avenue for further research, may be all that a public rights advocate needs to redirect and enhance his litigation efforts. Thus, almost

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36. Note that this is not the only nor even the most common definition. C. Fred Alford, for example, uses the term narrowly, to refer only to government employees who “experience[] retaliation” for their whistleblowing. C. FRED ALFORD, *WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER* 18 (2001). A popular textbook on whistleblowing states that “[t]he most common [legal] conception of a whistleblower is of an employee who reports his or her employer’s violation of law to an appropriate law enforcement agency.” DANIEL P. WESTMAN & NANCY M. MODESITT, *WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE* 22 (2nd ed. 2004). That textbook itself uses the term to “refer to employees who oppose, either internally, or externally, their employers’ conduct[,] based on the employee’s belief that the employer’s conduct is illegal, unethical, or dangerous.” *Id.* at 22-23.

any government insider who says anything “off the record” about her employer’s activities qualifies as a whistleblower for purposes of this discussion.

From the point of view of a public rights advocate, however, not all such whistleblowers are created equal. Some consistently provide useful and accurate information, while others fail to follow through, or waste advocates’ time with tantalizing hints at wrongdoing that later prove biased or false.<sup>37</sup> What traits, then, maximize a government whistleblower’s utility to an outside advocate? A complete, empirically substantiated list must await a comprehensive survey of advocates and whistleblowers, but eight important traits come readily to mind:

- Most obviously, the whistleblower must have access to relevant information (access).
- In addition, she must be able to recognize what sorts of information would be of use to a particular advocate (insight).
- She must be willing to disclose that information outside her employer’s organization, even though doing so may betray the trust of her employer and colleagues, breach her profession’s code of ethics, risk retaliation, and possibly violate the law (determination).
- Even though she may be dissembling or violating confidentiality rules at work, she must be honest in her dealings with the outside advocate (honesty).
- Further, she must correctly understand the information she passes on—no amount of honesty can make up for a whistleblower’s mistaken initial perception of, for example, a conversation she overheard (comprehension).
- Relatedly, her information must not be compromised by personal or political prejudices (bias).
- She must be willing to seek out concrete information and pursue any new leads (perseverance).
- Finally, she is useful to the outside advocate only so long as she retains her government position and her access to information (longevity).

The remainder of this Article refers to these eight traits by their shorthand labels: access, insight, determination, honesty, comprehension, bias, perseverance, and longevity.

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37. Interview with anonymous source, in Wash., D.C. (Jan. 16, 2009).

### III. ASSESSING THE UTILITY OF REAL WHISTLEBLOWERS

To determine whether public rights advocates make optimal use of government whistleblowers, then, one must somehow assess the degree to which advocates rely on whistleblowers who have access, insight, and determination; who are honest, accurate, and unbiased; who persevere; and who enjoy employment longevity. Unfortunately, one cannot survey for many of these traits; even an honest and forthcoming whistleblower cannot truthfully answer the question, “do personal or political prejudices bias your perceptions of information?” One can, however, gain insight into these somewhat intangible traits by investigating six concrete characteristics of the whistleblower and her whistleblowing activities: the whistleblower’s job description; her attitude toward her agency and the administration as a whole; her political and professional views and relationships; the professional context in which she made her disclosure; the manner of her disclosure; and the legal and ethical regimes under which she made that disclosure. Whenever the discussion of these issues implicates one of the eight traits listed in Part II, above, that trait is identified in parentheses at the end of the relevant sentence.

#### A. Job Description

Several aspects of a whistleblower’s job description may give insights into her utility as an informant. For example, how senior is the whistleblower? Is she a lawyer, a scientist, or a member of another profession that promulgates ethical guidelines? Does she hold a policy position or a technical or support position? What job protections does she enjoy? The answers to these questions are relevant for several reasons. For one thing, the more senior a government employee is, and the higher her security clearance,<sup>38</sup> the more access she has to inside information, and the more likely she is to encounter information useful to public rights litigators (access). In addition, a whistleblower’s professional role may affect her willingness to disclose information to legislators, reporters, or public rights advocates (determination). Government lawyers, for example, have ethical obligations

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38. According to the Government Accountability Project (“GAP”), a whistleblower support group, “the most common harassment technique” against national security whistleblowers is to “yank their security clearances.” *Protection for National Security Whistleblowers Before the H. Gov’t Reform Comm.*, 109th Cong. (2006) (statement of Thomas Devine, Legal Director, Government Accountability Project). This mode of retaliation “can lead to . . . indefinite suspension or termination” of the whistleblower if her job requires clearance, but it is neither prohibited under current law nor subject to judicial review. See Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 248 (2008).

to their client agencies that may make it professionally impossible for them to disclose even the most incriminating evidence of those agencies' wrongdoing.<sup>39</sup> In contrast, members of some other professions, including engineering, have an ethical obligation to disclose some types of wrongdoing by colleagues or superiors.<sup>40</sup> Finally, the terms of a government whistleblower's employment contract—in particular job security, but also such considerations as eligibility for performance awards<sup>41</sup>—may affect both her willingness to risk disapprobation by disclosing inside information about her employer's conduct (determination), and the likelihood that she will escape termination or other severe and access-limiting retaliation (longevity).

### B. Attitude

The second characteristic relevant to a potential whistleblower's utility to public rights litigators is her attitude toward the governing administration and toward her employer agency. On the first point, a career official or (perhaps more commonly) political appointee who agrees with most administration policy choices may be disinclined to betray the administration by disclosing procedural irregularities or other evidence of potential wrongdoing (determination).<sup>42</sup> Even more fundamentally, though, she may be unlikely to perceive that her agency's mode of implementing policy

39. The American Bar Association's Model Rules of Professional Conduct, for example, permit limited disclosure of information relating to client representation, but only in contexts in which such disclosure will prevent future harms or mitigate past financial wrongdoing committed with the aid of the lawyer. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2), (3) (2003); *see also* WESTMAN & MODESITT, *supra* note 36, at 35 (discussing professional ethical codes affecting whistleblowing). More anecdotally, public rights litigators report that they rarely receive information from government lawyer whistleblowers. Interview with anonymous source, in Wash., D.C. (Dec. 12-13, 2008).

40. WESTMAN & MODESITT, *supra* note 36, at 35 (quoting Nat'l Soc.'y of Prof'l Eng'rs, CODE OF ETHICS FOR ENGINEERS II:1:A; III:2:B (2003)).

41. *See, e.g.*, 5 U.S.C. § 5384 (2006) (providing for performance awards for "excellence in performance by career appointees" in the senior executive service).

42. There do not appear to be studies documenting the effect of junior agency employees' party affiliation on whistleblowing, but the effect at the cabinet level has been noted (and lauded). Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 901 (2007) (emphasizing the importance of a bipartisan presidential cabinet, and noting particularly that "[b]y . . . inviting a potential whistleblower into the tent, bipartisanship helps to dispel the suspicion that policy decisions rest on partisan motives or extreme preferences"). For empirical documentation of the effect of party affiliation on whistleblowing in a different context, see Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals* 107 YALE L.J. 2155, 2175 (1998) (arguing, with empirical evidence, that when an appellate review panel is split 2-1 in (presumptive) political affiliation, the "minority member acts as a whistleblower, ready to expose any [effort] by the majority" to discount relevant legal principles).

choices contravenes governing laws (bias).<sup>43</sup> On the other hand, an official or appointee who disagrees with the policies of the governing administration, or who is disgruntled by her work environment for nonpolitical reasons, may perceive wrongdoing even in routine administration actions (bias), and may be relatively eager to disclose any such wrongdoing to administration critics outside her agency (determination). Finally, studies suggest, perhaps counterintuitively, that loyalty to one's employer organization tends to *foster* rather than discourage whistleblowing, because most whistleblowers view themselves not as undermining their organization but as "defending the true mission of [the] organization by resisting illicit practices."<sup>44</sup> Thus, employees who self-identify as loyal to an agency's mission may be more rather than less inclined to blow the whistle when they discover irregularities (determination).

These observations lead to somewhat contradictory conclusions about whistleblower utility. On the one hand, public rights advocates seeking to monitor an agency's actions may face a risk of under-disclosure of wrongdoing from those agency employees sympathetic to administration policy, and simultaneously from disaffected employees who cannot be bothered to seek or disclose wrongdoing. On the other hand, such advocates may face a risk of over-disclosure from those employees who view *every* administration action with heavy skepticism, and simultaneously from those employees so committed to the organization's broad mission that they view any perceived detours from that mission as clear evidence of wrongdoing.

### C. Political and Professional Views and Relationships

A government employee's political views also affect her utility as a whistleblower, especially if those views coincide with the present configuration of the legislature. Tight connections to the party in power in one or

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43. On the effects of "cultural worldview," including political affiliations on individual's perceptions of fact, see generally Dan M. Kahan et al., *Whose Eyes are You Going to Believe?* *Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009). The authors showed 1350 Americans a video of the police chase at issue in *Scott v. Harris*, 550 U.S. 372 (2007). Describing the audience's varied perceptions of the video, they note that:

Social psychology teaches us that our perceptions of fact are pervasively shaped by our . . . views of individual virtue and social justice. It also tells us that although our ability to perceive this type of value-motivated cognition in others is quite acute, our power to perceive it in ourselves tends to be quite poor. We thus . . . experience overconfidence in the unassailable correctness of [our] factual perceptions.

*Id.* at 842-43.

44. MYRON PERETZ GLAZER & PENINA MIGDAL GLAZER, *THE WHISTLEBLOWERS: EXPOSING CORRUPTION IN GOVERNMENT AND INDUSTRY* 6 (1989).

both houses of Congress, for instance, may encourage an agency employee to blow the whistle on apparent irregularities at her agency—particularly if the majority party in the relevant house differs from that of the current administration, thereby guaranteeing the whistleblower a receptive audience (bias and determination). Also relevant are any contacts the whistleblower may have “with congressmen who might assist them and with committees investigating issues about which [the whistleblowers] could provide unique evidence” (determination).<sup>45</sup>

Politics are not, however, the only source of bias; a whistleblower’s professional ties are also important. For example, a government employee who formerly worked for a regulated industry may be more likely to see, and more willing to disclose, signs of unlawful over-regulation (bias and determination). Further, the reverse may be true of an agency insider who has a close relationship with a group that advocates more stringent regulation in a particular area.

Finally, professional and personal connections bear on traits other than bias. For example, a whistleblower with strong ties to a public rights group may be better able to recognize information that the group would find useful (insight). From the group’s perspective, those ties provide some reassurance that the information the whistleblower provides is both true and accurate (honesty and comprehension).

#### D. Context

The fourth issue to consider is the job context in which the whistleblower makes her disclosure. Some government whistleblowers disclose inculpatory or otherwise politically compromising information about their employers in connection with adverse employment decisions. In May 2008, for example, former Environmental Protection Agency (“EPA”) Region V Administrator Mary Gade resigned from her position, offering the inflammatory explanation that the EPA Administrator had pushed her to leave because she had been too aggressive in pressuring a company supportive of the Bush Administration to clean up contaminated company property.<sup>46</sup> In contrast, other informants blow the whistle in the course of doing their jobs—sometimes literally so, as illustrated by Los Angeles County Deputy District Attorney Richard Ceballos, who warned his supervisors

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45. *Id.* at 35-36.

46. Michael Hawthorne, *EPA Official Ousted While Fighting Dow*, CHI. TRIB., May 2, 2008, at 1.

that a warrant affidavit in a pending criminal case contained what he considered to be “serious misrepresentations.”<sup>47</sup>

In a subsequent lawsuit, *Garcetti v. Ceballos*,<sup>48</sup> Ceballos alleged that “he was subjected to a series of [unconstitutional] employment actions” in retaliation for this warning.<sup>49</sup> The Supreme Court’s decision in Ceballos’s case establishes that the circumstances of a disclosure affect the legal protections afforded the whistleblower, with a government employee who discloses information “as a citizen addressing matters of public concern” receiving greater First Amendment protections than a course-of-employment whistleblower like Ceballos<sup>50</sup>—a discrepancy that may well affect a course-of-employment whistleblower’s willingness to disclose (determination). The circumstances implicate other incentives for disclosure as well, though, and may also bear on the reliability of the information disclosed. Specifically, whistleblowers facing adverse employment decisions, especially termination, have less reason to fear such employment consequences as a reprisal for their disclosure (determination). On the other hand, these whistleblowers have every incentive to perceive—or even invent<sup>51</sup>—government wrongdoing in connection with their termination, demotion, or denial of promotion (bias and honesty). In contrast, potential whistleblowers who have not yet suffered adverse professional consequences may be disinclined to risk those consequences by coming forward (determination),<sup>52</sup> but there is correspondingly less reason for an advocate to fear that personal grievances taint whatever information the whistleblower ultimately chooses to disclose (bias and honesty).<sup>53</sup>

47. *Garcetti v. Ceballos*, 547 U.S. 410, 414 (2006).

48. *Id.* at 410.

49. *Id.* at 415.

50. *Id.* at 417, 426 (concluding that a government whistleblower who alleges wrongdoing privately, to a supervisor, pursuant to his official duties, is not entitled to First Amendment protections).

51. Indeed, later news stories suggested that Mary Gade may have done just that. See *Officials Question Claims Region V Head Forced to Quit over Cleanup*, INSIDE EPA, May 9, 2008, available at <http://governmentdocs.org/Doc/PageView.aspx?DocId=1603&PageNum=1>.

52. See *infra* Part II.F for a discussion of current whistleblower laws.

53. But see ALFORD, *supra* note 36. Alford argues that

The key organizational strategy [in response to whistleblowing] is to transform the act of whistleblowing from an issue of policy and principle into an act of private disobedience and psychological disturbance. . . . The academic study of whistleblowers should not unwittingly repeat the disciplinary strategy of the organization in the guise of an intellectual strategy that makes whistleblower psychology or the intellectual and ethical purity of the whistleblower’s case central.

*Id.* at 32.

### E. Manner of disclosure

The next issue is the manner in which a whistleblower makes her disclosure. On one extreme are whistleblowers who risk their jobs, careers, and sometimes even personal lives<sup>54</sup> to disclose strong evidence of substantively illegal or procedurally irregular conduct by employers or colleagues. These “active” whistleblowers may make their disclosures externally (to legislators, journalists, or advocates), or they may express their concerns to colleagues or supervisors—and possibly also the public—in the course of employment or via resignation.<sup>55</sup> Examples of active, purely “external”<sup>56</sup> whistleblowers abound, from Mark Felt, the recently deceased Deep Throat of the Watergate scandal,<sup>57</sup> to Thomas Tamm, the Justice Department lawyer who disclosed his concerns about the Bush Administration’s warrantless surveillance program to New York Times reporter Eric Lichtblau.<sup>58</sup> Their stories are the stuff of legend—and of Hollywood.<sup>59</sup>

As for active whistleblowers who chose first to express their concerns internally, the Bush Administration affords three ready examples: Jason Burnett, former Associate Deputy Administrator of EPA, who resigned his job in June 2008 over alleged political interference with the agency’s efforts to decide, as a scientific matter, whether greenhouse gases endanger public health and so should be regulated under the Clean Air Act;<sup>60</sup> FBI attorney Colleen Rowley, who wrote a now-public memo to Director Robert Mueller accusing the Bureau of failing to aggressively investigate 9/11 co-

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54. See, e.g., TOM DEVINE, GAP, *THE WHISTLEBLOWER’S SURVIVAL GUIDE: COURAGE WITHOUT MARTYRDOM* 7 (1997) (“Time and again, GAP has seen whistleblowers pay an enormous professional and personal price for their actions . . .”); *id.* at 27-39 (detailing the types of harassment and intimidation to which whistleblowers may be subject).

55. WESTMAN & MODESITT, *supra* note 36, at 23 (defining four “useful categories” of whistleblowers: “passive” whistleblowers, who make their disclosures in response to official inquiries; “active” whistleblowers, who “take affirmative steps to oppose their employers’ conduct”; within the active category, “internal” and “external” whistleblowers, who make their disclosures within or outside their employers’ organizations, respectively; and “embryonic” whistleblowers, who are discharged before they are able to make their disclosures).

56. *Id.*

57. Tim Weiner, *W. Mark Felt, Watergate Deep Throat, Dies at 95*, N.Y. TIMES, Dec. 19, 2008, at B11, available at <http://www.nytimes.com/2008/12/19/washington/19felt.html?fta=y#>.

58. Michael Isikoff, *The Fed Who Blew the Whistle*, NEWSWEEK, Dec. 22, 2008, at 40.

59. See, e.g., CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT’S MEN* (1974) (recounting the authors’ efforts to uncover the details of the Watergate scandal, with help from a shadowy figure then known only as Deep Throat); *ALL THE PRESIDENT’S MEN* (Warner Bros. Pictures 1976) (same).

60. See, e.g., Felicity Barringer, *A New (and Unlikely) Tell-All*, N.Y. TIMES, July 22, 2008, at A13.

conspirator Zacarias Moussaoui;<sup>61</sup> and Michael Kelly, a National Marine Fisheries Service scientist, who first sought federal whistleblower protection and later resigned from the Service over concerns that his political superiors had violated the Endangered Species Act by pressuring him to alter his findings on the minimum water levels necessary to protect endangered coho salmon in the Klamath River.<sup>62</sup> Plainly, then, active whistleblowers are ubiquitous; it should come as no surprise, therefore, that they are also well explored in the academic literature.<sup>63</sup>

An untold number of government informants, however, engage in an entirely different form of whistleblowing, which might be termed “insinuating.” These whistleblowers keep a much lower profile, disclosing small bits of interest-provoking but not particularly damning information to congressional committees, journalists, or advocacy groups, via unlabeled envelopes, anonymous phone calls, or “off the record” conversations. Insinulators act at the margins, and (by definition) they never pass on truly inculpatory evidence. Instead, they provide hints and innuendo designed to trigger or facilitate an outside party’s investigation into a government program or action about which the whistleblower has procedural, ethical, or legal concerns.

For example, one longtime public interest lawyer and former government official, who declines to be named, regularly meets his government sources on an unidentified floor of an unidentified building in downtown Washington, DC, to receive unlabeled brown envelopes containing bits of information about pending agency rulemakings.<sup>64</sup> Much of this information would be available through less covert channels (including FOIA requests). That is, the information itself is rarely classified or otherwise undiscoverable. Often, therefore, what is most important about these covert communications is not the contents of the envelope but the meta-information conveyed by the *passing* of the envelope: “the document in this envelope is important; be sure to consider it as you develop your advocacy in this area.”

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61. *Threats and Responses; Excerpts From F.B.I. Agent's Letter to Director Mueller*, N.Y. TIMES, Mar. 6, 2003, at A15.

62. Natalie M. Henry, *Klamath: Whistleblower Says NMFS Violated ESA when Deciding How to Protect Salmon*, ENERGY & ENV'T DAILY, March 20, 2003, available at <http://www.eenews.net/Greenwire/print/2003/03/20/8>; *Whistleblower Resigns After 2nd Dispute with Agency*, ENERGY & ENV'T DAILY, May 20, 2004, available at <http://www.eenews.net/Greenwire/2004/05/20/archive/7?terms=%22michael+kelly%22>.

63. See, e.g., ALFORD, *supra* note 36; GLAZER & GLAZER, *supra* note 44 (recounting and analyzing whistleblowers' stories).

64. Interview with anonymous source, in Wash., D.C. (Dec. 12-13, 2008).

Some insinulators choose to pass on the same kind of information over lunch or a cocktail or at a professional association meeting, discreetly letting it be known that, “The rulemaking on X is generating a lot of political controversy within the agency,” or “A lobbyist for group Z made interesting comments on rulemaking X at an agency meeting today,” or even, seemingly innocuously, “The agency plans to issue rule X on Monday.” In the first two examples, the insinuator discloses almost no actual information, but the recipient of the disclosure nevertheless receives critical guidance: inquire further into the specifics of rulemaking X, via docket searches or FOIA requests; additionally, determine whether the agency held meetings with group Z and, if so, whether any interest groups were excluded from the meetings. Even the third, far blander example provides helpful, previously nonpublic intelligence to a busy public rights advocate: ready your response to the rulemaking, and alert the press, so that the earliest news reports include not just the agency’s explanation of the need for the rule, but also the affected community’s reaction thereto.

Just as for job description and the other issues discussed above, the manner of a whistleblower’s disclosure—active whistleblowing or insinuating—may provide significant insight into her overall utility to public rights advocates. Consider, for example, the watchdog group described above, which seeks to monitor agency capture and challenge any rules or policies tainted thereby.<sup>65</sup> An active whistleblower may provide information that leads the group to a particularly egregious example of such capture. Moreover, the group can verify that information with relative ease, because (again, by definition) the information evinces some form of procedural or substantive wrongdoing and is therefore likely to become the subject of public discussion and evaluation (honesty, comprehension, and bias). On the other hand, an active whistleblower may not be systematically helpful to the hypothetical group, because she is unlikely to have access to similarly telling evidence of every or even most occasions on which the agency arbitrarily and capriciously acceded to the wishes of a regulated entity (access)—and unless she carefully covers her tracks in making her initial disclosure, she may quickly lose whatever access she once had (longevity).<sup>66</sup>

To discover other occasions of similar misconduct, therefore, the group is likely to turn to insinulators, who are willing to identify relevant record filings (“check out industry Z’s comments on rulemaking X”), or even just to suggest profitable avenues of further research (“the agency is struggling

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65. See *supra* note 30 and accompanying text.

66. DEVINE, *supra* note 54, at 32-33, 43-45 (discussing isolation techniques and noting that “employers may seek not only to punish whistleblowers, but also to make it impossible for them to gain access to information and evidence”).

with rulemaking X; the outcome is likely to be controversial”). Because such whistleblowers provide little substantive information, they are better able to maintain their anonymity over time—thereby both reducing the risk that they lose their jobs (access and longevity) and permitting them to develop relationships of trust with the advocates with whom they regularly communicate (insight, honesty, comprehension, and longevity). Again, though, there is a tradeoff: the more circumspect the whistleblowing activity, the more reason there may be to question the whistleblower’s accuracy. For one thing, such low-level whistleblowing requires little investment from the whistleblower; she can simply communicate her concern without having to produce hard evidence (perseverance). Thus, insinulators may be tempted to pass on any suspicion of procedural or substantive irregularities (bias). Moreover, a government employee who is willing to regularly have “off the record” conversations with an outside group may have her own political or personal axe to grind. The whistleblower’s motivation may taint the information she provides (honesty and bias),<sup>67</sup> but even if it does not, the information recipient may find itself in a quandary, eager to pursue all significant instances of misconduct, but stretched too thin or even publicly discredited if it chases all of the whistleblower’s leads with equal zeal (insight).

#### F. Legal and Ethical Regimes

A thorough exposition of the federal and state legal and ethical regimes governing whistleblowing is well beyond the scope of this Article. One can gain some insight into the relevance of this issue for whistleblower utility, however, by considering whether the constitutional and statutory protections for *federal* employees go as far as they could to encourage high utility whistleblowers to come forward. The short answer is no.

To begin with, as discussed above,<sup>68</sup> the Supreme Court recently narrowed First Amendment protections for government employees, holding that such protections do not extend to employees disciplined for “speech made pursuant to [their] official duties.”<sup>69</sup> As FBI whistleblower Colleen Rowley warned ahead of the *Garcetti* decision, the absence of such protections presents federal employees, particularly those who work in national security, with three equally grim choices: (1) ignore the perceived wrongdoing; (2) risk retaliation by trying “to remedy [the perceived] problem within the system,” or (3) risk public disapprobation—and perhaps the Na-

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67. See *supra* note 43.

68. *Supra* note 50 and accompanying text.

69. *Garcetti v. Ceballos*, 547 U.S. 410, 414 (2006).

tion's safety—by ignoring official reporting channels and instead disclosing concerns to the press or other outsiders.<sup>70</sup>

In reaching its cramped reading of the First Amendment, the *Garcetti* Court asserted that a “powerful network of legislative enactments—such as whistle-blower protection laws and labor codes”—protect “those who seek to expose wrongdoing.”<sup>71</sup> As the dissent observes, however, this claim “fails on its own terms.”<sup>72</sup> Consider, for example, the Whistleblower Protection Act (“WPA”),<sup>73</sup> which was enacted in 1989 and strengthened in 1994. For federal workers, the WPA offers the most substantial legislative bulwark against retaliation, yet some combination of the act itself and federal case law interpreting its provisions belies the *Garcetti* majority's confident assertion.

As relevant to the importance of government whistleblowing to effective public rights litigation, the WPA has four main shortcomings: it is underinclusive; whistleblowers challenging retaliation bear an almost prohibitive burden of proof; whistleblowers receive no protection for internal disclosures; and (partly as a result of the burden of proof problem) the administrative and judicial avenues available for challenging retaliation are almost entirely unavailing. On the first point, the Act extends only to retaliatory action taken against an employee for disclosure of information the “employee . . . reasonably believes evidences (i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”<sup>74</sup> This provision plainly falls short of protecting the less overt form of whistleblowing, insinuating, because insinulators do not provide direct evidence of any substantial wrongdoing, instead merely offering guidance about potentially profitable avenues of investigation. Indeed, insinulators may not themselves be certain that any “violation of . . . law” or “gross” or “substantial” misconduct has occurred. They may simply have concerns about the direction their agency is headed, and wish to alert advocates, journalists, and members of Congress to increase outside pressure on the agency to “do the right thing.” Under the express terms of the WPA, however, an employer may lawfully retaliate against an employee who communicates such nebulous suspicions.

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70. Colleen Rowley & Dylan Blaylock, *Occupational Hazard*, N.Y. TIMES, Oct. 10, 2005, at A19.

71. *Garcetti*, 547 U.S. at 425 (citing the Whistleblower Protection Act § 10, 5 U.S.C. § 2302(b)(8) (2006); CAL. GOVT. CODE § 8547.8 (West 2005); CAL. LAB. CODE § 1102.5 (West Supp. 2006)).

72. *Id.* at 439 (Souter, J., dissenting).

73. 5 U.S.C. § 1213 et seq. (2006).

74. *Id.*

The limited scope of the WPA's protections poses a particular problem for government scientists who wish to expose *scientific* misconduct, such as reliance on "inferior data" or outright data suppression.<sup>75</sup> Such misconduct may indicate that a final agency action is unlawfully arbitrary in that it rests on selective consideration of the record before the agency;<sup>76</sup> rarely, however, do scientific shenanigans provide sufficiently clear "evidence[]" of a legal violation, "gross mismanagement," or "a substantial and specific danger to public health or safety,"<sup>77</sup> to qualify as protected disclosures under the WPA.<sup>78</sup>

The Court of Appeals for the Federal Circuit's reading of the WPA's "reasonabl[e] belie[f]" language<sup>79</sup> worsens this underinclusivity and creates an onerous burden of proof for whistleblowers. That court—which has exclusive jurisdiction over whistleblower appeals under the WPA<sup>80</sup>—has repeatedly held that the Act requires that a whistleblower provide "irrefragable proof" of wrongdoing to rebut the court's presumption that "public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations."<sup>81</sup> As a result, a government whistleblower risks retaliation unless her "reasonable belief" in the inculpatory nature of the information she discloses amounts to an objectively verifiable certainty. In other words, under this standard, even active whistleblowers risk lawful retaliation for their actions unless they disclose not just a *smoking* gun, but one covered in their employer's unmistakable fingerprints.

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75. Eugene Russo, *The Plight of the Whistleblower*, SCIENTIST, Jan. 17, 2005, at 39-40.

76. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (noting that agency action may be found arbitrary and capricious if "the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency").

77. § 1213.

78. See Russo, *supra* note 75, at 40; see also Holly Doremus, *Scientific and Political Integrity in Environmental Policy*, 86 TEX. L. REV. 1601, 1608-09, 1641 (2008) ("[W]histleblower protection for federal scientists is currently a thin reed."). The House version of a bill to strengthen protections for government whistleblowers, introduced in the last session of Congress, would have extended the WPA's protections to whistleblowers who disclose "(1) any action that compromises the validity or accuracy of federally funded research or analysis; (2) the dissemination of false or misleading scientific . . . information;" and (3) any effort to restrict a government-funded scientist's ability to publish or disseminate her results. Whistleblower Protection Enhancement Act of 2007, H.R. 985, 110th Cong. (2007). The Senate version of the bill included no such provision. Federal Employee Protection of Disclosures Act, S. 274, 110th Cong. (2007).

79. § 1213.

80. 5 U.S.C. § 7703(b)(1) (2006); 28 U.S.C. § 1295(a)(9) (2006).

81. *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999) (quoting *Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 795 (Fed. Cir. 1993)).

The Federal Circuit also bears some responsibility for the WPA's third major flaw, the absence of protections for some intra-agency disclosures. The court has interpreted the Act to exclude coverage "for disclosures made to [a government employee's] immediate supervisor[]."82 On the positive side, this interpretation may foster some public rights litigation by encouraging government whistleblowers to disclose information to outside advocates. Like *Garcetti*, however, the interpretation may also operate to discourage some government employees from opening their mouths at all, lest their external disclosure violate security laws or protocols, or subject them to public disapproval.

Finally, the WPA's fourth relevant flaw is its system for review of whistleblower retaliation claims. Rather than allowing for a jury trial in federal district court, the Act requires federal employees to go through administrative channels to file and pursue retaliation claims.<sup>83</sup> Specifically, such employees must first file an appeal of an adverse agency employment action with an administrative law judge designated by the Merit Systems Protection Board ("MSPB").<sup>84</sup> If the employee wishes to appeal the judge's ruling, she must file a petition for review with the MSPB itself. Only if this second administrative appeal is unsuccessful may the employee appeal to an Article III court—and then only to the Federal Circuit.<sup>85</sup> This system might be satisfactory if it functioned adequately to vindicate protections for whistleblowers, but the statistics speak for themselves: as of 2007, "not a single First Amendment . . . claim filed by a federal employee against their agency [had] ever been successful on the merits before" either the MSPB or the Federal Circuit.<sup>86</sup> Further, even with respect to nonconstitutional claims, the Federal Circuit has utterly failed to offer an independent check on the MSPB appeals process, instead reviewing employees' claims of retaliation "under a highly deferential standard of review which has historically led to an astronomical affirmance rate of 93%-96%."<sup>87</sup>

Whistleblowers dismayed by the WPA's limitations have a few other weapons in their legal arsenal. Almost thirty substantive statutes, including

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82. *Garcetti v. Ceballos*, 547 U.S. 410, 441 (Souter, J., dissenting) (citing *Willis v. Dep't of Agric.*, 141 F.3d 1139, 1143 (Fed. Cir. 1998); *Horton v. Dep't of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995), *cert. denied*, 516 U.S. 1176 (1996)).

83. See generally WESTMAN & MODESITT, *supra* note 36, at 61-64 (describing the procedures mandated by the WPA and its predecessor, the Civil Service Reform Act of 1978).

84. *Id.*

85. See *supra* note 80.

86. *Id.* at 4.

87. Paul M. Secunda, *Whither the Pickering Rights of Federal Employees?* 3 (Marquette Univ. Law Sch. Legal Studies, Paper No. 08-10, 2007), available at <http://ssrn.com/abstract=1010243>.

the Clean Air Act,<sup>88</sup> the Clean Water Act,<sup>89</sup> and the Occupational Safety and Health Act,<sup>90</sup> provide protections to government whistleblowers who report statutory violations—including under-enforcement—by their employer agencies.<sup>91</sup> But these subject-specific protections, too, have their limitations. For one thing, the protections extend only to whistleblowers who disclose violations of the particular statute, resulting in piecemeal coverage and making it difficult for a whistleblower—or a judge—to determine whether a particular disclosure merits protection.<sup>92</sup> In addition, most of the statutes delegate enforcement authority to the Department of Labor (“DOL”) or, within DOL, to the Occupational Safety and Health Administration (“OSHA”).<sup>93</sup> Given the number and complexity of whistleblower provisions that DOL and OSHA are charged with administering, it is perhaps not surprising that their administrative review processes are time-consuming. The none-too-comfortingly titled *Whistleblower's Survival Guide* warns potential informants that “[f]rom start to finish, the entire [OSHA] process frequently takes two or more years.”<sup>94</sup> One can only imagine that some potential whistleblowers are deterred by the prospect of waiting multiple years for possible vindication of their disclosure rights.

Finally, some of the subject-specific protections do not extend to federal whistleblowers. In 2006, for example, the Bush Administration issued a legal opinion concluding that the Clean Water Act's expansive whistleblower protection provision does not extend to federal employees who report agency misconduct in connection with water pollution cleanup or enforcement, because—in the Administration's view—the Act does not clearly and unequivocally waive the United States' sovereign immunity from suit.<sup>95</sup>

88. 42 U.S.C. § 7622 (2006).

89. 33 U.S.C. § 1367 (2006).

90. 29 U.S.C. § 660(c) (2006).

91. See DEVINE, *supra* note 54, at 135 (indicating that as of 1997, the federal government had passed twenty-eight whistleblower protection provisions); Mary Kreiner Ramirez, *Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power*, 76 U. CIN. L. REV. 183, 208 n.134 (2007) (citing twenty-six statutes).

92. DEVINE, *supra* note 54, at 139 (describing the various whistleblower protection provisions as creating “an inconsistent—and often irrational—system”); Ramirez, *supra* note 91, at 211 (“Creating an omnibus [whistleblower protection] statute would eliminate requiring expertise in discreet areas of law, and would permit [the agency charged with enforcement of the protections] to concentrate its investigation and analysis on the issue of retaliation.”).

93. Ramirez, *supra* note 91, at 208 & n.134.

94. DEVINE, *supra* note 54, at 137.

95. Letter from Steven G. Bradbury, Acting Assistant Attorney Gen., Office of Legal Counsel, to Howard M. Radzely, Solicitor, Dep't of Labor (Sept. 23, 2005), available at [http://www.peer.org/docs/dol/06\\_31\\_8\\_ag\\_opinion.pdf](http://www.peer.org/docs/dol/06_31_8_ag_opinion.pdf).

If one accepts the conclusion that some amount of government whistleblowing is essential to some categories of public rights litigation, therefore, it should be clear that at least at the federal level, existing whistleblower protection laws do not adequately encourage such whistleblowing. Moreover, it is worth noting that even comprehensive constitutional and statutory whistleblower protections could not possibly deter all employer efforts at retaliation. Thus, such protections promise little more than a right to a remedy if and when retaliation occurs. But to benefit from that right, the whistleblower must have the wherewithal to risk the retaliation, and then to pursue a retaliation claim through whatever legal channels are available. The state of the protections available to federal whistleblowers thus reinforces the conclusion that it is an unusually resolute and tenacious federal employee who braves the risks of retaliation by coming forward to report her suspicions or knowledge of agency misconduct (determination and persistence).<sup>96</sup>

#### IV. THE BEGINNINGS OF A MODEL

From the discussion in Parts II and III, a model begins to emerge. Litigators seeking to achieve not just headlines, but systemic policy reform are likely to obtain the most useful, reliable, and comprehensive information from: (1) relatively senior government insiders with access to information, who (2) are not lawyers and are therefore unconstrained by client confidentiality rules, (3) have no political or personal axe to grind, and (4) remain loyal to and in good standing at their agencies, but who (5) nevertheless choose to serve as insinulators, offering inside guidance to public rights advocates seeking to shape and implement a policy agenda, and (6) have strong personal or professional ties to those advocates. The fact that these maximally useful whistleblowers are both loyal to their agencies *and* willing to serve as low-level informants further suggests that one might expect them to be most active when they find themselves working for an administration with which they broadly disagree. Finally, this last observation implies that the advocates receiving such whistleblowers' guidance would be wise to implement a systematic procedure for evaluating the accuracy and completeness of whatever information they receive, so as to reduce the time spent pursuing leads that ultimately prove unproductive or biased.

*Very* preliminary interviews with several public rights advocates substantiate this theoretical model, at least in part. Active whistleblowers indeed fuel a relatively small percentage of the interviewees' litigation activi-

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96. *See generally* Ramirez, *supra* note 91, at 187 (noting that anti-retaliation provisions hinge on a promise of a legal remedy "and thus, . . . operate to chill whistleblowing").

ties.<sup>97</sup> Certainly, when such whistleblowers are available, their information may serve as a key building block of a successful suit,<sup>98</sup> but insinulators play a far more pervasive role. In fact, one interviewee suggested that almost all of his litigation activity is informed in some way by seemingly offhand or passing remarks made to him in confidence by employees of the federal agency that he regularly sues.<sup>99</sup> This information is indispensable to his litigation activities, but he must examine it carefully for inaccuracies and biases—a process that can be time-consuming unless the source's information has proven consistently reliable in the past. Moreover, any missteps have dire consequences, not just for the advocate's limited resources, but also for the public reputations of both his group and his cause.

### CONCLUSION

Parts I and II of this Article offer a series of questions about government whistleblowers and whistleblowing, all of which have some bearing on the efficacy of public rights litigation. The analytical model of whistleblowing developed in Parts II and III begins to address some of those questions, but the model requires significant empirical substantiation. Moreover, even if the model proves accurate, it does not address many of the questions raised at the start of the Article, including (1) what types of information government whistleblowers are most likely to overlook or decline to disclose; (2) how and to what degree political, personal, and cognitive biases taint whistleblowers' information; (3) how often public rights advocates are misled—deliberately or otherwise—by biased or otherwise inaccurate information; and (4) what measures such advocates can and do take to encourage useful and accurate disclosures,<sup>100</sup> and to guard against untrue, biased, incomplete, or otherwise misleading disclosures.

These questions cannot be answered without conducting a survey of agency employees, public rights litigators, and attorneys who have represented whistleblowers in retaliation claims. Such a survey should explore the scope of government whistleblowing activities, the incentives driving

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97. Interviews with anonymous sources, in Wash., D.C. (Dec. 12-13, 2008, Jan. 16., 2009).

98. For an example of one case built largely on whistleblower disclosures, see *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082 (9th Cir. 2005) (finding aspects of the Klamath Irrigation Project operating plan arbitrary and capricious, thanks in part to information supplied by National Marine Fisheries Service whistleblower Michael Kelly).

99. Interviews with anonymous sources, in Wash., D.C. (Dec. 12-13, 2008).

100. For example, perhaps public rights advocates should prioritize hiring former agency insiders, not just for the information they can provide immediately, but also for their connections to friends and colleagues who remain at the agency.

government whistleblowers, the degree to which current legal and ethical regimes—and practical constraints—affect those incentives, and public rights litigators' efforts (if any) to encourage useful disclosures. The results would provide insights about the state of public rights litigation and, consequently, about the adequacy of judicial review as a check on executive branch overreaching.<sup>101</sup>

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101. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2349-51 (2001). Kagan notes that the more control the President exercises in a given administration, the more likely agencies may be “to deviate from accepted interpretations of [congressional] delegation provisions”—that is, to act unlawfully. *Id.* at 2349. She argues, however, that judicial review adequately responds to this threat: “so long as the courts remain open to legal challenges, the use of presidential directive authority cannot too greatly displace the clear preferences of the prior enacting . . . Congress with respect to agency action.” *Id.* at 2351.